VOL. 34, NO. 2 SUMMER 2021

BENEFITS LAW JOURNAL

Crimes and Illegal Acts

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Many welfare plans contain an exclusionary clause for benefits resulting from crimes or illegal acts, but in many instances these terms are not defined or are defined in an ambiguous manner, presenting a burden for the insurer seeking to invoke the exclusion. This article explores some of the issues that have arisen in connection with such clauses.

Many group health plans and accidental death and disability plans provide for exclusions for injuries or death resulting from crimes or illegal[1] acts,[2] but a number of issues arise in connection with such provisions.[3] The U.S. Supreme Court,[4] the U.S. Court of Appeals for the Sixth Circuit in a case not involving the Employee Retirement Income Security Act of 1974, as amended ("ERISA"),[5] and some district courts[6] have found the word "crime" to be ambiguous, while other district courts reach a contrary conclusion,[7] relying on definitions provided in cases[8] and dictionaries.[9]

Similarly, while most cases find "illegal act" to be unambiguous,[10] there is contrary authority.[11] Whether a particular term is ambiguous is a threshold question. If a term has an unambiguous meaning, then it is not relevant whether a district court is reviewing *de novo* or under an arbitrary and capricious standard, but it is relevant if a

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term is ambiguous. If the standard is arbitrary and capricious, then the plan administrator or insurer's interpretation of a term need only be reasonable.

The state in which the alleged criminal activity took place is frequently a significant issue,[12] although there is some divergence of views among the district courts.

For example, Pennsylvania courts have repeatedly emphasized that to constitute a crime in Pennsylvania, an offense must carry the possibility of imprisonment or death.[13]

Thus, in Pennsylvania, the *Black's Law Dictionary* definition of crime is trumped, because "the legislature has the exclusive power to pronounce which acts are crimes, to define crimes, and to fix the punishments for all crimes."[14]

As a result, it becomes more difficult for an insurer to establish a criminal exclusion. For example, in *Locklear*, the insurer, unable to rely on the traffic violation as the basis for the exclusion, could not establish that the insured had the *mens rea* to establish the crime of reckless endangerment under Pennsylvania law.[15]

Le Cates v. Blue Cross of Idaho[16] provides a different illustration. Idaho law may be unique in its definition of "blood alcohol concentration."

Under Idaho law, an analysis of blood to determine the alcohol concentration "shall be performed by a laboratory operated by the Idaho state police or by a laboratory approved by the Idaho state police or by a laboratory approved by the Idaho state police under the provisions of approval and certification standards to be set by that department, or by any other method approved by the Idaho state police." To implement the statutory requirement, the Idaho State Police have several administrative rules governing blood collection and alcohol testing.[17] While Blue Cross relied on a blood test taken at the hospital that indicated that Le Cates was over the legal limit for blood alcohol concentration, that test did not satisfy Idaho law.[18]

In contrast, in *Harrison v. Unum Life Insurance Company*,[19] the district court approved of Unum's reliance on a dictionary definition of crime rather than the treatment of drunk driving under New Hampshire law.

The district court explained that since Unum was relying on one interpretive source, its treatment of similarly situated participants would be uniform. In contrast, if the applicability of the crime exclusion was dependent upon the manner in which conduct was characterized under state law, then drunk driving in New Hampshire would be only a violation while in Massachusetts the same conduct would be a misdemeanor.

There is another situation in which a state's characterization of conduct may not be determinative. In *Lampen v. Albert Trostel & Son*

Employee Welfare Plan,[20] plaintiff argued that Wisconsin's treatment of a first offense drunk driving conviction as a civil forfeiture decriminalized the activity, but the district court disagreed. It held that Wisconsin's decision to treat a first conviction as a civil forfeiture did not change the criminal nature of the act.

CAUSATION

There should be some causal relationship between the criminal conduct and the death or injury, because "without a causal connection, the exclusion yields absurd results, and renders a meaning contrary to that expected by a reasonable person of average intelligence and experience."[21] As the U.S. District Court for the District of Oregon observed in *Bekos v. Providence Health Plan*:[22]

If interpreted without regard to its context, the "other illegal act" phrase arguably would exclude coverage for injuries to beneficiaries who:

- Trip on a sidewalk while jaywalking;
- Have their cars hit by a semi-truck while driving one hour per mile over the posted speed limit or not wearing a seatbelt;
- Are hit by another vehicle while executing a turn without displaying a turn signal;
- Fall off a ladder while remodeling a house without all relevant government permits;
- Are bitten by their dog when they have not yet obtained a dog license; or
- Fall into a fire while burning yard debris with no burn permit.

A reasonably intelligent person objectively examining the 'other illegal act' phrase in the context of the entire exclusion would not expect a denial of coverage for these types of activities.[23]

Notwithstanding the foregoing, the carrier or plan administrator will have flexibility in defining the nature of that causal relationship. Although the exclusion may be triggered if the loss is due to the commission of a crime or illegal act, there are multiple possible meanings of the phrase "due to."

As the U.S. Court of Appeals for the Tenth Circuit explained in *Kimber v. Thiekol Corp.*,[24] "the causal nexus of 'due to' has been given

a broad variety of meanings in the law, ranging from sole and proximate cause at one end of the spectrum to contributory cause at the other." For example, in *Jiminez v. SunLife Assurance Company of Canada,*[25] "In order for a disability to be due to the commission of an illegal act, the 'illegal act' does not necessarily have to be the sole cause of the disability."

In *Celardo v. GNY Automobile Dealers Health and Welfare Trust*,[26] appellant placed dealer plates on an unlicensed, uninsured, and uninspected Corvette, and was in an accident caused by crossing a double yellow line. Defendants further maintained the position that had *Celardo* not placed the unlawful plates on the car, he would not have been on the highway and the accident would not have occurred.

While the U.S. Court of Appeals for the Second Circuit felt this argument was not overwhelming, because it was reviewing the committee's action under an arbitrary and capricious stand, it concluded that the determination was reasonable.

Celardo was distinguished in *Shelby County Health Care Corp v. Majestic Star Casino,*[27] in part because the standard of review was *de novo*, rather than arbitrary and capricious, and in part because the discussion of "but for" causation was arguably *dicta*, because crossing the double yellow line was clearly an illegal act under New York law.

The analysis in *Celardo* was also questioned in *Reiling v. Sun Life Assurance Company*[28] as inconsistent with Tenth Circuit precedent.[29]

There is a consensus on certain broad principles. Courts have upheld denials of coverage under criminal act exclusions for acts constituting misdemeanors.[30] The fact that a state chooses not to prosecute a crime does not constitute an affirmative finding that a person was not guilty of a crime.[31] A guilty plea is equivalent to a conviction[32] in a plan under which the exclusion requires commission of a crime. Involuntary manslaughter can constitute the voluntary commission of a crime under a crime exclusion clause.[33]

However, nearly identical fact patterns can result in conflicting results, in part because of differences in state law and in part because of different rules of construction for ERISA and non-ERISA plans, as illustrated by comparing *Penn Mutual Life Ins. Co. v. Gibson*[34] with *Weisenhorn v. Transamerica Occidental Life Ins. Co.*[35]

In *Penn Mutual*, the decedent, legally intoxicated, crashed into the rear end of a pickup truck stopped at a red light, causing a four car pile-up that resulted in an injury to one Houck, the driver of one of the vehicles involved. The policy excluded coverage "if death results directly or indirectly from the commission by the insured of an assault or felony."[36]

The court viewed the central issue in the case as one of causation, in holding that the insured's death was not caused by the commission

of a felony (drunken driving causing injury), but rather from the commission of a misdemeanor (drunken driving). The court explained that "this must . . . be viewed in light of what happened to the deceased and not what happened to Houck. As to the insured, the event that caused his death was his collision with another automobile that was precipitated by his wrongful (but not felonious) acts of driving while intoxicated and operating his vehicle in a reckless manner. The fact that Houck was also injured is not what caused [the insured's] death. *A fortiori* the death was not the result of a felony under the statute. And, this was a risk not excluded by the . . . provision of the policy."[37]

The district court in *Weisenhorn* found the decision in *Penn Mutual* intriguing, but not persuasive in the ERISA context.

In *Weisenhorn*, the decedent, legally intoxicated, lost control of her vehicle and was killed when she crashed into an ongoing pickup truck. A passenger in her car was seriously injured in the crash. The accidental death and dismemberment policy under which she was covered at the time of her death provided that no benefits will be paid if the loss results from your commission of or attempt to commit an assault or felony.

Under Florida law, at the time or her death,[38] driving while intoxicated was a misdemeanor, and causing serious bodily injury to another while driving while intoxicated is a felony. The district court explained why in its view the analysis in *Penn Mutual* was unsatisfactory.

The argument isolates the individual elements of felonious drunk driving and misdemeanor drunk driving. It presumes that if each element is present for both categories of drunk driving, and the insured would have died without the additional element turning misdemeanor into felonious drunk driving, then the lesser included offense should characterize the decedent's conduct. By isolating the individual elements, however, the argument misconceives the totality of the circumstances that constitutes the conduct as a whole. And by presuming that the lesser offense should determine the outcome of contract construction, the argument relies on state law principles of interpretation that are inappropriate in this ERISA case.

It is the decedent's total conduct that determines the nature of the offense committed. Under the totality of the circumstances, her actual conduct was felonious. Her conduct constituted the kind of drunk driving that the Florida legislature had determined to be a felony, not a misdemeanor. It was this conduct that caused the accident including her death.[39]

The district court further indicated that cases such as *Penn Mutual* "rely upon state law rules of construction such as their contra-insurer rule and the reasonable expectations doctrine.

While this approach may be appropriate in those circumstances, here the policy is governed by ERISA and must be interpreted

according to principles appropriate under ERISA. The state law presumptions, which incline toward finding coverage, do not apply here."[40]

NOTES

1. An act may be illegal even if not criminal. *Celardo v. GNY Automobile Dealers Health and Welfare Trust*, 318 F. 3d 142 (2d Cir. 2002).

2. The purpose of exclusionary clauses is "to prevent claimants from passing the costs of illegal behavior on to other policy holders." *Harrison v. Unum Life Ins. Co.* 2005 WL 827070 (D.N.H. April 11, 2005). *See, also, Saint Anthony Medical Center v. Swedish American Group Health Bd. Trust*, 901 F. 2d 1369 (7th Cir. 1990) ("a health insurance plan . . . need not draw down from assets contributed by the provident many to shift the cost of self destructive behavior.").

3. Under ERISA, while a plan participant has the burden of establishing entitlement to a benefit, once a participant satisfies that burden, the plan administrator has the burden of establishing an exclusion applies; *Locklear v. Sun Life Assurance Co.*, 2015 US Dist. LEXIS 57276 (M.D. Pa. May 1, 2015); *Caffey v. Unum Life Ins. Co.*, 302 F. 3d 576 (6th Cir. 2000); *McCatha v National City Corp.*, 419 F. 3d 437, 443 (6th Cir. 2005); *Critchlow v. First Unum Life Ins. Co. of America*, 378 F. 3d 246, 257 (2d Cir. 2004); *Pitman v. Blue Cross Blue Shield of Oklahoma*, 217 F. 3d 1291, 1298 (10th Cir. 2000); *Diaz v. Prudential Ins. Co. of America*, 499 F. 3d 640, 643 (7th Cir. 2007); *Smathers v. MultiTool, Inc./Multi Plastics Inc. Employee Health and Welfare Plan*, 298 F. 3d 191,200 (3d Cir. 2002); *Horton v. Reliance Standard Life Insurance Co.*, 141 F. 3d 1038 (11th Cir. 1998). Exclusionary clauses are generally narrowly construed. *Frerking v. Blue Cross Blue Shield of Kansas*, 760 F. Supp. 877 (D. Kan. 1991) (collecting cases).

4. *United States v. Stitt*, 139 S. Ct. 399, 405 (2018) (discussing burglary in the context of the Armed Career Criminal Act and stating that "the term burglary, like the word crime itself, is ambiguous.").

5. *American Family Life Insurance v. Bilyeu*, 921 F. 22 87, 89-90 (6th Cir. 1990) ("reading that term [crime] in an insurance policy, the insured is more likely to understand it to mean burglary, armed robbery, or murder rather than drunk driving."). *Cf. Stamp v. Metropolitan Life Ins. Co.,* 466 F. Supp. 2d 422, 429 (D. R.I. 2006) (the term "serious crime" is ambiguous.).

6. *Reiling v. Sun Life Insurance Company*, 66 F. Supp. 3d 1361 (D. Kan., 2014) ("A crime broadly construed might include certain traffic violations, but construed narrowly might refer only to violent acts directed against third persons"); *Bekos v. Provident Health Plan*, 334 F. Supp. 2d 1248 (D. Oregon 2004); *Bates v. Crown Life Insurance Company,* 1987 WL 862369 (S.D. Ohio, March 31, 1987).

7. *See, e.g., Caldwell v. Unum Life*, 786 Fed. Appx. 816 (10th Cir. 2019) ("The term crime is not ambiguous. Although there are certainly varying degrees of crime . . . reasonable persons understand the term to mean a violation of law.") On appeal, the court of appeals noted that the district court decision was made before the Supreme Court decision in *United States v. Stitt*, *supra,* n. 4, and would be reluctant to uphold the district court decision on that basis. It found other support in the record, however, to affirm the district court decision.

8. *Redux Ltd. v. Commercial Union Ins Co.,* 1995 WL 88251 (D. Kan. February 7, 1995) (A crime is defined as commission of an act that is forbidden or the omission of a duty that is required by law or can generally refer to wrongdoing); *United States v. Grier*, 475 F. 3d 556, 562 (3d Cir. 2007) (Crime is conduct that is punishable by the state. Crime is punishable by the state when it exposes the individual to new or additional penalties); *Bohner v. Burwell*, 2016 WL 8716339 (E.D. Pa. December 2, 2016), all cited in *Oomrigar v. Unum Life*, 2017 WL 3913277, fn. 42 (D. Utah Sept. 6, 2017).

9. In *Caldwell v Unum Life*, *supra* n.7 the district court commented that "courts routinely look to dictionaries in determining the common and ordinary meaning of an undefined term." *See, also, Fruitt v. Astrue*, 604 F. 3d.1217 (10th Cir. 2010). In *Caldwell*, the district court cited Black's Law Dictionary, 10th ed., 2014 ("An act that the law makes punishable"); Black's Law Dictionary, 6th ed., 1991 (A positive or negative act in violation of penal law); and Merriam Webster (An illegal act for which someone can be punished by the government). Similarly, in *Oomrigar v. UnumLife*, *supra* n. 8, the district court relied on a fuller definition from Merriam Webster ("An illegal act for which someone can be punished by the government; an activity that is against the law; illegal acts in general."). The Tenth Circuit is not the only circuit that has relied on dictionaries to determine the "plain meaning" of a text. *See, e.g., Harrison v. Unum Life Ins. Co.*, *supra* n. 2 (collecting First Circuit cases relying on dictionary definitions to interpret a contract). In *Littlefield v. Arecda, Ins.*, 392 F. 3d 1 (1st Cir. 2004), the U.S. Court of Appeals for the First Circuit cited The American Heritage Dictionary of the English Language, which defined "criminal" as "[o]f, involving, or having the nature of a crime," and in turn defining "crime" as "[a]n act committed or omitted in violation of a law forbidding or commanding it and for which punishment is imposed upon conviction."

It has long been recognized that there are limitations associated with the dictionary approach to contract interpretation. *See Bock v. Computer Associates, International*, 257 F. 3d 700 (7th Cir. 2001) ("some authorities have questioned the efficacy of recourse, in many cases, to dictionaries," citing Farnsworth on Contracts, Section 7.10 at 275 (2d ed., 1998). As Judge Learned Hand stated in *Cabell v. Markham*, 148 F. 2d 737,739 (2d. Cir. 1945), "It is one of the surest signs of a mature and developed jurisprudence not to make a fortress out of the dictionary," and more generally "the dictionary approach to contract interpretation has been severely criticized." *See* Carlton J. Snow, "Contract Interpretation: The Plain Meaning in Labor Arbitration," 55 Fordham Law Review 68 (1987). One problem with dictionary definitions is that they are inherently acontextual. They focus on individual words devoid of the meaning created by the words or sentence around them. Philip Rubin, "War of the Words: How Courts Can Use Dictionaries in Accordance with Textualist Principles," 60 Duke Law Journal 167 (2010) and Rickie Sonpol, Note, "Old Dictionaries and New Textualists," 71 Fordham Law Rev. 2177 (2003). More generally, "scholars have identified several distinct and important problems regarding the use of dictionaries in legal reasoning. The problems include arbitrary and even broad-based selection of dictionaries by judges; lack of determination as to the qualifications of a particular dictionary; and failure to account for context when using a dictionary to define a single term."). Rubin, *supra,* at 169-170. *See, also,* Craig Hoffman, "Parse the Sentence First: Curbing the Urge to Resort to the Dictionary When Interpreting Legal Texts," 6 NYU Legislation and Public Policy 401 (2000). Despite these academic criticisms, courts continue to rely on dictionary definitions, as evidenced by the Supreme Court's decision In *Intel Corp. Investment Policy Committee v. Sulyma*, 589 U.S. ___ (2020).

10. *Tourdot v. Rockford Health Plan*, 439 F. 3d 351, 364 (7th Cir. 2006); *Sisters of the Third Order of St. Francis v. Swedish American Group Health Plan Trust*, 901 F. 2d 1369, 1372 (7th Cir. 1990); *Le Cates v. Blue Cross of Idaho*, 2016 WL 4974950 (E.D. Idaho, September 16, 2016).

11. *Bekos. v. Providence Health Plan*, *supra* n. 6 at 1248, 1256 (D. Or. 2004). The court found the phrase "other illegal act," when read in the context of the plan as a whole, ambiguous because it did not specify the level of offense and did not specify whether any official action, such as a citation, was required to trigger its application. Further, the court held that a reasonable person could read the phrase as requiring a conviction by a governmental authority to trigger the exclusion, although this latter point is clearly in the minority. *Cf. Kitchen v. Kosciusko Community Hospital Employee Benefit Plan*, 2000 WL 33173806 (N.D. Ind. September 14, 2000); *Jones v. Channel Shipyard & Co.*, 2001 WL 1490915 (E.D. La. November 20, 2001); and *Pando v. Prudential Insurance Co. of America*, 524 F. Supp.2d 848 (W.D. Texas. 2007).

12. If the criminal exclusion is triggered by a felony, then the line drawn by state legislatures as to what constitutes a felony is determinative. *Weisenhorn v. TransAmerica Occidental Life Insurance Co.*, 769 F. Supp. 302, 306 (D. Minn. 1991).

13. *Locklear v. Sun Life Assurance Company*, 2015 US Dist. LEXIS 57276 (M.D. Pa. May 1, 2015). *See In the Interest of Golden,* 365 A. 3d 157, 158-159 (Pa. Super. 1976) ("The definition of a crime is embodied in the Crimes Code itself. The code expressly tells that "An offense defined by this title for which a sentence of death or imprisonment is authorized constitutes a crime."). *See, also, Slusnar v. Sestli*, 2013 WL 5774019 (W.D. Pa. October 24,2013) (Under Pennsylvania law, a traffic violation punishable by a $200 fine is not a crime.); *Commonwealth v. Matty*, 619 A. 2d 1383, 1386 (Pa. Super. 1993); *Lewis v. Commonwealth*, 459 A. 2d 1339, 1341 (Pa. Cmwlth. Ct. 1983); *Commonwealth v. Field*, 490 Pa. 519, 524 (1980) ("All true crimes [are defined as] an offense [that] carries with it a jail sentence.").

14. *Commonwealth v. Church*, 513 Pa. 534, 544 (1987).

15. *See, also, O'Neal v. Life Insurance Company of North America*, 10 F. Supp. 3d 1132 (D. Mont. 2014) (Insurer could not satisfy its burden of establishing by a preponderance of evidence that decedent had violated Montana criminal law). *Cf. Mayor v. Minnesota Life Insurance Co.*, 2012 WL 12865015 (W.D. Ohio 2012) (No evidence in the record that elevated blood count led to the accident).

16. *Le Cates v. Blue Cross of Idaho*, *supra* n. 10.

17. Idaho Code Section 18-8004(4).

18. Illegal intoxication under Idaho law is defined as a blood alcohol concentration of .08 grams of alcohol per 100 centimeters of whole blood. Further, the sample must contain at least 10 milligrams of sodium fluoride per cubic centimeter of blood plus an appropriate anticoagulant. Additionally, an approved laboratory must test the blood. *Le Cates v. Blue Cross of Idaho*, *supra*, n. 10.

19. *Harrison v. Unum Life Insurance Company*, *supra*, n. 2.

20. *Lampen v. Albert Trostel & Son Employee Welfare Plan*, 832 F. Supp. 1287, 1292 (E.D. Wisc. 1993).

21. *Watkins v. M Class Mining Health Protection Plan*, 2020 Ill. App. (5th) 15103. The reasonable person of average intelligence and experience which is intended to be an objective standard of contract interpretation is found in *Sellers v. Zurich America*, Ins. Co., 627 F. 3d 632 (7th Cir. 2010) and *Hodges v. Life Insurance Company of North America*, 920 F. 3d 669, 680 (10th Cir. 2019).

22. *Bekos v. Providence Health Plan*, *supra* n.6.

23. *Id.* at 1257.

24. *Kimber v. Thiekol Corp.*, 196 F. 3d 1092, 1100 (10th Cir. 1998).

25. 486 Fed. Appx 398 (5th Cir. 2012).

26. *Celardo v. GNY Automobile Dealers Health and Welfare Trust, supra* n.1.

27. *Shelby County Health Care Corp v. Majestic Star Casino,* 581 F. 3d 355 (6th Cir. 2009).

28. *Reiling v. Sun Life Assurance Company*, *supra* n. 5.

29. *Fought v. Unum Life Insurance Company*, 379 F. 3d 997 (10th Cir. 2004); *Kellogg v. Metropolitan Life Ins. Co.*, 549 F. 3d 818 (10th Cir. 2008).

30. *Allstate Insurance Co. v. Burigh*, 120 F. 3d 834 (8th Cir. 1997); *North America Casualty & Insurance Company v. William D.*, 743 F. Supp. 1361 (N.D. Cal. 1990); *Carter v. Sun Life Assurance C*o., 2006 WL 1328821 (E.D. La. May 11, 2006); *Canada Life Assurance Co. v. Pendleton Memorial Methodist Hospital*, 1999 WL 243653 (E.D. La. 1999).

31. *Jones v. La. Laborers Health and Welfare Fund*, 29 F. 3d 1029 (5th Cir. 1994.); *Reed v. Sun Life Assurance Co.* of Canada, 268 Fed. Appx. 369,372 (5th Cir. 2008); *Redeaux v. Southern Natl. Life Ins. Co.*, 424 Fed. Appx. 271 (5th Cir. 2011); *SGI/Argis Employee Benefit Trust Plan v. The Canada Life Assurance Company*, 151 F. Supp. 2d 1044 (E.D. Ark. 2001); *Canada Life Assurance Co. v. Pendleton Memorial Methodist Hospital*, 1999 WL 243653 (E.D. La. April 21, 1999); *St. Louis University Hospital v. Glass*, 864 F. Supp. 110 (E.D. Mo. 1994); *Berg v. Board of Trustees, Local 705 International Brotherhood of Teamsters Health & Welfare Fund*, 726 F. 2d. 68, 70 (7th Cir. 1984) (felony does not depend on whether there is a conviction, it depends on the commission of an act.); *Steele v. Life Insurance Company of North America*, 2006 WL 44310 (C.D. Ill. January 9, 2006) (irrelevant for purpose of a criminal exclusion clause that there would be no prosecution). *Cf. Tourdot v. Rockford Health Plans*, 2005 WL 372256 (W.D. Wisc. 2005) ("illegal acts are illegal acts, whether or not they result in convictions"); and *Kitchen v. Kosciusko Community Hospital Employee Benefit Plan*, 2000 WL 33173806 (N.D. Ill. 2000) (not relevant that if participant had not been comatose she might have been acquitted of a crime).

32. *Chisholm v. Guinness America Plan*, 2002 WL 924855 (N.D. Ill .May 7, 2002). *See, also, Sosinski v. Unum Life Insurance Co.*, 15 F. Supp. 3d 723 (E.D. Mich. 2014) (finding of guilty, whether by plea or conviction, constitutes a crime under the plan).

33. *Baker v. Provident Life & Accident Ins. Co.*, 171 F. 3d 939 (4th Cir. 1999).

34. *Penn Mutual Life Ins. Co. v. Gibson*, 160 Colo. 402, 418 P. 2d. 50 (1966).

35. *Weisenhorn v. Transamerica Occidental Life Ins. Co., supra* n. 12 at 302.

36. *Penn Mutual Life Ins. Co. v. Gibson*, *supra* n.34.

37. *Id.* at 52.

38. At the time that the policy was entered into, driving while intoxicated and causing serious injury to another person was a misdemeanor.

39. *Weisenhorn v. TransAmerica Occidental Life Insurance Co.*, *supra* n. 12 at 305-306.

40. *Id.* at 306.