Disability Insurance

Owner of company who suffered injury that prevented him from performing certain physical tasks at work was not totally disabled.

Hecht v Paul Revere Life Ins. Co. (2008) 168 CA4th 30, ___ CR3d ___

The insured was a "hands-on" owner of a clothing business who purchased a disability insurance policy from the insurer. Under the policy, he could receive benefits if he became totally disabled. The policy defined "total disability" as the inability to perform the important duties of the insured's occupation in the usual or customary way. The insured was involved in an automobile accident and sustained back injuries that limited his ability to perform physical labor at work. The insured was still able to work as president of his company, and his income did not suffer from the disability. In the insured's application for disability payments, his doctor declared that he was partially disabled. In the insured's suit for denial of benefits, the trial court granted the insurer's motion for summary judgment, finding that the insured was not totally disabled as a matter of law. The insured appealed.

The Second District Court of Appeal affirmed. An insured is not totally disabled if he or she is physically or mentally capable of performing a substantial portion of the work related to the employment. *Erreca v Western States Life Ins. Co.* (1942) 19 C2d 388, 396, 121 P2d 689. The insured's job did not require him to perform substantial physical labor, and these physical duties are not important for an owner of a business. Because the insured still worked every day and was able to perform the substantial and material acts necessary for his business, he was not totally disabled.

COMMENT: This case was a hard sell for the simple reason that the insured was seeking total disability benefits even though he was working full time at his old job and his income had not dropped. The insured argued that the definition of disability required the insurer to establish that he could not perform the substantial and material duties of his occupation in the "usual and customary" way. Although the insured was not expected to work in chronic pain, his physical problems only prohibited him from performing some of his duties. Total disability benefits are not payable simply because an insured cannot perform some incidental duties of the job. A contrary example would be a surgeon who spends only 10 percent of his or her time in surgery, but whose income is based entirely on the ability to perform surgery. If the surgeon could not perform surgery, but was able to do the other 90 percent of the work, the surgeon would still be considered totally disabled. Even though the amount of time spent on surgery is a small percentage of the total time worked, the surgeon would be unable to perform "substantial and material" duties of the occupation.—*Arnold R. Levinson*

COMMENT: The trial court and court of appeal clearly got it right on this one. As Mr. Levinson notes, an insured seeking to establish total disability is going to have a hard time if he is still able to work full time and he has not suf-

fered a loss of income. Although the insured's *personal* working style was such that he involved himself in all facets of the business—including, quite literally, the heavy lifting—and though he was limited in his ability to perform certain of his own "usual and customary" duties after the accident, that did not render him "totally disabled" within the meaning of the controlling *Erreca* decision. Those duties , the court determined, "cannot reasonably be said to be 'important'" for someone in the insured's position in the company and thus did not affect the analysis.

Although not saying so explicitly, the court appears to have applied an objective standard in determining what constitutes the "substantial and material acts necessary to the prosecution of the [insured's] business":

> We agree that there are contested issues of fact concerning whether or not appellant can physically perform some of his job functions in the same way he did prior to the accident. Appellant was a "hands on" business owner who frequently did physical labor. Now, he cannot. This does not defeat summary judgment. Even if it were shown that all owners of retail clothing businesses performed "hands on" labor, it would not make a difference. It would make a difference if appellant's job required him to perform substantial physical labor. It does not.

Although it's a little difficult to know what to make of the court's determination that it wouldn't matter if everyone in the insured's position performed "hands on" labor—wouldn't that go a long way toward establishing that such labor was, in fact, a job "requirement?" The upshot is that the insured's personal work style will not be the litmus test for determining the "substantial and material" elements of the insured's job.—*Susan M. Popik*