Georgia State University Law Review

Volume 14
Issue 3 *May 1998*

Article 4

5-1-1998

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INSURANCE CAPS ON AIDS-RELATED HEALTHCARE COSTS: WILL THE ADA FILL THE GAP CREATED BY ERISA?

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INTRODUCTION

- By June 1997, over 612,000 persons were diagnosed with Acquired Immune Deficiency Syndrome (AIDS). 239,000 people are currently living with AIDS and another 79,000 have been diagnosed with the HIV virus.[1] The AIDS epidemic has shifted as the annual number of AIDS deaths in the United States fell in the first half of 1997. With fewer people dying and more people living with AIDS, society has a growing AIDS population to take care of.[2]
- Average lifetime healthcare costs for AIDS-related illnesses range from $75,000 to $85,000.[3] AIDS-related life and health insurance claims totaled over $1.6 billion in 1994, and are estimated by insurers to be $9.4 billion from 1985 to 1994.[4] Advances in medical technology indicate these healthcare costs are likely to increase.[5]

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1. *See* CDC HIV/AIDS SURVEILLANCE REPORT, Vol. 9, No. 1 (1997) [hereinafter CDC REPORT].
2. *See* Deborah L. Shelton, *Life Expectancy Better for AIDS Patients*, 41 AM. MED. NEWS 5 (1998).
3. *See* Thomas Bartram, *Fear, Discrimination and Dying in the Workplace: AIDS and the Capping of Employees' Health Insurance Benefits*, 82 KY. L.J. 249, 251 (1993).
4. *See 1994 AIDS Claims Total $1.6 Billion*, 22 Pens. & Ben. Rep. (BNA) 1957, at 1957 (Aug. 28, 1995).
5. *See* Bartram, *supra* note 3, at 251.

- In 1996, national healthcare expenditures were over one trillion dollars, 53.3% of which was paid by private insurance.[6]

In addition to the personal impact the disease has had on affected patients, families, and friends, employers have seen AIDS wreak havoc with their balance sheets. Some employers who self-insure responded to this unanticipated economic burden by limiting insurance benefits of AIDS-afflicted employees after learning of the diagnosis.[7]

"Employers have a strong and legitimate interest in holding down health insurance costs. . . . Employers fund a majority of health care in the United States,"[8] and Congress views them as a means to extend healthcare access in the future.[9] Employer alarm at the high costs associated with AIDS treatment is valid. However, AIDS treatment is not as costly as some diseases that are routinely covered throughout the disease's duration.[10] Rather, public fear over how AIDS is transmitted, its degree of contagion, and its association with a disapproved life-style have made it a cost-cutting target, given the Employment Retirement Income Security Act's[11] (ERISA) broad preemption reach. However, recent court decisions may enable the Americans with Disabilities Act[12] (ADA) to protect employees infected with the human immunodeficiency virus (HIV) from post-claim underwriting.[13]

ERISA is a federal law enacted to protect the security and well-being of employees.[14] Ironically, ERISA has allowed

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6. *See* HCFA Table 9 (available at http://158.73.248.10/stats/nhe-oact/tables/t09.htm).

7. *See generally* McGann v. H & H Music Co., 946 F.2d 401 (5th Cir. 1991), *cert. denied sub nom.* Greenberg v. H & H Music Co., 506 U.S. 981 (1992); Owens v. Storehouse, Inc., 773 F. Supp. 416 (N.D. Ga. 1991), *aff'd*, 984 F.2d 394 (11th Cir. 1993).

8. Eric C. Sohlgren, Note, *Group Health Benefits Discrimination Against AIDS Victims: Falling through the Gaps of Federal Law—ERISA, the Rehabilitation Act and the Americans with Disabilities Act*, 24 LOY. L.A. L. REV. 1247, 1300 (1991).

9. *See id.*

10. *See* Karen E. Woods, *Impact of the ADA on Employer-Provided Insurance: Limiting the Potential Financial Burden of Health Care for AIDS Victims*, 8 LAB. LAW. 271, 286 n.96 (1992).

11. 29 U.S.C. §§ 1001-1461 (1994).

12. 42 U.S.C. §§ 12101-12117 (1994).

13. *See infra* Part IV.C.

14. *See* 29 U.S.C. §§ 1001-1461 (1994).

employers to engage in post-claim underwriting, a practice of changing the terms of a health insurance policy after coverage is established. Generally, state insurance laws prevent insurers from reducing health insurance benefits after a disease is diagnosed. However, ERISA's preemption provisions provide employers an escape from state law if they self-insure.[15]

While the self-insurance solution has saved profits and jobs, and has protected non AIDS-related health benefits, the loss to employees with AIDS has been catastrophic. When individuals are diagnosed with HIV, they become uninsurable and their work life is shortened. They face enormous healthcare expenses, which often go unpaid or become the government's burden. Although the cost of treating AIDS can be high, treatment costs for heart and liver disease and cancer are often higher.[16] Employers rarely cap benefits for these diseases after a diagnosis.

Until recently, employers treated employees with AIDS disparately under the guise of risk management.[17] Such a response has created an added burden to government-sponsored insurance programs, because AIDS patients often deplete their accumulated resources and become eligible for government entitlement programs before they die. However, a line of cases beginning with a First Circuit decision[18] may provide protection for AIDS-related insurance benefits under the ADA.[19]

This Article explores the gap in insurance benefit protection created by ERISA. Further, it explains how the ADA may offer employees with AIDS protection from benefit capping after the disease is diagnosed. If the courts sustain this position, the ADA will require employers to treat employees with AIDS the same as employees suffering from other diseases. Employers who will not be able to control costs by post-claim underwriting may no longer have as strong an incentive to self-insure. Thus, the unexpected financial burden caused by an AIDS-related disease will remain

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15. *See infra* notes 47-57 and accompanying text.

16. *See* Woods, *supra* note 10, at 286 n.96.

17. Risk management is the systemic process for the identification and evaluation of pure loss exposures faced by an organization or individual, and for the selection and implementation of the most appropriate techniques for treating such exposures. *See* GEORGE E. REJDA, PRINCIPLES OF RISK MANAGEMENT AND INSURANCE 38 (5th ed. 1995).

18. *See* Carparts Distrib. Ctr. Inc. v. Automotive Wholesaler's Ass'n of New England, Inc., 37 F.3d 12 (1st Cir. 1994).

19. *See* 42 U.S.C. §§ 12101-12117 (1994).

in a larger pool of persons, diffusing the financial impact on individuals and decreasing the public burden.

Part I defines and describes HIV and AIDS. Part II explores the impact of AIDS on third party payers. Part III examines ERISA's scope and two landmark AIDS-related cases that demonstrate how ERISA allows employers who self-insure to avoid state insurance laws that protect persons with AIDS from post-claim underwriting. Part IV explores the ADA's application to post-claim underwriting and examines the landmark *Carparts Distribution Center, Inc. v. Automotive Wholesaler's Ass'n of New England*[20] decision, on which district courts in other circuits have relied to find that post-claim underwriting of HIV-infected persons does create a cause of action under the ADA.

I. HIV AND AIDS

HIV is a viral infection transmitted through sexual contact, prenatal exposure, and exposure to contaminated blood.[21] This virus interferes with the function of the immune system, creating a syndrome, AIDS, which encompasses four distinct stages.[22] Initially, the infection manifests by a short-term febrile illness with symptoms of acute infection. In its second stage, the syndrome is asymptomatic. By the third stage, the immune system compromises and symptoms range from swollen lymph glands to diarrhea, night sweats, weight loss, shortness of breath, fatigue, and persistent fever. The final stage is full-blown AIDS, which Thomas Bartram defines as an "HIV infection coupled with [any of twenty-six] certain opportunistic infections."[23] In this final stage, death actually occurs from another infection that the AIDS-impacted immune system is powerless to combat.[24]

The first reported case of AIDS in the United States occurred in 1981.[25] By September 30, 1992, the U.S. Centers for Disease

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20. 37 F.3d 12 (1st Cir. 1994).

21. *See* Lizzette Palmer, *ERISA Preemption and Its Effects 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, 1350 (1993).

22. *See* Bartram, *supra* note 3, at 250 n.5.

23. *Id.* (citing *Update: Public Health Surveillance for HIV Infection—United States, 1989 and 1990*, 39 MORBIDITY & MORTALITY WKLY. REP. 853, 853 (1990) [hereinafter *Update*]). The reader is referred to *Update* for explicit information regarding the infections that have been identified as causing death due to AIDS.

24. *See* Woods, *supra* note 10, at 272.

25. *See* Willie L. Brown, Jr., *AIDS: The Public Policy Imperative*, 7 ST. LOUIS U.

Control and Prevention (CDC) had received reports of at least 242,146 cases of AIDS and 160,372 deaths from AIDS.[26] By the end of 1995, the AIDS death toll was over 330,000, and between 515,000 and 635,000 individuals were diagnosed with AIDS.[27] AIDS deaths increased by an average of 16% each year until 1997 when reported AIDS deaths fell for the first time.[28]

The CDC estimates that between 650,000 to 900,000 Americans carry the HIV virus.[29] According to some estimates, up to half of this group will develop AIDS within two to ten years of becoming infected with the virus.[30]

Some experts estimate the average lifetime medical care costs of AIDS to range from $50,000 to $150,000.[31] Others narrow the figure to between $75,000 and $85,000.[32] However, advances in AIDS treatment lengthen patients' lives.[33] Infected employees are working longer,[34] but their healthcare costs are increasing.[35] With continued advances in treatment, AIDS may eventually become a chronic condition.[36]

II. AIDS IMPACT ON THIRD-PARTY PAYERS

Typically, private health insurance, employer-provided group health insurance, and government assistance pay for healthcare.[37] The majority of Americans obtain health insurance

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PUB. L. REV. 11, 11 (1988). However, outbreaks of AIDS may have occurred earlier than 1981. *See* Bartram, *supra* note 3, at 249 n.3.

26. *See* Bartram, *supra* note 3, at 249-50.

27. *See* Amanda Husted, *330,000 American Will Die from AIDS by 1995,* ATLANTA J. & CONST., June 15, 1993, at D3.

28. *See* M. A. J. McKenna, *Deaths from AIDS on Decline,* ATLANTA J. & CONST., Sept. 12, 1997, at A1 ("After a 26 percent drop in AIDS deaths from 1995 to 1996, the disease is the No. 2 cause of death, behind accidents and injuries and just ahead of cancer.").

29. *See* CDC REPORT, *supra* note 1, at 34.

30. *See* Bartram, *supra* note 3, at 250-51 (citing Mary C. Dunlap, *AIDS and Discrimination in the United States: Reflections on the Nature of Prejudice in a Virus,* 34 VILL. L. REV. 909, 910 n.6 (1989)).

31. *See* Woods, *supra* note 10, at 286 n.96.

32. *See* Bartram, *supra* note 3, at 251 & n.9 (citing Mike McKee, *Was Insurance Cap Illegal?,* LEGAL TIMES, Jan. 4, 1993, at 12).

33. *See* Arthur S. Leonard, *AIDS, Employment and Unemployment,* 49 OHIO ST. L.J. 929, 930-31 (1989).

34. *See id.* at 931.

35. *See* Karen Goldberg, *Surviving Despite HIV: As Their Life Expectancy Grows, So Do Needs of AIDS Patients,* WASH. TIMES, Feb. 26, 1993, at A1.

36. *See* Leonard, *supra* note 33, at 931.

37. *See* Bartram, *supra* note 3, at 252.

coverage through participation in group plans.[38] In 1989, group health insurers paid approximately $455 million in AIDS-related health claims.[39] This large expenditure may be explained by the fact that eighty-eight percent of AIDS patients are between twenty and forty-nine years old.[40]

However, there is a trend toward the "Medicaidization" of AIDS.[41] "Medicaid finances a much larger proportion of in-patient care for AIDS than other illnesses, and . . . during the epidemic years, Medicaid's share increased while that of private insurance declined."[42] "When [AIDS] patients become disabled, they often lose their jobs and insurance," quickly depleting personal funds and becoming eligible for public assistance.[43]

An employer's ability to modify insurance coverage for its employees with AIDS exacerbates the increased burden on government to provide healthcare for AIDS patients. A specific pattern emerges when employers attempt to control costs of healthcare.[44] In a common scenario, a group insurance plan participant incurs a covered illness brought on by an HIV infection. When the employee files an insurance claim, the employer learns of the illness and proceeds to modify the plan to exclude or provide only *de minimis* coverage for the AIDS-related disease.[45]

State laws exist to prevent employers from denying covered healthcare benefits after a disease has been diagnosed.[46] However, employers can convert employee health benefits packages to self-insured plans at any time, thus avoiding state insurance laws through ERISA's exemption provision. Part III of

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38. *See id.* at 252 n.15.

39. *See* Christine Woolsey, *AIDS Claims Hit $1 Billion*, 24 BUS. INS. 2, 38 (1990).

40. *See* Bartram, *supra* note 3, at 252 n.15.

41. *See id.* at 252-53.

42. *Id.* at 253 n.18 (quoting Jesse Green & Peter S. Arno, *The "Medicaidization" of AIDS: Trends in the Financing of HIV-Related Medical Care*, 246 JAMA 1261, 1264 (1990)).

43. *Id.* at 252 n.16 (quoting Sohlgren, *supra* note 8, at 1255).

44. *See* Carl A. Greci, *Use It and Lose It: The Employer's Absolute Right Under ERISA Section 510 to Engage in Post-Claim Modifications of Employee Welfare Benefit Plans*, 68 IND. L.J. 177, 184 (1992).

45. *See id.* at 185.

46. *See* Sohlgren, *supra* note 8, at 1248-51. The article lists various state laws prohibiting limitation of insurance benefits based on physical disability without sound actuarial support, forbidding discrimination based on handicap, unless handicap predates application, and proscribing AIDS discrimination. *See id.* at 1250 n.7.

this Article explains how ERISA allows employers to avoid state laws enacted to protect insureds from post-claim underwriting.

III. THE ERISA GAP

A. *ERISA's Scope: Employee Protection*

ERISA[47] was designed to protect, among other things, "the continued well-being and retirement income security of millions of workers, retirees, and their dependents [who are] directly affected by [employee benefit] plans."[48] To accomplish this purpose, ERISA directly regulates the fringe benefits of employment, pensions, and more importantly for the purposes of this Article, health benefits.[49] However, while ERISA regulation of pension plans is comprehensive, regulation of other employee benefit plans is minimal.[50] Nonetheless, ERISA provides "remedies, sanctions, and ready access to the Federal courts" to enforce its requirements and prohibitions.[51]

Congress omitted welfare benefit plans, including healthcare benefits, from the "vesting and funding" requirements of pension plans because ERISA's primary goal was to correct numerous pension problems and simplify administration.[52] The lawmakers feared employers would stop offering welfare plans altogether if vesting was required.[53] Therefore, ERISA does not entitle a

47. *See* 29 U.S.C. §§ 1001-1461 (1994). A full and complete discussion of ERISA is beyond the scope of this Article.

48. 29 U.S.C. § 1001b(a)(2) (1994); *see also* Bartram, *supra* note 3, at 255.

49. *See* 29 U.S.C. § 1001(b) (1994). ERISA uses the term "employee welfare benefit plan" to describe employer-provided group health insurance plans. *Id.* § 1002(1). The term includes, among other things, employer-provided "medical, surgical, or hospital care or benefits, or benefits in the event of sickness, accident, disability, death or unemployment, or vacation benefits, apprenticeship or other training programs, or day care centers, scholarship funds, or prepaid legal services . . . ." *Id.*

50. *See* Kevin Caster, *The Future of Self-Funded Health Plans*, 79 IOWA L. REV. 413, 413 (1994) (citing ROGER C. SISKE & JONI L. ANDRIOFF, ALI-ABA COURSE OF STUDY: ADVANCED LAW OF PENSIONS AND DEFERRED COMPENSATION, SELECTED TOPICS IN ERISA PREEMPTION (1992).

51. *Id.* at 415 (citing 29 U.S.C. § 1001(b)(2) (1994)). The remedies include: liability for plan fiduciaries; criminal and civil enforcement procedures available to plan participants, fiduciaries, and the Secretary of Labor; and prohibition of interference with employee exercise of rights by way of discharge or discrimination. *See id.* at 415 n.28 (citing RONALD J. COOKE, ERISA PRACTICE AND PROCEDURE § 1.09, at 1-13 to 1-14 (1989)).

52. *See* Palmer, *supra* note 21, at 1360.

53. *See id.* at 1360-61.

participant to a legally enforceable, non-forfeitable right to healthcare benefits.[54]

Thus, while Congress' main purpose in enacting ERISA was to protect employee pension benefits, the main focus of the welfare benefits provision was to protect the financial solvency of welfare benefit plans.[55] "[I]n the absence of any implicit or explicit contrary agreement between an employer and its employees, an employer is free to amend, alter or eliminate group health plan benefits."[56] ERISA, in fact, does not require employers to provide their employees any benefits.[57]

B. ERISA Preemption: An Advantage of Self-Insuring

In addition to very narrow welfare benefit protection, ERISA contains broad preemption provisions. Section 514(a) of ERISA preempts all state laws that relate to any ERISA-covered employee benefit plan.[58] The intended result of the preemption clause is to standardize pension and welfare benefit systems.[59] ERISA preemption serves a beneficial purpose with respect to pension benefits because it creates national uniformity and broader protection than many state laws provide.[60] However, a side effect is a "gut[ting of] existing state causes of action for which there is no federal counterpart."[61]

Through a "savings clause,"[62] ERISA does not preempt state law regulating the insurance industry. Many of these state regulations prevent limitations on particular diseases and post-claim capping.[63] At least seventeen states already prohibit exclusions of AIDS coverage in insurance policies.[64] However, employers may avoid state insurance regulation by self-insuring and falling under the ERISA exemption provision.[65]

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54. *See* Sohlgren, *supra* note 8, at 1273.
55. *See* Palmer, *supra* note 21, at 1360-61.
56. Sohlgren, *supra* note 8, at 1273.
57. *See* Shaw v. Delta Airlines, Inc., 463 U.S. 85, 91 (1983) ("ERISA does not mandate that employers provide any particular benefits, and does not itself proscribe discrimination in the provision of employee benefits.").
58. *See* 29 U.S.C. § 1144(a) (1994).
59. *See Shaw*, 463 U.S. at 99.
60. *See* Greci, *supra* note 44, at 179, 183.
61. *Id.* at 183.
62. *See* 29 U.S.C. § 1144(b)(2)(B) (1994); Palmer, *supra* note 21, at 1358.
63. *See* Palmer, *supra* note 21, at 1361.
64. *See id.* at 1361 n.98.
65. *See id.* at 1362. Through a "deemer" clause, "Congress prohibits states from

Self-funded insurance can be financially attractive if an employer has a relatively healthy insurance pool.[66] However, many AIDS patients initially appear to be low health insurance risks. When an employee contracts AIDS in a self-insured plan, the group may be too small to absorb the cost of this unanticipated claim,[67] and thus, a self-insured employer may risk financial ruin by honoring the existing benefit plan.

ERISA provides the employer relief from this financial burden by allowing the employer to reduce employees' benefits after they contract the disease.[68] ERISA preemption then allows the employer to circumvent state insurance laws that would have made it illegal for the employer to modify the self-insurance plan.[69]

Because ERISA preempts state regulations, Congress has left employee benefits unprotected.[70] Employers can avoid state insurance laws that restrict their freedom to modify plans and which expose them to greater financial burdens. Because ERISA does not constrain employers in defining and modifying health plans, ERISA provides an incentive and a mechanism for employers and insurers to avoid state regulation.[71] However, the AIDS-infected employee whose coverage is withdrawn is left without state law relief and is dependent on federal law.[72]

"Over 70% of privately-insured Americans are insured through employment-related group benefits plans."[73] The Bureau of Labor Statistics show that for medium-sized private employers (100 employees), the percentage of full-time employees in self-funded ERISA plans grew to 47% in 1995.[74] Fifty-five percent of 150 domestic medium-sized employers self-fund their employee

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deeming an employee benefit plan to be an insurance company for the purpose of subjecting the plan to state regulation." *Id.* at 1358.

66. In self-funded plans, employers pay health insurance benefits directly out of business assets rather than through the purchase of group insurance coverage. "In the face of rising healthcare costs, self-insurance attracts employers by offering flexibility, cost savings, and escape from state regulations." *Id.* at 1362.

67. *See, e.g.,* Owens v. Storehouse, Inc., 773 F. Supp. 416 (N.D. Ga. 1991), *aff'd,* 984 F.2d 394 (11th Cir. 1993).

68. *See* Sohlgren, *supra* note 8, at 1273.

69. *See* Greci, *supra* note 44, at 183.

70. *See* Palmer, *supra* note 21, at 1360.

71. *See id.* at 1361.

72. *See id.* at 1360.

73. BARRY R. FURROW ET AL., HEALTH LAW 781 (1997).

74. *See* U.S. Dep't of Labor, Bureau of Labor Statistics, Employee Benefits in Medium and Large Private Establishments (1995).

health benefit programs.[75] After self-funding, these medium-sized and smaller self-insurers claim that they must exclude or cap AIDS to preserve their overall employee benefit plans.[76]

C. Section 510: The Prohibition Against Discrimination

The language of ERISA appears to protect employees from discriminatory employer practices pertaining to welfare benefits. Section 510 contains two prohibitions. The first prohibition provides, in part, that: "[i]t shall be unlawful for any person to discharge, fine, suspend, expel, discipline, or discriminate against a participant or beneficiary for exercising any right to which he is entitled under the provisions of an employee benefit plan . . . ."[77] The second prohibition provides that "[i]t shall be unlawful for any person to discharge, fine, suspend, expel, discipline, or discriminate against a participant or beneficiary . . . for the purpose of interfering with the attainment of any right to which such participant may become entitled under the plan. . . ."[78]

"Although section 510 was designed to protect employees from interference by an employer with their rights to welfare benefits," a number of court decisions prior to the enactment of the ADA gave employers an absolute right to modify the terms of their benefits plan, even after claims had been filed.[79]

D. Applying Section 510 to Modification of Healthcare Benefit Plans

With respect to an employer's ability to modify health benefit plans, section 510's protections against discrimination have proved problematic. Two recent cases in which ERISA has been applied to post-claim capping of AIDS benefits illustrate ERISA's "blind spots."[80]

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75. *See Health Insurance: Survey Shows Self-Insurance Trend Among Medium-Sized Employers Polled*, 18 Pens. Rep. News (BNA) 335 (Feb. 25, 1991).

76. *See* Palmer, *supra* note 21, at 1362.

77. 29 U.S.C. § 1140 (1994).

78. *Id.*

79. Greci, *supra* note 44, at 178; *see* McGann v. H & H Music Co., 946 F.2d 401 (5th Cir. 1991), *cert. denied sub nom.* Greenberg v. H & H Music Co., 506 U.S. 981 (1992); Owens v. Storehouse, Inc., 773 F. Supp. 416 (N.D. Ga. 1991), *aff'd*, 984 F.2d 394 (11th Cir. 1993).

80. Greci, *supra* note 44, at 203.

1. McGann v. H & H Music Co.

The first of these decisions came from the Southern District of Texas.[81] In 1987, after six years with H & H Music, John McGann developed AIDS and informed his employer.[82] In August 1988, H & H Music instituted a self-insurance plan that raised deductibles and increased co-payments.[83] The new plan specifically reduced lifetime medical benefits for AIDS-related claims from $1,000,000 to $5000.[84] Maximum benefits were not reduced for any other catastrophic illness.[85] McGann was the only employee affected by this change.[86] Because H & H Music now had a self-insured plan, it was covered by ERISA and not state law.

McGann sued H & H Music under section 510, claiming that the employer's benefits cap was imposed specifically to retaliate against him for exercising his rights under H & H Music's insurance plan. McGann also claimed that the cap interfered with his attainment of a right to which he had become entitled under the plan.[87]

McGann lost on summary judgment. On appeal, the Fifth Circuit Court of Appeals held that H & H Music's action did not unlawfully discriminate against McGann.[88] The court found the

81. *See* McGann v. H & H Music Co., 742 F. Supp. 392 (S.D. Tex. 1990).

82. *See id.* at 393.

83. *See McGann*, 946 F.2d at 403 n.1.

84. *See id.* at 403. The other changes included increased individual and family deductibles, elimination of coverage for chemical dependency treatment, and increased contribution requirements. *See id.* at 403 n.1.

85. *See id.* at 403.

86. *See id.* at 404 n.4.

87. *See id.* at 403.

88. *See id.* at 408. In affirming the decision, the Fifth Circuit held that to survive summary judgment, McGann was required to show facts sufficient to create a genuine issue that H & H Music had a specific intent to retaliate against him for filing claims for AIDS-related treatment or to interfere with this attainment of any right to which he may become entitled. *See id.* McGann was unable to create an issue of fact because he was unable to rebut H & H Music's assertion that the AIDS-related benefits cap was implemented simply to reduce costs, rather than discriminate against him. *See id.* At least one commentator has been critical of the Court's fact-finding with respect to evidence of discrimination. *See, e.g.*, Bartram, *supra* note 3, at 255-59 (arguing that court's conclusion that H & H Music had no specific intent to discriminate is unfounded in light of McGann's being only employee affected by new policy, assumption that McGann's diagnosis was motivating factor for reduction of coverage, and fact that AIDS was only catastrophic illness for which benefits under plan were limited).

insurance cap for AIDS-related claims imposed by H & H Music to be legal under ERISA.[89]

The court justified H & H's actions on the theory that, under ERISA, an employer may terminate or amend a plan at any time, and that the availability of the $1,000,000 lifetime cap was not a right pursuant to Section 510. The court stated: "Congress did not intend that ERISA circumscribe employers' control over the content of benefits plans they offer to their employees."[90] The court defended post-claim modifications, noting that Congress recognized an employer's need to change the level of benefits provided to employees due to inflation and changing technology.[91] While this decision seems anomalous to ERISA's general purpose of protecting employee benefits, it is consistent with Congress' desire to protect the solvency of welfare benefit plans.[92]

McGann died of AIDS in 1991, spending the last three years of his life pursuing his claims against H & H Music. He was without medical insurance and was dependent on Medicaid for healthcare.[93] On November 9, 1992, the Supreme Court denied his petition for certiorari.[94]

2. Owens v. Storehouse, Inc.

Similarly, in *Owens v. Storehouse, Inc.*,[95] a district court failed to find discrimination against an AIDS-infected plaintiff who was stripped of health insurance protection.[96] Richard Owens had an employer-sponsored health insurance policy providing lifetime medical benefits up to a maximum of $1,000,000. Diagnosed with AIDS in November 1988, he received approximately $116,000 in healthcare benefits under his employer's plan. In October 1990, the company became self-insured and placed a $25,000 cap on AIDS-related claims, notifying Owens that he was ineligible for additional benefits.[97]

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89. *See McGann*, 946 F.2d at 408.

90. *Id.* at 407.

91. *See id.* (citing Moore v. Metropolitan Life Ins. Co., 856 F.2d 488, 492 (2d Cir. 1988)).

92. *See* Palmer, *supra* note 21, at 1360-61.

93. *See* Michele Zavos, *Aids and Insurance: No Guarantees*, 20 HUM. RTS. 18, 19 (1993).

94. *See* Greenberg v. H & H Music Co., 506 U.S. 981 (1992).

95. 773 F. Supp. 416 (N.D. Ga. 1991).

96. *See id.*

97. *See id.* at 418. Despite engaging in post-claim underwriting, the company

Owens challenged his employer's action under ERISA and received the *McGann* result in the Eleventh Circuit. In *Owens*, the court seemed persuaded by the company's "legitimate business purpose" for making the change, despite its sympathy for the plaintiff.[98] "If the plaintiff's motion were granted, [it] . . . could cause either the entire medical benefit plan for all 100-plus employees . . . to be ended, or . . . financial ruin to the employer."[99]

Despite the *Owens* court's discussion of legitimate business purpose, neither the *Owens* nor the *McGann* decision placed the burden on the employer to show a legal reason for modifying their plan; rather, the employee must show that the employer acted with specific intent to discriminate when the plan was modified.[100]

Judicial interpretation of Section 510 has left employees unprotected from employers who take away health insurance benefits after those employees file AIDS-related claims. Both the Fifth and the Eleventh Circuits have concluded that an AIDS-infected employee who experiences post-claim underwriting is not protected under ERISA.

Until the fall of 1994, the United States Supreme Court's denial of certiorari in the *McGann* case left AIDS-afflicted employees with no legal redress, especially without legislation plugging the self-insurance gap created by ERISA

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continued to honor plaintiff's claims of approximately $90,000 in excess of the $25,000 cap because the total claims experienced by the defendant for the first half of 1990 were running less than expected. However, the benevolence ended as the financial condition of the plan and the company deteriorated. *See* Greci, *supra* note 44, at 193 n.90. Storehouse placed the $25,000 cap on AIDS-related claims after it learned that its insurer intended to cancel the policy due to the high incidence of AIDS in the retail industry and among Storehouse's plan members. *See* Owens v. Storehouse, Inc., 984 F.2d 394, 396-97 (11th Cir. 1993). At the time the insurer threatened to cancel Storehouse's policy, five Storehouse employees had AIDS. *See id.* at 396.

98. Owens v. Storehouse, Inc., 773 F. Supp. 414, 415 (N.D. Ga. 1990).

99. *Id.*

100. *See* Owens v. Storehouse, Inc., 984 F.2d 394, 399 (11th Cir. 1993); McGann v. H & H Music Co., 946 F.2d 401, 404 (5th Cir. 1991).

preemption.[101] The next Part of this Article shows how the ADA of 1990 and recent cases[102] may fill the gap created by ERISA.

IV. ADA'S APPLICATION TO POST-CLAIM UNDERWRITING

A. *Americans with Disabilities Act of 1990*

The employment discrimination provision (Title I) of the ADA, which covers employers with twenty-five or more employees, became law in 1992.[103] Title I of the ADA prohibits covered employers from discriminating on the basis of disability in regard to "job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment."[104] The ADA does not, however, protect all types of physical infirmities and does not protect all "disabled"[105] persons from all adverse employment decisions.[106] Instead, the ADA prohibits discrimination against an individual with a disability who, with or without reasonable accommodation,[107] can perform the essential functions of the employment position.[108]

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101. On Feb. 18, 1993 Representative William J. Hughes (D.N.J.) introduced H.R. 975. This bill would have amended Title I of ERISA to provide that reduction or elimination of benefits in a self-insured policy, which occurs after submission of a claim for reimbursement would be considered a form of discrimination prohibited under the Act. The bill was sent to committee, where it died. It was not reintroduced in the 104th Congress.

102. *See, e.g.,* Carparts Distrib. Ctr., Inc. v. Automotive Wholesaler's Ass'n of New England, Inc., 37 F.3d 12 (1st Cir. 1994).

103. *See* James H. Coil, III & Charles M. Rice, *The Tip of the Iceberg: Early Trends in ADA Enforcement,* 19 EMPLOYEE REL. L.J. 485, 485 (1994).

104. 42 U.S.C. § 12112(a) (1994). Currently, an "employer" for this purpose is any person engaged in an industry affecting commerce who has 15 or more employees for each working day in 20 or more calendar weeks in the current or proceeding calendar year and the agent of such entity. *See id.* § 12111(5). The ADA covered only "employers" with 25 or more employees for the first two years following its effective date. *See id.*

105. *Id.* § 12102(2). A "disability" for the purposes of the ADA is defined as: "(A) a physical or mental impairment that substantially limits one or more of the major life activities of such individual; (B) a record of such an impairment; or (C) being regarded as having such an impairment." *Id.*

106. *See id.* § 12111(8).

107. Reasonable accommodation may include, among other things, making existing facilities used by employees readily accessible to and usable by individuals with disabilities, job restructuring, part-time or modified work schedules, reassignment to a vacant position, and acquisition or modification of equipment or devices. *See id.* § 12111(9).

108. *See id.* § 12111(8).

Section 12201(c) of the ADA addresses the interpretation of health insurance contracts under the ADA.[109] This section provides that nothing in the ADA will be construed to prohibit or restrict:

> (1) an insurer . . . or entity that administers benefit plans . . . from underwriting risks, classifying risks, or administering such risks that are based on or not inconsistent with State law; or
> (2) a person or organization covered by [the ADA] 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 [the ADA] from establishing, sponsoring, observing or administering the terms of a bona fide benefit plan that is not subject to State laws that regulate insurance.[110]

In other words, the ADA does not prevent an employer from treating employees differently based on legitimate underwriting risks. Section 12201(c) goes on to state, however, that "[p]aragraphs (1), (2), and (3) [above] shall not be used as a subterfuge to evade the purposes of" Title I of the ADA.[111]

According to the Congressional committee reports on the ADA, the protection for bona fide risk was included in the statute "to make it clear that the legislation will not disrupt the current nature of insurance underwriting or the current regulatory structure for self-insured employers or the insurance industry . . . ."[112] The legislative history of the ADA also indicates that section 12201(c) was "intended to afford to insurers and employers the same opportunities they would enjoy in the absence of [the ADA] to design and administer insurance products and benefit plans in a manner that is consistent with basic principles of insurance risk classification."[113]

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109. *See id.* § 12201(c).
110. *Id.*
111. *Id.*
112. Jonathan R. Mook, *Expanding ADA Coverage to Employee Benefit Plans: Recent Judicial and Administrative Developments,* 20 EMPLOYEE REL. L.J. 571, 572 (1995) (quoting S. REP. NO. 101-116, at 84 (1989); H.R. REP. NO. 101-485, pt. 2, at 137 (1990); H.R. REP. NO. 101-485, pt. 3, at 70 (1990)).
113. S. REP. NO. 101-116, at 85-86 (1989).

B. EEOC Interim Guidance: Directions for the Future

The Equal Employment Opportunity Commission (EEOC) is charged with interpreting the employment provisions of the ADA and guiding employers in its implementation.[114] In June 1993, the EEOC issued its Interim Guidance on Application of ADA to Health Insurance (Guidance).[115] Although the Guidance is only an interim document (not binding on courts), it represents a likely course of action for the EEOC in its investigatory efforts. The Guidance can help predetermine the legality of plan modifications contemplated by employers.

The Guidance makes clear from the onset that "the ADA prohibits employers from discriminating on the basis of disability in the provision of health insurance to their employees."[116] The Guidance then describes a framework for analyzing the legality of disability-based distinctions, and presents a number of hypothetical situations.[117] An examination of both the framework for analysis and the hypotheticals provides much needed guidance for employers seeking to clarify the ADA's application to their benefits plans.

The Guidance analyzes disability-based distinctions through a two-step framework.[118] The first determination is whether the challenged term or provision in the employer's welfare benefits plan is, in fact, a disability-based distinction.[119] "A term or provision is 'disability-based' [under the ADA] if it singles out a particular disability (*e.g.*, deafness, AIDS, schizophrenia), a discrete group of disabilities (*e.g.*, cancers, muscular dystrophies,

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114. *See* Woods, *supra* note 10, at 273.

115. *See EEOC Interim Guidance on Application of ADA to Health Insurance*, 20 Pens. & Ben. Rep. (BNA) 1303, at 1303 (1993) [hereinafter *Guidance*]. The Guidance explicitly limits its application to employer-provided health insurance plans. *See id.* It does not cover the application of the ADA to pension plans, life insurance, or disability insurance. *See id.* The EEOC plans to address those issues in the future. *See id.*

116. *Id.*; *see also* 29 C.F.R. § 1630.4 (1995) (providing that "[i]t is unlawful for [an employer] to discriminate on the basis of disability against a qualified individual with a disability in regard to . . . [f]ringe benefits available by virtue of employment, whether or not administered by the [employer]").

117. *See Guidance*, *supra* note 115, at 1303-07. The court, in Mason Tenders Dist. Council Welfare Fund v. Donaghey, No. Civ. 93-1154, 1993 WL596313 (S.D.N.Y. 1993), used a framework for analyzing disability-based distinctions similar to the framework set forth by the EEOC. *See* Mook, *supra* note 112, at 580-81.

118. *See Guidance*, *supra* note 115, at 1304.

119. *See id.*

kidney diseases), or disabilit[ies] in general (*e.g.*, non-coverage of all conditions that substantially limit a major life activity)."[120]

However, not all health-related plan distinctions discriminate on the basis of disability.[121] For example, "broad distinctions, which apply to the treatment of a multitude of dissimilar conditions and which constrain individuals both with and without disabilities, are not distinctions based on disability."[122] Therefore, pre-existing condition clauses that pre-date an individual's eligibility for benefits under the plan are not disability-based distinctions. Likewise, coverage limits on medical procedures that are not linked exclusively, or nearly exclusively, to the treatment of a particular disability are not disability-based distinctions.[123] However, a cap on lifetime benefits for AIDS victims would be considered a disability-based distinction because it "singles out a particular disability."[124]

Notably, even if an employer utilizes disability-based distinctions, it is not necessarily liable under the ADA.[125] In the second part of the EEOC's test, employers who make disability-based distinctions are allowed to justify them. If the EEOC determines that the challenged term or provision is a disability-based distinction, the employer must show that:

> (1) the health insurance plan is a bona fide insured health insurance plan that is not inconsistent with state law; or
> (2) the health insurance plan is a bona fide self-insured health insurance plan; and
> (3) the challenged disability-based distinction is not being used as a subterfuge to avoid the prohibitions of the ADA.[126]

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120. *Id.* at 1305.
121. *See id.*
122. *Id.* at 1304. Providing a lower level of coverage for mental/nervous conditions than for physical conditions would, therefore, not be considered a "disability-based distinction." *Id.* Likewise, providing fewer benefits for "eye care," for instance, would not be considered a disability-based distinction because it applies equally to those persons with and without disabilities. *Id.*
123. *See id.* at 1305. For example, it would not violate the ADA for an employer to cap the number of blood transfusions or x-rays an employee may receive, regardless of the adverse impact on persons with certain disabilities. *See id.*
124. *Id.* at 1307.
125. *See id.* at 1305.
126. *See id.* The three elements required to justify a disability-based distinction reflect the exclusion contained in section 12201(c) of the ADA, discussed *supra* in Part IV.A. of this Article.

The burden on an employer to meet (1) and (2) is minimal.[127] However, the burden on an employer to show that the disability-based distinction is not a "subterfuge" appears to be much more difficult.[128]

Under the EEOC's Guidance, a subterfuge means "disability-based disparate treatment . . . not justified by the risks or costs associated with the disability."[129] The EEOC will determine whether an employer is using a discriminatory disability-based distinction on a case-by-case basis after examining all the circumstances.[130] Therefore, according to the Guidance, an employer has many ways to prove that a challenged disability-based distinction is not a subterfuge.

For example, an employer may show that a distinction is not a subterfuge by showing that:

- all similarly catastrophic conditions are treated the same way;
- the distinction is based on legitimate actuarial data;[131]
- the distinction is necessary to ensure the fiscal soundness of the plan;[132] or
- the limitation is necessary to preserve meaningful and affordable health benefit coverage for employees.[133]

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127. *See id.* at 1306. If the health insurance plan is an insured plan, the employer will be able to satisfy this requirement by showing that the plan exists and pays benefits, its terms have been accurately communicated to employees, and the plan's terms are not inconsistent with applicable state law. *See id.* If the health insurance plan is a self-insured plan, the employer is only required to show that the plan exists, pays benefits, and that its terms have been accurately communicated to eligible employees. *See id.*

128. *Id.*

129. *Id.* Note that the ADA does not contain a "safe-harbor" for plans that were adopted prior to the passage of the ADA. *Id.* at 1305. Therefore, plans adopted prior to the effective date of the ADA are analyzed using the same framework as those enacted after the effective date of the ADA. *See id.*

130. *See id.* at 1306.

131. *See id.* Outdated or inaccurate actuarial data is not legitimate criteria. Therefore, employers are not permitted to rely on actuarial data that is based on myths, fears, or stereotypes about the disability. *See id.* at 1306 n.14.

132. *See id.* at 1306. Under this justification, the AIDS-related benefits cap in *Owens* may not be considered a subterfuge. In *Owens*, the employer's insurer threatened to cancel the entire policy because Storehouse had five employees with AIDS. *See* Owens v. Storehouse, Inc., 773 F. Supp. 416, 418 (N.D. Ga. 1991), *aff'd* 984 F.2d 394 (11th Cir. 1993).

133. *See Guidance, supra* note 115, at 1306.

The EEOC gives employers wide latitude in justifying the distinctions.[134]

However, the EEOC is free to look "behind" the employer's proffered reason to determine if the distinction is a subterfuge. For example, when an employer claims that a disability-based distinction was relied upon to ensure the fiscal soundness of the plan, EEOC investigators are instructed to examine the non-disability-based options for modifying the plan that the employee considered, and the reasons the employer rejected those options.[135]

The EEOC Guidance is not, and is not intended to be, the final authority on the application of the ADA to welfare benefit plans.[136] While the Guidance does provide some assistance for the workplace, the courts are ultimately responsible for determining the scope of the ADA's application to welfare benefit plans.

C. Landmark Cases

1. Mason Tenders v. Donaghey

In 1993 the New York District Director of the EEOC determined that a construction union violated the ADA because it changed its health insurance plan for union members to explicitly exclude payment for expenses arising from HIV infections, AIDS, and/or AIDS-related complexes.[137] The defendant in *Mason Tenders*[138] was the Mason Tenders District Council Welfare Fund (Fund), a self-insured, multi-employer benefit plan that provided health insurance benefits under collective bargaining agreements.

A Fund participant filed administrative charges with the EEOC, alleging that the Fund's reduction in benefits for AIDS-related illnesses violated the ADA.[139] The EEOC Director determined that the Fund's change in the welfare plan violated the ADA, even though the change in the plan had occurred in July 1991, one year before the ADA became effective.[140]

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134. *See id.*
135. *See id.* at 1307.
136. *See id.* at 1303.
137. *See* Mook, *supra* note 112, at 579.
138. No. Civ. 93-1154, 1993 WL596313 (S.D.N.Y. 1993).
139. *See* Mook *supra* note 112, at 579.
140. *See id.*

The union challenged the EEOC ruling in federal district court, asking the court to block any further EEOC action and to bar complaints filed against the union's fund by two persons with HIV.[141] In support, the union cited its precarious financial position and alleged that the high cost of the affected medical conditions threatened the fund's solvency and ability to provide benefits to fund participants.[142] Further, the Fund sought a declaratory judgment that it was not a covered entity under the ADA and had not violated the ADA by reducing coverage.[143]

In support of its motion for summary judgment, the Fund advanced a three-part argument:

- that it is not an entity covered by the ADA.[144]
- that as a self-insured benefits plan, it is governed solely by ERISA.[145]
- that the AIDS limitation could not constitute a subterfuge to avoid the purposes of the ADA because the modification was implemented prior to the effective date of the ADA and, therefore, the Fund could not have intended to subvert the purposes of the ADA.[146]

The court, however, refused to adopt the Fund's interpretation of subterfuge.[147] Instead, the court held that whether or not the

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141. *See id.*.

142. *See Mason Tenders,* 1993 WL 596313, at *10.

143. *See id.* at *1-*9, *12; Mook, *supra* note 112, at 579.

144. *See Mason Tenders*, 1993 WL 596313, at *4, *7-*9. In rejecting the Fund's argument that they are not covered by the ADA, the court looked to Spirt v. Teachers Ins. & Annuity Ass'n, 691 F.2d 1054 (2d Cir. 1982), in which an insurance fund was determined to be an "employer" within the meaning of Title VII of the Civil Rights Act of 1964. *See id.*

145. *See id.* The court rejected this argument after examining section 1144(d) of ERISA. That section states that "[n]othing in [ERISA] shall be construed to alter, amend, modify, invalidate, impair, or supersede any law of the United States . . . or any rule or regulation issued under any such law." 29 U.S.C. § 1144(d) (1988). The court reasoned, after examining § 1144(d), that ERISA could not impair federal anti-discrimination laws, such as the ADA. *Mason Tenders*, 1993 WL 596313, at *10-*11.

146. *See Mason Tenders*, 1993 WL 596313, at *6-*10; Mook, *supra* note 112, at 579.

147. *See Mason Tenders*, 1993 WL 596313, at *6-*10; Mook, *supra* note 112, at 579. The Fund argued that the AIDS limitation could not constitute a subterfuge under the definition of the term set forth in United Airlines, Inc. v. McMann, 434 U.S. 192 (1977) and Public Employees Retirement Sys. of Ohio v. Betts, 492 U.S. 158 (1989). The court in *Betts* held that a benefit plan constitutes a subterfuge under the Age Discrimination in Employment Act (ADEA) only if:

> [(1)] The plan was adopted after passage of the ADEA[;] and
>
> [(2)] The plan was purposefully adopted by an employer to discriminate against employees on the basis of age in a non[-]benefit aspect of the

Fund's AIDS limitation constituted a subterfuge under the ADA was a question of fact.[148] In addition, while not squarely addressing the issue of whether employers may discriminate on the basis of disability in the allocation of welfare benefits, the court in *Mason Tenders* indicated that a benefits cap based upon a disability would violate the ADA unless justified.[149] Because there were unresolved issues of fact with regard to whether the cap was a pretext for unlawful disability discrimination, the court in *Mason Tenders* denied the defendant's motion for summary judgment.[150]

The decision in *Mason Tenders* focused primarily on whether the Fund was a covered employer and whether a plan modification implemented prior to the passage of the ADA was a subterfuge.[151] The later of these two issues most likely will not arise for most employers *at this point in time*. This case and others involving *Mason Tenders* were later settled and resulted in payments to plaintiffs as well as an amendment to the fund's benefit plan to cover AIDS and payment of plaintiffs' attorneys' fees.[152] *Mason Tenders*, nonetheless, begins a trend signalling employers that plan modifications eliminating or capping benefits for a particular disability may be subject to the prohibition of the ADA. Furthermore, it notified employers that discrimination claims under the ADA may not be summarily dismissed as they were under Section 510 of ERISA. The court in *Carparts Distribution Center v. Automotive Wholesalers Ass'n of New England, Inc.* sent a similar message to employers.[153]

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employment relationship.

Mook, *supra* note 112, at 580. Under this definition of subterfuge, the Fund's modification would not be unlawful because it was implemented prior to the introduction of the ADA. *See id.*

148. *See Mason Tenders*, 1993 WL 596313, at *11; Mook, *supra* note 112, at 580.

149. *See Mason Tenders*, 1993 WL 596313, at *11.

150. *See id.*

151. *See id.*; Mook, *supra* note 112, at 579-80.

152. *See Disabilities: EEOC, Mason Tenders Reach Settlement to Set Aside $1 Million For AIDS Coverage*, 23 Pens. & Ben. Rep. (BNA) 40, at 40 (1996).

153. *See* 37 F.3d 12 (1st Cir. 1994).

2. Carparts Distribution Center, Inc. v. Automotive Wholesalers Ass'n of New England, Inc.

The *Carparts*[154] case is the first in which a federal appellate court issued an affirmative ruling suggesting that the ADA can effectively protect AIDS-related healthcare benefits from post-claim underwriting.[155]

Before his death from AIDS, the plaintiff, Ronald J. Senter (Senter), was chief executive officer, president, and sole shareholder of Carparts Distribution Center, Inc. (Carparts), an automotive parts wholesale distributor and New Hampshire corporation.[156] Senter and Carparts sued the Automotive Wholesalers Association of New England, Inc. (AWANE), a nonprofit Massachusetts corporation and the sponsor of a self-insured health benefit plan and AWANE Insurance Plan (AWANE PLAN).[157] Carparts had joined AWANE to offer its employees the health benefits of the AWANE PLAN. Liberty Mutual Insurance Co. administered the plan.

The specific facts of *Carparts* exemplify an employer's use of ERISA's preemption provisions in dealing with the unanticipated risks of covering AIDS-related diseases. Senter was diagnosed as HIV positive on or about May 12, 1986; he developed AIDS in March 1991. In 1989, Senter began submitting claims for HIV and AIDS-related illnesses. Defendants capped lifetime benefits under the AWANE PLAN for AIDS-related illnesses at $25,000, effective January 1, 1991. Other lifetime benefits remained at $1 million for covered AWANE PLAN members. The plaintiffs alleged that the cap on AIDS-related illnesses was instituted by

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154. *See id.*

155. The following cases have followed the reasoning in *Carparts* to hold that the ADA does protect insurance and/or employee benefit plans from discrimination based on disability: Lewis v. Aetna Life Ins. Co., 982 F. Supp. 1158 (E.D. Va. 1997); World Ins. Co. v. Branch, 966 F. Supp. 1203 (N.D. Ga. 1997); Cloutier v. Prudential Ins. Co. of Am., 964 F. Supp. 299 (N.D. Cal. 1997); Kotev v. First Colony Life Ins., 927 F. Supp. 1316 (C.D. Cal. 1996); Baker v. Hartford Life Ins. Co., 1995 WL 573430 (N.D. Ill. 1995). *See also* Shultz v. Hemet Youth Pony League, Inc., 943 F. Supp. 1222 (C.D. Cal. 1996) (holding ADA not limited to physical structures). *But See* Parker v. Metropolitan Life Ins. Co., 121 F.3d 1006 (6th Cir. 1997) (declining to follow *Carparts* and *Carparts* line of cases).

156. *See id.* at 14. When Senter died of AIDS on January 17, 1993, the court substituted his co-executors as plaintiffs. *See id.* at 14 n.1.

157. *See id.* at 14-15. The AWANE PLAN is administered as a trust and governed by a Board of Trustees, whose members are also involved in the automotive parts wholesale industry. *See id.*

the defendants with knowledge that Senter was HIV positive, and in direct response to his illness.

The plaintiffs sued the defendants in New Hampshire state court ten days before the ADA became effective, asserting state law claims only. When the defendants removed to federal court and raised the ERISA preemption defense, the plaintiffs amended to assert ADA claims. When the defendants objected to the amendment, the district court treated these objections as a motion to dismiss and dismissed plaintiffs' claims.[158] In doing so, the district court held that Title I of the ADA did not apply to this case because neither defendant met the definition of an "employer" with respect to the plaintiffs.[159] Furthermore, neither defendant was a "public accommodation" as required by Title III of the Act.[160] The plaintiffs appealed the district court decision.

On appeal, the First Circuit held that the district court improperly dismissed the plaintiffs' action.[161] Furthermore, the appeals court ruled that the decision was erroneous as a matter of law because the trial court excessively limited the ADA's coverage.[162] The circuit court then offered some guidance to the district court in properly interpreting the ADA.

The only issue addressed on appeal was whether the plaintiffs correctly contended that the defendants were covered entities under Titles I and III of the ADA. At first blush, the ADA, a federal law enacted to protect employees from employer discrimination, seems an unlikely vehicle to provide relief to a small business suing, on behalf of one of its employees, an association of similar businesses who have joined together to share an umbrella of health insurance benefits.

However, the appeals court ruled the trial court had defined "employer" too narrowly under Title I of the ADA.[163] "Covered entity" is defined by the ADA as "an employer, employment agency, labor organization, or joint labor-management committee."[164] Adopting the plaintiffs' argument, the court held

158. *See id.* at 15.
159. *See id.*
160. *See id.*
161. *See id.*
162. *See id.*
163. *Id.* at 16.
164. 42 U.S.C. § 12111(2) (1994).

that the defendants could be Title I, "employers" under any one of three tests.[165]

First, if they functioned as Senter's employer with respect to his employee healthcare coverage, then they exercised control over an important aspect of his employment and could fall into the category of employer.[166] Quoting *Spirt v. Teachers Ins. & Annuity Ass'n*,[167] the court stated: The "term 'employer,' . . . is sufficiently broad to encompass any party who significantly affects the access of any individual to employment opportunities, regardless of whether that party may technically be described as an 'employer' of an aggrieved individual as that term has generally been defined at common law."[168] In providing guidelines for the trial court to determine whether the defendants met this test, the court said Carparts would need to show that AWANE and AWANE PLAN existed solely for the purpose of enabling entities, such as Carparts, to delegate their responsibility to provide health insurance for their employees.[169] If the plaintiffs could meet this showing, they would prove that the defendants are so intertwined with the plaintiffs that they must be deemed an "employer" according to Title I of the ADA.[170]

Second, the defendants could be Title I employers if they functioned as "agents" of a "covered entity," even if they did not have authority to determine the level of benefits and even if Carparts retained the right to control the manner in which the plan administered these benefits.[171] Here, the court again relied

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165. *Carparts*, 37 F.3d at 16.

166. *See id.* at 17.

167. *See* 691 F.2d 1054, 1063 (2d Cir. 1982), *vacated and remanded on other grounds*, 463 U.S. 1223 (1983), *reinstated and modified on other grounds*, 735 F.2d 23 (2d Cir. 1984), *cert. denied*, 469 U.S. 881 (1984). Although *Spirt* was a Title VII case, there is no difference between the definition of the term "employer" in the two statutes. *Compare* 42 U.S.C. § 2000e(b) (1994) (Title VII) *with id.* § 12111(5)(A); *see also* 29 C.F.R. pt. 1630, App. (1997) (Interpretive Guidance on § 1630.2(a)-(f)) (stating that "employer" is "to be given the same meaning under the ADA that [it is] given under Title VII").

168. *See* Carparts Distrib. Ctr., Inc. v. Automotive Wholesaler's Ass'n of New England, 37 F.3d 12, 17 (1st Cir. 1994) (quoting *Spirt*, 691 F.2d at 1063).

169. *See id.*

170. *See id.*

171. *See id.* The district court found Carparts to be a "covered entity." Like Title VII, Title I of the ADA applies to "any agent" of a covered employer." 42 U.S.C. § 12111(5)(A) (1994); Los Angeles Dep't of Water & Power v. Manhart, 435 U.S. 702, 718 n.33 (1978) (Title VII).

on *Spirt*, recognizing that "exempting plans not actually administered by an employer would seriously impair the effectiveness of [the legislation]."[172]

Finally, if a defendant meets the statutory definition of an "employer" under 42 U.S.C. § 12111(5)(A) and a "person" under Title VII, 42 U.S.C. § 2000e(a), nothing in the ADA limits this prohibition to an employer's employees. Citing *Sibley Memorial Hospital v. Wilson*,[173] the court said an employer's obligation not to discriminate is not limited to its own employees, but extends to all individuals whose employment opportunities it can affect.[174] Finding the defendants met the statutory requirements of "employer,"[175] the appeals court invited the plaintiffs to develop facts at the trial level analogous to *Sibley* to hold these defendants, who were not technically employers, liable to Senter.[176]

The First Circuit also suggested that the defendants might be liable to the plaintiffs under Title III of the ADA, which prohibits public accommodations entities from discriminating against the disabled. Title III of the ADA provides that: "No individual shall be discriminated against on the basis of disability in the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of any place of public accommodation by any person who owns, leases (or leases to), or operates a place of public accommodation."[177] The First Circuit held that the district court erroneously interpreted "public accommodation" as "being limited to actual physical structures with definite physical boundaries which a person physically enters for the purpose of utilizing the facilities or obtaining services therein."[178] Using the plain meaning rule, the court found "public accommodation" not to be limited to a physical

172. *Carparts*, 37 F.3d at 18 (quoting *Spirt*, 691 F.2d at 1063).

173. 488 F.2d 1338, 1341 (D.C. Cir. 1973). *Sibley* is a Title VII case dealing with § 706(f)(1) of Title VII, 42 U.S.C. § 2000e-5(f)(1), a provision explicitly incorporated into the ADA at 42 U.S.C. § 12117(a) (1994).

174. *See id.* at 1341.

175. Under the ADA, an "employer" is a person engaged in an industry affecting commerce who has 25 or more employees for each working day in each of 20 or more calendar weeks in the current or preceding calendar year, and any agent of such person. 42 U.S.C. § 12111(5)(A) (1994).

176. *See Carparts*, 37 F.3d at 16, 18.

177. 42 U.S.C. § 12182(a) (1994).

178. *Carparts*, 37 F.3d at 18 (quoting district court).

structure for persons to enter.[179] Rather, it classified the defendants as "service establishments,"[180] noting they "do not require a person to physically enter an actual physical structure."[181] The court reasoned, because service businesses conduct business by mail and over the phone as well as in person, it would be irrational to interpret the ADA as providing protection for those entering the doors, but not to those conducting business by phone or mail.[182]

The court buttressed its reasoning with legislative history. The purpose of the ADA is to address the major areas of discrimination faced day-to-day by the disabled, bringing individuals with disabilities into the economic and social mainstream of American life.[183] After making the threshold determination that "public accommodation" is not limited to a showing of physical entry, the court instructed the plaintiff to develop a Title III claim, without providing further guidance.[184]

The First Circuit reversed and remanded the case to the district court for determinations of whether the defendants could be employers under Title I of the ADA, applying the three tests described above, and whether the defendants were "public accommodations" under Title III of the ADA.[185]

D. Other Open ADA Issues

1. Whether HIV and AIDS are Covered Disabilities

The ADA defines disability as: "(a) a physical or mental impairment that substantially limits one or more of the major life activities of such individuals; (b) a record of such an impairment; or (c) being regarded as having such an impairment."[186] Under federal guidelines, a person who is HIV positive or who has AIDS is considered disabled under the ADA.[187] Furthermore, several district courts have held HIV and/or AIDS to be a covered disability within the meaning on the ADA.[188]

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179. *Id.* at 19.
180. *Id.*
181. *Id.*
182. *See id.*
183. *See id.*
184. *Id.* at 19-20.
185. *Id.* at 21.
186. 42 U.S.C. § 12102(2) (1994).
187. *See* 28 C.F.R. § 35.104 (1997).
188. *See, e.g.,* World Ins. Co. v. Branch, 966 F. Supp. 1203 (1997); Kotev v. First

The United States Supreme Court has sanctioned a circuit court opinion holding that a person who is both contagious and has either an existing impairment or a record of impairment is handicapped within the meaning of Section 504.[189] This decision could provide precedent for finding AIDS a covered disability under the ADA.[190] In *Arline v. School Board of Nassau County*[191] a school teacher was fired solely because of her chronic tuberculosis.[192] The Court of Appeals held that her dismissal violated Section 504 of the Rehabilitation Act.[193] "Because 'the disease can significantly impair respiratory functions as well as other major body systems,' a person with 'active' tuberculosis is, 'one who has' a physical or mental impairment which substantially limits . . . major life activities."[194]

While, in *Arline*, the Supreme Court did not address the Justice Department's assertion that AIDS was also a handicap,[195] commentators believe that the Supreme Court's opinion serves as precedent for finding AIDS a covered disability for working conditions and benefits under the ADA.[196]

HIV can be analogized to tuberculosis for several reasons. Both are contagious; both have dormant and active stages; and both are feared because people lack understanding of how they are transmitted. Tuberculosis limits the activities of those infected with it. Likewise, because of the risk of infecting a partner and

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Colony Life Ins. Co., 927 F. Supp. 1316 (C.D. Cal. 1996); United States v. Morvant, 898 F. Supp. 1157 (E.D. La. 1995); Abbott v. Bragdon, 912 F. Supp. 580 (D. Me. 1995); D.B. v. Bloom, 896 F. Supp. 166 (D.N.J. 1995); Sharrow v. Bailey, 910 F. Supp. 187 (M.D. Pa. 1995); Anderson v. Gus Mayer Boston Store of Del., 924 F. Supp. 763 (E.D. Tex. 1996).

189. School Bd. of Nassau County, Fla. v. Arline, 480 U.S. 273 (1987).

190. *See* Tammie L. Follett, Note, *AIDS: An Insurable Handicap*, 9 HAMLINE J. PUB. L. & POL'Y 117, 135 (1988).

191. 772 F.2d 759 (11th Cir. 1985).

192. *Arline*, 772 F.2d at 759.

193. *Id.* at 764. The ADA adopts numerous provisions of the Rehabilitation Act of 1973, 29 U.S.C. §§ 701-797 (Supp. IV 1992), but has a broader scope of protection. The Rehabilitation Act applies to federal government agencies and contractors, while the ADA protects both public and private employers.

194. Follett, *supra* note 190, at 136 (quoting *Arline*, 772 F.2d at 764).

195. *See* School Bd. of Nassau County, Fla. v. Arline, 480 U.S. 273, 281 n.7 (1987) ("This case does not present, and we therefore do not reach, the question whether a carrier of a contagious disease such as AIDS could be considered to have a physical impairment, or whether such a person could be considered, solely on the basis of contagiousness, a handicapped person as defined by the Act.").

196. *See* Sohlgren, *supra* note 8, at 1284-85.

transmission to the unborn, an HIV infected person is substantially limited in his or her ability to procreate and engage in intimate sexual relationships, both of which are major life activities. Like tuberculosis, an HIV-infected individual may also be considered disabled under the third prong of the ADA definition of "disability" when he or she does not yet have clinical symptoms,[197] since an employer may fear the negative reactions of others or perceive the employee to be disabled.

2. *Whether Post-Claim Insurance Benefit Capping is Discrimination*

The term "discriminate" includes limiting, segregating, or classifying an employee based on a disability in a way that adversely affects the employee's opportunities or status.[198] The term also includes "participating in a contractual or other arrangement or relationship that has the effect of subjecting a covered entity's qualified applicant or employee with a disability to the discrimination prohibited" by the ADA.[199] Further, the term "relationship" includes any organization, which provides "fringe benefits to an employee of the covered entity."[200] Thus, to be liable under the ADA, the covered entity need not directly commit the discriminatory act. Rather, a relationship with the one committing the act is sufficient to find discrimination.

The EEOC has requested comments about insurance and risk to help develop a compliance manual for the ADA. Among the questions posed by the EEOC are the relationship between "risk" and "costs" and whether an employer or insurer must consider the effect on individuals with disabilities before making cost saving changes in its insurance coverage.[201] If the EEOC answers these questions in the affirmative, AIDS victims denied

197. *See* Sohlgren, *supra* note 8, at 1288 (citing HOUSE COMM. ON EDUCATION & LABOR, AMERICANS WITH DISABILITIES ACT OF 1990, H.R. REP. NO. 101-485, pt. 2, at 52, *reprinted in* 1990 U.S.C.C.A.N. 303, 334; 136 CONG. REC. H2442 (daily ed. May 17, 1990) (statement of Rep. Weiss) (discussing HIV infection as a disability covered by the ADA, whether asymptomatic or AIDS)); H.R. REP. NO. 101-485, pt. 2, at 52 (1990), *reprinted in* 1990 U.S.C.C.A.N. 267, 333-34 (noting also that HIV substantially limits procreation and intimate sexual relationships); S. REP. NO. 101-116, at 22 (1989) (including HIV infection in definition of "disability").

198. *See* 42 U.S.C. § 12112(b)(1) (1994).

199. *Id.* § 12112(b)(2).

200. *Id.*

201. *See* 56 Fed. Reg. 8579 (1991).

group health coverage because of employer cost saving measures could receive additional protection.[202]

Even if an employer denies coverage to a disabled person consistent with basic principles of insurance risk classification, the employer violates the ADA if its actions are a subterfuge to avoid the purposes of the ADA under section 501(c). Under the ADA, the employer has the burden of proving nondiscrimination by a preponderance of evidence.[203]

Employers should be able to defend against subterfuge if they can show classification and unequal treatment based on sound actuarial principles or experience. This inquiry will turn on whether employers can show that AIDS-related illnesses pose a greater risk to health insurance costs than other non-capped diseases such as heart disease.

Expenses related to medical care for AIDS treatment are often lower than other high-cost conditions covered by insurance.[204] AIDS average lifetime costs range from $50,000 to $150,000. By contrast, heart transplants average $83,000; liver transplants average $175,000; treatment for end-stage renal disease averages $158,000; treatment for myocardial infarction in men of middle age averages $66,800. The last year of life for a cancer patient generates an average cost of $30,300, while the final year of hospital costs for the AIDS patient is $20,000 to $25,000.[205] Therefore, compared to other diseases which employers have not capped historically, AIDS is no more costly. Thus, Section 501(c) may not provide a safe harbor for AIDS-related insurance caps because AIDS treatment costs are not substantially greater than other non-capped diseases.[206]

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202. *See* Sohlgren, *supra* note 8, at 1291 n.285. Implicated in the concept of risk classification are lifestyles and blood testing issues, which are beyond the scope of this inquiry.

203. *See EEOC Issues Guidance on ADA and Insurance: Will Sue Over AIDS Discrimination Sources Say*, 109 Daily Lab. Rep. (BNA) at AA-1 (June 9, 1993).

204. *See* Sohlgren, *supra* note 8, at 1259 (noting that heart attacks and organ transplants continue to be covered, even though expenses for these can far exceed expenses related to AIDS).

205. *See* Woods, *supra* note 10, at 286 n.96 (citing Lisa M. Tonery, *AIDS: A Crisis in Health Care Financing*, 40 FED'N OF INS. & CORP. COUNS. Q. 133, 143 (1990); Leonard, *supra* note 33, at 959 n.220).

206. Cost savings measures are still available to employers, as long as such restrictions are applied equally to all individuals regardless of the disease involved. Under EEOC guidelines, employers are permitted to limit coverage for certain general procedures and treatments, *i.e.*, blood transfusions and experimental drugs or procedures. Interpretive Guidance to 29 C.F.R. § 1630.5 (1995); *see also* Woods, *supra*

3. *Whether ERISA Preempts the ADA in This Context*

The legislative history of the ADA contains ample evidence that Congress sought to make the insurance practices of both self-insured plans and third-party insurers subject to the ADA.[207] "The bill is intended to apply non-discrimination standards equally to self-insured plans as well as third-party payer and third-party administered plans with respect to persons with disabilities."[208] Further, *Shaw v. Delta Airlines, Inc.*[209] held that Section 1144(d) of ERISA prohibits an interpretation of ERISA that would modify or impair federal anti-discrimination laws such as the ADA.[210]

CONCLUSION

In considering whether post-claim underwriting for HIV- and AIDS-related complexes violates the ADA, courts face two legitimate and competing policies. On the one hand, the public has an interest in protecting employers facing lost profits, and perhaps economic ruin, by continuing to cover a costly illness among a population that seemed low risk at the time healthcare expenses were projected. If employers can take advantage of the ERISA preemption and avoid state insurance law aimed at preventing post-claim underwriting, they can save money and jobs, while protecting the insurance benefits of their mainstream workforce.

On the other hand, the public has an interest in protecting its citizens from unfair discrimination and in protecting public healthcare from becoming a dumping ground for private insurers.

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note 10, at 280-81.

207. Section 514(a) of ERISA states that ERISA "supersede[s] any and all State laws insofar as they may now or hereafter relate to any employee benefit plan . . . ." 29 U.S.C. § 1144(a) (1994). An extensive discussion of ERISA preemption is beyond the scope of this Note. For further information, see James R. Bruner, Note, *AIDS and ERISA Preemption: The Double Threat*, 41 DUKE L.J. 1115 (1992); Raymond L. Wheeler & Kingsley R. Browne, *Federal Preemption of State Wrongful Discharge Actions*, 8 INDUS. REL. L.J. 1 (1986).

208. Memorandum of Law of *Amici Curiae* American Civil Liberties Union, Gay and Lesbian Advocates and Defendants, and Gay Men's Health Crisis Brief at 21, Carparts Distrib. Ctr., Inc. v. Automotive Wholesaler's Ass'n of New England, 37 F.3d 12 (1st Cir. 1994) [hereinafter *Carparts Memorandum*] (quoting S. REP. NO. 101-116, at 86 (1989) and H.R. NO. 101-485, at 138 (1990)).

209. 463 U.S. 85 (1983).

210. *Id.* at 102. For an in depth consideration of whether ERISA preempts ADA see pages 20 through 24 of the *Carparts Memorandum*.

Individuals infected with HIV are often subjected to discrimination in housing, employment, and other areas of their personal and professional lives. They face the complete depletion of their resources long before their treatment needs are complete. These employees, who may have been employed with a company for years, are suddenly deprived of benefits they have worked for and earned. Unfortunately, many must turn to the public treasuries to fund their treatment costs.

Historically, discrimination against people infected with HIV has taken many forms. They have been fired from jobs, evicted from their homes, denied medical care, prohibited from attending school, denied bail, confined without a hearing, refused services by business and government agencies, denied visitation privileges with their children, and refused proper funeral services.[211]

However, holdings in a developing line of cases suggest that the ADA may at least provide a mechanism through which AIDS discrimination in employee welfare benefit plans can be limited. If the trend begun by *Carparts* and its progeny are any indication, employees can use the ADA to stop their employers from limiting coverage for AIDS while continuing to provide unreduced coverage for other catastrophic or chronic disabilities. Employers attempting to justify an AIDS restriction on the basis of cost, while providing full coverage for other expensive illnesses, could be found to be operating under a subterfuge to evade the purposes of ADA.

If the ADA fills the gap created by ERISA and prevents employers from singling out AIDS for benefits capping, employers probably have at least two cost-containment responses available:

1. reduce healthcare benefits across the board for all diseases; or
2. limit certain costly kinds of treatment, so long as the treatment eliminated does not have a disparate impact on persons infected with HIV.

Judicial application of the ADA to fill the gap created by ERISA is justifiable from a public policy standpoint. ERISA preemption was never intended to provide employers with an avenue to deprive employees of benefits they relied on when they were hired. Employers have ways to protect themselves from financial disaster when they have unanticipated claims. They can

211. *See* Palmer, *supra* note 21, at 1351.

limit coverage for certain procedures or cap benefits across the board. They may even choose to forego self-insuring in favor of joining a larger pool to share risks. The end results will be the availability of the ADA federal regulation and state insurance laws to protect all insureds from post-claim underwriting.