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A MODERN FORFEITURE: TOWARDS ABOLITION OF THE LIFE INSURANCE SUICIDE EXCLUSION.

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[†] Professor of Law and Associate Dean for Intellectual Life, Louis D. Brandeis School of Law, University of Louisville. Thanks to Dean Colin Crawford for support of this scholarship; to my very capable research assistant Kendall Soule, who helped with a major expansion and reworking of this article during the summer and Fall of 2020; to my colleagues who commented on drafts of this paper, including the attendees of the 2019 Health Law Professors' Conference of the American Society of Law, Medicine and Ethics. Many people have contributed to this article; any errors or omissions remain my own. This article is dedicated to colleagues and friends lost to depression over the years.

ABSTRACT

This article proposes a new approach to a very old problem: Should an individual who dies by suicide thereby lose their life insurance coverage, depriving their beneficiaries of the protection offered by the policy? Modern courts and policies almost uniformly enforce such provisions; however, they are vestiges of an anachronistic view of suicide as a crime. Viewing suicide through a criminal lens has long justified a punitive approach, including the forfeiture of assets. Modern views of suicide, however, do not support its criminalization, and it is practically never treated as a criminal act in the 21st century. Nonetheless, the denial of insurance benefits under suicide exclusion clauses persists in punishing the heirs and beneficiaries of these individuals, creating a modern version of asset forfeiture. I propose that insurance laws be reformed in a way that will protect both the legitimate public policy of not allowing insurance to act as an incentive to suicide; but that will also preserve life insurance's function of cushioning the financial blow of an untimely death. There has been little recent scholarship considering this problem – after a burst of scholarly interest in the first decades of the twentieth century, most scholars have considered this a settled question. This article thus contributes substantively to the existing literature by proposing a novel solution to an under-recognized problem. This article also contributes to an emerging literature seeking to destigmatize mental health issues. Suicide is obviously of great concern; it is currently the second leading cause of death in the United States for young adults up to age 35, and recent studies show that there is a trend of increasing suicide. Public health policy should seek to minimize and prevent suicide; however, history shows us that there will always be a certain level of self-harm in society. Law and public policy should favor both the reduction of

stigma for those who suffer from mental illness, and protection of their heirs and beneficiaries from impoverishment due to the rote application of antiquated legal doctrines.

I. INTRODUCTION

For hundreds of years, life insurance policies have included a provision which excludes coverage for certain cases in which the insured dies by suicide.[1] Historically, this exclusion was permanent;[2] modern policies tend to contain an exclusionary period (generally, but not always, two years)[3] during which the insured's suicide terminates the insurer's obligation to pay the policy proceeds. This Article will argue that the suicide exclusion as it is currently written and applied is an anachronistic holdover from outdated ways of thinking about the act of suicide; that it does not achieve the goals which are currently advanced in favor of its inclusion in life insurance policies, and in fact that it causes far more harm than it prevents. Insurers should eliminate

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[1] In keeping with current views of best practices and the phenomenon of "suicide contagion," this Article will consistently use the phrase "died by suicide" instead of the phrase "committed suicide," which is viewed by advocates for suicide prevention as further stigmatizing of mental illness. *See* Kelly McBride, *Best Practice for Covering Suicide Responsibly*, POYTNER (June 8, 2018), https://www.poynter.org/reporting-editing/2018/best-practices-for-covering-suicide-responsibly/; *Best Practice and Recommendation for Reporting on Suicide*, REPORTING ON SUICIDE, https://reportingonsuicide.org/wp-content/themes/ros2015/assets/images/Recommendations-eng.pdf (last visited Sept. 27, 2020).

[2] FRANKLIN L. BEST, JR., LIFE & HEALTH INS. LAW 207, § 7.3 (2012) ("In the earlier days of life insurance, even without a suicide limitation in the policy, the view was taken that no payment should be made for death by suicide … based on the grounds that the insurer should not be called on to pay for the wrongful act of the insured[.]").

[3] ERIC M. HOLMES & JOHN A. APPLEMAN, 29 APPLEMAN ON INS. 143-144 (2d ed. 1996).

the suicide exclusion as it is currently worded from life insurance policies.[4] State legislatures and insurance commissioners pass statutes and adopt regulations amending its deleterious effects on insureds and their beneficiaries, and alternative methods should be adopted for preventing the legitimate potential harms to insurers and insureds which the current policy language seeks, but ultimately fails, to prevent.

II. THE LIFE INSURANCE SUICIDE EXCLUSION

The life insurance suicide exclusion was once the subject of more scholarly interest. Between 1895 and 1938, no fewer than thirteen case reports, notes and articles were published in the Harvard Law

[4] A similar issue may arise under accidental death policies, which commonly exclude from the definition of "accidental" deaths from self-inflicted injury. *See, e.g.*, Russell S. Buhite & H. Maggie Marrero-Ladik, *Drugs, Alcohol, and Accidental Death Coverage*, 39 TORT TRIAL & INS. PRAC. L.J. 985 (2004). *See also* Michelle L. Roberts & Glenn R. Kantor, *Anatomy of a Benefit Claim: Practical Presuit Considerations and How to Ensure a Strong Record for Litigation*, 44 BRIEF 36 n.25 (2015) ("Accidental death claims are almost always excluded if the result of suicide; basic life claims only exclude suicide if it results within 24 months of the effective date of coverage."); James L. Nolan, *Traumatic Trial: Litigating a Suicide Case*, 16 BRIEF 52 (1987). However, accidental death insurance defines its scope of coverage differently from traditional term life insurance, and these cases are thus outside the scope of this Article.

Review;[5] and nine in the Yale Law Journal,[6] exploring aspects of the insurability of those who had died by suicide. After this burst of scholarly activity, however, the presence and enforceability of the suicide exclusion has been largely accepted as fact by the legal scholarly literature. This section will provide a brief history of the life insurance suicide exclusion, the early caselaw which cemented its place in the

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[5] *See* Recent Case, Ritter v. Mut. Life. Ins. Co., 169 U.S. 139 (1898), 9 HARV. L. REV. 356, 360 (1895); Note, *No Insurance Against Suicide*, 11 HARV. L. REV. 547 (1898); Recent Case, Ritter v. Mut. Life Ins. Co., 169 U.S. 139 (1898), 11 HARV. L. REV. 549, 550 (1898); Recent Case, Royal Circle v. Achterrath, 68 N.E. 492 (Ill. 1903), 17 HARV. L. REV. 570, 576 (1904); Note, *Express Conditions Against Suicide in Life Insurance*, 23 HARV. L. REV. 557 (1910); Note, *Legality of Insurance Against Suicide*, 25 HARV. L. REV. 283 (1912); Recent Case, Nw. Mut. Life Ins. Co. v. Johnson, 254 U.S. 96 (1920), 25 HARV. L. REV. 292 (1921); Recent Case, Applegate v. Travelers' Ins. Co., 132 S.W. 2 (Mo. Ct. App. 1910), 30 HARV. L. REV 189 (1916); Recent Case, Nw.Mut. Life Ins. Co. v. Johnson, 254 U.S. 96 (1920), 34 HARV. L. REV 436 (1921); Note, *Suicide and Insurance*, 49 HARV. L. REV. 304 (1935); Recent Case, N.Y. Life Ins. Co. v. Gamer, 303 U.S. 161 (1938), 51 HARV. L. REV. 1110 (1938).

[6] *See* Recent Case, Sovereign Camp Woodmen of the World v. Haller, 66 N.E. 186 (Ind. 1903), 9 YALE L.J. 335 (1900); Recent Case, Knights Templars' and Masons' Life Indem. Co. v. Jarman, 187 U.S. 197 (1902), 10 YALE L.J. 165 (1901); Recent Case, Latimer v. Sovereign Camp Woodmen of the World, 40 S.E. 155 (S.C. 1901),11 YALE L.J. 265 (1902); Recent Case, Supreme Lodge Mut. Prot. v. Gelbke, 64 N.E. 1058 (Ill. 1902), 12 YALE L.J. 176 (1903); George Richards, Note, *Life Insurance – Suicide and Execution for Crime*, 22 YALE L.J. 292 (1913); Comment, *Suicide as a Defense in Life Insurance*, 30 YALE L.J. 401 (1921); Comment, *Effect of Incontestability Clause Upon Provision for Limited Liability in Case of Suicide*, 39 YALE L.J. 1050 (1930).

standard life insurance policy, and the modern common law and statutory framework which sustains it today.

A. History of the Suicide Exclusion

i. Early Case Law

Although the suicide exclusion is not a necessary feature of life insurance,[7] life insurance policies have for centuries included an exclusion for death "by [one's] own hand."[8] In early policies, however, the suicide exclusion was not a standalone provision. In the leading English case of *Schwabe v Clift*,[9] the life insurance policy at issue contained the then-standard language which provided for non-payment of proceeds "if the person assured should 'commit suicide, or die by dueling or by the hands of justice[.]"[10] In deciding that case, the Court focused on whether the death of the insured by ingestion of sulfuric acid

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[7] Coverage of death by suicide is not, in and of itself, against public policy, and some life insurance policies do not contain such an exclusion. *See, e.g.*, Phillips-Foster v. UNUM Life Ins. Co. of America, 302 F.3d 785, 788 (8th Cir. 2002) ("Basic" life insurance policy obtained through decedent's employment did not contain a suicide exclusion, although the "supplemental" life insurance policy decedent purchased through his employer did contain such an exclusion); Nat'l Life & Accident Ins. Co. v. Morris, 402 S.W.2d 297 (Tex. App. 1966) (Payment of face amount of policy not subject to a suicide exclusion; although, the payment of treble benefits for accidental death was subject to such an exclusion).

[8] *See, e.g.*, Note, *Life Insurance – Suicide*, 1 VA. L. J. 197 (1877) (quoting the policy provisions at issue in the English case of Borradaile v. Hunter, 5 Man. & Gr. 639 (1843)); Life Ins. Co. v Terry, 82 U.S. 580 (1872) (applying the terms of a life insurance policy that "[i]f the said person whose life is insured … shall die by his own hand, … this insurance shall be null and void."

[9] Schwabe v. Clift, 2 Car. & Kir. 134 (1846).

[10] *Id.* at 134.

was a "felonious suicide,"[11] that is, whether the insured committed a "criminal act of self-destruction."[12] As a criminal act, suicide was seen as deserving of punishment, and the denial of life insurance proceeds can be seen as a component of the punishment meted out to the individual dying by suicide (known as a *felo de se*).[13] In addition to the loss of insurance proceeds, other penalties attached to suicide included forfeiture of the decedent's lands and personal property to the decedent's feudal lord or to the Crown.[14] However, death at one's own hand by one "bereft of reason" was non-criminal, and the decedent was not punished by forfeiture of property.[15] Applying this distinction, the Court in *Schwabe* held that there was "surely no doubt … that [only exclusion of] a felonious suicide was intended" by the insurer's inclusion of that language in the life insurance policy, and that therefore, Mr. Schwabe's beneficiaries could recover the proceeds of the policy "unless the jury [were] of opinion that Mr. Schwabe was, at the time of his death, in such a state of mind as that he would have been held criminally responsible."[16]

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[11] *Id.*

[12] *Id.* At English common law, an act of suicide while "of sound mind," with knowledge of the consequences of the act, was a felony. *See generally* Danuta Mendelson & Ian Freckelton, *The Interface of the Civil and Criminal Law of Suicide at Common Law (1194-1845)*, 36 INT'L J. L. & PSYCHIATRY 343 (2013).

[13] *Felo-De-Se*, BLACK'S LAW DICTIONARY (11th ed. 2019). This term is sometimes found as "*felo in se*" in sources of the time.

[14] Mendelson & Freckelton, *supra* note 12, at 344.

[15] *Id.* at 344.

[16] Schwabe v. Clift, 2 Car. & Kir. 134-35 (1846).

In England, the practice of forfeiture of the assets of those dying by suicide was ended in 1870,[17] and the act of suicide itself was decriminalized in 1961.[18] Nonetheless, the inclusion of suicide exclusion clauses in life insurance policies continues to this day; and their enforcement is in some ways even more strict than in the time of *Schwabe*. The next section will briefly outline the evolution of the suicide exclusion in American insurance law.

ii. Expansion of the Exclusion

Early American insurance policies tended to mirror the terms of their English counterparts, excluding coverage for the insured's death by suicide.[19] Similarly, American courts took the position that the word "suicide" in the exclusion imported a requirement that the insured have been "sane" at the time of his or her death, that is, that they understood the nature and quality of the act.[20]

In the 19th century, the suicide exclusion was not a standalone exclusion. Language from late 19th century English life insurance policies exclude coverage "if the person assured 'shall commit suicide,

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[17] Helen Y. Chang, *A Brief History of Anglo-Western Suicide: From Legal Wrong to Civil Right*, 46 S. U. L. REV. 150, 166 (2018).

[18] *Id.*; *see also* Gerry Holt, *When Suicide Was Illegal*, BBC NEWS MAGAZINE (Aug. 3, 2011), https://www.bbc.com/news/magazine-14374296.

[19] Alex B. Long, *Abolishing the Suicide Rule*, 113 NORTHWESTERN L. REV. 767, 779-780 (2019) ("while the language in [nineteenth-century] contracts varied, they uniformly prohibited recovery where the insured committed suicide.").

[20] *Id.* ("The legal principle that typically emerged from these decisions was that the decedent's suicide voided the right to collect insurance proceeds unless the decedent's insanity prevented the decedent from understanding the consequences of his actions or the decent was compelled by an insane impulse he could not resist.").

or die by dueling [sic] or by the hands of justice[.]'"[21] Cases from this time interpret this language as precluding coverage if the insured dies as a consequence of a commission of a criminal act.[22] Thus, the relevant inquiry is whether the insured "commit[ted] a criminal act of self-destruction." If there is no criminal act, then there is coverage.[23] This indicates that the original intent of the exclusion was less dependent on the moral hazard argument that is raised in modern cases, and more concerned with the criminality of the death. Modern life insurance policies do not exclude deaths occurring during the commission of a crime,[24] and yet the suicide exclusion, stripped of its companions the dueling and death penalty exclusions, has survived to the present day.

In 1873, a case involving the suicide exclusion made its way to the United States Supreme Court. In *Mutual Life Ins. Co. v Terry*, the Court distinguished volitional suicides, which void the insurance policy, from suicides committed "when [the insured's] 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 he is about to commit, or which he is impelled to by an insane impulse," which did not operate to void the policy.[25] The language of the policy in that case, consistent

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[21] Schwabe v. Clift, 2 Car. & Kir. 133 (1846).

[22] *Id.* at 134 ("I find the terms 'shall commit suicide' that have been popularly understood, and judicially considered, as importing a criminal act of self-destruction…") (quoting Borradaile v. Hunter, 5 Man. & G. 639, 650 (1843)).

[23] *Id.*

[24] *See, e.g.*, Fields v Metropolitan Life Ins. Co., 249 S.W. 798 (1923); *See generally* DANIEL MALDANADO, ET AL., COUCH ON INSURANCE §138 (3d ed. 2015). By contrast, accident insurance policies commonly exclude coverage for death occurring in the commission of a crime. *Id.* at §140.

[25] Mut. Life Ins. Co. v. Terry, 82 U.S. 580, 591 (1873).

with the custom of the time, excluded coverage of death by suicide.[26] The ground for the distinction was that the suicide arising out of mental illness or "insanity" was not within the contemplation of the parties to the contract, and thus not covered by the then-standard suicide exclusion policy language.[27] By grounding the rule in standard contract law doctrine, rather than in public policy, the Court, and other courts of the time,[28] left the door open for insurance companies to redraft the policy language to exclude more coverage. Insurance companies accepted this invitation, adding the words 'whether sane or insane' to the more limited suicide exclusion language.[29]

In response to the judicial narrowing of the scope of the suicide exclusion, then, insurers redrafted the language of the exclusion to specify that coverage was lost if the insured died by his own hand within the suicide exclusion period, "whether sane or insane."[30] This additional language has been widely interpreted by courts to hold that the mental status of the decedent is irrelevant to the denial of his life insurance claim;[31] although a minority of states persist in holding that

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[26] *Id.*

[27] *Id.* at 591.

[28] *See, e.g.,* Blackstone v. Standard Life & Accident Ins. Co., 42 N.W. 156 (Mich. 1889) (stating in dicta that the insurer could have drafted its life insurance policy to exclude all suicides, while holding that the standard clause allowed the insured's beneficiary to show that the insured's suicide was caused by his "insanity" and avoid the application of the suicide exclusion).

[29] *See* Robert I. Simon, *You Only Die Once – But Did You Intend It?*, 25 TORT & INS. L. J. 650, 652 (1990).

[30] For an excellent judicial overview of the history of the suicide exclusion in American caselaw, see Mirza v. Maccabees Life and Annuity Co., 466 N.W.2d 340 (Mich. Ct. App. 1991).

[31] *See* Bigelow v. Berkshire Life Ins. Co., 93 US 284, 287 (1876) ("Nothing can be clearer than that the words 'sane or insane' were introduced for the

the insured must have had the capacity to understand the nature and quality of his act in order to trigger the suicide exclusion.[32] As the scope of the exclusion expanded to include suicide regardless of the state of mind of the insured, however, the exclusion was narrowed to only apply for a period of years after the issuance of the policy.[33] This reflects a shift from a concept of suicide as a criminal act to a new, two-fold concern: not allowing life insurance to be used to facilitate suicides, and prevention fraud on the insurer by an applicant seeking to purchase life insurance with the present intent to end his or her own life.

iii. American Statutory Law

American insurance law has, for the most part, developed as state law. Although Congress has the power to regulate insurance as an exercise of its power under the Commerce Clause of the US Constitution, it has generally deferred to the States to regulate the "business of insurance."[34] This "reverse pre-emption" scheme is

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purpose of exempting from the operation of the policy any intended self-destruction, whether the insured was or sound mind or in a state of insanity.").

[32] Nielson v. Provident Life. & Accident Ins. Co., 596 P.2d 95, 98 (Idaho 1979) ("In a minority of jurisdictions, it is held that a policy exclusion for 'suicide, sane or insane' is not operative absent an intent by the insured … [which] could not be formed … if he were so far insane as to be without appreciation for the physical consequences of his action or without power to resist the disordered impulse that caused him to take his own life.") (citations omitted).

[33] *See generally* Gary Schuman, *Suicide and the Life Insurance Contract: Was the Insured Sane or Insane: That is the Question – Or Is It?*, 28 TORT & INS. L. J. 745 (discussing history of suicide exclusions).

[34] *See generally* ROBERT JERRY, UNDERSTANDING INSURANCE LAW § 21 (5th ed. 2012).

described in the McCarran-Ferguson Act,[35] which is the foundation of the modern insurance regulatory framework.[36]

To the extent that state insurance statutes directly address the suicide exclusion they generally follow the industry in explicitly permitting such clauses to be included in life insurance policies.[37] However, as has traditionally been the case, there is generally no statutory mandate or requirement that life insurance policies contain such exclusions.[38]

In contrast to the general permissiveness of state legislatures towards suicide exclusion clauses, state law often places substantial restrictions on the ability of a life insurer to further narrow the causes of death which will trigger the policy.[39] Statutes of this type generally prohibit discrimination by insurers as to the causes of death, providing, "[A] policy of life insurance may not be delivered or issued for delivery in the State if the policy excludes or restricts liability for death that is caused in a specified manner or occurs while the insured has a specified status."[40]

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[35] 15 U.S.C. § 1011 et seq. (2005).

[36] *See generally* Linda M. Lent, *McCarran-Ferguson in Perspective*, 48 INS. COUNS. J. 411 (1981).

[37] *See, e.g.*, ALA. CODE § 27-15-24 (2018) (providing in pertinent part that "[A] policy may contain provisions excluding or restricting coverage as specified therein in the event of … [d]eath within two years from the date of issue of the policy as a result of suicide, while sane or insane.").

[38] *Id.* (specifying that policies "may," not "must," contain such exclusions.).

[39] Note that this restriction does not apply to accidental death insurance, which pays benefits only if the insured's death was caused by an "accident," which is often interpreted narrowly.

[40] MD. CODE ANN., INS. § 16-215 (2019); *see also* ALA. CODE § 27-15-24 (1975); ALASKA STAT. § 21.45.250 (2011); ARIZ. REV. STAT. ANN. § 20-1226

Thus, for example, an insurer worried about the potential increase in mortality during a pandemic, and desirous of incentivizing good public health practices among its insureds, could not begin to insert policy language in newly issued policies which excluded liability if the insured died of COVID-19 within two years of the issue date of the policy. However, state statutes continue to explicitly state that suicide as a cause of death is not subject to this requirement, as suicide is carved out of every one of the state statutes otherwise limiting an insurer's ability to discriminate as to cause of death.[41]

One other twist on state statutory regulation of life insurance coverage of suicide bears mentioning in this context. In eight states and the District of Columbia, physician-assisted dying is explicitly permitted by state statute.[42] Although the details of the "right to die" movement are beyond the scope of this article, it is worth noting that,

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(2012); ARK. CODE. ANN. § 23-81-115 (2010); KY. REV. STAT. § 304.15-260 (2010).

[41] *See, e.g.*, KY. REV. STAT. § 304.15-260(1)(b) (2010).

[42] *See Death With Dignity Acts*, DEATH WITH DIGNITY, http://deathwithdignity.org/learn/death-with-dignity-acts/ (last visited 4./25/2021) (providing list of current state statutes). In addition to the states with authorizing statutes, the Montana Supreme Court has stated that physician assistance in dying is not against public policy. *See* Baxter et al v. Montana, 224 P.3d 1211, 1222 (Mont. 2009). However, there appear to be no cases in Montana addressing the question of how this would affect life insurance coverage of a Montana patient seeking physician assistance in dying. Montana statutes explicitly allow life insurers to write policies with a two-year suicide exclusion. *See* MONT. CODE ANN. § 33-20-121 (2019). Those states are California, Colorado, Oregon, Vermont, Maine, New Jersey, Hawaii and Washington. *See Death With Dignity Act*, DEATH WITH DIGNITY.

for the most part, the architects of these policies took care to make sure that the exercise of the right to physician assistance in dying would not adversely affect the availability of life insurance that the patient had purchased.[43]

In California, death in accordance with the provisions of that state's End of Life Option Act is statutorily stated not to be "suicide" for any legal purpose,[44] and the Act further makes explicit that this means that life insurance proceeds may not be denied on the basis that an insured utilized the provisions of the Act to end their own life.[45] Similarly, in the District of Columbia,[46] Hawaii,[47] Maine,[48] New

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[43] For a more complete discussion of the relationship between right to die laws and life insurance coverage, see Amber N. Morris, *A Right to Die, A Right to Insurance Payouts? The Implications of Physician-Assisted Suicide on Life Insurance Benefits*, 81 MONT. L. REV. 213 (2020).

[44] CAL. HEALTH & SAFETY CODE § 443.18 (2016) (repealed 2026) ("Actions taken in accordance with this part shall not, for any purposes, constitute suicide, assisted suicide, homicide, or elder abuse under the law.").

[45] CAL. HEALTH & SAFETY CODE § 443.13(2) (2016) (repealed 2026) ("[D]eath resulting from the self-administration of an aid-in-dying drug is not suicide, and therefore health and insurance coverage shall not be exempted on that basis.").

[46] D.C. CODE ANN. § 7-661.09 (2016) ("A qualified patient's act of ingesting a covered medication shall not have an effect upon a life, health, accident insurance, annuity policy, or employment benefits.").

[47] HAW. REV. STAT. ANN. § 327L-17 (2019) ("A qualified patient's act of using medication to end the qualified patient's life pursuant to this chapter shall have no effect upon a life, health or accident insurance or annuity policy.").

[48] ME. REV. STAT. tit. 22, § 2140.19 (2019) ("A qualified patient whose life is insured under a life insurance policy issued under the provisions of Title 24-A, chapter 29 and the beneficiaries of the policy may not be denied benefits

Jersey,[49] Oregon,[50] Vermont,[51] and Washington,[52] state statutes make clear that the utilization of statutory mechanisms for physician assistance in dying shall not prevent the payment of proceeds under a life insurance policy.

The status of life insurance policies taken out on the lives of end-of-life patients in Colorado is slightly less clear. The Colorado End of Life Option Act provides that utilization of its provisions "[does] not, for any purpose, constitute suicide … under the Colorado Criminal Code."[53] Although the Colorado Act does not specifically address the question of life insurance suicide exclusions, which are authorized for a period of one year in the Colorado Insurance Code,[54] the Act does provide that "[t]he sale, procurement or issuance of … any life… insurance…policy must not be conditioned on or affected by an individual's act of making or rescinding a request for medical aid-in-dying medication in accordance with this article."[55] Notably, that provision does not explicitly apply to the payment of proceeds of a life

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on the basis of self-administration of medication by the qualified patient in accordance with this Act.").

[49] N.J. STAT. ANN. § 26.16-14 (2019).

[50] OR. REV. STAT. §§ 127.875, 127.880 (2019).

[51] VT. STAT. ANN. tit. 18, § 5287 (2013).

[52] WASH. REV. CODE §70.245.170 (2008).

[53] COLO. REV. STAT. ANN. § 25-48-121 (2016).

[54] COLO. REV. STAT. ANN. § 10-7-109 (2018) ("The suicide of a policyholder after the first policy year of any life insurance policy issued by any life insurance company doing business in this state shall not be a defense against the payment of a life insurance policy, whether said suicide was voluntary or involuntary, and whether said policyholder was sane or insane.").

[55] COLO. REV. STAT. ANN. § 25-48-115 (2016).

insurance policy. Finally, the Colorado Act provides that "[a]n obligation owing under any currently existing contract must not be conditioned on, or affected by, an individual's act of making or rescinding a request for medical aid-in-dying medication."[56] As of this writing, the relationship between the right to physician-assisted suicide and the life insurance suicide exclusion has not been conclusively resolved in Colorado.

iv. The Missouri Exception

An interesting exception to the treatment of life insurance coverage of a death by suicide in state law is illustrated by the historic example of Missouri. In that state, from at least 1879,[57] until 2007,[58] certain suicide exclusions were prohibited by state statute.[59] The statute stated in pertinent part:

> In all suits upon policies of insurance on life hereafter issued by any company doing business in this state, to a citizen of this state, it shall be no defense that the insured

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[56] COLO. REV. STAT. ANN. § 25-48-114 (2016).

[57] Although the statutory history of this section suggests that it was enacted in 1939, the case of *Jarman* discusses Missouri's prohibition on suicide exclusions in life insurance policies and states that this provision had been enacted as early as 1879. Jarman v. Knights Templars' & Masons' Life Indem. Co. of Ill., 95 F. 70, 71 (1899).

[58] There was a short period, from 1887 to 1889, during which certain assessment companies were held to be exempted from the operation of the Missouri suicide statute. However, this exemption only applied to contracts entered into during this short time, rested on a technical reading of an act passed in 1887, and is not relevant to the discussion of the statute in this Article. *See* Haynie v. Knights Templars and Masonic Life Indem. Co., 41 S.W. 461, 462 (Mo. 1897).

[59] *See* MO. REV. STAT. § 376.620 (1986).

> committed suicide, unless it shall be shown to the satisfaction of the court or jury trying the cause, that the insured contemplated suicide at the time he made his application for the policy; and any stipulation in the policy to the contrary shall be void.[60]

Despite Missouri's status[61] during this time as the most prominent state[62] to prohibit suicide exclusions in life insurance policies, there is relatively little caselaw or scholarship[63] discussing this singularity; and little to no legislative history detailing the reasons for its repeal in 2007. Senate Bill 66, the bill which repealed the prohibition in 2007, makes no reference to the effect of repeal on life insurance suicide exclusions in its official description;[64] the description of SB66 as introduced refers

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[60] *Id.*

[61] Missouri was described as "that most altruistic of states" for having adopted this statute. Brainard Currie & Herma Hill Schreter, *Unconstitutional Discrimination in the Conflict of Laws: Privileges and Immunities*, 69 YALE L.J. 1323, 1377 (1960).

[62] It is difficult to determine with certainty other states which might have implemented such legislation but references to the Missouri statute in the caselaw and law review literature far outstrip references to other states' policies. Colorado, for example, once had a state statute which provided that suicide was not a defense to a life insurance claim. *See* Woodmen of the World v. Sloss, 112 P. 49, 51 (Colo. 1910).

[63] See Note, Insurance: Applicability of the Missouri Suicide Statute to Accident Policies and Double Indemnity Provisions of Life Insurance Policies, 1959 WASH. U. L. Q. 183 (1959).

[64] *See* Mo. S.B. Hist., 2007 Reg. Sess. S.B. 66, "Modifies various provisions of law relating to investments by insurance companies, enforcement powers of the Department of Insurance, and revises title insurance code".

solely to the effect of the bill on insurance company investments.[65] Similarly, the Missouri Governor's Message issued upon the signing of SB66 into law similarly makes no reference to the suicide exclusion, focusing instead solely on the consumer protections from "title insurance schemes" enacted in SB66.[66]

Similarly, there is little caselaw discussing the Missouri approach to the suicide exclusion. What caselaw exists primarily turns on the question of whether the insurance contract in question was governed by the laws of Missouri or of another state in which suicide exclusions are valid and enforceable;[67] exactly who must have been a

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[65] *See* Mo. Journal of the Senate, 94 Gen. Ass. Reg. Sess. No. 1 (Jan. 3, 2007).

[66] *See Blunt Signs Anti-Fraud Protections for Missouri Home Buyers*, Mo. Gov. Mess. (July 13, 2007).

[67] *See, e.g.,* Tuttle v. Iowa State Traveling Men's Ass'n, 104 N.W. 1131 (Iowa 1905) (Application for insurance was made in Kansas City, MO, but the contract was formed when accepted by the insurer in Iowa; therefore, the contract was not made in the state of Missouri and the exclusion was valid); Lukens v. Int'l Life Ins. Co., 191 S.W. 418 (Mo. 1916) (policy issued by Missouri corporation to Illinois insured and beneficiary was an Illinois contract not subject to the Missouri statute); Nielsen v. Gen. Am. Life Ins. Co., 89 F.2d 90 (10th Cir. 1937) (Although original policy was issued in Missouri, replacement policy delivered and accepted in New Mexico was subject to New Mexico law); Bowen v. New York Life Ins. Co., 117 F.2d 298 (8th Cir. 1941) (Illinois law applied where the policyholder resided and received policy in Illinois); Nelson v. Aetna Life Ins. Co., 359 F. Supp. 271 (W.D. Mo. 1973) (Missouri law applied where group policy was issued to employer in Oklahoma, but covered employee was a resident of Missouri, under the "most significant relationship" test for choice of law); Moss v. Nat'l Life & Accident Ins. Co., 385 F. Supp. 1291 (W.D. Mo. 1974) (Missouri law applied even though the insured was attending college in Oklahoma); Whited v. Nat'l W. Life Ins. Co., 526 S.W. 2d 364 (Mo. Ct. App. 1975) (Missouri law rather than

citizen of Missouri in order to receive the protection of the statute,[68] or whether the issuing company itself was subject to the provisions of the Missouri suicide statute.[69] The Missouri statute was also challanged as being against public policy for promoting suicide.[70] the Missouri Supreme Court, while following prior caselaw indicating that life insurance coverage of suicide is not *per se* against public policy, correctly noted that a statutorily-required policy term cannot by definition, be struck down by a court as against public policy.[71] Despite being upheld consistently as a proper exercise of the State's power to regulate insurance companies, the statute prohibiting suicide clauses in life insurance policies issued to Missouri citizens was repealed in 2007. Policies issued after 2007 to Missouri citizens may now include suicide

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Alabama law applied where policy was delivered to insured's beneficiary in Missouri, even though insured was in Alabama).

[68] *See* Perkins v. Philadelphia Life Ins. Co., 755 F.2d 632 (8th Cir. 1985) (Missouri statute protects the purchaser, not the insured; the purchaser of the policy must be a citizen of Missouri to receive the protection of the statute); *see also* Frasher v. Life Investors Ins. Co. of America, 796 P.2d 1069 (Ct. App. Kansas 1990) (Credit life insurance policy was "issued to" car buyer rather than the car dealer; therefore, Missouri law applied rather than Kansas law).

[69] *See* Loyal Americans of the Republic v. McClanahan, 109 S.W. 973 (Tex. App. 1908) (Fraternal benefit association argued that it was exempt from the insurance regulations of Missouri; held that the contract was one of insurance subject to the statute).

[70] Andrus v. Business Men's Acc. Assn. of America, 223 S.W. 70 (Mo. 1920).

[71] *See id.* at 72 ("It is within the discretion of the Legislature to determine the propriety of an enactment and decide whether it may have a beneficial effect upon the subject to which it applies, and that determination it not to be questioned by this Court in determining the validity of the statute.").

clauses, although, in a vestige of the "altruism" once granted by the legislature, those clauses are restricted to one year, rather than the generally-accepted two-year suicide exclusion authorized by other states.[72]

B. Goals of the Exclusion

The modern suicide exclusion clause relies on at least two justifications for its inclusion in life insurance policies and its broad interpretation. First and most obviously, there is a strong public policy against incentivizing suicide and in favor of its prevention. Second, the exclusion minimizes one form of adverse selection in the insurance market. Adverse selection describes the fact that individuals who know they are at higher risk of a loss are more likely to buy insurance for that loss. The current drafting and interpretation of the suicide exclusion attempts to balance these policies against the legitimate interests of the insured and his beneficiaries by creating a limited-time exclusion. This prevents individuals from purchasing life insurance with the intent to end their lives and pass the proceeds on to their beneficiaries, but still provides coverage for suicidal acts which arise more than two years after the purchase of the policy, when the policy's purchase is presumably no longer an incentivizing factor.

At the time the suicide exclusion was first included in life insurance policies and interpreted by courts, willful suicide was considered a felony. Indeed, as described above, the suicide exclusion was not included in policies on its own, but as part of a three-part

[72] MO. REV. STAT. § 376.620 (2017) (Life insurance policies "may exclude or restrict liability … for death as the result of suicide in the event the insured, while sane or insane, dies as a result of suicide within one year from the date of the issue of such policy, rider, endorsement, amendment, or certificate.").

exclusion of coverage if the person insured died as part of certain criminal acts – namely, dueling, suicide or "dying by the hands of justice." As such, it made sense for courts to ask whether the decedent possessed the necessary mens rea to be found culpable in his own death in order to decide whether his life insurance policy was payable upon his death. However, in light of cases providing for payment of benefits for non-felonious suicides, insurance companies changed the wording of the exclusion in order to continue denying payment of benefits.

In modern life insurance policies, the insurance company typically owes no duty to pay the policy benefits "if the insured commits suicide, whether sane or insane … within 2 years from the date of issu[ance]" of the policy.[73] The words "whether sane or insane" have been inserted into life insurance policies to change the coverage of the exclusion and avoid the precise issue of the mental state of the insured which was key to the decision in *Schwabe* and other early cases.

Under the modern exclusion, the criminal nature of the insured's death is no longer an issue. In fact, modern life insurance policies do not exclude coverage for deaths which occur as part of a criminal act by the insured.[74] Neither dueling nor "death at the hands of justice" appear as exclusions in modern policies.[75] To be sure, dueling no longer is a

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[73] *See, e.g.,* Officer v. Chase Ins. Life & Annuity Co., 541 F.3d 713 (7th Cir. 2008).

[74] *See* Bird v. John Hancock Mutual Life Ins. Co., 320 S.W.2d 955 (Mo. Ct. App. 1959) (Death of the insured in a criminal act does not preclude life insurance coverage. There is no public policy against such coverage, unless the insured committed fraud on the insurer.).

[75] *See, e.g.*, VA. CODE ANN. §38.2.3106 (2021) (Providing that suicide or execution does not abrogate life insurance coverage except for the standard two-year suicide exclusion.).

substantial feature of modern American life (though in Kentucky, public office holders and attorneys must swear as part of their oath of office that they have never participated in a duel),[76] and, given the mechanics of modern capital punishment, it is highly unlikely that any death row inmate executed in the United States holds a life insurance policy.[77] However, if insurers (and society) were still interested in using life insurance proceeds as a deterrent to criminal behavior, they could insert policy language which excluded life insurance coverage if the insured died in the commission of a violent felony. Despite the epidemic of gun violence in modern America, however, they have not done so. Forfeiture of life insurance proceeds is no longer seen as a desirable deterrent to such antisocial behavior, as it apparently was in the 19th century.

Despite the turn away from the forfeiture of insurance proceeds as a deterrent to crime, and the abandonment of the dueling and capital punishment exclusions, however, the suicide exclusion remains a feature of life insurance policies to this day. There is one key difference between the 19th century suicide exclusion and the modern one. The modern exclusion is not an absolute exclusion, but rather is a temporary one. It only bars payment of life insurance proceeds if the insured

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[76] KY. CONST. § 228.

[77] *See* Tracy L. Snell, *Capital Punishment, 2018- Statistical Tables*, BUREAU OF JUST. STAT. 2 (Sept. 2020), https://www.bjs.gov/content/pub/pdf/cp18st.pdf ("The average elapsed time from sentencing to execution almost tripled from 1988 (6.7 years) to 2018 (19.8 years)."). The author infers that given the length of death penalty litigation, it is highly unlikely that any inmates have life insurance.

commits suicide within a certain period (generally but not always two years)[78] from the date the policy is issued.

This change in the language of the policy shows that the purpose of the modern suicide exclusion has also changed. Rather than acting as a deterrent to criminal behavior, the modern suicide exclusion can be understood as a balance between allowing individuals to protect themselves and their families against the risk of unknown future risks, including the risk of serious mental illness, against the need to not allow individuals to use insurance as a means to facilitate a present intent to self-harm. If one was able to purchase life insurance to provide for one's family while currently planning to end one's life, this would violate clear social values against incentivizing suicide. Although rarely discussed by courts in those terms, courts routinely uphold the modern suicide exclusion as an exercise in the rights of the parties to the insurance contract to decide what risks they intend to transfer from insured to insurer. The common thread linking the first suicide exclusions to the modern ones is a concern with fraud on the insurer – that is, the prospect of a life insurance applicant applying for insurance with the intent to kill himself for the purpose of his beneficiaries collecting the insurance proceeds. This concern is present in modern cases interpreting suicide exclusions;[79] it is also present as early as 1843.[80]

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[78] *See, e.g.,* MO. REV. STAT. § 376.620 (2017) (restricting the suicide exclusion to one year from the date of issuance of the policy); Founders Life Ins. Co. of Florida v. Poe, 251 S.E.2d 247, 248 (Ga. 1978) (discussing a policy with a six-month suicide exclusion provision).

[79] *See infra* Section IV.

[80] *See* Mendelson & Freckelton, *supra* note 12, at 346 n.16 ("The insurance industry, friendly societies, etc., were very concerned with the notion of fraud

C. Changes in Views of Suicide and Approaches to Mental Health

Although our understanding of the causes of suicide has changed much over the years,[81] there has been a fairly constant concern with the frequency of suicide. This concern is perhaps in part responsible for the historic attempts to deter suicides through the severity of the punishment inflicted upon both the body of the decedent and the fortunes of the surviving family members, including insurance beneficiaries. Although a comprehensive review of the history of suicide is beyond the scope of this article,[82] it is without doubt that the modern view of suicide has shifted away from viewing the act as a sin or a crime worthy of punishment, to a view of it as the result of a process of mental illness such as depression. This section will briefly sketch instances in which the changed modern view of suicide has resulted in changes to the law.

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whereby a person would take out a life insurance policy and then commit suicide.").

[81] For excellent and thorough discussions of the history of legal and philosophical approaches to suicide, see Chang, *supra* note 17; *see also* Long, *supra* note 19.

[82] For an excellent lengthy treatment of social views of suicide, see Long, *supra* note 19.

i. Decriminalization of Suicide

At the time of the earliest life insurance suicide cases, the act of suicide was criminalized in the United Kingdom and in many American jurisdictions.[83] However, in the 1960's, many countries decriminalized suicide.[84] As of 1964, there were only nine states which criminalized suicide,[85] and that trend has continued – suicide is not criminalized by statute in any American jurisdiction as of this writing.[86] However, despite the modern embrace of "right to die" laws and physician-assisted suicide, several states still criminalize encouragement of or assistance with another's suicide.[87]

Suicide is seen today as primarily a mental health or quality of life issue; that is, as the result of a disease process or as a possibly rational response to terminal illness or intolerable suffering, not as a moral weakness or a religiously prohibited act.

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[83] For an excellent overview of the historic legal treatment of suicide, see Long, *supra* note 19, at 777-782.

[84] *See* David Lester, *Decriminlizaation of Suicide in Seven Nations and Suicide Rates*, 91 PSYCHOLOGICAL REPORTS 898 (2002).

[85] *See* Robert E. Litman, *Medical-Legal Aspects of Suicide*, 6 WASHBURN L.J. 395 (1967) (listing Alabama, Kentucky, New Jersey, North Carolina, North Dakota, Oklahoma, South Carolina, South Dakota and Washington as states which then criminalized suicide).

[86] *But see* Clift v. Narragansett Television, L.P., 688 A.2d 805, 808 (R.I. 1966) (suicide remained a common law felony in Rhode Island); Wackwitz v. Roy, 418 S.E.2d 861, 864 (Va. 1992) (suicide is a common law felony in Virginia).

[87] *See* H. Tristram Englehardt & Michelle Molloy, *Suicide nad Assisting Suicide: A Critique of Legal Sanctions*, 36 SOUTHWESTERN L. J. 1003 (1982).

ii. Assisted Suicide

In addition to decriminalization of the act of suicide, several American jurisdictions have embraced physician-assisted suicide as a legitimate end-of-life option for individuals suffering from terminal illness.[88] Beginning with Oregon in 1997,[89] legalization of physician assisted suicide, or "death with dignity,"[90] has slowly spread across the nation. As of 2018, six states have legalized physician assisted suicide, with several others actively considering such legislation.[91] One commentator has predicted that the values of autonomy and self-determination render the eventual adoption of legalized physician-assisted suicide inevitable.[92]

Together with the expansion of assisted suicide laws has come an increasing social acceptance of intentionally ending one's own life in certain circumstances.[93] Studies show that the percentage of Americans who believe that suicide is a moral choice when an individual is faced with terminal illness or intractable pain has increased steadily over the years, rising to almost 70% in 2016.[94] As discussed

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[88] *See* Chang, *supra* note 17.

[89] OR. REV. STAT. §§ 127-800-127.897 (1997).

[90] *See* DEATH WITH DIGNITY, https://www.deathwithdignity.org/ (last visited October 5, 2020).

[91] Chang, *supra* note 17, at 153 (listing California, Colorado, the District of Columbia, Montana, Oregon, Vermont, and Washington as the states with assisted suicide laws on the books as of 2018).

[92] *Id.*

[93] *See generally* SUSAN STEFAN, RATIONAL SUICIDE, IRRATIONAL LAWS: EXAMINING CURRENT APPROACHES TO SUICIDE IN POLICY AND LAW (Oxford Univ. Press 2016).

[94] *See* Art Swift, *Euthanasia Still Acceptable to Solid Majority in U.S.*, GALLUP (June 24, 2016), https://news.gallup.com/poll/193082/euthanasia-acceptable-solid-majority.aspx; *see also* Long, *supra* note 19, at 777.

above, the legal expansion of the right to die has almost universally included a judgment that exercise of that right should not result in the forfeiture of the patient's life insurance proceeds.

iii. Advance Directives

As the principle of individual patient autonomy has supplanted the principle of physician beneficence as the primary ethical principle in modern American medicine,[95] there has been dramatic growth in the use of legal documentation of patients' wishes as a way for individuals to express their own desires about how they are to be treated at the end of their lives. Whether conceptualized as "living wills," "durable powers of attorney," or "advance directives," these mechanisms provide a way for patients to communicate their health care wishes to caregivers in the event they are rendered incapable of making such decisions in the course of treatment. Often, these documents are used to communicate the patient's desire to limit or avoid heroic life-sustaining treatment at the end of life. While the decision to forego life-sustaining treatment is not the same as the decision to actively seek treatment to end one's life as in the case of physician-assisted suicide, the rise and widespread acceptance of these procedures is further evidence of the trend away from a healthcare mindset which seeks to preserve life at all costs, and a recognition that in many cases, allowing death to occur naturally may well be the most beneficial course of treatment for a patient.

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[95] *See* David Orentlicher, *The Influence of a Professional Organization on Physician Behavior*, 57 ALB. L. REV. 583, 584-585 (1994).

III. CHALLENGES TO THE EXCLUSION

Despite its being increasingly out of step with modern views on the nature of suicide, mental health and the rights of individuals to dictate the nature of their end of life care, the modern suicide exclusion is routinely upheld by courts. The reporters are replete with decisions enforcing the plain language of the suicide exclusion against the heirs of individuals who died by suicide within the two-year exclusionary period.

The beneficiaries of insureds who have died by suicide within the exclusionary period have put forth a variety of theories to try to overcome the application of the exclusion,[96] with mixed success. This section will review several of those theories.

A. Decedent Unable to Form Requisite Intent

Despite the addition of the phrase "sane or insane" to the modern suicide exclusion clause, some life insurance beneficiaries still attempt to argue that the suicide exclusion should not apply because the insured did not have the capacity to intend his own death. Courts have taken one of two approaches to this argument. The majority approach holds that the "sane or insane" language renders the mental state of the decedent irrelevant to the question of insurance coverage; the only thing that matters, on this rule, is whether the action taken by the decedent to cause his own death was intentional. The minority rule holds that the language "sane or insane" still does not foreclose coverage if the insured took his own life, but at the time could not understand the nature or consequences of the action he was taking.

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[96] This has been the case for decades. *See*, *e.g.*, Litman, *supra* note 85 ("[T]he general uncertainty [about the legal definition of suicide] leads to many perplexing insurance contests in which the outcome is quite unpredictable.").

In *Galloway v Guaranty Income Life Ins. Co.*,[97] the estate of the insured decedent argued that his act of shooting himself in the head should not prevent payment of the policy proceeds because his daily activities shortly before death were not consistent with an intent to commit suicide, and because he was taking blood pressure and other medications that might have affected his mental state.[98] Nonetheless, the New Mexico Supreme Court held that the "sane or insane" language in the exclusion meant that the decedent need not necessarily fully comprehend the consequences of the act.[99] The Court also held that there was no reasonable interpretation of the circumstances of the decedent's death that would be consistent with the conclusion that he did not understand the nature and consequences of his actions.[100] Similarly, in *Mirza v. Maccabbes Life & Annuity Corp.*, the plaintiff beneficiary's proffered evidence of an expert psychiatrist that the insured's suicide was caused by his depression, and was the result of an "irresistible impulse," was held insufficient to establish that his actions were involuntary.[101] The clear majority of courts considering this issue have rejected the contention that the state of mind of the insured, regardless of whether the insured was mentally ill,[102] under the

[97] Galloway v. Guaranty Income Life Ins. Co., 725 P.2d 827 (N.M. 1986).
[98] *Id.* at 827-28.
[99] *Id.* at 828.
[100] *Id.* at 828-29.
[101] Mirza v. Maccabbes Life & Annuity Co., 466 N.W.2d 340, 344-5 (Mich. Ct. App. 1991).
[102] *Id.* at 346.

influence of drugs or alcohol, should prevent the application of the suicide exclusion.[103]

B. Decedent's Death Was Accidental, Not Suicidal

It is common for beneficiaries to argue that the insured decedent's death was due to an accident, not an intentional suicide.[104] In these cases, the courts have uniformly held that the beneficiary is entitled to a presumption against suicide,[105] and that the burden of showing that the insured committed suicide is on the insurance company.[106]

In the 1966 Idaho case of *Haman v Prudential Ins. Co.*,[107] the insured died from a gunshot wound only seven months after the issuance of the insurance policy on her life.[108] The primary question was whether the gun discharged accidentally, while trying to scare off a stray dog, or

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[103] *See, e.g.*, Rives v. Franklin Life Ins. Co., 664 F. Supp. 1025 (N.D. Miss. 1987) (Applying Mississippi law); Aetna Life Ins. Co. v. McLaughlin, 380 S.W.2d 101 (Tex. 1964).

[104] *See Rives*, 664 F. Supp. at 1026 (decedent was found with revolver in his hand; nonetheless, the beneficiaries' contention that he might have been killed by a third party necessitated jury trial on the issue of cause of death).

[105] Courts have held, however, that the presumption against suicide does not in and of itself constitute evidence that the insured's death was not a suicide, and that mere speculation, without more, is not sufficient to reach the jury on the issue. *See, e.g.*, Commonwealth Life Ins. Co. v. Hall, 517 S.W.2d 488 (Ky. 1974).

[106] *See, e.g.*, MacKenzie v. Mut. Benefit Life Ins. Co., 528 P.2d 150, 151 (Utah 1974) (Insurer failed to satisfy burden of proof where insured died after fall from hotel room window and there was no evidence of whether he intended to jump or accidentally fell).

[107] Haman v. Prudential Ins. Co. of America, 415 P.2d 305 (Idaho 1966).

[108] *Id.* at 306.

whether she intentionally shot herself. Both the sheriff and the coroner opined that the death was likely suicide, but circumstantial evidence, including testimony of her physician as to the lack of serious mental illness, existed to dispute that conclusion. The jury found unanimously that her death was accidental,[109] and the court, on appeal by the insurance company, found that sufficient evidence existed to submit the case to the jury, and that the jury's conclusion was not unreasonable.[110]

In the case of *National Life and Acc. Ins. Co. v. Morris*,[111] the insured decedent ingested cyanide but was then in an automobile accident (apparently while being driven to the hospital by his wife, although the opinion is not perfectly clear on this point).[112] Although the decedent's insurance policy did not contain a suicide exclusion, the policy provided for additional benefits of three times the face value of the policy if the insured's death "resulted directly and independently of all other causes from bodily injuries effected solely through external, violent and accidental means."[113] The evidence as to whether the cause of death was conflicting, but the jury found for the plaintiff beneficiary. The Texas Court of Appeals affirmed the verdict, stating that the car crash, combined with the legal presumption against suicide,[114] provided sufficient factual basis for the jury to find that the cause of death was solely due to the car crash, not the ingestion of cyanide that same morning.[115]

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[109] *Id.* at 309.

[110] *Id.* at 312.

[111] Nat'l Life & Accident Ins. Co. v. Morris, 402 S.W.2d 297 (Tex. App. 1966).

[112] *Id.*

[113] *Id.* at 298.

[114] *Id.* at 304.

[115] *Id.*

C. Decedent's Death Was Due to A Different Cause

In *Nielsen v Provident Life and Accident Ins. Co.*, the insured decedent had been previously involved in a serious automobile accident, which caused marked personality changes and after which he required "constant care of several doctors."[116] After the insured died from a self-inflicted gunshot wound, his widow and the life insurance beneficiary sued for the life insurance proceeds, claiming that the insured's death was caused by the automobile accident.[117] The court rejected this argument, relying on the policy language excluding suicide "whether sane or insane."[118] The source of the mental disturbance which eventually caused the insured to take his own life was irrelevant to the court.[119]

Where there is more than one possible interpretation of the circumstances of the decedent's death, whether or not the death was caused by suicide is a question of fact for the jury, and is to be decided on a preponderance of the evidence standard.[120] *Southern Farm Bureau Life Ins. Co. v. Dettle* is characteristic of these cases.[121] In that case, the insured decedent was found dead from a single gunshot wound to the abdomen.[122] The insurer denied payment on the ground that the death

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[116] Nielsen v. Provident Life and Accident Ins. Co., 596 P.2d 95, 97 (Idaho 1979).

[117] *Id.*

[118] *Id.* at 98.

[119] *Id.* at 98-99 ("The cause of the mental aberration is irrelevant to the applicability of the exclusionary language.").

[120] S. Farm Bureau Life Ins. Co. v. Dettle, 707 S.W.2d 271, 272 (1986); CM Life Ins. Co. v. Ortega, 562 So.2d 702 (Dist. Ct. App. Fl. 1990).

[121] *Dettle*, 707 S.W.2d at 271.

[122] *Id.* at 272.

was most likely due to suicide within the two-year suicide exclusion.[123] The trial court submitted the issue of cause of death to the jury, with the instruction that "'Suicide' means the intentional taking of one's own life, by his own hand or act, whether sane or insane."[124] The jury determined that the insured's death was not a suicide, and the insurer appealed, arguing that the inclusion of the word "intentional" in the jury instruction was erroneous.[125] The appellate court affirmed, holding that the use of the word "intentional" did not imply a requirement that the decedent understand the nature and quality of the act he performed; only that the act be voluntary, and not accidental.[126]

D. Iatrogenic Suicidality

In recent years, several high-profile articles have highlighted the risk of suicidal behavior occurring as a known risk or side effect of certain classes of drugs.[127] These include not only psychiatric medications such as Prozac and Zoloft, but also drugs which treat

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[123] *Id.*

[124] *Id.*

[125] *Id.*

[126] *Id.*

[127] *See, e.g.*, Harris Gardner, *Suicide Alert Revives Qualms on Antidepressants*, INT'L HERALD TRIBUNE, 4 (Aug. 8, 2003); Misti Crane, *Pediatricians Say Paxil Highlights Problem: Drugs Aren't Kid-Tested*, COLUMBUS DISPATCH, 4A (June 21, 2003); Cristopher Bowe, *FDA Warns of Suicide Risks of Antidepressants*, FINANCIAL TIMES, 32 (March 23 2004); Shankar Vedantam, *FDA Links Antidepressants, Youth Suicide Risk*, WASHINGTON POST, A1 (Feb. 3, 2004).

conditions unrelated to mental illness.[128] Harms which arise as an unintended result of medical treatment are referred to in the literature as "iatrogenic" harms, from the Greek roots iatros (healer) and genic (relating to the production or source of).[129] Estimates of iatrogenic injury in the American healthcare system are high. In 2000, a report of the Institute of Medicine reported a high incidence of iatrogenic injury.[130] However, that report did not break out injuries arising from iatrogenic suicidality, and the literature on this point is sparse. However, the sheer size of the market for prescription drugs, combined with the known risks of suicide associated with several commonly prescribed drugs, leads to the reasonable inference that this is an understudied and underreported phenomenon.

The case of *Charney v. Illinois Mut. Life Ins. Co.* explicitly addressed the issue of suicide caused by a side effect of medication.[131] The insured was being treated for high blood pressure.[132] He developed severe depression as a side effect of his blood pressure medication.[133] Although he was referred to a psychiatrist for treatment of this depression, he took his own life shortly thereafter.[134] The insurer refused to pay based on the suicide exclusion, and the court found that the language of the policy supported the

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[128] *See Epilepsy Drugs May Raise Suicide, FDA Says*, SEATTLE TIMES, A5 (Feb 1, 2008).

[129] *See* V. Siomopoulos, *Psychiatric Iatrogenic Disorders*, 34 AM. FAM. PHYSICIAN 111, 111, 115, 116 (1986).

[130] TO ERR IS HUMAN: BUILDING A SAFER HEALTH SYSTEM, INSTITUTE OF MEDICINE (Linda T. Kohn, Janet M. Corrigan & Molla S. Donaldson eds., 2000).

[131] *See* Charney v. Ill. Mut. Life Cas. Co., 764 F.2d 1441 (1985).

[132] *Id.* at 1442.

[133] *Id.*

[134] *Id.*

insurer's position.[135] The only question for the court was whether the insured "did in fact 'die by his own hand'" and whether he "knew and understood the physiological effects" of his action.[136] Key to the Court's holding is the clause of the policy which excludes coverage for suicide whether the insured is "sane or insane" at the time of the suicide.[137] The Court, consistent with other cases, adopts a strong pro-insurer interpretation of that clause which excludes coverage regardless of the insured's mental state at the time of the suicide; that is, it is irrelevant whether the insured suffered from diminished capacity to control his conduct, or appreciated the quality and nature of his actions, so long as he possessed the knowledge that his action was likely to result in his death.[138]

E. Decedent Had Reasonable Expectations of Coverage

In *Williams v. Nationwide Ins. Co.*, the insured's beneficiary sued to recover the proceeds of a life insurance policy.[139] The Court held that under Pennsylvania law, although suicide exclusions are enforceable, the insurer has the burden of making the policyholder aware of exclusions, so that he can make a decision whether to "assume the excluded risks or to obtain additional insurance to protect against them."[140] Since the insurance company had conceded that its agent had

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[135] *Id.*

[136] *Id.*

[137] Charney v. Ill. Mut. Life Cas. Co., 764 F.2d 1441 (1985).

[138] *Id.* at 1443.

[139] Williams v. Nationwide Ins. Co., 571 F. Supp. 414, 414 (M.D. Pa. 1983).

[140] *Id.* at 416.

not explained the suicide exclusion to the policyholder, it was thus barred from asserting the exclusion.[141]

In *Dibble v. Security of America Life Ins. Co.*, the insured decedent died by suicide more than two years after making application for insurance, but less than two years from the date the policy was issued.[142] The application provided that the effective date of the insurance policy would be after the application was approved by the insurer;[143] nonetheless, the Court held that the fact that the applicant paid the first premium for coverage with the application,[144] and the fact that the plaintiff beneficiary alleged that the insured believed that the insurance was effective as of the date of the application,[145] gave rise to a claim in reasonable expectations for coverage for the insured's death.[146]

The strength of the reasonable expectations doctrine is that the policyholder need not point to any ambiguity in the policy language itself in order to invoke it.[147]

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[141] *Id.* at 417.

[142] Dibble v. Sec. of Am. Life Ins. Co., 590 A.2d 352, 352-53 (Pa. 1991).

[143] *Id.* at 353 (The policy provided that "The insurance applied for will become effective on the first of the month following approval of the application by the Company if the application is approved by the 20th of the month. If approved after the 20th of the month, then the insurance will become effective on the first of the second month following approval.").

[144] *Id.*

[145] *Id.*

[146] *Id.* at 355 (holding that the Dibbles could have reasonably believed that when they paid the first premium … that the mortgage life insurance policy became effective at that time).

[147] *Id.* (holding that regardless of the ambiguity, or lack thereof, inherent in a set of insurance documents … the public has a right to expect that they will receive something of value for the premiums paid).

F. The Suicide Did Not Occur Within the Exclusion Period

Because the suicide exclusion period generally runs from the date the policy is issued, not the date of application,[148] and because, the insured's suicide tends to occur very close to the end of the exclusion period, beneficiaries often argue that the exclusion clause should be interpreted to run from the date of application rather than from the date of issuance.[149] In *Foster v. Globe Life Accident & Ins. Co.*, the beneficiary widow argued that her husband's death exactly one year and eleven months from the date of issuance of his life insurance policy should be covered, because the policy was applied for approximately forty-two days before the policy was issued.[150] Had the exclusion clause run from the date of application, the insured's death would have occurred twelve days after expiration of the exclusion.[151] The beneficiary argued that the insurance agent told her and her husband that the policy was effective upon application; although the language of the application stated otherwise, the plaintiff stated that the insurance agent would not allow her or her husband to read the application before signing it.[152] Rejecting this argument, the Court held that "the alleged

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[148] DANIEL MALDANADO, ET AL., COUCH ON INSURANCE §138.43 (3d ed. 2015).

[149] *See*, *e.g.*, Acme Life Ins. Co. v. White, 99 S.W.2d 1059 (Tex. Civ. App. 1936) (holding that the two-year period included the initial day of the policy; and, therefore, the anniversary day must be excluded); *see also* Foster v. Globe Life & Acci. Ins. Co., 808 F. Supp. 1281, 1281-84 (N.D. Miss. 1992).

[150] *Foster*, 808 F. Supp. at 1281-84.

[151] *Id.*

[152] *Id.*

oral representations of the agent . . . are insufficient to vary the plain, obvious and unambiguous language of the . . . application . . . ."[153]

The effective date of the policy can be difficult to ascertain in some cases. Because of the gap between the date of application and the date of issue of the policy, life insurance applicants often receive a "binder" or "conditional receipt" which provides that if the application is approved, the insurance will be effective as of an earlier date.[154] In *Parchman v. United Liberty Life Ins. Co.*, the conditional receipt given to the applicant stated that the policy would be effective as of the later of the completion of the application or "the date of completion of all required medical examinations."[155] The application was completed on July 20, 1977; the applicant was examined by a registered nurse on August 6, 1977; and the policy was delivered on November 17, 1977.[156] The insured died by suicide on August 3, 1979.[157] The issue was thus whether the August 6, 1977 examination was a required medical exam under the terms of the conditional receipt.[158] The plaintiff beneficiary argued that the term "medical examination" implied examination by a physician; and that the suicide exclusion thus lapsed on July 19, 1977,

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[153] *Id.* at 1287; *See* Craycraft v. Moran, No. 77AP-245, 1977 WL 200300, at *4 (Ohio Ct. App. July 28, 1977) (arguing to deny summary judgment for the insurer in part based on the allegations by the insured that the agent for the insurer had represented to the plaintiff that there would be insurance in effect without a suicide exclusion).

[154] *See* Springfield Impregnators, Inc. v. Ohio State Life Ins. Co., C.A. No. 3090, 1994 WL 95219, at *14 (Ohio Ct. App. Mar. 23, 1994).

[155] Parchman v. United Liberty Life Ins. Co., 640 S.W.2d 694, 695 (Tex. App. 1982).

[156] *Id.* at 695-96.

[157] *Id.* at 696.

[158] *Id.* at 697.

before the insured's death.[159] The Court rejected this reading, finding no precedent for the requirement that a "medical examination" must be performed by a physician rather than by another medical professional.[160] Similarly, in *Mauroner v. Massachusetts Indemnity & Life Ins. Co.*, the Court held that the suicide exclusion could not be interpreted to run from the date of application rather than the date of issuance of the policy.[161] This was so even though the policy provided for retroactive coverage to the application date upon approval,[162] and even though the negligence of the insurer and its agent in delaying the approval process, the issue date of the policy caused the death of the insured to fall within the suicide exclusion period.[163]

Several cases turn on the question of whether a new insurance policy is effectively a continuation of prior coverage, or the establishment of a new insurer/insured relationship. If the new policy is found to be merely a continuation, then the expiration of the suicide exclusion in the original policy will generally be held to be sufficient to terminate the exclusion. Whether the new policy is a continuation

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[159] *Id.* at 698.

[160] *Id.*

[161] Mauroner v. Massachusetts Indem. & Life Ins. Co., 520 So. 2d 451, 455 (5th Cir. 1988).

[162] *Id.* (reasoning that although the policy provided retroactive coverage, it did so "in accordance with its [the policy's] *provisions, limitations and exceptions*," and therefore, the retroactive date did not change the suicide exclusion clock).

[163] *Id.* at 456 ("[T]he cause of plaintiff's loss was not the deceased's choice in committing suicide . . . but defendants' breach of its duty to the insureds to correct its mistake timely.").

policy, or a new contract is often dependent on the specific facts of the case.

In *Navy Mutual Aid Association v. Barrs*, the insured owned a policy of life insurance issued in 1968.[164] As part of a divorce, his ex-wife was named the "irrevocable beneficiary" of that policy.[165] In 1993, the ex-spouse purchased additional coverage under the same plan.[166] Although the insured ex-husband died by suicide in 1994, within two years of the issuance of the additional insurance certificate,[167] the Court held that the suicide exclusion which applied was the original one which had started running in 1968, therefore, the insurer could not deny coverage based on the means of death.[168] However, in *Sonderegger v. United Investors Life Ins. Co.*, the Court held that a new policy issued pursuant to a conversion option offered to the insured by the insurance company was in effect a replacement policy.[169] As such, it was subject to a new two – year suicide exclusion.[170] The court based its conclusion on the differences in the terms of the two policies, including but not limited to an increase in the amount of the insurance from $50,000 to $100,000.[171]

Although the general rule is that when an insurance policy is renewed, the time limitation of the suicide exclusion relates back to the

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[164] Navy Mut. Aid Ass'n v. Barrs, 732 So. 2d 345, 356 (Fla. Dist. Ct. App. 1998).
[165] *Id.* at 346.
[166] *Id.*
[167] *Id.* at 348.
[168] *Id.* at 346.
[169] Sonderegger v. United Invs. Life Ins. Co., 829 P.2d 605, 610 (Kan. Ct. App. 1992).
[170] *Id.*
[171] *Id.*

initial issue date of the policy and does not restart,[172] difficulties also can arise for an insured when switching from one insurance policy to another. In *All American Life Ins. Co. v. Puckett Bros.*, an insurance company sued for a declarative judgment that it had no obligation to pay the proceeds of a policy even though it had insured the life of the decedent for fifteen years.[173] The defendant corporation, owner and beneficiary of a life insurance policy on its president, had first purchased a one million dollar policy in 1984, and renewed that policy annually until 1997.[174] In 1998, in order to reduce the premiums from $2,129 to $930 per month, the defendant's insurance agent advised defendant to "drop" the first policy and to "obtain" a new policy.[175] Unfortunately, the insured died by self-inflicted gunshot wound in 1999, and the insurer argued that the suicide exclusionary period restarted upon the issuance of the 1998 policy.[176] The Court noted that the question of whether the suicide exclusion continues to run or is restarted depends on whether the new policy was intended "merely a continuation of, or a replacement of, the [original] policy."[177] If it was intended as a continuation, then the original suicide exclusion would still control; if a replacement, then a new exclusionary period would begin.[178] On the facts of *Puckett*, the Court held that "the intent of the

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[172] *See, e.g.,* Founders Life Assurance Co. of Fla. v. Poe, 251 S.E.2d 247, 249 (Ga. 1978).

[173] All Am. Life Ins. Co. v. Puckett Bros., 139 F. Supp. 2d 1386, 1388 (N.D. Ga. 2001).

[174] *Id.*

[175] *Id.*

[176] *Id.*

[177] *Id.* at 1391.

[178] *Id.*

parties . . . was to create a 'new' policy rather than merely a policy to replace the original contract[,]"[179] even though key terms such as the insured, the beneficiary and the amount remained constant across both policies.[180] Thus, the insured's suicide triggered the exclusion, and the insurance company had no obligation to pay the proceeds of the policy.[181]

Not all courts have been so strict. In *Occidental Life Ins. Co. of North Carolina v. Hurley*, a Court allowed a plaintiff to collect the proceeds of a life insurance policy issued less than two years previously on the life of her daughter after her daughter's death by suicide.[182] The policy insuring the life of the child had been issued pursuant to an option in a previously held policy which insured the life of the mother and minor child.[183] Because the insurer had obligated itself to issue the subsequent policy upon request once the child reached the age of twenty-one,[184] the Court held that the stand-alone policy covering the child should be considered a continuation of the previous policy,[185]

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[179] All Am. Life Ins. Co. v. Puckett Bros., 139 F. Supp. 2d 1386, 1388 (N.D. Ga. 2001).

[180] *Id.*

[181] *Id.* at 1392; *see also* United Fence Co. v. Great-West Life Assurance Co.,723 P.2d 722, 724 (Ariz. Ct. App. 1986) (involving a replacement life insurance policy on the president of the beneficiary corporation).

[182] Occidental Life Ins. Co. v. Hurley, 513 S.W.2d 897, 898 (Tex. Civ. App. 1974).

[183] *Id.*

[184] *Id.*

[185] *Id.* at 900.

notwithstanding that the primary insured, amount and premiums had all changed from one policy to the other.[186]

In *Larson v. TransAmerica Life & Annuity Ins. Co*., the Court held that whether a replacement policy was a continuation of a previous policy for purposes of the suicide exclusion was a question of fact that must be submitted to the jury upon the allegation of sufficient facts by the plaintiff beneficiary.[187] Further, the Court stated that an insurance agent who advised the insured to apply for a new policy, rather than exercising a renewal option, could be found to have breached a duty to the insured to adequately advise them of the terms of the coverage being offered;[188] and that such action by the insured could be the basis of an estoppel claim.[189]

G. The Clause is Ambiguous and Should be Construed in Favor of Coverage.

Because of the nature of insurance policies as contracts of adhesion, it is a fundamental tenet of insurance law that ambiguous language in the policies should be interpreted in favor of the insured and against the insurance company.[190] Several plaintiffs have argued that

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[186] *Occidental Life Ins. Co.*, 513 S.W.2d at 900–01. A similar result was reached in Jackson v. W. & S. Life Ins. Co., 451 So. 2d 1244, 1247–48 (La. Ct. App. 1984).

[187] Larson v. Transamerica Life & Annuity Ins. Co., 597 P.2d 1292, 1295 (Or. App. 1979).

[188] *Id.* at 1294, 1296.

[189] *Id.* at 1296.

[190] 1 NEW APPLEMENT ON INS. LAW §5.02[1] ("The rule of contra proferentum has been described as 'the first principle of insurance law.'") (citation omitted).

courts should find ambiguity in the language of their policies' suicide exclusions; unfortunately, they have been almost uniformly unsuccessful.

In *Officer v. Chase Ins. Life & Annuity Co.*, the insurance contract provided that in case the insured committed suicide within two years of the policy's issue date, the amount paid under the policy would be limited.[191] Specifically, the policy stated that "[w]e will limit the proceeds we pay under this policy . . . [and] [t]he limited amount will equal all premiums paid on this policy."[192] The beneficiary plaintiff argued that this language could be read to provide that the sum of all premiums paid would be the amount deducted from the face value of the policy (about one million dollars),[193] but the Court rejected this alternative reading, finding that "[r]easonably intelligent persons would not find that the provision was susceptible to [the plaintiff's] interpretation."[194]

In *Bilkey v. Sentle Trucking Corp.*, the plaintiff argued that the brochure given to the insured as part of the life insurance application process created an ambiguity because of its expansive description of the coverage provided and its failure to mention the suicide exclusion.[195] However, the Court rejected this approach, holding that "'it would be beyond reason to conclude that the information brochure . . . in its own words a 'very brief synopsis . . .' is to be a binding and conclusive

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[191] Officer v. Chase Ins. Life & Annuity Co., 541 F.3d 713, 715 (7th Cir. 2008) (applying Indiana law).

[192] *Id*.

[193] *Id*.

[194] *Id*. at 716.

[195] Bilkey v. Sentle Trucking Corp, No. WD-81-80, 1982 Ohio App. LEXIS 11835 (Ct. App. June 30, 1982).

portion of the entire coverage package.'"[196] As the contract clearly stated that "'the entire contract consists of this policy and the application,'"[197] the plaintiff could not use the promotional materials as the basis for an allegation that an ambiguity existed.[198]

In *Navy Mutual Aid Ass'n v. Barrs*, the insured had purchased insurance pursuant to a "master policy" in 1968; and additional insurance was purchased by his ex-wife pursuant to the same plan in 1994.[199] The insured died by suicide in 1994.[200] The case thus turned on whether the suicide exclusion clock started running in 1968 or in 1994 for purposes of the "additional" coverage.[201] Although the language of the 1994 certificate provided that "'the [insured] is entitled . . . to the following life insurance coverage(s) under *this* certificate as of the applicable effective date shown below;'"[202] the certificate also provided that coverage would be excluded if the insured died by suicide "within two years from the effective date of *a* benefit plan . . . ."[203] Because the words 'benefit plan' could reasonably be construed to refer to the 1968 master policy, and not to the 1994 certificate of additional insurance, the Court held that the ambiguity thus created must be

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[196] *Id*. at *5.
[197] *Id*.
[198] *Id.*
[199] Navy Mut. Aid Ass'n v. Barrs, 732 So.2d 345, 346 (Fla. Dist. Ct. App. 1998).
[200] *Id.*
[201] *Id.*
[202] *Id.* at 346.
[203] *Id.* at 346–47.

construed against the insurer, and that the beneficiary was entitled to both the 1968 original coverage and the 1994 additional coverage.[204]

Life insurance is often sold though group plans and this sometimes creates uncertainty about the measuring date of the suicide exclusion. In *O'Connell v. Savings Bank Life Ins. Co.*, the insured's employer obtained group coverage from the defendant insurer in 1988.[205] In 1991, the insured applied for insurance under that group policy, and his application was approved.[206] The certificate of insurance issued to the insured made reference to the group policy with an effective date of January 1, 1988, but also stated that "'[t]he effective date of an insured's insurance shall by the first day of the month following the date of approval.'"[207] The application was approved on January 31, 1991;[208] therefore the effective date pursuant to that policy language would be February 1, 1991. When the insured died by suicide on January 21, 1993, the beneficiary sued, claiming that the two "effective date[s]" created an ambiguity which must be resolved in favor of coverage.[209] The Court disagreed, holding that the plaintiff's proposed construction was not reasonable, because it would obviate the

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[204] *Id.* at 349. The Court also correctly rejected the insurer's contention that the parol evidence rule should bar introduction of the 1968 certificate, as the parol evidence rule is, by its terms, not applicable to cases in which the court is interpreting the language of a writing, not varying the terms of that writing by parol. *Id.*

[205] O'Connell v. Savings Bank Life Ins. Co., CV 94-0364536, 1997 WL 30037, *5 (Conn. Super. Ct. Jan. 14, 1997).

[206] *Id.*

[207] *Id.*

[208] *Id.* at *4.

[209] *Id.* at *5–*6.

suicide exclusion entirely for any insured purchasing insurance after two years from the inception of the group policy.[210]

H. The Suicide Exclusion as Substantially Performed

As discussed previously, the suicide exclusion operates as a condition to the insurance company's duty to pay proceeds under the policy.[211] At least one beneficiary has argued unsuccessfully that the "substantial performance" of the suicide exclusion should be grounds for a holding that the condition was satisfied, and that proceeds should be payable when the insured died by self-inflicted gunshot wound a mere thirty-four days before the expiration of the suicide exclusion.[212] This is probably the correct result, as the substantial performance doctrine applies to implied conditions, not to express conditions.

I. Conduct by the Insurer: Waiver, Estoppel and Negligence

Some beneficiaries have successfully argued that the negligence of the insurer or its agents was the cause of their loss of insurance benefits after the insured dies of suicide. It is generally accepted that the insurance company and agents owe a duty of care to insurance

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[210] *Id.* at 7 (The plaintiff's reading "strains credulity past the breaking point, for if the plaintiff's logic is followed, it means that the defendant included a suicide exclusion in its policy that was obsolete more than a year before the plaintiff's decedent even applied for the issurance.").

[211] DANIEL MALDANADO, ET AL., COUCH ON INSURANCE §138.37 (3d ed. 2015) ("Stipulations avoiding liability in case of death by suicide, whether sane or insane, have been held to be conditions subsequent.") (citation omitted).

[212] Officer v. Chase Ins. Life & Annuity Co., 541 F.3d 713, 719 (7th Cir. 2008) (applying Indiana law).

applicants,[213] however, the scope of that duty of care can be quite limited. Traditionally, an insurance agent's duty to an applicant is simply the duty to procure the insurance requested.[214] In order to expand the scope of that duty, an applicant must show that the relationship between the applicant and the agent supports the expansion of the duty,[215] or that the duty has been assumed by the agent,[216] or imposed on the agent by operation of law.[217]

In *Van Der Heyde v. First Colony Life Ins. Co.*, an insurance agent who solicited the insured to replace an existing policy with a newer one was held to have breached a statutory duty to the insured to advise the insured of the comparative features of the existing and proposed replacement policies.[218] The court further held that the breach of that duty could create an estoppel against the insurer denying

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[213] *See* ERIC M. HOLMES & JOHN A. APPLEMAN, 29 APPLEMAN ON INS. §52.2B, 420 (2d ed. 1996) ("Absent special circumstances, the agent's professional duty of care does not include (1) a duty to give advice about particular insurance coverages[;] (2) to explain a policy's coverage; or (3) to procure certain kinds of coverage.").

[214] *Id.*

[215] *See, e.g.*, Langwith v. Am. Nat'l Gen. Ins. Co., 793 N.W.2d 215, 219 (Iowa 2010).

[216] *See* Paper Savers, Inc. v. Nacsa, 59 Cal. Rptr. 2d 547, 548 (Cal. Ct. App. 1996) (holding that misrepresentation of terms by the agent can be grounds for holding the agent assumed a greater duty than the limited default duty).

[217] Ellis v. William Penn Life Assurance Co. of Am., 873 P.2d 1185 (Wash. 1994); *but see* Springfield Impregnators, Inc. v. Ohio State Life Ins. Co., No. C.A. 3090, 1994 WL 95219 at *21 (Ohio Ct. App. Mar. 23, 1994) (holding that failure to comply with regulatory requirements does not create a private right of action on the part of the beneficiary or insured).

[218] Van Der Heyde v. First Colony Life Ins. Co., 845 P.2d 275, 276 (Utah Ct. App. 1993).

coverage notwithstanding the insured's suicide, if the finder of fact determined that the agent failed to inform the insured of the effect on the suicide exclusion of the replacement policy.[219]

Without the statutory duty established by the Utah legislature in *Van der Heyde*, however, plaintiff beneficiaries have found it more difficult to prevail in cases alleging breach of duty by the insurance agent.[220] In *Malcom v Farmers New World Life Ins. Co.*, an insurance applicant with a disclosed "history of observation, care and treatment for depression" applied for and was issued two $100,000 life insurance policies.[221] After the insured's suicide within the exclusion period, the beneficiaries sued, alleging inter alia that the insured's disclosed history of mental illness, coupled with the fact that the applicant asked the agent about "the effect his treatment for depression might have on his application," created a duty on the part of the insurance agent to specifically advise the applicant about the existence and effect of the suicide exclusion.[222] The Court rejected this contention, holding that there was no duty on the part of the agent to specifically advise the insured about the exclusion where there was "no evidence suggesting

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[219] *Id.* at 280.

[220] *See* Petrulis v. Prudential Ins. Co. of Am., No. B212058, 2010 WL 2599278 (Cal. Ct. App. June 30, 2010) ("in the absence of an express agreement . . . or a holding out by the agent to assume greater duties than otherwise implied in the agency relationship, the onus is . . . squarely on the insured to inform the agent of the insurance he requires.").

[221] Malcom v. Farmers New World Life Ins. Co., 5 Cal. Rptr. 2d 584, 585-86 (Ct. App. 1992).

[222] *Id.* at 587-88.

[the applicant] asked . . . for coverage for all suicide-related death [or that the insured] sought clarification . . . after receiving the policies."[223]

In *Mauroner v. Mass. Indem. and Life Ins. Co.*, the insurer was found to have negligently delayed the approval of the applicant's life insurance policy for approximately five weeks.[224] The insured died by suicide three weeks prior to the second anniversary of the issue date of the policy.[225] Although the court noted that the theory that the negligence of the insurer caused the insured's death to fall within the suicide exclusion was one of first impression, the court recognized that existing caselaw supported the existence of a duty to timely process life insurance applications, and that there was no material distinction between the damages claimed in this case and the damages claimed in previous negligence actions; even though those cases generally involved "negligent delay . . . [which] prevented the applicant . . . from obtaining coverage elsewhere."[226]

It should be noted that there are two potential remedies in cases alleging breach of a duty by the insurer and its agents. In some cases, the holding is that the breach creates an estoppel against the insurer

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[223] Malcom v. Farmers New World Life Ins. Co., 5 Cal. Rptr. 2d 584, 588–89 (Ct. App. 1992).

[224] Mauroner v. Mass. Indem. & Life Ins. Co., 520 So. 2d 451, 455-56 (La. Ct. App. 1988) (noting that the delay was at least thirty-six days from the date when the policy should have been approved, in light of the defendant's normal business operations).

[225] *Id.* at 456.

[226] *Id.* at 455. In this, the *Mauroner* case represents a welcome departure from the traditional approach to suicide in American tort law, which has seen suicide as a superseding cause breaking the connection from the defendant's negligence to the plaintiff's harm. *See generally* Long, *supra* note 19.

raising the suicide exclusion as a defense to coverage.[227] In these cases, the beneficiary receives the insurance benefits to which they would have been entitled had the insurer not breached the duty as damages.[228] In other cases, however, the breach of duty is simply treated as a tort claim, which can potentially expose the insurer to damages well beyond the limits of the insurance policy.[229]

J. Conflict with State Regulation

States frequently regulate the terms of the suicide exclusion by statute. These statutes regulate the allowed length of the exclusion (generally, but not always, two years), as well as the terms under which a new policy can institute a new exclusionary period, and the effect of the suicide exclusion on the rights of the insured's beneficiaries. Occasionally, the terms of a policy issued conflict with the terms allowed by applicable law. In *Sagan v. Prudential Ins. Co. of America*, defendant insurer issued a policy which complied with Montana law with respect to the duration of the exclusion (two years), but that departed from Montana law with respect to the sum payable under the exclusion.[230] The policy provided that, upon suicide within the exclusion period, the insured's beneficiaries would be entitled to the return of all premiums paid plus interest.[231] The applicable Montana

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[227] *See, e.g.*, Ellis v. William Penn Life Assurance Co. of Am., 873 P.2d 1185, 1192 (Wash. 1994) (holding that the violation of regulatory requirements estopped the insurer from denying coverage).

[228] *Id.*

[229] *See, e.g.*, Friedman v. Royal Maccabees Ins. Co., B140068, 2002 WL 1062252 (Cal. Ct. App. May 28, 2002).

[230] Sagan v. Prudential Ins. Co., 857 P.2d 719, 720 (Mont. 1993).

[231] *Id.*

statute required life insurance policies "to provide for payment of an amount not less than the commissioner's reserve value in the event of death under circumstances to which the suicide exclusion applies."[232] Upon the death of the insured, the beneficiaries sued, claiming that this failure to comply with Montana law meant that the Court should strike the suicide exclusion from the policy and that they should receive the full value of the policy.[233] The Court disagreed, holding that contracts of insurance are to be read as though the governing statutes constitute part of the contract.[234] Since the Montana statute explicitly allowed suicide exclusions, the Court reasoned that the intent of the legislature could not have been that failure to comply with the statutory requirement in any respect resulted in invalidation of the entire exclusion.[235]

IV. HARMS OF THE EXCLUSION

The suicide exclusion as it is currently drafted and applied by insurers and courts not only does not necessarily achieve the purposes it is intended for; it also imposes large costs on the life insurance system.

A. Perpetuation of Stigma and Bias

By treating suicide as a wrongful act which is subject to the forfeiture of life insurance proceeds, the current exclusion clause maintains and continues a stigma against mental illness and bias against individuals with mental illnesses. While not every person who dies by

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[232] *Id.*

[233] *Id.*

[234] *Id.* at 721 (citing STEVEN PLITT ET AL., COUCH ON INSURANCE § 13:6 (2d ed. rev. 1983)).

[235] *Id.* at 722.

suicide is mentally ill,[236] suicide is a risk and a consequence of several mental illnesses.[237] In general, we should try to treat physical illness and mental illness on parity with each other,[238] and to combat the stigma associated with mental illness whenever possible.[239] Isolating one cause of death, which happens to be associated with mental illness, for exclusion from life insurance coverage perpetuates that stigma,[240] giving the families of those who die by suicide another reason to try to hide or deny the true cause of death of their loved ones.[241]

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[236] For an indepth discussion of the view that suicide can be a rational act and should be given legal protections, see Susan Stefan, *Rational Suicide*, IRRATIONAL LAWS (Oxford Univ. Press 2016).

[237] *See* TASMAN ET AL., PSYCHIATRY 493 (1997).

[238] *See* Parity in Mental Health & Substance Use Disorder Benefits, 26 USC §9812 (2018). For a discussion of legislative efforts to treat mental health on parity with physical health, see Jeremy P. Ard, *An Unfilfilled Promise: Ineffective Enforcement of Mental Health Parity Laws*, 26 ANNALS HEALTH L. ADVANCE DIRECTIVE 68 (2017).

[239] For a study of mental health stigma in judicial opinions, see Alexandra S. Bornstein, *The Facts of Stigma*, 18 YALE J. HEALTH POL'Y, L. & ETHICS 127 (2018).

[240] *Supra* notes 39-40 and accompanying text (describing how insurance statutes prohibit discrimination based on cause of death, except for suicide.).

[241] *See* Litman*, supra* note 85, at 396 ("[t]he relatives and friends of suicide victims feel themselves to be not only bereaved but stigmatized . . . . Evidently, [a coroner] certifying suicide is equivalent to a . . . verdict of 'guilty.'"); *see also* Chang, *supra* note 17, at 163 (describing how the wealthy would bribe the coroner to avoid a verdict of suicide and resultant forfeiture of goods).

B. Perpetuation of the Myth of Suicide as a Moral Wrong Rather than as a Disease Product

The suicide exclusion was initially conceived at a time when the act of suicide was considered a crime against God and the state.[242] Needless to say, this is no longer the case. However, mental illness and suicide continue to be stigmatized and popularly misunderstood as selfish, immoral or the product of a weak-willed mind.[243] The current enforcement of the suicide exclusion gives these misunderstandings the force of law.

C. Treats Mental Illness Differently than Physical Illness, in Violation of Current Trends

Although the vast majority of life insurance caselaw treats mental illness as different from physical illness, in accidental death insurance cases, the two are treated with parity as an exclusion from coverage. In *Metropolitan Life Ins. Co. v. Sullen*, the Court construed an accidental death insurance policy which excluded "death caused wholly or partly, directly or indirectly, by disease or bodily or mental infirmity, or by medical or surgical treatment or diagnosis thereof."[244]

D. Over-inclusiveness

The two-year exclusion for suicides prevents the payment of life insurance policy proceeds in cases where the insured had no intent to

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[242] Long, *supra* note 19, at 773 (2019).

[243] ALAN H. MARKS, HISTORICAL SUICIDE IN 1 HANDBOOK OF DEATH AND DYING 309, 316 (2003).

[244] Metro. Life Ins. Co. v. Sullen, 413 So.2d 1106, 1108 (Ala. 1982).

end their own life at the time the insurance policy was applied for and delivered.[245]

The exclusion also may prevent the payment of proceeds in cases in which the underlying disease which caused the suicide did not develop or did not become clinically significant until after the policy was applied for and issued.[246] This, of course, is exactly why individuals purchase life insurance and why denying coverage in these cases does not advance any legitimate interest of the insurance company or the state.

E. Under-inclusiveness

The two-year exclusion may fail to prevent some of the very problems it seeks to avoid for three reasons. First, by creating a bright line rule (two years) rather than a case-by-case inquiry into the harm sought to be avoided (fraud on the insurer or misrepresentation of risk), the exclusion allows a determined insurance applicant to purchase a policy of insurance, wait out the two-year exclusionary period, then end

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[245] *See* Bigelow v. Berkshire Life Ins. Co., 93 US 284 (1876) (insured's state of mind at time of suicide irrelevant to coverage under the 'modern' formulation of the suicide exclusion); DANIEL MALDANADO, ET AL., COUCH ON INSURANCE §138.38 (3d ed. 2015) (Even in jurisdictions in which the state of mind of the insured is relevant, the inquiry is into the "state of mind of the insured at the time of the suicide.").

[246] The cause of the suicide is, generally speaking, irrelevant to the question of coverage. *See supra* notes 127-138 and accompanying text (discussing the phenomenon of iatrogenic suicide and the fact that courts routinely deny coverage even where the suicide was a side effect of medical treatment).

their own life with the full knowledge that the insurer will have no choice but to pay the proceeds of the policy.[247]

Second, the harshness of the suicide exclusion may lead juries to find that any questionable death is an accident, rather than a suicide, in order to avoid the forfeiture of policy proceeds.[248] This phenomenon has been noted during the period of English legal history when suicide resulted in the forfeiture of the decedent's entire estate to the Crown.[249]

Finally*, Fister v Allstate Life Ins. Co.* is an example of the potential under-inclusiveness of the suicide exclusion as it is currently implemented.[250] In that case, the insured, who had accumulated significant personal and business debt and had allegedly participated in a fraudulent sale of securities, actively sought to end her own life.[251] She had recently taken out several life insurance policies, and was aware of the existence of the still-active suicide exclusions in those policies.[252]

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[247] Although there are no reported cases of this occurring, there is a hint of the possibility. Paul SF Yip & Feng Chen, *A Study on the Effect of Exclusion Period on the Suicideal Risk Among the Insured*, 110 SOC. SCI. MED. 26-30 (2014).

[248] *See* Chang, *supra* note 17, at 165 ("[J]uries continued to excuse many suicides . . . out of compassion or common sense . . . nullif[ying] the severity of forfeiture . . . ."); Mendelson & Freckelton, *supra* note 12, at 346 ("The beneficiaries … would invariabl argue that the assured's death was either not a suicide, or … that the suicide in question was not felonious. Juries … tended to be sympathetic.").

[249] Chang, *supra* note 17, at 165; Mendelson & Freckelton, *supra* note 12, at 346.

[250] Fister v. Allstate Life Ins. Co., 783 A.2d 194 (Md. 2001).

[251] *Id.* at 197.

[252] *Id.* at 197-98 ("Fister . . . [said] that her death could not appear to be a suicide because her life insurance policies excluded coverage in the event that the insured . . . commits 'suicide.'").

She therefore sought to arrange a death scene that would appear to be a murder, enlisting a friend to "hold [a] shotgun to her head while she pulled the trigger" by means of a string tied to the trigger housing.[253] When this mechanism failed to work, she convinced her friend to pull the trigger for her; he was convicted of manslaughter in her death.[254] Allstate refused to pay the proceeds of the existing life insurance policies, totaling $1,650,000, to the beneficiaries of Ms. Fister, citing the language of the suicide exclusion.[255]

The lower courts differed on the proper outcome of this case. The insured decedent clearly wanted to cause her own death, clearly knew of the suicide exclusion in her policies, and clearly structured the death in an attempt to hide the intentional nature of the death.[256] The Federal District Court for the District of Maryland entered summary judgment for the insurer on the basis of these facts.[257] On appeal, the Court of Appeals reversed and remanded the case to the state court, which entered summary judgment for the beneficiaries.[258] On appeal from that decision, the Maryland Court of Special Appeals again reversed and remanded the case,[259] at which point certiorari was granted by the Maryland Supreme Court.[260] Despite the clear evidence showing the decedent's intent to die, and despite her clearly inducing her friend

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[253] *Id.* at 197.

[254] *Id.*

[255] *Id.*

[256] Fister v. Allstate Life Ins. Co., 166 F.3d 332 (1998) ("There is no doubt from the record that [Fister] wished to end her life.").

[257] *See* Allstate Life Ins. Co. v. Fister, 765 A.2d 1024, 1031-32 (2001).

[258] Fister v. Allstate Life Ins. Co., 783 A.2d 194, 205 (2001).

[259] Allstate Life Ins. Co. v. Fister, 765 A.2d 1024, 1031-32 (2001).

[260] Fister v. Allstate, 770 A.2d 168 (2001).

to pull the trigger of the shotgun which caused her death, the Maryland Supreme Court held that the word "suicide" required that the insured's death be directly caused by her own action, and that the intervening act of her friend in pulling the trigger prevented the death from being a "suicide" as a matter of law.[261] The Court noted that the two-year suicide exclusion was specifically authorized (though not required) by Maryland state law,[262] but that the word "suicide" was not defined either by statute or by the language of the policy.[263] The Appellate Division Court then looked to the Maryland Assisted Suicide Act for a definition of the term, finding that "the Legislature defined 'suicide' as 'the act or instance of intentionally taking one's own life.'"[264] Finding that the definition crafted by the legislature was the equivalent of the plain meaning of the term,[265] the Court held that the decedent insured's death could not be considered a suicide, and that the beneficiaries were entitled to recover the proceeds of the policies.[266] Paradoxically, the *Fister* case represents a high water mark for beneficiaries trying to recover the proceeds of a policy when the insured chose to die; yet allows them to so recover under a set of facts which allows the insured to intentionally circumvent the intended purpose of the suicide exclusion: to prevent fraud on the insurance companies from those intending to cause their own death in order to collect the proceeds of the

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[261] *Fister*, 783 A.2d at 201-02.

[262] *Id.* at 200 (citing MD. CODE ANN., INS. § 16-215 (Lexis 2021)).

[263] *Id.* at 200.

[264] *Id.* at 201 (citing MD. CODE ANN. art. 27, § 416(b) (1999)).

[265] *Id.*

[266] *Id.* at 205. The sole concurring judge would have also allowed the beneficiaries to recover, but would have found the word "suicide" in the policy ambiguous in these circumstances, thus triggering the contra proferentum interpretive principle. *Id.* at 203 (Eldridge, J., concurring).

policies.[267] This demonstrates that, in certain circumstances, the suicide exclusion does not accomplish the aims of the insurers.

F. Forfeiture and Punishment

As described in Section I above, the original operation of the suicide exclusion to forfeit the insured's right to life insurance coverage was consistent with existing law which forfeited the property of the person who died by suicide to the state. This was explicitly punitive and deterrent in its aspiration, if not in fact in its effect. This punitive forfeiture is no longer any part of the law regarding individuals who die by suicide,[268] yet this effect remains in the treatment of their insurance policy proceeds.

Nonetheless, courts continue to apply the suicide exclusion mechanically in spite of forfeiture arguments raised by the insured's beneficiaries. One recent example of such application is *Officer v. Chase Ins. Life and Annuity Co.*.[269] In that case, the plaintiff was a life insurance beneficiary of a policy insuring his wife who died from a self-inflicted gunshot wound thirty-four days before the expiration of the suicide exclusion in her insurance policy.[270] The plaintiff argued that the exclusion should not be enforced, as it would constitute a disproportionate forfeiture; in that the benefit to the insurer of enforcing

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[267] *Id.* at 196.

[268] *See* Litman, *supra* note 85, at 395 ("[s]ince such punishments as mutilation of bodies or forfeiture of estates are repugnant to the American spirit, no penalty is provided for breaking the law against suicide" in those states which still criminalized suicide in 1967).

[269] Officer v. Chase Ins. Life & Annuity Corp., 541 F.3d 713 (7th Cir. 2008) (applying Indiana law).

[270] Id. at 717.

the exclusion was grosly outweighed by the detriment to the beneficiary of strict enforcement.[271] The Seventh Circuit, however, upheld the lower court's enforcement of the exclusion, refusing to apply the contract doctrine of disproportionate forfeiture to the suicide exclusion, stating that "if a plainly expressed … exclusion … in an insurance policy is not contrary to public policy, it is entitled to construction and enforcement as expressed."[272] The court thus missed an opportunity to apply the contract doctrine of disproportionate forfeiture to excuse the failure of the condition subsequent of the suicide exclusion.[273]

G. Harm to the Innocent Beneficiaries

As the critique of the *Officer* case in the last section suggests, the interests of the beneficiaries should be given more weight in determining what proper approach to the suicide exclusion. By definition, the person whose life is insured is deceased at the time the claim is made.[274] Refusing to pay the proceeds of the policy does not harm the insured. Rather, it harms the innocent beneficiaries of the policy, who have suffered a loss by the death of the insured.

Allowing forfeiture of policy proceeds has effects beyond the insured. Life insurance policies are routinely used in business settings

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[271] Id.

[272] Id. at 718-19.

[273] *See, e.g.*, E. Allan Farnsworth, Contracts (4th ed) §8.7 ("[C]ourts have excused a condition when extremem forfeiture would result if it were not excused … in determining whether the forfeiture is 'disproportionate,' a court must weigh the extent of the forfeiture by the obligee against the importance to the obligor of the risk from which he sought to be protected[…]").

[274] DANIEL MALDANADO, ET AL., COUCH ON INSURANCE §40:1 (3d ed. 2015).

in order to fund the needs of a close corporation upon the death of one of its founders or key employees.[275] Business relationships are one of the universally accepted forms of insurable interest in life insurance.[276] The operation of the suicide exclusion thus deprives small businesses of the funds necessary to survive the death of a key employee.[277]

Life insurance policies are also widely used in family law as a means of assuring support for children from prior marriages.[278] Strict application of a suicide exclusion can have the effect of upsetting these carefully constructed plans. In *Tintocalis v. Tintocalis*, a divorced couple had stipulated to a court order requiring the husband to keep in effect a policy of life insurance in the amount of $100,000.[279] In order to perform this obligation, the husband purchased a life insurance policy, but committed suicide before the two year exclusionary period

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[275] *See generally* Ed Leefeldt, *The Right Insurance for a Business Partner's Death*, FORBES ADVISOR (March 27, 2020), https://www.forbes.com/advisor/life-insurance/key-man-insurance/.

[276] DANIEL MALDANADO, ET AL., COUCH ON INSURANCE §41:20 (3d ed. 2015) (discussing the requirement of an insurable interest in the life insurance context).

[277] *See, e.g.*, All Am. Life Ins. Co. v. Puckett Bros. Mfg. Co., 139 F. Supp. 2d 1386 (N.D. Ga. 2001); United Fence Co. v. Great-West Life Assurance Co., 723 P.2d 722 (Ariz. Ct. App. 1986) (both involving life insurance policies taken out by businesses on the lives of their senior executives).

[278] MARIAN DOBBS, DETERMINING CHILD AND SPOUSAL SUPPORT §4:113 (discussing the use of life insurance to provide child support)*; see also* Navy Mutual Aid Ass'n v. Barrs, 732 So. 2d 345, 346 (1998) (divorce settlement required that the former wife be named as "irrevocable beneficiary" of the husband's life insurance policy).

[279] Tintocalis v. Tintocalis, 25 Cal. Rptr. 2d 655, 656 (1993).

was completed.[280] Despite the general rule that "[o]rders for spousal support ordinarily terminate upon the death of the obligor spouse[,]"the Court found that the husband's suicide was a breach of the obligation to maintain life insurance, and that this breach could be remedied with an action against the estate of the decedent.[281]

The caselaw does not show any cases in which this principle has been carried over into the business context, but one can imagine a situation in which partners in a close corporation agree among themselves to maintain life insurance on their lives for the benefit of the corporation upon the death of any of them. Would a court hold that the death by suicide of one of the partners is a breach of that agreement, damages for which could be recovered against the estate of the decedent?

V. RECOMMENDATIONS FOR CHANGE

Insurance companies have a legitimate interest in ensuring that the risks they take on are known and calculable; and in ensuring that applicants for insurance policies accurately state the risks that they present. However, both of these interests can be protected without perpetuating the harms currently caused by the traditional suicide exclusion.

A. Revive and Expand old Missouri Approach

If states will revise their insurance statutes and regulations to include this provision, then even insurance policies written on old forms including a broad suicide exclusion will be denied enforcement by courts unless there is actual wrongful behavior by the applicant for insurance that would justify denial of coverage.

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[280] *Id.* at 657.

[281] *Id.* at 656, 659.

B. Focus on the Purpose of the Exclusion

It is a maxim of insurance law that exclusions should not be given effect beyond their purpose. Since the purposes of the suicide exclusion clause are to minimize adverse selection and moral hazard, and to disincentivize the purchase of insurance as a facilitator of suicidal intent, the application of the clause should be limited to cases where those risks are present.

Another interpretive canon of insurance law, at least in some states, is that the reasonable expectations of the insured should be given effect. Although insureds should not expect that they should be able to take out life insurance as part of a suicidal scheme, most insureds probably do not expect that coverage would be denied because of the operation of a side effect of a therapeutic treatment, when no other side effects are treated in this way.

C. Focus on the Actual Wrongful Acts

The modern suicide exclusion should be focused on the potential for misrepresentation by the applicant for insurance. This will protect the insurance company's interest in avoiding adverse selection and moral hazard, while also protecting the insured's legitimate interest in having death from all diseases, not just physical diseases, covered once the policy is issued.

It is a basic tenet of life insurance law that one cannot obtain a policy of insurance on the life of another with the intent to cause the death of the person whose life is insured.[282]

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[282] DANIEL MALDANADO, ET AL., COUCH ON INSURANCE §62:1 (3d ed. 2015).

It is clear that misrepresentation as to one's health, including mental health, at the time of the application will support an insurer's decision to rescind a policy based on misrepresentation.[283]

D. Develop Appropriate Screening Questions

Insurance companies regularly ask detailed questions of their applicants, and appropriate questions can be developed to guard against adverse selection and fraud.

E. Public Policy Arguments

Like other contracts, provisions of insurance policies which are held to violate public policy, can be refused enforcement by the courts.[284] In other circumstances, insurance policy provisions which have relied on strict time-based exclusions from coverage have been deemed to violate public policy where they produced results deemed to be unfair or to privilege the insurance company's interests over the legitimate interests of the insured.[285]

i. Coverage of Suicide is Not Against Public Policy

Caselaw from the last one hundred years shows that, although the suicide exclusion is a longstanding feature of life insurance policies, public policy does not demand that it be written or interpreted as broadly

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[283] *See, e.g.*, PWPG, LLC v. Primerica Life Ins. Co., No. D065467, 2014 WL 3661110, at *1 (Cal Ct. App. filed July 24, 2014) (applicant denied having used or been treated for use of illegal drugs as part of life insurance application; this constituted material misrepresentation justifying insurer's rescission of coverage during incontestability period).

[284] *See generally* E. ALLAN FARNSWORTH, CONTRACTS §5.1 (4th ed. 2004).

[285] *See* Strickland v. Gulf Life Ins. Co, 242 S.E.2d 148 (Ga. 1978).

as it currently is. Several older cases from the early Twentieth Century take the position that, although insurers may exclude coverage of all deaths by suicide, less restrictive language is also permissible and will be given less restrictive effect.[286] Thus, public policy does not require that all deaths by suicide within the exclusionary period be denied life insurance coverage. The keys to coverage in these older cases lie in 1) the inclusion of the language "whether sane or insane" in the suicide exclusion, and 2) the state of mind of the insured when he died, specifically whether he was capable of understanding the nature of the act and its fatal consequences. After these early cases, the "sane or insane" language was virtually uniformly incorporated into life insurance policies, thus narrowing the coverage provided by those policies.

ii. "Gruesome Choice" Doctrine

In *Strickland v Gulf Life Ins. Co.*, an insured with a policy covering accidental injury faced a gruesome choice.[287] The policy would pay damages for "dismemberment by severance," but only, by the terms of the contract, if a limb was lost within ninety days of the original injury.[288] Strickland and his doctors treated his injury for 118 days, but ultimately were forced to amputate his right leg.[289] Strickland sued for the insurance benefits after the insurance company refused to pay, citing the plain language of the policy.[290] Although the trial court

[286] *See supra* Section II.A.
[287] *Strickland*, 242 S.E.2d 148.
[288] *Id.* at 148.
[289] *Id.*
[290] *Id.*

entered summary judgment for the insurer, the Supreme Court of Georgia reversed, finding the strict application of the ninety -day exclusion potentially violative of public policy.[291] In so doing, the Court noted that the purpose of the time limitation was to act as a proxy for the problem of causation – that is, the longer from the date of the accident, the more likely that the eventual amputation was due to a cause unrelated to the accident.[292] The Court held that the case be remanded so that the trial court could properly assess the argument that the strict time limit was violative of public policy.[293]

The time limit in *Strickland* is similar, but not identical, to the strict time limit in the suicide exclusion. In *Strickland* and similar cases, the loss to the insured must occur within a certain time from the underlying insured event in order for the loss to be covered.[294] In the suicide exclusion cases, the time limit must pass before the loss in order to trigger coverage. However, the superficial distinctions (similar to the distinction at contract law between a condition precedent and a condition subsequent) should not obscure the fundamental similarity. In both scenarios, the insured risks the total loss of his bargained-for benefits based on the timing of an event potentially unrelated to the purpose of the exclusion. The lesson of *Strickland* and other cases like it is that courts should be reluctant to give insurance policy exclusions their strict meaning when doing so risks penalizing insureds or their beneficiaries with forfeiture disproportionate to the benefit to the insurer

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[291] *Id.* at 148, 152.

[292] Strickland v. Gulf Life Ins. Co, 242 S.E.2d 148, 150 (Ga. 1978) (citing INA Life Ins. Co. v. Commonwealth Ins. Dep't, 376 A.2d 670 (Pa. Commw. Ct. 1977) (holding that the causation problem did not justify the imposition of a strict time limit)).

[293] *Id.* at 152.

[294] *Id.* at 148.

itself. Rather, courts should employ the maxim that "[a] construction leading to an absurd, harsh, or unreasonable result should be avoided,"[295] and should construe the term as requiring a showing that the harm intended to be avoided was in fact present in order for the insurer to deny coverage. In the case of *Strickland*, this would be the causation issue – was the amputation of the limb causally related to the covered accident? In suicide exclusion cases, it would be the misrepresentation issue – did the insured in fact commit fraud on the insurer by seeking to purchase a policy with the intent of killing the person whose life is insured?

VI. CONCLUSION

The argument made in this Article is, in the end, not new. It has been made as early as 1826, in the English case of *Garrett v. Barclay*.[296] In that case, the insured's assignees argued that the insured's drowning death in shallow water should not operate to void his insurance coverage because the clause should be interpreted narrowly to prevent frauds by persons insuring their lives and shortly afterward preferring death to benefit their families.[297] Although in that case the Court of Exchequer avoided the issue by ruling the insured's death not a suicide,[298] the argument made by the insureds is a sound one, especially in light of

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[295] *See* Keith A. Rowley, *Contract Construction and Interpretation: From the "Four Corners" to Parol Evidence (and Everything in Between)*, 69 MISS. L. J. 73, 126 (1999).

[296] *See* Mendelson & Freckleton, *supra* note 12, at 346. The author notes that there is no independent report of the *Garrett* case due to its age, however it is discussed in the Mendelson & Freckleton source at length.

[297] *Id.*

[298] *Id.*

almost two hundred years of scholarship into the nature and causes of suicide.[299] Suicide is not an immoral act or the act of the weak-willed. It is instead the culmination of a disease process, a response to terminal illness or unbearable suffering, or perhaps the inadvertent result of medical treatment.[300] In the absence of actual fraud on the insurance company, or misrepresentations in the application process, there is no longer any legitimate reason to deny coverage for the sole reason that the cause of death was self-inflicted rather than the result of a physical disease process. The punitive criminal, civil and religious ideas of the Nineteen Century should not be a valid basis for Twenty-first Century outcomes, especially when our best knowledge shows them to be at best counterproductive and at worst harmful. Insurance companies, courts, insurance regulators and state legislators should act accordingly and implement the recommendations of this Article to ameliorate the harms caused by current doctrine.

[299] *See, e.g.*, MICHAEL CHOLBI, SUICIDE, STANFORD ENCYCLOPEDIA OF PHILOSOPHY, (Fall ed. 2017), https://plato.stanford.edu/entries/suicide.
[300] *Id.*