No._____

IN THE

SUPREME COURT OF THE UNITED STATES

AMBER BOYER

Petitioner

V.

SCHNEIDER ELECTRIC HOLDINGS, INC. LIFE INSURANCE AND ACCIDENT PLAN,
SCHNEIDER ELECTRIC HOLDINGS, INC., and
UNUM LIFE INSURANCE COMPANY OF AMERICA

Respondents

On Petition For Writ of Certiorari
To The Supreme Court of the United States

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Petitioner Amber Boyer's brother died in a tragic car accident but his insurer, Unum Life Insurance Company of America, has refused to pay on the policy he purchased. This is an Employee Retirement Income Security Act of 1974 ("ERISA") benefits-due case. Ms. Boyer is the beneficiary of an accidental-death and supplemental accidental-death policy purchased by her brother Eric Boyer. The plan administrator of the ERISA plan is Unum Life Insurance Company of America, denied coverage following Mr. Boyer's death in a single-car accident. Unum alleges that the crash occurred while Mr. Boyer was speeding and passing in a no-passing zone. As plan administrator, Unum determined that coverage was excluded under a "crime" exclusion in the accidental death policy. The questions presented are:

1. Whether the ERISA Plan Administrator's interpretation of "crime" to include speeding and improper passing was unreasonable when denying coverage under a crime exclusion in an accidental-death policy.
2. Whether the ERISA Plan Administrator's decision to deny accidental-death coverage was supported by substantial evidence.

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Boyer v. Schneider Electric Holdings, Inc. Life and Accident Plan, et al. No. 3:17-cv-05053, U.S. District Court for the Western District of Missouri, Southwestern Division. Judgment entered September 30, 2019. The opinion is published at 350 F.Supp.3d 854.

Boyer v. Schneider Electric Holdings, Inc. Life and Accident Plan, et al. No: 19-3144, United States Court of Appeals for the Eighth Circuit. Judgment entered on April 5, 2021. The opinion is published at 993 F.3d 578.

JURISDICTION

The United States Court of Appeals for the Eighth Circuit entered a judgment in this matter on April 5, 2021. The Eighth Circuit reversed a judgment entered in favor of Petitioner Amber Boyer by the U.S. District Court for the Western District of Missouri, Southwestern Division. The Eighth Circuit denied Petitioner's Petition for Rehearing en banc on May 14, 2021. This Writ of Certiorari has been filed within one hundred eighty days of the denial of Petitioner's Petition for Rehearing pursuant to this Court's Order related to COVID-19 dated July 19, 2021. This Court has jurisdiction under 28 U.S.C § 1254.

STATUTES IMPLICATED

This is an Employee Retirement Income Security Act of 1974 ("ERISA") benefits-due case. 29 U.S.C.A. § 1022, 1132.

STATEMENT

This is an ERISA benefits-due case. Petitioner Amber Boyer (hereinafter "Ms. Boyer") is the sister of Eric

Boyer, the decedent policy holder. Prior to his death in January 2016, Mr. Boyer held an accidental death policy and supplemental accidental death policy (collectively the "Plan") issued through his employer. Ms. Boyer is the sole beneficiary of benefits due under the Plan. Respondent Unum Life Insurance Company of America ("Unum") is the plan administrator and insurer of the Plan. As the decision-maker and payor under the Plan, Unum makes coverage decisions and pays (or denies) Plan benefits. Following Mr. Boyer's death, Unum denied coverage, citing two reasons: (1) that coverage was excluded because Mr. Boyer allegedly died during the commission of a crime—namely speeding and improper passing, and (2) that Mr. Boyer's death did not constitute an "accident" under the Plan.

The U.S. District Court for the Western District of Missouri disagreed. It granted motions for summary judgment in favor of Ms. Boyer. The U.S. District Court had original subject-matter jurisdiction pursuant to 29 U.S.C.A. § 1132(e) and 28 U.S.C.A. § 1331. The United States Court of Appeals for the Eighth Circuit reversed the judgment entered in favor of Petitioner Amber Boyer by the District Court reasoning that Unum's interpretation of crime was reasonable and the denial of benefits based upon the "crime exclusion" was supported by substantial evidence. The Eighth Court did not address whether Mr. Boyer's death constituted an "accident" under the Plan.

Mr. Boyer was pronounced dead at the scene of a single-car accident on January 22, 2016. A toxicology report made following his death showed no trace of drugs or alcohol. The St. Louis County Medical Examiner's Office ruled the death an "accident" caused by blunt craniocerebral and thoracic trauma. Unum denied coverage, in part, based upon a "crime" exclusion

in the Plan. The Plan 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." The term "crime" is not defined in the Plan. However, Unum's claims manual provides: "**Attempt to commit" or "commission" policy language was not intended to apply to activities which would generally be classified as "traffic violations."**

Unum's conclusion that the crime exclusion applied was based solely upon a Missouri Uniform Crash Report created by the St. Louis County Police Department following Mr. Boyer's crash. The Crash Report included the statements of five witnesses and listed probable contributing circumstances of improper passing and speed. Four of the witnesses observed Mr. Boyer's vehicle in their rear-view mirror, including an off-duty police officer who estimated that Mr. Boyer was travelling approximately eighty (80) miles per hour. His opinion was based solely upon his observation of Mr. Boyer approaching from the rear. No accident reconstruction done, and no objective evidence of speed was collected. Unum also did not contact any local prosecutors to determine whether Mr. Boyer would have been charged with a crime had he not died. Finally, Unum disregarded its own claims manual's conclusion that the crime exclusion does not apply to traffic violations.

REASONS FOR GRANTING THE WRIT

This Petition for Writ of Certiorari should be granted pursuant to United States Supreme Court Rule 10(c). Rule 10(c), provides that the Court has discretion to grant Petitions for Writ of Certiorari where "a United states court of appeals has decided an important question of federal law that has not been, but should be, settled by this Court . . . ." Here, the Eighth Circuit has

determined that an ERISA plan administrator may haphazardly deny coverage by including a crime exclusion in its Plan. Further, plan administrators are not required to define the term "crime" nor are they required to undertake a meaningful investigation of the alleged crime. The decision will have broad implications for all insureds participating in ERISA plans.

Unum's use of its crime exclusion to exclude coverage is not restricted to the Eighth Circuit. While a circuit-split does not yet exist, Unum's crime exclusion has been the subject of litigation across the country. *See e.g. Oomrigar v. Unum Life Ins. Co. of Am.*, No. 2:16-CV-940 TS, 2017 WL 3913277, at *1 (D. Utah Sept. 6, 2017) (coverage excluded where defendant died evading police); *Caldwell v. UNUM Life Ins. Co. of Am.*, 786 F. App'x 816 (10th Cir. 2019), *cert. denied,* 140 S. Ct. 2510, 206 L. Ed. 2d 464 (2020) (coverage excluded based upon speeding). Most recently, a District Court in Ohio overturned Unum's decision to deny coverage based upon the crime exclusion in a case of speeding. *See e.g. Fulkerson v. Unum Life Ins. Co. of Am.*, No. 1:19-CV-01180, 2021 WL 1214683, at *1 (N.D. Ohio Mar. 31, 2021). The *Fulkerson* decision has been appealed by Unum to the Sixth Circuit Court of Appeals. So far, courts in the Sixth, Eighth, and Tenth circuits have wrestled with the crime exclusion and, unless a decision is made by this Court, this trend will continue to the detriment of insureds.

Unum's crime exclusion was implemented after ERISA insurers began to be forced by courts to pay benefits in alcohol-related deaths. *See e.g., McClelland v. Life Ins. Co. of N. Am.,* 679 F.3d 755, 757 (8th Cir. 2012); *Loberg v. Cigna Grp. Ins.*, 781 F. Supp. 2d 857, 865 (D. Neb. 2011). In these cases, the Court of Appeals

correctly noted that drunk driving accidents were just that, accidents. *McClelland v. Life Ins. Co. of N. Am.*, 679 F.3d 755, 761 (8th Cir. 2012). Thus, insurers could not exclude coverage absent a specific exclusion. In a reaction to these decisions, many insurers began writing in an exclusion of coverage where the insured died while driving under the influence of drugs or alcohol. *See e.g. River v. Edward D. Jones Co.,* 646 F.3d 1029, 1031 (8th Cir.2011) (for an example of an ERISA qualified plan which wrote an intoxication exception into its plan).

Unum went a step further and enacted the subject "crime" exclusion. It has done so without defining the term crime. Instead, it relies haphazardly on dictionary definitions or state law, depending on which definition is helpful to Unum's quest to deny claims. Here, Unum points to Missouri state law to supply a definition of the crimes. In the past, Unum took the opposite approach—arguing state law should not apply—when it denied coverage under the same crime exclusion in New Hampshire, as New Hampshire defined a DWI as a "violation" rather than a crime. *See Harrison v. Unum Life Ins. Co. of Am.*, No. CV-04-21-PB, 2005 WL 827090, at *4 (D.N.H. Apr. 11, 2005)[1] (long term disability benefits denial based upon DUI). Under Unum's definition here, coverage claims could be denied in most auto crashes, and many other deaths most people would call

[1] Although the District Court in *Harrison* affirmed the application of Unum's broad definition of DWI, it did so expressing doubt as to whether the same approach could be extended to less serious violations: "It remains to be seen whether Unum's broad definition of crime would withstand scrutiny in a case where the underlying offense at issue lacks a similar penological pedigree." *Harrison v. Unum Life Ins. Co. of Am.*, No. CV-04-21-PB, 2005 WL 827090 at *3, n. 3 (D.N.H. Apr. 11, 2005).

accidents, due to the broad and ever-widening scope of criminal law. *See, e.g.* § 574.035, RSMo. (disturbing a house of worship); § 577.070 RSMo. (littering).

Unum clearly crafted the crime exclusion in a way that allows it to interpret and apply the exclusion in a broadly. The breadth of the exclusion is illustrated by the fact that Unum saw fit to clarify internally that the crime exclusion "was not intended to apply to activities which would generally be classified as traffic violations." Presumably, Unum would not be required to offer internal guidance to those interpreting the language if the language in the Plan was clear on its own. If the exclusion was inherently clear, Unum would not be required to employ dictionary definitions in some instances and state law in others.

Confusion is not a new concept in accidental death insurance. In fact, the term "accident" has been a subject of strife between insurers, insureds, and the courts for decades. The confusion, as here, is borne of insurers' attempts to exclude coverage even in illogical circumstances. This Court entertained such a case in *Landress v. Phoenix Mut. Life Ins.* when it upheld a distinction between accidental means and accidental results.[2] 291 U.S. 491 (1934). In *Landress*, this Court upheld an insurer's decision to deny coverage after an insured died of a heat stroke during a round of golf. The Court reasoned that under the relevant policy language it is not enough "that the death or injury was accidental in the understanding of the average man-that the result of the exposure 'was something unforeseen, unexpected, extraordinary, an unlooked-for mishap, and

[2] Unum also implored the district court to apply the accidental means standard to the case at hand when it argued that Mr. Boyer's death did not meet its definition of accident, despite a long history of case law rejecting the approach in *Landress*.

so an accident,' for here the carefully chosen words defining liability distinguish between the result and the external means which produces it." *Id.* at 495-96 (1934). In sum, the *Landress* court drew a distinction between deaths caused by accidental means and those caused by accidental results and held that intending to play golf rendered the death not an accident.

The majority's decision was sharply criticized by Justice Cardozo's dissent. Justice Cardozo remarked that:

> Probably it is true to say that in the strictest sense and dealing with the region of physical nature there is no such thing as an accident. .... On the other hand, the average man is convinced that there is, and so certainly is the man who takes out a policy of accident insurance. **It is his reading of the policy that is to be accepted as our guide, with the help of the established rule that ambiguities and uncertainties are to be resolved against the company**.
>
> . . . . .
>
> When a man has died in such a way that his death is spoken of as an accident, he has died because of an accident, and hence by accidental means.
>
> *(Id.* At 499-500 (emphasis added) (internal quotations and citation omitted).

Cardozo warned that the confusion regarding accident insurance would "plunge this branch of the law into a Serbonian Bog." *Id.* at 499. Fortunately for insureds, the law has mostly exited the bog and courts have since

rejected the distinction between accidental means and accidental results citing logic.

> It is illogical to purport to distinguish between the accidental character of the result and the means which produce it; that the distinction gives to "accidental means" a technical definition which is not in harmony with the **understanding of the common man**; and that the ambiguity found in the concept should be resolved against the insurer so as to permit coverage.

Wickman v. Nw. Nat. Ins. Co., 908 F.2d 1077, 1086 (1st Cir. 1990) (*citing* 10 *Couch on Insurance 2d* § 41:31, 50 (1982)).

The distinction between accidental means and results is not at issue in this case but an illogical interpretation of accident insurance is at play. Taking Justice Cardozo's suggestion—that insurance policies should be understood by the average policy holder—Congress passed the Employee Retirement Income Security Act of 1974. The Act requires ERISA plans to be "be written in a manner calculated to be understood by the **average plan participant**, and shall be sufficiently accurate and comprehensive to reasonably apprise such participants and beneficiaries of their rights and obligations under the plan." 29 U.S.C.A. § 1022 (West) (emphasis added). To be sure, if the Plan cannot be understood by Unum's claims representatives without its claims manual defining "crime" (and excluding traffic violations), an average plan participant cannot be expected to understand the crime exclusion to exclude coverage for a car accident allegedly contributed to by speeding and improper passing. Clearly, Unum's interpretation of the

crime exclusion violates the substantive rights of plan participants and, without Court intervention, other insurers will surely follow suit, undermining the purposes of ERISA.

Unum's adoption of a crime exclusion into an ERISA plan creates additional legal issues beyond how the word "crime" is defined in the plan. "A plan administrator's decision is an abuse of discretion if it is not supported by substantial evidence." *McClelland v. Life Ins. Co. of N. Am.*, 679 F.3d 755, 759 (8th Cir. 2012) (*citing Wrenn v. Principal Life Ins. Co.,* 636 F.3d 921, 925 (8th Circuit 2012). Under the Eighth Circuit's holding in the case, Unum arbitrarily determines that a crime has been committed without any evidence and upon a lower standard than even that required for probable cause. The broad nature of the crime exclusion undermines both ERISA and the traditional rights of the accused. It allows an insurer to determine a crime has been committed by the policy holder on minimal evidence without any apportionment for meaningful review instead of the substantial evidence required to show guilt beyond a reasonable doubt in a criminal proceeding.

Unum was cunning in adopting a sweeping crime exclusion without defining "crime". Crime exclusions in ERISA arose out of a string of claims for alcohol-related deaths. Numerous insurers amended their Plans to exclude coverage for drunk driving accidents, for example:

> Basic AD & D Benefits will only be paid for losses caused by accidents. Benefits will not be paid by the Plan if you or your covered family members die or are dismembered as a result of the following circumstances:

> • **intoxication while operating a vehicle or other device involved in an accident**
>
> *River v. Edward D. Jones Co.*, 646 F.3d 1029, 1031 (8th Cir. 2011) (emphasis added).

Insurers relied upon these exclusions to deny coverage where evidence of intoxication appears in a toxicology report. *Id.* (certified toxicology report stated that Polk's blood alcohol content (BAC) was 0.128% at the time of the crash). In *River*, the Plan defines intoxication:

> **Intoxicated** means that the injured person's blood alcohol level met or exceeded the level that creates a legal presumption of intoxication under the laws of the jurisdiction in which the incident occurred. *Id.* at 1032.

In sum, the plan contains an intoxication exclusion, a definition of intoxication that tracks with the law of the relevant jurisdiction, and a scientific method by which to determine intoxication—a toxicology report. A toxicology report clearly amounts to substantial evidence of intoxication to support a plan administrator's denial. The exclusion puts the insured on notice that if they die in an alcohol-related incident coverage will be excluded if a toxicology report shows that they were intoxicated at the time of their death according to the laws of the local jurisdiction. Insureds would reasonably expect the same proof to be presented by a prosecutor seeking to convict them of a crime if they were pulled over while driving.

Unum's crime exclusion does not do this. It provides no notice to plan participants of what is or is not a "crime", how a crime will be determined, and require no

significant evidence of guilt on the part of the plan participant. Plan participants like Mr. Boyer are left with Unum's general crime exclusion excluding a broad range of undefined crimes or attempted crimes. Crime is not defined and Unum does not tether the meaning of crime to the laws of the jurisdiction where the events occur. Rather, Unum defines crime on a case-by-case basis using any source that benefits it while ignoring any that does not exist. *See, e.g., Harrison,* 2005 WL 827090 at *4 (where state-law definition of "crime" ignored by Unum so it could deny coverage).

Unum's crime exclusion leads to a litany of questions. First, would an average plan participant understand that traffic related incidents (apart from drunk driving) would exclude coverage under the crime exclusion? Second, to the extent a plan participant makes that leap, what evidence of the crime is required to support a denial? When the crime is speeding is a radar reading required? If a radar reading isn't necessary, is an accident reconstruction required to determine the speed of the deceased driver? Here, the only evidence relied upon by Unum was a police report that did not contain a radar reading or an accident reconstruction and did not attempt to determine the actual speed at which Mr. Boyer was driving.

The questions above illustrate fundamental issues with Unum's crime exclusion: Conviction of a crime requires proof beyond a reasonable doubt. Here, Unum's only "proof" was an ambiguous police report—hardly enough to charge Mr. Boyer, much less convict him had he lived—and Unum provides no definition of crime within the exclusion. Unum's general crime exclusion does not comply with the goals of ERISA to

protect plan participants or with a basic understanding of fairness.

A reasonable plan participant (or anyone else not on the payroll of an insurance company) would think a single car **accident** should be covered under an accidental death policy. Excluding single-car accidents involving sober drivers, as Unum does here, would "reduce 'accident insurance' to insurance only for strange, unforeseeable injuries (e.g., choking to death on a piece of meat) or for injuries in which the victim was passive rather than active (being struck by lightning or being run down by a reckless driver while crossing the street)." *King v. Hartford Life & Acc. Ins. Co.*, 414 F.3d 994, 1008 (8th Cir. 2005) (J. Bright, concurring). Further, it allows Unum to haphazardly attach criminal culpability (slandering the memory and name of a decedent policy holder) based upon evidence that is "more than a scintilla but less than a preponderance" *Darvell v. Life Ins. Co. of N. Am.*, 597 F.3d 929, 934 (8th Cir. 2010) (providing the definition of "substantial evidence" in ERISA denial decisions). Crimes require proof beyond a reasonable doubt, and Unum's definitions and actions here "convict" Mr. Boyer of a "crime" without any significant evidence and no true investigation. Without this Court's intervention, Unum's crime exclusions will grow undermining the goals of ERISA and fundamental fairness.

CONCLUSION

For the foregoing reasons, Petition Amber Boyer respectfully requests the Court grant her Petition for Writ of Certiorari.

Respectfully Submitted,

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APPENDIX

United States Court of Appeals

For the Eighth Circuit

No. 19-3144

Amber Boyer,

Plaintiff - Appellee,

v.

Schneider Electric Holdings, Inc.; Schneider Electric Holdings, Inc. Life and Accident Plan; Unum Life Insurance Company of America,

Defendants-Appellants.

Appeal from United States District Court for the Western District of Missouri - Joplin

Submitted: November 18, 2020
Filed: April 5, 2021

Before COLLOTON, ARNOLD, and KELLY, Circuit Judges.

COLLOTON, Circuit Judge.

After Eric Boyer died in a single-vehicle crash, his sister Amber sought life and accidental death benefits under his insurance plan. Unum Life Insurance Company of America paid Amber life insurance benefits, but denied her claim for accidental death benefits. Unum concluded that no benefits were allowed because Boyer's commission of a crime—speeding and passing vehicles in a no-passing zone—contributed to the crash. Amber disagreed and sued Unum and two codefendants under the Employee Retirement Income Security Act of 1974 ("ERISA"). *See* 29 U.S.C. § 1132(a)(1)(B). The district court ruled that Unum's interpretation of a "crime" exclusion in Boyer's insurance plan was unreasonable and granted summary judgment for Amber. We reach a contrary conclusion, and therefore reverse the judgment.

I.

Boyer died on January 22, 2016, after his vehicle ran off a two-lane road in Missouri and struck a tree. He was employed by Schneider Electric Holdings, Inc., and enrolled in Schneider's Life and Accident Plan. The Plan is funded by an insurance policy issued by Unum, which also serves as claims administrator with discretionary authority to make benefit determinations. Amber is the sole beneficiary of Boyer's insurance plan. Schneider, on Amber's behalf, filed a claim for life and accidental death benefits under the Plan.

The Plan insures against an "accidental bodily injury" resulting in death. It defines "accidental bodily injury" as "bodily harm caused solely by accidental means and not contributed to by any other cause." An exclusion from coverage is at issue here. The Plan does not cover accidental losses "caused by, contributed to by, or

resulting from . . . an attempt to commit or commission of a crime."

Before reaching its decision to deny accidental death benefits, Unum reviewed Boyer's death certificate, a police report from the crash scene, an autopsy report, and a toxicology report. In its denial letter, Unum explained that the police report showed that Boyer was passing vehicles in a no-passing zone and driving approximately 80 miles per hour in a 35 mile-per-hour zone. Unum observed that improper passing and speeding are misdemeanors punishable by jail time in Missouri, and concluded that Amber could not recover accidental death benefits because the loss occurred during Boyer's commission of a crime.

Amber filed an appeal with the claims administrator. Elaborating on its earlier denial, Unum explained that speeding and improper passing are crimes under Missouri law and "under the dictionary definition of 'crime.'" Even if the crimes were classified as violations or infractions under Missouri law, the decision added, "they would still be crimes" under Unum's interpretation of the Plan. The administrator concluded that because Boyer's death was "caused by, contributed to by, and/or resulted from an attempt to commit or commission of a crime," Amber was not entitled to accidental death benefits.

Amber sued, and the district court concluded that Unum abused its discretion in applying the "crime" exclusion, because "its determination was unreasonable and not supported by substantial evidence." Unum and its co-defendants appeal, and we review the district court's ruling *de novo*. *Engle v. Land O'Lakes, Inc.*, 936 F.3d 853, 855 (8th Cir. 2019).

II.

The Plan grants Unum discretion to determine eligibility for benefits, resolve factual disputes, and interpret its provisions, so we review Unum's denial of benefits for abuse of discretion. We uphold an administrator's interpretation of a plan if it is reasonable. *Mitchell v. Blue Cross Blue Shield of N.D.*, 953 F.3d 529, 537 (8th Cir. 2020). We have identified a number of factors that bear on the question of reasonableness: (1) whether the interpretation is consistent with the goals of the plan, (2) whether the interpretation renders any language in the plan meaningless or internally inconsistent, (3) whether the interpretation conflicts with substantive or procedural requirements of the ERISA statute, (4) whether the administrator has interpreted the words at issue consistently, and (5) whether the interpretation is contrary to the clear language of the plan. *Finley v. Special Agents Mut. Benefit Ass'n, Inc.*, 957 F.2d 617, 621 (8th Cir. 1992).

By contrast, when an administrator evaluates facts to determine the plan's application to a particular case, we review whether the administrator's decision was supported by "substantial evidence." *Mitchell*, 953 F.3d at 537. Substantial evidence need not amount to a preponderance, but it must be sufficient to satisfy a reasonable mind of the conclusion. *See King v. Hartford Life & Accident Ins. Co.*, 414 F.3d 994, 999 (8th Cir. 2005) (en banc).

Although Unum plays the dual role of evaluating claims and paying benefits, any conflict of interest does not alter the abuse-of-discretion standard of review. *Metro. Life Ins. Co. v. Glenn*, 554 U.S. 105, 115-16 (2008). A conflict of interest may be a factor in the review—a tie, for example, might be resolved against a

conflicted administrator, *id*. at 117—but on this record, the circumstance does not warrant great weight. On the question of potential bias, Unum explained that the company does not permit outcomes on claims decisions to influence the company's evaluation and compensation of those who make the decisions, and Amber pointed to no contrary evidence.

A.

Amber challenged the factual premise of the administrator's decision, and the district court concluded that Unum lacked "any substantial evidence in support" of its determination. The court concluded that Unum acted without "any evidence" about the posted speed limit or Boyer's speed, and without evidence that speeding and improper passing contributed to Boyer's death.

We have examined the record and conclude that the administrator's decision was supported by substantial evidence. Unum relied largely on a police report that included a diagram of the collision and five witness statements. All five witnesses observed Boyer's westbound vehicle weaving into the eastbound lane of traffic and attempting to pass several westbound vehicles in a no-passing zone. The investigating officer noted that the posted speed limit was 35 miles per hour, and that the road was clearly marked as a "no passing zone" with double solid yellow lines in the center.

One witness, an off-duty police sergeant, saw Boyer driving approximately 80 miles per hour as he approached the witness from behind. The administrator noted that the sergeant was experienced in assessing speed without radar. Two witnesses said that Boyer eventually passed their vehicles; one said that Boyer was traveling at "a high rate of speed." All five saw Boyer

run off the road and strike a tree. One reported that Boyer's vehicle "lost control and began to spin out of control before striking a tree off of the roadway." The police report on the crash listed Boyer's speed above the posted limit and improper passing as "probable contributing circumstances." The evidence is sufficient to support a reasonable finding that Boyer's speeding and improper passing contributed to the crash.

The district court also faulted Unum for failing adequately to consider an investigator's report noting icy roads and the medical examiner's determination that the manner of Boyer's death was an "accident." Unum, however, did address Amber's contention that slush and ice on the road caused Boyer's car to spin out of control. The administrator concluded that her contention was "inconsistent with the statements of multiple eyewitnesses" who observed Boyer driving at a high rate of speed and attempting to pass. Road conditions do not undermine the administrator's conclusion that Boyer's illegal conduct at least "contributed to" the loss. The medical examiner's characterization of the crash as an "accident" does not conflict with the decision. The crime exclusion applies to "accidental losses."

B.

The district court also accepted Amber's contention that Unum's interpretation of the "crime" exclusion was unreasonable. Unum disputes that conclusion, and argues that the district court erred in setting aside its decision on benefits. "[W]here plan fiduciaries have offered a 'reasonable interpretation' of disputed provisions, courts may not replace [it] with an interpretation of their own—and therefore cannot disturb as an 'abuse of discretion' the challenged benefits determination." *King*, 414 F.3d at 999 (quoting *de Nobel v. Vitro Corp.*, 885 F.2d 1180, 1188 (4th

Cir. 1989)). "An interpretation of a term is reasonable if the interpretation conforms with ordinary meaning, which can be derived from 'the dictionary definition of the word and the context in which it is used.'" *Kutten v. Sun Life Assurance Co. of Can.*, 759 F.3d 942, 945 (8th Cir. 2014) (quoting *Hutchins v. Champion Int'l Corp.*, 110 F.3d 1341, 1344 (8th Cir. 1997)).

Unum articulated two reasons why the Plan's crime exclusion applied to Boyer's conduct. First, speeding and improper passing are misdemeanors under Missouri law and are punishable by jail time. Mo. Rev. Stat. §§ 304.010, 304.016, 558.011. As such, Unum concluded, "[s]peeding and violation of passing regulations are crimes under Missouri law." Second, speeding and improper passing are "crimes under the dictionary definition of 'crime.'"

Amber maintains that Unum's interpretation is contrary to the clear language of the Plan, which excludes coverage for accidental losses "contributed to by . . . commission of a crime." Common dictionaries, however, support the reasonableness of Unum's conclusion. Crime is "[a]n act that the law makes punishable." *Black's Law Dictionary* 451 (10th ed. 2014). A misdemeanor is "[a] *crime* that is less serious than a felony." *Black's Law Dictionary* 1150 (10th ed. 2014) (emphasis added). Lay dictionaries are in accord as to the meaning of "crime." *See American Heritage Dictionary of the English Language* 430 (5th ed. 2016) ("[a]nact committed in violation of law where the consequence of conviction by a court is punishment, especially where the punishment is a serious one such as imprisonment"); *Webster's Third New International Dictionary* 536 (2002) ("the commission of an act that is forbidden . . . by a public law of a sovereign state to the injury of the public welfare and

that makes the offender liable to punishment by that law in a proceeding brought against him by the state").

Boyer's conduct constituted a crime under Missouri law. Boyer was driving more than twice the legal speed limit and passing vehicles in a no-passing zone on a two-lane road in icy road conditions. This was not a *de minimis* non-criminal "infraction" for exceeding the speed limit by five miles per hour or fewer. *Cf*. Mo. Rev. Stat. §§ 304.009.1, 556.021.1. An administrator is not bound to incorporate a particular State's criminal law in fashioning its own definition of crime, for that approach could lead to benefits varying by jurisdiction. But Missouri's classification of improper passing and speeding as misdemeanor offenses reinforces the reasonableness of Unum's determination. Amber has not established that Missouri law is an outlier on the question whether Boyer was committing a crime at the time of the crash.

The district court expressed concern that the term "crime" does not encompass "traffic violations," and that Unum's interpretation would allow the administrator to deny coverage if an insured suffered an accident while driving one mile per hour over a speed limit. Unum's decision here, however, did not dictate that every violation of law in the area of "traffic" must be treated the same. Boyer's conduct of high-speed motoring and improper passing was akin to reckless driving, and Unum reasonably determined that he was committing a "crime." If an administrator were to extend the meaning of "crime" to cover driving 56 miles per hour in a 55-mile-per-hour zone, then there will be time enough to consider the reasonableness of that position. It is not implicated here.

Amber also defends the district court's conclusion that defining crime to include Boyer's conduct is

inconsistent with the goal of the Plan to provide benefits in the case of an insured's accidental death. A plan that provides accidental death benefits, however, need not pursue that goal to the exclusion of all others. *See Wald v. Sw. Bell Corp. Customcare Med. Plan*, 83 F.3d 1002, 1007 (8th Cir. 1996). The Plan at issue does not provide coverage for accidental losses caused or contributed to by commission of a crime. It thus tempers the goal of providing accidental death benefits in order to preserve assets for those who do not engage in criminal conduct. A plan "need not draw down the assets contributed by the provident many to shift the cost of self-destructive behavior." *Sisters of the Third Ord. of St. Francis v. SwedishAmerican Grp. Health Benefit Tr.*, 901 F.2d 1369, 1372 (7th Cir. 1990). Denying benefits to an insured who commits a crime is not inconsistent with the goals of the Plan.

Amber next argues that Unum's interpretation of "crime" renders the Plan meaningless, but that is not so. An exclusion for speeding and improper passing does not preclude an award of benefits when injury or death results from any number of occurrences when the insured does not commit a crime. Just in the area of auto accidents, for example, consider an insured who hits a deer in the highway, misses a curve on a dimly-lit road, falls asleep at the wheel, or sustains injury when impacted by a drunk or careless driver.

The district court thought it problematic that Unum's claims manual says the "crime" exclusion "was not intended to apply to activities which would generally be classified as traffic violations." As the Tenth Circuit observed, however, the manual "does not purport to be definitive and has substantial play in the joints." *Caldwell v. Unum Life Ins. Co. of Am.*, 786 F. App'x 816, 818 (10th

Cir. 2019). The manual emphasizes that "[e]ach claim is unique and should be evaluated on its own merits." On the "crime" exclusion, the guidance also says that the exclusion *was* intended to apply to "an activity that would typically be classified as a crime . . . under state or federal law." The document was not available to the insured, so it could not have affected his reasonable expectations. Even accepting the manual as evidence of Unum's intent, it does not remove Boyer's conduct from the "crime" exclusion. As discussed, Boyer's speeding and improper passing each were classified as a crime under state law, and the manual is reasonably understood to distinguish between driving offenses like Boyer's and minor traffic infractions that jurisdictions like Missouri do not even classify as crimes.

Nor has Amber established that Unum applies the crime exclusion inconsistently. She adverts to *Harrison v. Unum Life Ins. Co. of Am.*, No. CV-04-21-PB, 2005 WL 827090 (D.N.H. Apr. 11, 2005), where Unum applied a crime exclusion to drunk driving that New Hampshire classified as a "violation" rather than a "crime." *Id*. at *1, 3. Since Unum relied here on the fact that Boyer's conduct was criminal in Missouri, Amber perceives an inconsistency. But in both *Harrison* and here, Unum relied on the ordinary dictionary meaning of "crime" in applying the exclusion to a violation of law. Breadth of application does not establish inconsistency.

Amber argues finally that Unum's interpretation conflicts with the substantive and procedural requirements of ERISA. Summary plan descriptions must "be written in a manner calculated to be understood by the average plan participant." 29 U.S.C. § 1022(a). They also must contain information about "circumstances which may result in disqualification, ineligibility, or denial or loss of benefits."

Id. § 1022(b). Amber observes that Unum's summary does not mention traffic violations, and argues that it does not place an average participant on fair notice that the crime exclusion encompasses speeding and improper passing. But there is nothing inherent in the word "crime" that would lead an average participant to believe that violations of law like Boyer's are not contemplated, especially where state law criminalizes the conduct. The administrator's decision does not conflict with the statute.

* * *

For these reasons, the judgment of the district court is reversed, and the case is remanded with directions to enter judgment for the defendants.

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MISSOURI
SOUTHWEST DIVISION

AMBER BOYER,

Plaintiff,

v. Case No. 3:17-cv-5053-SRB

SCHNEIDER ELECTRIC HOLDINGS, INC. LIFE AND ACCIDENT PLAN, SCHNEIDER ELECTRIC HOLDINGS, INC., and UNUM LIFE INSURANCE COMPANY OF AMERICA,

Defendants.

ORDER

Before the Court are Plaintiff's Motion for Summary Judgment (Doc. #38) and Defendants' Motion for Summary Judgment (Doc. #40). For the following reasons Plaintiff's Motion is GRANTED IN PART and Defendants' Motion is DENIED. The case is remanded to Unum for further consideration.

I. Background

This case arises out of the denial of a claim for accidental death benefits following a single-car accident and subsequent death of the insured, Eric Boyer. Plaintiff, the sole beneficiary of Mr. Boyer's accidental death policy, alleges Defendants denied her claim for accidental death benefits because they determined Mr. Boyer's death was not an accident and Mr. Boyer died during the commission of crimes.

Mr. Boyer was employed by Schneider Electric Holdings, Inc. ("Schneider") and participated in a Life and Accident Plan ("the Plan") sponsored and administered by Schneider. (Doc. #43, p. 2). The Plan is an employee welfare benefit plan governed by the Employee Retirement Income Security Act ("ERISA"), 29 U.S.C. §§ 1001 *et seq*. Unum Life Insurance Company of America ("Unum") insures the benefits available under the Plan through a group insurance policy ("the Policy"). (Doc. #44, p. 2). The Policy grants Unum "discretionary authority to make benefit determinations under the Plan." (Doc. #43, p. 3). Mr. Boyer possessed $67,000 in basic life insurance coverage, which was paid to Plaintiff upon Mr. Boyer's death. Mr. Boyer also possessed $464,000 in total accidental death coverage that was not paid to Plaintiff and is at issue in this case. (Doc. #44, p. 3).

On January 22, 2016, Mr. Boyer died in a single-car accident in St. Louis County, Missouri, after his vehicle ran off the roadway and struck a tree. On April 7, 2016, Schneider filed a claim for life and accidental death benefits under the Plan on behalf of Plaintiff. (Doc. #44, p. 3). On April 11, 2016, Unum advised Plaintiff it would pay life benefits, but that it needed further information to determine whether it would pay accidental death benefits. (Doc. #43, p. 4). Upon reviewing Mr. Boyer's death certificate, the police report, the autopsy report, and the toxicology laboratory report, Unum denied Plaintiff's claim for accidental death benefits. (Doc. #44, pp. 3–4).

The police report cited "Speed-Exceeded Limit" and "Improper Passing" as "probable contributing circumstances" to Mr. Boyer's death. (Doc. #44, p. 4). Several witnesses reported Mr. Boyer was traveling

westbound on Centaur Road at a high rate of speed as he entered the eastbound lane of traffic in a "No Passing Zone" to pass several vehicles when his vehicle ran off the roadway and struck a tree. (Doc. #43, pp. 4–5). The report also noted the speed limit at the site of the accident was either 25 or 35 miles per hour. (Doc. #43, pp. 5, 8). One witness, an off-duty police officer who observed Mr. Boyer approaching in his rear view mirror, stated he believed Mr. Boyer's vehicle was traveling approximately 80 miles per hour. (Doc. #43, p. 5). There was no radar or other machine reading of the speed of Mr. Boyer's vehicle. (Doc. #43, pp. 4–5).

The medical examiner's report listed the manner of death as an accident caused by blunt craniocerebral and thoracic trauma. (Doc. #44, p. 3). A medicolegal investigator who investigated the scene of the car accident noted the road conditions were "somewhat slushy/icy with dry areas." (Doc. #44, p. 4). The toxicology laboratory report demonstrated there was no trace of drugs or alcohol in Mr. Boyer's system at the time of the car accident. (Doc. #44, p. 5).

In a letter to Plaintiff dated June 10, 2016, Unum denied the accidental death benefits claim based on (1) its conclusion that Mr. Boyer's death was not an "accidental bodily injury" under the Plan and (2) the "crime exclusion" in Mr. Boyer's plan that excludes coverage for "accidental losses caused by, contributed to by, or resulting from: . . . an attempt to commit or commission of a crime." (Doc. #44, p. 5). Specifically, Unum stated in the denial letter:

> Information from the police report indicates that your brother was passing vehicles in a no passing zone. In addition, according to

> a witness statement, he was driving approximately 80 miles per hour with the posted speed limit being 35 miles per hour. The speed at which he was driving, and passing other vehicles in a no passing zone, contributed to his motor vehicle accident, and in turn his death.

(Doc. #43, p. 6). Unum further stated that such traffic violations are considered misdemeanors under Mo. Rev. Stat. §§ 304.010 and 304.016. (Doc. #43, p. 7). Notably, Unum's internal policy manual states that "'Attempt to commit' or 'commission' policy language was intended to exclude disabilities/losses which result from an activity that would typically be classified as a crime (or felony, depending on policy language) . . . [and] was not intended to apply to activities which would generally be classified as traffic violations." (Doc. #44, p. 7).

On July 1, 2016, Plaintiff appealed the denial and on July 8, 2016, Unum issued a second letter denying accidental death coverage. (Doc. #44, p. 5). On April 11, 2017, through counsel, Plaintiff again requested Unum reconsider its decision. (Doc. #44, p. 6). Unum responded by letter, informing Plaintiff the appeal process was complete and reaffirming its decision to deny coverage. (Doc. #44, p. 6). Plaintiff then brought this claim for "benefits due" under ERISA § 502(a)(1)(B), 29 U.S.C. § 1132(a)(1)(B).[3]

II. Legal Standard

[3]Additionally**,** Plaintiff pled common law breach of contract in her Complaint (Doc. #1, p. 6). Defendants argue an ERISA "benefits due" claim preempts the breach of contract claim. Plaintiff did not challenge or otherwise respond to Defendants' preemption argument. Accordingly, the Court finds Plaintiff has abandoned the breach of contract claim.

A. Summary Judgment

A moving party is entitled to summary judgment on a claim "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). Material facts are those "that might affect the outcome of the suit under the governing law," and a genuine dispute over a material fact is one "such that a reasonable jury could return a verdict for the nonmoving party." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). The facts and inferences are viewed in the light most favorable to the nonmoving party. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986).

"Once the moving party has made and supported their motion, the nonmoving party must proffer admissible evidence demonstrating a genuine dispute as to a material fact." *Holden v. Hirner*, 663 F.3d 336, 340 (8th Cir. 2011) (citation omitted). A party opposing summary judgment "may not rest upon mere allegation or denials of his pleading, but must set forth specific facts showing that there is a genuine issue for trial." *Anderson*, 477 U.S. at 256. "Mere allegations, unsupported by specific facts or evidence beyond the nonmoving party's own conclusions, are insufficient to withstand a motion for summary judgment." *Thomas v. Corwin*, 483 F.3d 516, 526–27 (8th Cir. 2007) (citation omitted). Summary judgment should not be granted if a reasonable jury could find for the nonmoving party. *Woodsmith Publ'g Co. v. Meredith Corp.*, 904 F.2d 1244, 1247 (8th Cir. 1990) (citing *Anderson*, 477 U.S. at 248). When the Court analyzes cross-motions for summary judgment, each motion must be evaluated on its own merits. *Fox v. Transam Leasing, Inc.*, 830 F.3d

1209, 1213 (10th Cir. 2016). "The denial of one does not require the grant of another." *Christian Heritage Academy v. Oklahoma Secondary School Acitivites Ass'n*, 483 F.3d 1025, 1030 (10th Cir. 2007). Both Plaintiff and Defendants in the instant case agree that there is no genuine dispute over any material fact. Further, both parties agree that because only a question of law remains to be resolved, i.e., whether Unum's decision to deny Plaintiff accidental death benefits was unreasonable, the case should be decided on summary judgment. (Doc. #39, p. 8; Doc. #44, p. 1).

B. ERISA "Benefits Due" Claim

Where a plan administrator has "discretionary authority to determine eligibility for benefits or to construe the terms of the plan," the court reviews the administrator's decision for abuse of discretion. *Barnhart v. Unum Life Ins. Co. of Am*., 179 F.3d 583, 587 (8th Cir. 1999). Under the abuse of discretion standard, a plan administrator's determination must be upheld unless the determination was unreasonable. *King v. Hartford Life & Accident Ins. Co.*, 414 F.3d 994, 999 (8th Cir. 2005) (en banc). Additionally, "a plan administrator's decision is an abuse of discretion if it is not supported by substantial evidence." *McClelland v. Life Ins. Co. of N. Am.*, 679 F.3d 755, 759 (8th Cir. 2012). Where the same entity both insures the plan and makes benefits determinations, the court gives that conflict of interest some weight in the abuse of discretion analysis*. Id.*

III. Discussion

Plaintiff contends Unum's interpretation of the Policy's language is an abuse of
discretion because it was unreasonable to apply the crime exclusion in light of Unum's internal policy that

traffic violations are not typically classified as crimes and for Unum to determine that Mr. Boyer's death was not an accidental bodily injury. Plaintiff further argues such determination was not supported by substantial evidence. Defendants argue Unum's decision to apply the crime exclusion was reasonable and based on substantial evidence. Defendants also contend that if the Court finds Unum erroneously applied the crime exclusion, the Court should remand the case for further consideration of whether Mr. Boyer's death was accidental under the Plan.

A. Crime Exclusion

1. Reasonableness

"[W]here plan fiduciaries have offered a reasonable interpretation of disputed provisions, courts may not replace it with an interpretation of their own. . . ." *Manning v. Am. Republic Ins. Co.*, 604 F.3d 1030, 1042 (8th Cir. 2010). The Eighth Circuit outlined five factors in *Finley v. Special Agents Mut. Ben. Ass'n, Inc.* to aid in determining whether a denial of benefits is reasonable. 957 F.2d 617, 621 (8th Cir. 1992). "Whether a plan administrator's decision to deny benefits is reasonable requires consideration" of the *Finley* factors. *Smith v. United Television, Inc. Special Severance Plan*, 474 F.3d 1033, 1036 (8th Cir. 2007). Those factors are:

(1) whether the interpretation is consistent with the goals of the plan;
(2) whether it renders any language in the plan meaningless or internally inconsistent;

(3) whether it conflicts with the substantive or procedural requirements of ERISA;
(0) whether [Unum] has interpreted the provisions at issue here consistently; and
(1) whether the interpretation is contrary to the clear language of the plan.

McClelland, 679 F.3d at 759 (citing *Finley*, 957 F.2d at 621).

a. *Finley* Factor 1 – Consistency with Goals

The first *Finley* factor asks whether the plan administrator's "interpretation is consistent with the goals of the Plan." *Finley*, 957 F.2d at 621. Plaintiff argues that Unum's interpretation of the crime exclusion as including speeding and improper passing is not consistent with the goals of the Plan, which, according to Plaintiff, are to provide coverage for accidents and "protect[] the interests of plan beneficiaries . . . ." *Nichols v. Unicare Life & Health Ins. Co.*, 739 F.3d 1176, 1184 n.4 (8th Cir. 2014). Defendants contend Unum's interpretation is consistent with its goals of excluding accidents caused by the commission of or attempt to commit a crime in order to shift the costs of "self-destructive" behavior.

The Court finds Unum's interpretation of the crime exclusion is inconsistent with the goals of the Plan. The primary goal of the Plan, and specifically accidental death coverage, is to provide benefits in the case of the insured's accidental death. To apply the crime exclusion to traffic violations is inconsistent with this goal and with the overall goal of ERISA under § 1001 of protecting the interests of plan beneficiaries,

particularly when crimes are not defined under the Plan and Unum's own policy instructs that the crime exclusion was not intended to apply to traffic violations. Further, while Defendants contend the inclusion of a crime exclusion in an accidental death plan serves to shift the costs of self-destructive behavior, here, as discussed below, substantial evidence is lacking to show that Mr. Boyer was committing a crime. Without substantial evidence supporting this conclusion, it cannot be reasonably argued that treating Mr. Boyer's death as resulting from the commission of a crime is consistent with Defendants' proffered goal.

b. *Finley* Factor 2 – Renders Any Language Meaningless

The second *Finley* factor tests whether the insurer's "interpretation renders any language in the Plan meaningless or internally inconsistent." *Finley*, 957 F.2d at 621. Plaintiff argues Unum's interpretation of the crime exclusion creates a blanket exclusion rendering the entire accidental death policy meaningless because it allows denial of coverage for a car accident under an accidental death policy. Plaintiff contends "by excluding something as trivial as speeding or passing in a no passing zone in a 'crime exclusion' Unum undermines the very title of the Policy—Accidental Death and Disability." (Doc. #47, p. 7). Defendants argue Unum's interpretation does not render any language meaningless because the Plan would still cover car accidents not caused by crimes, such as one involving the innocent victim of a two-vehicle car crash.

The Court finds Unum's determination in Mr. Boyer's case unreasonably limits coverage for accidents by including traffic violations in its interpretation of crime. Such a far-reaching construction of the "crime" exclusion

is inconsistent with Unum's own internal claims manual. The claims manual instructs: "When administering a crime exclusion . . . 'Attempt to commit' or 'commission' policy language was intended to exclude disabilities/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" and "was not intended to apply to activities which would generally be classified as traffic violations." (Doc. #39-1, p. 1). By interpreting speeding and passing in a no passing zone as crimes, Unum disregarded its own policy directing that traffic violations are not to be construed as crimes, rendering the claims manual language meaningless.

c. *Finley* Factor 3 – Conflict with the Substantive or Procedural Requirements

The third *Finley* factor examines whether an insurer's "interpretation conflicts with the substantive or procedural requirements of ERISA." *Finley*, 957 F.2d at 621. Plaintiff argues Unum's interpretation conflicts with the substantive requirements of ERISA, which require the plan to be "written in a manner calculated to be understood by the average plan participant," 29 U.S.C. § 1022(a), because a reasonable person would not consider speeding and improper passing to be crimes. Plaintiff states that while Unum did not define "crime" in the language of the Policy and has accordingly taken the liberty of defining it broadly in this instance, the average plan participant would consider crimes to be serious violations of the law. Plaintiff also notes that in its initial denial letter Unum stated, "Even if the crimes were classified as violations or infractions . . . they would still be crimes." (Doc. #43, p. 14). Plaintiff contends this interpretation "reduces 'accident insurance' to insurance only for strange, unforeseeable injuries or for injuries in

which the victim was passive rather than active," which is contrary to a reasonable policyholder's interpretation. *King*, 414 F.3d at 1008.

Defendants argue Unum's interpretation poses no conflict with ERISA requirements. They argue the point of the § 1022(a) requirement is to ensure the plan administrator does not "rely on some exotic definition outside the realm of reasonable." (Doc. #48, p. 11). Defendants state Unum relied on an ordinary dictionary definition of crime and, therefore, its interpretation did not conflict with ERISA. Defendants also refute Plaintiff's position that including infractions in the definition of "crime" would undermine the purpose of accident insurance, arguing that a number of accidents, such as those in which a driver was not committing a crime, would not be susceptible to the crime exclusion.The Court finds Unum's interpretation of the Plan conflicts with the requirements of ERISA. Interpreting the crime exclusion to include traffic violations conflicts with the requirements of § 1022(a). Defendants failed to define crimes under the Plan, and it is unreasonable to believe the average plan participant could anticipate Unum would construe the concept of crime in such a broad manner as to include traffic violations. Further, as the Court discussed in its analysis of the third *Finley* factor, including speeding and passing in a no passing zone as crimes under the crime exclusion unreasonably limits accidental death coverage, which is contrary to a reasonable policyholder's understanding and in conflict with §1022(a). The Court also finds Unum's interpretation conflicts with §1022(b), which requires that the plan description contain "circumstances which may result in disqualification, ineligibility, or denial or loss of

benefits." The Plan does not state that traffic violations will result in denial of or ineligibility for benefits. To the contrary, Unum's internal claims manual states the opposite: that the crime exclusion was not intended to apply to traffic violations. Therefore, Unum's interpretation of the crime exclusion conflicts with ERISA requirements under § 1022(a)–(b).

d. *Finley* Factor 4 – Interpret Provisions Consistently

The fourth factor under *Finley* asks whether the plan administrator has interpreted the provisions at issue consistently. *Finley*, 957 F.2d at 621. Plaintiff argues Unum's application of the crime exclusion is inconsistent with its internal claims manual, which instructs that the crime exclusion "was not intended to apply to activities which would generally be classified as traffic violations." (Doc. #39, p. 22). Defendants argue Unum did not depart from its policy by applying it to Mr. Boyer's case. Even still, Defendants cite *Heimeshoff v. Hartford Life & Accid. Ins. Co.*, 571 U.S. 99, 108 (2013), for the proposition that the claims manual, which contains such language, is not a legally binding document and does not override the Plan language.However, *Heimeshoff* addressed the enforceability of Plan language providing a 3-year statute of limitations, and did not involve a crime exclusion or a claims manual of any sort.

Defendants further argue Unum has consistently applied the crime exclusion. In support of this assertion, Defendants cite *Oomrigar v. Unum Life Ins. Co. of Am.*, No. 16-cv-940, 2017 WL 3913277 (D. Utah Sept. 6, 2017) and *Caldwell v. Unum Life Ins. Co. of Am.*, 271 F. Supp. 3d 1252 (D. Wyo. 2017), *appeal docketed*, No. 17-8078 (10th Cir. Oct. 19, 2017). In both cases the

court upheld Unum's decision to apply the crime exclusion and deny accidental death benefits. *Oomrigar* involved a policy holder who was speeding and evading the police when his motorcycle crashed and he died. 2017 WL 3913277, at *1. Unum applied the crime exclusion after an investigation in which Unum phoned a sergeant who was at the scene of the accident, attempted to contact the sergeant who was in pursuit of Oomrigar leading up to the accident, and spoke with a representative of the county attorney's office, who advised that Oomrigar would have been charged for reckless driving and evading the police if he had survived the accident. *Id.* at *4. In *Caldwell*, a policy holder was speeding when he lost control of his vehicle and, as a result, was ejected from the vehicle and died. 271 F. Supp. 3d at 1255–56. Unum applied the crime exclusion and supported its decision by relying on a highway patrol trooper's report he produced after an investigation. *Id.* In the report, the trooper detailed his forensic mapping of the scene, including an analysis of tire marks, to determine the exact speed the decedent's car was traveling at the time it crashed. *Id*.

The Court finds Unum's application of the crime exclusion here is inconsistent with its own internal claims manual, which states the exclusion "was not intended to apply to activities which would generally be classified as traffic violations." (Doc. #44, p. 7). Unum has presented no substantial evidence establishing Mr. Boyer's actions were consistent with criminal behavior rather than traffic violations. Moreover, Unum's argument that its interpretation here is consistent with prior interpretations in *Oomrigar* and *Caldwell* is inaccurate. As detailed above, in both of those cases, Unum relied on substantial evidence resulting from

thorough and detailed investigations in making its decision to apply the crime exclusion. To the contrary, in this case, Unum declined to investigate and instead decided to deny accidental death benefits based on witness statements and "probable contributing circumstances" listed in the police report. Therefore, Unum has not interpreted the crime exclusion consistently.

e. *Finley* Factor 5 – Contrary to Clear Language

The fifth *Finley* factor examines whether the insurer's "interpretation is contrary to the clear language of the Plan." *Finley*, 957 F.2d at 621. Plaintiff argues Unum's interpretation is contrary to the plain language of the Plan in that the crime exclusion as written does not include traffic violations. Defendants argue Unum's interpretation is consistent with the plain language of the Plan because speeding and passing in a no passing zone are misdemeanors under Missouri law and because misdemeanors are considered crimes according to the dictionary.

The Court finds Unum's interpretation of the crime exclusion is contrary to the plain language of the Plan. The crime exclusion in Mr. Boyer's plan excludes coverage for "accidental losses caused by, contributed to by, or resulting from: . . . an attempt to commit or commission of a crime." This language does not demonstrate an exclusion of coverage for accidents resulting from the insured's traffic violations. To allow Defendants' construction to stand would allow Unum to deny coverage every time a plaintiff was caught speeding even one mile per hour over the speed limit.

To construe the crime exclusion to include such violations is contrary to the plain language of the Plan.

2. Substantial Evidence

"A plan administrator's decision is an abuse of discretion if it is not supported by substantial evidence." *McClelland*, 679 F.3d at 759. Substantial evidence is "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *King*, 414 F.3d at 999. The court cannot "substitute its own weighing of evidence for that of the [administrator]." *Cash v. Wal-Mart Group Health Plan*, 107 F.3d 637, 641 (8th Cir. 1997).

Plaintiff emphasizes that Unum did not attempt to investigate by actually interviewing witnesses or to otherwise determine what speed limit applied to the stretch of road on which Mr. Boyer's crash occurred or at what speed Mr. Boyer's car was actually traveling at the time of the accident. Plaintiff states there was no accident reconstruction done to prove that speeding or improper passing contributed to Mr. Boyer's death and that there is no substantial evidence to conclude that the area was in fact a no passing zone. Plaintiff cites *Glenn v. Metlife* for the proposition that failure to consider meaningful evidence and undertake a thorough investigation renders a benefits denial an abuse of discretion. 461 F.3d 660 (6th Cir. 2006). Plaintiff argues Unum chose to make its decision to deny coverage by giving significant weight to witness statements and minimizing consideration of evidence such as the medicolegal investigator's report noting icy roads and the medical examiner's determination that the manner of death was an accident. Plaintiff further argues Unum failed to inquire with relevant authorities as to whether charges would have been filed against

Mr. Boyer and failed to speak to any witnesses, investigators, or reporting officers. Plaintiff states that Unum failed to conduct a meaningful investigation and instead opted to rely on a file review, which should be considered in assessing whether the decision to deny coverage was reasonable. *Id.* at 671.

Defendants claim substantial evidence, including the police report and autopsy report, supports Unum's decision. They argue Unum did not need to investigate because the police report already captured the police officer's and witnesses' thoughts. Defendants further state Plaintiff has not cited any authority about the extent of investigation required before applying the crime exclusion and argue, "District courts do not second guess the investigation"; rather, they "only review . . . the evidence in front of Unum and determine if substantial evidence supports the decision." (Doc. #48, pp. 13–14).

The Court finds Unum's interpretation of the Plan was not supported by substantial evidence. It is unreasonable to define an insured's behavior as criminal based solely on witness statements and "probable contributing circumstances" contained within a police report. The police report contained no detailed analysis of the scene of the accident and no independent police investigation findings. Unum applied the crime exclusion to this claim without any evidence of the posted speed limit at the location of the car accident, of what speed Mr. Boyer's car was traveling, or that speed or improper passing in fact caused or contributed to causing Mr. Boyer's death. Unum also failed to meaningfully consider the medicolegal investigator's report noting icy roads and the medical examiner's determination that the manner of death was an accident.

Without substantial evidence available upon which Unum could rely, Unum arbitrarily concluded Mr. Boyer's conduct and cause of death was criminal in nature. Unum forewent any meaningful investigation or attempt to contact the reporting officers, investigators, prosecutors, or any authority whatsoever to obtain any substantial evidence regarding the circumstances surrounding Mr. Boyer's death. Unum did not contact a single witness in the claim review process. Instead, Unum relied on a file containing unsubstantiated and speculative information. Accordingly, Unum abused its discretion by concluding Mr. Boyer's car accident was caused by his own criminal activity without any substantial evidence in support.

In sum, the Court finds Unum abused its discretion in denying accidental death benefits based on the Plan's crime exclusion in that its determination was unreasonable under the *Finley* factors and not supported by substantial evidence.

B. Accident

Plaintiff argues Unum used the incorrect standard in determining Mr. Boyer's death was not an accident under the Plan. Plaintiff contends that to determine whether an occurrence was an accident, an insurer must apply the framework established in *Wickman v. Northwestern Nat'l Ins. Co.*, 908 F.2d 1077 (1st Cir. 1990), discussed extensively in *King,* 414 F.3d. Under *Wickman*, Unum must consider whether "a reasonable person . . . would have viewed the injury as *highly likely* to occur as a result of the insured's intentional conduct." *Id.* at 997 (emphasis added). Plaintiff states and Defendants concede Unum applied a "reasonably foreseeable" standard in determining that Mr. Boyer's death was not accidental. Both parties

acknowledge that in *King*, an insurer also applied the "reasonably foreseeable" standard in determining whether a beneficiary was entitled to accidental death benefits and the Eighth Circuit remanded the case to the insurer to apply the *Wickman* standard. (Doc. #44, p. 20; Doc. #39, p. 15) (citing *King*, 414 F.3d at 1002–1006).

Under *Wickman*, "an event is an accident if the decedent did not subjectively expect to suffer 'an injury similar in type or kind to that suffered' and the suppositions underlying that expectation were reasonable." *Nichols*, 739 F.3d at 1182 (quoting *Wickman*, 908. F.2d at 1088). The determination of whether the suppositions were reasonable "should be made from the perspective of the insured, allowing the insured a great deal of latitude and taking into account the insured's personal characteristics and experiences." *Id*. If the decedent's subjective expectation cannot be determined, the inquiry is whether "a reasonable person, with background and characteristics similar to the insured, would have viewed the injury as *highly likely to occur* as a result of the insured's intentional conduct." *Id*.

As Defendants argue, the Court finds the proper remedy under *King* is to return the case to Unum for reconsideration of the "accident" determination under the *Wickman* standard so the Court may conduct a proper review. In *King*, the Eighth Circuit noted that "by asserting that the *Wickman* test of 'highly likely to occur,' rather than a 'reasonably foreseeable' standard, should govern whether [plaintiff] is entitled to 'accidental death benefits' under the plan, [the insurer] effectively concedes that it applied the wrong definition of 'accidental' in denying the claim." *King*, 414 F.3d at

1005. The Court then held that "the proper remedy is to return the case to the administrator for reevaluation of the claim under what [the insurer] says is the correct standard." *Id.* The Court emphasized that under ERISA, the courts have "a range of remedial powers," which often includes remanding a case back to the plan administrator for further consideration. *Id.* Like the insurer in *King*, Unum conceded that it employed the "reasonably foreseeable" standard in denying accidental death benefits and urges the Court to remand the case so that it can apply the *Wickman* standard. Accordingly, this Court finds the proper remedy under *King* is to return the case to Unum for reconsideration of the "accident" determination under the *Wickman* framework.

C. Attorney's Fees

Plaintiff argues she is entitled to attorney's fees under ERISA § 502(g), 29 U.S.C. § 1132(g). Defendants assert a request for attorney's fees is not ripe pre-judgment under Federal Rule of Civil Procedure 54(d). Under ERISA, "a fees claimant must show 'some degree of success on the merits' before a court may award attorney's fees under §1132(g)(1)." *Hardt v. Reliance Standard Life Ins. Co.*, 560 U.S. 242, 255 (2010) (quoting *Ruckelshaus v. Sierra Club*, 463 U.S. 680, 694 (1983)). "Achieving 'trivial success on the merits' or a 'purely procedural victor[y]'" is not enough. *Id.* (quoting *Ruckelshaus*, 463 U.S. at 688). The test is satisfied "if the court can fairly call the outcome of the litigation some success on the merits without conducting a 'lengthy inquir[y] into the question whether a particular party's success was substantial or occurred on a central issue.'" *Id.* (internal quotations omitted).

The Court finds Plaintiff's argument that she is entitled to attorney's fees assumes the Court agrees with her position that she is "entitled to her full payment of the accidental death benefits[.]" (Doc. #39, p. 27). The Court does not find in Plaintiff's favor on this point, but instead remands for further consideration by Unum. Accordingly, Plaintiff's request for attorney's fees is denied without prejudice. Given that this Order grants Plaintiff's Motion for Summary Judgment on the issue of the "crime exclusion" and remands the case to Unum for proper analysis of the "accident" issue, Plaintiff may move for attorney's fees after Unum decides the "accident" issue under the *Wickman* framework.

IV. Conclusion

The Court finds Unum abused its discretion in denying Plaintiff accidental death benefits based on the Plan's crime exclusion in that its determination was unreasonable and not supported by substantial evidence. Accordingly, Plaintiff's Motion for Summary Judgment (Doc. #38) is GRANTED IN PART and Defendants' Motion for Summary Judgment (Doc. #40) is DENIED. The Court remands the case to Unum for further consideration of the "accident" determination under the *Wickman* standard.

ORDERED that Unum reconsider its determination that Mr. Boyer's car accident was not an "accident" under the *Wickman* standard and file a joint status report within 30 days.

IT IS SO ORDERED.

/s/ Stephen R. Bough
STEPHEN R. BOUGH
UNITED STATES DISTRICT JUDGE

Dated: October 10, 2018

**IN THE UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF MISSOURI
SOUTHWESTERN DIVISION**

AMBER BOYER,

Plaintiff,

v.

Case No. 3:17-cv-05053-SRB

SCHNEIDER ELECTRIC HOLDINGS, INC. LIFE AND ACCIDENT PLAN, SCHNEIDER ELECTRIC HOLDINGS, INC., and UNUM LIFE INSURANCE COMPANY OF AMERICA,

Defendants.

ORDER

Before the Court are Plaintiff's Second Motion for Summary Judgment (Doc. #59) and Defendants' Second Motion for Summary Judgment (Doc. #61). For the following reasons Plaintiff's Motion is GRANTED IN PART and DENIED IN PART and Defendants' Motion is DENIED.

I. Background

Eric Boyer was employed by Schneider Electric Holdings, Inc. ("Schneider") and participated in a Life and Accident Plan ("the Plan") sponsored and administered by Schneider. (Doc. #43, p. 2). The Plan is an employee welfare benefit plan governed by the Employee Retirement Income Security Act ("ERISA"), 29 U.S.C. §§

1001 *et seq*. Unum Life Insurance Company of America ("Unum") insures the benefits available under the Plan through a group insurance policy ("the Policy"). The Policy grants Unum "discretionary authority to make benefit determinations under the Plan." Mr. Boyer possessed $67,000 in basic life insurance coverage, which was paid to Plaintiff, the sole beneficiary of Mr. Boyer's life and accidental death policy, upon Mr. Boyer's death. Mr. Boyer also possessed $464,000 in total accidental death coverage that was not paid to Plaintiff and is at issue in this case.

On January 22, 2016, Mr. Boyer died in a single-car accident in St. Louis County, Missouri, after his vehicle ran off the roadway and struck a tree. Schneider filed a claim for life and accidental death benefits under the Plan on behalf of Plaintiff. Upon reviewing Mr. Boyer's death certificate, the police report, the autopsy report, and the toxicology laboratory report, Unum denied Plaintiff's claim for accidental death benefits. Unum based its denial on (1) its conclusion that Mr. Boyer's death was not an "accidental bodily injury" under the Plan and (2) the "crime exclusion" in Mr. Boyer's plan that excludes coverage for "accidental losses caused by, contributed to by, or resulting from: . . . an attempt to commit or commission of a crime." (Doc. #44, p. 5). Specifically, Unum stated in the denial letter:

> Information from the police report indicates that your brother was passing vehicles in a no passing zone. In addition, according to a witness statement, he was driving approximately 80 miles per hour with the posted speed limit being 35 miles per hour. The speed at which he was driving, and

> passing other vehicles in a no passing zone, contributed to his motor vehicle accident, and in turn his death.

(Doc. #43, p. 6).

Plaintiff exhausted Unum's appeal process to no avail. After Unum denied Plaintiff's appeals, Plaintiff brought a claim for "benefits due" under ERISA § 502(a)(1)(B), 29 U.S.C. § 1132(a)(1)(B).[4] The parties filed cross motions for summary judgment. The Court found that Unum abused its discretion in denying accidental death benefits based on the crime exclusion in that its determination was unreasonable and not supported by substantial evidence. The Court also found Unum used the incorrect standard in determining Mr. Boyer's death was not an accident under the Plan, and remanded the case to Unum for reconsideration of the accident determination under the standard set forth in *Wickman v. Northwestern Nat'l Ins. Co.*, 908 F.2d 1077 (1st Cir. 1990), discussed extensively in *King v. Hartford Life & Accident Ins. Co.*, 414 F.3d 994 (8th Cir. 2005) (en banc).

On remand, Plaintiff provided additional information to Unum including an affidavit of Plaintiff, an affidavit of Mr. Boyer's long-time friend, Marissa Delmoral, and information about autocross, a car racing sport in which Mr. Boyer participated. Unum interviewed by telephone a police officer who witnessed the car accident and obtained photos from the police investigation file. Unum again concluded that Mr. Boyer did not die by accident as contemplated by the Plan. In support of its decision, Unum stated it could not

[4] Plaintiff pled and subsequently abandoned a claim for common law breach of contract.

determine Mr. Boyer's subjective expectations and that a reasonable person with background and characteristics similar to Mr. Boyer would have viewed injury or death as a highly likely and foreseeable result based on Mr. Boyer's acts of speeding and attempting to pass multiple vehicles under dangerous conditions. Now before the Court are the parties' second cross motions for summary judgment.

II. Legal Standard

A. Summary Judgment

A moving party is entitled to summary judgment "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). Material facts are those "that might affect the outcome of the suit under the governing law," and a genuine dispute over a material fact is one "such that a reasonable jury could return a verdict for the nonmoving party." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). Here, Plaintiff and Defendants agree that there is no genuine dispute over any material fact. Further, all parties agree that because only a question of law remains to be resolved, i.e., whether Unum's decision to deny Plaintiff accidental death benefits was unreasonable, the case should be decided on summary judgment.

B. ERISA "Benefits Due" Claim

Where a plan administrator has "discretionary authority to determine eligibility for benefits or to construe the terms of the plan," the court reviews the administrator's decision for abuse of discretion. *Barnhart v. Unum Life Ins. Co. of Am*., 179 F.3d 583, 587 (8th Cir. 1999). However, where the same entity both insures the plan and makes benefits determinations, the court gives that conflict of interest

some weight in the abuse of discretion analysis. *McClelland v. Life Ins. Co. of N. Am.*, 679 F.3d 755, 759 (8th Cir. 2012). Under the abuse of discretion standard, a plan administrator's determination must be upheld unless the determination was unreasonable. *King*, 414 F.3d at 994. A reasonable determination must be supported by substantial evidence. *McClelland*, 679 F.3d at 759.

III. Discussion

A. Accident

To determine whether an occurrence was an accident, an insurer must apply the framework established in *Wickman v. Northwestern Nat'l Ins. Co.*, 908 F.2d 1077 (1st Cir. 1990), discussed extensively in *King,* 414 F.3d.[5] Under *Wickman*, "an event is an accident if the decedent did not subjectively expect to suffer 'an injury similar in type or kind to that suffered'and the suppositions underlying that expectation were reasonable." *Nichols v. Unicare Life & Health Ins. Co.*,

[5] Defendants argue that the Eighth Circuit has never adopted the *Wickman* standard and that the Court should allow Unum to utilize the "reasonably foreseeable" standard it used to make its accident determination before remand. The Court in its Order dated October 10, 2018, which ruled on the parties' first cross motions for summary judgment, ordered Unum to reconsider its determination that Mr. Boyer's car accident was not an accident under the *Wickman* standard. The Eighth Circuit all but formally adopted the *Wickman* test in its decision in King, 414 F.3d at 1005–06. In subsequent decisions, the Eighth Circuit and the Western and Eastern Districts of Missouri have applied the *Wickman* standard to cases like this, in which an insurer denies accidental death benefits based on a determination that an insured's death did not occur as a result of an accident. Several of those cases are cited in this Order. Defendants fail to point to any cases out of the Eighth Circuit or the Western or Eastern Districts of Missouri in which the court, in a case factually and legally similar to this case, does not utilize the *Wickman* standard and instead utilizes the reasonably foreseeable standard.

739 F.3d 1176, 1182 (8th Cir. 2014) (quoting *Wickman*, 908. F.2d at 1088). The determination of whether the suppositions were reasonable "should be made from the perspective of the insured, allowing the insured a great deal of latitude and taking into account the insured's personal characteristics and experiences." *Id*. If the decedent's subjective expectation cannot be determined, the inquiry is whether "a reasonable person, with background and characteristics similar to the insured, would have viewed the injury as highly likely to occur as a result of the insured's intentional conduct." *Id*.[6]

Defendants argue Unum's conclusion that Mr. Boyer's death was not accidental was reasonable based on "a combination of many factors – speeding, the lack of a shoulder for the road, trees and brush close by, the snowy/wet conditions, at twilight, in a No Passing Zone with numerous hills, along with the attempt to pass five vehicles." (Doc. #62, p. 17). Defendants argue that a driver with experience in autocross racing, like Mr. Boyer, would have "objectively believed that death was highly likely to occur." (Doc. #62, p. 18). Plaintiff argues evidence of Mr. Boyer's subjective expectations establishes the car crash was an accident and that his subjective beliefs were reasonable. Plaintiff argues alternatively that a reasonable person would not have viewed death as highly likely to occur as a result of Mr. Boyer's actions.

[6] The Court is not convinced by Defendants' misconstruction of the *Wickman* standard as one in which "plaintiff's burden is to prove that an objective person . . . would conclude that [Mr. Boyer's] death from his car crash was highly unlikely to occur." (Doc. #62, p. 12). *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101 (1989), cited by Defendants, sets forth no such rule and is not a case about the denial of accidental death benefits.

Unum drew no conclusion regarding Mr. Boyer's subjective expectations based on its determination that there is no reliable information "about [Mr. Boyer's] subjective belief when he made the decision to engage in the inherently risky behavior." (Doc. #62, p. 12). Unum argues that the "evidence submitted relates to [Mr. Boyer's] state-of-mind in the days leading up to the wreck," which is irrelevant to the subjective expectation analysis. (Doc. #62, p. 12). Binding case law does not limit the subjective expectation analysis to the moments before the accident, as Unum suggests. To the contrary, the Eighth Circuit has rejected insurance companies' attempts to narrow the subjective expectation analysis window to the moments before an accident. *See Nichols*, 739 F.3d at 1183; *McClelland*, 679 F.3d at 760–61.

Unum's failure to analyze the affidavits submitted by Plaintiff during remand to determine Mr. Boyer's subjective expectations is unreasonable and an abuse of discretion in light of Eighth Circuit precedent. In *Nichols*, the Eighth Circuit found an accidental death insurance plan participant's death from mixed prescription drug intoxication was accidental. *Nichols*, 739 F.3d at 1182–84. The Court found that the insurance company erred in denying accidental death benefits coverage in that the insurance company "ignore[d] the subjective evidence submitted by [plaintiff], and instead [made] leaps to get to the 'objective' conclusion it desire[d]." *Id.* at 1183. The Court looked to evidence demonstrating that the insured "had been taking this combination of prescribed medications . . . for [several months]" in determining the insured's subjective state of mind leading up to her death. *Id.*

In *McClelland*, the Eighth Circuit found the denial of accidental death benefits to be an abuse of discretion in the case of a plan participant who died as a result of a motorcycle accident in which the insured had an alcohol level above the legal limit, was driving at a high rate of speed, and was weaving in and out of traffic. *McClelland*, 679 F.3d at 760–62. The Eighth Circuit found the insurance company abused its discretion by failing to "take a subjective look at the insured's state of mind" as is required under *Wickman*. *Id.* at 760. The Court analyzed the insured's behaviors the morning of the motorcycle accident and considered his plans for the afternoon. In finding that the insured "did not think it highly likely that he would die on [the day of his death]," the Court considered that the insured had plans to do yard work that afternoon, that he showed no signs of intoxication prior to the accident, and that his behavior on the morning of the accident was normal. *Id.* at 760–61. The Court found "the objective evidence that [the insured] was traveling at a high rate of speed with an elevated blood alcohol level does not alter this subjective evidence." *Id.* at 761. The Court found "[t]here was overwhelming evidence that subjectively, [the insured], an experienced motorcyclist, intended to ride his Harley to visit friends and then return safely home to do yard work." *Id.*

Defendants' assertion that subjective evidence of Mr. Boyer's intent does not exist is incorrect. Substantial evidence demonstrates the car crash resulting in Mr. Boyer's death was an accident because Mr. Boyer did not subjectively expect to crash his car and die as a result of his actions, and his expectation was reasonable. Like the insured in *McClelland*, Mr. Boyer was an experienced and skilled driver with a

passion for and knowledge of cars. Much like in *McClelland*, affidavits submitted by Plaintiff demonstrate that Mr. Boyer was traveling to visit friends, with plans for the next day; in this case, to help a friend choose and purchase a car. Mr. Boyer had no alcohol in his system. The evidence shows that Mr. Boyer was happy and in a good place in life, and there is no evidence demonstrating otherwise. As was the case in *McClelland*, there is "not even a scintilla of evidence that [Mr. Boyer] thought his death was highly likely to occur." *Id.* The Court concludes that Unum abused its discretion by completely foregoing the analysis of Mr. Boyer's subjective expectations "to get to the 'objective' conclusion it desires." *Nichols*, 739 F.3d at 1182.

However, even if Mr. Boyer's subjective expectations were undeterminable, "a reasonable person, with background and characteristics similar to [Mr. Boyer], would not have viewed his death as highly likely to occur as a result of his conduct." *Id.* (quoting *Wickman*, 908 F.2d at 1088). Defendants acknowledge Mr. Boyer had a passion for cars and motorcycles and he raced cars in a sport called autocross. Mr. Boyer worked on breaking down and rebuilding vehicles. A reasonable person with Mr. Boyer's background and experience with cars would not have viewed his car crash and death as highly likely to occur as a result of unlawfully passing vehicles at a high rate of speed. As a car aficionado and experienced autocross racer, a person in Mr. Boyer's shoes would be confident in his driving abilities, as Unum admits, and make driving decisions in line with his confidence.

Mr. Boyer miscalculated his ability to pass and seemingly made an error in judgment, but substantial

evidence does not demonstrate that a reasonable person with Mr. Boyer's background would have viewed death as highly likely to occur as a result of his conduct. Defendants make much of the road conditions and the fact it was "dusk or twilight" at the time of the accident. (Doc. #62, p. 14). However, that Mr. Boyer misjudged the conditions of the road and the surrounding landscape does not demonstrate that a reasonable person with Mr. Boyer's background would have viewed his death as highly likely to occur. *See McClelland*, 679 F.3d at 758 (finding insured did not subjectively expect to be injured or die even though insured was weaving in and out of traffic, not wearing a helmet, and speeding around a curve with a soft gravel shoulder). Rather, "[g]enerally, insureds purchase accident insurance for the very purpose of obtaining protection from their own miscalculations and misjudgments." *Id.* at 762 (quoting *Wickman*, 908 F.2d at 1088) (internal quotation marks omitted).

Accordingly, Unum abused its discretion by foregoing the analysis of Mr. Boyer's subjective expectations and by unreasonably determining that a reasonable person with background and characteristics similar to Mr. Boyer would have viewed his death as highly likely to occur as a result of his conduct. Summary judgment is granted in favor of Plaintiff on her claim for recovery of accidental death benefits.

B. Attorney's Fees

Plaintiff argues she is entitled to prejudgment interest and attorney's fees under ERISA § 502(g), 29 U.S.C. § 1132(g). Plaintiff concedes additional briefing is needed on the issue. Defendants assert a pre-judgment request for attorney's fees is not ripe under Federal Rule of Civil Procedure 54(d). Defendants argue a motion for

attorney's fees should be filed following the entry of judgment. The Court agrees that Plaintiff's motion for prejudgment interest and attorney's fees is premature, especially considering the lack of briefing and absence of evidentiary support submitted on the matter. Accordingly, Plaintiff's motion for summary judgment on the attorney's fees issue is denied without prejudice.

IV. Conclusion

The Court finds Unum abused its discretion in denying Plaintiff accidental death benefits in that its determination was unreasonable and not supported by substantial evidence. Accordingly, Plaintiff's Second Motion for Summary Judgment (Doc. #59) is GRANTED IN PART and DENIED IN PART. Plaintiff's motion for summary judgment on Count I of her Complaint for recovery of accidental death benefits under 29 U.S.C. § 1132(a)(1)(B) is granted. Plaintiff's motion for summary judgment on her request for an award of prejudgment interest and attorney's fees is denied without prejudice. Defendants' Second Motion for Summary Judgment (Doc. #61) is DENIED.

The Court **ORDERS** the following briefing schedule for Plaintiff's motion for attorney's fees:

1) Plaintiff shall file a motion for attorney's fees on or before August 14, 2019.
2) Defendants shall file a response on or before August 28, 2019.
3) Plaintiff shall file a reply on or before September 11, 2019.

IT IS SO ORDERED.

/s/ Stephen R. Bough
STEPHEN R. BOUGH
UNITED STATES DISTRICT JUDGE
Dated: July 31, 2019

**IN THE UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF MISSOURI
SOUTHWESTERN DIVISION**

AMBER BOYER,

Plaintiff,

v.

CaseNo. 3:17-cv-05053 SRB

SCHNEIDER ELECTRIC HOLDINGS, INC. LIFE AND ACCIDENT PLAN, SCHNEIDER ELECTRIC HOLDINGS, INC., and UNUM LIFE INSURANCE COMPANY OF AMERICA,

Defendants.

ORDER

Before the Court is Plaintiff's Motion for Attorney Fees and Pre-Judgment Interest and Suggestions in Support. (Doc. #69). For the following reasons the Motion is GRANTED with modifications.

I. Background

Eric Boyer was employed by Schneider Electric Holdings, Inc. ("Schneider") and participated in a Life and Accident Plan ("the Plan") sponsored and administered by Schneider, and governed by the Employee Retirement Income Security Act ("ERISA"), 29 U.S.C. §§ 1001 *et seq*. Unum Life Insurance Company of America ("Unum") insures the benefits available under the Plan through a group insurance policy ("the Policy"). The

Policy grants Unum "discretionary authority to make benefit determinations under the Plan." (Doc. #43, p. 3). Mr. Boyer possessed basic life insurance coverage and accidental death coverage. On January 22, 2016, Mr. Boyer died in a single-car accident after his vehicle ran off the roadway and struck a tree. Schneider filed a claim for life and accidental death benefits under the Plan on behalf of Plaintiff, Mr. Boyer's sister and sole beneficiary of the Policy. Unum approved Plaintiff's claim for life insurance benefits and denied Plaintiff's claim for accidental death benefits. Unum based its denial of accidental death benefits on (1) its conclusion that Mr. Boyer's death was not an "accidental bodily injury" and (2) the "crime exclusion" in the Plan.

Plaintiff appealed Unum's denial of accidental death benefits through Unum's administrative appeal process. On July 8, 2016, Unum denied Plaintiff's appeal and advised that Plaintiff's next step to challenging Unum's decision would be to bring a civil suit under ERISA. Accordingly, Plaintiff hired counsel to pursue a civil claim. On April 11, 2017, Counsel sent a letter to Unum to give Unum an opportunity to reverse its decision before filing a lawsuit. On April 18, 2017, Unum responded to the letter and informed counsel that Plaintiff had already exhausted the appeal process and that no further internal review was available. Accordingly, Plaintiff, through counsel, brought a claim for "benefits due" under ERISA § 502(a)(1)(B), 29 U.S.C. § 1132(a)(1)(B).

The parties filed cross motions for summary judgment. The Court found that Unum abused its discretion in denying accidental death benefits based on the Plan's crime exclusion. The Court also found Unum used the incorrect standard in determining Mr. Boyer's

death was not an accident and remanded the case to Unum for reconsideration. On remand, Unum again concluded that Mr. Boyer's death was not accidental. The parties then filed a second round of cross motions for summary judgment. The Court granted summary judgment in favor of Plaintiff, finding Unum abused its discretion in determining Mr. Boyer's death was not accidental and finding Plaintiff was entitled to recover accidental death benefits. Plaintiff now moves the Court for attorney's fees and prejudgment interest.

II. Legal Standards & Discussion

A. Attorney's Fees

"ERISA provides the district court discretion to award 'a reasonable attorney's fee and costs of action to either party.'" *Delcastillo v. Odyssey Res. Mgmt., Inc.*, 431 F.3d 1124, 1131– 32 (8th Cir. 2005) (citing 29 U.S.C. § 1132(g)(1)). In deciding whether to award attorney's fees in an ERISA case, the Court considers: "(1) degree of bad faith; (2) ability to pay; (3) deterrence; (4) significance of the legal question; and (5) relative merits of the positions." *Nichols v. Unicare Life & Health Ins. Co.*, 739 F.3d 1176, 1184 (8th Cir. 2014). "[A]lthough there is no presumption in favor of attorney fees in an ERISA action, a prevailing plaintiff rarely fails to receive fees." *Starr v. Metro Sys., Inc.*, 461 F.3d 1036, 1041 (8th Cir. 2006) (internal citation omitted). A lodestar calculation, which is "the number of hours reasonably expended on the litigation multiplied by a reasonable hourly rate, is the appropriate method for determining the attorney fee award in most cases." *McClelland v. Life Ins. Co. of N. Am.*, 679 F.3d 755, 762 (8th Cir. 2012) (citing *Hensley v. Eckerhart*, 461 U.S. 424, 433–34 (1983)). The Court may award fees in excess of the lodestar amount only in "rare" and "exceptional" circumstances in which evidence

demonstrates "that the lodestar fee would not have been adequate to attract competent counsel." *Tussey v. ABB, Inc*., No. 06-04305-CV-C-NKL, 2012 WL 5386033, at * 4–5 (W.D. Mo. Nov. 2, 2012) (quoting *Perdue v. Kenny A. ex rel. Winn*, 559 U.S. 542, 553 (2010) (internal quotation marks omitted)), *vacated on other grounds*, 746 F.3d 327 (8th Cir. 2014).

Plaintiff seeks attorney's fees for a total of 360.4 hours of legal work completed from August 8, 2016, through August 5, 2019. The applicable rate varies based on each counsel's experience level, but the blended rate is $292.76 per hour. The lodestar calculation and total award of attorney's fees sought by Plaintiff is $108,511.50. Plaintiff also seeks reimbursement for costs associated with the lawsuit, which total $1,447.20. Plaintiff does not argue this case presents rare and exceptional circumstances that warrant an enhanced attorney's fee, but rather "leave[s] it up to the Court to decide whether an increase in fees is appropriate." (Doc. #69, p. 9). Defendants do not dispute that Plaintiff is entitled to attorney's fees and costs given this Court's summary judgment rulings. Defendants agree that the billing rates utilized for the attorney's fees calculation are reasonable. Defendants argue, however, that "part of the fee award is sought for activities of counsel during the administrative process," which is not recoverable. (Doc. #72, p. 1). Specifically, Defendants argue "the entries between August 8, 2016, and April 11, 2017, appear to be used for the pre-litigation administrative proceeding." (Doc. #72, p. 2). In support, Defendants cite *Parke v. Reliance Standard Ins. Co.*, 368 F.3d 999, 1011 (8th Cir. 2004), which held that "ERISA does not

allow recovery of attorney's fees incurred during pre-litigation administrative proceedings."

In *Parke*, the "administrative proceedings" for which the plaintiff argued he was entitled attorney's fees included proceedings that occurred "*during* [defendant's] administrative review process." *Id.* at 1010 (emphasis added). Here, Plaintiff navigated and completed the administrative appeal process before hiring counsel. Defendants argue that Plaintiff's Counsel's time spent meeting with Plaintiff, reviewing her case, communicating with Unum, and drafting and sending a demand letter to Unum prior to filing a complaint with this Court constitutes legal work related to administrative proceedings. Defendant cites no case that would support such a conclusion. *Parke* made clear that "pre-litigation administrative proceedings" are those proceedings that are "mandatory in a claim for benefits under ERISA's exhaustion requirement." *Id.* at 1022. As confirmed by Unum in response to Plaintiff's demand letter, Plaintiff had already exhausted the administrative appeal process, and Unum stood by its appeal decision. Further, the demand letter Plaintiff sent to Unum was done in anticipation of litigation, or "prior to suit being filed." (Doc. 1-6, p. 1). Accordingly, the legal work completed by counsel between August 8, 2016, and April 11, 2017, was not related to pre-litigation administrative proceedings.

In consideration of the relevant factors set forth above, the Court finds the lodestar calculation provided by Plaintiff is the appropriate measure of attorney's fees. The Court also finds Plaintiff is not entitled to an increase in attorney's fees as Plaintiff does not argue and has made no showing that the lodestar fee is inadequate. Plaintiff is entitled to the full amount of attorney's fees and costs she requests.

B. Prejudgment Interest

"It is well-settled in the Eighth Circuit that ERISA's § 502(a)(3)(B) allows an award of prejudgment interest to compensate a plaintiff for delayed benefits following a successful civil action to recover those benefits." *Jackson v. Fortis Benefits Ins. Co.*, 105 F. Supp. 2d 1055, 1058 (D. Minn. 2000), ***aff'd***, 245 F.3d 748 (8th Cir. 2001) (citing *Dependahl v. Falstaff Brewing Corp*., 653 F.2d 1208 (8th Cir. 1981)). "The Eighth Circuit has held that in an ERISA case, a court must calculate [] prejudgment interest using the rate established by [28 U.S.C.] § 1961." *Tussey*, 2012 WL 2368471, at *4 (quoting *Sheehan v. Guardian Life Ins. Co.*, 372 F.3d 962, 969 (8th Cir.2004) (internal quotation marks omitted)); *Mansker v. TMG Life Ins. Co*., 54 F.3d 1322, 1331 (8th Cir.1995) ("28 U.S.C. § 1961 provides the proper measure for determining rates of [prejudgment interest] under ERISA."). Section 1961 states:

> Interest shall be allowed on any money judgment in a civil case recovered in a district court.... Such interest shall be calculated from the date of the entry of the judgment, at a rate equal to the weekly average 1–year constant maturity Treasury yield, as published by the Board of Governors of the Federal Reserve System, for the calendar week preceding the date of the judgment.

§ 1961(a). "Interest shall be computed daily to the date of payment . . . and shall be compounded annually." § 1961(b).

All parties agree Plaintiff is entitled to prejudgment interest. Plaintiff argues the proper interest rate is 9% per

annum according to Unum's internal claims manual. Defendants argue the Court must use the rate set forth in § 1961. As evidenced by the language of the claims manual itself, and by the declaration and chart filed by Defendants, the 9% per annum interest rate cited by Plaintiff does not apply to Plaintiff's claim for accidental death benefits under Mr. Boyer's group insurance policy. (Doc. #69-1, pp. 1, 9; Doc. #72-1, pp. 1, 2, 6).

"[Section] 1961 provides the proper measure for determining rates of [prejudgment interest] under ERISA." *Mansker*, 54 F.3d at 1331. Pursuant to § 1961, the weekly average 1-year constant maturity Treasury yield from the calendar week preceding the Court's July 31, 2019, Order finding Plaintiff was entitled to accidental death benefits is 1.98%. Under the terms of the Policy, payment would have been due to Plaintiff on June 10, 2016, the date of Unum's initial decision, had Unum properly approved Plaintiff's claim for accidental death benefits. (Doc. #58-1, p. 148). Accordingly, the Court finds Plaintiff is entitled to prejudgment interest at a rate of 1.98%, computed daily and compounded annually, from June 10, 2016, through the date of payment.

III. Conclusion

Accordingly, Plaintiff's Motion for Attorney Fees and Pre-Judgment Interest and Suggestions in Support (Doc. #69) is granted with modifications. Plaintiff is entitled to $108,511.50 in attorney's fees and $1,447.20 in costs. Plaintiff is further entitled to prejudgment interest at a rate of 1.98%, computed daily and compounded annually, from June 10, 2016, through the date of payment.

IT IS SO ORDERED.

/s/ Stephen R. Bough

STEPHEN R. BOUGH
UNITED STATES DISTRICT JUDGE

Dated: September 23, 2019

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No: 19-3144

Amber Boyer

Appellee

v.

Schneider Electric Holdings, Inc., et al.

Appellants

Appeal from U.S. District Court for the Western District of Missouri - Joplin
(3:17-cv-05053-SRB)

ORDER

The petition for rehearing en banc is denied. The petition for rehearing by the panel is also denied.

May 14, 2021

Order Entered at the Direction of the Court:
Clerk, U.S. Court of Appeals, Eighth Circuit.

_____
/s/ Michael E. Gans

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No: 19-3144

Amber Boyer

Plaintiff - Appellee

v.

Schneider Electric Holdings, Inc.; Schneider Electric Holdings, Inc. Life and Accident Plan; Unum Life Insurance Company of America

Defendants - Appellants

Appeal from U.S. District Court for the Western District of Missouri - Joplin
(3:17-cv-05053-SRB)

JUDGMENT

Before COLLOTON, ARNOLD, and KELLY, Circuit Judges.

This appeal from the United States District Court was submitted on the record of the district court, briefs of the parties and was argued by counsel.

After consideration, it is hereby ordered and adjudged that the judgment of the district court in this cause is reversed and the cause is remanded to the

district court for proceedings consistent with the opinion of this court.

April 05, 2021

Order Entered in Accordance with Opinion:
Clerk, U.S. Court of Appeals, Eighth Circuit.

/s/ Michael E. Gans

29 U.S.C.A. § 1022

§ 1022. Summary plan description

(a) A summary plan description of any employee benefit plan shall be furnished to participants and beneficiaries as provided in section 1024(b) of this title. The summary plan description shall include the information described in subsection (b), shall be written in a manner calculated to be understood by the average plan participant, and shall be sufficiently accurate and comprehensive to reasonably apprise such participants and beneficiaries of their rights and obligations under the plan. A summary of any material modification in the terms of the plan and any change in the information required under subsection (b) shall be written in a manner calculated to be understood by the average plan participant and shall be furnished in accordance with section 1024(b)(1) of this title.

(b) The summary plan description shall contain the following information: The name and type of administration of the plan; in the case of a group health plan (as defined in section 1191b(a)(1) of this title), whether a health insurance issuer (as defined in section 1191b(b)(2) of this title) is responsible for the financing or administration (including payment of claims) of the plan and (if so) the name and address of such issuer; the name and address of the person designated as agent for

the service of legal process, if such person is not the administrator; the name and address of the administrator; names, titles, and addresses of any trustee or trustees (if they are persons different from the administrator); a description of the relevant provisions of any applicable collective bargaining agreement; the plan's requirements respecting eligibility for participation and benefits; a description of the provisions providing for nonforfeitable pension benefits; circumstances which may result in disqualification, ineligibility, or denial or loss of benefits; the source of financing of the plan and the identity of any organization through which benefits are provided; the date of the end of the plan year and whether the records of the plan are kept on a calendar, policy, or fiscal year basis; the procedures to be followed in presenting claims for benefits under the plan including the office at the Department of Labor through which participants and beneficiaries may seek assistance or information regarding their rights under this chapter and the Health Insurance Portability and Accountability Act of 1996 with respect to health benefits that are offered through a group health plan (as defined in section 1191b(a)(1) of this title), the remedies available under the plan for the redress of claims which are denied in whole or in part (including procedures required under section 1133 of this title), and if the employer so elects for purposes of complying with section 1181(f)(3)(B)(i) of this title, the model notice applicable to the State in which the participants and beneficiaries reside.
29 U.S.C.A. § 1022 (West).

29 U.S.C.A. § 1132

§ 1132. Civil enforcement

(a) Persons empowered to bring a civil action

A civil action may be brought--

(1) by a participant or beneficiary--

(A) for the relief provided for in subsection (c) of this section, or

(B) to recover benefits due to him under the terms of his plan, to enforce his rights under the terms of the plan, or to clarify his rights to future benefits under the terms of the plan;

(2) by the Secretary, or by a participant, beneficiary or fiduciary for appropriate relief under section 1109 of this title;

(3) by a participant, beneficiary, or fiduciary (A) to enjoin any act or practice which violates any provision of this subchapter or the terms of the plan, or (B) to obtain other appropriate equitable relief (i) to redress such violations or (ii) to enforce any provisions of this subchapter or the terms of the plan;

(4) by the Secretary, or by a participant, or beneficiary for appropriate relief in the case of a violation of 1025(c) of this title;

(5) except as otherwise provided in subsection (b), by the Secretary (A) to enjoin any act or practice which violates any provision of this subchapter, or (B) to obtain other appropriate equitable relief (i) to redress such violation or (ii) to enforce any provision of this subchapter;

(6) by the Secretary to collect any civil penalty under paragraph (2), (4), (5), (6), (7), (8), or (9) of subsection (c) or under subsection (i) or (l);

(7) by a State to enforce compliance with a qualified medical child support order (as defined in section 1169(a)(2)(A) of this title);
(8) by the Secretary, or by an employer or other person referred to in section 1021(f)(1) of this title, (A) to enjoin any act or practice which violates subsection (f) of section 1021 of this title, or (B) to obtain appropriate equitable relief (i) to redress such violation or (ii) to enforce such subsection;
(9) in the event that the purchase of an insurance contract or insurance annuity in connection with termination of an individual's status as a participant covered under a pension plan with respect to all or any portion of the participant's pension benefit under such plan constitutes a violation of part 4 of this title[1]or the terms of the plan, by the Secretary, by any individual who was a participant or beneficiary at the time of the alleged violation, or by a fiduciary, to obtain appropriate relief, including the posting of security if necessary, to assure receipt by the participant or beneficiary of the amounts provided or to be provided by such insurance contract or annuity, plus reasonable prejudgment interest on such amounts;
(10) in the case of a multiemployer plan that has been certified by the actuary to be in endangered or critical status under section 1085 of this title, if the plan sponsor--
(A) has not adopted a funding improvement or rehabilitation plan under that section by the deadline established in such section, or
(B) fails to update or comply with the terms of the funding improvement or rehabilitation plan in accordance with the requirements of such section,

by an employer that has an obligation to contribute with respect to the multiemployer plan or an employee organization that represents active participants in the multiemployer plan, for an order compelling the plan sponsor to adopt a funding improvement or rehabilitation plan or to update or comply with the terms of the funding improvement or rehabilitation plan in accordance with the requirements of such section and the funding improvement or rehabilitation plan; or

(11) in the case of a multiemployer plan, by an employee representative, or any employer that has an obligation to contribute to the plan, (A) to enjoin any act or practice which violates subsection (k) of section 1021 of this title (or, in the case of an employer, subsection (l) of such section), or (B) to obtain appropriate equitable relief (i) to redress such violation or (ii) to enforce such subsection.

(b) Plans qualified under Internal Revenue Code; maintenance of actions involving delinquent contributions

(1) In the case of a plan which is qualified under section 401(a), 403(a), or 405(a)[2]of Title 26 (or with respect to which an application to so qualify has been filed and has not been finally determined) the Secretary may exercise his authority under subsection (a)(5) with respect to a violation of, or the enforcement of, parts 2 and 3 of this subtitle (relating to participation, vesting, and funding), only if--

(A) requested by the Secretary of the Treasury, or

(B) one or more participants, beneficiaries, or fiduciaries, of such plan request in writing (in such manner as the Secretary shall prescribe by regulation) that he exercise such authority on their behalf. In the case of such a request under this paragraph he may exercise such authority only if he determines that such violation affects,

or such enforcement is necessary to protect, claims of participants or beneficiaries to benefits under the plan.

(2) The Secretary shall not initiate an action to enforce section 1145 of this title.

(3) Except as provided in subsections (c)(9) and (a)(6) (with respect to collecting civil penalties under subsection (c)(9)), the Secretary is not authorized to enforce under this part any requirement of part 7 against a health insurance issuer offering health insurance coverage in connection with a group health plan (as defined in section 1191b(a)(1) of this title). Nothing in this paragraph shall affect the authority of the Secretary to issue regulations to carry out such part.

(c) Administrator's refusal to supply requested information; penalty for failure to provide annual report in complete form

(1) Any administrator (A) who fails to meet the requirements of paragraph (1) or (4) of section 1166 of this title, section 1021(e)(1) of this title, section 1021(f) of this title, or section 1025(a) of this title with respect to a participant or beneficiary, or (B) who fails or refuses to comply with a request for any information which such administrator is required by this subchapter to furnish to a participant or beneficiary (unless such failure or refusal results from matters reasonably beyond the control of the administrator) by mailing the material requested to the last known address of the requesting participant or beneficiary within 30 days after such request may in the court's discretion be personally liable to such participant or beneficiary in the amount of up to $100 a day from the date of such failure or refusal, and the court may in its discretion order such other relief as it deems proper. For purposes of this paragraph, each violation described in subparagraph (A) with respect to any single participant,

and each violation described in subparagraph (B) with respect to any single participant or beneficiary, shall be treated as a separate violation.

(2) The Secretary may assess a civil penalty against any plan administrator of up to $1,000 a day from the date of such plan administrator's failure or refusal to file the annual report required to be filed with the Secretary under section 1021(b)(1) of this title. For purposes of this paragraph, an annual report that has been rejected under section 1024(a)(4) of this title for failure to provide material information shall not be treated as having been filed with the Secretary.

(3) Any employer maintaining a plan who fails to meet the notice requirement of section 1021(d) of this title with respect to any participant or beneficiary or who fails to meet the requirements of section 1021(e)(2) of this title with respect to any person or who fails to meet the requirements of section 1082(d)(12)(E)[2]of this title with respect to any person may in the court's discretion be liable to such participant or beneficiary or to such person in the amount of up to $100 a day from the date of such failure, and the court may in its discretion order such other relief as it deems proper.

(4) The Secretary may assess a civil penalty of not more than $1,000 a day for each violation by any person of subsection (j), (k), or (l) of section 1021 of this title or section 1144(e)(3) of this title.

(5) The Secretary may assess a civil penalty against any person of up to $1,000 a day from the date of the person's failure or refusal to file the information required to be filed by such person with the Secretary under regulations prescribed pursuant to section 1021(g) of this title.

(6) If, within 30 days of a request by the Secretary to a plan administrator for documents under section 1024(a)(6) of this title, the plan administrator fails to furnish the material requested to the Secretary, the Secretary may assess a civil penalty against the plan administrator of up to $100 a day from the date of such failure (but in no event in excess of $1,000 per request). No penalty shall be imposed under this paragraph for any failure resulting from matters reasonably beyond the control of the plan administrator.

(7) The Secretary may assess a civil penalty against a plan administrator of up to $100 a day from the date of the plan administrator's failure or refusal to provide notice to participants and beneficiaries in accordance with subsection (i) or (m) of section 1021 of this title. For purposes of this paragraph, each violation with respect to any single participant or beneficiary shall be treated as a separate violation.

(8) The Secretary may assess against any plan sponsor of a multiemployer plan a civil penalty of not more than $1,100 per day--

(A) for each violation by such sponsor of the requirement under section 1085 of this title to adopt by the deadline established in that section a funding improvement plan or rehabilitation plan with respect to a multiemployer plan which is in endangered or critical status, or

(B) in the case of a plan in endangered status which is not in seriously endangered status, for failure by the plan to meet the applicable benchmarks under section 1085 of this title by the end of the funding improvement period with respect to the plan.

(9)(A) The Secretary may assess a civil penalty against any employer of up to $100 a day from the date of the employer's failure to meet the notice requirement of

section 1181(f)(3)(B)(i)(I) of this title. For purposes of this subparagraph, each violation with respect to any single employee shall be treated as a separate violation.

(B) The Secretary may assess a civil penalty against any plan administrator of up to $100 a day from the date of the plan administrator's failure to timely provide to any State the information required to be disclosed under section 1181(f)(3)(B)(ii) of this title. For purposes of this subparagraph, each violation with respect to any single participant or beneficiary shall be treated as a separate violation.

(10) Secretarial enforcement authority relating to use of genetic information

(A) General rule

The Secretary may impose a penalty against any plan sponsor of a group health plan, or any health insurance issuer offering health insurance coverage in connection with the plan, for any failure by such sponsor or issuer to meet the requirements of subsection (a)(1)(F), (b)(3), (c), or (d) of section 1182 of this title or section 1181 or 1182(b)(1) of this title with respect to genetic information, in connection with the plan.

(B) Amount

(i) In general

The amount of the penalty imposed by subparagraph (A) shall be $100 for each day in the noncompliance period with respect to each participant or beneficiary to whom such failure relates.

(ii) Noncompliance period

For purposes of this paragraph, the term “noncompliance period” means, with respect to any failure, the period--

(I) beginning on the date such failure first occurs; and

(II) ending on the date the failure is corrected.

(C) Minimum penalties where failure discovered

Notwithstanding clauses (i) and (ii) of subparagraph (D):

(i) In general

In the case of 1 or more failures with respect to a participant or beneficiary--

(I) which are not corrected before the date on which the plan receives a notice from the Secretary of such violation; and

(II) which occurred or continued during the period involved;

the amount of penalty imposed by subparagraph (A) by reason of such failures with respect to such participant or beneficiary shall not be less than $2,500.

(ii) Higher minimum penalty where violations are more than de minimis

To the extent violations for which any person is liable under this paragraph for any year are more than de minimis, clause (i) shall be applied by substituting "$15,000" for "$2,500" with respect to such person.

(D) Limitations

(i) Penalty not to apply where failure not discovered exercising reasonable diligence

No penalty shall be imposed by subparagraph (A) on any failure during any period for which it is established to the satisfaction of the Secretary that the person otherwise liable for such penalty did not know, and exercising reasonable diligence would not have known, that such failure existed.

(ii) Penalty not to apply to failures corrected within certain periods

No penalty shall be imposed by subparagraph (A) on any failure if--

(I) such failure was due to reasonable cause and not to willful neglect; and

(II) such failure is corrected during the 30-day period beginning on the first date the person otherwise liable for such penalty knew, or exercising reasonable diligence would have known, that such failure existed.

(iii) Overall limitation for unintentional failures

In the case of failures which are due to reasonable cause and not to willful neglect, the penalty imposed by subparagraph (A) for failures shall not exceed the amount equal to the lesser of--

(I) 10 percent of the aggregate amount paid or incurred by the plan sponsor (or predecessor plan sponsor) during the preceding taxable year for group health plans; or

(II) $500,000.

(E) Waiver by Secretary

In the case of a failure which is due to reasonable cause and not to willful neglect, the Secretary may waive part or all of the penalty imposed by subparagraph (A) to the extent that the payment of such penalty would be excessive relative to the failure involved.

(F) Definitions

Terms used in this paragraph which are defined in section 1191b of this title shall have the meanings provided such terms in such section.

(11) The Secretary and the Secretary of Health and Human Services shall maintain such ongoing consultation as may be necessary and appropriate to coordinate enforcement under this subsection with enforcement under section 1320b-14(c)(8)[2]of Title 42.

(12) The Secretary may assess a civil penalty against any sponsor of a CSEC plan of up to $100 a day from the date of the plan sponsor's failure to comply with the requirements of section 1085a(j)(3) of this title to establish or update a funding restoration plan.

(d) Status of employee benefit plan as entity

(1) An employee benefit plan may sue or be sued under this subchapter as an entity. Service of summons, subpena, or other legal process of a court upon a trustee or an administrator of an employee benefit plan in his capacity as such shall constitute service upon the employee benefit plan. In a case where a plan has not designated in the summary plan description of the plan an individual as agent for the service of legal process, service upon the Secretary shall constitute such service. The Secretary, not later than 15 days after receipt of service under the preceding sentence, shall notify the administrator or any trustee of the plan of receipt of such service.

(2) Any money judgment under this subchapter against an employee benefit plan shall be enforceable only against the plan as an entity and shall not be enforceable against any other person unless liability against such person is established in his individual capacity under this subchapter.

(e) Jurisdiction

(1) Except for actions under subsection (a)(1)(B) of this section, the district courts of the United States shall have exclusive jurisdiction of civil actions under this subchapter brought by the Secretary or by a participant, beneficiary, fiduciary, or any person referred to in section 1021(f)(1) of this title. State courts of competent jurisdiction and district courts of the United States shall have concurrent jurisdiction of actions under paragraphs (1)(B) and (7) of subsection (a) of this section.

(2) Where an action under this subchapter is brought in a district court of the United States, it may be brought in the district where the plan is administered, where the breach took place, or where a defendant resides or may

be found, and process may be served in any other district where a defendant resides or may be found.

(f) Amount in controversy; citizenship of parties

The district courts of the United States shall have jurisdiction, without respect to the amount in controversy or the citizenship of the parties, to grant the relief provided for in subsection (a) of this section in any action.

(g) Attorney's fees and costs; awards in actions involving delinquent contributions

(1) In any action under this subchapter (other than an action described in paragraph (2)) by a participant, beneficiary, or fiduciary, the court in its discretion may allow a reasonable attorney's fee and costs of action to either party.

(2) In any action under this subchapter by a fiduciary for or on behalf of a plan to enforce section 1145 of this title in which a judgment in favor of the plan is awarded, the court shall award the plan--

(A) the unpaid contributions,

(B) interest on the unpaid contributions,

(C) an amount equal to the greater of--

(i) interest on the unpaid contributions, or

(ii) liquidated damages provided for under the plan in an amount not in excess of 20 percent (or such higher percentage as may be permitted under Federal or State law) of the amount determined by the court under subparagraph (A),

(D) reasonable attorney's fees and costs of the action, to be paid by the defendant, and

(E) such other legal or equitable relief as the court deems appropriate.

For purposes of this paragraph, interest on unpaid contributions shall be determined by using the rate

provided under the plan, or, if none, the rate prescribed under section 6621 of Title 26.

(h) Service upon Secretary of Labor and Secretary of the Treasury

A copy of the complaint in any action under this subchapter by a participant, beneficiary, or fiduciary (other than an action brought by one or more participants or beneficiaries under subsection (a)(1)(B) which is solely for the purpose of recovering benefits due such participants under the terms of the plan) shall be served upon the Secretary and the Secretary of the Treasury by certified mail. Either Secretary shall have the right in his discretion to intervene in any action, except that the Secretary of the Treasury may not intervene in any action under part 4 of this subtitle. If the Secretary brings an action under subsection (a) on behalf of a participant or beneficiary, he shall notify the Secretary of the Treasury.

(i) Administrative assessment of civil penalty

In the case of a transaction prohibited by section 1106 of this title by a party in interest with respect to a plan to which this part applies, the Secretary may assess a civil penalty against such party in interest. The amount of such penalty may not exceed 5 percent of the amount involved in each such transaction (as defined in section 4975(f)(4) of Title 26) for each year or part thereof during which the prohibited transaction continues, except that, if the transaction is not corrected (in such manner as the Secretary shall prescribe in regulations which shall be consistent with section 4975(f)(5) of Title 26) within 90 days after notice from the Secretary (or such longer period as the Secretary may permit), such penalty may be in an amount not more than 100 percent of the amount involved. This subsection shall not apply to a

transaction with respect to a plan described in section 4975(e)(1) of Title 26.

(j) Direction and control of litigation by Attorney General

In all civil actions under this subchapter, attorneys appointed by the Secretary may represent the Secretary (except as provided in section 518(a) of Title 28), but all such litigation shall be subject to the direction and control of the Attorney General.

(k) Jurisdiction of actions against the Secretary of Labor

Suits by an administrator, fiduciary, participant, or beneficiary of an employee benefit plan to review a final order of the Secretary, to restrain the Secretary from taking any action contrary to the provisions of this chapter, or to compel him to take action required under this subchapter, may be brought in the district court of the United States for the district where the plan has its principal office, or in the United States District Court for the District of Columbia.

(l) Civil penalties on violations by fiduciaries

(1) In the case of--

(A) any breach of fiduciary responsibility under (or other violation of) part 4 of this subtitle by a fiduciary, or

(B) any knowing participation in such a breach or violation by any other person,

the Secretary shall assess a civil penalty against such fiduciary or other person in an amount equal to 20 percent of the applicable recovery amount.

(2) For purposes of paragraph (1), the term “applicable recovery amount” means any amount which is recovered from a fiduciary or other person with respect to a breach or violation described in paragraph (1)--

(A) pursuant to any settlement agreement with the Secretary, or

(B) ordered by a court to be paid by such fiduciary or other person to a plan or its participants and beneficiaries in a judicial proceeding instituted by the Secretary under subsection (a)(2) or (a)(5).

(3) The Secretary may, in the Secretary's sole discretion, waive or reduce the penalty under paragraph (1) if the Secretary determines in writing that--

(A) the fiduciary or other person acted reasonably and in good faith, or

(B) it is reasonable to expect that the fiduciary or other person will not be able to restore all losses to the plan (or to provide the relief ordered pursuant to subsection (a)(9)) without severe financial hardship unless such waiver or reduction is granted.

(4) The penalty imposed on a fiduciary or other person under this subsection with respect to any transaction shall be reduced by the amount of any penalty or tax imposed on such fiduciary or other person with respect to such transaction under subsection (i) of this section and section 4975 of Title 26.

(m) Penalty for improper distribution

In the case of a distribution to a pension plan participant or beneficiary in violation of section 1056(e) of this title by a plan fiduciary, the Secretary shall assess a penalty against such fiduciary in an amount equal to the value of the distribution. Such penalty shall not exceed $10,000 for each such distribution.

29 U.S.C.A. § 1132 (West).