Escaping the Purpose of the ADA: 
The “Safe Harbor” Provision and Disability-Based 
Distinctions in Insurance Policies and Programs

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I. INTRODUCTION

In 1990 Congress passed the Americans with Disabilities Act ("ADA")1 in order to “eliminat[e] . . . discrimination against individuals with disabilities.”2 In doing so, Congress enacted a broad law with sweeping implications and broke from “the relatively narrow scope of earlier federal disability legislation.”3 The ADA touches many facets of life in this country from employment4 to bowling alleys.5 The ADA also covers the business of

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However, in a sense, the business of insurance and an antidiscrimination statute have little in common because insurance is inherently discriminatory. Insurance concerns the allocation of risk from one party to another, but that risk is evaluated in terms of any number of variables including some that are discriminatory by nature. For instance, insurers routinely charge older people a higher insurance premium than they do younger people. As a result, the tension between the ADA and the insurance business is a matter of course.

In an attempt to solve this dilemma, Congress included a separate section to the ADA on the subject of insurance. Section 12,201 of Title 42 is referred to as the "safe harbor" provision because it shields the risk classification practices of insurers from the brunt of the ADA, so long as such practices are not inconsistent with state law or they are not a subterfuge. In practice, the provision engenders much controversy. The issues raised by the safe harbor provision are twofold. First, courts are divided on whether a plaintiff has standing to bring a claim against an insurer, either as a Title IV action against their employer or the employer's insurance provider, or a Title III action against the insurance company. Proving that a plaintiff has standing under the ADA to bring this type of action is not a foregone conclusion in some federal courts. Second, even if a plaintiff has standing, in most courts the plaintiff has the burden of demonstrating, at least initially, that the underwriting practice at issue is a subterfuge. For many plaintiffs, the totality of such a claim presents an onerous burden because, in most cases, the insurance company or employer

9. 42 U.S.C. § 12,201(c).
10. See 42 U.S.C. §§ 12,201(b)-(c) (1994); 10 COUCH ON INSURANCE § 144.17 (3d ed. 1998).
13. Doe v. Mut. of Omaha Ins. Co., 179 F.3d 557, 563 (7th Cir. 1999) (holding that a Title III action is barred by the McCarran-Ferguson Act), cert. denied, 528 U.S. 1106 (2000); Gonzales v. Garner Food Servs. Inc., 89 F.3d 1523, 1531 (11th Cir. 1996) (holding that a former employee cannot bring suit against her former employer for a discriminatory insurance program in a Title I context); cf. Carparts Distrib. Ctr., Inc. v. Auto. Wholesaler's Ass'n of New England, Inc., 37 F.3d 12, 15-17 (1st Cir. 1994) (holding that an employee may bring suit against an employer under Title I); Kotev v. First Colony Life Ins. Co., 927 F. Supp. 1316, 1321-23 (C.D. Cal. 1996) (holding that a plaintiff can bring a suit under Title III against an insurance company).
has singular control over the contested information. In addition, the standard
that governs what is or is not a subterfuge appears to be firmly in the favor of
insurers. As a result, the tension between the ADA and insurance underwriting
practices is palpable indeed.

Section II of this comment examines some of the fundamental issues
governing insurance law in the context of the ADA, such as underwriting
practices in general and the relationship between federal and state regulation.
In Section III, this comment examines the safe harbor provision itself in terms
of its legislative history and statutory framework to establish a baseline of its
function. In Section IV, this comment compares and contrasts the different
approaches courts have taken in deciding whether actions brought against
insurance providers are even permissible under the ADA. Ultimately, the entire
issue turns on the dichotomy between the purposes of the ADA and the
traditional methods of insurance underwriting.

II. APPLICABLE PRINCIPLES OF INSURANCE LAW

A. A General Discussion of Risk

The underwriting of insurance is based on the premise of risk.\textsuperscript{15} Risk refers
to "[t]he inherent uncertainty of events [that] can be described in terms of
chance or probability."\textsuperscript{16} In the insurance business, risk is allocated by the
insured to the insurance company by way of an insurance contract.\textsuperscript{17} One
commentator defines an insurance contract as "an agreement in which one party
(the insurer), in exchange for a consideration provided by the other party (the
insured), assumes the other party's risk and distributes it across a group of
similarly situated persons, each of whose risk has been assumed in a similar
transaction."\textsuperscript{18} The latter part of the definition, which pertains to risk
distribution, causes problems in the context of disability law.

Traditionally, each person at a specific age has a risk of death and
insurance providers measure that risk in terms of actuarial tables.\textsuperscript{19} However,
insurance companies routinely use additional variables to measure risk.\textsuperscript{20} For
example, insurance providers frequently delineate between smokers and non-
smokers.\textsuperscript{21} On a risk basis, because smokers tend to die younger than non-

\textsuperscript{15} See JERRY, supra note 7, at 13-17.
\textsuperscript{16} Id. at 11.
\textsuperscript{17} Id. at 16-17.
\textsuperscript{18} Id. at 17 (emphasis omitted).
\textsuperscript{19} Id. at 11.
\textsuperscript{20} See generally JERRY, supra note 7, at 16.
\textsuperscript{21} Id.
smokers, the consideration or premium underlying their insurance contract is typically higher. 22 Other examples of risk classification include "occupation, personal habits (e.g. smoking), and medical history." 23 Underwriting refers to the application of the various risk factors or risk classes to a particular individual or group . . . for the purpose of determining whether to provide insurance. 24

Many variables are benign in the sense they do not discriminate in a manner repugnant to the law. However, courts and legislatures declare certain underwriting practices illegal. For example, it is illegal to use race as a variable in the issuance of insurance. 25 Similarly, the Supreme Court held that, despite the fact that women statistically live longer than men, it is a violation of the Civil Rights Act of 1964 26 for women to pay higher premiums than men in order to receive the same benefits. 27 Thus, while insurers may use certain variables to measure and distribute risk, not all variables are permissible. However, in the area of disabilities the line is less clear.

B. State vs. Federal Regulation and the McCarran-Ferguson Act

Historically in the United States, state governments dominate the regulation of insurance. 28 This trend was the product of a common law rule created entirely by the judiciary. 29 The result of this common law rule was certain federal antitrust laws were inapplicable to certain business activities conducted by insurance companies. 30 However, in United States v. South-Eastern Underwriters Ass'n, 31 the Supreme Court held that insurance was commerce

22. Id.
24. Id.
29. Id.
30. Id.; see also Paul v. Virginia, 75 U.S. (8 Wall.) 168, 183 (1868) (holding that insurance was not commerce for the purposes of the Commerce Clause of the Constitution), overruled in part by United States v. South-Eastern Underwriters Ass'n, 322 U.S. 533 (1944).
and could be regulated by Congress under the Commerce Clause.\textsuperscript{32} In response, Congress passed the McCarran-Ferguson Act of 1945 ("McCarran-Ferguson Act" or "Act") in order to clarify the regulation of insurance.\textsuperscript{33}

According to Congress, the purpose of the McCarran-Ferguson Act is to "continue[] regulation and taxation by the several States of the business of insurance."\textsuperscript{34} The operative section of the Act states:

(a) State regulation

The business of insurance, and every person engaged therein, shall be subject to the laws of the several States which relate to the regulation or taxation of such business.

(b) Federal regulation

No Act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of insurance, or which imposes a fee or tax upon such business, unless such Act specifically relates to the business of insurance.\textsuperscript{35}

The Act goes on to state that certain federal antitrust laws specifically apply to the insurance business.\textsuperscript{36} Thus, the McCarran-Ferguson Act operates to give state governments supremacy in the field of insurance regulation to the extent the states enact laws for that purpose.\textsuperscript{37} State insurance commissioners and insurance company representatives wasted little time in drafting and proposing laws to regulate insurance practices.\textsuperscript{38} However, there is still a serious conflict between state and federal regulation based on the language in the statute that pertains to the business of insurance.\textsuperscript{39} The plain language of the McCarran-Ferguson Act states the federal government may still regulate insurance if the particular Act of Congress "specifically relates to the business of insurance."\textsuperscript{40} This conflict between state and federal regulation is germane to the safe harbor provision and the underwriting practices.

The primary issue in terms of the ADA's safe harbor provision is that the McCarran-Ferguson Act only exempts states from federal regulation to the extent that: (1) the practice in question relates to the business of insurance; (2)}

\begin{itemize}
\item \textsuperscript{32} Id. at 545.
\item \textsuperscript{33} See LENCSIS, supra note 28, at 2; see also 15 U.S.C. § 1011 (1994).
\item \textsuperscript{34} 15 U.S.C. § 1011.
\item \textsuperscript{35} 15 U.S.C. § 1012 (1994).
\item \textsuperscript{36} Id.
\item \textsuperscript{37} See JERRY, supra note 7, at 58.
\item \textsuperscript{38} Id.
\item \textsuperscript{39} Id. at 60-61.
\item \textsuperscript{40} 15 U.S.C. § 1012(b).
\end{itemize}
states have actually regulated the practice in question; and (3) Congress has not preempted state regulation.\textsuperscript{41} Generally, the federal government leaves insurance regulation in the hands of the states.\textsuperscript{42} However, in certain cases, Congress passes acts that specifically relate to the business of insurance.\textsuperscript{43} As a result, in addressing the safe harbor provision, courts must decide whether the provision specifically relates to the business of insurance. If it does not, then the ADA cannot operate to interfere with the way insurers classify and distribute risk or underwrite their policies. If it does, then the ADA supercedes state regulation in that regard.

There are two leading conflicting opinions from the Second and Seventh Circuit Courts of Appeals regarding the ADA and the McCarran-Ferguson Act.\textsuperscript{44} The first is in \textit{Doe v. Mutual of Omaha Insurance Co.},\textsuperscript{45} which held that under Title III insurers may not refuse to deal with a disabled person on account of their disability.\textsuperscript{46} However, the court explicitly rejected a reading of the ADA allowing suits under Title III based on the content of insurance policies, in part, because the preemptive effect of the McCarran-Ferguson Act bars such a suit.\textsuperscript{47} According to the reasoning of the court, the safe harbor provision specifically relates to insurance and thus is not within the scope of McCarran-Ferguson. But the interpretation that the McCarran-Ferguson Act bars is not an interpretation of [the safe harbor provision]; it is an interpretation of [Title III] that injects the federal courts into the heart of the regulation of the insurance business by the states.\textsuperscript{48}

Thus, the court suggests the McCarran-Ferguson Act does not apply to insurers because although the safe harbor provision specifically relates to the content of insurance policies, Title III does not.\textsuperscript{49} As a result, a plaintiff may not bring a Title III action against an insurer based on the content of an insurance policy.
policy under the ADA in the Seventh Circuit. However, the court explained, the aggrieved plaintiff may seek relief under state law. The Third Circuit also reached a similar result.\footnote{Mut. of Omaha Ins. Co., 179 F.3d at 565.}

At first blush, the Seventh Circuit's approach appears to be an example of attempting to fit a square peg into a round hole. The court's approach seems contrary to the general principles outlined above, as well as prior precedent allowing federal preemption of state law in cases where Congress made its intent to do so clear, such as the Employee Retirement Income Security Act.\footnote{See JERRY, supra note 7, at 75-77.}

The Seventh Circuit articulated that the McCarran-Ferguson Act illustrates a crucial point; namely, plaintiffs must be wary when bringing suits pertaining to insurance policies under the ADA. In the Seventh and Third Circuits, there is simply no standing to bring a federal ADA action against an insurer under Title III of the ADA based on the content of an insurance policy.\footnote{See Mut. of Omaha Ins. Co., 179 F.3d at 564-65.} Other circuits have agreed with the result of the Third and Seventh Circuits by way of a different analysis.\footnote{See id. at 564; Ford, 145 F.3d at 611-12.} However, the preclusive effect is the same.

In contrast, the Second Circuit's decision in Pallozzi v. Allstate Life Insurance Co.\footnote{198 F.3d 28 (2d Cir. 1999), amended by 204 F.3d 392 (2d Cir. 2000).} is far more lenient. That court began with the novel argument that if Congress did not intend the ADA to reach the content of insurance policies then the safe harbor provision, which specifically relates to insurance, would not be in the text of the ADA.\footnote{Id. at 32.} With this assertion in mind, the court concluded that "the ADA does 'specifically relate to the business of insurance,' and therefore falls outside the scope of McCarran-Ferguson's prohibition."\footnote{Id. at 34.}

Thus, the Second Circuit concluded that the ADA is applicable both to the content of and access to insurance policies.\footnote{Id.}

The conflicting opinions and reasoning from the Second and Seventh Circuits make the issue ripe for review by the Supreme Court for final determination of applicability of the ADA and McCarran-Ferguson Act.

\footnotesize{50. Mut. of Omaha Ins. Co., 179 F.3d at 565.}
\footnotesize{51. See Ford v. Schering-Plough Corp., 145 F.3d 601, 611-12 (3d Cir. 1998).}
\footnotesize{52. See JERRY, supra note 7, at 75-77.}
\footnotesize{53. See Mut. of Omaha Ins. Co., 179 F.3d at 564-65.}
\footnotesize{54. See id. at 564; Ford, 145 F.3d at 611-12.}
\footnotesize{55. See, e.g., McNeil v. Time Ins. Co., 205 F.3d 179 (5th Cir. 2000), cert. denied, 121 S. Ct. 1189 (2001).}
\footnotesize{56. 198 F.3d 28 (2d Cir. 1999), amended by 204 F.3d 392 (2d Cir. 2000).}
\footnotesize{57. Id. at 32.}
\footnotesize{58. Id. at 34.}
\footnotesize{59. Id.}
III. THE SAFE HARBOR PROVISION

A. Legislative History

The legislative history of the safe harbor provision can best be described as contentious. In *Parker v. Metropolitan Life Insurance Co.*, the court noted:

"[T]he statute appears to be purposefully vague in order to satisfy contending interest groups. Unable to decide on exactly what it intended to legislate, Congress inserted language which looks in two directions. One provision attempts to appease the insurance industry; the other provisions attempt to help the large group of disabled people."

The court's description is apt. The legislative history for this provision tries to please two masters and, in doing so, Congress greatly confuses the issue. A brief recital of several pertinent excerpts illustrates the point.

One House Report notes:

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 impose increased risks.

Moreover, while a plan which limits certain kinds of coverage based on classification of risk would be allowed under this section [codified at 42 U.S.C. § 12201(c)], the plan may not refuse to insure, or refuse to continue to insure, or limit the amount, extent, or kind of coverage available to an individual, or charge a different rate for the same coverage solely because of a physical or mental impairment, except where the refusal, limitation, or rate differential is based on sound actuarial principles or is related to actual or reasonably anticipated experience.

"For example, a blind person may not be denied coverage based on blindness independent or actuarial risk classification."

The report continues:

In sum, [the safe harbor provision] is intended to afford to insurers and employers the same opportunities they would enjoy in the absence of this legislation to design and administer insurance products and benefit plans in

60. 99 F.3d 181 (6th Cir. 1996), *vacated by* 107 F.3d 359 (6th Cir. 1997).
61. *Id.* at 190.
a manner that is consistent with basic principles of insurance risk
classification. 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.

The provisions recognize that benefit plans (whether insured or not)
need to be able to continue business practices in the way they underwrite,
classify, and administer risks, so long as they carry out those functions in
accordance with accepted principles of insurance risk classification.64

Another House Report states that the "ADA requires that underwriting and
classification of risks be based on sound actuarial principles or be related to
actual or reasonably anticipated experience."65 The latter point in the last
quotation indicates the problem inherent in the legislative history. While the
House uses objective language initially, the phrase "actual or reasonably
anticipated experience" indicates a far more subjective standard. Indeed, to
allow an insurer to classify risks based on anticipated experience is tantamount
to allowing arbitrary discrimination based on what is reasonable speculation.

The Senate's Report is illustrative of the dichotomy between the interests
of insurers and those of the disabled. The Report states, in part, that "[t]he
Committee does not intend that any provisions of this legislation should affect
the way the insurance industry does business [under] State laws."66 The Report
further states that "[u]nder 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."67 Thus, on one
hand, Congress expresses its intent that the safe harbor provision should not
interfere with state regulation. On the other hand, it also suggests that the
provision may operate to interfere with state regulation of an insurance practice
if the disability itself does not "pose increased risks."68 As a result, Congress
confuses the issue in terms of state versus federal regulation. The safe harbor
provision should either be preemptive of state regulation or it should not. The
confusion on this issue leads, at least in part, to decisions such as Doe v.
Mutual of Omaha Insurance Co.,69 because Congress did not clearly set out its
intention for the provision. The end result is that courts are divided on the
applicability and guidance legislative history should have. Plaintiffs are further

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68. S. REP. NO. 101-116, at 84.
69. 179 F.3d 557 (7th Cir. 1999), cert. denied, 528 U.S. 1106 (2000).
disadvantaged by the vague language of Congress because it could have put the issue to rest simply by saying that the ADA preempts state law to the extent that disabilities are used in insurance underwriting. Instead, Congress vacillates in an attempt to please too many people.

B. Statutory Framework

As the Parker court noted, the safe harbor provision is vague. As such, the provision requires some explication in regard to several terms within the text. The provision states:

(c) Insurance
Subchapters I through III of this chapter and title IV of this Act shall not be construed to prohibit or restrict—

(1) an insurer, hospital or medical service company, health maintenance organization, or any agent, or entity that administers benefit plans, or similar organizations from underwriting risks, classifying risks, or administering such risks that are based on or not inconsistent with State law; or

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

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

Paragraphs (1), (2), and (3) shall not be used as a subterfuge to evade the purposes of subchapter I and III of this chapter.

As an initial matter, it is important to realize that subparagraph (1) refers to insurance companies in the Title III context, while subparagraphs (2) and (3) refer to employers and their agents in the Title I context. Thus, in order for an employer’s benefit plan to pass through the safe harbor provision it must be (1) bona fide; (2) not a subterfuge; and (3) not inconsistent with state law, while an insurer’s underwriting practices must only satisfy the second and third requirements.

Courts define the two crucial terms, bona fide benefit plan and subterfuge,

71. 42 U.S.C. § 12,201(c) (1994) (footnote omitted).
72. See id.
73. See id.
consistently in case law. Unlike Title I actions governed by subparagraph (1), the definition of a bona fide benefit plan is important to this discussion under subparagraphs (2) and (3) because it is the first step in a three-step analysis.\(^75\) If the benefit plan is not bona fide, then it clearly violates the safe harbor provision.\(^76\)

Courts are also consistent in the applicable definition of bona fide.\(^77\) Courts apply the definition found in *Public Employees Retirement System of Ohio v. Betts*,\(^78\) which is a United States Supreme Court case discussing the State of Ohio's retirement program. Under Betts, an employee benefit plan is bona fide so long as it "exists and pays benefits."\(^79\) Therefore, the first step in a Title I analysis for an employer is a relatively easy burden. In fact, there appears to be no case law on point under Title I that invalidates an employer's program on the basis that it is not bona fide. Although it is certain that such a program could exist, the bona fide requirement acts as a filter to ensure that the benefit program in question is not an artifice on the threshold of the analysis.

The definition of "subterfuge" is more complicated. Under subparagraph (1), an insurer's underwriting practices must not be a subterfuge in order to pass through the safe harbor.\(^80\) Under subparagraphs (2) and (3), after a benefit program is shown to be bona fide, then it must not be a subterfuge.\(^81\) Like the definition of "bona fide," the definition of "subterfuge" begins with a decision by the Supreme Court.\(^82\) In *United Air Lines, Inc. v. McMann*,\(^83\) the Court addressed the term "subterfuge" in the ADEA context, stating the term is to be given its ordinary meaning as "a scheme, plan, stratagem, or artifice of evasion."\(^84\) This definition, however, does not indicate exactly what constitutes a subterfuge in practice. Courts have suggested that subterfuge does not require a finding of malicious intent to make an insurer or employer liable under the ADA.\(^85\) In that regard, courts have fashioned a similar approach in judging

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\(^75\) See id.


\(^79\) Betts, 492 U.S. at 166 (quoting United Air Lines, Inc. v. McMann, 434 U.S. 192, 194 (1977)).

\(^80\) 42 U.S.C. § 12,201(c)(3) (1994); Krauel, 95 F.3d at 678.

\(^81\) 42 U.S.C. § 12,201(c)(3); Krauel, 95 F.3d at 678.


\(^84\) Id. at 203.

whether a particular underwriting practice is a subterfuge under the meaning of the safe harbor provision. 86 Borrowing from the language of the House Reports, one court held that "insurers maintain their [safe harbor] exemption so long as their underwriting decisions are in accord with either (a) sound actuarial principles, or (b) actual or reasonably anticipated experience." 87 The application of this standard engenders much controversy.

At the core of the controversy is which party bears the burden of proving the underwriting practice at issue is or is not a subterfuge within the meaning of the ADA. Generally, a plaintiff has the burden of pleading and proving each element of a civil offense. 88 However, in the ADA context, courts often employ a "burden shifting" scheme (such as the one used in determining the essential functions of a job) to shift the burden of proof on the employer. 89 The premise behind such a method is that "much of the information which determines those essential functions lies uniquely with the employer." 90 The EEOC mirrors this approach with burdens of proof in the insurance context. 91

To make a claim under the safe harbor provision, a plaintiff must show that the insurer or employer did not base its underwriting decision on sound actuarial principles or reasonably anticipated experience. 92 After this initial showing, the insurer or employer must "point to data, studies, or other information relevant to its risk assessment." 93 Then the insurer or employer must demonstrate the data it presents justifies a disability-based distinction on the basis of sound actuarial principles or reasonably anticipated experience. 94 Not surprisingly, this method of analysis poses some problems for plaintiffs.

As explained, underwriting "refers to the application of the various risk factors or risk classes to a particular individual or group for the purposes of determining whether to provide coverage." 95 Furthermore, "[r]isk classification refers to the identification of risk factors and the groupings of those factors which pose similar risks." 96 In general, "an insurer that confronts a heterogenous pool of applicants merely consults actuarial tables to adjust its

86. Cloutier, 964 F. Supp. at 304.
87. Id.
90. Id. at 1113.
91. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, supra note 23, at 21.
93. Id.
96. Id. at 443.
rates to account for varying levels of risk presented by those applicants. The end result is that if there are sound actuarial tables and the insurer relies on them to make its underwriting decision, then the underwriting decision passes through the safe harbor. Thus, if a person has AIDS, which is clearly a disability, an insurer may charge higher rates or deny coverage altogether on the basis of statistical evidence that the life expectancy of an AIDS patient is much shorter than that of a person without AIDS. Another example is, as one court determined, the safe harbor provision does not require "a plan sponsor or administrator to justify a plan’s separate classification of mental disability with actuarial data." Therefore, the burden on the employer and insurer is not very high, if there is sound actuarial data to bolster their decisions.

Even if the insurer or employer does not use sound actuarial principles, it may still rely on reasonably anticipated experience. Courts have interpreted this language to include some basis in actuarial data. Thus, while the underwriting distinction may not be mere speculation, presumably an insurer or employer may use inference to make its decision.

Ultimately, it is clear that the subterfuge provision benefits insurers more than the disabled. The analysis used by most courts makes it relatively simple for insurers to evade the purposes of the ADA since they have two options to show the underwriting practice in question is not a subterfuge. In essence, if an insurer wants to impose higher premiums on the disabled, it must simply show that there are sound statistics supporting its decision. The only way a plaintiff can succeed against this setting is if the insurer pulled the data out of thin air in order to support its decision.

The final requirement under the safe harbor provision is that the practice in question must be based on or not be inconsistent with state law. As the Senate noted, "Virtually all States prohibit unfair discrimination among persons of the same class and equal expectation of life." In fact, a court has held the proper venue for these actions lies in state court. However, it is also clear that if an insurer or employer violates state law by improperly discriminating

102. See 42 U.S.C. § 12,201(c) (1994).
against a disabled person, that person has an actionable claim under the ADA.\textsuperscript{105} This part of the safe harbor provision is more of a case-by-case analysis depending on the jurisdiction. Therefore, an attorney should research the applicable state law in this regard because a plaintiff may bootstrap an ADA claim behind a violation of state law.

So long as an insurer satisfies the requirements above, it is entitled to protection under the safe harbor provision. The most telling feature of the analysis is that the standards imposed upon insurers are not difficult to overcome. The more difficult burden is that the plaintiff must demonstrate the insurer’s practices are not based on sound actuarial data or reasonably anticipated experience. As noted, this information is under the exclusive control of the insurance company. In addition, even if the plaintiff can make out its claim, the insurer may rebut it only by showing exactly which data it used. For the most part, so long as such data exists and is sound, the practice at issue is not a subterfuge, despite the fact it may constructively prevent a disabled person from obtaining insurance.

IV. THE VIABILITY OF INSURANCE DISCRIMINATION ACTIONS UNDER TITLE I AND TITLE III

As mentioned, plaintiffs face a host of potential problems in bringing insurance related claims under the ADA. One of the most basic problems is whether the plaintiff has standing to sue. Under Title I, the plaintiff must be a qualified individual with a disability.\textsuperscript{106} This raises a number of problems for plaintiffs. For instance, in \textit{Krauel v. Iowa Methodist Medical Center},\textsuperscript{107} the plaintiff had no standing to bring a suit based on insurance discrimination under the ADA because she did not have a cognizable "impairment that substantially limits her in any major life activity."\textsuperscript{108} This sort of finding is common in Title I actions. If a plaintiff cannot make out a prima facie case under Title I, then the claim is barred as a matter of law.\textsuperscript{109} However, Title I governs employee benefit plans which continue after the plaintiff is retired or no longer working.\textsuperscript{110} Two decisions reached the conclusion that a former employee is not a qualified person with a disability.

\begin{itemize}
\item \textbf{105.} \textit{Chabner}, 994 F. Supp. at 1194.
\item \textbf{106.} See 42 U.S.C. § 12,112(a) (1994).
\item \textbf{107.} 95 F.3d 674 (8th Cir. 1996).
\item \textbf{108.} \textit{id.} at 677.
\item \textbf{110.} Castellano v. City of New York, 142 F.3d 58, 66-67 (2d Cir. 1998).
\end{itemize}
In Gonzales v. Garner Food Services, Inc., the court held the plaintiff was not a qualified individual with a disability because he no longer worked for the employer. In EEOC v. CNA Insurance Co., the court held the plaintiff had no standing under Title I because she was neither an applicant nor employee of the defendant. As a result, in the Seventh and Eleventh Circuits, former employees have no standing to bring actions against their former employers based on discriminatory benefit programs. Therefore, even before Title I plaintiffs try their luck with the safe harbor provision, they have to prove a prima facie case under Title I, which is an onerous burden.

Another problem with Title I actions is the disposition of benefit plans predating the ADA. For instance, in Modderno v. King, the court held that "because the coverage limitations challenged by Modderno were enacted before the [ADA] (and there is no suggestion that their enactment was prompted by an expectation of amendment), they do not fall into the subterfuge exception to the ADA's safe harbor." However, relying on legislative history in Zamora-Quezada, the court held the safe harbor provision applied regardless of when the benefit plan was adopted. The latter approach seems to be more consistent with the legislative history; indeed, the court relied on congressional intent in fashioning its holding. The House Report states that the safe harbor provision "may not, however, be used as a subterfuge to evade [the ADA] . . . regardless of the date an insurance or employer benefit plan was adopted."

In fact, the Modderno opinion has far reaching prospective consequences. Presumably, under the Modderno decision, any discriminatory result of an insurance or employee benefit plan would not fall under the ADA in any circumstances if the plan was enacted prior to the ADA. This is clearly a very favorable result for employers. For instance, an employee may have paid money into a plan for twenty years, only to become disabled and face rate increases or termination of coverage. Therefore, the potential pitfalls for plaintiffs under Title I do not end at the prima facie case. Instead, plaintiffs in some

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111. 89 F.3d 1523 (11th Cir. 1996).
112. Id. at 1531.
113. 96 F.3d 1039 (7th Cir. 1996).
114. Id. at 1045.
115. But see, e.g., Ford v. Schering-Plough Corp., 145 F.3d 601, 606 (3d Cir. 1998) (holding that employees may bring suits under Title I against a former employer).
116. 82 F.3d 1059 (D.C. Cir. 1996).
117. Id. at 1065.
119. Id.
jurisdictions must also be fortunate enough to be part of a post-ADA benefit program in order to receive the "full panoply of rights guaranteed by the ADA."\(^{121}\)

As mentioned in Part II, the most significant problem plaintiffs face in the Title III context seems to be whether or not Title III applies to the content of insurance policies. Under the ADA, "Title III . . . prohibits, inter alia, discrimination against individuals on the basis of disability in the full and equal enjoyment of goods or services of any place of public accommodation by a person who owns or operates such a place."\(^{122}\) Furthermore, "a private insurance office is considered a 'public accommodation' under Title III provided that its operations affect commerce."\(^{123}\) There are two primary arguments in this context. The first is best summarized by *Doe v. Mutual of Omaha Insurance Co.*\(^ {124}\) In that case, the court decided that an action under Title III was prohibited by the McCarran-Ferguson Act, but only after it decided that a Title III action was invalid because it was not statutorily permissible.\(^ {125}\) The Seventh Circuit's analysis revolves around the concept that while Title III governs access to public accommodation, it does not govern the content of policies issued by an insurance company. First, the court concluded "[Title III] does not require a seller to alter his products to make it equally valuable to the disabled and nondisabled, even if the product is insurance."\(^ {126}\) In addition, the court held Title III "does not regulate the content of the products or services sold in places of public accommodation."\(^ {127}\) Therefore, a suit based on insurance discrimination under Title III is simply not viable in the Seventh Circuit. The Third, Fifth, and Sixth Circuits all agree with the same basic rationale.\(^ {128}\) In fact, the Fifth Circuit pointed out that other circuits came to the conclusion that an opposite conclusion is "too obvious to warrant additional analysis."\(^ {129}\)

The Second Circuit reached a different conclusion. In *Pallozzi v. Allstate Life Insurance Co.*, the court suggested that if the Seventh Circuit's analysis

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124. 179 F.3d 557 (7th Cir. 1999), cert. denied, 528 U.S. 1106 (2000).
125. Id. at 564.
126. Id. at 563.
127. Id. at 564.
129. McNeil, 205 F.3d at 188.
was correct, there would be no need for a safe harbor provision. That court stated Title III "was meant to guarantee [the disabled] more than mere physical access." The court held that "an entity covered by Title III is not only obligated by the statute to provide disabled persons with physical access, but is also prohibited from refusing to sell them its merchandise by reason of discrimination against their disability." According to that court, an opposite conclusion would permit an interpretation in which "a bakery’s refusal to sell bread to a blind person would fall outside the scope of the statute." This approach aligns with the legislative history of the safe harbor provision. Moreover, the approach is consistent with Department of Justice regulations that prohibit “differential treatment of individuals with disabilities in insurance offered by public accommodations unless the differences are justified.” Thus, a number of courts have sided with the Second Circuit’s analysis as well as the First Circuit; nonetheless, it is clear that circuits are split as to the viability of insurance discrimination actions under Title III.

Ultimately, the best argument is if Congress had not intended Title III to reach insurance companies, the safe harbor provision would not exist. The Seventh Circuit’s view is much too narrow. It presumes that owners of a public accommodation must merely allow the disabled inside, but do not have to sell anything if they decide a disabled person is not deserving of a particular good or service. The fallacy in that argument is that the owner of a place of public accommodation cannot discriminate “on the basis of a disability in the full and equal enjoyment of [its] goods [and] services.” As a result, the Seventh Circuit’s approach is invalid as a matter of statutory interpretation because it is undoubtedly true that an insurance company is a public accommodation. However, this serves as a good example of how hostile the ADA, and the safe harbor provision in particular, are toward plaintiffs. It is not at all certain that a plaintiff even has standing to bring a suit under Title I or Title III for insurance discrimination. Moreover, as detailed above, even if a plaintiff can meet the standing requirements, the safe harbor provision further insulates insurers. Thus, the burden is very great indeed.

130. 198 F.3d 28, 32 (2d Cir. 1999).
131. Id.
132. Id. at 33.
133. Id.
134. See supra Part III.A.
V. CONCLUSION

As one judge explained, "Plaintiffs basically contend a modern version of the Golden Rule is being wrongfully applied by defendants: They who have the gold rule." In the case before that judge, the plaintiffs accused an HMO of "creat[ing] cost-cutting incentives to delay or deny professional treatment and services in an effort to force higher-cost disabled patients to go elsewhere." Unfortunately, these sorts of tactics are legion in case law dealing with the ADA. In his opinion, that judge wrote eloquently about a bygone era of family doctors compensated by their patients with "poultry and produce." However, as he put it, "Some would say the good old days were not all that good." Insofar as some disabled people are concerned, this is true. In the 19th and 20th centuries, mentally disabled were subject to imprisonment, sterilization, and segregation all in the hopes of halting their reproduction. Although these practices are generally a thing of the past, disability discrimination continues.

This comment began with a statement of the purposes of the ADA. The main purpose is to eliminate discrimination against the disabled. Debate continually rages over whether the ADA in fact achieves this purpose. In the context of the safe harbor provision, it is important to see how the safe harbor provision works to eliminate disability discrimination. Courts have held that caps restricting the amount of benefits payable to AIDS victims, for example, do not violate the ADA. Courts have also held that longer benefit periods for the physically disabled and not mentally disabled do not violate the ADA. These are but two examples included here because they recur time and time again in ADA case law. The importance of mentioning the results of these decisions is that they highlight a key concern. In attempting to protect both insurers and the disabled, Congress and the judiciary have set an uneven balance. The dilemma is how to protect both without radically altering the way in which insurers conduct business. In the final analysis, the two may be mutually exclusive.

140. Id. at 438.
141. Id. at 437.
142. Id.
A plaintiff bears an enormous burden to make a successful claim under the safe harbor provision. In some jurisdictions a claim under the ADA is flatly prohibited. Assuming plaintiffs can bring an action under the safe harbor provision, they must first show they have standing. In some jurisdictions, if they are former employees or if the plan in question predates the ADA, the plaintiff has no standing under Title I. In some jurisdictions no claim exists at all under Title III on the basis of judicial interpretation. The judiciary often seems to lose sight of what Congress intended to do in the broad scheme of the ADA. There is no question that many disabilities are severe. Certainly a person with AIDS, for example, needs medical insurance. However, some courts have held that a cap on AIDS benefits does not violate the ADA. More disturbing is the fact that an insurer may deny patients with severe disabilities coverage outright if it can support its decision with sound actuarial data or reasonably anticipated experience. Thus, even if plaintiffs can make a prima facie case, they must overcome a standard that is firmly in the favor of insurance companies.

Ultimately, the split between the circuits on the Title III standing issue may be decided by the Supreme Court. If the safe harbor provision is to have any effect, the Supreme Court must side with the First and Second Circuits and hold that Title III applies to both the access to and the content of insurance policies. However, in keeping with some prior precedent in the ADA context, this is not a foregone conclusion. Suffice it to say, at best, plaintiffs have a difficult time proving disability discrimination in the context of insurance. At worst, they never get the opportunity. How or when the Supreme Court will rule is purely a matter of conjecture. Only time and further litigation will show if the safe harbor provision can truly prevent an insurer or employer from evading the purposes of the ADA.

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148. See Mut. of Omaha Ins. Co., 179 F.3d at 558-63.