

DISABILITY HOTSPOTS

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This paper provides the reader with a comprehensive overview of three areas of disability claims. First, the paper examines the law evolving in the area of risk of relapse disability claims. Second, the paper reviews the case law surrounding legal versus factual disability claims. Third, the paper discusses the emerging case law on the question: What is “Your Occupation”?

A. Risk of Relapse Disability Claims¹

The risk of relapse disability claim arises most frequently in the context of anesthesiologists fearful of returning to the practice of anesthesiology after successful completion of a detoxification program. The American Society of Anesthesiologists recognizes the problem of addicted anesthesiologists and in 1991 published *Chemical Dependence Guidelines for Departments of Anesthesiology*. The American Society of Anesthesiologists has established a Task Force on Chemical Dependence, which in 1999 published a booklet, *Chemical Dependence in Anesthesiologists*. These publications provide information to assist anesthesiology groups and departments in returning the addicted anesthesiologist to work. They outline steps that are necessary, after formal treatment, for the physician to remain drug-free and return to work. They discuss the importance of the attitudes of departmental colleagues, other physicians on the medical staff, and the hospital administration in accepting the recovering physician. “[I]f they

have a basic understanding of the disease of addiction and are amenable to gradual return to work in keeping with the contract, then the outcome in most cases will be positive.” *Chemical Dependence in Anesthesiologists*, ASA Task Force on Chemical Dependence (1999)

Another study, however, suggests a 70% relapse rate among anesthesiology residents who had used opioids during their residency and returned to work after treatment. Menk, *et al.*, *Success of Reentry into Anesthesiology Training Programs by Residents with a History of Drug Abuse*, 263 JAMA 3060 (1990). “For many physicians, slips or relapses serve as valuable learning experiences that can, if handled properly, strengthen their recovery program.” Pelton, *et al.*, *The California Physicians Diversion Program’s Experience with Recovering Anesthesiologist*, 23 Journal of Psychoactive Drugs 430 (1991) “Relapse commonly occurs after treatment and is not necessarily a grave prognostic sign.” Relapse may be “strong evidence that the practice of anesthesiology may not be compatible with recovery from this lifelong disease.” *Chemical Dependence Guidelines for Departments of Anesthesiology*, American Society of Anesthesiologist (1991)

In *Levitt v. UNUM Life Ins. Co. of America*, case no. PJM 93-2434 (D. Md. June 21, 1994), an anesthesiologist sought benefits due to drug abuse for a period of approximately four years. In October 1992, plaintiff was arrested and charged with illegally obtaining controlled dangerous substances. The following day his hospital

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privileges were suspended. A week later his license to practice medicine was summarily suspended. At that point, plaintiff entered a full-time outpatient treatment program. He has remained clean and sober since 1992. In 1993, plaintiff's medical license and DEA license were both reinstated. Although benefits paid from 1992 to 1993, plaintiff filed this action seeking continuation of benefits for total disability.

After a bench trial the Court made several noteworthy observations - "[T] he drugs are there, you can do something about it, even if you are fearful, because, in fact, Dr. Levitt has done something about them in the past. He has resisted, and that to me is what distinguishes the kind of problem that is compensable from one that is not. . . . "Is it possible that he will relapse? Yes, it is possible. Is that sufficient to make the carrier obliged to pay him benefits? It is not. . . . He may, as a matter of prudence, decide not to [return to work]. That's his choice. But, again, it doesn't become the carrier's obligation to subsidize that. That is not what they contracted to do."

The Court focused on the policy language, which provided for benefits in the event of a loss of income "as a result of a present injury or sickness." "'Present' to me means immediate, now, active, engaged. [Dr. Levitt] is in remission..., and if indeed he becomes chemically dependent again, I would assume the policy would cover him on a month-by-month basis. But that is not the situation that the Court sees him in right now."

In *Sutherland v. The Paul Revere Life Insurance Company*, No. 4-96-1005 (Ill. App. 4th Dist. June 30, 1997), the Court confronted a claim from an anesthesiologist diagnosed with opioid addiction in 1990. The anesthesiologist was treated for several months and returned to his work as an anesthesiologist. The anesthesiologist relapsed in

1992 and reentered treatment. He was approved to return to work in 1995. Although benefits were paid during the course of treatment, benefits were terminated in 1995.

According to Dr. Sutherland's sworn deposition testimony, when he is not taking drugs, he possesses the physical and mental skills, and intellectual abilities necessary to perform all of the important duties of an anesthesiologist. Notwithstanding this evidence, his expert, Dr. Doot, testified that "[Dr. Sutherland] can't handle those drugs and stay focused on his work because of intrusive thoughts of using and craving that gets started when he is around the drugs." According to Dr. Doot, Dr. Sutherland is totally disabled, because if he returns to anesthesiology he faces an increased risk of relapse. The trial court granted summary judgment in favor of Paul Revere, concluding the mere risk of relapse was not a disability under the terms of the policy.

On appeal, the Court concluded the testimony of Dr. Doot was sufficient to create a genuine issue of material fact upon which a jury could conclude Dr. Sutherland is "unable to perform the important duties" of an anesthesiology. The judgment was reversed and the case remanded for trial.

In *Hinchman v. General American Ins. Co.*, case no. IP96-0578-C-B/S (S.D. Ind. Apr. 9, 1998), the Court considered a claim by an Obstetrician-gynecologist who had abused alcohol and, from time to time, speed, since his days in medical school in the 1970s. At some point along the way, some time in the 1980s, he added hydrocodone, a pain killer. In April 1995, plaintiff entered a treatment center for substance abuse. Since April 1995, plaintiff has been drug free and continued to participate in outpatient treatment programs. Although plaintiff believed he was competent to return to practicing

obstetrics and gynecology, he did not do so on the advice of his doctors. Benefits were paid from May to November 1996.

Plaintiff's expert, Dr. Talbott, expressed the opinion that plaintiff should never return to the practice of obstetrics because of the risk of relapse (even though 91% of chemically-dependent physicians treated by his center successfully return to the practice of medicine). Defendant's expert, Dr. Giannandrea voiced the contrary view, that plaintiff shows a remarkable likelihood of a successful return to practice, and the practice of obstetrics and gynecology does not present a significant risk to his health or life. Notwithstanding this evidence, the trial court denied the insurer's motion for summary judgment because it is a question of fact as to whether plaintiff can return to his practice without hazarding his health or risking his life.

In *Holzer v. MBL Life Assurance Corp.*, 1999 U.S. Dist LEXIS 13093 (S.D.N.Y. Aug. 25, 1999), the Court confronted a claim from an anesthesiologist addicted to Demerol, which he had begun using back in the 1970s during his residency. Between 1983 and March 1995, plaintiff used Fentanyl and sometimes Demerol. Plaintiff came under suspicion through a drug audit in 1995 and voluntarily surrendered his license to practice medicine. Plaintiff sought inpatient treatment, first at Anchor Hospital in Atlanta, and then at Talbott-Marsh Recovery Campus, also in Atlanta. At the conclusion of his in-patient treatment program at Talbott-Marsh Recovery Campus, plaintiff was advised not to return to anesthesiology. Plaintiff thereafter commenced outpatient treatment. Benefits were denied on the basis of plaintiff's "legal disability."

The parties filed cross motions for summary judgment. Plaintiff argued he was “unable” to practice anesthesiology because he would be required to handle drugs, which would involve “an unacceptable risk that he would relapse.” The insurer argued plaintiff did not return to his practice, either because he feared legal action would be taken against him or because he chose not to do so, neither of which is a covered loss. The trial court ruled the issue to be decided at trial is “whether... he can perform the duties of an anesthesiologist without resuming his drug use. How this can be tested for purposes of the present case remains to be seen, but there surely is a triable issue of fact.”

In *Laucks v. Provident Companies, Inc.*, case no. 1:CV-97-1507 (M.D. Pa. 1999), the Court confronted the risk of relapse issue in the context of a group disability plan governed by ERISA. Although the Court reviewed the claim denial under the *de novo* standard of review, the Court nonetheless found in favor of Provident.

The *Laucks* case again involved an anesthesiologist. The plaintiff-anesthesiologist had a successful career rising to the level of chief of the department of anesthesiology before his addiction was discovered. Once his addiction was discovered, the insured agreed to enter the Talbott-March Recovery Center. The insured was released from the Talbott-Marsh Recovery Center after approximately five months and continuously adhered to his treatment regime thereafter. Provident paid benefits from August 1994 until August 1997. In August 1997, Provident discontinued paying benefits concluding the insured no longer was disabled under the policy. The insured filed this action seeking reinstatement of benefits.

The Court, after hearing all the evidence, entered judgment in favor of Provident. The Court recognized that the insured's claim rested on the premise that his returning to the operating room would put him in a position where he would experience the overwhelming urge to use drugs and he assuredly would relapse into addiction. The Court further recognized that this argument eliminates choice from the equation, which the Court found was a critical flaw in the insured's position.

The Court made several factual findings worth noting. First, the Court noted that if the addiction was an uncontrollable urge, then the insured would have been unable to remain clean and sober for the past five years. Second, the Court noted that the insured was addicted to alcohol, but that urge has been controlled, notwithstanding his passing many public places that serve alcohol. Third, the Court accepted the view expressed by one of the expert witnesses that the urge may be uncontrollable when the person is using the addictive substance, but after detoxification and a period of non-use, then choice is involved in controlling the urge. Fourth, the Court noted the testimony of Dr. Talbott, a person described as a pioneer in the treatment of addicted physicians, who suggested dividing addicted anesthesiologists into three categories, and that only those falling into Category III could never return to the practice of anesthesiology. Notably, plaintiff does not fall into that category.

In *Kupshik v. John Hancock Mut. Life Ins. Co.*, case no. 1:98-CV-CAM (N.D. Ga. Jan. 6, 2000), the plaintiff, an anesthesiologist, stopped working in January 1996 due to addiction to Sufentanyl. Although plaintiff admitted using drugs as far back as during his

residency in late 1970's, he apparently did not use again until 1993 when he began using Sufentanyl.

In late December 1995, some of the plaintiff's colleagues began suspecting he had a drug problem. In early January 1996, two of the physicians confronted plaintiff and escorted him to the office of a psychiatrist. Plaintiff successfully completed the treatment plan mapped out by the psychiatrist and stopped taking Sufentanyl as of January 1996. Although plaintiff's hospital privileges were revoked as of January 1996, his license to practice medicine was not revoked and no actions for professional negligence were initiated against him. Interestingly, the psychiatrist's notes reflected numerous discussions with plaintiff about returning to work. Plaintiff indicated to his psychiatrist he "liked not working," "obsessed" over his disability policies, and was focused on applying for disability benefits, not returning to work. Nonetheless, in November 1996, plaintiff applied to return to his practice, but was rejected by his anesthesiology group.

Both insurers paid benefits to plaintiff beginning in January 1996 and continuing through October 1996. After the termination of benefits, plaintiff filed this action seeking continuation of total disability benefits. The parties filed cross motions for summary judgment. Plaintiff sought to rely on his expert's testimony that plaintiff "should not return to the practice of anesthesiology" because of "a very high risk that he would relapse and possibly die." Defendants' sought to rely on their expert's testimony that plaintiff does not have a high risk of relapse, because he "has entered a period of sustained remission without relapse," and because he has not used other drugs to which he was addicted and which remained readily available to him.

In the course of considering the cross motions for summary judgment, the court noted that the parties agree “but for the risk of relapse... Plaintiff would be able to perform” his duties. The Court determined “[a]s the level of risk is pivotal in determining whether Plaintiff is totally disabled by his addiction..., there are genuine issues of material fact as to whether Plaintiff is entitled to disability benefits.” The cross motions for summary judgment, therefore, were denied.

In *Routon v. Equitable Life Assurance Society*, case no. CV498-186 (S.D. Ga. Feb. 11, 2000), the Court confronted yet another claim by an anesthesiologist who had quit pain management practice in 1992 due to addiction to drugs, alcohol, and sex. After being confronted with the problem in 1992, plaintiff sought inpatient treatment at the Talbott Marsh Center. After his inpatient treatment was completed, plaintiff agreed to participate in an outpatient program for five years. Plaintiff remained clean and sober from 1992 forward. Plaintiff’s last visit to Talbott Marsh was in late 1997 or early 1998. Although benefits were paid from 1992 to 1998, in 1998 benefits were terminated.

Plaintiff filed this action seeking continuation of total disability benefits. Plaintiff’s expert, Dr. Talbott (Talbott Marsh Center) testified: “If Dr. Routon relapses into opioid use, which he more likely than not will do if he returns to... pain management, it is more likely than not that he will die.” The insurer’s expert testified that plaintiff is in sustained remission and has not used opioids available in his practice or other drugs and alcohol to which he had become addicted, although they remain readily available to him. The insurer moved for summary judgment.

Although the trial court expressed some skepticism about the merit of plaintiff's claim, the court ruled a jury will have to "resolve the issue of whether Routon cannot perform one or more of the important, substantial, and material aspects of his occupation on account of his drug dependence." This factual issue precludes the entry of summary judgment.

B. Legal Versus Factual Disability Claims

Although legal disability has become a hot topic and the subject of several recent decisions, the issue was first addressed in a slightly different context over fifty years ago in *Gates v. The Prudential Insurance Company of America*, 240 A.D. 444, 270 N.Y.S. 282 (App. Div. 1934). This case arose out of an order by the New York State Commissioner of Health against Mr. Gates prohibiting him from having any involvement in the production or sale of milk or any food product based on his condition as a typhoid carrier. This resulted in the exclusion of Mr. Gates from his farm and his vocation of farming. *Id.*

Although Mr. Gates sought other work, he was unable to find work because "his condition 'is such as to cause people to shun and fear him.'" *Id.* at 447. Mr. Gates filed this lawsuit against Prudential seeking disability benefits.

In considering whether the insured was disabled due to his condition as a typhoid carrier, the Court noted the following about this condition: (i) a typhoid carrier does not have typhoid fever; (ii) the carrier is not ill; (iii) the carrier suffers no loss of strength; (iv) the carrier experiences no pain or impairment; and (v) if undetected through testing,

a carrier would never know he was a carrier. *Id.* The condition of typhoid carrier, however, was permanent and incurable. *Id.* at 446.

The complaint filed by Mr. Gates was dismissed on the ground that it failed to state sufficient facts to sustain a cause of action. *Id.* at 445. The Appellate Division affirmed on the basis that Mr. Gates was not physically disabled within the meaning of the policy. *Id.* at 448. What prevents Mr. Gates from working, according to the Court, is the edict of the State. *Id.* The Court analogized to the situation where a man is incarcerated for a crime; although he is unable to find work, the inability is not due to any physical impairment. *Id.* Mr. Gates physical condition imposes no limitation on his activities; the limitations are imposed by society. *Id.* Mr. Gates confuses the result (his inability to work) with the cause (an order of the State Health Commissioner). *Id.* Judgment in favor of Prudential was affirmed.

Although nearly 50 years elapsed before the same facts gave rise to the same issue, the result was the same. In *Dang v. Northwestern Mutual Life Insurance Company*, 960 F. Supp. 215 (D. Neb. 1997), the insured was a surgical resident in a hospital. In the course of routine screening, the insured was discovered to be a carrier of the hepatitis B virus; the insured, however, was unaffected by the virus. The hospital required the insured to get an additional consent from the patient before performing surgical procedures. The insured transferred out of his surgical residency into the radiology residency program and claimed disability benefits.

The Court, granting summary judgment in favor of Northwestern Mutual, expressly relied on the *Gates* decision. The Court focused on the fact that the insured

remained physically able to perform all of his surgical duties and, but for the discovery of the condition, still would have been performing those procedures. The disability is a social disability and, according to the Court, not covered by the policy. Finally, drawing an analogy to the legal disability cases, the Court found the insured was seeking benefits for a legal or administrative disability, rather than a factual disability.

The last in this line of cases is the Sixth Circuit's decision earlier this year in *Doe v. Great-West Life & Annuity Ins. Co.*, 2000 U.S. App. LEXIS 3673 (6th Cir. Mar. 7, 2000). The Court, however, reaches the opposite conclusion.

The *Doe* Court confronted a disability claim by a dentist afflicted with hepatitis. Based on the Ohio Administrative Code, the dentist was obligated to inform any patients of his illness and the risks associated with it before performing certain procedures. According to at least one affiant, such disclosures would be tantamount to retirement. The dentist did not reveal his condition to patients, but rather sold his practice and sought disability benefits. The trial court granted summary judgment in favor of the insured.

On appeal, the Sixth Circuit reasoned that the policy did not distinguish between an inability to perform duties based on "physical" factors and "social" factors. Although the *Dang* court was willing to draw such a distinction, the Sixth Circuit was unwilling to follow suit. The Court, therefore, affirmed the entry of judgment in favor of the insured.

The recent line of cases discussing the issue of what might be viewed as pure legal disability begins with the Supreme Court of Vermont's decision in *Massachusetts Mutual Life Insurance Company v. Ouellette*, 159 Vt. 187, 617 A. 2d 132 (1992). In that case, the insured, an optometrist, suffered from a mental disorder, pedophilia, from the

late 1970s until his arrest in 1987. At no time prior to his arrest had the insured sought or received treatment for his disorder. As a result of a plea agreement, which led to a criminal conviction, the optometry practice was sold and the insured surrendered his license to practice optometry.

The insured filed a claim under his disability income policy with Mass Mutual seeking total disability benefits. The insured asserted that his illness, pedophilia, prevented him from performing substantially all of the duties of his usual occupation of optometry and had caused his incarceration. Mass Mutual denied the claim on the basis that the insured's inability to perform the duties of his occupation was due to his conviction and surrender of his optometry license. Mass Mutual filed this action seeking declaratory relief.

The trial court granted summary judgment in favor of Mass Mutual, holding the insured's "inability to practice optometry was caused by the legal consequences of his behavior and not by a disability." The insured appealed.

On appeal, the Court looked to the analogous body of law in area of claims under the Social Security Act. The Court noted that those cases focused on the causative element in the statutory definition and hold that "persons in prison because of acts alleged to result from mental impairments are not eligible for disability benefits."

The Court found this reasoning equally applicable in the context of private disability insurance contracts. The insured continued practicing optometry for almost ten years after the disorder manifested and only stopped practicing because of the criminal proceedings, which led to his incarceration and the surrender of his license. Summary

judgment, therefore, was appropriate because no evidence exists to refute the trial court's conclusion that the legal consequences of the insured's behavior, not his mental illness, precluded him from working.

The Court further reasoned that allowing recovery in these circumstances would be contrary to the public policy discouraging coverage for an insured's intentional criminal conduct. The insured sought to avoid this policy by proving the reason he was incarcerated was due to mental illness; the Court, however, found the evidence woefully deficient. The Court, therefore, was compelled to conclude the insured was incarcerated because he committed a crime, not because of mental illness.

The next court to consider the issue of legal disability was the Southern District of California in *Goomar v. Centennial Life Insurance Company*, 855 F. Supp. 319 (S.D. Cal. 1994), *aff'd*, 76 F.3d 1059 (9th Cir. 1996). In that case, Mr. Goomar claimed that his psychological disability, visions of astral beings, had caused him to sexually molest four female patients while he was engaged in the practice of medicine. As a result of the molestations, Mr. Goomar's license to practice medicine was revoked.

In March 1992, Mr. Goomar submitted a claim for disability benefits with Centennial Life and Sentry Life, claiming that his disability led to the conduct causing his loss of license. Both insurers investigated and denied the claim. Mr. Goomar then initiated this action.

Key to the Court's analysis of the claim of Mr. Goomar was the timing of events. The last act of molestation occurred in April 1984. Mr. Goomar, however, continued practicing medicine without further incident until June 1987 when his license was

revoked. Thus, even assuming Mr. Goomar was seeing astral beings, no evidence existed to suggest that this sickness had any disabling effect on Mr. Goomar's ability to practice medicine.

The Court went on to note that Mr. Goomar was seeking benefits for a legal disability, rather than a factual disability. The Court further recognized that a legal disability was not covered under either of the policies. Mr. Goomar fought the license revocation, only stopped practicing medicine when he lost his license and testified he would have continued practicing if he had not lost his license. Focusing on the causative requirement in the policies, the Court concluded Mr. Goomar's inability to practice was due to his license revocation, not due to a sickness.

The issue of legal disability next arose in *Grayboyes v. General American Life Insurance Company*, 1995 U.S. Dist. LEXIS 4233 (E.D. Pa. Mar. 31, 1995), when Mr. Grayboyes sought disability benefits after his license to practice orthodontics had been revoked and his practice had been sold. Although benefits were paid initially under a reservation of rights, the claim ultimately was denied and this lawsuit was filed by Mr. Grayboyes.

The action proceeded to trial and the court entered judgment in favor of General American. Although it was undisputed that Mr. Grayboyes suffers from the condition frotteurism, which involves recurrent intense sexual urges to touch or rub against a nonconsenting person, the Court concluded this condition was not totally disabling. The Court noted, for example, Mr. Grayboyes, during the years when he was practicing, was able to control his urges to avoid apprehension or detection. Further, Mr. Grayboyes

unquestionably, and without any treatment for his condition, could have treated approximately half of the patient pool. With treatment, according to the expert's testimony that the Court credited, Mr. Grayboyes likely could treat all patients.

In reaching the conclusion that Mr. Grayboyes was not entitled to benefits, the Court noted that his policy did not insure against the risk of legal disability. The policy likewise did not insure against his inability to profitably conduct his occupation, the need to limit his practice, or adverse publicity concerning his conduct. Finally, the Court recognized the distinction between a person who is unable to engage in his occupation and one who is not permitted by law to do so. The Court concluded Mr. Grayboyes fell into this latter category and was not entitled to benefits.

In *Paul Revere Life Insurance Company v. Bavaro*, 957 F. Supp. 444 (S.D. N.Y. 1997), the Court confronted the legal disability issued in the context of a claim for disability benefits by an insurance broker. Although the broker lost his license in September 1994, for purposes of the motion for summary judgment, Paul Revere conceded that the insured had a sickness prior to April 19, 1994 that was undiagnosed and untreated. The Court denied the motion for summary judgment filed by Paul Revere, finding a dispute of fact existed as to whether the insured's factual disability pre-dated his legal disability. According to the Court, if the insured is able to prove his inability to work was due to mental and emotional problems, then he is entitled to benefits regardless of his subsequent legal disability.

In *Massachusetts Mutual Life Insurance Company v. Millstein*, 129 F.3d 688 (2d 1997), the Court confronted a claim by a suspended attorney for total disability benefits.

At the trial court level, summary judgment was entered in favor of Mass Mutual. On appeal, the Court again finding in favor of Mass Mutual, ruled that (i) the policy requires the loss of income be caused by the disability; (ii) the insured's loss of income was caused by his suspension, not by any disabling condition; and (iii) it would be against public policy to allow a lawyer to steal from his clients and then recover disability benefits when his theft results in the suspension of his license.

Several facts appear to be critical to the Court's analysis in *Millstein*. Although Mr. Millstein apparently suffered from Attention Deficit Disorder and Conduct Disorder from about age 15, he continued on in school, graduated from college and law school, and passed the bar examination. The Court also noted Mr. Millstein had never sought treatment for these conditions until his license was in jeopardy. Finally, Mr. Millstein's license was not suspended because of chemical dependency, which was another part of his claim, but rather due to his theft from clients. Thus, the facts presented by Mr. Millstein were less than optimum from the claimant's perspective.

In *Allmerica Financial Life Insurance and Annuity Company v. Llewellyn*, 139 F.3d 664 (9th Cir. 1997), the Court confronted the legal disability issue in the context of a claim by a chiropractor whose license had been revoked. The trial court granted summary judgment in favor of the insurer. On appeal, the Court focused on the fact that the insured could not have been disabled from practicing chiropractic medicine because his license to practice chiropractic medicine was revoked before his date of disability. Once the insured's license was revoked, his regular occupation ceased being the practice of chiropractic medicine. The insured's legal disqualification, not his mental illness

precluded him from continuing with his practice. The trial court, therefore, correctly concluded the insured was not entitled to disability benefits under the policy.

In *Provident Life & Accident Insurance Company v. Harris*, 1997 U.S. Dist. LEXIS 15752 (S.D. Mich. July 23, 1997), the court confronted a claim by a podiatrist who surrendered his license in connection with a plea agreement. In June 1992, the postal authorities raided the podiatrist's office. The podiatrist subsequently was indicted on multiple counts of mail fraud. Shortly after the indictment, the podiatrist began experiencing psychological problems. In August 1995, the podiatrist began receiving care for this condition. In February 1996, the parties entered into a plea agreement. As part of that agreement, the podiatrist agreed to surrender his license for two years from the date of sentencing. In March 1996, the podiatrist's doctor recommended that he cease work. The podiatrist filed a claim seeking disability benefits and stated his disability date was March 1996. Provident denied the claim and filed this declaratory judgment action.

The Court granted summary judgment in favor of Provident. The Court reasoned that the causation ("due to") requirement in the policy was not satisfied. The insured could not practice podiatry because he had surrendered his license. The insured's own physicians admitted they could not determine whether the insured was unable to practice because of the surrender of his license. Thus, no evidence existed that the inability to practice was due to anything other than the surrender of the license.

Although the Court did not decide the case on public policy grounds, the Court's comments are noteworthy. The Court observed that "[i]t seems incongruous that a

defendant who gives up his livelihood as part of a plea agreement and encourages a federal court to accept the Plea Agreement because he is losing income can, in effect, pass on this financial aspect of punishment to his disability insurance provider.”

In *Provident Life and Accident Insurance Company v. Belding*, 1998 U.S. App. LEXIS 15406 (9th Cir. July 8, 1998), the Court considered and rejected a claim for disability benefits by a psychiatrist who had lost his license to practice psychiatry. Affirming the trial court’s judgment in favor of Provident, the Court focused on the fact that insured’s license to practice psychiatry was revoked before the date of the onset of his disability. Thus, the insured was not disabled under the policy because it was the loss of licensure, not mental illness that prevented him from continuing with his practice.

In *Provident Life and Accident Insurance Company v. Fleischer*, 26 F. Supp. 2d 1220 (C.D. Cal. 1998), the Court confronted a disability claim from an insurance agent and financial planner. In 1992, a search warrant was issued for the insured’s business records. In June 1993, the insured was indicted and arrested for fraud involving over \$1,000,000. In April 1994, the insured began seeing a doctor. The doctor believed the insured had depression from the stress of the criminal indictment. In April 1994, the insured submitted a claim for total disability to Provident. The insured claimed his date of disability was January 15, 1994.

In September 1995, the insured pled guilty to four felonies. In December 1995, the insured was indicted on 22 additional felony charges. In June 1996, the insured was found incompetent to stand trial on the second indictment.

Although Provident initially paid benefits, it subsequently determined the insured was not entitled to benefits. Provident filed this action seeking a declaratory judgment that it did not owe a contractual duty to the insured to pay benefits.

The Court granted summary judgment in favor Provident. The Court found that the insured's disability resulted from the legal consequence of his criminal activity (incarceration), not from a factual disability. Although the Court recognized that the date of disability preceded the guilty plea and subsequent legal proceedings, the Court focused on the fact that the initial criminal proceedings occurred before and precipitated his alleged factual disability. Thus, the alleged factual disability arose from the insured's illegal activities and no coverage exists for a factual disability arising after the legal disability.

In *Damascus v. Provident Life and Accident Insurance Company*, 933 F. Supp. 885 (N.D. Cal. 1996), *rev'd on other grounds*, 1999 U.S. App. LEXIS 1234 (9th Cir. 1999), the issue of legal disability again arose. In this case, State Board of Dental Examiners first put the insured's license on probation based on mental illness and inappropriate care of patients. During the probationary period the insured could practice dentistry, but only under the supervision of another dentist. Four years later, the State Dental Board revoked the insured's license based on his repeated acts of negligence and unprofessional conduct. The second order, while noting the existence of the prior order, expressly stated the prior order was not considered in reaching a decision on revoking the license of Mr. Damascus. Notwithstanding the terms of the order revoking his license,

the insured claimed he was determined by the State Dental Board to be disabled due to mental illness.

Provident denied the claim, contending the insured was legally disabled as a result of the actions of the State Dental Board. The insured filed this action against Provident seeking disability benefits. Granting Provident's motion for summary judgment, the trial court ruled there was no evidence the insured suffered from a mental illness at any time after the first order was issued by the State Dental Board. The trial court further pointed out that the policy requires the disability to be caused by the sickness or injury. The trial court further found no evidence of a sickness or injury causing the insured to be disabled. Finally, the trial court found the final order of the State Dental Board, not any sickness or injury, was what caused the insured's inability to practice his profession.

On appeal, the Ninth Circuit reversed, holding that the opinion of the psychiatrist retained by the State Dental Board that the insured was mentally incompetent raised a dispute of fact as to whether the insured's conduct between 1992-1995, which resulted in the revocation of his license, was caused by mental illness. Interestingly, the Court's opinion seemed to rest on its own independent investigation and review of the Diagnostic and Statistical Manual.

In *Stern v. Paul Revere Life Insurance Company*, 744 So. 2d 1084 (Fla. App. 1999), the Court confronted the legal disability issue in the context of a physician. In April 1989, the physician was treated for a psychosexual disorder, dysthymia and adjustment disorder. After returning to work, on July 11, 1989, the Florida Department

of Professional Regulation issued an emergency order suspending the insured's license. The insured filed a claim for total disability benefits with Paul Revere and asserting as his date of disability April 1989. The insured subsequently surrendered his license and was charged with two felony charges of sexual battery and two misdemeanors. The insured was incarcerated for this conduct.

The trial court granted summary judgment in favor of Paul Revere. On appeal, however, the court found the issue of whether the insured was legally or factually disabled to be in dispute. This dispute should have been left for the trier of fact to resolve. Also noteworthy is the appellate court's rejection of the public policy rationale employed in other cases as a basis for ruling against the insured as a matter of law.²

Close on the heels of *Stern*, the United States District Court for the Middle District of Florida confronted a substantially similar legal disability claim in *Alleman v. Provident Companies, Inc.*, 1999 U.S. Dist. LEXIS 17841 (M.D. Fla. Nov. 3, 1999). In that case, the Court, following the reasoning in *Stern*, denied the insurer's motion for summary judgment reasoning that it was a disputed question of fact whether the insured's underlying impairment or legal problems were the cause of the insured's inability to practice medicine.

C. What Is Your Occupation?

² In rejecting the public policy argument, the Florida Court relied primarily upon the decision in *Ohio National Life Assurance Corporation v. Crampton*, 822 F. Supp. 1230 (E.D. Va. 1993), *aff'd*, 53 F.3d 328 (4th Cir. 1995). This case held the insured's subsequent incarceration would not disqualify the insured from continuing to receive benefits and public policy did not bar recovery under Virginia law where there was no evidence the policy was purchased in contemplation of a crime.

Most individual disability insurance policies define the insured's "occupation" as the occupation (or occupations, if more than one) in which he or she is engaged at the onset of the disability. *See e.g. Emerson v. Fireman's Fund, American Life Ins. Co.*, 524 F. Supp. 1262, 1267 (N.D. Ga. 1981), *aff'd*, 691 F.2d 510 (11th Cir. 1982) ("[W]hen an insured changes occupations, it is his occupation at the time of the disability, not at the

time the policy went into effect that controls.”). In the process of considering whether an insured is totally disabled, the Court should look at the insured’s activities at the start of the alleged disability and not limit its inquiry to the occupation identified by the insured. *Id.* (“[W]hen an insured fills out his application and lists an occupational description that varies from what he actually does, the courts will look to this actual duties, not the application to determine the insured occupation”). *See also Brumer v. National Life of Vt.*, 874 F. Supp. 60, 63 (E.D.N.Y. 1995), *aff’d*, 133 F.3d 906 (2d Cir. 1999) (podiatrist was not disabled due to inability to perform surgery because he continued performing management duties and responsibilities for podiatry clinics); *Taterka v. Nationwide Mutual Insurance Company*, 91 A.D. 2d 568, 457 N.Y.S.2d 53 (App. Div. 1982), *aff’d without opinion*, 463 N.Y.S.2d 441 (1983) (ophthalmologist who taught medicine part-time, had a private practice, and performed various hospital duties before suffering a heart attack and stroke was not entitled to disability benefits simply because he closed down his private practice, but continued performing his other duties).

In *Brosnan v. Provident Life and Acc. Ins. Co.*, 31 F.Supp.2d 460 (E.D. Pa. 1998), the Court was confronted with the argument that plaintiff’s occupation was that of a medical doctor, not an anesthesiologist. On the applications for the policies, the insured had indicated his occupation was the “practice of anesthesiology.” Further, the uncontradicted testimony was that this was the only professional activity in which the insured was regularly engaged at the time he became disabled. Thus, the proper inquiry here was on whether the insured was disabled from his occupation of practicing anesthesiology.

In *Berkshire Life Insurance Company v. Adelberg*, 698 So.2d 828 (Fla. 1997), the Supreme Court of Florida was called upon to answer the certified question “when the term ‘occupation’ is left undefined in an occupational disability insurance policy which states that total disability means ‘your inability to engage in your occupation,’ does the terms ‘your occupation’ refer to precisely (and only) the work in which the insured is engaged at the time of the injury, or should the term be interpreted more generally to include any work requiring similar skills and producing a comparable income?” *Id.* at 828. The issue arose in the context of a claimant who was disabled from his duties as a yacht salesman due to his inability to crawl around the yachts, but who was able to continue working as a freight-space salesman.

The Supreme Court of Florida began its analysis of this issue by focusing on the pertinent policy language. The policy provided for total disability benefits for 120 months benefits if the insured became disabled from “your occupation.” After 120 months, the insured would be entitled to benefits only if he was disabled from any gainful occupation. Focusing on the distinction inherent in this policy language, the Court reasoned that a reasonable person reading the policy would conclude that during the first 120 months “your occupation” would mean the work the insured was engaged in at the time he became disabled. If the insurer intended the words “your occupation” to mean any sales position, as opposed to the actual sales position held by the insured, then the insurer should have so stated in the policy. Based on this policy language as well as the law of Florida, that insurance contracts are construed most favorably to the insured, the Court resolved the certified question in favor of the insured. The Court held “the term

‘your occupation’ refers to the specific work done by the insured at the time of the injury, not to work requiring similar skills and producing a comparable income.” *Id.* at 831.

The Ninth Circuit Court of Appeals adopted a similar approach in the group disability context in *Lee v. UNUM Life Insurance Company*, 1998 U.S. App. LEXIS 7979 (9th Cir. April 23, 1998). In that case, the insured sought disability benefits based on her inability to perform her duties as a respiratory therapist at the hospital where she worked. The district court entered judgment in favor of UNUM. On appeal, the Ninth Circuit reversed reasoning that the insured was entitled to benefits because it was undisputed she could not work in a hospital setting and could not perform the exertional activities required by her job. *Id.* at *5-6. The dissent, however, points out that the majority opinion rests on the requirements of the insured’s job, not her occupation. *Id.* at *6. UNUM, the dissent notes, did not insure plaintiff’s job, but rather her occupation. *Id.* The mere fact that plaintiff may have been required to seek out another job as a respiratory therapist did not, in the view of the dissent, entitle her to disability benefits. *Id.* at *7.

Another issue to consider in the occupation context is whether the insured is engaged in more than one occupation at the start of his disability. If an insured is engaged in more than one occupation as of the date of disability, then he or she must be totally disabled from (*i.e.*, unable to perform all the main duties of) all of the occupations. *See Klein v. National Life of Vt.*, 7 F. Supp. 2d 223, 227 (E.D.N.Y. 1998) (insured is barred from recovering total disability benefits if he is “not disabled from engaging in one of several occupations”); *Aetna Life Ins. Co. v. Orr*, 169 S.W.2d 651 (Ark. 1943)

(claimant engaged in two occupations “must be disabled as to both occupations.”). If the insured can perform the main duties of one of the occupations, then he or she is not totally disabled. *See Emerson*, 524 F. Supp. at 1262 (“[I]f the insured is engaged in several occupations and gives up one because of his disability, but is able to carry on one of them, and does so in his customary and efficient manner, he is [not] totally disabled.”).

Courts, with some frequency, have been called upon to determine whether an insured has separate occupations. *See Klein*, 7 F. Supp. 2d at 233 (podiatrist engaged in separate occupation as owner of podiatry clinics where his involvement was not as a passive investor in publicly held stock, but rather involved in management and operation of clinics); *Brotman v. National Life Ins. Co.*, 1997 WL 442173 at *2 (E.D.N.Y. 1997) (duties as podiatric surgeon and manager/administrator of podiatric clinics were different occupations and, because plaintiff was still qualified to perform latter, he was not entitled to total disability benefits as a matter of law); *Orr*, 169 S.W.2d 651 (internist practices both internal medicine and surgery was engaged in two occupations and was not totally disabled where he continued to treat patients, though not perform surgery); *New York Life Ins. Co. v. Saunders*, 236 S.W.2d 692 (Ky. 1951) (in addition to occupation as grocer, plaintiff had separate occupation as business executive of garage at the time of his disability); *Niccoli v. Monarch Life Ins. Co.*, 332 N.Y.S.2d 803 at 806, 808 (N.Y. App. Div. 1972) (management of family planning clinic considered a new occupation separate from OB/GYN physician because responsibilities at clinic did not involve “any substantial part” of the “ordinary duties” of other occupation).

Some courts apply a “fact-oriented, functional approach that look[s] to the professional activities in which the insured was regularly engaged at the time of onset of the insured’s disability.” *Klein*, 7 F. Supp.2d at 227. Under this approach, irrespective of whether the insured’s activities are characterized as separate occupations or a single occupation, a claimant is not totally disabled if he “is able to perform the duties of a ‘position of the same general character as the insured’s previous job, requiring similar skills and training, and involving comparable duties’” *Id.* (quoting *Blasbalg v. Massachusetts Cas. Ins. Co.*, 962 F. Supp. 362, 367 (E.D.N.Y. 1997)). As the Court stated in *Emerson*:

It has been stated broadly that a court must look to the insured’s occupation as a whole in order to determine whether or not recovery should be allowed on the ground the insured can no longer perform his occupational duties [This approach] is the only reasonable one to take since, ordinarily, under all types of clauses, to narrow the definition of an insured’s present or potential occupations is to expand the conditions under which the insured will recover for inability to work at those occupations.

Emerson, 524 F. Supp. at 1266-67.

In *Klein*, for example, the plaintiff identified his occupation as “podiatrist” and his job duties as “podiatric surgery.” 7 F. Supp. 2d at 224. In deposition, however, plaintiff conceded he engaged in office management activities on behalf of several podiatry clinics he owned including hiring employees, dealing with insurance companies, approving expenditures, and otherwise maintaining supervision of the offices. *Id.* at 225-26. Following the onset of his disability, the plaintiff no longer performed podiatric surgery, but continued to perform his management duties 10 to 15 hours per week. *Id.* at

226. The court granted summary judgment in favor of the insurer, holding whether the plaintiff's management activities were characterized as a separate occupation or not, he was not totally disabled because he continued performing his management duties. *Id.* at 227.

The question of what is the insured's occupation is not always an easy question to answer. Although we may think we know it when we see it, the question clearly is more complicated than one might suppose. Counsel should exercise restraint in committing to any position on the insured's occupation until all the facts are in and the myriad duties of the insured are well understood.