

DEFEATING INSURERS' ATTEMPTS TO AVOID REGULAR OCCUPATION-BASED LIABILITY IN DISABILITY INSURANCE BAD FAITH CASES

Douglas K. deVries, Esq.

deVries Law Firm
Sacramento, California

I. INTRODUCTION

Individual disability insurance policies that insure against loss of earning capacity specific to an insured's own regular occupation are known as "own occ" policies. The insurance industry expanded the benefits in such policies and aggressively marketed them from the late 1970's, through the 1980's and into the early 1990's. This occurred as a result of intense competition by insurers in an effort to acquire premium dollars for investment in a high interest rate, high investment return economy.

The target market for own occ insurance policies was high income earners who had more to lose from becoming disabled from their occupation, and who could afford the relatively high premiums - e.g., doctors, lawyers, accountants and other professionals as well as executives and business owners. As expected, States like California, New York, Massachusetts and Florida were among the largest and most lucrative sales markets.

The own occ policies were characterized by high monthly benefit amounts and liberalized disability definitions that protected against loss of highly specific occupations. For instance, surgeons who could no longer perform surgery were to be paid the disability benefits provided by the policy even though they could still work as a physician in a non-surgical practice. Further, since it was capacity to engage in a specific occupation, as opposed to loss of income itself, that was the insurable interest, the insured's income derived from working in another occupation or from other sources was irrelevant to the entitlement to collect the policy own occ benefits.

Following the early 1990's, interest and other investment return rates dropped dramatically and flattened resulting in lowered income and profits for insurers, and at the same time claims on own occ policies accelerated. The own occ promises made by insurers were coming home to roost and placing a financial strain on the insurers. These trends have continued unabated resulting, in relevant part, in increasingly aggressive claims and litigation practices on the part of insurers specific to own occ disability claims.

Plaintiffs who file suit to challenge denial of total disability claims made on disability insurance policies they purchased containing own occ benefit provisions are increasingly confronting insurer defenses that attempt to circumvent policy terms and otherwise controlling law.

The major issues being raised by these defense tactics include the following:

1. What is the meaning of own or regular occupation?
2. What controls, policy definitions or decisional law?
3. Can the own occ benefit be eliminated by a partial disability benefit provision?¹

This article sets forth the essential legal standards for interpreting “total disability” and “own occ” insurance policy provisions. These controlling standards demonstrate that new defense tactics may be challenged as being legally unsupported.

II. LEGAL STANDARDS FOR “TOTAL DISABILITY” DEFINITIONS IN DISABILITY INSURANCE POLICIES

A disability insurance policy's failure to define a term renders the term ambiguous. See e.g., *Patterson v. Hughes Aircraft Co.*, 11 F.3d 948 (9th Cir. 1993). *Amadeo v. Principal Mutual Life Ins. Co.*, 290 F.3d 1152, 1162 (9th Cir. 2002). Interpretation of policy terms may

¹ Occasionally, in policies sold in the 1990's, an insurer will even include in the policy's definition of “total disability” a statement that the insured will be considered disabled and entitled to benefits if “unable to perform the substantial and material duties of your regular occupation, and not working in any other occupation.” This essentially eviscerates the regular occupation benefit, and provides a basis (albeit an unlawful basis) to assert that whenever the insured is working in any capacity they are either entitled only to residual (partial) disability benefits (which is income tested) or no benefits at all.

not be unreasonable, and the reasonable interpretation is “the meaning a layperson would ordinarily attach to it.” *Ibid.* See also *Rodgers v. Nationwide Ins. Co.*, 47 Or.App.843, 615 P.2d 1090 (1980) (“the insurance policy must be construed according to its character and its beneficent purposes and in the manner in which (the insured) had reason to suppose it would be understood.”)

In the seminal case of *Erreca v. Western States Life Ins. Co.* (1942) 19 Cal.2d 388, 396, the California Supreme Court articulated the standard of total disability, as follows:

“Total Disability” does not signify an absolute state of helplessness but means such a disability as renders the insured unable to perform the substantial and material acts necessary to the prosecution of a business or occupation in the usual or customary way. Recovery is not precluded...because the insured is able to perform sporadic tasks, or give attention to simple or inconsequential details incident to the conduct of the business...”

California courts oppose strict adherence to a limited definition of total disability:

Through this progression of cases, it is clear that California courts oppose the strict adherence to a highly limited definition of ‘total disability’ in both non-occupational and general occupational disability policies. Such policies should offer protection to the insured when he is no longer able to carry out the substantial and material functions of his occupation. Common sense dictates this. Certainly it would be far beyond the reasonable expectations of an attorney covered by a disability policy, to discover, for instance, if he were still able to return a client’s telephone call or Shepardize a case but do nothing else, that he would not be considered totally disabled.” *Austero v. National Casualty Co. of Detroit, Michigan*, 84 Cal.App.3d 1,22, 148 Cal.Rptr. 653, 667 (1978).

The court in *Moore v. American United Life Ins. Co.* (1984) 150 Cal.App.3d 610, approved a jury instruction on “total disability,” in relevant part as follows:

The term “total disability,” as applicable to the insurance policy involved in this case, is defined as a disability that renders one unable to perform with reasonable continuity the substantial material acts necessary to pursue his usual occupation in the usual and customary way....” 150 Cal.App.3d at 632.

The test of “total disability” set forth in *Erreca v. West. States Life Ins.. Co., supra*, requires that the actual working circumstances of the plaintiff, and the real-world

employment marketplace be considered in determining whether an insured is “totally disabled.” *Moore v. American United Life Ins. Co.* (1984) 150 Cal.App.3d 610,629-30, 197 Cal.Rptr. 878. Under that test, “total disability” is one that prevents the insured from working with reasonable continuity in his customary occupation (“own occ”) or in any other occupation in which he might reasonably be expected to engage (“any occ”). (*Erreca v. West. States Life Ins.. Co., supra*, 19 Cal.2d at pp. 394-395; followed in *Culley v. New York Life Ins.. Co.* (1945) 27 Cal.2d 187, 191. Evidence of an insured’s actual employment prospects is relevant to show that, under the *Erreca* test, he could not, in fact, work with reasonable continuity. *Moore v. American United Life Ins. Co., supra*.

In *McClure v. Life Insurance Company of North America*, 84 F.3d 1129 (9th Cir. 1996) (an ERISA case), the court held that the term “every duty” used in a total disability definition is ambiguous and construed in favor of insured who is unable to perform any of the essential duties of an occupation.

III. MEANING OF “REGULAR OCCUPATION” OR “OWN OCCUPATION”

The California Supreme Court, in *Erreca v. Western States Life Ins. Co.* (1942) 19 Cal.2d 388, extensively analyzed the meaning of occupation in disability insurance. *Erreca* was a “farmer engaged in grain and stock.” 19 Cal.2d at 390. After being thrown from a horse and sustaining a multiple fractures of his right leg he suffered permanent instability of his knee, was able to walk with a cane but only to a limited extent, had varicose veins and ulcers. *Ibid.* Any extended walking brought about swelling in the legs, pain, shortness of breath and rapid heart rate. *Ibid.*

Erreca’s principal duties before his injury were supervisory in nature, characterized by the court as being a “ranch executive.” 19 Cal.2d at 391. His duties included negotiating and making leases of land, making annual arrangements for crop financing, signing notes and mortgages, buying livestock and supplies, determining the time for crop planting and harvesting, and selling his crops. *Ibid.*

In terms of physical exertion, Erreca had to determine whether the land was ready for planting by walking over it and testing for ground moisture with a digging instrument. *Ibid.* He also followed behind plows on foot to assure that the proper depth of planting was attained, and he directed the even distribution of seed planting by walking over the land and inspecting it behind the seeder. 19 Cal.2d at 391-392. Erreca would then dig in the ground to see if the planted seed was penetrating, and he would examine the land later to determine when the grain was ready for harvesting. 19 Cal.2d at 392. Erreca walked behind the harvester to see that the grain was being properly threshed. *Ibid.* Sometimes he directed work by riding horseback and other times he traveled to remote ranches by automobile. *Ibid.* In addition to the foregoing, Erreca operated plows, drove tractors, repaired fences, buildings and machinery and aided in the construction of levies and ditches. *Ibid.*

As a result of his injuries and resulting medical condition he could no longer engage in the activities requiring heavy physical exertion, but the injuries and medical condition in no way impaired his mental faculties. *Ibid.* He was still able to negotiate leases, arrange finances for crops, buy supplies, participate in selling his grain, and provide all other administrative functions associated with owning and operating his farm. *Ibid.*

Based on these facts, Erreca was found to be totally and permanently disabled within the meaning of the policy. 19 Cal.2d at 393.

The Erreca case involved a general or any occupation standard that included Erreca's own regular occupation at the time of onset of disability. The threshold issue was whether Erreca was deemed totally disabled from pursuing the occupation of farmer or farm supervisor. 19 Cal.2d at 395. The Erreca court observed that successful grain farming could not be properly conducted by a farmer from the doorstep of his home or from his automobile. 19 Cal.2d at 396. The court noted that the magnitude of Erreca's farming operation and the income he derived therefrom as a farm owner had no proper place in the determination of whether the insured was totally disabled from performing his regular work. 19 Cal.2d at 397. The court observed that his management and administrative activities, including negotiating

loans and leases, signing notes and mortgages, talking with grain buyers, participating in buying supplies and also talking with his son who took over the day to day operations of the farms were neither trivial nor inconsequential, but overall they did not constitute the substantial and material duties of his regular occupation. *Ibid.*

In *Moore v. American United Life Ins. Co.* (1984) 150 Cal.App.3d 610, the insured was a school bus driver who had suffered a heart attack. 150 Cal.App.3d at 616-617. In upholding a verdict for the insured for both breach of contract and insurance bad faith the court held that a disability insurance policy term defining total disability that is not in compliance with the standard set forth in *Erreca v. Western States Ins. Co., supra*, is “unlawfully restrictive.” 150 Cal.App.3d at 620. Further, processing a California-based disability insurance claim applying a standard of disability not in compliance with California law justified a finding of insurance bad faith and an award of punitive and exemplary damages. 150 Cal.App.3d at 638.

The Ninth Circuit, in *Hangarter v. Provident Life & Accident Ins. Co.*, 373 F.3d 998 (9th Cir. 2004), applied California law to a chiropractor’s own occ disability insurance claim consistent with the analysis presented in this article, including findings that (1) the California common law definition of total disability controlled over any inconsistent insurance policy definition that would be less favorable to the insured, and (2) limiting definitions and residual disability provisions cannot be used to defeat an otherwise valid total disability claim.

The Hangarter court rejected the insurer’s attempt to escape liability for payment of own occ total disability benefits by asserting that the insured qualified for partial disability benefits, holding as follows:

Defendants also contend that the imposition of *Erreca’s* definition of total disability in this case obviated the policy’s partial or residual disability provision. This argument also disregards California law. In *Wright v. Prudential Ins. Co. of America*, 27 Cal.App.2d 195, 80 P.2d 752 (1938), cited approvingly by the California Supreme Court in *Erreca*, the California District Court of Appeal specifically rejected the defendant’s contention that the California judicial “rule (regarding ‘total disability’) does not apply where the policy provides for ‘various degrees of disability.’”

No logical reason appears, however, why the same rules should not be applied where the policy provides for both total and partial disability in order to make the total disability clause “operative and to prevent a forfeiture” of the indemnity provided by that clause. In either case a literal interpretation of the total disability clause defeat the very purpose of insurance against total disability, because it rarely happens that an insured is so completely disabled that he can transact no business duty whatever 373 F.3d at 1007-1008 (citations omitted).

Forrest v. Provident Life & Accid. Ins. Co., 2008 WL 4814473 (2nd DCA Cal., Dec. 2, 2008), is instructive. Forrest was an OB-GYN physician who worked 40 hours a week in private practice and also worked 40 hours a week as Associate Medical Director of a hospital. After suffering injuries in an automobile accident he could no longer work as an OB-GYN physician, but continued to work 40 hours a week as a medical director.

The policy’s total disability provision, similar to the policies in this case, contained the phrase “Your occupation means the occupation (or occupations, if more than one) in which you are regularly engaged at the time you become disabled.” At *4. Provident asserted that Forrest had two occupations, and therefore would have to be disabled from both in order to qualify for total disability benefits, a position the court rejected. *Ibid*. The court found that the policy’s explanation of “your occupation” did not actually define either the term “your occupation” or the term “occupation;” it just fixed a time frame within which the determination of “occupation” was to be made. *Ibid*. The policy’s explanatory statement did not constitute a clear and unambiguous statement of what constitutes a person’s “occupation.” *Ibid*.

In order to ascribe a reasonable meaning relating to performing work, the court looked to the dictionary definition of “occupation,” which is “the principal business of ones life.” *Id.* at fn 7, citing Merriam-Webster’s Online Dictionary. (Webster’s Unabridged Dictionary (2nd Ed. 2001) similarly defines “occupation” as “a person’s usual or principal work or business.”).

The *Forrest* court held that even though Forrest worked 40 hours a week as a medical director, “... it is objectively reasonable to believe that Forrest considered his OB-GYN

practice to be his 'principal business' or 'occupation' and that he would be covered if he became disabled from his OB-GYN practice.” *Ibid.*

In *Stender v. Provident Life & Accid. Ins. Co.*, 2000 WL 875919 (N.D. Ill. 2000), Provident contended that Stender had two occupations because in addition to working as a commodities floor trader (colloquially referred to as a “Pit Scalper”) he was also involved in running his family’s coin operated laundry business. The court held that “(t)he fact that Stender has an ownership interest in Newco, and performed some duties for Newco, does not alter the fact that those activities were not the primary functions of Stender’s occupation as a Pit Scalper.”

In *Hamaker v. Paul Revere Life Ins. Co.*, 2004 WL 963701 (S.D. Ind. 2004), the court held that a head and neck surgeon who also owned and received income from other businesses did not have two occupations, nor could his occupation be reasonably characterized as “medical businessman.”

In *Fitzgerald v. Globe Indemnity Company of New York* (1927) 84 Cal.App. 689, the insured was a physician who also owned a walnut ranch, which the insurer considered to constitute a dual occupation. 84 Cal.App. At 691-692. The insured developed kidney disease, but was still able to drive his automobile on short trips and on occasion long trips; he drove to town nearly every day and made purchases of household supplies. 84 Cal.App. at 696. He executed contracts, received and examined monthly reports of the farming expenses, maintained bank accounts, drew checks, paid taxes, insurance and interest on money he borrowed. *Ibid.* He also performed other similar acts which the insurer contended constituted the transaction of the business duties. *Ibid.* The court concluded that just because an insured may do some work or transact some business duties during the time he claims disability benefits, or even the fact that the insured is physically able to do so, is not conclusive evidence that the insured does not suffer total disability “if reasonable care and prudence require that he desist.” 84 Cal.App. at 698. The court further noted that occasional transactions in an occupation does not mean that an insured is performing the substantial and

material acts of his business or occupation in the usual and customary way. 84 Cal.App. at 699.

In *Amadeo v. Principal Mutual Life Ins. Co.* (9th Cir. 2002) 290 F.3d 1152, the insured had been employed in the securities industry for twenty years, including her last position as vice president of compliance for a securities company. 290 F.3d at 1156. She suffered severe post-traumatic stress disorder and depression, but did not make a disability insurance claim for two years after she stopped working due to her mental disorders. 290 F.3d at 1156-1157. The insurer took the position that at the time she became disabled the insured's regular occupation was that of an unemployed person. 290 F.3d at 1157, 1162. The court, applying California law, found that such an interpretation of regular occupation would not meet the objectively reasonable expectations of an insured. 290 F.3d at 1162-1163. The court held that the insured's regular occupation was that occupation that she had engaged in as a career, an executive in the securities industry. *Ibid.* The insurer was found to be in bad faith and could not lawfully adopt an interpretation of its policy that was arbitrary or based on the subjective perceptions of its "unguided claims adjusters." 290 F.3d at 1163.

In *Dionida v. Reliance Standard Life Ins. Co.* (N.D. Cal. 1999) 50 F.Supp.2d 934, the insured was a registered nurse employed at a hospital who became disabled as a result of severe low back pain. 50 F.Supp.2d at 936. The insurer erroneously applied an "any occupation" standard rather than the "regular occupation" standard. *Ibid.* Citing with approval *Dawes v. First Unum Life Insurance Co.* (S.D.N.Y. 1994) 851 F.Supp. 118, 122, the court held that the term "regular occupation" was to be construed to mean "a position of the same general character as the insured's previous job, with similar duties and training requirements." 50 F.Supp.2d at 939. The court observed that an insured's regular occupation cannot be fairly defined as an occupational group by arbitrarily grouping together different occupations. 50 F.Supp.2d at 939-940. The effect of an insurer broadening the definition of an occupation to include all individual types of occupations that have different duties and different training requirements has the impermissible effect of obliterating the

distinction between the criteria for a regular or own occupation benefit and that of an any occupation benefit, which thus has the effect, contrary to contract terms and the law, of depriving the insured of the regular occupation benefit period. 50 F.Supp.2d at 939-941, 942.

Under California law, an insured is not required to re-train or rehabilitate himself for an other occupation which he could physically pursue. See *Erreca v. Western States Life Ins. Co.*, supra at 394; *Pistorius v. Prudential Ins. Co. of America* (1981) 123 Cal.App.3d 541, 546.

Most other jurisdictions that have addressed the issue of regular occupation have promulgated rules similar to, and consistent with, California's approach. In *Berkshire Life Ins. Co. v. Adelberg* (1997) 698 So.2d 828, the insured sought disability benefits because he could no longer perform his occupation as a yacht salesman. The insurer denied the claim on the basis that the insured was generally able to perform work as a salesman in other fields. In rejecting this position, the court held as follows:

Berkshire chose to state in this policy that total disability means "your inability to engage in your occupation." Berkshire likewise chose that, after 120 months of payments, total disability would mean "any gainful occupation." We conclude that the language chosen by Berkshire would lead a reasonable person reading this policy to conclude that for the first 120 months "your occupation" means the work in which he or she is engaged at the time of becoming disabled. In construing this policy, we simply give the term "your occupation" the meaning that an average buyer of an insurance policy would give to the term. Berkshire's contention that "your occupation" should be read to mean any sales position rather than the sales position *Adelberg* held at the time he was injured is not a distinction made by Berkshire in writing its policy. If this was Berkshire's intent, the company should have so stated in unambiguous language." 698 So.2d at 830.

In *Ogelesby v. Penn Mutual Life Ins. Co.* (D.De. 1995) 877 F.Supp. 872, the insured, at the onset of disability, was an interventional and vascular radiologist. The insurer claimed that the doctor could perform the duties of a general, as opposed to an interventional and

vascular, radiologist and thus was not disabled from his regular occupation. The court rejected the insurer's position, as follows:

In the plain meaning of the insurance policy's explicit terms, regular occupation is explained as one's usual work when total disability starts; an insured is totally disabled when he or she cannot do the substantial and material duties of that usual work. Therefore, if Ogelesby's usual work was that of an interventional and vascular radiologist, and he no longer could perform the substantial and material duties of that usual work, he would be entitled to Penn Mutual disability insurance benefits. 877 F.Supp. at 881.

There are numerous other examples, including the following:

Continental Casualty Company v. Novy (1982) 437 NE.2d 1338 (Physician who could no longer perform his duties in private general practice, but obtained employment at a veteran's administration hospital found disabled from his regular occupation).

McGrail v. Equitable Life Assurance Co. Etc. (1944) 55 NE.2d 483 (Surgeon who could no longer perform surgery but could prepare patient reports deemed disabled from regular occupation).

Rahman v. Paul Revere Life Ins. Co. (N.D. Ill. 1988) 684 F.Supp. 192 (Emergency cardiologist, rather than general cardiologist, was deemed the regular occupation).

Dixon v. Pacific Mutual Life Ins. Co. (2nd Cir. 1959) 268 F.2d 812 (Surgeon who developed hand tremor preventing him from performing surgery but who could still practice medicine generally deemed disabled from his occupation).

Brosnan v. Provident Life & Accident Ins. Co. (E.D. Pa. 1998) 31 F.Supp.2d 450 (Insurer's assertion that claimant's occupation was medical doctor as opposed to anesthesiologist rejected "as disingenuous at best").

Carlyon v. Mutual of Omaha Ins. Co. (1996) 559 N.W.2d 407 (Emergency room physician who became employed as prison doctor following injury was deemed totally disabled from his regular occupation).

Niccoli v. Monarch Life Ins. Co. (1974) 332 N.Y.S.2d 803, aff'd 356 N.Y.S. 2d 677 (Ob-Gyn doctor found totally disabled from regular occupation even though found employment as a hospital's director of family planning and sex education).

Laidlaw v. Commercial Insurance Company of Newark, 255 N.W.2d 807 (Minn. 1977) (solo practitioner trial lawyer who closed office due to chronic pain and depression and worked sporadically from home entitled to own occ total disability benefits even though he periodically made substantial income from cases).

Gammill v. Provident Life & Accid. Ins. Co., 55 S.W.3d 763, 346 Ark. 161 (2001) (hospital-based interventional cardiologist entitled to own occ benefits even though could still perform many duties of cardiologist and joined a clinic in which he worked as a cardiologist with the aid of other doctors).

Raithaus v. Unum Life Ins. Co., 335 F.Supp.2d 1098, 1125 (D. Hawaii 2004) ("regular occupation is one's routine work when disability begins"); see also, *Freling v. Reliance Standard Life Ins. Co.*, 315 F.Supp.2d 1277 (S.D. Fla. 2004).

IV. CONTINUING TO WORK WHILE TOTALLY DISABLED

The assertion that an insured is not entitled to receive total disability insurance benefits while they continue to work has been rejected not only in California but in many other jurisdictions and many other settings. See, for instance, discussion and resolution of this issue in *Lasser v. Reliance Standard Life Ins. Co.* 344 F3rd. 381 (3rd Cir. 2003), as follows:

Reliance argues, that even if emergency surgery and on-call duties are material, Dr. Lasser's resumption of these duties settles whether he is disabled from performing them. We disagree. ...there is substantial medical evidence that, if Dr. Lasser is performing on-call and emergency surgery duties, he is doing so to his detriment. Indeed, Dr. Lasser has argued that, to the extent that he has resumed these activities, he did so out of economic necessity - because Reliance discontinued his benefits. A claimant's return to work is not dispositive of his or her disability when economic necessity compels him or her to return to work. ("A desperate person might force himself to work despite an illness that everyone agreed was totally disabling."); (a claimant's status as a full-time employee should not constitute reliable evidence that he is able to perform the material duties of his occupation on a full-time basis); (even if a claimant returns to work, her doing so does not mean that she is not

disabled). This principal is especially persuasive here, where Dr. Lasser's disability was not observable and did not make it physically impossible for him to perform his job for a limited period. 344 F3rd. At 391-392 (citations omitted).

A diminishing work activity level corroborates being unable to perform substantially all the material duties of one's occupation, and one can be "totally disabled" before actual termination of work. See e.g., *Dotson v. Woodman of the World Life Ins. Society*, 109 Frd. 436-439 (8th Circ. 1997); *Kirwin v. Mariot Corp.*, 10 F3rd 784, 790 (11th Circ. 1994). Trying to work and collect a paycheck simply does not mean a person is not totally disabled and entitled to those insurance benefits. *Wahatley v. CNA Ins. Co.*, 189 F3rd 1310, 1313 (11th Circ. 1999).

V. DEVELOPING SUPPORTING TESTIMONY FROM ADVERSE WITNESSES

When a claimant's attorney is deposing the disability insurer's claims personnel, one goal is to establish the legal standards that apply to the terms of the disability policy and the related claim handling. In conducting discovery in a viable bad faith case, if done correctly, this can put the claim people in a no win situation - they have to either admit the applicable standards they failed to comport to or concede their ignorance of them. For instance, using a California claim as an example, explore the following:

1. claims people are expected to be familiar with California claims handling laws and regulations and adhere to them in the handling of the claim;
2. claims people are expected to understand and apply the California common law disability definitions in addition to the policy definition of total disability in evaluating the claim;
3. claims people are expected to be familiar with and apply the notice - prejudice rule;
4. claims people are expected, in their evaluation of the claim, to determine all possible benefits that might apply to a particular claim, and investigate and evaluate them;

5. claims people are expected to fulfill their duties under the implied covenant of good faith and fair dealing applicable to the handling of the claim; and
6. claims people are expected to be able to evaluate and determine whether a claim should be handled as total disability or residual disability in accordance with the law.

Stress the point that if the insurer has applied its residual disability definition in a manner that impermissibly and unlawfully negates the total disability definition, it deprives the insured of their total disability benefit.

For instance, a policy may define total disability, as follows:

Total disability means that, because of sickness or injury, you are not able to perform the major duties of your occupation.

Occupation means your regular occupation or profession at the time you become disabled.

If you have limited your practice to a recognized specialty in medicine, dentistry, law, or accounting, we will deem your specialty to be your occupation.

You will be totally disabled even if you are at work in some other capacity so long as you are not able to work in your occupation.

The total disability definition in the policy is subject to California law with respect to total disability, occupation and the entitlement to benefits.

A residual disability rider to a policy may define residual disability, as follows:

Residual disability means that you are at work *and are not totally disabled* under the terms of this policy, but, because of sickness or injury, you are not able to earn at a rate of at least 80% of your prior income. (Emphasis added).

Under these policy terms, and applicable law, if the insured meets the definition of total disability because they can no longer perform the substantial and material duties of their regular occupation in the usual and customary way and with reasonable continuity, they are entitled to the total disability benefit. By the terms of the policies themselves the residual disability provision would only apply if the insured did not meet the total disability definition under the policy and applicable law.

To read the policy terms otherwise, as insurers are trying to do in converting a total disability claim to a residual disability claim is effectively eliminating the total disability benefit in favor of a residual disability benefit that is tested by amount of income earned regardless of the nature or type of work, as opposed to protecting the insured from loss of their ability to practice their profession in the usual and customary way and with reasonable continuity.

VI. CONCLUSION

Plaintiff counsel should anticipate that insurers will attempt to reduce or eliminate own occ benefits whenever they see the opportunity by every means at their disposal. Increasingly, such efforts in defense of claimant lawsuits appear to be challenging the essential and long-recognized purpose of own occ provisions as they were sold to consumers. On balance, the law favors the claimant insured.

Extensive and consistent decisional law establishes that an own occ total disability benefit provision in a disability insurance policy constitutes a separate benefit for which the insured paid premiums. The purpose of the own occ benefit, as sold, is to protect the insured against loss of a chosen occupation (in other words, a career or a profession). Regardless of the ambiguities of varying policy terms, the interpretation and application of such own occ provisions cannot be more restrictive than the minimum requirements of applicable law that favors the claimant. Other policy benefit provisions, such as those for partial or residual benefits, are intended to provide separate, additional benefits and cannot be used to reduce or eliminate the own occ benefit.²

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² The very name “residual disability” suggests the origins and purpose of this benefit. It was designed to be an additional benefit that followed a period of “total disability,” a transition benefit. An insured may qualify for only one type of benefit at a time. By definition, “residual disability” would only apply if the insured did not meet the definition of, and qualify for benefits under, “total disability.”