

Spring 1991

HIV/AIDS and the Pre-Existing Health Condition Standard: Teaching an Old Dog New Tricks, 24 J. Marshall L. Rev. 653 (1991)

Barbara Lynn Pedersen

Follow this and additional works at: <https://repository.law.uic.edu/lawreview>



Part of the [Civil Rights and Discrimination Commons](#), [Courts Commons](#), [Health Law and Policy Commons](#), [Insurance Law Commons](#), [Jurisprudence Commons](#), and the [Medical Jurisprudence Commons](#)

Recommended Citation

Barbara Lynn Pedersen, HIV/AIDS and the Pre-Existing Health Condition Standard: Teaching an Old Dog New Tricks, 24 J. Marshall L. Rev. 653 (1991)

<https://repository.law.uic.edu/lawreview/vol24/iss3/5>

This Comments is brought to you for free and open access by UIC Law Open Access Repository. It has been accepted for inclusion in UIC Law Review by an authorized administrator of UIC Law Open Access Repository. For more information, please contact repository@jmls.edu.

COMMENT

HIV/AIDS AND THE PRE-EXISTING HEALTH CONDITION STANDARD: TEACHING AN OLD DOG NEW TRICKS¹

The availability of medical and life insurance for persons with the Human Immunodeficiency Virus (HIV) and Acquired Immune Deficiency Syndrome (AIDS) has severely decreased in recent years.² This decline in coverage is due, in part, to the insurance industry's long established practice of using pre-existing health conditions against an applicant.³ Recently, in *Lilley v. Protective Life Ins. Co.*,⁴ an AIDS patient challenged this practice after his insurance company refused him coverage.⁵ Ignoring society's desperate

1. "The AIDS epidemic occurred at a time when a number of other social forces had begun to call into question the way in which our society provides health care through a private insurance system." CLOSEN, AIDS: CASES AND MATERIALS 533 (1989).

2. This decrease in the availability of insurance coverage is due, in part, to the insurance industry's use of HIV testing as a means to screen applicants. Schatz, *The AIDS Insurance Crisis: Underwriting or Overreaching?*, 100 HARV. L. REV. 1782, 1786 (1987) [hereinafter Schatz, *Underwriting*]. See also American Council of Life Ins. v. District of Columbia, 645 F. Supp. 84, 85 (D.C. Cir. 1986); Closen, Connor, Kaufman, and Wojcik, *AIDS: Testing Democracy-Irrational Responses to the Public Health Crisis and the Need for Privacy in Serologic Testing*, 19 J. MARSHALL L. REV. 835, 915-16 (1986) [hereinafter Closen, *Testing Democracy*]; Note, *AIDS Antibody Testing and Health Insurance Underwriting: A Paradigmatic Inquiry*, 49 OHIO ST. L. J. 1059, 1059 (1989) [hereinafter Note, *A Paradigmatic Inquiry*].

3. A pre-existing health condition is a condition or illness originating prior to the issuance of an insurance policy. Annotation, *Construction and Application of Provision in Health or Hospitalization Policy Excluding or Postponing Coverage of An Illness Originating Prior to Issuance of Policy or Within Stated Time*, 94 A.L.R. 3d 990, 994-98 (1979) [hereinafter Annotation, *Construction*]. The insurance industry uses this condition to limit its coverage and liability by including clauses in its policies that preclude coverage for an illness suffered by an applicant prior to the drafting of the policy. *Id.* For a further discussion of the history of the insurance industry's use of the pre-existing health condition standard see *infra* notes 44-47 and accompanying text.

4. *Lilley v. Protective Life Ins. Co.*, 884 F.2d 575 (5th Cir. 1989) (unpublished, opinion reported at No. 89-3114 LEXIS, Genfed library, Dist. file) [hereinafter *Lilley II*].

5. *Lilley v. Protective Life Ins. Co.*, No. 87-5706 (E.D. La. Jan. 27, 1989) (LEXIS, Genfed library, Dist. file) (unpublished opinion), *rev'd*, 884 F.2d 575 [hereinafter *Lilley I*]. The plaintiff, Milton Lilley, challenged Protective Life Insurance (Protective) Company's denial of proceeds on a credit life insurance policy issued on the lives of Lilley and his lover, Tommy Ray Wells. *Id.* at 1.

plea for a solution to this growing problem,⁶ the Fifth Circuit Court of Appeals failed to issue an opinion after it ruled in favor of the insurance company.⁷ Thus, a court that could have clarified the insurance industry's controversial⁸ use of pre-existing health conditions, a practice especially damaging to persons with AIDS, merely skirted the issue at hand.⁹

Upon the death of Lilley, Wells, or both, Protective was obligated to pay Dryades Savings and Loan Association the balance of a \$54,812.70 mortgage taken out by Lilley and Wells. *Id.* at 1-2. The credit life insurance policy application did not require a physical examination, but it did require Lilley and Wells to answer a general health questionnaire. *Id.* at 2. Protective claimed that Lilley and Wells misrepresented their health conditions on this questionnaire because they answered "no" to the following two questions:

[1]. Do you know of any impairment in your health or physical condition?

[2]. Have you consulted or been treated by a physician or other practitioner for any illness, or been confined in a hospital during the last five years?

["Illness" was defined as] "some type of illness or disease that could impair longevity."

Id. at 2-5.

Wells had tested positive for HIV exposure in September of 1985, the same month he and Lilley applied for the credit life insurance policy. However, Wells was never hospitalized for any symptoms of AIDS. *Id.* at 3-4. In addition, doctors diagnosed Wells as having hepatitis B when he attempted to donate blood. *Id.* at 3. However, Wells' doctor told him that the hepatitis was not chronic, and apparently, Wells did not believe it to be a serious condition. *Id.* at 6. Lilley, on the other hand, was suffering from the early stages of AIDS [classified as ARC ("AIDS Related Complex")] when he answered the above questions. Wells died in April of 1987 from chronic hepatitis and peritonitis. *Lilley II, supra* note 4, at 4. Prior to his death, Wells did not suffer from any of the early symptoms of AIDS, appearing to be totally asymptomatic. *Lilley I, supra*, at 7-9. However, Protective and the court, in *Lilley II*, postulated that an HIV positive applicant, although asymptomatic, had an illness within the meaning of question 2. Therefore, both Wells, who did not believe himself "ill", and Lilley could be denied coverage. *Lilley II, supra* note 4, at 8. Lilley clearly misrepresented himself on the application since he had been hospitalized and treated for AIDS prior to his insurance application. Wells, on the other hand, had never been "treated by a physician or other practitioner" for HIV/AIDS nor had he been hospitalized during the five years prior to his application. *Lilley I, supra*, at 5-10.

6. AIDS may affect as many as 270,000 Americans by 1991. See Merritt, *Communicable Disease and Constitutional Law: Controlling AIDS*, 61 N.Y.U. L. REV. 739, 739 (1986); Note, *A Paradigmatic Inquiry, supra* note 2, at 1059.

7. *Lilley II, supra* note 4, at 1.

8. The insurance industry's use of the pre-existing health condition standard in the wake of the AIDS crisis has been labeled "controversial" due to its ability to totally preclude coverage for an entire sector of the population. See Schatz, *Underwriting, supra* note 2, at 1782. Although the industry has used this practice in dealing with other diseases and conditions, its use in light of the generalized symptoms of AIDS is causing quite an uproar. See Closen, *Testing Democracy, supra* note 2, at 844-45, 915-16. But see Clifford & Iuculano, *AIDS and Insurance: The Rationale for AIDS-Related Testing*, 100 HARV. L. REV. 1806, 1807 (1987) [hereinafter Clifford, *Aids and Insurance*] (insurance industry must be allowed to continue using HIV testing in determining insurability to preserve the present unbiased pricing system).

9. The court, in *Lilley II*, stated:

An insurance company can only escape its liability on the basis of a pre-existing condition if it can prove that the insured intended to "wilfully misrepresent" himself at the time of application.¹⁰ In many of these "wilful misrepresentation" cases, the insurance company provided coverage without requiring the applicant to undergo a thorough physical examination.¹¹ However, the insurance companies often requested that the applicant complete a general form,¹² which included questions concerning the applicant's past medical history, as a prerequisite to coverage. These general forms contained ambiguous language and broad questions, and courts have refused to construe the ambiguities against the applicant.¹³ However,

Local Rule 47.5 provides: 'The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession.' Pursuant to that Rule, the court has determined that this opinion should not be published.

Lilley II, *supra* note 4, at 1. However, this case does have precedential value because the public may view the outcome of the case as an affirmation of the insurance industry's preclusionary practices.

10. Compare *Liberty Nat'l Life Ins. Co. v. Waite*, 551 So. 2d 1003 (Ala. Civ. App. 1989) (agent's wilful misrepresentation does not deny coverage to insured) and *Taylor v. Security Indus. Ins. Co.*, 452 So. 2d 1260 (La. Ct. App. 1984) (later evidence that insured was diabetic and alcoholic not specific proof that these conditions were present at time of application) and *Pete Roy Ford, Inc. v. Lackney*, 390 So. 2d 248 (La. Ct. App. 1980) (insured did not knowingly misrepresent heart disease at time of application) with *Lentz v. Metro. Life Ins. Co.*, 428 F.2d 36 (5th Cir. 1970) (insured's failure to report two year treatment for diabetes was a wilful misrepresentation) and *Useldinger v. Old Republic Life Ins. Co.*, 377 N.W.2d 32 (Minn. Ct. App. 1985) (failure to disclose history of treatment for high blood pressure, alcohol abuse, and liver-related problems was wilful misrepresentation) and *Veal v. Veteran's Life Ins. Co.*, 767 S.W.2d 892 (Tex. Civ. App. 1989) (policy void due to failure of insured to disclose treatment for high blood pressure and drunk driving record).

11. See *Johnson v. Occidental Life Ins. Co. of Cal.*, 368 So. 2d 1032 (La. 1979) (insurance company told applicant no examination was necessary); *Key v. Cherokee Credit Life Ins. Co.*, 298 So. 2d 892 (La. Ct. App. 1974) (no inquiry made into applicant's health).

12. The questions on these forms are similar to those on *Lilley's* questionnaire. See *supra* note 5 for an example of the questions contained on health insurance forms. See, e.g., *Bertrand v. Protective Life Ins. Co.*, 419 So. 2d 1254 (La. Ct. App. 1982) (noting questions used on applicant's insurance form); *Brown v. National Old Life Ins. Co.*, 345 So. 2d 1023 (La. Ct. App. 1977) (noting questions used by insurance company).

13. As long as applicants do not materially misrepresent themselves on their application, courts have usually upheld ambiguities in the insurance contracts against their insurer. See, e.g., *Kane v. Aetna Life Ins.*, 893 F.2d 1283 (11th Cir. 1990) (applicant's reliance on agent's interpretation of ambiguous policy language upheld against insurance company); *Baker v. Washington Nat'l Life Ins. Co.*, 823 F.2d 156 (5th Cir. 1987) (pregnancy coverage cannot be denied due to ambiguity of policy conversion language); *Bertrand v. Protective Life Ins. Co.*, 419 So.2d 1254 (La. Ct. App. 1982) (obesity not considered a "physical impairment" or "illness," and voluntary hospitalization of alcoholism not "confinement" within meaning of policy); *Goodson v. American Home Assur. Co.*, 251 F Supp. 125 (E.D. Tenn. 1966) (plane crash victim could recover since policy language regarding the term "operated by" was ambiguous); *Hulse v. Blue*

courts have recognized the insurance industry's right to request a physical examination for a potential insured.¹⁴ The insurance industry may then use the results of this examination to preclude coverage.¹⁵ It is within these two seemingly contradictory judicial determinations that an HIV/AIDS patient must try to find a solution to his growing need for insurance benefits and within which the insurance industry must structure its practices.

This comment addresses the inapplicability of the pre-existing health condition standard to the current AIDS crisis. It begins with a brief overview of the medical background of HIV/AIDS. Next, it examines the history behind the pre-existing health condition standard and probes this standard's inapplicability in managing the generalized symptoms and medical problems of AIDS. Finally, this comment proposes a cost spreading analysis which the insurance industry should use to prevent the total exclusion of insurance coverage for HIV/AIDS applicants.

I. AIDS: AN OVERVIEW

Acquired Immune Deficiency Syndrome, AIDS, is a virus which attacks the human immune system¹⁶ rendering it incapable of preventing the onslaught of opportunistic diseases.¹⁷ Thus, the

Cross/Blue Shield of Fla., Inc., 424 So. 2d 191 (Fla. Dist. Ct. App. 1983) (coverage given to surgical removal of tumor due to ambiguous terms in policy).

14. Courts have upheld the insurance industry's right to require a physical examination on several occasions, and this practice is now standard throughout the industry. See *Wright v. Pilot Life Ins. Co.*, 254 F. Supp. 1018, 1024 (D.C. Va. 1966) (examination by company physician condition precedent to acceptability); *Anderson v. Continental Assur. Co.*, 666 P.2d 245, 248 (Okla. Ct. App. 1983) (insured died before examination could be performed). Courts have also recognized the right of the insurance industry to require HIV tests as a precursor to coverage. See *American Council of Life Ins. v. District of Columbia*, 645 F. Supp. 84, 88 (D.C. Cir. 1986); *Life Ins. Ass'n of Mass. v. Commissioner of Ins.*, 403 Mass. 410, 413-17, 530 N.E.2d 168, 170-72 (1988).

15. The insurance industry has used HIV tests, with judicial approval, against prospective insurance applicants. See *American Council of Life Ins. v. District of Columbia*, 645 F. Supp. 84, 88 (D.C. Cir. 1986) (District of Columbia ordinance excluding coverage for AIDS applicants upheld); *Life Ins. Ass'n of Mass. v. Commissioner of Ins.*, 403 Mass. 410, 413-17, 530 N.E.2d 168, 170-72 (1988) (commissioner's attempt to regulate insurance industry's use of exclusionary HIV testing denied).

16. See REPORT OF THE PRESIDENTIAL COMMISSION ON THE HUMAN IMMUNODEFICIENCY VIRUS EPIDEMIC 1-3 (1988) [hereinafter PRESIDENTIAL COMMISSION REPORT] (background on spread of AIDS in the United States). See also *Stability and Inactivation of HTLV-III/LAV Under Clinical and Laboratory Environments*, 25 J. A.M.A. 1887-91 (1986) (brief discussion of the mode of transmission of HIV and risks involved); Closen, *Testing Democracy*, *supra* note 2, at 856-61 (discussion of the transmission of HIV and how it causes disease).

17. Doctors label diseases "opportunistic" because they occur more quickly and commonly in patients who have depressed immune systems. MERCK SHARP AND DOHME RESEARCH LABORATORIES, THE MERCK MANUAL OF DIAGNOSIS

body of a person afflicted with AIDS cannot battle pneumonia, oral or esophageal disorders,¹⁸ or even the common head cold.¹⁹ This person's body lacks the "armor" to fight the viruses²⁰ and illnesses of everyday life.

HIV, or the Human Immunodeficiency Virus, causes AIDS.²¹ The viral genes of HIV integrate with the patient's genes, transforming a normal cell into an abnormal cell.²² Due to this transformation, the abnormal cell is incapable of performing its proper germ fighting function.²³ Principally, HIV attacks the white blood cells which produce antibodies necessary to destroy foreign matter in the human body.²⁴ Blood tests²⁵ can detect the presence of these

AND THERAPY 57-58 (R. Berkow, M.D. 14th ed. 1982) [hereinafter THE MERCK MANUAL].

18. One of the earliest reports of AIDS identified oral and esophageal candidiasis as a symptom of the virus. Centers for Disease Control, *Pneumocystis Pneumonia—Los Angeles*, 30 MORBIDITY AND MORTALITY WEEKLY REP. 250-52 (1981). Candidiasis is an "infection with a fungus of the germ candida. It is usually a superficial infection of the moist cutaneous area of the body . . . most commonly involves the skin, oral mucous membranes, respiratory tract, and vagina." THE SLOANE-DORLAND ANNOTATED MEDICAL-LEGAL DICTIONARY 109 (1987) [hereinafter SLOANE-DORLAND DICTIONARY]. See also PRESIDENTIAL COMMISSION REPORT, *supra* note 16, at 1-2, 7-11.

19. PRESIDENTIAL COMMISSION REPORT, *supra* note 16, at 8-9. See also Closen, *Testing Democracy*, *supra* note 2, at 856-61.

20. A virus is "one of a group of minute infectious agents . . . characterized by a lack of independent metabolism and the ability to replicate only within living host cells. Like living organisms, they are able to reproduce with genetic continuity and the possibility of mutation." SLOANE-DORLAND DICTIONARY, *supra* note 18, at 776. Viruses are the cause of many diseases in human beings and include: chicken pox, polio, hepatitis, and the common cold. Closen, *Testing Democracy*, *supra* note 2, at 859.

21. PRESIDENTIAL COMMISSION REPORT, *supra* note 16, at 7. See also Centers for Disease Control, *Classification System for Human T-Lymphotropic Virus Type III/Lymphadenopathy-Associated Virus Infections*, 35 MORBIDITY AND MORTALITY WEEKLY REP. 334-39 (1986) (persons with AIDS appear to be first infected with HTLV-III/LAV [an early classification of HIV]).

22. PRESIDENTIAL COMMISSION REPORT, *supra* note 16, at 37-49. See also CLOSEN, *supra* note 1, at 111.

23. CLOSEN, *supra* note 1, at 37-49.

24. *Id.*

25. Doctors and scientists use two blood tests to detect the presence of HIV in the human body. The first is the enzyme-linked immunosorbant assay or ELISA test. The ELISA test involves mixing a patient's blood serum with viral antigens. Centers for Disease Control, *Update: Serologic Testing for Antibody to Human Immunodeficiency Virus*, 36 MORBIDITY AND MORTALITY WEEKLY REP. 833-40 (1988). See also Closen, *Testing Democracy*, *supra* note 2, at 872-75. An antigen is "any substance which is capable, under appropriate conditions, of inducing a specific immune response and of reacting with the products of that response." SLOANE-DORLAND DICTIONARY, *supra* note 18, at 42. After this antigen reaction takes place, the specimen is mixed with a solution containing human antibodies which attach to the antiviral antibodies in the specimen. Centers for Disease Control, *Update: Serologic Testing for Antibody to Human Immunodeficiency Virus*, 36 MORBIDITY AND MORTALITY WEEKLY REP. 833-40 (1988); Closen, *Testing Democracy*, *supra* note 2, at 872 n.158. A color change shows the presence of HIV antibodies in the serum sample. The current accu-

abnormal antibodies²⁶ and determine if an individual is infected with HIV.

Transmission of HIV requires: (1) exposure to HIV; (2) entry of the virus into the host; and (3) successful replication within the host.²⁷ After a person has been exposed to HIV, the virus enters his system and duplicates itself within that person's previously healthy cells.²⁸ Thus, HIV "breeds" new and abnormal cells that resemble the original normal host cells.²⁹ Scientists have found HIV in blood, semen, saliva, urine and other bodily fluids.³⁰ To date, the only known methods to transmit HIV are through blood and blood products, needle-sharing, and intimate sexual contact.³¹ However, under current testing procedures, time must elapse between when a

racy of the ELISA test ranges from 60% to 97%. Closen, *Testing Democracy*, *supra* note 2, at 873.

The second test doctors and scientists use to detect the presence of HIV antibodies is the Western Blot test. This test separates the antiviral antibodies in the serum sample so that antibodies specific to HIV antigens are detected. *Id.* at 836-37. The Western Blot test is able to detect specific antiviral component antibodies of HIV and, therefore, has a higher accuracy rate. *Id.* "It is thought to be nearly 100% accurate." Closen, *Testing Democracy*, *supra* note 2, at 873. See also Centers for Disease Control, *Update: Public Health Service Workshop on Human T-Lymphotropic Virus Type III Antibody Testing—United States*, 34 MORBIDITY AND MORTALITY WEEKLY REP. 477, 477-78 (1985).

The ELISA test is less expensive to administer than the Western Blot and is, therefore, usually the first test used to screen blood. Closen, *Testing Democracy*, *supra* note 2, at 872. Several licensed ELISA test kits are currently available on the market. This availability has led to a wide variance in sensitivity/accuracy of positive results. *Id.* If an ELISA test is positive, the test is repeated and followed by a Western Blot test for confirmation. *Id.* at 873. The Western Blot test is more sophisticated and more expensive than the ELISA test and, therefore, is not used for mass screening of applicants. *Id.* at 873. However, the Western Blot is a more reliable test due to its high level of sensitivity. *Id.* at 873. But see Saag & Britz, *Asymptomatic Blood Donor With A False Positive HTLV-III Western Blot*, 314 NEW ENG. J. MED. 118 (1986) (report casting doubt upon accuracy of Western Blot tests as an indicator of true HIV status).

26. An antibody is "an immunoglobulin molecule that has a specific amino acid sequence by virtue of which it interacts only with the antigen that induced its synthesis in cells of the lymphoid series, or with antigen closely related to it." SLOANE-DORLAND DICTIONARY, *supra* note 18, at 41. An antibody is a molecule with a specific and identifiable structure which will only interact with the antigen responsible for its creation. For a definition of an antigen, see *supra* note 25.

27. *Stability and Inactivation of HTLV-III/LAV Under Clinical and Laboratory Environments*, 25 J. A.M.A. 1887-91 (1986). See also Closen, *Testing Democracy*, *supra* note 2, at 856-61; CLOSEN, *supra* note 1, at 113.

28. See Closen, *Testing Democracy*, *supra* note 2, at 857-59; CLOSEN, *supra* note 1, at 113.

29. See Closen, *Testing Democracy*, *supra* note 2, at 858-59.

30. Centers for Disease Control, *Testing Donors of Organs, Tissues and Semen for Antibody to Human T-Lymphotropic Virus Type III/Lymphadenopathy-Associated Virus*, 31 MORBIDITY AND MORTALITY WEEKLY REP. 294 (1985). See also Closen, *Testing Democracy*, *supra* note 2, at 864-66.

31. See *supra* note 26 for the function of an antibody.

person actually contracts HIV and when HIV antibodies can be detected.³² This time period between infection and detection is often referred to as the "window period".³³

Early warning signs of AIDS usually consist of high fevers, night sweats and rapid weight loss.³⁴ Later stages of this disease include pneumocystis pneumonia³⁵ and kaposi's sarcoma,³⁶ a rare disease which causes nodules to form under the skin and organs. Eventually, an individual with AIDS can no longer fight the constant diseases attacking his body, and dies. There is no known cure or immunization for HIV/AIDS.³⁷ The few government approved drugs³⁸ for treatment of HIV/AIDS only slow the dying process;

32. *Closen, supra* note 1, at 131. See also *A Time of Mild Optimism on Treatment for AIDS*, THE PHILADELPHIA INQUIRER, vol. 321, no. 175 (Jun. 24, 1990).

33. *CLOSEN, supra* note 1, at 131. See also *Closen, Testing Democracy, supra* note 2, at 861.

34. Centers for Disease Control, *Update on Acquired Immune Deficiency Syndrome (AIDS)—United States*, 31 MORBIDITY AND MORTALITY WEEKLY REP. 507-14 (1982) (basic case definition of AIDS and description of the combination of symptoms necessary for diagnosis). See also PRESIDENTIAL COMMISSION REPORT, *supra* note 16, at 7-16 (overview on AIDS patient care).

35. Pneumocystis pneumonia, also known as pneumocystis carinii, is a parasite that causes infection in persons with weakened immune systems. See Centers for Disease Control, *Pneumocystis Pneumonia—Los Angeles*, 30 MORBIDITY AND MORTALITY WEEKLY REP. 250, 250-52 (1981); THE MERCK MANUAL, *supra* note 17, at 664.

36. A sarcoma is "a tumor made up of a substance like the embryonic connective tissue . . . composed of closely packed cells embedded in a fibrillar substance . . . often highly malignant." SLOANE-DORLAND DICTIONARY, *supra* note 18, at 625. Kaposi's sarcoma is a rare cancer that causes malignant tumors of blood vessel cells to occur under the skin and in the lymph nodes and other body parts. See Centers for Disease Control, *Kaposi's Sarcoma and Pneumocystis Pneumonia Among Homosexual Men—New York City and California*, 30 MORBIDITY AND MORTALITY WEEKLY REP. 305, 305-08 (1981).

37. Almost since the start of the AIDS epidemic, scientists have been attempting to find a cure or vaccine for the AIDS virus. See *CLOSEN, supra* note 1, at 145-48 (general discussion of the function of a vaccine and the efforts to develop one for AIDS).

38. The only drug approved by the Food and Drug Administration for fighting AIDS is Azidothymidine (AZT). AZT or Retrovir, is used to manage the spread of AIDS symptoms in patients with symptomatic HIV infection. PHYSICIANS' DESK REFERENCE 793 (E. Barnhart 43d ed. 1989). See also PRESIDENTIAL COMMISSION REPORT, *supra* note 16, at 9. This drug is primarily recommended for patients with a history of pneumocystis carinii pneumonia, candidiasis, and/or a loss of ten percent or more body weight. PHYSICIANS' DESK REFERENCE, *supra*, at 794. Although AZT can slow the onslaught of opportunistic diseases, it is not a cure for HIV infection. Nor has it been shown to reduce the risk of HIV transmission to others through sexual contact or blood transfusion. *Id.* at 794. Additionally, AZT is known to have serious side effects that preclude many AIDS patients from taking the drug. Included among the known side effects are: (1) anemia; (2) severe headaches; (3) nausea; (4) insomnia; and (5) seizures. *Id.* at 794-95. Several other drugs, reported to have similar properties to AZT, have been imported into the United States illegally. Dideoxydenosine (DDA) and Ribavirus (Virazole) are two of the more frequently "imported" drugs used by AIDS patients. *CLOSEN, supra* note 1, at 145. The FDA, as yet,

they do not prevent it. Insurance coverage during the progression of HIV/AIDS is necessary to provide an HIV/AIDS patient with desperately needed medical care in the face of skyrocketing medical costs.

II. THE HISTORY BEHIND THE PRE-EXISTING HEALTH CONDITION STANDARD

Most insurance companies will not insure an applicant's pre-existing health conditions. A pre-existing health condition is an illness that originated prior to an insured's application for an insurance policy.³⁹ The simplest example of a pre-existing health condition is the case of an individual who is taking medication to control high blood pressure.⁴⁰ If such an applicant applied for insurance, his policy would deny coverage for any prior or subsequent claims that arose from the treatment of high blood pressure, because it existed⁴¹ prior to the issuance of his policy. On the other hand, the insurance company can withhold coverage for an insured's pre-existing health condition for a specific time, during which the policy is effective.⁴² Therefore, the applicant with high blood pressure may not be given coverage on claims involving high blood pressure during the first six months or more of his policy.⁴³ Or, the insurance company can refuse coverage if a condition manifests itself after the date of application but prior to the policy's

has not approved any of these "imported" illegal drugs. Therefore, information on their potency and side effects is unknown. See PRESIDENTIAL COMMISSION REPORT, *supra* note 16, at 9-10; CLOSEN, *supra* note 1, at 145.

39. See *supra* note 3 and accompanying text for a general discussion of the pre-existing health condition standard.

40. High blood pressure is classified as a pre-existing health condition because it permanently impairs the health of the recipient. It can never be totally cured; it can only be treated. THE MERCK MANUAL, *supra* note 17, at 389-99. See also Annotation, *Construction*, *supra* note 3, at 995-96.

41. There are three judicially accepted definitions to determine the existence or manifestation of a disease; see *infra* III, B, *The Pre-Existing Health Condition Standard and the "Origin" of AIDS*.

42. Many policies include language (either direct or indirect) that prevent the coverage of a pre-existing condition during any period when the insurance policy is effective. MEYER, LIFE AND HEALTH INSURANCE LAW §§ 17:1-2 (1972). See also Annotation, *Construction*, *supra* note 3, at 994. Many of the symptoms of this pre-existing condition that may appear after the issuance of the policy are not covered even though this particular symptom was not known to the insured at the time of the application for insurance. See generally *Lincoln Income Life Ins. Co. v. Milton*, 242 Ark. 124, 412 S.W.2d 291 (1967); *Mutual of Omaha Ins. Co. v. Walley*, 251 Miss. 780, 171 So. 2d 358 (1965).

43. The rationale behind this type of limited exclusion of post-application conditions seems to be that if the applicant survives without an attack for the first six months to a year, then the applicant is less of a risk. If the applicant's condition persists, the policy has a clause that classifies the illness as a pre-existing condition and the condition is totally excluded from coverage for the length of the policy. See also MEYER, LIFE AND HEALTH INSURANCE LAW §§ 6:11-12 (1972).

effective date.⁴⁴ Therefore, the applicant in the example above would be denied coverage for his high blood pressure if the need for medication arose after he applied for coverage but before the coverage became effective. The insurance company would also deny any claims filed by this applicant, as a result of his high blood pressure, during the life of his policy.

The insurance industry's first difficulty in applying the pre-existing health condition standard to HIV/AIDS infected individuals stems from the standard's definition. The definition of a pre-existing health condition centers on the word "origin".⁴⁵ Many courts have held that the origin of a disease occurs when it becomes "manifest or active, or when there is a distinct symptom or condition from which one learned in medicine can, with reasonable accuracy, diagnose the illness."⁴⁶ However, the question of when a disease manifests itself or becomes active is one of degree. Some jurisdictions hold that a pre-existing condition does not manifest itself if the condition does not hinder the normal function of the applicant's body prior to his application for insurance.⁴⁷ Other jurisdictions base a condition's manifestation or existence upon the insured's actual knowledge of the condition.⁴⁸ Under this theory, if the insured

44. Many insurance policies have an exclusionary period built into their terms. If an illness manifests itself between the time the insured makes the application and the policy's coverage becomes effective, the illness is classified as a pre-existing condition. Therefore, the insurance industry totally precludes coverage even though the condition was not known to the applicant until after he applied for insurance. See MEYER, LIFE AND HEALTH INSURANCE LAW §§ 17:3-5 (1972). See also *Cardamone v. Allstate Ins. Co.*, 49 Ill. App. 3d 435, 437-39, 364 N.E.2d 460, 462-64 (1977) (gall bladder illness excluded since it manifested itself within thirty day exclusion period); *American Life Ins. Co. v. Barnett*, 51 So.2d 227, 228 (Miss. 1951) (appendix abscess originating within ninety day exclusion period excluded); *Inman v. Life Ins. Co.*, 223 S.C. 98, 99, 74 S.E.2d 423, 424 (1953) (ulcer excluded from coverage since it manifested itself within ninety day exclusion period).

45. Annotation, *Construction*, *supra* note 3, at 995.

46. MEYER, LIFE AND HEALTH INSURANCE LAW § 17:4 (1972). See generally *Craig v. Central Nat'l Life Ins. Co.*, 16 Ill. App. 2d 344, 148 N.E.2d 31 (1958); *Thompson v. Commercial Ins. Co.*, 344 So. 2d 135 (Miss. 1977); Annotation, *Construction*, *supra* note 3, at 998.

47. See generally *Nat'l Casualty Co. v. Hudson*, 32 Ala. App. 69, 21 So. 2d 568 (1945) (knee injury did not impair limb's function until after policy date); *Medical Serv. of D.C. v. Llewellyn*, 208 A.2d 734 (D.C. App. 1965) (gall stones hindered normal function of gall bladder prior to issuance of policy); *Miller v. Industrial Hosp. Ass'n*, 183 Neb. 704, 163 N.W.2d 891 (1969) (back condition did not become chronic until after first six months of policy had elapsed); *Reserve Life Ins. Co. v. Ross*, 356 S.W.2d 393 (Tex. Civ. App. 1962) (back condition required corrective surgery after issuance of policy).

48. Once an insured is aware, due to a doctor's diagnosis, of his/her condition, the condition is said to have manifested itself. MEYER, LIFE AND HEALTH INSURANCE LAW §§ 17:6-8 (1972). But see *Lovett v. American Family Life Ins. Co.*, 107 Ga. App. 603, 131 S.E.2d 70 (1963) (tubal pregnancy held to exist before there was an outward sign to the applicant). If courts generally accept this definition of a disease, all HIV/AIDS applicants could be precluded from coverage

was unaware of the condition's presence at the time of his application, then the condition cannot be classified as pre-existing.⁴⁹ Since the symptoms of AIDS can lie dormant for an undetermined period of years, these definitions of "origin" are difficult to apply to an applicant with HIV/AIDS.⁵⁰ Furthermore, the specific origin and manifestation of the HIV/AIDS are unknown and undetectable.

A second difficulty inherent in the use of the pre-existing health condition standard is its application to concurrent and independent illnesses. A concurrent illness occurs simultaneously with the pre-existing condition and may aggravate the pre-existing condition or be aggravated by it.⁵¹ Conversely, an independent illness is a disease or condition occurring separate and apart from the pre-existing condition.⁵² Generally, courts have recognized that most serious illnesses are accompanied or preceded by other disorders and physical difficulties.⁵³ Most jurisdictions hold that insurance companies may not deny coverage for independent and/or

because their immune systems from the time of exposure are not "normal". See also *Lincoln Income Life Ins. Co. v. Milton*, 242 Ark. 124, 412 S.W.2d 291 (1967) (cause of cessation of menstrual cycle diagnosed after beginning of policy held to be a pre-existing condition).

49. See *Mutual Hosp. Ins., Inc. v. Klapper*, 153 Ind. App. 555, 288 N.E.2d 279 (1972) (medical inception of disease is trap for blissfully unaware insurance applicant); *Union Bankers Ins. Co. v. May*, 87 So. 2d 264 (Miss. 1956) (policy provision effective from date disease known to patient).

50. A person who is HIV positive is said to be seropositive because the serum in his blood has begun to produce the abnormal HIV antibodies. See *supra* note 25 for a discussion of the available HIV tests and seropositivity. Prior to this conversion, the person has been exposed to HIV but, due to the small amount of antibodies present in his or her body, the blood tests cannot detect the presence of HIV. For a discussion of this "window period," see *supra* notes 32-33 and accompanying text.

51. Concurrent illnesses occur at the same time as the pre-existing health condition. A concurrent illness may aggravate a pre-existing condition such as the case where liver and gall bladder trouble strained the insured's pre-existing weak heart condition. *Am. Life and Accident Ins. Co. v. Smith*, 380 S.W.2d 36, 37 (Tex. Civ. App. 1964). Additionally, a concurrent illness can be aggravated by a pre-existing condition. See *Cohen v. N. Am. Life and Casualty Co.*, 150 Minn. 507, 185 N.W. 939 (1921) (insured allowed to recover even though post-operative adhesions aggravated by adhesions from previous appendicitis surgery).

52. An independent illness is an illness or condition occurring separate and apart from the pre-existing health condition. Annotation, *Construction, supra* note 3, at 1004-05. The pre-existing condition cannot appear to be the cause of the independent illness or the claim will be barred. *Id.* See, e.g., *Rogers v. Columbian Protective Ass'n*, 132 Conn. 129, 129-30, 43 A.2d 72, 73-74 (1945) (hospitalization of insured due to intestinal obstruction not pre-existing generative organ disorder); *Reserve Life Ins. Co. v. Life*, 288 P.2d 717, 719-20 (Okla. 1955) (myocardial infarction not shown to be result of pre-existing general arteriosclerosis).

53. See *Am. Life and Accident Ins. Co. v. Smith*, 380 S.W.2d 36, 40 (Tex. Civ. App. 1964) (pre-existing heart condition did not preclude recovery for gall bladder claim); Annotation, *Construction, supra* note 3, at 1002-03 (lists cases generally dealing with concurrent illnesses).

concurrent ailments which complicate a pre-existing health condition.⁵⁴

Some jurisdictions allow recovery where the pre-existing condition does not appear to be responsible for the ailment upon which recovery is sought.⁵⁵ Additionally, some jurisdictions allow recovery when the pre-existing health condition is not the primary cause for the insured's further treatment.⁵⁶ In each of these situations, doctors can easily define and trace the concurrent or independent cause of treatment to an ailment separate from the pre-existing

54. Annotation, *Construction*, *supra* note 3, at 1002-06. For example, coverage could not be denied to a man who died from coronary occlusion after his gall bladder and liver (independent illnesses) aggravated his pre-existing heart condition. *Am. Life & Accident Ins. Co. v. Smith*, 380 S.W.2d 36, 40 (Tex. Civ. App. 1964). A coronary occlusion is a "complete obstruction of an artery of the heart, usually from progressive arteriosclerosis." SLOANE-DORLAND DICTIONARY, *supra* note 18, at 506.

Mr. Smith was admitted to the hospital because of liver and gall bladder trouble. *Smith*, 380 S.W.2d at 38-39. These two conditions aggravated his pre-existing heart condition (for which he was not insured) and he subsequently died of heart failure. *Id.* at 39. American Life attempted to deny coverage under his hospitalization policy. *Id.* The court held that since Smith's gall bladder and liver were the cause of his hospitalization, coverage could not be denied. *Id.* at 39-40.

55. Annotation, *Construction*, *supra* note 3, at 1002-04. A situation where the pre-existing condition is not responsible for the illness upon which the claim is based is similar to the cases dealing with independent illnesses. However, the insured's claim is for a pre-existing illness that the policy did not exclude. Typically, these other pre-existing illnesses occur during the early exclusion period included in most policies. See *supra* notes 42-44 for a discussion of the exclusionary period in an insurance policy.

Royal Family Ins. Co. v. Grimes, 42 Ala. App. 48, 168 So. 2d 262 (1964), provides an illustrative example of this type of situation. In *Grimes*, the applicant sought recovery for face cancer on a policy that excluded coverage for her pre-existing leukoplakia of the face. *Grimes*, 168 So. 2d at 263-64. Leukoplakia, a form of leukemia which affects the face, is "a progressive malignant disease of the blood forming organs, characterized by distorted proliferation and development of [corpuscles] in the blood and bone marrow." SLOANE-DORLAND DICTIONARY, *supra* note 18, at 409-10 (defining leukemia). The court allowed recovery since the plaintiff's leukoplakia did not appear to be responsible for her subsequent face cancer. *Grimes*, 168 So. 2d at 264.

56. Annotation, *Construction*, *supra* note 3, at 1005-06. Three elements are necessary for a pre-existing condition to be considered the non-primary cause of surgery: "(1) several conditions are corrected at the same time; (2) one of the illnesses originated after the exemption period and during the life of the policy; and (3) the operation was primarily to correct the condition covered or the pre-existing condition did not add materially to the bill." *Id.* at 1005. See also MEYER, LIFE AND HEALTH INSURANCE LAW § 17:11 (1972).

For example, in *Neck v. Reliance Indus. Life Ins.*, 159 So. 449 (La. Ct. App. 1935), a woman operated on for appendicitis and for pre-existing womb lacerations could not be denied coverage for both claims since the appendicitis was the primary cause for the surgery. *Neck*, 159 So. at 452. See also *Graham v. Guarantee Trust Life Ins. Co.*, 267 S.W.2d 692, 694-95 (Mo. Ct. App. 1954) (pre-existing varicose veins removed incidentally to prostate condition); *Group Hosp. Serv. Inc. v. Bass*, 252 S.W.2d 507, 509-10 (Tex. Civ. App. 1952) (coverage allowed for operation on both feet even though only one foot covered by policy since cost was about the same if operation performed on both feet).

health condition. This delineated separation is not possible with an HIV/AIDS patient.⁵⁷ The difficulty in determining the origin and effect of a pre-existing health condition in an AIDS patient renders this standard inapplicable.

III. THE PRE-EXISTING HEALTH CONDITION STANDARD AND ITS INAPPLICABILITY DURING THE AIDS CRISIS

A. Risk Classification

The pre-existing health condition standard is inapplicable to the insurance industry's reliance on risk classification in determining the type of coverage an insurance company will offer prospective applicants.⁵⁸ Risk classification is the practice of placing applicants in pre-determined categories based upon their life expectancy, age, health, and lifestyle.⁵⁹ An insurer relies on the projected insurance needs of each group in determining the amount and type of coverage to provide an applicant.⁶⁰ For example, an insurer places an applicant twenty years old, in good health and living a modest lifestyle in a lower risk category than an older or less healthy applicant, because the younger applicant's health and life insurance needs should be minimal.⁶¹ Thus, the insurer will give the applicant coverage at a reasonable premium on the theory that the insurance company will seldom need to pay the applicant's expenses.⁶² As this applicant ages or becomes infirm however, his insurance coverage will change correspondingly.⁶³

Any type of pre-existing health condition also influences the risk category within which a person is placed.⁶⁴ Generally, the insurer will exclude coverage for the individual's pre-existing condition and simultaneously use the condition to determine the

57. AIDS is a "system" disease. It attacks the human immune system, not just one particular organ or part. PRESIDENTIAL COMMISSION REPORT, *supra* note 16, at 7-11.

58. Hoffman & Kincaid, *AIDS: The Challenge to Life and Health Insurers' Right to Freedom of Contract*, 35 DRAKE L. REV. 709, 715-21 (1986) (hereinafter Hoffman, *Freedom of Contract*). See also Clifford, *AIDS and Insurance*, *supra* note 8, at 1806; Note, *A Paradigmatic Inquiry*, *supra* note 2, at 1059.

59. Hoffman, *Freedom of Contract*, *supra* note 58, at 715-17.

60. Note, *A Paradigmatic Inquiry*, *supra* note 2, at 1068. See also Clifford, *AIDS and Insurance*, *supra* note 8, at 1807-08; Hoffman, *Freedom of Contract*, *supra* note 58, at 715-21.

61. A twenty to twenty-five year old, healthy male with a moderate income should live to a normal life expectancy (70 years). Since this applicant is presently healthy, he is not likely to make any large claims under his policy in the near future. For a description of the factors that determine high and low risk classifications, see Hoffman, *Freedom of Contract*, *supra* note 58, at 716-17.

62. Hoffman, *Freedom of Contract*, *supra* note 58, at 717.

63. *Id.*

64. *Id.* at 739-41.

applicant's risk category.⁶⁵ For example, an applicant with circulatory problems typically will have an increased risk of stroke or heart attack.⁶⁶ Thus, an insurance company will place this applicant in a higher risk category based upon the possibility that the other conditions (stroke and heart attack) may occur due to his pre-existing circulatory problem.⁶⁷ Also, the insurance company will not honor any claims based on his circulatory disorder.⁶⁸

The insurance industry's use of pre-existing health conditions to classify applicants depends on the insurance company's ability to classify the condition.⁶⁹ HIV/AIDS attacks the entire immune system, not just one bodily organ or part.⁷⁰ It is this pervasive aspect of the virus that renders the pre-existing health condition standard inadequate and unsuitable as a means to classify HIV/AIDS applicants.⁷¹ Whereas chest pains and numbness in the left arm indicate a possible heart attack,⁷² a bout with pneumonia or a persistent fever may or may not indicate HIV/AIDS.⁷³ Most HIV/AIDS patients do not even become aware of the seriousness of their condition until a series of symptoms occur.⁷⁴ In addition, persons exposed to HIV can be asymptomatic⁷⁵ for lengthy periods of time.

65. See Note, *A Paradigmatic Inquiry*, *supra* note 2, at 1068-73. See also Hoffman, *Freedom of Contract*, *supra* note 58, at 735-41.

66. Patients with circulatory disorders have an increased risk of heart disease and stroke. THE MERCK MANUAL, *supra* note 17, at 643-51.

67. See Hoffman, *Freedom of Contract*, *supra* note 58, at 715-17 (change in factors for classification alter risk category).

68. Hoffman, *Freedom of Contract*, *supra* note 58, at 739-41.

69. Note, *A Paradigmatic Inquiry*, *supra* note 2, at 1068-73.

70. See Centers for Disease Control, *Update on Acquired Immune Deficiency Syndrome (AIDS)-United States*, 31 MORBIDITY AND MORTALITY WEEKLY REP. 507-14 (1982) (case definition for AIDS and description of combination of symptoms); Merritt, *Communicable Disease and Constitutional Law: Controlling AIDS*, 61 N.Y.U. L. REV. 739, 743-45 (1986); PRESIDENTIAL COMMISSION REPORT, *supra* note 16, at 7-11. See generally *Classification of HTLV-III/LAV-Related Diseases*, 125 J. OF INFECTIOUS DISEASES 1095 (1985); Centers for Disease Control, *Classification for Human T-Lymphotropic Virus Type III/Lymphadenopathy-Associated Virus Infections*, 35 MORBIDITY AND MORTALITY WEEKLY REP. 334-39 (1986).

71. Centers for Disease Control, *Update on Acquired Immune Deficiency Syndrome (AIDS) - United States*, 31 MORBIDITY AND MORTALITY WEEKLY REP. 507-14 (1982).

72. See THE MERCK MANUAL, *supra* note 17, at 350-55.

73. Pneumonia or fevers must be chronic (present for three or more months and unexplained) before they indicate HIV/AIDS exposure. *Classification of HTLV-III/LAV Related Diseases*, 125 J. OF INFECTIOUS DISEASES 1095 (1985).

74. See Centers for Disease Control, *Update on Acquired Immune Deficiency Syndrome (AIDS) - United States*, 31 MORBIDITY AND MORTALITY WEEKLY REP. 507-14 (1982). See also PRESIDENTIAL COMMISSION REPORT, *supra* note 16, at 7-11; Closten, *Testing Democracy*, *supra* note 2, at 861-64.

75. An asymptomatic patient is a patient who does not presently demonstrate any signs of illness.

B. *The Pre-Existing Health Condition Standard and the "Origin" of AIDS*

The insurance industry bases the pre-existing health condition standard on the usual situation in which every major condition has a distinct origin and readily identifiable manner of manifestation.⁷⁶ AIDS does have a distinct origin.⁷⁷ It originates from the transmission of HIV.⁷⁸ However, doctors and scientists cannot readily detect HIV transmission.⁷⁹ Only a blood test, performed after a sufficient waiting or "window" period, can detect the presence of HIV in a person's body.⁸⁰ After a positive HIV test, doctors consider this person "seropositive" since the antibodies in his blood serum have converted to HIV antibodies. However, the presence of HIV does not mean that the symptoms of full-blown AIDS will manifest themselves shortly.⁸¹ In fact, years may pass before a person becomes aware, due to detectable symptoms, that the person has been exposed to this deadly virus.⁸²

Prior to the HIV/AIDS epidemic, the courts defined the origin or manifestation of a pre-existing health condition in one of three ways. A pre-existing health condition originated or manifested itself: (1) at the time of its medical inception; (2) when the condition impaired the normal function of the body; or (3) when a person had actual knowledge of the condition's presence.⁸³ All three of these definitions present problems for HIV/AIDS applicants because of clauses in their insurance contracts identifying the origin of a condi-

76. Annotation, *Construction*, *supra* note 3, at 995-97. See also Hoffman, *Freedom of Contract*, *supra* note 58, at 715-20.

77. All research indicates that persons infected with AIDS have been exposed to HIV. Centers for Disease Control, *Classification System for Human T-Lymphotropic Virus Type III/Lymphadenopathy-Associated Virus Infections*, 35 MORBIDITY AND MORTALITY WEEKLY REP. 334-35 (1986); PRESIDENTIAL COMMISSION REPORT, *supra* note 16, at 1, 7-11. However, not all HIV positive persons develop AIDS. See Closen, *Testing Democracy*, *supra* note 2, at 860-61.

78. See *supra* note 27 for articles on HIV transmission.

79. For a discussion of the "window" period of HIV infection, see *supra* notes 32-33 and accompanying text.

80. For a discussion of the two tests used to detect the presence of HIV in the human body, see *supra* note 25.

81. See Centers for Disease Control, *Classification System for Human Lymphotropic Virus Type III/Lymphadenopathy-Associated Virus Infections*, 35 MORBIDITY AND MORTALITY WEEKLY REP. 334-39 (1986) (overview of diagnosis of AIDS symptoms). See also PRESIDENTIAL COMMISSION REPORT, *supra* note 16, at 7-20 (1988); CLOSEN, *supra* note 1, at 131.

82. CLOSEN, *supra* note 1, at 131.

83. See Annotation, *Construction*, *supra* note 3, at 998-1000. See also *Nat'l Casualty Co. v. Hudson*, 32 Ala. App. 69, 70-71, 21 So. 2d 568, 569-70 (1945) (condition did not hinder insured's use of knee until after benefits of policy accrued); *Mutual Hosp. Ins., Inc. v. Klapper*, 153 Ind. App. 555, 558-59, 288 N.E.2d 279, 281-82 (1972) (manifestation occurs when doctor can diagnose condition); MEYER, LIFE AND HEALTH INSURANCE LAW §§ 17:1-9 (1972).

tion, which can be used against them.⁸⁴

The first definition, the medical inception doctrine, is particularly problematic for HIV/AIDS applicants. The medical inception of AIDS is the moment of exposure to HIV, and is only detectable through a specific series of blood tests taken after several weeks to several months.⁸⁵ However, in the past these blood tests have produced false results.⁸⁶ These false results involve one of two possible outcomes: a false negative or a false positive. One way in which a false negative occurs is when the blood test is unable to detect a measurable amount of HIV antibodies in the applicant's blood.⁸⁷ Even though HIV begins to produce antibodies shortly after exposure, the antibodies are not readily detectable in small amounts.⁸⁸ Although medical science has made advances in both of the blood tests used to detect HIV/AIDS, their level of sensitivity to HIV antibodies is still not refined enough to immediately spot traces of HIV exposure.⁸⁹

Additionally, these tests may produce false positive results due to improper storage of the serum or mixed specimens.⁹⁰ The presence of other antibodies in the blood may be misread and mistaken for HIV antibodies.⁹¹ Furthermore, human error or a technician's failure to confirm the results may also produce a false positive.⁹² Thus, an applicant would test "positive" for exposure to HIV when he/she could be "HIV free".⁹³ Absolute and conclusive detection of HIV exposure is impossible due to the instability of HIV test results. Yet the insurance industry continues to rely on the HIV tests in determining the presence of a pre-existing HIV/AIDS health condition.⁹⁴ The undetectable nature of the precise time of expo-

84. See Hoffman, *Freedom of Contract*, *supra* note 58, at 739-40.

85. For a discussion of the blood tests used to detect HIV antibodies, see *supra* note 25.

86. See Centers for Disease Control, *Update: Serologic Testing for Antibody to Human Immunodeficiency Virus*, 36 MORBIDITY AND MORTALITY WEEKLY REP. 833-84 (1988). See also Closen, *Testing Democracy*, *supra* note 2, at 871-75; CLOSEN, *supra* note 1, at 149; Note, *A Paradigmatic Inquiry*, *supra* note 2, at 1060-62.

87. See Closen, *Testing Democracy*, *supra* note 2, at 871-75.

88. See *supra* note 25 for a discussion of the tests used to detect the presence of HIV antibodies in the human immune system. See also Closen, *Testing Democracy*, *supra* note 2, at 871-75.

89. Closen, *Testing Democracy*, *supra* note 2, at 873.

90. See CLOSEN, *supra* note 1, at 149.

91. See Closen, *Testing Democracy*, *supra* note 2, at 873. *But see* Saag & Britz, *supra* note 25, at 118.

92. *Id.*

93. See Closen, *Testing Democracy*, *supra* note 2, at 873. See also Note, *A Paradigmatic Inquiry*, *supra* note 2, at 1060-62.

94. See Hoffman, *Freedom of Contract*, *supra* note 58, at 715-21. See also Schatz, *Underswriting*, *supra* note 2, at 1782; Note, *A Paradigmatic Inquiry*, *supra* note 2, at 1059.

sure to HIV does not conform to the medical inception definition of "origin"; this definition, therefore, is inapplicable to an HIV/AIDS setting.

The second definition, the impairment doctrine, looks at the impairment of an applicant's normal bodily functions prior to his insurance application.⁹⁵ The key element in this definition is the concept of impairment.⁹⁶ An impairment occurs when an illness or injury causes the disfunction of a bodily part, thereby weakening or diminishing that part's functioning.⁹⁷ This weakness is permanent but will *not* spread to other parts of the body. Perhaps the most common example of an impairment is a slipped disc in the back. The disc, once injured, can never be completely restored, even through medical treatment. Therefore, an applicant with this condition will probably experience medical problems at some point later in life. An insurance company will either preclude coverage for any further treatment of the applicant's back, or will only allow limited coverage of "new" injuries/illnesses to this same area.⁹⁸

The ability to isolate a particular impairment is paramount in the insurance industry's use of the impairment doctrine.⁹⁹ Just as absolute detection of HIV in the early stages of AIDS is impossible, complete isolation of the impairments that follow HIV exposure is equally impossible until the applicant develops significant symptoms/impairments; this could take years.¹⁰⁰ HIV attacks the entire human immune system, not just one organ or body part.¹⁰¹ HIV/AIDS is similar to other systemic illnesses like multiple sclerosis and muscular dystrophy, in that the virus attacks the human body as a whole.¹⁰² It is impossible for medical science to predict

95. Annotation, *Construction*, *supra* note 3, at 999. *See also* Nat'l Casualty Ins. Co. v. Hudson, 32 Ala. App. 69, 71-72, 21 So.2d 568, 570 (1945) (court equates manifestation of disease with hindrance of organ or limb).

96. Annotation, *Construction*, *supra* note 3, at 999.

97. *See* MEYER, LIFE AND HEALTH INSURANCE LAW § 17:6 (1972). Some jurisdictions hold that the abnormal functioning of the body can constitute manifestation if the applicant was aware of serious symptoms prior to the effective date of the policy, even if he was not aware of having a disease. *See* Malone v. Continental Life and Accident Co., 89 Idaho 77, 403 P.2d 225 (1965) (applicant treated by doctor for cancer but never told cause of treatment); Dowdall v. Commercial Traveler's Mut. Accident Ass'n, 344 Mass. 71, 181 N.E.2d 594 (1962) (doctor knew applicant had multiple sclerosis but neglected to inform applicant until years after effective date of policy). *But see* Rosenberg v. North Dakota Hosp. Serv. Ass'n, 136 N.W.2d 128 (N.D. 1965) (actual diagnosis necessary to impute knowledge of condition to applicant).

98. *See* Hoffman, *Freedom of Contract*, *supra* note 58, at 739-41; Annotation, *Construction*, *supra* note 3, at 1035-36.

99. *See* Hoffman, *Freedom of Contract*, *supra* note 58, at 735-41. *See also* Schatz, *Underwriting*, *supra* note 2, at 1782.

100. *See infra* note 105 for a list of AIDS symptoms.

101. *See* PRESIDENTIAL COMMISSION REPORT, *supra* note 16, at 1.

102. *See supra* note 77 for articles on the diagnosis of AIDS. *See also* Closen, *Testing Democracy*, *supra* note 2, at 856-58.

with certainty which area of the HIV/AIDS patient's body will initially be most afflicted. The only known factor is that *all* of his body will eventually be affected by the illness.¹⁰³

HIV/AIDS cannot be categorized into a series of insurable impairments.¹⁰⁴ Certain symptoms are known to develop during the first stage of AIDS.¹⁰⁵ However, the course and severity of the remaining symptoms are unpredictable. No AIDS patient will follow quite the same course as a previous patient.¹⁰⁶ Unlike the applicant with a slipped disc, the HIV/AIDS applicant cannot be certain his "impairment" will remain constant for very long. In fact, the only thing he can be sure of is that his impairment will *not* remain localized in one body organ/part. Therefore, the definition of impairment used by the insurance industry to determine the presence of a pre-existing health condition is inadequate when dealing with the unique nature of HIV/AIDS.

Finally, the third definition the insurance industry uses centers on an applicant's knowledge of his condition prior to his application for insurance.¹⁰⁷ This "knowledge" definition is equally troublesome because a person actually knows he or she has been exposed to HIV/AIDS only if the person undergoes an HIV test which allows for a sufficient "window" period,¹⁰⁸ or knows of the classic symptoms of HIV/AIDS.¹⁰⁹ As previously mentioned, the blood tests used to detect the presence of HIV are not completely relia-

103. CLOSEN, *supra* note 1, at 856-61.

104. *Id.*

105. See *supra* notes 34-36 and accompanying text for a discussion of various AIDS symptoms. Additionally, the Centers for Disease Control has released a list of symptoms used for diagnosing AIDS. This list includes the simultaneous presence of: (1) malignant tumors (Kaposi's sarcoma); (2) protozoa infections (pneumocystis pneumonia); (3) fungus infections (candidiases); (4) viral infections (hepatitis). Centers for Disease Control, *Revision of the Case Definition of Acquired Immunodeficiency Syndrome for National Reporting - United States*, 34 MORBIDITY AND MORTALITY WEEKLY REP. 373, 373-75 (1985). See also *Classification of HTLV-III/LAV Related Diseases*, 152 J. OF INFECTIOUS DISEASES 1095 (1985); Centers for Disease Control, *AIDS and The Human Immunodeficiency Virus Infection In The United States: 1988 Update*, 38 MORBIDITY AND MORTALITY WEEKLY REP. 1-2 (1989); Closen, *Testing Democracy*, *supra* note 2, at 862-64.

106. Although AIDS can be detected by a series of symptoms, the severity or course of these symptoms vary with each patient. See Centers for Disease Control, *Update on Acquired Immune Deficiency Syndrome (AIDS) - United States*, 38 MORBIDITY AND MORTALITY WEEKLY REP. 507 (1982).

107. Annotation, *Construction*, *supra* note 3, at 999-1000. See also *Mutual Hosp. Ins., Inc. v. Klapper*, 153 Ind. App. 555, 288 N.E.2d 279 (1972) (disease exists when it is known to insured or is capable of being diagnosed by doctor).

108. Due to the "window" period, HIV antibodies cannot be detected immediately following exposure. See Closen, *Testing Democracy*, *supra* note 2, at 871-75.

109. See also *supra* notes 34-36, and 105 for a discussion of HIV/AIDS symptoms.

ble.¹¹⁰ In addition, unless an applicant has a reason to believe he was exposed to HIV, he would not generally undergo such a test. Therefore, in most cases only the onset of AIDS symptoms would cause him to suspect his condition.

Many symptoms of AIDS are, in fact, illnesses.¹¹¹ In addition, the initial symptoms (weight loss, fevers, and fatigue) are possibly indicative of many other, less severe, illnesses.¹¹² An applicant who develops one of these generalized symptoms prior to his application for insurance may not realize that such symptoms are an indication of exposure to HIV/AIDS. However, the insurance industry has been successful in using this pre-diagnosed medical ailment to preclude coverage when that ailment is later revealed to be an underlying symptom of AIDS.¹¹³ Therefore, actual knowledge of the severity of one's condition is not necessary to prevent the insurance industry from using the pre-existing health condition standard against the unsuspecting applicant.¹¹⁴

To date, no applicants have successfully challenged this knowledge requirement in the HIV/AIDS context.¹¹⁵ However, in cases involving different types of serious conditions, courts required the insurers to prove the applicant's actual knowledge of his condition and his intent to deceive the insurance company before the company may preclude insurance coverage.¹¹⁶ Presently, neither of

110. Clozen, *Testing Democracy*, *supra* note 2, at 871-72. See also *supra* notes 86-93 and accompanying text.

111. See Centers for Disease Control, *Pneumocystis Pneumonia-Los Angeles*, 30 MORBIDITY AND MORTALITY WEEKLY REP. 250-52 (1981); Centers for Disease Control, *Kaposi's Sarcoma and Pneumocystis Pneumonia Among Homosexual Men—New York City and California*, 30 MORBIDITY AND MORTALITY WEEKLY REP. 305-08 (1981).

112. A persistent fever is an indication of several illnesses (other than AIDS). Among these illnesses are: (1) drug hypersensitivity; (2) malaria; (3) measles; (4) rubella; (5) flu/influenza; and (6) the common cold. THE MERCK MANUAL, *supra* note 17, at 323-27, 171, 182-83, 189, 191, 239. Additionally, there are several dozen different types of pneumonia that are less deadly than pneumocystis carinii which have similar symptoms. *Id.* at 651-66

113. *Lilley I*, *supra* note 5, at 3-5 (applicant never diagnosed with AIDS prior to death, but, nonetheless, applicant's claim was barred due to his HIV/AIDS infection).

114. Some jurisdictions hold that the manifestation of the symptoms of a disease without actual diagnosis is enough to establish the presence of a pre-existing condition. See *Cardamone v. Allstate Ins. Co.*, 49 Ill. App. 3d 435, 439-40, 364 N.E.2d 460, 462-64 (1977) (insured's visit to doctor for stomach pains prior to effective date of policy sufficient to establish knowledge of gall bladder problem).

115. See *supra* notes 5 and 48. The plaintiff in *Lilley I*, *supra* note 5, at 20, successfully challenged this knowledge requirement at the trial court level, but the decision was overturned on appeal. *Lilley II*, *supra* note 4, at 8-9.

116. See generally *Massachusetts Casualty Ins. Co. v. Forman*, 516 F.2d 425, 428 (5th Cir. 1975), cert. denied 424 U.S. 914 (1976); *Nat'l Life and Accident Ins. Co. v. Mixon*, 50 Ala. App. 697, 699-701, 282 So. 2d 306, 308 (1972); *Chavis v. United Family Life Ins. Co.*, 269 S.C. 179, 180, 236 S.E.2d 816, 818 (1977).

these two elements are necessary in the AIDS context for an insurance company to preclude coverage.¹¹⁷ Unlike its two counterpart definitions that are ill-equipped to deal with the pervasiveness of HIV/AIDS, the insurance industry and the courts are simply ignoring the "knowledge" definition and its elements. Insurers are indiscriminately using this definition to label any general ailment a pre-existing condition of HIV/AIDS.

The three definitions of the origin of a pre-existing health condition are unsuited for use in an AIDS setting. These definitions do not consider that the symptoms of HIV/AIDS may not even indicate HIV exposure.¹¹⁸ The symptoms are general and can indicate many other ailments.¹¹⁹ Nor do these definitions account for the difficulty in accurately detecting exposure to HIV.¹²⁰ Moreover, these definitions ignore judicial guidelines regarding the extent of an applicant's knowledge of a pre-existing condition prior to application.¹²¹ Thus, an insurance company can hold an applicant accountable for knowledge of his HIV/AIDS condition prior to the time when a medical determination of that condition is possible and prior to the applicant having actual or implied knowledge of his condition.

These three definitions of the origin of a pre-existing health condition leave an HIV/AIDS applicant unprotected. The HIV/AIDS virus defies medical conventions and definitions. The definitions and standards must be adapted to meet the AIDS crisis. Until these definitions address the unique conditions and symptoms of AIDS, the pre-existing health condition standard will remain deficient as an insurance practice during the AIDS crisis.¹²²

117. See Hoffman, *Freedom of Contract*, *supra* note 58, at 736-38.

118. See *supra* note 105 for the combination of symptoms needed to diagnose AIDS.

119. See *supra* note 112 for a discussion of other ailments which mimic AIDS symptoms.

120. For a discussion of the reliability of HIV testing, see *supra* note 25. See also Closen, *Testing Democracy*, *supra* note 2, at 871-75.

121. For a comparison of cases dealing with an applicant's knowledge in a willful misrepresentation suit, see *supra* note 10.

122. Although difficult and inadequate, insurance companies are using the definition of a pre-existing health condition to "justify withholding life or health benefits to policyholders who exhibited any ailments prior to being diagnosed with AIDS." Schatz, *Underwriting*, *supra* note 2, at 1786. See also *AIDS Victim Used Other's Blood to Get Policy*, *Insurers Say*, *COURIER POST* p.6B (Jul. 8, 1990) (insured pays \$30,365 per year to maintain a \$2 million insurance policy). This preclusion of benefits has opened the door to a series of collateral issues that must be addressed before the lack of coverage rises to crisis proportions. Among the issues to be addressed are: (1) the discrimination against single persons employed in "gay" professions; (2) the responsibilities of insurance companies that require the HIV test; and (3) coverage for the rejected applicants.

The first issue to be addressed is the discrimination by insurance companies of single men or persons employed in certain "gay" jobs. Schatz, *Underwriting*,

IV. A POSSIBLE SOLUTION: COST SPREADING OF KNOWN RISKS THROUGH RISK CLASSIFICATION

The insurance industry's use of the pre-existing health condition standard does not cope with the HIV/AIDS crisis because it

supra note 2, at 1186-88. Included among these so-called "gay" jobs are hair-dressers, flight attendants, interior designers, and florists. *Id.* See also THE UNITED STATES OFFICE OF TECHNOLOGY ASSESSMENT SURVEY, *AIDS and Health Insurance* 32, 37 (Feb. 1988). Some insurance companies automatically deny coverage to single men employed in these industries. Bahls, *False Security: Who Gets Access to AIDS Test Results?*, STUDENT LAWYER, Feb. 1990, at 44 [hereinafter Bahls, *False Security*]. Other companies require an HIV test as a prerequisite to insurance for these "gay" jobholders. *Id.* See also CLOSEN, *supra* note 1, at 555-60. Since the courts have upheld the use of HIV testing in the insurance industry, discriminatory testing based on a person's chosen profession appears legal. See *Am. Council of Life Ins. v. District of Columbia*, 645 F Supp. 84, 86-88 (D.C. Cir. 1986); *Life Ins. Ass'n v. Comm'r of Ins.*, 403 Mass. 410, 416-17, 530 N.E.2d 168, 172 (1988). State legislatures, however, have recognized the need to prevent the insurance industry's use of arbitrary questions regarding sexual orientation, gender of roommates, and lifestyle on insurance applications. Schatz, *Underwriting*, *supra* note 2, at 1789. Many states have enacted non-discrimination statutes to prevent insurance companies from using biased questions on their applications. See, e.g., CAL. INS. CODE § 799 (West Supp. 1991); FLA. STAT. ANN. § 627.429.5 (West Supp. 1991). However, less overt methods of discrimination, such as the total exclusion of single men in certain "gay" cities, continues without legislative intervention. See Bahls, *False Security*, *supra*, at 44; Schatz, *Underwriting*, *supra* note 2, at 1782-85.

Second, the insurance industry's use of HIV testing to determine when a pre-existing condition exists is an additional area of concern. Most testing statutes do contain clauses relating the insurance company's responsibility before and after testing. See FLA. STAT. ANN. § 627.429 (West Supp. 1991) N.Y. INS. LAW § 2611 (McKinney 1989). The insurance company must make sure the applicant is aware of the test procedure and the implication of its results. However, these statutes do not address the realities of having to undergo the test itself nor the effects of a positive test result. They do not provide for a centralized counseling center where the HIV positive applicant can confront the psychological impact of the HIV test. Moreover, once the insurance company obtains the test results it is virtually relieved of its legal responsibility to the tested applicant. See Bahls, *False Security*, *supra*, at 40; Schatz, *Underwriting*, *supra* note 2, at 1782-87; Note, *A Paradigmatic Inquiry*, *supra* note 2, at 1060-67.

Furthermore, few of these testing statutes address the question of confidentiality of the test results. Bahls, *False Security*, *supra*, at 40. Compare *Rasmussen v. South Fla. Blood Serv., Inc.*, 500 So. 2d 533 (Fla. Dist. Ct. App. 1987) (court refused to grant transfusion patient access to name of HIV infected donor) with *Jones v. American Nat'l Red Cross*, No. 84-4510 (LEXIS, State library, Ommi file) (plaintiff allowed to discover identity of donor). As yet, the question of whether an insurance company can share the test results, on a limited basis, with other insurance companies has not been litigated. It is also undetermined whether they can release these results to other interested parties (employers, doctors, etc.) who wish to be informed about their perspective employee or patient.

Third, and perhaps most importantly, while the pre-existing health condition standard may aid the insurance industry in decreasing its risk, it does nothing to aid the large number of rejected applicants. See Note, *A Paradigmatic Inquiry*, *supra* note 2, at 1062-67. These applicants find themselves unable to obtain affordable coverage that includes adequate benefits necessary when or if these individuals become ill. Someone will ultimately have to bear the burden of supporting these currently uninsured individuals. Schatz, *Underwriting*,

results in total preclusion of applicants. Without insurance coverage, these applicants will turn to the welfare system or some other publicly funded alternative for their health care. From a purely economic standpoint, insurance companies insist they must apply some restrictions when issuing policies. However, precluding seropositive individuals from insurance coverage is not a justifiable restriction, especially when the applicant has not yet exhibited any AIDS symptoms, nor has knowledge of this condition. Critics of the present insurance system advance a re-structuring of the insurance industry's practice of cost spreading through risk classifications as a possible solution to this growing trend of total preclusion.¹²³

To a limited extent, the insurance industry already uses cost spreading of known risks through risk classification.¹²⁴ An insurance company determines the expected needs of each applicant and places that applicant with others who have similar needs, so that each applicant may be charged accordingly.¹²⁵ The classification of applicants is based on the statistics available on like individuals.¹²⁶ Statistics reveal that AIDS is no more likely a cause of premature death than cancer,¹²⁷ and that the direct medical costs during the last year of life for each group are remarkably similar.¹²⁸ Additionally, direct medical costs for each group can be reduced by the use of less costly facilities, such as home health care and out-patient treatment.¹²⁹ Yet the insurance industry denies coverage to seropositive individuals, while the same industry continues to bear the

supra note 2, at 1799-1803. It is already obvious from the number of AIDS patients who die bankrupt, that the families and employers of these patients cannot bear this burden. Thus, the only other viable alternative for society is the welfare system. CLOSEN, *supra* note 1, at 565-71. See also *Weaver v. Reagen*, 701 F Supp. 717 (W.D. Mo. 1988), *aff'd*, 886 F.2d 194 (8th Cir. 1989). The government is a perennial deep pocket. It can always trim one budget to better fund another. Individual families and employers do not have this luxury. Unfortunately, society still seems to view HIV/AIDS as a "gay disease" and is reluctant to advocate a welfare support system for rejected HIV/AIDS applicants. See Closen, *Testing Democracy*, *supra* note 2, at 837-40. Thus, an employer will support an HIV/AIDS individual as long as his group insurance benefits last, then the HIV/AIDS individual's family will be left to bear the burden. Once their resources are depleted, the HIV/AIDS individual might qualify for Medicare, but will most likely die bankrupt. See Bahls, *False Security*, *supra*, at 40, 44.

123. See Note, *A Paradigmatic Inquiry*, *supra* note 2, at 1068-76. See also Hoffman, *Freedom of Contract*, *supra* note 58; Schatz, *Underwriting*, *supra* note 2.

124. Note, *A Paradigmatic Inquiry*, *supra* note 2, at 1068-76.

125. *Id.* at 1067-68 (explanation of risk classification).

126. *Id.* at 1069-70 (use of statistics to separate applicants into risk categories).

127. *Id.* at 1069 (comparison of terminally ill cancer patients to AIDS patients).

128. Note, *A Paradigmatic Inquiry*, *supra* note 2, at 1068-70 (medical expenditures of patients with cancer similar to AIDS patients in last year of life).

129. Schatz, *Underwriting*, *supra* note 2, at 1796.

cost of care for cancer patients. This disparity is due, in part, to the insurance industry's use of HIV testing as its primary classification tool.¹³⁰

Proper cost spreading is only possible if risk classifications accurately reflect the differences among applicants and their expected losses.¹³¹ Total exclusion of seropositive individuals does not meet this requirement for proper cost spreading because this exclusion prevents a comparison of HIV/AIDS individuals with other high risk applicants.¹³² Studies reveal similarities in direct medical costs between cancer patients and HIV/AIDS patients.¹³³ However, at present, the insurance industry does not examine these other factors prior to excluding HIV positive applicants. A comparison of the current risks of a seropositive applicant to those of other high risk applicants is necessary to achieve proper risk classification of HIV positive applicants.

To prevent the preclusion of seropositive applicants, health insurance companies should re-structure their approach and follow the risk structure used by automobile insurers.¹³⁴ The automobile insurance industry uses a system whereby each driver is grouped according to his age, experience, and past driving record.¹³⁵ Drivers with a history of accidents are usually classified as high risks and subjected to high premiums.¹³⁶ Conversely, drivers with an accident-free driving record are classified as low risk applicants and charged low premiums.¹³⁷ A symptomless seropositive applicant is similar to the sixteen year old driver with an accident-free history. This applicant is not, as yet, a risk to the insurance company and his ultimate cost to the insurance company is unknown.

Additionally, a symptomless seropositive applicant is similar to an accident-free driver because both the driver and the applicant will require coverage benefits at a later, undetermined time. Taking this into account, the insurance company can charge the accident-free driver and the seropositive applicant a higher premium than presently needed. The driver and applicant would be subsidizing others in the program who currently need extra benefits. Later, the premiums of other applicants will subsidize them.¹³⁸

130. See Hoffman, *Freedom of Contract*, *supra* note 58, at 721-23. See also Schatz, *Underwriting*, *supra* note 2, at 1782; Closen, *Testing Democracy*, *supra* note 2, at 837; Note, *A Paradigmatic Inquiry*, *supra* note 2, at 1068.

131. Note, *A Paradigmatic Inquiry*, *supra* note 2, at 1068.

132. *Id.* at 1069-70.

133. *Id.*

134. See Note, *Discrimination On The Basis of HIV Infection: An Economic Analysis*, 49 OHIO ST. L.J. 965, 986-93 (1989).

135. *Id.*

136. *Id.*

137. *Id.*

138. See Clifford, *AIDS and Insurance*, *supra* note 8, at 1817-19.

This system would be similar to the present social security system where a citizen invests now for the benefit of others on the theory that these same benefits will be available to him later.

The above illustration is typical of the operating procedure of most insurance companies. Ordinarily, one group, usually the low risk category, subsidizes the other groups.¹³⁹ The high risk group, although subjected to high premiums, pays smaller premiums relative to the benefits received.¹⁴⁰ Presumably however, these high risk persons were once in the lower risk category, paying higher premiums than necessary to support others in high risk categories. A system whereby HIV positive applicants pay higher premiums now for coverage later is in keeping with this established system.¹⁴¹ However, until the insurance industry is willing to use HIV testing as a method to classify rather than preclude HIV positive applicants, the present system will continue to inadequately address the AIDS crisis.¹⁴² Consequently, society will have to bear the health care costs HIV/AIDS individuals desperately need.

VI. CONCLUSION

The AIDS crisis arose at a time when society began to question many of the practices of the insurance industry. One of these practices, the exclusion of coverage on the basis of the pre-existing health condition standard, regularly precludes applicants with HIV/AIDS from coverage. As the number of rejected applicants rises, the inapplicability of this standard to individuals with HIV/AIDS becomes evident.

Prior to the beginning of the AIDS epidemic, the insurance industry used three possible definitions for the origin of a disease, to preclude coverage for pre-existing health conditions. However, none of these definitions are suited for use in an AIDS setting. These definitions do not account for the unreliability of current HIV/AIDS testing or the inability of medical science to isolate the virus. Furthermore, these definitions do not acknowledge the diffi-

139. *Id.* at 1817.

140. *Id.*

141. Supporters of HIV testing as a preclusionary device argue that the coverage paid in the early stages of HIV exposure are not adequate to offset the losses incurred by the insurance industry when the applicant develops AIDS. See Clifford, *AIDS and Insurance*, *supra* note 8, at 1817-19. However, it should be pointed out that the same is true for applicants who develop terminal illnesses other than AIDS. Yet the insurance industry is willing to carry these applicants even though they too do not properly counterbalance the losses incurred by the industry. Schatz, *Underwriting*, *supra* note 2, at 1069-70.

142. Even the supporters of HIV testing acknowledge that the present insurance system is inadequate. Clifford, *AIDS and Insurance*, *supra* note 8, at 1817-19. However, they argue that the inadequacies must be allowed to preserve the principles on which the insurance business was founded. *Id.* at 1807, 1817-19.

culty an AIDS applicant faces in recognizing the generalized symptoms of the early stages of the virus. The combination of these factors make proper classification of the risks of HIV/AIDS difficult. This classification would be possible however, if the insurance industry compares the risks of HIV positive applicants with those of other high risk applicants. Thus, a re-structuring of the present classification practices used by the insurance industry is necessary. Absent such a change, the insurance industry will continue to use the pre-existing health condition standard to discriminate against HIV/AIDS applicants by precluding their insurance benefits.

Barbara Lynn Pedersen