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Note

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Words often carry an intuitive meaning that defies explicit definition. While this vagueness typically poses no issue in our daily lives, it presents distinct challenges within the legal realm where words and their definitions wield the power to influence the course of justice. One abstract concept is notoriously elusive: what is an accident? Despite the apparent simplicity of identifying what is commonly understood implicitly, there are inherent challenges in "giving substance to a concept which is largely intuitive."

The Wickman *framework was crafted to navigate these challenges, recognizing that an insured's background, experience, and skill in a particular activity may shape their perception of risk. However, with this deference comes the potential for imbalance—under* Wickman*, it's not the average person's viewpoint that matters, but rather how the insured, with their unique characteristics, interprets the danger.*

When applying the framework, a focal point has emerged: the significance of prior successful practice of the ultimately fatal activity. If an insured has previously engaged in the activity and survived, subsequent death from that activity is often deemed accidental because prior survival indicates a subjective belief of continued survival. The existence of prior successful practice weighs heavily on the court's perspective of the chain of events and, thus, its determination of accidental death. This becomes complicated when analyzing fatal first-time undertakings, i.e. intentional acts not committed by the insured before that which ultimately caused their death, leading to questions about the temporal and experiential aspects of the insured's actions.

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INTRODUCTION

Words often carry an intuitive meaning that defies explicit definition. While this vagueness typically poses no issue in our daily lives, it presents distinct challenges within the legal realm where words and their definitions wield the power to influence the course of justice. One abstract concept, in particular, remains elusive: what is an accident?[1] The endeavor to "giv[e] substance to a concept which is largely intuitive" is inherently problematic, as is the task of establishing fair and explicit legal standards capable of identifying what is commonly understood implicitly.[2] The stakes are exceptionally high when faced with coverage disputes that arise under accidental death policies,[3] and the determination is difficult where death resulted from an insured's intentional act. Presented with such circumstances, some courts have used prior successful practice of the ultimately fatal activity—i.e. previously engaging in and surviving that

* J.D., University of Connecticut School of Law, May 2024; M.M., Rutgers University; B.A., Manhattanville College. I thank my loving fiancé, Mark Ottersen, for patiently entertaining my musings on accidental death insurance and for keeping me nourished and hydrated throughout the long hours of crafting this Note. I thank my parents, Michael and Sheila Corvino, for their unwavering love and support, and for raising me to always be curious. Their encouragement to seek understanding of the world around me has been a guiding force in my approach to both scholarly pursuits and life's complexities. I thank my sister, Cara Corvino, whose relentless barrage of "What would you do if . . ." scenarios posed during our childhood undoubtedly overprepared me for the labyrinth of legal hypotheticals. Lastly, I thank the devoted members of the *Connecticut Law Review*, particularly Maggie Murolo, for their invaluable assistance in bringing this Note to fruition.

[1] *See* Douglas R. Richmond, *Drunk in the Serbonian Bog: Intoxicated Drivers' Deaths as Insurance Accidents*, 32 SEATTLE U. L. REV. 83, 90 (2008) ("Like pornography . . . courts are sure that they will recognize accidents upon sight."); Botts v. Hartford Accident & Indem. Co., 585 P.2d 657, 660 (Or. 1978) ("There are probably not many words which have caused courts as much trouble as 'accident' and 'accidental.' They are not words which lend themselves to specific or exact meanings, yet, everyone thinks he knows an accident when he sees one.") (internal citations omitted); Brenneman v. St. Paul Fire & Marine Ins. Co., 192 A.2d 745, 747 (Pa. 1963) ("Everyone knows what an accident is until it 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.").

[2] Wickman v. Nw. Nat'l Ins. Co., 908 F.2d 1077, 1087 (1st Cir. 1990).

[3] Accident insurance is also commonly known as accidental death and dismemberment (AD&D) insurance. Douglas R. Richmond, *Drugs, Sex, and Accidental Death Insurance*, 45 TORT TRIAL & INS. PRAC. L.J. 57, 61 (2009).

activity—to conclude that the decedent would not have viewed death as highly likely to occur, thus rendering the death accidental in nature.[4]

Take, for example, fifty-year-old Johnny Yates, whose lifeless body was found face-down on his bedroom floor.[5] His bed was made with the blanket partially pulled back, as if he was going to get into bed.[6] The investigation that followed his parents' horrific discovery revealed that Mr. Yates was a reported heroin user.[7] This revelation was supported by bruising along the inside of his forearms and abdominal area, which the investigating detective suspected were injection sites for the illicit substance.[8] The toxicology report ultimately confirmed the detective's conclusion: Johnny Yates died of an overdose.[9] The District Court for the Eastern Division of Missouri concluded that this death was accidental, in part, because a reasonable person with similar background and characteristics to Mr. Yates—someone characterized as a "known" and "long-time user" of heroin—"would not have viewed death as highly likely to occur as a result of injecting heroin, because th[at] person *would have done so successfully in the past*."[10]

Consider, now, the tragic death of Anthony McClelland, who lost control of his motorcycle after misjudging a curve in the road.[11] Witnesses to the fatal drive indicated that Mr. McClelland seemed to be playing "follow the leader" with other vehicles by weaving in and out of traffic while driving at approximately ninety miles per hour.[12] Toxicology reports later revealed that his blood alcohol concentration was over .20.[13] In determining Mr. McClelland's death was accidental, the Eighth Circuit Court of Appeals similarly considered prior successful practice of the ultimately fatal activity. However, instead of using distinct instances when the insured practiced and survived the activity prior to his death (such as prior practices of driving a

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[4] This reasoning essentially boils down to the idea that someone who previously engaged in an activity would not believe that later practice would lead to death because the practitioner had previously survived that same activity.

[5] Yates v. Symetra Life Ins. Co., No. 4:19-CV-154, 2021 U.S. Dist. LEXIS 99663, at *5–6 (E.D. Mo. 2021), *vacated*, 578 F. Supp. 3d 1024 (E.D. Mo. 2022).

[6] *Id.* at 6.

[7] *Id.* at 5–6.

[8] *Id.* at 6.

[9] *Id.*

[10] Yates v. Symetra Life Ins. Co., 578 F. Supp. 3d 1024, 1039–40 (E.D. Mo. 2022) (emphasis added).

[11] McClelland v. Life Ins. Co. of N. Am., 679 F.3d 755, 762 (8th Cir. 2012).

[12] *Id.* at 758.

[13] *Id.* To put this into perspective, the United States has a national blood alcohol concentration (BAC) of .08 as the legal limit for driving. *.08 BAC Legal Limit*, FOUND. FOR ADVANCING ALCOHOL RESP., https://www.responsibility.org/end-impaired-driving/solutions/prevention/08-bac-legal-limit/ (last visited Apr. 6, 2024). The vast majority of drivers, even experienced drivers, are impaired at .08 BAC in critical driving tasks such as braking, steering, lane changing, judgment, and divided attention. *Id.* A BAC of .20 will also cause confusion, disorientation, difficulty standing, nausea, vomiting, blacking out, and may even cause an inability to feel pain. *Blood Alcohol Content*, ALCOHOL REHAB GUIDE (Jan. 9, 2024), https://www.alcoholrehabguide.org/alcohol/blood-alcohol-content/.

motorcycle or of driving while intoxicated),[14] it considered Mr. McClelland's ultimately fatal drive in and of itself, crediting his "successful perform[ance]" navigating the first several miles.[15]

These cases raise an important question: what amounts to prior successful practice? While there is certainly room for judicial interpretation, several issues of scope require attention—particularly in reference to first-time undertakings.[16]

Part I reviews the elusive meaning of "accident" before discussing the distinct challenges presented by accidental death insurance, evidencing the need for a standard that addresses these unique challenges. Part II describes the *Wickman* framework—the federal standard for determining accidental death coverage within the meaning of an Employee Retirement Income Security Act (ERISA)-governed plan—and its relevance to this area of the law.[17] Part III analyzes cases where the insured's prior successful practice in the ultimately fatal activity necessitated a finding of accidental death coverage, and calls attention to certain problems of scope under the *Wickman* framework.

I. THE ELUSIVE MEANING OF "ACCIDENT" AND ITS IMPLICATIONS FOR ACCIDENT INSURANCE

Accidental death benefits are wildly popular and extend coverage to millions of people.[18] Unlike a standard life insurance policy, which typically provides coverage upon the death of the insured regardless of the cause, an accidental death policy will provide coverage only if the death was

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[14] Mr. McClelland had two prior driving under the influence convictions, although the most recent of them occurred ten years before his fatal accident. *McClelland*, 679 F.3d at 758.

[15] *Id.* at 761 (concluding that, although the insured died in a motorcycle crash after driving at "speeds in excess of 90 miles per hour with a BAC of .203," he had "successfully perform[ed] this feat for a distance of several miles, weaving in and out of traffic along with another motorcycle and a Saturn vehicle.").

[16] These issues include: (1) after how long a once-routine practice should be treated as a first-time undertaking; and (2) whether there is a point during a first-time undertaking after which the insured's death must be deemed accidental based on the insured's survival up until that point, as it may then be considered prior successful practice.

[17] This survey of legal standards, used to determine accidental death coverage, focuses only on the evolution of the *Wickman* standard. However, other standards do exist. General foreseeability, for example, is used by a minority of federal courts and many state courts to determine accidental death coverage. However, its application is often unpredictable, and it has been criticized for tending to frustrate the legitimate expectations of policyholders. *See infra* notes 107–112 and accompanying text.

[18] Adam F. Scales, *Man, God and the Serbonian Bog: The Evolution of Accidental Death Insurance*, 86 IOWA L. REV. 173, 190 (2000). While some insurance companies sell individual accidental death policies, many insureds are covered by employer-sponsored plans. *See* Cameron Huddleston, *What to Know About AD&D Insurance*, FORBES (Feb. 1, 2024, 4:56 PM) https://www.forbes.com/advisor/life-insurance/accidental-death-and-dismemberment-insurance/ ("According to [a] . . . 2019 survey of employers, 83% said they provided this insurance as a benefit to employees in 2019. AD&D insurance is one of the most commonly offered workplace benefits among those surveyed. Some employer group plans also allow employees to insure their spouse and children. A few insurance companies . . . sell individual AD&D insurance policies.").

accidental.[19] This narrower trigger for coverage has far-reaching implications.

First, accidental death policies often provide "double-indemnity" benefits.[20] When an insured is covered by both an accidental death policy and a general life insurance policy, as is often the case,[21] and their death triggers both coverages, the indemnity is greater than the life insurance benefit alone.[22] In other words: if the insured dies in an accident, their beneficiaries will receive both life insurance benefits and accidental death benefits.[23] Under certain circumstances, the additional accidental death payout may "double or triple the amount of . . . base coverage"[24] and the insurer may even offer additional benefits.[25]

Second, this narrow trigger for coverage leads to significant litigation. Accidental death insurance, where the cause of death is central to recovery, results in far more disputes than in the life insurance context where the cause of death is not a determining factor.[26] As such, the interpretation of what constitutes an accident becomes the focal point of the court's coverage determination.[27] While most accidental death policies guarantee recovery for

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[19] Scales, *supra* note 18, at 176. "As the name suggests, accidental death and dismemberment insurance provides coverage for a death due to an accident. It generally also pays if you lose a limb or a function such as sight, hearing or speech in an accident." Huddleston, *supra* note 18. While AD&D policies typically do not cover death due to illness, the COVID-19 pandemic has caused a marketplace shift. Not only has it heightened consumer awareness of its value, but insurers are adapting their policy terms and product marketing to reflect growing demand. For example, "accident insurance is more regularly being offered as part of insurers' voluntary benefits suite" and "[s]ome insurers are expanding their accident policies to include benefits for testing and immunizations, providing coverage for gig employees, and expanding their geographic coverage areas to beyond the United States and its territories to include international work assignments and adventure travel." Melanie Cannon, *As Demand for Accident Insurance Rises, More Organization[s] Recognize its Value*, INTER-COMPANY MKTG. GRP., https://icmg.org/Public/Public/Blog/Articles/Value_of_Accident_Insurance.aspx (last visited Apr. 6, 2024). Further, some workers, such as first responders, have been found eligible for accidental death benefits because of a presumption that the virus was contracted in the line of duty. Mark DeBofsky, *COVID Brings Disability, Accidental Death Coverage Questions*, DEBOFSKY (Sept. 17, 2021), https://www.debofsky.com/articles/covid-brings-disability-accidental-death-coverage-questions/.

[20] Richmond, *supra* note 1, at 89–90. However, accidental death coverage is not always, nor even typically, "double indemnity" coverage because it began as a stand-alone product. Years later however, it became bundled with standard life insurance. Scales, *supra* note 18, at 177.

[21] "Accidental death coverage is most frequently combined with life insurance. The insurer provides an accidental death benefit in an amount equal to the face amount of the life insurance policy. The insurer charges an additional premium for the accidental death benefit, but this premium is comparatively low, reflecting the relatively low probability of loss." Richmond, *supra* note 1, at 89.

[22] Scales, *supra* note 18, at 176.

[23] Richmond, *supra* note 1, at 89–90.

[24] For example, if the covered death was the result of an accident that occurred while traveling on public transportation, including a bus, train, or airplane. Huddleston, *supra* note 18.

[25] This may occur for example, if the decedent was wearing a seatbelt during the accident that led to their death, these additional benefits may include the provision of counseling, legal assistance, and financial advising services for the decedent's beneficiaries. *Id*.

[26] Scales, *supra* note 18, at 191.

[27] Gary Schuman, *Fatal Attraction: Autoeroticism and Accidental Death Insurance Coverage*, 49 TORT TRIAL & INS. PRAC. L.J. 667, 671 (2014).

deaths caused by "external, violent and accidental means"[28] and require that the insured's accidental death "result[ed] directly and independently of all other causes in a covered loss,"[29] the terms "accident" and "accidental" are frequently left undefined.[30] In their absence, insurers subject themselves to the common understanding of the term by an ordinary policyholder.[31] Policies that provide no guidance beyond requiring proof of accidental death are broadly constructed "such that the injury or death is likely to be covered unless the insured virtually intended his injury or death."[32] Regardless of this broad scope, a court will not strain to extend coverage where it was neither contracted nor intended; where the policy terms are clear and unambiguous, they will be enforced so long as they are not contrary to law.[33] This broad construction may nevertheless be complicated where death was the result of an intentional act by the insured. Consider the following two hypothetical scenarios:

> First, say that Accident-Prone Amy is a renowned cinema actress who has been hired for a Western-style film. For a scene in which her character is to play a non-fatal game of Russian roulette, she is handed a revolver and assured that it contains "no live rounds." However, due to no fault of Amy's,

[28] Sam Erman, Note, *Word Games: Raising and Resolving the Shortcomings in Accident-Insurance Doctrine That Autoerotic-Asphyxiation Cases Reveal*, 103 MICH. L. REV. 2172, 2173 (2005) (quoting Scales, *supra* note 18, at 234). Other common exclusions include intentionally self-inflicted injury, drug overdose, death or injury while committing a crime or driving under the influence of alcohol, and death or injury caused by illnesses (including mental illnesses). Huddleston, *supra* note 18.

[29] Russell S. Buhite & H. Maggie Marrero-Ladik, *Drugs, Alcohol, and Accidental Death Coverage*, 39 TORT TRIAL & INS. PRAC. L.J. 985, 986 (2004).

[30] *Id.*; Schuman, *supra* note 27, at 673. Accident policies were historically written to frustrate, rather than fulfill, the legitimate expectations of insureds who were "unschooled in fine linguistic distinctions." Scales, *supra* note 18, at 175. This practice has (presumably) since fallen out of style. The omission is, instead, likely due to the same challenges faced by courts in defining the elusive term.

[31] Botts v. Hartford Accident & Indem. Co., 585 P.2d 657, 660 (Or. 1978) ("The insurance company may, of course, insert in its policy any definition of 'accident' it chooses but, in the absence of doing so, it must accept the common understanding of the term by the ordinary member of the purchasing public."); Richmond, *supra* note 3, at 63 ("The question of whether an insured's death was accidental is generally answered from the insured's standpoint."); Erman, *supra* note 28, at 2175 & n.13 (explaining that "[m]ost courts have assigned 'accident' a lay definition when interpreting accident-insurance policies" and "generally reason that the word [] is only susceptible to its lay meaning").

[32] Smith v. Stonebridge Life Ins. Co., 582 F. Supp. 2d 1209, 1216 (N.D. Cal. 2008) (emphasis omitted).

[33] Fidelity Nat'l Title Ins. Co. v. OHIC Ins. Co., 619 S.E.2d 704, 706 (Ga. Ct. App. 2005) ("Though exclusions . . . are strictly construed against the insurer, one that is plain and unambiguous binds the parties to its terms and must be given effect, even if beneficial to the insurer and detrimental to the insured.").

> her scene proved fatal.[34] Amy did not intend to die, nor did she expect the gun to fire.[35]
>
> Now, say that Amy is no actress. She holds in her hand a revolver, for which she was given no assurances. She intends to play a game of Russian roulette and she intentionally pulls the trigger, but she neither expects nor intends to be killed. She does not check the firing chamber and relies solely upon fate to determine whether she will be shot.[36] Fate did not favor her, and the experience proved fatal.

While these two scenarios might appear identical on their face,[37] the first death may seem more clearly accidental in nature. But, when courts have tried to articulate how these intuitive distinctions are made, they have generally failed.[38]

Policy exclusions are similarly challenging. Insurers commonly resist paying accidental death benefits where the insured's activity involved the intentional engagement in a risky activity that may result in serious bodily injury or even death.[39] Three practices are particularly prone to such treatment: driving while intoxicated, using controlled substances, and engaging in autoerotic asphyxiation.[40] When faced with coverage disputes concerning fatal practices of autoerotic asphyxiation, for example, many courts deny coverage based on the common exclusion for deaths caused by an intentionally self-inflicted injury.[41] Such denial is based on the theory that

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[34] This hypothetical, while fictional, is adapted from the very real accidental shooting on the New Mexico film set of "Rust" involving actor Alec Baldwin, in which a cinematographer was tragically killed when a prop revolver fired. *See generally What to Know About the Fatal Shooting on Alec Baldwin's 'Rust' Movie Set*, N.Y. TIMES (Mar. 6, 2024), https://www.nytimes.com/article/alec-baldwin-shooting-investigation.html.

[35] Assume, for the purposes of this illustration, that coverage for this incident was not precluded by a policy exclusion.

[36] *See* Wickman v. Nw. Nat'l Ins. Co., 908 F.2d 1077, 1087 (1st Cir. 1990) ("[T]here are several reported cases of people who have participated in games of Russian roulette not expecting or intending that they be killed, evidently entertaining a fanciful expectation that fate would inevitably favor them."). "A player playing by the rules will not make any effort to check if the firing chamber is empty before pulling the trigger. Thus, essentially a participant relies solely upon fate to determine if he or she will be shot." *Id*. at 1097 n.4.

[37] "What distinguishes the injury a strangler causes from the experience of holding one's breath under water?" Erman, *supra* note 28, at 2173.

[38] *Id.* at 2176.

[39] Richmond, *supra* note 3, at 58–59.

[40] *See id.* at 84; Schuman, *supra* note 27, at 668–69. Common coverage challenges include death resulting from driving while intoxicated, death resulting from engaging in autoerotic asphyxiation, drug overdose, suicide, intentional conduct on the insured's part resulting in death, and whether sickness played a predominant role in the insured's death. *Id.* at 668. Autoerotic asphyxiation, driving while intoxicated, and using controlled substances such as heroin and cocaine have one important commonality: all involve the insured intentionally engaging in risky or even hazardous activity, sometimes resulting in serious bodily injury or death. *Id.* at 668–69.

[41] Richmond, *supra* note 3, at 84. *Cf.* Schuman, *supra* note 27, at 669 ("Death from autoerotic activity, while far less prevalent than drunk driving or drug overdoses, presents the courts with the additional important issue of whether it can be considered an accident when an individual purposefully

even if the insured did not intend to kill himself, "partial strangulation is an injury in and of itself."[42]

These implications reinforce the need for a standard that balances both objective reason and deference to subjective experience. The First Circuit Court of Appeals was mindful of this delicate balance and tailored the *Wickman* framework—the principal standard for determining accidental death coverage within the meaning of an ERISA-governed plan—to alleviate this concern.[43] Nevertheless, problems persist despite the framework's careful inception.

II. THE EVOLUTION OF THE *WICKMAN* FRAMEWORK

When the insured's subjective expectation of survival cannot be ascertained, the *Wickman* test "essentially boils down to whether a reasonable person, in the shoes of the insured, would have viewed death as highly likely to occur."[44] As discussed, some courts have thus considered an insured's prior experience engaging in the ultimately fatal activity to find their death accidental in nature.[45] Under such reasoning, the argument goes that prior successful practice of the activity—i.e. engaging in and surviving the activity—creates an expectation that later practice would not lead to

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engages in dangerous activity requiring self-infliction of physical injury to his body and serious injury or death results.").

[42] Richmond, *supra* note 3, at 84. While the question of whether death by autoerotic asphyxiation constitutes a covered accidental death remains an issue that divides courts, this rift normally stems from disagreement as to whether or not the death results from an intentionally self-inflicted injury, therefore precluding accidental death insurance payments by exclusion. Thomas Gawel, Comment, *Tran v. Minnesota Life Insurance Co.*, 65 N.Y.L. SCH. L. REV. 9, 17 & n.68 (2021). Notably, while some courts hold that death by autoerotic asphyxiation is intentionally self-inflicted, others find that "such temporary (although voluntary) oxygen deprivation does not constitute an injury." Schuman, *supra* note 27, at 674. *But see, e.g.*, Martin v. Reliance Standard Life Ins. Co., No. 2:20-cv-832, 2021 WL 5324891, at *9 (S.D. Ohio Mar. 2, 2021) ("[T]he Court rejects Plaintiff's argument that autoerotic asphyxiation cannot be an intentional injury if Decedent enjoyed it or did not intend for it to be an injury. In making that argument, Plaintiff is presenting a false dichotomy that autoerotic asphyxiation is either an injury or it is enjoyable. For some, it can be both.").

[43] Gary Schuman, *Dying Under the Influence: Drunk Driving and Accidental Death Insurance*, 44 TORT TRIAL & INS. PRAC. L.J. 1, 18 (2008); Wickman v. Nw. Nat'l Ins. Co., 908 F.2d 1077, 1087 (1st Cir. 1990). *See infra* Section II.B.1. The *Wickman* framework essentially dictates that: "if there was no direct evidence of subjective intent of the actor . . . the court should take an objective approach and ask whether a reasonable person with the 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." Buhite & Marrero-Ladik, *supra* note 29, at 987.

[44] Sam McMichael, Note, *Hold Your Breath: Predicting How the Eighth Circuit Will, and Should, Hold Regarding Autoerotic Asphyxiation Claims under ERISA-Governed Accidental Death Policies*, 69 DRAKE L. REV. 631, 640 (2021).

[45] *See, e.g.*, Yates v. Symetra Life Ins. Co., 578 F. Supp. 3d 1024, 1039–40 (E.D. Mo. 2022) (reasoning that if the insured was, in fact, a "long-term user, or a 'known user' of heroin,'" then "this would tend to prove that . . . [he] would not have viewed death as highly likely to occur as a result of injecting heroin, because the person would have done so successfully in the past"); McClelland v. Life Ins. Co. of N. Am., 679 F.3d 755, 761 (8th Cir. 2012) (concluding the insured's death to be accidental because, even though the insured died in a motorcycle collision after driving at "speeds in excess of 90 miles per hour with a BAC of .203," he had been "successfully performing this feat for a distance of several miles, weaving in and out of traffic along with another motorcycle and a Saturn vehicle"). *See supra* notes 4–16; *infra* Part III.

death.[46] What amounts to prior successful practice, however, must be addressed to prevent unfairness and inconsistency. Part II surveys the landscape of accidental death determination prior to *Wickman v. Northwestern National Insurance Company* before discussing the landmark case and its standard.[47]

A. *The Serbonian Bog: Distinguishing Between "Accidental Means" and "Accidental Results"*

Courts have long acknowledged the possibility of an intentional act leading to an unintended result. To address this, courts once determined accidental death coverage by making a distinction between "accidental means" and "accidental results."[48] This distinction rested on the theory that, "although the result of an intentional, voluntary act may be an accident, the act itself, that is, the cause, is not an 'accidental means.'"[49]

In practice, this approach essentially meant determining, in cases where a death or injury resulted from a knowingly voluntary act by the insured, whether the policy covered "accidental means" (i.e. deaths resulting from accidental causes)[50] or "accidental results."[51] If the policy covered the former, the court would next look to the particular facts and circumstances of the case to decide whether the underlying death or injury was produced by such means.[52]

This arbitrary distinction "prove[d] to be of no analytical assistance whatsoever."[53] Its most notable skeptic was Justice Cardozo, who, dissenting in *Landress v. Phoenix Mutual Life Insurance Company*, predicted that

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[46] *See supra* note 4 and accompanying text.

[47] *Wickman*, 908 F.2d 1077.

[48] *See* Richmond, *supra* note 3, at 66.

[49] *See* W.R. Habeeb, Annotation, *Death or Injury Resulting from the Insured's Voluntary Act in Taking Overdose of Medicine, Drugs, or the Like, as Caused by Accident or Accidental Means*, 52 A.L.R.2d 1083, § 3 (1957).

[50] Richmond, *supra* note 3, at 66 ("In this context, *means* is synonymous with *cause*.") (citation omitted).

[51] Habeeb, *supra* note 49, § 3. *See* Richmond, *supra* note 3, at 66.

> To illustrate, a policy providing accidental death benefits only if the insured died as a result of accidental means might state that coverage would apply if the insured suffers fatal "bodily injury . . . effected directly and independently of all other causes through accidental means." Alternatively, a life insurance policy with an accidental death benefits rider might cover only "loss of life as the direct result of bodily injury, independent of all other causes, effected solely through external, violent and accidental means."

Id. By requiring that the cause of the loss be accidental, insurers sought to reduce the number of losses for which they might be liable. *Id.*

[52] Habeeb, *supra* note 49, § 3.

[53] Richmond, *supra* note 3, at 66.

continuing to engage in this tenuous method would "plunge this branch of the law into a Serbonian Bog."[54]

> Probably it is true to say that . . . there is no such thing as an accident. On the other hand, the average man is convinced that there is, and so certainly is the man who takes out a policy of accident insurance. It is his reading of the policy that is to be accepted as our guide, with the help of the established rule that ambiguities and uncertainties are to be resolved against the company. The proposed distinction [between "accidental means" and "accidental results"] will not survive the application of that test. When a man has died in such a way that his death is spoken of as an accident, he has died because of an accident, and hence by accidental means.[55]

Justice Cardozo's warning has since been heeded.[56] While the approach does linger in some courts, many reject the analysis and consider the terms to be legally synonymous.[57] Seeking to avoid such swampy terrain, the First Circuit formulated a new test in *Wickman v. Northwestern National Insurance Company*.[58] However, though the *Wickman* court effectively eradicated one headache, it created another: grappling with what weight to give the insured's subjective experience when balancing it against that of a presumably reasonable person in the shoes of the insured.

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[54] Landress v. Phoenix Mut. Life Ins. Co., 291 U.S. 491, 499 (1934) (Cardozo, J., dissenting). The "Serbonian Bog" refers to Lake Bardawil which was, in antiquity, known as Lake Serbonis or Sirbonis. *See* SUSAN DESMARAIS BONNEN, OFF. TEX. ATT'Y GEN., TRANSP. DIV., INVERSE CONDEMNATION 2 (2019), https://www2.texasattorneygeneral.gov/conferences/handouts/2019-govt-law-and-liability/p_12-13-19_1045AM_INVERSE_CONDEMNATION_BONNEN.pptx; Pim de Klerk, *Peatland Prose from the Past: Ancient Egyptian Camouflaged Mires in the Works of Diodorus of Sicily (1st Century BCE) and Frontinus (c. 40-103 CE)*, 2022-1 IMCG BULLETIN 4, 5–6. The bog's use as a metaphor for an inextricable situation began with John Milton's *Paradise Lost*, in which he described hell as "[a] gulf profound as that Serbonian bog [b]etwixt Damiata and Mount Casius old [w]here Armies whole have sunk . . . ." John Milton, *Paradise Lost: Book II*, JOHN MILTON READING ROOM at 592–94, https://milton.host.dartmouth.edu/reading_room/pl/book_2/text.shtml (last visited Mar. 6, 2024) (ebook). Thus, roughly translated, Cardozo warned that accidental means and results would send accident insurance law to hell in a handbasket.

[55] *Landress*, 291 U.S. at 499 (Cardozo, J., dissenting) (internal citations and quotations omitted).

[56] Fortunately, Cardozo's premonition found an audience even in those who did not understand the reference. *See* Scales, *supra* note 18, at 264 & n.412 ("Whatever kind of bog that is, we concur.") (quoting Equitable Life Assurance Soc'y v. Hemenover, 67 P.2d 80, 81 (Colo. 1937)).

[57] Habeeb, *supra* note 49, § 3; Richmond, *supra* note 3, at 67. It is also notable that other jurisdictions embrace yet another standard, that of general foreseeability, which has similarly been widely criticized for its tendency to frustrate the legitimate expectations of the policyholder. See *infra* notes 107–112 and accompanying text.

[58] Richmond, *supra* note 3, at 69.

B. *Circumventing the Bog: The* Wickman *Framework*

1. Wickman v. Northwestern National Insurance Company*: Balancing Subjective Experience and Objective Reason*

The Employee Retirement Income Security Act (ERISA) regulates employee welfare benefit plans that provide benefits "in the event of sickness, accident, disability, [or] death . . . ."[59] Employer-sponsored accidental death insurance policies fall under this umbrella. In adopting ERISA, Congress "expected that a federal common law of rights and obligations under ERISA-regulated plans would develop."[60] Thus, when a federal court is called upon to interpret an ERISA-governed insurance policy, state law is preempted and federal common law applies.[61]

In *Wickman*, a federal court "delve[d] into the metaphysical conundrum of what is an accident" for the first time under ERISA.[62] Paul Wickman was seen dangling from a bridge by one arm before free-falling approximately fifty feet to the railroad tracks below.[63] Upon being admitted to the hospital, he was asked standard admissions questions: when asked about next of kin, he eventually replied "they don't care," and "it doesn't matter;" when asked about his religion, his initial response also was "it doesn't matter;" and, when asked what happened, he said he "jumped off."[64] He died shortly thereafter, so heavily medicated that he did not recognize his own wife, whom he sought until he went into fatal cardiac arrest.[65]

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[59] 29 U.S.C. § 1002(1). *See* Richmond, *supra* note 1, at 87 (noting that "ERISA comprehensively regulates employee welfare benefit plans that provide benefits to plan participants in the event of calamities").

[60] Critchlow v. First UNUM Life Ins. Co. of Am., 378 F.3d 246, 255 (2d Cir. 2004) (internal citations and quotations omitted). In developing this federal common law, a court may only borrow from state law where it "is consistent with the policies underlying the federal statute in question." *Id.* at 256.

[61] 29 U.S.C. § 1144(a); McMichael, *supra* note 44, at 638; Padfield v. AIG Life Ins. Co., 290 F.3d 1121, 1125 (9th Cir. 2002). *See also* Scales, *supra* note 18, at 264 n.411.

> Federal common law power in insurance was substantially, if inadvertently, resurrected when Congress enacted the Employee Retirement Income Security Act of 1974 (ERISA). Although ERISA displaces state-created legal entitlements, it does not actually contain any substantive law regarding the content of insurance plans. Thus, the Supreme Court and lower federal courts have begun to develop a body of federal common law for construing the insurance benefits of employer-provided welfare plans.

Id.

[62] Wickman v. Nw. Nat'l. Ins. Co., 908 F.2d 1077, 1079, 1084 (1st Cir. 1990).

[63] *Id.* at 1080, 1083. To reach the point where he was first observed, approximately thirty feet from where his car was parked in the breakdown lane, he would have had to walk head-on into high-speed traffic. *Id.* at 1079–80.

[64] *Id.* at 1080. However, after the medical examiner issued the initial death certificate that listed the cause of death as suicide, a nurse's note was brought to his attention that read: "admission to E.R. post-fall from 50' bridge to rail track, awake oriented X 3, states 'fell.'" Solely the basis of this note, the medical examiner issued an amended certificate, listing the cause of death as a "fall." He claimed that this was the only death certificate, one in over five thousand that he ever changed during his tenure in the coroner's office. *Id.*

[65] *Id.*

At the time of his death, the insured was covered by an ERISA-governed AD&D policy.[66] This policy provided that a coverage-triggering accident was "an unexpected, external, violent and sudden event," but excluded death by "suicide or intentionally self-inflicted injury, whether . . . sane or insane."[67] The insurer rejected the widow's claim and asserted that Wickman's death was not accidental, thus giving rise to the case at issue.[68]

After making quick work of the lesser issues posed to them,[69] the First Circuit moved onto a "more vexing" task: determining whether coverage could be awarded in the event of an *unintentional* fall that occurred after the insured *intentionally* climbed over the guardrail and suspended himself with one hand.[70] To do this, the *Wickman* court was determined to formulate a test that did not merely replicate the accidental means analysis, nor allow an insured's subjective, yet unreasonably optimistic, expectations to transform their accident policy into a life insurance policy.[71] When considering which path would most safely circumvent the Serbonian Bog, the court identified two issues with a test requiring blind adherence to a decedent's actual expectations.[72] First, allowing recovery when an insured's expectations are both virtually synonymous with specific intent and are patently unreasonable would defeat the purpose of accidental death insurance.[73] When an insured dies from such conduct—for instance, by playing Russian roulette not expecting or intending to be killed—it is unlikely that his death will be considered accidental.[74] Second, determining actual expectation is "an

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[66] *See id.* (noting that the insured was covered by a Northwestern life and AD&D policy held by his employer).

[67] *Id.* at 1081.

[68] *Id.* at 1079.

[69] The magistrate judge found that there were only three possible explanations for the insured's actions: (1) he intended to commit suicide, (2) he intended to "seriously injure himself, or (3) having so positioned himself, he fell inadvertently or mistakenly." *Id.* at 1083. Under the first two scenarios, the magistrate held that policy exclusions of losses resulting from suicide or self-inflicted injury required denial of the claim; under the third scenario, he held that the harm that befell the insured was "substantially certain to happen," not some unexpected result of the insured's intentional act, and that this was not an accident as defined under the policy or state law. *Id.* at 1083–84. The widow challenged the legal conclusions drawn by the magistrate judge and contended that, under the second and third hypotheticals, her late husband died accidentally and, absent an explicit finding of suicide, she was entitled to policy benefits. *Id.* at 1084. The *Wickman* court quickly concluded that the magistrate correctly ruled that no benefits would be due to the insured's widow under the first two hypotheticals. *Id.*

[70] *See id.* ("This still leaves us with the more vexing questions raised under the magistrate's third scenario: whether the widow is due benefits if Wickman climbed over the guardrail without any intent to kill or injure himself but fell inadvertently.").

[71] Scales, *supra* note 18, at 295.

[72] *Wickman*, 908 F.2d at 1086.

[73] *Id.* at 1087.

[74] *Id.* ("The courts have generally held that the insureds' deaths in these cases, regardless of actual expectation or intention, were not accidental. When a person plays a game like Russian roulette and is killed, the death, to use Cardozo's test, would not be publicly regarded as an accident.") (internal citations omitted). *See* Landress v. Phoenix Mut. Life Ins. Co., 291 U.S. 491, 499 (1934) (Cardozo, J., dissenting) ("When a man has died in such a way that his death is spoken of as an accident, he has died because of an accident, and hence by accidental means."). A person who participates in games of Russian roulette who does not expect to die or intend to be killed essentially relies solely upon fate to determine whether

uncertain and too often a hopelessly blind search for the truth," which would force courts to hypothesize and speculate.[75] Be that as it may, where actual expectation is discernible and not wholly unreasonable, it is a vital tool in determining whether an injury was accidental.[76]

This perceived tension between the deference a court must pay to the insured's expectations and the reasonableness of those expectations led to the "overlapping subjective and objective inquiry" now most often used when interpreting ERISA-governed accidental death policies.[77] The *Wickman* framework has two prongs: first is the subjective inquiry, which was designed to protect any reasonable and readily discernable actual expectations of an insured and guard the underlying purpose of accident insurance against destruction by unrealistic expectations;[78] second is the objective inquiry, which the *Wickman* court reasoned serves as the ideal proxy for actual expectation and fulfills the axiom that the accident should be judged from the perspective of the insured.[79] These two inquiries, together, are comprised of three steps.

Under the subjective inquiry, a court begins by analyzing the reasonable expectations of the insured at the time the policy was purchased.[80] This has two parts: first, the court must consider whether the decedent lacked an expectation of death or injury; second, if there was no expectation of death or injury, the court must determine whether the suppositions underlying that expectation were reasonable.[81] The latter determination should be made from the insured's perspective, granting the insured a great deal of latitude and taking his personal characteristics and experiences into account.[82] The disputed conduct should fall outside of policy coverage only when the insured's subjective misjudgment conflicts with the objective expectations of a reasonable person in the shoes of the insured.[83]

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he or she will be shot. As such, that player is "evidently entertaining a fanciful expectation that fate would inevitably favor them." *Wickman*, 908 F.2d at 1087 & n.4.

[75] *Wickman*, 908 F.2d at 1087–88.

[76] *See id.* at 1088 ("Notwithstanding these problems, we do not suggest actual expectation should be wholly ignored, for in most cases actual expectations govern the risks of an insurance policy a beneficiary believes has been purchased. Generally, insureds purchase accident insurance for the very purpose of obtaining protection from their own miscalculations and misjudgments.").

[77] Wolf v. Life Ins. Co. of N. Am., 46 F.4th 979, 984 (9th Cir. 2022). "This determination depends upon whether death as the result of an intentional act was actually expected by the insured and, if not, whether the insured's expectations were reasonable, applying an objective standard." Schuman, *supra* note 27, at 678–79.

[78] *Wickman*, 908 F.2d at 1088. *See* McMichael, *supra* note 44, at 639 ("This step essentially excludes those acting with the intent that their conduct will lead to an injurious or fatal outcome.").

[79] *Wickman*, 908 F.2d at 1088.

[80] *Id.* ("[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.").

[81] *Id.*

[82] *Id.*

[83] Schuman, *supra* note 27, at 679–80; *Wickman*, 908 F.2d at 1088 ("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

If the evidence is insufficient to determine the insured's subjective expectation, the court must move to the third step, which comprises the objective inquiry. Here, the court determines 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."[84] Applying these concepts, the *Wickman* court affirmed that the insured's death was not an accident: after climbing over the guardrail and hanging on it with one hand, "he either actually expected serious bodily injury or death, or a reasonable person in his place would have expected such result, and any other expectation would be unreasonable."[85]

Despite such careful design, however, the *Wickman* legacy is marred by inconsistency and imbalance.

2. *Drowning Lessons: Inconsistencies, Misapplications, and the Need for Uniformity in Accidental Death Determination*

While the *Wickman* framework was meticulously crafted to strike a balance between deference to the insured's expectations and the reasonableness of those expectations, this balance is often skewed by inconsistencies that hinge on deference to the plan administrator or subtle differences in wording and legal interpretations. These inconsistencies raise questions about the fundamental fairness and reliability of the framework and underscore the need for uniformity.

Recovering benefits under an ERISA-governed plan often depends on the interpretation of the policy language.[86] While courts will interpret policy language according to its plain meaning[87] and construe any ambiguity against the drafter,[88] this practice hinges upon the deference afforded to

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determines that the suppositions were unreasonable, then the injuries shall be deemed not accidental."). This refers to a common practice in the construction of insurance policies: "in the face of ambiguity, doubt, or uncertainty, courts generally do not look to what the insurer intended its words to mean[,] but look to the understanding of a reasonable consumer of insurance." 43 AM. JUR. 2D *Insurance* § 267 (2024). A reasonable consumer of insurance may also be understood as a reasonable person in the position of the insured, or a "reasonable person standing in the shoes of the insured." *Id.*

[84] *Wickman*, 908 F.2d at 1088.

[85] Joshua D. Lerner, *It Is Still a Slog Through a Bog: Interpreting "Accident" Under ERISA-Governed AD&D Coverage,* 13 ERISA REPORT 6, 7 (2018), https://rumberger.com/wp-content/uploads/2019/11/12.18-Josh-Lerner-Interpreting-Accident-in-The-ERISA-Report-Volume-13-Issue-3.pdf.

[86] *See* Richmond, *supra* note 1, at 87 (emphasizing that the validity of an ERISA claim "typically turns on an interpretation of the plan's terms"); Firestone Tire & Rubber Co. v. Bruch, 489 U.S. 101, 115 (1989).

[87] *See* Evans v. Safeco Life Ins. Co., 916 F.2d 1437, 1441 (9th Cir. 1990) (meaning "in an ordinary and popular sense as would a [person] of average intelligence and experience") (quoting Allstate Ins. Co. v. Ellison, 757 F.2d 1042, 1044 (9th Cir. 1985)).

[88] *See* Schuman, *supra* note 27, at 676 n.44 (explaining that courts typically construe ambiguity in favor of the policyholder "to determine if the loss is covered"). "Language in a plan is ambiguous when it is capable of more than one meaning when viewed objectively by a reasonably intelligent person who has examined the context of the entire integrated agreement. . . ." McMichael, *supra* note 44, at 639 (internal quotation omitted).

those who initially construed the policy and subsequently denied benefits.[89] ERISA itself is silent on the standard for denial of benefits.[90] However, the Supreme Court has established that a *de novo* standard applies unless the plan explicitly "gives the administrator or fiduciary discretionary authority to determine eligibility for benefits or to construe the terms of the plan."[91] Otherwise, a deferential abuse-of-discretion standard applies, and a court will only question whether the fiduciary's actions were arbitrary and capricious.[92] The determination of which standard applies will often impact the outcome of the case.[93]

In *Cozzie v. Metropolitan Life Insurance Company*,[94] for example, the Seventh Circuit Court of Appeals narrowed the scope of coverage under an ERISA-governed AD&D policy,[95] subjecting the insured to a different standard altogether. There, Robert Cozzie was found in his overturned car;[96] he missed a curve in the road, struck an embankment, and rolled over three times before his vehicle came to rest in a nearby field.[97] There were no witnesses to his fatal crash, and no apparent cause other than his impaired condition.[98] His widow and named beneficiary filed a claim for accidental death benefits.[99] Though his life insurance policy provided "added coverage for death or dismemberment from injuries caused solely by an accident," the term "accident" was left undefined.[100] Nevertheless, her claim was denied.[101] In interpreting the accidental death provision, the insurer defined "accident" in terms of reasonable foreseeability and concluded that it was reasonably foreseeable that Mr. Cozzie, "having ingested the quantity of alcohol that he did ingest, would suffer a fatal injury if he got behind the wheel of an automobile in such a state of inebriation."[102] Because the policy explicitly

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[89] *See* Richmond, *supra* note 1, at 87–88 (describing the federal common law standard of review for ERISA plan interpretation).

[90] William E. Altman & Danielle C. Lester, *Demystifying the Complexities of ERISA Claims Litigation*, 92 MICH. BAR J. 29, 32 (2013).

[91] *Firestone Tire & Rubber Co.*, 489 U.S. at 115; Wolf v. Life Ins. Co. of N. Am., 46 F.4th 979, 984 (9th Cir. 2022).

[92] Altman & Lester, *supra* note 90, at 32. In this case, the court will review the administrator's plan interpretation and fact-based coverage determination with its review usually limited to the administrative record. Schuman, *supra* note 27, at 676–77. If the administrator's decision is not supported by substantial evidence, it will be found unreasonable and, therefore, an abuse of discretion. McClelland v. Life Ins. Co. of N. Am., 679 F.3d 755, 759 (8th Cir. 2012).

[93] Altman & Lester, *supra* note 90, at 32. "The claimant obviously prefers the de novo standard, as it affords an independent review of the decision by the courts, whereas the defendant prefers the highly deferential arbitrary and capricious standard, affirming the plan administrator's decision unless it was 'arbitrary and capricious.'" *Id*.

[94] Cozzie v. Metro. Life Ins. Co., 140 F.3d 1104 (7th Cir. 1998).

[95] Lerner, *supra* note 85, at 8.

[96] *Cozzie*, 140 F.3d at 1106.

[97] *Id.*

[98] *Id.* Mr. Cozzie had a BAC of .252, over two times the legal limit under Illinois law at the time of the accident. *Id.*

[99] *Id.*

[100] *Id.* at 1106, 1109.

[101] *Id.* at 1106.

[102] *Id.* at 1108.

gave the insurance company, as claim fiduciary, full discretionary authority to interpret its terms and determine eligibility for benefits, the court reviewed the denial of benefits under the deferential arbitrary and capricious standard.[103] Ultimately, the court found that "it [could not] be said that [the administrator's] definition of 'accident' [was] downright unreasonable."[104] Despite citing the *Wickman* decision with approval, it never actually employed the test.[105] Instead, it deviated from *Wickman* by relying on cases that held a death from driving while intoxicated "is not an 'accident' because that result is reasonably foreseeable" and by defining "accident" as "conduct that results in a loss that could not have been reasonably anticipated."[106]

Wickman "requires more than mere foreseeability or increased risk,"[107] and for good reason—general foreseeability,[108] though still employed by many courts to determine accidental death coverage,[109] has repeatedly been criticized due to its tendency to frustrate the legitimate expectations of policyholders.[110] Further, while courts generally agree on what constitutes

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[103] *Id.* at 1107–08.

[104] *Id.* at 1110. Recall that, in the absence of a definition, insurers typically subject themselves to the common understanding of the term "accident" by an ordinary policyholder "such that the injury or death is likely to be covered *unless the insured virtually intended* his injury or death." Smith v. Stonebridge Life Ins. Co., 582 F. Supp. 2d 1209, 1216 (N.D. Cal. 2008). *See also supra* notes 31–32 and accompanying text.

[105] Metro. Life Ins. Co. v. Potter, 992 F. Supp. 717, 729 (D.N.J. 1998).

[106] *Cozzie*, 140 F.3d at 1110; Lerner, *supra* note 85, at 8 (contrasting this approach with *Wickman*, which "held an accident is conduct that results in a loss that was not *highly likely* to occur") (citation and emphasis omitted).

[107] *Metro. Life Ins. Co.*, 992 F. Supp. at 729.

[108] *See generally* McMichael, *supra* note 44, at 641–42. *See id*. at 641 ("Under this approach, the court interprets 'accident' according to the usage of the ordinary, 'common man.'"); Schuman, *supra* note 27, at 681 ("In the context of accident insurance, the test of foreseeability is an objective one in that the loss must be known to reasonable people to follow as a natural result of one's conduct. The test is whether the death was foreseen by the insured.").

[109] McMichael, *supra* note 44, at 641 (noting that a minority of federal courts and many state courts employ this standard).

[110] *See, e.g.*, Yates v. Symetra Life Ins. Co., 578 F. Supp. 3d 1024, 1038, 1040 (E.D. Mo. 2022) (finding a "meaningful difference between an 'unforeseen event,' i.e., an event that is not anticipated or expected, and [the insurer's] interpretation of accidental injury as set forth in the Denial letter," which stated that death is not accidental "when it is reasonable . . . the insured would have foreseen that using an illegal drug . . . could result in death or serious bodily harm," and concluding that the insurer's interpretation of the policy language was "not consistent with the common and ordinary meaning of the word 'unforeseen.'"). *See also, e.g.*, Wolf v. Life Ins. Co. of N. Am., 46 F.4th 979, 985–86 (9th Cir. 2022) (declining to apply a reasonable foreseeability standard as urged by the insurer as the plaintiff would have been unduly prejudiced by the belated application of such a standard and commenting that it is "a far broader standard than an event that is reasonably viewed as 'highly likely to occur.'") (quoting McClelland v. Life Ins. Co. of N. Am., 679 F.3d 755, 760 n.3 (8th Cir. 2012)); King v. Hartford Life & Accident Ins. Co., 414 F.3d 994, 1002 (8th Cir. 2005).

> If "accidental" means "unexpected," and if "reasonably foreseeable" is a reasonable synonym for "expected," then one might well conclude that the proffered standard passes muster under the deferential ERISA standard of review. On the other hand, a "reasonably foreseeable" standard is quite broad; if all "reasonably foreseeable" injuries are excluded from coverage, then the definition of accident may frustrate the legitimate expectations of plan participants, for insurance presumably is acquired to protect against injuries that are in some sense foreseeable. If [the insurer's] definition

an accident,[111] the application of this definition has been unpredictable because courts differ on how they view foreseeability.[112]

Linguistic variations of the framework have similarly yielded inconsistent results. Striving to discover the perfect balance between subjective expectation and objective reasonableness, various courts have used slightly different language when applying the *Wickman* framework.[113] For example, while *Wickman*'s objective prong asks whether someone in the insured's position would view the resulting injury as "highly likely," other courts have substituted this language with "substantially certain" or "substantially likely."[114] These linguistic variations, though seemingly minor, contribute to the complexities of applying the *Wickman* framework and their repercussions can be extensive.[115]

> of 'accidental bodily injury' were so narrow that it could eliminate many injuries that an average plan participant would expect to be covered based on the plain language of the plan, then there would be a question whether it conflicts with the statutory requirement that a plan be "written in a manner calculated to be understood by the average plan participant."

Id. (quoting 29 U.S.C. § 1022(a)).

[111] Generally concluding an accident is something which occurs "by chance or fortuitously, without intention or design, and which is unexpected, unusual, and unforeseen . . . an event that takes place without one's foresight or expectation, an event that proceeds from an unknown cause or is an unusual effect of a known cause, and therefore not expected." Habeeb, *supra* note 49, at § 2.

[112] While some courts view foreseeable, non-accidental death as that which was "so natural and probable as to be expected by any reasonable person," Cranfill v. Aetna Life Ins. Co., 49 P.3d 703, 707 (Okla. 2002), others view death as foreseeable, and thus non-accidental, if insureds knew it *could* have resulted from their voluntary acts. McMichael, *supra* note 44, at 642. *See also Cranfill*, 49 P.3d at 706–07.

> In the context of life and accident insurance, contract terms are not analyzed under the tort principle of foreseeability. Otherwise, deaths resulting from almost any high-risk driving activity would be excluded from coverage under an accident insurance policy (*e.g.*, driving at an excessive speed, failing to keep a proper lookout, failing to maintain brakes in good condition, changing lanes without using a proper turn signal, floating a stop sign). If one applied tort principles, death from such high-risk activity could be said to be reasonably foreseeable. Foreseeability has a more specific meaning in the context of life and accident insurance.

Id.

[113] *Wolf*, 46 F.4th at 985.

[114] [C]ourts applying the *Wickman* framework "have used a number of slightly different verbal formulations to describe the objective portion of the inquiry." Some courts ask whether a reasonable person similarly situated to the insured would view the resulting injury as "highly likely," whereas others use "substantially certain" or "substantially likely."

Id. at 985 (citations omitted) (quoting Padfield v. AIG Life Ins. Co., 290 F.3d 1121, 1126–27 (9th Cir. 2002)). "But this court held 'that the "substantially certain" test is the most appropriate one, for it best allows the objective inquiry to "serve as a good proxy for actual expectation."'" *Id.* (citations omitted) (quoting Wickman v. Nw. Nat. Ins. Co., 908 F.2d 1077, 1079, 1088 (1st Cir. 1990)).

[115] In *Santaella v. Metropolitan Life Insurance Co.*, the Seventh Circuit Court of Appeals adopted the following variation of the subjective prong: "[F]or death under an accidental death policy to be deemed an accident, it must be determined . . . that the deceased had a subjective expectation of survival . . . ." Santaella v. Metro. Life Ins. Co., 123 F.3d 456, 463 (7th Cir. 1997). Over twenty years later, in *Tran v. Minnesota Life Insurance Co.*, that precedent was misapplied when the court instead analyzed whether the decedent had a subjective expectation *of injuring himself*. Tran v. Minn. Life Ins. Co., 922

Misapplications and linguistic variations often involve a far lower standard of probability than *Wickman* requires and risk precluding coverage where there is only the possibility of death or injury.[116] The standard of probability should not be so low that the insured is inequitably disfavored; however, excessive deference to the insured's experience is likewise problematic. While prior successful practice may be probative of subjective expectation, its current use risks upsetting this delicate balance.

III. LOST IN THE WETLANDS: DISCERNING PRIOR SUCCESSFUL PRACTICE

The *Wickman* court recognized that the legal standard used to determine coverage under an accidental death policy should not unfairly favor either the insured or the insurer, and strove to balance these competing interests.[117] However, in practice, the *Wickman* framework has collapsed into one determination: whether someone in the position of the insured would have expected death to result from the assertedly accidental conduct.[118] As such, despite any protective measures, deaths analyzed under this framework are more likely to be deemed accidental because, while the average person might see engaging in a certain hazardous activity as highly likely to result

F.3d 380, 385 (7th Cir. 2019); Gawel, *supra* note 42, at 19–21 (arguing that the *Tran* court "erred in its application of the subjective prong of the subjective/objective test because it inquired whether [the decedent] had an expectation of injuring himself" instead of asking whether he had an expectation of survival) (citations omitted).

[116] *See* West v. Aetna Life Ins. Co., 171 F. Supp. 2d 856, 901 (N.D. Iowa 2001) (noting that the more lenient standard misapplies *Wickman*). While both the *Wickman* standard and foreseeability "plainly involve the degree to which the insured did or reasonably should have 'foreseen' or 'expected' the injury he or she sustained," *id*. at 886, the scope of probability would be so skewed that ineligibility would too easily be triggered. The ability to so misapply *Wickman* also risks enabling arbitrary decision-making. When the death in question involves activities that may be deemed offensive by some individuals, those determining coverage are more likely to be influenced by their personal viewpoints, experiences, and biases. *Cf.* Buhite & Marrero-Ladik, *supra* note 29, at 985–86 (observing that in cases "where the apparent cause of death was the result of ingestion of alcohol or an overdose of illicit or therapeutic drugs . . . the determination as to whether a particular death was accidental, within coverage, and not excluded is often impacted by societal biases, assumptions, and beliefs"); Scales, *supra* note 18, at 296–97.

> [S]everal ERISA decisions have misused *Wickman*'s quasi-objective test in ways that may appeal greatly to moralists . . . . These courts have held that a mere "general cognizance" of the potential dangers of "non-therapeutic" drug use establishes an *intentionally self-inflicted injury* within the meaning of the standard exclusion. Unsurprisingly, these courts also conclude that drug overdoses are nonaccidental because it is 'unreasonable' for a drug user to expect to survive. . . . [I]t is easy for judges sitting without juries to make these decisions with an eye to the fact that the insured "voluntarily rode the thunderbolt which killed him."

Id.

[117] Wickman v. Nw. Nat'l. Ins. Co., 908 F.2d 1077, 1087–88 (1st Cir. 1990). *See supra* notes 62–77 and accompanying text.

[118] Scales, *supra* note 18, at 296; McMichael, *supra* note 44, at 640.

in death or injury, someone with the insured's background, experience, and skill in that activity would not.[119]

Thus, under *Wickman*, it does not matter if the average person would believe engaging in a specific risky activity would likely prove fatal. Instead, all that matters is whether the insured's prior successful practice of the ultimately fatal activity caused him to believe that future endeavors would likewise be successful.[120] But at what point is an individual so practiced in a particular activity that subsequent death must be accidental? How should this experience be measured? And, if not by mere survival, how should success in these prior experiences be gauged? These questions must be carefully considered, and the role of prior experience determined, to prevent unfairness and inconsistency.

A. *"Prior Successful Practice" and Ultimately Fatal Acts Practiced by the Insured Prior to their Death*

Consider, again, the death of Johnny Yates, who died of a fatal overdose after voluntarily injecting himself with heroin.[121] At the time of his death, Mr. Yates was insured under his wife's ERISA-governed employee benefit plan, which included coverage for both life insurance and AD&D benefits.[122] When his widow filed claims under both coverages, the insurer paid the first benefit and denied the second, arguing that the underlying incident fell within an "intentionally self-inflicted injury" policy exclusion.[123] Ms. Yates

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[119] McMichael, *supra* note 44, at 640. "While the activity may present an increased risk and present foreseeable injury, under *Wickman*, it is still accidental." *Id.* This likelihood is not necessarily greater under the objective prong as some courts have found the insured's experience and skill to be indicative of subjective intent and thus satisfy the subjective inquiry. *See, e.g.*, Padfield v. AIG Life Ins. Co., 290 F.3d 1121, 1127 (9th Cir. 2002) (holding that the death was "accidental" and thus not a suicide within the meaning of the policy because where the decedent had a history of engaging in autoerotic behavior and surviving it, "there [was] nothing to suggest that [he] subjectively expected otherwise"). Similarly, Circuit Judge Bauer dissenting in *Tran v. Minnesota Life Insurance Co.* found the subjective prong of the analysis to be satisfied because "[t]he record, limited though[] it may be, indicated [that the insured] had a history of engaging in autoerotic asphyxiation and doing so without injury, leading one to the belief that the act, as it was intended to be performed, was not injurious." *Tran*, 922 F.3d at 388 (Bauer, J., dissenting).

[120] The second step of the subjective inquiry, the determination of whether the insured's expectations of avoiding death or injury were reasonable, is to be made from the perspective of the insured, granting him a great deal of latitude and taking his personal characteristics and experiences into account. *Wickman*, 908 F.2d at 1088. Therefore, it doesn't matter whether the activity was "undoubtedly risky" or "inherently injurious" so long as the insured had prior successful experience in that activity. *Tran*, 922 F.3d at 388 (Bauer, J., dissenting) (pointing out that, while the decedent's conduct was "undoubtedly risky," it was not "inherently injurious"). The impact of prior successful experience on accidental death determinations may also be impacted by which linguistic variation is being applied—would previous successful experience, from which the insured escaped unscathed, be weighed differently if the insured has viewed death or injury as "substantially certain" to result from his intentional act as opposed to "highly likely"? *See supra* notes 113–17 and accompanying text.

[121] Yates v. Symetra Life Ins. Co., 578 F. Supp. 3d 1024, 1029 (E.D. Mo. 2022). *See supra* notes 5–10.

[122] *Yates*, 578 F. Supp. 3d at 1029

[123] *Id.* at 1029, 1037.

ultimately brought action against her employer-sponsored ERISA plan to contest that finding.[124]

After deciding that the *Wickman* test should apply and that there was insufficient evidence to determine Mr. Yates' subjective expectations, the court proceeded to the objective inquiry and considered whether "a reasonable person, with background and characteristics similar to the insured," would have believed the death was highly likely to result from his intentional conduct.[125] Here, the insurer argued, Mr. Yates' background and characteristics necessitated a determination of no coverage—that it was "reasonable" for a fifty-year-old man, who was a "known" and "long-time user of heroin," and "not a youth experimenting with drugs," to have "foreseen" that illegal drug use and being under the influence of heroin could result in death.[126] The court rejected this argument, and embraced the opposite interpretation: such an individual "would not have viewed death as highly likely to occur as a result of injecting heroin, because the person would have done so successfully in the past."[127]

If the fatal activity is so risky or inherently dangerous that the insured "evidently entertain[s] a fanciful expectation that fate would inevitably favor them,"[128] deference to the insured's skill and experience is contrary to the goals of the *Wickman* court.[129] Nonetheless, to conclude that the *Wickman* court meant to summarily ban all risky activities would wrongly collapse the standard into one of reasonable foreseeability.[130] While this over-reliance on prior successful practice will not be appropriate for fatal practices that too closely resemble Russian roulette scenarios, its application is at least sensical where an insured routinely engaged in that practice prior to their death.[131] Regardless of whether illicit drug use should fall under the Russian

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[124] *Id.* at 1029 & n.1.

[125] *Id.* at 1039 (quoting *Wickman*, 908 F.2d at 1088). *See supra* notes 77–85 and accompanying text.

[126] *Id.* See also *supra* notes 108–12 and accompanying text regarding the faults of general foreseeability and how the standard stymies the legitimate expectations of the insured.

[127] *Yates*, 578 F. Supp. 3d at 1039–40. *See* Scales, *supra* note 18, at 296–97 ("[S]ome courts have pointed out that drug abusers do not expect serious injuries, not an unreasonable belief since they have obviously succeeded in avoiding death prior to the fatal dose."). In making this determination, the *Yates* court relied on *Padfield v. AIG Life Insurance Co.*, which likewise used the decedent's prior successful practice to conclude that "there [was] nothing to suggest [the insured] subjectively expected" not to survive the experience. 290 F.3d 1121, 1127 (9th Cir. 2002). *See also* Critchlow v. First UNUM Life Ins. Co., 378 F.3d 246, 262–63 (2d Cir. 2003) (finding that there was no evidence that indicated that one engaging in the practice expects to die, but rather expects to survive and repeat the experience again). Such an expectation is reasonable, the *Padfield* court concluded, where it is statistically rare that death will result from the insured's intentional act. *See Padfield*, 290 F.3d at 1127.

[128] *Wickman*, 908 F.2d at 1087 & n.4.

[129] Excessive deference to the mere existence of prior experience regardless of the activity in question would likewise be contrary to the goals of the *Wickman* court.

[130] *See supra* notes 108–12 and accompanying text. While insuring against Russian roulette type scenarios risks defeating the purpose of accident insurance, likewise does the exclusion of all "reasonably foreseeable" injuries as insurance is presumably acquired to protect against injuries that are in some sense foreseeable. King v. Hartford Life & Accident Ins. Co., 414 F.3d 994, 1002 (8th Cir. 2005).

[131] *See supra* note 127. *But see* Schuman, *supra* note 27, at 105 ("The fact that insured has successfully performed this act in the past does not make his belief of survival objectively reasonable.").

roulette scenario umbrella, the insureds here had prior successful (i.e. nonfatal) experiences performing these activities.[132] If Mr. Yates was a recurrent drug user, as the insurer baselessly contended,[133] his decision would have been bolstered by the memories of previously successful, nonfatal, and euphoric highs when administering his fatal heroin injection. The same cannot be said for fatal first-time undertakings, where the insured's decision to engage in the ultimately fatal behavior was not based on prior successful practice.

B. *"Prior Successful Practice" and Fatal, First-Time Undertakings*

Suppose that there are two broad categories of accidental deaths caused by an insured's intentional act. Those comprising the first category result from intentional acts practiced by the insured prior to his death,[134] while those in the second category result from fatal first-time undertakings.[135] Prior successful practice under one category necessarily differs from prior successful practice under the other.

To illustrate, say that Accident-Prone Amy is an experienced practitioner of autoerotic asphyxiation, one of the most controversial and commonly analyzed circumstances in accidental death insurance.[136] With each successful practice, her skills grow as she becomes familiar with the ligature and the point at which she must release herself to avoid harm. Her confidence also grows, and she becomes resolute that no harm will befall her. Every subsequent decision to engage in the risky activity is based on a body of prior successful experience. It is rendered, in her mind, innocuous.

This stands in stark contrast to a first-time practitioner under the second category, whose initial decision to engage in the ultimately fatal activity lacks the foundation of prior successful experiences. A critical question emerges: is there a point during the initial undertaking that the insured's death could be deemed accidental based on her success up until that point?

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[132] None of this suggests that the circumstances examined here should be automatically included or excluded from accidental death coverage, nor should it imply that any death underlying any case discussed herein should have been excluded from coverage. Instead, this Note argues that the boundaries of prior successful practice must be defined to mitigate unfairness and eliminate ambiguity.

[133] *See Yates*, 578 F. Supp. 3d at 1039.

[134] For example, say that Accident-Prone Amy, a first-time skydiver, plummets to her death after her parachute did not deploy due to mechanical malfunction. Though the "fault" was with her parachute, it was Amy's initial leap that led to her demise.

[135] Consider again Accident-Prone Amy, an experienced skydiver, plummets to her death after her parachute did not deploy due to mechanical malfunction. Like the prior hypothetical, *see supra* note 134, regardless of whether the "fault" was with her parachute, it was Amy's initial leap that led to her demise. *See also, e.g.*, Richmond, *supra* note 3, at 57–58 (The plaintiff "was not a heroin addict but, rather, was a repeat recreational user of the illegal drug. Regardless, he certainly did not expect his fatal injection to be his last." Nor did "James Adair, who died from an overdose . . . [having] apparently exceeded the prescribed doses of his medications, not pursuing pleasure but desperately attempting to alleviate chronic pain . . . .") (internal citations omitted). *Id.*

[136] *See supra* notes 41–42 and accompanying text.

Relatedly, after how much time should a once-practiced act be treated as a one-off for purposes of determining accidental death?

These issues are particularly relevant in coverage disputes arising from deaths by drunk driving. Thus, we return to Anthony McClelland.[137] On the morning of his fatal crash, his wife got ready for work as he shared his plans for the day: a motorcycle ride to enjoy the good weather, and an afternoon spent with their son doing yard work and tending to his garden.[138] His teenage daughter saw him off at around 9:00 a.m., when he left home to visit his coworker and his brother-in-law in nearby towns, each visit lasting about a half hour.[139] Mr. McClelland never made it home that day, and tragically crashed his motorcycle shortly after leaving his brother-in-law's house.[140]

Accidental death benefits were denied on the basis that Mr. McClelland's death was foreseeable due to his intoxication at the time of his fatal motor crash.[141] The district court, finding the insurer had employed an unreasonable definition of the term "accident" in denying coverage, remanded the matter to the insurer to determine whether death resulted from an "accident" as defined by *Wickman*.[142] After the insurer denied coverage again, the court held that the insurer did not properly apply the *Wickman* standard because it did not reasonably analyze the insured's subjective expectations on the morning of the incident.[143] Mr. McClelland's plans to complete yard work, coupled with his demeanor that morning—in that he showed "no obvious signs of intoxication," acted normal while visiting with several people, had no problems with balance or orientation, and was "in a good mood and joked with the people he had visited"[144]—were held to constitute overwhelming evidence indicating a subjective belief that death was not highly likely to occur.[145] The court held this belief to be objectively reasonable because, although the insured was driving over ninety miles an

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[137] McClelland v. Life Ins. Co. of N. Am., 679 F.3d 755, 755 (8th Cir. 2012). *See supra* notes 11–15.

[138] *McClelland*, 679 F.3d at 757.

[139] *Id.*

[140] *Id.* at 758.

[141] *Id.* Recall that post-mortem toxicology reports indicated that Mr. McClelland's blood alcohol content was over .20. *Id.*; *see supra* note 13.

[142] *McClelland*, 679 F.3d at 758. "Under *Wickman*, an event is an accident if the decedent did not subjectively expect to suffer 'an injury similar in type or kind to that suffered' and the suppositions underlying that expectation were reasonable." *Id.* at 758 n.2 (quoting Wickman v. Nw. Nat'l Ins. Co., 908 F.2d 1077, 1088 (1st Cir. 1990)). This is determined as described *supra* notes 77–85.

[143] *Id.* at 758–61 (explaining that, instead of taking into account the insured's characteristics on the day of the accident, the insurer relied "solely upon its expert's rather categorical conclusion that those who drink and drive should reasonably expect to be killed"). The insurer's approach effectively ignored the subjective components of the *Wickman* test, in which they should have determined the insured's expectations based on his personal characteristics and expectations. *Id.* at 761.

[144] *Id.* at 760–61.

[145] *Id.* at 761 ("There was not even a scintilla of evidence that Anthony thought his death was highly likely to occur.").

hour with a BAC of .203 and without a helmet, he had been doing so successfully "for a distance of several miles."[146]

While the court did not solely rely on prior successful practice to determine that Mr. McClelland's death was accidental,[147] the case nevertheless raises many important questions pertaining to scope when considering prior successful practice. First, should the court's consideration of prior successful practice be cut-off at the moment of initiation?[148] For first-time practitioners of the ultimately fatal activity, the initial decision to engage in that activity is made without reference to a body of prior successful experience. Here, successfully navigating the initial miles of the fatal drive while under the influence was deemed reasonable grounds for the belief that death was not highly likely to occur.[149] This successful experience was gleaned after the initial decision to undertake the ultimately fatal activity. There was, however, prior history that the court could have feasibly considered when rejecting the insurer's argument: Mr. McClelland's prior history of driving under the influence.[150]

Mr. McClelland notably had two prior convictions for driving under the influence (DUI), the most recent having occurred ten years prior to his death.[151] Thus, the case also raises the question: after how long should a once-practiced act be treated as a first-time undertaking? Though the court did not say so outright, it hinted that an experienced[152] drunk driver would likewise not expect to die by such means.

> [The insurer] argues that since Anthony had been convicted of DUI, he received mandatory counseling about the dangers and consequences of driving while intoxicated and therefore should have reasonably expected to die . . . . On the other hand, [the insurer] distances itself from the idea that someone who regularly, or at least in the past, has driven after drinking

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[146] *Id.*

[147] Recall that the court relied on additional evidence to conclude Mr. McClelland subjectively did not believe his death was highly likely to occur. *Id.* Though Mr. McClelland's history as an experienced motorcyclist was one such piece of evidence, this did not change the court's reliance on the initial success of his ultimately fatal drive in rebutting the insurer's argument that any belief that death was unlikely to occur would have been unreasonable. *Id.*

[148] In other words, when should the chain of causation be spliced? Prior successful practice may be deemed to include: (1) any experience gleaned before the insured's death; or (2) any experience gleaned before the insured's decision to engage in the activity that led to his death. The first definition would include fatal first-time undertakings; the second would not, as the insured's first time engaging in this activity necessarily happens after the decision to engage in it.

[149] *See id.*

[150] They also could have considered Mr. McClelland's prior history as an experienced motorcyclist, though this would not have taken his intoxication into account. *See supra* note 147.

[151] *McClelland*, 679 F.3d at 758.

[152] Meaning someone who had previously driven while under the influence, and not someone who gleans that experience during a fatal first-time undertaking.

> would subjectively believe that death is highly *unlikely* to occur in this situation.[153]

Whether or not such an argument *should* prevail, it would at least make sense as such prior successful practice occurred before the insured's decision to engage in the ultimately fatal activity.[154] Nevertheless, the court opted to rely only on experience garnered during his fatal drive.[155] This decision may suggest that the successful performance ten years prior was simply too long ago to influence the insured's subjective expectations—that the slate was wiped clean, and the ultimately fatal drive was similar to a first-time undertaking.[156]

Lastly, *McClelland* is probative of the role of prior successful practice where the fatal activity could be deemed a Russian roulette type scenario, thus excluding it from coverage. The *Wickman* court stated that allowing recovery when an insured's expectations are both virtually synonymous with specific intent and are patently unreasonable would defeat the purpose of accidental death insurance.[157] During his fatal drive, Mr. McClelland seemed to be playing "follow the leader" with other vehicles by weaving in and out of traffic for six miles, without a helmet, at approximately ninety miles an

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[153] *Id.* at 761 (emphasis in original).

[154] This is not to say Mr. McClelland's death should or should not have been determined accidental, nor is it a commentary on the determination of deaths caused by drunk driving. There are reasons to deem deaths caused by drunk driving as accidental. *Cf.* West v. Aetna Life Ins. Co., 171 F. Supp. 2d 856, 884 (N.D. Iowa 2001)

> The *Wickman* decision is important for a number of reasons here, but most particularly for the near uniformity with which courts in ERISA cases involving intoxicated drivers have since relied on *Wickman* to reject the "accidental means" test as a definition of "accident," and have instead embraced the *Wickman* definition of "accident" . . . .

Id. However, courts must be mindful of what reasoning they use to come to such a conclusion, and make sure that reasoning does not create a practice that could tip the delicate balance encased in the *Wickman* test.

[155] *See McClelland*, 679 F.3d at 761; *supra* notes 146–50.

[156] Consideration of the insured's knowledge under the *Wickman* framework has been criticized. *See, e.g.*, *West*, 171 F. Supp. 2d at 901.

> As substitutes for actual proof that a drunk driver is so likely to be injured or killed that any other expectation is unreasonable, these decisions sometimes rely on "common knowledge," "the media," drunk driving laws, or the logical, but unproved, assumption that a higher blood alcohol content necessarily increases the probability of injury or death while driving to the point that death or injury is "highly likely," not just *more* likely, to result. *See, e.g.*, *Cozzie*, 140 F.3d [1104,] 1110–11 (relying on a BAC of .252% and the exclusion of other causes of the accident, without reference to any evidence that such a BAC necessarily makes injury or death "highly likely," not merely an increased possibility.

Id. Santos v. Minn. Life Ins. Co., 571 F. Supp. 3d 1120, 1130 (N.D. Cal. 2021), judgment entered, No. 20-CV-06707-PJH, 2021 WL 5371416 (N.D. Cal. Nov. 15, 2021) ("Knowledge of a potential consequence, however, does not equate with knowledge of a substantially certain result."). However, Mr. McClelland's mandatory counseling following his criminal conviction could be considered relevant when figuratively slipping on the shoes of the insured, and it is particularly interesting when balanced against how much time had elapsed between that counseling and Mr. McClelland's death.

[157] Wickman v. Nw. Nat'l Ins. Co., 908 F.2d 1077, 1087 (1st Cir. 1990).

hour.[158] Regardless of whether driving while intoxicated should be considered a Russian roulette type scenario, such conduct arguably could be.

In contrast, consider *Wolf v. Life Insurance Company of North America*, where accidental death benefits were denied after the insured died in a one-car collision while intoxicated and driving at a high speed in the wrong direction down a one-way road.[159] Twenty-six-year-old Scott Wolf, Jr., hit a speed bump and lost control of his car, which ultimately flipped over and landed upside down in a body of water adjoining the road.[160] A post-mortem toxicology report revealed that he had a BAC of .20.[161] His father filed suit under ERISA, alleging the insurer wrongfully denied his insurance claim based on his son's accidental death.[162] Notably, in denying his claim, the insurer consistently defined "foreseeable" as "highly likely" and, instead of relying on a reasonable foreseeability test in denying coverage, it applied the *Wickman* standard.

Because there was insufficient evidence to determine Mr. Wolf's subjective expectation at the time he died, the court proceeded to the objective inquiry.[163] Under this analysis, although Mr. Wolf's conduct was "extremely reckless," it was deemed important that insureds in other, similar cases "were as reckless, if not more reckless."[164] Upon comparing his actions to those of Mr. McClelland, the Ninth Circuit Court of Appeals could not conclude that Mr. Wolf's death was substantially certain to result.[165]

Where Mr. Wolf's death was caused by a one-off, non-routine intentional act, Mr. McClelland's was not. However, because the *McClelland* court opted to rely on the insured's ultimately fatal drive instead of experience gained before this drive,[166] it created precedent that could

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[158] *McClelland*, 679 F.3d at 758.

[159] Wolf v. Life Ins. Co. of N. Am., 46 F.4th 979, 981–82 (9th Cir. 2022). Mr. Wolf was driving at approximately sixty-five miles per hour in the wrong direction down a one-way service road with a speed limit of ten miles per hour. *Id.* at 982.

[160] *Id.* at 981–82.

[161] *Id.* at 982.

[162] *Id.* at 981–82, 984. In the insurer's initial denial letter, it concluded that Mr. Wolf's death was a foreseeable outcome of his voluntary actions, and therefore did not result from a "covered accident" as defined within the policy. *Id.* ("The policy pays benefits for, among other things, a 'Covered Accident,' which is defined as '[a] sudden, unforeseeable, external event that results, directly and independently of all other causes.'"). Notably, however, the insurer consistently defined "foreseeable" as "highly likely" and, instead of relying on a reasonable foreseeability test in denying coverage, it applied the *Wickman* standard. *Id.* at 982–83, 985–86. These two standards, the court pointed out, are fundamentally inconsistent with each other. *Id.* at 986.

[163] *Id.* at 985.

[164] *Id.* at 988.

[165] *See id.* at 989. When dismissing the pertinence of expert statements explaining that "'[t]he probability of accidents increases exponentially as the [BAC] goes above 0.08[%]' and that '[b]oth the driving accident and the inability to save himself from drowning were impacted by his state of intoxication,'" the court acknowledged a "common knowledge that the probability of accidents increases as one gets more intoxicated." *Id.* at 989. This recognition similarly begs the question: at what point does intentionally engaging in risky and dangerous behavior cross the line into the Russian roulette scenario from which the *Wickman* court so desperately tried to protect accidental death insurance from covering?

[166] *See supra* notes 147–156 and accompanying text; McClelland v. Life Ins. Co. of N. Am., 679 F.3d 755, 761 (8th Cir. 2012).

influence coverage determinations for first-time undertakings. Thus, *Wolf*'s reliance on this precedent was not unwarranted.

Thus, courts must establish parameters for one-off occurrences. A first-time practitioner does not begin his inaugural fatal practice with the knowledge of previous practices from which the insured escaped unscathed. Moreover, if too much deference is given to experience to the extent that prior successful practice effectively creates a per se exception, and if first-time undertakings could qualify for such treatment, distinguishing between accidental and nonaccidental first-time undertakings becomes increasingly challenging.[167] Courts must determine when and how prior successful practice in the context of one-off occurrences should be treated similarly to practices survived prior to the fatal undertaking. While it may be easy to cast judgment,[168] and to make biased accidental death determinations considering that the insured "voluntarily rode the thunderbolt which killed him,"[169] the easy route must not be chosen. We must continue to grapple with the difficult task of quantifying that which is implicitly understood, navigating seemingly arbitrary matters of scope, and striving to understand the insured by slipping on his shoes—even when they do not seem to fit.

CONCLUSION

The abstract nature of "accident," the challenges inherent in deciphering a decedent's subjective expectations, and the need to balance competing interests of insureds and insurers—all of these have led to the notorious difficulty of determining accidental death under ERISA-governed policies. While the *Wickman* framework is plagued by issues of scope and tends to defer excessively to the role of experience in fatally risky activities, other standards are far too arbitrary. The problems under *Wickman* do not require us to tear it down but, instead, continue to strive for uniformity. In so doing, courts must consider the role of prior successful practice.

First, over reliance on prior successful practice, in and of itself, is dangerous. Blind adherence to the mere existence of prior experience, with nothing more, risks creating a per se exception for accidental death where there is such evidence. Such a presumption does not consider instances where the insured survives their prior practice, but nevertheless neither expected nor intended to survive the later fatal undertaking.[170] Thus, reliance on an insured's past survival of risky conduct that led to their demise, without careful consideration of that experience, is a faulty premise.

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[167] At what point during the fatal inaugural act, for example, does the insured's practice of that activity become prior successful practice thus mandating such a finding? For example, in the case of Mr. McClelland, is there a point at which his crash could have occurred that the driving that came before it would not have been considered "successful?"

[168] *See supra* note 116.

[169] Scales, *supra* note 18, at 296–97.

[170] Such a presumption likewise does not consider instances where the insured had no expectation or intention of surviving previous practice.

Second, while surviving a prior act may provide some experience, the experience of a one-off survival does not equate to the expertise gained from repeated successful endeavors. Therefore, the question remains as to whether and when such experience may be acquired during a fatal first-time undertaking by the insured. Each case must be evaluated individually, considering the specific circumstances and the insured's level of experience.

Nevertheless, it is important to recognize that in most cases, the narrow scope of experience obtained during a first-time endeavor unfairly disadvantages the insurer. A first-time practitioner does not possess the same expectation of survival as an experienced practitioner, as they lack the memories of prior successful endeavors that would bolster such an expectation. If parameters are not set, any fatal first-time undertaking could arguably be considered accidental under the theory that the first stages of that undertaking were navigated "successfully."[171]

In conclusion, reliance on the insured's prior successful experience when employing the *Wickman* framework requires further refinement and clarification. Clear guidelines regarding the regularity and duration of practice are essential to ensure fairness and consistency in the determination of accidental death coverage. Further, it is crucial to acknowledge the limitations of this reasoning, particularly in cases involving non-routine intentional acts, and that its application is not suitable in all circumstances. By carefully evaluating the unique circumstances of each case, courts can strike a delicate balance between the interests of the insured and the insurer, as well as those of justice and responsibility.

[171] *See* McClelland v. Life Ins. Co. of N. Am., 679 F.3d 755, 761 (8th Cir. 2012). *See supra* notes 147–156 and accompanying text. This is not to say that drunk driving should be a per se exclusion. Instead, for example, the *McClelland* court could have solely considered Mr. McClelland's experience as a motorcyclist if they were committed to using prior successful practice or, alternatively, relied solely on his characteristics the day of the accident prior to beginning the drive. *See supra* notes 155–160 and accompanying text.