# You Can't Hurry Love

## *Accidental Death and Dismemberment Update**

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* This paper was presented at the DRI Life, Health, Disability and ERISA seminar in April of 2006. The title – "You Can't Hurry Love" – was assigned to the author by the DRI committee that organized the seminar and it was in keeping with a theme that the committee used for the titles of all papers that were presented at this seminar.

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## I. Introduction

This update focuses on cases, under both ERISA and state law, involving accidental death and dismemberment coverage. The paper is not intended to be an exhaustive study of the issues, as "[a]ttempts to create a perfect definition for an accident have led to a horde of cases, which to review properly would require the writing of a treatise." *Eckelberry v. Reliastar Life Ins. Co.*, 402 F. Supp. 2d 704, 707 (S.D. W.Va. 2005). Or, as the Fourth Circuit recently repeated:

> "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 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."

*Resource Bankshares Corp. v. St. Paul Mercury Ins. Co*., 407 F.3d 631, 637 (4th Cir. 2005) (citation omitted). The scope of this update is far more limited, as it is intended to illustrate certain types of accidental deaths through a discussion of some recently decided cases. And, breaking with tradition, there will be no discussion of a Sebornian Bog.

## II. "Accidental Death" and "Accidental Means" – *Wickman v. Northwestern*

Historically, there was a distinction between an "accidental death" and "accidental means." Typically, "accidental means" policies require an insured to show that, if the means were intentional, the death resulted from some intervening element of force or violence. On the other hand, "accidental death" policies merely require the insured to show that the death was unforeseen. *See, e.g., Schar v. Hartford Life Ins. Co.*, 242 F. Supp. 2d 708, 715 (N.D. Cal. 2003). A policy covering "loss solely as a result of an injury caused by an accident" has been found to be an "accidental death" policy as opposed to an "accidental means" policy. *Paulissen v. United States Life Ins. Co. in the City of New York*, 205 F. Supp. 2d 1120, 1128 (C.D. Cal. 2002). Examples of deaths that were deemed accidents under "accidental death" policies that might not have been deemed accidents under "accidental means" policies are a death from high-altitude pulmonary edema as a result of mountain-climbing, *id.*, and a death from a massive intracranial hemorrhage caused by a rupture of a cerebral aneurysm during sexual intercourse. *Carroll v. CUWA Mutual Ins. Co.*, 894 P.2d 746, 753 (Colo. 1995) ("Death was certainly not an expected, intended, or foreseeable result of intercourse."). As a result, "accidental death" coverage tends to be broader than "accidental means" coverage.

"The modern trend is to reject the distinction between accidental means and accidental results when considering whether a particular death or injury is accidental." *Id*. at 751. Yet, there are a number of jurisdictions that continue to adhere to "accidental means" as a category of accidental insurance liability distinct from, and more restrictive than, other categories of accident liability insurance. *See Buce v. Allianz Life Ins. Co*., 247 F.3d 1133, 1144 (11th Cir. 2001). By one count, as of 1992, there were about 22

jurisdictions that continued to recognize "accidental means" coverage. *Id*. On the other hand, a majority of states have rejected or repudiated that distinction. *Id*. Therefore, it is important to review both the language of the policies and the applicable state law to determine whether the relevant coverage is "accidental means" coverage or "accidental death" coverage.

In the context of federal common law as it has been developed under ERISA, perhaps the most cited case is the seminal decision *Wickman v. Northwestern Nat'l Ins. Co*., 908 F.2d 1077 (1st Cir. 1990), in which the First Circuit discussed, but chose not to follow, the "accidental means" and "accidental death" approaches in an ERISA case. Rather, the court applied the following analysis that includes both subjective and objective factors:

> [T]he reasonable expectations of the insured when the policy was purchased is the proper starting point for a determination of whether an injury was accidental under its terms.
>
> If the fact-finder determines that the insured did not expect an injury similar in type or kind to that suffered, the fact-finder must then examine whether the suppositions which underlay that expectation were reasonable . . . . If the fact-finder determines that the suppositions were unreasonable, then the injuries shall be deemed not accidental. The determination of what suppositions are unreasonable should be made from the perspective of the insured, allowing the insured a great deal of latitude and taking into account the insured's personal characteristics and experiences . . . .
>
> Finally, if the fact-finder, in attempting to ascertain the insured's actual expectation, finds the evidence insufficient to accurately determine the insured's subjective expectation, the fact-finder should then engage in an objective analysis of the insured's expectations. In this analysis, one must ask whether a reasonable person, with background and characteristics similar to the insured, would have viewed the injury as highly likely to occur as a result of the insured's intentional conduct. An objective analysis, when the background and characteristics of the insured are taken into account, serves as a good proxy for actual expectation. Requiring an analysis from the perspective of the reasonable person in the shoes of the insured fulfills the axiom that accident should be judged from the perspective of the insured.

*Id*. at 1088. This is sometimes called a subjective/objective analysis. *Wickman* has been followed by a number of federal courts, especially in ERISA cases. *See, e.g., Jones v. Metropolitan Life Ins. Co*., 385 F.3d 654 (6th Cir. 2004); *Padfield v. AIG Life Ins. Co.,* 290 F.3d 1121 (9th Cir. 2002); *Cozzie v. Metro. Life Ins. Co.*, 140 F.3d 1104 (7th Cir. 1998). It also has been cited by some state courts. *See, e.g., MAMSI Life & Health Ins. Co. v. Callaway*, 825 A.2d 995, 996 (Md. 2003).

## III. Preexisting Condition or Accident

Cases that involve deaths resulting from the combination of an accident and a pre-existing condition often hinge on the courts' analyses of the roles that each had in the insureds' deaths. Typical policy language is that a death must result "directly and independently of all other causes." Some courts have found that such a phrase is unambiguous and that it requires two conditions: "First, the loss must result *directly* from an accidental bodily injury. Second, the loss must result *independently* of all other causes." *Pirkheim v. First UNUM Life Ins.*, 229 F.3d 1008, 1010 (10th Cir. 2000) (emphasis in original) (where the insured had a congenital heart defect and his death was caused by the failure of a pacemaker, which in turn was caused by the battery becoming depleted). Under such an approach, if an insured's death was at least partially due to a pre-existing condition, recovery of accidental death benefits would be precluded.

On the other hand, some courts have ruled that a pre-existing condition must have "substantially contributed" to an insured's death before recovery of accidental death benefits can be barred. For example, in *Dixon v. Life Insurance Company of North America*, 389 F.3d 1179 (11th Cir. 2004), the insured died in a single car accident near his home, but the cause of death was heart failure. The insured was found to have been suffering from a heart disease, and there were conflicting expert opinions as to whether or not the emergency situation that led to the accident caused emotional and psychological stress that, in turn, precipitated in the insured's sudden cardiac arrest. Reviewing the case *de novo* under ERISA, the Eleventh Circuit rejected the "directly and from no other causes" test employed by some other courts, because such an approach would provide coverage "only where the insured was in perfect health at the time of the accident." *Id*. at 1184. Rather, the court adopted the "substantially contributed" test as the federal common law, noting that it was more favorable to claimants. However, the court concluded that, even under the "substantially contributed" test, the insured's death was not accidental because his pre-existing heart condition "substantially contributed" to his death, regardless of whether the auto accident was the immediate cause in that it triggered his heart attack. *Id*.; *see also Johnson v. Life Investors' Ins. Co. of America*, 98 Fed. Appx. 814 (10th Cir. 2004) (in which the court found that the policy excluded coverage only where the sickness or infirmity directly caused the loss, noting that if the insurer had wanted to exclude coverage for the accident rather than loss that was caused by sickness or infirmity, it could have done so); *Murray v. United of Omaha Life Ins. Co.*, 145 F.3d 143, 156 (3rd Cir. 1998) (in which the court predicted that New Jersey would apply the more "modern" rule that looks to whether the accident or the preexisting condition was the "direct, efficient, and predominant cause of the insured's death"); *Elliott v. American Int'l Life Assurance Co. of New York*, 394 F. Supp. 2d 1357, 1364 (N.D. Ga. 2005); *House v. Life Ins. Co. of North America*, 399 F. Supp. 2d 1254 (N.D. Ala. 2005) (applying a *de novo* review in an ERISA case, the court found that the insured's myriad of significant health issues, which had caused the hospital to post "do not resuscitate orders" for her, substantially contributed to her death); *Danz v. Life Ins. Co. of North America*, 215 F. Supp. 2d 645 (D. Md. 2002) (applying the "substantially contributed" test even though the policy had language that the bodily injuries must be caused by an accident and "directly and from no other causes"); *Carroll v. CUWA Mutual Ins. Co.*, 894

P.2d 746, 755 (Colo. 1995) ("the expression 'directly and independently of all other causes' to require that the accident be the predominant cause of injury. The court of appeals' statement that this phrase precludes recovery whenever the injury is due, even in part, to a preexisting bodily infirmity is incorrect").

In another approach, one court has held that with a "sole clause" (*e.g.*, a death must be caused solely by bodily injury) a claimant may recover "if he shows that the accidental injury was the efficient, dominant, and proximate cause of death of the insured," but with an "exclusionary clause" (which negates coverage when a preexisting condition plays any part in the death), a claimant must show "that the accident itself was sufficient to cause death." *Harrison v. Monumental Life Ins. Co.*, 333 F.3d 717, 722 (6th Cir. 2003) (applying Michigan law). *Cf, Khatchatrian v. Continental Cas. Co.*, 198 F. Supp. 2d 1157 (C.D. Cal. 2002), *aff'd* 332 F.3d 1227 (9th Cir. 2003) ("if the cause of death was a process or occurrence that took place solely within the decedent's body, it cannot be 'external' and thus cannot be 'accidental'").

Other courts have made reference to 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." *Parra v. CIGNA Group Ins.*, 258 F. Supp. 2d 1058, 1066 (N.D. Cal. 2003). In *Parra*, the court concluded that there was no such "chain of events," because in the absence of any physical evidence to determine the medical effects of an automobile accident on the insured, "his list of illnesses is too long to attribute causation to the accident." *Id.* at 1068.

In these cases, there often is an exclusion that precludes coverage for a death caused by an illness, sickness and/or disease. Courts' analyses of this type of exclusion have varied. Some courts have found that once an accident has been established, an insurer bears the burden of showing that without the injury, death would have occurred when it did due to illness or disease. *Fiffick v. Econ-O-Check Corp.*, 85 Fed. Appx. 16 (5th Cir. 2004). *See also Chole v. Allstate Life Ins. Co.*, 353 F.3d 742, 748 (9th Cir. 2003) ("the insurer must surmount its burden to show that the death was caused by 'disease' or 'infirmity'"). Other courts have found that such exclusionary clauses require that an accident itself must be sufficient to cause an insured's death. *See Harrison, supra,* 333 F.3d at 722-23 (in which the exclusion pertained to a "loss which is caused by, results from, or contributed to by sickness" and the court noted this would require a finding that the "accident itself was sufficient to cause" an insured's death); *Miller v. The Hartford Life Ins. Co.*, 348 F. Supp. 2d 815 (E.D. Mich. 2004) (in which the exclusion applied to a loss "resulting from sickness or disease," the court found that the insured's death was caused by her underlying condition, even though her medical treatment was deemed to have contributed to her death); *Ablow v. Canada Life Assurance Co.*, 2003 U.S. Dist. LEXIS 24873 (D. Conn. 2003) (in which the court noted that an illness or disease exclusion precludes payment where the death results from a pre-existing disease or from a combination of a pre-existing disease and an accident); *Mooney v. Monumental Life Ins. Co.*, 123 F. Supp. 2d 1008 (E.D. La. 2000) (with an exclusion for a loss that is "caused by, results from, or contributed to by sickness," an insured's death cannot have been the result of, caused by or contributed to by sickness).

## IV. Medical Malpractice and Medical Procedures

Nationally, the cases are across the board on whether and when a death resulting from medical malpractice or a medical procedure is an accident. *See Couch on Insurance 3d*, “Coverage for Harm Related to Medical Procedures; Surgery,” §§ 141:79-141:89; “Death During or Allegedly Resulting From Surgery as Accidental or From Accidental Means within Coverage of Health or Accident Insurance Policy,” 91 ALR 3d 1042. The cases generally seem to fall into several basic categories: (a) Cases holding that death or injury resulting from medical malpractice does not constitute an accidental injury; (b) Cases finding that, in the absence of a mishap, death resulting from surgical procedures are not accidents; (c) Cases holding that a death from medical malpractice is accidental; (d) Cases holding that death from a medical procedure is accidental if it were not reasonably expected; and (e) Cases where the policy contains an exclusion for medical treatment.

### A. Medical Malpractice Not An Accident

There are cases in which courts, mostly deciding appeals under ERISA, have held that deaths or injuries resulting from medical procedures and/or malpractice do not constitute accidents. For example, in *Senkier v. Hartford Life & Accident Ins. Co.*, 948 F.2d 1050 (7th Cir. 1991), the insured was suffering from Crohn’s Disease and was hospitalized for an intestinal obstruction. A catheter was inserted for purposes of administering nourishment. The catheter became detached from its position, entered the insured’s heart and punctured it, thus leading to her death. The Seventh Circuit upheld the claims administrator’s determination, under ERISA, that accidental death benefits were not due:

> [A] policy of accident insurance does not reach iatrogenic injuries, that is, injuries resulting from medical treatment. Any time one undergoes a medical procedure there is a risk that the procedure will inflict an injury, illustrating the adage that “the care is worse than the disease.” The surgeon might nick an artery; might in fusing two vertebrae to correct a disc problem cause paraplegia; might in removing a tumor from the patient’s neck sever a nerve, so that the patient can never hold his head upright again. A simple injection will, in a tiny fraction of cases, induce paralysis. An injection of penicillin could kill a person allergic to the drug. A blood transfusion can infect a patient with hepatitis or AIDS. All these injuries are accidental in the sense of unintended and infrequent. But they are not “accidents” as that term is used in insurance policies for accidental injuries. The term is used to carve out physical injuries not caused by illness from those that are so caused, and while injuries caused not by the illness itself but by the treatment of the illness could be put in either bin, the normal understanding is that they belong with illness, not with accident.

*Id*. at 1051-52. Further, the court stated:

> 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. [T]he presence of negligence or other fault does not convert a medical or any other mishap into an accident. . . . . A medical mishap, whether or not caused by negligence, is . . . not an accident . . . .

*Id. See also Thomas v. AIG Life Ins. Co.*, 244 F.3d 368 (5th Cir. 2001) (a death resulting from complications following stomach stapling surgery was not caused by an accident under an ERISA-governed insurance policy); *Miller v. The Hartford Ins. Co.,* 348 F. Supp. 2d 815 (E.D. Mich. 2004) (applying a *de novo* standard of review in an ERISA case, the court concluded that injuries from alleged malpractice were not accidental).

### B. If No Mishap, Death Is Not An Accident

Another line of cases appears to hold that, unless there was a mishap during a medical procedure, a death resulting to an insured is not an accident for the purpose of AD&D benefits. For example, in *Beneficial Standard Life Ins. Co. v. Forsyth*, 447 So.2d 459 (Fla. App. 2 Dist. 1984), the insured died following an elective jaw-wiring surgical procedure. The court noted:

> The stipulation [of the parties] explains that the surgery was undertaken so that Mr. Forsyth's jaws would be wired together to inhabit the ingestion of solid food thereby causing him to lose weight. At the time of the surgery, Mr. Forsyth was suffering from morbid obesity, congestive heart failure, and uncontrolled hypertension. It was made clear that Mr. Forsyth's health rendered him less likely to survive surgical complications than an otherwise healthy individual.
>
> The parties further stipulated that Mr. Forsyth died as a result of complications which developed during the surgery. A pulmonary embolism developed causing cardiac and respiratory arrest. It was agreed that the embolism was caused by the surgery, although the death was unexpected and unanticipated from a medical standpoint. The parties acknowledged that the development of a pulmonary embolism is one of the many risks of surgery which, although possible, was not anticipated to develop during the type of surgery performed on Mr. Forsyth.

*Id*. at 460-61. Citing *Couch on Insurance,* the court concluded that, "There was no misstep or miscue during the operation to Mr. Forsyth. The embolism and death were foreseeable, albeit unanticipated results of this surgical procedure." *Id*. at 462. *See also Pennsylvania Life Ins. Co. v. Aron*, 739 So.2d 1171, 1173 (Fla. App. 3 Dist. 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.").

### C. Medical Malpractice Is An Accident

Other cases have held that if an insured dies as a result of medical malpractice, it is accidental for the purposes of AD&D coverage. For example, in *Swisher-Sherman v. Provident Life & Accident Ins. Co.*, 1994 U.S. App. LEXIS 28768, *5 (6th Cir. 1994), the court stated, "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." *See also The Michael J. Borrelli Family Trust v. UnumProvident Corp.*, 2002 U.S. Dist. LEXIS 722 (N.D. Ill. 2002) (distinguishing *Senkier* and finding that a death resulting from malpractice is covered); *cf. Fegan v. State Mut. Life Assurance Co. of America*, 945 F. Supp 396 (D. N.H. 1996) (in which the court concluded that the insured died of a rare complication from surgery and thus the death was accidental; the post-surgery treatment, even if it constituted malpractice, would have only interrupted the development of the complication).

### D. Death From Medical Procedure Not An Accident If Not Reasonably Foreseeable

Another line of cases has found that if an insured dies from a medical procedure and his death could not have been reasonably expected, it is accidental for the purposes of AD&D benefits. For example, in *INA Life Ins. Co. v. Brundin*, 533 P.2d 236 (Alaska 1975), the court found that the accidental death policy at issue covered "results and conditions which are unexpected and unforeseen and hence 'accidental' in common usage." *Id*. at 242-43. It also noted that the insured's death occurred during a routine hemorrhoid procedure, "in which the risk is ordinarily not substantial, so the insured cannot be said to have foreseen the result." *Id*. at 243 n.24.

In *Bornstein v. J. C. Penney Life Ins. Co.,* 946 F. Supp. 814 (C.D. Cal. 1996), the insured underwent a "redo" of coronary bypass surgery, which appeared to go well, but he never regained consciousness and ultimately died of a "cerebral vascular accident." Deciding the case under California law, the district court first noted the beneficiary's "common-sense yet specious argument" that the fact that the insured's death certificate listed his cause of death as a cerebral vascular accident brought the event within the policies' definition of the word "accident." *Id*. at 818. However, the court found that there was a question as to whether the insured "happened to die coincidentally during the surgery, the surgery itself being causally unrelated to this death, or whether he died unexpectedly as a result of an unforeseen and unusual event during, or as a result of, the surgery." *Id*. at 820. The court found that this question was left unanswered, thus precluding entry of summary judgment. *Id*.

### E. Exclusions For Medical Treatment

A fair number of decisions have turned on whether or not the policy in question contained an exclusion for medical treatment. *See generally* "What Constitutes Medical or Surgical Treatment, or the Like, Within Exclusionary Clause of Accident Policy or

Accidental Death Feature of Life Policy," 56 ALR 5th 471. For example, in *Carson v. Metro. Life Ins. Co.*, 72 F. Supp. 2d 725 (W.D. Tex. 1999), the policy contained an exclusion for any deaths that resulted from the treatment for illness. The insured died from vomiting and aspiration after a medical procedure. The court found that:

> That treatment may have been the application of general anesthesia, or it may have been the administration of narcotics or sedatives. The treatment may even have been negligent, an issue not before this Court. But it was undisputable medical treatment for a mental illness.

*Id*. at 730. *See also Brooks v. J. C. Penney Life Ins. Co.*, 231 F. Supp. 2d 1136 (N.D. Ala. 2002) (an exclusion for "medical or surgical treatment" included diagnostic procedures); *Krane v. Aetna Life Ins. Co*., 698 F. Supp. 220 (D. Colo. 1988) (exclusion applied even if the court assumed malpractice). In fact, some courts have ruled that, in the absence of such exclusion, deaths that have resulted from malpractice are covered for the purposes of AD&D benefits. *The Michael J. Borrelli Family Trust v. UnumProvident Corp.*, 2002 U.S. Dist. LEXIS 722 (N.D. Ill. 2002).

## V. Overdose of Prescription Medicine

If there is a majority position, it appears to be that a death from an overdose of prescription medication is an accidental death, and thus compensable. *See, e.g., Santaella v. Metro. Life Ins. Co.*, 123 F.3d 456 (7th Cir. 1997) ("There is no dispute that [the insured] ingested a lethal amount of the pain reliever propoxyphene that caused her death. However, there is no evidence that she knew it was a lethal amount . . . . More importantly, although the record establishes that a dose of propoxyphene caused her death, it reveals little else about that dose. Notably, we do not know how much propoxyphene [the insured] took. The concentration in her blood was 1.42 milligrams per liter . . . .The record contains no evidence to support the theory that [the insured] ought to have related her use of drugs, to whatever degree she had a dependency, to her seizure."); *Andrus v. AIG Life Ins. Co.*, 2005 U.S. Dist. LEXIS 8525 (N.D. Ohio 2005) ("[The insured's] physician continued to prescribe pain killers, increasing the OxyContin prescription in strength . . . There is no dispute that [the insured] ingested a lethal amount of prescription drugs that caused his death. There is no evidence in the record, however, that he knew it was a lethal amount. Nothing in the record reveals [the insured's] expectation or intent in taking the overdose . . . The record shows that [the insured] had previously taken excessive amounts of OxyContin without life-threatening consequences. There is no reason from the record to believe that he anticipated that death would occur . . . .").

Other cases have focused on whether there was an exclusion that applied. In *Hummel v. Continental Cas. Ins. Co*., 254 F. Supp. 2d 1183 (D. Nev. 2003), the insured died of Oxycodone poisoning. The insurer refused to pay, pointing to an exclusion in the policy which denied coverage "for any loss caused by or resulting from . . . alcoholic intoxication or influence of drugs *unless taken as prescribed by a physician* . . . . " *Id.* at 1185 (emphasis in original). The court noted that a state statute allowed an exclusion that

an "insurer is not liable for any loss sustained or contracted in consequence of the insured's being intoxicated or under the influence of any narcotic unless administered *on the advice of a physician*." *Id*. at 1188 (emphasis added). The court observed, "While numerous states have included the clause 'administered on the advice of' in their respective state insurance codes regulating Intoxicants and Narcotics exclusions, it does not appear that other courts have analyzed the clause to determine its proper interpretation. The parties' briefs demonstrate the dearth of case law on this issue." *Id.* at 1189. The court concluded:

> Under this definition, administered could mean given on the advice of a physician and would not necessarily include the dosage advised by the physician. The language as written in the statute does not have the limiting effect that 'taken as prescribed by' does. If the statutory language 'administered on the advice of' actually read 'administered as advised by,' the two clauses might be synonymous, but of course, this is not the case. 'Taken as prescribed by' focuses more upon the acts of the insured, while 'administered on the advice of' focuses more upon the acts of the physician.

*Id.* at 1189. The court found that "'Taken as prescribed by' is a much stricter standard than 'administered on the advice of;' it requires exact adherence to the instructed dosages, whereas 'administered on the advice of' does not. This interpretation of the clause 'administered on the advice of' is more in line with the policy behind the statute, namely, protecting insureds." *Id*. at 1190. The court concluded that the exclusion did not apply because the insured had been prescribed the medication on which she overdosed.

In *Clarke v. Metro. Life Ins. Co.*, 369 F. Supp. 2d 770 (E.D. Va. 2005), the exclusion at issue related to "the use of any drug or medicine, unless used on the advice of a licensed medical practitioner." *Id*. at 777. The court, applying an abuse of discretion standard under ERISA, found that coverage was not excluded when a death resulted from the use of medicine on the advice of a licensed medical practitioner where the medicine was prescribed to treat an illness. *Id*. at 778. The court remanded the case so that evidence could be developed to determine why the insured had the drugs in his system. In *Holsinger v. New England Mut. Life Ins. Co*., 765 F. Supp. 1279, 1282 (S.D. Mich. 1991), the court observed that an intentional self-inflicted injury exclusion did not apply when the insured died because of prescribed medications, noting that "A loss resulting from the appropriate ingestion of prescription drugs is not an injury because the professional expectation is that the ingestion of the drugs will yield a net benefit."

## VI. Illegal Drugs or Non-prescribed Controlled Substances

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. In *Weil v. Federal Kemper Life Assurance Co.,* 866 P.2d 774 (Cal. 1994), the Supreme Court of California held that the state recognized the distinction insurance policies that provide coverage for death by "accidental means" and those that provide coverage for "accidental death." *Id.* at 782.

The court held that the insured's death from a voluntary and intentional act that resulted in an unintentional overdose of cocaine was not caused by "accidental means" within the meaning of the policy, even though the insured may not have had personal knowledge that death was common, natural, or substantially likely as the result of ingesting the amount actually taken. *Id.* at 788.

If the analysis is based on an insured's intentions, such a death is more likely to be found accidental. In *Marsh v. Metro. Life Ins. Co., Inc.*, 388 N.E.2d 1121 (Ill. Ct. App. 1979), the court found an overdose of heroin to be an accident. The parties to the suit conceded that "although the overdose was self-administered, death was unintended." *Id.* at 1123. The court recognized that, under Illinois law, "recovery is permitted for a death if that result is accidental even though the means of destruction, here the injection of heroin, is intentional." *Id.* The court then went on to hold that the death was unexpected and unforeseen. Foreseeability was defined as "a contingency known to all sensible men as likely to follow as a natural result of one's conduct." *Id.* The court rationalized that a resulting overdose was not an intended consequence of the ingestion of heroin and, therefore, was an accident. *Id.*

Similarly, the application of an expectation analysis has resulted in the conclusion that an overdose is an accident. In *Hardy v. Beneficial Life Ins. Co.*, 787 P.2d 1 (Utah Ct. App. 1990), the insured took an undetermined amount of drugs including codeine, propoxyphene (Darvon), and trimethobenzamide (Tigan), which had not been prescribed by a physician for medical purposes, and died of an overdose. The insured had had a history of drug dependency and abuse and had been warned on several occasions that his continued use of drugs could kill him. The court decided that whether "an event is accidental is not whether the result is foreseeable, but whether it was expected. . . [which] imposes a high threshold of likelihood of injury or death for an event to qualify as a nonaccident." *Id*. at 2. It concluded that the insured did not expect to die, and thus his death was accidental:

> Admittedly, because [the insured] knew that his continued abuse would result in death at some time, his act was reckless and indicated bad judgment. We cannot assume, however, that [the insured] intended or expected to die on each occasion when he took drugs simply because he failed to heed the warnings of others that he should avoid taking narcotics. In fact, [the insured's] own extensive experience with drug abuse raises the inference that he would not believe, with a high degree of certainty, that doing only what he had been doing for some years would cause death . . . .

*Id*. at 3. *See also Andrus v. AIG Life Ins. Co.*, 368 F. Supp. 2d 829 (N.D. Ohio 2005) (applying an expectation/intent analysis to find that an overdose was accidental in an ERISA case under a *de novo* review).

Applying the *Wickman* analysis, the court in *Ablow v. Canada Life Assurance Co.*, 2003 U.S. Dist. LEXIS 24873 (D. Conn. 2003) found that an insured's death by

Ephedrine toxicity was not an accident. Deciding the ERISA case under a *de novo* standard, the court concluded:

> [The insured] could not reasonably expect that the Policy would protect him from his voluntary drug and alcohol abuse. Secondly, it belies credulity to believe that [the insured], as a person with an extensive history of alcohol and Ephedrine abuse, and who had suffered a stroke six years earlier, reasonably would not expect to possibly die from the ingestion of approximately forty-five tablets of crushed Ephedrine and three-fourths of a bottle of Vodka. Thirdly, even if [the insured] was himself naïve enough to ignore this incredible danger, no reasonable person with his background and characteristics, would have so believed.

*Id*. at *16.

Even where a death is deemed or assumed to be accidental, coverage can still be precluded by an exclusion. In *Ablow, supra,* the policy at issue had an exclusion for intentionally self-inflicted injuries. The court noted that several district courts had examined four factors to determine whether an exclusion for self-inflicted injury applies to a case involving the ingestion of drugs: (1) Was the ingestion intentional; (2) Did the insured know that the ingestion would likely cause an injury?; (3) Did the ingestion cause an injury?; and (4) Did the loss result from the injury? *Id*. at *22. The court also noted that it was not necessary that a person ingesting the drugs know that death could result. *Id*. at *23. Rather, if the person ingesting the drug has a general cognizance that the drug could produce some injury, it is enough that there is some causal connection between the injury caused and the ultimate loss. *Id*. Applying these four factors, the court concluded that the insured's death was an intentionally self-inflicted injury. *Id*. at *23-24. The court in *Holsinger v. New England Mut. Life Ins. Co*., 765 F. Supp. 1279 (S.D. Mich. 1991) applied the same four factors and concluded that:

> It is important to note that the injury caused by an ingestion of prescription drugs taken for a purpose other than the therapeutic effect for which they are designed need not be the injury that results in the loss. For example, when the loss is death, it is not necessary that the person ingesting the drugs know that death could result. If the person ingesting the drugs has a general cognizance that the drugs could produce some injury, it is enough that there is some causal relation between the injury caused and the ultimate loss.

*Id.* at 1282.

Similarly, in *Gerdes v. John Hancock Mut. Life Ins. Co.*, 199 F. Supp. 2d 861 (C.D. Ill. 2001), the insured's cause of death was due to opiate and cocaine intoxication, and the parties stipulated that the ingestion of such drugs by the insured was voluntary but that there was no direct evidence that the insured did so in an attempt to commit suicide. Reviewing the case under a *de novo* review under ERISA, the court concluded

that the insured accidentally overdosed, that it was reasonable to assume that the insured took the drugs with the expectation that he would survive them, and that such belief was "objectively reasonable." The court then focused on the exclusion for intentionally inflicted self-injuries and noted, somewhat at odds with its conclusions about whether the death was accidental, that the insured's mixture of drugs is among the most harmful and lethal of those drugs available on the street. *Id*. at 865. The court found that the insured's "voluntary participation in such dangerous action leaves no doubt that the resulting injuries were 'intentionally self-inflicted,'" and therefore the exclusion applied. *See also Landis v. Heathcare Resources Group, LLC*, 2003 U.S. Dist. LEXIS 12025 (W.D. Mich. 2003) (finding that an intentional self-inflicted injury exclusion applied even if the insured did not intend to injure himself).

## VII. Alcohol Poisoning

Finding that a death from acute alcoholism was foreseeable, some courts have upheld a determination that no accidental death benefits were payable. For example, in *Anderson v. Minnesota Life Ins. Co.* 2004 U.S. Dist. LEXIS 19803 (W.D. Va. 2004), the insured, a well educated person, was an alcoholic who had unsuccessfully participated in various alcohol programs and had recently been taken to the emergency room after being found unconscious. Ultimately, the insured was found dead in a motel room with a blood alcohol concentration ("BAC") of .50%. With him were five and a half empty vodka bottles. The medical examiner found that the cause of death was acute alcohol poisoning and categorized the death as "accidental" as opposed to a homicide, suicide, natural cause or undetermined cause. Applying Virginia law, the court noted that, "The 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." *Id.* at *7-8. The court found that "meaningful similarities" exist between an overdose of heroin and an overdose of alcohol, as the "dangers of excessive alcohol consumption, including loss of consciousness and death, are commonly known and understood." *Id.* at *8-9. The court concluded that the insured, given his education, experience in alcohol programs and the amount of alcohol that he consumed prior to his death, must have known that he was ingesting an amount sufficient to cause serious injury or death. *Id.* at *9. *See also Phillips v. Home Security Life Ins. Co*., 1980 U.S. Dist. LEXIS 15635 (N.D. Ga. 1980); *Hayden v. Ins. Co. of North America*, 490 P.2d 454, 455 (Wash. App. 1971).

On the other hand, some courts have concluded that such deaths were not foreseeable and, thus, were accidental. In *Russell v. Metro. Life Ins. Co.*, 439 N.E.2d 89 (Ill. App. Ct. 1982), for example, the court found that the ingestion of a lethal amount of alcohol was an accident. The insured was an alcoholic who was found dead in his car with an open bottle of vodka and a BAC of 0.475%. *Id.* at 90. However, the court determined that the death was unforeseeable as a matter of law and, therefore, was an accident. *Id.* at 93. *See also Collins v. Nationwide Life Ins. Co.,* 294 N.W.2d 194, 195 (Mich. 1980); *USA Life One Ins. Co. of Indiana v. Nuckolls*, 682 N.E.2d 534, 541 (Ind. 1997).

## VIII. Drinking And Driving

### A. Whether It Constitutes An Accidental Death

Some courts and commentators have suggested that state courts typically find that deaths from drunk driving are accidental whereas federal courts often conclude otherwise, especially under a deferential review in ERISA cases. *See, e.g., Cranfill v. Aetna Life Ins. Co.*, 49 P.3d 703, 707 (Okla. 2002) ("The split is between the federal courts on the one hand and state courts on the other."); Gardner, Michael E., "Accidental Death Insurance Coverage of Drunk Drivers," 69 Mo. L. Rev. 235 (2004). This might serve as a decent rule of thumb in some instances, but it is not always accurate, as some recent decisions indicate.

There have been both federal and state courts that have concluded that death or injury is foreseeable from drinking and driving. For example, in *Cozzie v. Metro. Life Ins. Co.*, 140 F.3d 1104, 1110 (7th Cir. 1998), the Seventh Circuit observed 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." The Fourth Circuit has applied this rule in an accidental death insurance case involving a drunk driver that arose under South Carolina law. *Poeppel v. Hartford Ins. Co.*, 87 Fed. Appx. 885, 886, 2004 U.S. App. LEXIS 2575 (4th Cir. 2004) (*per curiam*). In *Weatherall v. Reliastar Life Ins. Co.*, 398 F. Supp. 2d 918 (W.D. Wis. 2005), the insured died in a fatal motorcycle accident and his blood alcohol concentration was found to be twice the state's legal limit. Reviewing the claim administrator's decision under the deferential arbitrary and capricious standard, the court applied the analysis in *Wickman, supra*, and found that whereas the insured did not expect that his conduct of driving while intoxicated would result in his injury:

> [T]he hazards of driving while intoxicated are well-known. The public is continually reminded of the risks of driving while intoxicated especially through the media. It was not unreasonable for defendant to determine that 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. Accordingly, because [the insured's] expectations were objectively unreasonable, defendant's conclusion that his death was not an accident was sound.

*Id.* at 924. *See also Mullaney v. Aetna U.S. Healthcare*, 103 F. Supp. 2d 486 (R.I. 2000); *Sorrells v. Sun Life Assurance Co. of Canada*, 85 F. Supp. 2d 1221 (S.D. Ala. 2000); *Wineinger v. Metro. Life Ins. Co.*, 1999 U.S. Dist. LEXIS 19873 (S.D. Ind. 1999) (in which the court, applying an arbitrary and capricious standard of review, found that the claims administrator's interpretation of an accident as excluding deaths resulting from driving while intoxicated was not arbitrary and capricious); *Schultz v. Metro. Life Ins. Co.*, 994 F. Supp. 1419, 1422 (M.D. Fla. 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.'") (citation omitted);

*Walker v. Metro. Life Ins. Co.*, 24 F. Supp. 2d 775, 781 (E.D. Mich. 1997) ("The hazards of driving while intoxicated are well-known. The public is reminded daily of the risks of driving while intoxicated both in warnings from the media and in motor vehicle and criminal laws."); *Nelson v. Sun Life Assurance Co. of Canada*, 962 F. Supp. 1010 (W.D. Mich. 1997); *Fowler v. Metro. Life Ins. Co.*, 938 F. Supp. 476, 480 (W.D. Tenn. 1996) (noting that the "foreseeable harm resulting from an insured's intentional actions is not accidental," and further rationalizing that "the hazards of drinking and driving are widely known and widely publicized"). As for state courts, in *McDaniel v. Sierra Health & Life Ins. Co., Inc.*, 53 P.3d 904, 907 (Nev. 2002), the court found that "[d]runk driving is now widely recognized as criminal conduct that is too reckless to be characterized as an 'accident.'"

Although most federal cases have been decided under ERISA, there are also federal cases construing state law that also have found that a death from a DUI was not an accident. In *Minnesota Life Ins. Co. v. Scott*, 330 F. Supp. 2d 661 (E.D. Va. 2004), the insured died in a single vehicle accident. Road and whether conditions were safe, and the insured was found to have a BAC of between .16% and .19%, twice Virginia's legal limit of .08% for DUIs. Several years before, the insured had been convicted of a DUI and had attended an Alcohol Safety Action Program. Applying Virginia law, the court noted that, "'The 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.'" *Id.* at 665 (citation omitted). The court found that the insured's death was reasonably foreseeable, and thus not accidental under the terms of the policy: "The extreme dangers and substantial risk of injury to others and oneself from driving while intoxicated are widely known." *Id.* at 666. Moreover, the court noted that the insured understood these dangers himself. *Id.* Therefore, the court looked not only to what a reasonable person would have known, but also to what the particular insured knew. *Cf. Schrek v. Reliance Standard Life Ins.*, 104 F. Supp. 2d 1373, 1378 (S.D. Fla. 2000) (noting that a "majority of courts reject the argument that injuries in drunk driving cases should be classified as 'accidental' simply because the insured was too drunk to be aware of the risk of drinking and driving").

On the other hand, there have been recent cases from both federal and state courts that have found that an intoxicated driver's death was accidental. In *Collins v. Minnesota Life Ins. Co.*, 2006 U.S. Dist. LEXIS 2134 (W.D. Mo. 2006), the federal court in a diversity case found "unpersuasive defendant's argument that an automobile collision [was] not an accident if the driver [was] legally drunk. The submitted statistics are too low to prove that deaths and serious accidents are the natural and probable consequence of individuals who drive with blood alcohol levels above the legal limit." *Id.* at *6. *See also American Family Life Assurance Co. v. Bilyeu*, 921 F.2d 87 (6th Cir. 1990); *DeLaTorre v. Minnesota Life*, 2005 U.S. Dist. LEXIS 20938 (N.D. Ill. 2005) (in which the court found that under the "liberal standard" of Illinois law, a death from driving under the influence of alcohol was unforeseeable, and less accidental); *West v. Aetna Life Ins. Co.*, 171 F. Supp. 2d 856 (N.D. Iowa 2001) (refusing to hold that death or bodily injury is a foreseeable consequence of drinking and driving because an intoxicated driver

did not expect to die merely by driving); *Fryman v. Pilot Life Ins. Co*., 704 S.W.2d 205 (Ky. 1990); *Consumers Life Ins. Co. v. Smith*, 587 A.2d 1119 (Md. App. 1990), *cert. denied* 592 A.2d 178 (Md. 1991); *Cranfill v. Aetna Life Ins. Co*., 49 P.3d 703 (Ok. 2002); *Harrell v. Minnesota Mut. Life Ins. Co*., 937 S.W.2d 809 (Tenn. 1996); *LDS Hospital v. Capitol Life Ins. Co.*, 765 P.2d 857 (Utah 1988). *Cf., Cowser v. American United Life Ins. Co.*, 2005 U.S. Dist. LEXIS 15288 (D. Kan. 2005) (remanding the case to the claims administrator, the court declined to adopt the legal DUI limit as a bright line test for whether death was accidental when the insured's BAC was less than the legal limit).

Moreover, there is a recent case from a district court that concluded that death from drinking was accidental, even while applying a discretionary review under ERISA. In *Eckelberry v. Reliastar Life Ins. Co.*, 402 F. Supp. 2d 704 (S.D. W.Va. 2005), the insured was killed when the automobile he was driving rammed into a tractor-trailer parked on the side of the road. His blood alcohol level was found to be .15%. The court's extensive analysis began with a review of the plan at issue, which defined an accident as "an unexpected and sudden event which the insured does not foresee." The court noted that the drafters of the policy chose these words, instead of words that would have denoted an objective standard, such as "should have not foreseen." *Id.* at 708. The court observed, "To say, however, that [the insured] expected to crash his car defies logic. Even though he was intoxicated [the insured] expected to drive home safely, not to hit a parked tractor-trailer." *Id.* The court went on to analyze whether the plan administrator's interpretation conflicted with the substantive requirements of ERISA, and noted that the similar decision regarding federal common law meaning of "accident" is *Wickman, supra*, which established a two-step analysis: First, attempt to determine the insured's actual expectations. *Id.* at 710. If there is insufficient evidence to determine the insured's subjective expectations, then determine whether a reasonable person similarly situated to the insured "would have viewed the injury as highly likely to occur as a result of the insured's intentional conduct." *Id.* As already noted, the court found that the insured did not expect to die, and the court then concluded that a person who drives while intoxicated should not foresee his death as a result:

> Does driving while intoxicated increase a person's chances of crashing and possibly dying? Absolutely, but so do many other actions that hinder a driver's concentration, such as talking on his cell-phone, applying lipstick, trying to subdue screaming children, or attempting to locate the correct station on a satellite radio.

*Id.* at 711-12. The court also cited statistics from the National Highway Traffic Safety Administration, indicating that although over 17,000 persons died as a result of alcohol-related deaths in 2002, this was "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." *Id.* at 712. Concluding, the court observed that "'drunk driving accidents are simply more senseless, more unforgivable, and altogether more deserving of moral disapprobation than other accidents. But they are accidents nonetheless.'" *Id.* at 717 (citation omitted). Thus, although a federal court deciding an ERISA case under a deferential standard might

be more apt to uphold a determination that a death from drunk driving is not an accident, this is not a hard and fast rule.

### B. Whether Crime Exclusions Apply

Most cases have found that crime exclusions are not ambiguous and have applied them in drunk driving cases to preclude recovery, even if the death itself is deemed or assumed to have been accidental.

Some of the exclusions refer to only felonies. For example, in *Steele v. Life Ins. of North America*, 2006 U.S. Dist. LEXIS 1611 (C.D. Ill. 2006), the insured drove with a BAC of .255% and was speeding to elude police when he crashed his vehicle. The insured had two prior DUIs, and the insurer denied coverage based on a felony exclusion. Reviewing the ERISA case under an arbitrary and capricious standard, the court concluded that there was a causal link between the insured's driving under the influence and his death. *Id.* at *11. The plaintiff argued that the insured's death was caused by his speed and inattention, but the court found that "this does not rebut the inference that [the insured's] speed and lack of attention resulted from drinking." *Id.* at *9. Under state law, driving under the influence for a third time was a felony, and the insured need not have been convicted of the third offense; 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. *Id.* at *13-15. Similarly, in *DeLaTorre v. Minnesota Life*, 2005 U.S. Dist. LEXIS 20938 (N.D. Ill. 2005), the court found that under the "liberal standard" of Illinois law, a death from driving under the influence of alcohol was unforeseeable and less accidental. *Id.* at *9. However, the court still found that accidental death benefits were not due based on an exclusion for deaths that took place during the "commission of a felony." *Id.* at *21. The insured had previously been convicted of driving under the influence, and his doing so on the day of his death constituted a felony for recidivist behavior. *Id.* at *20. In reaching this conclusion, the court found that the toxicology report of the insured's BAC was admissible, even without the insurer establishing a perfect or unbroken chain of custody. *Id.* at *14-15.

Other exclusions refer to crimes and/or felonies. For instance, in *Minnesota Life Ins. Co. v. Scott*, 330 F. Supp. 2d 661 (E.D. Va. 2004), the insurer's alternative ground for not paying the AD&D benefits was that, even if there had been an "accidental death," coverage would be excluded because the death resulted from or was caused directly or indirectly by "the insured's participation in or attempt to commit a crime or a felony." The court agreed that this exclusion applied. *Id.* at 666. It found that the exclusion was not ambiguous. "When Decedent voluntarily drove while under the influence of alcohol, he participated in a crime." *Id. See also SGI/Argis Employee Benefit Trust Plan v. TV Canada Life Assurance Co.*, 151 F. Supp. 2d 1044 (W.D. Ark. 2001); *Rodriguez v. UNUM Life Ins. Co. of America*, 2001 U.S. Dist. LEXIS 10716 (N.D. Tex. 2001) (in which the court upheld the claim administrator's determination, applying a discretionary standard of review, that denied accidental death benefits based on an exclusion for death resulting from "an attempt to commit or commission of a crime under state or federal law."); *Barnes v. Greater Georgia Life Ins. Co.*, 530 S.E.2d 748 (Ga. App. 2000);

*Canada Life Assurance Co. v. Pendleton Memorial Methodist Hosp.,* 1999 U.S. Dist. LEXIS 6042 (E.D. La. 1999).

These types of exclusions typically require that there be a causal link between the commission of a crime or felony and an insured's death. *See Steele, supra*. In *Scott*, *supra*, the exclusion required that the death resulted from or be caused directly or indirectly by "the insured's participation in or attempt to commit a crime or a felony." *Id.* at 667. The court also noted that the exclusion required a causal link between the participation in or attempt to commit a crime and an insured's death. *Id.* It found such a link based on the insured's erratic driving just before the accident and the absence of factors that could have caused the accident, such as poor road conditions, bad weather, heavy traffic or a mechanical failure. *Cf. Collins v. Minnesota Life Ins. Co.*, 2006 U.S. Dist. LEXIS 2134 (W.D. Mo. 2006) (in which the court denied summary judgment because the facts regarding the causal connection between the felony and the death were disputed).

Yet, there are some cases have found that crime exclusions are ambiguous as applied to DUIs and are, thus, inapplicable. *See, e.g., American Family Life Assurance Co. v. Bilyeu*, 921 F.2d 87 (6th Cir. 1990).

### C. Whether Alcohol Exclusions Apply

Generally speaking, there are two types of intoxication exclusions in accidental death policies: a "status" exclusion and a "causation" exclusion. A status exclusion in an accidental death policy precludes coverage to an insured if he is intoxicated, regardless of whether that intoxication had anything to do with the cause of his accidental death. A sample of such an exclusion is one that provides that there would be no coverage for injuries received by the insured "while under the influence of intoxicants." A causation exclusion is one that applies in a situation where there is some causal link or connection between an insured's intoxication and his death. A sample of such exclusion would be: "This coverage does not include any loss resulting from an auto or land motor vehicle accident that occurs as a consequence of the insured being intoxicated." Of the two, causation exclusions are more common today and, indeed, are sometimes required by state statutes and regulations if an insurer desires to include an intoxication exclusion as part of its coverage.

For example, the Seventh Circuit has held that the Illinois Insurance Code sets a floor on the level of coverage to be provided in these types of exclusions. In *Holloway v. J.C. Penney Life Ins. Co.*, 190 F.3d 838 (7th Cir. 1999), the Director of the Department of Insurance had approved an alcohol "status" exclusion in accidental death policies issued by J.C. Penney rather than a "causation" exclusion as set forth in an Illinois statute. The court noted that a "status" exclusion is less favorable to an insured or a beneficiary than a "causation" exclusion. *Id.* at 840-41. Based on 215 ILCS § 5/357.14, the Seventh Circuit held that the director had no authority to approve policies that are less favorable to the insured than the mandatory provisions:

> The Director was not authorized by the statute to approve policies that were less favorable to the insured than the mandatory provisions in sections 357.15 through 357.25. The fact that the Director approved the Penney policy at issue is therefore irrelevant. *See Bertini v. State Farm Mut. Auto. Ins. Co.*, 48 Ill.App.3d 851, 6 Ill. Dec. 435, 362 N.E.2d 1355, 1358 (1977) (policy provisions that are contrary to the insurance code are void even if approved by the Director). Reading the policies in conformity with state law, the beneficiaries were entitled to recover unless the loss was a consequence of the decedent's intoxication.

*Id*. at 844.

With "causation" exclusions, cases vary as to whether an insurer must show that the intoxication was the proximate cause of an insured's death or whether it must only show that the intoxication was a cause. In *Interstate Life & Accident Ins. Co. v. Gammons*, 408 S.W.2d 307 (Ct. App. Tenn. 1966), the court stated that "in consequence" means "loss sustained or contracted as *the* consequence of the insured's being intoxicated. So that the insurer is excepted from liability only if it proves insured's intoxication was '*the*', not '*a*' proximate cause of death." *Id*. at 399 (emphasis in original). The court stated that had the policy read "a consequence of the insured's being intoxicated," the exclusion would have applied if there were evidence that the intoxication could have been a factor in the insured's death. *Id.* Other states have interpreted the phrase "in consequence" with mixed results. *See, e.g., Old Equity Life Ins. Co. v. Combs*, 437 S.W.2d 173 (Ct. App. Ky. 1969); *Interstate Life & Accident Ins. Co. v. Gammons*, 408 S.W.2d 307 (Ct. App. Tenn. 1966). In *Old Equity Life Insurance*, the court determined that this phrase requires an insurance company to show that "the insured was intoxicated to a degree that his judgment and coordination were impaired." *Id*., 437 S.W.2d at 174.

Other courts have not required an insurer to prove that an insured's intoxication was the sole cause of an accidental death. Typically, in these instances, the policy exclusion has broad causation language, such as that death be caused "directly or indirectly" by the insured's intoxication. For example, in *Morgan v. Fortis Benefits Ins. Co.*, 107 P.3d 267 (Alaska 2005), the Supreme Court of Alaska upheld an intoxication exclusion to deny accidental death benefits where the insured had run off the road and was later determined to have a BAC of .247% at the time of her death. Although the beneficiary argued that the insurer must prove that the insured's intoxication was the cause, not just a cause, of the death, the court found that this was "in direct contradiction to the text of the exclusion, which states that loss must result 'directly or indirectly' from intoxication." *Id*. at 270. The court observed that the insurer had carried its burden of proof on the causal connection by showing a BAC of .247% and that the roads were dry and straight at the time and place of the accident. *Id*. *See, e.g., Burkhard v. Continental Cas. Co.*, 2005 U.S. Dist. LEXIS 10266, *13-14 (S.D. Ohio 2005) (an exclusion for a loss "caused by, contributed to, or resulting, directly or indirectly, from injury sustained while the Insured is legally intoxicated" does not require that the proximate cause of death be intoxication, and it would be sufficient if the intoxication "indirectly contributed

to the cause of death"); *Saxon v. Guardian Life Ins.*, 2004 U.S. Dist. LEXIS 16087 (E.D. La. 2004).

The same conclusion has been reached by some courts when the policy exclusion uses words other than "directly or indirectly." For instance, in *Landry v. J.C. Penney Life Ins. Co.*, 920 F. Supp. 99, 102-03 (W.D. La. 1995), the court construed a Louisiana statute excluding from coverage losses sustained "in consequence" of the insured's intoxication to mean that the intoxication must be a "contributing cause" of the accident. Also, Louisiana courts, interpreting an exclusion that used the words "caused by or resulting from" have held that driving while intoxicated must be a contributing factor. *See, e.g., id.* at 102; *Ober v. Cuna*, 645 So.2d 231 (La. Ct. App. 1994). In *Ober*, the insured was thrown from his vehicle when he was unable to stay on a roadway, running into several trees and flipping his truck. *Id.*, 645 So. 2d at 232. A blood alcohol test taken in the emergency room revealed an alcohol content of .11%. *Id.* at 235. The beneficiary argued that the insured's death was caused by his excessive blood loss, rather than his drunk driving. The court stated that this argument "glosses over the fact that the massive blood loss was caused by injuries sustained in the accident which occurred while Ober was driving while intoxicated." *Id.* at 236. The court went on to add, "Cuna need not eliminate all other possible causes of the accident to invoke the policy exception . . . . A fair construction in the ordinary sense of this language encompasses driving while intoxicated as a contributing cause of the accident." *Id. Cf. Dipper v. The Union Labor Life Ins. Co.*, 400 F. Supp. 2d 604 (S.D. N.Y. 2005) (exclusion for loss "caused by or resulting from an injury that occurs because the insured is intoxicated" means that the harm must be caused by an insured's intoxication).

When policies do not define what intoxication means, at least one court has concluded that intoxication is a matter of fact that precludes the entry of summary judgment. *See Brust v. Mut. of Omaha*, 724 N.Y.S.2d 254, 258 (N.Y. 2000) ("In this case the court cannot as a matter of law determine there is no coverage based upon the undefined term of 'intoxication" . . . . A question of fact exists as to the meaning of 'intoxication.'").

## IX. Suicide and Certain Intentional Acts

The determination of whether accidental death benefits are payable when an insured takes his own life often hinges on the intent of the insured and the application of certain exclusions, including those concerning intentional self-inflicted injuries or the commission of a crime.

Courts in ERISA cases have upheld claims determinations when there was evidence of suicide, but no definitive evidence. In *Phillips-Foster v. Unum Life Ins. Co. of America*, 302 F.3d 785, 788 (8th Cir. 2002), the insured was found dressed completely in white, having died of a gunshot wound to the chest. Applying an abuse of discretion standard under ERISA, the Eighth Circuit upheld the insurer's finding that the beneficiary had been involved in his own death and that the beneficiary had played some role in it, and thus accidental death benefits were not payable based on the applicable

suicide exclusion. *Id*. at 789. The insured had written his own obituary, made a goodbye videotape to his family, and visited the locker where the gun was stored. The insured was interested in voodoo, and various people reported that he had talked about inflicting his own death. *Id.* Finally, the insurer had uncovered evidence that the insured had been treated for depression, had suffered recent financial setbacks, and had possibly made a suicide gesture in the past. *Id.* In *Racknor v. First Allmerica Financial Life Ins. Co*., 71 F. Supp. 2d 723 (S.D. Mich. 1999), the insured was found dead in a vehicle with a gunshot wound to his head, and the insurer asserted that the death was a suicide. The certificate of death and the medical examiner's autopsy report stated that the manner of death was "undetermined." Interestingly, no weapon was found inside the car. Applying an arbitrary and capricious standard of review under ERISA, the court noted that the case involved "puzzling and mysterious circumstances" but found that, under the standard of review, it was only to determine whether or not the insurer's determination was arbitrary and capricious, and thus upheld the insurer's decision. *Id.* at 729.

Recently, several courts have rejected arguments that an insured was so impaired by drug use that his actions could not have been intentional, or he could not have foreseen his own death. In *Life Ins. Co. of North America v. Valtier*, 116 F.3d 279 (7th Cir. 1997), the insured died of a self-inflicted gunshot wound. His beneficiary argued that he was so impaired by a combination of alcohol and Halcion that he did not act intentionally when he killed himself. Reviewing the lower court record *de novo* under ERISA, the court noted that the policy contemplated that someone might "intentionally" inflict injuries or himself while "insane." *Id*. at 283. In addition, the court found no evidence in the record to support the beneficiary's claim that the insured was suffering from an interaction of Halcion with alcohol at the time he killed himself. *Id*. at 284. Similarly, in *Miles v. AIG Life Ins. Co.,* 2005 U.S.Dist. LEXIS 8024 (E.D. La. 2005), the insured was on Zoloft and was found by his wife in a bathroom dead, with a handgun next to him and a bullet wound to the head. Plaintiff contended that the insured's death was not "intentional" because his use of the drug Zoloft drove him to take his own life, thereby rendering his death an "accident." *Id*. at *5. The insurer decided otherwise under ERISA, and the plaintiff filed suit. The court found for the insurer:

> The arguments that Plaintiff raises in support of 'accidental' death do not persuade the Court that AIG, even as a conflicted administrator, abused its discretion in rejecting them. Plaintiff asserts that AIG acted arbitrarily in refusing to recognize an established causal link between using Zoloft and committing suicide. Assuming *arguendo* that there is a causal link between Zoloft and suicide, to the Court's knowledge no one has suggested that ingesting Zoloft *always* leads to suicide. As one other court noted many people who take Zoloft do not commit suicide and many people who commit suicide have never taken Zoloft. Thus, even if AIG had conceded generally a link between Zoloft and suicide, in order to recover benefits under AIG's policy Plaintiff would still have to establish that Zoloft played such a role in Mr. Miles' suicide so as to render this self-inflicted injury an 'accident.'

*Id*. at *21-22 (emphasis in original).

Some courts have refused to enter summary judgment when they have concluded that evidence as to an insured's intention was incomplete or disputed. In *Schrek v. Reliance Standard Life Ins*., 104 F. Supp. 2d 1373 (S.D. Fla. 2000), the district court remanded the case to the claims administrator under ERISA because it concluded that there was not enough information on which the claims administrator could justify its decision, even under an arbitrary and capricious standard of review. *Id*. at 1377. In this case, the insured, who had been drinking and was intoxicated, fell out of a moving vehicle and died. The insurer had determined that the injury was not accidental, that it fell under the exclusion for self-inflicted injuries and that the insured died of a deliberate and intentional act. However, the district court found that there was no evidence to support a finding that the insured had intentionally evacuated the car. *Id. See also Baldwin v. Stonebridge Life Ins. Co*., 283 F. Supp. 2d 1148 (D. Colo. 2003) (in which the court denied summary judgment where it was disputed whether the insured voluntarily or involuntarily "jumped" out of a car). In *Brust v. Mut. of Omaha Ins. Co*., 724 N.Y.S.2d 254 (N.Y. App. Div. 2000), the insured died after being hit by a Conrail train early one morning. A witness described the insured sitting on the track, looking up at the train as it approached him, and then turning away. *Id*. at 256. Although the medical examiner concluded that the manner of death was suicide, the court found that there was no basis provided for such a conclusion, and that it was no more than the opinion of the medical examiner and was "not conclusive on the manner of death." *Id*. at 257. The state court found that there were questions of fact raised as to whether the insured had committed suicide, thus barring the entry of summary judgment. *Id*. Further, although there was an intoxication exclusion in the relevant policy, the policy did not define the term "intoxication" and the court found that a "question of fact exists as to the meaning of 'intoxication' and whether 'the insured' was intoxicated under such definition." *Id.* at 258.

Where an insured may not have had the intention to kill himself, courts have considered the application of certain exclusions. For instance, in *Simpson v. Safeco Life Ins. Co*., 26 Fed. Appx. 268 (4th Cir. 2002), a nineteen year-old died from a self-inflicted gunshot wound. The insured pointed a pistol at his friend and, on a dare from that friend, pulled the trigger, but the gun did not fire. Still "laughing and teasing," the insured then put the pistol to his own head and, on his friend's dare, pulled the trigger. *Id*. at 269. This time the weapon discharged, killing the insured. The insurer, under ERISA, refused to pay accidental death benefits based on an assertion that the insured's death occurred during his commission of a felony, namely, the possession of the pistol by an individual under twenty-one years of age. The Fourth Circuit upheld that determination. *Id*. at 270. On the other hand, in *Butler v. Group Life and Health Ins. Co.*, 962 S.W.2d 296 (Tex. App. 1998), the insured took part in "foolhardy behavior" by pointing an unloaded gun at himself and "dry-firing" it. *Id*. at 297. He did so without incident several times. At some point, an ammunition clip was placed in the gun, but there was no indication that the insured saw this taking place. The insured began playing with the gun again and this time, when he pulled the trigger, the gun fired a bullet striking him in the head and killing him. The court, reviewing the appeal from a state board's determination under a

"substantial evidence" review, found that the insured's death was an accident because it was "not the natural and probable consequence of his action, in light of the surrounding circumstances and the lack of evidence of [the insured's] knowledge of the loaded clip." *Id*. at 299. In addition, the court found that coverage was not excluded by an intentionally self-inflicted injury exclusion: "Although it is undisputed that [the insured] intentionally waved the gun near his head and fired it, it cannot be concluded in light of the evidence that [the insured] intended to injure himself or that he believed his death was substantially certain to follow his foolish actions." *Id*. at 300.

## X. Violent Behavior

### A. Altercations With Police

Some accidental death cases involve an insured who acts in a violent or aggressive manner, for example, when interacting with police. In *McAfee v. Transamerica Occidental Life Ins. Co.*, 106 F. Supp. 2d 1331 (N.D. Ga. 2000), *aff'd* 252 F.3d 1362 (11th Cir. 2001), the insured was struck down by "a hail of police bullets" in a parking lot. *Id*. at 1334. Pursuant to a medical examiner's report, the victim had displayed a rifle and discharged it in the direction of the police officers, who returned fire "striking the victim multiple times." *Id*. The insurer denied payment of accidental death benefits, finding that the insured, by firing at the police, had intentionally caused self-inflicted injuries and as a result of his conduct expected to die. Reviewing that determination under a lessened degree of an arbitrary and capricious standard under ERISA, the court applied the subjective/objective test in *Wickman*, *supra*. It concluded that the insured's "death was not accidental, because a reasonable person, with his background and experience, knew or should have known that serious bodily injury was a probable consequence substantially likely to occur as a result of his actions." *Id.* at 1341. The court noted that the insured's "actions are so unreasonable, ill-conceived, and extreme, that the court cannot torture any known definition of the term 'accident' to find that he died accidentally." *Id.* Similarly, in *Labo v. Aetna Life Ins. Co.*, 2005 U.S. Dist. LEXIS 2002 (D.N.J. 2005), the insured died of multiple gunshot wounds inflicted by an off-duty police officer who had been approached by the insured wielding a knife outside of a bar. Reviewing this ERISA case under a heightened arbitrary and capricious standard, the court applied the *Wickman* test and found that, "By entering into an altercation with a deadly weapon, the decedent's own death was a foreseeable and expected consequence of his actions. Such a result therefore cannot be deemed accidental. Here, the decedent knew or should have known that serious bodily injury or death was a probable consequence substantially likely to occur as a result of his volitional act. " *Id.* at *15-16.

On the other hand, in *Harrington v. New England Mut. Life Ins. Co.*, 873 F.2d 166 (7th Cir. 1989), the court determined that the insured's death, which resulted from a crash that occurred while the insured was fleeing from the police, was an accident. *Id.* at 169. The court reasoned that "[h]is death was not the rational and probable consequence of his intended act of flight, it was rather something unforeseen and unexpected occurring in the course of an intentional act." *Id.* The court acknowledged that the insured had taken a

risk by engaging in potentially destructive and illegal conduct, but concluded that he had not foreseen his death as a result of his conduct. *Id.* Consequently, his death was an accident. *Id.*

### B. Fights/Bomb Making

Some courts have looked to an insured's expectations in getting into an altercation to determine whether his subsequent death was an accident. For example, in *McElyea v. AIG Life Ins. Co.*, 326 F. Supp. 2d 960 (N.D. Ark. 2004), the insured was killed by multiple gun shot wounds during an altercation. The insured pursued his wife's former lover at a party and "possibly had intentions of beating [him] up." *Id.* at 962. Previously, the insured had, indeed, beaten up the former lover so badly that the latter had to be hospitalized. That night, the insured attacked a friend of the former lover and then started toward the former lover. *Id*. at 963. He warned the insured to stay away and, when the insured continued coming toward him, he shot and killed the insured. *Id*. Reviewing the ERISA case under a *de novo* standard, the court cited both *Wickman, supra,* and state law for guidance, and then concluded that since there was no evidence to suggest that the insured would have suspected the former lover would shoot him, as they had fought before with no gun-play, his death was an accident. *Id.* at 968.

By contrast, where an insured died when the pipe bomb he was making detonated, the court in *Komperda v. Hartford Life and Accident Ins. Co.*, 2003 U.S. Dist. LEXIS 8433 (N.D. Ill. 2003) found that the death was not accidental. Stressing that it was reviewing the ERISA case under an arbitrary and capricious standard, the court upheld the insurer's determination that the death was a reasonably foreseeable consequence of drilling into a pipe filled with gunpowder. *Id*. at *18-19. It rejected the plaintiff's argument that a subjective analysis of the insured's intentions should have been made because it found the insurer's definition of accidental was reasonable. *Id*.

### C. Russian Roulette

Courts do not seem hesitant to find that death as a result of an insured's engaging in "Russian Roulette" is not an accident. In *Moats v. Life Ins. Co. of North America*, 1998 U.S. App. LEXIS 20789 (6th Cir. 1998), the insured, having consumed alcohol, asked a companion whether he wanted to play a game. The insured put a gun to his temple and pulled the trigger at least two times, but the gun did not discharge. He then put the gun under his chin and pulled the trigger. This time, the gun discharged, killing him. A blood sample taken from the insured after his death revealed an alcohol level of .20%. The beneficiary submitted an affidavit from a doctor stating that the insured was so intoxicated that he did not intend or expect death to result from his actions. However, the court noted that the policy at issue excluded coverage for intentionally self-inflicted injuries or suicide while "sane or insane," "which takes the mental capacity out of the inquiry." *Id.* at *8. As a result, the court affirmed the lower court's decision to enter summary judgment in the insurer's favor. *Id*. at *9. Similarly, in *Arnold v. Metro. Life Ins. Co.*, 970 F.2d 360 (7th Cir. 1992), the insured had a history of playing "Russian Roulette" in front of his ex-wife, and during a quarrel with his subsequent live-in

girlfriend, he did so again. The insured placed one bullet in the revolver, spun the cylinder containing the bullet, held the gun to his head and fatally shot himself. In this diversity case, the Seventh Circuit found that under Illinois law, death from Russian Roulette was not considered accidental. *Id*. at 362.

### D. Murder

Courts typically have found that the murder of an insured is an accidental death. For instance, in *Cole v. State Farm Mut. Ins. Co.*, 753 A.2d 533 (Md. App. 2000), an insured was killed while sitting in a parked van. The insured had gone with her husband to pick up his daughter by a previous marriage. The daughter was at the home of her grandfather, the former father-in-law of the insured's husband. The former father-in-law opened fire on the insured's husband, striking him several times. He then circled to the van to the insured's side of the vehicle, and fired two shots at her from close range, killing her. The Maryland Court of Appeals noted that it was a critical distinction as to whether this event was deemed to be an accident from the standpoint of the father-in-law who murdered the insured, or an accident from the standpoint of the insured who was the victim of the violent attack. *Id*. at 538. Choosing the latter, the court applied the *Wickman* test and found that the insured's death was the result of an accident because there was no evidence suggesting that the insured expected that her husband's former father-in-law was going to kill her. *Id*. at 543. Moreover, "Viewing the undisputed facts of the case objectively, there [was] no evidence from which a reasonable trier of fact could determine that a reasonable person in the same situation as [the insured] would have expected to be shot and killed as she sat in her van . . . . From [the insured's perspective], as the insured victim, the events which caused her death were 'unforeseen, unusual, and unexpected' and therefore 'an accident.'" *Id*.

## XI. Autoerotic Asphyxiation

Perhaps it is best to defer to the courts for a definition of this practice:

> What is autoerotic asphyxiation? Also known also as hypoxyphilia, it is classified as a mental disorder falling into the category of "Sexual Masochism" and involves "sexual arousal by oxygen deprivation obtained by means of chest compression, noose, ligature, plastic bag, mask, or chemicals." Suffocation devices are employed for the purpose of "limiting the flow of oxygen to the brain during masturbation in an attempt to heighten sexual pleasure." Nerve centers in the brain are stimulated by asphyxia, which "produces a state of hypercapnia (an increase in carbon dioxide in the blood) and a concomitant state of hypoxia (a decrease in oxygen in the blood), all of which result in an increased intensity of sexual gratification."

*MAMSI Life & Health Ins. Co. v. Callaway*, 825 A.2d 995, 996 (Md. 2003) (citations omitted). Courts have not been uniform in their handling of autoerotic asphyxiation cases. There are decisions going each way on issues such as whether such a death is an

accident and, if so, whether exclusions such as those dealing with intentional self-inflicted injuries would apply to it. More recently, the cases seem to have either concluded or assumed that such a death is accidental, and thus have focused on the exclusion.

Some recent cases have found that oxygen deprivation is a self-inflicted injury, thus excluding coverage for a death caused by autoerotic asphyxiation under intentional self-inflicted injury exclusions. For instance, in *Callaway*, *supra*, the policy provided for the payment of death benefits if the insured sustained a loss of life "because of an injury caused by an accident." Among the policy exclusions from coverage was one for death resulting from "intentional self-injury." The court found that "the insured intended to cut off his air supply. The cutting off of the air supply caused his death. The Court believes that that is not a death caused because of an injury caused by an accident. He intended the act that resulted in his death." *Id*. at 998. In addition, the court found that "when you intend to cut off your air supply, you are causing a self-injury and that the exclusion would also apply to exclude benefits in this case." *Id*. However, the court ultimately based its decision on the exclusion alone. In *Sims v. Monumental General Ins. Co.*, 960 F.2d 478, 479 (5th Cir. 1992), the court found that partial strangulation engaged in as part of autoerotic activity was an "injury" triggering the exclusion for intentionally self-inflicted injury contained in an accidental death insurance policy. In *Cronin v. Zurich Am. Ins.,* 189 F. Supp. 2d 29 (S.D.N.Y. 2002), an ERISA case decided under a *de novo* review, the court noted: "The effect on the brain produced by this activity is abnormal; the higher cerebral functions of thought, consciousness and awareness are compromised; and a dangerous loss of coordination and self-control results. Temporary cell damage results, and reduced brain activity occurs." *Id.* at 38. The court held that the "purposefully self-inflicted injury" exclusion contained in the accidental death insurance policy at issue there encompassed the insured's act of hanging himself by the neck intending to deprive himself of oxygen in order to achieve a sexual "high." *Id.* at 39. In *Bryant v. AIG Life Ins. Co.*, 2002 U.S. Dist. LEXIS 23289 (S.D. Mich. 2002), an ERISA case, the insured was "discovered hanging naked from a flagpole in his backyard." *Id*. at *1. The court assumed that the death was accidental. *Id*. at *8. However, it found upon a *de novo* review that it would join "the overwhelming majority of federal courts in concluding that the partial strangulation involved in autoerotic asphyxiation comes within the plain meaning of 'intentionally self-inflicted injury.'" *Id*. at *16. In *Hamilton v. AIG Life Ins. Co.*, 182 F. Supp. 2d 39 (D. D.C. 2002), an ERISA case decided under an abuse of discretion standard, the court found that "there is no support in logic or law for the proposition that AIG abused its discretion in determining that partial strangulation is an injury." *Id*. at 50. In *Fawcett Metro. Life Ins. Co*., 2000 U.S. Dist. LEXIS 10061 (W.D. Ohio 2000), an ERISA case that was decided under an arbitrary and capricious standard, the insured died while engaging in autoerotic asphyxiation and watching the Playboy channel. The court accepted the plaintiff's premise that the insured's death by hanging was "accidental," as opposed to an intentional suicide. *Id.* at *15. "Even if Mr. Fawcett's death were 'accidental,' within the meaning of his life insurance policy, the Plaintiff [was] not entitled to recover accidental death benefits if her claim falls within the policy exclusion for any 'Covered Loss' that 'in any way results from, or is caused or contributed to by injuring oneself on purpose.'" *Id.* at *17.

By contrast, two recent federal circuit courts have reached the opposite result, both with dissenting opinions. In *Padfield v. AIG Life Ins. Co.,* 290 F.3d 1121, 1125 (9th Cir. 2002), an ERISA case decided under a *de novo* review, the insured met his death after engaging in autoerotic acts in the back of his van. He tied one end of a necktie around his neck and another end to the sliding door hinge, and died as a result of asphyxiation. The court first applied the subjective/objective analysis of *Wickman* and found that the insured's death was accidental because it appeared that the insured "had a history of engaging in this autoerotic behavior and surviving it," and from an objective standpoint there was "uniform medical and behavioral evidence indicating that autoerotic activity ordinarily has a nonfatal outcome." *Id*. at 1127. As for the intentionally self-inflicted injury exclusion, the court considered that the temporary deprivation of oxygen the insured intended to experience was not the type of harm classified as an "injury," and it found to be unintended the injuries that actually resulted in the insured's death, tissue injuries to the neck and the sustained period of time without blood flow. *Id*. at 1129. The dissent agreed that the insured's death was not suicide, but would have held as a matter of law that the insured's "act of tying a necktie around his neck with the intent to restrict the flow of oxygen to his brain was an intentionally self-inflicted injury which resulted in his death." *Id*. at 1130. Similarly, in *Critchlow v. First Unum Life Ins. Co. of America,* 378 F.3d 246 (2d Cir. 2004), a case decided under ERISA, the Second Circuit followed *Padfield*. The court described the event as follows: "In the early morning hours of February 27, 1999, Critchlow, age 32, was found dead in his bedroom. He was unclothed lying on the floor, with ligatures tying various parts of his body." *Id*. at 249-50. The court noted that "Critchlow's father's affidavit indicated that Critchlow had practiced autoerotic asphyxiation at least as early as the age of 12 or 13. By age 32, when he died, therefore, Critchlow apparently had engaged in that activity for some two decades." *Id*. at 260. The court found that the insured's death was accidental:

> Critchlow had survived the practice of autoerotic asphyxiation for some 20 years, with no evidence of any injurious effects; and on the night of his death he had, by all accounts, set up an elaborate escape mechanism designed to save him if he began to lose consciousness. His subjective belief that he would survive what turned out to be his final episode cannot be considered objectively unreasonable

*Id*. As for the intentional acts exclusion, the court concluded that "no scientific evidence before the court indicated that autoerotic asphyxiation, if practiced without accident, constitutes an injury rather than simply producing a temporary lightheadedness that the practitioner believes will increase his sexual gratification." *Id*. at 262. (The court also rejected an argument that coverage for the insured's death was precluded by an exclusion for loss caused by an "illness" or "disease," finding that although the DSM-IV included autoerotic asphyxia as a "mental disorder," it was not an "illness" or "disease" any more than "Mathematics Disorder," "Disorder of Written Expression," or "Caffeine-Induced Sleep Disorder," other entries in the DSM-IV. *Id*. at 264-5). The dissent in *Critchlow* noted, "[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." *Id.* at 265.

## XII. Conclusion

As demonstrated by the sampling of some recent cases in this paper, the question of what is an accident is "one of the most philosophically complex simple questions" in the law. *Fegan v. State Mut. Life Assurance Co.*, 945 F. Supp. 396, 399 (D. N.H. 1996). Or, as one commentator noted, there has been a jumbled mass of precedent which has steadily accumulated on the judicial shores over the past 150 years." Adam F. Scales, "Man, God, and the Sebonian Bog: The Evolution of Accidental Death Insurance," 86 Iowa L. Rev. 173, 191 (2000). It might be possible to divine some order from this jumbled mass if one begins a case by focusing on the language of the policy at issue, whether the applicable law still maintains a distinction between "accident death" coverage and "accidental means" coverage, whether the *Wickman* analysis applies, whether the policy at issue falls under ERISA and, if so, what the court's standard of review will likely be, and whether there might be any applicable exclusions.