

Please scan to 230605-00981-00

# EICHHORN & EICHHORN, LLP

200 Russell Street  
P.O. Box 6328  
Hammond, IN 46325  
219-931-0560  
Fax: 219-931-5370

## FAX COVER SHEET

FAX NUMBER TRANSMITTED TO: 803-329-8197

To: Brian Sullivan  
Of: Sun Life Assurance Company  
From: David C. Jensen  
Client/Matter: Ted Baxter - 590.11276  
Date: August 12, 2008

DOCUMENTS	NUMBER OF PAGES*
Letter	3
CV	2

**COMMENTS:**

Original will NOT follow.

If problem occurs, call **Becky** at (219) 931-0560.

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**\* NOT COUNTING COVER SHEET. IF YOU DO NOT RECEIVE ALL PAGES, PLEASE TELEPHONE US IMMEDIATELY AT 219-931-0560.**

**EICHHORN & EICHHORN, LLP**

DAVID C. JENSEN\*  
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ROBERT J. FELOT\*\*  
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JOHN F. TWOHY\*  
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MATTHEW S. VER STEEG  
KIRK D. BAGROWSKI\*  
MICHAEL F. MULCHAY  
TRENTON W. GILL  
KAROL A. SCHWARTZ

LOGAN C. HUGHES\*  
MEGAN C. BRENNAN\*  
MALLORY R. INGULBERG  
NICHOLAS G. BRUNETTE  
BRETT T. CLAYTON  
MICHAEL D. KARRAS  
CARLY A. BRANDENBURG

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INDIANAPOLIS, IN 46268  
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FREDERICK F. EICHHORN, JR.  
WILLIAM H. EICHHORN  
RETIRED

\* ALSO ADMITTED IN ILLINOIS  
\*\* ALSO ADMITTED IN ILLINOIS & MINNESOTA

TOLL FREE NUMBER: (866) 931-0560

August 12, 2008

PLEASE REPLY TO: **Hammond Office**

**BY TELECOPIER**

Brian Sullivan  
Sun Life Assurance Company of Canada  
SC 3208  
One Sun Life Executive Park  
Wellesley Hills, MA 02481-5699

Re: **Ted and Kelly Baxter**  
Policy No. 67534-GD  
Our File No. 590.11276

Dear Mr. Sullivan:

At your request, I have reviewed the materials submitted to me on July 23, 2008.

I have focused on the complaint filed by Ted and Kelly Baxter ("Baxter") against Evanston Northwestern Healthcare Corporation, Cause No. 06L12259, Circuit Court of Cook County ("medical malpractice action"); the discovery responses filed on Baxter's behalf in the medical malpractice action; the medical records pertinent to Baxter's care and treatment; the mediation statement with supporting exhibits prepared on Baxter's behalf; and Baxter's psychological evaluation prepared in November 2007 by Alissa Wickland, Ph.D.

My review discloses that the amount of the settlement in the medical malpractice action was significantly influenced by Baxter's high earning capacity. While his stroke was initially disabling, his recovery has been excellent, his disfigurement non-existent, and his physical rehabilitation relatively quick and successful. His medical bills are very small and I see nothing that suggests significant medical expenditures in the future. The substantial settlement he actually received - \$13 million after payment of attorneys fees and expenses - was driven by his lost future income.

You'll recall that Baxter experienced a cerebral vascular accident ("CVA") on April 21, 2005, while at home. His wife was with him, recognized the need for medical care, and had him transported to Evanston Northwestern within a hour of the onset of Baxter's symptoms. Unfortunately, the physicians at Evanston

## EICHHORN & EICHHORN, LLP

Brian Sullivan  
August 12, 2008  
Page 2

Northwestern misread both the initial CT scan of the brain and the follow-up MRI/MRA. The imaging studies did, in fact, depict changes in the brain secondary to a CVA. The theory of liability against Evanston Northwestern was that had these studies been properly interpreted thrombolytic agents would have been promptly administered. Studies have indicated that the prompt use of thrombolytics can dissolve clot formation and restore adequate circulation to the brain thereby preventing permanent and irreversible damage.

When the imaging studies were properly interpreted the following day, the administration of thrombolytics would have had no therapeutic value. Instead of receiving definitive treatment on April 21, 2005, Baxter was monitored for brain swelling and then started on a course of rehabilitation for his resulting physical and cognitive impairments.

While he has made excellent progress in rehabilitation, he has significant residual defects including expressive and receptive aphasia which prevents him from returning to his job as Managing Director and Global Controller for Citadel Hedge Funds.

The November 2007 evaluation by Alissa Wickland, Ph.D., a clinical neuropsychologist, confirms that because of his "cognitive dysfunction" Baxter "would not be able to maintain the demands of his high level job given his significant aphasia, difficulty manipulating verbal information in working memory, need for repetition for information processing, and executive dysfunction that effects his cognitive flexibility and organizational abilities."

At the time of his stroke, Baxter, aged 42, was making \$1.3 million dollars per year. He had an established earning history with Price Waterhouse and with Credit Suisse First Boston. At the time of the mediation Baxter presented an economic loss report prepared by Roger Skurski showing a net past lost income of \$997,342 and a net future lost income ranging from \$28,943,212 to \$63,248,192. This wide range was dependant on whether Baxter remained in his current position with Citadel or received one or two promotions.

Certainly, if Baxter had rejected settlement he would have gone to trial and been successful. He would have been entitled to a jury instruction on damages that would have included *inter alia* the following elements:

If you decide for the plaintiff on the question of liability, you must then fix the amount of money which will reasonably and fairly compensate him for any of the following elements of damages proved by the evidence to have resulted from the negligence of the defendant taking into consideration the nature, extent and duration of the injury. The expression "loss of a normal life" means the temporary or permanent diminished ability to enjoy life. This includes a person's inability to pursue the pleasurable aspects of life.

### EICHHORN & EICHHORN, LLP

Brian Sullivan  
August 12, 2008  
Page 3

1. Loss of a normal life experienced and reasonably certain to be experienced in the future: \$\_\_\_\_\_;
2. The value of earnings, salary and benefits lost and the present cash value of the earnings, salary and benefits reasonably certain to be lost in the future. \$\_\_\_\_\_.

As you probably know, Cook County is a very high verdict venue. I've looked at recent settlements and verdicts to help assess the role lost earnings likely played in this matter. In several CVA cases with much more severe injuries (or death) resulted in settlements that were either much less or in settlements that were comparable but driven by the extent of the physical disability. For instance, a 77 year old woman received \$2,000,000 for a CVA that left her hemiplegic, with significant speech impairment and a profound inability to perform any activities of daily living. In another, a former model received \$17,500,000 because she was paralyzed, confined to a wheelchair and left largely without speech. Physicians had to remove a third of her frontal lobe, that portion of the brain that controls thinking and conversation.

Here, however, Baxter has been spared surgery or any prolonged hospitalization. He has regained most of his strength, and does not appear injured or damaged in any way. His settlement - \$2,000,000 more than the severely damaged former model - is based upon his income loss. As his attorney argued in the mediation statement "his career as a financial wizard is over."

I see nothing in the file from Mark D. DeBofsky that even suggests a disagreement with this analysis. All I see is his disagreement with the application of the Other Income Benefit provision to the sums received from the settlement of the medical malpractice action.

My curriculum vitae is enclosed.

If I can be of further assistance, please let me know.

Very truly yours,

EICHHORN & EICHHORN, LLP

By: David C. Jensen  
David C. Jensen

DCJ/rst  
Enclosure

**DAVID C. JENSEN**  
**EICHHORN & EICHHORN, LLP**  
200 Russell Street  
P.O. Box 6328  
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Suite 401  
Indianapolis, Indiana 46268  
Tel. (317) 228-9670  
Fax (317) 228-9569

Born Oak Park, Illinois, June 12, 1946

***Professional Background***

1971 to Present: Eichhorn & Eichhorn, LLP and its predecessors, Schroer, Eichhorn & Morrow and Eichhorn, Eichhorn & Link. Partner 1976 to date. Managing Partner 1995 to date.

***Areas of Expertise***

Litigation, both trial and appellate, with special emphasis on professional liability and commercial litigation.

The firm clients include Medical Protective Company; The Doctor's Company; ProAssurance; Indiana Residual Malpractice Insurance Authority; Edwards Lifesciences, LLC; University of Chicago Hospitals; Northern Indiana Public Service Company

***Admissions***

Admitted to practice, Indiana 1971; Illinois, 1975; United States Federal Court for the Southern District of Indiana, 1971; United States Federal District Court for the Northern District of Indiana, 1971; United States Court of Appeals, Seventh Circuit, 1971; U.S. Supreme Court, 1983.

***Education***

DePauw University (B.A., 1968); University of Michigan (J.D., 1971). Elected to Phi Eta Sigma; Phi Beta Kappa.

***Professional Memberships***

Lake County Bar Association, Indiana State Bar Association, Illinois State Bar Association and American Bar Association. Fellow, American College of Trial Lawyers; Fellow, International Society of Barristers.

\*\* TOTAL PAGE.06 \*\*

DALEY, DEBOFSKY & BRYANT

FACSIMILE TRANSMITTAL SHEET

TO: <b>Robert Goodall</b>	FROM: <b>Mark D. DeBofsky</b>
COMPANY: <b>Sun Life</b>	DATE: <b>9/3/08</b>
FAX NUMBER: <b>781-304-5537</b>	TOTAL NO. OF PAGES INCLUDING COVER: <b>2</b>
PHONE NUMBER:	SENDER'S REFERENCE NUMBER:
RE: <b>Ted Baxter</b>	YOUR REFERENCE NUMBER:

URGENT     FOR REVIEW     PLEASE COMMENT     PLEASE REPLY     PLEASE RECYCLE

NOTES/COMMENTS:

Please find attached a letter from our office. If you have any questions, please contact us.  
Thank you.

55 WEST MONROE STREET, SUITE 2440  
CHICAGO, ILLINOIS 60603  
VOICE 312.372.5200  
FAX 312.372.2778



LAW OFFICES

**Daley, DeBofsky & Bryant**

June 12, 2008

55 W Monroe St  
Ste 2440  
Chicago, Illinois 60603

VOICE (312) 372-5200  
FAX (312) 372-2778  
WEB ddbchicago.com

Frederick J. Daley Jr.  
Mark D. DeBofsky  
David A. Bryant  
Marcie E. Goldbloom  
Violet H. Borowski  
Sandra M. Dye  
Gregory A. Benker  
Kimberly A. Jones

Of Counsel  
David R. Bryant  
Heather F. Aloe

Robert Goodall  
Claim Consultant  
Sun Life  
P.O. Box 81830  
Wellesley, MA 02481  
**Sent by fax to 781.304.5537**

RE: Ted Baxter

Dear Mr. Goodall:

With respect to our client Ted Baxter, we are writing to ask that we be provided with copies of all of the documents reviewed by the Eichorn firm. If you have any questions, please feel free to call our office.

Thank you for your attention to this matter.

Very truly yours,



Mark D. DeBofsky

MDD/mk



Sun Life Assurance  
Company of Canada  
SC 3208  
One Sun Life Executive Park  
Wellesley Hills, MA 02481-5699

1-800-247-6875

September 4, 2008

**Via FedEx**

Daley, DeBofsky & Bryant  
Attn: Mark DeBofsky  
55 West Monroe  
Suite 2440  
Chicago, IL 60603

RE: Ted Baxter  
Policy No: 67534-GD-Long Term Disability  
Control No: 230605-00981-00

Dear Mr. DeBofsky:

Enclosed are the following documents provided to the Eichorn firm for review:

- Initial Claim Application
- Earnings Statements from Citadel
- Social Security Notice of Award
- July 22, 2005 Comprehensive Report
- Employment Agreement
- Claimant Activity Questionnaire, Activities of Daily Living, Disability Information Update
- October 3, 2007 Report, Claims Bureau USA
- Court Records
- October 30, 2007 Report, Claims Bureau USA
- Supplemental Information Questionnaire, Authorizations
- Medical Records, including Living Will, Jesse Taber, MD
- Power of Attorney
- August 29, 2005 Benefit Approval Letter to Kelly Baxter
- January 19, 2006 Overpayment Letter to Kelly Baxter
- July 23, 2008 Referral Letter to David Jensen

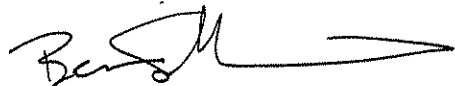
September 4, 2008  
Page 2

The following file documents were provided to the Eichorn firm but are not enclosed here as they came either from your office directly or were sent directly to your office by Sun Life:

- Your correspondences and accompanying documents dated 4/11/07, 8/29/07, 10/11/07, 10/19/07, 12/05/07, 2/04/08, 4/21/08, 6/12/08
- Sun Life's letters to your office dated 10/18/07, 11/08/07, 12/14/07, 1/29/08, 2/11/08, 4/18/08

Please call me at (877) 260-9778, extension 7102, if you have any questions.

Sincerely,

A handwritten signature in black ink, appearing to read "Brian Sullivan", with a long horizontal stroke extending to the right.

Brian Sullivan  
Benefit Consultant  
LTD Appeals

# EICHHORN & EICHHORN, LLP

DAVID C. JENSEN\*  
PAUL A. RAKE  
JOHN M. McCRIM  
ROBERT J. FELDT\*\*  
GREGORY A. CRISMAN  
ALYSSA STAMATAKOS  
DAVID J. BEACH  
LOUIS W. VOELKER, III

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MICHAEL D. KARRAS  
CARLY A. BRANDENBURG

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FREDERICK F. EICHHORN, JR.  
WILLIAM H. EICHHORN  
RETIRED

\* ALSO ADMITTED IN ILLINOIS  
\*\* ALSO ADMITTED IN ILLINOIS AND MINNESOTA

September 5, 2008

PLEASE REPLY TO Hammond Office

Brian Sullivan  
Sun Life Assurance Company of Canada  
SC 3208  
One Sun Life Executive Park  
Wellesley Hills, MA 02481-5699

Re: Sun Life Financial - Long Term Disability  
Our File # 590-11276

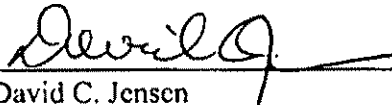
Dear Mr. Sullivan:

Herewith I enclose our firm's statement for services rendered and expenses incurred through August 31, 2008 applicable to the above-captioned matter.

If it is satisfactory, I'd appreciate your prompt payment.

Very truly yours,

**EICHHORN & EICHHORN, LLP**

By:   
David C. Jensen

DCJ/gg  
Enclosure

EICHHORN & EICHHORN, LLP  
200 Russell Street  
P. O. Box 6328  
Hammond, IN 46325  
Tax I. D. No. 35-1079127

001441  
08/31/2008  
1

Sun Life Assurance Company of Canada  
SC 3208  
One Sun Life Executive Park  
Wellesley Hills MA 02481-5699

OUR FILE NO:

Page 1  
08/31/2008  
590M

ATTN: Brian Sullivan

ITEMIZED  
FILE NO.

PREVIOUS BALANCE	FEES	EXPENSES	ADVANCES	PAYMENTS	BALANCE DUE
590-11276 SUN LIFE FINANCIAL - LONG TERM DISABILITY					
TED BAXTER					
0.00	2,070.00	0.00	0.00	0.00	<u>\$2,070.00</u>

EICHHORN & EICHHORN, LLP  
200 Russell Street  
P. O. Box 6328  
Hammond, IN 46325  
Tax I. D. No. 35-1079127

11/20/2008 10:30 AM

Sun Life Assurance Company of Canada  
SC 3208  
One Sun Life Executive Park  
Wellesley Hills MA 02481-5699

Page 1  
08/31/2008  
OUR FILE NO: 590-11276M  
REFERENCE NO: 1

ATTN: Brian Sullivan

SUN LIFE FINANCIAL - LONG TERM DISABILITY  
TED BAXTER

	HOURS	
08/05/2008		
DCJ	4.00	File review
08/06/2008		
DCJ	1.50	Prepare draft opinion letter
08/07/2008		
DCJ	0.90	Draft client correspondence
08/11/2008		
MFB	1.40	Research jury verdicts in Illinois for strokes
MFB	0.40	Research whether you can get "loss of enjoyment of life" damages in Illinois
MFB	0.50	Research pattern jury instructions re "loss of enjoyment of life" and earnings
MFB	0.90	Draft memorandum re "loss of enjoyment of life", jury instructions and jury verdicts
DCJ	0.90	Draft (complete) client evaluation letter
TOTAL FEES FOR CURRENT SERVICES 08/31/2008		<hr/> 10.50      2,070.00

SUMMARY			
<u>NAME</u>	<u>HOURS</u>	<u>HOURLY RATE</u>	<u>TOTAL</u>
David C. Jensen	7.30	\$220.00	\$1,606.00
Megan F. Brennan	3.20	145.00	464.00

Sun Life Assurance Company of Canada

SUN LIFE FINANCIAL - LONG TERM DISABILITY  
TED BAXTER

TOTAL CURRENT CHARGES

TOTAL BALANCE DUE

OUR FILE NO:  
REFERENCE NO:

Page 2  
08/31/2008  
590-11276M

2,070.00

\$2,070.00

Personally Prepped By: Carol C.

This Document Was Received With:

- Original Death Certificate
- Raised Seal Present On:  
\_\_\_\_\_
- Certified Document:  
\_\_\_\_\_
- No Raised Seals
- No Certified Documents
- EMSI Best Copy available  
(Please Index)
- Original Policy
- Prepaid Envelope For:
- Non Scannable Document
- Referenced Enclosure Was Not Found:  
\_\_\_\_\_

Returned Post Office Mail:

- Not Deliverable
- Return To Sender
- Not At This Address
- Insufficient Address
- Forwarding Order Expired

Notes:

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### Adjustments

- COLA
- FICA
- General Cal Worksheet
- Other  
(Activities/Financial Check/Bill)
- Overpayment Worksheet
- Partial Cal Worksheet
- Pension
- Personal Check
- Rehab Earnings
- Salary Adjustment
- SLF Check
- SLF Check Undeliverable
- Social Security
- SS Award
- SS Calc Worksheet
- SS Reimbursement
- WCB

### General Docs

- Authorizations
- Change of Address
- Complaints
- Correspondence
- EFT Forms
- E-Mail
- FML
- Job Description
- Notice of Return to Work
- Notice of Death
- Other Adjustments
- Other
- Police / Accident Report
- Proof of Age
- Surveillance
- Surveillance Bill
- Unassigned Doc Type  
(Personal Profiles)

### General Worksheet

- Telephone Template

### Legal Docs

- Appeal
- Court Order
- Demand
- Full and Final Release
- Other
- POA / Guardianship
- Subrogation

### Medical Docs

- APS Behavioral Health Condition
- APS Supplementary
- Clinical Notes
- FCE
- IME
- Internal Medical Opinion
- Internal Psychiatric Opinion
- List of Providers
- Medical Bills
- Other Medical
- Surveillance

### New Claim Docs

- Attending Physician Statement
- Complete Claim Package
- Employee Statement
- Enrollment Card
- Employer Statement
- Notice of Claim
- Other New Claim Documents
- Partial Claim Package
- Sun Advisor
- Telephonic
- Transitional Claim Form
- Unassigned Doc Type

### Rehab Docs

- Rehab Bills
- External Vendor Corresp
- FCE Report
- Other
- Rehab Correspondence
- TSA / LMS

Updated: October 18, 2007

SUN BAXTER 001444



LAW OFFICES

23605-00981-00

Daley, DeBofsky & Bryant

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WEB ddbchicago.com

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Marcie E. Goldbloom  
Violet H. Borowski  
Sandra M. Dye  
Gregory A. Benker  
Kimberly A. Jones

Of Counsel  
David R. Bryant  
Heather Freeman

October 15, 2008

Robert Goodall  
Claim Consultant  
Sun Life  
P.O. Box 81830  
Wellesley, MA 02481  
Sent by fax to 781.304.5537

RE: Ted Baxter

Dear Mr. Goodall:

With respect to our client Ted Baxter, please be advised that the last check he received was on July 31<sup>st</sup>. Please advise us as to the status of his August and September payments.

Thank you for your attention to this matter.


Very truly yours,



Mark D. DeBofsky

MDD/ccm

# MANUAL CHECK REQUEST FOR LTD

<b>Name of Requester</b>	Robert Goodall 	<b>Extension</b>	7107
<b>Approved By</b>		<b>Today's Date</b>	October 31, 2008

**Check Stock - Sun Life Assurance Company of Canada - Health (USBRH)**

<b>Date Check</b>	October 31, 2008	<b>Sun Code: 4328</b>
-------------------	------------------	-----------------------

<b>Payee</b>	Ted Baxter				
<b>Payee Cont.</b>					
<b>Addresses</b>	55 East Erie St. #2305				
<b>Address Cont.</b>					
<b>City</b>	Chicago	<b>State</b>	IL	<b>Zip Code</b>	60611

<b>Policy Number</b>	67534			
<b>Social Security Number</b>	084-50-3725			
<b>Sub</b>		<b>Claim Number</b>	230605-00981-00	
<b>Reported Date</b>		<b>Residence Code</b>		
<b>Incurred Date</b>		<b>Code</b>		
<b>Employee's Name</b>				
<b>Benefit Period (Include Both Dates):</b>				
<b>From</b>	August 1, 2008	<b>To</b>	October 31, 2008	

<b>Gross Amount</b>	\$4,500.00
<b>Benefit Subject to OASDI (Social Security Tax)</b>	
<b>Benefit Subject to HI (Medicare tax)</b>	
<i>***For input in Detail Section Only***</i>	
<b>Federal Tax Deduction</b>	
<b>Misc. Deduction</b>	
<b>OASDI (Social Security) Tax Deductions</b>	
<b>HI (Medicare) Tax Deductions</b>	
<b>Other</b>	
<b>Amount Of Check</b>	\$4,500.00

<b>Check Date-</b>	<b>Check Number-</b>
--------------------	----------------------

--	--



Sun Life Assurance  
Company of Canada  
SC 3208  
One Sun Life Executive Park  
Wellesley Hills, MA 02481-5699

1-800-247-6875

October 31, 2008

Mark D. DeBofsky  
Law Offices of Daley, DeBofsky & Bryant  
55 W Monroe St., Ste 2440  
Chicago, IL 60603

Re: Policy No. 067534-GD-Long Term Disability  
Control # 230605-00981-00  
Claimant: Ted Baxter

Dear Mr. DeBofsky:

This is in response to your letter of October 15 and in follow up to our conversation today concerning Mr. Baxter's continuing claim of Total Disability under the above referenced Long Term Disability Contract.

As discussed, due to clerical error, Mr. Baxter's August, September and October benefits were applied to his outstanding overpayment. However, as previously explained, we offered to provide Mr. Baxter the minimum benefit of \$1,500 under reservation of rights pending the appeal determination. As the appeal determination is still pending, we have reconsidered the benefits due and enclosed a benefit check under copy to Mr. Baxter in the amount of \$4,500 representing benefits paid for August, September and October 2008.

We apologize for any inconvenience this may have caused Mr. Baxter. Should you have any questions regarding this matter, please feel free to call me at 1-877-260-9778, extension 7107.

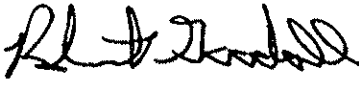
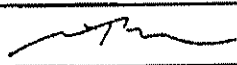
Sincerely,

A handwritten signature in black ink, appearing to read "Robert Goodall".

Robert Goodall  
Claim Consultant  
Group Long Term Disability  
SC 3208

CC: Ted Baxter

# MANUAL CHECK REQUEST FOR LTD

<b>Name of Requester</b>	Robert Goodall 	<b>Extension</b>	7107
<b>Approved By</b>		<b>Today's Date</b>	October 31, 2008

**Check Stock - Sun Life Assurance Company of Canada - Health (USBRH)**

<b>Date Check</b>	November 3, 2008	<b>Sun Code: 4328</b>
-------------------	------------------	-----------------------

<b>Payee</b>	Ted Baxter				
<b>Payee Cont.</b>					
<b>Address</b>	55 East Erie St. #2305				
<b>Address Cont.</b>					
<b>City</b>	Chicago	<b>State</b>	IL	<b>Zip Code</b>	60611

<b>Policy Number</b>	67534			
<b>Social Security Number</b>	084-			
<b>Sub</b>		<b>Claim Number</b>	230605-00981-00	
<b>Reported Date</b>		<b>Residence Code</b>		
<b>Incurred Date</b>		<b>Code</b>		
<b>Employee's Name</b>				
<b>Benefit Period (Include Both Dates):</b>				
<b>From</b>	August 1, 2008	<b>To</b>	October 31, 2008	

<b>Gross Amount</b>	\$4,500.00
<b>Benefit Subject to OASDI (Social Security Tax)</b> <i>***For input in Detail Section Only***</i>	
<b>Benefit Subject to HI (Medicare tax)</b> <i>***For input in Detail Section Only***</i>	
<b>Federal Tax Deduction</b>	
<b>Misc. Deduction</b>	
<b>OASDI (Social Security) Tax Deductions</b>	
<b>HI (Medicare) Tax Deductions</b>	
<b>Other</b>	
<b>Amount Of Check</b>	\$4,500.00

<b>Check Date-</b>	<b>Check Number-</b>

Date  
November 03, 2008

Check Number  
60234

Your Sun Life Financial  
Reference Number  
67534

\*\*TED BAXTER\*\*  
55 EAST ERIE ST. #2305  
CHICAGO, IL 60611

Issued by  
Sun Life Assurance  
Company of Canada

1  
0  
4  
4  
2

Statement

Amount  
4,500.00

Amount of check  
Social Security Number and/or Firm's ID - 084  
Claim Number - 230605-00981-00  
Benefit Period (include both dates)  
From 01/AUG/2008 To 31/OCT/2008

Total Amount Paid \$4,500.00

**Date** November 03, 2008      **Your Sun Life Financial Reference Number** 67534      **Check Number** 60234


The sum of  
Four thousand five hundred and 00/100 Dollars\*\*\*

**Pay to the order of**  
\*\*TED BAXTER\*\*  
55 EAST ERIE ST. #2305  
CHICAGO, IL 60611

**Amount in U.S. Currency**  
\*\*\*\*\*\$4,500.00

Sun Life Assurance  
Company of Canada

*Shel C. Subyate*  
*Mark Moran*

 Citibank Delaware - A Subsidiary of  
One Penn's Way, New Castle, DE 19720

Personally Prepped By: Carol C.

This Document Was Received With:

- Original Death Certificate
- Raised Seal Present On:  
\_\_\_\_\_
- Certified Document:  
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- EMSI Best Copy available  
(Please Index)
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Notes:

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### Adjustments

- COLA
- FICA
- General Cal Worksheet
- Other  
(Activities/Financial Check/Bill)
- Overpayment Worksheet
- Partial Cal Worksheet
- Pension
- Personal Check
- Rehab Earnings
- Salary Adjustment
- SLF Check
- SLF Check Undeliverable
- Social Security
- SS Award
- SS Calc Worksheet
- SS Reimbursement
- WCB

### General Docs

- Authorizations
- Change of Address
- Complaints
- Correspondence
- EFT Forms
- E-Mail
- FML
- Job Description
- Notice of Return to Work
- Notice of Death
- Other Adjustments
- Other
- Police / Accident Report
- Proof of Age
- Surveillance
- Surveillance Bill
- Unassigned Doc Type  
(Personal Profiles)

### General Worksheet

- Telephone Template

### Legal Docs

- Appeal
- Court Order
- Demand
- Full and Final Release
- Other
- POA / Guardianship
- Subrogation

### Medical Docs

- APS Behavioral Health  
Condition 2
- APS Supplementary
- Clinical Notes
- FCE
- IME
- Internal Medical Opinion
- Internal Psychiatric  
Opinion
- List of Providers
- Medical Bills
- Other Medical
- Surveillance

### New Claim Docs

- Attending Physician  
Statement
- Complete Claim Package
- Employee Statement
- Enrollment Card
- Employer Statement
- Notice of Claim
- Other New Claim  
Documents
- Partial Claim Package
- Sun Advisor
- Telephonic
- Transitional Claim Form
- Unassigned Doc Type

### Rehab Docs

- Rehab Bills
- External Vendor Corresp
- FCE Report
- Other
- Rehab Correspondence
- TSA / LMS

Updated: October 18, 2007

SUN BAXTER 001451

## DALEY, DEBOFSKY &amp; BRYANT

## FACSIMILE TRANSMITTAL SHEET

TO:	<b>Brian Sullivan and Robert Goodall</b>	FROM:	<b>Mark DeBofsky</b>
COMPANY:	<b>SunLife</b>	DATE:	<b>1/15/09</b>
FAX NUMBER:	<b>781.304.5537</b>	TOTAL NO. OF PAGES INCLUDING COVER:	<b>1</b>
PHONE NUMBER:	<b>800.247.6875</b>	SENDER'S REFERENCE NUMBER:	
RE:	<b>Ted Baxter - Request for Ext of Time</b>	YOUR REFERENCE NUMBER:	

URGENT     FOR REVIEW     PLEASE COMMENT     PLEASE REPLY     PLEASE RECYCLE

## NOTES/COMMENTS:

**URGENT - PLEASE DELIVER TO BRIAN SULLIVAN AND ROBERT GOODALL**

We respectfully request one final extension of time through the end of the month to submit our letter/report on behalf of our client Ted Baxter. The information is nearly complete; however, I have had to prepare for a deposition, mediation and oral arguments in several other cases.

We appreciate your cooperation in this matter. Please confirm via return fax or phone that an extension of time has been granted.

Thank you for your kind attention.

55 WEST MONROE STREET, SUITE 2440  
CHICAGO, ILLINOIS 60603  
VOICE 312.372.5200  
FAX 312.372.2778





Sun Life Assurance  
Company of Canada  
SC 3208  
One Sun Life Executive Park  
Wellesley Hills, MA 02481-5699

1-800-247-6875

March 3, 2009

**Via FedEx**

Eichhorn & Eichhorn, LLP  
Attn: David C. Jensen  
200 Russell Street  
Hammond, IN 46320  
(219) 931-0560

RE: Long Term Disability, Ted Baxter  
Policy No: 67534-GD-Long Term Disability

Dear Mr. Jensen:

Enclosed is a copy of the professional opinion you provided to Sun Life in August 2008 as well as the January 28, 2009 response from Attorney Neil Posner. We are asking for your review and further opinion; in particular, we would like you to review Mr. Posner's opinions under the headings "Medical Evidence of Personal Injury Already Sustained" and "Long-Term Risks of Post-Stroke Complications," pages 9 through 18 of the enclosed.

Upon completion of your review, please provide your professional opinion on the following:

- Does this information change the opinion that a portion of the malpractice settlement awarded to Mr. Baxter represents replacement of lost earnings? Please explain why this does or does not change your opinion.

Mr. Posner also provides an opinion regarding "Conflict with Controlling Tax Law" (pages 18 through 20). Please offer your comments regarding Mr. Posner's position only if applicable tax laws are in your realm of expertise.

Please contact me if there is any additional information you feel is necessary to complete your review. I will obtain any such documents directly from Mr. Baxter's attorney.

March 3, 2009  
Page 2

Thank you for your time in reviewing this case. If you have any questions, please call me at (877) 260-9778, extension 7102. Your bill for services can be sent to my attention at the address above.

SUN BAXTER 001453

Sincerely,

Brian Sullivan  
Benefit Consultant  
LTD Appeals

Please scan to #230605-00981-00, Legal Folder

**EICHHORN & EICHHORN, LLP**  
200 Russell Street  
P.O. Box 6328  
Hammond, IN 46325  
219-931-0560  
Fax: 219-931-5370

## FAX COVER SHEET

FAX NUMBER TRANSMITTED TO: 803-329-8197

To: Brian Sullivan  
Of: Sun Life Assurance Company  
From: David C. Jensen  
Client/Matter: Ted Baxter - 590.11276  
Date: May 12, 2009

DOCUMENTS	NUMBER OF PAGES*
Letter	3

COMMENTS:  
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RETHELY  
FREDERICK F. EICHHORN, JR.  
WILLIAM H. EICHHORN

\* ALSO ADMITTED IN ILLINOIS  
\*\* ALSO ADMITTED IN ILLINOIS & MINNESOTA

PLEASE REPLY TO: HAMMOND OFFICE

May 12, 2009

Brian Sullivan  
Sun Life Assurance Company of Canada  
SC 3208  
One Sun Life Executive Park  
Wellesley Hills, MA 02481-5699

Re: Ted and Kelly Baxter  
Policy No. 67534-GD  
Our File No. 590.11276

Dear Mr. Sullivan:

I have not changed my view that lost income and the loss of earning capacity for this high wage earner was a significant factor in the mediated settlement into which Baxter entered with Evanston Northwestern Hospital.

Baxter presented a compelling mediation statement which discussed the impact his injury had on his ability to perform a difficult, yet highly remunerative job.

The Wickland evaluation performed on November 14, 2007, does not suggest otherwise. After all, the cognitive impairments render him unemployable. "He is unable to return to work due to his aphasia." Indeed, "his significant aphasia also influenced his performance across all cognitive domains. . . ." Baxter's brain function has been spared, but his "scores in the average range likely represent a decline for Mr. Baxter given his estimated high average to superior level of premorbid abilities." While his cognitive impairments could affect activities of daily living, "Baxter would not be able to maintain the demands of his high level job given his significant aphasia, difficulty manipulating in working memory, need for repetition for information processing, and executive dysfunction that effects[sic] his cognitive flexibility and organizational abilities."

In short, nothing Dr. Wickland says undermines the contention that the CVA impaired Baxter's cognitive function which rendered him unable to perform his job at Citadel.

And, the Skurski economic loss evaluation made a part of Baxter's mediation submission absolutely builds on the impact the CVA had on Baxter's ability to maintain his high level of income.

# EICHHORN & EICHHORN, LLP

Brian Sullivan  
May 12, 2009  
Page 2

## Summary of Economic Loss

	Present Values of 2007		
	Option A	Option B	Option C
<b>Past Losses</b>			
Salary and Other Compensation			
Pre-Injury Earning Capacity	\$2,559,335	\$2,559,335	\$2,559,335
Post-Injury Earnings	1,561,993	1,561,993	1,561,993
Net Past Losses	\$ 997,342	\$ 997,342	\$ 997,342
<b>Future Losses</b>			
Pre-Injury Earning Capacity	\$28,943,212	\$50,989,958	\$63,248,192
Post-Injury Earning Capacity	0	0	0
Net Future Losses	\$28,943,212	\$50,989,958	\$63,248,192
Net Past and Future Totals	\$29,940,554	\$51,987,300	\$64,245,535

Given the magnitude of the loss, it is specious to argue that the income loss did not influence the settlement.

Baxter's reviewer has essentially repeated, many times verbatim, portions of Teasell's article *Long-Term Sequelae of Stroke*. While the observations contained in Teasell's article about medical complications, musculoskeletal complications and psychosocial complications of stroke are generally true, Baxter is not the victim of a stroke the cause of which is likely to repeat itself. Nor does he exhibit the panoply of complications, or is he at risk for, the complications Teasell addresses.

Remember Baxter does not have extensive atherosclerotic disease nor is he at risk for recurrent hemorrhage. He is on no medications such as the anticoagulant Coumadin which carries a bleeding risk. He has no history of hypertension, carotid artery disease, smoking, obesity, diabetes mellitus - any of which is a risk factor for recurrent stroke.

There is no evidence of concurrent cardiovascular disease. There is no evidence he is at risk - because of the 2005 stroke - of myocardial infarction, cardiac arrhythmia or congestive heart failure. No one who is treating him has any concern about a risk of hemorrhage or embolism.

Baxter is continent of urine and stool.

There is no evidence of dementia. He does not have multiple brain infarcts.

Nothing in the records supports any likelihood of musculoskeletal or psychosocial complications. Indeed, quite the contrary. He is active and exercises frequently. His personality does not appear to have changed. He is not on any anti-depressants.

## EICHHORN & EICHHORN, LLP

Brian Sullivan  
May 12, 2009  
Page 3

The mechanism of his stroke is important to understand. His stroke was precipitated by a heart defect – patent foramen ovale (PFO) – which was repaired in July 2005 by Ted Feldman, M.D. As the Mayo Clinic records state: He is a "42 year-old male [who is] status post patent foramen ovule induced stroke in April 2005." The foramen ovule is a tunnel-like space between the overlying septum secundum and septum premium which typically closes at birth by fusion of the septum premium and secundum. In a small number of patients with PFO which persists into adulthood, the defect can precipitate a stroke by facilitating embolization. Treatment can be surgical PFO closure, and that occurred here. That is the reason we don't have ongoing therapy with antiplatelet or anticoagulant agents. The literature suggests that the recurrence rate for embolization after PFO closure drops to insignificant levels. In short, Baxter's anatomy played a cruel trick on him, but the anatomy has been repaired, and with the repair his principal risk factor for recurrent stroke has been dramatically reduced, if not eliminated.

The medications Baxter was reported as taking in 2007 do not reflect a concern by his physicians about recurrent stroke – Lamictal and Lyrica are antiseizure medications; Aricept is used to improve neurotransmission, and the fourth medication – Lipitor – is utilized by many men over the age of forty to lower blood cholesterol levels. None of the studies I've seen even suggests that Baxter's cholesterol or triglyceride levels are elevated. As recently as June 2007 Baxter denied headache, dizziness, diplopia, amaurosis fugax, dysphagia, weakness, numbness or tremors. There's no evidence of any visual disturbances (diplopia, amaurosis fugax), and there's certainly no evidence of any spasticity, difficulty walking, or conducting activities of daily living. There is no evidence he's going to choke or aspirate because he has no difficulty swallowing (*i.e.*, no dysphagia).

While Baxter has reported seizure activity in 2005 and 2006, the medications he is on appear to have controlled the seizure risk. He has an Illinois driver's license which he renewed in 2008. As his physicians have reported "Illinois generally states that someone must be seizure free for 6 months prior to driving." Additionally, the patient is responsible for "contacting the Illinois Secretary of State's office to notify them of the diagnosis of seizures." I conclude that he has been seizure free for some time.

I cannot comment on the tax aspects of the Posner letter.

Very truly yours,

EICHHORN & EICHHORN, LLP

By:

  
David C. Jensen

DCJ/rst

\*\* TOTAL PAGE. 04 \*\*

Please scan to #230605-00981-00, "Appeal."





**Tracking Number**  
**70073020000084881691**

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LAW OFFICES

**Daley, DeBofsky & Bryant**

January 28, 2009

55 West Monroe Street  
Suite 2440  
Chicago, Illinois 60603

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Gregory Benker  
Sandra M. Dye

Of Counsel  
Heather F. Aloe

Robert Goodall  
Claim Consultant  
Sun Life  
P.O. Box 81830  
Wellesley, MA 02481  
**BY CERTIFIED MAIL**

RE: Ted Baxter

Dear Mr. Goodall:

We appreciate all of the courtesies you have extended in allowing us additional time to address the issue of whether Mr. Baxter's medical malpractice settlement affects his monthly disability benefits being paid by Sun Life. As you will see from the attached letter, the expert we retained, Neil Posner (biography attached) chose to pursue all of the relevant issues in addressing whether the settlement payment constitutes "other income." The comprehensiveness of Mr. Posner's report thoroughly addresses all of the relevant issues and makes it absolutely clear both as a matter of tax law, and as a matter of insurance law that the interpretation Sun Life has advanced is unsupported.

In addition to Mr. Posner's opinions, we wish to add that there have been at least two appellate rulings involving offsets in relation to ERISA-governed disability benefits; and both cases are consistent with Mr. Posner's findings. In both *In re Unisys Long-Term Disability Plan ERISA Litigation*, 97 F.3d 710 (3d Cir. 1996) and in *Feifer v. Prudential Insur.Co. of America*, 306 F.3d 1201 (2d Cir. 2002), efforts by plan administrators to expansively interpret offset provisions were rejected. In both of those cases, the issue had to do with dependent Social Security benefits, but the distinction is immaterial. The point made in both decisions is that the language in the benefit plan controls and cannot be read in a manner that grants rights beyond what the document states.

Accordingly, in view of the language in the policy, there is no basis for imposing any offset other than the Social Security offset which is currently in place. Therefore, Mr. Baxter's full benefits must be resumed and we anticipate you will pay interest on the money that has been

withheld from the payments due him - at the statutory rate of 9% (215 ILCS 5/357.9 or 357.9a).

Very truly yours,



Mark D. DeBofsky

MDD/ns

cc: Ted Baxter

11-18-09 11:18 AM

Neil B. Posner

http://www.muchshelist.com/Neil\_B.\_Posner.htm

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**PRACTICE AREAS**

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**AT WORK**

Neil B. Posner, head of the firm's Policyholders' Insurance Coverage department, focuses his legal practice in the area of insurance coverage, with specific emphasis on insurance recovery and dispute resolution, risk management, loss prevention and cost containment. Neil's clients include a range of public and private companies, organizations, boards of directors, individual officers and other policyholders.

Neil assists clients in analyzing, negotiating and enhancing a wide range of insurance policies and plans, including directors' and officers' liability, errors and omissions, employment practices liability and fiduciary liability. He also has significant experience in insurance coverage issues related to e-commerce, intellectual property and construction matters.

In addition to counseling clients with regard to ongoing and future insurance requirements, Neil helps policyholders resolve all types of insurance coverage disputes, through negotiation, litigation and other forms of dispute resolution, including mediation, arbitration and settlement.

He has successfully obtained insurance coverage for defendants involved in a variety of class actions and other complex lawsuits. For example, when the former CEO of a bankrupt Chicago-area public company was named in a shareholder class action brought by the bankruptcy estate — alleging securities fraud and breach of fiduciary duty, and seeking to recover damage claims totaling nearly \$400 million — Neil helped his client obtain effective insurance coverage.

**IN THE PROFESSION**

Neil is a member of the American Bar Association, serving on the

NEIL B. POSNER

Neil B. Posner

[http://www.muchshelist.com/Neil\\_B\\_Posner.htm](http://www.muchshelist.com/Neil_B_Posner.htm)

Insurance Coverage Litigation Committee of the Section of Litigation and as co-chair of the Committee's Ethics and Professionalism Subcommittee, and is a member of the ABA's Business Law Section. He has also taught insurance law at Chicago-Kent College of Law.

As a regular speaker at industry and legal seminars around the country — and author of articles and educational materials for dozens of conference training sessions — Neil has given presentations on issues as diverse as securities litigation, directors' and officers' insurance, change-of-control situations, errors and omissions insurance, non-traditional insurance options, cyberliability, the Sarbanes-Oxley Act, negotiating policy provisions and considerations, maximizing insurance coverage, recovering e-commerce and Internet claims, and directors' and officers' liability in consumer class action matters.

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Much  
Shebat

While in law school, Neil earned awards for achieving highest grades in Legal Writing and Research, Federal Income Taxation of Corporations and Shareholders, and Business Bankruptcy. He also served as Lead Articles Editor for the *Marquette Law Review*.

In 2006, Neil was designated an Illinois Super Lawyer, an honor given to the top 5% of attorneys in the state. He has also been recognized by the Leading Lawyers Network as a top Illinois lawyer in the area of insurance, insurance coverage and reinsurance law (2007-2008).

#### IN THE COMMUNITY

Neil is on the Board of Directors of HIAS, Inc (Hebrew Immigrant Aid Society) and JVS (Jewish Vocational Services) Chicago.

#### BACKGROUND

Marquette University Law School  
J.D., *magna cum laude*, 1996

University of California, Los Angeles  
Accounting Program, 1991

New York University  
B.A., 1971

Neil is admitted to practice in Illinois and Wisconsin.

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11-13-09 2:00 PM

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January 28, 2009

Mark D. DeBofsky, Esq.  
Daley, DeBofsky & Bryant  
55 W. Monroe Street  
Suite 2440  
Chicago, Illinois 60603

Re: *Ted Baxter Claim for Long-Term Disability Benefits*  
*Opinion regarding Coverage Position of Sun Life Assurance Company of Canada*  
*("Sun Life")*

Dear Mr. DeBofsky:

You have asked me to express my opinion as to Sun Life's position with respect to whether Sun Life may treat the proceeds of Mr. Baxter's settlement of his malpractice lawsuit against Evanston Hospital, et al., as income and therefore as an offset against Sun Life's obligations to Mr. Baxter under the terms of the Long Term Disability insurance contract with him. It is my opinion, for the reasons set forth below, that Sun Life's position is incorrect.

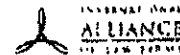
### **Background**

On or about April 21, 2005, Mr. Baxter became confused and then uncommunicative at home, during which time his right hand started to clasp and he began to drool. His wife called "911," which transported him to Evanston Hospital. Mr. Baxter suffered a left Middle Cerebral Artery stroke that night, a stroke that Evanston Hospital and its medical staff failed to timely diagnose. It is a well-settled medical fact that timely diagnosis, and treatment with tPA,<sup>1</sup> can and usually does result in much less permanent brain damage and disability. Had Mr. Baxter timely been treated with tPA, his chances of a full recovery would have been increased. As a result of the failure the hospital and its medical staff to administer tPA, Mr. Baxter's chances for a significantly better recovery were lost.

As a consequence of his stroke and the failure to receive timely treatment, Mr. Baxter suffers from right hemiparesis (one-sided weakness), severe aphasia (impairment in the

<sup>1</sup> "tPA" is the acronym for *tissue plasminogen activator*, a thrombolytic (clot-dissolving) agent. It is used in the treatment of ischemic strokes, such as the kind Mr. Baxter suffered. To be effective, however, it must be administered early. It is ineffective, and therefore cannot be given to a patient, more than three hours following the onset of stroke symptoms. See, e.g., Am. Heart Assoc., "Tissue Plasminogen Activator (tPA)," <http://www.americanheart.org/presenter.jhtml?identifier=4751>.

Much Shelist Donenberg Amen & Rubenstein, P.C.



**M U C H S H E L I S T**

Mark DeBofsky, Esq.  
January 28, 2009  
Page 2

ability to speak, write and understand spoken and written language), slowed mentation and problems with multi-tasking. In addition, he has also suffered from *grand mal* seizures, the first in February 2006 and the second in September 2006. He had a *petit mal* seizure in March 2007. He is being treated for seizure disorder. According to all medical and neuropsychological reports and documents consulted in connection with this report, Mr. Baxter has suffered permanent brain damage. As a direct consequence, he is unable to work in any profession.

At the time of his stroke, Mr. Baxter was working for Citadel Investment Group, LLC as its Global Controller. It is stipulated that he was successful at his profession and enjoyed a substantial income. Since the stroke, he has been unable to work at any job.

Following the stroke, he applied for and received benefits under his employer's short-term disability program. Upon expiration of that program, Mr. Baxter applied for benefits under a Long Term Disability ("LTD") Insurance Policy ("LTD Policy") issued by Sun Life and obtained through his employment. Sun Life approved his claim and began paying benefits in accordance with the terms of the LTD Policy. When instructed by Sun Life to apply for Social Security Disability Benefits ("SSD"), Mr. Baxter (through his wife because Mr. Baxter cannot reliably carry out any function requiring processing of information or instructions) complied. In accordance with the terms of the LTD Policy, Sun Life reduced Mr. Baxter's monthly benefit check by the amount of SSD he receives each month.

On or about November 22, 2006, Mr. and Mrs. Baxter filed a lawsuit against Evanston Hospital, McGaw Medical Center and the treating physicians (Cook County Circuit Court, Law Division, Case No. 2006 L 012259) ("Evanston Lawsuit"). Mr. and Mrs. Baxter were represented in the Evanston Lawsuit by Corboy & Demetric. The Evanston Lawsuit alleged, generally: that Mr. Baxter presented at the Evanston Hospital emergency room on April 21, 2005; that he was examined by various physicians and agents; that a CT and MRI were ordered and taken; that those tests were wrongfully interpreted as normal when, in fact, those tests were abnormal because the CT showed that Mr. Baxter has suffered an acute ischemic stroke in the left middle cerebral artery consistent with a thrombus within that artery and the MRI showed focal regions of restricted diffusion in the left caudate and insular region compatible with acute infarction; that because of the wrongful interpretation of those tests Mr. Baxter was not treated with tPA but, rather, was specifically advised by the treating physician or physicians that he should not receive tPA; and that because his stroke was not correctly diagnosed until the following morning—after the period within which tPA could be administered—Mr. Baxter suffered permanent personal and economic injuries. It appears from the record I reviewed that Evanston recognized that liability would attach and settled the lawsuit. The Settlement Agreement did not allocate the settlement amount as to damages, replacement of income or the other causes of action. The case was settled on or about March 28, 2007. The settlement amount was \$19.5 million. After payment of attorney's fees and expenses, the Baxters received approximately \$12-13 million.



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Following settlement of the case, Sun Life engaged the services of Claims Bureau USA, Inc. ("Claims Bureau"), which undertook an investigation of the facts underlying the Evanston Lawsuit, and Mr. Baxter's medical and financial condition. Presumably, Claims Bureau submitted its report to Sun Life, which, in turn, engaged the services of David C. Jensen of the law firm of Eichhorn & Eichhorn, LLP, Hammond, Indiana, to advise Sun Life as to whether any, all or none of the settlement amount constituted replacement of Mr. Baxter's income. In a letter dated August 12, 2008, Mr. Jensen concluded that the entire settlement amount was replacement of income and that Sun Life was entitled, under the provisions of the "Other Income Benefit" provision of the LTD Policy, to apply the full net amount of the settlement of the Evanston lawsuit to Sun Life's obligations to Mr. Baxter. Accordingly, Sun Life now claims that no further benefits are due under the LTD Policy on the ground that Sun Life is entitled to an offset for the entire amount of the settlement amount.

***Analysis of Insurance Contract*****Rules under ERISA**

The Sun Life Policy, and claims under it, is governed by ERISA and, as such, is interpreted under Federal common law. *Firestone Tire and Rubber Co. v. Bruch*, 489 U.S. 101, 110 (1989). This Policy does *not* grant "discretionary authority" to the insurer and therefore is *not* subject to an arbitrary-and-capricious or abuse-of-discretion standard of review. *Id.* Accordingly, Sun Life's determinations are subject to a *de novo* review under which the *contra proferentem* rule is applied in the construction of this Policy. *Id.* at 111-15. In conducting a *de novo* review, the Seventh Circuit has held that ERISA preempts state laws governing interpretation of insurance policies on the basis that state rules of contract interpretation do not regulate insurance within the meaning of ERISA and because Congress intended uniformity of decisions under ERISA. *Phillips v. Lincoln Nat'l Life Ins. Co.*, 978 F.2d 302, 307 (7th Cir. 1993); *Hammond v. Fid. & Guar. Life Ins. Co.*, 965 F.2d 428, 430 (7th Cir. 1992). Accordingly, ERISA preempts state decisional rules of contract interpretation; any ambiguities in ERISA plans and insurance policies are resolved by referring to the federal common law rules of contract interpretation. *Phillips*, 978 F.2d at 307; *Hammond*, 965 F.2d at 430.

The terms of an insurance policy governed by ERISA are interpreted in an ordinary and popular sense as would a person of average intelligence and experience. *Phillips*, 978 F.2d at 308; *Hammond*, 965 F.2d at 430. Ambiguous terms in an insurance contract will be construed strictly in favor of the insured. *Phillips*, 978 F.2d at 307; *Hammond*, 965 F.2d at 430. Courts will not artificially create an ambiguity where none exists. *Phillips*, 978 F.2d at 308; *Hammond*, 965 F.2d at 430. But where there is an ambiguity in a central plan limitation, a court is obliged to construe such ambiguities strictly in favor of the insured. *Phillips*, 978 F.2d at 313 ("Lincoln [National Life Insurance] is not being forced to provide benefits 'upon every remotely colorable claim of plan ambiguity,' . . . but upon an ambiguity in a central plan limitation. Lincoln urges us to reject the application of *contra proferentem* and simply determine the intent of the

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parties as to the mental illness limitation. This is precisely what we are unable to do because the Plan term 'mental illness' is ambiguous."). Further, the application of Federal common law does not mean that a court will not look for guidance to state rules of insurance policy construction. When "ERISA is silent on an issue, a federal court must fashion federal common law rules to govern ERISA suits . . . . In making such rules, we must of course look to the statute itself for guidance, . . . in it is also proper to turn to state law when creating such rules, . . . as long as such state law is consistent with the policies underlying the federal statutes at issue." *Phillips*, 978 F.2d at 311 (quoting *Fox Valley & Vic. Constr. Workers Pension Fund v. Brown*, 897 F.2d 275 (7th Cir.) (*en banc*), cert. denied, 498 U.S. 820 (1990)).

Accordingly, it is necessary to review Illinois's rules governing the interpretation of insurance contracts.

Rules Under Illinois Law

The construction of an insurance policy and a determination of the rights and obligations thereunder are questions of law for a court which, as such, are appropriate for summary judgment. *Crum & Forster Managers Corp. v. Resolution Trust Corp.*, 156 Ill. 2d 384, 391, 620 N.E.2d 1073 (1993). The primary function of a court when construing an insurance policy is to ascertain and enforce the intentions of the parties as expressed in the agreement. *Central Ill. Light Co. v. Home Ins. Co.*, 342 Ill. App. 3d 940, 950-51, 795 N.E.2d 412 (3d Dist. 2003). To ascertain the intent of the parties and the meaning of the words used in an insurance policy, a court will construe the policy as a whole, taking into account the type of insurance for which the parties have contracted, the risks undertaken and purchased, the subject matter that is insured and the purposes of the entire contract. *Crum & Forster*, 156 Ill. 2d at 391.

If the words used in an insurance policy are clear and unambiguous, they must be given their plain, ordinary and popular meaning. *Central Ill. Light*, 213 Ill. 2d at 153. A contract term is ambiguous, however, if it can reasonably be interpreted in more than one way due to the indefiniteness of the language or due to it having a double or multiple meanings. *Wm. Blair & Co. v. FI Liquidation Corp.*, 358 Ill. App. 3d 324, 334, 830 N.E.2d 760 (1st Dist. 2005). Insurance policies are to be liberally construed in favor of coverage, and courts will resolve any existing ambiguity against the insurer who drafted the policy. *Outboard Marine Corp. v. Liberty Mut. Ins. Co.*, 154 Ill. 2d 90, 108-09 (1992).

The insured has the burden of proving that its claim or loss falls within the terms of the policy. *St. Michael's Orthodox Catholic Church v. Preferred Risk Mut. Ins. Co.*, 146 Ill. App. 3d 107, 109, 496 N.E.2d 1174, 1178 (1st Dist. 1986), citing *Gibson v. State Farm Mut. Auto Insurance Co.*, 125 Ill. App. 3d 142, 148, 80 Ill. Dec. 577, 465 N.E.2d 689 (1984) and *Polzin v. Phoenix of Hartford Ins. Cos.*, 5 Ill. App. 3d 84, 87, 283 N.E.2d 324 (1972). Once the insured has brought itself within the terms of the policy, then the insurer must prove the applicability of an exception in the coverage if it wishes to escape liability. *St. Michael's*, 146 Ill. App. 3d

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at 109-110, 496 N.E.2d at 1178, citing *Rutgens Distributors, Inc. v. U.S. Fid. & Guar. Co.*, 94 Ill. App. 3d 753, 757-58, 50 Ill. Dec. 192, 419 N.E.2d 59 (1981) and *Great Central Ins. Co. v. Harris*, 46 Ill. App. 3d 542, 546, 4 Ill. Dec. 776, 360 N.E.2d 1151 (1977). The provision or provisions on which the insurer relies to deny or limit coverage must be free and clear from doubt. *West Bend Mut. Ins. Co. v. Rosemont Exposition Services, Inc.*, 378 Ill. App. 3d 478, 486, 800 N.E.2d 640 (1st Dist. 2007); *Hartford Fire Ins. Co. v. Whitehall Convalescent & Nursing Home, Inc.*, 321 Ill. App. 3d 879, 888, 748 N.E.2d 674 (1st Dist. 2001). Provisions in an insurance policy that limit or exclude coverage are construed liberally in favor of the insured and against the insurer. *United Services Automobile Ass'n v. Dare*, 357 Ill. App. 3d 955, 964, 830 N.E.2d 670 (1st Dist. 2005).

**Application of Law to the Sun Life Policy****Burden: Ambiguity**

Under Illinois law, the claimant has the burden of proving that his claim falls within the coverage grant of the policy. *St. Michael's*, 146 Ill. App. 3d at 109-110, 496 N.E.2d at 1178. Mr. and Mrs. Baxter have met that burden, as evidenced by the fact that Sun Life accepted and has been paying benefits under the LTD Policy. With the Baxters having met their burden, the burden shifts to Sun Life to establish that language in the policy clearly and unambiguously precludes or limits coverage. *Rosemont Exposition*, 378 Ill. App. 3d at 486; *Whitehall*, 321 Ill. App. 3d at 888. Sun Life cannot meet its burden because the language Sun Life relies does not clearly and unambiguously preclude or limit coverage. At best it is ambiguous. Under both Illinois and Federal common law, language in a policy that excludes or limits coverage is construed liberally in favor of coverage and ambiguities are strictly construed against the insurer and in favor of the insured. *Phillips*, 978 F.2d at 307, 308, 313; *Hammond*, 965 F.2d at 430.

The provisions that Sun Life relies on provides as follows:

**How is the Total Disability Benefit calculated?**

To determine your Total Disability Benefit:

1. Take the lesser of:
  - a. your Total Monthly Earnings multiplied by the Benefit Percentage (shown in the Benefit Highlights); or
  - b. your Maximum Monthly Benefit (shown in the Benefit Highlights); then
2. Subtract Other Income Benefits from the amount determined in Step 1.

Sun Life Policy, at 32.

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Thus, it is necessary to address the definition of "Other Income Benefits." The pertinent language continues on page 34 as follows:

**What are Other Income Benefits?**

Other Income Benefits are those benefits provided or available to you while your monthly LTD benefit is payable. These Other Income Benefits, other than retirement benefits, must be provided to you as a result of the same Total or Partial Disability payable under the Group Policy. Other Income Benefits include:

...

- 9. Any amount you receive due to income replacement or lost wages paid to you by compromise, settlement or other method as a result of a claim for any Other Income Benefit.

...

Other Income Benefits will include any amount described above which would have been available to you had you applied for that benefit.<sup>2</sup>

**What if I receive payment of Other Income Benefits in a lump sum?**

If you receive a lump sum payment for any Other Income Benefits, Sun Life will prorate the lump sum on a monthly basis over the time period specified for the lump sum payment. If no time period is stated, the lump sum payment will be prorated on a monthly basis over a reasonable period of time as determined by Sun Life.

Sun Life Policy, at 34-35.

<sup>2</sup> A review of the complete definition of "Other Income Benefits" demonstrates that third-party settlement agreements are not of the type of benefits enumerated therein. The complete provision is set forth following the signature page of this letter. The concept that unifies the list is embodied in the flush language at the conclusion of that section: "Other Income Benefits will include any amount described above which would have been available to you had you applied for that benefit." In other words, the purpose of this section is to impose a condition on the beneficiary to apply for any other benefits—such as Social Security, Workers' Compensation, retirement benefits and the like—potentially available to him. It does not require the beneficiary to file a lawsuit; accordingly, it follows that no proceeds of such a lawsuit should be included in this definition. Finally, proceeds from a lawsuit is completely unlike any of the other benefits in the "Other Income Benefits" section of the policy. "Under the doctrine of *eiusdem generis*, where general words follow an enumeration of specific things of a particular class, the general words are to be construed as applying only to things of the same general class as those enumerated." *Save Our Little Vermillion Environment, Inc. v. Ill. Cement Co.*, 311 Ill. App.3d 747, 752, 725 N.E.2d 386, 390 (3d Dist. 2000), citing *N.H. Ins. Co. v. Hanover Ins. Co.*, 296 Ill. App. 3d 701, 696 N.E.2d 22 (1998).

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Sun Life is not entitled to rely on these provisions because they do not clearly and unambiguously define "Other Income Benefit" insofar as that term might apply to the settlement amount. In the first place, paragraph 9 of the definition section is explicit in its requirement that the "amount" received by the Baxters be "due to income replacement or lost wages." The settlement agreement does not state that the settlement amount is paid as income replacement or for lost wages. To the contrary, the settlement is of the entire Evanston Lawsuit, which by its terms alleged both physical as well as economic damages. There is no other evidence that I have seen that Sun Life can rely on to show that the term "Other Income Benefit" clearly and unambiguously applies to the settlement amount.

In addition, even if the Policy language was free from doubt, it is not clear from the language in the Policy nor from the language of the settlement agreement that Sun Life is entitled to treat the settlement amount solely as replacement of Mr. Baxter's income. Again, nothing in the settlement agreement allocates the settlement amount according to damages or allegations.

Additionally, the Sun Life Policy does not contain a "third-party settlement clause" that, arguably, would include settlements of tort claims and/or personal-injury lawsuits within the definition of income. Such a clause, for example, might include within the definition of "Other Income Benefits" any "amount your receive from a third party (after subtracting attorney's fees) by judgment, settlement or otherwise." See, e.g., *Alvarez v. UNUM Life Ins. Co. of Am.*, No. C 07-00974 WHA, 2007 WL 2348737 (N.D. Cal. Aug. 14, 2007); *Smith v. Life Ins. Co. of N. Am.*, 466 F. Supp. 2d 1275, 1279 (N.D. Ga. 2006); *Dickens v. Prudential Ins. Co. of Am.*, No. Civ. A. 05-1785, 2006 WL 845601 (W.D. La. Mar. 28, 2006). The Sun Life Policy has no such language, and courts will not insert such language into an insurance policy when the insurer was able to do so when drafting the policy. *Wyatt v. UNUM Life Ins. Co.*, No. 97 C 8228, 1999 WL 116213 (N.D. Ill. Mar. 2, 1999). On appeal, the Seventh Circuit agreed:

UNUM can point to no provision in its own policy regarding third-party settlements, but instead attempts to piggyback on the provision in Federal's policy . . .

...

Had Wyatt not purchased insurance from Federal, he would have received the \$4 million settlement against which UNUM had no claim because its policy did not contain a third-party settlement clause.

*Wyatt v. UNUM Life Ins. Co.*, 223 F.3d 543, 547-48 (7th Cir. 2000).

In the absence of such a third-party-settlement clause, the problem with Paragraph 9 of the definition of Other Income Benefit becomes more clear, and cannot not apply as a "catch all" that would save Sun Life's failure to include a third-party-settlement clause in the

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definition. As explained above, "Other Income Benefit" is defined generally to include "any amount described above which would have been available to you had you applied for that benefit." The most reasonable interpretation of this provision is that it allows "income" to include benefits such as Social Security or Workers' Compensation for which an insured *could have* applied; it is thus intended to cause the insured to seek other available disability benefits that are otherwise defined as income. Such benefits would allow Sun Life to take a setoff against such amounts, thereby allowing Sun Life to avoid the risk of being entirely responsible for income payments when other benefits are otherwise available. And, in fact, Mr. Baxter *did* apply for Social Security Disability benefits and, in fact, Sun Life *did* take an offset against such benefits. But the "catch all" language of Paragraph 9—"any amount you receive due to income replacement or lost wages paid to you by compromise, settlement, or other method as a result of a claim for any Other Income Benefit"—cannot be used to expand the definition beyond what is otherwise defined. Mr. Baxter did not file the Evanston Lawsuit as a "claim for any Other Income Benefit" but, rather, as a claim for damages for personal and pecuniary injuries, and for Mrs. Baxter's loss of consortium. The settling Evanston Lawsuit defendants recognized their liability and settled the case without going to trial.<sup>3</sup> The list of personal injuries is long and without doubt. Accordingly, Sun Life cannot meet its burden because its interpretation is not reasonable and be-

<sup>3</sup> See Mar. 20, 2007 news release of Corboy & Demetrio, the law firm that represented the Baxters against Evanston Hospital, et al., attached as an exhibit to the Report of Daniel Neubeck, Claims Bureau USA, Inc., Oct. 3, 2007. The news release stated in pertinent part:

Ted Baxter, 41, alleged that Evanston Hospital failed to treat him with the clot busting drug, tPA, after he presented to its Emergency Department on April 21, 2005, with symptoms suggestive of stroke. He further alleged that after being admitted to the hospital, nurses failed to respond to his wife's repeated requests for him to be re-evaluated. Baxter's stroke went undiagnosed and evolved throughout the next 12 hours, resulting in significant expressive and receptive aphasia. He is permanently disabled from his job at Citadel.

According to David R. Barry of Corby & Demetrio, who represents the Baxters:

This case is a great example of how our civil justice system can work. Evanston did its investigation, realized that mistakes were made and immediately indicated an interest in trying to get the case resolved through mediation. . . .

"I give Evanston a great deal of credit for doing the right thing and allowing the Baxters to move forward with their lives. Evanston prides itself on being an outstanding stroke center, and the level of care here was clearly not up to its standards," said Barry.

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cause it could have drafted the Policy to include a third-party-settlement clause in the definition of Other Income Benefit.

At a minimum, there is more than one reasonable interpretation of the subject limiting language. Sun Life appears to assert that Paragraph 9 of the definition of Other Income Benefit applies to the settlement amount even in the absence of evidence that the settlement amount was meant to apply solely to income replacement or lost wages. The Baxters believe that the settlement amount received must be "due to" income replacement or lost wages and that the burden is on Sun Life to prove that such amount was "due to" those causes. Accordingly, the Policy provision at issue is ambiguous under both Illinois and Federal common law, and must be construed in favor of coverage. *Phillips*, 978 F.2d at 313; *Rosemont Exposition*, 378 Ill. App. 3d at 486; *Whitehall*, 321 Ill. App. 3d at 888.

### Medical Evidence of Personal Injury Already Sustained

Perhaps equally important is the medical and other evidence that confounds Sun Life's attempt to treat the settlement amount as replacement of income only.

First, Mr. Baxter has lost much more than mere income. As the medical and neuropsychological records I reviewed show, Mr. Baxter has suffered permanent brain damage as a result of the failure of timely treatment for his stroke. He sustained a left middle cerebral artery ("MCA") stroke, which was not timely treated. In the immediate aftermath of the stroke, he sustained right hemiparesis and severe aphasia. He has since undergone extensive physical, occupational and speech therapy, which have ameliorated some of his problems, but not all. Notwithstanding such treatment, Mr. Baxter suffers from the following<sup>4</sup>:

<sup>4</sup> See Alissa H. Wicklund, Ph.D., Clinical Neuropsychological Evaluation (Nov. 14, 2007) (hereinafter "Wicklund Evaluation").

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- Extensive cognitive sequelae, including:
  - Aphasia<sup>5</sup>
  - Slowed mentation
  - Difficulty with multitasking
- Speech output that is labored, with significant word-finding difficulties
- Difficulty with complex grammatical structures
- Difficulty with writing numbers and performing mental calculations.

Dr. Wicklund based her clinical findings upon her evaluation of the medical record and her own testing. Her analysis of the medical record showed that Mr. Baxter suffered a "large left MCA encephalomalacia involving lateral aspects of the left temporal lobe and extending to lateral aspects of the lentiform nucleus, white matter of the insula, and frontal and parietal lobes."<sup>6</sup> Encephalomalacia is defined to mean "softening of brain tissue, usually due to ischemia or infarction."<sup>7</sup> The syndrome associated with encephalomalacia is primarily one of loss of function including somnolence, blindness, ataxia, head pressing, circling and terminal coma.<sup>8</sup>

Dr. Wicklund administered the following tests: Wechsler Test of Adult Reading (WTAR), demographic estimate; Wechsler Adult Intelligence Scale, 3d edition (WAIS-III); Wechsler Memory Scale, 3d edition (WMS-III), select subtests; California Verbal Learning Test, 2d edition (CVLT-II); Brief Visuospatial Memory Test-Revised (BVMT-R); Rey Complex Figure Copy and Delayed Recall; Delis Kaplan Executive Function System (DKEFS), select subtests; Trail Making Test; Verbal Fluency (Letter and Semantic); Boston Naming Test (BNT); Western

<sup>5</sup> According to Drs. Melfi and Garrison, "Aphasia is a language disorder that results from damage to the areas of the brain responsible for language comprehension and expression. [Citation to Loddenkemper T, Dinner DS, Kubu C, et al., "Aphasia after hemispherectomy in an adult with early onset epilepsy and hemiplegia. *J Neurol Neurosurg Psychiatry*, Jan 2004; 75(1):149-51. It is notable that, since his stroke, Mr. Baxter has suffered from both epilepsy and hemiplegia.] These injuries usually occur in the dominant side of the brain, which, for most people, is the left hemisphere. [This is the side of the brain where Mr. Baxter suffered his stroke.] Depending on the site of the lesion, aphasia may involve spoken and written language expression, auditory comprehension, and reading and writing abilities. [Citation to Clark LW, "Communication disorders: what to look for, and when to refer" *Geriatrics*, Jun 1994; 49(6):51-5.]" Renee S. Melfi, MD, Susan J. Garrison, MD, *Communication Disorders*, <http://emedicine.medscape.com/article/317758>, visited Jan. 23, 2009 (hereinafter "Melfi and Garrison").

<sup>6</sup> *Id.* at 1.

<sup>7</sup> McGraw-Hill Concise Dictionary of Modern Medicine (2002).

<sup>8</sup> See <http://medical-dictionary.thefreedictionary.com/p/encephalomalacia>, visited Jan. 23, 2009.



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Aphasia Battery (WAB), select subtests; Visual Form Discrimination (VFD); Wisconsin Card Sorting Test (WCST); Beck Depression Inventory, 2d edition (BDI-II); Grooved Pegboard; and Finger-Tapping Test.

Dr. Wicklund's results are profound. She first determined that Mr. Baxter's pre-stroke intellectual abilities were "high average to superior." Since the stroke and the failure of timely treatment, however, the list of objective findings of brain damage is long:

- General intellectual abilities: low average (WAIS-II FSIQ=82, 12th percentile).
- Verbal abilities: low average (VIQ=80, 9th percentile).
- Non-verbal abilities: low average (PIQ=87, 19th percentile).
- Scores on measures of vocabulary, verbal abstract reasoning, general fund of knowledge and the ability to construct visual designs requiring problem solving "represent an area of weakness given the expectation of high average to superior intellectual abilities."
- Low-average to impaired results in the following measures: immediate auditory attention; manipulation of number sequences; ability to describe general conceptual information related to everyday scenarios.
- Working memory: impaired (WAIS-III WMI SS=73, 4th percentile).
- Immediate auditory attention: borderline performance.
- Ability to solve mental arithmetic problems and manipulate number and letter sequences in working memory: low average.
- Index of processing speed: average (PSI SS=93, 32d percentile).
- Measure of divided attention requiring use of numbers: low average.
- Measure of visual scanning and sequencing of numbers: mild to moderately impaired.
- More difficult version of above task, requiring cognitive flexibility: mildly impaired.
- Verbal fluency (a measure of sustained attention and word generation): impaired with a phonemic cue; low-average with categorical cue.
- Recognition of previously learned words: mildly impaired and characterized by source memory errors and false positive errors for semantically related words.
- New learning of six visual figures: low average.
- Ability to spontaneously recall the figures after a delay: impaired.

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- Ability to copy a complex visual figure: impaired, and characterized by poor spatial planning and inattention to detail.
- Incidental recall of the figure: severely impaired, reflecting poor spatial organization.

According to Dr. Wicklund, Mr. Baxter's language skills are damaged. As she writes:

Speech was slow and labored, agrammatic, and with word-finding difficulties. Occasional semantic paraphasic errors were noted.<sup>9</sup> Writing was agrammatic. Auditory comprehension was intact. However, he often required repetition to aid in information processing. Confrontation naming was low average. As described, intrinsic word generation was moderately impaired with a phonemic cue, and average with a categorical cue. He was able to execute sequential commands, but required a lot of time to process the verbal information. Repetition was intact for single words and phrases, but impaired for lengthier grammatical construction. Silent reading comprehension was relatively preserved, although he had mild difficulty with complex passages.<sup>10</sup>

Dr. Wicklund's evaluation of Mr. Baxter's executive functioning shows that these functions are damaged as well:

Basic visuoconstructional abilities were performed at the level of expectation. However, deficits were apparent on tasks of spatial planning and organization, reflecting executive dysfunction. On other tests of executive functioning (i.e., cognitive flexibility, problem solving, and reasoning) scores were variable. As described, scores on a measure of non-verbal reasoning were superior. Verbal abstract reasoning was in the average range. Scores were mildly impaired in his ability to initiate strategies for problem solving on a task of cognitive flexibility and reasoning. On a task of spatial planning, rule learning, inhibition, and establishing and maintaining cognitive set, his score was in the low average range. His ability to generate a complex figure was impaired and characterized by poor spatial planning and inattention to detail.<sup>11</sup>

<sup>9</sup> Semantic paraphasia is a subset of aphasia, characterized by word substitution belonging to the same semantic class, such as "table" for chair." See, e.g., Melfi and Garrison.

<sup>10</sup> Wicklund Evaluation, at 3.

<sup>11</sup> *Id.*

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And Dr. Wicklund reports findings of additional physical damage: "Fine motor speed was average bilaterally. Fine motor speed and dexterity was mild to moderately impaired with the dominant right hand, and mildly impaired with the non-dominant left hand"<sup>12</sup>

Finally, Dr. Wicklund's conclusion is a clear neuropsychological finding of personal injury as a result of medical malpractice:

Mr. Baxter's pattern of performance on testing is consistent with cognitive dysfunction secondary to his stroke in the left hemisphere. Most notable is his non-fluent aphasia which influenced his performance across multiple cognitive domains. For example, tests of intellectual ability that are verbally mediated likely underestimate his true intellectual capabilities as he has difficulty articulating concepts secondary to his aphasia. In addition, his verbal processing is slowed, and he requires repetition of information to enhance processing. Additional cognitive deficits are also apparent, and consistent with the large area of encephalomalacia resulting from his stroke. For example, there is evidence of mild executive dysfunction, which was demonstrated on tests that require minimal verbal demands.<sup>13</sup>

It is therefore clear that Mr. Baxter has suffered numerous, significant and permanent personal injuries as a result of the failure to timely treat his stroke. Each of these injuries has impacted his and his wife's lives negatively and profoundly. Each is an injury for which damages is an appropriate remedy at law. The settlement amount is therefore not "due to" income replacement and/or lost wages. Accordingly, it is my opinion that Sun Life will not be able to sustain its burden on this issue.

Additionally, Mr. Baxter faces numerous long-term risks that may as yet manifest, resulting in additional personal injury. Such injuries, as described below, likely would not arise but for the medical malpractice and would therefore constitute personal injuries for which damages is available as an appropriate remedy at law. The next section of this letter provides examples of those risks.

### Long-Term Risks of Post-Stroke Complications

Sun Life also has ignored, or has failed to consider, the long-term risks facing Mr. Baxter. The medical literature is replete with such risks. For example, Mr. Baxter is at a higher

<sup>12</sup> *Id.*

<sup>13</sup> *Id.* at 4.

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risk for epilepsy.<sup>14</sup> In fact, already he has suffered two *grand mal* seizures and one *petit mal* seizure. Prior to the stroke, he had never had a seizure.

In addition to epilepsy, Mr. Baxter faces a significant number of other risks. As reported by Robert W. Teasell, MD, FRCPC in his article, *Long-Term Sequelae of Stroke*,<sup>15</sup> "the acute stroke is the beginning of an ongoing struggle with physical impairment and the subsequent disability. With time, the immediate clinical consequences of the stroke are complicated by a variety of less well-known medical, musculoskeletal, and psychosocial difficulties."<sup>16</sup> According to Teasell, the medically established list of risks includes:

- Medical complications:
  - Stroke recurrence: "Patients who have had a stroke are five times more likely to have another stroke than matched controls."
  - Concurrent cardiovascular disease: "Stroke is associated with a high incidence of concurrent cardiovascular disease. The most common cause of death after an atherothrombotic stroke or transient ischemic attack [the type Mr. Baxter sustained] is not a second stroke but rather a myocardial infarction, cardiac arrhythmia, or congestive heart failure. Patients with pre-existing cardiac disorders leading to cardiac embolism often require long-term anticoagulation therapy, which carries with it a serious cumulative risk of hemorrhage."
  - Seizures: "Seizures occur in 5% to 9% of all stroke survivors. In one study of hemispheric stroke patients, who were followed for 2 to 4 years, the incidence was as high as 9%, being more likely to occur in cortical infarcts (26%) than in subcortical infarcts (2%)."
  - Risk of aspiration or pneumonia.
  - Neurogenic bladder; urinary incontinence and constipation: "Following a stroke, patients often experience variable degrees of urinary frequency, urgency, or incontinence due to an incomplete neurogenic (upper motor neuron) bladder."
  - Multi-infarct dementia.

<sup>14</sup> See, e.g., Julien Bogouslavsky, MD, Rosario Martin, MD, Franco Regli, MD, Paul-André Despland, MD, Serge Bolyn, MD, "Persistent Worsening of Stroke Sequelae After Delayed Seizures, *Archives of Neurology*, 1992; 49(4):385-388 (available at <http://archneur.ama-assn.org/cgi/content/abstract/49/4/385>, visited Jan. 21, 2009).

<sup>15</sup> R.W. Teasell, "Long-Term Sequelae of Stroke," *Canadian Family Physician*, Vol. 38, pp. 381-88 (Feb. 1992) (hereinafter "Teasell").

<sup>16</sup> Teasell, at 381.

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- Musculoskeletal complications:
  - Spasticity and hypertonicity: "[T]he increased tone that develops as a result of an upper motor neuron lesion leads to often painful and disfiguring contractures of joints, as well as abnormal gait patterns, which put excessive strain on various musculoskeletal structures."
  - Genu recurvatum: "Genu recurvatum, or hyperextension of the hemiplegic knee, is commonly seen. Repeated knee hyperextension can lead to progressive stretching of the posterior knee capsule and ligaments leading to ligamentous instability, thereby increasing the risk of osteoarthritis of the knee."
  - Plantarflexion: "Plantarflexion contracture of the ankle is a common complication that results in a decreased base of support and genu recurvatum during stance phase of gait and difficulty in clearing the foot during swing phase."
  - Inversion of the foot and ankle: "Inversion of the foot and ankle is often also present, causing the patient to walk on the lateral aspect of the foot, which can be quite painful. This inversion often interferes with proper fitting of an ankle-foot orthosis."
  - Painful hemiplegic shoulder: "A painful hemiplegic shoulder is common following stroke, occurring in up to 72% of hemiplegic patients. The two conditions most frequently associated with shoulder pain are glenohumeral subluxation and a frozen (spastic) shoulder."
  - Wrist and hand flexion: "Wrist and hand flexion contractures develop in the hemiplegic wrist and hand. A fixed flexion contracture of the hand interferes with restoration of hand function. It can be painful (therefore increasing spasticity) and often is unsightly."
  - Fractures: Fractures of the hip, humerus, and distal radius on the hemiplegic side are not uncommon."
  - Orthopedic surgical intervention.
- Psychosocial complications:
  - Depression: "Clinically significant depression occurs in more than 30% of stroke patients. This depression is more than a simple grief reaction to physical and cognitive impairments and disabilities. Rather, it is likely more complex, being related, at least partly, to the brain damage itself. The nature of this relationship is still unclear. The significance of the depression is that it reduces motivation, with

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an adverse effect on activities of daily living and socialization, and it often adds to family problems and stresses."

- o Family difficulties: "Family difficulties following a stroke are often not well appreciated. A stroke involving one member affects the well-being of the entire family. Family members providing care to a stroke victim face their own adjustment problems, as their personal needs are often sacrificed to meet the care needs of the stroke patient. The brunt of the long-term care of the stroke patient generally falls onto the spouse . . . ."<sup>17</sup>
- o Decreased sexual activity: "Decreased sexual activity or abstinence is common following a stroke for several reasons [Table 3 omitted], although sexual libido is generally unchanged. For married stroke patients younger than 50 years of age [Mr. and Mrs. Baxter fall into this category], one study showed the frequency of sexual intercourse decreased significantly; 41% of men and 17% of women ceased intercourse altogether, while 29% of men and 42% of women reduced their frequency of intercourse."
- o Functional disability: "Driving a motor vehicle is one of the most complicated of learned skills, requiring good vision, intact reflex responses, and rapid decision making."<sup>18</sup>

Other medical literature supports the above. According to the National Institute of Neurological Disorders and Stroke, generally, stroke can cause five types of disabilities: paralysis or problems controlling movement; sensory disturbances including pain; problems using or understanding language; problems with thinking and memory; and emotional disturbances.<sup>19</sup> And at least one study has examined and evaluated long-term, health-related quality-of-life measurements, with disturbing results. In addition to the commonly noted motor issues (including paralysis), there are significant nonmotor impairments, such as depression, cognitive impairment, and incontinence.<sup>20</sup> The findings of long-term sequelae, four years after the stroke event, included the

<sup>17</sup> This risk is clearly present in Mr. Baxter's case because, as Dr. Wicklund has already noted in her report, Mr. Baxter has "indicated that his wife is his main source of emotional support. The Baxter's may consider regular couples counseling, as well, as both articulated the dramatic change Mr. Baxter's sudden stroke has understandably caused in their lives." Wicklund Evaluation, at 4.

<sup>18</sup> Mr. Baxter has not been able or permitted drive since his stroke. See, e.g., Report of Daniel Neubeck, Claims Bureau USA, Inc., Oct. 3, 2007, at 6.

<sup>19</sup> Nat'l Inst. Of Neurological Disorders and Stroke, Nat'l Institutes of Health, "Post-Stroke Rehabilitation Fact Sheet," updated Jan. 12, 2009, and visited on Jan. 21, 2009 at <http://www.ninds.nih.gov/disorders/stroke/poststroke rehab.htm?css=print>.

<sup>20</sup> Caroline Haacke, MD; Astrid Althaus, MA; Annika Spottke, MD; Uwe Sieberg, MD, MPH; Tobias Back, MD; Richard Dodel, MD, "Long-Term Outcome After Stroke: Evaluating Health-Related

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following: 16% of the patients experienced TIA (transient ischemic attack)<sup>21</sup>; 47% experienced infarct<sup>22</sup>; and 57% of the patients experiencing hemorrhage died. Nine percent of the patients in the study need institutional care. Thirty-nine percent became "severely disabled."<sup>23</sup> The study's results showed further considerable risks:

Neuropsychiatric disorders such as depression and dementia after stroke become increasingly important in long-term stroke survivors. A considerable decline in cognitive function has been reported by several studies and can be assessed shortly after the occurrence of stroke. In a recent longitudinal study, ~30% of patients with stroke developed dementia compared with 11% in controls, and stroke increased the risk for dementia by 4 to 12X. Even mild or moderate difficulties with cognitive function limit the survivors' ability to plan and develop goals in life that are required abilities to achieve life satisfaction. In our study, cognitive impairment is a strong predictor for low HRQoL [health-related quality-of-life] outcomes.

If untreated, poststroke depression, which occurs in 30% to 40% of stroke patients, can interfere with recovery and adversely affect functional and social outcomes. Of 7 studies examining the independent effect of depression on stroke morbidity, 6 studies reported a strong influence. In our study, a depressive or anxious status is also associated with low HRQoL. Increasing HADS [Hospital Anxiety Depression Scale] scores are accompanied by decreasing scores on all 4 HRQoL measures.<sup>24</sup>

Accordingly, and as the medical literature shows, Mr. Baxter faces significant long-term risks from his untimely-treated stroke, including depression, loss of sexual function, dementia, early death and a low health-related quality of life.

Quality of Life Using Utility Measurements," *Stroke: J. Am. Heart Assoc.*, 2006; 37:193-198 (originally published online Dec. 8, 2005, and available at <http://stroke.ahajournals.org/cgi/content/full/37/1/193>) (hereinafter "Long-Term Outcome After Stroke").

<sup>21</sup> TIAs are also known as "warning strokes." Unlike actual strokes, TIAs do not cause damage. Of those who have a TIA, however, more than one-third will later have a stroke. A person who has had one or more TIAs is more likely to have a stroke than someone of the same age and sex who has not. See, e.g., "Transient Ischemic Attack," <http://www.americanheart.org/presenter.jhtml?identifier=4781>.

<sup>22</sup> An infarct is an area of tissue that undergoes necrosis (death) as a result of an obstruction of local blood supply. See, e.g., *Am. Heritage Dict. of the English Language* (4th ed. 2000, updated 2003); <http://thefreedictionary.com/infarct>.

<sup>23</sup> Long-Term Outcome After Stroke, at 194-95.

<sup>24</sup> *Id.* at 197.

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Mr. Baxter would not be facing what he is facing now, nor would he be facing the risks just listed, but for the medical malpractice of which he is a victim. These present and potential future losses constitute damages, for which he has been compensated, at least in part, by the settlement agreement. Sun Life's position that no portion of the settlement agreement should be allocated to these damages is without foundation in medicine or law.

Conflict with Controlling Tax Law: The Settlement Proceeds are not "Income"

As noted above, the interpretation of disability insurance policies governed by ERISA is subject to federal common law, which is applied because, among other things, Congress intended uniformity of decisions under ERISA.<sup>25</sup> The Internal Revenue Code ("IRC" or "Code"), the Treasury Regulations thereunder, and the Internal Revenue Service's ("IRS") own Revenue Rulings provide courts asked to construe the meaning of "income" with a well-developed body of law.

Pursuant to Section 104(a) of the Code, compensation for injuries or sickness damages (with the exception of punitive damages) are not treated as "income" and are entirely excluded from income. Further, the IRS has ruled that this exclusion from income includes the entirety of the compensation (whether the result of an award or settlement) resulting from the bodily and/or personal injury claims, even if some portion of that compensation may be intended to replace lost income. As explained in Rev. Rul. 85-97, 1985-2 C.B. 50:

Rev. Rul. 61-1, 1961 C.B. 14, holds that the entire amount received by a railroad employee in settlement of any and all claims that the employee had against the railroad for personal injuries is excludable from gross income under Section 104(a)(2) of the Code, even though the employee elected to apportion part of the settlement amount to 'time lost' in order to receive railroad retirement credit for the time the employee was unable to work. The revenue ruling states that the fact that the 'time lost payments' constituted compensation for purposes of the taxes imposed by the Railroad Retirement Tax Act does not preclude the application of the exclusion from gross income under section 104(a)(2). Thus, the ruling indicates that the exclusion provided by section 104(a)(2) extends to personal injury damages allocable to lost wages. Also *cf.*, *Norfolk & Western Ry. Co. v. Liepell*, 444 U.S. 490 (1980) (defendant is entitled to an instruction to jury that damages for lost future wages are not subject to federal income taxation).

In the instant case, the entire 3x dollars settlement amount, including the amount allocable to the claim for lost wages, represents compensation for personal injuries sustained by the taxpayer when the taxpayer was struck by the bus. There-

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<sup>25</sup> See, e.g., *Phillips v. Lincoln Nat'l Life Ins. Co.*, 978 F.2d 302, 307 (7th Cir. 1993); *Hammond v. Fid. & Guar. Life Ins. Co.*, 965 F.2d 428, 430 (7th Cir. 1992).



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fore, the exclusion provided by section 104(a)(2) of the Code extends to the entire settlement amount.

The taxpayer in Rev. Rul. 85-97 suffered serious injuries as the result of being hit by a bus. The taxpayer sued the bus company alleging that, as a result of the accident, the taxpayer sustained serious and permanent injuries, had been unable to pursue normal employment activities, had lost wages, had suffered and would continue to suffer pain and mental suffering. The complaint sought compensatory but not punitive damages. Before trial, the taxpayer and the bus company reached a settlement calling for a lump-sum payment in return for a full release of all claims. Those facts are closely analogous to those of the present case, and militates against Sun Life being able to sustain its burden.

It is questionable whether Sun Life has the right to take a position that could prejudice the Baxters with respect to their tax liabilities as a result of this settlement. Illinois law recognizes a duty on the part of an insurer to give its insured's interests at least equal consideration with its own. Usually applied in liability-insurance situations, an insurer that fails to settle a case within policy limits through fraud, negligence, or bad faith, has breached its duty to give the insured's interests at least equal consideration with its own. In the event of a judgment in excess of the policy's limits due to the insurer's breach, the insurer may be held liable for the full amount of the judgment without regard to the policy's limits. See, *O'Neill v. Gallant Ins. Co.*, 329 Ill. App. 3d 1166, 1172, 769 N.E.2d 100 (5th Dis. 2002); *Olympia Fields Country Club v. Bankers Indem. Ins. Co.*, 325 Ill. App. 649, 673, 60 N.E.2d 896 (1st Dist. 1945).

A correlated principle is that it is improper for an insurer to seek the resolution of a coverage dispute, prior to the resolution of a dispute between the insured and a third party in a separate action, where the resolution of the coverage dispute would decide "ultimate facts upon which recovery is predicated" in the third-party case. *Maryland Cas. Co. v. Peppers*, 64 Ill. 2d 187, 197, 355 N.E.2d 24 (1976); *Thornton v. Paul*, 74 Ill. 2d 132, 158-59, 384 N.E.2d 335 (1978).

My research has not shown that these related principles—that an insurer is not entitled to take a position that prejudices its insured in a separate case—have been applied in the context of disability insurance. Regardless of whether these principles have been so applied, however, it is a fact that the Sun Life Policy lacks language giving Sun Life the discretionary authority to interpret the plan in a manner that is broader than the plan language otherwise suggests. Accordingly, I do not believe that Sun Life has a legal basis to assert a position that differs from that of the IRS. More specifically, I do not believe that Sun Life has a legal basis to assert that a tort settlement is "income" under circumstances within which the Internal Revenue Service would *not* treat such settlement as "income." Based on the principles articulated in the cases cited above, and on the absence of language granting Sun Life broad interpretational authority, it is my view that Sun Life should not be allowed to treat as income that which the IRS