BEYOND SEX DISCRIMINATION: WHY EMPLOYERS DISCRIMINATE AGAINST WOMEN WITH DISABILITIES WHEN THEIR EMPLOYEE HEALTH PLANS EXCLUDE CONTRACEPTIVES FROM PRESCRIPTION COVERAGE

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I. INTRODUCTION

In June of this year, a federal court for the first time recognized that "the selective exclusion of prescription contraceptives from [an employer's] generally comprehensive prescription benefit plan constitutes discrimination on the basis of sex."[1] As the court in *Erickson v. Bartell Drug Co.* explained, "[W]hen an employer decides to offer a prescription plan covering everything except a few specifically excluded drugs and devices, it has a legal obligation to make sure that

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1. Erickson v. Bartell Drug Co., 141 F. Supp. 2d 1266, 1276–77 (W.D. Wash. 2001).

the resulting plan does not discriminate based on sex-based characteristics and that it provides equally comprehensive coverage for both sexes."[2]

The *Erickson* case is but one illustration of the "common practice" of excluding contraceptives from employee health plans that generally provide prescription coverage.[3] Another federal district court recently denied a motion to dismiss a similar case against United Parcel Service for providing its employees with a health plan that contained the exclusion.[4] In addition, the Equal Employment Opportunity Commission (EEOC) has similarly ruled in two administrative charges that the exclusion of contraceptives from otherwise comprehensive coverage constitutes sex discrimination.[5] It continues to receive charges of sex discrimination against employers whose plans contain the exclusion.[6]

Critics of this practice have viewed it exclusively a matter of sex discrimination without considering its particular impact on women with disabilities.[7] For example, the *Erickson* opinion cited with approval an article by Professor Sylvia Law published in 1998.[8] Professor Law's policy argument

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2. *Id.* at 1272 (citing Newport News Shipbuilding & Dry Dock Co. v. EEOC, 462 U.S. 669, 676 (1983)).

3. *Id.* at 1275.

4. *See* EEOC v. United Parcel Service, Inc., 141 F. Supp. 2d 1216, 1220 (D. Minn. 2001).

5. *See* U.S. EEOC Decision (December 14, 2000) *available at* http://www.eeoc.gov/docs/decision-contraception.html (last visited June 12, 2001) [hereinafter EEOC Decision]. In its Decision, the EEOC stated that "[c]ontraception is a means by which a woman controls her ability to become pregnant [and the Pregnancy Discrimination Act's] prohibition on discrimination against women based on their ability to become pregnant thus necessarily includes a prohibition on discrimination related to a woman's use of contraceptives." *Id.*

6. Martina Alexander, a flight attendant, recently filed sex discrimination charges with the EEOC against her employer, American Airlines, because her health plan does not cover prescription contraceptives. *See Woman Files Bias Charges Against Airline over Health Coverage*, ASSOCIATED PRESS, April 23, 2001. Although this charge alleges disability discrimination as well as sex discrimination, it is unclear whether Ms. Alexander is making the common but erroneous claim that pregnancy itself constitutes a disability or the more correct argument set forth *infra* Part II.B.

7. *See, e.g.*, Lisa A. Hayden, *Gender Discrimination Within the Reproductive Health Care System: Viagra v. Birth Control*, 13 J.L. & HEALTH 171, 172 (1999); Sylvia A. Law, *Sex Discrimination and Insurance for Contraception*, 73 WASH. L. REV. 363, 374 (1998).

The impact of the contraceptive exclusion certainly falls more heavily upon women than men. All forms of oral contraception currently available are taken by women. *See* Law, *supra* note 7, at 374. The cost of prescription contraceptives excluded from general insurance accounts for most of the significant disparity between men and women in out-of-pocket costs. *See id.* at 374–75. Law reported that 7.4 million women pay out-of-pocket costs, while only 3.4 million men do. *See id.* at 374 (citing WOMEN'S RESEARCH AND EDUCATION INSTITUTE, WOMEN'S HEALTH INSURANCE COSTS AND EXPERIENCES 26 (1994)). And, of course, women bear the primary costs of unwanted pregnancy. *See id.* at 375.

8. *See* Erickson, 141 F. Supp. 2d at 1273 (citing Law, *supra* note 7, at 364–68).

focused on the fact that "[u]nintended pregnancy is a serious problem in the United States,"[9] and her legal argument focused on the Pregnancy Discrimination Act (PDA), an amendment to Title VII of the Civil Rights Act of 1964, which prohibits sex discrimination by private employers.[10]

Legislative action, too, has focused on gender equity. The Senate Committee on Labor and Human Resources has twice considered legislation that would require health insurance plans that cover prescription drugs and devices to cover prescription contraceptives as a matter of ensuring "equity in health care for men and women."[11] Women's organizations have successfully lobbied in thirteen states for enactment of insurance laws requiring employee health plans to provide coverage for contraceptives.[12] Indeed, the California legislature entitled the bill it considered the "Women's Contraceptive Equity Act."[13]

These arguments, framed exclusively as a matter of gender equity, mask an even more pressing issue for women with disabilities that create a serious health risk in pregnancy. For these women, the question is not one of social equality alone, but of their very health and often the health of the babies they might conceive without effective access to reliable contraception.[14] Prescription

9. Law, *supra* note 7, at 402.

10. *See id.*; *see also* 42 U.S.C.A. § 2000e(k) (West, WESTLAW through P.L. 107-11 May 28, 2001).

11. *Equity in Prescription Insurance and Contraceptive Act, 1998: Hearings on S.766 Before the Senate Comm. On Labor and Human Resources*, 105th Cong. 1 (1998) (statement of James M. Jeffords, Chairman); *see also* Hayden, *supra* note 7, at 189 (citing *id.*, Statement of Richard H. Schwartz, M.D.). Federal law currently mandates prescription contraceptive coverage for federal employees, but President George W. Bush recently proposed a reversal of this mandate. *See* Daily Reproductive Health Report, *Politics and Policy: Senators to Send Letter Asking Appropriations Committee to Keep Contraceptive Coverage for Federal Employees* (Apr. 20, 2001), *available at* http://Kaisernetwork.org/Daily_reports/rep_index.cfm?DR_ID=4141 (last visited June 12, 2001); *see also* Juliet Eiperin, *House Panel Rebuffs Bush on Federal Contraceptive Coverage*, WASH. POST, July 18, 2001, at A06.

12. *See* CAL. INS. CODE § 10123.196 (West Supp. 2000); CONN. GEN. STAT. § 38a-503e (Supp. 2001); DEL. CODE ANN. tit. 18, § 3559(a) (1975, 2000); GA. CODE ANN. § 33-24-59.6 (Supp. 1999); HAW. REV. STAT. ANN. § 431:10A-116.6 (Supp. 2000); IOWA CODE § 514c.19(1) (2001); ME. REV. STAT. ANN. tit. 24A, § 2756 (West 2000); MD. CODE ANN., INS. § 15-826(b)(1) (2001); 1999 NEV. STAT. 689A.047; N.H. REV. STAT. ANN. § 415:18-i (Supp. 2000); N.C. GEN. STAT. § 58-3-178 (Supp. 1999); R.I. GEN. LAWS § 27-18-57 (Supp. 2000); VT. STATE ANN. tit. 8, § 4099(c) (2000); *see also* Planned Parenthood Fed'n of America, *Equity in Prescription Insurance and Contraceptive Coverage, available* at http://www.ppcna.org/pubaff/equity.html (visited Feb. 2, 2001). At least twenty states in total have considered such legislation. *See* Hayden, *supra* note 7, at 189.

13. A.B. 1112, Cal. Reg. Sess. (Cal. 1998). *See also* Sarah E. Bycott, *Controversy Aroused: North Carolina Mandates Insurance Coverage of Contraceptives in Wake of Viagra*, 79 N.C. L. REV. 779 (2001) (discussing North Carolina's law as a response to the fact that most plans cover Viagra, commonly used by men).

14. In considering the health of the baby, I in no way intend to suggest that any disability of the fetus itself is relevant, nor am I willing to concede that a fetus can suffer a disability as the term is understood in the context of the ADA as a civil rights statute. The

contraception, as the most effective means of safely preventing pregnancy,[15] takes on a different importance for these women.[16]

Furthermore, the legal right arising under the Americans with Disabilities Act (ADA) is not just the right to be free of discrimination, but, in promoting that right, to receive reasonable accommodations from an employer,[17] an obligation not imposed by Title VII in cases of sex discrimination.[18] While the cost defense proffered by employers does not clearly excuse them from charges of sex discrimination,[19] it holds even less weight in the context of the ADA.[20] With the reasonable accommodation requirement, Congress recognized that employers may face some cost burdens in accommodating the needs of individuals with

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relevant issue is how the possibility of fetal mortality affects a woman's decision whether to become pregnant. *See* discussion *infra*, pp. 514–15.

15. *See* Law, *supra* note 7, at 369–71. Although sterilization is, of course, highly effective in preventing pregnancy, the suggestion that it is the proper solution here both affronts women's personal autonomy and control over such medical decisions and ignores the very real possibility that medical advances may eventually make it possible for many of these women to safely carry a pregnancy to term and to deliver a healthy baby.

16. The employer in *Erickson* ignored this difference in defending against sex discrimination charges with the argument that "a woman's ability to control her fertility differs from the type of illness and disease normally treated with prescription drugs in such significant respects that it is permissible to treat prescription contraceptives differently than all other prescriptions." Erickson v. Bartell Drug Co., 141 F. Supp. 2d 1266, 1271–72 (W.D. Wash. 2001).

17. *See* 42 U.S.C.A. § 12102(b)(5) (West, WESTLAW through P.L. 107-11 May 28, 2001). Individuals with disabilities also have a right under Title III of the ADA to be free of discrimination from insurance offices themselves as "places of public accommodation." *See* 42 U.S.C.A. § 12181(7)(F) (West, WESTLAW through P.L. 107-11 May 28, 2001). Because there exists substantial debate over whether Title III covers the terms of insurance plans, *compare* Carparts Distribution Ctr. v. Auto. Wholesaler's Ass'n, 37 F.3d 12, 20 (1st Cir. 1994) (holding Title III does cover terms of insurance plans) *with* Parker v. Metro. Life Ins. Co., 121 F.3d 1006, 1010 (6th Cir. 1997) (en banc) (reaching opposing result), *cert. denied*, 522 U.S. 1084 (1998), and because Title I of the ADA imposes an express obligation on employers, this Article addresses only an employer's obligation to provide nondiscriminatory plan terms to its employees.

18. *See* 42 U.S.C.A. § 2000e-2 (1994) (West, WESTLAW through P.L. 107-11 May 28, 2001).

19. *See Erickson*, 141 F. Supp. 2d at 1274 ("While it is undoubtedly true that employers may cut benefits, raise deductibles, or otherwise alter coverage options to comply with budgetary constraints, the method by which the employer seeks to curb costs must not be discriminatory.") (citing Los Angeles Dep't of Water & Power v. Manhart, 435 U.S. 702, 716–17 (1978) and 29 C.F.R. § 1604.9(e)); *see also* Int'l Union, UAW v. Johnson Controls, 499 U.S. 187 (1991) (rejecting cost/liability defense to sex discrimination). *But see* Watson v. Fort Worth Bank & Trust, 487 U.S. 977, 998 (1988) (describing cost as "relevant" in determining whether alternatives proffered by plaintiffs in disparate impact cases are equally as effective as employers' unintentionally discriminatory policies).

20. *See* S. Elizabeth Wilborn Malloy, *Something Borrowed Something Blue: Why Disability Law Claims Are Different*, 33 CONN. L. REV. 603, 607 (2001) (explaining that the ADA "is fundamentally a very different type of statute" from Title VII).

disabilities.[21] Framing the issue as one of disability rather than sex discrimination reveals an employer's affirmative obligation to alter the terms of an employee health plan that excludes contraceptives from prescription coverage, even if doing so imposes additional costs on the employer.[22]

Perhaps more importantly, framing the issue purely as one of sex discrimination renders women with disabilities invisible.[23] Casting the debate as a question of whether women as a whole are treated differently from men in the workplace conjures up the image of an able-bodied woman, whose demand for benefits coverage for prescription contraceptives is premised on the fact that men receive better, more comprehensive benefits than women generally.[24] For many women, this debate, while important, becomes largely academic in the face of their health needs.[25] The gender equity argument largely ignores the needs of a

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21. *See* 42 U.S.C.A. §§ 12112(b)(5) (West, WESTLAW through P.L. 107-11 May 28, 2001) (creating affirmative obligation to provide "reasonable accommodation" unless it would create "undue hardship"), 12111(10) (West, WESTLAW through P.L. 107-11 May 28, 2001) (defining "undue hardship" as "*significant* difficulty or expense") (emphasis added); *see also* Malloy, *supra* note 20, at 609 ("[T]he ADA expressly contemplates that employers will take affirmative steps on behalf of employees and applicants with disabilities that they do not take for employees without disabilities.").

22. While employers generally offer plans with the prescription contraceptive exclusion as a cost-saving business decision, insurers often include the term in plans based on their judgment that contraceptives are not "medically necessary." As Timothy S. Jost explains,

> [w]hile historically the notion of medical necessity was important in defining the services that would be included within the scope of insurance coverage, it has more recently come to play a key role in delimiting the goods and services excluded from coverage. Insurance companies have increasingly refused to pay for health care goods and services that are not medically necessary, and to litigate the issue of medical necessity when it is pressed by insureds.

Timothy Stoltzfus Jost, *The American Difference in Health Care Costs: Is There a Problem? Is Medical Necessity the Solution?*, 43 ST. LOUIS U. L.J. 1, 1–2 (1999). The question of whether this insurer defense holds water is beyond the scope of this Article.

23. *See* Anita Silvers, *Reprising Women's Disability: Feminist Identity Strategy and Disability Rights*, 13 BERKELEY WOMEN'S L.J. 81, 84 (1998). By focusing on the entitlement to employment benefits, this Article admittedly ignores the needs of unemployed women with disabilities, who have an equally significant claim to prescription contraceptives as part of the government benefits they receive. *See generally* Jennifer Pokempner & Dorothy E. Roberts, *Poverty, Welfare Reform, and the Meaning of Disability*, 62 OHIO ST. L.J. 425 (2001).

24. *See* Law, *supra* note 7, at 372; *Erickson*, 141 F. Supp. 2d at 1271, ("The special or increased healthcare needs associated with a woman's unique sex-based characteristics must be met to the same extent, or on the same terms, as other healthcare needs.").

25. Indeed, Congress expressly stated that one of the types of discrimination the ADA addresses is access to health care. *See* 42 U.S.C.A. § 12101(a)(3) (West, WESTLAW through P.L. 107-11 May 28, 2001); *see also* Mary Crossley, *Becoming Visible: The ADA's Impact on Health Care for Persons with Disabilities*, 52 ALA. L. REV. 51, 51 (2000)

woman for whom pregnancy poses a risk of heart failure, seizure disorders, or dangerously high hypertension.[26] Ignoring her needs ignores the woman herself and creates the danger that her interests may in fact be harmed by a policy designed to meet the needs of women generally.[27]

This tendency to view "women" as primary and women with disabilities as a special subset of that group can lead to the criticism that this Article provides only "half a loaf" because it does not necessarily mandate the demise of the contraceptive exclusion in all employee health plans. Taking this perspective, one might point out that an employer need merely waive the exclusion for women who can demonstrate a medical need for prescription contraceptives.[28] In other words, rather than eliminate the exclusion itself, an employer can accommodate the needs of its employees with disabilities entitling them to prescription contraceptives by providing only them with plan coverage.

Calling this arrangement less than a full victory assumes that the needs of women with disabilities are somehow secondary to the greater needs of women generally. Eliminating the prescription contraceptive exclusion would benefit both women generally *and* women with disabilities; however, this confluence of benefits is certainly not guaranteed by considering only women generally without proper concern for the needs of women with disabilities specifically.[29] A proper focus on the needs of women with disabilities as fully as important as the needs of women generally in all circumstances avoids harming or simply failing to address the interests of women who differ from the norm.[30] Requiring employers to provide prescription contraceptive coverage to employees with disabilities whenever they provide prescription coverage generally represents a civil rights victory.[31] Further, it has the effect of broadening the perception of what the ADA mandates and whom it protects.

(describing "voluminous legislative history...regarding the barriers that people with disabilities faced in obtaining health care").

26. *See infra* Part II.A..

27. *See* Silvers, *supra* note 23, at 84; *cf.* Kimberle Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color*, 43 STAN. L. REV. 1241, 1252 (1991) ("The problem [for women of color] is not simply that both discourses [of racism and sexism] fail women of color by not acknowledging the 'additional' issue of race or of patriarchy but that the discourses are often inadequate even to the discrete tasks of articulating the full dimensions of racism and sexism.").

28. Similarly, some plans may include a standard waiver when prescription contraceptives are "medically necessary." The question remains whether this waiver would apply to the women discussed in this Article or only to, for example, menopausal women, for the determination of "medical necessity" remains highly subjective. *See* Jost, *supra* note 22, at 1.

29. *See* Silvers, *supra* note 23, at 84.

30. *See* Malloy, *supra* note 20, at 608 ("Unfortunately, an over-application of Title VII precedent has frequently frustrated the claims of ADA plaintiffs.").

31. *See* Miranda Oshige McGowan, *Reconsidering the Americans with Disabilities Act*, 35 GA. L. REV. 27, 45 (2000) ("The ADA is not just good public policy. It is a matter of guaranteeing essential civil rights."); Arlene B. Mayerson & Sylvia Yee, *The*

Perhaps because of the tendency to ignore women with disabilities, demanding prescription contraceptives as a right conferred by the ADA becomes conceptually and legally difficult. Most people think of disability primarily in terms of mobility impairments[32] and, more crucially, assume that they affect women and men in the same way.[33] Further, the fact that insurance plans traditionally discriminate on the basis of physical differences between individuals[34] often leads to the erroneous assumption that the terms of employee health plans are inviolate.[35] Resistance seems to arise as well from a backlash against the fact that private employers bear a great deal of the responsibility for providing reasonable accommodations to their employees with disabilities.[36] Such perceptions lead to a tendency to view with hostility creative uses of the ADA to impose liability on employers for failing to provide a workplace in which disability truly makes no difference.

Part II of this Article addresses the perception that women who face serious health risks in pregnancy are not protected by the ADA. It explains that the risk they face in pregnancy constitutes a substantial limitation on a major life activity, in accordance with the ADA.[37] Part III considers how the ADA specifically addresses its application to insurance plan terms. It demonstrates that the express parameters of the ADA's "safe harbor" provision for insurance plans do not apply to plan terms that deny coverage for prescription contraceptives despite covering other prescriptions. Finally, Part IV considers Title I's specific

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ADA and Models of Equality, 62 OHIO ST. L.J. 535, 535–36 (2001) ("There can be no doubt that [the] civil rights tradition was used as a strong moral imperative in advocating for a comprehensive civil rights statute for people with disabilities.").

32. *See* SUSAN WENDELL, THE REJECTED BODY: FEMINIST PHILOSOPHICAL REFLECTIONS ON DISABILITY 70 (1996).

33. *See, e.g.*, Silvers, *supra* note 23, at 87 (discussing feminist tendency to treat the issue of sterilization of individuals with disabilities as sex-specific, although it is practiced on both sexes).

34. *See* JUDITH K. MINTEL, INSURANCE RATE LITIGATION: A SURVEY OF JUDICIAL TREATMENT OF INSURANCE RATEMAKING AND INSURANCE RATE REGULATION 113 (1983).

35. *See* Crossley, *supra* note 25, at 78 (noting conflict between the ADA's nondiscrimination mandate and its application to insurers and employers sponsoring employee health benefit plans, "entities who have traditionally made it their business on a routine basis to make decisions regarding the availability and nature of benefits by taking into account individuals' health characteristics in a fashion that could often be construed as discriminating on the basis of disability").

36. *See* Malloy, *supra* note 20, at 617 (describing critics who "have argued that the reasonable accommodation requirement of the statute unfairly requires employers to 'subsidize' employees with disabilities"). The "private employers" discussed here do not include religious organizations. Title I allows religious organizations to "require that all...employees conform to the religious tenets of such organization." 42 U.S.C.A. § 12113(c)(2) (West, WESTLAW through P.L. 107-11 May 28, 2001). Whether the argument presented here applies to such employers implicates issues of religious freedom beyond the scope of this Article.

37. *See* 42 U.S.C.A. § 12102(2)(A) (West, WESTLAW through P.L. 107-11 May 28, 2001).

prohibition of employer discrimination in the provision of employee benefits. It concludes that, when grounded in a proper understanding of whom the ADA protects and how it specifically distinguishes between permissible and impermissible insurance disability discrimination, the ADA imposes liability on employers for excluding contraceptives from the coverage of other prescriptions in their employee health plans.

II. IS THE RISK OF PREGNANCY A DISABILITY?

Perhaps the greatest resistance to viewing the ADA as a vehicle for guaranteeing prescription contraceptive coverage in employer-provided health plans lies in difficulty understanding how the possibility of pregnancy could ever be a covered disability. When people envision a "disability," they tend not to think in sex-specific terms.[38] Furthermore, a condition as common and temporary as pregnancy falls outside most general concepts of how to define a recognizable category of individuals protected by the ADA.[39] Indeed, any analysis attempting to view pregnancy as a *per se* disability falls flat because of the fact that most pregnancies do not limit women in the way that disabilities impact the activities of the individuals who have them.[40] However, as discussed below, a number of health conditions can render the possibility of pregnancy so threatening to the health of a woman or her baby that that risk itself renders the woman's condition a disability because of its substantial limitation on her major life activity of reproduction.

A. When the Possibility of Becoming Pregnant Becomes a Disability

Upon initial consideration, the Supreme Court's examination in *Sutton v. United Air Lines*[41] of what constitutes a disability for purposes of the ADA seems to foreclose any finding that the possibility of pregnancy could ever be a protected disability. In *Sutton*, the Court considered whether two extremely near-sighted women who could correct their vision with glasses or contact lenses were individuals with disabilities protected by the Act.[42] The ADA defines "disability" as "a physical or mental impairment that substantially limits one or more of the major life activities of...[an] individual."[43] The Court held that the plaintiffs were not entitled to ADA protection because "we think the language is properly read as

38. *See* Silvers, *supra* note 23, at 84. Although breast cancer, which is woman-specific, might be perceived as a disability, this perception seems to exist because of an understanding of *any* cancer as a potential disability.

39. *See* Mary Crossley, *The Disability Kaleidoscope*, 74 NOTRE DAME L. REV. 621, 623 (1999) (noting the sharp increase in the frequency of litigation over whether the plaintiff is an individual with a disability entitled to ADA protection).

40. *See* discussion *infra* Part II.B.

41. 527 U.S. 471 (1999).

42. *See id.* at 475.

43. 42 U.S.C.A. § 12102(2)(A) (West, WESTLAW through P.L. 107-11 May 28, 2001).

requiring that a person be presently—not potentially or hypothetically—substantially limited in order to demonstrate a disability."[44] Hence, while the plaintiffs wore corrective lenses, they were not substantially limited in the major life activity of seeing, and, therefore, lost their status as individuals with disabilities.

The Court thus forcefully stated that one is not entitled to the protections of the Act if she will become substantially limited in a major life activity at some later date. In the case of a woman who must use prescription contraceptives as the most effective way to prevent a pregnancy that could create serious health risks, the very fact that she is using the contraceptives (which she must pay for herself) seemingly renders her condition at most a mere impairment, not a protected disability.[45]

When the possibility of pregnancy itself presents an unacceptable risk to the health of either the woman or the baby she would deliver,[46] however, the woman is in fact presently substantially limited in the major life activity of reproduction. In fact, she falls within the very definition of disability approved by the Court a year before its *Sutton* decision in *Bragdon v. Abbott*.[47] In that case, the plaintiff, Sidney Abbott, had asymptomatic HIV that "had not manifested its most serious symptoms."[48] Perhaps because she was still able to engage unimpeded in her everyday activities, Abbott argued that her HIV infection substantially limited only her major life activity of reproduction.[49]

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44. *Sutton*, 527 U.S. at 482.

45. *See id.* at 483 ("To be sure, a person whose physical or mental impairment is corrected by mitigating measures still has an impairment, but if the impairment is corrected it does not 'substantially limi[t]' a major life activity."); *see also id.* at 499 (Stevens, J., dissenting) (characterizing the majority's opinion as compelling "the counterintuitive conclusion that the ADA's safeguards vanish when individuals make themselves more employable by ascertaining ways to overcome their physical or mental limitations").

46. *See supra* note 14 for an explanation of why I do not mean to suggest here that any disability of the fetus itself is relevant.

47. 524 U.S. 624 (1998). The district court in *Wenzlaff v. NationsBank*, 940 F. Supp. 889 (D. Md. 1993), characterized the plaintiff's reliance on *Bragdon v. Abbott* as "misplaced" because "[t]he *Abbott* case does not even address the question of whether pregnancy is a disability under the ADA, as *Abbott* references the reproduction system in the context of A.I.D.S." *Id.* at 891. The court in *Gabriel v. City of Chicago*, 9 F. Supp. 2d 974 (N.D. Ill. 1998), similarly stated that, "[w]hile the *Abbott* decision makes clear that reproduction is a major life activity, it does not explain whether or under what circumstances functions of the reproductive system—such as pregnancy—can constitute disabilities." *Id.* at 979. As discussed herein, certain conditions create such a risk to the health of a woman and her baby that for women who have these conditions, the risk of pregnancy can constitute a disability.

48. *Abbott*, 524 U.S. at 628.

49. *See id.* at 637. The Court left open the possibility that Abbott could have pointed to other major life activities that were substantially limited by her HIV infection, despite her lack of severe symptoms, noting that "[g]iven the pervasive, and invariably fatal, course of the disease, its effect on major life activities of many sorts might have been relevant to our inquiry." *Id.* at 637. In fact, the majority apparently found persuasive the

Of particular importance here, Abbott was not pregnant at the time she claimed a disability, nor did she claim any intention of becoming pregnant.[50] In fact, the record suggested that Abbott's HIV-infection led to her "conclusive[] deci[sion] that she would not have children."[51]

Despite these facts, the Court held that Abbott's HIV infection substantially limited her ability to engage in reproduction largely because of the risk of infecting her child, both during the pregnancy itself and perinatally, or during childbirth.[52] While the Court approved of Abbott's statistics showing a twenty-five percent risk of HIV-infected women transmitting the virus to their children,[53] it also stated that Bragdon's significantly lower estimate of an eight percent risk if the woman undergoes antiretroviral therapy was still high enough to substantially limit her ability to engage in reproduction.[54] The Court concluded that "[i]t cannot be said as a matter of law that an eight percent risk of transmitting a dread and fatal disease to one's child does not represent a substantial limitation on reproduction."[55]

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amicus briefs that provided information "about HIV's profound impact on almost every phase of the infected person's life." *Id. See also id.* at 656 (Ginsburg, J., concurring) (noting that "HIV infection...has been regarded as a disease limiting life itself.").

A bare majority of the Court believed that reproduction constitutes a major life activity. Chief Justice Rehnquist and Justices Scalia, O'Connor, and Thomas all disagreed with even this conclusion. *See id.* at 658–59 & n.2 (Rehnquist, C.J., dissenting), 664–65 (O'Connor, J., concurring in judgment in part and dissenting in part) ("In my view, the act of giving birth to a child, while a very important part of the lives of many women, is not generally the same as the representative major life activities of all persons."). Prior to *Bragdon v. Abbott*, the lower courts had split over whether reproduction constitutes a major life activity. *Compare* Krauel v. Iowa Methodist Med. Ctr., 915 F. Supp. 102 (S.D. Iowa 1995) *with* Pacourek v. Inland Steel Co., 858 F. Supp. 1393 (N.D. Ill. 1994).

50. The dissent asserted that "[t]here is absolutely no evidence that, absent the HIV, [Abbott] would have had or was even considering having children," *id.* at 659 (Rehnquist, C.J., dissenting), and that "in the course of her entire brief to this Court, [Abbott] studiously avoids asserting even once that reproduction is a major life activity to her." *Id.* (Rehnquist, C.J., dissenting).

51. *Id.* (Rehnquist, C.J., dissenting); *see also id.* at 641 ("Testimony from [Abbott] that her HIV infection controlled her decision not to have a child is unchallenged.").

52. *See id.* at 640. The Court also discussed the risk of transmission to a woman's sexual partner. *See id.* at 639–40. The Court confined its discussion of partner infection to a single paragraph, however, devoting the bulk of its analysis to the possibility of the woman passing her infection on to her child. *See id.* at 640–41.

53. *See id.* at 640.

54. *See id.* at 640–41. The Court relied in part on the National Institutes of Health's AIDS Chemical Trials Group Protocol 076 (cited in Edward M. Connor, et al., *Reduction of Maternal-Infant Transmission of Human Immunodeficiency Virus Type I with Zidovadine Treatment*, 331 NEW ENG. J. MED. 1173, 1176 (1994)).

55. *Id.* at 641.

Women of child-bearing age with HIV-infection, even if asymptomatic, are therefore quite plainly protected by the ADA.[56] As women of childbearing age are the fastest growing group with reported HIV infection, the *Bragdon v. Abbott* decision affects a significant number of women.[57] Currently, about 7,000 pregnancies in the United States are complicated by HIV infection each year,[58] and the "vast majority" of pediatric AIDS cases arise from a mother's transmission of the virus to her child.[59] According to Doctors Robert K. Creasy and Robert Resnick, "HIV infection is now among the 10 leading causes of death in children aged one to four years."[60]

Furthermore, despite characterizations of the *Bragdon v. Abbott* decision as "fairly narrow" and "specific to Sidney Abbot,"[61] the Court's holding applies to a number of other conditions that create a similar risk of prenatal or perinatal transmission.[62] Like Abbott's HIV infection, the objective risks posed by these conditions may substantially limit a woman's subjective decision to become pregnant and, therefore, her major life activity of reproduction.[63]

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56. It is important to note that "[t]he risk factors associated with...HIV/AIDS in the African American community have differed from those in white communities." Pokempner & Roberts, *supra* note 23, at 437. "[T]he majority of perinatally acquired AIDS cases occur among African American and Hispanic children." *Id.* at 438.

57. Laura Hoyt, *HIV Infection in Women and Children: Special Concerns in Prevention and Care,* POSTGRADUATE MED., Oct. 1997, at 165.

58. ROBERT K. CREASY & ROBERT RESNICK, MATERNAL-FETAL MEDICINE 725 (4th ed. 1999). The authors report that an estimated 107,000 to 150,000 women in the United States currently live with HIV. *See id.* The number of HIV-infected women who become pregnant is still rising in parts of the southern United States. *See id.* The authors further report that women represented 19 percent of AIDS cases recorded in 1995, a substantial increase from seven percent in 1984. *See id.*

59. *Id. See also* Am. Med. Ass'n, *Update: Perinatally Acquired HIV/AIDS—United States, 1997,* 134 ARCHIVE OF DERMATOLOGY 257 (1998).

60. CREASY & RESNICK, *supra* note 58, at 725 (citing statistics compiled by the Centers for Disease Control). *See also* R.J. Simonds & Martha Rogers, *Editorial, Preventing Perinatal HIV Infection: How Far Have We Come?,* 275 JAMA 1514 (1996).

61. Crossley, *supra* note 39, at 641.

62. As Anita Silvers has observed, "most contemporary thinking about prenatal screening manifests a cultural aversion to disability." Silvers, *supra* note 23, at 91 (citing Deborah Kaplan, *Disability Rights Perspectives in Reproductive Technologies and Public Policy, in* REPRODUCTIVE LAWS FOR THE 1990'S 241, 242–43 (Sherrill Cohen & Nadine Taub eds., 1989)). I emphatically do not mean to suggest here that women who stand a significant risk of giving birth to a child with a disability should, as a matter of course, be counseled not to become pregnant. Rather, my focus is on how the risk affects a woman's individual choice whether to become pregnant and, hence, her major life activity of reproduction.

63. Although this proposition admits that not all women for whom pregnancy poses serious health risks can be considered individuals with disabilities, this interpretation is consistent with the ADA's individualized approach. *See* § 12102(2)(A) (West, WESTLAW through P.L. 107-11 May 28, 2001) (defining "disability" as an "impairment that substantially limits...the major life activities of *such individual*") (emphasis added);

For example, in *Sutton*, the Court stated in dicta that diabetes effectively controllable by insulin should not be a protected disability under the ADA.[64] Even if a woman controls her diabetes with insulin, however, she still faces an unacceptable risk of "serious birth injury" to her child.[65] According to Creasy and Resnick, the newborn morbidity attributable to mothers' diabetes is "disproportionate."[66] These infants face the "major threat" of a "life-threatening structural anomaly" that is four-to-eight times that of the general population.[67] Under the same reasoning the Court applied to Sidney Abbott, any woman for whom these risks would play a major role in the decision whether to become pregnant is substantially limited in her major life activity of reproduction.

Similarly, the *Sutton* majority suggested that a person who takes medication to control her high blood pressure does not qualify as an individual with a disability.[68] In *Leahr v. Metro. Pier & Exposition Auth.*, the district court added that, in the case of pregnancy-induced hypertension, the condition is merely temporary and therefore not a disability.[69] The *Sutton* Court allowed, however, that the "negative side effects suffered by the individual resulting from the use of mitigating measures," such as medication, could themselves substantially limit an individual in her major life activities.[70]

This concession applies to many women who use medication to control high blood pressure. "[T]he hypertensive disorders of pregnancy challenge the

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Sutton v. United Airlines, Inc., 527 U.S. 471, 483 (1999) ("[W]hether a person has a disability under the ADA is an individualized inquiry.").

64. Sutton v. United Airlines, 527 U.S. at 472. *But see id.* at 501 (Stevens, J., dissenting).

65. CREASY & RESNICK, *supra* note 58, at 964. The authors state that the risk of serious birth injuries in babies delivered to women with insulin-dependent diabetes is twice that of other births and that these babies are four times more likely to be admitted to intensive care units upon their birth. *See id.*

66. *Id.* In the general population, the risk of life-threatening structural anomalies is one-to-two percent. *See id.* at 966. No such increased risk arises when the father has diabetes. *See id.*

67. *Id.*

68. *See Sutton*, 527 U.S. at 488. In *Murphy v. United Parcel Service, Inc.*, 527 U.S. 516 (1999), the Court found the question whether Murphy was entitled to the protections of the ADA if he was able to control his high blood pressure through medication "answered...in *Sutton*." *Id.* at 521. *But see Sutton*, 527 U.S. at 502 (Stevens, J., dissenting).

69. Leahr v. Metro. Pier & Exposition Auth., No. 96-C1388, 1997 U.S. Dist. LEXIS 10601, at *10–*11 (N.D. Ill. July 16, 1997). The EEOC Compliance Manual recognizes that hypertension arising from pregnancy should be considered an impairment and therefore could rise to the level of a disability if it substantially limits a major life activity (such as reproduction). *See* 2 EEOC Compl. Man. § 902.2(c)(3).

70. *Sutton*, 527 U.S. at 472. The majority's unclear construction of the statute seems to suggest that the medication itself—which is what creates the substantial limitation—should be considered an impairment. *See* 42 U.S.C.A. § 12102(2)(A) (West, WESTLAW through P.L. 107-11 May 28, 2001) (defining disability as "a physical or mental impairment that substantially limits one or more of the major life activities of [the] individual").

medical and obstetric skills of the health care team"[71] because the medications used to control hypertension may result in a higher perinatal mortality rate[72] and growth restrictions.[73] Even the *Sutton* Court would be hard-pressed to deny that these side effects of medication create a risk that may constitute a present substantial limitation on the major life activity of reproduction for the woman who must take them.[74]

The medications used to treat a number of other conditions pose similar risks to the health of the baby a woman would deliver that may substantially limit her in the major life activity of reproduction. For example, common treatments for cardiovascular disease, such as oral anticoagulants, can harm a developing fetus.[75] The medications taken to treat Wegener's Granulaomatosis, a rare condition affecting the upper respiratory tract and lungs, also pose a significant risk of infant abnormalities.[76] In fact, the risk is so high that Creasy and Resnick counsel that patients taking these therapeutic drugs "should be offered pregnancy termination."[77]

It is important to note that the consideration of whether these conditions substantially limit a woman in her ability to engage in reproduction centers on how the risk of injury to the developing fetus affects the woman's decision whether to become pregnant. The condition of the fetus itself could not be considered a disability both because the fetus does not engage in the types of "major life activities" suggested by the regulations,[78] and because the fetus is not an "individual" with a disability entitled to the civil rights protections of the ADA.[79] A woman would face the same limitations on *her* ability to engage in reproduction if the risk of pregnancy involved her own health.

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71. CREASY & RESNICK, *supra* note 58, at 833.

72. *See id.* at 864–65.

73. For example, Creasy and Resnick specifically identify beta-adrenergic antagonists, which are commonly used as initial antihypertensive treatment in nonpregnant women, as causing low birth weight. *See id.* at 865.

74. *See* Bragdon v. Abbott, 524 U.S. 624, 639–41 (1998). In addition to the medication many women take to control high blood pressure, in some cases, the health risk posed by the hypertension itself can constitute a disability. Pheochromocytoma, a "rare but potentially lethal cause of hypertension in pregnancy" can be "life-threatening" for both the mother and her child. CREASY & RESNICK, *supra* note 58, at 1030. The risks posed by this condition are substantial: about a thirty-five percent risk of fetal mortality and a seventeen percent risk of maternal mortality according to the most recent statistics. *See id.* (citing statistics compiled between 1980 and 1987).

75. *See* CREASY & RESNICK, *supra* note 58, at 796.

76. *See id.* at 929

77. *See id.*

78. *See* 45 C.F.R. § 84.3(j)(2)(ii) (West, WESTLAW through July 19, 2001) (listing "major life activities" as "functions such as caring for one's self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working").

79. *See* Sutton v. United Airlines, Inc., 527 U.S. 471, 483 (1999) ("The definition of disability also requires that disabilities be evaluated 'with respect to an individual' and be determined based on whether an impairment substantially limits the

In fact, although *Bragdon v. Abbott* does not address the risk a condition poses to a woman should she become pregnant, the same analysis that governs the risk posed to her child applies to her own health.[80] Just as the risk of transmitting HIV-infection to a child substantially limited Sidney Abbott in her major life activity of reproduction because it strongly affected her choice of whether to become pregnant,[81] so the same objective magnitude of risk of suffering health problems oneself would also affect one's subjective decision regarding pregnancy.

For example, the increased demands pregnancy places on a woman's cardiovascular functions may exacerbate symptoms of heart disease or heart failure.[82] These increased risks range "from negligible to prohibitive";[83] pregnancy for many women with symptoms of heart disease may therefore be "extremely dangerous."[84] Creasy and Resnick counsel that

> some cardiac disorders are so serious in nature that the physiologic changes of a superimposed pregnancy pose prohibitive risks to the mother and carry such a high maternal mortality risk that pregnancy

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'major life activities of such individual.' § 12102(2)."). *See also* Jennifer Brown, *A Troublesome Maternal-Fetal Conflict: Legal, Ethical, and Social Issues Surrounding Mandatory AZT Treatment of HIV Positive Pregnant Women*, 18 BUFF. PUB. INT. L.J. 67 (2000) (arguing that mandatory AZT treatment of pregnant women, while likely to significantly reduce the incidence of pediatric AIDS, would impermissibly infringe upon a pregnant woman's constitutional rights); Angela Liang, *Gene Theraphy: Legal and Ethical Issues for Pregnant Women*, 47 CLEV. ST. L. REV. 61, 63 (1994) (arguing that the decision whether to undergo gene therapy to detect and correct birth defects *in utero* "should legally rest with the pregnant woman rather than the judiciary or the legislature"); Michelle Oberman, *Mothers and Doctors' Orders: Unmasking the Doctor's Fiduciary Role in Maternal-Fetal Conflicts*, 94 NW. U. L. REV. 451, 452–54 (2000) (noting that the "overwhelming majority" of articles considering conflicts between the rights of a woman and her fetus conclude that "in all but the most extreme circumstances, it is impermissible to infringe upon the pregnant woman's autonomy rights" and arguing that, properly understood, the conflict really lies between the pregnant woman and her doctor).

80. *See* Contreras v. Suncast Corp., 237 F.3d 756, 764 (7th Cir. 2001) ("[T]he [*Bragdon*] Court based its decision on the undeniable impact that HIV can have on the feasibility of reproduction.").

81. *See* Bragdon v. Abbott, 524 U.S. 624, 641 (1998) ("Testimony from [Abbott] that her HIV infection controlled her decision not to have a child is unchallenged."). As the Court noted, "the disability definition does not turn on personal choice. When significant limitations result from the impairment, the definition is met even if the difficulties are not insurmountable." *Id.*

82. *See* CREASY & RESNICK, *supra* note 58, at 793.

83. *Id.*

84. *Id.* Such heart disorders include Marfan's Syndrome, a defect of the connective tissue in the aorta, that renders pregnancy "particularly dangerous...because there appears to be a higher risk of aortic rupture and dissection." *Id.* at 815. Creasy and Resnick believe that if a woman has Marfan's Syndrome it is "prudent to avoid becoming pregnant altogether." *Id.* Even some diagnostic measures used in conjunction with heart disorders can present a high risk of harming the health of a pregnant woman. Creasy and Resnick believe that radiographic or radionuclide tests should be avoided unless the procedures are "deemed essential for the health and safety of the mother." *Id.* at 793.

> is contraindicated. In such circumstances, patients must be strongly cautioned against becoming pregnant. If such a patient is seen for the first time when she is already pregnant, termination of the pregnancy is recommended.[85]

Similarly, the drug therapies for countless other health conditions, can also substantially limit a woman's ability to engage in reproduction because of the risk of pregnancy. For example, although the *Sutton* majority disputed the notion that epilepsy successfully controlled by medication could be considered a disability,[86] pregnancy has an "unpredictable and variable influence" on seizure disorders under current therapies.[87] It can therefore be particularly difficult to maintain adequate drug treatment of the woman's disorder.[88] Because of the risk involved, for women who control their epilepsy with medication, if their drug therapy substantially interferes with their choice to become pregnant, they qualify as individuals with disabilities.

Women with a broad range of conditions in which pregnancy poses a risk to their health or the health of their baby that the individual women find unacceptable have an obvious and necessary need to avoid pregnancy. Even if the diagnoses of these conditions are based on medical assessments rather than a fuller understanding of disability,[89] the impact medical knowledge has on a woman's decision to avoid pregnancy is not in any way a medical assessment of the disability itself. Rather, following *Bragdon v. Abbott*, the disability is based on a woman's subjective experience of the risks to her own health and the health of the child she would deliver—an individualized and personal assessment. It is her need to avoid pregnancy, not some assessment of the physical limitations the complication might create for herself or her fetus, that substantially limits her major life activity of reproduction.

Speculative dicta about hypothetical disabilities in the *Sutton* majority opinion notwithstanding, the Court's prior decision in *Bragdon v. Abbott* makes it plain that, just as Sidney Abbott's HIV infection was a disability because it caused her to decide against ever becoming pregnant,[90] so countless other women face the

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85. *Id.* at 794.

86. *See* Sutton v. United Airlines, Inc., 527 U.S. 471, 488 (1999). *But see id.* at 509 n.5 (Stevens, J., dissenting).

87. CREASY & RESNICK, *supra* note 58, at 1091. One study showed an increase of forty-five percent the frequency of seizures in pregnant women, while other studies show an increase of twenty-three to seventy-five percent, especially if the woman experienced frequent seizures prior to her pregnancy. *See id.*

88. *See id.*

89. *See* Melissa Cole, *The Mitigation Expectation and the* Sutton *Court's Closeting of Disability*, 43 HOW. L.J. 499, 507 (2000).

90. Bragdon v. Abbott, 524 U.S. 624, 640–42 (1998).

same sorts of limitations. These women therefore meet the threshold test for protection under the ADA; they are, indeed, individuals with disabilities.[91]

B. The Legal Exclusion of Pregnancy from ADA Coverage

Although the risk of pregnancy may, in the circumstances described, constitute a disability protected by the ADA, considering pregnancy from the perspective of women without disabilities obscures this reality. Hence, in its Interpretive Guidance,[92] the EEOC has taken the position that pregnancy is not even an impairment, much less one that "substantially limits one or more of the major life activities"[93] of the pregnant woman, because it is "not the result of a physiological disorder."[94]

Relying on this guidance and on an uncritical view of pregnancy as affecting all women in the same way, many courts have concluded that if pregnancy itself is not a disability, neither are any conditions relating to it.[95] This

91. This approach avoids the problem of distinguishing pregnancy-related disabilities from temporary impairments that the EEOC Interpretive Guidance specifically excludes from the definition of disability. *See* 29 C.F.R. § 1630.2(j) app. (West, WESTLAW through July 29, 2001); *see also* Gabriel v. City of Chicago, 9 F. Supp. 2d 974, 983 (N.D. Ill. 1998) ("Although intermittent, episodic impairments are not considered disabilities under the ADA,...[plaintiff's] ailments extended beyond the time [she] gave birth."); Lacoparra v. Pergament Home Ctrs., Inc., 982 F. Supp. 213, 227 (S.D.N.Y. 1997); Jessie v. Carter Health Care Ctr., Inc., 926 F. Supp. 613, 616 (E.D. Ky. 1996).

92. Congress granted the EEOC the authority to promulgate regulations interpreting Title I of the ADA, which prohibits discrimination in employment. *See* 42 U.S.C.A. § 12116 (West, WESTLAW through P.L. 107-11 May 28, 2001). The EEOC has chosen to issue Interpretive Guidance in addition to the regulations themselves. *See* 29 C.F.R. app. § 1630.2. (West, WESTLAW through July 19, 2001). Congress directed the Department of Justice to issue regulations interpreting the provisions of Title II (prohibiting discrimination by public entities) and Title III (prohibiting discrimination by public accommodations) that do not relate to transportation systems. 42 U.S.C.A. §§ 12134(a), 12186(b) (West, WESTLAW through P.L. 107-11 May 28, 2001). The Department of Justice regulations and Interpretive Guidance interpreting Titles II and III do not specifically exclude pregnancy from the definition of physical impairment.

93. 42 U.S.C.A. § 12102(2)(A) (West, WESTLAW through P.L. 107-11 May 28, 2001).

94. 29 C.F.R. app. § 1630.2(h). (West, WESTLAW through July 29, 2001). In *Sutton v. United Airlines*, the Supreme Court called into question the EEOC's authority to define "disability." *See* 527 U.S. 471, 479–80 (1999). Because the lower courts have so widely relied on this provision of the Interpretive Guidance, however, I discuss their use of it and the limits of their analyses.

In its less authoritative Compliance Manual, the EEOC subsequently stated that a pregnancy-induced complication, such as hypertension, may be recognized as an impairment because it is recognized as one in non-pregnancy cases. 2 EEOC Compl. Man. (CBC) § 902.2(c)(3) (1995). The cases discussed *infra* largely ignore the Compliance Manual.

95. *See, e.g.*, Okoroji v. District of Columbia, No. 94-1442(TFH), 1998 U.S. Dist. LEXIS 10704 (D.D.C. July 8, 1998), *aff'd*, No. 98-7155, 1999 WL 151158 (D.C. Cir. Feb. 2, 1999); Gudenkauf v. Stauffer Communications, Inc., 922 F. Supp. 465, 473 (D.

perspective illustrates the danger of subsuming the concerns of women with disabilities under the umbrella of a generic "woman" who does not have a disability. Examining the distinction between women generally and women for whom pregnancy implicates a disability demonstrates yet more clearly why women who must avoid pregnancy for reasons of their health or the health of the babies they would deliver are entitled to the protection of the ADA.

A number of courts have relied uncritically on the EEOC Interpretive Guidance to bar, not only pregnancy, but all pregnancy-related conditions from ADA coverage. For example, in *Villarreal v. J.E. Merit Constructors, Inc.*, the plaintiff asserted that her employer terminated her in violation of several civil rights statutes, including the ADA, when she announced her pregnancy because she had previously miscarried and been absent from work while she recovered.[96] In considering the alleged ADA violation, the district court relied exclusively on the EEOC Interpretive Guidance to hold that the plaintiff's pregnancy did not itself qualify as a disability.[97] It went on to state that, in general, pregnancy-related conditions may not be considered disabilities either.[98] The court cited both the EEOC's position that pregnancy is not an impairment and further Interpretive Guidance that "temporary, non-chronic impairments of short duration, with little or no long term or permanent impact, are usually not disabilities."[99] Based on this authority, the *Villarreal* court concluded that, "absent unusual circumstances,"

Kan. 1996); Villarreal v. J.E. Merit Constructors, Inc., 895 F. Supp. 149, 152 (S.D. Tex. 1995).

96. *See Villarreal*, 895 F. Supp. at 151.

97. The court found "further support[]" in the existence of the Pregnancy Discrimination Act (PDA), which it believed provided the sole protection from employment discrimination against pregnant women. *Id.* at 152; *see also* Tsetseranos v. Tech Prototype, Inc., 893 F. Supp. 109, 119 (D.N.H. 1995); Crossley, *supra* note 39, at 675–76 (criticizing the impulse to categorize the issue as one of either sex discrimination under the PDA or disability discrimination under the ADA); Colleen G. Matzzie, Note, *Substantive Equality and Antidiscrimination: Accommodating Pregnancy Under the Americans with Disabilities Act*, 82 GEO. L.J. 193, 221–23 (1993) (arguing that the PDA actually requires the inclusion of pregnancy and pregnancy-related disabilities under the ADA); Jessica Lynne Wilson, Note, *Technology as a Panacea: Why Pregnancy-Related Problems Should Be Defined Without Regard to Mitigating Measures Under the ADA*, 52 VAND. L. REV. 831, 836–37 (1999).

98. The plaintiff had miscarried during a prior pregnancy. Although she did not base her claim on this pregnancy, she did seem to suggest that her employer's knowledge of the miscarriage and the time she missed from work as a result motivated her employer's actions. *Villarreal*, 895 F. Supp. at 150–51.

99. *Id.* at 152 (citing 29 C.F.R. app. § 1630 at 395, 396); *see also* Lacoparra v. Pergament Home Ctrs., Inc., 982 F. Supp. 213, 227 (S.D.N.Y. 1997); Jessie v. Carter Health Care Ctr., Inc., 926 F. Supp. 613, 616 (E.D. Ky. 1996); *Tsetseranos*, 893 F. Supp. at 119. *Sut see* Gabriel v. City of Chicago, 9 F. Supp. 2d 974, 983 (N.D. Ill. 1998) ("Although intermittent, episodic impairments are not considered disabilities under the ADA,...[plaintiff's] ailments extended beyond the time [she] gave birth.").

pregnancy and related medical conditions can not be considered disabilities under the ADA.[100]

Similarly, in *Gudenkauf v. Stauffer Communications, Inc.*, the plaintiff claimed that her employer violated, *inter alia*, the ADA when it terminated her during her pregnancy.[101] The district court concluded that the plaintiff's pregnancy did not entitle her to ADA protection because of the EEOC Interpretive Guidance.[102] The court opined that not only could pregnancy itself not be considered an impairment, but "[a]ll of the physiological conditions and changes related to a pregnancy also are not impairments unless they exceed normal ranges or are attributable to some disorder."[103] Because Gudenkauf's obstetrician testified that she did not experience any conditions that "were not normally expected with pregnancy,"[104] she was not entitled to ADA protection.[105]

What all of these courts recognized, albeit in dicta, was that, although pregnancy itself should not be considered a disability, those pregnancy-related conditions that themselves might "substantially limit[] one or more of the major life activities"[106] of the women who have them might fall within the ADA's definition of disability.[107] As the EEOC Interpretive Guidance correctly recognizes, pregnancy itself should not be viewed as an impairment, nor as *necessarily* limiting a woman's major life activities.[108] The EEOC Compliance

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100. *Villarreal*, 895 F. Supp. at 152.

101. 922 F. Supp. 465, 472 (D. Kan. 1996).

102. The *Gudenkauf* court also noted that several other courts had reached the same conclusion and found "[t]he implicit reasoning in these decisions...persuasive and sound." *Id.* at 473 (citing *Villarreal*, 895 F. Supp. 149; *Tsetseranos*, 893 F. Supp. 109; Byerly v. Herr Foods, Inc., No. 92-7382, 1993 WL 101196 (E.D. Pa. Apr. 6, 1993)).

103. *Id.*

104. *Id.* at 469.

105. In reaching this conclusion, the *Gudenkauf* court criticized the less nuanced—and facially questionable—approach of the district court in *Chapsky v. Mueller*, No. 93-6524, 1995 WL 103299, at *3 (N.D. Ill. May 9, 1995), in which the court held that plaintiff's pregnancy complications were a disability because "the reproduction system is a physical impairment which not only affects major life's activities[,] but life itself is also substantially limited by reproduction." *Gudenkauff*, 922 F. Supp. at 473–74; *see also* Gabriel v. City of Chicago, 9 F. Supp. 2d 974, 980 (N.D. Ill. 1998); Leahr v. Metro. Pier & Exposition Auth., No. 96-C1388, 1997 U.S. Dist. LEXIS 10601, at *9–*10 (N.D. Ill. July 17, 1997); Crossley, *supra* note 39, at 671 (calling *Chapsky* "aberrant").

106. 42 U.S.C.A. § 12102(2) (West, WESTLAW through P.L. 107-11 May 28, 2001).

107. *See* Jessie v. Carter Health Care Ctr., 926 F. Supp. 613, 616 (E.D. Ky. 1996) (concluding pregnancy was not a disability because "[n]o unusual circumstances exist with respect to [it]").

108. *See* Gudenkauf, 922 F. Supp. at 473 ("Pregnancy is a physiological condition, but it is not a disorder. Being the natural consequence of a properly functioning reproductive system, pregnancy cannot be called an impairment." (citing Brennan v. National Tele. Dir. Corp., 850 F. Supp. 331, 343 (E.D. Pa. 1994)); Okoroji v. District of Columbia, No. 94-1442(TFH), 1998 U.S. Dist. LEXIS 10704, at *19 (D.D.C. July 8, 1998) (distinguishing *Gudenkauf* from cases in which impairments limited more than the woman's

Manual further states that "complications resulting from pregnancy" may be considered impairments and, therefore, disabilities.[109] Although the courts' application of the Guidance was overly broad, by noting that the pregnancies in those cases were not unusual they implicitly recognized that unusual complications arising from a pregnancy might be considered disabilities.[110]

By contrast, the district court in *Okoroji v. District of Columbia*[111] held that limitations that were purely the result of pregnancy could *never* be considered disabilities if they limited only the pregnancy. There, the plaintiff had been diagnosed with an incompetent cervix, which "makes her pregnancies extremely risky."[112] Although the condition existed regardless of pregnancy, the court reasoned that "pregnancy complications are generally only found to be ADA disabilities when they affect not only the pregnancy itself, but also the pregnant woman's ability to work, learn, and function in other areas of her life."[113]

Courts applying "a more refined analysis"[114] have recognized the distinction between pregnancy itself and the conditions that may arise out of it.[115] For example, in *Cerrato v. Durham*, the plaintiff focused on the high-risk nature of her pregnancy in claiming that her employer discharged her because of her disability when it based the termination on excessive absenteeism.[116] The district court surveyed the decisions holding that pregnancy and its related conditions are

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pregnancy itself), *aff'd*, No. 98-7155, 1999 U.S. App. LEXIS 4002 (D.C. Cir., Feb. 2, 1999); Crossley, *supra* note 39, at 675; *see also* Matzzie, *supra* note 97, at 193.

109. 2 EEOC Compl. Man. (BNA) § 902.2(c)(3); *see also* Darian v. University of Mass. Boston, 980 F. Supp. 77, 85 (D. Mass. 1997).

110. *See* Martinez v. Labelmaster, No. 96C 4189, 1998 WL 786391, at *8 (N.D. Ill. Nov. 6, 1998) (holding that the plaintiff's inability to lift over twenty-five pounds during her pregnancy was not a disability because the limitation was "a general condition of pregnancy, not a complication unique to Martinez's pregnancy").

111. No. 94-1442(TFH), 1998 U.S. Dist. LEXIS 10704 (July 8, 1998), *aff'd*, No. 98-7155, 1999 U.S. App. LEXIS 4002 (D.C. Cir. Feb. 2, 1999).

112. *Id.* at *3.

113. *Id.* at *19 (citing Hernandez v. City of Hartford, 959 F. Supp. 125, 129–30 (D. Conn. 1997); Cerrato v. Durham, 941 F. Supp. 388, 392–93 (S.D.N.Y. 1996); Gudenkauf v. Stauffer Communications, Inc., 922 F. Supp. 465, 473 (D. Kan. 1996); Patterson v. Xerox Corp., 901 F. Supp. 274, 278 (N.D. Ill. 1995)); *see also* Tstesteranos v. Tech Prototype, Inc., 893 F. Supp. 109, 119 (D.N.H. 1995) ("Although plaintiff's pregnancy was clearly complicated by her ovarian cysts, and these complications required her to be out of work for a period of time, the court finds that plaintiff's pregnancy was not a 'disability' under the ADA.").

114. Cerrato v. Durham, 941 F. Supp. 388, 392 (S.D.N.Y. 1996); *see also Darian*, 980 F. Supp. at 86 (finding "more persuasive" the cases that "have emphasized the nature of the disability, regardless of its origin").

115. *Cerrato*, 941 F. Supp. at 392; *see also Darian*, 980 F. Supp. at 85 ("By its terms, though pregnancy per se is not covered by the ADA, the Act does not necessarily exclude all pregnancy-related conditions and complications.").

116. *Cerrato*, 941 F. Supp. at 390–91.

not disabilities[117] and concluded that "[t]he state of medical knowledge today tends to support the distinction between pregnancy itself and pregnancy-related complications."[118] Based on this distinction, the court held that Cerrato's pregnancy-related conditions—"spotting, leaking, cramping, dizziness, and nausea"—could be considered disabilities entitling her to protection under the ADA.[119]

In *Hernandez v. City of Hartford*, the district court discussed *Cerrato* with approval in holding that summary judgment was inappropriate where an employee claimed a disability on the basis of uterine fibroids that complicated her pregnancy.[120] The court further opined that the EEOC Interpretive Guidance, read carefully, "call[s] for the same conclusion."[121] The *Hernandez* court pointed out that "the regulation [sic] does not explicitly exclude pregnancy-related impairments, provided they are the result of a physiological disorder."[122]

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117. *See id.* at 392 (discussing *Patterson*, 901 F. Supp. 274, and Garrett v. Chicago School Reform Bd. of Trustees, No. 95-C7341, 1996 WL 411319 (N.D. Ill. July 19, 1996)).

118. *Id.* at 393 (citing Council on Scientific Affairs, *Effects of Pregnancy on Work Performance*, 251 JAMA 1995, at 1995 (1984), *quoted in* Laura Schlictmann, *Accommodation of Pregnancy-Related Disabilities on the Job*, 15 BERKELEY J. EMP. & LAB. L. 335, 350 (1994)). *See also* Koester v. City of Nori, 580 N.W.2d 835, 839 (Mich. 1998) (examining definition of "handicap" under Michigan's Handicappers' Civil Rights Act's substantially similar definition of "disability" and concluding that "at times, certain conditions associated with pregnancy may rise to the level of a substantial limitation of a major life activity. Therefore, in order to determine whether a pregnant person is 'handicapped'...a reviewing court must examine the particular facts and circumstances of the pregnancy to determine whether it substantially limits one or more major life activities of the employee."), *aff'd in part, rev'd in part*, 580 N.W.2d 835 (Mich. 1998).

119. *Cerrato*, 941 F. Supp. at 393. *See also* Gabriel v. City of Chicago, 9 F. Supp. 2d 974, 981–82 (N.D. Ill. 1998) (holding plaintiff's testimony that her pregnancy caused her back pain, stomach pain, and swelling that substantially limited her ability to stand could constitute a disability); *Darian*, 980 F. Supp. at 86 (finding plaintiff's severe pelvic bone pains, premature contractions, irritated uterus, back pain, increased heart rate, and edema "specific, medical conditions which, though caused by her pregnancy, nevertheless qualify as disabilities under the ADA"); Hernandez v. City of Hartford, 959 F. Supp. 125, 130 (D. Conn. 1997) (holding sufficient evidence existed that plaintiff's premature labor substantially limited her major life activity of working to preclude summary judgment).

120. *See* Hernandez v. City of Hartford, 959 F. Supp. 125, 127, 130 (D. Conn. 1997).

121. *Id.* at 130.

122. *Id.* Mary Crossley has criticized these cases and others creating the same distinction between pregnancy and pregnancy-related impairments as finding something "...wrong with, or abnormal about, a pregnant woman's body before acknowledging an impairment." Crossley, *supra* note 39, at 674–75. Isolating the pregnancy-related condition from the pregnancy itself, she argues, creates the danger of generalizing about groups of people and categorizing them as "disabled" based on their condition, not their individual abilities.

As these cases illustrate, there is no reason to consider every pregnancy a disability because it is a regular part of many women's lives. Indeed, as a matter of social policy, it seems unwise to consider pregnancy a *per se* substantial limitation on women's major life activities. The ADA requires a case-by-case assessment of disability, concerned with the disability of a particular individual rather than a labeling of groups of people with a shared condition as presumptively "disabled."[123] The question whether a woman's condition arising from pregnancy is a disability therefore properly focuses on whether that condition substantially limits one of *her* major life activities.

This proper understanding of the distinction between pregnancy and the complications that may arise from it highlights the importance of carefully considering the needs of women with disabilities rather than assuming that addressing the needs of women generally will adequately protect all women. For most women, pregnancy does not involve the sorts of substantial limitations that rise to the level of a disability. For those women who face grave health risks in pregnancy, however, the very potential of pregnancy constitutes a disability, a substantial limitation on the major life activity of reproduction.

In the end, considering pregnancy in the context of women without disabilities harms the interests of women with these disabilities because it ignores the possibility of ADA protection. In the case of a woman who faces a high enough risk of prenatal or perinatal transmission or of threats to her own health, her subjective decision to prevent pregnancy for these reasons, like Sidney Abbott's, renders her an individual with a disability.

III. THE "SAFE HARBOR" PROVISION AND THE TERMS OF EXEMPTION

Even where people are recognized as individuals with disabilities entitled to ADA protection, such protection seems inherently limited when it comes to insurance coverage.[124] It is a well accepted principle that insurance plans are

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> Instead, in assessing when pregnancy should be considered a disability, the proper questions are how women experience their pregnancies and all the accompanying changes—without attaching labels like "complicated" or "abnormal" or "unusual"—and how those changes affect women's lives and ability to participate in the workplace and society more broadly.

Id. at 677. Yet in making the question one of whether pregnant women are sufficiently like people with disabilities to merit ADA protection, she seems to shift the focus of the inquiry back to whether pregnancy itself should be considered disability. *See id.* at 678.

123. 42 U.S.C.A. § 12102(2) (West, WESTLAW through P.L. 107-11 May 28, 2001). *See also* Sutton v. United Airlines, 527 U.S. 471, 483 (1999) (citing Bragdon v. Abbott, 524 U.S. 624 (1998)).

124. *See* Regina Austin, *The Insurance Classification Controversy*, 131 U. PA. L. REV. 517, 517 (1983) ("[T]he insurance classification process is tied to social stratification, the hierarchical grouping of individuals by status and role that is prevalent throughout American society.)"; Crossley, *supra* note 25, at 77 ("[A] seemingly fundamental conflict

designed to discriminate on the basis of physical or mental characteristics that indicate actuarial risk[125]—some of them disabilities protected by the ADA.[126] This understanding fuels the argument that insurance plans should not be subject to the ADA because imposing such liability would fundamentally alter the nature of the business of insurance itself.[127]

Congress recognized this problem and expressly addressed the insurance issue in Title V of the ADA. Rather than simply exempting all insurance plans from coverage, Title V establishes the extent to which the Act affects the contents of insurance policies, including employee health benefit plans.[128] In particular, Section 501(c), referred to as the insurance "safe harbor" provision, states, in relevant part, that Title I shall not be construed to prohibit:

> (2) A person or organization covered by this Act from establishing, sponsoring, observing or administering the terms of a bona fide benefit plan that are based on underwriting risks, classifying risks, or administering such risks that are based on or not inconsistent with State law.[129]

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exists between the ADA's purpose and commonly accepted practices in the health insurance industry.").

125. *See* Kenneth S. Abraham, *Efficiency and Fairness in Insurance Risk Classification,* 71 VA. L. REV. 403, 417 (1985) ("The more homogeneous the class membership...the stronger the argument for charging each member the same rate. Like insureds are then treated alike."). Abraham argues for a reassessment of this process in order to address whether the system is "fair." *See id.* at 403–04.

126. *See* Leah Wortham, *The Economics of Insurance Classification: The Sound of One Invisible Hand Clapping,* 47 OHIO ST. L.J. 835, 850 (1986) ("[F]or most health/disability policies sold through groups,...restrictions on preexisting illnesses are usually the only major way in which distinctions among group members are made."); H. Miriam Farber, Note, *Subterfuge: Do Coverage Limitations and Exclusions in Employer-Provided Health Care Plans Violate the Americans with Disabilities Act?,* 69 N.Y.U. L. REV. 850, 861–82 (1994) (tracing legislative history of the ADA's safe harbor provision).

127. *See* Doe v. Mut. of Omaha Ins. Co., 179 F.3d 557, 562 (7th Cir. 1999) (describing the insurance industry's concern that the ADA would be interpreted to cover the contents of insurance policies), *cert. denied,* 528 U.S. 1106 (2000). *See also* Parker v. Metro. Life Ins. Co., 121 F.3d 1006, 1012 (6th Cir. 1997) ("The purpose of the ADA's public accommodations requirement is to ensure accessibility to the goods offered by a public accommodation, not to alter the nature or mix of goods that the public accommodation has typically provided."), *cert. denied,* 522 U.S. 1084 (1998).

128. *See* Crossley, *supra* note 25, at 78 ("Congress made express...reference to the ADA's applicability to insurance in Section 501(c) of the ADA... ."). *See also Doe,* 179 F.3d at 562 (referring to this provision as a "backstop" in cases where courts interpret other provisions of the ADA as reaching the terms of insurance plans).

129. 42 U.S.C.A. § 12201(c)(2) (West, WESTLAW through P.L. 107-11 May 28, 2001). Because this provision applies to employers who "establish[] , sponsor[], observ[e] or administer[]" employee benefits plans, the discussion here focuses solely on it. Paragraph (1) applies to "an insurer, hospital or medical service company, health maintenance organization, or any agent or entity that administers benefit plans, or similar

It further provides that this provision "shall not be used as a subterfuge to evade the purposes of," *inter alia*, Title I.[130]

The safe harbor provision plainly indicates that Congress intended any concerns over the apparent dissonance between prohibiting discrimination on the basis of disability and the very nature of insurance to be addressed, as an initial matter, by determining whether the contested plan terms fall within the safe harbor provision.[131] Certainly, not all the terms of an employee benefit plan fall within the safe harbor provision. Rather, "the language and the legislative history of the statute makes clear that Congress did not intend for § 501(c) to confer blanket immunity on insurers [and employers offering their plans to employees] in every insurance-related decision."[132] The safe harbor provision thus excludes certain plan terms from the ADA's prohibitions, leaving those terms not entitled to safe harbor protection subject to the Act's restrictions.

A. Terms that Classify, Underwrite, or Administer Risk

Section 501(c)'s exemption expressly applies only to those terms of a "bona fide benefit plan that are based on underwriting risks, classifying risks, or administering...risks."[133] The Supreme Court has twice held, in the context of the Age Discrimination in Employment Act (ADEA),[134] that a "bona fide" plan is simply one that "exists and pays benefits."[135] The language of Section 501(c)

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organization[]." Paragraph (3) applies to a "person or organization" whose plan "is not subject to State laws that regulate insurance," such as self-funded plans.

130. *Id.* § 12201(c) (West, WESTLAW through P.L. 107-11 May 28, 2001).

131. *See* Pallozzi v. Allstate Life Ins. Co., 198 F.3d 28, 32 (2d Cir. 2000) ("If the ADA were not intended to reach insurance underwriting under any circumstances, there would be no need for a safe harbor provision exempting underwriting practices that are consistent with state law."); *Parker*, 121 F.3d at 1020 ("If Title III does not cover the millions of employees covered by health and disability insurance policies, as our Court has now held, it is difficult to see why Congress would provide a qualified exemption for insurance companies.") (Martin, C.J., dissenting); Kotev v. First Colony Life Ins. Co., 927 F. Supp. 1316, 1322 (C.D. Cal. 1996) ("First Colony has not explained why insurers would need this 'safe harbor' provision...if insurers could never be liable.. for conduct such as the discriminatory denial of insurance coverage."); Attar v. Unum Life Ins. Co. of Am., No. CA 3-96-CV-0367-R, 1997 WL 446439, at *12 (N.D. Tex. July 19, 1997) ("Both the House and the Senate reports...make it clear that the safe harbor provision does not serve to completely insulate the insurance industry from Title III.").

132. Cloutier v. Prudential Ins. Co. of Am., 964 F. Supp. 299, 302–03 (N.D. Cal. 1997).

133. 42 U.S.C.A. § 12201(c)(2).

134. 29 U.S.C.A. § 623 (West, WESTLAW through P.L. 107-11 May 28, 2001).

135. United Air Lines, Inc. v. McMann, 434 U.S. 192, 194 (1977) (considering "bona fide" within meaning of the ADEA); Pub. Employees Ret. Sys. of Ohio v. Betts, 492 U.S. 158, 166 (1989) (reaffirming *McMann* definition); *see also* Piquard v. City of East Peoria, 887 F. Supp. 1106, 1120 (C.D. Ill. 1995) (adopting these definitions in context of Section 501(c)).

about "risk" therefore has a specific meaning; not every bona fide plan contains only terms that fit this description.[136]

Within the insurance context, "risk simply means the possibility of injury or loss."[137] Insurers "classify" risk by placing insureds "into groups according to their probability of loss and the potential magnitude of losses if they occur."[138] They then underwrite risks by "aggregat[ing] the risks of the group, so that in a large group the costs of high-risk employees will be offset by the costs of the low-risk employees, and the types of insurability requirements that are imposed on individuals are not necessary for group members."[139] The "key" to efficient allocation of costs is the pricing of coverage "in accordance with expected loss."[140] Plans thus use exclusions to contain the costs imposed by group underwriting.[141] For example, numerous plans cap benefits for AIDS-related treatments, excluding them from coverage, because of the high costs they would impose on the plan.[142]

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136. Several courts have ignored this plain language of Section 501(c), apparently believing that all bona fide plans underwrite, classify, or administer risk. *See* Leonard F. v. Israel Disc. Bank of New York, 199 F.3d 99, 103 (2d Cir. 1999) ("The plain meaning of Section 501(c) is that insurers are exempt from regulation under the ADA so long as (i) their actions conform to state law, and (ii) they do not use the exemption as 'subterfuge to evade the purposes of [the Act]."); Ford v. Schering-Plough Corp., 145 F.3d 601, 611 (3d Cir. 1998) (considering Section 501(c) only in terms of the "subterfuge" provision), *cert. denied*, 525 U.S. 1093 (1999); Krauel v. Iowa Methodist Med. Ctr., 95 F.3d 674, 678 (8th Cir. 1996) ("To qualify for protection under § 501(c)(3), the Plan's infertility exclusion must (1) be part of a bona fide ERISA medical benefit plan that is not subject to state law, and (2) not be a subterfuge."); Whaley v. United States, 82 F. Supp. 2d 1060, 1063 (D. Neb. 2000) (following *Ford*); Winslow v. IDS Life Ins. Co., 29 F. Supp. 2d 557, 564 (D. Minn. 1998) (same as *Krauel*). However, as the Second Circuit has opined, "[i]f the ADA were not intended to reach insurance underwriting under any circumstances, there would be no need for a safe harbor provision exempting underwriting practices that are consistent with state law." *Pallozzi*, 198 F.3d at 32.

137. KENNETH S. ABRAHAM, DISTRIBUTING RISK: INSURANCE, LEGAL THEORY, AND PUBLIC POLICY 1–2 (1986).

138. ABRAHAM, *supra* note 137, at 64 ("The heart of any insurance system is its method of classifying risks and setting prices."); Abraham, *supra* note 125, at 407; *see also* Mintel, *supra* note 34, at 113.

139. Farber, *supra* note 126, at 866.

140. ABRAHAM, *supra* note 137, at 12.

141. Farber, *supra* note 126, at 866. *See also* Kenneth S. Abraham, *Understanding Prohibitions Against Genetic Discrimination in Insurance*, 40 JURIMETRICS 123, 126 (1999) ("[M]uch health insurance is sold on a group basis through large employers without independent underwriting.... The effect of genetically [or otherwise] influenced health insurance costs incurred by a few members of the large group is submerged in the averaging of costs that occurs through group-based experience-rating of premiums."); Mintel, *supra* note 34, at 114 ("Most of the controversy surrounding risk classification in insurance rates involves where the lines are to be drawn between the extremes of one uniform rate for all and an individual rate for each risk insured.").

142. *See, e.g.*, McNeil v. Time Ins. Co., 205 F.3d 179 (5th Cir. 2000); Doe v. Mut. of Omaha Ins. Co., 179 F.3d 557 (7th Cir. 1999), *cert. denied*, 528 U.S. 1106 (2000). I

Therefore, to fall within the Section 501(c) exemption, the challenged plan term must be based on some element of risk as that term is understood in the insurance context. Specific plan exclusions are generally necessary to contain the cost of coverage associated with risk;[143] therefore, they must be necessary for the very health of the plan.[144] In this way, the safe harbor provision strikes a balance between the ADA's nondiscrimination mandate and the need "to permit the development and administration of plans in accordance with accepted principles of risk assessment."[145]

The better reasoned decisions[146] have recognized this balance and determined that any decision to deny or limit coverage must be based on considerations of actuarial risk or "actual or reasonably anticipated experience" in order to fall within the safe harbor provision.[147] Thus, "it may be possible to

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do not mean to suggest that such caps do not violate the ADA. I present my disagreement with the courts' reasoning in these two cases at *infra* pp. 554–55.

143. *See* Crossley, *supra* note 25, at 83 ("Over the past half century in the United States, the market for health insurance has developed...in a manner such that health insurers' competition has focused not primarily on product quality and cost and service, but on the identification of risk."); Farber, *supra* note 126, at 866 ("As a general matter, 'principles of risk classification' and 'actuarial principles' are simply techniques of cost measurement and projection that permit the cost of the benefit program to be estimated." (quoting D.C. Bar, District of Columbia Bar Task Force Report on the Effect of the Americans with Disabilities Act on Employer-Sponsored Health Plans 52 (1993)).

144. *See* Winslow v. IDS Life Ins. Co., 29 F. Supp. 2d 557, 565 (D. Minn. 1998) (denying summary judgment because, although the insurance company presented "specific industry data" projecting "a dramatic increase in payments," plaintiff presented evidence "challeng[ing]...the 'substantial' actuarial data and claims experience presented by Defendant and their applicability to Plaintiff[]."); Carparts Distribution Ctr. v. Automotive Wholesaler's Ass'n of New England, Inc., 987 F. Supp. 77, 82 (D.N.H. 1997) (denying cross-motions for summary judgment where defendant claimed that removing AIDS-cap "would create an intolerable and unsustainable financial drain upon the assets of the Plan and, therefore, posed an unjustifiable insurance risk" and executive director stated in his deposition that "he was concerned AIDS-related claims might overwhelm the Plan"); Cloutier v. Prudential Ins. Co. of Am., 964 F. Supp. 299, 305 (N.D. Cal. 1997) ("The mere fact that a particular individual presents a greater risk does not compel the conclusion that the individual presents an uninsurable risk."); Holmes v. City of Aurora, No. 93-C-0835, 1993 WL 512629, at *6 (N.D. Ill, Dec. 9, 1993) (noting defendant's claim that "the applicant's medical condition presented an unreasonable risk to the viability of the fund").

145. Barnes v. The Benham Group, 22 F. Supp. 2d 1013, 1020 (D. Minn. 1998) (citing 29 C.F.R. Pt. 1630.16(f)).

146. As the district court in *World Insurance Company v. Branch* noted, "[b]ecause 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." 966 F. Supp. 1203, 1208 (N.D. Ga. 1997), *aff'd in part, vacated in part*, 156 F.3d 1142 (11th Cir. 1998).

147. *See* Doukas v. Metro. Life Ins. Co., 950 F. Supp. 422, 428 (D.N.H. 1996); *see also CarParts Distributor Ctr.*, 987 F. Supp. at 81–82 (citing Doukas v. Metro. Life Ins. Co., 950 F.Supp. 422 (D. N.H. 1996) *World Ins. Co.*, 966 F. Supp. at 1208; *Cloutier*, 964 F.

provide certain coverage exclusions to individuals with disabilities if the risks of those disabilities so warrant and those risks are treated like other similar risks not associated with disabilities."[148] A failure on the part of the insurer (or the employer sponsoring or administering the plan) to make this showing would remove it from the protections of the safe harbor provision, regardless of its motivation.[149]

The legislative history of Section 501(c) amply supports this approach.[150] The House Report explains 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."[151] In sum, it concludes, "ADA requires that underwriting and classification of risks be based on sound actuarial principles or be related to actual or reasonably anticipated experience."[152] The Senate Report similarly states that Section 501(c) "recognize[s] that benefit plans (whether insured or not) need to be able to continue present business practices in the way they underwrite, classify, and

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Supp. at 303; Baker v. Hartford Life Ins. Co., No. 94-C-4416, 1995 WL 573430 (N.D. Ill. Sept. 28, 1995)).

148. *Anderson*, 924 F. Supp. at 780.

149. *See* Doe v. Mut. of Omaha Life Ins. Co., 179 F.3d 557, 562 (7th Cir. 1999), *cert. denied*, 528 U.S. 1106 (2000). This approach is consistent with the EEOC Interim Guidance, which explains that, because "it is the...employer (and/or the employer's insurer, if any) who has control of the risk assessment, actuarial, and/or claims data relied upon" and because "[c]harging party employees have no access to such data, and generally speaking, have no information about the employer provided health insurance plan beyond that contained in the employer provided health insurance plan description," the burden falls on the employer "to show that the challenged policy falls within the safe harbor provision." EEOC Interim Enforcement Guidance, *Application of the Americans with Disabilities Act of 1990 to Disability-Based Distinctions in Employer Provided Health Insurance*, at 81 (June 8, 1993) [hereinafter EEOC Interim Enforcement Guidance], *reprinted in* RUTH COLKER & BONNIE POITRAS TUCKER, THE LAW OF DISABILITY DISCRIMINATION 618–26 (2d ed., Anderson 1998); *see also* Schroeder v. Conn. Gen. Life Ins. Co., No. 93-M-2433, 1994 WL 909636, at *4 (D. Colo. April 22, 1994) ("The language of the [safe harbor] exception is in the nature of an affirmative defense.").

150. *See Cloutier*, 964 F. Supp. at 303 (concluding that the legislative history of Section 501(c) "implies that where underwriting lacks such a[n actuarial] basis, it fails to comply with the ADA").

151. H.R. REP. NO. 101-485(III), at 70 (1990).

152. *Id.* at 71; *see also* H.R. REP. NO. 101-485(II), at 136 (1990) ("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."); *id.* at 136–37 ("Moreover, while a plan which limits certain kinds of coverage based on classifications 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 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.").

administer risks, so long as they carry out those functions in accordance with accepted principles of insurance risk classification."[153] As one district court has noted, the phrases "based on sound actuarial principles" and "related to actual or reasonably anticipated experience" are "repeated almost as a mantra throughout the legislative history."[154]

The Second Circuit ignored this apparent meaning of "risk" in the context of insurance in *Leonard F. v. Israel Discount Bank of New York* and instead concluded that, because the safe harbor provision does not explicitly refer to actuarial justifications, none are necessary.[155] Observing that the Fourth Circuit had taken the same approach,[156] the court determined that the employer's long-term disability plan could provide limited coverage for mental (as opposed to physical) disabilities absent any evidence of actuarial reasons for doing so.[157]

The Second Circuit did, however, give some indication that it may have retreated from this position in *Pallozzi v. Allstate Life Insurance Co.*[158] There, the court held that the plaintiff did not bear the burden of pleading that the challenged conduct lacked actuarial justification to state an actionable claim under the ADA, thus suggesting that the defendant may bear such a burden.[159] The court noted that the provisions of New York law also allegedly violated did not include this requirement but did allow the employer to use actuarial justifications in its defense.[160]

More importantly, the *Leonard F.* conclusion simply misunderstands what "risk" means when discussing insurance; the term can not be considered independently of the actuarial principles used to determine it.[161] The insurance industry classifies, underwrites, and administers risk by means of actuarial

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153. S. REP. NO. 101-116, at 84–86 (1989).

154. Attar v. Unum Life Ins. Co. of Am., 1997 WL 446439, at *12 (N.D. Tex. July 19, 1997) (emphasis omitted).

155. Leonard F. v. Israel Disc. Bank of New York, 199 F.3d 99, 105 (2d Cir. 1999).

156. *See id.* (citing Rogers v. Dep't of Health & Envtl. Control, 174 F.3d 431, 437 (4th Cir. 1999)).

157. *See id.*

158. 198 F.3d 28 (2d Cir. 1999), *amended by* 204 F.3d 392 (2d Cir. 2000) (denying petition for rehearing).

159. *See id.* at 36.

160. *See id.* at 36 n.6.

161. *See* Cloutier v. Prudential Life Ins. Co. of Am., 964 F. Supp. 299, 305 (N.D. Cal. 1997) ("Common sense suggests that an insurer that confronts a heterogeneous pool of applicants merely consults actuarial tables to adjust its rates to account for varying levels of risk presented by those applicants."); Jeffrey S. Manning, Comment, *Are Insurance Companies Liable Under the Americans with Disabilities Act?*, 88 CAL. L. REV. 607, 647 (2000) (arguing that in enacting Section 501(c), "Congress apparently chose for the disability context the status quo position that insurance companies had long favored,...namely that insurance decisions based on actuarial data should not be prohibited as discriminatory.").

calculations.[162] Thus, as one district court has noted, "[b]y enacting the safe-harbor provision, Congress clearly intended deference to the insurance industry to write policies that are consistent with state law. But this deference requires that insurance companies' distinctions in coverage are in accord with sound actuarial principles, reasonably anticipated experience, and bona fide risk classification."[163]

The *Leonard F.* court thus misconstrued the nature of insurance when it dismissed the language of the Committee Reports because the Senate Report additionally "states in part that the Committee added Section 501(c) to make it clear that this legislation will not disrupt the current nature of insurance underwriting."[164] Reading "risk" consistently with insurance practices of using actuarial data to predict it does nothing to "disrupt" the insurance industry. To the contrary, it adopts the industry's own understanding of risk.[165]

The exemption of contraceptives from prescription coverage simply is not based on this sort of actuarial risk or experience.[166] A health plan that excludes contraceptives from prescription coverage would fall within the safe harbor provision only if the exclusion was designed to achieve the correct level of coverage for the group of employees insured commensurate with the price of the plan.[167] In other words, the contraceptive exclusion would have to significantly affect the cost of coverage and the plan's risk of loss.

Yet contraceptives are not excluded from employee health plans for this reason. Unlike the plan terms that exclude or limit coverage on the basis of a particular disability, such as mental disabilities or AIDS,[168] employee health plans do not exclude prescription contraceptives even arguably because of any projected

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162. *See* discussion *supra* pp. 526–27.

163. Attar v. Unum Life Ins. Co. of Am., No. CA 3-96-CV-0367-R, 1997 WL 446439, at *12 (N.D. Tex. July 19, 1997).

164. *See Leonard F.*, 199 F.3d at 105 n.4.

165. Indeed, the insurance industry apparently assisted the Senate Committee in drafting the language of Section 501(c). *See* Farber, *supra* note 126, at 863. *See also* Crossley, *supra* note 25, at 85 ("Congress did indeed include the safe harbor in order to make perfectly clear that the ADA would not require insurance companies to change how they conducted their underwriting or risk classification processes.").

166. *See* Erickson v. Bartell Drug Co., No. C00-1213L, 2001 WL 649651, at *6 (D. Wash., June 12, 2001); EEOC Decision, *supra* note 5. As these opinions illustrate, employers choose plans with the exclusion to save money; the fact that plans are available without the exclusion for a modest additional cost. *See* Hayden, *supra* note 7, at 183 (discussing how the insurance industry classifies prescription contraceptives as "elective" rather than "medically necessary" treatment), suggests that there is no other reason for employers to choose the exclusion.

167. *See* discussion *supra* pp. 526–27.

168. *See* Piquard v. City of East Peoria, 887 F. Supp. 1106, 1120 (C.D. Ill. 1995) ("Thus, under the ADA, as the EEOC explains and state law provides, benefit plan classification and administration of risks with regard to disabled persons requires the grouping of individuals of the same class and of essentially the same hazard in the amount of premiums, benefits payable, or any other terms or conditions of such benefit plans."). I do not mean to suggest that these caps are entitled to safe harbor protection.

risk of loss or grouping of risks. The exclusion is not based on classifying risks because women who use prescription contraception do not share certain characteristics that make them an unusual risk or in any way affect the homogeneity of the group.[169] In fact, among women aged twenty to forty-four who have had sexual intercourse, eighty-five percent have used prescription contraceptives.[170]

Nor is the exclusion based on underwriting risk. The cost of such coverage is predictable, easily absorbed into the premium, and quite small. Under standard cost-sharing arrangements, the cost to employers of expanding group coverage to include prescription contraceptives would be about $17.12 per employee per year,[171] or less than one percent.[172] This cost is not based on the risk of loss; if anything, it prevents loss, much like preventive yearly visits covered by standard plans.[173]

In the absence of any actuarial justification for the exclusion, it appears to be based instead on an arbitrary yet widely accepted practice,[174] the sort of unintentional barrier to participation that the ADA was designed to address.[175] Excluding contraceptives from prescription coverage therefore is not the sort of insurance "discrimination" that the ADA tolerates. It is, rather, the sort of arbitrary and unnecessary discrimination that the ADA prohibits.

B. Plan Terms Consistent with State Law

Nor would subjecting the prescription contraceptive exclusion to the nondiscrimination provisions of the ADA contradict the safe harbor provision's protection of plan terms that are "not inconsistent with state law." Two arguments have been advanced that this language forecloses the use of the ADA to alter plan

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169. *See* Law, *supra* note 7, at 369–72 (discussing the numbers of women who use prescription contraceptives).

170. *See* Amended Complaint in *Erickson v. The Bartell Drug Co.*, No. C00-1213L (W.D. Wash., filed Sept. 16, 2000), at III.I., *available at* www.covermypills.com/facts/amendedcomplaint_.htm.

171. *See* Hayden, *supra* note 7, at 186.

172. *See* Jacqueline E. Darroch, *Cost of Employer Health Plans of Covering Contraceptives*, 1998 THE ALAN GUTTMACHER INST. 1, *available at* www.agi-use.org/pubs/kaiser_0698.html.

173. *See* Wortham, *supra* note 126, at 879 ("If people with a treatable condition delay seeking medical care, the condition may become more expensive to treat and result in greater work loss, etc. Here...there would be no efficiency gain [if premiums are so high that they deter prevention].").

174. *See Erickson*, at *7 (D. Wash, June 12, 2000) (characterizing the prescription contraceptive exclusion as a "common practice").

175. *See* Crossley, *supra* note 25, at 51 (describing "ample testimony" in the ADA legislative history "regarding barriers that people with disabilities faced in obtaining health care"); Malloy, *supra* note 20, at 623 (describing ADA as intended "to force employers to recognize the subtle ways in which the workplace is biased against the disabled").

terms. One is based on the language of Section 501(c), and the other on the McCarran-Ferguson Act, which preserves State primacy in insurance regulation.[176]

Section 501(c) applies to plan terms that are "not inconsistent with state law."[177] This language plainly does not foreclose ADA liability for all discriminatory plan terms that comply with state law. Instead, it provides an *additional* requirement for safe harbor protection. Read carefully, the safe harbor provision merely exempts plan terms that classify, underwrite, or administer risk *if* those terms are "not inconsistent with state law."[178]

In fact, thirteen states have enacted legislation prohibiting prescription contraceptive exclusions.[179] In these states, the safe harbor provision plainly offers no protection to employers because the exclusion would be inconsistent with state law. Furthermore, most states have adopted a provision of the National Association of Insurance Commissioners' (NAIC) Model Unfair Trade Practices Act, which prohibits

> any unfair discrimination between individuals of the same class and essentially the same hazard in the amount of premium, policy fees or rates charged for any accident or health insurance policy or in the benefits payable thereunder, or in any of the terms or conditions of such policy, or in any other matter.[180]

Excluding contraceptives from prescription coverage is arguably inconsistent with this provision.[181] As discussed in Part II, such a plan term

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176. 15 U.S.C.A. § 1012(b) (West, WESTLAW through P.L. 107-11 May 28, 2001).

177. 42 U.S.C.A. § 12201(c)(2) (West, WESTLAW through P.L. 107-11 May 28, 2001).

178. *See id.* (exempting "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*") (emphasis added).

179. *See* CAL. INS. CODE § 10123.196 (West Supp. 2000); CONN. GEN. STAT. § 38a-503e (Supp. 2001); DEL. CODE ANN. TIT. 18, § 3559(a) (1975, 2000); GA. CODE ANN. § 33-24-59.6 (Supp. 1999); HAW. REV. STAT. ANN. § 431:10A-116.6 (Supp. 2000); IOWA CODE § 514c.19(1) (2001); ME. REV. STAT. ANN. TIT. 24A, § 2756 (West 2000); MD. CODE ANN., INS. § 15-826(b)(1) (2001); 1999 NEV. STAT. 689A.047; N.H. REV. STAT. ANN. § 415:18-i (Supp. 2000); N.C. GEN. STAT. § 58-3-178 (Supp. 1999); R.I. GEN. LAWS § 27-18-57 (Supp. 2000); VT. STATE ANN. TIT. 8, § 4099(c) (2000); *see also* Planned Parenthood Fed'n of America, *Equity in Prescription Insurance and Contraceptive Coverage, available* at http://www.ppcna.org/pubaff/equity.html (visited Feb. 2, 2001). At least twenty states in total have considered such legislation.

180. 4 NAIC MODEL L. REG. & GUIDELINES § 4G(2), at 880-4 (Nat'l Ass'n of Ins. Commissioners 1998).

181. *See, e.g.*, Rogers v. Dep't of Health & Envtl. Control, 174 F.3d 431, 436 (4th Cir. 1999) (discussing S.C. CODE ANN. § 38-55-50, "which prohibits insurers from 'discriminating in favor of individuals between insureds of the same class and risk involving the same hazards.'"); Winslow v. IDS Life Ins. Co., 29 F. Supp. 2d 557, 564 (D. Minn. 1998) (discussing MINN. STAT. § 72A.20; modeled after NAIC regulation); Doukas v.

discriminates against women who, in their nonpregnant state, are of the "same class and essentially the same hazard" as other employees. It is the very denial of coverage that increases the risk of loss for these women.[182]

Even if the oral contraceptives exclusion were consistent with state law, however, this fact does not automatically entitle it to safe harbor protection. The safe harbor provision references state law only in the context of plan terms that classify, underwrite, or administer risk.[183] The prescription contraceptive exclusion rests on none of these characteristics.[184] Because consistency with state law is relevant only to such terms, regardless of whether or not the exclusion is consistent with state law, it does not fall within the safe harbor provision.

Nor does the McCarran-Ferguson Act prevent courts from interpreting the ADA to impose restrictions on insurance plans that are not otherwise imposed by state law.[185] The McCarran-Ferguson Act mandates that no federal statute "shall be construed to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of insurance...unless [that statute] specifically relates to the business of insurance."[186] In other words, the question becomes whether the ADA "specifically relates to the business of insurance" within the meaning of the McCarran-Ferguson Act. If it does, federal courts are free to interpret the ADA as imposing additional requirements on the business of insurance, beyond those created by state law.

The Third Circuit has relied on this language to hold that the ADA's safe harbor provision absolves insurers (and, by extension, plan sponsors) from justifying "their coverage plans in court."[187] In *Ford v. Schering-Plough Corp.*, the court held that the McCarran-Ferguson Act compels the conclusion that the safe harbor provision was intended to exempt all insurance plan terms from the reach of the ADA because the ADA "does not mention the term 'insurance' in its introductory section entitled 'Findings and purpose.'"[188] Similarly, the Seventh Circuit, in *Doe v. Mutual of Omaha Insurance Co.*,[189] held that requiring federal courts "to determine whether limitations on coverage are actuarially sound and

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Metro. Life Ins. Co., 950 F. Supp. 422, 428-29 (D.N.H. 1996) (quoting N.H. REV. STAT. Ann. 417:4 VIII(b); modeled after NAIC regulation).

182. *See* Wortham, *supra* note 126, at 879.

183. *See* 42 U.S.C.A. § 12201(c)(2).

184. *See* discussion *supra*, Part III.A.

185. *See* Pallozzi v. Allstate Life Ins. Co., 198 F.3d 28, 33 (2d Cir. 1999), *amended by* 204 F.3d 392 (2d Cir. 2000) (dismissing this argument by defendant).

186. 15 U.S.C.A. § 1012(b) (West, WESTLAW through P.L. 107-11 May 28, 2001).

187. Ford v. Schering-Plough Corp., 145 F.3d 601, 612 (3d Cir. 1998), *cert. denied*, 525 U.S. 1093 (1999).

188. *Id.*

189. 179 F.3d 557 (7th Cir. 1999), *cert. denied*, 528 U.S. 1106 (2000).

consistent with state law...obviously would interfere with the administration of state law" in a way forbidden by the McCarran-Ferguson Act.[190]

The McCarran-Ferguson Act, however, requires nothing like the Third Circuit's demand that the word "insurance" be mentioned in a federal statute's findings and purpose. Nor does it erect what the Seventh Circuit characterized as a prohibition on *any* federal statutory interference with state insurance regulation. In a recent consideration of whether a federal statute "specifically relate[d] to insurance," the Supreme Court set out a much more practical test. In *Barnett Bank v. Nelson,*[191] the Court explained that the McCarran-Ferguson Act serves "to protect state [insurance] regulation primarily against inadvertent federal intrusion."[192] The Court explained that "[n]either the McCarran-Ferguson Act's language, nor its purpose, requires the Federal Statute to relate *predominantly* to insurance."[193] Rather, the federal law merely must have "a connection with" insurance;[194] that is, it must affect "matters...at the core of the McCarran-Ferguson Act's concern," such as "the relation of insured to insurer and the spreading of risk."[195]

The Second Circuit applied this analysis to the ADA in *Pallozzi v. Allstate Life Insurance Co.,*[196] overruling the district court's holding that the safe harbor provision indicates that "the ADA does not, nor was it ever intended to regulate the business of insurance."[197] The Second Circuit noted that the ADA relates to insurance because two provisions, Section 501(c) and Title III's definition of "place of public accommodation," "are explicit and direct in their references to insurance."[198] It further found that the ADA intentionally regulates the business of insurance because "Congress clearly contemplated that under some circumstances—when the conditions of the safe harbor were not met—Titles I through III would apply to insurance underwriting practices, including the relation of insurers to...insureds."[199] Thus, the *Pallozzi* court held, "[t]he ADA's specific references to insurance in Title III and Section 501(c) suggest that any intrusion by the statute on state insurance regulation is not 'inadvertent.'"[200] Indeed, the court

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190. *Id.* at 564. *But see id.* at 566 (Evans, J., dissenting) ("Consistent with McCarran-Ferguson we can—and we should—decide exactly what the majority seemed to think is permissible: whether an insurer may refuse to deal with disabled persons on the same terms as nondisabled persons.").

191. 517 U.S. 25 (1996).

192. *Id.* at 39.

193. *Id.* at 41 (emphasis in original).

194. *Id.* at 38.

195. *Id.* at 39.

196. 198 F.3d 28 (2d Cir. 2000).

197. Pallozzi v. Allstate Life Ins. Co., 998 F. Supp. 204, 206 (N.D.N.Y. 1998) (quoting Leonard F. v. Israel Disc. Bank of New York, 967 F. Supp. 802, 805 (S.D.N.Y. 1997), *vacated,* 199 F.3d 99 (2d Cir. 1999)), *rev'd,* 198 F.3d 28 (2d Cir. 2000).

198. *Pallozzi,* 198 F.3d at 34.

199. *Id.* at 34–35.

200. *Id.* at 35.

concluded, "we believe the safe harbor provision of Section 501(c) was written by Congress with McCarran-Ferguson in mind."[201]

The McCarran-Ferguson Act therefore does not in any way limit the ADA's application to the contents of insurance policies. As the *Pallozzi* court recognized, the very purpose of Section 501(c) is to signal Congress' awareness that the ADA does specifically relate to insurance and that it might have unintended consequences because of the traditional insurance practice of discriminating on the basis of characteristics that might be disabilities in order to classify, underwrite, or administer risk. The safe harbor provision quite plainly takes this legitimate insurance industry practice into account and exempts it from interference by the ADA. This careful attention to the needs of the insurance industry signals Congress' intent to prohibit some insurance industry practices that discriminate against individuals with disabilities, in particular, those practices that create plan terms not based on actuarial principles or other legitimate means of ascertaining risk, such as the prescription contraceptive exclusion.

C. The Disparate Impact Liability Created by the Subterfuge Provision

Even if the terms of an employee health plan fall within the safe harbor of Section 501(c), they may still lose their exemption from the ADA if the plan sponsor uses the safe harbor provision "as a subterfuge to evade the purposes of Titles I and III."[202] A number of courts have read this additional clause as indicating the *only* circumstances under which the terms of an insurance plan would not be exempted from the ADA.[203] In other words, these courts ignore the safe harbor provision's express limitation of its exemption to only those plan terms that underwrite, classify, or administer risk,[204] and assume that *all* plan terms are exempted unless they violate the subterfuge clause.[205] According to this reasoning,

201. *Id.* The *Pallozzi* court futher noted that in *Doe v. Mutual of Omaha*, the Seventh Circuit "found McCarran-Ferguson satisfied with respect to the type of discriminatory practice at issue in this case [complete denial of coverage]." *Id.* at 35.

202. 42 U.S.C.A. § 12201(c) (West, WESTLAW through P.L. 107-11 May 28, 2001).

203. *See* Ford v. Schering-Plough Corp., 145 F.3d 601, 611 (3d Cir. 1998) (considering Section 501(c) only in terms of the "subterfuge" provision), *cert. denied*, 525 U.S. 1093 (1999); Whaley v. United States, 82 F. Supp. 2d 1060, 1063 (D. Neb. 2000) (following *Ford*).

204. *See* 42 U.S.C.A. § 12201(c)(2) (West, WESTLAW through P.L. 107-11 May 28, 2001).

205. *See* Crossley, *supra* note 25, at 80 (noting "the trend of case law over the past several years...allowing suits to proceed only when the plaintiff can show that he was singled out for different treatment by an insure[r] because of his disability"). This construction of the safe harbor provision plainly ignores Section 501(c)'s structure. As one district court observed, "[i]t seems that if the benefit plan [term] is not based on the risks or costs associated with the disability, then it would not qualify for § 501(c)(1) or (2)'s exception and is prohibited by [Title I]." Piquard v. City of East Peoria, 887 F. Supp. 1106, 1125 (C.D. Ill. 1995). The *Piquard* court also noted that "the plain language of Section 501(c)'s 'subterfuge' sentence does not mention the risks or costs of a disability-based

any "bona fide" plan may discriminate on the basis of disability in any way, unless it is used as a subterfuge to evade the purposes of the ADA.[206]

This interpretation of Section 501(c)'s subterfuge clause ignores the specific parameters of the safe harbor provision discussed above.[207] The subterfuge clause adds to Section 501(c)'s safe harbor the caveat that insurers and plan sponsors may not take advantage of Congress' recognition that the business of insurance requires some discrimination between disabilities as a means of determining and accounting for risk. In other words, Section 501(c) represents Congress' reasoned solution to the problem of prohibiting discrimination on the basis of disability when such a prohibition would make insurance underwriting impossible.[208] At the same time, the subterfuge clause ensures that the safe harbor extends only as far as Congress intended. That is, it merely preserves the traditional underwriting practices of the insurance industry without giving insurers and plan sponsors the freedom to discriminate with impunity.[209]

The subterfuge clause therefore ought to be read as prohibiting intentional misuse of the safe harbor provision.[210] This conclusion compels the corollary that plan terms that have an unintentional disparate impact on employees with disabilities also violate the ADA, unless those terms fall within the safe harbor provision as classifying, underwriting, or administering risk in a manner

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distinction." *Id. See also* Baker v. Hartford Life Ins. Co., No. 94-C-4416, 1995 WL 573430, at *4 (N.D. Ill., Sept. 28, 1995) ("[E]ven though an insurer may claim to be basing a denial of coverage on actuarial or classification of risk considerations, that claim is not conclusive as the question of whether section 12201(c)(1) is being used as a subterfuge would remain.").

206. *See* EEOC v. Deloitte & Touche, LLP, 97CIV6484-LMM, 2000 WL 1024700, at *7 (S.D.N.Y. July 25, 2000) (citing Krauel, 95 F.3d at 678).

207. *See* Pub. Employers Ret. Sys. of Ohio v. Betts, 492 U.S. 185, 180 (1989) ("While [the Court's holding] permits employers wide latitude in structuring employee benefit plans, it does not render the 'not a subterfuge' proviso a dead letter.").

208. *See* discussion *supra* pp. 527–29.

209. *See* Pallozzi v. Allstate Life Ins. Co., 198 F.3d 28, 32 (2d Cir. 2000); Cloutier v. Prudential Life Ins. Co. of Am., 964 F. Supp. 299, 302–03 (N.D. Cal. 1997); Attar v. UNUM Life Ins. Co. of Am., No. CA 3-96-CV-0367-R, 1997 WL 446439, at *12 (N.D. Tex. July 19, 1997).

210. *See Betts*, 492 U.S. at 180 (providing examples of intentional actions that would constitute "subterfuge" to evade the purposes of ADEA's safe harbor provision). During the Congressional debate on the ADA, Senator Kennedy stated that "[t]he term 'subterfuge' is used in the ADA to denote a means of evading the purposes of the ADA. Under its plain meaning, it does not connote that there must be some malicious or purposeful intent to evade the ADA on the part of the insurance company." 135 CONG. REC. S9,697 (daily ed. July 13, 1990 (statement of Sen. Kennedy); *see also* 136 CONG. REC. H4,624 (daily ed. July 12, 1990) (statement of Rep. Edwards). This examination fails to provide a satisfying distinction between intentional and "unintentional subterfuge." While an insurer or plan sponsor certainly need not have malicious intent in order to use Section 501(c) as a subterfuge, it is unclear how they could not do so "purposefully."

consistent with state law.[211] There would be no need to prohibit intentional discrimination in the subterfuge clause if the safe harbor provision did not exempt some forms of unintentional insurance discrimination.[212] The safe harbor requirement that the exempted plan terms be related to actuarial risk or experience thus limits the exemption to certain plan terms that may have an unintentional disparate impact on individuals with disabilities. The subterfuge provision adds that terms entitled to the safe harbor protection, while not subject to disparate impact analysis, remain subject to a disparate treatment analysis. The terms not entitled to safe harbor protection, then, may violate the ADA even if they have only an unintentional disparate impact on individuals with disabilities.[213]

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211. *Cf. Betts*, 492 U.S. at 176 (examining "various exemptions and affirmative defenses" found in safe harbor provision of the ADEA and "look[ing] for guidance [on which types of age discrimination are protected] to the substantive prohibitions of the Act itself, for these provide the best evidence of the nature of the evils Congress sought to eliminate as arbitrary... .").

212. *Cf.* S. REP. NO. 101-116, at 6 (1989) ("Discrimination results from actions or inactions that discriminate by effect as well as by intent or design. Discrimination also includes harms resulting from...practices and procedures based on thoughtlessness or indifference—of benign neglect.").

213. The EEOC's Interim Enforcement Guidance defines "subterfuge" as "disability-based disparate treatment that is not justified by the risks or costs associated with the disability." EEOC Interim Enforcement Guidance, *supra* note 149, at 1054. Under this interpretation, any terms that are not covered by the safe harbor provision because they are not "justified by the risks or costs associated with the disability" and that are intentionally discriminatory fall within the subterfuge clause. This construction makes no sense, for it applies the subterfuge clause to plan terms that are *not* covered by the safe harbor provision, while the subterfuge clause expressly refers to plan terms that *are* covered. *See* 42 U.S.C.A. § 12201(c) (West, WESTLAW through P.L. 107-11 May 28, 2001) ("Paragraphs (1), (2), and (3) shall not be used as a subterfuge to evade the purposes of Titles I and III.").

While the EEOC's guidance was useful in determining what constitutes a disability because of the agency's experience and expertise in investigating such claims, *see Albemarle Paper Co. v. Moody*, 422 U.S. 405, 431 (1975) ("[A]s this Court has heretofore noted, [the EEOC Title VII guidelines, which are not promulgated pursuant to Congressional authorization]...constitute '[t]he administrative interpretation of the Act by the enforcing agency, and consequently they are entitled to great deference" (citing Griggs v. Duke Power Co., 401 U.S. 424, 433–34 (1971)), its opinion concerning the meaning of the safe harbor provision and its subterfuge clause should be entitled to far less deference. The EEOC simply does not have any special expertise in the area of insurance generally or the federal regulation of insurance specifically. *See* Sutton v. United Airlines, Inc., 527 U.S. 471, 479–80 (1999) (noting that "no agency has been delegated authority to interpret the term 'disability'" and therefore disregarding the EEOC's interpretation without deciding "what deference is due"). By contrast, ERISA claims, which are specifically about federal regulation of employee benefit plans, do not fall within the jurisdiction of the EEOC. *See* 29 U.S.C.A. §§ 1132(e)(1) (West, WESTLAW through P.L. 107-11 May 28, 2001) (granting exclusive jurisdiction over ERISA disputes to U.S. district courts), 1132(i) (West, WESTLAW through P.L. 107-11 May 28, 2001) (granting Secretary of the Department of Labor authority to assess any administrative penalties). In fact, only part of the safe harbor provision in its entirety applies to the employer-employee relationship. *See* 42 U.S.C.A. §

1. Subterfuge and Intent

The understanding of "subterfuge" as an intentional act arises from the Supreme Court's opinion in *Public Employees Retirement System of Ohio v. Betts*, a case concerning the Age Discrimination in Employment Act (ADEA).[214] In *Betts*, the Court affirmed its prior decision in *United Air Lines, Inc. v. McMann*, that the term "subterfuge" should be given its "ordinary" meaning of "a scheme, plan, stratagem, or artifice of evasion"[215] and therefore "connotes a specific 'intent' to evade a statutory requirement."[216] The *Betts* Court concluded that, in the context of the ADEA, only those pension plan terms that evinced intentional discrimination were prohibited; those with an unintentional disparate impact on employees protected by the ADEA were not.[217]

The provision of the ADEA at issue in *Betts*, however, differs from Section 501(c) in one significant respect. At the time the *Betts* Court considered it, the ADEA's safe harbor exempted "the terms of any bona fide employee benefit plan such as a retirement, pension, or insurance plan, which is not a subterfuge to evade the purposes of" the ADEA.[218] Concerned exclusively with pension plans, not insurance plans, it did not limit its safe harbor to the terms of such plans that are based on classifying, underwriting, or administering risk because pension plans are not structured around these sorts of health risks.[219] Therefore, the ADEA's safe harbor provision applied to all bona fide pension plans, unless they were used to intentionally discriminate on the basis of age, in marked contrast to the ADA's recognition that all plan terms have the potential to disparately impact individuals with disabilities and that only certain terms should be allowed to do so.[220]

12201(c)(1) (West, WESTLAW through P.L. 107-11 May 28, 2001) (applying to, *inter alia*, insurers, hospitals, and HMO's). Furthermore, this interpretation appears in the EEOC Interim Enforcement Guidance, guidance directed to the EEOC's enforcement authority, issued in the interim while the EEOC gathered the information necessary to come to a more reasoned judgment.

214. *See* Pub. Employees Ret. Sys. of Ohio v. Betts, 492 U.S. 158 (1989).

215. *See* United Air Lines, Inc. v. McMann, 434 U.S. 192, 203 (1977).

216. *Betts*, 492 U.S. at 171.

217. *See id.*

218. *Id.* at 161 (citing 29 U.S.C.A. § 623(f)(2)(B)).

219. *Compare* 42 U.S.C.A. § 12201(c)(2) (West, WESTLAW through P.L. 107-11 May 28, 2001). In fact, the *Betts* Court noted and rejected the employee's assertion that the employer had to provide a cost justification for its pension plan terms because this requirement "appears nowhere in the statute itself." *Betts*, 492 U.S. at 170; *see also* Monica E. McFadden, *Insurance Benefits Under the ADA: Discrimination or Business as Usual?* 28 TORT & INS. L.J. 480, 494 (1993).

220. Some employers have relied on *Betts* for the proposition that only plans enacted after the effective date of the ADA can fall within the subterfuge provision because an employer could intentionally use Section 501(c) as a subterfuge only once the prohibitions of the ADA are in place. *See, e.g.*, Doukas v. Metro. Life Ins. Co., 950 F. Supp. 422, 430 (D.N.H. 1996). The legislative history of Section 501(c), however, explains that the subterfuge provision applies "regardless of the date an insurance plan or employee

Arguably, the EEOC Interim Enforcement Guidance considers only intentionally discriminatory plan provisions subject to the ADA. This reading of the Guidance, however, is not dispositive. The Interim Enforcement Guidance states that "[i]nsurance distinctions that are not based on disability, and that are applied equally to all insured employees, do not discriminate on the basis of disability and so do not violate the ADA."[221] As its title makes clear, The Interim Enforcement Guidance is designed to be used by the EEOC only in the interim after the enactment of the ADA, while it researches, considers, and drafts its final Enforcement Guidance. In addition, unlike the regulations and Interpretive Guidance, the EEOC's Enforcement Guidance merely provides the EEOC's own attorneys with directions about which types of acts the Commission will pursue as a matter of policy; it is not intended as an authoritative interpretation of the ADA.[222] Thus, while the EEOC may quite logically choose to expend its limited resources only on those circumstances in which insurers and plan sponsors deliberately and unjustifiably discriminate against individuals with disabilities, its logistical decision in no way forecloses aggrieved individuals from pursuing other types of claims.[223] Furthermore, the EEOC's experience and expertise in regulating the contents of employee benefit plans is quite limited and its guidance in this area should therefore be accorded little deference.[224]

Any broader understanding of the Guidance as limiting the ADA's prohibitions on insurance discrimination to intentional discrimination would contradict the plain meaning of the statute. On its face, Section 501(c) does not limit the safe harbor exemption to plan terms that intentionally discriminate.[225] While some plan terms may limit coverage specifically on the basis of a particular disability,[226] others, such as limits in benefits coverage,[227] are not based on the

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benefit plan was adopted," H.R. REP. NO. 485(III) at 136 (1990), *reprinted in* 1990 U.S.C.C.A.N. 445; *see also* Doukas v. Metro. Life Ins. Co. 950 F.Supp. 422, 403–31 (D. N.H. 1996), and regardless of any intent. *See* 136 CONG. REC. H4614, H4626 (1990) (Statement of Rep. Edwards).

221. EEOC Interim Enforcement Guidance, *supra* note 49, at Part III.B.

222. *See* Watson v. Fort Worth Bank & Trust, 487 U.S. 977, 995 n.3 (1988) (Blackmun, J., concurring); Connecticut v. Teal, 457 U.S. 440, 453 n.12 (1982).

223. *See Watson*, 487 U.S. at 995 n.3 (Blackmun, J., concurring); *Teal*, 457 U.S. at 453 n.12; 42 U.S.C.A. § 12217(a) (West, WESTLAW through P.L. 107-11 May 28, 2001) (extending the enforcement provisions of Title VII to the EEOC, the Attorney General, "or to any person alleging discrimination on the basis of disability in violation of any provision of this chapter").+

224. *See* 29 U.S.C.A. § 1132(i) (West, WESTLAW through P.L. 107-11 May 28, 2001) (granting authority for assessing civil penalties for violations of ERISA, which regulates the contents of employee benefit plans, to the Secretary of the Department of Labor); Albemarle Paper Co. v. Moody, 422 U.S. 405, 431 (1975) (turning to EEOC guidelines for guidance in assessing a Title VII violation because of its status as the enforcing agency).

225. *See* 42 U.S.C.A. § 12201(c)(2) (West, WESTLAW through P.L. 107-11 May 28, 2001).

226. *See, e.g.*, EEOC v. Staten Island Sav. Bank, 207 F.3d 144, 148 (2d Cir. 2000) ("join[ing] six other Courts of Appeals in concluding that Title I of the ADA does not

classification of risk by disability, but by treatment that may be necessary for a range of conditions and that may consequently have a disparate impact on individuals with disabilities.[228]

The important difference between the safe harbor provisions of the ADA and the ADEA also renders inapplicable the *Betts* Court's holding that the ADEA's subterfuge clause applies only to an employer's use of the plan to discriminate in a non-fringe-benefit action, such as a hiring decision.[229] In *Krauel v. Iowa Methodist Medical Center*, the Fourth Circuit uncritically applied this portion of the *Betts* decision to the ADA to hold that insurance provisions themselves are never subject to a disparate impact analysis.[230] In *Betts*, however, the Court determined that the ADEA subterfuge clause applied only to non-fringe-benefit actions because its application to benefits decisions would merely duplicate the ADEA's substantive provisions.[231] Because, as the *Betts* Court held, the ADEA's safe harbor provision exempts *all* bona fide plans from the

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bar entities covered by the statute from offering different long-term disability benefits for mental and physical disabilities"); Doe v. Mut. of Omaha Ins. Co., 179 F.3d 557, 559 (7th Cir. 1999) (holding that policies with caps on AIDS-related treatments do not violate the ADA because "the policies give [people with AIDS] as much coverage for those needs as the policies give people who don't have AIDS"), *cert. denied*, 528 U.S. 1106 (2000). While I disagree with both decisions, the plan terms they considered are plainly distinguishable from the prescription contraceptive exclusion because they are facially discriminatory.

227. *See, e.g.*, Alexander v. Choate, 469 U.S. 287, 289 (1985) (discussing reduction of Tennessee Medicaid benefits for in-patient hospital coverage from twenty to fourteen days). Indeed, the fact that the Supreme Court addressed this issue prior to Congress' enactment of the ADA and that the legislative record specifically refers to the decision, *see* H.R. REP. NO. 101-485(II), at 84 (1990), *reprinted in* 1990 U.S.C.C.A.N. 267, 303, 367, illustrates that Congress was aware of the existence of plan provisions that are not facially discriminatory but have a disparate impact on individuals with disabilities and did not specifically limit consideration of them to instances of intentional discrimination.

228. Only a reading of the subterfuge clause as essentially repeating the requirements of Section 501(c) could compel a different conclusion. For example, one author has relied on the legislative history of the ADA to conclude that disparate impact analysis is not applicable to insurance decisions. *See* Farber, *supra* note 126, at 877–88; *see also* Bonnie Poitras Tucker, *Insurance and the ADA*, 46 DEPAUL L. REV. 915, 922 (1997) (relying on EEOC Enforcement Guidance to reach the same conclusion). The statements in the Committee Reports simply say that a plan may not discriminate in coverage 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." *See* Farber, *supra* note 126. This statement merely explains the parameters of the safe harbor protection, not the additional subterfuge language. Even if they did describe the subterfuge language, the fact that it is limited to intentional discrimination indicates that, beyond the subterfuge clause, the ADA prohibits a broader range of conduct, including disparate impact discrimination. *See* discussion *supra*. Finally, the Committee Reports' description of one example of prohibited conduct does not limit the ADA's application to that example.

229. *See* Pub. Employees Ret. Sys. of Ohio v. Betts, 492 U.S. 175, 158 (1989).

230. *See* Krauel v. Iowa Methodist Med. Ctr., 95 F.3d 674, 678–79 (8th Cir. 1996); *see also* Piquard v. City of E. Peoria, 887 F. Supp. 1106, 1123–24 (C.D. Ill. 1995).

231. *See Betts*, 492 U.S. at 177.

substantive prohibitions on age discrimination, it would make no sense to remove that exemption if the plans were used to discriminate on the basis of age as already prohibited by the substantive provisions from which the plans are specifically exempted.

The fact that the ADA's safe harbor provision exempts from liability only certain plan terms, not all bona fide plans, means that its subterfuge clause is not thus rendered duplicative when read to apply to discriminatory benefits decisions. The substantive provisions of the ADA specifically prohibit employers from discriminating in the provision of employee benefits.[232] The subterfuge clause must therefore accomplish something more than this general prohibition. Read in conjunction with the specific exemptions of the safe harbor provision, it does. While employers generally may not discriminate in the provision of employee benefits, they are free to offer plan terms that discriminate *if* those terms are based on classifying, underwriting, or administering risk in a manner consistent with state law.[233] The subterfuge clause applies to *such terms*, otherwise not actionable under the substantive provisions of Title I, if an employer intentionally uses the safe harbor provision as a means of discriminating. As discussed, discrimination by offering plan terms that are not protected by the safe harbor provision remains prohibited by the substantive provisions of Title I, regardless of whether such discrimination is intentional or not.

2. Applying Disparate Impact Analysis to Employee Benefit Plans

The Supreme Court's decision in *Alexander v. Choate*[234] further compels the argument for applying a disparate impact analysis to discriminatory plan terms not protected by the safe harbor provision. There, the Supreme Court considered whether Tennessee's Medicaid program violated Section 504 of the Rehabilitation Act, which prohibits programs receiving federal financial assistance from discriminating against individuals with disabilities.[235] The challenged practice was Tennessee's decision to reduce in-patient coverage from twenty days to fourteen.[236] This reduction disparately impacted Medicaid recipients with

232. *See* 42 U.S.C.A. § 12112(b)(2) (West, WESTLAW through P.L. 107-11 May 28, 2001); discussion *infra* Part IV.

233. *See id.* § 12201(c)(2) (West, WESTLAW through P.L. 107-11 May 28, 2001).

234. 469 U.S. 287 (1985).

235. 29 U.S.C.A. § 794(a) (West, WESTLAW through P.L. 107-11 May 28, 2001). Because the ADA was modeled on Section 504, *see* Bragdon v. Abbott, 524 U.S. 624, 631 (1998), the two laws are construed consistently. *See* 42 U.S.C.A. § 12117(b) (West, WESTLAW through P.L. 107-11 May 28, 2001); *Bragdon*, 524 U.S. at 638 (citing 42 U.S.C.A. § 12201(a)).

236. *See Alexander*, 469 U.S. at 289.

disabilities because 27.4% of them required more than fourteen days of in-patient care, while only 7.8% of recipients without disabilities required it.[237]

Although the Court ultimately declined to issue a definitive ruling on the matter,[238] it explained at length that limiting disability discrimination claims to those alleging intentional discrimination would not achieve the purposes of the laws because "[d]iscrimination against the handicapped was perceived by Congress to be most often the product, not of invidious animus, but rather of thoughtlessness and indifference—of benign neglect."[239] As the Court explained, "much of the conduct that Congress sought to alter in passing the Rehabilitation Act [the ADA's precursor] would be difficult if not impossible to reach were the Act construed to proscribe only conduct fueled by a discriminatory intent."[240]

In the context of Tennessee's administration of Medicaid benefits, the Court held that disparate impact claims should be circumscribed. In those circumstances, for the state "to evaluate the effect on the handicapped of every proposed action that might touch the interests of the handicapped, and then to consider alternatives for achieving the same objectives with less severe disadvantage to the handicapped...could lead to a wholly unwieldy administrative and adjudicative burden."[241]

In *Modderno v. King*,[242] a case cited with approval in several other jurisdictions,[243] the D.C. Circuit extended this analysis to a federal employer's administration of an employee benefit plan.[244] The court characterized *Alexander*

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237. *See id.* at 295. A sufficient statistical disparity may alone be enough evidence to establish a prima facie case of disparate impact. *See* Watson v. Fort Worth Bank & Trust, 487 U.S. 977, 992 (1988).

238. *See Alexander*, 469 U.S. at 299.

239. *Id.*; *see also* Mayerson & Yee, *supra* note 31 at 540 (describing Mayerson's role as co-counsel in *Alexander v. Choate* and her response "hail[ing] the part of the decision that recognized that discrimination against people with disabilities includes barriers to participation, whether erected by design or neglect").

240. *Alexander*, 469 U.S. at 296–97.

241. *Id.* at 298. Professor Mary Crossley characterizes the Court's decision as "refus[ing] to second guess the State's judgment," Crossley, *supra* note 25, at 54, and as an illustration of "judicial reluctance to apply disability discrimination law to health care decisions." *Id.* at 55. The Court's opinion, however, carefully circumscribes the holding to the particular situation faced by a state in administering Medicaid benefits. Its "reluctance" to find the state's action discriminatory does not mandate a "hands off" approach to *all* health care decisions by *all* actors.

242. 82 F.3d 1059 (D.C. Cir. 1996), *cert. denied*, 519 U.S. 1094 (1997).

243. *See, e.g.*, Ford v. Schering-Plough Corp., 145 F.3d 601, 609 (3d Cir. 1998), *cert. denied*, 525 U.S. 1093 (1999); Parker v. Metro. Life Ins. Cos., 121 F.3d 1006, 1017, 1019 (6th Cir. 1997), *cert. denied*, 522 U.S. 1084 (1998); EEOC v. CNA Ins. Co., 96 F.3d 1039, 1044 (7th Cir. 1996).

244. *See Modderno*, 82 F.3d at 1060. Modderno claimed that the Foreign Service Benefit Plan to which she was entitled as a Foreign Service officer, violated the Rehabilitation Act by imposing limitations on benefits for mental disabilities that it did not impose on physical disabilities. *See id.*

v. Choate simply as "conclud[ing] that Tennessee's generalized limitations on Medicaid payments, which fell disproportionately on disabled individuals because of their greater medical needs, were not subject to challenge [as disability discrimination] merely because of that disproportion."[245] In fact, the panel mused, the opinion "would seem to rule out a successful...disparate impact claim based on the terms of an insurance plan" because the types of discrimination that the Court stated justified disparate impact analysis "referred not to insurance coverage but to such matters as architectural barriers, job qualifications, and access to public transportation and educational services."[246]

What the *Modderno* court and the courts adopting its reasoning fail to recognize is that employers do not face the same sorts of administrative burdens as states administering programs like Medicaid.[247] In 1998, ten percent of Americans, or thirty-three million people, received Medicaid insurance administered by the states.[248] On average, then, each state oversees the distribution of Medicaid benefits to about three-quarters of a million recipients. Private employers, of course, have responsibility for significantly fewer employees.

Furthermore, as discussed in Part II, the consequences for employers of exempting contraceptives from prescription coverage in employee benefit plans are both insignificant and expected.[249] Unlike state governments, it is expressly the business of insurance companies to calculate as exactly as possible the expected impact of particular coverage decisions.[250] The Court's consideration of what is within "manageable bounds" [251] for the states, burdened with innumerable administrative decisions, therefore does not necessarily define what is "manageable" for employers.

Finally, although the *Alexander* Court spoke only in terms of architectural barriers, access to transportation, job qualifications, and special educational assistance for children with disabilities,[252] it did so in the context of a suit about state practices. These issues are regularly addressed by states and local municipalities, who are responsible for education, public transportation, and much architectural design (both buildings and public spaces), and who employ significant numbers of people.[253] Indeed, both *Alexander* and *Modderno* addressed

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245. *Id.* at 1061.

246. *Id.* at 1061 n.1.

247. *See, e.g.*, *Parker*, 121 F.3d at 1018; *CNA Ins. Co.*, 96 F.3d at 1044; *Modderno*, 82 F.3d at 1062.

248. *See* CATHERINE HOFFMAN & ALAN SCHOBOHM, UNINSURED IN AMERICA: A CHART BOOK (2nd ed. 2000) (published by Kaiser Commission on Medicaid and the Uninsured); Thomas L. Greaney, *Foreword: Reconceptualizing Medicaid*, 45 ST. LOUIS.U. L.J. 1, 1 (2001).

249. *See supra* pp. 530–31.

250. *See* discussion *supra* pp. 526–27.

251. Alexander v. Choate, 469 U.S. 287, 299 (1985).

252. *See id.* at 297.

253. *See, e.g.*, Milliken v. Bradley, 418 U.S. 717, 768 (1974) ("[I]t is well established that education is a traditional concern of the states."); Alsbrook v. City of

claims brought under Section 504 of the Rehabilitation Act, which prohibits discrimination against individuals with disabilities by entities receiving federal funds.[254]

By contrast, the ADA extends the nondiscrimination principle to private employers who receive no federal financial assistance[255] and therefore reflects Congress' belief that individuals with disabilities suffer discrimination in all aspects of employment, including the terms of employee benefit plans.[256] Given the ease with which employers could evaluate and correct for the impact of discriminatory plan terms, a disparate impact analysis should apply to their coverage decisions.[257]

Reading Section 501(c) within the broader context of the ADA and Congress' plain purpose to prohibit both intentional and disparate impact discrimination, it thus becomes apparent that an employer may, in limited circumstances, face liability for offering an employee health plan with discriminatory terms. The safe harbor provision clearly exempts the sorts of plan terms that traditionally result from insurance industry practices that evaluate risk, many of them not based on intentional discrimination between disabilities but, nevertheless, disparately impacting individuals with disabilities. Any terms that lie beyond that defined safe harbor—such as the exclusion of contraceptives from prescription coverage—would therefore violate the Act regardless of an employer's intent to do so.

Maumelle, 184 F.3d 999, 1016 (8th Cir. 1999) (McMillan, J., dissenting) (noting that each of the "critical areas" of discrimination against individuals with disabilities—including employment, housing, transportation, communication, recreation, institutionalization, health services, voting, and access to public services—"is, by its very nature, partially or entirely under the control of state or local government").

254. *See* 29 U.S.C.A. § 794 (West, WESTLAW through P.L. 107-11 May 28, 2001).

255. *See* 42 U.S.C.A. § 12111(5) (West, WESTLAW through P.L. 107-11 May 28, 2001) (defining "employer" as "a person engaged in an industry affecting commerce who has 15 or more employees..., and any agent of such person" and expressly exempting the United States and any corporation owned by it, Indian tribes and tax exempt organizations).

256. *See id.* § 12112(b)(2) (West, WESTLAW through P.L. 107-11 May 28, 2001). In fact, Congress did not expect Section 504 to have the sweeping impact it did when they included it in the 1972 amendments to the Rehabilitation Act. *See* RICHARD K. SCOTCH, FROM GOOD WILL TO CIVIL RIGHTS: TRANSFORMING FEDERAL DISABILITY POLICY 52 (1984).

257. *See* Crossley, *supra* note 25, at 68 ("The ADA clearly contemplates reaching at least some forms of disparate impact discrimination by recognizing that physical, social, or economic structures may create barriers or disadvantages for people with disabilities and that a failure to take reasonable steps to remove those barriers or remedy those disadvantages should be deemed to be discrimination.").

IV. TITLE I'S PROHIBITION OF DISCRIMINATION IN THE PROVISION OF EMPLOYEE HEALTH BENEFITS

While Section 501(c) of the ADA provides an exemption for traditional insurance practices, Title I of the ADA requires employers to provide nondiscriminatory fringe benefits, including health benefits, to employees with disabilities.[258] Section 102(b)(2) extends an employer's responsibility beyond its own even-handed provision of employee health plans to ensuring that the plans themselves do not discriminate.[259] Specifically, Title I imposes liability on employers for entering into a contractual relationship that "has the effect" of discriminating, including a contractual relationship with "an organization providing fringe benefits to an employee of the covered entity."[260] When read in conjunction with a proper understanding of Section 501(c) as exempting certain plan terms from this prohibition, it becomes apparent that Section 102(b)(2) extends to any non-exempt terms that discriminate against individuals with disabilities.[261]

258. *See, e.g.*, Castellano v. City of New York, 142 F.3d 58, 66 (2d Cir. 1998); *see also* Crossley, *supra* note 25, at 78 ("[T]he ADA clearly contemplates some application to health insurance, [including] receiv[ing] the insurance from an employer as a fringe benefit....").

259. *See* 42 U.S.C.A. § 12112(b)(2). This obligation does not impose untoward burdens on employers. "The specifics of group health and disability coverage usually are negotiated by the employer with the insurer." Wortham, *supra* note 126, at 849.

260. 42 U.S.C.A. § 12112(b)(2); *see also* 29 C.F.R. § 1630.6(c) (West, WESTLAW through July 19, 2001) (clarifying that this prohibition applies "whether the entity offered the contract or initiated the relationship"). Some courts have also held the insurance companies providing the plans liable under this provision. Most of these opinions rely on the First Circuit's opinion in *Carparts Distribution Ctr. v. Automotive Wholesaler's Ass'n of New England, Inc.*, 37 F.3d 12 (1st Cir. 1994). There, the court held that an insurance company could be considered an employer subject to Title I if it "had the authority to determine the level of benefits" because Title I defines "employer" as an entity that "exercises control over [an important] aspect of the [individual's] employment." *Id.* at 17. Even if an insurance company did not exercise this degree of control over the plan contents, the *Carparts* court held that it could be considered an agent of the employer and thus liable. *See id.* A number of other courts have held that insurance companies are not liable because they would have to be sued pursuant to Title III of the ADA and Title III, according to these courts, is limited to access to physical structures. *See, e.g.*, Doe v. Mut. of Omaha Ins. Co., 179 F.3d 557, 560 (7th Cir. 1999) ("The common sense of [Title III] is that the content of the goods or services offered by a place of public accommodation is not regulated."), *cert. denied*, 528 U.S. 1106 (2000); Ford v. Schering-Plough Corp., 145 F.3d 601, 614 (3d Cir. 1998), *cert. denied*, 525 U.S. 1093 (1999); Parker v. Metro. Life Ins. Co., 121 F.3d 1006, 1013 (6th Cir. 1997), *cert. denied*, 522 U.S. 1084 (1998). Whether insurance companies are liable for the prescription contraceptive exclusion is beyond the scope of this Article.

261. I rely on Section 102(b), rather than an employer's obligation to provide reasonable accommodations to employees, 42 U.S.C.A. § 12112(b)(5) (West, WESTLAW through P.L. 107-11 May 28, 2001), because an employee demanding a reasonable accommodation faces the additional burden of demonstrating that the accommodation is

Although the EEOC chose not to offer an interpretation of an employer's obligation under Section 102(b)(2) in the regulations interpreting Title I,[262] it did offer some opinions in its Interpretive Guidance and its Technical Assistance Manual (TAM).[263] The Interpretive Guidance states that "this part is intended to require that employees with disabilities be accorded equal access to whatever health insurance coverage the employer provides to other employees."[264] The TAM contains almost identical language.[265]

Lower courts have relied on this "equal access" language to absolve employers of their additional responsibility to provide employees with disabilities not just equal, but also *meaningful*, access to employee health plans, as required by the Supreme Court's decision in *Alexander v. Choate*.[266] In other words, an employer must do more than offer all employees access to plan terms when those terms discriminate against employees with disabilities; they have an affirmative obligation to ensure that the plan terms themselves are not discriminatory.

A. Both Equal and Meaningful Access

The EEOC itself, through the cases it has chosen to litigate,[267] has indicated that providing employees with "equal access" to health benefits does not absolve employers of their additional responsibility to ensure that the plans

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necessary to allow her to perform the essential functions of her job. *See id.* § 12111(8). Although a woman who faces serious health risks in pregnancy might argue that without prescription contraceptives she faces a high likelihood of becoming pregnant and therefore would be unable to perform any of her essential job functions because she would be completely incapacitated, this argument is more speculative than what is usually entailed by the reasonable accommodation consideration.

262. *See* 29 C.F.R. § 1630.4(f) (West, WESTLAW through July 19, 2001) ("It is unlawful for a covered entity to discriminate on the basis of disability against a qualified individual with a disability in regard to: ...[f]ringe benefits available by virtue of employment, whether or not administered by the covered entity.").

263. The EEOC's interpretation of Title I of the ADA is entitled to deference. *See* 42 U.S.C.A. § 12116 (directing the EEOC to promulgate regulations interpreting Title I); 29 C.F.R. § 1630.1(a) (West, WESTLAW through July 19, 2001) (describing purpose of the EEOC regulations as "to implement Title I"); Sutton v. United Airlines, Inc., 527 U.S. 471, 478 (1999).

264. 29 C.F.R. app. pt. 1630, § 1630.5 (2000) (EEOC Interpretive Guidance on Title I of the Americans with Disabilities Act).

265. EEOC, A TECHNICAL ASSISTANCE MANUAL ON THE EMPLOYMENT PROVISIONS (TITLE I) OF THE AMERICANS WITH DISABILITIES ACT, I-7.9 (1992) [hereinafter TAM].

266. 469 U.S. 287 (1985).

267. *See* Lewis v. Aetna Life Ins. Co., 982 F. Supp. 1158, 1161 (E.D. Va. 1997) (noting that the EEOC "has advocated the application of ADA Title I protection to employer-provided disability benefits") (citing EEOC v. CNA Ins. Co., 96 F.3d 1039, 1043 (7th Cir. 1996) (seeking to enjoin former employer from terminating long term disability benefits for employees with mental disabilities while not imposing similar limits on employees with physical disabilities)).

themselves do not discriminate.[268] For example, the EEOC recently filed suit against two New York banks for providing employee benefit plans that discriminated on their face by offering different long-term disability benefits for mental and physical disabilities.[269] Joining six other courts of appeals,[270] the Second Circuit, in *EEOC v. Staten Island Savings Bank*, affirmed the district courts' dismissal of the complaints because it believed that Title I of the ADA did not prohibit such plans.[271] Although the court found Section 102(b)(2) "ambiguous,"[272] it still dismissed the EEOC's reliance on its own Interim Guidance[273] because "[t]he interpretation of Title I urged upon us by the EEOC would require far-reaching changes in the way the insurance industry does business."[274] Instead, it cited the Interpretive Guidance's requirement that employers provide all employees with "equal access" to health benefits.[275]

The *Staten Island Savings Bank* court's assumption that, in explaining one obligation, the EEOC meant to remove all others is, of course, contradicted by the fact that the very litigant urging a different interpretation on the court was the EEOC itself.[276] It also belies the court's own acknowledgment of its "duty to

268. *See* Anderson v. Gus Mayer Boston Store of Del., 924 F. Supp. 763, 769 (E.D. Tex. 1996) (holding that an employer does not "acquit all its ADA duties when it selects a group insurer that has refusal standards which effectively deny an employee an equal opportunity to obtain coverage due to the employee's disability-status").

269. *See* EEOC v. Staten Island Sav. Bank, 207 F.3d 144, 147 (2d Cir. 2000) (describing EEOC's suit against Staten Island Savings Bank and Chase Manhattan Bank, both filed in the Eastern District of New York and consolidated on appeal, *see id.* at 146).

270. *See id.* at 148 (citing Weyer v. Twentieth Century Fox Film Corp., 198 F.3d 1104, 1116–18 (9th Cir. 2000); Kimber v. Thiokol Corp., 196 F.3d 1092, 1101–02 (10th Cir. 1999); Lewis v. Kmart Corp., 180 F.3d 166, 170 (4th Cir. 1999), *cert. denied*, 528 U.S. 1136 (2000); Ford v. Schering-Plough Corp., 145 F.3d 601, 608–10 (3d Cir. 1998), *cert. denied*, 525 U.S. 1093 (1999); Parker v. Metro. Life Ins. Co., 121 F.3d 1006, 1015–19 (6th Cir. 1997) (en banc), *cert. denied*, 522 U.S. 1084 (1998); EEOC v. CNA Ins. Cos., 96 F.3d 1039, 1044–45 (7th Cir. 1996); *cf.* McNeil v. Time Ins. Co., 205 F.3d 179, 186–90 (5th Cir. 2000); Doe v. Mut. of Omaha Ins. Co., 179 F.3d 557, 559–64 (7th Cir. 1999), *cert. denied*, 528 U.S. 1106 (2000); Modderno v. King, 82 F.3d 1059, 1060–62 (D.C. Cir. 1996), *cert. denied*, 519 U.S. 1094 (1997)).

271. *See Staten Island Sav. Bank*, 207 F.3d at 149.

272. *Id.* (citing Lewis, 180 F.3d at 170).

273. *See id.* at 151–52. The Interim Guidance on Application of ADA to Health Insurance (June 8, 1993), *reprinted in 8 Fair Employment Practices Manual* 405:7115 (BNA 2000), states that "health-related insurance distinctions that are based on disability may violate the ADA."

274. *Staten Island Sav. Bank*, 207 F.3d at 149; *see also* discussion *infra* part II.C.

275. *Staten Island Sav. Bank*, 207 F.3d at 152.

276. *See* Lewis v. Aetna Life Ins. Co., 982 F. Supp. 1158, 1168 n.9 (E.D. Va. 1997) ("Defendants note that the EEOC has in [its Interim Guidance] stated that distinctions between mental and physical illness in health insurance do not violate the ADA.... To the extent that this was ever the position of the EEOC with regard to disability benefit plans, it does not appear to be so now.") (emphasis omitted). Even if the EEOC's litigation position were inconsistent with the Guidelines, the Guidelines would not be entitled to deference.

interpret our remedial statutes broadly."[277] In particular, the ADA's reasonable accommodation requirement signals Congress' intent that courts interpret employers' obligations under the Act particularly broadly.[278] Rather than excusing employment actions with an unintentional disparate impact on individuals with disabilities, the ADA "force[s] employers to recognize subtle ways in which the workplace is biased against" individuals with disabilities and to address those inequities.[279] Simply providing employees with disabilities access to benefits that they cannot enjoy meaningfully violates the ADA's plain purpose.[280]

Rather than serving the ADA's broad nondiscrimination mandate, the court in *Staten Island Savings Bank* refused to question any terms of an employee benefit plan, however discriminatory, because "[t]he ADA, unclear on its face, does not specifically condemn the historic and nearly universal practice inherent in the insurance industry of providing different benefits for different disabilities.[281] This conclusion ignores Congress' specific means of addressing insurance industry practices in Section 501(c), which prohibits unjustified discrimination, not only in administering, but *additionally* in classifying and underwriting risk.[282]

Furthermore, the Interpretive Guidance more fully explains the parameters of employers' obligation and attempts to clarify when a plan itself is discriminatory and when it is not. Of particular importance, it states that "limits may be placed on reimbursements...on the types of drugs or procedures covered (e.g., limits on the number of permitted X-rays or non-coverage of experimental drugs or procedures)."[283] Plan exclusions for experimental drugs or procedures

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When an agency issues conflicting interpretations of a statute, it is "entitled to considerably less deference." INS v. Cardoza-Fonseca, 480 U.S. 421, 447 n.30 (1987).

277. *Staten Island Sav. Bank*, 207 F.3d at 149 (citing Heilweil v. Mount Sinai Hosp., 32 F.3d 718, 722 (2d Cir. 1994) (interpreting Rehabilitation Act), *cert. denied*, 513 U.S. 1147 (1995)).

278. *See* Malloy, *supra* note 20, at 609 ("[T]he reasonable accommodation requirement is based upon a more complex conception of equality than the simple notion that the disabled and non-disabled should be treated the same."); *see also* Jeffrey O. Cooper, *Interpreting the Americans with Disabilities Act: The Trials of Textualism and the Practical Limits of Practical Reason*, 74 TULANE L. REV. 1207, 1218 (2000) (stating that the ADA "goes further" than Title VII and the ADEA).

279. Malloy, *supra* note 20, at 623.

280. *See* Mayerson & Yee, *supra* note 31, at 537 ("[T]he disability movement has known from the outset that for people with disabilities, a civil rights statute based solely on equal treatment would fall far short of achieving the [ADA's] goals of inclusion and participation.").

281. *Staten Island Sav. Bank*, 207 F.3d at 149.

282. *See* 42 U.S.C.A. § 12201(c)(2) (West, WESTLAW through P.L. 107-11 May 28, 2001); *see also* discussion *supra* Part III.A.

283. 29 C.F.R. app. pt. 1630, § 1630.5 (West, WESTLAW through July 19, 2001) (EEOC Interpretive Guidance on Title I of the Americans with Disabilities Act); *see also* TAM, *supra* note 265, at I-7.9 ("An employer may continue to offer health insurance plans that limit reimbursements for certain types of drugs or procedures, even if these restrictions adversely affect individuals with disabilities, as long as the restrictions are uniformly applied without regard to disability.").

apply to treatments with uncertain results, such as autologous bone marrow transplant, a controversial but widely prescribed treatment for certain forms of cancer.[284] Furthermore, because any legal determination of what procedures are experimental is resolved "in favor of the insured to provide the broadest possible coverage,"[285] the permissible limitation recognized by the EEOC's guidance is a very narrow one. The prescription contraceptive exclusion is plainly distinguishable from such acceptable ones, for there is nothing experimental about prescription contraceptives, nor would covering them cause a plan to incur such substantial costs that a limit on reimbursement becomes necessary.[286]

Reading the Interpretive Guidance overly broadly to allow exemption of nonexperimental prescriptions without a similar justifiable distinction would also conflict with the Supreme Court's holding in *Alexander v. Choate* that individuals with disabilities must be given "meaningful access" to benefits. In that case, the question of discrimination in the state's provision of Medicaid benefits turned on whether the state provided individuals with disabilities with "meaningful access to the benefit" offered, even if the benefit itself produced disparate results.[287] As the Court explained, "the ultimate question is the *extent* to which a grantee [of federal funds covered by the Rehabilitation Act] is required to make reasonable modifications in its programs for the needs of the handicapped."[288]

Title I's prohibition of discrimination by means of a contractual relationship with an insurer suggests Congress recognized that the benefits provided by employers are defined by entities whose primary business is creating these plans.[289] Given the more efficient distribution of effort and the expertise of the private entities involved in the creation and distribution of employee benefit plans, Congress apparently determined that employers' obligation to provide employees with meaningful access to employee benefits prohibits them from abdicating responsibility for discriminatory plans simply by giving all employees access to them.[290]

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284. *See, e.g.*, Lubeznik v. HealthChicago, Inc., 644 N.E.2d 777 (Ill. App. 1994); Fox v. Health Net of Cal. (Cal. Sup. Ct. 1993) (No. 219692), *cited in* 3 BNA HEALTH CARE DAILY 1, 20 (Jan. 6, 1994).

285. *Lubeznik*, 644 N.E.2d at 780.

286. *See, e.g.*, Doe v. Mut. of Omaha Ins. Co., 179 F.3d 557, 561 (7th Cir. 1999) (describing AIDS caps in plan as "cover[ing]...the cost of fighting the AIDS virus itself and trying to keep the immune system intact plus the cost of treating the opportunistic diseases to which the body becomes prey when the immune system has eroded to the point at which one is classified as having AIDS"), *cert. denied*, 528 U.S. 1106 (2000).

287. Alexander v. Choate, 469 U.S. 287, 301 (1985).

288. *Id.* at 300 n.19 (emphasis added). Because the ADA was modeled on the Rehabilitation Act, *see* Bragdon v. Abbott, 524 U.S. 624, 631 (1998), the two laws are construed consistently. *See* 42 U.S.C.A. § 12117(b) (West, WESTLAW through P.L. 107-11 May 28, 2001); *Bragdon*, 524 U.S. at 638 (citing 42 U.S.C.A. § 12201(a)).

289. *See* 42 U.S.C.A. § 12112(b)(2).

290. The legislative history does not contradict this conclusion. The House and Senate Reports state that "as is stated by the U.S. Supreme Court in *Alexander v.*

Nor does it appear that Congress intended to replace the Court's "meaningful access" standard with the "equal access" one. The term "equal access" never appears in the statute, only in the EEOC's guidance.[291] Congress is, of course, presumed to be "aware of the existing law when it passes legislation."[292] Indeed, Congress specifically referenced *Alexander v. Choate* in enacting the ADA.[293] The *Alexander v. Choate* standard therefore should apply in addition to the EEOC's equal access approach. The only question is what "meaningful access" means in the context of the ADA's reasonable accommodation mandate for employers.[294]

In *Alexander v. Choate*, the Court found that Tennessee fulfilled its meaningful access obligation because the reduction of Medicaid coverage for hospital stays would merely reduce affected recipients' coverage, not eliminate it. Recipients with disabilities would still have access to "identical and *effective*

Choate...employee benefit plans should not be found to be in violation of this legislation under impact analysis simply because they do not address the special needs of every person with a disability, e.g., additional sick leave or medical coverage." S. REP. NO. 101-116, at 85 (1989), H.R. REP. NO. 101-485, at 137 (1990), *reprinted in* 1990 U.S.C.C.A.N. 267, 420; *see also* S. REP. NO. 101-116, at 29 (stating that an employer may "offer insurance policies that limit coverage for certain procedures or treatments, e.g., only a specific amount per year for mental health coverage"). In light of the plain wording of the statute making it an act of discrimination for employers to enter into a contractual relationship with an insurer or HMO that "has the effect of subjecting a covered entity's...employee with a disability to...discrimination," 42 U.S.C.A. § 12112(b)(2), these statements simply clarify that an employer need not tailor the plans to meet the special needs of particular individuals with disabilities. The plans themselves still must not create enough of a disparate impact to trigger a discrimination claim.

291. *See* EEOC Interpretive Guidance on Title I of the Americans with Disabilities Act, 29 C.F.R. app. pt. 1630 (West, WESTLAW through July 19, 2001) (discussing § 1630.5); *see also* TAM, *supra* note 265, at I-79.

292. South Dakota v. Yankton Sioux Tribe, 522 U.S. 329, 351 (1998) (quoting Miles v. Apex Marine Corp., 498 U.S. 19, 32 (1990)).

293. *See* H.R. REP. NO. 101-485(II), at 84 (1990), *reprinted in* 1990 U.S.C.C.A.N. 267, 303, 367. Congress stated that Title II of the ADA, which applies to state and local government entities, does not contain the sorts of specific prohibitions found in Titles I and III because *Alexander v. Choate*'s examination of Section 504 provides a mode of analysis for determining what sorts of discrimination by these entities should be actionable as illegal disability discrimination. *See* Mark C. Weber, *Disability Discrimination by State and Local Government: The Relationship between Section 504 of the Rehabilitation Act and Title II of the Americans with Disabilities Act*, 36 WM. & MARY L. REV. 1089, 1115 (1995). The fact that Congress discussed *Alexander v. Choate* with approval in the specific context of Title II does not indicate in any way that Congress rejected its application to Titles I and III in explaining what disparate impact is in the disability context (versus what acts it covers). In fact, Section 102(b)(2) states that an employer violates the ADA if it enters into a contractual relationship that "has the effect" of discriminating, 42 U.S.C.A. § 12112(b)(2), indicating approval of the *Alexander v. Choate* determination that certain acts are subject to a disparate impact analysis.

294. *See* Malloy, *supra* note 20, at 609 (discussing the affirmative obligations imposed on employers by the ADA's reasonable accommodation requirement in contrast to the less extensive Title VII requirement of nondiscrimination).

hospital services fully available for their use, with both classes of users subject to the same durational limit."[295] The record did not suggest that any of the illnesses occurring with greater frequency for individuals with disabilities could not be effectively treated within the fourteen days of coverage provided.[296]

Employers' complete denial of prescription coverage for contraceptives, on the other hand, does not merely reduce coverage, it eliminates it.[297] In the context of the affirmative obligations the ADA places on private employers, the argument that excluding contraceptives merely reduces the benefit of prescription coverage holds little weight.[298] Such reasoning erroneously assumes that an employer may, consistent with the ADA, justify a policy with a disparate impact on employees with disabilities based on its economic judgment, as long as it offers the discriminatory policy to all employees.[299] It also pays little attention to what the benefit really is. In choosing to provide coverage for prescriptions, an employer is providing the benefit of reducing the costs, not only of diagnosis, but of treatment.[300] For women who face serious health risks in pregnancy, the most effective and recommended treatment is usually to avoid pregnancy,[301] and the most effective means of doing so is through prescription contraception.[302] A plan that under no circumstances will cover that particular treatment thus denies these

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295. Alexander v. Choate, 469 U.S. 287, 302 (1985) (emphasis added).

296. *See id.* at 302 n.22.

297. A former Secretary of Health and Human Services has recognized this distinction between complete denial of a benefit and *Alexander v. Choate*'s approval of Tennessee's neutral provision of the same benefit to all Medicaid recipients. In rejecting the state of Oregon's application for a Medicaid waiver to allow it to ration which medical services would and would not be covered by state Medicaid benefits, the Secretary referenced *Alexander v. Choate* and explained that "Oregon may consider, consistent with the ADA, any content neutral factor that does not take disability into account *or that does not have a particular exclusionary effect* on persons with disabilities." Letter from Louis W. Sullivan, Secretary of Health & Human Services, to Barbara Roberts, Governor of Oregon (Aug. 3, 1992) (with accompanying "Analyses Under the Americans with Disabilities Act ("ADA") of the Oregon Reform Demonstration"), *reprinted in* Timothy B. Flanagan, *ADA Analyses of the Oregon Health Care Plan*, 9 ISSUES L. & MED. 397, 411 (1994) (emphasis added).

298. *See* 42 U.S.C.A. § 12112(b)(5) (West, WESTLAW through P.L. 107-11 May 28, 2001) (imposing affirmative duty to provide reasonable accommodations for individuals with disabilities).

299. *See* Malloy, *supra* note 20, at 617–18 ("The ADA...acknowledges that an employer's prejudice or ignorance may predispose him to make economically unsound judgments about certain individuals.").

300. *See* Wortham, *supra* note 126, at 879.

301. *See, e.g.*, CREASY & RESNICK, *supra* note 58, at 794, 929. Probably the most effective form of prevention is sterilization, but this form of contraception requires surgery and can have unwanted side effects. *See* Law, *supra* note 7, at 369. It is also, of course, irreversible.

302. *See* Law, *supra* note 7, at 369–71; *see also supra* note 15.

women meaningful access to the benefits of employer-subsidized health insurance.[303]

Finally, the *Alexander v. Choate* Court mandated that "to assure meaningful access, reasonable accommodations in the...benefit may have to be made."[304] This mandate is reflected in Title I's express delineation of one form of disability discrimination as failing to make reasonable accommodations to the known disabilities of its employees "unless [the employer] can demonstrate that the accommodation would impose an undue hardship on the operation of [its] business."[305] An "undue hardship" is defined as "an action requiring significant difficulty or expense," determined in light of the nature and cost of the accommodation and the overall financial resources of the employer.[306] Because the statute does not provide a similarly instructive definition of "reasonable accommodation," instead providing only a noninclusive list of examples,[307] Congress plainly intended that the term "reasonable accommodation" be read broadly, limited primarily by the undue hardship defense.[308]

In *Alexander v. Choate*, the costs of extending coverage beyond fourteen days would have been "far from minimal."[309] In fact, the action that precipitated the litigation was Tennessee's decision to reduce in-patient coverage to fourteen days as part of its means of avoiding a projected forty-two million dollar deficit in its Medicaid budget.[310] In light of the actual and administrative costs an increase in coverage would have imposed on the state, the Court concluded that the implementation of such an increase "would be well beyond the accommodations that are required."[311]

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303. *See* Erickson v. Bartell Drug Co., 141 F. Supp. 2d 1266, 1263-64 (D. Wash. 2001) ("Prescription contraceptives, like all other preventative drugs, help the recipient avoid unwanted physical changes. ...[I]dentifying and obtaining an effective method of contraception is a primary healthcare issue throughout much of a woman's life and is, in many instances, of more immediate importance to her daily healthcare situation than most other medical needs.") (citing VICKI L. SELTZER & WARREN H. PEARSE, WOMEN'S PRIMARY HEALTH CARE: OFFICE PRACTICE AND PROCEDURES 18, 141 (1995)); *see also* Malloy, *supra* note 20, at 618 (explaining that it is often more economically sound to provide employees with reasonable accommodations).

304. Alexander v. Choate, 469 U.S. 287, 301 (1985).

305. 42 U.S.C.A. § 12112(b)(5)(A) (West, WESTLAW through P.L. 107-11 May 28, 2001).

306. 42 U.S.C.A. § 12111(10) (West, WESTLAW through P.L. 107-11 May 28, 2001).

307. *Id.* § 12111(9).

308. *See, e.g.*, Harris v. H&W Contracting Co., 102 F.3d 516, 519 (11th Cir. 1997) ("In ADA parlance, the word 'discriminate' is defined broadly to include 'not making reasonable accommodations... .'"); Penny v. United Parcel Serv., 128 F.3d 408, 414 (6th Cir. 1997) (reading employer's "affirmative duty" of reasonable accommodation in the context of the ADA as a "broad remedial statute").

309. *Alexander*, 469 U.S. at 308.

310. *See id.* at 289.

311. *Id.* at 308.

An employer would face nothing approaching these proportionately prohibitive costs if it were to include contraceptives in its coverage of other prescriptions.[312] Nor would it even approach the "undue hardship" that the ADA recognizes as an employer defense to the obligation to provide reasonable accommodations.[313] Under standard cost-sharing arrangements, the cost to employers of expanding group coverage to include prescription contraceptives would increase by less than one percent.[314] While the cost increase would vary among individual employers, it certainly would approach neither the extremely high costs involved in *Alexander v. Choate*, nor the "significant difficulty and expense" required for the undue hardship defense.[315] Of course, if the cost were so significant for an individual employer, the undue hardship defense would provide an exception for that particular employer.

Applying the "meaningful access" instead of the "equal access" standard is therefore far from "impracticable," as the Fifth Circuit claimed in *McNeil v. Time Insurance Company*.[316] According to that court,

> [i]f the blind must be able to enjoy all goods and services to the same extent as the sighted, bookstores would be forced to limit the selection of books they carried because they would need to stock braille versions of every book. Shoe stores would reduce the styles available to their general customers, because they would need to offer special shoes for people with disabling foot deformities in every style sold to the non-disabled. Sporting goods stores might have to close altogether. Restaurants would have to limit their menus to avoid discriminating against diabetics. After all, to offer food to the public that a diabetic could not eat would, in the literal words of the statute, deny the diabetic the full and equal enjoyment of the goods of the restaurant compared to those with no limitation on their diets.[317]

While the court stated that such far-fetched, market-driven scenarios were "not mean[t] to make the statute sound ridiculous,"[318] its approach blatantly misreads

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312. Employers have tried to justify the exclusion primarily as a matter of cost. *See, e.g.*, Erickson v. Bartell Drug Co., No. C00-1213L, 2001 WL 648651, at *4 (D.Wash. June 12, 2001) (setting out employer defenses, which include the cost/business justification and *ex ante* legal defenses arguing the proper interpretation of Title VII); EEOC Decision, *supra* note 5.

313. *See* 42 U.S.C.A. §§ 12112(b)(5), 12111(10) ("The term 'undue hardship' means an action requiring significant difficulty or expense...."); *see also* Malloy, *supra* note 20, at 617.

314. *See* Darroch, *supra* note 172, at 1.

315. *See* 42 U.S.C.A. § 12111(10).

316. McNeil v. Time Ins. Co., 205 F.3d 179, 187 (5th Cir. 2000).

317. *Id.*

318. *Id.*

the ADA by ignoring its "reasonable accommodation" qualification and the undue hardship defense.[319]

Similarly, the Seventh Circuit, in *Doe v. Mutual of Omaha Life Insurance Company*, dismissed the argument that a cap on AIDS-related treatment discriminates on the basis of disability by stating that "the policies give [people with AIDS] as much coverage for those needs as the policies give people who don't have AIDS."[320] The court pointed out that not all the medical needs of people with AIDS are AIDS-related and concluded that Mutual of Omaha therefore could not have been intentionally excluding such individuals from the plan.[321] Instead, the court accused the plaintiffs' position of discriminating "among diseases" because only those diseases qualifying as disabilities would avoid caps, while "equally or more serious diseases that are generally not disabling, such as heart disease," would still be subject to caps.[322]

It is unclear why the Seventh Circuit was so concerned about discrimination among diseases that do not constitute disabilities, because such discrimination is not forbidden by the ADA.[323] In keeping with the purpose of anti-discrimination laws, insurers would be free to place caps on policy coverage—or to exempt certain prescriptions from coverage—as long as those caps did not discriminate against people with disabilities.[324] Furthermore, as *Alexander v. Choate* and Section 501(c) demonstrate, the insurer need not intentionally discriminate in order to violate the ADA.[325] Exempting certain treatments can have a disparate impact on individuals with disabilities that would violate Title I's imposition of liability on employers who enter into contractual relationships with benefits providers if those contracts have the effect of discriminating against employees with disabilities.[326]

Furthermore, *Alexander v. Choate* requires a far more nuanced analysis of the resources of the entity subject to the nondiscrimination mandate; the Court

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319. *See* 42 U.S.C.A. §§ 12112(b)(5), 12182(b)(2)(ii) (West, WESTLAW through P.L. 107-11 May 28, 2001).

320. Doe v. Mut. of Omaha Ins. Co., 179 F.3d 557, 559 (7th Cir. 1999), *cert. denied*, 528 U.S. 1106 (2000).

321. *See id.* As Professor Mary Crossley observes, the *Doe v. Mutual of Omaha Co.* court "thus implicitly recognizes that the plaintiffs are complaining of the AIDS cap's disparate impact on people with the disabling condition AIDS." Crossley, *supra* note 25, at 81.

322. *Doe*, 179 F.3d at 559.

323. *See* Crossley, *supra* note 25, at 85 (finding "the reasoning and outcome in *Doe v. Mutual of Omaha Insurance Co.* disturbing because the court's deceptively simple logic and analogies serve to obscure the complexity of the issues involved... .").

324. *See id.* at 81–82 (discussing the error of the *Doe v. Mutual of Omaha Co.* court in failing to recognize that an explicit cap on AIDS-related treatment is simply not neutral on its face).

325. *See* discussion supra Part III.C.

326. *See* 42 U.S.C.A. § 12112(b)(2) (West, WESTLAW through P.L. 107-11 May 28, 2001).

found the state action there to be legal discrimination because of the "wholly unwieldy administrative and adjudicative burden" it would impose.[327] The burdens the Fifth Circuit catalogued were far greater than an employer's burden in providing a nondiscriminatory health plan, particularly one that does not exempt contraceptives from prescription coverage.[328] As the First Circuit has explained, an employer cannot insulate itself from liability simply by delegating its responsibilities for employee benefits to the insurer.[329]

Thus, although the EEOC's guidance may be read to suggest that an employer may offer plans that exempt contraceptives from prescription coverage, such a conclusion ignores the EEOC's own litigation position and reflects an incomplete understanding of an employer's obligation to provide fringe benefits in a manner that does not discriminate against individuals with disabilities. "Equal access" is not a solitary obligation absolving the employer of any additional responsibilities in its provision of employee health plans. Rather, as the EEOC has made clear through its litigation of multiple cases, employers must provide meaningful access to their plans, taking into account the employer's resources as well as the needs of its employees with disabilities.[330] Under such an approach, a plan that legally exempts contraceptives from prescription coverage would be the exception—the result of a successful affirmative defense of undue burden[331]—rather than the rule.

B. Discrimination Between Disabilities

In construing the meaning of "equal access" referred to in the Interim Guidance, many of the lower courts rely on what the EEOC has criticized as an improper understanding of the ADA as prohibiting only discrimination between people with disabilities and people without, not discrimination on the basis of a

327. Alexander v. Choate, 469 U.S. 287, 298 (1985); *see also* Olmstead v. L.C., 527 U.S. 581, 604 (1999) (explaining that a state's obligation under the ADA is limited by the "reasonable accommodation" mandate, so that "the State [could] show that, in the allocation of available resources, immediate relief for the plaintiffs would be inequitable, given the responsibility the State has undertaken for the care and treatment of a large and diverse population of persons with mental disabilities.").

328. The employers in *Erickson* and the EEOC decisions did not argue that removing the exclusion would impose any kind of "administrative burdens" on them, merely that it would increase costs in contravention of their right to determine how to contain them as a matter of business judgment. *See* Erickson v. Bartell Drug Co., No. C00-1213L, 2001 WL 649651, at *6 (D.Wash. June 12, 2001); EEOC Decision, *supra* note 5.

329. *See* Carparts Distribution Ctr., Inc. v. Auto. Wholesaler's Ass'n of New England, 37 F.3d 12, 17–18 (1st Cir. 1994).

330. *See* Malloy, *supra* note 20, at 623 (describing the ADA's reasonable accommodation mandate as "forc[ing] employers to recognize subtle ways in which the workplace is biased against the disabled").

331. *See* 42 U.S.C.A. § 12113(a) (West, WESTLAW through P.L. 107-11 May 28, 2001).

particular disability (or group of disabilities).[332] Under this reasoning, the prescription contraceptive exclusion would not violate the ADA because it discriminates only against women with certain disabilities and does not discriminate against all individuals with disabilities. This approach mirrors the problems of subsuming women with disabilities within the group "all women"; in effect, it focuses on some mythical "disability" common to all individuals protected by the ADA rather than on the *individuals* themselves.[333]

For example, the Eighth Circuit has determined that employers do not violate the ADA when they provide insurance plans denying coverage for infertility because the exemption "appl[ies] equally to all insured employees, that is, to individuals with disabilities and to those who are not disabled."[334] Following this guidance, one district court held that a plan providing different long-term disability benefits for mental versus physical disabilities did not violate the ADA because "[s]uch broad distinctions which apply to the treatment of a multitude of dissimilar conditions and which constrain individuals both with and without disabilities, are not distinctions based on disability."[335]

The Third Circuit explained this philosophy by stating that

> differentiat[ing] between types of disabilities...is a far cry from a specific disabled employee facing differential treatment due to her disability. Every...employee had the opportunity to join the same plan with the same schedule of coverage, meaning that

332. *See* EEOC v. Staten Island Sav. Bank, 207 F.3d 144, 150 (2d Cir. 2000) (citing Weyer v. Twentieth Century Fox Film Corp., 198 F.3d 1104, 1116 (9th Cir. 2000); Rogers v. Dept of Health and Envtl. Control, 174 F.3d 431, 434 (4th Cir. 1999); Ford v. Schering-Plough Corp., 145 F.3d 601, 608–09 (3d Cir. 1998), *cert. denied*, 525 U.S. 1093 (1999); Parker v. Metro. Life Ins. Co., 121 F.3d 1006, 1015–16 (6th Cir. 1997) (en banc)).

333. *See* Sutton v. United Air Lines, Inc., 527 U.S. 471, 483 (1999) ("[W]hether a person has a disability under the ADA is an individualized inquiry.").

334. Krauel v. Iowa Methodist Med. Ctr., 95 F.3d 674, 678 (8th Cir. 1996). The court relied on EEOC Interim Enforcement Guidance for the proposition that "[i]nsurance distinctions that apply equally to all insured employees, that is, to individuals with disabilities and to those who are not disabled, do not discriminate on the basis of disability." *Id.* at 677. The EEOC Enforcement Guidance, however, is of questionable legal authority. *See supra* note 213.

The *Krauel* court also held that the plaintiff did not have a disability because infertility substantially limited only her ability to engage in reproduction and "to treat reproduction and caring for others as major life activities under the ADA would be inconsistent with the illustrative list of activities in the regulations, and a considerable stretch of federal law." *Krauel*, 95 F.3d at 677–78. This opinion was, of course, implicitly overruled by the Supreme Court in *Bragdon v. Abbott*, 524 U.S. 624, 638 (1998). *See also* discussion *supra* Part II.A.

335. Whaley v. United States, 82 F. Supp. 2d 1060, 1062 (D. Neb. 2000); *see also* Winslow v. IDS Life Ins. Co., 29 F. Supp. 2d 557, 565 (D. Minn. 1998) (citing Traynor v. Turnage, 485 U.S. 535 (1988); Alexander v. Choate, 469 U.S. 287 (1985);); Ford v. Schering-Plough Corp., 145 F.3d 601 (3d Cir. 1998), *cert. denied*, 525 U.S. 1093 (1999); Modderno v. King, 82 F.3d 1059 (D.C. Cir. 1996), *cert. denied*, 519 U.S. 1094 (1997); *Parker*, 121 F.3d 1006).

> every...employee received equal treatment. So long as every employee is offered the same plan regardless of that employee's contemporary or future disability status, then no discrimination has occurred even if the plan offers different coverage for various disabilities. The ADA does not require equal coverage for every type of disability; such a requirement...would destabilize the insurance industry in a manner definitely not intended by Congress when passing the ADA.[336]

As one district court put it, "although such distinctions may have a greater impact on certain individuals with disabilities, they do not intentionally discriminate on the basis of disability and do not violate the ADA."[337]

The Supreme Court's decision in *O'Connor v. Consolidated Coin Caterers*[338] indicates that these opinions are misguided and that employer actions that adversely affect certain protected employees without affecting others of the same protected class constitute illegal discrimination. In *Consolidated Coin*, the plaintiff claimed that his employer discriminated against him in violation of the Age Discrimination in Employment Act (ADEA) when it terminated him at age fifty-six.[339] The court of appeals affirmed the district court's grant of summary judgment for the employer because O'Connor failed to demonstrate that he was replaced by someone under the age of forty, that is, someone not within the class protected by the ADEA.[340] According to the court of appeals, O'Connor could not establish a *prima facie* case that his employer intentionally discriminated against him because of his age and, therefore, he could not survive the motion for summary judgment.[341]

The Supreme Court reversed in a unanimous decision. It held that an individual need not prove that someone outside the protected class was treated more favorably than he in order to establish a *prima facie* case of age discrimination.[342] The Court explained that the ADEA prohibits discrimination "because of [an] individual's age."[343] While the prohibition in the ADEA is "limited to individuals who are at least forty years of age,"[344] the Court held that "[t]his language does not ban discrimination against employees because they are aged 40 or older; it bans discrimination against employees because of their age, but limits the protected class to those who are forty or older."[345]

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336. *Ford*, 145 F.3d at 608.
337. *Whaley*, 82 F. Supp. 2d at 1062.
338. 517 U.S. 308 (1996).
339. *See id.* at 309.
340. *See id.*
341. *See id.*
342. *See id.* at 311–12.
343. *Id.* at 312 (quoting 29 U.S.C.A. § 623(a)(1)).
344. 29 U.S.C.A. § 631(a) (West, WESTLAW through P.L. 107-11 May 28, 2001).
345. *Consol. Coin*, 517 U.S. at 312.

> The fact that one person in the protected class has lost out to another person in the protected class is thus irrelevant, so long as he has lost out *because of his age*. Or to put the point more concretely, there can be no greater inference of *age* discrimination (as opposed to "40 or over" discrimination) when a 40-year-old is replaced by a 39-year-old than when a 56-year-old is replaced by a 40-year-old.[346]

The Fourth Circuit has refused to extend *Consolidated Coin*'s ADEA analysis to similar discrimination between disabilities in the ADA. In *Lewis v. KMart Corp.*, the court held that "the ADA does not require a long-term disability plan that is sponsored by a private employer to provide the same level of benefits for mental and physical disabilities."[347] The court stated that this holding was consistent with *Consolidated Coin* because that opinion did not apply to the ADA.[348]

The Sixth Circuit, however, has held that an individual with a disability need not establish that someone without a disability was treated more favorably as part of her *prima facie* case under the ADA. In *Monette v. Electronic Data Systems Corporation*, the court held that Monette did not have to present evidence that someone without a disability replaced him after his termination.[349] Although the *Monette* court expressed reluctance to extend *Consolidated Coin* "to other types of discrimination claims,"[350] it still cited that opinion for the proposition that "[g]iven the somewhat unique characteristics of various disabilities, and the differences between individuals afflicted with a particular disability, replacement of one disabled individual with another disabled individual does not necessarily weaken the inference of discrimination against the former individual that arises through establishment [of sufficient other indicia of discrimination]."[351]

Similarly, in *Prewitt v. United States Postal Service*, the Fifth Circuit noted that an employer's hiring of several people with a particular disability does not suggest that the employer did not discriminate against someone with a different disability.[352] These opinions implicitly recognize the variety of individual concerns addressed by the ADA in its it protection of a multitude of people with different disabilities limiting them in countless ways.

Indeed, the Supreme Court's recent decision in *Olmstead v. L.C.*[353] suggests that such discrimination between individuals with different disabilities does constitute an ADA violation.[354] In *Olmstead*, the Court considered whether

346. *Id.* (emphasis added).
347. Lewis v. KMart, 180 F.3d 166, 170 (4th Cir. 1999).
348. *See id.* at 170–71.
349. *See* Monette v. Elec. Data Sys. Corp., 90 F.3d 1173, 1179 (6th Cir. 1996).
350. *Id.* at 1179 n.6.
351. *Id.* at 1185 n.11.
352. *See* Prewitt v. U.S. Postal Serv., 662 F.2d 292, 307 (5th Cir. 1981).
353. 527 U.S. 581 (1999).
354. *See* Boots v. Northwestern Mut. Life Ins. Co., 77 F. Supp. 2d 211, 218 (D.N.H. 1999).

the State of Georgia violated the ADA when it placed people with mental disabilities in institutions instead of placing them in a community setting found appropriate by its treatment providers. The Court held that the State could not do so absent a showing that the community placement would be "inequitable" in light of the state's "allocation of available resources" to care for "a large and diverse population of persons with mental disabilities."[355] In his dissent, Justice Thomas argued that the action was not discriminatory because Georgia merely treated some people with mental disabilities (those who were in institutions) differently from other people with mental disabilities (those who were not).[356] He stated that "this Court has never endorsed an interpretation of the term 'discrimination' that encompassed disparate treatment among members of the same protected class."[357] The majority dismissed this argument, responding that "[t]he dissent is incorrect as a matter of precedent and logic"[358] and citing *Consolidated Coin*.[359]

As one district court judge has observed, holding that the ADA does not prohibit discrimination between different disabilities "flies in the face of the central purpose of anti-discrimination statutes—to assure that each individual is judged by his or her abilities, not on the basis of stereotypes."[360] By way of illustration, the court observed that "no one would suggest that because an employer is not required to provide a certain benefit, Title VII would allow it to provide that benefit only to Asian employees and not to black or white employees."[361] Indeed, any other approach absurdly assumes that the many individuals with a multitude of widely varying disabilities are somehow the same. Such thinking illustrates precisely the way in which women with disabilities—especially women with the particular disabilities relevant here—often become invisible in legal analysis.

V. CONCLUSION

The exclusion of contraceptives from prescription coverage in employee health plans appears at first to be primarily an issue of sex discrimination. Focusing on women without disabilities in this instance would also incidentally benefit women with disabilities. In other circumstances, however, approaching discrimination solely in terms of gender equity could just as easily harm the interests of women with disabilities. This tendency to think about gender equity absent any further understanding of women as a diverse group, including women

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355. *Olmstead*, 527 U.S. at 604.
356. *See id.* at 616 (Thomas, J., dissenting).
357. *Id.*
358. *Id.* at 598 n.10.
359. *Id.*
360. Boots v. Northwestern Mut. Life Ins. Co., 77 F. Supp. 2d 211, 219 n.7 (D.N.H. 1999).
361. *Id.*; *see also* Lewis v. Aetna Life Ins. Co., 982 F. Supp. 1158, 1168 (E.D. Va. 1997) ("Under [this] logic, an employer could hire an employee with a physical disability over a more qualified employee with a mental disability...without violating the ADA, simply because both applicants were members of the protected class.").

with disabilities, hampers not only a theoretical, but also a legal, approach to the issue as one of disability discrimination.

Yet focusing on women with disabilities implicating pregnancy as fully deserving of civil rights protections illustrates that the ADA ought to and in fact does offer them protection against the particular discrimination they suffer from the prescription contraceptive exclusion. As the Supreme Court has recognized, reproduction is a major life activity.[362] Any condition that significantly limits a woman's ability to engage in this activity is a disability under the ADA. Many women who might not otherwise be recognized as individuals with disabilities are thus entitled to the rights of nondiscrimination and reasonable accommodation granted by the ADA.

This recognition puts into better perspective the range of protections the ADA offers, including the protection it offers against discrimination in the terms of employee health plans. The ADA's safe harbor provision exempts only plan terms that are based on the actuarial principles that underlie traditional insurance underwriting practices. The prescription contraceptive exclusion is not based on any such principle of risk assessment but only minor cost savings and unthinking assumptions about women's health care needs. It is this sort of unnecessary and arbitrary—even if unintentional—discrimination by employers offering employee benefit plans that the ADA specifically prohibits.

Imposing liability on employers for offering employee benefit plans that exclude contraceptives from prescription coverage would not force employers to shoulder substantial additional costs. It would not in any way affect the structure of the workplace or employers' freedom to use their sound business judgment. Nor, in fact, would it make much difference to anyone other than the women who are now excluded from the benefit. And women who demand the benefit because of their disability will feel the difference most profoundly. Only by ignoring the particular issues and needs of women whose disabilities are implicated by the health risks of their potential pregnancies could one conclude that using the ADA for this purpose is taking disability rights too far.

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362. *See* Bragdon v. Abbott, 524 U.S. 624, 641 (1998).