



Donald M. de Camara

LAW OFFICES OF DONALD M. DE CAMARA

Understanding and handling long-term disability liens

LTD INSURERS' LIENS AGAINST THIRD-PARTY RECOVERIES MOST OFTEN RESULT FROM "OTHER INCOME" PROVISIONS IN THE INSURANCE POLICIES

Most large companies provide both short-term disability (STD) and long-term disability (LTD) coverage for their employees. Because the disability companies are much less militant about chasing personal-injury recoveries than health plans, these can easily be overlooked at the conclusion of the case. But periodically, virtually all LTD companies will demand reporting by their insureds of any source of other income that would trigger either a reduction of benefits under the policy's "Other Income" provision and/or an affirmative claim under the policy's reimbursement provision. These reporting forms typically will ask if the insured has made a personal-injury recovery or received any form of other income. If the client's recovery has already been disbursed, and dissipated without considering the existence of such a lien/claim, this can create a significant problem for both the client and the client's attorney.

Disability insurance is recognized in the California Insurance Code at section 106, which also covers health insurance. The disability plans can either be insured or self-funded. Where they are self-funded by a private employer (as opposed to a government or church plan), the federal law of ERISA preempts all state insurance law relating to the plan. Most large companies usually seem to have self-funded STD plans, but insured LTD plans. STD plans usually cover a period of the first 3-6 months after a disability as set forth in the policy and therefore involve much smaller payouts than LTD plans in a significant-injury case. Because of that, this article will focus on handling LTD liens.

Drafting of disability plans

Compared to the drafting of health plans, which frequently are hundreds of pages long, the insured LTD plans tend to be very rudimentary. They often are only 20-40 pages long. Often, they will not have any Table of Contents and sometimes do not even have page numbers. It is not uncommon for them to either

have no reimbursement provision or a provision that does not expressly waive the make-whole rule. When that occurs and your client has not been made whole for objective reasons (like policy limits), your client may well have a complete defense. For a recent case demonstrating a successful application of the make-whole rule supporting a motion to dismiss an insured ERISA lien case with prejudice in federal court, see *Aetna Health of Cal., Inc. v. Cianciulli* (CD Cal., 3/18/25) 2025 US Dist. Lexis 75368. There is one federal case holding that an LTD plan had failed to properly waive the make-whole rule under existing Sixth Circuit precedent, and ordering the parties to submit briefs on whether the insured was made whole. (See *Milam v. American Elec. Power LTD Plan* (SD Ohio, 2025) 2025 US Dist Lexis 168050.)

It appears that the reason for the poor drafting of the LTD policies may be overreliance on the universal "Other Income" provisions. These provisions allow the LTD plan to offset future disability payments for any other income received by the insured. However, the LTD plans often follow some industry standard for what constitutes "Other Income" and therefore fail to include personal-injury recoveries. In the *MetLife* case discussed below, "Other Income" was defined to include Social Security, Railroad Retirement, maritime maintenance or cure, workmen's compensation and 12 other categories. All of the categories except returning-to-work were statutory or contractual rights to benefits. Conspicuous by its absence was any reference to personal-injury cases or recoveries.

This gives rise to an argument under the doctrine of "expressio unius est exclusio alterius." (expression of one excludes the other). The leading ERISA case in the Ninth Circuit applying this doctrine is *Barnes v. Independent Auto Dhrs Assn H&B Plan* (9th Cir. 1995) 64 F.3d 1389, 1393, where the court held, "Under the doctrine of *expressio unius est exclusio*

alterius, we must assume that by expressly providing for subrogation in cases in which the Plan makes payment, the Plan document excludes subrogation when no payment is made."

Thus, whenever this pattern of not listing personal-injury recoveries as "Other Income" exists in a policy, it provides a persuasive argument against asserting a lien against such recovery. Notably, the *Barnes* case cited above is also the leading case in the Ninth Circuit finding that the make-whole rule is the default rule in ERISA cases and will apply where the plan document does not clearly and expressly waive the make-whole rule.

A third partial defense appears to be provided by Civil Code section 3040, which limits liens by disability plans by providing that a claimant who is represented by counsel is not obligated to pay a disability plan more than one third of the gross recovery. (See § 3040, subd. (c)(2).) In the alternative, a full common-fund reduction is provided. (§ 3040, subd. (f).)

Aside from the three defenses referenced above, there is a fourth possible defense where the insured LTD plan is a group plan issued by a private employer and the plaintiff's recovery is from an individual UM or UIM policy. California Insurance Code section 10270.98 provides that a group disability plan cannot reduce benefits based on individual coverage, as follows:

Group disability policies may provide, among other things, that the benefits payable thereunder are subject to reduction if the individual insured has any other coverage (other than individual policies or contracts) providing hospital, surgical or medical benefits, whether on an indemnity basis or a provision of service basis, resulting in such insured

being eligible for more than 100 percent of the covered expenses.

Clearly, almost all UM/UM policies are individual policies that also pay for hospital, surgical or medical benefits caused by a negligent uninsured or underinsured driver. In the case of a UM claim, this could provide a complete defense. There is no question but that the "Other Income" provisions in disability policies provide for a direct reduction of benefits in the full amount of the other income received, and, therefore, this would appear to be a valid defense, in cases involving an insured plan, as opposed to a self-funded plan.

Recent case examples

Case 1 – MetLife

In this case, a highly paid female executive for an international company was sent on a three-year work assignment in Switzerland. She had a MetLife LTD policy through her employer, which would pay her about \$13,700 per month if she was disabled from her own occupation and incapable of returning to work, at 60% of her prior earnings. While in Switzerland, she was severely injured in an auto accident and rendered paraplegic.

Switzerland provides \$100 million of liability coverage on all drivers in the country. However, the law of damages is highly restrictive and injury cases tend to resolve for 10-15% of what they would be worth in California. By way of example, Switzerland does not award pain-and-suffering and emotional-distress damages but has an analogous example called "moral harm." However, case law limits moral-harm recovery in a paraplegic case to about \$50,000. Switzerland also follows the double-damages rule instead of the collateral-source rule. This precludes the injured victim from claiming damages for any benefits provided by a collateral source. Instead, these claims for collateral-source benefits are transferred by operation of law to the payer of the collateral source. In this case, the total liens claimed by MetLife, an ERISA health plan, a travel policy and MediCare were well in excess of \$1 million and were interfering with her ability to resolve her personal-injury case.

The injured executive hired Swiss counsel to pursue her personal-injury claim under Swiss law. MetLife hired Optum to assert a claim for reimbursement

against its insured and also against the Swiss insurer of the tortfeasor.

My office was retained to defend against the assertion of the MetLife lien. We had three principal defenses to the lien. First and foremost was the fact that the MetLife reimbursement provision was limited to receipt of "payment from a third party for loss of income with respect to the same loss of income for which you received benefits under this certificate..." Coupled with Swiss law transferring the right to pursue collateral-source benefits to the payer of those benefits, this appeared to preclude the injured party from recovering for the disability benefits paid by MetLife.

The second defense was based on ERISA precedent established by the Supreme Court in *Sereboff v. Mid-Atlantic Med. Svcs. Inc.* (2006) 547 U.S. 356. *Sereboff* relied almost exclusively on an Oliver Wendell Holmes's decision in *Barnes v. Alexander* (1914) 232 U.S. 117, for the "familiar rule of equity that a contract to convey a specific object even before it is acquired will make the contractor a trustee as soon as he gets a title to the thing." (Emphasis added.) Since Swiss law precluded our client from acquiring title to the collateral-source benefits in her injury case, there was no way for the MetLife lien to attach under the law of ERISA.

The third defense was based on the fact that the MetLife "Other Income" provision listed 16 different categories of income without referencing personal-injury recoveries or anything similar. Other than returning to work, all of the other categories of other income involved either statutory or contractual entitlement to benefits. This allowed us to make a compelling argument under the doctrine of *expressio unius est exclusio alterius* that the Other Income provision was never intended to reach injury claims. Coupled with that argument was the fact that the MetLife reimbursement provision referred back by way of example to two of the 16 other income types, leading us to conclude that it only reached reimbursement for other income as defined in the policy. Notably, the MetLife reimbursement provision did properly waive the make-whole rule, so we could not raise that as a defense.

Since Optum was pursuing reimbursement from our client, I set forth all of our defenses to the lien in a letter to the Optum adjuster, with a copy to the

General Counsel's Office. Optum had also obtained the contact information for the Swiss insurer for the tortfeasor and sent multiple notices to that company, but the insurer was ignoring all of those. After sending the request for waiver to Optum, I had a detailed conference with their General Counsel's Office about the case. In that conference, the Optum attorney inquired whether our client's Swiss counsel could represent MetLife's interest. We declined that proposal due to the obvious conflict of interest. The Optum attorney indicated that he had even contacted Optum's London office for assistance with hiring Swiss counsel, but no one had any idea how to do it. At the end of this conversation the attorney in the General Counsel's Office agreed with me that there was little likelihood that Optum could collect from our client's case. On the very next business day, MetLife terminated Optum's involvement in the case. That led us to believe that Optum's General Counsel's Office had shared its same opinion about the case with MetLife.

Once Optum was terminated, I initiated direct contacts with the MetLife adjuster about the case, attempting to get them to either waive or hire Swiss counsel to subrogate against the Swiss insurer. At one point in these discussions, MetLife stated in writing that it would not retain Swiss counsel. Through multiple letters documenting that Swiss law precluded our client from recovering any of the benefits paid by MetLife, I continued to get the same response back from the MetLife adjuster, that MetLife retained its right to "recover any benefits for loss of income with respect to the same loss of income for which you received benefits under this certificate." Additionally, all email communications with MetLife about the case were met with an automatic reply stating, "Your message was deleted without being read on (date)."

When my last communication to the MetLife adjuster enclosing a translation of a Swiss law professor's article documenting the Swiss law of subrogation was ignored, I wrote a five-page letter to the president of MetLife, summarizing the history of the claim, the repeated failures to respond and requesting a waiver of the lien claim. Several weeks later, I received a very professional letter from MetLife apologizing for the failure to substantively respond, waiving the lien claim against

our client and also stating that no claim was being asserted against the Swiss insurer.

At the time of waiver, the lien claim to that point was \$714,000. Through the end of the contract period at age 67 of our client, the total LTD payments will be about \$2.2 million. This waiver, coupled with MetLife abandoning any claim against the Swiss insurer, finally allowed the client's injury case in Switzerland to be settled.

Case 2 – Guardian

The Guardian LTD policy has generally failed to specifically waive the make-whole rule in either its Integration of Income or Overpayment Recovery section. Consequently, any time there is a policy limit recovery that does not fully compensate the injured plaintiff, the make-whole rule is a complete defense. This case involved a \$2.1 million policy limit recovery, a \$1+ million Aetna health plan lien and a \$134,000 Guardian lien. Our client was millions of dollars short of being made whole. Guardian promptly waived on the initial demand based on the existing case law in *Barnes* and *Cianciulli*, *supra*, cited above.

For a more extensive discussion of the cases and the make-whole rule, see "Continued Viability of the Make Whole Defense in Insured ERISA Plans," *CAOC Forum* June/July 2025, reprinted in *Plaintiff*, December 2025. 

Donald de Camara is a sole practitioner in San Marcos, specializing in lien litigation and resolution. He has lectured at well over 120 trial lawyers' seminars throughout California about liens and has presented four nationwide webinars on ERISA liens. He has had dozens of articles on liens published in various trial lawyer magazines. He was lead counsel for the eight defendants in the case of Carpenters Health v. Vonderharr, 384 F3d 667 (2004), cert. denied 126 S.Ct. 729 (2005), establishing that defendants prevailing in litigation with their ERISA plan are equally as entitled as plaintiffs to the strong "special circumstances" presumption in favor of an award of attorneys fees. He briefed and argued AC Houston v. Berg, 407 Fed. Appx. 208 (9th Cir. 2010) as amicus counsel for CAOC in the 9th Cir., resulting in the court reversing the district court judgment holding a plaintiff's attorney liable on an ERISA lien.