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**Confidential Settlement Discussion**

September 11, 2017 Insured: Jane Doe

Beneficiary: John Doe

Policy No.: xxxxxxx

James Smith, CSR

Prudential Life Insurance Company

213 Washington Street, Newark New Jersey

Dear Mr. Smith,

I represent Mr. Doe in his claim against Prudential under policy number xxxxxxx and am in receipt of Prudential's denial letter of August 2, 2017. I have authority to accept on his behalf, if offered within 14 days and paid with 21 days of today’s date, the $100,000 policy limit. If this offer is not accepted, I will file suit on his behalf, seeking not only the policy limit, but, per 12 O.S. section 3629, prevailing party attorney's fee, interest at 15%, and costs. In addition, I believe the circumstances of the denial warrant bad faith damages which we will seek as well.

It appears the denial is based upon a misapprehension of applicable law. The pertinent statute is 36 O.S. section 3609. Per the statute, statements made by an applicant for insurance are deemed "representations" rather than "warranties." Accordingly, rescission may be had based upon a representation in an application only if the representation is (both): (1) incorrect; and, (2) the applicant knows the representation is incorrect and the applicant intends thereby to deceive the insurance company. It appears Prudential is under the impression it can rescind the policy simply because it did not have in its possession information that may have caused it not to issue the policy. That just is not the case. Oklahoma law just does not allow such attempts at post claim underwriting. Here, not only was there no intent to deceive, but the statement was simply not incorrect.

Per the denial letter, Prudential relies upon the response to question 8(c) on the application. The question asks (in pertinent part, emphasis mine): "In the past 7 years, have you been **diagnosed, treated, tested positive for, or been given medical advice** by a member of the medical profession **for . . . any form of cancer** (except basal cell or squamous cell carcinoma of the skin)." Ms. Doe checked "no" to this question *because she had not*.

Prudential cites, as its basis for rescission, a test that showed a mass "suspicious" of neoplastic process. A quick reference to Wikipedia reveals this about such masses:

Neoplasm is an abnormal growth of tissue, which if it forms a mass, is commonly referred to as a tumor. This abnormal growth (neoplasia) usually but not always forms a mass.

ICD-10 classifies neoplasms into four main groups: benign neoplasms, in situ neoplasms, malignant neoplasms, and neoplasms of uncertain or unknown behavior. Malignant neoplasms are also simply known as cancers and are the focus of oncology.

Wikipedia then summarizes: "A neoplasm can be benign, potentially malignant, or malignant (cancer)."

So, the cited test did not "show" (using Prudential's term in the denial) cancer. The test "showed" only "a mass" that was "suspicious" of neoplastic process. That neoplastic process, in turn, might have been "benign, potentially malignant, or malignant (cancer)."

I asked Mr. Doe the details of the hospitalization and decision to apply for coverage. Mr. Doe tells me that he got a call from Ms. Doe, on July 18, 2016, on her way home from work, saying she was having right side abdominal pain, and was going to a clinic. The clinic told her they thought she might have appendicitis. They sent her to the ER. At the ER she was given a CT and told they thought she had an abscess. The doctor came back later and said there was a chance it was a “mass,” but that he could not give more details until additional tests were performed. Over the next few days they did more scans and became suspicious it was indeed a “mass,” but they told Mr. Doe and Ms. Doe (as in the Wikipedia article), that it could be a “cyst” or it could be a “benign tumor,” or, worst case, perhaps even a “cancerous tumor.” They were told in very certain terms, there just was no way to tell what was going on until a biopsy was performed.

Sometime even before the first biopsy, the topic of life insurance came up. Mr. Doe describes the episode as a “wake-up call.” Though hoping and expecting positive results (Ms. Doe was otherwise very healthy and fully expected to hear she really did have appendicitis or an abscess), she decided to apply for life insurance. The couple talked and decided they’d just answer the questions truthfully and if she was denied coverage, at least they would have tried. *Though she looked at applications from four different companies, she only submitted two because on the other two, unlike the Prudential application, she could not truthfully answer “no” to all of the health questions.*

A day or two later, Ms. Doe had her first biopsy, which came back inconclusive. She had a second biopsy and was discharged before results came back. She was supposed to get a call from the hospital within a few days, but that call never came. They decided to pursue other treatment options and it was some time later, well after submitting the applications, before she finally got a diagnosis of, treatment for, positive testing of, or medical advice for, cancer. Prior to getting the policy, she had no diagnosis, treatment, positive test results, or medical advice regarding cancer.

Though she sought aggressive treatment upon finding out she had cancer, the cancer took Ms. Doe shortly after her 40th birthday.

That we now know (1) the suspicion was later confirmed in that it was neoplastic process, and (2) that the particular neoplastic process turned out to be the cancerous variety does not, though, get at the pertinent question when it comes to policy rescission. It just cannot be said that Ms. Doe’s response to question 8(C) was incorrect since at the time the application was submitted, neither she, nor her doctors, knew that she had cancer. Put another way, when asked had she been "diagnosed with, treated for, tested positive for, or been given medical advice for cancer," the strongest truthful answer she could have given (from Prudential's perspective) would have been "gee, I don't know. They tell me I have a mass *that might be neoplastic process* which *might be cancer* or *it might be something benign.*" Had she answered "yes" to the question, *that* would have been an incorrect answer. Instead she answered truthfully rather than speculate about things she just did not know.

Had Prudential wished to underwrite the policy before inception rather than do so only after a claim arose, Prudential could have spoken with Ms. Doe prior to writing the policy, or it could have required the usual paramedical examination, or just asked a simple question: "Have you recently sought any medical treatment or experienced any symptoms that cause you to think you may need to seek medical advice,” to trigger additional inquiry. Having chosen what questions to ask, Prudential cannot be heard to complain about the truthful answers provided by Ms. Doe to those questions.

So Prudential’s attempted rescission fails the first prong of section 3609.

If Prudential could somehow show that the statement was wrong, that still leaves the matter of intent to deceive. Intent to deceive is the touchstone of an insurer’s misrepresentation defense in Oklahoma.*See, New York Life Ins. Co. v. Strong, 179 Okla 280, 1937 OK 93,* 65 P.2d 194,196; *See also, Massachusetts Mutual,* 1965 OK 203, 416 P.2d 935 (construing 36 O.S. 3609); *Whitlach v. John Hancock Mutual Life Ins. Co.,* 1968 OK 6, 441 P.2d 956; *Hays,* 105 F.3d 583. In *New York Life Ins. Co. v. Strong*, the Oklahoma Supreme Court explains the law concerning representations in insurance applications:

“in a long line of cases [we have] uniformly held that where an insurance company defends a suit on a policy on the ground that the insured made false statements in an application, that the company must not only prove the falsity of the statements, but that they were made in bad faith and with the intent to deceive.”*Strong,* 65 P.2d at 196.

In *Farmers & Bankers Life Insurance Company v. Lemon,* the Oklahoma Supreme Court puts it:

“representations [by an applicant] carry a badge of good faith until overcome by the sheer weight of evidence to the contrary.”*Farmers & Bankers Life Ins. Co. v. Lemon,* 1951 OK 56, 204 Okla. 217, 228 P.2d 634, 637.

Here, as in *Strong* and *Lemon* there just is no evidence of fraudulent intent. Instead, not only was the application filled out truthfully (negating any potential for fraud), but there is no evidence of intent. Indeed, that she refused to submit the two applications that would have contained incorrect responses, reveals her intent only to be truthful.

If the representation could be construed as inaccurate, and the only issue with respect to rescission was intent, I would not see a potential for bad faith damages. Here, though, given that the representations cannot be reasonably construed as incorrect given that **a “suspicion” of a potentially benign “neoplastic process” is not the same as diagnosis of, positive testing for, treatment of, or medical advice for cancer,** I believe the denial gives rise to bad faith damages in addition to contract damages. Despite the potential for bad faith damages (in addition to damages under section 3629), Mr. Doe still prefers to resolve the matter now for the policy limit without the need for litigation. He has though, instructed me to file suit if this demand is not met. If forced to litigate, it will be my strong recommendation, that he not again agree to accept just the policy limit in satisfaction of the claim. If I do not receive agreement from Prudential by September 2, 2017, I will get our suit on file.

Please make the check payable to John Doe, and his Attorney, Paul Kouri. I have enclosed my W-9. I have also enclosed a copy of the voided rescission check.

Sincerely,

Paul Kouri

PK/hs