

## [Assembly's Insurance Committee to Hold Hearing Today on Legislation Voiding Discretionary Clauses in Disability and Life Insurance Policies](#)

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The [California Assembly's Insurance Committee](#) is scheduled to conduct its first hearing today on [AB 1868](#), a bill outlawing clauses in insurance policies and other related documents that purport to vest the insurer with discretionary power to determine eligibility for benefits or to interpret the terms of the policy.

Under the proposed legislation introduced by [Assemblyman Dave Jones](#) (D-Sacramento), any provision in an insurance policy, contract, certificate or agreement providing or funding life insurance or disability insurance coverage that purports to reserve discretionary authority with the insurer would be void and unenforceable. The bill would also require that the Insurance Commissioner disapprove of any disability policy containing such a provision.

To effect its purposes, the bill would both amend Insurance [Code Section 10291.5](#) (to address the Insurance Commissioner's disapproval of a disability insurance policy) and add Section 10116.2 (to confirm the unenforceability of that provision in a life or disability insurance-related document).

Assemblyman Jones originally introduced AB 1868 on February 12, 2010, but the bill was amended on April 5, 2010.

Efforts to invalidate discretionary clauses are not new in California. In February 2004, then-Insurance Commissioner John Garamendi issued a [Notice to Withdraw Approval](#) of any disability insurance forms that contained discretionary clauses, stating that the provisions were objectionable under Insurance Code Section 10291.5(b)(1) and "effectively deprive California insureds of protections under California law."

Garamendi's Notice was also accompanied by the Insurance Department's contemporaneous opinion letter, expressing that "the discretionary clause effectively negatives operative terms of the contract" because it "makes those payments contingent on the unfettered discretion of the insurer, thereby nullifying the promise to pay and rendering the contract potentially illusory."

However, subsequent cases severely limited the scope of the Department's Notice and opinion letter, with courts consistently confirming that any invalidation of discretionary clauses through these administrative actions could be applied prospectively only, and not retroactively. See, e.g., [Firestone v. Acuson Corp. Long Term Disability Plan](#), 326 F. Supp. 2d 1040 (N.D. Cal. 2004), [Mitchell v. Aetna Life Ins. Co.](#), 359 F. Supp. 2d 880 (C.D. Cal. 2005) and [Horn v. Provident Life and Accident Ins. Co.](#), 351 F. Supp. 2d 954 (N.D. Cal. 2004).