WHEN IS AN ACCIDENT NOT AN ACCIDENT?

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Accidental death insurance policies typically require a covered death to be a "direct result" of an accident and not "contributed to" by sickness or disease. This policy language has evolved over approximately the last one hundred years. In determining whether a loss would be covered, courts initially focused on whether a death occurred by accidental means or was an accidental result. If death was an accidental result, but did not occur by accidental means, there was no coverage. As time passed, courts turned their focus to proximate causation. *See*, *Man, God and the Serbonian Bog: The Evolution of Accidental Death Insurance,* 86 Iowa L.Rev. 173 (October, 2000)(presenting a compelling history of accidental death insurance that began in the latter part of the nineteenth century with the hazards of rail travel). This article focuses on the facts and circumstances that courts have recently found necessary to establish accidental death coverage in the face of policy exclusions for losses "contributed to" by sickness or disease. If sickness or disease is the proximate cause of death, and not just the accident, coverage for accidental death will be excluded. An accident will not be an accident.

In the leading and oft-cited case of *Kellogg v. Metro. Life Ins. Co.,* 549 F.3d 818 (10th Cir. 2008), the Tenth Circuit examined the causation requirement in contemporary accidental death insurance policies. Although *Kellogg* was an ERISA case, as accidental death policies are often employer-sponsored and fall under ERISA, its contractual analysis is nevertheless analogous and pertinent to accidental death insurance cases that fall outside of ERISA's scope.

In *Kellogg*, the decedent was driving a minivan that crossed the center line and struck a tree on the opposite side of the road. Decedent was found hunched over in the driver's seat incoherent and bleeding from his face. He was transported to a local hospital where he died. A witness who had seen the driver prior to the crash stated that the driver appeared to have had a seizure. The coroner determined that the cause of death was extensive subarachnoid hemorrhage to the brain secondary to traumatic transverse basilar skull fracture. The decedent was also found to have had excessive levels of five prescription and over-the-counter drugs in his system that could have caused psychosis, confusion, delusion, hallucinations, psychotic episodes and paranoia. However, it was unknown whether the excessive levels of drugs contributed to the decedent's death.

Mr. Kellogg was insured under an accidental death and dismemberment insurance plan that provided coverage in the amount of six times his annual pay if he sustained an accidental injury that was "the direct and sole cause of a covered loss" – i.e., if the covered loss was the direct result of accidental injury, independent of other causes. The policy also contained an exclusion for "any loss caused or contributed to by physical or mental illness or infirmity, or the diagnosis or treatment of such illness or infirmity." *Kellogg*, 549 F.3d at 821. MetLife, the insurer, initially denied the claim based upon the foregoing exclusion and the witness's

statement that the decedent was having a seizure at the time of the accident.

The Tenth Circuit found that MetLife had erroneously denied the claim based on its conclusion that Mr. Kellogg's physical illness was the cause of the crash. MetLife should have addressed whether Mr. Kellogg's death was caused by his purported seizure. The court concluded that the car crash, not the seizure, caused Mr. Kellogg's death and therefore, the exclusionary clause did not apply. It observed that "courts have long rejected attempts to preclude recovery on the basis that the accident would not have happened but for the insured's illness." *Kellogg*, 549 F.3d at 831. While the seizure may have caused the crash, it was not the cause of the death. The policy language did not exclude losses due to accidents that were caused by physical illness; instead, the policy excluded only losses/deaths caused by physical illness.

Consistent with *Kellogg*, recent court opinions reveal that policy exclusions for sickness or disease will likely be enforceable only if the loss/death was a direct result of sickness or disease. Thus, the beneficiary of the unfortunate person who suffers an accident as a result of an underlying health condition, sickness or disease will be compensated only if the underlying condition did not directly cause the insured's death. An accident is an accident so long as it is the proximate cause of death.

For example, in *Edwards v. Monumental Life Ins. Co.*, 812 F.Supp.2d. 1263 (D. Kan. 2011), a decedent who had been treating for severe chronic pain from arthritis died from Oxycodone toxicity. Her death was a direct result of the medication she had been prescribed, not her sickness. Coverage for accidental death was not excluded.

In *Kassa v. Plans Admin. Comm. of Citigroup, Inc.*, 2011 U.S. Dist. LEXIS 75797 (D. N.M. June 30, 2011), a seventy-seven-year-old man suffering from cardiovascular disease, Parkinson's, diabetes and other significant conditions died following a fall at his home. He suffered a broken leg in the fall and was hospitalized. He was released in stable condition the next day, and then found dead the day after that. The New Mexico district court found that the decedent's fracture aggravated his coronary artery disease and caused his death. Therefore, accidental physical injury caused decedent's death, resulting in coverage under the policy.

In *LaAsmar v. Phelps Dodge Corp. Life*, 605 F.3d 789 (10th Cir. 2010), the court found that accidental death benefits were payable where a decedent drove drunk at an excessive rate of speed and died in a rollover crash. The court concluded that the decedent died as a result of an accident. (In that case the policy did not contain an exclusion for drunk driving, though such exclusions are common). The court discussed its own examples of accidents versus non-accidents based upon a reasonable person standard. According to the court, it would not be reasonable to believe that a death resulting from an intentional car crash, or from a game of Russian roulette or from playing chicken with a train would be accidental. On the other hand, the court indicated that a reasonable person would generally believe that a death occurring after losing control of a vehicle due to distraction would be an accidental death. The court further theorized that most people would believe an accident had occurred where a driver engaged in conduct making the crash more likely, such as driving while sleepy or in bad weather.

Other recent cases have similarly followed the trend that the sickness/disease exclusion is only enforceable where the sickness or disease directly or proximately caused the death of the decedent. For instance, in *Genal v. Prudential Ins. Co. of Am.*, 2012 U.S. Dist. LEXIS 96390 (D.S.C. July 12, 2012), a decedent afflicted with multiple sclerosis who fell off his scooter in his backyard was found to have died as a result of a covered accidental environmental heat

exposure, even though he was unable to get up following the fall because of his neurological deficits.

In *Ferguson v. United of Omaha Life Ins. Co.*, 2014 U.S. Dist. LEXIS 33218 (D.Md. Dec. 11, 2014), it was held that an insured with a seizure disorder, who drowned in a pool, died in an accident. The court opined therein that the policy language requiring the accident to be "independent of sickness and all other causes" meant that the injury, not the accident, must be independent of sickness and all other causes. The court rejected the insurance company's position that it need only show a preexisting condition caused the accident which caused the loss.

Also, in *Yasko v. Reliance Std. Life Ins. Co.*, 2014 U.S. Dist. LEXIS 88469 (N.D. Ill. June 30, 2014), the insured's death by embolism after traveling by air from Chicago to Mexico was a covered accidental death, despite the insured's prior cancer diagnosis. The applicable policy required that benefits be paid if, due to injury, the insured suffers a death. The insurer failed to demonstrate that cancer had caused or contributed to the embolism that caused the insured's death.

Conversely, an automobile accident was not found to have caused a decedent's death when an insured's vehicle crossed the center line on I-95 and came to rest at the border of woods where he was found slumped over in the front seat. The vehicle had minor damage. An autopsy revealed that cardiovascular disease was the cause of death and that a secondary cause of death was blunt trauma to chest. *See, Phan v. Metropolitan Life Ins. Co.*, 2014 U.S. Dist. LEXIS 19864 (D. Mass. Feb. 18, 2104). The *Phan* court cited *Vickers v. Boston Mut. Life Ins. Co.,*135 F. 3d 179, 181 (1st Cir. 1988)(quoting *Bohaker v. Travelers Insurance Co*., 102 N.E. 342, 344 (Mass. 1913)):

> A sick man may be the subject of an accident, which but for his sickness would not have befallen him. One may meet his death by falling into imminent danger in a faint or in an attack of epilepsy. But such an event commonly has been held to be the result of an accident rather than of disease.

2014 U.S. Dist. LEXIS 19864, at *19-20. The court concluded that, if the converse were true, and "an accident triggered a fatal episode of disease, the ultimate fatality would be considered to have been 'caused or contributed to' by disease, rather than by (or, at very least, as well as by accident)." *Phan*, 2014 U.S. Dist. LEXIS 19864, at *20.

The Ninth Circuit recently rejected the *Kellogg* reasoning and, instead held that accidental death benefits were not payable when illness "substantially contributed to a loss" even though injury was the predominant or proximate cause of death. *See, Creno v. Metropolitan Life Ins. Co.*, 2014 U.S. Dist. LEXIS 113643 (D. Ariz. Aug. 14, 2104)(citing *McClure v. Life Ins. Co. of N. Am.*, 84 F.3d 1129 (9th Cir. Nev.1996)). In *Creno,* a decedent was found dead in a pond and his death certificate indicated drowning as the immediate cause of death along with seizure disorder as a significant condition contributing to, but not resulting in the underlying cause of death. The court found that the record supported that the decedent's seizure was the immediate cause of his drowning and, thus, benefits were not payable.

Similarly, in *Kitsock v. Baltimore. Life Ins. Co.*, 2014 U.S. Dist. LEXIS 2155 (M.D.Pa. Jan. 8, 2014), the court enforced the plain meaning of the exclusion for death contributed to by sickness or disease, and denied benefits to the beneficiary of the insured who died after falling onto the floor in his bedroom injuring his leg and head. The policy in that case required that death must occur solely through external, violent and accidental bodily injury, and recovery was precluded for death resulting solely or partly from mental or bodily infirmity,

illness, disease or infection. Benefits were payable only if preexisting infirmities, illness or diseases did not contribute to his death. The court found that it was undisputed that the insured suffered from numerous conditions that could have caused or contributed to his death, such as conditions making him unsteady and prone to falls. There was no basis for a juror to conclude that the insured had died solely as a result of an accident and that his preexisting conditions did not contribute to his death. *But see, Chebatoris v. Monumental Life Ins. Co.,* 2010 U.S. Dist. LEXIS 86367, at *8-16 (W.D.Pa. Aug. 23, 2010)(district court followed *Kellogg's* instruction that the sickness or disease exclusion is enforceable only where disease or infirmity was a proximate cause of death, holding that the insurer erred in focusing on whether death was caused directly and independently by an accident, and stating that "[a]s the Policy does not exclude benefits in the presence of indirectly contributory disease or infirmity, it does not, under the applicable Pennsylvania case law, require that Plaintiff demonstrate that her mother's death was caused solely or exclusively by her injury.").

Accordingly, when presented with a claim for accidental death benefits where the decedent suffered from underlying sickness or disease, it must be determined whether there is sufficient evidence that the underlying condition was a proximate cause of death. If the underlying condition contributed to the accident and not the death, it is likely that a court will apply the reasoning of *Kellogg, supra*, and that the claim will be compensable. Coverage will not be excluded. An accident will be an accident.

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