

Long Term Disability Offsets and Workers Compensation Settlements

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Long Term Disability Offsets and Worker's Compensation Settlements

All of us who handle worker's compensation claims on behalf of injured workers eventually run into clients who have various other benefit plans that need to be considered when we are settling our client's workers compensation cases. One of the more complex and troubling collateral benefits has to do with benefits that our clients are receiving or could potentially receive under long term disability policies. The purpose of this article is to discuss a number of issues that come up in regards to those policies and what, if anything, we can do about them.

I. Issues Discussed

1.) **As a general proposition, are offset provisions in long disability policies typically found to be enforceable?**

Yes. The typical policy will simply provide that when a long-term disability beneficiary receive benefit from other sources whether in the form of social security, workers compensation or under some other similar laws or through other plans purchased by the same employer, then the monthly amount of those benefits will be offset against the monthly long term disability benefits. An example of the offset provision that we often see is as follows:

E. INCOME FROM OTHER SOURCES

Income From Other Sources is used to reduce your LTD Benefit. It is explained in the following definition, exceptions, and rules.

1. Definition of Income From Other Sources

Income From Other Sources means:

...

- c. **Any amount you receive or are eligible to receive as a result of your disability under: a Workers' Compensation Act or similar law. This amount includes amounts for partial or total disability, whether permanent or temporary.**

There are numerous cases that have held or stood for the proposition that the validity of worker's compensation offsets in long-term disability policies is well established. Godwin v. Sun Life Insurance Co., 908 F.2d 323 (5th Cir. 1992); Alessi v. Raybestos-Manhattan, Inc., 451 U.S. 504, 522-25 (1981); PPG Industries Pension Plan A v. Crews, 902 F.2d 1148, 1150-51 (4th Cir. 1990); Salyers v. Allied Corp., 642 F. Supp. 442, 445 (E.D. Ky. 1986); McBarron v. S&T Industries Inc., 771 F.2d 94, 99 (6th Cir. 1985). However, while the offset provisions are typically enforceable, there are a number of issues that can potentially be raised in negotiating with the long term disability carriers or in litigating precisely how those offset provisions should be enforced. I will discuss a few of those issues. See also the discussion at section 9.) below.

2.) Does the general rule of thumb that ambiguous language in the insurance policy should be construed against the drafter apply in long term disability and ERISA cases?

Yes. It has been held that a long term disability policy is a contract like any other insurance policy. Therefore, the general rule of thumb that applies in construing contracts against the drafter should apply in these ERISA cases also. Glocker v. W.R. Grace & Co., 974 F.2d. 540, 544 (4th Cir. 1992); Bailey v. Blue Cross-Blue Shield, 67 F.3d 53, 57, 58 (4th Cir. 1995), cert. Denied, 116 S. Ct. 1043 (1996). This would appear to be all the more true if the suit being heard is a dispute in equity rather than contract. See section 9.) below.

3.) Can an argument be successfully made that the offset is not enforceable if there is a the third party settlement relating to the same accident as the work accident?

It may depend upon the policy language. It would seem logical that if the worker's compensation claimant actually has to pay back the entirety of or a large portion of the worker's compensation weekly checks for the time period covered by the proposed offset that the offset would be unfair. However, not all of the case law is particularly helpful. One case that is not helpful is the case of Connors v. Connecticut General Life Ins. Co., 272 F.3d 127 (2d Cir. 2001).

In Connors the policy allowed the insurer to reduce its disability benefits by the amount of "other benefits received by the employee, including 'any amounts which [the employee] receive[s] because of disability under... any workers' compensation or similar law.'" *Id.* At 130. The insurer reduced the plaintiff's disability benefits "by amounts equal to his workers' compensation benefits." *Id.* Following his settlement of his tort claim, the employee repaid the compensation benefits and then sued the insurer, contending that, as a result of such repayment, the insurer "owe[d] him the amount it had previously deducted from his [disability] benefits." *Id.* at 131. The Second Circuit, applying the de novo standard of review, rejected that contention, holding:

The terms at issue here are not ambiguous. The Policy allows CGLIC to reduce monthly benefits by amounts received from other sources. The fact that Connors ultimately repaid his workers' compensation benefits does not change CGLIC's rights under the Policy. Any other result would presume that additional benefits are due to Connors that were not stated in the insurance policy by the parties to the insurance contract. The District Court was correct in denying Connor's claim for return of the amounts withheld by CGLIC.

Id. at 137.

Another Court that found in favor of the LTD carrier was Snead v. UNUM Life Insurance Co. 842 F. Supp. 69 (E.D. Va. 1993), aff'd in part, remanded in part on other grounds, 1994 WL 489480; 35 F.3d 556 (4th Cir. 1994), cert. denied, ___ U.S. ___, 115 S. Ct. 1999 (1995). In Snead, the plaintiff had settled a third party tort action for injuries sustained in his work related accident. He netted \$410,000.00 from that settlement after payment of medical expenses, fees and costs including payment of a \$50,000.00 worker's compensation lien. An agreed statement filed with the industrial commission stated that no further compensation payments would be made to claimant until he had

exhausted the net proceeds of the settlement at the rate of \$326.00. The insurer sought to offset the amount of the worker's compensation benefits paid to the plaintiff against the disability benefits payable to him for the five hundred week maximum then allowable under Virginia law. The plaintiff argued that he was owed the full amount of his disability benefits and that Unum could not reduce benefits payments to him by offsetting previous worker's compensation benefits. Unfortunately, the court found in favor of the insurer. The Snead court followed Sampson v. Mutual Benefit Life Ins. Co., 863 F.2d 108 (1st Cir. 1988), where it was held that the LTD carrier properly offset worker's compensation benefits against long term disability payments even though the disability policy contained no provision dealing with the situations in which a worker's compensation insurer is later reimbursed from a third party recovery. 863 Fd at 109. The Sampson court held:

[E]ven if we were to interpret the Mutual policy de novo, rather than deferring to the interpretation of the trustees, we would still find Mutual's decision not to refund the disputed \$19,147.50 to be eminently reasonable. Sampson argues that because of Mutual's withholding of these funds, he has in fact received no recovery for the loss of time caused by his injury. He reasons that the third-party award – from which Peerless, the workers' compensation insurer, was reimbursed – was made not only to him but to his wife and children as well, and that the settlement failed to designate any amount specifically for the loss of time. We find this argument to be utterly unpersuasive. As a result of the third-party settlement, Peerless was reimbursed for the benefits it had paid, and Sampson and his family retained the excess of more than \$156,000. Sampson also kept the workers' compensation benefits for loss of time previously paid to him by Peerless. For Sampson now to claim that his loss of time remains uncompensated strikes us as verbal sleight of hand. In fact, to allow Sampson to recover the loss-of-time offset from Mutual would violate the principle underlying both the Mutual policy's offset provision and the reimbursement provisions of the Massachusetts workers' compensation law, for it would allow Sampson to recover twice for the same loss.

Id. at 110, 111. The Snead court described Sampson as confirming "the general rule that it is permissible for a disability insurer to offset workers' compensation benefits under ERISA only if the policy provides for such an offset." 824 F. Supp. At 73, ad held:

The Court finds, as did the court in Sampson, that the plain language of the policy provision permits the insurance company to offset disability benefits against workmen's compensation benefits previously paid to the disabled employee. Thus, UNUM is entitled to offset workmen's compensation benefits paid to Snead by Fireman's Fund against disability payments UNUM must pay to Snead.

The Snead court concluded:

Snead further argues that if UNUM is permitted to offset, he will have received no workmen's compensation recovery. He reasons that the third party settlement, from which Fireman's Fund was reimbursed, failed to provide specific funds for reimbursing the workmen's compensation insurer. The Court finds this argument unpersuasive. Here, as a result of the third party settlement, Fireman's Fund was reimbursed for the benefits that it paid to Snead and was relieved from liability for any future benefit payments. Snead retained \$410,000 from the third party settlement, and kept the workmen's compensation benefits previously paid to him by Fireman's Fund. Snead,

therefore, received one full payment of workmen’s compensation benefits, and he should not be allowed to recover twice for the same loss. Sampson, 863 f. 2d at 110-111. To refuse UNUM the offset, and allow Snead to retain the workmen’s compensation benefits would fly in the face of the policy American Pecco entered into with UNUM.

Two other cases looked at this issue. They are the cases of Lane v. Unum Life Insurance Co., 293 F. Supp. 2d 477 (M.D. Pa. 2003) (applying federal and Pennsylvania law) (permitting offset) and Wyatt v. Unum Life Insurance Co., 223 F.3d 543 (7th Cir. 2000) (denying offset).

In Wyatt, the plaintiff asserted that UNUM had improperly applied an offset reducing his LTD benefits by the amount of voluntary workers’ compensation benefits, although such compensation benefits had been suspended as a result of the plaintiff’s tort settlement. The court described the relevant policy language as follows:

The UNUM policy provided long-term disability benefits calculated at 60 percent of the insured’s monthly earnings, less “other income benefits” received from other sources. The UNUM policy defined “other income benefits” as:

- 1. The amount for which the insured is eligible under:**
 - a. Workers’ or Workmen’s Compensation Laws;**
 -
- 2. The amount of any disability income benefits for which the insured is eligible under:**
 - a. any group insurance plan.**

223 F.3d at 544. The court reviewed UNUM’s decision de novo pursuant to Firestone Tire & Rubber Co. v. Bruch, 489 U.S. 101 (1989). 223 F.3d at 545.

UNUM relied on Sampson, Snead, and Zeller v. UNUM Life Ins. Co., 1997 WL 732420 (E.D. la. 1997), *aff’d without opinion*, 161 F.3d 8 (5th Cir. 1998), a case following Sampson and Snead. The Wyatt court, however held:

These cases are distinguishable. First, Sampson, and Snead in part, involved the disability insurer’s right to an offset for benefits paid before the third-party settlement. Wyatt does not contest that UNUM is entitled to the \$670 offset for this period. Second, both involved workers compensation benefits under state law, in which the expressed policy was to prevent double recoveries. In such situations, workers compensation carriers are entitled to liens against any third-party settlements so that where possible, the burden of payment would be borne by tortfeasors rather than insurance carriers, which helps to keep rates down for state-mandated workers compensation insurance. By virtue of his partnership status in the firm, Wyatt was exempt from the state-required workers compensation insurance. His insurance was voluntary and not subject to the state requirements. Therefore, the state’s policy interest is inapplicable.

223 F.3d at 547. The Wyatt court explained, inter alia:

Instead, the matter is simply one of contract interpretation, and on this ground, UNUM's policy in this case differs significantly from UNUM's policy in Snead. In Snead, the relevant offset provision looked to "amounts payable under any Workmen's Compensation Law," *id.* at 72, and the court determined that UNUM should receive an offset for the amounts the worker actually was paid and retained. The court's language makes this clear:

The Court finds, as did the court in Sampson, that the plain language of the policy provision permits the insurance company to offset disability benefits against workmen's compensation benefits previously paid to the disabled employee. Thus, UNUM is entitled to offset workmen's compensation benefits paid to Snead by Fireman's Fund against disability payments UNUM must pay to Snead.

824 F. Supp. At 73 (emphasis added). The court focused on payments actually made to injured worker and allowed an offset for that amount. The case did not involve offsets for payments that would *never* be made. Even if we were to find that a public policy against double recoveries applied here, UNUM could show no double payments similar to those in Snead or Sampson, and thus the policy interest is not implicated by requiring UNUM to make payments to Wyatt notwithstanding the third-party settlement.

Id. (quoting Snead, 824 F. Supp. At 72-73 (Wyatt court's emphasis)).

In Lane, the plaintiff, an ERISA plan participant, contended that UNUM was wrongfully offsetting workers' compensation benefits against his disability benefits although his compensation benefits had been suspended, as permitted by state law, when he obtained a tort settlement from the third party responsible for his injury. The court held that such contention would be rejected whether a de novo or "heightened arbitrary and capricious" standard of review were to be applied. 293 F. Supp. 2d at 479. Lane is of interest for the court's consideration of three approaches which have been taken in addressing "the issue of entitlement to workers' compensation benefits in the context of permissible offsets under an employee benefit plan." *Id.* at 480.

The court first considered the approach taken by the Seventh Circuit in Wyatt, which it described as "a plain meaning approach, based on the four corners of the employee plan itself," *id.* at 481, but held:

Although the four corners analysis has superficial appeal, it is flawed. Entitlement cannot be determined solely by reference to the amount a person keeps in his or her pocket. Neither "eligible" nor "entitled" means "received." See WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 736, 758, 1894; see also Firestone, 489 U.S. at 119, 109 S. Ct. 948 (Scalia, J., concurring in part and concurring in judgment) (distinguishing between receipt and eligibility). The law recognizes many situations in which a person may irrevocably renounce the right to receive a benefit but still be considered "eligible" for it.

Id.

The Lane court then considered the approach taken in Sampson, Snead, and Zeller, which it described as dertermining

Entitlement to workers' compensation benefits by importing the presumed intent of workers' compensation laws: to provide a single full recovery to injured employees.

Id. The Lane court explained that “[t]his approach resolves the issue of entitlement not on the language of the plan or statutes but on the inferred purpose of these provisions, basing eligibility for workers’ compensation benefits on equitable concerns,” *id.*, but held:

The failure of this approach to consider the text of either the employee plan or applicable statutory provisions renders it inadequate. While intent may serve as a useful backup interpretive technique, it cannot serve as a primary method of analysis.

Id. The Lane court instead approved a third approach which it described as striking:

a balance between the first and second, maintaining fidelity to the text of the plan while recognizing the need to delve beyond the terms themselves and consider underlying workers’ compensation law.

Id. at 482 (citing Nesom v. Brown & Root, U.S.A., Inc., 987 F .2d 1188 (5th Cir. 1993). The Lane court stated:

This method operates on the premise that, by linking benefits under the plan to entitlement under state workers’ compensation law, employee benefit plans of the type *sub judice* contemplate application of state law. *See id.* Hence, entitlement to workers’ compensation cannot be decided without a detailed analysis of state law provisions governing the subject.

293 F. Supp. 2d at 482. The court explained:

In the instant case, Pennsylvania workers’ compensation law does not govern the employee benefit plan, but it must be considered because the parties incorporated it into the terms of the plan. In these circumstances, ERISA does not preclude the court from applying state law principles to interpret “eligibility.”

The court finds this third approach to be most theoretically acceptable and consistent method of analysis, and will adopt it in this case. Accordingly, the court will review the relevant Pennsylvania statutes to determine whether plaintiff is “entitled” to workers’ compensation benefits.

Id. The court held, following discussion of that state law:

Under Pennsylvania law, an injured employee remains eligible for workers’ compensation after a third-party recover and, in fact, enjoys a right to an immediate lump-sum payment of benefits to the extent of the recovery. Plaintiff in this case is not only still “eligible” for benefits, he actually received them in the form of a lump sum.

Thus, defendant acted properly in continuing to offset these benefits against those available under the employee benefit plan, and the court will grant summary judgment in favor of defendant.

Id. at 483-84.

4.) Can the insurer offset long term disability benefits by the portion of the workers' compensation settlement used to pay his attorney?

Courts have gone both ways on this issue. Again, a close review of the insurance contract is critical on this issue. In one case, Collins v. American Cast Iron Pipe Co., 105 F. 3d 1368 (11th Cir. 1997), where the plan at issue provided that the employee's pension benefits "Shall be reduced by the worker's compensation benefit payable to such participant" 105 F. 3d 1370 (court's emphasis) the court held that such language permitted the deduction of the entire amount of the plaintiff's worker's compensation settlement from his pension benefits including that portion of the settlement used to pay his attorney, *Id.* at 1370-1371. However, the court based its decision on the fact that the plaintiff "exercised control over the worker's compensation settlement funds before counsel deducted his fee" *Id.* at 1371. In some states, the injured worker's counsel's fees are controlled by the worker's compensation insurance company or the individual state's commission. Collins should be kept in mind as a further reminder that ultimately Court's will often rule based upon the specific language of the policy or plan.

The case of Leonard v. Southwestern Bell Corp. Disability Income Plan, 341 F .3d 696 (8th Cir. 2003), is of interest for holding that, while the plan's determination that benefits would be reduced by the amount of the plaintiff's worker's compensation benefits was not an abuse of discretion under plan language permitting offset for benefits for the "same general character as a payment provided by the Plan, " *id.* at 702, inclusion in the offset of the amount the plaintiff paid in attorney's fees and costs to obtain his compensation award *was* an abuse of discretion. The Leonard court explained that holding:

Southwestern Bell argues that the goal of these plans is to provide a safety net for employees, i.e., to provide a minimum amount of compensation for disabled employees. Allowing the plans to offset the portion of a worker's compensation award the employee paid in attorneys fees and costs to obtain that award contradicts this stated goal. Such a practice would place employees in worse positions than they would have been in had they not tried to obtain a worker's compensation award in the first place. This result would clearly violate the first Finley factor: that the interpretation be consistent with the goals of the plan. We note that concluding otherwise, i.e., concluding that the entire workers' compensation award --- including the amount paid in attorneys' fees and costs -- should be treated in the same manner, contradicts Southwestern Bell's main argument, namely, that it was nor contrary to the goals of the plans to find Leonard's

benefits of the "same general character" as the workers compensation.

Id. at 705 (referring to Finley v. Special Agents Mutual Benefit Ass'n, 957 F .2d 617 (8th Cir. 1992), a factually inapplicable case stating the factors considered by that Circuit in determining whether a

plan administrator's interpretation is reasonable). The Leonard court further held:

Additionally, we are concerned with the inequitable results this practice could produce. Assuming that an employer is not self-insured for workers' compensation, Southwestern Bell's argument would result in a windfall to an employee benefit plan and a detriment to an employee when the employee elects to asserts [sic] rights under a worker's compensation law. The employer would be able to reduce benefits, dollar for dollar, for the *total* amount of the worker's compensation award, while the employee, who asserted statutory rights and obtained additional recovery, would be worse off, having only received the amount of the award remaining after payment of attorneys' fees and costs.

Given these two concerns, we are unwilling to allow an offset to include the amount a plan participant had to pay in attorneys' fees and costs to obtain non-plan benefits, absent an explicit settlement in the plan that plan administrators had discretion to treat fee and cost portions of such payments as the "same general character" as plan benefits. In this case, neither the Disability Plan nor the Pension Plan provided the administrator with this discretion.

In a similar case, Trujillo v. Cyprus Amax Minerals Co. Retirement Plan Committee, 203 F.3d 733 (10th Cir. 2000), it was held that the plan administrator did not act arbitrarily and capriciously by determining that the plaintiff's disability benefits would be reduced by the amount of his workers' compensation benefits without deduction of the attorney's fees incurred in obtaining his workers' compensation settlement. The relevant plan language provided:

The Disability Retirement Benefits payable to any Member *shall be reduced by the amount of any worker's compensation benefits (except fixed statutory payment for the loss of any bodily member) payable to him with respect to his disability*; provided that deduction for all such benefits shall be made only with respect to the period in which such benefits (A) are actually paid to such Member, and (B) have not been deducted from a disability insurance benefit payable to him under the Federal Insurance Contributions Act, as now in effect or hereafter amended. In the case of lump sum settlements under workers' compensation, the lump sum shall be divided by the weekly payment to which he was entitled under worker's compensation in order to determine the period with respect to which worker's compensation benefits are payable for the purpose of this Section[.]

Id. at 736-37 (emphasis added). The court held:

Although Trujillo's argument is not without appeal, we are unable to conclude the Committee acted arbitrarily and capriciously when it adopted an interpretation different from the one espoused by Trujillo. The Plan does not define the word "payable." According to Black's Law Dictionary, "payable" means "[c]apable of being paid; suitable to be paid; admitting or demanding payment; justly due; legally enforceable." Black's Law Dictionary 1128 (6th ed. 1990). Analyzing the language of the Plan in light of these definitions, we believe the phrase "worker's compensation benefits... payable to him with respect to his disability" can reasonably be interpreted

to encompass any amounts “capable of being paid,” “justly due,” or “legally enforceable” that arise out of a worker’s disability. In turn, the workers’ compensation settlement agreement negotiated by Trujillo provided, in part, that “[a]ll sums set forth herein constitute damages on account of personal injuries and sickness, within the meanings of Section 104(a)(1) of the Internal Revenue Code of 1986, as amended.”... There was no mention of the amount of Trujillo’s attorney’s fees in the settlement agreement. Thus, as in most attorney fee agreements, it appears that Trujillo agreed to pay fees out of the total damage award he received from defendants. The fact that he agreed to do so, however, did not prevent the Committee, in determining the benefits due under the Plan, from deducting the total amount payable to him under the settlement agreement

Id. at 737. The court rejected the suggestion that “would allow policy arguments to trump the Committee’s reasonable interpretation of the Plan language,” *id.* at 738, and further rejected the plaintiff’s suggestion that it

should invoke the doctrine of unjust enrichment to preclude the Committee from offsetting the entire amount of the workers’ compensation settlement without paying a pro rata share of his attorneys’ fees.

Id. Smith v. Metropolitan Life Ins. Co., 2004 WL 252633 (D.Colo. 2004), followed, *e.g.*, Trujillo on the unjust enrichment issue, holding that the unjust enrichment doctrine:

can be used only when it does not override a contractual plan provision, and where its application would be consistent with ERISA’s scheme and further its purposes.

Id. at 9. In Smith, the doctrine was applied so as to permit the *insurer’s* recoupment of overpayments, consisting of Social Security disability payments to which it was found entitled to reimbursement. *Id.* at 9-10.

On a related issue in the case of Parker v. First Reliance Standard Life Ins. Co., 368 F .3d 999 (8th Cir. 2004), the plaintiff, while not disputing the insurer’s rights to reduce her LTD benefits as result of her receipt of Social Security disability benefits, asserted that it had no right to take an offset of her gross Social Security benefits rather than an offset of her net benefits (the difference resulting from her election to have taxes withheld on those benefits). The Parke court held, applying the abuse of discretion standard of review:

We conclude that First Reliance did not abuse its discretion in offsetting its obligation to Parke by the full \$1,500 each month. The policy permits First Reliance to offset its obligation by the amount of social security benefits Parks is “eligible to receive.” Although Parke elected to have taxes withheld on her social security benefits, First Reliance acted well within its discretion by concluding that she is eligible to receive the full \$1,500 each month.

Id. at 1005 (citing Trujillo, 203 F .3d at 736-38).

5.) **Is the long-term disability carrier entitled to take an offset for worker's compensation benefits that are received in relation to a different injury or disability than that for which the long term disability benefits are being received?**

This issue will likely also turn on an interpretation of plan language. Cherene v. First American Financial Corp. Long -Term Disability Plan, 303 F. Supp. 2d 1030 (N.D. Cal. 2004) dealt with this issue. The plan at issue in Cherene provided for a reduction of benefits for, inter alia:

1. **temporary or permanent disability benefits under a Workers' Compensation Law, occupational disease law, or similar law, governmental law or program that provides disability or**

.....

If you are paid Other Income Benefits in a lump sum or settlement, you must provide proof satisfactory to us of:

1. **the amount attributed to loss of income; and**
2. **the period of time covered by the lump sum or settlement.**

We will prorate the lump sum or settlement over this period of time. If you cannot or do not provide this information, we will assume the entire sum to be for loss of income, and the time period to be 24 months.

Id. at 1031-32. The court stated the respective positions of the parties:

Hartford contends that the terms of the policy establish that all compensation for permanent disability is deductible from her long-term disability benefits as Other Income Benefits. Hartford further claims that Cherene's C & R settlement was intended to compensate her for all her permanent disability claims. Thus, according to Hartford, Cherene was required to report the settlement to Hartford, and provide satisfactory proof of the amount attributed to loss of income, and the period covered by the lump sum or settlement. Hartford further contends that since Cherene failed to provide this information according to the specific terms of the policy, Hartford was entitled to "assume the entire sum to be for loss of income, and the time period to be 24 months...

On the other hand, Cherene claims that the policy provides that deductions are only made for other benefits that are to compensate for *loss of income*. She claims that the entire C & R settlement amount was for current and future medical costs, and not for loss of income, and therefore the settlement is no Other Income Benefits. Thus, she claims that while she sent Hartford a copy of the settlement and the check she received, she was not required to give Hartford any further information because she did not believe the settlement to be for loss of income.

Id. at 1038-39. The court held, inter alia:

Since this Court is without sufficient information to make a determination as to the

appropriate amount, if any, of the C&R settlement that is deductible, the most equitable solution at this point is to remand this case back to the plan administrator for a determination consistent with the principles set forth in this decision.

Id. at 1039.

In another case, Gruber v. UNUM Life Ins. Co., 195 F. Supp. 2d 711 (D. Md. 2002), the plan at issue provided for offset of workers' compensation and Social Security benefits where such "benefits were 'payable as a result of the *same disability* for which [her] policy pays a benefit'". *Id.* at 718 (court's emphasis). Following discussion of the facts, the Gruber court held:

Therefore, the Court finds that Plaintiff's WCC benefits were *not payable* for the same disability as UNUM, and that it is *ambiguous whether* SSA's inclusion of depression and post-traumatic stress disorder as non-primary impairments means that the SSA benefits were *payable for the same disability*. Accordingly, the ambiguity must be resolved in favor of Plaintiff[.]

Id. at 719 (citing Quesinberry v. Life Ins. Co. of North America, 987 F.2d 1017, 1030-31 (4th Cir. 1993)).

While involving the closely analogous situation of offset of Social Security benefits, rather than workers' compensation benefits, the case of Feifer v. Prudential Ins. Co., 306 F.3d 1202 (2d Cir. 2002), is notable as illustrative of cases where an offset is not permitted because it is precluded by what the court regards as unambiguous plan or policy language to the contrary. The Feifer court held:

[T]he language of the Program Summary manifests a plain and unambiguous intent to provide long-term disability benefits without offsets for Social Security or workers' compensation payment. Not only does the document describe long-term disability benefits without mentioning such offsets, its explicit mention of offsets for short-term benefits creates the impression that this silence was intentional.

Id. at 1210. The Feifer court further held that there could be no offset against LTD benefits as to employees who became disabled during the period such language was in effect, but that "a different analysis may be required," *id.* at 1213, as to employees who did not become disabled until after a "benefit booklet," which "specified that [LTD] benefits were subject to an offset for Social Security disability and workers' compensation payments received by employees," *id.* at 1205, was provided by Prudential to the employer/ policyholder.

Another useful analogy is presented by Welsh v. Burlington Northern, Inc., Employee Benefits Plan, 54 F.3d 1331 (8th Cir. 1995), which involved an attempt to set off an award under the Federal Employers Liability Act (FELA), 45 U.S.C. §§ 51 et seq., against LTD benefits owed under an ERISA-governed plan. In rejecting such attempt, the Welsh court held:

In support, the health insurance plan points to the language in the contract stating that disability benefits are to be reduced by "any amount" paid to the employee under

FELA. In other words, the health insurance plan seems to contend that if an employee has ever received or may ever receive *any* award under FELA, the amount of that award must be used as a setoff to payments received under the disability benefits contract, regardless of whether the basis for the FELA award is the same as the basis for the employee's entitlement to payments under the disability benefits contract. We consider that to be an entirely unreasonable construction of the contract, since it would be completely irrational to claim, for instance, a right to a setoff based on a FELA award for an injured foot, when the basis for an employee's entitlement to disability benefits was total incapacitation from a stroke unrelated in any way to the foot injury.

54 F .3d at 1338 (court's emphasis). The court further held:

The disability benefits contract itself contains no language requiring "the same Injury" to be the basis for a setoff of a FELA award against disability payments. In the absence of such language, we hold that the most reasonable construction of that contract is that in order for a FELA award to be used as a setoff, *that award must be for "the same loss," which does not necessarily mean for "the same injury."* We also note that in a separate paragraph of the disability benefits contract dealing with lump-sum payments under FELA, the language of the contract is "on account of such disability," rather than "o account of such injury." While we do not rely on that paragraph as the basis for our construction of the setoff provision in the contract, we believe that it supports *the distinction we draw between the partial disability compensated in Mr. Welsh's FELA lawsuit and the total disability that entitles him to payments under the contract.*

Id. at 1138-39 (emphasis added). The court concluded, on the pertinent point:

There is, moreover, an additional reason why a setoff is inappropriate in this case – because the railroad faces no double liability for any portion of Mr. Welsh's lost wages. In the FELA lawsuit, Mr. Welsh asked for damages for past and future pain and suffering and for lost wages on account of future diminished earning capacity. Because the jury in the trial rendered a general verdict, though, we have no way to knowing exactly what portion of the \$500,000 award was for pain and suffering and what portion was for future lost wages. The lost wages at issue, however, were based on the difference between Mr. Welsh's previous salary as an electrician and his salary, after his back injury, as a draftsman. In contrast, his disability payments under the contract are based only on his draftsman's salary. We observe, therefore, that the railroad faces no double liability for lost wages, because the disability payments are tried to a portion of Mr. Welsh's lost wages that was never sought in the FELA trial. We therefore affirm the district court's ruling that the health insurance plan is not entitled to offset Mr. Welsh's disability benefits with the award that he received in his lawsuit under FELA.

Id. at 1339.

While it cannot be represented as stating a nationally accepted rule, the case of Butler v. Aetna U.S. Healthcare, Inc., 109 F. Supp. 2d 856 (S.D. Ohio 2000) (applying federal and Ohio law), is significant as forming the basis for a potential equitable argument in support of limiting a claimed offset. In Butler, the plaintiff challenged the plan's withholding of future LTD benefits to offset her Social Security disability benefits. The court held:

Without question, the Bellflex plan grants Aetna a *legal* right to withhold Butler's entire monthly benefits award until it recoups the overpayment caused by her retroactive receipt of Social Security disability benefits. As set forth above, the ERISA plan documents unambiguously permit the Defendants to obtain a lump-sum recovery from Butler or, alternatively, to recover the overpayment from benefits payable under the plan. The Sixth Circuit recognized, however, that *equitable* principles may limit an ERISA fiduciary's legal right to recoup an overpayment of benefits.

Id. at 862 (court's emphasis). The court cited in support of that statement Wells v. United States Steel & Carnegie Pension Fund, Inc., 950 F.2d 1244, 1251 (6th Cir. 1991), *appeal after remand*, 76 F.3d 731 (6th Cir. 1996), which it summarized as noting

that principles of trust law obligate a District Court to consider the potential inequitable impact of requiring ERISA plan beneficiaries to remit an overpayment.

Butler, 109 F. Supp. 2d at 862. The Butler court quoted with approval the following holding in Wells (which case involved offset against ERISA-governed pensions of payments from the Kentucky Special Fund, and employer-financed fund compensating black-lung victims):

Although the Plan language permits recoupment, this court is concerned with the possible inequitable impact recoupment may have on the individual retirees. The retirees submitted affidavits describing the hardship they would suffer if they were forced to pay back benefits which they had received and depended upon. We thus remand this case to the district court to consider whether, under the principles of equity or trust law, relief is unwarranted. We do no, by doing so, suggest implicitly or otherwise any particular outcome.

Id. (quoting Wells, 950 F.2d at 1251).

If the offsets taken by the Social Security Administration against social security disability benefits are in some way analogous, it should be noted that workers' compensation benefits for one injury or disability may be taken against social security benefits that are being paid for a separate unrelated injury or disability. Kryztoforski v. Chater, 55 F.3d 857 (3d Cir 1995).

6.) If an offset is permitted, can it include the portion of the settlement that relates to permanent partial benefits, medical benefits or COLA?

For the reasons discussed above, it would generally be thought that a reasonable interpretation of most LTD offset provisions would not result in an offset for an amount of the workers' comp settlement that relates to medical benefits. The medical portion of a settlement is not in exchange for a benefit or income from other sources. Rather, it is money paid in exchange for giving up past or future medical coverage. On the other hand, whether or not the long term disability carrier would necessarily agree as to what portion of the settlement is related to medical as opposed to settlement of wage claims is another matter. This problem is somewhat similar to our dealings with Medicare. Medicare reserves the right to make an independent determination as to whether the parties'

allocations of settlement monies are fair and accurate.

Permanent partial disability benefits, of course, are very different. These benefits are often thought to be comparable in nature to a wage benefit or paid weekly and are “compensation” benefits. A close review of the plan language would also be in order in so far as how that language would impact our interpretation of these issues.

It should be noted that on the question of whether a LTD carrier is entitled to take an offset for the portion of a workers’ compensation settlement that is relating to medical, may involve the anti-subrogation statutes that some states have enacted. For instance, the State of Virginia prohibits the inclusion of subrogation provisions in insurance contracts which require repayment of medical benefits received from the proceeds of a recovery from third parties. Virginia Code § 38.2 – 3405(A).

Insofar as the question of whether disability carriers should be entitled to an offset for receipt of permanent partial, permanent total or COLA benefits or a settlement relating to same, we first should look to the insurance contract. In addition, by analogy, we might look to interpretation of Federal Social Security Laws under 42 U.S.C. Section 424(A). The Social Security rules provide that it is entitled to take an offset for “periodic benefits on account of his or her total or partial disability (whether or not permanent) under a workers’ compensation law or plan of the United States or a State”. *Id.* Federal Court opinions interpreting this statute are somewhat analogous to our situations with long term disability policy offset provisions.

A number of federal cases have specifically determined that permanent partial benefits may be an offset against social security disability payments because they relate to loss of earnings, capacity and are a substitute for periodic payments even if made in a lump sum. Kryzstoforski v. Chater, 55 F. 3d 857 (3d Cir 1995). Hodge v. Shalala, 27 F. 3d 430 (9th Cir 1994). Olston for Estate of Olston v. Apfel, 170 F. 3rd 820 (8th Cir 1999). If it can be shown that lump sum payments are compensation for loss of a bodily function or body part and not a benefit made on account of a disability, then the offset is not appropriate in social security disability cases. Campbell v. Shalala, 14 F. 3d 424 (8th Cir. 1994); Frost v. Chater, 952 F. Supp. 659 (D.N.D. 1996).

On the other hand if the workers’ compensation settlement papers have specifically allocated some portion of a lump sum to future rehabilitation services, they may not be considered in reducing the claimant’s social security benefits because they are not periodic payments. Allen v. Apfel, 65 F. Supp. 2d 391 (W.D. Va. 1999). A different result will occur if moneys are allocated for rehabilitation but the client never intended to use the money for that purpose. Meredith v. Apfel, 51 F. Supp. 2d 713 (W.D. Va. 1999). Similarly, it might be argued that cost of living increases should not be included in the offset calculation. See McClanatha v. Smith, 606 P. 2d 507 (Mont. 1980).

7.) If an offset is permitted, can the lump sum be offset in its entirety or should the offset be spread out over some reasonable period of time?

Perhaps, depending on the contract language. The Snead opinion discussed above may provide strong support for the insurer's right to offset the workers' compensation settlement until the entire settlement amount is exhausted. On the other hand, Nesom v. Brown & Root, U.S.A., Inc., 987 F.2d 1188 (5th Cir. 1993), rev'g 790 F. Supp. 123 (M.D. La. 1992), is a case that may only support the insurer's right to offset the amount of the workers' compensation settlement over a more reasonable period of time. In Nesom, the long-term disability policy at issue allowed for "a deduction of [t]he amount for which the insured is eligible under... Workers'... Compensation Law." 487 F.2d at 1192. The court held that the state court judgment established the plaintiff's eligibility under the workers' compensation law, and that the policy envisioned that once such eligibility was determined under state law, "that amount will be set off under the policy". *Id.* at 1193. The court stated that "an integration-of-benefits or setoff provision does not violate ERISA and is enforceable by federal law." *Id.* (citing Alessi, where the Supreme Court held that ERISA does not prohibit the offset of pension benefits by workers compensation awards. 451 U.S. at 521). With respect to the manner in which the offset could be taken by the insurer, the Nesom court construed the policy provision at issue:

[a]s allowing the UNUM to recoup the retroactive award by withholding from monthly benefits otherwise payable, but not by immediate repayment from Nesom of the entire retroactive award (as UNUM initially sought). The maximum amount of monthly recoupment is the amount of the lump sum award divided by (prorated over) the number of months for which the award was given. A month's pro rata share of the lump sum workers' compensation award is \$814.15. Recoupment is further limited, however, by the amount of benefits otherwise payable (\$433.85) and also by the plan's minimum benefits provision.

987 F.2d at 1194 (emphasis added). Each LTD policy should be examined to determine whether it contains a similar "minimum benefits provision." The Nesom court further held that since the compensation award was given for a specified time period:

[t]he maximum time period of UNUM may continue recoupment is 47 months (the number of months represented by the lump sum award), notwithstanding that UNUM will not achieve recovery of the entire retroactive award during that time period.

Id. at 1195.

8.) Is the standard of review an additional difficulty in overturning the LTD plan's interpretation and application of the offset provisions?

Yes. The standard of review problem which runs through many of these cases was demonstrated in the cases of Elliot v. Lockheed Martin Systems, Inc., 61 F. Supp. 2d 745 (E.D. Tenn. 1999), and Dorato v. Blue cross of Western New York, Inc., 163 F. Supp. 2d 203 (W.D.N.Y. 2001). In Elliot, the court, applying the "arbitrary and capricious" standard, held that the plan language, providing that "[y]our short term disability and long term disability benefits may be reduced by other income benefits, such as workers' compensation and Social Security, that you receive while disabled," 61 F. Supp. 2d at 751, permitted setoff for a prior workers' compensation settlement regardless of the relation between the disability for which compensation was paid and that covered by the plan:

There is no statement or other indication in the foregoing that the disability for which long term disability benefits are payable must be related to the disability in long term disability benefits. Rather, the foregoing language indicates that any “other disability income” will reduce a beneficiary’s long term disability benefits. Additionally, although the plaintiff has offered a reasonable interpretation of the phrase “because of your disability,” the sentence immediately following states that:

Income that will reduce your long term disability benefits includes:

[■] workers’ compensation benefits provided under a similar law, state disability benefits and other statutory benefits for disability, retirement or unemployment.

This language contains no limitation to workers’ compensation benefits received only for the same or related disability for which long term disability benefits are payable.

In light of the foregoing, I find that the traditional arbitrary and capricious standard of review must be applied to the defendant’s interpretation of the Plan provisions at issue in this case; that pursuant to this standard of review, *the defendant has offered a reasonable interpretation of the Plan language which must be upheld*; that plaintiff’s request for a declaratory judgment that the reduction of his Long Term Disability benefits to account for a prior workers’ compensation settlement is contrary to Lockheed’s Long Term Disability Plan must be denied [.]

Id. at 751-52 (emphasis added).

In Dorato, an analogous case involving a health insurer’s efforts to set off the plaintiff’s workers’ compensation settlement against the health insurance benefits it would otherwise owe, the relevant language, as summarized by the court, provided that the insurer

Will not pay for any injury if payment is available under Workers’ Compensation; neither will it make payments even if the insured does not claim benefits to which he/she may be entitled under the Workers’ Compensation Law (“WCL”).

163 F. Supp. 2d at 213-14. The court held that even though the plaintiff’s compensation claim was disallowed by the Workers’ Compensation Board, *id.* at 207, his settlement of that claim was, reviewing the case under the arbitrary and capricious standard, a reasonable basis for denial of his health insurance claim. It was held, in granting the defendant’s motion for summary judgment, that

it was not irrational for HealthNow to view Dorato’s injury as occurring on the job, that the settlement by the workers’ compensation carrier was for work-related injuries, that payment was available under the WCL and received, and such, that HealthNow’s contract exclusion was applicable.

The court agrees with defendant that it was not unreasonable for HealthNow to conclude that the \$80,000.00 represented payment to plaintiff under the Workers’ Compensation Law when he settled his workers’ compensation claim. Given the contract’s Workers’ Compensation provision that HealthNow will not pay for any injury if payment is available under the WCL, HealthNow has presented a rational interpretation of the contract that, under the law, must be allowed to control.

Id. at 214.

9.) Life after Great-West v. Knudson

On January 8, 2002, the United States Supreme Court decided the case of Great-West Life & Annuity Ins. Co. v. Knudson, 534 U.S. 204, 122 S.Ct. 708 (2002). That case dealt with the situation where an ERISA health plan was attempting to obtain reimbursement from a plaintiff claimant seriously injured in a car accident. Mr. Knudson's former employer had a self funded ERISA health plan. His wife was severely injured in an automobile collision and rendered quadriplegic. There was a reimbursement provision in the plan. The Knudsons filed a state court tort action and a settlement was negotiated in the amount of \$650,000.00. The settlement provided that the monies would be disbursed partly to a special needs trust for the benefit of the injured plaintiff's future medical care, partly to attorney's fees, some amount to Medicaid and an amount totaling only \$13,828.70 to satisfy Great-West's claim under the reimbursement provision in the plan. The plan had previously paid \$411,157.11 in medical bills. The plaintiff asked for a state court's approval of the distribution as stated above. The plan filed suit against the Knudsons in federal court seeking preliminary injunctive relief to prevent disbursement. The injunctive relief was denied. The plan attempted to remove the state court action to federal court. The federal court denied removal and remanded the case to state court. Thereafter, the state court approved the settlement and ordered the disbursement as proposed. Ultimately, Great-West filed an action in federal court seeking to enforce the plan's reimbursement provision under ERISA. The district court granted the Knudson's motion for summary judgment based on its determination that the plan's reimbursement right was limited to the amount received by the plan beneficiary for past medical treatment, which the state court had already calculated and allocated to Great-West. The United States Court of Appeals for the 9th Circuit affirmed on different grounds holding that the judicially decreed reimbursement for payments made to a beneficiary of an insurance plan by a third party was not equitable relief. It was therefore not authorized by ERISA. The Supreme Court granted certiorari. The Supreme Court held that Great-West was seeking legal relief by imposing personal liability on the Knudsons for a contractual obligation to pay money and ERISA did not authorize this type of action. ERISA plans are only permitted to seek equitable remedies against a beneficiary. *Id.* See also Providence Health Plan v. McDowell, 385 F. 3d 1168 (9th Cir. 2004).

After Great-West, ERISA plans have sought the imposition of constructive trusts against identifiable funds from settlement or verdict either in an attorney trust account, in possession of a court, in an escrow account or otherwise not commingled with client funds. For instance, see Wellmark, Inc. v. Deguara, 257 F. Supp. 2d 1209 (S.D. Iowa 2003); Wausau Benefits v. Progressive Ins., 270 F. Supp. 2d 980 (S.D. Ohio 2003); Admin. Comm. of the Wal-Mart Stores, Inc. Assoc. Health & Welfare Plan v. Hummell, 245 F. Supp. 2d 908, 912 (N.D. Ill. 2003), *aff'd* 77 Fed. Appx. 891; 2003 U.S. App. LEXIS 20764 (unpublished Opinion); Singh v. Prudential Health Care Plan, Inc., 335 F. 3d 278, 2003 U.S. App. LEXIS 13499 (4th Cir. Md., 2003) (ruling even HMO has right to subrogation), *pet. For writ of cert. denied* 157 L. Ed. 2d 743, 2003 U.S. LEXIS 9007; Sealy, Inc. v. Nationwide, 286 F. Supp. 2d 625 (M.D. NC 2003); Primax Recoveries v. Young, 83 Fed. Appx. 523 (4th Cir.) 2003 U.S. App. LEXIS 25786 (unpublished); Primax Recoveries v. Lee, 260 F. Supp. 2d 43 (D.C. 2003); Mid Atlantic Medical Services v. Do, ___ F Supp. ___, (D.C. MD) 2003 U.S. Dist. LEXIS 22238; Mank v. Green, ___ F. Supp. ___ (D.C. ME) 2003 U.S. Dist. LEXIS 23379 (funds were disbursed to clients but apparently placed in separate bank account in clients name and not commingled with other funds of client); Frosling v. J.J. Keller & Assoc., ___ F. Supp. ___, (E.D. WI) 2003 U.S. Dist. LEXIS 684; Bombardier v. Ferrer, ___ F3 ___, (5th Cir.) 2003 U.S. App. LEXIS 25428; IBEW-NECA Southwestern Health and Benefit Fund v. Douthitt, 211 F. Supp. 2d 812 (N.D. TX 2002) s.j. granted

2003 U.S. Dist. LEXIS 13316; Admin. Comm. Of the Wal-Mart Stores, Inc. Assoc. Health & Welfare Plan v. Varco, 338 F. 3d 680 (7th Cir. 2003).

As result of the Great-West case, plans will still be able to recover funds under ERISA but they may have difficulties unless they can show the court where the money is and convince the court that the relief sought is equitable in nature. Of course, none of these difficulties have any bearing on plans which are taking offsets on a on-going basis. They are merely holding money and recoupment is not an issue.

II. Conclusion

In recognition of the fact that as a general rule the LTD plans will be allowed to take an offset, but nonetheless construe an ambiguity in the favor of the injured worker, the first consideration in regards to strategy requires a very close review of the specific language of the long term disability plan in question. There should also be a review of the case law for the federal circuit in which the injured worker resides with the most recent cases on point. Claimant's counsel also needs to give consideration to the standard of review that is applicable since ultimately, the court must determine whether the plan administrator's interpretation and application of the offset provisions should be reversed. Unfortunately, the standard of review may simply be one of whether the administrator was reasonable or abused his discretion in so far as how the plan documents were interpreted and enforced.

Important questions may arise in each case as to whether any lawsuit should be filed in state or federal court, what parties should be named as defendants and what the applicable standards are that a court will apply for review of the plan administrator's decision. Steps must be taken to be certain that any administrative remedies have been exhausted prior to filling suit. Questions often arise as to whether any additional damages besides plan benefits might be awarded such an interest and attorney's fees. One useful resource on these questions is Cook and Whale, Procedural aspects of litigating ERISA Claims, ABA/BNA books (2000) (available on the internet at <http://www.bna.com/bnabooks>).

Some consideration should be given to beginning negotiation with the long term disability carrier on all of these issues before having discussion with the workers compensation company on possible settlement. It may be that a letter that could be sent to the long term disability carrier (sample correspondence enclosed at exhibit 1) inquiring as to the plan interpretation. There should also be consideration to settling the long term disability claim at the same time as the workers' compensation claim. These cases often have greater value over time than workers compensation claim. There can be a great benefit to resolving all pertinent issues short of litigation. Finally, of course, some resort to the courts may be necessary if a disagreement develops on the interpretation and application of the offset provisions. (see a sample at exhibits 2 and 3). In light of the Great-West case, LTD carriers may be considerably more negotiable where they have a need to recoup over payments than in cases where the offset being taken by the LTD Carrier is on-going.

Andrew J. Reinhardt

Andrew J. Reinhardt is a partner with Kerns, Kastenbaum and Reinhardt, PLC in Richmond. He specializes in handling workers' compensation, personal injury and Social Security Disability cases. He serves on the Board of Governors of the Virginia Trial Lawyers Association and is immediate Past Chair of VTLA's Workers' Compensation Section. He is also an active member of the Work Place Injury Litigation Group, the American Trial Lawyers Association and the Richmond Bar Association. He frequently lectures on topics related to his areas of specialty.

SUMMARY OF EXHIBITS

- Exhibit 1:** **Sample correspondence with long term disability carrier**
- Exhibit 2:** **Sample Complaint – Cherene vs. First American Financial Corporation
Long-Term Disability Plan and Hartford Life and Accident Insurance
Company**
- Exhibit 3:** **Sample Complaint – Leonard v. Southwestern Bell Corporation
Disability Income Plan**

RE: John Doe v. Phillip Morris
Date of Accident: 11/07/00

Dear Sir or Madam:

Thanks so much for chatting with me about the above referenced case. As you might recall, we represent Mr. John Doe in both his workers' comp and Social Security cases. He is currently receiving benefits from Social Security as well as workers' compensation benefits. We discussed the fact that as a recipient of Phillip Morris long-term disability provisions on page 4 of Phillip Morris Plan (updated 1995). I mentioned to you that we are currently in the process of discussing the possibility of settling the workers' comp case with Jane Smith at Broadspire. Prior to the time that we can reach a final agreement on a settlement, it would be important for us to know what the impact of any settlement would be on is long term disability benefits. More specifically, while I do understand that the plan spells out his workers' comp or Social Security benefits would be offset against his long term disability benefits, it does not state what the impact of any workers' comp settlement might be on his long term disability benefits. A number of possibilities exist. There might be a lump sum settlement. There might be an annuity settlement and it would be our request of course, that to the extent that the settlement include settlement of future medical benefits or permanent partial benefits, that those settlement amounts or for that matter, attorney's fees and expenses, would not be an offset against the future long term disability benefits. It would be helpful to have clarification that you agree with this. By the same token, whether there is a settlement in a lump sum or the annuity, after deduction of future medicals, permanent partial or attorney's fee be spread out over the remainder of Mr. John Doe's life for purpose of the offset. I am assuming that Phillip Morris would find this reasonable. However, this is not spelled out in the plan.

If you could discuss this with the appropriate persons at Phillip Morris and give me your thoughts at the earliest convenience, we would be most appreciative. I look forward to hearing from you shortly.

Exhibit
1

RE: John Doe v. Phillip Morris
Date of Accident: 11/07/00

Dear Sir or Madam:

My apologies for the delay in the response to your note below.

Yes, w/c settlements (annuity or lump sum) do affect future the benefit payable from the LTD Plan.
Attorney fees - not deductible (excluded from the offset calculation) Future Medical Expenses - not deductible (excluded from the offset calculation) Future lost wages - deductible (included in the offset calculation)

RE: John Doe v. Phillip Morris
Date of Accident: 11/07/00

Dear Sir or Madam:

Thank you so much for your recent response. I have a couple of follow up questions. If the workers' comp carrier and the injured worker are in agreement as to an amount that should be excluded from the offset calculation for future medical, and that is a reasonable number, does the long term disability carrier accept that figure? What about permanent partial injuries which are not a normal wage benefit which is a permanent partial injury to an arm or a leg? Are those also excluded from the calculation? Additionally, assuming the settlement is in the amount of a lump sum, would the Phillip Morris long term disability carrier be willing to spread the offset of the included amounts over the person's life. In other words, if the lump sum, or for that matter, the present value of an annuity was \$50,000.00 and the person's life expectancy was 50 months, would it not be reasonable to spread over those 50 months the offset such that the included offset against long term disability benefits would be no more than \$1000.00 per month. It is important to know the answers to these questions in order to determine whether or not Mr. Doe can settle his workers' compensation case. I intended for these questions to be spelled out in my original inquiry. To the extent that they were not, I apologize. For that matter, if you have difficulty understanding my questions or if you would like to speak to me over the phone, please let me know.

Thank you for your continuing cooperation. I look forward to hearing from you shortly.

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Attorneys for Plaintiff

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

BEATRICE CHERENE,)	
)	
Plaintiff,)	Case No.
)	
vs.)	COMPLAINT (ERISA)
)	
FIRST AMERICAN FINANCIAL)	
CORPORATION LONG-TERM DISABILITY))	
PLAN and HARTFORD LIFE AND)	
ACCIDENT INSURANCE COMPANY,)	
Defendants.)	
_____))	

JURISDICTION

1. Plaintiff brings this action for declaratory, injunctive, and monetary relief pursuant to § 502(a)(1)(B) of the Employee Retirement Income Security Act of 1974 (“ERISA”), 29 U.S.C. § 1132. This Court has subject matter jurisdiction over Plaintiff’s claims pursuant to ERISA § 502(e) and (f), 29 U.S.C. § 1132(e) and (f), and 28 U.S.C. § 1331.

VENUE

2. Venue lies in the Northern District of California pursuant to ERISA § 502(e)(2) 29 U.S.C. § 1132(e)(2), because one or more of the Defendants resides or may be found in this District and the breaches alleged took place in this District. Venue is also proper pursuant to 28

U.S.C. § 1391(b), in that a substantial part of the events or omissions giving rise to Plaintiff's claims occurred within this District.

INTRADISTRICT ASSIGNMENT

3. This action arises in Contra Costa and San Francisco Counties in that the defendant Plan may be found in Contra Costa and San Francisco Counties, the Plan is administered in part in San Francisco County, Plaintiff resides in Contra Costa County, and some of the breaches alleged took place in Contra Costa County.

PARTIES

4. At all relevant times, Plaintiff Beatrice Cherene ("Ms. Cherene" or "Plaintiff") was a participant, as defined in ERISA § 3(7), 29 U.S.C. § 1002(7), in Defendant First American Financial Corporation Long-Term Disability Plan ("Plan"). Plaintiff resides in Walnut Creek, California.

5. At all relevant times, the Plan was an employee welfare benefit plan within the meaning of ERISA § 3(1), 29 U.S.C. § 1002(1), sponsored by First American Financial Corporation ("First American"), and administered in part in San Francisco, California. At all relevant times, the Plan offered, inter alia, long-term disability ("LTD") benefits to employees of First American, including Plaintiff, through an insurance policy issued by defendant Hartford Life and Accident Insurance Company ("Hartford"). The Plan is named herein as a necessary party for the relief requested.

6. At all relevant times, Defendant Hartford was a fiduciary of the Plan within the meaning of ERISA § 3(21), 29 U.S.C. § 1002(21), in that Hartford acted as claims fiduciary for the Plan and exercised authority and control over the payment of LTD benefits, which are Plan assets. Hartford was also the "appropriate named fiduciary" of the Plan as described in 29 C.F.R. § 2560-503-1(h)(1), and therefore functioned as the plan administrator for claims procedure purposes.

FACTS

7. Beatrice J. Cherene suffers from cervicgia, thoracic strain and sprain, and rupture and herniation of a cervical disc, as well as fibromyalgia and Dequervains Tendinitis. Ms. Cherene suffers pain and muscle spasms down her shoulders, arms, elbows, forearms, hands, and fingers.

8. Ms. Cherene was noticeably injured from these conditions as of May 1, 1996. At the time of her injury, Ms. Cherene was employed by First American as a Senior Escrow Officer, where she had been employed since August of 1991. As a result of her disability, Ms. Cherene was no longer able to work as of April 1999.

9. Ms. Cherene applied for and was awarded workers compensation benefits for total disability for a period from the time of her injury until April 14, 2000. She also received workers compensation benefits for major permanent partial disability until she received a final payment on June 20, 2002.

10. Ms. Cherene applied for Social Security Disability Insurance ("SSDI") benefits in January 2000. On January 22, 2002, an administrative law judge for the Social Security Administration determined that she was entitled to disability benefits retroactive to April 14, 1999. Ms. Cherene continues to receive monthly SSDI benefits.

11. For the period from April 9, 2000, through November 22, 2001, Ms. Cherene received weekly State Disability Insurance Benefits.

12. On April 10, 2001, the Workers' Compensation Appeals Board approved a Compromise and Release agreement between Ms. Cherene, First American, and American Guarantee & Liability/Zurich-American Insurance Group ("Zurich"), First American's workers compensation insurance provider. The agreement was a settlement of all claims between the parties arising out of the May 1, 1996 injury.

13. On February 24, 2000, Hartford approved Ms. Cherene's claim for LTD benefits under the Plan, effective August 19, 1999.

14. Following its approval of LTD benefits, Hartford frequently reviewed Ms. Cherene's claim and requested updated information regarding, inter alia, her State Disability Benefits, Workers' Compensation benefits, and her plans to return to work. Ms. Cherene complied with Hartford's requests.

15. By letter dated October 8, 2002, Hartford notified Ms. Cherene that according to Hartford's calculations, Hartford had overpaid her in the amount of \$47,042.20 less a \$4,000 attorney fee for services provided by Ms. Cherene's Social Security attorney. Hartford identified the overpayment as having occurred during the years 1999, 2000, 2001, and 2002. Hartford included a Recalculation Work Sheet with the letter and requested repayment in full.

16. Although Hartford had previously deducted income offsets from Ms. Cherene's monthly LTD benefit checks, Hartford's Work Sheet failed to enumerate which offsets Hartford had already taken, and which additional offsets it was claiming. Additionally, Hartford's Work Sheet calculations generally did not correspond with any actual checks received by Ms. Cherene for her LTD benefits, SSDI benefits, workers compensation benefits, or SDI benefits, rendering it impossible for Ms. Cherene to discern what offsets Hartford was claiming.

17. By letter dated October 25, 2002, Hartford notified Ms. Cherene that according to Hartford's calculations, Hartford had overpaid Ms. Cherene an additional \$14,315.95. Hartford stated that no additional benefits would be paid until the balance of \$57,358.15 was repaid. Hartford included a revised Recalculation Work Sheet with the letter, which suffered from the same deficiencies as the first Work Sheet.

18. Ms. Cherene responded to Hartford's requests by letter dated November 25, 2002, explaining that Hartford's Recalculation Work Sheets inadequately accounted for the alleged overpayments made by Hartford and did not provide sufficient information for Ms. Cherene to determine the accuracy or reliability of Hartford's calculations. The letter requested that Hartford complete enclosed work sheets reflecting the monthly differences between Ms. Cherene's gross monthly benefits and the actual payments made by Hartford to provide the information missing

from the Recalculation Work Sheets. The letter further requested that Hartford reinstate Ms. Cherene's benefits until it provided clear and accurate calculations of the alleged overpayments, including any additional information to justify its calculations.

19. By letter dated December 4, 2002, Hartford replied to Ms. Cherene's letter of November 25, stating that Hartford had not terminated her benefits but was applying her Monthly Benefit toward the overpayment balance Hartford had calculated. Hartford enclosed copies of its previous Recalculation Work Sheets, asserted their accuracy, refused to complete the work sheets provided by Ms. Cherene, and refused to justify its calculations.

20. Ms. Cherene responded by letter dated December 17, 2002, explaining that Hartford had failed to account for the alleged overpayments it had made to Ms. Cherene. The letter reiterated Ms. Cherene's request for documentation, required under ERISA §§ 104(b)(4) and 503(1), that would assist her understanding of Hartford's decision to reduce or terminate her benefit payments.

21. Hartford responded by letter dated January 14, 2003, revising the alleged overpayment amount to reflect the monthly benefits Hartford had withheld from Ms. Cherene in the interim. Hartford did not further clarify or justify its previous calculations.

22. On February 11, 2003, Ms. Cherene requested review of Hartford's decision not to explain its calculations of claimed overpayments. Ms. Cherene submitted a detailed analysis of the proper amount for which she was responsible for reimbursing Hartford, and enclosed a cashier's check for that amount.

23. By letter dated March 18, 2003, Hartford concluded that Ms. Cherene owed them additional reimbursements, claiming that the Worker's Compensation settlement check represents wage replacement money.

24. The Worker's Compensation settlement agreement states that the settlement is intended to compensate Ms. Cherene for medical treatment and future medical care, and does not mention wage replacement.

25. Under the Plan, Hartford is not entitled to income offsets for the money Ms. Cherene received in her Worker's Compensation settlement agreement. Additionally, Hartford has inaccurately calculated other income offsets to which it is entitled.

26. Hartford has been withholding Ms. Cherene's LTD benefits until she satisfies Hartford's claimed overpayments.

27. Ms Cherene has exhausted her administrative remedies under the Plan.

FIRST CLAIM FOR RELIEF

[Claim for Benefits Pursuant to ERISA § 502(a)(1)(B) Against Defendants Plan and Hartford]

28. Plaintiff incorporates Paragraphs 1 through 27 as though fully set forth herein.

29. ERISA § 502(a)(1)(B), 29 U.S.C. § 1132(a)(1)(B), permits a plan participant to bring a civil action to recover benefits due to her under the terms of a plan, to enforce her rights under the terms of a plan, and/or to clarify her rights to future benefits under the terms of a plan.

30. At all relevant times, Ms. Cherene has been entitled to LTD benefits under the Plan. By withholding Ms. Cherene's benefits and claiming reimbursements to which it is not entitled under the terms of the Plan, and by related acts and omissions, Defendants Hartford and Plan have violated, and continue to violate, the terms of the Plan and Ms. Cherene's rights thereunder.

31. At all relevant times, under ERISA § 503 and 29 C.F.R. § 2560.503-1(g), Ms. Cherene has been entitled to receive all relevant information regarding the determination of her LTD monthly benefit amount, including a clear explanation of the basis for a reduction of her benefits. By refusing to provide an explanation for its claimed offsets in a manner calculated to be understood by Ms. Cherene, Defendants Hartford and Plan have violated, and continue to violate, their obligations set forth in ERISA and the Department of Labor regulations issued thereunder.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff prays that the Court grant the following relief:

AS TO THE FIRST CLAIM FOR RELIEF:

- A. Declare that Defendants Hartford and Plan, and each of them, violated the terms of the Plan by requiring reimbursement for income offsets to which they are not entitled under the terms of the Plan;
- B. Declare that Defendants Hartford and Plan, and each of them, violated the terms of the Plan by withholding Plaintiff's LTD benefits until she has satisfied their claimed reimbursements.
- C. Declare that Plaintiff has satisfied all reimbursements owed to Hartford.
- D. Order Defendants Hartford and Plan, and each of them, to pay LTD benefits to Plaintiff pursuant to the terms of the Plan from February 1, 2003, through the date judgment is entered herein, together with prejudgment interest on each and every such monthly payment through the date judgment is entered herein;
- E. Plaintiff reasonable attorneys' fees and costs of suit incurred herein pursuant to ERISA § 502(g), 29 U.S.C. § 1132(g);
- G. Provide such other relief as the Court deems equitable and just.

Dated: May 13, 2003

Respectfully submitted,
LEWIS & FEINBERG, P.C.
By:

Cassie Springer-Sullivan
Attorneys for Plaintiff

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MISSOURI

MARION LEONARD,

Plaintiff

vs.

**SOUTHWESTERN BELL CORPORATION
DISABILITY INCOME PLAN, et al**

Defendants.

Case No: 4:00CV0923-ERW

FIRST AMENDED COMPLAINT

COMES NOW plaintiff Marion Leonard, by and through her attorneys, and states the following for her cause of action and in support of her motion for class certification, as follows:

JURISDICTION AND VENUE

1. Jurisdiction of this proceeding arises out of subsections (a)(1), (2) and (3) and subsection (e) of Section 502 of the Employee Retirement Income Security Act of 1974, as amended 1980 ("ERISA"), 29 U.S.C. §1132. Ancillary jurisdiction exists pursuant to provisions of Section 301 of the Labor-Management Relations Act of 1947, as amended ("Labor Act"), 29 U.S.C. §1 85(a), Smith v. Evening News Assn., 371 U.S. 195 (1962). Pendant remedy jurisdiction exists under the Missouri and Federal common law of trusts.

2. Venue is founded on ERISA §502(e)(2), 29 U.S.C. §1132.

PARTIES

3. Plaintiff MARION LEONARD is and was at all times hereinafter mentioned an employee as defined in Sections 3(6) of ERISA and 2(3) of the Labor Act, 29 U.S.C. §§152(3)9 1002(6), of defendant SOUTHWESTERN BELL TELEPHONE CO. in a collective bargaining unit represented by the Communications Worker's of America (hereinafter "union"), and a participant as defined in Section 3(7) of ERISA, 29 U.S.C. §1002(7), in both the said

**Exhibit
3**

SOUTHWESTERN BELL CORPORATION PENSION BENEFIT PLAN ("Pension Plan" or alternatively "SBCBPB") and in the SOUTHWESTERN BELL CORPORATION DISABILITY INCOME PLAN ("Income Plan") as an hourly employee of defendant SOUTHWESTERN BELL TELEPHONE CO. Sometimes hereinafter the two said plans here in this paragraph and as later identified, are referred to collectively as "defendant plans."

2. Defendants SOUTHWESTERN BELL CORPORATION now known as SBC Communications, Inc., (hereinafter "SBC"), and SOUTHWESTERN BELL TELEPHONE CO. (hereinafter "SWBTC"), are and were at all times hereafter mentioned corporations duly organized and existing under law and employers engaged in commerce within the meaning of Sections 3(5), 3(11) and 3(12) of ERISA and Sections 2(2), 2(6) and 2(7) of the Labor Act, 29 U.S.C. 9§152(2), (6) and (7), 1002(5), (11) and (12); and that each of said named corporate defendants are and were at all times hereinafter mentioned engaged in business and maintain business offices within the territorial jurisdiction of this Court and this division. On information and belief, SWBTC is presently and at relevant times hereto a wholly owned subsidiary of SBC and/or is within the control group of SBC; on further information and belief, SBC is an outgrowth of the earlier existing SWBTC both prior to and following deregulation. Said two named corporate defendants are hereinafter sometimes referred to collectively as "Bell employers."

3. Defendant plans were heretofore established and maintained by said defendants Bell employers or one or more of them, for the hourly bargained for employees of both of them, for the purpose of providing their bargained for hourly employees as plan participants, including plaintiff, with, among other things, benefits in the event of sickness and accident, and as to such benefits said defendant plans are each an employee welfare benefit plan within the meaning of subsections (1) and (3) of Section 3 of ERISA, 29 U.S.C. §1002(1) and (3), and are subject to service in this action pursuant to Section 502(d)(1) of ERISA, 29 U.S.C. §1132(d)(1).

4. Defendant plans and the particular integration provisions included within the plan documents had its/their historical antecedents in employee benefit plans created by the American Telephone and Telegraph Co. (“AT&T”), and then adopted by the various regional telephone company units established by AT&T and wholly owned and/or controlled by it until deregulation, and that following such AT&T breakup and/or deregulation, the various regional telephone companies resulting from such breakup, including SWBTC, continued to provide substantially the same benefits for their bargained for hourly employees as they had theretofore in the past, which included benefits for disabilities which could result from *inter alia* injuries suffered in the course and scope of one’s employment and be separately compensable under state worker’s compensation statutes.

a. The terms with respect to welfare benefits provided in defendant plans and the kinds of offsets and integration allowed, which are herein relevant to plaintiff’s claim and claims of the proposed class, are terms that existed historically in said AT&T sponsored and created plan

5. Defendant plans provide for plan administration and fiduciary decision making with respect to the matters herein alleged as conduct and decisions of the defendant plans, to be within the province and function of the Bell employers and of respective Committees appointed by the respective Bell employer.

a. Defendants BENEFIT PLAN COMMITTEE OF SOUTHWESTERN BELL CORPORATION PENSION BENEFIT PLAN, BENEFIT PLAN COMMITTEE OF SOUTHWESTERN BELL CORPORATION DISABILITY INCOME PLAN and BENEFIT PLAN COMMITTEE OF SOUTHWESTERN BELL TELEPHONE COMPANY constitute such Committees, and each such Committee and the individual members thereof are deemed by the terms of the plan to be fiduciaries as such term is used in ERISA §3(21)(A), 29 U.S.C. §1002.

b. BENEFIT PLAN COMMITTEE OF SOUTHWESTERN BELL CORPORATION PENSION BENEFIT PLAN is the highest such Committee in the administration of such plan.

c. BENEFIT PLAN COMMITTEE OF SOUTHWESTERN BELL CORPORATION DISABILITY INCOME PLAN is the highest such Committee in the administration of such plan.

d. On information and belief, each such Committee further operates through a Secretary, who in like fashion constitutes a plan fiduciary when engaged in administration of Benefit Plan.

6. At the time of reorganization of the single predecessor of the present defendant Bell employers after said initial deregulation of AT&T, into the two or more corporate defendant entities, and at the time of the creation of Benefit Plan, Bell employers and their predecessor and their respective benefit plan Committees maintained their principal offices within the territorial jurisdiction of this Court and this division.

BENEFIT PLAN DISABILITY PAY TERMS, HISTORICAL INTERPRETATION, PRIOR JUDICIAL DECISIONS AND CONDUCT, AND JUDICIAL ESTOPPEL

7. Pension plan provides:

a. A participant who has at least 15 years of pension eligibility service, who is determined to be totally disabled as a result of sickness or injury while employed by SWBTC or other participating employer, and who is not eligible for a service pension at the time of such disability determination, shall received what the defendants called a “disability pension.”

Comment [ssw1]: 4.1.3(a) and (b), p.14.

b. The disabled participant is not vested in such disability pension, in that, among other things

i. The participant determined eligible for such disability pay is and at all times thereafter remains subjected to constant and repeated physical and mental examinations and tests, one or more of which could lead at any time under appropriate circumstances to the cessation of such disability benefit.

Comment [ssw2]: §4.1.3(b), p.14

ii. Defendant Bell employers claim to retain the right to end, amend, change, modify or terminate the provisions for disability pay.

Comment [ssw3]: §9.1.1 and §9.1.3 and §9.2, p.69

c. The disability pay provided by Pension plan is not funded as required by ERISA for pensions, the Pension Plan providing the costs of the benefit shall be a charge to the operating expense of the participating company, as SWBTC, “as and when paid.”

Comment [ssw4]: §4.1.3(e), p. 15 or p.16. See also §4.8.1, p.48 as to funding of pensions (and not disability pensions).

d. The Committee may not offset or reduce disability pay by other payments the recipient receives under law except and unless the offset amount is a “payment of the same general character as a benefit provided by the plan.”

Comment [ssw5]: §6.8.1, p.62.

e. Pension plan was to be deemed to incorporate the provisions of predecessor plans with respect to matters relating to entitlement to and computation of benefits

8. Income plan provides:

a. A participant who has received and exhausted short term disability benefits of fifty-two (52) weeks and is determined by income plan’s claims administrator to be thereafter totally disabled if incapable of performing the requirements of a job other than one for which the rate of pay is less than 50% of the participant’s basic wage rate at the time such participant’s wage rate at the time his or her long-term disability started, as a result of sickness or injury occurred while employed by SWBTC or other participating employer, and who is not eligible for a service pension at the time of such disability determination, shall received what the defendants called a “long term disability” (“LTD”) benefit.

Comment [ssw6]: 4.1.3(a) and (b), p.14.

b. The disabled participant is not vested in such LTD benefit in that, among other things

The participant determined eligible for such LTD benefit is and at all times thereafter remains subjected to constant and repeated physical and mental examinations and tests, one or more of which could under appropriate circumstances lead at any time to the cessation of such LTD benefit.

Comment [ssw7]: §4.1.3(b), p.14

Defendant Bell employers claim to retain the right to end, amend, change, modify or terminate the provisions for LTD benefits.

Comment [ssw8]: §9.1.1 and §9.1.3 and §9.2, p.69

c. The LTD benefit provided by Income plan is not funded as required by ERISA for pensions, the Income plan providing the costs of the benefit shall be a charge to the operating expense of the participating company, as SWBTC, “as and when paid.”

Comment [ssw9]: §4.1.3(e), p. 15 or p.16. See also §4.8.1, p.48 as to funding of pensions (and not disability pensions).

d. The Committee may not offset or reduce disability pay by other payments the recipient receives under law except and unless the offset amount is a “payment of the same general character as a benefit provided by the plan.”

Comment [ssw10]: §6.8.1, p.62.

e. Income plan was to be deemed to incorporate the provisions of predecessor plans with respect to matters relating to entitlement to and computation of benefits

9. On or about October 3, 1941 a study was completed for AT&T listing states not permitting offset of disability payments against permanent partial disability (“PPD”) awards provided in state workers compensation proceedings. Thereafter, on or about April 15, 1942, a Bell System

Comment [ssw11]: Wilken exh 40, 68

study committee made a recommendation and transmitted a draft proposed practice for the Employee Benefit Committee to consider with respect to said issue and the plan offset language as to “payments of the same general character,” the effect of which was inconsistent with the offset practice against

Comment [ssw12]: Wilken exh 40

permanent partial disability awards about which plaintiff now complains. On or about November 18, 1942 counsel for AT&T provided an opinion that the said recommendation not to offset disability

plan payments with PPD awards was consistent with the purposes of such offsetting language in the disability plan which language, then and now, is essentially the same. On or about December 31, 1942 the AT&T Employee Benefit Committee adopted the said recommendation. On or about December 31, 1942 AT&T Serial No. 124 concerning the “interpretation of” the offset language, allowing no such offset as defendants herein took on the basis of the same language, and suggested all operating companies adopt the same interpretation and policy. On or about February 2, 1943, the Employee Benefit Committee for SWBTC announced it too had adopted the AT&T interpretation and policy. Said policy was reaffirmed in 1946 when language was inserted in the plan stating offset will take place “which the [Employee Benefit] Committee shall determine to be of the same general character as a payment provided by the plan, and reaffirmed again in 1971 and again in 1975. Said policy and interpretation was made a part of the claims manual.

Comment [ssw13]: Wilken exh 41, 68

Comment [ssw14]: Wilken exh 42, 40; Pick deptsn tr tr 29.

Comment [ssw15]: Wilken exh 43; part of exh 4; see also exh 47. The transmittal to the various operating cos is exh 44, contains explanation.

Comment [ssw16]: Wilken 75.

Comment [ssw17]: Wilken 46, 47, 48.

10. In 1982, an employee of SWBTC named Charles Ramsey together with other employees of other AT&T affiliated companies, then including Western Electric Co., who had been threatened by their respective Bell employers with reduction of benefits and/or their PPD awards by reason of such offsets as herein claimed by defendants in the instant action, commenced a class action against SWBTC, its EBC and against other Bell Systems companies, in the United States District Court of the Eastern District of Missouri, under ERISA §502(a)(1), 29 U.S.C. §1132(a)(1), captioned “Richard A. Hechenberger et al v. Western Electric Co. et al,” cause no. 82-0145C3.

11. In such proceeding before a class was certified, the defendants represented that they would then and thereafter cease implementing the plan and practice the subject of this suit and to which the Hechenberger plaintiffs objected, with the district court noting that defendants had represented that they have “no intention to offset any amounts in pending or future cases that are similar to plaintiff Hechenberger’s” and that they “abandoned” their offsetting practice rendering their threats moot. In later appeals they assured that they had not and did not lessen amounts paid by the plan. Both the district court and the United States Court of Appeals for the Eighth Circuit were

Comment [ssw18]: 570 F.Supp. at 824

Comment [ssw19]: 570 F.Supp. at 824

satisfactorily assured that such integration and offsetting activities would not take place again, the Court of Appeals announcing “The employers decided to abandon the credit practice altogether,” “[e]ach defendant filed affidavits in the district court stating that they would not claim such offsets against . . . any other employees with claims pending in workers’ compensation proceedings,” that defendants’ had provided ironclad assurances there was no “potential” whatsoever that “others would be subjected to this practice in the future” and that the plaintiffs should have fully understood by defendants’ promises not to integrate, the “matter [had already been] effectively resolved in their favor.” By reason thereof defendants are judicially estopped from asserting the offsetting directed against plaintiff and others is appropriate or proper.

Comment [ssw20]: 599 F.Supp at 689.

Comment [ssw21]: 786 F.2d at 347

Comment [ssw22]: 742 F.2d at 455

Comment [ssw23]: 742 F.2d at 455

Comment [ssw24]: 786 F.2d at 348

12. During the course of such proceeding alleged in paragraph 13 above, individuals employed by each offending Bell employer and who had in fact earlier suffered from such integration practices defendants had sworn to in Hechenberger had been abandoned for the future, brought class actions against their Bell employers, their disability plans and the plan fiduciaries, resulting in dispositions in their favor, as follows:

Michael Wilken brought suit against AT&T Technologies, its disability plan and others for benefit loss resulting from the same integration practice violation as claimed in the Hechenberger lawsuit in the United States District Court of the Eastern District of Missouri, Eastern Division, captioned “Michael C. Wilken v. AT&T Technologies, Inc., et al” cause no. 83-2198C(3). The matter was certified as a class action. The Court entered two decisions on the merits which are hereto attached as exhibits 1 and 2. Defendants did not appeal.

Williard Clemens brought suit against his employer Southwestern Bell Telephone Company, and against Southwestern Bell Telephone Company Plan for Employees’ Pensions, Disability Benefits and Death Benefits which at that time was also known as Southwestern Bell Telephone Company Sickness and Accident

Disability Benefit Plan, for benefit loss resulting from the same integration practice violation as claimed in the Hechenberger lawsuit in the United States District Court of the Eastern District of Missouri, Eastern Division, captioned “Willard P. Clemens v. Southwestern Bell Telephone Company et al” and numbered 84-0756C(3). The matter was certified as a class action. After the entry of the decisions in Wilken, the Southwestern Bell defendants in this proceeding agreed to a settlement of the claims of the entire class who has suffered such integration practices anytime during the period commencing ten years before the filing of the Clemens action, by paying 100 cents on each dollar of loss, plus attorneys fees, which settlement was submitted to and approved by the Court. A copy of said settlement agreement is attached hereto as exhibit 3. Plaintiff is currently seeking discovery to determine if after such settlement defendants at any time thereafter sought to reduce or offset the amount of long term disability benefits payable under the plan by the amounts paid to plaintiff Wilken and members of the class in an effort to determine *inter alia* the consistency of defendants’ conduct.

The foregoing case was referred to by the United States Court of Appeals in footnote 4 at 742 F.2d at 455.

From and after these historical events defendants and their predecessors have not issued communications in form or format meeting the specifications contained in ERISA §102, 29 U.S.C. §1022, constituting a summary of material modification clearly advising that defendants were *changing* the meaning of what constituted payments of the same general character, nor have they sought to reopen the Hechenberger case to withdraw the commitment, pledge and promise made under oath and accepted by the Court in the broad manner indicated, as set out in paragraph [13](#)

ACTIONABLE FACTS

Plaintiff was initially employed in the State of Missouri by SWBTC and/or its predecessor of like name, on or about October 23, 1973.

In July of 1978 plaintiff was transferred by SWBTC to work in the State of Kansas.

On or about March 26, 1993 plaintiff suffered a series of micro traumatic injuries that caused permanent damage to plaintiff's upper extremities, for which plaintiff filed a claim for worker's compensation under the State of Kansas' Worker's Compensation Act.

On or about April 24, 1995 plaintiff was transferred by SWBTC to work in the State of Missouri.

On or about September 19, 1995 plaintiff was placed on permanent restriction by the medical advisor for SWBTC, who determined plaintiff should avoid repetitive use of her upper extremities.

Thereafter, on or about September 29, 1995 SWBTC through plaintiff's manager refused to allow her to work any further, whereupon plaintiff commenced being paid short term disability under the terms of the separate Disability Income Plan, for a period of fifty-two weeks, after which because of her continuing disability, age and years of service defendants in carrying out their fiduciary duties represented that she would become eligible for a long term disability pension under the terms of SBCBPB.

None of defendants offered to explain the circumstances under which she would be entitled to benefits under the terms of the Pension plan rather than under the terms of the Income plan.

On or about February 21, 1996 a Kansas Worker's Compensation judge found plaintiff not to be totally disabled from being gainfully employed, but only partially disabled. Benefits for such partial disability were awarded in the sum of \$100,00 for injuries incurred on or about March 26, 1993, while employed in Kansas. After deduction of attorney's fees and costs, plaintiff received the net amount of \$59,405.80.

On or about July 28, 1997 defendants began offsetting plaintiff's long term disability pay under either income plan or SBCPBP by the amount of her gross award awarded in her Kansas Worker's Compensation proceedings. Such offset was and is being conducted by cessation of benefits to which such is entitled under the long term disability pay provisions contained in income plan and/or SBCPBP.

Plaintiff through counsel attempted to administratively exhaust her complaint that such conduct was impermissible, but during such administrative proceeding defendants failed and refused to advise her in violation of their fiduciary duties of the historical matters set out and alleged in paragraphs [11](#) through [14](#) and their subparagraphs when defendants knew or should have known that persons like her would not have or know of the matters and/or information therein contained, and when on or about October 4, 1999 defendants were confronted with such information fortuitously known to such newly retained counsel, defendants at first informally and orally advised they would address such matters only through their legal department, and defendants (and such legal department) then and thereafter and at all times failed and refused to address such historical information not reasonably expected to be known to plaintiff or any of her attorneys other than for her newly retained counsel.

Plaintiff is informed and believes others in other states, including those receiving PPD awards in the State of Missouri, such as Joseph H. Puszkas, III, a resident of St. Louis County, Missouri, have and are suffering similar offsets or threats to carry out such offsets notwithstanding the matters recited in paragraphs [11](#) through [14](#) and their subparagraphs, and that defendants have not advised those persons of the matters recited in such paragraphs and subparagraphs.

In light of the matters set out in paragraph [25](#), any attempts by plaintiff or others to exhaust have been rendered futile by the defendants.

By reason of the conduct of defendants, plaintiff and many others in the employ of SBC and SWBTC have suffered the loss of benefits to which she is and they are entitled.

Subsequently, on or about April 4, 2000 defendants issued what may have been intended as a subtle response to the letter of plaintiff's counsel alleged in paragraph [25](#), but the terms of defendants' communication were unclear whether or to what extent any real correction was intended, nor was defendants' communication clear as to the exact nature of correction or as to which plan, income or pension, which lack of clarity failed to meet the duties imposed upon defendants under ERISA §102 and 104 and §404(a)(1) to be clear and explicit and to state matters in a manner calculated to be understood by the average plan participant.

SBCPBP purported to issue a statement of calculation commencing May 2, 1999, and in such statement again threatened that SBCPBP would reserve the right to continue to engage in the diminution of disability pay entitlements by amounts received in worker's compensation proceedings for permanent partial disability awards.

The materials so sent recently by defendants are not sufficiently explanatory or clear as to advise whether and/or the what extent correction has been made for the wrongful past taking of offsets, and whether and to what extent a disability pension now proposed by defendants to be paid under SBCPBP is being substituted for all or any part of long term disability payments under Income plan, and in view of defendants' refusal to communicate with her designated representative, as set out in paragraph [25](#) above, defendants have and are continuing to engage in conduct in violation of their fiduciary duties and appear to still be depriving of benefits by reason of their conduct in violation of their disclosure obligations and in further violation of the offset provisions in the aforesaid two plans.

WHEREFORE, plaintiff seeks such relief and remedies as are available under ERISA to her and for all others similarly situated who have suffered such diminution of long term disability benefits under either SBCPBP and/or Income plan by reason of state workers' compensation permanent partial disability awards, and for herself and all others who have likewise been subjected to such continuing threats by defendants or one or more of them to engage in such prohibited offsets in the future, and for a clear explanation of the current activities of defendants in this regard,, and for a declaration of her rights and the rights of others to future benefits free from offsetting against workers' compensation permanent partial disability awards without formal changes in the language of the plan(s) and the issuance of clear and explicit summaries of material modifications required by ERISA to explain such changes in plan language. Plaintiff prays further relief for herself and others that to the extent any such offset for workers' compensation awards is allowed by this Court to reduce long term disability entitlements under either SBCPBP or Income plan, that the amount of such state compensation award allowed for offset be further reduced by an appropriate share of fees and expenses as required of plaintiff and other workers to process and secure such worker's compensation award. Plaintiff also seeks an award for her attorneys' fees and costs herein expended and/or incurred.

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CERTIFICATE OF SERVICE

Copy served on the below named counsel by mailing the same addressed to the below counsel for defendants, first class postage prepaid, on January 10, 2001

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