



October 12, 2010

The Honorable Max Baucus
Chairman, United States Senate
Committee on Finance
219 Dirksen Senate Office Building
Washington, DC 20510-6200

The Honorable Charles Grassley
Ranking Member, United States Senate
Committee on Finance
219 Dirksen Senate Office Building
Washington, DC 20510-6200

Re: September 28, 2010 Hearing on Private Long-Term Disability Policies

Dear Senators Baucus and Grassley:

We are writing on behalf of the American Benefits Council ("Council") and the U.S. Chamber of Commerce to submit written comments for the record in connection with the September 28, 2010 Senate Finance Committee hearing on long-term disability ("LTD") policies. The Council is a public policy organization representing principally Fortune 500 companies and other organizations that assist employers of all sizes in providing benefits to employees. Collectively, the Council's members either sponsor directly, or provide services to, retirement and health plans that cover more than 100 million Americans. The Council and its members seek to advance the continuation, growth and maintenance of employer-sponsored benefit plans.

The U.S. Chamber of Commerce is the world's largest business federation, representing more than three million businesses and organizations of every size, sector, and region. Besides representing a cross-section of the American business community in terms of number of employees, the Chamber represents a wide management spectrum by type of business and location. Each major classification of American business -- manufacturing, retailing, services, construction, wholesaling, and finance -- is represented. Also, the Chamber has substantial membership in all 50 states.

The Council and the Chamber attended the Committee hearing and reviewed the written testimony. Much of the oral and written testimony from the hearing was critical of the legal framework currently in place under ERISA for employer-sponsored plans that provide LTD benefits. In particular, a number of witnesses criticized (i) the use of "discretionary clauses" in LTD plans and insurance policies, and (ii) the unavailability of jury trials and punitive or other "extra-contractual" damage awards in ERISA benefit claims litigation.

Such criticism is misguided because it does not recognize existing safeguards or the impact of the above changes on workers. If legislation were adopted to address the criticism, the nation's voluntary system of employer-sponsored benefit plans and the workers who participate in them would be substantially harmed. To ensure that the Committee has a balanced view on the issues framed by the hearing, we respectfully request that the Committee consider the written comments sets forth below.

America's Voluntary System of Employer-Sponsored Plans

As a threshold matter, it is important to remember that America relies on a *voluntary* system of employer-sponsored employee benefit plans. The voluntary system as it applies to disability programs is rooted in the recognition by employers that they could provide disability insurance on a group basis more cost effectively than individuals in the market place could obtain it on their own, and that if workers relied on the individual market then some workers might end up with insufficient or no income if they became disabled because they might not select to purchase enough or even any such insurance.

ERISA does not mandate that employers provide LTD benefits or any other kind of welfare benefits. "Employers or other plan sponsors are generally free under ERISA, for any reason at any time, to adopt, modify, or terminate welfare plans." *Curtiss-Wright Corp. v. Shoonjongen*, 514 U.S. 73, 78 (1995). Congress has wisely supported the principle that a voluntary system of employer-sponsored benefit programs optimizes benefits for America's workers.

Within this voluntary system, an employer or other plan sponsor must make a number of design choices that will impact the overall cost of its LTD benefit program. The employer might establish an LTD plan that pays generous benefit amounts or, instead, one that pays less generous amounts. An employer might decide that the LTD plan should pay benefits whenever an employee is unable to perform his or her own job or, instead, pay benefits only when the employee is unable to perform *any* job, not just his or her current job. Similarly, an employer may or may not include a "discretionary clause."

A discretionary clause gives the plan fiduciary (which may be the insurer) discretionary authority to determine eligibility for benefits or to construe plan or policy terms. When such discretionary authority is granted, federal common law under ERISA generally requires a reviewing court to defer to the fiduciary's determination so long as that determination is reasonable, even if the court might have made a different decision.¹ So long as the underlying decision is reasonable, the decision of the plan fiduciary is upheld. This type of deference to a fiduciary's determination is common in trust law and it reduces uncertainty and, hence, costs, including litigation costs for an employer's LTD plan.

ERISA Gives Every Plan Participant the Right to Have an Impartial Federal Judge Review Benefit Claim Denials

Certain witnesses at the September 28 hearing accused some insurers and plan fiduciaries of slanting their eligibility decisions against deserving claimants and in favor of a short-term interest in minimizing benefit expense. These witnesses further argued that discretionary clauses insulate biased eligibility decisions from meaningful judicial review.

Those arguments ignore the legal safeguards already in place for LTD benefit claimants under ERISA. As you know, ERISA § 502(a)(1)(B) gives every plan participant the right to have a federal judge review a final benefit claim denial. If the federal judge concludes that the claim was wrongfully denied, the judge may award the disputed benefit and also order the plan or insurer to pay pre-judgment interest plus the participant's reasonable attorney's fees and costs.

Importantly, current law under ERISA also allows the federal judge to factor into his or her decision the impact of any alleged bias on the part of the LTD insurer or plan administrator. The Supreme Court's recent decision in *Metropolitan Life Ins. Co. v. Glenn*, 554 U.S. ___, 128 S.Ct. 2343, 171 L.Ed.2d 299 (2008) confirms that a reviewing court may consider conflicts of interest on the part of the claims fiduciary in determining whether the fiduciary's decision was an abuse of discretion. Thus, if a discretionary clause is being abused by an insurer (or other plan fiduciary) that is operating under a conflict of interest, that conflict of interest is "weighed as a factor in determining whether there is an abuse of discretion." *Id.*, 127 S.Ct at 2360.

¹ The law in some States bans discretionary clauses from insurance policies sold in that State. Federal courts of appeals have split on whether these State-law bans are preempted by ERISA and, hence, unenforceable with respect to self-funded ERISA plans. Compare *Hancock v. Metropolitan Life Ins. Co.*, 590 F.3d 1141 (10th Cir. 2009) (holding that ERISA preempted State's rule); *American Council of Life Insurers v. Ross*, 558 F.3d 600 (6th Cir. 2009) (holding that State's rule is saved from preemption).

Critics of discretionary clauses would bar their use even though in the vast majority of cases the plan fiduciary has acted faithfully and without bias. Eliminating the deference accorded to plan decisions would increase uncertainty and litigation cost for plans unnecessarily.

The two other measures advocated by those same critics – jury trials and enhanced damage awards in benefit claims litigation – would be devastating to employers that voluntarily sponsor plans and are not needed. As noted above, participants in ERISA-covered plans already enjoy the right to have a federal judge review final benefit claim denials. There is no evidence, nor any reason to believe, that federal judges are deciding benefit claim disputes unfairly. Nor is there anything unusual in having judges rather than juries decide disputes of this nature. Much of ERISA is modeled on the law of trusts, and trust law has always relied on judges sitting in equity, rather than on juries, to resolve disputes over trust administration. See *Graham v. Hartford Life & Acc. Ins. Co.*, 589 F.3d 1345, 1355-56 (10th Cir. 2009) (explaining why Seventh Amendment right to a trial by jury does not extend to ERISA benefit claims because such claims are equitable in character rather than the kind of claims traditionally heard in courts of law).

Presumably, proponents of jury-tried benefit litigation believe that juries will be more sympathetic to LTD claimants than are federal judges. But advocating jury trials on that basis is just another way of saying that the legal playing field should be tilted in favor of granting or settling claims in favor of claimants even if the claim is questionable. This would only serve to increase costs of obtaining disability insurance, thereby hurting workers.

Allowing for open ended punitive and compensatory damage awards would tilt the legal playing field in an even more biased way. Such damages raise the stakes in litigation, but create no offsetting balance of costs for the insurer or plan (and in turn the workers and employers who are bearing the costs) if it wins. Raising the stakes in a one-sided fashion would force employers and insurers to capitulate on claims rather than litigate even very questionable or weak claims because capitulation would be less expensive than the risk of defending such claims. These costs will be borne by employers that sponsor LTD plans and their employees, either directly where the plan is self-insured, or indirectly through higher premiums, if the plan is insured.

In sum, outlawing discretionary clauses, mandating jury trials, and enhancing damage awards would all have the effect of encouraging plan fiduciaries to pay claims that have no merit. This outcome might work to the short-term advantage of those participants who have questionable claims. But such an outcome would necessarily work to the disadvantage of plan participants overall if the result is to increase costs that causes employers and/pr employees to reduce LTD benefits.

In a voluntary system of employee benefits, each employer has a finite amount to spend on compensation and benefits, including LTD plans. If the playing field is tilted in ways that require the employer's LTD plan pay a greater number of questionable claims, the employer will have to recoup those increased costs through offsetting changes to the LTD benefit, or other aspects of the compensation and benefit package. For example, the employer may be forced to adopt a less generous benefit formula that reduces the overall amount of every eligible participant's benefit. Those participants with solid and undisputed claims end up paying for the benefit dollars that are rerouted to participants with weak and questionable claims. That outcome plainly is not a good one for America's workers.

We thank the Committee for considering our views on these important issues.

American Benefits Council

U.S. Chamber of Commerce