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# DEATH FROM AUTOEROTIC ASPHYXIATION AND THE DOUBLE INDEMNITY CLAUSE IN LIFE INSURANCE POLICIES: THE LATEST ROUND IN ACCIDENTAL DEATH LITIGATION

by

FRANCIS ACHAMPONG\*

## INTRODUCTION

Apart from the traditional death benefit payable under life insurance policies, there may be added benefits such as the accidental death benefit, waiver of premium for disability, and the guaranteed insurability rider.

On the application of the insured, and for an additional premium, the accidental death benefit may be added to the basic death benefit in a life insurance policy, if the insured meets the particular insurer's underwriting requirements for the coverage.<sup>1</sup> The accidental death benefit is provided in an amount equal to the policy face<sup>2</sup>, hence the reference to "double indemnity" in the context of the accidental death benefit.

Policies containing an accidental death benefit may employ different terminology in according the coverage. Some courts have recognized two types of clauses — "accidental means" clauses on the one hand, and "accidental death" or "accidental result" clauses, on the other.<sup>3</sup>

For coverage under an accidental death clause to be triggered, only the result need be accidental. Thus, even where a voluntary or intended act is engaged in, coverage is still afforded under an accidental death clause as long as the result is unintended or unexpected. On the other hand, coverage under an accidental means clause is triggered only if the means or cause(s) of death themselves are accidental. Thus, in states recognizing a distinction, the accidental means clause is more restrictive than the accidental death clause.

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<sup>1</sup> It is an integral part of some life insurance policies. Accident and health insurance policies may also insure against accidental death.

<sup>2</sup> Thus, in a policy with a \$100,000 limit, the accidental death benefit would be \$100,000, resulting in a \$200,000 recovery for accidental death within the coverage of the policy.

<sup>3</sup> See, GREIDER, CRAWFORD AND BEADLES, *LAW AND THE LIFE INSURANCE CONTRACT* 210 (1984); also, AP-  
PLEMAN, *INSURANCE LAW AND PRACTICE* 360 (1981) (where he refers to the "accidental means" provision as "that simple, yet tricky, little term"). This distinction was recognized in cases such as *National Life and Accident Ins. Co. v. Knapp*, 430 S.W.2d 84, 88 (Tex. Civ. App. 1968); *Braley v. American Home Assurance Co.*, 354 So. 2d 904, 906 (Fla. Dist. Ct. App. 1978); *McKinnon v. Republic National Life Ins. Co.*, 25 Wash. App. 854, 862, 610 P.2d 944, 948 (1980) (Reed, C.J., concurring). The actual wording of either type of clause has many variations. For a sample of each, see GREIDER, CRAWFORD AND BEADLES, at 210-211.

Many states, owing to the practical problems arising from attempting to distinguish between the two clauses, have abrogated the distinction, treating accidental means clauses like accidental death clauses. Others have done so to accommodate the reasonable expectations of the ordinary policyholder.<sup>4</sup> In a dissenting opinion in *Landress v. Phoenix Mutual Life Ins. Co.*<sup>5</sup>, Justice Cardozo stated that "the attempted distinction between accidental results and accidental means will plunge this branch of the law into a Serbonian Bog."<sup>6</sup> Some states, however, still uphold the distinction.<sup>7</sup>

Accidental death litigation has brewed for over a century or more on diverse issues. The latest round in accidental death litigation, however, concerns autoerotic asphyxiation, a rather bizarre sex act involving a deliberate reduction of the supply of oxygen to the brain to heighten sexual pleasure.<sup>8</sup>

This paper examines the cases that have been decided on this issue, seeking to determine whether recovery under the double indemnity provision revolves around the type of clause used in the policy, or on the particular jurisdiction's stand on what is "accidental," regardless of policy language. The author seeks to determine whether any particular trend may be elicited from these cases that may shed light on the likely disposition of future cases.

#### JUDICIAL TREATMENT OF DEATH FROM AUTOEROTIC ASPHYXINATION

There are at least five reported cases in which different courts had to consider whether death from autoerotic asphyxiation was accidental for purposes of the double indemnity provision.<sup>9</sup> Only two of the cases allowed recovery

<sup>4</sup>In Wisconsin, for example, an "average man" test is used in interpreting the term "accidental means." *Wiger v. Mutual Life Ins. Co.*, 205 Wis. 95, 105, 236 N.W. 534, 538 (1931); also, *Stoffel v. American Family Life Ins. Co.*, 41 Wis. 2d 565, 570, 164 N.W.2d 484, 487 (1969), where the Wisconsin Supreme Court stated that "Wisconsin has elected to follow the 'average man test' in defining the word 'accident' rejecting the narrower definition that requires an unforeseen event as well as an unanticipated result . . ."

<sup>5</sup>291 U.S. 491 (1934) (Cardozo, J., dissenting).

<sup>6</sup>*Id.* This was reportedly a reference to Lake Serbonis in Egypt in which armies were engulfed. In abrogating the distinction in Colorado, the Colorado Supreme Court stated, "Whatever kind of bog that is we concur." *Equitable Life Assurance Soc'y v. Hemenover*, 100 Colo. 231, 235, 67 P.2d 80, 81 (1937). See also, GREIDER, CRAWFORD AND BEADLES, at 211. The authors note that most life insurers use the "accidental death" formulation in their policies.

<sup>7</sup>*Nicholas v. Mutual Benefit Life Ins. Co.*, 451 F.2d 252 (6th Cir. 1971); *Praetorian Mutual Life Ins. Co. v. Humphrys*, 484 S.W.2d 413 (Tex. Civ. App. 1972).

<sup>8</sup>Death from playing Russian Roulette, shooting during an altercation, jumping out of a moving car, physical exertion and numerous other situations have been the subject of accidental death litigation. According to medical testimony in *Connecticut General Life Ins. Co. v. Tommie*, 619 S.W.2d 199, 202 (Tex. Civ. App. 1981), some forty deaths per year are reported in the United States from this practice of autoerotic asphyxiation.

<sup>9</sup>Four of the cases involved life insurance policies: *Kennedy v. Washington Nat'l Ins. Co.*, 136 Wis. 2d 425, 401 N.W.2d 842 (Wis. Ct. App. 1987); *Connecticut General Life Ins. Co. v. Tommie*, 619 S.W.2d 199 (Tex. Civ. App. 1981); *Runge v. Metropolitan Life Ins. Co.*, 537 F.2d 1157 (4th Cir. 1976); *Sigler v. Mutual Benefit Life Ins. Co.*, 506 F. Supp. 542 (S.D. Iowa 1981), *aff'd*, 663 F.2d 49 (1981). One involved an accident policy: *International Underwriters, Inc. v. Home Ins. Co.*, 662 F.2d 1084 (4th Cir. 1981).

under the double indemnity provision.<sup>10</sup>

### *Jurisdictions Denying Recovery Under the Double Indemnity Provision*

In *Runge v. Metropolitan Life Insurance Co.*<sup>11</sup>, Sandra Runge, a widow, sued Metropolitan Life to recover under the double indemnity provision of two life policies insuring her deceased husband's life. Her husband had died while engaged in an autoerotic act, during which he had placed a noose formed from an electrical extension cord around his neck to enable him to vary the pressure on his neck. He lost consciousness due to an accentuated asphyxia during orgasm, and hanged to his death.<sup>12</sup>

The insurer paid the death benefit, but refused the accidental death benefit, arguing that death was not from "accidental means" as required by the policy. The District Court rendered judgment for the insurer, and Sandra Runge appealed. The sole issue on appeal was whether or not Mr. Runge died by "accidental means."

Affirming the decision of the District Court, the Court of Appeals for the Fourth Circuit held that Mr. Runge's death was not by accidental means. The court cited language from a Virginia Supreme Court decision to the effect that "Where the policy insures against loss of life through accidental means, the principle seems generally upheld that if the death of the insured, although in a sense unforeseen and unexpected, results directly from the insured's voluntary act . . . , it is not death by accidental means, even though the result may be such as to constitute an accidental injury."<sup>13</sup>

In *International Underwriters, Inc. v. The Home Ins. Co.*<sup>14</sup> the insurer refused to pay the accidental death benefit under two accident policies. The insured had died from autoerotic asphyxiation. The decedent in this case used a noose equipped with a pulley designed to protect him from asphyxiation if he lost consciousness, since he would lose his grip on the rope controlling the pulley, and the pressure on the noose would abate. The pulley system jammed

<sup>10</sup> Recovery was denied in *Runge*, 537 F.2d 1157; *Sigler*, 506 F. Supp. 542, *aff'd*, 663 F.2d 49 (1981); and *International Underwriters*, 662 F.2d 1084. Recovery was allowed in *Kennedy*, 136 Wis. 2d 425, 401 N.W.2d 842 and *Connecticut General Life Ins. Co.*, 619 S.W.2d 199.

<sup>11</sup> 537 F.2d 1157 (4th Cir. 1976).

<sup>12</sup> *Id.* at 1158.

<sup>13</sup> *Smith v. Combined Ins. Co. of America*, 202 Va. 758, 761, 120 S.E.2d 267, 269 (1961). The Virginia Supreme Court reaffirmed its position in *Wooden v. John Hancock Mutual Life Ins. Co.*, 205 Va. 750, 755, 139 S.E.2d 801, 804 (1965), where it noted that ". . . death or injury does not result from . . . accidental means within the terms of an accident policy where it is the natural result of the insured's voluntary act, . . ." In *Smith*, the insured was burnt to death when tear gas grenades hurled by police accidentally set a barn, in which he was hiding, on fire. *Smith* had shot at the police and seriously wounded one officer. In *Wooden*, the insured visited his estranged wife's home and was shot following an argument. See, also, *Boyd v. Life Ins. Co. of Virginia*, 219 Va. 824, 252 S.E.2d 307 (1979), where double indemnity was denied for the death of an insured who was killed when he visited the home of his girlfriend's ex-boyfriend.

<sup>14</sup> 662 F.2d 1084 (4th Cir. 1981).

when the insured lost consciousness, causing him to die from asphyxia.<sup>15</sup> The policy covered "accidental bodily injury," injury being defined to include death.<sup>16</sup>

The issue, therefore, was whether the decedent's death was "accidental death." The District Court held that the death was accidental, since it resulted from a malfunctioning of the pulley system. In overturning the District Court's decision, the Court of Appeals for the Fourth Circuit held that because the decedent voluntarily placed his neck in the noose and tightened the same to the point where he lost consciousness, his death was the natural result of a voluntary act unaccompanied by anything unforeseen except death or injury. Thus, his death was not an accident.<sup>17</sup>

The District Court had distinguished the *Runge* decision<sup>18</sup> partly because it said *Runge* concerned an "accidental means" policy, while the policy here covered "accidental result."<sup>19</sup> Although the Court of Appeals noted that Virginia may recognize a distinction between accidental means and accidental results policies<sup>20</sup>, the court nonetheless followed the *Runge* decision because the Virginia Supreme Court did not explicitly differentiate between the two types of policies in its *Smith* decision.<sup>21</sup>

In *Sigler v. Mutual Benefit Life Ins. Co.*<sup>22</sup>, Mrs. Sigler claimed the accidental death benefit under a group insurance plan covering her husband who had died while engaged in an autoerotic act which resulted in his asphyxiation by hanging. The insurer denied the accidental death benefit, and Mrs. Sigler sued in District Court. Summary judgment was entered for the insurer, and Mrs. Sigler appealed. The sole issue on appeal was whether Mr. Sigler's death was an accidental death under the terms of the insurance agreement and Iowa law. The policy contained an accidental result or accidental death clause. It excluded intentionally self-inflicted injury of any kind.

The court referred to the definition of "accidental" by the Iowa Supreme Court. That court had stated that ". . . if the insured does a voluntary act, the

<sup>15</sup> *Id.* at 1085.

<sup>16</sup> *Id.*

<sup>17</sup> *Id.* at 1087. The court referred to the *Smith* decision, where the Virginia Supreme Court stated that death or injury does not result of an accident or accidental means within the terms of an accident policy where it is the natural result of the insured's voluntary act, unaccompanied by anything unforeseen except the death or injury. 202 Va. at 760-61, 120 S.E.2d at 268. The court also referred to the definition of "accident" as adopted in Virginia in *Ocean Accident & Guarantee Corp. v. Glover*, 165 Va. 283, 285, 182 S.E. 221, 222 (1935), where an "accident" was defined as "An event that takes place without one's foresight or expectation; an undesigned, sudden and unexpected event; chance; . . ."

<sup>18</sup> 662 F.2d at 1086.

<sup>19</sup> Counsel for appellees had argued the point at trial. *Id.*

<sup>20</sup> 662 F.2d at 1086, where the court refers to such possible recognition in language in *Newsoms v. Commercial Casualty Ins. Co.*, 147 Va. 471, 475, 137 S.E. 456, 457 (1927), and in *Smith v. Combined Ins. Co. of America*, 202 Va. 758, 761, 120 S.E.2d 267, 269 (1961).

<sup>21</sup> 662 F.2d at 1087.

<sup>22</sup> 506 F. Supp. 542 (S.D. Iowa 1981).

natural, usual, and to be expected result of which is to bring injury upon himself, then a death so occurring is not an accident in any sense of the word, legal or colloquial; . . ." <sup>23</sup> The court decided that Mr. Sigler's death was not an accident since a reasonable person would have recognized that his actions could result in his death. The court found that a reasonable person would comprehend and foresee that placing a noose around his neck and subsequently hanging himself for the purpose of inducing asphyxia could result in his death. <sup>24</sup> Although the court recognized that Mr. Sigler did not intend to cause his own death, it reasoned that he reasonably should have expected that his actions could be fatal. <sup>25</sup>

### *Jurisdictions Allowing Recovery Under the Double Indemnity Provision*

In *Connecticut General Life Ins. Co. v. Tommie* <sup>26</sup>, the insurer refused to pay the accidental death benefit under Mr. Tommie's group insurance policy after his death from asphyxiation. Mrs. Tommie brought suit and was awarded judgment upon a jury finding that the death was an accident and not the result of intentionally self-inflicted injury. The insurer appealed arguing, inter alia, that death was not the result of an accident.

The court referred to its own analysis of decisions concerning death arising from dangerous or negligent activities, where it had concluded that ". . . the mere fact that a person's death may have occurred because of his negligence, even gross negligence, does not prevent that death from being an accident within the meaning of an accident insurance policy. It is only when the consequences of the act are so natural and probable as to be expected by any reasonable person that it can be said that the victim, in effect, intended the result . . ." <sup>27</sup> The court concluded that "although the type of activity in which Mr. Tommie was engaged was foolish and fraught with substantial risks of injury or death, it was not of such a nature that the insured should have reasonably known that it would probably result in his death." <sup>28</sup>

<sup>23</sup>Lickleider v. Iowa State Traveling Men's Ass'n, 184 Iowa 423, 429, 166 N.W. 363, 366 (1918). The Iowa Supreme Court had also stated in *Rowe v. United Commercial Travelers Ass'n*, 186 Iowa 454, 464-65, 172 N.W. 454, 458 (1919), that where the insured knew and appreciated the danger, or the risk was so apparent that as an ordinary reasonable man he must be held to have known and appreciated it, and with the knowledge intentionally assumed the risk, death would not be accidental. *Lickleider* had been relied on by the Eighth Circuit in *Continental Casualty Co. v. Jackson*, 400 F.2d 285 (8th Cir. 1968).

<sup>24</sup>506 F. Supp. 544.

<sup>25</sup>*Id.* The court found *Runge* persuasive. It also decided that even if Mr. Sigler's death was an accident, recovery would be barred by the clause excluding "intentionally, self-inflicted injury of any kind." *Id.* at 545.

<sup>26</sup>619 S.W.2d 199 (Tex. Civ. App. 1981).

<sup>27</sup>*Freeman v. Crown Life Ins. Co.*, 580 S.W.2d 897, 900 (Tex. Cir. App. 1979). The court stated that more is required than a simple showing that the insured could have reasonably foreseen that injury or death might result. 619 S.W.2d at 202. Medical testimony was presented on behalf of Mrs. Tommie to the effect that death is not the normal expected result of autoerotic behavior, but would be considered unexpected. There was also testimony that the insured had probably engaged in the practice for several years. *Id.*

In considering whether the death was the result of a self-inflicted injury<sup>29</sup>, the court referred to the ordinary meaning of "injury," since it was not defined in the policy.<sup>30</sup> The issue was whether a reduction of the supply of oxygen to the brain in order to produce a state of hypercapnia is an injury within the normal and usual meaning of that term. The court stated that a state of hypercapnia simply alters the amount of oxygen in the brain, thus heightening or intensifying certain body sensations, and that it could be accomplished by various drugs as well as by other means. Thus, the court held that Mr. Tommie did not intentionally inflict bodily injury upon himself in the normal and usual meaning of that term, upholding the jury's finding.<sup>31</sup>

In *Kennedy v. Washington Nat'l Ins. Co.*<sup>32</sup>, Mr. Kennedy, an orthopedic surgeon, died while engaged in an autoerotic act. His death resulted from strangulation from a noose. The insurer denied Mrs. Kennedy's accidental death benefit under a group life policy containing a clause of the "accidental death" type. Mrs. Kennedy brought suit and was awarded summary judgment by the trial court, which concluded that the death was accidental.<sup>33</sup> The insurer appealed. The sole issue related to whether the term "accidental death" in the policy included death from autoerotic asphyxiation.<sup>34</sup>

The court pointed out that the Supreme Court of Wisconsin had adopted an "average man" test interpreting the term "accidental means" in *Wiger v. Mutual Life Insurance Co. of New York*<sup>35</sup>, and that this test had been reaffirmed in *Stoffel v. American Family Life Ins. Co.*<sup>36</sup>

The court stated that if an insured does a voluntary act where the natural, usual or expected result would cause injury or death, such injury or death would not be an accident in any sense of the word.<sup>37</sup> The court stated that more is required than a simple showing that injury or death might result, and that it is only when the consequences of the act are so natural and probable that it can be said the insured, in effect, intended the result and it was, therefore, not

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<sup>29</sup>The jury had found that it was not.

<sup>30</sup>619 S.W.2d at 203.

<sup>31</sup>*Id.*

<sup>32</sup>136 Wis. 2d 425, 401 N.W.2d 842 (Wis. Ct. App. 1987).

<sup>33</sup>*Id.* at 426, 401 N.W.2d at 843.

<sup>34</sup>*Id.*

<sup>35</sup>205 Wis. 95, 105-06, 236 N.W. 534, 538-39 (1931), where the Supreme Court of Wisconsin held that "to eliminate from the definition of 'accidental means' all cases where the injury happened as the natural or foreseeable result of a force or event voluntarily set in motion by the insured may have some scientific justification, but is contrary to the common understanding of the term and tends unfairly to limit such policies to cases where the insured is guilty of no negligence."

<sup>36</sup>41 Wis. 2d 565, 570, 164 N.W.2d 484, 487 (1969), where the court stated that "Wisconsin has elected to follow the 'average man test' in defining the word 'accident' rejecting the narrower definition that requires an unforeseen event as well as an unanticipated result to constitute an accidental happening." The insured in *Stoffel* had died from a massive hemorrhage caused by the strain of lifting a heavy wagon.

<sup>37</sup>136 Wis. 2d at 432, 401 N.W.2d at 846. The court referred to definitions of "accident" in the *American Heritage Dictionary* (1976) and *Webster's New Collegiate Dictionary* (1977). *Id.* at 430-31, 401 N.W.2d at 845.

accidental. The court held that there was no evidence that Kennedy's death was highly probable, expected or a natural result. Mr. Kennedy participated in the act solely for sexual gratification, and all the circumstances indicated that he would emerge from the experience alive and without injury. The court inferred from the circumstances that Mr. Kennedy had done this same act on previous occasions.<sup>38</sup>

#### A DISCUSSION OF THE VARIANT POSITIONS

The decision in *Runge* revolved around the voluntariness of the insured's conduct and the "accidental means" language in the insured's policy. The Virginia Supreme Court had held that where death results directly from the insured's voluntary act, it is not death by accidental means although in a sense unforeseen.<sup>39</sup> Since *Runge* deliberately placed his neck into a noose and intentionally and deliberately self-induced asphyxia by hanging himself in the noose, his death was a natural and foreseeable, though un-intended, consequence of his activity.<sup>40</sup> *Smith* and *Wooden* were cases dealing with the accidental means provision. *Runge* also dealt with the accidental means provision. *Runge* was, therefore, within the *Smith* and *Wooden* decisions. The Virginia Supreme Court's decisions in *Smith* and *Wooden* were to the effect that death resulting from a voluntary act was not death by "accidental means," even though unexpected. The Supreme Court's decision in those cases did not purport to lay down a broad principle applicable to both accidental means and accidental death situations. As a matter of fact, the court used language that arguably recognized a distinction between the two types of double indemnity provisions.<sup>41</sup> The decision in *Runge* was clearly within Virginia law.

Against the background of *Smith*, *Wooden* and *Newsoms*, however, some legitimate questions may be raised concerning the *International Underwriters, Inc.*<sup>42</sup> decision. The Fourth Circuit refused to distinguish *Runge* although what was involved there was an "accidental means" policy. The Fourth Circuit stated that since the *Smith* decision did not differentiate between the two types of policies at that point, it would be applied here.<sup>43</sup> But the *Smith* decision did not have to reach the issue as to whether the holding would be different in an accidental death, as opposed to an accidental means policy. In fact, the *Smith* and *Newsoms* courts had used language implicitly recognizing a distinction between the two types of policies. In *Smith*, the court held that on the facts, *Smith's*

<sup>38</sup> *Id.* at 433, 401 N.W.2d at 846.

<sup>39</sup> *Smith v. Combined Ins. Co. of America*, 202 Va. 758, 761, 120 S.E.2d 267, 269; also *Wooden v. John Hancock Mutual Life Ins. Co.*, 205 Va. 750, 755, 139 S.E.2d 801, 805 (1965).

<sup>40</sup> 537 F.2d 1157 (4th Cir. 1976).

<sup>41</sup> See *Smith v. Combined Ins. Co. of America*, 202 Va 258, 261, 120 S.E.2d 267, 269 (1961); also, *Newsoms v. Commercial Casualty Ins. Co.*, 147 Va. 471, 475, 137 S.E. 456, 457 (1927).

<sup>42</sup> 662 F.2d 1084 (4th Cir. 1981).

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<sup>43</sup> *Id.* at 1087.

death was not effected by an accident within the meaning of the policy.<sup>44</sup> Before arriving at this conclusion, the court had quoted language from a decision that had stated that where death results from a voluntary act of the insured, it is not death by accidental means, although unforeseen or unexpected.<sup>45</sup>

The Fourth Circuit, however, refused to acknowledge that the Virginia Supreme Court was implicitly recognizing a distinction between accidental means and accidental death language, choosing to interpret the holding that "death was not effected by accident within the meaning of the policy" independently of the quoted passage from *Scarborough* and the wording of the policy.<sup>46</sup> The Virginia Supreme Court in *Smith* was only saying that the accidental means requirement of the policy had not been satisfied.

The *International Underwriters* decision was not within the *Smith* and *Wooden* holdings, which were that death resulting from a voluntary act was not death by "accidental means," although unforeseen. The Fourth Circuit should not have extended the decision in *Smith* and *Wooden* to "accidental death" or "accidental results" cases. In states where the distinction between the two types of clauses has been obliterated, the courts use a test independent of policy language, such as the "average man" test employed in Wisconsin<sup>47</sup>, or the foreseeability test employed in Iowa<sup>48</sup> to all double indemnity provisions, regardless of policy language. Such was not the case in Virginia at the time of the *International Underwriters* decision. The Fourth Circuit should, in the least, have secured an advisory opinion from the Virginia Supreme Court, instead of independently determining the future direction of Virginia law on such an important issue.<sup>49</sup>

The *Sigler* decision did not revolve around the terminology in the policy, Iowa apparently making no distinction between accidental means and accidental death or accidental results policies. Instead, a foreseeability test is used to decide the issue of whether death was accidental in all policies. The District Court held that ". . . a reasonable person would comprehend and foresee that placing a noose around his neck and subsequently hanging himself with the noose for the purpose of inducing asphyxia could result in his death."<sup>50</sup> The

<sup>44</sup>202 Va. at 762, 120 S.E.2d at 269.

<sup>45</sup>*Scarborough v. World Ins. Co.*, 244 N.C. 502, 505, 94 S.E.2d 558, 561, quoted in *Smith*, 202 Va. at 761, 120 S.E.2d at 269.

<sup>46</sup>662 F.2d at 1087, nn. 1, 2. In the *Newsoms* case where the insured died of ptomaine poisoning after eating pork and beans, the court held that the death was from accidental means since it was an unintentional taking of a poisonous substance which the insured thought edible. The death was, therefore, anything else but usual. 147 Va. at 474, 137 S.E. at 457.

<sup>47</sup>136 Wis.2d at 430, 401 N.W.2d at 845.

<sup>48</sup>506 F. Supp. at 544.

<sup>49</sup>The Fourth Circuit did not arguably apply Virginia law as written by its highest court in this diversity case, as required by *Erie R. Co. v. Tompkins*, 304 U.S. 64 (1938).

<sup>50</sup>506 F. Supp. 544. Although the court cited the *Runge* decision with approval, it must be noted that Virginia has not employed a foreseeability test independent of policy language. The *Sigler* and *Runge* decisions were not, therefore, identical.

decision was, therefore, consistent with Iowa law on the issue.

It is interesting that the District Court in Iowa also found that Mr. Sigler's death was, in any case, intentionally self-inflicted, since ". . . his voluntary acts were intended to temporarily restrict his air supply . . .";<sup>51</sup> whereas the Texas Court of Appeals held that it was not, since a state of hypercapnia simply alters the amount of oxygen in the brain and may be accomplished by drugs as well as other means.<sup>52</sup>

The Texas courts do not employ a foreseeability test, but on the contrary, employ an expected, intended or inevitable results test, where the policy insures against "accidental death," as opposed to death by "accidental means." In the words of the court, the consequences of the act must be "so natural and probable as to be expected by any reasonable person that it can be said that the victim, in effect intended the result and it was therefore not accidental . . ."<sup>53</sup>

The courts in Wisconsin reject the foreseeability approach, adopting instead, an "average man" test in considering issues of whether death is "accidental death" or from "accidental means." The court in *Kennedy* stated that "More is required than a simple showing that injury or death might result. It is only when the consequences of the act are so natural and probable that it can be said the insured, in effect, intended the result and it was therefore not accidental."<sup>54</sup> The "average man" test is, in effect, identical to the intended or inevitable results test employed in Texas in "accidental death" cases. The court in *Kennedy* stated that ". . . there are occasions when an insured participates in some act where serious injury or death is highly probable or an inevitable result. Under no circumstances can or should that conduct be termed accidental."<sup>55</sup>

## CONCLUSION

It is obviously up to the various states to define their approach to the issue of whether death in any particular set of circumstances is accidental for double indemnity purposes. There is no universal position on this issue. As such, the question as to whether death from an autoerotic act is "accidental death" or death from "accidental means" will depend on several factors. One factor would be whether the particular state where suit is instituted recognizes a distinction between the two types of double indemnity provision. If it does, then there

<sup>51</sup> *Id.* at 545.

<sup>52</sup> 619 S.W.2d at 203.

<sup>53</sup> *Id.* at 202.

<sup>54</sup> 136 Wis. 2d at 432, 401 N.W.2d at 846.

<sup>55</sup> *Id.* It might be mentioned that constitutional questions have been raised where a publisher was sued for emotional harm resulting from death of an adolescent who had read an article describing the autoerotic practice in *Hustler* magazine. The Court of Appeals (5th Cir.) of Texas, reversing a lower court judgment, held that the magazine article was entitled to first amendment protection, since it did not incite performance of the act. See *Herceg v. Hustler Magazine Inc.*, 84 F. 2d 1017.

may be coverage under an “accidental death” or “accidental results” policy, but not under an “accidental means” policy. On the other hand, if no distinction is drawn between these two types of policy provisions, then the resolution of the dispute will revolve around the test used in that state to determine the issue of whether death is accidental, independently of policy language. This could be a “foreseeability” test as in Iowa, an “average man” test as in Wisconsin, or some other test. Recovery may be denied under the first, but accorded under the second.