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The Beard Winter Defender reports on legal issues related to the insurance industry.

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DEDUCTIBILITY OF LTD BENEFITS: ANOTHER WIN FOR THE CLAIMANT



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Your comments are appreciated and if there are any accident benefits or tort topics that you would be interested in reading about, please feel free to [email](#) me and I will certainly explore the possibility of writing an article.

Accident benefits carriers and tort defendants ought to take notice of the recent court decision of *Cromwell v. Liberty* (February, 2008) which has effectively granted license to a claimant to obtain double recovery of future LTD benefits and income replacement benefits / income loss. This is an important decision to be cognizant about as it has the potential to result in a huge windfall to the claimant and a level of exposure to the insurer that was not previously contemplated. Although the decision revolves around entitlement to accident benefits, the same principles apply in the tort realm.

First, a little background. Only collateral benefits paid pursuant to an indemnity policy are deductible from income replacement benefits and income loss. The two main hallmarks of an indemnity policy are: (1) its intent to pay for wage loss, and (2) is designed to continue to pay paying an amount of income that closely follows the claimant's pay.

In *Cromwell*, the claimant has been involved in a motor

vehicle accident in 1998 and put forth a claim for accident benefits against her accident benefits carrier Liberty and her disability benefits carrier Sunlife. Sunlife denied payment of the policy and the claimant advanced a claim against the disability benefits carrier for payment of long term disability benefits, bad faith, and mental distress. Sunlife ultimately settled the claim for a payment of \$15,000.00 for arrears due under the policy and \$160,000.00 which was viewed by Sunlife as representing future payments and costs. At the same time of the settlement of the LTD claim, the claimant was also receiving income replacement benefits from Liberty. Liberty took the position that both the \$15,000.00 payment of arrears and the \$160,000.00 payment of future LTD benefits were deductible from ongoing payment of income replacement benefits (they could deduct 20% of the amount of payment of ongoing income replacement benefits). The Plaintiff argued that Liberty could not deduct any of the \$175,000.00 settlement and a motion ensued to resolve this dispute.

The Court found that the Sunlife policy was a policy of indemnification and that benefits payable may be deducted from income replacement benefits. The key question was therefore whether Liberty was entitled to credit for any or part of the \$15,000.00 payment of arrears and /or the \$160,000.00 future lump sum payment. Quite surprisingly, the Court concluded that Liberty was not entitled to a credit for any of the \$160,000.00 future lump sum payments but could deduct for the \$15,000.00 payment of arrears. So, even though this collateral benefits policy was clearly a policy of indemnification, the Court found that only part of



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the settlement was deductible. The rationale by the Court is somewhat mystifying.

The Court heard evidence from the in-house counsel from Sunlife, (who had negotiated the settlement), that the insurer's settlement amount was arrived at not through any principled calculations, but rather on the basis that that was the maximum authority of the adjuster. By way of the settlement agreement, the \$15,000.00 payment of arrears was "taxable" and that the \$160,000.00 for future payments and costs was "non-taxable" (standard in LTD releases).

Based on this evidence, the Court found that: (1) Sunlife was not obligated to make any lump sum payments to the Plaintiff with respect to future payments (the only obligation is to pay for periodic past benefits); (2) there was also no evidence that the lump sum payment was in any way calculated taking into account the future value of these payments, (but rather based on the maximum authority of the instructing adjuster), and (3) the claimant had also advanced a claim for punitive damages and mental distress.

On the other hand, the Court did find that the payment of the \$15,000.00 arrears was deductible as it was quantifiable and did fall under the classification of an indemnity policy.

Accordingly, the claimant was found entitled to receive both the \$160,000.00 payment of future benefits from the LTD carrier and ongoing entitlement to income replacement benefits without credit to the insurer. Based on this rationale, a tort defendant would also not be able to deduct for any future lump sum payments of LTD benefits from a payment of any past or future income loss claims.

The Court's rationale does not appear to reflect the reality of insurance law. An insurer and claimant's counsel can certainly assess how long they believe that a claimant will continue to suffer a disability and negotiate a resolution accordingly. Moreover, when assessing the settlement value of a case an insurer will base its decision on the value of future income benefits, minus contingencies. The Court's focus on the assertion that the insurer resolved the case based on the adjuster's maximum authority fails to recognize that an assessment of the case was assuredly done in order to assess exposure. Finally, it is very rare

that an insurer will settle a case for payment of punitive damages and mental distress. As such, it would not have been difficult to calculate how much of the \$160,000.00 future lump sum payment was for disability benefits and how much towards costs.

The repercussions of this case are serious for an insurer. Clever claimant's counsel ought to settle with the LTD carrier for payment of future benefits prior to any resolution with the accident benefits carrier or the tort defendant. Indeed, claimant's counsel may choose to settle a claim with an LTD carrier for a discount for payment of future benefits in order to make it attractive for the LTD carrier to settle early. Counsel can then redeem a double recovery against the tort and accident benefits carrier as they will not be entitled to deduct for the settlement.

The result is that the claimant may receive more money not working than he ever did working. That was clearly not the intention of the legislation – but may be the net effect of these types of decisions.

My suggestions for potentially addressing the issues raised in this decision issue will be saved for those adjusters who choose to retain my services (wink).

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