

You Can't Hurry Love

Accidental Death and Dismemberment Update

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Accidental Death

- What is the policy language?
- What law applies?
- Is the policy language consistent with the law?

Accidental Death

- Was the death “accidental”?
- If accidental, was the loss excluded?

“Accidental Death” or “Accidental Means”

“Accidental means” policies require a claimant to show that, if the means were intentional, the death resulted from some intervening element of force or violence.

“Accidental death” policies merely require the claimant to show that the death was unforeseen.

Wickman v. Northwestern Nat'l Ins. Co., (1st Cir. 1990)

- Did the insured expect an injury similar in type or kind to that he suffered?
- If he did not, were the suppositions which underlay that expectation reasonable?
- If the suppositions were unreasonable, then the injuries were not accidental.

Wickman v. Northwestern Nat'l Ins. Co., (1st Cir. 1990)

If cannot determine the insured's subjective expectation, apply an objective analysis of the insured's expectations.

Ask whether a reasonable person, with background and characteristics similar to the insured, would have viewed the injury as highly likely to occur.

**Preexisting Condition
Or
Accident**

Different Approaches

The loss must result *directly* from an accidental bodily injury, and the loss must result *independently* of all other causes.

Different Approaches

A preexisting condition must have “substantially contributed” to an insured’s death before recovery of accidental death benefits can be barred.

Different Approaches

When a death must be caused “solely by bodily injury,” a claimant may recover if the accidental injury was the “efficient, dominant, and proximate cause of death.”

Different Approaches

A “chain of events”: finding that a preexisting illness does not bar recovery if an accident “sets in progress a chain of events leading directly to death.”

Exclusions

With an “exclusionary clause” which negates coverage when a preexisting condition plays any part in the death, the accident itself must have been sufficient to cause death.

Medical Malpractice and Medical Procedures

Medical Malpractice Is Not An Accident

Senkier v. Hartford Life & Accident Ins.
(7th Cir. 1991)

“Medical treatment is often risky and when the risk materializes and the patient dies we do not call it dying in or because of an accident; it is death from sickness.”

Medical Malpractice Is An Accident

“Every act of medical malpractice is to some extent an accident, if one equates ‘accident’ with ‘unintended,’ because it is outside the course of the intended medical treatment.”

Swisher-Sherman v. Provident Life & Accident (6th Cir. 1994)

If No Mishap In Medical Procedure, Death Is Not An Accident

Pennsylvania Life Ins. Co. v. Aron, (Fla. App. 1999)

“[I]f an operation is not necessitated by an injury resulting from an accident, death occurring during or following the operation can be considered ‘accidental’ only when it is the result of a mishap or a misadventure in the operative procedure.”

Death From Medical Procedure Accidental If Not Reasonably Foreseeable

INA v. Brudun, (Alaska 1975)

- **Subpoena medical records**
- **Explanation of risks**
- **Patient consent forms signed by an insured**

Exclusions For Medical Treatment

Sample language:

- **Caused or contributed to by physical or mental illness, diagnosis of or treatment for the illness**
- **Is due to disease; bodily or mental infirmity; or medical or surgical treatment of these**

Overdose of Prescription Medicine

Exclusions

No coverage for deaths that result from the use of drugs, except:

- If the drug was "taken as prescribed by a physician"
- If the drug was "administered on the advice of a physician"

Exclusions

- **“Taken as prescribed by a physician”** focuses more on the acts of the insured, it requires exact adherence to the instructed dosages, and is a stricter standard.
- **“Administered on the advice of a physician”** focuses more on the acts of the physician, does not require an exact adherence to the instructed dosages, and thus more favorable to a beneficiary.

Illegal Drugs or Non-prescribed Drugs

- **Death from an overdose of drugs is more likely to be found not accidental if the policy is deemed to be an “accidental means” policy.**
- **But, if the analysis is based on an insured’s intentions, such a death is more likely to be found accidental.**
- **The application of an expectation analysis has resulted in courts ruling both ways on whether an overdose is an accident.**

Exclusion For Intentionally Self-inflicted Injuries

Gerdes v. John Hancock Mut. Life Ins. Co.,
(C.D. Ill. 2001)

The insured took the drugs with the “objectively reasonable” expectation that he would survive them.

But, the insured’s “voluntary participation in such dangerous action leaves no doubt that the resulting injuries were ‘intentionally self-inflicted.’”

Alcohol Poisoning

Anderson v. Minnesota Life Ins. Co., **(W.D. Va. 2004)**

- The "dangers of excessive alcohol consumption, including loss of consciousness and death, are commonly known and understood."
- Given his education, experience in alcohol programs and the amount of alcohol consumed, he must have known that he was ingesting an amount sufficient to cause serious injury or death.

Evidence – Death Certificates

- Natural cause
- Accidental
- Suicide
- Homicide
- Undetermined
- Pending

Evidence – Death Certificates

- *Clark v. Metro. Life Ins. Co.*, (E.D. Va. 2004)
Medical Examiner's determination is irrelevant.
- *Brust v. Mut. of Omaha Ins. Co.*, (N.Y. App. 2000)
Medical Examiner's opinion was "not conclusive on the manner of death."

Drinking And Driving

Not An Accident

- ERISA cases
- Some state law cases

Not An Accident

- Death from DUI, though unintentional, is “reasonably foreseeable.” – *Cozzie v. Metro. Life Ins. Co.*, (7th Cir. 1998)
- “The horrors associated with drinking and driving are highly publicized and well known to the public. ‘It is clearly foreseeable that driving while intoxicated may result in death or bodily injury.’” – *Schultz v. Metro. Life Ins. Co.*, (M.D. Fla. 1998)

Not An Accident

- Subjective-type analysis

Minnesota Life Ins. Co. v. Scott, (E.D. Va. 2004)

The insured understood the dangers:

- ASAP course

- Told family

Not An Accident

- Subjective/Objective-type analysis

“[A] reasonable person with [the insured’s] background and experience should have known that serious injury or death was likely to occur as a result of driving while intoxicated.”

Weatherall v. Reliastar Life Ins. Co., (W.D. Wis. 2005)

Not An Accident

- Objective-type analysis

Although the insured did not expect to die, his “expectations were objectively unreasonable.”

Weatherall v. Reliastar Life Ins. Co., (W.D. Wis. 2005)

Accidental

- More often state law cases
- Fewer ERISA cases

Accidental

Eckelberry v. Reliastar Life Ins. Co., (S.D. W.Va. 2005)

The insured rammed into a tractor trailer parked on the side of the road.

BAC .15%.

Accidental

Eckelberry v. Reliastar Life Ins. Co., (S.D. W.Va. 2005)

Plan: an accident was “an unexpected and sudden event which the insured does not foresee.”

If the insured “knew beforehand that he was going to crash his car into a parked tractor trailer. . . , he would have avoided the collision.”

Accidental

Eckelberry v. Reliastar Life Ins. Co., (S.D. W.Va. 2005)

“Does driving while intoxicated increase a person’s chances of crashing and possibly dying?”

Absolutely, but so do . . . talking on a cell-phone, applying lipstick, trying to subdue screaming children, or attempting to locate the correct station on a satellite radio.”

Accidental

Eckelberry v. Reliastar Life Ins. Co., (S.D. W.Va. 2005)

Over 17,000 persons died as a result of alcohol-related deaths in 2002 . . .

“Remarkably low when compared to the number of times a person impaired by alcohol got behind the wheel of a car during the same year.”

Accidental

Eckelberry v. Reliastar Life Ins. Co., (S.D. W.Va. 2005)

“[D]runk driving accidents are simply more senseless, more unforgivable, and altogether more deserving of moral disapprobation than other accidents. But they are accidents nonetheless.”

Evidence – Intoxication

Insured Drinking Before Incident:

**BAC readings from toxicology reports or
hospital blood tests**

- **Eyewitnesses**
- **Credit Card and Debit Card
Statements/Card Numbers**
- **Alcohol Purchases**
- **Bar/Restaurant Tabs**

Started - 11:47 p.m.

22 oz. Coors Lt

Red Bull Can

Jager.

22 oz. Coors Lt

Jager.

House Rum

22 oz. Coors Lt

22 oz. Coors Lt

Closed - 1:37 a.m.

Crime Exclusions – DUI's

Crime Exclusions

“Crimes” – “When Decedent voluntarily drove while under the influence of alcohol, he participated in a crime.”

Minnesota Life Ins. Co. v. Scott, (E.D. Va. 2004)

Crime Exclusions

“Felonies” – Third DUI was a felony under state law. *Steele v. Life Ins. of North America*, (C.D. III. 2006)

The court found that a felony is not defined with reference to whether there has been a conviction

or

whether a prosecutor would have charged him with a felony.

Alcohol Exclusions

“Status” exclusion: Precludes coverage to an insured if he is intoxicated, regardless of whether that intoxication had anything to do with the cause of his death.

“Causation” exclusion: Applies in a situation where there is some causal link or connection between an insured’s intoxication and his death.

Alcohol Exclusions

Causation Requirement:

Proximate cause or a cause of an insured's death?

“In consequence”

“A consequence”

“Directly or indirectly”

“Caused by or resulting from”

Violent Behavior

Altercations With Police

- Shoot-outs/Knife Wielding

Not an accident

- Fleeing police

An accident (*Harrington v. New England Life*, (7th Cir. 1989))

Fights/Bomb Making

Russian Roulette

Murder

Autoerotic Asphyxiation

An Accident?

**If so, excluded as an intentionally
self-inflicted injury?**

Even If Accidental, Still An Intentionally Self-inflicted Injury

- Oxygen deprivation
- Temporary cell damage/reduced brain activity
- *Bryant v. AIG Life Ins. Co.*, (S.D. Mich. 2002)

The “overwhelming majority of federal courts” – “partial strangulation involved in autoerotic asphyxiation comes within the plain meaning of ‘intentionally self-inflicted injury.’”

Accidental

Subjective-type analysis –

“[H]ad a history of engaging in this autoerotic behavior and surviving it”
Padfield v. AIG, (9th 2002)

Accidental

Insured's "father's affidavit indicated that [insured] had practiced autoerotic asphyxiation at least as early as the age of 12 or 13."

"By age 32, when he died, therefore, [the insured] apparently had engaged in that activity for some two decades." *Crichlow v. First Unum*, (2nd Cir. 2004)

Accidental

Objective-type analysis –

Padfield: “[U]niform medical and behavioral evidence indicating that autoerotic activity ordinarily has a nonfatal outcome.”

Not An Intentionally Self-inflicted Injury

- **Temporary deprivation of oxygen was not the type of harm classified as an "injury"**
- **It was an unintended injury that resulted in the insured's death**
- **Simply producing a temporary lightheadedness to increase sexual gratification**

The Dissent In *Critchlow*:

“[U]ntil someone, whose opinion I respect, honestly informs me that as a general proposition, he or she would not hesitate to undergo a session of autoerotic asphyxiation through strangulation, I will not change my mind. Partial strangulation is an injury.”

Conclusion

- Policy language
- Applicable law
- *Wickman* analysis
- Whether ERISA applies