

the rights and liabilities of the parties. Courts have held that even where no policy is stated, considered with all the other circumstances, congressional silence should indicate the desire to keep state law as the determinative body of rules.⁴² The perfected security interest held by the United States was created under the laws of Pennsylvania. Because the rights and interests of the parties are created by state law, that same law should also decide the liabilities and obligations. If Congress felt that the loan program under the Bankhead-Jones Act would be hampered, then it could have provided for a security interest based on a federal right. The court in *Sommerville* saw a federal interest and twisted the *Clearfield* doctrine to fit their decision. It disregarded two well reasoned opinions,⁴³ and relied heavily on a decision for which no reason was given,⁴⁴ because whether federal or state law should be applied was not there in issue. Even though the result would be the same whether federal or state law was applied in the main case, the importance of this decision is not lessened. The next case involving a security agreement or chattel mortgage held by the United States under the FHA Loan Program might call for a different result under the appropriate state law.

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Insurance—Pre-Existing Disease—Insurer's Contractual Liability in Accident Policies.—*Miles v. Continental Cas. Co.*¹—Plaintiff-beneficiary brought an action for recovery under a Health and Accident Policy which provided for the payment of \$5,000 for death from "bodily injury caused by accident" and "resulting directly and independently of all other causes."² Decedent-insured had accidentally sustained a fracture of his left femur, and subsequent X-rays revealed the presence of cancerous growth in the immediate area of the injury. Medical testimony disclosed that: (1) the cancer was malignant, metastatic, and present in the area prior to the fracture rather than trauma induced; (2) the cancer was active and not dormant, and would have caused the insured's death irrespective of the fracture; (3) although the fracture itself could not directly and independ-

⁴² United States v. Kramel, supra note 28, at 581.

⁴³ Supra notes 31 and 35.

⁴⁴ Supra note 28.

¹ — Wyo. —, 386 P.2d 720 (1963).

² Although the court characterized it as an "Accident and Health Policy," Continental Casualty Company classified the contract as a "Business and Professional Disability Policy." The two relevant clauses are as follows:

(1) Definition of injury

"Injury" wherever used in this policy means bodily injury caused by accident occurring while this policy is in force and resulting directly and independently of all other causes in loss covered by this policy.

(2) Death provision

When injury results in loss of life of the Insured within 100 days after the date of the accident the Company will pay the Loss of Life Accident Indemnity stated in the Schedule.

It should be noted that the company had previously paid claims under the policy for hospitalization, medical treatment, and per diem expenses.

ently of the cancer have caused death, it did in fact accelerate it by aiding the spread of the cancer to other parts of the body; and (4) the cancer was the immediate cause of death. The trial court in setting aside a verdict favorable to the plaintiff entered a judgment n.o.v. for the defendant-insurer. On appeal the Supreme Court of Wyoming affirmed, and in finding that the plaintiff had failed to "demonstrate a bodily injury resulting in death from accident"⁸ HELD: (1) notwithstanding the fact that the accidental injury accelerated the fatal effect of the pre-existing cancer, where both the injury and the pre-existing disease or infirmity were found to be proximate causes of the death, recovery would be denied; (2) that since the cancer was "active" and "virulent" and found to be a contributing cause of the insured's death, it was necessary for the plaintiff to prove that it was not also a proximate cause of death;⁴ (3) as the record left no reasonable doubt that the cancer was a proximate cause of death, the trial court was warranted in disposing of the issue as a matter of law.

Attempted recovery under policies containing "sole clause" provisions,⁵ which award benefits for accidental death resulting "directly and independently of all other causes," has produced a plethora of litigation. Generally, little difficulty has arisen in finding the insurer liable in cases where the insured had been free from any pre-existing ailment prior to sustaining an accidental injury, or where the effects of the accident have produced a diseased condition or bodily infirmity which in turn has caused the death or disability of the insured.⁶ However, in attempting to determine whether the insured's loss has resulted from accidental means within the terms of the contract,⁷ an array of divergent authority has evolved from cases where the effects of an accidental injury have aggravated or combined with a pre-existing condition to produce the death or disability.⁸

³ Supra note 1, at 723.

⁴ The death certificate stated that "Respiratory Failure" was the immediate cause of death due to a cancerous condition in the lungs which had become infected after the cancer had spread from other parts of the body. (Metastatic Osteogenic Sarcoma, due to Osteogenic Sarcoma Femur.)

⁵ Basically there are two types of accident insuring clauses:

(1) "*Sole Clause*"—This is a standard feature of most policies, generally insuring against death or injury resulting "directly and independently from all other causes," or "solely and exclusively from accidental means." This language is sometimes supplemented by the language, "solely by external, violent, and accidental means."

(2) "*Exclusionary Clause*"—This type of clause is generally included in addition to the "sole clause" to render further protective language for the insurer in an attempt to exclude risks from various areas. Parts of these clauses attempting to exclude contributing effects from pre-existing conditions generally read, e.g., "if death or injury is caused or contributed to by disease or bodily infirmity," or "wholly or in part from disease or bodily infirmity." Others exclude liability unless death results "directly and independently from disease or bodily infirmity."

⁶ E.g., *Aetna Life Ins. Co. v. Kelly*, 70 F.2d 589 (8th Cir. 1934); *Barnett v. John Hancock Mut. Life Ins. Co.*, 304 Mass. 564, 24 N.E.2d 662 (1939). See generally, *Freeman v. Mercantile Mut. Acc. Ass'n*, 156 Mass. 351, 30 N.E. 1013 (1892); *Hutchinson v. Aetna Life Ins. Co.*, 182 Ore. 639, 189 P.2d 586 (1948).

⁷ See Vance, *Insurance* 977 (3d ed. 1951).

⁸ See Annot., 84 A.L.R.2d 176 (1961) for a detailed analysis of the divergent approaches to the problem of causation.

One line of authority, in applying a strict and literal meaning to the language of the insuring clause, has generally precluded recovery where the accident was not found to have been the "sole" and "independent" cause of the insured's death or injury.⁹ This narrow view achieved primary significance in *Penn v. Standard Life & Acc. Ins. Co.*,¹⁰ where the court established the policy of denying recovery when the effect of a pre-existing disease or infirmity was found to be a "necessary condition" to the loss incurred by the insured. Courts adhering to the *Penn* approach have tended to apply the "necessary condition" rule indiscriminately without regard to the nature or character of the pre-existing ailment.¹¹ Furthermore, they have apparently added a mechanical "but for" test to the foregoing rationale; thus, when it is determined that a pre-existing condition has been a "necessary" one in the causal chain, and the insured would not have died when he did *but for* the disease or infirmity, recovery is generally precluded.¹²

However, the majority of jurisdictions have recognized that ultimate death or disability rarely results exclusively from accidental means "independently of all other causes," and have deviated from a strict construction of the insuring clauses. Instead, they have employed the familiar tort doctrine of proximate causation to determine the causal relationship between the accidental injury, the pre-existing condition, and the resultant death or disability.¹³ These jurisdictions have been strongly influenced by the rationale generated in *Driskell v. United States Health & Acc. Ins. Co.*,¹⁴ where the court in formulating its celebrated doctrine stated:

. . . the fact that a given injury may not be generally lethal does not prevent it from becoming so under certain conditions; and if under a peculiar temperament or condition of health of an individual upon whom it is inflicted, such injury appears [as] the *active, efficient cause* that sets in motion agencies that result in death, without the intervention of any other independent force, then it should be regarded as the *sole and proximate cause* of death. The

⁹ *Ryan v. Continental Cas. Co.*, 47 F.2d 472 (5th Cir. 1931); *Aetna Life Ins. Co. v. Ryan*, 255 Fed. 483 (2d Cir. 1918); *Commercial Travelers' Mut. Acc. Ass'n v. Fulton*, 79 Fed. 423 (2d Cir. 1897); *National Masonic Acc. Ass'n v. Shryock*, 73 Fed. 774 (8th Cir. 1896) (exclusionary clause); *White v. Standard Life & Acc. Ins. Co.*, 95 Minn. 77, 103 N.W. 735 (1905).

¹⁰ 158 N.C. 24, 73 S.E. 99 (1911), supplemental opinion rendered, 160 N.C. 326, 76 S.E. 262 (1912) (accidental fall hastened loss of eyesight in one eye with a previous cataract).

¹¹ E.g., *Crowder v. General Acc. Fire and Life Assur. Corp.*, 180 Va. 117, 21 S.E.2d 772 (1942). Cf. *Leland v. Order of United Comm. Travelers*, 233 Mass. 558, 124 N.E. 517 (1919).

¹² E.g., *Bush v. Order of United Comm. Travelers of America*, 124 F.2d 528 (2d Cir. 1942). Cf. *Fetter v. Fidelity & Cas. Co.*, 174 Mo. 256, 73 S.W. 592 (1903).

¹³ Courts employing the doctrine of proximate causation generally construe the terminology "independently of all other causes" to mean accidental injury which was the *proximate cause* of the resultant death. On this point see *Cramer v. John Hancock Mut. Life Ins. Co.*, 18 N.J. Misc. 367, 377, 13 A.2d 651, 656 (1940). See also *Freeman v. Mercantile Mut. Acc. Ass'n*, *supra* note 6.

¹⁴ 117 Mo. App. 362, 93 S.W. 880 (1906).

fact that the physical infirmity of the victim may be a *necessary condition* to the result does not deprive the injury of its distinction as the sole producing cause. *In such case, disease and low vitality do not arise to the dignity of concurring causes*, but, in having deprived nature of her normal power of resistance to attack, appear rather as *passive allies* of the agencies set in motion by the injury. (Emphasis supplied.)¹⁵

The *Driskell* holding is apparently the direct antithesis of that enunciated in the *Penn* case, and these cases have since been the predominant forces responsible for the polarization of authority in this area. Cases following the *Penn* rule have tended to preclude recovery as a matter of law where the pre-existing ailment was found to be a "necessary condition," whereas courts closely adhering to the *Driskell* approach have generally awarded relief where the jury has determined the accidental effects to be the "proximate cause" of the insured's death or injury.¹⁶ Although some courts in following *Driskell* have gone so far as to award recovery on a "but for the accident" basis,¹⁷ many others in directing more attention to the nature, character, and causal effect of the pre-existing condition have attempted to draw a legal distinction between those conditions which are remote causes and those which are, in fact, *proximate* causes.¹⁸ Generally, pre-existing ailments which are found to be latent or dormant in nature are deemed to be remote causes, whereas those which are active, virulent, and life-endangering are more apt to be designated as proximate causes.¹⁹ Under this line of reasoning, where a latent or dormant ailment becomes activated by the agencies released from the accidental injury and combines with that injury to produce death, the accident is deemed to be the proximate factor—and recovery is generally granted.²⁰ However, where the pre-existing con-

¹⁵ *Id.* at 369, 93 S.W. at 882.

¹⁶ For cases adopting the *Driskell* rationale, see generally *Wheeler v. Fidelity & Cas. Co.*, 298 Mo. 619, 251 S.W. 924 (1923); *Fetter v. Fidelity Cas. Co.*, *supra* note 12; *Foulkrod v. Standard Acc. Ins. Co.*, 343 Pa. 505, 23 A.2d 430 (1942); *Kelly v. Prudential Ins. Co. of America*, 334 Pa. 143, 6 A.2d 55 (1939); *Kelly v. Pittsburgh Cas. Co.*, 256 Pa. 1, 100 Atl. 494 (1917). See also, *Rebenstorf v. Metropolitan Life Ins. Co.*, 299 Ill. App. 71, 19 N.E.2d 420 (1939).

¹⁷ E.g., *Roberts v. Woodmen Acc. Co.*, 233 Mo. App. 1058, 129 S.W.2d 1053 (1939). See Comment, *Pre-existing Disease and Accident Insurance: Pathology and Metaphysics in the Common Speech of Men*, 21 U. Chi. L. Rev. 266 (1954).

¹⁸ Two of the foremost cases in this area are: *Silverstein v. Metropolitan Life Ins. Co.*, 254 N.Y. 81, 171 N.E. 914 (1930) and *Equitable Life Assur. Soc. of United States v. Gratiot*, 45 Wyo. 1, 14 P.2d 438 (1932). For one view illustrating the effect of an exclusionary clause on this distinction see *Illinois Comm. Men's Ass'n v. Parks*, 179 Fed. 794 (7th Cir. 1910).

¹⁹ Compare *Equitable Life Assur. Soc. of United States v. Gratiot* (remote aneurysm), *supra* note 18, with *Mutual of Omaha Ins. Co. v. Deposit Guar. Bank and Trust*, — Miss. —, 151 So. 2d 816 (1963) (active, virulent heart ailment). Compare *Kievit v. Loyal Protective Life Ins. Co.* (latent, inactive), *infra* note 23, with *Runyon v. Commonwealth Cas. Co.*, 109 N.J. 238, 160 Atl. 402 (1932) (patent, active).

²⁰ E.g., *United States Fid. & Guar. Co. v. Hood*, 124 Miss. 548, 87 So. 115 (1921); *Driskell v. United Health & Acc. Ins. Co.*, *supra* note 14. But cf. *Adkins v. American Cas. Co.*, 145 W. Va. 281, 114 S.E.2d 556 (1960).

dition is found to be the proximate cause, in that it was of such an active and virulent character as to play a substantial contributing role in the death of the insured apart from the effects produced by the accident—then recovery is generally denied.²¹

Although the inclusion of an exclusionary clause²² in the terms of a policy has often failed to narrow the scope of the insurable risk,²³ there is a line of authority which adopts a literal construction of the exclusionary clause and bars recovery in any instance where the pre-existing condition, regardless of its nature, was found to play a contributing role in the resultant death or disability.²⁴ In fact, the existence of an exclusionary clause has influenced some jurisdictions to refute the doctrine of proximate causation and permit recovery only where the accidental injury was shown to be the "sole cause" of the ultimate loss.²⁵ These latter courts, however, do employ the doctrine in determining whether the loss has resulted solely from accidental means.²⁶

²¹ E.g., *Mutual of Omaha Ins. Co. v. Deposit Guar. Bank and Trust*, supra note 19. This situation should be compared to those cases where there was no causal relation found between a pre-existing incurable disease and the resultant death. E.g., *Kundiger v. Prudential Ins. Co. of America*, 219 Minn. 25, 17 N.W.2d 49 (1944); *Klinke v. Great Northern Life Ins. Co.*, 318 Ill. App. 43, 47 N.E.2d 506 (1943).

²² Supra note 5.

²³ This position was exemplified in *Kievit v. Loyal Protective Life Ins. Co.* 34 N.J. 475, 488, 170 A.2d 22, 30 (1961), where the court stated:

[W]e attach little significance to the presence of the exclusionary clause in view of the primary provision limiting coverage to loss from accidental bodily injuries, directly and independently of all other causes.

... the courts goal in construing an accident insurance policy is to effectuate the reasonable expectations of the average member of the public who buys it; he may hardly be expected to draw any subtle or legal distinctions based on the presence or absence of the exclusionary clause for he pays premiums in the strong belief that if he sustains accidental injury which results ... in his disability he will be indemnified and not left empty-handed on the company's assertion that his disability was caused or contributed to by a latent disease or condition of which he was unaware and did not effect him before the accident.

See *Krug v. Mutual Life Ins. Co. of New York*, 235 Mo. App. 1224, 149 S.W.2d 393 (1941), where the court labeled the exclusionary provision as a "redundant clause."

²⁴ *Brown v. United States Fid. & Guar. Co.*, 336 Mass. 609, 147 N.E.2d 160 (1958) (diabetes determined to have been a "contributing cause" of death); *Fries v. John Hancock Mut. Life Ins. Co.*, 227 Ore. 139, 360 P.2d 774 (1961); 41 Ore. L. Rev. 348 (1962).

²⁵ In *Kundiger v. Metropolitan Life Ins. Co.*, 218 Minn. 273, 281, 15 N.W.2d 487, 493 (1944), the court explained this reasoning:

The rule of proximate cause as applied to actions of negligence, cannot, however, be applied in its full scope to the contract of this nature. ... This is true because under the parties' express contract a recovery can be had only if death resulted "solely" (not proximately) from injury[ies] received through accidental means, and, if the insured's condition was a contributing cause, there can be no recovery.

For other Minnesota cases following this view, see *Ryan v. Metropolitan Life Ins. Co.*, 206 Minn. 562, 289 N.W. 557 (1939); *Ackermann v. Minn. Comm. Men's Ass'n*, 184 Minn. 522, 239 N.W. 229 (1931); *White v. Standard Life & Acc. Ins. Co.*, supra note 9.

²⁶ For an example illustrating how courts may disagree over the distinction between

The holding in the case at bar, precluding recovery because an incurable pre-existing disease was found to "arise to the dignity" of a substantial contributing cause (proximate cause) in the death of the insured, appears to adhere to the guideposts initially set forth in Wyoming in *Equitable Life Assur. Soc. of United States v. Gratiot*.²⁷ There the plaintiff-beneficiary was successful in obtaining recovery under a double indemnity provision where the insured-deceased had died from a cerebral hemorrhage after sustaining injuries in an automobile accident. Medical testimony disclosed that a rupture, which caused ultimate death, had occurred at a point in the basilar artery where an aneurysm had existed prior to the accident. Testimony also revealed that the aneurysm was "latent" or "dormant" in nature, but was conflicting in regards to its causal relation to the insured's death. The insurer contended that the exclusionary language of the insuring clause precluded recovery where the insured had been afflicted with a pre-existing bodily infirmity.²⁸ In rejecting the insurer's strict interpretation of the insurable risk, the court pointed out that a distinction must be drawn between remote and proximate causes in determining the causal effect of the pre-existing infirmity.²⁹ In relying on *Lemos v. Madden*,³⁰ Judge Blume attempted to distinguish between the two by stating:

[P]roximate cause is *probable cause*, and remote cause is *improbable cause*. . . . The criterion laid down by some of the courts is . . . whether it can be said to have been a *substantially contributing cause*. . . . A condition which could not reasonably be expected to endanger, and which, but for some independent cause without which the injury would not have occurred, would not have endangered, does *not* ordinarily amount to a proximate cause. (Emphasis supplied.)³¹

the phraseology found in "sole" and "exclusionary" clauses, and the different legal effects possible from each, compare *Illinois Comm. Men's Ass'n v. Parks*, supra note 18, (as summarized by *Fidelity Cas. Co. v. Meyer*, infra note 43, at 98, 152 S.W. at 998:

The phrase, "resulting directly, independently and exclusively in death," refers to the efficient, or, as some courts speak of it, the predominant, cause of death. . . . In other words, it means the proximate cause; whereas, the other phrase employed in some policies excepting liability where death has resulted, "wholly or in part, directly or indirectly, from disease or bodily infirmity," refers to another contributing cause, whether proximate or remote.)

with *Kerns v. Aetna Life Ins. Co.*, 291 Fed. 289, 292 (8th Cir. 1923) which stipulated: [I]t is difficult, if not impossible, to eke out any legal distinction between death which results directly and independently of all other causes, and death caused wholly or in part from disease or bodily infirmity.

²⁷ 45 Wyo. 1, 14 P.2d 438 (1932).

²⁸ The policy awarded benefits for accidental death, "of bodily injuries effectuated solely through external, violent and accidental means. . . ." It also contained an exclusionary provision barring recovery unless death from bodily injuries was one "resulting directly or indirectly from bodily or mental infirmity. . . ."

²⁹ In reaching this conclusion, the court was strongly influenced by the rationale generated in the *Silverstein* and *Driskell* cases.

³⁰ 28 Wyo. 1, 200 Pac. 791 (1921).

³¹ Supra note 27, at 23, 14 P.2d at 445. See, *Eberhardt v. Glasco Mut. Tel. Ass'n*, 91 Kan. 763, 139 Pac. 416 (1914).

From this interplay of legalistic logic he then stipulated the mandate of the decision:

[I]f a disease, bodily infirmity, or predisposing cause in fact existed, as claimed, still unless it can be said to be one of the proximate causes instead of only the remote cause . . . recovery should not, on that account, be denied.³²

In *Bankers Life Co. v. Nelson*,³³ plaintiff-beneficiary was awarded recovery under a double indemnity provision of a policy containing an exclusionary clause.³⁴ The insured-decedent, who had been afflicted with a pre-existing thinness of his heart wall (determined to be of latent and dormant character), sustained a hernia there during an accident and subsequently died of heart failure. The Wyoming Supreme Court reaffirmed the reasoning of *Gratiot*:

This court has already decided that latent or dormant bodily weakness in itself, on the part of the claimant, is insufficient to be regarded as the proximate cause of a death or injury where the accident sets in motion consequences which otherwise would not have ensued if such latent or dormant condition had not existed.³⁵

In adopting this rationale, the court in *Miles* had little difficulty in distinguishing the situation on hand from those presented in *Gratiot* and *Nelson*. In the latter cases the pre-existing conditions were inactive, latent, and dormant and therefore easily found to constitute remote causes; whereas in *Miles*, the cancer was determined to be malignant, active, virulent, and incurable and therefore constituted a substantial contributing factor (proximate cause) in the insured's death. Furthermore, in *Gratiot* and *Nelson*, the latent defects did not impose any immediate threat of death until they became activated by the agencies released from the accident, whereas in *Miles* the cancerous condition was already activated and life-endangering prior to the accidental injury. As such, it could hardly be said that the fracture was the active and efficient cause that set in motion the agencies which resulted in death.³⁶ Where a pre-existing condition was shown to be

³² Equitable Life Assur. Soc. of United States v. Gratiot, supra note 27, at 23, 14 P.2d at 445.

³³ 56 Wyo. 243, 108 P.2d 584 (1940), rehearing denied, 56 Wyo. 513, 111 P.2d 136 (1941).

³⁴ The exclusionary clause contained in the Double Indemnity provision in essence provided: "This double indemnity benefit will not apply if the insured's death resulted from . . . physical or mental infirmity, directly or indirectly from disease of any kind."

³⁵ Bankers Life Co. v. Nelson, supra note 33, at 256, 108 P.2d at 588.

³⁶ This line of reasoning is supported in Mutual of Omaha Ins. Co. v. Deposit Guar. Bank and Trust, supra note 19, where the Mississippi Supreme Court in applying a strict interpretation to the insuring clause, precluded recovery where it was found that the insured-decedent had been afflicted with an "active" and "virulent" heart ailment "likely to cause death at any time." In adopting an approach similar to *Miles*, the court also distinguished the situation on hand, where the active heart ailment was found to play a substantial role in the insured's death, from those cases where a latent or dormant condition becomes activated by the agencies released from the accident. Cf. United States Fid. & Guar. Co. v. Hood, supra note 20.

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a contributing factor in the ultimate death, it was essential for the plaintiff to demonstrate that such was not also a proximate cause in the death.³⁷ The plaintiff, in *Miles*, failed to meet this latter burden and thus failed to demonstrate a death resulting from accidental cause within the coverage of the policy.

Although it was established in *Miles* that the accidental fracture had in fact hastened the fatal effect of the cancerous condition, the court, in following the authority of *Gratiot*,³⁸ refused to extend the coverage of the policy to cases where death has been *accelerated* by accidental effects.³⁹ A similar result was reached in *Prudential Ins. Co. of America v. Lowe*,⁴⁰ where the court, in acknowledging the fact that the accidental injury had accelerated the death of an insured previously afflicted with incurable cancer, held that the death loss did not fall within the language of the policy containing an exclusionary clause. Although in *Lowe*, and in other cases involving similar insuring clauses, recovery was precluded primarily because of the additional exclusionary language,⁴¹ there is also a substantial body of authority involving "sole clauses" which have refused to recognize the doctrine of acceleration where the combined effects of both the pre-existing condition and the accidental injury have produced death.⁴²

The doctrine of acceleration has been adopted in a few jurisdictions which recognize an insurable value in the shortened life expectancy of the insured in cases where the accidental effects have accelerated the fatal condition of a pre-existing ailment. Apparently, these courts have proceeded upon the theory that if the accidental injury accelerates death, then it must

³⁷ In support of this holding the court cited *Pettit v. United Benefit Life Ins. Co.*, 277 S.W.2d 857 (Mo. 1955); *Lucas v. Metropolitan Life Ins. Co.*, 339 Pa. 277, 14 A.2d 85 (1940); and *Worley v. International Travelers Assur. Co.*, 110 S.W.2d 1202 (Tex. Civ. App. 1937). Generally, when the plaintiff has demonstrated that the death had resulted from accidental means (in accordance to the sufficiency of evidence required by the particular court), then the insurer, in his defense, must usually show the loss to have fallen within some exception of the policy in order to bar recovery.

³⁸ *Supra* note 27.

³⁹ The Defendant-Appellee pointed out in his brief, and the court agreed, that the problem of acceleration was not a legal issue under Wyoming Law; the main question being "Whether the cancerous condition was the proximate or a remote cause of his death, or whether it was directly contributing in a substantial nature to . . . death. . . ." (p. 13).

⁴⁰ 313 Ky. 126, 230 S.W.2d 466 (1950).

⁴¹ In *New York Life Ins. Co. v. Rees*, 341 S.W.2d 246 (Ky. 1960) (arteriosclerosis, heart ailment, poor life expectancy), the court followed *Lowe* in holding that notwithstanding the fact that the injury contributed or *accelerated* death, the plaintiff still had the burden to demonstrate an accidental injury which was the "exclusive" and "independent" cause of the insured's death. In *Miller v. Life & Cas. Co. of Tenn.*, 102 Ga. App. 655, 117 S.E.2d 237 (1960) (hemophilia), where the policy involved contained a narrowly drawn clause—"if death is not caused or contributed to by disease or infirmity"; the court held that the plaintiff had the burden to show that death was caused from accidental injury independent of the insured's pre-existing infirmity, and if it was shown that such resulted from the combined effects of both the injury and the infirmity—then recovery would be denied.

⁴² E.g., *Smith v. Massachusetts Bonding & Ins. Co.*, 207 App. Div. 682, 202 N.Y. Supp. 857, aff'd, 241 N.Y. 558, 150 N.E. 554 (1929). See generally, Annot., 84 A.L.R.2d 176 § 11 (1961). Cf. *Fetter v. Fidelity & Cas. Co.*, *supra* note 12.

be held to be the proximate and sole cause of death. In achieving its primary significance in Alabama and Arkansas, the theoretical underpinnings of this doctrine were formulated in *Fidelity Cas. Co. v. Meyer*,⁴³ where the court stated:

[I]f the injury, by aggravating the disease, *accelerated* the death of the assured, then it resulted "directly, independently, and exclusively of all other causes." (sole clause terms) In other words, if death would not have occurred when it did, *but for* the injury resulting from the accident, it was the direct, independent and exclusive cause of death at that time, *even though the death was hastened by the diseased condition*. (Emphasis supplied.)⁴⁴

Although this liberal rule was promulgated in circumstances involving a "latent" cancerous growth, it appears that subsequent cases in both Arkansas and other jurisdictions have applied it indiscriminately to situations where the pre-existing ailment was active or terminal, rather than latent or remote.⁴⁵ The *Meyer* rule is so well established in Arkansas⁴⁶ that it has even been employed in cases involving exclusionary clauses.⁴⁷ In Alabama, however, although the *Meyer* rule has had substantial influence,⁴⁸ there has been a

⁴³ 106 Ark. 91, 152 S.W. 995 (1912).

⁴⁴ *Id.* at 96, 152 S.W. at 997. In *Clay County Cotton Co. v. Home Life Ins. Co. of New York*, 113 F.2d 856 (8th Cir. 1940) (sole clause), the court held it was a question for the jury to determine whether the insured would not have died when he did, except for the accident. In *Moon v. Order of United Comm. Travelers of America*, 96 Neb. 65, 146 N.W. 1037 (1914), the court held the accident to constitute the *proximate* cause of death, where it was shown (notwithstanding the insured's arteries had been weakened by sclerosis prior to the trauma), *but for* the accident, the insured would have lived many more years. Accord, *United States Cas. Co. v. Thrush*, 21 Ohio App. 129, 152 N.E. 796 (1926). Cf. Defendant-Appellee's argument, *supra* note 39.

⁴⁵ *Life & Cas. Co. of Tenn. v. Jones*, 230 Ark. 979, 985, 328 S.W.2d 118, 122 (1959):

Our exhaustive research reveals the law to be well settled in this state that an insurance company is liable . . . if death resulted when it did on account of an aggravation of a disease by accidental injury, even though death from the disease might have resulted at a later period regardless of the injury, on the theory that if death would not have occurred when it did but for the injury, the accident was the direct, independent and exclusive cause of death at that time.

However, in *Metropolitan Cas. Ins. Co. of N.Y. v. Fairchild*, 215 Ark. 416, 220 S.W.2d 803 (1949), the court did stipulate that death had resulted from the aggravation of a "latent" disease when directing its instructions to the jury.

⁴⁶ Some of the cases in Arkansas following the *Meyer* rule which are not elsewhere cited include: *Fidelity Reserve Ins. Co. v. English*, 226 Ark. 210, 288 S.W.2d 951 (1956); *Union Life Ins. Co. v. Epperson*, 221 Ark. 522, 254 S.W.2d 311 (1953); *Duke v. Life & Cas. Co. of Tenn.*, 218 Ark. 686, 238 S.W.2d 631 (1951); *National Life & Acc. Ins. Co. v. Shibley*, 192 Ark. 53, 90 S.W.2d 766 (1936); *Missouri State Life Ins. Co. v. Barron*, 186 Ark. 46, 52 S.W.2d 733 (1932); *Maloney v. Maryland Cas. Co.*, 113 Ark. 174, 167 S.W. 845 (1914).

⁴⁷ *E.g.*, *Life & Cas. Ins. Co. of Tenn. v. Jones*, *supra* note 45.

⁴⁸ The rule as stated in *Benefit Ass'n of Ry. Employees v. Armbruster*, 217 Ala. 282, 116 So. 164, 166 (1928) (sole clause) reads:

[W]here accidental injury aggravated a disease and hastened death so as to cause it to occur at an earlier period than it would have occurred but for the

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reluctance to extend its application to exclusionary clause situations.⁴⁹ The doctrine of acceleration, as advocated in *Meyer*, has stirred considerable controversy in numerous opinions, but because of its tendency to inject broad and liberal implications into the insuring language of the contract, most jurisdictions have repudiated its legal validity.⁵⁰ In the dissenting opinion of *Miles*, Judge Harnsberger strongly appealed for the adoption of the *Meyer* rule in Wyoming. However, in pointing out the insurable value in the continuation of life, and in advocating the right of the jury to determine whether the accidental injury had in fact shortened the insured's life, it is submitted that he misinterpreted the majority opinion.

First, the dissent overlooked the fact that unlike the general life insurance contract where the insurable risk is based upon an inevitable certainty—namely, death—the insured under an accident policy is paying for protection to cover an unforeseeable event predicated upon fortuity and chance.⁵¹

Second, the dissent ignored the fact that the courts are confronted with a situation where two parties have entered into an enforceable contract, wherein the insurer has expressly stipulated that accidental death must result from bodily injury "directly and independently of all other causes." It is true that a literal construction of this language would probably bar recovery in most instances where the pre-existing condition had some causal bearing on the insured's death.⁵²

Third, the court in *Miles* has clearly stipulated that only in situations where the disease or infirmity is "active" and "virulent" will their contrib-

accident, it is the direct, independent, and exclusive cause of death at the time.

Accord, *United Ins. Co. of America v. Ray*, 271 Ala. 543, 125 So. 2d 704 (1960).

⁴⁹ In *First Nat'l Bank v. Equitable Life Assur. Soc.*, 225 Ala. 588, 144 So. 451 (1932), the court suggested that *but for* the exclusionary language in the insuring clause, it might have granted recovery under the *Meyer* rule. In *Standard Acc. Ins. Co. of Detroit v. Hoehn*, 215 Ala. 109, 110 So. 7 (1926), the court asserted that if the policy in question had contained a *clear* stipulation of exclusionary language concerning *death* rather than *disability*, they would have denied recovery.

⁵⁰ However, the doctrine of acceleration, allied with the *Driskell* rule, has influenced many cases in Missouri. In *Horn v. Travelers Ins. Co.*, 64 F. Supp. 59 (E.D. Mo. 1946), where a trauma sustained in an accident aggravated the insured's cancerous condition, the court pointed out that the issue whether the accident had caused an earlier death of the insured should be considered by the court in determining the liability of the insurer (recovery denied on other provisions of the policy). See *Hooper v. Standard Life & Acc. Ins. Co.*, 166 Mo. App. 209, 148 S.W. 116 (1912).

⁵¹ *Vance*, op. cit. supra note 7, at 944.

⁵² *Wolfangel v. Prudential Ins. Co. of America*, 209 Minn. 439, 441, 296 N.W. 576, 577 (1941), where the court stated:

[A] strict application of the doctrine that the accident must be the sole and independent cause of death would probably always require a decision for the insurer since it is seldom, from a medical point of view, that one cause is solely responsible for death. . . . This consideration has persuaded several courts to distinguish between legal and medical causes and recovery is allowed wherever the accident and its effects, acting upon an imperfect state of health, can be said to be the proximate cause of death.

For the feeling that a contributing cause from the viewpoint of science will not necessarily be recognized as the proximate cause from a legal standpoint, see *Silverstein v. Metropolitan Life Ins. Co.*, supra note 18; *Equitable Life Assur. Soc. of United States v. Gratiot*, supra note 27.

uting effect be deemed proximate. The holding in *Miles* has not adopted the narrow view of the *Penn* case which excludes recovery where the ailment is found to be but a "necessary condition" to the ultimate consequences. Neither does the majority purport to bar recovery upon the mere presence of an incurable disease when there is no causal relationship between its agencies and the death of the insured.⁵³

Fourth, the dissent failed to realize that it was not the mere presence of an ailment which defeats recovery, but the causal effect it has on the ultimate loss is the factor which will extend the situation beyond the risks in the policy.⁵⁴

Fifth, where the insurable risk is expressly confined to accidental injury or death resulting "directly and independently of all other causes," it requires the most imaginative interpretation to imply coverage to situations where an injury, incapable of itself to render a fatal effect, merely accelerated an inevitable, and predetermined result.

Finally, the bare statement by the dissent that there is an insurable value in the continuation of life is indisputable. It is another matter, however, to find such a value within the meaning of these insuring clauses in situations where an accidental injury has accelerated the fatal effect of an otherwise incurable disease. The adoption of such a view would tend to lead to further judicial distortion and abrogation of the protective language of these contracts, and in essence would relegate their coverage to areas and risks presently insured by the general life insurance contracts.⁵⁵

ALBERT NEIL STIEGLITZ

Labor Law—Consumer Picketing—"Threat, Coercion or Restraint."—*Burr v. NLRB*.¹—The Wholesale and Warehouse Employees Union called a strike against Perfection Mattress & Spring Co. in support of their contract demands. In furtherance of its dispute with Perfection, the Union picketed retail stores that sold Perfection's products, at entrances commonly used by customers and employees. Employees of the stores could see the picket line from inside the stores and had to cross the picket line on their way into and out of the stores during the course of the day. There had been no work stoppages nor were there any refusals to handle Perfection's products at any time by employees of the retail stores.² Perfection filed charges with

⁵³ *Klinke v. Great Northern Life Ins. Co.*, supra note 21.

⁵⁴ Justice Cardozo in *Silverstein v. Metropolitan Life Ins. Co.*, supra note 18, at 84, 171 N.E. at 915, illustrated this point when he coined the celebrated phrase "the common speech of men" in the following passage:

Something more, however, must be shown to exclude the effects of accident from coverage of a policy. The disease or infirmity must be so considerable or significant that it would be characterized as a disease or infirmity in the *common speech of men*. (Emphasis supplied.)

⁵⁵ See Hancock and Grahame, *Are the Courts Destroying the Double Indemnity and Accidental Death Benefit?*, 1951 *Ins. L.J.* 440.

¹ 321 F.2d 612 (5th Cir. 1963).

² There were facts indicating more than just peaceful picketing. At one store,