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
RESPONSE TO DEFENDANT'S MEMORANDUM IN SUPPORT OF JUDGMENT

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

INTRODUCTION

The Defendant, Lori Soldat, insists that the Court must determine the subjective intentions and mental capacity of Kenneth Soldat at the time of his death. She argues that Ohio National must prove that Mr. Soldat specifically intended to die, and that it must do so with "clear and convincing" evidence of his suicidal intent as if this case was an involuntary civil commitment proceeding.

Under Illinois insurance law, however, suicide while sane or insane is simply the act of killing one's self. It is determined by an objective standard based on a preponderance of the evidence, and not through a forensic inquiry that attempts to reconstruct the insured's subjective thoughts at the moment of death. Although the preponderance of the evidence standard applies, the evidence that Mr. Soldat died by suicide while sane or insane is clear and convincing. To an

objective observer, Mr. Soldat died by suicide while sane or insane, or by self destruction while insane. His last words, spoken to a parking lot attendant, focused on death and the loss of loved ones. He removed his watch, reenacting a gesture performed by his father at the moment of his mother's death and foreshadowing his own death. He slowly entered the parking garage, and then accelerated at a high rate of speed directly toward a concrete wall without swerving, breaking or engaging in any evasive maneuver, killing himself on impact. Whatever his subjective state of mind, to an objective observer, Mr. Soldat killed himself. Under Illinois law, therefore, Kenneth Soldat died "by suicide while sane or insane or by self-destruction while insane."

ARGUMENT

I. This Case Is Properly Decided According To The Preponderance Of The Evidence.

The standard of proof communicates the degree of confidence our society believes the court or fact-finder should have in the judicial outcome for a particular type of legal dispute. The standard of proof reflects how society values the parties' competing interests. When one party represents interests of transcending value, society protects those interests by placing a heightened burden of proof on the opposing party.

Our society places a particularly high value on personal liberty. It is more important to reduce the risk that the innocent might be imprisoned than to reduce the risk that the guilty will go free. So in criminal cases, guilt must be established by proof beyond a reasonable doubt. As explained by the Supreme Court in *Speiser v. Randall*, 357 U.S. 513, 525-526 (1958):

> There is always in litigation a margin of error, representing error of factfinding, which both parties must take into account. Where one party has at stake an interest of transcending value—as a criminal defendant his liberty—this margin of error is reduced as to him by the process of

> placing on the other party the burden…of persuading the fact-finder at the conclusion of the trial of his guilt beyond a reasonable doubt.

Certain civil proceedings also implicate transcending social values. Involuntary commitment proceedings, while civil in nature, seek to deprive individuals with mental illness of their liberty, though the infringement on liberty is more limited than in criminal proceedings. Implicated too are countervailing social interests in treating mental illness and protecting the mentally ill from harming themselves and others. Balancing these competing social interests, the State of Illinois has determined that in involuntary commitment proceedings, proof of mental incompetence must be established by clear and convincing evidence. *In Re Stephenson*, 67 Ill.2d 544, 555, 367 N.E.2d 1273, 1278 (1977). The clear and convincing evidence standard "requires a high level of certainty before finding an individual in need of mental treatment and curtailing his liberty, but does not place an impossible burden on the State in proving the case." *Id.*

By contrast, in civil contract disputes, no transcending social interests favor one party over the other. These disputes simply determine which party should bear the risk of economic loss. The court determines which party prevails according to the preponderance of the evidence. As explained by the Illinois Supreme Court: "[T]he decision in the ordinary civil case only determines which party must bear an economic loss. Because there are no sound reasons for favoring one party over another, a preponderance of the evidence standard is used." *In Re Stephenson*, 67 Ill.2d at 553, 367 N.E.2d at 1276. Civil disputes involving competing economic interests, therefore, are decided based on the preponderance of the evidence:

> In a civil suit between two private parties for money damages…we view it as no more serious in general for there to be an erroneous verdict in the defendant's favor than for there to be an erroneous verdict in the plaintiff's favor. A preponderance of the evidence standard therefore seems peculiarly appropriate….

In Re Winship, 397 U.S. 358, 371 (1970) (Justice Harlan, concurring).

The question of whether Kenneth Soldat's death falls within the Policy's suicide clause, and thus whether Lori Soldat recovers a one million dollar benefit or, alternatively, a refund of premiums paid, represents a dispute over a contractual right to money. That is not to say that the parties' *personal interests* lack importance, but rather, there are no transcending *societal interests* that favor one party to the dispute over the other party. Lori Soldat and Ohio National are persons of equal stature in the eyes of the law. A contractual dispute over economic damages between parties of equal stature should be decided according to the preponderance of the evidence. While Ohio National bears the burden of proving that the Policy's suicide limitation applies, that burden is properly satisfied by the preponderance of the evidence.

The Defendant nevertheless argues that Ohio National must satisfy its burden of proof with clear and convincing evidence, citing *Kettlewell v. Prudential Ins. Co. of America*, 4 Ill.2d 383, 385, 122 N.E.2d 817, 818 (1954). (Def. Mem., pg. 2). This heightened standard is an outdated relic from the development of early insurance law, when courts drew upon criminal law concepts in adjudicating contractual suicide clauses.

As a result of the fusion of criminal law into civil insurance law, nineteenth century courts required insurers to prove suicide by clear and convincing evidence. As Ohio National explained in its initial Memorandum, nineteenth century courts viewed suicide as morally reprehensible and punishable criminally as "felonious suicide."[1] To prove death by suicide even in the insurance context, the insurer was required to prove the elements of self-murder: that the insured killed himself with *mens rea* and, concomitantly, that the insured possessed the mental capacity to comprehend the moral turpitude of his conduct.

[1] Even earlier, under seventeenth and eighteenth century common law, a man who died by suicide forfeited his property to the State leaving his family bereft of their inheritance. See http://www.fsu.edu/~crimdo/forfeiture.html (August 6, 2009).

But in 1903, the Illinois Supreme Court rejected the criminal law paradigm that had shaped the law of contractual suicide clauses. In *Seitinger v. Modern Woodmen of America*, 204 Ill. 58, 68 N.E. 478 (1903), the Illinois Supreme Court held that when a life insurance policy limits coverage for suicide "whether sane or insane," the insured's state of mind at the time of death is irrelevant. *Seitinger*, thus, abandoned the criminal law concept of *mens rea* in the insurance context and, in its place, adopted an objective standard. Applying *Seitinger*, if to an objective observer the insured committed a fatal act of self-destruction, then for insurance coverage purposes, the act is regarded as "suicide, whether sane or insane." Illinois law after *Seitinger* does not attempt to reconstruct the insured's subjective intentions and mental capacity at the moment of death.

Outdated legal concepts tend to fade away gradually, particularly when those concepts touch upon non-legal beliefs involving personal morality such as suicide. Despite *Seitinger's* departure from the criminal law paradigm of felonious suicide, some courts have continued to require proof of suicide by clear and convincing evidence, one of these being *Kettlewell*. The *Kettlewell* court commented that an insurer must prove the applicability of a policy's suicide clause by clear and convincing evidence. Unfortunately, *Kettlewell's* statement about the standard of proof has been quoted in two relatively recent federal decisions. See *Floramo v. Monumental Life Ins. Co. of Baltimore*, 447 F.Supp. 354, 355 (N.D. Ill. 1978); *O'Mara v. Metropolitan Life Ins. Co.*, No. 88 C 7858, 1989 WL 121289 (N.D. Ill. Oct. 5, 1989) (the affirmative defense of suicide must be proven by clear and convincing evidence, citing *Kettlewell*). Neither *Floramo* nor *O'Mara* provided any analysis of the standard of proof. Both courts simply cited *Kettlewell's* statement that proof of death by suicide must be clear and convincing.

The sole authority cited in *Kettlewell* for applying the clear and convincing evidence standard was *Cooley's Briefs on Insurance*, 2nd ed. vol. 6 pg. 5475 (1928). *Cooley's Briefs on Insurance*, originally authored in 1904, reflected nineteenth century notions that suicide was an immoral and criminal act. Indeed, *Cooley's Briefs on Insurance* defined "suicide" as an act of "moral turpitude," and referred to the "preponderance" of the evidence and "clear and satisfactory" evidence standards interchangeably, as if synonymous:

> The defense that insured committed suicide must be established by a preponderance of the evidence. The evidence should be clear and satisfactory, and the preponderance of the evidence should be such as to overcome the presumption of innocence of moral turpitude. (Internal citations omitted).

Cooley's on Insurance, vol. 7 at 3263-3267 pg. 1322 (1919).[2]

By contrast, the Seventh Circuit, applying Illinois law, determined that once evidence of suicide is submitted, the presumption against suicide vanishes and the case should be decided based on the preponderance of the evidence. See *Ziegler v. Equitable Life Assurance Society of the U.S.*, 284 F.2d 661, 665 (7th Cir. 1961) ("In the *Guardian Mutual* case cited in *Kettlewell* the issue was whether the insured had taken arsenic inadvertently or deliberately and there was evidence of the latter. The court said: 'The defendant was entitled to have the issue it made on this question fairly submitted and decided, *upon a preponderance of the evidence adduced*.'") (quoting the Illinois Supreme Court in *Guardian Mutual Life Ins. Co. v. Hogan*, 80 Ill. 35 (1875)). See also *Maddox v. MFA Life Ins. Co.*, 132 Ill.App.2d 109, 267 N.E.2d 723 (2nd Dist. 1971) (noting that the circuit court instructed the jury that the presumption against suicide

[2] The 1919 supplement appears to be the most recent version of *Cooley's on Insurance* available in online archives. Supplements subsequent to 1919 could not be located. The 1919 supplement of *Cooley's on Insurance*, volumes 6 and 7, is digitally archived online at http://www.archive.org/stream/briefsonlawinsu02voldgoog#page/n9/mode/1up (volume 6) and at http://www.archive.org/stream/briefsonlawinsu02voldgoog#page/n912/mode/1up (volume 7). The online archive erroneously identifies volumes 6 and 7 as the 1927 supplements.

applies only when "there is no preponderance of the evidence" that suicide was the cause of death, and holding that based on that instruction, the jury's verdict was not against the manifest weight of the evidence).

No transcendent social interest mandates applying a heightened standard of proof in insurance coverage disputes involving suicide clauses. Indeed, even in life insurance disputes involving exclusions due to the beneficiary's act of murder, Illinois law applies a preponderance of the evidence standard. For example, in *Blair v. Travelers Ins. Co.*, 30 Ill.App.2d 191, 174 N.E.2d 209 (1st Dist. 1961), the named beneficiary of a life insurance policy killed the insured (his wife) then committed suicide. Under Illinois law, a murderer cannot profit from his crime by recovering the proceeds of his victim's life insurance policy. The victim's parents asserted that they were entitled to the life insurance proceeds as next of kin. The killer's estate also asserted a claim to the policy's proceeds, maintaining that the beneficiary was insane at the time of the killing. The Court of Appeals held that the beneficiary's estate was entitled to the policy's proceeds, because the *preponderance of the evidence* established that the beneficiary was insane. Although the beneficiary was a killer, he was an insane killer and therefore not a murderer. The killer's estate recovered the proceeds of his victim's life insurance policy based on the preponderance of the evidence.

There are no transcendent social interests justifying a heightened clear and convincing standard in cases involving exclusions for acts of suicide, when a preponderance of the evidence standard governs cases involving insurance exclusions for acts of murder. Surely Illinois insurance law, as a matter of public policy, does not favor the economic interests of those who kill others over those who kill themselves. Ohio National has presented evidence that Kenneth Soldat died by suicide while sane or insane. The legal presumption against suicide vanishes and

the case is properly decided according to the preponderance of the evidence. *Ziegler*, 284 F.2d at 664-665.

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

When a life insurance policy limits the recovery for suicide while sane or insane, all questions about the insured's subjective state of mind are removed from controversy. There should be no *post-mortem* speculation about the insured's mental capacity and subjective intentions at the moment of death. Yet the Defendant insists that the Policy's suicide clause accomplishes precisely the opposite, and places the focus of the judicial inquiry squarely on the insured's subjective state of mind. According to the Defendant, the Court's task is to divine Kenneth Soldat's mental competence and subjective intentions when he performed his act of self-destruction.

She rests her case on two sources. First, she relies on a single sentence in *Kettlewell* that states "The only question before this court is whether the evidence conclusively leads all reasonable minds to an inescapable decision that Dr. Kettlewell took his own life with suicidal intent." *Kettlewell*, 4 Ill.2d at 385, 122 N.E.2d at 818. Even though she concedes that Kenneth Soldat took his own life, she contends that *Kettlewell's* statement mandates an inquiry into Mr. Soldat's subjective intentions at the moment of death.

But *Kettlewell* does not hold that an insurance limitation for suicide "sane or insane" mandates a determination of the insured's subjective intentions. The statement from *Kettlewell* quoted by the Defendant actually comes from a section of the opinion that recites the issue presented by the parties on appeal. The issue presented in *Kettlewell* was whether the jury's finding that the insured died with suicidal intent was against the manifest weight of the evidence.

The issue on appeal, as presented by the parties, was not a holding of the Illinois Supreme Court, much less a rejection of the Illinois Supreme Court's prior decision in *Seitinger*.

Second, the Defendant relies on two dictionaries defining "insanity" as a "more or less permanent derangement" of the psyche (The Living Webster Dictionary from 1975) or a "more or less permanent derangement" due to "disease of the mind" (Random House Dictionary from 1966). (Def. Mem., pgs. 2, 9). She argues that Mr. Soldat's alleged psychotic state was not "insanity" according to these two dictionaries. She concludes that "Mr. Soldat self-destructed, but was not insane" because his psychotic state was temporary and not a permanent psychiatric condition. (Def. Mem., pg. 9).

The Defendant's selected dictionary definitions are far too restrictive and inadequate for judicial decision-making. The Merriam-Webster Dictionary defines "insanity," in the context of determining legal responsibility for intentional conduct, as the mental capacity to understand the nature of one's actions. See http://www.merriam-webster.com/dictionary insanity (Aug. 5, 2009) ("such unsoundness of mind or lack of understanding as prevents one from having the mental capacity required by law to enter into a particular relationship, status, or transaction or as removes one from criminal or civil responsibility.").

Insanity, as defined by Illinois criminal law, may result from any defect in mental cognition (encompassing both "mental defect" as well as "mental disease"), and may be a permanent or a temporary condition, despite compelling social interests that narrow the scope of the insanity defense in the criminal context. See 720 ILCS 5/6-2 (insanity is determined "at the time of such conduct" and may be the result of "mental disease" or "mental defect"). See also *People v. Pasch*, 152 Ill.2d 133, 165-169, 604 N.E.2d 294, 306-307 (1992); *People v. Eckhardt*,

124 Ill.App.3d 1041, 1043, 465 N.E.2d 107, 109 (2nd Dist. 1984) (acknowledging the defense of temporary insanity).

This case is properly decided under Illinois insurance law and not according to random dictionaries or criminal statutes. Under Illinois insurance law, when a life insurance policy limits coverage for suicide while "sane or insane," all questions about the insured's subjective state of mind are removed from controversy. In *Seitinger*, the Illinois Supreme Court adopted an objective test for determining whether the insured died by suicide whether sane or insane. If to a reasonable objective observer the insured died by his own hand, then the insured died by suicide while sane or insane. The insured's subjective state of mind is completely irrelevant.

For example, if a hypothetical insured jumped to his death from the Golden Gate Bridge, and there was no dispute that he jumped rather than accidently slipped, then to an objective observer the insured died by suicide whether sane or insane. It is irrelevant that the insured was unable to comprehend the consequences of his actions, failed to appreciate the meaning of death, or due to delusions thought the jump survivable.[3]

In *Knott v. Globe Indemnity Co.*, 242 Ill.App.7, 1926 WL 3908 (1st Dist. 1926), the life insurance policy limited coverage to premiums paid if death resulted from suicide "sane or insane." The Court of Appeals held that whether an act of self-destruction falls within the suicide clause depends on the nature of the act viewed objectively, and that the subjective intention and mental capacity of the insured is irrelevant:

> [T]he test is not the capacity of the assured to form an intention to commit the act, or his consciousness of the physical consequences thereof, but the nature or character of the act itself viewed from the standpoint of being done by one in the possession of all his faculties.

[3] More suicides occur at the Golden Gate Bridge than any other location. See Tad Friend, "Jumpers," *The New Yorker*, Oct. 13, 2003 (at http://www.newyorker.com/archive/2003/10/13/031013fa_fact). In the controversial 2006 documentary *The Bridge*, the filmmaker recorded 23 people jump to their death from the Golden Gate Bridge. http://en.wikipedia.org/wiki/The_Bridge_(2006_film).

Id. at *2.

The insured in *Knott* jumped to his death from his office window at 25 W. Washington in Chicago's Loop. There was no evidence that the insured might have accidentally fallen. To the contrary, a witness observed the insured open the sash and dive head-first through the open window. The plaintiff, the insured's wife, maintained that her husband's death was accidental "based not in the nature of the act, but the state of mind of the assured." *Id.* at *4. The Court of Appeals reversed the trial court and entered judgment as a matter of law for the insurer based on the uncontroverted fact that the insured jumped from the window. The Court of Appeals held that the insured's subjective state of mind at the time of his death was completely irrelevant:

> The crucial fact that the assured leaped from the window being uncontroverted, it was immaterial whether the assured was sane or insane at the time of the act, for the act being one that would be deemed intentional, whatever the state of mind of the assured, and therefore, not accidental, no recovery could be had under the terms of the policy.

Id. See also *Kiesewetter v. Supreme Tent of Knights of Maccabees of the World*, 227 Ill. 48, 52-53, 81 N.E. 19 (1907) (holding that the insured's death by self-hanging fell with the policy's limitation for suicide "sane or insane," and that the trial court properly excluded evidence that the insured was not aware of the physical consequences of his act when he took his life); *Zerulla v. Supreme Lodge, Order of Mut. Prot.*, 223 Ill. 518, 79 N.E. 160 (1906) (no recovery when insured died by self-hanging, regardless of the insured's mental state, when the policy excluded death by "suicidal act" whether "sane or insane"); *Couch on Insurance*, §138:38, 3rd ed. 2009 ("[T]he 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….").[4]

[4] By contrast with Illinois' majority approach (as established by *Seitinger*), the minority view is that "suicide, sane or insane" requires some degree of intentional conduct that can be "negated by a

The Defendant contends that the circumstances of Kenneth Soldat's death "suggest an absence of suicidal intent," such as the wearing of a seatbelt, that he chose a "well populated area" in which to die (purportedly increasing the opportunity for rescue), and that he "apparently" could have driven faster than 40 to 50 mph into the concrete wall.[5] (Def. Mem., pg. 5). One could examine any suicide and find arguable inefficiencies of method, but that is an academic exercise where, as here, the chosen method proved to be a swift and effective means of death.[6]

If Mr. Soldat's car had swerved or there was some indication of braking, that would be evidence, to an objective observer, suggestive of the absence of suicidal intent. Mr. Soldat, however, did not engage in any evasive maneuver whatsoever to avoid colliding head-on with the concrete wall. The car never swerved, braked, or engaged in any evasive maneuver. (J. Stmt, ¶¶ 21, 27, 31, 70). To the contrary, Mr. Soldat accelerated at a high rate of speed directly toward the concrete wall, killing himself immediately on impact. (J. Stmt, ¶¶ 20, 21). Like the insured in *Knott*, to an objective observer, Mr. Soldat killed himself. Whatever his state of mind

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determination that the insured did not understand the physical nature and consequences of the act…." *Searle v. Allstate Life Ins. Co.*, 38 Cal.3d 425, 437, 696 P.2d 1308, 1315 (1985). Ohio National's Policy, therefore, limits coverage "[i]f the insured dies by suicide while sane or insane or by self-destruction while insane…." The inclusion of the phrase "self destruction while insane" ensures that in States that have adopted the minority view (such as California), death benefits are limited to premiums paid even when the insured lacked the capacity to understand the consequences of his act of self-destruction.

[5] Regarding Mr. Soldat's wearing of a seatbelt, Dr. Segovia, the medical examiner, testified: "Given what happened, no, the wearing of a seat belt didn't—doesn't say anything to me about an intent." (J. Stmt., ¶ 39). The location of Mr. Soldat's death was in an *unpopulated* area—the parking garage at Soldier Field on a weekday when there was no scheduled event. (J. Stmt., ¶ 9). Defendant only speculates that Mr. Soldat could have driven his car faster than 40 to 50 mph in the parking garage. In any case, Mr. Soldat was traveling at a high rate of speed such that he died immediately on impact with the concrete wall, and the police photos show the devastating force of the impact. (J. Stmt., ¶ 24).

[6] Suicide by poison is fatal only 15% of the time, by drug overdose only 12% of the time, and by wrist cutting only 5% of the time. Yet individuals who take their life by poison, drug overdose or wrist cutting still committed suicide notwithstanding the inefficiency of their method. See http://www.newyorker.com/archive/2003/10/13/031013fa_fact?currentPage=3 (Aug. 10, 2009).

at the moment of death, Mr. Soldat took his own life. He may not have been morally responsible for his actions, but for insurance coverage purposes, he clearly died by suicide whether sane or insane.

CONCLUSION

Mr. Soldat killed himself by driving his car at a high rate of speed head-on into a concrete wall without swerving, breaking or engaging in any other evasive maneuver. Under Illinois law, Kenneth Soldat died "by suicide while sane or insane or by self-destruction while insane."

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 August 11, 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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