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AIDS, INSURANCE AND THE ADA

SUSAN J. STABILE*

The topic of the second symposium panel is AIDS, Insurance and the American with Disabilities Act ("ADA").¹ This topic covers a broad range of potential issues.

Acquired Immune Deficiency Syndrome ("AIDS") was part of the discussion surrounding the ADA even before the act became effective, mainly due to the Fifth Circuit's 1992 decision in *McGann v. H & H Music Co.*,² a decision the Supreme Court declined to review. *McGann*, a decision which received a great deal of attention, held that the Employee Retirement Income Security Act of 1974 ("ERISA")³ does not prevent an employer from reducing benefits available to its employees for the treatment of AIDS and AIDS-related illnesses.⁴ The Court made this determination even though the employer's knowledge of the plaintiff's illness was a motivating factor in the employer's decision to impose a five thousand dollar cap on AIDS-related benefit claims.⁵

In that case, the Fifth Circuit did not, of course, address the impact of the ADA on the employer's behavior, since the employer's activity took place before the Act became effective.⁶ The question thus remains, does the ADA do what ERISA does not? Does it prevent an employer from excluding AIDS from coverage in medical plans or limiting benefits payable for AIDS claims but not for other illnesses? The Equal Employment Opportunity Commission clearly believes that the ADA does exclude such disease-

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¹ Americans with Disabilities Act, 42 U.S.C. § 12111 *et seq.* (Supp. V 1993).

² 946 F.2d 401 (5th Cir. 1991), *cert. denied sub nom.* Greenberg v. H & H Music Co., 113 S. Ct. 482 (1992).

³ 29 U.S.C. § 1001 *et seq.* (Supp. V 1993).

⁴ *McGann*, 946 F.2d at 406.

⁵ *Id.* at 405.

⁶ *See Id.* The ADA became effective in July of 1992. The changes to the H & H Music plan at issue in *McGann* were made in July 1988. *Id.*

specific limitations,⁷ and the Court of Appeals for the First Circuit suggested the same conclusion in its decision in *Carparts Distribution Ctr., Inc. v. Automotive Wholesaler's Ass'n.*⁸ However, not everyone agrees.⁹

Even though this debate over capping benefits has been couched in terms of AIDS, it applies to any disease constituting a disability within the meaning of the ADA that an employer may single out for disparate treatment. There are certainly other diseases, for example kidney disease, that are costly to treat.¹⁰

In addition to the cap or limitation issue, AIDS raises other issues. For example, how should we deal with the health care needs of those with AIDS and the extent to which someone seeking worker's compensation can be forced to undergo HIV testing?

Outside the AIDS arena, the recent First Circuit Court of Appeals decision in the *Carparts*,¹¹ case addressed a fairly fundamental question about the ADA: how is the employer defined? In that decision, the First Circuit determined that, under certain circumstances, an insurance company may be an employer subject to ADA's prohibitions.¹² Based on interpretations of Title VII of the Civil Rights Act,¹³ the Court determined when the insurance company functioned as an employer with respect to an employee's health care coverage. An insurer is deemed to function as an employer for ADA purposes if it exercises control over an important aspect of an employee's employment.¹⁴ The question then becomes: is *Carparts* correct, or does following its reasoning give the ADA a broader reach than originally intended by Congress?

Questions under the ADA that relate more directly to insurance itself have also surfaced. For example, can an employer get insurance coverage for claims brought under the ADA? Or, since violation of the ADA is an intentional act, is an employer precluded, as

⁷ See Laborers District Council Buildings and Construction Health and Welfare Fund, EEOC Charge No. 170-93-0899 (Sept. 1993); Mason Tenders District Council Trust Fund, EEOC Charge No. 160-93-0419 (Jan. 1993).

⁸ 37 F.3d 12, 20 (1st Cir. 1994).

⁹ See *The Impact of the ADA on Medical Plans*, 1 ERISA Litig. Rep. 18, 21 (1992).

¹⁰ See Terry A.M. Mumford et al., *Coordinating Employee Benefits with the Americans with Disabilities Act*, C940 A.L.I. 305, 337 (1994) (discussing disability-based distinctions).

¹¹ 37 F.3d 12 (1st Cir. 1994).

¹² *Id.* at 16-17.

¹³ 42 U.S.C. § 2000e(b) (1988).

¹⁴ *Carparts*, 37 F.3d at 17.

a matter of public policy, from being able to insure against such claims?

These are all issues that are unclear based on the language of the ADA and will be focused on in this symposium panel.

