

1                                    IN THE UNITED STATES DISTRICT COURT  
2                                    FOR THE NORTHERN DISTRICT OF CALIFORNIA

3  
4 NEW HAMPSHIRE INSURANCE COMPANY,

No. C 10-02496 CW

5                                    Plaintiff,

ORDER GRANTING IN  
PART AND DENYING  
IN PART

6                                    v.

PLAINTIFF'S MOTION  
FOR PARTIAL  
SUMMARY JUDGMENT  
AND DEFENDANT'S  
CROSS-MOTION FOR  
PARTIAL SUMMARY  
JUDGMENT (Docket  
Nos. 32 & 34)

7 BILL MCNAB,

8                                    Defendant.

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12                                    The pending motions present disputes as to legally  
13 permissible offsets to certain insurance coverage. Plaintiff and  
14 Counterclaim Defendant New Hampshire Insurance Company (NHIC)  
15 moves for partial summary judgment. Docket No. 32. Defendant and  
16 Counterclaim Plaintiff McNab opposes the motion, and has filed a  
17 cross-motion for partial summary judgment. Docket No. 34. Having  
18 considered all of the parties' submissions, the Court grants in  
19 part and denies in part the parties' motions for summary judgment.

20                                    BACKGROUND

21                                    McNab was injured during the course and scope of his  
22 employment with Holt Transportation when, on July 28, 2006,  
23 another vehicle collided with the truck he was operating on a  
24 California highway. As a result of the accident, McNab suffered  
25 injuries to his face, back and extremities. NHIC issued Holt  
26 Transportation a commercial vehicle policy (NHIC policy) that,  
27 among other things, covered its employees for injuries caused by  
28 an underinsured motorist (UIM), sustained during the course and

1 scope of their employment with Holt Transportation. The maximum  
2 coverage under this UIM policy is \$1,000,000.

3 Due to McNab's injuries suffered while on the job, he was  
4 awarded workers' compensation benefits from the State Compensation  
5 Insurance Fund (State Fund), including payment of past and future  
6 medical expenses and disability income payments. In addition, the  
7 workers' compensation policy provides an \$8,000 job training  
8 voucher. McNab also obtained a \$100,000 settlement from the at-  
9 fault driver's liability insurer. McNab reimbursed \$33,145.85 of  
10 that settlement to the State Fund. After the accident, McNab  
11 began receiving federal social security disability payments. He  
12 continues to receive social security payments, and expects to  
13 receive them on an ongoing basis.

14 LEGAL STANDARD

15 Summary judgment is properly granted when no genuine and  
16 disputed issues of material fact remain, and when, viewing the  
17 evidence most favorably to the non-moving party, the movant is  
18 clearly entitled to prevail as a matter of law. Fed. R. Civ. P.  
19 56. Celotex Corp v. Catrett, 477 U.S. 317, 322-23 (1986);  
20 Eisenberg v. Ins. Co. of N. Am., 815 F.2d 1285, 1289 (9th Cir.  
21 1987). The court must draw all reasonable inferences in favor of  
22 the party against whom summary judgment is sought. Matsushita  
23 Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 587 (1986);  
24 Intel Corp. v. Hartford Accident & Indem. Co., 952 F.2d 1551, 1558  
25 (9th Cir. 1991).

26 Material facts which would preclude entry of summary judgment  
27 are those which, under applicable substantive law, may affect the  
28 outcome of the case. The substantive law will identify which

1 facts are material. Anderson v. Liberty Lobby, Inc., 477 U.S.  
2 242, 248 (1986).

3 DISCUSSION

4 I. Social Security Payments

5 NHIC argues that a provision of its policy allows it to  
6 offset social security payments from its UIM coverage. That  
7 provision states,

8 We [NHIC] will not pay for any element of "loss" if a  
9 person is entitled to receive payment for the same  
10 element of "loss" under any workers' compensation,  
disability benefits or similar law.

11 NHIC Policy, California Uninsured Motorist Coverage, Part D, ¶ 3.<sup>1</sup>

12 McNab responds that this provision violates California law to the  
13 extent that it permits offsets for social security payments. The  
14 Court agrees.

15 California law sets forth the reductions allowable for  
16 underinsured and uninsured motorist coverage. California  
17 Insurance Code § 11580.2(h) states in relevant part,

18 Any loss payable under the terms of the uninsured  
19 motorist endorsement or coverage to or for any person  
may be reduced:

20 (1) By the amount paid and the present value of all  
21 amounts payable to him or her, his or her executor,  
22 administrator, heirs, or legal representative under  
any workers' compensation law, exclusive of  
23 nonoccupational disability benefits.

24 (2) By the amount the insured is entitled to recover  
25 from any other person insured under the underlying  
liability insurance policy of which the uninsured

26 \_\_\_\_\_  
27 <sup>1</sup> The NHIC policy makes clear that its underinsured motorist  
28 coverage is included in its uninsured motorist coverage. NHIC  
Policy, Renewal Declaration, p. 5.

1 motorist endorsement or coverage is a part, including  
2 any amounts tendered to the insured as advance payment  
3 on behalf of the other person by the insurer providing  
4 the underlying liability insurance.

5 (emphasis added). The offsets allowed in § 11580.2(h) apply to  
6 UIM coverage. Rudd v. California Casualty Gen. Ins. Co., 219 Cal.  
7 App. 3d 948, 955 (1990). California Insurance Code § 11580.2(e)  
8 further provides for reductions in uninsured motorist coverage by  
9 amounts paid by an auto insurance provider for medical expenses,  
10 and § 11580.2(p)(4) allows an offset from underinsured motorist  
11 coverage for an "amount paid to the insured by or for any person  
12 or organization that may be held legally liable for the injury."  
13 The California Court of Appeal has declined to enforce a policy  
14 provision that set forth a reduction in uninsured motorist  
15 payments that was not approved by the legislature. Preferred Risk  
16 Mutual Ins. Co. v. Harrison, 118 Cal. App. 3d 561, 564 (1981).

17 NHIC's citation to California Insurance Code § 11580.2(a)(1)  
18 does not support an offset based on McNab's social security  
19 payments. The provision authorizes an insured and insurer to  
20 agree to limit uninsured motorist coverage for bodily injury to an  
21 amount less than \$30,000, as long as it is more than \$15,000, the  
22 minimum required by California Vehicle Code § 16056. However,  
23 this provision does not mean that any and all agreements to reduce  
24 coverage are enforceable. Rather, the very cases NHIC cites make  
25 clear that agreements to reduce coverage must be in accordance  
26 with law. Darrah v. California State Automobile Association, 259  
27  
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1 Cal. App. 2d 243, 246 (1968) ("[T]here can be no doubt of the  
2 right of the insurance companies to limit, in accordance with  
3 section 11580.2, the coverage of their policies, and when they  
4 have done so the plain language of the limitations must be  
5 respected.") (emphasis added); Lumberman's Mut. Cas. Co. v. Wyman,  
6 64 Cal. App. 3d 252, 259 (1976) ("There is no doubt that an  
7 insurance company can limit the coverage of a policy issued by it  
8 as long as such limitation conforms to the law and is not contrary  
9 to public policy."). Section 11580.2(p)(4) does not apply because  
10 the Social Security Administration is not liable for McNab's  
11 injury. The agency provides social security payments when an  
12 individual's disability precludes employment. See Cole v.  
13 California Ins. Guar. Ass'n., 122 Cal. App. 4th 552, 560 (2004)  
14 (denying, in an action against the California Insurance Guarantee  
15 Association, offsets for social security payments against  
16 uninsured motorist coverage because the social security benefit  
17 stems from the insured's ongoing inability to be employed due to  
18 disability, whereas her claim under the automobile insurance  
19 policy was for bodily injury).

22 Nor are NHIC's public policy arguments persuasive. Even  
23 though uninsured and underinsured motorist coverage is not  
24 designed to make the insured whole, this does not render  
25 enforceable reductions in uninsured and underinsured motorist  
26 coverage that are precluded by legislation. NHIC argues that  
27 disallowance of an offset for McNab's social security payments  
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1 leaves him in a better position than if the tortfeasor had been  
2 fully insured. However, NHIC provides no authority that payments  
3 pursuant to such a liability policy would be reduced by social  
4 security payments received by the beneficiary. NHIC's invocation  
5 of the threat of double recovery is without merit because social  
6 security disability insurance provides coverage if a disability  
7 renders a person unable to work, while NHIC's UIM policy extends  
8 coverage in event the insured suffers bodily injury as a result of  
9 an automobile accident with an underinsured motorist. There is no  
10 double recovery because the policies are directed at different  
11 risks.  
12

13 The social security benefits McNab has received or will  
14 receive in the future are not permissible offsets from the NHIC  
15 underinsured motorist policy limit. Therefore, with respect to  
16 this issue, the Court denies NHIC's motion for partial summary  
17 judgment, and grants McNab's cross-motion for partial summary  
18 judgment.  
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## 20 II. Workers' Compensation Benefits

21 The parties agree that offsets for lost income payments and  
22 medical expenses paid by the State Fund are permissible. NHIC  
23 also seeks to offset from its UIM policy limits the value of the  
24 job training voucher and future medical expenses to be covered by  
25 the State Fund. California Insurance Code § 11580.2(h)(1)  
26 provides that uninsured and underinsured coverage may be reduced  
27 "[b]y the amount paid and the present value of all amounts  
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1 payable" under any workers' compensation law. Rudd, 219 Cal. App.  
2 3d at 955 (applying § 11580.2(h)(1) to UIM coverage).

3 The California Court of Appeal has cited Black's Law  
4 Dictionary for the definition of the term "payable:" "capable of  
5 being paid; suitable to be paid; admitting or demanding payment;  
6 justly done, legally enforceable." Bailey v. Interinsurance  
7 Exchange, 49 Cal. App. 3d 399, 404 (1975). Bailey and Burkett v.  
8 Continental Cas. Co., 271 Cal. App. 2d 360, 362 (1969) are not on  
9 point because the insured in those cases never applied for any  
10 workers' compensation benefits, unlike the present case where  
11 McNab has applied for and received benefits through the State  
12 Fund. In Waggaman v. Northwestern Sec. Insurance Company, 16 Cal.  
13 App. 3d 571 (1971), the court affirmed the denial of an offset for  
14 future permanent disability payments through workers'  
15 compensation. However, in Waggaman the insured's present physical  
16 condition had not been determined, and permanent disability had  
17 not been established.

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20 In contrast to Waggaman, McNab has been deemed permanently  
21 disabled, and the State Fund's Award on Stipulation provides:  
22 "Further medical treatment to [McNab's] upper back, chest, ribs,  
23 left shoulder and left elbow." McNab intends to seek further  
24 payment from the State Fund for future medical costs, although the  
25 precise amount is unknown. Thus, an offset for medical expenses  
26 covered by the State Fund is warranted. On the other hand, it  
27 appears unlikely that McNab will be able to use the job training  
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1 voucher due his ongoing disability and his age. Since McNab will  
2 not likely receive this benefit, an offset for its value is  
3 unwarranted.

4 Accordingly, the Court grants NHIC's motion for partial  
5 summary judgment and denies McNab's cross-motion with respect to  
6 future medical expenses paid by the State Fund, but denies NHIC's  
7 motion for partial summary judgment and grants McNab's cross-  
8 motion for partial summary judgment regarding the offset for the  
9 job voucher. The parties do not know and the Court cannot  
10 adjudicate the amounts of McNab's future medical expenses. The  
11 fact that they will be paid for, however, can be taken into  
12 account in any settlement or insurance arbitration.

14 III. Settlement from At-Fault Driver's Policy

15 McNab seeks summary adjudication that NHIC cannot offset the  
16 full amount of the \$100,000 settlement he received from the at-  
17 fault driver's liability insurance policy because McNab reimbursed  
18 the State Fund \$33,145.85 from that settlement.

20 NHIC cites Waggaman, 16 Cal. App. 3d at 580 n.7, for support  
21 that it is entitled to offset the full amount of the settlement.  
22 The case, however, is not on point. In addition, NHIC relies on a  
23 provision in its policy stating that its UIM and UM coverage do  
24 not apply to the "direct or indirect benefit of any insurer or  
25 self-insurer under any workers' compensation, disability benefits  
26 or similar law . . ." NHIC Policy, California Uninsured Motorist  
27 Coverage, Part C, ¶ 3. This language does not support NHIC's  
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1 contention that the parties agreed to offset such reimbursements.  
2 McNab's reimbursement to the State Fund for a portion of benefits  
3 he received is not a direct or indirect benefit to the State Fund  
4 that the policy provision sought to proscribe. The State Fund  
5 received its reimbursement from a portion of McNab's settlement  
6 with the at-fault driver's liability insurer, not from any payment  
7 made by NHIC pursuant to its UIM or UM coverage.  
8

9 The basis for McNab's reimbursement to the State Fund and the  
10 terms of its lien are not clear. However, to the extent that  
11 McNab reimbursed the State Fund with a portion of his settlement  
12 with the at-fault driver in compliance with law, NHIC is not  
13 entitled to offset the full amount of the settlement. Rudd, 219  
14 Cal. App. 3d at 956 (holding that an insurer may set off the  
15 insured's underinsurance coverage for the amount of workers'  
16 compensation benefits paid to the insured, except to the extent  
17 that the insured did not receive or retain proceeds from the  
18 tortfeasor because of the workers' compensation carrier's lien or  
19 recoupment rights).  
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#### 21 IV. Workers' Compensation Disability Payments

22 McNab's cross-motion seeks summary adjudication of the amount  
23 of disability payments he has received from the State Fund. NHIC  
24 does not dispute the amount. Therefore, the Court summarily  
25 adjudicates that McNab has received \$88,283.08 in disability  
26 payments. The parties agree that this amount can be offset.  
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CONCLUSION

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The Court denies NHIC's motion for partial summary judgment that it may offset McNab's social security payments, and grants McNab's cross-motion for partial summary judgment with respect to that issue.

The Court denies NHIC's motion for partial summary judgment and grants McNab's cross-motion for partial summary judgment that the amount of the job voucher cannot be offset, but denies McNab's cross-motion and grants NHIC's motion that future medical expenses paid by the State Fund may be offset. The Court cannot determine the amount of future medical expenses that may be offset.

The Court summarily adjudicates that NHIC may offset only \$66,854.15 of the \$100,000 settlement McNab received from the at-fault driver's liability insurance policy because McNab reimbursed the State Fund \$33,145.85

Finally, the Court summarily adjudicates that McNab has received \$88,283.08 in disability payments, which, the parties agree, may be offset.

IT IS SO ORDERED.

Dated: 3/18/2011

  
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CLAUDIA WILKEN  
United States District Judge