

Long Term Disability Offsets

What to Look for From a Claimant's Perspective

By Robert E. Hoskins



OFFSETS AHEAD

When will some workers' compensation and Social Security disability claimants' attorneys have to deal with the Employee Retirement Income Security Act of 1974 (ERISA)? Unfortunately, the answer is sometimes when it is "too late." While health insurers' ERISA subrogation rights have become common knowledge among personal injury attorneys, many workers' compensation and Social Security attorneys are oblivious to the same sort of subrogation like pitfalls that face their clients who draw long term disability (LTD) benefits. This article discusses what to look for when representing a workers' compensation or Social Security disability claimant who also draws LTD benefits from an ERISA plan.

Plan document language governs

At their core, ERISA plan documents are contracts. The Fourth Circuit has noted:

"We adhere to plan documents unless they contravene ERISA or other binding authority. But ERISA "does not mandate any minimum substantive content for [welfare benefit] plans" (citation omitted). "Employers have large leeway to design disability and other welfare plans as they see fit." *Black & Decker Plan v. Nord*, 538 U.S. 822, 833, 155 L.Ed.2d 1034, 123 S. Ct. 1965 (2003). [...] Indeed, "ERISA neither requires a welfare plan to contain a subrogation clause nor does it bar such clauses or otherwise regulate their content." *Ryan by Capria-Ryan v. Fed. Express Corp.*, 78 F.3d 123, 127 (3d Cir. 1996). ... ERISA allows plans broad discretion to draft such clauses." *Kress v. Food Employers Labor Relations Assoc. & United Food and Commercial Workers Health and Welfare Fund*, 391 F.3d 563, 568 (4th Cir. 2004).

What are offset terms?

Offset clauses reduce the amount an LTD insurer owes when the insured receives income from other specified sources (other income). Although not universal, offset clauses are "common." *In re Unisys Corp. Long Term Disability ERISA Litigation*, 97 F.3d 710, 715 (3rd Cir. 1996). Offsets serve an important purpose. As the one court stated:

"... Clauses of this kind not only reduce the employer's outlay for disability coverage (and thus enable the employer to provide additional fringe benefits from a given budget) but also control the moral hazard of insurance—that is, the chance that the existence of insurance will increase the likelihood of the insured event. People who know that their full income will continue after they stop working may take more risks in their daily lives

and will not try as hard to return to work after injury or illness; some insureds will fake the existence of a disability or exaggerate its severity. The closer the disability benefit to 100% of earned income, the greater the moral hazard. As a practical matter even 80% may fully replace lost wages, for persons who no longer work do not incur commuting and related costs, and they enjoy certain tax advantages." *Hall v. Life Ins. Co.*, 317 F.3d 773, 778 (7th Cir. 2003).

Offset clauses are usually incorporated into an ERISA plan document several ways. First, there may be a provision specifying what "other income" sources are offsets to LTD benefits. Usually, the monthly LTD benefit is a fixed percentage of the insured's earnings minus the specified other income benefits. Workers' Compensation (WC) and Social Security Disability Income (SSDI) are almost universally listed as LTD plan offsets. Some plans also have provisions specifying what is not an offset. Some plans explain how a lump sum award, such as with a settled WC claim, will be prorated for the purposes of calculating the offset. The details of these provisions vary widely amongst plans. Finally, most plans will provide a subrogation like clause that specifies that if LTD benefits are overpaid due to the insured's subsequent receipt of "other income," then the insurer has a legal right to recover the overpayment. A legal action against the claimant to recover the overpayment may be brought in federal court pursuant to ERISA 29 U.S.C. § 1132(a)(3). *See Dillard's, Inc. v. Liberty Life Assurance Co.*, 456 F.3d 894 (8th Cir. 2006).

Anti-assignment laws are of no effect

Attorneys unfamiliar with ERISA might surmise that for an ERISA plan to recover an overpayment out of WC monies violates S.C. Code § 42-9-360 (the workers' compensation anti-assignment pro-

vision). However, that supposition is wrong. The Supreme Court has specifically recognized that ERISA plans can integrate workers' compensation payments with ERISA benefits. In *Alessi v. Raybestos-Manhattan, Inc.*, 101 S. Ct. 1895 (1981), the Court held that a New Jersey workers' compensation law prohibiting offset clauses was preempted by ERISA and was of no effect when it comes to ERISA plans. So, S.C. Code § 42-9-360 will not avail the individual who draws both ERISA benefits and WC monies. Likewise, Social Security attorneys who may believe their clients' SSDI benefits cannot be offset or recovered by an ERISA LTD plan based upon 42 U.S.C. § 407 (the Social Security anti-assignment provision) would be wrong. The vast majority of courts to have addressed the issue have recognized that "§ 407(a)'s prohibition is not triggered by this kind of reimbursement provision because the insurance company 'seeks the amount it overpaid [the claimant rather than] any of [the claimant's] Social Security benefits.'" *Maddox v. Life Ins. Co.*, 536 F.Supp.2d 1307, 1327 (N.D. Ga. 2008). (However, a small minority of courts have held to the contrary. *See Ross v. Pa. Mfrs. Ass'n Ins. Co.*, 2006 W.L. 1390446 (S.D.W.Va. 2006) and *Mote v. Aetna Life Ins. Co.*, 435 F.Supp.2d 827 (N.D. Ill. 2006).) Faced with the reality that offset clauses are a legal and common reality, what should an attorney representing a WC or SSDI claimant look for to best protect the client?

Difference between short and long term disability

It is necessary to distinguish between short term disability (STD) and LTD plans. Most large employers provide both types of benefit, but, technically, the two benefit plans are separate. STD plans are intended to replace lost income for a short and finite period (usually three to six months). LTD plans are designed to provide income in the event of catastrophic illness or injury that disables an individual for the long term. Usually, the right

to LTD benefits attaches when the maximum amount of STD benefits have been paid. The mere fact that one files an STD claim does not necessarily mean that the individual has also filed an LTD claim. In fact, the Fourth Circuit has held that the need to file an LTD claim can be separate and, in addition to, an STD claim. *See Isaacs v. Metro. Life Ins. Co.*, 2008 U.S. App. LEXIS 12584 (4th Cir. 2008), unpublished. A common misperception among HR professionals is that an individual cannot file an LTD claim if he is pursuing a WC claim. This misconception usually derives from a failure to appreciate the difference between STD and LTD plans. Most STD plans specify that an individual cannot draw benefits for a work-related injury. (STD plans also do not generally contain offset provisions for SSDI benefits as they are not payable until five months after the claimant's date of disability. 42 U.S.C. § 423.) Realizing that an STD plan may not allow an individual to "double dip," HR professionals sometimes wrongfully advise

employees that if there is a pending WC claim, the employee cannot also pursue an LTD claim (confusing it with STD). In reality, most LTD plans do allow individuals to draw benefits regardless if the disabling injury is work-related. However, there is almost always an integration between amounts payable under the LTD plan and the workers' compensation benefit. Therefore, even if the client is not entitled to STD benefits, the separate LTD claim should be filed if the injury proves to be disabling in the long term. Most LTD plans have strict time limits within which a claim must be filed, and failure to file a claim within the internal plan limitations period can be fatal. *See Isaacs.*

Get the plan document


The starting point in analyzing how LTD benefits may be affected by receipt of "other income" is to obtain a copy of the plan document. The unique language of each plan document will determine the rights of the plan and its partici-

pant. The plan document is easily obtained by writing to the plan's administrator (which will usually be the client's employer). The administrator is required to provide the document within 30 days or face imposition of up to a \$110 per day penalty for each day the document is not tendered. 29 U.S.C. § 1132(c). The plan document should reveal the following:

- How to file an LTD claim
- When to file a claim
- The amount of benefit payable
- Offsets that will reduce any monthly benefit
- How the plan will amortize a lump sum settlement
- The applicable standard of review
- The name of the plan and the agent for service of process (in the event litigation is necessary)

Common issues

There are no "across the board" rules when it comes to offsets. However, some issues that commonly arise regarding integration between LTD benefits and



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“other income” follow.

What if the disabling condition is different than the work-related injury?

Does the insurer get an offset if a person draws LTD benefits for one condition, but WC or SSDI benefits based upon a completely different condition? As with other issues discussed in this article, the outcome is resolved by the language of the plan document. If the offset provision is broad and references “any” WC monies, then the plan will likely get the offset even if the basis for the WC is different than the LTD claim. See *Godwin v. Sun Life Assurance Co.*, 980 F.2d 323 (5th Cir. 2002) and *Carden v. Aetna Life Ins. Co.*, 559 F.3d 256 (4th Cir. 2009). Another plan document’s language may not be so broad or might even specify that the plan will only get an offset if the basis for the WC claim is the same as the LTD claim. See *Confer v. Unum Life Ins. Co.*, 2007 U.S. App. LEXIS 842 (5th Cir. 2007) and *Gruber v. Unum Life Ins. Co.*, 195 F.Supp.2d 711 (D. Md.

2002). The same is true in the Social Security context. See *Padilla v. UnumProvident*, 2007 U.S. Dist. LEXIS 97092 (D. N.M. 2007), where the court found the insurer entitled to an offset because the basis for the SSDI and LTD claims was the same, *but compare* to *Gruber*, where the court disallowed the offset when the basis for the two claims was different.

Does the LTD carrier get credit for a dependent’s SSDI payments?

A frequent issue with an SSDI award is whether the ERISA plan can offset a dependent’s benefits in addition to the primary benefits. This issue, too, is resolved by the language of the plan document. See *Sanders v. Unum Life Ins. Co.*, 2007 U.S. Dist. LEXIS 72062 (W.D. Tx. 2007) and *Fortune v. Group Long Term Disability Plan for Employees of Keyspan Corp., et. al.*, 588 F.Supp. 339 (E.D. N.Y. 2008), both holding that, based upon the language of the plan document, the ERISA plan was allowed to off-

set for dependent benefits, *but compare* to *In re Unisys Corp. Long Term Disability Plan ERISA Litigation* (citation above), holding to the contrary where the plan language was not clear.

How is a lump sum workers’ compensation settlement pro-rated?

An issue that arises with WC lump sum settlements is how the offset will be calculated. Imagine a 25-year-old totally disabled individual receives a lump sum WC settlement of \$100,000. For purposes of calculating the LTD offset, should the payment be spread over the period for which the WC could be paid (for example, 500 weeks, which results in a monthly LTD offset of \$866.66)? The plan could prorate the award over the period that LTD benefits are expected to be paid (usually up to age 65, which would yield a monthly offset of \$208.33). Another potential way to prorate the settlement is to use the monthly equivalent of the *Utica-Mohawk Mills v. Orr*, 87 S.E.2d

589 (S.C. 1955), figure. (This method would yield a monthly offset of approximately \$138.) Finally, the plan might internally establish the method by which any lump sum will be prorated. One prominent disability insurer's policies state that any lump sum will be prorated, for offset purposes, over a period of 60 months (which, with the example, would be a monthly offset of \$1,666.67). Clearly, how a lump sum award is prorated can make a significant difference from a financial standpoint. If the language of the plan is clear on the calculation method, then that language will be determinative. However, if the plan is silent on how to prorate, then various arguments can be made. There is at least one S.C. District Court decision where the court held that in the absence of clear language in the plan, the monthly equivalent of the *Utica/Mohawk* weekly rate was the proper monthly offset. See *Arrington v. Aetna Life Ins. Co.*, 7:98-0126-24 (D.S.C. 1998).

"Make whole" relief

Another common issue involves a situation where a WC lump sum settlement is partially attributable to lost income, but otherwise attributable to permanent impairment or some other category of damage. Can the LTD insurer claim an offset for the entire award or just that portion attributable to lost income? You guessed it, the answer depends upon the plan language. Some plans will specify whether the plan gets credit for the whole award or not. At least one insurer's plans typically state that if the insurer cannot discern what amount is attributable to lost income, then the plan is entitled to a credit for 50 percent of the total amount.

In appropriate cases, a court may even employ equitable theories like the "make whole" doctrine to block an insurer's claim to an offset. In *Smith v. Life Ins. Co.*, 466 F.Supp.2d 1275 (N.D. Ga. 2006), the court foreclosed a disability insurer from taking an offset to its monthly LTD obligation where the

plan participant made a limited recovery in a tort action after having suffered catastrophic injuries. The key to the court's holding in *Smith* was that the plan's overpayment provision did "not explicitly reject the make whole doctrine." *Smith*, 466 F.Supp.2d at 1286. (But compare to *White v. Coca-Cola Co.*, 542 F.3d 848 (11th Cir. 2008) rejecting application of the "make whole" doctrine in the context of an ERISA LTD plan offset for SSDI benefits.) So, with the proper facts and if the plan language does not otherwise foreclose the "make whole" doctrine, then an argument can be made, in equity, that the insurer should not be allowed an offset. The Fourth Circuit has not squarely addressed this issue, but has indicated that the equitable "make whole" doctrine may be compelling if "the plan (is) silent as to the amount of reimbursement." *United McGill Corp. v. Stinnett*, 154 F.3d 168, 173 (4th Cir. 1998).

What if the client refuses to pursue "other income"?

A final regularly occurring issue is where an individual draws LTD benefits and has a right to pursue WC or SSDI benefits, but chooses not to. Can the insurer take an offset for the benefits the claimant would receive if only he or she would pursue the other claim? The courts are split on this point and, again, the language of the plan document dictates the outcome. In *Wyatt v. Unum Life Ins. Co.*, 223 F.3d 543 (7th Cir. 2000), the court blocked the insurer's attempt to offset LTD benefits by an amount the claimant could have drawn from another income source if only he had pursued his claim. The plan document in *Wyatt* specified that the insurer was entitled to an offset for any other income benefits for which the insured was "eligible." The insurer argued that even though the claimant did not pursue the "other" claim, that he remained "eligible" for those benefits nonetheless. The court rejected the argument and equated the word "eligible" to "entitled" and thereafter denied the offset reason-

ing that the claimant was "entitled" to zero on the other claim because he did not pursue it. However, for a contrary holding, see *Baxter v. Briar Cliff Coll. Group Ins. Plan*, 409 F.Supp.2d 1108 (N.D. Iowa 2006).

Maximize the client's recovery

Proper handling of the issues addressed in this article can have a significant impact on the amount of benefits an LTD claimant might receive. When an LTD insurer asserts an offset for a client's receipt of other income benefits, any attorney advising that client would be remiss if he or she did not closely scrutinize the language of the ERISA benefit plan document to attempt to maximize the client's benefits. These issues should be addressed early on and thoroughly. Otherwise, due to ERISA procedural complications, it might later prove too late to help the client maximize his or her recovery.

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