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UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

MARIANA NELSON, an individual, on behalf of herself and all others similarly situated, and ROES 1 through 500, inclusive,

Plaintiff

vs.

STANDARD INSURANCE COMPANY, an Oregon company; COUNTRYWIDE FINANCIAL CORPORATION GROUP LONG TERM DISABILITY PLAN; COUNTRYWIDE FINANCIAL CORP., and DOES 1 through 50, inclusive,

Defendants

Case No. 13-CV-0188-WQH(MDD)

DEFENDANTS' MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF THEIR MOTION TO DISMISS PLAINTIFF'S COMPLAINT

Judge: William Q. Hayes
Courtroom: 14B
Date: May 20, 2013
Time: 11:00 a.m.

NO ORAL ARGUMENT UNLESS REQUESTED BY THE COURT

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Secondary Sources

MEMORANDUM OF POINTS AND AUTHORITIES

INTRODUCTION

Mariana Nelson's former employer, Countrywide, provides disability insurance coverage to its employees as a benefit of employment. Countrywide provides this coverage under a Group Policy issued by Standard Insurance Company and governed by the Employee Retirement Income Security Act of 1974, 29 U.S.C. §1001 *et seq.* ("ERISA"). All full-time employees receive exactly the same disability coverage under the Group Policy on completely equal terms. The Group Policy authorizes payment of disability benefits up to age 65, but caps benefits at 24 months for disabilities caused by "Mental Disorders, Substance Abuse, and Other Limited Conditions." (Complaint ¶ 8). Nelson, a home loan officer with Countywide, became disabled by a medical condition that falls within the Group Policy's Mental Disorders provision. Under the Group Policy's terms, the duration of her disability benefit is contractually capped at 24 months.

Nelson alleges that Standard, by enforcing the Group Policy's 24-month benefit cap to her Mental Disorder, unlawfully discriminated against her in violation of §10144 of the California Insurance Code. Nelson, purporting to act on behalf of a putative class of California employees, contends that Standard violated §10144 every time it applied the contractual 24-month benefit cap for Mental Disorders, whether under Countrywide's Group Policy or any group policy issued by Standard (though she incidentally limits the scope of her lawsuit to Standard group policies governed by ERISA). She charges Standard, Countrywide, and every employer who provides disability coverage to its California employees under a group policy issued by Standard (the "Does 1 through 50 inclusive") with unlawful discrimination in violation of §10144. She seeks a declaration that the Mental Disorders benefit cap is "illegal" and unenforceable, and demands payment of disability benefits beyond 24 months to herself and the putative class. She styles her individual and class

action claims as a suit for payment of benefits under 29 U.S.C. §1132(a)(1)(B) (Count I of the Complaint), and for breach of fiduciary duty under 29 U.S.C. §1132(a)(3) and declaratory relief (Counts II through IV of the Complaint).

Nelson's entire Complaint rests on the false premise that Standard's enforcement of contractual benefit caps for Mental Disorders violates §10144. But Nelson's discrimination theory is incompatible with the statutory language of §10144 and well established law defining the parameters of unlawful discrimination. Two California federal courts recently rejected Nelson's same discrimination theory as a matter of law, in *Townsend v. Thomson Reuters Group Disability Income Ins. Plan*, 867 F.Supp.2d 1085 (C.D. Cal. 2012) and *Monterastelli v. Standard Ins. Co.*, No. CV 12-01669 (AGRx), slip op. (C.D. Cal. June 12, 2012).

Section 10144 is an antidiscrimination statute that ensures equal access to life insurance, disability insurance, and annuity products. But §10144 has never been interpreted to require that insurers alter their inventory of disability insurance products to provide the same benefits, for the same duration, for all disabilities. Antidiscrimination statutes regulate discriminatory *conduct* but do not alter the terms of an insurance policy offered equally to all. The Americans with Disabilities Act, 42 U.S.C. §§12101 *et seq.* ("ADA"), for example, ensures that people enjoy equal access to products and services. Under the ADA, merchants cannot exclude disabled persons from their stores or charge the disabled more to purchase their products. But merchants are not required to alter their inventory of goods for sale in the name of preventing "discrimination." Clothiers must make their products available to all on equal terms, but they are not required to sell shirts with one arm or pants with one leg lest they be accused of discriminating against the disabled. Booksellers are not required to alter their inventory and stock books in Braille for every book sold in print to accommodate the blind.

Section 10144 does not mandate that disability insurance policies provide the same coverage for all types of disabilities. And §10144 does not regulate the content of disability insurance policies offered on equal terms to all employees. Standard did not single out Nelson for unequal treatment because of her mental impairment. Nelson obtained the same coverage under the Group Policy provided to all employees of Countrywide, and she obtained her coverage before she became mentally impaired. Standard simply enforced the non-discriminatory terms of the Group Policy, and paid benefits to Nelson for 24 months as required by the Group Policy.

The purported violations of §10144 provide the sole basis for Nelson's individual and class action claims for payment of benefits, breach of fiduciary duty, and declaratory judgment. With the legal fallacy of Nelson's statutory interpretation of §10144 exposed, all the claims in her Complaint must fall as a matter of law.

ARGUMENT

A motion to dismiss under Fed. R. Civ. P. 12(b)(6) challenges the sufficiency of the complaint for failure to state a claim. To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to state a facially plausible claim for relief. *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). A complaint should be dismissed as a matter of law for "lack of a cognizable legal theory." *Balistreri v. Pacifica Police Dep't*, 901 F.2d 696, 699 (9th Cir. 1990).

Nelson's Complaint is premised on a legally incorrect interpretation of §10144 and therefore warrants dismissal with prejudice. See *DeSoto v. Yellow Freight Sys., Inc.*, 957 F.2d 655, 658 (9th Cir. 1992) ("A district court does not err in denying leave to amend where the amendment would be futile.") (citing *Reddy v. Litton Indus.*, 912 F.2d 291, 296 (9th Cir. 1990)).

I. Section 10144 Does Not Mandate Equivalent Coverage Terms for All Impairments

Section 10144 prohibits an insurer from imposing barriers that thwart an individual's access to insurance coverage "solely because of" the individual's physical or mental impairment. By targeting obstructive discriminatory *conduct*, §10144 ensures that all citizens of California enjoy equal access to life insurance, disability insurance, and annuity products. Section 10144, which is contained in the "Discriminatory Practices" article of the California Insurance Code, provides,

> 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 or reasonably anticipated experience.

Cal. Ins. Code §10144.

Countrywide chose to provide its employees with disability coverage under a Group Policy that pays benefits for 24 months for disabilities caused by Mental Disorders, Substance Abuse, or Other Limited Conditions such as fibromyalgia and chronic fatigue, and that pays benefits to age 65 for other disabilities. Nelson claims that the Group Policy's 24-month benefit provision for Mental Disorders is a "refusal to insure," a "refusal to offer to continue to insure," or a "limitation on the amount, extent and kind of coverage" available to her and the putative class. (Complaint ¶ 36). Nelson alleges that she "suffered" a violation of §10144 simply because Standard paid her claim in full for 24 months in compliance with the Group Policy's Mental Disorders provision.

Standard's compliance with the Group Policy's contractual terms is not a discriminatory practice under §10144. Standard did not refuse to insure, refuse to continue to insure, or limit the amount of coverage available "to an *individual*" "solely because of" the individual's physical or mental impairment. Cal. Ins. Code §10144 (emphasis added). Standard issued a Group Policy that provides the same coverage to all Countrywide employees, including Nelson, on an equal opportunity basis. The Group Policy's Mental Disorders provision applies to all Countrywide employees, and was not inserted into the Group Policy "solely because of" Nelson's mental impairment. Indeed, coverage under the Group Policy became effective on January 1, 2005, more than two years before Nelson's mental disability. (Complaint ¶¶ 6, 9). All employees of Countrywide have exactly the same disability coverage under the Group Policy on the same terms and conditions. "[I]nsurance distinctions that apply equally to all employees cannot be discriminatory." *Weyer v. Twentieth Century Fox Film Corp.*, 198 F.3d 1104, 1116 (9th Cir. 2000).

Nelson, in her Complaint, erroneously seeks to transform §10144—which prohibits discrimination against an individual "*solely because of*" her physical or mental impairment—into a statute that mandates comprehensive coverage for all disabilities. Nelson reads "solely because of" out of §10144 and replaces it with "for." If §10144 had been enacted to mandate equal coverage for all disabilities, the statute would state that an insurer cannot limit the amount, extent, or kind of coverage "*for*" physical or mental impairments. But §10144 does not mandate equal coverage *for* all disabilities. Rather, §10144 prohibits an insurer from refusing to provide insurance to an individual "*solely because of*" her physical or mental impairment. See *Azusa Land Partners v. Dep't of Indus. Relations*, 191 Cal.App.4th 1, 19-20, 120 Cal.Rptr.3d 27, 37 (Cal.App. 2 Dist. 2010) ("We are not at liberty to insert into the statute a term the Legislature chose to omit. Its absence cannot be assumed to be without meaning.").

Section §10144 regulates discriminatory conduct by insurers against individuals with physical or mental impairments. But §10144 does not regulate the content of insurance products or proscribe mandatory coverage terms. Section 10144 does not prohibit an insurer from providing different kinds of coverage *for* different kinds of disabilities to all employees equally.

Courts unanimously hold that §10144 does not require insurers to provide equal coverage for both physical and mental disabilities. In *Townsend v. Thomson Reuters Group Disability Income Ins. Plan*, 867 F.Supp.2d 1085 (C.D. Cal. 2012), the court held as a matter of law that an ERISA governed group policy's 24-month benefit cap for mental impairments does not violate the clear text of §10144:

> [I]t is clear from the text of the statute that the California legislature enacted Section 10144 in order to prevent unfounded discrimination of individuals by insurance providers for the individual's mental or physical impairments, not to require insurers to provide equal coverage for mental and physical disabilities.

Id. at 1086. The plaintiff received the same coverage under the group policy as all other enrolled employees, and was not singled out for discriminatory treatment.

> Here, Plaintiff was not singled out individually for a coverage limitation, nor was her coverage limited *because of* her mental condition. She was offered the same coverage as all other employees of Thomson Reuters. Her coverage was not limited because of her mental condition.

Id. "No court has held that Section 10144 requires insurers to offer equal benefits for both mental and physical disabilities." *Id.*

The court in *Monterastelli v. Standard Ins. Co.*, No. CV 12-01669 (AGRx), slip op. (C.D. Cal. June 12, 2012) (attached as Exhibit A) held that the 24-month benefit cap for Mental Disorders and Other Limited Conditions in a group policy issued to the City of Burbank by Standard—the same benefit cap contained in Countrywide's Group Policy—is non-discriminatory and does not violate §10144. "[N]othing in

section 10144 bars the Defendant from providing, as it does, disability benefits until age 65 for the physically disabled, but only a 24-month window of benefits for mental disabilities." *Id.* at pg. 5.

> [T]he Court concludes that the California Supreme Court would interpret section 10144 as only ensuring that a given insurance plan affords disabled individuals equal access to and eligibility for the same benefits as non-disabled individuals. It does not limit the kind of coverage an insurer can offer.

Id. The *Monterastelli* court dismissed the complaint with prejudice under Rule 12(b)(6). "Because section 10144 does not prevent an insurer from providing different insurance benefits for physical and mental disabilities, Defendant's alleged impropriety is not actionable." *Id.* at pg. 7.

Nelson enjoyed the same access to the same disability coverage as all other employees of Countrywide and was not singled out individually for discriminatory treatment "solely because of" her disability. The duration of her disability benefit is established by the Group Policy's terms, which apply equally to all employees. The Group Policy did not violate §10144 when it was issued and when Nelson enrolled because the same terms were offered to all Countrywide employees. A Group Policy that is not discriminatory when sold does not become discriminatory simply because an insured later becomes disabled and the insurer enforces the Policy's express terms. See *Townsend*, 867 F.Supp.2d at 1086; *Monterastelli*, slip op. at pgs. 5-7 (holding as a matter of law that §10144 does not mandate equal coverage for mental and physical disabilities).

II. Identical Statutes in Sister States have *Never* been Interpreted to Mandate Equal Coverage for Mental and Physical Disabilities

Section 10144 traces its statutory lineage directly to the National Association of Insurance Commissioners ("NAIC") Model Regulation on Unfair Discrimination in Life and Health Insurance ("Model Act"). In enacting §10144, the California

legislature adopted *verbatim* the description of discriminatory conduct proscribed in the Model Act. Both §10144 and the Model Act describe insurer discrimination as "refus[ing] to insure, or refus[ing] to continue to insure, or limit[ing] the amount, extent, or kind of coverage available to an individual, or charg[ing] a different rate for the same coverage solely because of a physical or mental impairment …." Cal. Ins. Code §10144; 4 NAIC Model Laws, Regulations & Guidelines at 997-1 (July 1993) (quoted in *Polan v. State of N.Y. Ins. Dept.*, 3 N.Y.3d 54, 61, 814 N.E.2d 789, 793 (N.Y. 2004)).

The NAIC's Model Act does not mandate equal coverage for physical and mental disabilities. The NAIC explained that the Model Act "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." *Polan*, 3 N.Y.3d at 61-62 (quoting NAIC Drafting Note) (emphasis omitted); *Rogers v. Dep't of Health & Env. Control*, 174 F.3d 431, 435 (4th Cir. 1999). The Model 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." *Id.* at 62.

Many states have adopted antidiscrimination statutes modeled on the NAIC Model Act that prohibit the same conduct proscribed by §10144. These antidiscrimination statutes prohibit discrimination against individuals "solely because of" disability and do not ban limitations on coverage "for" a particular disability. See *Polan*, 3 N.Y.3d at 58 (The statute "proscribes limitations on coverage 'solely because of' a particular disability, rather than limitations on coverage 'for' a particular disability."); *McNeil v. Time Ins. Co.*, 205 F.3d 179, 184 n.5 (If "because of" a disability meant "for" a disability, insurers would be required "to have an actuarial basis or past experience in support of every limitation on coverage for anything that could be construed as a handicap.").

No court has held that these antidiscrimination statutes void policy terms, prohibit an insurer from providing different levels of coverage for different impairments, or preclude an insurer from enforcing a 24-month benefit cap for mental impairments or other specified conditions. See *Polan*, 3 N.Y.3d at 59 ("Courts have generally declined to interpret these statutes to require equivalent coverages for mental and physical disabilities.") (citations omitted). See also *Townsend*, 867 F.Supp.2d at 1086; *Monterastelli*, slip op. at pgs. 5-7; *McNeil*, 205 F.3d at 184; *Pelletier v. Fleet Fin. Group, Inc.*, No. CIV.99-245, CIV.99-CV-146, 2000 WL 1513711, at *4 (D. N.H. Sept. 19, 2000); *El-Hajj v. Fortis Benefits Ins. Co.*, 156 F.Supp.2d 27, 33 (D. Me. 2001).

Like Nelson, the plaintiff in *Polan* asserted that New York's antidiscrimination statute, which proscribes precisely the same conduct as §10144, prohibited enforcement of a 24-month cap on benefits for mental disorders. *Polan*, 3 N.Y.3d at 58. The court in *Polan* rejected the plaintiff's claim that benefit caps for mental disorders are discriminatory. Because the insured was eligible for the same coverage at the same premium as all other participating employees, the insurer did not discriminate against her "solely because of" her mental disability:

> Thus, in order to discriminate against "an individual" and to do so "solely because of" a disability, the insurer must somehow limit an individual's coverage by reason of that individual's disability. Here, the insurer did not adopt the 24-month limitation "solely because of" petitioner's mental disability; the limitation preceded her disability. Nor was petitioner otherwise discriminated against. She was eligible for the same long-term disability coverage at the same premium as were all other employees participating in her employer's group plan.

Id. at 59.

The Fifth Circuit held that Texas's antidiscrimination statute did not prohibit an insurer from offering and enforcing different levels of coverage for different impairments. *McNeil*, 205 F.3d 179. Like §10144 and the New York statute, the

Texas antidiscrimination statute forbid insurers to "refuse to insure, refuse to continue to insure, limit the amount, extent or kind of coverage available to an individual, or charge an individual a different rate for the same coverage solely because of handicap...." *Id.* at 183 (emphasis omitted). The plaintiff argued that the policy's $10,000 benefit limit for AIDS incurred during the first two years of coverage discriminated against him in violation of the statute. The Fifth Circuit held that the statute is directed at the *conduct* of the insurer, not the *content* of the policy. The insurer did not violate the statute and discriminate "solely because of" the plaintiff's disability because the insurer offered the same policy terms to all employees "without distinguishing between individual applicants based on whether they had AIDS." *Id.* at 184. An insurer who simply enforces a non-discriminatory term of an insurance policy does not violate the statute. *Id.* at 184-185.

Federal courts in Maine and New Hampshire have dismissed Nelson-like discrimination claims under state statutes functionally identical to §10144. The court in *El-Hajj* held that Maine's antidiscrimination statute "requires insurers to offer coverage on the same terms and conditions to both disabled and non-disabled persons," but does not mandate the same coverage terms for physical and mental disabilities. *El-Hajj*, 156 F.Supp.2d at 33. The court in *Pelletier* held that Maine's statute "does not limit the kind of coverage that an insurer can offer" and "the policy is not inconsistent with the requirements of [the statute] even though it provides for different coverage periods for physical and mental disabilities." *Pelletier*, 2000 WL 1513711, at *4. Because the insurers offered the same coverage terms to all eligible employees, plaintiffs could not state a cognizable claim based on a violation of the statute.

The purpose of antidiscrimination statutes is to prohibit individualized discriminatory conduct, not to alter the nature and content of the products offered for sale on equal terms to all. Courts have refused to construe antidiscrimination

statutes as laws that dictate the content of goods. As explained by the California Court of Appeals,

> If the ADA and the FEHA prohibited the treatment-based distinction appellant challenges, the statutes would constitute not just shields against disability discrimination but swords mandating comprehensive healthcare coverage for all job-related disabilities, because that is the only form of coverage that does not discriminate on the basis of treatment. This is not what the FEHA was designed to accomplish.

Knight v. Hayward Unified School Dist., 132 Cal.App.4th 121, 131, 33 Cal.Rptr.3d 287, 294 (Cal.App. 1 Dist. 2005) (holding that because a coverage exclusion for in vitro fertilization treatment applied equally to all employees covered under the health plan, there was no disability based discrimination). See also *McNeil*, 205 F.3d at 186 (Title III of the ADA does not "regulate the content of goods and services that are offered" and "a business is not required to alter or modify the goods or services it offers to satisfy Title III.").

Under the ADA, a merchant's goods must be available on equal terms to all, but merchants are not required to alter their inventory to provide products for the disabled. So too, an insurer must provide its various insurance products on equal terms to all unless sound actuarial reasons justify otherwise. But like other businesses, insurers are not required to alter the content of their insurance products to eliminate limitations for mental disorders, subjective symptoms, and other conditions. See *Weyer*, 198 F.3d at 1115 ("Title III does not govern the content of a long-term disability policy offered by an employer.") (citation omitted); *El-Hajj*, 156 F.Supp.2d at 32 ("[T]he ADA does not create a cause of action against insurers who provide different levels of coverage for those who are mentally disabled versus those who are physically disabled."); accord *McNeil*, 205 F.3d at 189.

A disability insurance policy is a product, and a policy that provides benefits for all disabilities is a different product from a policy that provides benefits to age 65 for

some disabilities and 24 months of benefits for other disabilities. Nelson essentially contends that §10144 nullifies all coverage limitations in all disability policies. She impermissibly seeks to rewrite §10144 into a statute that dictates the content of insurance policies, contrary to the express terms of §10144, the holding of two California federal courts in *Townsend* and *Monterastelli*, the clear intent of the NAIC's Model Act, and judicial holdings across the country construing statutes functionally identical to §10144.

According to Nelson's proffered interpretation of §10144, distinct insurance products would homogenize by operation of law into a single insurance product that must provide "pay-all" coverage for every disability. Nelson cannot use §10144 to transform the specific terms of the Group Policy, which Countrywide chose to provide to all of its employees equally, into a homogenous policy covering every type of disability for an unlimited period.

Standard provided the same coverage to Nelson under the Group Policy, on the same terms that Standard provided to all insured employees of Countrywide. When Nelson subsequently claimed to be disabled by conditions that fall within the Group Policy's coverage for Mental Disorders and Other Limited Conditions, Standard paid the maximum 24-month disability benefits established by the Group Policy's contractual terms. Standard did not target Nelson individually for discriminatory treatment "solely because of" her disability. Standard paid contractually determined benefits in compliance with the non-discriminatory terms of the Group Policy. Nelson received the precise benefits that Standard contractually promised to pay when it issued the Group Policy to Countrywide in January 2005.

CONCLUSION

Nelson's entire Complaint is founded on an interpretation of §10144 that is not legally viable and has been rejected by every court that has addressed the issue. Nelson fails to state individual and class action claims for payment of benefits under

29 U.S.C. §1132(a)(1)(B), and for breach of fiduciary duty and declaratory relief under 29 U.S.C. §1132(a)(3), based on her legally untenable insurance discrimination theory, warranting dismissal of the entire Complaint with prejudice.

WHEREFORE, defendants Standard Insurance Company, Countrywide Financial Corporation Group Long Term Disability Plan, and Countrywide Financial Corporation request dismissal of Plaintiff's Complaint with prejudice pursuant to Fed. R. Civ. P. 12(b)(6), and an award of costs and reasonable attorneys' fees incurred pursuant to 29 U.S.C. §1132(g).

Dated April 15, 2013

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