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5-1-2000

## Doe v. Mutual of Omaha: Do Insurance Policy Caps on Aids Treatments Violate the Americans with Disabilities Act

Edward Caspar

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### Recommended Citation

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COMMENT

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*DOE v. MUTUAL OF OMAHA: DO INSURANCE  
POLICY CAPS ON AIDS TREATMENTS VIOLATE  
THE AMERICANS WITH DISABILITIES ACT?*

*Edward Caspar\**

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\* Candidate for Juris Doctor, Notre Dame Law School, 2001. Special thanks to my parents, Joe and Rita, to my brothers, Phil and Rich, and to my sister, Sheela, for their encouragement, love, and support. Thanks as well to those who offered their helpful suggestions on earlier drafts of this comment: to Professor Kent Hull, Jonathan Bridges, Michael Chaplin, Eric Hall, Courtney Woolridge, and all the members of the *Notre Dame Law Review*.

## INTRODUCTION

John Doe and Richard Smith sued their insurance company, Mutual of Omaha, for disability discrimination<sup>1</sup> in violation of Title III of the Americans with Disabilities Act (ADA).<sup>2</sup> Sadly, Doe and Smith suffered from Acquired Immune Deficiency Syndrome (AIDS), and they claimed that the terms of their insurance policies discriminated against them based on their affliction with AIDS.<sup>3</sup> The insurance policies Doe and Smith held with Mutual of Omaha limited recoverable benefits for the treatment of AIDS or AIDS-related conditions (ARCs) to a lifetime maximum of \$100,000 for Doe and \$25,000 for Smith.<sup>4</sup>

However, each policy provided for a relatively generous \$1,000,000 in benefits for medical care *not* relating to AIDS or ARCs.<sup>5</sup> Additionally, for medical conditions not relating to AIDS or ARCs, Mutual would reinstate the \$1,000,000 maximum benefit and pay out additional claims after the original million dollar limit had been reached, provided that the policy holder did not incur any expenses for two consecutive years.<sup>6</sup> Thus, under Mutual's policies, people with AIDS could spend up to \$25,000 or \$100,000 to treat their illness, while people *without* AIDS could spend up to \$1,000,000 to treat their illnesses.

In this suit, Doe and Smith alleged specifically that the benefits caps on the treatment of AIDS or ARCs violated the ADA's prohibition of discrimination on the basis of disability because the caps denied Doe and Smith the opportunity to participate in and benefit from the \$1,000,000 limit and potential reinstatement of benefits afforded to policy holders who do not suffer from AIDS.<sup>7</sup> Mutual of Omaha moved to dismiss the complaint for failing to state a claim

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1 See *Doe v. Mutual of Omaha Ins. Co.*, 999 F. Supp. 1188, 1190 (N.D. Ill. 1998), *rev'd*, 179 F.3d 557 (7th Cir. 1999), *cert. denied*, 120 S. Ct. 845 (2000). Doe and Smith also alleged that Mutual of Omaha violated the Illinois Insurance Code, but this Comment focuses only on the discrimination claim under the ADA.

2 42 U.S.C. §§ 12182-189 (1994 & Supp. 1997).

3 See *Doe*, 999 F. Supp. at 1191.

4 See *id.* at 1190.

5 See *id.*

6 See *id.*

7 See *id.* at 1191. At trial, Mutual stipulated that it "has not shown and cannot show that its AIDS Caps are or ever have been consistent with sound actuarial principles, actual or reasonably anticipated experience, bona fide risk classification, or state law." *Doe v. Mutual of Omaha Ins. Co.*, 179 F.3d 557, 558 (7th Cir. 1999), *cert. denied*, 120 S. Ct. 845 (2000).

upon which relief could be granted,<sup>8</sup> thus putting to the district court the resolution of three distinct issues.<sup>9</sup>

First, the claim presented the court with the novel issue of whether Title III of the ADA, which prohibits discrimination on the basis of disability, applies to the *content* of insurance policies and not just to *access to* insurance policies. Second, the district court had to determine whether the McCarran-Ferguson Act,<sup>10</sup> which prohibits the construction of any federal law so as to interfere with any state law enacted to regulate the business of insurance, precludes application of the ADA to insurance policies.<sup>11</sup> Finally, the district court addressed the issue of whether AIDS caps constitute disability discrimination at all, or whether the caps "are a permissible distinction in the level of benefits provided to one category of disability as differentiated from other categories."<sup>12</sup>

The district court held that (1) Title III of the ADA does extend to the content of insurance policies,<sup>13</sup> (2) the McCarran-Ferguson Act does not bar application of the ADA to insurance policies,<sup>14</sup> and (3) the AIDS caps do not present a matter of differentiating between categories of disabilities, but of "singling out . . . individuals with a particular disability, AIDS, for inferior coverage as compared to that afforded non-disabled individuals."<sup>15</sup> Thus, the district court held that Doe and Smith had stated a viable claim that the AIDS caps in their policies with Mutual of Omaha violated Title III of the ADA by discriminating against them on the basis of their disability.<sup>16</sup>

On appeal,<sup>17</sup> a divided panel of the Seventh Circuit reversed, holding that Title III of the ADA did not apply to the content of insurance policies because "section 302(a) does not require a seller to alter his product to make it equally valuable to the disabled and to the

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8 See *Doe*, 999 F. Supp. at 1190.

9 For the purposes of its motion to dismiss, Mutual of Omaha assumed that asymptomatic HIV infection constituted a disability. See *id.* at 1191 n.2. The Supreme Court has since held that infection with HIV is an impairment "from the moment of infection," *Bragdon v. Abbott*, 524 U.S. 624, 627 (1998), making it "apparent" by the time the Seventh Circuit decided *Doe* "that both ARC and AIDS are disabilities," *Doe*, 179 F.3d at 558.

10 15 U.S.C. §§ 1012-15 (1994).

11 See *Doe*, 999 F. Supp. at 1195.

12 *Id.* at 1195-96.

13 See *id.* at 1194.

14 See *id.* at 1196.

15 *Id.*

16 See *id.* at 1196-97.

17 See *Doe*, 179 F.3d at 557.

nondisabled, even if the product is insurance.”<sup>18</sup> Even if it did, the court continued, the suit would be barred by the McCarran-Ferguson Act.<sup>19</sup>

The resolution of the first two issues in favor of Mutual rendered moot the third issue addressed by the district court—whether the AIDS caps constituted disability discrimination. Thus, the appellate court need not have addressed it. However, the court addressed one example of the way in which the AIDS caps would apparently discriminate against the disabled. If a policy holder infected with HIV were to contract pneumonia as a result of the person’s infection, the cost of treating the pneumonia would be subject to the AIDS caps because the caps applied to AIDS-related conditions. Thus, if the HIV-infected person’s medical expenses had already reached the maximum allowed under the cap, the policy would not cover the cost of treating the pneumonia. Yet, if a policy holder *not* infected with HIV were to contract pneumonia, the costs of treating that person’s pneumonia would be fully covered.<sup>20</sup> Therefore, as the circuit court noted, “[i]t looks . . . like a difference in treatment referable solely to the fact that one person is disabled and the other not.”<sup>21</sup> However, the court found this conclusion to be in error because an illness like pneumonia is far more lethal to a person with AIDS than to a person without, “[w]hich means they are not *really* the same disease.”<sup>22</sup> Thus, the court rejected the district court’s conclusion on this issue as well.

This Comment considers each of the three issues addressed by the district court in turn and their treatment in the Seventh Circuit. It suggests that Title III of the ADA does prevent discrimination in the content of insurance policies, that the McCarran-Ferguson Act does not bar application of Title III to insurance policies, and that Mutual’s AIDS/ARCs cap discriminates against persons with AIDS by denying them the same consideration it affords non-disabled persons in the determination of their policy limits.

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18 *Id.* at 563.

19 *See id.*

20 *See id.* at 560.

21 *Id.*

22 *Id.* at 561.

## I. DOES TITLE III OF THE ADA APPLY TO THE CONTENT OF INSURANCE POLICIES?

### A. *The District Court*

The district court in *Doe* found that Title III of the ADA does apply to the content of insurance policies. The court based its conclusion on its analysis of the plain language of the anti-discrimination provisions of the ADA, the legislative history of the ADA, and the interpretive guidance offered by the Department of Justice (DOJ).<sup>23</sup> Section 302(a) of the ADA states the general rule prohibiting discrimination by public accommodations. The section reads,

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.<sup>24</sup>

Mutual argued that the plain language of the statute dictates that Title III "regulates only access to goods and services offered by places of public accommodation, [and not] the *content* of the goods and services themselves."<sup>25</sup> According to this view, Doe's and Smith's claim should have failed regardless of whether the content of the policies discriminated against individuals with AIDS because Doe and Smith

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23 See *Doe*, 999 F. Supp. at 1191-94.

24 Americans with Disabilities Act § 302(a), 42 U.S.C. § 12182(a) (1994). The DOJ regulations implementing Title III define "place of public accommodation" as "a facility, operated by a private entity, whose operations affect commerce and fall within at least one of [12 specified categories]." 28 C.F.R. § 36.104 (1996). This definition "incorporates the 12 categories of facilities represented in the statutory definition of public accommodation in section 301(7) of the ADA." *Id.* pt. 36, app. B, at 603 (1996). Section 301(7) of the ADA includes "insurance office" in its list of "private entities that are considered public accommodations." 42 U.S.C. § 12181(7)(F) (1994). The DOJ's regulations define "public accommodation" as "a private entity that owns, leases (or leases to), or operates a place of public accommodation." 28 C.F.R. § 36.104. The term "public accommodation" as used in the DOJ's regulations corresponds to the term "person" employed by Title III of the ADA. *Id.* pt. 36, app. B, at 606. Title III prohibits discrimination "by any person who owns, leases (or leases to), or operates a place of public accommodation." 42 U.S.C. § 12182(a) (1994). Thus, an insurance company, as the "person" who owns, leases, or operates an insurance office, falls under the purview of the ADA and may not discriminate against an individual on the basis of disability. Mutual of Omaha did not contest that it was a "person" who owned and operated a place of public accommodation for the purposes of Title III. Mutual merely asserted that the ADA applied only to a disabled person's right of access to insurance, and not to the content of insurance policies themselves. See *Doe*, 999 F. Supp. at 1191.

25 *Doe*, 999 F. Supp. at 1191 (emphasis added).

enjoyed equal access to the same insurance policies available to any other individual whether disabled or not.<sup>26</sup>

However, the district court in *Doe* could find nothing in the plain language of the anti-discrimination provisions of Title III that indicated that the scope of Title III "is limited to questions of access."<sup>27</sup> Instead, the court asserted that four sections of Title III, the general rule quoted above<sup>28</sup> and the three general prohibitions that follow it in the statute,<sup>29</sup> belied such a narrow conclusion.<sup>30</sup> The court did not elaborate but went on to reach the rather summary conclusion that "Title III is patently concerned with more than just access to the goods and services offered by places of public accommodation."<sup>31</sup> The court concluded that the plain language of the statute "manifests a Congressional intent to ensure 'full and equal enjoyment' of the goods and services themselves"<sup>32</sup> and not just access to them. Given the abbreviated nature of the district court's analysis, a closer look at the language of the relevant provisions and their application to the present case is warranted. This Comment addresses those provisions below in its analysis of the Seventh Circuit's opinion.<sup>33</sup>

The district court found further support for its conclusion (that the ADA applies to the content of insurance policies) in the legislative history of the ADA. The court cited House and Senate reports that, according to the court, "acknowledge[] the applicability of the ADA's anti-discrimination provisions to insurance policies."<sup>34</sup> The court quoted the following language from a House report:

[W]hile a plan which limits certain kinds of coverage based on classification of risk would be allowed under [section 501(c) of the ADA], 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.<sup>35</sup>

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26 *See id.*

27 *Id.* at 1193.

28 *See* 42 U.S.C. § 12182(a).

29 *See id.* § 12182(b)(1)(A)(i)-(iii).

30 *See Doe*, 999 F. Supp. at 1193.

31 *Id.*

32 *Id.* (quoting 42 U.S.C. § 12182(a)).

33 *See infra* notes 75-81 and accompanying text.

34 *Doe*, 999 F. Supp. at 1193.

35 *Id.* (quoting H.R. REP. NO. 101-485, pt. 2, at 136-37 (1990), reprinted in 1990 U.S.C.C.A.N. 267, 419-20.)

Indeed, Mutual stipulated that it “has not shown and cannot show that its AIDS Caps are or ever have been consistent with sound actuarial principles, actual or reasonably anticipated experience, bona fide risk classification, or state law.”<sup>36</sup>

The Senate Report cited by the district court notes that it did not intend the provisions of the ADA to affect the way insurance companies do business in accordance with the state laws and regulations under which they are regulated. It continues with language quoted in *Doe*:

Virtually all states prohibit unfair discrimination among persons of the same class and equal expectation of life. The ADA adopts this prohibition of discrimination. Under the ADA, a person with a disability cannot be denied insurance or be subject to different terms or conditions of insurance based on disability alone, if the disability does not pose increased risks.<sup>37</sup>

Hence, the district court noted that Congress intended the ADA to apply to the content of insurance policies.<sup>38</sup>

Finally, the court in *Doe* found persuasive support for its conclusion that Title III applies to the content of insurance policies in the regulations promulgated by the DOJ to implement Title III.<sup>39</sup> According to the passage quoted by the district court, the DOJ concluded “that Congress intended [the ADA] to reach insurance practices by prohibiting differential treatment of individuals with disabilities in insurance offered by public accommodations unless the differences are justified.”<sup>40</sup> The court also cited the *Title III Technical Assistance Manual*<sup>41</sup> issued by the DOJ,<sup>42</sup> which states, “Insurance offices are places

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36 *Doe*, 179 F.3d at 558. Risk classification is an actuarial technique used to estimate the future costs associated with an individual’s claim based on that individual’s risk characteristics—such as age, weight, or presence of a disability—that have a causal or statistical link to the risk that the insurance company is measuring. See H. Miriam Farber, *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, 866 (1994); Jill L. Schultz, Note, *The Impact of Title III of the Americans with Disabilities Act on Employer-Provided Insurance Plans: Is the Insurance Company Subject to Liability?*, 56 WASH. & LEE L. REV. 343, 353 (1999).

37 S. REP. NO. 101-116, at 84 (1989).

38 See *Doe*, 999 F. Supp. at 1194.

39 See *id.* Congress “delegated to the DOJ the authority to promulgate binding regulations” to implement Title III. *Id.* at 1194 n.6 (citing 42 U.S.C. § 12186(b) (1994)).

40 28 C.F.R. pt. 36, app. B at 619 (1996).

41 See 42 U.S.C. § 12206(c)(3) (1994). Congress delegated to the DOJ the authority to issue a technical assistance manual to provide guidance concerning the ADA’s requirements. See *id.*



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.”<sup>43</sup>

Thus, the court concluded that in light of the plain language of Title III, the legislative history of the ADA, and the DOJ’s interpretative guidance, Title III of the ADA regulates not merely access to Mutual’s insurance policies, but the content of the policies as well. The court further noted that in reaching its conclusion it “joins a growing number of district courts across the nation that have found Title III’s scope to encompass review of the substance of insurance policies.”<sup>44</sup> Nevertheless, despite the seemingly heavy weight of authority supporting the district court’s conclusion, the Seventh Circuit reversed.

### B. *The Court of Appeals*

The majority of the Seventh Circuit panel reviewing the case framed the issue of whether the ADA applied to the content of insurance policies in terms of whether the ADA required a seller to alter its product to make it equally valuable to disabled individuals and non-disabled individuals alike.<sup>45</sup> The court noted, “[I]t is apparent that a store is not required to alter its inventory in order to stock goods such as Braille books that are especially designed for disabled people.”<sup>46</sup> The court conceded, however, that such a conclusion becomes “apparent” through interpretation of the statute and not through a simple reading.<sup>47</sup> In fact, the court stated that a simple reading of the statute would suggest the opposite conclusion for the present case,<sup>48</sup> and so, the court reasoned, “the case cannot be resolved by reference

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42 See *Doe*, 999 F. Supp. at 1194.

43 U.S. DEP’T OF JUSTICE, CIV. RTS. DIV., THE AMERICANS WITH DISABILITIES ACT: TITLE III TECHNICAL ASSISTANCE MANUAL § III-3.11000, at 19 (1993) [hereinafter TECHNICAL ASSISTANCE MANUAL].

44 *Doe*, 999 F. Supp. at 1194 (citing *Chabner v. United of Omaha Life Ins. Co.*, 994 F. Supp. 1185, 1190 (N.D. Cal. 1998), *Lewis v. Aetna Life Ins. Co.*, 982 F. Supp. 1158, 1163–65 (E.D. Va. 1997), *World Ins. Co. v. Branch*, 966 F. Supp. 1203, 1207-08 (N.D. Ga. 1997), *Cloutier v. Prudential Ins. Co.*, 964 F. Supp. 299, 301–02 (N.D. Cal. 1997), *Doukas v. Metropolitan Life Ins. Co.*, 950 F. Supp. 422, 425–26 (D.N.H. 1996), *Kotev v. First Colony Life Ins. Co.*, 927 F. Supp. 1316, 1321–22 (C.D. Cal. 1996), *Anderson v. Gus Mayer Boston Store*, 924 F. Supp. 763, 779 (E.D. Tex. 1996), and *Baker v. Hartford Life Ins. Co.*, No. 94 C 4416, 1995 WL 573430, \*3 (N.D. Ill. 1995)).

45 See *Doe*, 179 F.3d at 559–60.

46 *Id.* at 559 (citing *Lenox v. Healthwise of Ky., Ltd.*, 149 F.3d 453, 457 (6th Cir. 1998), and 28 C.F.R. § 36.307 (1996)).

47 See *id.* at 559–60.

48 See *id.* at 560.

simply to the language of section 302(a).<sup>49</sup> Thus, the court bypassed the plain language of the ADA and looked instead to the “common sense of the statute,”<sup>50</sup> which, according to the court, suggests that the ADA does not regulate the content of the goods and services offered by a place of public accommodation.<sup>51</sup>

The following syllogism describes the court’s rationale. First, a store is not required to alter its inventory in order to stock goods specially designed for disabled people.<sup>52</sup> Second, an insurance company is a store and its policies constitute its inventory. Therefore, an insurance company is not required to alter its insurance policies to accommodate the disabled.<sup>53</sup>

However, the court’s reasoning here is flawed. Whether the ADA may compel a public accommodation to alter its inventory is not relevant to the determination of whether the ADA applies to the content of insurance policies. This is so for two reasons. First, the major premise grounding the court’s syllogism should only apply to the furnishing of tangible goods and not to services like insurance policies. Second, the analogy the court draws between insurance companies—faced with having to eliminate discriminatory terms from their policies—and retail stores—faced with having to alter their inventory to include special goods—fails to accurately describe the scenario presented by *Doe*.

### 1. Title III Does Not Compel the Alteration of Inventories (of Tangible Goods)

The appellate court in *Doe* noted that “[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.”<sup>54</sup> This is unquestionably the case when a retail store supplies goods of a tangible nature.<sup>55</sup> However, as this Comment shows, the rule should not apply to the provision of insurance policies. The circuit court in *Doe* decided that the rule cannot be confined merely to the furnishing of tangible goods, “since section 302(a) [of the ADA] is not limited to physical products, but includes contracts and other intangibles.”<sup>56</sup> However, the rule excusing public accommodations from having to alter their

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49 *Id.*

50 *Id.*

51 *See id.*

52 *See id.* at 559.

53 *See id.* at 559, 563.

54 *Id.* at 560.

55 *See* 28 C.F.R. § 36.307(a) (1996); *id.* pt. 36, app. B, at 630–31.

56 *Doe*, 179 F.3d at 560.

inventories derives not from section 302(a) but from § 36.307 of the DOJ's regulations.<sup>57</sup> That section is limited to physical products. Section 36.307 establishes that the ADA "does not require a public accommodation to alter its inventory to include accessible or special goods" designed to accommodate the disabled.<sup>58</sup> Though the regulations do not explicitly limit the application of this rule to the furnishing of tangible goods, analysis of the regulations suggests this result.

First, all of the examples of "accessible or special goods"<sup>59</sup> listed in § 36.307 are of a tangible nature. According to § 36.307(c), "accessible or special goods include items such as Brailled versions of books, books on audio cassettes, closed-captioned video tapes, special sizes of lines of clothing, and special foods to meet particular dietary needs."<sup>60</sup> Nowhere in § 36.307 does the DOJ indicate that the section applies to services of a non-tangible nature such as insurance policies.

Second, after limiting the duty of public accommodations to serve the disabled by prohibiting compulsory inventory alterations, § 36.307 goes on to impose on public accommodations the obligation of ordering, at the request of an individual with a disability, accessible or special goods that it does not maintain in its stock.<sup>61</sup> A public accommodation must order the goods if the public accommodation makes special orders for unstocked goods in the course of its regular business and if the requested goods can be obtained from a supplier with whom the public accommodation does regular business.<sup>62</sup> Such a rule is clearly unsuitable in the context of insurance policies. An insurance company does not order insurance policies from other suppliers. If § 36.307 were to apply to insurance companies, they could be required to "order" policies accommodating to individuals with disabilities. Certainly neither Mutual nor the Seventh Circuit contemplated such a result, nor was it the intention of the DOJ's regulations.

Finally, the regulations containing the rule regarding inventory alteration also contain examples of public accommodations that provide services of a non-physical nature. These public accommodations are treated separately in the DOJ's regulations and the same rules do not apply.<sup>63</sup> Significantly, the regulations specifically address the case

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57 See 28 C.F.R. § 36.307; see also *Doe*, 179 F.3d at 559 (citing § 36.307). Congress delegated to the DOJ the authority to promulgate binding regulations to implement Title III. See 42 U.S.C. § 12186 (1994).

58 28 C.F.R. § 36.307(a).

59 *Id.*

60 *Id.* § 36.307(c).

61 See *id.* § 36.307(b).

62 See *id.*

63 See *id.* § 36.306 (1996).

of a medical specialist and provide for the specialist's right to refuse to treat a disorder that is not within his specialty and to refer the prospective patient to another physician.<sup>64</sup> A psychiatrist, as the court in *Doe* noted,<sup>65</sup> may refuse to treat schizophrenia if the psychiatrist does not specialize in the disorder. However, because the regulations contain a separate section dealing explicitly with medical specialists, the rules provided in § 36.307 pertaining to the alteration of inventories would not govern a medical provider's refusal to treat a certain disorder. The regulations also contain a section specifically addressing the application of the ADA to insurance.<sup>66</sup> That section simply restates section 501(c) of the Act and does not provide for the limitation imposed by § 36.307. Thus, because the regulations cover insurance—like medical specialists—in a separate section, then by analogy, the rule provided in § 36.307 should not govern insurance policies. The court, therefore, should resolve the question of whether Title III applies to the content of insurance policies by reference to the provisions relating specifically to insurance and not by analogy to other inapplicable provisions.

## 2. The Flawed Analogy

Notwithstanding the foregoing analysis of the regulations promulgated by the DOJ, the appellate court's reasoning is flawed in that the analogy on which it is based simply fails to accurately describe the scenario presented by *Doe*. The appellate court in *Doe* reasoned that the ADA does not require Mutual to remove the AIDS caps from its insurance policies because the ADA does not require a public accommodation, like a bookstore, to alter its inventory so as to include special goods, like Braille books, in order to accommodate individuals with disabilities.<sup>67</sup> However, as Circuit Judge Terence Evans pointed out in his dissent, the majority's analogy "misses the mark."<sup>68</sup> A bookstore has an inventory of books, none of which are suitable to blind people because the bookstore does not stock Braille books. However, a bookstore presumably has no specific policy limiting a blind person's access to goods that it provides to other non-disabled customers. It simply does not supply the needed goods to *any* customers.

In contrast, Mutual does have a policy limiting a disabled person's access to a service it provides to other non-disabled customers—

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64 See *id.* § 36.302(b)(2) (1996).

65 See *Doe*, 179 F.3d at 560.

66 See 28 C.F.R. § 36.212 (1996).

67 See *Doe*, 179 F.3d at 559–60.

68 *Id.* at 565 (Evans, J., dissenting).

the \$1,000,000 limit on benefits. Mutual does not totally restrict such access, for, as the majority opinion points out,<sup>69</sup> policy holders with AIDS can draw from the \$1,000,000 limit for medical treatment unrelated to AIDS or ARCs.<sup>70</sup> Nevertheless, as the majority opinion made clear, “[a]n insurance policy is a product, and a policy with a \$25,000 limit is a different product from one with a \$1 million limit, just as a wheelchair is a different product from an armchair.”<sup>71</sup> The proper analogy, therefore, is not of a bookstore faced with having to include Braille books in its inventory, but of a bookstore limiting access by disabled customers to books of a certain genre or by a particular author specifically because the customers are disabled.<sup>72</sup> Thus, the analogies employed by the appellate court are inapposite to the facts presented by *Doe* and do not help to resolve the question of whether the ADA applies to the content of insurance policies.

The appellate court concluded that reference to the plain language of the statute could not resolve the issue of whether the ADA applies to the content of insurance policies because a simple reading of the statute could not lead one to the rule establishing that the ADA cannot require a public accommodation to alter its inventory.<sup>73</sup> However, as the foregoing discussion makes clear, whether the ADA may compel a public accommodation to alter its inventory is not relevant to the determination of whether the ADA applies to the content of insurance policies. Thus, to resolve the issue presented by *Doe*, this Comment turns again to the plain language of the statute, the legislative history, and the interpretative guidance of the DOJ.

### C. *The Plain Language, Legislative History, and Interpretative Guidance*

Nothing in the plain language of the ADA suggests that the Act should apply only to questions concerning *access* to goods and services offered by public accommodations. In fact, as the court of appeals in *Doe* conceded,<sup>74</sup> the language of the statute suggests just the opposite result—that the anti-discrimination provisions of the ADA apply to the

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69 See *id.* at 558.

70 However, Mutual does *limit* access to the \$1,000,000 limit, and as a result “the policies have less value to persons with AIDS than they would have to persons with other, equally expensive diseases or disabilities.” *Id.* at 559.

71 *Doe*, 179 F.3d at 560; accord *Boots v. Northwestern Mut. Life Ins. Co.*, No. 1:98CV625JM, 1999 WL 1191425, at \*4 (D.N.H. June 30, 1999).

72 See Schultz, *supra* note 36, at 380; see also *Doe* 179 F.3d at 565 (Evans, J., dissenting) (“The better analogy would be that of a store which lets disabled customers in the door, but then refuses to sell them anything but inferior cameras.”).

73 See *Doe*, 179 F.3d at 559.

74 See *id.* at 560.

content of goods and services as well. Two provisions in particular suggest this result in their use of the words "full and equal enjoyment."<sup>75</sup>

The general rule prohibiting discrimination by public accommodations is contained in section 302(a) of the ADA.<sup>76</sup> The rule provides that the owner or operator of a "place of public accommodation" may not discriminate against an individual "on the basis of disability in the full and equal enjoyment of the goods [or] services"<sup>77</sup> offered by that place of public accommodation.<sup>78</sup> The key words here are "in the full and equal enjoyment" of goods or services. Section 302(b) identifies specific forms of discrimination prohibited by section 302(a).<sup>79</sup> According to section 302(b)(2)(A)(i), it would be discriminatory, and thus in violation of the Act, to impose or apply "eligibility criteria that screen out or tend to screen out an individual with a disability or any class of individuals with disabilities from fully and equally enjoying any goods [or] services unless such criteria can be shown to be necessary for the provision of the goods [or] services being offered."<sup>80</sup> Here again, the key words are "fully and equally enjoying" the goods or services.

The provisions do not explicitly apply to the content of insurance policies. However, nothing in those words suggests that the anti-discrimination provisions should apply only to questions of access, for plainly, before one can enjoy goods or services, one must first gain access to them.<sup>81</sup> Moreover, as Doe and Smith argued, to construe the provisions as regulating only access to goods and services would render meaningless the words "full and equal enjoyment."<sup>82</sup> It is difficult to imagine how Doe and Smith could be said to have "fully and equally enjoy[ed]" the benefits of their insurance policies when, for the treatment of their illness, they had to rely on a sum of money that was ten to forty times less than the sum of money on which persons without AIDS could rely for the treatment of their illnesses. Yet, if the ADA regulates only access to goods and services, then Mutual's policies did not violate the Act, inasmuch as Mutual does not refuse to sell its insurance policies to persons with AIDS, and Doe and Smith must

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75 See 42 U.S.C. § 12182(a), (b)(2)(A)(i) (1994).

76 See Americans with Disabilities Act § 302(a), 42 U.S.C. § 12182(a) (1994). This section is quoted in full in the text accompanying *supra* note 24.

77 *Id.*

78 For an explanation of how insurance companies are considered public accommodations for the purposes of Title III, see *supra* note 24.

79 See Americans with Disabilities Act § 302(b), 42 U.S.C. § 12182(b) (1994).

80 § 302(b)(2)(A)(i), 42 U.S.C. § 12182(b).

81 See *Doe*, 999 F. Supp. at 1191.

82 *Id.*

be seen as fully and equally enjoying the benefits of their insurance policies. Thus, interpreting the statute to apply only to questions of access and not to the content of insurance policies renders meaningless the words "full and equal enjoyment."

However, whether such an interpretation would render those words meaningless depends on the meaning attributed to those words by the ADA. The statute itself offers no definition, but the regulations promulgated by the DOJ to implement the statute do: "Full and equal enjoyment means the right to participate and to have an equal opportunity to obtain the same results as others to the extent possible with such accommodations as may be required by the Act and these regulations."<sup>83</sup> Thus, sections 302(a) and 302(b)(2)(A)(i) would guarantee a disabled person's right both to participate in an insurance policy—that is to have access to that good or service—and to have an equal opportunity to obtain the same results. Whether a disabled person who holds an insurance policy has the opportunity to obtain the same results depends on the terms of the disabled person's policy. Thus, because the "full and equal enjoyment" of goods and services includes the right to have an equal opportunity in obtaining the same results as the non-disabled, the Act must regulate the content of insurance policies.

Significantly, however, "full and equal enjoyment" promises equal opportunity to achieve the same results only "to the extent possible with such accommodations as may be required by the Act and [the DOJ's] regulations."<sup>84</sup> The "accommodations" to which the regulations refer here are concessions made to the public accommodations regulated by Title III—that is, they are *limitations* on Title III's anti-discrimination provisions. Therefore, it is only to the extent possible with such limitations on the Act that the ADA regulates the content of insurance policies. Thus, the question becomes, do the DOJ's regulations or the Act itself require any limitations on the ADA's anti-discrimination provisions that would allow Mutual to place policy caps on AIDS benefits? The answer, as indicated by the DOJ's regulations, its interpretative guidance, and the legislative history of the ADA, is yes.

Mutual may limit coverage for the treatment of AIDS or ARCs, *provided*, however, that the limitations are based on sound actuarial principles or actual or reasonably anticipated experience. Section

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83 28 C.F.R. pt. 36, app. B, at 609 (1996). As the court in *Doe* noted, *see Doe*, 179 F.3d at 563 (citing *Bragdon v. Abbott*, 524 U.S. 624, 646 (1998)), the DOJ's regulations are entitled to *Chevron* deference, which asks "whether the agency's answer is based on a permissible construction of the statute." *Chevron, U.S.A., Inc., v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843 (1984).

84 28 C.F.R. pt. 36, app. B, at 609.

501(c)(1) of the ADA provides that the Act "shall not be construed to prohibit or restrict . . . an insurer . . . from underwriting risks, classifying risks, or administering such risks that are based on or not inconsistent with State law," provided, however, that such practices are not "used as a subterfuge to evade the purposes of" Title III.<sup>85</sup> The House Judiciary Committee explained that this section was added "because [the Committee] does not intend for the ADA to affect legitimate classification of risks in insurance plans in accordance with the state laws and regulations under which such plans are regulated."<sup>86</sup> The report continues,

Specifically, Section 501(c)(1) makes it clear that insurers may continue to sell to and underwrite individuals applying for life, health, or other insurance on an individually underwritten basis, or to service such insurance products, *so long as the standards used are based on sound actuarial data and not on speculation.*<sup>87</sup>

In language quoted by the district court in *Doe*,<sup>88</sup> the legislative history further clarifies that the requirement that public accommodations base their insurance practices on sound actuarial principles extends to the terms and conditions of insurance policies.

Moreover, while a plan which limits certain kinds of coverage based on classification of risk would be allowed under this section, the plan may not refuse to insure, or 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 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.*<sup>89</sup>

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85 Americans with Disabilities Act § 501(c), 42 U.S.C. § 12201(c)(1) (1994). Some scholars have suggested that Section 501(c) may shield insurance companies from all liability. See Monica E. McFadden, *Insurance Benefits Under the ADA: Discrimination or Business as Usual?*, 28 TORT & INS. L.J. 480, 481 (1993); Schultz, *supra* note 36, at 347-48. However, this does not seem to be the case, as section 501(c) limits its own scope to those practices not used to evade the purposes of the Act. See Schultz, *supra* note 36, at 347-48; see also *infra* notes 86-92 and accompanying text.

86 H.R. REP. NO. 101-485, pt. 3, at 70 (1990), *reprinted in* 1990 U.S.C.C.A.N. 445, 493. The House Committee on Education and Labor offered a similar explanation, *see id.* pt. 2, at 136, *reprinted in* 1990 U.S.C.C.A.N. 303, 419, echoing the report of the Senate Committee on Labor and Human Resources, *see* S. REP. NO. 101-116, at 84-85 (1989).

87 H.R. REP. NO. 101-485, pt. 3, at 70 (1990), *reprinted in* 1990 U.S.C.C.A.N. 445, 493 (emphasis added).

88 *See Doe*, 999 F. Supp. at 1193.

89 H.R. REP. NO. 101-485, pt. 2, at 136-37 (1990), *reprinted in* 1990 U.S.C.C.A.N. 303, 419-20 (emphasis added); S. REP. NO. 101-116, at 85 (1989) (emphasis added); *see also* TECHNICAL ASSISTANCE MANUAL, *supra* note 43, § III-3.11000, at 19.



In light of the reports offered by the various legislative committees, the Department of Justice (delegated by Congress with the authority to promulgate binding regulations implementing Title III<sup>90</sup>) concluded that the ADA "does not prohibit use of legitimate actuarial considerations to justify differential treatment of individuals with disabilities in insurance."<sup>91</sup> However, the legislative history clearly indicates that the ADA prohibits differential treatment that is *not* based on legitimate actuarial principles or reasonably anticipated experience. "This legislation assures that decisions concerning the insurance of persons with disabilities which are not based on bona fide risk classification be made in conformity with non-discrimination requirements."<sup>92</sup>

Thus, as Doe and Smith asserted, it seems Mutual may limit coverage for the treatment of AIDS or ARCs, provided that the limitations are based on sound actuarial principles or actual or reasonably anticipated experience.<sup>93</sup> The circuit court in *Doe* considered this interpretation, however, and concluded that it was not correct.<sup>94</sup> "If it were," the court reasoned, "it would imply that section 302(a) regulates the content not only of insurance policies but also of all other products and services, since the section is not limited to insurance."<sup>95</sup> Yet, such is the case. Section 302(a) regulates the content of all products and services "to the extent possible with such [limitations on the Act] as may be required by the Act and these regulations."<sup>96</sup> Presumably the court reasoned that section 302(a) could not regulate the content of all other goods and services because if it did, it would not provide for the rule that the Act does not require the alteration of inventories to include special goods accommodating to the disabled. However, the rule concerning the alteration of inventories is one of the limitations on Title III provided for in the Act and the DOJ's regulations (and, as we have seen,<sup>97</sup> does not apply to insurance policies).

In rejecting the contention that Mutual's AIDS caps must be based on sound actuarial principles, the court further reasoned that

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90 See 42 U.S.C. § 12186(b) (1994); see also *supra* note 83 (discussing deference accorded to the DOJ's regulations).

91 28 C.F.R. pt. 36, app. B, at 619 (1996).

92 H.R. REP. No. 101-485, pt. 2, at 138 (1990), *reprinted in* 1990 U.S.C.C.A.N. 303, 421.

93 See Bonnie Milstein et al., *The Americans with Disabilities Act: A Breathtaking Promise for People with Mental Disabilities*, 24 CLEARINGHOUSE REV. 1240, 1243 (1991).

94 See *Doe*, 179 F.3d at 562.

95 *Id.*

96 28 C.F.R. pt. 36, app. B at 609 (1996) (emphasis added); see also text accompanying *supra* note 84.

97 See *supra* notes 46-71 and accompanying text.

"the insurance industry . . . may have obtained the rule of construction in section 501(c) just to backstop its argument that section 302(a) regulates only access and not content."<sup>98</sup> Indeed, it seems the insurance industry did press that interpretation upon the Department of Justice while the DOJ was drafting its regulations. Appendix B to the DOJ's regulations states, "[A] few commentators argued that the Act does not apply to insurance underwriting practices or the terms of insurance contracts."<sup>99</sup> However, the DOJ rejected that argument, concluding instead,

Language in the committee reports indicates that Congress intended to reach insurance practices by prohibiting differential treatment of individuals with disabilities in insurance offered by public accommodations unless the differences are justified. "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."<sup>100</sup>

The circuit court noted that the DOJ's regulations implementing the ADA are entitled to *Chevron* deference,<sup>101</sup> which asks "whether the agency's answer is based on a permissible construction of the statute."<sup>102</sup> However, the court concluded that the DOJ's regulations did not compel the interpretation offered by Doe and Smith largely because the examples provided by the DOJ's regulations and the committee reports only include instances of insurance companies *refusing to sell* insurance to disabled persons and not of insurance companies *discriminating in the content* of their policies.<sup>103</sup> Moreover, both the Judiciary report and the DOJ's regulations provide in their examples that an insurance company may offer policies that limit coverage for certain procedures or treatments but may not entirely deny coverage to a person with a disability.<sup>104</sup> However, when read in the context of the preceding language, it becomes apparent that an insurance company may limit coverage for certain treatments, but only if such limita-

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98 *Doe*, 179 F.3d at 562.

99 28 C.F.R. pt. 36, app. B, at 619 (1996).

100 *Id.* (quoting H.R. REP. NO. 101-485, pt. 2, at 136 (1990), *reprinted in* 1990 U.S.C.C.A.N. 303, 419, and S. REP. NO. 101-116, at 84 (1989)) (emphasis added). While AIDS certainly poses increased risks, the legislative history indicates that insurance companies must apply actuarial principles in weighing those risks to determine reasonable coverage limits for persons with AIDS.

101 *See Doe*, 179 F.3d at 563 (citing *Bragdon v. Abbott*, 524 U.S. 624, 646 (1998)).

102 *Chevron, U.S.A., Inc., v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843 (1984).

103 *See Doe*, 179 F.3d at 562-63.

104 *See* H.R. REP. NO. 101-485, pt. 3, at 71 (1990), *reprinted in* 1990 U.S.C.C.A.N. 445, 494; 28 C.F.R. pt. 36, app. B, at 619.

tion is based on sound actuarial principles or reasonably anticipated experience.<sup>105</sup>

It is curious, however, that in its regulations and *Technical Assistance Manual* the Department of Justice does "not indicate a focused attention to coverage limits."<sup>106</sup> In fact, before the DOJ issued the regulations, many commentators argued that section 501(c) of the Act did not give enough protection to disabled persons,<sup>107</sup> yet the DOJ decided to adopt the language of the rule unchanged.<sup>108</sup>

Still, while the regulations and legislative history do not specifically address coverage limits, neither do they explicitly limit application of the anti-discrimination provisions to questions of access. The regulations do specifically address other limitations on Title III's scope; note for example the limitations regarding the alteration of inventories and those allowing medical specialists to refuse to treat illnesses outside of their specialty.<sup>109</sup> However, the regulations do not specifically restrict Title III from applying to the content of insurance policies, an interpretation that would contradict much of the language in the committee reports forbidding insurance companies from discriminating against persons with disabilities "in the terms or conditions of insurance"<sup>110</sup> and prohibiting insurance companies from "limit[ing] the amount, extent, or kind of coverage available to an individual"<sup>111</sup> based on disability unless the limitation is based on sound actuarial principles or reasonably anticipated experience.

Furthermore, while the circuit court in *Doe* labeled as a "radical stance" the interpretation that the ADA requires insurance companies to base their coverage limitations on legitimate actuarial considerations, such an interpretation is consistent with the stated purpose of the Act. "It is the purpose of [the ADA] to provide a clear and comprehensive national mandate for the elimination of discrimination

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105 See H.R. REP. NO. 101-485, pt. 2, at 136-37 (1990), *reprinted in* 1990 U.S.C.C.A.N. 303, 419-20; *id.* pt. 3, at 71, *reprinted in* 1990 U.S.C.C.A.N. 445, 494; S. REP. NO. 101-116, at 85 (1989).

106 *Doe*, 179 F.3d at 563.

107 See 28 C.F.R. pt. 36, app. B, at 619 ("The Department received numerous comments on proposed § 36.212 [implementing section 501(c)]. Most supported the proposed regulation but felt that it did not go far enough in protecting individuals with disabilities and persons associated with them from discrimination.").

108 See *id.*

109 See *supra* note 64 and accompanying text.

110 H.R. REP. NO. 101-485, pt. 2, at 136 (1990), *reprinted in* 1990 U.S.C.C.A.N. 303, 419; S. REP. NO. 101-116, at 84 (1989).

111 H.R. REP. NO. 101-485, pt. 2, at 137 (1990), *reprinted in* 1990 U.S.C.C.A.N. 303, 420; *id.* pt. 3, at 71 (1990), *reprinted in* 1990 U.S.C.C.A.N. 445, 494; S. REP. NO. 101-116, at 85 (1989).

against individuals with disabilities,"<sup>112</sup> and "to bring those individuals into the economic and social mainstream of American life."<sup>113</sup> In light of the purpose of the ADA, it seems an interpretation limiting the Act's application to questions of access would be far more narrow than the alternative interpretation would be "radical." Indeed, restricting the ADA's purview to mere access to goods and services would affirmatively undermine the goals of the Act.<sup>114</sup> As the Federal District Court for the Northern District of Georgia noted, "Because access to adequate health care is often integral to a disabled individual's ability to participate in society, the court cannot imagine that an insurer could arbitrarily cap the benefits payable with respect to a particular disability without running afoul of this stated purpose."<sup>115</sup> Persons with AIDS in particular are widely ostracized from the mainstream of American society because AIDS is so often associated with homosexuality and drug use.<sup>116</sup> Allowing coverage limits for AIDS treatments to be based on speculation and not on legitimate actuarial considerations perpetuates the marginalization of persons with AIDS in American society in direct contradiction of the stated purpose of the ADA.

Therefore, the language of the statute, the committee reports, the regulations promulgated by the Department of Justice, and the stated purpose of the ADA all suggest that Title III should prohibit discrimination in the content of insurance policies. Though neither the statute nor the regulations specifically address their application to

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112 42 U.S.C. § 12101(b)(1) (1994).

113 H.R. REP. NO. 101-485, pt. 3, at 23 (1990), *reprinted in* 1990 U.S.C.C.A.N. 445, 446; *see also* Statement by President George Bush upon Signing S. 933, 26 WEEKLY COMP. PRES. DOC. 1165 (July 30, 1990), *reprinted in* 1990 U.S.C.C.A.N. 601, 602 ("[The ADA] signals the end to the unjustified segregation and exclusion of persons with disabilities from the mainstream of American life.").

114 For a thorough analysis of the ADA's goals and potential implications, see Robert L. Burgdorf, Jr., *The Americans with Disabilities Act: Analysis and Implications of a Second-Generation Civil Rights Statute*, 26 HARV. C.R.-C.L. L. REV. 413 (1991).

115 *World Ins. Co. v. Branch*, 966 F. Supp. 1203, 1208 (N.D. Ga. 1997), *vacated as moot*, 156 F.3d 1142 (11th Cir. 1998); *see also* *Doukas v. Metropolitan Life Ins. Co.*, 950 F. Supp. 422, 427 (1996) ("[I]t is often insurance coverage that will determine a disabled person's ability to prevent the disability from limiting his or her participation in society." (quoting *Parker v. Metropolitan Life Ins. Co.*, 99 F.3d 181, 192-93 (6th Cir.), *reh'g en banc granted and vacated*, 107 F.3d 359 (6th Cir. 1996), *reh'g en banc*, 121 F.3d 1006 (6th Cir. 1997), *cert. denied*, 522 U.S. 1084 (1998)); Milstein, *supra* note 93, at 1243 (discussing difficulties that health insurance poses for individuals with disabilities).

116 *See* Nan D. Hunter & William B. Rubenstein, *Introduction to AIDS AGENDA: EMERGING ISSUES IN CIVIL RIGHTS*, at xi (Nan D. Hunter & William B. Rubenstein eds., 1992); JEFFREY A. MELLO, *AIDS AND THE LAW OF WORKPLACE DISCRIMINATION* 1 (1995).

coverage limitations, the committee reports indicate that Congress did not intend to completely relieve the insurance industry of its duty to refrain from discriminating against disabled policy holders. Rather, insurance companies must base any differential treatment of persons with disabilities on legitimate actuarial considerations and not on speculation.

However, regardless of whether Mutual's AIDS caps violate the anti-discrimination provisions of Title III, Mutual may still escape liability if the application of the ADA to Mutual's policies is barred by the McCarran-Ferguson Act.

## II. DOES THE MCCARRAN-FERGUSON ACT BAR APPLICATION OF THE ADA TO INSURANCE POLICIES?

The majority of the Seventh Circuit panel in *Doe* concluded that regardless of whether the ADA regulates the content of insurance policies, the suit brought by Doe and Smith had to fail because it was barred by the McCarran-Ferguson Act.<sup>117</sup> Section 2(b) of that Act forbids construing any federal statute "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."<sup>118</sup> Thus, to escape preclusion by the McCarran-Ferguson Act and come to bear on a case involving the business of insurance, a federal statute *either* (1) must not "invalidate, impair, or supercede" a state law enacted to regulate the business of insurance *or* (2) must "specifically relate" to the business of insurance.<sup>119</sup> Contrary

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117 See *Doe*, 179 F.3d at 563. More precisely, the court said,

We conclude that section 302(a) does not require a seller to alter his product to make it equally valuable to the disabled and to the nondisabled, even if the product is insurance. . . . And if [this conclusion] is wrong, the suit must fail anyway, because it is barred by the McCarran-Ferguson Act.

*Id.* Given the court's qualification of its conclusion regarding the applicability of § 302(a) to the content of insurance policies, this conclusion could be regarded as mere dicta.

118 McCarran-Ferguson Act § 2(b), 15 U.S.C. § 1012(b) (1994).

119 Of course, just what constitutes "the business of insurance" is often at issue in cases implicating the McCarran-Ferguson Act. However, that issue does not present itself in the context of *Doe* inasmuch as the conduct at issue, the provision of insurance policies with potentially discriminatory policy caps, clearly constitutes "the business of insurance." Both the district court and the court of appeals in *Doe* made that assumption, and the relevant case law supports it. See *SEC v. National Sec., Inc.*, 393 U.S. 453, 460 (1969) ("The relationship between insurer and insured, the type of policy which could be issued, its reliability, interpretation, and enforcement—these [are] the core of the 'business of insurance.' . . . Statutes aimed at protecting or regulating this [policyholder-insurer] relationship, directly or indirectly, are laws regulat-

to the circuit court's holding in *Doe*, the anti-discrimination provisions of the ADA meet both of those requirements, and the McCarran-Ferguson Act should not bar their application to insurance policies.

A. *To "Invalidate, Impair, or Supersede"*

If a federal statute does not specifically relate to the insurance business, the McCarran-Ferguson Act prohibits construing the act "to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of insurance."<sup>120</sup> By its very terms then, the McCarran-Ferguson Act does not bar application of a federal statute to the business of insurance if the statute does not "invalidate, impair, or supersede" any state law regulating insurance.<sup>121</sup> The district court in *Doe* concluded that Mutual did "not identif[y] any state law that an application of Title III of the ADA would 'invalidate, impair, or supersede.'"<sup>122</sup> In fact, Illinois insurance law would have had the same effect on the business of insurance that Title III of the ADA would have had if the ADA were applied to the content of insurance policies. According to Illinois law,

No company, in any policy of accident or health insurance issued in this 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 principles or is related to actual or reasonably anticipated experience.<sup>123</sup>

The district court in *Doe* interpreted section 2(b) of the McCarran-Ferguson Act to mean that "[w]here there is no conflict between the federal statute and state law, as in this case, the McCarran-Ferguson Act does not bar application of federal law."<sup>124</sup> Indeed, the court's conclusion was well supported by several circuit court rulings

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ing the 'business of insurance.');

*see also* Julia M. Melendez, *The McCarran-Ferguson Act: Has It Outlived Its Intent?*, 42 FED'N INS. & CORP. COUNSEL Q. 283, 290-92 (1992).

120 15 U.S.C. § 1012(b) (1994).

121 *See* *Humana, Inc. v. Forsyth*, 525 U.S. 299, 303 (1999); *Murff v. Professional Med. Ins. Co.*, 97 F.3d 289, 291 (8th Cir. 1996); *Nationwide Mut. Ins. Co. v. Cisneros*, 52 F.3d 1351, 1360-61 (6th Cir. 1995).

122 *Doe*, 999 F. Supp. at 1195-96.

123 215 ILL. COMP. STAT. 5/364 (West 1993).

124 *Doe*, 999 F. Supp. at 1196.

from the previous few years including one of the Seventh Circuit's.<sup>125</sup> Accordingly, the district court ruled that the McCarran-Ferguson Act did not preclude application of Title III to insurance policies.<sup>126</sup>

However, the court of appeals in *Doe* rejected the district court's analysis, noting that a federal statute need not directly conflict with a state law designed to regulate insurance in order to trigger the prohibitive effect of the McCarran-Ferguson Act.<sup>127</sup> It is enough, the circuit court maintained, if the interpretation of the federal statute would "interfere with a state's administrative regime."<sup>128</sup> In support, the court cited *Humana Inc. v. Forsyth*, decided by the Supreme Court just six months before.<sup>129</sup> In *Humana*, the Supreme Court held that because the Racketeer Influenced and Corrupt Organization Act (RICO) advanced the State of Nevada's interest in combating insurance fraud and did not frustrate any articulated Nevada policy, the McCarran-Ferguson Act did not bar insurance policy beneficiaries from suing a group health insurer and hospital under RICO.<sup>130</sup>

In determining whether suit under RICO would "invalidate, impair, or supersede" relevant Nevada law, the Supreme Court considered definitions of the three relevant terms.<sup>131</sup> The Court quickly concluded that application of RICO would not "invalidate" or "supersede" Nevada law regulating insurance because, to do so under the

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125 See *id.* (citing *Cisneros*, 52 F.3d at 1363, *Merchants Home Delivery Serv., Inc. v. Frank B. Hall & Co.*, 50 F.3d 1486, 1491-93 (9th Cir. 1995), and *NAACP v. American Family Mut. Ins. Co.*, 978 F.2d 287, 295-97 (7th Cir. 1992)).

126 See *id.*

127 See *Doe*, 179 F.3d at 563.

128 *Id.* (citing *Humana, Inc. v. Forsyth*, 525 U.S. 299, 310 (1999)).

129 See *id.* The opinion also cites the following two cases for support: *Department of the Treasury v. Fabe*, 508 U.S. 491 (1993), and *Autry v. Northwest Premium Services, Inc.*, 144 F.3d 1037 (7th Cir. 1998). However, neither of these cases contain any reference to such a standard, nor did they address the issue of whether the federal statutes in question "invalidate, impair, or supersede" the relevant state statutes. See *Fabe*, 508 U.S. at 501.

The parties agree that application of the federal priority statute would "invalidate, impair, or supersede" the Ohio priority scheme and that the federal priority statute does not "specifically relat[e] to the business of insurance." All that is left for us to determine, therefore, is whether the Ohio priority statute is a law enacted "for the purpose of regulating the business of insurance."

*Id.* (alteration in original); see also, *Autry*, 144 F.3d at 1044 (holding that the relevant state statute was not enacted for the purpose of regulating insurance and that there was no need for the court to determine whether the federal statute invalidated, impaired, or superseded it).

130 See *Humana, Inc. v. Forsyth*, 525 U.S. 299, 314 (1999).

131 See *id.* at 307-10.

ordinary definitions of the words, RICO would have to render the Nevada law "ineffective."<sup>132</sup> Likewise, application of Title III of the ADA to insurance policies would not "render ineffective"<sup>133</sup> the applicable Illinois law, inasmuch as litigants would still have recourse to that law in Illinois court. Hence, the key question before the Supreme Court in *Humana*, and before the Seventh Circuit in *Doe*, was whether application of the relevant federal statute would "impair" the state law regulating insurance.<sup>134</sup>

In resolving the question, the Supreme Court in *Humana* articulated a "formulation [that] seem[ed] to [it] to capture the meaning and to construe, most sensibly, the text of § 2(b)" of the McCarran-Ferguson Act.<sup>135</sup> According to that formulation, "[w]hen federal law does not directly conflict with state regulation, and when application of the federal law would not frustrate any declared state policy or interfere with a State's administrative regime, the McCarran-Ferguson Act does not preclude its application."<sup>136</sup>

Clearly application of Title III of the ADA to insurance policies would not conflict with state regulation of insurance and would not frustrate any declared state policy, because Illinois has itself enacted a law that would provide for the same or greater protection of disabled persons against discrimination by insurance companies.<sup>137</sup> At issue then is whether application of Title III of the ADA to insurance policies would "interfere with a state's administrative regime." This was the sole standard on which the circuit court in *Doe* relied in determining that application of Title III to insurance policies would impair Illinois's regulation of insurance and trigger preclusion by the McCarran-Ferguson Act.<sup>138</sup>

The Supreme Court articulated the standard prohibiting interference with a state's administrative regime for the first time in *Humana*.<sup>139</sup> However, the Court did not explain how application of a federal statute to the business of insurance might interfere with a state's administrative regime. The Court in *Humana* ruled that the plaintiffs' suit under RICO in that case did *not* "impair" state regula-

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132 *Id.* at 307-08.

133 *Id.* at 307.

134 *See id.* at 308.

135 *Id.* at 310.

136 *Id.*

137 For the text of the statute, see 215 ILL. COMP. STAT. 5/364 (West 1993) and see also *supra* text accompanying note 123.

138 *See Doe*, 179 F.3d at 563-64.

139 *See Humana*, 525 U.S. at 303.



tion of insurance—that is, it did not frustrate any state policy or interfere with the state’s administrative regime.<sup>140</sup>

Unfortunately, *Humana* does not answer the precise question raised in *Doe*. In *Humana*, the Supreme Court decided the question of whether application of a federal law that proscribes the same conduct as a state law, but which provides materially different remedies, would “impair” the state law.<sup>141</sup> *Doe* presents the question of whether a federal statute that requires a court to determine whether insurance coverage limits are consistent with sound actuarial principles “impairs” state law by causing interference with the state’s administrative regime.

The circuit court in *Doe* presumed that application of the ADA to the content of insurance policies would require federal courts to determine whether coverage limits were consistent with sound actuarial principles *and state law* before it determined whether an insurance company had violated the ADA.<sup>142</sup> It is this construction of the ADA—“requiring a *federal* court to decide whether an insurance policy is consistent with *state law*”<sup>143</sup>—that the circuit court in *Doe* ruled “obviously would interfere with the administration of the state law.”<sup>144</sup>

However, the anti-discrimination requirements of Title III of the ADA would not necessarily require a federal court to determine whether coverage limits are consistent with state law. Were the general anti-discrimination requirement contained in section 302(a) of Title III of the ADA to apply to the content of insurance policies, that

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140 See *id.* at 311. The defendants had argued that the McCarran-Ferguson Act barred the policy beneficiaries’ suit under RICO against their insurance company for insurance fraud because RICO’s private remedies and treble damages provision exceeded Nevada’s administrative penalties for the crime. See *id.* at 304–05. However, the Supreme Court held that the application of RICO did not “impair” state regulation of insurance since Nevada law also provided for a private right of action and plaintiffs could be eligible for damages exceeding the treble damages available under RICO. See *id.* at 311–13.

141 See *id.* at 303.

142 See *Doe*, 179 F.3d at 564.

143 *Id.*

144 *Id.* Dissenting from the majority’s opinion in *Doe*, Judge Evans points out that “the question of whether these caps are actuarially sound or consistent with state law has been taken out of the equation by Mutual of Omaha’s concession in the parties’ stipulation.” *Id.* at 566 (Evans, J., dissenting). Mutual had stipulated that it “has not shown and cannot show that its AIDS Caps are or ever have been consistent with sound actuarial principles, actual or reasonably anticipated experience, bona fide risk classification, or state law.” *Id.* at 558. However, as the majority noted, the court would be “certain to be called upon to decide such issues in the next case, when the insurer does not stipulate to them.” *Id.* at 564. Though such a rationale may not justify the decision in *Doe*, it warrants consideration of the issue in this Comment.

section would prohibit inferior policy provisions for the disabled, such as lower coverage limits, unless such provisions were *based on sound actuarial principles or actual or reasonably anticipated experience*.<sup>145</sup> Section 302(a) does not require federal courts to ensure that insurance policy provisions comport with principles of state law. Thus, application of Title III of the ADA to the content of insurance policies would not interfere with a state's administrative regime and would not "impair" state law for the purposes of the McCarran-Ferguson Act.

Since application of Title III of the ADA to the content of insurance policies would not "invalidate, impair, or supersede" Illinois law regulating insurance, the McCarran-Ferguson Act should not bar its application in *Doe*. However, whether application of the ADA to insurance policies would interfere with state law regulating insurance depends on the state laws in question. Thus, federal courts would have to determine the issue on a case-by-case basis. If, however, Title III of the ADA "specifically relates" to the business of insurance, then it falls within the scope of the explicit exception to preclusion provided for by the McCarran-Ferguson Act and applies to the content of insurance policies in all cases and in all states.

### B. Title III "Specifically Relates" to the Business of Insurance

The circuit court in *Doe* concluded that the McCarran-Ferguson Act barred the application of Title III to insurance because Title III did not fall within the "specifically relates" exception of the McCarran-Ferguson Act.<sup>146</sup> In reaching this conclusion, however, the court confused the issues of whether the ADA impairs state law, on the one hand, and whether the ADA specifically relates to insurance, on the other.

As the district court in *Doe* concluded, the relevant anti-discrimination provisions of the ADA do specifically relate to the business of insurance.<sup>147</sup> Section 501(c) of Title IV of the ADA expressly provides that insurance underwriting practices "shall not be used as a subterfuge to evade the purposes of [Title III]."<sup>148</sup> Moreover, Title III explicitly includes "insurance office" in its definition of public accommodation such that the general anti-discrimination clause contained in section 302(a) applies to insurance companies.<sup>149</sup> These specific references to the business of insurance suffice to preserve the

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145 See *supra* notes 85–113 and accompanying text.

146 See *Doe*, 179 F.3d at 564.

147 See *Doe*, 999 F. Supp. at 1195.

148 Americans with Disabilities Act § 501(c), 42 U.S.C. § 12201(c) (1994).

149 See 42 U.S.C. § 12187(7)(F) (1994); see also *supra* note 24.

ADA's application to insurance companies from the preclusive effect of the McCarran-Ferguson Act.

The United States Supreme Court analyzed the "specifically relates" exception in *Barnett Bank v. Nelson*.<sup>150</sup> There the Court considered whether a federal statute granting national banks in small towns the authority to sell insurance preempted Florida state law prohibiting the same. The Court determined that the federal statute specifically relates to the business of insurance within the meaning of the exception to the McCarran-Ferguson Act and rested its conclusion on the McCarran-Ferguson Act's language and purpose.<sup>151</sup> Considering the language "specifically relates to the business of insurance," the Court noted, "The word 'relates' is highly general, and this Court has interpreted it broadly in other pre-emption contexts."<sup>152</sup> The Court concluded, "In ordinary English, a statute that says that banks may act as insurance agents, and that the Comptroller of the Currency may regulate their insurance-related activities, 'relates' to the insurance business."<sup>153</sup> Likewise, a statute that says an insurer shall not use otherwise legitimate practices of underwriting, classifying, or administering risks to evade the purposes of the ADA "relates" to the insurance business.<sup>154</sup>

The Court further noted that, according to *Black's Law Dictionary*, the word, "specifically" could mean "'explicitly, particularly, [or] definitely,' . . . thereby contrasting a *specific* reference with an *implicit* reference made by more general language to a broader topic."<sup>155</sup> The Court explained, "The general words 'business activity,' for example, will sometimes include, and thereby implicitly refer . . . to insurance; the particular words 'finance, banking, and insurance' make that reference explicitly *and specifically*."<sup>156</sup> By analogy, then, the terms "an insurer"<sup>157</sup> and "insurance office"<sup>158</sup> used by the ADA refer explicitly and specifically to insurance.

Finally, the Court in *Barnett Bank* considered the meaning of "business of insurance."<sup>159</sup> The Court concluded that the federal stat-

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150 517 U.S. 25 (1996).

151 *See id.* at 38.

152 *Id.*

153 *Id.*

154 *See* 42 U.S.C. § 12201(c) (1994).

155 *Barnett Bank*, 517 U.S. at 38 (quoting BLACK'S LAW DICTIONARY 1398 (6th ed. 1990)).

156 *Id.* at 38-39.

157 42 U.S.C. § 12201(c).

158 *Id.* § 12181(7)(F) (1994).

159 *See Barnett Bank*, 517 U.S. at 39; *see also supra* note 119.

ute in question specifically relates to the “business of insurance” because it affected the “relation of insured to insurer and the spreading of risk-matters that this Court, in other contexts, has placed at the core of the McCarran-Ferguson Act’s concern.”<sup>160</sup> Section 501(c) of Title IV of the ADA also specifically addresses those spreading of risk-matters that constitute the “business of insurance.” That section states that the ADA does not prohibit insurers “from underwriting risks, classifying risks, or administering such risks that are based on or not inconsistent with State law,”<sup>161</sup> provided, however, that insurers do not use those exempted underwriting practices to evade the purposes of the ADA.<sup>162</sup>

The majority of the Seventh Circuit panel in *Doe* conceded that section 501(c) of Title IV of the ADA specifically relates to insurance and thus is not itself within the scope of the McCarran-Ferguson Act.<sup>163</sup> However, the court maintained that the McCarran-Ferguson Act barred application of the anti-discrimination provisions of Title III to the insurance industry. The court reasoned that because it is the anti-discrimination provision of section 302(a) of Title III that “injects the federal courts into the heart of the regulation of the insurance business by the states,”<sup>164</sup> (and not section 501(c)) it is section 302(a) that must fall within the “specifically relates” exception of the McCarran-Ferguson Act if it is to apply to insurance companies.<sup>165</sup>

As noted above, however, Title III explicitly includes “insurance office” in its definition of public accommodation.<sup>166</sup> Thus, in prohibiting discrimination against individuals on the basis of disability in the full and equal enjoyment of the goods and services offered by places of public accommodation,<sup>167</sup> section 302(a) specifically prevents such discrimination by insurance companies.<sup>168</sup> Moreover, section 302(a) specifically relates to “*the business of insurance*” because the provision of insurance policies to policy-holders is the essence of the “relation of insured to insurer” that constitutes the “business of insurance” as defined by the Supreme Court.<sup>169</sup> Yet, the circuit court rejected the ar-

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160 *Barnett Bank*, 517 U.S. at 39.

161 Americans with Disabilities Act § 501(c), 42 U.S.C. § 12201(c) (1994).

162 *See id.*

163 *See Doe*, 179 F.3d at 564.

164 *Id.*

165 *See id.*

166 *See* 42 U.S.C. § 12181(7)(F) (1994).

167 *See id.* § 12182(a) (1994).

168 *See supra* note 24.

169 *See Barnett Bank*, 517 U.S. 25, 39 (1996); *see also* SEC v. National Sec. Inc., 393 U.S. 453, 460 (1969); *supra* note 117 (quoting *National Securities, Inc.*, 393 U.S. at 460).

gument that Title III falls within the “specifically relates” exception to the McCarran-Ferguson Act and that, therefore, the McCarran-Ferguson Act should not bar the application of Title III to insurance.<sup>170</sup> The court’s reasoning for rejecting the argument, however, is fundamentally flawed.

The majority opinion conceded that “section 302(a) has some application to insurance: it forbids an insurer to turn down an applicant merely because he is disabled. To that extent . . . we can accept (certainly for the purposes of argument) that section 302(a) relates specifically to the business of insurance.”<sup>171</sup> The court continued,

But thus limited to a simple prohibition of discrimination, section 302(a) does not impair state regulation of insurance; no state wants insurance companies to refuse to insure disabled people. It is only when section 302(a) is interpreted as broadly as it must be for the plaintiffs in this case to prevail that McCarran-Ferguson’s reverse preemption comes into play.<sup>172</sup>

The court here confused the issues of whether application of section 302(a) to insurance will “impair” state regulation of insurance, on the one hand, and whether section 302(a) “specifically relates” to the business of insurance, on the other. If section 302(a) specifically relates to the business of insurance, then whether section 302(a) impairs state regulation of insurance is irrelevant.<sup>173</sup> The circuit court accepted that section 302(a) specifically relates to the business of insurance insofar as section 302(a) only prohibits discriminatory denials of access to insurance,<sup>174</sup> but it denied that section 302(a) specifically relates to insurance if that section is to be interpreted as regulating the content of insurance policies. What the court failed to appreciate is that if section 302(a) specifically relates to the business of insurance, then it does so regardless of whether the section regulates the content of insurance policies or merely access to them. Because, as the court here conceded, section 302(a) specifically relates to the business of insurance—at least to the extent that it prohibits discriminatory denials of access to insurance<sup>175</sup>—then it relates to the business of insurance even if section 302(a) regulates the content of insurance policies as well. Thus, the McCarran-Ferguson Act should not bar its application in *Doe*.

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170 See *Doe*, 179 F.3d at 564.

171 *Id.*

172 *Id.*

173 See *Humana Inc. v. Forsyth*, 525 U.S. 299, 303 (1999); *Murff v. Professional Med. Ins. Co.*, 97 F.3d 289, 291 (8th Cir. 1996).

174 See *Doe*, 179 F.3d at 564.

175 See *id.*

This conclusion is also consistent with the purpose of the McCarran-Ferguson Act—namely, that because continued regulation of the insurance industry by the states is in the public interest, “silence on the part of the Congress shall not be construed to impose any barrier to the regulation or taxation of such business by the several States.”<sup>176</sup> As the Supreme Court in *Barnett Bank* explained, this stated purpose,

particularly the word ‘silence,’ indicates that the Act does not seek to insulate state insurance regulation from the reach of all federal law. Rather, it seeks to protect state regulation primarily against *inadvertent* federal intrusion—say, through enactment of a federal statute that describes an affected activity in broad, general terms, of which the insurance business happens to constitute one part.<sup>177</sup>

The effect of the ADA on the insurance industry—that is, the prohibition of discrimination by insurance companies against individuals with disabilities—is not inadvertent. The ADA specifically addresses the business of insurance and intentionally draws it within the scope of its anti-discrimination provisions. The Court also explained,

Neither the McCarran-Ferguson Act’s language, nor its purpose, requires the Federal Statute to relate *predominately* to insurance. To the contrary, specific detailed references to the insurance industry in proposed legislation normally will achieve the McCarran-Ferguson Act’s objectives, for they will call the proposed legislation to the attention of the interested parties, and thereby normally guarantee, should the proposal become law, that Congress will have focused upon its insurance-related effects.<sup>178</sup>

Thus, consideration of the language and purpose of the McCarran-Ferguson Act indicate that Title III of the ADA falls within the “specifically relates” exception of the McCarran-Ferguson Act, as at least one court of appeals has held since the Seventh Circuit decided *Doe*.<sup>179</sup> Therefore, contrary to the circuit court’s conclusion in *Doe*, the McCarran-Ferguson Act should not bar application of the ADA to the business of insurance.

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176 15 U.S.C. § 1011 (1994); *see also* *Barnett Bank v. Nelson*, 517 U.S. 25, 39 (1996).

177 *Barnett Bank*, 517 U.S. at 39.

178 *Id.* at 41–42.

179 *See* *Pallozzi v. Allstate Life Ins. Co.*, 198 F.3d 28, 34 (2d Cir. 1999). *But see* *McNeil v. Time Ins. Co.*, No. 98-10585, 2000 WL 217500, at \*6 (5th Cir. Feb. 24, 2000).

### III. THE DISCRIMINATORY EFFECT OF AIDS CAPS

In assessing the discriminatory effect of Mutual's AIDS caps, the district court provided the following example:<sup>180</sup> Mutual will provide up to \$1,000,000 to non-disabled individuals for the treatment of pneumonia; however, if pneumonia afflicts an individual as a complication of AIDS, the pneumonia is deemed an AIDS related condition (ARC), and it becomes subject to the AIDS/ARC cap. Thus, if Richard Smith, who joined Doe in his suit against Mutual, had already exceeded his \$25,000 limit for AIDS-related care, Mutual would deny Smith coverage for the treatment of his pneumonia, while a non-disabled individual who had not reached the \$1,000,000 benefit cap would not be denied coverage.<sup>181</sup>

The appellate court conceded that the difference in treatment seemed to be "referable solely to the fact that one person is disabled and the other not."<sup>182</sup> However, the court rejected this conclusion, reasoning that even when a person with AIDS and a person without are struck with the same disease, because the disease is much more lethal when it strikes a person with AIDS, it is "not *really* the same disease."<sup>183</sup> By the circuit court's reasoning, then, a disease would not really be the same if it struck an elderly person or a young child, because in each case the same disease would be much more lethal to that person than to a young adult. Moreover, Judge Evans in dissent noted that neither Mutual's policies nor the medical community have established definitions for what "conditions" are "AIDS-related."<sup>184</sup> Thus, the very same affliction may be classified as both AIDS-related and not AIDS-related.<sup>185</sup> As a result (and as Mutual conceded) "coverage for certain expenses would be approved or denied based solely on whether the insured had AIDS."<sup>186</sup>

There is, however, a deeper, more fundamental discriminatory effect of Mutual's AIDS caps: such AIDS caps deny in persons with AIDS the human dignity that Mutual recognizes and respects in persons who are not so disabled. Mutual's policies suggest that persons disabled with AIDS do not warrant application of the same procedures by which Mutual arrives at the policy caps of non-disabled individuals. Whereas Mutual will determine the policy caps of non-disabled per-

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180 See *Doe*, 999 F. Supp. at 1196.

181 See *id.*

182 *Doe*, 179 F.3d at 560.

183 *Id.* at 561.

184 See *id.* at 565 (Evans, J., dissenting).

185 See *id.* (Evans, J., dissenting).

186 *Id.* (Evans, J., dissenting).

sons by application of actuarial principles or by reference to actual experience with a non-disabled person's illness, Mutual will not take the time to apply the same criteria to the determination of the policy caps of those individuals afflicted with AIDS. Implicit in such discriminatory practice is the principle that because a person has contracted the virus that causes AIDS, that person does not deserve the same effort, time, or expense on the part of Mutual in determining appropriate benefit caps for that person's insurance policy. Rather, Mutual can resort to raw speculation or simply apply an arbitrary figure in setting the cap on the amount of money it will provide to a person with AIDS for that person's AIDS related treatment.

### CONCLUSION

The discrimination effected by Mutual's AIDS caps is blatantly antithetical to the stated purpose of the ADA. The ADA purports to signal a "clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities."<sup>187</sup> "The common sense of the statute,"<sup>188</sup> to borrow a phrase from the majority's opinion in *Doe*, suggests that a "comprehensive" national mandate to "eliminate" discrimination against individuals with disabilities should not provide for protection up to the point of sale of an insurance policy and then excuse discrimination in the terms and conditions of that policy. Because the plain language of the ADA does not limit its application to mere access to insurance policies, and because to do so would directly contradict the stated purpose of the Act, and lastly, because the McCarran-Ferguson Act does not bar application of Title III of the ADA to the content of insurance policies, Title III should so apply.

As the rule articulated by the majority in *Doe* now stands, however, the protection afforded by the ADA runs only so far as the sales counter in an insurance office. Essentially, so long as Mutual, or any other insurance company, allows individuals with disabilities a place on its bus, the insurance company may seat them anywhere it wants. And so long as *Doe* is the law in the Seventh Circuit, the insurance companies will seat them in the back.

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<sup>187</sup> 42 U.S.C. § 12101(b)(1) (1994).

<sup>188</sup> *Doe*, 179 F.3d at 560.



