

## **FIRM CONVICTIONS: THE EFFECT OF CRIMINAL PROCEEDINGS ON COVERAGE**

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### **I. Introduction**

We often look at the criminal and civil justice systems as two distinct entities. Each has its own rules with its own burdens of proof. However, those clear lines of demarcation get blurred where the victim files a civil suit arising out of a criminal act. The issues become even murkier when demands are made by the insured for coverage and the victim seeks compensation from the insurance proceeds.

At first blush, the answer seems straightforward - the insured committed an intentional act (the crime) and the insurer has not duty to defend. In reality, the answer is not so simple. The interplay of collateral estoppel, criminal convictions, guilty pleas and even the timing of a declaratory judgment can all impact upon the coverage questions.

In this paper we try to guide you through this potential minefield of coverage issues.

### **II. General Requirements of Collateral Estoppel**

Collateral estoppel, also known as issue preclusion, is an equitable doctrine, the application of which forecloses a party from relitigating an issue decided in a prior proceeding. *American Family Mut. Ins. Co. v. Savickas*, 2000 Ill. LEXIS 1231, \*13 (Ill. September 28, 2000) (citing *Talarico v. Dunlap*, 177 Ill. 2d 185, 191 (1997)). The doctrine is intended to protect litigants from the burden of relitigating an identical issue with the same party or his privy. In addition, the doctrine promotes judicial economy by preventing needless litigation. *Tradewind Ins. Co., Ltd. v. Stout*, 85 Haw. 177, 184, 938 P.2d 1196, (Haw. Ct. App. 1997), *cert. denied*, 85 Haw. 81 (Haw. 1997). Generally, a party asserting collateral estoppel must satisfy three threshold requirements. First, the issue decided in the prior proceeding must be identical with the one presented in the suit in question. Second, there must have been a final judgment on the merits in the prior proceeding. Third, the party against whom estoppel is asserted must have been a party or in privity with a party to the prior proceeding. *Id.* See also *Tradewind Ins. Co., Ltd. v. Stout*, *supra*, 85 Haw. at 184; *City of Marlborough v. DeKroon*, 1994 Mass. Super. LEXIS 277, \*4 (Mass. Super. Ct. Nov. 2, 1994); *Aetna Casualty and Surety Co. v. Jones*, 220 Conn. 285, 297,

596 A.2d 414, 421 (Conn. 1991); *Safeco Ins. Co. of America v. Yon*, 118 Idaho 367, 369, 796 P.2d 1040, 1042 (Idaho Ct. App. 1990). The party against whom estoppel is sought must have actually litigated the issue in the first suit and a determination on the issue must have been necessary to the judgment in the first action. For an issue to be subject to collateral estoppel, it must have been “fully and fairly litigated” in the first action. *Id.*

The third prong of the collateral estoppel test, the privity and/or mutuality requirement, is prone to mixed treatment among jurisdictions when it is applied in declaratory judgment actions concerning insurance coverage for personal injury actions instituted against an insured by victims of crime after the related criminal trial has taken place. At one time it was required that the parties to the previous and current proceeding be identical in order to invoke collateral estoppel. However, “mutuality” is no longer required in the vast majority of jurisdictions. *Aetna Casualty and Surety Co. v. Jones*, *supra*, 596 A.2d at 423-424 (citations omitted). The fact that the parties in a subsequent civil action are not the same as those in the preceding criminal action is no longer an automatic bar to collateral estoppel. *Travelers Indemnity Company v. Walburn*, 378 F. Supp. 860, 863 (D.D.C. 1974). The concept of privity or mutuality has expanded to bind non-parties. 18 C. Wright, A. Miller, & E. Cooper, *Federal Practice and Procedure: Jurisdiction*, § 4449 (1981). In addition, the mutuality requirement has been completely discarded by the United States Supreme Court for purposes of the federal common law. *Parklane Hosiery Co., Inc. v. Shore*, 439 U.S. 322, 99 S.Ct. 645 (1979).

Despite this liberalization of the application of collateral estoppel, as discussed more fully in Section III of this Article, the courts are in disagreement as to whether the victim of a crime is in privity with the criminal defendant for purposes of collateral estoppel when that doctrine is sought to be invoked by insurance carriers to prevent the recovery of insurance proceeds. Where an insured is convicted of or plead guilty to a criminal offense in which intent is a necessary element of the crime, some jurisdictions hold that the victim of the crime or victim’s heirs are barred from relitigating the issue of intent in a subsequent civil action against the insured or the insurer. Other jurisdictions, find that a victim of crime or the victim’s heirs cannot be collaterally estopped by an adverse determination of intent in the earlier criminal proceeding.

### **III. Invoking Collateral Estoppel Against Victims of Crimes or Their Heirs**

Generally, a nonparty to a prior action may be collaterally estopped by a determination in that action by having a relationship with a party to the prior litigation such that his own rights or obligations in the subsequent proceeding are “conditioned in one way or another on, or derivative of, the rights of the party to the prior litigation.” *D’Arata v. N.Y. Central Mut. Fire Ins. Co.*, 76 N.Y.2d 659, 663, 564 N.E.2d 634, 637 (N.Y. 1990). Even when the general threshold requirements are satisfied, the collateral estoppel doctrine should not be applied unless it is clear that no unfairness will result to the party sought to be bound by the prior adjudication. The determining court

should balance the need to limit litigation against the right to an adversarial proceeding in which a party is accorded a full and fair opportunity to present his or her case. Also considered relevant is the party's incentive to litigate the issue in the prior action. *American Family Mut. Ins. Co. v. Savickas*, *supra*, 2000 Ill. LEXIS at \*14. A key consideration in determining the existence of privity is "the sharing of the same legal right by the parties allegedly in privity." *Aetna Cas. & Sur. Co. v. Jones*, *supra*, 596 A.2d at 424. Moreover, due process requires that the party to be estopped must have had "an identity or community of interest with, and adequate representation by, the losing party in the first action." *Safeco Ins. Co. of America v. Yon*, *supra*, 796 P.2d at 1044.

In considering the foregoing factors, several jurisdictions hold that it is a proper extension of the collateral estoppel doctrine to preclude a victim or a victim's heirs, each a nonparty to the criminal case, from relitigating the issue of the criminal defendant's intent in a subsequent declaratory judgment action instituted by an insurer concerning coverage. These jurisdictions find that it is fair to use the result of the criminal trial, including determinations of intent, in a subsequent declaratory judgment action involving the insured and/or the insured's victim. *American Family Mut. Ins. Co. v. Savickas*, *supra*, 2000 Ill. LEXIS at \*22-24; *Ohio Casualty Ins. Co. v. Clark*, 1998 ND 153, 583 N.W.2d 377, 384 (N.D. 1998); *Tradewind Ins. Co., Ltd. v. Stout*, *supra*, 85 Haw. at 159; *Aetna Casualty and Surety Co. v. Jones*, *supra*, 596 A.2d at 425; *State Mut. Ins. Co. v. Bragg*, 589 A.2d 35, 38 (Me. 1991); *D'Arata v. New York Central Mutual Fire Ins. Co.*, *supra*, 564 N.E.2d at 667; *State Farm Fire and Cas. Co. V. Reuter*, 299 Ore. 155, 164, 700 P.2d 236, 242 (Or. 1985).

These courts rely on the general rule that the rights of a tort victim or judgment creditor are generally no greater than the rights of the insured. Since the only source for any duty owed by an insurer is its contract with the insured, any claims that the victim or the victim's heirs have upon the coverage of the insurance policy stem from the same source. Thus, the injured person stands in the shoes of the insured in the subsequent civil litigation and is entitled to no greater rights under the policy than the insured. Accordingly, once an insured has been convicted of and/or pled guilty to a crime in which intent is a necessary element, the victim's derivative status collaterally estops the victim or his heirs from relitigating the issue of intent. *Id.*

In *State Farm Fire & Cas. Co. v. Reuter*, *supra*, an insurer asserted that the victim of a sexual assault committed by its insured was precluded from claiming coverage under the insured's liability insurance policy because of the insured's conviction in the earlier criminal action and the jury's requisite determination of intent. The court held that the insured's conviction barred his claim for coverage under the insurance policy due to the "expected and intended" exclusion, and that the victim was similarly barred because her legal relationship with the insured arose from her status as a claimant and potential creditor of the insured. Within that status, the court explained, the victim was subject to the claims or defenses that the insurer has against the insured, including collateral estoppel. 700 P.2d at 241.

In *Ohio Casualty Ins. Co. v. Clark*, 1998 ND 153, 583 N.W.2d 377, (N.D. 1998), the Supreme Court of North Dakota explained why a victim of a criminal act should be precluded from relitigating whether his injury was intentionally caused, and, therefore, excluded from coverage:

While [Victim] also was not a party to those [criminal] proceedings, he was in privity with [Insured]. Therefore, he is barred from relitigating any issue necessarily decided against [Insured] in the earlier criminal action. [Victim's] rights under the insurance policy are derivative from those of [Insured]. In effect, [Victim] stands in the shoes of [Insured] with respect to the liability policy involved . . . Moreover, there was an identity of interest between [Victim] and [Insured] at the time of the criminal proceedings. [Insured], who was charged with, among other crimes, assault with intent to kill, was afforded a full opportunity to litigate the issue of his guilt. [Insured] had every reason to make as vigorous and effective a defense as possible. His personal interests would have been served by establishing that he did not intend to assault [Victim] because he would have avoided criminal responsibility for the assault and retained his liability coverage. [Victim] had a similar interest in the outcome of the trial because coverage would not be precluded if [Insured] did not intentionally assault him.

*Ohio Cas. Ins. Co., supra*, 583 N.W. 2d at 384 (quoting *New Jersey Mfrs. Ins. Co. v. Brower*, 161 N.J. Super. 293, 391 A.2d at 923, 926-27 (App. Div. 1978). *See also Tradewind Ins. Co., Ltd. v. Stout, supra*, 85 Haw. at 189.

Intertwined with the concepts of privity for collateral estoppel purposes, courts must also determine that due process requirements have been met. In the collateral estoppel setting, “due process requires that, to be estopped, the party must have had an identity or community of interest with, and adequate representation by, the losing party in the first action.” *Safeco Ins. Co. of America v. Yon, supra*, 796 P.2d at 1044. In determining whether due process requirements will be satisfied, the courts consider equitable factors such as whether it would be unfair in the second action to use the result of the first action, whether assertion of the plea of estoppel by a stranger to the judgment would create inconsistent results, whether the party adversely affected by the collateral estoppel offers a sound reason why he or she should not be bound by the judgment, and whether the first action was litigated strenuously and with vigor. *Id.* at 1045.

In *Safeco Ins. Co. of America v. Yon*, Safeco brought a declaratory judgment action against its insured and the heirs of the insured's victim seeking a determination that it had no duty to defend and indemnify its insured, Yon, in a wrongful death action. Safeco maintained that because Yon was convicted of second degree murder his

conduct was “intended” for the purposes of the exclusionary clause. *Id.* at 1042. The court stated that it could not help but notice the inconsistency that would result if the heirs of the victim could now proclaim that the murderer’s conduct was negligent after he was found guilty of second degree murder by a jury beyond a reasonable doubt. The court held that the only unfairness which could occur is if collateral estoppel were not applied and Safeco was then obligated to defend an issue that had already been decided in a criminal case with a much higher standard of proof. In finding that the due process requirements had been met with respect to the victim’s heirs in a collateral estoppel context, the court explained that the heirs and the insured shared an identity of interest, the heirs offered no sound reason why they should not be bound, and the insured strenuously defended the criminal action. *Id.* at 1045. Therefore, the victim’s heirs were estopped from relitigating the issue of the intent and were bound by the adverse determination of intent incumbent in the conviction for second degree murder.

Similarly, in *Tradewind Ins. Co., Ltd. v. Stout, supra*, the court expressly concluded that the application of collateral estoppel does not violate the victim’s right to due process. The court explained that the victim’s interest in litigating the issue of the insured’s intent in the declaratory judgment action does not differ from what the insured’s interest was in litigating intent in the criminal case. Both the insured’s and the victim’s ultimate objective was to establish that the insured did not intend to cause the victim’s death. 85 Haw. at 189. Thus, there was a sufficient identity of interests.

Some jurisdictions hold that even where a plaintiff-victim is permitted to maintain a direct action against the insurer on the policy, the plaintiff-victim still “stands in the shoes” of the insured and is entitled to no greater rights than the insured. *D’Arata v. New York Central Mut. Fire Ins. Co.*, 564 N.E. 2d at 665. In *D’Arata*, plaintiff-victim proceeded directly against the defendant-insurer to recover the amount of a default judgment obtained against the assailant who had been convicted of first degree assault. The court held that the plaintiff-victim does so as subrogee of the insured’s rights and is subject to the principles of estoppel that would apply to the insured. *Id.* Therefore, a non-party plaintiff in legal privity with the insured should be bound by the adverse determination on intent in the prior criminal proceeding. Moreover, the court stated that where the victim is in privity with the insured, the critical question is whether the “insured” had a full and fair opportunity to litigate the issue of intent in the prior criminal proceeding. *Id.* at 664-665. The court in *D’Arata* also noted it would be inconsistent to permit plaintiff-victim now to relitigate the issue of intent which the jury already determined under a higher standard of proof in the criminal case and where the plaintiff, himself, gave evidence supporting the jury’s finding. *Id.* at 668.

In contrast, some courts refuse to invoke collateral estoppel against a victim or a victim’s heirs holding that the victims of crimes are not parties to criminal proceedings and consequently do not have a full and fair opportunity to litigate the issue of the insured-defendant’s intent. These courts allow the victim or the victim’s heirs to relitigate the issue of the insured’s intent in a subsequent civil action despite the final adjudication of that issue in a prior criminal proceeding under a much higher standard of

proof. See *Meridian Ins. Co. v. Zepeda*, 2000 Ind. App. LEXIS 1472 (Ind. Ct. App. Sept. 19, 2000); *Allstate Ins. Co. v. Cole*, 129 Ohio App. 3d 334, 717 N.E.2d 816 (Ohio Ct. App. 1998); *K.B. v. State Farm Fire and Cas. Co.*, 189 Ariz. 263, 941 P.2d 1288 (Ariz. Ct. App. 1997); *Allstate Ins. Co. v. Aubert*, 129 N.H. 393; 529 A.2d 915 (N.H. 1987); *Clemmer v. Hartford Ins. Co.*, 22 Cal. 3d 865, 587 P.2d 1098 (Cal. 1978).

In *Clemmer v. Hartford Ins. Co.*, *supra*, the Supreme Court of California expressly held that the concept that an injured person stands in the shoes of the insured cannot be mechanically applied in all instances to invoke collateral estoppel against an injured third person in a suit by the tortfeasor's insurer. In *Clemmer*, the record indicated that after being adjudged guilty of second degree murder, the criminal defendant withdrew his plea of not guilty by reason of insanity. The court speculated that the criminal defendant may have done so as a result of a belief on his part that the sentence under a second degree murder conviction would be preferable to prevailing on his insanity pleas (i.e. commitment to a state mental hospital). Therefore, the court held that it cannot be said that the criminal defendant had the same interests in fully litigating the issue of the willfulness of his act in killing the victim as do the victim's heirs in the civil action. Thus, the victim's heirs cannot be collaterally estopped from relitigating the issue of intent. 587 P.2d at 1102.

In *Meridian Ins. Co. v. Zepeda*, *supra*, Meridian Insurance brought a declaratory judgment action claiming that it had no duty to indemnify its insured, in a personal injury suit brought by a shooting victim, after a jury convicted the insured of aggravated battery which manifested a determination of intent. The insured's insurance policy excluded coverage for "expected and intended acts." The court found that the insured was collaterally estopped from relitigating the issue of his intent after the criminal jury necessarily found his acts to be intentional but that the victim was not bound by that determination. 2000 Ind. App. LEXIS at \*8-11. The court rationalized that victims participate in criminal trial's by testifying on the State's behalf, they function only as witnesses who recall and testify to the events that occurred. Specifically, victims do not participate as litigants who may control the direction of the trial. The court further explained that no one is present at the criminal trial to protect the victims interests and rights specifically. Therefore, the court held that it would be unfair to allow the use of collateral estoppel against the victim. However, the court expressly recognized the potential for inconsistent determinations of fact in criminal trials and declaratory judgment actions. Nonetheless, the court noted, that providing a litigant the opportunity to have her day in court to fully litigate her position overrides the potential for inconsistent determinations. The court added that if it ruled otherwise, it might be "sending a message to victims of crime not to cooperate with criminal prosecutions, lest the criminal conviction may be used against them in a subsequent civil action." *Id.* at \*13-15.

In *Allstate Ins. Co. v. Aubert*, *supra*, the court similarly held that a judgment in an earlier criminal action does not preclude a victim of crime from relitigating issues

determined in the earlier criminal proceeding. The court simply reasoned that a victim is not party to the criminal trial, is not represented in the criminal action, has no opportunity to litigate the issues and cannot control the criminal litigation. Plaintiff Allstate argued that the victim of the crime should be bound by the two preceding criminal trials because the victim testified in both trials that the insured acted in such a fashion that a jury could reasonably infer the insured acted intentionally. The court declined to adopt a rule of “testimonial estoppel” asserted by Allstate but did comment that the victim is bound by the rules of law relating to perjury, and to that extent the victim is bound by his earlier testimony. 529 A.2d at 918.

Ohio has strictly followed the minority rule on collateral estoppel and continues to hold that a judgment can operate as collateral estoppel only where all of the parties to the proceeding in which the judgment is relied upon were bound by the judgment (i.e., the mutuality requirement). *Culberson v. Doan*, 72 F. Supp. 2d 865, 872 (S.D. Ohio 1999). Where strict mutuality is enforced, the victim and/or the victim’s parents cannot be bound by a prior criminal conviction because they were not parties to the criminal proceeding. In *Allstate Ins. Co. v. Cole*, *supra*, the court refused to apply collateral estoppel to the parents of a victim of Allstate’s insured on the issue of intent in a declaratory judgment action instituted by Allstate simply because the mutuality requirement was not met. 717 N.E.2d at 818-19.

Likewise, in *K.B. v. State Farm Fire and Cas. Co.*, *supra*, the court declared that victims of crimes are not parties to a criminal proceeding and therefore they are not limited by the doctrine of collateral estoppel which binds only parties or their privies to determinations made in a prior proceeding. Thus, the court stated that generally a victim is not precluded from relitigating the issue of the assailant’s intent in a civil proceeding although that issue was fully adjudicated in the criminal action. However, in *K.B.*, the insured assigned his rights against State Farm to the victim by agreement. 941 P.2d at 1292. State Farm asserted collateral estoppel on the issue of intent against the victim as an assignee of the insured, whom the court held estopped. The court explained that when an insured assigns his right to sue his insurer under a liability policy, the assignee takes only those rights that the insured had. Therefore, the court held that the victim was bound by the adverse determination of intent made in the prior criminal proceeding and the victim could not relitigate that issue. *Id.*

#### **IV. Effect of Criminal Convictions in Subsequent Civil Actions**

According to recent case law, the vast majority of jurisdictions today hold that a criminal conviction acts as a bar precluding the retrial of issues in a later civil proceeding that were actually litigated in the criminal trial. *American Family Mut. Ins. Co. v. Savickas*, *supra*, 2000 Ill. LEXIS at \*8 (citing *Zinger v. Terrell*, 336 Ark. 423, 428, 985 S.W.2d 737, 740 (1999)). Only a minority of courts refuse to give criminal convictions conclusive effect in later civil proceedings. However, it appears that in the majority of the cases where a court refuses to give conclusive effect to a criminal

conviction, the reason is particular to the facts of that case rather than an outright general objection to giving preclusive effect to criminal convictions.

#### **A. Convictions Given Conclusive Effect**

The modern trend is to give criminal convictions and the necessary facts and issues decided in the criminal trial conclusive effect in subsequent civil actions. *Savickas, supra*, 2000 Ill. LEXIS at \* 9 (citing *Zinger, supra*, 985 S.W.2d at 740). This practice has become increasingly accepted over the years with the fall of the mutuality requirement. *Id.* In addition, the Restatement (Second) of Judgments also favors permitting third parties to draw preclusive effect from issues determined in criminal convictions, so long as the general requirements for estoppel are met. *See* Restatement (Second) of Judgments § 85(2) (1982).

Numerous types of criminal convictions have been found to be conclusive on the issue of intent in subsequent civil actions, including, convictions for first and second degree murder, voluntary and involuntary manslaughter, aggravated and simple assault and the burning of insured property. It appears as though the majority of criminal convictions given conclusive effect, in particular with respect to the issue of intent, require a determination of intent by the jury as a necessary element of the crime. In addition, the courts look at whether the conviction is of the type which would give the defendant incentive to litigate the criminal prosecution when determining conclusive effect of a conviction.

For instance, first degree murder requires a finding that the defendant acted intentionally or knowingly. *Mead v. Farmers Union Mut. Ins. Co.*, 2000 ND 139, 613 N.W.2d 512, 515 (N.D. 2000). In *Mead*, the Supreme Court of North Dakota held that a criminal conviction for first degree murder precludes the relitigation of intent in a subsequent civil proceeding because the issue of whether the criminal defendant acted intentionally was necessarily raised, litigated and determined in the criminal case. The court affirmed the lower court's decision granting summary judgment in favor of the insurer finding that the insurer did not have a duty to defend or indemnify in the wrongful death action because of the "intended and expected" exclusion. *Id.* In *Savickas, supra*, the court held that by finding the criminal defendant guilty of first degree murder the jury necessarily found him either to have intended to kill the victim, or at least to have known that his acts created a strong probability of death or great bodily harm. Therefore, this finding conclusively established that the criminal defendant either "intended or expected" the result of his actions, and the identical issue of intent in the declaratory judgment action could not be relitigated. 2000 Ill. LEXIS at \*15-16.

The court further expressed that it cannot be seriously questioned that a person charged with first degree murder had a full incentive to litigate his criminal trial. *Id.* at \*17.

Similarly, where intent to take a life is an essential element of second degree murder and a criminal defendant is convicted, the conviction for second degree murder has been held to be conclusive evidence of the intent necessary in determining whether an insurance policy exclusion applies in a subsequent wrongful death action. *Safeco Ins. Co. of America v. Yon*, 118 Idaho 367, 369, 796 P.2d 1040, 1042 (Idaho Ct. App. 1990); *Tradewind Ins. Co., Ltd. v. Stout*, *supra*, 185 Haw. at 183. In *Safeco Ins. Co. of America*, a victim's heirs argued that the issue of intent for the sake of interpreting an insurance clause (i.e. subjective intent) is different from the issue of intent decided in the criminal action. The court rejected this argument noting that the jury was instructed that malice is a necessary element for second degree murder. In Idaho, malice is defined by statute as importing "a wish to vex, annoy, or injure another person, or an intent to do a wrongful action." Therefore, the court reasoned, in finding the criminal defendant guilty of second degree murder, the jury necessarily found that the defendant intended to achieve the result obtained, the death of the victim. The court precluded the victim's heirs from relitigating the issue of intent for purposes of the exclusionary clause. *Id.* See also *State Farm Fire & Cas. Co. v. Engstrom*, 933 F.2d 772 (9<sup>th</sup> Cir. 1991).

Moreover, in some states where second degree murder can be unintended, a second degree murder conviction can be conclusive of the issue of "expected" rather than "intended" where the conviction could only have been returned by the jury if they found that the insured "expected" serious bodily injury. In *Travelers Indemnity Co. v. Walburn*, 378 F.Supp. 860 (D.D.C. 1974), malice was considered to be a necessary element to the crime of second degree murder. In that jurisdiction, a finding that the criminal defendant expected that serious bodily injury would be the result of his actions was held to be inherent in the finding of malice. Therefore, the jury's conviction for second degree murder was held to be conclusive on the issue of that the criminal defendant "intended or expected" the injury for purposes of determining insurance coverage in a subsequent civil action. *Id.*

In *Aetna Cas. & Sur. Co. v. Jones*, *supra*, the Supreme Court of Connecticut held that where a criminal defendant had been convicted of first degree manslaughter, collateral estoppel precluded litigation of the criminal defendant's intent to cause injuries in a later civil proceeding, because intent was necessary to the judgment of the criminal court. In order to use the criminal conviction as conclusive evidence of intent, the court explained that the meaning of the term "intent," as that word is used in the insurance policy, must necessarily be included in the definition of intent applied by the jury in the criminal trial. The applicable Connecticut criminal statute provided that "[a] person acts 'intentionally' with respect to a result or to conduct described by a statute defining an offense when his conscious objective is to cause such result or to engage in such conduct . . .". The court found that one could not logically find that the necessary

criminal intent was present but that the intent that operates to exclude coverage under the insurance policy was not. Therefore, the determination of intent in the criminal proceeding was given conclusive effect in the subsequent declaratory judgment action. 596 A.2d at 422. *See also Cretens v. State Farm Fire & Cas. Co.*, 60 F.Supp. 2d 987 (D. Ariz. 1999); *In re Nassau Ins. Co.*, 161 A.D.2d 146, 554 N.Y.S.2d 551 (N.Y. App. Div. 1990), *aff'd*, 577 N.E.2d 1039 (1991).

In *Figueroa v. Hartford Ins. Co.*, 241 N.J. Super. 578, 575 A.2d 888 (App. Div. 1990), an insured was tried and convicted of voluntary manslaughter. Under New Jersey law, voluntary manslaughter is an intentional crime. The court held that it is well settled in New Jersey that an injured party is collaterally estopped from relitigating an insured's intent after the issue of intent has been settled in a previous criminal action. The court further explained that where an insured has been adjudged guilty of intentional criminal conduct, a party injured by the insured's actions has no cause of action against the insured's carrier for damages where the policy specifically excludes coverage for injuries caused by intentional acts. Moreover, the insured's conviction for voluntary manslaughter established that at the time of the decedent's death, the insured was not insane or suffering from a mental derangement. Consequently, the court held that the administrator of the estate of the victim was bound by the jury's determination that the insured intentionally killed the victim and has no recourse against the insurer. *Id. See also State Farm Fire & Cas. Co. v. Fisher*, 192 Mich. App. 371, 481 N.W.2d 743 (Mich. Ct. App. 1991).

In addition, preclusive effect has been given to criminal convictions for simple and aggravated assault on the issue of intent for purposes of the "intended or expected" insurance coverage exclusion. In *Selected Risk Ins. Co. v. Bruno*, 718 F.2d 67, 69 (3<sup>rd</sup> Cir. 1983), the United States Court of Appeals for the Third Circuit held that where an insured had been convicted of simple assault for striking the victim who later died from the blow, the insurer did not have a duty to defend or afford coverage to the insured in a subsequent wrongful death action. The court, giving preclusive effect to the conviction for simple assault, held that an intentional assault precludes coverage under the insurance policy which excludes coverage for bodily damage expected or intended by the insured. *Id.* In *New Hampshire Ins. Co. v. Vardaman*, 838 F.Supp. 1132 (N.D. Miss. 1993), the insured was convicted of numerous counts of aggravated and simple assault. The insurer maintained that the insured was precluded from arguing that he did not intend to injure the victims since the jury convicted him of aggravated assault. The statute pursuant to which the insured was found guilty states that a person is found guilty of aggravated assault if he attempts to cause or purposely or knowingly cause bodily injury to another. Simple assault also requires a finding that the defendant acted intentionally. The court held that the jury convictions of aggravated and simple assault are conclusive findings that the insured acted intentionally. Significantly, the court did note that misdemeanor convictions are frowned upon when used as conclusive evidence that an issue is established due to the relative trivial nature of a misdemeanor. The court believes that there is little incentive for a party to fight misdemeanor charges. However, the court explained that the misdemeanor convictions here are different because the

insured was tried for aggravated assault and the jury returned lesser included offense verdicts of simple assault. *Id.* The insured had the necessary incentive to fully and fairly litigate the issue of intent.

In *Aetna Cas. & Surety Co. v. Niziolek*, 395 Mass. 737, 747, 481 N.E.2d 1356, 1362 (Mass. 1985), the criminal defendant was convicted of burning insured property. In Massachusetts, intent to injure or defraud the insurer is an element of the crime. Thus, the court held that the jury's guilty verdict established conclusively that the criminal defendant intended to commit the crime in the subsequent civil action.

Moreover, some jurisdictions hold that a determination of "knowingly" committing a criminal act is sufficient for purposes of applying the intentional acts exclusion where the insured is convicted of voluntary manslaughter to deny coverage. In addition, adequate provocation (i.e. provocation sufficient to arouse the passions of an ordinary person so that he loses self control) does not negate intent for purposes of an intentional act exclusion. *Cretens v. State Farm Fire & Cas. Co.*, *supra*, 60 F.Supp. 2d at 992. In *Cretens*, the court gave preclusive effect to the insured's conviction for voluntary manslaughter and State Farm summary judgment as a matter of law based on the intentional act exclusion. *Id.* Other jurisdictions have held that conviction of a crime involving the element of "recklessness" is sufficient to trigger an intentional acts exclusion. *Allstate Ins. Co. v. Cole*, 129 Ohio App. 3d 334 (Ohio Ct. App. 1998). In *Allstate Ins. Co.*, the court granted Allstate's summary judgment based on the intentional acts exclusion by finding that the insured's criminal conviction for involuntary manslaughter conclusively determined that the insured perversely disregarded a known risk that his conduct was likely to cause a certain result and that he should have reasonably expected injury to result. The court stated that it has repeatedly held that a criminal conviction, in and of itself, may conclusively establish intent for purposes of applying an intentional acts exclusion. Moreover, a conviction involving the element of recklessness is sufficient to trigger the exclusion. *Id.*

In finding criminal convictions conclusive, including, any requisite determination of intent, several jurisdictions emphasize the differences between civil and criminal litigation which they argue militate in favor of according estoppel effect to criminal convictions. A criminal defendant must be proven guilty beyond a reasonable doubt by a unanimous verdict. Those jurisdictions finding criminal convictions conclusive reason that it would be an exercise in futility to retry those same issues in a civil action where the burden is only by a preponderance of the evidence. *See Savickas, supra*, 2000 Ill. LEXIS at \*10; *Tradewind Ins. Co. v. Stout, supra*, 85 Haw. at 188. Thus, the higher burden of proof satisfied in the criminal case already encompasses the standard of proof in the civil case. *Id. See also New Hampshire Ins. Co. v. Vardaman*, 838 F.Supp. 1132, 1134 (N.D.Miss. 1993); *Travelers Indemnity Co. v. Walburn*, 378 F. Supp. 860 (D.C. 1974). In addition, the criminal defendant has a right to counsel and to a record paid for by the State on appeal. *Savickas, supra*, 2000 Ill. LEXIS at \*10.

In addition to the higher standard of proof and numerous safeguards in criminal proceedings as rationale for the rule allowing judgments in criminal proceedings to have preclusive effect in later civil actions, these courts held that giving convictions conclusive effect advances judicial economy. These jurisdictions propound that the policies of promoting judicial economy by minimizing redundant litigation, preventing inconsistent judgments which undermine the finality and integrity of the judicial system and protecting against vexatious litigation wholly support giving criminal convictions and the determination of issues necessary therein preclusive effect. *Tradewind v. Stout, supra*, 85 Haw. at 189. The courts assert that in light of the scarcity of judicial time and resources, the repeated litigation of issues that have already been conclusively resolved by a criminal court or jury “carries a considerable price tag in both money and time.” *Aetna Cas. & Sur. Co. v. Jones, supra*, 596 A.2d at 424. Further, the courts contend that the application of collateral estoppel to a civil action following a criminal prosecution will prevent the diminution of public confidence in our judicial system that would potentially result if civil juries repeatedly found by a preponderance of the evidence that a convicted criminal defendant had not done something that a criminal jury had found that he had done beyond a reasonable doubt. *Aetna Cas. & Sur. Co. v. Niziolek, supra*, 481 N.E.2d at 1360.

## **B. Convictions Not Given Conclusive Effect**

A minority of jurisdictions, when faced with coverage issues in subsequent civil actions, hold that the insured’s intent or expectation of harm is not conclusively established where the insured is convicted on a jury verdict. For instance, Indiana does not permit the use of criminal convictions as evidence in a civil action except in very limited circumstances, excluding declaratory judgment actions relating to coverage. *Liberty Mut. Ins. Co. v. Metzler*, 586 N.E.2d 897, 902 (Ind.Ct. App. 1992). In *Liberty Mut. Ins. Co. v. Metzler*, Liberty Mutual contended that the injured party should be collaterally estopped from relitigating the question of whether its insured acted negligently or intentionally where the insured’s criminal convictions, including murder, conclusively determined that the insured acted intentionally. The court refused to admit the conviction as conclusive evidence and held simply that Indiana follows the traditional rule that a criminal conviction is not admissible in a civil case, as evidence of the facts upon which it was based. *Id. See also Snodgrass v. Baize*, 405 N.E.2d 48 (Ind. Ct. App. 1980) (finding while a conviction for aggravated assault and battery carries with it an element of “intentional” or “knowing” conduct, that evidence is not conclusive as a matter of law).

At least one court has held that a criminal conviction for a voluntary manslaughter does not have a collateral estoppel effect in determining coverage under an insurer’s policy arguing that the standard of intent in the criminal and civil contexts differ. *State Farm Fire & Cas. Co. v. Pommier* 1992 U.S. Dist. LEXIS 2487, \*8 (N.D. Cal. 1992). In *Pommier*, the court refused to give collateral estoppel effect to a conviction of voluntary manslaughter on the basis that the standard for intent in the criminal context differs from the standard of intent in the insurance coverage context.

1992 U.S. Dist. LEXIS at \*10-13. The court stated that in the criminal proceedings, the jury did not consider volitional control. Therefore, because the volitional aspect of the insured's mental capacity was not fully litigated in the criminal proceeding, collateral estoppel did not apply. *Id.* at \*14.

In other situations, the fact of intoxication may affect whether or not a court in a later civil proceeding is willing to give preclusive effect to a criminal conviction. In *Hunter v. Farmers Ins. Co. of Oregon*, 135 Ore. App. 125, 898 P.2d 201 (Or. Ct. App. 1995), the insured was convicted of third degree assault. The court refused to give conclusive effect to the assault conviction. The court explained that under Oregon statutory law, a criminal defendant may be found guilty of reckless conduct even though the defendant is entirely unaware of his actions because of intoxication. The volitional act in such cases is presumed to be the act of becoming intoxicated. Therefore, the court held that the assault conviction only evidenced reckless conduct which did not establish that the insured intended to harm the victim or that he acted intentionally. *Id.*

In addition, in *Aetna Cas. & Sur. Co. v. Best*, 1996 Conn. Super. LEXIS 229 (Conn. Super. Ct. 1996), contrary to *Allstate Ins. Co. v. Cole*, discussed in Section A above, the court held that conviction of a crime in which recklessness is a necessary element, should not be given preclusive effect as a determination of intent. In *Aetna Cas. & Sur. Co. v. Best*, an insured was convicted of manslaughter in the second degree. The applicable Connecticut statute provides that a person is guilty of manslaughter when he recklessly causes the death of another person. The court expressed that reckless conduct is not intentional conduct because one who acts recklessly does not have a conscious objective to cause a particular result. *Id.* (citations omitted). Therefore, the court held that because an issue must have been actually decided and the decision must have been necessary to the judgment for collateral estoppel to apply, the issue of intent was not conclusively established and can be litigated in the civil action. 1996 Conn. Super. LEXIS at \*7-11.

Similarly, in *Wiggins v. Hampton*, 78 Ohio App. 3d 669 (1992), the court held that a determination that an insured "knowingly" caused injury is not akin to a determination of intent. In *Wiggins*, the insured was convicted of aggravated assault. The court found that a conviction for aggravated assault does not conclusively establish, as a matter of law, that physical harm was expected or intended. *But see Cretens v. State Farm Fire & Cas. Co.*, *supra*, 60 F.Supp. 2d at 992.

Nonetheless, the current trend and the law in the majority of jurisdictions today is to hold criminal convictions which require a finding of intent as conclusive of the issue of intent in subsequent civil proceedings.

## **V. Effect of Guilty Pleas in Subsequent Civil Actions**

Although not as rampant as the modern trend giving criminal convictions conclusive effect in later civil actions, there may also be a trend developing among

jurisdictions to give guilty pleas and all issues necessarily determined by the conviction conclusive effect in later civil actions. However, nothing approaching a consensus has emerged and there are still numerous jurisdictions which refuse to give collateral estoppel effect to guilty pleas. As discussed more fully below, the most prevalent issue the disputing courts appear to focus on is whether the “actually litigated” requirement of the collateral estoppel doctrine has been met where a conviction by guilty plea has been entered.

#### **A. Guilty Pleas Given Conclusive Effect**

Many jurisdictions hold that a guilty plea is equivalent to a conviction after trial for collateral estoppel purposes and precludes litigation in a subsequent civil action of all issues necessarily determined by the conviction, including intent. *State Farm Fire & Cas. Co. v. Fullerton*, 118 F.3d 374 (5<sup>th</sup> Cir. 1995); *Colorado Farm Bureau Mut. Ins. Co. V. Snowbarger*, 934 P.2d 909 (Colo. Ct. App. 1997); *State Farm Fire & Cas. Co. v. Sallak*, 140 Ore. App. 89, 914 P.2d 697 (Or. Ct. App. 1996); *State Mut. Ins. Co. v. Bragg*, 589 A.2d 35 (Me. 1991); *State Farm Fire & Cas. Co. v. Groshek*, 161 Mich. App. 703, 411 N.W.2d 480 (Mich. Ct. App. 1987); *Merchants Mutual Ins. Co. V. Arzillo*, 98 A.D.2d 495, 472 N.Y.S.2d 97 (N.Y. App. Div. 1984); *Ideal Mut. Ins. Co. v. Winker*, 319 N.W.2d 289 (Iowa 1982).

There is perhaps a trend developing among jurisdictions to treat guilty pleas and all issues necessarily determined in the conviction as conclusive in later civil proceedings. *State Farm Fire & Cas. Co. v. Fullerton*, *supra*, 118 F.3d at 381. In *State Farm Fire & Cas. Co. v. Fullerton*, the United States Court of Appeals for the Fifth Circuit, in a case of first impression, was faced with the issue of whether an insured’s guilty plea satisfies the requisites of collateral estoppel in a later civil proceeding concerning coverage. After conducting a thorough review of jurisdictions across the country, the court found little guidance due to the unsettled state of law but noted that the more recent decisions tended to favor treating a guilty plea as the equivalent of a conviction after a trial, as conclusive. 118 F.3d at 381.

In *Fullerton*, the insured plead guilty to murder. The heirs of the victims brought wrongful death actions against the insured in state court. The insurer, State Farm, then moved for summary judgment on the theory that the insured’s conviction by guilty plea collaterally estopped the heirs from litigating the insured’s intent. In determining the preclusive effect of the guilty plea, the court first analyzed whether a guilty plea counts as “full and fair litigation” of the facts necessary to establish the elements of the crime. The court held that the insured’s criminal proceedings included a full and fair airing of his intent. The court reasoned that the insured had a full hearing and a right to appeal his conviction. *Id.* at 382.

The court in *Fullerton* next analyzed whether the insured’s guilty plea counts as a full and fair litigation for the victim’s heirs. The court held that because the heirs are in privity with the insured as a result of the derivative nature of their recovery under the

policy, and because the insured had a strong incentive to defend himself in the criminal trial, it was fair give the insured's guilty plea preclusive effect against the victim's heirs. *Id.* at 386. *See also State Mut. Ins. Co. v. Bragg*, 589 A.2d 35, 38 (Me. 1991) (finding insured's unilateral action in pleading guilty precludes the victims of his actions from pursuing a negligence theory).

A commonly debated issue regarding the preclusive effect of guilty pleas is whether a guilty plea meets the "actually litigated" requirement which is necessary to invoke the doctrine of issue preclusion. Several courts propound that the "actually litigated" requirement is satisfied upon the application of the "factual basis rule" which must be complied with before a court may accept a guilty plea in several jurisdictions. *State Farm Fire & Cas. Co. v. Sallak*, *supra*, 914 P.2d at 700; *Ideal Mutual Ins. Co. v. Winker*, *supra*, 319 N.W.2d at 295.

In *State Farm Fire & Cas. Co. v. Sallak*, State Farm brought a declaratory judgment action seeking a determination that it had no duty to indemnify its insured where the insured plead guilty to "knowingly causing physical injury". The insured contended that the entry of a guilty plea does not satisfy the "actually litigated" requirement of issue preclusion, because no adversarial litigation takes place and no findings of fact are made. 914 P.2d at 700. Under Oregon law, after accepting a guilty plea, a court cannot enter a judgment without "making such inquiry as may satisfy the court that there is a factual basis for the plea" (i.e. factual basis rule). The court held that because the factual basis rule requires that the trial court be convinced that the plea is founded on fact, the acceptance of the insured's plea is the equivalent of a judicial determination of each of the material elements of the crime and satisfies the "actually litigated" requirement of issue preclusion. In addition, the court contended that the issue of whether the insurer knowingly or intentionally caused the victim's injuries was the same in the criminal case and the current action, the insured had a full and fair opportunity to be heard, the insured knowingly and voluntarily waived his right to a trial by jury, the right to present evidence and the right to confront witnesses, and the insured established to a judge's satisfaction that his plea was voluntarily and intelligently made. Therefore, the court gave preclusive effect to the insured's guilty plea and incumbent determination of intent. *Id.*

Similarly, in *Ideal Mut. Ins. Co. v. Winker*, *supra*, the Iowa Supreme Court held that it expressly prohibits "relitigation concerning an essential element of a crime when the accused has tendered a guilty plea, which necessarily admits the elements of the crime, and the court has ascertained that a factual basis exists for the plea and accepts it." 319 N.W.2d at 295. The court explained that although the parties do not litigate the question of whether the accused committed each element constituting the crime, the effect of the "factual basis rule" is to require the existence of evidence sufficient to convince the court that the plea is founded on fact. Once a guilty plea is accepted, a judicial determination has thus been made with respect to the essential elements of the crime and this requirement is sufficient to meet the "fully and fairly litigated" element of issue preclusion. *Id.* In addition, the court noted that the insured,

faced with the prospect of prolonged litigation, had an adequate incentive to litigate the issue of intent. Therefore, the conditions necessary to invoke issue preclusion had been established.

Moreover, some jurisdictions give preclusive effect to Serrano or Alford-type guilty pleas. A Serrano or Alford plea occurs where a criminal defendant pleads guilty to a crime to minimize the risk of being found guilty after trial, but never admits that he or she in any way, committed any of the acts alleged in connection with the crime or any wrongdoing. *Merchants Mutual Ins. Co. v. Arzillo*, *supra*, 98 A.D.2d at 504. There is no admission of the facts justifying the conviction. *Id.* Notwithstanding, these courts hold that the issues representing the essential elements of the crime have necessarily been judicially determined by the plea, so that a criminal defendant is estopped to contest them in a subsequent civil action. *Id.* at 505-06.

In *Merchants Mutual Inc. Co. v. Arzillo*, *supra*, insured entered a Serrano-type plea of guilty to arson in the fourth degree and claimed that he was framed and continued to protest his innocence after he was sentenced. *Id.* at 496. The insured contended that due to his Serrano type guilty plea, the facts constituting the crime charged were never litigated and are not subject to collateral estoppel. The court held that the doctrine of collateral estoppel applied to the insured's plea of guilty and the insured was estopped from contesting the operative facts of the crime, including intent. *Id.* at 507. The court stated that the doctrine of issue preclusion as it has developed in New York mandated a holding that the insured's guilty plea conclusively established his commission of the elements of the crime. The court rationalized that although not actually litigated, the issues have necessarily been determined by the plea. The court commented that a criminal defendant who enters a Serrano plea is no less guilty than one who is convicted by a jury for the same charge or by a conventional guilty plea, and is subject to no less punishment. Those who knowingly and voluntarily plead guilty to substantial criminal charges should not expect courts to look behind convictions based on such pleas in order to relieve them of adverse civil implications that may follow. *Id.* at 507.

Several courts explicitly hold that intent is an issue that, when finally decided in a previous criminal prosecution, including convictions by guilty plea, cannot be relitigated so as to avoid the intentional acts exclusion of an insurance policy. *Colorado Farm Bureau Mut. Ins. Co. v. Snowbarger*, *supra*, 934 P.2d at 911; *State Farm Fire & Cas. Co. v. Groshek*, *supra*, 411 N.W.2d at 484. These courts hold that treating the question of intent as resolved will not only cut short declaratory judgment suits, but it will also accelerate the adjudication of victims' suits against an insured who has admitted his responsibility for a criminal act. *State Farm Fire & Cas. Co. v. Fullerton*, *supra*, 118 F.3d at 386-87. The courts recognize that although criminal defendants sometimes enter guilty pleas for reasons other than the truth of the charges against them, it is more disconcerting when a judicial system tolerates the continued incarceration of those defendants and at the same time awards civil damages based on findings that those

defendants did not commit all the elements of the crimes for which they are being punished. *Id.*

In *State Farm Fire & Cas. Co. v. Groshek*, *supra*, the court held that a guilty plea to a specific intent crime is dispositive of the expectation-of-injury question in the declaratory judgment action brought by the insurer under the insurance policy's exclusionary clause for injuries "expected or intended by the insured." The court explained that an insured's plea of guilty to an intentional crime involving intentional conduct dispels any triable factual issue regarding the insured's intention or expectation to cause injury to the victim. 411 N.W.2d at 484. *See also Colorado Farm Bureau Mut. Ins. Co. v. Snowbarger*, *supra*, 934 P.2d at 911 (finding where insured pled guilty to sexual assault against defendant in underlying criminal action, intent was decided in the underlying criminal action and could not be relitigated to avoid the intentional acts exclusion of the insured's policy).

## **B. Guilty Pleas Not Given Conclusive Effect**

Other jurisdictions refuse to give guilty pleas conclusive effect in subsequent civil actions holding that guilty pleas are not fully litigated matters for collateral estoppel purposes. *Mulkins v. Allstate Ins. Co.*, 2000 U.S. App. LEXIS 8208 (9<sup>th</sup> Cir. April 21, 2000); *Stidham v. Millvale Sportsmen's Club*, 421 Pa. Super. 548, 618 A.2d 945 (Pa. Super. Ct. 1992); *New York Underwriters Ins. Co. v. Doty*, 58 Wn. App. 546, 794 P.2d 521 (Wash. Ct. App. 1990); *Garden State Fire & Cas. Co. v. Keefe*, 172 N.J. Super. 53, 410 A.2d 718 (App. Div. 1980), *cert. denied*, 84 N.J. 389 (1980); *Teitelbaum Furs, Inc. v. Dominion Ins. Co.*, 58 Cal. 2d 601, 375 P.2d 439 (Cal. 1962), *cert. denied*, 372 U.S. 966 (1963).

In *Aetna Cas. & Sur. Co. v. Niziolek*, *supra*, the Supreme Court of Massachusetts explicitly rejected the notion that the "factual basis rule" which requires that the trial court be convinced that the plea is founded on fact is the equivalent of a judicial determination of each of the material elements of the crime and satisfies the "actually litigated" requirement of issue preclusion. Rather, the court reasoned that while the judge taking the plea must satisfy himself that there is a factual basis for a charge, he need not find that the defendant actually committed the crime to which he is pleading guilty. 395 Mass. at 749. Therefore, the taking of a guilty plea is not the same as a full adjudication on the merits. Moreover, the court noted, because there have been no findings, a conviction after a plea of guilty does not present the possibility of inconsistent factual determinations. Thus, for collateral estoppel purposes, the court held that those factors justify treating a guilty plea differently than a conviction after a trial. *Id.*

Some courts hold that it is unfair to invoke collateral estoppel against a party due to a guilty plea because a defendant's option to forgo litigation is usually for reasons having little or nothing to do with the nature of the issues of the crime itself and, thus, does not represent a full and fair litigation of the issues. *Stidham v. Millvale*

*Sportsmen's Club, supra*, 618 A.2d at 952; *Garden State Fire & Cas. Co. v. Keefe, supra*, 410 A.2d at 721.

In *Garden State Fire & Cas. Co. v. Keefe, supra*, the court held that a guilty plea does not constitute a full and fair litigation of the issues, including the issue of the insured's intent. The court reasoned that a guilty plea simply represents an insured's option to forego litigation and usually for reasons having nothing to do with the nature of the issues themselves. The court held that it would be unfair to preclude the victim from relitigating the issue of intent and seeking a civil recovery, as a result of the defendant's wholly unilateral and self-interested decision to waive trial of the criminal charge. 410 A.2d at 721. In *Stidham v. Millvale Sportsmen's Club, supra*, the court found that a guilty plea of third-degree murder while severely intoxicated does not establish the insured's intent to kill the victim. The court explained that a guilty plea may be no more than a trial technique whereby the defendant seeks to avoid a lengthy trial, and does nothing to enlighten the court regarding the criminal defendant's intent. Thus, a guilty plea cannot be held conclusive of a criminal defendant's intent. 618 A.2d at 952.

Similarly, in *Teitelbaum Furs, Inc. v. Dominion Ins. Co.*, 58 Cal. 2d 601, 375 P.2d 439 (Cal. 1962), the Supreme Court of California declared that it does not serve the public policy underlying collateral estoppel (i.e. limiting litigation by preventing a party who has had a fair trial on an issue from again drawing it into controversy) to make a guilty plea conclusive in a later civil suit. Rather, the public policy underlying collateral estoppel must be considered together with the policy that a party must not be deprived of a full and fair adjudication. The court expressed that when a guilty plea has been entered, no issues have been "drawn into controversy" by a "full presentation" of the case. Therefore, considering fairness to civil litigants and regard for the efficient administration of criminal justice, the court refused to preclude the party who plead guilty to the criminal charge from litigating the same issues in a civil action. 375 P.2d at 441. *See also Mulkins v. Allstate Ins. Co., supra*, 2000 U.S. App. LEXIS at \*3 (holding a criminal judgment arising out of a guilty plea cannot be used for purposes of collateral estoppel under California law).

Courts have also held that the "full and fair opportunity" to litigate requirement of issue preclusion is not met in situations involving Serrano or Alford type pleas. *New York Underwriters Ins. Co. v. Doty, supra*, 794 P.2d at 550-51. In *New York Underwriters Ins. Co. v. Doty*, an insurer sought a declaration of non-coverage for damages sought by the insured's former spouse in a civil suit based on the insured's physical and sexual assault. The insured entered an Alford-type guilty plea for second degree rape in an earlier criminal trial. The court, relying upon *Teitelbaum Furs, Inc. v. Dominion Ins. Co., supra*, held that a criminal defendant's entry of an Alford-type guilty plea constitutes an admission of intent to commit the acts underlying the criminal charge but does not collaterally estop the defendant from later claiming a lack of intent to commit such acts. The court held that an Alford-type plea does not allow a "full and fair opportunity" to litigate the issue of intent. *Id.*

## **VI. Timing of Declaratory Judgment Actions to Deny Coverage Based on Conclusive Effect of Conviction or Plea in Subsequent Civil Action**

A declaratory judgment action prior to the trial of a civil action against an insured may be a valuable means of resolving coverage questions where those questions are independent and separable from the claims asserted in a pending suit by an injured third party. *Brohawn v. Transamerica Ins. Co.*, 276 Md. 396, 347 A.2d 842, 848. For example, where an insurer claims lack of coverage because of the insured's failure to comply with contract provisions such as the notification clause or failure to pay premiums, a declaratory judgment action would ordinarily be appropriate. *Id.*

However, where an insurer seeks to have the issue of intent resolved subsequent to a non-conclusive criminal conviction or plea of guilty as the result of a later civil action, the issue of intent is one which would be fully decided in the pending tort action. 347 A.2d at 847. Therefore, a declaratory judgment action would not be appropriate, as the factual issues relied upon to deny coverage (i.e. whether any injuries were intentionally inflicted) would be resolved by the jury in the pending tort suit. *Id.*

Similarly, in *State Farm Fire & Cas. Co. v. Shelton*, 176 Ill. App. 3d 858, 531 N.E.2d 913, (Ill. App. Ct. 1988), after an insured was convicted of voluntary manslaughter, a wrongful death action was instituted against him. The conviction for manslaughter was not held to be conclusive evidence of intent. The court was faced with the issue of whether an insurance company can institute a declaratory judgment action to determine its duty to defend its insured in the underlying personal injury action, before the resolution of that litigation, on the grounds that the insured was convicted of an intentional crime arising out of the incident. 531 N.E.2d at 915. The court held that when an insured's conduct is covered under the policy, it must not determine disputed factual issues that are crucial to the insured's liability in the underlying personal injury lawsuit such as intent. *Id.* at 917. The held states that had the insured admitted an intent to harm, then resolution of a declaratory judgment action on the coverage issue may have been appropriate before the underlying lawsuit was resolved. *Id.* at 917-18.

In *Stidham v. Millvale Sportsmen's Club*, *supra*, an insured plead guilty to third degree murder and aggravated assault. The insurer made an independent decision refusing to defend the insured in both the criminal action and the subsequent civil action. 618 A.2d at 950. The insurer denied coverage and a defense based on its position that the insured's acts were intentional and, therefore, excluded under the policy. In the subsequent civil trial, the court found the insured was negligent. *Id.* at 955.

The court held that the insurer was bound by the trial court's findings of negligence. The court explained that the insurer did not pursue the available declaratory judgment procedure at the outset in order to definitively determine its duty to defend its insured. The court held that the insured had an opportunity to litigate the issue of the insured's intent and is now bound by the court's finding of negligence as a result of its cavalier approach to the legal proceedings. The court further expressed that a

declaratory judgment action, though not required by law, might have resolved at the outset the issue of the insurer's duty to defend and the issue of intent. *Id.* at 955-56.

## **VII. Conclusion**

Finality, in a criminal case, does not always result in finality in a civil case arising from the criminal act. The criminal conviction, although conclusive evidence of an insured's guilt, is not necessarily a final adjudication of the insurance coverage issues. A majority of jurisdictions stand "firm" allowing insurers to use the criminal conviction resulting from a criminal trial as a shield to bar relitigating the civil issue of intent. A minority of jurisdictions provide no definitive shield for the insurer. Instead, these jurisdictions allow the victim his or her day in civil court ignoring the possibility of inconsistent verdicts or results.

Under the circumstances, an insurer cannot conclude a criminal conviction will conclusively decide the potential insurance coverage issues. Because the proceeds are potentially at risk, an insurer must closely monitor the progress of any criminal proceeding and be aware how a potential conviction is treated in that jurisdiction.