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DISORDER IN THE COURTS: THE APPLICATION OF THE AMERICANS WITH DISABILITIES ACT TO HEALTH INSURANCE

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ABSTRACT

In the past several years the United States Supreme Court has issued a number of rulings that clarify ambiguous sections of the Americans With Disabilities Act (ADA). These rulings have addressed the division among the lower federal courts concerning interpretations of various ADA provisions. However, there is one nagging question under the ADA on which the lower courts have ruled inconsistently and the Supreme Court has repeatedly declined to review. This troubling issue concerns the application of the ADA to health insurance and its implications for how the rights of those with disabilities to health insurance can be fully upheld under the ADA. The courts have ruled and regulatory agencies have argued inconsistently as to whether insurance practices that "cap" or otherwise limit the benefits offered to employees who suffer from disabilities fall under the coverage of the ADA. This article explores the rulings and interpretations of the lower courts and calls for legislative action and/or Supreme Court review of the issue.

While the Americans With Disabilities Act of 1990 (ADA) provides broad legal protection from discrimination for those with disabilities, it also contains a number of ambiguous areas which the courts have been forced to interpret [1]. One major unresolved controversy involves actions by which insurance companies place caps on benefits for medical care for individuals with select disabilities. Despite the fact that the federal circuits have been split in their rulings in this area, the Supreme Court has refused to hear cases related to this issue on three separate occasions. This article explores the controversy surrounding the issue and presents recommendations for how the rights of those with disabilities can be fully upheld under the ADA.

LEGISLATIVE HISTORY: INTENT AND BACKGROUND

The Americans With Disabilities Act prohibits discrimination in employment, housing, public accommodations, education, transportation, and communications for an estimated 43 million Americans with physical and/or mental disabilities. The act specifically extends protection against discrimination to three groups of individuals: 1) those who have an actual physical or mental impairment that substantially limits one or more major life activities; 2) those with a record of physical or mental impairment that substantially limits one or more major life activities; and 3) those regarded as having a physical or mental impairment that substantially limits one or more major life activities.

The ADA is composed of five titles: Title I covers employers; Title II covers public entities; Title III covers public accommodations; Title IV covers telecommunications; and Title V covers miscellaneous issues. Title III of the ADA specifically prohibits discrimination against those with disabilities in public accommodations. However, the statute is silent as to whether this public accommodations provision regulates only physical access to places of public accommodation or whether it has broader application to such goods and services as health insurance offered by the entities covered.

Little light is shed on this issue by examining the intent of Congress in passing Title III. The Senate proposed the purpose of Title III as extending the ADA's "general prohibitions against discrimination to privately operated public accommodations and to bring individuals with disabilities into the economic and social mainstream" [2, p. 58]. The House intent was to give those with disabilities "equal access to the array of establishments available to those without disabilities" [3, p. 99].

However, the specific language of Title III of the ADA provides "[n]o individual shall be discriminated against on the basis of disability in the full and equal enjoyment of 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." Beneath this is a listing of 12 categories of private entities that are considered public accommodations for the purpose of Title III. Notable within this listing of entities is "insurance office" [1, §1282(a)].

Moreover, Title V of the statute describes the applicability of the ADA to the insurance industry. Provisions within Title V indicate that the ADA does not affect the way the insurance industry does business in accordance with state laws and regulations under which the industry is regulated. However, both the House and Senate reports state that 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. Such risk must be based on sound actuarial principle, and any differential coverage may not be used as a subterfuge to evade the purposes of Titles I and II. Consequently, an

inherent inconsistency exists within the ADA regarding the provision of health insurance for those with disabilities and the extent to which an insurer may cap benefits for any given disability and/or provide differential coverage or exclusions for any particular disability.

The insurance industry has traditionally been regulated primarily by individual states, usually based on model legislation drafted and proposed by the National Association of Insurance Commissioners. However, in 1973, Congress began passing federal legislation that pertained to the health insurance industry in response to dramatic increases in health-care costs. The Rehabilitation Act of 1973 prohibits discrimination based on handicaps in programs that receive federal aid, including those that affect public health and welfare [4]. The Employee Retirement Income Security Act of 1974 created a federal regulatory structure for employee benefit plans [5]. The Health Insurance Portability and Accountability Act of 1996 allows certain employees to maintain temporary health insurance subsequent to employment termination [6].

As a result of the enactment of these federal laws, the lines of responsibility between federal and state oversight of health insurance have been blurred and jurisdictional problems have arisen. The ADA further complicates this issue by creating uncertainty as to whether and how the statute alters an insurer's ability to provide differential coverage under applicable state laws, as explained below.

FIRST CIRCUIT

The First Circuit was the first of the federal appellate courts to consider the status of caps on health insurance benefits for disabled individuals under Title III of the ADA. In *Carparts Distribution Center Inc. v. Automotive Wholesaler's Ass'n of New England,* the district court dealt with the question of whether a medical reimbursement plan and its administering trust violated Title III by limiting benefits for AIDS-related illnesses to $25,000 when lifetime benefits for other conditions were capped at $1,000,000 [7]. The lower trial court ruled that the defendant was not a "public accommodation" under Title III as the term "public accommodation" was considered to be "limited to actual physical structures with definite physical boundaries which a person physically enters for the purpose of utilizing the facilities or obtaining services therein" [7, at 19]. However, the court of appeals rejected the finding that "establishments of public accommodation are limited to actual physical structures" [7, at 25].

In reaching this conclusion, the court found that Title III's antidiscrimination provisions extend beyond mere physical access to public accommodations, as nothing in the legislative history of the ADA explicitly precludes an extension of the statute to the substance of what is being offered by these organizations [7]. This reasoning was based on the fact that the statute expressly prohibited discrimination based on "the denial, on the basis of disability, of the opportunity to

benefit from the goods, services, privileges, advantages or accommodations of an entity" [7, at 20].

Perhaps more important, the court noted that Title III makes no mention whatsoever of physical boundaries of public accommodations. In addition to listing "insurance office" in its categories of entities covered under Title III, Congress also included "travel services" [7, at 22]. The *Carparts* court noted that many travel services conduct business by telephone, fax, or e-mail without requiring the physical presence of a customer in the physical place of business of a travel services agency. Similarly, many other types of goods and services are sold in this manner and "to exclude this broad category of businesses from the reach of Title III and limit the application of Title III to physical structures which persons must enter to obtain good and services would run afoul of the purposes of the ADA and would severely frustrate Congress' intent that individuals with disabilities fully enjoy the good, services, privileges and advantages available indiscriminately to other members of the general public" [7, at 26-27].

SIXTH CIRCUIT

The legality of insurance caps under the ADA was next addressed in *Parker v. Metropolitan Life Insurance Co.* [8]. Parker became disabled due to severe depression and was able to receive only 24 months of disability benefits for her mental/nervous disorders, while those who suffered from physical disabilities could receive continuous benefits until the age of 65. The district court concluded that nothing in the legislative history of the ADA indicated that Title III governs employment practices and dismissed the case.

When Parker appealed, a panel of the court of appeals found that the ADA did prohibit discrimination in the contents of goods and services offered at places of public accommodation in addition to physical access to places of public accommodation. The panel found that the "plain language" of Title III prohibited discrimination in the contents of insurance products because these "products are 'goods' or 'services' provided by a 'person' who owns a public accommodation," citing specific language taken from the ADA [8, at 1009]. The panel further found that the ADA did not oversee discrimination strictly in terms of "'physical access' to places of 'public accommodation'" because the language "goods and services" was obviously used in Title III "for a specific reason" [8, at 1009]. Hence, it ruled that Title III regulated the contents of goods and services offered by public accommodations and that Title III consequently prohibited discrimination in the contents of insurance policies [8].

When Met Life appealed for a rehearing by the full court, the court vacated the panel's ruling. It ruled that Title III could not regulate the terms and provisions of Parker's insurance policy because the policy was not a good or service offered by a place of public accommodation, noting that Parker obtained her policy through her employer rather than directly from Metropolitan Life [8]. Under Department of

Justice regulations, businesses that sell products and services exclusively to other businesses are not places of public accommodation [9]. The court further found that Title III regulates only the *availability* of goods and services offered by a place of public accommodation and does not regulate the *content* of such goods and services.

Despite the majority ruling, five members of the court strongly disagreed with the majority, including Chief Judge Martin, who noted that Title III specifically identifies an "insurance office" as a place of public accommodation and argued that the rationale of the First Circuit in *Carparts* should be applied to *Parker* [8, at 1020]. Judge Merritt found the majority's distinction between policies provided by an employer and those purchased directly from an insurer to be "absurd" [8, at 1021]. Merritt further argued that employer-provided insurance policies fell within the scope of Title III, a position supported by the Department of Justice, the EEOC, and other circuit and district courts. When the Supreme Court was asked to resolve the split between the two circuits, the Court refused to hear the case.

THIRD CIRCUIT

Shortly thereafter, the Third Circuit was asked to consider the same issue in *Ford v. Schering-Plough Inc.* [10]. Ford sued her employer, Schering-Plough, and its insurance carrier, Metropolitan Life, alleging that a two-year limit of benefits for mental disabilities violated Title III of the ADA. Ford's claim was identical to Parker's, as her policy provided only two years of disability coverage for mental disability, whereas an individual with a physical disability would have received unlimited benefits until age 65.

The Third Circuit relied on the Sixth Circuit's ruling in *Parker* in finding that Ford did not have a valid claim against Schering-Plough because the "disability benefits constituted part of the terms and conditions of employment" that are governed by Title I of the ADA as opposed to Title III [10, at 612]. In addressing Ford's claim against Metropolitan Life, the Third Circuit found that the terms of her policy did not qualify as a public accommodation and were consequently outside of the scope of Title III. Hence, the court ruled that Ford was not discriminated against relative to a public accommodation because her policy was provided by her employer, and that Title III regulated only physical access to public accommodations, not the goods and services offered by such places [10]. To resolve these inconsistent rulings, Ford appealed to the Supreme Court, which again refused to resolve the issue.

SEVENTH CIRCUIT

Soon after the Ford ruling, the Seventh Circuit heard *Doe v. Mutual of Omaha Insurance Company,* in which it was asked to determine whether caps for care

of AIDS-related conditions violated the ADA [11]. Two Mutual of Omaha policyholders who suffered from AIDS challenged caps in their insurance policies. One individual had a policy that limited lifetime benefits for AIDS-related conditions at $25,000, while the other individual's policy capped benefits at $100,000. Non-AIDS-related benefits were capped at $1,000,000 in each of the policies. The district court held that any prohibition against disability discrimination in places of public accommodation under the ADA applied to insurance policies that capped benefits for AIDS. [As evidence of this, the lower court noted that providing coverage for pneumonia that was not AIDS-related that was different from the coverage for pneumonia that was AIDS-related would subject the plaintiffs to altogether different terms and conditions [11].

The lower court found that the caps were prohibited based on each of three alternative interpretations of Title III. First, the caps constituted a discriminatory denial of the full and equal enjoyment of goods or a service. Second, they constituted discriminatory denial of an equal opportunity to benefit from goods or a service. Third, they constituted discriminatory denial of an opportunity to benefit from goods or a service or the provision of goods or a service that was provided to others.

When Mutual of Omaha appealed the judgment, the court of appeals reversed the lower court decision, ruling that "the common sense of the statute is that the content of the goods or services offered by a place of public accommodation is not regulated" by Title III [11, at 560]. The court held that if the statute regulated the content of insurance policies then it would also regulate "the content . . . of all other products and services," as the "language in the statute is not limited to insurance" [11, at 560]. In that case, a furniture store that did not stock wheelchairs or a bookstore that did not stock Braille books would be in violation of the ADA. The court found that the ADA had not been understood to require all furniture stores to stock wheelchairs [11, at 560].

The court continued by introducing a new angle that the previous courts had not addressed. It noted that any challenges to Title III were barred by the McCarran-Ferguson Act [12], which "forbids constructing a federal statute to '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" [11, at 563]. Because "state regulation of insurance is comprehensive and includes rate and coverage issues," the Seventh Circuit found that any interpretation of the ADA that infringes on these terms and conditions would be in violation of McCarran-Ferguson [11, at 564]. At the same time, the court noted that such a construction of the ADA relative to McCarran-Ferguson did not leave plaintiffs without remedy. If any caps were, in fact, violations of applicable "state law and sound actuarial practices," plaintiffs "can obtain all the relief to which they are entitled from the state commissioners who regulate the insurance business" [11, at 565].

In a strongly worded dissent, Judge Evans reiterated that "the parties stipulated that the very same affliction (e.g., pneumonia) may be both AIDS-related and non-AIDS-related and that, in such cases coverage depends solely on whether the patient has AIDS [11, at 565]. The practical effect of all of this, as Mutual of Omaha concedes, is that coverage for certain expenses would be approved or denied based solely on whether the insured had AIDS. In my view, that is more than enough to trigger an ADA violation [11, at 565]. Not surprisingly, Doe appealed the decision to the Supreme Court.

NINTH CIRCUIT

However, before the Supreme Court could address the case, the Ninth Circuit was faced with *Weyer v. Twentieth Century Fox Film Corporation and UNUM* [13]. Weyer, a former employee of 20th Century Fox who was suffering from depression, was subject to a 24-month limitation on benefits for the treatment of mental illness, and such benefits were less than those provided for physical illnesses. In addressing whether the limitation violated Title III of the ADA, the court found that the insurer, UNUM Life Insurance Company of America, was not a place of public accommodation and that Title III relates only to the availability of goods and services and not the content of the goods [13].

In ruling that a public accommodation must be an "actual, physical place," the Ninth Circuit found that "the ordinary meaning" of public accommodation is that "whatever goods or services the place provides, it can not discriminate on the basis of disability in providing those goods and services. This language does not require provision of different goods or services, just nondiscriminatory enjoyment of those that are provided" [13, at 1115]. Moreover, the court held that while an insurance office must be physically accessible to those with disabilities, it need not provide insurance that treats the disabled equally with the nondisabled [13].

The Ninth Circuit further noted that even if the contents of insurance policies were covered under Title III, UNUM's decision to classify the underwriting risks of mental illness, alcoholism, and drug abuse differently from those of physical disabilities falls within the "safe harbor provision" of Section 12201(c) of the ADA, which allows an insurer to underwrite or classify risks that are based on or not inconsistent with state law. The court further cited an EEOC guidance on health insurance, which states that a lower level of benefits is usually provided for the treatment of mental/nervous conditions than is provided for the treatment of physical conditions [14]. The court noted that this statement conflicted with the EEOC's current interpretation of Title III and that the current interpretation was entitled to no deference, given that this position conflicted with the plain language of the statute, as previously interpreted by the Supreme Court.

CONFUSION IN THE COURTS

At this point, the Third, Sixth, Seventh, and Ninth circuits have ruled, often with ringing dissents, that the ADA did not prohibit caps, limitations, or exclusions, contrary to the opinions of the First Circuit. A number of federal district courts have also taken up the issue of whether Title III governs the terms of employer-provided insurance policies, but the decisions of these courts were fairly balanced between those supporting the disabled plaintiffs and those supporting the legality of caps. And, at this point, the high court has again refused to grant a writ of certiorari.

As a result of these continuing Supreme Court denials, both the federal circuits and district courts remain sharply divided about whether the ADA prohibits caps on insurance benefits for selected disabilities. There are two critical issues on which the courts have been unable to reach consensus. The first is exactly what constitutes a "place of public accommodation" under the ADA. The second is whether the ADA regulates the availability—rather than the content—of goods and services provided to the public. Turning to the stated opinions of both the Department of Justice (DOJ) and the Equal Employment Opportunity Commission (EEOC), the questions become muddled even further.

THE DEPARTMENT OF JUSTICE AND THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION: MORE CONFUSION

The Department of Justice's Technical Assistance Manual provides an interpretation of Title III that includes the regulation of the terms of an insurance policy, stating that "[i]nsurance offices are places of public accommodation and, as such, may not discriminate on the basis of a disability in the sale of insurance contracts or in the terms or conditions of the insurance contracts they offer" [15, p. 90]. However, both the Sixth and Third circuits challenged this view in light of the DOJ's general rule that public accommodations are also not required to change the nature or mix of goods they provide. This creates some ambiguity concerning the DOJ's position as to whether the actual contents of an insurance policy are affected by Title III.

The Equal Employment Opportunity Commission has issued a guidance which states that insurance distinctions do not necessarily violate the ADA if the distinctions are based on a disability or apply equally to all insured employees [14]. However, the EEOC has assumed the position that if a term or provision of an insurance plan singles out 1) a particular disability, for example, AIDS; 2) a discrete group of disabilities, such as kidney diseases or cancers; or 3) a disability in general, for example "non-coverage of all conditions that substantially limit a major life activity," it is disability-based and *may* violate the ADA [14, p. 7118]. This ambiguous language of the EEOC guidance only adds to the confusion.

THE LOWER COURTS: STILL MORE CONFUSION

An analysis of the cases shows a variety of inconsistent rulings on the legality of health insurance caps under the ADA. The *Carparts* case involved overturned trial court rulings, as did the *Parker* case. Both the *Parker* and *Doe* appellate decisions had strongly worded dissents. It has been noted that the appellate court opinions on the ADA have generally been the primary influence on trial courts because the Supreme Court has heard only a handful of ADA cases and made very narrow rulings in those cases [16]. Even so, the trial courts have not necessarily followed the appellate rulings regarding insurance caps.

In *Pappas v. Bethesda Hospital Association,* an Ohio court constructed "public accommodation" as purely physical in light of the ADA's use of the word "place" [17, at 620]. In *Lenox v. Healthwise of Kentucky, Ltd.,* the Sixth Circuit found that Lenox "did not demonstrate the existence of any barrier to her accessing Healthwise's physical facility" in ruling in favor of the insurer's caps [18, at 457]. Both courts issued rulings that place the regulation of goods and services offered by public accommodations outside the coverage of Title III.

However, two other trial courts have ruled that Title III's coverage extends beyond mere physical access and includes the contents of goods and services offered by public entities. A California court, in *Cloutier v. Prudential Insurance Company of America,* found that "interpreting Title III to prohibit only physical barriers to the access of facilities would dispense with the language mandating equal opportunity" to "participate in or benefit from" the "goods, services, privileges and advantages of a commercial transaction" [19, at 302]. Similarly a New Hampshire court ruled, in *Doukas v. Metropolitan Life Insurance Company,* that denial of an application for insurance based on an applicant's disability violated Title III, as the insurer "provided her with a good or service different from that provided to others" [20, at 426]. Hence, the substance and content of the "goods and services" offered by an insurer were covered under Title III in both of these cases.

ANALYSIS

As the above discussion illustrates, the issue of whether the Americans With Disabilities Act prohibits caps or limitations on the terms of health insurance is both complex and controversial. The ambiguity of the statute has resulted in inconsistent rulings in the federal courts, particularly relative to what constitutes a place of public accommodation, as well as whether Congress intended to regulate the availability of the content of goods and services offered by public accommodations. Even the Department of Justice and the Equal Employment Opportunity Commission have found it necessary to walk a tightrope in interpreting the language of the statute.

Clearly, it is not "fair" to those with disabilities to limit the amount of health insurance provided to select disabling conditions, particularly if there is no underwriting risk present to the insurer. However, fair or not, many courts are ruling that the ADA does not prohibit such behavior, largely because Congress was ambiguous in stating its true intent when it passed the ADA. From the perspective of the employer, the question is largely one of ethics. While it may be considered unfair to limit the coverage provided to employees who may be in extreme need, many jurisdictions are finding that it is not necessarily unlawful. Hence, employers and insurance underwriters have some choice relative to their practices and policies. On the other hand, when proven underwriting risks result in coverage that is limited or excluded, it seems only fair to limit the amount of benefits provided as long as such limitations are not intentional subterfuges to avoid ADA compliance.

When individuals with disabilities are excluded from or provided with only limited health insurance coverage, they will either forgo treatment or rely on public assistance funds to pay their health-care costs. Unless an insurer can demonstrate, through sound actuarial principles, a reason to deny or limit coverage for certain disabling conditions, the public health and welfare are undermined when disabled individuals are no longer able to receive health insurance benefits.

Given both the inconsistent court rulings and the positions of the DOJ and EEOC, it is clear that Congress needs to revisit the ADA sooner rather than later. A compromise that would be "fair" to both sides regarding health insurance caps or limitations would be to prohibit any disability-based distinction in the terms and amount of coverage unless bona fide underwriting risks could be documented. In cases where such risks could be documented, reasonable restrictions on the terms and coverage provided could be allowed. This could assist those with disabilities by insuring that their health care needs are met in a nondiscriminatory manner while, at the same time, not forcing employers and insurance underwriters to assume unreasonable costs and potentially jeopardize the viability of the plan for all other employees.

CONCLUSION

There seemed little question as to whether Title III applied to the provisions and contents of insurance polices when the First Circuit decided *Carparts* in 1994 or when the Sixth Circuit panel decided *Ford* in 1996. Both federal courts clearly found health insurance caps or limitations to be a violation of Title III of the ADA. Since then, however, inconsistent interpretations of the ADA by the courts have caused severe confusion. The positions of the Equal Employment Opportunity Commission and the Department of Justice have further muddled the issue. As a result, the protection an individual receives

under the Americans With Disabilities Act with regard to insurance benefits is dependent on where that individual resides and which judge(s) hear the claim. Clearly, that cannot be what Congress intended when it drafted and passed the ADA. This conflicting legal authority must be reconciled by either a Supreme Court ruling on the reach of Title III or an act of Congress to clarify this ambiguous interpretation of the ADA. Until then, many individuals who are at the highest need for health care may find it unavailable and unaffordable, and employees with disabilities and their employers will continue to be faced with protracted, expensive litigation.

ENDNOTES

1. Americans With Disabilities Act of 1990, 42 USC §§ 12101-12213 (1994).
2. Senate Report No. 116, 101st Congress, 1st Session (1989).
3. House of Representatives Report No. 485, 101st Cong., 2nd Sess., pt. 2 (1990).
4. Rehabilitation Act of 1973, 29 USC §§ 794 (1994).
5. Employee Retirement Income Security Act of 1974, 29 USC §§ 1001-1169 (1994 & Supp. 1996).
6. Health Insurance Portability and Accountability Act of 1996, 29 USCA §§ 1161-1169 (1985 & 1998).
7. *Carparts Distribution Center Inc. v. Automotive Wholesaler's Association of New England,* 826 F Supp. (D NH 1993), vacated 37 F.3d 12 (1st Cir. 1994).
8. *Parker v. Metropolitan Life Insurance Co,* 875 F. Supp. 1321 (W.D. Tenn. 1995), aff'd in part and rev'd in part, 99 F.3d 181 (6th Cir. 1996), reh'g en banc granted and vacated, 107 F.3d 359 (6th Cir. 1997), aff'd 121 F.3d 1006 (6th Cir. 1997), cert. denied 118 S.Ct. 871 (1998).
9. 28 Code of Federal Regulations. pt. 36, app. B (1996).
10. *Ford v. Schering-Plough Inc.,* 145 F.3d 601, cert. denied 119 S.Ct. 850 (6th Cir 1999).
11. *Doe v. Mutual of Omaha Insurance Company,* 179 F.3d 557, cert. denied 120 S.Ct. 845 (2000).
12. McCarran-Ferguson Act, 15 USCS §§ 1011-1015 (2001).
13. *Weyer v. Twentieth Century Fox Film Corporation and UNUM,* 198 F.3d 1104 (9th Cir. 2000).
14. EEOC Interim Enforcement Guidance on the Application of the ADA to Disability-Based Distinctions in Employer Provided Health Insurance, *BNA Daily Labor Report,* June 9, 1993, reprinted in *Fair Employment Practice Manual, 405,* pp. 7115-7118.
15. Department of Justice Title III Technical Assistance Manual (1993), Sec. III-3.1100.
16. Barbara A. Lee, The Implications of ADA Litigation for Employers: A Review of Federal Appellate Court Decisions, *Human Resource Management, 40*(1), pp. 35-50.
17. *Pappas v. Bethesda Hospital Association,* 861 F Supp. 616 (S D Ohio 1994).
18. *Lenox v. Healthwise of Kentucky, Ltd.,* 149 F3d 4543 (6th Cir 1998).

19. *Cloutier v. Prudential Insurance Company of America,* 9643 F Supp. 299 (N D Cal 1997).
20. *Doukas v. Metropolitan Life Insurance Company,* 950 F Supp. 422 (D NH 1996).

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