***Berg v. New York Life Ins. Co.*, 2016 WL 4011167 (7th Cir. July 27, 2016)(available at http://media.ca7.uscourts.gov/cgi-bin/rssExec.pl?Submit=Display&Path=Y2016/D07-27/C:15-1410:J:Wood:aut:T:fnOp:N:1800359:S:0).** In this case, which was won by DeBofsky & Associates, PC, along with co-counsel Steven Pflaum and Ronald Betman, the U.S. Court of Appeals for the Seventh Circuit answered two critical questions in this ruling: First, can an insured be disabled by a condition prior to the date the condition is diagnosed and first treated; and second, what is the insured's regular or usual occupation when a claim is submitted more than a year after a claimant ceases to work.

The case involved Eric Berg, a pit broker at the Chicago Mercantile Exchange, who developed a hand tremor that interfered with his ability to write quickly and legibly and forced him to leave his job in 2007. In February 2010, Berg finally sought treatment and was diagnosed with an essential tremor. Shortly thereafter, Berg applied for benefits retroactive to 2007; however, the insurer refused to consider his claim prior to 2010 when he was first diagnosed with the essential tremor and when he first sought treatment. Moreover, although Berg sought total disability benefits, his claim was approved for residual disability only because the insurer deemed his occupation at the time of disability (2010) as "unemployed person." Although the district court sided with the defendant, the court of appeals reversed.

Before addressing the merits, the court first looked at whether Berg's claim was doomed due to late notice. The court concluded that the defense was waived due to defendants' failure to bring up the issue on summary judgment. Turning to the merits, the court reiterated the familiar principle of *contra proferentem,* which construes ambiguities against the insurer. And in determining whether a provision is ambiguous, the court explained that it reads the policy in light of the insured's reasonable expectations and the policy's intended coverage. Moreover, policy provisions that limit or exclude coverage are to be construed liberally in favor of the insured and against the insurer.

The two policies at issue were identical and provided that "Total Disability means that the Insured can not [*sic*] do the substantial and material duties of his or her regular job." An insured may be totally disabled due to sickness or injury; and the policies further provided that "[t]he injury or sickness must be one which requires and receives regular care by a Physician." The defendants maintained that because Berg did not receive doctor care until February 2010, he did not suffer from an illness or sickness until that date. The court disagreed, finding:

> This syllogism might hold up in the rarified atmosphere of formal logic, but it disintegrates when exposed to the corporeal world. To begin with the obvious, neither of these provisions contains any temporal element. There is no reason to think that either of them demands that the injury or sickness have required and received the care of a physician at any point except when the insured makes the claim. Both are written in the present tense. If the insurers had wanted the definitions to have force at any moment before the one at which the relevant claim was adjudicated, they could easily have included language to that effect. They didn't.

The court further pointed out:

> while there is no temporal language in the physician-care requirement, there is in one of the preceding requirements: that the injury or sickness "first manifest itself[ ] while this policy is in force." If the insurers' reading were correct, this provision would be surplusage: an injury or sickness cannot require and receive regular care by a physician before it manifests itself. "We will not interpret an insurance policy in such a way that any of its terms are rendered meaningless or superfluous." *Pekin Ins. Co. v. Wilson*, 909 N.E.2d 379, 387 (Ill. App. Ct. 2009).

In addition, because the policy stated, "[t]he injury or sickness must be one which requires and receives regular care by a Physician" the court determined the provision "applies to the *kind* of malady that qualifies as an 'injury or sickness' under the policy, not *when* it qualifies." (emphasis in original). Thus, the court added, "The provision is thus best read as a description of the *class* of conditions that qualify under the policy—not a prerequisite for their onset date." (emphasis in original).

Returning to principles of insurance language interpretation, the court observed,

> Average insureds would presume that their benefits will flow from the date that their malady became severe enough to prevent them from working or require medical care, not when they actually went to the doctor. The provisions at issue do nothing to put them on notice that this is not the case.

The court also expressed concern that applying defendants' interpretation could lead to absurd results: "Hypochondriacs might find a doctor who spots an illness at the earliest possible moment, while those who lack the resources to see doctors regularly might suffer for months or years and yet not be considered to have an illness or injury." The court offered several scenarios to support a conclusion that there are many circumstances where "it is plain that the person is either disabled or ill without regard to the timing of the visit to the physician."

In contrast to the lack of temporal qualifications for injury or sickness, though, the policies do contain a temporal element in the definition of "Regular Job," which is defined as "[t]he occupation, or occupations if more than one, in which the Insured is engaged when a disability starts." By rejecting the insurer's efforts to insert a temporal requirement in the total disability definition, the court was easily able to dispose of the defendants' arguments that since Berg was not working in 2010 when he submitted his claim, his occupation was "unemployed person." The court pointed out "the evidence favorable to Berg shows that he met the policies' definition of 'total disability' when he left his job as a pit broker at the Chicago Mercantile Exchange. If that is accepted by the trier of fact, then his 'regular job' under the policies was that of a pit broker."

Discussion: This is not the first case that has raised these issues, but this is probably the most influential court that has addressed these concerns. The insurer was insistent that there was a requirement of temporal treatment in the establishment of a disability – however, the court flatly disagreed based on the policy ambiguous language, logic, and the insured's reasonable expectations. This ruling will finally put an end to the ridiculous assertion that has been made in

several cases that a disability claimant's occupation is "unemployed" if the claim is submitted after the insured quits working.