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Accident and the Presumption Against Suicide Under ERISA

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In this article, the author explains that, in most cases, a court will find that, even where the presumption against suicide in claims for benefits under accidental death or accidental death and disability policies is the correct standard, there was sufficient evidence in the record to rebut the presumption.

FIRST CIRCUIT APPROACH

A procedural rule and a judicial reluctance to address issues not necessary to decide the issue before it prevented the U.S. Court of Appeals for the First Circuit from addressing an infrequently discussed issue under the Employee Retirement Income Security Act of 1974 ("ERISA"), namely, the possible application of the presumption against suicide[1] in claims for benefits under accidental death or accidental death and disability ("AD&D") policies.[2]

The issue in *Alexandre v. National Union Fire Insurance Company of Pittsburgh, PA*, an action initially filed in the U.S. District Court for the Southern District of Florida, but transferred to the U.S. District

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Court for the District of Massachusetts,[3] was whether the insurance company violated ERISA in denying a claim for death benefits under an AD&D policy because the death resulted from suicide.

The facts are fairly straightforward. The insured was in a tenth floor hotel room with his brother. The insured made a "full sprint" out the door. His brother heard a loud crash, and saw the decedent in a flower arrangement one floor below. The decedent's brother yelled to him "No, no. Keep still. Don't do it." The decedent then rolled off the ledge, fell nine floors to the atrium of the hotel, and was pronounced dead on the scene.

The Georgia Department of Public Health declared the death to be a suicide. The decedent's brother also provided a subsequent statement that implied that the decedent's rolling off the ninth floor ledge was accidental, rather than intentional. The toxicology report indicated that the decedent's blood tested positive for cannabis.

After reviewing all of the evidence and considering precedent from the U.S. Court of Appeals for the Eleventh Circuit, the insurance company's ERISA appeal committee concluded that the decedent's death was caused by suicide and, therefore, that it was a risk not covered under the policy.[4] The plaintiff, the decedent's designated beneficiary under the policy, brought an action in the Southern District of Florida, but the defendant's motion for change of venue was granted, and the action was transferred to the Massachusetts district court.

The Massachusetts district court concluded that the defendant had been granted discretionary authority to determine benefits; that its determination that the death was not an accident under the *Wickman*[5] test applied in the First Circuit; and that the death resulted from an intentionally self-inflicted injury was not arbitrary, capricious, or an abuse of discretion.

However, as a procedural point, once the district court determined that the appellee's determination that the death was not an accident and was not arbitrary, capricious, or an abuse of discretion, its determination that the death was the result of a technically self-inflicted injury was technically dicta.

The appellant apparently realized that it had little chance of prevailing under the *Wickman* standard, but sought to rely upon Eleventh Circuit precedent, the circuit in which the appellant had initially filed her claim. The plaintiff's position was that the evidence in this case was inconclusive, which required a finding of accidental death based on the presumption against suicide, as stated by the U.S. Court of Appeals for the Eleventh Circuit in *Horton v. Reliance Standard Life Insurance Co.*,[6] a case to be discussed in greater detail below. In that decision, the Eleventh Circuit concluded that in ERISA death benefit cases, "when the evidence is inconclusive as to whether the

decedent died by accidental or intentional means, use of the legal presumptions against suicide and in favor of accidental death are appropriate."

In response, the district court correctly observed that Eleventh Circuit precedents are not binding on a district court in the First Circuit, even where an action was first filed in the Eleventh Circuit. The district court cited *AER Advisors, Inc. v. Fidelity Brokerage Services, LLC*,[7] which held that every circuit that has considered the issue "has concluded that when one district court transfers a case to another, the norm is that the transferee court applies its own [c]ircuit's cases on the meaning of federal law."[8]

As a result, the district court was required to follow First Circuit precedent, and indicated it was not aware of, nor had plaintiff cited, any presumption against suicide in the First Circuit.[9] The district court concluded its analysis, again in dicta, that even if Eleventh Circuit precedent were persuasive, it would not help the plaintiff in this case, because the evidence was not inconclusive.

The First Circuit affirmed[10] the district court[11] and noted that even if there was a presumption against suicide under Massachusetts law, an issue which it did not decide, the substantive law of Massachusetts would be preempted with respect to the interpretation of an insurance policy under ERISA.[12]

ELEVENTH CIRCUIT

In a short per curiam opinion, the U.S. Court of Appeals for the Eleventh Circuit in *Horton v. Reliance Standard Life Insurance Company*[13] affirmed a decision of the U.S. District Court for the Northern District of Florida that the presumption against suicide[14] is part of the federal common law of ERISA,[15] which was also the starting point for the analysis of the First Circuit in reaching a different conclusion, although with respect to a different question – the definition of accident versus the presumption against suicide.

It explained that when crafting a body of federal common law, federal courts may look to state law as a model because of the states' greater experience in interpreting insurance contracts and resolving coverage disputes.[16] It stated that to determine whether a particular rule should become part of ERISA's common law, courts are required to examine whether the rule, if adopted, would further ERISA's scheme and goals.[17] The two central goals of ERISA in the view of the Eleventh Circuit were the protection of the interests of employees and their beneficiaries in employee benefit plans, and providing uniformity in the administration of employee benefit plans.[18] The First Circuit presumably would agree with the Eleventh Circuit that uniformity in the

administration of employee benefit plans is a desired outcome, but it nonetheless concluded that it was obligated to follow First Circuit precedent.

The Eleventh Circuit concluded that both of these goals would be satisfied by the negative presumption against suicide[19] and the affirmative presumption of accidental death benefits.[20] With respect to uniformity in plan administration, the Eleventh Circuit concluded that presumptions provide courts and juries with uniform rules to determine coverage questions where the evidence of how insured died is inconclusive,[21] although as discussed below, there is some question concerning the uniformity of the presumption.

Further, the presumption favors beneficiaries over insurance companies.

Moreover, according to the Eleventh Circuit, the presumption was not arbitrary, but rather "grounded in tested observations of human behavior[22] and in American legal history." It stated that the majority of states recognize the presumption against suicide,[23] although they treat it as rebuttable. Common law had existed in England and the United States for centuries, and part of the law is that suicide will not be presumed. It indicated that the presumption was important because suicide was viewed as a crime, a type of self-murder. "One earthly reason that an unexplained death was historically not counted as a suicide was the law's harsh impact on the decedent's family and heirs, that is, the innocent. Suicide . . . was a felony at common law, punishable by forfeiture of the goods and chattels of the offender."[24] However, while the presumption against suicide has long been part of the common law in the United States, generally there has never been punishment for suicide in the United States.[25]

Of course, much had changed since the time of Blackstone's Commentaries, both in England[26] and in the United States, including the manner in which suicide was viewed and the increased frequency of suicide.[27] Presumably in response to these concerns, the Eleventh Circuit cited *Astoria Federal Savings and Loan v. Solemino*,[28] in which the U.S. Supreme Court stated that "Congress is understood to legislate against a background of common law adjudicatory principles . . . thus, where a common law principle is well-established . . . the Court may take it as a given that Congress legislated with an expectation that the principle will apply except when a statutory purpose to the contrary is evident."[29] The Eleventh Circuit was not persuaded that Congress, by enacting ERISA, meant to change the established basic presumptions on the subject of accidental death. "It still makes sense not to deprive innocent heirs . . . without sufficient evidence of suicide."

The Eleventh Circuit indicated that the presumption against suicide was rebuttable,[30] but what precisely does that mean? "The orthodox

statement is that every presumption remains in a case only until the person against whom it operates introduces some evidence to the contrary."[31] Another law review article stated that, "[i]n the absence of proof, the presumption assists the party in whose favor it operates to establish a *prima facie* case and shifts the burden of going forward to the defendant. The presumption arises when facts establish death by violent or external means, but leave unexplained whether death was suicidal or accidental. When substantial evidence is introduced, the presumption disappears."[32]

The Eleventh Circuit provided limited guidance on this question. A plan participant or beneficiary bears the burden of establishing his or her entitlement to contractual benefits.[33] However, if the insurer claims that a specific exclusion applies to deny the insured benefits, the insurer generally must prove that the exclusion prevents coverage.[34]

In this connection, the Eleventh Circuit noted in a footnote that the district court had concluded that the evidence did not favor one theory over the other. Rather, the district court decided that the presumptions were outcome determinative. The Eleventh Circuit assumed, without deciding, that the plaintiff has the burden of persuasion. It then stated that, "The presumption never drops out of the case until the factfinder becomes convinced, given all the evidence, that it is more likely than not that Mr. Horton committed suicide." It then made the arguably inconsistent statement that, "Defendant's evidence about suicide was not so strong that every reasonable fact finder would have had to find the death to be a suicide," suggesting that the factfinder would need to rule out all other explanations for death than suicide.

While the presumption against suicide exists in virtually all jurisdictions, there is not unanimity as to the sufficiency of evidence required to rebut the presumption.

In *Malin v. Metropolitan Life Ins. Co.*,[35] a Delaware district court held that once there was some evidence of decedent's intent to commit suicide, which was sufficient to persuade the factfinder, the presumption against suicide does not override such evidence.

In *Eliskalne v. Provident Life and Accident Insurance Co.*,[36] commenting on *Horton*, the U.S. Court of Appeals for the Ninth Circuit explained that while a presumption may control in the complete absence of evidence, it cannot be used as a tie-breaker, as it was in *Horton* when actual evidence exists.

From an evidentiary perspective, it is not a breach of fiduciary duty to fail to consult with an expert in making a determination whether a death resulted from accident or suicide.[37] Also, claims administrators can properly rely on an insured's death certificate and autopsy report in evaluating claims for death benefits.[38]

CONCLUSION

Outside of the Eleventh Circuit, it is not likely that the *Horton* decision will be followed. While courts in other circuits may not necessarily disagree with its mode of analysis, in most cases a court will find that, even assuming that the presumption against suicide is the correct standard, there was sufficient evidence in the record to rebut the presumption.

NOTES

1. Although not usually defined as such in the case law, suicide can be defined as the intentional, voluntary, un-accidental act of a sane person that results in his or her own death. *See* David S. Markson, The Punishment of Suicide: The Need For Change, 14 Villanova L. Rev. 463 (1969). A corollary presumption to the presumption against suicide was that no sane person would take his or her own life. As a result, very slight evidence was sufficient to induce a coroner's jury to bring in a verdict of temporary insanity, which made suicide no crime, a practice of which Blackstone was critical. *See* Howard S. Hartman, The Presumption Against Suicide as Applied in the Trial of Insurance Cases, 19 Marq. L. Rev. 20, 24-25 (1934). *Cf. Reinking v. Philadelphia America Life Ins. Co.*, 910 F.2d 1210 (4th Cir. 1990) (attempted suicide was not intentionally self-inflicted where severe depression prevented her from acting in a rational matter). Psychiatrists and psychological experts have differing views as to the relationship between suicide and an unsound mind. One group believes that anyone who commits suicide is mentally ill and therefore of an unsound mind. Another group is of the view that only those persons committing suicide who are legally insane are of an unsound mind. A third group believes that persons committing suicide who are grossly psychotic are of unsound mind. Simon, Levenson, and Shuman, 2005, The Journal of the American Academy of Psychiatry and the Law. On Sound and Unsound Mind: The Role of Suicide in Tort and Insurance Litigation.

2. Outside of the ERISA context, the same issue arises under double indemnity policies. The issue does not arise under other insurance policies, in which the insurance company has the burden of establishing that the individual's death is not a covered risk because of a suicide exclusion.

3. 2021 WL 201319, 2021 Employee Benefits Cases 18,561 (D. Mass. January 20, 2021).

4. Companies issuing life insurance policies are permitted to determine the risks against which they are willing to insure, and most limit or exclude risks of self-destructive acts committed by the insured. The intentional injury exclusion is intended to prevent enrichment from immoral or illegal acts that are deliberately performed by competent individuals. Simon, Levenson, and Shuman, On Sound and Unsound Mind: The Role of Suicide in Tort and Insurance Litigation, The Journal of the American Academy of Psychiatry and the Law (2005), p. 179. *See also*, Gary Schuman, Suicide and the Life Insurance Contract: Was the Insured Sane or Insane? That is the Question – Or Is It?, 28 Tort and Insurance L. J. 4 pp. 745-746 (Summer 1993).

5. In *Wickman v. Northwestern National Insurance Co.*, 908 F.2d 1077 (1st Cir. 1990), the U.S. Court of Appeals for the First Circuit established a test for defining accident

in an AD&D policy, which is now followed in several circuits. Courts first consider the expectations of the insured at the time of the incident that caused his or her death. If the insured expected to be injured, then his or her death was not accidental. If the insured did not expect his or her activity to result in injury, the inquiry becomes whether the expectations were reasonable. If the expectations were not reasonable then the death cannot be an accident. As summarized in *Wightman v. Securian Life Ins. Co.*, 453 F.Supp.3d 460, 467 (D. Mass. 2020) for an insured's death to be covered under an AD&D policy, "the beneficiary must demonstrate that the insured did not expect an injury similar in type or kind and that the suppositions underlying this expectation were reasonable."

6. 141 F.3d 1038 (1998) (per curiam).

7. 921 F.3d. 282 (1st Cir. 2019).

8. *Id*. at 288.

9. In fn. 5 of its decision, the district court noted that plaintiff had relied extensively on a presumption against suicide, but the court did not reach the issue. The court in *Wickman* indicated that because it was affirming the magistrate judge's decision that there was no accident, it was not necessary to reach the issue of whether the death was a suicide. The failure to reach that issue made the plaintiff's discussion of the presumption against suicide irrelevant.

10. The First Circuit was somewhat critical of plaintiff's brief, noting some issues that plaintiff could have addressed, but did not. However, those issues were not the issues that are the subject of this article.

11. 22 F.4th 261 (1st Cir. 2022).

12. *Sampson v. Mutual Benefit Life Insurance Co*., 863 F.2d.108, 109-110 (1st Cir. 1988).

13. 141 F.3d 1038 (11th Cir. 1998). The *Horton* decision is discussed in Marc T. Treadwell, Evidence, 50 Mercer L. Rev. 1019-1020 (1999).

14. As a corollary to the presumption against suicide, the "common law of insurance presumes that death by drowning is presumed to be an accident." *Ming Hing Wong v. Capital Group Companies Accidental Death and Dismemberment Plans*, 2008 WL 1148080 (D.S.C. June 20, 2008). Other evidence may support the proposition that death by drowning was accidental. *Wolf v. Life Insurance Co. of North America*, 541 F.Supp.3d 1191 (W.D. Wash. 2021). However, as with other common law presumptions, the presumption is rebuttable. *See Evenson v. Life Ins. Co. of North America*, 2012 WL 893919 (D. Mont. 2012). (Sheriff's Office determined that death was suicide by drowning). The presumption against suicide is confined to civil cases. There is no presumption against suicide in criminal cases. Note, Ohio State Law Journal 1939 p. 406, Evidence Against Suicide – Nature and Effect on Burden of Proof, p. 407; Thomas M. McDade, Evidence-Presumption of Suicide – Presumption of Innocence, 6 St. Johns L. Rev. 127 (1931).

15. In *Nichols v. Unicare Life and Health Insurance Company*, 739 F.3d 1176, fn. 4 (8th Cir. 2014), the U.S. Court of Appeals for the Eighth Circuit stated that "there would be nothing remarkable about applying the presumption against suicide in an uncertain cause of death ERISA case, as ERISA plan administrators are bound to follow federal common law, as informed by state common law." Not all circuit courts have addressed the issue. *See, e.g., Carlson v. Reliance Standard*, 2017 WL 4767660 (M.D. Tenn. 2017) (Sixth Circuit has not addressed whether the presumption against suicide applies in ERISA cases). *Cf. Malin v. Metropolitan Life Ins. Co.*, 845 F.Supp.2d. 606 (D. Del. 2012) (Third Circuit has not found a presumption against suicide in ERISA cases).

16. State laws providing for a presumption against suicide are generally held to be preempted by ERISA. *Alexandre v. National Union Fire Insurance Company of Pittsburgh*, *supra*, n. 3 (without deciding whether there was a presumption against suicide under Massachusetts law, concluding that even if there were, it would be preempted); *Hammer v. Aetna Life Ins. Co.*, 465 F.Supp.2d 491 (D. S.C. 2006) (ERISA preempts South Carolina presumption against suicide, because ERISA preempts evidentiary presumptions). In *Rice v. Reliastar Life Ins. Co.*, 2012 WL 4460757 (M.D. La. September 25, 2012) the district court held that under ERISA, Louisiana's presumption against suicide was preempted. On appeal, the Fifth Circuit did not decide the issue, holding that even if the presumption existed, it was not an abuse of discretion to find that death was not accidental. 770 F.3d 1122 (2014); *McCorkle v. Metropolitan Life Insurance Company*, 757 F.3d 452 (5th Cir. 2014) (same). *Cf. Bateman v. Equitable Variable Life Ins. Company*, 902 F.Supp.3d (S.D.N.Y. 1995) (even with the benefit of the presumption against suicide, plaintiff would not prevail). *But see Smith v. Cigna Group Life Ins.*, 2010 WL 2978143 (W.D. La. July 22, 2010) (Texas presumption against suicide applies and is not preempted by ERISA) and *Cartledge v. Aetna Life Ins Co.*, 594 F.Supp.2d 610 (D. S.C. 2009) (concluding that finding of intentional safe harm arguably inconsistent with state law preemption against suicide.) However, the fact that preemption applies to a state law presumption against suicide does not mean that there is no room for the application of state law. While state law cannot directly control an ERISA decision, it can do so as part of the federal common law. *Shaffer v. Unum Provident Corp.*, 2007 WL 9711976 (N.D. Ala. Oct. 1, 2007).

17. Nachwalter, Christie, 805 F.2d 956, 960 (11th Cir. 1986).

18. *Smith v. Jefferson Pilot Life Insurance Company*, 14 F.3d 562, 570-571 (11th Cir. 1994).

19. All that is required to raise the presumption against suicide is to show the fact of the death of a human being. The presumption is not created by proof of other facts, but arises automatically and immediately upon the death of a person. *Liberty National Insurance Co. v. Power*, 111 Ga.App. 458 (1965). One commentator has stated that the presumption is not based on any difficulty in producing the evidence or on the fact that the evidence is peculiarly within the possession of one of the parties, or on the judgment of the courts as to what is socially desirable. Roger H. Smith, Evidence-Presumption Against Suicide – Nature and Effect on Burden of Proof, Ohio State L. J., Notes and Comments (June 1939) 406, 407.

20. There is case law for the proposition that the presumption against suicide is not a presumption that the death was accidental. *See* H.G.W. The Presumption against Suicide in Insurance Cases, 45 W.Va. L. Rev 167, 170 (1939) and Howard A. Hartman, The Presumption Against Suicide as Applied in the Trial of Insurance Cases, 19 Marquette L. Rev. 20, 31 (1934). The fact that an individual did not intend to kill himself or herself does not necessarily establish that the insured's death was accidental.

21. The facts of *Horton* may have been more inconclusive than other suicide cases. The insured and two other pilots died as a result of an in-flight fire and airplane crash. The theory of the insurance companies was apparently that the fire was an intentional act so that death resulted from an arson/suicide. The district court judge was not persuaded by defendants' evidence: "All of the speculation about the arson/suicide theory is just that, speculation. Much of the evidence supporting this theory is incredible. All of it, credible or not, yields no conclusive answer."

22. While the Eleventh Circuit did not elaborate on general tenets of human behavior, other courts have done so. For example, in *Life & Casualty v. Daniel*, 209 Va. 332 (1968), Virginia's highest court stated that: "The presumption in favor of death by

accidental means and against suicide has its basis in the love of life and the instinct of self-preservation, the fear of death, the fact that self-destruction is contrary to the general conduct of mankind, the immorality of taking one's own life, and the presumption of innocence of crime," cited in Notes, 46 Georgia Law Journal 503 (1957-1958). *See also*, 29 Am Jur. 2d Evidence Section 217, "The presumption against suicide is based on the nearly universal characteristic of love of life and fear of death" cited in *Evans v. Provident Life and Accident Insurance Company*, 249 Kan. 248, 253, 815 P. 2d. 550, 555 (1991); John E. Fennelly, 26 Stetson L. Rev. 300, Florida's Anti-Suicide Presumption: An Evidentiary Chameleon, ("The presumption in its early phases in what was usually termed the common experience that love of life may be strong in mankind."); Richard M. White, 5 University of Miami L. Rev. (Fall 1960), Presumption in Violent Death Cases or Quo Vadis Presumption, ("Many cases have held that the presumption is based on the natural love of life by an individual."); *Michael B. v. Northfield Retirement Communities* (Nebr. Ct. App., Feb. 7, 2017) ("The presumption against suicide is one of law and not of fact, and is based upon the natural characteristics of persons for love of life and fear of death."); and Thomas M. McDade, Evidence-Presumption of Suicide-Presumption of Innocence, 6 St. Johns L. Rev. 127 (Dec. 1931) ("The universal knowledge of the love of life has led to the presumption that one would not commit suicide.").

23. *See* Notes, 46 Georgia Law Journal 503, The Presumption Against Suicide in Insurance Cases in the District of Columbia (1957-1958) ("The presumption has long been recognized in the common law, and is part of the jurisprudence of virtually every jurisdiction in the United States.").

24. *Stiles v. Clifton Springs Sanitarium Co*., 74 F.Supp. 907, 909 (W.D.N.Y. 1947). The exact date of the origin of the presumption, or the place or decision where it was first applied to a specific case, appears to be unknown, but there is no doubt that it existed at common law, as discussed in Blackstone's commentaries. *See* Hartman, The Presumption Against Suicide as Applied in the Trial of Insurance Cases, 19 Marquette L. Rev. 20, 23-24 (1934). In addition to the forfeiture of goods, the offender was given an ignominious burial on the highway, with a stake driven through his body. The strict common law burial rule was slightly modified in 1824, to provide that the body could be buried between 9 p.m. and midnight. *Ibid*. *See also*, H.G.W., The Presumption Against Suicide in Insurance Cases, 45 W.Va. L. Rev. 167 (1939).

25. Markson, The Presumption Against Suicide, 14 Villanova L. Rev. 463, 465 (1969).

26. The last burial in the highway in England occurred in 1823, and the practice was abolished in 1823. 4 Geo.4, ch. 52, Section 1 (1823). The Forfeiture Act of 1870 ended the practice of forfeiture to the king and, in 1964 England abolished suicide as a crime. *See* David S. Markson, The Punishment of Suicide: A Need for Change, 14 Villanova L. Rev. 463,465 (1969).

27. At least as early as the 1930s the presumption against suicide was called into question. A 1939 W. Va. L. Rev. article asked, "is this not a presumption that has outlived its usefulness?" Is this ancient presumption to be clung to in spite of the present day statistics upon the so-called crime of self-murder? By these criteria, suicide is becoming alarmingly more prevalent in America. The year 1932 witnessed more than 20,000 suicides in the United States and more than twice as many attempts. Suicide has become pronounced evil of our Twentieth Century social order. "Who now is stunned when the coroner's jury brings in a finding of self-inflicted death? It is upsetting of course, but it does not carry the stigma of yesteryear, and some of the nation's most prominent citizens have died by their own hands." H.G.W., The Presumption Against Suicide in Insurance Cases, 45 W. Va. L. Rev. 167, 171-172 (1939). An article in the 1934 Marquette Law Review stated, "The ancient penalties referred to are now

a matter of history. The purpose of the presumption, as a protection to the relatives of the deceased, no longer applies. The very prop upon which the presumption is presumed to rest, namely, that no sane man would take his own life, is disproved by facts which are a matter of common knowledge . . . we know that not only sane men, but brilliant men, have done so. It is time, therefore, that lawyers and judges in approaching the problem of suicide in the court room, should approach it in the light of present day knowledge of facts and conditions, rather than to approach the problem from the standpoint of a coroner's jury in the 15th century." Howard A. Hartman, The Presumption Against Suicide as Applied in the Trial of Insurance Cases, 19 Marq. L. Rev. 20, 25-26 (1934). *Cf. Schelberg v. E. Savings*, 60 N.Y.2d 506, 458 N.E.2d 1225(1983), rejecting insurer's claim that presumption against suicide should no longer continue to be applied based on current statistical data showing suicide as a major cause of death, nor were suicide and attempted suicide criminal offenses in New York).

28. 501 U.S. 104 (1991).

29. *Id*. at 108.

30. The presumption against suicide cannot be an absolute or conclusive presumption because individuals do commit suicide.

31. Note, Evidence-Presumption Against Suicide-Effect on Burden of Proof, 5 University of Chicago L. Rev. 685-686 (June 1938).

32. Note, New York's Mistreatment of Burden of Proof and Presumption Against Suicide, 34 Fordham L. Rev. 305, 308 (1965).

33. *Farley v. Benefit Trust Life Ins. Co.*, 979 F.2d 653, 658 (8th Cir. 1992).

34. *Ibid*.

35. 845 F.Supp.2d 606 (D. Del. 2012).

36. 230 F.3d 1366 (9th Cir. 2000).

37. *Phillips Foster v. Unum*, 302 F.3d 785 (8th Cir. 2002).

38. *Lann v. Metropolitan Life*, 371 F.Supp.3d 1185 (N.D. Ga. 2019).