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## Safe, but Not Sound: Limiting Safe Harbor Immunity for Health and Disability Insurers and Self-Insured Employers Under the Americans with Disabilities Act

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## NOTE

# Safe, but Not Sound: Limiting Safe Harbor Immunity for Health and Disability Insurers and Self-Insured Employers Under the Americans with Disabilities Act

Rachel Schneller Ziegler

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### INTRODUCTION

When Congress passed the Americans with Disabilities Act<sup>1</sup> (“ADA”) on July 26, 1990, supporters heralded the Act as a full-scale victory for the 43 million disabled Americans.<sup>2</sup> The Act’s protections went far beyond those of its predecessor, the Rehabilitation Act of 1974,<sup>3</sup> which only prohibited discrimination against individuals with

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1. 42 U.S.C. §§ 12101-12213 (1994).

2. See 42 U.S.C. § 12101(a)(1) (estimating that 43 million Americans are disabled); *ADA: the Advocates; Comments from Legislators and Advocates Attending the Signing of the Americans with Disabilities Act*, 3 WORKLIFE 12 (Sept. 22, 1990).

3. 29 U.S.C. §§ 701-797(b) (1994).

disabilities by entities receiving federal funding.<sup>4</sup> The new act was intended to prevent discrimination by private and public employers, public services, and public accommodations.<sup>5</sup> In a bill signing ceremony at the White House, in front of more than two thousand advocates for the disabled, then President George Bush likened the ADA to the signing of the Declaration of Independence and the dismantling of the Berlin Wall.<sup>6</sup> Amidst mighty cheers from the crowd, President Bush proclaimed that, because of the new law, “every man, woman and child with a disability can now pass through once-closed doors into a bright new era of equality, independence, and freedom.”<sup>7</sup> Sandra Swift Parrino, director of the National Council on Disability, stated assuredly that the ADA was “a new beginning . . . [that would] shape the lives of those with disabilities for decades to come.”<sup>8</sup>

Disability advocates’ optimism about the broad reach of the ADA was certainly justified, for Congress also had grand goals in mind when enacting the law. The statute states that the main purposes of the ADA are to “provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities” and “to provide clear, strong, consistent, enforceable standards addressing discrimination against individuals with disabilities . . .”<sup>9</sup> The legislative history also indicates that Congress intended the ADA to be far-reaching in scope and dramatic in impact. Both the Senate and House Reports state that the purpose of the ADA is to “end discrimination against individuals with disabilities and to bring persons with disabilities into the economic and social mainstream of American life . . . .”<sup>10</sup>

4. 29 U.S.C. § 794(a) (1994) (“No otherwise qualified individual with a disability in the United States . . . shall, solely by reason of her or his disability, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving federal financial assistance . . .”).

5. Title I of the Act applies to employers. Title II applies to public services. Title III applies to public accommodations. 42 U.S.C. §§ 12112, 12132, 12182 (1994).

6. See John W. Mashek, *To Cheers, Bush Signs Rights Law for Disabled*, BOSTON GLOBE, July 27, 1990, at 4 (National/Foreign); *A Law for Every American*, N.Y. TIMES, July 27, 1990, at A26.

7. Ann Devroy, *In Emotion-Filled Ceremony, Bush Signs Rights Law for America’s Disabled*, WASH. POST, July 27, 1990, at A18.

8. *Id.*

9. 42 U.S.C. § 12101(b) (1994).

10. H.R. REP. NO. 101-485, pt. 3, at 23 (1990); S. REP. NO. 101-116, at 2 (1989). The Senate report came from the Committee on Labor and Human Resources. The House of Representatives’ reports came from the Committee on the Judiciary and the Committee on Education and Labor. There are widely divergent views about the value of committee reports in shedding light on congressional intent. The main objection to the use of committee reports is that they reflect only the views of the committee, not Congress as a whole. Others, however, view committee reports as the “most useful legislative history.” WILLIAM N. ESKRIDGE ET AL., LEGISLATION AND STATUTORY INTERPRETATION 302-03 (2000) [hereinafter ESKRIDGE, LEGISLATION]. In fact, nearly half of all Supreme Court references to leg-

Despite its initial glamour and fanfare, the ADA has proven to be only a modest protector of the disabled.<sup>11</sup> One study found that disabled plaintiffs lose in more than ninety-three percent of reported ADA employment cases decided on the merits at the trial court level.<sup>12</sup> Their chances of success at the appellate level are similarly unlikely.<sup>13</sup> In addition, on at least four occasions in recent years, courts have significantly limited the potential reach of the ADA. In a series of three cases — *Sutton v. United Airlines, Inc.*,<sup>14</sup> *Murphy v. United Parcel Service, Inc.*,<sup>15</sup> and *Albertson's, Inc. v. Kirkingburg*<sup>16</sup> — the Supreme Court held that an individual who uses a corrective device or medication to mitigate the effects of his disability does not qualify as “disabled” under the statute.<sup>17</sup> As a result, the Court limited the class

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islative history are to committee reports. The committee reports prove useful in providing an overview of legislation and offer additional information about how specific provisions fit within the statutory scheme. In addition, empirical studies suggest that the reports often express the views of the chamber as a whole, rather than just the committee. *Id.* A full debate about the value of legislative history is beyond the scope of this Note. The author has assumed that committee reports reflect the view of the entire congressional chamber.

11. Jennifer S. Geetter, *The Condition Dilemma: A New Approach to Insurance Coverage of Disabilities*, 37 HARV. J. ON LEGIS. 521, 525 (2000).

12. Ruth Colker, *The Americans with Disabilities Act: A Windfall for Defendants*, 34 HARV. C.R.-C.L. L. REV. 99, 100 (1999) [hereinafter Colker, *Windfall*]. In a study of civil rights actions between 1978 and 1985, Theodore Eisenberg found that plaintiff success rates varied from a high of 53% in voting rights cases to a low of 14% in prisoner rights cases. Theodore Eisenberg, *Litigation Models and Trial Outcomes in Civil Rights and Prisoner Cases*, 77 GEO. L.J. 1567, 1578 (1989). Only prisoner rights cases face as difficult odds as ADA cases. *Id.*

13. Defendants prevail in 84% of cases appealed by plaintiffs. Colker, *Windfall*, *supra* note 12, at 108. This Note recognizes that these statistics alone do not indicate that the ADA has failed to protect the disabled. In conjunction with other evidence, however, they are powerful indications.

14. 527 U.S. 471 (1999). *Sutton* involved two commercial airline pilots denied employment because of severely myopic vision. *Sutton*, 527 U.S. at 471. The plaintiffs' ADA claims were dismissed because the pilots wore glasses that fully corrected their vision and therefore, they were not disabled under the law. *Id.* The Supreme Court upheld the dismissal. *Id.*

15. 527 U.S. 516 (1999).

16. 527 U.S. 555 (1999).

17. See Bonnie Poitras Tucker, *The Supreme Court's Definition of Disability Under the ADA: A Return to the Dark Ages*, 52 ALA. L. REV. 321, 321 (2000). The statute defines a “disability” as a “(A) a physical or mental impairment that substantially limits one or more of the major life activities . . . ; (B) a record of such an impairment; or (C) being regarded as having such an impairment.” 42 U.S.C. § 12102(2) (1994). A physical or mental impairment includes any physiological disorder, condition, or anatomical loss that affects a major bodily system or a mental or psychological disorder. S. REP. NO. 101-116, at 22 (1989). An individual has a record of impairment if he or she has a history of or has been misclassified as having a disability. 29 C.F.R. § 1630.2 (2000). An individual is regarded as having such impairment if he or she is treated as having a disability, regardless of whether he or she is actually disabled under section (A). *Id.* A major life activity is defined as “caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working.” *Id.* The House Report specifies that the definition of disability does not include physical or mental characteristics, such as hair color or eye color, that are not the result of a mental or physiological disorder. H.R. REP. NO. 101-485, pt. 3, at 28 (1990). In addition, it does

of potential plaintiffs who could sue under the ADA. Similarly, in *Toyota Motor Manufacturing v. Williams*,<sup>18</sup> the Court limited the definition of “disability” by ruling that the plaintiff, a factory worker suffering from carpal tunnel syndrome, was not disabled under the statute because her illness only affected her ability to work, not her ability to perform “activities that are of central importance to most people’s daily lives.”<sup>19</sup> The unanimous court reasoned that “disability” should not be assessed by looking only at the plaintiff’s ability to perform her job; rather, the plaintiff must present additional evidence of hardship outside of the work setting.<sup>20</sup> The Court’s opinion increases the burden that plaintiffs bear in proving they are disabled. In *Chevron U.S.A. Inc. v. Echazabal*,<sup>21</sup> the Court broadened an employer’s ability to defend against an employee’s charge of disability discrimination.<sup>22</sup> It held that an employer may refuse to hire a disabled individual if the employee’s job presents a threat to the employee’s own health or safety because of his disability.<sup>23</sup> Prior to this holding, an employer was only permitted to deny employment if the employee’s disability presented a threat to the health or safety of others.<sup>24</sup> Finally, in *Board of Trustees v. Garrett*,<sup>25</sup> the Court held that, pursuant to the Eleventh Amendment,<sup>26</sup> suits under Title I of the ADA cannot be brought against a State to recover for monetary damages.<sup>27</sup>

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not include environmental, cultural, or economic disadvantages, such as poverty or a prison record. *Id.*

18. 534 U.S. 184 (2002).

19. *Toyota Motor Manufacturing*, 534 U.S. at 185.

20. *Id.* at 198.

21. 536 U.S. 73 (2002).

22. *See Chevron* 536 U.S. at 87.

23. *See id.*

24. *See id.* at 2049. This defense, known as the “direct threat” defense, is found in § 102 of the ADA. *See* 42 U.S.C. § 12113(b). The Court broadened the defense because it believed that Congress’s decision to mention only threats to others in the statute itself did not indicate that Congress intended to exclude threats to self. *See id.*

25. 531 U.S. 356 (2001). Two disabled state employees brought this discrimination suit against the State of Alabama. Both requested and were denied accommodations in their employment.

26. U.S. CONST. amend. XI (“The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.”).

27. *See Bd. of Trs. v. Garrett*, 531 U.S. 356, 360 (2001). For a discussion of Title I, see *infra* note 29. Self-insured employers may also be immunized from state anti-discrimination laws under the Employee Retirement Income Security Act (“ERISA”) of 1974. 29 U.S.C. § 1001-1461 (1988). Section 514(a) of ERISA precludes states from regulating health benefits provided by self-insured employers. *See generally*, BARRY R. FURROW ET AL., HEALTH LAW 418-38 (2000). As a consequence, ERISA preempts discrimination claims related to employee benefits brought in state court against self-insured employers. *See Metro. Life Ins. Co. v. Massachusetts*, 471 U.S. 724, 732-33 (1985); *Shaw v. Delta Airlines*, 463 U.S. 85, 91 (1983). Specifically, § 514(a) states that ERISA “supersedes” any state law that

The cases discussed above illustrate four ways in which the Supreme Court has limited the reach of the ADA in protecting the disabled and, in doing so, undermined the purposes of the law. This Note addresses another example. It discusses how courts have broadly interpreted Section 501(c) of the ADA<sup>28</sup> — the safe harbor provision — such that health and disability insurers and self-insured employers are nearly fully exempt from Titles I<sup>29</sup> and III<sup>30</sup> of the ADA. In

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“relates to” an employee benefit plan. Section 514(b)(2)(A) “saves” from preemption any state laws that regulate banking, investment, or insurance. Section 514(b)(2)(B) states that self-insured employee benefit plans do not qualify as insurance plans, thus preventing them from being “saved” from preemption. See FURROW, *supra* note 27, at 419. In addition, liability in federal court for discrimination under § 510 of ERISA is limited to instances in which a plaintiff can prove a specific intent to evade ERISA — an exceedingly difficult standard. See John E. Estes, *Employee Benefits or Employer “Subterfuge”: The Americans with Disabilities Act’s Prohibition Against Discriminatory Health Plans*, 12 N.Y.L. SCH. J. HUM. RTS. 85, 85 (1994). Two cases illustrate how ERISA can leave disabled individuals without a remedy for disability-based discrimination. In *McGann v. H & H Music Co.*, pursuant to § 510, the Fifth Circuit upheld summary judgment in favor of a self-insured employer when the employer lowered benefits for HIV/AIDS care from \$1,000,000 to \$5,000 after the plaintiff was diagnosed with AIDS. *McGann*, 946 F.2d 401, 403 (1991). The court reasoned that § 510 permitted the employer to alter the terms of its benefits plan. See *id.* at 408. In *Owens v. Storehouse*, the Eleventh Circuit affirmed a lower court’s grant of summary judgment in favor of the defendant employer who capped benefits associated with HIV/AIDS care because the plaintiff failed to present evidence of intentional discrimination. *Owens*, 984 F.2d 394, 399 (11th Cir. 1993). Therefore, the immunity from state discrimination laws afforded by ERISA creates an even greater need for adequate protections under the ADA.

28. 42 U.S.C. § 12201(c) (1994).

29. Title I calls for an end to discrimination against the disabled in all aspects of employment. It states that, “No covered entity shall discriminate against a qualified individual with a disability because of the disability of such individual in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions and privileges of employment.” 42 U.S.C. § 12112(a) (1994). Included among the prohibitions of Title I is discrimination with regard to fringe benefits, which include health and disability insurance. See 42 U.S.C. § 12112(b)(2) (1994); H.R. REP. NO. 101-485, pt. 3, at 36 (1990); S. REP. NO. 101-116, at 28-29 (1989); 29 C.F.R. § 1630.4 (2000); 29 C.F.R. App. § 1630.5 (2000) (“In addition, it should also be noted that this part is intended to require that employees with disabilities be accorded equal access to whatever health insurance coverage the employer provides to other employees.”). The prohibition against discrimination applies not only to employers but also to those entities with which employers contract to administer or provide fringe benefits. *Carparts Distrib. Ctr. Inc. v. Auto. Wholesaler’s Assoc.*, 37 F.3d 12, 17 (1st Cir. 1994) (holding that a benefits administrator is a covered entity under Title I); see 29 C.F.R. § 1630.4 (2000). These entities include insurers, third party administrators, health maintenance organizations, and stop-loss carriers.

30. Title III prohibits discrimination against the disabled “in the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of any place of public accommodation” that is privately operated. See 42 U.S.C. § 12182 (1994); S. REP. NO. 101-116, at 59. Public establishments operated by the federal, state, or local governments are covered under Title II of the ADA. See also 42 U.S.C. § 12131 (1994). Congress includes insurance offices on the list of entities considered public accommodations. See 42 U.S.C. § 12181(7)(F) (1994). In addition, the legislative history indicates that Congress did not intend this list to be all-inclusive. See S. REP. NO. 101-116, at 59. (“For example, the legislation lists ‘golf course’ as an example under the category of ‘place of exercise or recreation.’ This does not mean that only driving ranges constitute ‘other similar establishments.’ Tennis courts, basketball courts, dance halls, playgrounds, and aerobic facilities . . . are also included . . .”).

§ 501(c),<sup>31</sup> Congress qualified the reach of the statute as it applies to health and disability insurers and self-insured employers by offering these entities a partial exemption from the statute. The provision states:

Titles I through IV of the 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 Act from establishing, sponsoring, observing or administering the terms of a bona fide benefit plan that are based on underwriting risks, classifying risks, or administering such risks that are based on or not inconsistent with State law; or
- (3) a person or organization covered by this Act from establishing, sponsoring, observing or administering the terms of a bona fide benefit plan that is not subject to State laws that regulate insurance.

Paragraphs (1), (2), and (3) shall not be used as a subterfuge to evade the purposes of subchapter I and II of this Chapter.<sup>32</sup>

A threshold issue must be addressed prior to further discussion of the safe harbor. The federal circuits are split as to whether Title III requires insurers to offer the disabled equal access to the goods and services of public accommodations — in this case, insurance policies — or merely physical entry to their buildings.<sup>33</sup> This Note assumes that

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31. 42 U.S.C. § 12201(c).

32. 42 U.S.C. § 12201(c). Section 501(c)(1) applies to any organization, most typically a health insurer or health maintenance organization, that provides health or disability insurance benefits directly to individuals or to employee groups. Section 501(c)(2) will most typically apply to an employer who contracts with another entity to provide insurance benefits to its employees. Section 501(c)(3) applies to self-insured employers and was included to ensure that these employers are still subject to the preemption provision of ERISA. See H.R. REP. NO. 101-485, pt. 3, at 70-71 (1990).

33. The Third, Sixth, and Ninth Circuits have held that the statute only regulates the disabled's physical access to insurance offices, not their enjoyment of insurance policies. See *Weyer v. Twentieth Century Fox Film Corp.*, 198 F.3d 1104, 1115 (9th Cir. 2000); *Ford v. Schering-Plough Corp.*, 145 F.3d 601, 612-13 (3d Cir. 1998); *Lenox v. Healthwise of Ky., Ltd.*, 149 F.3d 453, 456 (6th Cir. 1998) (stating that "a bookstore . . . 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 caption video tapes."); *Parker v. Metro. Life Ins. Co.*, 121 F.3d 1006, 1010-11 (6th Cir. 1997). The First and Seventh Circuits have held that Title III mandates that the disabled have equal access to insurance policies. See *Doe v. Mutual of Omaha Ins. Co.*, 179 F.3d 557, 559 (7th Cir. 1999); *Carparts Distrib. Ctr. v. Auto. Wholesaler's Assoc.*, 37 F.3d 12, 20 (1st Cir. 1994) ("Prohibited discrimination under Title III includes the denial, on the basis of disability, of the opportunity to benefit from the goods, services, privileges, advantages or accommodations of an entity."). Despite

Congress intended that the statute be applied more broadly to include equal access to goods and services. If Title III only required insurers to provide physical entry to insurance offices, insurers would be permitted to discriminate against the disabled in the provision of insurance policies without violating the ADA, and any further discussion of the safe harbor would be pointless. A number of arguments support this Note's assumption. First, the statute itself calls for the equal enjoyment of the goods and services of public accommodations.<sup>34</sup> Second, the existence of the safe harbor suggests that Title III applies to the sale of insurance policies; otherwise, the safe harbor would be superfluous. Third, among the list of public accommodations, Congress included entities, such as a travel service, that primarily offer their services by phone or mail. If Title III were to apply to these entities in any meaningful way, it would need to require more than just physical entry for the disabled.<sup>35</sup>

Assuming that Title III requires insurers to provide equal access to insurance policies permits further inquiry into the intent of the safe harbor provision. Congress carved out the safe harbor exemption to allow insurers to continue to underwrite risks.<sup>36</sup> Underwriting is the process by which an insurer assesses an individual policyholder's likelihood of requiring benefits or filing claims to determine the individual's premium payment.<sup>37</sup> The impracticality of determining individually-rated premiums leads insurers to group individuals by lifestyle, behaviors, or health status and then set premiums for each

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these holdings, no circuit has gone so far as to hold explicitly that Title III regulates the content of insurance policies offered to the disabled. For a detailed discussion of this debate, see generally Mary Carol Joly, Doe and Smith v. Mutual of Omaha Insurance Company: *The Possible Impact on HIV-Infected Individuals*, 4 DEPAUL J. HEALTH CARE L. 193 (2000), and Bonnie Poitras Tucker, *Individual Rights and Reasonable Accommodations Under the Americans with Disabilities Act: Insurance and the ADA*, 46 DEPAUL L. REV. 915, 940-45 (1997).

34. See 42 U.S.C. § 12182(a) (1994) ("No individual shall be discriminated against on the basis of disability in the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of any place of public accommodation . . .").

35. See *Carparts*, 37 F.3d at 19 ("[I]t would be irrational to conclude that persons who enter an office to purchase services are protected by the ADA, but persons who purchase the same services over the telephone or by mail are not. Congress could not have intended such an absurd result.").

36. See S. REP. NO. 101-116, at 84-85 (1989) ("[T]he Committee added section 501(c) to make it clear that this legislation will not disrupt the current nature of insurance underwriting or the current regulatory structure for self-insured employers or of the insurance industry in sales, underwriting, pricing, administrative and other services, claims, and similar insurance related activities . . ."). Insurance allows risk averse individuals to pay someone else to assume risks for them. Insurers are able to assume these risks by grouping individuals together so they may use premiums from one policyholder to cover the costs of benefits paid to other policyholders. As a result, policyholders who do not incur losses over the coverage period subsidize the payment of benefits to those who do incur losses. See ROBERT H. JERRY II, *UNDERSTANDING INSURANCE LAW* 11-17 (2d ed. 1996).

37. See JERRY, *supra* note 36 at 17.



group.<sup>38</sup> This process permits insurers to guarantee their ability to pay benefits later and limits the need for cross-subsidization across policyholders.<sup>39</sup> It also results in higher premium payments for disabled and sick individuals who the insurer predicts will require more benefits. Congress created an exemption from the ADA for insurers because it feared that attempts by insurers to underwrite the policies of disabled individuals would violate the statute.<sup>40</sup> Congress was concerned that if insurers were no longer able to underwrite, the ADA would destroy the profitability of the insurance industry.

Although Congress intended the safe harbor provision to offer insurers an exemption from the ADA, its ambiguous language raises questions as to the extent of the exemption.<sup>41</sup> Congress placed two limitations on this exemption. First, disability-based discrimination is only exempt if insurers and employers are “underwriting risks, classifying risks, or administering such risks.”<sup>42</sup> Second, discrimination is not exempt if the insurer has engaged in “subterfuge to evade the purposes of Titles I and III.”<sup>43</sup> Congress failed, however, to explain these two limiting clauses.<sup>44</sup> These ambiguous clauses have prompted a debate between disability rights advocates, who view the exemption as limited, and insurers, who view it as wide-reaching.<sup>45</sup>

38. *See id.* at 14.

39. *See id.*

40. *See* S. REP. NO. 101-116, at 86 (“[Without the safe harbor,] this legislation could arguably find violative of its provisions any action taken by an insurer or employer which treats disabled persons differently under an insurance or benefit plan because they represent an increased hazard of death or illness.”).

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

42. 42 U.S.C. § 12201(c).

43. *Id.* Congress’s failure to define the term “subterfuge” and the resulting ambiguity surrounding the term’s meaning is primarily responsible for the controversy surrounding the scope of the safe harbor provision. The meaning of the term as defined by the Equal Opportunity Employment Commission, the agency responsible for enforcing the ADA, and by the courts will be discussed *infra* notes 61-62, 93-105 and accompanying text.

44. Voicing his dissent to the House Judiciary Report on the ADA, Representative Chuck Douglas recognized some of the unanswered questions raised by the text’s use of the term subterfuge:

There are also sections of the bill which either have not been explained carefully or are not capable of being understood. A good example comes in Section 501(c) which deals with insurance. After spending a great deal of time explaining what insurance plans are permissible, the Act seems to say that these same plans which were previously approved are not permissible if they act as a subterfuge to the purposes of the Act. What does that mean? How does an employer or employee know when a subterfuge has been created?

H.R. REP. NO. 101-485, pt. 3, at 94 (1990).

45. *See* Jeffrey S. Manning, *Are Insurance Companies Liable Under the Americans with Disabilities Act*, 88 CAL. L. REV. 607, 637 (2000) (“This provision has provoked a debate about what restrictions on the ADA’s applicability to insurance its drafters intended. Did the drafters mean to exempt insurers altogether, or only to exempt ‘underwriting risks’ if consistent with state law?”). Manning argued that the safe harbor should permit insurers to make disability-based distinctions in the provision of insurance only if they can justify those

This Note argues that Congress intended the safe harbor provision to offer insurers and self-insured employers a narrow exemption from the ADA and suggests a standard for courts to use in determining whether the exemption applies. Part I demonstrates that the language of the statute, its legislative history, and agency interpretations, as well as other health care safe harbors, support a limited interpretation of the reach of the safe harbor provision. Part II illustrates that, despite Congress's intent, courts have interpreted the provision broadly, such that insurers and employers are nearly immunized from the requirements of the ADA. Part III proposes a novel remedy to the disparity between Congress's intent and courts' interpretations of the safe harbor. It proposes that courts adopt the undue hardship evidentiary standard used to determine whether an employer must offer an employee a reasonable accommodation under Title I in safe harbor defense cases.<sup>46</sup> By requiring defendant insurers to provide evidence justifying disability-based distinctions, the undue hardship standard will assure that insurers remain bound by the ADA and faithful to congressional intent.

## I. INTERPRETING THE SAFE HARBOR PROVISION

This Part examines the safe harbor statutory language, legislative history, agency interpretations, and other health care statutes and safe harbors to discuss the scope of the ADA's safe harbor provision. It concludes that although Congress intended the safe harbor to allow insurers and employers to continue underwriting and risk classifying, it designed the provision to offer only a limited exception to the ADA, not a full-scale exemption from the ADA's requirements.

### A. *Statutory Language and Legislative History*

The ambiguity of the safe harbor statutory language raises many questions about the reach and limitations of insurers' exemption from the ADA,<sup>47</sup> but provides incomplete answers. By including the subterfuge clause, Congress indicated that it intended the exemption

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distinctions with statistical data. See *id.* at 643-47. Manning's comment, however, failed to explain how courts should implement his proposed solution. See also Craig C. Dirrim, Note, *Unpopular but Not Unfair: The Fifth Circuit Considers the Terms but Ignores the Endearment in McGann v. H & H Music Co.*, 72 NEB. L. REV. 860, 879-84 (1993) (discussing the diverging viewpoints of advocates about the reach of the safe harbor provision).

46. The ADA requires covered entities to make reasonable accommodations for all individuals with disabilities "unless such covered entity can demonstrate that the accommodation would impose an undue hardship on the operation of the business of such covered entity." 42 U.S.C. § 12112(b)(5)(A). The statute defines an "undue hardship" as "an action requiring significant difficulty or expense," when considered in light of several other factors. 42 U.S.C. § 12111(10).

47. See *supra* notes 41-45 and accompanying text.

to be somewhat limited.<sup>48</sup> That is, Congress did not intend the safe harbor to be a trump card or an “escape hatch” to permit insurers and employers to engage in discrimination.<sup>49</sup> In addition, the reach of the subterfuge clause itself must be limited. If all disability-based distinctions were regarded as subterfuge, any disability-based distinction made by an insurer would violate the ADA.<sup>50</sup> An all-encompassing definition of subterfuge is, therefore, inappropriate because it treats the words of the safe harbor as surplusage.<sup>51</sup>

The legislative history provides further guidance about the purposes and reach of the safe harbor provision.<sup>52</sup> The Senate Report indicates that Congress included the provision to ensure that the ADA would not disrupt the insurance industry or the regulatory structure for self-insured employers.<sup>53</sup> Congress was concerned that the ADA

48. See 42 U.S.C. § 12201(c) (1994) (“Paragraphs (1), (2), and (3) shall not be used as a subterfuge to evade the purposes of Title I and III of this chapter.”).

49. Stephen T. Kaminski, *Must Employers Pay for Viagra? An Americans with Disabilities Act Analysis Post-Bragdon and Sutton*, 4 DEPAUL J. HEALTH CARE L. 73, 121 (2000).

50. See H. Miriam Farber, *Subterfuge: Do Coverage Limitations and Exclusions in Employer-Provided Health Care Plans Violate the Americans with Disabilities Act?*, 69 N.Y.U. L. REV. 850, 912 (1994) (“[T]he subterfuge language should not be read to create such an imposing burden that in effect would swallow up the limiting construction that section 501(c) was intended to ensure.”).

51. The statutory interpretation rule against surplusage is the “presumption that every statutory term adds something to the law’s regulatory impact.” See ESKRIDGE, LEGISLATION, *supra* note 10, at 266. *But see* Robert J. Gregory, *Overcoming Text in an Age of Textualism: A Practitioner’s Guide to Arguing Cases of Statutory Interpretation*, 35 AKRON L. REV. 451 (2002) (agreeing with Karl Llewellyn’s argument that if “[a word or clause] is inadvertently inserted or repugnant to the rest of the statute, [the word or clause] may be rejected as surplusage” (citing Karl N. Llewellyn, *Remarks on the Theory of Appellate Decision and the Rules or Canons About How Statutes are to be Construed*, 3 VAND. L. REV. 395, 401-06 (1950))).

52. Courts and scholars disagree about the importance and relevance of legislative history as a tool for statutory interpretation. See generally, WILLIAM N. ESKRIDGE, DYNAMIC STATUTORY INTERPRETATION, 207-38 (1994) [hereinafter ESKRIDGE, INTERPRETATION] (discussing courts’ use of legislative history in the twentieth century). The Supreme Court first relied on legislative history in interpreting a federal immigration statute in *Church of the Holy Trinity v. United States*, 143 U.S. 457 (1892). It stated “that a thing may be within the letter of the statute yet not within the statute, because not within its spirit, nor within the intentions of its makers.” 143 U.S. at 459. Since *Holy Trinity*, the Court has often used legislative history to assist in statutory interpretation. See, e.g., *Jett v. Dallas Indep. Sch. Dist.*, 491 U.S. 701 (1989) (interpreting the Civil Rights Act of 1866 with the assistance of legislative history); *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409 (1968) (same); *Duplet Printing Press Co. v. Deering*, 254 U.S. 443 (1921) (interpreting the Clayton Act by relying on legislative deliberations). More recently, proponents of the new textualist movement have argued against using legislative history as a tool in statutory interpretation. See e.g., *Conroy v. Aniskoff*, 507 U.S. 511, 518-28 (1993); *Hirschey v. FERC*, 777 F.2d 1, 7-8 (D.C. Cir. 1985) (Scalia, J., concurring); ESKRIDGE, INTERPRETATION, *supra* note 52, at 402 n.97. Courts have not, however, rejected legislative history as an important tool. See *Wisconsin Pub. Intervenor v. Mortier*, 501 U.S. 597, 610 n.4 (1991); ESKRIDGE, INTERPRETATION, *supra* at 403 n.102.

53. See S. REP. NO. 101-116, at 84-85 (1989). Eskridge, Frickey and Garrett argue that committee reports are the most reliable and useful source of legislative history. See

would interfere with efforts by insurers to classify risks.<sup>54</sup> Although Congress intended to protect the solvency of the insurance industry, neither the statutory text nor the legislative history explicitly states the extent of the desired protection. There is no indication in the Senate Report that Congress intended to permit insurers to continue business as usual, particularly if such business included discrimination against the disabled. Such an interpretation conflicts with the otherwise wide-reaching goals of the statute.<sup>55</sup>

More specifically, the legislative history indicates that Congress intended the safe harbor to have limited reach. Both the Senate and House Reports state that the reach of the safe harbor is limited by insurers' and employers' abilities to offer actuarial evidence or "actual or reasonably anticipated experience" that justifies their decisions to make a disability-based distinction.<sup>56</sup> Presumably, Congress intended courts to evaluate this kind of evidence when making decisions in safe harbor cases. Similarly, a limited exemption is consistent with the overall wide-reaching purpose of the ADA as described in the Senate and House reports.<sup>57</sup>

The safe harbor language and legislative history support a broad enough interpretation of the provision to permit insurers and employers to continue to underwrite and make risk classifications. The legislative history limits the provision's reach, however, by requiring that insurers justify disability-based distinctions with data or actuarial experience.<sup>58</sup> The legislative history, like the statutory language, raises questions about the extent of these limits. For instance, the legislative history does not state the kind or amount of actuarial evidence sufficient or necessary to trigger safe harbor protection.

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ESKRIDGE, LEGISLATION, *supra* note 10, at 303 ("For now, it seems safe to say that committee reports have weathered the most cynical critiques of judicial reliance and that careful use of them in interpretation is justified.").

54. See S. REP. NO. 101-116, at 86.

55. The Senate Report states:

The purpose of the ADA is to provide a clear and comprehensive national mandate to end discrimination against individuals with disabilities and to bring persons with disabilities into the economic and social mainstream of American life, to provide enforceable standards addressing discrimination against individuals with disabilities, and to ensure that the Federal government plays a central role in enforcing these standards on behalf of individuals with disabilities.

S. REP. NO. 101-116, at 2.

56. S. REP. NO. 101-116, at 85 (reporting that a plan may not refuse or limit insurance based on a physical or mental impairment, "except where the refusal, limitation, or rate differential is based on sound actuarial principles or is related to actual or reasonably anticipated experience."); H.R. REP. NO. 101-485, pt. 3, at 71 (1990) (reporting that the "ADA requires that underwriting and classification of risks be based on sound actuarial principles or be related to actual or reasonably anticipated experience").

57. See S. REP. NO. 101-116, at 2; H.R. REP. NO. 101-485, pt. 3, at 23.

58. See S. REP. NO. 101-116, at 85; H.R. REP. NO. 101-485, pt. 3, at 71.

### B. Agency Interpretations

The interpretations of the Equal Employment Opportunity Commission ("EEOC"), the federal agency charged with interpreting and enforcing the ADA,<sup>59</sup> provide additional evidence that the safe harbor offers a narrow exception for insurers and employers. The agency offered its interpretation of the safe harbor in the ADA's implementing regulations<sup>60</sup> as well as the agency's *Interim Enforcement Guidance*.<sup>61</sup>

By requiring that insurers justify disability-based distinctions with actuarial data, the EEOC limits the reach of the safe harbor exemption.<sup>62</sup> The EEOC incorporates an actuarial cost standard by creating a framework for the analysis of ADA claims.<sup>63</sup> First, the EEOC or the court must determine that the distinction made by the insurer or employer is a disability-based distinction.<sup>64</sup> Second, the insurer or employer must establish that it has met the terms of § 501(c); that is, it must demonstrate that the disability-based distinction is neither inconsistent with state law nor a subterfuge.<sup>65</sup> The EEOC defines subterfuge as "disability-based disparate treatment that is not justified by the risks or costs associated with the disability."<sup>66</sup> The agency also demonstrates the safe harbor's limitations by offering a list of possible "business/insurance justifications" for disability-based distinctions.<sup>67</sup> First, the respondent may show that the distinction is based on legitimate actuarial data or actual or reasonably anticipated experience and that physical or mental conditions with comparable actuarial data and/or experience are also similarly distinguished.<sup>68</sup> Second, the insurer or

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59. See 42 U.S.C. § 12116 (1994).

60. See 28 C.F.R. § 36 (2000); 29 C.F.R. § 1630 (2000).

61. U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, INTERIM ENFORCEMENT GUIDANCE ON THE APPLICATION OF THE AMERICANS WITH DISABILITIES ACT OF 1990 TO DISABILITY-BASED DISTINCTIONS IN EMPLOYER PROVIDED HEALTH INSURANCE (1993) [hereinafter EEOC INTERIM GUIDANCE].

62. See *id.* at 3-4.

63. For a good summary, see generally D'Andra Millsap, *Sex, Lies, and Health Insurance: Employer-Provided Health Insurance Coverage of Abortion and Infertility Services and the ADA*, 22 AM. J.L. & MED. 51 (1996).

64. See EEOC INTERIM GUIDANCE, *supra* note 61, at 2-3.

65. See *id.* at 4. It is also noteworthy that the agency places the burden on the insurer/employer to prove that its actions are not a subterfuge. See *id.* at 9. The agency views the safe harbor as an affirmative defense. See *id.* It justifies the placement of the burden on the insurer or employer because it "has control of the risk assessment, actuarial, and/or claims data relied upon in adopting the challenged disability based distinction" and thus, "has the greatest access to the relevant facts." *Id.* at 9-10.

66. *Id.* at 11.

67. *Id.*

68. *Id.* For instance, if an insurer refused to provide coverage to a disabled individual with multiple sclerosis, such a distinction would be justified if the insurer could demonstrate

employer may show that the distinction is necessary to ensure the fiscal soundness and financial solvency of the plan.<sup>69</sup> Third, it may demonstrate that the distinction is necessary to avoid a drastic increase in premiums or a drastic alteration in benefits.<sup>70</sup> To support these justifications with actuarial data, an insurer must provide a detailed explanation of the rationale for the disability-based distinction along with its actuarial conclusions, assumptions, and data.<sup>71</sup>

The EEOC indicates that the reach of the safe harbor should be limited not only by the existence of any actuarial data or experience to justify a disability-based distinction, but also by the nature of this data or experience.<sup>72</sup> Insurers and employers may not discriminate against the disabled by relying on evidence of typical variations because risk variations are an inevitable part of the insurance business. Rather, the safe harbor protects insurers and employers only when risk variations are excessive and atypical,<sup>73</sup> or will lead to drastic alterations in plan characteristics or premiums.<sup>74</sup> By focusing on the nature of evidence to support a disability-based distinction, in addition to its existence, the agency creates an evidentiary standard that insurers must meet to make distinctions under the safe harbor. As a result, the agency places clear limits on the reach of the safe harbor.

Some courts and commentators have objected to reliance on the EEOC's interpretations of the safe harbor because they do not believe that courts should defer to the agency's interpretations.<sup>75</sup> Although the EEOC's interpretations have not been published in the Federal Register nor endured notice and comment procedures, courts should defer to the *Interim Guidance*. The Supreme Court stated in *Christenson v. Harris County* and reiterated in *United States v. Mead* that administrative interpretations by an enforcing agency are entitled

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with actuarial data that the costs of treating such an individual are inordinately high and that it treats all other conditions with similar actuarial data in the same way.

69. *Id.* at 12.

70. *Id.*

71. *See id.* at 11.

72. *See id.* at 11-13.

73. *See id.* at 12 ("The respondent, for example, may prove that it limited coverage for the treatment of a discrete group of disabilities because continued unlimited coverage would have been so expensive as to cause the health insurance plan to become financially insolvent, and there was no nondisability-based health insurance plan alteration that would have avoided insolvency.").

74. *See id.*

75. *See, e.g., Moddero v. King*, 82 F.3d 1059, 1065 (1996) (refusing to defer to the EEOC's definition of subterfuge). Pursuant to *Chevron Inc. v. Natural Res. Def. Council*, 467 U.S. 837 (1984), federal agencies' interpretations of ambiguous statutes are given deference only if they have gone through formal rulemaking procedures.

to *Skidmore*-style deference.<sup>76</sup> Though less deferential than *Chevron*-style deference, *Skidmore*-style deference calls for adherence to agency views proportional to their "power to persuade."<sup>77</sup> The EEOC's interpretations of the safe harbor have the power to persuade.<sup>78</sup>

### C. Other Health Care Statutes and Safe Harbors

The safe harbors in other health care statutes and regulations provide a good analogy for the ADA and further support this Note's argument that Congress intended the ADA safe harbor to provide a narrow exception.

Health care antitrust laws are designed to ensure competition in the health care market.<sup>79</sup> In the early 1990s, the Department of Justice and the Federal Trade Commission, the agencies responsible for antitrust law enforcement,<sup>80</sup> became concerned that strict laws were precluding potentially beneficial integration in the health care industry.<sup>81</sup> As a result, in 1994 the agencies carved out nine safety zones to traditional health care antitrust laws.<sup>82</sup> These safety zones offer exemptions for certain hospital and physician mergers and joint ven-

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76. See *United States v. Mead*, 533 U.S. 218, 308-309 (2001); *Christenson v. Harris County*, 529 U.S. 576, 587 (2000) ("[I]nterpretations contained in formats such as opinion letters are 'entitled to respect' under our decision in *Skidmore v. Swift & Co.*" (quoting 323 U.S. 134, 140 (1944))).

77. *Skidmore*, 323 U.S. at 140.

78. A more detailed discussion of this debate is beyond the scope of this Note.

79. See Janet L. McDavid, *Antitrust Issues in Health Care Reform*, 43 DEPAUL L. REV. 1045, 1053-55 (1994) ("Historically, antitrust law has promoted competition in health care."); Amy Woodhall, Note, *Integrated Delivery Systems: Reforming the Conflict Among the Federal Referral, Tax Exemption, and Antitrust Laws*, 5 HEALTH MATRIX 206 (1995). Health care antitrust laws include several different statutes: Sherman Act, 15 U.S.C. § 1, 2 (1988) (prohibiting contracts, combinations, and conspiracies in restraint of trade); the Robinson-Patman Act, 15 U.S.C. § 14 (1988) (governing price discrimination); the Clayton Act, 15 U.S.C. § 18 (1988) (prohibiting mergers and acquisitions which substantially lessen competition or tend toward monopoly); 15 U.S.C. § 14 (1988) (prohibiting exclusive dealings and tying arrangements that substantially lessen competition); and the Federal Trade Commission Act, 15 U.S.C. § 45 (1988) (governing unfair methods of competition that restrict market structures). See Woodhall, *supra* note 79, at 205 n.126.

80. See ERNEST GELLHORN AND WILLIAM E. KOVACIC, ANTITRUST LAW AND ECONOMICS IN A NUTSHELL 29 (1994).

81. See DEP'T OF JUSTICE & FEDERAL TRADE COMM'N, STATEMENTS OF ENFORCING POLICY AND ANALYTICAL PRINCIPLES RELATING TO HEALTH CARE AND ANTITRUST, TRADE REGULATION REP. (CCH) ¶ 13,151 (Sept. 1994) [hereinafter DOJ & FTC STATEMENT] ("The [1993 policy] statements [were] designed to provide education and instruction to the health care community in a time of tremendous change, and to resolve, as completely as possible, the problem of antitrust uncertainty that [some have said] might deter mergers or joint ventures that would promise to reduce health care costs."); KENNETH R. WING, ET AL., THE LAW AND AMERICAN HEALTH CARE 902 (1998).

82. See DOJ & FTC STATEMENT, *supra* note 81.

tures.<sup>83</sup> One year later, the agencies expanded the antitrust safety zones.<sup>84</sup> Though the safety zones were designed to limit the application of antitrust law in the health care arena, they offer only narrow and limited exceptions to antitrust law.<sup>85</sup> For example, one safety zone permits the formation of physician network joint ventures if the network includes twenty percent or less of the physicians in each specialty who practice within a geographic market and share substantial financial risk.<sup>86</sup> In addition, the agencies created an exemption for joint ventures designed to share high technology or other expensive medical equipment. The safety zone calls for a joint venture among the fewest number of hospitals necessary to "allow the hospitals to recover the costs of acquiring, operating and marketing the services provided by the equipment."<sup>87</sup>

Congress also carved out narrow safe harbors to fraud and abuse laws.<sup>88</sup> Despite the burden that fraud places on the health care system,<sup>89</sup> Congress was concerned that broad fraud and abuse laws would result in the inappropriate prosecutions of legitimate providers.<sup>90</sup> As a result, in the Medicare and Medicaid Patient and Program Protection

83. *See id.*

84. *See Agencies Clarify Reach of Health Care Guidelines*, Statement of Assistant Attorney General Anne K. Bingaman, 67 *Antitrust & Trade Reg. Rep.* 357 (BNA) (Sept 29, 1994) (The agencies were still concerned that "procompetitive transactions were not happening because of fear of antitrust violations.").

85. *See DOJ & FTC STATEMENT*, *supra* note 81.

86. *See id.*

87. *Id.* Even after the 1995 expansion, the safety zones remain narrow exemptions. For instance, the safety zone for hospital joint ventures for the sharing of high technology or other expensive equipment was expanded to include not only new, but existing, equipment. Similarly, the agencies allowed physician network joint ventures that comprised thirty percent or less of the physicians in a given specialty in a geographic market as long as the network was non-exclusive, meaning that the participating physicians were permitted to belong to more than one network.

88. Fraud and abuse is extremely varied in its form. Fraudulent claims can be submitted for care never provided or care provided but not required. In addition, "upcoding," in which providers bill for a more complex service than is required, has become a common form of fraud. Fraud is prosecuted under a number of different statutes, including the Stark Amendments to the Ethics in Patient Referrals Act of 1989 and the Civil False Claims Act. *See* 42 U.S.C. § 1395nn (1997); 31 U.S.C. § 3729(a)(1)-(7) (1997). The Medicare-Medicaid Antifraud and Abuse Amendments of 1977 make kickbacks and self-referral schemes illegal. *See* 42 U.S.C. § 1320a-7b(b)(1)(B) (1997).

89. Some estimate that ten percent of the nation's health care costs can be attributed to fraud. *See Fraud and Abuse: Medicare Continues To Be Vulnerable to Exploitation by Unscrupulous Providers: Testimony Before the Senate Special Comm. on Aging*, in U.S. GENERAL ACCOUNTING OFFICE, T-HEHS-96-7 (Nov. 2, 1995) (testimony of Sarah F. Jaggard, Director, Health, Financing, and Public Health Issues, Health, Education, and Human Services Division); WING ET AL., *supra* note 81, at 909.

90. This concern became even more real when the Third Circuit held in *United States v. Greber*, 760 F.2d 68 (3d. Cir. 1985), that a payment could be considered fraudulent even if it had legitimate purposes if it was also intended to induce future referrals.



Act of 1987,<sup>91</sup> Congress authorized the Office of the Inspector General at the Department of Health and Human Services to carve out specific safe harbors to the antikickback law.<sup>92</sup> Despite their broad purpose, these safe harbors were narrowly written and have limited application.<sup>93</sup> For example, the statute allows for certain types of investment interests by providers in health care enterprises. Providers may maintain investments only in large publicly traded health care companies if the shareholders' dividends do not increase as a result of shareholder referrals.<sup>94</sup> Similarly, the safe harbors allow for certain kinds of referral services as long as the fee paid for the service is to support the operation of the service and does not reflect the value of the referral itself. The service also must disclose to all consumers its relationship with the physician.<sup>95</sup>

The language of the safe harbor, its legislative history, agency interpretations, and other health care statutes indicate that Congress intended the safe harbor to offer insurers a narrow and limited exemption from the ADA. To read the statute more broadly is inconsistent with Congress' desire to protect the disabled.

## II. THE COURTS' OVEREXPANSION OF THE SAFE HARBOR

This Part argues that in construing the safe harbor broadly courts have undermined Congress's intent to create a limited exemption from the ADA.<sup>96</sup> Section II.A demonstrates that in safe harbor cases courts have interpreted the safe harbor provision broadly. In doing so, courts have ignored the statutory language, legislative history, and agency interpretations which indicate that Congress intended the provision to be applied narrowly.<sup>97</sup> This section also identifies a few cases in which

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91. Pub. L. No. 100-93, 101 Stat. 680 (1987).

92. See WING ET AL., *supra* note 81, at 915.

93. See *infra* note 95.

94. See 42 U.S.C. § 1395nn(b)-(e) (1997).

95. See *id.* In order to respond to the growing importance of managed care, the agency carved out two new managed care safe harbors in 1992. See 42 C.F.R. § 1001.952(l)-(m) (1997). Again, these safe harbors offer very narrow exceptions to the underlying antikickback laws. The first allows health plans that have contracted with the government under Medicare or Medicaid to offer incentives to enrollees, such as increased benefits or decreased deductibles. The second protects some negotiated price reduction agreements between health plans and providers. In order to be protected by the safe harbor, agreements must (1) reflect the provider's reduction of usual charges, (2) be in writing, and (3) exist solely to allow the provider to furnish enrollees with services covered under Medicare and Medicaid.

96. See S. REP. NO. 101-116, at 2 (1989).

97. See *supra* Part I(A); see also, e.g., Leonard F. v. Israel Disc. Bank, 199 F.3d 99, 102-104 (2d Cir. 1999) (ignoring the statutory language, legislative history and agency interpretations in interpreting the meaning of the term ('subterfuge') as defined in Pub. Employee Ret. Sys. v. Betts, 492 U.S. 158 (1989)); Ford v. Schering-Plough Corp., 145 F.3d 601, 611-12 (3d Cir. 1998) (same).

courts have interpreted the provision in keeping with Congress's intent. Section II.B evaluates courts' reasons for a broad interpretation and concludes that these reasons are inadequate.

### A. *An Examination of Safe Harbor Cases*<sup>98</sup>

An examination of cases in which defendants have relied on the safe harbor provision to absolve themselves of ADA liability reveals that courts have overextended the safe harbor in four ways: first, by not requiring defendants to present evidence to justify a disability-based distinction; second, by viewing the safe harbor as an irrebuttable defense; third, by relying on an incorrect definition of "subterfuge,"<sup>99</sup> and fourth, by failing to keep the underlying purposes of the ADA in mind when interpreting the reach of the provision. The result of courts' failures to adhere to congressional intent is that a defendant need only plead the safe harbor defense to be assured of a judgment in its favor; that is, cases decided under the safe harbor essentially have a predetermined outcome.<sup>100</sup>

First, many courts have inappropriately broadened the reach of the safe harbor provision by finding in favor of defendant insurers in ADA cases without requiring them to provide evidence to justify disability-based distinctions. The protections of the safe harbor are limited by the defendant's ability to offer actuarial or experience-based evidence.<sup>101</sup> The courts have not, however, required defendants to provide such evidence. In *Leonard F. v. Metropolitan Life Insurance*

98. This discussion relies on cases brought in eight federal circuits. The cases are largely motions by defendant insurers and employers for dismissal or summary judgment, or appeals by plaintiffs from grants of dismissals or summary judgment. The plaintiffs are all qualified disabled individuals, suffering from conditions such as muscular dystrophy, depression, AIDS, and panic anxiety disorder, who have been denied health or disability insurance benefits because of their disabilities. See *Chabner v. United of Omaha Life Ins. Co.*, 225 F.3d 1042 (9th Cir. 2000); *McNeil v. Time Ins. Co.*, 205 F.3d 179 (5th Cir. 2000); *Leonard*, 199 F.3d at 99; *Rogers v. Dept. of Health and Env'tl. Control*, 174 F.3d 431 (4th Cir. 1998). For the statute's definition of a "qualified disabled individual," see *infra* note 143.

99. Courts rely on the Supreme Court's definition of "subterfuge" in *Public Employees Retirement System of Ohio v. Betts*, 492 U.S. 158, 167 (1989) (defining "subterfuge" as "a scheme, stratagem, or artifice of evasion"). In *Betts*, the plaintiff brought a claim against her employer challenging an age-based employment decision under the Age Discrimination in Employment Act, 29 U.S.C. §§ 621-624 (1994).

100. It is worth noting again that not all courts have granted summary judgment simply because the defendant pled the safe harbor. See *infra* notes 112-125 and accompanying text.

101. See *supra* notes 56-74 and accompanying text; see also H.R. REP. NO. 101-485, pt. 3, at 71 (1990) ("[T]he ADA requires that underwriting and classification of risks be based on sound actuarial principles or be related to actual or reasonably anticipated experience."); S. REP. NO. 101-116, at 85 (1989) ("[T]he plan may not refuse to insure, or refuse to continue to insure, or limit the amount, extent, or kind of coverage available to an individual . . . except where the refusal, limitation, or rate differential is based on sound actuarial principles or is related to actual or reasonably anticipated experience.").

Co.,<sup>102</sup> the plaintiff sued his insurer under the ADA because the insurer provided him with a policy that limited coverage for his mental disability to two years without limiting coverage for other kinds of care.<sup>103</sup> The Second Circuit relied on the safe harbor to conclude that the defendant insurer was exempt from the ADA.<sup>104</sup> The court did not require the defendant to provide any actuarial or experience-based evidence to prove that the plaintiff's disability justified a disability benefits cap.<sup>105</sup> It reasoned that neither the statute nor its legislative history require insurers to "base their decisions with respect to disabled individuals on 'sound actuarial principles.'" <sup>106</sup> Similarly, in *Ford v. Schering-Plough Corp.*,<sup>107</sup> the plaintiff claimed that a similar benefits cap on coverage for mental disabilities violated the ADA.<sup>108</sup> The Third Circuit held that the safe harbor provision protected the defendant from liability and did not require the employer or insurer to offer actuarial evidence or experience to justify the cap.<sup>109</sup> The court argued that such a requirement would have an improper and dramatic effect on the insurance industry.<sup>110</sup> Finally, in *Rogers v. Department of Health and Environmental Control*,<sup>111</sup> the Fourth Circuit upheld a dismissal in favor of the defendant based on the safe harbor, and did not require the defendant to provide evidence that justified the denial of benefits for treatment of the plaintiff's panic anxiety disorder.<sup>112</sup> These cases illustrate courts' lack of adherence to congressional intent by

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102. *Leonard*, 199 F.3d 99 (2d Cir. 1999).

103. *Id.* at 100.

104. *Id.* at 107. The plaintiff, disabled by a mental illness, alleged that MetLife violated the ADA by contracting with the plaintiff's employer to provide a health insurance policy that limited coverage for mental disabilities to two years without limiting coverage of physical disabilities. *See id.* at 100.

105. *See id.* at 106 ("[W]e agree with the district court that . . . [MetLife's long term disability policy] is exempt from regulation under the Act pursuant to the safe harbor provision of Section 501(c), regardless [of] whether it was based on actuarial evidence.").

106. *Id.* at 104.

107. 145 F.3d 601 (3d Cir. 1998). The plaintiff, disabled by a mental disorder, brought an ADA claim challenging the defendant's insurance policy which provided only two years of mental health benefits but unlimited physical benefits. *See Ford*, 145 F.3d at 603.

108. *See id.* at 603.

109. *See id.* at 612.

110. *See id.* ("[W]e will not construe section 501(c) to require a seismic shift in the insurance business, namely requiring insurers to justify their coverage plans in court after a mere allegation by a plaintiff.").

111. 174 F.3d 431 (4th Cir. 1999). The plaintiff, disabled by panic anxiety disorder, claimed that the defendant's insurance plan's disparity in benefits between physical and mental disabilities violated the ADA. *See Rogers*, 174 F.3d at 432.

112. *See id.* at 437 ("[W]e do not find anything in § 501(c) of the ADA . . . that requires a plan sponsor or administrator to justify a plan's separate classification of mental disability with actuarial data.").

failing to require defendants to present actuarial or experience-based evidence in safe harbor cases.

Second, several courts have overextended the intended reach of the safe harbor provision by treating the provision as an irrebuttable defense to a plaintiff's ADA claim. Congress did not state which party should bear the burden of proof of exemption based on the safe harbor. The EEOC, however, specified that the burden should lie with the defendant, the party that has the greatest access to actuarial and experience-based data that may justify a distinction.<sup>113</sup> Such placement comports with accepted standards that the burden of proof of a defense to liability lie with the defendant.<sup>114</sup> Just as the defendant must provide evidence to meet its burden, the plaintiff has the opportunity to provide evidence to rebut the defense to liability.<sup>115</sup> When defendants plead the safe harbor defense, however, courts have found plaintiffs' attempts to rebut inappropriate and futile. In *Doe v. Mutual of Omaha Insurance Co.*,<sup>116</sup> the Seventh Circuit remarked that it was "odd" that the plaintiff made attempts to rebut the defendant's reliance on the safe harbor provision, particularly considering that the provision was designed for the benefit of the defendant.<sup>117</sup> Similarly, in *Rogers*, the Fourth Circuit suggested that the plaintiff's reliance on a rebuttal of the safe harbor defense was strange because the "provision [is] actually intended for the protection of those he sues."<sup>118</sup> The result of these courts' views is that a defendant's mere assertion of the safe harbor defense is enough to guarantee it protection from liability. In this way, the provisions' reach becomes much broader than Congress intended.

Third, courts have expanded the reach of the safe harbor by relying inappropriately on the Supreme Court's definition of subterfuge in the Age Discrimination in Employment Act ("ADEA") in *Public Employees Retirement System v. Betts*.<sup>119</sup> Relying on its prior holding

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113. See EEOC INTERIM GUIDANCE, *supra* note 61, at 9-10.

114. See GENE R. SHREVE & PETER RAVEN-HANSEN, UNDERSTANDING CIVIL PROCEDURE 224 (2d ed. 1994).

115. See *id.* at 225.

116. 179 F.3d 557 (7th Cir. 1999). The plaintiffs, both disabled by AIDS-related conditions, challenged the disparity between the defendants' low AIDS benefits cap as compared to a much higher cap on all other conditions.

117. See *Doe*, 179 F.3d at 562 ("[S]ection 501(c) is obviously intended for the benefit of insurance companies rather than plaintiffs and it may seem odd therefore to find the plaintiff placing such heavy weight on what is in effect a defense to liability.").

118. 174 F.3d 432, 436 (4th Cir. 1999).

119. 492 U.S. 158 (1989). The ADEA provided that an employer was permitted to discriminate against an employee based on her age if it were "observ[ing] the terms of . . . any bona fide employee benefit plan . . . which is not a subterfuge to evade the purposes of this chapter . . ." 29 U.S.C. § 623(f)(2) (1994). For examples of courts' reliance on the *Betts* definition in the ADA context, see *Ford v. Schering Plough Corp.*, 145 F.3d 601, 611 (3d Cir.

under the ADEA in *United Airlines Inc. v. McMann*<sup>120</sup> and its understanding of the plain language and ordinary meaning of the word, in *Betts*, the Court defined subterfuge as “a scheme, plan, stratagem, or artifice of evasion.”<sup>121</sup> The Court held that subterfuge required a specific and malicious intent to evade the underlying statute.<sup>122</sup> The *Betts* definition conflicts with the definition found in the ADA’s legislative history and agency guidance that define subterfuge as discrimination not justified by actuarial data.<sup>123</sup>

Despite the conflict between the *Betts* definition of subterfuge and the use of the term in the ADA, courts have offered several arguments in favor of incorporating the *Betts* definition into the ADA. First, the ADA was passed one year after *Betts* was decided.<sup>124</sup> Courts argue that rules of statutory interpretation support reliance on the *Betts* definition because Congress was aware of the Supreme Court’s decision when drafting the ADA and did not redefine the term in the statute.<sup>125</sup> Second, courts have argued that the plain meaning of the safe harbor statutory text supports the *Betts* definition.<sup>126</sup> The cost-justification definition of subterfuge depends on an analysis of the legislative history and agency interpretation. Some argue that, under traditional

1998), *Moddero v. King*, 82 F.3d 1059, 1064 (D.C. Cir. 1996), and *Krauel v. Iowa Methodist Med. Ctr.*, 95 F.3d 674, 678-79 (8th Cir. 1996).

120. 434 U.S. 192 (1977).

121. *Betts*, 492 U.S. at 167 (quoting *McMann*, 434 U.S. at 203).

122. *See id.* at 171.

123. *See supra* notes 47-74 and accompanying text; *see also* H.R. REP. NO. 101-485, pt. 3, at 71 (1990); S. REP. NO. 101-116, at 84-5 (1989); EEOC INTERIM GUIDANCE, *supra* note 61, at 11 (“‘Subterfuge’ refers to disability-based disparate treatment that is not justified by the risks or costs associated with the disability.”).

124. *Betts* was decided in 1989. *Betts*, 492 U.S. at 158. The ADA was passed in 1990. 42 U.S.C. § 12101(b) (1994).

125. *See Ford v. Schering Plough Corp.*, 145 F.3d 601, 611 (3d Cir. 1998); *Moddero v. King*, 82 F.3d 1059, 1065 (D.C. Cir. 1996) (“[W]hen Congress chose the term ‘subterfuge’ for the insurance safe-harbor of the ADA, it was on full alert as to what the Court understood the word to mean and possessed (obviously) a full grasp of the linguistic devices available to avoid that meaning.”); *Krauel v. Iowa Methodist Med. Ctr.*, 95 F.3d 674, 679 (8th Cir. 1996) (“Had Congress intended to reject the *Betts* interpretation of subterfuge when it enacted the ADA, it could have done so expressly by incorporating language for that purpose into the bill that Congress voted on and the President signed.”); *see also Lorillard v. Pons*, 434 U.S. 575, 581 (1978) (“[W]here, as here, Congress adopts a new law incorporating sections of a prior law, Congress normally can be presumed to have had knowledge of the interpretation given to the incorporated law, at least insofar as it affects the new statute.”); *Standard Oil Co. of N.J. v. United States*, 221 U.S. 1, 59 (1911) (“[W]here words are employed in a statute which had at the time a well-known meaning at common law or in the law of this country they are presumed to have been used in that sense unless the context compels to the contrary.”); *ESKRIDGE, LEGISLATION*, *supra* note 10, at 265 (arguing that courts should presume that Congress uses a term consistently across statutes).

126. *See, e.g., Ford*, 145 F.3d at 611 (arguing that the definition forwarded in *Betts* is the “ordinary meaning” of subterfuge).

rules of statutory interpretation, the legislative history should not be used to interpret the text, if the language of the text is unambiguous.<sup>127</sup>

When the intent of Congress is known, however, the legislative intent, as evidenced in the legislative history, may override the plain meaning of the words.<sup>128</sup> The *Betts* definition does not apply to the ADA because it conflicts with clear legislative intent. The legislative history indicates that Congress intended the term subterfuge to incorporate a cost justification requirement into the safe harbor, not a specific intent requirement.<sup>129</sup> In addition, four members of Congress indicated in statements on the Senate and House floor that they did not intend the *Betts* definition to apply in the ADA context. Senator Kennedy stated that "the term 'subterfuge' is used in the ADA to denote a means of evading the purposes of the ADA. Under its plain meaning, the term does not connote there must be some malicious or purposeful intent to evade the ADA . . ." <sup>130</sup> Also, Representative Owens stated that, "Subterfuge does not mean that there must be some malicious or purposeful intent to evade the ADA . . ." <sup>131</sup> These statements and the legislative history rebut the presumption that the *Betts* definition should apply because Congress was aware of it when drafting the ADA.

127. This viewpoint is described as the "new textualism." It is the view that "[w]hen the text is relatively clear, interpreters should not even consider other evidence of specific legislative intent or general purpose." ESKRIDGE, *LEGISLATION*, *supra* note 10, at 228.

128. See *Dewsnupp v. Timm*, 502 U.S. 410, 416-17 (1992) (rejecting interpreting ambiguous statutory language based on its plain meaning in favor of construing the statute in accordance with the intent of Congress as indicated in pre-Code law and legislative history); *Doukas v. Metro. Life Ins. Co.*, 950 F. Supp. 422, 431 (D.N.H. 1996) ("[T]his case represents one of those perhaps rare situations when the legislative intent is so clearly and unmistakably expressed that it can overcome the customary meaning of the words within the statute."); ESKRIDGE, *LEGISLATION*, *supra* note 10, at 228; 2A NORMAN J. SINGER, *STATUTES AND STATUTORY CONSTRUCTION* § 46.01 (1992) ("[E]ven if the words of the statute are plain and unambiguous on their face the court may still look to the legislative history in construing the statute . . . if there is a clearly expressed legislative intention contrary to the language of the statute.").

129. See H.R. REP. NO. 101-485, pt. 3, at 70 (1990) ("[I]nsurers may continue to sell to and underwrite individuals applying for life, health, or other insurance on an individually underwritten basis . . . so long as the standards used are based on sound actuarial data and not on speculation."); S. REP. NO. 101-116, at 85 (1989) ("[T]he plan may not refuse to insure . . . except where the refusal, limitation, or rate differential is based on sound actuarial principles.").

130. 136 CONG. REC. S17378 (1990).

131. 136 CONG. REC. S17378 (1990). See also statements of Representative Edwards that "subterfuge does not mean that there must be some malicious intent to evade the ADA . . ." 114 CONG. REC. H4624 (1990) and Representative Waxman that "there is no requirement of an intent standard under the ADA." 114 CONG. REC. H17290 (July 12, 1990). Next to committee reports, explanatory statements by the sponsors or floor managers of legislation are the most useful and reliable kind of legislative history. Statements by supporters and opponents, however, carry less weight. See ESKRIDGE, *LEGISLATION*, *supra* note 10, at 303-04.

Fourth, courts have inappropriately expanded the reach of the safe harbor provision by failing to keep the underlying purposes of the ADA in mind when making decisions in safe harbor cases. The ADA was enacted to end discrimination against the disabled.<sup>132</sup> Congress added the safe harbor to ensure that the insurance industry could continue to underwrite and classify risks.<sup>133</sup> In their discussions of the safe harbor, the courts never address the issue of how to balance the contradictory purposes of the statute and one of its provisions. As a result, they allow Congress's secondary intent — avoidance of disruption to the insurance industry<sup>134</sup> — to override the ADA's main purpose — protection of the disabled.<sup>135</sup> The result is an inappropriate expansion of the reach of the safe harbor to protect distinctions made by insurers and employers that violates the underlying purposes of the ADA.

Despite the courts' general overexpansion of the reach of the safe harbor, several courts have suggested that the safe harbor provision offers insurers a narrower exemption. In *Henderson v. Bodine Aluminum, Inc.*,<sup>136</sup> the Eighth Circuit implied its support for a narrower approach. The court suggested in dicta that an insurer's decision to deny coverage of an autologous bone marrow transplant for the treatment of breast cancer may violate the ADA, if not based on sufficient actuarial evidence or experience.<sup>137</sup> The court did not base its decision to grant a preliminary injunction against the defendant insurer on a safe harbor analysis.

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132. See S. REP. NO. 101-116, at 2 (intending to “provide a clear and comprehensive national mandate to end discrimination against individuals with disabilities and to bring persons with disabilities into the economic and social mainstream of American life”).

133. See *id.* at 84-85.

134. See *id.*

135. See 42 U.S.C. § 12101 (1994).

136. 70 F.3d 958 (8th Cir. 1995).

137. *Henderson*, 70 F.3d 958 (8th Cir. 1995). The plaintiff, Karen Henderson, sought a preliminary injunction against her health plan and insurance providers to require the plan to approve her physician's request for an autologous bone marrow transplant and a regimen of high dose chemotherapy to treat her aggressive breast cancer. She claimed that her health plan's denial of coverage was a violation of the ADA because the plan was willing to cover the treatment for other types of cancer. The Eighth Circuit reversed the lower court's order denying the preliminary injunction and remanded for entry of the injunction and for trial. It also stated that it believed the plaintiff's ADA argument was sufficiently likely to succeed. The defendant did not raise a safe harbor defense and therefore, the court did not directly address the reach of the provision or its application to these facts. The courts suggested, however, that the insurer's denial of coverage may violate the ADA. See *id.* at 960 (8th Cir. 1995) (“[I]f the evidence shows that a given treatment is non-experimental — that is, if it is widespread, safe, and a significant improvement on traditional therapies — and the plan provides the treatment for other conditions directly comparable to the one at issue, the denial of that treatment arguably violates the ADA.”).

Four federal district courts have explicitly interpreted the safe harbor provision narrowly in concert with congressional intent.<sup>138</sup> All have held that the safe harbor requires an actuarial or cost-based justification for a disability-based distinction. In *Cloutier v. Prudential Insurance Co. of America*,<sup>139</sup> a California federal district court denied the defendant insurer's motion for summary judgment based on the plaintiff's claim of discrimination under the ADA for the denial of life insurance coverage.<sup>140</sup> The court found that the defendant did not offer sufficient actuarial data to support its decision to deny coverage.<sup>141</sup> In *Baker v. Hartford Life Insurance Co.*,<sup>142</sup> an Illinois federal district court denied the defendant insurer's motion for dismissal of the plaintiff's ADA claim.<sup>143</sup> The court suggested that the insurer's decision to deny coverage was not justified under the safe harbor because it was not based on considerations of underwriting or classifying risks.<sup>144</sup> In *Doukas v. Metropolitan Life Insurance Co.*,<sup>145</sup> a New Hampshire federal district court denied the defendant's motion for summary judgment despite the defendant's inclusion of an affidavit of one of its underwriters stating that the insurer's experience with bipolar disorder indicated that the disability presented an increased risk.<sup>146</sup>

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138. See *Cloutier v. Prudential Ins. Co.*, 964 F. Supp. 299 (N.D. Cal. 1997); *Doukas v. Metro. Life Ins. Co.*, 950 F. Supp. 422 (D.N.H. 1996); *Baker v. Hartford Life Ins. Co.*, No. 94C4416 1995 U.S. Dist. LEXIS 14103 (N.D. Ill. Sept. 28, 1995); *Piquard v. City of East Peoria*, 887 F. Supp. 1106 (C.D. Ill. 1995).

139. *Cloutier*, 964 F. Supp. 299 (N.D. Cal. 1997).

140. See *id.* at 299. The plaintiff was an HIV-negative individual in a sexual relationship with an HIV-positive partner. *Id.* The defendant denied the plaintiff's application for a life insurance policy based on the defendant's sexual relationship. *Id.* The plaintiff had standing to sue under the ADA because the statute prohibits discrimination against "an individual or entity because of the known disability of an individual with whom the individual or entity is known to have a relationship or association." 42 U.S.C. § 12182(b)(1)(E) (1994). The plaintiff's partner who was HIV-positive had a disability. See 964 F. Supp. at 301.

141. See *Cloutier*, 964 F. Supp. at 305 ("The mere fact that a particular individual presents a greater risk does not compel the conclusion that the individual presents an uninsurable risk. Common sense suggests that an insurer that confronts a heterogeneous pool of applicants merely consults actuarial tables to adjust its rates to account for varying levels of risk presented by those applicants.").

142. 1995 U.S. Dist. LEXIS 14103 (N.D. Ill. 1995).

143. See *Baker*, 1995 U.S. Dist. LEXIS 14103 at \*1. The plaintiff was disabled by a seizure disorder that forced him to rely on the use of a wheelchair and an augmentative communication device. The defendant insurer denied the plaintiff's application for major medical insurance on the basis of his disability. The defendant brought a motion to dismiss the plaintiff's claim.

144. See *id.* at \*10 ("[T]he mere fact that an insurer decides to deny coverage because of plaintiff's disability does not necessarily preclude a claim under the ADA. It is possible 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.").

145. 950 F. Supp. 422 (D.N.H. 1996).

146. See *Doukas*, 950 F. Supp. at 429. The plaintiff suffered from bipolar disorder. As a result, the defendant denied her application for disability insurance.



The court found that the statement did not constitute sufficient actuarial or experience-based evidence to justify a disability-based distinction under the ADA.<sup>147</sup> Finally, in *Piquard v. City of East Peoria*,<sup>148</sup> an Illinois federal district court held that the *Betts* definition should not apply to the ADA because the legislative history confirms a cost justification approach to the safe harbor.<sup>149</sup> Its rejection of the *Betts* definition supports a narrower interpretation of the safe harbor provision. Though these four holdings are consistent with Congress's intention to create a narrow and limited exception to the safe harbor, they are atypical, have never been affirmed by an appellate court, and do not represent the overall trend in the case law.

### B. Courts' Reasons for a Broad Interpretation

In addition to the courts' statutory justifications discussed above, several courts offer additional reasons for interpreting the safe harbor provision broadly. Overall, these reasons are inadequate and do not justify an interpretation contrary to congressional intent.

First, courts may interpret the provision broadly because of their reluctance to intervene in the business of the insurance industry. Exemption under the safe harbor provision requires insurers to justify disability-based distinctions with actuarial data or experience-based evidence.<sup>150</sup> As a result, in order to adhere to Congress's intent when making decisions in safe harbor cases, courts must engage in an analysis of actuarial data and the risk classification methods of an insurance company. Courts offer two reasons for their reluctance to conduct such an analysis. They argue that the federal McCarran-Ferguson Act<sup>151</sup> reserves for the states the authority to regulate the "business of insurance."<sup>152</sup> If a federal court were to engage in a substantive analy-

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147. *See id.* at 432. This case was heard by a district court in the First Circuit, a circuit that has not yet heard a case in which a defendant raises a safe harbor defense. It is likely that the First Circuit will also offer a narrow interpretation of the safe harbor and create a circuit split, because it offered an expansive view of Title III in *Carparts Distribution Center Inc. v. Automotive Wholesaler's Ass'n.*, 37 F.3d 12 (1st Cir. 1994).

148. 887 F. Supp. 1106 (C.D. Ill. 1995). Each of two plaintiffs suffered from a disability and, as a result, were denied the opportunity to participate in their employer's pension fund. *See id.* at 1112.

149. *See Piquard*, 887 F. Supp. at 1123 ("It is important to note that the term 'subterfuge,' as used in the ADA, should not be interpreted in the manner in which the Supreme Court interpreted the term in *Betts*. The term 'subterfuge' is used in the ADA to denote a means of evading the purposes of the ADA."). Though *Piquard* was not overturned, the Seventh Circuit has interpreted the safe harbor broadly in *Doe v. Mutual of Omaha Ins. Co.*, 179 F.3d 557 (7th Cir. 1999).

150. *See supra* Part I.

151. 15 U.S.C. § 1011 (1994).

152. *See* 15 U.S.C. § 1012(a) (1994) ("The business of insurance, and every person engaged therein, shall be subject to the laws of the several States which relate to the regulation or taxation of such business."). Congress intended the McCarran-Ferguson Act to allocate

sis of a defendant's decision to deny coverage, it would violate the Act's prohibition.<sup>153</sup> The courts' proffered reliance on the McCarran-Ferguson prohibition is inadequate, however, because the Act contains a relevant exception. The prohibition against the federal regulation of insurance applies unless a federal statute "specifically relates to the business of insurance," in which case the federal law supersedes the state law.<sup>154</sup> Federal courts can evaluate an insurer's denial of coverage without violating the McCarran-Ferguson prohibition because the ADA's safe harbor was specifically enacted to regulate insurance.<sup>155</sup>

In addition, courts elect to construe the safe harbor broadly, eliminating the need to make actuarial assessments because they are reluctant to engage in an analysis of actuarial or experience-based data. Courts are reluctant to perform such analyses because they lack specialized knowledge and experience.<sup>156</sup> Though it is understandable that judges may feel ill-equipped to make such actuarial assessments, this concern does not justify an inappropriately broad interpretation of the statute. In addition, their reluctance may be unjustified because courts are experienced at evaluating evidence for which they are not specifically trained to evaluate.<sup>157</sup> For example, judges have played an increasingly significant role in evaluating and admitting expert scientific evidence.<sup>158</sup> In *Daubert v. Merrell Dow Pharmaceuticals Inc.*,<sup>159</sup> the

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properly the regulatory and taxing power over the insurance industry between the federal government and the states. Congress wanted to assure state regulation of the "business of insurance" for two reasons: first, the state governments are "closer" to the insurance industry and second, the states are experienced at regulating the industry. See JERRY, *supra* note 36, at 24, 57.

153. See *Doe*, 179 F.3d at 564 ("If the ADA is fully applicable, insurers will have to defend their AIDS caps by reference to section 501(c), and the federal courts will then find themselves regulating the health insurance industry, which McCarran-Ferguson tells them not to do."); *Ford v. Schering Plough Corp.*, 145 F.3d 601, 611-12 (3d Cir. 1998) ("The second reason that Ford's argument must fail is that it ignores our statutory duty under the McCarran-Ferguson Act regarding insurance cases.")

154. 15 U.S.C. § 1012(b) (1994) ("No Act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of insurance . . . unless such Act specifically relates to the business of insurance . . ."); Geetter, *supra* note 11, at 535.

155. See JERRY, *supra* note 36, at 67 (suggesting that the exception to the McCarran-Ferguson prohibition applies even when only one section of a statute "specifically relates" to the business of insurance).

156. See *Ford*, 145 F.3d at 612 ("[R]equiring insurers to justify their coverage plans elevates this court to the position of super-actuary. This court is clearly not equipped to become the watchdog of the insurance business.")

157. See *Borkowski v. Valley Cent. Sch. Dist.*, 63 F.3d 131, 147 (2d Cir. 1995) ("A trial judge must decide rather quickly whether to send a case to a jury without pausing to conduct a graduate seminar in efficient-market economics.")

158. Although *Daubert v. Merrell Dow Pharm. Inc.*, 509 U.S. 579 (1993), does not require judges to evaluate scientific evidence as would a factfinder, it does require judges to engage in sophisticated analyses of scientific evidence in order to determine its reliability.

Supreme Court assigned judges the role of “ensuring that an expert’s testimony both rests on a reliable foundation and is relevant to the task at hand.”<sup>160</sup> This role often requires judges to evaluate unfamiliar evidence, a task for which they may be untrained.<sup>161</sup> In his dissent, Justice Rehnquist argued that *Daubert* imposed on judges “the obligation . . . to become amateur scientists in order to perform [this] role.”<sup>162</sup> The Supreme Court’s rejection of Justice Rehnquist’s concern indicates that the Court believed that judges were qualified to make judgments based on scientific evidence. The same reasoning applies to judges’ evaluations of actuarial and experience-based insurance data.

Second, judges interpret the safe harbor provision broadly because of their beliefs that ADA claims are often illegitimate and brought by plaintiffs not truly deserving of a legal remedy.<sup>163</sup> Judges are likely concerned that holdings in favor of ADA plaintiffs will encourage a flood of illegitimate claims that would clog up their dockets.<sup>164</sup> As expected, the opinions do not readily reveal evidence of a court’s belief that a complainant lacks conviction. At least one judge has expressed his disdain for a plaintiff’s allegation of an ADA violation by an insurer.<sup>165</sup> The existence of judicial hostility toward the ADA is further evidenced by judges’ expressions of concern, in other contexts, that ADA plaintiffs may be using the statute to take advantage of defendants.<sup>166</sup> In addition, the argument that courts view many ADA claims

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*See id.* at 592-95; *see also* RICHARD O. LEMPET ET AL., A MODERN APPROACH TO EVIDENCE: TEXT, PROBLEMS, TRANSCRIPTS AND CASES 1044 (3d ed. 2000).

159. *Daubert*, 509 U.S. 579 (1993).

160. *Id.* at 597; *see also* LAWRENCE O. GOSTIN, PUBLIC HEALTH LAW: POWER, DUTY, RESTRAINT 285 (2000).

161. A result of this new role has been the proliferation of articles and manuals to assist judges in the task of evaluating scientific evidence. For example, judges will often rely on the FEDERAL JUDICIAL CENTER, REFERENCE MANUAL ON SCIENTIFIC EVIDENCE (2d ed. 2000), available at [http://air.fjc.gov/public/pdf.nsf/lookup/sciman01.pdf/\\$file/sciman01.pdf](http://air.fjc.gov/public/pdf.nsf/lookup/sciman01.pdf/$file/sciman01.pdf) (last visited Sept. 25, 2002). *See* LEMPET ET AL. *supra* note 158, at 1044 n.79.

162. 509 U.S. at 601 (Rehnquist, C.J., dissenting).

163. *See* Ruth Colker, *Winning and Losing Under the Americans with Disabilities Act*, 62 OHIO ST. L.J. 239, 260 (2001) [hereinafter Colker, *Winning*] (“[J]udicial attitude towards a statute may be the most important predictor of litigation results.”).

164. *See* *Sutton v. United Air Lines Inc.*, 527 U.S. 471, 510 (1999) (Stevens, J., dissenting) (“It has also been suggested that if we treat as ‘disabilities’ impairments that may be mitigated by measures as ordinary and expedient as wearing eyeglasses, a flood of litigation will ensue.”).

165. *See* *Ford v. Schering-Plough Corp.*, 145 F.3d 601, 612 (3d Cir. 1998) (“Accordingly, we will not construe section 501(c) to require a seismic shift in the insurance business, namely requiring insurers to justify their coverage plans [with actuarial data] in court after a mere allegation by a plaintiff.” (emphasis added)).

166. *See, e.g.*, *Arneson v. Heckler*, 879 F.2d 393, 400 (8th Cir. 1989) (Whipple, J., dissenting) (“I agree with the Court that the Government should bend over backwards to accommodate the handicapped. However, this does not mean the Government should be a floor mat to be walked on by individuals intent on taking advantage of the Government’s perceived inability to discharge non-productive or unqualified employees . . .”).

as illegitimate is consistent with the recent overall narrowing of the reach of the ADA.<sup>167</sup> Judges' hostility toward the ADA's wide-reaching purposes is an improper reason for a broad interpretation of the safe harbor.

### III. APPLICATION OF A NEW STANDARD

This final Part offers a solution to courts' failures to adhere to the intent of Congress when interpreting the safe harbor provision. It proposes that, in safe harbor cases, courts adopt the undue hardship defense standard used to determine whether an employer is exempt from the ADA's reasonable accommodation requirement in Title I of the statute.<sup>168</sup> Section III.A of this Part examines the ADA's reasonable accommodation requirement and the undue hardship defense. Section III.B proposes that courts apply the undue hardship standard in safe harbor cases and demonstrates how the application of this standard will permit courts to remain faithful to Congress's intent. Section III.C offers several justifications for the adoption of the undue hardship standard. Section III.D responds to several objections to the application of the undue hardship standard in safe harbor cases.

#### A. *The Undue Hardship Defense*

Title I of the ADA requires that employers make reasonable accommodations for all employees with disabilities.<sup>169</sup> Reasonable accommodations may include, but are not limited to, changing physical facilities, offering part-time or modified work schedules, reassigning to

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167. See e.g., *Bd. of Trs. v. Garrett*, 531 U.S. 356 (2001); *Sutton*, 527 U.S. at 475 (holding that those with correctable disabilities do not qualify as disabled under the ADA); *Krauel v. Iowa Methodist Med. Ctr.*, 95 F.3d 674, 677 (8th Cir. 1996) (holding that infertility is not a disability under the ADA).

168. The ADA defines a "qualified individual with a disability" as "an individual with a disability who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires." 42 U.S.C. § 12111(8). By prohibiting discrimination against a qualified individual with a disability, the statute requires employers and public accommodations to make reasonable accommodations. The failure to make a reasonable accommodation, without demonstration of undue hardship, constitutes an ADA violation. See 42 U.S.C. § 12112(b) ("[T]he term 'discriminate' includes . . . not making reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability who is an applicant or employee, unless such covered entity can demonstrate that the accommodation would impose an undue hardship on the operation of the business of such covered entity."). If the employer or public accommodation can demonstrate an undue hardship, however, it need not provide a reasonable accommodation. See 42 U.S.C. § 12112(b)(5)(A).

169. See 42 U.S.C. §§ 12111-12112. See generally Stephen F. Stuhlberg, *Reasonable Accommodation Under the Americans With Disabilities Act: How Much Must One Do Before Hardship Turns Undue?*, 59 U. CIN. L. REV. 1311, 1313-14 (1991).

a vacant position, or providing qualified readers or interpreters.<sup>170</sup> An employer who fails to offer a qualified employee a reasonable accommodation has violated the ADA.<sup>171</sup> Nonetheless, the statute permits an employer or public accommodation to deny a reasonable accommodation if it is an “undue hardship” or “undue burden;”<sup>172</sup> that is, the em-

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170. See 42 U.S.C. § 12111(9); 16 C.F.R. § 1630.2(o)(2) (2000). The regulations state that reasonable accommodations may include modifications in the job application process, the work environment, the manner in which work is performed, or the employee's ability to enjoy equal benefits and privileges of employment. See 29 C.F.R. § 1630.2(o) (2000). The EEOC views the reasonable accommodation requirement as a means by which barriers to the equal employment opportunity of an individual with a disability are removed or alleviated. See 29 C.F.R. § 1630, *Interpretive Guidance on Title I of the Americans with Disabilities Act*.

171. See 42 U.S.C. § 12112(b)(5)(A). Public accommodations are similarly bound to provide disabled individuals with reasonable modifications to ensure that they have equal access under Title III of the ADA. The regulations require that a public accommodation take steps to ensure that the disabled are not excluded or denied services through the provision of “auxiliary aids and services.” See 28 C.F.R. § 36.303.

172. See 42 U.S.C. § 12112(b) (“[T]he term ‘discriminate’ includes . . . not making reasonable accommodations . . . unless such covered entity can demonstrate that the accommodation would impose an undue hardship on the operation of the business of such covered entity.”); 28 C.F.R. § 36.303. The undue hardship defense originated under the Rehabilitation Act of 1973. 29 U.S.C. § 706 (1988). Section 504 of the Rehabilitation Act broadly prohibited discrimination against individuals with disabilities by all entities receiving federal financial assistance. 29 U.S.C. § 794(a); S. REP. NO. 1297, at 39 (1974) (Section 504 “therefore constitutes the establishment of broad government policy that programs receiving federal financial assistance shall be operated without discrimination on the basis of handicap.”); H.R. REP. NO. 101-485, pt. 3, at 26 (1990) (“Section 504 bars discrimination by recipients of Federal financial assistance against persons with disabilities in all the recipient’s programs and activities.”). The statute included the reasonable accommodation requirement adopted by Congress in the ADA, but did not explicitly include a hardship defense. See Armen Merjian, *Bad Decisions Make Bad Decisions: Davis, Arline, and Improper Application of the Undue Financial Burden Defense Under the Rehabilitation Act and the Americans with Disabilities Act*, 65 BROOK. L. REV. 105, 113 (1999). The hardship defense first appeared in the Department of Health, Education, and Welfare’s regulations promulgated in 1978 and was written into the Act in the 1978 amendments. The regulations state that employers must “make reasonable accommodation . . . unless the recipient [of federal financial assistance] can demonstrate that the accommodation would impose an undue hardship on the operation of its program.” See 45 C.F.R. § 84.12(a) (1998); Amendments to the Rehabilitation Act of 1973, Pub. L. No. 95-602, 92 Stat. 2955, 2982 (“In fashioning an equitable or affirmative action remedy under [Section 501], a court may take into account the reasonableness of the cost of any necessary work place accommodation.”). These provisions limited an employer’s duty to accommodate to instances where an accommodation proves unreasonably costly. A hardship defense was independently created by the Supreme Court in *Southeastern Community College v. Davis*, 442 U.S. 397 (1979). The Court stated that reasonable accommodations would ordinarily be expected as long as they did not impose “undue financial and administrative burdens upon a State.” *Id.* at 412. This view was reiterated in later cases. See, e.g., *Alexander v. Choate*, 469 U.S. 287, 289 (1984) (denying a remedy to disabled plaintiffs challenging Tennessee’s proposal to reduce the number of inpatient hospital days covered by Medicaid under Section 504 of the Rehabilitation Act); *Nelson v. Thornburgh*, 567 F. Supp. 369, 371 (E.D. Pa. 1983) (requiring that the Pennsylvania Department of Public Welfare provide three blind individuals with readers). Title II of the ADA, which applied to public services, adopted the undue hardship defense that existed under the Rehabilitation Act. H.R. REP. NO. 101-485, pt. 3, at 50 (“[T]itle II incorporates the duty set forth in the regulation for Sections 501, 503 and 504 of the Rehabilitation Act to provide a ‘reasonable accommodation’ that does not constitute an ‘undue hardship.’”).

ployer need not accommodate the disabled employee if the needed accommodation is too burdensome, either financially or administratively.<sup>173</sup> Congress explicitly defined undue hardship as “significant difficulty or expense.”<sup>174</sup>

The burden of proving undue hardship rests with the defendant because the undue hardship defense is an affirmative defense to a claim of discrimination under the ADA.<sup>175</sup> Initially, the plaintiff bears the burden of demonstrating that an accommodation is generally reasonable. Once the plaintiff meets this burden, the defendant may show that the accommodation, though generally reasonable, constitutes an undue hardship because of the employer’s specific circumstances.<sup>176</sup> If the defendant meets its burden, it is absolved of liability under the ADA.

Neither Congress nor the EEOC has provided a bright line rule as to the level of hardship that meets the defendant’s burden. In fact, Congress explicitly rejected proposals for a clear standard in favor of

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173. See Mary Kate Kearney, *The ADA, Respiratory Disabilities and Smoking: Can Smokers at Burger King Really Have it Their Way?*, 50 SYRACUSE L. REV. 1, 23 (2000). For example, an employer may argue that the cost of installing an elevator for a disabled individual is too costly and presents an undue hardship.

174. 42 U.S.C. § 12111(10)(A).

175. See *Juvelis v. Snider*, 68 F.3d 648, 653 n.5 (3d Cir. 1995); *Barth v. Gelb*, 2 F.3d 1180, 1188 (D.C. Cir. 1993); H.R. REP. NO. 101-485, pt. 3, p. 26 (“Like Section 504 of the Rehabilitation Act, the burden is on the employer to demonstrate that the needed accommodation would cause an undue hardship.”); Thomas Simmons, *The ADA Prima Facie Plaintiff: A Critical Overview of Eighth Circuit Case Law*, 47 DRAKE L. REV. 761, 804 (1999) (“[T]he undue hardship defense is just that — a defense — and the burden of establishing it rests wholly with the defendant.”); Julie Brandfield, Note, *Undue Hardship: Title I of the Americans with Disabilities Act*, 59 FORDHAM L. REV. 113, 121 (1990) (“[T]he employer has the burden of establishing undue hardship by a preponderance of the evidence.”); Wendy Voss, Note, *Employing the Alcoholic Under the Americans with Disabilities Act of 1990*, 33 WM. & MARY L. REV. 895, 930 (1992) (“The employer, in turn, should bear the burden of assessing whether the requested accommodation would create an undue hardship.”). The circuits are split as to the actual placement of the burdens of persuasion and production. A full discussion of this controversy is beyond the scope of this Note because all agree that the burden of proving undue hardship falls on the defendant. See *Borkowski v. Valley Cent. Sch. Dist.*, 63 F.3d 131, 136 (2d Cir. 1995); Jason Zarin, *Beyond the Bright Line: Consideration of Externalities, the Meaning of Undue Hardship, and the Allocation of the Burden of Proof under Title I of the Americans with Disabilities Act*, 7 S. CAL. INTERDISC. L.J. 511, 527-532 (1998).

176. See *Walton v. Mental Health Ass’n*, 168 F.3d 661, 671 (3d Cir. 1999); *LaPorta v. Wal-Mart Stores, Inc.*, 163 F. Supp. 2d 758, 767 (W.D. Mich. 2001); Kearney, *supra* note 173, at 8 (“If the plaintiff establishes that the proposed modification is generally reasonable, the burden then shifts to the defendant to show that the modification would not be reasonable.”). There is a fine line between the plaintiff’s burden of showing reasonableness and the defendant’s burden of showing hardship. The line is fine because evidence used to support reasonableness may also indicate whether there is an undue hardship. See Simmons, *supra* note 175, at 804-05. The burdens differ, however, in that the plaintiff must present “a rather generalized inquiry which focuses on the method of accommodation” whereas the defendant must present particular evidence based on an “individualized inquiry.” See *id.* at 805.

retaining a flexible one.<sup>177</sup> While the burden is not fixed, the statute and legislative history indicate that it is significant.<sup>178</sup> The legislative history states that the duty to accommodate creates a more substantial obligation than the duty to remove physical barriers in existing buildings, which is limited to “readily achievable” barriers.<sup>179</sup> In addition, a defendant cannot show that an accommodation presents an undue hardship because of a mere *de minimis* cost<sup>180</sup> or because it presents an inconvenience.<sup>181</sup> The defendant is not required, however, to demonstrate a hardship so great that providing the accommodation would ruin his business.<sup>182</sup>

Agency interpretations provide additional support for the placement of a significant burden on the defendant. The EEOC states that a defendant’s claim of undue hardship must be supported by evidence of a defendant’s individualized circumstances that demonstrate that a requested accommodation would present a significant difficulty or ex-

177. See H.R. REP. NO. 101-485, pt. 3, at 41 (“The Committee rejected an amendment which would have set a fixed limit of over 10% of the disabled employee’s salary as a per se undue hardship.”); U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, ENFORCEMENT GUIDANCE: REASONABLE ACCOMMODATION AND UNDUE HARDSHIP UNDER THE AMERICANS WITH DISABILITIES ACT TO DISABILITY-BASED DISTINCTIONS IN EMPLOYER PROVIDED HEALTH INSURANCE 58 n.113 (1999) [hereinafter EEOC ENFORCEMENT GUIDANCE: REASONABLE ACCOMMODATION] (“[T]he House of Representatives rejected a cost-benefit approach by defeating an amendment which would have presumed undue hardship if a reasonable accommodation cost more than 10% of the employee’s annual salary.” (citation omitted)); LAWRENCE O. GOSTIN & HENRY A. BEYER, IMPLEMENTING THE AMERICANS WITH DISABILITIES ACT: RIGHTS AND RESPONSIBILITIES OF ALL AMERICANS 65 (1993) (“Congress refused to ‘peg undue hardship to a fixed ratio . . . .’”).

178. See 42 U.S.C. § 12111(10); H.R. REP. NO. 101-485, pt. 3, at 40 (“[T]he definition of ‘undue hardship’ in the ADA is intended to convey a significant, as opposed to a *de minimis* or insignificant, obligation on the part of employers.”).

179. H.R. REP. NO. 101-485, pt. 3, at 40.

180. See S. REP. NO. 101-116, at 36 (1989); H.R. REP. NO. 101-485, pt. 3, at 40. The legislative history states that the duty to accommodate under the ADA is more significant than the duty to accommodate for religious discrimination, established in *Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63 (1977), which requires only a showing of *de minimis* cost increase to absolve the defendant of the duty to accommodate. See also, e.g., *Worthington v. City of New Haven*, No. 3:94-CV-00609(EBB), 1999 U.S. Dist. LEXIS 16104, at \*36 (D. Conn. Oct. 5, 1999); *Prewitt v. United States Postal Services*, 662 F.2d 292, 308 n.22 (5th Cir. 1981); 29 C.F.R. pt. 1630 app. 1630.15(d) (“To demonstrate undue hardship pursuant to the ADA and this part, an employer must show substantially more difficulty or expense than would be needed to satisfy the ‘*de minimis*’ Title VII standard of undue hardship.”)

181. See WILLIAM D. GOREN, UNDERSTANDING THE AMERICANS WITH DISABILITIES ACT: AN OVERVIEW FOR LAWYERS 24 (2000).

182. In the original version of the ADA, a hardship was considered undue only if the accommodation “threatened the continued existence of the employer’s business.” Congress rejected this approach. Jeffrey O. Cooper, *Overcoming Barriers to Employment: The Meaning of Reasonable Accommodation and Undue Hardship in the Americans with Disabilities Act*, 139 U. PA. L. REV. 1423, 1448 (1991).

pense.<sup>183</sup> A defendant cannot absolve himself of liability in an ADA case by simply pleading the undue hardship defense.<sup>184</sup> In addition, a court will not rely on a defendant's unsupported statements that a hardship is undue.<sup>185</sup> Nor will a court find in favor of the defendant by making presumptions about the difficulty or expense of an accommodation.<sup>186</sup>

The ADA and its regulations offer some guidance as to the type of evidence that courts should require defendants to provide to demonstrate undue hardship. The statute lists several factors for a court to consider. These include: (1) the nature and cost of the accommodation; (2) the overall financial resources of the covered entity; and (3) the type of operation of the covered entity.<sup>187</sup> The legislative history and EEOC regulations indicate that courts may consider three additional factors. These include: (1) the impact of the accommodation on other employees' abilities to perform their duties and the facility's ability to conduct business;<sup>188</sup> (2) the total number of employees benefiting from the accommodation;<sup>189</sup> and (3) the availability of outside funding to pay for the accommodation.<sup>190</sup> The statute and cases also include the fundamental alteration defense as a component of the undue hardship defense.<sup>191</sup> That is, a court must consider

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183. See EEOC ENFORCEMENT GUIDANCE: REASONABLE ACCOMODATION, *supra* note 177, at 54 ("Generalized conclusions will not suffice to support a claim of undue hardship. Instead, undue hardship must be based on an individualized assessment of current circumstances that show a specific reasonable accommodation would cause significant difficulty or expense." (citation omitted)).

184. See *Garcia-Ayala v. Lederle Parenterals, Inc.*, 212 F.3d 638, 649 (1st Cir. 2000); *Borkowski v. Valley Cent. Sch. Dist.*, 63 F.3d 131, 143 (2d Cir. 1995); *Langon v. Dep't of Health and Human Servs.*, 959 F.2d 1053, 1060 (D.C. Cir. 1992).

185. See *Ward v. Mass. Health Research Inst.*, 209 F.3d 29, 36 (1st Cir. 2000) (denying summary judgment because the defendant has "offered only general statements regarding the snowball effect of such an accommodation"); *Langon*, 959 F.2d at 1060; 29 C.F.R. pt. 1630 app. 1630.15(d) ("It should be noted, however, that an employer cannot simply assert that a needed accommodation will cause it undue hardship . . . and thereupon be relieved of the duty to provide accommodation.").

186. See *Brandfield*, *supra* note 175, at 128 ("The ADA clearly calls for basing determinations of undue hardship on objective data . . . not on presumptions as to the abilities of a class of disabled individuals or the hardships they will cause."); Kristen M. Ludgate, Note, *Telecommuting and the Americans with Disabilities Act: Is Working at Home a Reasonable Accommodation?*, 81 MINN. L. REV. 1309, 1335 (1997) ("[T]he final decision under a fact-specific approach will reflect the actual feasibility of telecommuting . . . [as a reasonable accommodation], rather than rely on outdated and inaccurate assumptions.").

187. See 42 U.S.C. § 12111(10)(B); 29 C.F.R. § 1630.2(p)(2).

188. See 29 C.F.R. § 1630.2(p)(2)(v).

189. See S. REP. NO. 101-116, at 93 (1989). For instance, if an elevator is installed in an office building to accommodate an employee confined to a wheelchair, all employees may benefit from using the elevator.

190. See S. REP. NO. 101-116, at 93.



whether an accommodation would require a business to change its mission or alter its essential nature.<sup>192</sup>

Despite Congress and the EEOC's attempts to develop factors for courts to consider in determining whether a hardship is undue, the standard remains ambiguous.<sup>193</sup> Courts must determine undue hardship by looking at individualized facts on a case-by-case basis.<sup>194</sup> Courts have, however, developed a "relatively consistent framework" for evaluating undue hardship cases.<sup>195</sup> As a general rule, courts rely on the factors outlined in the statute and regulations to determine whether an accommodation would present an undue hardship.<sup>196</sup> They consider the costs of the accommodation,<sup>197</sup> the nature of the accommodation,<sup>198</sup> the employer's resources,<sup>199</sup> and the impact that the accommodation would have on the employer's business.<sup>200</sup>

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191. See *PGA Tour Inc. v. Martin*, 121 S. Ct. 1879, 1884 (2001); *Sch. Bd. v. Nassau County*, 480 U.S. 273, 288 (1987); *Barth v. Gelb*, 2 F.3d 1180, 1187 (D.C. Cir. 1993); *Burriola v. Greater Toledo YMCA*, 133 F.Supp. 2d 1034, 1038 (N.D. Ohio 2001); H.R. REP. NO. 101-485, pt. 3, at 59 (1990); GOREN, *supra* note 181, at 24; Voss, *supra* note 153, at 937. Fundamental alteration is a component of undue hardship under Title I, but is listed as a separate companion defense to undue burden under Title III. See 28 C.F.R. § 36.303. Whether fundamental alteration is viewed as included within the hardship defense or as a companion defense, it still must be considered.

192. See *Kearney*, *supra* note 173.

193. See Steven B. Epstein, *In Search of a Bright Line: Determining When an Employer's Financial Hardship Becomes "Undue" Under the Americans with Disabilities Act*, 48 VAND. L. REV. 391, 396 (1995); *Ludgate*, *supra* note 186, at 1318 ("The requirements for establishing an undue hardship defense are ambiguous because neither Congress nor the EEOC have promulgated specific guidelines that distinguish a reasonable accommodation from an undue hardship.").

194. See H.R. REP. NO. 101-485, pt. 3, at 42 ("The determination of undue hardship is a factual one which must be made on a case-by-case basis."); JAMES G. FRIERSON, EMPLOYER'S GUIDE TO THE AMERICANS WITH DISABILITIES ACT 154 (1995).

195. *Ludgate*, *supra* note 186, at 1319 ("Despite the lack of specific guidelines, courts have developed a relatively consistent framework for evaluating reasonable accommodation cases.").

196. See *supra* notes 187-192 and accompanying text.

197. See, e.g., *Timothy H. v. Cedar Rapids Cmty. Sch. Dist.*, 178 F.3d 968, 970-71 (8th Cir. 1999); *Gardner v. Morris*, 752 F.2d 1271, 1283 (8th Cir. 1985); *Burriola v. Greater Toledo YMCA*, 133 F. Supp. 2d 1034, 1039 (N.D. Ohio 2001) (holding that a day care center could provide one-on-one attention to a disabled child without undue hardship because the additional time required by day care staff was minimal and would not cost very much); *Worthington v. City of New Haven*, No. 3:94-CV-00609(EBB), 1999 U.S. Dist. LEXIS 16104, \*36 (D. Conn. Oct. 5, 1999); *Garza v. Abbott Laboratories*, 940 F. Supp. 1227, 1243 (N.D. Ill. 1996) (denying summary judgment because an issue as to the actual cost of the accommodation remained and would bear significantly on whether undue hardship existed.); *Huber v. Howard County*, 849 F. Supp. 407, 414 (D. Md. 1994).

198. See *Gaul v. Lucent Techs. Inc.*, 134 F.3d 576, 581 (3d Cir. 1998); *Davis v. Francis Howell Sch. Dist.*, 138 F.3d 754, 757 (8th Cir. 1998) (finding that a school would suffer undue hardship if it were to be required to give prescription medication to a child with attention deficit hyperactivity disorder because the school nurse was not capable of determining the safety of the dosage.); *Easley v. Snider*, 36 F.3d 297, 305 (3d Cir. 1994) (holding that a state would suffer undue hardship if it were required to include non-mentally alert individuals in a

Courts have also identified and relied on at least four additional criteria not listed in the statute or regulations. First, courts have considered the past practices of either the defendant or society in determining whether an accommodation would create an undue hardship.<sup>201</sup> If the defendant or other similar entity took actions similar to the requested accommodation in the past, the accommodation would not be an undue hardship.<sup>202</sup> Second, courts consider the externalities of a requested accommodation on others, particularly other employees.<sup>203</sup> Third, courts conduct a cost/benefit analysis to determine whether an accommodation would create an undue hardship.<sup>204</sup> Finally, at least a few courts have considered the importance of the defendant's business to a community or society.<sup>205</sup> If a defendant's services are beneficial or

state program for mentally alert disabled individuals because the increase in numbers of individuals in the program could not be handled by the state).

199. See *Rascon v. U.S. West Communications, Inc.*, 143 F.3d 1324, 1335 (10th Cir. 1998) (arguing that a large company will experience less hardship from costly accommodations.); *Worthington v. City of New Haven*, No. 3:94-CV-00609(EBB), 1999 U.S. Dist. LEXIS 16104, at \*36 (D. Conn. Oct. 5, 1999).

200. See *Walton v. Mental Health Ass'n.*, 168 F.3d 661, 671 (3d Cir. 1999) (holding that an accommodation was an undue hardship because it threatened the future of the defendant's organization); *Barth v. Gelb*, 2 F.3d 1180, 1188 (D.C. Cir. 1993) (holding that the defendant demonstrated undue hardship by showing that the accommodation would lead to a loss of "essential operational flexibility"); *Kimbro v. Atlantic Richfield Co.*, 889 F.2d 869, 878 (9th Cir. 1989) ("[T]he first two proposed accommodations would have imposed an undue hardship on ARCO's ability to effectively operate its refinery."); *Emery v. Caravan of Dreams*, 879 F. Supp. 640, 642 (N.D. Tex. 1995).

201. See *Rascon*, 143 F.3d at 1334; *Juvelis v. Snider*, 68 F.3d 648, 654 (3d Cir. 1995); *Wagner v. Fair Acres Geriatric Ctr.*, 49 F.3d 1002, 1016 (3d Cir. 1995).

202. See *PGA Tour, Inc. v. Martin*, 532 U.S. 661, 666 (2001); *Barnett v. United States Air, Inc.*, 228 F.3d 1105, 1120 (9th Cir. 2000); *Barth*, 2 F.3d at 1188 ("As the VOA admits that it restricts the assignment of certain of its current radio specialists for medical and family reasons, there can be no claim that such an accommodation would mark a 'fundamental alteration' in the nature of the VOA's program."); *Service v. Union Pacific R.R.*, 153 F. Supp. 2d 1187, 1193 (E.D. Cal. 2001) (holding that the requested accommodation of a no-smoking policy was not an undue hardship because the company had instituted a no-smoking policy in the past).

203. See *Ward v. Mass. Health Research Inst.*, 209 F.3d 29, 37 (1st Cir. 2000) ("MHRI could have introduced evidence that in order to accommodate Ward, . . . his duties would need to be subsumed by a co-worker."); *Wagner v. Fair Acres Geriatric Ctr.*, 49 F.3d 1002, 1017 (3d Cir. 1995) (arguing that the defendant need not accommodate the plaintiff because she created a health and safety risk to the staff and patients at Fair Acres); *Zarin*, *supra* note 175, at 516 ("Externalities on employees could play a significant part in the undue hardship determination.").

204. See *e.g.*, *Borkowski v. Valley Cent. Sch. Dist.*, 63 F.3d 131, 138 (2d Cir. 1995) ("[A]n accommodation is reasonable only if its costs are not clearly disproportionate to the benefits it will produce.") (citing *Vande Zande v. Wis. Dep't. of Admin.*, 44 F.3d 538, 542-43 (7th Cir. 1995)); *Vande Zande*, 44 F.3d at 543; *Ransom v. Arizona Bd. of Regents*, 983 F. Supp. 895, 903 (D. Az. 1997) (" 'Undue' hardship . . . is a relational term: the costs that the employer must assume are measured in relation to the benefits of the accommodation, including societal benefits of reducing dependency and nonproductivity.").

205. See, *e.g.*, *Equal Employment Opportunity Comm'n. v. United Blood Servs.*, No. 99 C2060, 2001 U.S. Dist. LEXIS 7272, at \*7-8 (N.D. Ill. May 2, 2001); *Nelson v. Thornburgh*,

necessary to society as a whole, a requested accommodation is more likely to present an undue hardship to the employer.<sup>206</sup>

### B. *Application of the Undue Hardship Standard to Safe Harbor Cases*

Congress intended the safe harbor provision to offer insurers and self-insured employers a narrow and limited exception to the requirements of the ADA.<sup>207</sup> By viewing the standard broadly and upholding insurers' decisions to deny coverage simply because they plead the safe harbor defense, courts ignore the meaning of the safe harbor provision.<sup>208</sup> This section demonstrates how courts can adhere to Congress's intent by relying on the undue hardship standard in safe harbor cases.

In safe harbor cases, the defendant should bear the burden of proving that a disability-based distinction is justified under the ADA because the safe harbor is a defense to liability. Currently, in safe harbor cases, the plaintiff has the initial burden of showing that she is a disabled individual and that her insurer denied coverage as a result of her disability.<sup>209</sup> Once the plaintiff has met her burden, the court should presume that the defendant has violated the ADA.<sup>210</sup> As in undue hardship cases, the burden should shift to the defendant, who may successfully defend its decision to deny coverage by showing that it is protected by the safe harbor.<sup>211</sup> The EEOC agrees that the burden of supporting the safe harbor defense should rest with the defendant because it is "the party who has the greatest access to the relevant facts."<sup>212</sup> Likewise, the insurer or self-insured employer has sole access to the actuarial or experience-based evidence needed to support its safe harbor defense, and therefore, should bear the burden of proof.<sup>213</sup>

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567 F. Supp. 369, 382 (E.D. Pa. 1983) ("When one considers the social costs which would flow from the exclusion of persons such as plaintiffs from the pursuit of their profession, the modest cost of accommodation . . . seems . . . quite small.").

206. See *United Blood Servs.*, 2001 U.S. Dist. LEXIS, at \* 7-8 (finding that an accommodation could present an undue hardship for a non-profit corporation that operated blood centers, at least in part, because of the importance of the defendant's business to society).

207. See *supra* Part I.

208. See, e.g., *Leonard F. v. Israel Disc. Bank*, 199 F.3d 99, 107 (2d Cir. 1999); *Rogers v. Dep't of Health and Env'tl. Control*, 174 F.3d 431, 432 (4th Cir. 1998).

209. See *Kearney*, *supra* note 173, at 8. The ADA defines a "qualified disabled individual" as any individual who can perform the essential functions of his or her job with or without a reasonable accommodation. See 42 U.S.C. § 12111 (2000).

210. See *Kearney*, *supra* note 173, at 8.

211. See EEOC INTERIM GUIDANCE, *supra* note 61, at 9-10.

212. *Id.* at 5.

213. See *Estes*, *supra* note 27, at 112 ("Under the ADA, the burden of proving subterfuge — or lack thereof — should rightfully be on the employer, because the employer has access to all of the underwriting and classifying information that was used to develop the health-benefit plan.").

At least one scholar has argued that the defendant should not bear the burden of proof of the safe harbor defense<sup>214</sup> because Congress did not include the safe harbor provision among its list of affirmative defenses to Title I.<sup>215</sup> By placing the safe harbor in a separate section of the Act — apart from the defenses — Congress indicated that it intended the safe harbor to be a rule of statutory construction, not an affirmative defense.<sup>216</sup> As a rule of statutory construction, the burden of proof would not fall on the defendant insurer. Even though the safe harbor appears separately in the statute, several arguments support the placement of the burden on the insurer. First, Congress may have elected not to include the safe harbor among its list of affirmative defenses in part because it viewed the safe harbor as a unique defense. Unlike the undue hardship defense, the safe harbor defense is limited in its applicability to the insurance industry.<sup>217</sup> Its limited applicability may have led Congress to include the safe harbor in a separate section, even though Congress intended the provision to be treated as an affirmative defense. Second, Congress has historically placed safe harbors in separate sections of statutes, rather than including them in a list of affirmative defenses.<sup>218</sup> Placing the ADA safe harbor separately suggests Congress's desire to be consistent, not its intent for the safe harbor to be treated differently than other defenses. Finally, Congress intended the safe harbor to apply to both Titles I and III of the Act.<sup>219</sup> Including the safe harbor only among the defenses to Title I would either not have indicated Congress's full intent or required Congress to repeat the same language under Title III.

By adopting the undue hardship defense standard in safe harbor cases, courts would require defendant insurers to present evidence, either in the form of actuarial statistics or experience-based data, that demonstrates that the predicted costs or burden of providing coverage to a disabled individual are so high as to justify the denial of coverage to the individual.<sup>220</sup> The ADA's legislative history and agency interpre-

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214. See Farber, *supra* note 50, at 851.

215. The undue hardship defense, 42 U.S.C. § 12111(10) (2000), and direct threat defense, 42 U.S.C. § 12111(3) (2000), were included within the text of Title I, while the safe harbor provision is in Title V, the statute's miscellaneous provision. 42 U.S.C. § 12201(c) (2000).

216. See Farber, *supra* note 50, at 851.

217. See *id.*

218. For instance, in fraud and abuse statutes, Congress placed the safe harbors in a separate section rather than including them near the text of other defenses. See 42 U.S.C. § 1395nn(b)-(e) (2000).

219. See 42 U.S.C. § 12201(c) (2000).

220. In the large majority of instances, an insurer will argue that coverage of a disabled individual presents an undue hardship because it is excessively costly. Theoretically, however, an insurer could also argue that coverage is an undue hardship because it presents an administrative burden. See Estes, *supra* note 27, at 92. In his article, Jeffrey Manning ar-

tations support this evidentiary requirement.<sup>221</sup> In addition, once courts have applied the undue hardship standard in safe harbor cases, courts should treat the defendant insurer's burden of providing evidence to justify the safe harbor defense as significant. A defendant should not be protected by the safe harbor simply by showing a de minimis increase in costs or burden.<sup>222</sup> The EEOC guidance supports this increased standard in safe harbor cases.<sup>223</sup> The agency stated that the defendant must produce evidence that coverage would lead to a drastic increase in costs and/or premium payments or a drastic alteration of the breadth of coverage or benefits.<sup>224</sup> In addition, once courts apply the undue hardship standard, their decisions as to whether the defendant has met its burden should be based on an assessment of actual evidence. A court should not base its determination on speculation about the increased risk created by a particular disability.<sup>225</sup>

In safe harbor cases, courts should also look to the undue hardship standard for guidance as to the kind of evidence that a defendant insurer must present to support its safe harbor defense. A court should consider the increased costs to the insurer that would stem from coverage, the nature of the coverage decisions, the overall financial resources of the defendant insurer, and the effect that coverage would have on the operation of the defendant's business.<sup>226</sup> Most impor-

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gues that only actuarial data should be able to justify disability-based distinctions by insurers. See John Manning, *Are Insurance Companies Liable Under the ADA?*, 88 CAL. L. REV. 607, 647-48 (2000). He contends that experience-based evidence, though discussed in the legislative history, should not be viewed by courts as a legitimate rationale for denying coverage to a disabled individual. See *id.* ("There is no reason, under my argument, why we should rely on the language 'based on sound actuarial principles or related to actual or reasonably anticipated experience' that appears in the legislative history. The text of the statute itself supplies the actuarial data requirement, so this secondary source is unnecessary."). Manning argues that reliance on experience-based evidence undermines the statute's actuarial data requirement. *Id.* at 648. Manning's view, however, is contrary to Congress's expression of intent found in the legislative history. See S. REP. NO. 101-116, at 85 (1989). Congress clearly did not agree that the experienced-based evidence requirement undermined the actuarial data requirement. It listed the two kinds of evidence in the same sentence as potential support for a denial of coverage to a disabled individual. See *id.* By arguing that it did, Manning rejects the legislative history in favor of a strict reliance on the statutory language. Such a statutory interpretation would be appropriate only if the legislative history conflicted with the statutory language; it does not in this case. See ABNER J. MIKVA AND ERIC LANE, AN INTRODUCTION TO STATUTORY INTERPRETATION AND THE LEGISLATIVE PROCESS 34 (1997).

221. See *supra* notes 47-74 and accompanying text.

222. See H.R. REP. NO. 101-485, pt. 3, at 40 (1990); S. REP. NO. 101-116, at 36.

223. See EEOC INTERIM GUIDANCE, *supra* note 61, at 6.

224. See *id.* ("The respondent may prove that the challenged insurance practice or activity is necessary . . . to prevent the occurrence of an unacceptable change either in the coverage of the health insurance plan, or in the premiums charged for the health insurance plan. An 'unacceptable' change is a drastic increase in premium payments . . . or a drastic alteration to the scope of coverage or level of benefits provided . . .").

225. H.R. REP. NO. 101-485, pt. 3, at 71.

226. Cf. 42 U.S.C. § 12111(10)(B) (1994); 29 C.F.R. § 1630.2(p)(2) (2002).

tantly, courts should consider the costs of coverage when deciding whether a disability-based distinction is justified under the ADA.<sup>227</sup> In addition to costs, courts should consider whether coverage would interfere with the future provision of coverage or would constitute a fundamental alteration of the defendant insurer's business.<sup>228</sup>

Even if a court finds that the costs or nature of coverage are burdensome, pursuant to the undue hardship model, it should weigh those factors against a number of other factors before determining whether a defendant's disability-based distinction is justified under the safe harbor provision. First, courts should consider the past coverage practices of the insurer.<sup>229</sup> For instance, if the defendant has provided coverage to other individuals who presented similar risks to the plaintiff, a court should not find that the decision to deny coverage was justified. The EEOC stated its support for a consideration of the defendant's past coverage decisions when deciding safe harbor cases.<sup>230</sup> Second, courts should consider the effect that a coverage decision will have on other policyholders.<sup>231</sup> Most likely, coverage will affect other policyholders in the form of increased premium payments. If such increases are excessive, an insurer's decision to deny coverage may be justified. Third, courts should weigh the costs of a coverage decision against the benefits to both the disabled individual, as well as society

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227. See GOSTIN & BEYER, *supra* note 177, at 65 (“[C]ost is the most important, although certainly not the only, factor in assessing undue hardship.”).

228. See, e.g., *Arline v. Nassau County*, 480 U.S. 273, 288 (1987). Defendants will likely contend that if the ADA compels an insurer to provide coverage to a disabled individual, then the statute interferes with underwriting practices, an essential element of the insurance industry, and therefore, constitutes a fundamental alteration. This argument does not justify disability-based distinctions. First, the restrictions on underwriting as a result of the ADA are limited. Insurers will be able to continue traditional underwriting practices for all individuals who are not disabled. Second, the Supreme Court's decision in *PGA Tour, Inc. v. Martin* limited the reach of the fundamental alteration defense. See *Martin*, 532 U.S. 661 (2001). The PGA Tour argued that permitting a competitor to ride in a cart rather than walk in a professional golf tournament would fundamentally alter the game of golf. See *id.* at 670-71. The Tour essentially claimed that it was responsible for determining the fundamental elements of its own business and the court should defer to its determination. See *id.* at 671. The Court disagreed. The case supports the proposition that a defendant should not be permitted to define what is fundamental to its own business or industry. See *id.* at 689-90. After *Martin*, therefore, it is for courts, not the insurance industry, to decide whether the industry's underwriting practices are fundamental.

229. Several courts have identified the importance of the defendant's past practices in undue hardship cases. See *supra* notes 201-202 and accompanying text.

230. See EEOC INTERIM GUIDANCE, *supra* note 61, at 11 (“The respondent may prove that the disparate treatment is justified by legitimate actuarial data, or by actual or reasonably anticipated experience, and that conditions with comparable actuarial data and/or experience are treated in the same fashion.” (citation omitted)).

231. Courts have considered the externalities of a reasonable accommodation when determining undue hardship. See *supra* note 203 and accompanying text.

in general.<sup>232</sup> A consideration of the interests of society in this calculus comports with the broad purposes of the ADA.<sup>233</sup>

A case example will provide a further illustration of how a court should apply the undue hardship standard in a safe harbor case. In *Doe v. Mutual of Omaha Insurance Co.*,<sup>234</sup> the plaintiffs brought suit against their health insurers because they were subjected to lower lifetime benefit limits because they suffered from AIDS than were individuals with other disabilities or illnesses.<sup>235</sup> The defendant insurer pleaded the safe harbor defense but did not provide any evidence in support.<sup>236</sup> Despite the lack of evidence, the Seventh Circuit held that the safe harbor justified the disability-based distinction.<sup>237</sup> Applying the undue hardship standard in this case should lead to a different analysis by the court and potentially a different outcome. The defendant's failure to provide any evidence explaining the lower cap should result in a decision for the plaintiff because the defendant insurer bears the burden of proof to justify the lower AIDS benefit cap.<sup>238</sup> Had the defendant presented actuarial or experienced-based evidence justifying the AIDS cap, the court should have evaluated the evidence to assess whether the insurer met its burden and whether the safe harbor permitted the lower cap. In order to meet its burden, the defendant would most likely present evidence of the high costs of AIDS care. This evidence might include actuarial tables or data of the insurer's own experiences paying for the care of individuals with AIDS. In addition, the defendant may present evidence of how uncapped coverage of an individual with AIDS would affect the insurer's ability to provide sufficient care to others. The court's role should be to assess this evidence to determine if the defendant met its burden of proof.<sup>239</sup> It should weigh the likelihood and magnitude of increased costs that would result from coverage as well as the administrative and financial burden on the insurer and other policyholders against the benefits to both the disabled individual and/or society. This calculus would help the court determine whether the cap was discriminatory or justified under the safe harbor.

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232. See *supra* note 204 and accompanying text.

233. 42 U.S.C. § 12101(b) (1994).

234. 179 F.3d 557 (1999).

235. The health insurance policies limited AIDS coverage to \$25,000 and \$100,000. Coverage for all other conditions was limited to \$1 million. *Id.* at 558.

236. See *Doe*, 179 F.3d at 561.

237. See *id.* at 564.

238. See *supra* notes 175-176 and accompanying text.

239. The court might also want to consider other evidence such as the insurer's coverage limits for other disabilities or illnesses or the societal benefits that may flow from uncapped coverage for individuals with AIDS. See *supra* notes 201-206 and accompanying text.

There are several positive implications that will result from courts' adoption of the undue hardship standard in safe harbor defense cases. First, courts' reliance on a stricter standard will most likely lead to greater insurance coverage for the disabled.<sup>240</sup> Such a result promises to solve, if only in part, the important and growing problem of the large number of uninsured and underinsured Americans.<sup>241</sup> Second, the new standard will ensure that courts provide a rationale for decisions in favor of a defendant insurer. As a result, courts' decisions will tend to be more equitable. This result is especially important considering that courts may find against individual plaintiffs because of a general belief that ADA claims are largely illegitimate.<sup>242</sup> Finally, the adoption of the undue hardship standard may have an *ex ante* effect on the actions of insurers. Insurers may be more likely to make actuarial determinations before denying coverage to a disabled individual because of their concern about later liability. In addition, they may have a greater incentive to settle cases with disabled plaintiffs when the actuarial evidence in the insurer's favor is vague or questionable. The positive results from this *ex ante* effect would be two-fold: first, insurers will tend to base coverage decisions on actual data, rather than discrimination against the disabled; and second, courts will be faced with a reduced ADA caseload.

### C. *Justifications for the Adoption of the Undue Hardship Standard*

There are two main features of the undue hardship standard that make it an appropriate model for courts to use in assessing safe harbor defense claims. First, cases decided under the standard are not predetermined. By pleading the undue hardship defense, defendants are not guaranteed exemption from the reasonable accommodation requirement. Courts often find in favor of plaintiffs even when the defendant claims that an accommodation would present an undue hardship.<sup>243</sup> By limiting the reach of the safe harbor provision, Congress similarly intended that defendants not be guaranteed exemption from

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240. See John Jacobi, *The Ends of Health Insurance*, 30 U.C. DAVIS L. REV. 311, 365 (1997) (arguing that broadening the reach of the ADA will lead to increased coverage for disabled individuals).

241. The proportion of Americans without insurance increased from 14.2% in 1995 to 16.1% in 1997. Robert Kuttner, *The American Health Care System: Health Insurance Coverage*, NEW ENG. J. MED., Jan. 14, 1999, at 163. There are currently almost 44 million Americans who do not have any health insurance and a substantial proportion of those are children. *Id.*

242. See *supra* notes 163-167 and accompanying text.

243. See, e.g., *LaPorta v. Wal-Mart Stores, Inc.*, 163 F. Supp. 2d 758, 768 (W.D. Mich. 2001) ("Defendant's arguments concerning the effect of past accommodations, lack of substitute personnel, and the need for predictable attendance all relate to the question of undue burden, upon which defendant bears the burden of persuasion. The evidence on the issue of undue burden is not so one-sided that Wal-Mart must prevail as a matter of law.").



Titles I and III simply by pleading the safe harbor defense. Courts have interpreted safe harbor cases as if they had a predetermined outcome.<sup>244</sup> In nearly all cases, a defendant who pleads the safe harbor defense will win on summary judgment or at trial.<sup>245</sup> Reliance on the undue hardship model in safe harbor cases will ensure that courts no longer treat safe harbor cases as predetermined.

Second, a defendant must present evidence of an undue hardship to justify exemption from the reasonable accommodation requirement.<sup>246</sup> Merely pleading the undue hardship defense without presenting sufficient evidence results in a decision in favor of the plaintiff, presuming the plaintiff has established its *prima facie* case.<sup>247</sup> Congress similarly intended that defendants present actual evidence of actuarial data or experience to justify the safe harbor defense.<sup>248</sup> Courts have failed to require defendants to present such evidence in safe harbor cases.<sup>249</sup> The undue hardship model will ensure consistency with congressional intent in safe harbor cases by requiring defendants to present actual evidence of an undue hardship. It is, therefore, an appropriate standard to use in safe harbor cases.

There are several secondary justifications for the adoption of the undue hardship model. The application of the undue hardship standard is consistent with the underlying goals of the ADA. The statute was designed to ensure broad and comprehensive protection for disabled Americans.<sup>250</sup> Such broad protection calls for a standard that reduces the burden on plaintiffs of proving discrimination and requires defendant employers and insurers to meet a significant burden to justify disability-based distinctions. The undue hardship standard is appropriate because it places a significant burden on defendants to justify denying a reasonable accommodation.<sup>251</sup>

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244. See *supra* Part II(A).

245. See, e.g., *Doe v. Mutual of Omaha Ins. Co.*, 179 F.3d 557, 565 (7th Cir. 1999).

246. See EEOC ENFORCEMENT GUIDANCE: REASONABLE ACCOMMODATION, *supra* note 177, at 54 ("Generalized conclusions will not suffice to support a claim of undue hardship. Instead, undue hardship must be based on an individualized assessment of current circumstances that show a specific reasonable accommodation would cause significant difficulty or expense." (citation omitted)).

247. See *Borkowski v. Valley Cent. Sch. Dist.*, 63 F.3d 131, 143 (2d Cir. 1995) ("But in the absence of evidence regarding school district budgets, the cost of providing an aide of this sort, or any like kind of information, we are unable to conclude that unreasonableness or undue hardship has been established . . ."); see also *Garcia-Ayala v. Lederle Parenterals, Inc.*, 212 F.3d 638, 649 (1st Cir. 2000); *Langon v. Dep't of Health and Human Servs.*, 959 F.2d 1053, 1060 (D.C. Cir. 1992).

248. See H.R. REP. NO. 101-485, pt. 3, at 70-71 (1990); S. REP. NO. 101-116, at 84-85 (1989).

249. See, e.g., *Leonard F. v. Israel Disc. Bank.*, 199 F.3d 99, 107 (2d Cir. 1999).

250. See 42 U.S.C. § 12101(b) (1994); S. REP. NO. 101-116, at 2; H.R. REP. NO. 101-485, pt. 3, at 23.

251. See 42 U.S.C. § 12111(10)(1994); H.R. REP. NO. 101-485, pt. 3, at 40.

In addition, rules of statutory interpretation state that when part of a statute is unclear or ambiguous, courts should look to other parts of the statute for interpretive clues.<sup>252</sup> It is appropriate to look to the reasonable accommodation/undue hardship framework in Titles I, II, and III to better understand Congress' intent because the safe harbor provision is ambiguous. Finally, employers and judges are already familiar with the reasonable accommodation and undue hardship standards. The standards were developed under the Rehabilitation Act in the late 1970s and have remained largely unchanged today.<sup>253</sup> The reliance on an already existing and well-understood standard will not only ease implementation for judges, insurers, and employers, but will assure consistent and more effective application.<sup>254</sup>

#### D. *Objections to the Adoption of the Undue Hardship Standard*

Opponents may raise a number of objections to the application of the undue hardship standard in safe harbor defense cases.<sup>255</sup> First, opponents may contend that the proposed adoption of the undue hardship standard reads the safe harbor out of the statute.<sup>256</sup> Insurers and employers are required to make reasonable accommodations and are permitted to rely on the undue hardship defense under Titles I and III.<sup>257</sup> This Note argues that they should also be bound by the same standard under the safe harbor provision. Some may argue that modeling the safe harbor defense after the undue hardship standard leads to the inconsistent and inappropriate conclusion that Congress did not intend the safe harbor to have any additional meaning, beyond that already incorporated into the statute by Titles I and III, because the undue hardship standard would apply to insurers and employers regardless of the safe harbor provision.<sup>258</sup> This Note does not, however, treat the safe harbor provision as superfluous; the provision still plays an important role in the statute by eliminating confusion for insurers

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252. See ESKRIDGE, LEGISLATION, *supra* note 10, at 264-66.

253. For the origins of the undue hardship defense, see *Southeastern Cmty. College v. Davis*, 442 U.S. 397, 412 (1979).

254. See Peter D. Jacobson & Michael T. Cahill, *Applying Fiduciary Responsibilities in the Managed Care Context*, 26 AM. J.L. & MED. 155, 171 (2000) ("In terms of the relative ease of its implementation, a 'new' alternative that is still rooted in traditional common law concepts and doctrines may be easier to implement than a truly radical or revolutionary approach.").

255. See *supra* Part II(b) (discussing courts' reasons for broadly interpreting the safe harbor provision.).

256. Interview with Thomas Bulleit, Partner, Hogan and Hartson L.L.P., in Washington, D.C. (Fall 2001).

257. See 42 U.S.C. § 12111(2) (1994); 42 U.S.C. § 12131(1) (1994); 42 U.S.C. § 12182 (1994).

258. See ESKRIDGE, LEGISLATION, *supra* note 10, at 266-68.

and courts as to whether insurers and self-insured employers are bound by the ADA.<sup>259</sup>

Second, proponents of a market-based approach to insurance coverage may argue that forced risk pooling will create an unstable market for insurance.<sup>260</sup> They may contend that the application of the undue hardship defense in safe harbor cases forces greater risk pooling<sup>261</sup> and cross-subsidization<sup>262</sup> into the insurance market.<sup>263</sup> By placing the burden of supporting the safe harbor defense on defendants, courts will more often find in favor of plaintiffs in ADA safe harbor cases. Insurers, therefore, will be required to provide coverage to a higher number of disabled individuals resulting in greater risk pooling.<sup>264</sup> Low risk individuals will “opt out” of the market because they do not want to pay high premiums necessary to subsidize high-risk individuals, resulting in a new population of uninsured individuals. Unable to cross-subsidize claims from high risk individuals with premiums from low risk individuals, insurers will be forced to raise premiums to exorbitant levels.<sup>265</sup>

Despite the risk of introducing instability into the insurance market, there are a number of arguments that continue to support a proposal that would create greater insurance coverage for the disabled. The fear of market instability generally arises when some insurers can undercut their competitors by offering lower premiums to low risk individuals.<sup>266</sup> This competition causes segmentation in the market such that the low risks no longer subsidize the care of the high risks. The concern over market segmentation will not arise if the ADA forces insurers to cover disabled individuals because the ADA applies equally to all insurers; one insurer will not be able to undercut its competitor's premiums because all are bound by the ADA. Opponents' potential

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259. The safe harbor provision specifically states that it applies to “insurance.” See 42 U.S.C. § 12201(c) (1994).

260. Interview with Peter Hammer, Assistant Professor of Law, University of Michigan Law School, in Ann Arbor, Mich. (Spring 2001).

261. Risk pooling occurs when individuals with varied risk levels are grouped together into one insurance pool.

262. Cross-subsidization follows from risk pooling and occurs when healthy policyholders are forced to cover the costs of care of ill policyholders through high premiums.

263. Interview with Peter Hammer, *supra* note 260. Such a proposal is analogous to attempts to develop an insurance system based on community rating. That is, all individuals, regardless of risk, would be charged the same premium. Under an experience rated system, individuals are charged varied premiums based on their assessed risk.

264. See Jacobi, *supra* note 240, at 347 (“Ultimately, the ADA forces employment-based coverage toward risk-pooling, and away from risk segmentation.”).

265. Interview with Richard Hirth, Associate Professor, University of Michigan School of Public Health, in Ann Arbor, Mich. (Fall 2001).

266. Insurers' attempts to identify and attract low risks with low premiums is known as “cherry picking.” See Jacobi, *supra* note 240, at 319.

objections based on a market-based approach, however, remain an open question; a more detailed discussion is beyond the scope of this Note.

Third, opponents may object to the proposed adoption of the undue hardship standard in safe harbor cases because its adoption will not dramatically affect the protection of disabled individuals. In her first study of the outcomes of ADA cases, Ruth Colker found that disabled plaintiffs lose in more than ninety-three percent of ADA employment cases.<sup>267</sup> She reported similar results in a second study.<sup>268</sup> Although plaintiffs are more often successful in undue hardship cases than in safe harbor cases, they still face significant difficulties in winning ADA claims.<sup>269</sup> As a result, the application of the undue hardship standard to safe harbor cases would not necessarily ensure increased protection for the disabled. Courts' current failures to adequately protect disabled individuals do not, however, justify continued reliance on standards that perpetuate discriminatory practices. In fact, the lack of adherence to the intent of the ADA increases the need for revised standards.

### CONCLUSION

When the ADA was first enacted it offered the promise of finally protecting disabled Americans from discrimination by employers, public services, and public accommodation. The statute has, however, failed to meet the expectations of those who heralded its passage in 1990.<sup>270</sup> Despite some gains and successes, disabled individuals continue to have higher unemployment and poverty rates than any other group of Americans.<sup>271</sup> The lack of protection afforded to the disabled stems in large part from courts' narrow constructions of the statute. Particularly in the last several years, courts have misinterpreted the statute, contributing to its ineffectiveness and undermining its goals.<sup>272</sup> The result of courts' misinterpretations is the exclusion of many victims of real disability discrimination from the protections of

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267. See Colker, *Windfall*, *supra* note 12, at 100.

268. See Colker, *Winning*, *supra* note 163, at 247-51.

269. See EMPLOYMENT, DISABILITY AND THE AMERICANS WITH DISABILITIES ACT: ISSUES IN LAW, PUBLIC POLICY, AND RESEARCH 7 (Peter David Blanck ed., 2000) ("[C]ourts are often construing the ADA far too narrowly and excluding from its protection many victims of real disability discrimination.").

270. See Devroy, *supra* note 7; cf. Colker, *Windfall*, *supra* note 12, at 100.

271. See EMPLOYMENT, DISABILITY AND THE AMERICANS WITH DISABILITIES ACT, *supra* note 269, at 4.

272. See, e.g., *Bd. of Trs. v. Garrett*, 531 U.S. 356 (2001); *Sutton v. United Air Lines*, 527 U.S. 471 (1999).

the statute.<sup>273</sup> This Note discussed courts' broad interpretations of the safe harbor provision that nearly immunize insurers and self-insured employers from ADA liability. As a solution, this Note proposed that courts adopt the undue hardship standard in safe harbor defense cases. The adoption of this standard promises to ensure a more limited and narrow interpretation of the safe harbor, as well as more equitable treatment of people with disabilities.

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273. See EMPLOYMENT, DISABILITY AND THE AMERICANS WITH DISABILITIES ACT, *supra* note 269, at 7.