Drunk in the Serbonian Bog:
Intoxicated Drivers’ Deaths as Insurance Accidents

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I. INTRODUCTION

Drunk driving is a scourge. On a yearly average, approximately 17,600 people die in alcohol-related motor vehicle accidents in the United States.1 The drunk drivers involved in these accidents are often among those killed.2 When they are, and when they are among the many people who hold insurance policies providing accidental death benefits, the question becomes whether their beneficiaries are entitled to recover under those policies. This is an astonishingly difficult question to answer. The term “accident” lends itself to differing interpretations.3 Indeed, few issues so confound courts and litigants as when deaths are to be considered accidents within the meaning of insurance policies affording accidental death coverage.4

More than seventy years ago, Justice Cardozo, dissenting in Landress v. Phoenix Mutual Life Insurance Co.,5 predicted that the Court’s suspect reasoning in denying accidental death benefits to the widow of a golfer killed by sunstroke would “plunge this branch of the law into a Serbonian Bog.”6 Later courts, struggling to determine whether some-
one's death was accidental for insurance purposes, have seized on this description in their analytical approaches.\textsuperscript{7} Scholars credit Justice Cardozo with "undeniably, the perfect metaphor."\textsuperscript{8}

Insurers often resist paying accidental death benefits to the spouses, children and other beneficiaries of policyholders killed while driving under the influence of alcohol on the grounds that the policyholders' deaths are not accidental. Metropolitan Life Insurance Company's (Met Life's) stance in Metropolitan Life Insurance Co. v. Potter\textsuperscript{9} is illustrative. In that case, Met Life denied David Potter's claim for accidental death benefits under his wife's employee benefit plan when she was killed in a motorcycle accident apparently attributable to her intoxication.\textsuperscript{10} Notwithstanding the medical examiner's declaration of Mrs. Potter's death as accidental,\textsuperscript{11} the insurer wrote:

Common sense, as well as the law, dictate that a death resulting from one's own drunk driving is not an "accident" for the purposes of collecting additional benefits under an ERISA plan's Accidental Loss Insurance. The term "accident" is universally construed as meaning an event which is "fortuitous, unexpected or unanticipated, which cannot reasonably be foreseen." The dangers of drunk driving . . . are so widely known . . . and publicized that they cannot innocently be ignored . . . [D]riving while intoxicated is too great a risk to be tolerated without penalty. In today's world, people who drink and drive must be charged with responsibility for their own acts. Serious injury or death resulting from drunk driving is to be expected; either is a result which can reasonably be foreseen. One's own injury or death from driving while intoxicated is, therefore, in

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\textsuperscript{7} See, e.g., Wickman v. Nw. Nat'l Ins. Co., 908 F.2d 1077, 1087 (1st Cir. 1990) ("[W]e continue our trek across this judicial morass realizing that some mud on our boots may be inevitable. Nonetheless, we continue to strive to avoid miring in a 'Serbian Bog.'"); Crisler v. Unum Ins. Co. of Am., 233 S.W.3d 658, 662 (Ark. 2006) (referring to earlier case and noting desire to avoid the Serbian Bog of accidental means versus accidental results); MAMSI Life & Health Ins. Co. v. Callaway, 825 A.2d 995, 1001 n.2 (Md. 2003) (noting the warning that accidental death interpretations risk miring courts in a Serbian bog and explaining the allusion's roots); Beckham v. Travelers Ins. Co., 225 A.2d 532, 535 (Pa. 1967) ("Our own cases have also confirmed Cardozo's prediction about plunging this branch of the law into a Serbian Bog."); Harrell v. Minn. Mut. Life Ins. Co., 937 S.W.2d 809, 814 (Tenn. 1996) ("Tennessee, therefore, joins the growing number of jurisdictions which have emerged from the 'Serbian Bog.'"); Republic Nat'l Life Ins. Co. v. Heyward, 536 S.W.2d 549, 557 (Tex. 1976) (noting that "Texas courts have waded through Justice Cardozo's Serbian bog").

\textsuperscript{10} \textit{Id.} at 720–21 (describing the accident and the decedent's blood alcohol content).
\textsuperscript{11} \textit{Id.} at 721.
the true sense of the word no “accident” at all. . . . People who drive (which is already potentially dangerous) while intoxicated (thus significantly elevating the risk that harm will occur) necessarily take the chance which invited their own injury or death. Injury or death resulting from such acts is not deemed an “accident” or an “accidental loss” for the purposes of obtaining Accidental Loss Insurance Benefits.\textsuperscript{12}

Curiously, Met Life had earlier referred to the decedent’s death in a “car accident” in an internal memorandum, which belied the “common sense” basis for its denial of accidental death benefits.\textsuperscript{13} That, combined with other disputed facts, caused the court to deny the company summary judgment.\textsuperscript{14} It seems obvious that Met Life’s reprobation of drunk driving had far more to do with its own economic concerns than it did with societal interests.\textsuperscript{15} Nonetheless, courts routinely reflect similar intolerance for drunk driving in their decisions and deny accidental death benefits in analogous cases.\textsuperscript{16} It now appears to be the majority rule that drunk drivers’ deaths are not accidental for purposes of accident insurance.\textsuperscript{17}

The problem, as this Article will demonstrate, is that the majority rule is wrong. Most motor vehicle crashes are traceable to “some failure of judgment that fully reveals its dangers only when it is too late. That is precisely why they are accidents.”\textsuperscript{18} For example, speeding is one of the most prevalent factors contributing to vehicular crashes.\textsuperscript{19} Although especially deadly when combined with driver intoxication, speeding is a significant contributing factor in fatal crashes involving sober drivers.\textsuperscript{20} Speeding is clearly unsafe,\textsuperscript{21} yet speeding does not in and of itself render a driver’s death non-accidental.\textsuperscript{22} Similarly, it is common sense that

\textsuperscript{12} Id. (quoting Met Life’s denial letter).
\textsuperscript{13} Id. at 730.
\textsuperscript{14} Id. at 725–31.
\textsuperscript{15} See West v. Aetna Life Ins. Co., 171 F. Supp. 2d 856, 904 (N.D. Iowa 2001) (noting that the absence of evidence supporting an administrator’s denial of benefits could indicate that financial self-interest was an underlying motive).
\textsuperscript{16} Marcus Wilbers, Note, Alcohol-Related Car “Accidents”? The Eighth Circuit Moves Toward Policy Change in ERISA Litigation, 71 Mo. L. REV. 471, 471 (2006).
\textsuperscript{17} Buhite & Marrero-Ladik, supra note 3, at 987.
\textsuperscript{18} Scales, supra note 8, at 298.
\textsuperscript{19} NAT’L HIGHWAY TRAFFIC SAFETY ADMIN., TRAFFIC SAFETY FACTS, SPEEDING 1 (2007).
\textsuperscript{20} Id. at 2.
\textsuperscript{22} See, e.g., Rodgers v. Reserve Life Ins. Co., 132 N.E.2d 692, 693–97 (Ill. App. Ct. 1956) (holding that insured’s death was accidental; insured was driving 100 m.p.h. at night on a country road when he missed a curve); Scott v. New Empire Ins. Co., 400 P.2d 953, 954–56 (N.M. 1965) (finding insured’s death to be accidental where insured was speeding at night on a mountain road on which he had never driven at night and missed a curve); Ky. Cent. Life Ins. Co. v. Fannin, 575
driving on icy or rain-slicked roads is significantly more dangerous than driving on dry ones, and countless news stories of catastrophic wrecks caused by wet or icy roads make related injuries reasonably foreseeable. Yet, no court would reason that the death of an average driver who voluntarily ventured out in inclement weather was anything other than accidental for insurance purposes. Likewise, driving at night is notably more dangerous than driving during daylight, as is apparent to all experienced drivers, and frequent news accounts of serious nighttime accidents make the associated danger foreseeable. Even so, the death of a driver who is killed when she dozes off and crosses a highway centerline, or who fails to appreciate the sharpness of a curve in the dark and runs off the road, is clearly accidental for insurance purposes.

Another major contributor to vehicular crashes, "distracted driving," may result from cellular phone use, eating, listening to music, or personal grooming while behind the wheel. In fact, "the performance of drivers who are conversing on cell phones is more impaired than drivers who are intoxicated." The dangers of distracted driving are obvious. Yet, a court is unlikely to find that a distracted driver’s death is anything other than accidental.

In summary, the fact that drunk drivers’ deaths may be publicly perceived as senseless, as the natural cost of obvious negligence or recklessness, or as reprehensible acts of stupidity, does not mean that they are not accidental. Accidents are commonly attributable to "careless, reckless, [and] perhaps foolhardy" behavior. Indeed, it is impossible to eliminate risky behaviors from the meaning of "accident" or "accidental." Met Life’s argument in Potter, and similar positions embraced by

S.W.2d 76, 79-83 (Tex. App. 1978) (upholding verdict that driver’s death was accidental where driver was traveling 100-110 m.p.h. on a country road, ran a stop sign and rolled her car).

23. NAT’L HIGHWAY TRAFFIC SAFETY ADMIN., TRAFFIC SAFETY FACTS RESEARCH NOTE, PASSENGER VEHICLE OCCUPANT FATALITIES BY DAY AND NIGHT—A CONTRAST 1 (May 2007) (stating that passenger vehicle occupant fatality rate at night is about triple the daytime rate); NAT’L SAFETY COUNCIL, DRIVING AT NIGHT, available at http://www.nsc.org/resources/Factsheets/road/night_driving.aspx (last visited July 15, 2008) (explaining why driving at night is dangerous).

24. See, e.g., Rodgers, 132 N.E.2d at 693-97 (finding insured’s death to be accidental where he was driving 100 m.p.h. at night on a country road and missed a curve); Scout, 400 P.2d at 954-56 (finding insured’s death to be accidental where insured was speeding at night on a mountain road and was killed when he failed to negotiate a curve).


26. Id.


28. Scales, supra note 8, at 299.

29. Rodgers, 132 N.E.2d at 697.

numerous other courts, erroneously "confl ate[] ‘accidental’ with ‘inno-
cent.’" 31

Moving forward, Part II of this Article briefly discusses the de-
velopment of accident insurance. It examines courts' struggles in deter-
mining whether an insured's death was an accident for purposes of award-
ing accidental death benefits, and approaches to resolving this issue.

Part III reviews the case law on drunk drivers' deaths as accidents
within the meaning of accidental death insurance, examining repre-
sentative cases in three categories. First, cases reflecting the majority rule that
drunk drivers' deaths are not accidents. Second, cases characterizing
drunk drivers' deaths as accidents—the present minority view. Third,
cases in which courts deny accidental death benefits not because they
characterize intoxicated drivers' deaths as non-accidental, but because of
policy exclusions.

Within these categories, Part III similarly treats accidental death
cases decided in relation to the Employee Retirement Income Security
Act of 1974 ("ERISA") 32 and those decided under state law, even though
many courts and litigants urge a distinction. This is because ERISA does
not preclude courts from correctly determining that an insured's death
was accidental in a case in which an ERISA plan administrator reached
the opposite conclusion. 33 It is, nonetheless, important to recognize
ERISA's impact in this area.

ERISA comprehensively regulates employee welfare benefit plans
that provide benefits to plan participants in the event of calamities, in-
cluding those that do so through insurance. 34 Congress enacted ERISA
with the intent "that a federal common law of rights and obligations un-
der ERISA-regulated plans would develop." 35 This it has. The validity
of a claim to benefits under an ERISA-regulated plan typically turns on
an interpretation of the plan's terms. 36 This includes the terms of group
insurance policies within a plan. If a plan participant or beneficiaries
challenge an administrator's decision denying benefits, the issue is often
the federal common law standard of review. Absent a conflict of inter-
est, or other extraordinary circumstances, judicial review of a plan ad-
ministrator's decision is de novo. Exceptions are when the plan gives the
administrator the power to construe "disputed or doubtful terms" or pro-

(finding plan administrator's decision denying benefits arbitrary and capricious); West v. Aetna Life
35. Id. at 56.
vides that the court afford deference the administrator’s eligibility determinations. Where a plan grants an administrator such discretionary powers courts review the administrator’s eligibility determinations only for abuse of discretion. Applying an abuse of discretion standard, the court will uphold an administrator’s eligibility determination so long as the administrator’s interpretation of disputed or doubtful terms is reasonable, and the decision is supported by substantial evidence. Alternatively, a court may review a plan administrator’s discretionary determination according to an “arbitrary and capricious” standard, meaning that the court will uphold the determination unless it is irrational in light of the plan’s provisions.

Many ERISA-regulated plans grant the administrator broad discretion. If so, and the plan administrator has determined that an insured’s death is not accidental, a federal court is limited to reviewing that determination for an abuse of discretion or for being arbitrary and capricious. But deferential standards of review do not transform federal courts into rubber stamps. Courts may well find that plan administrators abused their discretion or acted arbitrarily in determining that insureds’ deaths linked to driving while intoxicated were not accidental. The fact that more courts do not overturn administrators’ decisions in drunk driving cases reviewed deferentially is more a problem attributable to courts’ analyses or value judgments than it is a product of the standard being applied. Claimants’ failure to make a suitable evidentiary record before plan administrators exacerbates the problem. Thus, while it is true that most of the cases holding that drunk drivers’ deaths are not accidents for insurance purposes involve federal courts applying deferential standards of review, it is unwise to categorically distinguish them on that basis.

38. Id. at 999.
39. Id.
41. See id. at 661 (quoting cases).
42. Id.; see also Cozzie v. Metro. Life Ins. Co., 140 F.3d 1104, 1108 (7th Cir. 1998) (noting that even arbitrary and capricious standard of review is not “without some teeth”).
Part IV explains the analytical framework that courts should employ when attempting to determine whether an intoxicated driver’s death was accidental. This approach was proposed nearly twenty years ago in *Wickman v. Northwestern National Insurance Co.*[^45] but many courts that have attempted to apply it have misconstrued its elements, or have substituted value judgments for legal ones. This Part strives to correct such errors and to appropriately guide future courts.

II. FUNDAMENTALS OF ACCIDENT INSURANCE

Accident insurance has a long history. It is presently enough to understand that today it overlaps with life, health, and disability insurance.[^46] Accident insurance may be sold as a separate policy or combined with other forms of insurance.[^47] Insurers may provide it as part of a group insurance policy or in an individual policy.[^48] Millions of people now enjoy the protection of accidental death benefits.[^49]

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.[^50] The insurer charges an additional premium for the accidental death benefit, but this premium is comparatively low, reflecting the relatively low probability of loss.[^51] People are less likely to die from accidents than they are to die from other causes.[^52] Nonetheless, the coverage has value. If, for example, a life insurance policy provides a death benefit of $100,000, and the policyholder dies in an accident, the insurance company will pay the policyholder’s beneficiaries $200,000: $100,000 in death benefits and $100,000 in accidental death benefits. The presence of an accidental death benefit in a life insurance policy leads to the common description of many life insurance policies as “double-indemnity” policies.[^53] A pol-


[^46]: 908 F.2d 1077 (1st Cir. 1990).

[^47]: 10 LEE R. RUSS & THOMAS F. SEGALLA, COUCH ON INSURANCE 3D § 139:1, at 139-7 to -8 (2005) [hereinafter COUCH ON INSURANCE 3D].

[^48]: Id. § 139:1, at 139-8.

[^49]: Id.


[^52]: Id.

[^53]: JERRY & RICHMOND, supra note 50, at 474–75.
icy’s accidental death benefit has its own set of exclusions separate from those that apply to the basic life insurance coverage. If one of those exclusions applies, or if the insured’s death is not accidental, the insured’s beneficiaries will receive the life insurance death benefit but not the accidental death benefit. This can make a material economic difference to the beneficiaries, as the foregoing example illustrates.

A. The Meaning of Accidental Death: Natural and Probable Consequences

Litigation over accidental death benefits typically pivots on the circumstances or nature of the insured’s death: was it accidental? This question is generally answered from the insured’s standpoint. Unfortunately, “accident” and “accidental” are two of the most elusive terms in insurance law. Like pornography, however, courts are sure that they will recognize accidents upon sight. As the Oregon Supreme Court observed in Botts v. Hartford Accident & Indemnity Co., “[t]here are probably not many words which have caused courts as much trouble as ‘accident’ and ‘accidental.'” These words do not lend themselves to exact or specific meanings, yet “everyone thinks he knows an accident when he sees one.”

Courts’ ability to recognize accidents when they see them is debatable. There are few consistent threads running through the numerous cases on the subject. In many cases, the insureds voluntarily engaged in risky activities that contributed to their deaths. The essential difficulty then becomes determining the insured’s intent. If an insured dies as a result of an activity from which death is a natural and foreseeable consequence, was the insured’s death accidental? Maybe yes, maybe no. Consider, for example, an insured who dies as a result of a cocaine or heroin overdose. It certainly is arguable that the dangers of using these powerful drugs are so well known that the insured’s death cannot be

54. Id. at 475.
55. Id. (assuming that the policy is in force and an exclusion applicable to the basic life insurance coverage does not also pertain to the insured’s death).
57. 585 P.2d 657 (Or. 1978).
58. Id. at 660.
59. Id.
60. See JERRY & RICHMOND, supra note 50, at 476 (stating that “generalities are difficult to make” and observing that the fact patterns in these cases “are so diverse, the causation patterns so varied, and the judicial decisions so divergent that guideposts for predicting results in particular cases are virtually nonexistent”).
called an accident. On the other hand, a person who dies from an overdose of an illicit drug probably used the drug before and never anticipated or expected that the next use would prove fatal. Even if she is a knowing first-time user, a person killed by cocaine surely did not expect or intend to die as a result of the drug’s use and her death is fairly deemed to be an accident.

A Wisconsin appellate court struggled with the concept of accidental death in *Kennedy v. Washington National Insurance Co.* There, an orthopedic surgeon, Kennedy, somehow strangled himself during autoerotic masturbation. The insurer contended that Kennedy’s death was not accidental because he “voluntarily exposed himself to a known and unnecessary risk of death.” The court disagreed, explaining:

> [T]he intentional or unnecessary exposure to risks, as well as the negligent creation of risks to one’s own safety, does not prevent the result from being accidental. The customary expectation of a policyholder is that the injury or death is accidental if there is some reasonable basis for the belief that his conduct does not make the injury or death an expected result.

More is required than a simple showing that injury or death might result [from an activity]. . . . It must be demonstrated in some way that [the insured] knew or should have known that his actions probably would result in his death.

Although Kennedy’s actions were extraordinary, it was reasonable to infer from the facts that he had done this sort of thing before, his purpose was sexual gratification, and he expected to emerge from the experience unscathed. His actions were foolish and involved some risk of injury or death, but death was “not a normal expected result of [the] be-

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63. 401 N.W.2d 842 (Wis. Ct. App. 1987).

64. *Id.* at 843–44.

65. *Id.* at 844.

66. *Id.* at 846.

67. *Id.*
havior.”68 His death was therefore accidental.69 Other courts have reached the opposite conclusion on similar facts.70

B. Accidental Means Versus Accidental Results: A False Distinction

Difficulties in determining whether an insured’s death was accidental are as old as accident insurance itself. To alleviate these difficulties and narrow coverage in the process, insurers began distinguishing between “accidental means” and “accidental results.”71 For example, a policy providing accidental death benefits only where the insured died as a result of accidental means might state that coverage would apply if the insured suffers fatal “bodily injury . . . , directly and independently of all other causes through accidental means.”72 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.”73 By affording coverage only if an insured’s death is the product of accidental means, an insurer is attempting to require that the mechanism of loss be accidental, rather than insuring against intentional acts that produce unintended results.74 In the accident insurance realm, “means” is synonymous with “cause.”75

The distinction between accidental means and accidental results is at best artificial and tenuous. Indeed, it is this distinction that prompted Justice Cardozo’s famous Serbonian Bog allusion.76 As a result, a number of courts have rejected it.77

Knight v. Metropolitan Life Insurance Co.78 is an exemplary case. Jackie Knight was insured under a Met Life policy that provided accidental death and dismemberment benefits for bodily injuries sustained “solely through violent, external and accidental means.”79 Knight was an

68. Id.
69. Id.; see also Critchlow v. First UNUM Life Ins. Co. of Am., 378 F.3d 246, 263–64 (2d Cir. 2004) (finding that insured’s death during autoerotic asphyxiation was accidental under federal common law).
71. JERRY & RICHMOND, supra note 50, at 457.
74. JERRY & RICHMOND, supra note 50, at 457.
75. COUCH ON INSURANCE 3D, supra note 46, § 139:21, at 139–46.
76. See supra notes 5–6 and the accompanying text.
77. See Weil, 866 P.2d at 781 (identifying courts).
79. Id. at 417.
accomplished high diver, who, by his twenties, had made dives from upwards of 75 feet from railroad trestles, ship decks, cliffs and canyons, and the towering Coolidge Dam.80 Those who knew him considered him to be “a very experienced and good diver,” and noted his extreme confidence in his own ability.81 At age twenty-two, Knight made a swan dive from atop the Coolidge Dam, but misjudged his distance and was killed from landing on his back. A trial court decided that Met Life did not owe Knight’s mother accidental death benefits because Knight should have anticipated that he would die or be seriously injured as a natural and probable consequence of his dive, meaning that his death was not accidental.82 The Arizona Supreme Court disagreed.

The court in Knight rejected any distinction between accidental means and accidental results on the basis that it was contrary to the parties’ intentions.83 In the court’s view:

One paying the premium for a policy which insures against “death by accidental means” intends to provide benefits to his family or named beneficiary in the event he should suffer death caused by accident as opposed to death caused by other means, such as suicide, murder, disease, or natural death. He intends to insure against the fortuitous, the unintentional, and the unexpected, that which happens through mishap, mischance or misjudgment. . . . [H]e does not intend that any act by him, no matter how daring, reckless or foolhardy, be adjudged by a court under “reasonable man tests” or “natural and probable consequence” standards to deprive his beneficiary of contractual rights arising out of his unintended and unexpected and, therefore, accidental death.84

Knight attempted a daring dive, but he thought he could successfully perform the feat. The fact that a reasonable man might think the stunt foolhardy, the court observed, would “not of itself make the result any less accidental.”85 Accordingly, the supreme court reversed the trial court’s judgment for Met Life and awarded Knight’s mother the accidental death benefit.86

Although the distinction between accidental means and accidental results has been widely discredited and insurers have generally deleted this language from their policies, some courts still embrace the distinc-

80. Id. at 418.
81. Id.
82. See id. at 417 (quoting trial court’s conclusions of law).
83. Id. at 420.
84. Id. (citations omitted).
85. Id. at 421.
86. Id.
tion. This is most often the case where the policy at issue employs accidental means language. Some courts, however, retain the distinction regardless of policy language.

Gaddy v. Hartford Life Insurance Co. illustrates the accidental means test's application in a drunk driving case. The insured, Charles Gaddy, was killed when he lost control of his car on a curve, overcorrected, and struck an oncoming vehicle. The other driver also died. The Missouri State Highway Patrol investigated the wreck, determined that Gaddy's blood alcohol content or concentration (BAC) was twice the state's legal limit, and ruled that his intoxication caused the crash. Gaddy had an accidental death and dismemberment policy with Hartford, which declined to pay Gaddy's widow and children on the basis that Gaddy's death was not accidental as a matter of Missouri law. The Gaddy family sued Hartford and the company moved for summary judgment.

The question of whether an intoxicated driver's death is accidental was a matter of first impression under Missouri law, leaving the district court to predict how the Missouri Supreme Court would rule. "Missouri courts have long held that although an injury may be unusual or unexpected, it is not the result of an accident if the 'means causing the injury has been employed by the insured in the usual and expected way.' An insured's death, even if unexpected, is not accidental under Missouri law if it is the product of voluntary exposure to a known peril that ordinary and reasonable prudence would deem dangerous. This is an objective standard.

The court began its analysis by noting that Gaddy voluntarily decided to drive while intoxicated and that a "reasonable person of ordinary prudence is presumed to know that driving while intoxicated presents a serious risk of death or serious bodily harm." This position, the court

88. See COUCH ON INSURANCE 3D, supra note 46, § 139:21, at 139-48 (noting that "the bulk of the jurisdictions adhering to a distinction between accidental results and accidental means" do so only where the policy uses accidental means language) (emphasis added).
89. 218 F. Supp. 2d 1123 (E.D. Mo. 2002).
90. Id. at 1125.
91. Id. at 1126.
92. Id.
93. Id. at 1127 (quoting Applebury v. John Hancock Mut. Life Ins. Co., 379 S.W.2d 867, 870 (Mo. Ct. App. 1964)).
94. Id. at 1128.
95. Id.
96. Id.
observed, reflected the majority view of the federal courts.\textsuperscript{97} If Gaddy had survived the crash, he could have been criminally charged with felonies for driving with excessive alcohol content and involuntary manslaughter. The Missouri legislature’s designation of drunk driving as a felony seemingly suggested that the consequences of this behavior were foreseeable.\textsuperscript{98}

In the end, the \textit{Gaddy} court determined that the insured’s death “was the probable, natural and foreseeable result of his intentional act of driving while intoxicated, and therefore was not an ‘accident’ under Missouri law.”\textsuperscript{99} The court reasoned that Missouri courts would hold that an insured’s death proximately caused by driving while intoxicated was not an accident within the meaning of an accidental death and dismemberment insurance policy.\textsuperscript{100} Accordingly, the court granted Hartford’s summary judgment motion.\textsuperscript{101}

\textbf{C. The Wickman Test}

Seeking a course around the Serbonian Bog of accidental means versus accidental results, the First Circuit formulated a new two-part test for accidents under federal common law in \textit{Wickman v. Northwestern National Insurance Co.}\textsuperscript{102} Many federal courts have adopted the \textit{Wickman} analytical framework.\textsuperscript{103} Apparently because the First Circuit was discussing federal common law and the case involved an ERISA plan, however, the \textit{Wickman} approach has not caught on with state courts.

In \textit{Wickman}, the insured, Paul Wickman, was seen by a motorist standing on the outside of a bridge guardrail, holding onto the guardrail with only one hand. The motorist looked away to check traffic and, when he looked back, he saw Wickman falling from the bridge.\textsuperscript{104} The motorist summoned aid and Wickman, remarkably still alive, was rushed to a hospital. As he lay dying in the hospital’s emergency room, he told an emergency room staff member that he had jumped off the bridge.\textsuperscript{105} Because of concerns about Wickman’s orientation at the time he said that he had jumped, the coroner, who had initially described Wickman’s

\textsuperscript{97} Id. (citing four cases as examples).
\textsuperscript{98} Id.
\textsuperscript{99} Id.
\textsuperscript{100} Id. at 1128–29.
\textsuperscript{101} Id. at 1129.
\textsuperscript{102} 908 F.2d 1077 (1st Cir. 1990).
\textsuperscript{104} \textit{Wickman}, 908 F.2d at 1080.
\textsuperscript{105} Id.
death as a suicide based on that statement, amended his conclusion and fixed the cause of death as a “fall.”

Wickman was insured under a Northwestern accidental death and dismemberment policy held by his employer. The policy defined an accident as “an unexpected, external, violent and sudden event,” and excluded benefits for losses caused “by suicide or intentionally self-inflicted injury, whether . . . sane or insane.” Northwestern refused to pay Wickman’s widow the accidental death benefits, and she sued the company in federal court under ERISA. The case was tried to a magistrate, who found that Wickman’s death was not an accident because he “knew or should have known that serious bodily injury or death was a probable consequence substantially likely to occur as a result of the volitional act of placing himself outside of the guardrail and hanging on with one hand.” The widow appealed.

Given the facts and policy language, the question for the First Circuit was whether the widow was due accidental death benefits if Wickman climbed over the guardrail without any intent to injure or kill himself, but fell inadvertently. In answering this question, the First Circuit rejected the distinction between accidental means and accidental results, and resolved to follow a path to resolution “which safely circumvent[ed] this ‘Serbonian Bog.’”

In defining the term “accident,” the court declined to accept the widow’s argument that “unless Wickman actually expected to die, essentially that he expected to commit suicide, his death must be considered an accident.” There were two reasons for this. First, this test would be inappropriate in cases in which the insured’s expectations were clearly unreasonable and, therefore, equated to specific intent. For instance, in a case in which an insured was killed playing Russian Roulette to honor his “fanciful expectation” that fate would favor him, it would defeat the purpose of accidental death insurance to declare his death accidental. Second, insureds’ actual expectations are often difficult to determine, if not impossible. Courts would, thus, be forced to speculate about insureds’ expectations, which is undesirable.

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106. Id.
107. Id. at 1081 (quoting policy).
108. Id. (quoting the magistrate’s decision).
109. Id. at 1084.
110. Id. at 1086.
111. Id. at 1087.
112. Id.
113. Id.
114. Id.
115. Id. at 1088.
Despite these problems, the court was unwilling to ignore insureds' actual expectations. Insureds purchase accident insurance "for the very purpose of obtaining protection from their own miscalculations and misjudgments." Thus, an insured's reasonable expectations are an appropriate starting point for analyzing whether her death is accidental for insurance purposes.

Accordingly, a court must first analyze the insured's reasonable expectations. If the insured expected an injury of the kind suffered, that obviously ends the inquiry; the insured's injury or death was not an accident. In the more likely event that the court finds that the insured did not expect to suffer an injury "similar in type or kind to that suffered," the court must "examine whether the suppositions which underlay that expectation were reasonable." If the insured's suppositions are judged to be unreasonable, then the injuries will be deemed non-accidental. In determining the reasonableness of the insured's suppositions, the court should view matters from the insured's perspective and take into account the insured's personal characteristics and experiences. Second, if the court cannot ascertain the insured's subjective expectation because of insufficient evidence, then it should objectively analyze the insured's expectations. "In this analysis, one must ask whether a reasonable person, with background and characteristics similar to the insured, would have viewed the injury as highly likely to occur as a result of the insured's intentional conduct." Requiring the court to conduct this objective analysis from the standpoint of a reasonable person in the insured's shoes respects the axiom that accidents should be determined from the insured's perspective.

Applying this test, the First Circuit concluded that the magistrate did not err in ruling that Wickman's death was not accidental. Either Wickman subjectively expected that he would suffer serious injury, or the evidence was inconclusive on that point. Objectively, Wickman reasonably should have expected to suffer serious injury. The bridge was high, the foothold was narrow, and he possessed no extraordinary physical skills that would have allowed him to safely grasp the guardrail with

116. Id.
117. Id.
118. Id. at 1088.
119. Id. (citing N.Y. Life Ins. Co. v. Harrington, 299 F.2d 803, 806 (9th Cir. 1962)).
120. Id.
121. Id.
122. Id.
123. Id.
124. Id.
125. Id. at 1089.
one hand. In summary, Wickman’s death was not accidental as a matter of federal common law.

The Wickman court reached the correct result, but courts struggle with this approach in drunk driving cases. Courts tend to erroneously collapse the Wickman multi-factor analysis into one of simple objective foreseeability. Sometimes they disregard evidence of the insured’s subjective intent to apply an objective standard, disregarding Wickman’s first prong.

Some courts ignore the Wickman court’s requirements that objective analysis in this realm adopt the standpoint of a reasonable person with the insured’s background and characteristics, and that such a person view fatal injury as having been highly likely. Even when engaging in supposedly objective analysis, the test allows courts that are so inclined to focus on the normative aspects of drunk driving rather than the facts surrounding the insured’s death. Whether drunk driving is, in fact, highly likely to cause intoxicated drivers’ deaths often escapes reasoned analysis. Insofar as drunk driving cases are concerned, the Wickman approach has proven to be little different from the accidental means test that the First Circuit sought to avoid.

III. DRUNK DRIVERS’ DEATHS AS ACCIDENTAL DEATHS OR AS SOMETHING ELSE: THE CURRENT STATE OF THE LAW

The case law on drunk drivers’ deaths as accidental deaths for accidental death insurance purposes falls into three categories. The majority approach holds that drunk drivers’ deaths are not accidents for purposes of conferring accidental death benefits. The minority approach holds that such deaths are accidental, thus entitling deceased drivers’ beneficiaries to double indemnity payouts. Finally, in some cases, accidental death benefits may be denied not because a drunk driver’s death is determined to be non-accidental, but because an exclusion in the subject policy precludes accidental death coverage.

A. The Majority Approach: Drunk Drivers’ Deaths Are Not Accidents

Again, most courts presented with the issue have concluded that intoxicated drivers’ deaths attributable to their intoxication are not acci-

126. Id.
127. Id.
131. See, e.g., Miller v. Auto-Alliance Int’l, Inc., 953 F. Supp. 172, 176 (E.D. Mich. 1997) (failing to see how “an automobile collision caused by a person who was driving while intoxicated and which results in his death or dismemberment can be said to be an “accident””).
idents for accidental death insurance purposes. 132 *Eckelberry v. ReliaStar Life Insurance Co.* 133 is a representative case.

Earl Eckelberry was killed when his car crashed into the back of a parked tractor-trailer rig near Parkersburg, West Virginia, in the very early morning. His BAC was 0.15—50% higher than the West Virginia legal limit of 0.10. 134 He had an accidental death and dismemberment ("AD & D") policy through his employer, Ames. The policy was issued by ReliaStar, which administered Ames's ERISA plan with broad discretionary authority. The plan documents defined "accident" as "an unexpected and sudden event which the insured does not foresee." 135 When Eckelberry's ex-wife, Michele, made a claim for AD & D benefits, ReliaStar denied it on the grounds that Earl's death was not an accident. ReliaStar asserted that by driving under the influence of alcohol, Earl knowingly exposed himself to the risk of death or serious injury, such as being hit by another vehicle or coming off the road.

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133. 469 F.3d 340 (4th Cir. 2006).
134. Id. at 342.
135. Id. (quoting the plan).
that his death was not unexpected.\textsuperscript{136} Michele Eckelberry sued ReliaStar and won in the district court, which held that the insurer had unreasonably interpreted the plan’s definition of accident.\textsuperscript{137} ReliaStar appealed.

The Fourth Circuit purportedly employed the \textit{Wickman} framework to determine whether Earl Eckelberry’s death was accidental.\textsuperscript{138} Because there was no evidence in the record from which his subjective expectations could be accurately determined, the court proceeded objectively, in theory searching for “whether a reasonable person, with [a] 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.”\textsuperscript{139}

The plaintiff argued that ReliaStar’s denial of benefits was unreasonable because (1) drunk-driving injuries are not highly likely to occur; and (2) ReliaStar’s urged interpretation of the term “accident” would frustrate the purpose of AD & D insurance.\textsuperscript{140} The court disagreed based on the weight of contrary federal authority:

\begin{quote}
[F]ederal courts have found with near universal accord that alcohol-related injuries and deaths are not “accidental” under insurance contracts governed by ERISA. . . .
\end{quote}

These courts have applied the objective foreseeability test set forth in \textit{Wickman} and reasoned that since “the hazards of drinking and driving are widely known and widely publicized” the insured should have known that that driving while intoxicated was highly likely to result in death or bodily harm.\textsuperscript{141}

Furthermore, the court reasoned:

\begin{quote}
We do not understand ReliaStar to have applied a per se rule to Eckelberry’s case. The simple fact that drunk driving occurred does not mean that there was no accident under the policy. If the insurer did not intend to cover any injury to a drunk driver, then drunk driving would have been a specific exclusion listed in the plan.\textsuperscript{142}
\end{quote}

Earl Eckelberry was plainly intoxicated at the time of the fatal crash, the tractor-trailer rig he struck was parked well off the road, and he was not wearing a seatbelt. All of this conduct is consistent with a 0.15 BAC, which typically causes blurred vision, impaired judgment,

\begin{thebibliography}{99}
\bibitem{136} Id.
\bibitem{137} Id.
\bibitem{138} Id. at 343–44.
\bibitem{139} Id. at 344 (quoting \textit{Wickman}, 908 F.2d at 1088).
\bibitem{140} Id.
\bibitem{141} Id. at 344–45 (citations omitted).
\bibitem{142} Id. at 345.
\end{thebibliography}
and reduced motor coordination.\textsuperscript{143} West Virginia, like other states, criminalizes drunk driving and imposes harsh penalties for the crime.\textsuperscript{144} In the court’s view, the fact that Eckelberry did not intend to crash into the tractor-trailer rig could not alone render his death accidental. \textquoteleft{}To put it simply, unjustifiable optimism about one’s odds (or failure even to calculate them) does not relieve conduct such as Eckelberry’s of foreseeable results.\textquoteright\textsuperscript{145}

By choosing to drive while intoxicated, Earl Eckelberry voluntarily placed himself and other motorists in peril. To characterize harm flowing from such behavior as accidental, the court reasoned, would diminish the personal responsibility required by West Virginia state law and the commonly understood rules of the road.\textsuperscript{146} In short, there was no basis for the court to conclude that ReliaStar’s denial of benefits was unreasonable.\textsuperscript{147}

The court was additionally unimpressed with the plaintiff’s argument that ReliaStar’s interpretation of the term “accident” would frustrate the purpose of AD & D insurance. A plan administrator must deny “unmeritorious” claims to protect the financial health of pooled plan assets and thus ensure the availability of benefits for future applicants.\textsuperscript{148} And, because a plan administrator must consider the best interests of all plan participants, it is reasonable for an administrator to distinguish between deaths caused by ultra-hazardous activities such as drunk driving and other tragedies that do not involve the voluntary assumption of a known risk.\textsuperscript{149}

Finally, the court attempted to emphasize the limits of its decision. It did not intend to foreclose AD & D benefits in cases of insureds killed due to other forms of automobile-related negligence.\textsuperscript{150} It was inappropriate, as the district court did in finding for the plaintiff, to analogize wrecks caused by drunk driving to those resulting from distracted driving, such as driving while applying lipstick, adjusting a radio dial, or talking on a cellular phone.\textsuperscript{151} Although speeding is a crime and in some jurisdictions driving while using a cell phone is illegal, these offenses do not rise to the level of drunk driving, which is widely-known to be both

\begin{itemize}
\item \textsuperscript{143} Id.
\item \textsuperscript{144} Id. at 345–46.
\item \textsuperscript{145} Id. at 346.
\item \textsuperscript{146} Id.
\item \textsuperscript{147} Id.
\item \textsuperscript{148} Id. at 347.
\item \textsuperscript{149} Id.
\item \textsuperscript{150} Id.
\item \textsuperscript{151} Id.
\end{itemize}
illegal and extremely dangerous. Even so, the court said that it was unwilling to declare that drunk driving deaths can never be accidents; whether they are or are not depends on the facts of a given AD & D claim.

Ultimately, the Fourth Circuit accepted ReliaStar’s denial of benefits as reasonable, reversed the district court judgment for the plaintiff, and remanded the case with instructions to enter judgment for the insurer.

The decision in *Eckelberry* is seriously flawed in several respects. To begin, the court appears to have misconstrued the objective prong of the *Wickman* analysis, which required it to ask “whether a reasonable person, with [a] 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.” The Fourth Circuit essentially treated the analysis as one of routine foreseeability, seizing on the fact that Eckelberry chose to drive when his vision, motor skills and judgment were likely to be impaired. The fact that driving while intoxicated is more dangerous than driving while sober, however, does not mean that death or serious injury is highly likely to occur as a result. Events that are merely possible may not be reasonably foreseeable. The objective prong of the *Wickman* analysis requires far more.

Second, the fact that many other federal courts have determined that drunk driving deaths are not accidents for insurance purposes is essentially meaningless. Each case rises or falls on its own facts—or at least it should, as the Fourth Circuit apparently recognized. Even if the weight of authority was a compelling consideration—arguably because it demonstrated that the plan administrator’s discretionary decision was not arbitrary and capricious—reliance on other cases surely requires at least some attempt to determine whether they were correctly decided. For example, the *Eckelberry* court approvingly discussed the Seventh Circuit’s 1998 decision in *Cozzie v. Metropolitan Life Insurance Co.*, yet a cursory review of *Cozzie* reveals that the Seventh Circuit botched the *Wickman* analysis by applying a simple foreseeability test. Further-

152. *Id.*
153. *Id.*
154. *Id.* at 347–48.
156. *Eckelberry*, 469 F.3d at 346.
157. *Id.* at 347 (rejecting a per se rule in drunk driving cases and explaining ERISA plan administrators’ obligations with respect to claim analysis and evaluation).
158. *Id.* at 345.
159. 140 F.3d 1104 (7th Cir. 1998).
160. *Id.* at 1110.
more, the court in *Eckelberry* did not even acknowledge cases reaching the opposite result or criticizing courts’ widespread misapplication of the *Wickman* test, even though at least one prior case stood out for its careful approach to these issues. There is no excuse for the court’s failure to acknowledge that case, *West v. Aetna Life Insurance Co.*, because the plaintiff cited it in her appellate brief.

Third, the premise that ReliaStar’s denial of benefits was reasonable because it did not reflect a per se rule against drunk driving merits scrutiny, because the obvious converse is that the company’s denial would have been unreasonable were it the product of a per se rule. As the court saw it, if ReliaStar had not intended to cover “any injury to a drunk driver, then drunk driving would have been a specific exclusion listed in the plan.” In other words, the lack of a drunk driving exclusion in the plan supposedly indicated that ReliaStar would pay benefits for drunk drivers’ deaths on the right facts, but Eckelberry’s death did not fit the accident mold, and ReliaStar’s denial of benefits was therefore reasonable. The court’s conclusion is unsubsupportable, however, because it reflects a gross misunderstanding of basic insurance law.

To explain, coverage under any insurance policy is conferred by the policy’s insuring agreements. The purpose of an exclusion in an insurance policy is to exclude from coverage an event that would otherwise be insured. If a policy’s insuring agreements do not provide coverage for an event, the absence of an exclusion for that event is irrelevant. The absence of an exclusion in a policy neither confers nor implies coverage. Accordingly, an accidental death insurer has no need to insert a drunk driving exclusion in its policy if an insured’s death attributable to drunk driving is not covered in the first place. That is exactly the insurer’s position when it denies benefits on the rationale that drunk drivers’ deaths are not “accidents” or “accidental.” It is possible, then, that

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161. See *Eckelberry*, 469 F.3d at 344–45 (discussing cases); see also Metro. Life Ins. Co. v. Potter, 992 F. Supp. 717, 729 (D.N.J. 1998) (noting that in some of the cases cited by the court in *Eckelberry*, the courts cited *Wickman* but did not actually employ that analysis).


163. Id.


165. *Eckelberry*, 469 F.3d at 345.

166. See *State Farm Fire & Cas. Co. v. Acuity*, 695 N.W.2d 883, 886 (Wis. 2005) (“To determine whether coverage exists under a particular policy, we first examine the facts of the insured’s claim to ascertain whether the insuring agreement makes an initial grant of coverage.”).


168. Id.; see also *State Farm*, 695 N.W.2d at 886 (explaining that a court looks to see if any exclusions apply only if there is an initial grant of coverage).

ReliaStar was applying a per se rule to all drunk driving deaths, but the Fourth Circuit missed it out of ignorance of fundamental insurance law.

Finally, the court's rejection of the plaintiff's and the district court's attempts to analogize drunk driving to distracted driving when classifying drivers' deaths as accidental warrants scrutiny. While acknowledging that "speeding and (in some jurisdictions) driving while talking on a cellular phone are illegal," the Fourth Circuit considered these undesirable habits to be incomparable to drunk driving, "which has long been 'widely known and widely publicized' to be both illegal and highly dangerous." But driving while talking on a cellular phone is even more dangerous than driving under the influence of alcohol because drivers on cellular phones are "more impaired than drivers who are intoxicated." The dangers of cell phone use while driving are well known, as evidenced by widespread legislative efforts to prohibit or restrict it. The parallels between drunk driving and driving while conversing on a cellular phone are apparent. So, in the future, will the Fourth Circuit treat driving while talking on a cellular phone as the equivalent of drunk driving for purposes of awarding accidental death benefits? The answer, plainly, is no. That alone demonstrates the arbitrariness of the court's decision in Eckelberry.

A more recent case denying benefits based on an insured's intoxication is the Sixth Circuit case Lennon v. Metropolitan Life Insurance Co. In that case, David Lennon was killed when he drove his car off a perfectly good highway and into a wall in the very early morning. Lennon's BAC was three times the Michigan legal limit of 0.10. The medical examiner reported that Lennon's death was an "accident." Met Life, functioning as an ERISA plan administrator with discretionary authority, denied accidental death benefits to Lennon's mother on the principal basis that his death was not accidental as evidenced by his blood alcohol content. She then sued Met Life in a Michigan federal court.

Following Wickman, the district court held that Met Life's decision was arbitrary and capricious given that (1) there was no evidence that Lennon lost control of his vehicle because of his intoxication; (2) Met

171. Leesfield & Segal, supra note 25, at 59.
172. Id. at 60.
173. Id. at 62.
174. 504 F.3d 617 (6th Cir. 2007).
175. Id. at 619.
176. Id. at 619 n.3.
177. Id. at 619–20.
Life offered no evidence in support of its position that death is a reasonably foreseeable consequence of driving while impaired; (3) Met Life offered no evidence suggesting that Lennon intended to be involved in a wreck when he decided to drive while intoxicated or that a reasonable person in his position would have viewed a fatal accident as being highly likely; and (4) the plaintiff offered evidence suggesting that “despite the increased risks associated with drunk driving, a person in Mr. Lennon’s situation would have viewed it as highly likely that he would return home safely on the night in question.”

Despite recognizing “the logical force of the district court’s analysis,” the Sixth Circuit reversed.

The court determined that Mr. Lennon’s conduct was grossly negligent and, quoting a treatise on tort law, noted that the law commonly treats wanton conduct more like an intentional tort than negligence. “If tort law can treat such conduct the same way it treats intentional conduct,” the court reasoned, “it is not arbitrary and capricious for an ERISA plan administrator to treat such conduct as not accidental under a policy that only covers accidents.” Continuing, the court waved away the reasoning that drunk driving is not statistically more risky than other actions that the court would be reluctant to condemn and that drunk driving deaths are relatively rare. The court explained:

[The court] persons who drive while very drunk may have a better than even, or even a pretty good, chance of not being injured. This does not keep the activity from being reckless. The same could be said, after all, of a person playing Russian roulette, who may have a five out of six chance of not being injured. What is dispositive . . . is that at some point the high likelihood of risk and 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.

The court recognized that the term “accidental” might be more broadly defined to include any dangerous activity, so long as the insured did not intend injury or death was not substantially certain. Drunk driving deaths might fit within this definition. That inquiry, however,
would have to wait for a case in which the court’s review was de novo.\textsuperscript{186} Under the applicable arbitrary and capricious standard of review, the court comfortably reached the narrow conclusion that Met Life did not act arbitrarily in determining that Mr. Lennon’s drunk driving death was not an accident.\textsuperscript{187}

\textit{Lennon} is interesting because the court did not apply the \textit{Wickman} analysis in reaching its decision. Why? The opinion does not say. Judge Boggs, concurring, stated that the district court erred by applying \textit{Wickman} given the arbitrary and capricious standard of review.\textsuperscript{188} Judge Boggs faulted the district court for concluding that the cases applying a reasonable foreseeability standard on which the administrator relied in denying benefits misinterpreted \textit{Wickman} and were thus wrongly decided, and opined that a court reviewing a plan administrator’s decision under a deferential standard cannot substitute its judgment for the administrator’s.\textsuperscript{189} But that must be the wrong answer because it emasculates reviewing courts. The Sixth Circuit discredited that approach three years earlier in \textit{Jones v. Metropolitan Life Insurance Co.},\textsuperscript{190} when it explained that “[t]he arbitrary-and-capricious standard . . . does not require us merely to rubber stamp the administrator’s decision. . . . Under the arbitrary-and-capricious standard, both the district court and this court must exercise review powers.”\textsuperscript{191} The \textit{Wickman} opinion simply provides a framework to guide courts’ review of plan administrators’ decisions, whatever the standard.

The court’s analogy to Russian roulette was inapt. A person playing Russian roulette has a one-in-six chance of being killed. In stark contrast, an intoxicated driver’s chance of dying is about 1-in-9128.\textsuperscript{192} That translates to a 99.999 percent chance of survival. The rate of alcohol-related fatalities is roughly one for every 200 million vehicle miles traveled and drunk drivers safely make 94 million trips each year.\textsuperscript{193} The plaintiff offered evidence that a person is more likely to be struck by lightning than to be killed by driving under the influence of alcohol.\textsuperscript{194} In short, there is nothing fanciful about drunk drivers’ expectations of survival.

\textsuperscript{186} \textit{Id.} at 623–24.
\textsuperscript{187} \textit{Id.} at 624.
\textsuperscript{188} \textit{Id.} at 624–26 (Boggs, C.J., concurring).
\textsuperscript{189} \textit{Id.} at 625.
\textsuperscript{190} 385 F.3d 654 (6th Cir. 2004).
\textsuperscript{191} \textit{Id.} at 661.
\textsuperscript{193} Wilbers, \textit{supra} note 16, at 471–72.
\textsuperscript{194} Lennon, 504 F.3d at 623 (citing Eckelberry, 402 F. Supp. 2d at 712).
To avoid these unhelpful statistical comparisons, the *Lennon* court invoked social utility, explaining that the risk of harm associated with drunk driving so outweighed the activity’s social utility that resulting deaths “may be outside a definition of ‘accidental’ that is not unreasonably narrow.”195 Fair enough, but then the court has committed itself to ruling that drivers’ deaths attributable to cellular phone use are not accidental, because cell phone use while driving is more dangerous than driving under the influence of alcohol and is devoid of social utility.196 Even if a driver were using his cellular phone to report an accident, for example, there is no reason for him to keep driving when he could just as easily pull off the road to make the call and thus avoid related impairment.

Similarly, the court has committed itself to holding that speeding drivers’ deaths are non-accidental, because, after all, speeding is devoid of social utility. It is a weak dodge to say, as the court did, that social utility reasoning omits “risky activities” of some social value, such as “driving over the speed limit to get a woman in labor to the hospital.”197 Automobile dashes to maternity wards are largely the stuff of movies and novels, not real life. Moreover, there is little social utility in a frantic husband driving recklessly to a hospital when he could instead dial 911 and have his pregnant wife transported by ambulance. Calling an ambulance reduces the risk of a crash en route by virtue of the ambulance’s emergency lights and siren, and best safeguards the life of mother and child by immediately putting them in the hands of medical personnel.

Perpetuating just for a moment the court’s social utility folly, what if a drunk driver was killed rushing a pregnant woman to a hospital because there was no ambulance service for miles? Would that driver’s death be an accident because it occurred in a risky but socially useful exercise? And how could the court suggest that its holding would not foreclose the payment of accidental death benefits to someone killed while skiing, a plainly risky activity with potentially greater social value than driving drunk? Skiing’s principal value is pleasure, but ice skating and ice fishing are also pleasurable winter activities, and neither one poses the risk of harm that accompanies skiing. Does not the “high likelihood of risk and the extensive degree of harm risked” by skiing as compared to ice skating or fishing suggest that deaths or injuries suffered while skiing should be deemed non-accidental?198 Long story short, social utility is an immensely slippery decisional slope.

195. *Id.*
196. See Leesfield & Segal, *supra* note 25, at 59 (noting dangers of cell phone use).
197. *Lennon*, 504 F.3d at 624.
198. *Id.* at 623 (explaining when risky activities become non-accidental).
In summary, Lennon is wrongly decided. The court departed from federal common law and elevated its values over applicable contract language.\footnote{Id. at 626 (Clay, J., dissenting).}

B. The Minority Rule: Drunk Drivers’ Deaths May Be Accidents


For example, the insured, Steven Sarac, was a forensic scientist employed by the Illinois State Police. He was killed when he lost control of his car on the interstate near Chicago and struck a tractor-trailer. Sarac had a BAC of .203—more than twice the Illinois legal limit—at the time of the accident.\footnote{Id. at 925–26.} Minnesota Life refused to pay accidental death benefits to Sarac’s widow on the basis that his death was not accidental. The insurer reasoned that Sarac’s death could not be characterized as an accident because (1) he had a BAC of .203, more than twice the legal limit to operate a vehicle in Illinois; and (2) as a forensic scientist, he was assumed to know the perils of drunk driving.\footnote{Id. at 926.}

Invoking diversity jurisdiction, Sarac’s widow sued Minnesota Life for breach of contract and bad faith in an Illinois federal court. The parties filed cross motions for summary judgment. With respect to her breach of contract claim, the plaintiff argued that her husband’s death clearly fit the insurance policy description of an accidental death as one resulting “from an accidental injury which [was] unexpected and unforeseen.”\footnote{Id. at 925–26.} Under controlling Illinois law, an event is accidental for insurance purposes if it “‘happens by chance or fortuitously, without intention or design, and . . . is unexpected, unusual, and unforeseen.”\footnote{Id. at 926.} Minnesota Life thus bore the burden of demonstrating that Sarac both expected death or seriously bodily injury to occur and that a reasonable person
would consider death or serious injury to be the natural and probable consequence of driving drunk. This it could not do. Minnesota Life presented no facts indicating that Sarac expected to seriously injure or kill himself as a result of driving drunk. Minnesota Life's argument that Sarac should have expected catastrophe by virtue of his employment as an Illinois State Police forensic scientist failed on two counts. First, the company offered no evidence to support such a conclusion. Second, while the police report for the wreck listed alcohol as a contributing factor, it also listed as contributing factors Sarac's "poor driving skills, knowledge and experience," such that Sarac's intoxication could not be characterized as the sole cause of the accident. Accordingly, the court granted the plaintiff's motion for summary judgment on her breach of contract claim and denied Minnesota Life's cross motion on the same count.

In Cranfill v. Aetna Life Insurance Co., Cortez Cranfill was killed while traveling in Colorado when his pickup truck ran off the road and he was ejected from the vehicle. His BAC was more than double Colorado's legal limit to operate a vehicle. Aetna, which issued Cranfill's accidental death policy, refused to pay partly because his death was not an accident. His widow sued Aetna in an Oklahoma federal court. The district court certified the question of whether Cranfill's death was accidental to the Oklahoma Supreme Court.

The plaintiff argued that the term "accident" is ambiguous and should thus be construed against Aetna. The Oklahoma Supreme Court disagreed and applied "the word in its plain, ordinary and popular sense." Aetna contended that the court should apply a test for "accident" that it had adopted several years before in Willard v. Kelley. In Willard, the court "described an accident as an event that is 'unexpected, unintended and unforeseen in the eyes of the insured' and said that the

206. Id. at 929–30.
207. Id. at 930.
208. Id. at 930 n.3.
209. Id.
210. Id. at 930.
211. 49 P.3d 703 (Okla. 2002).
212. Id. at 705.
213. Id.
214. Id. at 706.
215. Id.
216. Id.
217. Id.
standard to be used is that of a reasonable person appraising the event from the insured’s perspective.\textsuperscript{219} The court disagreed again, stating:

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.\textsuperscript{220}

The court further explained:

Foreseeability has a more specific meaning in the context of life and accident insurance. It is only when the consequences of the act are so natural and probable as to be expected by any reasonable person that the act can be said to be so foreseeable as not to be accidental. . . . The mere fact that an insured’s death may have resulted from his or her own negligence, or even gross negligence, does not prevent that death from being accidental under the plain meaning of the word accident.\textsuperscript{221}

Aetna argued that the majority rule supported its position and urged the court to adopt the position commonly embraced by federal courts in ERISA cases.\textsuperscript{222} The court declined to do so, reasoning that it was bound by Oklahoma law and not federal common law, and further noted that the results in most federal cases are foreordained by deferential standards of review.\textsuperscript{223}

After deciding that Cranfill’s death was accidental, the court examined whether awarding benefits would offend Oklahoma public policy.\textsuperscript{224} Aetna argued that Oklahoma public policy against drunk driving necessarily implied a policy against awarding accidental death benefits for the death of an intoxicated driver in a single-vehicle crash.\textsuperscript{225} The plaintiff argued that the state’s public policy favored compensating innocent beneficiaries.\textsuperscript{226}

220. Id. at 706–07.
221. Id. at 707 (citation omitted).
222. Id.
223. Id.
224. Id. at 709.
225. Id.
226. Id.
Oklahoma public policy certainly disfavored drunk driving, as evidenced by the existence of statutes making it illegal to drive while impaired by or under the influence of alcohol. The court did not believe, however, that denying accidental death benefits to Cranfill’s widow would further that public policy. Moreover, there was no Oklahoma statute or case law relating to accident insurance that suggested a public policy favoring the denial of insurance proceeds to an innocent beneficiary. The court accordingly rejected Aetna’s public policy argument.

*West v. Aetna Life Insurance Co.* is an ERISA case in which a federal court applying a deferential standard of review concluded that an insured’s drunk driving death was accidental. The insured in that case, Delane West, was killed in a single-car wreck in December 1997 on his way home from a Christmas party. His BAC was .203 at the time of his death, twice the Iowa legal limit. His widow applied for accidental death benefits. Aetna denied the claim on the basis that Mr. West’s death was not accidental, asserting that he should have “reasonably foreseen” the unfortunate consequences of driving while under the influence of alcohol and stating that the “serious risks associated with driving while intoxicated are widely publicized.” Mrs. West sued Aetna. The parties requested that the district court decide the matter on written submissions. After hearing argument, the court was left to determine whether Aetna’s denial of accidental death benefits could be upheld “under a fully deferential review of its plan interpretation.” The court resolved that it could not.

The court’s analysis of the issues eventually led it to *Wickman*. Aetna contended that *Wickman* supported its conclusion that Mr. West’s death was not accidental. While agreeing that the vast majority of courts relying on *Wickman* accepted Aetna’s position, the court in *West* reasoned that those courts had misapplied the objective prong of the *Wickman* analysis. Beyond that, there was nothing to suggest that Aetna based its denial on a basis that could be upheld as consistent with *Wickman*. Aetna offered no evidence that Mr. West should have

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227. Id.
228. Id.
229. Id.
231. Id. at 860.
232. Id. at 863–64.
233. Id. at 865.
234. Id. at 875.
235. Id. at 898.
236. Id.
237. Id. at 901.
238. Id. at 902.
known that the likelihood or strong possibility of death, rather than some lesser negative effects, were the consequences of driving while intoxicated.\textsuperscript{239} His level of intoxication did not provide such evidence.\textsuperscript{240} As for Aetna's rationale that the serious risks associated with drunk driving are widely publicized, the court was unwilling to make the leap from "serious risks," \textit{i.e.}, the \textit{possibility} of injury or death, that are "widely publicized" to the conclusion that a drunk driver knew or should have known that the consequences of driving while intoxicated are that he or she is "highly likely" to suffer injury or death, \textit{i.e.}, the \textit{probability} of injury or death.\textsuperscript{241}

In contrast, the plaintiff presented ample evidence that her late husband's death was accidental. More particularly, the court detailed the following statistical evidence:

Mrs. West has submitted statistics compiled by the [FBI]. . . . Those statistics indicate that, for 1996, the year preceding Mr. West's fatal crash, there were 1,033,000 arrests for driving under the influence of alcohol. . . . To the extent that "common knowledge" is helpful in evaluating this evidence . . . it should be plain that \textit{not every intoxicated driver is arrested for driving under the influence of alcohol} in any given year, let alone every time he or she is intoxicated. However, for the same year, there were only 42,065 fatalities in motor vehicle crashes, and only 17,218 of those were alcohol-related. . . . [C]ommon sense and logic suggest that if it were indeed "highly likely" that a person driving while intoxicated would suffer a serious injury or be killed, the number of alcohol-related fatalities in 1996, in light of the number of arrests for driving under the influence, should have been vastly higher than 17,218. What "common knowledge" should actually tell a person driving while intoxicated is that he or she is far more likely to be arrested for driving while intoxicated than to die or be injured in an alcohol-related automobile crash, and far more likely to arrive home than to be either arrested, injured, or killed.\textsuperscript{242}

The deficient reasoning in the cases Aetna cited to support its decision suggested that those plan administrators based their denials not on substantial evidence but on "'moralistic conclusion[s],'' as the plaintiff argued.\textsuperscript{243} Although skeptical that insurers deny claims for moralistic reasons, the complete absence of evidence supporting Aetna's denial

\textsuperscript{239} Id.
\textsuperscript{240} Id. at 903.
\textsuperscript{241} Id.
\textsuperscript{242} Id. at 904 (citations omitted).
\textsuperscript{243} Id.
compelled the conclusion that Aetna’s decision “was unreasonable, arbitrary, and capricious.”

C. The Third Approach: Policy Exclusions

Courts have long indicated that accident insurers that do not want to insure drunk drivers’ deaths should insert related exclusions in their policies. Many insurers now do. Some policies include intoxication exclusions, which preclude coverage for losses caused by the insured’s blood alcohol context exceeding a stated measure (such as 0.10) or the legal limit for driving in a jurisdiction, for “operating a motor vehicle while intoxicated,” or for injuries occurring under the influence of alcohol. Other policies contain exclusions for losses suffered while committing a felony or attempting to do so. If drunk driving is a felony in a given state, these exclusions will operate to deny accidental death benefits. This is true even if the insured is not prosecuted for, or convicted of, a felony. Finally, some policies contain exclusions for losses caused by the actual or attempted commission of a crime, for “criminal acts,” or for “illegal acts” which clearly apply to driving under the influence of alcohol. Regardless of the exact exclusion at issue, it is the insurer’s burden to prove its applicability—typically including a causal

244. Id.
249. Steele, 408 F. Supp. 2d at 631–32; DeLaTorre, 2005 WL 2338809, at *7; Weisenhorn, 769 F. Supp. at 306; McDaniel, 53 P.3d at 908.
250. Steele, 408 F. Supp. 2d at 632.
connection between the insured’s death and the excluded event or conduct.252

Accidental death policies commonly exclude coverage for intentionally self-inflicted injuries. Although a few courts have incorrectly found otherwise,253 an insured’s intentional act of driving while intoxicated will not generally trigger this exclusion.254 As the Oklahoma Supreme Court explained, "[a] death is not intentionally self-inflicted for purposes of an accidental death policy merely because it resulted from engaging in negligent or even grossly negligent conduct, unless the insured intended to cause his own death."255 Certainly, the mere consumption of beer, wine, or spirits is not self-inflicted injury.256

IV. A REASONABLE APPROACH TO EVALUATING DRUNK DRIVERS’ DEATHS AS INSURANCE “ACCIDENTS”

It should now be apparent that courts have struggled to evaluate the allegedly accidental nature of insureds’ deaths and that those struggles have often produced undesirable results. In light of courts’ uneven and unsatisfying approaches to determining whether events are insurance “accidents,” scholars have proposed new analytical schemes that are said to be better than the various tests that courts currently apply.257 These well-intended efforts are unnecessary. The Wickman v. Northwestern National Insurance Co.258 framework is perfectly suitable, so long as courts apply it carefully and without modification.

Under Wickman, again, a court first analyzes the insured’s reasonable expectations.259 If the insured did not expect to suffer an injury similar to that suffered, the court must “examine whether the suppositions which underlay that expectation were reasonable.”260 If the in-

255. Cranfill, 49 P.3d at 709.
256. King, 414 F.3d at 1004.
257. See, e.g., Seals, supra note 8, at 278 (proposing a test that incorporates human agency, the actor’s expectations, and proximate cause).
258. 908 F.2d 1077 (1st Cir. 1990).
259. Id. at 1088.
260. Id. (citing N.Y. Life Ins. Co. v. Harrington, 299 F.2d 803, 806 (9th Cir. 1962)).
sured's suppositions are judged to be unreasonable, then the injuries will be deemed non-accidental.\textsuperscript{261}

In determining the reasonableness of the insured's suppositions, the court should view matters from the insured's perspective and take into account the insured's personal characteristics and experiences.\textsuperscript{262} The first prong, therefore, is essentially subjective. Second, if the insured expected to survive, or if the court cannot ascertain the insured's subjective expectations because of insufficient evidence, then it should objectively analyze the insured's expectations.\textsuperscript{263} "In this analysis, one must ask whether a reasonable person, with background and characteristics similar to the insured, would have viewed the injury as highly likely to occur as a result of the insured's intentional conduct."\textsuperscript{264} The objective prong does not permit simplistic reasonable foreseeability analysis, as the requirement that a court consider whether the injury was "highly likely" makes clear.

Subjectively, a variety of evidence may support the conclusion that the insured did not expect to be injured or killed, and that those expectations were reasonable.\textsuperscript{265} For example, before departing on the fateful journey, did the insured tell people that he would see them later or the next day, or respond to questions about his fitness to drive by saying that he was "fine" or words to that effect? Did the insured mention her intentions with respect to the drive, such as stopping for groceries or to get gas before continuing on to her final destination or picking up someone else? Did the insured tell someone that he was going to take a particular route because, under the conditions, it might be safer, as where a driver takes a road that he knows to be better plowed or salted in the winter? Did she fasten her seatbelt? If the insured was riding a motorcycle, did he wear a helmet? Had the insured driven safely after drinking similar quantities of alcohol in the past? Had the insured driven safely after consuming far greater quantities of alcohol in the past? Did the insured specifically say that she intended to drink less because she had to drive or do something else later? Did the insured simply reveal future plans, regardless of whether those plans required him to moderate his immediate al-

\textsuperscript{261} Wickman, 908 F.2d at 1088.
\textsuperscript{262} Id.
\textsuperscript{263} Id.
\textsuperscript{264} Id.

\textsuperscript{265} The determination of an insured's subjective expectations does not depend on direct evidence. Rather, an insured's subjective expectations may be gleaned from the totality of the evidence in the record. See, e.g., Gower v. AIG Claim Servs., Inc., 501 F. Supp. 2d 762, 772–74 (N.D. W. Va. 2007) (addressing insurer's argument that record contained insufficient evidence of the insured's subjective expectations and applying Wickman test in case involving insured's death caused by overdose of prescription pain medications).
cohol consumption? En route, did witnesses see the insured using her turn signals or otherwise driving appropriately? Closer to the wreck, did the insured take evasive action, such as braking or swerving? Did he sound his horn or flash his lights? Affirmative answers to these questions (and countless others) indicate that an insured did not subjectively expect to be injured as a result of driving while intoxicated.266

In many cases, of course, the insured’s death, coupled with a lack of witnesses, makes the insured’s subjective intent impossible to determine. The analysis then shifts to Wickman’s objective prong, which requires the court to ask whether a reasonable person with the insured’s background and characteristics would have viewed death from drunk driving as “highly likely to occur.”267 It is not appropriate for a court to apply objective analysis to override sufficient evidence of an insured’s subjective intent.268 Objective analysis alone is appropriate only if the court lacks sufficient evidence to determine the insured’s subjective expectations.269

Regardless of whether one is weighing the reasonableness of the suppositions underlying an insured’s subjective expectations or objectively analyzing the circumstances of an insured’s death, it is extremely difficult to conclude that a person would perceive injury or death as being “highly likely to occur” as a result of driving while intoxicated.270 For an event to be highly likely to occur, it must be more than reasonably foreseeable.271 The occurrence must be more than possible. In other

266. In Walker v. Metropolitan Life Insurance Co., 24 F. Supp. 2d 775, 781 (E.D. Mich. 1997), a drunk driving case reviewed under an arbitrary and capricious standard, the court listed the following evidence as indicating that the insured did not intend to be injured or killed: “He was wearing a seat belt at the time of the collision; he planned to meet his wife after his ride; he had driven the route on previous occasions after drinking alcohol; and, eyewitnesses saw him attempt to turn his vehicle to avoid the crash.” In Harrell v. Metropolitan Life Insurance Co., 401 F. Supp. 2d 802, 807 (E.D. Mich. 2005), the court rejected a plan administrator’s determination that an insured’s death was not accidental based partly on evidence that the insured drank every day and drove nearly every day, and always arrived home safely.


268. Id.; but cf. Walker, 24 F. Supp. 2d at 781 (applying objective prong of Wickman analysis after concluding that “[t]he evidence presented indicate[d] that the decedent did not intend or expect to be injured when he drove while intoxicated”).

269. Wickman, 908 F.2d at 1088.

270. See Precopio v. Bankers Life & Cas. Co., Civ. No. 01-5721 (RBK), 2004 WL 5284512, at *27 (D.N.J. Aug. 10, 2004) (calling government statistics on drunk driving fatalities “real evidence” and explaining that they show that “a reasonable person may not expect that death or serious bodily injury is ‘highly likely to occur’ as a result of drunk driving”).

271. See City of Carter Lake v. Aetna Cas. & Sur. Co., 604 F.2d 1052, 1059 n.4 (8th Cir. 1979) (explaining that an event is “reasonably foreseeable” if it “could follow” from a person’s acts, and that such an event is far less expected than an event which is substantially probable to occur, the latter also being described as “highly likely to occur”).
words, it must be probable, or perhaps substantially probable. Published reports and statistics establish that drunk drivers’ deaths are neither probable nor substantially probable. For example, 15% of adult drivers responding to a federal survey spanning the years 2004–06 reported driving drunk at least once every year. A smaller study by the AAA Foundation for Traffic Safety revealed that 9% of the respondents claimed to have driven drunk at least once within the thirty previous days. If drunk drivers’ deaths were probable or substantially probable, there would be many more of them than there already are based on the prevalence of the behavior.

The Centers for Disease Control (CDC) studied alcohol-impaired driving by adults during the period 1993–2002. In 2002, the last year of the study, subjects reported making 159 million trips in which they drove while alcohol-impaired. Given that there were 17,419 deaths from alcohol-related motor vehicle crashes in 2002, drunk driving possibly proved fatal only once in every 9,128 trips. Furthermore, the subjects studied probably under-reported the frequency with which they drove while intoxicated, meaning that the risk of death attributable to drunk driving is even lower than the CDC study suggests. Other reports indicate that the rate of alcohol-related fatalities is roughly one for every 200 million vehicle miles traveled, and drunk drivers safely make 94 million trips each year.

Even this data, which makes clear that an intoxicated driver’s death is not “highly likely to occur,” may overestimate the dangers of drunk driving. This is because the National Highway Traffic Safety Administration (NHTSA), which compiles the most widely-cited statistics on alcohol-related motor vehicle fatalities, counts as alcohol-related fatalities “those that occur in crashes involving at least one driver, pedestrian, or pedacyclist with a BAC of .01 or above.” In other words, of the

273. City of Carter Lake, 604 F.2d at 1059 n.4.
274. Kevin Freking, 15% Say They’ve Driven Drunk, CHI. TRIB., Apr. 23, 2008, § 1, at 3 (reporting results of the National Survey of Drug Use and Health conducted by the federal Substance Abuse and Mental Health Services Administration).
275. Larry Copeland, 9% of Us Admit to Driving Drunk, USA TODAY, Apr. 29, 2008, at 3A (discussing the AAA Foundation study).
277. Id at 346.
278. See id. at 346 (reporting 2002 fatalities).
279. Id at 349.
281. NHTSA 2006 ASSESSMENT, supra note 1, at 1.
approximately 17,600 people who die every year in alcohol-related motor vehicle crashes, many are not intoxicated drivers.

There is more. In 2005, for example, there were an estimated 6,159,000 motor vehicle crashes reported to police.282 There were 17,590 alcohol-related crash fatalities that year.283 Thus, even if a drunk driver were involved in a wreck, there is less than a one percent chance that she would be killed. It is more likely that a drunk driver involved in a wreck would expect to suffer property damage.284 The most widely-known negative consequence of drunk driving is arrest. For example, some 1.4 million drivers were arrested for driving under the influence of alcohol or narcotics in 2004.285 Common sense dictates that not every intoxicated driver is arrested every year, let alone every time that she drives while intoxicated.286 If drunk driving deaths were highly likely to occur, one would expect vastly more of them in light of the number of drunk driving arrests.287 Parenthetically, there were 16,919 alcohol-related fatalities in 2004,288 and, as explained above, it appears that not all of those fatalities were drivers.

Courts may rely on statistical evidence to determine whether an insured’s death was highly likely to occur. In Glyn v. Bankers Life & Casualty Co.,289 for example, the insured was killed in a single-vehicle crash; his BAC was 0.17. Subjectively, the evidence indicated that the insured expected to survive his fateful trip.290 In deciding that the insured’s expectations were reasonable, and thus that his death was accidental, the court was persuaded by statistics showing that a male driver older than thirty-five traveling a distance of twenty miles has a 772 in 10 million chance of being involved in a fatal accident.291 While the insurer disputed the distance that the insured traveled before he was killed, the court was “convinced that no proposed alternative would augment the reasonableness of relying on a 99,999228% chance of survival.”292

Courts that are not persuaded by such statistics tend to discount them on the basis that they do not consider individual driver’s character-

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283. NHTSA 2006 ASSESSMENT, supra note 1, at 1.
284. NHTSA 2005 OVERVIEW, supra note 282, at 1 (stating that of the 6,169,000 traffic crashes reported to police in 2005, 4,304,000 involved property damage only).
285. Id. at 5.
287. Id.
290. Id. at 280–81.
291. Id. at 281.
292. Id. (footnote omitted).
istics, the nature of the road involved, or the length of the fatal trip. That may be true, but it is also irrelevant. These considerations factor into the subjective prong of the Wickman framework, not the objective prong. Even if such statistics are used to demonstrate the reasonableness of the suppositions underlying an insured’s subjective beliefs, courts that disregard them should do so only if more reliable data is available. To do otherwise ignores the insured’s perspective, risks substituting normative judgments and “common knowledge” for evidence, and may tilt the playing field so heavily in insurers’ or plan administrators’ favor that beneficiaries are wrongly precluded from proving their cases.

The decision in Stamp v. Metropolitan Life Insurance Co. illustrates this trap. The Stamp court reasoned that such statistical data was irrelevant because it did not take into account drivers’ level of intoxication. Thus, the court found against the beneficiary of a sporadic drinker whose BAC was 0.265 on the basis that a “highly intoxicated driver is many times more likely to be fatally injured.” The court had no evidence to support this conclusion, which was mere surmise, but this reasoning is suspect anyway. States set .08 or 0.10 BAC standards because most drivers’ caution, reaction times, and motor skills tend to become impaired at these levels.

A driver with a 0.265 BAC would experience “total mental confusion.” A reasonable person with the background and characteristics of the insured in Stamp would be incapable of viewing driving as being highly likely to result in death or serious injury. The danger of driving drunk probably never crossed his mind, and if it did, it did not register. In the unlikely event that drivers who have been drinking appreciate any risk, it is that their chance of arrest increases with their level of intoxication, since once they reach a certain BAC, their impairment may be noticeable to other drivers including the police. But even that concern has disappeared without a trace by the time a driver’s BAC reaches 0.265.

294. Id.
295. Id. at 432.
296. Id. at 433; see also Lennon v. Metro. Life Ins. Co., 504 F.3d 617, 623–24 (6th Cir. 2007) (making the same argument in a case in which the driver’s BAC was 0.321).
299. See Glenn E. Rohrer et al., Calculation of Blood Alcohol Concentration in Criminal Defendants, 22 AM. J. TRIAL ADVOC. 177, 189 (1998) (explaining that even chronic alcoholics suffer 80 percent memory impairment at a BAC of 0.25).
Insurers, understandably, argue that drunk drivers are statistically more likely to be injured in a crash than are sober drivers.\textsuperscript{300} This certainly is true.\textsuperscript{301} Drunk driving is irresponsible and entails risk, but the fact that a drunk driver is more likely to be injured than a sober driver, or that drunk drivers are more likely to be injured than people participating in other activities, is meaningless here.\textsuperscript{302} The issue, again, is whether someone is “highly likely” to suffer grievous harm as a result of intentionally driving while intoxicated. All relevant data clearly demonstrate that is not the case.

“Common knowledge” and “common sense” are no substitute for data when applying Wickman’s objective prong.\textsuperscript{303} References to the “general risks associated with drunk driving” are equally unsatisfactory.\textsuperscript{304} Were it otherwise, courts would have to declare that drivers’ deaths stemming from speeding or cellular phone usage are also non-accidental,\textsuperscript{305} as are drivers’ deaths resulting from non-essential trips on icy or wet roads. Similarly, crashes by drivers who choose to drive while fatigued could not be characterized as accidental, given that the hazards of drowsy driving are commonly known, and the physical and mental impairments produced by fatigue are similar to those caused by excessive alcohol consumption.\textsuperscript{306} No court appears to be prepared to adopt such extreme positions, nor should they be.\textsuperscript{307} For that matter, what “common sense” and “common knowledge” truly tell us is that intoxicated drivers are “far more likely to be arrested . . . than to be injured or die in an al-

\textsuperscript{300} See, e.g., Glynn v. Bankers Life & Cas. Co., 432 F. Supp. 2d 272, 281–82 n.2 (D. Conn. 2005) (acknowledging insurer’s assertion that “a drunk driver with a BAC of 0.15% is 380 times more likely to die in a single-vehicle crash than a non-drinker”).

\textsuperscript{301} See United States v. McCall, 439 F.3d 967, 972 (8th Cir. 2006) (stating that a driver with a .08 BAC is 11.1 times more likely to cause a fatal wreck than a sober driver), reh’g granted, 523 F.3d 902 (8th Cir. 2008).

\textsuperscript{302} Glynn, 432 F. Supp. 2d at 281–82 n.2.


\textsuperscript{304} Id.

\textsuperscript{305} See Copeland, supra note 275, at 3A (reporting that most drivers surveyed identified distracted driving and speeding as serious problems, yet many admitted talking on cell phones while driving or speeding within the previous 30 days).

\textsuperscript{306} NAT’L SAFETY COUNCIL, DROWSY DRIVING, available at http://www.nsc.org/resources/factsheets/road/drowsy_driving.aspx (last visited July 15, 2008) (“Just like drugs or alcohol, sleepiness slows reaction time, decreases awareness, and impairs judgment. Just like drugs or alcohol, it can be fatal when driving.”).

\textsuperscript{307} See, e.g., Consumers Life Ins. Co. v. Smith, 587 A.2d 1119, 1123 (Md. Ct. Spec. App. 1991) (discrediting insurer’s argument that the death of a person “who intentionally starts to drive a long distance knowing that he or she is severely fatigued” may be foreseeable and hence non-accidental); Scott v. New Empire Ins. Co., 400 P.2d 953, 954–56 (N.M. 1965) (finding that insured’s death was accidental where insured was speeding at night on a mountain road on which he had never driven at night and missed a curve).
coho-related automobile crash, and far more likely to arrive home than to be either arrested, injured, or killed.\footnote{West v. Aetna Life Ins. Co., 171 F. Supp. 2d 856, 904 (N.D. Iowa 2001).}

Some courts rest their conclusions that drunk drivers’ deaths are not accidental on the fact that states criminalize driving while intoxicated and that criminal penalties for drunk driving are more severe than those for other traffic offenses. Courts state that these facts, separately or together, show that reasonable people should recognize the perils of drunk driving.\footnote{See, e.g., Eckelberry v. ReliaStar Life Ins. Co., 469 F.3d 340, 345–46 (4th Cir. 2006) (discussing the criminalization of drunk driving and graduated penalties for repeat offenses).} This reasoning misses the mark. To repeat, the correct inquiry is not whether a reasonable person should appreciate the dangers of driving while intoxicated, but whether death or serious injury to oneself is “highly likely to occur” as a result.\footnote{Wickman v. Nw. Nat’l Ins. Co., 908 F.2d 1077, 1088 (1st Cir. 1990).} The possibility of self-destruction and a high likelihood of that occurring are profoundly different things. Furthermore, the criminalization of drunk driving is focused not on the risk such behavior poses to intoxicated drivers themselves but on the risk it poses to others.\footnote{See United States v. Rutherford, 54 F.3d 370, 376 (7th Cir. 1995) (explaining why drunk driving is a crime of violence for federal sentencing purposes and repeatedly referring to the dangers that drunk driving poses to other motorists and pedestrians).} Drunk driving is punished more harshly than other traffic offenses for the same reason. Increased penalties for repeat offenders are “directly related to the fact that persistent drunk driving creates a substantially greater risk of physical injury to others.”\footnote{United States v. McCall, 439 F.3d 967, 972 (8th Cir. 2006).} In fact, given the relative rarity with which drunk drivers injure or kill themselves or others, all that harsh drunk driving penalties really communicate to most people who drink and drive is that they had better not get caught.

The criminalization of drunk driving also implicates public policy and, specifically, courts’ occasional denial of coverage on public policy grounds where a loss results from the insured’s violation of law. The rationale behind these decisions is that permitting coverage has the perverse effect of encouraging crime by shielding the criminal from the consequences of his act.\footnote{JERRY & RICHMOND, supra note 50, at 450.} That is not the situation here. The beneficiaries of drunk drivers’ accident insurance policies are guilty of no wrongdoing.\footnote{Freeman v. Crown Life Ins. Co., 580 S.W.2d 897, 901 (Tex. App. 1979).} They probably did not approve the insured’s decision to drive under the influence of alcohol. As a rule, insureds’ drunk driving deaths are entirely fortuitous from beneficiaries’ standpoint. Additionally, it is imprudent to think that a significant number of insureds obtain accident
insurance in contemplation of death or serious injury attributable to driving while intoxicated. 315

To the extent that the denial of accidental death benefits to drunk drivers’ beneficiaries reflects an attempt to protect the public from harm by discouraging such reckless behavior, the declaration or implementation of this public policy should be entrusted to state legislatures rather than to courts. Legislatures are free to restrict or prohibit insurance recoveries in drunk driving cases if they see societal benefit to doing so. Legislatures have restricted insurability in other contexts with public policy implications, as where they have enacted statutes either prohibiting or limiting the insurability of punitive damages.316

V. CONCLUSION

Drunk driving is dangerous and irresponsible, and a person’s decision to drive drunk is a serious misjudgment. But many fatalities are attributable to dismal judgment, seriously flawed reasoning, or recklessness. Consider, for example, a speeding driver who cannot stop her car in time, a fatigued motorist who falls asleep behind the wheel and veers into oncoming traffic, or a driver using her cellular phone who fails to appreciate a lane shift in a construction zone with catastrophic results. Drivers’ deaths in these cases are accidental for accident insurance purposes “even though the deceased voluntarily rode the thunderbolt which killed him.”317 There is no principled reason to treat drunk drivers’ deaths differently. However irresponsible or reckless drunk driving may be, it is impossible to conclude that any significant number of drunk drivers expect or intend to die or be seriously injured as a result of their behavior, or that these outcomes are highly likely. The fact that drunk driving is risky does not render drunk drivers’ deaths non-accidental. Courts that hold otherwise based on supposed common sense, common knowledge, or the simplistic notion that the dangers of drunk driving are widely known, are wrong as a matter of fact and as a matter of law. They have, in short, wandered into a Serbonian Bog. Treating drunk drivers’ deaths as accidents for insurance purposes is much firmer ground.

315. Id.
316. See, e.g., KAN. STAT. ANN. § 40-2,115(a) (2007-08) (allowing insurance for punitive damages assessed against a defendant on vicarious liability principles); OHIO REV. CODE ANN. § 3937.182 (2002) (prohibiting coverage for punitive or exemplary damages under automobile, casualty or liability insurance policies); VA. CODE ANN. § 38.2-227 (2002) (prohibiting insurance coverage for punitive damages awarded because of an insured’s intentional acts).