

M U C H S H E L I S T

Mark DeBofsky, Esq.
January 28, 2009
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does not, and that Sun Life should be estopped from taking a position that puts its insured in peril of additional legal exposure; in this case, additional tax liability.

Conclusion

In my opinion, Sun Life's position is incorrect because it cannot meet its burden of proving that its exclusionary or limiting language is unambiguous and free from doubt, that no portion of the settlement amount is for personal injury as opposed to replacement of income, that Mr. Baxter has suffered no personal injury other than loss of income, and that it would be entitled to take a position contrary to that of the IRS. For those reasons, I do not believe that Sun Life may take as an offset an amount in excess of that portion of the settlement amount that the IRS deems to be includable in income for purposes of the Internal Revenue Code.

Very truly yours,



Neil B. Posner

NBP:cmc

2009 JAN 28 11:32 AM

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APPENDIX: "What are Other Income Benefits" Section of Sun Life Policy (pp. 34-35)

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:

1. The amount you are eligible for under:
 - a. Workers' Compensation Law; or
 - b. Occupational Disease Law; or
 - c. Unemployment Compensation Law; or
 - d. Compulsory Benefit Act or Law; or
 - e. an automobile no-fault insurance plan; or
 - f. any other act or law of like intent.

2. The Railroad Retirement Act (including any dependent benefits).

3. Any labor management trustee, union or employee benefit plans that are funded in whole or in part by your Employer.

4. Any disability income benefits you are eligible for under:
 - a. any other group insurance plan of your Employer;
 - b. any governmental retirement system as a result of your job with your Employer.

5. The benefits you receive under your Employer's Retirement Plan as follows:
 - a. any disability benefits;
 - b. the Employer-paid portion of any Retirement Benefits.
(Disability benefits that reduce your accrued retirement benefit will be treated as a retirement benefit. Retirement benefits do not include any amount rolled over or transferred to any other retirement plan as defined in Section 402 of the Internal Revenue Code.)

6. The disability or retirement benefits under the United States Social Security Act, or any similar plan or act, as follows:
 - a. Disability benefits you are eligible to receive.
 - b. Disability benefits your spouse, child or children are eligible to receive because of your Total or Partial Disability, unless the dependent benefits are paid directly to your divorced spouse or to your children in custody of your divorced spouse.
 - c. Retirement benefits received by you.

Personally Prepped By: Carol W.

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:

Adjustments
<input type="checkbox"/> COLA
<input type="checkbox"/> FICA
<input type="checkbox"/> General Cal Worksheet
<input type="checkbox"/> Other (Activities/Financial Check/Bill)
<input type="checkbox"/> Overpayment Worksheet
<input type="checkbox"/> Partial Cal Worksheet
<input type="checkbox"/> Pension
<input type="checkbox"/> Personal Check
<input type="checkbox"/> Rehab Earnings
<input type="checkbox"/> Salary Adjustment
<input type="checkbox"/> SLF Check
<input type="checkbox"/> SLF Check Undeliverable
<input type="checkbox"/> Social Security
<input type="checkbox"/> SS Award
<input type="checkbox"/> SS Calc Worksheet
<input type="checkbox"/> SS Reimbursement
<input type="checkbox"/> WCB

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

General Worksheet
<input type="checkbox"/> Telephone Template

Legal Docs
<input checked="" type="checkbox"/> Appeal
<input type="checkbox"/> Court Order
<input type="checkbox"/> Demand
<input type="checkbox"/> Full and Final Release
<input type="checkbox"/> Other
<input type="checkbox"/> POA / Guardianship
<input type="checkbox"/> Subrogation

Medical Docs
<input type="checkbox"/> APS Behavioral Health Condition
<input type="checkbox"/> APS Supplementary
<input type="checkbox"/> Clinical Notes
<input type="checkbox"/> FCE
<input type="checkbox"/> IME
<input type="checkbox"/> Internal Medical Opinion
<input type="checkbox"/> Internal Psychiatric Opinion
<input type="checkbox"/> List of Providers
<input type="checkbox"/> Medical Bills
<input type="checkbox"/> Other Medical
<input type="checkbox"/> Surveillance

New Claim Docs
<input type="checkbox"/> Attending Physician Statement
<input type="checkbox"/> Complete Claim Package
<input type="checkbox"/> Employee Statement
<input type="checkbox"/> Enrollment Card
<input type="checkbox"/> Employer Statement
<input type="checkbox"/> Notice of Claim
<input type="checkbox"/> Other New Claim Documents
<input type="checkbox"/> Partial Claim Package
<input type="checkbox"/> Sun Advisor
<input type="checkbox"/> Telephonic
<input type="checkbox"/> Transitional Claim Form
<input type="checkbox"/> Unassigned Doc Type

Rehab Docs
<input type="checkbox"/> Rehab Bills
<input type="checkbox"/> External Vendor Corresp
<input type="checkbox"/> FCE Report
<input type="checkbox"/> Other
<input type="checkbox"/> Rehab Correspondence
<input type="checkbox"/> TSA / LMS

Updated: October 18, 2007

MED PSYCH REFERRAL

Work Type
Medical Opinion

Claim Control #: 230605-00981-00	Claim Status: End Pay Period	Claim Type: LTD
Policy #: 67534	Cert #: 84503725	Group Office: CHICAGO
Last Name: BAXTER	First Name: TED	Claim Office: Boston
Last Payment Date: 31/May/2009		
Start Date: 1/Jun/2009	Due Date: 2/Jun/2009	Priority: 1

Created Date:	1/Jun/2009	Referred By:	Brian Sullivan
Sex:	Male	City:	Chicago
Age at Referral:		Province/State:	IL
Home Phone Num:	(312) 654-9949		
Job/Occupation Title:		Job/Occupation On File:	
Regularly scheduled work week: Days per week:		Hours per day:	

Disability Date:	22/Apr/2005	Transition Date STD/ECI to LTD:	
LTD Change of Def Date:	21/Jul/2008	Employment Date:	21/Jun/2004

Primary Diagnosis: Other disorders of circulatory system

Secondary Diagnosis:

Attending Physicians Name:
Specialty:
Telephone No:
Ext: 0

Other Attending Physicians Name:
Specialty:
Telephone No:
Ext: 0

Other Attending Physicians Name:
Specialty:
Telephone No:
Ext: 0

Other Attending Physicians Name:
Specialty:
Telephone No:
Ext: 0

REASON FOR REFERRAL

Reason for Referral:

LTD Appeal. Benefits are being paid based upon medical condition; appeal is based upon an offset for a malpractice award claimant received. File has been reviewed by a malpractice attorney.

Please review "Claim Forms" folder, "Medical/Investigations" folder, and in the "General" folder correspondences with entry dates 9/03/08 (7pgs.) and 5/13/09 (5pgs.), authored by Attorney David Jensen.

Questions for Medical Consultants:

1. Based upon your review of the medical documentation, do the opinions expressed by Atty. Jensen regarding M Baxter's future medical expenses seem reasonable? Please explain.

Thank you for your time in reviewing this case. Please call me at (877) 260-9778, extension 7102, if you have any questions.

Brian Sullivan

Special Reply Instructions For Medical Consultant/Support Staff:

MEDICAL CONSULTANT RESPONSE

Response Created Date: 06/08/2009 Created By: George DiDonna

Medical Consultants Comments:

MEDICAL REVIEW

CLAIMANT: BAXTER, TED
DOB: 11/17/1963
DATE OF DISABILITY: 04/22/2005
CLAIM NUMBER: 230605-00981-00
DATE OF REPORT: 6/08/2009
REFERRAL SOURCE: Brian Sullivan
TYPE OF REVIEW: LTD-1
CLIENT: Sun Life Employee Benefits

DISCLAIMER:

The opinions expressed by the reviewer are based on a review of the medical records provided by the referral source and any direct written or verbal correspondence with the claimant's attending physician(s). This review does not involve the reviewer's evaluation of the claimant.

MEDICAL INFORMATION REVIEWED:

Completed Claim Package (182pp) Inclusive of APS Terrance Sullivan M.D. 6/08/05;
2005- Through 8/2007 Office Notes Terrance Sullivan M.D.
CT Brain, 4/21/05, 4/22/05, 4/23/05, 4/24/05, 4/25/05, 4/26/05, 4/27/05, 4/28/05, 4/29/05
MRI/MRA of the Brain 4/21/05
4/22/05 Progress note of Ian Katznelson M.D. Neurology attending.
4/22/05 EEG
Multiple laboratory blood tests in the acute hospitalization period.
Evanston Northwestern Healthcare Discharge Summary 4/22-29/05-Diagnoses of Secundum ASD; Transient alteration of awareness; Expressive Language Disorder; DVT site unspecified.
Hospital Notes from above admission including neurology note Dr.Jesse Taber 4/23/05.
4/25/05 Venous Doppler showed left leg Greater Saphenous Vein thrombus but no DVT.
6/29/05, 3/08/06, 10/23/06, 12/21/06, 6/11/07, Neurology Follow-up note of Dr.Taber
8/14/06 Rehabilitation Institute of Chicago note

3/18/07 MRA of Head and Neck
12/06/07 Nurse Consultant Review Loretta Dionne R.N.
3/07/08 Internal Psychiatric Opinion Margaret O'Connor PhD
8/12/08 Letter from Attorney David C. Jensen
5/13/09 Letter from Attorney David C. Jensen

SUMMARY OF DATA:

From The Benefit Analyst's Referral:

LTD Appeal. Benefits are being paid based upon medical condition; appeal is based upon an offset for a malpractice award claimant received. File has been reviewed by a malpractice attorney.

Please review "Claim Forms" folder, "Medical/Investigations" folder, and in the "General" folder correspondences with entry dates 9/03/08 (7pgs.) and 5/13/09 (5pgs.), authored by Attorney David Jensen.

The Brain CT of 4/21/05 did not show a definite cerebral infarction but there was a suspicion of a thrombus in the LMCA and further studies were recommended specifically an MRI.

The Brain CTs of 4/22/05, 4/23/05- 4/29/05 shows a large infarction in the distribution of the left middle cerebral artery and hemorrhagic areas in the infarcted area and cerebral edema.

The MRI/MRA 4/21/05 showed infarction of the insula and caudate areas of the left brain with loss of signal of branches of the LMCA.

The claimant's initial history obtained at the time of hospital admission was that he had flown home from England (8 hrs) on the day of admission and his varicose veins were bothering him. When his wife asked him to replay a TV program he did and then she noticed twitching of his left arm and blinking of his eyes; he became unresponsive. The Stroke Team was notified and the initial CT Brain was negative for a cerebral hemorrhage and the MRI was not diagnostic according to the resident physician (Kumar) note but showed ischemia according to resident (Srinivasin) note. He had a negative CT for Pulmonary embolism (done due to travel history). A diagnosis of evolving stroke made 4/22/05. A TEE (Transesophageal Echocardiogram) 4/22/05, showed a Patent Foramen Ovale and an atrial septal aneurysm (Connection between the left and right atria). There was no DVT seen on the initial venous Doppler study of the legs.

The Carotid Doppler study was negative for any significant plaque or obstruction to flow 4/22/05.

4/23/05 Dr. J. Taber summarized the claimant's course to that point. A massive left hemispheric stroke due to emboli from the patient's veins which caused paradoxical embolization from a PFO. He also explained the best and worst case recovery scenarios total dependence to the best expectation of some ability to communicate and do ADLs but not be able to return to work. He also was asked about whether the course would have been altered had the claimant been given TPA the night of admission. His wife expressed that he would not want to live with serious disabilities. The claimant, however, disagreed and showed by non-verbal communication that he would choose life.

4/25/05 PFO closure to be discussed with Dr. Feldman; Dr. Feldman thought closure in one month but with ASA and Plavix.

Lovenox started on 4/25/05 for DVT prophylaxis.

4/29/05 the claimant was transferred to the Rehabilitation Institute of Chicago. At this time he was aphasic and needed assistance with ambulation as well as an assistance support system.

6/29/05 OVnote summary of Dr. Taber in a letter to Dr. Sullivan indicates that the claimant while still aphasic has improved somewhat. He was walking without assistance. He was exercising 30 minutes a day on a treadmill. His recovery had been complicated by a DVT at the rehabilitation hospital and an IVC filter was placed. Closure of the PFO was set for 7/12/05. Dr. Taber said he had never seen anyone with a stroke do so well so soon.

The APS from Dr. Sullivan dated 6/07/05 shows a diagnosis of a CVA with Left Upper Extremity Paresis and a Global Aphasia; he was ambulatory; he could stand/walk for 1-4 hrs; sit 1-3 hrs; he had no grasp or fine movement of the left hand; he was capable of repetitive motion for foot controls; he could not grasp or reach but otherwise could perform all physical duties on the EFAP form occasionally; he could not work 8 hours a day and he could lift 10 lbs.; he could not drive; Class 5 incapable of Sedentary Activity. Cardiac function was Class I; the Global Aphasia which prevented him from any type of work at that time.

3/08/06 Office note of Dr. Taber indicates diagnosis and treatment for a seizure disorder after a witnessed seizure while exercising at the YMCA.

Of note his PFO closure was done on 7/12/05.

10/23/06 OV note Taber-a second seizure. No further seizures between this and 12/21/06 office note. A seizure reported in March or 2007

8/14/06 Note from Dr. Harvey at the RIC indicates persistent aphasia after treatment at the University of Michigan Aphasia Group.

3/18/07 MRA of the head and neck shows only an abnormality of the LMCA. The other arteries are not occluded.
APS 10/09/07 Terrance Sullivan M.D. No limitation of functional capacity. Answers are continuous for all physical activities except driving (negligible) and balance (frequent). No cardiac limitation.
Diagnosis is Aphasia.

QUESTIONS POSED BY BA WITH RATIONALES/CONCLUSIONS:

1. Based upon your review of the medical documentation, do the opinions expressed by Atty. Jensen regarding M Baxter's future medical expenses seem reasonable? Please explain.

I agree with the conclusion and explanation of Attorney Jensen regarding the mechanism of the CVA in the case of Mr. Baxter.

My review of the medical records indicates that the claimant had a paradoxical embolism as a result of the combination of a history of peripheral venous disease (predisposing him to clotting in the legs), a long plane ride without mention of precautions such as elastic stockings, (□ Economy Class Syndrome of DVT after prolonged airplane flights with little activity) and a Patent Foramen Ovale.

The claimant had a Patent Foramen Ovale which is a congenital defect in the Atrial Septum. The combination of a source of venous thrombosis (from almost any vein in the lower extremity, upper extremity or pelvic region) and the connection between the right and left sides of the heart in the atria (PFO) can lead to a piece of blood clot going from the right atrium to the brain. As noted in this case there were no blood clots found in the lung (Pulmonary Emboli) which is the usual result of Venous Thrombosis and embolization in a person without a connection between the right heart and left heart circulations. The PFO was closed (7/12/05) and after successful procedure there should not be further emboli based on a reasonable degree of medical probability although they are not 100% excluded since clots can really form anywhere. He is not at high risk of repeat embolic CVA as evidenced by his medical treatment of only ASA.

While he is on Lipitor there is no evidence that he has any clinically significant extracranial cerebrovascular disease or any obstructions in the cerebral arteries as of his most recent MRA and Carotid Doppler testing (2007). The lipid values on file were normal 9/13/05.

He has no evidence of significant systemic Atherosclerosis although this certainly can develop in a man or woman of his age in this country. However the reason he had the embolus and cerebral infarction was due to an unfortunate combination of circumstances as noted above. His risk for CVA in the future would be in the normal range for a man his age with his risk factors. The IVC filter would prevent most if not all clots from the lower extremities which would now go to the lungs since the PFO has been repaired.

His residual problems of aphasia and seizure disorder continue. The seizure disorder is treated medically and appears controlled. The aphasia has improved but the records indicate that it still causes him significant impairment. The fact that he had his first seizure while exercising at the YMCA using the Elliptical machine indicates adequate exercise function. His physician states he is a Cardiac Class I for function.

In short Mr. Baxter should not have the need for extensive medical treatment from a cardiovascular standpoint now that his underlying problems of venous thrombosis and paradoxical embolism have been addressed and his lipids are controlled. He does not have diabetes and there is no evidence of a clotting disorder.

RECOMMENDATIONS:

None at this time and I have discussed this case with Mr. Sullivan.

George J. DiDonna M.D. FACC
Cardiology Consultant to Sun Life Employee Benefits Disability
Board Certified in Cardiology
Licensed Physician in the state of Maine
Special Reply Instructions For Medical Consultant/Support Staff:

Assigned To:
Brian Sullivan

Created:
1/Jun/2009

Work Item ID:
4153363



Group LTD - Claims
tel (877) 260-9778, Ext. 7102
fax (803) 329-8197

fax t r a n s m i t t a l

Recipient : **Mark DeBofsky**
Fax Number : (312) 372-2778

Subject : Ted Baxter

From : Brian Sullivan

Date : June 15, 2009

Pages : 16

Dear Mr. DeBofsky:

Attached are the most recent reports obtained as part of Mr. Baxter's appeal review. If you would like to respond to these reports, please do so within a reasonable amount of time but not later than 45 days from the date of this letter.

Please contact me at the number above if, after you have had the opportunity to review the attachments, you do not intend to respond.

Sincerely,

Brian Sullivan
Benefit Consultant
LTD Appeals

Attachments:

David Jensen, May 12, 2009

George DiDonna, MD, June 8, 2009

James McElligott, June 10, 2009

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June 10, 2009

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

Ted and Kelly Baxter
Policy No. 67534-GD

Dear Mr. Sullivan:

You have asked us to address certain tax issues raised by Neil B. Posner in his January 28, 2009 letter to Mark D. DeBofsky, counsel for Mr. and Mrs. Baxter. Mr. Posner's letter responded to Sun Life Assurance Company of Canada's ("Sun Life") position that a portion of the \$19 million in settlement proceeds received by Mr. Baxter pursuant to a settlement agreement entered into with Evanston Hospital should be treated as an "Other Income Benefit" under the Sun Life Long Term Disability Policy (the "Sun Life Policy"). According to Mr. Posner's letter, the settlement agreement settled a lawsuit filed by Mr. and Mrs. Baxter in November 2006 against Evanston Hospital and the treating physicians.

Along with Mr. Posner's letter, you have sent me David C. Jensen's letters of August 12, 2008 and May 9, 2009 to Sun Life. Our analysis is based on, and limited to, the applicable facts stated in the Posner and Jensen correspondence. According to these letters, the claims asserted by the Baxters were based on tort rights arising from physical injuries Mr. Baxter allegedly sustained on account of Evanston Hospital's negligence in not timely diagnosing Mr. Baxter's stroke.

Mr. Jensen concluded in his August 12, 2008 letter to Sun Life that a portion of Mr. Baxter's recovery was attributable to his high earning capacity and loss of future income. Mr. Jensen's Letter of May 12, 2009 confirmed this view following review of the January 28, 2009 letter of Neil B. Posner.

You have asked us to address two contentions regarding tax law that Mr. Posner makes at pages 19 and 20 of his letter: "that Sun Life should not be allowed to treat as income that which the IRS does not, and that Sun Life should be estopped from taking a position that puts its

insured [Mr. Baxter] in peril of additional legal exposure; in this case, additional tax liability." In my opinion, both contentions are clearly wrong.

1. *Exclusion of the settlement proceeds from gross income under Section 104(a)(2) of the Internal Revenue Code does not prevent treating a portion of the settlement proceeds as an Other Income Benefit under the Sun Life Policy.*

Under the Sun Life Policy, the Total Disability Benefit to which the insured is entitled is calculated as follows:

To determine your Total Disability Benefit:¹

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.

Paragraph 9 on page 34-35 of the Sun Life Policy defines "Other Income Benefits" to include "[a]ny 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." Whether the portion of the settlement proceeds attributable to Mr. Baxter's lost earning constitutes "Other Income Benefits" is a matter of interpretation of the Sun Life Policy. There is no suggestion that the "Other Income Benefit" must be taxable for federal income tax purposes. Sun Life's characterization of the settlement proceeds for purposes of honoring its obligations under the policy should not impact the insured's treatment of the settlement proceeds for federal income tax purposes.

Section 61 of the Code² provides that, except as otherwise provided in subtitle A, gross income means all income from whatever source derived. Section 104(a)(2) excludes from gross income the amount of any damages (other than punitive damages) received (whether by suit or agreement and whether as lump sums or as periodic payments) on account of personal physical injuries or physical sickness.

¹ Sun Life Policy, at page 32. Portions of the Policy are set forth in the Appendix to Mr. Posner's letter of January 28, 2009.

² Unless otherwise indicated, references are to the Internal Revenue Code of 1986 (as amended) and Treasury regulations promulgated thereunder.

Treas. Reg. §1.104-1(c) provides, in part, that the term "damages received (whether by suit or agreement)" means an amount received (other than workmen's compensation) through prosecution of a legal suit or action based upon tort or tort type rights, or through a settlement agreement entered into in lieu of such prosecution. The legislative history of Section 104(a)(2) provides that if an action has its origin in a physical injury or physical sickness, then all damages (other than punitive damages) that flow from that injury or sickness are treated as payments received on account of physical injury or physical sickness. H. Rep. No. 104-586 (PL 104-188), pp. 143-144.

Consistent with these principles, Section 104(a)(2) excludes damages or settlement payments received in physical injury lawsuits, even though a portion of the recovery may be clearly for loss of income - income that if otherwise received would have been taxable. See, Rev. Rul. 85-97, 1985-2 CB 50; Rev. Rul. 85-143, 1985-2 CB 55; Rev. Rul. 61-1, 1961-1 CB 14. In *O'Gilvie v. United States*, 519 U.S. 79, 86 (U.S. 1996), the Supreme Court stated that Section 104(b)(2) "also excludes from taxation those damages that substitute, say, for lost wages, which would have been taxed had the victim earned them. To that extent, the provision can make the compensated taxpayer better off from a tax perspective than had the personal injury not taken place."

In Rev. Rul. 85-97, the IRS ruled that the entire amount received by an individual in settlement of a suit for personal injuries sustained in an accident, including the portion of the amount allocable to the claim for lost wages, was excludable from the individual's gross income. This ruling amplified Rev. Rul. 61-1 wherein the IRS ruled that an amount received by a railroad employee from the railroad under a settlement agreement for personal injuries sustained in the course of his employment was not includible in the gross income of the employee irrespective of the fact that he elected to apportion part of such amount to "time lost" for the purpose of computing railroad retirement credit. In so ruling, the IRS reasoned that "[t]he fact that in this case 'time lost payments' constitute compensation for the purposes of taxes imposed by the Railroad Retirement Tax Act is not controlling for federal income tax purposes." *Id.*

In the present situation, it appears the claims asserted by Mr. Baxter were based on tort rights whose origin was in a physical injury that arose from the hospital's negligence in not correctly diagnosing the insured's stroke. The damages received on account of that injury, including the lost wages attributable to Mr. Baxter inability to continue work are directly related to his personal physical injury.

Accordingly, the settlement proceeds should constitute damages received on account of personal physical injuries sustained by the insured and such amounts should be excludible from gross income under Section 104(a)(2) regardless of whether a portion of such damages constitute compensation for lost wages. The fact that these amounts are excluded from Mr. Baxter's income does not control whether these amounts are an "Other Income Benefit" under the Sun Life Policy.

Similar to the reasoning employed by the IRS in Rev. Rul. 61-1, the fact that a portion of the settlement proceeds constitutes an Other Income Benefit under the Sun Life Policy should not determine federal income tax consequences. Conversely, the fact that the settlement proceeds are excludible from Mr. Baxter's gross income does not change the underlying substantive characterization of a portion of those proceeds as due to lost wages.

Sun Life does not contend that the settlement proceeds are "income" for federal income tax purposes. Treatment of a portion of the proceeds as an amount received due to income replacement or lost wages is not inconsistent with Mr. Baxter's treatment of the proceeds as damages excludible from gross income on account of personal physical injuries under Section 104(a)(2).

2. *Mr. Baxter's income exclusion of such settlement proceeds from gross income should not be affected by Sun Life treating a portion of the settlement proceeds as an Other Income Benefit under the Sun Life Policy.*

Sun Life's treatment of a portion of such damages as an "Other Income Benefit" under the policy does not change the insured's federal income tax treatment of the proceeds as damages received on account of personal physical injuries, the full amount of which are excludible from gross income under Section 104(a)(2).

Consistent with the analysis set forth above, the following arguments (set forth in italics) raised at page 10 of Mr. Posner's letter of January 28, 2009 are without merit:

- *"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 the 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."*

As described above, the position advocated by Sun Life does not prejudice the Baxters with respect to their income tax liabilities because their income tax liabilities with respect to the settlement proceeds are not affected by Sun Life claiming a benefit offset under the Sun Life Policy. Sun Life's position for reducing the Total Disability Benefit owed to the insured under the Sun Life Policy does not depend upon or require treating the settlement proceeds as income to the insured for federal tax purposes.

- *"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.'"*

As described above, Sun Life's position that a portion of the settlement proceeds constitute an Other Income Benefit is not inconsistent with the insured's treatment of the proceeds as excludible damages under Section 104(a)(2). The fact that the settlement proceeds

June 10, 2009
Page 5

are excludible from the insured's gross income does not change the underlying substantive characterization of a portion of such proceeds as an Other Income Benefit.

Very truly yours,


James P. McElligott, Jr.

JPMjr/aw

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