No. 98-17060

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

HOWARD L. CHABNER,

Plaintiff-Appellee

v.

UNITED OF OMAHA LIFE INSURANCE COMPANY,

Defendant-Appellant

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING APPELLEE

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IDENTITY AND INTEREST OF THE AMICUS CURIAE AND THE SOURCE OF THE AUTHORITY TO FILE

The Department of Justice submits this amicus brief on behalf of the United States, under Fed. R. App. P. 29(a). This appeal raises questions about the proper interpretation of Title III of the Americans With Disabilities Act (ADA), 42 U.S.C. 12181-12189 (Title III). The Department of Justice enforces Title III. 42 U.S.C. 12188(b). Pursuant to 42 U.S.C. 12186(b) and 12206(c)(3), the Department has also issued regulations and a Technical Assistance Manual interpreting Title III. See 28 C.F.R. Pt. 36; ADA Title III Technical Assistance Manual (Nov. 1993). The Department has consistently construed Title III as prohibiting unjustified disability-based discrimination in the terms and conditions of insurance coverage. This Court's

decision could, therefore, affect the Department's enforcement of the statute.

STATEMENT OF THE ISSUES

The United States limits its participation to the following issues:

1. Whether Title III of the Americans With Disabilities Act (ADA), 42 U.S.C. 12181-12189 (Title III), prohibits forms of disability-based discrimination that do not involve a denial of physical access to a place of public accommodation.

2. Whether Title III applies to the terms and conditions of insurance coverage.

3. Whether the McCarran-Ferguson Act, 15 U.S.C. 1012 et seq., precludes the plaintiff in this case from using Title III of the ADA to challenge the terms and conditions of insurance coverage.

4. Whether the district court properly construed the exemption in Section 501(c) of the ADA, 42 U.S.C. 12201(c).

STATEMENT OF THE CASE

The parties' briefs adequately describe the nature and history of the case.

STATEMENT OF FACTS

1. Howard Chabner has fascioscapulohumeral muscular dystrophy (FSH MD) (ER 191, 395).[1] He is in his mid-30s and is a non-smoker (ER 395).

In 1993, Chabner sought life insurance coverage from United of Omaha Life Insurance Company (United) (ER 191, 395). United ultimately issued Chabner a life insurance policy but charged him a yearly fee ($305.44) for the insurance portion of the policy that was $150 higher than the standard fee that the company charged non-smokers who were the same age as Chabner (ER 191, 395). United imposed the higher fee because of Chabner's FSH MD (ER 60, 396).[2]

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[1] "ER __" refers to the page number of appellant's Excerpts of Record, "Br. __" indicates the page number of appellant's opening brief, and "Chabner Br. __" refers to the page number of the appellee's response brief.

[2] Chabner purchased "whole life insurance" from United (ER 395, 416 n.2). Under whole life insurance policies, the insurer deducts a portion of the policyholder's total annual fee to cover the cost of the insurance itself (the "mortality charge") and then invests most of the remainder (ER 98, 205, 416 n.2). As a result of this investment, the policy has a cash value that grows over time. An insured can borrow against the accumulated cash value of the policy and can receive a portion of this amount (the "surrender value") if he terminates the policy before his death (ER 61-74).

Chabner paid a total annual fee of $1,076 for the life insurance policy, the same total fee that United charges non-disabled policyholders of average life expectancy (ER 98, 205). Under Chabner's policy, United withheld a mortality charge of $305.44 from his total annual fee to cover the cost of insurance; by contrast, United deducts a mortality charge of only $155.44 from the total annual fee paid by a non-disabled policyholder of

(continued...)

2. Chabner filed suit in state court, raising various claims under California law (ER 394, 396-397). After United removed the case to federal court, Chabner amended his complaint to add a claim under Title III of the ADA (ER 394-397).

The district court granted summary judgment in favor of Chabner on his Title III claim, as well as most of his state law claims (ER 394, 415). The court held that Title III reached insurance underwriting practices and rejected United's argument that Title III guarantees only physical access to places of public accommodation (ER 402-404). The court also found that United had engaged in discrimination on the basis of disability by treating Chabner differently from non-disabled persons by charging him a higher rate for the insurance portion of his policy because of his FSH MD (ER 406, 410).

The court further held that United's discrimination against Chabner did not fall within the limited insurance exemption of Section 501(c) of the ADA, which states that the ADA does not prohibit an insurer "from underwriting risks, classifying risks, or administering such risks that are based on or not inconsistent

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[2](...continued)
average life expectancy (ER 191). Consequently, United invested less money on behalf of Chabner than it would invest for a non-disabled policyholder who paid the same total annual fee (ER 205-206, 210-213, 416 n.2). As a result of this lesser investment, the accumulated cash value of Chabner's policy would increase more slowly than the value of a policy held by the non-disabled individual, thus reducing the amount of money that Chabner could borrow from the investment reserves and diminishing the surrender value of the policy (see ER 88, 204-207).

with State law," 42 U.S.C. 12201(c) (ER 408-415). Concluding that the Section 501(c) exemption "incorporates state law" (ER 408), the court analyzed whether United's decision to charge Chabner a higher fee because of his disability violated the California Insurance Code, which prohibits life insurance companies from charging "a different rate for the same coverage solely because of a physical or mental impairment, except where the * * * rate differential is based on sound actuarial principles or is related to actual and reasonably anticipated experience." Cal. Ins. Code § 10144. (Chabner also asserted an independent claim under Section 10144 (see ER 397)). The court held that, although the ultimate burden of persuasion remained on Chabner under Section 501(c) to prove a violation of state law, United had the burden of producing evidence that its rate differential met the requirements of the California Insurance Code — in other words, United must produce evidence that the rate differential was either based "on sound actuarial principles" or was "related to actual and reasonably anticipated experience." Cal. Ins. Code § 10144. See ER 410-411. The court concluded that United had not carried its burden of production because it provided no evidence that it relied on actuarial data regarding Chabner's anticipated mortality risk (ER 411-415). Therefore, the court held that United had violated Section 10144 of the California Insurance Code and thus could not qualify for the insurance exemption in Section 501(c) of the ADA (ER 413- 415).

SUMMARY OF ARGUMENT

The district court correctly interpreted the ADA. The court properly recognized that Title III of the ADA guarantees more than mere physical access to places of public accommodation. The statute also prohibits unjustified disability-based discrimination in the terms and conditions of insurance coverage. The court's holding is consistent with the plain language and legislative history of the ADA and with the Department of Justice's consistent interpretations of the statute.

Contrary to United's argument, the McCarran-Ferguson Act does not preclude Chabner from relying on Title III of the ADA to challenge the terms and conditions of his insurance coverage. The McCarran-Ferguson Act is irrelevant here because: (1) the ADA specifically relates to the business of insurance, and (2) the Department of Justice's interpretation of Title III would not invalidate, impair, or supersede relevant state law.

Even if an insurance practice constitutes disability-based discrimination under Title III, it is not necessarily unlawful under the ADA. An insurer can avoid liability if it qualifies for the exemption in 42 U.S.C. 12201(c), which protects certain insurance practices that Title III otherwise would prohibit. But an insurer cannot qualify for the exemption if the challenged insurance practice is "inconsistent with State law." 42 U.S.C. 12201(c). The district court concluded that United's disability-based discrimination against Chabner violated Cal. Ins. Code

§ 10144. If, in fact, United violated California law, United would not qualify for the exemption in 42 U.S.C. 12201(c) and thus would be liable under Title III of the ADA. Although we take no position as to whether the district judge correctly construed the California Insurance Code, this Court should affirm the judgment on the Title III claim if it upholds the finding of a state law violation.

ARGUMENT

I

TITLE III OF THE ADA GUARANTEES MORE THAN MERE PHYSICAL ACCESS TO PLACES OF PUBLIC ACCOMMODATION

United argues that Title III guarantees only "physical access to places of public accommodation" and that Chabner has no claim under Title III "because he was not denied access to a physical facility" (Br. 6-7). The district court properly rejected that argument. Interpreting Title III to guarantee only physical accessibility is utterly incompatible with the statute's plain language and broad remedial purposes, as numerous other courts have properly recognized. See, e.g., Carparts Distribution Ctr., Inc. v. Automotive Wholesaler's Ass'n, 37 F.3d 12, 19-20 (1st Cir. 1994); Chabner Br. 39-40 (citing cases).[3]

[3] Cf. Parker v. Metropolitan Life Ins. Co., 121 F.3d 1006,1011 n.3 (6th Cir. 1997) (en banc) (stating that "Title III covers only physical places," but emphasizing that it was expressing "no opinion as to whether a plaintiff must physically enter a public accommodation to bring suit under Title III as opposed to merely (continued...)

United's misreading of the statute would threaten the enforcement of Title III not only in the insurance context, but also in a variety of other areas.

The broad language of Title III makes clear that the statute guarantees more than mere physical access. Title III provides, in relevant part, that

> 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 by any person who owns, leases (or leases to), or operates a place of public accommodation.

42 U.S.C. 12182(a). United makes much of the fact that the statute refers to a "place of public accommodation" (see Br. 9-10). But the statute does not merely guarantee access to a place; rather, the plain language ensures full and equal enjoyment of the goods and services of places of public accommodation. Discrimination can thus occur under Title III even if the place of public accommodation is physically accessible to persons with disabilities.

Had Congress been concerned only with physical accessibility, it could have accomplished its goal by drafting 42 U.S.C. 12182(a) to guarantee only equal access to the "facilities" of a public accommodation. But Congress worded the statute more broadly to guarantee the full and equal enjoyment

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[3](...continued)
accessing, by some other means, a service or good provided by a public accommodation"), cert. denied, 118 S. Ct. 871 (1998).

not only of "facilities," but also of the "goods, services, * * * privileges, [and] advantages" of any place of public accommodation. 42 U.S.C. 12182(a). Interpreting Title III to guarantee only physical accessibility would render superfluous the statute's use of the terms "goods," "services," "privileges," and "advantages." Such a reading would violate the fundamental canon of statutory construction that courts must attempt to give meaning to all words of a statute. United States v. Alaska, 521 U.S. 1, 59 (1997).

Other provisions of Title III confirm that the statute prohibits more than a denial of mere physical access. For example, Title III makes it unlawful for a public accommodation to exclude or deny equal opportunities to non-disabled persons because of their relationship with other individuals who have disabilities. 42 U.S.C. 12182(b)(1)(E). Such discrimination against non-disabled persons (who themselves may have no physical impairments whatsoever) has nothing to do with physical barriers.

In addition, the examples of "public accommodations" listed in Title III show that Congress was not concerned just with guaranteeing physical access. One of the examples cited in the statute is a "travel service." 42 U.S.C. 12181(7)(F). This example indicates that Congress contemplated that public accommodations would "include providers of services which do not require a person to physically enter an actual physical structure." Carparts, 37 F.3d at 19. Many travel services

"conduct business by telephone or correspondence without requiring their customers to enter an office." Ibid. As the First Circuit has reasoned, "[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." Ibid.

United's cramped reading of Title III violates the well-established principle that remedial statutes are to be interpreted expansively to further their underlying goals. See Jefferson County Pharm. Ass'n v. Abbott Labs., 460 U.S. 150, 159 (1983); Gomez v. Toledo, 446 U.S. 635, 639 (1980). This rule of statutory construction applies with special force here in view of the sweeping goals that Congress announced when it enacted the ADA. The statute is designed to "invoke the sweep of congressional authority * * * in order to address the major areas of discrimination faced day-to-day by people with disabilities," 42 U.S.C. 12101(b)(4), to "provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities," 42 U.S.C. 12101(b)(1), and "to bring individuals with disabilities into the economic and social mainstream of American life." H.R. Rep. No. 485, Pt. 2, 101st Cong., 2d Sess. 99 (1990).

Interpreting Title III to guarantee only physical accessibility would undermine these broad remedial goals by

severely restricting the protections available to persons with disabilities. Such a reading of the statute is particularly nonsensical in this age of advancing technology where business is increasingly conducted through the Internet or over the telephone. "To exclude this broad category of businesses from the reach of Title III * * * would severely frustrate Congress's intent that individuals with disabilities fully enjoy the goods, services, privileges and advantages, available indiscriminately to other members of the general public." Carparts, 37 F.3d at 20.

United's narrow interpretation of Title III would severely limit the protections available for persons with disabilities even in those public accommodations where customers physically enter the premises to obtain goods or services. Such an interpretation would preclude relief, for example, for individuals who are denied service in a restaurant because of their disabilities, so long as the restaurant does not physically impede their access to the premises. Although such individuals have faced no physical barriers, they have nonetheless suffered "discriminat[ion] * * * in the full and equal enjoyment" of the public accommodation's "goods [and] services." 42 U.S.C. 12182(a). Accordingly, this Court should hold, consistent with the plain language and broad remedial purposes of the statute, that Title III guarantees more than mere physical access to places of public accommodation.

II

TITLE III'S BAN ON DISABILITY-BASED DISCRIMINATION APPLIES TO THE TERMS AND CONDITIONS OF INSURANCE COVERAGE

United argues (Br. 9-30) that Title III of the ADA does not prohibit disability-based discrimination in insurance coverage. That argument conflicts with the statute's plain language, legislative history, and broad remedial purposes, as well as the Department of Justice's consistent interpretation of Title III.

Title III provides, in relevant part, that "[n]o individual shall be discriminated against on the basis of disability in the full and equal enjoyment of the goods [or] services * * * of any place of public accommodation * * *." 42 U.S.C. 12182(a). The statute defines such a "public accommodation" to include an "insurance office" whose operations affect commerce. 42 U.S.C. 12181(7)(F). Because United is engaged in the business of selling insurance policies to members of the public, it is an operator of insurance offices affecting commerce and thus is a "public accommodation" covered by Title III.[4] Insurance coverage

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[4] For this reason, United gains no support (see Br. 15-16) from the decisions in Clegg v. Cult Awareness Network, 18 F.3d 752 (9th Cir. 1994), and Welsh v. Boy Scouts of Am., 993 F.2d 1267 (7th Cir.), cert. denied, 510 U.S. 1012 (1993). Clegg and Welsh merely held that the membership organizations at issue in those cases did not fall within the statutory definition of "place of public accommodation" under Title II of the Civil Rights Act of 1964, 42 U.S.C. 2000a. This Court emphasized in Clegg that "[n]owhere does [Title II] refer to membership organizations." 18 F.3d at 755. By contrast, Title III of the

(continued...)

is undoubtedly one of the "goods" or "services" offered by United's insurance offices. Therefore, the plain language of 42 U.S.C. 12182(a) prohibits discrimination on the basis of disability in the terms or conditions under which United offers insurance coverage to its prospective policyholders.

United argues, however, that Title III does not apply where, as here, the insurance company allows the plaintiff with a disability to purchase an insurance policy (Br. 17-20). United reasons that such a person is "not denied equal access" to an insurer's goods or services (Br. 20). But United has a distorted view of equality. Although United has not denied Chabner complete access to life insurance coverage, it has nonetheless discriminated against him within the meaning of Title III. By charging Chabner a higher fee because he has FSH MD, United has provided Chabner a good or service that "is not equal to that afforded to other individuals" who do not have the same disability. 42 U.S.C. 12182(b)(1)(A)(ii).

Section 501(c) of the ADA confirms that Title III reaches disability-based discrimination in insurance coverage. That provision creates a limited exemption for certain insurance

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[4](...continued)
ADA expressly defines "public accommodation" to include an "insurance office" that affects commerce. 42 U.S.C. 12181(7)(F). United operates such insurance offices by selling insurance coverage to members of the public, by engaging in underwriting decisions concerning insurance coverage, and by otherwise enforcing the terms of its insurance policies.

practices, decreeing that Title III of the ADA "shall not be construed to prohibit or restrict * * * an insurer * * * from underwriting risks, classifying risks, or administering such risks that are based on or not inconsistent with State law." 42 U.S.C. 12201(c)(1). Section 501(c) also emphasizes that the exemption "shall not be used as a subterfuge to evade the purposes of" Title III. 42 U.S.C. 12201(c). If the broad language of Title III did not otherwise cover insurance practices, there would have been no need for Congress to emphasize in Section 501(c) that the exemption protected certain insurance practices from the scope of the statute.

Although Section 501(c) creates a limited exemption for certain practices, it does not nullify Title III's general prohibitions against discrimination in insurance coverage. It is well-established that statutory exemptions — especially exemptions from remedial statutes such as the ADA — must be construed narrowly. See City of Edmonds v. Oxford House, Inc., 514 U.S. 725, 731-732 (1995). The exemption in Section 501(c), therefore, must be read to reach only those insurance practices that are "plainly and unmistakably" within its "terms and spirit." Citicorp Indus. Credit, Inc. v. Brock, 483 U.S. 27, 35 (1987) (citation omitted).

The legislative history explains that disability-based distinctions in insurance coverage ordinarily will not qualify for the Section 501(c) exemption — and thus will be prohibited

under Title III — unless they are justified by increased risks associated with the disability:

> Virtually all States prohibit unfair discrimination among persons of the same class and equal expectation of life. The ADA adopts this prohibition of discrimination. Under the ADA, a person with a disability cannot be denied insurance or be subject to different terms or conditions of insurance based on disability alone, if the disability does not pose increased risks.

H.R. Rep. No. 485, Pt. 2, supra, at 136; S. Rep. No. 116, 101st Cong., 1st Sess. 84 (1989). Similarly, the congressional committee reports emphasize that an insurer ordinarily will be prohibited from "charg[ing] a different rate for the same coverage solely because of a physical or mental impairment, except where the * * * rate differential is based on sound actuarial principles or is related to actual or reasonably anticipated experience." H.R. Rep. No. 485, Pt. 2, supra, at 137; S. Rep. No. 116, supra, at 85; H.R. Rep. No. 485, Pt. 3, 101st Cong., 2d Sess. 71 (1990). These committee reports are an "authoritative source" for interpreting Congress's intent in enacting Title III. See Thornburg v. Gingles, 478 U.S. 30, 43 n.7 (1986).

Moreover, the Department of Justice has consistently construed Title III to prohibit insurers from engaging in unjustified discrimination in the terms and conditions of insurance coverage. In the commentary to its Title III regulations, the Department explained that the statute "reach[es] insurance practices by prohibiting differential treatment of

individuals with disabilities in insurance offered by public accommodations unless the differences are justified" by evidence that those disabilities "'pose increased risks.'" Preamble to Regulation on Nondiscrimination on the Basis of Disability by Public Accommodations and in Commercial Facilities (July 26, 1991) (citation omitted), reprinted at 28 C.F.R. Pt. 36, App. B, § 36.212 at 601 (1998). The commentary further emphasized that Title III covers "unjustified discrimination in all types of insurance provided by public accommodations." Id. at 602. The Department adopted the same interpretation in its Title III Technical Assistance Manual, which explains that "[i]nsurance offices are places of public accommodation and, as such, may not discriminate on the basis of disability in the sale of insurance contracts or in the terms or conditions of the insurance contracts they offer." Manual § III-3.11000 (Nov. 1993) (emphasis added) (reproduced in Addendum to this brief).

As the Supreme Court has emphasized, the Department of Justice's interpretations of Title III are "entitled to deference," because the Department is "the agency directed by Congress to issue implementing regulations, see 42 U.S.C. § 12186(b), to render technical assistance explaining the responsibilities of covered individuals and institutions, § 12206(c), and to enforce Title III in court, § 12188(b)." Bragdon v. Abbott, 118 S. Ct. 2196, 2209 (1998). See also Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.,

467 U.S. 837, 843 & n.11 (1984). Courts owe the same deference to the Department's commentary interpreting its own regulations. See Stinson v. United States, 508 U.S. 36, 45 (1993). And the Department's Technical Assistance Manuals are also entitled to deference. See Bragdon, 118 S. Ct. at 2209; Paralyzed Veterans of Am. v. D.C. Arena L.P., 117 F.3d 579, 584-585 (D.C. Cir. 1997), cert. denied, 118 S. Ct. 1184 (1998); Innovative Health Sys., Inc. v. City of White Plains, 117 F.3d 37, 45 & n.8 (2d Cir. 1997). Thus, although we submit that the plain language of the ADA demonstrates Congress's intent to prohibit unjustified discrimination in the terms and conditions of insurance coverage, this Court should defer to the Attorney General's interpretation even if it finds the statute ambiguous.

The Department's interpretation of Title III does not lead to any of the "absurd" results that United denounces in its brief. Contrary to United's assertion (Br. 20), our reading of Title III would not require bookstores to stock books in Braille, would not force restaurants to change their menus, and would not require theaters to add sound tracks to classical silent films. The Department has promulgated a regulation explaining that a public accommodation is not required "to alter its inventory to include accessible or special goods that are designed for, or facilitate use by, individuals with disabilities." 28 C.F.R. 36.307(a). In interpreting that regulation, the Department has stated that Title III does not require a public accommodation "to

alter the nature or mix of goods that [it] has typically provided," and has specifically explained that a bookstore "is not required to stock Brailled or large print books." 28 C.F.R. Pt. 36, App. B, § 36.307 at 612 (1998); see id., § 36.302 at 604. That regulation is perfectly consistent with the Department's interpretation of Title III as reaching discrimination in insurance coverage. For example, a company that traditionally has sold only automobile insurance need not start offering health or life insurance policies, even though some persons with disabilities may have a great need for such coverage. However, once a company decides to sell health or life insurance coverage, it must avoid unjustified differential treatment in deciding the terms and conditions under which it will offer such coverage to persons with disabilities.

Finally, United points to the 1996 enactment of the Mental Health Parity Act (42 U.S.C. 300gg-5 and 29 U.S.C. 1185a), as evidence that Congress did not intend the ADA to prohibit disability-based discrimination in insurance coverage (see Br. 25). Under the Mental Health Parity Act, a health insurance plan that offers mental health benefits may not impose a lifetime or annual limit on those benefits that is more restrictive than the cap allowed for medical and surgical treatment. 42 U.S.C. 300gg-5(a)(1)(A) & (B); 29 U.S.C. 1185a(a)(1)(A) & (B). United apparently believes that there would have been no need for the

Mental Health Parity Act if the ADA already reached insurance discrimination. That reasoning is flawed.

The Mental Health Parity Act prohibits certain insurance practices that do not qualify as disability-based discrimination, and thus the statute extends significantly beyond the anti-discrimination requirements of the ADA. The ADA's ban on disability-based discrimination in insurance coverage does not prohibit health insurance plans from providing a lower level of benefits for mental conditions than for physical conditions. See EEOC: Interim Enforcement Guidance on Application of ADA to Health Insurance (June 8, 1993), quoted in Krauel v. Iowa Methodist Med. Ctr., 95 F.3d 674, 677-678 (8th Cir. 1996). Such a distinction between mental and physical conditions is not disability-based discrimination because it applies to a multitude of dissimilar conditions (many of which are non-disabling) and constrains both disabled and non-disabled individuals. Id. at 678. In other words, individuals with mental conditions who would be adversely affected by a limit on mental health benefits would include persons whose conditions do not qualify as disabilities under the ADA. Ibid. Accord Modderno v. King, 82 F.3d 1059, 1061 (D.C. Cir. 1996), cert. denied, 519 U.S. 1094 (1997).

The Mental Health Parity Act also extends beyond the requirements of the ADA because it requires parity (under certain circumstances) for mental and physical conditions even where

there is an actuarial basis for treating mental impairments less favorably than physical conditions. But as we have explained, Congress did not intend the ADA to prevent insurers from drawing distinctions that had a legitimate actuarial justification. See p. 15, supra. The enactment of the Mental Health Parity Act in 1996 was thus consistent with Congress's understanding that the ADA already prohibited unjustified disability-based discrimination in insurance coverage.

III

THE MCCARRAN-FERGUSON ACT DOES NOT BAR PLAINTIFF'S TITLE III CLAIM

United argues (Br. 31-33) that the McCarran-Ferguson Act precludes Chabner from relying on Title III to challenge the terms and conditions of his insurance coverage. That contention is meritless.

The McCarran-Ferguson Act provides that "[n]o 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." 15 U.S.C. 1012(b). For two independent reasons, that statute does not preclude Title III's application to insurance policies.

First, the ADA "specifically relates to the business of insurance." 15 U.S.C. 1012(b). The statute provides that an "insurance office" is a "public accommodation" for purposes of

Title III if its operations affect commerce. 42 U.S.C. 12181(7)(F). Further, Section 501(c) of the ADA, which is entitled "Insurance," provides that the underwriting practices of an "insurer" shall not be used to evade the purposes of Title III. 42 U.S.C. 12201(c).

Second, the McCarran-Ferguson Act is inapplicable because the Department of Justice's interpretation of Title III would not "invalidate, impair, or supersede" relevant state law. 15 U.S.C. 1012(b). "When federal law does not directly conflict with state regulation, and when application of the federal law would not frustrate any declared state policy or interfere with a State's administrative regime, the McCarran-Ferguson Act does not preclude its application." Humana Inc. v. Forsyth, 119 S. Ct. 710, 717 (1999). No direct conflict exists between Title III and California law (the relevant state law in this case). United has not identified any California law that would require or even permit it to impose the rate differential at issue here. Nor would application of the ADA frustrate state policy or interfere with the state's regulation of insurance practices. Indeed, California law provides that:

> No insurer [that issues life insurance policies] shall * * * charge a different rate for the same coverage solely because of a physical or mental impairment, except where the * * * rate differential is based on sound actuarial principles or is related to actual and reasonably anticipated experience.

Cal. Ins. Code § 10144. The Justice Department's interpretation of Title III would thus promote, not hinder, California's goal of

prohibiting unjustified disability-based discrimination in the terms and conditions of insurance policies. To be sure, California law does not impose an absolute bar on disability-based distinctions in insurance coverage. But neither does the ADA. Because compliance with state law can be an affirmative defense to an alleged violation of Title III, see 42 U.S.C. 12201(c), the ADA will not interfere with California's policy of permitting insurers to impose some disability-based distinctions in insurance coverage if there is a legitimate actuarial basis for doing so.

IV

THE DISTRICT COURT PROPERLY INTERPRETED THE EXEMPTION IN SECTION 501(C) OF THE ADA

The district court correctly recognized that an insurance company cannot qualify for the exemption in Section 501(c) of the ADA if its underwriting practices are "inconsistent with State law." 42 U.S.C. 12201(c)(1). Although we do not take a position on the district court's interpretation of Cal. Ins. Code § 10144, this Court should affirm the judgment on the Title III claim if it upholds the district court's finding that United violated California law.

The district court properly placed the burden of production on United to come forward with evidence that its rate differential complied with California law. The party seeking the benefit of a statutory exemption bears the burden of producing

evidence that it clearly fits within the terms of that exemption. United States v. First City Nat'l Bank, 386 U.S. 361, 366 (1967). It is also well-established that the burden of production should rest with the party that has superior access to the relevant facts. See International Bhd. of Teamsters v. United States, 431 U.S. 324, 359-360 n.45 (1977). An insurance company will possess and control information showing whether a disability-based distinction is justified by "sound actuarial principles" or is "related to actual and reasonably anticipated experience," as required by Cal. Ins. Code § 10144. Applicants for insurance will rarely, if ever, have equal access to such data.

United nonetheless relies (Br. 25-29) on Public Employees Retirement System v. Betts, 492 U.S. 158 (1989), for the proposition that it had no burden to produce evidence justifying its rate differential under state law. Betts involved an interpretation of the word "subterfuge" under the Age Discrimination In Employment Act (ADEA). Id. at 166-172, 175-182. Betts rejected the argument that an age-related reduction in employee benefits was a "subterfuge" to evade the ADEA unless the employer showed a cost-based justification for such action. Id. at 169-172. Instead, Betts held that the plaintiff alleging age discrimination had the burden of proving that an employee benefit plan was a "subterfuge." Id. at 181-182. United argues that this Court should adopt the Betts definition of "subterfuge" for Section 501(c) and should place

the burden on Chabner to prove "subterfuge" in order to establish a violation of Title III.

But the two central questions in Betts — the meaning of "subterfuge" and the burden of proof on that issue — are irrelevant here.[5] The "subterfuge" provision of Section 501(c) does not come into play unless the court concludes that the disability-based distinction complies with relevant state law. Only then would an insurance company have a plausible claim to the exemption, and only then would it become relevant whether the insurer was invoking the exemption as a "subterfuge" to evade the purposes of the ADA. Because the district judge concluded that United's rate differential was inconsistent with California law, the court had no reason to consider whether United's insurance practices were a "subterfuge" under Section 501(c). If an insurance practice violates relevant state law, it simply cannot qualify for the Section 501(c) exemption.

CONCLUSION

The district court correctly interpreted the ADA. If this Court upholds the finding of a state law violation, it should

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[5] The ADA's legislative history shows that Congress intended to reject the Betts definition of "subterfuge." 136 Cong. Rec. 17,290 (1990) (Rep. Owens); id. at 17,291 (Rep. Edwards); id. at 17,293 (Rep. Waxman); id. at 17,378 (Sen. Kennedy).

affirm the district court's judgment on Chabner's Title III claim.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Ninth Circuit Rule 32(e)(4), I certify that the foregoing BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING APPELLEE uses a monospaced typeface of no more than 10.5 characters per inch, is appropriately double-spaced, and contains 5,558 words.

_____
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March 31, 1999

CERTIFICATE OF SERVICE

I hereby certify that on March 31, 1999, two copies of the foregoing BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING APPELLEE were served by Federal Express, next business-day delivery, on:

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