No. 98-7552

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

JOSEPH M. PALLOZZI
LORI R. PALLOZZI

Plaintiffs-Appellants

v.

ALLSTATE LIFE INSURANCE COMPANY

Defendant-Appellee

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

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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STATEMENT OF JURISDICTION

The district court had jurisdiction under 28 U.S.C. 1331, 1343 and 42 U.S.C. 12188(a). On March 25, 1998, the court entered a final judgment in favor of the defendant (JA 23).[1/] Plaintiffs filed a timely notice of appeal on April 3, 1998 (JA 24). This Court has appellate jurisdiction under 28 U.S.C. 1291.

INTEREST OF THE UNITED STATES

This appeal raises questions about the proper interpretation of Title III of the Americans With Disabilities Act (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 also has issued regulations and a Technical Assistance Manual

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1/ "JA __" refers to the page number of the Joint Appendix. "R. __" indicates the entry number on the district court docket sheet.

interpreting Title III. See 28 C.F.R. Pt. 36 (1997); Americans With Disabilities Act Title III Technical Assistance Manual (Nov. 1993). The Department has consistently construed Title III as prohibiting unjustified disability-based discrimination in insurance coverage. This Court's decision on this issue could therefore affect the Department's enforcement of Title III.

STATEMENT OF THE ISSUES

1. Whether a refusal to sell insurance coverage to a person because of his or her disability is covered by the ban on discrimination contained in Title III of the Americans With Disabilities Act, 42 U.S.C. 12181-12189 (Title III).

2. Whether an insurance company acts as an owner or operator of a place of public accommodation under Title III when it engages in the business of selling insurance coverage to individuals.

3. Whether the district court erred in deciding, on a motion to dismiss and without any factual basis in the record, that the plaintiffs' disabilities posed increased risks that justified complete denial of life insurance coverage.

STATEMENT OF THE CASE

A. Preliminary Statement

The plaintiffs, Joseph M. and Lori R. Pallozzi, appeal from a final judgment entered on March 25, 1998, by the United States District Court for the Northern District of New York (Judge Frederick J. Scullin, Jr.) (JA 23). That judgment dismissed the Pallozzis' claims against defendant Allstate Life Insurance

Company (Allstate) under Title III of the Americans With Disabilities Act of 1990 (ADA), 42 U.S.C. 12181-12189 (Title III), and under New York State law. Plaintiffs allege that Allstate discriminated against them on the basis of disability in denying them life insurance coverage. The district court's opinion is reported at Pallozzi v. Allstate, __ F. Supp. __, No. 97-CV-0236, 1998 WL 139410 (N.D.N.Y. Mar. 24, 1998).

B. Statement Of Facts

Plaintiffs' complaint alleged the following facts, which must be accepted as true in ruling on a motion to dismiss:

The Pallozzis, who are married to each other, have been diagnosed with mental illnesses (JA 6). Specifically, Joseph Pallozzi has been diagnosed with agoraphobia and major depression (JA 6), and Lori Pallozzi has been diagnosed with major depression and borderline personality disorder (JA 6).

In October 1996, the Pallozzis applied to Allstate for a joint life insurance policy (JA 8). Allstate maintains insurance offices in New York for the purpose of selling insurance to the public (JA 6). Although Allstate initially issued the Pallozzis a temporary insurance agreement, it later canceled that agreement and refused to sell the plaintiffs a life insurance policy (JA 8). Allstate's refusal was based upon medical information provided by plaintiffs' psychiatrist (JA 8). The Pallozzis have requested, but Allstate has refused to provide, a specific explanation for the denial of their application for insurance (JA 8).

C. Proceedings In The District Court

On February 24, 1997, the Pallozzis filed this action in federal court, alleging that Allstate violated Title III of the ADA by refusing, because of their disabilities, to issue them a life insurance policy (JA 9). The Pallozzis also alleged that Allstate's actions violated New York State law (JA 9-10). The Pallozzis sought declaratory and injunctive relief, including an order directing Allstate to sell them a life insurance policy at a price that is based "on sound actuarial principles, or actual or reasonably anticipated experience" (JA 11).

Allstate moved to dismiss the Pallozzis' complaint under Fed. R. Civ. P. 12(b)(6). Allstate argued that Title III did not prohibit an insurance company from discriminating on the basis of disability in deciding whether to offer insurance coverage (R. 13 at 4-15). Allstate acknowledged that it refused to issue the life insurance policy based on the Pallozzis' medical history (JA 17). Moreover, Allstate did not dispute that the Pallozzis' mental illnesses were disabilities within the meaning of the ADA (JA 16-17).

D. The District Court Opinion

The district court granted Allstate's motion to dismiss, holding that the Pallozzis failed to state a cause of action under Title III (JA 14-23). The court concluded that in light of the exemption in Section 501(c) of the ADA, 42 U.S.C. 12201(c), "Title III of the ADA does not ordinarily apply to the underwriting practices of insurance companies" (JA 20). But the

court also observed that, under the ADA, "an individual may not be denied insurance coverage based on a disability unless such denial is based upon sound risk classification" (JA 20). In dismissing the Title III claim, the court asserted that the Pallozzis had "not alleged facts from which the Court can draw a favorable inference that the denial might not have been based on sound actuarial principles or that their combined mental illnesses did not pose increased risks" (JA 20). In the court's view, "[t]wo individuals who suffer from major depression, agoraphobia, and borderline personality disorder would under traditional risk classification and common sense have a significantly higher risk classification than two individuals who do not have a disability or even individuals who have a different type of disability" (JA 20-21).

The district court also recognized that the ADA prohibits insurers from using the exemption in Section 501(c) as a "subterfuge" to evade the purposes of the statute (JA 19 & n.6). The court held, however, that the Pallozzis had failed to provide factual support to show that Allstate was trying to use the exemption as a subterfuge (JA 21). The court further asserted that "[b]ecause the higher risk classification based on serious mental illness existed before the enactment of the ADA, the practice cannot be characterized as a subterfuge to evade the purposes of the ADA" (JA 21 n.8).

Having granted Allstate's motion to dismiss the Title III claim, the district court refused to exercise jurisdiction over the Pallozzis' state law claims (JA 21).

SUMMARY OF ARGUMENT

The district court erred in dismissing the Pallozzis' complaint. The Pallozzis allege that Allstate violated Title III of the ADA by denying them life insurance coverage because of their mental disabilities. The factual allegations in the Pallozzis' complaint, which must be accepted as true for purposes of this appeal, state a claim of disability-based discrimination under Title III.

Allstate argued below, however, that its alleged conduct was not covered by Title III. Principally, Allstate contended (1) that Title III's ban on disability-based discrimination does not apply to refusals to sell insurance coverage to persons with disabilities, and (2) that Allstate was not a public accommodation covered by Title III. Both arguments are meritless.

The refusal to sell insurance coverage to a person because of his or her disability is covered by Title III's ban on discrimination. The plain language, legislative history, and administrative interpretations of Title III, all demonstrate that the statute was intended to reach discriminatory refusals to provide insurance coverage to persons with disabilities.

Allstate is subject to the prohibitions of Title III. The allegations of the Pallozzis' complaint, if true, would establish

that Allstate was acting in its capacity as an owner or operator of a "place of public accommodation" (42 U.S.C. 12182(a)) when it denied insurance coverage to the Pallozzis. Allstate was operating an "insurance office" affecting commerce, one of the examples of a "public accommodation" listed in Title III. 42 U.S.C. 12181(7)(F).

Even though the Pallozzis have stated a claim of discrimination under Title III, that does not mean that they will necessarily prevail if they prove the allegations in their complaint. Allstate could still avoid liability if it qualified for the exemption in Section 501(c) of the ADA, 42 U.S.C. 12201(c). That provision exempts from the ADA's coverage certain insurance practices that Title III would otherwise prohibit.

The district court erred in deciding, without any factual basis in the record, that Allstate qualified for the exemption of Section 501(c). In dismissing the complaint, the court emphasized that the Pallozzis failed to allege facts showing that their mental disabilities did not pose increased insurance risks. But the Pallozzis were not required to plead such facts. Instead, Allstate has the obligation, if it wishes to invoke the protections of Section 501(c), to produce objective evidence that the denial of insurance coverage to the Pallozzis is justified by increased risks associated with their disabilities. Allstate should have the opportunity on remand to produce such evidence, if it exists. But since Allstate has not yet come forward with such evidence, there is no factual basis in the record to support

the district court's conclusion that the denial of life insurance coverage was warranted.

ARGUMENT

THE DISTRICT COURT ERRED IN DISMISSING THE PALLOZZIS' TITLE III CLAIM

In enacting Title III of the ADA, "Congress intended that people with disabilities have equal access to the array of goods and services offered by private establishments and made available" to other individuals. Carparts Distribution Ctr., Inc. v. Automotive Wholesaler's Ass'n of New England, Inc., 37 F.3d 12, 19 (1st Cir. 1994). Such access is precisely what Allstate allegedly denied to the plaintiffs in this case. The Pallozzis claim that, because of their mental disabilities, Allstate denied them access to a good or service (life insurance coverage) that it makes available to other individuals. Such an allegation states a claim of discrimination under Title III, and the district court thus erred in dismissing the Pallozzis' complaint.[2/]

Title III prohibits discrimination on the basis of disability "in the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations

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[2/] The dismissal of the Pallozzis' complaint is reviewed de novo. See Boddie v. Schnieder, 105 F.3d 857, 860 (2d Cir. 1997). This Court must accept the material facts alleged in their complaint as true. See Staron v. McDonald's Corp., 51 F.3d 353, 355 (2d Cir. 1995) (reversing dismissal of claim under Title III of ADA). Dismissal of a complaint is appropriate only if it appears "beyond doubt" that the plaintiffs "can prove no set of facts in support of the[ir] claim which would entitle [them] to relief." Ibid., quoting Conley v. Gibson, 355 U.S. 41, 45-46 (1957).

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). The statute makes clear that it is discriminatory to subject an individual, because of disability, "to a denial of the opportunity * * * to participate in or benefit from" such goods, services, facilities, privileges, advantages or accommodations. 42 U.S.C. 12182(b)(1)(A)(i).

The Pallozzis' complaint alleges all the elements necessary to establish a violation of Title III. First, the Pallozzis allege (and Allstate does not dispute) that they have mental conditions that qualify as disabilities for purposes of the ADA. Second, the Pallozzis allege that they were discriminated against on the basis of their disabilities. They claim that, because of their mental disabilities, they were denied access to a benefit (life insurance coverage) that Allstate makes available to other individuals. Such disparate treatment is literally disability-based discrimination. Next, as we explain below, the life insurance coverage sought by the Pallozzis was one of the "goods" or "services" (42 U.S.C. 12182(a)) offered by an "insurance office," which is a place of public accommodation under Title III. 42 U.S.C. 12181(7)(F). See p. 12, infra. Thus, a refusal to sell life insurance coverage to an individual, because of his or her disability, is a type of discrimination covered by Title III. See pp. 10-23, infra. And finally, Allstate was acting as an owner or operator of such an "insurance office" when it rejected the Pallozzis' application for life insurance. See pp.

23-29, infra. Allstate was thus a public accommodation covered by Title III at the time of the alleged discrimination.

That does not mean that Allstate's alleged conduct necessarily violates the ADA. Even though the Pallozzis have stated a claim under Title III, Allstate could nonetheless avoid liability if it qualifies for the limited exemption in Section 501(c) of the ADA, 42 U.S.C. 12201(c). In order to invoke the protections of Section 501(c), Allstate must produce objective evidence that the Pallozzis' disabilities pose increased risks that would justify the complete denial of life insurance coverage. Allstate has not come forward with such evidence, but should be given the opportunity to do so on remand. See pp. 29-33, infra.

A. The Refusal To Sell Insurance Coverage To A Person Because Of His Or Her Disability Is Covered By Title III's Ban On Discrimination

Allstate argued below (R. 13 at 4-15) that Title III does not cover a refusal to sell insurance coverage to an individual because of his or her disability. That argument is wrong as a matter of law. Allstate's position conflicts with the plain language and legislative history of Title III, as well as the Department of Justice's consistent interpretation of the statute. Numerous courts have thus properly recognized that Title III reaches disability-based discrimination in insurance coverage. See Doe v. Mutual of Omaha Ins. Co., ___ F. Supp. ___, No. 98 C 0325, 1998 WL 166856, at *2-*6 (N.D. Ill. Apr. 3, 1998); Chabner v. United of Omaha Life Ins. Co., 994 F. Supp. 1185, 1190-1193

(N.D. Cal. 1998); Lewis v. Aetna Life Ins. Co., 982 F. Supp. 1158, 1163-1165 (E.D. Va. 1997); World Ins. Co. v. Branch, 966 F. Supp. 1203, 1207-1209 (N.D. Ga. 1997); Cloutier v. Prudential Ins. Co. of America, 964 F. Supp. 299, 301-302 (N.D. Cal. 1997); Hollander v. Paul Revere Life Ins. Co., No. 96 Civ. 4911, 1997 WL 811531, at *2 (S.D.N.Y. Apr. 21, 1997); Attar v. Unum Life Ins. Co., No. CA 3-96-CV-0367-R, 1997 WL 446439, at *10-*12 (N.D. Tex. July 19, 1997); Doukas v. Metropolitan Life Ins. Co., 950 F. Supp. 422, 425-427 (D.N.H. 1996); Kotev v. First Colony Life Ins. Co., 927 F. Supp. 1316, 1321-1323 (C.D. Cal. 1996); Baker v. Hartford Life Ins. Co., No. 94 C 4416, 1995 WL 573430, at *3 (N.D. Ill. Sept. 28, 1995).[2/] 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).

[2/] Contra Brewster v. Cooley Associates/Counseling & Consulting Servs., 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").

In addition, the Third and Sixth Circuits have criticized, in dictum, the Department's interpretation of Title III as prohibiting discrimination in the terms or conditions of insurance coverage. Ford v. Schering-Plough Corp., __ F.3d __, No. 96-5674, 1998 WL 258386, at *13 (3d Cir. May 22, 1998), and Parker v. Metropolitan Life Ins. Co., 121 F.3d 1006, 1012 n.5 (6th Cir. 1997) (en banc), cert. denied, 118 S. Ct. 871 (1998). Such criticism was not part of the holdings of either Ford or Parker, because both courts had already decided that the defendants were not public accommodations covered by Title III (see pp. 25-26, infra), and thus it was unnecessary for either court to decide whether Title III reached discrimination in insurance coverage. This Court should reject the dictum in Ford and Parker because, as explained below, it is contrary to the language and legislative history of the statute.

1. The Plain Language Of Title III Covers Discriminatory Refusals To Sell Insurance Coverage To Individuals With Disabilities

The starting point in interpreting the scope of Title III's coverage is, of course, the language of the statute. See Board of Educ. v. Mergens, 496 U.S. 226, 237 (1990). As we have noted, Title III prohibits discrimination on the basis of disability "in the full and equal enjoyment of the goods [or] services * * * of any place of public accommodation * * *." 42 U.S.C. 12182(a). Such discrimination includes a "denial of the opportunity * * * to participate in or benefit from" such goods or services. 42 U.S.C. 12182(b)(1)(A)(i).

The refusal to sell life insurance coverage to an individual because of his or her disability falls within the plain language of the statute. Title III expressly defines public accommodation to include an "insurance office" that affects commerce. 42 U.S.C. 12181(7)(F). An insurance policy is undoubtedly one of the "goods" or "services" offered by such an insurance office. Doukas, 950 F. Supp. at 426. And by refusing to sell life insurance coverage to the Pallozzis because of their disabilities, Allstate has literally "deni[ed]" them "the opportunity * * * to participate in or benefit from" the company's goods and services. 42 U.S.C. 12182(b)(1)(A)(i).

Allstate argued below, however, that Title III guarantees only physical access to the goods and services offered by public accommodations, and thus does not reach discriminatory refusals to sell insurance coverage to persons with disabilities (JA

17).[3/] Such a restrictive reading of Title III cannot be squared with the plain language of the statute.

Title III guarantees many types of access — not just physical accessibility. Carparts, 37 F.3d at 19-20. The statute prohibits public accommodations from denying individuals, because of their disabilities, "the opportunity * * * to participate in or benefit from * * * goods, services, facilities, privileges, advantages, or accommodations." 42 U.S.C. 12182(b)(1)(A)(i) (emphasis added). Such denials can occur even if the public accommodation is physically accessible to persons with disabilities. Suppose, for example, that a public accommodation gives an individual physical access to its facility, but then refuses to sell its products to that person once she has entered the premises. Although that individual has faced no physical barriers, she has nonetheless been denied access to the "goods [or] services" of a place of public accommodation. 42 U.S.C. 12182(a).

Had Congress been concerned only with physical accessibility, it could have accomplished that more limited goal by drafting Title III to guarantee only equal access to the "facilities" of a public accommodation. But Congress worded the

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[3/] Although not expressly deciding this issue, the district court implicitly rejected Allstate's argument that Title III guarantees only physical accessibility. The court held that "an individual may not be denied insurance coverage based on a disability unless such denial is based upon sound risk classification" (JA 20). This holding recognizes that Title III reaches some forms of discrimination in insurance coverage that do not involve denials of physical access to places of public accommodation.

statute broadly to guarantee the full and equal enjoyment not only of "facilities," but also of "goods, services, * * * privileges, [and] advantages." 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." Such an interpretation would thus violate the fundamental canon of statutory construction that courts must avoid interpretations that render words of a statute superfluous. United States v. Alaska, 117 S. Ct. 1888, 1918 (1997).

Moreover, Allstate's reading of the statute would severely restrict the protections of Title III by allowing public accommodations to engage in blatant disability-based discrimination. Under such a skewed interpretation of Title III, a restaurant could refuse to serve food to persons in wheelchairs, as long as such individuals faced no physical barriers in entering or moving about the restaurant. Congress could not have intended Title III's protections to be so limited.

The statutory language makes clear that Title III even prohibits forms of insurance discrimination that do not involve a complete denial of access to insurance coverage. An insurance provider that offers to sell an insurance policy to a person with a disability can nonetheless violate Title III if such insurance coverage is less favorable than that offered to other customers. Under such circumstances, the insurer is providing a "good [or] service" that is "not equal to that afforded to other

individuals." 42 U.S.C. 12182(b)(1)(A)(ii). 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.

Section 501(c) of the ADA confirms that Title III's broad language reaches disability-based discrimination in insurance coverage. That provision creates a limited exemption for certain insurance practices. Section 501(c) states, in relevant part:

> Subchapters I through III of this chapter [i.e., Titles I through III of the ADA] and title IV of this Act shall not be construed to prohibit or restrict —
>
> > (1) an insurer, hospital or medical service company, health maintenance organization, or any agent, or entity that administers benefit plans, or similar organizations from underwriting risks, classifying risks, or administering such risks that are based on or not inconsistent with State law; * * *.

42 U.S.C. 12201(c) (emphasis added). Section 501(c) also emphasizes that the exemption "shall not be used as a subterfuge to evade the purposes of" Titles I and III. 42 U.S.C. 12201(c). If the broad language of Title III did not otherwise cover insurance practices, there would have been no need for Congress to emphasize in Section 501(c) that the exemption protected certain insurance practices from the scope of the statute.

Although Section 501(c) creates a limited exemption for certain practices, it does not nullify Title III's general prohibitions against discrimination in insurance coverage. It is well-established that statutory exemptions — especially exemptions from remedial statutes — must be construed narrowly.

See City of Edmonds v. Oxford House, Inc., 514 U.S. 725, 731-732 (1995); Martin v. Malcolm Pirnie, Inc., 949 F.2d 611, 614 (2d Cir. 1991), cert. denied, 506 U.S. 905 (1992). 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, 142 F.3d 58, 68, 69 (2d Cir. 1998), petition for cert. filed (May 27, 1998) (No. 97-1961). The exemption in 501(c) therefore must be read narrowly to reach only those insurance practices that are "plainly and unmistakably within its terms and spirit." A.H. Phillips, Inc. v. Walling, 324 U.S. 490, 493 (1945); accord Citicorp Indus. Credit, Inc. v. Brock, 483 U.S. 27, 35 (1987).

By its terms, the language of the exemption provides only limited protection for insurance companies. Paragraph (1) of the exemption, which applies to "insurer[s]," 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) (emphasis added). This language suggests that a disability-based denial of insurance coverage cannot qualify for the exemption of Section 501(c) if it is not justified by increased risks associated with the disability. As explained immediately below, the legislative history confirms this interpretation of Section 501(c). See pp. 17-18, infra.

2. The Legislative History Makes Clear That Title III Covers Discrimination In Insurance Coverage

Various committee reports and floor debates make clear that Title III prohibits insurance companies and other public accommodations from discriminating against individuals with disabilities in insurance coverage unless such differential treatment is justified. See 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). This legislative history reveals that prohibited discrimination includes not only an outright denial of insurance coverage, which is what the Pallozzis allege here, but also unjustified discrimination in the terms and conditions under which insurance is made available to persons with disabilities. 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, Pt. 2, 101st Cong., 2d Sess. 136 (1990); S. Rep. No. 116, 101st Cong., 1st Sess. 84 (1989). Accord H.R. Rep. No. 485, Pt. 2, 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, Pt. 2, supra, at 137; S. Rep. No. 116, supra, at 85; H.R. Rep. No. 485, Pt. 3, 101st Cong., 2d Sess. 71 (1990).[2/]

3. This Court Should Defer To The Department Of Justice's Consistent Interpretation Of Title III As Covering Unjustified Disability-Based Discrimination In Insurance Decisions

The Department of Justice has consistently construed Title III to prohibit insurers from engaging in unjustified discrimination in deciding whether to insure, and under what conditions to insure, persons with disabilities. 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

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[2/] Accord 136 Cong. Rec. 17,289-17,290 (1990) (Rep. Owens); id. at 17,291 (Rep. Edwards); id. at 17,293 (Rep. Waxman); id. at 11,475 (Rep. Hoyer); id. at 17,378 (Sen Kennedy).

Accommodations and in Commercial Facilities (July 26, 1991) (citation omitted), reprinted at 28 C.F.R. Pt. 36, App. B, § 36.212 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).

As the Supreme Court has recently made clear, the Department of Justice's interpretations of Title III are accorded great weight. "As the agency directed by Congress to issue implementing regulations, see 42 U.S.C. § 12186(b), to render technical assistance explaining the responsibilities of covered individuals and institutions, § 12206(c), and to enforce Title III in court, § 12188(b), the Department's views are entitled to deference." Bragdon v. Abbott, __ U.S. __, No. 97-156, 1998 WL 332958, at *14 (June 25, 1998). Indeed, in view of Congress's delegation of rulemaking authority to the Attorney General, 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) (internal quotation marks omitted), cert. denied, 118 S. Ct. 1184 (1998). As such, the interpretations contained in the manual are entitled to Chevron-type deference. Bragdon, 1998 WL 332958, at *14 (relying on interpretation contained in Department's Title III Technical Assistance Manual); see also 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).

This Court should defer to the Department's interpretation because it is consistent with both the plain language and legislative history of the statute. As we have previously explained, both the language and legislative history of Title III demonstrate that it was designed to reach unjustified discrimination in insurance coverage. See pp. 12-18, supra.

Allstate, however, has attacked the Department's interpretation of Title III by trying to show an inconsistency in the Department's regulations. Specifically, Allstate relied below (R. 17 at 1-3) 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. Pt. 36, App. B, § 36.307 at 640-641 (1997) (preamble to Department's regulations); 28 C.F.R. Pt. 36, App. B, § 36.302 at 632 (1997) (same). But that regulation is perfectly consistent with the Department's interpretation of Title III as reaching discrimination in insurance coverage. 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.

4. Interpreting Title III To Reach Discrimination In Insurance Coverage Is Not Inconsistent With The McCarran-Ferguson Act

Allstate argued below (R. 13 at 10-15) that the McCarran-Ferguson Act, 15 U.S.C. 1011 et seq., precludes interpreting Title III to prohibit discrimination in insurance coverage. 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 "specifically relates to the business of insurance," 15 U.S.C. 1012(b), and thus 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"). 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). Further, Section 501(c) of the ADA, which is entitled "Insurance," 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).[3/]

Second, even if the ADA did not relate to the insurance business, the McCarran-Ferguson Act would not support Allstate's

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[3/] The Third Circuit has stated in dictum that the ADA does not specifically relate to the business of insurance. Ford, 1998 WL 258386, at *11. That assertion simply cannot be squared with the Act's express references to "[i]nsurance," "insurance office," and "insurer[s]." 42 U.S.C. 12181(7)(F); id. at § 12201(c).

position because Allstate 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. Cos., 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, 295-297 (7th Cir. 1992), cert. denied, 508 U.S. 907 (1993). Allstate has not identified any state law that would either authorize or require it to discriminate against persons with disabilities in issuing insurance policies.

B. Allstate Was Acting As An Owner Or Operator Of A "Place Of Public Accommodation" When It Denied Life Insurance Coverage To The Pallozzis

Allstate argued below (R. 13 at 4-10) that it did not act as a public accommodation in denying insurance coverage to the Pallozzis, and thus is not subject to the requirements of Title III. That argument is meritless. The Pallozzis' allegations, if true, would establish that Allstate was acting as an owner or

operator of a place of public accommodation in its dealings with the Pallozzis.[4/]

Section 302(a) of the ADA prohibits certain types of disability-based discrimination by "any person who owns, leases (or leases to), or operates a place of public accommodation." 42 U.S.C. 12182(a). Allstate qualifies as a "person," which Congress has defined to include companies as well as individuals. 1 U.S.C. 1 (prescribing general rules of construction for acts of Congress). In addition, Title III specifically defines "public accommodation" to include an "insurance office" whose operations affect commerce. 42 U.S.C. 12181(7)(F). Plaintiffs' complaint alleges that Allstate "maintains offices in the Northern District of New York for the purpose of selling insurance" (JA 6 (¶ 10)), and that Allstate's "operation" of these offices "affects commerce" (JA 9 (¶ 38)). These allegations, if true, would establish that Allstate is an owner or operator of "a place of public accommodation," within the plain meaning of Section 302(a).

Moreover, the Pallozzis' allegations, if true, would establish that Allstate was acting in its capacity as an owner or operator of "a place of public accommodation" when it rejected their application for life insurance. The Pallozzis allege that they dealt directly with an Allstate representative in their attempt to obtain life insurance coverage (see JA 8 (¶¶ 24, 26-

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[4/] Although the district court did not expressly decide this issue, we raise it here because we anticipate that Allstate will reassert this argument on appeal.

32)). The alleged discrimination is thus directly linked to Allstate's operation of an insurance office that transacts business with individuals.

This case is thus distinguishable from Ford v. Schering-Plough Corp., __ F.3d __, No. 96-5674, 1998 WL 258386 (3d Cir. May 22, 1998), and Parker v. Metropolitan Life Ins. Co., 121 F.3d 1006 (6th Cir. 1997) (en banc), cert. denied, 118 S. Ct. 871 (1998), both of which rejected Title III claims against the Metropolitan Life Insurance Company (MetLife). Both courts concluded that MetLife was not subject to suit under Title III because it was not acting in its role as an owner or operator of a place of public accommodation when it issued the insurance plans that the plaintiffs alleged were discriminatory. Ford, 1998 WL 258386, at *12; Parker, 121 F.3d at 1010. The plaintiffs in Ford and Parker did not seek to purchase insurance coverage directly from the defendant insurance company or one of its agents. Instead, MetLife issued group insurance policies to the plaintiffs' employers, which then provided long-term disability benefits to the plaintiffs and their co-workers as fringe benefits of their employment. Ford, 1998 WL 258386, at *2, *12; Parker, 121 F.3d at 1010. Because the plaintiffs received the insurance coverage through their employers, they "had no nexus to MetLife's 'insurance office'" and thus were "not discriminated against in connection with a public accommodation." Ford, 1998 WL 258386, at *12; accord Parker, 121 F.3d at 1011. The Third and Sixth Circuits concluded that the plaintiffs were really

asserting employment discrimination claims, which are covered by Title I of the ADA, 42 U.S.C. 12111-12117, rather than by Title III. Ford, 1998 WL 258386, at *12; Parker, 121 F.3d at 1010.

The Pallozzis' allegations stand in sharp contrast to the facts of Ford and Parker. The Pallozzis have alleged a sufficient nexus between their denial of life insurance coverage and Allstate's operation of an insurance office. Unlike the plaintiffs in Ford and Parker, the Pallozzis tried to purchase a life insurance policy from a representative of Allstate itself. And unlike the plaintiffs in Ford and Parker, who sued their employers under Title I of the ADA for alleged employment discrimination, the Pallozzis have no plausible claim under Title I since the denial of insurance coverage did not arise in the context of their employment. The Pallozzis' only remedy under the ADA is to bring a Title III claim.

Allstate suggested below, however, that an insurance company would be covered by Title III only if customers physically enter its offices to purchase insurance coverage (see JA 17; R. 13 at 4). Dictum in a recent Third Circuit opinion also seems to adopt the same restrictive reading of Title III. See Ford, 1998 WL 258386, at *14 (public accommodations are limited to places "with resources utilized by physical access").

Contrary to the suggestions of Allstate and the Third Circuit, nothing in Title III requires that customers physically enter the premises of a business in order for it to qualify as an "insurance office." For example, an insurance company

representative may solicit business and sell insurance coverage to individuals over the telephone, through the mail, or via the Internet without inviting customers to physically enter the company's office. By engaging in the business of selling insurance coverage to individuals an insurance company is literally operating an "insurance office" that affects commerce within the meaning of Title III.

As the First Circuit has correctly recognized, it would be contrary to the statutory language, the broad remedial purposes of the ADA, and common sense to read Title III as covering only those entities that customers physically enter to purchase goods or services. Carparts, 37 F.3d at 19-20. The court correctly recognized that the list of "public accommodations" set forth in 42 U.S.C. 12181(7) "do not require 'public accommodations' to have physical structures for persons to enter." Carparts, 37 F.3d at 19. For example, Title III cites a "travel service," in addition to an "insurance office" as one of the "service establishment[s]" that qualify as a "public accommodation." 42 U.S.C. 12181(7)(F). As the First Circuit explained:

> By including "travel service" among the list of services considered "public accommodations," Congress clearly contemplated that "service establishments" include providers of services which do not require a person to physically enter an actual physical structure. Many travel services conduct business by telephone or correspondence without requiring their customers to enter an office in order to obtain their services. Likewise, one can easily imagine the existence of other service establishments conducting business by mail and phone without providing facilities for their customers to enter in order to utilize their services. It 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.

Carparts, 37 F.3d at 19.

In construing the term "place of public accommodation," this Court should adopt a broad interpretation that reflects the sweeping goals of the ADA. It is well-settled that remedial statutes are to be interpreted expansively to further their underlying goals. Jefferson County Pharm. Ass'n v. Abbott Labs., 460 U.S. 150, 159 (1983); Gomez v. Toledo, 446 U.S. 635, 639 (1980). This rule of construction applies with special force here in view of the "ADA's broad remedial purpose." Castellano, 142 F.3d at 68, 69. 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. at § 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, supra, at 99.

The interpretation proposed by Allstate would thwart these sweeping goals. Allstate's reading of Title III is particularly nonsensical in this age of advancing technology where business is increasingly conducted through the Internet or over the telephone. See Carparts, 37 F.3d at 19-20. Under Allstate's interpretation, retail establishments that take orders for goods or services over the telephone or Internet could flatly refuse to

sell their products to persons with disabilities. Such a reading of Title III would obviously thwart the goal of bringing persons with disabilities into the "economic * * * mainstream of American life." H.R. Rep. No. 485, Pt. 2, supra, at 99. See Carparts, 37 F.3d at 20.

It is irrelevant whether customers typically enter Allstate's insurance offices to seek insurance coverage or whether the Pallozzis themselves physically entered an Allstate office. By engaging in the business of selling insurance coverage to individuals, Allstate has operated an insurance office that affects commerce, and is thus covered by Title III.

C. The District Court Erred In Deciding, Without Any Factual Basis In The Record, That The Pallozzis' Disabilities Posed Risks That Justified The Complete Denial Of Life Insurance Coverage

Although the Pallozzis have stated a claim of discrimination under Title III, Allstate could nonetheless avoid liability if it were able to qualify for the exemption in Section 501(c) of the ADA, 42 U.S.C. 12201(c). As we have previously explained, Section 501(c) provides a limited exemption for some insurance practices that would otherwise constitute unlawful discrimination under Title III. See pp. 15-16, supra. In order to qualify for the protections of Section 501(c), an insurer's actions must involve the underwriting, classifying or administering of "risks." 42 U.S.C. 12201(c)(1). The language of Section 501(c)(1), when read in conjunction with the legislative history, makes clear that the exemption applies only if the alleged discrimination is justified by increased risks associated with

the plaintiff's disability. See pp. 16-18, supra. The district court thus properly recognized that "an individual may not be denied insurance coverage based on a disability unless such denial is based upon sound risk classification" (JA 20).

But the court erred in deciding — without any factual basis in the record — that the Pallozzis' disabilities created risks that justified Allstate's outright denial of life insurance coverage. The court mistakenly believed that the plaintiffs were obligated to allege facts in their complaint showing that their disabilities did not pose such risks (JA 20). In fact, the Pallozzis had no burden to plead such facts. Instead, the burden was on Allstate, if it wished to qualify for the Section 501(c) exemption, to produce objective evidence that the Pallozzis' mental conditions posed increased risks that would justify the denial of life insurance coverage.

Placing the burden on Allstate to come forward with such evidence is consistent with two well-settled principles. First, it has long been recognized that the party seeking the benefit of a statutory exemption bears the burden of producing evidence that it clearly fits within the terms of that exemption. United States v. First City Nat'l Bank, 386 U.S. 361, 366 (1967); Corning Glass Works v. Brennan, 417 U.S. 188, 196-197 (1974); Freeman v. NBC, 80 F.3d 78, 82 (2d Cir. 1996). Second, it is also well-established that the burden of production should rest with the party who has superior access to the relevant facts. See McCahey v. L.P. Investors, 774 F.2d 543, 550 (2d Cir. 1985),

citing McCormick on Evidence 950 (3d ed. 1984). See also International Bhd. of Teamsters v. United States, 431 U.S. 324, 359-360 n.45 (1977) (it is common to place burden on party that has "superior access to the proof"). It is the insurance company — not the individual applicant for insurance coverage — that will be in possession of and have control over empirical evidence showing whether a particular disability produces increased risks. Applicants for insurance will rarely, if ever, have access to such data.

In order to invoke the protections of Section 501(c)'s exemption, Allstate must produce evidence that the denial of insurance to the Pallozzis was "based on sound actuarial principles or [was] related to actual or reasonably anticipated experience." H.R. Rep. No. 485, Pt. 2, supra, at 137; S. Rep. No. 116, supra, at 85; H.R. Rep. No. 485, Pt. 3, supra, at 71. In other words, Allstate must produce objective evidence to support its claim of increased risks. Bald assertions or unsupported assumptions that a disability poses increased risks will not be sufficient to meet the burden imposed by Congress. The ADA was designed to combat such "stereotypic assumptions," which have often been used to deny equal opportunities to persons with disabilities. 42 U.S.C. 12101(a)(7) (congressional findings).

The Third Circuit, however, has asserted in dictum that Section 501(c) does not impose a duty on an insurance company to produce evidence justifying its insurance decisions. See Ford,

1998 WL 258386, at *9-*11. The court based that assertion primarily on its interpretation of the word "subterfuge" in Section 501(c). Id. at *10-*11. As previously noted, Section 501(c) provides that the terms of the exemption "shall not be used as a subterfuge to evade the purposes" of Titles I and III of the Act. 42 U.S.C. 12201(c) (emphasis added). The Third Circuit concluded that the "subterfuge" language in Section 501(c) should be given the same meaning that the Supreme Court adopted in Public Employees Retirement System of Ohio v. Betts, 492 U.S. 158 (1989), in interpreting the word "subterfuge" under the Age Discrimination In Employment Act (ADEA). The ADEA provision at issue in Betts stated, in relevant part, that it was not unlawful "to observe the terms of . . . any bona fide employee benefit plan * * * which is not a subterfuge to evade the purposes" of the Act. 492 U.S. at 165. The Court in Betts rejected the argument that an age-related reduction in employee benefits was a "subterfuge" unless the employer proved that it had a cost-based justification for such a reduction. Id. at 169-172. In light of Betts, the Third Circuit in Ford concluded that the "subterfuge" language in Section 501(c) does not require a defendant to provide evidence justifying disability-based decisions regarding insurance coverage.

But the Third Circuit's interpretation of the word "subterfuge" in Section 501(c) is irrelevant to the issue at hand. This Court need not decide in this case whether the Betts interpretation of "subterfuge" under the ADEA should govern the

meaning of the word "subterfuge" under the ADA.[5/] Even if the subterfuge provision did not appear in Section 501(c), the defendant would still have a duty to produce objective evidence that the plaintiff's disability poses increased risks. The necessity of providing a risk-based justification for disability-based discrimination arises from Section 501(c)'s reference to "risks." 42 U.S.C. 12201(c)(1). If an insurance company denies coverage for some reason unrelated to the risks posed by an applicant, then it is not "underwriting risks, classifying risks, or administering such risks," and thus has no plausible claim to the protections of Section 501(c)(1), the portion of the exemption that applies to "insurer[s]." 42 U.S.C. 12201(c)(1).

In sum, Allstate cannot qualify for the exemption of Section 501(c) unless it produces objective evidence that its denial of life insurance coverage was based on increased risks associated with the Pallozzis' disabilities. In the absence of such evidence from Allstate, it was improper for the district court, on a motion to dismiss, simply to assume that the Pallozzis' mental conditions posed unacceptable insurance risks or that such a risk assessment was the true basis for Allstate's decision.

[5/] We note, however, that the legislative history reflects that Congress intended to reject the Betts definition of "subterfuge" in enacting the ADA. 136 Cong. Rec. 17,290 (1990) (Rep. Owens); id. at 17,291 (Rep. Edwards); id. at 17,293 (Rep. Waxman); id. at 17,378 (Sen. Kennedy).

CONCLUSION

This Court should reverse the judgment of the district court.

Respectfully submitted,

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A D D E N D U M

Americans With Disabilities Act Title III
Technical Assistance Manual
§ III-3.11000 (Nov. 1993)

public health authorities, such as the U.S. Public Health Service, the Centers for Disease Control, 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,

CERTIFICATE OF SERVICE

I hereby certify that on June 30, 1998, two copies of the foregoing BRIEF FOR THE UNITED STATES AS AMICUS CURIAE, were served by Federal Express, next business day delivery, on the following counsel of record:

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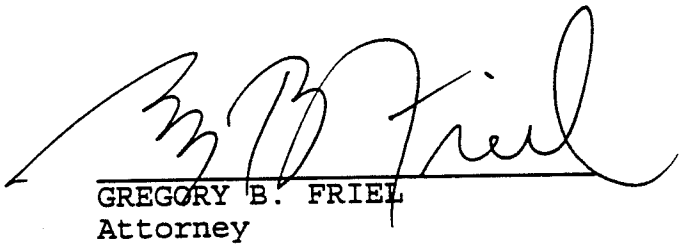

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