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Disability Policy Discretionary Clauses Come Under Congressional Attack

Policyholder/Employee groups who have group disability insurance coverage through their employers and who find themselves operating in the byzantine world of ERISA have long criticized discretionary clauses contained in such ERISA policies. These often have the effect of giving insurance companies firmer ground to support claim denials because the "abuse of discretion" standard of review typically applies. This higher standard of review makes it more difficult for policyholders/employees to challenge disability claim denials.

California Governor Arnold Schwarzenegger has the opportunity to sign California Assembly Bill 1868 ("AB 1868") and to prohibit these discretionary clauses. In the recent case of *Standard Insurance Company v. Morrison*, the Ninth Circuit Court of Appeals ruled that the California Insurance Commissioner has the authority to disapprove any disability insurance policies that contain discretionary clauses.

Arthur Postal of National Underwriter writes about such clauses in an article entitled "Disability Policy Discretionary Clauses Come Under Fire." Here is a reprint of it:

> WASHINGTON BUREAU -- The long-term disability insurance (LTD) industry took a licking today during a Senate Finance Committee hearing.
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> Senate Finance Committee Chairman Max Baucus, D-Mont., said LTD insurers have doctors with conflicts of interest review claims.
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> "Many of these doctors are employed either by the insurance company or by companies that do a lot of business with the insurance company," Baucus said. "These arrangements make it far too easy for the doctors to deny claims, terminate claims, or reject appeals."
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> Ronald Leebove, a rehabilitation counselor who appeared for the American Board of Forensic Counselors, Springfield, Mo., said private group LTD policies fail to provide the protection insurers promise.
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> "There are many tricks and tactics used by the insurance companies to deny claims," Leebove said.
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> Several witnesses talked about employers' and insurers' use of Employee Retirement Income Security Act (ERISA) provisions to give plan administrators' discretion over LTD benefits decisions, and to ward off challenges of benefits determinations.
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> Mark DeBofsky, a partner at Daley, DeBofsky & Bryant, Chicago, a law firm, said the courts have gone against legislative intent and transformed ERISA into "a shield that protects insurance companies from having to face the consequences of unprincipled benefit denials and other breaches of fiduciary duty."
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> In most cases involving LTD claim disputes, there is not even a trial, DeBofsky said.

"Instead," DeBofsky said, "courts conduct reviews of claim records assembled and shaped by self-serving insurance companies without hearing any testimony whatsoever, under a procedure that gives more deference to the insurance company than a court would give a Social Security administrative law judge in its review of a Social Security disability benefit claim denial."

Judge William Acker Jr., a senior district court judge in northern Alabama, testified that the "courts have not rescued ERISA" in its handling of long-term disability cases. "If anything, they have dug the ERISA hole deeper," Acker said. "ERISA jurisprudence will stay as messed up as it is unless Congress reworks it."

Paul Graham, a senior vice president at the American Council of Life Insurers (ACLI), Washington, defended disability insurers.

Disability insurance can be susceptible to fraud and abuse, and many states have passed regulations that require short-term disability (STD) insurance and long-term disability disability insurance companies to report instances of suspected fraud, Graham said.

"While fulfilling their contractual and regulatory responsibilities, insurers need to remain attentive to potentially fraudulent claims," Graham said.

Therefore, he said, an eligibility determination, whether made by the insurance carrier or other fiduciary, is only valid for the information at that point in time and must be periodically re-evaluated to account for changes in the claimant's condition.

Graham said a 2008 industry study that included a majority of group disability carriers found that 79% of submitted claims were approved.

Of those claims not approved, over 25% were not paid because the claimant recovered too quickly to collect benefits, Graham testified.

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