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Insurance: New Definitions and Guidelines Regarding Medical Questions in Life Insurance Applications

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INSURANCE: NEW DEFINITIONS AND GUIDELINES REGARDING MEDICAL QUESTIONS IN LIFE INSURANCE APPLICATIONS

In *Massachusetts Mutual Life Ins. Co. v. Allen*,[1] a recent Oklahoma case, recovery was allowed under a life insurance policy even though there were both a knowing misrepresentation in the application and a failure to disclose a recent biopsy. This was an action for the cancellation of a life insurance policy in which the defendant beneficiary filed a cross-petition seeking recovery on the policy. The court reaffirmed a well-known doctrine, discredited a company argument in the face of the facts, and laid down new guidelines in the area of medical definitions.

Three distinct aspects were presented: first, an agent falsified material information in the application; second, the company contended that they could have discovered a disease which competent doctors had been unable to discover; and third, there was uncertainty as to whether a biopsy could be considered to be surgery.

It has long been an established principle of insurance law that an intentional misrepresentation of health material to the assumption of risk in an application for a life insurance policy is a ground for cancelling the policy and denying the beneficiary any recovery under it.[2] Likewise, failure to disclose the whole truth has been held tantamount to giving false information.[3]

The existing Oklahoma law regarding misrepresentations in applications for insurance policies provides that such false statements will not bar recovery unless they materially affect the acceptance of risk or hazard[4] or are fraudulent or conceal facts which would cause the insurer not to issue the policy without allowing

[1] Massachussetts Mutual Life Ins. Co. v. Allen, 416 P.2d 935 (Okla. 1965).

[2] Aetna Life Ins. Co. v. Shipley, 134 S.W.2d 342, (Tex. Civ. App. 1939); Kirk v. Metropolitan Life Ins. Co., 336 Mo. 675,—, 81 S.W. 2d 333 (1935), Texas Nat'l Life Ass'n v. Bailey, 54 S.W.2d 1085 (Tex. Civ. App. 1932), (dicta).

[3] National Life & Acc. Ins. Co. v. Fisher, 211 Ky. 12, 276 S.W. 981, (1925).

[4] OKLA. STAT. tit. 36, § 4407 C (1961).

for the additional facts.[5]

The decedent insured told the company's agent, on application, that he had had a recent case of infectious mononucleosis, for the diagnosis and treatment of which he had consulted a physician, been hospitalized, and had X-rays and blood tests. The agent, in filling in answers contained in the application, answered in the negative all questions pertaining to whether the applicant had a recent history of medical consultation, hospitalization, X-ray, or serious illness. The insured questioned the propriety of entering such answers in the application and offered to submit to a physical examination if the agent thought it was necessary. The agent concluded that the information was irrelevant since Evans' doctor had dismissed him even though the company required an examination before issuing a policy applied for within three years of recovery from mononucleosis. The court said that since the agent knew the actual facts, the company should be charged with notice of those facts[6] and that delivery of the policy under those circumstances bound the company.[7]

It further appeared from the testimony that Evans had failed to disclose the fact that he had had a lymph node removed from his neck for purposes of biopsy. The company insisted that this was "surgery" as contemplated in the application questionnaire and that if they had known of this "surgery" they would have discovered Hodgkin's disease.

The Court rejected the company's argument that they would have made this discovery. The testimony showed that the biopsy was, in fact, taken to determine whether Evans had Hodgkin's disease. The pathologist who examined the lymph node testified

[5] OKLA. STAT. tit. 36, § 2609 (1961).

[6] *Supra* note 1, at 940.

[7] *Supra* note 1, at 940. With respect to the facts so far presented, the company's only remedy appears to be against the agent for issuing the policy contrary to instructions. There is authority supporting the rule that where an agent issues a policy contrary to his instructions he may be held liable for the loss which the company has to pay. Manufacutrer's Cas. Ins. Co. v. Martin-Lebreton Ins. Agency, 242 F. 2d 951, (5th Cir. 1957), *cert. denied*, 355 U.S. 870 (1957); American Fire & Marine Ins. Co. v. Seymour, 144 So. 755, (La. 1932); Phoenix Ins. Co. v. Seegers, 192 Ala. 103, 68 So. 902 (1915).

" . . . that there was no diagnosis he could make as to any . . . Hodgkins [sic] disease involved."[8] The court then ruled, "The findings of [the doctors] . . . render[s] Company's argument that *they* would have discovered Hodgkins [sic] disease inconclusive. The test is whether insurance companies generally would have rejected the application."[9]

The company also introduced evidence which tended to show the cause of Evan's death was Marfan's disease. The court found no evidence that Evans knew of, or was ever suspected of having Marfan's disease.

At this point it will be helpful to make a brief comparative analysis of the medical disorders involved. Infectious mononucleosis is ". . . characterized by a sudden onset and acute course, with fever and inflammatory swelling of the lymph nodes, especially those of the cervical [neck] region."[10] Hodgkin's disease is "[a] painless, progressive, and fatal enlargement of the lymph nodes, spleen, and general lymphoid tissues, which often begins in the neck and spreads over the body."[11] Marfan's syndrome is "(a) congenital and hereditary condition . . . ."[12] characterized by a tendency to great height, long and thin distal extremities, funnel chest, deep-set eyes, muscular weakness, scanty subcutaneous fat, ocular abnormalities, and cardiac abnormalities and failure.[13]

It is seen that infectious mononucleosis and Hodgkin's disease have great similarities in sign and symptom. Both involve the lymphatic system. Both infectious mononucleosis and early Hodgkin's disease are characterized by a swelling of the lymph nodes in the neck region. It is quite reasonable that a doctor, in making a diagnosis of either of these two diseases, would seriously consider the possibility of the existence of the other.

[8] *Supra* note 1, at 941.

[9] New York Life Ins. Co. v. Carroll, 154 Okla. 244, 7 P.2d 440 *as cited by the Court* (1932), in Allen, *supra* note 1, at 941.

[10] DORLAND'S ILLUSTRATED MEDICAL DICTIONARY 854 (W. B. Saunders Co.: Phila. 1957).

[11] *Id.* at 397

[12] *Id.* at 1347.

[13] Tung & Liebow, *Marfan's Syndrome,* 1 LAB. INVESTIGATION 382, (1952).

On the other hand the characteristics of Marfan's syndrome, the malady which the company appeared to believe caused Evan's death, are seen to be quite distinctly different from and generally unrelated to any prior sign relating to the company's acceptance of the risk. "There is no evidence that Evans had ever heard of the disease or that any doctor had though of the disease in connection with Evans until after his death."[14] In the light of this statement there is great doubt as to whether a company examination would or could have revealed this malady which, if Evans had had it at all, he had had since birth, and which had not been discovered by even as thorough an examination as was made in connection with his case of infectious mononucleosis. It is settled law that an applicant cannot be required to disclose a latent disease of which he has no knowledge.[15]

The court properly found little strength in the company's argument that on its own examination it would have discovered facts which might have materially affected the assumption of risk. It appears that the company's only escape from liability would have been for it to prove that the very fact of the biopsy was material to the assumption of risk. If the company could have shown that its policy was not to write a life insurance policy for anyone who had had a biopsy it might well have been able to cancel the policy on the ground of concealment of facts. A less forceful argument, but one more likely to be in keeping with the company's policy, would have been to prove that the company would not have issued the policy in as large an amount had they known of the biopsy. Either of the above arguments would have placed the case squarely within the Oklahoma statute, which allows the prevention of recovery where a "... concealment of facts [is] . . . [m]aterial . . . to the acceptance of the risk . . . or . . . [t]he insurer in good faith would . . . not have issued the policy in as large an amount . . . if the true facts had been made known to the insurer as required either by the application for the policy or otherwise."[16]

[14] *Supra* note 1, at 941.

[15] *Id.* United Benefit Life Ins. Co. v. Knapp, 175 Okla. 25, 51 P.2d 963, (1935); National Life & Acc. Ins. Co. v. Wicker, 171 Okla. 241, 42 P.2d 50, 100 A.L.R. 357 (1935), National Life & Acc. Ins. Co. v. Shermer, 161 Okla. 77, 17 P. 2d 401 (1932).

[16] OKLA. STAT. tit. 36, § 3609 (1961).

Through an exercise in semantics the court rejected the company's argument that the biopsy was surgery. The court formulated a definition of surgical operation as ". . . a procedure carried out on a living body for effecting a cure by altering an existing state or condition, as distinguished from medical."[17] The court also proffered a definition of biopsy as ". . . the removal of tissue, cells, or fluids from the living body for examination or study for diagnostic purposes."[18] The court then went on to conclude, "It is doubtful if the ordinary person would have considered this biopsy as 'surgery.' "[19]

It is extremely important to note that these definitions may be applied to future cases. It is a general rule in the field of insurance law that policies should be construed so as to avoid forfeiture,[20] and it has been inferred that diagnostic work in a hospital is not "treatment" as contemplated in a life insurance application.[21] In the light of these observations, therefore, the definitions given by the court were fully adequate to resolve the controversy before it by expressing doubt that ". . . the ordinary person would have considered this biopsy as 'surgery.' "[22] It should be noted, however, that very little attention was paid to these definitions in the opinion and no authority was cited for either.

The definition of surgery as ". . . a procedure carried out on a living body for effecting a cure by altering an existing abnormal state or condition, as distinguished from medical"[23] leaves much room for procedures outside the realm of surgery as viewed by the ordinary man. Under the court's definition a doctor who returns a dislocated shoulder to its normal position would be performing "surgery." He has done a non-medical "procedure" on a "living body." He has effected a "cure by altering an existing

[17] *Supra* note 1, at 941.
[18] *Supra* note 1, at 941.
[19] *Supra* note 1, at 941.
[20] Missouri State Life Ins. v. Carey, 262 S.W. 864, (Tex. Civ. App. 1924); Southland Life Ins. Co. v. Hopkins, 219 S.W. 254 (1920), (dicta).
[21] Aetna Life Ins. Co. v. Hub Hosiery Mills, 170 F.2d 547, (1st Cir. 1948), (dicta).
[22] *Supra* note 1, at 941.
[23] *Supra* note 1, at 941.

abnormal state or condition." Likewise, a father who slaps his choking three-year-old infant on the back, causing him to cough up a button he has accidentally inhaled, would be considered to have performed "surgery." It is submitted that an ordinary man would not consider these procedures to be "surgery." A reasonable definition of surgery by an ordinary man would be: A procedure, in the general field of healing, involving an incision.

Biopsy has been defined as ". . . a microscopic examination of a piece of tissue removed from the infected and questioned diseased region . . .".[24] A lymph node biopsy certainly requires an incision, is usually carried out in an operating room, and the excision is generally performed by a surgeon. Such a procedure falls squarely within the ordinary man's definition as proffered. The procedure involved in applying an ordinary man's definition of a biopsy in conjunction with a definition of surgery which varies widely from that of the ordinary man is highly questionable.

Ruling in this case, the court had added strength to the doctrine that notice to an insurance agent is considered to be notice to the company, regardless of whether the agent actually communicated his knowledge to the company.

The discrediting of the company's argument that, had it been able to examine the applicant, it would have discovered a specific disease, is subject to two interpretations. First, the court has allowed the opinion of an expert witness to represent the opinion of the entire class of which he is a member. Second, the unsupported assertion that the company could have discovered a specific disease does not stand without discrediting the medical testimony of the docors who said the applicant did not have the disease.

The court's definition of surgery, together with the rationale applied in conjunction with it, is not of sufficient technical quality and clarity to be applied to future cases without elaboration, qualification, and distinguishment. Counsel presented with this problem in the future would be well-advised to employ additional materials and use further insights in order to achieve the certainty needed in this area.

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[24] U.S. v. Hoxsey Cancer Clinic, 198 F.2d 273, 277 (5th Cir. 1952).