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## Complex and Troubling Benefits

# Long Term Disability Offsets and Workers' Compensation Settlements

by Andrew J. Reinhardt, Esq.

### Introduction

All of us who handle worker's compensation claims on behalf of injured workers eventually have clients who have various other benefits that need to be considered when we are settling our client's workers' compensation cases. One of the more complex and troubling of these are 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 regard to those policies and what, if anything, we can do about them.

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

**A.** Yes. The typical policy will simply provide that when a long-term disability beneficiary receives benefits 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 workers' compensation offsets in long-term disability policies is well established. *Godwin v. Sun Life Assurance Co.*, 980 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.

**Q-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?**

A. 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 no less true if the suit being heard is a dispute in equity rather than contract (see Q-9, below).

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

A. It may depend upon the policy language. It would seem logical that if the workers' compensation claimant actually has to pay back the entirety, or a large portion, of the workers' compensation weekly checks for the time period covered by the proposed offset, the offset would be unfair. However, not all of the case law is particularly helpful. One unhelpful case is *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 on this issue was *Snead v. UNUM Life Insurance Co.*, 824 F. Supp. 69 (E.D. Va. 1993), *aff'd in part, remanded in part on other grounds*, 35 F.3d 556 (4th Cir. 1994), *cert. denied*, 514 U.S. 1127 (1995). In *Snead*, the plaintiff had settled a third party tort action for injuries sustained in his work-related accident. He netted \$410,000 from that settlement after payment of medical expenses, fees, and costs, including payment of a \$50,000 workers' compensation lien. An agreed statement filed with the industrial commission provided

that no further compensation payments would be made to claimant until he had exhausted the net proceeds of the settlement.

The insurer sought to offset the amount of the workers' compensation benefits paid to the plaintiff against the disability benefits payable to him for the \$500 per 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 workers' 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 workers' compensation benefits against long term disability payments even though the disability policy contained no provision dealing with the situations in which a workers' compensation insurer is later reimbursed from a third party recovery. 863 F.2d at 109. 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.

Two other cases have addressed this issue: *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. 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:

"The court focused on payments actually made to the 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 doublepayments 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.* at 547.

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. The *Lane* court held, following a discussion of that state law:

"Under Pennsylvania law, an injured employee remains eligible for workers' compensation after a third-party recovery 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.

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

A. Courts have gone both ways on this issue. Again, a close review of the insurance contract is critical. 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 workers' 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 workers' 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 workers' 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 workers' compensation insurance company or the individual state's commission. *Collins* should be kept in mind as a further reminder that ultimately courts 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. It held that, while the plan's determination [that benefits would be reduced by the amount of the plaintiff's workers' 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.

*Trujillo v. Cyprus Amax Minerals Co. Retirement Plan Committee*, 203 F.3d 733 (10th Cir. 2000), 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 was critical in the court's analysis. 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.

On a related issue in the case of *Parke 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).

**Q-5. Is the long-term disability carrier entitled to take an offset for workers’ 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. In the *Cherene* case, the plan language provided for a reduction of LTD benefits as a result of workers’ compensation benefits or disability benefits under a similar law or program compensating for a loss of income. The *Cherene* court remanded the case back to the plan administrator for a determination of what portion of the settlement was for a loss of income. 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,” was provided by Prudential to the employer/ policyholder. *Id.* at 1205

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).

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

A. For the reasons discussed above, 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.

On the question of whether an LTD carrier is entitled to take an offset for the portion of a workers’ compensation settlement that is related to *medical*, anti-subrogation statutes that some states have enacted may be involved. 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).

On 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 receipt of permanent partial benefits result in 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. *Kryztoforski 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. 3<sup>rd</sup> 820 (8<sup>th</sup> Cir 1999). But, 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).

**Q-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?**

A. It depends 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 support the insurer’s right to offset only 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." 987 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).

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

A. 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*, in applying the "arbitrary and capricious" standard, the court 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," 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. 61 F. Supp. 2d at 751.

In *Dorato*, the court held that even though the plaintiff's compensation claim was disallowed by the Workers' Compensation Board, *Id.* at 207, plaintiff's settlement of that claim was (reviewing the case under the arbitrary and capricious standard) a reasonable basis for denial of his health insurance claim. *Id.* at 214.

**Q-9. How Has Life Changed After *Great-West v. Knudson*?**

A. 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 an ERISA health plan 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 with Great-West. 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. 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. Yet, the plan had previously paid \$411,157.11 in medical bills.

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 (4th Cir. 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*, 294 F. Supp. 2d 695 (D.C. MD 2003) ; *Mank v. Green*, 297 F. Supp 2d 297 (D. ME 2003) (funds were disbursed to clients but apparently placed in separate bank account in clients name and not commingled with other funds of client); *Forsling v. J.J. Keller & Assoc.*, 241 F. Supp 2d 915 (E.D. WI 2003); *Bombardier v. Ferrer*, 354 F.3d 348 (5th Cir. 2003); *IBEW-NECA Southwestern Health and Benefit Fund v. Douthitt*, 211 F. Supp. 2d 812 (N.D. TX 2002); *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 has any bearing on plans that are taking offsets on an on-going basis. They are merely holding money and recoupment is not an issue.

## Conclusion

Recognizing that as a general rule LTD plans will be allowed to take an offset, but that language ambiguities will be construed in favor of the injured worker, practitioners should observe the following:

1. Closely review the specific language of the long term disability plan.
2. Review the case law for the federal circuit in which the injured worker resides for the most recent cases on point.
3. Consider the applicable standard of review, 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 whether the administrator was reasonable or abused his discretion regarding how the plan documents were interpreted and enforced.

Important questions may arise in each case:

1. Whether any lawsuit should be filed in state or federal court;
2. What parties should be named as defendants; and,
3. The applicable standards that a court will apply for review of the plan administrator's decision.

There are these additional

considerations:

1. Steps must be taken to be certain that any administrative remedies have been exhausted prior to filling suit.
2. 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>).
3. 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.
4. A letter may be sent to the long term disability carrier inquiring as to the plan interpretation.
5. Also consider 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 claims. There can be a great benefit to resolving all pertinent issues short of litigation.
6. Finally, of course, some resort to the courts may be necessary if a disagreement develops on the interpretation and application of the offset provisions. In light of the *Great-West* case, LTD carriers may be considerably more amenable to negotiation where they have a need to recoup overpayments than in cases where the offset being taken by the LTD carrier is ongoing.