UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

RICK CALDWELL; SONYA CALDWELL, Plaintiffs-Appellants, v. UNUM LIFE INSURANCE COMPANY OF AMERICA, Defendant-Appellee.	No. 17-8078 (D.C. No. 2:16-CV-00236-SWS) (D. Wyo.)

ORDER AND JUDGMENT*

(Filed Sep. 18, 2019)

Before **HARTZ**, **PHILLIPS**, and **EID**, Circuit Judges.

Plaintiffs appeal the decision of the district court in *Caldwell v. UNUM Life Ins. Co. of Am.*, 271 F. Supp. 3d 1252 (D. Wyo. 2017), which rejected their claim under the federal Employee Retirement Income Security Act (ERISA), 29 U.S.C. § 1001 et seq., that Defendant had improperly denied benefits for accidental death and dismemberment arising from the death of

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* This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. It may be cited, however, for its persuasive value consistent with Fed. R. App. P. 32.1 and 10th Cir. R. 32.1.

Plaintiffs' son when he was thrown from the vehicle he was driving at 74 mph on an unpaved road. Defendant relied on an exclusion in its policy for losses "caused by, contributed to by, or resulting from . . . an attempt to commit or commission of a crime." Aplt. App., Vol. 6 at 902–03. We affirm the district court for essentially the reasons set forth in its opinion. We add only two comments.

First, the district court wrote, "The term 'crime' is not ambiguous." 271 F. Supp. 3d at 1261. A little over a year later, however, the Supreme Court said, "The word 'burglary,' like the word 'crime' itself, is ambiguous." *United States v. Stitt*, 139 S. Ct. 399, 405 (2018). We would therefore be reluctant to rely on the unambiguity of the term *crime.* But the district court did not so rely. As that court noted, "'A decision denying benefits based on an interpretation of an ERISA provision survives arbitrary and capricious review so long as the interpretation is reasonable.'" 271 F. Supp. 3d at 1263 (quoting *Flinders v. Workforce Stabilization Plan of Phillips Petroleum Co.*, 491 F.3d 1180, 1193 (10th Cir. 2007), *abrogated on other grounds by Metro. Life Ins. Co. v. Glenn*, 544 U.S. 105 (2008)). And the district court's ultimate decision was that Defendant's interpretation of its policy was reasonable.

Second, Plaintiffs' best argument is that Defendant's claims manual would treat the speeding in this case as a traffic violation not encompassed by the crime exclusion. The manual states that the exclusion "was not intended to apply to activities which would *generally* be classified as traffic violations," although it

also says that driving while intoxicated would "generally" be treated as a crime under the policy. Aplt. App., Vol. 12 at 1784 (emphasis added). But we agree with the district court that the policy manual does not purport to be definitive and has substantial play in the joints. *See* 271 F. Supp. 3d at 1263–64. At the end of its discussion of the crime exclusion, the manual states in bold type: "Reminder: Each claim is unique and must be evaluated on its own merits. The actual policy governing the claim must be referenced." Aplt. App., Vol. 12 at 1784. And this point is emphasized a few pages later, where the manual states that it "is not intended to offer a prescribed answer to each claim situation. Rather, such answers must be arrived at based on the specific and particular facts of the claim. Each claim is unique and must be evaluated on its own merits." *Id.* at 1789. In this context it is reasonable to ask whether the decedent's operation of his vehicle was more like (1) driving while intoxicated, which is apparently considered a species of traffic violation in Wyoming, *see Whitfield v. State*, 781 P.2d 913, 915 (Wyo. 1989) (the defendant "had accumulated numerous traffic violations which included eight speeding citations and one charge of driving under the influence"), or (2) failing to signal a lane change. More importantly, however, judicial reliance on a claims manual in this context is problematic when there is no evidence that the manual was offered to, or even available to, an insured or otherwise used in advertising or closing a sale. *Cf. Brown v. J.B. Hunt Transp. Servs., Inc.*, 586 F.3d 1079, 1088–89 (8th Cir. 2009) (plan administrators are not required to disclose claims manuals to plan participants under

ERISA; "the district court correctly held claims manuals are not the 'other instruments' mentioned in [29 U.S.C.] § 1024(b)(4)"). If claims manuals are, in essence, treated as part of the insurance contract, they will be written with the technical precision so beloved by lawyers and defeat the purpose of providing general guidance to claims agents. We doubt that the interests of insureds would benefit from that process.

Entered for the Court

Harris L Hartz
Circuit Judge

PHILLIPS, J., dissenting:

Is speeding a crime? UNUM Life Insurance Company of America (Unum) determined that it is—at least within the meaning of William Caldwell's insurance plan, which exempts from accidental-death-and-dismemberment coverage any "losses caused by, contributed to by, or resulting from" the actual or attempted "commission of a crime," Appellants' App. vol. 6 at 902–03, and at least when the speeding happens in Wyoming, where it is wholesale incorporated as a misdemeanor, *see* Wyo. Stat. Ann. §§ 31-5-301(b), 31-5-1201(a) (West 2018). But Rick and Sonya Caldwell (William's parents and the beneficiaries of his insurance plan) disagree with this view. In this appeal, the Caldwells argue that Unum's interpretation of the "crime" exclusion—and its resulting decision to deny their claim for accidental-death benefits—runs

counter to the Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. §§ 1001–1461.

William Caldwell's insurance plan reserves to Unum discretion to interpret the plan and to determine his eligibility for benefits. Under the Supreme Court's ERISA jurisprudence, this prevents us from disturbing Unum's interpretation of the "crime" exclusion unless that interpretation is arbitrary or capricious. Apart from this, we must consider whether disputed policy language is ambiguous, and, if it is, we must consider extrinsic evidence of the parties' intent. Here, I conclude that "crime" is ambiguous, and turn to Unum's intended meaning of "crime" as stated in its informal policy manual. The informal policy manual says that the crime exclusion is not intended to apply to offenses generally classified as traffic offenses. And under Wyoming law, speeding is considered a traffic violation. In view of this, I would hold that Unum acted arbitrarily and capriciously in unreasonably denying accidental-death benefits under the crime exclusion. On that basis, I would reverse the district court's judgment in Unum's favor.

BACKGROUND

In June 2015, William Caldwell, an employee of Sinclair Services Company, was speeding on Carbon County Road 605 N toward Rawlins, Wyoming. He was driving so fast that, as he navigated an S-shaped bend in the packed-dirt-and-gravel road, his car began fishtailing, and he lost control. He managed to straighten

the car after the first turn in the S-bend, but not the second. As he oversteered, the car yawed, then skidded off the road and over a ditch at a 45-degree angle, hitting an embankment. The collision vaulted the car 30 feet into the air. After landing, the car slid more than 200 feet before coming to rest on its left side. William, who had not been wearing a seatbelt, was ejected—probably out the driver's-side window as the car rolled—and he died at the scene. The highway-patrol trooper who investigated the accident estimated that William had been traveling 74 miles per hour right before the crash—well over a 35-mile-per-hour posted speed limit and even the 55-mile-per-hour default speed limit for unpaved roads. *See* Wyo. Stat. Ann. § 31-5-301(b)(iv) (setting the maximum lawful speed "where the roadway is unpaved" at 55 miles per hour, and mandating that "no person shall drive . . . in excess of maximum limits").

Acting as his beneficiaries, William's parents submitted accidental-death and life-insurance claims to Unum, which administered the ERISA-governed group-insurance plan that Sinclair provided its employees.[1] Unum granted the Caldwells' life-insurance claim, paying them $247,351.90 in benefits. But Unum denied the Caldwells' accidental-death claim, citing the accidental-death-and-dismemberment plan's exclusion

[1] The plan declares that Sinclair is "the Plan Administrator and named fiduciary." Appellants' App. vol. 6 at 913. But the plan also authorizes Sinclair to delegate its fiduciary duties. Consistent with that delegation (and as elaborated below), the plan reserves to Unum discretionary authority to determine eligibility for claims and to construe the plan's terms.

for any "accidental losses caused by, contributed to by, or resulting from[ ] . . . an attempt to commit or commission of a crime." Appellants' App. vol. 6 at 902–03. Unum determined that because Wyoming law treats speeding as a misdemeanor, *see* Wyo. Stat. Ann. § 31-5-1201(a), William had committed a crime within the plan's meaning. And because William's speeding had caused his fatal crash, Unum determined that the plan prevented the Caldwells from recovering accidental-death benefits.[2]

In September 2016, after exhausting Unum's internal appeals process, the Caldwells filed an ERISA action against Unum, alleging that the plan entitled them to accidental-death benefits. *See* 29 U.S.C.

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[2] In the facts section of their opening brief, the Caldwells contradict the district court's and the highway patrol's findings to assert that "[t]here was no speed limit sign posted for the section of road where Will died" and that "he never passed a 35 MPH sign before the accident." Appellants' Opening Br. at 8 n.8. But earlier, during the district-court proceedings, the Caldwells submitted a photograph of a 35-mile-per-hour-speed-limit sign, presumably taken somewhere along William's route. Wyoming law allows "local authorities" (such as counties) to "determine the proper maximum speed" for roads in their jurisdiction, "which may be greater or less than the maximum speed" that the law otherwise specifies. Wyo. Stat. Ann. § 31-5-303(b) (West 2018). This means that, if the Caldwells' photograph is accurate—if the Carbon County commissioners posted a 35-mile-per-hour limit on the dirt road where William died—then William was traveling 39 miles per hour over the maximum lawful speed. Yet even if the Caldwells are correct that the commissioners never altered Wyoming's 55-mile-per-hour default unpaved-road speed limit, William still exceeded that limit by 19 miles per hour. *See* Wyo. Stat. Ann. § 31-5-301(b)(iv). Whether by 19 or 39 miles per hour, William was speeding.

§ 1132(a)(3)(B)(ii) (entitling the beneficiaries of an ERISA-governed employee-benefit plan to enforce the plan's terms in court).

Then, in July 2017, Unum and the Caldwells each moved for summary judgment. Two months later, the district court issued a written order resolving both their motions. As both sides agreed, the court noted, the plan gave Unum discretion to interpret its terms,[3] so the deferential, arbitrary-and-capricious standard of review (sometimes called *Firestone* deference, after the eponymous Supreme Court case) applied to Unum's denial of the Caldwells' accidental-death claim.

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[3] In the "Additional Summary Plan Description Information," the plan states:

> The Plan, acting through the Plan Administrator [Sinclair], delegates to Unum . . . discretionary authority to make benefit determinations under the Plan. . . . Benefit determinations include determining eligibility for benefits and the amount of any benefits, resolving factual disputes, and interpreting and enforcing the provisions of the Plan. All benefit determinations must be reasonable and based on the terms of the Plan and the facts and circumstances of each claim.

Appellants' App. vol. 6 at 920. The plan's "Certificate Section" further states:

> Benefits under this plan will be paid only if Unum as the claims administrator (or its designee) decides in its discretion that you are entitled to them. Unum also has discretion to determine eligibility for benefits and to interpret the terms and conditions of the benefit plan. This reservation of discretion by Unum does not prohibit or prevent you from seeking judicial review in federal or state court of Unum's claims determinations.

Id. at 879.

See Firestone Tire & Rubber Co. v. Bruch, 489 U.S. 101, 115 (1989) (holding that when an employee-benefit plan gives the plan administrator "fiduciary discretionary authority to determine eligibility for benefits or to construe the terms of the plan," ERISA requires judicial deference to the administrator's decisions. From this, the court framed the question before it as "whether Unum's interpretation of 'crime' to include speeding for purposes of the Crime Exclusion was reasonable and made in good faith." *Caldwell v. Unum Life Ins. Co. of Am.*, 271 F. Supp. 3d 1252, 1261 (D. Wyo. 2017). The court answered yes—concluding that Unum's interpretation fell "somewhere on the continuum of reasonableness." *Id.* at 1264 (quoting *Joseph F. v. Sinclair Servs. Co.*, 158 F. Supp. 3d 1239, 1254 (D. Utah 2016)). It thus upheld Unum's denial of the Caldwells' accidental-death claim, granted Unum's summary-judgment motion, and denied the Caldwells' competing motion. That same day, the court entered judgment for Unum and dismissed the Caldwells' case.

The Caldwells appealed.

DISCUSSION

The Caldwells dispute the summary-judgment ruling by contesting the district court's conclusion that, considering the administrative record and the language of the accidental-death-and-dismemberment

plan, Unum's interpretation of the "crime" exclusion was reasonable.[4]

I. Judicial Review of ERISA Claims

First, I describe the two-layered standard of review governing our analysis: one standard applicable to the district court's summary-judgment ruling, another applicable to Unum's decision to deny the Caldwells' accidental-death-benefits claim. Next, I apply that layered standard to determine whether the district court reversibly erred by ruling in Unum's favor.

A. Standard of Review

In an ERISA case, we review the district court's summary-judgment ruling de novo, applying the same standards that a district court would. *See LaAsmar v. Phelps Dodge Corp. Life, Accidental Death & Dismemberment & Dependent Life Ins. Plan*, 605 F.3d 789, 795 (10th Cir. 2010). In this case, the Caldwells and Unum both moved for summary judgment on the Caldwells' ERISA claim, thereby stipulating that the Caldwells' entitlement to benefits depends solely on the facts in the administrative record and that no trial is necessary. *See id.* at 796. Their motions thus present this court—as they did the district court—with "a vehicle

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[4] We do not address the Caldwells' general challenge to *Firestone* deference, in which they argue (among other things) that this level of deference has "eviscerated" ERISA's purpose and its underlying insurance- and trust-law tenets. Appellants' Reply Br. at 1.

for deciding the case." *Id.* (quoting *Bard v. Boston Shipping Ass'n*, 471 F.3d 229, 235 (1st Cir. 2006)).

Next, we must determine (as the district court did) what standard of review applies to the case. Well-settled law instructs that our default standard of review is de novo when the beneficiaries of an ERISA-governed employee-benefit plan challenge a denial of benefits but that we must switch to the more deferential arbitrary-and-capricious standard if "the benefit plan gives the administrator or fiduciary discretionary authority to determine eligibility for benefits or to construe the terms of the plan." *Firestone*, 489 U.S. at 115.

Here, the policy grants Unum "discretion to determine eligibility for benefits and to interpret the terms and conditions of the benefit plan." Appellants' App. vol. 6 at 879. This language triggers arbitrary-and-capricious review, because any reasonable reader would understand that Unum had thereby reserved discretion over the specific decision at issue here: whether speeding is a "crime" subject to the plan's coverage exclusion. *See Cardoza v. United of Omaha Life Ins. Co.*, 708 F.3d 1196, 1201 (10th Cir. 2013) (concluding that both parties agree to arbitrary-and-capricious review where the policies grant insurance company "discretion and final authority to construe and interpret the terms of the policy"); *Nance v. Sun Life Assurance Co. of Canada*, 294 F.3d 1263, 1266 (10th Cir. 2002) (emphasizing the importance of "focus[ing] precisely on what decision is at issue, because a plan may grant the administrator discretion to make some decisions but not others"); *see also Caldwell*, 271 F. Supp. 3d

at 1258 (finding that "[t]he parties agree[d]" to this standard). Under the arbitrary-and-capricious standard, we may ask only whether Unum's interpretation of the plan was "reasonable and made in good faith." *LaAsmar*, 605 F.3d at 796 (quoting *Kellogg v. Metro. Life Ins. Co.*, 549 F.3d 818, 825–26 (10th Cir. 2008)). Factors indicating "an arbitrary and capricious denial of benefits include lack of substantial evidence, mistake of law, bad faith, and conflict of interest by the fiduciary." *Cardoza*, 708 F.3d at 1201–02 (quoting *Graham v. Hartford Life & Accident Ins. Co.*, 589 F.3d 1345, 1357 (10th Cir. 2009)).

Firestone deference applies even when, as here, the same entity (*i.e.*, Unum) both pays benefits (as the insurance company) and decides claims (as the plan administrator)—in other words, when an administrator's (or employer's) dual roles create a structural conflict of interest. *See Metro. Life Ins. Co. v. Glenn*, 554 U.S. 105, 115 (2008).[5] Yet, though a structural

[5] Many of this court's pre-*Glenn* decisions held that by proving that a plan administrator operated under "an inherent conflict of interest," an ERISA plaintiff could shift to the administrator the burden of establishing that its denial of benefits was *not* arbitrary or capricious. *E.g.*, *Fought v. UNUM Life Ins. Co. of Am.*, 379 F.3d 997, 1006 (10th Cir. 2004) (per curiam), *abrogated in part as recognized in Holcomb v. Unum Life Ins. Co. of Am.*, 578 F.3d 1187, 1192–93 (10th Cir. 2009); *Flinders v. Workforce Stabilization Plan of Phillips Petroleum Co.*, 491 F.3d 1180, 1189–90 (10th Cir. 2007), *abrogated in part as recognized in Spradley v. Owens-Illinois Hourly Emps. Welfare Benefit Plan*, 686 F.3d 1135, 1141 (10th Cir. 2012). But in *Glenn*, the Court rejected this approach, reasoning that it was neither "necessary" nor "desirable for courts to create special burden-of-proof rules, . . . focused narrowly upon the evaluator/payor conflict." 554 U.S. at 116. After

evaluator-payor conflict doesn't change the applicable *standard* of review, we still must consider it as "one factor among many" in evaluating whether an administrator acted arbitrarily or capriciously. *Id.* at 116. Under this approach, the conflict's weight depends on its seriousness—which depends, in turn, on the case's specifics. *Glenn*, 554 U.S. at 117; *accord Holcomb*, 578 F.3d at 1193. If circumstances suggest that the conflict "affected the benefits decision," then the conflict weighs more heavily. *Glenn*, 554 U.S. at 117. But if the administrator took "active steps to reduce potential bias and to promote accuracy"—like "walling off claims administrators from those interested in firm finances" or "imposing management checks that penalize inaccurate decisionmaking irrespective of whom the inaccuracy benefits"—then the conflict "should prove less important (perhaps to the vanishing point)." *Id.* Tenth Circuit cases have typically described this as a "sliding scale approach," under which we will decrease our deference to the administrator "in proportion to the seriousness of the conflict." *Weber v. GE Grp. Life Assurance Co.*, 541 F.3d 1002, 1010 (10th Cir. 2008) (quoting *Flinders*, 491 F.3d at 1190).

Here, Unum undoubtedly operated under a structural conflict of interest: paying claims reduces profits. We must weigh that conflict of interest in our

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Glenn, the burden remains on the plaintiff to prove that the administrator's decision was arbitrary or capricious. *See*, *e.g.*, *Doyle v. Liberty Life Assurance Co. of Boston*, 542 F.3d 1352, 1360 (11th Cir. 2008); *accord Crowe v Lucent Techs. Inc. Pension Plan*, No. Civ-04-1027-M, 2006 WL 2494565, at *2–3 (W.D. Okla. Aug. 25, 2006) (citing *Fought*, 379 F.3d at 1005–06).

arbitrary-and-capricious analysis, "allocating it more or less weight depending on its seriousness." *Murphy v. Deloitte & Touche Grp. Ins. Plan*, 619 F.3d 1151, 1162 (10th Cir. 2010) (citing *Glenn*, 554 U.S. at 115–18). But "[t]he seriousness of a conflict of interest is 'proportionate to the likelihood that the conflict affected the benefits decision.'" *Cardoza*, 708 F.3d at 1202 (quoting *Graham*, 589 F.3d at 1358). And here, I agree with the district court's assessment: Nothing in the administrative record indicates that the structural conflict motivated Unum's decision to deny the Caldwells' claim for accidental-death benefits. *See Caldwell*, 271 F. Supp. 3d at 1259.

This is not a case in which, for instance, the insurance company administrator "ha[d] a history of biased claims administration." *Glenn*, 554 U.S. at 117 (citing John H. Langbein, *Trust Law as Regulatory Law: The Unum/Provident Scandal & Judicial Review of Benefit Denials Under ERISA*, 101 Nw. U. L. Rev. 1315, 1317–21 (2007)); *see also Glenn*, 554 U.S. at 123 (Roberts, C.J., concurring) (giving the example of "a plan that gives 'a bonus for administrators who denied benefits to every 10th beneficiary'" (quoting *Pegram v. Herdrich*, 530 U.S. 211, 227 n.7 (2000))). To the contrary, Unum proffered evidence of the "active steps" that it took to minimize the structural conflict's impact and to promote accuracy. *Caldwell*, 271 F. Supp. 3d at 1260. Unum walled off claims handlers from finance personnel, and it encouraged accurate benefits determinations by penalizing claims handlers for both over- and underpayments. *Id.* at 1260–61.

In sum, I give little weight to Unum's structural conflict of interest, and I would not disturb its interpretation of the "crime" exclusion so long as that interpretation was reasonable. *See Conkright v. Frommert*, 559 U.S. 506, 521 (2010).

B. William Caldwell's Claim for Accidental-Death Benefits

Because we review de novo the district court's decision granting Unum summary judgment, we accord that court's analysis no deference, and we address anew whether Unum's interpretation of the "crime" exclusion was arbitrary or capricious, or whether its interpretation was reasonable and made in good faith. *See*, *e.g.*, *LaAsmar*, 605 F.3d at 795–96.

We interpret ERISA plans as we would any other contract: by looking to the language of the provision at issue—here, the "crime" exclusion—and first determining whether, read in context, it is ambiguous. *See Cardoza*, 708 F.3d at 1203 (citing *Kennedy v. Plan Adm'r for DuPont Sav. & Inv. Plan*, 555 U.S. 285, 299–302 (2009); and *Hickman v. GEM Ins. Co.*, 299 F.3d 1208, 1212 (10th Cir. 2002)). In assessing whether a provision is ambiguous, we give words their ordinary and common meaning, asking what a reasonable person in the beneficiaries' position would understand the words to mean. *Weber*, 541 F.3d at 1011. A provision is ambiguous if it is "reasonably susceptible to more than one meaning" or if its meaning is uncertain. *Scruggs v. ExxonMobil Pension Plan*, 585 F.3d 1356, 1362 (10th

Cir. 2009) (quoting *Miller v. Monumental Life Ins. Co.*, 502 F.3d 1245, 1250 (10th Cir. 2007)). If a provision is unambiguous, then we will construe it as a matter of law—any interpretation that differs from its ordinary meaning is unreasonable and, therefore, arbitrary and capricious. *Id.* If a provision is ambiguous, though, "then we 'must take a hard look and determine' whether [the plan administrator's] decision was arbitrary in light of its conflict of interest." *Id.* (quoting *Weber*, 541 F.3d at 1011).[6]

Thus, the primary issue here is whether the plan's "crime" exclusion unambiguously includes speeding. That exclusion states: "Your plan does not cover any accidental losses caused by, contributed to by, or resulting from[] . . . an attempt to commit or commission of a crime." Appellants' App. vol. 6 at 902–03. The plan doesn't further define "crime."

This provision is ambiguous regarding whether speeding counts as the "commission of a crime" because the word "crime" is susceptible to two reasonable—albeit contradictory—interpretations: one that covers speeding and one that excepts speeding. *See United States v. Stitt*, 139 S. Ct. 399, 405 (2018) (noting, in a case concerning the Armed Career Criminal Act, that "the word 'crime' itself[] is ambiguous"); *Am. Family*

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[6] The Caldwells assert that we should construe ambiguous terms against the plan's drafter (that is, against Unum). But because Unum has discretion to interpret the plan, and the arbitrary-and-capricious standard applies, "the doctrine of contra proferentem is inapplicable." *Kimber v. Thiokol Corp.*, 196 F.3d 1092, 1100 (10th Cir. 1999); *see also Miller*, 502 F.3d at 1253.

Life Assurance Co. v. Bilyeu, 921 F.2d 87, 89–90 (6th Cir. 1990) (per curiam) (affirming district court's conclusion that "the contractual language regarding commission of a crime" is ambiguous); *Stamp v. Metro. Life Ins.*, 466 F. Supp. 2d 422, 429 (D. R.I. 2006) (concluding that the term "serious crime" as used in an ERISA plan is ambiguous). On the one hand, as the district court observed, Wyoming law labels speeding a misdemeanor and defines misdemeanors as crimes. *See* Wyo. Stat. Ann. §§ 6-10-101 ("Crimes which may be punished by death or imprisonment for more than one (1) year are felonies. All other crimes are misdemeanors."), 31-5-301(b) & 31-5-1201(a)–(b) (labeling speeding a misdemeanor punishable by up to six months' imprisonment); *see also Caldwell*, 271 F. Supp. 3d at 1262. And speeding fits most dictionaries' definitions of "crime." *See id.* Black's Law Dictionary, for example, defines a "crime" as "[a]n act that the law makes punishable," *Crime*, Black's Law Dictionary (11th ed. 2019), while the Merriam-Webster Dictionary defines it as "an illegal act for which someone can be punished by the government," *Crime*, Merriam-Webster, www.merriam-webster.com/dictionary/crime (last visited July 17, 2019).

But on the other hand, a reasonable reader of the provision might separate traffic violations, including speeding, which Wyoming locates in the "Motor Vehicles" title (Title 31) of its code, from more serious offenses, such as those against people or property, which Wyoming locates in the "Crimes and Offenses" title

(Title 6) of its code—and might consider only the latter "crimes" subject to the coverage exclusion.

Addressing the ambiguous "crime" exclusion, the Caldwells turn to extrinsic evidence to shed light on Unum's intent in its crime exclusion. *See Miller*, 502 F.3d at 1253. And they contend that Unum's internal claims manual required it to adopt the narrower interpretation of "crime," an interpretation that exempts traffic violations, including speeding. The Caldwells note that, in guiding Unum's own application of coverage exclusions for "disabilities/losses arising out of criminal activity," the manual (among other things) advises the insurer's claims handlers to "consider the following":

- "Attempt to commit" or "commission" policy language was intended to exclude disabilities/losses which result from activity that would typically be classified as a crime (or felony, depending on policy language) under state or federal law.
- "Attempt to commit" or "commission" policy language was *not* intended to apply to activities which would generally be classified as *traffic violations*.
- We will generally exclude benefits on claims where a disability/loss results from the claimant's operating under the influence or driving while intoxicated since these offenses are typically classified as crimes (or felonies, depending on the policy language).

Appellants' App. vol. 12 at 1783–84 (emphases added).

I acknowledge that the "manual is not the Plan and cannot override the Plan terms." Appellee's Response Br. at 34 (citing *Wade v. Life Ins. Co. of N. Am.*, 271 F. Supp. 2d 307, 324 (D. Me. 2003) ("The contested manual is not part of the [Summary Plan Description] or other Plan documents. . . . Rather the manual is peripheral to any interpretation of the Plan.")). And as the plan itself states: "The summary plan description and the Summary of Benefits constitute the Plan. Benefit determinations are controlled exclusively by the Summary of Benefits, your certificate of coverage and the information contained in this document [Additional Summary Plan Description Information]." Appellants' App. vol. 6 at 913; *see also id.* at 856–78 ("Summary of Benefits"), 879–912 ("Certificate of Coverage"), 913–24 ("Additional Summary Plan Description Information").

Even so, we may rely on Unum's informal policy manual for help in determining the parties' intended meaning of an ambiguous policy term—here, "crime." The internal policy manual helps in determining whether Unum's interpretation of "crime" in denying the Caldwells' claim is reasonable and made in good faith (or instead arbitrary and capricious). *Cf. Fought*, 379 F.3d at 1003 (listing conformity with "any external standards" as one of several reasonableness indicators (quoting Kathryn J. Kennedy, *Judicial Standard of Review in ERISA Benefit Claim Cases*, 50 Am. U. L. Rev. 1083, 1135, 1172 (2001))).

Unum's internal policy manual shows that it did *not* intend "crime" to include traffic violations, except

for DUI offenses. And we know that Wyoming cases routinely describe speeding as a traffic violation. *See*, *e.g.*, *Klomliam v. State*, 2014 WY 1, ¶ 21, 315 P.3d 665, 670 (Wyo. 2014); *Hunnicutt-Carter v. State*, 2013 WY 103, ¶ 11, 308 P.3d 847, 851 (Wyo. 2013); *Formisano v. Gaston*, 2011 WY 8, ¶ 22, 246 P.3d 286, 292 (Wyo. 2011). Now Unum asks us to bless as reasonable its about-face in its treating William Caldwell's traffic violation (speeding) as a crime—and to ignore its expressed written intent not to do so. We should do neither. Instead, we should credit Unum's expressed intent in its internal policy manual not to treat a traffic violation (speeding in Wyoming) as a crime. I would hold that Unum's denial of the Caldwells' claim is unreasonable. *See Boyer v. Schneider Elec. Holdings, Inc. Life & Accident Plan*, 350 F. Supp. 3d 854, 861–66 (W.D. Mo. 2018) (reaching same result when considering the same Unum crime exclusion in a case where the car driver's death resulted from his speeding 80 m.p.h. through a 25 or 35 m.p.h. zone, while passing other automobiles in a no-passing zone).[7]

For all reasons given, I respectfully dissent.

[7] I note that Unum chose not to appeal this decision.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF WYOMING

RICK V. CALDWELL and SONYA S. CALDWELL, Plaintiffs, vs. UNUM LIFE INSURANCE COMPANY OF AMERICA, Defendant.	Case No. 2:16-CV-0236-SWS

ORDER ON CROSS MOTIONS FOR SUMMARY JUDGMENT

(Filed Sep. 21, 2017)

This matter comes before the Court on *Unum's Motion for Summary Judgment or in the Alternative Motion for Judgment on the Record* (ECF No. 54) and *Plaintiffs' Motion for Summary Judgment* (ECF No. 56). This case arises out of Plaintiffs' claim for accidental death benefits under a policy of group insurance Defendant Unum Life Insurance Company ("Unum") issued to Sinclair Services Company, the employer of Plaintiffs' late son, William Caldwell. Unum based its denial of benefits on a determination that speeding is a crime for purposes of a policy exclusion for a loss "caused by, contributed to by, or resulting from . . . an

attempt to commit or commission of a crime." Plaintiffs filed this ERISA action seeking review of Unum's determination. The Court, having reviewed the record and considered the parties' respective motions and opposition briefs, having heard oral argument of counsel and being otherwise fully advised, FINDS and ORDERS that Defendant Unum's motion should be granted and Plaintiff's motion denied.

BACKGROUND

On June 28, 2015, Plaintiffs' son, William Caldwell, was traveling approximately 74 mph on a dirt roadway in Carbon County, Wyoming where the posted speed limit is 35 mph but the "legal speed limit is 55 mph." (WHP Investigator's Traffic Crash Report, R. at 103; Amended WHP Report, R. at 313, 316).[1] William lost control of his vehicle. Following an investigation, Trooper Chapman of the Wyoming Highway Patrol ("WHP") reported:

> I observed a Maroon passenger vehicle on its right side lying nearly perpendicular to the roadway. The vehicle was later identified as a 1996 Chevrolet Cavalier. . . . It was approximately halfway off the west edge of the road. The decedent, Mr. William M. Caldwell, . . . was lying face down in the middle of the road approximately 12.5 feet from the vehicle.

[1] Citations to the record can he found at ECF Nos. 57-1 and 57-2 (Unum Claim File).

There was a line of debris from the east shoulder to the vehicle.

. . . I completed a forensic mapping of the scene. . . . The roadway is constructed of hard-packed dirt and rock road base, with some loose gravel on the surface, especially near the roadway edges. . . . The vehicle had been traveling northeast. In this direction of travel, there is a downhill grade with a left curve leading into a more gentle right curve. The posted speed limit at the junction with Carbon County Road 340 is 35 miles per hour.

I observed the marks near the top of the hill leading into the left curve . . . The vehicle's rear tires began to track outside the front tires as the vehicle was steered left in an attempt to maintain the road. At the west edge, the vehicle straightened, then the vehicle's rear tires began to track outside the front tires again as it was steered right, . . . The vehicle exited the roadway on the east side at approximately 45 degrees. . . . The vehicle traveled through the air over the bottom of the ditch and collided at an angle with the embankment on the opposite side. The collision caused the vehicle's right side to rebound upward, vaulting the vehicle approximately 30 feet, and causing it to come back down on at least one left side tire. The vehicle traveled in this manner for approximately 70 feet as it began to rotate counter-clockwise. The vehicle then tripped and overturned, leading with the passenger side, for approximately 150 feet

> before coming to rest on its left side. Mr. Caldwell was completely ejected. . . .
>
> The placement of the tire marks are consistent with negotiating a curve at higher speeds or "cutting the corner". . . . Using a conservative drag factor of 0.5, and assuming the brakes were functioning normally, a mathematical analysis results in speeds of 75 miles per hour at the first middle ordinate, and 72 miles per hour at the second.
>
> An examination of the vehicle showed that the driver's restraint was not in use and the airbags did not deploy. . . .
>
> Mr. Caldwell's vehicle was traveling too fast for the road conditions. There was not enough friction present to allow the vehicle to stay on the roadway at the speed it was traveling. Once off the roadway, the vehicle overturned several times and Mr. Caldwell was ejected. . . .

Id. at 103, 316-17. William died in the resulting one-vehicle crash.

On July 29, 2015, Plaintiffs filed a claim for accidental death and dismemberment ("AD&D") benefits under a policy of group insurance Unum issued to William's employer, Sinclair Services Company (the "Policy").[2] Relying on the initial WHP Report – which, despite the officer's narrative, indicated a posted speed

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[2] Plaintiffs also filed a life insurance claim which Unum paid on or around August 20, 2015.

limit of 30 mph and estimated speed of William's vehicle of 61 mph (*see* R. at 105) – Unum ultimately denied Plaintiffs' claim pursuant to a Policy exclusion which provides: "Your plan does not cover any accidental losses caused by, contributed to by, or resulting from . . . an attempt to commit or commission of a crime." ("Crime Exclusion") (R. at 76-77). In its initial denial letter dated October 8, 2015, Tracy McKenzie, a Unum Benefits Specialist, advised Plaintiffs: "In the state of Wyoming, speeding is a misdemeanor per Wyoming Statute Ann. § 31-5-1201(a) & (d)(iv). Your son's act of speeding was a violation of the law; thus, a crime." (R. at 238.)

By letter dated January 4, 2016, Plaintiffs – represented by counsel – appealed Unum's determination, arguing that the legal speed limit on the road where the accident occurred was 55 mph, not 30 or 35 mph.[3] The appeal also asserted, *inter alia*, that "[s]peeding alone, even well over the legal speed limit, does not rise to the 'commission of a crime' as specified in the policy." (R. at 260, 262.) By letter dated January 12, 2016, Unum Lead Appeals Specialist, Denise Legendre, asked Plaintiffs' attorney to provide additional information to complete the appellate review, including a corrected traffic report to support Plaintiffs' contention that the WHP Report contained inaccurate information. (R. at 304.) By letter dated February 10, 2016, Plaintiffs' attorney provided an amended Traffic Crash

[3] Plaintiffs' counsel pointed out that the posted speed limit was 35 mph, not 30 mph as indicated in the "posted speed" field in the WHP Report.

Report from WHP. (R. at 306.) Trooper Chapman's amended report contained the same narrative as in his original July 11, 2015 report. (*See* R. at 103, R. at 311.) Trooper Chapman changed the "posted speed" field from 30 mph in his original report to 35 mph in his amended report, and he changed the "estimated speed" field from 61 mph in his original report to 74 mph in his amended report, which is consistent with his original narrative. (R. at 311, 313.)

By letter dated April 8, 2016, Unum notified Plaintiffs' attorney that it had completed the appeal review and determined its initial decision to deny AD&D benefits was correct. (R. at 361-67.) Ms. Legendre explained:

> We have determined the evidence supports Mr. Caldwell was speeding, which is a violation noted in Wyoming Statutes. These state statutes constitute speeding as a misdemeanor. A misdemeanor is considered a criminal offense that is less serious than a felony and more serious than an infraction, and is generally punishable by a fine or incarceration in a local jail, or both. His actions (speeding), constitutes an offense that may be prosecuted by state and punishable by law as stated in the Wyoming Statutes.
>
> The policy does not cover this accidental loss because Mr. Caldwell's death was caused by, contributed to by, or resulting from him committing a crime (speeding).

(R. at 362.) Ms. Legendre summarized the information that supported her decision, including the WHP crash report finding Mr. Caldwell was traveling 74 mph at the time of the crash and was driving too fast for the conditions. She explained that "Mr. Caldwell was driving 39 miles per hour over the posted 35 mile per hour limit and 19 miles per hour over [the] 55 mile per hour [limit] where the roadway is unpaved." (R. at 364.) She further explained that "[w]e do not concur that Mr. Caldwell was committing a 'minor traffic infraction.'" (R. at 366.) Ms. Legendre further advised Plaintiffs that "[i]f you have additional information that verifies under Wyoming Motor Vehicle Regulations/Statutes that speeding is not a crime, please submit this written verification within 30 days. . . ." *Id.*

Plaintiffs' counsel responded by letter dated May 2, 2016, not disputing that speeding is a misdemeanor under Wyoming law but, rather, arguing that "[t]here is no possibility of a jail sentence in Wyoming for going 74 mph in a 55 mph zone." (R. at 369.) Plaintiffs further argued, "Even if speeding is technically a 'criminal act,' as the relevant statute does say violations of the provisions of the act are a misdemeanor, there is absolutely no way any reasonable person would understand the criminal exclusion to cover the act of speeding in a motor vehicle." (R. at 370.) By letter dated May 16, 2016, Ms. Legendre notified Plaintiffs' attorney that Unum was "adhering to [its] decision that the accidental death claim is excluded from coverage under the policy." (R. at 402.) Ms. Legendre again explained:

> We are upholding the denial under the crime exclusion. Speeding is a crime under Wyoming law (Wyo. Stat. Ann. § 31-5-1201(a) in violation of § 31-5-301(b)(iv) (55 mph on unpaved road) or 31-5-302 or 303 (posted speed limit)). It also is a crime under the dictionary definition of "crime." See discussion of the dictionary definition of crime in Harrison v. Unum, 2005 WL 827090 (D.N.H, 2005).
>
> Regardless of whether Mr. Caldwell was going 72 or 74 miles per hour on a gravel road, and regardless of whether the speed limit was 35 or 55, he was committing a crime. . . . More importantly, it is a crime that caused, contributed to, or resulted in the loss.

Id. This lawsuit followed.

In their Complaint, Plaintiffs allege the plain and ordinary meaning of the phrase "attempt to commit or commission of a crime" does not include a motor vehicle accident involving speeding, and a reasonable person would not consider speeding a crime. (Compl. ¶¶ 24 & 25.) Therefore, Plaintiffs contend, Unum breached the terms of the Policy by denying benefits to Plaintiffs based on the Crime Exclusion. The Policy at issue is governed by the Employee Retirement Income Security Act ("ERISA"), 29 U S.C. §§ 1001-1461. (*See* Compl. ¶ 4.)

STANDARD OF REVIEW

Where both parties move for summary judgment in an ERISA case, "summary judgment is merely a

vehicle for deciding the case; the factual determination of eligibility for benefits is decided solely on the administrative record, and the non-moving party is not entitled to the usual inferences in its favor." *LaAsmar v. Phelps Dodge Corp. Life, Accidental Death & Dismemberment and Dependent Life Ins. Plan*, 605 F.3d 789, 796 (10th Cir. 2010) (internal quotation marks and citation omitted). The Court must first determine the appropriate standard to be applied to Unum's decision to deny benefits. *Id.*

> " '[A] denial of benefits' covered by ERISA 'is to be reviewed under a de novo standard unless the benefit plan gives the administrator or fiduciary discretionary authority to determine eligibility for benefits or to construe the terms of the plan.' *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101, 115, 109 S. Ct. 948, 103 L.Ed.2d 80 (1989). Where the plan gives the administrator discretionary authority, however, 'we employ a deferential standard of review, asking only whether the denial of benefits was arbitrary and capricious.' *Weber [v. GE Group Life Assurance Co.*, 541 F.3d 1002,] 1010 (internal citation, quotation omitted). Under this arbitrary-and-capricious standard, our 'review is limited to determining whether the interpretation of the plan was reasonable and made in good faith.' *Kellogg* [*v. Metro, Life Ins. Co.*, 549 F.3d 818,] 825-26 (internal alterations, quotations omitted).

LaAsmar, 605 F.3d at 796 (emphasis added).

The parties agree Unum's decision is reviewed under the arbitrary and capricious or abuse of discretion standard because the Policy grants Unum discretion and final authority to construe and interpret the terms of the Policy. *See Cardoza v. United of Omaha Life Ins. Co.*, 708 F.3d 1196, 1201 (10th Cir. 2013). "Certain indicia of an arbitrary and capricious denial of benefits include lack of substantial evidence, mistake of law, bad faith, and conflict of interest by the fiduciary." *Id.* at 1201-02. Because Unum acts as both the claims administrator and payer of benefits, the Court should weigh that conflict as "a factor" in determining whether the denial of benefits was an abuse of discretion, "according it more or less weight depending on its seriousness." *Id.* at 1202 (internal quotations and citation omitted). "A conflict is more important when circumstances suggest a higher likelihood that it affected the benefits decision, but less so when the conflicted party has taken active steps to reduce potential bias and to promote accuracy." *Id.* (internal quotations and citation omitted).

Plaintiffs argue the inherent conflict of interest created by the mere fact that Unum acts in a dual role by both evaluating and paying claims was "compounded when claims personnel were 'forced' to rely solely on DLRs [in-house lawyers] to provide guidance on contract interpretation." (Pls.' Mem. in Supp. of Mot. for Summ. J. at 19.) Plaintiffs contend this somehow created a conflict because, as claims fiduciaries, Ms. McKenzie and Ms. Legendre owed a duty of loyalty to the plan beneficiaries as opposed to Unum. *Id.*

However, there is no evidence the claims examiners were required to follow the DLRs' advice, nor do Plaintiffs cite any legal authority for the proposition that Unum's reliance on DLRs was somehow improper. Moreover, the fiduciary duties that accompany claims administration do not require administrators to defer to claimants' interpretations or arguments. A plan administrator does not breach its fiduciary duty to a beneficiary "simply by interpreting a plan provision in a manner that results in a denial of the beneficiary's claims." *Joseph F. v. Sinclair Servs. Co.*, 158 F. Supp. 3d 1239, 1253 (D. Utah 2016).

> [A] fiduciary obligation, enforceable by beneficiaries seeking relief for themselves, does not necessarily favor payment over nonpayment. The common law of trusts recognizes the need to preserve assets to satisfy future, as well as present, claims and requires a trustee to take impartial account of the interests of all beneficiaries.

Varity Corp. v. Howe, 516 U.S. 489, 514 (1996). *See also Foster v. PPG Indus., Inc.*, 693 F.3d 1226, 1238 (10th Cir. 2012) ("the Plan Administrator's decision was consistent with its fiduciary obligation to safeguard Plan assets for the benefit of all participants, not just Foster").

"[O]nce [an ERISA] plan is established, the administrator's duty is to see that the plan is 'maintained pursuant to [that] written instrument.'" *Heimeshoff v. Hartford Life & Acc. Ins. Co.*, 134 S. Ct. 604, 612 (2013) (quoting 29 U.S.C. § 1102(a)(1)). Under a deferential

standard of review, "the plan administrator's interpretation of the plan 'will not be disturbed if reasonable.'" *Conkright v. Frommert*, 559 U.S. 506, 521 (2010) (quoting *Firestone*, 489 U.S. at 111). As the Supreme Court specifically held in *Conkright*, these principles are critical to the fundamental interests at the heart of ERISA:

> Congress enacted ERISA to ensure that employees would receive the benefits they had earned, but Congress did not require employers to establish benefit plans in the first place. *Lockheed Corp. v. Spink*, 517 U.S. 882, 887, 116 S.Ct. 1783, 135 L.Ed.2d 153 (1996). We have therefore recognized that ERISA represents a "'careful balancing' between ensuring fair and prompt enforcement of rights under a plan and the encouragement of the creation of such plans." *Aetna Health Inc. v. Davila*, 542 U.S. 200, 215, 124 S.Ct. 2488, 159 L.Ed.2d 312 (2004) (quoting *Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41, 54, 107 S.Ct. 1549, 95 L.Ed.2d 39 (1987)). Congress sought "to create a system that is [not] so complex that administrative costs, or litigation expenses, unduly discourage employers from offering [ERISA] plans in the first place." *Varity Corp., supra*, at 497, 116 S.Ct. 1065. ERISA "induc[es] employers to offer benefits by assuring a predictable set of liabilities, under uniform standards of primary conduct and a uniform regime of ultimate remedial orders and awards when a violation has occurred." *Rush Prudential HMO, Inc. v. Moran*, 536 U.S. 355, 379, 122 S.Ct. 2151, 153 L.Ed.2d 375 (2002).

> *Firestone* deference protects these interests and, by permitting an employer to grant primary interpretive authority over an ERISA plan to the plan administrator, preserves the "careful balancing" on which ERISA is based. Deference promotes efficiency by encouraging resolution of benefits disputes through internal administrative proceedings rather than costly litigation. It also promotes predictability, as an employer can rely on the expertise of the plan administrator rather than worry about unexpected and inaccurate plan interpretations that might result from *de novo* judicial review. Moreover, *Firestone* deference serves the interest of uniformity, helping to avoid a patchwork of different interpretations of a plan, like the one here, that covers employees in different jurisdictions—a result that "would introduce considerable inefficiencies in benefit program operation, which might lead those employers with existing plans to reduce benefits, and those without such plans to refrain from adopting them." *Fort Halifax Packing Co. v. Coyne*, 482 U.S. 1, 11, 107 S.Ct. 2211, 96 L.Ed.2d 1 (1987).

Conkright, 559 U.S. at 516-17.

As further evidence of a conflict of interest Plaintiffs offer Unum's practice of paying Performance Based Incentives to employees based on the overall financial results of the company, a component of which is dependent upon the employee's performance. (*See* Unum Ex. F-5.) Specifically, Plaintiffs reference Unum's

use of "overpayments" as one such performance measure for Benefit Specialists like Ms. McKenzie, and argue there is no similar metric for underpayments. (Pls.' Memo. in Supp. at 21.) Ms. McKenzie was given an overall performance quality score of 74.9% relating to a 2014 Texas claim involving an overpayment where the accident was the claimant's fault for failing to yield to an oncoming truck. The overpayment was based on Ms. McKenzie's assumption that the claimant was a vehicle passenger when apparently the claimant was the driver. Plaintiffs argue this circumstance evidences a bias toward denying claims where the insured is at fault even if the policy only excludes accidents caused by commission of a crime rather than the insured's negligence. The Court finds insufficient grounds to make such an inference.

In *Metropolitan Life Ins. Co. v. Glenn*, the Supreme Court suggested administrators can reduce conflict "by walling off claims administrators from those interested in firm finances, or by imposing management checks that penalize inaccurate decisionmaking irrespective of whom the inaccuracy benefits." 554 U.S. 105, 117 (2008). Unum produced evidence showing active steps it has taken to minimize the impact of conflict, including "walling off" claims handlers from personnel in finance and penalizing inaccurate decision-making (*see* Unum Ex. F). As the quality audit itself makes clear, the feedback to Ms. McKenzie was that the investigation was incomplete because the auditor could not rule out that a policy exclusion might apply (Unum Ex. F-10 at 0139). Contrary to Plaintiffs'

assertion, the Quality Audit simply evidences Unum's efforts to penalize inaccurate or incomplete decision-making. The audit contains several metrics on which a claim is evaluated, including Eligibility, Customer Service, Information Gathering, Payment Accuracy, and the overall accuracy of the decision (*id.* at 0003). With respect to Payment Accuracy, the sub-categories include: Were benefits calculated and paid correctly? Were all benefit enhancements calculated and paid correctly per the policy language? Were all overpayments identified and handled? Were all *underpayments* identified and handled? (*Id.* at 0009.) In fact, audit feedback in the record identifies both underpayments and overpayments. (*Id.* at 0012, 0055, 0066.)

Plaintiffs have failed to demonstrate that conflict was an important factor in Unum's decision to deny benefits to Plaintiffs. The record shows Unum has taken steps to reduce potential bias and to promote accuracy. The claims evaluators sought the advice of counsel and conducted an investigation. Plaintiffs were allowed to appeal the decision and submit additional information and argument (twice) in support of their claim. Thus, while the Court will consider Unum's inherent conflict of interest as a factor in determining whether its decision was arbitrary and capricious, the Court will accord the conflict little weight in making that determination. *See Foster*, 693 F.3d at 1232-33. *See also Cardoza*, 708 F.3d at 1202-03. *See also Conkright*, 559 U.S. at 513 ("a systemic conflict of interest does not strip a plan administrator of deference"); *Adamson v. Unum Life Ins. Co. of America*, 455

F.3d 1209, 1213 (10th Cir. 2006) ("The fact that UNUM administered and insured the group term life insurance portion of this plan does not on its own warrant a further reduction in deference.").

DISCUSSION

The issue here is whether Unum's interpretation of "crime" to include speeding for purposes of the Crime Exclusion was reasonable and made in good faith. In interpreting an ERISA plan, the Court must look to the terms of the plan and, if unambiguous, construe them as a matter of law. *Cardoza*, 708 F.3d at 1203; *Foster*, 693 F.3d at 1237. "In making this determination, [the] court 'consider[s] the common and ordinary meaning as a reasonable person in the position of the plan participant would have understood the words to mean.'" *Cardoza*, 708 F.3d at 1203 (quoting *Scruggs v. Exxon Mobil Pension Plan*, 585 F.3d 1356, 1362 (10th Cir. 2009)). Both the Plaintiffs and Defendant in this case contend the term "crime" is not ambiguous – yet each side ascribes the term a different meaning. Plaintiffs insist, when given its common and ordinary meaning as a reasonable person in the position of the plan participant would have understood the word to mean, "crime" does *not* include speeding. (Pls.' Memo. in Supp. at 1-2.) On the other hand, Defendant maintains the common and ordinary meaning of "crime" undisputedly includes speeding as it is a violation of Wyoming law. (Unum's Opp'n to Pls.' Mot. at 11.) "That judges and lawyers, who by education and experience are primed to discover ambiguity in contract language,

might find gaps or contradictions in a summary plan description's ordinary, conversational language does not mean that the language is necessarily ambiguous or silent to the point of default for ERISA purposes." *Sunbeam Oster Co., Inc. Group Benefits Plan v. Whitehurst*, 102 F.3d 1368, 1376 (5th Cir. 1996).

The term "crime" is not ambiguous. Although there are certainly varying degrees of crime – obviously some being more serious than others in most people's minds and in the eyes of the law – reasonable persons understand the term to mean a violation of the law. Courts routinely look to dictionary definitions in determining the common and ordinary meaning of an undefined term. *See*, *e.g.*, *Taniguchi v. Kan Pacific Saipan, Ltd.*, 566 U.S. 560, 132 S. Ct. 1997, 2002-03 (2012); *In re Mallo*, 774 F.3d 1313, 1321 (10th Cir. 2014) (dictionary definitions are "useful touchstones" to determine an undefined term's ordinary and common meaning); *Fruitt v. Astrue*, 604 F.3d 1217, 1220 (10th Cir. 2010) (the court may "consult a dictionary to determine the plain meaning of a term"); *Cummings v. Minnesota Life Ins. Co.*, 711 F.Supp.2d 1287, 1294 (N.D. Okla. 2010) (court looked to dictionary definition of "drug" to determine its common and ordinary meaning for purposes of ERISA policy exclusion).

Black's Law Dictionary defines "crime" as: "An act that the law makes punishable." *Crime*, BLACK'S LAW DICTIONARY (10th ed. 2014). *See also Crime*, BLACK'S LAW DICTIONARY (6th ed. 1991) ("a positive or negative act in violation of penal law"). Likewise, the Merriam-Webster Dictionary defines "crime" as: "an illegal act

for which someone can be punished by the government," *Crime*, MERRIAM-WEBSTER, https://www.merriam-webster.com/dictionary/crime (last visited Sept. 18, 2017). Driving in excess of the established maximum speed limit, or at a speed greater than is reasonable and prudent under the conditions, is a violation of Wyoming law, which classifies such a violation as a misdemeanor. WYO. STAT. §§ 31-5-301(a) & (b), 31-5-1201(a). Further, a speeding violation is punishable by a fine, imprisonment (for not more than six months), or both. *Id.* § 31-5-1201(b) & (d). Wyoming expressly classifies "misdemeanors" as crimes. *See* WYO. STAT. § 6-10101 ("Crimes which may be punished by death or by imprisonment for more than one (1) year are felonies. All other crimes are misdemeanors."). Similarly, Black's defines "misdemeanor" as: "A crime that is less serious than a felony and is usu[ally] punishable by fine, penalty, forfeiture, or confinement (usu[ally] for a brief term) in a place other than prison (such as a county jail)." *Misdemeanor*, BLACK'S LAW DICTIONARY (10th ed. 2014), Therefore, Unum's interpretation of "crime" is consistent with the ordinary and unambiguous meaning of the term.

Plaintiffs contend that, because most people view speeding as a minor traffic violation and not a serious crime, Unum's interpretation is contrary to the common and ordinary meaning a reasonable Sinclair employee would have understood the word to mean.[4]

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[4] Plaintiffs further argue that the doctrine of *contra proferentem* required Unum to resolve any ambiguity in Policy terms in favor of the beneficiary. However, the Tenth Circuit has

However, Plaintiffs cite no authority or factual support for their proposition that, to reasonable people (or even reasonable Sinclair employees) the common and ordinary meaning of crime is something more serious than simple traffic infractions. And the fact that some level of speeding may be generally accepted as normal in Wyoming does not establish that reasonable people don't understand speeding to be a crime. Moreover, even if Plaintiffs' interpretation suggests ambiguity in the term, "[a] decision denying benefits based on an interpretation of an ERISA provision survives arbitrary and capricious review so long as the interpretation is reasonable." *Flinders v. Workforce Stabilization Plan of Phillips Petroleum Co.*, 491 F.3d 1180, 1193 (10th Cir. 2007), *abrogated on other grounds by Metro. Life Ins. Co. v. Glenn*, 554 U.S. 105 (2008). Unum's decision "need not be the only logical one nor even the best one. It need only be sufficiently supported by facts within [its] knowledge to counter a claim that it was arbitrary or capricious. The decision will be upheld unless it is not grounded on any reasonable basis." *Hancock v. Metro. Life Ins. Co.*, 590 F.3d 1141, 1155 (10th Cir.

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held that "when a plan administrator has discretion to interpret the plan and the standard of review is arbitrary and capricious, the doctrine of contra proferentem is inapplicable." *Kimber v. Thiokol Corp.*, 196 F.3d 1092, 1100 (10th Cir. 1999). *See also Miller v. Monumental Life Ins. Co.*, 502 F.3d 1245, 1253 (10th Cir. 2007) ("We have rejected contra proferentem in cases where the plan administrator retains discretion and where we review only to consider whether the administrator abused discretion."). Likewise, Plaintiffs have cited no direct authority requiring Unum to apply *contra proferentem* when interpreting Policy terms in the first instance.

2009) (internal quotation marks omitted) (quoting *Finley v. Hewlett-Packard Co. Employee Benefits Org. Income Prot. Plan*, 379 F.3d 1168, 1176 (10th Cir. 2004)). In other words, "[w]hen a plan administrator is given authority to interpret the plan language, and more than one interpretation is rational, the administrator can choose any rational alternative." *Kimber v. Thiokol Corp.*, 196 F.3d 1092, 1100 (10th Cir. 1999).

Plaintiffs assert that, if the Court finds ambiguity in the term "crime," it should look to Unum's Claims Manual to determine Unum's intent in applying the Crime Exclusion. The Claims Manual provides the following guidance for application of the Crime Exclusion:

When administering a crime exclusion, consider the following:

- "Attempt to commit" or "commission" policy language was intended to exclude [ ]losses which result from an activity that would typically be classified as a crime (or felony, depending on policy language) under state or federal law.
- "Attempt to commit" or "commission" policy language was not intended to apply to activities which would generally be classified as traffic violations.
- We will generally exclude benefits on claims where a [ ]loss results from the claimant's operating under the influence or driving while intoxicated since these offenses are typically classified as crimes

(or felonies, depending on the policy language).

- Consult with a DLR [dedicated legal resource] if you question whether or not the circumstances of a claim and the policy language support a denial of benefits on the basis of the crime exclusion.
- **Reminder: Each claim is unique and should be evaluated on its own merits. The actual policy governing the claim must be referenced.**

(ECF No. 55-3 at 1-2) (underlined emphasis added) (bold emphasis in original). Plaintiff's argue this guidance evidences Unum's intent to ensure the term "crime" is interpreted consistent with the understanding of a reasonable insured and, because Unum's interpretation in this case is contrary to the Claims Manual guidance, Unum abused its discretion and denied Plaintiffs' claim in bad faith. The Court is unconvinced. To the extent the Claims Manual is relevant here, Unum's decision is not inconsistent with the guidance provided therein. First, in addition to the reminder set forth above, Unum's Claims Manual further cautions: "The Claims Manual is not intended to offer a prescribed answer to each claim situation. Rather, such answers must be arrived at based on the specific and particular facts of the claim. Each claim is unique and must be evaluated on its own merits." (*Id.* at 7.) Second, the Claims Manual is not the Policy and cannot override the Policy terms. *See Wade v. Life Ins. Co. of North Am.*, 271 F.Supp.2d 307, 324 (D. Me. 2003) (the manual

is "not part of the SPD or other Plan documents central to Plaintiff's appeal . . . [and] . . . is peripheral to any interpretation of the Plan"). Nothing in the record supports a finding that the conduct at issue in this case – speeding at least 17 mph over the legal limit on an unpaved road – is "generally classified as a traffic violation," particularly where a causal nexus to the loss is sufficient to implicate the Crime Exclusion.

Unum's interpretation of "crime" to include speeding for purposes of applying the Crime Exclusion to Plaintiffs' AD&D claim was reasonable and made in good faith. Speeding is undisputedly a violation of Wyoming law and thus, a crime. The record shows William was speeding – at least 17 mph and arguably 39 mph over the speed limit – and his excessive speed "caused, contributed to, or resulted in" the accident. While perhaps viewed as unreasonable by some, under the deferential standard of review a court "will not substitute its judgment for that of an administrator so long as the administrator's decision falls 'somewhere on the continuum of reasonableness – even if on the low end.'" *Joseph F.*, 158 F. Supp. 3d at 1254 (quoting *Kimber*, 196 F.3d at 1098). Accordingly, Unum's denial of the Plaintiffs' claim for AD&D benefits based in its interpretation of "crime" was not arbitrary and capricious.

CONCLUSION

The terms of the AD&D policy and the evidence in the administrative record show Unum's denial of

benefits to Plaintiffs was reasonable and made in good faith. THEREFORE, it is hereby

ORDERED that *Unum's Motion for Summary Judgment or in the Alternative Motion for Judgment on the Record* (ECF No. 54) is GRANTED; it is further

ORDERED that *Plaintiffs' Motion for Summary Judgment* (ECF No. 56) is DENIED; it is further

ORDERED that *Plaintiffs' Motion to Strike Defendant's Supplemental Authority* (ECF No. 72) is DENIED.

Dated this 21st day of September, 2017.

/s/ Scott W. Skavdahl
Scott W. Skavdahl
United States District Judge

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF WYOMING

Rick V. Caldwell and Sonya S. Caldwell Plaintiff vs UNUM Life Insurance Company of America Defendant	Case Number: 16-CV-236-SWS

JUDGMENT IN A CIVIL ACTION

(Filed Sep. 21, 2017)

This matter comes before the Court on Defendant's Motion for Summary Judgment [54] and Plaintiffs Motion for Summary Judgment [56]. Pursuant to the Order entered September 21, 2017 GRANTING Defendant's Motion for Summary Judgment and DENYING Plaintiffs Motion for Summary Judgment,

IT IS HEREBY ORDERED AND ADJUDGED that a Judgment be entered on behalf of the Defendant and the matter is dismissed.

Dated this 21st day of September, 2017.

Stephan Harris
Clerk of Court

By Crystal Toner
Deputy Clerk

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

RICK CALDWELL, et al., Plaintiffs - Appellants, v. UNUM LIFE INSURANCE COMPANY OF AMERICA, Defendant - Appellee.	No. 17-8078

ORDER

(Filed Oct. 16, 2019)

Before **HARTZ**, **PHILLIPS**, and **EID**, Circuit Judges.

Appellants' petition for rehearing is denied.

The petition for rehearing en banc was transmitted to all of the judges of the court who are in regular active service. As no member of the panel and no judge in regular active service on the court requested that the court be polled, that petition is also denied.

Entered for the Court

/s/ Elisabeth A. Shumaker

ELISABETH A. SHUMAKER, Clerk
