SECOND CIRCUIT REVIEW

INSURANCE REGULATIONS UNDER THE AMERICANS WITH DISABILITIES ACT

MARTIN FLUMENBAUM - BRAD S. KARP

PUBLISHED IN THE New York Law Journal

JANUARY 2000
In this month’s column, we discuss two recent decisions issued last month by the United States Court of Appeals for the Second Circuit, *Pallozzi v. Allstate Life Ins. Co.* and *Leonard F. v. Israel Discount Bank of New York*, which address application of the Americans with Disabilities Act (“ADA”) to the regulation of insurance underwriting. In *Pallozzi v. Allstate*, the Second Circuit held that Title III of the ADA regulates insurance underwriting practices, unless such practices are exempted by the “safe harbor” provision of Title V. In *Leonard F. v. Israel Discount Bank*, the court ruled that an insurance company may continue its underwriting practices under the “safe harbor” provision of Title V, if such practices are adopted prior to the enactment of the ADA, do not violate state insurance regulations and are not otherwise a “subterfuge to evade the purposes” of the act.

**Insurance Underwriting**

In *Pallozzi v. Allstate*, in an opinion written by Judge Pierre N. Leval and joined by Senior Judge Jon O. Newman and Judge Fred I. Parker, the Second Circuit held that an insurance company’s refusal to sell individuals a life insurance policy is subject to the provisions of the ADA and is not exempt from its purview under the McCarran-Ferguson Act, which governs state insurance regulatory regimes.

Plaintiffs Joseph and Lori Pallozzi, a married couple, suffered from mental illnesses that required counseling, medication and inpatient treatment. The Pallozzis applied to Allstate for a joint life insurance policy — and were temporarily approved—but Allstate subsequently rescinded the policy based upon medical information supplied by the Pallozzis’ psychiatrist. Allstate additionally refused to furnish the Pallozzis with information as to why their coverage had been terminated.

The Pallozzis commenced suit against Allstate, alleging that the company’s refusal to sell them life insurance violated Title III of the ADA, and that such conduct was not shielded by the statute’s “safe harbor” provision. The latter claim was based upon assertions that Allstate violated New York State insurance regulations and engaged in a subterfuge to evade the purposes of the ADA. The Pallozzis sought a declaratory judgment that Allstate had violated their rights under Title III and New York law, as well as an order directing Allstate to offer the Pallozzis a life insurance policy at a price reflecting actuarial principles or reasonable experiential evidence.

Allstate moved to dismiss the complaint, asserting that Title III of the ADA does not regulate insurance-company underwriting. The district court ruled that, although Title III does not ordinarily apply to insurance-company underwriting, insurers must nonetheless predicate decisions to refuse coverage upon a “sound risk classification.” The district court held, however, that the Pallozzis’ complaint did not allege facts from which the court could infer that Allstate’s denial was based upon something other than sound actuarial principles, or that the “safe harbor” provision was being used as subterfuge to evade the requirements imposed by the ADA. Accordingly, the district court dismissed the complaint, and the Pallozzis appealed.
The Second Circuit first examined the text of ADA, Title III, which prohibits discrimination based upon disability in a “public accommodation.” The statute specifies that several private facilities are encompassed within the meaning of a “public accommodation”—including an “insurance office”—and that such enterprises may not discriminate on the basis of disability in an individual's enjoyment of “goods” and “services.”

Finding the statutory language dispositive, the Second Circuit agreed with the Pallozzis that Title III covers insurance underwriting decisions. According to the court, the most obvious “goods” and “services” provided by insurance companies are its insurance policies. Thus, the court discerned prima facie evidence from the text of Title III that the legislative ban on discrimination in a “public accommodation” comprehends insurers’ underwriting determinations.

The court's conclusion was reinforced by the “safe harbor” provision of Title V, § 501(c), and its “subterfuge clause.” Labeled “Insurance,” § 501(c) protects underwriting policies that are not inconsistent with state insurance law, and which are not otherwise designed as a “subterfuge” to evade the purposes of Titles I through III. The court reasoned that such a “safe harbor” would have been superfluous if Congress had intended that Title III not govern insurance underwriting and administration. Thus, without reviewing Allstate’s proffered legislative history and administrative interpretations, the court interpreted Title III to govern insurance underwriting based upon a structural reading of the legislative language.

**Defining ‘Public Accommodations’**

Urging a contrary textual interpretation, Allstate argued that inclusion of the term “insurance offices” within the definition of “public accommodation” (rather than the term “insurance companies”) suggested that Congress intended only that the disabled would have physical access to the facilities of insurance providers, and not that Title III was intended to cover insurance underwriting-at-large. Allstate further pressed this argument by noting that insurance policies — unlike insurance offices — could not be considered a “place of public accommodation” under the ADA.

The Second Circuit rejected this contention. First, the court noted that the statute requires places of public accommodation to grant “full and equal enjoyment” of goods and services to the disabled. According to the court, this sweeping language indicated an intent to guarantee more than mere physical access to the beneficiaries of the ADA. Therefore, in addition to providing disabled persons with physical access to certain goods and services, the statute proscribed subject entities from discriminating in the sale of such goods and services by reason of a disability.

Second, the court observed that the “safe harbor” provision itself provides that insurance practices, not inconsistent with state law, would be protected to the extent they concern “underwriting” and “classifying” of risks. This protection would have been unnecessary if Title III guaranteed access to an insurance company's physical premises alone.
Third, the court found no merit in Allstate's argument that insurance policies do not qualify as goods or services “of a place of public accommodation.” The court stressed that the ordinary and contextual meanings of the word “of” are not equivalent to the word “in.” Thus, the fact that goods or services would be used outside the insurer's premises did not preclude application of Title III to sales of insurance policies, subject to the limitations of the Title V “safe harbor” provision.

Allstate's second principal line of argument was that the McCarran-Ferguson Act independently barred application of ADA to insurance underwriting. The McCarran-Ferguson Act mandates that no federal statute “shall be construed to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of insurance unless [the statute] specifically relates to the business of insurance.” Under Allstate's interpretation, the ADA does not “specifically relate to the business of insurance,” and therefore its reach is circumscribed by the language and policies established by the McCarran-Ferguson Act.

The Second Circuit disagreed. Applying the four-step analysis set forth by the Supreme Court in *Barnett Bank v. Nelson*, the court held that Title III does “specifically relate to the business of insurance,” thus overriding the barriers imposed by the McCarran-Ferguson Act. Examining the first prong under *Barnett Bank*, the court found that the ADA “relates” to the insurance business in that it “has a connection with” insurance plans. This is so because Title III defines an “insurance office” as a “public accommodation” subject to regulation under that provision. In addition, the “safe harbor” provision of Title V, § 501(c), is labeled “Insurance,” and subjects insurance underwriting to the ADA’s regulatory scope.

**Insurance Business**

Analyzing the second branch of the *Barnett Bank* test, the court determined that the ADA “specifically” relates to the insurance business. For the same reasons that the first element was established, the court concluded that the second element was satisfied because the identical statutory provisions relate to the insurance business “explicitly, particularly, [or] definitely.”

Turning to the third *Barnett Bank* factor, the court assessed whether the ADA specifically relates to the “business of insurance.” Under the court's analysis, because Congress contemplated that Titles I through III would prohibit insurance underwriters from refusing life insurance to the disabled by reason of their disabilities when the conditions of the “safe harbor” were not met, the ADA specifically relates to the “business of insurance.” In particular, these ADA provisions would impact matters “at the core of the McCarran-Ferguson Act's concern,” such as “the relation of insured to insurer and the spreading of risk.”

Finally, applying the fourth *Barnett Bank* factor, the court considered the ADA in light of the McCarran-Ferguson Act's purpose of protecting state insurance regulation against “inadvertent federal intrusion.” The court held that explicit references to insurance in Title III and § 501(c) suggest that any intrusion by the ADA upon state insurance regulation was not “inadvertent.” The court cited legislative history as further
evidence that Congress had considered the effect of its ADA enactment upon state insurance practices. Indeed, the court surmised that Congress had included the “safe harbor” provision with the McCarran-Ferguson Act specifically in mind: to make out a claim under the ADA, Congress required a plaintiff to demonstrate not only that the suspect underwriting policy violated the ADA itself, but also that it contravened state law. Therefore, the court concluded that the McCarran-Ferguson Act does not preclude application of ADA, Title III, to insurance-company underwriting.

Finally, the Second Circuit addressed the pleading requirements imposed by the district court under the ADA. The court held that the district judge erred in requiring plaintiffs to plead that the insurer’s refusal to provide coverage lacked actuarial justification. The court did acknowledge, however, that the “safe harbor” provision and “subterfuge clause” of § 501(c) do add an element to the plaintiff’s prima facie case, a burden that requires plaintiffs to plead a violation of state law or other subterfuge by the defendant. Importing a statutory analogy from the Age Discrimination in Employment Act (ADEA), as interpreted by the Supreme Court in Public Employees Retirement System v. Betts, the Second Circuit held that an ADA plaintiff must allege that the insurance practice challenged as discriminatory violates state law or is being used as a “subterfuge” to evade the purposes of Titles I through III. Therefore, the Pallozzis’ complaint, which alleged that Allstate’s conduct violated New York State law and Title III, stated an actionable claim under the ADA.

Pre-Dating ADA

In Leonard F. v. Israel Discount Bank of New York, in an opinion also written by Judge Pierre N. Leval, and joined by Judge Rosemary S. Pooler and Judge Alan H. Nevas (U.S. District Judge for the District of Connecticut, sitting by designation), the Second Circuit held that defendant MetLife’s practice of limiting long-term disability coverage for mental illnesses to two years — while not similarly limiting coverage for physical disabilities — was not a “subterfuge” under the ADA, provided that MetLife’s practice pre-dated the ADA’s enactment.

Plaintiff Leonard F. had been employed by defendant Israel Discount Bank. As part of the Bank’s benefits package, plaintiff received short-term and long-term disability coverage issued by defendant MetLife. Under the plan, long-term coverage for mental disabilities was limited to two years, while long-term disability coverage for physical disabilities continued until the beneficiary reached 65 years of age. Plaintiff became disabled due to depression, and applied for long-term coverage. MetLife subsequently approved the claim, but terminated coverage after two years. Plaintiff brought suit against the Bank and MetLife.

Plaintiff’s complaint alleged that the policy of limiting long-term disability benefits for mental illnesses to two years, without similarly capping the benefit period offered to treat physical illnesses, violates Title III of the ADA and constitutes a “subterfuge” to evade the ADA’s purposes. Plaintiff sought a declaration that both defendants were in violation of the ADA, as well as an injunction prohibiting MetLife from discriminating
against mental disabilities by virtue of their shorter duration of coverage, as measured against coverage periods for physical disabilities.\textsuperscript{21}

Both defendants moved to dismiss for failure to state a claim. The district court first dismissed the Title III claims against the bank because, in that court's view, Title III does not relate to the "goods, services and facilities" that the bank provides as a "public accommodation." Rather, the district court ruled, plaintiff's complaint pertained to the terms and conditions of a benefit provided by a private employer, and thus should be analyzed for ADA purposes as an employment benefit under Title I, not Title III, of the Act. (Plaintiff settled this portion of the case with the Bank, thus obviating the need for the Second Circuit to address the issue.)

The district court also dismissed the Title III claim against MetLife, holding that the policy was protected by the "safe harbor" provision of Title V, § 501(c). According to the district court, MetLife's policy not only was consistent with state insurance law, but also had pre-dated the ADA's passage. Drawing from the ADEA and the Supreme Court opinion in \textit{Betts},\textsuperscript{22} the district court held as a matter of law that a benefit plan adopted before enactment of the ADA could not be considered a "subterfuge" to evade the ambit of the statute.

The Second Circuit agreed with this reasoning. Relying upon the "plain" and "ordinary" meaning of the "safe harbor" provision, as well as on \textit{Betts}, the court construed the word "subterfuge" to require an "intent to evade." Given this requirement, a benefit plan adopted prior to a legislative enactment cannot evince an intent to evade it, since the statute did not exist at the relevant moment. Further supporting this rationale, three sister circuit courts had ruled that because the ADA was passed after the Supreme Court's decision in \textit{Betts}, Congress implicitly incorporated the \textit{Betts} holding within the meaning of the statutory term "subterfuge."\textsuperscript{23} Thus, if MetLife's policy had been formulated prior to the passage of the ADA, it could not as a matter of law be considered a "subterfuge" to evade the ADA.

In so deciding, the Second Circuit rejected plaintiff's argument that an insurer's plan must conform to sound actuarial principles to be entitled to this interpretive shield. First, the court noted that Congress did not mention any such actuarial soundness requirement. Conducting a facial analysis of the statute, the court similarly declined to accept plaintiff's suggestion that legislative history and certain administrative interpretations supplied evidence that Congress intended to reject the \textit{Betts} analysis. Because these materials could not be squared with the plain and unambiguous language of the statute — according to dictionary definitions as well as previous Supreme Court constructions — no deference was due these extra-textual sources of argument. In sum, the Second Circuit held that if MetLife's policy was not inconsistent with state law, and had been adopted prior to the passage of the ADA, it was exempt from the act's requirements under the § 501(c) "safe harbor" provision, whether or not the policy was based upon actuarial experience.

The Second Circuit nevertheless vacated the district court's judgment, because the judgment on the issue of "subterfuge" was based, in part, on information outside of the pleadings. Although the ruling on consistency with state law was a question of law, properly dismissable by the district court, the finding with respect to MetLife's prior adoption of the
insurance policy could not be discerned from the face of the complaint, or through documents appended to or incorporated within the complaint.

Thus, the Second Circuit ruled that the district court should have converted the motion to dismiss into a motion for summary judgment, entitling plaintiff to rebut any factual assertions concerning when MetLife's policy had been adopted. Accordingly, the Second Circuit remanded the case for a determination of whether MetLife's policy had been adopted prior to, or after, the ADA's enactment.
ENDNOTES

(1) 198 F.3d 28 (2d Cir. Dec. 1, 1999).

(2) No. 98-7320, 1999 WL 1114700 (2d Cir. Dec. 8, 1999).


(4) Section 501(c) of the ADA, 42 USC § 12201(c).

(5) Id.


(7) 42 U.S.C. §§ 12181-12189.

(8) Id. § 12182(a).

(9) Id. §§ 12181(7)(F), 12182(a).

(10) Id. § 12201(c).

(11) Id. §§ 12181(7)(F), 12182(a) (emphasis supplied).

(12) Id. § 12182(a).


(15) Id. at 38.

(16) Id. (internal quotation marks and citation omitted).

(17) Id. at 39.

(18) Id.


(21) The EEOC moved to intervene, and after the district court granted the motion, EEOC alleged that the insurance policy furnished by the Bank and issued by MetLife violated Title I of the ADA.

(22) In Betts, the Supreme Court held, among other things, that a benefit plan pre-dating enactment of the ADEA could not be viewed as a “subterfuge” to avoid