COURT OF APPEALS
STATE OF NEW YORK

In the Matter of the Application of CHARLENE POLAN,

Petitioner-Appellant,

For a Judgment Pursuant to CPLR Article 78,

-against-

STATE OF NEW YORK INSURANCE DEPARTMENT,

Respondent-Respondent.

AMICUS CURIAE BRIEF OF
THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK

THE ASSOCIATION OF THE BAR OF
THE CITY OF NEW YORK

Marianne Engelman Lado
Committee on Civil Rights
NEW YORK LAWYERS FOR THE
PUBLIC INTEREST, INC.
151 West 30th Street, 11th Floor
New York, NY 10001
(212) 244-4664

James George Felakos
Committee on Legal Issues Affecting
People with Disabilities
343 East 30th Street, Apt. 15B
New York, NY 10016-6439
(212) 213-6685

Janet L. Steinman
Committee on Mental Health
250 West 16 Street Apt., 2B
New York City, NY 10011
(212) 255-3267

Dated: May 11, 2004

TABLE OF CONTENTS

Page

QUESTION PRESENTED 1

STATEMENT OF INTEREST 1

INTRODUCTION 2

ARGUMENT 4

I. INSURANCE LAW § 4224(B)(2) PROHIBITS DISCRIMINATION IN THE PROVISION OF BENEFITS ON THE BASIS OF DISABILITY 4

A. The plain language of Insurance Law § 4224(b)(2) prohibits discrimination on the basis of physical or mental disability, impairment or disease in the provision of benefits 4

B. The legislative intent of Insurance Law § 4224(b)(2) was to expand on existing insurance laws and proscribe unfair discrimination on the basis of disability, impairment or disease in the provision of accident and health insurance benefits 6

C. The provision of inferior accident and health insurance benefits for persons with mental disabilities constitutes discrimination under Insurance Law § 4224(b)(2) even if the same benefits are provided to all employees under the same policy 9

II. THE PUBLIC POLICY OF NARROWLY LIMITING THE CIRCUMSTANCES UNDER WHICH PERSONS BELONGING TO HISTORICALLY DISFAVORED CLASSES CAN BE SUBJECT TO DISPARATE TREATMENT IS INCORPORATED INTO THE ANTIDISCRIMINATION PROVISIONS OF THE NEW YORK INSURANCE LAW 11

III. PETITIONER-APPELLANT'S READING OF INSURANCE LAW § 4224(b)(2) AS REQUIRING THAT ANY DISTINCTIONS IN BENEFITS BASED ON MENTAL DISABILITY MUST BE SUPPORTED BY ACTUARIAL OR EXPERIENTIAL DATA IS CONSISTENT WITH THE INSURANCE LAW AND THE STATE'S REGULATION OF THE INSURANCE INDUSTRY 16

Page

A. Requiring Met Life to produce sound actuarial justification for differences in benefits for persons with mental disabilities pursuant to Insurance Law § 4224(b)(2) is consistent with the State's regulation of the insurance industry.....16

B. The public policy of prohibiting or narrowly limiting the circumstances under which distinctions can be based on certain historically disfavored classes is also embodied in the New York State Insurance Law.....20

CONCLUSION.....23

TABLE OF AUTHORITIES

Cases

Page

Arizona Governing Comm. for Tax Deferred Annuity and Deferred Compensation Plans v. Norris, 463 U.S. 1073 (1983).....11

Astoria Fed. Sav. & Loan Ass'n v. Solimino, 501 U.S. 104 (1991).....5

Binghamton GHS Employees Fed. Credit Union v. State Div. of Human Rights, 77 N.Y.2d 12 (1990).....5,9,11,17

Blue Cross & Blue Shield of Cent. New York, Inc. v. McCall, 89 N.Y.2d 160 (1996).....16

Bragdon v. Abbott, 524 U.S. 624, 118 S. Ct. 2196 (1998).....13

Cahill v. Rosa, 89 N.Y.2d 14 (1996).....11,14

Chabner v. United of Omaha Life Ins. Co., 994 F. Supp. 1185 (N.D.Cal. 1998).....5

Chabner v. United of Omaha Life Ins. Co., 225 F.3d 1042 (9th Cir. 2000).....14

Elaine W. v. Joint Diseases N. Gen. Hosp., Inc., 81 N.Y.2d 211 (1993).....14

Feinstein v. Bergner, 48 N.Y.2d 234 (1979).....5

Goldman v. Standard Ins. Co., 341 F.3d 1023 (9th Cir. 2003).....15

Hazen Paper Co. v. Biggins, 507 U.S. 604, 113 S. Ct. 1701 (1993).....12

Health Ins. Assoc. of America et al. v. Corcoran, 154 A.D.2d 61 (App. Div., 3d Dept. 1990).....17,18,19

Health Ins. Ass'n v. Harnett, 44 N.Y.2d 302 (1978).....21

Hernandez v. Barrios-Paoli, 93 N.Y.2d 781 (N.Y. 1999).....7,8

Lovejoy-Wilson v. NOCO Motor Fuel, Inc., 263 F.3d 208 (2d Cir. 2001).....14

Page

Matter of Yolanda D., 88 N.Y.2d 790 (1996).....5

Mowczan v. Bacon, 92 N.Y.2d 281 (1998).....6

Nev. Dep. of Human Res. v. Hibbs, 538 U.S. 721, 123 S. Ct. 1972 (2003).....12

Olmstead v. L.C. ex rel. Zimring, 527 U.S. 581, 119 S. Ct. 2176 (1999).....12

People v. Sheppard, 54 N.Y.2d 320 (1981).....7,8

Polan v. State of New York Ins. Dep't, 3 A.D.3d 30 (App. Div. 2003)..... passim

Public Serv. Mut. Ins. Co. v. Levy, 387 N.Y.S 2d 962 (N.Y. Sup.Ct., New York County 19776).....19

School Bd. of Nassau County, Fla. v. Arline, 480 U.S. 273, 107 S. Ct. 1123 (1987).....13

Scheiber v. St. John's Univ., 84 N.Y.2d 120 (1994).....11

Statutes & Rules

11 NYCRR 185.5[f][2][i].....6,17

42 U.S.C. § 12101 (a)(7).....12

Cal. Ins. Code § 10144 (West 2004).....14,15

Domestic Relations Law § 72.....8

Executive Law § 290(3).....12

Executive Law § 296(a)(1)(b).....10

Executive Law § 296(2)(b).....13

Executive Law § 296(3-a)(d).....13

Executive Law § 296(3)(b).....13

Insurance Law § 2331.....18,20

Insurance Law § 2606..... passim

Page

Insurance Law § 2606(d) 18,20,21

Insurance Law § 2606(e) 21

Insurance Law § 2607 6,17

Insurance Law § 2608 20,21

Insurance Law § 2612 20

Insurance Law § 3201[c][3] 5,17

Insurance Law § 3234 ..... passim

Insurance Law § 3430 19

Insurance Law § 3435-a(b) 21

Insurance Law § 4224 6,17

Insurance Law § 4224(a)(1) 17,18

Insurance Law § 4224(b)(1) 17,18

Insurance Law § 4224(b)(2) ..... passim

Insurance Law § 4224(c) 7

Other Authorities

2000 NY Ins. GC Opinions LEXIS 4, 7 18

979-2 NAIC Proceedings 257, 262 9

Memorandum of the Assembly Rules Committee, NYS Legislative Annual 1994, p. 522 7,16

Memorandum of Senator Thomas W. Libous, N.Y.S. Legislative Annual 1993, p. 110-111 8,21

Phillip E. Stano, Underwriting in the Twentieth Century: Grafting Societal Values to the Regulation of Risk, Journal of Insurance Regulation, 1/1/00 JINSREGLN 25972 (Jan. 1, 2000) 17

Page

Risk Classification: Statement of Principles of American Academy of Actuaries, p. 2, *available at* http://www.actuary.org/pdf/asb/appendices/risk.pdf 17

QUESTION PRESENTED

Does Insurance Law § 4224(b)(2) prohibit the provision of inferior benefits on the basis of mental disability in the absence of a showing of actuarial or experiential data justifying the limitation of benefits? The Appellate Division for the First Department answered No.

STATEMENT OF INTEREST

The Association of the Bar of the City of New York (the "Association") submits this brief as *amicus curiae* in support of Petitioner-Appellant to urge the reversal of the decision in Polan v. State of New York Ins. Dept., 3 A.D.3d 30 (App. Div. 2003), in which the Appellate Division, First Department, held that the New York State Department of Insurance properly concluded that an insurer did not discriminate on the basis of mental disability under Insurance Law § 4224 (b)(2) by issuing a long-term disability policy that provided long-term disability benefits to persons with physical disabilities from the date of disability up to age sixty-five while limiting such benefits for persons with mental disabilities to twenty-four months. Respondent has consented to the filing of this brief.

The Association is a professional association with more than 22,000 members. It was founded in 1870 to improve the administration of justice, promote the rule of law, and elevate the legal profession's standards of integrity, honor and courtesy.

The Association has had a longstanding interest in legal issues affecting persons with physical and mental disabilities. The Association also has a strong interest in protecting civil rights. A central concern of the Association has been in ensuring that persons with disabilities are not unjustly discriminated against by either private or public entities. The Association believes that the proper construction of Insurance Law § 4224(b)(2) will prevent arbitrary and unjust discrimination against persons with disabilities in the provision of insurance.

INTRODUCTION

The issue on appeal is the interpretation by the Appellate Division of the antidiscrimination provisions of New York Insurance Law § 4224(b)(2) in a manner that allows insurers to provide more extensive long-term accident and health insurance coverage for workers with physical disabilities than for those with mental disabilities.

Specifically, in this case, a disability insurance policy covering Ms. Polan was maintained by her employer, MetPath, Inc. The policy was initially provided by Travelers Insurance Company and then by its successor, Metropolitan Life Insurance Company ("Met Life"). When she became disabled, she was found eligible for disability benefits under her employer's policy for only twenty-four months, whereas workers with physical disabilities covered by the same policy were eligible for disability benefits up to the age of sixty-five. Ms. Polan's mental disability in not in dispute.

Ms. Polan unsuccessfully sought administrative review from the New York Department of Insurance and Article 78 review from the Supreme Court and the Appellate Division. She claimed that the disparate limitation of coverage for mental and

physical disability under the policy maintained by her employer was in contravention of Insurance Law § 4224(b)(2).

As a matter of statutory interpretation, in a 3-2 decision, the Appellate Division majority, affirming the Supreme Court's decision, agreed with the Department of Insurance that Insurance Law § 4224(b)(2) only requires the provision of the same long-term disability benefits to all employees, and only forbids an insurance carrier from discriminating between disabled and non-disabled employees in making coverage available.

The decision by the First Department should be reversed because, in tandem with the Department of Insurance and the Supreme Court, it misinterpreted the plain meaning of Insurance Law § 4224(b)(2). Insurance Law § 4224(b)(2) states, in relevant part:

> No insurer doing in this state the business of accident and health insurance . . . shall: . . . (2) refuse to insure, refuse to continue to insure or limit the amount, extent or kind of coverage available to an individual, or charge a different rate for the same coverage solely because of the physical or mental disability, impairment or disease, or prior history thereof, of the insured or potential insured, except where the refusal, limitation or rate differential is permitted by law or regulation and is based on sound actuarial principles or is related actual or reasonably anticipated experience . . . .

Amicus submits that, by its terms, Insurance Law § 4224(b)(2) clearly prohibits discrimination in "limit[ing] the amount, extent or kind of coverage available" on the basis of disability, and that the provision of inferior benefits for persons with mental disabilities is contrary to law and public policy. Even assuming, *arguendo*, that MetLife's policy is not facially invalid, the insurer's failure to submit any supporting actuarial or experiential data in support of the limitation of benefits for persons with mental disabilities violates Insurance Law § 4224(b)(2).

The strong public policy embodied in New York's antidiscrimination statutes, including the New York State Insurance Law, is that distinctions based upon suspect classifications such as race, sex, age or disability may not permissibly be made based upon stereotypes, myths or unsupported assumptions. To the extent that distinctions based on such classifications are permissible, they must have a cognizable, objective basis. In requiring that insurers justify differences in benefits for persons with mental disabilities based upon sound actuarial principles or actual or reasonably anticipated experience, Insurance Law § 4224(b)(2) serves that purpose.

ARGUMENT

I. INSURANCE LAW § 4224(B)(2) PROHIBITS DISCRIMINATION IN THE PROVISION OF BENEFITS ON THE BASIS OF DISABILITY.

A. The plain language of Insurance Law § 4224(b)(2) prohibits discrimination on the basis of physical or mental disability, impairment or disease in the provision of benefits.

The plain language of Insurance Law § 4224(b)(2) clearly prohibits discrimination on the basis of physical or mental disability, impairment or disease in the provision of benefits. The law states that insurers may not:

> refuse to insure, refuse to continue to insure or limit the amount, extent or kind of coverage available to an individual or charge a different rate for the same coverage solely because of physical or mental disability, impairment or disease, or prior history thereof, of the insured or potential insured, except where the refusal, limitation or rate differential is permitted by law or regulation and is based on sound actuarial principles or is related to actual or reasonably anticipated experience . . . .

Insurance Law § 4224(b)(2) (emphasis added).

The Appellate Division held that because all employees were offered the same policy, Insurance Law § 4224(b)(2) was not violated. Polan, 3 A.D.3d at 32. However,

other phrases in the statute such as "refuse to insure," or "charge a different rate for the same coverage" prohibit an unequal offering of insurance. The inclusion of the phrase "limit the amount, extent or kind of coverage" in addition to those phrases clearly indicates the Legislature's intent for that phrase to cover more than "refuse to insure" or "charge a different rate for the same coverage," and reaches the unequal provision of benefits within a policy. The words "limit the amount" or the "extent" of coverage would be meaningless unless they related to the unequal provision of benefits. Principles of statutory construction require a reading of the statute that gives effect to every word and avoids rendering words superfluous. Statutes § 231.[1] As this Court has noted, "where the Legislature has used different words in a series, the words should not be construed as mere redundancies . . . ." Feinstein v. Bergner, 48 N.Y.2d 234, 239 (1979).

The Appellate Division's decision was flawed because that court failed to consider what meaning the phrase "limit the amount, extent or kind of coverage available" would have in the statute other than addressing the unequal provision of benefits. Instead, the majority evaded the issue by drawing a distinction between insurers and insurance policies, stating that Insurance Law § 4224(b)(2) only covers insurers and not insurance policies. Polan, 3 A.D.3d at 32. However, it is insurers who write policies and make decisions as to the content of the policies. Insurance policies are not actors; instead, insurance policies are memorializations of the decisions made by insurers. As such, a policy which includes an insurer's decision to limit the amount of long-term disability benefits to a person with mental disability to twenty-four months is plainly

[1] See Matter of Yolanda D., 88 N.Y.2d 790, 795 (1996) ("[C]ourts must, where possible, give effect to every word of a statute ...."); See also, Chabner v. United of Omaha Life Ins. Co., 994 F.Supp. 1185, 1190 (N.D.Cal. 1998) ("It is axiomatic that courts must interpret statutes 'so as to avoid rendering superfluous any parts thereof.'") (quoting Astoria Fed. Sav. & Loan Ass'n v. Solimino, 501 U.S. 104 (1991)).

covered by the law. As this court has noted, Insurance Law § 4224 is intended to eliminate discrimination in insurance policies, as well as by insurers. Binghamton GHS Employees Fed. Credit Union v. State Div. of Human Rights, 77 N.Y.2d 12, 16-17 (1990) ("The Insurance Department has the statutory power and duty to determine whether policy premiums are rationally related to risks and expenses (Insurance Law § 3201[c][3]) and to eliminate discriminatory practices in the writing of insurance (see Insurance Law §§ 2606, 2607, 4224; 11 NYCRR 185.5[f][2][i])"). (Emphasis added).

B. The legislative intent of Insurance Law § 4224(b)(2) was to expand on existing insurance laws and proscribe unfair discrimination on the basis of disability, impairment or disease in the provision of accident and health insurance benefits.

The legislative history further shows that Insurance Law § 4224(b)(2) was intended to proscribe unfair discrimination in the provision of benefits based on disability, impairment or disease. In construing a statute, "[g]enerally, inquiry must be made of the spirit and purpose of the legislation, which requires examination of the statutory context of the provision as well as its legislative history." Mowczan v. Bacon, 92 N.Y.2d 281, 285 (1998) (citation omitted). Insurance Law § 4224(b)(2) was passed in 1994, one year following the passage of Insurance Law § 3234, which prohibits insurers from unfairly discriminating against persons who have a history of breast cancer by refusing to issue or canceling an existing life or disability policy. Insurance Law § 3234 states, in relevant part:

> No insurer shall refuse to issue any policy of life or non-cancelable disability insurance, or cancel or decline to renew such a policy because an individual has had breast cancer . . . .

Notably, the Memorandum of the Assembly Rules Committee stated, regarding Insurance Law § 4224(b)(2): "This bill would encompass Chapter 601 and would go

several steps further by not only prohibiting the refusal to issue or cancel a policy but also prohibiting the limiting of benefits covered and the differentiation of premium rate levels, based solely upon the mental or physical disability, impairment or disease, or prior history of such, of the insured or potential insured (unless the insurer is basing the decision to do so on sound actuarial principles)." Memorandum of the Assembly Rules Committee, NYS Legislative Annual 1994, p. 522 (emphasis added).

The difference between Insurance Law § 3234 and § 4224 (b)(c) is evident in comparing their text. Unlike Insurance Law § 4224(b)(2), no mention is made of "limiting the amount, extent or kind of coverage" in Insurance Law § 3234. This distinction is important, as, when construing statutes, the Legislature is presumed to know what statutes are in effect when enacting laws. People v. Sheppard, 54 N.Y.2d 320, 325 (1981). "When the meaning of certain terms in a statute is unclear, 'a court's role is not to delve into the minds of legislators, but rather to effectuate the statute by carrying out the purpose of the statute as it is embodied in the words chosen by the Legislature.'" Hernandez v. Barrios-Paoli, 93 N.Y.2d 781, 788 (N.Y. 1999) (citation omitted). The inclusion of the language "limiting the amount, extent or kind of coverage" only one year after a law upon which Insurance Law § 4224(b)(2) is modeled is significant, as it clearly indicates that the Legislature intended the law to cover the unequal provision of benefits.

A comparison between Insurance Law § 4224(b)(2) and Insurance Law § 2606 similarly demonstrates the Legislature's intent that Insurance Law § 4224(b)(2) prohibit the discriminatory provision of benefits on the basis of disability. Also in 1993, the year before the passage of Insurance Law § 4224(b)(2), the Legislature amended Insurance

Law § 2606 to add disability to the list of classifications on the basis of which insurers could not discriminate. Insurance Law § 2606 specifically addresses discrimination in access and pricing of insurance.[2] See Memorandum of Sen. Thomas W. Libous, NYS Legislative Annual 1993, pp. 110-111. ("The object of [the amendment of Section 2606 to include the prohibition of classification based on disability] is to ensure that the decision made by insurers, with regard to the availability and cost of insurance, are based on sound underwriting and actuarial principles, reasonably related to loss experience.") (emphasis added). Unlike Insurance Law § 4224 (b)(2), Insurance Law § 2606 contains no reference to limits on coverage. The difference in the language of these several statutes shows that the Legislature intended Insurance Law § 4224(b)(2) to have a far broader scope than either Insurance Law § 2606 or Insurance Law § 3234 and to proscribe unfair discrimination in the form of the unequal provision of benefits. Cf. Sheppard, 54 N.Y.2d at 326 (in determining the meaning of the grandparent visitation law, Domestic Relations Law § 72, the Court imputed knowledge of the existing law on the effect of adoption to the legislature and held that the legislature intended "each to have full effect.").

The reading of Insurance Law § 4224(b)(2) as prohibiting the unequal provision of benefits based on disability is also consistent with the intent of the drafters of the NAIC Model Regulation on Unfair Discrimination in Life and Health Insurance on the Basis of Physical or Mental Disability. In the drafting notes to the model regulation upon which Insurance Law § 4224(b)(2) is based, the Task Force stated:

[2] Insurance Law § 2606 provides: No insurer "shall because of race, color, creed, national origin, or disability: (1) Make any distinction or discrimination between persons as to the premiums or rates charged for insurance policies or in any other manner whatever. (2) Demand or require a greater premium from any persons than it requires at that time from others in similar cases. (3) Make or require any rebate, discrimination or discount upon the amount to be paid or the service to be rendered on any policy."

> The regulation is not intended to mandate the inclusion of particular coverages, such as benefits for normal pregnancy, or of levels of benefits such as for mental illness, in a company's policies or contracts . . . . The model unfair trade practices act has never been interpreted to provide the basis for such mandates but rather to assure that such coverage and benefits as are offered by insurers are provided on a basis which is not unfairly discriminatory among individuals of the same class.

1979-2 NAIC Proceedings 257, 262 (emphasis added).[3]

Thus, it is clear that even if the drafters of the Model Regulations did not intend to mandate particular levels of benefits, they did intend for unequal benefits on the basis of mental disability to be subject to a showing of sound actuarial principles or relatedness to actual or reasonably anticipated experience. This treatment does not require parity, but it does require justification for a differentiation in benefits based on disability.

C. The provision of inferior accident and health insurance benefits for persons with mental disabilities constitutes discrimination under Insurance Law § 4224(b)(2) even if the same benefits are provided to all employees under the same policy.

A policy that explicitly gives persons with mental disabilities benefits which are inferior to those provided to persons with physical disabilities constitutes discrimination "because of" mental disability, even if all employees were offered the same policy. In Binghamton, 77 N.Y.2d 12 (1990), this Court held that offering the same package to everyone is discriminatory if a person in the protected class could not obtain the same benefits in the package as others. The question in Binghamton was whether an automobile loan with an optional disability insurance provision that excluded coverage for disabilities caused by normal pregnancy violated the Human Rights Law prohibition against discrimination on the basis of gender in the "rates, terms or conditions of . . . any

[3] The Appellate Division, in using this passage in support of its decision, pointed to how the drafters did not intend for this provision to mandate a certain level of benefits. However, the Appellate Division ignored that part of the passage that supports the scrutiny of the provision of different levels of benefits under the lens of actuarial principles. See Polan, 3 A.D.3d at 34.

form of credit."[4] This Court held that it did. Id. at 18. In reaching its conclusion, this Court held that the credit offering was discriminatory despite the fact that the insurance was optional, because the disability insurance with the provision that excluded pregnant women was "inextricably intertwined" with the loan agreement and was a "term" of the credit. Id. In determining that the optional disability insurance policy was a term of the credit, the Court noted the following factors: the insurance was part of the one-page credit agreement and promissory note used by the loan company; it was available with every installment loan; the duration of the loan was keyed to the amount and duration of the car loan; and the insurance was only available with the car loan. Id. at 17. The Court held that the exclusion of normal pregnancy-related disabilities was sex discrimination, as it meant that women could not obtain the same coverage as men. Id. at 18. As the disability benefits policy was discriminatory on the basis of sex for excluding normal pregnancy-related disabilities, the Court held that the auto loan was also discriminatory. Id.

Similarly, here, the fact that "Ms. Polan was eligible for the same package of [long-term disability] benefits provided to all employees," Polan, 3 A.D.3d at 35, does not negate the fact that Petitioner-Appellant's coverage under the insurance policy is limited solely because of her mental disability. The Appellate Division's reliance on the argument that all employees were being offered the same policy overlooks the fact that limiting coverage for those with mental disabilities to two years is itself a form of discrimination "because of" mental disability. Under the Appellate Division's reasoning,

[4] Executive Law § 296-a(1)(b) states, in relevant part: "It shall be an unlawful discriminatory practice for any creditor … to discriminate in the granting, withholding, extending or renewing, or in the fixing of the rates, terms or conditions of, any form of credit, on the basis of race, creed, color, national origin, age, sex, marital status, disability, or familial status."

there would have been discrimination under Insurance Law § 4224 (b)(2) had Ms. Polan, due to her mental disability, been offered a different policy or benefits than other employees. Polan, 3 A.D.3d at 35-36. As in Binghamton, while the same policy is offered to all, the policy itself is discriminatory because it provides inferior benefits to persons with mental disabilities, and thus, persons with mental disabilities cannot obtain the same coverage as persons with physical disabilities. Cf., Ariz. Governing Comm. for Tax Deferred Annuity and Deferred Compensation Plans v. Norris, 463 U.S. 1073, 1086 (1983) (in a case challenging the unequal provision of benefits for women who paid the same premium for a pension plan, the Supreme Court held: "We conclude that it is just as much discrimination 'because of … sex' to pay a woman lower benefits when she made the same contribution as a man as it is to make her pay larger contributions to obtain the same benefits.").

II. THE PUBLIC POLICY OF NARROWLY LIMITING THE CIRCUMSTANCES UNDER WHICH PERSONS BELONGING TO HISTORICALLY DISFAVORED CLASSES CAN BE SUBJECT TO DISPARATE TREATMENT IS INCORPORATED INTO THE ANTIDISCRIMINATION PROVISIONS OF THE NEW YORK INSURANCE LAW.

In prohibiting different treatment "because of" physical or mental disability, Insurance Law § 4224(b)(2) is clearly an antidiscrimination law. As a law intended to prohibit discrimination on the basis of membership in a historically disadvantaged class, i.e., persons with disabilities, it should be read broadly to effectuate its antidiscrimination purpose. Cf. Scheiber v. St. John's Univ., 84 N.Y.2d 120, 126 (1994) (requiring a broad reading of the Human Rights Law to accomplish its "strong antidiscriminatory purpose."); Cahill v. Rosa, 89 N.Y.2d 14, 20 (1996) (New York Human Rights Law interpreted liberally to cover private dental offices as "places of public accommodation").

Moreover, the statute is arguably intended to protect persons under disability, and the statute should be liberally construed as such. Statutes § 323.

Both federal and state antidiscrimination laws strongly disfavor discrimination based upon unfounded fears, myths and stereotypes. For example, the Americans with Disabilities Act was enacted upon a finding that:

> individuals with disabilities are a discrete and insular minority who have been faced with restrictions and limitations, subjected to a history of purposeful unequal treatment . . . based on characteristics that are beyond the control of such individuals and resulting from stereotypic assumptions not truly indicative of the individual ability of such individuals to participate in, and contribute to, society . . . .

42 U.S.C. § 12101 (a)(7) (emphasis added).

Similarly, New York State's Human Rights Law states that:

> the state has the responsibility to act to assure that every individual within this state is afforded an opportunity to enjoy a full and productive life and the failure to provide such an opportunity, whether because of discrimination, prejudice, intolerance or inadequate education, training, housing or health care not only threatens the rights and proper privileges of its inhabitants but menaces the institutions and foundation of a free democratic state . . . .

Executive Law § 290(3) (emphasis added). See also, Nev. Dep. of Human Res. v. Hibbs,538 U.S. 721, 123 S. Ct. 1972, 1978-79 (2003) (FMLA enacted on evidence that "States continue[d] to rely on invalid gender stereotypes in the employment context," such as views that the woman is and should remain the center of home life and women's maternal duties made them responsible for the well-being of the race); Olmstead v. L.C. ex rel. Zimring, 527 U.S. 581, 600, 119 S. Ct. 2176, 2187 (1999) (recognizing that unjustified institutionalization of persons with disabilities "perpetuates unwarranted assumptions that persons so isolated are incapable or unworthy of participating in community life"); Hazen Paper Co. v. Biggins, 507 U.S. 604, 610, 113 S. Ct. 1701, 1706

(1993) (ADEA enacted because Congress was concerned that older workers were being discriminated against "on the basis of inaccurate and stigmatizing stereotypes").

Antidiscrimination laws are not always absolute in the prohibition of distinctions based upon protected classes. See e.g., Executive Law § 296(3-a)(d) (allowing employment decisions based on age where age is a bona fide occupational qualification); Executive Law § 296(2)(b) (allowing public accommodations to bar persons because of sex if the Division of Human Rights grants "an exemption based on bona fide considerations of public policy"); Executive Law § 296(3)(b) (allowing an exception to the provision of accommodations to persons with disabilities upon a showing of undue hardship). However, to the extent that exceptions to antidiscrimination laws are made, they require that the covered entity base its decisions upon the realities of the situation, the individual and/or group, and not merely on unsupported assumptions, myths or stereotypes. See e.g., Sch. Bd. of Nassau County, Fla. v. Arline, 480 U.S. 273, 284-85, 107 S. Ct. 1123, 1129 (1987) (in discussing Section 504 of the Rehabilitation Act of 1973, the Supreme Court stated that the law "is carefully structured to replace such reflexive reactions to actual or perceived handicaps with actions based on reasoned and medically sound judgments"); Bragdon v. Abbott, 524 U.S. 624, 649-650, 118 S. Ct. 2196, 2210 (1998) (in a case under the Americans with Disabilities Act involving a dentist's refusal to treat an HIV-positive individual, the risk assessment in a direct threat inquiry must be based on medical or other objective evidence, without any deference to a health care professional's individual judgment).

When exceptions are made to prohibitions against discrimination, the burden shifts to the entity making the discriminatory distinction to show that it is entitled to the

exception. For example in Elaine W. v. Joint Diseases N. Gen. Hosp., Inc., 81 N.Y.2d 211, 217 (1993), a hospital excluded pregnant women from its drug detoxification program. This court held that "[t]he burden rests on North General, as the actor drawing distinctions based upon pregnancy, to prove that the policy's distinctions are based upon medical necessity, not upon generalizations associated with pregnant women." Id. See also, Lovejoy-Wilson v. NOCO Motor Fuel, Inc., 263 F.3d 208, 220 (2d Cir. 2001) (employer failed to meet burden of proving that the plaintiff posed a significant risk of substantial harm to support a direct threat defense, and "the plaintiff is not required to prove that he or she poses no risk" under the Americans with Disabilities Act); Cahill, 89 N.Y.2d at 22-23 (petitioners failed to meet burden of proving that they were entitled to "private" place exemption to "place of public accommodation" provision under the Human Rights Law).

Like other antidiscrimination laws, a showing of differential treatment shifts the burden to the actor, here the insurer, to show that it meets the narrow exception to the prohibition against discrimination. In Chabner v. United of Omaha Life Ins. Co., 225 F.3d 1042 (9th Cir. 2000), the Ninth Circuit Court of Appeals interpreted California's equivalent of Insurance Law § 4224(b)(2), Cal. Ins. Code § 10144.[5] The Ninth Circuit held that when an insurer treats a person differently because of a disability, it is lawful "only if it meets one of two prongs: it must be based on sound actuarial principles, or it must be related to actual and reasonably anticipated experience." Id. at 1051-52 (internal

[5] Cal.Ins.Code § 10144 (West 2004) states: "No insurer issuing, providing, or administering any contract of individual or group insurance providing life, annuity, or disability benefits applied for and issued on or after January 1, 1984, shall refuse to insure, or refuse to continue to insure, or limit the amount, extent, or kind of coverage available to an individual, or charge a different rate for the same coverage solely because of a physical or mental impairment, except where the refusal, limitation or rate differential is based on sound actuarial principles or is related to actual and reasonably anticipated experience."

quotations omitted). See also, Goldman v. Standard Ins. Co., 341 F.3d 1023, 1034 (9th Cir. 2003) (summary judgment denied because insurer failed to establish under Cal. Ins. Code § 10144 that its refusal to insure based on mental impairment was based on sound actuarial principles or related to actual and reasonable experience).

Here, the plain language of the law clearly shows that insurers may not discriminate based on disability by, among other things, refusing to insure, refusing to continue to insure or to limit the amount, extent or kind of coverage available to an individual, unless the insurer can show that the distinction is not based on stereotypes or unfounded assumptions, but rather is "based on sound actuarial principles or is related to actual or reasonably anticipated experience." Insurance Law § 4224 (b)(2). Once an insurer makes a distinction based on disability, the burden shifts to the insurer to show that it has an actuarial or experiential basis to do so. In other words, the law requires an insurer to make its decisions on a careful assessment of the risk differences based on evidence, rather than on assumptions or stereotypes about persons with mental or physical disabilities.

The construction of Insurance Law § 4224(b)(2) that requires insurers to show actuarial or experiential support justifying any differences in benefits for persons with mental disabilities is also within the spirit of the legislative intent. The Memorandum of the Assembly Rules Committee in enacting the provision stated:

> The enactment of this bill will assure that coverage and benefits which are offered by insurers are provided on a basis which is not unfairly discriminatory towards individuals with mental or physical disabilities, impairments or diseases. At the same time, this bill acknowledges the right of the insurer to underwrite a policy, if its underwriting decisions are based upon sound actuarial principles or related actual or reasonably anticipated experience.

Memorandum of the Assembly Rules Committee, NYS Legislative Annual 1994, p. 522 (emphasis added). Even if "the Legislature did not intend section 4224 (b)(2) to mandate insurers to provide the same coverage for mental disabilities as for physical disabilities," Polan, 3 A.D.3d at 33, Insurance Law § 4224(b)(2) carefully lays out the criteria that must be met in order to make distinctions based on disabilities. In requiring insurers to show that any disability-based distinction in treatment is based on sound actuarial data or is related to actual or reasonably anticipated experience, the legislature intended to prevent insurers from unfairly discriminating against persons with disabilities based on stereotypes or unsupported assumptions of their risks.

III. PETITIONER-APPELLANT'S READING OF INSURANCE LAW § 4224(b)(2) AS REQUIRING THAT ANY DISTINCTIONS IN BENEFITS BASED ON MENTAL DISABILITY MUST BE SUPPORTED BY ACTUARIAL OR EXPERIENTIAL DATA IS CONSISTENT WITH THE INSURANCE LAW AND THE STATE'S REGULATION OF THE INSURANCE INDUSTRY.

A. Requiring MetLife to produce sound actuarial justification for differences in benefits for persons with mental disabilities pursuant to Insurance Law § 4224(b)(2) is consistent with the State's regulation of the insurance industry.

The State has broad powers to regulate the insurance industry through various means. Blue Cross and Blue Shield of Cent. New York, Inc. v. McCall, 89 N.Y.2d 160, 165 (1996). "Indeed, the organization of an insurance company and the conduct of the business of writing of insurance is not a right but a privilege granted by the State subject to conditions imposed by it to promote the public welfare." Id. As noted by this Court in Binghamton, the State's power to regulate the insurance industry also includes the obligation to prevent discrimination in both the offering and the writing of insurance. Binghamton, 77 N.Y.2d at 16-17. ("The Insurance Department has the statutory power and duty to determine whether policy premiums are rationally related to risks and

expenses (Insurance Law § 3201 [c][3]) and to eliminate discriminatory practices in the writing of insurance (see Insurance Law §§ 2606, 2607, 4224; 11 NYCRR 185.5 [f] [2] [i]).") (emphasis added).

The insurance industry necessarily distinguishes among persons because it offers various policies to consumers based on the classification of risks caused by their characteristics or behaviors. The three main purposes of risk classification are to protect the insurance program's financial solvency, to be fair, and to permit economic incentives to operate in order to encourage the availability of coverage. See Risk Classification: Statement of Principles of American Academy of Actuaries, p. 2, *available at* http://www.actuary.org/pdf/asb/appendices/risk.pdf. A reasonable risk classification system that is reflective of expected costs is likely to result in equitable terms and conditions and is thus not unfairly discriminatory. Id. at p. 6.

While distinctions among persons of different classes are allowed in the insurance industry, unfair discrimination is not permitted. See e.g., Ins. Law § 4224(a)(1); Ins. Law § 4224(b)(1). Unfair discrimination occurs where there is no sound actuarial or medical justification for the classification of risks posed by consumers with a given characteristic or behavior. See Phillip E. Stano, Underwriting in the Twentieth Century: Grafting Societal Values to the Regulation of Risk, Journal of Insurance Regulation, 1/1/00 JINSREGLN 25972, 3 (Jan. 1, 2000); see also, Health Ins. Assoc. of America et al. v. Corcoran, 154 A.D.2d 61, 68 (App. Div., 3d Dept. 1990) (discussing how Insurance Law § 4224(b)(1),[6] which prohibits unfair discrimination, has been "authoritatively construed to not apply when differential treatment has an actuarial basis").

[6] Insurance Law § 4224 (b)(1) reads: "No insurer doing in this state the business of accident and health insurance . . . . shall: (1) make or permit any unfair discrimination between individuals of the same class in

The New York Department of Insurance ("The Department") has previously recognized the importance of actuarially fair classification of risks to determine the contents of insurance policies. With regard to Insurance Law § 4224(a)(1),[7] the Department has stated that in order to avoid unfair discrimination "(a)ppropriate classification of risks is sanctioned and encouraged throughout the Insurance Law…(A)n acceptable basis for distinction is significant actuarial risk differences between the classifications, using normal actuarial underwriting standards for risk classification." 2000 NY Ins. GC Opinions LEXIS 4, 7-8. In the past, the Department itself has presented medical evidence in order to persuade the court that an insurance regulation should be upheld because it is based on sound actuarial principles. Corcoran, 154 A.D.2d at 71.

Insurance laws often contain provisions which may require the Department of Insurance to examine insurers' actuarial or experiential justification for differential treatment of classes of persons. See e.g., Ins. Law § 2331 (requiring filing of actuarially sound data if rate, rating plan, rating rule or rate manual application of motor vehicle insurance rates is based on age, sex or marital status); Ins. Law § 2606(d) (requiring limitations based on preexisting conditions to be consistent with regulations or sound actuarial principles or anticipated loss experience); Ins. Law § 3430 (requiring sound underwriting actuarial principles reasonably related to actual or anticipated loss

---

the amount of premiums, policy fees or rates charged for any policy of accident and health insurance, or in the benefits payable thereon, or in any of the terms or conditions of such policies, or in any other manner whatsoever."

[7] Insurance Law § 4224(a)(1) reads: "No life insurance company doing business in this state and no savings and insurance bank shall: (1) make or permit any unfair discrimination between individuals of the same class and of equal expectation of life, in the amount or payment or return of premiums, or rates charged for policies of life insurance or annuity contracts, or in the dividends or other benefits payable thereon, or in any of the terms and conditions thereof."

experience for refusing to issue, renew, or cancel a fire or automobile insurance policy solely on the geographic location of the risk). New York State courts have not been averse to examining medical or actuarial justifications in the past when evaluating the legality of insurance regulations. See e.g., Corcoran, 154 A.D.2d at 71. However, judicial involvement in this evaluation can be minimized as long as the Department of Insurance fulfills its goal and duty of "ensur(ing) equity both to policy holder and Company, not only in rates but in the extremely important realm of giving the public proper coverage in return for premium payments." Pub. Serv. Mut. Ins. Co. v. Levy, 387 N.Y.S 2d 962, 964 (N.Y. Sup.Ct., New York County 1976).

Providing evidence for their rate setting and benefit level determinations is not an onerous burden for insurance companies. Actuarial data analysis is part of the foundation of the insurance industry. Indeed, the insurance industry has argued that it has the ability to use such data and has specifically fought to use it**.** See Corcoran, 154 A.D.2d at 70 (insurance trade associations and companies submitted actuarial evidence in arguing for the validity of using HIV tests to determine an applicant's insurability). Requirements to produce this information will in no way jeopardize the industry; rather, such requirements will result in equitable decisions based upon actuarial principles rather than on stereotypes and biases.

B. The public policy of prohibiting or narrowly limiting the circumstances under which distinctions can be based on certain historically disfavored classes is also embodied in the New York State Insurance Law.

Requiring insurers to provide actuarial or experiential data to support their categorizations of persons with mental disabilities is not revolutionary. Repeatedly, the State has restricted the classifications used by insurance companies and the manner in which they can be used. This is especially true for groups that the State has recognized as having suffered historical discrimination. See Ins. Law § 2606 (discrimination because of race, color, creed, national origin or disability); Ins. Law § 2608 (discrimination because of treatment for a mental disability); Ins. Law § 2612 (victims of domestic violence); Ins. Law § 3234 (persons with a history of breast cancer, and effective, April 1, 2004, persons with a history of any type of cancer); Ins. Law § 2331 (motor vehicle comprehensive insurance rates: age, sex or marital status).

When distinctions are made based on these classifications, the State has carefully outlined the circumstances under which they can be made. Most often, the State prohibits insurers from treating persons of protected groups differently unless the differential treatment is supported by actuarial data or reasonably related experiential data.[8] See Ins. Law § 2331 (prohibiting different rates unless supported by and reflective of actuarially sound statistical data); Ins. Law § 2606(d) (allowing insurers to make distinctions based

[8] The Appellate Division's decision relied in part on the failure of the Legislature to pass "Timothy's Law." ("Timothy's Law" was introduced into the 2003 Assembly as A. 8301 and introduced into the 2003 Senate as S. 5329.) This reliance is misplaced. "Timothy's Law," unlike Insurance Law § 4224(b)(2), would require absolute parity and would prevent insurance companies from making distinctions even where substantiated by actuarial data. The failure of the Legislature to pass substantially broader legislation is not instructive as to the Legislature's narrower intent under Insurance Law § 4224(b)(2) to require only that insurers present actuarial data to justify differentiations based on disability.

on pre-existing conditions or disability "where the insurer can prove that its decision was based on sound underwriting and actuarial principles reasonably related to actual or anticipated loss experience."); Ins. Law § 2606(e) (allowing insurers to reject an application, refuse to issue, renew or sell a policy or fix a lower rate for fees or commissions of a broker who writes such policies if it is based on actual or anticipated loss experience); Ins. Law § 3434 (prohibiting insurers from canceling or refusing to issue or renew a motor vehicle insurance policy of any person with a disability, "unless based on sound underwriting and actuarial principles reasonably related to actual or anticipated loss experience."); Ins. Law § 3435-a(b) (prohibiting insurers from refusing to renew an existing motor vehicle liability insurance policy solely because a person has reached age sixty "unless such decision is based on sound underwriting and actuarial principles reasonably related to actual or anticipated loss experience.").

Although the insurance industry has engaged in discriminatory practices in the past,[9] the State has recognized that some of the industry's historical risk classification practices as to certain protected groups should no longer be allowed unless they are rooted in actuarial or experiential data. Even if the Court's decision in this case were to change the historically standard practice of the insurance industry, it is well within the State's power to do so in order to advance an important public interest, i.e., the elimination of discrimination against persons with disabilities based on stereotypes or unfounded assumptions about their risks. Cf., Health Ins. Ass'n v. Harnett, 44 N.Y.2d 302, 310 (1978) (holding that it was well within the State's power to regulate the industry

[9] See e.g., Memorandum of Senator Thomas W. Libous, N.Y.S. Legislative Annual 1993, p. 111 (in discussing the amendment of Ins. Law § 2606(d) to prohibit discrimination based on disability, the Senator pointed out that "due to modern medical advances, the life expectancy of a person with Down Syndrome was well beyond what it was in the first half of this century. Yet, many persons with Down Syndrome have been virtually unable to purchase life insurance.").

to mandate the inclusion of maternity care coverage in health and accidental insurance policies, which was previously not required).

CONCLUSION

The Appellate Division's decision should be reversed in order to ensure that the proper interpretation of Insurance Law § 4224(b)(2) comports with the legislature's intent to prohibit unfair discrimination against persons with disabilities.

Dated: May 11, 2004
New York, New York

Respectfully submitted,

THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK

\s\

Marianne Engelman Lado
Committee on Civil Rights
NEW YORK LAWYERS FOR THE PUBLIC INTEREST, INC.
151 West 30th Street, 11th Floor
New York, NY 10001
(212) 244-4664

James George Felakos
Committee on Legal Issues Affecting People with Disabilities
343 East 30th Street, Apt. 15B
New York, NY 10016-6439
(212) 213-6685

Janet L. Steinman
Committee on Mental Health
250 West 16 Street Apt., 2B
New York City, NY 10011
(212) 255-3267

Of Counsel:[10]
Pauline H. Yoo
NEW YORK LAWYERS FOR THE PUBLIC INTEREST, INC.
151 West 30th Street, 11th Floor
New York, NY 10001

[10] Amicus wishes to express its gratitude to Sarah Wheeler and Susanna Saul, students at the CUNY School of Law, for their diligent assistance in the research and writing of this brief.