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EMPLOYEE BENEFITS OR EMPLOYER "SUBTERFUGE": THE AMERICANS WITH DISABILITIES ACT'S PROHIBITION AGAINST DISCRIMINATORY HEALTH PLANS

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NOTES

EMPLOYEE BENEFITS OR EMPLOYER "SUBTERFUGE": THE AMERICANS WITH DISABILITIES ACT'S PROHIBITION AGAINST DISCRIMINATORY HEALTH PLANS

I. Introduction

Most states have laws that prohibit employers from providing their employees health benefits under discriminatory health-insurance plans.[1] The Supreme Court, however, in *FMC Corp. v. Holliday*[2] and *Pilot Life Insurance Co. v. Dedeaux*,[3] has held that the Employment Retirement Income Security Act[4] (ERISA) preempts state laws that regulate health-benefit plans when the plan is self-insured.[5] Employers have been able to skirt state laws that prohibit discriminatory health plans by implementing self-insured plans, which, under *FMC* and *Pilot Life*, are regulated exclusively by

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[1] *See* Eric C. Sohlgren, *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, 1248-50 (1991). "Most states prohibit AIDS discrimination in employee benefit plans through either employment discrimination or insurance laws." *Id.* at 1248-50. Only nine states either exclude AIDS or have not decided whether their anti-discrimination laws encompass AIDS. *See id.* at 1248-49 & n.6.

[2] 498 U.S. 52 (1990).

[3] 481 U.S. 41 (1987).

[4] 29 U.S.C. §§ 1001-1461 (1988).

[5] *FMC*, 498 U.S. at 65; *Pilot Life*, 481 U.S. at 57 (holding that ERISA preempts state common law tort and contract actions asserting improper claims processing under a self-insured employee benefit plan). A self-insured health-benefit plan differs from an insured plan in that under a self-insured plan the employer pays benefits directly from its own assets. *See* SECTION OF LABOR AND EMPLOYMENT LAW, ABA, EMPLOYEE BENEFITS LAW 1050-53 (1991). Under an insured plan, the employer pays a premium to an insurer and the insurer provides claims administration services and pays benefits to the employees. *Id.* Thus, under an insured plan, the insurer bears the risk of future health-benefit payments, but under a self-insured plan the employer bears this risk.

ERISA.[6] Applying the Supreme Court's holdings in *FMC* and *Pilot Life*, courts have further held that ERISA allows employers to establish self-insured discriminatory health-benefit plans that have a discriminatory impact on certain classes of employees.[7] For example, under ERISA, employers are permitted to cap lifetime health benefits for AIDS-related illnesses at much lower levels than benefits for other illnesses.[8]

Although ERISA prohibits an employer from denying benefits in which its employees have vested interests or to which its employees are otherwise entitled,[9] the Supreme Court has held that employers may amend or eliminate health benefits previously afforded because employees do not have vested interests in health benefits.[10] As a result, an increasing number of employers have implemented self-insured health plans to reduce costs and avoid state anti-discrimination laws.[11] In fact, limiting health benefits for AIDS-related illnesses is becoming a particularly popular method for employers to reduce the overall cost of their health-benefit plans.[12]

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[6] *See* 498 U.S. at 64; 481 U.S. at 57. These decisions have caused a shift by employers toward self-insured health benefit plans. *See* Sohlgren, *supra* note 1, at 1251.

[7] *See, e.g.*, Owens v. Storehouse, Inc., 984 F.2d 394, 400 (11th Cir. 1993) (holding that ERISA does not prohibit employers from altering the substance of benefit plans); McGann v. H&H Music Co., 946 F.2d 401, 408 (5th Cir. 1991), *cert. denied*, 113 S. Ct. 482 (1992) (allowing employer to limit health benefits for AIDS-related expenses); Dister v. Continental Group, Inc., 859 F.2d 1108, 1111 (2d Cir. 1988) (finding that employer's action causing loss of benefits does not violate ERISA); Young v. Standard Oil, 849 F.2d 1039, 1045 (7th Cir.), *cert. denied*, 488 U.S. 981 (1988) (permitting an employer to alter employee benefit plans under ERISA).

[8] *See, e.g.*, *H&H Music Co.*, 946 F.2d at 408.

[9] *See* 29 U.S.C. § 1140 (1988). The statute declares that "[i]t shall be unlawful for any person to . . . discriminate against a participant or beneficiary for exercising any right *to which he is entitled* under the provisions of an employee benefit plan." *Id.* (emphasis added).

[10] *See, e.g.*, Metropolitan Life Ins. Co. v. Mass., 471 U.S. 724, 732 (1985) (holding that ERISA does not regulate the substance of benefits afforded under health-benefit plans).

[11] *See* Sohlgren, *supra* note 1, at 1256; Christine Woolsey, *More Small Firms Self-Fund Benefits*, BUS. INS., Jan. 28, 1991, at 3, 12-14; Jerry Geisel, *Self-Insurers Can Limit AIDS Benefits*, BUS. INS., Aug. 6, 1990, at 1.

[12] *See, e.g.*, Mary Pflum, *EEOC Seeks to Compel Plan to Cover AIDS*, BUS. INS., June 14, 1993, at 20 (discussing a suit brought by the Equal Employment Opportunity Commission against the Mason Tenders District Council Welfare Fund for denying

Although employers have seemingly found a safety net to protect themselves from employee suits alleging discriminatory health-benefit plans, the Americans with Disabilities Act[13] (ADA) may now prohibit employers from continuing these discriminatory practices.[14]

This Note will demonstrate that an employer's obligation under the ADA to eliminate discriminatory practices affecting qualified employees with disabilities mandates that employers structure their health-benefit plans in a nondiscriminatory manner. First, this Note will examine the statutory language and legislative history of the ADA as it relates to discriminatory health-benefit plans. Second, this Note will show that relevant case law and administrative regulations concerning the ADA and other federal anti-discrimination laws require employers to afford all employees equal access to comparable health benefits. Third, burdens of proof will be discussed, by way of three hypothetical health-benefit plans that afford less benefits for AIDS-related illnesses than for other illnesses. Finally, this Note will conclude that the ADA should prohibit employers from establishing or continuing discriminatory health-benefit plans.

II. Statutory Language and Legislative History of the ADA

When Congress enacted the ADA,[15] it sought to eliminate

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health coverage to an employee infected with the AIDS virus). The "International Brotherhood of Electrical Workers Local 110 caps treatment for acquired immune deficiency syndrome at $50,000. All other diseases are covered up to $500,000." *Union Sued Over AIDS Cap*, BUS. INS., Mar. 29, 1993, at 2. *See ADA Suit Challenges AIDS Cap*, BUS. INS., Sept. 20, 1993, at 62 (Victory Van Corp. capped AIDS benefits at $25,000 per year and $50,000 over a lifetime.); Christine Woolsey, *Union Plan to Retain AIDS-Treatment Cap*, BUS. INS., Oct. 4, 1993, at 60. The Laborer's District Council Building and Construction Health and Welfare Fund, in June of 1992, capped lifetime benefits related to human immunodeficiency virus at $10,000, while maintaining lifetime benefits for other illnesses at $100,000. Woolsey, *supra*, at 60.

[13] 42 U.S.C. §§ 12101-12213 (Supp. II 1990).

[14] *See* Monica E. McFadden, Note, *Insurance Benefits Under the ADA: Discrimination or Business as Usual?*, 28 TORT & INS. L.J. 480, 502-03 (1993).

[15] This Note concerns the anti-discrimination provisions of the ADA, 42 U.S.C. § 12112(a) (Supp. II 1990), and the application of these provisions to the structure of employer-provided health-benefit plans.

discrimination against individuals with disabilities[16] in both the public sector and private employment.[17] Subchapter I of the ADA prohibits employers from discriminating against employees with disabilities in all aspects of the employment relationship.[18] The employer's duty to eliminate discrimination in employment includes the duty to provide nondiscriminatory fringe benefits, such as health benefits.[19] Subchapter IV of the ADA specifically addresses health-benefit plans, and requires employers to structure their health-benefit plans based on bona fide risk classifications.[20] Thus, the plain language of the ADA indicates that employers should not be able to discriminate against employees suffering from specific diseases or illnesses by reducing health benefits for those employees while maintaining more generous health benefits for other employees.[21]

A. ADA Subchapter I—Employment

The plain language of Subchapter I of the ADA bars employers, in all aspects of employment, from discriminating against employees with disabilities based on the disability of the employees.[22]

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[16] Congress defined a disability as "a physical or mental impairment that substantially limits one or more of the major life activities of such individual." *Id.* § 12102(2)(A).

[17] *Id.* § 12101(b). Congress specified that the purpose of the ADA is:

> (1) to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities; [and]
>
> (2) to provide clear, strong, consistent, enforceable standards addressing discrimination against individuals with disabilities . . . .

Id.

[18] *Id.* § 12112(a).

[19] *See id.*; 29 C.F.R. § 1630.4(f) (1992).

[20] *See* 42 U.S.C. § 12201(c) (Supp. II 1990).

[21] This Note focuses on discriminatory health-benefit plans rather than on whether employees can perform the essential functions of a job. Accordingly, this Note assumes that employees are otherwise qualified to perform the essential functions of a job.

[22] The Act mandates that "[n]o covered entity shall discriminate against a qualified individual with a disability because of the disability of such individual 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*." 42 U.S.C. § 12112(a) (Supp. II 1990) (emphasis added).

Among other things, the ADA requires employers to eliminate discrimination against disabled employees in fringe-benefit aspects of employment,[23] including those fringe benefits which are provided through contracts with third parties.[24] For example, the ADA precludes employers from providing health insurance purchased from a third-party insurer that would afford less coverage for a particular class of disabled employees than it would for nondisabled employees.[25] Thus, whether an employer provides its employees health-benefit coverage under a self-insured plan or by way of a third-party insurer, the plain language of Subchapter I of the ADA compels employers to design—or to restructure—their health-benefit plans in a nondiscriminatory manner.[26]

Commentators have suggested that language in Subchapter IV of the ADA, entitled "Miscellaneous Provisions,"[27] eliminates protection against discriminatory self-funded health-benefit plans that employees would otherwise be afforded under Subchapter I.[28] These commentators contend that, because the language of § 12201(c)(3)

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[23] 29 C.F.R. § 1630.4(f) (1992). The blanket prohibition against discrimination includes fringe benefits, such as health benefits, because fringe benefits are considered "privileges of employment." *Id.*

[24] 42 U.S.C. § 12112(b)(2) (Supp. II 1990). The Act states that:

> [T]he term 'discriminate' includes . . . participating in a contractual or other arrangement or relationship that has the effect of subjecting a . . . qualified [individual] with a disability to the discrimination prohibited by this subchapter (such relationship includes a relationship with . . . an organization providing fringe benefits to an employee of the covered entity).

Id.

[25] *See id.*

[26] *See id.*

[27] *Id.* § 12201(c). This Section provides that:

> Subchapters I through III of this chapter and title IV of this Act shall not be construed to prohibit or restrict . . . (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.

[28] *See, e.g.*, Sohlgren, *supra* note 1, at 1290-91. Sohlgren states that "[t]he ADA does not, therefore, appear to protect an employee from AIDS coverage restrictions under a self-funded group health plan by adding protections not available under ERISA." *Id.*

demonstrates that the ADA should not disrupt ERISA preemption of *state* insurance laws, employers are free to establish or continue discriminatory self-funded health-benefit plans in the same manner that they could before Congress enacted the ADA.[29] Although § 12201(c)(3) states that the ADA does not affect ERISA's preemption of *state* insurance laws, it should not be construed to mean that ERISA is a safe harbor for discriminatory practices that violate federal anti-discrimination statutes.[30] Because ERISA, unlike the ADA, does not regulate the substantive provisions of health-benefit plans,[31] no preemption problem exists between ERISA and the ADA.[32] In fact, the ADA and ERISA should be read in conjunction and as compatible with one another.[33] Therefore, self-funded health-benefit plans should not be exempt from the anti-discrimination mandates of the ADA under § 12201(c).[34]

B. ADA Subchapter IV—Miscellaneous Provisions

In Subchapter IV, Congress specifically addressed health-benefit plans, and, although it provided employers with some freedom in structuring these plans, Congress retained the ADA's broad

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[29] *See, e.g.*, David A. Copus & Glen D. Nager, *Benefit Plan Limitations After the Americans with Disabilities Act*, 19 EMPL. REL. L.J. 77, 85 (1993).

[30] *See* McGann v. H & H Music Co., 946 F.2d 401, 408 (5th Cir. 1991) (holding that Section 510 of ERISA does not prohibit employers from structuring health-benefit plans that provide less coverage for specific diseases). The *H & H Music* court did not address, however, whether employers are free to structure health-benefit plans that discriminate against individuals in violation of other federal anti-discrimination laws. *See id.* For example, Section 510 of ERISA would afford no protection to an employer who structured a health-benefit plan that afforded a $1,000,000 lifetime cap for males and a $20,000 lifetime cap for females, because such a plan would blatantly violate Title VII of the Civil Rights Act. *See, e.g.*, Ariz. Governing Comm'n v. Norris, 463 U.S. 1073, 1081 (1983) (holding that disparate payout of retirement benefits based on gender violates Title VII); City of L.A. v. Manhart, 435 U.S. 702, 711 (1978) (holding that requiring women to contribute more than men to a pension plan violates Title VII); *see also* McFadden, *supra* note 14, at 500-01.

[31] *See* Metropolitan Life Ins. Co. v. Mass., 471 U.S. 724, 732 (1985).

[32] *See* McFadden, *supra* note 14, at 488-89.

[33] *See id.*

[34] *See supra* note 30 and accompanying text.

proscription against discrimination.[35] Under § 12201(c)(2), employers are allowed flexibility to structure their health-benefit plans based on "underwriting risks, classifying risks, or administering . . . risks" that comply with state laws.[36] In addition, § 12201(c)(3) preserves the ability of employers to provide health benefits under self-insured plans, which do not implicate state *insurance* laws.[37] Employers, however, may not use these exceptions as a guise, or "subterfuge," to evade the purposes and goals of the ADA.[38] So, the ADA allows employers to afford health benefits under insured plans governed by state law, and under self-insured plans that are not governed by state law.[39] However, the fact that the ADA allows employers to afford coverage under self-insured plans, which are not regulated substantively by state law, does not compel the conclusion that the ADA allows employers to discriminate under self-insured plans.

The different references to state laws in §§ 12201(c)(2) and 12201(c)(3) show that, regardless of whether the health plan is insured or self-insured, the employer may only afford reduced benefits for a particular illness if such reduction in benefits is based on "underwriting risks, classifying risks, or administering such risks . . . based on or not inconsistent with State law."[40] Whereas §

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[35] *See* 42 U.S.C. § 12201(c)(2)-(3) (Supp. II 1990).

[36] The Act states that:

> Subchapters I through III of this chapter and title IV of this Act shall not be construed to prohibit or restrict . . . (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.

Id. § 12201(c)(2).

[37] The Act provides that:

> Subchapters I through III of this chapter and title IV of this Act shall not be construed to prohibit or restrict . . . (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. § 12201(c)(3) (emphasis added).

[38] *Id.* § 12201(c).

[39] *See id.*

[40] 42 U.S.C. § 12201(c)(2)-(3) (Supp. II 1990).

12201(c)(3)—the section allowing for self-funded health-benefit programs—refers to state *insurance* laws,[41] § 12201(c)(2) requires that employers structure their health-benefit plans in a manner consistent with *all* state laws.[42] Accordingly, employers are not free to disregard state anti-discrimination laws when they structure self-funded health-benefit plans.[43] Moreover, because the statutory language indicates that § 12201(c)(2) applies to both self-insured and insurer-provided health-benefit plans, employers who self-insure should be required to show that any disability-based distinction in their health-benefit plans are based on one of the enumerated cost justifications.[44]

Two commentators have suggested, however, that § 12201(c)(2) is limited to insured health-benefit plans that are regulated by state insurance laws, and should not be read to encompass self-insured plans that are not regulated by state insurance laws.[45] However, these commentators fail to focus on.Congress's use of the term "insurance" in § 12201(c)(3), and the absence of that term in § 12201(c)(2). Moreover, it seems inconsistent for Congress to require cost justifications for insured benefit plans while at the same time allowing self insurers freedom to discriminate against any disability they so desire. Therefore, § 12201(c) should not only be read to prohibit self-insurers from using benefit plans as a "subterfuge" to evade the purposes of the ADA, but also to require self-insurers to justify disability-based distinctions with accepted risk classifications.

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[41] *Id.* § 12201(c)(3) (allowing plans "not subject to *State laws that regulate insurance*") (emphasis added).

[42] *See id.* § 12201(c)(2) (requiring all health-benefit plans to be based on "underwriting risks, classifying risks, or administering such risks that are based on or not inconsistent with State law").

[43] *See* LABOR RELATIONS SECTION, D.C. BAR, DIST. OF COLUMBIA BAR TASK FORCE REP. ON THE EFFECT OF THE AMERICANS WITH DISABILITIES ACT ON EMPLOYER-SPONSORED HEALTH PLANS 54 n.164 (1993) [hereinafter D.C. TASK FORCE REP.].

[44] *See id.* at 53.

[45] Stephen M. Koslow & Mark R. White, *Employer Sponsored Health Benefits Under the ADA*, 16 MENTAL & PHYSICAL DISABILITY L. REP. 560, 562-63 (1992).

C. *Legislative History of the ADA*

The ADA reflects Congress's paramount concern over the preventing of discrimination against—and providing equal access to employment for—individuals with disabilities.[46] In addition, Congress expressed in the Act's legislative history that the goal of equal access to employment means that individuals should not be denied the opportunity to secure or maintain employment solely due to a discriminatory health-benefit plan, which does not have a valid cost justification for its disability-based distinction.[47]

Section 12201(c) was not included in the original draft of the legislation, but was later added to clarify that:

> (1) insurers may continue to sell to and underwrite individuals applying for life, health, or other insurance on an individually underwritten basis;
> (2) employers . . . [may] establish and observe the terms of employee benefit plans, so long as these plans are based on underwriting or classification of

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[46] *See* 42 U.S.C. § 12112(a) (Supp. II 1990). The legislative history indicates that Congress was concerned about discrimination in critical areas such as employment. H. R. REP. NO. 485(II), 101st Cong., 2d Sess. 29 (1990), *reprinted in* 1990 U.S.C.C.A.N. 303. Moreover, Congress acknowledged that current federal and state laws did not adequately address this problem. *Id.* Finally, Congress noted that discrimination against people with disabilities includes the denial of health benefits. *Id.* Sohlgren states that "[t]he Americans with Disabilities Act of 1990 (ADA) was passed primarily as a national mandate aimed at eliminating discrimination against the some forty-three million Americans who have one or more physical or mental disabilities." Sohlgren, *supra* note 1, at 1288.

[47] H.R. REP. NO. 485(II) at 136-38. Although Section 12201(c) of the ADA reflects Congress's intention to preserve the validity of state insurance laws, Congress was aware that most states already had laws prohibiting discrimination in group health-insurance plans. Specifically, the Congressional report states that:

> This legislation should [not] affect the way the insurance industry does business in accordance with State laws . . . . Virtually all States prohibit unfair discrimination among persons of the same class and equal expectation of life . . . . Under the ADA, a person with a disability cannot be denied insurance or be subject to different terms or conditions of insurance based on disability alone, if the disability does not pose increased risks.

Id. at 136.

> risks; and
> (3) self-insured plans, which are currently governed by the preemption provisions of . . . ERISA, are still governed by that preemption provision and are not subject to *state* insurance laws.[48]

The legislative history also reveals that, while Congress wanted to preclude employers from discriminating against employees with respect to health benefits, employers could impose health-benefit limitations if such limitations were based on "sound actuarial principles" or if they were related to actual or reasonably foreseen claims experience.[49] In fact, the legislative history reveals that health-benefit plans do not violate the ADA merely because they do not address the particular needs of each individual with a disability requiring special treatment.[50] Nonetheless, Congress did not intend to permit employers to limit health benefits solely on the basis of a disability, absent sound actuarial principles,[51] and legislated that employers could not use the statutory cost-justification exceptions as a "subterfuge" to evade the purposes of the ADA.[52] So, while Congress did not want to disrupt employee-benefit plans and other aspects of insurance based on sound actuarial principles, Congress also did not want employers to have free reign to structure health-benefit plans that would limit or eliminate employment opportunities for "disabled" individuals.

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[48] H.R. REP. NO. 485(II) at 137 (emphasis added).

[49] H.R. REP. NO. 485(III), 101st Cong., 2d Sess. 31-35 (1990), *reprinted in* 1990 U.S.C.C.A.N. 445, 494. Coverage limitations because of physical or mental impairment are permissible when they are related to actual or reasonably anticipated claims experience. *Id.* This seems to be a nebulous standard that leaves more questions unanswered than answered, such as: Who retains the burden of proof, and what threshold is required before reasonably anticipated costs rise to the level where discriminatory benefits no longer violate the ADA?

[50] H.R. REP. NO. 485(II) at 137. The ADA Committee clarified that "employee benefit plans should not be found to be in violation of this legislation under impact analysis simply because they do not address the special needs of every person with a disability." *Id.*

[51] *Id.* at 136-37; H.R. REP. NO. 485(III) at 460.

[52] 42 U.S.C. § 12201(c) (Supp. II 1990).

III. Interpreting the ADA's Health Benefit Provisions

A. The Meaning of "Subterfuge"

It is clear that Congress did not want employers to circumvent the goals of the ADA through misapplication of the cost-justification exceptions listed under § 12201(c).[53] This is reflected in the language of the statute, which states that employers cannot use the exceptions in § 12201(c) as a "subterfuge" to avoid the purposes of the Act.[54] However, Congress left the term "subterfuge" undefined in the statute. Therefore, prior case law and other interpretive sources must be examined to shed some light on what Congress intended when it used "subterfuge" in Section 12201(c) of the ADA. The Supreme Court, in *Public Employees Retirement System v. Betts*,[55] interpreted the term "subterfuge" under another federal anti-discrimination statute.[56] Accordingly, examining *Betts* closely should provide some insight into the meaning that Congress intended for the term "subterfuge" in the ADA.

Betts concerned an action brought under the Age Discrimination in Employment Act (ADEA).[57] In *Betts*, the plaintiff alleged that her employer's retirement plan violated the ADEA because her eligibility for disability benefits varied depending on her age when she retired.[58] The retirement plan actually provided a dual benefit level, one for age-and-service employees and one for disabled employees.[59] The disability benefit, however, was only available to those employees who retired before the age of sixty, and far exceeded the age-and-service benefits.[60] Betts was sixty-one years old and was

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[53] *See id.*

[54] *Id.*

[55] 492 U.S. 158 (1989).

[56] *Id.* at 167 (stating that "subterfuge" in the Age Discrimination in Employment Act, 29 U.S.C. §§ 621-634 (1988), requires specific intent on the part of the employer to evade the statutory requirement). The Supreme Court decided *Betts* before the ADA was enacted. *See* 492 U.S. at 158.

[57] 29 U.S.C. §§ 621-634 (1988); *see Betts*, 492 U.S. at 167.

[58] 492 U.S. at 161-63.

[59] *Id.* at 162.

[60] *Id.* at 162-63.

forced to retire because of a disability.[61] Thus, under the employer's policy, Betts was only entitled to the age-and-service retirement benefits, even though her disability forced her into retirement.[62] The age-and-service benefit for Betts was half the comparable disability benefit.[63]

In dicta, the Court first commented that "subterfuge is to be given its ordinary meaning, and that as a result an employee benefit plan adopted prior to enactment of the ADEA cannot be a subterfuge."[64] The Court then examined the regulations issued under the ADEA, which required that employers justify lower levels of benefits based on age with age-related cost considerations.[65] The Court, however, dismissed the regulations as contrary to the statutory intent and the plain meaning of the word "subterfuge."[66] Instead, the Court set forth its own definition of "subterfuge," stating that it requires specific "'intent . . . to evade a statutory requirement.'"[67] Thus, under the ADEA, the Supreme Court had set the stage for an extremely difficult burden on employees to show that an employer's acts amounted to "subterfuge,"[68] because: (1) intent is always a difficult element to prove; and (2) all of the evidence that could be used to prove intent will be in the employer's possession. Some commentators are concerned that if courts apply the *Betts* analysis in ADA cases involving discriminatory health-benefit plans, employees will rarely be successful in challenging such health plans.[69] Applying

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[61] *Id.* at 163.

[62] *Id.*

[63] *Betts*, 492 U.S. at 163.

[64] *Id.* at 168. This was dicta because in this case the employer amended the retirement plan after the ADEA was enacted. *Id.* at 169.

[65] *Id.* at 170.

[66] *Id.* at 170-71.

[67] *Id.* at 171 (quoting United Air Lines, Inc. v. McMann, 434 U.S. 192, 203 (1977)). The Court noted that "an employer may provide lesser amounts of insurance coverage under a group insurance plan to older workers than he does to younger workers where the plan is not a subterfuge to evade the purposes of the act." *Id.* at 172 n.4.

[68] *See* Sohlgren, *supra* note 1, at 1293. Sohlgren argues that "[b]ased on this interpretation of subterfuge, a court would be likely to hold that an AIDS coverage limitation in an employee benefit plan does not evade the purposes of the ADA unless the provision violates the substantive provisions of the ADA." *Id.*

[69] *Id.* at 1294.

the *Betts* interpretation of subterfuge in ADA cases, however, may be less onerous than it appears at first blush. In addition, differences exist between the ADEA and the ADA that should preclude such a result.

Unlike the ADEA, the ADA specifically addresses employee-benefit plans.[70] In fact, the Supreme Court in *Betts* noted that the ADEA did not address employee-benefit plans.[71] As the Court noted, "Congress left the employee-benefit battle for another day and legislated only as to hiring and firing, wages and salaries, and other *nonfringe-benefit* terms and conditions of employment."[72] Thus, according to the Supreme Court, Congress simply did not intend for the ADEA to govern employee-benefit plans.[73]

In contrast to the ADEA, the ADA and its legislative history makes it clear that Congress intended for the Act's proscriptions to apply to discriminatory employee-benefit plans.[74] Section 12201(c) of the ADA merely clarifies the manner in which the statute's broad proscription against discrimination should be applied in the context of health-benefit plans.[75] In fact, the Supreme Court in *Betts* acknowledged that a health plan that discriminated against a statutorily protected group in itself would be a "subterfuge" to evade the statute's purposes.[76] Thus, a proper accord of *Betts* indicates that

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[70] *See* 42 U.S.C. § 12112(a) (Supp. II 1990).

[71] 492 U.S. at 177.

[72] *Id.* (emphasis added).

[73] *See id.* (finding that the ADEA does not apply to "bona fide seniority systems and retirement, pension, or other employment benefit plans" (quoting S. REP. NO. 723, 90th Cong., 1st Sess. 14 (1967))).

[74] *See* H.R. REP. NO. 485(II) at 136-38. This intent is apparent in that the Congressional Report states that "[u]nder the ADA, a person with a disability cannot be denied insurance or be subject to different terms or conditions of insurance based on disability alone, if the disability does not pose increased risks." *Id.*

[75] *See* 42 U.S.C. § 12201(c) (Supp. II 1990).

[76] 492 U.S. at 177. The *Betts* Court struggled with the conflict between the anti-discrimination law for elderly workers, and the reality of pension plan management, which necessarily includes disparate benefits depending on age. *Id.* Arguably, the ADA has a similar conflict between disability-based discrimination and underwriting classifications for health-benefit plans. However, there is an important distinction between developing a health plan based upon underwriting risks and implementing a health plan to exclude a particular type of employee from the workplace. Where a health plan excludes coverage for specified illnesses, but affords full coverage for other

§ 12201(c) must be construed in light of the purposes of the ADA. In addition, unlike the ADEA, the ADA generally requires employers to provide reasonable accommodations to their employees, unless to do so would impose an undue hardship on the employer.[77] The ADA's cost-justification provisions dictate that employers must investigate and implement "reasonable accommodations" unless to do so would impose an "undue hardship"[78] on the employer.[79] Although

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illnesses, a presumption should exist that the plan violates the ADA and the employer may overcome this presumption only by showing that the plan is not a subterfuge to exclude a particular class of employees from the workplace. *See* Sohlgren, *supra* note 1, at 1298.

[77] *See* 42 U.S.C. § 12113(a) (Supp. II 1990). This Section states that:

> It may be a defense to a charge of discrimination under this chapter that an alleged application of qualification standards, tests, or selection criteria that screen out or tend to screen out or otherwise deny a job or benefit to an individual with a disability has been shown to be job-related and consistent with business necessity, and such performance cannot be accomplished by reasonable accommodation, as required under this subchapter.

Id. *See* 42 U.S.C. § 12112(b)(5)(A) (Supp. II 1990) (providing that "the term 'discriminate' includes . . . not making reasonable accomodations . . . unless such covered entity can demonstrate that the accommodation would impose an undue hardship on the operation of the business of such covered entity"); 42 U.S.C. § 12111(10)(a) (Supp. II 1990) ("The term 'undue hardship' means an action requiring significant difficulty or expense . . . .").

[78] *Id.* § 12111(10). An "undue hardship" is defined in the ADA as:

> [A]n action requiring significant difficulty or expense when considered in light of . . .
> (i) the nature and cost of the accommodation needed under this chapter;
> (ii) the overall financial resources of the facility or facilities involved in the provision of the reasonable accommodation; the number of persons employed at such facility; the effect on expenses and resources, or the impact otherwise of such accommodation upon the operation of the facility;
> (iii) the overall financial resources of the covered entity; the overall size of the business of a covered entity with respect to the number of its employees; the number, type and location of its facilities; and
> (iv) the type of operation or operations of the covered entity, including the composition, structure, and functions of the workforce of such entity; the geographic separateness, administrative, or fiscal relationship of the facility or facilities in question to the covered entity.

Id.

"reasonable accommodation" in this context refers to the employment facilities or job requirements,[80] the term "subterfuge" in the ADA's health-benefit provision should be read with the Act's affirmative duties and cost-justification provisions in mind.[81] Accordingly, the bite of the *Betts* decision should have much less sting under the ADA than it has had under the ADEA.[82]

Commentators have suggested that employers operating bona fide benefit plans should have a safe harbor for disability-specific limitations adopted before the ADA was enacted.[83] This argument, however, ignores the plain language of the ADA and its cost-justification approach, and improperly relies upon dicta in *Betts*.

The purpose of the ADA—to prevent discrimination against individuals with disabilities—has been implemented at the state level prior to the enactment of the ADA.[84] Only by hiding behind the protection of ERISA were employers able to legally "evade the purposes" of these state laws with respect to health-benefit plans.[85] Moreover, the language of the statute indicates that employers cannot use the cost-justification exceptions to evade the purposes of the Act.[86] This statutory scheme contradicts the argument that any plan in force prior to enactment of the statute cannot be a "subterfuge."[87] Such a conclusion would ignore the affirmative duty throughout the ADA for employers to implement reasonable accommodations for qualified individuals with disabilities, unless to do so would impose

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[79] *See* McFadden, *supra* note 14, at 482.

[80] *See* 42 U.S.C. § 12112(a) (Supp. II 1990).

[81] *See id.*; 42 U.S.C. § 12111(10) (Supp. II 1990).

[82] Congress reacted swiftly to the *Betts* decision, and enacted the Older Workers Benefit Protection Act, Pub. L. No. 101-433, 104 Stat. 978 (1990), *codified in* 29 U.S.C. §§ 621-633a (Supp. II 1990), which employs the cost-justification approach and eliminates the "subterfuge" language.

[83] *See, e.g.*, Copus & Nager, *supra* note 29, at 80-81.

[84] Under most state laws, employment discrimination against individuals with disabilities is prohibited. *See, e.g.*, CAL. LAB. CODE § 1735 (West 1989); D.C. CODE ANN. §§ 1-2502, 1-2512, 6-1705 (1981); *see also* Sohlgren, *supra* note 1, at 1248-49 & n.6 (providing a complete list of all the state statutes that prohibit discrimination against individuals with disabilities).

[85] *See supra* note 9-11 and accompanying text.

[86] *See* 42 U.S.C. § 12201(c) (Supp. II 1990).

[87] *See* McFadden, *supra* note 14, at 494.

an undue hardship on the employer.[88] For example, it would be absurd to think that the ADA does not require an employer to refurbish its restroom facilities to accommodate handicapped individuals merely because that employer installed the restroom facilities before the ADA was enacted. The same reasoning should hold true with respect to health-benefit plans.[89]

The plain language of the ADA, and the context in which the term "subterfuge" is employed therein, also contradict the conclusion that health-benefit plans implemented prior to enactment of the ADA fall within a "safe harbor."[90] In fact, the legislative history of the ADA specifically states that "subterfuge" is to be determined "regardless of the date an insurance or employer [provided] benefit plan was adopted."[91] Unlike the ADEA, the term "subterfuge" in the ADA applies specifically to the use of health-benefit plans that, by way of disability-based distinctions, preclude certain classes of employees from equal access to employment opportunities.[92] Thus, under the ADA, if an employer affords a health-benefit plan, which contains disability-based distinctions, the employer would first have to show that these distinctions are based on the enumerated cost justifications outlined in the statute.[93] Then, the employer should be required to show that the cost justifications are not, in fact, being used as a "subterfuge" to evade the purposes of the Act.[94]

The ADA prohibits employers from discriminating against disabled employees in all aspects of employment, including fringe benefits such as health-benefit plans.[95] The subterfuge language of the ADA simply prohibits employers from using an otherwise cost-justified health-benefit plan as a ruse to avoid the anti-discrimination mandate of the ADA.[96] In other words, under the ADA, a health-benefit plan that discriminates on the basis of a disability can be

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[88] *See* 42 U.S.C. § 12112(b)(5)(A) (Supp. II 1990).

[89] *See* McFadden, *supra* note 14, at 494.

[90] *See* Copus & Nager, *supra* note 29, at 80.

[91] S. REP. No. 116, 101st Cong., 1st Sess. 85 (1989).

[92] *See* 42 U.S.C § 12201(c) (Supp. II 1990).

[93] *See id.*

[94] *See supra* notes 37-38 and accompanying text.

[95] *See* 42 U.S.C. § 12112(a) (Supp. II 1990).

[96] *See id.* § 12201(c).

deemed a "subterfuge" if it attempts to avoid the purposes of the Act, even though the plan is based on the cost-justifications delineated in the statute.[97]

Although there is no precedent yet, employers providing health-benefit plans that afford less coverage for a particular illness than for other illnesses will have difficulty showing that the reduction in benefits is based upon acceptable cost justifications where the costs associated with other illnesses are comparable.[98] Thus, an employer that desires to reduce the cost of its health-benefit plan and still comply with the ADA should reduce benefits for all catastrophic illnesses evenhandedly, and refrain from implementing disability-specific limitations, especially when the anticipated medical expenses associated with the particular disability are not significantly greater than anticipated medical expenses associated with other unaffected disabilities. Only when an employer can justify the elimination or reduction of coverage for a particular disability with sound actuarial analysis should the employer be permitted to implement a disability-specific limitation. Further support for this conclusion can also be found in the Equal Employment Opportunity Commission (EEOC) interim guidelines.[99]

B. The EEOC Guidelines

In June of 1993, the EEOC promulgated interpretive

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[97] *See* McFadden, *supra* note 14, at 494.

[98] *See* Jerry Geisel, *ADA Rules to Affect Few Health Plans*, BUS. INS., June 14, 1993, at 1 ("[H]ealth care plans that single out a particular disability—like AIDS or schizophrenia—or a 'discrete' group of disabilities—like cancer or kidney diseases—would be considered 'disability-based' and thus discriminatory under the ADA, the [EEOC] commission said."). Whereas AIDS patients can expect to incur between $25,000 to $147,000 in medical costs over their lifetimes, *see* Robert A. Hiatt et al., *The Cost of Acquired Immunodeficiency Syndrome in Northern California*, 150 ARCHIVES INTERNAL MED. 833, 833-38 (1990), the medical costs of a breast cancer patient range from $36,000 for chemotherapy to $89,700 for bone-marrow transplants. *See* Bruce E. Hillner et al., *Efficacy and Cost-Effectiveness of Autologous Bone Marrow Transplantation in Metastic Breast Cancer*, 267 JAMA 2055 (1992).

[99] Interim Enforcement Guidance on Application of ADA to Disability Based Distinctions in Employer Provided Health Insurance, EEOC Compl. Man. (CCH) ¶ 6902 (June 8, 1993) [hereinafter EEOC Guidelines].

enforcement guidelines concerning the manner in which the ADA governs health-benefit plans.[100] Although the EEOC promulgated these guidelines for its own staff, the guidelines reflect the position which the EEOC should take in litigation.[101] According to the guidelines, in order to determine whether an employer's health plan violates the ADA, the EEOC will first decide whether the benefit-plan distinction is a "disability-based distinction."[102] If the EEOC determines that such a distinction exists, it will require the employer to prove that the "disability-based distinction" falls within one of the exceptions outlined in § 12201(c).[103] Thus, if an employer's health-benefit plan includes a "disability-based distinction," the EEOC will require the employer to demonstrate that the plan is a bona fide self-insured plan, which is not inconsistent with state law, and that the "disability-based distinction" is not a "subterfuge" to evade the purposes of the Act.[104]

In its guidelines, the EEOC provides a list of possible justifications to show that an employer's "disability-based distinction"

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[100] *Id.*

[101] *See* D.C. TASK FORCE REP., *supra* note 43, at 79 n.235 (1993).

[102] EEOC Guidelines, *supra* note 99, at 5314.

[103] *Id.* These exceptions are identified as "underwriting risks, classifying risks, or administering risks." *Id.*

[104] *Id.* at 5315-16. The EEOC provides a useful example of applying these guidelines:

> R Company's new self-insured health insurance plan caps benefits for the treatment of all physical conditions, except AIDS, at $100,000 per year. The treatment of AIDS is capped at $5,000 per year. CP, an employee with AIDS enrolled in the health insurance plan, files a charge alleging that the lower AIDS cap violates the ADA. The lower AIDS cap is a disability-based distinction. Accordingly, if R is unable to demonstrate that its health insurance plan is bona fide and that the AIDS cap is not a subterfuge, a violation of the ADA will be found.

Id. at 5315. Furthermore, the EEOC has stated that the burden of proof on these two issues rests with the employer because the employer has easier access to the relevant information. *Id.* at 5316. *But see* D.C. TASK FORCE REP., *supra* note 43, at 67-68 (arguing that, because St. Mary's Honor Ctr. v. Hicks, 113 S. Ct. 2742 (1993) held that the plaintiff bears the burden of proving discriminatory intent, even when the employer's earlier articulated explanation for its action has been shown to be pretext, the burden of proof should rest with the plaintiff employee in ADA cases).

is not a subterfuge to avoid the purposes of the Act.[105] These justifications include: (1) that the distinctions are based on legitimate actuarial data or on actual or reasonably anticipated experience; (2) that unlimited coverage for a discrete group of employees would cause the plan to go insolvent; (3) that the distinctions would cause significant adverse affects on plan costs or on the availability of coverage for other employees; and (4) that the disability-specific treatment is unnecessary for the disability.[106] Therefore, according to the EEOC, the only way in which an employer can show that its discriminatory plan is not a "subterfuge" is to set forth evidence that the plan meets one of the above-mentioned cost-justifications.[107]

Applying these guidelines, the EEOC has found instances where disability-based distinctions in employers' health-benefit plans were not based on sound actuarial principles or on actual or reasonably anticipated claims experience and, therefore, that they violated the ADA.[108] For example, the EEOC found that the AIDS-related benefit cap implemented by the Laborers District Council Building and Construction Health and Welfare Fund (Fund) was an action based on "fear," rather than on sound actuarial principles.[109] Although it argued that the reduction of coverage for AIDS-related benefits was due to financial concerns,[110] the Fund offered no hard

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[105] EEOC Guidelines, *supra* note 99, at 5317.

[106] *Id.* at 5317-18.

[107] *See id.* The EEOC's position in this regard is entirely consistent with the cost-justification approach that exists throughout the ADA. *See supra* notes 77-81 and accompanying text.

[108] *See, e.g., EEOC Finds Union Health Fund Violated ADA by Capping HIV-Related Benefits at $10,000*, EMPLOYMENT POL'Y & L. DAILY (BNA), Sept. 29, 1993, *available in* LEXIS, Labor Library, Bnaeld File.

[109] *See id.* (reporting that the Fund reduced coverage for HIV-related benefits to $10,000 over a lifetime while maintaining a $100,000 cap for benefits not HIV-related).

[110] *See id.* The Fund argued that it needed to cap HIV-related benefits because of its precarious financial state caused by a decline in hours worked by union members and rising health-care costs in recent years. *Id.* The Fund also cited the lifestyles of its members, who it claimed were at greater risk for HIV infection because of greater-than-average drug use and other factors. *Id.* The Fund's trustees feared that several members might develop full-blown AIDS within a short time, causing the fund to incur high medical costs leading to bankruptcy. *Id.*

data to illustrate this.[111] The EEOC's tough stance in this case, as well as its tough stance in *Mason Tenders v. Donaghey*,[112] indicates that it will continue to oppose strongly discriminatory health-benefit plans in the future.

C. Rehabilitation Act Cases

In Subchapter IV of the ADA, entitled "Miscellaneous Provisions," Congress provided an important standard to be employed when applying the mandates of the other subchapters. Congress stated that the ADA should follow the same standards that are employed under the Rehabilitation Act of 1973 and its corresponding regulations.[113] In addition, the EEOC noted that the Rehabilitation Act case law will generally apply under the ADA.[114] Thus, examining the case law interpreting the Rehabilitation Act should provide meaningful insight into Congress's intent when it enacted the ADA.

Support for the EEOC's cost-justification approach can be found in the few cases that have interpreted Section 504 of the Rehabilitation Act, which deals with health-benefit plans.[115] In

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[111] *See id.* The EEOC also found that a similar health-benefit plan implemented by the Mason Tenders District Council Trust Fund also violated the ADA. *Id.* The Trust Fund moved for summary judgment in the United States District Court for the Southern District of New York. Without opinion, the district court denied the motion. Mason Tenders v. Donaghey, No. 93-Civ. 1154 (JES), 1993 U.S. Dist. LEXIS 17032, at *1 (S.D.N.Y. Nov. 22, 1993).

[112] No. 93-Civ. 1154 (JES), 1993 U.S. Dist. LEXIS 17032 (S.D.N.Y. Nov. 22, 1993); *see EEOC Finds Union Health Fund Violated ADA by Capping HIV-Related Benefits at $10,000*, EMPLOYMENT POL'Y & L. DAILY (BNA), Sept. 29, 1993, *available in* LEXIS, Labor Library, Bnaeld File.

[113] 42 U.S.C. § 12201(a) (Supp. II 1990). The ADA provides that: "Except as otherwise provided in this chapter, nothing in this chapter shall be construed to apply a lesser standard than the standards applied under title V of the Rehabilitation Act of 1973 (29 U.S.C. 790 et seq.) or the regulations issued by Federal agencies pursuant to such title." *Id.*

[114] 29 C.F.R. § 1030 (1994) (EEOC's Interpretive Guildeline on Title I of the ADA).

[115] 29 U.S.C. § 794 (1988). The Act mandates that "[n]o otherwise qualified handicapped individual . . . shall, solely by reason of his handicap, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance." *Id.* Case law

Alexander v. Choate,[116] the Supreme Court held that § 504 proscribes more than just intentional discrimination, and could apply to certain types of disparate-impact discrimination.[117] In discussing intentional discrimination against handicapped individuals, the Court noted that discrimination against handicapped people was not usually the product of invidious intent, but rather was the product of "thoughtlessness and indifference."[118] Although the Supreme Court did not define the parameters of discrimination that could be actionable under the Rehabilitation Act, it did recognize that a court's approach to discrimination issues dealing with people suffering from disabilities differs markedly from invidious discrimination issues arising in such contexts as race or gender.[119] Thus, similar to the discrimination standard advocated by the Supreme Court in *Choate*,[120] the ADA should be interpreted by the courts in light of the same noninvidious nature of discriminatory acts affecting individuals with disabilities.[121] Although the Supreme Court in *Choate* did not find that a reduction in the number of hospital days covered by Medicaid violated the Rehabilitation Act, the Court noted that benefit reductions applied differently to disabled individuals would violate the Rehabilitation

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interpreting Section 504 of the Rehabilitation Act is illuminating because, not only is the Rehabilitation Act the precursor to the ADA, the ADA itself states that "nothing in this chapter shall be construed to apply a lesser standard than the standards applied under title V of the Rehabilitation Act." 42 U.S.C. § 12201(a) (Supp. II 1990).

[116] 469 U.S. 287 (1985).

[117] *Id.* at 299. The Court stated that "[w]hile we reject the boundless notion that all disparate-impact showings constitute prima facie cases under § 504 [of the Rehabilitation Act], we assume without deciding that § 504 reaches at least some conduct that has an unjustifiable disparate impact upon the handicapped." *Id.*

[118] *Id.* at 295-96. During this discussion, the Court focused on the legislative history of the Rehabilitation Act, which consistently mentioned indifference and neglect instead of affirmative acts of invidious discrimination. *See id.*

[119] *See id.* at 293-94. The Court explained that "much of the conduct that Congress sought to alter in passing the Rehabilitation Act would be difficult if not impossible to reach were the Act construed to proscribe only conduct fueled by discriminatory intent." *Id.* at 296-97. The Court then gave an example that illustrated why the Act should not be construed to require discriminatory intent, stating, "elimination of architectural barriers was one of the central aims of the Act . . . yet such barriers were clearly not erected with the aim or intent of excluding the handicapped." *Id.* at 297.

[120] *See id.* at 299.

[121] *See* McFadden, *supra* note 14, at 498-500.

Act.[122]

Lower federal court decisions interpreting the Rehabilitation Act have employed the same policy concerns expressed by the Supreme Court in *Choate*. For example, in *Bernard B. v. Blue Cross & Blue Shield*,[123] a federal district court held that a plan that disparately discriminated against individuals needing psychiatric care did not violate the Rehabilitation Act if there existed "substantial justification" for the coverage distinction.[124] In *Bernard B.*, the plaintiffs alleged that the exclusion of psychiatric benefits from the health-care provider's "minimum" benefits plan violated the Rehabilitation Act.[125] The court, after holding that the defendant had the burden of proof on this issue, found that the plan was substantially justified by cost considerations.[126] It is noteworthy that the *Bernard B.* court did not require the plaintiffs to prove that the health-care provider intentionally discriminated against them, but rather looked at the health plan itself, and required the health-care provider to show that the disability-based distinction was based on sound cost considerations.[127]

This cost-justification approach[128] is at odds with the position taken by some commentators who advocate that plaintiffs should be required to prove that their employers specifically intended to avoid the purposes of the ADA when they structured their discriminatory health-benefit plans. However, because disabled individuals have not been subject to the same instances of invidious discrimination as, for example, minorities, the statutes that prohibit discrimination against disabled individuals cannot be construed to prohibit solely intentional discrimination. The Rehabilitation Act and the ADA, must, out of necessity, proscribe disparate or unintentional discrimination. Thus, the EEOC's cost-justification approach, with the burden of proof

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[122] *See* 469 U.S. at 304.

[123] 528 F. Supp. 125 (S.D.N.Y. 1981).

[124] *Id.* at 132-33.

[125] *Id.*

[126] *Id.*

[127] *Id.*

[128] The court noted that "[m]edical coverage is structured around the identification of categories of benefits and a calculation of risk and consequent costs for that coverage." *Bernard B.*, 528 F. Supp. at 132-33.

resting with the defendant (i.e., employers, unions, and health-care providers), should be used by the courts when deciding whether a discriminatory health-benefit plan violates the ADA.

IV. Hypothetical Health-Benefit Plans

Because the ADA has only been effective since July of 1992, there is little case law interpreting the provisions of the statute. The EEOC, however, has recently seen a rise in the number of claims alleging ADA violations. At the writing of this Note, the only case involving discriminatory health coverage under the ADA—*Mason Tenders v. Donaghey*—is set to be heard by the United States District Court for the Southern District of New York.[129]

This Part will outline three hypothetical health-benefit plans that disparately impact on individuals suffering from AIDS. Furthermore, this Part will predict the likely reaction by the EEOC to these benefit plans, as well as the judicial response that most closely tracks the statutory language and legislative history of the ADA.

A. Plan I: Intentional Discrimination

Employer Y does not want to employ any individuals that are HIV positive. In order to accomplish this goal, Y decides to reduce the lifetime health-benefit cap for AIDS-related benefits to $10,000, while maintaining a $200,000 benefit cap for all other catastrophic illnesses. Employee X, hearing of the health-plan amendments, files a claim with the EEOC because he is HIV positive.

The EEOC, upon receiving X's claim, would likely determine that Y's health-benefit plan violates the ADA. The EEOC would base this finding on § 12112(a), which states, in pertinent part, that "[n]o covered entity shall discriminate against a qualified individual with a disability because of the disability of such individual in regard to . . . terms, conditions, and other privileges of

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[129] No. 93-Civ. 1154 (JES), 1993 U.S. Dist. LEXIS 17032 (S.D.N.Y. Nov. 22, 1993) (denying defendant-union's motion for summary judgment).

employment."[130] Section 12201(c) of the ADA should not be implicated, because Y did not base the limitation in the company's health plan on any of the cost justifications delineated in the ADA.[131] Furthermore, it is likely that the judiciary would uphold the EEOC's determination because discrimination in this instance is blatant, and violates the basic mandate of the ADA—the elimination of disability-based discrimination.

B. Plan II: Disparate Discrimination Without Cost Justification

Employer Y has experienced a few AIDS-related health-benefit claims over the last few years. In response, Y reduces coverage for AIDS-related benefits from the $200,000 lifetime cap, which still applies to other catastrophic illnesses, to $10,000. However, Y has not reviewed the plan to determine the effect that reducing the lifetime cap for AIDS-related benefits will have on the company's health plan. Y also has not examined any other alternatives that would help reduce health costs. In response, employee X, who is infected with the AIDS virus, files a complaint with the EEOC.

This hypothetical is similar to the *Mason Tenders* case. The EEOC would likely find that Y violated the ADA by discriminating against an individual with a disability in regard to a privilege of employment.[132] Y would likely counter that the disability-distinction falls within the exceptions outlined in Section 12201(c) of the ADA. The EEOC, based on its position in the *Mason Tenders* case, would probably require Y to demonstrate that the disability-based distinction was based on "sound actuarial principles."[133] Because Y could not

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[130] 42 U.S.C. § 12112(a) (Supp. II 1990); *see supra* note 18 and accompanying text.

[131] *See* 42 U.S.C. § 12201(c) (Supp. II 1990).

[132] *See id.* § 12112(a).

[133] *See* Brief for EEOC at 7, Mason Tenders v. Donaghey, No. 93-Civ. 1154 (JES), 1993 U.S. Dist. LEXIS 17032 (S.D.N.Y. Nov. 22, 1993). The EEOC argued that "[t]he Fund has not met its burden to demonstrate that the AIDS exclusion, a disability-based distinction in employment benefits, is not a subterfuge to evade the purposes of the ADA." *Id.*

offer any evidence to show that the disability-based distinction in his health-benefit plan is based on an insurance risk classification or on sound actuarial principles, the EEOC's determination should be upheld by the judiciary. However, this issue has not yet been decided by the courts.

Y would argue that so long as his acts did not amount to a "subterfuge" to evade the purposes of the ADA, the legitimacy of the health-benefit plan should be upheld. Furthermore, Y would argue that his actions could not amount to a subterfuge, unless he specifically intended to violate the purposes of the Act, and that, so long as his motivation was to reduce costs, his action could not be a subterfuge.[134] Y would finally argue that the burden of proof to show intentional discrimination rests with the plaintiffs.

Y's arguments should fail, however, because the ADA states that only those health-benefit plans that are based on accepted risk classifications will not be disturbed by the application of the statute's proscriptions.[135] Y, on the other hand, amended his health-benefit plan based on his own unconfirmed belief that the reduction in AIDS-related benefits would reduce costs without examining the alternatives, and without formally analyzing the impact of the change. Accordingly, the judiciary should not even reach the subterfuge question, because here Y's health-benefit plan fails to meet any cost justifications outlined in the statute. With respect to the burden-of-proof issue, once X has made a prima facie showing of disparate impact or discriminatory effect, Y should bear the burden to show that its health-benefit paln was based on sound actuarial principles.[136]

C. Plan III: Subterfuge

Employer Y desires to terminate the employment of several

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[134] *See* Copus & Nager, *supra* note 29, at 85.

[135] *See* 42 U.S.C. § 12201(c) (Supp. II 1990).

[136] *See* Peter D. Blanck et al., *AIDS Related Benefits Equation: Cost Times Need Divided by Applicable Law*, N.Y. L.J., Feb. 28, 1994, at 1, 4. According to these authors, Judge Sprizzo, during oral argument of defendant's motion for summary judgment in *Mason Tenders*, stated that the plaintiff only need show disparate impact, and that the defendant bears the burden to show that any disability based distinction was based on "sound acturial assumptions." *Id.* at 4.

employees who he believes are HIV positive. To accomplish this goal, Y decides to make amendments to his health-benefit plan. However, Y is also aware that the ADA prohibits discriminating against disabled individuals. Accordingly, Y hires an actuarial firm to review his health-benefit plan, and to advise methods to reduce costs. Y advises the actuarial firm of his desire to terminate employees who are HIV positive. After a preliminary review, Y's actuarial firm reports that, among other things, Y can save money by reducing health coverage for AIDS-related illnesses. The only change that Y makes to the benefit plan, however, is reducing coverage for AIDS-related illnesses. When X, an employee with AIDS, learns of the reduced AIDS-related benefits, he files a complaint with the EEOC.

Two distinctions exist between this hypothetical and the hypothetical outlined in Plan II. In this Plan, Y is motivated to evade the purposes of the ADA. It is apparent from this hypothetical that X would have a difficult time generating proof that Y's actions constituted a subterfuge to evade the purposes of the Act, because Y has the availability of an actuarial study to show that reducing AIDS-related benefits was cost justified. Accordingly, the burden of proof should rest with the employer to show that reducing benefits was not a subterfuge to evade the purposes of the Act.

The EEOC would probably find that Y's actions violated the ADA, because it is not enough to show that an amendment of health benefits has some cost justification.[137] The employer should also be required to show that its actions were not a subterfuge to evade the purposes of the Act.[138] Here, Y did not investigate the other

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[137] *See* Brief for EEOC at 14, Mason Tenders v. Donaghey, No. 93-Civ. 1154 (JES), 1993 U.S. Dist. LEXIS 17032 (S.D.N.Y. Nov. 22, 1993). The EEOC noted that:

> Although the Fund has offered a document, prepared by an actuarial firm, purporting to justify the plan's AIDS exclusion on actuarial grounds . . . all the document shows is that the Fund has subjected AIDS-related expenses to a degree of scrutiny that has not been applied to expenses associated with any other physical or mental condition. This practice of selective examination is in itself discriminatory because the cost of benefits is evaluated only for employees with AIDS.

Id.

[138] *See id.*

alternatives that the actuary suggested. Such alternatives may have included measures that did not have a discriminatory impact on a protected class of employees. Accordingly, the EEOC would find that Y did not meet his burden of proof to show that his actions were not a subterfuge to evade the purposes of the ADA.[139] It remains to be seen whether the judiciary will follow the EEOC's reasoning. However, the district court in *Mason Tenders* viewed this as a question of fact for a jury to determine.[140]

These hypotheticals are just a few examples of the endless sort of factual and legal disputes that could arise under the ADA. These examples, however, do illustrate the difficult position disabled employees are in to prove specific intent to discriminate when their employers have structured discriminatory health-benefit plans. The courts should be cognizant of the history of "thoughtlessness and indifference"[141] to individuals with disabilities and should allocate the burdens of proof to the party with the more facile access to relevant information.

V. *Conclusion*

Although the extent that an employer is precluded from establishing discriminatory health-benefit plans has not yet been played out in the courts, the ADA should adequately protect disabled employees. The statutory language of the ADA shows that employers are prohibited from discriminating against disabled employees in all aspects of employment, including "privileges of employment."[142] This broad requirement includes the obligation to afford nondiscriminatory health-benefits, whether insured or self-insured.[143] Moreover, the cost-justification exceptions of the ADA[144] should be construed as a requirement on employers to justify any disability-based limitation in coverage, and the burden of proof to show such

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[139] *See id.*

[140] 1993 U.S. Dist. LEXIS 17032, at *1.

[141] *See supra* note 118 and accompanying text.

[142] 42 U.S.C. § 12112(a) (Supp. II 1990).

[143] *See* 29 C.F.R. § 1630.4(f) (1992).

[144] 42 U.S.C. § 12201(c) (Supp. II 1990).

cost justifications should rest with the defendant. Finally, even if a rational cost justification exists for a disability-based coverage limitation, the employer should also be required to prove that its cost justification is not a subterfuge to avoid the purposes of the ADA.[145]

The legislative history of the ADA supports this scheme of liability and burdens of proof.[146] Congress's main goal when it enacted the ADA was to eliminate discrimination against disabled Americans.[147] Only by holding employers to strict standards and by not allowing them to evade the mandates of the statute under the guise of the statutorily permitted cost justifications will Congress's goals be furthered.

One would anticipate that much of the case law that will develop in this area will hinge upon who the term "subterfuge." Based on the EEOC's interpretation, "subterfuge" should mean that the employer cannot use cost justifications as a guise to evade the purposes of the Act.[148] Under the ADA, the burden of proving subterfuge—or lack thereof—should rightfully be on the employer, because the employer has access to all of the underwriting and classifying information that was used to develop the health-benefit plan.[149] It is also important to note that, regardless of whether the employer had evil intentions, the employer at least has to show that any disability-based distinction is based on one of the enumerated cost justifications. If the employer cannot do this, the "subterfuge" issue should not come into play.

The ADA states that it encompasses at least the minimum standards of the Rehabilitation Act.[150] Accordingly, the courts should look to cases decided under the Rehabilitation Act for guidance when deciding ADA cases. Although the issue of discriminatory health plans has not come up under the Rehabilitation Act, the reasoning of the courts hearing Rehabilitation Act cases on related issues can be

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[145] *See id.*

[146] *See supra* notes 46-52 and accompanying text.

[147] *See* 42 U.S.C. § 12101(b) (Supp. II 1990); *supra* note 46-47 and accompanying text.

[148] *See* Brief for EEOC at 14, Mason Tenders v. Donaghey, No. 93-Civ. 1154 (JES), 1993 U.S. Dist. LEXIS 17032 (S.D.N.Y. Nov. 22, 1993).

[149] *See id.*

[150] 42 U.S.C. § 12201(a) (Supp. II 1990).

useful. These cases demonstrate that concerns for disability-based discrimination have existed for quite some time.

The EEOC has taken a firm stance on this issue, and has required employers to justify discriminatory health plans. Although the EEOC's decisions can—and may be—overturned in the courts, employers should be cognizant of the EEOC's approach to these issues today.

Individuals with disabilities ought to be afforded the same employment opportunities as those that do not have disabilities. Employers simply cannot be allowed to discriminate selectively against individuals suffering from disabilities by implementing discriminatory health-benefit plans. The ADA is an appropriate tool to protect these individuals from such discriminatory practices by employers.

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