HOLD YOUR BREATH: PREDICTING HOW THE EIGHTH CIRCUIT WILL, AND SHOULD, HOLD REGARDING AUTOEROTIC ASPHYXIATION CLAIMS UNDER ERISA-GOVERNED ACCIDENTAL DEATH POLICIES

ABSTRACT

In everyday life, it is usually easy to identify an accident and an injury. However, due to coverage disputes arising under ERISA-governed accidental death policies, federal courts are presented situations in which the determinations of an accident and an injury become more difficult. Of these situations, the most disputed are deaths arising from autoerotic asphyxiation. Here, despite a federal framework for analyzing accidental death policies, federal courts continue to come to inconsistent conclusions concerning (1) whether such deaths are accidental, and (2) whether they should be excluded under intentionally self-inflicted injury provisions. Yet, despite the continuing divisiveness over both matters—the latter of which has caused a current circuit split—the Eight Circuit has not yet decided either issue.

This Note attempts to predict how the Eighth Circuit will rule on accidental death coverage as it applies to autoerotic asphyxiation deaths and argues how it should rule. Using Eight Circuit precedent, this Note anticipates an eventual de novo ruling by the Eight Circuit will conclude death from autoerotic asphyxiation is both accidental and not resulting from an intentionally self-inflicted injury. In addition, this Note argues such findings would be the correct ones under current federal common law.

TABLE OF CONTENTS

I. INTRODUCTION

After the powder of deployed airbags begins to settle and sirens begin to pierce the air, a concerned pedestrian inquires of one of the drivers how the accident occurred.[1] In the same moments, in another locale, a doctor notes the cause of a woman's injuries as an accident after she explains her bruising resulted from a fall down the stairs.[2] Elsewhere, while writing a love letter to his girlfriend, a man's hands fail him in this familiar task, and he endures the surprising sting of a paper cut.[3] Identifying an accident and the subsequent injury that results appears, by nearly all measures, to be a simple process.[4] In most situations, a person is able to easily determine when either one has occurred.[5]

1. *See* Sam Erman, Note*, Word Games: Raising and Resolving the Shortcomings in Accident-Insurance Doctrine that Autoerotic-Asphyxiation Cases Reveal*, 103 MICH. L. REV. 2172, 2172 (2005).
2. *See id.*
3. *See id.*
4. *See id.* at 2173.
5. *See id.*; *see also* Kennedy v. Wash. Nat'l Ins. Co., 401 N.W.2d 842, 846 (Wis. Ct. App. 1987) (stating the concept of identifying an accident is largely intuitive).

Yet, beyond the simplistic surface of these everyday determinations hides more complex decisions, and what at first seems like an intuitive issue becomes more complicated.[6] Is the death of a skydiver who voluntarily exits a plane at 15,000 feet truly accidental, and should the life-threatening but euphoric tranquility one receives from heroin use be classified as an injury?[7] Is there a difference between the downhill skier who crashes into a tree while riskily weaving through a thicket of trees and the driver who slams a car into a pole after several beers at the local bar? What distinguishes the effects caused by a strangler from the experience of holding one's breath?[8]

In the federal sphere, courts have been forced to fight these questions in the context of Employee Retirement Income Security Act (ERISA)-governed[9] accidental death policies, which pay a benefit for covered loss arising from an "accident" or "accidental" event.[10] In almost all policies, the terms "accident" and "accidental" are undefined, leaving to the courts the troublesome task of interpreting these coverage-dispositive terms.[11] Courts have struggled in this interpretation, especially when death arises from a situation in which the insured has intentionally placed themselves.[12]

6. Brenneman v. St. Paul Fire & Marine Ins. Co., 192 A.2d 745, 747 (Pa. 1963) ("Everyone knows what an accident is until it comes up in court. Then it becomes a mysterious phenomenon, and, in order to resolve the enigma, witnesses are summoned, experts testify, lawyers argue, treatises are consulted and even when a conclave of twelve world-knowledgeable individuals agree as to whether a certain set of facts made out an accident, the question may not yet be settled and it must be reheard in an appellate court.").

7. *See* Erman, *supra* note 1, at 2173.

8. *Id.*

9. The Employee Retirement Income Security Act (ERISA) encompasses insurance policies provided by an employer. 29 U.S.C. § 1002(1). Federal common law is used to resolve insurance issues arising under ERISA. Padfield v. AIG Life Ins. Co., 290 F.3d 1121, 1125 (9th Cir. 2002). ERISA will be discussed in more detail in Part II of this Note. *See infra* Part II.

10. Joshua D. Lerner, *It is Still a Slog Through a Bog: Interpreting "Accident" Under ERISA-Governed AD&D Coverage*, RUMBERGER, http://www.rumberger.com/wp-content/uploads/2019/11/12.18-Josh-Lerner-Interpreting-Accident-in-The-ERISA-Report-Volume-13-Issue-3.pdf [https://perma.cc/F84G-J55L].

11. *See, e.g.*, Johnson v. Am. United Life Ins. Co., 716 F.3d 813, 819 (4th Cir. 2013) (stating the policy failed to define the term "accident").

12. Lerner*, supra* note 10.

At the center of this difficulty are cases in which death has been caused by autoerotic asphyxiation. Autoerotic asphyxiation is "the practice of temporarily limiting the flow of oxygen to the brain during masturbation in an attempt to heighten sexual pleasure."[13] Individuals who engage in the practice typically utilize a rope or other ligature to place pressure on the neck in order to constrict the passage of blood through the carotid artery to the brain.[14] If the individual engaging in the practice retains consciousness—as most do—the individual is able to relieve pressure in a timely matter to avoid injury.[15]

However, because asphyxia produces a state of hypoxia[16] and hypercapnia,[17] the individual can induce light-headedness which sometimes results in a loss of coordination and an inability to appreciate the risks associated with the act.[18] As a consequence, in rare circumstances, the individual may lose consciousness prior to restoring oxygen to the brain and die from strangulation.[19]

Specific death rates associated with autoerotic asphyxiation have been difficult to nail down. The number of yearly deaths resulting from the

13. Todd v. AIG Life Ins. Co., 47 F.3d 1448, 1450 (5th Cir. 1995).

14. *See* Christopher Beam, *Strangle With Care*, SLATE (June 5, 2009), https://slate.com/news-and-politics/2009/06/is-there-a-safe-way-to-perform-autoerotic-asphyxiation.html [https://perma.cc/29QN-Q5DQ]; *see also* Bennett v. Am. Int'l Life Assurance Co. of N.Y., 956 F. Supp. 201, 204 (N.D.N.Y. 1997) (quoting AM. PSYCHIATRIC ASS'N, DIAGNOSTIC AND STAT. MANUAL OF MENTAL DISORDERS § 302.83 (4th ed. 1994)) (describing oxygen deprivation as being "obtained by means of chest compression, noose, ligature, plastic bag, mask, or chemical").

15. *Todd*, 47 F.3d at 1453. ("When performed successfully, the act results only in a temporary decrease in oxygen levels . . . ."); Padfield v. AIG Life Ins. Co., 290 F.3d 1121, 1126 (9th Cir. 2002).

16. Brain hypoxia results when there is a deficiency of oxygen reaching the brain. Jayne Leonard & Nancy Hammond, *What to Know About Brain Hypoxia*, MEDICALNEWSTODAY (Aug. 17, 2018), https://www.medicalnewstoday.com/articles/322803.php#symptoms [https://perma.cc/M4UV-EAR5].

17. Hypercapnia results when an excessive amount of carbon dioxide accumulates in the bloodstream. Jayne Leonard & Emelia Arquilla, *What to Know About Hypercapnia*, MEDICALNEWSTODAY (Nov. 8, 2020), https://www.medicalnewstoday.com/articles/320501.php [https://perma.cc/QL77-436E].

18. *See Padfield*, 290 F.3d at 1126.

19. *See Todd*, 47 F.3d at 1457; *see also* Critchlow v. First UNUM Life Ins. Co. of Am., 198 F. Supp. 2d 318, 326 (W.D.N.Y. 2002), ("It is common knowledge that strangulation will result in death if it continues long enough . . . .") *aff'd,* 340 F.3d 130 (2d Cir. 2003), *rev'd*, *withdrawn*, *vacated* 378 F.3d 246 (2d Cir. 2003).

practice has been calculated to lie somewhere between 500 and 2,000.[20] However, because many are unreported or are mistaken for suicide or murder, the number of deaths is largely unknown.[21] Nonetheless, experts tend to agree the individuals performing the act do not intend to die and engage in the practice over a period of years with no permanent injury.[22] In fact, most practitioners of autoerotic asphyxiation install some sort of safety measure—such as a rescue mechanism or fail-safe device—to prevent death from occurring.[23]

Interpretive issues arise when the beneficiary attempts to recover under an ERISA-governed accidental death policy after a family member

20. *See* Lonergan v. Reliance Standard Life Ins. Co., No. CV-96-11832-PBS, 1997 WL 34706253, at *1 (D. Mass. May 29, 1997) (quoting Kessler Aff., ¶¶ 6–7) ("Approximately 2,000 deaths occur per year in this country arising out of autoerotic stimulation . . . ."); Jane E. Brody, *'Autoerotic Death' of Youths Causes Widening Concern*, N.Y. TIMES (Mar. 27, 1984), https://www.nytimes.com/1984/03/27/science/autoerotic-death-of-youths-causes-widening-concern.html[https://perma.cc/J9M2-LWU8] ("Researchers for the Federal Bureau of Investigation estimate conservatively that 500 to 1,000 such deaths occur each year in this country . . . ."); Martin Downs, *The Highest Price for Pleasure*, MEDICINENET (Jan. 1, 2005), https://www.medicinenet.com/script/main/art.asp?articlekey=51776 [https://perma.cc/M5GV-CADZ] ("[A]s many as 1,000 Americans each year . . . die accidentally while practicing what's known as autoerotic asphyxiation.").

21. Katherine Seigenthaler, *No Intention of Killing Themselves*, WASH. POST (June 12, 1985), https://www.washingtonpost.com/archive/lifestyle/wellness/1985/06/12/no-intention-of-killing-themselves/f82af43a-72b4-4fe0-bbb4-9c447001e624/[https://perma.cc/5NLS-C24G]; *see* Erman, *supra* note 1, at 2174; Brody, *supra* note 20 (explaining many autoerotic asphyxiation deaths are covered up by family members due to "the social stigma that surrounds a sexually motivated death").

22. *See* Parker v. Danaher Corp., 851 F. Supp. 1287, 1290 (W.D. Ark. 1994) ("It is pointed out that research . . . suggests that autoerotic asphyxiation is a repetitive pattern of behavior that individuals engage in over a period of years and that the intent of the individuals performing this act is not death."); Conn. Gen. Life Ins. Co. v. Tommie, 619 S.W.2d 199, 202 (Tex. Civ. App. 1981) (summarizing expert testimony to the effect that "death is not the normal expected result of the behavior, but would be considered unusual or unexpected").

23. *See* Critchlow v. First UNUM Life Ins. Co. of Am., 378 F.3d 246, 260 (2d Cir. 2004) (describing that the insured had set up an elaborate escape mechanism designed to save him if he lost consciousness); *Todd*, 47 F.3d at 1450 (noting the deceased had developed a system of leashes as a safety device); Book v. Monumental Life Ins. Co., 723 N.W.2d 208, 209 (Mich. Ct. App. 2006) (stating the decedent had employed various safety mechanisms); *see* Seigenthaler, *supra* note 21 ("Frequently, the victim [places] some sort of scarf around the neck underneath the strangulation device to prevent welts and scars.").

dies due to autoerotic asphyxiation.[24] The beneficiary and insurer almost always agree death was not intentional.[25] However, the insurer may deny benefits under the argument that the insured acted with the intent to cut off the flow of oxygen to the brain.[26] The death is not considered accidental because the insurer believes the practice is too reckless and too likely to result in death for a reasonably prudent person not to be aware of its inherent danger.[27]

In contrast, beneficiaries have challenged under the argument that the outcome of death was unanticipated, unexpected, and thus accidental.[28] Beneficiaries assert that while autoerotic asphyxiation can indeed result in death, it is rarely the outcome of the practice.[29] As noted above, practitioners often perform autoerotic asphyxiation repetitively over a number of years,[30] and the fact insureds had routinely performed the act indicates a belief they could continue to do so without death.[31]

To make matters more complicated, accidental death insurance policies often include a clause excluding accidental deaths which result from an intentionally self-inflicted injury.[32] In the case of autoerotic asphyxiation, the determination of whether the exclusion applies hinges on whether the

24. Gary Schuman, *Fatal Attraction: Autoeroticism and Accidental Death Insurance Coverage*, 49 TORT TRIAL & INS. PRAC. L.J. 667, 670–72 (2014) [hereinafter *Fatal Attraction*].

25. *See Critchlow*, 378 F.3d at 251; Padfield v. AIG Life Ins. Co., 290 F.3d 1121, 1126 (9th Cir. 2002); Sims v. Monumental Gen. Ins. Co., 960 F.2d 478, 479 (5th Cir. 1992).

26. *See Todd*, 47 F.3d at 1452; Bennett v. Am. Int'l Life Assurance Co. of N.Y., 956 F. Supp. 201, 206 (N.D.N.Y. 1997).

27. *See Padfield*, 290 F.3d at 1126; Sousa *ex rel.* Will of Sousa v. Unilab Corp., 252 F. Supp. 2d 1046, 1052–53 (E.D. Cal. 2002), *aff'd sub nom.* Sousa v. Unilab Corp., 83 F. App'x 954 (9th Cir. 2003); Fawcett v. Metro. Life Ins. Co., No. C-3-97-540, 2000 WL 979994, at *4 (S.D. Ohio June 28, 2000).

28. *See* Cronin v. Zurich Am. Ins. Co., 189 F. Supp. 2d 29, 37 (S.D.N.Y. 2002); *Padfield*, 290 F.3d at 1127.

29. *See Padfield*, 290 F.3d at 1127 (noting "death by autoerotic asphyxiation is statistically rare").

30. *See* Parker v. Danaher Corp., 851 F. Supp. 1287, 1290 (W.D. Ark. 1994); Sims v. Monumental Gen. Life Ins. Co., 778 F. Supp. 325, 327 (E.D. La. 1991), *aff'd* 960 F.2d 478 (5th Cir. 1992).

31. Lonergan v. Reliance Standard Life Ins. Co., No. CV-96-11832-PBS, 1997 WL 34706253, at *6 (D. Mass. May 29, 1997) (agreeing with the plaintiff that because the insured was highly experienced in autoerotic asphyxiation, it indicated he did not intend to injure himself).

32. *See Fatal Attraction*, *supra* note 24, at 670.

self-strangulation intended by the practitioner is an injury—even when unconsciousness and death do not occur.[33] This forces courts to essentially make the determination of whether partially and temporarily restricting the flow of oxygen to the brain, alone, is an injury.[34]

Due to the difficulty surrounding this area of the law, federal courts have come to conflicting decisions in determining whether death from autoerotic asphyxiation is an accident under ERISA-governed policies. More crucially, this difficulty has resulted in a circuit split over whether such deaths should be excluded under an intentionally self-inflicted injury provision.[35] However, the Eighth Circuit has not yet decided whether autoerotic asphyxiation is an accident or, if so, whether it should be excluded under a provision for an intentionally self-inflicted injury. [36]

Therefore, this Note will: (1) summarize the relevant federal common law governing this area;[37] (2) discuss the approaches used by courts in assessing accidental death;[38] (3) address the conflicting decisions regarding autoerotic asphyxiation in the context of accidental death policies;[39] (4) predict how the Eighth Circuit will hold regarding the issues surrounding death from autoerotic asphyxiation;[40] and (5) argue death resulting from autoerotic asphyxiation should be viewed as an accident under accidental death policies and should fall outside the exclusion for an intentionally self-inflicted injury.[41]

33. *See generally* Critchlow v. First UNUM Life Ins. Co. of Am., 378 F.3d 246, 254 (2d Cir. 2004); MAMSI Life & Health Ins. Co. v. Callaway, 825 A.2d 995, 998 (Md. Ct. App. 2003); *Sims*, 778 F. Supp. at 328.

34. *See generally* Tran v. Minn. Life Ins. Co., 922 F.3d 380, 383–85 (7th Cir. 2019); *Critchlow*, 378 F.3d at 260; *Padfield*, 290 F.3d at 1129; Cronin v. Zurich Am. Ins. Co., 189 F. Supp. 2d 29, 38 (S.D.N.Y. 2002); *Lonergan*, 1997 WL 34706253, at *5.

35. *See* Jacklyn Wille, *Autoerotic Asphyxiation Ruling Creates Circuit Split on Coverage*, BLOOMBERG L. (Apr. 30, 2019), https://news.bloomberglaw.com/employee-benefits/autoerotic-asphyxiation-ruling-creates-circuit-split-on-coverage [https://perma.cc/9G3R-B6L2].

36. *Fatal Attraction*, *supra* note 24, at 701–02.

37. *See infra* Part II.

38. *See infra* Part III.

39. *See infra* Part IV.

40. *See infra* Parts V.C.1, V.D.1.

41. *See infra* Parts V.C.2, V.D.2.

II. ERISA-GOVERNED POLICIES

When an accidental death policy under which a beneficiary is bringing suit is included as a part of an employee benefit plan—as is often the case—the policy is governed by ERISA.[42] ERISA regulates "any plan, fund, or program" provided or maintained by an employer furnishing "benefits in the event of sickness, accident, disability, [or] death."[43] Challenges to ERISA benefit determinations are generally reviewed de novo.[44] However, where the benefit plan contains language which expressly gives the plan administrator or fiduciary discretionary authority to determine eligibility for benefits or to construe the plan's terms, a deferential standard of review is used.[45] Under this latter standard, the inquiry is whether the administrator or fiduciary reasonably construed and applied the plan.[46]

When faced with questions of insurance policy interpretation under ERISA, state law is preempted and federal courts instead apply federal common law.[47] In adopting ERISA, Congress expected a "federal common law of rights and obligations under ERISA-regulated plans" would develop.[48] In developing federal common law in this area, the courts are allowed to borrow from state law, but may do so only where it "is consistent with the policies underlying the federal statute in question."[49]

42. *See* 29 U.S.C. § 1002(1).

43. *Id.*

44. Firestone Tire & Rubber Co. v. Bruch, 489 U.S. 101, 114–15 (1989); Tran v. Minn. Life Ins. Co., 922 F.3d 380, 382 (7th Cir. 2019). Applying de novo review, the straightforward language in an ERISA-regulated insurance policy is given its natural meaning. Burnham v. Guardian Life Ins. Co. of Am., 873 F.2d 486, 489 (1st Cir. 1989).

45. *Bruch*, 489 U.S. at 115.

46. Hamilton v. AIG Life Ins. Co., 182 F. Supp. 2d 39, 43 (D.D.C. 2002). When deciding whether to pay benefits, the plan administrator makes two determinations: (1) the finding of facts regarding the claim, and (2) the finding of whether these facts support coverage under the plan. Firman v. Becon Const. Co., 789 F. Supp. 2d 732, 739 (S.D. Tex. 2011),(citing Schadler v. Anthem Life Ins. Co., 147 F.3d 388, 394 (5th Cir. 1998), *aff'd sub nom.* Firman v. Life Ins. Co. of N. Am., 684 F.3d 533 (5th Cir. 2012)). When a deferential standard is used, both of these decisions are reviewed under an arbitrary and capricious standard. *Firman*, 789 F. Supp. 2d at 740.

47. Padfield v. AIG Life Ins. Co., 290 F.3d 1121, 1125 (9th Cir. 2002); Wickman v. Nw. Nat'l Ins. Co., 908 F.2d 1077, 1082 (1st Cir. 1990) (citing Pilot Life Ins. Co. v. Dedeaux, 481 U.S. 41, 57 (1987)).

48. *Bruch*, 489 U.S. at 110 (quoting *Dedeaux*, 481 U.S. at 56).

49. Critchlow v. First UNUM Life Ins. Co. of Am., 378 F.3d 246, 256 (2d Cir. 2004) (quoting Krishna v. Colgate Palmolive Co., 7 F.3d 11, 14 (2d Cir. 1993)).

Courts interpret terms in ERISA-governed insurance policies "in an ordinary and popular sense as would a [person] of average intelligence and experience."[50] If there are ambiguities in the language of an ERISA-governed policy, they are to be construed against the insurer.[51] Language in a plan "is ambiguous when it is capable of more than one meaning when viewed objectively by a reasonably intelligent person who has examined the context of the entire integrated agreement . . . ."[52]

III. METHODS OF DETERMINATION

A. *The* Wickman *Subjective/Objective Test*

Although inconsistent in its application, the federal courts—for the most part—have consistently adopted and applied the same federal common law test for determining when an accident occurs under an accidental death policy.[53] This test originates from *Wickman v. Northwestern National Insurance Co.*, in which the First Circuit established a two-part subjective/objective test focusing on the reasonable expectations of the insured.[54]

First, a court must consider whether the insured subjectively expected the harmful result of the activity.[55] This step essentially excludes those acting with the intent that their conduct will lead to an injurious or fatal outcome.[56]

Second, if the court decides the insured did not subjectively expect death to result, the court must then determine whether this expectation was objectively reasonable.[57] Assessment of the insured's expectation is made "from the perspective of the insured, allowing the insured a great deal of latitude and taking into account the insured's personal characteristics and

50. *See* Evans v. Safeco Life Ins. Co., 916 F.2d 1437, 1441 (9th Cir. 1990) (quoting Allstate Ins. Co. v. Ellison, 757 F.2d 1042, 1044 (9th Cir. 1985)).

51. *See, e.g.*, Fay v. Oxford Health Plan, 287 F.3d 96, 104 (2d Cir. 2002).

52. O'Neil v. Ret. Plan for Salaried Emps. of RKO Gen., Inc., 37 F.3d 55, 59 (2d Cir. 1994) (internal quotation marks omitted).

53. *Fatal Attraction*, *supra* note 24, at 678 (citations omitted) ("[*Wickman*] provides the controlling federal standard for determining when an accident occurs under the terms of accidental death coverage.").

54. Wickman v. Nw. Nat'l Ins. Co., 908 F.2d 1077, 1088 (1st Cir. 1990).

55. *Id.*

56. *Fatal Attraction*, *supra* note 24, at 679; *see Wickman*, 908 F.2d at 1088.

57. *Wickman*, 908 F.2d at 1088.

experiences."[58] If the court determines the insured's expectation was unreasonable, then the injuries will be deemed not accidental.[59]

However, in some cases, evidence may be insufficient to determine the insured's subjective expectation.[60] In such cases, the reasonableness of the insured's conduct is to be determined strictly from an objective perspective.[61] The court is required to ascertain "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."[62]

Thus, both in cases where a subjective expectation of survival can be determined and those in which no subjective expectation can be found, as a whole, the *Wickman* test essentially boils down to whether a reasonable person, in the shoes of the insured, would have viewed death as highly likely to occur.[63] By viewing accidental this way, the *Wickman* framework is more apt to hold injuries accidental even when they result from people's involvement in a risky activity they are skilled or experienced in.[64] This is because, while an insured's involvement in a perilous activity may appear to an average person as likely to result in injury, given the insured's background, experience, and skill in it, an injury would not be viewed by that individual as highly likely to occur.[65] While the activity may present an increased risk and present foreseeable injury, under *Wickman*, it is still accidental.[66]

58. *Id.*
59. *Id.*
60. *See Fatal Attraction*, *supra* note 24, at 680; *Wickman*, 908 F.2d at 1088–89.
61. *Wickman*, 908 F.2d at 1088.
62. *Id.* (emphasis added).
63. *See id.*
64. Lerner, *supra* note 10.
65. *See Wickman*, 908 F.2d at 1088; *see also* Lerner, *supra* note 10 (giving hypothetical examples of a person experienced in using guns who, after having examined a gun and believing it to be empty, pointed and fired it at his head, resulting in death, or the death of a professional diver who, after having previously completed the same dive without incident, died after diving off a dam).
66. *See Fatal Attraction*, *supra* note 24, at 679–80.

B. *General Foreseeability*

While the majority of federal courts have adopted the test articulated in *Wickman,*[67] a minority of federal courts and many state courts have used a more general approach to foreseeability in determining whether death is an accident.[68] Under this approach, the court interprets "accident" according to the usage of the ordinary, "common man."[69] This interpretation has led to the relatively consistent conclusion that accident means something which occurs without plan or design and, from the eyes of the insured, is something "unexpected, unintended, and unforeseen."[70] It is an event that proceeds from an unexpected cause or is an unusual result of a known cause.[71]

Yet, while the courts using general foreseeability have come to a surprising consensus on the definition of accident, the application of this definition has been anything but predictable.[72] This lack of consistency is attributable to a difference in how these courts view foreseeability.[73]

67. *See id.* at 678.

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

69. Parker v. Danaher Corp., 851 F. Supp. 1287, 1292, 1295 (W.D. Ark. 1994) (adopting Justice Cordozo's dissenting opinion in *Landress v. Phoenix Mut. Life Insurance Co.* and concluding "the common man on the street regards an accident as being something unintended, not according to the usual course of things, or not as expected"); Habeeb, *supra* note 68, at § 2; *see* Fryman v. Pilot Life Ins. Co., 704 S.W.2d 205, 206 (Ky. 1986).

70. Habeeb, *supra* note 68, at § 2; *see* Willard v. Kelley, 803 P.2d 1124, 1128–29 (Okla. 1990) (stating an accident is an event "which is unexpected, unintended and unforeseen *in the eyes of the insured*"); *see also* Heighley v. J.C. Penney Life Ins. Co., 257 F. Supp. 2d 1241, 1253 (C.D. Cal. 2003); Collins v. Nationwide Life Ins. Co., 294 N.W.2d 194, 196 (Mich. 1980) (citation omitted).

71. Habeeb, *supra* note 68, at § 2.

72. *See* Kennedy v. Wash. Nat'l Ins. Co., 401 N.W.2d 842, 846 (Wis. Ct. App. 1987) (holding death from autoerotic asphyxiation as accidental); *see also* Sigler v. Mut. Benefit Life Ins. Co., 506 F. Supp. 542, 544–45 (S.D. Iowa 1981), *aff'd* 663 F.2d 49 (8th Cir. 1981) (holding death from autoerotic asphyxiation as not accidental).

73. *See* Bennett v. Am. Int'l Life Assurance Co. of N.Y., 956 F. Supp. 201, 207–08 (N.D.N.Y. 1997) (comparing cases which recognized a lack of an accident where the insured understood that his actions *could* result in death with cases that reject this approach in favor of one in which death must be a *highly probable* result).

Some courts view foreseeability as having a more specific, insured-friendly meaning in the context of accidental death insurance.[74] Under this meaning, an outcome is foreseeable, and thus not accidental, "only when the consequences of the act are *so natural and probable as to be expected* by any reasonable person."[75] Courts viewing foreseeability this way contend, otherwise, deaths resulting from almost any high-risk activity would be labeled as foreseeable and, thus, would be excluded under an accident insurance policy.[76]

Other courts, however, view death as foreseeable and not accidental if it is a result insureds knew *could* result from their voluntary acts.[77] This means the insured's death is accidental only when there is no expectation at all death could result.[78] If the insured does not think death is probable but knows it may occur from the conduct, the resulting death is still held as non-accidental.[79] Obviously, this approach is insurer-friendly and has the effect of excluding more claims for benefits under accidental death policies—especially when the insured placed themselves in a high-risk situation in which death was known by the insured to be a *possible* consequence of the action.[80]

74. Cranfill v. Aetna Life Ins. Co., 49 P.3d 703, 706–07 (Okla. 2002).

75. *Id.* at 707 (emphasis added); Conn. Gen. Life Ins. Co. v. Tommie, 619 S.W.2d 199, 202 (Tex. Civ. App. 1981) (citation omitted).

76. *Bennett*, 956 F. Supp. at 207 (stating that a test that simply requires that death *could* result from an activity would include death resulting from arguably any activity: "Under this test, a pedestrian who is hit by an automobile [would not be] entitled to accidental benefits because a reasonable person would have recognized that crossing the street 'could result in death.'"); *Cranfill*, 49 P.3d at 706–07.

77. *See* Int'l Underwriters, Inc. v. Home Ins. Co., 662 F.2d 1084, 1087 (4th Cir. 1981) ("[The insured] is bound to have foreseen that death or serious bodily injury could have resulted when he voluntarily induced unconsciousness with a noose around his neck."); *Sigler*, 506 F. Supp. at 544 ("[The insured's] death was not an accident since a reasonable person would have recognized that his actions could result in his death."); Cronin v. Zurich Am. Ins. Co., 189 F. Supp. 2d 29, 37 (S.D.N.Y. 2002) ("One who purposefully creates the conditions of risk foresees the logical consequence of risk, and has to assume that he may not be able to manage those conditions so as to eliminate the risk he has created.").

78. *See Int'l Underwriters, Inc.,* 662 F.2d at 1087; *Sigler*, 506 F. Supp. at 544–45; *Cronin*, 189 F. Supp. 2d at 37.

79. *See Int'l Underwriters, Inc.*, 662 F.2d at 1087; *Sigler*, 506 F. Supp. at 544–45; *Cronin*, 189 F. Supp. 2d at 37.

80. *See Int'l Underwriters, Inc.*, 662 F.2d at 1087; *Sigler*, 506 F. Supp. at 544–45; *Cronin*, 189 F. Supp. 2d at 37.

IV. ERISA-GOVERNED AUTOEROTIC ASPHYXIATION CASES

A. *Accidental Bodily Injury*

As mentioned, most federal courts have adopted the *Wickman* test in determining whether death resulting from autoerotic asphyxiation is an accidental death under ERISA-governed policies.[81] Nearly every decision using this test has held in favor of the insured and found death to be accidental.[82]

Most persuasive to a potential Eighth Circuit decision are *Todd v. AIG Life Insurance Co.*, *Padfield v. AIG Life Insurance Co.*, and *Critchlow v. First UNUM Life Insurance Co. of America*.[83] These cases are the only circuit court decisions to have addressed the issue under ERISA.[84] Each used the *Wickman* test to hold deaths resulting from autoerotic asphyxiation as accidental.[85]

In *Todd*, benefits were denied under the insured's ERISA-governed accidental death policy after the insured died while engaging in autoerotic asphyxiation.[86] From the insured's viewpoint, the asphyxia caused by the insured's intentional strangulation was such that he should have realized it was reasonably probable death would result.[87] However, the district court ruled in favor of the beneficiary.[88]

The Fifth Circuit affirmed, observing that the district court had appropriately followed and applied "the essence of *Wickman*" in its two-step

81. Douglas R. Richmond, *Drugs, Sex, and Accidental Death Insurance*, 45 TORT TRIAL & INS. PRAC. L.J. 57, 71 (2009); *see, e.g.*, Todd v. AIG Life Ins. Co., 47 F.3d 1448, 1456 (5th Cir. 1995) (finding the *Wickman* analysis to be the appropriate test for determining whether a result is an accident under insurance contracts).

82. *See, e.g.*, Critchlow v. First UNUM Life Ins. Co. of Am., 378 F.3d 246, 263 (2d Cir. 2004).

83. *Todd*, 47 F.3d 1448; Padfield v. AIG Life Ins. Co., 290 F.3d 1121 (9th Cir. 2002); *Critchlow*, 378 F.3d 246.

84. *Tran v. Minn. Life Ins. Co.* is a circuit court case that addresses a challenge to an ERISA benefit determination with regard to an autoerotic asphyxiation death. 922 F.3d 380 (7th Cir. 2019). However, the court focused on a policy exclusion for an "intentionally self-inflicted injury," *not* for an accidental death or "accidental bodily injury." *See id.* at 382, 386; *infra* Part IV.B.

85. *Critchlow*, 378 F.3d at 263–64; *Padfield*, 290 F.3d at 1127; *Todd*, 47 F.3d at 1456.

86. *Todd*, 47 F.3d at 1450.

87. *Id.*

88. *Id.* at 1451.

process of (1) determining the deceased had a subjective expectation of survival and (2) finding this expectation to be objectively reasonable, because death was not substantially certain to result from the insured's conduct.[89] The Fifth Circuit noted as a matter of law, under the *Wickman* test, the "likelihood of death resulting from autoerotic activity falls far short of what would be required to negate coverage."[90] In making this determination, the court relied heavily on expert evidence and academic studies which suggested autoerotic asphyxiation normally results in a nonfatal outcome.[91] The court held that while the insured may have had the intention of strangulation before or to the point of losing consciousness, such a result is not the same as death.[92] Rather, the prolonged lack of oxygen after the point of unconsciousness was an additional injury which the evidence suggested was not intended nor substantially likely to occur as a result of the practice.[93] Thus, the Fifth Circuit held death resulting from autoerotic asphyxiation was an accident.[94]

The Ninth Circuit in *Padfield* also used *Wickman* in holding death from autoerotic asphyxiation as accidental under an ERISA-governed policy.[95] The court's rationale was similar to that of *Todd*.[96] First, the court concluded the insured had an expectation of survival.[97] Not only did the insured have a history of engaging in the practice and surviving it, but there was also no evidence indicating he was depressed or suicidal.[98] Second, the court found death was not a substantially certain result of the practice because, like the Fifth Circuit in *Todd*, the Ninth Circuit found medical and scientific evidence supported the conclusion that death from the practice was uncommon.[99]

89. *Id.* at 1456. The district court decided to use the language of "substantially certain" in place of the "highly likely to occur" language the *Wickman* opinion had used. *Id.* However, as the Fifth Circuit highlighted, the *Wickman* court had found substantially certain to be the equivalent of highly likely to occur. *See id.*; *see also* Wickman v. Nw. Nat'l Ins. Co., 908 F.2d 1077, 1089 (1st Cir. 1990).

90. *Todd*, 47 F.3d at 1456.

91. *Id.* at 1457.

92. *Id.* at 1453.

93. *See id.*

94. *Id.* at 1457.

95. Padfield v. AIG Life Ins. Co., 290 F.3d 1121, 1127 (9th Cir. 2002).

96. *See id.* at 1126–27.

97. *Id.* at 1127.

98. *See id.*

99. *Id.*

Therefore, the insured's expectation of survival was also held objectively reasonable.[100]

Critchlow is the most recent circuit court decision concerning whether death resulting from autoerotic asphyxiation qualifies as an accident.[101] Although the court primarily addressed whether the insured's injuries were self-inflicted, the Second Circuit also discussed the issue of whether the insured's death was accidental.[102] In adopting the *Wickman* test to determine it was, the Second Circuit relied heavily on a previous district court decision: *Bennett v. American International Life Assurance Co. of New York*.[103]

In that case, the district court adopted the *Wickman* standard and held an act was accidental only where "death is not *substantially likely* to result from the insured's conduct."[104] Similarly to *Todd* and *Padfield*, the court explained although the insured intended to cause himself asphyxia—even to the point right before loss of consciousness—"more is necessary to elevate [the] facts to the point where a fact-finder can conclude that [the insured] intended to die."[105] Additionally, the court held asphyxia from autoerotic asphyxiation was not an injury which invariably leads to death but rather found "most practitioners likely survive the experience and expect to repeat it again."[106]

Referring to *Bennett*, the Second Circuit in *Critchlow* acknowledged *Wickman* as the appropriate standard for assessing autoerotic asphyxiation cases,[107] and used the same rationale as *Bennett* to conclude both that the insured had a subjective expectation of survival and that his expectation was

100. *See id.*

101. *See* Critchlow v. First UNUM Life Ins. Co. of Am., 378 F.3d 246, 246 (2d Cir. 2004).

102. *Id.* at 263–64.

103. *See id.* at 262–64 (citing Bennett v. Am. Int'l Life Assurance Co. of N.Y., 956 F. Supp. 201 (N.D.N.Y. 1987)).

104. *Bennett*, 956 F. Supp. at 211. The court adopted the "substantially likely" language used in *Wickman* instead of the "substantially certain" language used in *Todd* only to avoid possible semantic challenges. *Id.* at 210–11; *see* Todd v. AIG Life Ins. Co., 47 F.3d 1448, 1456 (5th Cir. 1995); Wickman v. Nw. Nat'l Ins. Co., 908 F.2d 1077 (1st Cir. 1990).

105. *See Bennett*, 956 F. Supp. at 211.

106. *Id.* (citation omitted).

107. While not deciding whether the *Wickman* analysis is appropriate in all ERISA cases, the Second Circuit concluded the test was not inconsistent with federal common law and is the appropriate standard for determining whether death from autoerotic asphyxiation is an accident. *See Critchlow*, 378 F.3d at 264.

objectively reasonable.[108] Specifically, the court noted the insured's repeated engagement in the practice strongly supported a reasonable belief—taking into account the insured's own experiences—death from the activity was not substantially likely to occur.[109]

Unlike when federal courts use *Wickman* to assess whether a death resulting from autoerotic asphyxiation is accidental, inconsistency appears when general foreseeability is used.[110] This is made apparent by *Parker v. Danaher Corp.* and *Cronin v. Zurich American Insurance Co.*[111]

In *Parker*, the court found *Wickman* to "shed[] little light" on determining what is or is not an accident but rather concluded "it more appropriate to accord the term 'accident' its natural meaning."[112] Still, the court in *Parker* found the death to be accidental because it applied the more insured-friendly definition of foreseeability.[113] Describing an accident as being "something unintended, not according to the usual course of things, or not as expected," the court found while the practice created a risk of serious injury or death, it was clear "the insured did not expect to die as a result of performing the autoerotic act."[114]

In *Cronin*, the court also used the foreseeability approach in place of *Wickman* but used the more insurer-friendly meaning of foreseeability.[115] The court found an occurrence was accidental only if the risk was completely unforeseen.[116] As applied to autoerotic asphyxiation, the court held death

108. *Id.*

109. *Id.* at 260–61 (emphasizing that the insured's engagement in the autoerotic practice for more than 20 years without incident indicated both a subjective belief of survival and that this subjective belief was objectively reasonable given his experience in performing the practice).

110. *Compare* Cronin v. Zurich Am. Ins. Co., 189 F. Supp. 2d 29, 37 (S.D.N.Y. 2002) (finding insured's death was not accidental because the risk was foreseeable), *with* Parker v. Danaher Corp., 851 F. Supp. 1287, 1295 (W.D. Ark. 1994) (finding the insured's death was accidental because the insured did not expect to die).

111. *See Cronin*, 189 F. Supp. 2d at 37; *Parker*, 851 F. Supp. at 1295–96.

112. *Parker*, 851 F. Supp. at 1295.

113. *See id.*

114. *Id.*

115. *See Cronin*, 189 F. Supp. 2d at 37. The court used the plain meaning of foreseeability rather than a more specific meaning of the word. *Id.* As discussed earlier, most courts—including the court in *Parker*—give foreseeability a specialized definition in the context of accidental death insurance which prevents death from all somewhat-risky activities from being declared non-accidental. *See Parker*, 851 F. Supp. at 1292.

116. *See Cronin*, 189 F. Supp. 2d at 37.

resulting from such an activity as not accidental because the practitioner intentionally "creates an imminent danger that consciousness will be lost and death will result."[117] While the insured may not intend death, "he clearly wishes to put himself in a position that risks death's irreversible grasp."[118]

B. *Exclusion for an Intentionally Self-Inflicted Injury*

Even if the insured's death is determined to be accidental, more divisiveness arises when an ERISA-governed accidental death policy includes an exclusion for an intentionally self-inflicted injury[119] and is being reviewed de novo.[120] In determining whether such an exclusion is enforceable, many courts have adopted the same *Wickman* subjective/objective test used by the courts to determine whether death is accidental.[121]

117. *Id.*

118. *Id.*

119. Insurance companies have a right to limit their liability and may exclude certain risks it does not intend to cover. *See, e.g.*, Caribbean I Owners' Ass'n v. Great Am. Ins. Co. of N.Y., 600 F. Supp. 2d 1228, 1246 (S.D. Ala. 2009); *United Nat'l Ins. Co.*, 598 F. Supp. 2d at 546; *see* Monceaux v. Monumental Life Ins. Co., No. 2:10 CV147, 2011 WL 400342, at *3 (W.D. La. Feb. 1, 2011). These exclusions are construed more strictly than coverage provisions. Yonkers v. Riversource Life Ins. Co., No. 10-80415-CIV, 2011 WL 332830, at *3 (S.D. Fla. Jan. 31, 2011). The burden also falls on the insurer to prove the exclusion's applicability. *See, e.g.*, *Carribean I Ownsers' Ass'n*, 600 F. Supp. 2d at 1246; *United Nat'l Ins. Co.*, 598 F. Supp. 2d at 546.

120. If the insurance policy contains language which expressly gives an administrator authority to determine eligibility for benefits or to construe the plan's terms, these administrator's decisions are reviewed for an abuse of discretion which hinges on whether the plan administrator acted arbitrarily or capriciously. Firman v. Becon Const. Co., 789 F. Supp. 2d 732, 740 (S.D. Tex. 2011), *aff'd sub nom.* Firman v. Life Ins. Co. of N. Am., 684 F.3d 533 (5th Cir. 2012) (citing Holland v. Int'l Paper Co. Ret. Plan, 576 F.3d 240, 246 (5th Cir. 2009)). Given the difficulty of deciding whether autoerotic asphyxiation is an intentionally self-inflicted injury, courts applying the more lenient arbitrary and capricious standard almost always find the determination to be, at the very least, reasonable and hold for the insurer. *See, e.g.*, Est. of Thompson v. Sun Life Assurance Co. of Can., 354 F. App'x 183, 190 (5th Cir. 2009). As a result, conflict between courts emerges when the insurance company has not given an administrator authority and the court must review the insurer's decision de novo. *See, e.g.*, Tran v. Minn. Life Ins. Co., 922 F.3d 380, 382 (7th Cir. 2019).

121. *See, e.g.*, Critchlow v. First UNUM Life Ins. Co. of Am., 378 F.3d 246, 259 (2d Cir. 2004) ("We conclude, as did *Padfield*, that this subjective/objective analysis reflects the developing federal common law used in ERISA cases to determine whether a death, including a death during the practice of autoerotic asphyxiation, was, within the meaning of an ERISA-regulated insurance policy, either accidental or the result of an intentionally self-inflicted injury.")

To fall outside the exclusion, the injury causing the insured's death must have been subjectively unintended, and the expectation that injury would not result must be objectively reasonable.[122]

However, the fulfillment of these requirements depends on the determination of whether the intended physical consequences of the insured's actions constitute an injury.[123] In the realm of autoerotic asphyxiation cases, it is the difficulty of this vital determination which has caused conflict between the courts and has resulted in inconsistent application of the exclusion.[124] Courts are divided on whether partial, temporary strangulation—the intended consequence of autoerotic asphyxiation—is truly an injury.[125] If the intended consequences of the practice are injurious, then the exclusion applies because the insured clearly had a subjective intention to self-inflict an injury by performing the activity.[126] But if the intended consequences of the action are not injurious, and the injury of the practice is the deprivation of oxygen which occurred *after* the loss of consciousness, then the exclusion likely does not apply.[127] This is because unconsciousness, and the continued strangulation that occurs because of it, is not the intended or the usual result of the practice.[128] Thus, for the same reasons death from the practice has been held as accidental, both prongs of *Wickman* would be met.[129]

122. *See Tran*, 922 F.3d at 385–86; *Critchlow*, 378 F.3d at 259–60; Padfield v. AIG Life Ins. Co., 290 F.3d 1121, 1129 (9th Cir. 2002).

123. *Fatal Attraction*, *supra* note 24, at 691; *see generally Tran*, 922 F.3d at 384–86.

124. *Compare Tran*, 922 F.3d at 385–86 (concluding the act of autoerotic asphyxiation itself is an injury) *and* Lonergan v. Reliance Standard Life Ins. Co., No. CV-96-11832-PBS, 1997 WL 34706253, at *3–5 (D. Mass. May 29, 1997) (finding partial strangulation for purposes of autoerotic asphyxiation is an injury) *with Critchlow*, 378 F.3d at 259–60 (rejecting partial strangulation for purposes of autoerotic asphyxiation is an injury in and of itself), *and Padfield*, 290 F.3d at 1129 (distinguishing voluntary acts resulting in injury from acts that result in "intentionally self-inflicted injury").

125. Wille, *supra* note 35.

126. *See Tran*, 922 F.3d at 386; Cronin v. Zurich Am. Ins. Co., 189 F. Supp. 2d 29, 38–40 (S.D.N.Y. 2002); *Lonergan*, 1997 WL 34706253, at *4–5.

127. *See Critchlow*, 378 F.3d at 259–60; *Padfield*, 290 F.3d at 1129.

128. *Padfield*, 290 F.3d at 1129.

129. The injury is subjectively unintended because the insured did not expect to lose consciousness and continue the strangulation to the point of injury and death. *See id.* This subjective lack of intention to injure is objectively reasonable for the same reason the court held an expectation of survival is objectively reasonable when deciding whether the act was accidental—the insured's past experience of safely performing the activity without loss of consciousness and the insured's use of safety mechanisms to avoid an

As compared to determining whether autoerotic asphyxiation deaths are accidental, insurers have had greater success in arguing such deaths fall under this exclusion.[130] However, because of the compelling arguments supporting the conclusion partial strangulation is not an injury, some courts have found the partial strangulation involved in autoerotic asphyxiation is not an injury or, at the very least, have found the term injury is ambiguous in the context of the practice.[131] The result is a current circuit split regarding the issue.[132]

1. *Death from Autoerotic Asphyxiation Does Not Result from an Intentionally Self-Inflicted Injury*

Notably, two federal courts of appeals, under de novo review, have rejected insurers' exclusionary arguments and found death from autoerotic asphyxiation is not excluded under an intentionally self-inflicted injury provision.[133]

In *Padfield*, the Ninth Circuit used the *Wickman* subjective/objective test to determine the injury causing death in an autoerotic asphyxiation case was not intentionally self-inflicted.[134] Addressing the question of whether the physical consequence the insured intended was an injury, the court found it was not.[135] The court explained if the practice had gone as planned, the practitioner "would have experienced a temporary deprivation of oxygen, a euphoric lightheadedness . . . and an intensified sexual experience. His oxygen level would then have been restored, his euphoric state would have subsided, and he would have returned home uninjured."[136] Thus, the court concluded the injury causing death was the unintentional asphyxiation the practitioner experienced after blacking out, not the partial strangulation inflicted before he lost consciousness.[137]

injurious result. *See id.* The court can use the same reasons in finding injury not intentionally inflicted as it used in finding death was accidental because in both situations the court is essentially deciding whether the insured was reasonable in thinking loss of consciousness would not occur. *See Critchlow*, 378 F.3d at 259–60.

130. *Fatal Attraction*, *supra* note 24, at 692; *see, e.g.*, *Tran*, 922 F.3d at 386.

131. *See Critchlow*, 378 F.3d at 259–60; *Padfield*, 290 F.3d at 1129.

132. Wille, *supra* note 35.

133. *Critchlow*, 378 F.3d at 259–60; *Padfield*, 290 F.3d at 1129.

134. *Padfield*, 290 F.3d at 1130.

135. *Id.* at 1129.

136. *Id.*

137. *See id.*

Having determined the insured's intended result of autoerotic asphyxiation was not injurious, and, thus, that the insured had no subjective intent to cause an injury,[138] the Ninth Circuit moved to deciding whether this subjective intent was objectively reasonable under the *Wickman* test.[139] The court concluded it was.[140] Due to the insured's repeated engagement in the practice, "A reasonable person with background and characteristics similar to [the insured] would not have viewed the strangulation injury that resulted in his death as 'substantially certain' to result from his conduct."[141]

In *Critchlow*, the Second Circuit also held death resulting from autoerotic asphyxiation did not fall under the insurer's exclusion for intentionally self-inflicted injuries.[142] Like *Padfield*, the court first found the intended effects of the practice to not be injurious, noting the "physiological effects of partial strangulation without loss of consciousness, absent an accident, are a temporary lightheadedness and euphoria with no serious or lasting impact on one's health."[143] Instead, the court found the death was caused solely by the insured's "total loss of oxygen for a sustained period" *after* unconsciousness.[144]

Having come to this conclusion on the question of injury, the Second Circuit, following the subjective/objective analysis set forth in *Wickman*, also found the insured did not intend to injure himself.[145] The insured's subjective expectation was partial strangulation and survival, not the full loss of oxygen

138. Because the court had already determined the subjective intent of the insured was limited to partial strangulation and not any further consequence, the determination that partial strangulation was not an injury naturally meant the insured had no subjective intent to injure himself. *Id.*

139. *Id.* at 1129–30.

140. The Ninth Circuit relied heavily on *Santaella v. Metro. Life Ins. Co.* in making this determination. *Id.* In that case, the Seventh Circuit held an insured's accidental overdose was not an intentionally self-inflicted injury because there was no evidence the woman intended to injure herself when she took too much of a legal prescription. Santaella v. Metro. Life Ins. Co., 123 F.3d 456, 465 (7th Cir. 1997). Interestingly, the Seventh Circuit downplayed the relation of *Santaella* in *Tran v. Minn. Life Ins. Co.,* where the court said "*Santaella* sheds little light on the question of whether autoerotic asphyxiation is an injury." 922 F.3d 380, 383 (7th Cir. 2019).

141. *Padfield*, 290 F.3d at 1129 (citing Todd v. AIG Life Ins. Co., 47 F.3d 1448, 1456 (5th Cir. 1995)).

142. Critchlow v. First UNUM Life Ins. Co. of Am., 378 F.3d 246, 263 (2d Cir. 2004).

143. *Id.* at 260.

144. *See id.*

145. *Id.* at 259–60.

which caused his death.[146] This subjective expectation of survival was also objectively reasonable given the insured's use of safety mechanisms and his long-time engagement in the activity.[147] Therefore, the court found the insurer failed to show the insured's death unambiguously fell within the exclusion for intentionally self-inflicted injuries.[148]

2. *Death from Autoerotic Asphyxiation Results from an Intentionally Self-Inflicted Injury*

In many cases, the ERISA-governed plan gives discretionary authority to the insurer and, therefore, the court must determine whether the insurer acted arbitrarily and capriciously in concluding the act of autoerotic asphyxiation was an intentionally self-inflicted injury.[149] Due to the highly deferential nature of this review, courts in these situations have consistently found for the insurer.[150]

Yet, more importantly, even when the plan does not give discretionary authority to the insurer, and thus the court uses de novo review, some courts have held autoerotic asphyxiation deaths fall within the exclusion for an intentionally self-inflicted injury.[151]

146. *Id.*

147. *Id.* at 260.

148. *Id.* at 261–63.

149. *See, e.g.*, Est. of Thompson v. Sun Life Assurance. Co. of Can., 354 F. App'x 183, 189–90 (5th Cir. 2009).

150. *See, e.g.*, *id.* at 190 (finding the insurer did not abuse its discretion in determining autoerotic asphyxiation fell under the exclusion for an intentionally self-inflicted injury); Hamilton v. AIG Life Ins. Co., 182 F. Supp. 2d 39, 49 (D.D.C. 2002) (explaining that because both parties' interpretation of injury were reasonable, the insurer did not abuse its discretion in finding the intentional prevention of oxygen to the brain to be an intentionally self-inflicted injury); Fawcett v. Metro. Life Ins. Co., No. C-3-97-540, 2000 WL 979994, at *5 (S.D. Ohio June 28, 2000) (rejecting plaintiff's argument that an accidental death cannot be caused by an intentionally self-inflicted injury, and holding the insurer's decision to exclude coverage was not arbitrary and capricious); Clarke v. Fed. Ins. Co., 823 F. Supp. 2d 1213, 1220–21 (W.D. Okla. 2011) (noting the fact that courts disagree over whether restricting the flow of oxygen to the brain is an intentionally self-inflicted injury supports the conclusion the insurer's decision was not arbitrary and capricious); Bond v. Ecolab, Inc., No. 06-15072, 2007 WL 551595, at *5–6 (E.D. Mich. Feb. 21, 2007) (noting the fact that reasonable minds may differ on the question only supports that it is not an abuse of discretion to decide partial strangulation is an injury).

151. *See, e.g.*, Tran v. Minn. Life Ins. Co., 922 F.3d 380, 386 (7th Cir. 2019).

In *Cronin*, the court held death by autoerotic asphyxiation to fall within the exclusion for an intentionally self-inflicted injury—finding the partial strangulation involved in the activity was an injury.[152] The court explained, "Temporary cell damage results, and reduced brain activity occurs" as a consequence of the autoerotic behavior.[153] Although the insured did not intend permanent injury from his actions, "his intention to restrict the flow of blood and oxygen to his brain in order to impair his mental processes was a 'hurt' to his physical and mental being, and risked death."[154] The court concluded "[c]ausing oneself 'hurt' or 'harm' is an injury to one's own body whether inflicted in the search for delight or in the search for pain" and "exposes the practitioner to a substantially increased risk of accidental death."[155] Thus, because the insured intended to cause hurt to his body, which resulted in death, the court found the activity fell under the exclusion for an intentionally self-inflicted injury.[156]

In two unreported district court cases, *Lonergan v. Reliance Standard Life Insurance Co.* and *Bryant v. AIG Life Insurance Co.*, both courts also found the act of temporarily reducing a person's own oxygen and blood supply to their brain was an injury.[157] In both cases, the courts held such an act was injurious "because it damages tissues in the neck and deprives the brain of valuable oxygen."[158] "If someone else had placed [the insured] in the same position as he placed himself to temporarily restrict his ability to breathe, it would have been an injury."[159] According to the *Bryant* court, just because the act did not cause visible or lasting effects does not mean it does not qualify as an injury.[160] Therefore, in both cases, the courts concluded the

152. Cronin v. Zurich Am. Ins. Co., 189 F. Supp. 2d 29, 38 (S.D.N.Y. 2002).

153. *Id.* at 38.

154. *Id.* at 40.

155. *Id.*

156. *Id.*

157. Lonergan v. Reliance Standard Life Ins. Co., No. CV-96-11832-PBS, 1997 WL 34706253, at *5 (D. Mass. May 29, 1997); Bryant v. AIG Life Ins. Co., No. 4:01-CV-92, 2002 WL 34504617, at *5 (W.D. Mich. Nov. 27, 2002).

158. *Bryant*, 2002 WL 34504617, at *4 (citing Sims v. Monumental Gen. Ins. Co., 960 F.2d 478, 480–81 (5th Cir. 1992)); *Lonergan*, 1997 WL 34706253, at *4–5 (citing *Sims*, 960 F.2d at 480–81).

159. *Bryant*, 2002 WL 34504617, at *4 (citing Sigler v. Mut. Benefit Life Ins. Co., 506 F. Supp. 542, 545 (S.D. Iowa 1981), *aff'd* 663 F.2d 49 (8th Cir. 1981)).

160. *Bryant*, 2002 WL 34504617, at *5.

partial strangulation involved in autoerotic asphyxiation is an injury causing death and thus falls within the exclusion.[161]

Most recently, in *Tran*, the Seventh Circuit became the first and only circuit court to hold death resulting from autoerotic asphyxiation to fall under the exclusion for an intentionally self-inflicted injury.[162] Like the cases noted above, the Seventh Circuit found the partial strangulation involved in autoerotic asphyxiation is an injury.[163] The court explained, "Strangling oneself to cut off oxygen to one's brain is an injury, full stop."[164] Like *Lonergan* and *Bryant*, the court asserted "if [the insured] had partially strangled another person, there would be no debate he had inflicted an injury," and noted several state criminal codes confirmed this by making partial strangulation of another person a prosecutable offense.[165] The Seventh Circuit also found the practitioner's pleasurable aim and the popularity of the practice was irrelevant in this determination.[166] The court explained that the fact that the insured "performed the act on himself and enjoyed the accompanying euphoria [did] not make partial strangulation less of an injury."[167] While some people may enjoy harming themselves, "That harm is still an injury, regardless of its popularity or the pleasure some people may derive from it."[168]

The court also rejected that the act of intentional strangulation can be severed into distinct and separate injuries.[169] Rather, the Seventh Circuit found the strangulation involved in autoerotic asphyxiation was one continuous act with "no break in the chain of causation."[170] "The resulting hypoxia caused [the insured's] euphoria, [the insured's] black out, and [the insured's] death—all the result of one intentionally inflicted injury."[171] Therefore, even if the effects of partial strangulation were found not to be independently injurious, the court concluded it would not be of consequence

161. *Id.*; *Lonergan*, 1997 WL 34706253, at *5.
162. Tran v. Minn. Life Ins. Co., 922 F.3d 380, 386 (7th Cir. 2019).
163. *Id.* at 385.
164. *Id.* at 386.
165. *See id.* at 384.
166. *Id.* at 384–85.
167. *Id.*
168. *Id.* at 385.
169. *Id.* at 383–84.
170. *Id.* at 384.
171. *Id.*

because partial strangulation cannot be severed from the entire act of strangulation which caused the insured's death.[172]

Having determined autoerotic asphyxiation was an injury, the court then proceeded with the *Wickman* subjective/objective test in order to decide whether the injury was intentionally self-inflicted.[173] The Seventh Circuit did not reach the objective step, deciding the insured's subjective intent was clear.[174] "[The insured] intentionally performed autoerotic asphyxiation. Because that act itself is an injury, [the insured's] death falls under the policy exclusion for intentionally self-inflicted injuries."[175]

As a result of the Seventh Circuit's recent decision in *Tran*, there now exists a circuit split regarding whether death from autoerotic asphyxiation should be excluded under a provision for deaths resulting from an intentionally self-inflicted injury.[176] Neither this issue, nor whether death from autoerotic asphyxiation is an accident, has yet to be addressed by the Eighth Circuit under an ERISA-governed plan.[177]

V. PREDICTING THE EIGHTH CIRCUIT'S POTENTIAL HANDLING OF THE ISSUE AND HOW IT SHOULD HOLD

A. *The Importance of a Potential Decision*

Like a majority of the other circuit courts, the Eighth Circuit has yet to determine whether death from autoerotic asphyxiation is an accident or self-inflicted injury under an ERISA-governed insurance policy.[178] While the Eighth Circuit has tackled each issue previously, both cases were governed by state law, not by ERISA-based federal common law.[179] Yet, the provision

172. *Id.*
173. *See id.* at 385.
174. *Id.* at 385–86.
175. *Id.* at 386.
176. *See* Wille, *supra* note 35.
177. *See Fatal Attraction*, *supra* note 24, at 682–88, 692–97.
178. *See id.*
179. *See* Am. Bankers Ins. Co. of Fla. v. Gilberts, 181 F.3d 931, 933 (8th Cir. 1999) (reversing the district court's grant of summary judgment and remanding because under Minnesota law, the insured's self-inflicted partial strangulation from autoerotic asphyxiation was accidental and did not result from a self-inflicted injury); Sigler v. Mut. Benefit Life Ins. Co., 663 F.2d 49, 49–50 (8th Cir. 1981) (approving the district court's finding, under Iowa law, that the insured's death from autoerotic asphyxiation was not an accident and, even so, fell under the policy's self-inflicted injury exclusion).

of an ERISA-governed ruling in regard to these issues is important for the states that fall under the umbrella of the Eighth Circuit.

First, most accidental death and dismemberment (AD&D) policies are employer provided.[180] In fact, as of 2019, approximately 80 percent of all employers offered AD&D coverage to their employees.[181] As a result, in most accidental death policy disputes, state law will not be controlling but rather will be preempted by federal common law.[182]

Second, a ruling by the Eighth Circuit would result in precedent for claims involving autoerotic asphyxiation deaths and would likely provide enlightenment regarding how the Eighth Circuit views an injury in this context. While autoerotic asphyxiation is statistically rare as a whole, it is a relatively common problem in the realm of deaths which actually cause accidental death policy issues.[183] As previously discussed, it is approximated around 500 to 2,000 deaths occur from autoerotic asphyxiation each year.[184] Although these numbers appear minute in comparison to the total number of accidents which occur per year, it is prevalent when considering most accidents cause no interpretive problems and are easily determined to be covered or not covered by an accidental death policy.[185] For example, injury and death resulting from car accidents are significantly more common, but rarely result in a dispute over whether the accidental death policy applies.[186] Yet, in comparison to the kinds of deaths that have caused coverage disputes in the past—such as skydiving (around 20 deaths per year),[187] cliff diving

180. *See 2019 Survey Results: Employee Benefits*, NEEBCO 23–24 (2019), https://www.neebco.com/wp-content/uploads/2019/03/Employee-Benefits-Survey-Results.pdf [https://perma.cc/D6BB-S22U].

181. *Id.*

182. *See id.*

183. *See* Lonergan v. Reliance Standard Life Ins. Co., No. CV-96-11832-PBS, 1997 WL 34706253, at *1 (D. Mass. May 29, 1997); Brody, *supra* note 20; Downs, *supra* note 20.

184. Downs, *supra* note 20; *Lonergan*, 1997 WL 34706253, at *1 ("'Approximately 2,000 deaths occur per year in this country arising out of autoerotic stimulation . . . .'") (citation omitted).

185. *See How to Keep Your Family Financially Secure After a Tragic Accident*, TRUSTED CHOICE (Feb. 16, 2020), https://www.trustedchoice.com/life-insurance/coverage-types/riders/accidental-death-dismemberment/ [https://perma.cc/4VYS-3SKW].

186. *See* Georgia Rose, *Accidental Death and Dismemberment (AD&D) Insurance Explained*, NERD WALLET (Apr. 7, 2021), https://www.nerdwallet.com/article /insurance /accidental-death-and-dismemberment-insurance [https://perma.cc/2D6S-6TSK].

187. Paul Sitter, *Malfunction, Malfunction, Malfunction–The 2017 Fatality Summary*,

(around 25 deaths per year),[188] rock climbing (around 30 per year)[189]—deaths resulting from autoerotic asphyxiation are a relatively common issue insurance companies must face.[190] As a result, a decision regarding these issues is pertinent to the many insurance companies encompassed within the Eighth Circuit.

B. *The Eighth Circuit's Likely Use of* Wickman

Like the vast majority of federal courts, the Eighth Circuit in recent years appears to have adopted *Wickman* as the standard for attempting to define an accident.[191] The use of this standard over a general foreseeability standard is likely to continue in the event the court is confronted with an autoerotic asphyxiation case. Not only have most federal courts begun to use this standard when applying federal common law,[192] but the growing use of *Wickman* has also helped to increase the consistency in how accident is defined by federal courts under ERISA.[193] Autoerotic asphyxiation is a great example of this.[194] While state courts continue to come to opposite conclusions based on how that state interprets foreseeability,[195] federal courts in recent years have almost unanimously held death from autoerotic

U.S. PARACHUTE ASS'N (Apr. 1, 2018), https://uspa.org/p/Article/malfunction-malfunction-malfunctionthe-2017-fatality-summary [https://perma.cc/94JQ-DBPJ].

188. *Tourists Take Part in Cliff-Jumping Craze That Kills Dozens Each Year*, INSIDE EDITION (May 4, 2016), https://www.insideedition.com/headlines/16216-tourists-take-part-in-cliff-jumping-craze-that-kills-dozens-each-year [https://perma.cc/X6R3-FTDL].

189. Jake Harmer, *How Many People Die Rock Climbing?*, SCOUTORAMA, https://scoutorama.com/rock-climbing-deaths [https://perma.cc/SJV9-72AT].

190. Due to courts often holding these risky activities as accidental and not intentionally self-inflicted injuries, many insurance companies have begun expressly excluding coverage for inherently dangerous activities. *See* Johnson v. Am. United Life Ins. Co., 716 F.3d 813, 817 (4th Cir. 2013) (noting policy exclusion for "hang-gliding, bungee jumping, automobile racing, motorcycle racing, skydiving, rock climbing, or mountain climbing") (citation omitted); Kovach v. Zurich Am. Ins. Co., 587 F.3d 323, 336 (6th Cir. 2009) (noting policy exclusions for "skydiving, parasailing, hanggliding [sic], bungee-jumping, or any similar activity").

191. *See* McClelland v. Life Ins. Co. of N. Am., 679 F.3d 755, 759–60 (8th Cir. 2012).

192. Richmond, *supra* note 81, at 71.

193. Eric Hulett, *Accidental Death Policies: Do They Cover Death Due to Alcohol or Drug Use?*, DRI FOR DEF., Dec. 2013, at 34.

194. *See* Peter M. Nothstein, MAMSI Life & Health Insurance Co. v. Callaway: *A Missed Opportunity to Safely Circumnavigate the Serbonian Bog and Decisively Settle a Conflict in Maryland Accident Law*, 63 MD. L. REV. 891, 904 (2004).

195. *See Fatal Attraction*, *supra* note 24, at 688–91.

asphyxiation is accidental.[196] Inconsistency only appears when the federal courts decide to bypass *Wickman* in favor of a particular application of general foreseeability.[197]

Even when considering *Wickman*'s application to determining whether a particular injury should be excluded as an intentionally self-inflicted injury, the continuing disagreement between the courts on this issue centers not on the *Wickman* portion of the analysis but rather on how that specific court defines an injury.[198] As it concerns *Wickman*'s use in determining whether an injury was intentionally self-inflicted, the federal courts have demonstrated its application to be relatively straightforward.[199]

The *Wickman* standard also makes sense in the way it evaluates accidental death polices. By first determining whether the insured's expected injury or death occurred from their actions, the subjective portion of the *Wickman* analysis applies the generally agreed meaning of accident—that the result must be unintended.[200] Yet, as previously discussed in Part III.A, courts have historically been divided in cases where the result was held to be unintended but could be argued to have been non-accidental because the result should have been foreseen.[201] Although determined to be unintended, some courts found an unintended outcome to still be non-accidental when the insured knew death or serious bodily injury "could" result from the action; while others found a result to be foreseeable (and thus non-accidental) only when it was "so natural and probable to be expected."[202] The objective portion of the *Wickman* analysis takes the correct side by

196. *See* Tracy Bateman Farrell, Annotation, *Recovery on Insurance Policy When Death Occurs by Autoerotic Asphyxiation*, 51 A.L.R.6th 495, §3 (2010); Richmond, *supra* note 81, at 71.

197. *Compare* Cronin v. Zurich Am. Ins. Co., 189 F. Supp. 2d 29, 37 (S.D.N.Y. 2002) (finding insured's death was not accidental because the risk was foreseeable), *with* Parker v. Danaher Corp., 851 F. Supp. 1287, 1295 (W.D. Ark. 1994) (finding the insured's death was accidental because the insured did not expect to die).

198. *See* Erman, *supra* note 1, at 2201.

199. Tran v. Minn. Life Ins. Co., 922 F.3d 380, 385–86 (7th Cir. 2019); *see* Critchlow v. First UNUM Life Ins. Co. of Am., 378 F.3d 246, 259–60 (2d Cir. 2004); Padfield v. AIG Life Ins. Co., 290 F.3d 1121, 1129 (9th Cir. 2002).

200. *See* Wickman v. Nw. Nat'l Ins. Co., 908 F.2d 1077, 1088 (1st Cir. 1990); Habeeb, *supra* note 68, at § 2.

201. *See* Bennett v. Am. Int'l Life Assurance Co. of N.Y., 956 F. Supp. 201, 207–08 (N.D.N.Y. 1997).

202. *Compare* Int'l Underwriters, Inc. v. Home Ins. Co., 662 F.2d 1084, 1086–87 (4th Cir. 1981), *with* Cranfill v. Aetna Life Ins. Co., 49 P.3d 703, 707 (Okla. 2002).

standardizing the latter foreseeability approach and applying a definition of foreseeability specific to accidental death insurance.[203] By holding an event foreseeable only if, from the insured's perspective, it was highly likely to occur, *Wickman* avoids the problems connected to the former foreseeability method; specifically, that it has the effect of excluding any and all arguably risky activities (i.e., skiing, playing football, crossing the street, etc.) from being covered under an accident insurance policy.[204]

Therefore, for the above reasons, it is unlikely the Eighth Circuit would shy away from continuing to use the *Wickman* test in a possible autoerotic asphyxiation case.

C. *Accidental Death*

1. *Whether Death Resulting from Autoerotic Asphyxiation Will be Held as an Accidental Death by the Eighth Circuit*

Using *Wickman*, the Eight Circuit would likely find death resulting from autoerotic asphyxiation is an accident. It would no doubt be persuasive to the court that almost every federal court presented with the issue under ERISA, including two circuit courts, have held death to be an accident.[205] However, even apart from this notable line of persuasive precedent, the Eighth Circuit, when applying *Wickman* to similar events, has held the result of those events accidental.[206]

In *McClelland v. Life Insurance Co. of North America*, the Eighth Circuit held death was accidental where the insured died as a result of riding a motorcycle at high speeds with an elevated blood alcohol level.[207] The court emphasized the importance of the subjective prong of the *Wickma*n standard, noting the objective portion of the test should only be heavily relied on "when the evidence is insufficient to accurately determine the insured's subjective expectations at the time of the accident."[208] The court found the insured had an expectation of survival because he had experience

203. *See Wickman*, 908 F.2d at 1088.

204. *See id.*; *Bennett*, 956 F. Supp. at 207.

205. *See* Farrell, *supra* note 196, at § 3.

206. *See* Nichols v. Unicare Life & Health Ins. Co., 739 F.3d 1176, 1183–84 (8th Cir. 2014); McClelland v. Life Ins. Co. of N. Am., 679 F.3d 755, 761–62 (8th Cir. 2012).

207. *McClelland*, 679 F.3d at 758, 761–62.

208. *Id.* at 761.

in riding motorcycles and lacked any suicidal inclinations.[209] Additionally, this expectation was found to be objectively reasonable due to the insured's experience in this type of reckless behavior—evidenced by the fact the insured had for several miles been weaving in and out of traffic at speeds exceeding 90 miles per hour.[210]

Subjective past experience and a lack of suicidal intent was again emphasized in *Nichols v. Unicare Life and Health Insurance Co.*, where the court held a woman's death from drug overdose was an accident.[211] The court noted there was no evidence to suggest the insured intended to kill herself, and also highlighted that her past experience in taking the mixture of drugs meant a reasonable person with the insured's experience would not have viewed death as highly likely to occur.[212]

Both cases illustrate that when there is no indication of suicidal intentions and when the insured has performed the action in the past without fatal results, the Eighth Circuit, applying the *Wickman* standard, will hold death as accidental.[213] This precedent suggests death from autoerotic asphyxiation would also be held accidental.[214] In such instances, the insured's purpose for performing the act is pleasure, not to kill themselves, and the insured is almost always a repeat performer of the autoerotic practice.[215] While death is a potential consequence of the autoerotic behavior, this is no different than the known and potentially fatal effects of speeding through traffic or taking a mix of prescription drugs.[216] In all three situations, the insured is pursuing some sort of pleasure or excitement and is placing oneself in a risky situation—where death could result—for the purpose of pursuing this goal.[217] Therefore, given both the known absence of any suicidal purpose of the autoerotic behavior and the insured's often recurring experience with it, Eight Circuit precedent alone indicates autoerotic asphyxiation is likely

209. *See id.*

210. *Id.*

211. *Nichols*, 739 F.3d at 1184.

212. *Id.* at 1183.

213. *See id.* at 1183–84; *McClelland*, 679 F.3d at 761.

214. *See, e.g.*, *Nichols*, 739 F.3d at 1183–84; *McClelland*, 679 F.3d at 761–62.

215. *See* Parker v. Danaher Corp., 851 F. Supp. 1287, 1290 (W.D. Ark. 1994) (noting that autoerotic asphyxiation is a repetitive pattern of behavior over a period of years and that the intent of practitioners is to survive).

216. *See McClelland*, 679 F.3d at 761; *Nichols*, 739 F.3d at 1179.

217. *See* Todd v. AIG Life Ins. Co., 47 F.3d 1448, 1450 (5th Cir. 1995); *McClelland*, 679 F.3d at 758; *Nichols*, 739 F.3d at 1179.

to be held accidental—even when it is determined the insured knew fatality could result.[218]

2. *The Eighth Circuit Should Hold Death by Autoerotic Asphyxiation as an Accidental Death*

The Eighth Circuit would be correct in classifying death from autoerotic asphyxiation as an accident. As discussed, in attempting to determine whether a death is accidental, federal courts, under the *Wickman* analysis, are forced to determine whether insureds actually believed their conduct would result in survival and whether this belief was reasonable.[219] In cases of autoerotic asphyxiation, whether the insured had an expectation of survival is almost always clear.[220] Because autoerotic asphyxiation is generally practiced repeatedly and for the sole purpose of enhancing sexual pleasure, unless there is some indication of suicidal intent, simply performing the activity does not indicate the insured lacked an expectation of survival.[221] As a result, conflict regarding this issue seldom exists.[222]

Rather, disagreement arises when attempting to determine whether this expectation of survival is objectively reasonable.[223] In their discussion of *Wickman*, some courts have suggested a subjective expectation of survival is objectively *un*reasonable if the fatal result is highly likely to occur from the perspective of an outside individual.[224] However, this explanation overlooks an essential aspect of the analysis—that the determination of whether a result is highly likely to occur *is from the insured's perspective*.[225] Therefore, the appropriate determination is whether a reasonable person, *in the*

218. *See Nichols*, 739 F.3d at 1183–84; *McClelland*, 679 F.3d at 761–62.

219. Wickman v. Nw. Nat'l Ins. Co., 908 F.2d 1077, 1088 (1st Cir. 1990).

220. *See, e.g.*, Padfield v. AIG Life Ins. Co., 290 F.3d 1121, 1127 (9th Cir. 2002) (noting "[a]utoerotic asphyxiation practitioners expect to survive the experience").

221. *See id.*

222. *See Fatal Attraction*, *supra* note 24, at 704.

223. *Id.* Under a general foreseeability approach, essentially the same determination must be made. *See* Int'l Underwriters, Inc. v. Home Ins. Co., 662 F.2d 1084, 1085, 1087 (4th Cir. 1981); Cranfill v. Aetna Life Ins. Co., 49 P.3d 703, 706–07 (Okla. 2002).

224. Todd v. AIG Life Ins. Co., 47 F.3d 1448, 1456 (5th Cir. 1995) (stating an expectation is objectively reasonable if death is not substantially certain to result from the activity); *Fatal Attraction*, *supra* note 24, at 704 (stating it is determinative "whether a reasonable person would have known that engaging in such conduct could cause injury or death").

225. Wickman v. Nw. Nat'l Ins. Co., 908 F.2d 1077, 1088 (1st Cir. 1990).

insured's position, would view death as highly likely to result from practicing autoerotic asphyxiation.[226]

Considering this is the appropriate test, an insured's expectation of survival is objectively reasonable for three primary reasons: (1) those engaging in the practice almost always have a history of repeatedly surviving the experience,[227] (2) practitioners often use safety mechanisms and fail-safe devices,[228] and (3) evidence shows death is unlikely to result from the practice.[229]

In essentially every case involving autoerotic asphyxiation, the insured has had a long history of engaging in the activity—often for many years and from a young age.[230] Importantly, because objective reasonableness is assessed from the insured's perspective, these past experiences must be taken into account.[231] With each safe and successful completion of the behavior, it is logical for the practitioner to become more and more convinced of its harmlessness.[232] Because the insured has repeatedly performed the act previously without incident, the potential for harmful results becomes both less prevalent and less likely to occur in the mind of the insured.[233] Repeated engagement in the act also helps to persuade

226. *See id.*

227. *See* Critchlow v. First UNUM Life Ins. Co. of Am., 378 F.3d 246, 252, 260 (2d Cir. 2004); Cronin v. Zurich Am. Ins. Co., 189 F. Supp. 2d 29, 37 (S.D.N.Y. 2002); Bennett v. Am. Int'l Life Assurance Co. of N.Y., 956 F. Supp. 201, 212 (N.D.N.Y. 1997); Kennedy v. Wash. Nat'l Ins. Co., 401 N.W.2d 842, 846 (Wis. Ct. App. 1987).

228. *See* STEVEN A. KOEHLER & CYRIL H. WECHT, 4 FORENSIC SCIENCES § 37B.08 (2021) [hereinafter FORENSIC SCIENCES].

229. Padfield v. AIG Life Ins. Co., 290 F.3d 1121, 1127 (9th Cir. 2002); *Todd*, 47 F.3d at 1457.

230. *See Critchlow*, 378 F.3d at 260; *Padfield*, 290 F.3d at 1127; *Bennett*, 956 F. Supp. at 212; Parker v. Danaher Corp., 851 F. Supp. 1287, 1290 (W.D. Ark. 1994).

231. *Wickman*, 908 F.2d at 1088.

232. *See* Hannah A. D. Keage & Tobias Loetscher, *Estimating Everyday Risk: Subjective Judgments are Related to Objective Risk, Mapping of Numerical Magnitudes and Previous Experience*, PLOS ONE (Dec. 5, 2018), https://journals.plos.org/plosone/article?id=10.1371/journal.pone.0207356 [https://perma.cc/JT9U-7227].

233. Linda Thrasybule, *Autoerotic Deaths Less Common than Thought*, LIVE SCIENCE (July 24, 2012), https://www.livescience.com/21794-autoerotic-deaths-accidental-asphyxiation.html [https://perma.cc/ANS2-CEYK] ("[T]he longer a person practices autoeroticism, the more comfortable they may become with the dangerous practice.").

practitioners of their ability to avoid a potentially harmful result.[234] While the risk of death remains, it becomes more reasonable for the insured to believe death is not likely to occur.[235]

The use of safety mechanisms also bolsters this belief. For many practitioners of autoerotic asphyxiation, the use of a self-rescue mechanism or fail-safe device is an important feature.[236] Such safety devices allow the practitioner to avoid loss of consciousness and to "extricate himself . . . from a potentially dangerous situation."[237] Like a climber's rope or a skydiver's second parachute, these devices provide real protection and further convince the insured of the practice's safety.[238] Although it is argued the device only provides this protection as long as the practitioner stays conscious, the existence of the device still enables the individual to prevent loss of consciousness and stay in control.[239] Therefore, the mere fact that a fail-safe mechanism is used provides an additional level of security to the practice, a decreased chance of incident, and, as a result, a more reasonable belief incident will not occur.[240]

Most notable is the evidence suggesting death is an objectively unlikely consequence of autoerotic asphyxiation.[241] According to researchers, in most cases, the autoerotic practice does not result in a fatal outcome.[242] While death is clearly a possibility, only in a small number of instances is this the

234. *See* Ward v. Penn Mut. Life Ins. Co., 352 S.W.2d 413, 423 (Mo. Ct. App. 1961) (finding an accident where a man fell off the top of a moving car; he had performed the stunt previously, knew, and trusted the driver, was strong, and had a good grip); Knight v. Metro. Life Ins. Co., 437 P.2d 416, 421 (Ariz. 1968) (en banc) (finding the death of an experienced diver who dove off the Coolidge Dam was accidental because he previously had completed the same dive without injury).

235. *See Bennett*, 956 F. Supp. at 212.

236. FORENSIC SCIENCES, *supra* note 228, at § 37B.08.

237. *Id.*

238. *See* Tina Zdawczyk, *Oh Chute! The Science of Skydiving*, SMITHSONIAN SCI. EDUC. CTR., https://ssec.si.edu/science-of-skydiving [https://perma.cc/8XF6-GY28].

239. *See* FORENSIC SCIENCES, *supra* note 228, at § 38B.08.

240. *See* Critchlow v. First UNUM Life Ins. Co. of Am., 378 F.3d 246, 253–54 (2d Cir. 2004); Todd v. AIG Life Ins. Co., 47 F.3d 1448, 1450 (5th Cir. 1995); MAMSI Life & Health Ins. Co. v. Callaway, 825 A.2d 995, 997 n.1 (Md. Ct. App. 2003).

241. *See* Padfield v. AIG Life Ins. Co., 290 F.3d 1121, 1127 (9th Cir. 2002); *Todd*, 47 F.3d at 1457; Brody, *supra* note 20.

242. ROBERT R. HAZELWOOD, PARK ELLIOTT DIETZ & ANN WOLBERT BURGESS, AUTOEROTIC FATALITIES 49 (1983).

actual result.[243] Thus, even when viewing the practice from the perspective of someone other than the insured, an expectation of survival is reasonable because statistics—which are entirely objective—suggest death is unlikely to occur.[244]

Despite these facts, insurers argue an expectation of survival is still objectively unreasonable because insureds know they are engaging in a risky activity where a loss of consciousness may occur, and death may result.[245] However, this argument misses the mark.

Although it is difficult to argue against the proposition that autoerotic asphyxiation is inherently risky, this does not mean a resulting death is so likely to occur as to be considered purposeful.[246] Many activities people perform are inherently risky. Take for example skydiving, rock climbing, auto racing, and bungee jumping. Like those practicing autoerotic asphyxiation, the practitioners of these activities are placing themselves into a known, risky situation where death could result.[247] While precautions are taken in the execution of each of these practices, they sometimes prove to be insufficient and, thus, death can occur.[248] Yet, despite the inherent danger, in the minds of most individuals, death resulting from these hazardous activities are viewed as accidental.[249]

In the same vein, the fact death *may* occur from autoerotic asphyxiation, and that the practitioner knows death may occur, is not enough for the death to fall outside an accidental death policy under federal common law.[250] The flawed reasoning used by insurers to hold otherwise correlates

243. *See id.*

244. *See Todd*, 47 F.3d at 1457 (using statistics alone to determine the insured's expectation of survival was objectively reasonable).

245. *See id.* at 1450; Int'l Underwriters, Inc. v. Home Ins. Co., 662 F.2d 1084, 1087 (4th Cir. 1981); Bennett v. Am. Int'l Life Assurance Co. of N.Y., 956 F. Supp. 201, 203 (N.D.N.Y. 1997).

246. *See Todd*, 47 F.3d at 1456.

247. *See, e.g.*, Chelsea Curtis, *FAA Probes Skydiving Death Near Grand Canyon National Park Airport*, USA TODAY (Sept. 10, 2019), https://www.usatoday.com/story/news/nation/2019/09/10/grand-canyon-skydiver-dies-tandem-jump-faa-investigates/2281988001/ [https://perma.cc/E47D-UTK4].

248. *See* Faith Karimi & Chris Boyette, *American Rock Climber Brad Gobright Dies After a Fall in Mexico*, CNN (Nov. 29, 2019), https://www.cnn.com/2019/11/29/us/climber-brad-gobright-dies/index.html [https://perma.cc/GH4F-NLFP].

249. Richmond, *supra* note 81, at 58–59; *Fatal Attraction*, *supra* note 24, at 706–07.

250. *Bennett*, 956 F. Supp. at 207.

with the insurer-friendly application of the general foreseeability approach used in *Cronin* and some state court decisions.[251] However, the significant faults in this approach are clear.[252] Death *could* be the consequence of almost anything.[253] When a person jaywalks, sleds down a steep hill, or speeds to work, that individual knows there is a possibility of death.[254] This type of reasoning would inappropriately merge mere knowledge with intent and would result in the exclusion of almost any activity from being covered under an accidental death policy.[255]

Instead, the appropriate question is the one *Wickman* asks: whether the insured, from the perspective of the insured, was unreasonable in believing survival would occur.[256] Given the statistical probability of survival, the insured's safe practice of the activity in the past, and the use of safety mechanisms to protect against dangerous situations, an insured's expectation of surviving another bout of autoerotic asphyxiation is objectively reasonable. Therefore, death resulting from the practice should be deemed accidental.

D. *Exclusion for an Intentionally Self-Inflicted Injury*

1. *Whether Death Resulting from Autoerotic Asphyxiation Will be Held to be an Intentionally Self-Inflicted Injury by the Eighth Circuit*

Given the current circuit court split and the lack of ERISA-based precedent regarding the exclusion, the Eighth Circuit's conclusion on the issue of whether autoerotic asphyxiation is an intentionally self-inflicted injury is less certain.[257] However, the Eighth Circuit's opinion in *American*

251. *See* Cronin v. Zurich Am. Ins. Co., 189 F. Supp. 2d 29, 37 (S.D.N.Y. 2002); *see, e.g.*, Int'l Underwriters, Inc. v. Home Ins. Co., 662 F.2d 1084, 1087 (4th Cir. 1981).

252. *See Bennett*, 956 F. Supp. at 207.

253. *Id.*

254. *See id.*

255. *See id.*

256. Wickman v. Nw. Nat'l Ins. Co., 908 F.2d 1077, 1088 (1st Cir. 1990).

257. *Compare* Tran v. Minn. Life Ins. Co., 922 F.3d 380, 386 (7th Cir. 2019) (finding intentionally self-inflicted injury) *with* Critchlow v. First UNUM Life Ins. Co. of Am., 378 F.3d 246, 262 (2d Cir. 2004) (holding death from autoerotic asphyxiation is not automatically an intentionally self-inflicted injury), *and* Padfield v. AIG Life Ins. Co., 290 F.3d 1121, 1129 (9th Cir. 2002) (holding "voluntary risky acts resulting in injury are not necessarily acts that result in 'intentionally self-inflicted injury'").

Bankers Insurance Co. of Florida v. Gilberts may give some insight into how the court would hold under an ERISA-governed policy.[258]

In *Gilberts*, the Eighth Circuit applied Minnesota law and found it was a question for the jury whether the insured's death as a result of autoerotic asphyxiation was an intentionally self-inflicted injury.[259] Under Minnesota law, the insurer is required to show the insured acted with a specific intent to cause bodily injury.[260] Even if no actual intent by the insured can be shown, intent can be inferred as a matter of law if the act was substantially certain to result in injury.[261] While it was conceded by both parties the insured did not intend to cause himself injury, the district court found injury substantially certain to result from autoerotic asphyxiation and, therefore, intent was inferred.[262]

The Eighth Circuit disagreed and remanded the case for trial.[263] The insurance policy required the intentional act to cause "bodily injury," not just an "injury."[264] Considering this difference, the court noted the practice—when performed correctly—results in no change to the individual's bodily function and involves no pain.[265] Instead, the only substantially certain result of the activity is a temporary decrease in oxygen levels in the brain.[266] The court found there was insufficient evidence to conclude, as a matter of law, that a reasonable jury would find this effect to be a bodily injury.[267]

Although applying Minnesota law instead of federal common law, the Eighth Circuit's opinion in *Gilberts* suggests the Eighth Circuit, in an ERISA-governed case, may hold an exclusion for an intentionally self-inflicted injury to ambiguously apply to deaths resulting from autoerotic asphyxiation.[268] Although the insured does not have a right to a jury trial under ERISA,[269] language is held ambiguous when a reasonably intelligent

258. Am. Bankers Ins. Co. of Fla. v. Gilberts, 181 F.3d 931 (8th Cir. 1999).
259. *Id.* at 933–34.
260. *Id.* at 932.
261. *Id.*
262. *Id.*
263. *Id.* at 934.
264. *See id.* at 933.
265. *See id.*
266. *Id.*
267. *Id.* at 933–34.
268. *See id.* at 932–34.
269. *In re* Vorpahl, 695 F.2d 318, 320–22 (8th Cir. 1982).

person could find it to be capable of more than one meaning.[270] Thus, the court's explanation in *Gilberts* for why partial strangulation is not a bodily injury at a matter of law (because a reasonable jury could find either way) could easily be used in finding ambiguity concerning whether partial strangulation is an injury under an ERISA-governed policy.[271] Additionally, given the difficulty courts have had in coming to a consensus on this issue, a holding of ambiguity would also be understandable.[272] If found to be ambiguous, the Eighth Circuit would construe the exclusion of an intentionally self-inflicted injury against the insurer and negate the exception's application.[273]

At the very least, *Gilberts* indicates the Eighth's Circuit's acceptance of some of the arguments for why the partial strangulation involved in autoerotic asphyxiation is not an injury and, thus, does not fit under the exclusion.[274] The court in *Gilberts* specifically noted the lack of pain or any lasting effects of the practice and indicated more than a "de minimus existence of tissue damage" was needed to create a bodily injury.[275]

Yet, the Eighth Circuit's clear distinction between "bodily injury" and "injury" is interesting.[276] While seemingly just semantics, the court's emphasis on this difference in language seems to suggest a different conclusion if the policy's exclusion in *Gilberts* had used the language of injury instead of bodily injury.[277] For bodily injury to be met, the court indicated an activity must cause some sort of visible, lasting effect.[278] Successful autoerotic asphyxiation does not fit this requirement because it rarely causes bruising, scarring, or other visible consequences.[279] However, the court may interpret injury to include a broader range of effects as

270. O'Neil v. Ret. Plan for Salaried Emps. of RKO Gen., Inc., 37 F.3d 55, 59 (2d. Cir. 1994).

271. *See Am. Bankers Ins. Co. of Fla.*, 181 F.3d at 932–34.

272. *See* Erman, *supra* note 1, at 2201.

273. *See, e.g.,* Fay v. Oxford Health Plan, 287 F.3d 96, 104 (2d Cir. 2002).

274. *See Am. Bankers Ins. Co. of Fla.*, 181 F.3d at 933.

275. *Id.* at 934 n.4.

276. *See id.* at 933 (noting the policy language defines injury as bodily injury and that partial strangulation is not, as a matter of law, a bodily injury).

277. *See id.*

278. *See id.* at 934 n.4 ("The loss of a few cells could easily be so minimal that it would not rise to the level of a bodily injury as the average insured would understand the term.").

279. *See* Padfield v. AIG Life Ins. Co., 290 F.3d 1121, 1126 (9th Cir. 2002).

compared to bodily injury and, thus, may find that the temporary, internal changes caused by the practice constitute an injury but not a bodily injury.[280] Therefore, while the Eighth Circuit seems accepting of the idea that autoerotic asphyxiation is not an intentionally self-inflicted injury under federal common law, the court has left the door open for the opposite conclusion.[281]

2. *The Eighth Circuit Should Rule Death by Autoerotic Asphyxiation as Not Falling Under an Exclusion for an Intentionally Self-inflicted Injury*

The safest method for insurers to avoid liability for autoerotic asphyxiation deaths is to include within their policies an appropriate exclusion specifically concerning loss resulting from this type of activity.[282] However, in absence of such a provision and when the insurer is not given discretionary authority, a death resulting from the practice should not be excluded under an intentionally self-inflicted injury provision.[283]

As previously discussed, courts determining whether such an exclusion is applicable must determine two separate issues: (1) whether the intended consequences of successful autoerotic asphyxiation—that is, partial strangulation–causes an injury and (2) whether the injury causing death was

280. *See Am. Bankers Ins. Co. of Fla.*, 181 F.3d at 933.

281. *See id.*

282. *Fatal Attraction*, *supra* note 24, at 703. As the court in *Kovach v. Zurich Am. Ins. Co.* put it:

> [t]he solution for insurance companies . . . is simple: add an express exclusion in policies covering accidental injuries for any . . . risky activity that the company wishes to exclude. Policy holders would thus be able to form reasonable expectations about what type of coverage they are purchasing without having to make sense of conflicting bodies of caselaw that deal with obscure issues of contractual interpretation.

587 F.3d 323, 338 (6th Cir. 2009). Some insurers have started doing this. In *Tyler v. AIG Life Ins. Co.*, the insurance policy stated "no payment shall be made for any loss resulting in whole or in part from, or contributed to by, or as a natural and probable consequence of any of the following[:] . . . auto-eroticism." No. 07-12373, 2008 WL 874857, at *5 n.9 (11th Cir. Apr. 2, 2008). Likewise, the accidental death policy in *Burnett v. AIG Life Ins. Co.* read: "No coverage shall be provided under this Policy . . . for any loss resulting in whole or in part from, or contributed to by, . . . any attempt at intentionally self-inflicted injury or auto-eroticism." No. 6:08-CV-322-HAI, 2011 WL 1226867, at *1 (E.D. Ky. Mar. 30, 2011).

283. *See* Todd v. AIG Life Ins. Co., 47 F.3d 1448, 1457 (5th Cir. 1995) (noting "insurance companies have ample ways to avoid judgments" for deaths resulting from autoerotic asphyxiation).

intentional.[284] Because the second question is determined by the first,[285] disagreement between federal courts center on whether the intended partial strangulation involved in the practice is an injury.[286]

In determining whether partial strangulation causes an injury, courts are forced to classify the physical consequences which "accompany successful incidents of autoerotic asphyxiation."[287] As exemplified by the federal decisions noted earlier, pro-exclusion courts give several arguments for why these physical consequences are injurious.[288] However, as will be explained, each one of these arguments is flawed. Rather, "successful autoerotic asphyxiation involves no permanent harms, no physical injuries, and no loss of autonomy."[289] Therefore, the practice "neither constitutes an injury nor triggers the exclusion."[290]

Because autoerotic asphyxiation, when performed correctly, does not cause bruising or other lasting, visible ramifications,[291] the most prevalent argument made by pro-exclusion courts focuses on clinical descriptions of how autoerotic asphyxiation internally effects the brain.[292] Specifically, these courts argue the partial strangulation involved in the practice causes injury because it temporarily changes the brain's composition and function for the worse.[293] The reduction of oxygen to the brain increases the amount of carbon dioxide in the blood resulting in reduced brain activity;[294] impaired thought, consciousness, and awareness; "lightheadedness, loss of

284. *See, e.g.*, Tran v. Minn. Life Ins. Co., 922 F.3d 380, 383, 385–86 (7th Cir. 2019).

285. *See supra* Part IV.B.

286. *See Tran*, 922 F.3d at 383–85; *but see* Critchlow v. First UNUM Life Ins. of Am., 378 F.3d 246, 260–62 (2d Cir. 2004).

287. *See* Erman, *supra* note 1, at 2202.

288. *See, e.g.*, *Tran*, 922 F.3d at 383–85.

289. Erman, *supra* note 1, at 2202.

290. *Id.*

291. *See* Padfield v. AIG Life Ins. Co., 290 F.3d 1121, 1126 (9th Cir. 2002).

292. Erman, *supra* note 1, at 2202.

293. *See id.*; *Tran*, 922 F.3d at 383, 385–86; Est. of Thompson v. Sun Life Assurance Co. of Can., 603 F. Supp. 2d 898, 911 (N.D. Tex. 2008), *aff'd,* 354 F. App'x 183 (5th Cir. 2009); Cronin v. Zurich Am. Ins. Co., 189 F. Supp. 2d 29, 37–38 (S.D.N.Y. 2002); Bryant v. AIG Life Ins. Co., No. 4:01-CV-92, 2002 WL 34504617, at *5 (W.D. Mich. Nov. 27, 2002); Lonergan v. Reliance Standard Life Ins. Co., No. CV-96-11832-PBS, 1997 WL 34706253, at *4–5 (D. Mass. May 29, 1997).

294. Conn. Gen. Life Ins. v. Tommie, 619 S.W.2d 199, 202 (Tex. Civ. App. 1981).

coordination, and the inability to appreciate the hazard of the situation."[295] This hurt or harm, it is argued, constitutes an injury.[296]

The problem with this argument is that it improperly magnifies the effects of partial strangulation by medicalizing temporary, inconsequential changes to the body.[297] In actuality, this brief reduction in brain function, and the symptoms it causes, are merely a short-lived side effect of correctly performing the practice.[298] As long as the practice progresses as intended and oxygen levels are restored before unconsciousness, no lasting harm occurs.[299] The experience is not unlike "a diver who needs a few extra seconds to come up for air" or "a child who holds his breath in frustration."[300] Most laypeople would conclude neither case exhibits an intentionally self-inflicted injury, and would find the effects of both to be non-injurious.[301]

Yet, in spite of this close analogical relationship, some pro-exclusion courts seem to suggest autoerotic asphyxiation is different because the method being used to deprive oneself of oxygen is strangulation instead of holding one's breath.[302] To support this conclusion, these courts use an analogy of their own by equating autoerotic asphyxiation to battery: if another person had strangled the insured, there would be no debate an injury had been inflicted.[303]

However, the reasons strangulation is viewed as injurious in the context of a battery are not present in autoerotic asphyxiation.[304] In the case of a battery, the strangulation inflicted is violent and uncontrolled by the recipient, and the recipient does not know if he will survive.[305] It is this lack

295. *Cronin*, 189 F. Supp. 2d at 38 (citation omitted).

296. *Id.* at 40.

297. Erman, *supra* note 1, at 2203–04.

298. *Id.* at 2204.

299. *See* Jennifer Kornick, *What You Need to Know About Brain Oxygen Deprivation*, SPINAL CORD (Apr. 26, 2021), https://www.spinalcord.com/blog/what-happens-after-a-lack-of-oxygen-to-the-brain [https://perma.cc/57JB-2MZK].

300. *See id.*

301. Erman, *supra* note 1, at 2204.

302. *See* Tran v. Minn. Life Ins. Co., 922 F.3d 380, 383–84 (7th Cir. 2019); Cronin v. Zurich Am. Ins. Co., 189 F. Supp. 2d 29, 39 (S.D.N.Y. 2002); MAMSI Life & Health Ins. Co. v. Callaway, 825 A.2d 995, 1007 (Md. Ct. App. 2003).

303. *See, e.g.*, *Tran*, 922 F.3d at 384 (noting partial strangulation by a third person is a prosecutable offense in many jurisdictions).

304. *See* Erman, *supra* note 1, at 2204–05.

305. *See* Dana Bettger, *Strangulation: One of the Most Violent, Lethal Forms of*

of control, loss of autonomy, and apparent danger which causes a third-party strangulation to be viewed as injurious and criminal—even if no visible, lasting consequences result.[306] On the other hand, practitioners of autoerotic asphyxiation deprive their brains of oxygen voluntarily.[307] They do not perceive themselves to be causing injury to their own bodies and instead expect to feel the intended euphoria and then return to normal.[308] Despite strangulation being involved in both instances, the violent loss of autonomy people associate with battery is not present in autoerotic asphyxiation.[309] Yet, by analogizing the two situations, pro-exclusion courts are not only ignoring clear contextual differences but, as a result, are also improperly attaching the injurious characteristics of third-party strangulation to the self-strangulation involved in autoerotic asphyxiation.[310]

Most recently, the Seventh Circuit in *Tran* elucidated another argument concerning why the partial strangulation involved in successful autoerotic asphyxiation causes injury.[311] The Seventh Circuit argued the act of strangulation cannot be broken up into distinct parts: "The insured . . . did not strangle himself in a *nonlethal* manner, then involuntarily shift into a different form of *lethal* strangulation."[312] Rather, under this theory, the act of strangulation is viewed as one continuous injurious act.[313] The partial strangulation involved in successful autoerotic asphyxiation is not severed from the total strangulation which undisputedly causes injury and death.[314] Thus, it is argued, the injury and death occurring from total strangulation can also be attributable to the intentionally inflicted partial strangulation that led up to it.[315]

Domestic Abuse, FORT HOOD SENTINEL (Oct. 27, 2011), http://www.forthoodsentinel.com/editorial/strangulation-one-of-the-most-violent-lethal-forms-of-domestic/article_724ea30c-abb3-50f6-9fb5-ed2133170fef.html [https://perma.cc/FWN3-2N3Y].

306. *See* Erman, *supra* note 1, at 2205.
307. *See, e.g.*, Todd v. AIG Life Ins. Co., 47 F.3d 1448, 1450 (5th Cir. 1995).
308. *See id.*
309. *See* Erman, *supra* note 1, at 2205.
310. *See id.*
311. *See* Tran v. Minn. Life Ins. Co., 922 F.3d 380, 384 (7th Cir. 2019).
312. *Id.*
313. *Id.*
314. *Id.*
315. *Id.*

This argument is misguided and attempts to assign injury to the portion of an act that does not cause one.[316] While total strangulation can be viewed as a slow and uninterrupted deprivation of oxygen to the brain, the Seventh Circuit's argument loses sight of the fact that, when it is interrupted, it fails to cause injury.[317] The partial strangulation intended by the practitioner—that is, strangulation before the point of unconsciousness—is non-injurious and nonlethal because, at this point, it is controlled and leaves no lasting effects.[318] Rather, only at the point of unconsciousness—which is unintended—is control relinquished and the strangulation continues to the point of injury and sometimes death.[319] The intentional, non-injurious portion of a continuous activity is not transformed into an intentionally self-inflicted injury just because it has the ability to lead to injury if continued.[320]

Once again, other admittedly risky activities that have traditionally been inferred or held to not be excluded illustrate the fault in this argument.[321] The activities of skydiving and bungee jumping both involve the intended act of rapidly falling back to Earth.[322] This fall is one continuous event.[323] As intended, the activity of this fall fails to cause injury because the rapid descent involved in each is stopped—either by parachute or by bungee cord—before the hitting of the ground occurs.[324] But, of course, when the equipment involved in either activity malfunctions, injury is caused by the continuation of the fall and the "sudden stop when the thrill seeker crashes back to earth."[325] Yet, a reasonable layperson does not conclude the resulting death from the jump to constitute an intentionally self-inflicted injury, even though the actor purposely began an activity that, if continued without intervention, would lead to death.[326] In the same way, just because autoerotic asphyxiation involves an activity which can lead to injury if no

316. *See* Kornick, *supra* note 299.

317. *See id.*; Erman, *supra* note 1, at 2205–07.

318. *See* Padfield v. AIG Life Ins. Co., 290 F.3d 1121, 1126 (9th Cir. 2002); Beam, *supra* note 14.

319. *See* Todd v. AIG Life Ins. Co., 47 F.3d 1448, 1457 (5th Cir. 1995).

320. *See* Critchlow v. First UNUM Life Ins. Co. of Am., 378 F.3d 246, 260 (2d Cir. 2004).

321. *See id.* at 262.

322. Tran v. Minn. Life Ins. Co., 922 F.3d 380, 388–89 (7th Cir. 2019) (Bauer, J., dissenting).

323. *See id.* at 388–89.

324. *See Critchlow*, 378 F.3d at 262–63.

325. *Tran*, 922 F.3d at 388 (Bauer, J., dissenting).

326. *See Critchlow*, 378 F.3d at 262–63.

intervention occurs, it does not mean the injury is intentionally self-inflicted.[327]

Admittedly, while the arguments of pro-exclusion courts have holes, it would be naïve to assert that they are entirely erroneous. Valid questions are raised as to what is needed to evidence an injury and at what point a self-inflicted activity becomes injurious.[328] Yet, the simple fact that these questions are raised in autoerotic asphyxiation cases supports further the conclusion that deaths resulting from the activity should not be excluded.[329] Even if one does not fully buy into the arguments supporting successful autoerotic asphyxiation's lack of injury, the fact that the legal field has squabbled over the issue shows reasonable minds can differ on whether or not autoerotic asphyxiation is an intentionally self-inflicted injury.[330] This creates an ambiguity in the exclusion, and, under ERISA-governed policies reviewed de novo, ambiguities are resolved in favor of coverage.[331]

VI. CONCLUSION

Whether a death is covered under an accidental death insurance policy continues to be a difficult question for courts and remains highly litigated.[332] At the center of and exemplifying this confusion are deaths resulting from the practice of autoerotic asphyxiation.[333] While the *Wickman* analysis has helped guide federal courts to more consistent conclusions when dealing with ERISA-governed policies, these courts remain divided over whether autoerotic asphyxiation deaths should be covered—especially when the policy includes an exclusion for an intentionally self-inflicted injury.[334]

Not yet a part of this fray is the Eighth Circuit, which, despite the prominence of the conflict and its importance in the territory of accidental death, has yet to rule on an ERISA-governed autoerotic asphyxiation case.[335] While the outcome of a future decision is not certain, some of the court's

327. *See id.*; *Tran*, 922 F.3d at 388–89 (Bauer, J., dissenting).

328. *See, e.g.*, *Tran*, 922 F.3d at 383–85.

329. *See* O'Neil v. Ret. Plan for Salaried Emps. of RKO Gen., Inc., 37 F.3d 55, 59 (2d Cir. 1994).

330. *See* Padfield v. AIG Life Ins. Co., 290 F.3d 1121, 1129 (9th Cir. 2002) (finding insured's injuries were not "intentionally self-inflicted").

331. *See, e.g.*, Fay v. Oxford Health Plan, 287 F.3d 96, 104 (2d Cir. 2002).

332. Lerner, *supra* note 10.

333. *See* Farrell, *supra* note 196, § 3.

334. *See id.*; Hulett, *supra* note 193.

335. *See Fatal Attraction, supra* note 24, at 682–88, 692–97.

past accidental death opinions appear to suggest it would, if reviewing de novo, use *Wickman* to find autoerotic asphyxiation to be an accidental death, and, if applicable, not exclude the death as an intentionally self-inflicted injury.[336] Such findings would be the correct ones. It is simply not unreasonable for a practitioner of autoerotic asphyxiation to believe death is an unlikely result of the practice.[337] Nor does partial strangulation before the point of unconsciousness constitute an injury.[338] At the very least, the term injury is ambiguous when applied to the autoerotic practice.[339] As a result, absent more specific exclusions, beneficiaries should recover on the accidental death policies of autoerotic asphyxiation decedents.

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336. Suggesting death from autoerotic asphyxiation would be found to be accidental under the *Wickman* standard. *See generally* Nichols v. Unicare Life & Health Ins. Co., 739 F.3d 1176 (8th Cir. 2014); McClelland v. Life Ins. Co. of N. Am., 679 F.3d 755 (8th Cir. 2012). Suggesting death from autoerotic asphyxiation would not be excluded as an intentionally self-inflicted injury. *See generally* Am. Bankers Ins. Co. of Fla. v. Gilberts, 181 F.3d 931 (8th Cir. 1999).

337. *See supra* Part V.C.2.

338. *See supra* Part V.D.2.

339. *See* Padfield v. AIG Life Ins. Co., 290 F.3d 1121, 1129 (9th Cir. 2002).

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