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JOEL RAY, MD

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

JOEL RAY, MD., Plaintiff, vs. PROVIDENT LIFE AND ACCIDENT INSURANCE COMPANY, Defendant.	CASE NO: 3:19-cv-00759-JAH-WVG **PLAINTIFF'S MEDIATION BRIEF** June 18, 2019: 9:30 a.m. JAMS Irvine Office 5 Park Plaza, Suite 400, Irvine, CA 92614 Mediator, Hon. Margaret Nagle, (Ret.)

Dr. Joel W. Ray respectfully submits his mediation brief. Dr. Ray, his wife, Patricia Ray, and his attorneys, Matt Davis and Glenn Kantor, will attend. This is an action for recovery of long-term disability benefits, which is governed by California state law. Plaintiff has asserted claims for breach of contract and breach of implied covenant of good faith and fair dealing. Plaintiff seeks past and future benefits, damages for emotional distress, an award of attorneys' fees and punitive damages.

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INTRODUCTION

Dr. Ray, when still a young neurosurgeon in residency in California, purchased an individual non-ERISA private long-term disability insurance in case something in the future prevented him from performing his chosen occupation of neurosurgery. He pays premiums for 30 years during which nothing goes wrong; he sees patients, evaluates their need for surgery, and operates on them, in many cases saving their lives. The procedures he performs are precise and exacting and include surgeries on the brain and spinal column. When the neurosurgeon is 63, he is diagnosed with age-related macular degeneration, a progressive condition that will inevitably deprive him of his central vision. He experiences intermittent blind spots and difficulty adjusting to differences in light. Yet he continues to perform surgeries, adapting to his visual problems by using a microscope more of the time, while seeking out cutting edge treatments.

When Dr. Ray is 67 years old, he schedules an appointment with his retinal specialist, a world renown Harvard physician, because he is having more trouble seeing during surgeries. The specialist instructs him to stop operating until they meet. The hospital bars him from performing surgeries until the specialist clears him to do so. However, after his next examination, rather than clear him to resume his duties, the specialist does the opposite; **he explains to his patient that it is no longer safe for him to operate – it is time to stop.** The specialist then writes a short letter, making his opinion clear: "he is not **safely** able to continue to render

surgical care for patients." The neurosurgeon is terminated from his employment based on his disability, and a plan is agreed upon to transition the surgical patients to other neurosurgeons. Dr. Ray applies for long-term disability benefits. Because he is over 65, it will only pay him for two years. UNUM, the insurer who had quite willingly accepted premiums for 30 years, shockingly denies the claim. From UNUM's financially self-interested position, its denial is incontrovertible evidence of its putting its own interests ahead of that of both its insured and the general public. From UNUM's perspective, the surgeon's concern for his patients was premature. The surgeon's eyesight was not quite bad enough; he jumped the gun on disability, he was fine to continue operating notwithstanding his deteriorating vision. As such, UNUM asserted that no benefits were due.

Moreover, UNUM being UNUM, it went above and beyond to protect its own financial interests. Even though he stopped working at the mandate of his hospital administration, UNUM went to the next step and terminated Dr. Ray's coverage as he had "voluntarily" ceased to work on a full time basis. So, even though if working, his coverage would remain in effect until he was 75, UNUM made sure that if another claim was submitted down the road, theoretically after Dr. Ray had harmed a patient due to his failing eyesight, and another claim was submitted, UNUM could avoid liability because coverage would have been terminated. From UNUM's somewhat warped perspective, it is possible to have your cake and eat it too.

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1. THE POLICY

Dr. Ray's policy, which dates to 1988, is known in the industry as a "Cadillac" policy.[1] He originally purchased it from Provident Life & Accident Insurance Company, which became part of Unum. (255). It was non-cancellable and guaranteed renewable until age 65. (255). Dr. Ray did renew the policy after he turned 65. By the time he claimed disability, he was 67 and because of his age, the policy would only pay him two years of benefits for being Totally Disabled. Although Dr. Ray lives and had worked for many years in Missouri, the policy was offered and issued in California and is governed by California law. (593).

To receive disability benefits the insured must be Totally Disabled. *Total Disability* is defined as follows:

> *Total Disability or totally disabled means that due to Injuries or Sickness:*
>
> *1. you are not able to perform the substantial and material duties of your occupation:*
> *2. you are receiving care by a Physician which is appropriate for the condition causing the disability.*
>
> *your occupation means the occupation (or occupations, if more than one) in which you are regularly engage at the time you became disabled. If your occupation is limited to a recognized specialty within the scope*

[1] *Merrick v. Paul Revere Life Ins. Co.,* 594 F. Supp. 2d 1168, 1176 (D. Nev. 2008) (" Under the terms of the policy Merrick was entitled to benefits, if, due to illness or injury, he was unable to perform the material and substantial duties of his occupation. The policy does not require the existence of a particular injury or illness or even any diagnosis. If disabled from his occupation under the policy Merrick was entitled to benefits of $12,000 per month . . . Merrick's policy was one of the "Cadillac" policies that disability insurers had sold in the 1980's and 1990's to doctors, lawyers, and other professionals.")

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of your degree or license, we will deem your specialty to be your occupation.

(RAY UNUM CF 126)[2] Sickness is defined as *"sickness or disease which is first manifested while your policy is in force." Id.* There is no dispute that Dr. Ray suffers from sickness. Mr. Ray's policy was enhanced by a provision entitled, "CARE BY PHYSICIAN REQUIREMENT LIBERALIZED," which clarifies that the requirement to be receiving care of a physician is waived "when continued care would be of no benefit to you." (299).

The policy is simple and is notable mostly for what is does NOT include. It does NOT include an objective evidence standard of proof. [3] It does NOT include a self-reported symptom limitation, as some more modern Unum policies do.[4] It does NOT require that there be a diagnosis.[5] Notably, it does NOT require a claimant or his doctor to frame his proof in terms of "Restrictions and Limitations" (a/k/a "R&Ls").[6] It does not require that the insured be unable to perform an occupation

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[2] Hereinafter, all citations to the Bates numbered claim file will use the number only.

[3] *Merrick v. Paul Revere Life Ins. Co.,* 594 F. Supp. 2d 1168, 1170 (D. Nev. 2008) ("Another of the tactics that Provident implemented was its practice of claim objectification. Through its practice of imposing objective evidence requirements on its insureds, when its policies contained no such standard, Provident sought to defeat their claims.")

[4] Regardless, Unum is precluded from using a self-reported symptom limitation in California. The CSA reads, **"Respondents shall discontinue application of the "self-reported condition" provisions in *California Contracts* . . . " CSA**

[5] See FN 1.

[6] Some Unum policies do require this. See e.g., *Payzant v. UNUM Life Ins. Co. of Am.*, 402 F. Supp. 2d 1053, 1056 (D. Minn. 2005)("Your proof of claim, provided at your expense, must show: that you are under the regular care of a physician; the appropriate documentation of your monthly earnings; the date your disability began; the cause of your disability; the extent of your disability, including **restrictions and limitations** preventing you from performing your regular

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that is adjusted to accommodate his impairments. None of these potential barriers to obtaining benefits exists in Dr. Ray's policy.

On the other hand, the policy does include the following provision, the clear purpose of which is to ease the way for Unum to conduct a reasonable investigation:

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

(139).

It should be noted that the policy provides for "Presumptive Total Disability" if the insured suffers "the entire and permanent loss of . . . "sight of both eyes . . ." (145). While Dr. Ray is not claiming that his disability is entitled to such a presumption, when one reads the policy as a whole it is clear that a Total Disability claim exists somewhere on the continuum between completely unimpaired vision and Presumptive Total Disability, or loss of sight. Where a neurosurgeon needs to be on this continuum to stop working and successfully claim his disability benefits is at the heart of this dispute. Dr. Ray and his world renown retinal specialist have provided substantial evidence of his condition, and the symptomology which establishes beyond even a reasonable doubt that it was no longer safe for him to perform neurosurgery on patients, and therefore his claim for benefits could not be denied in good faith. However, in the face of the incontrovertible evidence, Unum

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occupation; and the name and address of any hospital or institution where you received treatment, including all attending physicians.")

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has responded by stating "there is no support for restrictions and limitations that would prevent you from working in your occupation." (577). If the policy terms mandated that before obtaining benefits Dr. Ray was required to maim or kill a patient, then Unum would be correct. But fortunately for both Dr. Ray and his patients, it is not.

In addition to the policy provisions discussed above, there are standards, superimposed on this policy, that govern Unum's claims handling practices due to its historical agreement with the State of California. This includes a more favorable definition of disability: "unable to perform **with reasonable continuity** the substantial and material acts necessary to pursue your usual occupation **in the usual and customary way**" (CSA)(Emphasis added). Unum understands that it is bound to apply this definition, as it sent Dr. Ray a letter notifying him of it, though - paradoxically - it was sent only **after Unum had already denied his claim**. (612-615).

2. <u>DR. RAY'S OCCUPATION AND HOW HE PERFORMED IT.</u>

Unum does not dispute that Dr. Ray's occupation is the medical specialty of neurosurgery. Unum never questioned Dr. Ray's motives in stopping performing surgeries, likely because Dr. Ray's pride in and enjoyment of his work was clear. (317). He practiced until he was 67, past retirement age. There was no reason for Dr. Ray's termination from employment other than his medical disability. Dr. Ray

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likely could have made a meritorious claim for LTD earlier, but instead he strove to find ways to continue to safely perform surgery despite his symptoms.

The sole question is whether Dr. Ray was able "to perform **with reasonable continuity** the substantial and material acts necessary to pursue [his] usual occupation **in the usual and customary way.**" In order to make a good faith determination on this question, it is necessary to understand how neurosurgery is practiced. Unum's apparent intentional failure to do so in this case was egregious. No one at Unum either consulted with an actual neurosurgeon regarding occupational, or even applied his/her common sense (we acknowledge that "common sense" and UNUM are often oxymorons) about the practice of neurosurgery to Dr. Ray's claim, much less the information they had deliberately collected about the specialty. Even the ophthalmologists Unum used in this case – who should know something about operating on small parts of the human anatomy - avoided any discussion of the impact that even a minor visual impairment would have on a neurosurgeon. Rather, UNUM chose to "see no evil" and somehow manage to commit bad faith in denying what should have been a "no brainer" (pun intended) claim.

Turning to the occupational specialty of neurosurgery, it is a given that it is extremely risky and depends on being able to see minuscule things under circumstances of great stress. It is not an overstatement to say that patients' lives hang in the balance. Nonetheless, a picture is worth a thousand words. The

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Internet, a resource available to everyone including Unum claims handlers,[7] provides a great deal of insight. A easily found internet video shows a neurosurgeon implanting a spinal cord stimulator into a patient's spine: https://www.youtube.com/watch?v=xMQfElhBw60. Aside from the obvious –the precision is required to avoid paralyzing the patient – the video also shows that a surgeon needs to alternate his gaze between the surgical field and a monitor. The surgical area is in dim light, even with a spotlight illuminating it. The monitor, showing the images from the fluoroscope, is bright.[8]

Another video demonstrates a micro neurosurgery to remove a tumor from a patient's brain. https://www.youtube.com/watch?v=P_vE4fymAdw. Yet another shows a neurosurgeon clipping off a patient's brain aneurysm, a surgery that Dr. Ray frequently performed. https://www.youtube.com/watch?v=VNuYckAvFdc. These images speak for themselves. Unum needs to consider what it would be like to perform these procedures with intermittent scotomas (blind spots in one's central vision), fuzziness, or the inability to predict whether these conditions will appear or not in a given day, time of day, or hour. It failed to do so. Unum needs to consider these images now or imagine what will happen when a jury considers them. (the question which the jury will never have to be asked, but will with 100% certainty ask themselves, "would I let this doctor operate on me or mine? Not a chance!)

[7] See, e.g., (309 – 314).

[8] This is important because Dr. Ray tried to explain this at least twice during the claims process and was not heard. (88, 317).

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Even where Unum collected information on the details of Dr. Ray's occupation, it proceeded to ignore them. Unum sent Dr. Ray a special application form for physicians that instructs "For Group-sponsored policies – the employer should complete this form. For Individual policies – the insured should complete this form." (43). This suggests that Unum considers the individually insured physician to be an expert on his job duties and how they are customarily performed. For some reason, Unum sent a similar form to Dr. Ray's employer. (347). These forms were poorly designed and did not capture some of the critical information. For instance, in the "Environmental Conditions" section, the forms fail to inquire about lighting conditions, an area critical to a proper understanding of how Dr. Ray performed his occupation and how his vision kept him from doing so in the usual and customary manner. Nonetheless, these forms were one possible source of information about Dr. Ray's occupation. Another was a follow-up telephone conversation between Unum's Erin Sabatini and Dr. Ray and his wife. (316-319). Although Ms. Sabatini's questions to Dr. Ray were not aimed at eliciting information about the surgeries he performed and the conditions under which he performed them, Dr. Ray did, nonetheless, volunteer important information about his neurosurgery practice which did manage to find its way into the file.

Based on the information it collected, Unum knew that Dr. Ray performed "brain, spine and peripheral nerve surgeries." (45). It knew that he performed surgeries for 16-20 hours per week "under stress when confronted with emergency,

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critical unusual or dangerous situations." (44-45). It knew some of the CPT codes for surgeries Dr. Ray performed.[9] (58, 304). It knew that a given surgery could last for 6 -10 hours. (88). It knew that he had to maintain speed while working and that fine manipulation was required "frequently." (45). It knew that hand/eye coordination was a key component of his occupation – although this is obviously true. (347). It also knew that he had to make "independent judgments" as part of his occupation. (45). It knew that Dr. Ray was exposed to radiation in his occupation because of the use of "in field fluoroscopy." (46). It knew that in the use of fluoroscopy, dark to light adjustment was required. (88, 317).

Unum also knew that while he was still practicing neurosurgery, Ray had already stopped performing his occupation in its usual and customary way due to his vision problems. He was performing more surgeries with microscopes and he was leaning into the radiation field of the fluoroscope. His own exposure to unusual levels of radiation was the cost Dr. Ray had been willing to pay to continue to operate while attempting to safely accommodate his declining vision.

[9] The collection of CPT codes in the claim filed appears to be used by UNUM to determine if he remained employed on a full time basis rather than to ascertain his occupational duties, as no one at UNUM ever considered what the CPT Codes meant.

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3. DR. RAY'S MEDICAL CONDITION

In 2014, at age 62, Dr. Ray was diagnosed with early stage age-related macular degeneration ("AMD")[10] in both of his eyes. (354).[11] His disease is the dry form. (466). AMD is a progressive disease that causes the sufferer to slowly lose central vision and affects his ability to see fine details. https://www.aao.org/eye-health/diseases/amd-macular-degeneration. *See also*, *Currier v. Thompson,* 369 F. Supp. 2d 65, 65–66 (D. Me. 2005)("Macular degeneration is a degenerative condition of the area of the retina called the macula, which controls central vision . . . This pernicious condition can cause blurring or blank spots except in peripheral vision. *Id.* There is no known cure."). The American Academy of Ophthalmology provides an example of how loss of central vision might affect someone - "imagine you are looking at a clock with hands. With AMD, you might see the clock's numbers but not the hands." *Id.* AMD has no cure. *Id.* The formation of drusen[12] is one of the hallmarks of AMD. *Id.* Unum never questioned Dr. Ray's diagnosis of AMD.

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[10] In the claim file Dr. Ray's disease will be called age-related macular degeneration, AMD, ARMD, and bi-lateral nonexudative age-related macular degeneration, all of which refer to the same thing.

[11] OU is the ophthalmic term for "each eye," meaning both eyes. This term is used throughout the medical records. https://medical-dictionary.thefreedictionary.com/OU

[12] Drusen, from the German word for node or geode, are tiny yellow or white accumulations of extracellular material that build up between Bruch's membrane and the retinal pigment epithelium of the eye. The presence of a few small drusen is normal with advancing age, and most people over 40 have some hard drusen. However, the presence of larger and more numerous drusen in the macula is a common early sign of age-related macular degeneration.

Dr. Ray had been complaining about certain aspects of his vision, including less visual acuity at a distance and light perception, seeing a golf ball and "coming into the dark form the light." (351). The first symptom he noticed was "going to church," where he had to adjust from light to dark. (317). This light to dark problem affected his ability to perform surgery, something he tried to explain to Ms. Sabatini. In his application for LTD benefits Dr. Ray explained that he saw an ophthalmologist in 2014 because he was "experiencing intermittent scotomas and accommodation issues." (47). The diagnosis of AMD was made by his primary ophthalmologist in Cape Girardeau, Missouri, where he lived. The diagnosis was made on the basis of photography and angiography, and not on the basis of the standard visual acuity test, i.e., his ability to read letters on a chart at a distance. (352-356). Dr. Ray's conventional visual acuity tests have never been alarming; that is not the way in which AMD affects him.

Dr. Ray's deceased father had suffered from AMD, so Dr. Ray had an understandable amount of concern about his future as a neurosurgeon. He took steps to assure himself that he would receive the best possible care and treatment. His father had been treated at the Massachusetts Eye and Ear Infirmary ("MEEI") in Boston. Wanting the best treatment, Dr. Ray turned to a retinologist[13] at MEEI. It is easy to see why Dr. Ray, himself a physician, chose as his retinologist, Dr.

[13] The macula is part of the retina, hence the need for a retinologist. https://www.aao.org/eye-health/diseases/amd-macular-degeneration.

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Demetrios Vavvas, M.D. PhD. Dr. Vavvas' 43 page resume is attached as **Exh. A** to this brief. Despite the inconvenience of having to travel over 1,000 miles from Missouri to Massachusetts to see Dr. Vavvas, Dr. Ray started to treat with Dr. Vavvas in 2014 and continues to do so at the present time. Fully aware that there is no cure for the condition, Dr. Ray wanted to do everything within his power to stem the progression of the disease, largely to ensure that her could continue to work in the occupation which he both loved and excelled.[14]

By June 30, 2015 Dr. Vavvas' records show that Dr. Ray was having symptoms of "dark adaption, golf ball viewing and detecting motion most likely related to the AMD." (502). Dr. Vavvas noted "recently more trouble with contrast and illumination level changes." *Id.* Dr. Vavvas' complaints correlated with "confirmed abnormality on testing 12/2015." (502,369). Dr. Vavvas noted the large confluent drusen in both eyes as well as RPE changes. (502). RPE stands for retinal pigment epithelium, and damage or death of theses cells is also a hallmark of vision loss due to AMD. https://www.ncbi.nlm.nih.gov/pmc/articles/PMC5989860/.

Treatment at MEEI was rewarding for a time, as Dr. Ray's disease actually improved from an objective standpoint. (488, 482). Presumably this was due to his taking a high dose of Lipitor, a statin. (466, 318). Dr. Ray and his wife were "ecstatic" when he was offered the Lipitor. (318). Dr. Ray appears to credit his

[14] Dr. Vavvas is both a treating clinician, and a committed researcher. He has been experimenting with the use of statins to slow the progression of the disease.

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ability to maintain his driver's license to the use of Lipitor. *Id.* However, even with this acknowledged improvement, Dr. Ray still reported blind spots (scotomas). The medical records contain the following description:

> vision is the same, or better. When I look at a grey wall I see the Central scotoma. When I close my eye and squint in a twilight situation it looks like a yellow bright light and when I open it's the same image but looks black, always symmetrical. When I squint they merge. When I do cardio it looks like it gets better. On Memorial day it had gotten worse, while I was stressed. When I got back home and went to Yoga, I noticed it again. This morning I started noticing the holes, symmetrical and it might change in the order of days . . . changed to Lipitor and notice better changes to the Scotoma.

(479, 471).

In his initial conversation with Ms. Sabatini Dr. Ray similarly explained,

> I get these blind spots and they are called scitomas [sic]. He said so I get light to dark problem which is the most obvious to me, so if I am under a fluoroscopic monitor I kept having to get closer and closer and it got to the point that I could only operate a microscope and with a light because I couldn't change and so I became very proficient with doing surgeries with the microscope. He said here is an example, so if I am staring at the computer or monitor for a while and go to look at Patty's pretty face it is temporarily blurred.

(318). In other words, Dr. Ray was experiencing the telltale blind spots of AMD, unpredictably, and was consistently having trouble with adjusting light to dark and was therefore struggling to perform surgeries. While the argument is becoming a bit redundant, who wants to have brain surgery performed by a surgeon who was struggling with his vision?

Dr. Ray's problems continued to be unpredictable. (another fabulous quality patients are certainly seeking in their neurosurgeon: "unpredictability.") At the end of 2017 Dr. Ray reported that his visual acuity "**vacillates**." (471). Dr. Vavvas

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wrote, "Pt states the central scotomas he used to experience upon awakening have dissipated. Pt notices that **they will return** when diet and exercise is off." (471).

Dr. Ray's complaint of trouble adjusting from light to dark and difficulty tracking a golf ball continued and is mentioned in every medical record documenting his MEEI visits. This includes his visit to Dr. Kevin Houston, an optometrist who tried to help Dr. Ray with his dark to light adaptation on December 28, 2017. He noted "macular degeneration with symptoms of photostress, consistent with poor dark adaptation scores previously 12/2015." (369).

By 7/6/18 Dr. Ray stated his vision was "slightly improving" but he also reported "**more defined scotomas in both eyes. Noticed Two months**." (463).

In 2018 Dr. Ray's concern about his symptoms related to his ability to perform neurosurgery was mounting. "[He] began noticing **increasing difficulties in my eye accommodations, acuity and increasing central scotomas**." (48). While on vacation in the summer of 2018 Dr. Ray called Dr. Vavvas, saying that the Lipitor had stopped working. (318). Whatever else they may have discussed, ***Dr. Vavvas insisted Dr. Ray stop performing surgeries until he could examine him. (48).*** Notably, Dr. Vavvas did not make any ultimate pronouncements without the benefit of an in-person exam, meaning that he was unwilling to permanently sideline Dr. Ray without performing objective tests.[15]

[15] As compared to UNUM, which was perfectly happy foisting Dr. Ray onto the unsuspecting public, without the benefits of an IME, in order to safe itself a few

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This appointment took place on September 21, 2018. (48, 459). Dr. Vavvas recorded "symptoms of dark adaption with confirmed abnormality on testing 12/2015, issues with detecting motion and adapting to light environment as well as microscotomas most likely related to the AMD." (459). He also wrote, "Pt state VA OU **is more fuzzy especially in the morning**, and in the light. Pt reports **there's still central scotomas in OU**. The scotomas are affecting his VA OU. **Pt is concern [sic] about functional aspect of his vision**. Pt thinks a lot of the changes in vision is due to stress." (456). Dr. Vavvas did not confirm that the changes were "due to stress." He performed a battery of tests and explained that there was no solution to the deterioration that had taken place. He wrote, **"atrophic changes of AMD are unfortunately not amenable to treatment currently. Patient having trouble with his vision from contrast sensitivities issues, dark spots, distortion. Difficulty with his fine neurosurgical work."** (459). Dr. Vavvas suggested to his patient that he would be negligently performing his duties as a surgeon, if he continued. (318). Next, on October 1, 2018, Dr. Vavvas wrote a letter saying:

> **Dr. Joel Ray has been diagnosed with dry age related macular degeneration in both eyes. Dr. Ray has had a decline in vision in one eye significant enough that, in my medical opinion, he is not safely able to continue to render surgical care for patients, which is a substantial and material duty of his occupation.**

(51)(Emphasis added).

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dollars in premiums payments. This is the stuff upon which punitive damage awards are built.

Dr. Vavvas also executed an Attending Physician Statement, and apparently found it puzzling, as he had already written the above letter. (112). When asked about Dr. Ray's "restrictions" he reiterated his statement from the letter in which he had **restricted** Dr. Ray from performing neurosurgery. The question asking for Dr. Ray's "limitations" must have seemed ridiculous to Dr. Vavvas; since he had already totally **restricted** Dr. Ray from his core occupational activity of performing neurosurgery, his *limitations* could not have mattered. Accordingly, Dr. Vavvas once again plugged in the text of his letter. Importantly, when asked to **support his opinion with "clinical findings**," he wrote, "Dilated eye exam with ophthalmology scans such as OCT and Optos." *Id.*

Dr. Ray's career as a surgeon was over. He never performed another surgery, and he was terminated from his position as a result of his disability. (397). He filed a disability claim under the Provident policy he had purchased 30 years earlier.

4. <u>UNUM'S CLAIM HANDLING</u>

Unum's approach to Dr. Ray's claim directed towards a claim denial from the outset, and in typical UNUM fashion, it refused to change course. It appears that the claim was slated for denial by means of a process that generated the wrong questions and a produced a pre-determined conclusion. Instead of focusing on whether Dr. Ray could predictably perform the duties of his occupation, Unum's claims' handling and medical personnel focused on "what suddenly changed to justify new restrictions and limitation as of the date September 21, 2018."

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Ms. Sabatini began the process early on, before she even received Dr. Ray's medical records:

> Question/purpose of the forum. IFD: 1. Is there support for R&Ls as stated by the insured and AP? 2. If so, duration? Prognosis? 3. If not, what is needed?

(315). Exactly what a "forum" is and how similar it is to the Unum "roundtables" of yore, is a subject for discovery.[16] It is also unclear why a "forum" was needed at this time, when Unum had not collected all the information necessary to make and informed claims decision. The opportunity to decide the claim based on the application, Dr. Vavvas' APS and the records was already foreclosed, and the die was cast.

A few days later Ms. Sabatini spoke with Dr. Ray and his wife. (318). Her questions steered clear of information that would have benefitted UNUM in making a good faith and fully informed claims decision. The central question Ms. Sabatini was tasked with deciding was whether Dr. Ray had established that his vision problems impacted his ability to perform his surgical duties in the usual manner. Inexplicably, Ms. Sabatini never asked Dr. Ray to explain how exactly how he performed his surgeries and how his vision difficulties impacted his abilities. For instance, in Ms. Sabatini's telephone conversation with him, Dr. Ray described his

[16] See, e.g., *Leavey v. Unum Provident Corp.,* 295 F. App'x 255, 258 (9th Cir. 2008)(describing evidence of Unum's "evil mind," including how Unum used roundtables, "the sole purpose of which was to close expensive claims; that Unum sought to influence the opinions of independent medical examiners; that Unum misrepresented the opinions of those independent medical examiners in its letter to Leavey announcing the closing of his claim.")

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last surgery performed and how it saved the patient's life. (317). Ms. Sabatini's reaction was "that is amazing." *Id.* She did not follow up by asking him to tell her about the surgery, under what conditions her performed it, or what his challenges were in performing it or how his current vision difficulties might prevent him from performing similar surgeries in the future. (317).

Instead, she asked him filler questions, the answers to which were included in the material already in her file. Ms. Sabatini began what would become a long period of perseveration regarding what date would constitute Dr. Ray's date of disability: "I asked the insured to explain the claim DOD of September 21, 2018" whereas he had listed the last day worked as August 31, 2018. Theses answers had already been given to UNUM by Dr. Ray, and were already in Ms. Sabatini's file. Nevertheless, Dr. Ray again explained that he had last performed surgery in August, but Dr. Vavvas had disabled him in September.

The forum included a collection of employees, none of whom had any knowledge beyond that of the average layperson concerning the workings of the eye, or the occupational duties of a neurosurgeon. The initial forum did not even include an M.D.!!! The forum included a UNUM vocational assessor, who ludicrously summarized the practice of neurosurgery with the following statement: "VOCATIONAL: The CPT report for the time period of 8/17 – 8/18 suggests that the insured was working in a full time capacity prior to DOD. He performed a variety [sic] spinal and cranial procedures. These procedures can take several hours

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to complete." (525). The claim file shows that no more attention was ever given to Dr. Ray's occupation of neurosurgeon, nor the vision required to perform the occupation in the usual manner. Surgeries that last 6-10 hours now lasted "several hours." The hours per week spent in surgery – 16-20 – was not mentioned. Highly detailed work that requiring the ultimate in hand eye coordination and manual dexterity became "a variety of spinal and cranial procedures," without more. The lighting requirements that Dr. Ray was adamant about were not mentioned. The radiation field into which Dr. Ray was leaning in order to see during surgeries was ignored. This distillation of Dr. Ray's occupation did not include any of the information that Unum had obtained from him or his employer. Nor, as is discussed above, did it include any information that is commonly known or can be intuited about the practice of neurosurgery.

The forum appears to have been an echo chamber. The upshot of this forum was – lack of clarity. Although it was noted that "EE reported more 'fuzziness'" in vision and scotomas in 9-2018" the presence of drusen, and that "EE reported difficulty with fine surgical work and dark spots and distortion," the "NEXT ACTION STEPS" were to "Send to CC for CA to determine **what changed in 9-2018**" (526). A registered nurse, Beth O'Brien (the CC, i.e. the clinical consultant), commented, "[b]ased on the MR. received, the EE has a hx of macular degeneration. The EE was able to function until reported DOD. CC cannot determine if his condition worsened as of 9-2018. R/Ls are uncertain." (529). Ms. O'Brien

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recommended that they "defer to forum with OSP" to ask the very same questions that Ms. Sabatini had posed.

Dr. Jay Rosenfeld, the OSP, was no more qualified, as he specialized in Physical Medicine and Rehabilitation and Pain.[17] He joined the "Forum Discussion" and appears to have taken charge of the claim. The forum discussion does not seem to be recorded – or at least was not released with the claim file – but a "Director/Facilitator" named Allison Weissensee shed some light on what took place:

> MEDICAL: OSP review of retinal specialty records indicate EE had remained stable until 2017 when EEs complaints increased. **Changes are noted** compared to prior exams which may relate to complaints. A letter to the AP would be helpful to understand **if the changes seen in September correspond to complaints** as there is no central vision field testing, nor contrast sensitivity testing. AP contact is recommended to understand EEs complaints and if it is consistent with findings.

(528)(Emphasis added). The problems with this comment are numerous. First, although it appears that Dr. Rosenfeld agreed that the September findings were significant enough and the forum acknowledged that there **were changes** seen in September, the forum seems to be insisting that Dr. Vavvas provide the objective basis for his conclusion. Dr. Vavvas had already done so. (113). As discussed above, the policy does not require objective evidence. The forum suggests some additional testing that could have been done, although the claim was not staffed with anyone who would have known what tests were

[17] It is not clear that Dr. Rosenfeld practices medicine anymore. His credentials are another certain area of discovery.

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appropriate or whether they would benefit the patient if they were performed. Dr. Ray's policy does not require him to undergo medical care that would not benefit him. The forum ignored Dr. Ray's subjective reports.

Dr. Rosenfeld attempted to call Dr. Vavvas and was not able to make contact. It is a reasonable inference that Dr. Vavvas felt he had said all he needed to say and that his time was not best spent talking to Unum employees who could not "understand" his statements or his medical records. The reasons for Dr. Vavvas lack of response don't matter however, since there was nothing missing that Unum needed to make a claims decision.

Dr. Rosenfeld continued to dither and drafted a series of questions for Dr. Vavvas to answer within 10 days. Each of the questions sought either information which was not pertinent to a disability determination, or information which was duplicative of medical evidence already contained in UNUM's claim file. In addition, the information was not solely within the purview of Dr. Vavvas, but could easily have been obtained from a UNUM OSP conversant in the field of retinal ophthalmology.

At a minimum, the questions appeared to come the mistaken notion that Dr. Ray's condition would have resulted in an change as of a certain date, rather than a slow progression of his vision deterioration. The questions were:

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1) Do the changes on OCT in September 2018 correlate to his symptomatic visual complaints?[18]

2) If the changes on OCT correlate with his symptoms, would you expect an abrupt visual change in September 2018 or a more gradual progression of symptoms in Dr. Ray's case?[19]

3) Is there any indication for other diagnostic tests to assess his central vision and contrast sensitivity?[20] Please explain.

4) Did Dr. Ray use Amsler grids to monitor his vision?[21]

5) Is Dr. Ray restricted from driving due to his condition?[22] Please explain why or why not.

6) Is there any treatment available than [sic] may improve Dr. Ray's condition to allow a return to surgery?[23]

Having received no response to his irrelevant questions, Dr. Rosenfeld obtained a paper review by an on-site physician from ophthalmologist, Dr.

[18] Dr. Vavvas clearly thought so, since he based his determination of the objective findings of OCT. (113).

[19] This is irrelevant. AMD is a progressive disease and Dr. Vavvas did not claim that Dr. Ray's disease had sharply deteriorated, only that it was bad enough that he was a danger to his patients.

[20] Dr. Vavvas, a specialist in the disease in question, obviously did not think so. Dr. Vavvas had considered the patient's complaints and it was not until he examined him that he rendered his opinion on the basis of his longitudinal knowledge of the patient and the OCT and Octo scans.

[21] Whether or not Dr. Ray used them, "Amsler" was recorded at every appointment. However, there is no indication that this test - a simple matter of viewing straight lines and reporting whether they look wavy – would provide more information than Dr. Ray reporting on his actual experience of attempting to perform surgery.

[22] Dr. Ray answered this question himself at the beginning of the claim. He had to retest and was allowed to keep his driver's license.

[23] There are no treatments for AMD, as Dr. Vavvas already had discussed in his 9/21/18 visit with Dr. Ray.

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Richard Eisenberg. Dr. Rosenfeld abandoned his questions along with the idea that progressive diseases necessarily result in sudden changes.

Dr. Rosenfeld asked Dr. Eisenberg to "[p]lease comment on the insured's current visual function." However, Dr. Eisenberg apparently knew that his opinion on "R&Ls" on the exact date of September 21, 2018 was not the actual question being asked. At least from his answer that is the obvious conclusion, as he stated: "There does not appear to be clearly new support for visual R and L's as of 09/21/2018."[24] (555).

Dr. Eisenberg's reasons were as follows: 1) Dr. Ray's visual acuity, i.e., ability to read letters on a chart, was fine and satisfies the requirements set out by an in-house VRC; 2) Dr. Ray worked full-time performing surgeries until he stopped; 3) there is no "documentation" of central scotomas, evidence of contrast sensitivity worsening with time; 4) Dr. Vavvas didn't respond to explain his determination. Dr. Eisenberg appears to have been slightly uncomfortable with his own response, so he qualified it:

> It should be noted, however, that ARMD does appear to be present consistently OU on repeated examinations since 2014, and it is known to be a progressive disease. The insured is at risk for a future decline in his corrected central visual acuity in each eye, enlarging central scotoma, and worsening contrast sensitivity. There does not appear to be clear evidence, however, that a significant enough decline in visual functioning took place in 09/2019 [sic] to justify new R & L's. The determination of disability by Dr. Vavvas appears to be more related to an increase in the insured's self-reported symptoms than a change in testing parameters. (556).

[24] New support isn't really an issue. The question was his inability to perform the material duties of his occupation as a neurosurgeon as of the date his treating physician advised him, he could no longer safely perform surgery.

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No one at Unum considered conducting an IME that might generate the test results that Dr. Eisenberg felt were missing. Instead, Dr. Rosenfeld adopted Dr. Eisenberg's opinion and reiterated the fallacy that "the medical records do not support such a decline in functioning in September 2018 to result in new visual R and Ls."[25](558). Dr. Rosenfeld then obtained another paper review. This decision was predicated on the existence of a "disagreement . . . regarding the interpretation of the agreed upon data." *Id.* Where exactly the disagreement lay was not explained, but it seems likely that Unum did not like Dr. Eisenberg's hedging paragraph about the progressive nature of Dr. Ray's disease. When speaking with Dr. Ray about the delay, Ms. Sabatini explained it differently, saying," still no response [from Dr. Vavvas] so he is having second doctor look over the records we have and that I would be in touch as soon as that review is complete." (560). Dr. Rosenfeld's "Next Steps" was to seek a DMO review in order to break the non-existent tie. (558).

The next paper reviewer was Dr. Clifford Michaelson. Although Dr. Michaelson is purportedly an ophthalmologist who was almost certainly trained to perform surgery, he denied knowing the "visual demands of performing neurosurgical procedures."[26] (569). He therefore created his own

[25] UNUM's obsession with "new" R & L's is very telling. It needed some basis to deny the claim, and this was its only avenue.

[26] Based on his training, he is either suffering from dementia, is an idiot, or is an out and out liar. Only his deposition will reveal which he is.

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"minimum" visual demands of "best corrected visual acuity OU and good depth perception." *Id.* This did not include being able to adjust from light to dark. There is no sign that Dr. Michaelson considered the nature of the procedures that Dr. Ray regularly performed as part of his specialty. There is also no sign that he was supplied with the information that Dr. Ray, himself, had supplied regarding how his vision affected his surgical practice. Dr. Michaelson *was* provided with other important prompts, such as that "[[t]he file referred to the OSP ophthalmologist who found that there had been no change in the insured's visual condition as of September 21, 2018 to support any restrictions and/or limitations." (567). Dr. Michaelson's bias was compounded by the fact that he was presented with two choices – to agree either with "the AP opinion or with the Ophthalmologist and GenMed OSP opinions." (566). Not surprisingly Dr. Michaelson agreed with his UNUM paid colleagues rather than the world renown treating physician. (569).

Dr. Michaelson purportedly did not agree with Dr. Vavvas because of the lack of "any data mapping his reported central scotomas provided either on Amsler grid diagrams, Humphrey 10-2 visual fields, or any other means of documenting the presence or absence of central scotomas." (570). Turning to his own made-up visual demands, he also complained that "no depth perception testing nor stereopsis testing was provided in any of the medical records reviewed." *Id.* He also pointed out that Dr. Rays best-corrected visual

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acuity - once again, his ability to read letters on a chart - could not be determined." *Id.* He opined, "without convincing evidence that Dr. Ray's best-corrected visual acuity has significantly declined in the time between July 6, 2018 and September 21, 2018 in either one or the other eye or both, and/or documentation of worsening central scotomoas in one or the other eye of both, in my medical opinion, there is insufficient evidence to support Dr. Vavvas's position with regard to visual limitations for Dr. Ray, and in this I am in agreement with the ophthalmology OSP. If additional data regarding Dr. Ray's best-corrected visual acuity, Amsler grid findings, central visual field findings and/or any other relevant clinical findings become available, I would be happy to review them." (570). Yet, this additional data – whether it was called for or not – would not become available because Dr. Michaelson's recommendation was for "[n]o further medical investigation." *Id.* **And once again, no one at Unum invoked Unum's right to conduct an IME.** Of course, by this time, months had elapsed since Unum's chosen drop-dead date of September 21, 2018, so Unum's dithering had created a Catch-22 for Dr. Ray. Had Unum invoked its right to an IME, it would not have been able to establish what his condition was six months earlier. Unum's fixation on the September 21, 2018 date served the additional purpose of making additional proof impossible to obtain.

Dr. Ray continued to call for updates regarding his claim, and Ms. Sabatini always framed the delay in terms of Dr. Vavvas lack of response. She did not remind Dr. Ray of his right to request and IME, she did not inform him of the tests that the OSPs had suggested, and she did not explain that the question being asked was whether there was support for R&Ls on the specific date of September 21, 2018.

On April 4, 2019, Unum finally denied Dr. Ray's claim both by phone and email. By phone Ms. Sabatini explained to Dr. Ray's wife, "based on the medical records we have there is no support for restrictions and limitations as we did not find that he had a decline in his visual acuity." (582). In her letter denying the claim, Ms. Sabatini became confused. She was unable to accurately describe the process that took place and failed to mention anything about the conclusions of Dr. Eisenberg, as she didn't seem to know which paper reviewer was which. She did however repeat Dr. Michaelson's opinion:

> He stated that there is no testing to show that your best-corrected visual acuity has significantly declined in the time between July 06, 2018 and September 21, 2018 in either one or the other eye, or both, and /or documentation of worsening central scotomas in one or the other eye or both.

(577). The letter also explained his appeal options.

Later, on April 9, Ms. Sabatini sent another letter saying that Unum had failed to advise him of his rights as a California policyholder, which included the more generous definition of disability and the right to request an IME. (612-615). The letter also included an informative paragraph about another

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way that Unum had failed Dr. Ray. It informed him of the type of investigation it had been obliged to conduct about his occupation. It read:

> we will perform a detailed assessment of the work you performed. After determining the duties that are material to the performance of your pre-disability occupation, we evaluated the usual and customary way you performed those duties. We further assess whether the usual and customary way you performed a particular material duty precludes your actual ability to execute that material duty or is solely a reflection of personal or employer preference unrelated to ability. Consideration is given to the amount of time necessary to perform a material duty with reasonable continuity.

(613). Although this definition of disability had not been applied and the "detailed assessment" had clearly not taken place, Ms. Sabatini did not admit to this. The letter again recited the appeal options open to Dr. Ray. The option called "reevaluation" depended on his providing new information. The option called "appeal" could be taken without new information. (613-614). Because Dr. Ray requested immediate reevaluation and Ms. Sabatini did not receive new information, Unum never looked at the claim again. Of course, Dr. Ray was not required to appeal the denial, and one questions the wisdom of allowing an insurer to continue to churn the file, where it had already failed to investigate or apply the proper definition of disability. This lawsuit followed.

5. IMPORTANT LEGAL PRINCIPLES CAST ASIDE BY UNUM.

1. *A Disability Claimant is Entitled to Cease Working and Apply for Disability Benefits Without Demonstrating a Precipitous Decrease is His Medical Condition.*

Unum will not likely dispute that an insured can be disabled and working at the same time, as this concept is deeply imbedded in the federal common law and basic insurance law. *Hawkins v. First Union Corporation Long–Term Disability*

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Plan, 326 F.3d 914 918 (7th Cir.2003)(there is no "logical incompatibility between working full time and being disabled from working full time" as "a desperate person might force himself to work despite an illness that everyone agreed was totally disabling"); *Addis v. Ltd. Long-Term Disability Program*, 268 F. App'x 157, 162 (3d Cir. 2008)(recognizing that employees work beyond their capabilities without defeating their disability claims); *Accord Heffernan v. UNUM Life Ins. Co. of America,* 101 Fed. Appx. 99, 108 (6th Cir.2004) (to infer that claimant's depression was inconsequential because she continued to work is not warranted and does not support a decision to deny benefits), citing *Perlman v. Swiss Bank Corp. Comprehensive Disability Protection Plan,* 195 F.3d 975, 983 (7th Cir.1999) ("Some disabled people manage to work for months, if not years, only as a result of superhuman effort, which cannot be sustained.... Reality eventually prevails, however, and limitations that have been present all along overtake even the most determined effort to keep working."); *Reardon v. Prudential Ins. Co. of Am.,* No. 1:05CV178, 2007 WL 894475, at *11 (S.D. Ohio Mar. 21, 2007)("To uphold such a basis for denial would effectively punish a claimant for her diligence in attempting to continue working with a disabling condition at a job she held for thirty years before seeking disability benefits. Prudential's assumption that a change in plaintiff's medical condition was a prerequisite to a disability finding is without support in the Plan language or caselaw and is one indication that Prudential's decision-making process was not rational."); *Staffeld v. Prudential Ins. Co. of Am.,*

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No. 05CV2298 BTM (WMC), 2007 WL 1975448, at *7 (S.D. Cal. June 11, 2007)(criticizing the insurer for asserting that had claimant who had worked with headaches and not shown a recent increase in pain); *Green v. Prudential Ins. Co. of Am.,* 383 F.Supp.2d 980, 992 (M.D.Tenn.2005) (fact that plaintiff worked with similar complaints in the past does not lead to the conclusion that she is not disabled); *Abdel-Malek v. Life Ins. Co. of N. Am.,* 359 F. Supp. 2d 912, 914 (C.D. Cal. 2005); *Crespo v. Unum Life Ins. Co. of America,* 294 F.Supp.2d 980 (N.D.Ill. Dec. 18, 2003); *Fitzgerald v. Globe Indem. Co. of New York,* 84 Cal. App. 689, 698, 258 P. 458, 462 (Cal. Ct. App. 1927)("The fact that the insured may do some work or transact some business duties during the time for which he claims indemnity for total disability or even the fact that he may be physically able to do so is not conclusive evidence that his disability is not total, if reasonable care and prudence require that he desist."); *Wright v. Prudential Ins. Co. of Am.,* 27 Cal. App. 2d 195, 216, 80 P.2d 752, 763 (1938)("the test of disability is not what the insured actually did in the effort to perform his duties, but what, in the exercise of due prudence he was reasonably able to do.").

All of these cases stand for the proposition that it is not necessary for a date of disability to line up precisely with a sudden decrease in functionality. Without this, most coverage for long-term disability would be illusory, as few disabling medical conditions strike like bolts of lightning. One court described the insurer's insistence on a "date certain" as "contrived and spurious." *Garmon v. Liberty Life Assur. Co.*

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of Bos., 385 F. Supp. 2d 1184, 1201 (N.D. Ala. 2004). The insurer denied the claim after deciding that the claimant had become disabled precisely on the date after she was terminated from employment and her coverage had ended. The court noted, "[i]t is not simply a question of "*bang* " ... "I'm disabled today and out of here." *Id.* The court found that "defendant started out being wrong by assuming an absolute date certain of the disability with regard to a medical condition that was and is progressive. The defendant's decision was thereafter shaded to maintain this initial position." *Id.* at 1201-02; See also *Mitchell v. Metro. Life Ins. Co.,* 523 F. Supp. 2d 1132, 1148 (C.D. Cal. 2007), aff'd sub nom. *Mitchell v. CB Richard Ellis Long Term Disability Plan,* 611 F.3d 1192 (9th Cir. 2010) ("The fact that a person is "still working" does not settle whether that person is able to perform regular job functions"); *Rabbat v. Standard Ins. Co.,* 894 F. Supp. 2d 1311, 1322 (D. Or. 2012)(claimant did not need to show his condition had changed significantly on a certain date); *Knox v. United of Omaha Life Ins. Co.,* 357 F. Supp. 3d 1265, 1275–76 (M.D. Ga. 2019)("the Court is unpersuaded, based on the record, that a degenerative disease like AIDS suddenly manifested into a disability in November 2016 but at no time prior.'); *Delaney v. Prudential Ins. Co. of Am.,* 68 F. Supp. 3d 1214, 1229 (D. Or. 2014)(recognizing that diseases with symptoms that fluctuate in their severity can be a basis for disability where the claimant had Meniere's); *Knox v. United of Omaha Life Ins. Co.*, 357 F. Supp. 3d 1265, 1275–76 (M.D. Ga. 2019); *Estep v. Reliance Standard Life Ins. Co.,* No. 3:04-CV-407-J-20MCR, 2005 WL

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8159677, at *7 (M.D. Fla. Dec. 8, 2005)(crediting a treating physician whose opinion was based on claimant's "overall condition and slowly advancing deterioration*"); Radford Tr. v. First Unum Life Ins. Co. of Am., 321 F. Supp. 2d 226, 247 (D. Mass. 2004), rev'd in part, appeal dismissed in part, 491 F.3d 21 (1st Cir. 2007)*(discussing Unum's bad faith in asserting that a schizophrenic employee had suddenly become disabled after his employment ended).

The basis for Unum's denial of Dr. Ray's benefits ignores logic and the law, and it will lose this case because of its willful ignorance of how a claimant becomes disabled from a progressive disease. Just as the insurer did in *Garmon*, Unum selected a date and allowed this wrong-ness to carry forward and shade all its claims handling. While a few employees noted that Dr. Ray's condition was "progressive," this did not prompt them to change their approach to his claim. By insisting on a change on a "date certain," Unum never considered what is obvious from the facts - that Dr. Ray could have been disabled even *before* he saw Dr. Vavvas in September 21, 2018 or on any number of other dates.

2. *Risk of Future Danger to the Public Is a Basis for Disability.*

Not only is it not necessary to become "bang" disabled on a date certain, a claimant can be currently disabled because of the *potential* to harm others by continuing to perform one's occupation his medical condition. Therefore, it is not necessary for an impaired pilot to crash the plane in order to prove he is disabled. It is not necessary for the formerly drug addicted anesthesiologist to relapse and kill

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her patient in order to qualify as disabled. A truck driver with narcolepsy not does have to cross the median into oncoming traffic. *Colby v. Union Sec. Ins. Co. & Mgmt. Co. for Merrimack Anesthesia Assocs. Long Term Disability Plan*, 705 F.3d 58, 66–67 (1st Cir. 2013); *Hannagan v. Piedmont Airlines, Inc.,* No. 307-CV-795 FJS/DEP, 2010 WL 1235395, at *6 (N.D.N.Y. Mar. 31, 2010)(holding it was arbitrary and capricious to fail to consider the risk of future harm to others, where the claimant was an airline pilot); *Kufner v. Jefferson Pilot Fin. Ins. Co.,* 595 F. Supp. 2d 785, 796–97 (W.D. Mich. 2009)("Defendant would force plaintiff to work to the brink of failure to justify disability benefits, thereby imposing an unacceptable risk on patients, hospitals and the public generally—a risk of error that neither plaintiff nor the public should bear.").

Did Dr. Ray have to actually hurt one of his patients in order to prove up his disability claim? Of course not. Unum's claims handling did not take the danger to Dr. Ray's occupational specialty in account at all much less contemplate whether he could harm his patients. The Unum employees were careful not to mention the specifics of Dr. Ray's occupation and refused to use their common sense understanding of what neurosurgeons actually do. The result of doing so would have been, and should have been, instantaneous approval of the claim. Assembly of a "forum" for instance merely delayed the payment of an obvious claim. Dr. Ray provided ample proof that his disease was progressing along with a super-expert opinion that it was no longer safe for him to practice neurosurgery. Dr. Ray did not

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have to fail at surgery in order to show that he was disabled from his occupation. Accordingly, he did not have to provide tests showing that he couldn't see well enough to perform surgery, as Unum's paper reviewer ophthalmologists suggested. Stopping before the disastrous outcome is exactly what the law permits, if not REQUIRES him to do.[27]

3. *A Claimant is Disabled Where Continuing to Practice His Occupation Would Place Him at Risk.*

A present disability can exist where the risk of insured continuing to pursue his occupation would put the insured at risk of further harm. '[t]he insured is considered to be ... disabled where it is impossible for him to work without hazarding his health or risking his life.' " *Lasser v. Reliance Standard Life Insurance Co.,* 146 F.Supp.2d 619, 628 (D.N.J.2001)(quoting 1C *Appleman Insurance Law & Practice* § 651 at 241 (1981)), *aff'd,* 344 F.3d 381 (3d Cir.2003): See also, *Schwartz v. Metro. Life Ins. Co.,* 463 F. Supp. 2d 971, 984 (D. Ariz. 2006), order clarified, No. CIV-01-2075 PHXMHM, 2006 WL 3201017 (D. Ariz. Nov. 3, 2006); *McGuigan v. Reliance Standard Life Ins. Co.*, No. CIV.A. 02-7691, 2003 WL 22283831, at *11 (E.D. Pa. Oct. 6, 2003).

Here, Dr. Ray explained that he was subject to increased radiation exposure because of his need to get closer and closer to see what he was doing. (88, 318).

[27] Imagine if this were a medical malpractice case, and Dr. Ray had just thrown away Dr. Vavvas' letter and continued to operate and had killed a patient. His malpractice carrier would likely have declined a defense, much less coverage, asserting that the Doctor's conduct was in reckless disregard of his patient's wellbeing. At a minimum, the carrier would have declined to pay the punitive award that would certainly have been imposed against Dr. Ray.

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This is because many of the surgeries are performed with fluoroscopy, an X-ray technology that creates real time x-rays of parts of the patient's anatomy that the surgeon cannot otherwise see. Dr. Ray described the problem in a telephone conversation with Ms. Sabatini. (318). Because neither Ms. Sabatini nor any other individual who worked on this file was interested in this, it is not particularly well developed in the claim file. However, Dr. Ray will testify to this.

6. DAMAGES CALCULATIONS

Dr. Ray's policy pays $12,000 per month in benefits. Dr. Ray is entitled to 2 years of benefits. This shorter period of benefits is due to his age, 67. After one year of benefits, a COLA applies of at least 4%.

LTD Benefits (year one): $144,000.00

LTD Benefits (year two): $144,000.00

COLA (year two): $5,760.00

7. UNUM'S BREACH OF CONTRACT

Dr. Ray was Totally disabled as defined in the contract. He had a sickness that rendered him "unable to perform **with reasonable continuity** the substantial and material acts necessary to pursue [his] usual occupation **in the usual and customary way**." Dr. Ray had had AMD for at least 4 years. He struggled to work with it but when he noticed his problems increasing, he sought Dr. Vavvas advice. He did the only responsible thing. He told his employer about his vision problems and waited until he was cleared to perform surgery. Dr. Vavvas, whose credentials

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cannot be reasonably questioned, advised him it was NOT safe for him to operate on his patients. Dr. Vavvas performed repeated tests over years and had multiple visits with his patient. Dr. Vavvas did not conclude that Dr. Ray was done with surgery until he examined him, so this determination was not made in a vacuum of clinical proof, as Unum's paper reviewers would suggest. And no one can come up with any reason – other than disability – why Dr. Ray would have stopped operating. Despite the well-organized "forum" Unum's process did not yield any contrary evidence. They merely suggest that the evidence provided is not good enough to justify new R&Ls as of a certain date. "However, logically speaking, a conclusion that the specific limitations are not supported by medical evidence does not answer the question of whether a claimant could not perform the duties of his occupation, which was the ultimate question presented by Plaintiff's claim." *Rucker v. Life Ins. Co. of N. Am.,* No. CIV.A. 10-3308, 2012 WL 956507, at *19 (E.D. La. Mar. 20, 2012).

Ray had his own concerns about the amount of radiation he was exposed to in trying to accommodate his vision problems. He was already not performing his occupation in the usual and customary way and he was placing himself in danger by doing so. He described his intermittent scotomas and his dark to light adjustment problem and how these affected his ability to perform his surgeries. Because his surgeries were often lengthy and he operated for 16-20 hours per week, it is impossible that his intermittent symptoms would not, at some point, affect his ability

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to perform surgery safely. See *Gallegos v. Prudential Ins. Co. of Am.,* No. 16-CV-01268-BLF, 2017 WL 2418008, at *12 (N.D. Cal. June 5, 2017) (noting that symptoms that appear unpredictably contribute to disability).

The jury will not find that the opinions of several in-house physicians are more persuasive than that of a physician who was familiar with the patient over time and examined him. *See Salomaa v. Honda Long Term Disability Plan,* 642 F.3d 666, 676–79 (9th Cir.2011)(evidence showing that the doctors who personally examined the claimant concluded that he was disabled, even though insurance company's non-examining physicians found otherwise, supported finding that the claimant was disabled under terms of the plan). This is especially true since Unum opted not to have Dr. Ray examined. *Helms v. Gen. Dynamics Corp.,* 222 F. App'x 821, 833 (11th Cir. 2007); *Salomaa v. Honda Long Term Disability Plan,* 642 F.3d 666, 676 (9th Cir. 2011); *Demer v. IBM Corp. LTD Plan,* 835 F.3d 893, 905–06 (9th Cir. 2016).

Dr. Eisenberg's opinion certainly does no damage to Dr. Ray's claim. As an initial matter, his opinion was not part of a process that was designed ascertain the truth, as is clear from the totality of UNUM's claim handling. Accordingly, Dr. Eisenberg answered an irrelevant question, whether Dr. Ray had proven that he became suddenly unable to be a neurosurgeon on September 21, 2018. The relevant question was Dr. Ray disabled as of September 21, 2018. The answer to that question under any reasonable test was uncontrovertibly yes.

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Furthermore, Dr. Eisenberg's emphasis on corrected visual acuity is a red herring. *Fontaine v. Metro. Life Ins. Co.,* No. 12 C 8738, 2014 WL 1258353, at *13 (N.D. Ill. Mar. 27, 2014), on reconsideration in part, No. 12 C 8738, 2014 WL 2511091 (N.D. Ill. June 3, 2014), and aff'd in part, 800 F.3d 883 (7th Cir. 2015)(faulting MetLife for this same mistake, noting,"[v]isual acuity is a measure of a person's ability to read individual letters on an eye chart at a distance. As Fontaine's doctors noted, an attorney could have excellent visual acuity yet still be unable to perform the difficult tasks that Fontaine was required to perform.").

Dr. Eisenberg's observation that Dr. Ray worked full time until his date of disability ignores that Dr. Ray had been struggling to perform surgery for some time, while working full time. The relevance of this was lost on Dr. Eisenberg as it was on the rest of the Unum employees. And to the extent that his opinion is focused on R&Ls as of a date certain, this is largely irrelevant, because the date certain was a fiction created by Unum that is not only contrary to the facts but does not comport with the law.

Dr. Eisenberg's call for more tests does not address why Dr. Ray could not be relied upon to report his own blind spots or how further testing would produce more reliable results. He also does not address Dr. Ray's very important complaint regarding his inability to adjust from light to dark while performing surgeries, choosing instead to focus on "contrast sensitivity," which is another symptom altogether that was cherry-picked from the records.

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Dr. Eisenberg did not address the fact that Dr. Ray's symptoms came and went and thus he could not count on his vision to be good enough on any given day or during any given surgery. If Dr. Ray's symptoms varied throughout a day, he certainly could not perform a surgery that took 6-10 hours. He could not perform a surgery 16-20 hours per week with these fluctuations either. Although Dr. Eisenberg's recited the medical records that included Dr. Ray's complaints of these vacillations, he did not consider them and was not encouraged to do so. It is hornbook law that insurers in California are forbidden from putting their own interests ahead of their insureds and doing so is per se bad faith. Dr. Eisenberg's review, and UNUM's reliance on his review is just another brick in the wall establishing not merely bad faith, but reckless disregard of Dr. Ray's rights as an insured. A punitive award will be the only reasonable response from the jury.

Furthermore, it is illogical for Dr. Eisenberg to cite Dr. Vavvas' lack of response as a reason to deny that Dr. Ray was disabled. Dr. Vavvas medical records and his opinion expressed in both his letter and APS form were enough to pay the claim just as they will be for Dr. Ray to win this case. Conspicuously, Dr. Eisenberg did not recommend that an in-person eye exam be performed by another ophthalmologist or retinal specialist.[28]

[28] Plaintiff anticipates that if this matter does not settle at mediation, the first thing UNUM will do is to depose Dr. Vavvas, and then assert that if it had been aware of all of the information imparted in the deposition, it would NEVER have denied the claim, and will pay benefits. This will be comparable to the conduct of a certain unnamed individual who is known to back down on a threat, while claiming victory.

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A deposition would reveal whether Dr. Eisenberg thought it wise that Dr. Ray discontinued his surgical practice given his visual complaints, whether he would choose a neurosurgeon (or an ophthalmic surgeon, for that matter) with Dr. Ray's condition, and whether he would send one of his family members into surgery with Dr. Ray. *Jacobs v. Nw. Mut. Life Ins. Co.,* 103 A.D.3d 78, 86, 957 N.Y.S.2d 347, 353 (2012)("No one would knowingly use a doctor or lawyer, or any other professional or tradesperson, who shows up for work but performs incompetently. Thus, the fact that the plaintiff's waiting room was filled with unwitting patients on the day the plaintiff's license was suspended is not the end of the inquiry . . . We must also examine the ability of the insured to perform the principal tasks of the profession competently.").

That leaves Dr. Michaelson's opinion, which suffers from many of the same defects but displays even more bias. He does get some points for originality by inventing his own visual requirements for the practice of neurosurgery. In doing so, he ignored or was not provided with, all the information about what the requirements were. But he should have known better and pretended he did not. Further, he was told he had to pick one or the other point of view – Dr. Vavvas' or his colleagues' - foreclosing the possibility of reaching his own conclusions or

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However, such action will not work here. Dr. Vavvas, if deposed, will merely point to the evidence in UNUM's files at the time of the denial and testify that his opinion is the same now as it was on September 18, 2018, and that UNUM was fully aware of his opinion, and the basis for it.

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exercising any independence. Ultimately, he was guided down the same path – to say that the there was no objective evidence to support new R&Ls as of the date certain. Like Dr. Eisenberg, he paid no attention to Dr. Ray's subjective complaints and insisted that he expected to see different tests.

As for these tests, Dr. Vavvas is likely to say that these additional tests would not be of any help to Dr. Ray. Pursuant to the terms of his UNUM policy, Dr. Ray has no obligation, nor is he expected to undergo tests that are not beneficial. Importantly, AMD has no cure, so continuing to perform tests to demonstrate what is already known, that Dr. Ray was struggling to see during surgery, was entirely unnecessary. If Unum truly needed these tests – which it did not – it had every right to either request an IME, or request that Dr. Vavvas perform them. It could and should have done either of these things at the beginning of the claim, and certainly before denying the claim for benefits. At least that is what an insured which was not motivated to avoid paying a $350,000.00 benefit claim would do. Had it truly wanted to capture this evidence when it was closest in time to the date of disability, it would have done so. Instead, it staffed the claim with a "forum," to manufacture questions in its own corporate mind to justify denying the claim, when to any reasonable layperson, no such doubt existed.

Unum's insistence on more testing, which is just another way of saying "objective evidence" is also contrary to the policy, which does not require this standard of proof.

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There is no question that Dr. Ray was disabled because he could not perform his substantial and material duties without risking harm to himself and others. Even if he could have occasionally performed surgeries successfully, he could not do so with reasonable continuity. (which, of course, begs the question of which surgery might have been unsuccessful due to his vision issues.). There is no actual evidence to the contrary, only the opinions of paper reviewers who say Dr. Ray's evidence is not good enough. *Addis v. Ltd. Long-Term Disability Program,* 268 F. App'x 157, 162 (3d Cir. 2008). Unum is in breach of the contract, as its denial is predicated purely on extra-contractual standards that do not apply to this Cadillac policy and evidence that does not contradict Dr. Ray's. Benefits are due.

7. UNUM FACES BAD FAITH LIABILITY

The failure to investigate a disability claim is a violation of the implied covenant of good faith and fair dealing that is a part of every contract in California. *Egan v. Mut. of Omaha Ins. Co.*, 24 Cal. 3d 809, 620 P.2d 141 (1979); *Wilson v. 21st Century Ins. Co*., 42 Cal. 4th 713, 171 P.3d 1082 (2007), as modified (Dec. 19, 2007).

It is well understood that Unum has resisted paying on the individual own occupation LTD policies it wrote in the 80s and 90s and that it has engaged in bad faith investigations of the claims under these policies in order to do so. *See, e.g., Hangarter v. Provident Life & Acc. Ins. Co.,* 373 F.3d 998, 1011 (9th Cir. 2004); *Saldi v. Paul Revere Life Ins. Co.,* 224 F.R.D. 169 (E.D. Pa. 2004); *Leavey v. Unum*

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Provident Corp., 295 F. App'x 255, 258 (9th Cir. 2008); *Merrick v. Paul Revere Life Ins. Co.*, 500 F.3d 1007 (9th Cir. 2007).

In order to deny this claim, Unum had to do more than fail to investigate; it had to **refuse** to investigate. No one at Unum even acknowledged the issue at to whether anyone would hire a neurosurgeon with Dr. Ray's eye condition, or god forbid, whether they would submit themselves to a surgery performed by such a surgeon. No one at UNUM even acknowledged that his operating privileges had been suspended, not because of malfeasance, but because his retinal specialist deemed him unsafe to continue operating.

Rather than consider this essential evidence, the "forum" religiously avoided acknowledging the duties and the inherent risks of neurosurgery. The denial was based on the opinions of paper reviewers who pointed to more information that MIGHT have been helpful to prove up the R&L on the date certain. The history of the claim demonstrates that there likely was a carefully crafted methodology that is comparable to, if not identical to, those described in the above cases regarding Unum's bad faith practices regarding this book of policies.

One suspects that the "forum," which suspiciously had been invoked before Unum collected Dr. Ray's medical records is the newer form of "round tabling," discussed in the cases. Notably, Unum's insistence that Dr. Ray should have submitted certain types of tests to show that his claim was not self-reported has been described as "claim objectification." *Merrick* at 1012. In other words, Unum's

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practice of reading an "objective evidence" standard of proof into its policies where none exists has not stopped.

Unum not only applied extra-contractual terms to Dr. Ray, but it compounded the problem by misrepresented the policy to Dr. Ray. Until his claim was denied, it did not explain that the California definition, a definition more favorable to him, was applicable. Although this should have triggered a re-investigation of the claim, Unum did nothing and rested on its former determination that there was "no support for new R&Ls dating to September 21, 2018."

Unum will incur substantial liability due to its utter disregard for good faith and fair dealing.

Dr. Ray has suffered actual financial emotional distress as a result of the denial. He planned to continue working for at least several more years and counted on the income from performing surgery. While his income was far greater than the $15,000.00 a month payable by UNUM, the benefits for which he had paid premiums for 30 years would have cushioned the blow of the early, unplanned, termination of his career as a surgeon.

However, UNUM's primary concern should be the potential imposition of a substantial punitive damage award. It is a safe assumption that unlike the typical jury in a disability denial case, the focus of the jury will not be on the secondary gain of the insured. Rather, the jury will focus on UNUM's attempt to foist a vision impaired neurosurgeon onto the unsuspecting public. Moreover, punitive awards

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in Hangarter, Saldi, Leavey, and Merrick, don't seem to have convinced UNUM to mend its evil ways.

What does one do with a recidivist? Impose a harsher and harsher penalty.

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