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The Need for Parity in Health Insurance Benefits for the Mentally and Physically Disabled: Questioning Inconsistency between Two Leading Anti-Discrimination Laws

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THE NEED FOR PARITY IN HEALTH INSURANCE BENEFITS
FOR THE MENTALLY AND PHYSICALLY DISABLED:
QUESTIONING INCONSISTENCY BETWEEN TWO LEADING
ANTI-DISCRIMINATION LAWS

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I. INTRODUCTION

“We must act . . . to retain in and return to the community the mentally ill . . . [in order] to restore and revitalize their lives.”¹ President John F. Kennedy uttered these words when addressing Congress on the issue of mental illness and mental retardation.² Following President Kennedy’s suggestion, this country has been less than successful in returning the mentally ill to the community and revitalizing their lives. While some people with mental illness may be seen functioning in and contributing to society on a daily basis, in schools, the workforce and social settings, many are without shelter or a job. While many members of the community believe that persons who are mentally ill are being taken care of and are adequately accommodated and protected by the law, they are not. Persons with mental illness face stigma and severely limited opportunities for medical treatment, which might, if successful, return them to the world that President Kennedy hoped this country would create. Lack of access to basic mental health care is a significant barrier.

While at first glance, the law appears to protect persons from being discriminated against because they are disabled, the purpose of this paper is to illustrate that significant discrimination exists in an area where protection is most needed - health insurance. Currently, health insurance providers are permitted to severely limit or even deny health insurance to persons for the sole reason that they have a mental illness, have had a mental illness, or in some extreme cases, at some point believed they had a mental illness.³ Health insurance providers are permitted to discriminate solely on the basis of disability, while this type of discrimination by employers, housing providers, and the government has been prohibited or strictly limited since the dawn of the discrimination law.

One in five Americans is affected by mental illness.⁴ According to the National Institute of Mental Health (“NIMH”), approximately 22.1% of adult Americans suffer from a mental disorder that would be diagnosable.⁵ Approximately 9.5% of the U.S. population aged eighteen and over suffer from a depressive disorder (defined by the NIMH as including major depressive disorder, dysthymic disorder, and bipolar disorder).⁶ An estimated 13.3% of Americans aged 18-54 suffer from an anxiety disorder (defined by NIMH as including panic disorder, obsessive

¹Special Message to Congress on Mental Illness and Mental Retardation, 50 Pub. Papers 137 (Feb. 5, 1963).

²*See id.*

³*See* Patrick J. Kennedy, *Why We Must End Insurance Discrimination Against Mental Health Care*, 41 HARV. J. ON LEGIS. 363 (2004).

⁴John V. Jacobi, *Parity and Difference: The Value of Parity Legislation for the Seriously Mentally Ill*, 29 AM. J.L. & MED. 185 (2003) (citing Department of Health and Human Services (HHS), MENTAL HEALTH: A REPORT OF THE SURGEON GENERAL 46 (1999), available at <http://www.surgeongeneral.gov/library/mentalhealth/home.html>).

⁵NATIONAL INSTITUTE OF MENTAL HEALTH (NIMH), NATIONAL INSTITUTE OF HEALTH, US DEPARTMENT OF HEALTH AND HUMAN SERVICES, *The Numbers Count: Mental Disorders in America*, NIH Publication No. 01-4584 available at <http://www.nimh.nih.gov/publicat/numbers.cfm> (last visited Jan. 6, 2005).

⁶*Id.*

compulsive disorder, post-traumatic stress disorder, generalized anxiety disorder, and phobias).⁷ Approximately 1.1% of American adults suffer from schizophrenia.⁸

Untreated mental illness can be devastating, and may interfere with family, employment, and quality of life in general.⁹ Despite these dramatic statistics and realities, privately insured Americans are not covered for mental health services on the same terms as they are covered for physical health services.¹⁰ This inferior coverage for mental disabilities severely reduces persons with mental illness ability to access adequate and proper medical care.¹¹ This lack of proper care further reduces disabled persons ability to hold successful and meaningful places in our society because of unemployment, homelessness, incarceration, and even early death.¹²

Discriminatory practices by the insurance industry, such as benefit limits (caps) on mental health services coverage, or complete lack of mental health care coverage fuel the disparate treatment of those with mental disabilities. These discriminatory practices have been the subject of much debate, and cases challenging those principles have not fared well in the court system.¹³ These insurance practices, which single out persons with mental illness and provide them with little or no benefits for mental health care, violate the terms of the Americans with Disabilities Act ("ADA"), and are inconsistent with other laws that seek to remedy discrimination against the disabled, such as the Fair Housing Act.

The following sections will discuss the legislative history of disability law with regard to how and why laws protect persons with disabilities. I will discuss the Americans with Disabilities Act, and its legislative history. Then, I will discuss interpretations of the Americans with Disabilities Act and the arguments commonly used for and against mental and physical illness equality in medical insurance coverage. Next, I will provide a comparison of this interpretation with interpretation of the Fair Housing Act. Finally I will suggest continuity and congruence throughout disability law to promote a system that lives up to the goals of disability protections.

II. HISTORY AND PURPOSE OF THE ADA

Long before the emergence of disability law, there have been advocates for the rights of disabled persons, and recognition of a need for policy to protect disabled individuals.¹⁴ Significant protection for persons with disabilities first surfaced in

⁷*Id.*

⁸*Id.*

⁹Jacobi, *supra* note 4, at 185.

¹⁰*Id.*

¹¹*Id.*

¹²*Id.*

¹³Jennifer Mathis, *The ADA's Application to Insurance Coverage*, BAZELON CENTER FOR MENTAL HEALTH LAW, June 2004, available at <http://www.bazelon.org/issues/disabilityrights/resources/insurance.htm>.

¹⁴Laura F. Rotheinstein, *Reflections on Disability Discrimination Policy-25 Years*, 22 U. ARK. LITTLE ROCK L. REV. 147 (2000).

1973, seventeen years prior to the passage of the ADA in 1990.¹⁵ In 1973, sections 501, 503, and 504 of the Rehabilitation Act were passed.¹⁶ Soon after, in 1975, the predecessor to the Individuals with Disability Education Act (“IDEA”) was passed.¹⁷ “These two federal statutes moved disability policy from a philosophy of support and benefits to one of rights.”¹⁸

Following the Rehabilitation Act and the IDEA, federal statutes were introduced affecting a nondiscrimination policy in voting,¹⁹ air transportation,²⁰ and housing.²¹ Both the statutes regarding air transportation and housing addressed discrimination in the private sector, which was not addressed by the Rehabilitation Act and the IDEA.²² The Rehabilitation Act and the IDEA were also especially significant because they demonstrated congressional response to judicial decisions, which continued to be the cause of amendments to the statutes during 1970-1990.²³

The policy of ensuring that mentally ill are returned to the community could only be effective if incorporated into all aspects of life.²⁴ Statutes providing protection for students so that they will receive specialized education to prepare them for college and/or the workplace would prove useless if employers were permitted to discriminate against these disabled persons after graduation.²⁵ Providing a discrimination-free work environment would also be useless if disabled persons still faced barriers in transportation and social interactions, such as eating at restaurants.²⁶ This being recognized, ADA was passed in 1990 to ensure full participation in society by individuals with disabilities.²⁷

¹⁵*Id.*

¹⁶29 U.S.C. §§ 791, 793, 794 (1994).

¹⁷20 U.S.C. §§ 1400-1491 (1994).

¹⁸Rotheinstein, *supra* note 14, at 148.

¹⁹The Voting Accessibility for the Elderly and Handicapped Act, 42 U.S.C. § 1973 (1994) (providing for accessible voting places for federal elections).

²⁰The Air Carrier Access Act of 1986, 49 U.S.C. § 41705 (1994) (subjecting airlines to nondiscrimination on the basis of disability mandates, was passed in response to the Supreme Court decision in *Dep’t of Transp. v. Paralyzed Veterans of America*, 477 U.S. 597 (1986), which held that indirect assistance to airlines does not subject them to Section 504 of the Rehabilitation Act).

²¹The Fair Housing Act Amendments of 1988, 42 U.S.C. §§ 3601-3631 (1994) (passed in part as a response to the Supreme Court decision in *City of Cleburne v. Cleburne Living Ctr. Inc.*, 473 U.S. 432 (1985), a case in which the denial of a special use permit for a group home for disabled individuals was struck down as unconstitutional. The need to have a statutory, rather than a constitutional basis, to challenge housing discrimination led to the FHAA).

²²Rotheinstein, *supra* note 14, at 148-49.

²³*Id.* at 147-48.

²⁴*Id.* at 149.

²⁵*Id.*

²⁶*Id.*

²⁷*Id.* at 149-50.

The ADA was enacted “to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities.”²⁸ The ADA addresses employment, public services, public accommodations, telecommunication, and various miscellaneous areas, one of which is health insurance.²⁹

III. THE ADA AND HEALTH INSURANCE

Over the last five years, the Supreme Court has been somewhat successful in “disabling” the ADA. From 1999 when the Court adopted a narrow understanding of the class protected by the ADA,³⁰ to 2001, when the Court held that the ADA’s employment title was not valid legislation under section 5 of the Fourteenth Amendment,³¹ the protections for the disabled have been narrowed. The narrowing effect continued in 2001-2002 (the “Disabilities Act Term”)³² when an ADA plaintiff’s claim failed against the Supreme Court’s restrictive interpretations of the ADA.³³ Critics of the Supreme Court’s analysis of both the ADA and other disability laws have argued that the Supreme Court simply does not understand that disability rights are civil rights, and that the ADA is a civil rights law.³⁴ If the ADA were widely considered to be a civil rights law, greater deference would be afforded to it. However, unlike discrimination laws based on race or sex, the Court seems to view disability discrimination law as a product of pity for the less fortunate.³⁵ Not only is this view a type of discrimination the disabled wish to avoid, but also it has been said that it is the very reason the ADA has been uniquely limited as compared to other civil rights laws.³⁶

One area in which the Court has been successful in limiting disability discrimination protection is in the field of health insurance.³⁷ The Court Justices have limited the ADA’s protections through their interpretation of the statute, prior case law, policy, and arguably, because their personal prejudices against disabled

²⁸Americans with Disabilities Act, 42 U.S.C. § 12101(b)(1) (2004).

²⁹See Americans with Disabilities Act, 42 U.S.C. § 12112 (2004) (on employment); Americans with Disabilities Act, 42 U.S.C. § 12182 (2004) (on public accommodations); Americans with Disabilities Act, 42 U.S.C. § 12201(c) (2004) (containing the “safe harbor” provision).

³⁰See generally *Sutton v. United Air Lines, Inc.*, 527 U.S. 471 (1999); *Murphy v. United Parcel Serv. Inc.*, 527 U.S. 516 (1999); *Albertson’s, Inc. v. Kirkingburg*, 527 U.S. 555 (1999).

³¹See *Bd. of Trs. of the Univ. of Alabama v. Garrett*, 531 U.S. 356, 374 (2001).

³²See Charles Lane, *O’Conner Criticizes Disabilities Law as Too Vague*, WASH. POST, Mar. 15, 2002, at A2 (referring to Justice O’Conner’s reference to “Disability Term”).

³³Samuel R. Bagenstos, *The Supreme Court, the Americans with Disabilities Act, and Rational Discrimination*, 55 ALA. L. REV. 923 (2004).

³⁴*Id.*

³⁵*Id.*

³⁶*Id.* at 924.

³⁷Mathis, *supra* note 13.

persons.³⁸ To understand the unique limitations placed, it is useful first to examine the text of the ADA and the analytical framework used by the court in the area of health insurance for all disabled persons.

A. Textual Analysis of the ADA

Since the enactment of the ADA, there has been a great deal of litigation surrounding its application to health insurance.³⁹ Specifically, litigation has focused on whether the ADA prohibits health insurers from discriminating in the types of coverage offered to persons with particular disabilities.⁴⁰ The section of the ADA addressing insurance is unclear at best. Consequently, courts have been required to interpret the language and intent of the statute, and in doing so, have significantly narrowed the ADA's protections by allowing disparity between the protections offered to the physically disabled versus the mentally disabled.⁴¹

Though the ADA has achieved significant progress for some individuals with disabilities, significant additional progress is needed.⁴² The main purpose of the ADA was to prohibit discrimination against disabled persons in employment, public services, and places of public accommodation.⁴³ While its enactment has provided significant protections for persons with disabilities, persons with mental disabilities still lack significant protection from discrimination in health insurance.⁴⁴ Titles addressing insurance in some form are Title I (employment) and Title III (public accommodations). And most directly relating to insurance is the "safe harbor" provision of Title V.⁴⁵ This section will give an overview of the ADA with respect to health insurance.

1. Title I

Health insurance benefits currently offered by many employers seem to violate Title I of the ADA on its face.⁴⁶ Most health insurance plans offered by insurers and employers provide significantly less benefits to the mentally disabled as compared with the physically disabled.⁴⁷

³⁸See generally Bagenstos, *supra* note 33.

³⁹Mathis, *supra* note 13.

⁴⁰*Id.*

⁴¹*Id.*

⁴²Steven F. Stuhlberg, Comment, *Reasonable Accommodation Under the Americans with Disabilities Act: How Much Must One Do Before Hardship Turns Undue?*, 59 U. CIN. L. REV. 1311 (1991) (noting that the ADA has been called the "Emancipation Proclamation" for individuals with disabilities).

⁴³H.R. REP. NO. 101-336 pt. 2 (1990) (reprinted in 1990 U.S.C.C.A.N. 267, 303, 419-21).

⁴⁴Stuhlberg, *supra* note 42.

⁴⁵See 42 U.S.C. § 12112; 42 U.S.C. § 12182; 42 U.S.C. § 12201(c).

⁴⁶See 42 U.S.C. § 12112.

⁴⁷Jane Byeff Korn, *Crazy (Mental Illness Under the ADA)*, 36 U. MICH. J.L. REFORM 585, 589 (2003).

Title I limits employers' ability to discriminate against disabled persons in hiring and firing decisions and obliges employers to provide reasonable accommodations for disabled individuals.⁴⁸ Title I also prohibits "limiting, segregating, or classifying a job applicant or employee in a way that adversely affects the opportunities or status of such applicant or employee because of [their] disability . . ." The statute also specifically prohibits employers from "participating in a contractual or other arrangement or relationship that has the effect of subjecting . . . a qualified applicant or employee with a disability to the discrimination prohibited by this title . . ."⁴⁹ This "includes a relationship with an organization providing fringe benefits to an employee."⁵⁰ Employer provided health insurance is a fringe benefit of employment, therefore, the ADA should prohibit employers from contracting with providers of health insurance that discriminate on the basis of disability.

Despite this seemingly clear prohibition, employers are permitted to contract with health insurance companies that limit, segregate, and classify persons based upon their disabilities in adverse ways that deny or significantly limit insurance coverage.⁵¹ Allowing employers to provide discriminatory health insurance benefits thwarts the clear purpose of the ADA.

2. Title III

Title III provides, in 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 operates a place of public accommodation."⁵²

⁴⁸42 U.S.C §12112.

⁴⁹42 U.S.C. §12112(b)(1).

⁵⁰*Id.*

⁵¹*See* 42 U.S.C. § 12201(c) (containing the "safe harbor" provision).

⁵²42 U.S.C. § 12182 (2004) in pertinent part reads:

General rule: 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.

Construction:

General prohibition.

Activities.

Denial of participation: It shall be discriminatory to subject an individual or class of individuals on the basis of a disability or disabilities of such individual or class, directly, or through contractual, licensing, or other arrangements, to a denial of the opportunity of the individual or class to participate in or benefit from the goods, services, facilities, privileges, advantages, or accommodations of an entity.

Participation in unequal benefit: It shall be discriminatory to afford an individual or class of individuals, on the basis of a disability or disabilities of such individual or class, directly, or through contractual, licensing, or other arrangements 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.

Separate benefit: It shall be discriminatory to provide an individual or class of individuals, on the basis of a disability or disabilities of such individual or class, directly, or through contractual, licensing, or other arrangements with a good, service,

“Public accommodation” is defined only through a list of specific entities that are considered public accommodations for purposes of Title III, one of which is an “insurance office.”⁵³ Under Title III, discrimination includes “denial of the opportunity of the individual or class to participate in or benefit from the goods, services, facilities, privileges, advantages, or accommodations of an entity.”⁵⁴ It seems clear that disabled persons are protected from discrimination in places of public accommodation, including insurance offices. In order to be nondiscriminatory, insurance offices must not deny an individual or class the opportunity to participate in or benefit from the good or service provided. As it will be described, the current state of the law is far from consistent with the plain language of the statute.

Further, Title III states that the benefits afforded to the disabled must be equal to the benefits afforded to other individuals unless “action is necessary to provide . . . a good, service . . . accommodation, or other opportunity that is *as effective* as that provided to others.”⁵⁵ The distinction between “equal” and “equally effective” is made to indicate that something more than equality is demanded by the law. It is easier to see this distinction with regard to physical disabilities. For instance, stating that all persons are welcome to attend a workshop on the second floor would provide nothing to a person who is wheelchair bound if there is no elevator. Similarly, if a child with a developmental delay, such as Attention Deficit Disorder (ADD) is given a written science test identical to that given other students, it would be equal, but it would not be equally effective as that provided to other students.⁵⁶ Accommodations are made to ensure that the students are tested on the same playing field, such as having the test read aloud.⁵⁷ Tests and procedures cannot be given in an equal manner; if they are to accommodate, they must be different to ensure that testing will be equally as effective for the disabled child.⁵⁸

Disabled persons should receive the same sort of accommodation in health insurance to ensure equally as effective goods and services are being received. Current practices in the insurance arena in this country appear to ignore these norms and mandates. Insurance companies are not providing coverage to mentally disabled persons that is equal or as equally as effective as coverage provided to the physically disabled or people with no disability.

facility, privilege, advantage, or accommodation that is different or separate from that provided to other individuals, unless such action is necessary to provide the individual or class of individuals with a good, service, facility, privilege, advantage, or accommodation, or other opportunity that is as effective as that provided to others.

⁵³42 U.S.C. § 12181(7).

⁵⁴42 U.S.C. § 12182(b)(1)(A)(i).

⁵⁵*Id.* at § 12182(b)(1)(A)(iii) (emphasis added).

⁵⁶Interview with Megan Ritz, Special Education Teacher, West Geauga Local Schools, in South Euclid, Ohio (Jan. 13, 2005).

⁵⁷*Id.*

⁵⁸*Id.*

3. Title V, The Safe Harbor Provision

Title V contains a significant provision, commonly known as the safe harbor provision.⁵⁹ On its face, the safe harbor provision provides insurance companies with the authority to discriminate when administering health care coverage.⁶⁰ Insurers, medical service companies, and similar organizations are not prohibited or restricted by Titles I through IV of the ADA with regard to insurance.⁶¹ Insurance companies are free to act without the ADA's restraints in underwriting risks, classifying risks, or administering risks when evaluating potential clients.⁶²

While the "safe harbor" provision seems to give insurers the ability to discriminate, it contains a limitation that courts have interpreted with difficulty.⁶³ The limitation states that the provision "shall not be used as a subterfuge to evade the purposes of title [titles] I and III."⁶⁴ The Supreme Court has described "subterfuge" as the intent to serve the purpose of discriminating.⁶⁵ It appears that insurance companies can discriminate, but they cannot take advantage of their exemption in a way that would show a discriminatory intent under the previous provisions of the ADA.

Legislative history describes the safe harbor provision as providing that a disabled person cannot be denied insurance or be subjected to different terms of the plan based on his or her disability alone, so long as the disability does not carry any increased risks.⁶⁶ The refusal or limitation must be based on sound actuarial principles or must be related to actual or reasonably anticipated experience.⁶⁷ The

⁵⁹42 U.S.C. § 12201(c) (2004) reads:

Insurance. Titles I through IV of this Act shall not be construed to prohibit or restrict—

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; or

a person or organization covered by this Act from establishing, sponsoring, observing or administering the terms of a bona fide benefit plan that are based on underwriting risks, classifying risks, or administering such risks that are based on or not inconsistent with State law; or

a person or organization covered by this Act from establishing, sponsoring, observing or administering the terms of a bona fide benefit plan that is not subject to State laws that regulate insurance.

Paragraphs (1), (2), and (3) shall not be used as a subterfuge to evade the purposes of title [titles] I and III [42 USCS §§ 12111 et seq., 12181 et seq.].

⁶⁰*Id.*

⁶¹*Id.* at § 12201(c)(1).

⁶²*Id.* at § 12201(c)(2).

⁶³*Id.* at § 12201(c).

⁶⁴*Id.*

⁶⁵*See* Pub. Employees Ret. Sys. v. Betts, 492 U.S. 158 (1989) (describing the term "subterfuge" with respect to non-fringe-benefit aspect of an employment relationship).

⁶⁶H.R. REP. No. 101-485 at 137 (1990) (reprinted in 1990 U.S.C.C.A.N. 267, 419).

⁶⁷*Id.*

legislature gives an example of a blind person, stating that she may not be denied coverage based on her blindness if there were no independent or actual risk classifications.⁶⁸ Title V's safe harbor provision appears to undermine the very purpose for which the ADA was enacted. Because risk is inherent to disability, risk should not be a determinative factor on whether or not a person can be discriminated against in providing insurance benefits.

B. Interpretations of the ADA

Plaintiffs challenging insurance discrimination in general under the ADA have not been successful.⁶⁹ Courts have offered limited protection of dubious worth to disabled individuals with regard to insurance policy coverage.⁷⁰ Ten federal circuit courts have held that employers or insurance companies are not required to provide plans that cover all disabilities equally.⁷¹ Similarly, district courts addressing the issue have found that unequal insurance benefits do not constitute an ADA violation.⁷² The following sub-sections will discuss the various analyses used by courts in rejecting these general claims.

⁶⁸*Id.*

⁶⁹Mathis, *supra* note 13.

⁷⁰*See* McNeil v. Time Ins. Co., 205 F.3d 179, 187-88 (5th Cir. 2000) (holding that insurance providers must offer the same product to all potential subscribers); Kimber v. Thiokol Corp., 196 F.3d 1092, 1101-02 (10th Cir. 1999) (holding that employers must offer every employee the same plan, regardless of their current or future disability status); Pallozzi v. Allstate Life Ins. Co., 198 F.3d 28 (2d Cir. 1999) (holding that Title III guarantees more than mere physical access to an insurance agency and therefore insurers cannot refuse to issue a life insurance policy because of the purchaser's disability status); Ford v. Schering-Plough, Corp., 145 F.3d 601 (3d Cir. 1998) (noting that employers must offer every employee the same plan, regardless of their current or future disability status); Carparts Distribution Ctr., Inc. v. Automotive Wholesaler's Assoc'n, 37 F.3d 12, 19-20 (1st Cir. 1994) (holding that "public accommodation" within the meaning of Title III of the ADA is not limited to physical structures and cannot exclude certain disabilities from coverage).

⁷¹*See* McNeil, 205 F.3d at 188; Weyer v. Twentieth Century Fox Film Corp., 198 F.3d 1104, 1115 (9th Cir. 2000); EEOC v. Aramark Corp., 208 F.3d 266 (D.C. Cir. 2000) (rejecting an ADA claim challenging an employer's adoption of an insurance cap on coverage of an AIDS-related treatment on the ground that plaintiff was no longer an employee when the discrimination in post-employment benefits occurred, but Gonzales was later overruled by Johnson v. K Mart Corp., 273 F.3d 1035 (11th Cir. 2001)); EEOC v. Staten Island Sav. Bank, 207 F.3d 144, 148 (2d Cir. 2000); Kimber, 196 F.3d at 1101-02; Lewis v. K Mart Corp., 180 F.3d 166 (4th Cir. 1999); Doe v. Mutual of Omaha Ins. Co., 179 F.3d 557 (7th Cir. 1999); Rogers v. Dep't of Health & Envir. Control, 174 F.3d 431, 436 (4th Cir. 1999); Ford v. Schering-Plough Corp., 145 F.3d 601, 608 (3d Cir. 1998); Parker v. Metropolitan Life Ins. Co., 121 F.3d 1006 (6th Cir. 1997); Moddero v. King, 82 F.3d 1059 (D.C. Cir. 1996); EEOC v. CNA Ins. Co., 96 F.3d 1039, 1044 (7th Cir. 1996); Krauel v. Iowa Methodist Med. Ctr., 95 F.3d 674, 678 (8th Cir. 1996).

⁷²First Circuit:

Witham v. Brigham & Women's Hospital, Inc., Civ. No. 00-268-M, 2001 U.S. Dist. LEXIS 7027 (D.N.H. May 31, 2001); Wilson v. Globe Specialty Prods., Inc., 117 F. Supp. 2d 92 (D. Mass. 2000); Pelletier v. Fleet Fin. Group, Inc., 2000 U.S. Dist. LEXIS 16456 (D.N.H. Sept. 19, 2000); Connors v. Maine Med. Ctr., 42 F. Supp. 2d 34 (D. Me. 1999). *But see* Boots

1. Disability-Based Distinctions

Courts have determined that not all disability-based distinctions are discriminatory under the ADA.⁷³ Many insurance plans contain distinctions based on disabilities, providing varying coverage amounts between both disabled persons versus non-disabled persons, and between different types of disabilities.⁷⁴ In determining what is and is not a disability-based distinction, the courts have generally narrowed the protections of the ADA.⁷⁵

Although normally it is impermissible to treat persons with one class of disabilities differently from persons with another class of disabilities, courts have permitted distinction between physical and mental illness in the health insurance context.⁷⁶ One court justified the disparity by simply stating that insurers have historically made distinctions in offering health and disability coverage.⁷⁷ Further justification is found in the Equal Employment Opportunity Commissions' (EEOC) 1993 Interim Guidance on Health Insurance.⁷⁸

Currently, distinctions between mental and physical disabilities are not considered disability-based distinctions, even though a significantly "lower level of benefits is provided for the treatment of mental/nervous conditions than is provided for the treatment of physical conditions."⁷⁹ The EEOC reasons that this distinction is broad and will have an impact on both individuals with and without a disability; therefore, it does not intentionally discriminate on the basis of disability.⁸⁰ What the

v. Northwestern Mut. Life Ins. Co., 77 F. Supp. 2d 211 (D.N.H. 1999) (denying motion to dismiss because capping disability benefits for mental illnesses at 24 months while providing such benefits for physical illnesses until the age of 65 could give rise to a claim of discrimination under Title III).

Fifth Circuit:

Fermin v. Conseco Direct Life Ins. Co., SA-98-CA-0943, 2001 U.S. Dist. LEXIS 6204, *36-40 (W.D. Tex. May 1, 2001) (extending the holding in *McNeil v. Time Insurance Co.*, 205 F.3d 179, 199 (5th Cir. 2000), which held that a health insurance plan that limited coverage for AIDS to \$10,000 did not violate the ADA, to a long-term disability plan that had different coverage for mental and for physical disabilities); *Templet v. Blue Cross/Blue Shield of La.*, CA-99-1400, 2000 U.S. Dist. LEXIS 15605 (E.D. La. Oct. 19, 2000).

Eleventh Circuit:

World Ins. Co. v. Branch, 966 F. Supp. 1203 (N.D. Ga. 1997).

⁷³*Mathis*, *supra* note 13.

⁷⁴*Id.*

⁷⁵*Id.*

⁷⁶*Id.*

⁷⁷*See Weyer*, 198 F.3d at 1116 (citing *Rogers*, 174 F.3d at 435).

⁷⁸*See* Equal Employment Opportunity Commission Interim Guidance on Application of ADA to Health Insurance, Daily Lab. Rep. (BNA) No. 109 (June 8, 1993), available at <http://www.eeoc.gov/policy/docs/health.html> [hereinafter EEOC Guidance].

⁷⁹*See Krauel*, 95 F.3d at 678 (quoting EEOC's Interim Guidance).

⁸⁰*See* EEOC Guidance, *supra* note 78.

EEOC and the courts following EEOC guidance do not note is, though there are non-disabled individuals who *may* be adversely affected by this distinction, disabled persons will absolutely be affected.

Disability-based distinctions in insurance coverage allow insurance companies to discriminate against individuals with certain disabilities by providing them with little or no insurance coverage.⁸¹ These distinctions have a discriminatory effect upon the disabled, as they are the vast majority of those receiving the inferior coverage.⁸² Courts must not rely on the EEOC's guidance or similar tools, as they do not properly evaluate the effect that disability-based distinctions have on the disabled.

2. Public Accommodations

Separate and unequal benefits in places of public accommodation are disallowed under Title III.⁸³ Access to insurance benefits should be considered a public accommodation, and therefore, neither separate, nor unequal benefits should be allowed under the ADA.

Plaintiffs asserting that unequal insurance benefits violate Title III of the ADA have seen varying results.⁸⁴ Three circuits have found that Title III does not apply to insurance products, because while the physical premises of an insurance office are subject to Title III, the products offered by the insurer are not.⁸⁵

The First and Second circuits have found that Title III of the ADA does apply to the coverage provided by insurance policies.⁸⁶ These courts provided some protection to the disabled, but the extent of that protection is still very unclear.⁸⁷ While the First Circuit held that Title III does apply to the sale of insurance, regardless of whether the individual actually enters the structure of an insurance office, it did not decide whether Title III applies to the terms and conditions contained in that policy.⁸⁸ The Second Circuit somewhat addressed what the First Circuit left open, but with a limiting effect.⁸⁹ The second circuit held that "an entity covered by Title III is not only obligated . . . to provide disabled persons with physical access, but is also prohibited from refusing to sell them its merchandise by reason of discrimination against their disability."⁹⁰ This ruling states only that the insurance company may not refuse to sell, it does not state that they must sell

⁸¹Susan Nanovic Flannery, *Employer Health-Care Plans: The Feasibility of Disability-Based Distinctions Under ERISA and the Americans With Disabilities Act*, 12 HOFSTRA LAB. & EMP. L.J. 211, 215 (1995).

⁸²*Id.*

⁸³42 U.S.C. § 12182.

⁸⁴Mathis, *supra* note 13.

⁸⁵See *Ford*, 145 F.3d at 614; *Parker*, 121 F.3d at 1014; *Lenox*, 149 F.3d at 453; *Weyer*, 198 F.3d at 115.

⁸⁶*Pallozzi*, 198 F.3d at 33; *Carparts Disrib. Ctr.*, 37 F.3d at 19.

⁸⁷Mathis, *supra* note 13.

⁸⁸*Id.* (citing *Carparts Disrib. Ctr.*, 37 F.3d at 20).

⁸⁹*Pallozzi*, 198 F.3d at 32-33.

⁹⁰*Id.*

packages to disabled individuals that are as effective as those provided to non-disabled individuals.⁹¹ Overall, the courts have generally concluded that as long as the same benefit package is provided to everyone, even though that package may provide very different coverage for mental versus physical disabilities, the ADA has not been violated.⁹² Thus, though a claim based on total exclusion from benefits might succeed, a claim based on inferior mental health benefits is much less likely to succeed.⁹³

Though circuits are split as to whether disabled individuals have a claim under Title III, there is no controversy with regard to insurance benefits that are equal in terms but not in effect.⁹⁴ Title III requires that equal and/or equally effective accommodations be provided to those who are disabled.⁹⁵ Since insurance coverage is considered a public accommodation, courts should follow a Title III analysis and require insurance coverage that is either equal in terms or effect, whichever provides the individual with full and equal enjoyment of the service. By only offering a claim under Title III when there has been a total exclusion from benefits, and not considering the equality of terms and effect of the benefit provided, the courts have significantly limited the ADA's protection.⁹⁶

3. The Safe Harbor Provision

Historically interpretations of the safe harbor provision have severely limited plaintiff's ability to use the ADA to force employers and insurers to offer equal and adequate benefits to persons with disabilities.⁹⁷ The safe harbor provision in Title V provides an exemption from the ADA in "establishing, sponsoring, observing or administering the terms of a bona fide benefit plan that are based on underwriting risks, classifying risks, or administering such risks . . .".⁹⁸ Essentially, as long as a disabled person is disabled enough to produce a real financial risk, they can be discriminated against because the safe harbor provision provides this outlet. To qualify for the safe harbor, the plan must be consistent with existing state law,⁹⁹ and cannot be used as "subterfuge" to evade the purpose of previous titles of the ADA.¹⁰⁰

⁹¹*Id.*

⁹²*Ford*, 145 F.3d at 608; *Palozzi*, 198 F.3d at 33.

⁹³*Mathis*, *supra* note 13.

⁹⁴Equal in terms means that, on the face of the insurance package, all terms are equal. Equal in effect means that the effect of the terms is equal. (For example, an employer offers an insurance plan that contains a \$10,000 cap on the treatment of physical conditions. This exact plan is offered to all employees; therefore, it is equal in its terms. However, one employee has cancer and the treatment of her physical conditions is sure to exceed \$10,000. The effect of this benefit is now unequal because one employee will not receive the benefit as all other employees will.)

⁹⁵42 U.S.C. § 12182.

⁹⁶*Palozzi*, 198 F.3d at 32-33.

⁹⁷*Mathis*, *supra* note 13.

⁹⁸42 U.S.C. § 12201(c).

⁹⁹*Id.*

¹⁰⁰*Id.*

The EEOC states that “subterfuge refers to disability-based disparate treatment that is not justified by the risks or costs associated with the disability.”¹⁰¹ Plaintiffs have used this definition to argue that the safe harbor provision is inapplicable where differences in benefits are not justified by actuarial data. Courts have rejected this argument finding that there is no requirement that insurers provide actuarial justifications for differences in benefits.¹⁰²

Some courts have read the safe harbor provision more broadly than the EEOC has by defining subterfuge as a “scheme, plan, stratagem, or artifice of evasion.”¹⁰³ Consequently, these courts have found subterfuge only when the employer or insurer has engaged in intentional conduct in order to carry out some non-insurance related discrimination.¹⁰⁴ Courts placing an intentional requirement within the definition of “subterfuge” have narrowed the provision beyond what was originally intended.¹⁰⁵

4. The Narrowing Effect

In general, our society has come to know two major themes about health insurance. First, health insurance is important, and second, having it is good.¹⁰⁶ For a person who is disabled, “important” is a term that severely understates the value of this essential, and just “having it” is not good enough.¹⁰⁷ Disabled persons face

¹⁰¹See EEOC Guidance, *supra* note 78, at III(c)(2).

¹⁰²*Ford*, 145 F.3d at 611; *see also Leonard F.*, 199 F.3d at 101-05 (refusing to extend subterfuge clause to policies created before the adoption of the ADA); *Moddermo*, 82 F.3d at 1064 (refusing to extend subterfuge clause to policies created before the adoption of the ADA); *Aramark Corp.*, 208 F.3d at 271-272 (refusing to extend subterfuge clause to policies created before the adoption of the ADA); *Krauel*, 95 F.3d at 679 (rejecting the EEOC guidance on subterfuge because it is “at odds” with the ADA); *Weyer*, 198 F.3d at 1115 (ruling for defendant on basis of safe harbor provision without applying subterfuge clause). *But see Pallozzi*, 198 F.3d at 36 (“[T]he subterfuge clause suggests that, notwithstanding compliance with state law, Titles I and III do apply to insurance practices where conformity with state law is used as a subterfuge to evade their purposes.”); *Zamora-Quezada v. Health Texas Med. Group of San Antonio*, 34 F. Supp. 2d 433, 444 (W.D. Tex. 1998) (presuming safe harbor provision is applicable where defendants engaged in financial practices that created cost-cutting incentives to delay or deny services in order to force higher-cost individuals with disabilities to go elsewhere, to prevail defendants would have to establish a bona fide benefit plan engaged in lawful risk assessment; motion for dismissal or summary judgment denied because record does).

¹⁰³See *Ford*, 145 F.3d at 611 (reading based on the Age Discrimination in Employment Act’s definition of the term, as construed by the Supreme Court in *Pub. Employees Ret. Sys. of Ohio v. Betts*, 492 U.S. 158 (1989)).

¹⁰⁴See *Mathis*, *supra* note 13.

¹⁰⁵*Id.*

¹⁰⁶See generally, Symposium, *Paths to Universal Health Insurance: Progressive Lessons from the Past for the Future*, 2004 U. ILL. L. REV. 205 (2004).

¹⁰⁷Mitchell LaPlante, *Health Insurance Coverage of People with Disabilities in the U.S.*, U.S. Department of Education, National Institute of Disability and Rehabilitation Research, Number 7 (May 1994).

serious challenges because of their distinct and substantial need for health care.¹⁰⁸ People with mental and/or physical disabilities are more likely to have low incomes, be older, be women, and are much less likely to be employed.¹⁰⁹ They have particular needs and should have access to the health care system with adequate health insurance, while encountering the fewest barriers.¹¹⁰ Other than claiming outside of the ADA,¹¹¹ successful challenges are usually based on total exclusions from insurance rather than the inability to attain adequate and proper health insurance due to insurance company discrimination.¹¹² Courts have not found any provision of the ADA to be applicable to the terms of health insurance plans. Consequently, disabled individuals are severely limited in their ability to succeed on claims under the ADA with respect to discriminatory practices by insurance companies. The following sections will discuss health insurance discrimination against the mentally disabled and the effect of that discrimination, as the mentally disabled are among the most widely effected by narrow interpretations of the ADA.

IV. THE ADA'S NEW OUTCAST: THE MENTALLY DISABLED

Over the past thirty years, the United States has made significant progress in the field of disability rights, most notably through the ADA.¹¹³ Though progress has been made, there is still widespread discrimination against persons with mental disabilities in the United States.¹¹⁴ Though experts in the field have pushed hard for disability rights to be viewed as civil rights, the state of our law is far from this ideal.¹¹⁵ As discussed above, our court system barely considers disability rights to be civil rights, and without this recognition disabled individuals are disadvantaged. The ADA has been much more effective for the physically disabled than the mentally disabled.¹¹⁶

¹⁰⁸Kristina Hanson, *Uncovering the Health Challenges Facing People with Disabilities: The Role of Health Insurance*, The People-to-People Health Foundation (November 2003) (citing J.A. Meyer and P.J. Zeller, *Profiles of Disability: Employment and Health Coverage*, Washington: Kaiser Commission on Medicaid and the Uninsured (September 1999)).

¹⁰⁹*Id.* (recalling the findings of the survey on which her article is based).

¹¹⁰*Id.*

¹¹¹There may be available action under state anti-discrimination laws, contract theories, state insurance claims, and state mental health parity laws.

¹¹²*See Anderson v. Gus Mayer Boston Store of Delaware*, 924 F. Supp. 763 (E.D. Tex. 1996) (holding that safe harbor provision is not applicable in cases of total denial of insurance; a complete denial is a *per se* violation of the ADA's mandate that employers provide individuals with disabilities equal access to insurance coverage).

¹¹³Michael Posner, *The Human Rights of Persons with Intellectual Disabilities: Different but Equal*, 63 MD. L. REV. 203 (2004).

¹¹⁴*Id.*

¹¹⁵*Id.*

¹¹⁶*See Jacobi, supra note 4*, at 186.

A. Allowable Insurance Discrimination Against the Mentally Disabled

Under the ADA, a person is disabled if he or she has an impairment that substantially limits one or more major life activities, if he or she has a record of such an impairment or is regarded as having such an impairment.¹¹⁷ The statute also describes who exactly is covered, and from a plain textual reading of the statute, all provisions apply to the mentally disabled as well as the physically disabled.¹¹⁸

The text of the ADA appears to disallow disparity in health insurance benefits between the mentally and physically disabled.¹¹⁹ For one, employers may not exclude or deny equal jobs or benefits to a disabled person under the ADA.¹²⁰ It also bars discrimination that denies the full and equal enjoyment of the goods and services of places of public accommodation to persons with disabilities (which includes an insurance office).¹²¹ Mental disabilities such as schizophrenia, attention deficit disorder, and autism clearly limit life activities, and these persons are regarded as having a disability. Though the mentally disabled can be just as disabled as the physically disabled, recent interpretations ensure that only the physically disabled or, in some cases, the severely mentally impaired, will be covered.¹²² Common perceptions and prejudices often exclude the “less” mentally disabled from this “lucky” group of severely mentally impaired individuals.¹²³

Current health insurance policies overtly discriminate against the mentally disabled. Often, health insurance policies do not cover mental health care at all, and if they do, there is great disproportion in the quality and duration of mental versus physical care. One popular method of discrimination against the mentally disabled is time limits on treatment of mental disabilities (durational caps).¹²⁴ They are usually for one or two years, at which point coverage for mental health services is simply cut off. Sometimes this is hinged on whether or not the covered person is currently hospitalized for the condition.

One insurer had a uniform policy of denying disability insurance to anyone who had received *any* mental health services, such as seeing a therapist within two years

¹¹⁷42 U.S.C. § 12102(2)(A).

¹¹⁸*Id.*

¹¹⁹*See* 42 U.S.C. § 12112 (on employment); 42 U.S.C. § 12182; 42 U.S.C. § 12201(c) (containing the “safe harbor” provision).

¹²⁰*See* 42 U.S.C. § 12112.

¹²¹*See* 42 U.S.C. § 12182.

¹²²*See* Jacobi, *supra* note 4, at 185.

¹²³*See* *Toyota Motor Mfg. Ky., Inc. v. Williams*, 534 U.S. 184 (2002) (reversing a decision that found an employee suffering from “carpal tunnel syndrome, myotendinitis, and thoracic outlet compression” disabled in part because the lower court disregarded evidence that the employee was capable of engaging in household chores such as bathing and brushing her teeth); *Sutton v. United Air Lines, Inc.*, 527 U.S. 471 (1999) (rejecting a claim that an employee denied an opportunity on the basis of a physical impairment was “regarded as” disabled unless the employer subjectively assessed the impairment as substantially limiting major life activities).

¹²⁴*Ford v. Schering-Plough Corp.*, 145 F.3d 601 (3d Cir. 1998).

of applying for the insurance.¹²⁵ Another precludes coverage for anyone with an occurrence of bipolar disorder more than twice in a lifetime or once within five years of applying for the policy.¹²⁶ Another astonishing example includes a policy that denied coverage to “applicants who report having received treatment for a mental or nervous condition, regardless of seriousness, within twelve months prior to application.”¹²⁷ Whether the courts or insurance companies want to recognize it, overt discrimination in the insurance arena is very present and persistent.

Various circuits have addressed the issue of disparity between mental and physical disabilities in health insurance. Notable circuit decisions include the Third Circuit’s 1998 decision finding that the ADA does not contain a parity requirement for mental and physical disability benefits.¹²⁸ The court held, “[s]o long as every employee is offered the same plan regardless of that employee’s contemporary or future disability status, then no discrimination has occurred even if the plan offers different coverage for various disabilities.”¹²⁹ The court also opined that the ADA does not require equal coverage for every type of disability, and if this requirement did exist, it would destabilize the insurance industry.¹³⁰ In the case of a state’s long-term disability plan that included a one year cap for mental health care, the Fourth Circuit held that the ADA does not require equal benefits for mental and physical disabilities, nor does it mandate that the plan sponsors justify risk classification with actuarial data.¹³¹

These and similar holdings have been justified with the legislative history of the ADA.¹³² These committee reports have expressed the view that “employee benefits plans should not be found to be in violation of [the] legislation . . . simply because they do not address the special needs of every person with a disability.”¹³³ Courts also looked to the EEOC’s interim guidance on the ADA’s application to health insurance.¹³⁴ EEOC’s guidance offers little support for equality. It states, health insurance plans distinguishing between the benefits provided for the treatment of physical and mental conditions do not violate the ADA.¹³⁵

The Sixth Circuit ruled on the issue in the widely cited case, *Parker v. Metropolitan Life Insurance Company*.¹³⁶ In *Parker*, the plaintiff/employee suffered

¹²⁵Goldman v. Standard Ins. Co., 341 F.3d 1023 (9th Cir. 2003).

¹²⁶Doukas v. Metropolitan Life Ins., 950 F. Supp 422 (D.N.H. 1996).

¹²⁷Winslow v. IDS Life Ins. Co., 29 F. Supp. 2d 557 (D. Minn. 1998).

¹²⁸*Ford*, 145 F.3d at 610.

¹²⁹*Id.* at 608.

¹³⁰*Id.*

¹³¹Rogers v. Dep’t of Health & Envtl. Control, 174 F.3d 431, 432, 437 (4th Cir. 1999).

¹³²*Id.* at 434 (citing S. Rep. No. 101-116, at 85 (1989); H.R. Rep. No. 101-485, at 137 (1990), reprinted in 1990 U.S.C.C.A.N. 267, 420).

¹³³*Id.*

¹³⁴See generally EEOC Guidance, *supra* note 78.

¹³⁵*Id.* at Sec. 8.

¹³⁶*Parker*, 121 F.3d at 1006.

from severe depression. The employee challenged her employer's long-term disability plan, which capped mental disability benefits at one year unless the insured was hospitalized.¹³⁷ The very same plan provided benefits for physical disability care until age sixty-five.¹³⁸ The court held that the ADA only prohibits discrimination between the disabled and the non-disabled, not between various disabilities.¹³⁹

In a Seventh Circuit decision, an employee suffering from severe depression and bipolar disorder challenged her employer-provided plan that also capped mental disability benefits at two years while providing physical health benefits to the age of sixty-five.¹⁴⁰ The court stated that, though the great disparity in long-term benefits between the physically versus the mentally disabled "may or may not be an enlightened way to do things," the disparity was not discriminatory.¹⁴¹ The court admitted the narrow scope of the ADA with regard to the inferior coverage offered to persons with mental disabilities, but ultimately found that the distinction between physical and mental health care coverage was not in violation of the ADA.¹⁴² Remarkably, the court further stated, "although such distinction may have a greater impact on certain individuals with disabilities, they do not intentionally discriminate on the basis of disability and do not violate the ADA."¹⁴³ We must ask ourselves, how much more intentional can written provisions in insurance policies that limit and exclude particular disabled persons from an opportunity to attain health insurance be?

The Ninth Circuit offered an offensively simple approach to the complex and important issue of mental illness discrimination in health insurance. In similar facts as the Sixth and Seventh Circuit decisions, the court found that "there is no discrimination under the [ADA] where disabled individuals are given the same opportunity as everyone else."¹⁴⁴ As long as insurance distinctions are applied to all employees, then they cannot be discriminating.¹⁴⁵ Furthermore, in seeming support of insurance company concerns, the Ninth Circuit went on to support its holding by stating, "[i]nsurers have historically and consistently made distinctions between mental and physical illness in offering health and disability coverage."¹⁴⁶ Is the court really using a historical basis to justify their determination? How simple the law would be, if history and consistency were truly our only precedent, for the people of this country would have not a single civil right.

¹³⁷*Id.*

¹³⁸*Id.*

¹³⁹*Id.* at 1015-16.

¹⁴⁰*EEOC v. CAN Ins. Co.*, 96 F.3d 1039, 1041 (7th Cir. 1996).

¹⁴¹*Id.* at 1044.

¹⁴²*Id.* at 1045.

¹⁴³*Id.*

¹⁴⁴*Weyer v. Twentieth Century Fox Film Corp.*, 198 F.3d 1104, 1116 (9th Cir. 2000).

¹⁴⁵*Id.*

¹⁴⁶*Id.*

The Tenth Circuit, in similar facts and with the support of these various circuits also found in favor in the defendant/employer.¹⁴⁷ The court reasoned that even though the plan does make a distinction between different types of disabilities, this is far different than an employee facing differential treatment due to her disability.¹⁴⁸ The Tenth Circuit clearly has missed the point that not only is this type of discrimination the very essence of differential treatment, but is one of the worst kind. The Tenth Circuit appears to be comparing a demotion or name-calling to the denial of health insurance benefits.

When addressing similar issues, some circuits have been confronted with §504 of the Rehabilitation Act. A plaintiff in the District of Columbia Circuit claimed that her employer provided health insurance plan violated section 504 of the Rehabilitation Act in that the plan placed a cap of \$75,000.00 for mental health care, and no similar limit existed for physical health benefits.¹⁴⁹ Section 504 states, “No otherwise qualified individual with a disability in the United States . . . shall, solely by reason of her or his disability, be excluded from . . . participation in, be denied the benefits of, or be subjected to discrimination under any . . . program or activity conducted by an executive agency”¹⁵⁰ Despite the plain language of Section 504, the court found that disparities in health insurance coverage between the mentally and physically disabled were no different than generalized limits, which are permissible.¹⁵¹

These decisions have destroyed what little protection is provided to persons with mental health disabilities. The lack of coverage by insurance companies and disregard of the problem by courts may largely be due to the very prejudices and discriminatory practices creators of the ADA wished to avoid. Mental illness is often viewed not as a disease, but rather a personal weakness or lack of character.¹⁵² Widespread lack of knowledge about mental diseases and disabilities feeds much of the avoidance, disregard and prejudice against the mentally disabled.¹⁵³ This widespread lack of knowledge clearly exists within the insurance industry and the court system.

B. Effects on Health

Not only have the recent decisions resulted in further discrimination against the disabled, they have an adverse effect on mental health. The National Institute of Mental Health agrees that the majority of people with a mental disorder can be

¹⁴⁷*Kimber*, 196 F.3d at 1101-02.

¹⁴⁸*Id.*

¹⁴⁹*Modderno*, 82 F.3d at 1060.

¹⁵⁰29 U.S.C. § 794(a) (2001).

¹⁵¹*Modderno*, 82 F.3d at 1062.

¹⁵²Pamela Signorello, *The Failure of the ADA: Achieving Parity with Respect to Mental and Physical Health Care Coverage in the Private Employment Realm*, 10 CORNELL J. L. & PUB. POL’Y 349 (2001).

¹⁵³*Id.* at 371.

diagnosed and effectively treated through psychotherapy and medication.¹⁵⁴ Many people fail to recognize that mental illness is a disease of the brain.¹⁵⁵ “Brain research demonstrates that disorders as different as stroke, anxiety disorders, alcohol addiction, anorexia, learning disabilities, and Alzheimer’s disease all have their roots in the brain.”¹⁵⁶ The Institute further states, “Every American will be affected at some point in his or her life, either personally or by a family member’s struggle, with a brain disorder.”¹⁵⁷ Though mental illness it is often trivialized and is left untreated because of this misconception, effective treatments are available for almost all mental disorders, especially those most common, such as anxiety disorder.¹⁵⁸ Untreated, a mental brain disorder usually becomes more and more disabling, and eventually can lead to severe depression, alcoholism, drug use, or commonly suicide.¹⁵⁹

Research has shown that more than 90 percent of people who commit suicide have depression or another diagnosable mental or substance abuse disorder, often in combination with other mental disorders.¹⁶⁰ The majority of people “who have received treatment for mental illnesses show genuine improvement over time and lead stable, productive lives.”¹⁶¹

Untreated or mistreated mental illness can have devastating results. Treatment for mental disabilities has proven effective, and scientific knowledge in the area is extensive. But, since Americans rely primarily on health insurance to pay medical bills, and insurance coverage excludes or greatly limits mental health coverage, these effective and approved treatments are not utilized as they should be.

C. *Effects on Employment*

One of the main goals in passing the ADA in 1990 was to increase employment opportunities for people with disabilities who wanted to, and could, work, but were being kept out of the job market because of discrimination on the basis of disability.¹⁶² It has become clear that the goal for protection from employment discrimination based on mental disabilities has not been met. This attempted

¹⁵⁴National Institute of Mental Health (NIMH), National Institute of Health, U.S. Department of Health and Human Services: Health Information, *available at* <http://www.nimh.nih.gov/HealthInformation/index.cfm> (last visited Jan. 6, 2005).

¹⁵⁵*Id.*

¹⁵⁶*Id.*

¹⁵⁷*Id.*

¹⁵⁸*Id.*

¹⁵⁹*Id.*

¹⁶⁰*Id.*

¹⁶¹Signorello, *supra* note 152, at 370.

¹⁶²42 U.S.C. § 12101.

protection has even been called a “delusion of rights,” rights that never really existed.¹⁶³

When the ADA was being considered, research submitted to Congress cited discrimination as a significant cause of the striking level of unemployment among people with disabilities.¹⁶⁴ Research has also shown that people with psychiatric disabilities are subject to more severe employment discrimination than people with other types of disabilities.¹⁶⁵ Yet, analysis of reported cases and research supports the conclusion that people with mental disabilities have received little benefit from the ADA’s protections against employment discrimination.¹⁶⁶ In a 1999 survey encompassing cases regarding potential discrimination by employers under the ADA, employers prevailed 95.7% of the time in federal appellate court.¹⁶⁷ Discrimination against the mentally disabled hinders the opportunity to be employed, which has a negative effect on the job market.

In order for a disabled person to be protected under the ADA, he or she must be capable of performing the essential functions of the job.¹⁶⁸ Therefore, even if the ADA covers the employee’s illness, if he is incapable of performing the essential functions of the job, he is unable to take advantage of the ADA’s protections.¹⁶⁹ Currently, many mentally disabled persons in and out of the workplace are not receiving adequate and appropriate medical care due to the lack of coverage in their health insurance plans. When an employee is not treated for a mental illness she is less likely to be able to perform the essential functions of her job. Essentially, this allowable discrimination in health insurance coverage is creating a class of mentally disabled persons who are not protected under the ADA in an employment setting. They are unable to hold jobs, which is directly contravening the purpose for which the legislation was enacted. This type of discrimination is the quintessential “vicious circle”. The fact is, if these persons had the opportunity to receive proper medical care, many of them would be able to function in their job, in society, and in life.

V. A COMPARISON: THE FAIR HOUSING ACT AND THE ADA

Adequate health insurance and adequate housing are both essential components of a safe and healthy life. As indicated, a mentally disabled person is likely to encounter many barriers when attempting to attain adequate health insurance due to his or her disability. On the other hand, a mentally disabled person is unlikely to encounter barriers due to discrimination when attaining adequate housing.

¹⁶³Susan Stefan, *The American with Disabilities Act: A Ten-Year Retrospective: Delusion of Rights: Americans with Psychiatric Disabilities Employment Discrimination, and the Americans with Disabilities Act*, 52 ALA. L. REV. 271 (2000).

¹⁶⁴*Id.* at 272.

¹⁶⁵*Id.*

¹⁶⁶*Id.*

¹⁶⁷*Id.*

¹⁶⁸Harvey S. Mars, *An Overview of Title I of the Americans With Disabilities Act and its Impact Upon Federal Labor Law*, 12 HOFSTRA LAB. & EMP. L.J. 251, 252 (1995).

¹⁶⁹*Id.* at 251-52.

Housing is one of our basic needs. Currently in the United States, there are approximately 274 million people living in approximately 105 million owned or rented units.¹⁷⁰ This is approximately 97.5% of the population, according to the 2000 Census.¹⁷¹ Because shelter is a recognized basic need, the Fair Housing Act Amendments of 1988 requires equality for the disabled living in, buying, or renting a dwelling.

In 2003, approximately 243 million people had health insurance,¹⁷² which is approximately 86.5% of the population.¹⁷³ There is a strong argument that health insurance is a basic need as well. At the very least, it is a need, utilized by the vast majority of our population, which deserves adequate and supportive measures against discrimination. The court, legislature, and persons able to acquire adequate insurance have an easier time dismissing health insurance as a benefit rather than a necessity. It is those who do not have adequate health insurance, like the mentally disabled, who realized how very necessary the “benefit” really is.

The Fair Housing Act has done a stellar job making it clear that fair housing is a basic need deserving of protection. The policy choice was likely made easier because, generally, people understand the importance of shelter. Since the ADA and the Fair Housing Act Amendments are comparable in purpose and in statutory form, a comparable application should follow. The following sections will look at the Fair Housing Act Amendments, and discuss the disparity seen between decisions interpreting it and those interpreting the ADA.

A. Background of the Fair Housing Act Amendments

The Fair Housing Act was enacted in 1968, during a time in which our country was headed toward a sharp divide between races.¹⁷⁴ The Fair Housing Act banned discrimination on the basis of race, color, religion, and national origin in the hopes of creating a truly integrated society.¹⁷⁵ “Handicap” was added in 1988 via the Fair Housing Amendments Act (FHAA). The Amendments were seen as “a clear pronouncement of a national commitment to end the unnecessary exclusion of persons with handicaps from the American mainstream.”¹⁷⁶

The definition of “handicap” under the Fair Housing Act Amendments and the definition of “disability” under the ADA are identical. Both definitions arise out of the definition provided in § 504 of the Rehabilitation Act, which was intended to cover the widest possible range of disabilities that limit activities such as walking,

¹⁷⁰ U.S. Bureau of the Census: American Fact Finder, Feb. 2, 2005, *available at* http://factfinder.census.gov/servlet/SAFFHousing?_sse=on.

¹⁷¹*Id.*

¹⁷²*Id.*

¹⁷³*Id.*

¹⁷⁴Robert G. Schwemm & Michael Allen, *For the Rest of Their Lives: Seniors and the Fair Housing Act*, 90 IOWA L. REV. 121 (2004).

¹⁷⁵*Id.*

¹⁷⁶*See* U.S. House of Representatives, Committee on the Judiciary, H.R. Rep. No. 100-711: the Fair Housing Amendments Act of 1988, at 80-81, 86-88, 90, 100th Cong., 2nd Sess. (1988).

seeing, hearing, speaking, breathing, learning, and working.¹⁷⁷ It was also intended to include a wide variety of impairments, including a range of physiological disorders and conditions such as mental retardation, emotional and mental illness.¹⁷⁸

Under the Fair Housing Act Amendments and the ADA, a “handicap” or “disability” is a physical or mental impairment that substantially limits one or more of such person’s major life activities, there is a record of such impairment, or the person is regarded as having such impairment.¹⁷⁹ The courts that have interpreted these definitions have done so broadly and have included physical and mental impairments such as those who are substantially limited by alcoholism, emotional problems, mental illness, learning disabilities, and many difficulties associated with old age.¹⁸⁰ Yet there appears to be a trend toward defining “disability” more narrowly under the ADA than it is under the Fair Housing Act Amendments.

Though the language in the statutes is identical, the application of, and therefore the protections offered have been strikingly different. Allowable practices under the ADA support overt discrimination against the mentally disabled. On the contrary, court interpretations of the FHAA have not permitted such discrimination. The FHAA has been interpreted to disallow discrimination against mentally disabled to the exact same degree as physically disabled persons.

B. Applications of the FHAA

Both the ADA and the Fair Housing Act Amendments addressing disability are based on the same fundamental principle, which is, ending discrimination against persons on the basis of disability. Though the language and proposed intent of the ADA and the FHAA are identical, the laws as applied to both physically and mentally disabled persons, are very different.

Under the FHAA there truly is no distinction between mental and physical illness with regard to attaining adequate, appropriate, and fair housing. Housing providers may not refuse to deal with people because they are disabled, whether physically or mentally.¹⁸¹ As we have seen, this is a practice that is not prohibited under the ADA with regard to health insurance.

1. Nondiscrimination Under the FHAA

Housing providers may not ask whether the applicant has a disability or is associated with anyone who has a disability, nor may they inquire into the nature or severity of a disability.¹⁸² This restriction does not prohibit inquiry into an applicant’s ability to meet the requirements of ownership or tenancy, provided the inquiry is made of all applicants, whether or not they have handicaps. Current case law exemplifies the narrow exceptions to the confines created by the FHAA.

¹⁷⁷See 24 C.F.R. § 8.3 (1993).

¹⁷⁸*Id.*

¹⁷⁹42 U.S.C. § 12102(2); 42 U.S.C. § 3602(h).

¹⁸⁰ROBERT G. SCHWEMM, HOUSING DISCRIMINATION LAW AND LITIGATION §11-D (West 2004).

¹⁸¹*Id.* at § 11D:8.

¹⁸²24 C.F.R. § 100.202(c) (2005) (based on the regulation under § 504 of the Rehabilitation Act concerning “pre-employment inquiries”).

One example is that housing providers, unlike health insurance providers, may not inquire into the nature of disability. In *Cason v. Rochester Housing Authority*, a city housing authority was held to have violated the Fair Housing Act Amendments¹⁸³ by denying housing to certain individuals who had physical or mental disabilities.¹⁸⁴ These persons were denied on the grounds that they failed to satisfy a criterion of being able to live independently.¹⁸⁵ The housing authority determined potential tenants' ability to live independently by requiring them to answer detailed inquiries regarding the nature and scope of their disabilities and to authorize the release of medical information.¹⁸⁶ The court held that a portion of the authority's manual entitled "Standards for Tenant Selection Criteria" requiring an applicant to demonstrate an ability "to live independently" violates federal statutes and is contrary to federal regulations concerning discrimination in housing and must not be utilized in the tenant selection process.¹⁸⁷

Following strict application, the FHAA is violated upon a showing of discriminatory intent. In *Stewart B. McKinney Found., Inc. v. Town Plan and Zoning Commission of the Town of Fairfield*, the court stated that a plaintiff could establish a violation of the Fair Housing Act Amendments¹⁸⁸ by showing discriminatory intent or discriminatory impact.¹⁸⁹ The court explained that, under discriminatory intent analysis, the plaintiff must demonstrate only that his or her handicapped status was one factor, not the sole factor, in the defendant's decision.¹⁹⁰ Also, the court added that an undesirable discriminatory intent could be demonstrated through an inquiry into certain factors; specifically, (1) discriminatory impact, (2) the historical background of the decision, (3) the sequence of events leading up to the challenged decision, (4) departures from normal procedural sequences, and (5) departures from normal substantive criteria.¹⁹¹ The court further explained that, to prevail on a claim of discriminatory treatment, the plaintiff is not required to show that the defendant was motivated solely, or even predominantly, by the plaintiff's handicapped status. It is sufficient only to show that such status was a motivating factor in the defendant's action.¹⁹² If this analysis were to be used under the ADA with regard to its application to health insurance providers, plans that distinguished mental and physical illness would be deemed discriminatory.

Further, the court has expressly stated that exceptions to the FHAA are to be narrowly construed. In *Bangerter v. Orem City Corp.*, a former resident of a group

¹⁸³42 U.S.C. § 3604(f)(1) (2005).

¹⁸⁴*Cason v. Rochester Hous. Auth.*, 748 F. Supp. 1002, 1011 (W.D.N.Y. 1990).

¹⁸⁵*Id.* at 1005.

¹⁸⁶*Id.*

¹⁸⁷*Id.* at 1011.

¹⁸⁸42 U.S.C. § 3604(f)(1).

¹⁸⁹*Stewart B. McKinney Foundation, Inc. v. Town Plan and Zoning Com'n of Town of Fairfield*, 790 F. Supp. 1197, 1211 (D. Conn. 1992).

¹⁹⁰*Id.*

¹⁹¹*Id.*

¹⁹²*Id.*

home for the mentally handicapped, challenged certain restrictions that the defendant city had imposed as a condition of the issuance of a special permit to live in a residential district.¹⁹³ The court stated that the exceptions to the Fair Housing Act Amendment's prohibitions on discrimination should be narrowly construed.¹⁹⁴ The court held that restrictions on housing for persons with disabilities, which are predicated on public safety, cannot be based on blanket stereotypes about the handicapped, and the restrictions must be tailored to particularized concerns about individual person with disabilities.¹⁹⁵ Further, the court noted, any special requirements placed on housing for the handicapped, based on concerns for the protection of the disabled, must be unique to the needs associated with particular kinds of disabilities.¹⁹⁶ The Fair Housing Act Amendments are unwilling to compromise a disabled person's right to fair housing. The ADA should follow a similar unwillingness to compromise a disabled person's right to adequate health insurance.

Under the ADA, willingness to compromise overwhelms the meager protections offered to the mentally disabled. Through insurance practices, the ADA has compromised the rights of the very person it professes to protect. If housing providers may not refuse tenants based on their disability, why do we allow an insurance company to do just that? It is unthinkable that a landlord would be permitted to tell a tenant that, since he or she has bipolar disease, he or she is too risky and therefore not a desirable candidate to live in this dwelling. Yet, insurance companies are statutorily permitted to use financial risks to deny or limit the coverage they provide to the mentally disabled.

A housing provider may only refuse to rent to a person who possess a significant risk of causing physical harm to others, or substantial physical damage to the property of others.¹⁹⁷ There are no health concerns or safety risks to physical property in providing equal health coverage to the mentally and physically disabled. Exceptions provided by the FHAA are based on a significant risk to health, safety, or property. Though the FHAA is partially motivated by financial risk, house reports indicate that this provision was not intended to permit housing to be denied based on presumptions. It is impermissible for a landlord or landowner to deny housing on a presumption that handicapped people generally pose a greater threat to the health, safety and/or property of others than non-handicapped buyers or renters.¹⁹⁸ Alternatively, the ADA's exceptions are based on presumptions that disabled people pose a greater financial risk.

2. Real Accommodations

The Fair Housing Act Amendments declare it unlawful to refuse to make reasonable accommodations in rules, policies, practices, or services when the

¹⁹³*Bangerter*, at 46 F.3d at 1491.

¹⁹⁴*Id.* at 1503.

¹⁹⁵*Id.*

¹⁹⁶*Id.* at 1504.

¹⁹⁷42 U.S.C. § 3604(f)(9).

¹⁹⁸SCHWEMM, *supra* note 180 (citing Preamble I, 53 Fed. Reg. 45001 (Nov. 7, 1988)).

accommodation is necessary to afford a handicapped person equal opportunity to use and enjoy a dwelling.¹⁹⁹ A plaintiff bringing a claim against a housing provider for refusing to make a reasonable accommodation, in addition to showing the accommodation is reasonable must also show that: (1) the plaintiff suffers from a handicap, (2) the defendant knew or should reasonably be expected to have known of this handicap, (3) accommodation of the handicap may be necessary to afford the plaintiff an equal opportunity to use and enjoy the housing involved, and (4) the defendant refused to make such an accommodation.²⁰⁰ When shown, the FHAA may require landlords to assume reasonable financial burdens in accommodating handicapped residents.²⁰¹ Also, the public use and common use portion of all multi-family dwellings must be readily accessible and usable by handicapped persons.²⁰²

Further, the FHAA specifically makes it unlawful to refuse to permit, at the expense of the handicapped person, reasonable modifications to existing premises occupied or to be occupied by such a person if such modifications are necessary to afford such person full enjoyment of the premises.²⁰³ With respect to rental housing, the FHAA provides that a landlord may, where reasonable, condition permission for a modification on the lessee's or tenant's restoration of the interior of the premises to the condition that existed before the modification, reasonable wear and tear excepted.²⁰⁴ The purpose of such allowance and requirements is to ensure every disabled person an equal opportunity to enjoy a dwelling.²⁰⁵ These FHAA allowances and requirements of reasonable accommodations make no distinction between the mentally and physically disabled, and essentially allow a disabled person to buy a "better" plan if need be.

No such accommodations or allowance of accommodation at the disabled person's expense exist under the ADA. The vast disparity between the application of the FHAA and the ADA's application to health insurance coverage has been exemplified in current case law.

In *Samuelson v. Mid-Atlantic Realty Co.*, plaintiff was forced to break his lease early due to a serious deterioration in his mental condition, which made it unsafe for him to continue living in the apartment for the remainder of his lease.²⁰⁶ The court found that the plaintiff had stated a cognizable claim of handicap discrimination under the FHAA by alleging that the defendant failed to reasonably accommodate him by waiving an assessment of rent for the remainder of his lease.²⁰⁷ In the interest of protecting the rights of the disabled, the court will decide against a

¹⁹⁹42 U.S.C. § 3604(f)(3)(B).

²⁰⁰SCHWEMM, *supra* note 180, at § 11D:8.

²⁰¹*United States v. Calif. Mobile Home Park Mgmt. Co.*, 29 F.3d 1412 (9th Cir. 1994).

²⁰²42 U.S.C. § 3604(f)(3)(C)(i).

²⁰³*Id.* at § 3604(f)(3)(A).

²⁰⁴*Id.*

²⁰⁵*Id.* at § 3604(f)(3)(B).

²⁰⁶*Id.*

²⁰⁷*Samuelson v. Mid-Atlantic Realty Co.*, at 947 F. Supp. 756 (D. De. 1996).

landlord even if it poses some financial inconvenience. With regard to the ADA, the court offers no such disposition.

Under the FHAA, meaningful access is important to the court. In *Oconomowoc Residential Programs, Inc. v. City of Greenfield*, the court concluded that a state zoning requirement (that 2,500 feet should exist between community-based residential facilities) was discriminatory against (mentally disabled) adults.²⁰⁸ The court concluded that by substantially limiting meaningful access to housing for the developmentally disabled, the spacing requirement was discriminatory. The court held that special zoning permission was a reasonable accommodation under the FHAA. Reasonable accommodations have been repeatedly provided for the mentally disabled,²⁰⁹ just as the physically disabled have been accommodated under the FHAA.

The FHAA has been construed very broadly with regard to accommodating both the physically and mentally disabled equally. All allowances, such as allowing reasonable modifications to be made, or requirements, such as reasonable accommodation in rental policies are applied to both mentally and physically disabled persons.

Recall, under Title I of the ADA, employers are obligated to provide reasonable accommodations for disabled individuals in the workplace.²¹⁰ This obligation should apply equally to both the mentally and physically disabled, as it applies under the FHAA. The FHAA and the ADA's use of "reasonable accommodations" is derived from interpretations of § 504 of the Rehabilitation Act.²¹¹ Both the FHAA and the ADA came after the Rehabilitation Act, and were at least in part, derived from it. Yet, the ADA does not require reasonable accommodations to be applied equally to

²⁰⁸*Oconomowoc Residential Programs v. City of Greenfield*, 23 F. Supp. 2d 941 (D. Wis. 1998).

²⁰⁹*See Garza v. Raft*, 3 Fair Hous.-Fair Lending (Aspen Law & Bus.) P, at 16,406 (N.D. Cal. Nov. 3, 1999); *Elliott v. Sherwood Manor Mobile Home Park*, 947 F. Supp. 1574 (M.D. Fla. 1996); *United States v. Country Club Garden Owners Ass'n*, 159 F.R.D. 400 (E.D.N.Y. 1995); *United States v. Freer*, 864 F. Supp. 324 (W.D.N.Y. 1994); *Twinbrook Village Apts.*, 2A Fair Hous.-Fair Lending P, at 26,264-67; *HUD v. Ocean Sands, Inc.*, 2A Fair Hous.-Fair Lending (Aspen Law & Bus.) P, at 25,530-42 (HUD ALJ Sept. 3, 1993), *aff'd in part and remanded in part on other grounds*, 2A Fair Hous.-Fair Lending (Aspen Law & Bus.) P 25,056 (HUD Secretary), *additional relief awarded*, 2A Fair Hous.-Fair Lending (Aspen Law & Bus.) P 25,061 (HUD ALJ Oct. 4, 1993).

For example, in *United States v. Freer*, the resident was disabled and confined to a wheelchair. The court stated that the Government established a prima facie case of discrimination under the Act because there was no dispute that the resident was disabled and that the owners refused to allow her to install a wheelchair ramp at her home. The court determined that the owners failed to show that the resident's proposed modification imposed on them an undue financial or administrative burden. The court found that the Government showed irreparable harm to the resident because, without a wheelchair ramp, she was essentially a prisoner in her own home. The court concluded that the Government clearly demonstrated as possibility of success on the merits of its claim; therefore, the resident was entitled to injunctive relief.

²¹⁰42 U.S.C. § 12212(b)(1).

²¹¹SCHWEMM, *supra* note 180 (citing 29 U.S.C. § 794).

both mentally and physically disabled persons in health insurance. Because health insurance companies create coverage that is not applied equally, their policies are discriminatory.

3. A Simple Test

The FHAA not only protects persons searching for housing, but it also ensures their right to equal treatment once they become residents.²¹² It is unlawful to “discriminate against any person in the terms, conditions, or privileges of the sale or rental of a dwelling, or in the provision of services or facilities in connection with such dwelling, because of a handicap.”²¹³ According to the HUD regulation, it is unlawful to “deny or limit” housing-related services based on any FHAA-prohibited factor.²¹⁴ The practices covered by this prohibition include “limiting the use of privileges, services or facilities associated with a dwelling”²¹⁵ Even evictions based on nondiscriminatory and generally acceptable reasons, such as failure to pay rent on time, unruly behavior, and poor housekeeping, may violate the FHAA so long as the conduct is attributable to the resident’s disability and could be remedied by a reasonable accommodation.²¹⁶ Further, “reasonable accommodations” ensure housing equally as effective for all disabled persons.

Recall that, currently, insurance companies are permitted to underwrite risks, classify risks, and administer such risks into the terms of a benefit plan.²¹⁷ The legislative history of the ADA notes that insurers may limit coverage based on “classification of risks” and may refuse to insure, limit insurance, or charge a different rate based on an individual’s disability when such practice is based on sound actuarial principles or is related to actual or reasonably anticipated experience.²¹⁸ This simple test consists of examining the effect on insurers’ practices if they were to practice as housing providers under the FHAA, and then examine the effect on housing providers’ practices if they were to practice as insurers under the ADA, as interpreted.

Under FHAA restraints, a health insurance company would not be permitted to discriminate against persons seeking a benefit plan. This means insurance providers would not be permitted to ask an applicant if she has a disability, or if she is associated with anyone who has a disability. Nor may the insurance provider inquire into the nature or severity of a disability.²¹⁹ This restriction would not prohibit inquiry into an applicant’s ability to meet the requirements of the plan (namely payment) provided the inquiry is made of all applicants, whether or not they

²¹²Schwemm & Allen, *supra* note 174, at 202.

²¹³42 U.S.C. § 3604(f)(2); 24 C.F.R. § 100.202(b).

²¹⁴Schwemm & Allen, *supra* note 174, at 204.

²¹⁵24 C.F.R. 100.65, (b)(4) (2003); Schwemm & Allen, *supra* note 174, at 203.

²¹⁶Schwemm & Allen, *supra* note 174, at 204 (citing *HUD v. Strawberry Pointh Lutheran Home for the Aged*, No. 07-01-0584-8, 2003 WL 1311336, at 8).

²¹⁷42 U.S.C. § 12181(c).

²¹⁸H.R. REP. No. 101-485, pt. 2, at 136-37 (1990).

²¹⁹24 C.F.R. § 100.202(c). Regulation based on the regulation under § 504 of the Rehabilitation Act concerning “pre-employment inquiries.”

have disabilities. Further, the insurance provider would be unable to limit the use of privileges and services of the policy in a discriminatory manner.²²⁰ This would mean that durational caps, such as a two-year cap on mental health coverage as opposed to coverage for physical disabilities until the age of sixty-five, would be prohibited. Distinguishing between mental disabilities and physical disabilities in health insurance plans would be deemed discriminatory, in violation of the statute, and disallowed.

Let us hypothesize that the ADA mandates are utilized in fair housing. Under the ADA structure, a housing provider has the authority to ask if an applicant has a disability, and inquire into the nature and severity of the disability.²²¹ Upon inquiry, if the housing provider deems this disability, and the behavior stemming from it, as a risk to him financially, he may refuse this person housing, limit his offer, or charge this person a higher rate so long as it is based on sound actuary principles. The law permits him to openly discriminate by denying housing to this person based on a particular disability.

This is the norm for insurance companies today. The comparison is shocking. Current discriminatory practices by health insurance companies are inexcusable. Their practices need to be curbed, in the same fashion and under the same constraints posed and practiced by housing providers under the FHAA.

C. The FHAA and Home Insurance Discrimination

Home insurance discrimination claims have been brought both under the ADA and the FHAA. Claims brought under the FHAA, have seen much more success, than those brought under the ADA. For instance, claims requesting reasonable accommodations by housing insurance companies have been much better received under the FHAA.

Insurance companies have attempted to side step the law in home insurance practices. Companies have refused to write insurance, or have charged higher rates to disabled persons or to housing providers with disabled tenants.²²² In *Wai v. Allstate Insurance Co.*, relying on the ADA, a district court held that the FHAA bars insurance companies from refusing to provide standard insurance at ordinary rates to landlords with disabled tenants.²²³ The court held that this type of insurance discrimination violated the FHAA's "otherwise make unavailable" and "discriminatory terms-and-conditions" provisions as well as its "reasonable accommodations" mandate.²²⁴ This case exemplifies the intolerance for discriminatory activity of FHAA enforcers.

In *Avalon Residential Care Homes, Inc. v. GE Financial Assurance Co.*, the court did not find a violation in the insurance company's activity.²²⁵ An insurance

²²⁰ 24 C.F.R. § 100.65(b)(4) (2003); Schwemm & Allen, *supra* note 174, at 203.

²²¹ *See* 24 C.F.R. § 100.202(c).

²²² Schwemm & Allen, *supra* note 174, at 214.

²²³ *Wai v. Allstate Ins. Co.*, 75 F. Supp. 2d 1, 5-8 (D. D.C. 1999).

²²⁴ *Id.*

²²⁵ *Avalon Residential Care Homes, Inc. v. GE Financial Assurance Co.*, 72 Fed. Appx. 35 (5th Cir. 2003).

company was sued for not changing its long-term nursing home care indemnity policy to cover a disabled resident.²²⁶ The court held that the reasonable accommodation provision was not violated because the defendant offered equal coverage to disabled and non-disabled persons (i.e., neither group was covered). The *Avalon* opinion relied on a decision that had interpreted an ADA provision forbidding businesses from denying people with disabilities the full and equal enjoyment of goods and services. Relying on ADA interpretation, the court found the discriminatory insurance practice lawful.

Courts that rely on the ADA for interpretation of the FHAA have encountered criticism.²²⁷ It has been professed that not all courts agree that the ADA provision cited in *Avalon* is as limited as the Fifth Circuit held.²²⁸ Also, *Avalon's* reliance on this ADA provision to interpret the FHAA's reasonable accommodations provision seems questionable.²²⁹ As seen in *Avalon*, when relying on the ADA for interpretation, it is more likely that a discriminatory insurance practice will be deemed lawful. The FHAA, by its terms, goes beyond the simple denial of access; it requires changes in a defendant's "rules, policies, practices, or services" that may be necessary to afford a disabled person equal housing opportunities.²³⁰ The disabled persons' right to home insurance was jeopardized in this case because of reliance on discriminatory ADA interpretation, but there is hope that FHAA interpretations will prevail in the future.²³¹

Scholars have suggested that *Avalon's* narrow interpretation of the FHAA will not be the end of the matter.²³² "The type of claim made there (in *Avalon*) - that an insurance underwriter may be required by the FHAA to modify the coverage it offers if necessary for a person with a disability to secure a housing unit - may be expected to be presented on a regular basis."²³³ It may be expected on a regular basis in the context of housing.²³⁴ What about in the context of health? FHAA mandates and interpretations appear to have more understanding and awareness of the needs of disabled people and the purpose of the legislation than ADA mandates and interpretations have revealed.

V. A GROWING PROBLEM

In prior years, the ADA has been repeatedly brought into question regarding discriminatory insurance practices, most recently regarding monetary caps on

²²⁶*Id.*

²²⁷Schwemm & Allen, *supra* note 174, at 215.

²²⁸*Id.*

²²⁹*Id.*

²³⁰*Id.*

²³¹*Id.*

²³²*Id.* at 215.

²³³*Id.*

²³⁴*Id.*

coverage for AIDS.²³⁵ As AIDS awareness rose, discrimination against those with AIDS became an issue, and effectuated a demand for fairness in insurance policies. While AIDS patients still encounter insurance discrimination, some federal courts have invalidated insurance company caps on lifetime benefits for AIDS treatment.²³⁶

The mentally ill have since assumed the position of those suffering from AIDS. Recently, like AIDS, with increasing awareness, discrimination against the mentally disabled in health insurance has increased. This awareness will grow as the numbers of those affected continues to rise. As indicated above, one in five Americans is affected by mental illness, and more than five percent of American adults have a serious mental illness so severe that it interferes with social functioning.²³⁷ These numbers can be expected to rise in upcoming years.²³⁸

According to the 2000 Census, more than 35 million people in the United States (12% of the total population) are over 65 years old.²³⁹ This number will continue to rise dramatically when the “baby boomers” reach retirement age.²⁴⁰ In the first three decades of the twenty-first century, the number of seniors will double, and the age group will compose one-fifth rather than one-eighth of the overall population.²⁴¹ Disability status is highly correlated with old age.²⁴²

Census data shows that, as people get older, their likelihood of having a disability increases substantially.²⁴³ Between fifteen to twenty percent of elderly people in the United States suffer from significant symptoms of mental illness.²⁴⁴ Also, the highest suicide rate in America is among those sixty-five and older.²⁴⁵ Elderly people lead the World Health Organization’s list of new cases of mental illness. Between the likely increase in senior population, and an overall increase in awareness of mental disabilities, the demand for equality and fairness in health insurance for the mentally disabled is not only unlikely to retreat, but will likely intensify.

VI. PROPOSAL FOR CHANGE

The ADA was enacted to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities in light of

²³⁵See Signorello, *supra* note 152, at 358-59 (discussing, in greater depth, insurance caps on lifetime benefits for AIDS treatment).

²³⁶Signorello, *supra* note 152, at 359.

²³⁷Jacobi, *supra* note 4.

²³⁸Schwemm & Allen, *supra* note 174, at 127-28.

²³⁹*Id.*

²⁴⁰*Id.*

²⁴¹*Id.* at 126.

²⁴²*Id.* at 129.

²⁴³*Id.*

²⁴⁴See American Psychiatric Association, Mental Health and Elderly, *available at* <http://healthyinds.org/mentalhealthofelderly.cfm> (last visited Jan. 9, 2005).

²⁴⁵*Id.*

historical tendency to isolate and segregate these individuals.²⁴⁶ Similarly, the FHAA was a clear pronouncement of a national commitment to end the unnecessary exclusion of persons with handicaps from the American mainstream because individuals with handicaps “have been denied housing because of misperceptions, ignorance and outright prejudice.”²⁴⁷ These mandates are equal in their purpose, rationale, and language, yet, their treatment of mentally versus physically disabled persons has been vastly different. Under the FHAA, there truly is no distinction between mental and physical illness with regard to attaining adequate, appropriate, and fair housing. Accordingly, the ADA should not permit a distinction to be made between mental and physical illness with regard to attaining adequate, appropriate, and fair health insurance.

“Because a basic feature of our health insurance industry is classification based on health, its relation to the nondiscrimination mandate of the ADA raises difficult issues.”²⁴⁸ The safe harbor provision disturbs the statutory framework by exempting traditional, discriminatory insurance practice from Title I constraints.²⁴⁹ It was not included in the original bill but was later added “to reassure the insurance industry and other covered entities that the ADA would not disturb current insurance underwriting practices.”²⁵⁰ The safe harbor provision was inserted into the statute “to curb the effect of the broad-reaching employment title on the provision of employee insurance benefits.”²⁵¹

The inclusion of the safe harbor provision into the ADA appears to have been motivated, at least in part, by the insurance lobby.²⁵² According to an interview of a member of the Senate Labor and Human Resources Subcommittee on Disabilities Policy, in 1992, the insurance amendment (the safe harbor provision) was developed in response to insurance group lobbying.²⁵³ The insurance industry actually assisted the Committee in drafting the actual language of the provision, no hearings were held on the insurance issue, and the legislative history does not document the initial development of the language.²⁵⁴ These insurance provisions were included in the

²⁴⁶H.R. REP. NO. 101-336 pt. 2 (1990) (reprinted in 1990 U.S.C.C.A.N. 267, 303, 419-21).

²⁴⁷See U.S. House of Representatives, Committee on the Judiciary, H.R. REP. NO. 100-711: the Fair Housing Amendments Act of 1988, at 80-81, 86-88, 90, 100th Cong., 2d Sess. (1988).

²⁴⁸H. Miriam Farber, Note, *Subterfuge: Do Coverage Limitations and Exclusions in Employer-provided Health Care Plans Violate the Americans with Disabilities Act?*, 69 N.Y.U. L. REV. 850, 915 (1994).

²⁴⁹*Id.* at 916.

²⁵⁰*Id.* at 861.

²⁵¹*Id.*

²⁵²David M. Studdert & Troyen A. Brennan, *The Americans with Disabilities Act: Social Contract or Special Privilege?: HIV Infection and the American with disabilities Act: An Evolving Interaction*, 549 ANNALS 84, 91 (1997).

²⁵³Farber, *supra* note 248, at 863 (citing Telephone Interview with Subcommittee on Disabilities Staffperson (Oct. 1992)).

²⁵⁴*Id.*

final version of the ADA which passed in both houses on July 17, 1990, and was signed into law by President Bush nine days later.²⁵⁵

The power of the insurance lobby cannot be denied. An equally powerful lobby of pro-consumer agencies, groups, and professions must be created to counter the law which the self-interested insurance lobby created; the law that permits discrimination. This lobby might include for example, NAMI (National Alliance for the Mentally Ill), AAPD (American Association of People with Disabilities), AARP, (American Association for Retired Persons), American Psychiatric Association, Doctors, Nurses, Employer, or Unions. The lobby should support legislation mandating equality in insurance benefits for the mentally ill by either amending or reconstructing the safe harbor provision. Lobbying efforts should begin at the state level, as the likelihood of successful legislation on a state level is greater than such legislation on a federal level.

VII. CONCLUSION

Health insurance is a basic need for sustaining a healthy and productive life. Americans rely on health insurance to provide them with medical care for the flu, broken bones, giving birth, life threatening illnesses, and many other problems. Americans who experience, for example, social withdrawal, inability to sleep, delusions, hallucinations, extreme high and low moods, excessive fear or anxiety, or thoughts of suicide, are not provided with medical care in an equal fashion. The disparity between physical and mental health care coverage is reprehensible. The insurance lobby interests, and the fact that mental illness remains misunderstood and feared, explain the disparity.²⁵⁶ Insurance lobby efforts and public apprehension are revealed through the narrow scope of the ADA with regard to health insurance.

“The goals of the ADA - for equality of opportunity, full participation, independent living, and economic self-sufficiency - are beginning to shape our national culture.”²⁵⁷ Those goals have not yet shaped our culture with respect to a group of illnesses, which affect one in five Americans, mental illness. Mental health care is important, and necessary; just as important and necessary as physical health care or a home to live in. It is time for a change.

SARAH RITZ²⁵⁸

²⁵⁵*Id.* (citing 136 Cong. Rec. H5631 (daily ed. July 26, 1990)).

²⁵⁶Signorello, *supra* note 152, at 384.

²⁵⁷Nat'l Council on Disability, *The Americans with Disabilities Act: Ensuring Equal Access to the American Dream* 6 (1995).

²⁵⁸Cleveland-Marshall College of Law, Cleveland State University 2006. The author wishes to thank Carole Heyward for her endless support, guidance, and friendship.