

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

TED BAXTER,)	
)	
Plaintiff,)	
)	Case No.: 1:09-cv-03818
vs.)	
)	Honorable Robert M. Dow, Jr.
SUN LIFE ASSURANCE)	
COMPANY OF CANADA,)	
)	
Defendant.)	

DEFENDANT'S STATEMENT OF FACTS IN SUPPORT OF JUDGMENT

The LTD Policy¹

1. Under the terms of the Policy "the Net Monthly Benefit will be calculated based on the Total Disability Benefit formula." (Policy 678.) The Policy states:

To determine the Total Disability Benefit:

1. Take the lesser of:
 - a. the Employee's Total Monthly Earnings multiplied by the Benefit Percentage (shown in Section I, Schedule of Benefits); or
 - b. the Maximum Monthly Benefit (shown in Section I, Schedule of Benefits; then
2. Subtract Other Income Benefits from the amount determined in Step 1.

(*Id.*)

¹ The administrative record (including the applicable policy) are authenticated by the Declaration of Steven J. Leask and are filed contemporaneously herewith. The administrative record is Bates numbered as SUN BAXTER 1 – 1501, and will be referred to as "R. ___."

2. Section IV of the Policy contains a section entitled "Other Income Benefits."

(Policy 680-81.) In pertinent part, the Other Income Benefits section states:

Other Income Benefits are those benefits provided or available to the Employee while a Long Term Disability Benefit is payable. These Other Income Benefits, other than retirement benefits, must be provided as a result of the same Total or Partial Disability payable under this Policy. Other Income Benefits include:

1. The amount the Employee is 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.
- ...
9. Any amount due to income replacement or lost wages the Employee receives by compromise, settlement or other method as a result of a claim for any Other Income Benefit.

(Policy 680-81.)

3. Section IV of the Policy also contains a section entitled "Lump Sum Payment"

which states:

If an Employee receives 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.

(Policy 681.)

4. Additionally, Section IV of the Policy contains a section entitled "Adjustment of

Benefit" which states:

The Employee must notify Sun Life in writing, within 31 days of receipt of notice, of the amount of Other Income Benefits when it is approved. . . Sun Life will make an adjustment to the Net Monthly Benefit payment when Sun Life receives written notice of the amount of the Other Income Benefit. . . If after Sun Life makes an adjustment to the Net Monthly Benefit the Employee has been

overpaid, the Employee must reimburse Sun Life the amount of the overpayment within 31 days of the award. Sun Life has the right to reduce or eliminate future LTD benefit payments until the amount of the overpayment has been repaid. During the overpayment reimbursement period, the Minimum Monthly Benefit will not apply.

(Policy 682.)

5. The Insurer's Authority section of the Policy states:

The Plan Administrator has delegated to Sun Life its right to make all final determinations regarding claims for benefits under the benefit plan insured by this Policy. This right includes, but is not limited to, the determination of eligibility for benefits, based upon enrollment information provided by the Policyholder, and the amount of any benefits due, and to construe the terms of this Policy.

Any decision made by Sun Life in the exercise of this right, including review of denials of benefit, is conclusive and binding on all parties. Any court reviewing Sun Life's determinations shall uphold such determination unless the claimant proves Sun Life's determinations are arbitrary and capricious.

(Policy at 699.)

Plaintiff's Claim for Long Term Disability ("LTD") Benefits

Background

5. Plaintiff was employed as the Global Controller for the Citadel Investment Group, LLC. (R. 49.) On April 21, 2005, Plaintiff suffered what later was diagnosed as a stroke. (R. 53.) Plaintiff was admitted to Northwestern (Evanston) Hospital on April 21, 2005, for treatment of his condition. (R. 54, 1011.)

6. Plaintiff's employer sponsored an ERISA-governed employee disability benefit, the benefits of which were funded, at least in part, by a group policy of long term disability insurance ("Policy") issued by Sun Life. (See R. 644-701.) Plaintiff submitted to Sun Life a written application for LTD benefits in June 2005. (R. 47-71.)

Approval Of Plaintiff's LTD Benefit Claim

7. Sun Life approved Plaintiff's LTD claim by letter dated August 29, 2005 from Robert Goodall (Sun Life claims consultant) to Plaintiff's wife, Mrs. Baxter. (R. 445-46.) The letter concluded that Plaintiff became disabled on April 22, 2005, and after the Policy's 90-day elimination period, benefits accrued as of July 21, 2005. (R. 445.) The letter noted that Plaintiff's Basic Monthly Earnings² were \$25,000.00, and stated that Plaintiff's Monthly Gross Benefit was \$15,000.00 - 60% of his Total Monthly Earnings.³ (*Id.*) Plaintiff did not challenge the calculation of his Gross Monthly Benefit.

The approval letter showed no deductions for Other Income Benefits. (*Id.*) However, the letter did state that:

Please also be advised that the amount of benefits may be reduced by income received from other sources. These sources include Social Security Disability and Retirement, Workers' Compensation, state disability, employer sick leave or salary continuation programs. Please refer to the Other Income provisions of the Group Policy and the employee booklet for additional information. If Mr. Baxter has applied for or is currently receiving any of these benefits, please let us know the status of the applications or provide us with a copy of any award showing the benefit amount and period. Any Other Income received will be offset from eligible benefits. To prevent overpayment, please advise us of Other Income as soon as it is received.

(R. 446.)

8. Plaintiff was later awarded Social Security disability income benefits ("SSDI"), and the amount of the award was \$2,133.00. (R. 547.) In a January 19, 2006, letter to Mrs. Baxter, Mr. Goodall showed how Sun Life recalculated the amount of Plaintiff's LTD benefits in

² The Policy provides that Total Monthly Earnings means the "Employee's basic monthly earnings as reported by the Employer immediately prior to the first date Total or Partial Disability begins. Total Monthly Earnings does not include commissions, bonuses, overtime pay or any other extra compensation." (Policy at 659.)

³ As shown in the Policy's Schedule of Benefits, the Benefit Percentage is 60% of Total Monthly Earnings. (Policy 650.) Under the Schedule of Benefits, the Minimum Monthly Benefit is \$100 or 10% of the Gross Monthly Benefit, whichever is greater.

light of the SSDI award. (R. 546-47.) The recalculated net benefit was \$12,867.00 (\$15,000 - \$2,133 = \$12,867).⁴

9. As part of his obligation to conduct an ongoing review of Plaintiff's claim and because Sun Life decided to forego an earlier meeting, Mr. Goodall wanted to set up a face-to-face interview of Plaintiff to evaluate the status of his condition, and he spoke with Mrs. Baxter about such an interview on August 28, 2007. (R 34.)

The Baxters' Malpractice Lawsuit

10. On August 27, 2007, while conducting some routine research to update Plaintiff's file, Mr. Goodall discovered that in March 2007, Plaintiff "settled with Northwestern Hospital in the amount of 19.5 million dollars for not giving the proper medical treatment while [Plaintiff was] in the ER on the night of his stroke." (R. 34.) Mr. Goodall noted that Mrs. Baxter did not mention the settlement when he had spoken to her earlier that day. (*Id.*)

11. A face-to-face interview of Plaintiff by a special agent of Claims Bureau USA occurred on September 27, 2007. (R. 876-883.) The interview was conducted in the presence of Mrs. Baxter and Mr. DeBofsky ("Plaintiff's counsel"). (R. 877.) During the interview, the agent asked about the settlement of Plaintiff's malpractice claim against the hospital. (R. 881.) Plaintiff's counsel told the agent the amount of the settlement ("Settlement") was \$19,500,000.00, and Plaintiff received \$13,000,000.00 after satisfaction of fees and costs. (*Id.*) Plaintiff stated he received the \$13 million in May 2007. (*Id.*)

12. In a letter dated October 10, 2007, Mr. Goodall asked Plaintiff's counsel to provide Sun Life with a copy of the malpractice settlement agreement ("Settlement Agreement"). (R. 921-22.) Mr. Goodall wrote that Sun Life was requesting this information "to determine

⁴ There is no dispute regarding the offset for Social Security benefits.

whether the additional income received, as a result of settlement, would fall under the above referenced Other Income Benefit provision." (R. 922.)

13. Plaintiff's counsel provided the Settlement Agreement, but took the position that Sun Life did not have the right to offset Plaintiff's LTD benefits because the malpractice settlement agreement did not itemize damages. (R. 1392-93.)

14. Mr. Goodall wrote Plaintiff's counsel on October 18, 2007, acknowledging receipt of the Settlement Agreement and stating that because Sun Life had not made a formal determination "whether the proceeds of the settlement would be considered an offset as Other Income Benefits under the policy," pending a final determination of this issue, Sun Life would continue to provide Plaintiff the net monthly benefit in good faith while it continued to assess the matter. (R. 987.)

15. In a November 8, 2007, letter to Plaintiff's counsel, Mr. Goodall stated that Sun Life had obtained a copy of the malpractice Complaint. (R. 1192.) However, Mr. Goodall requested additional information so that Sun Life could better assess whether the settlement proceeds would fall under the Other Income Benefit provision. (*Id.*) The additional information requested was:

- Plaintiffs' and Defendants' Pre-Trial Memoranda;
- Lost Wages Analyses performed by Plaintiff and Defendants and/or their respective counsel or experts;
- Plaintiffs' Supplement Answers to Interrogatories identifying Plaintiffs' Expert Economist or Life Care Planner or Psychiatrists;
- Depositions of Plaintiffs' experts as well as Mr. and Mrs. Baxter;

- Demand letters submitted to all defendants' insurance carriers or defendants' attorneys; and
- Plaintiffs' and Defendants' Mediation Statement and Settlement Proposals.

(*Id.*)

16. In response, Plaintiff's counsel provided the following information to Sun Life: Plaintiffs' Answers to Interrogatories; Plaintiffs' Mediation Statement; and Mrs. Baxter's Deposition. (R. 1400.) In his December 5, 2007 cover letter, counsel wrote that "these are the only documents in existence that are on the list contained [in Mr. Goodall's November 8, 2007, letter.]" (*Id.*)

17. In regard to the specifics of their malpractice action, the Baxters brought suit against Evanston Northwestern Healthcare Corporation d/b/a Evanston Hospital as well as other defendants in or about November 2006. (R. 1008-1025.) The Baxters alleged that as a result of the defendants' negligence in their treatment of Plaintiff after his April 21, 2005 stroke, Plaintiff suffered "injuries of a personal and **pecuniary nature**." (R. 1014.) (emphasis added)

18. The Baxters submitted a mediation statement dated March 19, 2007 as part of their malpractice suit ("Mediation Statement"). (R. 1203-1220.) The Mediation Statement prominently listed lost income as a substantial part of Plaintiffs' damages. (R. 1206.) Under a section of the Mediation Statement entitled "Lost Time," the Baxters attached a report entitled, Ted Baxter Economic Loss ("Economic Loss Report"). The Economic Loss Report showed "net past lost income as of March 19, 2007 [of] \$997,342.00 and future lost income ranging from \$28,943,212.00 to \$63,248,192.00." (R. 1207, 1213-15.) The Baxters settled the malpractice action for \$19.5 million.

Sun Life's Decision To Offset Plaintiff's LTD Benefit By A Portion Of the Malpractice Action Settlement

19. In an April 18, 2008, letter to Plaintiff's counsel, Mr. Goodall stated Sun Life had determined that Plaintiff's LTD benefit must be offset by a portion of the settlement. (R. 1384-1388.)

20. Mr. Goodall stated that upon review of the responses to interrogatories, the Mediation Statement, Mrs. Baxter's deposition, and the Economic Loss Report, "the vast majority of Mr. Baxter's claims relate to his lost wages." (R. 1385.) More specifically, Mr. Goodall stated that:

The preliminary Economic Loss Report indicated that as of March 19, 2007, Mr. Baxter had a 'net past lost income' of \$997,342 and 'net future lost income' ranged from \$28,943,212 to \$63,248,192. In contrast, the 'known specials' as of March 19, 2007, including patient out of pocket medical expenses totaled only \$76,344.88. . . Although the financial settlement was not itemized, given the claims outlined in the documents you provided and the clear focus on the very substantial loss of earnings, it appears that the \$19,500,000 settlement recovered under an Illinois Medical Malpractice claim was based in large part on the reported lost income."

(R. 1385.) Mr. Goodall concluded that the Policy's Other Income Benefit provision applied to the settlement. (*Id.*)

21. Because the malpractice settlement represented damages incurred at the onset of disability, Mr. Goodall calculated the offset from the April 22, 2005. (R. 1386.) In an effort to take into account other damages that were claimed in the malpractice action, Mr. Goodall conservatively applied only one-third of the total settlement to represent recovery for Plaintiff's lost income. (*Id.*)

22. Mr. Goodall recalculated the net benefit based on the offset created by the settlement. (R. 1386.) To determine the monthly amount of the offset, Mr. Goodall took one-third of \$19.5 million Settlement and divided that amount by 283 months. (*Id.*) (283 months was

the period from the April 22, 2005 onset of disability through the Maximum Benefit duration of November 17, 2028, the date Plaintiff will turn age 65. (R. 1386.) Mr. Goodall calculated the amount of the monthly offset of LTD benefits based on the settlement to be \$22,965.90. (*Id.*) Because this amount exceeded the Gross Monthly Benefit (which also took into account the SSDI offset), under the terms of the Policy, Plaintiff was eligible for and paid the Minimum Monthly Benefit of \$1,500. (*Id.*)

23. Because the LTD benefit payments made to Plaintiff through March 31, 2008, had not been offset based on the amount of the settlement, Mr. Goodall determined that Plaintiff had been overpaid \$375,480.00 in LTD benefits, and Sun Life requested he reimburse it the full amount of the overpayment. (*Id.*) He requested a response within 30 days concerning the reimbursement, and stated that if a response was not forthcoming, Sun Life would begin to reduce the amount of the overpayment from the monthly benefit as provided under the Policy. (*Id.*) Mr. Goodall concluded by advising Plaintiff of his appeal rights concerning Sun Life's decision set forth in the Letter. (R. 1387.)

Plaintiff's Appeal

24. By letter dated April 21, 2008, Plaintiff (through counsel) appealed. (R. 1416.) Plaintiff also declined to reimburse Sun Life for the overpayment of benefits. (*Id.*)

25. Sun Life acknowledged receipt of the appeal in a April 29, 2008, letter to Plaintiff's counsel from Brian Sullivan (claims consultant, LTD appeals). (R. 1410.)

Sun Life's Review of Plaintiff's Appeal

26. By letter dated July 23, 2008, Mr. Sullivan forwarded "all claim file documents related to [Plaintiff's] employment, income, and litigation settlements" to David C. Jensen, an attorney with the firm of Eichhorn & Eichhorn, LLP. (R. 1418-19.) Mr. Jensen had practiced

law for more than 35 years, and his area of expertise is litigation (both trial and appellate) with "special emphasis on professional liability and commercial litigation." (R. 1434.) Mr. Sullivan requested that Mr. Jensen review the documents and provide a professional opinion on whether it is "reasonable to conclude that no portion of [Plaintiff's] Medical Malpractice Settlement represents lost income and/or income replacement, as has been suggested by [Plaintiff's] counsel." (R. 1418.) Mr. Sullivan also requested that if Mr. Jensen concluded that a portion of the settlement represented lost income/income replacement, for him to give an opinion about what amount of the settlement (dollar or percentage) likely represented a recovery for lost income. (*Id.*) Mr. Sullivan requested that Mr. Jensen explain his conclusions. (*Id.*)

27. On July 23, 2007, Mr. Sullivan telephoned Plaintiff's counsel to inform him that Sun Life was obtaining a legal opinion from a medical malpractice attorney. (R. 26.) Plaintiff's counsel agreed to an extension for the decision provided he was given an opportunity to review and respond to the opinion. (*Id.*)

28. Mr. Jensen prepared a written opinion dated August 12, 2008 ("August Letter"). (R. 1431-1435.) Mr. Jensen stated that he focused his review on the malpractice Complaint, Plaintiff's discovery responses, and the Mediation Statement (and its supporting exhibits). (R. 1431.) Mr. Jensen stated that he also focused on medical records pertinent to Plaintiff's care and treatment. (*Id.*)

29. In his August Letter, Mr. Jensen stated that his review disclosed the amount of the Settlement "was significantly influenced by [Plaintiff's] high earning capacity." According to Mr. Jensen:

While his stroke was initially disabling, [Plaintiff's] 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.

(R. 1431.) Mr. Jensen observed that at the time of Plaintiff's stroke, he was making \$1.3 million dollars per year, and he had an established earning history at two previous jobs. (R. 1432.) Mr. Jensen observed Dr. Skurski's Economic Loss Report showed Plaintiff's net past loss of income of \$997,342 and future lost income ranging from \$28,943,212 to \$63,248,192 depending on whether Plaintiff remained in the job he had at the time of his stroke or received promotions. (*Id.*)

30. In rendering his opinion, Mr. Jensen reviewed recent settlements and verdicts from Cook County, Illinois "to help assess the role lost earnings likely played in this matter." (R. 1433.) Mr. Jensen noted that Plaintiff received a settlement that was \$2 million more than a severely injured former model, and he concluded this greater amount was "based on his income loss." (*Id.*)

31. Mr. Sullivan faxed Mr. Jensen's August Letter to Plaintiff's counsel on September 2, 2008. (R. 26.) In a letter dated September 4, 2008, to Plaintiff's counsel, Mr. Sullivan listed the documents provided to Mr. Jensen for his review. (R. 1438.)

32. By letter dated January 28, 2009, Plaintiff's counsel submitted a letter from Neil B. Posner, Esq. (R. 1462-63.) Mr. Posner's letter opined that Sun Life's position concerning application of the malpractice settlement proceeds to the LTD benefit was not correct. (R. 1467-86.)

33. Mr. Sullivan forwarded Mr. Posner's letter to Mr. Jensen for his review. (R. 1453-54.) Mr. Sullivan asked whether Mr. Posner's letter changed Mr. Jensen's "opinion that a portion of the malpractice settlement awarded to Mr. Baxter represents replacement of lost earnings." (R. 1453.)

34. Mr. Jensen responded by letter dated May 12, 2009, ("May Letter") that he had not changed his opinion "that lost income and the loss of earning capacity for this high wage earner was a significant factor in the mediated settlement into which the [Baxters] entered with Evanston Northwestern Hospital." (R. 1457.)

35. Mr. Jensen cited the Economic Loss Report that was part of the Baxters' Mediation Statement, and stated that the evaluation "absolutely builds" on the impact Plaintiff's stroke had on his ability "to maintain his high level of income." (*Id.*) Mr. Jensen concludes that "[g]iven the magnitude of the loss, it is specious to argue that the income loss did not influence the settlement." (R. 1458.)

36. Mr. Jensen also stated that Plaintiff "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 [in the article *Long-Term Sequelae of Stroke* that was cited in Mr. Posner's letter.]" (*Id.*) Mr. Jensen observed that Plaintiff's stroke was precipitated by a heart defect –patent foramen ovale ("PFO") – which was repaired in July 2005. (R. 1459.) Mr. Jensen stated that with this repair, Plaintiff's "principle risk factor for recurrent stroke has been dramatically reduced, if not eliminated." (*Id.*) Mr. Jensen also observed that while Plaintiff reported seizure activity in 2005 and 2006, "the medications he is on appear to have controlled the seizure risk," and noted that Plaintiff had been seizure-free "for some time." (*Id.*)

37. Mr. Jensen stated that he could not comment on the tax issues raised in Mr. Posner's letter. (R. 1459.)

38. In June 2009, Mr. Sullivan asked James McElligott, Jr., a partner with McGuireWoods, LLP, to address the tax issues raised by Mr. Posner. (R. 14, 24.) Mr. McElligott handles employment, executive compensation, and benefits matters, and is a member

of the Employee Benefits Committee of the ABA Section of Labor and Employment Law and ABA Section of Taxation. (R. 9.)

39. Mr. McElligott provided his opinions in a June 10, 2009 letter. (R. 14-18.) Mr. McElligott stated that Sun Life had asked him to address two contentions regarding tax law that Mr. Posner raised: (1) that Sun Life should not be allowed to treat as income that which the IRS does not; and (2) that Sun Life should be estopped from taking a position that puts . . . [Plaintiff] in peril of additional tax liability. (R. 14-15.) In Mr. McElligott's opinion, both of Mr. Posner's contentions are "clearly wrong." (R. 15.)

40. Mr. McElligott cited paragraph 9 of the Policy's Other Income Benefits section and he observed there is "no suggestion that the 'Other Income Benefits' must be taxable for federal income tax purposes." (R. 15.) Mr. McElligott stated that "Sun Life's characterization of the settlement proceeds for purposes of honoring its obligations under the policy should not impact the insured treatment of the settlement proceeds for federal income tax purposes." (*Id.*)

41. Based on his analysis of the facts in light of the Internal Revenue Code ("IRC"), Treasury Regulations, and rulings from the IRS, Mr. McElligott concluded that:

- "[T]he 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 [IRC] Section 104(a)(2) regardless of whether a portion of such damages constituted compensation for lost wages. The fact that these amounts are excluded from [Plaintiff's] income does not control whether these amounts are an 'Other Income Benefit' under Sun Life's Policy." (R. 16.)
- "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 tax consequences. Conversely, the fact that the settlement proceeds are excludible from the [Plaintiff's] gross income does not change the underlying substantive

characterization of a portion of those proceeds as due to lost wages." (R. 17.)

- "Treatment of a portion of the proceeds as an amount received due to income replacement or lost wages is not inconsistent with [Plaintiff's] treatment of the proceeds as damages excludible from gross income on account of personal physical injuries under [IRC] Section 104(a)(2)." (*Id.*)
- "[T]he 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." (*Id.*)

42. Mr. Sullivan also requested George J. DiDonna, M.D. FACC (Board Certified in Cardiology) to review Mr. Jensen's August and May Letters and Plaintiff's medical records and provide his opinion concerning whether Mr. Jensen's opinion about Plaintiff's future medical expenses was reasonable. (R. 1491-93.)

43. Dr. DiDonna stated that he agreed with the explanation and conclusions of Mr. Jensen regarding "the mechanism of the CVA [stroke]" in Plaintiff's case. (R. 1493.) Dr. DiDonna also stated that Plaintiff would not be "at high risk of repeated embolic CVA [stroke] as evidenced by his medical treatment" (R. 1493.) Dr. DiDonna concluded that Plaintiff "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." (*Id.*)

44. As it previously had done with Mr. Jensen's August Letter, on June 16, 2010, Sun Life sent by facsimile to Plaintiff's counsel Mr. Jensen's May Letter, Mr. McElligott's letter, and Dr. DiDonna's report. (R. 12.) Sun Life invited counsel to respond to these documents. (*Id.*) Rather than respond, Plaintiff filed the present lawsuit. (*Id.*)

Sun Life's Decision On Plaintiff's Appeal

45. Having received no response from Plaintiff, Sun Life denied Plaintiff's appeal by letter dated July 8, 2009. (R. 1-13.) Mr. Sullivan stated that Sun Life was applying two "Other Income Benefits" offsets to Plaintiff's monthly long term disability benefit: Plaintiff's \$2,049.00 monthly SSDI benefit and "\$22,965.90 per month for "income replacement or lost wages . . .the Employee receives . . . by settlement. . . ." (R. 3.) Mr. Sullivan stated that to address the issues Plaintiff raised on appeal, and specifically Mr. Posner's report, Sun Life sought an additional review by Mr. Jensen, as well as reviews by Dr. DiDonna and Mr. McElligott. (R. 5.)

46. Mr. Sullivan quoted extensively from Mr. Jensen's August and May Letters, from Mr. McElligott's June Letter, and from Dr. DiDonna's report. (R. 3-12.) The letter concluded that:

Upon consideration of all opinions obtained during this appeal review, it is Sun Life's determination that the settlement awarded to Mr. Baxter is an offset under the Policy because the settlement included an amount due to income replacement under medical malpractice law. Sun Life has not used the total amount of Mr. Baxter's settlement as an Other Income offset and does not argue that no portion of this is for either personal injury sustained or anticipated future medical expenses. Considering Mr. Baxter's current medical status and the anticipated future medical expenses he faces, Sun Life is attributing only 33% of his total award to income replacement.

Sun Life will not, therefore, reverse its position regarding the offsets applicable to Mr. Baxter's monthly long term disability benefit.

(R. 12.)

47. The appeal denial letter stated that in light of the Other Income Benefit offsets, Plaintiff is due the Minimum Monthly Benefit payable under the Policy (\$1,500.00), and because Plaintiff did not provide Sun Life with timely notice of "all Other Income Benefits Mr. Baxter receives," he was overpaid LTD benefits in the amount of \$378,480.00. (R. 12.) The appeal denial letter requested that Plaintiff reimburse the amount of the overpayment, and if he did not

do so, Sun Life stated it would withhold future monthly benefits and "credit them against the overpayment until the overpayment is satisfied." (*Id.*)

48. The appeal denial letter informed Plaintiff that he had exhausted administrative remedies, and he had a right to bring a civil action under ERISA. (*Id.*)

Dated this 30th day of September, 2010.

Respectfully submitted,

OGLETREE, DEAKINS, NASH,
SMOAK & STEWART, P.C.

/s/ Mark E. Schmidtke

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