CLAIMS FOR COVERAGE INVOLVING CRIMINAL ACTS

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I. INTRODUCTION

One of the first steps in evaluating a claim under an insurance policy is to determine whether the act causing the loss constitutes an "occurrence" under the policy. If so, coverage may be "triggered" and indemnity may ultimately be owed. Much of the litigation involved in declaratory judgment actions centers upon the definition of what exactly constitutes an occurrence. The case law is rife with conflicting and contradictory interpretations.

When this analysis involves the interplay of criminal acts, it is often assumed that this line is even clearer. Even though we look at the criminal and civil justice systems as two distinct entities with its own rules and its own burdens of proof, these clear lines of demarcation get blurred when 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 no duty to defend. In reality, the answer is not so simple. The

interplay of the criminal convictions, guilty pleas and even the timing of the declaratory judgment action can all impact upon the coverage questions. Moreover, the coverage issues raised by the expected or intended exclusion also must be weighed. A significant weapon in circumventing some of these coverage issues is the use of collateral estoppel.

II. 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*, 193 Ill.2d at 384 (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*, 193 Ill.2d at 385 (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. 193 Ill.2d at 388. 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 (9th 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 (3rd 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 causes 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 noted 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,*193 Ill.2d at 385; *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,* 193 Ill.2d at 385.

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*, 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.

III. EFFECT OF GUILTY PLEAS IN SUBSEQUENT CIVIL ACTIONS

Although not as pronounced 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 (5th 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 reprieve 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).

In *State Farm Fire & Casualty Co. v. Gorospe*, 106 F. Supp. 2d 1028 (D. Haw. 2000), the insured plead no contest to voluntary manslaughter arising out of a shooting death of another. The court did not analyze the facts under collateral estoppel. It instead explained that a plea of no contest is different from a guilty plea in that the defendant does not admit guilt. *Id*. at 1034. The court further explained that "[d]efendants in criminal cases often plead guilty to lesser charges to avoid the risks associated with trial" while "a judge accepts the plea because the attendant circumstances and the evidence demonstrate with reasonable certainty that the defendant committed the crime to which he is pleading." *Id*. Therefore, as to the shooting at hand, the court found that no "accident" or "occurrence" had occurred, and also the victim's injuries were "expected" under the intentional act exclusion, so coverage was precluded. *Id*. at 1033-34.

But see Vanguard Insurance Co. v. Bolt, 204 Mich. App. 271 (Mich. Ct. App. 1994). In *Vanguard* the fourteen-year old defendant plead guilty to assault and battery, a specific intent crime. The court noted that normally a defendant's plea of guilty to a specific intent crime is dispositive in determining the applicability of an intentional acts exclusion in an insurance policy. *Id.* at 275. However, because Michigan has a statute providing that juvenile convictions are not admissible as substantive evidence in any civil proceeding, the court found that the general rule did not apply to minors, and therefore the guilty plea did not have any bearing on coverage. *Id*. at 275-76.

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 (9th 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). (Superseded by statute in part on other grounds.)

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 524-25. 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.*

IV. 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) (superceded by statute in part on other grounds), 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 court opined 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 was 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.

V. IMPACT OF CRIMINAL CONVICTIONS ON THE INNOCENT CO-INSURED

Often, an innocent co-insured will argue that the actions of the "guilty" co-insured should not be attributed to him or her. Although from a fairness issue, the argument might be compelling, the resolution of policy coverage with regard to the innocent co-insured frequently rests on interpretation of the articles "an," "any," and "the." *Compare Vance v. Pekin Insurance Company*, 457 N.W.2d 589 (Iowa 1990); *Dolcy v. Rhode Island Joint Reinsurance Association*, 589 A.2d 313 (R.I. 1991); *Osbon v. National Union Fire Insurance Company*, 632 So.2d 1158 (La. 1994); *Watson v. United Services Automobile Association*, 566 N.W.2d 683 (Minn. 1997); *State Farm Fire & Casualty Insurance Company v. Miceli*, 518 N.E.2d 357 (Ill. 1987).

In *Vance v. Pekin Insurance Company*, 457 N.W.2d 589 (Iowa 1990), Mrs. Vance, the plaintiff, argued that she was covered for her loss after her husband burned down their home. The policy contained the following language:

> In this policy, "you" and "your" refer to the "named insured" shown in the declaration and the spouse if a resident of the same household. "We," "us" and "our" refer to the company providing this insurance. In addition, certain words and phrases are defined as follows:
>
> . . .
> 3. "insured" means you and residents of your household who are:
>
> a. your relatives; or
>
> b. other persons under the age of 21 and in the care of any person named above.
>
> . . .
> We do not insure for loss caused directly or indirectly by any of the following: such loss is excluded regardless of any other cause or event contributing concurrently or in any sequence to the loss.
> . . .
>
> 8. Intentional Loss, meaning any loss arising out of any act committed:
>
> a. by or at the direction of *an* insured. [Emphasis added.]

The parties agreed that the case turns on whether the italicized word "an" before the word "insured" was ambiguous. The test for ambiguity was whether a reasonable person would read more than one meaning into the word. The Iowa Supreme Court held, that measured by this test, the word "an" was not ambiguous. The innocent co-insured was therefore denied coverage under this policy.

In *Dolcy v. Rhode Island Joint Reinsurance Association*, 589 A.2d 313 (R.I. 1991), the Supreme Court of Rhode Island held that whether an innocent co-insured may recover under a

policy depended upon whether an innocent co-insureds' obligation not to commit fraud or arson was considered to be joint rather than separate. The policy read, "We do not provide coverage for an insured who has: a) intentionally concealed or misrepresented any material fact or circumstances or b) made false statements or engaged in fraudulent conduct; relating to this insurance."

The defendant insurance carrier argued that if it had used the words "the insured," then the insureds' obligations would have been separate. By distinction, "an" insured connotes a joint obligation to refrain from intentional losses. The plaintiff argued that the word "an" in and of itself was ambiguous. Further, the words "the" and "an" were used interchangeably throughout the policy. The Rhode Island Supreme Court held that after examining the exclusion clause and the entire policy and found that it was not ambiguous. Both insureds had a joint obligation to refrain from causing intentional loss because the carrier did not insure for such a loss.

In *Osbon v. National Union Fire Insurance Company,* 632 So.2d 1158 (La. 1994), the Louisiana Supreme Court addressed the issue of whether an innocent co-insured was barred from recovering under a fire insurance policy because her home was destroyed by a fire intentionally set by her husband. The Supreme Court held that "the insured" meant only one insured, and the phrase "the insured" referred to the insured who was responsible for causing the loss and was seeking to recover under the policy. Moreover, the Court found that National Union's policy did not conform to the standard fire policy form provided by state law. The Court held that reformation of the policy to conform with the standard fire policy form was appropriate.

In *Watson v. United Services Automobile Association,* 566 N.W.2d 683 (Minn. 1997), the Minnesota Supreme Court examined a case in which a husband and wife were in the process of a divorce when the husband intentionally burned down their mobile home. Only the husband lived in the mobile home, although the mobile home was being purchased by both husband and wife under a contract for deed. The court held that the wife was entitled to her proportionate share of the insurance proceeds. The court based its decision on the theory that insurer's policy did not conform to the minimum coverage requirements set forth in Minnesota Statutes even though such theory was not presented to the trial court. Notwithstanding the fact that the "an insured" language in insurer's policy unambiguously barred coverage for innocent co-insured, the exclusion of coverage contained in insurer's policy conflicted with the level of protection provided in the statute, and the wife was therefore entitled to her proportionate share.

In *State Farm Fire & Casualty Insurance Company v. Miceli,* 518 N.E.2d 357 (Ill. 1987 the appellate court of Illinois examined a case in which an insurance carrier denied coverage to Mr. and Mrs. Miceli, after their son, an insured vandalized their home. State Farm homeowners' insurance policy contained the following provisions:

> "Throughout this policy 'you' and 'your' refer to the 'named insured' shown in the Declarations and the spouse if a resident of the same household. . .
>
> '[Insured]' means you and the following residents of your household: (a) your relatives..

Concealment of Fraud. This entire policy shall be void if any insured has intentionally concealed or misrepresented any material fact or circumstance relating to the insurance."

The trial court found that a reasonable person interpreting this language would have supposed that the wrongdoing of a co-insured would not be imputed to him. The court reasoned that a reasonable person would not understand that the wrongdoing of a co-insured would prevent recovery under the policy. Therefore the trial court held that the innocent co-insureds were covered under the policy and the appellate court agreed, despite the fact that the policy used the phrase "any insured."

In order for insurers to better protect themselves, closer attention must be paid to seemingly minute language and phrases contained in the exclusionary clauses of policies. Where there is not statutorily-prescribed standard insurance policy, the insurer would do well to avoid vague phrases like, "the insured" and use phrases such as "an insured" and "any insured" consistently throughout the body of the policy, because clearly many courts will go out of their way to find coverage for the innocent co-insured.

A. Coverage Cases

1. Coverage For The Innocent Co-Insured Parents Where A Child Commits An Excluded Act

In *Safeco Insurance Company of America v. Robert S.,* 70 Cal. App. 4th 757, 82 Cal. Rptr. 2d 880 (1999), the California Court of Appeals examined a case in which a sixteen-year-old boy accidentally shot and killed his friend, also a minor. The teenager, Kelly S. found his mother's .22 caliber Beretta handgun in the pocket of a coat in her closet. Kelly removed the clip from the handle of the gun and pulled the slide back, which caused the hammer to be cocked. Believing that the gun was unloaded, Kelly held the gun straight out, pointed it over his friends' heads and pulled the trigger. Kelly's friend Christopher was struck by a bullet and killed. Christopher's parents filed a wrongful death suit against Kelly and his parents.

Safeco insured Robert S., Kelly's father, under a homeowners' insurance policy, under which Velvet S., Kelly's mother, and Kelly were also insured. Safeco filed a motion for summary judgment in July 1996, contending that it had no duty to defend or indemnify the insureds because coverage was precluded by law and by the "illegal act" exclusion in the policy. The trial court granted summary judgment in favor of the insureds on the basis that the illegal acts exclusion was ambiguous. The provision did not indicate whether it was meant to encompass unintentional acts in addition to intentional acts. The appellate court reversed the trial court's decision. The appellate court reasoned that the exclusion for illegal acts would be rendered superfluous and redundant if it were interpreted as excluding only intentional illegal acts, which would merely be a subset of those intentional acts already removed from coverage by other exclusions.

The appellate court also noted that under the language of the policy at issue which excluded coverage for liability "arising out of any illegal act committed by or at the direction of *an* insured," coverage is also precluded for innocent co-insureds, such as Robert and Velvet, even though their theory of liability is based on the theory of negligent supervision. *Id, citing*

Fire Ins. Exchange v. Altieri, Cal App. 3d 1352, 1360-1361 (1991); *Western Mutual Ins. Co. v. Yamamoto*, 29 Cal App. 4th 1474, 1486-1487 (1994).

In *Fire Insurance Exchange v. Altieri*, 235 Cal. App. 3d 1352, 1 Cal. Rptr.2d 360 (1991), the California Court of Appeals held that an insurer was not liable where the policy excluded coverage for bodily injury intended or expected by "an" or "any" insured, and where a fifteen year old insured intentionally assaulted another minor, causing him serious injuries.

In both of these cases, the courts did not use true innocent co-insured analysis in determining whether or not there was coverage. The parents were potentially liable for negligent supervision, and were therefore not innocent. In other jurisdictions, however, courts decide cases of negligent supervision by reasoning that the parents were innocent co-insureds.

In *Montgomery Mutual Insurance Company v. Dyer*, 2001 U.S. Dist LEXIS 21484 (W.D. Va.), accepted by *Montgomery Mutual Insurance Company v. Dyer*, 170 F.Supp. 2d 618 (W.D. Va.), Gregory Dyer burned down the home of his mother, Diana Dyer, believing that he was Jesus Christ. The court found that Gregory was mentally ill, and that Diana was an innocent co-insured. The court held that the Dyers' insurance carrier owed Diana Dyer coverage, but it did not focus on Gregory's mental illness, or on his mother's failure to supervise him. Instead the court based its decision on the language of the policy. The court reasoned that "who," following "an insured" in the policy narrowed the focus of the exclusion to those insureds engaging in the conduct that excluded coverage for an otherwise insurable loss. Therefore Diana Dyer's loss was not excluded.

2. The Special Case Of Firearms

In *Allstate Ins. Co. v. Freeman*, 432 Mich. 656, 443 N.W.2d 734 (1989), the Michigan Supreme Court held that a husband who negligently made a gun available to his wife was not covered where the intentional act exclusion referred to "an insured." The Court held that "an insured" unambiguously refers to "all" or "any" insureds under a homeowners' insurance policy.

The Tennessee Court of Appeals reached a different conclusion in *Musser v. Tennessee Farmers Mutual Insurance Company*, 1989 Tenn.App. LEXIS 749. In that case, the Plaintiff obtained an automobile insurance policy from the Defendant. The policy was in her name only and insured a 1984 Nissan Stanza which was titled in her name as well. Subsequently the Plaintiff married William Musser who, according to the Plaintiff suffered an "insane attack," which resulted in an assault upon her and the firing of 30 rounds from a semi-automatic machine gun into her car. She testified that her car was essentially destroyed as a result of the numerous bullet holes throughout the interior and exterior of the vehicle.

The appellate court chose to analyze the case under the "Innocent Spouse Rule." It held that the insurance company owed the plaintiff coverage. The appellate court reasoned that the policy was in the Plaintiff's name and was purchased when she was single. Moreover, the car was titled to her alone and she had absolutely nothing to do with the destruction of the property. Since the destruction of the car was accidental as to her (she did not intend, and could not have predicted that her husband would spray her car with bullets), denying coverage would produce an inequitable result.

In *Musser*, the Tennessee court of appeals analyzed an automobile insurance policy. This was not however, a relevant factor in the court's decision. The court chose to analyze this case under the "Innocent Spouse Rule" as announced in *Ryan v. MFA Mut. Ins. Co.,* 610 S.W.2d 428 (Tenn.App. 1980). In Ryan, the Court permitted a husband, a co-insured, to recover for his property which was destroyed by a fire intentionally set by his wife. Thus the court focused on the language of the policy and the name that appeared on the title, not the kind of property that was insured.

The issue of negligent entrustment can arise in cases involving firearms, even where the insureds are spouses, and not children. *Allstate Insurance Company v. Worthington,* 46 F.3d 1005 (10th Cir. 1995), was a suit that arose out of Richard Worthington's kidnapping of hostages and fatal shooting of a nurse. His wife was sued by the victims and their survivors on claims that she negligently entrusted weapons to her husband and failed to warn the potential victims. Allstate asserted that summary judgment for the defendants was improper because (1) the insurance policy unambiguously provided that because the husband's intentional acts were not covered under the policy the wife's negligent acts also were not covered; and (2) the wife's actions or omissions also were not covered, and (3) the innocent co-insured case law did not afford coverage to the wife. The court reasoned that because its decision on the first two points it did not need to even address the issue of the innocent co-insured.

The court reasoned that the language of the policy was ambiguous as to whether Allstate had a duty to defend and indemnify the wife when her co-insured husband was not covered because he was engaged in an intentional or criminal act excluded under the policy. The particular exclusionary clause on which Allstate relied did not include any reference to "an insured" or "any insured." The clauses excluding coverage of acts or omissions while insane or lacking capacity or control did explicitly refer to "an insured person," the criminal act clause referred to "the insured person."

Applying Utah law, the circuit court held that Allstate had a duty to defend the suits alleging the wife's negligence. The circuit court rejected Allstate's argument that it should look to the "underlying cause" of the injuries to determine whether the wife was covered. The circuit court distinguished this case from other cases where the policies at issue referred to "an insured," "any insured," or even "insured." The court found that Utah courts had not specifically adopted or rejected the view that negligent acts or omissions connected to intentional acts of other insured were never covered by homeowners' liability policies. Therefore, based on Utah policies of construing exemptions against the insurance company, the circuit court affirmed the district court's summary judgment in favor of the insured. The circuit court noted that if Allstate wanted its homeowners' insurance policies to exclude coverage for all insured persons for an excluded act by any insured person, it could do so by careful drafting.

In *Swanson v. Trinity Universal Insurance Co.,* 2006 Mont. Dist. LEXIS 447 (July 13, 2006), a mother, who suffered from serious mental disease, shot and killed her two daughters. *Id*. at *2-3. The mother pled guilty to two counts of deliberate homicide, but because she was determined to be seriously mentally ill, she was committed to a psychiatric facility for life on each count, to run concurrently. *Id*. at *2. The estates of the victims, as well as their father and siblings, brought civil suits against the mother. *Id*. at *3-4. The mother's homeowners' policy sought to deny coverage because the bodily injury to the victims was "expected and intended"

from the standpoint of the insured mother and was not an "accident." *Id*. at *5-6. The court noted that the majority view in the courts addressing the issue of a mentally ill insured is that "intent to cause bodily injury requires that the insured possess both cognitive and volitional capacities, either of which may be affected by mental illness." *Id*. at *16 (citing *State Farm Fire & Cas. V. Wicka*, 474 N.W.2d 324, 327 (Minn. 1991); citing 33 *A.L.R.* 4th 983, Sec. 3). However, the court cautioned that intoxication is not akin to mental illness. "Mental illness is hardly voluntary and is not laden with the potential for abuse or fraud." *Id*. at *16. Further, while the court found that coverage existed for the claims brought by the victims' estates, the court denied coverage for the claims brought by the family members, because the insured mother did not cause the family members any bodily injury or property damage. *Id*. at *12-13.

3. Assault & Battery

In *Allstate Insurance Co. v. Deborah Jean Morton*, 254 Mich. App. 418 (2002), a woman allowed numerous minors in her home for parties and supplied them with alcohol. The plaintiff attended one such party and, after passing out after consuming alcohol, was raped by another guest. *Id*. at 419. In a civil suit, the minor and her parents alleged that the woman was vicariously liable for assault and battery, as well as gross negligence, social host liability, nuisance, and premises liability. *Id*. at 420. The woman's homeowners' insurer argued that coverage was precluded as the minor's injuries did not arise from an occurrence, defined as an "accident" under the policy. *Id*. The court agreed. The court found that the woman reasonably should have expected that providing the minor with enough alcohol for her to pass out would result in harm. "The fact that the specific harm that occurred was [an] intentional act of rape rather than alcohol poisoning is irrelevant to the determination of whether the occurrence was an accident." *Id*. at 422-23.

In *Allstate Insurance Co. v. Bruttig*, 2006 U.S. Dist. LEXIS 81927 (D. Nev. November 2, 2006), the insured was in a fender bender accident with the plaintiff and, upon exiting his vehicle, the insured proceeded to push and kick the plaintiff, breaking his right hip. *Id*. at *2. The insured was convicted of battery with substantial bodily harm. *Id*. In the subsequent civil suit, the insurer disputed coverage. The homeowners' policy contained the following exclusion:

> "We do not cover any bodily injury or property damage intended by, or which may reasonably be expected to result from the intentional or criminal acts or omissions of, any insured person . . . This exclusion applies regardless of whether or not such insured person is actually charged with or convicted of a crime."

Id. Likewise, the automobile policy excluded "bodily injury or property damage which may reasonably be expected to result from the intentional acts of an insured person . . .." *Id*. at *3. However, along with claims alleging intentional conduct, the plaintiff's Complaint also contained a negligence claim with no reference to intent. *Id*. at *12. The court noted that an earlier Nevada case had declined to preclude coverage of a negligence claim that was "appended to" claims of intentional acts—the earlier case involved intentional claims of fraud and conversion against an employee, and also claims of negligent supervision against the employer. *Id*. at *16-17. However, the earlier case was distinguishable from the facts in *Bruttig* because in the earlier case, the alleged intentional acts were performed by a third party employee, and were thus "accidental" as to the insured employer. By contrast in *Bruttig*, both the intentional and

negligent acts were performed by the same party—the insured. *Id*. at *18. Therefore, the court held that the homeowners' policy excluded coverage for both the negligence and intentional tort causes of action under the Complaint. *Id*. at *19. As to the automobile policy, the Court found that coverage was precluded because not only did the plaintiff's injuries not arise out of the use of an automobile, but also the injuries resulted from intentional acts of the insured. *Id*. at *21-22.

4. Arson

In *Great Northern Insurance Co. v. Paino Assoc.*, 369 F. Supp. 2d 177 (D. Mass. 2005), the Massachusetts Turnpike Authority leased two suites in a building; it allowed another company, which provided certain services to the Authority, to occupy the suites. *Id*. at 184. An Authority employee set four fires at the premises. The Authority and the company had a contract that required the company to maintain insurance "for all damages arising out of bodily injury or death, or damage to personal or real property incurred with respect to work performed under the [contract.]" *Id*. at 183. Therefore, when the owner of the building sued the Authority for negligent supervision of the employee, the Authority sought coverage as an additional insured under the company's Commercial General Liability policy. *Id*. The court held that under Massachusetts law, there is generally a conceptual separation between the intent of the employee and the employer. *Id*. at 188. Massachusetts does recognize a narrow exception to the general rule—"the intent of an employee may be imputed to the insured employer if the intentional torts are 'so routine as to constitute a general practice or policy' of the employer.'" *Id*. (Quoting *Worcester Ins. Co. v. Fells Acres Day School, Inc.*, 408 Mass. 393, 408 (1990)). In *Fells Acres*, the Massachusetts Supreme Court found that like sexual harassment, sexual molestation at a school could be so widespread or routine within an organization as to constitute a general practice or policy, and thus intent an employee's intent to molest students could be imputed to a school. *Id*. However, in *Paino*, the court noted that the tort of arson is not the type of tort that becomes routine within an organization, and therefore the employee's intent could not be imputed to the Authority. *Paino*, 369 F. Supp. at 188.

In *Wasik v. Allstate Insurance Co.*, 351 Ill. App. 3d 260 (Ill. App. 2004), a named insured sought compensation for losses sustained when a fire started by his stepson destroyed his garage. While the stepson denied taking any action which lead to the fire in his statement under oath, the fire investigator concluded that the fire was incendiary, and it was undisputed that the stepson had borrowed lantern fuel from a neighbor and had been in the garage minutes before the fire started. *Id*. at 262-64. The homeowners' policy contained a joint obligations clause which provided:

> "The terms of this policy impose joint obligations on persons defined as an insured person. This means that the responsibilities, acts and failures to act of a person defined as an insured will be binding upon another person defined as an insured person."

Id. at 264-65. Further, the general policy declarations stated that there was no coverage for "any loss or occurrence in which *any* insured person has concealed or misrepresented any material fact or circumstance" *Id*. at 265 (emphasis added). Finally, the policy exclusions applied to "an" or "any" insured and included (1) the failure by any insured to take reasonable steps to preserve property; (2) any substantial change or increase in hazard . . . by any means within the control or knowledge of an insured; and (3) intentional or criminal acts of . . . any insured. *Id*. The court

found that although the policy provisions referred to certain acts or failures to act of "any insured" or "an insured," the provisions did not clearly state that the policy would be void or coverage would be excluded as to all insureds in the event of some improper action by one insured. *Id*. at 266. The court also found the joint obligations clause ambiguous. *Id*. at 267. The court found that a plausible interpretation of the joint obligations clause was that "it refers to the general obligations to pay premiums and to take certain actions before and after a loss and that a reasonable insured would not understand the clause to exclude coverage for all insureds when coverage is excluded for one insured." *Id*. *See also C.P. v. Allstate Insurance Co.*, 996 P.2d 1216 (Alas. 2000).

VI. 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.