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SAMHSA Policy Brief
Analysis of State Laws Permitting Intoxication Exclusions in
Insurance Contracts and their Judicial Enforcement

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February, 2004

Introduction

This Policy Brief reviews judicial decisions construing state laws that permit insurers to include intoxication exclusionary clauses in their insurance policies. The cases and state laws examined in this analysis span health, life, disability, accidental death and dismemberment (AD&D), workers compensation, and unemployment insurance. Some variant of the intoxication exclusionary clause appears across all of these products, depending on the state. The widespread nature of such laws has its roots in the 1947 Uniform Accident and Sickness Policy Provision Law (UPPL), a model statute whose broader public policy purpose was to avoid the use of insurance to protect against the risk of unlawful conduct.

As public understanding of alcoholism and addiction as treatable conditions has increased, and as the cost of intoxication-related injuries to health care providers and society as a whole have become more fully understood, the continued validity of this policy argument has collapsed to the point that in 2001, the National Association of Insurance Commissioners repealed the UPPL outright and replaced it with a model prohibition against its use by insurers. But as this Brief discusses at greater length, judicial decisions construing the intoxication exclusion frequently find in favor of the insurer. Furthermore, they underscore that affirmatively ending the practice of intoxication exclusions requires significantly more than just the repeal of a pre-existing statute.

Background

A recent nationwide survey of state insurance laws by Rivara and colleagues¹ reported that 38 states and the District of Columbia² expressly permitted licensed health

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¹ Frederick P. Rivara, et al., "Screening Trauma Patients for Alcohol Problems: Are Insurance Companies Barriers?," 48 *J. Trauma, Injury, Infection and Critical Care* 115 (2000).

² 344 F.3d 305 (2d Cir. 2003).

insurers to exclude diagnostic and treatment services for conditions related to the use of alcohol or drugs, while another 8 state statutes were silent on the subject.³ The study also found that the insurance laws in 4 states⁴ permitted health insurers to exclude treatment for injuries incurred as a result of intoxication arising from narcotics, except on the advice of a physician, but not alcohol.

Since publication of the Rivara study and the decision by the NAIC to replace the older law with an express prohibition of exclusionary clauses, two states⁵ have enacted prohibitions. However, the legality of such an exclusion where state law is silent was illustrated by the 2003 decision in *Bishop v. National Health Insurance Co.*⁶ in which the United States Court of Appeals for the Second Circuit upheld an intoxication clause in an individual health insurance coverage contract purchased in Connecticut, one of the 8 states in which insurance law is silent. The hospital emergency bills alone in *Bishop* amounted to more than a quarter million dollars; payment was denied since the victim's intoxicated status had been documented from the time that emergency care began.

As the field of alcohol and drug treatment has evolved in the face of emerging evidence regarding the positive effects of brief intervention and initiation of treatment as part of emergency care, insurers' continued use of intoxication treatment has come to represent a particularly striking example of the disjunction between evidence-based medical care advances and third party payment policies. Indeed, such exclusions actually appear to directly incentivize inappropriate treatment during emergency care, thereby widening the gap between evidence-based medicine and actual practice.⁷ Health professionals who test for intoxication face the prospect of insurance denials,⁸ and the problem may intensify as states increasingly enact laws requiring emergency room personnel to develop protocols to screen incoming patients for drug and alcohol use.⁹ A logical response would be to attempt to avoid any health care interventions that might reveal intoxication, even where the absence of such interventions undermines the standard of care.¹⁰

² Alabama, Alaska, Arizona, Arkansas, California, Delaware, the District of Columbia, Florida, Georgia, Hawaii, Idaho, Illinois, Indiana, Iowa, Kansas, Kentucky, Louisiana, Maine, Maryland, Mississippi, Missouri, Montana, Nebraska, Nevada, New Jersey, North Carolina, North Dakota, Ohio, Oregon, Pennsylvania, Rhode Island, South Carolina, Tennessee, Texas, Vermont, Virginia, Washington, West Virginia, and Wyoming.

³ Colorado, Connecticut, Massachusetts, Michigan, New Hampshire, New Mexico, Utah, and Wisconsin.

⁴ Minnesota, New York, Oklahoma, and South Dakota. The Rivara study stated that New York has adopted a provision that allows for an exclusion only when a beneficiary is injured during the course of committing a felony, however, N.Y. Ins. § 3216 (McKinney 2003) contains the general UPPL exclusion for drug and alcohol ingestion.

⁵ Iowa, Code Ann. § 514A.3(2)(K) (West 2003); and South Dakota., S.D. Codified Laws § 58-17-30.8.

⁶ 344 F.3d 305 (2d Cir. 2003).

⁷ McGlynn EA. Asch SM. Adams J. Keeseey J. Hicks J. DeCristofaro A. Kerr EA. The quality of health care delivered to adults in the United States. *New England Journal of Medicine*. 348(26):2635-45, 2003 Jun 26.

⁸ See Rachel Zimmerman, "Why Emergency Rooms Rarely Test Trauma Patients for Alcohol, Drugs," Wall St. J., February 26, 2003.

⁹ See, e.g., Conn. Gen. Stat. Ann. § 19a – 490(h) (West 2003) (requiring hospitals licensed as a short-term general hospital, outpatient surgical facility, or outpatient clinic, to include in the record of each trauma patient the outcome of screening for alcohol and substance abuse).

¹⁰ Ironically, this strategy of cost avoidance might evaporate were insurers to accompany their coverage exclusion with a contractual payment limitation that barred provider payment of treatment for emergencies and injuries in the absence of the results from an intoxication screen.

The impact of such an exclusion also has the potential to spread to other third party payers in the form of bad debt, and to taxpayers as a form of uncompensated care whose cost is borne through Medicaid and other uncompensated care financing mechanisms. Put differently, even though the cost of treatment for intoxication-related injury and death is enormous -- with much of the cost undoubtedly attributable to insured persons -- state legislatures have permitted the insurance industry to avoid bearing any burden and have allowed a cost shift onto the general public. Whatever premium savings result from this shifting, undoubtedly pale next to the exposure the practice creates for public programs and health care providers.

It certainly may entirely appropriate to treat such costs as a social expenditure, no state with the UPPL exclusion in its insurance code appears to have enacted a public financing scheme to bear these costs.

Judicial Decisions Construing State Law Versions of the UPPL

Between 1947 and 2001, the UPPL contained a provision permitting insurers to exclude coverage for losses sustained in consequence drug or alcohol influence. Specifically, the UPPL provision stated:

The insurer shall not be liable for any loss sustained or contracted in consequence of the insured's being intoxicated or under the influence of any narcotic unless administered on the advise of a physician.¹¹

No state requires such an exclusion, but in states that have adopted this provision, insurance companies are authorized to write contracts that exclude coverage for alcohol- or drug-related injuries. Thirty-three states and the District of Columbia¹² enacted laws that are identical (or nearly so) to the original version of the UPPL. In these states, insurers have express statutory authority to exclude such treatment from their contract terms. When insurance companies do adopt such an exclusion, they are generally upheld as valid and not unreasonable.¹³

a. Degree of causation, burden of proof, and the sufficiency of the evidence

All thirty-eight states and the District of Columbia require insurance companies that desire to incorporate an exclusionary clause to adopt the exact language contained in the statute, unless "a corresponding provision. . . is not less favorable in any respect to the insured or the beneficiary."¹⁴ If an insurance company does not use the exact "in consequence" language and offers less favorable terms than that found in the UPPL-

¹¹ National Association of Insurance Commissioners, *NAIC Individual Model Laws, Regulations and Guidelines*, available at http://www.naic.org/insprod/individual_model_laws.htm# (accessed February 13, 2004).

¹² Alabama, Alaska, Arizona, Arkansas, California, Delaware, the District of Columbia, Florida, Georgia, Hawaii, Idaho, Illinois, Indiana, Kansas, Kentucky, Louisiana, Mississippi, Missouri, Montana, Nebraska, New Jersey, New York, North Dakota, Ohio, Oregon, Pennsylvania, Rhode Island, South Carolina, Tennessee, Texas, Virginia, Washington, West Virginia, and Wyoming.

¹³ 43 Am. Jurisprudence 2d, Insurance § 628.

¹⁴ See, e.g., D.C. Code § 31-4712(c)(2) (2003) (formerly D.C. Code § 35-517 (1981)).

modeled statute, courts may still require the company to demonstrate that the injury was “in consequence,” or causally related to the influence of alcohol.¹⁵

Courts vary in the degree of causation they require, but all require insurers to demonstrate a connection between intoxication and the injury in order to trigger the exclusion. For example, Florida courts have strictly construed the language in their exclusion statute to require insurance companies to demonstrate a high level of causation between the insured’s intoxication and the loss in order to successfully deny coverage. In *Blue Cross and Blue Shield of Florida, Inc. v. Steck*,¹⁶ the insured was hit by an oncoming vehicle when she attempted to cross a multilane highway while intoxicated. She was taken to the hospital where she lost a leg and incurred over \$350,000 in medical bills. Despite these facts, the *Steck* court held that

[t]wo types of injuries may result from one’s intoxication: direct injury, i.e., injury to biological systems of a person, such as acute alcohol poisoning or liver damage; and indirect injuries, such as accidental injuries caused by the behavior of the person while intoxicated. Ms. Steck’s injuries were clearly the latter kind--indirect injuries. The trial court found, and we agree, that the language of Ms. Steck’s policy was . . . not specific enough to exclude from coverage indirect injuries as well as direct injuries.¹⁷

However, some state courts have held that insurance companies need not demonstrate a strict causal connection between the intoxication and the loss incurred to deny coverage under an old UPPL-type statute.¹⁸ In the case of *McGarrah by McGarrah v. Southwestern Glass Co.*,¹⁹ the court wrote that “as a general rule if an insurer establishes that the intoxication has *some* causal connection with the death or injury of the insured, the insurer may avoid liability” [emphasis added]. In other words, the *McGarrah* court held that intoxication need be only a, not the sole, proximate cause of the injury or death in order for the exclusion to trigger.

These cases illustrate the variation in state courts’ approaches to the interpretation of the “in consequence of” provision of the UPPL intoxication exclusionary clause. This variation in the burden of proof that insurers must meet from state to state probably can be explained by variation in judicial approaches to exclusionary clauses

¹⁵ See *Holloway v. J.C. Penney Life Ins. Co.*, 190 F.3d 873 (7th Cir. 1999) (applying Illinois law) (holding that the policy’s provision excluding coverage regardless of whether the loss was actually sustained “in consequence” of intoxication was less favorable than the language contained in the Illinois statute, and that on remand the Illinois statute requiring a causal link between the intoxication and the loss should be applied). See also *Olson v. American Bankers Ins. Co.*, 30 Cal. App. 4th 816, 35 Cal. Rptr. 2d 897 (1st Dist. 1994) (same); *Rivers v. Conger Life Ins. Co.*, 229 So. 2d 625 (Fla. Dist. Ct. App. 4th Dist 1969) (same).
¹⁶ 778 So.2d 374 (Fla. App. 2 Dist. 2001).

¹⁷ *Id.* at 376.

¹⁸ See, e.g., *Bills v. Conseco Ins. Co.*, 2003 WL 22455399, slip op. at 5 (Tenn. Ct. App. 2003) (holding that “the [UPPL model] language used in the exclusion clause in the present case is plain, unambiguous, and clearly does not require a causal connection between the insured’s intoxication and the loss”); *Burgess v. J.C. Penney Life Ins. Co.*, 167 F.3d 1137 (7th Cir. 1999) (same); *Brown v. J.C. Penney Life Ins. Co.*, 861 S.W.2d 834 (Tenn. Ct. App. 1992) (same); *Greene v. J.C. Penney Life Ins. Co.*, 23 F. Supp. 2d 1351 (M.D. Fla. 1997) (applying Illinois law) (holding that where the insured’s blood alcohol level was 0.10% or higher and the insurance company had obtained approval from the Director of the Illinois Department of Insurance in advance, the exclusion did not require a causal connection between the intoxication and the loss).

¹⁹ 41 Ark. App. 215, 852 S.W.2d 328 (1993).

in contracts of risk generally. In some states, courts may by tradition require a high level of proof before permitting insurers to avoid liability under duly executed contracts, while in other jurisdictions, courts may be willing to tolerate a lesser level of proof. These traditions may be shaped by the effects of previous judicial rulings related to the construction of insurance contracts (i.e., *stare decisis*), courts' awareness of a high degree of insurance fraud throughout the state, or other factors.

The level of evidence needed to demonstrate a causal connection between the insured's loss and intoxication or ingestion of drugs will depend on the particular facts of the case. In the absence of any rebuttal evidence, an insurer's evidence that the insured was under the influence of alcohol or drugs while operating a motor vehicle may be sufficient to bar recovery after an accident.²⁰ At the same time, courts have found for the insured on similar facts.²¹ A 1994 California decision, *Olson v. American Bankers Ins. Co.*²² provides an example of the lengths to which some courts may be willing to go to find for the insured when a policy exclusion is contested. In *Olson*, the court upheld the trial court's instruction to the jury that the "in consequence" language found in the California statute (identical to that found in the original UPPL) required the insurance company to demonstrate that the insured's intoxication was the proximate cause of her death, and not merely a contributing factor. The court held further that while the insured (who had drowned in a hot tub) had a 0.14% blood alcohol level and had ingested Valium, there was also a scrape on the insured's right elbow that could have been caused by a fall. Thus, the court found that the scrape on the insured's elbow could have supported a jury finding that the insured's death was accidental, and that the insured's intoxication was not the proximate cause of her death.

b. Notice

²⁰ See *Brown v. J.C. Penney*, 861 S.W.2d at 834 (holding that a Tennessee criminal statute establishing a presumption of intoxication for driving while intoxicated could be used by the life insurance company to create a rebuttable presumption that the insured, having died in an automobile accident, was in fact intoxicated within the meaning of the policy exclusion). See also *Ober v. CUNA Mut. Soc.*, 645 So. 2d 231 (La. Ct. App. 2d Cir 1994) (holding that the evidence was sufficient to exclude coverage where blood tests from the deceased revealed blood alcohol levels of 0.12%, an expert testified that intoxication made the insured forty times more likely to be in a car accident, and the road was straight); *Old Equity Life Ins. Co. v. Combs*, 437 S.W.2d 173 (Ky. 1969) (holding evidence of insured's appearing to be drunk, staggering, throwing chairs and threatening others sufficient); *Landry v. JC Penney Life Ins. Co.*, 23 F. Supp. 2d 1351 (M.D. Fla. 1997) (relying on expert testimony on the impact of a 0.25% BAC on a person's driving ability); *Giangreco v. John Hancock Mut. Life Ins. Co.*, 168 F. Supp. 2d 417 (E.D.Pa.) (provision excluding coverage where intoxication directly, indirectly, wholly or partly caused the death is applicable under Pennsylvania law if the insured's use of drugs or alcohol played any role therein).

²¹ See, e.g., *Hastie v. J.C. Penney Life Ins. Co.*, 115 F.3d 895 (11th Cir. 1997) (applying Florida law) (finding error in trial court's grant of summary judgment for the insurance company despite the fact that the insured died in a motorcycle accident while his blood alcohol level was 0.254%, because there was conflicting evidence about whether there was a causal connection between the intoxication and the accident); *Remedies v. Trans. World Life Ins. Co.*, 546 So. 2d 1380 (La. Ct. App. 3d Cir. 1989) (holding that the presumption of intoxication in the Louisiana driving while intoxicated criminal statute is only applicable to criminal cases and could not be used by the insurance company to establish the insured's intoxication); *Interstate Life & Acc. Ins. Co. v. Gammons*, 408 S.W.2d 397 (Tenn. Ct. App. 1996) (insurer is required to show intoxication was "the" proximate cause of death, not merely "a" proximate cause); *American Family Life Assur. Co. v. Russell*, 700 N.E.2d 1174 (Ind. Ct. App. 1998) (intoxication alone not enough to trigger alcohol exclusion in AD&D policy; insured must have been participating in some activity while intoxicated where the activity itself caused death).

²² 30 Cal. App. 4th 816, 35 Cal. Rptr. 2d 897 (1st Dist. 1994).

In general, courts take a strict approach to the enforcement of insurance contracts, because of the uneven bargaining power between the insurer and the insured as well as the fact that the insurer has itself drafted and sold the contract.²³ At the same time, courts may uphold insurers' ability to enforce their agreements even where procedures were defective. For example, in a recent decision, the Court of Appeals of Oregon held that an issuer was permitted to defend an intoxication exclusion in group AD&D coverage contract authorized by a state insurance statute, even where it failed to provide notice to the insured (and to insurance regulators) that the policy contained such an exclusion.²⁴

c. Defining intoxication

State courts have also adopted different strategies to define what constitutes intoxication for the purposes of insurance coverage exclusions. In *Bishop v. National Health Insurance Co.*,²⁵ the Second Circuit upheld a provision in an insurance contract that defined "drunk" by reference to Connecticut's drunk driving statute. In *Mahoney v. Union Pacific R.R. Employees' Hosp. Ass'n*,²⁶ however, a provision in a group medical policy excluded benefits for injuries where the insured's intoxication exceeded "legal limits." The court in that case refused to uphold denial of coverage to an insured, whose blood alcohol content (BAC) was 0.201, because the injury did not arise from driving, and there was no legal limit for *nondriving* intoxication in Nebraska. The court reasoned that if the insurer wanted to use the drunk driving statute as a standard, it should have incorporated the standard by reference in its policy. Similarly, the Louisiana Court of Appeals held that the presumption of intoxication in the Louisiana driving-while-intoxicated statute was applicable only to criminal cases and could not be used by the insurance company to establish the insured's intoxication. In *Vulcan Life Ins. Co. v. Davenport*,²⁷ the court found that where the insured sought to recover under a health insurance policy which did not define the term "drunk," the jury was correctly instructed that being "drunk" meant that the insured was overcome by alcoholic liquor to the point of losing control over his faculties. The court held that

We are not inclined to accept Vulcan's arguments that under Georgia case law, since Davenport's blood alcohol intoxication level would support a conviction of DUI as defined by [the Georgia DWI statute], he was 'drunk' as a matter of law and thereby excluded from coverage. When Vulcan drafted the policy, if it intended 'drunk' to mean having a minimum .10 blood alcohol level, or being under the influence of an intoxicant in any amount whatsoever, or being in a condition as measured by some other objective criteria such as physical manifestations, it was bound to have so stated. While it appears to be illogical that a person who pleads guilty to driving under the influence and has a blood alcohol level of .19 is covered by medical insurance which excludes coverage when injuries

²³ R. Rosenblatt, S. Law and S. Rosenbaum, 1997. *Law and the American Health Care System* (Foundation Press, NY, NY) Ch. 2.

²⁴ *Baylor v. Continental Casualty Co.*, 78 P.3d 108, 113 (Ct. App. Or. 2003).

²⁵ 344 F.3d 305 (2d Cir. 2003).

²⁶ 471 N.W.2d 438 (Neb. 1991).

²⁷ 191 Ga. App. 79, 380 S.E.2d 751 (1989).

result from being ‘drunk,’ the terms of the policy differ from the driving prohibitions.²⁸

Finally, in *Healthwise of Kentucky, Ltd. v. Anglin*,²⁹ a health insurance policy contained an exclusion for injuries resulting from “intoxication as defined by Kentucky law.” The court found that the provision was ambiguous and, in applying the principle of contract law requiring construing an insurance contract in favor of the insured, held that for the exclusion to apply, an insured must have been convicted under the Kentucky criminal intoxication statute.

Some insurance companies define “intoxicated” for the purpose of excluding coverage for injuries caused by ingestion of alcohol simply by specifying a BAC over which coverage will be denied. Where the policy does announce a BAC limit, courts have upheld this standard regardless of other factors such as causation and other signs contradicting the conclusion that the insured was intoxicated.³⁰

d. Administered on the advice of a physician

The UPPL excepts drugs that have been administered on the advice of (i.e., prescribed by) a physician. In a recent Nevada case involving an intoxication exclusion in an AD&D policy that allowed payment only when drugs were “taken as prescribed by a physician,” the court ordered payment when it found that the insurer attempted to unlawfully narrow the exception in its contract terms in order to avoid payment for overdoses.³¹ Thus, an insured in Nevada who overdoses on prescribed medication may escape a drug exclusion policy and be entitled to benefits.

e. Variations on the UPPL

Maine’s exclusionary statute differs from the original UPPL model law in one important and expansive respect. The statute permitting insurance companies to exclude coverage for drug- and alcohol-related loss states

The insurer shall not be liable for death, injury incurred, *or disease contracted* while the insured is intoxicated or under the influence of narcotics or hallucinogenic drugs unless administered on the advice of a physician.³²

Research did not reveal any case law where an insurance company sought to deny coverage for treatment of a disease contracted while the insured was under the influence of drugs or alcohol.

²⁸ *Id.* at 755.

²⁹ 956 S.W.2d 213 (Ky. 1997).

³⁰ See *Jefferson v. Pilot Life Ins. Co. v Clark*, 414 S.E.2d 521 (Ga. App. 1991) (sustaining denial of AD&D benefits based on the insured’s BAC, regardless of whether intoxication was the proximate cause of the accident); *Chmiel v. JC Penney Life Ins. Co.*, 158 F.3d 966 (7th Cir. 1998) (sustaining denial of AD&D benefits based on insured’s BAC, regardless of absence of conclusive relationship of a particular BAC to the insurer’s increased risk).

³¹ *Hummel v. Continental Cas. Ins. Co.*, 254 F. Supp. 2d 1183 (D. Nev. 2003).

³² Me. Rev. Stat. Ann. tit. 24-A § 2829(3) (emphasis added).

f. Reconciling the UPPL exclusion with insurance mandates covering alcohol and drug treatment

An important question lurks below the surface of state laws that follow or replicate in some fashion the UPPL: what happens in jurisdictions in which state law both allows exclusion of treatment linked to intoxication but also contains coverage mandates for drug and alcohol treatment?

Table 1 (attached), prepared by “Ensuring Solutions to Alcohol Problems” at the George Washington University School of Public Health and Health Services, summarizes the status of state laws regarding the use of intoxication exclusions in insurance policies, alcohol treatment insurance coverage mandates, and mandated BAC testing. The table shows that many states that maintain the UPPL (or maintain silence on the subject) also mandate at least some coverage for alcohol and drug treatment in one or more categories of insurance contracts. This juxtaposition of the UPPL statute against treatment mandates suggests that even if insurers are authorized to deny coverage for an injury resulting from a drug or alcohol exclusion, they cannot also deny coverage for drug or alcohol treatment.

For example, Nevada’s statute is virtually identical to the original UPPL in the authority it grants insurers to exclude treatment.³³ At the same time, Nevada insurance law mandates coverage of alcohol and drug treatment in certain policies, including policies in which insurers are authorized to incorporate the UPPL exclusion.³⁴ In what may be an attempt to account for this seeming paradox, Nevada law also provides that if an insurer uses a drug and alcohol exclusion in an insurance contract, the insurer

“shall also provide that such provision in no way affects benefits payable for the treatment of alcohol or drug abuse....”³⁵

The Nevada example underscores an obvious conundrum: state law may mandate coverage of treatment for alcoholism and drug addiction; at the same time, state law also may allow insurers to exclude all medical treatment (other than treatment of the addiction) in connection with injuries arising from the condition. Whether this peculiarity encourages courts to read the exclusion narrowly and the coverage mandate broadly is unclear, although the Nevada experience would suggest that the answer to this is yes.

The Effects of Simply Repealing a State Intoxication Exclusion Statute

Maryland, North Carolina and Vermont repealed their laws in 2001. That these states repealed their exclusionary laws does not necessarily mean that insurance companies in those states are precluded from continuing their practice. Unless a court is willing to infer from the state legislature’s action in repealing the statutes that a drug and alcohol provision is no longer permissible, insurance companies may continue to be free to enforce drug and alcohol exclusions.

³³ Nev. Rev. Stat. 689A280(1) (1975).

³⁴ Nev. Rev. Stat. 689A.030(9).

³⁵ Nev. Rev. Stat. 689A.280(2).

For example, in *Sutherland v. N.N. Investors Life Ins. Co., Inc.*,³⁶ the federal First Circuit Court of Appeals explicitly rejected the insured's claim that because Massachusetts had repealed its alcohol exclusion statute in 1971, the legislature intended to preclude insurance companies from denying coverage for drug and alcohol exclusions. The First Circuit upheld the district court and denied coverage for the insured's hospital bills after a drunk driving accident, terming as "fallacious" the plaintiff's arguments that Massachusetts' *repeal* of its insurance law granting insurers express statutory authority to include such an exclusionary clause their policies amounted to a prohibition of such clauses. Even more striking was the court's refusal to prevent the insurer from enforcing such a clause on public policy grounds in the face of the state's repeal:

Apart from the fallacious statutory argument [that the repeal of the UPPL model drug and alcohol exclusion in 1971 was meant to end the use of the exclusions in insurance contracts], plaintiff cites no cases, anywhere, suggesting that it is against public policy to exclude coverage for injuries due to intoxication; nor have we found any. If we were to approach the question as an original proposition, we might think that the answer to plaintiff's contention that public policy forbade excluding coverage for hospital charges due to his children's driving under the influence, would be that the public would be better served to have parents aware of, rather than relieved of, the economic consequences of their children driving intoxicated. Under the banner of public policy plaintiff is saying defendant cannot choose not to indemnify the insured for an illegal act.³⁷

Courts in states that have repealed the UPPL in the context of health insurance can of course continue to uphold such denials of benefits in other insurance markets where the repeal is not effective. (See, for example, *Balthis v. AIG Life Ins. Co.*,³⁸ which construed an exclusionary clause in the context of life insurance.)

State Laws that Prohibit the Use of Exclusionary Provisions Related to Intoxication

Presumably, the intent of states that repeal the UPPL is to cease the use of exclusionary clauses in contracts of insurance, although the caselaw would suggest that simple repeal is insufficient. The question is what happens when states replace the UPPL with an outright prohibition on such policies.

In 2001, the NAIC voted unanimously to repeal the original version of the UPPL, and adopted an amendment expressly prohibiting health insurers from denying payment on the basis of intoxication.³⁹ The amendment to the UPPL provides as follows

(1) This provision may not be used with respect to a medical expense policy (2) For purposes of this provision, "medical expense policy" means and accident and

³⁶ 897 F.2d 593 (1st Cir. 1990) (applying Massachusetts law).

³⁷ *Id.* at 596.

³⁸ 5 Fed. Appx. 320, 25 Employee Benefits Cas. (BNA) 2255 (4th Cir. 2001) (applying North Carolina law).

³⁹ *Insurance Association Repeals Rule on Intoxicated Patients*, (press release July 16, 2001), available at <http://www.naic.org> (accessed February 13, 2004).

sickness insurance policy that provides hospital, medical and surgical expense coverage.⁴⁰

Since the revision of the UPPL, only two states--South Dakota and Iowa--have adopted statutes prohibiting coverage denials for injuries caused by alcohol intoxication.

South Dakota's statute provides as follows:

A policy or certificate of health insurance for an individual that is delivered, issued for delivery, or renewed in this state may not exclude the payment of benefits for injuries sustained by an insured person because the insured was under the influence of alcohol or drugs, as defined by § 32-23-1. Nothing in this section precludes a health insurer from excluding coverage for an insured for any sickness or injury caused in the commission of a felony.⁴¹

In effect, South Dakota's law preserves the right of insurers not to underwrite the risk of criminal conduct but declares injuries resulting from intoxication not to be part of a criminal activity. Research revealed no South Dakota cases interpreting the statute.

Iowa's exclusionary statute states in relevant part:

Intoxicants and narcotics: The insurer shall not be liable for any loss sustained or contracted in consequence of the insured's being intoxicated or under the influence of any narcotic unless administered on the advice of a physician. This provision shall not be used with respect to a medical expense policy. For purposes of this provision, "medical expense policy" means an accident and sickness insurance policy that provides hospital, medical, and surgical expense coverage.⁴²

Iowa thus adopted the revised UPPL in its entirety. Since the promulgation of the revised statute, no Iowa court has directly interpreted the statute in the context of health insurance.⁴³

⁴⁰ National Association of Insurance Commissioners, *NAIC Model Laws, Regulations and Guidelines*, updated January 2004, http://www.naic.org/models_papers/models/Table_of_Contents2003.htm#; Larry M. Gentilello, MD, *Implementing Preventive Interventions in Emergency Medicine: Strategic Considerations*, (white paper for CDC) available at http://www.cdc.gov/ncipc/pub-res/alcohol_proceedings/Session4-PDF.pdf

⁴¹ S.D. Codified Laws § 58-17-30.8.

⁴² Iowa Code Ann. § 514A.3(2)(K) (West 2003).

⁴³ One year before Iowa revised its statute, however, the district court for the Northern District of Iowa in *West v Aetna Life Ins. Co.* held that an insurer could not deny AD&D benefits to the survivor of an insured who, while driving intoxicated, died in a car crash. The court refused to find that the possibility that the insured's intoxication caused the crash was sufficient to render the crash "non-accidental" so as to be excluded from the policy as "non-accidental." The policy in *West* did not contain an intoxication exclusion (although it would have been legal at the time in Iowa), and the court reasoned that a finding of "non-accidental," as it was not defined by the plan, required evidence of foreseeability more than merely the insured's intoxication. This holding should not be surprising: in states in which intoxication clauses are permitted, an insurer that elects *not* to include such a clause in its contract would be held to a very high burden of proof before being permitted to give the same meaning to an entirely separate clause meant to cover intentional suicides. But courts historically have come down on both sides of the issue, sometimes refusing to view deaths and injuries caused by intentional ingestion of drugs or alcohol as "accidental." See, e.g., *Minton v. Stuyvesant Life Ins. Co.*, 373 F. Supp. 33 (D. Nev. 1974); *Marsh v. Met.*

Similarly, South Dakota's other markets maintain exclusionary policies, such as a workers' compensation statute that provides:

No compensation shall be allowed for any injury or death due to the employee's willful misconduct, including intentional self-inflicted injury, intoxication, illegal use of any schedule I or schedule II drug, or willful failure or refusal to use a safety appliance furnished by the employer, or to perform a duty required by statute. The burden of proof under this section shall be on the defendant employer.⁴⁴

Statutes Silent on Alcohol but Permitting Exclusions for Injuries Resulting from Narcotics

Minnesota and Oklahoma have statutes that are silent on the issue of alcohol but which permit exclusion of coverage for injuries caused by the insured's use of narcotics. Minnesota's statute allow insurers to write provisions stating that "[t]he insurer shall not be liable for any loss sustained or contracted in consequence of the insured's being under the influence of any narcotic unless administered on the advice of a physician."⁴⁵ No Minnesota case directly addresses an alcohol exclusion in a health or accident insurance policy, but one case in the Court of Appeals of Minnesota indicated that the courts may be sympathetic to a revised-UPPL approach. In *Reserve Life Ins. Co. v. Commissioner of Commerce*,⁴⁶ the court held that the Commission of Commerce was entitled to disapprove a life insurance policy as against public policy because, among other things, it contained an AD&D rider excluding coverage for losses caused by an insured's intoxication.

Oklahoma's statute permitting a narcotics exclusion is identical to Minnesota's. Although Oklahoma nor Minnesota law are both are silent on the use of alcohol exclusions and are express only with respect to narcotics, this silence, coupled with express permission to exclude treatment for narcotics injuries may in fact help claimants whose injuries arise from alcoholism. In other words, courts may be willing to read a selective statute as permitting exclusions only in the case of the substances that are named, not those that are not. Looking once again at the body of caselaw arising from life insurance policies, in a recent AD&D case, the Supreme Court of Oklahoma considered whether an insured's death was "accidental" or excluded from coverage as "intentionally self-inflicted" where he died in a car crash and where his BAC was two and one-half times the legal limit for driving.⁴⁷ In that case, the policy did not contain an alcohol exclusion provision. In finding in favor of the insured's beneficiary, the court held that voluntary intoxication does not render an accident foreseeable. A similar case was recently decided in Minnesota.⁴⁸

Life Ins. Co., 388 N.E.2d 1121 (Ill.App.2.Dist. 1979); *Harrell v. Minnesota Mut. Life Ins. Co.*, 937 S.W.2d 809 (Tenn. 1996); and *Bruce v. Cuna Mut. Ins. Soc.*, 555 N.W.2d 718 (Mich.App. 1996); *but see Jackson v. National Life & Accident Ins. Co.*, 202 S.E.2d 711 (Ga.App. 1973); *Fowler v. Met. Life Ins. Co.*, 938 F. Supp. 476 (W.D. Tenn. 1996); *Nelson v. Sun Life Assur. Co. of Canada*, 962 F. Supp. 1010 (W.D. Mich. 1997); and *Employee Retirement System of Texas v. Cash*, 906 S.W.2d 204 (Tex. App. 1995).

⁴⁴ S.D. Codified Laws § 62-4-37.

⁴⁵ Minn. St. Ann. 62A.04.3(11).

⁴⁶ 402 N.W.2d 631, 632 (Ct. App. Minn. 1987).

⁴⁷ *Cranfill v. Aetna Life Ins. Co.*, 49 P.3d 703, 705 (Okla. 2002).

⁴⁸ *King v. Hartford Life & Accident Ins. Co.*, No. 02-3934 (8th Cir. Feb. 9, 2004).

States with no Drug and Alcohol Exclusion Legislation

Utah, Colorado, Connecticut, Massachusetts, Michigan, New Hampshire, New Mexico, and Wisconsin have not enacted any legislation permitting insurance companies to exclude coverage for loss incurred in consequence of drugs or alcohol. As *Bishop* reveals, this absence does not mean, however, that in these states insurance companies may not write policies with intoxication exclusions. In *Sylvester v. Liberty Life Ins. Co.*,⁴⁹ the Colorado Court of Appeals, in the course of upholding a drug and alcohol exclusion in a life insurance policy, held that Colorado law does not require the insurer to prove that the predominant cause of death of the insured was alcohol. Instead, all that was held to be required was for the insurer to prove that the insured was under the influence of alcohol, and there was some causal connection between the intoxication and the insured's death. And as the *Sutherland* case discussed above provides, insurers may be free to include an intoxication clause even where a state has repealed the UPPL.

Conclusion

As of 2004, only two states (Iowa and South Dakota) appear to unequivocally prohibit the use of intoxication exclusion clauses in health insurance contracts. Moreover, even in states that enact health insurance exclusion prohibitions, such clauses may remain in the context of workers compensation (a critical form of health care payment, particularly for uninsured workers) and AD&D, disability, auto, and property and casualty contracts.

The caselaw surrounding these exclusionary clauses suggest that courts vary in their approach to construing the meaning of exclusionary provisions. Some courts will set the bar high for insurers by demanding a high burden of proof that turns on a showing that intoxication was either *the* or *the primary* proximate cause of the injury. Other courts are more lenient and allow insurers to prevail on a lesser showing that intoxication was somehow involved in the injury.

Regardless of whether courts are strict or liberal in construing the terms of contracts, it appears that each class of insurance contract will be considered in the context of its own statutory terms. Thus, even if the UPPL is repealed for health insurance contracts, this would not affect workers compensation products. Moreover, a simple repeal does not appear to suffice. Statutory silence in the face of insurer custom probably will be sufficient to sanction the custom. Thus a repeal unaccompanied by extensive history and/or an outright prohibition might yield no result whatsoever where industry practices are concerned.

The case law suggests ways to curb the use of intoxication exclusions even if there is no consensus regarding their outright elimination. For example, intoxication exclusions could be prohibited in the case of medical payment provisions across all classes of insurance contracts (health, workers compensation, or otherwise), not merely those contracts that are written to cover medical care losses alone. Similarly, a

⁴⁹ 42 P.3d 38, 100 A.L.R.5th 793 (Colo. Ct. App. 2001).

legislature could set insurers' burden of proof high, requiring, for example, proof by clear and convincing evidence that intoxication was *the* proximate cause of an injury.

Whatever the approach, the fundamental policy decision is whether certain health care costs should be entirely borne by society at large, or through a public/private approach that combines risk spreading through insurance contracts with direct public support in the case of publicly insured and uninsured persons. The impact on health care quality for persons with alcoholism or addiction problems, as well as the viability of hospital emergency departments, would appear to be implicated in how states answer this question, particularly since no state with the UPPL as its official policy appears to maintain a comprehensive system for financing necessary health care arising from intoxication injuries.

Appendix

ENSURING SOLUTIONS TO ALCOHOL PROBLEMS The George Washington University School of Public Health and Health Services

Table 1.
STATE LAWS PERTAINING TO INTOXICATION EXCLUSIONS IN LICENSED INSURANCE PRODUCTS, VEHICULAR
CRASH BAC¹ MANDATES, &
ALCOHOL TREATMENT INSURANCE COVERAGE MANDATES

STATE	STATUS OF HEALTH INSURANCE INTOXICATION EXCLUSION ⁱⁱ			INTOXICATION EXCLUSION: OTHER INSURANCE PRODUCTS	MANDATORY BAC OF DRIVERS IN VEHICULAR CRASHES	ALCOHOL TREATMENT HEALTH INSURANCE MANDATE
	EXPRESS PERMISSION ⁱⁱⁱ	SILENCE ^{iv}	EXPRESS PROHIBITION ^v			
AL	X			D ^{vi}	X	
AK	X				X	X
AZ	X			D		
AR	X			A ^{vii} /L ^{viii}	X	
CA	X			D/LT ^{ix}	X	
CO		X			X	
CT		X			X	X
DE	X				X	X
DC	X			A	X	
FL	X				X	
GA	X			A	X	
HI	X			A	X	X
ID	X			D		
IL	X			A	X	X
IN	X			A	X	X
IA			X	A	X	
KS	X			A	X	X
KY	X				X	X
LA	X			A	X	
ME	X				X	X
MD		X			X	X
MA		X				X
MI		X				X
MN		X			X	X
MS	X			A	X	X
MO	X			A	X	X
MT	X			D	X	X
NE	X			A	X	
NV	X				X	X
NH		X			X	X
NJ	X				X	X
NM		X			X	X
NY	X			A	X	
NC			X		X	
ND	X			A	X	X
OH	X			A	X	X
OK		X			X	
OR	X					X
PA	X			A	X	X
RI	X			A/LT		X
SC	X			A	X	
SD			X		X	
TN	X			A		

STATE	STATUS OF HEALTH INSURANCE INTOXICATION EXCLUSION ⁱⁱ			INTOXICATION EXCLUSION: OTHER INSURANCE PRODUCTS	MANDATORY BAC OF DRIVERS IN VEHICULAR CRASHES	ALCOHOL TREATMENT HEALTH INSURANCE MANDATE
	EXPRESS PERMISSION ⁱⁱⁱ	SILENCE ^{iv}	EXPRESS PROHIBITION ^v			
TX	X			A	X	X
UT		X			X	
VT	X				X	X
VA	X			A	X	X
WA	X			D	X	X
WV	X			A	X	
WI		X			X	
WY	X				X	
TOTAL	37	11	3	28	44	29

- Sources:**
- 1) UPPL state laws: Alcohol Policy Information Service (APIS) www.niaaa.nih.gov accessed 2/18/04.
 - 2) Mandatory BAC testing for drivers who survive a crash: <http://www3.madd.org/laws/law.cfm?LawID=MSVE> accessed 2/18/04; States are considered to mandate alcohol treatment in group health insurance if they specify either minimum coverage mandates or parity or both.
 - 3) Ensuring Solutions to Alcohol Problems (2002). Workplace solutions: Treating alcohol problems through workplace health insurance. <http://www.ensuringsolutions.org/images/reports/rr1.pdf> accessed 2/18/04.

ⁱ Blood-Alcohol Content.

ⁱⁱ Includes both group and individual coverage markets.

ⁱⁱⁱ Signifies that state law expressly permits licensed insurers to include an intoxication exclusion.

^{iv} Signifies silence in state law regarding insurers' use of an intoxication exclusion.

^v Signifies that state law expressly prohibits the use of an intoxication exclusion.

^{vi} Disability insurance

^{vii} Accidental death and dismemberment insurance.

^{viii} Life insurance.

^{ix} Long-term care insurance.