COMMENT

THE PRESUMPTION AGAINST SUICIDE AS THE STANDARD FOR ERISA ACCIDENTAL DEATH AND DISMEMBERMENT BENEFIT CASES

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This Comment argues that the presumption against suicide should be applied in ERISA-controlled accident death and dismemberment ("AD&D) insurance policy cases where the decedent's intent cannot be determined. The First Circuit, which articulated the current majority standard in Wickman v. Northwest National Insurance Co.*, requires the application of a two-prong subjective-objective test to determine if the decedent died accidentally or by suicide. The Eleventh Circuit requires the application of a presumption against suicide when the decedent's intent is unclear, as articulated in* Horton v. Reliance Standard Life Insurance Co. *The* Horton *standard better aligns with the goals of ERISA, which include protecting the interests of AD&D plan beneficiaries.*

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INTRODUCTION

On May 18, 2018, Marzuq Muhammad tragically fell to his death from the ninth-floor balcony of a hotel in Atlanta, Georgia.[1] Mr. Muhammad was staying with his brother, Mujihad, in a room on the tenth floor of the Hyatt Regency Hotel.[2] Mujihad awoke when his brother squeezed his hand, before seeing Mr. Muhammad in a "full sprint towards the door," after which Mr. Muhammad was on the ledge one floor below, "kicking and wiggling."[3] Witnesses say they heard Mujihad protest and warn his brother not to move, but Mr. Muhammad rolled off the ledge and fell to the street level.[4] He died on impact, and the medical examiner listed his death as a suicide.[5]

Mary Alexandre, Mr. Muhammad's wife, submitted a claim under his accidental death and dismemberment ("AD&D") policy with National Union Fire Insurance Company of Pittsburgh ("National Union"),

1. Brief for Petitioner at 3, Alexandre v. Nat'l Union Fire Ins. Co. of Pittsburgh, 143 S. Ct. 88 (2022) (No. 21-1376).
2. Alexandre v. Nat'l Union Fire Ins. Co. of Pittsburgh, 22 F.4th 261, 265 (1st Cir. 2022), *cert. denied*, 143 S. Ct. 88 (2022).
3. *Id.*
4. *Id.*
5. *Id.*

with which they were insured.[6] The claims administrator denied Ms. Alexander's claim because they determined that Mr. Muhammad's death was outside of the policy's coverage, as his death was not caused by a "bodily injury sustained as a direct result of an unintended, unanticipated accident," but rather "was the result of suicide or an intentionally self-inflicted [i]njury . . . ."[7] During the appeals process, Ms. Alexandre submitted a sworn declaration of Mujihad Muhammad, disputing that Mr. Muhammed's death was a suicide.[8] The claims administrator, however, did not find the declaration sufficiently convincing and affirmed the denial of benefits.[9] The crux of the dispute was whether Mr. Muhammad's death was caused by a self-inflicted, intentional injury, or by an accidental fall, with only the latter having coverage under the AD&D policy.[10] In other words, what was Mr. Muhammad thinking when he fell from the balcony—did he do it on purpose?[11]

Ms. Alexandre filed suit in federal court against National Union under section 502(a)(1)(B) of the Employee Retirement Income Security Act (ERISA),[12] which allows a participant or beneficiary of an eligible plan to recover benefits that are owed to them and to enforce their rights under the Act.[13] ERISA requires private employers who provide employee benefit plans to their employees to report and disclose comprehensive summaries of their benefit plans, establishes fiduciary standards of employers to employees, and provides for administrative enforcement of the Act.[14] Because Mr. Mohammad's plan was offered as part of his employment package, ERISA controls any litigation that arises out of it.[15]

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6. *Id.*
7. *Id.* (alteration in original).
8. *Id.* at 265–66.
9. *See id.* at 266 (noting that the claims administrator considered case law submitted by outside counsel, the sworn declaration, Ms. Alexandre's appeal letter, and other material, but found the report of the official in Georgia "more credible than the singular, after-the-fact Declaration of Mujihad").
10. Brief for Petitioner, *supra* note 1, at 3–4.
11. *Id.*
12. 29 U.S.C. § 1132(a)(1)(B).
13. *Alexandre*, 22 F.4th at 266.
14. *See* Leslie C. Hallock, *ERISA Primer: What Every Non-ERISA Attorney Should Know*, 12 ME. BAR J. 206, 206 (1997) (noting that ERISA was enacted to protect the interests of participants and their beneficiaries through the imposition of reporting requirements and operating standards).
15. *Alexandre*, 22 F.4th at 265.

Ms. Alexandre filed suit in the District of Southern Florida, but National Union moved to transfer the case to the District of Massachusetts.[16] Before the transfer occurred, Ms. Alexandre moved for summary judgment, invoking the presumption against suicide and in favor of an accidental death.[17] The Eleventh Circuit established this standard in *Horton v. Reliance Standard Life Insurance*.[18] to control in AD&D insurance disputes.[19] However, once the case was transferred, the district court judge relied on the First Circuit's standard in *Wickman v. Northwest National Insurance*,[20] which uses a two-step, subjective-objective analysis to determine if a death was caused by an accident or by suicide.[21] In *Wickman*, the factfinder must first determine what result the decedent subjectively expected from their action, and if that cannot be determined, the factfinder must determine what result would objectively be expected from the decedent's action.[22] The district court affirmed the denial of AD&D benefits to Ms. Alexandre, which was then affirmed by the First Circuit.[23] The Supreme Court denied Ms. Alexandre's petition for certiorari to resolve the conflict between the two standards.[24]

The issue that arose in *Alexandre v. National Union Fire Insurance Co. of Pittsburgh*[25] regarding the decedent's state of mind in the context of

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16. *Id.* at 266.

17. Brief for Petitioner, *supra* note 1, at 4.

18. 141 F.3d 1038 (11th Cir. 1998) (per curiam).

19. *See id.* at 1041–42 (11th Cir. 1998) (per curiam) (explaining that the presumption against suicide works to further ERISA's goals by providing courts and juries with uniform rules and by protecting the interest of beneficiaries over insurance companies).

20. 908 F.2d 1077 (1st Cir. 1990).

21. *See* Brief for Petitioner, *supra* note 1, at 4 (applying the *Wickman* two-step test).

22. *Wickman*, 908 F.2d at 1088 ("[T]he reasonable expectations of the insured . . . is the proper starting point for a determination of whether an injury was accidental . . . [and] if the fact-finder, in attempting to ascertain the insured's actual expectation, finds the evidence insufficient to accurately determine the insured's subjective expectation, the fact-finder should then engage in an objective analysis of the insured's expectations.").

23. Alexandre v. Nat'l Union Fire Ins. Co. of Pittsburgh, 22 F.4th 261, 266 (1st Cir. 2022), *cert. denied*, 143 S. Ct. 88 (2022).

24. Petition for Writ of Certiorari, Alexandre v. Nat'l Union Fire Ins. Co. of Pittsburgh, No. 21-1376 (U.S. 2022); *No. 21-1376 Mary Alexandre v. National Union Fire Insurance Company of Pittsburgh, PA*, CERT POOL, https://certpool.com/dockets/21-1376 [https://perma.cc/ES94-KDHE] (last updated: November 16, 2023).

25. 22 F.4th 261 (1st Cir. 2022).

AD&D insurance benefits disbursement is not uncommon.[26] If the decedent's state of mind is contested, it falls to the factfinder to determine if their death was caused by an accident or was self-inflicted.[27] Because these standards operate to determine how the death occurred, courts rule differently on whether someone can receive benefits, creating disparate results despite similar facts.[28] As exemplified in *Alexandre*, courts are split on which standard is appropriate in these situations.[29] In the *Alexandre* case, the plaintiff likely lost when the court applied the *Wickman*, rather than the *Horton*, standard; if the *Horton* standard was used, the court would have likely applied the presumption against suicide because there were insufficient definitive facts to determine that Mr. Muhammad intended to commit suicide.[30]

This Comment argues that the Eleventh Circuit's *Horton* standard, rather than the First Circuit's *Wickman* standard, should be universally

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26. *See, e.g.*, Wolf v. Life Ins. Co. of N. Am., 46 F.4th 979, 982–85 (9th Cir. 2022) (discussing that it is not always substantially certain that a person will die in a drunk driving incident, so the death can be considered an accident); Santaella v. Metro. Life Ins., 123 F.3d 456, 465 (7th Cir. 1997) (holding that when the record does not establish that the decedent died of an intentional drug overdose, her death will be ruled accidental); Todd v. AIG Life Ins., 47 F.3d 1448, 1456–58 (5th Cir. 1995) (agreeing with the plaintiff that because the decedent's subjective expectation was not death, their death was accidental and therefore covered by the AD&D plan). These cases will be discussed in greater detail *infra* Section I.D.

27. *See* Gary Schuman, *Suicide and the Life Insurance Contract: Was the Insured Sane or Insane? That Is the Question—or Is It?*, 28 TORT & INS. L.J. 745, 751–54 (1993) [hereinafter Schuman, *Suicide and the Life Insurance Contract*] (discussing how the factfinder analyzes the facts of the case to determine if the death was accidental or caused by suicide).

28. *See, e.g.*, Gary Schuman, *Fatal Attraction: Autoeroticism and Accidental Death Insurance Coverage*, 49 TORT TRIAL & INS. PRAC. L.J. 667, 674 (2014) [hereinafter Schuman, *Fatal Attraction*] (discussing how courts are split on whether injuries arising from auto-erotic asphyxiation are accidental and therefore eligible for recovery of benefits).

29. *Compare* Wickman v. Nw. Nat'l Ins., 908 F.2d 1077, 1089 (1st Cir. 1990) (First Circuit standard), *with* Horton v. Reliance Standard Life Ins., 141 F.3d 1038, 1041 (11th Cir. 1998) (per curiam) (Eleventh Circuit standard); *compare* Acree v. Hartford Life & Acc. Ins., 917 F. Supp. 2d 1296, 1306–10 (M.D. Ga. 2013) (applying the *Horton* standard and holding that the district court did not correctly apply the presumption against suicide after the decedent's gun-related death could not be proved a suicide), *with* West v. Aetna Life Ins., 171 F. Supp. 2d 856, 897–905 (N.D. Iowa 2001) (applying the *Wickman* standard and holding that the insurance company erroneously denied benefits to the decedent's beneficiary when it incorrectly determined that the death was not accidental).

30. *Horton*, 141 F.3d at 1040.

applied in conflicts over the disbursement of benefits of ERISA-controlled AD&D plans when the state of mind of the decedent is contested. Part I provides background on ERISA, including its purposes, and how AD&D plans that are governed by the Act operate. Part I will also discuss how the two standards are applied when the state of mind of the decedent is contested, and it will outline common kinds of cases where this conflict tends to arise. Part II will analyze the two standards and how their differing application affects the outcome of cases with similar facts. Part II will also argue that the *Horton* standard aligns better with ERISA's core purposes of protecting employee interests and creating a uniform regulatory scheme. Part III will conclude that the Supreme Court should hold that the *Horton* standard is superior and be universally applied.

I. BACKGROUND

Section I.A discusses ERISA, including why it was passed and how it protects employees who receive insurance from their employers. Section II.B explains when AD&D insurance benefits are paid and how ERISA affects employer-provided AD&D plans. Section II.C provides the two standards used when conflicts regarding the state of mind of the decedent arise in ERISA-controlled AD&D cases to determine if the death was accidental. Finally, Section II.D discusses typical kinds of cases where the conflict between the two standards tends to occur.

A. Employee Retirement Income Security Act (*ERISA*)

The passage of the Internal Revenue Code in 1939,[31] which made qualified pension plans tax deductible, spurred employers to form self-administered pension plans and subjected once-informal plans to federal regulation.[32] These plans, however, were misused by businesses to keep themselves afloat and by organized crime to fund their criminal enterprises,[33] which became a motivating factor for Congress

31. *Historical Perspectives on the Federal Income Tax*, TAXHISTORY.COM, https://web.archive.org/web/20221112034744/http://www.taxhistory.com/1939.html [https://perma.cc/3XU6-GXZW].

32. *See* Leeroy Chaffin & Brian H. Kleiner, *What Is ERISA?*, 43 MANAGERIAL L. 116, 116–17 (2001) (noting that the enactment of the Internal Revenue Code gave impetus to the formation of self-administered funding arrangements over the more traditional use of contractual arrangements with insurance companies).

33. *See, e.g.*, George Lardner Jr., *3 Mob Families Linked to Teamsters Fund*, WASH. POST (Nov. 23, 1985), https://www.washingtonpost.com/archive/politics/1985

to pass ERISA in 1974.[34] ERISA regulates the employee benefit plans, including pension plans, that most private employers provide to their employees by setting up a comprehensive federal scheme that controls the fiduciary duties of plan administrators, the plans' disclosure and reporting requirements, and how issues arising from these plans are litigated.[35] However, not all plans are covered: ERISA does not include employee benefit plans from government employers; plans from churches; plans from fraternal and other similar organizations; plans solely maintained to comply with workers' compensation, unemployment insurance, or disability insurance laws; and plans maintained outside of the United States for non-resident aliens.[36] Outside of these exceptions, however, most employer insurance plans are covered.[37]

ERISA encourages the creation of comprehensive pension plans by employers through considerable tax advantages.[38] To prevent misuse, Title II of the Act regulates how plan sponsors design and administer plans, limiting the amount of money that can be contributed and paid

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/11/23/3-mob-families-linked-to-teamsters-fund/fffb0a69-9233-4517-8da5-64090281d6a1 [https://perma.cc/8ZLA-H3SQ] (reporting on the testimony of a former mob boss who described how the mob skimmed from Teamsters' pension funds for their own use, taking the money from the workers who earned it).

34. *See* DeBofsky Law, *ERISA for Dummies*, YOUTUBE (May 8, 2020), https://www.youtube.com/watch?v=wbH6YaZ661c [https://perma.cc/9RD3-8DKS] (noting Congress's stated purpose behind ERISA was to protect participants in employee benefit plans); JAIME RUTH EBENSTEIN & MARK E. SCHMIDTKE, ERISA LITIGATION PRIMER 2021, 3 (2021), https://www.dri.org/docs/default-source/webdocs/other/2021/april/lhd-erisa-litigation-primer.pdf [https://perma.cc/XV7C-XSC8] (noting that ERISA regulates life, health, disability, and pension benefits provided by employers to employees); Patrick Purcell & Jennifer Staman, CONG. RSCH. SERV., RL34443, SUMMARY OF THE EMPLOYEE RETIREMENT INCOME SECURITY ACT (ERISA) 2, (2009), https://crsreports.congress.gov/product/pdf/RL/RL34443/6 [https://perma.cc/99FE-AL9Q] (asserting that Congress passed ERISA to address the growing tendency of employers to misuse assets from private pension plans).

35. Hallock, *supra* note 14, at 206.

36. Chaffin & Kleiner, *supra* note 32, at 117.

37. Employee Benefits Security Administration, *Fact Sheet: What Is ERISA*, U.S. DEP'T OF LAB. [hereinafter, *Fact Sheet: What Is ERISA*], https://www.dol.gov/agencies/ebsa/about-ebsa/our-activities/resource-center/fact-sheets/what-is-erisa [https://perma.cc/ZF48-67UK] (stating that fifty-four percent of American workers' retirement plans are covered and fifty-nine percent of American workers' health benefits are covered by ERISA).

38. Hallock, *supra* note 14, at 207 (noting that many employee pension plans covered by ERISA are tax qualified under the Internal Revenue Code and so provide tax advantages).

out from defined plans.[39] ERISA sets minimum standards for plans offered by private employers.[40] To protect plan beneficiaries, ERISA sets reporting and disclosure, fiduciary, and administrative enforcement, including the availability of legal remedies in federal court.[41] Before ERISA, employers sometimes suddenly removed older employees from payroll to make them ineligible for the pensions that they were promised.[42] Once ERISA was enacted, these new federal regulations prevented older employees from being pushed out of their jobs simply to avoid paying out their pensions.[43]

At its inception, ERISA covered only pension plans. While it is still best known for regulating pension and retirement benefits,[44] ERISA was broadened in 1974 to include welfare benefits.[45] A typical "employee benefit plan" includes both employee welfare benefit plans and employee pension benefit plans.[46] "Welfare" benefits are not public assistance benefits, but benefits offered for the well-being of an employee.[47] Benefits in the event of accidents, disability, or death are considered part of employee welfare benefit plans, as are daycare centers, paid holidays, scholarship funds, and paid legal services.[48]

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39. Chaffin & Kleiner, *supra* note 32, at 119; Hallock, *supra* note 14, at 207.

40. *Employment Retirement Income Security Act (ERISA)*, U.S. DEP'T OF LAB., https://www.dol.gov/general/topic/retirement/erisa [https://perma.cc/X5HK-FA5A].

41. *See* Hallock, *supra* note 14, at 206, 212 (providing an overview of ERISA's mechanisms, including the preemption of state law).

42. Chaffin & Kleiner, *supra* note 32, at 116.

43. *See id.* (discussing the post-ERISA changes to pension plans in terms of increased protections for older workers).

44. *See* Hallock, *supra* note 14, at 206 (discussing the types of employee benefits that ERISA typically regulates).

45. *See History of EBSA and ERISA*, U.S. DEP'T OF LAB., https://www.dol.gov/agencies/ebsa/about-ebsa/about-us/history-of-ebsa-and-erisa [https://perma.cc/W5J8-KHSH] (explaining that ERISA "has been amended to meet the changing retirement and health care needs of employees" by covering retirement plans and welfare benefit plans like employment-based medical and hospitalization benefits and apprenticeship plans).

46. Hallock, *supra* note 14, at 206.

47. *See* 29 U.S.C. § 1002(1) (defining "employee welfare benefit plan" to mean any plan, fund, or program established by an employer to provide specified benefits through the purchase of insurance or other medical, disability, unemployment, or vacation benefits).

48. Hallock, *supra* note 14, at 206.

ERISA was passed with two main purposes and goals.[49] First, it was enacted to protect the interests of the employees and their beneficiaries.[50] Part of the impetus for the formulation of ERISA was the rapid increase of employee benefit plans in the years preceding the Act's passage, which increased the amount of people whose well-being was suddenly dependent on the legitimacy and security of these plans.[51] One of the most poignant examples of a pre-ERISA pension failure is the 1963 closure of the Studebaker-Packard plant, which resulted in the default of its pension plan and complete loss of benefits by most of the plant's younger workers.[52] Studebaker-Packard had tried to compete with other automakers by promising increased pension benefits, but because the company was in financial distress, these promises were a fiction, and workers lost the bulk of their pension when the company shut down operations.[53] "The shutdown was an ideal vehicle for injecting [pension regulation] into these policy debates" and was a big motivator to push through legislation protecting pension plans.[54] In 1973, the year before ERISA was passed, 4,130 pension plans were terminated, and frustration among workers about the inefficacy of pension plans was continuing to build.[55] This

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49. *See* Buce v. Allianz Life Ins., 74 F. Supp. 2d 1272, 1279 (N.D. Ga. 1999) ("ERISA has two central goals: (1) protection of the interests of employees and their beneficiaries in employee benefit plans; and (2) uniformity in the administration of employee benefit plans." (quoting Horton v. Reliance Standard Life Ins., 141 F.3d 1038, 1041 (11th Cir. 1998))).

50. 29 U.S.C. § 1001(b).

51. *Id.* § 1001(a) ("The Congress finds that the growth in size, scope, and numbers of *employee benefit plans* in recent years has been rapid and substantial . . . that the continued well-being and *security* of millions of *employees* and their dependents are directly affected by these *plans*.") (emphasis added).

52. *See generally* James A. Wooten, *"The Most Glorious Story of Failure in the Business": The Studebaker-Packard Corporation and the Origins of ERISA*, 49 BUFF. L. REV. 683, 683–84 (2001) (summarizing the Studebaker-Packard crisis and how it helped push the discussion for a federal law like ERISA).

53. *See* Roger Lowenstein, *The Long, Sorry Tale of Pension Promises*, WALL ST. J. (Oct. 1, 2013, 11:49 AM), https://www.wsj.com/articles/SB10001424127887323085045790 85220604114220 [https://perma.cc/5JM6-M4UU] (explaining that, to stay afloat, Studebaker-Packer increased the benefits promised to retirees while knowing that it did not have the requisite funds to ultimately pay out these increased benefits).

54. Wooten, *supra* note 52, at 726.

55. Jacob K. Javits & Harrison A. Williams, Jr., *In Defense of the Pension Reform Act: Senators Javits and Williams Say the Protection is Already Better*, N.Y. TIMES (Feb. 29, 1976), https://www.nytimes.com/1976/02/29/archives/in-defense-of-the-pension-reform-act-senators-javits-and-williams.html [https://perma.cc/9L7N-FREN].

was coupled with the high-profile conviction of Teamsters' mob boss, James Hoffa, and his associates for fraudulently arranging loans of $25 million from pension funds and diverting $1.7 million for their personal use.[56] By the time ERISA was proposed, there was bipartisan support in Congress to quell worker dissatisfaction with the widespread abuses in private pension plans.[57] Labor unions and companies did not support ERISA's passage, as they did not want to be more closely monitored, but they eventually relented to the proposed federal legislation to avoid having to navigate individual state legislation.[58] More than ten years after the Studebaker crisis, ERISA was finally signed into law by President Ford in 1974 to protect worker assets and the individuals participating in pension plans.[59]

Second, ERISA was enacted to "provide a uniform regulatory regime over employee benefit plans."[60] Employee benefit plans are often distributed through interstate commerce; the same plan can be offered to employees in several states or administered in more than one state.[61] Therefore, plans governed by ERISA must be regulated at the national level. The principal purpose in enacting ERISA was to create one system of common law relating to benefits and "to unify the judicial and regulatory environment within which employee benefit plans operate."[62] To that end, ERISA is enforced by several federal

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56. Austin C. Wehrwein, *Hoffa Convicted on Use of Funds; Faces 20 Years*, N.Y. TIMES, (July 27, 1964), https://www.nytimes.com/1964/07/27/archives/hoffa-convicted-on-use-of-funds-faces-20-years-he-and-6-others-are.html [https://perma.cc/EN7W-2W2U].

57. Javits & Williams, *supra* note 55, at 14.

58. *See* Leland D. Bengtson, *The History of ERISA*, ATT'Y L. MAG. (June 15, 2022), https://attorneyatlawmagazine.com/latest-articles/the-history-of-erisa [https://perma.cc/S2FH-GWC5] (discussing how having three agencies that enforce ERISA affects the monitoring of companies and labor unions).

59. *Id.*

60. Aetna Health Inc. v. Davila, 542 U.S. 200, 208 (2004); *see also* Smith v. Jefferson Pilot Life Ins., 14 F.3d 562, 570–71 (11th Cir. 1994), *cert. denied* 513 U.S. 808 (1994) ("One of the core purposes of ERISA is to provide uniformity in the administration of employee benefit plans and avoid subjecting plan administration to varying standards created by differing state laws."); H.R. Rep. 93-533, at 12 (1973) ("[A] . . . standard embodied in Federal legislation is considered desirable because it will bring a measure of uniformity in an area where decisions under the same set of facts may differ from state to state.").

61. 29 U.S.C. § 1001(b) ("It is hereby declared to be the policy of this chapter to protect interstate commerce and the interests of participants in employee benefit plans and their beneficiaries . . . .").

62. Hallock, *supra* note 14, at 212.

agencies working in tandem: the Department of Labor (DOL), the Internal Revenue Service (IRS), and the Pension Benefit Guaranty Corporation (PBGC), which was created by the Act itself.[63]

To help ensure that ERISA is uniformly administered throughout the United States, ERISA preempts state laws and mandates that all relevant lawsuits be litigated in federal court.[64] Section 514 of ERISA mandates that any state laws that "relate to" employee benefit plans are preempted by federal law, meaning that not only laws directly affecting the plan itself are impacted.[65] ERISA's preemption of "state law" is broadly interpreted to preempt any state statutes, decisions, rules, regulations, and actions.[66] The courts have broadly applied section 514 to preclude actions for recovery of benefits and damages brought under state common law or any state statutes that "relate to employee benefit plans" or that are inconsistent with ERISA's statutory enforcement scheme.[67]

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63. *Fact Sheet: What Is ERISA*, *supra* note 37; *Who We Are*, PENSION BENEFIT GUAR. CORP., https://www.pbgc.gov/about/who-we-are [https://perma.cc/6CL5-Z6CJ] (last updated Mar. 31, 2022). The DOL is responsible for the enforcement of Title I of ERISA, which covers rules for, *inter alia*, vesting, reporting and disclosure, and plan participation; the IRS is responsible for the enforcement of Title II, which contains amendments to the Internal Revenue Code that mirrors Title I of ERISA; the PBGC is responsible for the enforcement of Title IV, which provides insurance defined benefit pension plans; and the DOL and IRS are jointly responsible for Title III, which discusses jurisdictional issues. *See* Bengtson, *supra* note 58 (listing the roles of each agency in the enforcement of ERISA).

64. 29 U.S.C. § 1144(a) ("[T]he provisions of this subchapter and subchapter III shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan."); *see* Pilot Life Ins. Co. v. Dedeaux, 481 U.S. 41, 54 (1987), *superseded by statute*, Retirement Equity Act of 1984, Pub. L. No. 98-397, 98 Stat. 1426, *as recognized in* Hunter v. Ameritech, 779 F. Supp. 419 (N.D. Ill. 1991) ("[T]he deliberate care with which ERISA's civil enforcement remedies were drafted and the balancing of policies embodied in its choice of remedies argue strongly for the conclusion that ERISA's civil enforcement remedies were intended to be exclusive [of traditional state law claims]." (internal citations omitted)).

65. 29 U.S.C. § 1144(a); DeBofsky Law, *supra* note 34.

66. DeBofsky Law, *supra* note 34.

67. Joseph J. Torres, Jennifer T. Beach & Alexis E. Bates, *ERISA Litigation Handbook*, JENNER & BLOCK (Mar. 16, 2021), 197, https://www.jenner.com/en/news-insights/publications/jenner-block-publishes-sixth-edition-of-its-erisa-litigation-handbook [https://perma.cc/4P2Y-A8PW]; *see also* Ingersoll-Rand Co. v. McClendon, 498 U.S. 133, 145 (1990) (holding that a state wrongful discharge claim is preempted because the plaintiff asserted an ERISA-related claim); Romney v. Lin, 94 F.3d 74, 80–81 (2d Cir. 1996), *cert. denied* 522 U.S. 906 (1997) (following *Ingersoll* and holding that the plaintiff's state law claim is preempted by section 502 of ERISA).

When enacting ERISA, Congress also intended that a body of federal common law would be developed to fill in the gaps of the Act.[68] If ERISA itself is silent on a specific issue, the common law can fill that void, provided that it is consistent with the Act.[69] Because courts are still developing the federal common law, decisions interpreting ERISA vary court-by-court.[70] For example, courts have recognized the common law principle of estoppel as a valid cause of action when participants have tried to enforce benefits that are not included in their plans, but were allegedly promised to them; however, different courts have enforced this principle differently.[71]

B. Accidental Death and Dismemberment Insurance

Some employers offer AD&D insurance as part of their employee benefit plans, and, if offered by qualifying private employers, these plans are regulated by ERISA.[72] AD&D plans provide life insurance coverage for accidental deaths (e.g., in a car accident or because of a workplace injury), or if someone loses a limb or an essential function

68. 120 Cong. Rec. 29,942 (1974) (statement of Sen. Jacob Javits) ("[A] body of Federal substantive law will be developed by the courts to deal with issues involving rights and obligations under private welfare and pension plans.").

69. Torres et al., *supra* note 67, at 232.

70. *See id.* at 230–33 (discussing the principles guiding the development of federal common law and what some courts consider to be acceptable, while others do not).

71. *Compare* Katz v. Comprehensive Plan of Grp. Ins., 197 F.3d 1084, 1090 (11th Cir. 1999) (holding that equitable estoppel claims are only available where "(1) the provisions of the plan at issue are ambiguous, and (2) representations are made which constitute an oral interpretation of the ambiguity"), *with* Watkins v. Westinghouse Hanford Co., 12 F.3d 1517, 1527 (9th Cir. 1993) (applying the Eleventh Circuit's equitable estoppel principles but stating that it cannot be used against a trust fund where recovery would contradict what is written in the plan itself). For an explanation of the recognized federal common law principles in ERISA jurisprudence, see also Torres et al., *supra* note 67, at 233–45 (explaining recognized federal common law principles in ERISA jurisprudence).

72. *See The Difference between Life Insurance and Accidental Death*, JONATHAN M. FEIGENBAUM, ESQUIRE, https://erisaattorneys.com/life-insurance-claim-denied/life-insurance-claims-for-accidental-death-and-dismemberment [https://perma.cc/U5GB-29Q3] (noting that accidental death and dismemberment insurance policies can be purchased independently from an insurer or provided as an employee benefit; however, when offered through an employer or union, the policy is governed by ERISA).

(e.g., hearing, sight, or speech) in an accident.[73] AD&D plans do not cover deaths caused by illness or natural causes.[74]

In the insurance world, "the definition of the term 'accident' is one of the most elusive in the . . . field."[75] There is no definition of "accident" incorporated into ERISA.[76] This gray area has caused a lot of litigation in the insurance context to determine if a claim qualifies as an accident.[77] These disputes can drag on for years; insurance companies will drag their feet on paying out claims, after which a claimant often only has sixty days to submit an appeal, and only after all administrative avenues are exhausted can a claimant begin the arduous process of litigation in court.[78] Different jurisdictions apply conflicting standards to similar sets of facts, resulting in inconsistent outcomes and different definitions of "accidents" that qualify for the disbursement of benefits.[79] The court in *Wolf v. Life Insurance Co. of North America*[80] summarized this dilemma:

> Events that can cause death span a vast continuum that range from intentionally driving off a cliff into the ocean below (a clear suicide) to driving off a bridge that has suddenly collapsed due to a structural

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73. *See* Cameron Huddleston & Les Masterson, *Understanding AD&D Insurance: Benefits & Coverage*, FORBES ADVISOR, https://www.forbes.com/advisor/life-insurance/accidental-death-and-dismemberment-insurance [https://perma.cc/MQ4N-MZZ9] (last updated Sep. 11, 2023) (discussing the coverage provided by accidental death and dismemberment insurance).

74. *Id.*

75. Gary Schuman, *Dying Under the Influence: Drunk Driving and Accidental Death Insurance*, 43 TORT TRIAL & INS. PRAC. L.J. 1, 2 (2008) [hereinafter Schuman, *Dying Under the Influence*].

76. *See generally* 29 U.S.C. §§ 1001–02.

77. *See infra* Section II.C (discussing the kinds of cases where the issue of what qualifies as an "accident" is the main legal question).

78. *See Accidental Death and Dismemberment Claim Fact Sheet*, JONATHAN M. FEIGENBAUM, ESQUIRE, https://erisaattorneys.com/accidental-death-dismemberment-claim-fact-sheet [https://perma.cc/2HTB-5N5A] (discussing the timeline of submitting an AD&D claim and an insurance company's motivation to increase their profit when delaying payment of a claim); *see also* Schuman, *Dying Under the Influence*, *supra* note 75, at 2 ("[I]t becomes a mysterious phenomenon, and, in order to resolve the enigma, witnesses are summoned, experts testify, lawyers argue . . . and even when . . . twelve world-knowledgeable individuals agree as to whether a certain set of facts made out an accident, the question may not yet be settled . . . ." (internal citation omitted)).

79. *See* Schuman, *Dying Under the Influence*, *supra* note 75, at 8–9 (discussing the issue of inconsistent outcomes and definitions resulting from the use of different standards in the context of a drunk driving death).

80. 46 F.4th 979 (9th Cir. 2022).

> failure (an undisputed accident). All jurists would agree that an accidental-death policy, such as the one involved here, would exclude coverage for driving off the cliff but allow coverage for driving off the bridge. The facts of this case, as in most cases involving drunk driving, fall somewhere in between.[81]

Most AD&D plans explicitly exclude deaths caused by suicide.[82] Suicide is an "intentional, voluntary, unaccidental act of a sane man which results in his own death."[83] For many, "grief [is] a forever thing" after the passing of a loved one,[84] and one person's death by suicide affects the wider community more than many might realize.[85] Deaths by suicide are often excluded from coverage to disincentivize those contemplating ending their own lives from doing so just so their beneficiaries can receive their insurance plan benefits.[86]

When an insurance company denies a claim under an AD&D plan because, based on the evidence presented, it believes the death was caused by suicide, the claimant must then prove that the death was, in fact, accidental.[87] Many states, however, have a presumption against suicide in cases where the decedent's state of mind at the time of their death is unknown and when there is a lack of evidence, like a suicide note, indicating that the death was intentional.[88] Courts have long considered suicide to be a legal improbability because it is "contrary to

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81. *Id.* at 987.

82. Huddleston & Masterson, *supra* note 73.

83. David S. Markson, Comment, *The Punishment of Suicide—a Need for Change*, 14 VILL. L. REV. 463, 464 (1969) (internal citations omitted).

84. Jill Bialosky, *Grief Is a Forever Thing*, N.Y. TIMES (Nov. 27, 2022), https://www.nytimes.com/2022/11/27/opinion/prolonged-grief-suicide.html [https://perma.cc/ZXU9-DGMD]; *see also* Elana Premack Sandler, *The Ripple Effect of Suicide*, NAMI: NAT'L ALL. ON MENTAL ILLNESS (Sept. 10, 2018), https://nami.org/Blogs/NAMI-Blog/September-2018/The-Ripple-Effect-of-Suicide [https://perma.cc/DG3B-VBR8] ("A suicide is like a pebble in a pond. The waves ripple outward.").

85. *See* Victor Ray Armstrong, *Suicide is a Community Issue*, PRA: POL'Y RSCH. ASSOCS. (Apr. 9, 2020), https://www.prainc.com/suicide-community-issue [https://perma.cc/3FRM-JBVL] (arguing for a community-based suicide prevention approach, as one person's suicide affects many communities).

86. *See* Kelly S. Noble, *Accidental Death . . . or Was It? The Question of Suicide in Life and Accidental Death Insurance*, 39 BRIEF 50, 50 (2010).

87. Kevin J. McManus, *AD&D Life Insurance Claim Denied? What to Know About "Accidental Death & Dismemberment" Life Insurance Appeals*, KEVIN MCMANUS L., https://www.kevinmcmanuslaw.com/library/accidental-death-dismemberment-ad-d-life-insurance-claim-denied-lawyer.cfm [https://perma.cc/E6UR-Y9A2].

88. *See* Noble, *supra* note 86, at 53 (noting that in many states, the presumption applies because suicide is considered contrary to human instinct to live). This will be discussed further in Section II.C.

the general conduct of mankind,"[89] and, therefore, it is a legal improbability that a person would intentionally take their own life.[90] Insurance policy beneficiaries of people who died by suicide often argue that the act of suicide is, by definition, an insane act, and therefore decedents lack the intent to die.[91] ERISA is silent, however, on what to do when the decedent's state of mind is contested, and because state laws are preempted, there is no statutory standard for the factfinder to follow in these cases.[92]

C. The Wickman *and the* Horton *Standards*

Generally, if the state of mind of the decedent is contested,[93] it falls to the factfinder to determine if their death was an accident or was self-inflicted.[94] If the beneficiary can prove that the insured's death was caused by an unintentional act, they establish a prima facie case against suicide and for insurer liability.[95] The burden of proof then shifts to the insurer to prove that the insured died by suicide, rather than by accident.[96] In determining whether the decedent died by accident or by self-inflicted injury, there are two standards that courts predominately use: the *Wickman v. Northwest National Insurance Co.*[97] standard and the *Horton v. Reliance Standard Life Insurance Co.* standard.[98]

89. Mallory v. Travelers' Ins., 47 N.Y. 52, 54–55 (1871).

90. Wellisch v. John Hancock Mut. Life Ins., 293 N.Y. 178, 184 (1944) ("[The] presumption against [suicide] is one of the 'judicial recognitions of what is probable.'" (citation omitted)).

91. Schuman, *Suicide and the Life Insurance Contract*, *supra* note 27, at 756.

92. *See* Alexandre v. Nat'l Union Fire Ins., 22 F.4th 261 (1st Cir. 2022), *cert. denied* 143 S. Ct. 88 (2022) (denying petition that would resolve the conflicting standards).

93. *See infra* Section II.C (discussing the kinds of cases where the decedent's state of mind is at issue).

94. *See* Schuman, *Suicide and the Life Insurance Contract*, *supra* note 27, at 751–54 (outlining the factfinder's job when the decedent's state of mind is contested).

95. *Id.* at 751.

96. *Id.* at 751–52.

97. 908 F.2d 1077 (1st Cir. 1990), *cert. denied* 498 U.S. 1013 (1990).

98. 141 F.3d 1038 (11th Cir. 1998).

1. The Wickman *standard*

The First Circuit Court of Appeals first articulated the *Wickman* standard, which has since become the majority standard.[99] In *Wickman*, a driver noticed Mr. Wickman standing on outside of a bridge's guardrail, holding on to it with one hand.[100] The passerby looked back at traffic for a moment, and when he turned back towards the bridge, Wickman was falling ninety feet to the railroad tracks below.[101] Wickman's widow tried to claim the benefits from his employer-provided AD&D plan, which was covered by ERISA.[102] After the plan administrator denied her claim, Ms. Wickman filed suit in the District Court of Massachusetts, and the magistrate in the case held that the plan administrator denied the benefits correctly.[103]

The court developed a standard that many courts now use to determine if Wickman's death was accidental or intentional.[104] To prove that the decedent did not intentionally cause their own death, the plaintiff must satisfy a two-prong test: they must show that they had a subjective expectation of survival, and that this expectation was objectively reasonable.[105]

First, the factfinder must determine that a reasonable person must have viewed the injury as "highly likely" to occur as a result of the insured's intentional conduct for it to be denied by the AD&D policy.[106] The court noted that "[r]easonableness is to be analyzed by allowing the insured a great deal of latitude and taking into account

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99. *Wickman*, 908 F.2d at 1079; *see, e.g.*, Todd v. AIG Life Ins., 47 F.3d 1448, 1450, 1456 (5th Cir. 1995) (adopting the *Wickman* standard in an auto-erotic asphyxiation case to hold that the death was accidental); Wolf v. Life Ins. Co. of N. Am., 46 F.4th 979, 984, 987 (9th Cir. 2022) (adopting the *Wickman* standard in a drunk driving case to hold that the death was accidental). *But see* Gerdes v. John Hancock Mut. Life Ins., 199 F. Supp. 2d 861, 866 (C.D. Ill. 2001) (denying that a drug overdose was accidental because a reasonable person would have been aware that harm could occur from drug use, and, thus, the drug use was an intentionally inflicted harm).

100. *Wickman*, 908 F.2d at 1079–80.

101. *Id.* at 1080.

102. *Id.* at 1081.

103. *Id.* The parties agreed that there is no right to a jury trial in an action brought under ERISA and consented to have a trial before the magistrate judge. *Id.*

104. *Id.* at 1088 ("[W]hether 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.").

105. *Id.*; *see also* Schuman, *Dying Under the Influence*, *supra* note 75, at 20 ("The Wickman decision presents a two-step subjective/objective test to be used in determining what constitutes 'accidental' death . . . .").

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

his personal characteristics and experience."[107] If the evidence shows that the decedent would have believed that the action that caused the injury was highly likely to cause death, the inquiry is over.[108]

If, after the first step, the evidence is "insufficient to accurately determine the insured's subjective expectation," the factfinder should then objectively analyze the insured's expectations in the second step.[109] The factfinder must ask "whether a reasonable person, with [a] background and characteristics similar to the insured" would have thought that the injury was highly likely to occur as a result of their intentional conduct.[110] This inquiry requires a finding of more than just "foreseeability or increased risk," but rather that the consequence of their action was "the likelihood or strong possibility of death or serious bodily injury."[111]

A review of decisions published by various circuit courts indicates that many courts adopt the *Wickman* standard simply because other circuits have.[112] However, courts have used variations in the wording of the standard, resulting in different standards, rather than a standard that is uniformly applied by all courts.[113] The effects of the differing standards will be discussed more in Part II.

2. The Horton *standard*

The Eleventh Circuit in *Horton* followed a simpler approach than *Wickman* to determine if the decedent's death was accidental when

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107. Schuman, *Fatal Attraction*, *supra* note 28, at 680.

108. *Id.* at 679 ("[I]f the insured's belief is unreasonable, the injury will not be considered to be an accident.").

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

110. *Id.*

111. Schuman, *Fatal Attraction*, *supra* note 28, at 680.

112. *See, e.g.*, Eckelberry v. Reliastar Life Ins., 469 F.3d 340, 343 (4th Cir. 2006), *cert. denied* 550 U.S. 904 (2007) (applying the *Wickman* standard because "many federal courts have adopted [its] framework"); Deibler v. United Food & Com. Workers' Loc. Union 23, 973 F.2d 206, 209 (3d Cir. 1992) (applying the *Wickman* standard because the "test has since been adopted by other circuits").

113. *See, e.g.*, Todd v. AIG Life Ins., 47 F.3d 1448, 1456 (5th Cir. 1995) (holding that a decedent's actions are objectively reasonable if death is "not substantially certain" to result from their actions); *Wickman*, 908 F.2d at 1088–89 (holding that the objective prong of the analysis turns on whether a reasonable person would have thought that the injury was "highly likely to occur" from the intentional conduct); Bennett v. Am. Int'l Life Assurance Co. of N.Y., 956 F. Supp. 201, 211–12 (N.D.N.Y. 1997) (holding that the subjective expectation of survival is objectively reasonable if "a reasonable person would conclude that death is not *substantially likely* to result . . .").

their state of mind is contested.[114] The court consolidated several cases that arose out of an in-flight fire and airplane crash that killed Mr. Horton and two pilots.[115] Their deaths were shrouded in mystery: Mr. Horton was a senior vice president of the Gulf Power Company, which was under investigation by a federal grand jury for possible theft, payoffs, and cover-ups.[116] Several theories were advanced by the press and public about why the plane crash occurred, including that the plane was sabotaged to prevent Mr. Horton from testifying.[117] Federal investigators said that it was "possible, though not likely" that the crash was the result of a suicide.[118] Horton's widow filed to recover benefits from her husband's AD&D plan, which he received from his employer.[119] In a per curiam opinion, the Eleventh Circuit held that when the evidence is inconclusive about whether the decedent died on purpose or by accident, it is "appropriate" to presume against suicide and in favor of an accidental death to determine insurance benefit eligibility.[120] *Horton* clearly establishes that in the context of an accidental death policy, the presumption against suicide is part of the federal common law and should be used when there is not conclusive evidence that the death was either accidental or intentional.[121]

The *Horton* standard is closer to the analysis that most state courts employ when a decedent's state of mind at the time of death is disputed.[122] States like Ohio agree that courts apply the presumption against suicide because "a person ordinarily will not act in a manner which will foreseeably result in personal injury to himself."[123] New York

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114. Horton v. Reliance Standard Life Ins., 141 F.3d 1038, 1040 (11th Cir. 1998).

115. *Id.*

116. Jeffrey Schmalz, *Florida Mystery Is Fueled by Intrigues and 4 Deaths*, N.Y. TIMES (June 18, 1989), https://www.nytimes.com/1989/06/18/us/florida-mystery-is-fueled-by-intrigues-and-4-deaths.html [https://perma.cc/BDZ6-LXBN].

117. *Id.*

118. *Id.*

119. *Horton*, 141 F.3d at 1040.

120. *Id.*

121. *See* Acree v. Hartford Life & Acc. Ins., 917 F. Supp. 2d 1296, 1307 n.3 (M.D. Ga. 2013) (noting that in the face of inconclusive evidence, it is appropriate to apply the negative presumption against suicide and the affirmative presumption towards accidental death as a tiebreaker per *Horton*).

122. *See, e.g.*, Noble, *supra* note 86, at 53 (claiming New York's presumption against suicide creates a high burden since suicide is contrary to human nature).

123. Shepherd v. Midland Mut. Life Ins., 87 N.E.2d 156, 163 (Ohio 1949); *see also* Evans v. Nat'l Life & Acc. Ins., 488 N.E.2d 1247, 1249 (Ohio 1986) ("As do many states, Ohio has recognized the legal presumption that in the absence of sufficient substantial evidence to the contrary, a person is presumed not to have taken his own life.").

also uses the presumption against suicide: "[A] finding of suicide is warranted only if the jury is satisfied from the evidence, and taking into account the presumption against suicide, that no conclusion other than suicide may reasonably be drawn."[124] Other states, including Washington,[125] Colorado,[126] and Texas,[127] also apply the presumption against suicide.

Like most state standards,[128] the *Horton* standard is rebuttable with sufficient evidence.[129] *Horton* does not require the application of the presumption against suicide when there is just *any* doubt that the decedent intended to die by suicide.[130] However, when courts do apply the presumption against suicide, it is only successfully rebutted when the factfinder is convinced by the evidence provided that the death was caused by suicide.[131]

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124. Schelberger v. E. Sav. Bank, 458 N.E.2d 1225, 1227 (N.Y. 1983).

125. *See* Gould v. Mutual Life Ins., 629 P.2d 1331, 1332 (Wash. 1981) (noting that the presumption originates from the "forced humiliation" that would befall the survivors, so "no sane man" would commit suicide and cause that kind of anguish for their family).

126. *See* Indus. Comm'n of Colo. State Comp. Ins. Fund v. Peterson, 377 P.2d 542, 543–44 (Colo. 1962) (holding that the evidence presented, which pointed to the decedent having a plan to die, was strong enough to overcome the presumption against suicide).

127. Price v. Am. Nat'l Ins., 113 S.W.3d 424, 428, 431 (Tex. App. 2003) (internal citation omitted) (noting that Texas law includes a rebuttable presumption against suicide and holding that there was not enough evidence presented to grant summary judgment to the insurance company claiming that the death was caused by suicide).

128. *E.g.*, Carson v. Metro. Life Ins., 135 N.E.2d 259, 238 (Ohio 1956) (stating that "[w]here the party against whom the presumption against suicide operates produces substantial credible evidence to the contrary as to the means of causing death, the presumption disappears as a rule of law").

129. Horton v. Reliance Standard Life Ins. Co., 141 F.3d 1038, 1041 (11th Cir. 1998) (per curiam).

130. *Id.* at 1042.

131. *Id.*; *see also* Barry L. Salkin, *Accident and the Presumption Against Suicide Under ERISA*, 35 BENEFITS L.J. 1, 4–5 (2022) (discussing *Horton*'s rebuttable presumption against suicide). For an example of the presumption against suicide being successfully rebutted because there was sufficient evidence pointing to suicide, see Malin v. Metro. Life Ins., 845 F. Supp. 2d 606, 614–15 (D. Del. 2012) (applying the presumption against suicide and citing to *Horton* but concluding that the decedent intended to commit suicide when he pulled the trigger of his gun twice, despite not leaving behind a suicide note).

D. Typical Cases Where the Intent of the Decedent is Disputed

Some fact patterns naturally result in ambiguity between an accidental and an intentional death; this ambiguity most often results where it is not obvious from the activity in which the decedent was participating if the decedent intended to end their life or engage in something that brought them pleasure.[132] Three kinds of cases where the issue of the decedent's state of mind at the time of death commonly arises are cases in which the decedent died while engaging in auto-erotic asphyxiation,[133] by drug overdose,[134] or while driving drunk.[135]

1. Auto-erotic asphyxiation

There are a variety of cases where the decedent's state of mind at the time of their death is contested, including cases where the decedent is suspected of participating in auto-erotic asphyxiation.[136] The practice of auto-erotic asphyxiation is when a "person exert[s] pressure on the arteries of his neck to constrict oxygen flow to the brain while engaging in sexual self-stimulation," often using a rope or a similar ligature.[137] Unfortunately, sometimes individuals engaging in auto-erotic asphyxiation lose consciousness and subsequently die by strangulation.[138]

Often, situations where people who die of an injury sustained during auto-erotic asphyxiation can be misunderstood to be ones where someone died by suicide.[139] However, most people do not intend to die when engaging in the act, having done it several times in the past with no adverse consequences.[140] For example, the 2009 death of actor

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132. *See infra* Section I.D.1–3.

133. *See infra* Section I.D.1.

134. *See infra* Section I.D.2.

135. *See infra* Section I.D.3.

136. *See generally*, Schuman, *Fatal Attraction*, *supra* note 28, 674–75 (discussing auto-erotic asphyxiation deaths in the context of AD&D insurance).

137. *Id.* at 669.

138. *Id.* at 670.

139. *See* R.W. Byard, *Autoerotic Asphyxial Death—Accident or Suicide?*, 19 AM. J. FORENSIC MED. & PATHOLOGY 4, 377 (1980) (discussing how the possibility of suicide must be entertained when suspecting a death by auto-erotic asphyxiation).

140. *Auto-Erotic Asphyxia's Deadly Thrill*, ABC NEWS (June 5, 2009, 10:50 AM), https://abcnews.go.com/Health/story?id=7764618& [https://perma.cc/K8Q8-HTCX]; *see also* Parker v. Danaher Corp. ex. rel. Danaher Corp. Emp. Benefit Plan, 851 F. Supp. 1287, 1290 (W.D. Ark. 1994) ("It is pointed out that research into this particular sexual phenomena suggests that autoerotic asphyxiation is a repetitive pattern of

David Carradine was originally ruled a suicide but was later revised to be death by asphyxiation, most likely while engaging in auto-erotic acts.[141] His ex-wife suggested that he participated in auto-erotic asphyxiation acts throughout his life.[142] Mr. Carradine probably did not expect to die while participating in an activity from which he derived sexual pleasure.[143] There have been many instances besides Mr. Carradine's death where a death by auto-erotic asphyxiation was mistakenly thought to be intentional.[144]

Beneficiaries of decedents whose death is suspected to be caused by auto-erotic asphyxiation argue that the death was unintentional because the decedent frequently participated in the act throughout their lives without intending to cause themselves harm.[145] In *Todd v. AIG Life Insurance Co.*,[146] the decedent was found dead with a "system of leashes" attached to his neck that he had apparently designed to loosen in case he became unconscious.[147] However, the system failed and did not release and loosen before he died.[148] The court noted that other cases considered that "the risk of death from autoerotic practice is 'not of such a nature that [the decedent] knew or should have known that it probably would result in death'" and that "'[d]eath was not a

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behavior that individuals engage in over a period of years and that the intent of the individuals performing this act is not death.").

141. Alex Dobuzinskis, *David Carradine Died of Asphyxiation: Pathologist*, REUTERS (July 1, 2009, 8:34 PM), https://www.reuters.com/article/us-carradine/david-carradine-died-of-asphyxiation-pathologist-idUSTRE5610CD20090702 [https://perma.cc/2Q2V-K44R].

142. *Auto-Erotic Asphyxia's Deadly Thrill*, *supra* note 140.

143. *See id.* ("People usually have safety nets and no intention to die, but something often goes wrong in their calculation." (internal citation omitted)).

144. *See* Justin Peters, *How Do You Tell a Suicide from an Autoerotic Asphyxiation Accident?*, SLATE (Oct. 10, 2013, 1:35 PM), https://slate.com/news-and-politics/2013/10/ariel-castro-autoerotic-asphyxiation-how-do-you-tell-a-suicide-from-an-autoerotic-asphyxiation-accident.html [https://perma.cc/EWJ6-BA7S] (discussing how kidnapper Ariel Castro's death was first mistaken for suicide, but evidence showed it was due to auto-erotic asphyxiation); Kwame Anthony Appiah, *Her Brother Most Likely Died from Autoerotic Asphyxiation. Do I Tell Her?*, N.Y. TIMES (Oct. 25, 2022), https://www.nytimes.com/2022/10/25/magazine/suicide-privacy-ethics.html [https://perma.cc/G2K6-XEKC] (answering a question in an ethics column about whether a woman should tell her friend that the paramedic actually thought the death was caused by an auto-erotic asphyxiation accident, rather than suicide).

145. Schuman, *Fatal Attraction*, *supra* note 28, at 671.

146. 47 F.3d 1448 (5th Cir. 1995).

147. *Id.* at 1450.

148. *Id.*

normal expected result of the behavior.'"[149] After considering several case precedents, including *Wickman*, the court concluded in *Todd* that the decedent's death resulted from a "bodily injury caused by an accident" and fell within the AD&D plan's coverage.[150]

The plaintiffs in *Cronin v. Zurich American Insurance*,[151] similarly argued that, based on expert testimony, "practitioners of autoerotic *asphyxiation* often have done so before without harmful consequence," and therefore the death was accidental.[152] The court disagreed and held that, while the decedent might not have intended to die, they foreseeably put themselves at great risk, and "[a]n occurrence is not accidental if it results from a foreseen risk purposefully brought about."[153] In *Bennett v. American International Life Assurance Co. of New York*,[154] a man traveled to Maryland for a work conference with his coworker.[155] When his coworkers noticed that he did not arrive at the next day's events and that his car was still in the parking lot, they asked hotel management to check on him.[156] When they got into the room, they found the decedent, who had accidentally died from what the police later determined to be auto-erotic asphyxiation.[157] The insurance company, however, denied his beneficiary's claim because the decedent should have foreseen "that in all reasonable probability he could die" because of his actions, which it did not consider to be accidental.[158] On appeal, the district judge used the *Wickman* standard and considered if the decedent's previous participation in auto-erotic asphyxiation let him reasonably believe that he would be substantially likely to survive again.[159] However, the judge ultimately determined that there were genuine issues of material fact regarding whether the decedent's subjective expectation of survival was objectively reasonable, and they denied the parties' dueling motions for summary judgment.[160]

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149. *Id.* at 1457.
150. *Id.* at 1455, 1459.
151. 189 F. Supp. 2d 29 (S.D.N.Y. 2002).
152. *Id.* at 37.
153. *Id.*
154. 956 F. Supp. 201 (N.D.N.Y. 1997).
155. *Id.* at 202–03.
156. *Id.* at 203.
157. *Id.*
158. *Id.*
159. *Id.* at 212.
160. *Id.*

Some courts do not exclude deaths caused by auto-erotic asphyxiation from AD&D plans because the decedent had no actual intent to die.[161] The Second Circuit in *Critchlow v. First UNUM Life Insurance Co. of America*,[162] overturned the district court ruling that the death was not an accident because the decedent participated in an activity that had a "serious and obvious risk of death."[163] The circuit court emphasized that the decedent incorporated escape mechanisms into the system that he used to participate in his sexual activities, which showed that he, in fact, intended *not* to die of asphyxiation, and, after applying the *Wickman* standard, that his death was accidental.[164] Similarly, in *Padfield v. AIG Life Insurance*,[165] the Ninth Circuit used the *Wickman* standard and held that the death was accidental because the decedent "having performed the act in the past without inflicting any injury, had a reasonable expectation that he would be able to do so again."[166]

Other courts have excluded deaths caused by auto-erotic asphyxiation from AD&D plan coverage because they consider them self-inflicted, intentional injuries.[167] For example, the court in *Cronin* held that because the decedent purposefully restricted the flow of oxygen to his brain, his injury was self-inflicted and intentional; therefore, his death was considered suicide, and he was not eligible for recovery in an AD&D plan.[168] According to some courts, however, accidental deaths and self-inflicted injuries are not necessarily mutually exclusive.[169] *Fawcett v. Metropolitan Life Insurance.*[170] stated that because "the terms 'accidental death' and 'intentionally self-inflicted

161. *See, e.g.*, Todd v. AIG Life Ins., 47 F.3d 1448, 1459 (5th Cir. 1995) (holding that the decedent's auto-erotic asphyxiation-related death was accidental).

162. 378 F.3d 246 (2d Cir. 2004).

163. *Id.* at 254, 264.

164. *Id.* at 259, 262–63.

165. 290 F.3d 1121 (9th Cir. 2002).

166. *Id.* at 1127, 1130.

167. *See* Sigler v. Mut. Benefit Life Ins., 663 F.2d 49, 50 (8th Cir. 1981) (per curiam) (applying state law and holding that death caused by auto-erotic asphyxiation was intentional); Fawcett v. Metro. Life Ins., No. C-3-97-540, 2000 WL 979994, at *6 (S.D. Ohio June 28, 2000) (holding that because the decedent took an action that contributed to his death, it was a self-inflicted injury and therefore his beneficiaries cannot recover).

168. Cronin v. Zurich Am. Ins. Co., 189 F. Supp. 2d 29, 39–40 (S.D.N.Y. 2002).

169. *See Fawcett*, 2000 WL 979994, at *6 (holding that an accidental death and self-inflicted injuries are not mutually exclusive).

170. No. C-3-97-540, 2000 WL 979994 (S.D. Ohio June 28, 2000).

injury' are not mutually exclusive," someone engaging in auto-erotic asphyxiation did intentionally cause their self-inflicted injury, which led to their demise.[171] However, because they did not intend for their action to result in death, the death was accidental.[172]

2. Drug overdoses

Drug overdoses provide another set of cases where it can be difficult to determine the decedent's state of mind at the time of their passing.[173] Many drug users do not expect that their drug use will lead to their death, especially if they are habitual or recreational users.[174] Among people who die of opioid overdoses, 10% of them have already overdosed once, indicating that they did not expect to take a fatal dose of the drug.[175] However, courts have historically considered overdoses of illicit drugs to be self-inflicted injuries, denying AD&D benefits when these overdoses are fatal.[176] This analysis generally does not change, even if the decedent is a longtime habitual drug use who has repeatedly avoided a fatal overdose.[177] Similar issues can also arise from the abuse or misuse of therapeutic drugs.[178]

As in cases of death by auto-erotic asphyxiation, drug overdoses can give rise to AD&D coverage disputes over whether the death is accidental or intentional.[179] The appeals and district courts in the Seventh Circuit are among those that use the *Wickman* standard in

171. *Id.* at *6.

172. *Id.*

173. *See generally* Douglas R. Richmond, *Drugs, Sex, and Accidental Death Insurance*, 45 TORT TRIAL & INS. PRAC. L.J. 57 (2009) (discussing the role of drugs in certain ERISA AD&D cases).

174. *Id.* at 58.

175. *See id.* at 72 (discussing how most courts do not alter their analysis regarding if a death was accidental if the person had used the drug without injury over a long period of time); *Overdose Deaths and the Involvement of Illicit Drugs*, CTR. FOR DISEASE CONTROL & PREVENTION (last updated Jan. 23, 2023), https://www.cdc.gov/drugoverdose/featured-topics/VS-overdose-deaths-illicit-drugs.html [https://perma.cc/3G4L-RKKK] ("Among the people who died from overdoses involving opioids, about 10% had had a previous overdose.").

176. Richmond, *supra* note 173, at 72.

177. *Id.* at 72–73.

178. *Id.* at 77–78.

179. *See e.g.*, Gerdes v. John Hancock Mut. Life Ins., 199 F. Supp. 2d 861, 866 (C.D. Ill. 2001) (disputing whether the death was accidental when the decedent ingested a "speedball," despite the stipulation between the parties that there was no suicidal intent).

drug overdose AD&D disputes.[180] In *Santaella v. Metropolitan Life Insurance*,[181] the Seventh Circuit overruled the district court's determination that the decedent knew or should have known that ingesting propoxyphene, a drug used mostly for pain relief, would have caused a fatal seizure.[182] According to the record, the decedent took her seizures seriously, sought medical treatment, and had not used illegal drugs in more than five years.[183] The Seventh Circuit applied *Wickman* and found that the record showed that the decedent had a subjective expectation of survival.[184] The court also found that expectation was objectively reasonable because her death was not highly likely, let alone certain, to result from her actions.[185] Therefore, her death was held to be accidental.[186] Similarly, in the Northern District of California, *Santos v. Minnesota Life Insurance*.[187] applied the same analysis to determine that the decedent's drug overdose was accidental and that the beneficiaries could recover.[188]

Meanwhile, in *Gerdes v. John Hancock Mutual Life Insurance*,[189] the Central District of Illinois applied *Wickman* and the analysis in *Santaella* to determine that the intentional self-infliction exclusion applies.[190] Unlike in *Santaella*, where there was no evidence that the decedent thought ingesting the drug would harm her,[191] the court reasoned here that because information about drug abuse is widely available, and because the public generally considers the use of drugs like cocaine to be dangerous, the plaintiff "cannot reasonably assert that" the decedent did not know that the combination of the substances he ingested could cause serious injury or death.[192] The decedent objectively should have known that ingesting cocaine, morphine, and

180. *See* Santaella v. Met. Life Ins., 123 F.3d 456, 462–63 (7th Cir. 1997) (applying the subjective-objective approach of *Wickman* in determining whether a drug overdose was accidental).
181. 123 F.3d 456 (7th Cir. 1997).
182. *Id.* at 459, 464.
183. *Id.* at 463–64.
184. *Id.*
185. *Id.* at 464.
186. *Id.*
187. 571 F. Supp. 3d 1120 (N.D. Cal. 2021).
188. *Id.* at 1131–32.
189. 199 F. Supp. 2d 861 (C.D. Ill. 2001).
190. *Id.* at 866.
191. 123 F.3d at 464.
192. *Gerdes*, 199 F. Supp. 2d at 866.

ethanol would likely lead to death.[193] Therefore, the injury was intentionally self-inflicted, despite the decedent choosing to take the drugs for its pleasurable effects, not to harm himself.[194]

Other courts utilize the *Horton* presumption against suicide when the decedent's intent while ingesting drugs cannot be determined.[195] While the *Horton* approach is the minority view, the Eighth Circuit used it in *Nichols v. Unicare Life & Health Insurance*.[196] to support its finding that the decedent's death was caused by drug overdose.[197] The court, invoking the purposes and goals of ERISA itself, argued that its conclusion was "bolstered by the presumption against suicide" in the *Horton* standard, which advances ERISA's central goals of protecting the interests of plan beneficiaries and ensuring uniformity in plan administration.[198] Although the court used the *Wickman* standard as well, it noted that there would be "nothing remarkable" about applying the *Horton* presumption in this kind of AD&D case.[199]

3. Drunk driving

Cases involving drunk driving deaths also elicit some of the same questions in AD&D plan disputes as cases involving auto-erotic asphyxiation or drug overdose. The inquiry can be somewhat different, as it tends to turn more on the issue of foreseeability, rather than intent, which further complicates the *Wickman* standard.[200] For example, if a driver engaged in 'inherently risky' behavior, like driving drunk, this can disqualify their beneficiaries from recovering from their AD&D plan if they die. Should engaging in more innocuous activities, like eating a sandwich, while driving automatically preclude

193. *Id.*
194. *Id.*
195. *See e.g.*, Nichols v. Unicare Life & Health Ins., 739 F.3d 1176, 1183 n.4 (8th Cir. 2014) (using the *Horton* standard in its consideration to determine that the district court erred in denying the plaintiff AD&D coverage).
196. 739 F.3d 1176 (8th Cir. 2014).
197. *Id.* at 1183 n.4.
198. *Id.*
199. *Id.*
200. *See* Schuman, *Dying Under the Influence*, *supra* note 75, at 10–30 (2008) ("Any person who operates a motor vehicle in a highly intoxicated condition at an excessively high rate of speed should fully appreciate the probable consequences of such conduct.").

recovery because it was foreseeable that it would increase the risk of injury or death?[201]

As in auto-erotic asphyxiation and drug overdose cases, there is no per se rule regarding the denial of AD&D benefits under ERISA in drunk driving cases.[202] Courts often follow the *Wickman* standard to determine if a drunk driving death was accidental for the purposes of the AD&D plan.[203] For example, the court in *Wolf v. Life Insurance Co. of North America* used the *Wickman* standard to determine that the decedent was not "substantially certain" that driving while intoxicated would lead to their death, and, therefore, their death was accidental.[204] In *King ex rel. Schanus v. Hartford Life & Accident Insurance Co.*,[205] the Eighth Circuit also applied *Wickman* and determined that the decedent subjectively believed he would return home safely when he drove home with a blood alcohol level of 0.19%.[206] Because the decedent subjectively did not intend to die, the death was accidental.[207]

Conversely, the court in *Stamp v. Metropolitan Life Insurance Co.*[208] also applied the *Wickman* standard to a drunk driving case, but determined that the death was not accidental.[209] The court agreed that the plan administrator's determination that the decedent's decision to drive while very intoxicated was "overwhelmingly and disproportionately" dangerous and risky, and was, therefore, not accidental within the *Wickman* framework.[210] As these cases demonstrate, different courts

201. *See id.* at 36 (discussing how doing other things while driving, not just driving drunk, can increase the chances of serious injury or death).

202. *See* Metro. Life Ins. v. Potter, 992 F. Supp. 717, 729–30 (D.N.J. 1998) ("The Court cannot find as a matter of law that death is 'highly likely to occur' because of drunk driving and that 'any other expectation would be unreasonable' where many drunk drivers survive.").

203. *See* Schuman, *Dying Under the Influence*, *supra* note 75, at 18–30 (discussing the varying results when courts apply the *Wickman* standard to disputes involving the state of mind of decedents in drunk driving AD&D cases).

204. Wolf v. Life Ins. Co. of N. Am., 46 F.4th 979, 987 (9th Cir. 2022).

205. 357 F.3d 840 (8th Cir. 2004), *vacated*, 414 F.3d 996 (8th Cir. 2005).

206. *Id.* at 841, 845.

207. *Id.* at 845–46.

208. 531 F.3d 84 (1st Cir. 2008).

209. *Id.* at 90–91.

210. *Id.* at 93–94.

have applied the *Wickman* standard to similar facts with varying results.[211]

II. ANALYSIS

The *Wickman* and *Horton* standards will lead courts to differing outcomes when presented with similar facts in ERISA-controlled AD&D cases where the decedent's intent is disputed.[212] *Wickman* requires an individualized analysis of the facts of the case using its two-part subjective-objective standards of reasonableness.[213] *Horton*, on the other hand, only requires that the presumption against suicide be applied when there is no definitive evidence pointing towards suicide or an accident.[214] This Comment argues that the *Horton* standard should apply to all cases where ERISA controls the AD&D plan and the intent of the decedent is disputed. First, this Part discusses how even though the *Wickman* standard is the preferred standard by most courts, it is a more convoluted, difficult, and inconsistent standard to apply, which burdens lower courts and leads to disparate holdings for similar cases.[215] Second, this Part will argue that the *Horton* standard aligns more closely with ERISA's legislative purposes and goals.[216]

A. The Wickman *Standard is the Preferred Standard of Most Courts*

As the First Circuit stated, the *Wickman* standard is "widely accepted by [its] sister circuits."[217] Despite courts using variations in the standard's wording, most circuits apply the two-step subjective-objective analysis to determine if an AD&D plan beneficiary is eligible

211. *Compare Stamp*, 531 F.3d at 93–94 (holding that drunk driving is risky enough conduct that it cannot fall within the definition of "accidental" in AD&D cases), *with King ex rel. Schanus*, 357 F.3d at 846 (holding that the decedent's expectation that they would return home safely rendered the death an "accident" in terms of AD&D insurance). This idea will be discussed more in *infra* Part II.

212. *Compare* Wickman v. Nw. Nat'l Ins., 908 F.2d 1077, 1088 (1st Cir. 1990) (subjective-objective analysis), *with* Horton v. Reliance Standard Life Ins., 141 F.3d 1038 (11th Cir. 1998) (per curiam) (presumption against suicide).

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

214. *Horton*, 141 F.3d at 1040.

215. *See supra* Section I.C.1.

216. *See supra* Section I.C.2.

217. Stamp v. Metro. Life Ins., 531 F.3d 84, 89 (1st Cir. 2008).

for benefits.[218] Some courts seem to begrudgingly apply the *Wickman* standard, dissatisfied with its different formulations.[219]

Cases rarely explain why the *Wickman* standard is "the most persuasive precedent" for AD&D coverage cases.[220] Many courts simply apply the *Wickman* standard to follow the precedent of other circuits when the fact pattern of a case is similar to one with which other circuits have already dealt.[221] Other courts have adopted the *Wickman* standard simply because other circuits have used it.[222] Other than the unconvincing reasons that it exists and has been used in the past, courts have not further articulated why the *Wickman* standard is preferred.[223]

B. The Wickman *Standard Is a Difficult and Inconsistent Standard to Apply*

In essence, the *Wickman* standard asks the plaintiff to prove a negative—the plaintiff must show that the decedent did not want to die when they are already dead.[224] The first step of the *Wickman* standard requires that the factfinder determine the decedent's "actual expectation," examining whether the decedent expected, or, in other words, intended, to die as a result of their actions, or if the decedent died accidentally.[225] In *Wickman*, the decedent had fallen off of a ninety-foot bridge onto railway tracks and later died in the hospital due to a cardiac arrest as a result from the fall.[226] An observer said that he

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218. *See, e.g.*, Wolf v. Life Ins. Co. of Am., 46 F.4th 979, 985 (9th Cir. 2022) (noting that courts "have used a number of slightly different verbal formulations to describe the objective portion of the [*Wickman*] inquiry").

219. *See, e.g.*, Padfield v. AIG Life Ins., 290 F.3d 1121, 1127 (9th Cir. 2002) (applying the *Wickman* standard using the "substantially certain" test despite stating that it is "not great" that there are different formulations of the test).

220. *See, e.g.*, King ex rel. Schanus v. Hartford Life & Acc. Ins., 357 F.3d 840, 843 (8th Cir. 2004) (holding that the decedent's fatal crash was an accident pursuant to the life insurance policy).

221. *See* Santaella v. Metro. Life Ins., 123 F.3d 456, 463–65 (7th Cir. 1997) (applying *Wickman* as it was applied in Todd v. AIG Life Ins., 47 F.3d 1448 (5th Cir. 1995)).

222. *See supra* Section I.C.1 (discussing how courts have applied the *Wickman* standard simply because their sister circuits have applied it, without providing any further explanation).

223. *See e.g.*, *Padfield*, 290 F.3d at 1127 (stating that the *Wickman* standard formulation using the "substantially certain" test is the "most appropriate").

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

225. *Id.*

226. *Id.* at 1080.

saw the decedent hold onto the railing with one hand, and after having turned away for a moment, turned back to see the decedent "free-falling" onto the tracks.[227] The magistrate who originally denied the decedent's widow benefits under the AD&D plan concluded that there were three potential explanations for the decedent's actions: to commit suicide; to seriously injure himself; or some other, more innocuous, reason that led to him inadvertently falling off the bridge.[228]

This analysis, in and of itself, shows that the decedent's intent is disputed because the entire reason this analysis is being undertaken is that it was not obvious at the time of the decedent's death whether they intended the result of their actions, in this case, their death.[229] How does someone prove a deceased person's intent when all other evidence is inconclusive? This is a nearly impossible task; "without being able to talk to [the decedent themselves], it is impossible to [actually know their] subjective intent . . . ."[230] The *Wickman* standard requires that courts, like plan administrators had to do before them, "mak[e] the call [of whether the death was accidental or not] without access to the only witness who knows the absolute truth."[231]

Wickman anticipates this conundrum by requiring a second analysis if the decedent's subjective intent cannot be determined.[232] This second analysis requires the factfinder to "engage in an objective analysis of the insured's expectations."[233] In applying this step of the standard, the factfinder must consider the decedent's actions from the point of view of a reasonable person with the insured's background and characteristics.[234] As a result, this "objective" analysis is not entirely objective.[235] In essence, then, the *Wickman* standard not only asks the

227. *Id.*
228. *Id.* at 1083.
229. *Id.* at 1088.
230. Hamilton v. AIG Life Ins., 182 F. Supp. 2d 39, 48 (D.D.C. 2002); *see also* Schuman, *Dying Under the Influence*, *supra* note 75, at 20 n.115 (2008) ("It is very difficult to determine an insured's subjective expectations.").
231. Noble, *supra* note 86, at 58.
232. *Wickman*, 908 F.2d at 1088.
233. *Id.*
234. *Id.*
235. *OBJECTIVE STANDARD Definition & Legal Meaning*, LAW DICTIONARY, https://thelawdictionary.org/objective-standard [https://perma.cc/42L8-SH2Z] (the standard does not include "biased judgment or analysis").

plaintiff to overcome two hurdles to recover their benefits,[236] but those two hurdles are not substantially different from one another, but instead repetitive.

Asking a plaintiff to prove that the decedent did not die by suicide is next to impossible when there is no conclusive evidence.[237] When investigating an auto-erotic asphyxiation-related death, without speaking to the decedent, it would be impossible to know if they had the intent to die or the intent to have a pleasurable experience.[238] For example, the decedent in *Todd* created a system of leashes that was meant to release before he passed out, indicating that he did not intend to severely injure himself or take his own life.[239] Most people who drive drunk intend to arrive at their destination safely, rather than perish in a crash, like the driver in *King ex rel. Schanus v. Hartford Life & Accident Insurance Co.*, who drove his motorcycle drunk but intended to get home safely.[240] This issue of the lack of proof of intent is best illustrated by cases involving drug overdose deaths, especially those of habitual drug users. A habitual drug user often takes drugs without the expectation of death.[241] It is impossible to know if they intended or expected to die by using drugs the specific occasion that it caused their death. The objective analysis that the court considers to be a proxy for the decedent's actual intentions or expectations is still a relatively subjective analysis, but from the point of view of the factfinder, who cannot get into the head of the decedent.[242]

Because the *Wickman* standard requires that the plaintiff essentially clears the same hurdle twice, it makes it more difficult for them to recover benefits when it is unclear if the decedent died by accident or

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236. *See* Schuman, *supra* note 75, at 20 (discussing the two-step analysis required by *Wickman*).

237. Hamilton v. AIG Life Ins., 182 F. Supp. 2d 39, 48 (D.D.C. 2002) (arguing that it is impossible to know someone's subjective intent without asking them).

238. *See* Todd v. AIG Life Ins., 47 F.3d 1448, 1457 (5th Cir. 1995) (noting that the decedent did not expect to die from an activity in which they had regularly engaged).

239. *Id.* at 1451, 1456.

240. *See* King ex rel. Schanus v. Hartford Life & Acc. Ins., 357 F.3d 840, 841, 845 (8th Cir. 2004) (finding that the driver did not expect to die when driving with a 0.19% blood alcohol level).

241. Richmond, *supra* note 173, at 72–73 ("[A] Georgia court observed that 'the heroin user plays a form of Russian roulette substituting a needle for a pistol.'"); *Overdose Deaths and the Involvement of Illicit Drugs*, *supra* note 175 (reporting that ten percent of habitual drug users have already overdosed at least once, which indicates that they do not expect to die of an overdose).

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

by suicide.[243] One of ERISA's goals is to protect the interests of the insured and their beneficiaries.[244] ERISA primarily achieves this goal by ensuring that the insured and their beneficiaries understand their benefit plan rights and by establishing fiduciary duties owed to them.[245] The negative presumption against suicide and affirmative presumption towards accidental death "favor the protection of the interests of beneficiaries over those of insurance companies" is a notion that is "grounded in tested observations of human behavior and in American legal history," namely state courts that apply the presumption.[246]

Moreover, the *Wickman* standard creates inconsistencies both within and across jurisdictions.[247] For example, *Bennett* and *Cronin,* have very similar fact patterns; the two decedents both died from engaging in auto-erotic asphyxiation in their hotel rooms while on business trips.[248] However, the district courts, both applying the *Wickman* standard, came to different conclusions whether the death was accidental.[249] The court in *Bennett* determined that there was a genuine question of material fact whether the decedent's subjective "expectation of survival was objectively reasonable" and denied the defendant's motion for summary judgment.[250] The court in *Cronin*, however, held that the death was not accidental because the decedent engaged in an activity that created an "imminent danger" of death.[251] As noted above, the two courts, both within the Second Circuit, applied the same standard to very similar facts but came to two different conclusions, creating the potential for more litigation and prolonging the grieving process for

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243. Salkin, *supra* note 131, at 2 (discussing how the plaintiff in *Alexandre* realized she was not going to prevail under the *Wickman* standard, despite having evidence indicating an accidental death).

244. *See supra* Section I.A; 29 U.S.C. § 1001(c).

245. *See* Salkin, *supra* note 131, at 2 (noting the Eleventh Circuit's primary goal of protecting beneficiaries through the presumption against suicide).

246. Horton v. Reliance Standard Life Ins., 141 F.3d 1038, 1041 (11th Cir. 1998) (per curiam).

247. *Compare* Bennett v. Am. Int'l Life Assurance Co. of N.Y., 956 F. Supp. 201, 212 (N.D.N.Y. 1997) (holding that there was a genuine question of material fact regarding whether the death due to auto-erotic asphyxiation in a hotel was accidental), *with* Cronin v. Zurich Am. Ins., 189 F. Supp. 2d 29, 37 (S.D.N.Y. 2002) (holding that the death due to auto-erotic asphyxiation in a hotel room was not accidental).

248. *Bennett*, 956 F. Supp. at 203; *Cronin*, 189 F. Supp. 2d at 32.

249. *Bennett*, 956 F. Supp. at 212; *Cronin*, 189 F. Supp. 2d at 37.

250. *Bennett*, 956 F. Supp. at 211.

251. *Cronin*, 189 F. Supp. 2d at 37.

the decedent's beneficiaries.[252] Even before the *Horton* standard was introduced, courts outside of the First Circuit agreed that the *Wickman* standard was too complicated and that it "sheds little light in an area of the law already unduly complicated by reference to various artificial distinctions."[253]

Wickman leaves room for interpretation in defining the two-step standard, which has resulted in courts using different terminology and, in effect, applying different standards.[254] For example, courts have used both "highly likely"[255] and "substantially certain."[256] Some courts make assumptions to square the various terminology.[257] Courts have also "have confused the 'highly likely to occur' test with the 'reasonably foreseeable' standard."[258]

Perhaps the most glaring issue with the *Wickman* standard and its lack of clarity is when it is applied to drunk driving cases.[259] The court in *Stamp* determined that the decedent's "overwhelmingly and disproportionately risky conduct" when he drove drunk precluded his beneficiaries from receiving benefits.[260] However, "[c]onduct that increases the risk of serious consequences does not make those consequences inevitable."[261] The *Wickman* standard allows for actions that are inherently risky to be deemed intentional, when, like in many drunk driving cases, the decedent's actual expectations were survival.[262] Using the same logic, applying lipstick while driving increases the chances of a car crash and might be considered risky, but

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252. *See* Schuman, *Dying Under the Influence*, *supra* note 75, at 62 (noting the copious amounts of litigation of AD&D plans in the context of drunk driving with a variety of results).

253. Parker v. Danaher Corp. ex rel. Danaher Corp. Emp. Benefit Plan, 851 F. Supp. 1287, 1295 (W.D. Ark. 1994).

254. *Compare* Padfield v. AIG Life Ins. Co., 290 F.3d 1121, 1127 (9th Cir. 2002) (using "substantially certain" in its application of the *Wickman* standard), *with* King ex rel. Schanus v. Hartford Life & Acc. Ins. Co., 357 F.3d 840, 844 (8th Cir. 2004) (using "highly likely" in its application of the *Wickman* standard).

255. *King ex rel. Schanus*, 357 F.3d at 844.

256. *Padfield*, 290 F.3d at 1127.

257. *See* Stamp v. Metro. Life Ins., 531 F.3d 84, 92–93 (1st Cir. 2008) (noting that a death is "not 'highly likely' if that phrase is taken to mean 'more likely than not' or 'substantially certain.'").

258. Schuman, *Dying Under the Influence*, *supra* note 75, at 33.

259. *See id.* at 30–38 (discussing courts that have considered drunk driving deaths accidental, despite arguments that the actions leading to them were not reasonable).

260. *Stamp*, 531 F.3d at 93–94.

261. Schuman, *Dying Under the Influence*, *supra* note 75, at 33.

262. *Id.*

it would be illogical to say that someone doing so intended to die.[263] The vagueness of the *Wickman* standard allows for this kind of strained interpretation, which only hurts beneficiaries.[264]

While many argue that it would be counterintuitive to pay out AD&D benefits for something that a person knew was going to harm them,[265] that is not true in instances, where it was as likely that the decedent did not expect that their actions would result in their death.[266] The *Wickman* standard does not create a standard that can be applied equally to similar situations. Rather, it relies on individual judge's opinions in an area where the law is meant to be uniformly applied,[267] and fails to adequately protect the interests of the insured and their beneficiaries.[268]

C. The Horton *Standard Aligns with ERISA's Purposes and Goals*

ERISA's two purposes are to protect the interests of employees who receive benefit plans and their beneficiaries, and to provide uniformity of regulation and enforcement.[269]

The legislative history of ERISA shows the emphasis that was put on having a uniform regulatory system, rather than relying on a variety of state laws that could conflict with one another.[270] The entire point of preempting state law under ERISA is to have a uniform standard for

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263. *Id.* at 36.

264. Wickman v. Nw. Nat'l Ins., 908 F.2d 1077, 1088 (1st Cir. 1990) (setting forth a basic subjective expectation of injury test followed by a basic objective expectation of injury test).

265. *See* Schuman, *Dying Under the Influence*, *supra* note 75, at 21 ("The first step [of the *Wickman* analysis] excludes from accident coverage anyone acting with the belief that his conduct would cause the injurious outcome . . . .").

266. *See, e.g.*, Cronin v. Zurich Am. Ins. Co., 189 F. Supp. 2d 29, 37 (S.D.N.Y. 2002) (acknowledging that the decedent had participated in auto-erotic asphyxiation in the past, which indicated that they did not expect to die from their actions).

267. *See* Singer v. Black & Decker Corp., 964 F.2d 1449, 1453 (4th Cir. 1992) (ERISA's preemption provision meant to avoid "variable standards of recovery").

268. *See* 29 U.S.C. § 1001(c)(3) (stating policy to protect interests of employee benefit plans participants and their beneficiaries by establishing fiduciary standards and providing for appropriate remedies).

269. *See supra* Section I.A.

270. *See, e.g.*, H.R. Rep. 93–533 at 12 (1973) ("The uniformity of decision which the Act is designed to foster will help administrators, fiduciaries and participants to predict the legality of proposed actions without the necessity of reference to varying state laws."); 120 Cong. Rec. 4275 (1974) (statement of Congressman Ullman) ("We have adopted a procedure under which uniform regulations can be accomplished. It is workable, responsible, and sound . . . .").

courts to apply when conflicts about qualified benefits arise: "[T]he goal [of ERISA] was to minimize the administrative and financial burden of complying with conflicting directives among States or between States and the Federal Government. Otherwise, the inefficiencies created could work to the detriment of plan beneficiaries."[271] *Horton* provides a readily applicable standard in AD&D disputes, which better aligns with ERISA's goals of providing uniformity across the United States than does *Wickman*, which requires a detailed, case-by-case analysis that can result in differing conclusions drawn from the same facts depending on the judge.[272] Because the *Horton* standard prioritizes the "protection of the interest of the beneficiaries over those of the insurance company,"[273] it comports with ERISA's first goal of protecting the interests of beneficiaries as well. On the other hand, the *Wickman* standard tends to protect insurance companies more—the more difficult it is to recover, the better the insurance companies make out.[274] *Horton*'s presumption tilts the inquiry in favor of the decedent's beneficiaries, which is what ERISA intended.[275]

When enacting ERISA, Congress intended there to be a federal common law created to fill in the statute's gaps.[276] Keeping the various state laws regarding accidental death insurance and how to handle a dispute over a decedent's state of mind when faced with conflicting (or no) evidence would "fly in the face of Congressional intent."[277] However, Congress did not intend that ERISA be "writ[ten] on a clean slate," but, rather, incorporate existing common law to inform the new

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271. Ingersoll-Rand Co. v. McClendon, 498 U.S. 133, 142 (1990).

272. *See* Horton v. Reliance Standard Life Ins., 141 F.3d 1038, 1041 (11th Cir. 1998) ("Both the negative presumption against suicide and the affirmative presumption of accidental death further ERISA's goals. The presumptions provide courts and juries with uniform rules to resolve coverage questions where the evidence of how the insured died is inconclusive."); Hammond v. Fidelity & Guar. Life Ins., 965 F.2d 428, 430 (7th Cir. 1992) ("ERISA's legislative history, discussed in a plethora of ERISA preemption cases, undeniably demonstrates that Congress expects uniformity of decisions under ERISA.").

273. Stephen W. Mooney & Leigh Lawson Reeves, *Labor Law*, 50 Mercer L. Rev. 1061, 1080 (1999).

274. *See Accidental Death and Dismemberment Claim Fact Sheet*, *supra* note 78 (discussing the motivation for insurance companies to prolong AD&D litigation to avoid paying out benefits).

275. 29 U.S.C. § 1001(c).

276. Hallock, *supra* note 14, at 212.

277. *Hammond*, 965 F.2d at 430.

body of federal common law.[278] The court in *Horton* states that it was "not persuaded that Congress, by enacting ERISA, meant to change the established, basic presumptions on the subject of accidental death."[279] In fact, federal courts have held that while state law cannot control an ERISA decision, there is room for state law to apply through its adoption by the federal courts into the federal common law.[280] Many states include the presumption against suicide in their insurance common law,[281] so including it into the standard used in ERISA-controlled cases would further the Act's uniformity goal by remaining consistent with state law, rather than reinventing the wheel. Incorporating the state law negative presumption against suicide and affirmative presumption towards accidental death would not only standardize how to deal with situations where intent cannot be determined when AD&D plans that fall within ERISA's jurisdiction, but also keep the standard similar to most state law, lessening confusion across the board.[282] *Horton*'s simplicity and ease of application furthers ERISA goals far more effectively than the *Wickman* standard.[283]

CONCLUSION

The *Horton* standard for AD&D "accident" disputes most closely aligns with ERISAs goals of protecting the insured and their beneficiaries and having a uniform regulatory scheme. Congress did not mean for the federal common law that was to grow out of ERISA to start from scratch;[284] most state courts already apply the presumption against suicide in non-ERISA AD&D cases.[285]

If *Alexandre* had been litigated in the Eleventh Circuit, as the plaintiffs originally wanted, rather than in the First Circuit, which applied *Wickman*, it is likely that the outcome would have been

278. Horton v. Reliance Standard Life Ins., 141 F.3d 1038, 1041 (11th Cir. 1998).

279. *Horton*, 141 F.3d at 1042.

280. Shaffer v. UnumProvident Corp., No. 2:07-CV-1526-VEH, 2007 WL 9711976, at *4 (N.D. Ala. Oct. 1, 2007).

281. *Id.*; Noble, *supra* note 86, at 53.

282. *Horton*, 141 F.3d at 1041; Noble, *supra* note 86, at 53.

283. *See Horton*, 141 F.3d at 1041–42 (discussing how the law should simply execute ERISA's goals of protecting the employees, beneficiaries, and uniformity in employee benefit plans).

284. *See supra* Section II.B.

285. *See supra* Section I.C.

completely different and she would have received her benefits.[286] Rather, the current majority standard from the First Circuit leaves beneficiaries, who are already grieving the death of their loved ones and potentially struggling financially after experiencing this loss, with a standard that is applied inconsistently.[287] The next step would be for the Supreme Court to grant certiorari in a case like *Alexandre*[288] to settle this debate and hold for the *Horton* standard. While this is likely to be an uphill battle, as the *Horton* standard is the minority standard,[289] the legislative history of ERISA and the goals it explicitly lays out demonstrates that *Horton* is the better, fairer standard. It is time for the Supreme Court to take up this issue and settle the debate, once and for all.

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286. *See* Alexandre v. Nat'l Union Fire Ins. Co. of Pittsburgh, 22 F.4th 261, 266 (1st Cir. 2022) (describing the plaintiffs' efforts to win summary judgment by invoking a presumption available in the Eleventh Circuit), *cert. denied* 143 S. Ct. 88 (2022).

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

288. *Alexandre*, 22 F.4th at 265.

289. Outside of the Eleventh Circuit, no other circuit uses the *Horton* standard as its primary standard to determine if a death was caused by an accident. Cases like Nichols v. Unicare Life & Health Ins. Co. used it to inform and strengthen their positions. 739 F.3d 1176 (8th Cir. 2014).