"EASY'S GETTING HARDER EVERY DAY": SOCIAL SECURITY AND WORKERS' COMPENSATION OFFSETS - LEGAL AND PRACTICAL EFFECT ON CLAIMS FOR INDIVIDUAL AND GROUP DISABILITY AND PENSION BENEFITS

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I. INTRODUCTION.

For many years, individual and group disability policies have provided a measure of protection against the loss of income caused by injury or illness. Many of these policies fix the benefit at a stated amount or percentage of the insured's pre-disability income. Some companies and other organizations have also established pension plans providing benefits beginning at a certain age with payments set at a stated amount or percentage of pre-retirement income.

In order to maintain the intended limits of payments, many private disability policies and pension plans contain provisions specifying that payments under the policy or plan will be reduced by the amount of "other income" received by the insured person or retiree from public programs such as those administered under the Social Security Act or state Workers' Compensation statutes.[1]

One method of design of these disability policies and pension plans is to specify that in calculating payments, the insurer or plan will take into account income which the individual receives from various sources in determining the level of benefits to be paid from the policy or plan. In other words, if an insured or retiree receives no benefits from other sources such as Social Security or Workers' Compensation, his payments from the insurer or the plan may be 100% of the amount specified. However, when benefits from these other sources are received and combined with the amounts available under the disability policy or plan, then such clauses may permit the insurer or plan to reduce their payments by an amount necessary to bring the

payments from the combined or integrated benefit stream to the amount promised in the policy or plan.

Such clauses may be called "coordination of benefit" clauses, e.g., Cody v. Connecticut General Life Ins. Co., 387 Mass. 142, 439 N.E. 2d 234, 235 n.1 (1992), "integration" clauses, Alessi v. Raybestos-Manhattan, Inc., 451 U.S. 504, 514, 101 S.Ct. 1895 (1981)[2] or "offset" clauses. For purposes of this paper, the term "offset clause" will be used.

Perhaps not surprisingly, the interpretation and enforcement of those clauses in disability and retirement plan documents have met with resistance by those who maintain that they are entitled to the full amount of benefits provided by both the private and public programs.

While, as a general matter, it can be stated that it now appears that such clauses do permit an insurer or administrator to deduct the stated portion of the public benefits from those afforded by plans governed by ERISA, the results may be somewhat mixed as to policies or plans governed by state law. In responding to challenges to the deduction of Social Security or Workers' Compensation benefits from disability or pension benefits pursuant to offset clauses, the courts have often conducted careful analysis of the language of the policy or plan as well as relevant statutory language to reach their decisions. Although some questions involved with these issues appear to have been resolved, challenges to the application of these offset clauses continue to be asserted with some frequency.

For that reason, in the hope that it may be of value to inside and outside counsel evaluating and defending future claims, this paper will discuss the resolution of some of the more common disputes which have arisen over the efforts to offset Social Security or Workers' Compensation payments from disability or pension plan benefits.

II. PURPOSE AND DESIGN OF OFFSET PROVISIONS.

Although they may be couched in terms similar to those of the Social Security Act and Workers' Compensation statutes, private disability and pension plans are generally intended to provide a benefit which supplements those available under federal or state laws up to a stated maximum amount or percentage of pre-disability income. See 12 Couch on Insurance - 3d, 182:2 (1998). Offset provisions which permit the reduction of disability or pension payments as a result of the receipt of benefits under such public programs are common features of such plans, In Re: Unisys Long-Term Disability Plan ERISA Litigation, 97 F.3d 710, 715 (3rd Cir. 1996); Dameron v. Sinai Hospital of Baltimore, Inc., 815 F.2d 975, 977 n.2 (4th Cir. 1987), for at least two reasons:

A. Calculation of Affordable Premiums.

Provisions which specify the percentage of pre-disability income intended to be provided and call for the deduction of the amounts of "other income" received by the insured from the disability or retirement plan payments so as to maintain that level of pre-disability income have been recognized by various courts as an important method by which insurers and employers can set appropriate and affordable premiums. See Lamb v. Connecticut General Life Ins. Co., 643 F.2d 108, 109 n.1 (3rd Cir. 1981); Connecticut General Life Ins. Co. v. Craton, 405 F.2d 41, 47 (5th Cir. 1968); Cody v. Connecticut General Life Ins. Co., 387 Mass. 142, 439 N.E. 2d 234, 239-40 (1982).

B. Avoidance of Duplicate Recovery.

In upholding the application of offset clauses, some courts have also commented that they serve the public purpose of precluding double recovery for the same injury or condition,

at least insofar as Workers' Compensation benefits are concerned.

For example, in Sampson v. The Mutual Benefit Life Ins. Co., 863 F.2d 108 (1st Cir. 1988); the group disability insurer withheld from plan payments the amount of Workers' Compensation loss-of-time benefits paid to the insured or rejecting the plaintiff's argument that the policy offset provision could not be applied to those benefits because the Workers' Compensation insurer had been reimbursed by the subsequent settlement of a third-party action, the court affirmed judgment for the insurer. Nothing that, even under the de novo standard of review the insurer's decision was reasonable, the court commented:

> In fact, to allow Sampson to recover the loss-of-time offset from Mutual would violate the principle underlying both the Mutual policy's offset provision and the reimbursement provisions of the Massachusetts workers' compensation law, for it would allow Sampson to recover twice for the same loss.

863 F.2d at 110-11

Similarly, in Snead v. UNUM Life Ins. Co., 824 F. Supp. 69 (E.D. Va. 1993), aff'd 35 F.3d 556 (4th Cir. 1994) (unpublished), the Eastern District of Virginia rejected the argument that the insurer could not apply an offset clause which permitted the insurer to reduce group disability policy benefits by amounts received from a Workers' Compensation insurer who later settled with the insured-plaintiff. Citing Sampson, the court noted that the plaintiff had received a full payment of Workers' Compensation benefits and "should not be allowed to recover twice for the same loss." 824 F. Supp. at 73.

Several state courts have also rejected efforts to avoid deduction of amounts received for settlement of Workers' Compensation claims for benefits under disability policies

on similar grounds, Sims v. First National Bank of Maryland, 42 Md. App. 309, 400 A.2d 13, 15 (1979); Mailhot v. Travelers Ins. Co., 375 Mass. 342, 377 N.E. 2d 681, 684 (1978).

III. CHALLENGES TO ENFORCEMENT OF OFFSET CLAUSES.

As might be expected, there have been a range of challenges to efforts to enforce offset clauses in disability policies and pension plans. When courts have found that policy or plan language clearly authorized the offsetting of the particular benefit payments at issue, such clauses have often been enforced both in claims under ERISA-governed employee welfare benefit or retirement plans and under policies regulated by state law. However, in some instances the specific language of the policy or plan at issue have led courts to reject enforcement of offset clauses as respects certain benefits.

A. Claims that Offset Clauses Violate the Social Security Act and ERISA

1.) Social Security Act Anti-Assignment Clause.

The Anti-Assignment Clause, Section 207 of the Social Security Act, states, in part:

> The right of any person to any future payment under this subchapter shall not be transferable or assignable, at law or in equity, . . .

42 U.S.C. §407(a).

Some plaintiffs have sought to block enforcement of offset clauses arguing that they constitute an "assignment" of the right to future payment of Social Security benefits in violation of that section. Thus far, it appears that those arguments have been rejected by the federal and state courts to which they have been presented.

In Hurd v. Illinois Bell Telephone Company, et al., 136 F. Supp. 125 (N.D. Ill. 1955), aff'd 234 F.2d 942 (7th Cir. 1956), cert. den. 352 U.S. 918, 77 S.Ct. 216 (1956), a group of Bell System employees brought an action seeking a determination barring their employer's practice of deducting the amounts of their Social Security Old Age and Survivors Insurance (OASI) benefits from the amounts otherwise payable under their pension plan. When the Social Security Act was amended to add the OASI benefits, the pension plan had been revised to add a clause specifying that when a person became entitled to receive such benefits the amount of his pension or plan benefit would be reduced by one-half of his OASI benefits. Id. at 130-31.

One of the plaintiffs' arguments in support of their claims for declaratory and injunctive relief was that the offset of these Social Security benefits was a transfer prohibited by Section 207(a) of the Act. The court rejected this argument noting that this section of the Act was directed primarily at traditional devices such as wage assignments and commented further that:

> . . . The application of the defendant's offset provisions in no way affects their right to OASI benefits. They continue to receive the full government check to which they are entitled under the Act . . . Section 207 was never intended to freeze a worker's private pension at a particular level. It was concerned only with guaranteeing that the worker would actually receive for his own use the amount due him under the Social Security Act.

Id. at 142.

Courts in other jurisdictions have reached the same conclusion. Lessard v. Metropolitan Life Ins. Co., 56 A.2d 491, 498-99 (Me. 1989); Poisson v. Allstate Life Ins. Co., 640 F. Supp. 147, 149

(D.M. 1986); Killebrew v. Abbott Laboratories, 352 So. 2d 332, 336 (La. App. 1977), aff'd, 359 So. 2d, 1275, 1278 (La. Sup. Ct. 1978); Williams v. Insurance Company of North America, 150 Mont. 492, 434 P. 2d 395, 397 (1967); Voss v. Mutual of Omaha Ins. Co., 469 S.W. 2d 602, 604 (Tex. Civ. App. 1971).

In Lamb v. Connecticut General Life Ins. Co., 643 F.2d 108 (3rd Cir. 1981), the plaintiff conceded that the insurer was entitled to deduct the amount of Social Security benefits which she was entitled to receive on the date she became disabled but argued that Section 207 of the Act precluded the company from increasing the amount it deducted under the offset provision as Social Security benefits were increased. To rule otherwise in her view would be contrary to the intent of Congress because it would permit the insurer to enjoy the benefits of the increases in Social Security benefits and not her. Id. at 110. The Third Circuit rejected this argument relying in significant part of the reasoning of Hurd v. Illinois Bell Telephone, et al., supra. Since plaintiff continued to receive the full amount to which she was entitled under the Social Security Act and had transferred none of it to the insurance company, the court could not say that the increases of the deduction from payments under the policy by virtue of the increase in Social Security benefits violated Section 207. Id. at 111.

However, the Louisiana Court of Appeals reached the opposite conclusion in Massengill v. Aetna Life Ins. Co., 394 So. 2d 264, 765-6 (La. App. 1981).

2.) ERISA Non-Forfeiture Provision.

In Alessi v. Raybestos-Manhattan, Inc., 451 U.S. 504, 101 S. Ct. 1895 (1981), pension plans of several large corporations contained offset clauses stating that payments would be reduced by the amount of payments received under Workers' Compensation and other

statutes. Plaintiffs, who were retired employees of these companies, contended that reduction of their pension benefits by application of such offset clauses was prohibited by the non-forfeiture provision of ERISA. Id. 451 U.S. at 508-09. The District Court ruled in favor of the employees, and the Third Circuit Court of Appeals reversed.

Section 203 of ERISA, states in part:

> (a) Every pension plan shall provide that an employee's right to his normal retirement benefit is nonforfeitable upon the attainment of a normal retirement age . . .

29 U.S.C. §1053.

The Supreme Court, through Justice Marshall, affirmed the Third Circuit and upheld the application of the offset clauses to permit reduction of the pension plan benefits by the amount of Workers' Compensation benefits received after their retirement.

The court noted that although ERISA prohibited forfeiture of vested pension rights, it did not define the content or amount of the benefit which became vested, leaving that issue to the private parties who create the plan, saying ". . . the statutory definition of 'nonforfeitable' assures that an employee's claim to the protected benefit is legally enforceable, but it does not guarantee a particular amount or a method for calculating the benefit." Id. 451 U.S. at 513. The court further pointed to the fact that following its extensive study of private pension plans before adopting ERISA, Congress did not prohibit integration as a method of combining benefit levels from pension plans with other income streams available to a retired employee. Id. 451 U.S. at 514-15. This view was reinforced by the fact that Treasury Regulations and IRS Rulings authorized the inclusion in pension plan of clauses which offset

plan benefits based upon Workers' Compensation payments. Id. 451 U.S. at 518-21.

The Court's opinion in Alessi by no means ended litigation over the application of offset clauses to Workers' Compensation benefits. However, it did confirm that such clauses do not violate Section 203 of ERISA. E.g., Huppeler v. Oscar Mayer Foods Corp., 32 F.3d 245, 247-50 (7th Cir. 1994); Johnson v. Eaton Corp., 970 F.2d 1569 (6th Cir. 1992); Losada v. Golden Gate Disposal Co., 950 F.2d 1395, 1397-98 (9th Cir. 1991); PPG Industries Pension Plan v. Crews, 902 F.2d 1148, 1150 (4th Cir. 1990); Reska v. Pension Plan of Bethlehem Steel Corp., 848 F.2d 372, 373-74 (2d Cir. 1988); Server v. Interpace Corp., 657 F.2d 1115, 1117 (9th Cir. 1981); Kapuscinski v. Plan Administrator, 658 F.2d 427, 429 (6th Cir. 1981).

Although it dealt with an offset of post-retirement Workers' Compensation benefits against pension plan benefits, Alessi has also been cited in support of the conclusion that Section 203 does not prohibit the deduction of Social Security benefits from payments under long term disability policies. See, Godwin v. Sun Life Assurance of Canada, 980 F.2d 323, 327 (5th Cir. 1992); Fisher v. Metropolitan Life Ins. Co., 895 F.2d 1073, 1076 n.1 (5th Cir. 1990); Lopez v. Commonwealth Oil Refining Co., 833 F. Supp. 86, 89 (D. P.R. 1993), aff'd, 29 F.3d 619 (1st Cir. 1994) (unpublished).

However, it should be noted that in Dameron v. Sinai Hospital of Baltimore, Inc., 815 F.2d 975 (4th Cir. 1987), the court ruled that ERISA's nonforfeiture section was violated by a pension plan integration clause because it used a method of calculating Social Security benefits which was not stated in the plan and produced estimates not reasonably related to the actual level of Social Security benefits:

> This method of calculation is unreasonable because it is not intended to provide a reasonable estimate of an employee's actual Social Security Benefit. It systematically overestimates an employee's Social Security benefit because it does not employ a reasonable average of an employee's past earnings and because it assumes that an employee has always been covered by the Social Security Act. Although the latter assumption is stated in the plan, it nonetheless violates ERISA's proscription against unreasonable integration. The methods used by Sinai to make their estimates therefore cause forfeiture of vested rights of the employees in violation of ERISA.

Id. at 980-81.

B. Claims that Deduction of Policy or Plan Payments By Amount of Workers' Compensation Benefits are Barred by State Law.

While there are some rather anomalous decisions, courts have generally found that objections to the enforcement of offset clauses in plans governed by ERISA are preempted. Predictably, the results are more mixed in disputes over the efforts to enforce such clauses in policies not subject to ERISA.

1.) Plans Governed by ERISA.

In Alessi v. Raybestos-Manhattan, Inc., supra, in addition to their attack on the deduction of post-retirement Workers' Compensation benefits, the plaintiffs contended that offsets were barred by a New Jersey statute providing, in part, that compensation granted by the New Jersey Workers' Compensation Act " . . . shall not be set off against employees' retirement pension benefits or payments." Id. 451 U.S. at 521. Concluding that the New Jersey statute related to pension plans governed by ERISA, because it purported to preclude integration as a method for calculating pension benefits, the Court ruled that the effort to ban pension plan offsets

based upon Workers' Compensation payments was preempted by ERISA. Id. 451 U.S. at 524-25.

In Kaupuscinski v. Plan Administrator, 658 F.2d 427 (6th Cir. 1981), one of the grounds for the plaintiff's challenge to the Plan's reduction of his pension plan payments by the amount of Workers' Compensation benefits received was founded on a Michigan statute which had been interpreted to require that any reimbursement for benefits paid pursuant to an order which was subsequently reversed must be sought from the state's Second Injury Fund. Citing Alessi, the Sixth Circuit ruled that as interpreted by plaintiff, the statute "related to" the pension plan by prohibiting the application of its offset provision and was therefore preempted. Id. at 429-30.

Similarly, in PPG Industries Pension Plan v. Crews, 902 F.2d 1148 (4th Cir. 1990), the plaintiffs argued that the reduction of pension plan benefits by the amount of Worker's Compensation benefit received was prohibited by provisions of the West Virginia Workers' Compensation Act requiring an insurer to maintain funds for the payment of Workers' Compensation benefits in a separate account from the funds maintained to pay pension benefits. Because the West Virginia statute purported to dictate a method of benefit integration under the pension plan, the Court held that it was preempted by ERISA and rejected plaintiffs' argument. Id. at 1150. To similar effect are Wallace v. Transport Life Ins. Co., 841 P.2d 613, 615 (Okl. Civ. App. 1992); Employee Benefits Committee v. Pascoe, 679 F.2d 1319, 1322-23 (9th Cir. 1982).

2.) Plans governed by state law.

a.) Violations of State Public Policy.

In some cases, plaintiffs have argued that coordination of benefits clauses should be deemed unenforceable because they are against the public policy of a state. With one notable exception, these challenges appear to have been unsuccessful as courts have focused upon the fact that the challenged provisions are in private contracts intended to supplement the public benefit programs to a specified extent. See, Wallace v. Transport Life Ins. Co., supra at 616; Cody v. Connecticut General Life Ins. Co., 387 Mass. 142, 439 N.E. 2d 234 (1982); Voss v. Mutual of Omaha Ins. Co., 469 S.W. 2d 602, 604 (Tex. Civ. App. 1971).

However, an extended discussion of this question was set forth by Judge Keeton in Kates v. St. Paul Fire and Marine Ins. Co., 509 F. Supp. 477 (D. Ma. 1981). In that matter, after paying benefits for some months, the group disability insurer reduced monthly disability payments to $0 because the plaintiff received Social Security disability benefits together with an award under the Workers' Compensation statute which together exceeded the $800 per month maximum promised to plaintiff under the disability policy. Id. at 481.

Uncertain as to the resolution of the plaintiff's claims that the policy should not be enforced because it was ambiguous, the court turned to the consideration of plaintiff's alternative argument that the coordination of benefits provisions were unenforceable because they were contrary to Massachusetts' public policy. Although it could find no decision enunciating a public policy against coordination of benefits clauses generally or against those clauses applied to Social Security or Workers' Compensation benefits, id. at 486, after an extended analysis, the court concluded the law of Massachusetts revealed public policies that

insurance contracts should not be misleading and that coverage provided should not be "unrealistically limited" or so limited as to be of "no substantial value." Id. at 491.

Applying these policies to the facts before it, the court concluded that the coordination of benefits clause in question it contravened the public policy of Massachusetts because it found that the certificate issued to plaintiff was seriously misleading since instead of the promised "lifetime" coverage for on-the-job accidental injuries, the most the plaintiff could ever recover was a few months of benefits until Social Security and Workers' Compensation benefits were paid. Id. at 491-92. However, in view of the approval of coordination of benefits clauses generally, the court determined that it should enforce the offset as to the Social Security benefits but decline to enforce it as to Workers' Compensation benefits. Id. at 492-93.

The opposite result was achieved in Renshaw v. U.S. Pipe & Foundry Co., 30 N.J. 458, 153 A.2d 673 (1959), in which retired employees sought an order that the deduction from pension plan payments of an amount equal to post-retirement Workers' Compensation benefits was a violation of New Jersey public policy. The New Jersey court rejected this argument, reasoning, in part:

> But in our case it is plain beyond argument that no decrease in compensation benefits was intended or accomplished by the pension plan, nor did it amount to an unlawful means whereby defendant was enabled to recoup such payments. . . . The purpose and design of the agreement were quite differently oriented. . . What the plan actually amounted to, and no more, was a commitment by the company to see that each retired employee received a fixed amount of money monthly, to compensate partially for wages lost through inability to continue

> employment by reason of age, and that if such was not forthcoming in whole or in part from the specified sources, I.e., public pension, other pension contributed to by the company, social security benefits, private or statutory severance pay and the like, workmen's compensation benefits from the company or any other employer or public disability pension, it would pay the computed amount or any deficiency. The scheme had no particular relation to compensation benefits. Its scope was much broader and the theory an infinitely deeper one.
>
> Moreover, it was no unilateral or gratuitous undertaking, but an agreement collectively bargained for and reached between the employer and the exclusive agent of the employees as part of a basic labor contract. * * * In such a situation, the rights and obligations of the parties must be measured by the terms of he contract under the ordinary rules of contractual construction.
>
> We see no public policy question involved, and so no violation thereof, in any such design of a private, contractual pension plan or the particular provision before us.

Id. 153 A.2d at 678-79.

b.) Violations of State Statutes.

In some instances, the enforcement of offset clauses has been challenged on the basis of state Workers' Compensation code provisions intended to protect the benefits of the injured workmen of the state. These efforts have not often been successful.

For example, in Parsons v. Granite City Steel Co., 4 Ill. App. 2d 396, 190 N.E. 2d 644 (Ill. App. 1963) the plaintiffs contended that a pension plan offset provision calling for the reduction of pension benefits by the amount of any Workers' Compensation payments received could not be enforced because it violated the non-assignability

provisions of the Illinois Workmen's Compensation Act. Id., 190 N.E. 2d at 645. Citing Renshaw v. U.S. Pipe & Foundry, supra, the court rejected the plaintiff's argument and commented that:

> [Plaintiff's] . . . argument overlooked the fact that the pension is not tied to workmen's compensation. It is clearly a substitute for other disability or retirement benefits. He has a contractual right to the pension unless and until his minimal needs are otherwise provided for . . .

Id. 190 N.E. 2d at 646.

See also, Provident Life & Accident Ins. Co. v. Toran, 288 Ark. 63, 702 S.W. 2d 10 (1986); Bunney v. Standard Oil Co., 571 P.2d 981, 983-84 (Wy. Sup. Ct. 1977).

In Neson v. Brown & Root, U.S.A., Inc., 987 F.2d 1188 (5th Cir. 1993), the court refused to accept the plaintiff's argument that a Louisiana State Court's order that his Workers' Compensation benefits be paid "in addition to" any disability benefits, constituted a binding ruling that no offset could be taken against those disability payments:

> The state court ruling that the Workers' Compensation benefits be "in addition to" disability benefits does not bind UNUM to pay the full $1,248 disability benefit or limit its contractual right of setoff.

Id. at 1192.

C. Application of Offset Clauses to Reduce Policy or Plan Payments As a Result of Social Security Benefits Paid to Dependents.

An issue which has continued to give rise to litigation for many years under both individual and group policies is the question of whether Social Security benefits received by children of a disabled individual may be offset against plan or policy payments otherwise due to

that person.

In resolving these disputes, courts have looked closely at the language of the offset provision in question and have issued some decisions rejecting the reduction of benefit by the amount of Social Security benefits paid to dependents.

For example, in In Re: Unisys Corp. Long Term Disability Plan ERISA Litigation, 97 F.3d 710 (3rd Cir. 1996), the court was called upon to interpret a provision of the Unisys plan which stated:

> The LTD benefit you receive may be adjusted if you receive pension benefits from Unisys and/or disability income from other sources such as Social Security . . .

Id. at 715. The Plan interpreted that clause to permit the deduction from plan benefits of the amounts of Social Security benefits payable to the dependents of disabled employees.

The Third Circuit rejected the Unisys argument that Social Security benefits paid their dependents were "received" by the Plan participants. Concluding that the Income from Other Sources provision of the Plan unambiguously authorized the offset only of Social Security benefits received by the Plan participant and not those received by his dependents, the court reversed the summary judgment for Unisys. Id. at 716-17.

> Because of the twofold nature of Social Security disability awards -- primary and dependent -- LTD plans must specify whether one or both kinds of awards are to be offset from plan benefits. The Social Security disability award structure does not create ambiguity in the Unisys Plan. Rather it confirms that the Plan's language unambiguously provides for the offset of primary Social Security benefits and not dependent benefits.

Id. at 716.

Similarly, in Jones v. Benefit Trust Life Ins. Co., 605 F. Supp. 179 (S.D. Miss.

1985), the court refused to accept the insurer's argument that a duplication of benefits provision calling for reduction of plan benefits by the amount of "full Social Security benefits" paid or payable to the insured included benefits awarded under the Act to his wife and children. Agreeing with the defendant's argument that the clause was unambiguous, the court noted that it called for a reduction in disability benefits by amounts received by the insured and made no mention of amounts paid to his wife or children. The court also rejected the insurer's contention that the term "full" must be interpreted to require the conclusion that Social Security benefits paid to his dependents were to be included in the offset. Id. at 180-81. See also, Meeks v. Mutual of Omaha Ins. Co., 70 Ill. App. 3d 800, 388 N.E. 2d 1362 (1979) (disability benefits could not be reduced by Social Security benefits received by plaintiff's daughter because they were not "other benefits received" by the plaintiff within the meaning of the Policy); Coughlin v. Connecticut General Life Ins. Co., 330 A.2d 159, 163 (Del. Supra. 1974) (Insurer was not entitled to deduct Social Security benefits paid for his two minor children to agencies who cared for the children).

On the other hand, in a number of instances courts have interpreted policy or plan language to uphold the deduction of disability or pension benefits by the amount of Social Security benefits received by a participant's dependents.

In Cooperative Benefit Administrators, Inc. v. Whittle, 989 F. Supp. 1421 (M.D. Ala. 1997), the plaintiff refused the plan's claim for reimbursement of the amount of Social Security benefits received by his wife and children pursuant to a reimbursement agreement. He defended his refusal based on certain sections of an Administrative Manual which he had received and contended that if he had known that amounts paid to his wife and children were

subject to the Reimbursement Agreement, he never would have used those funds for household expenses. Id. at 1426-27. Rejecting the plaintiff's estoppel claims, the court concluded that the Plan and its SPD required reimbursement of the benefits paid to plaintiff's wife and children and entered summary judgment for the Plan. Id. at 1433-34.

In Spinella v. UNUM, 1995 WL 599209 (D.N.H.) (unpublished), that court interpreted the UNUM Coordination of Benefits clause to authorize the reduction of benefits paid to plaintiff under the group disability policy issued to her employer by the amount of SSDI benefits plaintiff and her child received as a result of her disability. Id. at *4. See also, Porter v. Continental Cas. Co., 156 Ariz. 488, 753 P.2d 178, 181 (1998) (Social Security payments paid to an ex-wife for minor children who no longer live with insured may be deducted from payments under group disability policy); Smith v. CNA Insurance, 319 Pa. Super. 449, 466 A.2d 629, 634-35 (1983) (Insurer may deduct Social Security benefits paid directly to insured's non-dependent adult children); Dowell v. Aetna Life Ins. Co., 468 F.2d 802, 804-05 (4th Cir. 1972) (Under a group disability certificate insurer was entitled to offset the amount of Social Security benefits received by the insured's wife and children because of his disability).

D. Scope of Permissible Offset of Workers' Compensation Benefits.

Although, in Alessi v. Raybestos-Manhattan, Inc., supra, the Supreme Court may have thought it resolved the ERISA nonforfeiture clause and state law challenges to the offsetting of Workers' Compensation benefits against pension plan payments, that decision was followed by much debate and litigation over whether it authorized the offset of the entire range of benefits obtained pursuant to the state Workers' Compensation statutes.

In support of the Alessi court's ruling that integration was a permissible method of benefit calculation for pension plans, it discussed at some length Treasury Regulations and IRS rulings, in effect at the time ERISA was enacted, which approved the use of integration in pension plans. The court noted that:

> The IRS rulings based their allowance of pension payment integration on three factors: the employer must contribute to the other benefit funds, these other funds must be designed for general public use, and the benefits they supply must correspond to benefits available under the pension plan. The IRS employed these considerations in approving integration with workers' compensation benefits.

Id., 451 U.S. at 521.

By way of further explanation, the Court commented that the IRS had disallowed integration with damages recovered by an employee through a common law action against an employee, with reimbursements for medical expenses, with unemployment compensation or with sums paid for bodily impairment because such payments are not a kind of benefit comparable to any permitted in a qualified pension plan. Id. at 520-21.

In subsequent cases, employees have challenged the deduction of all or parts of Workers' Compensation awards from disability or pension payments claiming that they do not correspond to benefits available under a pension plan. Although a broad right of offset has regularly been affirmed in post-Alessi decisions, in some instances courts have not been willing to apply the decision as broadly as insurers and plans have wished.

Some post-Alessi courts have interpreted the ruling as broadly allowing offset of Workers' Compensation benefits against pension plan payments. See Neson v. Brown and Root, U.S.A., Inc., 987 F.2d 1188, 1193 (5th Cir. 1993); Saylor v. Parker Seal Co., 975 F.2d 252, 255-

56 (6th Cir. 1992); Kapuscinski v. Plan Administrator, 658 F.2d 427, 429 (6th Cir. 1981).

Others have disagreed, concluding that Workers' Compensation benefits which are not of the same character as pension plan benefits, as defined by law, cannot be offset against those pension plan payments. Losada v. Golden Gate Disposal Co., 950 F.2d 1395, 1399-1400 (9th Cir. 1991) (Workers' Compensation award which, under California law, compensated plaintiff for bodily impairment could not be offset against pension plan).

Perhaps the most helpful discussion of these issues may be found in Huppeler v. Oscar Mayer Foods Corp., 32 F.3d 245 (7th Cir. 1994). In that matter, the Oscar Mayer pension plan specified a dollar-for-dollar reduction of pension plan benefits for any Workers' Compensation award with the exception of payment for an injury for the loss of a body member. The plaintiffs took early retirement after learning that they had suffered serious bilateral hearing loss as a result of many years of working around noisy machinery. After he retired one plaintiff received a lump sum award pursuant to the Wisconsin Workers' Compensation Act as a result of which his employer notified him that he would not have pension benefits until the amount of the Workers' Compensation award had been fully offset against monthly pension plan payments. The other plaintiffs did not apply for Workers' Compensation because they expected that whatever they received would simply be deducted from their pension payments. Id. at 246.

The Huppeler court examined with care the Supreme Court's analysis of the Treasury Regulations and IRS rulings with which it supported its decision that integration was a permissible method of benefit calculation for pension plans governed by ERISA, and suggested two possible interpretations of the scope of permissible integration under Alessi. The first was that the Court intended to require that Workers' Compensation benefits be integrated only if they

correlated to benefits available under the pension plan. The second was that the Court was simply deferring to the IRS interpretation of ERISA as authorizing integration of Workers' Compensation and pension plan benefits. Id. at 249-50.

After reviewing decisions of other Circuits on this issue, the Huppeler court concluded that Alessi was best understood as deferring to the IRS interpretation of ERISA which by Regulations promulgated at 26 C.F.R. §1. 411(a) - 4(a), determined that integration with benefits under any state law was appropriate. Consequently, the court affirmed the summary judgment in favor of the defendant upholding the offset. See also, Reske v. Pension Plan of Bethlehem Steel, 848 F.2d 372, 374-75 (2d Cir. 1988) (benefits awarded for loss of hearing equivalent to loss of income benefit under New York Law; no decision necessary as to whether Alessi only authorizes integration of awards in the nature of wage replacements).

E. Reimbursement Agreements.

For some years, in recognition of the difficulty which may be caused if an employee is forced to await the lengthy processing of a Workers' Compensation or Social Security claim through the administrative and judicial process, insurers and plans have adopted the practice of offering to pay the full amount of disability or pension benefits subject to the execution of a formal Reimbursement Agreement. These Agreements usually require repayment of the appropriate portions of the amounts advanced during the pendency of the Workers' Compensation or Social Security claim and appeal processes if plan or policy benefits are thereafter received.

1.) Enforcement of Agreements.

Although rather simple in concept, attempts to enforce these

Reimbursement Agreements have been challenged with some frequency especially when that award has involved a substantial lump sum award of retroactive benefits.

For example, in Pocchia v. Prudential Ins. Co., 74 F. Supp. 2d 240 (E.D. N.Y. 1999), the plaintiffs, who had been received long-term disability benefits, filed suit against the employer, their employee welfare benefit plan and its insurer, claiming that their rights under ERISA were violated when defendants sought to reduce their disability payments by the amounts they received under Workers' Compensation and Social Security. Plaintiffs argued that the defendants' had no right to recoup the amount of overpayment of plan benefits because the plan documents were so inconsistent as to violate ERISA disclosure requirements. The court rejected this argument and entered summary judgment against plaintiffs noting that there was no material conflict in the plan documents and that, in any event, the plaintiffs could not show detrimental reliance on the allegedly contradictory provisions. Id. at 250. The court also rejected the claim of one of the plaintiff's that the Reimbursement Agreement which he signed should not be enforced as he had signed it only because he had been told by a Prudential employee that he would lose all of his benefits under the Plan if he failed to do so. That Agreement asked Prudential to postpone the reduction of long-term disability benefits until Social Security benefits were actually received and included an agreement to repay Prudential immediately any benefits received in excess of the amount to which the employee would have been entitled under the terms of the LTD Plan. Id. at 251.

In Anweiler v. American Elec. Power Service Corp. , 3 F.3d 986 (7th Cir. 1993), the plaintiff's husband received long-term disability benefits together with Social Security benefits for a considerable period of time before he died. The Plan contained an offset provision

which called for the reduction of Plan benefits by the amount of Social Security benefits. When the Plan's insurer began to make payments under the disability plan, it requested him to sign a Reimbursement Agreement designating the insurer the beneficiary of his life insurance policy. The court found that he was not told that he did not have to sign the Reimbursement Agreement in order to receive long-term disability benefits and was also not informed that the Agreement was revocable at will. By the time of his death, plaintiff's husband had received sufficient Social Security benefits to create an overpayment of long-term disability benefits in excess of the proceeds of life insurance policy of which the insurer had been named beneficiary. Id. at 988-89.

Because the insurer had continued to pay long-term disability benefits as a result of the Reimbursement Agreement, the Seventh Circuit rejected the plaintiff's argument that it was not supported by adequate consideration. Id. at 991. However, the court agreed with the plaintiff and the conclusions of the trial court that the defendants had breached their fiduciary duties by not informing the insured that the agreement was revocable at will and that he was not forced to sign it at all. Id. at 991-92.

The court went on to rule that Ms. Anweiler was entitled to seek equitable relief as a result of this breach of fiduciary duty, but it refused to award any such relief because the proceeds of the life insurance policy had not eliminated the entire overpayment of long-term disability plan benefits. Id. at 993.

2.) Lump Sum Awards of Retroactive Benefits.

Considerable litigation has developed over the question of whether and by what means a plan or insurer may recover an overpayment of benefits when a participant has received a lump sum award of retroactive Social Security or Workers' Compensation benefits.

With a few exceptions, when presented with carefully drawn plan language, courts appear to have been willing to uphold the right of recovery of overpayments either by a lump sum payment or by deductions from future benefits under the plan or policy.

For example, in Lake v. Metropolitan Life Ins. Co., 73 F.3d 1372 (6th Cir. 1996), former employees who became disabled while working at GE and began to receive long-term disability benefits under the Plan then had their benefits reduced as a result of receiving a lump-sum retroactive SSDI award or as a result of becoming eligible for Social Security retirement.

The plaintiffs who had received the lump-sum retroactive SSDI award had signed a Reimbursement Agreement on the basis of which the defendant claimed the right to withhold a portion of their future monthly LTD benefits to permit collection of the overpayment resulting from the award. Id. at 1374. The Plan specified that monthly benefits would be reduced by the amount of ". . . any primary Social Security (disability) benefits . . ." It further stated that "the carrier may, in addition to other remedies it may have to recover any overpayment, reduce future benefits otherwise payable under the Plan . . ." Id. at 1375.

The plaintiff's contended that their plan benefits could not be reduced because the practice of recouping retroactive awards was not clearly described in the Plan documents in violation of the clear notice requirement of Section 102(a)(1) of ERISA. The court rejected this argument ruling that the Plan language specified that plan payments would be reduced by the amount of "any primary Social Security benefits" including retroactive as well as prospective SSDI payments and that the offset could be taken against future Plan payments until the overpayment was recovered. Id. at 1377.

Other courts have issued similar rulings upholding the right to offset against future payments the full amount of overpayments resulting from an award of retroactive Social Security or Workers' compensation benefits. Neson v. Brown & Root, U.S.A., Inc., 987 F.2d 1188, 1193-95 (5th Cir. 1993) (Insurer entitled to recover amount of retroactive Workers' Compensation award by an offset against future monthly payments despite the fact that the Plan said nothing about an offset of the amount of past benefits); Madden v. ITT Long Term Disability Plan, 914 F.2d 1279, 1287 (9th Cir. 1990) (Plan documents authorized Plan to recover amount of retroactive Social Security award for the period during which he also received Plan benefits); PPG Industries Plan v. Crews, 902 F.2d 1148, 1151-52 (4th Cir. 1990) (Plan authorized to offset pension benefits already paid against a retroactive award of Workers' Compensation); Calloway v. Pacific Gas & Elec. Co., 800 F. Supp. 1444 (E.D. Tex. 1992) (Plan entitled to recoup overpayment created by award of retroactive Social Security benefits even though plan documents did not mention retroactive benefits); Gray v. Travelers Indemnity Co. of Rhode Island, 725 F. Supp. 495, 498 (M.D. Fla. 1989) (Insurer was entitled to apply offset against a lump-sum retroactive award of Social Security benefits against future benefits and was not confined to the Plan benefits payable during the month in which the lump sum award was received); Stuart v. Metropolitan Life Ins. Co., 664 F. Supp. 619, 623-24 (D. Me. 1987) (Plan documents authorized reduction of plan benefits to recover amount of overpayment caused by receipt of lump sum retroactive Social Security benefits despite absence of any reference to a retroactive award of such benefits); Barklage v. Metropolitan Life Ins. Co., 614 F. Supp. 51 (W.D. Mo. 1985) (Insurer entitled to be reimbursed for future benefit payments for the amount of overpayment of disability payments created by receipt of lump-sum retroactive awards of

Workers' Compensation and Social Security); Travelers Ins. Co. v. Cole, 3 Ark. App. 183, 623 S.W. 2d 848, 850-51 (Ark. App. 1981) (a retroactive award of eleven months of Social Security benefits was "available" to the insured for the entire period and not only for the month in which the award was received; insurer was entitled to recoup the overpayment caused by that award for future payments).

However, in one instance, a court rejected an insurer's efforts to recover from future payments under its disability policy an overpayment of benefits created by the receipt of a lump-sum retroactive award of 13 months of Social Security benefits. Bush v. Metropolitan Life Ins. Co., 656 F.2d 231 (6th Cir. 1981). The offset provision at issue in that case stated in part:

> If it is determined that any benefits paid to an employee under the group policy should not have been paid or should have been paid in a lesser amount, the insurance company shall be entitled to a refund of the amount of the overpayment.

The clause also permitted the company to deduct unpaid amounts from future benefits under the Policy. The insurer argued that the offset provision entitled the company to deduct the amount of benefits when later developments revealed that the payments should have been made in a lesser amount. Id. at 232-33.

The Sixth Circuit disagreed and found the provision equally susceptible to the interpretation that it permitted recoupment only when the company mistakenly overpaid according to conditions existing at the time of the overpayment. Since the clause was susceptible to at least two plausible interpretations, the court applied the rule of contra proferentem and refused to adopt the one favoring the insurer. Consequently, it affirmed the ruling of the trial

court allowing the insurer only to recover that part of the overpayment equal to the Plan benefits paid in the month in which the retroactive Social Security award was received. Id. at 233.

IV. CONCLUSION.

While many issues involved in the enforceability and interpretation of clauses permitting an insurer or plan administrator to offset Social Security and Workers' Compensation benefits against disability policy or pension plan payments appear to have been resolved, challenges to the assertion of those offsets continue to be raised.

Because the policies and plans in question are private agreements usually intended to supplement other benefit streams, courts often seek to uphold the intent of the drafters of the plan documents. However, both under policies and plans regulated by ERISA and those governed by state law, the resolution of particular issues will be dependent upon the clarity and care with which the plan documents were drafted and applied.

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END NOTES

1. Benefits from various other sources such as the Veterans Administration may be included in the list of sources for "other income" which may be reduced from or offset against policy or plan payments. Discussion of these additional benefit sources is beyond the scope of this paper.

2. The Alessi court explained integration of pension benefits as:

> . . . a calculation practice under which benefit levels are determined by combining pension funds with other income streams available to the retired employees. Through integration, each income stream contributes for calculation purposes to the total benefit pool to be distributed to all the retired employees, even if the nonpension funds are available only to a subgroup of the employees. The pension funds are thus integrated with the funds from other income maintenance programs, such as Social Security, and the pension benefit level is determined on the basis of the entire pool of funds. Under this practice, an individual employee's eligibility for Social Security would advantage all participants in his private pension plan, for the addition of his anticipated Social Security payments to the total benefit pool would permit a higher average pension payout for each participant. The employees as a group profit from the higher pension level, although an individual employee may reach that level by a combination of payments from the pension fund and payments from the other income maintenance source. In addition, integration allows the employer to attain the selected pension level by drawing on the other resources, which, like Social Security, also depend on employer contributions.

Alessi, supra, 451 U.S. at 514.