

MENTAL ILLNESS AND LONG-TERM DISABILITY PLANS UNDER THE AMERICANS WITH DISABILITIES ACT

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One of the most difficult issues under the Americans with Disabilities Act of 1990 (ADA),¹ concerns the status of employer-provided long-term disability plans. These plans typically afford longer periods of benefit eligibility to individuals who are physically, as opposed to mentally, disabled. Numerous lawsuits have challenged this distinction as violative of the ADA's ban on disability-based discrimination. Thus far, the judiciary's response to these lawsuits has been far from uniform.

One of the factors contributing to this current state of confusion is the ADA's lack of detail with respect to the treatment of disability plans. An equally important factor is the complexity of this issue in terms of the ADA's overall regulatory scheme. This complexity is demonstrated by the fact that courts must address at least four separate sub-issues in order to determine the validity of the mental/physical distinction in disability plans. These sub-issues are as follows:

1. Does a fully disabled former employee have standing to sue his or her ex-employer under Title I of the ADA?
2. May a former employee bring suit against an insurance provider of a long-term disability benefit policy under Title III of the ADA?
3. Do distinctions between mental and physical disabilities constitute discrimination within the meaning of the ADA?
4. What type of showing must be made to establish that a coverage distinction in a disability plan is not a "subterfuge" to evade the purposes of the ADA?

The resolution of these sub-issues requires the courts to grapple not only with thorny questions of statutory interpretation, but also with significant policy concerns that go to the heart of the ADA's objectives.

Part I of this article provides a brief overview of the structure and

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1. 42 U.S.C. §§ 12101-12213 (1994).

purposes of long-term disability plans. Part II reviews the competing policy considerations concerning the prevalent disparate treatment of mental and physical disabilities under these plans. Part III then analyzes the judiciary's treatment of each of the four legal sub-issues noted above. Finally, Part IV provides a critique and proposes a resolution of the disability plan conundrum.

I. INTRODUCTION TO DISABILITY BENEFIT PLANS

A disability benefit plan provides income-replacement benefits to employees who are unable to work because of illness or accident.² The purpose of such an insurance plan, which may be either employer-sponsored³ or privately purchased, is to replace some or all of the income lost while an employee is suffering from a disability. Therefore, the amount of disability income an employee collects depends on his or her pre-disability income level and not on the type or severity of the disability suffered.⁴ This wage replacement characteristic makes disability benefits different from medical benefits, which are used to reimburse employees for expenses associated with medical services.⁵ Disability plans also differ from medical or health plans in that they typically provide benefits only for individuals who become totally disabled and unable to work.⁶

Employer-sponsored disability insurance plans may be either short-term or long-term in nature. Under a short-term plan, an employee receives a portion of his or her regular wages for a specified period of disability generally not to exceed twenty-six weeks.⁷ Long-term benefit coverage usually starts after short-term disability income benefits cease.⁸ Long-term plans provide a partial income-replacement benefit to employees who are not likely to return to work because of the total and/or permanent nature of their disabilities. This latter type of plan frequently provides for the offset of other disability or retirement-type benefits, such as those provided under Social Security and private pension plans.⁹

A common characteristic of long-term disability plans is their different

2. CYNTHIA M. COMBE & GERALD J. TALBOT, *EMPLOYEE BENEFITS ANSWER BOOK* § 10:1 (3d ed. 1994).

3. An employer may choose to provide such a benefit through the purchase of a commercially available insurance policy or through a self-insured arrangement.

4. See COMBE & TALBOT, *supra* note 2, § 10:4.

5. See Charles B. Lynch, *The Americans with Disabilities Act and Disability Benefit Plans*, 22 SETON HALL LEGIS. J. 561, 570 (1998).

6. See Frank J. Rief, III, *Disability Insurance: If You Have Not Considered It, You Are Better Off Dead!*, C472 A.L.I.-A.B.A. COURSE OF STUDY 1151, 1176 (1990).

7. See Combe & Talbot, *supra* note 2, § 10:4.

8. See *id.*

9. See *id.*

treatment of mental and physical disabilities. Most employer-sponsored plans limit eligibility for employees who are totally disabled due to a mental condition to a term of twenty-four months or less.¹⁰ By contrast, individuals with a physical disability typically remain eligible under such plans until age sixty-five.¹¹ As a result of this distinction, employees who become seriously disabled because of physical causes likely will receive a far greater amount of benefits than those employees who suffer from mental or nervous disabilities.

II. POLICY CONSIDERATIONS AND THE MENTAL/PHYSICAL DISTINCTION

A. *Justifying the Distinction*

Defenders of the differentiation in coverage levels for mental and physical disabilities cite arguments for cost control along with a general distrust of mental illness diagnoses to justify their stance.¹² As one commentator has summarized, “both the need to keep premiums affordable and the perception that diagnosis and treatment of mental health is less reliable and effective than treatment of ‘regular’ physical medical care are the primary reasons for the commonality of these limitations [on mental disability coverage].”¹³

Advocates of the status quo often couch their cost control arguments in terms of “risk justification.” The argument has been described as follows:

Insurers generally make coverage distinctions and exclusions for purposes of risk classification. They seek out information on insurance applications to determine who is at high risk for developing certain illnesses that may be very costly to cover. By declining to cover those illnesses, or covering them only up to a very low amount, insurers can hold down costs and presumably maintain premium levels for other insureds.¹⁴

From this vantage-point, coverage limitations on costly mental conditions serve the greater good of enabling a higher degree of coverage

10. See Nicole Martinson, *Inequality Between Disabilities: The Different Treatment of Mental Versus Physical Disabilities in Long-Term Disability Benefits Plans*, 50 BAYLOR L. REV. 361, 362 (1998).

11. See *id.*

12. See Christopher Aaron Jones, *Legislative “Subterfuge”?: Failing to Insure Persons with Mental Illness Under the Mental Health Parity Act and the Americans with Disabilities Act*, 50 VAND. L. REV. 753, 755-56 (1997).

13. *Id.*

14. Youndy C. Cook, Comment, *Messing With Our Minds: The Mental Illness Limitation in Health Insurance*, 50 U. MIAMI L. REV. 345, 359-60 (1996).

for more common physical disorders.

Two other related cost-based arguments are grounded in the concepts of "moral hazard" and "adverse selection." The basic premise of moral hazard is that, as insurance providers increase coverage for services, the demand for those services also will increase even though the same individuals, if uninsured, might not opt for such services at their own expense.¹⁵ According to some, this concern is particularly troublesome with respect to mental conditions because some individuals "might claim to suffer from an illness when they are actually suffering from life."¹⁶ With regard to adverse selection, employers and insurers are concerned that increased mental health coverage will result in many high risk enrollees, thereby raising costs and necessitating either a reduction in overall coverage or an increase in premiums.¹⁷

The other argument against parity centers around a general widespread suspicion of mental illness and of mental health treatments in particular. Mental disorders tend to be more subjective in nature and more difficult to define than physical disorders with visible manifestations.¹⁸ Some view treatments for mental and nervous conditions as less effective, void of definite, predictable results and capable of continuing for years without substantial improvement in the employee's condition.¹⁹ Although mental disabilities may not be as common as physical disabilities, the higher level of severity associated with the former suggests to some "that there is a qualitative difference between mental/nervous disorders and physical disorders that warrants treating them separately for insurance purposes."²⁰

B. Arguments for Parity

Supporters of parity between mental and physical disability coverage are quick to dismiss the above arguments as based on biased attitudes and outdated stigmas concerning mental disabilities. Indeed, some mental health advocates have referred to these limitations as "the last bastion of open discrimination in health insurance in this country."²¹

15. See Barry Blackwell, *No Margin, No Mission*, 271 JAMA 1466 (1994).

16. James E. Sabin & Norman Daniels, *Determining "Medical Necessity" in Mental Health Practice*, 24 HASTINGS CENTER REP. 5, 9-10 (Nov.-Dec. 1994).

17. See Jeffrey Rubin, *Financing Mental Health Care*, 28 HOUS. L. REV. 143, 157 (1991).

18. See Allan P. Blostin, *Mental Health Benefits Financed by Employers*, 110 MONTHLY LAB. REV. 23 (July 1987).

19. See Cook, *supra* note 14, at 346, 360.

20. Allison C. Blakley, *Is Depression Disabling America's Group Insurance Plans? Mental Health Benefit Parity and the ADA*, 27 A.B.A. BRIEF 40, 45 (Summer 1998), available in WESTLAW, 27-SUM Brief 40.

21. *Insurance Regulation: CBO Analysis Doesn't Tell Full Story on Mental Health Parity, Coalition Says*, 4 Health Care Pol'y Rep. (BNA) 908 (May 27, 1996) (quoting a

Advocates for change point to medical research that increasingly shows that many mental disorders have identifiable biological origins. This research purportedly establishes that mental illness such as bipolar disorder and severe depression can be traced to measurable physiological effects on the brain.²² Citing to this research, the Director of the National Institute on Mental Health testified to a House Subcommittee that no biomedical justification exists for assuming that mental diseases are in any way less real or less deserving of treatment than physical diseases.²³

This research also calls into question the notion that mental illness is different because it is less susceptible to successful treatment. According to some commentators, many classic mental illnesses such as schizophrenia and bipolar disorder are highly treatable conditions that respond well to therapy when conducted in tandem with appropriate levels of medication.²⁴

Supporters of parity acknowledge that equal treatment will result in higher costs, although the exact economic impact is difficult to predict. They point out, however, that the current limitation on coverage of treatment for mental disabilities is not based upon true risk classification analysis. Instead of comparing economic risk data for both mental and physical disabilities, the current practice simply imposes a blanket exclusion of coverage for all mental disabilities after a certain period of time.²⁵ After reviewing the various arguments for and against equality of treatment, one supporter of parity concluded that “[t]he only distinction at this point seems to be between one group of insureds whose illnesses manifest themselves in socially stigmatized ways and another group of insureds whose illnesses are more acceptable as physical injury or disease.”²⁶

C. *The Mental Health Parity Act*

In 1996, Congress responded to one aspect of the parity debate. The Mental Health Parity Act of 1996 (MHPA) amended the Employee Retirement Income Security Act of 1974 (ERISA) and the Public Health Services Act to require uniformity in the application of certain limits on

press release by the Coalition for Fairness in Mental Illness Coverage).

22. See Brian D. Shannon, *The Brain Gets Sick, Too—The Case for Equal Insurance Coverage for Serious Mental Illness*, 24 ST. MARY'S L.J. 365, 367-69 (1993).

23. See *Hearing Before the Subcomm. on Labor, Health & Human Servs., Educ. & Related Agencies of the House Comm. on Appropriations*, 104th Cong. (1996) (statement of Dr. Stephen Hyman, Director of the National Institute of Mental Health, Dep't of Health & Human Servs.).

24. See Shannon, *supra* note 22, at 367-70.

25. See Cook, *supra* note 14, at 359-60.

26. *Id.* at 360.

mental health benefits.²⁷ More specifically, the MHPA provides for parity in the aggregate lifetime and annual limits for mental and medical/surgical benefits if a group health plan includes such limits.²⁸ Despite this requirement, the statute is not a mandate for mental health coverage.²⁹ The MHPA contains no mandate with respect to the terms and conditions of insurance plans. In addition, the MHPA permits limits on the amount, duration, and scope of mental health benefits under an insurance plan.³⁰ Parity, accordingly, is only required in aggregate lifetime and annual benefits, and even then is required only if the employer or insurer has voluntarily chosen to provide mental health benefits.

The MHPA represents a legislative attempt to address and partially correct insurance coverage disparities between mental and physical disabilities. It is important to note, however, that the MHPA applies only to health and medical insurance coverage, and not to disability plans.³¹ Thus, the prevailing policy of distinguishing between mental and physical illness in long-term disability benefit plans is not affected by the MHPA, and its continuing validity must be tested under the ADA.

III. THE LEGAL ISSUE UNDER THE ADA

As noted above, the ADA's treatment of the mental/physical distinction with respect to eligibility for long-term disability benefits depends on the judiciary's response to four unsettled sub-issues. Each of these sub-issues is discussed below.

A. *Does a Fully Disabled Former Employee Have Standing to Sue His or Her Ex-employer Under Title I of the ADA?*

Title I of the ADA generally prohibits disability discrimination in the employment relationship.³² In order to have standing to challenge an employer-provided disability insurance policy as discriminatory under the ADA, a plaintiff must be a "qualified individual with a disability."³³ Title I

27. See Pub. L. No. 104-204, 110 Stat. 2944 (codified as amended at 29 U.S.C. § 1185a and 42 U.S.C. § 300gg-5) (Supp. II 1996).

28. See The Mental Health Parity Act (MHPA), 29 U.S.C. § 1185a(a)(1)-(2) (West 1996).

29. See *id.* § 1185a(b)(1).

30. See *id.* § 1185a(b)(2).

31. See *id.* § 1185a(a)(1)-(2); see also H.R. REP. NO. 104-882, at 356 (1997) (describing the MHPA as dealing with parity in mental health *services*, as opposed to in disability *benefits*).

32. See generally The Americans with Disabilities Act (ADA), 42 U.S.C. §§ 12111-12117 (1994).

33. *Martinson v. Kinney Shoe Corp.*, 104 F.3d 683 (4th Cir. 1997).

of the ADA defines a “qualified individual with a disability” as a person who can perform the essential functions of his or her position with or without reasonable accommodation.³⁴

Neither the EEOC regulations nor the interpretive guidance address the standing issue. In litigation, the EEOC has taken the following position:

the relevant “employment position” in any case involving post-employment fringe benefits, is the position actually occupied by plaintiff, that of benefit recipient, and that as long as the plaintiff satisfies any non-discriminatory eligibility criteria for receipt of benefits, he is a “qualified individual” within the meaning of the ADA.³⁵

According to the EEOC, therefore, a former employee has standing to sue under the ADA so long as he or she is qualified to receive benefits.

A number of courts have held that a former employee who is fully disabled and receiving disability benefits lacks standing to bring suit under Title I of the ADA.³⁶ According to these courts, the former employee is not a “qualified individual with a disability” because he or she can no longer perform the essential functions of the former job.³⁷ Because only fully disabled individuals qualify for disability benefits, this interpretation has been criticized as effectively preventing any benefits recipient from ever challenging an employer’s provision of disability benefits on grounds of discrimination.³⁸

As noted above, the EEOC attempts to avoid this result by asserting that the relevant “employment position” for which a plaintiff may be a “qualified individual” is that of a benefits recipient.³⁹ This approach goes to the opposite extreme and automatically confers standing on a former employee who is a beneficiary under a disability benefit policy. The Seventh Circuit has criticized the EEOC’s interpretation, in turn, on the grounds that an “employment position” necessarily refers to a job, not simply the task of collecting benefit checks.⁴⁰ Thus far, no court has adopted the EEOC’s position.

A recent decision in the Third Circuit, *Ford v. Schering-Plough*

34. See 42 U.S.C. § 12111(8).

35. Leonard v. Israel Discount Bank, No. 95 Civ. 6964, 1996 WL 634860, at *3 (S.D.N.Y. Sept. 24, 1996).

36. See EEOC v. CNA Ins. Cos., 96 F.3d 1039 (7th Cir. 1996); Gonzales v. Garner Food Servs., Inc., 89 F.3d 1523 (11th Cir. 1996); Parker v. Metropolitan Life Ins. Co., 875 F. Supp. 1321 (W.D. Tenn. 1995), *aff’d in part and rev’d in part*, 99 F.3d 181 (6th Cir. 1996), *judgment vacated*, 107 F.3d 359, *reh’g en banc*, 121 F.3d 1006 (6th Cir. 1997).

37. See Parker, 875 F. Supp. at 1326. See also CNA Ins. Cos., 96 F.3d at 1043-45.

38. See Lewis v. Aetna Life Ins. Co., 982 F. Supp. 1158, 1162-63 (E.D. Va. 1997).

39. See *supra* note 35 and accompanying text.

40. See CNA Ins. Cos., 96 F.3d at 1043-44.

Corp.,⁴¹ sanctioned the result sought by the EEOC, but on different grounds. The *Ford* court borrowed from a 1997 Supreme Court decision that authorized former employees to bring suit under Title VII for post-employment retaliation.⁴² The Third Circuit extended this principle to the ADA and held that former employees may also sue their former employer for disability-based discrimination based on the manner in which the former employer provides post-employment benefits.⁴³

Some courts have opted for an interpretation somewhere between the extremes of the above-mentioned approaches. In *Lewis v. Aetna Life Insurance Co.*,⁴⁴ the District Court for the Eastern District of Virginia held that the standing issue should be determined with reference to the plaintiff's status at the time that he or she was offered the allegedly discriminatory disability insurance plan. In that case, the court ruled that an employee who was partially disabled, yet qualified to perform the duties of the job at the time that he was offered the disability plan, had a vested right to challenge the plan even though he was fully disabled at the time of bringing suit.⁴⁵ The *Lewis* court left open the question of whether a person who was not yet disabled at the time the plan was offered would have the same vested right. Another district court refused to dismiss a former employee's challenge to a disability plan, but held that the claim was only viable for the period before the plaintiff became fully disabled.⁴⁶

B. *May a Former Employee Bring Suit Against an Insurance Provider Under Title III As a Public Accommodation?*

Title III of the ADA states that “[n]o 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.”⁴⁷ Among the entities listed as a public accommodation for purposes of Title III is an “insurance office.”⁴⁸ On the other hand, Title V of the ADA contains a safe harbor provision that insulates insurance providers from liability when “underwriting risks, classifying risks, or administering such risks that are based on or not inconsistent with State law.”⁴⁹

41. 145 F.3d 601 (3d Cir. 1998).

42. *See id.* at 606-08 (citing *Robinson v. Shell Oil Co.*, 519 U.S. 337 (1997)).

43. *See Ford*, 145 F.3d at 607-08.

44. 982 F. Supp. 1158 (E.D. Va. 1997).

45. *See id.* at 1162-63.

46. *See Esfahani v. Medical College of Pa.*, 919 F. Supp. 832 (E.D. Pa. 1996).

47. 42 U.S.C. § 12182(a) (1994).

48. *Id.* § 12181(7)(F).

49. *Id.* § 12201(c)(1).

The Department of Justice (DOJ) has adopted regulations interpreting Title III of the ADA. These regulations define a "place of public accommodation" as a "facility operated by a private entity."⁵⁰ The regulations then define a "facility" as "all or any portion of buildings, structures, sites. . . ."⁵¹ The DOJ Technical Assistance manual states that "insurance offices are places of public accommodation and, as such, may not discriminate on the basis of disability in the sale of insurance contracts or in the terms or conditions of the insurance contracts they offer."⁵²

An individual may bring an action against an insurance provider under Title III only if the disability insurance policy is a good or service provided by a place of public accommodation.⁵³ Some courts have held that the term "public accommodation" encompasses only *physical* places and structures.⁵⁴ They base this conclusion on the fact that the entities listed as "public accommodations" in the statute are primarily physical places open to public access.⁵⁵ The Sixth Circuit, in *Parker v. Metropolitan Life Insurance Co.*,⁵⁶ for example, while admitting that an "insurance office" is a place of public accommodation, ruled that an employee who had obtained a disability plan through her employer did not have a necessary physical nexus with an insurance office.⁵⁷ That court further held that Title III only regulates the accessibility to a place of public accommodation and not the contents of those goods and services offered by a public accommodation.⁵⁸

Several other courts have concluded that Title III reaches the sale or provision of insurance policies and have allowed actions against insurers to go forward on that basis.⁵⁹ These courts do not require a physical nexus between a plaintiff and an insurance office, arguing that such a holding would lead to the absurd result that those people entering an office would be protected while those people who merely transact business over the

50. 28 C.F.R. § 36.104 (1998).

51. *Id.*

52. DEPARTMENT OF JUSTICE, AMERICANS WITH DISABILITIES ACT TECHNICAL ASSISTANCE MANUAL, § III-3.11000.

53. *See* 42 U.S.C. § 12182(a) (1994).

54. *See* *Ford v. Schering-Plough Corp.*, 145 F.3d 601 (3d Cir. 1998); *Parker v. Metropolitan Life Ins. Co.*, 121 F.3d 1006 (6th Cir. 1997); *Pappas v. Bethesda Hosp. Ass'n*, 861 F. Supp. 616 (S.D. Ohio 1994).

55. *See, e.g., Ford*, 145 F.3d at 612; *Parker*, 121 F.3d at 1014.

56. 121 F.3d 1006 (6th Cir. 1997).

57. *See id.* at 1010, 1014.

58. *See id.* at 1012.

59. *See, e.g.,* *Carparts Distribution Ctr., Inc. v. Automotive Wholesaler's Ass'n*, 37 F.3d 12 (1st Cir. 1994); *Winslow v. IDS Life Ins. Co.*, 29 F. Supp. 2d 557 (D. Minn. 1998); *Lewis v. Aetna Life Ins.*, 982 F. Supp. 1158 (E.D. Va. 1997); *World Ins. Co. v. Branch*, 966 F. Supp. 1203 (N.D. Ga. 1997); *Kotev v. First Colony Life Ins. Co.*, 927 F. Supp. 1316 (C.D. Cal. 1996).

phone or internet would not.⁶⁰ Some of these courts rely, in part, on the fact that neither the statute nor the regulations expressly limit covered public accommodations to physical places.⁶¹ Finally, some of these courts also find that the inclusion of the safe harbor provision regarding insurance providers illustrates that the ADA was intended to cover the contents of insurance plans and not just access to insurance offices.⁶²

C. *Do Distinctions Between Mental and Physical Disabilities Constitute Discrimination Within the Meaning of the ADA?*

The ADA states that no covered entity shall discriminate against a qualified individual with a disability with respect to "job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment."⁶³ The ADA's discrimination ban extends to contractual arrangements which have the effect of subjecting an employer's disabled employees to discrimination.⁶⁴

The EEOC regulations state that the ADA bars discrimination on the basis of disability with regard to fringe benefits whether or not they are administered by the employer.⁶⁵ In a 1993 Interim Enforcement Guidance, the EEOC took the position that distinctions between mental and physical disabilities in terms of insurance coverage do not constitute actionable disability-based discrimination for purposes of the ADA.⁶⁶ Although the EEOC has not withdrawn this Guidance, it does not appear to adhere to this position at present.⁶⁷

In *Lewis v. Aetna Life Insurance Co.*,⁶⁸ the District Court for the Eastern District of Virginia held that the ADA prohibits disability insurance policies from providing different benefit levels for mental as opposed to physical disabilities unless the distinction in treatment is grounded in sound actuarial data. The court acknowledged that the distinction occurring in the *Lewis* context was between individuals with different types of disabilities, as opposed to the more typical scenario in

60. See, e.g., *Carparts Distribution*, 37 F.3d at 19; *Lewis*, 982 F. Supp. at 1164-65.

61. See, e.g., *Lewis*, 982 F. Supp. at 1164.

62. See, e.g., *Carparts Distribution*, 37 F.3d at 20.

63. 42 U.S.C. § 12112(a) (1994).

64. See *id.* § 12112(b)(2).

65. See 29 C.F.R. § 1630.4(f) (1998).

66. See *Application of the Americans with Disability Act of 1990 to Disability-Based Distinctions in Employer Provided Health Insurance*, 8 Fair Empl. Prac. Man. (BNA) 405:7120 (June 8, 1993) (citing EEOC, *Interim Enforcement Guidance on Application of ADA to Health Insurance*).

67. See *Lewis v. Aetna Life Ins. Co.*, 982 F. Supp. 1158, 1168 n. 9. (E.D. Va. 1997)

68. *Id.* at 1158.

which the challenged distinction is between individuals who are disabled and individuals who are not disabled. The court stressed that the former type of distinction is nonetheless violative of the ADA so long as the resulting discrimination occurs because of an individual's particular disability status.⁶⁹

The majority of courts that have addressed this issue have reached a different conclusion.⁷⁰ Once again, the Sixth Circuit's decision in *Parker v. Metropolitan Life Insurance Co.*⁷¹ is a leading example of those court decisions which have denied liability. In *Parker*, the court stated that "[t]he ADA does not mandate equality between individuals with different disabilities. Rather, the ADA [only] prohibits discrimination between the disabled and the non-disabled."⁷² The *Parker* court explained that disability plans with benefit levels that differentiate between those with mental and physical disabilities do not offend the ADA because all employees subject to such a policy, whether disabled or non-disabled, receive the same access to the plan.⁷³

The Third Circuit, in *Ford v. Schering-Plough Corp.*,⁷⁴ agreed with *Parker* and pointed to two pieces of legislative history in further support of that conclusion.⁷⁵ First, the *Ford* court cited to a pre-enactment Senate report⁷⁶ that took the position that the proposed legislation, while requiring that individuals with disabilities must have equal access to health insurance coverage, would not require identical benefit levels for all disabling conditions.⁷⁷ The *Ford* decision also looked to Congress' defeat of an amendment to the Health Insurance Portability Act of 1996,⁷⁸ that would have mandated parity in insurance coverage for mental and physical illnesses.⁷⁹ The *Ford* court noted that "[s]uch an amendment would have been unnecessary altogether if the ADA already required such parity."⁸⁰

69. *See id.* at 1168-69.

70. *See, e.g.*, *Rogers v. Dep't of Health & Envtl. Control*, 174 F.3d 431 (4th Cir. 1999); *Ford v. Schering-Plough Corp.*, 145 F.3d 601 (3d Cir. 1998); *Parker v. Metropolitan Life Ins. Co.*, 121 F.3d 1006 (6th Cir. 1997); *EEOC v. CNA Ins. Cos.*, 96 F.3d 1039 (7th Cir. 1996); *Krauel v. Iowa Methodist Med. Ctr.*, 95 F.3d 674 (8th Cir. 1996); *Moddero v. King*, 82 F.3d 1059 (D.C. Cir. 1996) (interpreting the Rehabilitation Act).

71. *Parker*, 121 F.3d at 1006.

72. *Id.* at 1015.

73. *See id.* at 1015-16.

74. 145 F.3d 601 (3d Cir. 1998).

75. *See id.* at 601.

76. *See S. REP. NO. 101-116*, at 29 (1989).

77. *See Ford*, 145 F.3d at 610.

78. Pub. L. No. 104-191, 110 Stat. 1936 (1996).

79. *See Ford*, 145 F.3d at 610.

80. *Id.*

D. *What Type of Showing Must Be Made to Establish That a Coverage Distinction in a Disability Plan Is Not a "Subterfuge" to Evade the Purposes of the ADA?*

The ADA expressly affords insurance providers a safe harbor to underwrite, classify, or administer risks in a manner consistent with state law.⁸¹ Providers may not do so, however, as a "subterfuge" to evade the anti-discrimination purposes of the statute.⁸² The ADA nevertheless does not define or describe the meaning of the term "subterfuge."

The EEOC's Interim Enforcement Guidance states that the term "subterfuge" refers to a "disability-based disparate treatment that is not justified by the risks or costs associated with the disability."⁸³ According to the Guidance, a defendant can establish that a distinction is not a subterfuge in a number of ways, such as by providing proof that "the disparate treatment is justified by legitimate actuarial data, or by actual or reasonably anticipated experience."⁸⁴

Only a handful of reported cases have reached the "subterfuge" issue. So far, these decisions have adopted two divergent views of this exception to the ADA's insurance safe harbor provision.

The more restrictive interpretation of the "subterfuge" exception builds upon the Supreme Court's prior construction of a similar provision in the Age Discrimination in Employment Act (ADEA). In *Public Employees Retirement System v. Betts*,⁸⁵ the Court ruled that an employer's differential treatment of employees on the basis of age in structuring a benefit plan was not a discriminatory subterfuge unless such action was designed to discriminate "in some non-fringe benefit aspect of the employment relation."⁸⁶ Under the *Betts* analysis, the subterfuge issue becomes part of the plaintiff's prima facie case of establishing discrimination, rather than a cost-based defense borne by the employer.⁸⁷

At least two circuit courts have used the *Betts* approach in interpreting the ADA's subterfuge provision.⁸⁸ Although Congress subsequently amended the ADEA to overturn *Betts*,⁸⁹ these decisions point out that Congress was aware of the still-controlling *Betts* interpretation at the time it

81. See 42 U.S.C. § 12201(c)(1) (1994).

82. See 42 U.S.C. § 12201(c).

83. *Interim Enforcement Guidance*, *supra* note 66.

84. *Id.*

85. 492 U.S. 158 (1989).

86. *Id.* at 181.

87. See *id.* at 181-82.

88. See *Krauel v. Iowa Methodist Med. Ctr.*, 95 F.3d 674 (8th Cir. 1996); see also *Modderno v. King*, 82 F.3d 1059 (D.C. Cir. 1996).

89. See Older Workers Benefit Protection Act of 1990, Pub. L. No. 101-433, 104 Stat. 978, Title I, § 103 (codified as amended at 29 U.S.C. § 623(f)(2)(B)(i) (1994)).

adopted the ADA.⁹⁰ Accordingly, both courts concluded that Congress would have used different language in the ADA if Congress had intended the subterfuge exception to have a meaning different from that of the *Betts* decision.⁹¹

In short, these circuit court decisions adopted a restrictive view of the subterfuge exception which, in turn, recognizes a broad safe harbor for insurance-based distinctions in benefit plans. These cases rejected the EEOC's position and held that the subterfuge exception is implicated only if a plaintiff can establish that an employer intentionally structured a benefit plan so as to discriminate in some non-benefit aspect of employment.

In contrast, a Virginia district court has expressly adopted the EEOC's position and ruled that the subterfuge exception permits an employer to provide different benefit levels for individuals with mental disabilities, as opposed to physical disabilities, only if the classification "is grounded on sound actuarial principles or other competent factual basis."⁹² In reaching this conclusion, the *Lewis I* court relied, in part, on other decisions finding unlawful insurance plan distinctions that have the effect of either denying coverage or providing inferior coverage on the basis of a particular disability in the absence of actuarial justification.⁹³ In a subsequent opinion following a bench trial, the court concluded that the disability plan in question was invalid because the employer failed to justify the distinction in benefit coverage by actuarial data or any other type of cost analysis.⁹⁴

The two *Lewis* decisions rely heavily on legislative history in their analysis. In *Lewis I*, the court cited a House Report that explained the reach of the safe harbor provision as follows:

[W]hile a plan which limits certain kinds of coverage based on classification of risk would be allowed under this section, the plan may not refuse to insure, or limit the amount, extent, or kind of coverage available . . . solely because of a physical or mental impairment, except where the refusal, limitation, or rate differential is based on sound actuarial principles or is related to actual or reasonably anticipated experience.⁹⁵

90. See *Krauel*, 95 F.3d at 679; *Modderno*, 82 F.3d at 1065.

91. See *Krauel*, 95 F.3d at 679; *Modderno*, 82 F.3d at 1065.

92. *Lewis v. Aetna Life Ins. Co.*, 982 F. Supp. 1158, 1169 (E.D. Va. 1997) [hereinafter *Lewis I*].

93. See *id.* at 1166-68 (referring to *Cloutier v. Prudential Ins. Co. of Am.*, 964 F. Supp. 299 (N.D. Cal. 1996); *Doukas v. Metro. Life Ins. Co.*, 950 F. Supp. 422 (D.N.H. 1996); and *World Ins. Co. v. Branch*, 966 F. Supp. 1203 (N.D. Ga. 1997)).

94. See *Lewis v. Aetna Life Ins. Co.*, 7 F. Supp. 2d 743, 747 (E.D. Va. 1998) [hereinafter *Lewis II*].

95. *Lewis I*, 982 F. Supp. at 1166 (quoting H.R. REP. NO. 101-45, pt. 2, at 136-37 (1990)).

The *Lewis II* court used legislative history to support its conclusion that Congress expressly declined to follow the *Betts* decision in enacting the ADA:

The term "subterfuge" is used in the ADA simply to denote a means of evading the purposes of the ADA. It does not mean that there must be some malicious intent on the part of the insurance company or other organization, nor does it mean that a plan is automatically shielded because it was put into place before the ADA was passed. Indeed, there is currently a bill moving through Congress to overturn the *Betts* decision and we have no intention of repeating a decision with which we do not agree.⁹⁶

Using this legislative history, the two *Lewis* decisions read the ADA's subterfuge provision as imposing an evidentiary burden on insurance providers to justify disability-based plan distinctions with concrete financial data.

IV. CRITIQUE AND RECOMMENDATION

The current state of confusion regarding the legal status of long-term disability plans is not surprising, considering the significant policy and legal issues at stake. The relevant policy concerns go beyond the typical tug-of-war between disabled workers and entrepreneurial owners and call into question society's long-held beliefs respecting the comparative worthiness of those suffering from mental, as opposed to physical, disabilities. The four legal sub-issues implicated by the mental/physical distinction in disability plans place the ADA's text, the EEOC's interpretive guidance, and the pertinent legislative history in a battle royale for the true meaning of the ADA. Given the complexity and importance of these issues, the disability plan debate likely will continue for many years in the absence of Congressional intervention.

While these issues are admittedly difficult, they are not without solutions. This article recommends the following interpretation of the ADA as a desirable path out of the current thicket.

First, courts should follow the Third Circuit's decision in *Ford*⁹⁷ and hold that disabled former employees have standing under Title I to challenge disability plan distinctions. The competing line of cases holding that a fully disabled employee lacks standing because he or she is no longer a "qualified" employee creates a "catch-22" dilemma where employees

96. *Lewis II*, 7 F. Supp. 2d at 748-49 (quoting 136 CONG. REC. H4624 (daily ed. May 17, 1990) (statement of Rep. Edwards)).

97. See *Ford v. Schering-Plough Corp.*, 145 F.3d 601 (3d Cir. 1998) (discussed *supra* at notes 41-43 and accompanying text).

who are qualified to receive benefits can never be qualified to challenge the benefit plan as discriminatory. The *Ford* decision appropriately avoids the complications of determining when and for what purpose an individual is "qualified" by simply extending the ADA's reach to include former employees in a manner similar to that recognized under Title VII.

On the other hand, the courts should not stretch Title III of the ADA to find that insurance providers are public accommodations and thus are automatically subject to suit. The plain language of Title III protects disabled individuals who seek access to places of accommodation as physical structures.⁹⁸ An insurance policy is neither a place nor a structure. If Congress had intended to make the much larger leap in Title III to prohibiting discrimination in the provision of all goods and services, it likely would have said so more explicitly.

This reading of Title III is not as harsh as one might initially suspect. Title I's discrimination ban extends to contractual arrangements which discriminate against disabled employees.⁹⁹ Thus, even if an insurance provider is not directly subject to suit under the suggested reading of Title III, its discriminatory practices are still subject to challenge in a Title I suit directed at the beneficiary's former employer.

Finally, the judiciary should follow the lead of the *Lewis* decisions in resolving the two remaining issues. In *Lewis I*, the U.S. District Court for Eastern District of Virginia ruled that the ADA bans discrimination between individuals with different disabilities so long as the discrimination occurs because of an individual's particular disability.¹⁰⁰ This determination runs counter to the current majority line of cases that limit the ADA's prohibition to conduct that discriminates between the disabled and the non-disabled. While the majority reading is plausible, the *Lewis I* approach better comports with the ADA's goal of eradicating discrimination based on "stereotypic assumptions" about the disabled.¹⁰¹ As noted above, individuals with mental disabilities have long suffered from others' biased attitudes and outdated stigmas.¹⁰² The ADA, accordingly, should be interpreted so as to prohibit an employer from acting on such stereotypical assumptions to the detriment of individuals with mental disabilities, regardless of whether the benefited comparison group consists of other disabled or nondisabled individuals.

Both *Lewis I* and *Lewis II* construe the ADA's subterfuge provision as imposing a cost-based justification defense on employers rather than as an

98. See 42 U.S.C. § 12181(7) (1994) (defining "public accommodation").

99. See 42 U.S.C. § 12112(b)(2).

100. *Lewis I*, 982 F. Supp. at 1169.

101. See 42 U.S.C. § 12101(a)(7), (b)(1).

102. See *supra* notes 21-26 and accompanying text.

additional element of the plaintiff's prima facie case.¹⁰³ This interpretation is both rational and consistent with the weight of legislative history.

In terms of rationality, the subterfuge provision, in conjunction with the remainder of the insurance safe harbor, serves much the same purpose as the business necessity defense in disparate impact litigation. Under Title VII, a plaintiff can make out a prima facie disparate impact case if he or she shows that an employer's employment practice disproportionately disadvantaged members of a protected class.¹⁰⁴ The employer, nonetheless, may avoid liability (and continue the practice) if it establishes that the practice is job-related and consistent with business necessity.¹⁰⁵

The subterfuge provision as construed by the *Lewis* decisions operates in much the same fashion. The ADA bans discrimination in the provision of employment benefits but establishes a safe harbor for insurance-based distinctions resulting from traditional risk classification. The subterfuge provision insulates an employer or insurance provider from liability to the extent that the distinction actually serves the legitimate business purpose of risk classification. As in the disparate impact context, the practice in question is saved to the extent that legitimate business needs are established. As noted in the legislative history, this need is verified in the subterfuge context if the employer shows that "the standards used are based on sound actuarial data and not on speculation."¹⁰⁶

The question remains as to the appropriate height of this cost-justification hurdle. At a minimum, the purpose of the subterfuge provision requires that an insurance provider justify a disability-related distinction in benefit eligibility by generally acceptable risk classification data. On the other hand, this requirement should not be so burdensome as to invalidate distinctions that generally correlate with demonstrated risk factors, but which are not established with dollar-for-dollar mathematical precision.

V. CONCLUSION

The prevalent mental/physical distinction in long-term disability plans raises many difficult policy and legal issues under the ADA. The ultimate resolution of these issues may take a number of years to unfold. This article attempts to identify these issues and suggests one possible blueprint for interpreting the ADA. This effort hopefully will contribute toward a resolution of this subject that appropriately considers and balances the many important issues at stake.

103. See *supra* notes 92-96 and accompanying text.

104. See 42 U.S.C. § 2000e-2(k) (1994).

105. See 42 U.S.C. § 2000-2(k)(1)(A)(i) (1994); *Griggs v. Duke Power Co.*, 401 U.S. 424, 431 (1971).

106. H.R. REP. NO. 101-485, pt. 3, at 70 (1990).