inseparable

February 26, 2025

House Health and Government Operations
House Office Building, Room 241
6 Bladen St.
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 Peña-Melnyk, Vice-Chair Cullison, 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**

[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.

prohibitions are necessary "to assure that health insurance benefits and disability income 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.”