98-7320

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 98-7320

LEONARD F.,

Plaintiff-Appellant,

—v.—

ISRAEL DISCOUNT BANK OF NEW YORK,

Defendant,

(for continuation of caption see inside front cover)

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR THE UNITED STATES AS *AMICUS CURIAE*

MARY JO WHITE,
United States Attorney
for the Southern District
of New York.

SARA L. SHUDOFSKY,
STEVEN M. HABER,
Assistant United States
Attorneys,
Of Counsel.

BILL LANN LEE,
Acting Assistant
Attorney General,
Civil Rights Division,
Department of Justice.

JESSICA DUNSAY SILVER,
GREGORY B. FRIEL,
Attorneys,
Civil Rights Division,
Department of Justice,
Of Counsel.

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– v. –

ISRAEL DISCOUNT BANK OF NEW YORK,

Defendant,

– and –

METROPOLITAN LIFE INSURANCE COMPANY,

Defendant-Appellee.

BRIEF FOR THE UNITED STATES AS *AMICUS CURIAE*

Preliminary Statement

Plaintiff Leonard F. appeals from a final judgment entered on February 19, 1998 by the United States District Court for the Southern District of New York (Hon. Charles A. Brieant, J.) in accordance with a June 26, 1997 opinion dismissing plaintiff's claim against defendant Metropolitan Life Insurance Company ("MetLife") under Title III of the Americans with Disabilities Act of 1990 ("ADA"), 42 U.S.C.

§§ 12181-12189 ("Title III"). (JA 79-87, 95).* Plaintiff had alleged that MetLife discriminated against him on the basis of disability in the terms and conditions of insurance coverage. (JA 39-52). The district court's opinion is reported at 967 F. Supp. 802.

Statement of Interest

This appeal raises questions about the proper interpretation of Title III of the ADA. The Department of Justice enforces Title III. 42 U.S.C. § 12188(b). Pursuant to 42 U.S.C. §§ 12186(b) and 12206(c)(3), the Department has also issued regulations and a Technical Assistance Manual interpreting Title III. *See* 28 C.F.R. pt. 36 (1997); Americans With Disabilities Act Title III Technical Assistance Manual (1993). The Department has consistently construed Title III as prohibiting disability-based discrimination in the terms and conditions of insurance policies. This Court's decision on this issue could therefore affect the Department's enforcement of Title III.

Issues Presented

The United States' brief is limited to two issues:

1. Whether Title III of the ADA prohibits forms of disability-based discrimination that do not involve a denial of physical access to a physical facility.

2. Whether the terms and conditions under which insurance coverage is offered are subject to the ban

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* References to the Joint Appendix are denoted as "JA_" with appropriate page numbers inserted. References to the record on appeal are denoted "R. Doc._" according to their assigned number in the Index to the Record on Appeal.

on disability-based discrimination that is contained in Title III of the ADA.

Statement of the Case

A. Statement of Facts

In 1987, the defendant Israel Discount Bank of New York ("the Bank") hired Leonard F. as an Assistant Vice President. As a fringe benefit of employment, the Bank provided plaintiff with short-term and long-term disability insurance coverage issued by Metlife. The long-term disability ("LTD") plan limited coverage to two years for persons who became disabled as a result of mental conditions, but provided coverage to age 65 (or until recovery) for persons whose disabilities were physical in nature. (JA 79-80).

In 1994, Leonard F. became disabled as a result of depression. After receiving benefits under the Bank's short-term disability plan, Leonard F. applied for LTD benefits. MetLife determined that Leonard F. had a disability and approved his claim for long-term benefits retroactive to October 1994. Pursuant to the plan's two-year limit for mental disabilities, however, the benefits were terminated in October 1996. Leonard F. presently remains unable to return to work because of his disability. (JA 79-80).

B. Prior Proceedings in the District Court

On August 25, 1995, Leonard F. filed a complaint against the Bank in the Southern District of New York, alleging that the LTD plan's two-year cap on benefits for persons with disabling mental conditions discriminated on the basis of disability in violation of Title I of the ADA, 42 U.S.C. §§ 12111-12117. (JA 4, 21-30). Thereafter, on November 29, 1996, plaintiff

filed an amended complaint adding MetLife as a defendant and alleging that both the Bank and Metlife violated Title III of the ADA by including the two-year cap in the LTD plan. (JA 9, 39-52).

C. The District Court Opinion

In a June 26, 1997 opinion, the district court dismissed the Title III claims against the Bank and Metlife, although the court declined at that time to direct entry of final judgment on those claims. (JA 79-87). First, as to plaintiff's claim against the Bank, the court held that the Bank could not be liable under Title III because, in providing LTD insurance coverage to the plaintiff, the Bank was acting in its role as an employer and not as a place of public accommodation. The court concluded that the alleged discrimination by the Bank was covered, if at all, by Title I of the ADA, which prohibits employment discrimination. (JA 81-82). In the course of its discussion, the district court suggested, without deciding, that Title III guarantees only physical accessibility to the goods and services offered by places of public accommodation. (JA 82-83).

Second, with respect to plaintiff's claim against MetLife, the district court held that the so-called "safe harbor" provision of the ADA, 42 U.S.C. § 12201(c) ("Section 501(c)"), precluded Leonard F.'s Title III claim. (JA 84-86). Referring to the language of Section 501(c) and its legislative history, the court concluded that "Title III is not intended to regulate the business of private insurance carriers." (JA 84). According to the court, the two-year limit on benefits for mental (but not physical) conditions was consistent with state insurance law, traditional underwriting practices, and "common sense," and thus was

tected from challenge by the safe harbor provision. 85). The court further held that MetLife's policy trictions with respect to mental disabilities were acts of "subterfuge" to evade the purposes of the A, as contemplated by Section 501(c), because the licy existed in this form long before the ADA was cted in 1990." (JA 86).

On February 19, 1998, the court entered a settlement resolving Leonard F.'s claims against the Bank. 18, 88-94). On the same date, the court entered a al judgment in favor of Metlife on the Title III im that had previously been dismissed. (JA 19,). Plaintiff filed a timely notice of appeal on March 1998. (JA 19, 96).

Summary of Argument

The United States submits this brief to address two ues raised by the district court's decision. First, the strict court suggested, without expressly deciding, at Title III guarantees only physical accessibility to e goods and services offered by places of public accommodation. Such a restrictive reading of Title III is supportable. The plain language of Title III makes ear that it prohibits forms of disability-based discrimination that go beyond the denial of physical access to a physical facility. Interpreting Title III to guarantee only physical accessibility would also thwart the statute's broad remedial goals. Accordingly, this Court should hold that Title III of the ADA guarantees more than mere physical accessibility to public accommodations. *See* Point I, *infra*.

Second, this Court should hold that the terms and conditions under which insurance coverage is offered are subject to Title III's ban on disability-based discrimination. Contrary to MetLife's argument below,

and to the suggestion of the district court. Title III of the ADA prohibits unjustified disability-based differential treatment in the terms and conditions of insurance policies. The Department of Justice has consistently interpreted Title III as reaching such discriminatory insurance practices. Because Congress has expressly delegated authority to the Attorney General to issue regulations interpreting Title III, the Department's reading of the statute is controlling unless it is arbitrary, capricious, or plainly contrary to the statutory language. This Court should defer to the Department's interpretation because it comports with the plain language, legislative history and underlying purposes of Title III. *See* Point II, *infra*.

ARGUMENT

POINT I

TITLE III OF THE ADA PROHIBITS FORMS OF DISABILITY-BASED DISCRIMINATION BEYOND THE DENIAL OF PHYSICAL ACCESS TO A PHYSICAL FACILITY

In dismissing plaintiff's claim against the Bank under Title III, the district court suggested that Title III guarantees only physical accessibility to the goods and services offered by places of public accommodation. (JA 82-83). Although the district court did not expressly state that the statute's coverage was thus limited, it nonetheless criticized, and expressly refused to rely upon, the decisions of two other circuit courts that had held that Title III guarantees more than mere physical access to physical facilities. *Id.* (discussing *Carparts Distribution Center, Inc. v. Automotive Wholesaler's Ass'n of New England, Inc.*, 37 F.3d 12 (1st Cir. 1994), and *Parker v. Metropolitan Life Ins. Co.*, 99 F.3d 181 (6th Cir. 1996), *vacated and*

superseded on rehearing in banc, 121 F.3d 1006 (6th Cir. 1997), *cert. denied*, 118 S. Ct. 871 (1998)).*

The district court's suggestion that Title III guarantees only the physical accessibility of a public accommodation is misguided. As even MetLife conceded below, Title III "must be interpreted in a broader sense than actual physical entry to the premises of public accommodations." (JA 10; R. Doc. 45 at 18 n.5). The restrictive reading of Title III suggested by the district court runs counter to the overwhelming weight of the caselaw, which has properly rejected the argument that Title III guarantees only physical accessibility. *See Carparts*, 37 F.3d at 19-20; *Chabner v. United of Omaha Life Ins. Co.*, ___ F. Supp. ___, 1998 WL 37750, at **4-5 (N.D. Cal. Jan. 16, 1998); *World Ins. Co. v. Branch*, 966 F. Supp. 1203, 1207 (N.D. Ga. 1997); *Cloutier v. Prudential Ins. Co. of America*, 964 F. Supp. 299, 301-02 (N.D. Cal. 1997); *Attar v. Unum Life Ins. Co.*, No. CA 3-96-CV-0367-R, 1997 WL 446439, at **11-12 (N.D. Tex. July 19, 1997); *Doukas v. Metropolitan Life Ins. Co.*, 950 F. Supp. 422, 425 (D.N.H. 1996); *Kotev v. First Colony Life Ins. Co.*,

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* Subsequent to the district court's opinion, the Sixth Circuit, sitting *in banc*, reversed the panel's decision in *Parker*. On rehearing *in banc*, the Sixth Circuit held that "Title III covers only physical places." *Parker v. Metropolitan Life Ins. Co.*, 121 F. 3d 1006, 1011 n.3 (6th Cir. 1997), *cert. denied*, 118 S. Ct. 871 (1998). The court stated, however, that it was expressing "no opinion as to whether a plaintiff must physically enter a public accommodation to bring suit under Title III as opposed to merely accessing, by some other means, a service or good provided by a public accommodation." *Id.*

927 F. Supp. 1316, 1321 (C.D. Cal. 1996).* As discussed below, such a restrictive reading of Title III is contrary to the plain language of the statute and to its broad underlying purposes, and should therefore be rejected by this Court.

A. The Plain Language of Title III Demonstrates That It Guarantees More Than Mere Physical Access to Facilities

The broad language of Title III makes clear that the statute guarantees more than mere physical accessibility to places of public accommodation. Title III provides, in relevant part:

> No individual shall be discriminated against on the basis of disability in the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of any place of public accommodation by any person who owns, leases (or leases to), or operates a place of public accommodation.

42 U.S.C. § 12182(a). Persons who are given *physical* access to a place of public accommodation will nonetheless suffer "discriminat[ion] . . . in the full and equal enjoyment" of "goods [and] services," *id.*, if the

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* *Contra Pappas v. Bethesda Hosp. Ass'n*, 861 F. Supp. 616, 620 (S.D. Ohio 1994)(holding that the scope of Title III is limited to discrimination based on the "physical use of a place of public accommodation"); *Ford v. Schering-Plough Corp.*, No. 96 Civ. 1991 (D.N.J. Sept. 12, 1996) (finding no Title III violation because plaintiff was not denied "physical use" of any of MetLife's services), *appeal pending*, No. 96-5674 (3d Cir.).

public accommodation refuses, on the basis of disability, to sell its goods and services to those individuals after they have physically entered the premises.*

Had Congress been concerned only with physical accessibility, it could have accomplished that more limited goal by drafting 42 U.S.C. § 12182(a) to guarantee only equal access to the "facilities" of a public accommodation. But Congress worded the statute broadly to guarantee the full and equal enjoyment not only of "facilities," but also of the "goods, services, . . . privileges, [and] advantages" of any place of public accommodation. 42 U.S.C. § 12182(a). Interpreting Title III to guarantee only physical accessibility would render superfluous the statute's use of the terms "goods," "services," "privileges", and "advantages." *See Chabner*, 1998 WL 37750, at *5 ("Finding that Title III applies only to physical barriers to entry would render meaningless the provisions providing for equal access to goods and services."); *Cloutier*, 964 F. Supp. at 302 ("Interpreting Title III to prohibit only physical barriers to the access of 'facilities' would dispense with the language mandating equal opportunity to 'participate in or benefit from' the 'goods,' 'services,' 'privileges,' and 'advantages' of a commercial transaction."). Such an interpretation

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* A portion of the district court's opinion suggests agreement with this position. Although, as discussed *supra* at 6-7, the district court suggested that Title III guarantees only physical accessibility (*see* JA 82-83), the court suggested earlier in its opinion that the ADA does prohibit disability-based discrimination in the provision of goods and services at a physical place. (*See* JA 82).

would thus violate the fundamental canon of statutory construction that courts must avoid interpretations that render words of a statute superfluous. *See United States v. Alaska*, 117 S. Ct. 1888, 1918 (1997).

Moreover, the examples of "public accommodations" listed in Title III confirm that Congress was not concerned just with guaranteeing physical accessibility to places of public accommodation. One of the examples cited in the statute is a "travel service." 42 U.S.C. § 12181(7)(F). This example indicates that Congress contemplated that public accommodations would "include providers of services which do not require a person to physically enter an actual physical structure." *Carparts*, 37 F.3d at 19. Many travel services "conduct business by telephone or correspondence without requiring their customers to enter an office." *Id.* As the First Circuit has reasoned, "[i]t would be irrational to conclude that persons who enter an office to purchase services are protected by the ADA, but persons who purchase the same services over the telephone or by mail are not. Congress could not have intended such an absurd result." *Id.* Rather, the "plain language of Title III and the ADA demonstrates that Title III is not limited to prohibiting only the denial of physical access to persons with disabilities." *Kotev*, 927 F. Supp. at 1321.

E. Interpreting Title III to Guarantee Only Physical Accessibility Would Undermine the Statute's Broad Remedial Goals

It is well-settled that remedial statutes are to be interpreted expansively to further their underlying goals. *Jefferson County Pharmaceutical Ass'n, Inc. v. Abbott Labs.*, 460 U.S. 150, 159 (1983); *Gomez v. Toledo*, 446 U.S. 635, 639 (1980). This rule of statutory

construction applies with special force here in view of the "ADA's broad remedial purpose." *Castellano v. City of New York*, __ F.3d ___, 1998 WL 91216, at **8, 10 (2d Cir. Feb. 24, 1998). The ADA is designed to "invoke the sweep of congressional authority . . . in order to address the major areas of discrimination faced day-to-day by people with disabilities," 42 U.S.C. § 12101(b)(4), to "provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities," *id.* § 12101(b)(1), and "to bring individuals with disabilities into the economic and social mainstream of American life," H.R. Rep. No. 485, pt. 2, 101st Cong., 2d Sess. 99 (1990).

Interpreting Title III to guarantee only physical accessibility would undermine these broad remedial goals by severely restricting the protections available to persons with disabilities. *Carparts*, 37 F.3d at 19-20; *Doukas*, 950 F. Supp. at 427; *Kotev*, 927 F. Supp. at 1321-22. Many goods and services are sold over the telephone or by mail without customers physically entering the premises of a commercial entity. *Carparts*, 37 F.3d at 20. As the First Circuit has held:

> To exclude this broad category of businesses from the reach of Title III and limit the application of Title III to physical structures which persons must enter to obtain goods and services would run afoul of the purposes of the ADA and would severely frustrate Congress's intent that individuals with disabilities fully enjoy the goods, services, privileges and advantages, available indiscriminately to other members of the general public.

Carparts, 37 F.3d at 20.

Such a cramped reading of Title III would also severely restrict the protections available for persons with disabilities even in those public accommodations where customers physically enter the premises to obtain goods or services. Such an interpretation would preclude relief, for example, for individuals who are denied service in a restaurant because of their disabilities, so long as the restaurant does not physically impede their access to the premises. An interpretation that would so restrict the protections of Title III cannot be squared with the sweeping goals announced by Congress when it enacted the statute. Accordingly, this Court should hold, consistent with the plain language and the clear legislative history of the statute, that Title III covers more than mere physical accessibility to public accommodations.

POINT II

THE TERMS AND CONDITIONS UNDER WHICH INSURANCE COVERAGE IS OFFERED ARE SUBJECT TO TITLE III'S BAN ON DISABILITY-BASED DISCRIMINATION

MetLife argued below that Title III of the ADA does not prohibit discrimination in the "substantive content" of insurance policies. (JA 10; R. Doc. 45 at 2, 8, 16). The district court's decision, while not explicitly so stating, suggests this conclusion as well. (JA 84). MetLife's argument is wrong as a matter of law and should be rejected.

The Department of Justice has consistently construed Title III to cover unjustified differential treatment in the terms and conditions of insurance policies. Consistent with the Department's position,

numerous courts have properly recognized that Title III reaches disability-based discrimination in insurance coverage. *See Doe v. Mutual of Omaha Ins. Co.*, ___ F. Supp. ___, 1998 WL 166856, at **2-6 (N.D. Ill. Apr. 3, 1998); *Lewis v. Aetna Life Ins. Co.*, 982 F. Supp. 1158, 1163-65 (E.D. Va. 1997); *World Ins. Co.*, 966 F. Supp. at 1207-09; *Cloutier*, 964 F. Supp. at 301-03; *Doukas*, 950 F. Supp. at 425-27; *Kotev*, 927 F. Supp. at 1321-23; *Chabner*, 1998 WL 37750, at **5-8; *Hollander v. Paul Revere Life Ins. Co.*, No. 96 Civ. 4911, 1997 WL 811531, at *2 (S.D.N.Y. April 21, 1997); *Attar*, 1997 WL 446439, at **10-12; *Baker v. Hartford Life Ins. Co.*, No. 94 C. 4416, 1995 WL 573430, at **3-4 (N.D. Ill. September 28, 1995).* *See also Carparts*, 37 F.3d at 20 (instructing district court to consider plaintiff's Title III challenge to insurance plan's limitation on health benefits for AIDS-related illnesses). As discussed below, the Department's interpretation is consistent with the plain language, legislative history and underlying purposes of the statute, and thus should be given controlling weight.

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* *Contra Brewster v. Cooley Associates/Counseling and Consulting Services, Ltd.*, No. Civ. 97-0058, 1997 WL 823634, at *1 (D.N.M. Nov. 6, 1997) ("Congress has indicated that the ADA does not govern the content of insurance policies"). *Cf. Parker*, 121 F.3d at 1012-13 & n.4 (suggesting, without deciding, that Title III would not govern the content of insurance policies offered by a public accommodation); *Ford, supra*, slip op. at 8 (same).

A. The Department of Justice Has Consistently Interpreted Title III to Cover Unjustified Disability-Based Differential Treatment in the Terms and Conditions of Insurance Policies

In the commentary to its Title III regulations, the Department of Justice emphasized that the statute "reach[es] insurance practices by prohibiting differential treatment of individuals with disabilities in insurance offered by public accommodations unless the differences are justified" by evidence that those disabilities "'pose increased risks.'" Preamble to Regulation on Nondiscrimination on the Basis of Disability By Public Accommodations and in Commercial Facilities (July 26, 1991) (citation omitted), *reprinted at* 28 C.F.R. Ch. 1, pt. 36, App. B at 629 (1997). The Department's commentary further noted that Title III covers "unjustified discrimination in all types of insurance provided by public accommodations." *Id.* at 630.

The Department adopted the same interpretation of the statute in its Technical Assistance Manual:

> 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.

Title III Technical Assistance Manual § III-3.11000 (Nov. 1993) (reproduced in Addendum hereto).

MetLife relied below (JA 10; R. Doc. 45 at 17) on 28 C.F.R. § 36.307(a), which states that a public accommodation is not required "to alter its inventory to include accessible or special goods that are designed

for, or facilitate use by, individuals with disabilities." *See also* 28 C.F.R. Ch. 1, pt. 36, App. B at 640-41. But that regulation is perfectly consistent with the Department's interpretation of Title III as reaching discrimination in the terms and conditions of insurance policies. For example, an insurance company that traditionally sells only life insurance need not change the scope of its business by also offering disability insurance policies, even though persons with disabilities may have a great need for such coverage. However, once a company decides to sell disability insurance, it must avoid unjustified differential treatment in deciding which customers it will cover and the conditions under which it will offer such coverage to persons with disabilities.

B. The Department of Justice's Interpretation of Title III Is Entitled to Controlling Weight

Congress delegated authority to the Department of Justice to promulgate binding regulations interpreting Title III, 42 U.S.C. § 12186(b), and to issue a technical assistance manual providing guidance about the statute's requirements. *See id.* § 12206 (c)(3). The Attorney General is the only federal official with authority to enforce the provisions of Title III. *See* 42 U.S.C. § 12188(b)(1)(B). In view of Congress's delegation, the Department of Justice's regulations must be given "legislative and hence controlling weight unless they are arbitrary, capricious, or plainly contrary to the statute." *United States v. Morton*, 467 U.S. 822, 834 (1984); *accord ABF Freight Sys., Inc. v. NLRB*, 510 U.S. 317, 324 (1994) (citing *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 844 (1984)). The same is true of the preamble or commentary accompanying the regulations, since both are

part of the Department's official interpretation of legislation. *Stinson v. United States*, 508 U.S. 36, 45 (1993); *see also Thomas Jefferson Univ. v. Shalala*, 512 U.S. 504, 512 (1994).

In addition, the Department's Title III Technical Assistance Manual represents "formal agency action" that establishes "an authoritative departmental position" on the meaning of the statute. *Paralyzed Veterans of America v. D.C. Arena L.P.*, 117 F.3d 579, 587 (D.C. Cir. 1997), *cert. denied*, 118 S. Ct. 1184 (1998). As such, the interpretations contained in the manual are entitled to *Chevron*-type deference. *See Innovative Health Sys., Inc. v. City of White Plains*, 117 F.3d 37, 45 n.8 (2d Cir. 1997) (deferring to Department's Title II Technical Assistance Manual).

C. The Department of Justice's Interpretation of Title III Is Consistent with the Plain Language of the Statute

This Court should defer to the Department of Justice's interpretation of Title III because it is supported by the plain language of the statute. Title III prohibits discrimination 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." 42 U.S.C. § 12182(a). The statute specifically defines "public accommodation" to include an "insurance office" whose operations affect commerce. 42 U.S.C. § 12181(7)(F). An insurance policy is one of the "goods, services, privileges, [or] advantages" offered by an insurance office. *Doukas*, 950 F. Supp. at 426. Therefore, discrimination on the basis of disability in the terms or conditions of an insurance policy is prohibited by the plain language of 42 U.S.C. § 12182(a).

Insurance discrimination also falls within the plain language of at least four other subsections of Title III. Section 302(b) provides, in part:

> It shall be discriminatory to afford an individual . . . , on the basis of a disability, . . . with the opportunity to participate in or benefit from a good, service, facility, privilege, advantage, or accommodation that is not equal to that afforded to other individuals.

42 U.S.C. § 12182(b)(1)(A)(ii). An insurance provider who offers to an individual with a disability less favorable coverage than that offered to other customers is plainly providing the former with a "good [or] service" that is "not equal to that afforded to other individuals." *Id.* Such action could also violate 42 U.S.C. § 12182(b)(1)(A)(iii) because the insurer would be providing an individual with a disability with a "good [or] service" that is "different" from, and not equally "as effective as," that provided to others. In addition, outright rejection of insurance coverage for a person with a disability would constitute a "denial of the opportunity" to "benefit from the goods [or] services" of a public accommodation, within the meaning of 42 U.S.C. § 12182(b)(1)(A)(i). Finally, an insurance company that has a policy of excluding from coverage persons with particular disabilities would be using "eligibility criteria that screen out" individuals "from fully and equally enjoying" the "goods [and] services" of a public accommodation, in violation of 42 U.S.C. § 12182(b)(2)(A)(i). Accordingly, "to give full effect to Title III's plain language, it must be deemed applicable to the content of insurance policies." *Doe*, 1998 WL 166856, at *5 (citing 42

U.S.C. §§ 12182(a), (b)(1)(A)(i), (b)(1)(A)(ii), & (b)(1)(A)(iii)).

Section 501(c) of the ADA further confirms that Title III's broad language reaches discrimination in the terms and conditions of insurance policies. That provision, which is entitled "Insurance," creates a so-called "safe harbor" for certain insurance practices. Section 501(c) states, in part:

> Subchapters I through III [*i.e.*, Titles I through III of the ADA] . . . shall not be construed to prohibit or restrict . . . an *insurer* . . . or any agent, or entity that administers benefit plans . . . from underwriting risks, classifying risks, or administering such risks that are based on or not inconsistent with State law.

42 U.S.C. § 12201(c)(1) (emphasis added). If the broad language of Title III did not otherwise cover insurance policies, there would have been no need for Congress to emphasize in Section 501(c) that the safe harbor provision exempted certain insurance practices from the scope of the statute. *See Chabner*, 1998 WL 87750, at *5 ("the 'safe harbor' provision of the ADA for insurers would be rendered utterly meaningless if the court did not hold that Title III applied to insurance underwriting practices"); *Kotev*, 927 F. Supp. at 1322 (insurers would not "need this 'safe harbor' provision under Title III if insurers could never be liable under Title III for conduct such as the discriminatory denial of insurance coverage").

Thus, although Section 501(c) creates a safe harbor for certain practices, it does not nullify Title III's general prohibitions against discrimination in the terms and conditions of insurance policies. To the

contrary, "[r]ather than signaling Congress' intent to broadly exempt insurance companies from the reach of Title III of the ADA, § 501(c)'s safe harbor provision manifests the contrary intent to subject insurance companies to the full scope of the ADA's anti-discrimination prohibitions." *Doe*, 1998 WL 166856, at *6.

The ADA also explicitly provides that Section 501(c) "shall not be used as a subterfuge to evade the purposes of subchapter I and III [Titles I and III of the ADA]." 42 U.S.C. § 12201(c). By its terms, the language of the safe harbor provision provides only limited protection for insurers. Paragraph (1) of the provision, which applies to insurance companies, covers only insurance practices that involve "underwriting risks, classifying risks, or administering such risks that are based on or not inconsistent with State law." 42 U.S.C. § 12201(c)(1). This language suggests that a disability-based distinction in an insurance policy cannot qualify for the safe harbor of Section 501(c) if it is not justified by increased risks associated with the disability. *See World Ins. Co.*, 966 F. Supp. at 1208 ("insurance practices are protected to the extent they are in accord with sound actuarial principles, reasonably anticipated experience, or bona fide risk classification"); *Doe*, 1998 WL 166856, at *6 (same). As explained immediately below, the legislative history confirms this interpretation of Section 501(c)

D. The Department of Justice's Interpretation of Title III Is Consistent with the Legislative History of the ADA

This Court should uphold the Department of Justice's interpretation of Title III because it is also

supported by the legislative history of the ADA. Various committee reports and floor debates make clear that Title III prohibits insurance companies and other public accommodations from unjustifiably discriminating against individuals with disabilities in insurance coverage unless such differential treatment is justified. *See generally Pierpoint v. Barnes*, 94 F.3d 813, 817 (2d Cir. 1996) (committee reports are "particularly good indicator[s] of congressional intent"), *cert. denied*, 117 S. Ct. 1691 (1997). For example, committee reports from both the House of Representatives and the Senate explain that:

> Virtually all States prohibit unfair discrimination among persons of the same class and equal expectation of life. The ADA adopts this prohibition of discrimination. 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.

H.R. Rep. No. 485, *supra*, at 136; S. Rep. No. 116, 101st Cong., 1st Sess. 84 (1989). *Accord* H.R. Rep. No. 485, *supra*, at 138 (ADA "assures that decisions concerning the insurance of persons with disabilities which are not based on *bona fide risk classification* be made in conformity with non-discrimination requirements") (emphasis added). Similarly, the reports explain that a public accommodation is not permitted to:

> refuse to insure, . . . or limit the amount, extent, or kind of coverage available to an individual, or charge a different rate for the same coverage solely because of a physical or

> mental impairment, except where the refusal, limitation, or rate differential is based on sound actuarial principles or is related to actual or reasonably anticipated experience.

H.R. Rep. No. 485, *supra*, at 137; S. Rep. No. 116, *supra*, at 85; H.R. Rep. No. 485, pt. 3, 101st Cong., 2d Sess. 71 (1990); *accord* 136 Cong. Rec. H4614-02, H4623 (1990) (Rep. Owens); *id.* at H4624-4625 (Rep. Edwards); *id.* at H4626 (Rep. Waxman); 136 Cong. Rec. E1913, E1921 (1990) (Rep. Hoyer); 136 Cong. Rec. S9684-03, S9697 (1990) (Sen. Kennedy). Accordingly, the legislative history of Title III "implies that where underwriting lacks such a basis [in sound actuarial principles or experience], it fails to comply with the ADA." *Cloutier*, 964 F. Supp. at 303.

E. The Department of Justice's Interpretation of Title III Does Not Conflict with the McCarran-Ferguson Act

Finally, MetLife argued below (JA 10; R. Doc. 45 at 8-9) that the McCarran-Ferguson Act, 15 U.S.C. § 1012 *et seq.*, precludes interpreting Title III to prohibit discrimination in the substantive content of insurance policies. That argument is meritless.

The McCarran-Ferguson Act provides, in relevant part, that "[n]o Act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of insurance . . . unless such Act specifically relates to the business of insurance." 15 U.S.C. § 1012(b). For two independent reasons, that statute does not preclude Title III's application to insurance policies.

First, the ADA expressly provides that an "insurance office" is a "public accommodation" for purposes of Title III if its operations affect commerce. 42 U.S.C. § 12181(7)(F). Further, Section 501(c) of the ADA provides that the underwriting practices of an "insurer" shall not be used to evade the purposes of Title III. 42 U.S.C. § 12201(c). The ADA therefore "specifically relates to the business of insurance," 15 U.S.C. § 1012(b), and is not covered by the McCarran-Ferguson Act. *Doe*, 1998 WL 166856, at *7. *See Barnett Bank of Marion County, N.A. v. Nelson*, 517 U.S. 25, 37-42 (1996) (finding McCarran-Ferguson Act inapplicable after giving broad interpretation to phrase "specifically relates to the business of insurance").

Second, even if the ADA did not explicitly refer to the insurance business, the McCarran-Ferguson Act would not support MetLife's position because MetLife has failed to identify any state law that the Department's interpretation of Title III would "invalidate, impair, or supersede." *See Doe*, 1998 WL 166856, at **7-8. The mere fact that a state has adopted a general scheme for regulating insurance practices "does not show that any particular state law would be invalidated, impaired or superseded" by the federal statute. *Mackey v. Nationwide Ins. Co.*, 724 F.2d 419, 421 (4th Cir. 1984); *accord Nationwide Mut. Ins. Co. v. Cisneros*, 52 F.3d 1351, 1363 (6th Cir. 1995), *cert. denied*, 516 U.S. 1140 (1996). Rather, there must be a showing of a specific conflict between some particular state law and the federal statute at issue. *See NAACP v. American Family Mut. Ins. Co.*, 978 F.2d 287, 295-97 (7th Cir. 1992), *cert. denied*, 508 U.S. 907 (1993). MetLife has simply not identified any state law that would either authorize or require it to discriminate against persons with disabilities in issuing insurance policies.

CONCLUSION

This Court should hold: (1) that Title III guarantees more than mere physical accessibility to public accommodations; and (2) that the terms and conditions of insurance policies are subject to Title III's ban on disability-based discrimination.

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Respectfully submitted,

MARY JO WHITE,
United States Attorney for the Southern District of New York.

SARA L. SHUDOFSKY,
STEVEN M. HABER,
Assistant United States Attorneys,
Of Counsel.

BILL LANN LEE,
Acting Assistant Attorney General,
Civil Rights Division,
Department of Justice.

JESSICA DUNSAY SILVER,
GREGORY B. FRIEL,
Attorneys,
Civil Rights Division,
Department of Justice,
Of Counsel.

ADDENDUM

U.S. Department of Justice
Civil Rights Division
Public Access Section

The Americans with Disabilities Act

Title III Technical Assistance Manual

Covering Public Accommodations and Commercial Facilities

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public health authorities, such as the U.S. Public Health Service, the Centers for Disease Contro.. and the National Institutes of Health, including the National Institute of Mental Health..

ILLUSTRATION: Refusal to admit an individual to a restaurant because he or she is infected with HIV would be a violation, because the HIV virus cannot be transmitted through casual contact, such as that among restaurant patrons.

III-3.9000 Illegal use of drugs. Discrimination based on an individual's current illegal use of drugs is not prohibited (see III-2.3000). Although individuals currently using illegal drugs are not protected from discrimination, the ADA does prohibit denial of health services, or services provided in connection with drug rehabilitation, to an individual on the basis of current illegal use of drugs, if the individual is otherwise entitled to such services.

ILLUSTRATION 1: A hospital emergency room may not refuse to provide emergency services to an individual because the individual is illegally using drugs.

ILLUSTRATION 2: A medical facility that specializes in care of burn patients may not refuse to treat an individual's burns on the grounds that the individual is illegally using drugs.

Because abstention from the use of drugs is an essential condition for participation in some drug rehabilitation programs, and may be a necessary requirement in inpatient or residential settings, a drug rehabilitation or treatment program may deny participation to individuals who use drugs while they are in the program..

ILLUSTRATION: A residential drug and alcohol treatment program may expel an individual for using drugs in a treatment center.

III-3.10000 Smoking. A public accommodation may prohibit smoking, or may impose restrictions on smoking, in places of public accommodation..

III-3.11000 Insurance. 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. Because of the nature of the insurance business, however, consideration of disability in the sale of insurance contracts does not always constitute "discrimination.." An insurer or other public accommodation may underwrite, classify, or administer risks that are based on or not inconsistent with State law, provided that such practices are not used to evade the purposes of the ADA.

Thus, a public accommodation may offer a plan that limits certain kinds of coverage based on classification of risk, but may not refuse to insure, or refuse to continue to insure, or limit the amount, extent, or kind of coverage available to an individual, or charge a different rate for the same coverage solely because of a physical or mental impairment, except where the refusal, limitation, or rate differential is based on sound actuarial principles or is related to actual or reasonably anticipated experience. The ADA, therefore, does not prohibit use of legitimate actuarial considerations to justify differential treatment of individuals with disabilities in insurance.

ILLUSTRATION: A person who has cerebral palsy may not be denied coverage based on disability independent of actuarial risk classification.

Can a group health insurance policy have a pre-existing condition exclusion? Yes. An individual with a pre-existing condition may be denied coverage for that condition for the period specified in the policy. However, the individual cannot be denied coverage for illness or injuries unrelated to the pre-existing condition.

Can an insurance policy limit coverage for certain procedures or treatments? Yes, but it may not entirely deny coverage to a person with a disability.

Does the ADA require insurance companies to provide a copy of the actuarial data on which its actions are based at the request of the applicant? The ADA does not require it. Under some State regulatory schemes, however, insurers may have to file such actuarial information with the State regulatory agency, and this information may be obtainable at the State level.

Does the ADA apply only to life and health insurance? No. Although life and health insurance are the areas where the ADA will have its greatest application, the ADA applies equally to unjustified discrimination in all types of insurance, including property and casualty insurance, provided by public accommodations.

ILLUSTRATION: Differential treatment of individuals with disabilities, including individuals who have been treated for alcoholism, applying for automobile insurance would have to be justified by legitimate actuarial considerations.

BUT: An individual's driving record, including any alcohol-related violations, may be considered.

May a public accommodation refuse to serve an individual with a disability because of limitations on coverage or rates in its insurance policies? No. A public accommodation may not rely on such limitations to justify exclusion of individuals with disabilities. Any exclusion must be based on legitimate safety concerns (see III-4.1200), rather than on the terms of the insurance contract.

ILLUSTRATION: An amusement park requires individuals to meet a minimum height requirement that excludes some individuals with disabilities for certain rides because of a limitation in its liability insurance coverage. The limitation in insurance coverage is not a permissible basis for the exclusion.

BUT: The minimum height requirement would be a permissible safety criterion, if it is necessary for the safe operation of the ride.

III-3.12000 Places of public accommodation located in private residences. When a place of public accommodation is located in a home, the portions of the home used as a place of public accommodation are covered by title III, even if those portions are also used for residential purposes.

Coverage extends not only to those portions but also includes an accessible route from the sidewalk.