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

OHIO NATIONAL LIFE ASSURANCE CORPORATION, an Ohio corporation,	)	
Plaintiff,	)	
	)	**No. 07 C 4266**
v.	)	
	)	**Magistrate Judge Schenkier**
LORI SOLDAT, Executor of the ESTATE OF KENNETH M. SOLDAT, Deceased,	)	
Defendant.	)	

OHIO NATIONAL LIFE ASSURANCE CORPORATION'S
MEMORANDUM IN SUPPORT OF ITS MOTION FOR ENTRY OF JUDGMENT

Plaintiff, OHIO NATIONAL LIFE ASSURANCE CORPORATION ("Ohio National"), by its attorneys, Michael J. Smith and Warren von Schleicher, hereby submits its Memorandum in Support of its Motion for Entry of Judgment, pursuant to Fed. R. Civ. P. 52:

INTRODUCTION

Kenneth Soldat died on impact when he drove his car at a high rate of speed head-on into a concrete wall. Ohio National determined that Mr. Soldat's death falls within the Policy's suicide clause, which limits coverage when the insured dies by suicide while sane or insane, or by self-destruction while insane.

Lori Soldat, the Policy's beneficiary, endeavors to infuse the Policy's suicide clause with philosophical concepts of self-determination and moral responsibility, in order to relieve her husband of personal responsibility for his death. She retained forensic experts to reconstruct her husband's likely state of mind in the days preceding his death. They theorize that Mr. Soldat had a psychotic reaction to medication, which altered his mental state and ultimately led him to commit his final act of self-destruction. They attempt to proffer a rational explanation for the

cause of Mr. Soldat's irrational state of mind. If Mr. Soldat suffered an adverse psychiatric reaction to medication, and therefore failed to comprehend the physical nature and consequences of his actions, then he was not morally responsible for his act of self-destruction.

But under Illinois law, when a life insurance policy excludes coverage for suicide while "sane or insane," all question of the insured's mental capacity is removed from controversy. There should be no *post-mortem* inquisition into Mr. Soldat's mental capacity, or forensic reconstruction of his "likely" mental state. The insured's state of mind at the time of death is irrelevant to the issue of coverage. Ohio National contracted out of this class of risks entirely.

In the insurance context, suicide while "sane or insane" is not concerned with the insured's mental capacity or moral responsibility for his act of self-destruction. Suicide is simply the act of killing one's self. It is determined by an objective standard, and not a subjective inquiry into the insured's state of mind. To an objective observer, Mr. Soldat drove his car at a high rate of speed head-on into a concrete wall without swerving, breaking or engaging in any other evasive maneuver. His death was self-inflicted. Under Illinois law, therefore, Kenneth Soldat died "by suicide while sane or insane or by self-destruction while insane."

ARGUMENT

I. Trial On The Papers Under Rule 52(a).

Trial on the papers under Fed. R. Civ. P. 52(a) is similar to a bench trial in which the court decides the case based on the stipulated written record and consideration of the parties' briefs. In a Rule 52(a) proceeding, the court evaluates the persuasiveness of the evidence and decides contested issues of law and fact. The court's findings of fact are reviewed on appeal for clear error. *Sullivan v. Bornemann*, 384 F.3d 372, 375 (7th Cir. 2004). See also *Patton v.*

MFS/Sun Life Financial Distributors, Inc., 480 F.3d 478, 484 n.3 (7th Cir. 2007) ("Those who wish to ensure that a judgment is treated with the deference due the result of a bench trial are advised to eschew Rule 56 and stick to Rule 52(a)").

The parties agree that Illinois law governs the provisions of Soldat's Policy. (J. Stmt, ¶ 1). The court must apply the substantive law of Illinois as the court believes the Illinois Supreme Court would apply it. See *Officer v. Chase Ins. Life and Annuity Co.*, 541 F.3d 713, 715 (7th Cir. 2008) ("When sitting in diversity, we must apply the substantive law of the state as we believe the highest court of that state would apply it when faced with the same issue.") (citing *Allstate Ins. Co. v. Keca*, 368 F.3d 793, 796 (7th Cir. 2004)). Under Illinois law, the terms of an insurance policy are governed by the same rules of interpretation that apply to contracts. Courts are to construe an insurance policy according to the plain, ordinary and popular meaning of the policy's terms. *Valley Forge Ins. Co. v. Swiderski Electronics, Inc.*, 223 Ill.2d 352, 860 N.E.2d 307, 314 (2006); *Outboard Marine Corp. v. Liberty Mut. Ins.*, 154 Ill.2d 90, 607 N.E.2d 1204, 1212 (1992). Although there is a legal presumption against suicide, the presumption vanishes when evidence of suicide or self-destruction is introduced. *Kettlewell v. Prudential Ins. Co. of America*, 4 Ill.2d 383, 122 N.E.2d 817, 819 (1954). "Thereafter, the question is to be decided on the evidence without resort to the presumption." *Id.*

The insurer bears the burden of establishing that a claim falls within a provision of the policy that limits or excludes coverage. *Jarrett v. Fortis Ins. Co.*, No. 06-3143, 2008 WL 109086, at *2 (C.D. Ill. Jan. 9, 2008); *Universal Cas. Co. v. Lopez*, 376 Ill.App.3d 459, 876 N.E.2d 273, 278 (1st Dist. 2007). When the language of the policy limitation is clear, the limitation should be enforced according to its written terms. *Chmiel v. J.C. Penney Life Ins. Co.*, 158 F.3d 966, 969 (7th Cir. 1998); *DeVore v. American Family Mut. Ins. Co.*, 383 Ill.App.3d 266,

891 N.E.2d 505, 508 (2nd Dist. 2008). Cf. *Rich v. Principal Life Ins. Co.*, 226 Ill.2d 359, 875 N.E.2d 1082, 1090 (2007) ("Although policy terms that limit an insurer's liability will be liberally construed in favor of coverage, this rule of construction only comes into play when the policy is ambiguous.") (quoting *Hobbs v. Hartford Ins. Co. of the Midwest*, 214 Ill.2d 11, 823 N.E.2d 561, 564 (2005)).

II. The Suicide Clause Applies Regardless Of The Insured's Capacity To Direct Or Comprehend The Nature And Consequences Of His Act Of Self-Destruction.

Insurance policies have limited coverage for death by suicide since the mid-nineteenth century. In interpreting suicide clauses in these early policies, courts looked for guidance to the criminal law and commonly accepted societal *mores*. Under English and American common law, suicide was a criminal act of self-murder, punishable as felonious suicide. According to nineteenth century insurance law, as in criminal law, the requirement of *mens rea* was foundational. To constitute suicide, the act of self-destruction had to be performed by a morally responsible agent who was mentally capable of forming a specific intent to die. An insane man might bring about his death through an act of self-destruction, but in the absence of mental capacity, he could not be held morally or legally accountable for the criminal act of suicide. As recounted in a 1902 insurance decision of the Illinois Court of Appeals:

> By common law, suicide was a felony. In such cases courts have held, as the term imports, that one so insane as not to understand the moral character of the act, incapable of forming guilty intent, could not, while in that condition, commit suicide; that self-destruction was not suicide.

Seitinger v. Modern Woodmen of America, 106 Ill.App. 449, 1902 WL 2410, at *2 (4th Dist. 1902), *aff'd*, 204 Ill. 58, 68 N.E. 478 (1903).

The Supreme Court in *Life Ins. Co. v. Terry*, 82 U.S. 580 (1872) drew upon these common law principles in interpreting a policy's suicide exclusion.[1] Adducing the concept of legal capacity from criminal law, the Court held that if the insured intentionally takes his own life while "in the possession of his ordinary reasoning faculties," whether out of jealousy, anger, or a desire to escape the ills of life, then the policy's exclusion applies. *Id.* at 591. But if the insured intentionally takes his own life when "his reasoning faculties are so far impaired that he is not able to understand the moral character, the general nature, consequences, and effect of the act" or when impelled "by an insane impulse," the exclusion does not apply and the policy's beneficiary may recover. *Id.* *Terry* reflects the nineteenth century sensibility that only morally responsible agents, capable of exercising free will, should be held legally accountable for their acts of self-destruction.

Insurance companies responded to *Terry* by drafting clauses that excluded suicide whether the insured was "sane or insane." The purpose of this language was to exclude coverage for all acts of self-destruction, and avoid *post-mortem* speculation about the insured's mentation at the moment of death.

The Supreme Court in *Bigelow v. Berkshire Life Ins. Co.*, 93 U.S. 284 (1876) construed such a clause in a life insurance policy governed by Illinois law. The policy limited coverage if the insured dies "by suicide, sane or insane." The insured in *Bigelow* died when he intentionally discharged a pistol to his head. Although he knew that he was killing himself, "he was unconscious of the great crime he was committing." *Id.* at 288. "His darkened mind did not enable him to see or appreciate the moral character of his act, but still left him capacity enough to understand its physical nature and consequences." *Id.*

[1] The policy excluded coverage if the insured dies "by his own hand." The Court noted that death by one's own hand is synonymous with "suicide" and "taking one's own life." *Terry*, 82 U.S. at 591.

Departing from the criminal law paradigm, the *Bigelow* Court held that insurers properly may exclude coverage for intentional self-destruction, "whether it be the voluntary act of an accountable moral agent or not." *Id.* at 286. An insane man "could not commit felony; but, conscious of the physical nature, although not of the criminality of the act, he could take his own life, with a settled purpose to do so." *Id.* at 287. By including the mental states "sane or insane," the policy's suicide clause encompassed any act of intentional self-destruction, and not just acts of felonious suicide. The question of the insured's mental capacity at the moment of death became irrelevant:

> As the line between sanity and insanity is often shadowy and difficult to define, this company thought proper to take the subject from the domain of controversy, and by express stipulation preclude all liability by reason of the death of the insured by his own act, whether he was at the time a responsible moral agent or not.

Id. at 287.

The parties in *Bigelow* did not dispute that the insured's self-destruction was intentional. His mental illness was not so severe as to totally deprive him of the ability to direct his actions. The Court acknowledged, however, that a phase of insanity might be so extreme that the insured loses all semblance of an individual will. The Court, however, declined to decide whether the policy's suicide clause would apply in that hypothetical scenario:

> It is unnecessary to discuss the various phases of insanity, in order to determine whether a state of circumstances might not possibly arise which would defeat the condition [of suicide, sane or insane]. It will be time to decide that question when such a case is presented. For purposes of this suit, it is enough to say that the policy was rendered void, if the insured was conscious of the physical nature of his act, and intended by it to cause his death, although, at the time, he was incapable of judging between right and wrong, and of understanding the moral consequences of what he was doing.

Id. at 287. See also *Supreme Lodge Mut. Protection v. Gelbke*, 198 Ill. 365, 64 N.E. 1058 (1902) (Relying on *Bigelow*, the Illinois Supreme Court, construing an exclusion for death by the insured's "own suicidal act, sane or insane," held that it was reversible error for the trial court to instruct the jury that the insured must possess a *rational* intent to commit suicide).[2]

The issue left undecided in *Bigelow* was directly addressed and decided by the Illinois Supreme Court twenty-seven years later in *Seitinger v. Modern Woodmen of America*, 204 Ill. 58, 68 N.E. 478 (1903). The policy in *Seitinger* excluded coverage if the insured "shall die by his own hand, whether sane or insane." *Id.* at 479. The parties stipulated that the insured "took his own life, and that at the time he did so he was wholly insane, totally unconscious of the manner of his death, and by reason of his total insanity was incapable of forming an intention of taking his life, and did not comprehend the physical nature and results of his act." *Id.*

Seitinger explained that the terms "sane or insane" exclude coverage for all acts of self-destruction, without differentiating varying degrees of insanity:

> Nothing can be clearer than that the words "sane or insane" were introduced in the certificate by the insurer for the purpose of excepting from its operation any self-destruction, whether the insured was of sound mind or in a state of insanity. There is no qualification of the varying degrees of insanity, but the language is simply "sane or insane." These words have a precise, definite, well-understood meaning.

[2] Illinois courts initially interpreted *Bigelow* as creating a distinction between consciousness of the moral nature of one's actions and consciousness of the physical nature of one's actions. See *Nelson v. Equitable Life Assur. Soc. of the U.S.*, 73 Ill.App. 133, 1898 WL 2206, at *7 (1st Dist. 1897) ("[W]hen the policy contains 'the insane or insane clause,' it is not necessary, in order to avoid liability, to show that a person taking his own life was conscious of the *moral quality or consequences of the act*, but only that he was conscious at the time of the *physical nature and consequences of the act*, that is, that he knew that the means he employed would cause death or endanger his life."); *Dickerson v. Northwestern Mut. Life Ins. Co.*, 200 Ill. 270, 65 N.E. 694, 696 (1902) (holding that suicide "sane or insane" precludes coverage for intentional self-destruction, and suggesting in *dicta* that the exclusion might not apply if "the assured was in such a state of mind as to be unconscious of the physical nature of the act of self-destruction.").

Id. at 481. "[T]o permit, in cases of this kind, the discussion and proof and a differentiation of the degrees of insanity would be to do violence to words having a generally accepted significance, and to do that which the parties themselves never contemplated." *Id.* at 481-482. The court held, therefore, that the insured died by suicide "sane or insane," and that no death benefit was payable. That the insured was "totally insane" and "incapable of forming an intention to take his life" was completely irrelevant. *Id.* at 482.[3]

The Illinois Supreme Court's *Seitinger* decision establishes the departure from a subjective test for suicide "sane or insane" to an objective one. If to an objective observer the insured committed a fatal act of self-destruction, then the act is regarded as "suicide, whether sane or insane." Illinois law does not attempt to look *post-mortem* into the insured's possible subjective intentions and mental capacity at the moment of death. *Seitinger* reflects the current prevailing view of the majority of the states that have addressed coverage exclusions for suicide "sane or insane." See *Couch on Insurance*, §138:38, 3rd ed. 2009 ("What appears to be the majority view is that the applicability of a suicide clause with the words 'sane or insane' is not dependent upon the insured's consciousness or realization of the physical nature or consequences of his or her act, or his or her conscious purposes to kill himself or herself…. That is, there can be no looking into the condition of the mind of the insured when he or she committed the fatal

[3] In 1971, the Illinois Court of Appeals misapplied Illinois law by relying on *dicta* in a 1902 Illinois Supreme Court case and failing to acknowledge the Illinois Supreme Court's 1903 *Seitinger* decision. See *Maddox v. MFA Life Ins. Co.*, 132 Ill.App.2d 109, 267 N.E.2d 723, 726 (2nd Dist. 1971) ("Our courts have interpreted this phrase [suicide, sane or insane] to mean that an act of self-destruction is suicide unless the decedent could not form the intent to destroy himself or would not comprehend what the results of his action would be") (citing *Supreme Lodge Mut. Protection v. Gelbke*, 198 Ill. 365, 369, 64 N.E. 1058 (1902). The *Maddox* court's statement of Illinois law was incorrect. The *Seitinger* court specifically stated that "[i]t was not decided in that case [*Gelbke*]" whether an exclusion for suicide "sane or insane" precludes liability when the insured dies by his own hand but was "wholly and totally incapable, by reason of such insanity, of forming an intention to taking his own life…." *Seitinger*, 68 N.E. at 480.

act, rendering it irrelevant whether the insured was under the influence of drugs and alcohol at the time of his or her death.") (citing, *inter alia*, *Seitinger*, 68 N.E. 478).[4]

Because courts sitting in diversity must apply the law of the state as would the highest court of that state, the Illinois Supreme Court's *Seitinger* decision supplies the applicable substantive law and governs the outcome of this case.

III. Kenneth Soldat Died By Suicide While Sane Or Insane, Or By Self-Destruction While Insane.

In light of *Terry*, *Bigelow*, *Seitinger* and their progeny, Ohio National's suicide clause avoids altogether the risk of insuring against death by suicide or self-destruction, regardless of the insured's mental capacity. There should be no *post-mortem* speculation about Mr. Soldat's mental state at the moment of death, or forensic theories about the cause of his mental state. Ohio National contracted out of this class of risks entirely.

Kenneth Soldat died instantaneously when he drove his car head-on into a concrete wall in the parking garage at Soldier Field. (J. Stmt, ¶ 6). His final conversation, spoken with a parking lot supervisor, reflected a preoccupation with thoughts of death. He said that his mother and sister died at a young age and he never got to say goodbye, and that his father's watch stopped at the exact time of his mother's death and his father never wore the watch again. Mr. Soldat then removed his own watch and placed it on the dashboard. (J. Stmt., ¶ 14). He turned off the radio and spoke his last words: "Thank you. I'm going to go in." (J. Stmt, ¶ 16). He drove his car to the ticket booth at a normal speed just like anybody else, but instead of taking a ticket and turning to park, he drove slowly through the unopened gate and over a median, then

[4] By contrast, the minority view focuses on whether the insured subjectively intended to kill himself and whether he had the mental capacity to understand the physical nature and consequence of his actions. *Couch on Insurance*, §138:38 (citing *Searle v. Allstate Life Ins. Co.*, 38 Cal.3d 425, 696 P.2d 1308 (1985)).

accelerated to 40 to 50 miles per hour and drove straight toward the concrete wall at the end of the garage, hitting the wall head-on and killing himself on impact. (J. Stmt, ¶¶ 6, 16-20).

Mr. Soldat did not engage in any evasive maneuver to avoid the head-on collision. The car's brake lights did not light, the car never swerved, there was no sound of screeching tires, and there were no skid marks to evidence breaking. (J. Stmt, ¶¶ 21, 27, 31, 70). There was no evidence that Mr. Soldat fell asleep at the wheel or passed out, such as deceleration, swerving or drifting of the car's path. To the contrary, after entering the garage and driving over the median, he accelerated his car to 40 to 50 miles per hour and traveled on a direct path toward the concrete wall. (J. Stmt, ¶¶ 20, 21). This means that Mr. Soldat continued to apply pressure to the gas pedal, never applied the brakes, and controlled the steering wheel to maintain the car's straight path until he collided head-on with the concrete wall.[5]

Lori Soldat testified that her husband exhibited bizarre behavior in the days prior to his death, shortly after obtaining prescriptions for methyl prednisone and clarithromycin.[6] Her attorney engaged a pharmacologist, James O'Donnell, Ph.D., and a psychiatrist, Alberto Goldwaser, M.D., who offered opinions about the cause of Mr. Soldat's bizarre behavior. Dr. O'Donnell opined that his behavior was consistent with a psychiatric toxic reaction to his medication. (Def. Stmt., ¶¶ 5, 12, 13). Dr. Goldwaser opined that the "most likely diagnosis

[5] Studies suggest that many acts of driver suicide are impulsive acts in response to acute distress rather than pre-planned events. Gordon, Harvey, "Psychiatry, the Law and Death on the Roads," *Advances in Psychiatric Treatment*, vol. 10, pgs. 439-445 (2004), published by The Royal College of Psychiatrists (http://apt.rcpsych.org/cgi/content/full/10/6/439 (June 23, 2009)). 19.1% of males who plan suicide conceive to do so by vehicle collision. Murray, Dominique; de Leo, Diego, "Suicidal Behavior by Motor Vehicle Collision," *Traffic Injury Prevention*, vol. 8, no. 3, pgs. 244-247 (2007) (http://www.informaworld.com/smpp/content~content=a781411904~db=all~jumptype=rss (June 23, 2009)).

[6] Prednisone (Medrol Dosepak) is an oral corticosteroid used as an immunosuppressant and to treat serious inflammatory diseases. http://en.wikipedia.org/wiki/Prednisone. Clarithromycin is an oral antibiotic used to treat infections, including severe sinus infections. http://en.wikipedia.org/wiki/Clarithromycin (June 20, 2009).

afflicting Kenneth Soldat as of September 17, 2006" (three days before his death) was substance induced mood disorder. (Def. Stmt., ¶¶ 28-29).

Every act of self-destruction can be deconstructed to relieve the actor of personal responsibility and blame, if that is the objective. One might suffer from severe depression due to uncontrollably low levels of serotonin in the brain, or one might suffer from hallucinations due to hereditary schizophrenia. They are no less victims of brain chemistry and genetics than Mr. Soldat might be a victim of a rare biological hypersensitivity to steroid medication. Suicide is the act of taking one's own life, and not a judgment about the victim's personal responsibility for the mental state leading to suicide.

In *Charney v. Illinois Mut. Life Cas. Co.*, 764 F.2d 1441 (11th Cir. 1985), the insured, a veterinarian, experienced an adverse psychiatric reaction (severe depression) to his new hypertension medication, resperine. Unaware of the cause of his depression, he went to his office and injected himself with a fatal dose of euthanasia solution, dying instantly. The court held that the insured's death fell within the policy's limitation for "suicide, sane or insane." The court explained that the cause of the insured's depression was irrelevant in determining the applicability of the policy's suicide limitation:

> Even assuming that the [insured] was rendered insane by resperine, there is nothing in the contract that suggests the cause of insanity would make any difference in the policy's coverage. The cause of Dr. Charney's insanity, if he was insane, is simply irrelevant.

Id. at 1442-1443 (citing, *inter alia*, *Bigelow*, 93 U.S. at 284). The court, therefore, rejected the beneficiaries' argument that resperine-induced depression was the direct cause of Dr. Charney's death. "Whatever the effect of the resperine on the insured, the direct cause of his death was the self-injection of T61 euthanasia solution." *Id.* at 1443.

Defendant's theory of drug induced psychosis reflects an effort to relieve Mr. Soldat of personal responsibility for his death, by identifying the *cause* of his altered state of mind. But no one seeks to blame Mr. Soldat for his act of suicide. If the theory of drug induced psychosis explains why Mr. Soldat took his life, so be it. Then Mr. Soldat was not morally responsible for his death.

But under Illinois law, as *Seitinger* instructs, the issue is not whether Mr. Soldat was morally responsible for his death, or even whether he was able to appreciate the nature and consequences of his actions. The state of mind of the insured at the time of death is irrelevant to the issue of coverage, as is the cause of the insured's state of mind.

Perhaps Mr. Soldat's mind was so greatly impaired that he lost all semblance of individual will and was rendered insane. Certainly Mr. Soldat's treating physician, Dr. Robert Towne, thought so. Dr. Towne testified that Mr. Soldat lacked the mental capacity to appreciate the nature of his action. Dr. Towne concluded that Mr. Soldat "self-destructed while insane." (J. Stmt., ¶¶ 60, 61, 65, 66).

Or perhaps his altered state of mind magnified past sorrows, such as the premature death of his mother and sister. He might have been cognizant of the physical consequences of his actions in speeding head-on into a concrete wall, but he lacked the mental clarity to comprehend the meaning of death. Mr. Soldat's gesture of removing his watch, as his father had upon the death of his mother, clearly was a conscious reenactment of the moment of his mother's death as well as a foreshadowing of his own death.

Mr. Soldat might not be morally responsible for his death, or he might not have had the mental capacity to understand the consequences of his actions. But Illinois insurance law applies an objective standard for determining whether an insured died "by suicide while sane or insane."

To an objective observer, Mr. Soldat drove his car at a high rate of speed head-on into a concrete wall without swerving, breaking or engaging in any other evasive maneuver. His death was self-inflicted. Under Illinois law as established in *Seitinger*, Kenneth Soldat died "by suicide while sane or insane or by self-destruction while insane."

CONCLUSION

The insured's mental capacity to comprehend the nature and consequences of his act is irrelevant in determining whether death occurred by suicide while sane or insane, or by self destruction while insane. Whatever his state of mind or degree of self-control, Mr. Soldat took his own life. (J. Stmt., ¶ 53). Accordingly, the court should find that the Policy's suicide clause applies, and that the death benefit payable is limited to the amount of premiums paid.

WHEREFORE, plaintiff, OHIO NATIONAL LIFE ASSURANCE CORPORATION, respectfully requests entry of judgment in its favor pursuant to Fed. R. Civ. P. 52.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on June 24, 2009, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to the following attorney of record:

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