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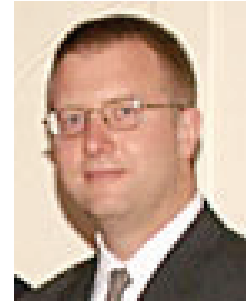
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And The Defense Wins

Patrick W. Begos (pwb@begoshorgan.com), a partner in **Begos & Horgan, LLP**, in Westport, Connecticut, recently obtained a defense verdict on behalf of National Life of Vermont in a residual disability insurance case tried in the Southern District of New York. The plaintiff, a co-owner of a national law firm specializing in Social Security Disability representation, claimed that complications of a deep vein thrombosis prevented him from working full time and caused a reduction in his earned income. The jury unanimously concluded that plaintiff did not prove that his illness caused a reduction in his earned income.



Patrick W. Begos

In the case, *Charles E. Binder v. National Life of Vermont*, (S.D.N.Y.), the plaintiff claimed that he suffered from a post-phlebotic syndrome, and that the resulting leg pain prevented him from working as effectively as he had before the illness, and caused a reduction in his income. Plaintiff claimed that he was due more than \$1 million in past benefits. The defense focused on the financial aspects of the claim, attacking plaintiff's assertion that his earned income declined by more than 20% due to his illness.

Defendant presented evidence from a forensic accounting expert (Ernest Patrick Smith, with the firm of Callaghan, Nawrocki, LLP in Melville, NY) who testified that plaintiff and his brother/partner had manipulated their books to decrease plaintiff's "earned" income, while increasing his "unearned" income. For example, after plaintiff's alleged disability began, he and his brother engineered a reorganization of their firm that resulted in an alleged debt by the new company to plaintiff; the firm then paid plaintiff approximately \$100,000 in "interest" annually. The plaintiff similarly paid himself "royalties" that he claimed represented unearned income. The accounting expert was able to show, through a detailed analysis of plaintiff's firm's tax returns, general ledger, trial balance and accountant's work papers, that plaintiff and his brother had the firm's accountant "adjust" the books at the end of the year to make the sums paid during the year appear to be unearned income.

A significant victory was won in limine, with the court agreeing with the defense's contention that the classification of plaintiff's income as earned or unearned was a question of fact that depended on the substance of the transactions between plaintiff and his firm, rather than on the labels that plaintiff and his brother chose to give the payments. In limine rulings also resulted in the dismissal of plaintiff's bad faith and deceptive business practice claims.