what extent ERISA applies to various types of pension plans—plans which may not be terribly familiar to those who manage or litigate life, health, and disability matters.

But with the exception of unfunded excess benefit plans (which are of limited utility and seemingly rare given the changes to the Tax Code after ERISA was enacted), employee pension benefit plans are subject to the familiar administration and enforcement provisions also applicable to employee welfare benefit plans. Chief among these provisions is ERISA's expansive preemption provision, ERISA §514, codified at 29 U.S.C. §1144, by which ERISA "supersede[s] any and all State laws insofar as they may now or hereafter related to any employee benefit plan."

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It Is Still a Slog Through a Bog

Interpreting "Accident" under ERISA-Governed AD&D Coverage

By Joshua D. Lerner

Typical ERISA-governed accidental death and dismemberment ("AD&D") insurance pays a benefit for covered loss arising from an "accident," or an "accidental" event. In many if not most policies, the terms "accident" and "accidental" are undefined or vaguely defined, leaving ultimate interpretation of these coverage-dispositive terms to the courts.

When it arises from a situation in which the insured has intentionally placed herself, determining whether an injury or death arises from an "accident" or was "accidental" has bemused the courts, leading to different, arguably inconsistent, outcomes. For many years, under state law, and even continuing today in some jurisdictions, courts have wrestled with the distinction between accidental means and accidental results in attempting to interpret these terms in non-ERISA policies.

Justice Cardozo wrote that grappling with this distinction would mire courts in a Serbonian Bog. In developing the federal common law under ERISA, courts have declined to recognize a distinction between accidental means and accidental results, steering clear of that muddy terrain. Interpreting the terms under ERISA for purposes of triggering the policy benefit, courts have largely focused on the objective expectations of the insured as to whether death or injury was accidental.

This article examines selected cases from the developing common law and concludes that judicial interpretation of these undefined policy terms in ERISA cases has mired courts in a different, arguably no less murky, bog.

"The Metaphysical Conundrum"

In *Wickman v. Northwestern Nat. Ins. Co.*, 908 F.2d 1077, 1084 (1st Cir. 1990), for the first time under ERISA, a court of appeals "dove into the metaphysical conundrum of what is an accident." This case arose from the denial of an AD&D death benefit under coverage that was triggered if an insured's death was accidental, *i.e.*, the result of an "unexpected, external, violent and sudden event."

In *Wickman*, the insured died after falling at least 40 feet from a highway bridge to railroad tracks below. He was last seen before the fall standing on the outside of the bridge's guardrail, holding onto it with one hand. He had purposely climbed over or through the guardrail to the location where he was last seen.

In denying the claim *de novo*, the district court noted that there were only three possible explanations for the insured's actions: either he intended (1) to commit suicide; or (2) to seriously injure himself; or (3) having positioned himself on the outside of the guardrail, he fell inadvertently or mistakenly. The court concluded that even under the third scenario, the insured did not die from an accident, because once he intentionally climbed over the guardrail and suspended himself with one hand, serious bodily injury or death was substantially certain.

The appellate court reviewing the summary judgment in favor of the insurer, framed the issue: accidental death benefits were due "if the insured climbed over the guardrail without any intent to kill or injure himself, but fell inadvertently." *Id.*

Furthermore, it was clear that the insured's fall was external, violent, and sudden, but was unclear whether the fall was *unexpected*. Finding the policy definition of "accident" therefore unhelpful, the court considered state law interpretations, revealing the analysis that distinguished between accidental means and accidental results.

As part of its survey of state law, the court discussed the United States Supreme Court's decision in *Landress v. Phoenix Mutual Life Ins. Co.*, 291 U.S. 491 (1934), in which the Court applied the means/result distinction. There the Court held that a man who died of heat stroke while golfing was not entitled to accidental death benefits; since he had intentionally played golf, exposing himself to the hot sun for a long period of time, the means of his death was not accidental. However, Justice Cardozo famously dissented, criticizing the distinction between accidental means and results as artificial, writing that "[w]hen 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." *Id.* at 499. Justice Cardozo admonished that allegiance to the means/result distinction would "plunge this branch of the law into a Serbonian Bog." *Id.*

Next, the First Circuit endeavored to skirt the Serbonian Bog in developing the law under ERISA for the interpretation of AD&D coverage. In crafting an alternative to the accidental means/accidental result distinction, the court observed that the concept of an "accident" and of "accidental" "is largely intuitive." *Wickman*, 908 F.2d at 1087. Accordingly, the court articulated a framework for analysis specifically focused on the insured's expectations with respect to the loss-causing event itself.

If the fact-finder determines the insured did not subjectively expect an injury like the one sustained, the fact-finder must then determine whether the suppositions underlying the expectation were reasonable. "If the fact-finder determines that the suppositions were unreasonable, then the injuries shall be deemed not accidental," precluding coverage. *Id.* at 1088. Assessment of whether the suppositions are unreasonable is to be made "from the perspective of the insured, allowing the insured a great deal of latitude in taking into account the insured's personal characteristics and experiences." *Id.*

When viewed from the insured's perspective, risky actions leading to injury or death on the part of skilled or experienced individuals could be deemed accidental. Hypothetical examples included the death of an individual experienced in the use of guns who, after having examined the gun and believing it to be empty, pointed and fired it at his head, resulting in death, or the death of a professional diver who, after having previously completed the same dive without incident, died after diving off the Coolidge Dam. *Id.*

In some cases, as in *Wickman*, evidence of the insured's actual subjective expectations will be unavailable. In that event, under the *Wickman* framework, an objective analysis of the insured's expectations is required. *Id.* The fact-finder must ask whether a reasonable person, with the background and characteristics of the insured, would have viewed the injury as "*highly likely* to occur as a result of the insured's intentional conduct." *Id.* (italics added).

Applying these concepts, the court of appeals agreed that the insured's death was not an accident. After placing himself on the outside of the bridge guardrail and hanging on 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. *Wickman*, then, suggests that an accident under ERISA, in the absence of a clear policy definition, is an outcome that is not *highly likely* to occur as a result of particular conduct.

Autoerotic Asphyxiation

Similarly, in *Todd v. AIG Life Ins. Co.*, 47 F. 3d 1448 (5th Cir. 1995), the insured died from autoerotic asphyxiation, the practice of limiting the flow of oxygen to the brain during masturbation in an attempt to heighten sexual pleasure. The insured, Todd, apparently used two leashes to gradually tighten a dog collar around his neck. He had designed the system of leashes to loosen the collar if he lost consciousness, but on this occasion, the system failed. It was undisputed that Todd did not intend or expect to die from his autoerotic behavior.

Todd's AD&D coverage was triggered if he sustained bodily injury or death caused by an accident, and though he did not intend or expect to die, the circuit court queried whether the injury that killed him was an accident. Following what it characterized as the "essentials of the *Wickman* approach," the court concluded that Todd's subjective expectation of survival was objectively reasonable, and affirmed summary judgment in favor of accidental death coverage. *Todd,* 47 F.3d at 1456.

Commenting on the *Wickman* analysis' objective component, the court wrote: "the expectation [of survival] would be unreasonable if the conduct from which the insured died posed such a high risk of death that his expectation of survival was objectively unrealistic." *Id.* The Fifth Circuit and the district court whose order it reviewed found the risk of death from autoerotic activity insufficient to deny coverage as non-accidental.

Judicial review of the plan administrator's denial of coverage in *Todd* was *de novo*. Whether the outcome would have been different under the more deferential ERISA standard of review is an open question, but the decision in *Cozzie v. Metropolitan Life Ins. Co.*, 140 F.3d 1104 (7th Cir. 1998), shows the importance of the standard of review to the court's ultimate decision. Additionally, *Cozzie* reflects some deviation from the framework for analysis established in *Wickman*.

Driving While Intoxicated

There, the insured, Robert Cozzie, died from asphyxiation after being trapped beneath his automobile. The vehicle had come to rest, overturned, after missing a curve in the road, striking an embankment and rolling over three times. Cozzie was the driver and only occupant of the vehicle, and at the time, had a blood alcohol level in excess of two times the legal limit. Other than Cozzie's intoxication, there was no apparent cause of the crash.

Cozzie's beneficiary made a claim under his ERISA-governed AD&D coverage, which was payable if Cozzie died as a direct result of an accident, independent of all other causes. The policy did not define the term "accident," but gave the plan trustees the authority to interpret its language.

MetLife denied the claim on grounds that Cozzie's death was not caused by an accident. The plan trustees interpreted the term "accident" to be an event that is not *reasonably foreseeable*. The Seventh Circuit noted several district court decisions that, utilizing the same definition, held that a death that occurs as a result of driving while drunk, although perhaps unintentional, is not an accident, because that result is "reasonably foreseeable." *Id*. at 1110.

That the court of appeals expressed its approval of the result only in negative terms, is an indication of the significant role the deferential standard of review played in the decision in that case, and that the standard of review plays generally in the development of the law around interpretation of the term "accident" for ERISA purposes. *Id*. at 1109, 1110 ("MetLife's interpretation cannot be said to contradict the plain language of the Plan." "It cannot be said that MetLife's definition of 'accident' is downright unreasonable.").

Cozzie is noteworthy, as concerns that developing common law, also because while it cites the *Wickman* decision with approval, its application of *Wickman* arguably narrows the scope of coverage under an ERISA AD&D policy. *Wickman* determined that if the insured had a subjective expectation of survival and such expectation was objectively reasonable, the resulting death was caused by an accident. As discussed, to make the objective assessment of the insured's expectations, *Wickman* requires the fact-finder to ask whether a reasonable person standing in the shoes of the insured would have viewed the injury as "*highly likely*" to occur as a result of the insured's intentional conduct. 908 F.2d at 1088 (italics added).

The *Cozzie* court, however, relied on cases that held a death from driving while intoxicated is not an "accident" because that result is *reasonably foreseeable*. 140 F.3d at 1110. Moreover, summarizing its decision, the *Cozzie* court defined an accident as "conduct that results in a loss that could not have been *reasonably anticipated*." *Id.* at 1104 (italics added). *Wickman*, however, held an accident is conduct that results in a loss that was not *highly likely* to occur.

Was the Death "Unexpected"?

The Fourth Circuit's decision in *Eckelberry v. ReliaStar Life Ins. Co.*, 469 F.3d 340 (4th Cir. 2006), further diluted *Wickman's* objective test for whether an incident was "unexpected," and therefore "accidental." Under Eckelberry's employer-provided AD&D coverage, the insurer would pay death benefits for a death "due to an accident." "Accident" was defined as "an unexpected and sudden event which the insured does not foresee." *Id.* at 342. The plan gave the administrator final discretionary authority to determine all questions of eligibility and to interpret the terms of insurance coverage.

Eckelberry, the insured, lost control of his vehicle and perished after he ran headlong into the rear of a parked

tractor-trailer. His blood alcohol level was 50 percent higher than the applicable legal limit, and he was not wearing a seatbelt. The insurer denied the claim because the insured's death was not "unexpected," in view of his blood-alcohol level and because "he should have known serious injury or death could occur." *Id.* at 343. His death, therefore, was not "unexpected" as required to trigger coverage. The district court disagreed and granted summary judgment in favor of coverage, concluding that, viewed subjectively, serious injury was not "*highly likely*" to occur as a result of drunk driving. *Id.* at 342.

On appeal, the Fourth Circuit observed that the deferential arbitrary and capricious standard circumscribed its review: "We do not search for the best interpretation of a Plan or even for one we might independently adopt … [but] will not disturb any reasonable interpretation." 469 F.3d at 343 (citations omitted). The court reversed and ordered judgment for the insurer.

To qualify as an accident under the plan at issue in *Eckelberry*, an incident must be both "unexpected" and an event "the insured does not foresee." The court drew on the analytical framework laid out in *Wickman* to clarify the meaning of "unexpected." Describing the objective component of the *Wickman* test, the court quoted from the First Circuit's case: "'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.'" *Id.* at 344, quoting *Wickman*, 908 F.2d at 1088 (italics added). And, the court invoked *Wickman's* "highly likely" standard when it declined to "characterize as incompatible with the Plan … ReliaStar's determination that the Plan's best interests are served by limiting the Plan's definition of 'accident' to unexpected events that are not highly likely to occur." *Id.* at 347.

In expressing its holding, though, the court seemed to conflate the two objective tests to evaluate an insured's subjective expectations of survival, *i.e.*, "reasonable foreseeability" versus "highly likely" – "we think it was reasonable for ReliaStar to conclude that because the insured 'put himself in a position in which he should have known serious injury or death could occur' his death was not 'unexpected.'" *Id.*

Social mores, rather than close adherence to *stare decisis* or, arguably, to the ERISA objective of protecting employee interests in benefit plans, may have driven the result in *Eckelberry*. Identifying the record facts supporting the insurer's determination that Eckelberry's death was not unexpected because he should have known serious injury or death could occur, the court noted Eckelberry's elevated blood alcohol level and stated his crash "was perfectly consistent with his inebriated state." *Id.* at 345. The court commented that drunk driving is illegal, "reflect[ing] a recognition of the seriousness of the problem of drunk drivers." *Id.* "To characterize harm flowing from such behavior," the court wrote, "as merely 'accidental' diminishes the personal responsibility that state laws and the rules of the road require." *Id.* at 346.

Objective Analysis of Expectations

Moreover, in *Stamp v. Metropolitan Life Ins. Co.*, 531 F.3d 84 (1st Cir. 2008), the First Circuit applied the W*ickman* analysis to an insured who died with a heightened blood alcohol level in a single car collision. The insured, Stamp, died after the automobile he was driving left the road and collided with a tree; his blood-alcohol level was more than three times the legal limit. The applicable ERISA coverage provided that AD&D benefits were payable if the insured is "physically injured as a result of an accident and die[d] within 90 days as a result of that injury or accident." The plan administrator, which had full and exclusive discretionary authority to determine coverage and to interpret the plan, rejected the beneficiary's claim, and the district court entered summary judgment in favor of the plan.

In its decision, the court of appeal referred to *Wickman* as "a case in which we added to the ERISA common law by formulating an approach for interpreting the ambiguous term 'accident' in AD&D insurance policies." *Id.* at 88. The court then purported to apply *Wickman.* Focusing on an objective analysis of the insured's expectations, the court phrased the dispositive question: "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." *Id.* at 89 (quoting *Wickman*, 908 F.2d at 1088).

The administrative record showed that Stamp was severely intoxicated when he died and that his blood-alcohol level would cause lethargy, stupor, incoherence, and impairment of all mental, physical, and sensory functions, with blackouts likely. In the absence of evidence of another vehicle or object, mechanical failure, or adverse weather or road conditions contributing to Stamp's collision, the court found it reasonable to infer his blood-alcohol level was at least a substantial contributing cause of the collision. On this record, "in Wickman terms," the court stated that it was not arbitrary and capricious for the plan administrator "to conclude that a reasonable person would view death or

serious injury as a highly likely outcome of driving while so drunk that one may need help to stand or walk and is likely to black out." *Id.* at 91.

There was a dissent in *Stamp,* which took issue with the majority's application of *Wickman*. Citing *Todd v. AIG Life Ins. Co., supra,* the dissenting judge contended the proper analysis under *Wickman* is as follows:

> [F]or death under an accidental death policy to be deemed an accident, it must be determined (1) that the deceased had a subjective expectation of survival, and (2) that such expectation was objectively reasonable, which it is *if death is not substantially certain to result from the insured's conduct*.

Id. at 95 (Torruella, J. dissenting; citations omitted, italics in original).

For the dissent, the question was not whether the insured was severely intoxicated, but whether he intended to kill himself by becoming intoxicated and driving while in this condition. The dissent concluded that although Stamp miscalculated and misjudged his ability to drive, the record showed he had a subjective expectation of survival when he got behind the wheel drunk that evening.

Based on reliable statistical studies demonstrating that much more often than not, driving while under the influence has a non-fatal outcome, the dissent viewed Stamp's subjective expectation of survival as objectively reasonable. Based on those statistics, the dissent contended it is not highly likely for an impaired driver to die in an alcohol-related wreck and such deaths, therefore, are accidents. *Id.* at 96.

The deferential standard of review – and social views on drinking and driving – may explain the result in this case. Had the dissenting judge's observations and conclusions been the plan administrator's decision, under the arbitrary and capricious standard, the same panel of the court may have affirmed that result.

The Effect of *de novo* Review

Unlike in *Stamp*, and *Eckelberry*, which was also a Fourth Circuit case, the ERISA standard of review in *Johnson v. American United Life Ins.Co.*, 716 F.3d 813 (4th Cir. 2013), was *de novo.* In *Johnson*, the court revisited the question of whether an alcohol-related single-vehicle crash qualified as an "accident" under ERISA AD&D policies, without the restraint that bound the court in *Eckelberry* to consider only the reasonableness of the plan administrator's decision.

In *Johnson*, the policies at issue paid benefits if the insured died "due to an accident, directly and independently of all other causes." The term "accident" was not defined. One policy provided an additional death benefit if the insured was wearing a seatbelt in the automobile accident causing the death. Furthermore, that policy would not pay the "Seatbelt Benefit" if the insured was legally intoxicated during the accident.

The plan administrator declined to pay the accidental death benefits stating, among other things, "[a]n accident occurs when an unforeseen, sudden and unexpected event, usually of an afflictive or unfortunate character[,] occur[s]…. As the decedent should have *foreseen* the consequences of drinking excessive amounts of alcohol, a determination of his death not being accidental is reasonable." *Id.* at 818 (italics added). The district court entered summary judgment in favor of the plan, stating the crash was an anticipated and expected result and thus not an accident.

The appellate panel, one of whom had participated in *Eckelberry,* noted the significance of its standard of review ("The correctness, not the reasonableness, of [the administrator's] denial of AD&D benefits is our only concern in this appeal."). *Id.* at 819. The court commented that there would be no reason to include an express limitation excluding payment of the Seatbelt Benefit where the insured was driving while intoxicated unless a drunk-driving collision otherwise qualified as an "accident," but still found the term "accident" as applied to a claim arising from a drunk driving crash to be ambiguous. *Id.* at 821–22.

This finding permitted the court to apply the rule of *contra proferentum* to construe the policy provisions strictly in favor of the insured. The court concluded a reasonable plan participant in the insured's circumstances would "easily" have understood that the subject accident was covered. *Id.* at 822.

Reiterating the admonitions of other courts confronted with the problem of determining what constitutes an accident, the *Johnson* court noted that ERISA insurers had the ability to explicitly state what is and is not a covered accident under an AD&D policy. The absence of such explicitness constrained the court, on *de novo* review, to construe the term in favor of coverage.

The AD&D coverage's scope in *Eckelberry* was also unclear. But the definition of "accident" there employed the term "foresee," as well as the term "unexpected," and thus seemed to import the tort concept of foreseeability. This lead to the *Eckelberry* court's conclusion that the

death in that case was not unexpected because the insured put himself in a situation in which he should have known serious injury or death "*could* occur." *Eckelberry,* 469 F.3d at 345.

However, on *de novo* review in *Johnson,* the Fourth Circuit seemed to cleave to the "highly likely" test for determining what is unexpected. Addressing the district court's use of the state law "substantially certain" test, the court stated such test is "almost indistinguishable from the 'highly likely' standard employed by *Wickman,"* and would also lead the court to conclude Johnson died in an accident. *Johnson*, 716 F.3d at 826–27. Adherence to the "highly likely" test, the *de novo* standard of review, and the application of the rule of contract interpretation, *contra proferentum,* explain the result in *Johnson*.

Degree of Intoxication

Comparison of two decisions from the Sixth Circuit involving alcohol related motor vehicle crashes illuminates the nuanced nature of the developing common law around construction of the term "accident" under ERISA-governed AD&D insurance. In *Lennon v. Metropolitan Life Ins. Co.*, 504 F.3d 617 (6th Cir. 2007), the court held a death caused by drunk driving was not accidental. Conversely, in *Kovach v. Zurich Am. Ins. Co.*, 597 F.3d 323 (6th Cir. 2009), the court found the loss of a leg resulting from a drunk driving crash was "accidental." Neither policy defined "accident" or "accidental." The court reviewed both cases under the arbitrary and capricious standard, and the material difference explaining the differing outcomes was the degree of intoxication at the time of the incidents.

In *Lennon*, the court characterized the insured's conduct as "grossly negligent drunk driving." *Lennon*, 504 F.3d at 618. There, the insured, Lennon, operated his automobile at an excessive speed the wrong way down a one-way boulevard into a wall, and subsequently died. Lennon's blood-alcohol level at the time was .321 percent, more than three times the legal limit. The district court held the death was accidental and ruled in favor of coverage, noting death is a statistically unlikely outcome of driving while intoxicated.

Yet the appellate court had no hesitation reversing and upholding the plan administrator's denial of coverage. The Sixth Circuit invoked public policy to explain its approval of the interpretation of the contract term "accidental" as excluding reckless drunk driving: "At some point the high likelihood of risk and the extensive degree of harm risked, weighed against the lack of social utility of the activity, become not marginally but so overwhelmingly disproportionate that the resultant injury may be outside a definition of 'accidental' that is not unreasonably narrow." *Id.* at 623.

The *Lennon* court's lead opinion drew both a concurring and a dissenting opinion, both criticizing the misapplication of *Wickman*. Although he acknowledged they had misapplied *Wickman*, solely because of the quantity of cases, many from within the Sixth Circuit, that have held that a collision involving a highly intoxicated driver is not an accident because it is reasonably foreseeable, the concurring judge agreed the plan administrator was not arbitrary and capricious in concluding Johnson's death was not from an accident.

The district court had reversed the plan administrator's decision because the administrator had relied on the many district court decisions that had modified the *Wickman* "objective standard from one of 'high likelihood' to 'reasonable foreseeability,' and have concluded that a collision by a highly intoxicated driver . . ., being reasonably foreseeable, is not an accident." *Id.* at 625 (Boggs, C.J., concurring). Had the district court's review of the coverage decision been *de novo,* its rejection of the cases that failed to adhere to *Wickman*'s strict standard would have been warranted, but because of those cases, whether rightly or wrongly decided, the administrator was not arbitrary and capricious in relying on them. *Id.* The concurrence parted company with the lead opinion because that opinion "appears" to address the question whether the plan administrator's denial of coverage was correct as a matter of substantive law, and utilized the concept of foreseeability to answer the question affirmatively. *Id.* at 624 (Boggs, C.J., concurring).

The dissent was strident, calling the lead opinion a "clear departure from federal common law" and "an elevation of moralistic judgments above the interpretation fairly attributable to the policy." *Id.* at 626 (Clay, J., dissenting). Regarding the federal common law, the dissent observed that reviewing courts since *Wickman* have distorted the objective standard for determining whether injury or death is unexpected, framing the question whether an injury was "reasonably foreseeable" rather than whether it was "highly likely to occur." *Id.* at 626. And, "'the reasonably foreseeable' formulation is little more than a tool enabling plan administrators and courts to transform moral judgments about the insured's conduct into arbitrary denials of coverage under vaguely worded ERISA plans." *Id.* at 630.

The dissent viewed the lead opinion's characterization of Lennon's conduct as "grossly negligent drunk driving" as tantamount to stating that the insured intended to drive drunk, "harkening back to the distinction between

'accidental means' and 'accidental ends'" and providing no analytical assistance of "the insured's intentions or expectations with respect to the consequences of his voluntary act." *Id.* at 632. The dissent expressed its disapproval of drunk driving but equally disapproved the employment of a social-utility calculus as a means to interpret an insurance contract.

Less than two years after its splintered decision in *Lennon*, the Sixth Circuit held Kovach's plan administrator was arbitrary and capricious in concluding Kovach's leg injury was not an accidental occurrence. Kovach had a blood-alcohol level at the time of his crash of .148 percent, which was above the applicable legal limit of .08 percent, and significantly lower than Lennon's at the time of his crash. Kovach ran a stop sign on his motorcycle and was hit by a car, resulting in amputation of his left leg. The plan administrator had denied benefits based on its assessment that Kovach's injuries were not the result of an accident because they were a reasonably foreseeable consequence of driving while highly intoxicated. The district court ruled the denial was not arbitrary and capricious. The Sixth Circuit noted the most obvious distinction between *Kovach* and *Lennon* was the disparity between Lennon and Kovach's blood-alcohol levels.

On appeal, the Sixth Circuit focused on the plan administrator's interpretation of the term "accidental." Observing the ERISA requirement that benefit plans be written in a manner calculated to be understood by the average participant, the court concluded an ordinary person would consider Kovach's collision to be an accident. Regarding the foreseeability of the injury, the court wrote that reliable statistics show that the likelihood of serious injury or death for each person who drives while intoxicated is far less than reasonably foreseeable.

The court also noted that the reasonably foreseeable standard would operate to bar coverage in many circumstances in which the typical policy holder would consider accidental, *e.g.*, the driver who substantially increases her risk of a collision by driving while fatigued, or who drives after taking certain over-the-counter medications. Perhaps frustrated with the variant interpretations of the word "accidental," the Sixth Circuit adopted the *Wickman* "highly likely" standard for district courts in its circuit to utilize in determining whether an injury is "accidental" in ERISA cases.

Conclusion

The circuit courts of appeals have been unsuccessful in developing a uniform application of *Wickman*'s objective test. Plan administrators and the courts have tended to employ a "reasonable foreseeability" standard instead of the "highly likely" standard that *Wickman* calls for to determine whether an outcome is expected, and thus a non-accident.

Factors like the absence of an unambiguous policy definition, the discretion extended in some plans to the plan administrator, the applicable ERISA standard of review, state law principles of contract interpretation, consideration of objectives underlying ERISA, social mores, criminal laws, and occasionally policy language, have all contributed to this trend, of which inconsistent interpretations of the accidental insurance provisions in ERISA plans is a by-product.

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