WRITTEN TESTIMONY OF MARK D. DE BOFSKY
IN SUPPORT OF SENATE BILL 202

Mark D. DeBofsky
DeBofsky Sherman Casciari Reynolds P.C.
150 N. Wacker Dr., Suite 1925
Chicago, Illinois 60606
(312) 561-4040
mdebofsky@debofsky.com

Chairman Harris and Members of the Senate Insurance Committee. I would like to thank you for allowing me the opportunity to present testimony in support of SB 202. By way of background, I am an attorney in private practice in Chicago, Illinois and teach law on a part-time basis at the University of Illinois-Chicago John Marshall Law School. I have practiced law since 1980; and my practice is focused on representing individuals whose claims involving disability, health and life insurance benefits have been denied.

When I began practicing law in 1980, there was no Americans with Disabilities Act or any Mental Health Parity Act. When the ADA was first passed, in addition to expanding access to places of public accommodation and offering protection against employment discrimination, there was great hope and expectation that the legislation would bring an end to discrimination by insurance companies that provided unequal coverage for individuals suffering from mental illness or other disfavored conditions. Unfortunately, those hopes have not been realized. Cases such as *Doe v. Mutual of Omaha Ins. Co.,* 179 F.3d 557 (7th Cir. 1999) ruled the Americans with Disabilities Act lacked any provision that would regulate the content of and coverage offered by insurance policies. *Doe* involved an individual who suffered from HIV/AIDS whose health insurer reduced the amount it would pay for the cost of lifesaving anti-viral medication to well below the amount necessary to maintain treatment for more than a month or two before the cap was reached. Similar rulings addressed the nearly universal practice by disability insurers to offer insurance that

limits the duration of disability benefits for mental illness to 24 months while benefits for other disabling conditions are payable until the claimant reaches retirement age. *See, e.g., Weyer v. Twentieth Century Fox,* 198 F.3d 1104 (9th Cir. 2000). Those rulings reinforced existing discrimination against mental illness in disability insurance and emboldened disability insurers to shorten the duration of benefits for other conditions that are deemed "self-reported," such as migraine headaches or other conditions that cause disability due to pain, fatigue or dizziness.

The Illinois Human Rights Act in its current form suffers from the same structural limitations as those raised in *Doe* and *Weyer* since neither the employment nor the public accommodations provisions of the Act regulate discriminatory practices by disability insurers. While state and federal mental health parity laws have remedied discrimination against mental illness to a significant degree in health insurance coverage, and the Affordable Care Act eliminates limitations on benefit payments such as what occurred in the *Doe* case, those laws have no applicability to disability insurance.

Unlike the ADA and the Illinois HRA, human rights laws in other countries have been used successfully to ban the discrimination that SB 202 aims to redress. In Canada, for instance, the case of *Battlefords and District Co-operative Ltd. v. Gibbs* [1996] 3 SCR 566 found the Province of Saskatchewan Human Rights Code, which made it unlawful for an employer to discriminate against any person with respect to any "term or condition of employment," barred the imposition of duration limits on disability benefit payments for mental health impairments. While the Illinois Human Rights Act contains a similar provision in Section 2-102, its generality, rather than specific application to insurance, invites ERISA preemption as will be explained further below; and the existing provision in the Illinois Human Rights Act would not protect purchasers of individual disability insurance. SB 202 addresses both issues.

The State of Vermont has also banned discrimination against mental illness in disability insurance on the ground that "Vermont is committed to mental health parity, and will not approve policies that discriminate against persons disabled due to a mental health condition." Revised HCA Bulletin 127: Discrimination Against Disability Due to a Mental Health Condition Prohibited in Disability Income Replacement Insurance – October 22, 2008. Since the same public policy exists in Illinois, SB 202 will achieve the same end.

No one knows if or when they will become disabled. Or if they do become disabled, no one gets to choose their disabling impairment. But the consequence of disability is the same regardless of cause; and no one is any "less disabled" if they cannot work on account of mental illness or other condition as to which benefits are limited.

Insurance companies will no doubt argue that the limitations in their policies have actuarial justifications. First, nothing in SB 202 would restrict insurers from maintaining sound underwriting practices with respect to the sale of disability insurance. The bill only addresses the benefits themselves. Nor would requiring equal treatment of all disabilities open the floodgates to more claims and liability. Mental illness is much better understood today than when benefit limitations were imposed decades ago. For one thing, diagnoses have become standardized. New and more effective treatments have also been developed. This means fewer mental illness disability claims would be payable for extended periods. In addition, psychological testing and other means of evaluation can more objectively assess psychopathology and functional limitations.

The same holds true for other so-called "self-reported" illnesses. Advances in medicine have drastically reduced the incidence and duration of disability for most conditions. The Social Security Administration does not discriminate among disabilities by limiting payments for certain targeted conditions. This is because SSA recognizes that disability doesn't end just because

someone has a particular diagnosis while the need for financial support continues. Why should insurance companies be allowed to continue discriminating as they do?

In our own law practice, we have seen insurers aggressively utilize mental impairment and self-reported illness limitations to terminate benefits in situations where a physical illness such as cirrhosis has resulted in delirium or where the policies make exceptions to their limitation provisions for conditions recognized to have biological origin such as schizophrenia, but the insurer nonetheless asserts that schizoaffective disorder subject to the limitation. Because many policies are drafted broadly, though, and encompass within their limitations any condition listed in the *Diagnostic and Statistical Manual of Mental Disorders,* insurers have granted themselves license to limit benefits for individuals who become disabled on account of brain trauma or Alzheimer's disease or who suffer from severe cognitive impairments due to diseases such as Multiple Sclerosis. Indeed, in the case of *Weitzenkamp v. Unum Life Ins. Co.,* 661 F.3d 323 (7th Cir. 2011), which refused to countenance such a result, the court pointed out that a disability insurer acknowledged it intended to apply its limitation to *any* condition where the disabling symptom is pain "regardless of the etiology of the pain," and would impose the limitation on benefit payments even to conditions such as "stage IV cancer or advanced heart disease, [which] are disabling because of the pain, weakness or fatigue" caused by those conditions.

Insurance against wage loss due to disability fulfills a critical need in every wage earner's financial plan. It provides a financial safety net when a worker experiences a disabling illness or injury; and the need for financial support during a period of disability remains the same regardless of whether disability is due to multiple sclerosis or depression or chronic migraine headaches. Moreover, applying discriminatory limitations that cause the premature termination of disability benefits in the face of consensus agreement that the claimant's disability remains ongoing is not

only perverse but also results in insufficient financial resources to afford ongoing treatment and could ultimately relegate claimants to requiring public assistance benefits.

The Americans with Disabilities Act and the Illinois Human Rights Act were passed in recognition of a public policy favoring equality and disfavoring discrimination based on status. The passage of those laws, and subsequent laws of the same nature such as the federal Mental Health Parity and Addiction Equity Act and the Illinois Mental health Parity Act, was intended to redress the stigmatization of mental illness and other disabling conditions. There is simply no rational basis for remedying a history of discrimination against mental illness in health insurance while allowing the stigmatization of mental illness and other conditions to persist in other insurance coverage.

Further, it is difficult to perceive a legitimate actuarial justification for perpetuating a distinction amongst disabilities since the cost of providing disability insurance coverage for conditions that are not limited is so much greater. The Council for Disability Awareness published a paper titled "Chances of Disability- Me Disabled?" (March 28, 2018), which included statistics on the most common diagnoses leading to log-term disability:

1. Musculoskeletal disorders (29%)
2. Cancer (15%)
3. Pregnancy (9.4%)
4. Mental health issues including depression and anxiety (9.1%)
5. Injuries such as fractures, sprains, and strains of muscles and ligaments (9%)

(Source: Integrated Benefits Institute, Health and Productivity Benchmarking 2016 (released November 2017), Long-Term Disability, All Employers. Condition-specific results). Most disability claims also have a duration of under three years. (Source: Andrews, "Why a Long-Term Disability Policy is More Important than Pet Insurance," National Public Radio October 11, 2017). In view of these statistics, the reason why benefits are *not* limited for the principal causes of

disability is obvious – no one would buy a disability insurance policy that offered inferior coverage for the most common causes of disability. Why then should prospective insureds be forced to buy insurance that offers less favorable coverage for other potential disabling conditions such as psychiatric impairments?

Regardless of the type of impairment, claimants seeking disability benefits and remain on claim need to meet rigorous proof requirements that may include submission of MRI and CT scans, x-rays, blood tests, and psychometric testing. Given the relatively low incidence of disabilities due to psychiatric and other so-called "self-reported" conditions, and the rigorous proof of disability required by insurers, fears that removing limitations would invite fraud or significantly drive up premium costs is hardly as threatening as insurers maintain.

While requiring parity in disability insurance may result in a modest increase in insurance premiums, prevention of the economic and societal harm that result from the unequal treatment of particular disabilities such as psychiatric conditions more than justifies the need for SB 202's passage. First, such increased costs were accepted as necessary when both Congress and the Illinois General Assembly enacted mental health parity in health insurance. Moreover, a modest increase in premium costs for coverage that provides comprehensive protection regardless of the nature of the disabling impairment is well worth it. Most consumers, when given the option of paying a little extra for added peace of mind would gladly make that choice.

Nor would the passage of SB 202 deter employers from providing offering coverage to their employees. Employee benefits such as disability insurance are utilized by employers as a means of recruiting and retaining highly qualified employees. Employers that offer inferior benefits are likely to attract fewer recruits and would experience an exodus of personnel who would seek employment with a competitor that offers better benefits. The fact that in many

instances the employee, not the employer, pays for the premiums also lessens concerns that employers would simply drop their disability coverage if SB 202 were enacted.

There may also be concern expressed about whether SB 202 might be subject to preemption by the Employee Retirement Income Security Act (ERISA). It will not. Although the ERISA law contains broad preemption provisions, state laws that regulate insurance are saved from preemption and insurers must comply with those laws even if their policies are governed by ERISA. While self-funded plans subject to ERISA are not required to comply with state insurance regulation, very few disability insurance plans are self-funded. There is also legal precedent establishing an exemption from ERISA preemption for laws such as SB 202. The case of *Sand-Smith v. Liberty Life Assur. Co. of Boston*, 2017 WL 41689430 (D. Mont. September 20, 2017) tested whether a mental health parity law encompassing disability insurance was preempted by ERISA, and the court found it was not preempted.

Thus, the only remaining potential objection to SB 202 is that it may reduce insurers' profits. A modest increase in premiums should offset a potential increase in the indemnity that would result from the passage of the law, but the fulfillment of an already-recognized public policy aimed at redressing discrimination and ending the stigmatization of certain conditions more than justifies a minor decline in insurers' profits. Therefore, I urge the Committee, the entire State Senate, and the State House of Representatives to speedily pass SB 202 and place the bill on Governor Pritzker's desk for signing so that it may quickly become the law of the State of Illinois.