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# Genetic Testing and Disability Insurance: An Alternative Opinion

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**T**he paper by Susan M. Wolf and Jeffrey P. Kahn<sup>1</sup> published in this issue of the *Journal of Law, Medicine & Ethics* notes that we are members of the Working Group on Genetic Testing in Disability Insurance and that the members of the Working Group do not necessarily subscribe to its recommendations. Although we agree with some of Wolf and Kahn's recommendations, we do not agree with recommendations 1, 3, 4, and 5 for individual disability insurance and recommendations 1, 2, and 3 for group disability insurance. We use this paper to delineate our areas of disagreement, but we do not discuss areas such as employment law as they are not our areas of expertise.

First, understanding our roles on the Working Group is important. As members, we provided technical expertise on disability insurance. Our input to the Working Group represents our individual opinions. It does not represent the opinions of our respective companies, the disability insurance community at large, the American Academy of Actuaries, the Society of Actuaries, the American Academy of Insurance Medicine, the American Council of Life Insurers, America's Health Insurance Plans, or any other trade organization. Likewise, Wolf and Kahn represent their own opinions in this *Journal's* issue.

## **Additional Background on Insurance**

Before discussing the areas of disagreement, we want to provide some additional insurance background. When considering genetic testing and disability insurance, the reader must first remember the basic purpose of all insurance products: the collective sharing of money to protect against a risk that may occur to any members of the insured group. Each group member provides money in the form of a premium collected

by the insurance company. The insurance company agrees to use those funds to pay a benefit to the members of the group to whom the insured risk occurs. This provides protection to group members against a risk that may occur and against which they cannot financially protect themselves on an individual basis.

This agreement remains fair in that the premium charged to each individual is related to the likelihood that the insured risk will happen to that individual or to groups of similar individuals. A typical example is automobile insurance for which the premium charged to a teenage driver is higher than what is charged to a middle-aged driver with a good driving record. This discrepancy is accepted as fair because of teenagers' increased likelihood of being involved in an accident due to their driving inexperience.

The process of underwriting an insurance application involves assessing the risk that a claim will be made. For those insurance products in which the applicant's health affects this risk, this process is called medical underwriting.<sup>2</sup>

There are two different ways to purchase disability insurance. Individual disability insurance is a contract between the insurance company and an individual, protecting the income of a working person if he or she becomes disabled due to injury or illness.<sup>3</sup> This type of insurance is generally purchased by executives and other professionals with high incomes. Group disability insurance is a contract between the insurance company and an employer and protects the income of all of

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its employees. Group disability insurance is only available to workers whose company purchases it.

The process of group and individual disability insurance underwriting involves an evaluation of many factors such as occupation and financial issues. Individual disability insurance applications are usually medically underwritten,<sup>4</sup> whereas group disability insurance policies are generally not. Exceptions occur when an employee chooses a higher percentage of income to be paid in the event of disability (“buy-ups”) or decides to apply for coverage after the open enrollment period ends (“late enrollee”). We believe that any policy recommendations made concerning individual disability policies should apply equally to the medically underwritten portions of group disability policies (including buy-ups and late enrollees).<sup>5</sup>

Because group disability products are not generally medically underwritten, they usually contain a pre-existing condition clause. This clause is intended to serve some of the medical risk selection function that medical underwriting covers. Pre-existing condition clauses do not permanently exclude from coverage a condition that existed prior to the onset of coverage, but simply exclude the condition for a specified period of time.<sup>6</sup>

### **Discussion Regarding Positions in the Article by Susan M. Wolf and Jeffrey P. Kahn**

We agree with Wolf and Kahn that disability insurers should treat genetic risks as they would actuarially similar non-genetic risks and should rigorously protect the confidentiality of genetic information. However, this is already required under fair trade practice laws and privacy legislation. We agree with Wolf and Kahn that disability insurers should obtain informed consent for any genetic test, should notify an applicant of the reason(s) for rejection or for charging a higher than standard premium, and should educate their personnel on the proper interpretation of genetic information. These are current industry standards for any medical disorder.

However, Wolf and Kahn’s definition of genetic testing is broad because it includes the testing of the product of a gene as well as genetic material. Their definition could be interpreted to include most, if not all, of the laboratory testing currently used by insurance companies; the production of some substances such as cholesterol are probably at least partially regulated by genes. Current legislation limiting the use of genetic testing in underwriting disability insurance has allowed for the continued use of those tests that are currently performed such as cholesterol tests.

In arguing for limitations on genetic testing and information in underwriting disability insurance,

Wolf and Kahn imply that genetic medical information is different than other forms of medical information. Essentially, this is genetic exceptionalism (as mentioned in their paper). We see no inherent difference between genetic medical information and any other form of medical information and believe that they should be treated similarly.

### **Implications**

As medical knowledge increases, more disorders will be found to have some genetic component. Therefore, the end result of Wolf and Kahn’s recommendations to prohibit disability insurers from considering genetic information, at least in the absence of manifestation and diagnosis, would be to ban most medical underwriting of conditions not manifested at the time of underwriting, even though a significant likelihood of their impact on future health existed.

This medical underwriting restriction would result in individual disability insurers not being able to take actuarially justified actions such as increasing premiums or excluding specific conditions on medical information known at the time of underwriting. For group disability insurers, these recommendations would remove the medical underwriting equivalent provided by the pre-existing condition clause because both diagnosis and manifestation are required in Wolf and Kahn’s recommendations.

If Wolf and Kahn’s proposed recommendations were adopted, disability insurance companies would be exposed to the risk of adverse selection, which occurs when the insurance applicant has knowledge that affects the risk of a future claim and does not disclose this to the insurance company. Consequently, individuals with an increased risk of a claim are able to purchase policies at standard premium rates, potentially leading to a higher rate of claim than the insurer’s actuaries anticipated when determining the standard premium. As a result, the product will have poor financial results, causing the company to raise the standard premium.<sup>7</sup> This will have the unintended consequence of limiting the availability of disability insurance.

We believe that Wolf and Kahn have seriously underestimated the risk of adverse selection in their recommendations. We believe that the adverse selection that would result from applicants withholding knowledge of their genetic medical status would lead to a significant increase in standard premiums. We believe that changing pre-existing condition clauses to apply only to conditions that are manifested and diagnosed would have the same effect on group disability insurance rates.

We support the goal of increasing the number of individuals who have disability insurance. However,

we fear that the unintended consequence of the recommendations made by Wolf and Kahn would cause the opposite. As health insurance costs continue to rise, many employers struggle to continue to provide it to their employees in addition to all the other benefits. Any legislative or regulatory action that increases group disability insurance premiums is only going to decrease the number of employers who offer it to their employees as they continue to struggle to control their costs. The number of insurance companies selling individual disability insurance has decreased markedly in the last few years. Any legislative or regulatory action that increases individual disability insurance premiums will also further decrease the number of insurers in this market and the number of individuals who can afford to purchase it.

We expect that as medical knowledge in genetics increases, doctors' abilities to prevent and treat genetically based disorders will similarly improve, which should result in a decreased number of people who lose the ability to perform their own or any occupation. Assuming this occurs, a decrease in the incidence of disability insurance claims with the subsequent lowering of disability insurance premiums could result. We hope that increasing knowledge of genetics will lead to an increased availability of disability insurance as a result of an improvement in the overall health of the general population. Consequently, we fear that any legislative or regulatory action that limits insurance companies' ability to medically underwrite genetic information will result in increased premiums and a decrease in the availability of disability insurance.

## Conclusion

In summary, we believe that there should be a level playing field for applicants and insurance companies. Both parties should have equal knowledge of all information impacting the determination of the risk of claim. Insurance companies should use that information to analyze the future risk of claim in an actuarially justified manner, by providing policies to individuals and employees where risk is fairly shared by everyone.

## References

1. S. M. Wolf and J. P. Kahn, with input from the Working Group on Genetic Testing in Disability Insurance, "Genetic Testing and the Future of Insurance: Ethics, Law & Policy," *Journal of Law, Medicine, & Ethics* 35, no. 2, Supplement (2007): 6-32.
2. See J. H. Dodge, "Predictive Medical Information and Underwriting," *Journal of Law, Medicine & Ethics* 35, no. 2, Supplement (2007): 36-39, in this issue for a discussion of medical underwriting.
3. The exact definition of disability varies depending upon the specific contract. See for sample language.
4. Some individual disability insurance policies are sold on a guaranteed standard basis to a group of individuals for up to a maximum benefit amount. These policies have risk characteristics that are similar to group disability insurance and are not medically underwritten.
5. If recommendation 1 for group disability insurance did not apply to the medically underwritten portions of group disability insurance policies, we would agree with it.
6. See Dodge, *supra* note 2, for a discussion of pre-existing condition clauses.
7. *Id.*; D. Christianson, "Disability Income Insurance: The Private Market and the Impact of Genetic Testing," *Journal of Law, Medicine & Ethics* 35, no. 2, Supplement (2007): 40-46, in this issue; and American Academy of Actuaries, *Issue Brief: The Use of Genetic Information in Disability Income and Long-Term Care Insurance* (Spring, 2002) for a discussion of adverse selection.