Inseparable 2025 - HB 1069 FAV - Discretionary Cla

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Position: FAV

inseparable

April 1, 2025

Senate Finance Committee
3 East Miller Senate Building
Annapolis, Maryland 21401

Via electronic submission

RE: Support for House Bill 1069: Life and Health Insurance Policies and Annuity Contracts – Discretionary Clauses Prohibition

Dear Chair Beidle, Vice-Chair Hayes, and Members of the Committee:

On behalf of Inseparable, I write to urge you to support House Bill 1069, which would prohibit so-called discretionary clauses in health insurance policies. Discretionary clauses—language that insurers insert into plan policies to grant themselves broad discretion in interpreting plan terms and conditions—are deeply harmful to patients' interests. These clauses create an inherent conflict of interest, undermining the very purpose of health insurance and stripping consumers of meaningful protections.

Maryland has already recognized the dangers of discretionary clauses by banning them in disability insurance policies in 2011 (HB 1085/CH 155, Del. Peña-Melnyk). Now, Maryland should take the next logical step by prohibiting these clauses in health insurance policies as well.

The ability of insurers to arbitrarily deny medically necessary care, particularly for mental health and substance use disorders, has caused widespread harm and continues to put Marylanders at risk. Discretionary clauses contribute to inappropriate denials of care and limit patients' ability to seek fair recourse, as courts must defer to insurers' determinations unless a decision is proven "arbitrary and capricious." The result is a system in which insurers act as both judge and jury, making it far more difficult for patients to challenge wrongful denials—even when those denials contradict accepted medical standards. In numerous instances (see Appendix for selected cases), judges indicated they would have ruled in favor of covered person seeking benefits under their insurance policy but, due to discretionary clauses, were forced to uphold what the court believed to be a flawed determination.

The National Association of Insurance Commissioners (NAIC) has recognized the danger of discretionary clauses and has adopted a model law to ban them.[1] **The NAIC states that such prohibitions are necessary "to assure that health insurance benefits and disability income**

[1] National Association of Insurance Commissioners, "Prohibition on the Use of Discretionary Clauses Model Act," https://content.naic.org/sites/default/files/inline-files/MDL-042.pdf.

protection coverage are contractually guaranteed, and to avoid the conflict of interest that occurs when the carrier responsible for providing benefits has discretionary authority to decide what benefits are due." Maryland has already addressed these clauses in disability insurance—as called for by the NAIC—but has yet to do so for health insurance. Nearly half of U.S. states, including states as diverse as Arkansas, California, Utah, and Wyoming, have already banned discretionary clauses, ensuring that insurers adhere to clear, fair standards in claim determinations. Maryland should complete the work it started over a decade ago.

The harmful consequences of discretionary clauses are particularly evident in mental health cases. In *Wit v. United Behavioral Health*, for example, the insurer was found to have wrongly denied nearly 70,000 claims by applying overly restrictive medical necessity guidelines that conflicted with generally accepted standards of care. Despite these findings and an amicus brief filed by Maryland and 15 other states supporting the plaintiffs[2], the insurer's denials were largely upheld on appeal due in significant part to the deferential legal standard enabled by discretionary clauses. This case exemplifies how insurers exploit these provisions to prioritize financial interests over patient well-being.

Prohibiting discretionary clauses is a commonsense reform that enjoys broad support. More than 40 national health care advocacy organizations—including the American Hospital Association, American Psychiatric Association, American Psychological Association, National Association of Social Workers, and Mental Health America—have supported prohibiting these clauses.

We urge you to support legislation to ban discretionary clauses in health insurance policies, particularly given that Maryland has already recognized their dangers in disability insurance policies. Thank you for your consideration. If you would like to discuss this issue further, please reach me at david@inseparable.us.

Sincerely,

David Lloyd
Chief Policy Officer, Inseparable

[2] *Brief for the States of Rhode Island, Colorado, Connecticut, Delaware, Illinois, Maine, Maryland, Michigan, Minnesota, Nevada, New Jersey, New York, Oregon, Vermont, Washington, and the District of Columbia as Amici Curiae Supporting Plaintiffs-Appellees, Wit v. United Behavioral Health*, Nos. 20-17363, 20-17364, 21-15193, 21-15194 (9th Cir. Mar. 17, 2023).

APPENDIX –
IMPORTANT FEDERAL CASES INVOLVING DISCRETIONARY CLAUSES

Federal Circuit Court Cases

Standard Ins. Co. v. Morrison, 584 F.3d 837, 845 (9th Cir. 2009) – more losses will be covered where de novo review results from discretionary ban.

Abatie v. Alta Health & Life Ins. Co., 458 F.3d 955, 976 (9th Cir. 2006) – observing that discretionary language must be apparent since discretion can leave insureds "high and dry."

Cosey v. Prudential, 735 F.3d 16, 167–68 (4th Cir. 2013) – same.

Herzberger v. Standard Ins. Co., 205 F.3d 327, 331 (7th Cir. 2000) – "The broader that discretion, the less solid an entitlement the employee has."

Fischer v. Liberty Life Assur. Co. of Bos., 576 F.3d 369, 376 (7th Cir. 2009) – ruling for insurer because under abuse of discretion review the court must defer to plan administrator's findings of fact.

Krolnik v. Prudential Ins. Co. of Am., 570 F.3d 841, 844 (7th Cir. 2009) – ruling for plaintiff under de novo review but noting that if discretionary review applied the insurer's decision "would be sustained easily."

Gibbs ex rel. Estate of Gibbs v. CIGNA Corp., 440 F.3d 571, 577–78 (2d Cir. 2006) – holding that the standard of review affects a participant's substantive rights, since abuse of discretion review allows a court to uphold erroneous decisions.

Brigham v. Sun Life of Canada, 317 F.3d 72, 86 (1st Cir. 2003) – explaining that though "it seems counterintuitive that a paraplegic suffering serious muscle strain and pain, severely limited in his bodily functions, would not be deemed totally disabled" the deferential standard of review permits it.

Federal Trial Court Cases

Robertson v. Blue Cross & Blue Shield of Texas, 99 F. Supp. 3d 1249, 1261 (D. Mont.), aff'd sub nom. *Robertson v. Blue Cross*, 612 F. App'x 478 (9th Cir. 2015) – "The masks of the law in this case conceals the person at risk of dying by a deferential standard of review and the rules of legal interpretation. The result is a determination that Blue Cross's denial of benefits was legally, but perhaps not morally, reasonable."

Criss v. Union Sec. Ins. Co., 26 F. Supp. 3d 1161, 1164 (N.D. Ala. 2014) – "In response to Bruch, an increasing number of states have adopted a statute or insurance industry rule that precludes the inclusion of the so-called "discretionary clause" in a disability insurance policy"

and "have accomplished in their states what Congress intended, namely, trials de novo for beneficiaries after they have been denied and unsuccessfully exhausted their internal plan remedies."

Morgenthaler v. First Unum Life Ins. Co., No. 03 CIV. 5941 (AKH), 2006 WL 2463656, at *3 (S.D.N.Y. Aug. 22, 2006) – describing its two contradictory rulings on Unum policies due to the different applicable standards of review.

Harrison v. UnitedHealth Grp., No. 2:16-CV-11406, 2018 WL 1528177, at *6 (S.D.W. Va. Mar. 28, 2018) – a court could disagree but must defer.

Fessenden v. Reliance Standard Life Ins. Co., No. 3:15CV370-PPS, 2018 WL 461105, at *1-6 (N.D. Ind. Jan. 17, 2018), vacated and remanded, 927 F.3d 998 (7th Cir. 2019) – deferential review means "the die was essentially cast" against insured's claim and "the claimant may lose even if a preponderance of the evidence supports a finding of disability, so long as the decision has "rational support in the record."

Hafford v. Aetna Life Ins. Co., No. 16-CV-4425 (VEC)(SN), 2017 WL 4083580 (S.D.N.Y. Sept. 13, 2017) – adopting Magistrate's facts but reversing and entering judgment in favor of insurer after concluding that the Magistrate had wrongly applied de novo review.

Rizzi v. Hartford Life & Acc. Ins. Co., 613 F. Supp. 2d 1234, 1249 (D.N.M. 2009), aff'd sub nom. *Rizzi v. Hartford Life & Acc. Inc. Co.*, 383 F. App'x 738 (10th Cir. 2010) – describing the court's role as "not to referee a battle of physicians or to decide whether Defendant's decision to terminate Plaintiff's LTD benefit payments was correct. It is simply to determine whether Defendant reasonably exercised its discretion and based its determination on substantial evidence."

Johnston v. Commerce Bancshares, Inc., 276 F. Supp. 3d 926, 939 (W.D. Mo. 2017), aff'd sub nom. *Johnston v. Prudential Ins. Co. of Am.*, 916 F.3d 712 (8th Cir. 2019) – "if the Court were the claims administrator, it might have reached a different conclusion" but holding the plan administrator did not abuse its discretion.

Graham v. L & B Realty Advisors, Inc., No. CIV.A. 3:02CV0293-N, 2003 WL 22388392, at *4 (N.D. Tex. Sept. 30, 2003) – outcome would be different under de novo review where court could perform its own fact-finding.

Deloach v. Great Atl. & Pac. Tea Co. LTD Plan, No. 09-14087, 2013 WL 363840, at *5 (E.D. Mich. Jan. 30, 2013) – "While it appears to the court that an examination of the administrator's actions for arbitrary and capricious decision making would result in a finding for defendants, under the de novo standard of review, the court is convinced that its weighing of the evidence requires reversal of Cigna's decision to terminate benefits."

HB 1069cross - LAC - FAV.pdf
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Position: FAV

LEGAL ACTION CENTER
Breaking Barriers. Defending Dignity.

H.B. 1069: Life and Health Insurance Policies and Annuity Contracts – Discretionary Clauses – Prohibition
Senate Finance Committee Hearing
April 1, 2025
Favorable

Thank you for the opportunity to submit testimony in support of House Bill 1069, which would prohibit discretionary clauses in health insurance policies, life insurance policies, and annuity contracts. The Legal Action Center (LAC) is a non-profit law and policy organization that fights discrimination, builds health equity, and restores opportunities for people with substance use disorders, arrest and conviction records, and HIV/AIDS. LAC convenes the Maryland Parity Coalition and works with its partners to ensure non-discriminatory access to mental health and substance use disorder services through enforcement of the Mental Health Parity and Addiction Equity Act and other consumer protections against unfair insurance practices.

H.B. 1069 fills an important gap in Maryland law, in which health insurance carriers are currently able to include clauses that gives them the sole discretion to interpret the terms of their own contracts and policies. These types of clauses are often used to improperly deny claims and restrict the rights of consumers, such as the right to appeal denials at various stages of the process. This means that Marylanders have a high burden to overcome when they need to challenge or dispute ambiguous or vague policies in court. Maryland law already prohibits disability insurance policies that contain such clauses, recognizing that they are inequitable and misleading to consumers. Health insurance policies in Maryland should be subject to the same rules and standards of interpretation as any other contract in court.

H.B. 1069 is modeled on the National Association of Insurance Commissioners' Prohibition on the Use of Discretionary Clauses Model Act.[1] A number of other states have adopted this language, or taken similar action to prohibit discretionary clauses in health insurance and other types of policies.[2] Marylanders deserve no less.

Thank you for considering our testimony, and we urge a favorable report on H.B. 1069.

Sincerely,

Deborah Steinberg
Senior Health Policy Attorney
Legal Action Center
dsteinberg@lac.org

[1] "Prohibition on the Use of Discretionary Clauses Model Act," National Association of Insurance Commissioners (2006), https://content.naic.org/sites/default/files/inline-files/MDL-042.pdf.
[2] "Discretionary Clauses Outlawed in Many States," https://www.erisadisabilitybenefits.com/longtermdisability/discretionaryclausesbannedinerisapolicies.html.

HB 1069 - MIA - FAV - FIN.pdf
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Date: **April 1, 2025**

Bill # / Title: **House Bill 1069 - Life and Health Insurance Policies and Annuity and Health Maintenance Organization Contracts - Discretionary Clauses - Prohibition**

Committee: **Senate Finance Committee**

Position: **Support**

The Maryland Insurance Administration (MIA) appreciates the opportunity to share its support for House Bill 1069. As the Committee is likely aware, the bill has already unanimously passed out of the House.

Current Maryland law prohibits the use of discretionary clauses in disability insurance policies. If enacted, House Bill 1069 would extend this prohibition to include health insurance policies, life insurance policies, and annuity contracts. It also amends state law to ensure that these prohibitions are explicitly applied to health maintenance organizations as well.

Discretionary clauses are contract provisions that give an insurer discretionary authority to determine eligibility for benefits and to interpret the terms and provisions of the policies they issue. The use of these clauses creates a conflict of interest by giving carriers responsible for providing benefits to insureds the authority to decide what benefits are due. In the past, courts have often deferred to discretionary clauses when insureds have taken legal action against carriers for not honoring their policies. In effect, this means that insureds who purchase insurance policies with discretionary clauses can never be certain that they will be provided with the benefits as set forth in their policy.

In 2002, the National Association of Insurance Commissioners (NAIC) issued a proposed "model law" that would ban discretionary clauses in health insurance products, including policies issued in connection with ERISA plans. In 2004, the NAIC expanded this to include disability benefit policies. Since that time, twenty-five states have adopted some form of law or rule restricting or banning the use of discretionary clauses in insurance contracts.

If enacted, House Bill 1069 will prevent insurance carriers from solely adjudicating their own disputes, thereby promoting fair and unbiased resolution of issues related to health insurance benefits and disability income protection by eliminating discretionary clauses in policies.

For these reasons, the MIA urges a favorable committee report on House Bill 1069 and thanks the committee for the opportunity to share its support.

NCADD-MD - 2025 HB 1069 FAV - Discretionary Clause

Uploaded by: Nancy Rosen-Cohen

Position: FAV

Senate Finance Committee
April 1, 2025

House Bill 1069 – Life and Health Insurance Policies and Annuity Contracts – Discretionary Clauses – Prohibition

Support as Amended

NCADD-Maryland supports House Bill 1069, a bill to prohibit discretionary clauses in health insurance policies. These clauses, banned by the General Assembly for disability policies in 2011, can be used by insurance carriers to deny coverage of mental health and substance use disorder care that members believed they had access to.

When a person's health care services are denied coverage, they can file and appeal with their carrier, then a grievance with the Maryland Insurance Administration, and if not resolved, they can take the ultimate step of challenging an adverse decision in court. At that point, if the policy contains a discretionary clause, the court's hands are generally tied.

According to the National Association of Insurance Commissioners (NAIC), prohibiting such clauses can ensure that health insurance benefits are contractually guaranteed. They contend that these clauses create a conflict of interest when the carrier responsible for providing benefits has discretionary authority to decide what benefits are actually due. Prohibiting these kinds of clauses in health insurance policies will help consumers better understand and access the services they pay for.

We ask for a favorable report on House Bill 1069.

TW HB1069 Senate Finance Committee Testimony.pdf
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Teresa S. Woorman
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THE MARYLAND HOUSE OF DELEGATES
ANNAPOLIS, MARYLAND 21401

April 1, 2025

Finance Committee
Chair Senator Pamela Beidle
Vice Chair Delegate Antonio Hayes
3 East Miller Senate Office Building
Annapolis, Maryland 21401

Dear Chair Beidle, Vice Chair Hayes, and Members of the Senate Finance Committee,

Thank you for the opportunity to testify on House Bill 1069, a bill that builds on Maryland's strong commitment to consumer protection. But let me be clear—this bill isn't about favoring policyholders over insurance companies. It's about creating an even playing field rather than letting insurance companies stack the deck in their favor when a dispute arises.

This issue isn't new to Maryland. ChairPeña-Melnyk herself led the charge in 2011 when she passed legislation to ban discretionary clauses in health insurance policies. Thanks to her leadership, Maryland became a national leader in protecting consumers from these unfair contract provisions.

Now, we have the opportunity to finish what she started. HB1069 closes the loophole by applying the same common sense protections to life insurance, annuities, and disability insurance—ensuring fairness across the board.

I'm not an attorney, but let me explain this issue in football terms—since I know some might have strong opinions about that.

Imagine a high-stakes game between the Baltimore Ravens and the Washington Commanders. It's the final play of the game. The referee makes a controversial call. But here's the twist—according to the official NFL rules, if there's any doubt about the call, the Commanders get to decide how the rule should be interpreted. Why? Because a Commanders representative helped write the rule in the offseason.

What would you think when—surprise!—the call goes in their favor? Ravens fans would be furious, Commanders fans would be a little suspicious, and everyone would agree that the game was rigged.

That’s exactly how discretionary clauses work in insurance policies. They let insurance companies interpret their own contracts—meaning they get to decide what their policies actually cover and whether they have to pay out a claim. And under current law, if a policyholder challenges that decision, the court defers to the insurance company’s interpretation unless it finds an "abuse of discretion."

That’s not a level playing field—that’s a rule that favors one team over the other before the game even starts.

What HB1069 Does

✅ Closes the loophole – Maryland banned discretionary clauses in health insurance in 2011 thanks to Chair Peña-Melnyk’s leadership. But insurers still use them in life, disability, and annuity policies. This bill ends that practice.

✅ Ensures fairness – Just like a referee should make calls based on what the rulebook actually says, insurance disputes should be decided based on what the contract actually states—not the insurer’s self-serving interpretation.

✅ Protects all Marylanders – No one should have to fight an uphill battle to get the benefits they’ve paid for and counted on. This bill expands consumer protections without adding bureaucracy or unnecessary costs.

Insurers might argue that discretionary clauses make the system more efficient—but at what cost? Efficiency shouldn’t come at the expense of fairness and accountability. A contract should be a two-way street—not a rulebook where only one side gets to call the shots.

At the end of the day, this is about fairness, transparency, and making sure the system works for everyone—not just those with the most power. I urge a favorable report on HB1069, and I thank you for your time and consideration.