

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF KENTUCKY  
LEXINGTON DIVISION  
CASE NO. [REDACTED]

Our client [REDACTED]

PLAINTIFF

VS. CONFIDENTIAL SETTLEMENT MEMORANDUM

Smith [REDACTED] LIFE  
INSURANCE COMPANY,

DEFENDANT

Plaintiff, Our client Client by and through counsel, and for his confidential settlement memorandum in response to the Court's order for settlement conference, states as follows:

**OVERVIEW OF CLAIMS**

**Claim for Reinstatement of Insurance Policy:**

Mr. Client is the insured under life insurance policy no. [REDACTED] (the "Policy") originally issued by [REDACTED] Life Insurance Company, but assumed by Smith [REDACTED]. The Policy was issued July 17, 1989, with a maturity date of July 17, 2047. It provides that premiums were fixed for the first 10 years, but could be changed by the insurer every year thereafter. The Policy explicitly provides that "Before each policy year begins, written notice of the premium for that year will be given."

The policy premiums on the Policy are due on the anniversary of the policy (July 17<sup>th</sup> of each year). Smith [REDACTED] did not send Mr. Client a notice of premium due for the policy year beginning July 17, 2003. Mr. Client lawyer inquired about the premium notice shortly after July 17<sup>th</sup> by calling Smith [REDACTED] and was informed that a premium

notice would be mailed shortly. **Smith** was informed then that Mr. **Client** intended to keep the policy in force. When no premium notice was forthcoming, counsel for Mr. **Client** wrote to **Smith** asking for the premium notice and again informing **Smith** that Mr. **Client** intended to keep the policy in force. On or around September 9, 2003, a representative of **Smith** sent Mr. **Client** an e-mail informing Mr. **Client** that the Policy was terminated in June of 2003. There was no explanation given of any grounds for the termination of the Policy.

Mr. **Client** claims that the failure to deliver the premium notice and termination of the Policy were breaches of the Policy and that he is, consequently, entitled to judgment that the Policy be reinstated.

**Claim for Determination of Disability:**

The Policy contains a “Total Disability Benefit Rider” which provides that “[w]e will waive the payment of premiums which become due during a Total Disability which lasts at least four straight months . . . .”. Mr. **Client** has a “Total Disability” as defined in the Policy and has submitted proof of the disability, including Attending Physician’s Statements from , M.D. (dated October 6, 1999) and , M.D. (dated August 28, 2000). Dr.  and Dr.  reported that Mr. **Client** was disabled by, among other things, cardiovascular disease, debilitating cluster headaches, severe knee pain, depression, and chronic fatigue.

Mr. **Client** claims that **Smith** has wrongfully denied Mr. **Client** claim for a waiver of premiums under the Total Disability Benefit Rider. He claims that he is entitled to a determination that he is totally disabled and that, consequently, no further premiums are due under the Policy. In addition, Mr. **Client** is claims he is entitled to a

return of all premiums paid on the Policy after October 6, 1999 (the date of Dr. [REDACTED] statement) (approximately \$45,000/00).

**Unfair Claims Settlement Practices:**

Mr. Client claims that Smith [REDACTED] denied the premium waiver benefit without reasonable foundation and that Smith [REDACTED] has attempted to wrongfully terminate the Policy as a way of forcing an unfair settlement of Mr. Client claims and avoid any future claim that Mr. Client may make for the disability premium waiver. Moreover, Mr. Client has serious medical problems and is in declining health and he claims that the wrongful termination of the Policy is also an attempt by Smith [REDACTED] to avoid the payment of life insurance benefits to Mr. Client beneficiaries.

**EVALUATION OF CLAIMS**

**Termination of Policy:**

We feel that Mr. Client case is very strong on this point. Smith [REDACTED] will claim that it sent the premium notices to the address it had for Mr. Client in its files (an old address in Hazard). However, we have proof that Mr. Client sent notice of the change of address to Smith [REDACTED]. Perhaps more importantly, Smith [REDACTED] corresponded a number of times with Mr. Client at his proper Lexington address and its agent met with Mr. Client at his Lexington address (at a time when the agent tried to persuade Mr. Client to convert to a policy without the disability premium waiver). Mr. Client was paying premiums of approximately \$15,000 per year and we think it is unlikely that a jury will believe that an insurance company would allow a policy of that type to lapse without at least a phone call to the policyholder asking about the status of the premium payment.

Moreover, we believe that the jury will be unlikely to find that Mr. **Client** got the premium notice and just failed to pay the premium.

The Policy provides, on page 4 “Before each policy year begins, written notice of the premium for that year will be given.” The law is that the policy cannot be cancelled unless this notice is given.

A duty to give notice of a premium due may be imposed by the provisions of the policy itself or by the company's bylaws, either expressly or by necessary inference, as where dividends are subtracted from the gross premium in accordance with the orders of the insured. **In this situation, the insurer is required to provide an accurate notice of the amount of the dividend or policy loan that may be applied to the premium, so that the insured knows the additional amount of cash that is required to keep the policy in force.** A duty may also arise from the company's prior custom of giving the insured notice. Because this course of dealing develops after the formation of the insurance contract, it may be proven by parol evidence. If the custom, or course of performance is established and the insured proves knowledge of and reliance upon it, an implied agreement of the company to give notice is created and **the company cannot lawfully declare a forfeiture without first giving such a notice.**

16 Williston on Contracts § 49:85 (4th ed.) (Emphasis supplied.)

Cancellation of an insurance policy in Kentucky must be in accordance with the exact terms of the policy. *United States v. Goodpaster*, 769, F. 2d 374 (1985); *Gordon v. General Accident Fire and Life Assurance Corp*, 450 S.W.2d 252 (1970); *State Farm Mutual Automobile Co. v. Martin* 382 S.W. 83 (1964).

It is clear that **Sm** had Mr. **Client** Lexington address and corresponded with him at that address. The law is that where the insurance company has actual notice of the insured's new address, all notices must be sent to that address:

Basically, there is no conflict at all between the cases in regard to the abstract legal proposition that where actual knowledge of the change of insured's address has been acquired by the insurer, a notice, in order to be effective to bind the insured, must be mailed to the changed address.

\_\_\_ALR2d \_\_\_ “Provision Of Policy For Mailing Of Notice To Insured's Address As Stated Therein, As Affected By Change Of Address.”

**The Disability Issue:**

This issue is more complicated, primarily because of uncertainty over when the disability occurred, rather than uncertainty over whether Mr. **Client** is now disabled. Mr. **Client** has massive serious health problems – as detailed in the attached medical report. He is collecting Social Security disability and under a disability policy issued by **\_\_\_\_\_**.

Prior to his disability, Mr. **Client** owned and managed large coal companies. His first claim of disability was based on, among other things, a serious injury to his left knee which prevented him from managing his underground mining operations. That same knee had been previously replaced and **Smith** claims that the later knee injury did not qualify as a disability because the knee had been replaced prior to the purchase of the policy. The Total Disability Benefit Rider provides that “No premiums will be waived if Total Disability results from: (4) Bodily injury or disease manifested before the Rider Date.” The law in Kentucky is that:

.... a pre-existing infirmity or disease is not to be considered as a cause unless it substantially contributed to the **disability** or loss.... a "pre-disposition" or "susceptibility" to injury, whether it results from congenital weakness or from previous illness or injury, does not necessarily amount to a substantial contributing cause. A mere "relationship" of undetermined degree is not enough.

*Continental Life & Accident Ins. Co. v. Weartz*, Ky. App., 636 S.W.2d 891 (1982) at 894, quoting from *Continental Casualty Co. v. Freeman*, Ky., 481 S.W.2d 309 (1972).

Since the knee injury, Mr. **Client** has had a massive heart attack, heart bypass surgery, aortic aneurysm surgery, spinal surgery, kidney problems, cluster headaches,

depression, lower back problems, chronic left knee pain, lack of stamina, continuing heart problems, and degenerative arthritis. On the other hand, Mr. **Client** is intelligent and pleasant to be around and not obviously disabled (as with a loss of limb, for example).

If Mr. **Client** was disabled before the policy terminated, then the policy could not have been properly terminated because he owed no premiums after the disability (because of the disability premium waiver clause).

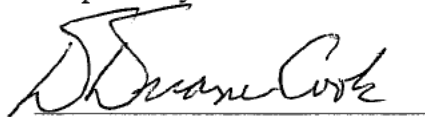
**Unfair Claims Settlement Practices:**

We think that there is at least a fair chance that a jury would determine that **Smith** wrongfully terminated this policy to avoid coverage.

**CONCLUSION**

**Smith** counsel has suggested that the company would reinstate the policy, if Mr. **Client** would pay all of his back premiums. We have suggested that Mr. **Client** would agree to drop his claim for premium refunds and his punitive damage claims if **Smith** will reinstate the policy and agree that no further premiums are due. In our view, the settlement discussions should principally revolve around the issue of whether any additional premiums are due.

Respectfully submitted:



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