To: John Smith

From: OnPoint Legal Research Law Corporation

Date:

Re: Denial of Life Insurance Claim on Basis of Non-Disclosure: Your File *A v. B*

Introduction:

You have informed me that your client's husband died in an automobile fire. Her claim under his life insurance policy has been denied on the grounds of material non-disclosure.

Within the prior two years, in his application for life insurance, the insured misrepresented that he was taking anti-depressants and had sought medical assistance from his doctor.

The defendants state that had they been aware of the medication and medical attendances, the deceased would not have been insured.

We have agreed that I would research this matter initially in Canada. We further agreed that I would spend up to fifteen hours researching and drafting a memorandum.

Issue:

1. Does a material non-disclosure on an application for life insurance of some fact unrelated to the actual cause of an insured's death entitle an insurer to deny coverage?

Although I have focused upon researching the impact that a cause of death unrelated to a material non-disclosure has on the claim, I have also included some comments on whether this particular non-disclosure would be considered by the courts to be material and on possible other grounds on which the claim may succeed. However, neither of these other matters has been thoroughly researched. Please contact me should you like me to further research either of these issues.

Brief Answer:

Yes. The non-disclosure of a material fact on an application for life insurance renders the contract voidable at the hands of the insurer. It appears to be irrelevant whether or not the cause of death is related to the ultimate cause of death.

Analysis:

a). *Non-Disclosure: Initial Comments*

The most frequent reason for denying a life insurance claim is that the applicant for insurance made a misrepresentation to the insurer or failed to disclose information that the insurer alleges was material to the risk: see Trakman, L. "'Escape Hatches' in Life Insurance Policies: Rights and Fiduciary Responsibilities", (2001), 35 U.B.C. L.Rev. 91-134.

The applicant's failure to do so renders the contract voidable at the instance of the insurer. This is legislated in s.41 of the *Insurance Act*, R.S.B.C. 1996, c.226 (formerly s.134 of the *Insurance Act*, R.S.B.C. 1979, c.200), which is a statutory recognition of the common law duty that flows from the principle that contracts of insurance require the exercise of the utmost good faith by the parties (several provinces have similar provisions in their Insurance Acts):

> 41(1) An applicant for insurance and a person whose life is to be insured must each disclose to the insurer in the application, on a medical examination, if any, and in any written statements or answers furnished as evidence of insurability, every fact in his or her knowledge that is material to the insurance and not so disclosed by the other.
>
> (2) Subject to section 42, a failure to disclose, or a misrepresentation of, such a fact renders the contract voidable by the insurer.

As you have informed me that the deceased's contract of insurance had been in effect for less than two years, s. 42 does not affect s.41, but I include it for your information:

> 42(1) This section does not apply to a misstatement of age or to disability insurance.
>
> (2) Subject to subsection (3), if a contract has been in effect for 2 years during the lifetime of the person whose life is insured, a failure to disclose, or a misrepresentation of, a fact required to be disclosed by section 41 does not, in the absence of fraud, render the contract voidable.

I further note that if the deceased's life insurance was a group contract, section 42(3) will have an impact upon s.41 if the evidence of insurability was not specifically requested by the insurer:

> 42(3) In the case of a contract of group insurance, a failure to disclose, or a misrepresentation of, such a fact in respect of a person whose life is insured under the contract does not render the contract voidable, but if evidence of insurability is specifically requested by the insurer, the insurance in respect of that person is voidable by the insurer unless it has been in effect for 2 years during the lifetime of that person, in which event it is not, in the absence of fraud, voidable.

As in your clients' case, the insurer's allegation is often that had the insured party disclosed the material information the insurer would have declined to cover the risk or would have contracted on different terms. This allegation is linked to the further assertion

that the insured party is bound by the duty of the "utmost good faith" in making disclosures to the insurer. Misrepresenting or failing to disclose information that the reasonable insurer would regard as material to the risk allegedly violates that duty. It is irrelevant whether the failure to disclose is deliberate or inadvertent. C. Brown & J. Menezes, *Insurance Law in Canada*, *2d ed.* (Toronto: Carswell, 1991) at 9 define the duty of the "utmost good faith" as follows:

> Insurance contracts are contracts *uberrimae fidei*. In the main this label imposes on an applicant for insurance the obligation of disclosing to the insurer all information that the applicant has that would influence a reasonable insurer in deciding to assume the risk and determine an adequate premium."

Further, in D. Norwood & J.P. Weir, *Norwood on Life Insurance Law in Canada* (Toronto: Carswell, 2002) at 376, it is noted:

> "Unlike the case in many other kinds of contracts where the parties are in an equal position as far as ascertaining matters which are material to the proposed transaction, the facts which have a bearing upon the insurance risk which the insurer is asked to take are usually known in full detail only to the parties seeking to be insured and are certainly not as easily available to the insurer. This is particularly true of the life insurance risk, where the health condition or pertinent symptoms of the person whose life is to be insured is very much within that person's private knowledge. Contracts of life insurance, therefore, are prime examples of contracts *uberrimae fidei*, imposing a duty [upon the parties seeking insurance] to make true and full representations of facts, which are material to the insurance risk."

For a case applying this reasoning, see *Coronation Insurance Co. v. Taku Air Transport Ltd.*, [1991] 3 S.C.R. 622.

b). *Non-Disclosure: Where the Cause of Death is Unrelated to the Non-disclosure*

Most commonly, grounds for challenging the validity of a life insurance contract arise after the life insured's death has occurred and the insurer, in investigating the death claim, discovers a history of medical or other uninsurability factors which were misrepresented when the deceased applied for the insurance. In this situation, the insurer's contest of the validity of the contract takes the form of defending against liability for the claim upon the grounds that the policy itself is invalid. In other words, it is not a contest upon the merits of the claim that may or may not have been a good claim in terms of the policy, but a challenge of the whole contract as an ineffective contract under which no insurance coverage should have been in force at all.

At page 378 of *Norwood on Life Insurance Law in Canada, supra*, the authors state:

> "It should be noted that the material fact misrepresented need not be one which is in any way linked or connected to the circumstances or cause of death of the life insured. If for example, the life insured misrepresented a health condition and then dies from unrelated causes, from another disease or by accident, for example, the insurer is still not liable. The point is, of course, that if proper representations had been made, the insurer would not have been willing to issue the policy applied for, and would never have been on the risk for the death of the life insured at all."

In the most factually relevant case that I located, *Jones Estate v. Cumis Life Insurance Co*. (2003), 171 Man. R. (2d) 123 (QB), the plaintiff's daughter held life insurance with the defendant. She died in a motor vehicle accident. The defendant denied the claim on the basis that the daughter had given false answers to medical questions on her insurance application a few months before her death. She had failed to disclose medication and treatment for depression and cancer. The defendant maintained that this failure had significantly altered its decision to provide her with coverage. The court held that had she filled out the application correctly, the insurer would have requested additional information. It also held that this misinformation was material to the defendant's underwriting decision in considering its risk and as such the policy was not enforceable.

Similarly, in *Hammill v. Gerling Global Life Insurance Co.* (1990), 74 Alta. L.R. (2d) 332 (Q.B.), the plaintiff's wife took out a life insurance policy and falsely stated in the application that she had not smoked cigarettes in the last 12 months. She died in an automobile accident. Evidence showed that she had been a smoker for years. This fact was material to the risk assessment at the time the policy was issued. By concealing this risk, the plaintiff's wife had avoided the appropriate premiums for her level of risk and could not now claim on the policy.

Similar facts and conclusions appear in the Quebec case of *Ouellet c. Industrielle Cie d'assurance sur la vie* [1993] A.Q. No. 207 (QL), which unfortunately is in French. However, my French is sufficient to enable me to determine that the insured had lied about her tobacco usage, died in a car accident, and that her life insurance was deemed invalid on the grounds that she had failed to disclose information material to the issuance of the claim.

c). *Other Comments*

Is the Non-Disclosure Material?

Materiality is ordinarily defined according to what a reasonable insurer would regard as material. For example, as Martin, C.J.S. stated in *Shields v. North American Life Assurance Company*, [1950] 1 W.W.R. 481 at 488 (Sask. C.A.):

> "From the authorities therefore it is clear that the question of fact as to materiality in every case is whether if the matters concealed or misrepresented had been truly stated in the application, they would have influenced a reasonable insurer in deciding whether to accept or decline the risk: and the question of fact must be determined on a fair consideration of the evidence".

For a leading case on this reasonable insurer test, see *Henwood v. Prudential Insurance Co. of America*, [1967] S.C.R. 720. See also *Stewart v.Canada Life Assurance Co.* (1999), 100 O.T.C. 93 (Sup.Ct.); *Lachman Estate v. Norwich Union Life Insurance Co.*

(Canada) (1998), 40 O.R. (3d) 393 (Gen.Div.) and *Kruska v. Manufacturers Life Insurance Co.* [1984] B.C.J. No. 2812 (QL)(S.C.).

Without having specifically researched this issue in the context of your file, I cannot conclusively comment upon whether a court would find that a non-disclosure of medical attendances and drugs related to depression would be deemed ‘material’, however, it does not appear that it would be overly difficult for the defendant to demonstrate that it had denied other applicants with a similar medical history. I note that the R. Andal in his text, *Insurance Law in Canada*, *Vol. 1*, commented at p.5-15 that “The test of relevance is that applied by the reasonable insurer. Some things, such as the insured person’s medical history, age and occupation easily satisfy this test”.

The Particular Wording of the Contract

The scope of this research did not allow for a consideration of the issues that might arise on the particular wording of the contract. However, I wanted to point out that depending upon the wording of the policy and the context of the ‘non-disclosure’, there may be an argument that it may have been ambiguous and as such, should be interpreted in favour of the insured: see, for example, *Hoult Estate v. First Canadian Insurance Corp.* [1994] B.C.J. No. 1226 (QL)(S.C.), wherin the exclusion clause was vague and ambiguous as it was unclear whether “pre-existing illness” included pre-existing symptoms of subsequently diagnosed serious conditions or only pre-existing diagnosed conditions.

If the defendant insurer is asserting that your client’s husband failed to answer a particular question correctly or if he had responded negatively to a particular clause relating to an exclusion for past physical or emotional difficulties (rather than just failed to bring the medical history voluntarily to its attention), it is possible that the clause was not clear or could be construed as excluding physical difficulties but not emotional disabilities. See, for example: *Bradford Estate v. Cumis Life Insurance Co.* [1989] B.C.J. No. 693 (QL)(S.C.), wherein the plaintiff’s claim was allowed as the contract specifically included coverage to an applicant ‘physically able to perform or within a reasonable time to resume the usual duties of his livelihood’. The court concluded that the deceased’s

depression that kept her from working was not caught by this clause as it was a mental or emotional problem and as such not a ‘physical’ disability. Of course, I do not know anything about the terms of the contract and as such I do not know if this line of argument has any relevance.

Similarly, if you could establish that the deceased reasonably answered a specific question to the fullest extent possible, the court might uphold your client’s claim: see *Stewart v.Canada Life Assurance Co. supra*, affirmed on appeal at [2000] O.J. No. 2970 (QL)(C.A.), wherein the claim was allowed as the insured, who had suffered from ulcerative colitis (a disease of the lower intestines and rectum) since he was a child, answered in the negative the question as to whether he had any history of diseases of the stomach, rectum, bladder, intestines, etc. The insured died of a heart attack, however, the court did not address that this cause of death was unrelated to the alleged non-disclosure. Because the insured believed that he had a disease of the bowel or colon and not the intestines, the court concluded in answering this question he did not misrepresent his medical history. I note that, at paragraph 52, the court states that the duty to disclose is limited to giving the correct answers to the specific questions in the application. The positive duty of full disclosure only arises if the answer to any of the questions is in the affirmative. Again, I am not aware if the policy in your case was limited to specific questions, but if it was, this issue appears to be worth considering. See also the cases cited in *Stewart, supra*, for further discussion on this matter.