The Impact of Title III of the Americans with Disabilities Act on Employer-Provided Insurance Plans: Is the Insurance Company Subject to Liability?

Jill L. Schultz

Follow this and additional works at: https://scholarlycommons.law.wlu.edu/wlulr

Part of the Disability Law Commons, and the Insurance Law Commons

Recommended Citation


Available at: https://scholarlycommons.law.wlu.edu/wlulr/vol56/iss1/9

This Note is brought to you for free and open access by the Washington and Lee Law Review at Washington and Lee University School of Law Scholarly Commons. It has been accepted for inclusion in Washington and Lee Law Review by an authorized editor of Washington and Lee University School of Law Scholarly Commons. For more information, please contact christensena@wlu.edu.
The Impact of Title III of the Americans with Disabilities Act on Employer-Provided Insurance Plans: Is the Insurance Company Subject to Liability?

Jill L. Schultz*

Table of Contents

I. Introduction ........................................ 344
II. The Nature of Insurance ........................................ 350
III. Title III of the Americans with Disabilities Act .......................... 353
IV. The Title III Inquiry ......................................... 355
   A. The Four Factor Analysis ............................. 355
   B. The First Circuit's Inconclusive Analysis .......... 358
      1. The Meaning of "Public Accommodations" ...... 358
      2. The First Circuit Fails to Resolve Title III Claim 359
   C. The Sixth Circuit Narrows the Scope of Title III ....... 360
      1. Public Accommodation Is a Physical Place .......... 361
      2. The Sixth Circuit Rejects Title III Claim ......... 363
V. The Broad Scope of Title III: Applying the Four Factors .... 365
   A. Title III Is Not Limited to Protecting Physical Access into Places of Public Accommodation ................. 365
      1. The First Circuit's Analysis of Section 301(7) .......... 366
      2. The Broad Language of Title III ................. 369
      3. Legislative History ................................ 372
   B. Title III Does Not Require Physical Presence ........ 373
   C. Title III Governs the Contents of Goods and Services .... 377
   D. Individuals Need Not Obtain Goods Directly from Public Accommodation .................................. 381
VI. Conclusion ........................................ 386

* The author thanks Professors Adam Scales and Gwen Handelman, Richard Smith, and Ellen Wasilausky for their assistance in the development and editing of this Note. The author also expresses her appreciation to her family and to Matthew Distler for their continuing support and encouragement.
I. Introduction

At least forty-three million Americans have one or more physical or mental disabilities.¹ Insurance is critical to these individuals because it provides them with the means to participate fully in society.² The specific terms of employer-provided insurance plans, however, often discriminate against individuals with disabilities and are not as beneficial to those individuals as they may appear.³

Employers providing insurance to their employees typically purchase a universal policy directly from an insurance company and then offer coverage to their employees under that policy.⁴ These employer-provided policies dis-

1. See Americans with Disabilities Act of 1990 § 2(a)(1), 42 U.S.C. § 12101(a)(1) (1994) (stating that "some 43,000,000 Americans have one or more physical or mental disabilities, and this number is increasing as the population as a whole is growing older").

2. See Doukas v. Metropolitan Life Ins. Co., 950 F. Supp. 422, 427 (D.N.H. 1996) (stating that "it is often insurance coverage that will determine a disabled person's ability to prevent the disability from limiting his or her participation in society" (quoting Parker v. Metropolitan Life Ins. Co., 99 F.3d 181, 193 (6th Cir.), reh'g en banc granted and vacated, 107 F.3d 359 (6th Cir. 1996), reh'g en banc, 121 F.3d 1006 (6th Cir. 1997), cert. denied, 118 S. Ct. 871 (1998))); Kimberly A. Ackourey, Comment, Insuring Americans with Disabilities: How Far Can Congress Go to Protect Traditional Practices?, 40 EMORY L.J. 1183, 1215-16 (1991) (recognizing that ability of disabled individuals to become independent citizens depends on prohibition of discrimination in insurance coverage).

3. See Parker v. Metropolitan Life Ins. Co., 121 F.3d 1006, 1008 (6th Cir. 1997) (en banc) (considering discrepancy between long-term disability coverage that employer provides to employees with physical illnesses and coverage employer provides to employees with mental illnesses), cert. denied, 118 S. Ct. 871 (1998); Carparts Distrib. Ctr., Inc. v. Automotive Wholesaler's Ass'n, 37 F.3d 12, 14 (1st Cir. 1994) (contrasting $25,000 cap on health benefits for AIDS-related illnesses with $1 million cap that insurer provides to other plan members under same employer-provided insurance plan); PENSION & WELFARE BENEFITS ADMIN., U.S. DEP'T OF LABOR, TRENDS IN HEALTH BENEFITS 231 (John P. Turner et al. eds., 1993) (stating that some employers restrict long-term disability benefits for individuals with mental disabilities); Stephen M. Koslow & Mark R. White, Employer-Sponsored Health Benefits Under the ADA, 16 MENTAL & PHYSICAL DISABILITY L. REP. 560, 561 (1992) (discussing discriminatory treatment of disabilities in employer-provided insurance plans); Brian D. Shannon, Paving the Path to Parity in Health Insurance Coverage for Mental Illness: New Law or Merely Good Intentions?, 68 U. COLO. L. REV. 63, 66-67 (1997) (stating that insurance plans typically provide less coverage for mental health treatment than for physical ailments); Bonnie Poitras Tucker, Insurance and the ADA, 46 DePAUL L. REV. 915, 925-26 (1997) (noting major dispute involving health insurance plans that provide less coverage for mental health care than for physical health care).

4. See JERRY S. ROSENBOBLOOM & G. VICTOR HALLMAN, EMPLOYEE BENEFIT PLANNING 233 (1981) (stating that employers often provide disability income benefits through plans that insurance companies underwrite); Koslow & White, supra note 3, at 560 (stating that employer typically provides employer-sponsored health insurance plan that employer purchases from private insurance company); Ted Storer, Comment, The Americans with Disabilities Act: Will the Insurance Field Change?, 20 OHIO N.U. L. REV. 1031, 1041 (1994) (stating that some employers purchase employee benefit plans from insurance companies).
insurance company liability under title III of the ada 345

criminate against employees with disabilities in the following ways: (1) they often treat physical and mental ailments differently, (2) they regularly exclude coverage for "pre-existing" conditions, and (3) they frequently exclude certain ailments or subject those ailments to lower benefit levels. Individuals with disabilities face such discrimination in health insurance and long-term disability insurance plans.

Congress enacted the americans with disabilities act of 1990 (ada) to eliminate discrimination against americans with disabilities and to bring these individuals into the social and economic mainstream of american life. the ada defines causes of action in terms of the environment in which discriminatory acts may occur. title i prohibits discrimination in private employment, title ii prohibits discrimination in public services, and title iii prohibits discrimination by public accommodations.

5. see koslow & white, supra note 3, at 561 (discussing treatment of disabilities by employer-provided insurance policies).

6. see shannon, supra note 3, at 66-67 (stating that insurance plans typically provide less coverage for mental health treatment than for physical ailments); tucker, supra note 3, at 925-26 (discussing major dispute that exists with respect to disability-based distinctions in employer-provided health insurance plans); see also infra notes 53-57 and accompanying text (discussing importance of health insurance to individuals with disabilities).

7. see pension & welfare benefits admin., supra note 3, at 231 (stating that some employers have begun to restrict long-term disability benefits for individuals with mental disabilities); see also infra notes 58-61 and accompanying text (discussing long-term disability insurance).


10. see h.r. rep. no. 101-485, pt. 1, at 24 (stating that ada will permit united states to welcome individuals with disabilities into mainstream of american society), reprinted in 1990 u.s.c.c.a.n. 267, 268; s. rep. no. 101-116, at 2 (same).

11. see infra notes 12-14 and accompanying text (describing environments in which ada provides causes of action).

12. see ada §§ 101-108, 42 u.s.c. §§ 12111-12117 (discussing prohibition of discrimination in area of private employment). congress refers to this section of the ada as title i. see ada, pub. l. no. 101-336, §§ 101-108, 104 stat. 327, 330-37 (1990) (designating this section "title i - employment").

13. see ada §§ 201-246, 42 u.s.c. §§ 12131-12165 (discussing prohibition of discrimination by public entity). congress refers to this section of the ada as title ii. see ada, §§ 201-246, 104 stat. at 337-53 (designating this section "title ii - public services").

14. see ada §§ 301-310, 42 u.s.c. §§ 12181-12189 (discussing prohibition of discrimination by public accommodations). congress refers to this section of the ada as title iii. see ada, §§ 301-310, 104 stat. at 353-65 (designating this section "title iii - public accommodations and services operated by private entities").
Many employees look to the provisions of the ADA for protection from disability-based terms of their employer-provided insurance plans. Employees sue their employers under Title I, which governs employment practices and applies to employer-provided insurance. Many employees, however, also initiate a cause of action against the insurance company that issues the employer-provided insurance plan on the theory that the insurance company violated Title III. Title III, perhaps the broadest title in the ADA, prohibits discrimination by people who own, lease, or operate places of public accommodation, including insurance offices.


17. See ADA § 102(a), 42 U.S.C. § 12112(a) (1994) (prohibiting employer from discriminating against qualified individual with disability regarding "terms, conditions, and privileges of employment"). Title I prohibits an employer from subjecting an individual to different terms or conditions of insurance based on disability alone, if the disability does not impose increased risks. See EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, TECHNICAL ASSISTANCE MANUAL § 7.9 (Jan. 26, 1992), reprinted in AMERICANS WITH DISABILITIES ACT MANUAL (BNA) 90:0565-66 (stating that Title I prohibition against discrimination applies to provision and administration of health insurance and other benefit plans).

18. See Parker, 121 F.3d at 1010-14 (considering employee's Title III claim against insurance company); Carparts Distrib. Ctr., Inc. v. Automotive Wholesaler's Ass'n, 37 F.3d 12, 18-20 (1st Cir. 1994) (considering employee's Title III claim against insurer); Lewis, 982 F. Supp. at 1163-65 (considering employee's standing to sue insurance company under Title III); Leonard F., 967 F. Supp. at 805-06 (considering employee's Title III claim against insurance company); Pappas, 861 F. Supp. at 619-20 (same).


20. See ADA § 302(a), 42 U.S.C. § 12182(a) (prohibiting discrimination on basis of disability "by any person who owns, leases (or leases to), or operates a place of public accommodation").

21. See infra notes 168-85 and accompanying text (demonstrating that insurance office is place of public accommodation and that Title III equates insurance company with person operating insurance office).
A determination of whether Americans with disabilities have a cause of action under Title III against insurance companies on the basis of the discriminatory terms of employer-provided insurance plans requires a two-part inquiry. First, Title III must be broad enough to authorize an employee's claim challenging the substantial terms of a policy issued by the insurance company.22 Unless Title III authorizes the suit, the potential plaintiff with a disability has no cause of action against the insurance company and must proceed solely against the employer.23 Second, Section 501(c) of the ADA24 must not provide immunity for the actions of the insurance company.25 Section 501(c) protects the insurance industry's current practice of providing insurance based on state-regulated risk classification schemes.26 Section 501(c) appears, however, to limit its own scope.27 It protects insurance companies only when they use risk classification schemes that do not violate state law28 and do not

22. See Tucker, supra note 3, at 940 (stating that to determine liability of private insurance carrier, it is first necessary to address "the threshold issue of when an insurer falls within the coverage of Title III").


24. ADA § 501(c), 42 U.S.C. § 12201(c).

25. See Monica E. McFadden, Insurance Benefits Under the ADA: Discrimination or Business as Usual?, 28 TORT & Ins. L.J. 480, 481 (1993) (stating that Section 501(c) raises question about whether ADA shields insurance companies from all liability).

26. See S. Rep. No. 101-116, at 84-85 (1989) (discussing intent of Section 501(c)). Section 501(c) states:

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

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

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

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

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


27. See ADA § 501(c), 42 U.S.C. § 12201(c) (limiting scope of protections to when insurance company uses risk classification schemes consistent with state law and does not use such classification schemes as subterfuge to violate ADA).

28. See id. (stating that Section 501(c) protects insurers that administer risks based on or not inconsistent with state law).
otherwise evade the purposes of Title III. Courts recognize that Section 501(c) does not provide absolute immunity to insurance companies. The exact scope of the protection offered insurers under Section 501(c) has, however, yet to be determined and is beyond the scope of this Note. This Note focuses on the issue that courts largely have ignored: Does Title III authorize plaintiffs to sue insurance companies when the terms of their employer-provided insurance plans discriminate on the basis of a disability?

Two federal courts of appeals have considered whether Title III provides an employee with a disability a cause of action against an insurance company based on the discriminatory terms of an employer-provided insurance policy. The two cases provide diametrically opposed answers and inadequate anal-

29. See id. (stating that "[p]aragraphs (1), (2), and (3) shall not be used as a subterfuge to evade the purposes of subchapter[s] I and III of this chapter").

30. See, e.g., Winslow v. IDS Life Ins. Co., No. CIV. 3-96-75 MJD/ AJB, 1998 WL 852876, at *6 (D. Minn. Sept. 30, 1998) (recognizing that if Title III did not apply to insurance policies, Section 501(c) would be superfluous); Cloutier v. Prudential Ins. Co., 964 F. Supp. 299, 302-03 (N.D. Cal. 1997) (stating that "Congress did not intend for § 501(c) to confer blanket immunity on insurers in every insurance-related decision" and that "[t]he plain text of § 501(c) leaves insurance companies vulnerable in two ways"); Doukas v. Metropolitan Life Ins. Co., 950 F. Supp. 422, 430-31 (D.N.H. 1996) (stating that insurance practice consistent with state law may still be subterfuge to evade purposes of ADA and therefore not receive protections of Section 501(c)); Kotev v. First Colony Life Ins. Co., 927 F. Supp. 1316, 1323 (C.D. Cal. 1996) (concluding that Section 501(c) does not prevent Title III claim); Baker v. Hartford Life Ins. Co., No. 94-C-4416, 1995 WL 573430, at *4 (N.D. Ill. Sept. 28, 1995) (recognizing possibility that the decision to deny plaintiff coverage was not based on considerations of underwriting or classifying risks, in which case plaintiff might be entitled to recover under the ADA"). But see Leonard F. v. Israel Discount Bank, 967 F. Supp. 802, 805 (S.D.N.Y. 1997) (stating that plain meaning and legislative history of Section 501(c) support conclusion that Congress did not intend Title III to regulate business of private insurance carriers).

31. See Parker v. Metropolitan Life Ins. Co., 121 F.3d 1006, 1010-14 (6th Cir. 1997) (en banc) (considering employee's Title III claim against insurance company), cert. denied, 118 S. Ct. 871 (1998); Carparts Distrib. Ctr., Inc. v. Automotive Wholesaler's Ass'n, 37 F.3d 12, 18-20 (1st Cir. 1994) (same). This Note focuses on the analysis provided by the First and Sixth Circuits. It is important to note, however, that in 1998 the Court of Appeals for the Third Circuit rejected an employee's Title III claim against an insurance company based on a disparity in the benefits for mental and physical disabilities provided in an employer-provided insurance plan. See Ford v. Schering-Plough Corp., 145 F.3d 601, 603 (3d Cir. 1998) (describing issue presented upon appeal), cert. denied, 119 S. Ct. 850 (1999). In concluding that the employee did not have a cause of action against the insurance company based on Title III, the Third Circuit aligned itself with the analysis provided by the Sixth Circuit in Parker v. Metropolitan Life Insurance Co. Id. at 613-14 (stating that "by aligning ourselves with the Sixth Circuit's Parker decision regarding the definition of 'public accommodation,' we part company with the First Circuit in this regard"). See infra notes 130 and 151 for a discussion of specific instances in the Ford case in which the Third Circuit agreed with the Sixth Circuit's analysis in Parker.

yses. In *Carparts Distribution Center, Inc. v. Automotive Wholesaler's Ass'n*, the United States Court of Appeals for the First Circuit determined that the broad language and the intent of Title III suggested that a plaintiff could directly sue an insurance company based on the discriminatory, disability-based health coverage of an employer-provided insurance plan. In *Parker v. Metropolitan Life Insurance Co.*, however, the United States Court of Appeals for the Sixth Circuit interpreted Title III narrowly and

33. See infra Part V (discussing inadequacies of First and Sixth Circuit opinions).

34. 37 F.3d 12 (1st Cir. 1994).

35. *Carparts Distrib. Ctr., Inc. v. Automotive Wholesaler's Ass'n*, 37 F.3d 12, 19 (1st Cir. 1994) (arguing that "public accommodations" do not require physical structures); see infra Part IV.B (providing First Circuit's Title III analysis). In *Carparts*, the First Circuit considered whether Ronald Senter and his employer, Carparts Distribution Center, Inc. (Carparts), had a valid Title III claim against Automotive Wholesaler's Association of New England, Inc. (AWANE), the provider of the self-funded medical reimbursement plan of which Carparts was a member, and AWANE's administering trust, Automotive Wholesaler's of New England, Inc. Insurance Plan (AWANE Plan). *Carparts*, 37 F.3d at 14-15. Senter contracted HIV in 1986 and AIDS in 1991. *Id.* at 14. When the AWANE Trust limited benefits for AIDS-related illnesses, Senter and Carparts sued both AWANE and AWANE Plan alleging that the cap on benefits violated the ADA. *Id.* The First Circuit, looking at the language and legislative history of Title III, concluded that "public accommodations" need not consist of physical structures. *Id.* at 19. The court stated that a contrary conclusion would conflict with the purposes of the ADA and of Title III. *Id.* However, the court recognized that Title III's ambiguous language makes the statute difficult to interpret. *Id.* The court could not determine from the text and supporting legislative material whether Congress intended Title III to shape and control the products and services that a place of public accommodation offers. *Id.* The court also noted the ambiguity of the ADA's treatment of insurance in Section 501(c). *Id.* at 20. Because of the ambiguities involved in the Title III issue, the court remanded the case on the plaintiffs' Title I claim instead and declined to provide further guidance on the Title III issue beyond merely suggesting that a Title III claim might be possible. *Id.*

36. See *Carparts*, 37 F.3d at 20 (suggesting "possibility that the plaintiff may be able to develop some kind of claim under Title III").

37. 121 F.3d 1006 (6th Cir. 1997).

38. See *Parker v. Metropolitan Life Ins. Co.*, 121 F.3d 1006, 1012 (6th Cir. 1997) (en banc) (arguing that Title III does not govern contents of employer-provided insurance plan and that employer-provided plan is not good or service of place of public accommodation), cert. denied, 118 S. Ct. 871 (1998); see also infra Part IV.C (providing Sixth Circuit's analysis of Title III). In *Parker*, the Sixth Circuit considered whether Title III prohibits an insurance company from issuing an employer-provided insurance plan that contains longer benefits for employees with physical disabilities than for employees with mental disabilities. *Parker*, 121 F.3d at 1008. Schering-Plough Health Care Products (Schering-Plough) employed the plaintiff, Ouida Sue Parker, and offered her a long-term disability plan issued by Metropolitan Life Insurance Co. (MetLife). *Id.* Parker became disabled because of severe depression, and 24 months after she began to receive disability benefits, Schering-Plough terminated the payments pursuant to the terms of the insurance plan. *Id.* The court, relying upon the language of Title III, determined that although Title III expressly states that an insurance office is a public accommodation, Parker did not seek a good from an insurance office. *Id.* at 1010. The court stated that an employer-provided benefit plan is not a good from a place of public accommoda-
concluded that Title III does not provide potential plaintiffs a direct cause of action against an insurance company. 39 Neither court provided satisfactory guidance for potential plaintiffs, potential defendants, or district courts.

This Note examines whether Title III provides Americans with disabilities a cause of action against insurance companies on the basis of the discriminatory terms of employer-provided insurance plans. Part II provides an overview of the insurance system, including the principles of risk classification that tend to discriminate against employees with disabilities.40 Part III discusses the background and language of Title III.41 Part IV presents a critical analysis of the scope of Title III protections as it currently exists under case law.42 Part IV.A focuses the Title III inquiry within the employer-provided insurance context,43 and Parts IV.B and IV.C present the competing analyses of the Carparts and Parker courts, respectively, within that context.44 Part V critiques the Carparts and Parker decisions, explores their omissions, and concludes that Title III is broad enough to subject insurance companies to liability based on discrimination in the terms of employer-provided insurance plans.45

II. The Nature of Insurance

Insurance protects against significant and unpredictable financial loss stemming from defined adverse events.46 Insurance companies provide such protection. Id. Based on the Department of Justice (DOJ) regulations, the court also determined that Title III regulates the availability of the goods and services offered by a place of public accommodation as opposed to the contents of those goods and services. Id. at 1011-12. In addition to Title III, the court also considered whether the ADA prohibits only discrimination between the disabled and the nondisabled as opposed to discrimination between individuals with different disabilities. Id. at 1015-19. The court decided that the ADA does not require equality between individuals with different disabilities. Id. at 1019. The court concluded that the provision of an employer-provided long-term disability plan that an insurance company administers does not fall within the purview of Title III. Id. at 1015.

39. See Parker, 121 F.3d at 1014 (stating that "provision of a long-term disability plan by an employer and administered by an insurance company does not fall within the purview of Title III").

40. See infra notes 46-70 and accompanying text (discussing nature of insurance industry).

41. See infra notes 71-82 and accompanying text (presenting provisions of Title III).

42. See infra notes 83-158 and accompanying text (discussing Title III inquiry).

43. See infra notes 83-95 and accompanying text (presenting four factors that courts must consider in order to determine appropriate scope of Title III protections within context of employer-provided insurance plans).

44. See infra notes 96-158 and accompanying text (describing Title III analyses of Carparts and Parker courts).

45. See infra notes 159-320 and accompanying text (concluding that scope of Title III is broad enough to subject insurance company to liability).

46. See COMMITTEE ON EMPLOYER-BASED HEALTH BENEFITS, INSTITUTE OF MEDICINE,
protection pursuant to written contracts in return for advance payments. An employer typically contracts with an insurance company to provide insurance to its employees. The employer holds the policy and assumes partial or full responsibility for the premium payments. As a third party beneficiary, however, the employee is a de facto party to the contract or is at least sufficiently interested in the contract to require the employer and the insurance company to consider the employee's interests.

Employer-provided health and disability insurance plans are critical to individuals with disabilities, yet these plans often exclude or limit coverage for certain conditions or ailments that affect these individuals. Adequate health insurance is often the key to full participation in society for many individuals with disabilities. Nonetheless, these individuals cannot always secure adequate health insurance coverage. The recent national health insurance debate reveals a terrible shortage of employer-provided health insurance available to individuals with disabilities. This shortage causes great concern

---

47. See COMMITTEE ON EMPLOYER-BASED HEALTH BENEFITS, supra note 46, at 43 (defining insurance).
49. See 1 id. (explaining nature of group insurance).
50. See 1 id. (discussing third party beneficiary's unique position under group insurance contracts).
51. See supra note 2 and accompanying text (discussing why insurance coverage is critical to disabled individuals).
52. See supra notes 5-7 and accompanying text (discussing discriminatory nature of employer-provided health and disability insurance policies).
53. See World Ins. Co. v. Branch, 966 F. Supp. 1203, 1208 (N.D. Ga. 1997) (noting that access to adequate health care is important to disabled individual's ability to participate in society), aff'd in part, vacated in part, 156 F.3d 1142 (11th Cir. 1998); Doukas v. Metropolitan Life Ins. Co., 950 F. Supp. 422, 427 (D.N.H. 1996) (stating that "it is often insurance coverage that will determine a disabled person's ability to prevent the disability from limiting his or her participation in society") (quoting Parker v. Metropolitan Life Ins. Co., 99 F.3d 181, 192-93 (6th Cir.), reh'g en banc granted and vacated, 107 F.3d 359 (6th Cir. 1996), reh'g en banc, 121 F.3d 1006 (6th Cir. 1997), cert. denied, 118 S. Ct. 871 (1998)); Ackourey, supra note 2, at 1216 (stating that prohibition of discrimination in insurance coverage is crucial to ability of disabled individuals to become independent citizens).
54. See Milstein et al., supra note 19, at 1243 (discussing difficulties that health insurance introduces to individuals with disabilities); John W. Parry, Mental Disabilities Under the ADA: A Difficult Path to Follow, 17 MENTAL & PHYSICAL DISABILITY L. REP. 100, 108 (1993) (stating that insurers limit employees' health coverage for mental disability treatment).
55. See Maria O'Brien Hylton, Insurance Risk Classifications After McGann: Managing
because of the importance of health insurance for people seeking quality health care for themselves and for their families and because of the dependence of most Americans on employer-provided plans for their health insurance.

Long-term disability insurance is also significant to individuals with disabilities. Disability benefits provide wage replacements to employees who are absent from work because of injury or illness. Employees typically receive long-term disability insurance when they are absent from work for a certain amount of time. Some employers limit the long-term disability insurance available for individuals with certain disabilities.

The discriminatory terms of employer-provided insurance plans are due in part to the nature of the insurance system. The insurance industry writes policies based on principles of actuarial fairness and risk classification. Actuarial fairness principles suggest that insurers link the cost of and access to insurance coverage to an individual's risk class. For example, younger people pay more for car insurance because statistically, they have more accidents.

---

56. See Ackourey, supra note 2, at 1186 (stating that health coverage is necessity for people wishing to provide themselves and their family with adequate health care).
57. See Koslow & White, supra note 3, at 560 (discussing Americans' dependence on employer-sponsored health coverage to provide for their own and their families' health care); see also Steven Eisenstat, Capping Health Insurance Benefits for AIDS: An Analysis of Disability-Based Distinctions Under the Americans with Disabilities Act, 10 J.L. & POL. 1, 2 (1993) (suggesting that three out of four American workers rely upon health insurance that employer provides); Palmer, supra note 46, at 1353 (stating that Americans "who have health insurance typically obtain coverage through an employer-sponsored plan").
58. See PENSION & WELFARE BENEFITS ADMIN., supra note 3, at 230 (discussing long-term disability insurance).
59. Id. at 225.
60. Id. at 230.
61. See id. at 231 (stating that some companies restrict long-term disability benefits for individuals with mental disabilities).
62. See Storer, supra note 4, at 1048-49 (suggesting that different terms or conditions of insurance plans may be "legal discrimination" if "based upon risk classification made in conformity with non-discriminatory requirements").
63. See COMMITTEE ON EMPLOYER-BASED HEALTH BENEFITS, supra note 46, at 180 (stating that conventional insurance theory follows principle of actuarial fairness).
64. See Ackourey, supra note 2, at 1212 (stating that "[t]he basis of the insurance industry . . . involves assessing risks according to the classification of individuals with particular risks").
65. COMMITTEE ON EMPLOYER-BASED HEALTH BENEFITS, supra note 46, at 180.
66. See id. (providing examples of actuarial fairness).
Risk classification is an actuarial technique for estimating an individual’s future claim costs based on risk characteristics of the individual, such as the presence of a disability, that have a direct causal or statistical link to the risk that the insurance company is measuring, such as disability income or medical expenses. When an insurance company provides insurance to an individual, the company classifies the person according to various characteristics and then charges a rate accordingly. The insurer may also limit the amount of insurance coverage that a policy provides to an individual. Employer-provided insurance plans usually do not vary the degree of coverage that a policy provides to individual members of the plans based on individual risk classification. Instead, employers subscribe to group plans that tend to impose blanket limitations that affect all employees that display the same characteristics.

III. Title III of the Americans with Disabilities Act

Section 302(a) of Title III of the ADA prohibits discrimination by public accommodations. The section provides that "[n]o individual shall be discriminated against on the basis of disability in the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of any place of public accommodation by any person who owns, leases (or leases to), or operates a place of public accommodation." Title III defines a "public accommodation" as a private entity whose operations affect commerce.

The plain statutory language of Title III indicates that an insurance office is a place of public accommodation. An insurance company typically owns,
leases, or operates an insurance office.\textsuperscript{75} Thus, for the purpose of determining whether an insurance company is subject to liability under Title III, the appropriate question is whether the insurance company that owns, leases, or operates the insurance office "discriminated against [an employee] on the basis of disability in the full and equal enjoyment of" the goods or services of the insurance office.\textsuperscript{76}

The provisions of Section 302(b)(1) of the ADA assist in answering this question.\textsuperscript{77} Section 302(b)(1) describes the general forms of discrimination that Section 302(a) prohibits.\textsuperscript{78} Three general forms of discrimination are relevant within the insurance context. First, a public accommodation may not deny an individual with a disability the opportunity to participate in or benefit from the goods or services of a place of public accommodation.\textsuperscript{79} Second, a public accommodation may not provide an individual with a disability an opportunity to participate in or benefit from a good or service that is not equal to the opportunity provided to other individuals.\textsuperscript{80} Finally, a public accommodation may not provide an individual with a disability a good or service that is different or separate from that provided to other individuals.\textsuperscript{81} Title III


\textsuperscript{76} See ADA § 302(a), 42 U.S.C. § 12182(a) (providing general prohibition of discrimination by public accommodations).

\textsuperscript{77} See ADA § 302(b)(1), 42 U.S.C. § 12182(b)(1) (1994) (providing general forms of discrimination that Section 302(a) prohibits).

\textsuperscript{78} See id. (describing general forms of discrimination that Title III prohibits); S. REP. No. 101-116, at 60 (1989) (stating that Section 302(b)(1) of ADA specifies general forms of discrimination prohibited by Title III).


\textit{It shall be discriminatory to subject an individual or class of individuals on the basis of a disability or disabilities of such individual or class, directly, or through contractual, licensing, or other arrangements, to a denial of the opportunity of the individual or class to participate in or benefit from the goods, services, facilities, privileges, advantages, or accommodations of an entity.}

\textit{Id.}


\textit{It shall be discriminatory to afford an individual or class of individuals, on the basis of a disability or disabilities of such individual or class, directly, or through contractual, licensing, or other arrangements with the opportunity to participate in or benefit from a good, service, facility, privilege, advantage, or accommodation that is not equal to that afforded to other individuals.}

\textit{Id.}

prohibits these forms of discrimination regardless of whether the public accommodation directly discriminates or does so indirectly through contractual, licensing, or other arrangements.\textsuperscript{82}

\textit{IV. The Title III Inquiry}

\textit{A. The Four Factor Analysis}

Discrimination in the terms of employer-provided insurance plans is subtle and is therefore difficult to identify and to examine under Title III.\textsuperscript{83} It differs from the traditional claim of overt discrimination involving a denial of physical access,\textsuperscript{84} such as when a store owner refuses to allow a blind individual to enter into the store\textsuperscript{85} or when a store is inaccessible by wheelchair. Because of this difference, the determination of whether an employee can maintain a cause of action against an insurance company demands a more thorough analysis of the scope of Title III than courts typically engage in when considering a claim of overt discrimination.\textsuperscript{86}

Four factors are relevant to the determination of whether Title III provides employees with a cause of action against insurance companies on the basis of the discriminatory terms of employer-provided insurance plans. First,
courts must determine whether Title III is limited to protecting physical access into places of public accommodation.\textsuperscript{87} When an employee sues an insurance company under Title III, the employee alleges discrimination in the terms of the insurance policy, not a denial of physical access to the insurance office.\textsuperscript{88} If Title III protects only physical access, an employee does not have a cause of action against an insurance company.

Second, courts need to consider whether a plaintiff must be physically present inside a place of public accommodation to be entitled to nondiscriminatory treatment.\textsuperscript{89} An employee is not physically present in the insurance office when the employee obtains an employer-provided plan.\textsuperscript{90} If Title III

\textsuperscript{87} Compare World Ins. Co. v. Branch, 966 F. Supp. 1203, 1207 (N.D. Ga. 1997) (stating that scope of Title III extends beyond mere prohibition of denial of physical access to place of public accommodation), \textit{aff'd in part, vacated in part}, 156 F.3d 1142 (11th Cir. 1998), Cloutier v. Prudential Ins. Co., 964 F. Supp. 299, 302 (N.D. Cal. 1997) (stating that to interpret Title III as prohibiting only physical barriers to access to public accommodations is inconsistent with language of Title III), Doukas v. Metropolitan Life Ins. Co., 350 F. Supp. 422, 425-26 (D.N.H. 1996) (suggesting that Title III does not merely prohibit public accommodations from denying physical access), Kotev v. First Colony Ins. Co., 927 F. Supp. 1316, 1321 (C.D. Cal. 1996) (stating that Title III does not bar only discrimination in access to physical structures), and Tucker, \textit{supra} note 3, at 942 (stating that Title III extends beyond mere access to facilities), \textit{with} Elitt, 922 F. Supp. at 223 (determining that plaintiff had to show denial of physical access to ice rink as place of public accommodation to have successful Title III claim), and Pappas, 861 F. Supp. at 620 (stating that Congress limited scope of Title III to protect only disabled person's inability to make physical use of services of place of public accommodation).

\textsuperscript{88} See Parker v. Metropolitan Life Ins. Co., 121 F.3d 1006, 1008 (6th Cir. 1997) (en banc) (considering liability of insurance company for issuing disability plan containing longer benefits for employees with physical disabilities than for employees with mental disabilities), \textit{cert. denied}, 118 S. Ct. 871 (1998); \textit{Carparts}, 37 F.3d at 14 (considering plaintiffs' allegations concerning lifetime cap on health benefits for employees with AIDS); Lewis v. Aetna Life Ins. Co., 982 F. Supp. 1158, 1159-60 (E.D. Va. 1997) (considering discrepancy between employer-provided disability benefits that insurer offers to employees with physical disabilities as compared to benefits that insurer offers to employees with mental disabilities).

\textsuperscript{89} See \textit{Parker}, 121 F.3d at 1011 n.3 (failing to resolve issue of whether discrimination must occur while plaintiff is physically present inside place of public accommodation); \textit{Lewis}, 982 F. Supp. at 1163-64 (considering whether Title III protections extend to goods purchased while plaintiff was not physically present inside place of public accommodation); Doukas v. Metropolitan Life Ins. Co., 950 F. Supp. 422, 425 (D.N.H. 1996) (noting that court in \textit{Carparts} stated that Congress intended to protect those individuals purchasing services over telephone or by mail as support for conclusion that Title III does not protect only denial of goods or services that occurs when plaintiff is physically present (citing \textit{Carparts Distrib. Ctr., Inc. v. Automotive Wholesaler's Ass'n, 37 F.3d 12, 19 (1st Cir. 1994)); Baker v. Hartford Life Ins. Co., No. 94-C-4416, 1995 WL 573430, at *3 (N.D. Ill. Sept. 28, 1995) (stating that plaintiff need not be physically present at place of public accommodation for Title III to ensure nondiscriminatory treatment).

\textsuperscript{90} See \textit{Parker}, 121 F.3d at 1011 (noting that employee did not physically access insurance policy from insurance office); \textit{Lewis}, 982 F. Supp. at 1163-64 (discussing defendant's
requires physical presence and face-to-face contact, an employee cannot sue an insurance company for discrimination in the terms of an employer-provided insurance plan.

Third, courts must ascertain whether Title III governs the contents of the goods and services that public accommodations offer. In making a Title III claim based on the discriminatory terms of an employer-provided insurance plan, an employee alleges discrimination in the contents of the policy as opposed to discrimination in the access to the nominal coverage provided by the insurance company. Therefore, unless an employee alleges a complete denial of insurance, the employee cannot sue the insurance company if Title III does not govern the contents of goods and services.

Finally, courts must consider the relationship between the employee and the insurance company. An employee obtains an employer-provided insurance plan through the employer rather than directly from the insurance company. If Title III only governs discrimination that a public accommodation inflicts directly upon individuals, an employee does not have a cause of action against the insurance company.

Each of these four factors is critical to a thorough interpretation of the application of Title III to employer-provided insurance. The only two federal courts of appeals to consider the issue, however, each failed to fully address all four factors. Thus, neither court adequately analyzed the Title III inquiry.

---

91. See Carparts Distrib. Ctr., Inc. v. Automotive Wholesaler’s Ass’n, 37 F.3d 12, 19 (1st Cir. 1994) (stating that Title III’s language is ambiguous concerning whether Congress intended Title III to shape contents of goods or services offered). Compare Parker, 121 F.3d at 1012 (stating that Title III does not govern contents of insurance plan), and Ronald S. Cooper, The Treatment of Employee Benefit Programs Under the Americans with Disabilities Act of 1990, 17 J. PENSION PLAN & COMPLIANCE 37, 46 (1991) (demonstrating that Title III does not apply to product design), with Doukas, 950 F. Supp. at 425-26 (stating that Title III extends to contents of insurance policies), and Storer, supra note 4, at 1036 (stating that Title III governs terms of private insurance contracts).

92. See Parker, 121 F.3d at 1012 (finding it necessary to address whether Title III governs contents of insurance plan because of plaintiff’s claim of discrimination in terms of policy); Doukas, 950 F. Supp. at 425 (same).

93. Compare Parker, 121 F.3d at 1010 (arguing that because plaintiff accessed plan provided by employer, plaintiff did not seek good or service of insurance office) with Lewis, 982 F. Supp. at 1165 (concluding that Title III prohibits insurer from discriminating regardless of whether insurer sells policy directly to individual or sells indirectly to employee through contractual arrangement with employer).

94. See supra notes 48-50 and accompanying text (discussing nature of employer-provided insurance).

95. See infra notes 96-158 and accompanying text (discussing Title III analysis of Carparts and Parker courts).
B. The First Circuit's Inconclusive Analysis

In Carparts Distribution Center, Inc. v. Automotive Wholesaler's Ass'n, the First Circuit considered whether an employee and his employer had causes of action under Titles I and III against the insurance company that provided health insurance to Carparts's employees. Carparts participated in a medical reimbursement plan, the Automotive Wholesalers Association of New England Health Benefit Plan (Plan). Automotive Wholesalers Association of New England, Inc. (AWANE) and its administering trust, Automotive Wholesalers Association of New England, Inc. Insurance Plan (AWANE Plan) offered the Plan to Carparts. Ronald Senter, an employee of Carparts, was the sole shareholder, president, and chief executive director of Carparts. He contracted HIV in 1986, which developed into AIDS in 1991. In 1990, AWANE informed Carparts that it would amend the plan to limit benefits for AIDS-related illnesses to $25,000.

Carparts and Senter sued AWANE and AWANE Plan under two theories. First, they alleged that the lifetime cap on benefits for individuals with AIDS constituted illegal discrimination on the basis of a disability in violation of Title III. Second, Carparts and Senter alleged that AWANE and AWANE Plan were employers for the purposes of Title I and therefore violated Title I by discriminating in the terms of the insurance plan. The district court dismissed plaintiffs' Title I and Title III claims, and the plaintiffs appealed to the United States Court of Appeals for the First Circuit. On appeal, the plaintiffs argued, inter alia, that the district court erred in determining that a public accommodation must be an actual physical structure, which the defendants did not possess.

1. The Meaning of "Public Accommodations"

In considering the appeal from the district court's dismissal, the Carparts court determined the meaning of "public accommodations" by analyzing

96. Carparts Distrib. Ctr., Inc. v. Automotive Wholesaler's Ass'n, 37 F.3d 12, 14 (1st Cir. 1994).
97. Id.
98. Id.
99. Id.
100. Id.
101. Id.
102. Id. at 14-15.
103. Id. at 15-16.
104. Id. at 15.
105. Id. at 18.
Section 301(7) of the ADA.\textsuperscript{106} Section 301(7) lists private entities that are public accommodations for the purposes of Title III if the operations of those entities affect commerce.\textsuperscript{107} As the Carparts court stated, the list "includes a 'travel service,' a 'shoe repair service,' an 'office of an accountant, or lawyer,' an 'insurance office,' a 'professional office of a healthcare provider,' and 'other service establishment[s].'"\textsuperscript{108} The court determined that the plain meaning of these terms indicates that Title III does not require public accommodations to have physical structures.\textsuperscript{109} The conclusion that Title III extends beyond merely protecting physical access into physical structures necessarily follows from this determination.\textsuperscript{110}

If the establishments listed in Section 301(7) need not have physical structures, it would be illogical to require a plaintiff to be physically present inside a physical structure to be entitled to nondiscriminatory treatment.\textsuperscript{111} The Carparts court, although still addressing whether public accommodations are physical places, provided direct support for the argument that a plaintiff need not be physically present to have a cause of action under Title III.\textsuperscript{112} Because many service establishments, such as travel services, conduct business without requiring a person to enter a physical structure to obtain the services, the court concluded that Congress contemplated that service establishments include providers of services that do not require individuals to enter an office to receive services.\textsuperscript{113} The court stated that Congress could not have intended for the ADA to protect those who enter an office to receive services, but not those who purchase the same services by telephone or through correspondence.\textsuperscript{114}

2. \textit{The First Circuit Fails to Resolve Title III Claim}

Although the court was confident in its conclusion that public accommodations need not have physical structures, the court did not have sufficient

\textsuperscript{106} Id. at 19.
\textsuperscript{108} Carparts Distrib. Ctr., Inc. v. Automotive Wholesaler's Ass'n, 37 F.3d 12, 19 (1st Cir. 1994) (quoting ADA § 301(7)(F), 42 U.S.C. § 12181(7)(F)).
\textsuperscript{109} Id.
\textsuperscript{110} See supra notes 87-88 and accompanying text (discussing factor concerning whether Title III merely protects physical access into physical structures).
\textsuperscript{111} See supra notes 89-90 and accompanying text (discussing factor addressing whether plaintiff must be physically inside place of public accommodation for Title III to ensure nondiscriminatory treatment).
\textsuperscript{112} See Carparts, 37 F.3d at 19 (stating that it would be irrational for Congress to have intended to protect persons who enter an office to purchase goods but not persons who purchase those goods through correspondence or by telephone).
\textsuperscript{113} Id.
\textsuperscript{114} Id.
knowledge of the facts of the case to determine whether the plaintiffs had a valid Title III claim. The court recognized that the determination of the validity of the Title III claim would require a careful consideration of the language of Title III. The court, however, found the bare language and legislative history of Title III unclear, particularly concerning whether Congress intended to provide only access to products and services or whether Congress intended also to shape and to control the contents of the products and services that a place of public accommodation offers. Because the court remanded the case on the Title I issue and determined that the facts before it were insufficient, the court chose not to resolve the ambiguity, but instead allowed the district court to ascertain the appropriate scope of Title III on remand. Thus, the court failed to determine whether Title III governs the contents of goods and services and chose to limit its Title III conclusion to the possibility that Senter and Carparts might develop a Title III claim against AWANE.

C. The Sixth Circuit Narrows the Scope of Title III

In Parker v. Metropolitan Life Insurance Co., the Sixth Circuit considered whether an employee had a valid cause of action under Title III of the ADA against the insurance company that issued an employer-provided disabili-

115. See id. at 20 (stating that "[w]hile it is tempting to seek to provide further guidance [on the Title III issue], the nature of the record and the way the issues are addressed in the appellate briefs make it imprudent to do so").

116. See id. at 19 (stating that "[b]eyond our threshold determination, we must tread with care").

117. Id.

118. See id at 21 (vacating district court's dismissal of plaintiffs' ADA claims). On remand, the district court accepted the First Circuit's conclusion that a public accommodation need not be a physical structure and thus considered whether defendants were public accommodations. Carparts Distrib. Ctr., Inc. v. Automotive Wholesaler's Ass'n, 987 F. Supp. 77, 81 (D.N.H. 1997). Defendants asserted that they were not public accommodations and were therefore entitled to judgment as a matter of law with regard to plaintiffs' Title III claims. Id. After considering defendants' arguments, the district court concluded that defendants failed to demonstrate the absence of a genuine issue of material fact as to whether they were public accommodations under Title III. Id.

119. See supra notes 91-92 and accompanying text (discussing third factor that concerns whether Title III governs only access to, as opposed to contents of, goods and services of place of public accommodation). The court failed to mention the fourth factor that concerns the relationship between the employee and the insurance company issuing the employer-provided insurance plan.

120. See Carparts Distrib. Ctr., Inc. v. Automotive Wholesaler's Ass'n, 37 F.3d 12, 20 (1st Cir. 1994) (stating that "at this stage it is unwise to go beyond the possibility that the plaintiff may be able to develop some kind of claim under Title III").
ity plan.\textsuperscript{121} Schering-Plough Health Care Products (Schering-Plough) employed the plaintiff, Ouida Sue Parker, and offered her a long-term disability plan that Metropolitan Life Insurance Company (MetLife) issued.\textsuperscript{122} Parker became disabled because of severe depression, and twenty-four months after she began to receive payments, Schering-Plough terminated her payments pursuant to the terms of the plan.\textsuperscript{123} Parker sued MetLife, alleging that the discrepancy between the length of benefits provided to individuals with physical disabilities and the length of benefits provided to individuals with mental disabilities constituted a violation of Title III.\textsuperscript{124} The district court dismissed Parker's Title III claim based upon the conclusion that Title I does not govern discrimination in the terms of insurance policies.\textsuperscript{125} Parker appealed, and a panel of the Sixth Circuit reversed the district court's dismissal of the Title III claim.\textsuperscript{126} Following the reversal, the defendant sought rehearing en banc.\textsuperscript{127} The Sixth Circuit, hearing the case en banc, vacated its prior judgment and agreed with the district court's dismissal of the Title III claim.\textsuperscript{128} Then, the plaintiff appealed, bringing the case before the Sixth Circuit sitting en banc for a second time.\textsuperscript{129}

1. Public Accommodation Is a Physical Place

Hearing the case en banc for the second time, the Sixth Circuit disagreed with the First Circuit's conclusion that a public accommodation need not be a physical place.\textsuperscript{130} Applying the principle of \textit{noscitur a sociis},\textsuperscript{131} the Parker

\begin{itemize}
\item \textsuperscript{121} Parker v. Metropolitan Life Ins. Co., 121 F.3d 1006, 1008 (6th Cir. 1997) (en banc), \textit{cert. denied}, 118 S. Ct. 871 (1998).
\item \textsuperscript{122} Id.
\item \textsuperscript{123} Id.
\item \textsuperscript{124} See id. (presenting Parker's claims).
\item \textsuperscript{125} Id.
\item \textsuperscript{126} Id. at 1009.
\item \textsuperscript{127} Id.
\item \textsuperscript{128} Id.
\item \textsuperscript{129} Id.
\item \textsuperscript{130} Id. at 1013-14; see supra Part IV.B.1 (providing First Circuit's analysis of meaning of "public accommodations"). In Ford v. Schering-Plough Corp., the Third Circuit also disagreed with the First Circuit's definition of "public accommodation" and aligned itself with the Sixth Circuit's conclusion that a "public accommodation" is a place. See Ford v. Schering-Plough Corp., 145 F.3d 601, 613-14 (3d Cir. 1998) (aligning itself with Sixth Circuit's definition of "public accommodation" and explaining its disagreement with First Circuit's conclusion that public accommodation need not be place), \textit{cert. denied}, 119 S. Ct. 830 (1999).
\item \textsuperscript{131} See \textsc{Black's Law Dictionary} 1060 (6th ed. 1990) (explaining that under doctrine of \textit{noscitur a sociis}, "the meaning of questionable or doubtful words or phrases in a statute may be ascertained by reference to the meaning of other words or phrases associated with it").
\end{itemize}
court determined that the public accommodations that Section 301(7) lists are physical places.\textsuperscript{132} The court noted that every term in Section 301(7) is a physical place open to public access.\textsuperscript{133} Although subsection F lists establishments such as a "travel service," a "shoe repair service," an "office of an accountant or lawyer," an "insurance office," and any "other service establishment," the court stated that Congress used the term "service" throughout the list because it did not have a better term to describe the offices where entities provide their services.\textsuperscript{134} The court stated that placing the terms "office of an accountant or lawyer," "insurance office," and "professional office of a healthcare provider" in the context of the other terms in subsection F suggests only a physical place where entities offer their services.\textsuperscript{135} The Sixth Circuit concluded that interpreting such terms as permitting a public accommodation to be something other than a physical place is contrary to the principle of \textit{noscitur a sociis}.\textsuperscript{136}

The Sixth Circuit disagreed with the \textit{Carparts} court's conclusion that public accommodations need not have physical structures.\textsuperscript{137} The Sixth Circuit's analysis therefore did not address two factors—whether Title III protects only physical access into places of public accommodation and whether a plaintiff must be physically present at the place of public accommodation to be entitled to nondiscriminatory treatment—that the \textit{Carparts} court addressed in defining "public accommodation."\textsuperscript{138} In determining that a public accommodation must be a physical place, the \textit{Parker} court left open the possibility that Title III protects only physical access.\textsuperscript{139} In contrast to the First Circuit's conclusion in \textit{Carparts}, the \textit{Parker} court's analysis does not necessarily lead to the determination that a plaintiff need not be physically present inside a place of public accommodation to be entitled to nondiscriminatory treatment.\textsuperscript{140}

\begin{enumerate}
\item[133.] \textit{Id.}
\item[134.] \textit{Id.}
\item[135.] \textit{Id.}
\item[136.] \textit{Id.}
\item[137.] \textit{Id.} at 1013 (expressing disagreement with \textit{Carparts} court).
\item[138.] \textit{See supra} notes 110-14 and accompanying text (discussing \textit{Carparts} court's analysis of first two factors inherent in court's definition of "public accommodation").
\item[139.] \textit{See supra} notes 87-88 and accompanying text (discussing first factor—whether Title III prohibits only denial of physical access—that courts must address in determining if Title III cause of action exists).
\item[140.] \textit{See supra} notes 89-90 and accompanying text (discussing second factor—whether plaintiff must be physically present inside place of public accommodation for Title III to ensure nondiscriminatory treatment of plaintiff—that courts must address in determining if Title III cause of action exists).
\end{enumerate}
Thus, contrary to *Carparts*, Parker did not inherently provide guidance on the first two factors that courts must consider in determining a plaintiff's Title III claim.

2. The Sixth Circuit Rejects Title III Claim

The Sixth Circuit affirmed the summary judgment that the district court entered against Parker's Title III claim. In reaching this decision, the court stated that Title III regulates only the availability of the goods and services that a place of public accommodation offers as opposed to the contents of those goods and services. Quoting Department of Justice (DOJ) regulations, the court stated that the purpose of Title III "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." The court concluded that Title III does not apply to the contents of a long-term disability plan.

Although recognizing that an insurance office is a public accommodation under Title III, the Sixth Circuit determined that an employer-provided insurance plan is not a good that a place of public accommodation offers. The *Parker* court stated that the plaintiff did not seek a good from an insurance office but instead accessed a benefit plan that her employer provided. Such a benefit plan, according to the court, is not a good that a public accommodation offers. The court reasoned that the plaintiff did not access her

---

141. See supra notes 106-09 and accompanying text (providing *Carparts* court's conclusion that public accommodations need not have physical structures).

142. See supra notes 87-90 and accompanying text (discussing first two factors that courts must consider in determining if Title III cause of action exists).

143. See *Parker v. Metropolitan Life Ins. Co.*, 121 F.3d 1006, 1015 (6th Cir. 1997) (en banc) (stating that "District Court properly granted summary judgment on behalf of the defendants"), cert. denied, 118 S. Ct. 871 (1998).

144. *Id.* at 1012; see supra notes 91-92 and accompanying text (discussing third factor — whether Title III governs contents of goods and services — that courts must address in determining if Title III cause of action exists).

145. *Parker*, 121 F.3d at 1012 (quoting 28 C.F.R. pt. 36, app. B, at 630 (1996)). In the regulation, the DOJ explained: "[A] bookstore, for example, must make its facilities and sales operations accessible to individuals with disabilities, but is not required to stock Brailled or large print books. Similarly, a video store must make its facilities and rental operations accessible, but is not required to stock closed-captioned video tapes." *Id.* (quoting 28 C.F.R. pt. 36, app. B, at 630).

146. *Id.*

147. *Id.*

148. *Id.* at 1011.

149. *Id.* at 1012.
plan from the insurance office and that the public cannot enter into the office of either the insurance company or the employer and obtain the same disability plan.150 The court therefore stated that a nexus did not exist between the services that MetLife offered to the public from its insurance office and the terms of the plaintiff's disability plan.151

In support of its conclusion, the Sixth Circuit again considered the regulations implementing Title III.152 In the regulations, the DOJ explained that "[t]he Department intends for wholesale establishments to be covered . . . as places of public accommodation except in cases where they sell exclusively to other businesses and not to individuals."153 Based upon this explanation, the Sixth Circuit concluded its analysis by stating that a disability plan which an insurance company offers solely to a business on a discounted rate is not a good or service that a place of public accommodation offers.154

Based upon the resolution of the above issues, the Sixth Circuit concluded that Title III does not govern a long-term disability plan which an employer provides to its employees.155 In reaching this conclusion, the court provided answers to two of the four factors that courts must address when assessing a Title III claim — whether Title III governs the contents of goods and services and whether Title III only prohibits discrimination that a public accommodation inflicts directly upon individuals with disabilities.156 How-

150. Id. at 1011.

151. Id. The Third Circuit in Ford v. Schering-Plough Corp. also concluded that when an employee receives benefits from an insurance company via her employment, the employee lacks a nexus to the insurance office and thus does not suffer from discrimination in connection with a public accommodation. Ford v. Schering-Plough Corp., 145 F.3d 601, 612-13 (3d Cir. 1998) (discussing lack of nexus between employee's benefit plan and services provided by insurance office), cert. denied, 119 S. Ct. 850 (1999).


154. Id. at 1012.

155. Id. at 1014. In addition to resolving the Title III claim, the Sixth Circuit determined that the ADA does not mandate equality between individuals with different disabilities and would therefore allow distinctions between benefits for physical versus mental disabilities. Id. at 1015. The court concluded that the ADA prohibits only discrimination between the disabled and the nondisabled. Id. Although this issue is beyond the scope of this Note, it is a concern. See Lewis v. Aetna Life Ins. Co., 982 F. Supp. 1158, 1169 (E.D. Va. 1997) (concluding that providing unequal benefits for physical versus mental disabilities violates ADA); Shannon, supra note 3, at 66-67 (noting that insurance plans typically provide less coverage for mental health treatment than for physical ailments); Tucker, supra note 3, at 925-26 (discussing EEOC's view that distinctions in coverage for physical conditions versus mental conditions are not disability based).

156. See supra notes 91-94 and accompanying text (describing last two factors that courts must consider in determining whether Title III cause of action exists).
ever, these factors are the two that the Carparts court did not address.\textsuperscript{157} Because neither the First Circuit nor the Sixth Circuit adequately resolved all four factors, the decisions reached by these courts failed to produce a decisive answer to the question of the potential liability of an insurance company that issues employer-provided insurance plans.\textsuperscript{158}

\section{V. The Broad Scope of Title III: Applying the Four Factors}

\subsection{A. Title III Is Not Limited to Protecting Physical Access into Places of Public Accommodation}

The Carparts court determined that Title III does not require a plaintiff to demonstrate that the defendant public accommodation was a tangible, physical structure.\textsuperscript{159} Many lower courts have extrapolated from Carparts a second conclusion: Title III plaintiffs do not have to demonstrate that the defendant denied them actual physical access to a place of public accommodation.\textsuperscript{160} Indeed, if Carparts is correct as to its limited conclusion, then the second conclusion necessarily follows.\textsuperscript{161} This Note suggests that, ironically, the Carparts court may have erred in concluding that physical structures are irrelevant to a Title III claim, yet the conclusion that lower courts have extrapolated from the First Circuit’s opinion is accurate.\textsuperscript{162} Lower courts have persuasively concluded that Title III is not limited to eradicating merely

\begin{itemize}
\item \textsuperscript{157} See supra note 119 and accompanying text (discussing failure of Carparts court to address third and fourth factors).
\item \textsuperscript{158} Compare supra notes 106-20 and accompanying text (discussing First Circuit’s analysis) with supra notes 130-57 and accompanying text (providing Sixth Circuit’s reasoning).
\item \textsuperscript{159} See supra Part IV.B.1 (providing First Circuit’s determination that public accommodations are not limited to actual physical structures).
\item \textsuperscript{160} See World Ins. Co. v. Branch, 966 F. Supp. 1203, 1207 (N.D. Ga. 1997) (citing Carparts decision as support for statement that scope of Title III "extends beyond the mere denial of physical access to places of public accommodation"), aff’d in part, vacated in part, 156 F.3d 1142 (11th Cir. 1998); Cloutier v. Prudential Ins. Co., 964 F. Supp. 299, 302 (N.D. Cal. 1997) (stating that interpreting Title III to prohibit only physical barriers to access to public accommodation is not consistent with statutory language of Title III); Shultz v. Hemet Youth Pony League, Inc., 943 F. Supp. 1222, 1225 (C.D. Cal. 1996) (stating that Title III does not limit "place of public accommodation" to actual physical structures with physical boundaries); Doukas v. Metropolitan Life Ins. Co., 950 F. Supp. 422, 425 (D.N.H. 1996) (suggesting that Carparts court already determined that Title III does not merely prohibit public accommodations from denying physical access); Kotev v. First Colony Life Ins. Co., 927 F. Supp. 1316, 1321 (C.D. Cal. 1996) (stating that Title III does not bar only discrimination in access to physical structures).
\item \textsuperscript{161} See supra notes 109-10 and accompanying text (providing logic of second conclusion following from Carparts court’s conclusion).
\item \textsuperscript{162} See supra note 160 and accompanying text (discussing conclusions of lower courts).
\end{itemize}
physical barriers to places of public accommodation.\textsuperscript{163} The language of Title III and the intent underlying the ADA reveals that Title III prohibits less overt discrimination as well.\textsuperscript{164}

\textbf{1. The First Circuit’s Analysis of Section 301(7)}

Two district courts have relied upon the \textit{Carparts} court’s limited conclusion that a public accommodation need not have an actual physical structure as support for their own conclusions that Title III extends beyond protecting physical access into places of public accommodation.\textsuperscript{165} The First Circuit’s interpretation of Title III, however, confused the true issue. This is not surprising given the confusing language that Congress employed in defining "public accommodation"\textsuperscript{166} and in describing the general prohibition of discrimination by public accommodations.\textsuperscript{167}

One problem evident in Title III’s list of private entities that "are considered public accommodations"\textsuperscript{168} is that the list unambiguously includes insurance offices.\textsuperscript{169} However, whether an insurance office is actually a private entity is uncertain. An entity is "[a]n organization or being that possesses separate existence for tax purposes."\textsuperscript{170} Corporations and partnerships are entities.\textsuperscript{171} Congress’s definition of entities throughout the ADA conforms to the definition of an "entity" as an organization or being.\textsuperscript{172} The insurance

\textsuperscript{163} See infra notes 194-225 and accompanying text (determining that Title III protections extend beyond ensuring physical access for individuals with disabilities).

\textsuperscript{164} See infra notes 194-225 and accompanying text (providing analysis of Title III).

\textsuperscript{165} See World Ins. Co. v. Branch, 966 F. Supp. 1203, 1207 (N.D. Ga. 1997) (citing \textit{Carparts} court’s decision that Title III does not limit public accommodation to actual physical structure as support for court’s own conclusion that Title III extends beyond prohibiting physical access to places of public accommodation), aff’d in part, vacated in part, 156 F.3d 1142 (11th Cir. 1998); Doukas v. Metropolitan Life Ins. Co., 950 F. Supp. 422, 425 (D.N.H. 1996) (same).


\textsuperscript{167} See ADA § 302(a), 42 U.S.C. § 12182(a) (providing general prohibition against discrimination by public accommodations).

\textsuperscript{168} ADA § 301(7), 42 U.S.C. § 12181(7).

\textsuperscript{169} See ADA § 301(7)(F), 42 U.S.C. § 12181(7)(F) (listing insurance office as public accommodation).

\textsuperscript{170} BLACK’S LAW DICTIONARY 532 (6th ed. 1990).

\textsuperscript{171} See id. (providing examples of entities).

\textsuperscript{172} Compare ADA § 301(6), 42 U.S.C. § 12181(6) (1994) (stating that "private entity" means entity other than public entity) with ADA § 201(1), 42 U.S.C. § 12131(1) (stating that "public entity" means State or local government, department or agency of State or local government, and commuter authority). A government, a department or agency, and a commuter authority are certainly not physical structures.
company, not the insurance office as listed in Title III, has a separate legal existence and therefore constitutes the private entity.

Another problem exists when one substitutes the words "insurance office" for "public accommodation" in Section 302(a). Section 302(a) would then read: "No individual shall be discriminated against on the basis of disability . . . by any person who owns, leases (or leases to), or operates a place of [insurance office]." The term "office" already indicates a place. The term "place" would be superfluous if an insurance office is actually a public accommodation.

The DOJ recognized the contradictions inherent in the language Congress used to define "public accommodations" and provided the most sensible solution. In its regulations implementing Title III, the DOJ stated that a "public accommodation" is the private entity that owns, leases, or operates a place of public accommodation, and therefore "public accommodation" corresponds to "person" in Section 302(a). The DOJ defined a "place of public accommodation" as a facility listed in Section 301(7) that a private entity operates and whose operations affect commerce. Thus, the DOJ concluded that Section 301(7), which includes an insurance office, actually lists places of public accommodation as opposed to private entities or public accommodations.

The DOJ's conclusion is consistent with Section 302(a), which prohibits discrimination by a person who owns, operates, or leases a place of public accommodation. The public accommodation is the private entity that owns, operates, or leases a facility listed in Section 301(7). Thus, Title III prohibits discrimination by the private entity, such as an insurance company, that owns, operates, or leases a facility, such as an insurance office. Applying

173. See ADA § 302(a), 42 U.S.C. § 12182(a) (emphasis added) (stating general prohibition of discrimination by public accommodations).
174. See WEBSTER'S NEW WORLD DICTIONARY 941 (3d ed. 1991) (defining "office" as "place" in which "the affairs of a business . . . are carried on").
176. 28 C.F.R. pt. 36.
178. Id. at 606.
179. See id. at 603-04 (defining "place of public accommodation").
180. See id. at 603 (stating that "definition of place of public accommodation incorporates the 12 categories of facilities represented in the statutory definition of public accommodation in section 301(7) of the ADA").
181. Id.
182. See id. (stating that public accommodation is "the private entity that owns, leases (or leases to), or operates a place of public accommodation").
183. See id. (asserting that Title III prohibits discrimination by private entities).
this interpretation to Section 302(a) and again substituting terms yields a more rational result. Section 302(a) would then read: "No individual shall be discriminated against on the basis of disability in the full and equal enjoyment of the goods, services... of any [insurance office] by any [insurance company that] owns, leases (or leases to), or operates [an insurance office]." Thus, as the DOJ regulations suggest, the public accommodation is the subject of the nondiscrimination requirements of Title III and cannot discriminate in the goods, services, facilities, accommodations, privileges, and advantages of the actual facility.185

Based upon the DOJ's resolution of Title III's conflicting language, the Carparts court erred in concluding that the items in the list in Section 301(7) are not actual physical structures.186 In addition to stating that a place of public accommodation is a facility listed in Section 301(7), the DOJ defined a facility as a physical structure.187 Therefore, according to the DOJ, each item in Section 301(7) is a physical structure.188 The DOJ's interpretation is consistent with the Parker court's conclusion that the words in Section 301(7) refer to physical places.189 However, the Parker court erred in stating that a public accommodation is a physical place.190 The DOJ demonstrated that the place of public accommodation, not the actual public accommodation, is the physical place.191

The DOJ's interpretation supports the Parker court's determination that the items in Section 301(7) are actual physical places and suggests that the

---


186. See supra notes 168-85 and accompanying text (describing DOJ's interpretation of Title III's language and flaws in Carparts court's interpretation of "public accommodations").

187. See supra note 179 and accompanying text (providing DOJ's explanation that Section 301(7) lists facilities).

188. See 28 C.F.R. pt. 36, app. B, at 602. The DOJ stated that facility "means all or any portion of buildings, structures, sites, complexes, equipment, rolling stock or other conveyances, roads, walks, passageways, parking lots, or other real or personal property, including the site where the building, property, structure, or equipment is located." Id.

189. See supra notes 187-89 and accompanying text (explaining logic in conclusion that items in Section 301(7) are physical places).

190. See supra text accompanying note 132 (stating that Parker court concluded that items in Section 301(7) are physical places).

191. See Parker v. Metropolitan Life Ins. Co., 121 F.3d 1006, 1010 (6th Cir. 1997) (en banc) (stating that, based on Section 301(7), "a public accommodation is a physical place"), cert. denied, 118 S. Ct. 871 (1998).

192. See supra notes 175-89 and accompanying text (providing logic for conclusion that place of public accommodation is physical structure).
Carparts court was wrong in stating that those items need not have physical structures. Based on the DOJ regulations, a plaintiff must demonstrate that a private entity discriminated against him on the basis of a disability in the enjoyment of goods and services available from an actual physical structure. Therefore, a court should not rely upon the Carparts court's potentially wrong conclusion that the items listed in Section 301(7) are not necessarily physical structures to support the argument that Title III does not prevent only discrimination in the physical access to physical structures. It is therefore necessary to look to the broad language and legislative history of Title III to support the conclusion that Title III protects more than physical access into places of public accommodation.

2. The Broad Language of Title III

The broad language of Title III supports the conclusion that Title III does not address only physical barriers to places of public accommodation. The courts that have interpreted Title III as only prohibiting the denial of physical access to a place of public accommodation have focused too narrowly on the word "place." This narrow focus has several flaws. First, it ignores the fact that only certain sections of Title III specifically discuss physical barriers. Second, it renders superfluous much of the language of Title III. Finally, it severely restricts the protections that Title III extends to individuals who do not have an actual physical or mental disability but do have a "disability" as the ADA defines that term.

193. See supra notes 175-89 and accompanying text (demonstrating that place of public accommodation is physical structure).

194. See infra notes 203-14 and accompanying text (analyzing broad language of Title III).

195. See Elitt v. U.S.A. Hockey, 922 F. Supp. 217, 223 (E.D. Mo. 1996) (suggesting that, based on language in Sections 301(7) and 302(a) of Title III, plaintiff had to show denial of access to ice rink as place of public accommodation in order to have successful Title III claim); Pappas v. Bethesda Hosp. Ass'n, 861 F. Supp. 616, 620 (S.D. Ohio 1994) (stating that, based on ordinary, common meaning of words of Section 302(a), Title III is limited to protecting disabled person's ability to make physical use of services of place of public accommodation). The Pappas court stated that a proper example of a Title III claim would be an allegation that an office failed to make accommodations for an individual who required the use of a wheelchair in order to access the place of public accommodation. Id.

196. See infra notes 201-02 and accompanying text (discussing sections of Title III that specifically prohibit discrimination through use of physical barriers).

197. See infra notes 203-10 and accompanying text (providing explanation of how narrow interpretation of Title III renders language superfluous).

198. See infra notes 211-14 and accompanying text (discussing various individuals Title III would fail to protect if Title III only prevented denial of physical access to places of public accommodation).
Nothing in the plain language of Title III narrows its protection to ensuring only physical access to a place of public accommodation. Section 302(a), the general provision of Title III that prohibits discrimination by public accommodations, does not refer to access to physical structures. Sections 302(b)(2)(A)(iv)-(v) are the only sections of Title III that refer specifically to physical barriers to places of public accommodation as prohibited discrimination. It is in these sections that Congress specifically intended to address physical access into places of public accommodation.

Interpreting Title III as prohibiting only physical barriers would render certain language of Title III superfluous. Title III lists the general activities by a public accommodation that Section 302(a) prohibits. One of these general activities involves denying an individual with a disability "the opportunity . . . to participate in or benefit from the goods, services, facilities, privileges, advantages, or accommodations of an entity." Interpreting Title III as prohibiting only denial of physical access to public accommodations would render meaningless provisions that require equal access to goods or services.

199. See Doe v. Mutual of Omaha Ins. Co., 999 F. Supp. 1188, 1193 (N.D. Ill. 1998) (stating that "the plain language of Title III's anti-discrimination provisions nowhere indicates that Title III's scope is limited to questions of access"); Cloutier v. Prudential Ins. Co., 964 F. Supp. 299, 302-03 (N.D. Cal. 1997) (stating that plain language of Title III should not be limited to prohibiting only discrimination in providing physical access); Kotev v. First Colony Life Ins. Co., 927 F. Supp. 1316, 1321 (C.D. Cal. 1996) (stating that plain language of Title III demonstrates that Title III does not prohibit only denial of physical access to places of public accommodation).

200. Kotev, 927 F. Supp. at 1321. For the full text of Section 302(a), see supra text accompanying note 72.

201. See Kotev, 927 F. Supp. at 1322 (stating that only Sections 302(b)(2)(A)(iv)-(v) refer specifically to the prohibition of physical barriers). Section 302(b)(2)(A)(iv) provides that discrimination includes "a failure to remove architectural barriers, and communication barriers that are structural in nature, in existing facilities . . . where such removal is readily achievable." ADA § 302(b)(2)(A)(iv), 42 U.S.C. § 12182(b)(2)(A)(iv) (1994). Section 302(b)(2)(A)(v) states that discrimination also includes "where an entity can demonstrate that the removal of a barrier under clause (iv) is not readily achievable, a failure to make such goods, services, facilities, privileges, advantages, or accommodations available through alternative methods if such methods are readily achievable." ADA § 302(b)(2)(A)(v), 42 U.S.C. § 12182(b)(2)(A)(v).


203. See Chabner v. United of Omaha Life Ins. Co., 994 F. Supp. 1185, 1190 (N.D. Cal. 1998) (stating that interpreting Title III as applying only to physical barriers to entry would render meaningless provisions that require equal access to goods or services); Cloutier, 964 F. Supp. at 302 (noting that interpreting Title III to prohibit only physical barriers to access of public accommodations would dispense with plain language of Title III).

204. See ADA § 302(b), 42 U.S.C. § 12182(b) (describing general activities by public accommodation that violate Title III).

dispenses with the language mandating equal opportunity to benefit from the "goods," "services," "privileges," and "advantages." Thus, if Title III only prohibits the denial of physical access, it would only be necessary to mandate equal opportunity to benefit from the "facilities" and "accommodations" of an entity.

Congress used the nouns "goods," "services," "privileges," and "advantages" not only in the provision mandating equal opportunity but repeatedly throughout the statute. This use demonstrates the significance that Congress placed on each noun. Thus, if Congress intended for Title III to protect only physical access to public accommodations, much of the language in Title III would be meaningless. Because courts should construe statutes in a manner that avoids rendering any language within them superfluous, courts interpreting Title III should not limit Title III to eradicating only physical barriers to places of public accommodation.

Interpreting Title III to protect only physical access would narrow its scope to the point that Title III would only prevent discrimination against some of the individuals that the ADA expressly protects. In addition to protecting individuals with mental or physical impairments, the ADA also protects two categories of individuals who are not impaired: those whom


207. See ADA § 302(b)(1)(A)(i), 42 U.S.C. § 12182(b)(1)(A)(i) (1994) (stating that public accommodations cannot deny disabled individuals opportunity to benefit from "the goods, services, facilities, privileges, advantages, or accommodations of an entity").

208. Cloutier, 964 F. Supp. at 302 n.2. For examples of other sections of Title III that use the various nouns listed, see ADA §§ 302(b)(1)(A)(ii)-(iii), 42 U.S.C. §§ 12182(b)(1)(A)(ii)-(iii). The court in Chabner v. United of Omaha Life Ins. Co., 994 F. Supp. 1185 (N.D. Cal. 1998) noted that interpreting Title III as prohibiting only physical barriers would render meaningless the provision in Section 302(b)(1)(A)(ii) that ensures equal access to goods and services. Id. at 1190. Section 302(b)(1)(A)(ii) provides:

It shall be discriminatory to afford an individual or class of individuals, on the basis of a disability or disabilities of such individual or class . . . with the opportunity to participate in or benefit from a good, service, facility, privilege, advantage, or accommodation that is not equal to that afforded to other individuals.

ADA § 302(b)(1)(A)(ii), 42 U.S.C. § 12182(b)(1)(A)(ii) (emphasis added). The nouns emphasized are also located in the general provision in Section 302(a). See ADA § 302(a), 42 U.S.C. § 12182(a) (describing general rule prohibiting discrimination by public accommodations). Thus, if Title III only governed physical access to physical structures, Section 302(a) only would need to prevent discrimination in "the full and equal enjoyment of the . . . facilities . . . or accommodations of any place of public accommodation by any person who owns, leases (or leases to), or operates a place of public accommodation." Id.


others regard as being impaired and those who have a record of impairment. If Title III specifically protects individuals who face discrimination "because of the known disability of an individual with whom the individual or entity is known to have a relationship or association." If Title III ensures only physical access to places of public accommodation, then many of the individuals who do not have physical impairments, but whom the ADA still protects, could bring a Title III claim only if they could demonstrate that a place of public accommodation took affirmative steps to prevent their physical access. Thus, if Title III protects only physical access into places of public accommodation, then many of the ADA's protections would be meaningless.

3. Legislative History

In addition to the broad statutory language of Title III, the legislative history supports the conclusion that Title III protects more than physical access into places of public accommodation. During the ADA legislative hearings, Congress heard testimony by witnesses describing why individuals with disabilities do not frequent places of public accommodation. Witnesses identified the major areas of discrimination that Congress needed to address. Only one of these areas concerned the lack of physical access to facilities. Congress was thus aware of areas of discrimination beyond the lack of physical access to facilities.

In Senate Report 101-116, the Committee on Labor and Human Resources did not describe the denial of physical access as the only type of discrimination that violates Title III. The Committee explained that a restaurant which allowed an individual with Down's Syndrome to sit at a counter, but not in the table-seating section, would violate Title III. The Committee also stated that a theater or restaurant cannot require an individual

212. Id. (citing ADA § 3(2), 42 U.S.C. § 12102(2)).
213. Id. at 1322 (quoting ADA § 302(b)(1)(E), 42 U.S.C. § 12182(b)(1)(E) (1994)).
214. Id.
217. Id. at 35.
218. Id.
219. See id. at 35-36 (describing testimony that witnesses provided to Congress).
220. See S. REP. No. 101-116, at 62 (providing examples of Title III violations).
221. Id.
with a wheelchair to have a chaperone. The discrimination in these examples is not only a denial of access, but is also a restriction on the disabled individual’s ability to enjoy fully the goods and services offered by the place of public accommodation.

Several courts have determined that Title III protects only physical access into physical structures. The plain language and legislative history of Title III demonstrate, however, that the protections of Title III extend beyond this limited protection. Thus, a public accommodation not only must allow an individual with a disability inside the physical structure, but also must provide that individual with equal enjoyment of the good or service that the place of public accommodation offers.

B. Title III Does Not Require Physical Presence

In concluding that public accommodations are not physical structures, the First Circuit indirectly determined that individuals need not be physically present inside a place of public accommodation for Title III to protect them against discrimination. The Carparts court may have erred, however, in concluding that the establishments listed in Section 301(7) need not have physical structures. Although courts therefore should not rely on the First Circuit’s conclusion about the meaning of public accommodations, the Carparts court provided additional support for the argument that Title III does not merely prevent discrimination which occurs while an individual is physically present inside a place of public accommodation.

---

222. Id.

223. See supra note 195 and accompanying text (discussing view that Title III protects only physical access to physical structures).

224. See supra notes 194-222 (analyzing language and legislative history of Title III to demonstrate that Title III protections extend beyond ensuring physical access to places of public accommodation).

225. See supra notes 205-09 and accompanying text (explaining that Title III mandates full and equal enjoyment of goods and services as well as of facilities and accommodations of places of public accommodation).

226. See supra notes 111-14 and accompanying text (discussing First Circuit’s treatment of issue concerning whether individuals need to be physically present inside place of public accommodation to have Title III claim).

227. See supra Part IV.B.1 (providing First Circuit’s conclusion that items in Section 301(7) need not be physical structures).

228. See supra Part V.A.1 (describing flaws in Carparts court’s interpretation of "public accommodation").

229. See supra notes 112-14 and accompanying text (discussing Carparts court’s statement that Congress would not have intended for Title III not to protect individuals with disabilities who purchase goods through correspondence or by telephone).
The First Circuit stated that by including the term "travel service" in Section 301(7), Congress intended that service establishments include public accommodations that do not require an individual to enter into a physical structure to receive the services offered. As the court reasoned, many travel services conduct business with individuals over the telephone or through correspondence. The same is true of insurance companies. Customers often purchase insurance policies without physically entering the insurance office.

Because insurance provides individuals with disabilities with the means to participate fully in society, an interpretation of Title III requiring an individual to physically enter a place of public accommodation in order to receive Title III protections would conflict with Congress's intent to bring individuals with disabilities into the social and economic mainstream of American life. An insurance office would be able to avoid the provisions of Title III by simply marketing its policies through the mail. This certainly would defeat Congress's intent.

Other courts have agreed with the Carparts court's conclusion that a plaintiff need not be physically present at a place of public accommodation to establish a Title III claim. In Lewis v. Aetna Life Insurance

230. See supra text accompanying note 113 (presenting First Circuit's statement that by including term "travel service," Congress intended service establishments to include public accommodations that do not require individuals to physically enter building to obtain goods or services).

231. See supra text accompanying note 114 (discussing Carparts court's reasoning).


233. Id.

234. See Doukas v. Metropolitan Life Ins. Co., 950 F. Supp. 422, 427 (D.N.H. 1996) (stating that "it is often insurance coverage that will determine a disabled person's ability to prevent the disability from limiting his or her participation in society" (quoting Parker v. Metropolitan Life Ins. Co., 99 F.3d 181, 192-93 (6th Cir.), rehe'g en banc granted and vacated, 107 F.3d 359 (6th Cir. 1996), rehe'g en banc, 121 F.3d 1006 (6th Cir. 1997), cert. denied, 118 S. Ct. 871 (1998))).


236. Lewis, 982 F. Supp. at 1165.

237. See supra note 235 and accompanying text (discussing Congress's intent in enacting ADA).

the United States District Court for the Eastern District of Virginia provided further support for the assertion that Title III prevents discrimination against individuals with disabilities even though the individual did not physically enter an office to obtain goods and services. The court agreed with the First Circuit that ignoring the language of Title III and adopting a contrary interpretation would mean that Title III would not permit a public accommodation to discriminate when an individual purchases goods and services while on its physical premises but would allow discrimination when an individual purchases the same goods or services over the telephone or through the mail. The court demonstrated the irrational nature of such a result by providing an example of a department store that could not refuse to sell shoes to disabled customers who visited the store’s physical business location but could refuse to sell shoes to customers with disabilities who chose to order through the mail by mail or over telephone as support for its determination that Title III does not merely protect physical access to places of public accommodation.

In Lewis, the court considered whether Lewis had a valid Title III claim against the insurance company that issued his employer-provided disability insurance plan. The court agreed with the Carparts court’s assertion that the opposite construction of Title III would yield an irrational result. The court determined that, based on the statutory language of Title III which provides that a Title III violation occurs whether the public accommodation acts directly or indirectly through contractual or other arrangements, an insurer may not write discriminatory insurance plans regardless of the fact that the employee obtains the insurance via an employer.

The court ultimately denied the employer’s and insurance company’s motions to dismiss.

---

240. Lewis v. Aetna Life Ins. Co., 982 F. Supp. 1158, 1164 (E.D. Va. 1997). In Lewis, the court considered whether Lewis had a valid Title III claim against the insurance company that issued his employer-provided disability insurance plan. Id. at 1160. Severe depression had forced Lewis to leave his position as Store Manager at K-mart, and Lewis began receiving disability benefits pursuant to an Aetna Life Insurance Company insurance plan. Id. at 1159. However, the plan terminated disability payments after only 24 months because Lewis’s disability was not physical in nature. Id. at 1159-60. Lewis sued Aetna under Title III and claimed that Aetna had discriminated against him on the basis of a disability in violation of the ADA. Id. at 1160. In considering Lewis’s claim, the court looked for guidance from the Carparts decision and determined that Title III protections extend to goods not purchased in a physical office. Id. at 1163-65. The court agreed with the Carparts court’s assertion that the opposite construction of Title III would yield an irrational result. Id. at 1164-65. The court determined that, based on the statutory language of Title III which provides that a Title III violation occurs whether the public accommodation acts directly or indirectly through contractual or other arrangements, an insurer may not write discriminatory insurance plans regardless of the fact that the employee obtains the insurance via an employer. Id. at 1165. In addition to the Title III claim, the court determined that the ADA prohibits discrimination on the basis of a particular disability and is not limited to discrimination between the disabled and the nondisabled. Id. at 1168. The court also considered the plaintiff’s Title I claim against his employer and stated that an employer violates Title I by discriminating in the terms of an employer-provided plan, which is a fringe benefit of employment that Title I governs. Id. at 1160-61. The court ultimately denied the employer’s and insurance company’s motions to dismiss. Id. at 1169.
241. Id. at 1165.
store’s catalog. The court stated that Congress could not have intended to withhold the ADA’s protections from the millions of individuals with disabilities who purchase goods by telephone or through home delivery. Such a result would conflict with Congress’s intent to provide a comprehensive mandate to eliminate discrimination against individuals with disabilities.

The discrimination that Title III prohibits sometimes occurs when an individual with a disability has contact with a public accommodation only over the telephone or through home delivery. Section 302(a) forbids discrimination against an individual with a disability in the full and equal enjoyment of the goods and services of a place of public accommodation. A public accommodation is capable of denying an individual the full and equal enjoyment of goods and services without the individual being physically present inside the place of public accommodation. For example, in Baker v. Hartford Life Insurance Co., the insurance company informed the plaintiff’s father over the telephone and through correspondence that it would deny coverage for the plaintiff because of the plaintiff’s medical history of seizure disorder. Thus, the insurance company denied the plaintiff the full and

---

242. Id.; cf. Sharrow, 910 F. Supp. at 192 (noting illogical result of requiring plaintiff to be physically present at place of public accommodation). The Sharrow court explained: "To superimpose on the statute a requirement that the plaintiff must present himself or herself at the defendant’s place of business and there be denied service or receive unequal service would be illogical and contrary to the underlying intent of the Act." Id.


244. Id. (quoting ADA § 2(b), 42 U.S.C. § 12101(b) (1994)).


246. ADA § 302(a), 42 U.S.C. § 12182(a).

247. See Baker, 1995 WL 573430, at *3 (stating that discrimination against individual in full and equal enjoyment of goods and services of place of public accommodation can occur when plaintiff is not physically present at place of public accommodation).


249. Baker v. Hartford Life Ins. Co., No. 94-C-4416, 1995 WL 573430, at *1 (N.D. Ill. Sept. 28, 1995). In Baker, the court considered defendant Hartford Life Insurance Company’s motion to dismiss plaintiff Nicholas Baker’s Title III claim. Id. Baker’s father applied for health insurance for Baker through Hartford Life Insurance Company. Id. Hartford Life Insurance Company informed Baker’s father over the telephone and through correspondence that it would deny the application because of Baker’s history of seizure disorder. Id. The court closely analyzed the language of Title III and determined that Baker deserved Title III protection because the insurance office was a place owned, leased, or operated by the insurance company, and because the company denied Baker its good — insurance — on the basis of a disability. Id. at *3. The court stated that Title III does not require a plaintiff to be physically present at the place of public accommodation to enjoy the nondiscrimination provisions of Title III. Id. The court considered the effect of Section 501(c) on Baker’s claim and recognized the
equal enjoyment of insurance coverage, which is the good the company offered, without the plaintiff ever having physically entered the insurance office. Another example is the situation in which a patient calls a dentist or a physician, informs the dentist or physician of her HIV status, and the dentist or physician denies the patient treatment on the basis of this disability. In this instance, the doctor denied the plaintiff medical treatment provided by the doctor's office – a place of public accommodation.

In both of these examples, the actions of the public accommodation violate Section 302(b)(1)(A)(i) of Title III. This section prohibits the denial, on the basis of a disability, of the opportunity to benefit from the goods or services of a place of public accommodation. In each example, the public accommodation refused to provide the disabled individual with the opportunity to benefit from the goods that the public accommodation offers. Based upon the statutory language of Title III and the irrational nature of a contrary interpretation, it is possible for a place of public accommodation—although a physical structure—to violate Title III's general rule against discrimination even when a plaintiff has not attempted to access a good or service by physically entering a physical office.

C. Title III Governs the Contents of Goods and Services

In Parker, the Sixth Circuit determined that Title III governs only the availability, as opposed to the contents, of the goods and services that a public

possibility that the insurance company did not base its denial on considerations of risk classification, and therefore, Baker may have a claim. Id. at *4. The court ultimately denied Hartford Life Insurance Company's motion to dismiss. Id.

250. See id. at *3 (citing ADA § 302(a), 42 U.S.C. § 12182(a) (1994)) (stating that insurance office denied plaintiff its service). The court explained that the "insurance office was a place that was owned, leased, or operated by defendant, and plaintiff was denied a service of this office, insurance, on the basis of his disability." Id. (citing ADA § 302(a), 42 U.S.C. § 12182(a)).

251. See id. (noting that only contact plaintiff had with insurance office was through his father by telephone or correspondence).

252. See Sharrow v. Bailey, 910 F. Supp. 187, 192 (M.D. Pa. 1995) (describing as violation of Title III situation in which patient calls dentist or physician, informs her of disability such as HIV-positive status, and is denied treatment on basis of disability).

253. See ADA § 301(7)(F), 42 U.S.C. § 12181(7)(F) (listing professional office of health care provider as "service establishment").

254. See ADA § 302(b)(1)(A)(i), 42 U.S.C. § 12182(b)(1)(A)(i) (providing that denial of opportunity to benefit from goods and services of place of public accommodation violates Title III). For the full text of Section 302(b)(1)(A)(i), see supra note 79.

255. See ADA § 302(b)(1)(A)(i), 42 U.S.C. § 12182(b)(1)(A)(i) (providing that denial of opportunity to benefit from goods, services, facilities, privileges, advantages, or accommodations of place of public accommodation violates Title III).
accommodation offers.\textsuperscript{256} In making its determination, the court relied solely on the DOJ regulations implementing Title III.\textsuperscript{257} The regulations state that the ADA does not alter the nature or mix of goods that a public accommodation offers.\textsuperscript{258} The \textit{Parker} court specifically relied on the following statement in the DOJ regulations:

The purpose of the ADA’s public accommodations requirements 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. In other words, a bookstore, for example, must make its facilities and sales operations accessible to individuals with disabilities, but is not required to stock Brailled or large print books. Similarly, a video store must make its facilities and rental operations accessible, but is not required to stock closed-captioned video tapes.\textsuperscript{259}

The court erred in relying upon the above DOJ statement as support for the conclusion that Title III does not govern the contents of goods or services. In a separate statement applying specifically to insurance policies, the DOJ explicitly stated that Title III governs the content of insurance policies.\textsuperscript{260} The DOJ provided:

Insurance offices are places of public accommodation and, as such, may not discriminate on the basis of disability in the sale of insurance contracts or in the terms or conditions of the insurance contracts they offer. Because of the nature of the insurance business, however, consideration of disability in the sale of insurance contracts does not always constitute "discrimination." An insurer or other public accommodation may underwrite, classify, or administer risks that are based on or not inconsistent with State law, provided that such practices are not used to evade the purposes of the ADA.\textsuperscript{261}

This statement demonstrates the DOJ’s determination that, except in certain circumstances, Title III governs the terms of insurance policies. The Sixth Circuit failed to mention or to explain why it ignored the DOJ’s explicit

\textsuperscript{256} \textit{See supra} notes 144-46 and accompanying text (explaining \textit{Parker} court’s determination that Title III does not govern contents of goods and services).

\textsuperscript{257} \textit{See} \textit{Parker} v. Metropolitan Life Ins. Co., 121 F.3d 1006, 1012 (6th Cir. 1997) (en banc) (relying upon DOJ regulations as support for conclusion that Title III does not govern contents of goods and services), \textit{cert. denied}, 118 S. Ct. 871 (1998).


\textsuperscript{259} \textit{Parker}, 121 F.3d at 1012 (quoting 28 C.F.R. pt. 36, app. B, at 630).

\textsuperscript{260} \textit{See} DEPARTMENT OF JUSTICE, TECHNICAL ASSISTANCE MANUAL III-3.11000 (Jan. 24, 1992), \textit{reprinted} in AMERICANS WITH DISABILITIES ACT MANUAL (BNA) 90:0917 (stating that Title III governs terms of insurance policies).

\textsuperscript{261} \textit{Id.}
finding related to insurance and instead focused solely on other DOJ regulations that required the court to draw analogies that are ultimately futile.\textsuperscript{262}

In the section of the regulations upon which the \textit{Parker} court relied, the DOJ focused on accessible or special goods.\textsuperscript{263} The purpose of the section is to establish that Title III "does not require a public accommodation to alter its inventory to include accessible or special goods with accessibility features that are designed for, or facilitate use by, individuals with disabilities."\textsuperscript{264} The DOJ provided examples of accessible or special goods, including Brailled versions of books, closed-captioned videotapes, special sizes of clothing, and special foods to meet particular dietary needs.\textsuperscript{265} The DOJ was emphasizing that a public accommodation does not have to provide goods to individuals with disabilities beyond what it usually provides to others.\textsuperscript{266}

When an individual who is blind wishes to obtain Brailled books from a bookstore that does not provide Brailled books, the individual seeks something that the bookstore does not typically provide and that is specially designed for use by individuals with disabilities. When an individual with a disability sues an insurance company on the basis of discriminatory terms in an insurance policy, however, the individual is seeking the same protection from the economic risks of disease that the insurance company already provides to other individuals.\textsuperscript{267} For example, in \textit{Lewis}, the plaintiff sued an insurance company because the insurance company provided disability insurance for individuals with mental disabilities for a shorter period of time

\begin{itemize}
\item \textsuperscript{262} \textit{See Parker}, 121 F.3d at 1012 n.5 (noting that "Department of Justice has in other writings interpreted Title III to include regulation of the substantive terms of insurance contracts").
\item \textsuperscript{263} \textit{See} 28 C.F.R. pt. 36, app. B, at 630 (designating section upon which \textit{Parker} court relies as "Accessible or Special Goods").
\item \textsuperscript{264} \textit{Id.}
\item \textsuperscript{265} \textit{Id.}
\item \textsuperscript{266} \textit{See id.} (stating that ADA does not require public accommodation to alter nature or mix of goods that it typically provides).
\item \textsuperscript{267} \textit{See Parker v. Metropolitan Life Ins. Co.}, 121 F.3d 1006, 1006, 1008 (6th Cir. 1997) (en banc) (describing plaintiff's claim against insurance company that insurer did not provide disability benefits to individuals with mental disabilities for same amount of time that it provided same benefits to individuals with physical disabilities), \textit{cert. denied}, 118 S. Ct. 871 (1998); \textit{Carparts Distrib. Ctr., Inc. v. Automotive Wholesaler's Ass'n}, 37 F.3d 12, 14 (1st Cir. 1994) (explaining that plaintiffs sued because insurance plan limited benefits for AIDS-related illnesses to $25,000, but plan otherwise provided lifetime benefits in amount of $1 million per eligible plan member); \textit{Lewis v. Aetna Life Ins. Co.}, 982 F. Supp. 1158, 1159-60 (E.D. Va. 1997) (describing plaintiff's claim against insurance company that insurer did not provide disability benefits to individuals with mental disabilities for same amount of time that it provided same benefits to individuals with physical disabilities); \textit{Leonard F. v. Israel Discount Bank}, 967 F. Supp. 802, 803 (S.D.N.Y. 1997) (same).\
\end{itemize}
than it provided disability insurance for individuals with physical disabilities. The plaintiff was not trying to obtain a plan that the insurance company did not already provide or that was specially designed for his specific disability. Rather, the plaintiff wanted a plan that did not specifically consider his type of disability and that was comparable to plans that the insurance company already provided to others.

The bookstore example would be comparable to discrimination in the terms of an insurance plan only if the bookstore refused to provide individuals with disabilities books on a certain subject or books that a certain author wrote. For the bookstore to provide ordinary books to individuals with disabilities would not require the bookstore to alter the nature or mix of goods that it typically provides and, therefore, would not do what the DOJ interpreted Title III to prevent. Thus, the Parker court mistakenly relied on the DOJ regulations concerning accessible or special goods in determining that Title III does not govern the contents of goods or services and, therefore, does not govern the contents of insurance policies. The court should have focused its attention on the provisions directly applying to insurance rather than attempting to create an argument based upon regulations that are in no manner applicable in the insurance context.

The language of Title III also supports the conclusion that the Parker court erred in stating that Title III does not govern the contents of goods or services of a place of public accommodation. Section 302(b)(1)(A)(iii) states that it is discriminatory to provide an individual, on the basis of a disability, with a good or service that is different from that provided to other

268. Lewis, 982 F. Supp. at 1159-60.
269. Id.
270. Id.
271. See supra notes 263-70 and accompanying text (discussing DOJ's bookstore example).
273. See supra notes 260-72 and accompanying text (discussing flaws in Parker court's reliance on DOJ regulations).
274. See Doukas v. Metropolitan Life Ins. Co., 950 F. Supp. 422, 425 (D.N.H. 1996) (stating that, based on plain statutory language, Title III extends to substance or contents of insurance policy); Storer, supra note 4, at 1036 (stating that terms of private insurance contracts are covered under Title III's provisions as goods and services). But see Cooper, supra note 91, at 45-46 (demonstrating that Title III does not apply to product design, including insurance contracts). In deciding that Title III does not govern the terms of insurance contracts or policies, Cooper relied on the same DOJ regulations on which the Parker court relied. See id. (relying on DOJ commentary stating that Title III does not require bookstore to stock Brailled books).
INSURANCE COMPANY LIABILITY UNDER TITLE III OF THE ADA 381

individuals. The language "with a good [or] service ... different ... from that provided to other individuals" logically extends to the content or nature of the good itself. Therefore, discrimination in the terms of an insurance policy violates this section by providing an insured with a policy, the contents of which differ on the basis of a disability from that provided to other individuals.

The Parker court incorrectly concluded that Title III does not govern the contents of the goods or services offered by a place of public accommodation. The court completely ignored DOJ statements that are directly applicable to insurance and instead relied on DOJ regulations that, when closely examined, do not support the court's suggestion that Title III does not apply to the contents of goods, and specifically to the terms of insurance plans. The language of Title III supports the view that Title III governs the contents of goods and services.

D. Individuals Need Not Obtain Goods Directly from Public Accommodation

The Parker court determined that an employer-provided insurance plan is not a good that a place of public accommodation offers because the public cannot enter the office of the insurance company and obtain the same plan. The court relied on the DOJ's explanation of whether wholesale establishments are places of public accommodation as support for this conclusion. The DOJ explained that Title III covers wholesale establishments as places of public accommodation except those that sell exclusively to other businesses.

277. See id. (explaining that discrimination in terms of insurance plan violates Section 302(b)(1)(A)(iii) because insurer is providing individual with good or service different from that provided to others).
278. See supra notes 260-77 and accompanying text (providing analysis that refutes Parker court's determination that Title III does not govern contents of goods or services).
279. See supra notes 260-62 and accompanying text (describing Parker court's ignorance of DOJ regulations that are directly applicable to insurance).
280. See supra notes 259-73 and accompanying text (explaining Parker court's reliance upon irrelevant DOJ regulations).
281. See supra notes 274-77 and accompanying text (providing language of Title III as support for view that Title III governs contents of goods and services).
283. Id. at 1011-12.
and not to individuals. The Parker court thus concluded that a disability policy offered solely to a business is not a service or good of a place of public accommodation. The statutory language and legislative history of Title III and the DOJ regulations implementing Title III demonstrate that the Parker court erred in arriving at this conclusion.

Under the plain language of Title III, an insurance office is a place of public accommodation that provides insurance policies as goods or services under Title III. In Lewis, the court determined that an insurer may not discriminate in the provision of insurance policies regardless of whether the insurer sells the policy directly to the individual or provides it to the individual indirectly through the employer pursuant to a contractual or other relationship. In arriving at this conclusion, the court focused on language stating that Title III prohibits discrimination which a public accommodation inflicts either directly or indirectly through contractual or other arrangements. This language is located in the Title III provisions that prohibit a denial of participation by an individual with a disability, that prohibit affording an individual with a disability the opportunity to participate or benefit from a good or service that is not equal to the opportunity afforded to other individuals, and that forbid the provision of a good or service that is different from that pro-

285. Id. at 1012; see Brewster v. Cooley Assoc., No. CIV. 97-0058 M/LFG, 1997 WL 823634, at *1 (D.N.M. Nov. 6, 1997) (agreeing with Parker court's conclusion that benefit plan offered by employer is not good offered by place of public accommodation).
286. See infra notes 287-317 and accompanying text (analyzing Title III's language and legislative history and DOJ regulations implementing Title III).
287. See supra notes 168-85 and accompanying text (demonstrating that insurance office is place of public accommodation).
288. See Doukas v. Metropolitan Life Ins. Co., 950 F. Supp. 422, 425 (D.N.H. 1996) (stating that insurance office is public accommodation that Title III prohibits "from discriminating on the basis of disability in the provision of a good or service, which includes insurance products").
290. See id. (emphasizing language "directly, or through contractual, licensing or other arrangements" located in Section 302(b)(1)(A)(i)).
291. See ADA § 302(b)(1)(A)(i), 42 U.S.C. § 12182(b)(1)(A)(i) (1994) (stating that "[i]t shall be discriminatory to subject an individual or class of individuals on the basis of a disability... directly, or through contractual, licensing, or other arrangements, to a denial of the opportunity... to participate in or benefit from the goods [or] services" (emphasis added)).
292. See ADA § 302(b)(1)(A)(ii), 42 U.S.C. § 12182(b)(1)(A)(ii) (stating that "[i]t shall be discriminatory to afford an individual or class of individuals, on the basis of a disability... directly, or through contractual, licensing, or other arrangements with the opportunity to participate in or benefit from a good [or] service... that is not equal to that afforded to other individuals" (emphasis added)).
vided to other individuals. The Parker court failed to consider the contractual provision.

In the legislative history of Title III, the Committee on Education and Labor described the intent behind the contractual provision. The Committee stated that the intent of the provision is to prevent a public accommodation from doing indirectly through a contractual relationship what Title III prohibits it from doing directly. When an insurance company issues an employer-provided plan, the company does not directly provide the plan to the employees. Rather, the insurance company indirectly provides the insurance to employees by virtue of the contractual arrangement between the insurance company and the employer. Title III prohibits an insurance company from discriminating in the terms of an insurance plan when it directly provides the plan to an individual, such as when an individual personally contacts the insurance company in order to answer the plan. Therefore, to conform to the intent of the contractual provision of Title III, courts should hold that Title III also prohibits an insurance company from discriminating in the terms of an insurance plan when the company provides the plan to the employees through a contractual relationship that the insurance company has with their employer. Although the public cannot enter into the office of an insurance company and obtain the same insurance policy that an employer provides to an employee, the insurance

293. See ADA § 302(b)(1)(A)(iii), 42 U.S.C. § 12182(b)(1)(A)(iii) (stating that "[i]t shall be discriminatory to provide an individual ... on the basis of a disability ... directly, or through contractual, licensing, or other arrangements with a good [or] service ... that is different or separate from that provided to other individuals" (emphasis added)).

294. See Parker v. Metropolitan Life Ins. Co., 121 F.3d 1006, 1010 (6th Cir. 1997) (en banc) (referencing Title III language only to support argument that good must be from place of public accommodation), cert. denied, 118 S. Ct. 871 (1998).


296. Id.; see 28 C.F.R. pt. 36, app. B, at 611 (1996) (stating that "[t]he intent of the contractual prohibitions ... is to prohibit a public accommodation from doing indirectly, through a contractual relationship, what it may not do directly").

297. See 1 RUS, supra note 48, at § 7.1 (stating that central entity, such as employer, operates middle position between insurer and employees).

298. See 1 id. (stating that employer, as central entity between insurance company and employees, has primary contractual relationship with insurance company).

299. See supra notes 274-77 and accompanying text (demonstrating that discrimination in terms of insurance plans violates Section 302(b)(1)(A)(iii)).

300. See supra note 296 and accompanying text (discussing intent of contractual provision of Title III).

company is still providing its good, in the form of an insurance policy, to the employee.\(^{302}\) The insurance office could not provide its insurance plan to the employees on a group basis without the contract with the employer.\(^{303}\) Therefore, the insurance policy is a good of the place of public accommodation regardless of whether the insurance company provides it directly or through an employer.

The *Parker* court mistakenly relied upon the DOJ’s explanations of when wholesale establishments are places of public accommodations.\(^{304}\) In its explanation, the DOJ provided an example of a wholesale establishment that is not a place of public accommodation under Title III.\(^{305}\) The DOJ suggested that a company which grows food produce and supplies the crops exclusively to food processing corporations on a wholesale basis is not a public accommodation when it transacts with the corporations.\(^{306}\) In such a case, the offering of the crops to the food processing corporations is not a service or a good of a place of public accommodation.\(^{307}\)

Insurance companies issuing employer-provided insurance plans are distinguishable from wholesalers that sell only to businesses. The DOJ provided the wholesaler explanation in order to answer commenters’ concerns about the coverage of wholesale establishments under the category of "sales and rental establishments" as listed in Section 301(7).\(^{308}\) The DOJ explained that jewelry stores, pet stores, and bookstores are included in the category of "sales and rental establishments."\(^{309}\) Then, the DOJ stated that a wholesale establishment is not included in that category when the wholesaler sells solely to businesses and not to individuals.\(^{310}\) The key distinction is the fact that the

\(^{302}\) See [Russ, supra note 48, at § 7:1 (stating that group members are ultimate insureds)].

\(^{303}\) See [id. (stating that group insurance policy involves contract between central entity, such as employer, and insurer)].

\(^{304}\) See [supra notes 283-84 and accompanying text (discussing DOJ’s explanation concerning wholesale establishments)].

\(^{305}\) See 28 C.F.R. pt. 36, app. B, at 604 (1996) (providing example of public accommodation selling exclusively to other businesses and not to individuals and therefore not falling within purview of Title III).

\(^{306}\) Id.

\(^{307}\) See [Parker v. Metropolitan Life Ins. Co., 121 F.3d 1006, 1011-12 (6th Cir. 1997) (en banc) (relying upon DOJ’s food wholesaler example as support for conclusion that offering of disability policy on discounted rate to business is not service or good offered by place of public accommodation), cert. denied, 118 S. Ct. 871 (1998)].

\(^{308}\) See 28 C.F.R. pt. 36, app. B, at 604 (stating that commentators were concerned over coverage of wholesale establishments under category of "sales or rental establishments").

\(^{309}\) Id.

\(^{310}\) See [id. (stating that wholesale establishments are places of public accommodation under category of "sales or rental establishments" except when they sell exclusively to businesses and not to individuals)].
wholesaler does not sell to individuals, whereas jewelry stores, pet stores, and bookstores typically do sell to individuals.\textsuperscript{311}

In the wholesaler example, the food wholesaler does not sell to individuals and would not consider the potential individual purchasers of its crops.\textsuperscript{312} However, an insurance company that issues an employer-provided insurance plan provides insurance to the employees.\textsuperscript{313} Although the employer contracts with the insurance company, the individual group member is the insured and ultimately receives the protection offered by the insurance company.\textsuperscript{314} The insurance company therefore considers the individuals who might become the beneficiaries of the group insurance plan.\textsuperscript{315} In relation to losses suffered, the employee is like any other policyholder and may directly contact the insurance company.\textsuperscript{316} Therefore, unlike a wholesale establishment selling exclusively to other businesses, an insurance company issuing employer-provided insurance plans offers its good—insurance plans—to the individual employees and is in a position to consider the characteristics of individuals in determining the terms of the insurance plans.\textsuperscript{317}

The \textit{Parker} court thus erred in arguing that a benefit plan which an employer offers is not a good that a public accommodation offers.\textsuperscript{318} The fact that an employee obtains the insurance policy through the employer rather than directly from the insurance company does not defeat the employee’s Title III claim.\textsuperscript{319} The language and legislative history of Title III indicate Congress’s intent to prohibit exactly what the insurance company is doing in such a case: indirectly providing a good in a discriminatory fashion when direct provision of that same good would violate Title III.\textsuperscript{320}

\textsuperscript{311} \textit{See id.} (stressing that reason that wholesaler selling exclusively to businesses is excluded from category under which jewelry stores, pet stores, and bookstores fall is because wholesaler does not sell to individuals).

\textsuperscript{312} \textit{See id.} (explaining that food wholesaler sells exclusively to other businesses).

\textsuperscript{313} \textit{See I RUS, supra note 48, at § 7:1} (stating that group members are ultimate insureds).

\textsuperscript{314} \textit{See 1 id.} (stating that group members are ultimate insureds).

\textsuperscript{315} \textit{See 1 id.} (stating that individual insured is at least sufficiently interested in insurance contract between employer and insurance company; thus, insurance company should consider individual’s interests).

\textsuperscript{316} \textit{44 C.J.S. Insurance} § 285 (1993).

\textsuperscript{317} \textit{See supra} notes 314-16 and accompanying text (arguing that wholesale establishment is unlike insurance company that issues employer-provided insurance plans).

\textsuperscript{318} \textit{See supra} notes 147-54 and accompanying text (providing \textit{Parker} court’s conclusion that benefit plan is not good of place of public accommodation).

\textsuperscript{319} \textit{See supra} notes 287-303 and accompanying text (demonstrating that indirect relationship between employee and insurer does not defeat employee’s Title III claim).

\textsuperscript{320} \textit{See supra} notes 295-96 and accompanying text (describing Congress’s intent in including contractual provision in Title III).
VI. Conclusion

Insurance is critical to millions of Americans with disabilities because it provides them with the means to participate fully in society.\textsuperscript{321} Unfortunately, these individuals face discrimination in the terms of their employer-provided insurance plans.\textsuperscript{322} Because of the subtle nature of this discrimination, courts have experienced difficulty in identifying and examining this discrimination and remain hopelessly mired in the confusing language of Title III of the ADA.\textsuperscript{323} The two federal courts of appeals that have considered Title III within the context of employer-provided insurance did not sufficiently analyze the Title III inquiry and thus failed to provide adequate guidance concerning the scope of Title III protections within the context of employer-provided insurance plans.\textsuperscript{324}

The determination of an employee's Title III claim within this context involves a careful consideration of four factors.\textsuperscript{325} Careful consideration of each factor is crucial to determining the actual scope of Title III within this subtle and unique context.\textsuperscript{326} A close analysis of each of these factors reveals that the scope of Title III is broad enough to subject an insurance company to liability on the basis of the discriminatory terms in an employer-provided insurance plan.\textsuperscript{327} Because insurance coverage aids individuals with disabilities in becoming full members of society, this conclusion effectuates Congress's purpose in enacting the ADA to bring individuals with disabilities into the social and economic mainstream of American life.\textsuperscript{328}

\textsuperscript{321} See supra note 2 and accompanying text (discussing importance of insurance to individuals with disabilities).

\textsuperscript{322} See supra notes 3-7 and accompanying text (describing discriminatory terms of employer-provided insurance plans).

\textsuperscript{323} See supra notes 83-86 and accompanying text (explaining problems caused by subtle nature of discrimination in terms of employer-provided insurance plans).

\textsuperscript{324} See supra Part IV.B (discussing Carparts court's Title III analysis); supra Part IV.C (providing Parker court's Title III analysis).

\textsuperscript{325} See supra notes 87-94 and accompanying text (describing four factors that courts must analyze).

\textsuperscript{326} See supra Part IV.A (discussing subtle nature of discrimination in employer-provided plans and need for consideration of four factors).

\textsuperscript{327} See supra Part V (arguing that, based on analysis of four necessary factors, Title III is broad enough to allow employee to have cause of action against insurance company that issues employer-provided plan).

\textsuperscript{328} See supra text accompanying notes 9-10 (describing Congressional purpose in enacting ADA).
DEDICATION