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Marc L. Zaken

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THE CONFUSION CREATED BY THE CARPARTS DECISION

MARC L. ZAKEN*

Unlike the first panel of speakers, I am not much of a philosopher or an economist. I am a very practical person, and my job as a management lawyer is to communicate to my clients, some of whom are very large Fortune 500 companies, what the Americans with Disabilities Act (the "ADA")¹ means and how they are supposed to apply and follow it. It may surprise some of the more strident members of the plaintiff's bar to find that those of us on the management side of the table do follow the law, and I try to explain to my clients what their obligations are under the law. I think the goal of every management lawyer is to keep his or her clients out of court and that is what I try to do.

When the ADA initially passed, as a practitioner, I spent a lot of time attempting to explain to management clients what the legislation would mean to their business interests. At first, I thought I had a handle on it. Nevertheless, as a result of the decision in *Carparts Distribution Center, Inc. v. Automotive Wholesaler's Association, Inc.*,² I realized that I do not understand the ADA at all.

In order to illustrate why I was so confused by the Carparts decision, I would like to go back to a case decided prior to the enactment of the ADA, *McGann v. H & H Music Company*.³ In *McGann*, the United States Court of Appeals for the Fifth Circuit

* B.S., Cornell University's School of Industrial and Labor Relations, 1979; J.D., New York University, 1982. Marc L. Zaken is a partner at Cummings & Lockwood in Stamford, Connecticut. He represents private and public sector management clients in a variety of employment law contexts, including discrimination, wrongful discharge, and employee benefits litigation, arbitrations and collective bargaining agreements. He is the founder and former chair of the Stamford/Norwalk Regional Bar Association's Employment Law Committee. He is also a member of the Labor and Employment Law sections of the Connecticut and New York Bar Associations, and vice-chair of the employee/employer relations committee of the Torts and Insurance Practice Section of the American Bar Association. He is also the president of the Southwestern Connecticut chapter of the Industrial Relations Research Associations.

¹ Americans with Disabilities Act of 1990, Pub. L. No. 101-336, 104 Stat. 327 (1990) (codified at 42 U.S.C. §§ 12101-12213 (Supp. V 1993)).

² 37 F.3d 12 (1st Cir. 1994).

³ 946 F.2d 401 (5th Cir. 1991), *cert. denied*, 113 S. Ct. 482 (1992).

held that under the Employee Retirement Income Security Act⁴ ("ERISA") an employer could cap Acquired Immune Deficiency Syndrome ("AIDS") insurance benefits at \$5,000, even though they continued to reimburse other insurance benefits for up to one million dollars.⁵ The holding in *McGann* was clear, and whether we agreed with the decision or not, at least we could understand it. Yet, it was expected that when the ADA passed, it probably would change the landscape created by the *McGann* decision.⁶

Subsequently, in June 1993, the Equal Employment Opportunity Commission (the "EEOC") issued an Interim Enforcement Guidance on the ADA,⁷ explicitly stating that a cap on health insurance for AIDS benefits as opposed to other benefits is discriminatory under the ADA.⁸ This was still no surprise to those of us on the management side of the table.

The anticipated change came in the form of a far-reaching decision by the United States Court of Appeals for the First Circuit in *Carparts*. The case was brought by Ronald Senter, a small businessman in New Hampshire, who was the sole shareholder of and also employed by the automotive parts wholesale distributorship, Carparts Distribution Center ("Carparts").⁹ Carparts and other similar type wholesalers participated in a trade association.¹⁰ The wholesalers combined into a trade association, and probably in order to save on health insurance, they created a self-funded medical reimbursement plan.¹¹ Each of the automobile wholesalers contributed money into the fund on behalf of their employees and

⁴ Pub. L. No. 93-406, 88 Stat. 829 (1990) (codified as amended at 29 U.S.C. §§ 1001-1462 (1988)).

⁵ *McGann*, 946 F.2d at 408.

⁶ See generally Lizzette Palmer, Comment, *ERISA Preemption and its Efforts on Caping the Health Benefits of Individuals with AIDS: A Demonstration of Why the United States Health and Insurance Systems Require Substantial Reform*, 30 HOUS. L. REV. 1347, 1349-53 (1993).

⁷ See Equal Employment Opportunity Comm'n, Interim Enforcement Guidance on Application of the Am. With Disabilities Act to Disability Based Distinction in Employer Provided Health Ins. (June 8, 1993) [hereinafter EEOC Interim Guidance].

⁸ See generally Patrick J. Morgan, *Applicability of ADA Non-Discrimination Principles to Self-Insured Health Plans: Do "AIDS Caps" Violate the Law?*, 11 J. CONTEMP. HEALTH L. & POL'Y 221, 224-25 (1994).

⁹ *Carparts*, 826 F. Supp. 583, 584 (D.N.H. 1993), *vacated and remanded*, 37 F.3d 12 (1st Cir. 1994).

¹⁰ *Carparts*, 826 F. Supp. at 584. The trade association was known as Automotive Wholesaler's Association of New England, Inc. *Id.*

¹¹ *Id.* Carparts was a participant in a self-funded medical reimbursement plan known as Automotive Wholesaler's Association of New England Health Benefit Plan and its administering trust, Automotive Wholesaler's Association of New England, Inc. Insurance Plan. *Id.*

appointed a third-party administrator. This administrator managed the money, paid out claims as they came in, and ensured that people received the coverage that they were promised.

In May 1986, Mr. Senter was diagnosed with Human Immunodeficiency Virus ("HIV") and soon after he was afflicted with AIDS-related illnesses.¹² Around this time, he began to submit claims to the trade association, the third-party administrator, and the self-funded plan, for payment of his medical treatment. They reimbursed him for his medical expenses for a while. However, effective January 1, 1991, perhaps as a result of the *McGann* decision, the self-funded plan amended its prior plan by placing a limitation on AIDS coverage at \$25,000.¹³ In January 1993, Mr. Senter died.¹⁴ The co-executors of his estate maintained this action against the trade association and the self-funded plan claiming that the cap on his benefits was illegal discrimination under the ADA.¹⁵

At the district court level, I will focus on two theories of liability that were offered. The first theory was that the trade association and the self-funded plan were liable as employers under Title I of the ADA.¹⁶ The trade association and the self-funded plan rebutted that they did not actually employ Mr. Senter. Initially, it appeared that Mr. Senter had a great claim against his employer, because under the ADA it is clear that an employer cannot discriminately cap health insurance benefits.¹⁷ However, for Mr. Senter to sue his employer would have been tantamount to him suing himself, since he was his employer.

The United States District Court for the District of New Hampshire, agreeing with my interpretation of the ADA, held that the trade association and the insurance plan were not employers under the ADA.¹⁸ Mr. Senter was self-employed, therefore, the trade association and the insurance plan, not actually employing

¹² *Id.* at 585.

¹³ *Id.*

¹⁴ *Id.* at 584.

¹⁵ *Carparts*, 826 F. Supp. at 584.

¹⁶ 42 U.S.C. § 12111(2) (1988 & Supp. V 1993). Title I of the ADA provides that "[n]o covered entity shall discriminate against a qualified individual with a disability because of the disability . . . in regard to . . . terms, conditions and privileges of employment." 42 U.S.C. § 12112(a). Covered entity includes "an employer, employment agency, labor organization, or joint labor-management committee." *Id.*; see also *Carparts*, 826 F. Supp. at 585 (discussing employer liability under Title I of ADA).

¹⁷ See EEOC Interim Guidance, *supra* note 7.

¹⁸ *Carparts*, 826 F. Supp. at 585.

Mr. Senter, were not liable to his estate under Title I of the ADA.¹⁹ Nevertheless, Mr. Senter's estate pursued their claim against the trade association and the health insurance plan on appeal.

The second theory leveled at the district court was that the trade association and the health insurance plan was an "accommodation" under Title III of the ADA.²⁰ Title III sets forth that a public accommodation means a physical structure.²¹ The statute maintains that a physical place cannot discriminate against a person with a disability. For instance, this means that if this individual was visually impaired, hearing impaired or mobility impaired, and this individual went to a bank, a grocery store, or a movie theater, some accommodation would have to be made for this person. For instance, the grocery store would have to help him or her get things off the shelf. The bank would have to lower the ATM machine, so that a person in a wheelchair could take money out of it. The movie theater would have to set up a place where somebody in a wheelchair could sit. Basically, a public accommodation was a place that had to make accessibility-type corrections to its facility to enable people with disabilities to gain access to services or goods. I understood this, and when I informed my clients they may not have liked it, but they understood it as well.

The district court in *Carparts* held that neither the trade association nor the self-funded insurance plan were public accommodations.²² About the same time as the *Carparts* decision, the District Court for the Southern District of Ohio issued a similar ruling in *Pappas v. Bethesda Hospital Ass'n*.²³ The court in *Pappas* agreed with the district court in *Carparts*, holding, in similar circumstances, that a health insurance plan, self-funded plan, or trade association, is neither an employer nor a place of public accommodation.²⁴ Therefore, there was no liability under the ADA. The *Pappas* decision made perfect sense to me.

¹⁹ See *id.*

²⁰ 42 U.S.C. § 12182(a) (1988 & Supp. V 1993). Title III of the American with Disabilities Act provides that "no individual shall be discriminated against on the basis of disability . . . by any person who owns, leases, or operates a place of public accommodation." *Id.*

²¹ *Carparts*, 826 F. Supp. at 586. The district court interpreted the definition of public accommodation as being limited to "actual physical structures with definite physical boundaries which a person physically enters." *Id.*

²² *Id.* at 585.

²³ 861 F. Supp. 616 (S.D. Ohio 1994).

²⁴ *Pappas*, 861 F. Supp. at 618, 620.

In October 1994, *Carparts* was appealed to the United States Court of Appeals for the First Circuit, and that court issued an extraordinary decision.²⁵ The First Circuit held that the trade association and the self-insured plan could be considered employers under three separate theories.²⁶ The court also held that the trade association and the health insurance plan could be considered a public accommodation even though neither was a physical place.²⁷

The First Circuit came to their decision, that the trade association and the self-funded plan could be employers, based on three theories. First, if the trade association had the authority to determine the level of benefits to be provided to the plan's participants, then they would be acting as an employer who exercises control over a significant aspect of the employment relationship.²⁸ For example, if the trade association and the insurance plan shared administrative responsibilities or set the level of benefits, then each could be considered an employer. This theory is similar to the traditional notions of the employment law concept of joint employer. If the trade association and the health insurance plan are meeting with the employer, setting the level of benefits, making the determinations, and administering the plan, then they could be held to be an employer.

Under the second theory, the court said that even if the trade association and the insurance plan did not have the authority to determine the level of benefits, if the employer retained the right to control the manner in which the plan administered those benefits, the trade association and the insurance plan could be considered agents of the employer.²⁹ Thus began the erosion from the concept of joint employer to some kind of ephemeral agency concept. Under the third theory the court was vague, stating that even if the trade association and insurance plan are not agents, and even if they are not joint employers, they may still be liable if they substantially affect an employee of another entity.³⁰

²⁵ *Carparts Distribution Ctr., Inc. v. Automotive Wholesaler's Ass'n, Inc.*, 37 F.3d 12, 21 (1st Cir. 1994).

²⁶ *See id.* at 16-18.

²⁷ *Id.* at 20.

²⁸ *Id.* at 17.

²⁹ *Id.* at 17-18.

³⁰ *Carparts*, 37 F.3d at 18.

Finally, the court addressed the issue of whether a public accommodation must be a place with walls or structures.³¹ The court concluded that there are many entities, such as travel services, which conduct business by telephone that may be considered an accommodation.³² The court also noted that other places exist that may be considered an accommodation, where a person does not have to physically enter an office to obtain a service.³³

The First Circuit proposed that a scenario of liability may exist under Titles I and III. The court, however, did not say that the trade association or the insurance plan was liable.³⁴ Perhaps even the court realized they were going a bit too far and that this may not be the best theory, because they did not know enough about the facts of the case.

For practical purposes, I had to determine what this case would mean to management clients. I realized that with respect to management, the *Carparts* decision does not change the landscape all that much, because, had the estate of Mr. Senter sued Carparts, his employer, Carparts would have been liable under the ADA. Management clients who purchase insurance for their employees must continue to follow the guidelines set forth in the EEOC Interim Guidance.³⁵ For example, limitations on the number of blood transfusions would be legitimate because it covers a broad scope of illnesses, and does not necessarily single out a disability.³⁶ However, a health insurance plan that has a cap on AZT treatments, singles out a disability, AIDS, and would be unlawful discrimination under the ADA.³⁷ The *Carparts* decision does not change the landscape with regard to what employers have to do when purchasing insurance, but it dramatically changes the scope of the landscape for insurance businesses.

The *Carparts* case was remanded to the District Court for the District of New Hampshire to allow that court to develop the facts,

³¹ *Id.* at 19. The court reasoned that the plain meaning of the statutory language does not require public accommodations to have physical structures for persons to enter. *Id.*

³² *Id.* (citing *Sierra Club v. Larson*, 2 F.3d 462, 467 (1st Cir. 1993)).

³³ *Carparts*, 37 F.3d at 19.

³⁴ *Id.* at 20.

³⁵ See *supra* note 7 and accompanying text.

³⁶ See EEOC Interim Guidance, *supra* note 7. Health related insurance distinctions based upon a disability may violate the ADA. *Id.* A provision is so-based if it singles out a disability, such as AIDS. *Id.* The EEOC Interim Guidance provides examples of discrimination that could possibly be found in health insurance provisions. *Id.*

³⁷ See *supra* note 7, and accompanying text.

and decide whether the employer or public accommodation theories are viable under the ADA.³⁸ What is really frightening about the *Carparts* decision is that I must inform insurance company clients that if they sell a product in the form of a policy to anyone, who then sells it or makes it available to its employees, and that policy discriminates, the insurance company may be brought into a lawsuit. Discrimination can be found in policies that provide disparate coverage on the basis of the types of reimbursements or types of coverage for treatment or prescription medications.³⁹ According to *Carparts*, an insurance company may be liable for such discrimination under the ADA based on allegations that the insurance plan, by virtue of it being sold to an employer, gives rise to a joint employer relationship, an agency relationship, or substantially affects the rights of employees with whom no prior employment relationship existed.

Presently, an insurance company may be on the hook for placing a product on the market that can be construed as discriminating on the basis of a disability, or selling that product to an employer who is liable under Title I. The insurance company may have to litigate the case through summary judgment, because the First Circuit has said that a factual based inquiry is necessary.⁴⁰ When a factual based inquiry is necessary, the case will not get thrown out on a motion to dismiss.

Thousands of dollars will be spent litigating through summary judgment either the issue of whether a joint employer or agency relationship exists or whether an employee's rights have been substantially affected by the policy. Under the public accommodations theory in *Carparts*, an insurance company may be liable, even if it does not sell the insurance to an employer who provides it to an employee. In contrast with liability under Title I as an employer, for purposes of Title III liability, the public accommodations section, an employment or agency relationship does not have to exist at all. If a disabled individual purchases an insurance plan that has a discriminatory element, the decision in *Carparts* suggests that this individual may bring an action based on allegations under Title III, namely, that the insurance policy was dis-

³⁸ *Carparts Distribution Ctr., Inc., v. Automotive Wholesaler's Ass'n, Inc.*, 37 F.3d 12, 20 (1st Cir. 1994).

³⁹ See EEOC Interim Guidance, *supra* note 7.

⁴⁰ *Carparts*, 37 F.3d at 21.

criminatory with respect to the provision of goods or services as a public accommodation.

The *Carparts* decision is especially terrifying, at least with respect to the public accommodations theory, because the ruling is not necessarily limited to the provision of health insurance services. Other types of arguments can be envisioned, that involve a place without walls that provides a discriminatory service. For instance, service may be provided by a travel agent, such as sending a disabled person on a trip to stay in a hotel. The hotel is a place of public accommodation and has to provide facilities that are accessible to the disabled. However, does the travel agent, selling the package as a provision of the service, now buy into liability for the hotel if the hotel does not have handicapped accessible bathrooms? I fear that this is just the tip of the iceberg on bizarre theories that can be drawn from the *Carparts* decision.