Autoerotic Asphyxiation and Accidental Death Insurance: Odd Facts Make Odd Law in Circuit Split

Mike Brown*

I. INTRODUCTION

It was a grim scene involving a famous actor, but this was no movie. Still, there was a mystery to be unraveled. The setting was a hotel room in Bangkok, Thailand.[1] In the closet hung the lifeless body of David Carradine, star of Quentin Tarantino's "Kill Bill" films and 1970s television show "Kung Fu."[2] An intricate web of ropes suspended him above the floor, wrapped around his neck and genitals.[3] The door to the hotel room was locked, and there was no sign that anyone other than Carradine had been there.[4] When asked, his friends were skeptical that he would commit suicide.[5]

Authorities ultimately concluded the cause of Carradine's death was autoerotic asphyxiation,[6] defined as an intentionally induced state of asphyxia that heightens sexual arousal during masturbation.[7] It is believed that Carradine secretly engaged in this behavior for decades leading up to the fatal incident.[8]

The FBI estimates that between 500 and 1,000 people die each year in the United States from autoerotic asphyxiation.[9] The federal circuit courts have

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* J.D. Candidate, 2021, Sandra Day O'Connor College of Law at Arizona State University. My thanks to Professor Michael Saks for his critical guidance and feedback and the Editors and Staff Writers of the *Arizona State Law Journal* for their dedication and hard work.

1. Russell Goldman, *Police: Carradine's Death Likely Sex Accident*, ABCNEWS (June 4, 2009, 10:40 AM), https://abcnews.go.com/Entertainment/story?id=7763422&page=1 [https://perma.cc/EY7V-B2LL].
2. *Id.*
3. Susan Donaldson James, *Auto-Erotic Asphyxia's Deadly Thrill*, ABCNEWS (June 5, 2009, 7:50 AM), https://abcnews.go.com/Health/story?id=7764618&page=1 [https://perma.cc/ZH3D-9C89].
4. *See* Goldman, *supra* note 1.
5. *Id.*
6. *Id.*
7. *Autoerotic Asphyxiation*, MERRIAM-WEBSTER, https://www.merriam-webster.com/dictionary/autoerotic%20asphyxiation [https://perma.cc/7376-Q2HW].
8. *See* James, *supra* note 3.
9. *Id.*

recently split on the question of whether these deaths are accidents for purposes of accidental death insurance.[10]

This Comment argues that the Seventh Circuit's modification of the federal common law's accidental-death test in *Tran v. Minnesota Life Insurance Co.* was wrongly decided. The Seventh Circuit's new threshold inquiry is unworkable and invites uncertainty to federal accidental-death analysis. This Comment further argues that the proper test is the subjective/objective intentions approach that was initially adopted under the federal common law by the First Circuit in *Wickman v. Northwestern National Insurance Co.*

II. BACKGROUND

Part II provides an overview of the Employee Retirement Security Act, outlines different approaches for analyzing accidental death, and reviews three cases that apply the federal common law's accidental-death test. Section A of Part II briefly describes the Employee Retirement Security Act and how employer benefits plans came to be enforced under the federal common law instead of state law. In Section B, this Comment outlines the different approaches for analyzing accidental death that the First Circuit considered in its development of the federal common law, including the accidental means/results test and the subjective/objective intentions approach. Section C of Part II details three interconnected cases applying the federal common law's accidental-death test. Finally, Part III argues that the Seventh Circuit's new threshold inquiry in its accidental-death analysis is a step backward in the development of the federal common law in that it brings a similar uncertainty as the accidental means/results test—a test specifically rejected by the First Circuit in the formation of federal accidental-death analysis. Part IV concludes.

10. *Compare* Tran v. Minn. Life Ins. Co., 922 F.3d 380, 386 (7th Cir. 2019) (holding participant's death from hypoxia while engaging in act of autoerotic asphyxiation fell within scope of exclusion for intentionally self-inflicted injury), *with* Padfield v. AIG Life Ins. Co., 290 F.3d 1121, 1129 (9th Cir. 2002) (holding autoerotic asphyxiation death was not result of "intentionally self-inflicted injury" within meaning of the exclusion).

A. ERISA, Insurance, and the Federal Common Law

Congress enacted the Employee Retirement Income Security Act of 1974[11] ("ERISA") "to promote the interests of employees and their beneficiaries in employee benefit plans."[12] Among other things, ERISA regulates "employee welfare benefit plans that, 'through the purchase of insurance or otherwise,' provide . . . benefits in the event of sickness, accident, disability, or death."[13] Most employer-offered benefits plans fall under ERISA protections.[14]

Designed as a comprehensive statute,[15] ERISA provides employees with several options to enforce their rights.[16] Importantly, ERISA empowers aggrieved participants and beneficiaries to bring civil actions against their respective benefits plans.[17] This empowerment gave rise to a troublesome question: When a party brings suit asserting their benefits claims have been improperly denied, does federal or state law govern?[18] The Supreme Court answered this question definitively in 1987.[19] If not specifically excepted under ERISA,[20] the Court held, state law causes of action are preempted.[21] Disputes arising out of ERISA plans are not state law causes of action and are instead governed by a newly developing federal common law.[22] This includes disputes concerning whether a death is accidental under

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11. Employee Retirement Income Security Act of 1974, Pub. L. No. 93-406, 88 Stat. 829 (codified as amended at 29 U.S.C. §§ 1001–1461 and in scattered sections of 5, 18, and 26 U.S.C.).

12. Shaw v. Delta Air Lines, Inc., 463 U.S. 85, 90 (1983).

13. Pilot Life Ins. Co. v. Dedeaux, 481 U.S. 41, 44 (1987) (quoting 29 U.S.C. § 1002(1)).

14. ERISA covers "any employee benefit plan if it is established or maintained (1) by any employer engaged in commerce or in any industry or activity affecting commerce; or (2) by any employee organization or organizations representing employees engaged in commerce or in any industry or activity affecting commerce; or (3) by both." 29 U.S.C. § 1003(a). Certain plans are specifically excepted from ERISA coverage. *See id.* § 1003(b).

15. *Shaw*, 463 U.S. at 90.

16. *See* 29 U.S.C. § 1131 (providing criminal penalties for employers who willfully violate specific portions of ERISA); *see also id.* § 1133 (requiring notice be given to any participant or beneficiary who is denied benefits and affording opportunity to any participant for full and fair review of their claim).

17. *Id.* § 1132. "Empowers" used in this context means provides a statutory cause of action.

18. *See* Dedeaux v. Pilot Life Ins. Co., 770 F.2d 1311, 1312, 1317 (5th Cir. 1985) (reversing the district court's conclusion that ERISA "preempts an employee's common law breach of contract and tort claims against the insurance company" and holding that "state laws proscribing the same conduct as ERISA may provide a cause of action in place of, in addition to, or coequal with any cause of action available under ERISA"), *rev'd*, 481 U.S. 41.

19. *Pilot Life Ins. Co.*, 481 U.S. at 44.

20. *See* § 1144.

21. *Pilot Life Ins. Co.*, 481 U.S. at 48.

22. *Id.* at 56 ("The expectations that a federal common law of rights and obligations under ERISA-regulated plans would develop . . . would make little sense if the remedies available . . . could be supplemented or supplanted by varying state laws.").

ERISA-governed accidental death and dismemberment ("AD&D") benefits plans.[23]

AD&D insurance differs from term life insurance in significant ways.[24] Generally, term life insurance pays benefits in the event of death due to illness, accidents, drug overdoses, fatal drunken driving, and even suicide.[25] AD&D plans, on the other hand, pay out in the event of death only if the death is deemed accidental.[26] To accomplish this, AD&D plans contain two separate clauses that are often at the center of accidental-death disputes: the suicide exception and the intentionally self-inflicted injury exception.[27] Simply put, a death is not accidental, and does not pay benefits, if it is a suicide or the result of an intentionally self-inflicted injury.[28]

B. Accidental Death Under the Federal Common Law

In the course of this "emerging jurisprudence" under the federal common law, a case of first impression came before the First Circuit Court of Appeals in 1990.[29] In *Wickman v. Northwestern National Insurance Co.*, the interpretation of AD&D plans was at issue.[30]

Paul Wickman, insured under an ERISA-governed AD&D plan, died after falling from a bridge.[31] A witness saw Wickman standing on an interstate overpass with his car parked in the breakdown lane.[32] Wickman was standing outside of the guardrail, holding on to it with only one hand.[33] The witness looked away momentarily, "and upon looking back he saw Wickman no

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23. *See* Wickman v. Nw. Nat'l. Ins. Co., 908 F.2d 1077, 1089 (1st Cir. 1990) (applying the federal common law in determining whether death was accidental), *cert. denied*, 498 U.S. 1013 (1990).

24. *See* Adam F. Scales, *Man, God and the Serbonian Bog: The Evolution of Accidental Death Insurance*, 86 IOWA L. REV. 173, 176–77 (2000).

25. *Id.* at 176. To discourage consumers from buying term life insurance while contemplating suicide, insurance companies often exempt suicides committed within the first two years of buying or changing term life coverage. *What Are the Typical Life Insurance Exclusions and Limitations?*, INSURANCEQNA, http://www.insuranceqna.com/life-insurance/life-insurance-exclusions.html [https://perma.cc/AZM6-H3AJ].

26. Scales, *supra* note 24, at 176.

27. *See, e.g.*, Critchlow v. First UNUM Life Ins. Co. of Am., 378 F.3d 246, 254 (2d Cir. 2004); Padfield v. AIG Life Ins. Co., 290 F.3d 1121, 1124 (9th Cir. 2002); Santaella v. Metro. Life Ins. Co., 123 F.3d 456, 460 (7th Cir. 1997); *Wickman*, 908 F.2d at 1081.

28. *See, e.g.*, *Critchlow*, 378 F.3d at 254; *Padfield*, 290 F.3d at 1124; *Santaella*, 123 F.3d at 460; *Wickman*, 908 F.2d at 1081.

29. *Wickman*, 908 F.2d at 1079.

30. *Id.*

31. *Id.*

32. *Id.* at 1079–80.

33. *Id.* at 1080.

longer holding on to the rail but free-falling to the railroad tracks below."[34] The fall was approximately forty to fifty feet.[35]

Wickman's surviving spouse sought to recover benefits under the plan, but Northwestern National Insurance Company denied her claim, asserting that her husband's death was not accidental.[36] Wickman's widow filed suit under ERISA, raising the question of what constitutes an accidental death.[37]

Before reaching the First Circuit, a United States magistrate judge heard the case.[38] The magistrate judge found only three possibilities could explain Wickman's projecting himself over such a "dangerous visible void:" (1) he intended suicide; (2) he intended to seriously injure himself; or (3) he intended to place himself there but then fell inadvertently.[39] The first two possibilities, according to the magistrate, invoked the suicide or intentionally self-inflicted injury exclusions to the AD&D plan, mandating denial of the claim.[40]

The magistrate also found that the third possible explanation for Wickman's death, an inadvertent fall, warranted denial of the claim because "even if Wickman had no specific intent to injure or kill himself, 'the harm that befell him was substantially certain to happen.'"[41] Mrs. Wickman challenged the magistrate's decision that the second and third possible explanations for her husband's death warranted a finding of non-accidental death on her appeal to the First Circuit.[42]

The First Circuit began its analysis by looking at the "terms of the policy contract."[43] The court took note that the AD&D policy stated benefits won't be paid "for loss directly or indirectly caused by . . . [s]uicide or intentionally self-inflicted injury, whether [the] [insured is] sane or insane."[44] The court stated, "We are bound by this plain language, and we may not distort it in an effort to achieve a desirable or sympathetic result. The language, in the clearest of terms, denies benefits if Wickman committed suicide, the magistrate's first scenario."[45] Had Wickman's intent been only to injure himself, the court would have been similarly bound because the attempt to

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34. *Id.*
35. *Id.* at 1079.
36. *Id.* at 1081.
37. *Id.* at 1079.
38. Wickman v. Nw. Nat'l Life Ins. Co., No. 86-1895-WF, 1989 WL 129240, at *1 (D. Mass. Oct. 23, 1989), *aff'd*, 908 F.2d 1077.
39. *Wickman*, 908 F.2d at 1083.
40. *Id.*
41. *Id.* (quoting *Wickman*, 1989 WL 129240, at *5).
42. *Id.* at 1084.
43. *Id.*
44. *Id.*
45. *Id.*

injure himself would have “indirectly caused” his death.[46] Thus, under the magistrate’s first two scenarios, “Northwestern would not be liable . . . for accidental death benefits.”[47]

This left the magistrate’s third scenario. What if Wickman had “climbed over the guardrail without any intent to kill or injure himself” and then, once there, fell inadvertently?[48] To solve this dilemma, the court “delve[d] into the metaphysical conundrum of what is an accident.”[49] The court first looked for a definition of “accident” within the insurance contract.[50] The contract “define[d] ‘accident’ as ‘an unexpected, external, violent, and sudden event.’”[51] Both his widow and his insurance company agreed that Wickman’s fall was external, violent, and sudden.[52] They disagreed about whether Wickman expected to fall.[53] The insurance company contended that “when Wickman climbed over the railing and extended himself from the bridge he must have expected that he would fall and kill or, at least, significantly injure himself.”[54] Wickman’s widow argued “that only if Wickman intended to commit suicide could the incident not be an accident; otherwise, he would not have expected to die.”[55]

To determine “what level of expectation is necessary for an act to constitute an accident[,]”[56] the court examined how state courts have dealt with this issue.[57] The court found “essentially two approaches to determining whether an injury was ‘unexpected’ and thus ‘accidental.’”[58] The first approach distinguished between accidental means and results, and the second focused on the deceased’s intentions, subjectively and objectively.[59]

1. Accidental-Means Approach

The first approach used by state courts in determining accidental death distinguishes between “accidental means” and “accidental results.”[60]

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46. *Id.*
47. *Id.*
48. *Id.*
49. *Id.*
50. *Id.*
51. *Id.* at 1085.
52. *Id.*
53. *Id.*
54. *Id.*
55. *Id.*
56. *Id.*
57. *Id.*
58. *Id.*
59. *Id.* at 1085, 1087–88.
60. *Id.* at 1085.

Accidental-means analysis applies only where the contract language specifically deals with the circumstances surrounding an injury or death.[61] For example, Wickman's contract defined "accident" in terms of an event.[62] Because an "event" connotes the manner and circumstances surrounding a death or injury, this type of language would prompt a court to use the accidental-means approach.[63] Had Wickman's contract spoken only of an "unexpected injury, not an unexpected event[,]" a court "would reason that . . . the contract had intended a[n] '[accidental] result' analysis."[64] Under accidental-means analysis, "if the act . . . leading to injury is intentional, then so is the result, even if the result itself was neither intended nor expected."[65] The accidental-means test thus focuses on "the *cause* of the injury," and in order to be an "accident," that cause must be "unforeseen, unexpected, and unusual; happening or coming by chance without design."[66]

Forty years before ERISA was enacted, the Supreme Court applied accidental means/result analysis in the landmark 1934 case, *Landress v. Phoenix Mutual Life Insurance Co.*[67] There, an insured golfer suffered a fatal sunstroke.[68] The language of his insurance policy prompted the Court to use accidental-means analysis.[69] The golfer's spouse contended "that the death, resulting from voluntary exposure to the sun's rays under normal conditions, was accidental in the common or popular sense of the term."[70]

The Court explained that under accidental-means analysis, "that the death or injury was accidental in the understanding of the average man" is not enough.[71] Rather, because the *cause* of the injury was sun exposure, in order for the death to have been accidental, the result of the exposure must have been "something unforeseen, unexpected, extraordinary, an unlooked-for mishap, and so an accident."[72] Because sunstroke is a foreseeable result of sun exposure, if the golfer had intended to expose himself to the sun's rays,

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61. *Id.*

62. *Id.*

63. *Id.* (explaining that "[s]imilarly, 'violent, external, and sudden' terms concentrate upon the cause of the injury" and would also prompt accidental-means analysis).

64. *Id.*

65. *Id.*

66. *Id.* (quoting 10 LEE R. RUSS & THOMAS F. SEGALLA, COUCH ON INSURANCE 2d § 41:28, 40 (1982)).

67. Landress v. Phx. Mut. Life Ins. Co., 291 U.S. 491, 495–97 (1934).

68. *Id.* at 494.

69. *Id.* at 495–96.

70. *Id.* at 495.

71. *Id.* at 495–96.

72. *Id.* at 496 (quoting Lewis v. Ocean Accident & Guarantee Corp., 120 N.E. 56, 57 (N.Y. 1918)).

then his death could not have been an accident.[73] This line of reasoning ultimately led the court to conclude that "injury from sunstroke, when resulting from voluntary exposure . . . to the sun's rays, *even though an accident*, [is not] caused by external accidental means."[74] Thus, the golfer's widow could not recover payment from the insurance company for her husband's accidental death.[75]

Justice Benjamin Cardozo dissented, harshly criticizing the distinction between accidental results and accidental means.[76] He warned that the distinction would "plunge this branch of the law into a Serbonian Bog."[77] Justice Cardozo remarked that the golfer was playing under the same conditions he had often before—the "heat was not extraordinary; the exertion not unusual."[78] That the sun exposure led to his death was as much an accident as if the golfer had been struck by lightning.[79]

How then, Justice Cardozo questioned, could the majority still deny benefits to his widow?[80] Any distinction between accidental means and accidental results would be untenable because "the two were inseparable."[81] For Justice Cardozo, accidental-means analysis should be more logical: "When a man has died in such a way that his death is spoken of as an accident, he has died because of an accident, and hence by accidental means."[82] Justice Cardozo warned that the majority's test proposing a distinction between accidental means and accidental results would not survive its own application.[83]

In *Wickman*, the First Circuit proved Justice Cardozo's prediction true, citing the myriad of issues state courts had in applying the test[84] and rejecting

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73. *Id.*
74. *Id.* at 497 (emphasis added) (citations omitted).
75. *See id.*
76. *Id.* at 499 (Cardozo, J., dissenting).
77. *Id.* A Serbonian bog is a situation from which it is difficult to extricate oneself. *Serbonian*, LEXICO, https://www.lexico.com/en/definition/serbonian [https://perma.cc/F5XC-QLKK].
78. *Landress*, 291 U.S. at 501 (Cardozo, J., dissenting).
79. *Id.*
80. *See id.*
81. *Id.*
82. *Id.* at 499.
83. *Id.*
84. Wickman v. Nw. Nat'l. Ins. Co., 908 F.2d 1077, 1086 (1st Cir. 1990), *cert. denied*, 498 U.S. 1013 (1990); *see* Republic Nat'l Life Ins. Co. v. Heyward, 536 S.W.2d 549, 557 (Tex. 1976) ("[W]e are now convinced that the terms 'accidental death' and 'death by accidental means,' as those terms are used in insurance policies, must be regarded as legally synonymous . . . ."); *see also* Beckham v. Travelers Ins. Co., 225 A.2d 532, 535 (Pa. 1967) ("Our own cases have also confirmed Cardozo's prediction . . . .").

the distinction between accidental means and accidental results.[85] The court decided to "safely circumvent[ ] this 'Serbonian Bog'" in its development of the federal common law and turned to another approach to determine whether an injury was unexpected and accidental.[86]

2. Subjective/Objective Intentions Approach

Having safely avoided the Serbonian Bog—a situation from which it is difficult to extricate oneself—the First Circuit still faced the question of how to examine Wickman's expectations in determining what an accident is.[87] Wickman's widow asserted that "anything short of specifically intended injury is an accident."[88] The magistrate disagreed, ruling "that even if Wickman did not intend to kill or injure himself, he did not die accidentally" because he "reasonably should have expected" to die or be injured as a result of falling off a bridge.[89] The First Circuit had to decide whether expectations should be measured subjectively, as the widow argued, or objectively, as the magistrate ruled.[90]

The court did not agree with the widow's strictly subjective standard for two reasons.[91] First, there are times when a person's subjective expectations are "patently unreasonable."[92] As an example, the court cited several cases where the insured died as a result of playing Russian roulette, not expecting or intending to die.[93] Allowing recovery under such circumstances would "defeat the very purpose or underlying function of accidental life insurance."[94] Second, it is "often difficult, if not impossible, to determine" the subjective expectations of the insured.[95] To make an accident wholly dependent on a dead person's subjective expectations invites uncertainty and is "too often a hopelessly blind search for the truth."[96] Even so, the court was unwilling to completely discount subjective expectation in its analysis, for

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85. *Wickman*, 908 F.2d at 1086.
86. *Id.*
87. *Id.*
88. *Id.*
89. *Id.*
90. *Id.* at 1087.
91. *Id.*
92. *Id.*
93. *Id.*
94. *Id.* (quoting Kennedy v. Wash. Nat'l Ins. Co., 401 N.W.2d 842, 846 (Wis. Ct. App. 1967)).
95. *Id.*
96. *Id.* at 1088.

the simple reason that accident insurance exists to protect people from their own misguided, subjective expectations.[97]

The court's decision could be viewed as a compromise between the widow's subjective argument and the magistrate's objective point of view.[98] "If the fact-finder determines that the insured did not expect an injury similar . . . to that suffered, the fact-finder must then" determine if that expectation was reasonable.[99] If the expectations are unreasonable, then the injuries are not accidental.[100] The reasonableness determination is to be made from the insured's perspective, taking into account their "personal characteristics and experiences."[101] If the fact-finder cannot determine the insured's actual expectation, "the fact-finder should then engage in an objective analysis of the insured's expectations."[102] Under "this analysis, one must ask whether a reasonable person, with background and characteristics similar to the insured, would have viewed the injury as highly likely to occur as a result of the insured's intentional conduct."[103]

Applying this test to *Wickman*, the First Circuit affirmed the magistrate's ruling.[104] Under any possible application of the test, Wickman's death was not an accident.[105] If Wickman expected to die or injure himself, his death was not accidental.[106] If Wickman did not expect to die or injure himself, this expectation was not reasonable, and hence his death was not an accident, because a reasonable person would have expected death or injury to result from falling off a bridge.[107] Under a purely objective analysis, assuming Wickman's expectation is unknown, the death was also not an accident because a reasonable person would have viewed death or injury as highly likely to occur as a result of intentionally climbing over a guardrail and hanging on with only one hand on the precipice of a fifty-foot drop.[108]

Most of the other circuit courts adopted a formulation of the *Wickman* test following the First Circuit's decision.[109] Since its adoption, federal courts

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97. *Id.*
98. *See id.*
99. *Id.*
100. *Id.*
101. *Id.*
102. *Id.*
103. *Id.*
104. *Id.*
105. *Id.* at 1089.
106. *Id.*
107. *Id.*
108. *Id.*
109. *See, e.g.*, Kovach v. Zurich Am. Ins. Co., 587 F.3d 323, 337–38 (6th Cir. 2009); Eckelberry v. Reliastar Life Ins. Co., 469 F.3d 340, 345 (4th Cir. 2006); Critchlow v. First UNUM

have applied the *Wickman* test to a broad spectrum of accidental-death possibilities[110] with generally consistent results amongst the circuits.[111] However, a modification to the *Wickman* test made by the Seventh Circuit led to a circuit split as to whether autoerotic asphyxiation deaths are accidental.[112]

C. Application of the Wickman *Test*

In three cases confronting the same issue, the Seventh Circuit and the Ninth Circuit applied the *Wickman* test to determine if a death was accidental.[113] In *Santaella v. Metropolitan Life Insurance Co.*, the Seventh Circuit held that a prescription drug overdose was accidental and not the result of an intentionally self-inflicted injury.[114] In *Padfield v. AIG Life Insurance Co.*, the Ninth Circuit, relying in part on the reasoning used in *Santaella*, held that an autoerotic asphyxiation death was not an intentionally

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Life Ins. Co. of Am., 378 F.3d 246, 263 (2d Cir. 2004); King *ex rel.* Schanus v. Hartford Life & Accident Ins. Co., 357 F.3d 840, 843 (8th Cir. 2004), *rev'd sub nom.* King v. Hartford Life & Accident Ins. Co., 414 F.3d 994 (8th Cir. 2005) (en banc); Padfield v. AIG Life Ins. Co., 290 F.3d 1121, 1126–27 (9th Cir. 2002); Buce v. Allianz Life Ins. Co., 247 F.3d 1133, 1147 (11th Cir. 2001); Santaella v. Metro. Life Ins. Co., 123 F.3d 456, 463 (7th Cir. 1997); Todd v. AIG Life Ins. Co., 47 F.3d 1448, 1456 (5th Cir. 1995). The Supreme Court has not heard a case involving the *Wickman* test, leaving the circuit courts free to adopt, reject, or modify it as they choose.

110. *See e.g.*, Grabowski v. Hartford Life & Accident Ins. Co., 747 F. App'x 923 (4th Cir. 2018) (analyzing whether a sudden pulmonary embolism was accidental death); Nichols v. Unicare Life & Health Ins. Co., 739 F.3d 1176 (8th Cir. 2014) (analyzing whether death was accidental when cause was undetermined and multiple prescription drugs were found in deceased's system); Sellers v. Zurich Am. Ins. Co., 627 F.3d 627 (7th Cir. 2010) (analyzing whether fatal complications arising out of necessary surgery was accidental death); *Kovach*, 587 F.3d 323 (analyzing whether a severed limb suffered as a result of operating a motorcycle under the influence was accidental); Schadler v. Anthem Life Ins. Co., 147 F.3d 388 (5th Cir. 1998) (analyzing accidental death where deceased overdosed on illegal drugs); Vickers v. Bos. Mut. Life Ins. Co., 135 F.3d 179 (1st Cir. 1998) (analyzing whether a driver killed in a car accident after suffering a heart attack behind the wheel was an accidental death); Casey v. Uddeholm Corp., 32 F.3d 1094 (7th Cir. 1994) (analyzing whether unsuccessful suicide attempt was self-inflicted injury).

111. *Compare* Stamp v. Metro. Life Ins. Co., 531 F.3d 84, 89 (1st Cir. 2008) (finding that death resulting from driving while intoxicated was not accidental), *with Eckelberry*, 469 F.3d at 346 (finding that insured's death from driving under the influence was not accidental).

112. *Compare* Tran v. Minn. Life Ins. Co., 922 F.3d 380, 386 (7th Cir. 2019) (holding that a death resulting from hypoxia while engaging in act of autoerotic asphyxiation fell under the exclusion for intentionally self-inflicted injury), *with Padfield*, 290 F.3d at 1130 (holding that autoerotic asphyxiation death did not result from "intentionally self-inflicted injury" within the meaning of the exclusion).

113. *Tran*, 922 F.3d at 385–86; *Padfield*, 290 F.3d at 1126–27; *Santaella*, 123 F.3d at 463.

114. *Santaella*, 123 F.3d at 460.

self-inflicted injury.[115] In *Tran v. Minnesota Life Insurance Co.*, the Seventh Circuit rejected the Ninth Circuit's decision in *Padfield*, criticized its reasoning as flawed, and held that an autoerotic asphyxiation death was an intentionally self-inflicted injury.[116]

1. *Santaella v. Metropolitan Life Insurance Co.*

Santaella involved a thirty-six-year-old flight attendant named Eldridge who was found dead in her home.[117] Following an autopsy, the medical investigator determined she died of a drug overdose, specifically from a prescription pain medicine known as propoxyphene.[118] In the medical investigator's expert opinion, Eldridge ingested the lethal dose of propoxyphene accidentally.[119]

The medical investigator elaborated on his conclusions in his deposition.[120] He noted the fairly low levels of the drug in Eldridge's system compared to other lethal doses, ruled out other possible causes of death, and even discussed the possibility of suicide with Eldridge's family.[121] The medical examiner also took note of Eldridge's history of drug abuse but ultimately ruled out intentional overdose.[122] To support this conclusion, the medical investigator explained that propoxyphene had a very small margin between a therapeutic dose and a fatal dose, much smaller than other drugs.[123] This fact, combined with the absence of undigested pills in Eldridge's stomach—an indication of suicide—led him to conclude the overdose was accidental.[124]

Eldridge was insured through her employer by an ERISA-governed AD&D plan.[125] The plan contained the typical exclusions for suicide and intentionally self-inflicted injury.[126] The insurance company, MetLife, denied accidental-death benefits to Eldridge's beneficiary.[127] A lawsuit followed

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115. *Padfield*, 290 F.3d at 1123.
116. *Tran*, 922 F.3d at 381.
117. *Santaella*, 123 F.3d at 458.
118. *Id.*
119. *Id.* at 459.
120. *Id.*
121. *Id.*
122. *Id.*
123. *Id.*
124. *Id.*
125. *Id.* at 460.
126. *Id.*
127. *Id.* at 462.

and, on cross-motions for summary judgment, the district court ruled in MetLife's favor.[128]

The Seventh Circuit reviewed the district court's decision.[129] MetLife contended that, under the *Wickman* test, Eldridge's death was no accident because she knew or reasonably should have known that ingesting the pills was likely to cause death or serious bodily injury.[130] As support, MetLife pointed to Eldridge's history of drug abuse, her enlarged spleen, and a seizure suffered two months before her death.[131] Given this history, Eldridge should have known that serious injury or death would likely result from her voluntary ingestion of the drug.[132] Whatever Eldridge's expectations were regarding survival, they were unreasonable and therefore her death could not have been an accident.[133] Likening Eldridge's behavior to the Russian roulette cases discussed in *Wickman*,[134] the crux of MetLife's argument was as follows: Because Eldridge intended to consume the dangerous drugs, and the drugs caused her death, her death was the result of an intentionally self-inflicted injury.[135]

The Seventh Circuit was not persuaded.[136] It clarified the distinction between a voluntary act and a "purposeful infliction of injury on [oneself]."[137] Despite the undisputed fact that Eldridge took the drug voluntarily, there was no indication that she intended to overdose "or that she intended to inflict injury on herself."[138] The court referenced its earlier decision where it stated that a "self-inflicted injury may be accidental . . . . For example, it is an accident when someone hits his thumb with a hammer when driving a nail. The injury was self-inflicted but not intended, hence accidental."[139] Nor was "there any evidence that Mrs. Eldridge knew or should have known that [her] . . . damaged spleen" or seizure "might be related to an abuse of drugs."[140] On

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128. Santaella v. Metro. Life Ins. Co., No. 95 C 4571, 1996 WL 167336, at *1, *10 (N.D. Ill. Apr. 5, 1996), *rev'd*, 123 F.3d 456.

129. *Santaella*, 123 F.3d at 460.

130. *Id.* at 462.

131. *Id.*

132. *Id.*

133. *Santaella*, 1996 WL 167336, at *9.

134. MetLife urged the District Court to follow the decision reached in *McLain v. Metropolitan Life Insurance Co.*, 820 F. Supp. 169 (D.N.J. 1993). There, the court found a cocaine addict's unintended overdose was not accidental, persuaded by "MetLife's argument that voluntary ingestion of cocaine is 'no less hazardous tha[n] engaging in Russian roulette or standing outside the guardrail of a high suspension bridge.'" *Id.* at 178.

135. *Santaella*, 1996 WL 167336, at *9.

136. *Santaella*, 123 F.3d at 465.

137. *Id.*

138. *Id.*

139. *Id.* (quoting Casey v. Uddeholm Corp., 32 F.3d 1094, 1097 (7th Cir. 1994)).

140. *Id.*

these grounds, the Seventh Circuit reversed and directed the district court to enter summary judgment for Eldridge's beneficiary.[141] Five years later, the Ninth Circuit would rely upon the Seventh Circuit's distinction between voluntary acts and intentionally self-inflicted injuries in *Padfield v. AIG Life Insurance Co.*[142]

2. *Padfield v. AIG Life Insurance Co.*

In February of 1999, Gerald Padfield "told his wife he was going to the cleaners" and drove off in the family van.[143] Three days later, his lifeless body was discovered.[144] Padfield was found on the back-seat floor of his van, naked below the waist, with one end of a necktie strung around his neck.[145] The other end of the necktie was attached to a door hinge located above him.[146] Numerous sexual devices, pornography, and an industrial solvent were also in the van.[147] The coroner reported that Padfield's death appeared to be an accident, "the 'accidental' result of autoerotic asphyxiation."[148]

Padfield's wife claimed benefits under Padfield's ERISA-governed AD&D insurance policy.[149] Invoking the policy's exclusions for suicide and intentionally self-inflicted injury, AIG Life Insurance Company rejected her claim.[150] Mrs. Padfield filed suit against AIG, and both parties subsequently filed summary judgment motions.[151] The district court ruled in AIG's favor, holding that "Mr. Padfield's death by autoerotic asphyxiation fell outside the policy exclusion for suicide, but fell within the exclusion for death resulting from 'intentionally self-inflicted injury.'"[152] Mrs. Padfield appealed to the Ninth Circuit.[153]

The Ninth Circuit affirmed the district court's ruling that the suicide exclusion did not apply[154] but reversed its application of the intentionally

141. *Id.*
142. Padfield v. AIG Life Ins. Co., 290 F.3d 1121, 1129–30 (9th Cir. 2002).
143. *Id.* at 1123.
144. *Id.*
145. *Id.*
146. *Id.*
147. *Id.* at 1123–24.
148. *Id.* at 1124.
149. *Id.*
150. *Id.*
151. *Id.*
152. *Id.*
153. *Id.*
154. *Id.* "Every court to have considered autoerotic asphyxiation under the federal common law of ERISA has concluded that it is not excluded from coverage by a suicide exclusion." *Id.* at

self-inflicted injury exclusion.[155] The court explained that whether Padfield's death was the result of an intentionally self-inflicted injury hinged on Padfield's intentions.[156] Under the subjective/objective test first established in *Wickman*, if Padfield intended injury by strangling himself with a necktie, and those injuries "led to his death, the exclusion applies, and AIG correctly denied benefits."[157] The court found this not to be the case.[158] Rather, the court found:

> All of the evidence indicates that if the events . . . had gone as Mr. Padfield intended, he would have experienced a temporary deprivation of oxygen, a euphoric light-headedness . . . , 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.[159]

The court found that none of these intended consequences was an injury.[160]

Because Padfield had no subjective intent to cause the injuries that resulted in his death, the court then examined whether his subjective intent was objectively reasonable.[161] After examining "a number of slightly different verbal formulations to describe the objective portion of the inquiry,"[162] the court held that a subjective expectation of survival is objectively reasonable "if death is not substantially certain to result from the insured's conduct."[163]

1127 (first citing Todd v. AIG Life Ins. Co., 47 F.3d 1448, 1456–57 (5th Cir. 1995); then citing Bennet v. Am. Int'l Life Assurance Co. of N.Y., 956 F. Supp. 201, 212–13 (N.D.N.Y. 1997); then citing Parker v. Danaher Corp., 851 F. Supp 1287, 1295 (W.D. Ark. 1994); and then citing Fawcett v. Metro. Life Ins. Co., No. C-3-97-540, 2000 WL 979994, at *4 (S.D. Ohio June 28, 2000)).

155. *Id.* at 1130.

156. *Id.* at 1129.

157. *Id.*

158. *Id.*

159. *Id.*

160. *Id.*

161. *Id.*

162. *Id.* at 1126.

163. *Id.* at 1126–27 (quoting Todd v. AIG Life Ins. Co., 47 F.3d 1448, 1456 (5th Cir. 1995)). The "slightly different verbal formulations" are a reference to the minimal differences among circuits for the objective portion of the test. For example, the First Circuit states that the reasonableness of a subjective intention depends on whether a reasonable person in the position of the insured "would have viewed the injury as highly likely to occur as a result of the insured's intentional conduct." Wickman v. Nw. Nat'l Ins. Co., 908 F.2d 1077, 1088–89 (1st Cir.), *cert. denied*, 498 U.S. 1013 (1990). Other courts have used the term "substantially likely" as opposed to "highly likely" or "substantially certain." Bennett v. Am. Int'l Life Assurance Co. of N.Y., 956 F. Supp. 201, 210–11 (N.D.N.Y. 1997). Recognizing that "the difference between the formulations is not great," the Ninth Circuit chose the "substantially certain" option because "it best allows the objective inquiry to 'serve [ ] as a good proxy for actual expectation.'" *Padfield*, 290 F.3d at 1127 (alteration in original) (quoting *Wickman*, 908 F.2d at 1088).

AIG argued that Padfield, in strangling himself to induce a state of heightened sexual arousal, "voluntarily engaged in a risky activity."[164] Stating that Padfield's "case is analytically identical to *Santaella*," the court likened Padfield's voluntary act of wrapping a necktie around his neck to Eldridge's voluntary ingestion of a dangerous amount of prescription pain medication.[165] Just as the size of Eldridge's lethal dose indicated an accidental as opposed to a deliberate overdose, Padfield's past performance of the act without inflicting any injury on himself indicated a "fatal mistake" as opposed to an intentionally self-inflicted injury.[166] Accordingly, the court held that autoerotic asphyxiation was not an intentionally self-inflicted injury.[167] Seventeen years later, the Seventh Circuit disagreed in *Tran v. Minnesota Life Insurance Co.*[168]

3. *Tran v. Minnesota Life Insurance Co.*

Like in *Padfield*, the deceased in *Tran* died from autoerotic asphyxiation. The insured, Llenos, "hung a noose from a ceiling beam in his basement, stood up on a stool with the noose around his neck, and stepped off," dying as a result.[169] Llenos's wife later discovered his body and called the police.[170]

A towel was found on the back of Llenos's neck, presumably to protect his skin from showing any marks as a result of the noose constricting.[171] The rope itself hung in loops directly in front of Llenos's body, a possible release mechanism from the noose.[172] Sexual paraphernalia was found on Llenos's body as well.[173] Llenos also had "[n]o history of depression or prior suicidal ideation."[174] These facts led the medical examiner to conclude that Llenos "died performing autoerotic asphyxiation."[175]

Tran, Llenos's wife, sought to recover benefits under her deceased husband's ERISA-governed AD&D insurance policies.[176] Minnesota Life

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164. *Padfield*, 290 F.3d at 1129.
165. *Id.* at 1130.
166. *Id.*
167. *Id.*
168. Tran v. Minn. Life Ins. Co., 922 F.3d 380 (7th Cir. 2019).
169. *Id.* at 381.
170. *Id.*
171. *See* Tran v. Minn. Life Ins. Co., No. 17-cv-450, 2018 WL 1156326, at *2 (N.D. Ill. Mar. 5, 2018).
172. *Id.*
173. *Id.* ("Four rubber rings were around the decedent's genitals, the pubic hair was shaved in a semi-circular pattern consistent with prior use of the rubber rings.").
174. *Id.*
175. *Tran*, 922 F.3d at 381.
176. *Id.* at 382.

Insurance Company denied her claims, taking the position that the death fell under the intentionally self-inflicted injury exclusion.[177] Tran then initiated a lawsuit in federal court.[178] Relying on *Santaella* and *Padfield*, the district court granted Tran summary judgment.[179] Minnesota Life Insurance Company appealed the decision to the Seventh Circuit.[180]

Rather than beginning with Llenos's intentions, the Seventh Circuit announced that a threshold inquiry was necessary: "To determine whether Llenos's death is excluded from AD&D coverage, we must determine first whether autoerotic asphyxiation is an 'injury,' and second, whether that injury was 'intentionally self-inflicted.'"[181] The court noted that its reasoning in *Santaella* "sheds little light on the question of whether autoerotic asphyxiation is an injury, because the opinion did not explore the issue in any depth."[182]

The court then examined *Padfield*[183] and declined to adopt its reasoning. The Seventh Circuit found *Padfield* to be based on the "false premise[ ]that the act of strangling oneself is severable into distinct phases and distinct injuries."[184] The Ninth Circuit in *Padfield* reasoned that the insured was killed not by autoerotic asphyxiation but by "the continued asphyxiation that occurred after he blacked out."[185] The Seventh Circuit rejected "such reasoning because it artificially separates one continuous act into two or more parts."[186] The court elaborated:

> The insured in *Padfield* did not strangle himself in a *nonlethal* manner, then involuntarily shift into a different form of *lethal* strangulation. He pulled a necktie tightly around his neck to cut off oxygen to his brain; as the self-strangulation continued, he gradually lost consciousness and eventually died. . . . [T]here was no intervening cause, and no break in the chain of causation: one act of autoerotic asphyxiation caused the hypoxia that killed [him]. The same reasoning applies here: Llenos placed a noose around his neck and stepped off a stool, strangling himself. The resulting

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177. *Id.*
178. *Id.*
179. *Tran*, 2018 WL 1156326, at *10.
180. *Tran*, 922 F.3d at 382.
181. *Id.*
182. *Id.* at 383.
183. *Id.* at 383–84. The Seventh Circuit also examined *Critchlow v. First UNUM Life Insurance Co. of America*, 378 F.3d 246 (2d Cir. 2004), which held that autoerotic asphyxiation is not an intentionally self-inflicted injury. *Id.* at 384. *Critchlow* is omitted from discussion above for clarity, as its holding and reasoning are substantially similar to *Padfield*.
184. *Tran*, 922 F.3d at 383–84.
185. *Id.* at 384.
186. *Id.*

> hypoxia caused his euphoria, his black out, and his death—all the result of one intentionally inflicted injury.[187]

The court continued that, even if autoerotic asphyxiation could be viewed in distinct stages of strangulation, the partial strangulation that Padfield sought to inflict still fell within the exclusion for intentionally self-inflicted injuries.[188] The court pointed out that if Llenos had partially strangled someone other than himself, "there would be no debate he had inflicted an injury" because partial strangulation is a criminal offense.[189]

Having determined the act of autoerotic asphyxiation itself was the "injury" that killed Llenos, the court then addressed whether this "injury" was intentionally self-inflicted.[190] This is where the court applied the subjective/objective test originally formulated in *Wickman*.[191] For an intentionally self-inflicted injury, the first step is to "examine whether the injured individual had a subjective expectation of injuring himself."[192] The court stated that Llenos's subjective intent was clear.[193] "Llenos intentionally performed autoerotic asphyxiation. Because that act itself is an injury, Llenos's death falls under the policy exclusion for intentionally self-inflicted injuries."[194] The Seventh Circuit concluded its opinion: "Even assuming Llenos's death were accidental, Tran is not entitled to AD&D coverage . . . ."[195]

III. ANALYSIS

The Seventh Circuit's analysis in *Tran* is flawed. Its threshold inquiry, whether the act itself is an injury, is unworkable, inviting an uncertainty into accidental-death analysis that harkens back to Justice Cardozo's warning about the Serbonian Bog. Under the Seventh Circuit's analysis, an initial determination that the act itself is an injury renders the intentions of the deceased irrelevant so long as they intended the act. This circumvents the *Wickman* test's ability to apply broadly to the entire spectrum of accidental-death possibilities. The proper analysis to be applied in accidental-death cases was set forth in *Wickman*. That should be the test

187. *Id.* (citation omitted).
188. *Id.*
189. *Id.*
190. *Id.* at 385.
191. *Id.*
192. *Id.*
193. *Id.* at 386.
194. *Id.*
195. *Id.*

under the federal common law, unobscured by the Seventh Circuit's act-itself inquiry.

A. Act-Itself Inquiry Is Unworkable

Before addressing the unworkability of the Seventh Circuit's analysis in *Tran*, an examination of those facts under the *Wickman* test is in order. The inquiry begins not with whether the act itself was an injury but rather by asking what the deceased's subjective intentions were in performing the act. If his intention was to injure himself, then the injury was intentionally self-inflicted and is not covered under his AD&D insurance. If his intentions were something other than to injure himself, the inquiry shifts to whether the expectation to survive those intentions was objectively reasonable.

The facts in *Tran* show the deceased did not subjectively intend to injure himself and that he expected to survive. He placed a towel between the noose and his neck to protect his skin from any bruising or cuts that might result. He tied a release mechanism into the hypoxia-inducing rope as a safety measure. He had no history of depression or suicidal ideation. The sexual paraphernalia on his body support that the deceased's subjective intentions were to heighten his sexual experience, not to inflict injury on himself. There was no evidence to suggest that he did not expect to survive the autoerotic event. Indeed, the towel and the release mechanism serve no discernible purpose if the deceased did not expect to survive.

Because the deceased did not intend to injure himself, the second step is to determine whether his expectation to survive his autoerotic activity was objectively reasonable. Think back to the facts in the *Wickman* case, where the deceased died after intentionally climbing over a guardrail and hanging by one hand while overlooking a fifty-foot drop. The court found the expectation of survival was unreasonable, and thus Wickman's death could not have been an accident, no matter his intentions. The court explained that a subjective expectation of survival is objectively reasonable if death is not substantially certain to result from the insured's conduct.[196] Applying the objective prong of the *Wickman* test to the facts in *Tran*, the deceased's expectation to survive is objectively reasonable unless autoerotic asphyxiation is substantially certain to result in death.

Autoerotic asphyxiation, though undoubtedly unusual behavior, is not as dangerous as hanging off a bridge by one hand; in fact, far from it. Courts examining the inherent risk of autoerotic asphyxiation have turned to medical

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196. See cases cited *supra* note 154 for more on the minimal language differences among the circuit courts.

experts for the answer.[197] The medical evidence shows that autoerotic asphyxiation often has a nonfatal outcome,[198] that death from the practice is unusual,[199] and that death is "not a normal expected result of this behavior."[200] Courts have likewise concluded that "the likelihood of death from autoerotic activity falls far short of [the substantial certainty] required to negate coverage."[201]

Note that the above facts were not considered under the Seventh Circuit's analysis in *Tran*. The Seventh Circuit's threshold inquiry of whether the act itself is an injury, and its subsequent holding that the act of autoerotic asphyxiation itself is an injury, actually prevents examination of these facts. If the act itself is an injury, and the deceased intended the act, then the injury is self-inflicted, without any regard to the deceased's subjective intentions or the reasonableness of their expectation of survival. This approach to accidental death is unworkable.

The unworkability of analyzing whether a death is accidental by first asking whether the act itself is an injury can be shown by a simple scenario. Take for instance a diabetic who self-administers insulin injections. The diabetic has done so for years, without incident, until a fateful day when she contracts a fast-acting, fatal infection from a tainted hypodermic needle.

Under the *Wickman* test, the analysis is simple. Looking first to the diabetic's subjective intentions, it is clear that she intended the insulin injections to regulate her blood-sugar levels, not as an injury or means of suicide. The next step is to ask if her intention, and accompanying expectation to survive, is objectively reasonable. Of course this is so. What reasonable person would not undertake an insulin regimen to control diabetes, and why should they not expect to survive given their daily injections over a period of many years?

Under the Seventh Circuit's analysis, the answer is not so clear. The diabetic's intentions, other than the fact that she intended the act itself, may not even come into play. After all, the diabetic intended to inject herself with the needle. Since the diabetic's reasons for injecting herself with insulin are not relevant at this stage in the analysis, the question becomes whether the piercing of one's own skin with a sharp object can be fairly categorized as an injury.

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197. *See* Critchlow v. First UNUM Life Ins. Co. of Am., 378 F.3d 246, 260 (2d Cir. 2004); Padfield v. AIG Life Ins. Co., 290 F.3d 1121, 1125–26 (9th Cir. 2002); Todd v. AIG Life Ins. Co. 47 F.3d 1448, 1457 (5th Cir. 1995).

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

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

200. Kennedy v. Wash. Nat'l Ins. Co., 401 N.W.2d 842, 846 (Wis. Ct. App. 1987).

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

The court determined that autoerotic asphyxiation was an injury in *Tran* by reasoning that such an act would certainly be understood as an injury if done to a third party. Finding that if Llenos tightened a noose around a third party's neck, the court stated, "[T]here would be no debate he had inflicted an injury."[202] Applying that same reasoning to the diabetic mandates the same conclusion. Had the diabetic injected another person with the syringe, she would have certainly inflicted an injury.

Thus, under the Seventh Circuit's threshold inquiry, the act itself of injecting insulin seems to be an injury. Since the diabetic intended this act, and this act was an injury, then her resulting death, no matter her intention to self-administer needed medication or how unexpected the result was, could not have been an accident.

Obviously, injecting insulin is a far cry from tying a noose around one's neck. The acts have different aims: one to preserve life, the other to heighten sexual pleasure. But the court's reasoning defining what constitutes a self-inflicted injury compels the conclusion that if autoerotic asphyxiation is an injury, insulin injections must be as well. At this step in the inquiry, the reasons for doing the act do not matter;[203] only the act itself is relevant.

The court would likely attempt to distinguish the diabetic scenario on the grounds that the fatal infection was an intervening cause. Unlike the injury in *Tran*, where the court found no break in the causal chain leading to Llenos's death, the diabetic's fatal infection did break the causal chain as an unforeseeable consequence of the injection injury. But rather than resolve this dilemma, it muddies the waters even further.

The Seventh Circuit's threshold inquiry is perhaps more accurately put: Is the act itself an injury in which no intervening cause breaks the causal chain so as to relieve the actor from liability resulting from their act? Bear in mind that not all intervening causes break the causal chain.[204] In the civil context, the actor's liability is generally limited only to harms that are the foreseeable result of the actor's negligent act.[205] Thus, in our diabetic scenario, a break in the causal chain would require two things: The diabetic must have been negligent; and the infection must have been unforeseeable. A strong argument can be made that neither of those conditions is present.

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202. Tran v. Minn. Life Ins. Co., 922 F.3d 380, 384 (7th Cir. 2019).

203. *Id.* at 384–85 ("The dissent asserts we have ignored the sexual nature and pleasurable aim of autoerotic asphyxiation. Even acknowledging both, we fail to see their relevance. That Llenos performed the act on himself and enjoyed the accompanying euphoria does not make partial strangulation less of an injury.").

204. *See* DAN B. DOBBS, PAUL T. HAYDEN & ELLEN M. BUBLICK, THE LAW OF TORTS § 204 (2d ed. 2019) (discussing the requirement that an intervening cause also be a superseding (or unforeseeable) one to relieve a potential tortfeasor of liability).

205. *Id.* § 202.

The Seventh Circuit gives no guidance on how to analyze intervening causes in this context. Is it required that the actor be negligent in some way, as in other areas of law? What role, if any, do the deceased's intentions play in determining whether a result was from the act itself or an intervening cause? And what happens when a result is foreseeable, such as an infection from a hypodermic needle, and yet so unexpected that imposing liability on the actor is fundamentally unfair?

The Seventh Circuit's decision in *Santaella* further complicates matters. Despite the court's insistence that its ruling in *Tran* does not conflict with *Santaella*, it's difficult to see how that's possible. The deceased in *Santaella* ingested a fatal dose of painkillers. The Seventh Circuit did not analyze whether this act itself was an injury there, instead concluding "there was no record evidence to indicate the [deceased] had intended to injure herself."[206] In attempting to distinguish *Tran* from *Santaella*, the court stated that *Tran* was different because the deceased intentionally strangled himself. "That strangulation itself, partial or otherwise, was an injury that he intentionally inflicted on himself, unlike the insured in *Santaella*."[207] Implicit in this attempt to distinguish the two cases is the premise that the ingestion of a fatal amount of prescription drugs in *Santaella* is not an injury, whereas the strangulation in *Tran* is an injury.

But the Seventh Circuit's reasoning in *Tran* appears to compel a different outcome than the one reached in *Santaella*. If one were to feed a third party a lethal amount of prescription pills, that would certainly be an injury, possibly even murder. Accordingly, the act of ingesting a lethal amount of prescription medicine must be an injury. Since the act itself was an injury, and the deceased intended the act, then her resulting death could not be an accident under the Seventh Circuit's act-itself inquiry.

One could argue that the deceased in *Santaella* did not know that it was a lethal amount, had no intention to injure herself, and never would have ingested the pills had she known that it was a fatal dose. Indeed, this is precisely why the Seventh Circuit ruled her death was accidental.[208] However, the deceased's expectation of survival is only relevant after this threshold act-itself inquiry. Had the court applied the act-itself analysis in *Santaella* as it did in *Tran*, it would have reached the opposite result.

Justice Cardozo suggested that a person dies accidentally when their death is spoken of by others as an accident.[209] The application of this common sense, albeit not broadly applicable, standard to the diabetic scenario would

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206. *Tran*, 922 F.3d at 386.
207. *Id.*
208. Santaella v. Metro. Life Ins. Co., 123 F.3d 456, 465 (7th Cir. 1997).
209. Landress v. Phx. Mut. Life Ins. Co., 291 U.S. 491, 499 (1934).

likely lead to a finding of accidental death. Under the *Wickman* test, the diabetic assuredly suffered an accidental death. The Seventh Circuit's act-itself threshold inquiry makes the answer far less certain. While it might not exactly plunge this branch of law back into Justice Cardozo's Serbonian Bog, it certainly gets both feet wet.

B. How Tran *Is a Revival of the Accidental Means/Results Test*

The Seventh Circuit's analysis resurrects in a different guise the unsustainable approach to accidental death that was explicitly rejected in *Wickman*. Though on its face the Seventh Circuit's analysis may not appear like the accidental means/results test that Justice Cardozo criticized in *Landress*, it operates in a familiar manner and can produce similarly unfair results. Under the accidental means/results test, if the act leading to the injury is intentional, then so is the result, even if the result itself was neither intended nor expected. Like the Seventh Circuit's analysis, there is a similar focus on the act itself because if the deceased intended the act, it will be deemed not accidental. The Seventh Circuit's analysis operates under the same principle but is limited to situations where the act itself is an injury. It is nonetheless problematic.

The facts of *Landress* show the difference between accidental means/results and the Seventh Circuit's act-itself analysis. Recall the avid golfer who died of sunstroke after voluntarily walking beneath the sun's rays.[210] The Supreme Court, using the accidental means/results test, ruled that the golfer's death was not an accident because the golfer intended to expose himself to the sun's rays. Because sunstroke is a foreseeable result of sun exposure, and the golfer intended to be in the sun, his death could not be an accident. The golfer's subjective and reasonable intentions to survive his golf outing were not relevant under this analysis. And thus, a veteran golfer who often played in the sunshine to no ill effect was deemed not to have died accidentally when he suddenly and without warning died of sunstroke.

Applying the Seventh Circuit's threshold question—is the act itself an injury—to the *Landress* case yields a different result. The act to be analyzed here is whether golfing in the sun is an injury. The answer assuredly is no.[211] Having determined that golf is not an injury, the next step in the inquiry is to analyze the subjective intentions of the golfer and ask whether those

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210. *Id.* at 494–95.

211. It is possible that an insurance company could put a dermatologist expert witness on the stand to testify that exposing oneself to the sun without adequate protection is an injury. For purposes of this argument, we can assume that the golfer routinely protected himself sufficiently from the sun to prevent skin damage.

intentions are reasonable. The golfer's subjective intention to survive his golf outing is objectively reasonable, given that the golfer was playing under the very same conditions he had before to no ill effect. Accordingly, even with the Seventh Circuit's threshold question being applied, the result is that the golfer died accidentally.

Had a court somehow found that golfing in the sun is an injury, the subjective/objective intention stage of the analysis would not be reached, and the golfer's death would not be an accident because he intended to golf in the sun. Thus, a finding that the act itself is an injury precludes any examination of the actor's intentions beyond the voluntariness of the act. In these cases, the Seventh Circuit's analysis operates very similarly to the accidental means/results test. Absent some "intervening cause," as the Seventh Circuit put it, or "something unforeseen, unexpected, [or] extraordinary," in the Supreme Court's words, the golfer's death would not be an accident.[212]

With a sport as civilized and peaceful as golf, a conclusion that golfing in the sun is not an injury is straightforward. But how would the Seventh Circuit approach accidental death in a sport of a more violent persuasion? Victory in mixed martial arts is generally achieved in three ways: (1) by causing your opponent to lose consciousness either by concussive force or strangulation; (2) by opponent's submission, usually achieved by placing your opponent in a position where they must either submit, lose consciousness, or suffer serious injury to a joint or limb; or (3) by judges' determination for fights in which time has elapsed without either fighter securing the other's unconsciousness or submission. In those cases, the fighter who has inflicted the most damage to the other fighter will be declared the victor.[213]

Suppose that a fighter dies from injuries inflicted upon him by his opponent in a mixed martial arts fight. Almost invariably, a fighter intentionally exposes himself to some degree of injury. If those injuries led to the fighter's death, whether the act of participation alone in such a contest would trigger the Seventh Circuit's act-itself inquiry is unclear.

The deficiency in the Seventh Circuit's analysis is not that certain situations are reduced to judgment calls or that it leaves room for disagreement amongst reasonable minds; it's that it modified the *Wickman* standard, which had already proved capable of handling a broad spectrum of real-world scenarios. There will always be uncertainty and borderline calls to

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212. *Tran*, 922 F.3d at 384; *Landress*, 291 U.S. at 496 (quoting Lewis v. Ocean Accident & Guarantee Corp., 120 N.E. 56, 57 (N.Y. 1918)).

213. *MMA (Mixed Martial Arts) Rules: Winning the Match*, RULESOFSPORT, https://www.rulesofsport.com/sports/mma-mixed-martial-arts.html [https://perma.cc/WX33-LXHY].

be made from factual scenarios and hypotheticals. The Seventh Circuit's act-itself analysis brings uncertainty to the legal standard now as well.

The core problem with the Seventh Circuit's analysis is simply that acts do not exist wholly separate from the intentions and expectations behind them. Because the determination as to whether the act itself is an injury must be considered without regard to the actor's intentions for doing the act, there will inevitably be situations in which applications of this standard will produce irrational and unfair results. Ironically, the uncertainty created by the Seventh Circuit's new step in accidental-death analysis can be solved by looking to the subjective intentions of the actor and asking if those intentions were reasonable, as the *Wickman* test prescribes. This shows that the Seventh Circuit's new act-itself step in accidental-death analysis is indeed a step backwards for the federal common law.

C. Tran*'s Inconsistency with Settled Circuit Precedent*

If the uncertainty created by the Seventh Circuit's analysis can be solved by the very test that the Seventh Circuit modified, it raises the question why the Seventh Circuit modified it at all. Reading between the lines, there seems to be a steadfast unwillingness to accept the lower court's conclusion that death resulting from autoerotic asphyxiation, in accordance with other circuits' settled precedent, is accidental. Indeed, a new step in accidental-death analysis might have been necessary to reach the conclusion that autoerotic asphyxiation deaths are not accidental.

Notably, the court does not explicitly state that it is adding a new step in the analysis. Referencing *Santaella*'s lack of any act-itself injury analysis, the court states "the opinion did not explore the issue in any depth" and "simply stated the facts did not show that the insured meant to injure herself."[214] The court sidesteps the obvious reason why the *Santaella* opinion did not explore the injury issue in any depth: because the act-itself analysis hadn't been invented yet.

The court strangely characterizes the language of other circuits as if they applied such an analysis when in fact they did not. Regarding *Padfield* and *Critchlow*, the Seventh Circuit stated:

> We find both cases grounded on a false premise: that the act of strangling oneself is severable into distinct phases and distinct injuries. In *Padfield*, for example, the Ninth Circuit reasoned that what killed the insured was not the autoerotic asphyxiation, but the continued asphyxiation that occurred after he blacked out. The same

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214. *Tran*, 922 F.3d at 383.

> reasoning was applied in *Critchlow*, in which the Second Circuit found that Critchlow's death "was not caused by 'partial' strangulation but by the total loss of oxygen for a sustained period."[215]

Though both the *Padfield* and *Critchlow* decisions did contain language supporting the above, the focus of their inquiry was on the deceased's intentions; they were not asking whether the act itself was an injury.

In *Padfield*, the court stated that whether autoerotic asphyxiation deaths are self-inflicted injuries "hinges on whether the physical consequences that [the deceased] *intended* were injuries."[216] Thus, it was the deceased's intentions, not whether the act itself was an injury, that determined whether death was accidental.

In *Critchlow*, the Second Circuit affirmed this analysis:

> 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. Thus, in the present case, we ask, first, whether Critchlow subjectively lacked an expectation of death or injury, and second, if so, whether the suppositions that underlay that expectation were reasonable from Critchlow's perspective, taking into account, *inter alia,* his own personal characteristics and experiences.[217]

The Second Circuit in *Critchlow* even corrected the district court below, which concluded "that '*deliberately strangling*' oneself constitute[d] an intentional self-infliction of injury."[218] The Second Circuit noted that the district court was "merg[ing] the concepts of intent and result," and that the evidence "entirely refute[d] any suggestion that that result was what [the deceased] intended."[219]

Though it is certainly within the province of the Seventh Circuit to add a step to accidental-death analysis, it is curious that it chose not to announce the new step as such, instead relying on language from other circuits to make it appear as if this weren't the case. It will be interesting to see moving forward how the Seventh Circuit applies the act-itself analysis in accidental-death cases not involving autoerotic asphyxiation, if it does so at all.

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215. *Id.* at 383–84 (citation omitted).
216. Padfield v. AIG Life Ins. Co., 290 F.3d 1121, 1129 (9th Cir. 2002) (emphasis added).
217. Critchlow v. First UNUM Life Ins. Co. of Am., 378 F.3d 246, 259 (2d Cir. 2004).
218. *Id.* at 260.
219. *Id.*

CONCLUSION

The best approach to accidental-death analysis is the subjective/objective intentions approach as adopted initially by the First Circuit in *Wickman v. Northwestern National Insurance Co.* The Seventh Circuit's decision in *Tran v. Minnesota Life Insurance Co.* modified that test in such a way as to render it unworkable. In doing so, the Seventh Circuit resurrected the accidental means/results test under a different guise, a test that was explicitly rejected in the formation of the federal common law. The Seventh Circuit's modification invites uncertainty to federal accidental-death analysis, representing a step backward for the federal common law and a step toward Justice Cardozo's Serbonian Bog. Like Justice Cardozo predicted about the accidental means/results test, the Seventh Circuit's analysis will not survive its own application.