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CLIENT BULLETIN

UNREASONABLE EXPECTATIONS: An Insured's Expectation of Surviving Auto-Erotic Misadventure Found Objectively Unreasonable by Massachusetts Federal Court

This month, a federal judge in the District of Massachusetts entered summary judgment for an insurer and against a beneficiary on *de novo* review of the insurer's denial of a claim for accidental death benefits under an ERISA policy. *Wightman v. Securian Life Ins. Co.*, No. 18-11285-DJC, 2020 WL 1703772 (D. Mass. Apr. 8, 2020). Applying the *Wickman* test developed by the First Circuit, the court found that, while the insured undisputedly did not subjectively expect to die when he engaged in auto-erotic asphyxiation by suspending himself with a belt from his bathroom door, this expectation was objectively unreasonable in light of both his apparent inexperience and his failure to implement an adequate failsafe in the event he lost consciousness. Despite expert testimony on the statistical rarity of death by auto-erotic asphyxiation and the lack of physical harm resulting from the practice as intended, the court found the insured's death was not the result of "an accidental bodily injury which was unintended, unexpected and unforeseen," as required for accidental death coverage. Furthermore, because the insured's death was the direct or indirect result of "intentionally self-inflicted injury or attempt at self-inflicted injury," it was excluded under the policy. In so finding, the court criticized decisions from the Second and Ninth Circuits which "distinguished between the act of initial strangulation for pleasure and the strangulation that caused death." *Id.* at *7 (citing *Critchlow v. First UNUM Life Ins. Co. of Am.*, 378 F.3d 246, 258 (2d Cir. 2004); *Padfield v. AIG Life Ins. Co.*, 290 F.3d 1121, 1121 (9th Cir. 2002)). The *Wightman* court described this distinction in *Critchlow* and *Padfield* as "artificial." Following instead the Seventh Circuit's reasoning in *Tran v. Minnesota Life Insurance Co.*, 922 F.3d 380, 386 (7th Cir. 2019), the court characterized the insured's initial act of "partial" strangulation for pleasure and his resulting loss of consciousness and death as "one continuous act," which carried with it an objective expectation of injury under the circumstances. *Wightman*, 2020 WL 1703772, at *7.

Although not discussed at length in *Wightman*, we compared the circumstantial evidence of the deceased's expectations in *Critchlow*, *Padfield*, *Tran*, and *Wightman* in an attempt to harmonize these outcomes, notwithstanding their criticisms of one another. In *Wightman*, the insured's wife argued his subjective expectation that no injury would result from his activity was objectively reasonable because, had he remained conscious, he "could have ended the autoerotic asphyxiation activity by straightening his legs and standing up fully or by pushing down on the bathroom door latch which releases easily." *Wightman*, 2020 WL 1703772, at *6. Contrast this with *Critchlow*, where the insured was found dead on his bedroom floor "with ligatures tying various parts" of his naked body. *Critchlow*, 378 F.3d 250. On the surface, any expectation of disengagement by the insured in *Critchlow* sounds far more unreasonable than that of the insured in *Wightman*; however, the police report in *Critchlow* revealed that the insured had rigged an elaborate apparatus involving cords attached to a set of counter weights "which were meant to give him an 'out' if he started

to lose consciousness"—apparently the product of some two decades of experience in the practice. *Id.* In *Padfield*, while no failsafe measures were identified, there was evidence of a long history of the insured practicing auto-erotic asphyxiation without serious injury or death. *Padfield*, 290 F.3d at 1127 (the Ninth Circuit also applied a slightly more forgiving standard of objective reasonableness to the insured's subjective expectations). By contrast, in *Tran*, the insured "hung a noose from a ceiling beam in his basement, stood up on a stool with the noose around his neck, and stepped off," appearing to investigators to be suicide until a medical examiner concluded from unspecified paraphernalia on the insured's body that he died from auto-erotic asphyxiation. *Tran*, 922 F.3d at 381.

Examining all four cases side-by-side, and keeping in mind that there is no "*per se* rule on insurance coverage for autoerotic asphyxiation . . . because the policy language and factual circumstances involved in a death can vary, sometimes greatly" (*Wightman*, 2020 WL 1703772 at *4), we think it is fair to say that insurers and attorneys investigating auto-erotic asphyxiation deaths should pay special mind to whether there is any evidence supporting the objective reasonableness of the insured's subjective expectation of safety or survival, including their history of engaging in the activity and any measures undertaken to provide a means of escape. As with any hazardous hobby, a participant's fate is often determined not by what goes wrong, but by their preparation (or lack thereof) of a contingency plan.

Auto-erotic asphyxiation is but one of the many tragic yet not atypical scenarios commonly covered in CMN's annual contribution to the ABA's Tort Trial & Insurance Practice Law Journal addressing recent developments in health, life, and disability insurance law. Look for our article in that journal this spring for more on accidental deaths and ensuing coverage disputes across the country.

Chittenden, Murday & Novotny LLC will continue to monitor developments on this issue and update its clients accordingly.

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If you have any questions about this Client Bulletin, please feel free to contact any of the attorneys listed or the CMN attorney with whom you regularly work.

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