SUPREME COURT OF FLORIDA

CASE NO. 89,128

[USDC No. 9 1-54 1 -CV-UUB]

BRUCE ADELBERG

Appellee

v.

BERKSHIRE LIFE INSURANCE COMPANY

Appellant

Certified Question From
The United States Court Of Appeals
For The Eleventh Circuit

ANSWER BRIEF OF APPELLEE

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STATEMENT OF THE FACTS

Adelberg has been insured by Berkshire under disability insurance policies since the 1960s. RS-3 12.[1] Over the years, Adelberg timely made all premium payments and never presented a claim. RS-203, RS-325. Under the first Berkshire policy purchased by Adelberg, total disability was defined as "your inability to engage in your occupation . . ." R-290-R-292. Subsequently, Berkshire changed the language in the policy defining total disability. RS-291, Adelberg received letters from Berkshire indicating that they were making "improvements" in the policy. RS-292, RX-3 14, Rl-4 1- 17. One of these improvements was a change in the definition of total disability during the first ten years of the disability. R8-292, Rl-4 1-17. The "improved" policy language defines total disability as "[y]our inability to perform the material and substantial duties of your occupation." Id. In Berkshire's letter to Adelberg, the impact of this language change is explained: "This means that you no longer have to be unable to perform **all** the duties of your occupation to be considered disabled. You could be entitled to benefits for up to ten years if you were unable to perform your material and substantial duties." Rl-4 1- 17, RX-293 . After ten years of total disability, the definition of total disability changes from "Your occupation" and broadens to the "inability to engage in **any gainful occupation** in which [the insured] might reasonably be expected to engage with due regard for [his] education, training and experience and prior

[1] Although cognizant of the rule, the absence of essential facts and mixture with irrelevant facts leads Adelberg to set forth this summary rather than simply try to point out areas of disagreement.

economic status." R8-291, R8-308 (emphasis added). The term "occupation" is undefined in the policy. Rl-57-5, Rl-53-124.

Adelberg worked as a diamond setter when he obtained the first policies. R8-3 10. In 1970 he left the diamond setting business and started a new career working in the export business as a commodities broker. R8-3 12 to 3 13. This new occupation brought a larger income so he increased the amount of disability insurance with Berkshire and was issued two new "Executive" classification policies, available only to professionals, with a total disability benefit payable of $3,700 per month. These are the policies at issue. R8-3 13 to 3 14. It was agreed the relevant occupation under the policy was the insured's occupation at the time of injury. R6- 11. These changes in occupation need not be reported so long as the insured remained in the "Executive" classification.

Adelberg's employer in the export business went into bankruptcy. R8-3 15. In 1986, Adelberg obtained a license and began to work full time as a yacht salesman for a licensed yacht broker. R8-3 16 and 3 17, Florida Yacht and Ship Brokers' Act, §326.002(3), Fla. Stat. During his four and one-half year tenure as a yacht salesman, Adelberg was very successful, selling several large new and used boats. R8-317, 3 19. Adelberg's employer described him as in the top ten percent of yacht salesmen with regard to experience and productivity. R7-111.

As a yacht salesman, Adelberg was required to visit and have firsthand knowledge of a boat before showing it to potential clients. R7-122, R8-3 18. In order to get this firsthand

knowledge, a yacht salesman must board the boat (which is sometimes out of water or not easily accessible by a dock), go through the boat in detail, requiring crawling, bending and climbing interior and exterior ladders. R7-122, R7-123, R7-125, R8-342 to 346.

Adelberg injured his knee when he fell in February 1990 as he was on his way to a boat show in Toronto, Canada. R8-326. He first sought medical treatment for this condition on April 17, 1990. R3-164-12. His primary care physician, Dr. Weiner, stated his opinion that Adelberg was totally disabled from doing his duties as a yacht salesman at that time. R3-164-29, R3-164-39. Adelberg did not take on any new customers or sell another boat after April 17, 1990. R8-328, R8-327.

Berkshire denied benefits prior to July 17, 1990, the date of Adelberg's first knee surgery, due to late notice of the claim. R8-216, R8-257 and 258. It began paying total disability benefits as of that date after applying the 30 day waiting period. R8-255 to 256. Adelberg notified Berkshire that he had recovered and was returning to work effective October 1, 1990. R-8-257, R8-330, R8-334. Benefits were terminated on October 1, 1990 and Berkshire has not paid Adelberg disability benefits for any period subsequent to that date. R8-257, R8-294.

On or about October 28, 1990 Adelberg reinjured his knee while working at his normal duties as a yacht salesman at the Miami boat show. R8-327, R8-336, R8-34 1. On November 7, 1990 Adelberg notified Berkshire that he had reinjured his knee and was totally disabled as of October 28. RX-284, R8-340, R9-431. After the October 1990 incident,

Adelberg was unable to perform his duties as a yacht salesman. R8-336 to 337. Adelberg had a second knee operation on December 27, 1990. R8-227, R8-340. In January 1991, Adelberg's orthopedic surgeon, Dr. Dunn, recommended that he avoid bending, crouching, kneeling, climbing ladders and pivoting in tight quarters and recommended that Adelberg cease working as a yacht salesman permanently. R8-232, R8-233, R8-247. In his doctor's opinion, Adelberg was disabled in January 199 1 from doing the material and substantial duties of a yacht salesman on a permanent basis. R8-23 1 to 234, R8-238.[2]

Berkshire determined that Adelberg was not prevented from performing the material and substantial duties of his occupation and denied benefits. R8-297, R8-307. Berkshire defined Adelberg's occupation as "salesman" for purposes of their decision whether or not to pay the claim. R8-307.

Physically unable to continue his work as a yacht salesman, Adelberg obtained employment selling freight space on long-haul tractor trailer trucks in January 199 1. R8-339 to 230, R8-348.

Adelberg filed a motion for partial summary judgment in which argument was presented to the court on two issues: 1) that Adelberg's "occupation" for purposes of the insurance policy was "yacht salesman" and 2) that Adelberg was totally disabled in his occupation for purposes of the policy. Rl-4 1-6, Rl-4 1-9. Berkshire's opposition to the

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[2] No opposing medical testimony was presented at trial nor was the jury finding of total disability as a yacht salesman appealed.

motion for partial summary judgment argued a broader definition of Adelberg's occupation under the policy -- "salesman." R1-48- 12. Adelberg's motion for partial summary judgment was denied by Judge Moreno on April 27, 1992 who concluded there were unspecified factual issues involved. R2-60- 1.

At the beginning of trial, Judge Ungaro-Benages revisited the first issue of Adelberg's motion for partial summary judgment -- the definition of Adelberg's occupation under the insurance policy. R6-2 and 11. Judge Ungaro Benages advised counsel that unless there was an argument that "yacht salesman" was not Adelberg's regular occupation at the time he became disabled, the court would rule as a matter of law that "occupation" in the policy refers to Adelberg's occupation at the time he became disabled, "yacht salesman." R6-2, R6-5, R6- 11. Berkshire acknowledged that there was "no evidence that he was selling anything other than yachts at the time," reiterated their position that Adelberg was a "salesman" who happened to be selling yachts, but presented no argument to the court that Adelberg's regular occupation at the time of his disability was anything other than yacht salesman. R6- 11 and 12. The trial court granted the motion and also specifically found that evidence relating to Adelberg's post-disability income was not relevant and highly prejudicial and held that evidence relating to such income would not be introduced. R6-6, 7 and 10.

Standard of Review

"Under Florida law, interpretation of an insurance contract, including determination and resolution of ambiguity, is a matter of law." Dahl-Eimers v. Mutual of Omaha Life Ins.

Co., 986 F.2d 1379,381 (11th Cir. 1993) cert. den., 114 S.Ct. 440,126 L.Ed.2d 374 (1993); Sproles v. American States Ins. Co., 578 So. 2d 482,484 (Fla. 5th DCA 1991).

SUMMARY OF ARGUMENT

The question presented before this Court is whether an insurance company is bound by the terms and conditions of the disability policy it wrote and Adelberg purchased, or can it adopt more restrictive terms and conditions after the loss to avoid the claim. Here, the term "occupation" could have been defined by Berkshire using as narrow or precise a defmition as they wanted. Having failed to do so, where two alternative reasonable interpretations are presented, one affording coverage and one not, the law is clear that the insurer is bound by the interpretation affording coverage. Thus, if this Court concludes, as it must, that Adelberg's interpretation of the term "occupation" to mean his employment at the time of the accident as a licensed yacht salesman, then the judgment in his favor must be affirmed and the certified question answered by holding that the term "occupation" where it is undefined in an occupational disability policy should be construed narrowly as referring to one's regular business or employment considering that which principally takes up one's time, thoughts and energies at the time of injury.[3]

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[3] In its opinion, the Eleventh Circuit Court of Appeals indicated it did not intend the particular phrasing of the question to limit the court's consideration of the problem posed. Appellee respectfully suggests the wording of the certified question is prejudicially narrow "precisely (and only) the job held." Obviously the focus is on one's occupation, not simply one's job. One can be hired for a multitude of jobs while still pursuing the occupation of yacht salesman. Appellant also objects to the court's reference to a job "producing comparable income." By this reference, the court is obviously demonstrating a confusion with an income replacement policy. Nowhere in Berkshire's

ARGUMENT

The fundamental disagreement between the parties framed by the certified question translates into a question of law for the Court of how broadly one construes the undefmed term "occupation" for purposes of these policies. Berkshire contends that Adelberg was a "salesman." As long as he could sell anything, be it yachts or pencils, he was not disabled in his "occupation." R8-293. In contrast, Adelberg contends his occupation was "yacht salesman." R8-5.

I. IF THE UNDEFINED TERM "OCCUPATION" IS AMBIGUOUS, THE COURT MUST ADOPT THE DEFINITION MOST FAVORABLE TO THE INSURED AND IN FAVOR OF COVERAGE.

This case represents a classic example of bait and switch by an insurance company. When they sold this product, they avoided the use of any of the common restrictions on disability coverage utilized in the industry to avoid losses so they could command a top dollar premium for a "champagne" product. Now when the claim comes in, they ask this Court to read in, as a matter of law, all the restricted terms and conditions they failed to include to allow them to avoid coverage under a "beer" policy. To do so not only flies in the face of equity, it would be to ignore a long established principle of construction of insurance policies in the State of Florida. Quite simply, if a policy term is undefined, the law holds it

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definition of "total disability" is there any reference to post-injury income.

should be given its plain, ordinary meaning construing any ambiguities against the insurance company. Dahl-Eimers v. Mutual of Omaha Life Ins. Co.. 986 F.2d 1379, 1381-82 (1 1th Cir. 1993); King v. Allstate Ins. Co., 906 F.2d 1537, 154 1-42 (1 lth Cir. 1990); Certain British Underwriters at Lloyds v. Jet Charter Service, 789 F.2d 1534, 1536 (1 lth Cir. 1986); Airmanshin. Inc. v. U.S. Aviation Underwriters. Inc., 559 So. 2d 89, 91 (Fla. 3d DCA 1990), *rev. denied* (Fla. 1990).

The term "occupation" is not defined in Berkshire's policy. For this major oversight in an occupational disability policy there is no question that it is Berkshire which bears the responsibility and should bear the consequences. Since this policy is a contract of adhesion written by the insurer, any ambiguity in the language caused by a failure to define a term must be construed against Berkshire. Airmanshin, 559 So, 2d at 91 . Under Florida law, interpretation of insurance contracts, including determinations and resolutions of ambiguity, is a matter of law. Dahl-Eimers, 986 F.2d at 138 1; Sproles v. American States Ins. Co,, 578 So. 2d 482,484 (Fla. 5th DCA 1991).

This case could have been avoided by numerous common alternatives the insurer could have taken had it so chosen:

(1) The insurer professes an outrage at "double dipping." Never mind that Adelberg is only asking for the benefits Berkshire promised and that he paid for. Berkshire could have written this as a "income replacement" policy instead of a "total disability" policy. This type of policy has a much cheaper premium because the insured must demonstrate not

only the injury but also the loss of income and benefits are provided on a basis proportionate to the loss of income. This is analogous to Berkshire's "partial disability" language, not its "total disability" language. Instead they offered and sold a much more valuable product whose definition required to recover was, "your inability to perform the material and substantial duties of your occupation." Post-disability income is irrelevant under this definition, but now Berkshire wants this Court to change its policy definition after the fact and make it an income replacement policy. Berkshire asks this Court, as a matter of law, to read into the policy a requirement of loss of income, as a matter of law. This is simply "bait and switch."

(2) Berkshire could have defined total disability as the "inability to engage in any gainful occupation in which [the insured] might reasonable be expected to engage with due regard for [his] education, training and experience and prior economic status." *Compare* Papczynski v. Connecticut General Life Ins. Co., 730 F. Supp. 410, 413 (M.D.Fla. 1990). In fact, these type of policies are hybrid in many ways between a pure occupational disability policy, such as Adelberg's, and a general disability policy which requires the insured to be disabled from any occupation. The latter of course is a much cheaper premium policy as well, given the much more difficult task of qualifying for disability under that type of policy. It should be noted that after ten years, Berkshire's definition of "total disability" in fact changes to require the insured to be disabled from any gainful occupation. At that time, Adelberg will no longer qualify as totally disabled under this policy. Thus, we are only

talking ten years of benefits. Now, having accepted the premium for their much touted "improved" language, they want this Court as a matter of law to "unimprove" their product and bar this claim. Berkshire wants this Court to alter, as a matter of law, the policy to delete the definition for the first 10 years and only use the second definition for both periods. Again, this is simply "bait and switch."

(3) Berkshire could have required the applicant to list a specific occupation and job duties any time there was a change in the occupation, similar to the way they require that information on the initial application. *C.f.*, Smith v. Eauitable Life Assur. Soc. of U.S., 67 F.3d 6 11, 6 17 (7th Cir. 1995). Instead, under their underwriting procedures, no update was required under this "executive" policy so long as the insured remained a professional, a classification grouping that includes doctors and lawyers. It is undisputed that the policy automatically applies to the insured's occupation at the time of injury. One has to wonder if Mr. Adelberg was working as a lawyer today if Berkshire would be arguing that he was in the same "occupation" because it is in the same classification. Now, having designed and sold a product that they told their insureds would automatically cover any change of occupation so long as it was within the classification, they now ask this Court, as a matter of law, to adopt a meaningless broad interpretation of the term "occupation" so as to make Adelberg's purchase of this policy a total waste of his money. Again, "bait and switch."

A similar issue was presented in the case of Dahl-Eimerg, *supra*. An undefined term within an insurance policy resulted in two different interpretations by the insurer and their

insured. At issue in Dahl-Eimers was a major medical expense policy that failed to define the term "experimental." Id. at 986; F.2d at 1380. The District Court held that the term was not ambiguous as a matter of law and the plaintiff appealed. On appeal, the Eleventh Circuit noted that "differing interpretations of the same provision is evidence of ambiguity, particularly when a term is not explicitly defined or clarified by the policy." Id. at 1382. Additionally, although the failure to define a term does not create an ambiguity per se, "[n]onetheless, the insurance company cannot claim the narrow and favorable interpretation that its determination, alone, is controlling." Id.; see *also* National Merchandise v. United Services Automobile Association, 400 So. 2d 526, 530 (Fla. 1st DCA 1981).

In the instant case, Berkshire is making the same argument as Dahl-Eimers' insurer. Berkshire chose not to define "occupation" and then argues that the broad interpretation ("salesman" as opposed to "yacht salesman") is the only acceptable definition. This it cannot do. The case of Ohio National Life Assurance Corp. v. Crampton, 822 F. Supp. 1230 (E.D.Va. 1993) presented an analogous situation where an insurance company was trying to create an exclusion to deny coverage after the fact. There the court, interpreting Virginia law which is quite similar to Florida's with regard to the interpretation of insurance contracts, held that insurers have the capacity to exclude certain types of disabilities from coverage under their policy. But they cannot come in after the fact and ask the court to rewrite the contract for insurance because they later wind up regretting the decision to remove certain exclusions from their policies. In short, had Berkshire wanted to define Bruce Adelberg's

occupation as "your occupation at the time of the disability and all similar positions of the same general character in the field in which he works, unless he is employed in a field with well-recognized and rigorously defined professional subspecialties," they could have done so and should have done so. Failing to do so, they cannot claim the benefit of this restricted definition.

Although not directly on point, the case of Groff v, Paul Revere Life Ins. Co,., 887 F. Supp. 1519 (S.D.Fla. 1994) is instructive. It notes that under Florida law, "total disability" does not mean helplessness but contemplates a disability to perform all the substantial material acts necessary to the insured's regular occupation in a customary and usual manner. 887 F. Supp. at 1520. In Groff, the insurance company tried to show that the physician was not totally disabled because he continued his office practice in his specialty by examining patients, supervising office staff, and making post-operative visits. However, the court noted that the plaintiff was no longer able to perform major head and neck cancer surgeries unassisted, and that these surgeries constituted a major portion of his practice. Thus, he was totally disabled under the policy even though he continued to practice in his medical specialty and, presumably, was making a substantial income doing so. Thus, the Groth court's summary of Florida law is directly contrary to the position taken by Berkshire.

Similarly, in Oglesby v. Penn Mutual Life Ins. Co,, 877 F. Supp. 872 (D.Del. 1994), applying Delaware law, Penn Mutual tried to persuade the court that the phrase "regular occupation" should be interpreted as requiring attention to the amount of income earned by

the insured. The court noted that the Penn Mutual insurance policy, like the Berkshire policy, made no reference to income. Absent the mention of income, there is no reasonable basis for defining "regular occupation" based on the insured's income. 877 F. Supp. at 880, fn. 3. They went on to hold that the plaintiffs "regular occupation" was that of a "interventional and vascular radiologist, and not a general radiologist," where the plaintiffs usual work was that of an interventional and vascular radiologist. Id. at 88 1.

The Ninth Circuit Court of Appeals tackled a similar issue recently in McClure v. Life Ins. Co. of North America, 84 F.3d 1129 (9th Cir. 1996). There, the court, applying federal law under the ERISA statute, held that the term "occupation" referred to the duties of his or her "position." 84 F.3d at 1134. Clearly, Mr. Adelberg's "position" at the time of the loss was that of a yacht salesman,

This Court addressed an analogous issue in State Farm Mutual Ins. Co. v. Pridgen, 498 So. 2d 1245 (Fla. 1986) with regard to an automobile insurance policy that failed to define "theft." Id. at 1247. The Court noted that an undefined term, "will be interpreted liberally in favor of the insured." Id. at 1247-48, fn. 3.

Insurance policies are construed liberally in favor of the insured and strictly against the insurer and any ambiguity must be construed strictly in favor of the insured. Grissom v. Commercial Union Ins. Co., 6 10 So. 2d 1299, 1304 (Fla. 1st DCA 1992). Clearly, evidence of ambiguity in this undefined term is contained in Berkshire's and Adelberg's appellate argument. Each party argues a different "common usage" of the term and cites cases in

support of the different definitions. As the court reasoned in Dahl-Eimers, "[t]he existence of differing interpretations of the term . . . provides further evidence of a genuine ambiguity." 986 F.2d at 1383. See *also,* Grissom, 610 So. 2d at 1304 (the fact of diverse definitions of "accident" within case law is "sufficient in itself to belie the notion that the policy language is clear and unambiguous").

Another jurisdiction which has addressed this issue is the Northern District of Illinois in Rahman v. Paul Revere Life Ins. Co.. Inc., 684 F. Supp. 192 (N.D.Ill. 1988). A total disability policy was again at issue. There, the insurer had failed to define the term "regular occupation" in the policy. Id. at 195. The plaintiff sustained an injury to his foot which prevented him from running to his patients, an essential aspect of his position as a cardiologist who specialized in the treatment of hospitalized patients requiring emergency cardiac care. Id. at 193. The plaintiff argued that his "regular occupation" was the more narrowly defined "emergency cardiologist" and the insurer asserted that the definition should be broader, "cardiologist." Id. at 194-95. Since there was no definition of "regular occupation" in the policy, the ambiguity concerning the definition was resolved by the court in favor of the insured. Id. at 195. Accordingly, the court concluded that the plaintiffs "regular occupation" was the narrower position of an emergency cardiologist, instead of the broad field of cardiology in general. This conclusion is obviously consistent with those opinions in Groff and Oglesby described *infra*. It is interesting to note that if Berkshire's definition were applied, the question would not be whether or not these physicians could

work in their subspecialty, but whether they could work as physicians at all. Obviously, each of them is a "physician" every bit as much as Mr. Adelberg was a "salesman,"

As discussed below, Adelberg believes that the plain, ordinary definition of the term "occupation" supports his position. However, even if Berkshire's interpretation is possible as well, the judgment should be against the insurer where the term is undefined and unclarified and the insurer and the insured present two plausible interpretations of the same provision.

II. WHERE THE TERM "OCCUPATION" IS UNDEFINED IN AN OCCUPATIONAL DISABILITY POLICY, IT SHOULD BE CONSTRUED NARROWLY AS REFERRING TO ONE'S REGULAR BUSINESS OR EMPLOYMENT CONSIDERING THAT WHICH PRINCIPALLY TAKES UP ONE'S TIME, THOUGHTS AND ENERGIES AT THE TIME OF INJURY.

This occupational disability policy, unlike general disability policies or income replacement policies, does not require disability from any occupation that the person is qualified for by education, training, experience, etc.[4] Rather, it only requires the insured to be unable to perform the material and substantial duties of "Your occupation." - 17

[4] Again, the policy definition does change after ten years to, "inability to engage in any gainful occupation in which [the insured] might reasonably be expected to engage with due regard for [his] education, training and experience and prior economic status. While strictly irrelevant to this appeal, it blatantly shows the alteration Berkshire proposes.

(emphasis added). It is uncontested that the insured was employed as a licensed yacht salesman at the time of disability. R1-57-5.

In granting the partial summary judgment, Judge Ungaro Benages cited "Appleman on Insurance" as authority for ruling, as a matter of law, that Adelberg's occupation at the time of disability controlled as the definition of "occupation" under the policy. R6-2. In Appleman's section entitled "Disability Relative to Customary Occupation," the definition of "occupation" in occupational disability insurance policies is explained as:

> The occupation to which such contracts refer in promising indemnity when the insured is unable to carry on an occupation refers to the occupation which the insured was carrying on at the time he was injured.

1C John Alan Appleman, Insurance Law and Practice, §671 (1981). There was no evidence presented that Adelberg was anything other than a yacht salesman at the time he was injured. R6-12. At the time of the trial judge's oral ruling that Adelberg was a yacht salesman as a matter of law, she advised counsel that, if there was an argument that Adelberg's occupation was not yacht salesman at the time of disability, then the issue of his regular occupation would be litigated. R6-5, R6-11. Berkshire's counsel did not and could not argue otherwise. Id.

Under the Florida Yacht and Ship Brokers' Act (§§326.001-326.006, Fla. Stat.), one cannot sell yachts without being licensed by the State of Florida as a "Broker" (§326.002(1))

or "Salesman" (§326.002(3)).[5] Nor can one sell yachts except as a licensed yacht broker or as a licensed yacht salesman under the employment of a licensed yacht broker. Thus, the "occupation" of "yacht salesman" is specifically recognized by Florida Statute. For four years prior to his injury Adelberg held a yacht salesman's license and worked exclusively selling yachts for a yacht broker as a yacht salesman.

Black's Law Dictionary, Sixth Edition, defines one's occupation as:

> That which principally takes up one's time, thoughts, and energy, especially one's regular business or employment; ..."

Since Bruce Adelberg's regular business or employment was selling yachts, the "plain and ordinary" meaning of his "occupation" would be "yacht salesman." Berkshire's contention that he was a "salesman" and not a "yacht salesman" does not make sense. During this period, Adelberg was involved in the sale of yachts, not just any products or services. Berkshire admitted during the oral ruling on Adelberg's motion for summary judgment that "[t]here is no evidence that he was selling anything other than yachts at the time." R6-12. It was the sale of yachts that was his regular business or employment. In fact, "salesman" is such a broad category that this interpretation effectively defeats the purpose of the policy to compensate Adelberg if he can no longer do his regular job. Under Berkshire's definition,

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[5] Berkshire makes the rather disingenuous argument that the state licenses so many occupations that it is irrelevant. To the contrary, in trying to determine the plain and ordinary meaning of the term, what better source than the governmental body specifically required to make these distinctions?

Adelberg is not disabled if he can sell anything -- yachts, freight space or pencils on the street corner!

It is clear that the test under this disability policy is whether or not the individual is disabled from performing the substantial and material duties of his occupation in the usual and customary manner. Thus, there would be coverage whether or not it affected his ability to engage in some other occupation. Gonzales v. Prudential Ins. Co. of America, 901 F.2d 446,450 (5th Cir. 1990); Felker v. Aetna Ins. Co., 234 So. 2d 758 (La.App. 1970).

Consistent with Judge Ungaro Benages' conclusion, the definitions she relied on and the case law cited under issue one, the answer to the certified question can now be framed. The proper definition of the term "occupation" when it is undefined in an occupational disability policy is to construe it narrowly as referring to one's regular business or employment considering that which principally takes up one's time, thoughts and energies at the time of injury.

This same issue was before the Louisiana Supreme Court in Patterson v. Metropolitan Life Ins. Co., 194 La. 106, 193 So. 478 (1939). In Patterson, the plaintiff was an "oil-field" laborer who suffered deafness. The insurer contended that the man's occupation was "laborer" and he could work as a "laborer" in another field although he could not work as an "oil-field laborer." This argument is directly parallel to Berkshire's contention in this case that Adelberg's occupation was "salesman" and he could work as a "occupation" in another field although he cannot work as a "yacht salesman."

Rejecting this argument, the Patterson court held the plaintiff was permanently and totally disabled in his "occupation" as an "oil-field laborer" even though he might secure employment as a "laborer" in a field other than the oil field. Id. at 111. Thus, on facts directly parallel, in determining the person's "occupation" the courts look at what principally took up his time, thoughts and energies, not simply the most generic label that could be applied.

Obviously, the fact that a "yacht salesman" is a specially licensed occupational category distinct from other "salesman" in the State of Florida creates even a greater distinction than present between an "oil-field laborer" and a "laborer." Without the occupational license, no other "salesman" is allowed to act as a "yacht salesman." Bruce Adelberg was clearly working in his occupation of "yacht salesman" at the time he was injured and reinjured.[6]

Contrary to Berkshire's assertions, Dawes v. First Unum Life Ins. Co., 85 1 F. Supp. 118 (S.D.N.Y. 1994) does not address the particular narrow issue on appeal as the facts surrounding the case are totally distinguishable. In fact, Dawes actually supports Adelberg's position that the court properly acted to interpret the term "occupation" as a matter of law. The main thrust of Dawes involved the right to future benefits and the appropriate standard of review based on the ERISA statute. Id. The Dawes parties were disputing whether

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[6] Berkshire seems to suggest Adelberg used the injury as an excuse to quit. Not only is this contrary to the jury verdict, it is factually contradicted by his effort to come back after the first surgery only to reinjure the knee while working necessitating the second surgery.

eligibility for future benefits was a question of law or fact in an ERISA case. Id. at 120. Although the court found that the question of future benefits was one for the jury, it addressed the issue of the definition of "regular occupation" as a matter of law. Id. at 121-122. In Dawes, the occupational insurance policy defined disability as the insured's inability to perform the duties of his "regular occupation." Id. at 121. The court defined "regular occupation," as a matter of law, basing its analysis on previous New York decisions consistent with Adelberg's position: Niccoli v. Monarch Life Ins. Co., 70 Misc. 2d 147, 332 N.Y.S.2d 803 (Sup.Ct. 1972) (physician who specialized in gynecological surgery and obstetrics unable to engage in "regular occupation" even when subsequent position was Director of Family Planning and Sex Education in hospital); Dixon v. Pacific Mutual Life Ins. Co., 268 F.2d 812 (2d Cir. 1959) (surgeon entitled to benefit under occupational insurance policy even though he obtained position requiring physician's license as hospital administrator); Waldman v. Mutual Life Ins. Co., 252 A.D. 448,299 N.Y.S. 490 (2d Dep't 1937) (error to give jury instruction defining occupation as that in which insured "had been trained and worked during his working life, . . . or in work of the same general character . . ."). Berkshire's *ex post facto* suggested definition of "occupation" is similar to Waldman's "general character" definition which was deemed error. Dawes stands for the narrow proposition that the definition of occupation is a matter of law and relates to the specific duties, skills and activities of the particular job the individual occupies at the time of injury.

Berkshire also cites Texas Co. v. Amos, 81 So. 471, 472 (Fla. 1919), a case interpreting the legislative intent with regard to a license tax as authority for the common usage definition of "occupation" as "the business which one principally engages in." Id. Clearly, Adelberg was principally engaged in the business of yacht sales at the time of his disability, a fact that Berkshire does not contest. Therefore, although Amos, does not deal with either an insurance or contract interpretation issue, its common usage definition of occupation is in line with the trial court's ruling and Adelberg's position.

III. BERKSHIRE RELIES ON AUTHORITIES THAT DO NOT ADDRESS THE NARROW ISSUE ON APPEAL.

Berkshire's incongruous argument is that Adelberg was a salesman who sold yachts yet his "occupation" was not a yacht salesman. A review of Berkshire's citations in support of this argument belies a host of cases which do not even speak to the issue on appeal, the definition of "occupation" within an occupational disability policy.

Berkshire's cases involve issues that are irrelevant to the issue on appeal and generally fall into three categories: a) cases deciding the issue of disability rather than occupation under the policies; b) cases involving general disability policies rather than occupational disability policies; and c) cases turning on the issue of income.

A. CASE LAW INVOLVING THE DETERMINATION OF DISABILITY IS INAPPLICABLE TO THE ISSUE ON APPEAL,

Berkshire's broad implication that Adelberg's occupation is a salesman simply because one must look at "the insured's occupation as a whole in order to determine whether the insured can no longer perform his occupation" is inapposite. The cases cited for this proposition do not deal in the slightest with the definition of "occupation," but rather with the ability of the insured to perform the duties of his occupation. This is a completely separate issue than that on appeal and one which was tried by the jury and not appealed. Obviously, one must define the insured's occupation before addressing the issue of whether or not the insured is able to perform this occupation.

In Danzig v. Reliance Standard Life Ins. Co., 668 F. Supp. 1551 (S.D. Fla, 1987), the definition of "occupation" was not at issue. However, the court's conclusion of law indicates that his occupation was a "Distribution Clerk," certainly a more narrow definition than "clerk." Id. at 1554. In addition, the policy at issue in Danzig was more restrictive in its definition of "total disability" than the policy at issue. The Danzig policy required that the insured be "completely unable to perform each and every duty pertaining to his occupation. Id. at 1553. In Danzig, the court used the definition "Distribution Clerk" and looked at that occupation as a whole. Id. at 1554. In the instant case, the jury looked at Adelberg's occupation of "yacht salesman" as a whole on the issue of disability. This is not the same

issue as determining the definition of "occupation." Extensive evidence was presented to the jury on whether Adelberg could perform the material and substantial duties of a yacht salesman. R7-121 to 130, R8-32 1 to 324, R8-340 to 346. The jury was presented with evidence that the occupation required traveling, communication with clients, and sea trials as well as specific physical requirements. Id. Evidence was introduced concerning the duties of his current occupation, freight space broker, so the jury could compare and see if Adelberg was disabled from his former occupation. R8-348, R8-383 to 384. The instant appeal does not turn on the issue of whether or not Adelberg was disabled, but rather whether his occupation was a yacht salesman at the time of injury, as a matter of law. Therefore, cases cited for the proposition that an insured was not disabled are inapposite to the issue before this Court.

B. CASE LAW INTERPRETING GENERAL LIABILITY POLICIES IS IRRELEVANT TO THE ISSUE ON APPEAL WHICH INVOLVES AN OCCUPATIONAL DISABILITY POLICY.

Berkshire's reference to case law interpreting "any occupation" policies is inapplicable to the narrow issue before this Court. The policy at issue specifically defines "total disability" to the insured as "[y]our inability to perform the material and substantial duties of your occupation." R8-292, Rl-41-17. Interestingly, Berkshire's corporate representative testified that Berkshire interprets the policy as an "any occupation" even though the word

"any" is not contained in the definition of "total disability" in the applicable provision of the policy. R9-5 16. This liberalized policy language should not be compared with language such as that found in New York Life Ins. Co. v. Lecks, 165 So. 50 (Fla. 1936) where total disability was defined as injury that prevents an insured "from engaging in any occupation whatsoever for remuneration or profit." Id. at 51-52 (c.f. Berkshire's definition of total disability after ten years). Obviously, the definition of "any occupation" is not analogous to the definition of "your occupation." Unfortunately, Berkshire seems to equate the two.

Berkshire totally distorts the holding in Kirkpatrick v. United Fed. of Postal Cl. Ben. Kirkpatrick, 11a App. 2d 13, 213 N.E.2d 636 (1965) is with the determination of disability under a policy, not the issue on appeal. See 3(a), *supra*. In addition, the Kirkpatrick policy provided benefits when the insured was "unable to perform the duties of his regular employment or any other emnlovment. 213 N.E.2d at 640. In Kirkpatrick, the plaintiff was a Postal Transportation Clerk who sustained a back injury, claiming disability. Id. at 637,640. The defendant argued that the plaintiff was not disabled because he was attending school at the time of trial and should be considered "employed" as a student, thereby excluded from benefits under the "other employment" language of the policy. Id. at 64 1. The court held that the plaintiff was "totally and permanently disabled within the meaning of the agreement if he was unable to perform the duties of his regular occupation or any similar emplovment" and affirmed the judgment rendered for plaintiff. Id. at 641. Berkshire misconstrues the opinion and touts the use of this language as a "test"

indicating that Adelberg must also be unable to engage in any similar employment in order to be considered disabled. Again, this totally misses the mark and is irrelevant to the issue on appeal. Kirkpatrick does not address the definition of "occupation" and the court's use of the phrase "any similar employment" merely narrowed the policy language from "any other employment." Id. at 640-641. Berkshire's occupational disability policy does not contain the extended "any other employment" language and therefore the so-called "Kirkpatrick test" has no application or relevance to the issue on appeal,

C. CASE LAW INVOLVING AN ANALYSIS OF THE INSURED'S INCOME IS NOT RELEVANT TO THE ISSUE ON APPEAL AS BERKSHIRE'S POLICY IS NOT AN INCOME-REPLACEMENT POLICY.

Berkshire continuously attempts to turn Adelberg's policy into an income-replacement policy, which it clearly is not.[7] This is a third type of policy that uses loss of income as its criterion rather than disability. As the court noted below, post-injury total earnings are irrelevant to the issue of disability under the Berkshire policy. R6-4, R6-7. This case was tried on the basis of total disability, not residual disability, rendering Adelberg's post-disability income irrelevant.

[7] Appellant's brief, p. 1 S, The certified question, as noted, also seems to invite this same error.

In its brief to this Court, Berkshire inappropriately presents irrelevant argument regarding Adelberg's post-disability income not based on any evidence in the record. Prior to trial, Judge Ungaro Benages specifically ruled that evidence relating to Adelberg's post-disability income was irrelevant to the issues and prejudicial to Adelberg. R6-4, R6-7, R6-10. The trial judge's ruling was not appealed by Berkshire and post-disability income is certainly irrelevant to the narrow issue on appeal. References to such income should be ignored by this Court. The ability or inability to do the material and substantial duties of his occupation is the sole determinant of total disability.

Finally, Berkshire's reliance on a workers' compensation case is another example of their attempt to confuse the issue on appeal. Bill Bard Associates. Inc. v. Totten, 418 So. 2d 418 (Fla. 1st DCA 1992) is a workers' compensation case dealing with permanent partial disability (PPD) benefits "based on loss of wage earning capacity. . ." Id. at 419. Totten does not address the definition of "occupation," and the main thrust of the opinion is the earning capacity, not the occupation of the employee. Id. Workers' compensation and lost earnings are irrelevant to the instant issue on appeal, and so is Totten.

CONCLUSION

Under Florida law, where the term "occupation" is undefined in au occupational disability policy, it should be construed narrowly as referring to one's regular business or employment considering that which principally takes up one's time, thoughts and energies

at the time of the injury. In Bruce Adelberg's case, his "occupation" at the time of injury was a "yacht salesman."

Respectfully submitted,

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CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a true and correct copy of the foregoing was served by U.S. mail upon Jay S. Blumenkopf, PROSKAUER ROSE GOETZ & MENDELSOHN, Attorneys for Appellant, 2255 Glades Road, Suite 340 West, Boca Raton, Florida 3343 1, on this 9th day of January, 1997.

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