
IN THE
COURT OF APPEALS OF MARYLAND

September Term, 2006

No. 79

JANICE K.,

Appellant,

v.

PROVIDENT LIFE AND ACCIDENT INSURANCE COMPANY,

Appellee.

Appeal from Circuit Court for Baltimore City
(M. Brooke Murdock, J.)

BRIEF OF APPELLEE
PROVIDENT LIFE AND ACCIDENT INSURANCE COMPANY

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3 John A. Appleman & Jean Appleman, <i>Insurance Law and Practice</i> (1967).....	5
Joseph B. Martin, <i>The Integration of Neurology, Psychiatry, and Neuroscience in the 21st Century</i> , <i>Am. J. of Psychiatry</i> 159:5 (May 2002)	18
<i>Md. Commissioner Steven Larsen Joining Law Firm's Baltimore Office</i> , <i>Insurance Journal</i> , May 30, 2003, http://www.insurancejournal.com/news/east/2003/05/30/29398.htm	24
NAIC, About the NAIC, the NAIC's History and Background; A Tradition of Consumer Protection, http://www.naic.org/index_about.htm (last visited Dec. 4, 2006).....	9
National Institute of Mental Health, <i>Depression</i> 4 (2000), http://www.himh/hig/gov/publicat/depression.cfm	20

Physicians' Desk Reference, PDR.net,
http://www.pdrhealth.com/drug_info/rxdrugprofiles/drugs/well488.shtml
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Physicians' Desk Reference, PDR.net,
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Uniform Individual Accident and Sickness Policy Provision Law § 180-3(11),
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University of California, San Diego School of Medicine, *A Practical Guide to
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STATEMENT OF THE CASE

Provident Life and Accident Insurance Company ("Provident") accepts the statement of the case set forth in the brief of appellant, except that on November 21, 2006, the Court of Appeals, on its own motion, granted a writ of certiorari.

QUESTION PRESENTED

Whether the Circuit Court correctly concluded that a policy provision mandated by statute required appellant to submit to an independent mental examination during the pendency of her claim for total disability benefits due to a mental condition?

STATEMENT OF FACTS

On February 22, 1995, Provident issued the Policy to Janice K. (E. 14.) The Policy became effective on January 30, 1995 and remains in force. (E. 14.) Janice K. filed a claim under the Policy and has a claim pending for total disability benefits due to a mental condition. (E. 86.)

In pertinent part, the Policy provides as follows:

PHYSICAL EXAMINATIONS

We, at our expense, have the right to have you examined as often as is reasonable while a claim is pending.

(E. 30.)

Appellant contends the Policy provides no right to require her to submit to an independent mental examination, notwithstanding her claim for total disability benefits

due to a mental condition. (E. 78-79.) Provident contends the Policy permits a mental examination because of the pending claim for total disability benefits due to a mental condition. (E. 76-78.)

ARGUMENT

A. Appellant Is Required To Submit To A Mental Examination Pursuant To The Policy Provision Mandated By Statute Because She Has A Pending Claim For Disability Benefits Due To A Mental Condition

Maryland law defines disability insurance as a form of “health insurance.” *See* Md. Code Ann., Ins. § 1-101(p)(2)(ii) (2006). The Maryland Insurance Article requires every policy of health insurance delivered in Maryland to contain a provision entitled “Physical Examinations.” *See id.* §§ 15-202(a), (d), 15-216. The provision permitted under the heading “Physical Examinations” must “contain the following provision:”

Each policy of health insurance shall contain the following provision: “Physical examinations and autopsy: The insurer at its own expense shall have the right and opportunity to examine the person of the insured when and as often as it may reasonably require during the pendency of a claim hereunder and to make an autopsy in case of death where it is not forbidden by law.

Id. § 15-216.

Provident was required to omit the part of the provision pertaining to autopsy because the Policy is a disability insurance policy, not a life insurance policy. *See id.* § 15-202(c)(1). Any other differences between the Policy provision and the statutory provision were approved by the Maryland Insurance Commissioner. *See id.* § 15-202(b).

Where, as here, an insurance policy provision is mandated by statute, rules of statutory construction should control interpretation of the provision. See *Hofkin v. Provident Life & Acc. Ins. Co.*, 81 F.3d 365, 369 (3d Cir. 1996); *Terra Indus., Inc. v. Commonwealth Ins. Co. of Am.*, 981 F. Supp. 581, 589-91 (N.D. Iowa 1997); *Oglesby v. Penn Mut. Life Ins. Co.*, 877 F. Supp. 872, 886 n.9 (D. Del. 1994). This is because the provision is “one of ‘adhesion’ as to both the insurer and the insured.” *Terra Indus.*, 981 F. Supp. at 591 (citation omitted). Indeed, in the controlling case of *Fister ex rel. Estate of Fister v. Allstate Life Insurance Co.*, 366 Md. 201, 783 A.2d 194 (2001), this Court, in the context of interpreting a statutory “suicide” exclusion in a life insurance policy, explained as follows:

When the terms of the contract are derived from explicit statutory guidelines ..., the paramount consideration is interpreting the pertinent statutory provision. While the insurance policy contractually binds the parties ..., the authority for implementing and utilizing the specific policy terms in question emanates from our State Legislature, and it is to their design to which we defer.

Id. at 210.

The cardinal rule of statutory construction is to discern the intent of the legislature. *Mgmt. Pers. Servs., Inc. v. Sandefur*, 300 Md. 332, 341, 478 A.2d 310, 314 (1984); *Howard County v. Carroll*, 71 Md. App. 635, 643, 562 A.2d 996, 999-1000 (1987). “The primary indication of legislative intent is found in the plain language of the statute, with the words given their ordinary and natural meanings.” *In re Adoption/Guardianship No.*

CCJ14746, 360 Md. 634, 641, 759 A.2d 755, 759 (2000). Where the legislature fails to define a term, reference to a dictionary is appropriate to determine its plain meaning. *Bennett v. Dep't of Assessments and Taxation*, 143 Md. App. 356, 368, 795 A.2d 124, 131 (2001) (citing *Dep't of Assessments & Taxation v. Md.-Nat'l Capital Park & Planning Comm'n*, 348 Md. 2, 14, 702 A.2d 690, 696 (1997)). Even under the plain meaning rule, however, a court should not ignore the legislature's purpose if it is readily known. *See State v. Pagano*, 341 Md. 129, 133, 669 A.2d 1339, 1341 (1996).

As required by statute, the Policy provides Provident with a right to have appellant "examined," at its expense, "as often as is reasonable while a claim is pending." (E. 30.) The ordinary meaning of "examine" indicates a procedure or process unlimited in substance or scope. *See Webster's II New College Dictionary* 390 (1999) (defining "examine" as follows: "1.a. to inspect in detail. b. to analyze or observe carefully. 2. to test the state of. 3. to determine the aptitude, qualifications, or skills of by questions or exercises. ..."). As a result, the plain meaning of "examine" and, therefore, the plain meaning of the provision authorizes Provident to require appellant to submit to a mental examination because of her pending claim for disability benefits due to a mental condition. (E. 30.) The mere fact that the provision does not specifically use the words "mental examination" is irrelevant.

Moreover, the purpose of this statutory provision is to require an insured to submit to an examination so that the insurer can ascertain its liability. *See Fernandez v. Conn.*

Mut. Life Ins. Co., 917 F. Supp. 120, 123 (D.P.R. 1996) (stating further, “IME clauses help an insurer obtain information related to a pending claim in order to protect itself against fraud”); *Eller v. Guthrie*, 284 N.W. 412, 415-16 (Iowa 1939) (noting the insured assented to the provision in his policy permitting an examination when insured accepted the policy); *Martinez v. Lewis*, 942 P.2d 1219, 1224 (Colo. Ct. App. 1996) (stating that insurance companies “must be accorded wide latitude in [their] ability to investigate claims and to resist false or unfounded efforts to obtain funds not available under the contract of insurance” (citing *Travelers Ins. Co. v. Savio*, 706 P.2d 1258, 1274 (Colo. 1985))); (internal quotation marks omitted); 3 John A. Appleman & Jean Appleman, *Insurance Law & Practice* § 1502, at 180-81 (1967). Indeed, in *Huntt v. State Farm Mutual Insurance Co.*, 72 Md. App. 189, 527 A.2d 1333 (1987), the Court of Special Appeals recognized the need of insurers to examine claimants in order to objectively assess claims.

In *Huntt*, the Court of Special Appeals considered whether Maryland’s personal injury protection (“PIP”) statute, which required payment upon “satisfactory proof” of loss, was sufficiently broad to permit an automobile insurer to include a policy provision requiring claimants to submit to an examination by a physician selected by the insurer. *Id.* at 192-94. Finding in favor of the insurer, the Court reasoned as follows:

[I]n order to make an informed decision as to whether a PIP claim should be paid, an insurer is entitled to the benefit of having a claimant examined by someone other than his or her treating physician(s). Although disagreements between

physicians as to the best course of treatment for a particular injury are not uncommon, we do not think the legislature intended that the opinion of the claimant's physician should be conclusive in every case. Nor do we think the legislature intended that insurance companies should be left unprotected against unreasonable PIP claims. Accordingly, we hold that the term "satisfactory proof" ... encompasses the right of an insurance company to demand that a PIP claimant submit to a physical examination by a physician selected and paid by the insurer.

Id. at 195-96.

Similarly, the only reasonable interpretation of the provision mandated by statute, consistent with its purpose, is to permit Provident to ascertain its liability with respect to a specific claim covered by the Policy. With respect to appellant's claim, Provident's request for a mental examination is consistent with the statutory purpose because her alleged disability is due to a mental condition. Indeed, if Provident were unable to conduct a mental examination in connection with a mental disability claim, then the statutory purpose of the examination would be thwarted. *See Benson v. Public Serv. Comm'n*, 141 Md. 398, 401-402, 118 A. 852, 853 (1922) ("The construction to be given [to the statute] ... must be as far as possible such as to carry out the legislative intent, not to thwart it nor to render its exercise, or inability to exercise, meaningless or absurd.").

Moreover, it makes absolutely no sense to conclude, as appellant suggests, that Provident could require her to submit to a physical examination when her pending claim is for disability allegedly due to a mental condition. Indeed, to conclude the language mandated by statute precludes an examination of the origin of a claimed mental disability

would be illogical and unreasonable. Such a result should be avoided. *See Frost v. State*, 336 Md. 125, 137, 647 A.2d 106, 112 (1994) (as a general matter, courts should avoid “constructions that are illogical, unreasonable, or inconsistent with common sense”).

Further, interpreting the provision to exclude an examination of an insured claiming a mental disability would require disability insurers in Maryland, with policies containing the same language required by statute, to rely solely on a treating physician’s assessment of an alleged disability without any recourse to verification of this assessment through independent examination. This cannot be the intent of the law, as it would frustrate the purpose behind the provision and expose insurers to an inappropriate risk of fraudulent claims. *See, e.g., Fernandez*, 917 F. Supp. at 123. The examination provision mandated by statute, therefore, clearly authorizes Provident to request a mental examination when the insured claims disability due to a mental condition.

Finally, it would be illogical, unreasonable, and inconsistent with common sense to conclude that the General Assembly intended to create a special and protected class of disability claimants – those suffering from mental conditions. *See Frost*, 336 Md. at 137. Claimants seeking disability benefits based on a physical condition unquestionably would be subject to an independent examination in accordance with the terms of their policies. In turn, physical disability claims could be denied based on a lack of substantiated findings from the independent examination. Claimants seeking total disability benefits based on a mental condition, however, would not be subject to independent examination

and their claims would not be subject to the same scrutiny. Absent compelling evidence of legislative intent to create such a caste system, the Court ought not to put its imprimatur upon such an illogical, unreasonable, and unfair statutory interpretation. *Id.*

B. The Text Of Article 48A Supports Provident's Position And The Caption Change In Accordance With NAIC Model Legislation Is Not Evidence Of A Change In Legislative Intent

Appellant posits that the legislative history of Md. Code Ann., Ins. § 15-216 demonstrates that the General Assembly intended to limit “examinations” to “physical examinations.” A complete reading of the legislative history suggests this argument is not well founded.

In 1942, when the pertinent statutory text was enacted, the caption “Physical examinations and autopsy” was not present. *See* Md. Ann. Code art. 48A, § 106(B)(2)(h) (Cum. Supp. 1947.) Thus, at the time of enactment, the General Assembly could not have intended to limit the right of examination to physical examinations. Appellant admits this point. (Appellant’s Br. 11.)

Appellant contends that, when Article 48A was amended in 1951 and the caption “Physical examinations and autopsy” was inserted, this heading “can only have been intended to restrict the insurer’s right of examination to ‘physical’ examinations.” (*Id.*) The 1951 revisions to Article 48A were not the result of any change in legislative intent, but simply part of NAIC revisions to a model law. *See* Uniform Individual Accident and Sickness Policy Provision Law § 180-3(11), NAIC Model Laws, Regulations and

Guidelines (Model Regulation Service Jan. 1993) (Appendix).¹ The mere insertion of caption headings, as result of changes in NAIC model legislation, should not be considered a change in legislative intent sufficient to alter the clear text of the statute as it was originally enacted. *See Penn. Dept. of Corrs. v. Yeskey*, 524 U.S. 206, 212, 118 S. Ct. 1952, 1956 (1998) (“The title of a statute ... cannot limit the plain meaning of the text. For interpretive purposes, [it is] of use only when [it] sheds light on some ambiguous word or phrase.”) (citing *Bhd. of R.R. Trainmen v. B&O R.R. Co.*, 331 U.S. 519, 528-29, 67 S. Ct. 1387, 1392 (1947))).

The lack of legislative intent to modify the text of the statutory language is further evidenced by the fact that the NAIC model legislation, and the amendment to Article 48A, inserted captions for *all* of the mandatory policy provisions. *Compare* Md. Ann. Code art. 48A, § 106B(2)(b), § 106B(2)(g) (Cum. Supp. 1947) (no captions for mandatory policy provisions regarding changes in the contract and proofs of loss, respectively), *with* Md. Ann. Code art. 48A, § 153(A)(1), (7) (substantially similar mandatory contract provisions preceded by the captions “Entire Contract; Changes” and “Proofs of Loss,” respectively). The insertion of captions throughout the relevant section

¹ The NAIC refers to the National Association of Insurance Commissioners. The NAIC is an organization of state insurance commissioners that provides a forum for the development of uniform insurance policy and model law and regulation. NAIC, About the NAIC, the NAIC’s History and Background; A Tradition of Consumer Protection, http://www.naic.org/index_about.htm (last visited Dec. 4, 2006). The NAIC’s membership consists of insurance regulatory officials in all 50 states, the District of Columbia, and five territories. *Id.*

of Article 48A is not evidence of legislative intent to modify the text of the pertinent statute.

The final difficulty with appellant's legislative intent analysis arises from a failure to appreciate that textual revisions were included in certain provisions within the 1951 amendments to Article 48A. *Compare, e.g.*, Md. Ann. Code art. 48A, § 106B(2)(b) (requiring cancellation of policy when insured moves to a less hazardous occupation), *with* Md. Ann. Code art. 48A, § 153(B)(1) (requiring only reduction of premium rate, and not cancellation, in the same situation). The text of the pertinent provision, however, was not revised. *Compare* Md. Ann. Code art. 48A, § 106(B)(2)(h), *with* Md. Ann. Code art. 48A, § 153. The only reasonable conclusion that can be drawn from the changes in the text of some statutory provisions, but not the relevant statutory provision, is that the legislature did not intend to change the legal significance and import of the unaltered statutory language.

Appellant's argument also is inconsistent with the well-established rule of statutory interpretation that a caption does not change the meaning of the provision it introduces. *See Penn. Dept. of Corrs.*, 524 U.S. at 212 ("The title of a statute ... cannot limit the plain meaning of the text. For interpretive purposes, [it is] of use only when [it] sheds light on some ambiguous word or phrase.") (citing *Bhd. of R.R. Trainmen*, 331 U.S. 528-29)); *see also Tidewater/Havre De Grace, Inc. v. Mayor of Havre De Grace*, 337 Md. 338, 347, 653 A.2d 468, 473 (1995) (stating that resort to the title or preamble of an

act of the General Assembly should only be to resolve, not create, an ambiguity). The reason behind this rule is that a section heading is “but a short-hand reference to the general subject matter involved.” *Bhd. of R.R. Trainmen*, 331 U.S. at 528. The Supreme Court stated:

[M]atters in the text which deviate from those falling within the general pattern are frequently unreflected in the headings and titles. Factors of this type have led to the wise rule that the title of a statute and the heading of a section cannot limit the plain meaning of the text.

Id. The insertion of the caption “Physical Examinations,” therefore, should not be considered relevant in determining the intent of the text mandated by statute. *See id.* This is particularly true when, as here, the caption was added only to comply with NAIC model legislation. In determining legislative intent, the most reliable guide is the text of the provision mandated by statute. *See In re Adoption/Guardianship No. CCJ14746*, 360 Md. at 641.

C. Even Assuming The Caption Mandated By Statute Is Considered For Purposes Of Statutory Construction, The Court Should Sustain The Right To Require Appellant To Submit To A Mental Examination

Even if the caption were consulted for interpretative purposes, the Court still should conclude that the provision authorizes mental examinations if the insured claims disability due to a mental condition. The ordinary meaning of “physical examination” is any “medical examination to detect illness or dysfunction and [especially] to determine fitness for a specified service or activity.” *Webster’s II New College Dictionary* 830.

Since “illness” includes both physical and mental ailments, *id.* at 550 (defining “illness” as “[s]ickness of body or mind”), the heading “Physical Examinations” is sufficiently broad to include a mental examination. *See Curran v. Price*, 334 Md. 149, 172, 638 A.2d 93, 105 (1994) (“All parts of a statute are to be read together to determine intent, and reconciled and harmonized to the extent possible.”). Accordingly, the caption creates no ambiguity regarding the right of “examination.”

Moreover, assuming *arguendo* the caption created some ambiguity based on the word “physical,” the general rule that ambiguities in insurance policies are construed against the insurer is inapplicable when the caption is mandated by statute. *See, e.g., Terra Indus.*, 981 F. Supp. at 589-91; *Paul Revere Life Ins. Co. v. Haas*, 644 A.2d 1098, 1103 (N.J. 1994) (“When terms in an insurance policy are included by statutory mandate, however, courts no longer construe the policy against the insurer”); *Vaiarella v. Hanover Ins. Co.*, 567 N.E.2d 916, 919 (Mass. 1991) (“Because [the] provision was prescribed by statute, and was thus not controlled by the defendant insurer, ‘the rule of construction resolving ambiguities in a policy against the insurer is inapplicable.’”) (citations omitted); *Laidlaw v. Commercial Ins. Co.*, 255 N.W.2d 807, 811 (Minn. 1977) (same); *State Farm Mut. Auto. Ins. Co. v. Messinger*, 283 Cal. Rptr. 493, 499-500 (Cal. Ct. App. 1991) (same). Accordingly, the caption should not be construed so as to deny Provident the right of “examination” conferred by the express language of the statute. (See *supra*, part A.)

Another well-settled principle of statutory interpretation is that the statutory text should be construed so that “no word, clause, sentence or phrase is rendered superfluous or nugatory.” *Mayor of Baltimore v. Chase*, 360 Md. 121, 128, 756 A.2d 987, 991 (2000) (citing *Montgomery County v. Buckman*, 333 Md. 516, 524, 636 A.2d 448, 452 (1994)). Appellant’s proposed reading of the statutory text would render part of the Policy nugatory. Provident’s right to “examine” is only in effect while “a claim is pending.” (E. 30.) Thus, the Policy must be reasonably read to create a nexus between the words “claim” and “examined.” Given the statutory link between the examination and the claim, the only reasonable and logical interpretation of this policy provision is that the permissible scope of examination is determined by reference to the type of disability claimed. Here, for example, where appellant claims disability due to a mental condition, the mandatory statutory provision contemplates that Provident can require her to submit to a mental examination. (E. 30.)

Although appellant argues Provident’s reading of the statute renders the caption “physical examination” nugatory, this assumes the accuracy of appellant’s argument that the mind is completely separate from the physical body. As Provident points out later in this brief, appellant’s mind-body dichotomy is not well grounded in either law or fact. (*See infra*, part E.)

D. Reasonably Construed, The Policy Provides The Right To Require Appellant To Submit To A Mental Examination

Even if the Court applies general rules of contract interpretation rather than rules of statutory construction, the Court still should conclude that the Policy authorizes Provident to require appellant to submit to a mental examination. “It is well established in Maryland that insurance policies are construed like other contracts.” *Litz v. State Farm Fire & Cas. Co.*, 346 Md. 217, 224, 695 A.2d 566, 569 (1997). Thus, an insurance policy should be construed “as a whole to determine the parties’ intentions.” *Id.*; see also *NSC Contractors, Inc. v. Borders*, 317 Md. 394, 403, 564 A.2d 408, 412 (1989). A court “should examine the character of the contract, its purpose, and the facts and circumstances of the parties at the time of the execution.” *Litz*, 346 Md. at 224-25 (citing *Pac. Indem. v. Interstate Fire & Cas.*, 302 Md. 383, 388, 488 A.2d 486, 488 (1995)). The intent of the parties is ordinarily ascertained from applying the terms of the contract itself. *Id.* A court also may look to a dictionary to construe the words of a contract. *Pac. Indem.*, 302 Md. at 388; *B & P Enters. v. Overland Equip. Co.*, 133 Md. App. 583, 616, 758 A.2d 1026, 1043 (2000).

The Policy indemnifies appellant for “total disability” due to Injuries or Sickness. (E. 16.) The Policy defines “Sickness” as “sickness or disease.” (E. 16.) The ordinary meaning of “sickness” includes “illness,” which, in turn, means “[s]ickness of body or mind.” See *Webster’s II New College Dictionary* at 550, 1025. Moreover, the Policy unquestionably provides coverage for “total disability” based on mental illness. (E. 16)

(stating to be considered “totally disabled,” appellant “must be receiving care by a Physician which is appropriate for the condition causing the disability” and defining “Physician” as “a licensed psychiatrist or a licensed doctoral-level psychologist[,] if a covered loss is due to a mental disorder”).) To give effect to the Policy language as a whole, the “Physical Examinations” provision should be construed so that the right to have an insured “examined” includes an examination relevant to the particular claim at issue. Indeed, the pertinent language connects the right of examination to the period of time “while a claim is pending.” (E. 30.) Thus, the provision itself highlights the connection between the claim and the disability. Where a claimant asserts a disability due to a mental condition, the relevant examination is a mental examination. This clearly is what is intended by the words in the Policy.

Considering the principle that a “contract must be construed in its entirety,” *National Union Fire Insurance Co. of Pittsburgh v. Bramble*, 388 Md. 195, 209, 879 A.2d 101, 109 (2005), appellant cannot isolate the word “physical” from the entire contract and interpret that word in a vacuum. The definitions at the beginning of the policy are part of the contract and must make sense alongside each individual provision. *See id.* Further, as discussed above, even within the Provision, the word “examined” must be analyzed alongside the phrase “while a claim is pending,” thus presenting a clear connection between the examination and the claim. (E. 30.) The plain language of the

entire Policy informs a reasonable reader that examinations include mental examinations if the pending claim is for disability due to a mental condition.

Provident's contractual right to examine appellant concerning the basis of her claimed disability is entirely consistent with the coverage the Policy provides and with the intent of the provision permitting examinations. *See Fernandez*, 917 F. Supp. at 122-24 (holding policy provision granting right to have insured "examined" included examination for disabling mental condition). Also, since "physician" is defined in the contract to include psychiatrists and psychologists, appellant should have been aware that she would be subject to examination by a doctor from either of those fields. (E. 16.)

E. Appellant's Historical Authorities And Reliance On Other Statutes Provide No Meaningful Support For Appellant

Appellant cites a wide variety of sources to support her position that the plain meaning of "physical examination" cannot include a "mental examination." Pointing to various scholars expressing the view that the mind is separate from the body, appellant contends a reasonable person could not believe that the mental and physical overlap. (Appellant's Br. 11-13.) Appellant's argument appears to suffer from a gap in logic. Regardless of the philosophers' views on the metaphysical distinction between mind and body, the writers fail to explicate any distinction between "physical" and "mental" examinations. This, presumably, is an inference appellant asks the Court to draw. The Court, however, cannot legitimately draw such bright lines of demarcation via inference. The authorities provided by appellant, therefore, are not useful.

1. Appellant's Ancient Authorities Are Inconsistent With Current Understanding, Knowledge, and Wisdom

Appellant asks the Court to recognize mind-body dualism as a widely accepted fact. (Appellant's Br. 11-13.) No mention, however, is made of any authoritative twentieth century commentary on this concept. Notably, the American Psychological Association asserts that a "compelling literature documents that there is much 'physical' in 'mental' disorders and much 'mental' in 'physical' disorders." American Psychological Association, *Diagnostic and Statistical Manual of Mental Disorders* (DSM-IV) (4th ed., Text Revision 2000) (App. 3). Thus, the mind-body duality appellant advocates is neither common nor accepted.

In the twentieth century, through the development of psychiatry and neuroscience, opposition to mind-body dualism has strengthened. By the mid-twentieth century, Stanley Cobb, a Harvard professor of neuropathology and significant contributor to many areas of mental diagnosis and treatment, claimed that "[t]he mind is the living brain in action, and the brain is subject to physical and chemical changes just as any other cell or tissue in the body." W. Bentinck-Smith & E. Stouffer, *Harvard University History of Named Chairs: Sketches of Donors and Donations: Professorships of the Faculties of Medicine and Public Health, 1721-1991* (1993).

Finally, as we enter the twenty-first century, the scientific treatment of mind and body as one has become almost an afterthought:

The separation of [organic and functional diseases] is arbitrary, often influenced by beliefs rather than proven scientific observations. And the fact that the brain and mind are one makes the separation artificial anyway.

Joseph B. Martin, *The Integration of Neurology, Psychiatry, and Neuroscience in the 21st Century*, Am. J. of Psychiatry 159:5, 695 (May 2002). Contrary to appellant's suggestion, no reasonable person would assume a clear and bright line division exists between mental and physical health.

Indeed, the very fact that many mental disorders are now treated physically, i.e., by administering drugs that work directly upon the brain or nervous system to alter a patient's mental state, shows that ancient philosophy is not authoritative as to the mind-body distinction suggested by appellant. See, e.g., PDR.net, PDRhealth – Wellbutrin, http://www.pdrhealth.com/drug_info/rxdrugprofiles/drugs/well488.shtml (last visited Dec. 4, 2006) (Wellbutrin is used to treat major depression and is “thought to work by altering levels of the brain chemicals norepinephrine and dopamine.”); PDR.net, PDRhealth – Paxil, http://www.pdrhealth.com/drug_info/rxdrugprofiles/drugs/pax1319.shtml (last visited Dec. 4, 2006) (Paxil is used to treat depression, obsessive-compulsive disorder, panic disorder, generalized anxiety disorder, social anxiety disorder, and post-traumatic stress disorder, and “Paxil belongs to the class of drugs known as selective serotonin reuptake inhibitors. Serotonin is one of the chemical messengers believed to

govern mood.”). These medications have an actual physical impact on the body, as explained in the Physicians’ Desk Reference, and are not mere placebos to soothe the mind. *See id.* The fact that licensed medical doctors must administer and monitor medications providing physical treatment for mental disorders is compelling evidence that the mind-body separation suggested by appellant is not well grounded. *See* Md. Code Regs. 10.13.01.02 – 04 (2006).

2. Appellant’s Alleged Common Understanding Is Contrary To Any Reasonable Reading Of The Policy And Is Unsupported By Any Authority

To determine how a reasonable person would understand the terms of a contract, a court must “accord words their ordinary and accepted meanings.” *Pac. Indem.*, 302 Md. at 388. Although appellant focuses heavily on a proposed meaning of the word “physical,” a more appropriate analysis should involve the meaning of the entire term “physical examination,” which carries a substantially different connotation in ordinary understanding.

Appellant contends that when a person goes to a doctor for a physical examination (frequently referred to as a “physical”), she expects only to be tested physically, without any corresponding analysis of her mental status. (Appellant’s Br. 13.) This argument is erroneous for three reasons. First, a reasonable person reading the Policy would not read the policy provision in such a limited fashion. The words “physical examination” in the caption are elaborated upon in the text. (E. 30.) The text and title together make clear

that a connection exists between the right to examine and the claim that is pending. No reasonable reader would think that all that was entailed by such an examination is a standard physical examination, divorced from the claim at issue. *See Kay v. Aetna Cas. & Sur. Co.*, 152 So.2d 198 (Fla. App. 1963) (insured was required to submit to x-rays by insurer's physicians in connection with accident insurance claim). Indeed, the narrow construct appellant seeks to impose upon the Policy is entirely nonsensical and at odds with the complete text of the Policy.

Second, appellant's argument ignores the fact that many mental conditions manifest themselves through physical symptoms, e.g., the various effects that depression can have on the body. *See National Institute of Mental Health, Depression 4*, (2000) available at <http://www.nimh.nih.gov/publicat/depression.cfm> (Symptoms of depression include decreased energy or fatigue, insomnia, weight loss or gain, restlessness, and "persistent physical symptoms that do not respond to treatment."). For this reason, even if viewed through the narrow prism offered by appellant, physical examinations may well delve into recognized mental conditions and thus, at some point, cross over into the realm of mental examinations.

Third, appellant is in error in suggesting that a standard physical examination excludes a mental examination. Indeed, medical schools and hospitals, in defining the elements of a complete physical examination, include a mental status exam ("MSE"). *See University of California, San Diego School of Medicine, A Practical Guide to*

Medicine, The Mental Status Exam, <http://medicine.ucsd.edu/clinicalmed/mental.htm> (last visited Dec. 4, 2006). While administering a physical examination, a doctor is expected to pay attention to the patient's demeanor, look for physical symptoms of his mental state, and ask specific questions about the patient's thoughts and feelings in order to perform a full diagnosis. *Id.* Through proper use of the MSE, many forms of mental illness can be diagnosed merely from a "physical examination." *See id.* On the basis of a complete physical evaluation, general practice physicians can, and often do, prescribe mood-altering drugs (e.g., antidepressants) to treat mental conditions. *See id.* Standard physical examinations also include neurological tests, which gauge the more basic cognitive and reactive functions of the brain. *See* University of California, San Diego School of Medicine, *A Practical Guide to Medicine, The Neurological Examination*, <http://medicine.ucsd.edu/clinicalmed/neuro2.htm> (last visited Dec. 4, 2006). This form of testing further demonstrates that no bright line divides physical and mental examinations.

3. Maryland Law Does Not Support Appellant's Position

Appellant argues that, because Maryland law occasionally uses the phrase "mental and/or physical examinations," this evidences a clear distinction between the two types of examination. (Appellant's Br. 14-15.) Although all the statutes cited include some variant of the phrase "physical or mental examinations," none of the statutes cited defines "physical or mental examinations." (*Id.*) Moreover, virtually any medical condition will

fall within the broad scope of “physical or mental examinations.” This language, therefore, provides no guidance for the Court in ascertaining whether the General Assembly actually intended to draw some form of distinction between physical and mental examinations.

Appellant also contends that the difference between the statutory privilege that attaches to communications between a psychiatrist or psychologist and a patient, *see* Md. Code Ann., Cts. & Jud. Proc. § 9-109(b) (2006), and the absence of any privilege for communications between physicians and patients, *see Butler-Tulio v. Scroggins*, 139 Md. App. 122, 774 A.2d 1209 (2001), supports her interpretation of the Policy. (Appellant’s Br. 15-16.) According to appellant, this distinction supports drawing a distinction between mental and physical examinations. (*Id.*) This argument, however, cannot be accepted because the privilege extends to communications between a psychiatrist/psychologist and a patient, regardless of the type of examination conducted. Stated differently, the presence of privilege depends on the status of the health care provider (psychiatrist or psychologist), not the nature of the examination (physical vs. mental). Thus, the law of privilege provides no support for appellant’s position.

4. Subsequently Issued Insurance Policies Cannot Alter
The Interpretation Of The Policy At Issue

Appellant contends that Provident's subsequent issuance of a completely different policy to another insured, which refers to a "psychiatric" examination, is relevant to this Court's consideration and interpretation of the policy provision mandated by statute. The only document governing the relationship between appellant and Provident is the Policy. *See Kendall v. Nationwide Ins. Co.*, 348 Md. 157, 169, 702 A.2d 767, 770 (1997) ("An insurance policy is a contract between the parties, the benefits and obligations of which are defined by the terms of the policy."); *Mayor of Baltimore ex rel. Lehigh Structural Steel Co. v. Md. Cas. Co.*, 171 Md. 667, 672, 190 A. 250, 253 (1937) ("[P]ersons are only bound by the contracts they make, and are not bound by contracts they do not make."). Appellant cannot avoid her obligations under the Policy by relying on policy language found in a different policy issued to another insured.

The fact that the Policy is unambiguous precludes appellant from relying on extrinsic evidence to ascertain the Policy's meaning. *See Kendall*, 348 Md. at 170 (citing *Pac. Indem. Co.*, 302 Md. at 389) (stating that a court must find a contract ambiguous before it may consider extrinsic evidence as an aid to determining the parties' intent). A different policy issued to a different insured, therefore, proves nothing with respect to appellant's claim. *See Kendall*, 348 Md. at 165.

In any event, the policy appellant relies on differs substantially from her Policy. (E. 39-69.) As a threshold matter, the policy forms are different; appellant's policy is

form no. 338, and the comparison policy is form no. 600. Also, appellant's policy (January 30, 1995 (E. 14)) was issued over eight years before the comparison policy (October 2003 (E. 40)). Although each policy received the Maryland Insurance Commissioner's approval, the individual serving as the Commissioner in 1995 did not hold that office in 2003. *See Md. Commissioner Steven Larsen Joining Law Firm's Baltimore Office*, Insurance Journal, May 30, 2003, available at <http://www.insurancejournal.com/news/east/2003/05/30/29398.htm> (explaining that Steven Larsen was Maryland's Insurance Commissioner from 1997-2003). The fact that the comparison policy references "psychiatric examination," therefore, illustrates nothing more than the existence of different perspectives on different forms and/or distinctly different standards employed by different Insurance Commissioners. Thus, even if the comparison policy were relevant, it would provide no basis for drawing the inference suggested by appellant.

F. Provident Had No Duty To Alter Or Add Terms To The Policy

Appellant claims Provident failed to fulfill its duty under the statute because it did not include the words "mental examination" in the Policy. This argument fails for three reasons. First, the language in the Policy is broad enough to include mental examinations. Provident had no affirmative duty to seek modification of the language mandated by statute when, as here, the plain language of the Policy confers the right to require a mental examination. Appellant, therefore, misplaces her reliance on § 15-

202(c)(2) of the Maryland Insurance Article. *See* Md. Code Ann., Ins. § 15-202(c)(2) (requiring an insurer to, upon the approval of the Insurance Commissioner, modify inconsistent provisions required by statute where necessary to make the provisions consistent with the coverage provided in a policy form).

Second, appellant errs in stating that Provident made no changes to the statute's language other than removing references to autopsy. (Appellant's Br. 7.) Although the statutory provision authorizes insurers to examine "the person of the insured," § 15-216, Provident omitted this phrase from the policy, leaving only the more general phrase "have you examined." (E. 30.) This change, as well as the Insurance Commissioner's approval of the change, indicates that Provident intended to retain and did retain the broadest right to "examine" and was not to be limited to "physical examinations."

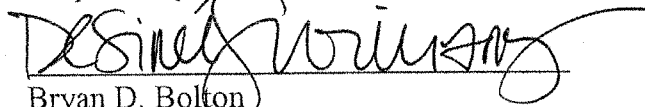
Finally, even if Provident had a duty to attempt to modify the statutory language, any changes to the statutory language would have to be approved by the Insurance Commissioner, and no evidence exists that the changes appellant posits would have been approved. Appellant asks the Court to assume that whatever changes Provident proposed to the statutory language would have been approved. No evidentiary predicate exists for this assumption. Appellant could have established some basis for this position by proving that the Insurance Commissioner, at or around the time this Policy was approved, approved the type of policy language appellant suggests should have been included in the Provident policy form. No sound basis exists for assuming that any language suggested

by appellant would have been approved by the Insurance Commissioner as part of the Provident policy form. Indeed, due to different concerns and standards adopted by various Insurance Commissioners, it is equally likely, if not probable, that the language suggested by appellant would not have been approved because it would have been viewed as unnecessary and/or overly technical.

CONCLUSION

For the reasons set forth herein, Provident Life and Accident Insurance Company respectfully requests that this Court affirm the judgment of the Circuit Court for Baltimore City.

Respectfully submitted,



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STATEMENT OF COMPLIANCE WITH MD RULE 8-504(a)(8)

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