

AMENDED IN SENATE JULY 15, 2010

AMENDED IN ASSEMBLY APRIL 13, 2010

AMENDED IN ASSEMBLY APRIL 5, 2010

CALIFORNIA LEGISLATURE—2009–10 REGULAR SESSION

ASSEMBLY BILL

No. 1868

Introduced by Assembly Member Jones
(Coauthors: Senators Calderon and Correa)

February 12, 2010

An act to amend Section 10291.5 of, and to add Section 10116.2 to, the Insurance Code, relating to insurance.

LEGISLATIVE COUNSEL'S DIGEST

AB 1868, as amended, Jones. Insurance: life: disability: discretionary clauses.

Existing law generally regulates life and disability insurance policies, and requires the Insurance Commissioner to disapprove any disability policy for issuance or delivery in this state in specified circumstances.

This bill would provide that if a policy, contract, certificate, or agreement offered, issued, delivered, or renewed, whether or not in California, that provides or funds life insurance or disability insurance coverage for any California resident contains a provision that reserves discretionary authority to the insurer, or an agent of the insurer, to determine eligibility for benefits or coverage, to interpret the terms of the policy, contract, certificate, or agreement, or to provide standards of interpretation or review that are inconsistent with the laws of this state, that provision would be void and unenforceable. *The bill would define the term “discretionary authority” for these purposes.*

The bill would also require the commissioner to disapprove any disability policy that contains a provision of this type.

Vote: majority. Appropriation: no. Fiscal committee: yes.
State-mandated local program: no.

The people of the State of California do enact as follows:

1 SECTION 1. Section 10116.2 is added to the Insurance Code,
2 to read:

3 10116.2. (a) If a policy, contract, certificate, or agreement
4 offered, issued, delivered, or renewed, whether or not in California,
5 that provides or funds life insurance or disability insurance
6 coverage for any California resident contains a provision that
7 reserves discretionary authority to the insurer, or an agent of the
8 insurer, to determine eligibility for benefits or coverage, to interpret
9 the terms of the policy, contract, certificate, or agreement, or to
10 provide standards of interpretation or review that are inconsistent
11 with the laws of this state, that provision is void and unenforceable.

12 (b) For purposes of this section, “renewed” means continued in
13 force on or after the policy’s anniversary date.

14 (c) *For purposes of this section, the term “discretionary*
15 *authority” means a policy provision that has the effect of*
16 *conferring discretion on an insurer or other claim administrator*
17 *to determine entitlement to benefits or interpret policy language*
18 *that, in turn, could lead to a deferential standard of review by any*
19 *reviewing court.*

20 (d) *Nothing in this section prohibits an insurer from including*
21 *a provision in a contract that informs an insured that as part of*
22 *its routine operations the insurer applies the terms of its contracts*
23 *for making decisions, including making determinations regarding*
24 *eligibility, receipt of benefits and claims, or explaining policies,*
25 *procedures, and processes, so long as the provision could not give*
26 *rise to a deferential standard of review by any reviewing court.*

27 SEC. 2. Section 10291.5 of the Insurance Code is amended to
28 read:

29 10291.5. (a) The purpose of this section is to achieve both of
30 the following:

31 (1) Prevent, in respect to disability insurance, fraud, unfair trade
32 practices, and insurance economically unsound to the insured.

1 (2) Assure that the language of all insurance policies can be
2 readily understood and interpreted.

3 (b) The commissioner shall not approve any disability policy
4 for issuance or delivery in this state in any of the following
5 circumstances:

6 (1) If the commissioner finds that it contains any provision, or
7 has any label, description of its contents, title, heading, backing,
8 or other indication of its provisions that is unintelligible, uncertain,
9 ambiguous, or abstruse, or likely to mislead a person to whom the
10 policy is offered, delivered, or issued.

11 (2) If it contains any provision for payment at a rate, or in an
12 amount, other than the product of rate times the periods for which
13 payments are promised, for loss caused by particular event or
14 events, as distinguished from character of physical injury or illness
15 of the insured, more than triple the lowest rate, or amount, promised
16 in the policy for the same loss caused by any other event or events,
17 loss caused by sickness, loss caused by accident, and different
18 degrees of disability each being considered, for the purpose of this
19 paragraph, a different loss; or if it contains any provision for
20 payment for any confining loss of time at a rate more than six times
21 the least rate payable for any partial loss of time or more than twice
22 the least rate payable for any nonconfining total loss of time; or if
23 it contains any provision for payment for any nonconfining total
24 loss of time at a rate more than three times the least rate payable
25 for any partial loss of time.

26 (3) If it contains any provision for payment for disability caused
27 by particular event or events, as distinguished from character of
28 physical injury or illness of the insured, payable for a term more
29 than twice the least term of payment provided by the policy for
30 the same degree of disability caused by any other event or events;
31 or if it contains any benefit for total nonconfining disability payable
32 for lifetime or for more than 12 months and any benefit for partial
33 disability, unless the benefit for partial disability is payable for at
34 least three months; or if it contains any benefit for total confining
35 disability payable for lifetime or for more than 12 months, unless
36 it also contains benefit for total nonconfining disability caused by
37 the same event or events payable for at least three months, and, if
38 it also contains any benefit for partial disability, unless the benefit
39 for partial disability is payable for at least three months. The

1 provisions of this paragraph shall apply separately to accident
2 benefits and to sickness benefits.

3 (4) If it contains provision or provisions that would have the
4 effect, upon any termination of the policy, of reducing or ending
5 the liability as the insurer would have, but for the termination, for
6 loss of time resulting from accident occurring while the policy is
7 in force or for loss of time commencing while the policy is in force
8 and resulting from sickness contracted while the policy is in force
9 or for other losses resulting from accident occurring or sickness
10 contracted while the policy is in force, and also contains provision
11 or provisions reserving to the insurer the right to cancel or refuse
12 to renew the policy, unless it also contains other provision or
13 provisions the effect of which is that termination of the policy as
14 the result of the exercise by the insurer of that right shall not reduce
15 or end the liability in respect to the hereinafter specified losses as
16 the insurer would have had under the policy, including its other
17 limitations, conditions, reductions, and restrictions, had the policy
18 not been so terminated.

19 The specified losses referred to in the preceding paragraph are:

20 (i) Loss of time which commences while the policy is in force
21 and results from sickness contracted while the policy is in force.

22 (ii) Loss of time that commences within 20 days following and
23 results from accident occurring while the policy is in force.

24 (iii) Losses that result from accident occurring or sickness
25 contracted while the policy is in force and arise out of the care or
26 treatment of illness or injury and that occur within 90 days from
27 the termination of the policy or during a period of continuous
28 compensable loss or losses which period commences prior to the
29 end of the 90 days.

30 (iv) Losses other than those specified in clause (i), (ii), or (iii)
31 of this paragraph that result from accident occurring or sickness
32 contracted while the policy is in force and the losses occur within
33 90 days following the accident or the contraction of the sickness.

34 (5) If by any caption, label, title, or description of contents the
35 policy states, implies, or infers without reasonable qualification
36 that it provides loss of time indemnity for lifetime, or for any period
37 of more than two years, if the loss of time indemnity is made
38 payable only when house confined or only under special
39 contingencies not applicable to other total loss of time indemnity.

1 (6) If it contains any benefit for total confining disability payable
2 only upon condition that the confinement be of an abnormally
3 restricted nature unless the caption of the part containing that
4 benefit is accurately descriptive of the nature of the confinement
5 required and unless, if the policy has a description of contents,
6 label, or title, at least one of them contain reference to the nature
7 of the confinement required.

8 (7) (A) If, irrespective of the premium charged therefor, any
9 benefit of the policy is, or the benefits of the policy as a whole are,
10 not sufficient to be of real economic value to the insured.

11 (B) In determining whether benefits are of real economic value
12 to the insured, the commissioner shall not differentiate between
13 insureds of the same or similar economic or occupational classes
14 and shall give due consideration to all of the following:

15 (i) The right of insurers to exercise sound underwriting judgment
16 in the selection and amounts of risks.

17 (ii) Amount of benefit, length of time of benefit, nature or extent
18 of benefit, or any combination of those factors.

19 (iii) The relative value in purchasing power of the benefit or
20 benefits.

21 (iv) Differences in insurance issued on an industrial or other
22 special basis.

23 (C) To be of real economic value, it shall not be necessary that
24 any benefit or benefits cover the full amount of any loss that might
25 be suffered by reason of the occurrence of any hazard or event
26 insured against.

27 (8) If it substitutes a specified indemnity upon the occurrence
28 of accidental death for any benefit of the policy, other than a
29 specified indemnity for dismemberment, which would accrue prior
30 to the time of that death or if it contains any provision which has
31 the effect, other than at the election of the insured exercisable
32 within not less than 20 days in the case of benefits specifically
33 limited to the loss by removal of one or more fingers or one or
34 more toes or within not less than 90 days in all other cases, of
35 doing any of the following:

36 (A) Of substituting, upon the occurrence of the loss of both
37 hands, both feet, one hand and one foot, the sight of both eyes or
38 the sight of one eye and the loss of one hand or one foot, some
39 specified indemnity for any or all benefits under the policy unless
40 the indemnity so specified is equal to or greater than the total of

1 the benefit or benefits for which the specified indemnity is
2 substituted and which, assuming in all cases that the insured would
3 continue to live, could possibly accrue within four years from the
4 date of such dismemberment under all other provisions of the
5 policy applicable to the particular event or events, as distinguished
6 from character of physical injury or illness, causing the
7 dismemberment.

8 (B) Of substituting, upon the occurrence of any other
9 dismemberment some specified indemnity for any or all benefits
10 under the policy unless the indemnity so specified is equal to or
11 greater than one-fourth of the total of the benefit or benefits for
12 which the specified indemnity is substituted and which, assuming
13 in all cases that the insured would continue to live, could possibly
14 accrue within four years from the date of the dismemberment under
15 all other provisions of the policy applicable to the particular event
16 or events, as distinguished from character of physical injury or
17 illness, causing the dismemberment.

18 (C) Of substituting a specified indemnity upon the occurrence
19 of any dismemberment for any benefit of the policy that would
20 accrue prior to the time of dismemberment.

21 As used in this section, loss of a hand shall be severance at or
22 above the wrist joint, loss of a foot shall be severance at or above
23 the ankle joint, loss of an eye shall be the irrecoverable loss of the
24 entire sight thereof, loss of a finger shall mean at least one entire
25 phalanx thereof and loss of a toe the entire toe.

26 (9) If it contains provision, other than as provided in Section
27 10369.3, reducing any original benefit more than 50 percent on
28 account of age of the insured.

29 (10) If the insuring clause or clauses contain no reference to the
30 exceptions, limitations, and reductions, if any, or no specific
31 reference to, or brief statement of, each abnormally restrictive
32 exception, limitation, or reduction.

33 (11) If it contains benefit or benefits for loss or losses from
34 specified diseases only unless:

35 (A) All of the diseases so specified in each provision granting
36 the benefits fall within some general classification based upon the
37 following:

38 (i) The part or system of the human body principally subject to
39 all of those diseases.

40 (ii) The similarity in nature or cause of those diseases.

1 (iii) In case of diseases of an unusually serious nature and
2 protracted course of treatment, the common characteristics of all
3 of those diseases with respect to severity of affliction and cost of
4 treatment.

5 (B) The policy is entitled and each provision granting the
6 benefits is separately captioned in clearly understandable words
7 so as to accurately describe the classification of diseases covered
8 and expressly point out, when that is the case, that not all diseases
9 of the classification are covered.

10 (12) If it does not contain provision for a grace period of at least
11 the number of days specified below for the payment of each
12 premium falling due after the first premium, during which grace
13 period the policy shall continue in force provided, that the grace
14 period to be included in the policy shall be not less than seven days
15 for policies providing for weekly payment of premium, not less
16 than 10 days for policies providing for monthly payment of
17 premium and not less than 31 days for all other policies.

18 (13) If it includes a provision that reserves discretionary
19 authority, *as defined by Section 10116.2*, to the insurer, or an agent
20 of the insurer, to determine eligibility for benefits or coverage, to
21 interpret the terms of the policy, or to provide standards of
22 interpretation or review that are inconsistent with the laws of this
23 state.

24 (14) If it fails to conform in any respect with any law of this
25 state.

26 (c) The commissioner shall not approve any disability policy
27 covering hospital, medical, or surgical expenses unless the
28 commissioner finds that the application conforms to both of the
29 following requirements:

30 (1) All applications for disability insurance covering hospital,
31 medical, or surgical expenses, except that which is guaranteed
32 issue, which include questions relating to medical conditions, shall
33 contain clear and unambiguous questions designed to ascertain the
34 health condition or history of the applicant.

35 (2) The application questions designed to ascertain the health
36 condition or history of the applicant shall be based on medical
37 information that is reasonable and necessary for medical
38 underwriting purposes. The application shall include a prominently
39 displayed notice that states:

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1 “California law prohibits an HIV test from being required or
2 used by health insurance companies as a condition of obtaining
3 health insurance coverage.”

4
5 (d) Nothing in this section authorizes the commissioner to
6 establish or require a single or standard application form for
7 application questions.

8 (e) The commissioner may, from time to time as conditions
9 warrant, after notice and hearing, adopt reasonable rules and
10 regulations, and amendments and additions thereto, as are necessary
11 or convenient, to establish, in advance of the submission of
12 policies, the standard or standards conforming to subdivision (b),
13 by which he or she shall disapprove or withdraw approval of any
14 disability policy.

15 In adopting those rules and regulations the commissioner shall
16 give consideration to the criteria herein established and to the
17 desirability of approving for use in policies in this state uniform
18 provisions, nationwide or otherwise, and is hereby granted the
19 authority to consult with insurance authorities of any other state
20 and their representatives individually or by way of convention or
21 committee, to seek agreement upon those provisions.

22 Any such rule or regulation shall be adopted in accordance with
23 the procedure provided in Chapter 3.5 (commencing with Section
24 11340) of Part 1 of Division 3 of Title 2 of the Government Code.

25 (f) The commissioner may withdraw approval of filing of any
26 policy or other document or matter required to be approved by the
27 commissioner, or filed with him or her, by this chapter when the
28 commissioner would be authorized to disapprove or refuse filing
29 of the same if originally submitted at the time of the action of
30 withdrawal.

31 The withdrawal shall be in writing and shall specify the reasons.
32 An insurer adversely affected by any such withdrawal may, within
33 a period of 30 days following mailing or delivery of the writing
34 containing the withdrawal, by written request secure a hearing to
35 determine whether the withdrawal should be annulled, modified,
36 or confirmed. Unless, at any time, it is mutually agreed to the
37 contrary, a hearing shall be granted and commenced within 30
38 days following filing of the request and shall proceed with
39 reasonable dispatch to determination. Unless the commissioner in
40 writing in the withdrawal, or subsequent thereto, grants an

1 extension, the withdrawal shall, in the absence of a request, be
2 effective, prospectively and not retroactively, on the 91st day
3 following the mailing or delivery of the withdrawal, and, if request
4 for the hearing is filed, on the 91st day following mailing or
5 delivery of written notice of the commissioner's determination.

6 (g) No proceeding under this section is subject to Chapter 5
7 (commencing with Section 11500) of Part 1 of Division 3 of Title
8 2 of the Government Code.

9 (h) Except as provided in subdivision (k), any action taken by
10 the commissioner under this section is subject to review by the
11 courts of this state and proceedings on review shall be in
12 accordance with the Code of Civil Procedure.

13 Notwithstanding any other provision of law to the contrary,
14 petition for a review may be filed at any time before the effective
15 date of the action taken by the commissioner. No action of the
16 commissioner shall become effective before the expiration of 20
17 days after written notice and a copy thereof are mailed or delivered
18 to the person adversely affected, and any action so submitted for
19 review shall not become effective for a further period of 15 days
20 after the filing of the petition in court. The court may stay the
21 effectiveness thereof for a longer period.

22 (i) This section shall be liberally construed to effectuate the
23 purpose and intentions herein stated; but shall not be construed to
24 grant the commissioner power to fix or regulate rates for disability
25 insurance or prescribe a standard form of disability policy, except
26 that the commissioner shall prescribe a standard supplementary
27 disclosure form for presentation with all disability insurance
28 policies, pursuant to Section 10603.

29 (j) This section shall be effective on and after July 1, 1950, as
30 to all policies thereafter submitted and on and after January 1,
31 1951, the commissioner may withdraw approval pursuant to
32 subdivision (d) of any policy thereafter issued or delivered in this
33 state irrespective of when its form may have been submitted or
34 approved, and prior to those dates the provisions of law in effect
35 on January 1, 1949, shall apply to those policies.

36 (k) Any policy issued by an insurer to an insured on a form
37 approved by the commissioner, and in accordance with the
38 conditions, if any, contained in the approval, at a time when that
39 approval is outstanding shall, as between the insurer and the

- 1 insured, or any person claiming under the policy, be conclusively
- 2 presumed to comply with, and conform to, this section.

O