

Unintended Consequences

By Jason L. Byrne



How a Criminal Plea Can Result in the Loss of Insurance Coverage

Your client has been charged with shooting and injuring his friend while they were at your client's home. He claims the gun went off accidentally while he was cleaning it. The prosecutor, however, does not believe him and charges him with intentionally shooting his friend. You represent him in the criminal case and, after lengthy negotiations with the prosecutor, agree that he will plead guilty to careless discharge of a firearm and will not be incarcerated.

Six months later, the friend sues your client for the serious injuries he suffered in the accident. The civil complaint does not allege that the shooting was intentional, but merely alleges that it was the result of your client's negligence. Because your client has a homeowner's insurance policy, he is sure that this lawsuit will not put his personal assets at risk. He notifies his homeowner's insurance carrier, assuming that his insurer will defend and indemnify him. After all, the complaint does not allege that he intentionally shot his friend, merely that his negligence resulted in the shooting. A few weeks later, however, your client gets a nasty surprise in the mail: a letter from his insurance company denying coverage for the lawsuit. The letter correctly points out that your client's policy contains the typical "criminal acts exclusion" found in most liability policies. The exclusion is simple and provides that the insurer will not pay for any loss "arising out of a criminal act or omission." The insurance company contends that your client's guilty plea conclusively establishes that the exclusion applies and that it has no duty to defend or indemnify your client.

The insurance company is probably right, and all of your client's personal assets may now be at risk in the civil lawsuit. In Michigan, an individual's guilty plea to a criminal charge can result in the automatic application of exclusions in his or her insurance policy, resulting in the loss of insurance coverage for any subsequent claim arising out of that incident.

The Criminal Acts Exclusion

Like most clauses in insurance policies, criminal acts exclusions come in different forms. Some policies contain criminal acts exclusions that are very broad and simply exclude coverage for any suit arising out of a criminal act or omission. Other policies use criminal acts exclusions that bar coverage only when the criminal act was committed with intent to cause harm. The policy language is the key to determining whether a guilty plea to a particular crime will bar insurance coverage in a subsequent civil action.

The Broad Criminal Acts Exclusion

Consider the case of Judith Daniel.¹ She accidentally shot Richard Beringer while deer hunting in the same blind. Daniel's blood-alcohol content was 0.103 grams per 100 milliliters of blood at the time, but all the parties agreed that the shooting was unintentional. She pleaded guilty to careless discharge of a firearm resulting in injury. Beringer sued Daniel for the personal injuries he suffered in the shooting. Daniel tendered the claim to her insurer, which cited an exclusion to Daniel's policy that barred coverage for "bodily injury or property damage resulting from a criminal act or omission." On the basis of this exclusion, the trial court granted summary disposition to the insurance company. The court of appeals agreed that this provision excused the insurer from any duty to defend or indemnify Daniel in Beringer's lawsuit and upheld the trial court's ruling. Specifically, the court of appeals focused on Daniel's guilty plea in the criminal proceeding and held: "There is no dispute that this incident meets the definition of 'criminal act or omission' because Daniel pleaded guilty to the criminal charge of careless discharge of a firearm. Thus, the criminal acts exclusion precludes coverage for Beringer's injuries."²

Another appellate panel applied the same reasoning in *Aldrich v Auto Club Group Ins Co* to reach the same conclusion.³ In that case, Scott Barcheski had pleaded guilty to second-degree child abuse. In an action brought by Barcheski's victim to collect against Barcheski's insurance policy, the insurer argued that the guilty plea triggered the application of the policy's criminal acts exclusion, which contained the same language as Daniel's policy. The *Aldrich* panel held that

[t]he criminal acts exclusion clearly precludes coverage for bodily injury resulting from a criminal act.... Scott Barcheski pleaded guilty of second degree child abuse.... Thus, there is no dispute that Scott Barcheski's actions constituted a criminal act, and the policy clearly and unambiguously exempts from coverage the injuries incurred as a result of those actions.⁴

According to the court of appeals, the guilty pleas in these criminal cases were the conclusive facts triggering the mandatory application of this version of the criminal acts exclusion. In these cases, the insureds had no opportunity to introduce facts to argue that the exclusions did not apply (for example, that they did not

Fast Facts

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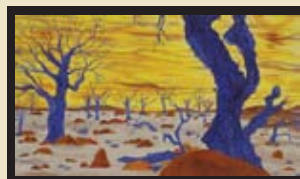
Unlike a guilty plea to a criminal charge, a plea of *nolo contendere* to a criminal charge cannot result in the automatic application of a criminal acts exclusion or an intentional acts exclusion.

A *nolo contendere* plea does not guarantee coverage, it simply guarantees an insured's ability to litigate the relevant coverage issues according to the applicable policy language.

actually commit crimes, even though they pleaded guilty). Any hope for coverage was lost the moment the courts accepted their guilty pleas.

The Intentional Criminal Acts Exclusion

There are, however, other criminal acts exclusions. One of the most common applies only if the criminal conduct was intentional. This particular exclusion played a prominent role in recent litigation arising from 16-year-old Cory Wagner's shooting and killing his friend, Travis Woodwyk.⁵ Wagner claimed that although he pointed his father's shotgun at Woodwyk (apparently as a joke to scare Woodwyk), he did not mean to fire and the gun only went off when he dropped it and accidentally hit the trigger while catching the gun. Wagner pleaded guilty to "manslaughter caused by a weapon aimed with intent but without malice." Wagner's insurance company sought a judicial determination that it need not defend nor indemnify Wagner in civil litigation brought by Woodwyk's family, relying on the criminal acts exclusion in the policy. Because, unlike the cases discussed earlier, this policy contained an exclusion that only barred coverage for any bodily injury or property damage resulting from any criminal act or omission "expected or intended by any insured to cause any harm," the trial court determined that the insurance company had to defend and indemnify its insured. The court of appeals agreed and held that, even though Wagner had pleaded guilty to a criminal act, because the exclusion required proof that the insured intended to cause harm, the exclusion did not apply, given that "there was no evidence that Wagner intended or expected any harm to result from his intentional act of pointing the shotgun."⁶



Wearing Blues by Kinnari Suta

A criminal defense attorney who wants to avoid entering a plea in a criminal case that will automatically trigger an exclusion in a client's insurance policy should first examine the policy language.

Wagner did not plead guilty to a crime for which intent to cause harm was an element. Thus, the plea itself did not operate to bar coverage. Unlike the *Daniel* and *Aldrich* panels, the *Wagner* court engaged in an analysis of the underlying facts to determine whether the exclusion applied.

The Intentional Acts Exclusion

Michigan courts have also held that a guilty plea to a crime that requires intent to do harm effectively bars insurance coverage under another common policy provision: the intentional acts exclusion. Like the criminal acts exclusion, this intentional acts exclusion is typical in most liability policies. In 1988, the court of appeals addressed the case of Brian Gardipey.⁷ When he was 15, Gardipey was diagnosed with a blood disorder called Fanconi DNA Syndrome that had progressively affected his mental capacity and caused significant changes in his character. As a result of the disease, Brian was mentally slow and had spent his school years in special education programs. About three years after his diagnosis, Gardipey allegedly sexually assaulted a 10-year-old boy and was charged with first-degree criminal sexual conduct. Rather than go to trial, Gardipey pleaded guilty to assault with intent to commit criminal sexual conduct. The victim's family then sued Gardipey. Gardipey's insurer brought a declaratory judgment action, arguing that it had no duty to defend or indemnify its insured because a clause in the policy barred coverage for "bodily injury or property damage which is either expected or intended from the standpoint of the insured." The trial court agreed and awarded summary disposition to the insurer. On appeal, the court of appeals concluded that the guilty plea was dispositive: "Brian Gardipey's guilty plea and testimony established that Gardipey intended to harm or injure the ten-year-old child as a matter of law."⁸ Because of his guilty plea, Gardipey had no

opportunity to argue that he was entitled to coverage because he did not intend to cause injury to the victim.

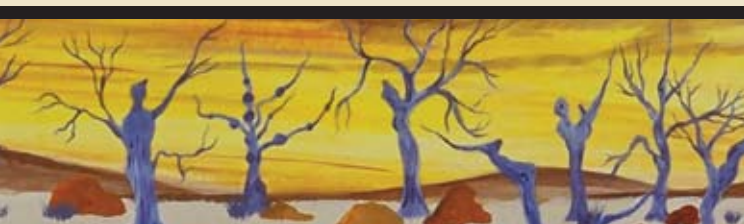
Similarly, after Marvin Johnson attacked and severely injured Gary Gant, he pleaded guilty to assault with intent to do great bodily harm less than murder.⁹ When Gant sued Johnson, Johnson's insurer sought a judicial declaration that Johnson's guilty plea established the application of an intentional acts exclusion and barred coverage for the civil suit. In affirming the lower court's award of summary disposition to the insurer, the court of appeals stated:

In pleading guilty, Johnson freely and voluntarily admitted that he intended to strike Gant and that he did so with the intent to do great bodily harm. Accordingly, we agree that the trial court correctly concluded that Johnson's plea of guilty dispelled any triable factual issue regarding Johnson's intention or expectation to cause injury to Gant.¹⁰

Considerations for the Criminal Defense Attorney

A criminal defense attorney who wants to avoid entering a plea in a criminal case that will automatically trigger an exclusion in a client's insurance policy should first examine the policy language. If a particular client's policy includes an intentional acts exclusion or an intentional criminal acts exclusion, a guilty plea to an intent-based crime will likely establish the application of those exclusions. Conversely, a guilty plea to a crime for which intent is not an element will still preserve the client's right to argue that his or her actions were not intentional and thus that those exclusions do not apply. But, if the policy includes a broad criminal acts exclusion, *Daniel* and *Aldrich* indicate that any guilty plea conclusively establishes the application of the exclusion and cuts off any right for the insured to argue that he or she is entitled to coverage.

There is another option. Michigan law has established that, unlike a guilty plea, a *nolo contendere* plea (also termed a no contest plea) to a criminal charge cannot result in the automatic application of a criminal acts exclusion or an intentional acts exclusion. For example, Dennis Lichon pleaded *nolo contendere* to attempted burning of real property: his party store.¹¹ He sought coverage for the fire damage from his property insurer, but the insurer argued that the *nolo contendere* plea triggered the application of the policy's criminal acts exclusion that barred coverage for "loss caused by any fraudulent, dishonest or criminal act." The trial court granted the insurer's motion for summary disposition, and the court of appeals affirmed. The Supreme Court, however, disagreed that the *nolo contendere* plea entitled the insurer to summary disposition, reasoning that Lichon was "not precluded from litigating the issue whether he burned his business because his *nolo contendere* plea to a charge of attempted burning of real property is not an admission of guilt that can be used against him in subsequent civil or criminal litigation."¹² This case presents an excellent contrast to *Daniel* and *Aldrich*. If, as in those cases, Lichon had pleaded guilty to attempted burning of real property, the insurer would have been entitled to summary disposition. Instead, by pleading *nolo contendere*, Lichon



was able to resolve the criminal action without a trial and preserve his right to pursue insurance coverage.¹³

Of course, a *nolo contendere* plea does not guarantee coverage. It simply guarantees an insured's ability to litigate the relevant coverage issues according to the applicable policy language. For example, Leonard Weitzel fatally shot another person during a hunting trip.¹⁴ He ultimately pleaded *nolo contendere* to hunting while intoxicated. The insurance company filed suit, alleging that it need not defend or indemnify Weitzel because the policy included a broad criminal acts exclusion. The trial court granted the insurance company summary disposition, and the court of appeals affirmed that decision because it considered the evidence and concluded that Weitzel's acts were criminal, not because his plea automatically established the application of the exclusion.¹⁵

A criminal defense attorney may not necessarily be able to improve a client's chances to ultimately secure insurance coverage for any subsequent civil litigation, but if the attorney consults the relevant policy, he or she may be able to prevent taking an action in the criminal case that irrevocably surrenders the client's right to pursue insurance coverage. ■

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FOOTNOTES

1. *Auto Club Group Ins Co v Daniel*, 254 Mich App 1; 658 NW2d 193 (2002).
2. *Id.* at 4 (emphasis added).
3. *Aldrich v Auto Club Group Ins Co*, unpublished opinion per curiam of the court of appeals, issued August 13, 1999 (Docket No. 206375).
4. *Id.*
5. *Pioneer State Mut Ins Co v Wagner*, unpublished opinion per curiam of the court of appeals, issued March 22, 2007 (Docket No. 273080).
6. *Id.*
7. *Auto-Owners Ins Co v Gardipey*, 173 Mich App 711; 434 NW2d 220 (1988).
8. *Id.* at 715.
9. *State Farm Fire & Cas Co v Johnson*, 187 Mich App 264; 466 NW2d 287 (1991).
10. *Id.* at 266.
11. *Lichon v American Universal Ins Co*, 435 Mich 408; 459 NW2d 288 (1990).
12. *Id.* at 415.
13. See also *Shuler v Michigan Physicians Mut Liability Co*, 260 Mich App 492; 679 NW2d 106 (2004) (physician who pleaded *nolo contendere* to sexual abuse charges was not prohibited from arguing that his conduct did not trigger the criminal acts exclusion).
14. *Auto Club Group Ins Co v Weitzel*, unpublished opinion per curiam of the court of appeals, issued February 1, 2005 (Docket No. 250819).
15. See also *Allstate Ins Co v Fick*, 226 Mich App 197; 572 NW2d 265 (1997); *Allstate Ins Co v Dempsey*, 477 Mich 874; 721 NW2d 591 (2006); *Allstate Ins Co v Price*, unpublished opinion per curiam of the court of appeals, issued November 3, 2005 (Docket No. 261793).