

# How Much Is That 'Talker' In The Window? Challenging Speech Generating Device Coverage Exclusions

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# Insurance SGD Denials: Initial Questions

- What is the benefits source: policy or plan?
  - Policy: subject to federal and state law
  - Plan: subject to federal law only
- How was the benefit obtained?
  - Employment fringe benefit?
  - Direct purchase of health benefit?
- What is the denial source: AFD or XX?
  - AFD: look within policy or plan for approval; challenge interpretation by decision maker
  - XX: must look to external source of law that prohibits exclusion

# How To Obtain A Favorable Outcome

Type of Benefit:	Policy	Plan
Will Administrative Appeal produce favorable outcome?	NO	NO
Will Talking to Employer produce favorable outcome?	NO	YES
Must proceeding (agency complaint process or litigation) relying on external source of law be pursued to produce favorable outcome?	YES	NO

# Administrative Appeal Resources

- 4 question test: See e.g., *Fred C. v. Texas Health & Human Services Commission*, 988 F.Supp. 1032, 1035n.3 (W.D.Tex. 1997) *affirmed per curiam*, 167 F.3d 537 (5<sup>th</sup> Cir. 1998)(discussing 4 part test in the context of Medicaid); 68 Fed. Reg. 55,634,55,635, 2003 WL 22213011 (F.R.)(Sept. 26,2003)(discussing same in the context of Medicare).
- Client is eligible (covered) – look at benefits booklet; get “card;” ask if other services have been covered
- SGDs are “covered” or “fit” – look at benefits booklet for SGD or prosthetics device coverage; look at definitions; compare to Medicare and Medicaid
- Medical Need is established – look at benefits booklet for M/N definition; compare to SLP report and prescription;
- Look for evidence of past coverage – look at insurance database posted at [www.aacfundinghelp.com](http://www.aacfundinghelp.com)

# SGD Approvals Database

- <http://www.aacfundinghelp.com/>

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# Who Controls the Solution?

- Insurer or Employer?
- Can the denial be overturned by negotiation, by administrative appeal, or only by litigation?
- If by negotiation, with whom? Can talking to employer help?
- What are employer options?

Policy	Plan
Talk to Employer About Policy?	Talk to Employer About Plan?
Employer Options:  Ask Insurer to Provide Information About XX  Ask Insurer to Remove XX  Cancel Policy  Not Renew Policy	Employer Options:  Obligation (not option) to Provide Information about XX  Change Plan

# Federal Law that may Impact Express Exclusion Denials

- Americans with Disabilities Act:
  - Title I
  - Title III

# ADA, Title I:

- Covers employment relationship
  - No covered entity shall discriminate against a [QID] because of the disability of such individual in regard to application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions and privileges of employment 42 USC 12112(a).
- Protects against discrimination in fringe benefits.
  - Discriminate includes: participating in a contractual or other arrangement or relationship that has the effect of subjecting a covered entity's qualified ... employee with a disability to the discrimination prohibited by this subchapter (such relationship includes a relationship with an ... organization providing fringe benefits to an employee of the covered entity....) 42 USC 12112(b)(2)

# To Whom Does Title I Apply?

- Covered Entity:
  - The term “covered entity” means an employer, .... 42 USC § 12111(2)
- Employer:
  - The term “employer” means a person engaged in an industry affecting commerce who has 15 or more employees ... and any agent of such person . . . . 42 USC § 12111(5)(A)

# Employer as Defendant ?

- Will the client ever allow it?
  - Fearful of alienating his employer
  - Mention on non-retaliation provision means challenging employer *twice* !
- *Should* the employer be defendant?
  - Employer may not be aware of exclusion
  - Employer may not have asked for it; may not have gotten anything for it – no discount for exclusion; no surcharge for coverage
  - Employer may support trying to get rid of it – may need and like employee
  - Employer may even investigate alternative coverage; one employee's needs may affect whole company

# Employer as Defendant ? [2]

- Remedy:
  - Action brought against employer;
  - if SGD-XX is established as discrimination,
    - *employer is directed to purchase the equipment;*
    - court may have no power to void one paragraph of policy;
    - employer may be forced to explore new policy for company;
    - insurer has no liability

# Insurer or Plan Administrator as Employer's *“Agent?”*

- Agent vs Contractor:

# ADA, Title III:

- Covers Commercial Interactions
  - No individual shall be discriminated against on the basis of disability in the full and equal enjoyment of the goods and services, facilities, privileges, advantages, or accommodations of any place of public accommodation by any person who owns, leases (or leases to) a place of public accommodation. 42 USC § 12182(a).
- Identifies Insurance Offices as Public Accommodations
  - The following private entities are considered public accommodations . . . insurance office . . . . 42 USC § 12181(7)(F).

# Does Title III Govern Insurance Policy Content?

- Circuits and District Courts Split of Opinion:
  - Allow Challenges to Content: *Palozzi v. Allstate Life Ins. Co.*, 204 F.3d 392 (2d Cir. 1999); *Carparts Distribution Center v. Automotive Wholesaler's Assoc. of New England*, 37 F.3d 12 (1<sup>st</sup> Cir. 1994); *Winslow v. IDS Life Ins. Co.*, 29 F.Supp.2d 557 (D.Minn. 1998); *World Insurance Co. v. Branch*, 966 F.Supp. 1203 (N.D.GA. 1997)
  - Do Not Allow Challenges to Content: *Fitts v. Federal Nat'l Mortgage Assoc.*, 236 F.3d 1 (D.C. Cir. 2001); *Chabner v. Mutual of Omaha*, 225 F.3d 1042 (9<sup>th</sup> Cir. 2000); *Weyer v. Twentieth Cent. Fox*, 198 F.3d 1104 (9<sup>th</sup> Cir. 2000); *Doe v. Mutual of Omaha*, 179 F.3d 557 (7<sup>th</sup> Cir. 1999), *cert. denied* 528 U.S. 1106 (2000); *Ford v. Schering Plough Corp.*, 145 F.3d 601 (3d Cir. 1998); *Parker v. Metropolitan Life Ins. Co.*, 121 F.3d 1006 (6<sup>th</sup> Cir. 1997)(*en banc*).

# SGD – XX in Self-Funded Plans

- ERISA expressly permits discrimination
  - “ERISA does not mandate that employers provide any particular benefits, and *does not itself proscribe discrimination in the provision of employee benefits.*” *Shaw v. Delta Air Lines*, 463 U.S. 85, 91 (1983).
- Does ADA apply to Plans?
  - “Subchapters I through IV ... shall not be construed to prohibit or restrict . . . (2) a person or organization covered by this chapter from establishing, sponsoring, observing or administering the terms of a bona fide benefit plan that is not subject to state laws that regulate insurance.” 42 USC § 12201(c)(3).

# Federal Law Summary

- Policies:
  - ADA Title I has employer not insurer focus
  - ADA Title III has Circuit-limitations re: its applicability to the content of policies
- Plans:
  - ERISA does not prohibit discrimination
  - Applicability of ADA has not been tested

# State Law that may Impact Express Exclusion Denials

- Unfair Discrimination Statutes
  - State Health Insurance Unfair Discrimination Statutes prohibit “making or permitting **any unfair discrimination** between individuals of the same class and of essentially the same hazard in the amount of premium, policy fees or rates charged for any accident or health insurance policy **or in the benefits payable thereunder**, or in any of the terms or conditions of such policy ...”
- Insurance Department Statutes and Rules

# “Any Unfair Discrimination ... in the benefits payable thereunder . . . .”

- Disparate *Treatment* Discrimination
- Disparate *Impact* Discrimination
  
- Private Right of Action?

# General State Non-Discrimination Statute

- CALIFORNIA CIVIL CODE § 43-53 51. (a) This section shall be known, and may be cited, as the Unruh Civil Rights Act.
- (b) All persons within the jurisdiction of this state are free and equal, and no matter what their sex, race, color, religion, ancestry, national origin, disability, or medical condition are entitled to the full and equal accommodations, advantages, facilities, privileges, or services in all business establishments of every kind whatsoever.

# Insurance Department Statutes and Regulations

- “All domestic foreign and alien life and accident and sickness insurers doing business within the State of Georgia shall file a single copy of each policy form used by such insurers . . . .”
- “Policies filed with this division will be evaluated for the purpose of determining if the policy meets the minimum requirements of law; determining if the policy is actuarially sound; determining that policies are not detrimental to the public interest; and determining if construction of the policy renders terms or language conflicting or ambiguous.”

# What Does This Get Us?

- Private Right of Action – allege violation of state laws and rules in state court
- No Private Right of Action – file request for a hearing before the insurance commissioner
  - Key procedural right: discovery; subpoena of information from insurer
  - Key information to be sought: justification for the exclusion

# Is an SGD-XX Unfair Discrimination?

- If SGD-XX is unarguably “discrimination,” is it “unfair?”
  - Will remedy to discrimination constitute a fundamental alteration of the program or impose an undue financial burden on the program
  - Fundamental Alteration:
    - Not treatment
    - Not effective
    - Not least costly
    - Not generally accepted
  - Undue Burden:
    - Overall, too costly to cover

# SGD Costs to An Insurer

- “Our analysis indicates that the incremental cost of covering Speech Generating Devices (SGDs) in a commercial population is quite small. We consider the cost to be de minimis, relative to the cost of providing most types of care to commercial populations.”
- “We projected the cost per member per month (PMPM) of covering SGDs in a commercial population, to be a range of approximately zero (trace) to approximately \$ 0.02. Compared to the cost of providing most types of health services and supplies, these costs are quite small.”

# SGD Costs to An Insurer [2]

- What does 2 cents PMPM mean?
- For an insured group of 1,000 persons, \$ 0.02 PMPM = \$ 240.00 in additional costs per year for the policy as a whole.
- What are the monthly premiums? Close to \$ 400 PMPM
- The cost of SGDs is approx.  $5/100,000^{\text{th}}$  s the cost of the monthly premium, or 0.005 %
- If the monthly premium were compared to the height of the Chrysler Building in NYC (approx. 1000 feet), the contribution of SGDs would be approx.  $\frac{1}{2}$  inch.

# State Law Summary

- Every application of state law is intended to force the insurer to produce a factual basis for the SGD exclusion – either coverage based facts, or financial facts.
- To force the production of this information, we need a state law or rule we can enforce and that provides a right to discovery.
- Options include “any unfair discrimination” statutes; general non-discrimination statutes; and state insurance department rules on policy review
- Once the source of law is identified, the existence of a private right of action must be determined
- If there is no court access, it must be determined whether the insurance department proceeding provides a right to discovery

# Conclusion

- This session and the one in 2006 outlined how we can overcome all manner of private health benefits denials of SGDs
- In 2006, we focused on “adverse fit determinations” – expressions of opinion by funding program staff that SGDs should not be provided
- This year, we focused on SGD-XX, and how we can use state law to attack policy-based exclusions; and actuarial data to negotiate elimination of plan based exclusions.