

Ms. Anne Marie Narcini ,

The Product Standards Committee should not recommend adoption of a standard that permits group disability income insurance policies to deny or limit benefits otherwise payable based on the insured's "anticipated" recovery from third party tortfeasors:

1) A contractual provision allowing offset of disability income benefits against anticipated recovery from third party tortfeasors is not permitted under the law governing subrogation. Subrogation is an equitable doctrine created, in most states, by the courts.

The right of subrogation arises only when an insurer makes a payment on a loss which is the responsibility of another party/tortfeasor. The insurer is subrogated to the claim of the insured against the responsible tortfeasor in order to prevent double recovery for the loss. Subrogation law does not give rise to a right of offset for anticipated recovery for three reasons:

If payment is offset, i.e. not made, there is no right of subrogation; subrogation law grants the right to the insured's claim against the third party tortfeasor, not a right of offset; and, most important, a right of offset against anticipated recovery from a third party tortfeasor is inequitable for too many reasons to fully list here.

2) A contractual right to offset anticipated recovery from a third party tortfeasor places the insured in the inequitable position of disputing the highly uncertain outcome of the claim for loss of income. It also defeats the purpose of disability income insurance by leaving the insured with reduced or no benefits for years or even decades of litigation. It requires the insured to fund the litigation of the claim against the third party tortfeasor and requires speculative resolution of multiple areas of dispute, including whether the insured will be "Made Whole" with respect to all elements of the insured's claim (such as for medical costs, pain and suffering and the cost of prosecuting the claim) aside from the amount of the claim for loss of income.

3) The Industry Advisory Committee suggested that a right of offset for anticipated recovery from a third party tortfeasor is contemplated under the Industry Advisory Committee draft Section 9. We disagree. Section 9 appears to contemplate reduction based on the insured's first party rights to benefits under either a contractual or statutory benefit scheme. We note in particular that the Covered Person under Section 9 must be either eligible for or be entitled to the benefits on timely application. In each case the term used does not lend itself to a tort claim requiring litigation.

Items listed in Section 9 (2) that suggest to the contrary, such as Section 9 (2) (g), (n) and (o) should be revised or deleted.

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