A Developing Trend in ERISA Accidental Death Cases?

Nikole M. Crow
Smith Moore Leatherwood LLP
1180 West Peachtree Street
Suite 2300
Atlanta, Georgia 30309
(404) 962-1067
nikole.crow@smithmoorelaw.com
AD&D Coverage

Accidental death and dismemberment ("AD&D") coverage is unique in that it only pays benefits when the death or injury is due to an accident.

Most policies and plans contain language to the effect that the covered loss must result from an accident "directly and independently of all other causes."

The question of how to define "accident" when it is not unambiguously defined in the policy or plan has been the subject of much litigation.
Exclusions

Many AD&D policies and plans contain various exclusions for losses resulting from some or all of the following:
Exclusions

Many AD&D policies and plans contain various exclusions for losses resulting from some or all of the following:

• intentionally self-inflicted injury;
Exclusions

Many AD&D policies and plans contain various exclusions for losses resulting from some or all of the following:

• intentionally self-inflicted injury;
• suicide or attempted suicide;
Exclusions

Many AD&D policies and plans contain various exclusions for losses resulting from some or all of the following:

• intentionally self-inflicted injury;
• suicide or attempted suicide;
• losses sustained during acts of war (whether declared or not) and/or while full-time in the armed services of any country;
Exclusions

Many AD&D policies and plans contain various exclusions for losses resulting from some or all of the following:

• intentionally self-inflicted injury;
• suicide or attempted suicide;
• losses sustained during acts of war (whether declared or not) and/or while full-time in the armed services of any country;
• losses sustained while on other than commercial aircrafts;
Exclusions

Many AD&D policies and plans contain various exclusions for losses resulting from some or all of the following:

• intentionally self-inflicted injury;
• suicide or attempted suicide;
• losses sustained during acts of war (whether declared or not) and/or while full-time in the armed services of any country;
• losses sustained while on other than commercial aircrafts;
• losses sustained while committing or attempting to commit a felony;
Exclusions

Many AD&D policies and plans contain various exclusions for losses resulting from some or all of the following:

• intentionally self-inflicted injury;
• suicide or attempted suicide;
• losses sustained during acts of war (whether declared or not) and/or while full-time in the armed services of any country;
• losses sustained while on other than commercial aircrafts;
• losses sustained while committing or attempting to commit a felony;
• losses sustained due to alcohol intoxication while operating a motor vehicle;
Exclusions

Many AD&D policies and plans contain various exclusions for losses resulting from some or all of the following:

- intentionally self-inflicted injury;
- suicide or attempted suicide;
- losses sustained during acts of war (whether declared or not) and/or while full-time in the armed services of any country;
- losses sustained while on other than commercial aircrafts;
- losses sustained while committing or attempting to commit a felony;
- losses sustained due to alcohol intoxication while operating a motor vehicle;
- losses sustained due to alcohol intoxication or other intoxicants in general; and/or
Exclusions

Many AD&D policies and plans contain various exclusions for losses resulting from some or all of the following:

- intentionally self-inflicted injury;
- suicide or attempted suicide;
- losses sustained during acts of war (whether declared or not) and/or while full-time in the armed services of any country;
- losses sustained while on other than commercial aircrafts;
- losses sustained while committing or attempting to commit a felony;
- losses sustained due to alcohol intoxication while operating a motor vehicle;
- losses sustained due to alcohol intoxication or other intoxicants in general; and/or
- losses caused by ingesting narcotics unless taken as prescribed by a physician.
Sickness Not Covered

AD&D policies do not provide benefits for injury or death due to sickness or disease, although some contain exceptions for infections that occur through accidental cuts or wounds.

Many policies specifically exclude “accidental” results of surgical or other medical intervention for sickness or disease as well.
Underlying Disease and the Substantial Contribution Test

The seminal case in the Eleventh Circuit regarding whether a death or injury resulted directly from an accident and independently of all other causes - - Dixon v. Life Ins. Co. of N. Am., 389 F.3d 1179 (11th Cir. 2004)

*Dixon* discussed as a matter of first impression how to determine whether accident or underlying disease causes a particular loss.
Underlying Disease and the Substantial Contribution Test

The court in *Dixon* would not consider the decedent’s pre-existing heart disease as an “other cause” of his death after a car accident, “unless it substantially contributed to his death.” 389 F.3d at 1184.

This test was adopted from the Fourth Circuit decision in *Adkins v. Reliance Standard Life Ins. Co.*, 917 F.2d 794 (4th Cir. 1990)
The plaintiff in *Adkins* was claiming disability based on an on-the-job back injury suffered when he “stepped into a hold inside a coal mine” in May 1985.

The issue was whether the disability resulted directly and independently of the plaintiff’s previous on-the-job injuries in 1973, 1979, and 1982.

The court rejected the plaintiff’s proffered “but for rule” which would require, in effect “that the triggering of a disabling condition by accident might authorize recovery whatever the previous condition might be.”

Instead, the court formulated the “middle ground” approach that was adopted in *Dixon*.
Sickness or Accident?

- arbitrary and capricious standard of review
Sickness or Accident?

• arbitrary and capricious standard of review

• 56-year old gentleman swimming laps at Swim Atlanta
Sickness or Accident?

• arbitrary and capricious standard of review

• 56-year old gentleman swimming laps at Swim Atlanta

• witnesses said he “suddenly grimaced and submerged”
Sickness or Accident?

• arbitrary and capricious standard of review

• 56-year old gentleman swimming laps at Swim Atlanta

• witnesses said he “suddenly grimaced and submerged”

• they recovered him from the pool and gave him CPR until EMS arrived
Sickness or Accident?

- death certificate listed immediate cause of death as “drowning”
Sickness or Accident?

- death certificate listed immediate cause of death as “drowning”
- death certificate listed “atherosclerotic coronary artery disease” as an “other significant condition” defined as “conditions contributing to death but not related to the [immediate] cause”
Sickness or Accident?

• death certificate listed immediate cause of death as “drowning”

• death certificate listed “atherosclerotic coronary artery disease” as an “other significant condition” defined as “conditions contributing to death but not related to the [immediate] cause”

• EMS noted the “chief complaint’ and “reason for call” as “cardiac arrest”
Sickness or Accident?

- death certificate listed immediate cause of death as “drowning”
- death certificate listed “atherosclerotic coronary artery disease” as an “other significant condition” defined as “conditions contributing to death but not related to the [immediate] cause”
- EMS noted the “chief complaint’ and “reason for call” as “cardiac arrest”
- witnesses told EMS the gentlemen was swimming “when he appeared to have a heart attack or some other distress” and went under water
Sickness or Accident?

- death certificate listed immediate cause of death as “drowning”
- death certificate listed “atherosclerotic coronary artery disease” as an “other significant condition” defined as “conditions contributing to death but not related to the [immediate] cause”
- EMS noted the “chief complaint” and “reason for call” as “cardiac arrest”
- witnesses told EMS the gentlemen was swimming “when he appeared to have a heart attack or some other distress” and went under water
- he was pulled out of the water in 30-40 seconds, EMS noted agonal breathing (gasperg, labored breathing) and a pulse upon arrival, but gentleman “became pulseless during assessment”
Accident?

No –

the decedent’s pre-existing heart condition substantially contributed to his death

Sickness or Accident?

- *de novo* standard of review
Sickness or Accident?

- *de novo* standard of review
- Insured had pre-existing conditions of atrial fibrillation and hypertension
Sickness or Accident?

• *de novo* standard of review

• insured had pre-existing conditions of atrial fibrillation and hypertension

• insured was taking Coumadin, a blood-thinner which causes anticoagulation
Sickness or Accident?

• *de novo* standard of review

• insured had pre-existing conditions of atrial fibrillation and hypertension

• insured was taking Coumadin, a blood-thinner which causes anti-coagulation

• while shopping at the mall, the insured felt “light-headed,” fainted, and hit his head on the ground
Sickness or Accident?

- *de novo* standard of review
- insured had pre-existing conditions of atrial fibrillation and hypertension
- insured was taking Coumadin, a blood-thinner which causes anti-coagulation
- while shopping at the mall, the insured felt “light-headed,” fainted, and hit his head on the ground
- CT scan showed “intracranial hemorrhaging secondary to a fall on Coumadin”
Accident?

Yes –

but still not covered because “his regrettable and tragic death did not result solely from accidental causes because his anticoagulation treatment prevented his blood from clotting, which significantly worsened his intracranial hemorrhages and substantially contributed to, and in fact constituted the primary cause of, his death”

Volitional Conduct and the *Wickman* Framework

Seminal federal common law ERISA case regarding accidental death or injury as a result of volitional conduct is *Wickman v. Northwestern Nat’l Ins. Co.*, 908 F.2d 1077 (1st Cir. 1990).

Most circuits (including the Eleventh Circuit) have adopted the *Wickman* analysis, although the Tenth Circuit appears to have declined to apply it, and the latest case on the matter from the Fourth Circuit suggests it will only be applied when the standard of review is arbitrary and capricious.
Wickman

• witness saw Wickman’s car parked in the “break-down lane” of a bridge/overpass
Wickman

- witness saw Wickman’s car parked in the “break-down lane” of a bridge/overpass
- Wickman was about 30 feet away from his car, standing on the outside of the bridge’s guardrail, holding onto it with only one hand
Wickman

- witness saw Wickman’s car parked in the “break-down lane” of a bridge/overpass

- Wickman was about 30 feet away from his car, standing on the outside of the bridge’s guardrail, holding onto it with only one hand

- witness “turned his eyes to check on traffic, and upon looking back he saw Wickman no longer holding on to the rail but free-falling to the railroad tracks below”
Wickman

- witness saw Wickman’s car parked in the “break-down lane” of a bridge/overpass

- Wickman was about 30 feet away from his car, standing on the outside of the bridge’s guardrail, holding onto it with only one hand

- witness “turned his eyes to check on traffic, and upon looking back he saw Wickman no longer holding on to the rail but free-falling to the railroad tracks below”

- witness pulled over, flagged down a tow truck, and asked the driver to call police and ambulance, then ran down embankment to administer first aid to Wickman, who later died at the hospital
Wickman

- the spot where Wickman was first seen was about 40 to 50 feet above the railroad tracks
Wickman

- the spot where Wickman was first seen was about 40 to 50 feet above the railroad tracks

- because of the way the bridge and guardrail were constructed, it was not possible that Wickman came to be in the position he was in without a conscious effort to climb over or through the guardrail
Wickman Framework

- court rejected distinction between accidental means and accidental results (which has been abandoned by most states but is still alive and well in Georgia)
Wickman Framework

• court rejected distinction between accidental means and accidental results (which has been abandoned by most states but is still alive and well in Georgia)

• The court noted that Justice Cardozo’s prediction in Landress v. Phoenix Ins. Co., 291 U.S. 491 (1934), that “adherence to the distinction” would “plunge this branch of the law into a Serbonian Bog” had come to pass, and that “[o]ther courts have been equally frustrated by the means/injury distinction, which has shrouded this branch of law in a semantic and polemical maze, and forced courts applying the distinction to resort to tortuous and tortured legal jujitsu.”
**Wickman Framework**

- The court rejected the distinction between accidental means and accidental results (which has been abandoned by most states but is still alive and well in Georgia).

- The court noted that Justice Cardozo’s prediction in *Landress v. Phoenix Ins. Co.*, 291 U.S. 491 (1934), that “adherence to the distinction” would “plunge this branch of the law into a Serbonian Bog” had come to pass, and that “[o]ther courts have been equally frustrated by the means/injury distinction, which has shrouded this branch of law in a semantic and polemical maze, and forced courts applying the distinction to resort to tortuous and tortured legal jujitsu.”

- Thus, the court concluded “that the better reasoning rejects the distinction,” and elected “to pursue a path for the federal common law which safely circumvents this ‘Serbonian Bog.’”
Wickman Framework

• Having rejected the means/results distinction, the court was left with the task of determining “the standards by which to judge the insured’s expectations.”
**Wickman Framework**

- Having rejected the means/results distinction, the court was left with the task of determining “the standards by which to judge the insured’s expectations.”

- The court rejected the plaintiff’s proffered solution: that “unless Wickman actually intended to die, essentially that he specifically intended to commit suicide, his death must be considered an accident.”
Wickman Framework

• Having rejected the means/results distinction, the court was left with the task of determining “the standards by which to judge the insured’s expectations.”

• The court rejected the plaintiff’s proffered solution: that “unless Wickman actually intended to die, essentially that he specifically intended to commit suicide, his death must be considered an accident.”

• Two distinct difficulties with relying on an insured’s actual expectations to determine whether an injury or death resulted from accident.
Wickman Framework

One: “The first difficulty comes in cases where an insured’s expectations, virtually synonymous with specific intent, are patently unreasonable.”
Wickman Framework

One: “The first difficulty comes in cases where an insured’s expectations, virtually synonymous with specific intent, are patently unreasonable.”

– Russian Roulette
Wickman Framework

One:  “The first difficulty comes in cases where an insured’s expectations, virtually synonymous with specific intent, are patently unreasonable.”

– Russian Roulette

– killed by vehicle while lying in the middle of the highway
Wickman Framework

One: “The first difficulty comes in cases where an insured’s expectations, virtually synonymous with specific intent, are patently unreasonable.”

– Russian Roulette

– killed by vehicle while lying in the middle of the highway

– Even if these individuals did not have an *actual* intention or expectation that they would be killed, their deaths were not “accidental.”
Wickman Framework

Two: It is usually difficult (if not impossible) to determine the actual expectation of the insured because they are deceased.
Wickman Framework

Two: It is usually difficult (if not impossible) to determine the actual expectation of the insured because they are deceased.

– “courts and jurists” would be required to “hypothesize and speculate” as to the insured’s subjective state of mind.
Wickman Framework

Two: It is usually difficult (if not impossible) to determine the actual expectation of the insured because they are deceased.

– “courts and jurists” would be required to “hypothesize and speculate” as to the insured’s subjective state of mind.

– Such an inquiry “is an uncertain and too often a hopelessly blind search for the truth.”
Wickman Framework

So - unwilling to completely disregard the insured’s expectations, the court came up with this framework:
Wickman Framework

So - unwilling to completely disregard the insured’s expectations, the court came up with this framework:

– Step 1: start with the reasonable expectations of the insured *when the policy was purchased*
Wickman Framework

So - unwilling to completely disregard the insured’s expectations, the court came up with this framework:

- Step 1: start with the reasonable expectations of the insured when the policy was purchased

- Step 2: if the insured did not expect an injury similar in type or kind to that suffered, then “examine whether the suppositions which underlay the expectation were reasonable” (which removes the potential for unrealistic expectations to undermine the purpose of accident insurance)
Wickman Framework

So - unwilling to completely disregard the insured’s expectations, the court came up with this framework:

– Step 1: start with the reasonable expectations of the insured *when the policy was purchased*

– Step 2: if the insured did not expect an injury similar in type or kind to that suffered, then “examine whether the suppositions which underlay the expectation were reasonable” (which removes the potential for unrealistic expectations to undermine the purpose of accident insurance)

– Step 3: if the suppositions underlying the insured’s expectations are unreasonable, the injuries are not accidental
Wickman Framework

How do you determine if the expectations are reasonable?
How do you determine if the expectations are reasonable?

– “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;”
Wickman Framework

How do you determine if the expectations are reasonable?

– “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;”

– if, from the available evidence, insured’s actual expectations cannot be determined, then “engage in an objective analysis of the insured’s expectations,” by asking “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.”
Accident?

Applying its framework to the facts of Mr. Wickman’s death, the court found it was not an accident because:

“Wickman knew or should have known that serious bodily injury or death was probably a consequence substantially likely to occur as a result of his volitional act in placing himself on the outside of the guardrail and hanging on with one hand.” This finding equates with a determination that Wickman expected the result, or that a reasonable person in his shoes would have expected the result, and that any other expectation would be unreasonable.
Applying *Wickman*: Miscellaneous Volitional Conduct

- insured died of multiple gunshot wounds to his chest and back that were sustained after he robbed a convenience store, then intentionally fired a gun at police
Applying *Wickman*: Miscellaneous Volitional Conduct

- insured died of multiple gunshot wounds to his chest and back that were sustained after he robbed a convenience store, then intentionally fired a gun at police

- Accident?
Applying *Wickman*: Miscellaneous Volitional Conduct

- insured died of multiple gunshot wounds to his chest and back that were sustained after he robbed a convenience store, then intentionally fired a gun at police

- Accident?

- No - under *Wickman* analysis – because decedent’s “actions [were] so unreasonable, ill-conceived, and extreme, that the court [could] not torture any known definition of the term ‘accident’ to find that he died accidentally.”

Applying *Wickman*: Miscellaneous Volitional Conduct

- insured was rather intoxicated
Applying *Wickman*: Miscellaneous Volitional Conduct

- insured was rather intoxicated
- insured was stowing a loaded rifle, in a soft case
Applying *Wickman*: Miscellaneous Volitional Conduct

- insured was rather intoxicated
- insured was stowing a loaded rifle, in a soft case
- the safety was off
Applying *Wickman*: Miscellaneous Volitional Conduct

- insured was rather intoxicated
- insured was stowing a loaded rifle, in a soft case
- the safety was off
- the barrel was pointed at the insured’s chest
Applying *Wickman*: Miscellaneous Volitional Conduct

- insured was rather intoxicated
- insured was stowing a loaded rifle, in a soft case
- the safety was off
- the barrel was pointed at the insured’s chest
- Accident?
Applying *Wickman*: Miscellaneous Volitional Conduct

- insured was rather intoxicated
- insured was stowing a loaded rifle, in a soft case
- the safety was off
- the barrel was pointed at the insured’s chest
- Accident?

No - while the scant available evidence suggested the insured did not subjectively expect to shoot and kill himself, the objective inquiry under *Wickman* was whether a reasonable person would expect that result under the circumstances

Applying *Wickman*: Miscellaneous Volitional Conduct

- insured died as a result of auto-erotic asphyxiation
Applying *Wickman*: Miscellaneous Volitional Conduct

- insured died as a result of auto-erotic asphyxiation
- insurer asserted suicide or self-inflicted injury exclusion
Applying *Wickman*: Miscellaneous Volitional Conduct

- insured died as a result of auto-erotic asphyxiation
- insurer asserted suicide or self-inflicted injury exclusion
- arbitrary and capricious to deny benefits?
Applying *Wickman*: Miscellaneous Volitional Conduct

- insured died as a result of auto-erotic asphyxiation
- insurer asserts suicide or self-inflicted injury exclusion
- arbitrary and capricious to deny benefits?
- Depends on the jurisdiction . . .
Applying *Wickman*: Miscellaneous Volitional Conduct

*Estate of Thompson v. Sun Life Assurance Co. of Canada*, 354 F. App’x 183 (5th Cir. Nov. 20, 2009):

The evidence supported the existence of the insured’s knowledge with respect to the “high risk” nature of his activity, so denial of benefits was not an abuse of discretion.
Applying *Wickman*: Miscellaneous Volitional Conduct

*Padfield v. AIG Life Ins. Co.*, 290 1121 (9th Cir. 2002):
Applying *Wickman*: Miscellaneous Volitional Conduct

*Padfield v. AIG Life Ins. Co.*, 290 1121 (9th Cir. 2002):

- subjectively, people who do this expect to survive the experience
Applying *Wickman*: Miscellaneous Volitional Conduct

*Padfield v. AIG Life Ins. Co.*, 290 1121 (9th Cir. 2002):

- subjectively, people who do this expect to survive the experience
- nothing to suggest this insured expected otherwise
Applying *Wickman*: Miscellaneous Volitional Conduct

*Padfield v. AIG Life Ins. Co.*, 290 F.3d 1121 (9th Cir. 2002):

- subjectively, people who do this expect to survive the experience
- nothing to suggest this insured expected otherwise
- insured had a history of engaging in this autoerotic behavior and surviving it
Applying *Wickman*: Miscellaneous Volitional Conduct

*Padfield v. AIG Life Ins. Co.*, 290 1121 (9th Cir. 2002):

- subjectively, people who do this expect to survive the experience
- nothing to suggest this insured expected otherwise
- insured had a history of engaging in this autoerotic behavior and surviving it
- under the objective prong of *Wickman*: (a) “death is not the ‘substantially certain’ result of autoerotic asphyxiation,” (b) “uniform medical and behavioral science evidence indicat[e] that autoerotic activity ordinarily has a nonfatal outcome”” so (c) “the likelihood of death from autoerotic activity falls far short of what would be required to negate coverage under an accidental death policy.”
Applying *Wickman*: Miscellaneous Volitional Conduct

*Padfield v. AIG Life Ins. Co.*, 290 1121 (9th Cir. 2002):

- subjectively, people who do this expect to survive the experience
- nothing to suggest this insured expected otherwise
- insured had a history of engaging in this autoerotic behavior and surviving it
- under the objective prong of *Wickman*, “death is not the ‘substantially certain’ result of autoerotic asphyxiation,” and “[g]iven the uniform medical and behavioral science evidence indicating that autoerotic activity ordinarily has a nonfatal outcome, ‘the likelihood of death from autoerotic activity falls far short of what would be required to negate coverage’ under an accidental death policy.”
- Thus - suicide exclusion doesn’t apply
Applying *Wickman*: Miscellaneous Volitional Conduct

- decedent opened door and “exited” moving vehicle
Applying *Wickman*: Miscellaneous Volitional Conduct

- decedent opened door and “exited” moving vehicle
- medical examiner reported the decedent “died as a result of blunt head trauma sustained following a leap from a moving vehicle. Although the deceased effected his own egress from the vehicle, it is difficult to know his specific motivations or intentions. There is no evidence of suicidal intent, however, neither does it appear thoroughly accidental.”
Applying *Wickman*: Miscellaneous Volitional Conduct

- decedent opened door and “exited” moving vehicle
- medical examiner reported the decedent “died as a result of blunt head trauma sustained following a leap from a moving vehicle. Although the deceased effected his own egress from the vehicle, it is difficult to know his specific motivations or intentions. There is no evidence of suicidal intent, however, neither does it appear thoroughly accidental.”
- “neither the police report nor the medical examiner’s report provide sufficient evidence to support a finding that [the decedent] intentionally left the car”
Applying *Wickman*: Miscellaneous Volitional Conduct

- decedent opened door and “exited” moving vehicle
- medical examiner reported the decedent “died as a result of blunt head trauma sustained following a leap from a moving vehicle,” and though “the deceased effected his own egress from the vehicle,” it was “difficult to know his specific motivations or intentions” because there was “no evidence of suicidal intent,” but “neither [did] it appear thoroughly accidental”
- neither the police report nor the medical examiner’s report provided “sufficient evidence to support a finding that [the decedent] intentionally left the car”
- Accident?
Applying *Wickman*: Miscellaneous Volitional Conduct

- decedent opened door and “exited” moving vehicle
- medical examiner reported the decedent “died as a result of blunt head trauma sustained following a leap from a moving vehicle. Although the deceased effected his own egress from the vehicle, it is difficult to know his specific motivations or intentions. There is no evidence of suicidal intent, however, neither does it appear thoroughly accidental.”
- “neither the police report nor the medical examiner’s report provide sufficient evidence to support a finding that [the decedent] intentionally left the car”
- Accident?
- Yes – it was arbitrary and capricious to conclude that opening the door of a moving vehicle was highly likely to cause serious injury without further investigation into “crucial” circumstances, such as the speed of the vehicle
Applying *Wickman*: Drug Overdose

- Is it an accident when a person dies from the voluntary ingestion of drugs, alcohol, or other substances?
Applying Wickman: Drug Overdose

• Is it an accident when a person dies from the voluntary ingestion of drugs, alcohol, or other substances?

• What about recovering addicts who don’t realize when they “fall off the wagon” that the high dose they used to need to achieve the desired effect after building a tolerance to the drugs is now enough to cause them to overdose?
Applying *Wickman*: Drug Overdose

- Is it an accident when a person dies from the voluntary ingestion of drugs, alcohol, or other substances?
- What about recovering addicts who don’t realize when they “fall off the wagon” that the high dose they used to need to achieve the desired effect after building a tolerance to the drugs is now enough to cause them to overdose?
- Could this be the explanation for the recent death of the famous actor, Phillip Seymour Hoffman?
Applying *Wickman*: Drug Overdose

- Is it an accident when a person dies from the voluntary ingestion of drugs, alcohol, or other substances?
- What about recovering addicts who don’t realize when they “fall off the wagon” that the high dose they used to need to achieve the desired effect after building a tolerance to the drugs is now enough to cause them to overdose?
- Could this be the explanation for the recent death of the famous actor, Phillip Seymour Hoffman?
- Consider the following:
Applying *Wickman*: Drug Overdose

- the insured “died while he was in Australia on a business trip . . .,” and “the cause of death was heroin overdose”
Applying *Wickman*: Drug Overdose

- the insured “died while he was in Australia on a business trip . . .,” and “the cause of death was heroin overdose”
- the decedent “had a long history of drug dependence,” had participated in inpatient rehabilitation on several occasions, and had “managed to be ‘drug free sporadically, for periods of from [sic] one to three years”
Applying *Wickman*: Drug Overdose

- the insured “died while he was in Australia on a business trip . . .,” and “the cause of death was heroin overdose”
- he “had a long history of drug dependence,” participated in inpatient rehabilitation several times, and stayed drug free “sporadically”, for periods 1 to 3 years at a time
- a year or two before he died, he relapsed while on business in Australia, which prompted him “to enroll in the outpatient rapid detox program” and begin “the Suboxone program”
Applying *Wickman*: Drug Overdose

- an expert physician who was board certified in internal and addiction medicine testified: “Because he was drug free for a significant period of time, his prior tolerance had returned to a lower level and the amount he thought he had tolerated before was not able to be tolerated because of this lower tolerance”
Applying *Wickman*: Drug Overdose

- an expert physician who was board certified in internal and addiction medicine testified: “Because he was drug free for a significant period of time, his prior tolerance had returned to a lower level and the amount he thought he had tolerated before was not able to be tolerated because of this lower tolerance”

- Accident?
Applying *Wickman*: Drug Overdose

- an expert physician who was board certified in internal and addiction medicine testified: “Because he was drug free for a significant period of time, his prior tolerance had returned to a lower level and the amount he thought he had tolerated before was not able to be tolerated because of this lower tolerance”

- Accident?

- Yes – rationale for claim denial: it was “extremely unlikely” the decedent was unaware of “the risks associated with his behavior,” so his death was “foreseeable and not accidental,” BUT on *de novo* review, the court applied *Wickman* (as modified by *Kovach* discussed *infra.*), and determined that the death was *accidental*

Applying *Wickman*: Drug Overdose

By contrast, the court in *Gerdes v. John Hancock Mut. Life Ins. Co.*, 199 F.Supp.2d 861 (C.D. Ill. 2001), held on *de novo* review (without reference to *Wickman*) that voluntary ingestion of a combination of opiate, heroin, and cocaine (called a “speedball”) implicated the intentionally self-inflicted injury exclusion of a group accident policy.

Rationale: even though it was undisputed the drugs were ingested “for pleasurable effects”, the “widespread dissemination of drug information” and “high general public perception of the danger of using drugs such as heroin and cocaine” meant the decedent knew or should have known of the risk and assumed that risk.
Applying *Wickman*: Drug Overdose


Court made only a passing reference to *Wickman* but upheld the denial of accidental death benefits for the decedent’s death by overdose on unprescribed drugs because:

(a) death was not an accident because a reasonable person would have known it was highly likely to occur; and

(b) drug and/or self-inflicted injury exclusions applied
Applying *Wickman*: Drug Overdose


Insured died due to combination of prescription drugs and alcohol -- but it was uncertain whether he overdosed or whether his liver and kidneys failed to properly metabolize the correct dose.

Accident? Yes – because it was an “unintended or unforeseeable event”

But – loss was still excluded from coverage by one or all of the plan’s exclusions for sickness, heart attack, and voluntary ingestion of excess prescription drugs.
Applying *Wickman*: Drug Overdose

- If the insurer “properly concluded that Decedent intended to consume a toxic substance, then it could reasonably conclude that the death was not ‘accidental’ as that term is generally understood.”
Applying *Wickman*: Other Toxic Substance

- If insurer “properly concluded that Decedent intended to consume a toxic substance, then it could reasonably conclude that the death was not ‘accidental’ as that term is generally understood.”

- The evidence was insufficient as to whether the insured intentionally ingested the antifreeze that led to his demise, so the court remanded for further investigation into his intent.

Driving While Intoxicated

There can be no question that the general population of America is well aware of the increased risk of fatal wrecks when operating any motor vehicle under the influence of alcohol, and that the likelihood of a wreck increases exponentially with higher levels of alcohol consumption.

See Lennon v. Metropolitan Life Ins. Co., 504 F.3d 617, 623 (6th Cir. 2007) (citing NHTSA statistics and Wikipedia for the proposition that “[w]e can take judicial notice of the fairly obvious scientific fact that as blood-alcohol levels rise, ‘so does the risk of being involved in a fatal crash’”)
Driving While Intoxicated

The court in *Lennon* noted the Seventh Circuit’s explanation “albeit in a different context” that:

Drunk driving is a reckless act, perhaps an act of gross negligence. Any drunk driver who takes to the road should know he runs a risk of injuring another person [or himself]. The extent of the risk will of course vary from case to case, depending on how intoxicated the driver is, how far he drives, how fast he drives, and how many other drivers and pedestrians are sharing the road with him.

504 F.3d at 621 (quoting *United States v. Rutherford*, 54 F.3d 370, 376 (7th Cir. 1995)).
Driving While Intoxicated

According to one treatise, a person with blood alcohol content ("BAC") of .18% would "show signs of 'increas[ed] impairment of sensory motor activities, reaction times, attention, visual acuity, and judgment.'"

Driving While Intoxicated

For these reasons:

• All 50 states have criminalized operation of a motor vehicle with BAC ≥ .08%
Driving While Intoxicated

For these reasons:

• All 50 states have criminalized operation of a motor vehicle with BAC $\geq .08\%$

• Other countries consider BAC dangerous at lower levels than in the US:
Driving While Intoxicated

For these reasons:

• All 50 states have criminalized operation of a motor vehicle with BAC $\geq .08\%$

• Other countries consider BAC dangerous at lower levels than in the US:
  – Sweden = BAC dangerously high at .02%
Driving While Intoxicated

For these reasons:

• All 50 states have criminalized operation of a motor vehicle with BAC ≥ .08%

• Other countries consider BAC dangerous at lower levels than in the US:
  – Sweden = BAC dangerously high at .02%
  – Japan = BAC dangerously high at .03%
Driving While Intoxicated

For these reasons:

• All 50 states have criminalized operation of a motor vehicle with BAC ≥ .08%

• Other countries consider BAC dangerous at lower levels than in the US:
  – Sweden = BAC dangerously high at .02%
  – Japan = BAC dangerously high at .03%
  – Germany = BAC dangerously high at .05%
Driving While Intoxicated

For these reasons:

- All 50 states have criminalized operation of a motor vehicle with BAC $\geq 0.08\%$
- Other countries consider BAC dangerous at lower levels than in the US:
  - Sweden = BAC dangerously high at $0.02\%$
  - Japan = BAC dangerously high at $0.03\%$
  - Germany = BAC dangerously high at $0.05\%$
- On May 14, 2013, the National Transportation Safety Board recommended that all states reduce to the legal limit to $0.05\%$
Driving While Intoxicated

For these reasons:

• All 50 states have criminalized operation of a motor vehicle with BAC ≥ .08%

• Other countries consider BAC dangerous at lower levels than in the US:
  – Sweden = BAC dangerously high at .02%
  – Japan = BAC dangerously high at .03%
  – Germany = BAC dangerously high at .05%

• On May 14, 2013, the National Transportation Safety Board recommended that all states reduce to the legal limit to .05%

• Subsequent Daily Report article suggested a 180-lb man who consumed 4 drinks over 4 hours would have a BAC of .05%
Driving While Intoxicated

Common sense dictates that combining alcohol with other prescription or illicit drugs only increases the likelihood of a fatal crash.

Recent study published by BMJ (f/k/a British Medical Journal) performed a meta-analysis of hundreds of studies which “included observational studies of motor vehicle drivers who had been treated for serious injuries sustained in a crash or had been involved in a fatal crash.”
Driving While Intoxicated

That article documented:

(a) that “[i]n all studies assessing cannabis use in conjunction with alcohol, the estimated odds ratio for cannabis and alcohol combined was higher than for cannabis use alone, suggesting the presence of a synergistic effect”; and
Driving While Intoxicated

That article documented:

(a) that “[i]n all studies assessing cannabis use in conjunction with alcohol, the estimated odds ratio for cannabis and alcohol combined was higher than for cannabis use alone, suggesting the presence of a synergistic effect”; and

(b) that “[e]ven at low doses the combination of alcohol and marijuana is dangerous and places the drivers, their passengers and others on the road at serious risk.”
Driving While Intoxicated – Developing Trend?

Despite the foregoing information being well known or “widely publicized,” perhaps the most litigated aspect of AD&D coverage involves operating motor vehicles (whether cars, motorcycles, or other vehicles) while under the influence of alcohol, drugs (whether prescription or illicit), or both.

This particular area is one that courts have really struggled with over the past several years, with differing results.

Indeed, as the court noted in Johnson v. American United Life Ins. Co., “[t]he question of whether drunk-driving deaths or injuries are ‘accidental’ for purposes of accidental death insurance has perplexed the judiciary for some time.” 716 F.3d 813, 816 (2013).
Driving While Intoxicated – Eleventh Circuit

Although the Eleventh Circuit in *Buce, supra.*, applied the Georgia accidental means test pursuant to the Plan’s choice of law provision, it nevertheless confirmed (in a footnote) that under the *Wickman* framework, death from a single-vehicle crash where the decedent’s blood alcohol content (“BAC”) was .22 (with no factors of bad weather, road defects, or vehicle malfunction) was not an accident.

The court in *Buce* approved the Seventh Circuit’s application of the “vital aspect” of *Wickman* in the “essentially indistinguishable” case of *Cozzie v. Metropolitan Life Ins. Co.*, 140 F.3d 1104, 1106 (7th Cir. 1998) (insured died in single vehicle crash with BAC of .252 and “no apparent cause other than [his] impaired condition”).
Driving While Intoxicated – Eleventh Circuit

As noted in *Buce*, “[a] reasonable person would have foreseen that driving with a blood alcohol level of .22 grams percent was highly likely to result in injury or death.”

Judge Carnes’s concurring opinion stated the decedent was “exceedingly intoxicated” (over twice the legal limit) and his death “represents a statistically predictable loss.”
Driving While Intoxicated – District Courts in the Eleventh Circuit

Driving While Intoxicated – District Courts in the Eleventh Circuit

• *Amy Smith v. Hartford Life & Accident Ins. Co.*, 1:10-CV-2471-JOF, pp. 20-21 (N.D. Ga. Feb. 27, 2012) (applied *Wickman* and determined that “objectively, a death resulting from driving while intoxicated to more than twice the legal limit . . . indicates the foreseeable result of someone placing himself in grave peril”).

• *Witcher v. Cigna Group Ins.*, 2006 2006 WL 3614920 (M.D. Fla. Dec. 11, 2006) (“[T]he foreseeability of being impaired when driving while intoxicated turns what would otherwise be characterized as an accident into a non-accidental event”).
Driving While Intoxicated –
District Courts in the Eleventh Circuit


- the decedent had a BAC of .23% when his vehicle ran off the road onto the right shoulder and he was partially ejected.
Driving While Intoxicated – District Courts in the Eleventh Circuit


- the decedent had a BAC of .23% when his vehicle ran off the road onto the right shoulder and he was partially ejected.
- denial of benefits upheld in part because fatal injuries “were reasonably foreseeable and were the natural and probable result of conduct knowingly undertaken.”
Driving While Intoxicated –
District Courts in the Eleventh Circuit


• the decedent had a BAC of .23% when his vehicle ran off the road onto the right shoulder and he was partially ejected.

• denial of benefits upheld in part because fatal injuries “were reasonably foreseeable and were the natural and probable result of conduct knowingly undertaken.”

• court noted an absence of evidence suggesting any other cause (i.e. “[t]he road was dry and unobstructed, and no other vehicles were involved”) and the decedent’s “level of intoxication was significant.”
Driving While Intoxicated – District Courts in the Eleventh Circuit


• the decedent had a BAC of .23% when his vehicle ran off the road onto the right shoulder and he was partially ejected.

• denial of benefits upheld in part because fatal injuries “were reasonably foreseeable and were the natural and probable result of conduct knowingly undertaken.”

• court noted an absence of evidence suggesting any other cause (i.e. “[t]he road was dry and unobstructed, and no other vehicles were involved”) and the decedent’s “level of intoxication was significant.”

• “Given the well-documented and well-known effects of intoxication on a person’s ability to operate a motor vehicle and given the absence of evidence of any other cause of the accident,” the court found “no conflicting evidence which would require a trial on the issue.”
Driving While Intoxicated – District Courts in the Eleventh Circuit


• applied Wickman where the fatal car wreck occurred while the decedent had a BAC of .29%, and held the insured did not intend to die, but “his expectations were unreasonable given his condition.”
Driving While Intoxicated –
District Courts in the Eleventh Circuit


• applied Wickman where the fatal car wreck occurred while the decedent had a BAC of .29%, and held the insured did not intend to die, but “his expectations were unreasonable given his condition.”

• “It is just common sense that a driver whose faculties are significantly impaired by alcohol or drugs, or both, risks his life as well as others.”

• applied Wickman where the fatal car wreck occurred while the decedent had a BAC of .29%, and held the insured did not intend to die, but “his expectations were unreasonable given his condition.”

• “It is just common sense that a driver whose faculties are significantly impaired by alcohol or drugs, or both, risks his life as well as others.”

• denial of benefits was appropriate because “[t]he horrors associated with drinking and driving are highly publicized,” it is “clearly foreseeable” that drunk driving “may result in death or bodily harm;” the decedent should have known “he was risking his life in a real and measurable way;” and “[a]ny other expectation would have been unreasonable.” (quoting Fowler v. Metropolitan Life Ins. Co., 938 F. Supp. 476, 480 (W.D. Tenn. 1996) (denial of benefits appropriate where decedent with a BAC of .25% died in single vehicle crash)).
Driving While Intoxicated – Seventh Circuit

Cozzie v. Metropolitan Life Ins. Co., 140 F.3d 1104 (7th Cir. 1998):

• Plan did not define “accident” or contain an intoxication exclusion, but granted discretion to interpret Plan terms
Driving While Intoxicated – Seventh Circuit

Cozzie v. Metropolitan Life Ins. Co., 140 F.3d 1104 (7th Cir. 1998):

• Plan did not define “accident” or contain an intoxication exclusion, but granted discretion to interpret Plan terms

• It was not arbitrary and capricious to interpret “accident” to mean “an event that is not ‘reasonably foreseeable’” or to determine that death was no “accident” in light of “the amount of alcohol ingested . . . and the exclusion of any other cause for the event.”
Driving While Intoxicated – Fourth Circuit


“Whether the test is one of high likelihood, or reasonable foreseeability, federal courts have found with near universal accord that alcohol-related injuries and deaths are not ‘accidental’ under insurance contracts governed by ERISA.”

_Baker v. Provident Life & Accident Ins. Co._, 171 F.3d 939, 941-43 (4th Cir. 1999) (decedent’s BAC was .286, “dangers of driving while intoxicated are plain,” insured cannot claim he was “unaware that his behavior threatened his own life and those of other motorists,” and “reasonable person in [the insured’s] position would have known that death or serious injury was a reasonably foreseeable result”).

But, stay tuned . . . .
Driving While Intoxicated – First Circuit

What about the circuit where the Wickman analysis originated?

*Stamp v. Metropolitan Life Ins. Co.*, 531 F.3d 84, 91 (1st Cir. 2008):

- applied *Wickman* after the Supreme Court’s decision in *Metropolitan Life Ins. Co. v. Glenn*, 554 U.S. 105 (2008), and upheld denial of accidental death benefits where the decedent had a BAC of .265% and died in a single-car collision
Driving While Intoxicated – First Circuit

This is the circuit where Wickman originated

*Stamp v. Metropolitan Life Ins. Co.*, 531 F.3d 84, 91 (1st Cir. 2008):

- applied *Wickman* after the Supreme Court’s decision in *Metropolitan Life Ins. Co. v. Glenn*, 554 U.S. 105 (2008), and upheld denial of accidental death benefits where the decedent had a BAC of .265% and died in a single-car collision

- reiterated that “the critical determination under *Wickman* lies in an objective analysis of what the insured reasonably should have expected when he decided to drive while highly intoxicated”
Driving While Intoxicated – Post-Stamp Developing Trend?

Since *Stamp*, however, “[t]here is some conflicting authority in other cases” regarding whether drunk driving “precludes a finding of coverage under an ‘accidental death’ policy.” *Smith*, 1:10-CV-2471-JOF, pp. 18-19.

Some post-*Stamp* cases demonstrate a trend against viewing death or serious injury in drunk driving accidents as “foreseeable,” “highly likely,” “substantially likely,” or even statistically likely, while other jurisdictions maintain the position that the danger is just too well known to expect a different result.
Driving While Intoxicated – Post-Stamp Developing Trend? (District of Connecticut)


• insured (with BAC of .26 or .27) died after driving at high rate of speed past 7 construction zone warning signs, entering the left lane, and collided head-on with a dump truck that had both headlights and flashers on, with no attempt to avoid
Driving While Intoxicated – Post-Stamp Developing Trend? (District of Connecticut)


• decedent (with BAC of .26 or .27) died after driving at high rate of speed past 7 construction zone warning signs, entering the left lane, and collided head-on with a dump truck that had both headlights and flashers on, with no attempt to avoid the crash

• claimant conceded crash would not have occurred had decedent not been drunk
Driving While Intoxicated – Post-Stamp Developing Trend? (District of Connecticut)

_Danouvong v. Life Ins. Co. of N. Am, 659 F.Supp.2d 318 (D. Conn. 2009):_

- decedent (with BAC of .26 or .27) died after driving at high rate of speed past 7 construction zone warning signs, entering the left lane, and collided head-on with a dump truck that had both headlights and flashers on, with no attempt to avoid
- claimant conceded crash would not have occurred had decedent not been drunk
- court nevertheless rejected denial of benefits, stating insurer applied “categorical per se rule” that drunk driving deaths were “foreseeable” and thus not accidental
Driving While Intoxicated – Post-Stamp Developing Trend? (District of Connecticut)

*Danouvong v. Life Ins. Co. of N. Am, 659 F.Supp.2d 318 (D. Conn. 2009)*:

- decedent (with BAC of .26 or .27) died after driving at high rate of speed past 7 construction zone warning signs, entering the left lane, and collided head-on with a dump truck that had both headlights and flashers on, with no attempt to avoid
- claimant conceded crash would not have occurred had decedent not been drunk
- court nevertheless rejected denial of benefits, stating insurer applied “categorical per se rule” that drunk driving deaths were “foreseeable” and thus not accidental
- insurer needed to show that, “in light of the facts and circumstances involved,” that the insured’s “car collision and resulting death were foreseeable beyond the fact of his serious intoxication” to avoid being held arbitrary and capricious
Driving While Intoxicated – Post-Stamp Developing Trend? (Sixth Circuit)


- appears anomalous because motorcyclist lost his leg due to injuries sustained after he ran a stop sign with a BAC of almost twice the legal limit (combined with benzodiazepines and opiates in his bloodstream), and the court ostensibly adopted *Wickman*, yet did not find it highly likely that the insured would be seriously injured in a crash under these circumstances
Driving While Intoxicated – Post-*Stamp*
Developing Trend? (Sixth Circuit)


- appears anomalous because the court ostensibly adopted *Wickman*, yet did not find it highly likely that a motorcyclist who lost his leg due to injuries sustained after he ran a stop sign with a BAC of almost twice the legal limit (combined with benzodiazepines and opiates in his bloodstream) would be seriously injured in a crash.

- seems somewhat result-oriented in light of the pronouncement that courts must “refrain from allowing our moral judgments about drunk driving to influence our review of [the insurer’s] interpretation of the relevant Plan provisions,” and the curious statement that the collision involved no other “out-of-the-ordinary factors” except running a stop sign, because the injured motorist was not speeding or “driving in an otherwise risky manner” (implying that riding with a BAC of .148% combined with narcotic agents is not “risky”).
Driving While Intoxicated – Post-
Stamp
Developing Trend? (Sixth Circuit)

The court in *Kovach* distanced itself from previous Sixth Circuit precedent in *Lennon* (where the drunk driver had a BAC of three times the legal limit and was thus considered grossly negligent), and indicated that the BAC of .148% was only “slightly” over the legal limit (even though it was actually almost twice the legal limit of .08%).
Driving While Intoxicated – Post-Stamp Developing Trend? (Sixth Circuit)

The court in Kovach distanced itself from previous Sixth Circuit precedent in Lennon (where the drunk driver had a BAC of three times the legal limit and was thus considered grossly negligent), and indicated that the BAC of .148% was only “slightly” over the legal limit (even though it was actually almost twice the legal limit of .08%).

See Hansen v. Liberty Life Assurance Co. of Boston, 2010 WL 908477 (N.D. Ohio Mar. 12, 2010) (attempting to reconcile Lennon and Kovach, and ultimately determining that the insurer’s denial of benefits was not arbitrary and capricious where the decedent’s BAC was .216%, such that her “death result[ed], in part, from the affects [sic] of gross drunkenness”).
Driving While Intoxicated – Post-
Stamp Developing Trend? (Sixth Circuit)

*Kovach* dissent looks more like reasoning of Eleventh Circuit in *Buce* (i.e. that the focus should be “on the objectively reasonable expectations of a person in the perilous situation that the decedent had placed himself in”):

When [the plaintiff] decided to mount his motorcycle and drive it on crowded roadways, with a [BAC] nearly double the legal limit, he engaged in high-risk behavior that made it reasonably foreseeable and highly likely that he would be injured as a result of his choices. It was, therefore, not arbitrary and capricious for [the insurer] to determine that the ensuing traffic collision was not accidental and to deny his claim.
Driving While Intoxicated – Post-Stamp Developing Trend? (Eighth and Tenth Circuit – No Wickman)

LaAsmar v. Phelps Dodge Corp., 605 F.3d 789) (10th Cir. 2010):

• rejected a _per se_ rule, which plaintiffs had characterized as a “blanket rule that all wrecks occurring while the driver has a BAC of approximately 2.8 times the legal limit is not an ‘accident.’”
Driving While Intoxicated – Post-Stamp Developing Trend? (Eighth and Tenth Circuit – No Wickman)

LaAsmar v. Phelps Dodge Corp., 605 F.3d 789) (10th Cir. 2010):

• rejected a *per se* rule, which plaintiffs had characterized as a “blanket rule that all wrecks occurring while the driver has a BAC of approximately 2.8 times the legal limit is not an ‘accident.’”

• *LaAsmar* was reviewed under the *de novo* standard of review and also “appears to have declined to apply Wickman” (so it has limited use in the Eleventh Circuit)
Driving While Intoxicated – Post-Stamp Developing Trend? (Eighth and Tenth Circuit – No Wickman)

LaAsmar v. Phelps Dodge Corp., 605 F.3d 789) (10th Cir. 2010):

• rejected a per se rule, which plaintiffs had characterized as a “blanket rule that all wrecks occurring while the driver has a BAC of approximately 2.8 times the legal limit is not an ‘accident.’”

• LaAsmar was reviewed under the de novo standard of review and also “appears to have declined to apply Wickman (so it has limited use in the Eleventh Circuit)

• See also McClelland v. Life Ins. Co. of North Am., 679 F.3d 755, 759 n.2, 761 (8th Cir. 2012), infra. (using Wickman only “as a framework for discerning the meaning of ‘accident,’” and apparently modifying the objective prong of the Wickman test)
Driving While Intoxicated – Fourth Circuit About Face?


• decedent sustained fatal injuries when partially ejected from flipping vehicle after veering off road and hitting a sign while speeding with a BAC of .289
Driving While Intoxicated –
Fourth Circuit About Face?


- decedent sustained fatal injuries when partially ejected from
  flipping vehicle after veering off road and hitting a sign while
  speeding with a BAC of .289

- district court held death was not accidental because crash was
  anticipated and expected in light of the level of intoxication
  and high speed
Driving While Intoxicated – Fourth Circuit About Face?


- decedent sustained fatal injuries when partially ejected from flipping vehicle after veering off road and hitting a sign while speeding with a BAC of .289

- district court held death was not accidental because crash was anticipated and expected in light of the level of intoxication and high speed

- Because standard of review was *de novo* and “accident” was not defined in the plan, the Fourth Circuit reversed by applying *contra proferentum* to construe the plan against the insurer and hold that the “loss was the result of an accident covered by the policies.”
Driving While Intoxicated – Fourth Circuit About Face?

• The court found many factual similarities to *Eckelberry, supra.*, where it previously held the record supported a finding that decedent put himself in a position where he knew or should have known that death or serious injury could occur and therefore his death was not “unexpected”
Driving While Intoxicated – Fourth Circuit About Face?

• The court found many factual similarities to *Eckelberry, supra.*, where it previously held that record supported a finding that decedent put himself in a position where he knew or should have known that death or serious injury could occur and therefore his death was not “unexpected”

• However, two distinctions (that the plan in *Eckelberry* defined “accident,” and conferred discretion on the claim administrator) rendered that case uncontroverting in the eyes of the court.
Driving While Intoxicated – Fourth Circuit About Face?

• The court found many factual similarities to Eckelberry, supra., where it previously held that record supported a finding that decedent put himself in a position where he knew or should have known that death or serious injury could occur and therefore his death was not “unexpected”

• However, two distinctions (that the plan in Eckelberry defined “accident,” and conferred discretion on the claim administrator) rendered that case uncontrolling in the eyes of the court.

• “Unlike Eckelberry, our review is de novo in this appeal, and we construe the meaning of the Plan terms in the first instance and are not limited to considering only the reasonableness of the decision and reasoning of the claims administrator.”
There are three recent Fifth Circuit decisions discussing whether drunk driving deaths are accidental. Two unpublished decisions – *Davis v. Life Ins. Co. of N. Am.*, 379 F. App’x 393 (5th Cir. May 26, 2010), and *Sanchez v. Life Ins. Co. of N. Am.*, 393 F. App’x 229 (5th Cir. Sept. 1, 2010) – upheld the insurer’s determination that the deaths were not covered accidents under somewhat similar circumstances, while the published decision of *Firmin v. Life Ins. Co. of North Am.*, 684 F.3d 533 (2012), held the insurer’s determination an abuse of discretion.
Like the Fourth, Eighth, and Tenth Circuit cases discussed herein, *Firmin* took issue with what it deemed to be a categorical decision that no drunk driving death can be considered accidental.

The term “accident” was not defined in the plan at issue in *Firmin*. Conversely, both *Davis* and *Sanchez* involved policies that “defined ‘accident’ as ‘[a] sudden, unforeseeable, external event.’”
Driving While Intoxicated – Fifth Circuit – Just The (Additional) Facts . . .

In *Firmin*, there was no evidence but the decedent’s BAC, of .20% (and the officer’s description of an open container and strong alcohol smell)
In *Firmin*, there was no evidence but the decedent’s BAC, of .20% (and the officer’s description of an open container and strong alcohol smell)

So, “instead of considering any other facts specific to the case [like the administrator did in *Stamp*], the insurer effectively adopted a stance that a crash resulting from any [BAC] over the legal limit is *per se* foreseeable, and therefore *per se* not an accident.”
In *Firmin*, there was no evidence but the decedent’s BAC, of .20% (and the officer’s description of an open container and strong alcohol smell)

So, “instead of considering any other facts specific to the case [like the administrator did in *Stamp*], the insurer effectively adopted a stance that a crash resulting from any [BAC] over the legal limit is *per se* foreseeable, and therefore *per se* not an accident.”

Thus, it was abuse of discretion not to obtain the necessary information to conduct a proper, fact-specific review.
In *Davis*, in addition to the decedent’s BAC of .28%, the insurer relied on:
(a) evidence that the decedent was driving his motorcycle at 60 miles-per-hour;
Driving While Intoxicated – Fifth Circuit – Just The (Additional) Facts . . .

In *Davis*, in addition to the decedent’s BAC of .28%, the insurer relied on:

(a) evidence that the decedent was driving his motorcycle at 60 miles-per-hour;

(b) the fact that the “crash occurred in daylight, with clear or cloudy weather and a dry road surface”; and
In *Davis*, in addition to the decedent’s BAC of .28%, the insurer relied on:

(a) evidence that the decedent was driving his motorcycle at 60 miles-per-hour;

(b) the fact that the “crash occurred in daylight, with clear or cloudy weather and a dry road surface”; and

(c) opinions of a forensic toxicologist that the decedent’s BAC would have caused “delayed response time”/”increased response time,” tendency “to take greater risks,” “impaired sensory-motor skills, attention, judgment, and control,” “reduced visual acuity [and] peripheral vision,” and “disturbances of perception of motion and dimensions.” These factors led the toxicologist to opine that the decedent “would have been impaired to the extent that it likely was a causative factor in his crash leading to his death.”
In *Sanchez*, the insurer also relied on additional information besides the BAC:

(a) eyewitness testimony that the insured’s vehicle swerved left then sharply right before rolling over several times;
In *Sanchez*, the insurer also relied on additional information besides the BAC:

(a) eyewitness testimony that the insured’s vehicle swerved left then sharply right before rolling over several times;

(b) the lack of any apparent reason for the swerving and rolling over other than “driver error”;
In *Sanchez*, the insurer also relied on additional information besides the BAC:

(a) eyewitness testimony that the insured’s vehicle swerved left then sharply right before rolling over several times;

(b) the lack of any apparent reason for the swerving and rolling over other than “driver error”; 

(c) the lack of weather, road, or vehicle conditions contributing to the crash; and
In *Sanchez*, the insurer also relied on additional information besides the BAC:

(a) eyewitness testimony that the insured’s vehicle swerved left then sharply right before rolling over several times;
(b) the lack of any apparent reason for the swerving and rolling over other than “driver error”;
(c) the lack of weather, road, or vehicle conditions contributing to the crash; and
(d) the opinion from a forensic consultant “with a reasonable degree of scientific certainty” that the decedent’s BAC of .174% “and resultant impairment was a causative factor in the accident that resulted in his death.”
Driving While Intoxicated – Post-Stamp Developing Trend? (Eighth Circuit)

McClelland v. Life Ins. Co. of North Am., 679 F.3d 755, 758 (8th Cir. 2012):

• insurer’s denial of accidental death benefits arbitrary and capricious where the decedent had two prior DUls, had a BAC of .20, and was witnessed riding a motorcycle with no helmet and weaving in and out of traffic at speeds up to 90 miles per hour.
Driving While Intoxicated – Post-Stamp Developing Trend? (Eighth Circuit)

McClelland v. Life Ins. Co. of North Am., 679 F.3d 755, 758 (8th Cir. 2012):

- insurer’s denial of accidental death benefits arbitrary and capricious where the decedent had two prior DUIs, had a BAC of .20, and was witnessed riding a motorcycle with no helmet and weaving in and out of traffic at speeds up to 90 miles per hour.

- In reaching that conclusion, the Eighth Circuit appears to have used Wickman only “as a framework for discerning the meaning of ‘accident,’” and also appeared to modify the objective prong of the Wickman test.
Driving While Intoxicated – Post-Stamp Developing Trend? (Eighth Circuit)

McClelland v. Life Ins. Co. of North Am., 679 F.3d 755, 758 (8th Cir. 2012):

• insurer’s denial of accidental death benefits arbitrary and capricious where the decedent had two prior DUls, had a BAC of .20, and was witnessed riding a motorcycle with no helmet and weaving in and out of traffic at speeds up to 90 miles per hour.

• In reaching that conclusion, the Eighth Circuit appears to have used Wickman only “as a framework for discerning the meaning of ‘accident,’” and also appeared to modify the objective prong of the Wickman test.

• Nevertheless, the court in McClelland quoted Wickman for the proposition that “[g]enerally, insureds purchase insurance for the very purpose of obtaining protection from their own miscalculations and misjudgments,” then downplayed the situation under consideration by stating that the insured merely “misjudged a curve in the road, and perhaps, his ability to operate a motorcycle after consuming alcohol.”
Driving While Intoxicated – Proper Application of *Wickman*

Arguably, the result of applying the *Wickman* test set forth by the First Circuit should result in a conclusion that no reasonable person could objectively expect to survive riding a motorcycle with no helmet at 90-miles-per-hour after consuming enough alcohol to be more than twice the legal limit for operating a vehicle.

See *Hauser v. Stonebridge Life Ins. Co.*, 2012 WL 1941576, *11* (D. R.I. Mar. 5, 2012) (noting that, under *Wickman*, the insured’s subjective expectations are only the “starting point” and concluding that no reasonable person in the insured’s position “would have viewed the event which caused his death as unlikely to occur given his intentional conduct of driving with a [BAC] of .32%, four times the legal limit”)

Driving While Intoxicated – Proper Application of Wickman?

One of the most recent decisions from the Northern District of Georgia applied Wickman properly -- Clark v. Life Ins. Co. of N. Am., 950 F.Supp.2d 1348 (N.D. Ga. 2013):

• found that the insurer’s denial of accidental death benefits was correct from a de novo perspective where the facts were strikingly similar to those in McClelland. (In Clark, the decedent was killed when he rode a motorcycle with no helmet on a curvy two-lane road, left the roadway, was ejected from his motorcycle, and struck a tree.)
Driving While Intoxicated – Proper Application of *Wickman*?


- found that the insurer’s denial of accidental death benefits was correct from a *de novo* perspective where the facts were strikingly similar to those in *McClelland*. (In *Clark*, the decedent was killed when he rode a motorcycle with no helmet on a curvy two-lane road, left the roadway, was ejected from his motorcycle, and struck a tree.)

- At the time of the crash, the decedent in *Clark* had BAC over twice the legal limit in Georgia and Colorado (where the crash occurred), and tested positive for THC, the principal psychoactive constituent of marijuana.
After working through the *Wickman* analysis, the court found as a matter of law that the death was not “accidental” because the decedent knew or should have known that serious injury or death was a highly probable consequence of riding a motorcycle without a helmet after consuming enough alcohol to have a BAC of .176 and ingesting marijuana.
Driving While Intoxicated – Proper Application of Wickman?

- After working through the Wickman analysis, the court found as a matter of law that the death was not “accidental” because the decedent knew or should have known that serious injury or death was a highly probable consequence of riding a motorcycle without a helmet after consuming enough alcohol to have a BAC of .176 and ingesting marijuana.

- “A reasonable person with [the decedent’s] college education and experience riding a motorcycle on the road at issue would know the dangerous effects that alcohol and marijuana would have on the ability to ride downhill towards a curve.” Indeed, “a reasonable person would perceive death as a highly likely outcome of riding a motorcycle downhill towards a curve under the influence of alcohol and drugs even when doing so in broad daylight on a dry, paved, defect-free road.”
• plan language and the standard of review play a large part in the outcome of an accidental death or dismemberment case
Take-Aways on this Trending Issue

• plan language and the standard of review play a large part in the outcome of an accidental death or dismemberment case
• Insurers should make a point to consider all factors surrounding a drunk driving accident, regardless of how high the BAC level is, or whether other substances are involved
Take-Aways on this Trending Issue

- plan language and the standard of review play a large part in the outcome of an accidental death or dismemberment case
- Insurers should make a point to consider all factors surrounding a drunk driving accident, regardless of how high the BAC level is, or whether other substances are involved
- the law involving underlying sickness or disease and certain volitional acts appear fairly settled
Take-Aways on this Trending Issue

• plan language and the standard of review play a large part in the outcome of an accidental death or dismemberment case
• Insurers should make a point to consider all factors surrounding a drunk driving accident, regardless of how high the BAC level is, or whether other substances are involved
• the law involving underlying sickness or disease and certain volitional acts appear fairly settled
• there has been an emerging trend in some circuits to treat drunk driving deaths as accidents unless the plan contains a clear exclusion for driving under the influence
Take-Aways on this Trending Issue

• plan language and the standard of review play a large part in the outcome of an accidental death or dismemberment case
• Insurers should make a point to consider all factors surrounding a drunk driving accident, regardless of how high the BAC level is, or whether other substances are involved
• the law involving underlying sickness or disease and certain volitional acts appear fairly settled
• there has been an emerging trend in some circuits to treat drunk driving deaths as accidents unless the plan contains a clear exclusion for driving under the influence
• so far, this trend has not extended to the Eleventh Circuit or its district courts
Questions?

Nikole M. Crow
Smith Moore Leatherwood LLP
1180 West Peachtree Street
Suite 2300, Regions Plaza
Atlanta, Georgia 30309
(404) 962-1067 (direct dial)
(404) 962-1258 (direct fax)
nikole.crow@smithmoorelaw.com