OXYCONTIN OVERDOSE DEATHS: VIRGINIA'S LATEST TREND IN ACCIDENTAL DEATH COVERAGE LITIGATION?

Robert B. "Chip" Delano, Jr.*

"OxyContin is a narcotic pain reliever similar to morphine . . . intended to relieve pain which is moderate to severe in intensity."[1] The Federal Drug Administration's approval of the prescription pain medication OxyContin in 1995,[2] and the exponential popularity (and resulting abuse) of OxyContin[3] and other such powerful painkillers that followed, have led to a national epidemic of prescription drug abuse.[4] Consequently, insurers have increasingly grappled with accidental death claims arising out of abuse of prescribed medications such as OxyContin.[5]

Fully cognizant that "[w]hat can be called an 'accident' has, at times, been a puzzling question"[6] and that "[t]he word 'accidental' is not easy to define in

* Mr. Delano is a partner in the Richmond office of Sands Anderson Marks & Miller, P.C. and was VADA president from 2002 to 2003.

1 Nickola v. CNA Group Life Assur. Co., 2005 WL 1910905 at *2 n.4 (N.D. Ill. 2005) (citing www.fda.gov.cder/drug/infopage/oxycontin).

2 S*ee* Cordill v. Purdue Pharma, L.P., 2002 WL 31474466 at *1 n.1 (W.D. Va. 2002).

3 *See* www.fda.gov/cder/drug/infopage/oxycontin ("In recent months, there have been numerous reports of OxyContin diversion and abuse in several states. Some of these reported cases have been associated with serious consequences including death.")

4 *See, e.g.,* United States v. Marty, 450 F.3d 687, 690 n.4 (7th Cir. 2006) ("The danger that arises from the sale, misuse, and abuse of OxyContin is not excused by its status as a prescription painkiller. While Marty may have obtained her pills from a pharmacy, rather than a drug dealer, her crime still poses a grave danger to the community. Law enforcement officials around the country have been wrestling with an epidemic of prescription drug abuse, especially of powerful painkillers such as OxyContin, popularly known as 'hillbilly heroin'"); McCauley v. Purdue Pharma, L.P., 331 F. Supp. 2d 449, 464 (W.D. Va. 2004) ("As a trial judge hearing criminal cases, I am unfortunately all too familiar with the human misery caused by the abuse of prescription drugs, particularly including OxyContin. Lives wasted, families disrupted, communities devastated, because of overuse of these drugs.")

5 In addition to abuse of OxyContin by patients, in Virginia there has been at least one criminal prosecution of a well-known physician who prescribed large quantities of OxyContin and other powerful opioid painkillers as part of a high-dose protocol for patients suffering from chronic pain. *See* United States v. Hurwitz, 459 F.3d 463 (4th Cir. 2006).

6 Resource Bankshares Corp. v. St. Paul Mercury Ins. Co., 401 F.3d 631, 637 (4th Cir.), *cert. denied,* 546 U.S. 978, 126 S. Ct. 568, 163 L. Ed. 2d 463 (2005). In the *Resource Bankshares* case, which was decided under Virginia law, the court acknowledged this difficulty in attempting to answer the question of whether something is an accident when it stated:

> Everyone knows what an accident is until the word comes up in court. Then it becomes a mysterious phenomenon, and, in order to resolve the enigma, witnesses are summoned, experts testify, lawyers argue, treatises are consulted and even when a conclave of twelve world-knowledgeable

specific legal terms applicable to every case,"[7] this article focuses on issues frequently faced in the defense under Virginia law of such a claim for benefits under an accidental death insurance policy or a life insurance policy with a double indemnity clause arising out of an insured's death caused by his voluntary taking of a quantity of prescribed medications in excess of his prescribed dosage.

I. Familiar Fact Pattern

A typical factual scenario would be that the insured has been living with severe chronic pain for an extended period of time for which he has been treated by multiple physicians who have prescribed OxyContin or similar powerful painkillers in an attempt to help manage the pain. Despite being instructed by his physicians about the dangers of the drug and/or perhaps signing a narcotics use agreement with his doctor outlining the appropriate use of the controlled medication, the insured has taken more medication than prescribed on multiple occasions. During that same time, the insured may also have received treatment and/or been hospitalized for depression and/or suicidal thoughts. Ultimately, the insured is found dead with an empty bottle, which should have contained a prescribed month's worth of the OxyContin pills, beside his body. The toxicologist's findings reveal a postmortem blood concentration of OxyContin/oxycodone well in excess of his prescribed dosage. The medical examiner lists the insured's immediate cause of death as drug poisoning resulting from substance abuse.

II. Was the Insured's Death a Covered "Accidental Death"?

In accidental death litigation, the plaintiff has the burden of proving that the insured's death was an "accidental death" covered by the policy.[8] "[W]hen death occurs, it is to be presumed to be the result of natural dissolution rather than of accidental injury."[9]

At the outset, an accidental death claim is controlled by the governing language of the policy, rather than the classification of manner of death made by the medical examiner, who is not charged with interpreting the policy. Therefore, a medical examiner's use of the term "accident" in characterizing an insured's manner of death is merely a function of the five choices of the manner of death with which he was typically presented on the death certificate form (*i.e.*,

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individuals agree as to whether a certain set of facts made out an accident, the question may not yet be settled, and it must be reheard in an appellate court.

407 F.3d at 637 n.5 (citation omitted). Nevertheless, in *Resource Bankshares,* the Fourth Circuit, citing settled Virginia law, had little difficulty in finding that the intentional sending of unsolicited faxes did not constitute an "accident" under a comprehensive general liability policy's property damage definition. *Id.* at 637-39.

7 Aetna Ins. Co. v. Carpenter, 170 Va. 312, 324, 196 S.E. 641, 646 (1938).

8 Estate of Mohamed v. Monumental Life Ins. Co., 138 F. Supp. 2d 709, 719-720 (E.D. Va. 2001) (citing General Accident Fire & Life Assur. Corp., Ltd. v. Murray, 120 Va. 115, 126, 90 S.E.620, 624 (1916)).

9 *Id.*

natural, accident, suicide, homicide, or undetermined) and is not determinative of any lawsuit seeking recovery on the policy.[10]

In *Smith v. Combined Insurance Co. of America,*[11] the court enunciated the following general principle of Virginia insurance law, which absent policy definitions to the contrary, applies in Virginia:

> [t]he generally accepted rule is that death or injury does not result from accident or accidental means within the terms of an accident policy where it is the natural result of the insured's voluntary act, unaccompanied by anything unforeseen except the death or injury.[12]

In those jurisdictions that, like Virginia, follow this well-settled principle of insurance law, courts have ruled in myriad factual situations that when an insured's death is the natural or probable result of the insured's voluntary act, the death does not constitute an accident within the scope of an accidental death policy. Tracing the application of this general rule through this wide variety of different contexts, including death by violence, autoerotic asphyxiation, drunk driving, and overdose of illegal drugs, demonstrates why, in Virginia as well as other jurisdictions that follow this general rule, the rule should equally apply to an overdose of prescribed pain medications like OxyContin.

III. Death by Violence

This general rule has been repeatedly applied in Virginia in the context of death by violence when the insured's death resulted directly from his own voluntary, aggressive behavior *or* when he provokes the act that ultimately causes his death. "[I]t is generally held that if the insured voluntarily provokes or is the aggressor in an encounter, and knows, or under the circumstances should normally anticipate, that he will be in danger of death or great bodily harm as a natural or probable consequence of his act or course of action, his death or injury is not caused by an accident within the meaning of such a policy."[13] In

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[10] *See, e.g.,* Lennon v. Metropolitan Life Ins. Co., 504 F.3d 617, 619 n.3 (6th Cir. 2007) (death certificate's indication that insured died as a result of "accident" did not preclude subsequent denial of accidental death benefits); Kellog v. Metropolitan Life Ins. Co., 2007 WL 2684536 at *7 n.3 (D. Utah 2007) (same); Thomas v. Reliance Standard Life Ins. Co., 487 F. Supp. 2d 697, 702 n.3 (D.S.C. 2007) (same); Clark v. Metropolitan Life Ins. Co., 369 F. Supp. 2d 770, 776 (E. D. Va. 2005) (same); *but cf.* Andrus v. AIG Life Ins. Co., 368 F. Supp. 2d 829, 833 (N.D. Ohio 2005) (relying in part on coroner's determination that insured's cause of death was an accident in finding overdose death to be a covered accident).

[11] 202 Va. 758, 120 S.E.2d 267 (1961).

[12] 202 Va. at 761, 120 S.E.2d at 268 (quoting 29A, Am. Jur. *Insurance* § 1167, at 313 and citing 45 C.J.S. *Insurance* § 753-b, at 781). *Accord* 43 Am. Jur. 2d § 570, at 638 (2003) (same).

[13] *See* Smith v. Combined Ins. Co., 202 Va. at 261, 120 S.E.2d at 269 (death of insured, a fugitive charged with murder who was resisting arrest, as a result of a fire in the building caused by tear gas projectile launched by law enforcement officials was not a covered "accident"). *Accord* Valley Dental Assoc., P.C. v. Great-West Life Assur. Co., 173 Ariz. 327, 330, 842 P.2d 1340, 1343 (1993) ("The general rule . . . is that if the insured threatens to kill, or inflict serious bodily injury on, another person or assaults another person under circumstances making it likely the other person will respond with deadly force, and does so and kills the insured, the insured's death is not accidental.").

those cases where the insured was the aggressor or provoked violence, the insured's death has been held not to be an "accident."[14]

IV. Death by Autoerotic Asphyxiation

In *Runge v. Metropolitan Life Insurance Co.*[15] and *International Underwriters, Inc. v. Home Insurance Co.*,[16] both of which were decided under Virginia law, this rule was applied in concluding that deaths from "autoerotic hanging" were not accidental. In both *Runge* and *International Underwriters Insurance*, since the insureds voluntarily placed their necks in the nooses in connection with autoerotic sexual acts, the courts ruled that the deaths were not accidents. "Death, under these circumstances, was a natural and foreseeable, though unintended, consequence of [the insured's] activity."[17]

V. Death by Drunk Driving

In *Minnesota Life Insurance Co. v. Scott*,[18] the court applied this settled Virginia law rule in holding that the insured's death in a single-car accident while driving under the influence of alcohol was not an accident under an accidental death policy. To the same effect was the ERISA case of *Eckelberry v. Reliastar Life Insurance Co.*,[19] where the Fourth Circuit ruled that the insured's death as

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[14] *See* Ayers v. Continental Cas. Co., 955 F. Supp. 50 (W.D. Va. 1997) (after a long history of domestic violence, insured was shot and killed by his wife while choking her with his hands); Aliff v. Travelers Ins. Co., 784 F. Supp. 232 (W.D. Va. 1990) (death of insured who was shot and killed after he entered his former wife's trailer); Tucker v. Life Ins. Co. of Va., 228 Va. 55, 321 S.E.2d 78 (1984) (insured shot and killed by his fifteen-year-old son while advancing toward his son); Byrd v. Life Ins. Co. of Va., 219 Va. 824, 252 S.E.2d 307 (1979) (insured shot and killed after he had accompanied his girlfriend to trailer of her boyfriend who insured knew was violent and carried a gun); Wooden v. John Hancock Mut. Life Ins. Co., 205 Va. 750, 139 S.E.2d 801 (1965) (insured shot and killed by his former wife after there had been a long history of violence between them). *But see* Harris v. Bankers Life & Cas. Co., 222 Va. 45, 278 S.E.2d 809 (1961) (after insured had stopped striking one of his live-in girlfriend's children, the girlfriend picked up the knife and fatally stabbed insured; question of whether insured's striking of child or pushing girlfriend would reasonably have led to stabbing presented factual issue for trial); Mutual Benefit Health Assoc. v. Ryder, 166 Va. 446, 185 S.E. 894 (1936) (wound that insured received in an apparently unprovoked assault, which became infected and subsequently led to insured's death by blood poisoning, was ruled accidental under health and accident policy); Hodge v. American Family Life Assur. Co. of Columbus, 213 Va. 30, 189 S.E.2d 351 (1922) (court ruled in favor of insured in action on policy providing for payment of hospital and other expenses resulting from accidental bodily injury because there was no evidence of anything on the insured's part that would have caused his wife to shoot him).

[15] 537 F.2d 1157 (4th Cir. 1976)

[16] 662 F.2d 1084 (4th Cir. 1981).

[17] *Runge*, 537 F.2d at 459.

[18] 330 F. Supp. 661, 665-66 (E.D. Va. 2004).

[19] 469 F.3d 340 (4th Cir. 2006), *cert. denied,* ___ U.S. ___, 127 S. Ct. 2101, 167 L. Ed.2d 814 (2007).

a result of driving under the influence of alcohol[20] was not an accident under an accidental death policy.[21]

VI. Death by Overdose of Illegal Drugs

In *Patch v. Metropolitan Life Insurance Co.*,[22] the court ruled that under Virginia substantive law the insured's death as the result of a self-administered overdose of heroin did not constitute loss of life by accidental means under an insurance policy, stating:

> The dangers of heroin use are well known and require no lengthy elaboration. Indeed, one court has characterized use of this drug as a "form of Russian roulette." *Jackson v. National Life & Accident Insurance Co.*, 130 Ga. App. 208, 202 S.E.2d 711, 712 (1973). Our previous interpretations of Virginia law in *Runge* and *International Underwriters* demonstrate that death will be found non-accidental where an insured has deliberately exposed himself to a substantial and foreseeable risk of serious injury or death, even if death is neither intended nor certain to result. We find that because Phillips voluntarily administered an overdose of heroin to himself, fully aware of the manifold risks involved, under Virginia law his death was a natural and probable consequence of his knowing actions and therefore did not occur by "accidental means."[23]

Similarly, in *French v. New York Life Insurance Co.,*[24] the court ruled that the insured's death from a drug overdose of cocaine and heroin poisoning was not accidental bodily injury under a life insurance policy.[25]

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[20] In ERISA case of *Sawyer v. Potash Corp. of Saskatchewan*, 417 F. Supp. 2d 730, 740-42 (E.D. N.C. 2006), *aff'd.,* 223 Fed. Appx. 217 (4th Cir. 2007), the court ruled that a toxicology report stating that the insured was under the influence of alcohol, standing alone, provided a sufficient basis to support the insurer's conclusion that the insured was intoxicated at the time of his fatal single vehicle accident, in the absence of any evidence by the beneficiary to the contrary.

[21] *Accord* Lennon v. Metropolitan Life Ins. Co.*,* 504 F.3d 617, 622-623 (6th Cir. 2007) (collecting cases); Poeppel v. Hartford Ins. Co., 273 F. Supp. 2d 714 (D.S.C 2003), *aff'd*., 87 Fed. Appx. 885 at **1 (4th Cir. 2004) ("[I]n [*Baker v. Provident Life & Acc. Ins. Co*., 171 F.3d 939, 942 (4th Cir. 1999)], we adopted the rule that a death that occurs as a result of driving while intoxicated, although perhaps unintentional, is not an 'accident' because that result is reasonably foreseeable.").

[22] 733 F.2d 302, 304 (4th Cir. 1984).

[23] In *Patch*, both the district court and the Fourth Circuit ruled that the insured's death from an overdose of heroin did not constitute loss of life by accidental means despite the fact that the medical examiner described the manner of death as "accidental." 733 F.2d at 302.

[24] 39 Va. Cir. 249, 1996 WL 1065537 (Va. Cir. Ct. 1996).

[25] *Accord* Weil v. Federal Kemper Life Assur. Co., 7 Cal. 4th 125, 866 P.2d 774 (1994) (lethal overdose of cocaine held not to be death by accidental means). Jackson v. National Life & Acc. Ins. Co., 130 Ga. App. 208, 202 S.E.2d 711 (1973) (death following massive dose of heroin ruled not death by accidental means).

VII. Death by Overdose of Prescribed Medications

While, to date, there are no reported decisions from the Supreme Court of Virginia or federal courts applying Virginia law dealing with an insured's death by overdose of prescribed medications, cases applying this well-established rule to accidental death claims involving overdoses of prescribed medications include *Gatt v. Continental Casualty Co.*[26] and *Adair v. Boston Mutual Life Insurance Co.*[27] In *Gatt,* the insured's voluntary act of taking a lethal dose of the prescribed pain medication OxyContin (oxycodone) was held not to constitute a covered accident under the accidental death policy. There, the insured's OxyContin bottle had a total of twenty-one pills missing while, according to his prescription, only six pills should have been missing. The insured's cause of death was listed as oxycodone toxicity. In *Adair*, the insured's death by taking a higher dose of the pain medications methadone and valium than prescribed by his doctor was held not to be accidental within an accidental death policy. "If [the insured] took his pills intentionally, though without any intent to end his life, if his death resulted from that intentional act, his death would not be 'accidental' within the tenor of the policy."[28]

Conversely, in *Gower v. AIG Claim Services, Inc.*[29] and *Andrus v. AIG Life Insurance Co.*,[30] the insureds' deaths by lethal overdoses of the painkillers fentanyl and OxyContin, respectively, were held to be accidents within the meanings of the accidental death policies. In both cases, the courts ruled that, despite taking large quantities of prescription dosages, there was no evidence that the insureds ingested the drugs with the expectation or intent that they would die.

As with a death by overdose of illegal drugs, an insured's death from a lethal overdose of a prescribed medication like OxyContin taken in a quantity in excess of the prescription dosage should not constitute a covered "accidental death" under the insurance policy. Most significantly, just as the hazards of illegal drugs[31] and drunk driving[32] are well known, the dangers of misuse of the prescription medication OxyContin, a Schedule II controlled[33] substance, are

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26 2006 WL 2617139 (W.D. Ga. 2006).

27 24 F. Supp. 2d 1380 (M.D. Ga. 1988).

28 *Id.* at 1381.

29 501 F. Supp. 2d 762 (N.D. W. Va. 2007).

30 368 F. Supp. 2d 829 (N. D. Ohio 2005).

31 *See, e.g.,* Patch v. Metropolitan Life Ins. Co., 733 F.2d 302 (4th Cir. 1984).

32 S*ee, e.g.,* Lennon v. Metropolitan Life Ins. Co., 504 F.3d 617 (6th Cir. 2007); Eckelberry v. Reliastar Life Ins. Co., 469 F.3d 340 (4th Cir. 2006), *cert. denied,* ___ U.S. ___, 127 S. Ct. 2101, 167 L. Ed. 2d 814 (2007).

33 Under Virginia Code § 54.1-3448(1), both oxycodone and oxymorphone are listed as Schedule II controlled substances. Oxymorphone is a pharmacologically active metabolite, breakdown product of oxycodone. *Accord* United States v. Alerre, 430 F.3d 681, 684 n.2 (4th Cir. 2005), *cert. denied,* 547 U.S. 1113, 126 S. Ct. 1925, 164 L. Ed. 2d 667 (2006) ("OxyContin, Oxy IR, and Percocet are brand names for drugs containing oxycodone, a Schedule II controlled substance. *See* 21 C.F.R. § 1308.12(b)(1)(15). Schedule II controlled substances have three defining characteristics: (A) 'a high potential for abuse'; (B) 'a currently accepted medical

similarly well-known nationally.[34] When an insured voluntarily administers to himself a fatal overdose of a prescribed medication such as OxyContin in a dosage in excess of that prescribed by his doctor, under the general rule followed in Virginia his death should not be covered by an accidental death policy because he "deliberately exposed himself to a substantial and foreseeable risk of serious injury or death, even if death was neither intended nor certain to result."[35]

VIII. Is the Insured's Death Direct and Independent of All Other Causes?

The accidental death definitions of many insurance policies require that the insured's death be due not only to an accidental bodily injury caused by an accident, but also include language to the effect that the death must result from the accident "directly and independently of all other causes."

This particular policy language has been frequently litigated in Virginia.[36] Under the reasoning of the Virginia line of cases, if the insured's overdose cooperated with his preexisting medical conditions in causing his death, the death did not result "directly and independently of all other causes."

To the degree that the insured's preexisting medical conditions may have cooperated with his abuse of prescribed pain medications such as OxyContin to cause his death, under Virginia law the accidental death claim should fail to meet the "directly and independently of all other causes" prong of the policy's accidental death provision.

IX. Is the Insured's Death the Result of Trauma?

Some insurance policies include language to the effect that the accidental bodily injury or accidental death must be "unexpected traumatic change to the insured's body of external origin." In Virginia, traumatic damage to the body is associated with injury caused by physical force.[37]

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use in treatment . . . or a currently accepted medical use with severe restrictions'; and (C) a possibility that abuse 'may lead to severe psychological or physical dependence.' 21 U.S.C. § 812(b)(2).")

[34] *See, e.g.,* United States v. Marty, 450 F.3d 687 (7th Cir. 2006); McCauley v. Purdue Pharma, 331 F. Supp. 2d 449 (W.D. Va. 2004).

[35] Patch v. Metropolitan Life Ins. Co., 733 F.2d 302, 304 (4th Cir. 1984).

[36] *Compare* Gay v. American Motorists Ins. Co., 714 F.2d 13 (4th Cir. 1983) (under Virginia law, if insured's death cooperated with preexisting disease or bodily infirmity, death was not an accident); Macauley v. Home Beneficial Life Ins. Co., 235 Va. 649, 369 S.E.2d 420 (1988) (same); Tanner v. Life of Va., 217 Va. 218, 227 S.E.2d 693 (1976) (same); Crawley v. General Accident Fire & Life Assur. Coop., 180 Va. 117, 21 S.E.2d 772 (1942) (same), *with* Adkins v. Reliance Standard Life Ins. Co., 917 F.2d 794 (4th Cir. 1990) (under ERISA, a preexisting disease or infirmity is not considered a cause that precludes coverage for a disability or death caused by accident unless it "substantially contributed" to the loss).

[37] *Compare* Allied Fibers v. Rhodes, 23 Va. App. 101, 104, 474 S.E.2d 829, 830 (1996) (hearing loss due to noise exposure caused by physical damage to the outer brain cells in the cochlea classified as traumatic injury because noise is strictly a physical force), *with* A New Leaf, Inc. v. Webb, 26 Va. App. 460, 470, 495 S.E.2d 510, 515 (1998), *aff'd*, 257 Va. 190, 511 S.E.2d 102 (1999) (hypersensitivity of claimant's immune system to the floral allergens in the workplace held not caused by the type of physical force associated with trauma). *See also* Figueroa v. Industrial Commission, 112 Ariz. 473, 476, 543 P.2d 785, 788 (1975) ("While the word 'trau-

To the degree that an insured's death by overdose of his prescribed medications was not the result of a physical force associated with trauma and the policy includes a "traumatic damage" requirement in its accidental death provision, the accidental death claim arguably should not meet the "traumatic damage" prong of the policy's accidental death provision.

X. Was the Insured's Death a Fortuitous Event?

The insurance policy may include language within the accident provisions to the effect that the loss must be "a fortuitous event, unforeseen and unintended." A "fortuitous event" has been defined as follows:

> *Fortuitous event*. 1. A happening that, because it occurs only by chance or accident, the parties could not reasonably have foreseen. 2. An event that, so far as contracting parties are aware, depends on chance.[38]

In fact, in Virginia the terms *fortuitous* and *accidental* have frequently been used synonymously.[39]

Insofar as the insured's death from a lethal drug overdose of OxyContin or other prescribed medication taken in a quantity in excess of the dosage prescribed by his doctor does not constitute a "fortuitous event" or "accident" under the policy, the accidental death claim may also fail on this ground.

XI. Is the Insured's Death Excluded by the Policy's Medical Treatment Exclusion?

Even if the insured's death by lethal overdose of prescription drugs constitutes a covered "accidental death," the accidental death claim may, nevertheless, still be excluded by the policy's medical treatment exclusion. While the plaintiff has the burden of proving that the claim is an accidental death, the burden is on the insurer to prove that the insured's death falls within a policy

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matic,' itself, is often used in the sense of a blow only, by definition it also includes wounds such as spasms and dislocations. Webster's Third New International Dictionary. The word 'injury' used in the definition is a word synonymous with 'hurt, damage, harm.' Webster's, supra.")

Webster's Third International Dictionary at 2432 (1986 ed.), quoted by the *Figueroa* court, defines "trauma" and "traumatic" as follows:

> *Trauma* – 1: an injury or wound to a living body caused by the application of external force or violence <injuries . . . such as sprains, bruises, factures, dislocation, concussion – indeed *traumata* of all kinds – *Lancet*>. . .
> Traumatic – relating to, or resulting from trauma.

[38] Black's Law Dictionary at 680 (8th ed. 2004).

[39] *See, e.g.*, Insurance Co. of N. Am. v. U.S. Gypsum Co., 678 F. Supp. 138, 142 (W.D. Va. 1988), *aff'd*, 870 F.2d 148 (4th Cir. 1989) ("[W]e see the definition of fortuity becoming almost synonymous with accident. In fact, Black's Law Dictionary uses the words fortuity and accidental as synonymous."); Fidelity & Guar. Ins. Co. v. Allied Realty Co., Ltd., 238 Va. 458, 462, 384 S.E.2d 613, 615 (1989) ("[S]ome courts have interpreted fortuitous as analogous to the insurance policy term accident.").

exclusion.[40] The typical "medical treatment" exclusion contains language to the effect that the policy "does not cover death caused by . . . disease, sickness, or mental infirmity, or medical or surgical treatment of same . . . ."

Courts outside Virginia that have construed similar "medical treatment" exclusions have ruled that the exclusion must be given a reasonable scope as to all aspects of the insured's medical treatment, including the taking of prescribed medications. For instance, in *Order of the United Commercial Travelers of America v. Shore*,[41] the court ruled that a death caused by the insured's reaction to a drug taken in the proper dosage to lessen pain was excluded by the accident insurance policy's medical treatment exclusion. In explaining the scope of the medical treatment exclusion, the Eighth Circuit stated:

> The meaning of the word "treatment" as used in the policy must be given a reasonable scope. It includes not merely the actual operation in a surgical case *or the giving of a prescription in a nonsurgical case,* but also the preliminary examination, including sometimes an exploratory operation or exploratory examination. The treatment may, and generally does, include three stages: Preliminary, main and final. Whatever is usually done to the patient or administered to him by a skilled physician or surgeon in any of these stages is properly included under the term "treatment," even though it may not be an indispensable prerequisite.
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> *If the administering of the drug in the case at bar did not constitute medical or surgical treatment, we should be at a loss how to classify such act.*[42]

To the same effect is the court's analysis of the broad meaning of the term "treatment" in a medical context in *Wickland v. American Travelers Life Insurance*,[43] where the court stated: "[T]he commonly accepted meaning of the term 'treatment' signifies all steps taken to effect a cure of an injury or disease; including . . . management in the application of medicines . . . ."

Courts have held that these medical or surgical treatment exclusions extend not only to death caused by medical mishaps during the course of medical treatment performed by a doctor,[44] but also to self-treatment by the patient attempting to follow the doctor's advice. In *Barkerding v. Aetna Life Insurance Co.,*[45]

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[40] Estate of Mohamed v. Monumental Life Ins. Co., 138 F. Supp. 2d 709, 720 (E.D. Va. 2001).

[41] 64 F.2d 55 (8th Cir. 1933).

[42] 64 F.2d at 59-60 (emphasis added).

[43] 204 W. Va. 430, 513 S.E.2d 657, 665 (1998).

[44] S*ee* Whetsell v. Mutual Life Ins. Co. of N.Y., 669 F.2d 955, 956 n.1 (4th Cir. 1982) (insured's death after an infected IV needle was used, causing him to contract bacterial endocarditis of which he died, was excluded from accidental death insurance coverage as medical treatment) (applying South Carolina law; collecting cases).

[45] 82 F.2d 358 (5th Cir. 1936).

the court ruled that an accident insurance policy, which excluded loss caused by medical or surgical treatment, did not cover the amputation of the insured's toe, which was a direct result of a burn caused by the insured's use of excessive heat prescribed by his physician to cure an infection. The Fifth Circuit analogized the insured's overuse of heat as a curative agent to a prescription drug overdose, stating:

> The excess of heat is like an overdose of a prescribed drug ignorantly taken by a patient, the effect of which is held to be the result of medical treatment under policies such as this one.[46]

The two cases relied upon by the *Barkerding* court held that the insured's death as the result of taking of an overdose of medicine prescribed by a physician in proper dosage was excluded by the policy's medical treatment exclusion. In *New Amsterdam Casualty Co. v. Perryman*,[47] the court held that the insured's paralysis as a result of an overdose of quinine taken in twice the dosage recommended by the physician was excluded by the accident insurance policy's medical treatment exclusion. Similarly, in *Bayless v. Travelers Insurance Co*.,[48] the district court ruled that the insured's death from the inadvertent taking of an overdose of opium prescribed by a physician in proper doses fell within the accident insurance policy's medical treatment exclusion.

When the insured's doctor has prescribed a prescription drug such as the potent painkiller OxyContin to medically treat the insured for severe pain, and the insured ultimately dies of an overdose of that drug that had been prescribed to him for pain, the claim should likely fall squarely within the typical policy exclusion for death caused by medical treatment.

XII. Is the Insured's Death Excluded by the Policy's Drug Exclusion?

Even if the insured's death by prescription drug overdose were held to be accidental, the accidental death claim may still be excluded by the policy's drug exclusion. While the language of drug exclusions varies widely, such exclusions typically contain language to the effect that the policy does not cover death caused by or resulting from the taking of any drug "unless taken on the advice of a physician," "unless administered on the advice of a physician," or "except as prescribed by a physician."

Courts outside Virginia analyzing these types of drug exclusion have ruled that the exclusion applies to an insured's death as the result of either a drug overdose or the taking of more than the dosage of drug prescribed by the insured's doctor. In *Dice v. General Electric Capital Assurance Co.,*[49] the in-

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46 82 F.2d at 359.

47 162 Miss. 864, 140 So. 342 (1932).

48 2 Fed. Cas. 1077 (E.D. N.Y 1877), *rev'd. on other grounds,* 113 U.S. 316, 5 S. Ct. 494, 28 L. Ed. 989 (1885).

49 93 Fed. Appx. 68 (6th Cir. 2004).

sured's doctor prescribed that in a twenty-four-hour period the insured take six 40-milligram tablets, or a total of 240 milligrams. However, the postmortem toxicology report indicated that the insured had the equivalent of 300 milligrams of OxyContin in her blood, more than the prescribed dosage. In affirming the district court's entry of summary judgment for the insurer and application of the drug exclusion, the Sixth Circuit ruled that the insured's ingestion of more OxyContin than her physician had prescribed for pain caused her death, stating:

> *Brenda ingested more Oxycontin than her physician had prescribed or advised that she ingest and such ingestion, either alone or in combination with some of the other drugs found in her blood, caused her death. Under these circumstances, Oxycontin was not administered on the advice of Brenda's physician. Because Brenda's death resulted from her being under the influence of at least one drug that was not administered on the advice of a physician, the policy exclusion is applicable* and Dice is not entitled to the life insurance benefits under the GECA policy.[50]

In *Lewis v. Monumental Life Insurance Co.,*[51] the court ruled that the drug exclusion applied to the insured's death as a result of phenobarbital toxicity after he had taken a dosage amount in excess of his prescribed phenobarbital dosage. Similarly, in *Duncan v. Cuna Mutual Insurance Co*.,[52] the court ruled that coverage for the insured's death from methadone toxicity was excluded by the policy's drug exclusion.

In the ERISA case of *Guin v. Fortis Benefits Insurance Co.*,[53] the court ruled that the plan administrator's denial of an accidental death claim was not arbitrary and capricious, finding that the policy's drug exclusion applied to the insured's drug overdose caused by taking multiple drugs, including a dosage of the drug diazepam that exceeded the therapeutic dosage normally prescribed by a doctor. Conversely, on similar facts in the ERISA case of *Clarke v. Metropolitan Life Insurance Co.,*[54] the court, applying the modified abuse of discretion standard of review, declined to apply the drug exclusion and remanded the case for the making of a new accidental death benefits decision to be made after the administrator had determined why the insured had such high levels of multiple drugs in his system.

The insured died of circulatory collapse from cardiac arrhythmia caused by the taking of three over-the-counter cold medications all containing the medication phenylpropanolamine in *Guest v. Horace Mann Insurance Co*.[55] There, the

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50 *Id.* at **2 (emphasis added).

51 2007 WL 1207153 (Ky. Ct. App. 2007).

52 171 N.C. App. 403, 614 S.E.2d 592 (2005).

53 256 F. Supp. 2d 542, 548-549 (E.D. Tex. 2002).

54 369 F. Supp. 2d 770 (E.D. Va. 2005).

55 168 Ga. App. 714, 310 S.E.2d 241 (1984).

court ruled that the insured's death from taking these drugs was excluded by the policy's drug exclusion.[56]

Yet in *Hummel v. Continental Casualty Insurance Co.,*[57] the court contrasted the clauses "administered on the advice of" and "taken as prescribed by" in the context of a case where the insured died of oxycodone poisoning. Finding that the clause "administered on the advice of" was ambiguous and susceptible to differing interpretations, the *Hummel* court ruled that the more reasonable construction of that clause was to still cover the insured's death by oxycodone overdose.

When the insured's death is caused by being under the influence of a prescribed medication taken in a dosage well in excess of that prescribed by his doctor, the claim may well be excluded by the typical accidental death policy drug exclusion.

XIII. Is the Insured's Death Excluded by the Policy's Suicide Exclusion?

Regardless of whether the insured's death by prescription drug overdose is deemed to be accidental, depending on the facts presented, the accidental death claim may still be excluded by the policy's suicide exclusion. A typical suicide exclusion[58] contains language to the effect that the policy does not cover death caused by or resulting from "suicide or intentionally self-inflicted bodily injury, while sane or insane."[59]

Most states, including Virginia, have statutes[60] that prohibit a life insurance policy from excluding coverage for suicide that occurs more than two years from

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56 310 S.E.2d at 242-43.

57 254 F. Supp. 2d 1183 (D. Nev. 2003).

58 When the insurer asserts suicide as a defense, it has the burden of excluding every hypothesis of accidental death that ordinarily would be presumed. If the evidence is in doubt as to whether the death was accidental or suicidal, the presumption is in favor of accident. *See, e.g.,* the following cases decided under the common law before an enactment of the predecessor to Code § 38.2-3106: Cosmopolitan Life Ins. Co. v. Koegal, 104 Va. 619, 52 S.E. 166 (1905); Metropolitan Life Ins. Co. v. DeVault's Adm'x, 109 Va. 392, 63 S.E. 982 (1909); Life Ins. Co. of Va. v. Hairston, 108 Va. 832, 62 S.E. 1057 (1908); South Atl. Life Ins. Co. v. Hurt, 115 Va. 398, 79 S.E. 401 (1913). There is a rebuttable presumption against suicide, which may be overcome by clear and satisfactory evidence that excludes any reasonable hypothesis consistent with death from natural or accidental causes. Atkinson v. Life Ins. Co. of Va., 217 Va. 208, 228 S.E.2d 117 (1976); Life & Cas. v. Daniel, 209 Va. 332, 163 S.E.2d 577 (1968).

59 Virginia follows the majority rule that holds that if the act of self-destruction would be deemed to be a suicide in the case of a sane person, it would be so treated as to an insane insured, regardless of whether the insured realized or was capable of realizing that such act would cause his death or whether he was capable of entertaining an intention to help himself. Atkinson v. Life Ins. Co. of Va., 217 Va. 208, 228 S.E.2d 117 (1976) (Insured, under delusion that hospital personnel were attempting to gas him, extricated himself from bed constraints, left his room, went down the hall and purposely and by his own volition went through an open eight story window to escape the imaginary peril; insured's death resulted from self-destruction or self-inflicted injury within the terms of that policy exclusion.).

60 In Virginia, suicide is still classified as a common-law crime. *See* Wackwitz v. Roy, 244 Va. 60, 418 S.E.2d 861 (1992); Hill v. Nicodemus, 755 F. Supp. 692 (W.D. Va. 1991), *aff'd*, 979 F.2d 987 (4th Cir. 1992). An older Virginia decision also held suicide to be an immoral act. Plunkett v. Supreme Conclave, 105 Va. 643, 55 S.E. 9 (1906). Under Virginia common law, there could be no recovery under a life insurance policy for suicide.

the date of issuance of the policy.[61] However, an accidental death insurance policy differs from a life insurance policy in that the former covers only death by accident, while the latter insures against death regardless of the cause.[62] While there are no reported cases decided under Virginia law, courts that recognize this distinction between insurance coverages have gone on to hold that statutes permitting the suicide exclusion in life insurance policies for only the first two years are inapplicable to accidental death insurance claims.[63]

If the evidence establishes that the facts surrounding the insured's death were inconsistent with an accident, and that the insured died by his own hand by taking a quantity of prescribed medications in excess of his prescribed dosage, the accidental death claim may well also fall within the accidental death insurance policy's suicide or self-inflicted bodily injury exclusion.

XIV. Conclusion

The provisions of insurance policies, like the court decisions interpreting them, may vary by jurisdiction. Nevertheless, state and federal courts applying Virginia law have consistently applied the following generally accepted rule to a wide variety of factual scenarios: when an insured's death was caused by his voluntary act of taking a lethal dosage of his prescription medications in excess of the prescribed dosage, the death is not considered to have resulted from the requisite accident or accidental means within the terms of an accident insurance policy or a life insurance policy with a double indemnity clause. Likewise, despite these policy and/or jurisdictional differences, the more reasonable construction of the typical medical treatment and/or drug exclusions similarly excludes coverage for such deaths by overdose of prescribed medications.

Security Life Ins. Co. of Am. v. Dillard, 117 Va. 401, 84 S.E. 656 (1910). This common-law rule pertaining to suicide was modified by the enactment of Code § 38.2-3106, which permits life insurance carriers doing business in Virginia to assert a suicide defense only during the first two years of the policy. The purpose of this statute is to preserve the common-law rule for the limited period of two years in those cases where the policy contains a suicide exclusion. New England Mut. Life Ins. Co. v. Mitchell, 118 F.2d 414 (4th Cir.), *cert. denied*, 314 U.S. 629, 62 S. Ct. 60, 86 L. Ed. 505 (1941). Since Code § 38.2-3106 is in derogation of the common-law rule that there can be no recovery in the case of a suicide, the statute is to be given a liberal construction. *Id.*

61 *See, e.g.,* Va. Code § 38.2-3106.

62 *See* Gudnason v. Life Ins. Co. of N. Am., 231 Va. 197, 203, 343 S.E.2d 54, 58 (1986).

63 *See, e.g*., Gomez v. Life Ins. Co. of N. Am., 84 Wash. App. 562, 567-68, 928 P.2d 1153, 1155 (1997), *rev. denied*, 132 Wash. 2d 1002, 939 P.2d 215 (1997) (Table).