# Disabling the Opposition:

## Selected Trial Tactics for the Prosecution and Defense of Coverage Litigation

ABA Litigation Insurance Coverage Section

Life, Health and Disability Committee

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*The minute you read something and you can't understand it, you can almost be sure that it was drawn up by a lawyer. Then if you give it to another lawyer to read and he don't know just what it means either, why then you can be sure it was drawn up by a lawyer. If it's in a few words and is plain and understandable only one way, it was written by a non-lawyer*

*Every time a lawyer writes something, he is not writing for posterity, he is writing so that endless others of his craft can make a living out of trying to figure out what he said.*

Will Rogers 1879-1935

*I don't want a lawyer to tell me what I cannot do; I hire him to tell me how to do what I want to do.*

J.P. Morgan 1837-1913

This paper touches briefly on a topic or two of the substantial number of legal issues raised in the model case, but avoids duplicate treatment of the issues ably presented in the paper written by the insurer's representatives. The substantial exception is the controversy over Total and Residual disability, which we address herein to a greater extent and with something less (more?) than a neutral perspective. But first, we'll touch upon Pre-existing conditions, Appropriate medical care, and the Florida version of

bad faith in first party cases.

*Pre-Existing Medical Condition/First Manifest Clause:*

Recent decisions have recognized that, after three decades, the *Forman* Doctrine has retreated from what was once a majority position to one now viable in New Jersey, *Paul Revere Life Ins. Co. v. Haas*, 644 A.2d 1098 (N.J. 1994), Washington, *Jack v. Paul Revere Life Ins. Co.*, 982 P.2d 1228 (Wash. App. 1999); and, in the only pro-insurer opinion on this subject in the past four years, Florida, *Paul Revere Life Ins. Co. v. Damus, Ecker, et al.*, 864 So.2d 442 (Fla. App. 2003). The *Forman* Doctrine, after *Massachusetts Cas. Ins. Co. v. Forman*, 516 F.2d 425 (5th Cir. 1975) (Florida law), allowed disability insurers to deny coverage for preexisting medical conditions after the time limit set by statutorily mandated incontestability clauses because the policies' insuring clause included coverage only for disability resulting from a sickness that first manifested after the policy's issue date.

In October, Montana became the latest jurisdiction to dismantle this "prior manifest" defense, in *Marie Deonier & Assocs. v. Paul Revere Life Ins. Co.*, 101 P.3d 742 (Mont. 2004). *Forman* was similarly rejected by California in *Galanty v. Paul Revere Life Ins. Co.*, 1 P.3d 658 (Cal. 2000), and *Morris v. Paul Revere Life Ins. Co.*, 135 Cal. Rptr. 2d 718 (Cal. App. 2003).

The Galanty court described the dispositive issue:

> Assuming for the sake of argument that the sickness causing the insured's disability manifested itself before the policy's date of issue, does the incontestability clause nevertheless bar the insurer from denying coverage after the policy has been in effect two years? Ultimately the question is one of statutory construction: Does [the incontestability

> statute] place effective, mandatory limits on an insurer's ability to deny disability benefits on account of a preexisting condition, regardless of when the condition first became manifest?

Id. at 73. It said yes, reasoning as follows:

> [T]o recognize a conflict between the statutory incontestability clause on one hand, and the policy's definitional and coverage provisions on the other, is unavoidable. The former bars the insurer from denying coverage "because a sickness or physical condition ... had existed before the Date of Issue." The latter purport to limit coverage to disabilities caused by "sickness or disease which first manifests itself after the Date of Issue," and to exclude coverage for preexisting conditions that were "not disclosed on [the] application." Having acknowledged the conflict, the resolution is clear: Policy language required by the Insurance Code takes precedence over other policy language. The code does not permit provisions written by the insurer, such as the provisions in Paul Revere's policy defining sicknesses and preexisting conditions, to "make a policy or any portion thereof less favorable in any respect to the insured ... than the [statutory] provisions," such as the incontestability clause. Moreover, when any nonrequired policy provision, such as a definitional provision, "is in conflict" with any required provision, such as the incontestability clause, "the rights, duties and obligations of the insurer [and] the insured ... shall be governed by" the required provisions. In short, the incontestability clause controls.

Id. at 81 (internal citations omitted). *See also Equitable Life Assurance Soc'y v. Bell*, 27 F.3d 1274 (7th Cir. 1994); *Mutual Life Ins. Co. of New York v. Insurance Comm'r*, 723 A.2d 891 (Md. 1999); *Yumukoglu v. Provident Life & Accident Ins. Co.*, 131 F. Supp. 2d 1215 (D. N.M. 2001); *Peterson v. Equitable Life Assurance Soc'y*, 57 F. Supp. 2d 692 (W.D. Wis. 1999); *Fischer v. Massachusetts Cas. Ins. Co.*, 458 F. Supp. 939 (S.D. N.Y. 1978).

*Duty to Submit to "Appropriate Medical Care"*

An insurer can require a policyholder to undergo surgery as a condition of receiving disability payments, but only where the surgery represents the only course of medical care a reasonably prudent person would choose. That position, in *Provident Life & Accident Ins. Co. v. Van Gemert*, 262 F. Supp. 2d 1047 (C.D. Cal. 2003), constitutes the latest reported decision on the question of how far an insurer can go in requiring policyholders to submit to medical treatment they do not want.

The disability policy at issue in *Van Gemert* was typical in that it required that an insured claiming benefits be "receiving care by a physician which is appropriate for the condition causing the disability."[1] Provident sought a declaration that it owed no disability payments to Van Gemert so long as he refused to undergo surgery to correct a loss of vision in one of his eyes. In holding that there was a genuine issue of material fact as to whether eye surgery constituted the requisite "appropriate care" for Van Gemert, the court expressly adopted the reasoning set forth in *Provident Life & Accident Ins. Co. v. Henry*, 106 F. Supp. 2d 1002 (C.D. Cal. 2000).

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[1] A second policy issued to Van Gemert by Provident had slightly different language, requiring that the policyholder be "under the care and attendance of a physician." The court discussed the policies together, and treated them both as requiring "appropriate care."

In *Henry*, the policyholder had refused to submit to surgery for carpal tunnel syndrome, arguing that the insurer could not "require him to have surgery as a condition of his benefits without specific policy language alerting him he could be required to undergo surgery." *Id.* at 1003. The Provident disability policy at issue stated that the policyholder must be "receiving care by a physician which is appropriate for the condition causing the disability." In deciding for Provident, the court wrote:

> The policy does not state that the insured must obey every doctor's recommendation or defer to Provident's judgment about the appropriate care for his condition. Provident does not have that power, and the Court does not interpret the policy to create it. Instead, the Court interprets the policy's plain language to require "appropriate" medical treatment. This would be determined objectively as the treatment a patient would make a reasonable decision to accept after duly considering the opinions of medical professionals. It is commonly understood that, under some circumstances, the appropriate medical treatment for some conditions may be surgical.

*Id.* at 1004.

The Henry court went to great lengths to harmonize its decision with the two major precedents that the policyholder relied on: *Heller v. Equitable Life Assurance Soc'y*, 833 F.2d 1253 (7th Cir. 1987), and *Casson v. Nationwide Ins. Co.*, 455 A.2d 361 (Del. Super. Ct. 1982). The *Henry* court distinguished the policy language at issue in *Heller* and *Casson*, elaborating:

> In *Heller*, the court refused to allow an insurer to condition a carpal tunnel syndrome-disabled

doctor's benefits on release surgery based on a policy provision requiring the insured to be "under the regular care and attendance of a physician." *Heller* found the physician's care provision required no more than regular monitoring of the insured by a physician to determine whether the disabling condition persisted.

The Heller court cited a Delaware case, *Casson v. Nationwide Ins. Co.*, as concluding "the majority view does not even require the insured to minimize his disability with medical treatment absent a specific contractual requirement, much less require an insured to submit to surgery." The *Casson* court explained more fully that the "apparent" majority view

> is based upon the principle that an insured should not be required to incur expense or risk injury or death where the insurer who drafted the contract did not incorporate such a provision. The imposition by law of such a requirement would, in effect, enlarge the terms of the policy beyond those agreed to by the parties.

Thus, *Casson* notes the majority of courts will not imply an appropriate treatment requirement (surgical or otherwise) into insurance contracts. *Heller* declined to interpret "regular care and attendance [of the insured by] a physician" to mean appropriate care for the insured's condition, or to imply an

> appropriate-care requirement into a contract it interpreted as not containing one.
>
> Neither *Heller* nor *Casson* is inconsistent with this Court's conclusion that the appropriate-care provision here creates an explicit duty to seek and accept appropriate treatment. The policy provision is broad and unambiguous, and does not enumerate the particular treatments contemplated.
>
> The insured argues appropriate-care provisions are intended only to require monitoring of the insured's condition by a physician. However, this appropriate-care provision does not merely state the insured must be under a doctor's care. It provides the insured must receive from a doctor the *appropriate* care *for* his condition. The only reasonable interpretation of this clause is that it imposes a duty on the insured to seek and accept appropriate care for his disabling condition.

*Henry*, 106 F. Supp. 2d at 1004-05 (internal citations omitted; emphasis in original). The court brushed aside Henry's policy argument that an individual, not his insurer, has the right to control his medical care. "[R]equiring an insured to adhere to the terms of his insurance contract by accepting appropriate care in order to receive contractual disability payments does not deprive the insured of the ultimate choice in his treatment," the court wrote. "[P]ublic policy is not harmed by allowing people to make contracts which provide they will receive appropriate care for disabling conditions."

*Bad Faith*

This is a subject far beyond the scope of this paper, but

Florida, like Georgia, has a bad faith statute which governs -- and is the exclusive bad faith remedy for -- all disability cases. In brief summary, Florida law contains the following primary issues:

(1) Simultaneous bad faith. No bad faith suit can be filed prior to coverage being established under the underlying contract. *Doan v. John Hancock Mut. Life*, 727 So.2d 400 (Fla. App. 1999). But in non-disability cases, there are other ways to establish coverage without litigating to the last dime. *See Plante v. USF&G*, 2004 WL 741382 (S.D. Fla. Mar. 2, 2004), *reconsid. den.* 2004 WL 1429932 (S.D. Fla., Jun. 2, 2004).

(2) Standards and defenses. Florida has no "reasonable basis" defense, and the test employed for measuring bad faith is the statutory one employed in F.S. § 624.155(1)(b), ("Not attempting in good faith to settle claims when under all the circumstances, it could and should have done so, had it acted fairly and honestly toward its insured and with due regard for her or his interests.") *State Farm Mut. Ins. Co. v. Laforet*, 658 So.2d 55 (Fla. 1995). The practical effect of this standard is that each bad faith case is a question of fact, non-resolvable on summary judgment.

(3) Safe Harbor. A statutory notice is a condition precedent to first party bad faith, and no action may be filed if the claim is paid within this period. *Talat Enterprises v. Aetna Casualty & Surety Co.*, 753 So.2d 1278 (Fla. 2000). A curious and unresolved dilemma is raised by the possibility that such a rule, operating within a consumer protection statute, may extinguish foreseeable consequence damages arising from the breach of insurance contracts.

(4) Punitive Damages. Under F.S. § 624.155(5), punitive damages can be imposed only if the actions are in reckless disregard of an insured's rights *and* are found to be a general business practice.

# When More Is Less

**Partial Disability Riders as Limitations on Total Disability Coverages**

## Prolog

If "Total Disability" is the inability to perform the substantial and material duties of your occupation, how do you know how *many* of these duties you must be unable to perform before you qualify for benefits? Is one enough? Most? Some? Several? Many? Or are you out of luck if you lost several such abilities but still retain one or two?

The policy might say, of course, but what if it doesn't? And what if you have to venture outside the basic policy coverage -- to a residual rider, say – to find the answer? These issues are resolved in some jurisdictions, but remain in play elsewhere. Authorship has its advantages, however, and one of them is picking facts that will highlight your point. So let's talk baseball.

## Introduction

A shoulder injury leaves a Major League shortstop – let's call him Casey – unable to throw to first. Casey still can get his glove under a fly; he still can bat better than .250; he still can steal bases. But he can't throw the ball.

Casey secured a disability policy back in the 1980s that provided benefits if he became "totally disabled", but the phrase does scant justice to the agent's pitch and the policy's expansive

benefits — "total" meant only that he was "not able to perform the material and substantial duties of [his] occupation." Far from the helpless concept that "total disability" might otherwise conjure, the insurer owes Casey monthly payments in a contracted-for amount, for life, if he can no longer work as a pro shortstop because of an injury or sickness. No haggling with his insurer over his alternative employability as, say, a sportscaster. No obligation to take his chances as a designated hitter. No balancing lowered income against his pre-disability salary (if sportscasting would double his salary, he collects both salary and full benefits). Just a monthly check, because the policy was sold not to replace income but to compensate by cash payments for the loss of his life's occupation if he could no longer perform even one of his material and substantial duties. And so it would, had Casey been insured solely under his basic coverage for occupational total disability.

Unfortunately for Casey, his agent slid in "extra" coverage – for a substantial additional premium – in the form of a residual disability rider. It promises a portion of the total disability benefits if Casey were to become partially disabled; that is, "unable to perform one or more of [his] important daily business duties." The insurer marketed the rider as an additional safety net. That turned out to be true — but Casey wasn't the one it protected. Under the rider, Casey would receive benefits only until he reached age 65, the benefits would end if a periodic medical checkup showed that he had recovered from the (partial) disability, and the coverage only replaced lost income rather than protecting Casey's ability to be a shortstop. That sportscaster's job now wipes out his benefit. It was, in other words, very much less coverage than he'd expected, and it held a poison pill — it contained a reference to the *number* of duties he had to be unable to perform not contained in his basic policy.

Casey filed a disability claim with his insurer, believing himself totally disabled under the policy because he is "unable to perform the material and substantial duties of [his] regular

occupation." His insurer, however, countered that he is not totally disabled because, under the definition in the rider, Casey still can perform one or more of his duties. In fact, he can do all but one of them. In sum and in short, the extra coverage that cautious Casey paid extra for stands to cost him the benefits he sought under the policy itself, because the insurer wants to read the provisions collectively.[2]

## Background

Casey is not alone. In the 1970s and 1980s, insurers promised ever-escalating levels of disability benefits in order to lure high-income policyholders like physicians and attorneys. As the insurers' aggressive marketing came home to roost, insurers were swamped with big-ticket total disability claims threatening to cost them billions -- particularly because caselaw had long held that "total" disability did *not* mean total helplessness, but only the inability to perform one or more of their material and substantial duties in the usual and customary manner.[3]

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[2] For a general discussion of the issue, and to read the source from which this base was stolen, see *McFarland v. General Am. Life Ins. Co.,* 149 F.3d 583, 587 (7th Cir. 1998). *See also* the excellent updates of all disability insurance issues contained in *Recent Developments in Health Insurance, Life Insurance, and Disability Insurance Case Law,* found in the Annual Winter issues of the Tort & Ins. L. J.

[3] *See, e.g., Hangarter v. Provident Life & Accident Ins. Co.,* 373 F.3d 998 (9th Cir. 2004); *Phoenix Home Life Mut. Ins. Co. v. Huggett*, No. CV 97-0735-PHX-EHC, 2001 WL 262726, at *1-2 (9th Cir. Mar. 16, 2001); *McFarland v. General Am. Life Ins. Co.*, 149 F.3d 583, 588 (7th Cir. 1998); *Gammill v. Provident Life & Accident Ins. Co.*, 55 S.W.3d 763, 767 (Ark. 2001); *Berkshire Life Ins. Co. v. Adelberg*, 698 So. 2d 828 (Fla. 1997); *Stender v. Provident Life & Accident Ins. Co.*, No. 98 C 1056, 2000 WL

Caselaw over the integration of total (no income component) and residual (income replacement) clauses is of relatively recent origin, essentially blossoming within the past decade. Beginning in the mid-1990s insurers began to press the negative of "unable to perform one or more of [his] important daily business duties" found in the residual rider as defining -- and, by definition, limiting the scope of -- the (otherwise unspecified) number of duties in the basic coverage. They argued that if you could perform one such business duty, you were not totally disabled.

A typical policy from the early 1980s defines "total disability" thusly:

> Total Disability means that due to Injuries or Sickness:
>
> 1. you are not able to perform the substantial and material duties of your occupation; and
> 2. you are under the care and attendance of a Physician.
>
> Your Occupation means the occupation (or occupations, if more than one) in which you are regularly engaged at the time you become disabled.

The residual disability rider on the same policy states:

> Residual Disability means that due to Injuries or

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875919, at *7-9 (N.D. Ill. June 29, 2000); *Groff v. Paul Revere Life Ins. Co.*, 887 F. Supp. 1519, 1520-21 (S.D. Fla. 1994). Contrary decisions such as *Ames v. Provident Life & Accident Ins. Co.*, 942 F. Supp. 551 (S.D. Fla. 1994) and *Danzig v. Reliance Standard Life Ins. Co.*, 668 F. Supp. 1551 (S.D. Fla. 1987) certainly exist, and this summary is not meant to be exhaustive. *See also* 10 Couch on Ins. § 147:107-108 (3d ed. 1998).

Sickness:

1. you are unable to perform one or more of your important daily business duties or you are unable to perform your usual business duties for as much time as is normally required to perform them;
2. your Loss of Monthly Income is at least 25% of your Prior Monthly Income; and
3. you are under the care and attendance of a Physician.[4]

Read together, the residual rider supplies the *number* of duties that the basic coverage leaves conspicuously unspecified, and insurers now routinely contend that those two sets of definitions should be read in conjunction, with the terms of the residual disability endorsement limiting the total disability provisions of the policy (by providing the missing reference to the number of duties).

The courts have not been persuaded.

## Analysis

*Unified definitions and analytical evolution*

Support for the proposition that total disability requires an inability to perform all the material duties rests on such cases as *Yahiro v. Northwestern Mutual Life Ins. Co.*, 168 F. Supp. 2d 511 (D. Md. 2001). *Yahiro* involved an orthopedic surgeon who, as a result of repeated and debilitating episodes of lightheadedness, nausea, and vomiting, could no longer safely perform surgery. *Id.* at

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[4] The policy language comes from Provident Life & Accident's Form 334, and was at issue in *Stender v. Provident Life & Accident Ins. Co.*, No. 98 C 1056, 2000 WL 875919 (N.D. Ill. June 29, 2000), a case we discuss at length *infra*.

512. Dr. Yahiro was insured under three occupational disability policies issued by Northwestern Mutual. Northwestern conceded that the policyholder's medical condition prevented him from performing surgery, that surgery was one principal duty of his former occupation and that his employer reduced his salary, at least in part, because of his inability to perform surgery. *Id.* at 515. According to Dr. Yahiro, surgery and operative care of patients consumed 25 percent of his professional time. *Id.*

On these facts, Dr. Yahiro moved for summary judgment on his entitlement to total disability benefits, arguing that surgery is the only principal duty of an orthopedic surgeon and that his other professional duties were merely incidental to his surgical responsibilities. *Id.* Alternatively, Dr. Yahiro argued that even if some of these non-surgical duties were "principal" duties of his former occupation, he still would be entitled to total disability benefits because he could not perform *all* the substantial and material acts necessary to the performance of his former occupation in the customary and normal way. *Id.*

Northwestern Mutual also moved for summary judgment arguing that, under its policies, a policyholder is totally disabled only if he can perform *none* of the substantial and material duties of his occupation. *Id.* In other words, the carrier claimed that Dr. Yahiro was not entitled to total disability benefits because he could still perform his non-surgical duties in his usual and customary manner.

The district court found for the insurer, reasoning that the principal duties of an orthopedist encompass more than just performing surgeries. *Id.* It then turned to the applicable policy language to determine whether Dr. Yahiro was entitled to total disability benefits where he was unable to perform one of the principal duties of his former occupation, namely performing

surgery. *Id.* at 517.

All three policies contained similar provisions – each with total and partial disability provisions contained in the primary coverage i.e., with a unified definition — as opposed to an optional rider. The first two policies read:

> Total Disability…[T]he Insured is totally disabled when he is unable to perform the principal duties of his occupation.
>
> Partial Disability….[T]he Insured is partially disabled when: (a) he is unable: -- to perform one or more of the principal duties of his occupation; or – to spend as much time at his occupation as he did before the disability started; and (b) he has at least a 20% Loss of Earned Income.

The third policy contained similar terms:

> Total Disability…[T]he Insured is totally disabled when he is unable to perform the principal duties of his occupation.
>
> If the Insured can perform one or more of the principal duties of the regular occupation, the Insured is not totally disability; however, the Insured may qualify as partially disabled.
>
> Partial Disability….[T]he Insured is partially disabled when: (a) the Insured is unable: -- to perform one or more but not all of the principal duties of the regular occupation; or – to spend as much time at the regular occupation as before the disability started; and (b) the Insured has at least a

> 20% Loss of Earned Income; and (c) the Insured is gainfully employed in an occupation.

*Id.* at 513-514.

Analyzing Northwestern's language, the district court rejected Dr. Yahiro's alternative argument that he was totally disabled under these policies because he was unable to perform one principal duty (surgery) of his former occupation, concluded that he was partially disabled under the contract language, and entered summary judgment for the insurer. *Id.* at 517.

> Plaintiff's alternative argument that he is totally disabled unless he can perform "all the substantial and material acts necessary to the performance of his former occupation," effectively eliminates the partial disability provisions contained in the policies. The policies clearly envision that where the insured "is unable to perform one or more *but not all* of the principal duties of the regular occupation," he is not totally disabled, but partially disabled.

*Id.* at 517. The court relied on *Giampa v. Trustmark Ins. Co.*, 73 F. Supp. 2d 22 (D. Mass. 1999) (essentially the first case to address in depth the contradictory and competing nature of the total and residual definitions, and holding that "insurance policies containing provisions for total and partial disability must be construed as a whole, so as to give effect to the entire contract;") [5]

[5] The district court in *Giampa* nevertheless refused to grant summary judgment in favor of the insurance carrier. That court also recognized that, but for the residual disability provision contained in the same contract, the policyholder would have been entitled to total disability benefits as a matter of law. *Giampa*, 73 F. Supp. 2d at 27. *See also, e.g., Falik v. Penn Life Mutual Ins. Co.*, 204 F.Supp. 2d 1155 (E.D. Wi, 2002) and *Conway v. Paul*

and *Dym v. Provident Life & Accident Ins. Co.*, 19 F. Supp. 2d 1147 (S.D. Cal. 1998) (same). In *Yahiro*, *Giampa* and (by silent presumption, if not in fact) *Dym*, the provisions for total and partial disability were included in the same basic contract, for which the insured had paid one premium. Balancing the interplay between the potentially contradictory total and residual disability provisions, they endorsed a construction that would give effect to the entire contract. *Yahiro*, 168 F. Supp. 2d at 1517.

These unified contract cases, however, do not translate into situations where a residual disability provision is contained in an optional endorsement requiring an additional premium. In essence, the policyholder paid additional money for a supposed benefit now being employed to limit the policies' definition of total disability. Put another way, an additional premium purchasing but a host of additional defenses for his insurance company.[6]

*Policy construction*

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*Revere Life Ins. Co.*, 2002 WL 31770489 (W.D. N.C.), *affd* 2003 WL 21730096 (4th Cir. 2003).

[6] Without the optional residual coverage, of course, the insurer can always argue that someone still able to perform one or more of their duties is not totally disabled, and that they should have bought the residual rider. But this poses an "all or nothing" alternative for the jury not much in favor amongst well-advised insurers, not to mention leaving a conspicuous gap -- and thus, an ambiguity subject to *contra proferentum* – in the basic policy's definition of the *number* of duties which must be incapable of performance to trigger total disability benefits. Without an attached alternate definition, the insurer is reduced to an effort which tries to limit a policy's terms via a definition nowhere contained in the policy. Whether this even meets the purple face test is a matter of personal taste.

An optional coverage purchased at extra cost should, *a fortiori*, be incapable of defeating coverage under the basic policy, a basic proposition punctuated by language in some residual riders: "Nothing in this provision limits the policy definition of 'Total Disability.'" Provident, whose residual rider contains that language, encountered its obvious implication in *Stender v. Provident Life & Accident Ins. Co.*, No. 98 C 1056, 2000 WL 875919, at *10 (N.D. Ill. June 29, 2000), when it argued that the optional rider for residual disability and the total disability definition should be read together to support Provident's decision to deny benefits for total disability.

Stender was employed as a "pit scalper" – one who buys and sells commodities in the noisy environment of a trading pit. *Stender*, 2000 WL 875919, at *10. A pit scalper shouts buy and sell prices until a striking price is reached as to a particular commodities contract. In 1993, after a decade of Provident coverage, Stender's career as a pit scalper ended when he could no longer hear well enough to trade in the pits and his voice had deteriorated to the point that he could no longer be heard on the trading floor. *Id.* at *2. His claim for total disability was initially honored, but later denied, though Provident admitted that Stender had a hearing loss which partially disabled him from being a commodities trader. *Id.* at *3. Challenging Stender's motion for summary judgment, Provident claimed that genuine issues of material fact existed as to Stender's occupation at the time of his disability.

Rejecting Provident's arguments, the court found it undisputed that "Stender was trading commodities from the pit at the time he became disabled and that the duties required of him were to stand in the pit shouting buy and sell prices until a striking price was reached for a given commodity contract." *Id.* at *7. The court also rejected as irrelevant Provident's contention that Stender was able to perform the duties of an off-the-floor positions trader, which, it argued, fell within the same general occupational

category: Commodities Future Trading.[7]

The court recognized that Stender's pre-disability occupation of pit trader and post-disability occupation of off-the-floor trader were similar, but confirmed his entitlement to total disability benefits because he could no longer perform the "hearing and shouting" requirements of pit trader. *Id.* at *8. The court directly addressed Provident's argument that the optional rider for residual disability and the total disability definition should be read together:

> Such an interpretation of the policy would be improper here because the policies at issue specifically prohibit using any language in the residual portion to interpret the total disability provisions. Indeed, the residual provisions specifically states: "Nothing in this provision limits the policy definition of 'total disability.'"

*Id.*, at *10. *See also Stern v. National Life Ins. Co.*, No. 00 C 4612, 2002 WL 31101684 (N.D. Ill. Sept. 20, 2002), which, on

[7] *See also Gammill v. Provident Life & Accident Ins. Co.*, 55 S.W. 3d 763 (Ark. 2001) (holding that a disability policy providing that the insured would be considered totally disabled if he were to become unable to perform substantial and material duties of his occupation would be construed in favor of the insured because policy's definition of total disability did not speak in terms of any, all, some, or the majority of the insured's duties and since different reasonable interpretations could be given this definition). Moreover, two recent federal decisions applying California law – *Hangarter v. Provident Life & Accident Ins. Co.*, 373 F.3d 998 (9th Cir. 2004) and *Gross v. UnumProvident Life Ins. Co.*, 319 F. Supp. 2d 1129 (C.D. Cal. 2004) – decline to accept insurers' arguments that the *Dym* line of cases authorized them to alchemically meld the definitions of total and residual disability.

facts virtually identical to those in *Stender*, denied the insurer's motion for summary judgment. *Accord Soll v. Provident Life & Accident Ins. Co.,* No. CIV.A.00-3670, 2002 WL 1379183 (E.D. La. June 26, 2002) ("The Court disagrees [with the insurer's position] for the reason that the policy language itself explicitly prohibits reading the two provisions *in pari materia*.").

*Ambiguity*

At minimum, the interplay of the total disability clause and the residual disability rider in these policies necessarily creates an ambiguity concerning the *number* of duties the insured must be incapable of performing. Ambiguity, of course, exists where an insurance policy provision is susceptible of more than one reasonable interpretation. *See, e.g., Auto Owners Ins. Co. v. Anderson*, 756 So. 2d 29, 34 (Fla. 2000). Under the universal doctrine of *contra proferentem*, where one reasonable interpretation provides coverage and another limits coverage, the ambiguity is interpreted liberally in favor of the insured and strictly against the insurance carrier that drafted the policy. *See, e.g., Flores v. Allstate Ins. Co.,* 819 So.2d 740, 744 (Fla. 2002); *Gammill v. Provident Life & Accident Ins. Co.,* 55 S.W. 3d 763 (Ark. 2001); *Auto-Owners Ins. Co. v. Anderson*, 756 So.2d 29 (Fla. 2000); *State Farm Fire & Cas. Co. v. CTC Dev. Corp.*, 720 So. 2d 1072, 1076 (Fla. 1998); *Berkshire Life Ins. Co. v. Adelberg*, 698 So. 2d 828 (Fla. 1997).

## Conclusion

When insurers place residual disability coverage in a rider instead of the basic policy, they have consistently been denied success in efforts to treat the rider's "one or more duties" definition as if it were part of the basic coverage. This has happened for at least three reasons: (1) the authorities relied on to "retain" the residual disability language involve policies with integrated total and partial disability coverage and, consequently, do not apply

where the partial disability coverage is created by an optional coverage; (2) including the "one or more" limitation only in optional coverage, purchased with additional premium, bars its use to restrict the basic coverage, a principle expressly recognized in the language of many riders, and (3) at the very least, the conflicting definitions create an ambiguity traditionally resolved in favor of the policyholder, since without the residual restriction a policyholder-friendly construction of a standard total disability definition will entitle a claimant to benefits if she is unable to perform one or more of her material and substantial duties in the usual and customary way.

So after all that, where's Casey? If he'd bought a policy with a unified definition of total and residual disability, or if his basic policy otherwise specified that he was not totally disabled if he could still perform even one of his material duties if he lives in the wrong state, he might be out of luck. But he still couldn't be a shortstop.

If he's in a state where the courts have addressed the rider issue and which has a bad faith remedy, he might even be paid total benefits without a judicial contest. If not, well, it depends on the ambition of his insurer and its counsel . . . unless, of course, strikeouts become so routine that the team's shortstop never has to throw to first.