CASE NOTES

Doe v. Mutual of Omaha: The Seventh Circuit Eviscerates the ADA's Protection of People with HIV/AIDS Against Insurance Policy Discrimination

I. INTRODUCTION

Acquired Immune Deficiency Syndrome (AIDS) is the fifth leading cause of death for Americans between the ages of twenty-five and forty-four.[1] More than 50% of America's 126 million workers are in this age

1. Nancy R. Mansfield, *Evolving Limitations on Coverage for AIDS: Implications for Insurers and Employers under the ADA and ERISA*, 35 TILJ 117 (citing NATIONAL CTR. FOR HEALTH STATISTICS, U.S. DEP'T OF HEALTH AND HUMAN SERV., HIV NEWS, Oct. 7, 1998), *at* http://www.cdc.gov/nchsww/releases/98news/aidsmort.htm. According to the Center for Disease Control, there are currently (Dec. 1999) and estimated 412,471 people living with HIV/AIDS in

group.[2] One in six work sites in the United States with more than fifty employees and one in sixteen smaller companies employ at least one person who is infected with human immunodeficiency virus (HIV), the virus that causes AIDS.[3] As medical treatments for AIDS and HIV have evolved, average lifetime care costs have grown from $55,000 to more than $155,000.[4] As medical technology advances and high-priced "triple-cocktail" therapies become the norm, health care costs are likely to increase. AIDS-related life and health insurance claims totaled over $1.6 billion in 1994; the aggregate claims from 1985 to 1994 reached $9.4 billion.[5]

In 1998, John Doe and Richard Smith,[6] both infected with HIV, sued Mutual of Omaha Insurance Company (Mutual) in federal district court for alleged violations of the Americans with Disabilities Act (ADA).[7] The plaintiffs claimed that Mutual of Omaha's policy of capping health insurance benefits for only those clients who are HIV positive or have AIDS is discriminatory behavior as defined by the ADA.[8]

Both Doe and Smith held health insurance policies through Mutual that placed extensive limitations on medical claims arising from care for AIDS or AIDS Related Conditions (ARC).[9] Doe's lifetime maximum coverage was limited to $100,000 for such claims and Smith's lifetime benefits were limited to just $25,000.[10] In spite of these limitation on AIDS and ARC claims, their lifetime maximum coverage for all other

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the United States, *at* http://www.cdc.gov/hiv/stats/hasr1102/table1.htm (note that this number is only representative of *reported* cases of HIV/AIDS).

2. Mansfield, *supra* note 1, at 117 (citing CENTERS FOR DISEASE CONTROL AND PREVENTION, 9 HIV/AIDS SURVEILLANCE REP. 2 (1997)).

3. Mansfield, *supra* note 1, at 117 (citing CENTERS FOR DISEASE CONTROL AND PREVENTION, 9 HIV/AIDS SURVEILLANCE REP. 2 (1997)).

4. Mansfield, *supra* note 1, at 117 (citing David R. Holtgrave and Steven D. Pinkerton, *Updates of Cost of Illness and Quality of Life Estimates for Use in Economic Evaluations of HIV Prevention Programs*, 16 J. ACQUIRED IMMUNE DEFICIENCY SYNDROME & HUM. RETROVIROLOGY 54 (1997)). *See also* Fred Hellinger, *The Lifetime Cost of Treating a Person with HIV*, 270 JAMA 474 (1993) (presenting data showing that the yearly cost of treating a person with HIV/AIDS has remained constant, and has even decreased, since the 1980s reflecting a reduction in hospital stays for AIDS patients among other factors).

5. Mansfield, *supra* note 1, at 117 (citing *1994 AIDS Claims Total $1.6 Billion*, 22 PENS. & BEN. REP. (BNA) 1957 (1995)).

6. The names of the plaintiffs are court given pseudonyms.

7. *See* Doe v. Mutual of Omaha, 999 F. Supp. 1188, 1190 (N.D. Ill. 1998). The plaintiffs also alleged a violation of Illinois state law. The state law claims were dismissed by the lower court and will not be an issue in this Comment. *See id.* at 1197.

8. Mutual, 999 F. Supp. at 1190. The Supreme Court has ruled that AIDS and HIV, even when asymptomatic, constitute a disability under the ADA. *See* Abbott v. Bragdon, 107 F.3d 934, 939, *cert. granted*, 522 U.S. 991 (1997).

9. *Mutual*, 999 F. Supp. at 1190.

10. *Id.*

medical claims, those not related to AIDS or ARC, remained at the $1,000,000.[11] In addition, under the policies, even if the lifetime maximum benefit allowance of $1,000,000 is reached, Mutual will reinstate the one million dollar coverage if the insured files no new claims for a two year period.[12]

II. IN THE DISTRICT COURT

The novel question presented to the district court was whether the ADA's Title III prohibition against unlawful discrimination covers the "content of insurance policies offered directly through an insurer."[13] The general anti-discrimination provision of Title III, found in section 302(a) of the ADA, states: "No individual shall be discriminated against based 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."[14]

Mutual claimed that this provision of Title III only pertained to access to goods and services offered by places of public accommodation, not the actual content of the goods and services themselves.[15] Mutual argued that since the plaintiffs had access to the same insurance policies offered to all clients, whether they be disabled or not, their ADA claims must fail as a matter of law.[16]

In the plaintiffs' view, however, Mutual's strained reading of the plain language of section 302(a) would "render meaningless [the] requirement that persons with disabilities be granted full and equal enjoyment" of facilities, goods, services, privileges, or advantages of public accommodations.[17] According to the plaintiffs' argument, one can enjoy a certain benefit only after having gained access to it.[18] Doe and Smith further relied on the fact that section 302(b) states:

> 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 . . . with the opportunity to participate in or benefit from a good, service, facility,

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11. *Id.*
12. *Id.*
13. *Id.* at 1191.
14. *Id.* (citing 42 U.S.C. § 12182(a) (2000)). "Insurance offices" are listed in Title III's list of "private entities that are considered public accommodations." *Id.* at 1191 n.3.
15. *See id.* at 1191.
16. *See id.*
17. *See id.*
18. *See id.*

> privilege or advantage, or accommodation that is not equal to that afforded to other individuals.[19]

The plaintiffs averred that this passage reveals that Title III is concerned with more than just "equal access," but rather the ADA extends to the discriminatory denial of opportunity, as well.[20]

Mutual relied on *Parker v. Metropolitan Life Insurance Company* and *Leonard F. v. Israel Discount Bank of New York* to support its "narrow interpretation" of Title III.[21] In *Parker*, the Sixth Circuit, sitting en banc, held that "the provision of a long-term disability plan by an employer and administered by an insurance company does not fall within the purview of Title III [of the ADA]."[22] The Sixth Circuit refused to recognize that Title III regulated the actual content of the goods and services offered by the public accommodation.[23]

Leonard F. addressed a challenge to the ADA very similar to the one heard by the *Parker* court. Leonard F., like Parker, argued that the two year limitation placed on mental disorders, but not physical disorders, by his employer's disability plan was discriminatory under the ADA.[24] The *Leonard F.* court rejected the plaintiff's argument, stating that it would not follow a First Circuit ruling that Title III applies to "more than mere places, in the sense of physical structures."[25]

However, the plaintiffs countered by citing two cases, *Chabner v. United of Omaha Life Insurance Company* and *World Insurance Company v. Branch*, that support a broad interpretation of Title III.[26] In *Chabner*, the court held that Title III applies to insurance underwriting practices, rejecting the notion that Title III is only applicable to physical goods and services.[27] The *Chabner* court reasoned that Title III required

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19. *Id.* at 1192 (citing 42 U.S.C. § 12182(b)(1)(A)(ii) (2000).

20. *Mutual*, 999 F. Supp. at 1192.

21. *Id. See* Parker v. Metropolitan Life Ins. Co., 121 F.3d 1006 (6th Cir. 1997); Leonard F. v. Israel Discount Bank of N.Y., 967 F. Supp. 802 (S.D.N.Y. 1997).

22. *Id.* (citing *Parker*, 121 F.3d at 1014).

23. *See Parker*, 121 F.3d at 1012.

24. *See Leonard F.*, 967 F. Supp. at 803.

25. *Id.* at 804 (citing Carparts Distribution Center v. Automotive Wholesaler's Ass'n of New England, 37 F.3d 12, 17-18 (1st Cir. 1994)). Carparts rejected a narrow interpretation of Title III of the ADA. Courts rejecting the view that Title III only assures the disabled of *physical* access to public accommodations claim that an absurd result would follow: phone solicitations or internet sites that refuse to sell to the disabled would be legal, whereas refusing to sell goods and services to a disabled person at the physical situs of the business would not. *See, e.g.*, Krauel v. Methodist Med. Ctr., 95 F.3d 674, 677-78 (8th Cir. 1996); Conners v. Maine Med. Ctr., 42 F. Supp. 2d 34, 46 (D. Me. 1999); Kotev v. First Colony Life Ins. Co., 927 F. Supp. 1316, 1321 (C.D. Cal. 1996).

26. *Mutual*, 999 F. Supp. at 1192. *See* Chabner v. United of Omaha Life Ins. Co., 994 F. Supp. 1185 (N.D. Cal. 1998); World Ins. Co. v. Branch, 966 F. Supp. 1203 (N.D. Ga. 1997).

27. *Id.* (citing *Chabner*, 994 F. Supp. at 1188-93).

"reasonable modifications in policies, practices or procedures . . . necessary to afford such goods, services, facilities, privileges, advantages or accommodations to individuals with disabilities" would not be "rendered superfluous."[28]

The district court in *World Insurance Company* addressed a fact pattern similar to *Mutual*, wherein the insurance company placed caps on lifetime coverage for AIDS treatment.[29] After examining the precedent and legislative history of the ADA, the *World Insurance Company* court held that Title III did apply to AIDS caps of $5,000 placed on insurance policies.[30] The district court, agreeing with the plaintiffs, held that limiting Title III to the question of discriminatory access was "at odds with the plain language of Title III, relevant legislative history, and the Department of Justice's [DOJ] interpretative guidance."[31]

A. Title III Is Not Limited to Discrimination Based on Physical Access

1. Plain Language of Title III

Title III of the ADA reveals no inclination to limit itself in terms of mere physical access.[32] In fact, the restrictive view of Title III advanced by the *Parker* court relied on ADA regulatory language and not on the statutory text itself.[33] The "plain language of Title III manifests a Congressional intent to ensure 'full and equal enjoyment' of the good and services themselves and an equal opportunity to 'participate in or benefit from' goods or services offered by a place of public accommodation."[34]

Applying the plain language of Title III to *Mutual*, the AIDS/ARC caps could be viewed as either "a discriminatory denial of 'full and equal enjoyment' of goods or a service; as the discriminatory denial of an equal opportunity to benefit from goods or a service; or as the provision of goods or a service different from that provided to others."[35] Limiting the

28. *Mutual*, 999 F. Supp. at 1192-93 (citing *Chabner*, 994 F. Supp. at 1190).
29. *Mutual*, 999 F. Supp. at 1193 (citing World Ins. Co., 966 F. Supp. at 1207).
30. *Mutual*, 999 F. Supp. at 1193 (citing World Ins. Co., 966 F. Supp. at 1208-09).
31. *Id.*
32. *Id.*
33. *See id.*
34. *Id.* (citing 42 U.S.C. § 12182(a),(b)(1)(A)(ii)); *see Mutual*, 999 F. Supp. at 1193 (citing Doukas v. Metropolitan Life Ins. Co., 950 F. Supp. 422, 426 (D.N.H. 1996) ("The broad wording and diversity of [§ 12182's] specific prohibitions, are a strong indication that Title III was intended to extend beyond mere access or availability of a good or service.").
35. *Mutual*, 999 F. Supp. at 1193 (citing § 12182(a), (b)(1)(A)(i), (b)(1)(A)(ii), (b)(1)(A)(iii) (2000)).

scope of the statutory language would render the meaning of Title III "meaningless."[36]

2. The Legislative History

Both the House and the Senate reports confirm the plaintiff's view that ADA anti-discrimination provisions apply to insurance policies.[37] The House report states:

> [W]hile a plan which limits certain kinds of coverage based on classification of risk would be allowed under [Section 501(c)], the plan may not refuse to insure, or refuse to continue to insure, or limit the amount, extent, or kind of coverage available to an individual, or charge a different rate for the same coverage solely because of a physical or mental impairment, except where the refusal, limitation, or rate differential is *based on sound actuarial principles* or is related to actual or reasonably anticipated experience.[38]

The Senate report mirrors the House's language:

> [V]irtually all state prohibit unfair discrimination among persons of the same class and equal expectation of life. The [ADA] adopts this prohibition of discrimination. Under the [ADA], a person with a disability cannot be denied insurance or be subject to different terms or conditions of insurance based on disability alone, *if the disability does not pose increased risks*.[39]

The legislative history clearly relates that Congress contemplated and intended application of the ADA to insurance policies.[40]

3. The DOJ's Interpretation

The Department of Justice provides persuasive support in both its regulations and technical assistance manual.[41] The regulations state that the ADA "reach[es] insurance practices by prohibiting differential

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36. *Id.*; *see also Chabner*, 994 F. Supp. at 1190.

37. *See Mutual*, 999 F. Supp. at 1193.

38. *Id.* (citing H.R. Rep. No. 101-485, pt. 2, at 136-37 (1990), *reprinted in* 1990 U.S.C.C.A.N. 267, 419-20) (emphasis added).

39. *Mutual*, 999 F. Supp. at 1194 (citing S. Rep. No. 101-116 at 84 (1989)) (emphasis added).

40. *See Mutual*, 999 F. Supp. at 1194.

41. *Mutual*, 999 F. Supp. at 1194 n.6 (citing U.S. v. Morton, 467 U.S. 822, 834 (1984) (Congress has delegated to the DOJ the authority to promulgate binding regulations, 42 U.S.C. § 12186(b) 2000, and to issue a technical assistance manual providing guidance about the ADA's requirements, 42 U.S.C. § 12206(c)(3) (2000). In view of this express delegation of authority, the DOJ's regulations must be given "legislative and hence controlling weight, unless they are arbitrary, capricious, or plainly contrary to the statute."). United States v. Morton, 467 U.S. 822, 834 (1984)).

treatment of individuals with disabilities in insurance offered by public accommodations unless the differences are justified."[42] In addition, its technical assistance manual avers that "[i]nsurance offices are places of public accommodation and, as such, may not discriminate on the basis of disability in the sale of insurance contracts or in the terms or conditions of the insurance contracts they offer."[43] Therefore, the DOJ consistently treats insurance companies as within the purview of Title III.[44]

B. Title IV of the ADA to Limit Title III's Reach

Mutual asserted that section 501(c) of Title IV of the ADA is proof that Congress intended to limit the scope of Title III, barring it from reaching insurance policies.[45] Title IV reads:

> Subchapters I through III of this chapter and Title IV of this Act shall not be construed to prohibit or restrict— (1) an insurer . . . from underwriting risks, classifying risks, or administering such risks that are based on or not inconsistent with State law; . . . Paragraph[ ] (1) . . . shall not be used as a subterfuge to evade the purposes of subchapter I and III of this chapter.[46]

According to Mutual, section 501(c) exhibits Congressional intent to allow insurers to design policies in any way they see fit.[47] However, the district court agreed with the plaintiffs, maintaining that section 501(c) only reinforces the conclusion that Title III reaches the content of insurance policies and establishes a "safe harbor" provision for insurance companies.[48] Under the "safe harbor" provision, insurance companies are exempted from ADA compliance if their underwriting conforms with "sound actuarial principles, reasonably anticipated experience, or bona fide risk classification," or does not constitute a "subterfuge to evade the purposes of the ADA."[49] Although the district court found that Title III applied to insurance policies, the court noted

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42. *Mutual*, 999 F. Supp. at 1194 (citing 28 C.F.R. ch.1, pt.36, App. B at 619 (1996)).

43. *Mutual*, 999 F. Supp. at 1194 (citing Title III Technical Assistance Manual § III-3.11000 (Nov. 1993)).

44. *See Mutual*, 999 F. Supp. at 1194.

45. *See id.*

46. *Id.* (citing 42 U.S.C. § 12201 (1994).

47. *See Mutual*, 999 F. Supp. at 1194.

48. *Id.* at 1195 (citing *Chabner*, 994 F. Supp. at 1190-91) ("If Title III were meant only to prevent insurance companies from denying persons with disabilities equal access to the physical plants of insurance offices, there would have been no need for Congress to include the safe harbor provision dealing with underwriting practices."). *See Mutual*, 999 F. Supp. at 1195 (citing *Kotev*, 927 F. Supp. at 1322) ("Insurers would [not] need this 'safe harbor' provision . . . if insurers could never be liable under Title III for conduct such as the discriminatory denial of insurance coverage.").

49. *Mutual*, 999 F. Supp. at 1195 (quoting World Ins. Co., 966 F. Supp. at 1208, 1209 n.6).

that Mutual was free to avail itself of the "safe harbor" provision, provided that it could provide evidence that the AIDS/ARC caps were based on sound actuarial principles.[50]

C. The McCarran-Ferguson Act

The McCarran-Ferguson Act provides that "[n]o act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of insurance . . . unless such Act specifically relates to the business of insurance."[51] In other words, "unless a federal statute clearly provides otherwise, it must be construed as inapplicable to the business of insurance."[52] Mutual argues that as the only mention of insurance in Title III is the fleeting reference to "insurance office,"[53] the ADA does not demonstrate a clear intent to regulate the insurance industry and, therefore, application of the ADA to the plaintiff's insurance policy is barred as a matter of law.[54]

The district court disagreed with Mutual, stating that section 501(c) of the ADA expressly provides a "safe harbor" provision that "specifically relates to the business of insurance" for purposes of the McCarran-Ferguson Act.[55] Therefore, considering the "insurance office" language in Title III and the "safe harbor" provision in Title IV, the district court rejected Mutual's argument that Congress did not exhibit the necessary intent to regulate the content of insurance policies.[56]

Furthermore, according to the district court, Mutual indicated that Title III of the ADA would not "invalidate, impair, or supersede" any state law.[57] In fact, Illinois law is similar to Title III of the ADA, stating:

> No company, in any policy of accident or health insurance issued in the State, shall make or permit any distinction or discrimination against individuals solely because of handicaps or disabilities . . . in the amount of any dividends or other benefits payable thereon, *or in any other terms and conditions of the contract it makes, except where the distinction or discrimination is based on sound actuarial principals or is related to actual or reasonably anticipated experience*.[58]

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50. *See Mutual*, 999 F. Supp. at 1195.
51. *Id.* (citing 15 U.S.C. § 1012(b) (1994)) *et seq.*
52. *Mutual*, 999 F. Supp. at 1195; *see, e.g.*, U.S. Dept. of Treasury v. Fabe, 508 U.S. 491, 493 (1993); Barnett Bank of Marion County, N.A. v. Nelson, 517 U.S. 25, 27-28 (1996).
53. *See* 42 U.S.C. § 12181(7) (1994).
54. *See Mutual*, 999 F. Supp. at 1195.
55. *See Mutual*, 999 F. Supp. at 1195.
56. *See id.*
57. *Mutual*, 999 F. Supp. at 1195-96 (quoting 15 U.S.C. § 1012(b) (1994)).
58. *Id.* at 1196 (citing 215 ILCS 5/364 (West 1997)) (emphasis added).

The district court found that as the language of Title III of the ADA and the Illinois statute were virtually identical, the McCarran-Ferguson Act was irrelevant and could not act to bar the application of the federal statute.[59]

D. ADA Discrimination

Lastly, Mutual argued that its AIDS/ARC caps were not discriminating "on the basis of a disability."[60] Mutual relied on three cases that sanctioned providing unequal benefits to patients with mental disabilities, as opposed to physical disabilities.[61] The district court refused to accept Mutual's argument and, in fact, held that the relied upon cases were inapposite to Mutual's assertions.[62] The court reasoned that Mutual had singled out a particular disease for inferior treatment and that the *Parker* court specifically rejected discrimination prohibited by the ADA between disabled and nondisabled, as opposed to differentiations between categories of disabilities.[63] Similarly, in the relied upon case *EEOC v. CNA Insurance Co.*, the court drew a distinction between its holding and an insurer who chooses "to vary the terms of its plan depending on whether the employee was disabled."[64] According to the district court, Mutual's discrimination against the plaintiffs fell directly within the exceptions of the cases upon which Mutual relied and within the purview of the ADA.[65] The court noted that Mutual would provide coverage for pneumonia up to one million dollars, unless the pneumonia was a complication of AIDS, in which case the coverage for pneumonia was capped.[66] The court further noted that

> [i]f, for instance, Smith had already exhausted his $25,000 dollar limit for AIDS related care, he would be denied coverage for pneumonia treatment. A non-disabled individual who had not reached the $1 million dollar cap would not be denied coverage. Further, even if that non-disabled

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59. *Mutual*, 999 F. Supp. at 1196. For previous cases standing generally for the proposition that the purpose of the McCarran-Ferguson Act was not to preempt a state's ability to regulate and tax the insurance business, see, e.g., National Mut. Ins. Co. v. Cisneros, 52 F.3d 1351,1363 (6th Cir. 1995) (holding that the McCarran-Ferguson Act represents a sort of "inverse preemption" under which state laws are not superseded); Merchants Home Delivery Serv. Inc. v. Frank B. Hall & Co., 50 F.3d 1486, 1491-93 (9th Cir. 1995); NAACP v. American Family Mut. Ins. Co., 978 F.2d 287,295-97 (7th Cir. 1992).

60. *Mutual*, 999 F. Supp. at 1196 (citing 29 U.S.C. § 12182(a) (2000)).

61. *See Mutual*, 999 F. Supp. at 1196 (relying upon EEOC v. CNA Ins. Co., 96 F.3d 1039 (7th Cir. 1996); Modderno v. King, 82 F.3d 1059 (D.C. Cir. 1996); Parker, 121 F.3d at 1015-16).

62. *See Mutual*, 999 F. Supp. at 1196.

63. *See id.*

64. *Id.* (quoting *EEOC*, 96 F.3d at 1044).

65. *Mutual*, 999 F. Supp. at 1196.

66. *See id.*

> individual had exhausted his $1 million dollar maximum, he would be entitled to a reinstatement of benefits, provided that he did not incur any expenses for two consecutive calendar years. The same reinstatement benefit is not provided to disabled persons after exhaustion of the AIDS/ARC cap.[67]

The district court concluded that the plaintiff's complaint alleging differential treatment for disabled persons with AIDS was sufficient to state a "cognizable claim of discrimination in violation of Title III of the ADA."[68]

III. IN THE SEVENTH CIRCUIT DISTRICT COURT OF APPEALS

Mutual of Omaha appealed to the Seventh Circuit which reversed the lower court in a 2-1 decision.[69] Chief Judge Richard Posner, delivering the court's opinion, stated that the ADA did not apply to the actual terms and coverage limits of insurance policies.[70] Moreover, the court held that the McCarran-Ferguson Act prohibited the court from interpreting the ADA to govern such policies.[71]

A. The ADA

The Seventh Circuit noted that it is against the law to refuse to sell an insurance policy to a person with AIDS.[72] However, Mutual did not refuse to sell the plaintiffs an insurance policy—in fact, the court noted that Mutual "was happy to sell health insurance policies to the two plaintiffs."[73] The court of appeals stated that although the policies are worth less in the hands of a person with AIDS/ARC, the offer by Mutual is not illusory, as persons with HIV and AIDS can develop medical conditions that are unrelated to the caps.[74] The court remarked that if Mutual had excluded all coverage for people with HIV, AIDS, or ARC, that such an exclusion might be in violation of Title III of the ADA, but that such an allegation was not made.[75] The court pointed out that diseases that qualify as disabilities would, under the plaintiffs' argument, be classified as "special," uncappable diseases, causing a discrimination

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67. *Id.*
68. *Id.* at 1196-97.
69. *See* Doe v. Mutual of Omaha, 179 F.3d 557, 565 (7th Cir. 1999).
70. *Doe*, 179 F.3d at 561.
71. *Id.* at 563.
72. *See* 28 C.F.R. § 36.104. Place of Public Accommodation.
73. *Mutual*, 179 F.3d at 559.
74. *See id.*
75. *See id.*

among diseases themselves.[76] Furthermore, existing law already allows insurance companies to cap preexisting conditions at zero dollars coverage and this capping is not limited to disabilities.[77]

The court of appeals averred that the case could not be settled by merely referring to section 302(a).[78] Furthermore, the court found the plaintiff's reliance on the 501(c) "subterfuge" provision to be misplaced, as "[it is] obviously intended for the benefit of insurance companies rather than plaintiffs and it may seem odd therefore to find the plaintiffs placing such heavy weight on what is in effect a defense to liability."[79] The court held that "the common sense of the statute" dictates that "content of goods or services offered by a place of public accommodation is not regulated."[80] The court stated "[a] camera store may not refuse to sell cameras to a disabled person, but it is not required to stock cameras specially designed for such persons."[81] The court noted that if Congress had intended such a broad scope and reading of Title III of the ADA—a reading that could effect the entire United States' economy and backlog the federal courts—it would have made its intentions more plain.[82]

The court of appeals analogized that an insurance policy with a cap is a different product from one without a cap, just as a wheelchair is different from an armchair.[83] The court maintained that a furniture store that chooses not to stock wheelchairs makes its products less desirable to the disabled, but the ADA does not require furniture stores to stock wheelchairs.[84] The plaintiffs argued that the "refusal to stock" cases are distinguishable from AIDS/ARC caps on insurance policies, in that the caps include complications of AIDS, not just AIDS itself.[85]

The court addressed the plaintiffs' argument that pneumonia caused by AIDS is subject to an AIDS caps, whereas non-AIDS-related pneumonia is not subject to any such cap, revealing a differentiation on the basis of disability.[86] However, the court of appeals flatly refused this argument as "incorrect," stating that "HIV doesn't cause illness

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76. *See id.* (noting that AIDS, because it is a "disability" would not be subject to a cap, but heart disease, not considered a disability, would be.)
77. *See id.*
78. *See id.* at 560.
79. *Mutual*, 179 F.3d at 562.
80. *Mutual*, 179 F.3d at 560.
81. *Id.*
82. *See id.*
83. *See id.*
84. *See id.*
85. *See Mutual*, 179 F.3d at 560.
86. *See id.*

directly."[87] The court explained that HIV is responsible for weakening the body's immune system, allowing the body to fall victim to a host of opportunistic infections, such as "exotic cancers and rare forms of pneumonia and other infectious diseases."[88] The cost of treating these "*distinctive* diseases," along with the cost of treating HIV infection, are the goal of the AIDS caps.[89] Therefore, in the court's opinion, when an HIV infected person is afflicted with the *same* disease as a non-HIV infected person, since it is more fatal to the HIV infected person, it constitutes a *different* disease.[90]

B. The Legislative History

Although the plaintiffs, citing legislative history, argued that section 501(c) has no meaning if section 302(a) does not regulate insurance, the court of appeals disagreed.[91] The court stated that if 302(a) were allowed to apply to insurance policies, it would apply to all goods and services, as it is not limited to insurance policies.[92] The court reasoned that Congress included section 501(c) to be a "backstop" for arguments that 302(a) only regulates access and not content or to guard against a refusal to sell an insurance policy to a disabled person.[93] The court conceded that if Mutual refused to sell health insurance policies to people with AIDS, it would be a "prima facie violation" of 302(a).[94] However, the court continued by saying that "the insurance company just might be able to steer into the safe harbor provided by section 501(c), provided it didn't run afoul of the 'subterfuge' limitation, as it would do if, for example, it had adopted the AIDS caps to deter people who know they are HIV positive from buying the policies at all."[95]

According to the court, "the legislative history is consistent with [its] interpretation."[96] The committee reports cited by the plaintiffs present the example that refusing to sell an insurance policy to a blind person is illegal.[97] However, the court noted that refusal to sell an insurance policy to a blind person differs from stipulating in the policy

87. *Id.*
88. *Id.* at 561 (citing Anthony S. Fauci & H. Clifford Lane, *Human Immunodeficiency Virus (HIV) Disease: AIDS and Related Disorders*, 2 HARRISON'S PRINCIPLES OF INTERNAL MEDICINE 1791, 1824-45 (1998)).
89. *Mutual*, 179 F.3d at 561.
90. *See id.*
91. *See id.* at 562.
92. *See id.*
93. *Id.*
94. *Id.*
95. *Mutual*, 179 F.3d at 562.
96. *See id.*
97. *See id.*

that if the insured becomes blind, the insurer will not cover the expense of the insured learning Braille, which would be entirely legal.[98] The court held, under section 302(a), a seller is not required to alter his goods and services so that they will be equally valuable to disabled and nondisabled persons alike, "even it the product is insurance."[99] The court of appeals noted that even if its analysis was wrong, the suit was barred by the McCarran-Ferguson Act.[100]

C. McCarran-Ferguson Act

The Seventh Circuit maintained that direct conflict with a state law was not necessary to trigger the prohibition to regulate the insurance industry; it was enough if the interpretation would "interfere with a State's administrative regime."[101] The court averred that the plaintiffs' position was such an interference, as state regulation of the insurance industry is "comprehensive and includes rate and coverage issues."[102] Therefore, determining if caps on AIDS or other disabilities are "actuarially sound" according to state law would be encroaching illegally into the domain reserved to state insurance commissioners.[103] The court insisted that even if the state and federal laws were the same, it is still up to the state courts to decide state law issues—a federal court has no business displacing the jurisdiction of the state court on insurance issues unless specifically authorized by Congress.[104]

The Seventh Circuit, in dicta, did admit that if the ADA were applicable, insurers would be forced to show a state court that their caps were actuarially sound; however, as mentioned, the court maintained that section 302(a) of the ADA did not stretch far enough to allow the federal courts to regulate state insurance policy.[105] The court stated that although section 302(a) does apply to insurance because it forbids an insurer from refusing an applicant based on disability, it does not sweep broadly

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98. *See id.*

99. *Mutual*, 179 F.3d at 563. *See, e.g.*, Vaughn v. Sullivan, 83 F.3d 907, 912-13 (7th Cir. 1996); Rogers v. Department of Health & Environmental Control, 174 F.3d 431 (4th Cir. 1999); *Parker*, 121 F.3d at 1010-14; Lenox v. Healthwise of Kentucky, Ltd., 149 F.3d 453, 457 (6th Cir. 1998); *cf. Modderno*, 82 F.3d 1059.

100. *Mutual*, 179 F.3d at 563.

101. *Id.* (citing Humana Inc. v. Forsyth, 525 U.S. 299 (1999); Department of the Treasury v. Fabe, 508 U.S. 491 (1993); Autry v. Northwest Premium Services, Inc., 144 F.3d 1037 (7th Cir. 1998)).

102. *Mutual*, 179 F.3d at 564 (referring to LEE R. RUSS & THOMAS F. SEGALLA, COUCH ON INSURANCE §§ 2:7, 2:20, 2:26, 2:35 (3d ed. 1997)).

103. *Mutual*, 179 F.3d at 564.

104. *Id.*

105. *See id.*

enough to preempt state regulation of insurance policy.[106] The Seventh Circuit closed by stating that "[f]ederal law is not the only source of valuable rights," affirming that the plaintiffs could seek relief in a state court from the commissioners who regulate insurance policy.[107]

D. The Seventh Circuit Dissent

Circuit Judge Terence Evans opened by stating that the ADA is a "broad, sweeping, protective statute requiring the elimination of discrimination against individuals with disabilities."[108] The dissent framed the issue before the court as whether the court should decide if an insurer can discriminate against someone with AIDS, rather than whether the court should regulate insurance policies.[109] The dissent believed that the ADA granted the federal courts the right to pass judgment on such alleged discriminatory conduct.[110] Judge Evans agreed with Chief Judge Posner's opinion that the ADA would not require a camera store owner to alter his stock to carry cameras specially designed for disabled people.[111] However, Judge Evans felt that a better analogy for the *Mutual* case was one where a camera store allowed disabled people to enter, but then would only sell them inferior cameras.[112] Judge Evans analogized further that although a restaurant cannot be forced to alter its menu for disabled people, it should not be allowed to offer a full menu to able-bodied people and a limited one to the disabled.[113] The dissent argued that differentiating coverage for pneumonia based upon whether or not the individual has AIDS is enough to trigger an ADA violation.[114] According to the dissent, Chief Judge Posner believed that ARC referred to a "unique set of symptoms and afflictions that would make it easy for the insurance company to determine with certainty whether an expense incurred for a particular illness is 'AIDS-related' and therefore subject to the cap."[115] However, the dissent pointed out that the insurance policies do not provide even a "hint at what illnesses or afflictions might fall within the ARC exclusion. Nor has the medical community embraced an

106. *See Mutual*, 179 F.3d at 564.
107. *Id.* at 565.
108. *Id.* at 565 (dissenting Evans, J.) (referring to this court's decision in Talanda v. KFC Nat'l Management Co., 140 F.3d 1090 (7th Cir. 1998)).
109. *See Mutual*, 179 F.3d at 565.
110. *See id.*
111. *See id.*
112. *See id.*
113. *See id.*
114. *See id.*
115. *Mutual*, 179 F.3d at 565.

accepted definition for what 'conditions' are 'AIDS-related.'"[116] Therefore, the "practical effect" is that Mutual will deny or permit coverage based solely on whether the insured has AIDS.[117]

The dissent also disagreed with the majority's handling of the McCarran-Ferguson Act issue.[118] Judge Evans stated that the issue was not whether federal courts should determine if actuarial soundness was consistent with state law because these issues had been removed by the parties' own stipulation.[119] The court, according to the dissent, should have been deciding if an insurer may refuse to deal on the same terms with the disabled and nondisabled.[120] Therefore, the dissent stated that, as "any conceivable justification for the caps (under section 501(c)) is not at issue, and because an insurer cannot legally decide to pay or not pay expenses based solely on whether an insured has AIDS and is therefore disabled under the ADA," the AIDS/ARC caps are a violation of federal law.[121]

IV. PROBLEMS WITH THE SEVENTH CIRCUITS' INTERPRETATION

A. Subterfuge?

The result of the ADA's statutory ambiguity is a mix of decisions regarding the scope and application of section 501(c)'s "safe harbor" provision.[122] On one side are courts holding that distinctions drawn in insurance coverage where disabilities are involved must have actuarial justification.[123] The other, diametrically opposite view, is that insurance companies' actuarial data may not be pertinent to the particular circumstances of the case at issue, and no justification is needed to exclude people on the basis of their disability.[124]

Courts siding with plaintiffs tend to support their position by referring to the legislative history on the subterfuge clause as requiring disabilities to be justified by actuarial data. In a pre-ADA case called *Betts*, the Court, interpreting a clause in the Age Discrimination in Employment Act (ADEA), defined "subterfuge" as "a scheme, plan,

116. *Id.*
117. *Id.*
118. *Mutual*, 179 F.3d at 566.
119. *See id.*
120. *See id.*
121. *Id.*
122. Jeffrey S. Manning, Casenote, *Are Insurance Companies Liable Under the Americans with Disabilities Act?*, 88 CALIF. L. REV. 607, 638 (2000).
123. *See* Lewis v. Aetna Life Ins. Co., 982 F. Supp. 1158, 1169 (E.D. Va. 1997); *Doukas*, 950 F. Supp. at 432.
124. *See Chabner*, 994 F. Supp. at 1194-95.

stratagem, or artifice of evasion."[125] However, Congress, rejecting this definition, passed the Older Workers Benefits Protection Act (OWBPA), amending the ADEA.[126] The OWBPA deleted the word "subterfuge" and, instead, replaced it with a broad prohibition against age-based discrimination "*unless cost justified*."[127] The legislative history of the ADA also refutes the *Betts* interpretation of "subterfuge."[128] Three legislators noted that "subterfuge" does not entail "some malicious or purposeful intent to evade the ADA on the part of the insurance company," and several legislators referred directly to the OWBPA which had explicitly rejected the *Betts* interpretation.[129] In fact, Senator Kennedy stated, "[i]t is important to note that the term 'subterfuge,' as used in the ADA, should not be interpreted in the manner in which the Supreme Court interpreted the term in [*Betts*]. . . . Indeed, our committee recently reported out a bill to overturn the *Betts* decision."[130]

In contrast, courts siding with the insurance companies "proceed by attacking that interpretation of the subterfuge clause, rather than by advancing an independent argument for reading the section as an unlimited exception."[131] These courts argue that in spite of clear and persuasive legislative history, courts are free to use the "plain meaning" of the word "subterfuge" and completely ignore the legislative history.[132] Therefore, a court wishing to rule against a plaintiff who claims that an insurance company must base its decision on an actuarial data can resort to a "plain meaning" interpretation to justify its decision.[133]

B. Actuarial Data

In spite of the seemingly enormous amount of money spent on AIDS-related illnesses, the numbers are quite deceiving. Although AIDS is an expensive disease, AIDS treatment is not as costly as many medical problems routinely, and without hesitation, covered by health insurance

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125. Public Employees Retirement Sys. v. Betts, 492 U.S. 158, 167 (1989) (quoting United Air Lines, Inc. v. McMann, 434 U.S. 192 (1977)).

126. Manning, *supra* note 122, at 641.

127. *See id.* at 641 (emphasis added).

128. *See id*.

129. Manning, *supra* note 122, at 641-42 (citing 136 Cong. Rec. S9697 (daily ed. July 13, 1990) (statement of Sen. Kennedy); 136 Cong. Rec. H4623 (daily ed. July 12, 1990) (statement of Rep. Owens (same language); 136 Cong. Rec. H4624 (daily ed. July 12, 1990) (statement of Rep. Edwards) (same language)).

130. Manning, *supra* note 122, at 642 (citing 136 Cong. Rec. S9697 (daily ed. July 13, 1990)).

131. Manning, *supra* note 122, at 638-39.

132. *See id.* at 642-43.

133. *See id.*

plans.[134] The total annual cost of treating individuals with AIDS/HIV is $3.3 billion,[135] whereas annual treatment for those with cancer is $27.5 billion,[136] lung disease costs $16.5 billion,[137] and asthma $3.6 billion.[138] Moreover, it is estimated that total health care costs for AIDS patients will not exceed two percent of the total health care expenses in the United States.[139]

Unfortunately, AIDS and HIV-related illnesses are often singled out by insurers, leaving many with either no health insurance or coverage that is useless. These patients must then turn to the taxpayers to pay for treatment, leading to the "Medicaidization" of AIDS and HIV-related illnesses.[140] In fact, Medicaid finances a disproportionately large number of AIDS patients compared with other illnesses.[141]

If required to show a sound actuarial basis for denying health insurance coverage to people with AIDS or HIV-related illnesses, employers will not be able to defend against a claim of subterfuge. Employers should be able to spread the costs of AIDS and HIV-related illnesses across the spectrum of all illnesses. However, if the courts follow the *Mutual of Omaha* decision, and agree that the ADA governs only the access to insurance and not the content of the policy itself, every American with a definable illness will be at risk of being denied coverage.[142] The new Seventh Circuit policy gives insurance companies the right to place arbitrary caps on any medical condition they choose, regardless of actuarial data, which inevitably "legalizes irrational

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134. Mansfield, *supra* note 1, at 132-33 (citing Fred Hellinger, *The Cost and Financing of Career Persons with HIV Disease: An Overview*, HEALTH CARE FIN. REV. (Spring 1998). Hellinger uses research data to show that the cost of treating HIV/AIDS is similar to or less than the cost of treating other medical conditions, which may have incidence higher than those for HIV/AIDS.).

135. Mansfield, *supra* note 1, at 132 n.a (citing Fred J. Hellinger, *Updated Forecasts of the Costs of Medical Care for Persons with AIDS*, 1989-93, 105 PUBLIC HEALTH REP. 1, 1, 1-12 (Jan.-Feb. 1990)).

136. Mansfield, *supra* note 1, at 132 n.e (citing Martin L. Brown, *The Economic Burden of Cancer*, *in* CANCER PREVENTION AND CONTROL (P. Greenwald, et al., eds. 1997) at 69-81 (1995)).

137. Mansfield, *supra* note 1, at 132 n.f (citing NATIONAL HEART, LUNG, AND BLOOD INST., U.S. DEP'T OF HEALTH AND HUMAN SERV., MORBIDITY AND MORTALITY CHARTBOOK ON CARDIOVASCULAR, LUNG, AND BLOOD DISEASES (May 1994)).

138. Mansfield, *supra* note 1, at 132 n.d (citing K.B. Weiss, *An Economic Evaluation of Asthma in the United States*, 13 NEW ENG. J. MED. 862, 862-66 (1992)).

139. Mansfield, *supra* note 1, at 133 n.82 (citing REPORT OF THE NATIONAL COMMISSION ON AIDS, AMERICA LIVING WITH AIDS, at 68 (1991)).

140. Mansfield, *supra* note 1, at 133 n.84 (citing Larry Gostin, *A Decade of a Maturing Epidemic: An Assessment and Directions for Future Public Policy*, 16 AM. J. L. & MED. 1 (1990)).

141. Mansfield, *supra* note 1, at 133 n.85 (citing Thomas Bartram, Note, *Fear, Discrimination and Dying in the Workplace: AIDS and the Capping of Employees' Health Insurance Benefits*, 82 KY. L.J. 249, 256 (1993)).

142. Mansfield, *supra* note 1, at 135.

discrimination by health insurers," especially against those with AIDS and HIV infection.[143]

The courts have never asserted that the ADA should force insurers to cover all illnesses and disregard actuarial data. However, it is apparent that the ADA does mandate that any distinctions drawn regarding coverage refusal must be based on scientific, empirical actuarial data, not misconceptions or animus towards a particular group.

C. The "Conditional" Debate

The *Mutual* decision has created a situation where insurance companies "can exclude a disability, classify additional medical care that is tangentially related to the disability as care for the excluded disability, and then deny reimbursement," which inevitably raises many questions.[144] For example, if Mutual decided that Alzheimer disease was an excluded disability, but that broken bones were covered, would Mutual cover a disoriented Alzheimer patient who slipped and broke her leg? . . . or would the broken bone, ostensibly covered, now be a "condition" of Alzheimer disease and, therefore, excluded from coverage?[145] *Mutual* presented the exact same conundrum regarding insurance coverage for those with HIV, AIDS, and ARC.[146]

The Seventh Circuit in *Mutual* did not cite a single medical authority to support its assertion that certain opportunistic infections were "different diseases" when contracted by persons with AIDS.[147] Although the court referred obliquely to the opinion of Dr. Fauci that opportunistic infections are an ever-present danger to a person with HIV/AIDS, there was no assertion by any medical authority that pneumonia contracted by an individual with HIV/AIDS is a different disease from pneumonia contracted by a non-HIV/AIDS infected individual.[148]

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143. *Id.*

144. Jennifer Geetter, Casenote, *The Conditional Dilemma: A New Approach to Insurance Coverage of Disabilities*, 37 HARV. J. ON LEGIS. 521, 523 (Summer 2000).

145. *Id.*

146. *See* Geetter, *supra* note 144, at 544 n.114. (The court evades the EEOC's guidelines. *See* EEOC Interim Enforcement Guidance on the Application of the Americans with Disabilities Act of 1990 to Disability-Based Distinctions in Employer Provided Health Insurance, No. N-915.002, *reprinted in* EEOC Compl. Man. (CH) P6902 at 5313-19 (June 8, 1993) (stating that caps violate the ADA if they result in different treatment of persons with disabilities)).

147. Geetter, *supra* note 144, at 547 n.126 (referring to Anthony S. Fauci & H. Clifford Lane, *Human Immunodeficiency Virus (HIV) Disease: AIDS and Related Disorders*, 2 HARRISON'S PRINCIPLES OF INTERNAL MEDICINE 1791, 1824-45 (1998)).

148. Geetter, *supra* note 144, at 547 n.126.

V. PROPOSALS FOR THE FUTURE

A. What Exactly Is "Subterfuge?"

The courts need to arrive at a clear definition and application of the "subterfuge" clause. Currently, courts are able to justify any preconceived decision based on legislative history or by choosing to ignore the legislative history. Congress must make its intentions clear and unambiguous and not leave such important matters to the uncertainty of the courts. Courts ruling for plaintiffs should not have to rely on strained interpretations of the "subterfuge" clause. Congress should rewrite or amend the ADA to expressly refute a *Betts* interpretation of the "subterfuge" clause.

B. Insurance Companies Must Present Actuarial Data to Justify Decisions

Insurance companies should be required by law to present actuarial data to justify any reimbursement exclusions. A decision to deny coverage must be based on empirical, scientific data, not bias, prejudice, or preconceived notions about a given group. People with HIV/AIDS/ARC and gay people at large have historically been the target of unfounded and pernicious discrimination. Courtrooms are no exception to this rule. Requiring insurance companies to present solid, empirical evidence for insurance exclusion is the only way to ensure that discrimination, however latent, is not the motivating force behind reimbursement exclusion.

Furthermore, although the Seventh Circuit agreed that refusing to sell insurance policies to the disabled is a discriminatory act under the ADA, it never addressed what should happen if the insurance company raises premiums for the disabled to the point where insurance coverage becomes economically unfeasible.[149] By not compelling insurance companies to show actuarial evidence to underpin their decisions, the courts permit insurance companies to raise premiums without justification until they can "legally" preclude the disabled.[150] Requiring insurance companies to present hard, empirical evidence to justify

149. *Id.* at 535 n.62.

150. *Id.* at 536 n.69 (quoting Chabner, 994 F. Supp. at 1195) ("While sound actuarial principles may include elements of discretion and judgment based on individual circumstances, they must also include reference to some sort of actuarial data either in the form of actuarial tables or clinical studies" documenting the increased risk in order not to violate the ADA."). *See also* Geetter, *supra* note 144, at 536 n.69 (quoting Lewis v. Aetna Life Ins. Co., 982 F. Supp. 1158, 1169 (E.D. Va. 1997) (holding that "the ADA does not require that every disability be covered, but that sound actuarial principles underpin decisions concerning the scope of coverage.")).

coverage denial and premium increases will prevent this end run around the law.

C. Define All Excluded "Conditions"

Insurance companies should be required by law to define what illnesses and disabilities are conditions of an illness excluded from insurance coverage. Furthermore, courts should require that an illness defined as a condition of an excluded disease in fact has a correlative and causation relatedness to the root illness.[151] Such correlation and causation must be supported by empirical medical science.[152] An insurance company should be required to show that a condition and the underlying coverage-excluded illness are statistically correlated.[153] If the insurance company can show such a correlation, it should then be required to prove that the condition was caused by the underlying illness as currently understood within the medical community.[154] In other words, before refusing coverage an insurance company must "convince the trier of fact that *X* and *Y* are not merely correlated, but rather that the requested treatment for secondary condition *Y* . . . is effectively treatment for the primary condition *X*."[155] Although insurance companies may legally refuse to cover disabilities, "they should not be allowed to exclude coverage for every additional medical condition for which a disability creates a greater risk of development, but does not directly cause."[156]

VI. CONCLUSION

Courts must reject murky, *ad hoc* explanations offered by insurance companies to justify refusal of coverage for disabled people and Congress must realize that the sweeping generalities of the ADA are not sufficient to stop discrimination by insurance companies against the disabled, especially those further stigmatized by HIV/AIDS. Shifting the burden of justification to insurance companies "will protect the insured from outdated understandings of disability and will prevent insurance companies from wagering that an insured will not bring suit."[157] A

151. Geetter, *supra* note 144, at 565.
152. *Id.*
153. *Id.* at 548.
154. *Id.*
155. *Id.* at 549.
156. *See id.*
157. Geetter, *supra* note 144, at 565. ("Defendants prevailed in 448 of 475 [ADA] cases (94%) at the trial court level and in 376 of 448 instances (84%) in which plaintiffs appealed these adverse judgments.") *Id.* at 524 n.13 (quoting R. Colker, *The Americans with Disabilities Act: A Windfall for Defendants*, 34 C.R.-C.L. L. REV. 99, 108.)

specific and clearly written amendment to the ADA is in order to prevent such abuses.

Furthermore, Congress's revision of the ADA to allow people with HIV to have realistic insurance coverage is in the economic best interest of the country. People with HIV, if prescribed medications currently available, may have a ten to fifteen year period before debilitating illness to remain contributing, taxpaying members of society. Without insurance coverage, hence, without medication and medical care, these individuals will spiral quickly, possibly with five years, into full-blown AIDS/ARC.[158] Once diagnosed with AIDS and hospitalized, not only is the individual no longer an "economically" contributing member of society, but he is also eligible for State assistance under the Medicaid plan. Requiring people to be hospitalized and dying before the State offers guidance or assistance is not only inefficient, it is inhumane. Congress should act now, if only for economic reasons, to stem this counterproductive inhumanity and require that insurance companies, absent sound actuarial data, cover HIV illnesses and spread the cost across the spectrum of illnesses for which coverage is currently available.

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158. *See id.*

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