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ADMISSIBILITY OF NO CONTEST PLEA IN CIVIL INSURANCE DISPUTE

[ref: Proving Fraud, Para. 7.01; Arson & Fraud, Para. 3.04]

In *Bearden v. State Farm Fire & Casualty Company*, 299 P3d 705 (Alaska 2013), the Alaska Supreme Court held that an insured's no contest plea in a criminal matter was admissible in his insurer's subsequent declaratory judgment action to determine its duty to defend and indemnify. There appears to be a split of opinion among courts having addressed the issue. This article will explain the reasoning of the courts on either side.

In cases like this, involving an insured's no contest plea to criminal charges brought against him, the insurer can argue that the plea is relevant to the issue of the insurer's coverage obligation in the victim's civil suit against the insured. The rationale is that the policy only provides coverage for accidental occurrences and excludes coverage for injuries arising out of the insured's intentional or criminal misconduct. A conviction based on the no contest plea, the argument goes, establishes the underlying facts and supports the insurer's position of no coverage. One problem with this rationale is that Federal Rule of Evidence 410 expressly prohibits the admission of a no contest plea. Under the federal rule (or in the many states that have adopted a similar rule based on Federal Rule 410), therefore, the no contest plea is not admissible to establish the underlying facts upon which it was based.

In the Alaska case, the insured, Bearden, was sued in civil court for injuries he allegedly inflicted on the plaintiff, Rasmussen, during an altercation between the two. Bearden claimed he was acting in self-defense and sought coverage under his homeowners insurance policy.

Prior to the civil action, however, Bearden had been charged with criminal assault, and ultimately agreed to plead no contest to a lesser criminal offense. Based on Bearden's no contest plea and resulting conviction, his homeowners insurer, State Farm, filed a declaratory judgment action and argued that the claim against Bearden was not covered because it did not arise out of an occurrence and was subject to the expected or intended injury exclusion. During the declaratory judgment action, State Farm sought to introduce Bearden's no contest plea and conviction into evidence to prove that Bearden could not have been acting in self-defense.

Can evidence of a no contest plea and resulting conviction be used in a civil insurance coverage dispute to negate coverage and prove that the insured actually committed the acts that form the basis of the criminal conviction?

This was the issue that the Alaska Supreme Court had to resolve. Before addressing the supreme court's decision, however, it's important to understand what it means to plead "no contest" in criminal court.

Unlike a guilty plea in which a defendant formally admits to having committed the charged crime, a no contest or *nolo contendere* (Latin for no contest) plea is a plea in which the defendant neither contests nor admits guilt. There are many reasons a defendant might plead no contest, but often the defendant does so in exchange for a reduced punishment. The plea also saves the defendant from the expense and stress of having to defend a criminal trial from inception to conclusion, and saves the state the same expenses associated with fully prosecuting the case against the defendant. Although a no contest plea, like a guilty plea, generally results in a criminal conviction, one major difference between the two pleas is how they can be used in subsequent legal proceedings, including civil lawsuits. While a guilty plea is often admissible in a civil lawsuit against the party who entered the plea, a no contest plea is generally inadmissible because the party who entered the no contest plea is not admitting guilt. As mentioned previously, according to Federal Rule of Evidence 410 and the state rules modeled on it, evidence of a no contest plea generally cannot be used against the party who made the plea in a subsequent civil suit brought against him.

When an insurer seeks to use an insured's no contest plea in an insurance coverage dispute, Federal Rule of Evidence 410, or the state rule modeled after it, is usually at the center of the court's analysis. The language of the criminal statute that is the subject of the no contest plea is also significant.

In the absence of any express prohibition like the one in Federal Rule of Evidence 410, courts have established other criteria for determining the admissibility of a no contest plea. Alaska law, for example, does not expressly prohibit the admission of a no contest plea in a related civil action.

In *Bearden*, the insured was charged with assault and use of reckless force or violence under Alaska's Municipal Code (AMC) and ultimately pleaded no contest to the crime of "Disorderly Conduct" under AMC 8:30.120 (A)(6), which makes it unlawful to "knowingly challenge another to a fight" or engage in "fighting other than self-defense." Bearden was fined and sentenced to 90 days in jail, with 85 days suspended.

Rasmussen alleged he was injured in the altercation and filed a civil lawsuit against Bearden. The insured sought coverage under his homeowners policy. The policy covered bodily injury caused by an occurrence, which was defined in part as "an accident" and excluded coverage for bodily injury that was "expected or intended" by the insured or resulted from "willful and malicious" acts of the insured.

State Farm filed a declaratory judgment and argued two points. First, it asserted that the fight was not an "accident" and therefore not a covered "occurrence" under the policy. Second, it claimed that the expected or intended injury exclusion barred coverage. As support for its position, State Farm argued that Bearden's no contest plea established as a matter of law that he injured Rasmussen while engaged in expected or intended conduct or willful and malicious acts. Bearden maintained that he was acting in self-defense.

The trial court granted State Farm's motion for summary judgment. The court explained its decision:

> A conviction of Disorderly Conduct contains a "knowingly" element. ... As a matter

> of law, Mr. Bearden knowingly entered into the fight that caused Mr. Rasmussen's bodily injuries and Mr. Bearden's conduct was not in self-defense. Therefore, Mr. Bearden's conduct cannot be considered an "accident" or "unanticipated, unforseen, and unexpected" from Mr. Bearden's perspective.

Bearden appealed and the Alaska Supreme Court affirmed the trial court's ruling and held that Bearden was collaterally estopped from relitigating the elements of disorderly conduct based on his no contest plea. The court began its analysis by examining its prior decision in *Lamb v. Anderson*, 147 P3d 736 (Alaska 2006), which set forth a three part test for determining when a criminal conviction can be used in a civil suit.

Under *Lamb*, a conviction, such as one that results from a no contest plea, can be used to prevent a defendant in a civil case from relitigating a legal issue when:

(1) the conviction is for a "serious" criminal offense,

(2) the defendant had a full and fair hearing, and

(3) the legal issue in the civil case is the same as the one that was already decided in the criminal hearing.

The court determined that the first part of the *Lamb* test was satisfied because Bearden's criminal conviction was for a serious offense. The court explained that a "serious" criminal offense is one in which the defendant would be motivated to fully defend himself, such as when the potential penalty deprives the defendant of his liberty. Bearden's disorderly conduct conviction was serious because it carried a possible sentence of up to six months imprisonment. The court distinguished this type of offense from a minor traffic violation in which the penalty is usually a fine or DMV points. In the latter case, a defendant might not be motivated to obtain an acquittal because of the time and cost involved in fighting a penalty that is relatively minor. This is not the same as an offense that is punishable by imprisonment for up to six months.

Bearden also argued that he lacked the requisite motivation to defend himself because he just wanted to make the case "go away" and that he did not know that the plea would impact his insurance coverage. The court, however, ruled that motivation is determined by whether the crime was a "serious offense" and not the defendant's subjective state of mind.

On the issue of the effect of the no contest plea on Bearden's civil liability, the court said Bearden should have filed a motion for post-conviction relief and challenged the validity of the plea itself if he believed the judge failed to properly inform him of the consequences of his plea. The fact that Bearden pleaded no contest to a charge that carried a potential six month jail term satisfied the first element of the *Lamb* test.

As for the second element of the *Lamb* test – whether he had a full and fair hearing prior to his no contest plea – Bearden argued that "the hearing was fair as to the entry of plea, but was not fair to the extent that the plea would subsequently be applied to insurance coverage." The court, however, noted that criminal proceedings are presumed to be fair unless there was an irregularity, which typically involves a lack of representation by an attorney. Bearden never argued that his no contest plea was the result of such an irregularity.

With respect to the third element of the *Lamb* test, Bearden argued that because the disorderly persons statute had two parts, it was unclear to him whether he was charged and convicted of knowingly challenging another to a fight or was charged and convicted of engaging in a fight that was not self-defense. The court ruled that it didn't matter.

> We need not consider Bearden's argument that he pleaded no contest only to the "knowingly challenge another to fight" prong of the ordinance rather than to the ordinance in its entirety because, even assuming this argument is correct, Bearden would still be precluded from arguing that he was acting in self-defense or that his actions were covered by his homeowners policy. Bearden could not "knowingly challenge another to fight" and subsequently claim self-defense in a criminal prosecution. Alaska's self-defense statute, AS 11.81.330, prohibits a person from relying on self-defense where "the person claiming self-defense was the initial aggressor."

The court also noted that an injury resulting from "knowingly challenging someone to fight" cannot be deemed an occurrence under a homeowners policy. Specifically, Bearden's policy provided coverage for an "occurrence" which was defined, in part, as "an accident" that results in a bodily injury. The policy did not define accident but according to Alaska case law, an accident is "anything that begins to be, that happens, or that is a result which is not anticipated and is unforeseen and unexpected" from the viewpoint of the insured. The court took the position that the act of knowingly challenging another to fight is not unforeseen or unexpected, and that the challenger cannot fail to anticipate any resulting injuries.

The Alaska Supreme Court concluded that Bearden's no contest plea collaterally estopped him from relitigating the elements of disorderly conduct in the civil insurance coverage dispute. As a result, it was impossible for Bearden to argue he was acting in self-defense under his homeowners policy and there was no coverage.

EVIDENCE OF NO CONTEST PLEA HELD INADMISSIBLE

Many courts have taken an approach contrary to that taken by the Alaska Supreme Court in *Bearden*. These courts hold that a no contest plea cannot be used in an insurance coverage action against the person who entered the plea.

In *Allstate Insurance Company v. Nicholas Daniken*, 2005 U.S. Dist. LEXIS 41493 (D. Or. 2005), for example, the insured, Daniken, was involved in an altercation with Horton that caused Horton to sue Daniken for battery. Specifically, Horton accused Daniken of punching, pushing, and injuring him. Daniken sought coverage under a standard homeowners policy that was issued by Allstate. The insurer agreed to provide a defense but did so under a reservation of rights. The insurer then filed a declaratory judgment action, asserting that Horton's injuries were not the result of an "occurrence" and that the policy's expected or intended injury exclusion applied.

The incident was also the subject of a criminal proceeding in which Daniken was convicted of criminal assault after pleading no contest. Based on the plea, Allstate moved for summary judgment in the declaratory judgment action, arguing that the criminal proceedings "established the criminality of the acts" alleged in Horton's civil lawsuit and that Horton's injuries were the result of Daniken's intentional and criminal acts.

The court focused on Federal Rule of Evidence 410 and noted that the rule bars evidence of a no contest plea insofar as such a plea constitutes a statement or admission. It also acknowledged the existence of limited exceptions that permit the use of criminal convictions in certain circumstances. Recognizing that Rule 410 generally bars the use of no contest pleas but allows limited use of convictions, Allstate argued that Daniken's conviction, not the plea itself, should be admissible in the civil suit. Daniken countered that the plea and resulting conviction were inseparable and that allowing evidence of the conviction in the civil suit would undermine the purpose of Rule 410.

The court first recognized that the exceptions for the use of criminal convictions apply to

situations in which the existence of the conviction itself was significant rather than the facts upon which the conviction was based. For example, evidence of a prior conviction can be admissible when a multiple offender statute is involved and a greater penalty could be imposed as a result of multiple criminal convictions. This situation is distinguishable from a party seeking to use a conviction to prove in a civil suit that a defendant is actually guilty of criminal acts that form the basis of a conviction. The latter situation does not fall within the rule's exceptions.

Allstate was seeking to use the conviction to prove the facts upon which the conviction was based, that is, to prove that Daniken "engaged in fighting other than in self-defense." The court decided that this use did not fit within any of the exceptions and held that, therefore, Daniken's conviction was inadmissible in the civil suit. The court explained:

> The fact of defendant Daniken's conviction resulting from a nolo plea does not, standing alone, assist plaintiff in the instant case. The conviction must relate to the underlying acts so as to come within the exclusion of the policy, and this is not possible by introduction of the "fact of the conviction" alone. Without reference to the same event, the same parties, and the same conduct as those alleged in the underlying Horton case, plaintiff is unable to show that Daniken's acts at the time at issue were criminal acts. Although plaintiff asserts that it is evidence of Daniken's conviction alone which establishes the applicability of the criminal acts exclusion, plaintiff, in reality, asks the court to look beyond the fact of the conviction to the underlying acts to which defendant Daniken entered his no contest plea.

The court held that Allstate could not use its insured's no contest plea and resulting conviction to show that the insured's acts came within the policy exclusions.

In *Elevators Mutual Insurance v. Patrick O'Flaherty's, Inc.*, 928 NE2d 685 (Ohio 2010), the Supreme Court of Ohio interpreted Rule 410 in the same way as the court in *Daniken*. In *Elevators Mutual*, Richard and Jan Heyman owned a restaurant named O'Flaherty's and filed an insurance claim after the restaurant was damaged by a fire. The insurer, Elevators Mutual, investigated and determined that Richard Heyman intentionally set the fire. Elevators denied the claim and filed a declaratory judgment against O'Flaherty's and the Heymans individually, and the defendants filed a breach of contract counterclaim. Less than a month later, both Heymans were indicted for arson, aggravated arson, and insurance fraud. Richard Heyman entered a no contest plea and was convicted. The charges against Jan Heyman were dismissed.

In the civil suit, Elevators Mutual attempted to use evidence of Richard Heyman's no contest plea to prevent or "collaterally estop" him from arguing his innocence. Like the court in *Daniken*, the Ohio trial court determined that Ohio's rules of evidence bar the use of a no contest plea in civil suits. Elevators Mutual attempted to make a distinction between the actual no contest plea and the resulting criminal conviction, and filed a pretrial motion seeking to introduce Heyman's criminal conviction, instead of the no contest plea, as substantive evidence of arson and insurance fraud.

The Ohio Supreme Court held that Ohio criminal law and Ohio's rules of evidence bar the use of a no contest plea and the resulting conviction in a civil insurance dispute:

> Richard Heyman pleaded no contest to the charges of arson and insurance fraud and was convicted. Crim.R.11(A) provides that a defendant may plead no contest in a criminal matter. "The plea of no contest is not an admission of defendant's guilt, but is an admission of the truth of the facts alleged in the indictment, information, or complaint, and the plea or admission shall not be used against the defendant in any subsequent civil or criminal proceeding." ... Evid.R.410 (A)(2) echoes this same principle. A plea of no contest or the equivalent plea from another jurisdiction "is not

> admissible in any civil or criminal proceeding against the defendant who made the plea."

The court noted that the rationale behind these rules is to encourage resolving criminal disputes through plea bargaining by removing any civil consequence of the plea. Criminal defendants would be less likely to plead no contest if the plea could be used against them in a civil suit. The court acknowledged that barring evidence of the plea is contrary to the public policy that no one should profit from his wrongful acts, but it also noted that Elevators could still use the facts upon which the pleas were based to prove that its policy exclusion barred coverage.

In *First National Bank v. First Financial of LA.*, 921 F. Supp. 1506 (E.D. La. 1996), a Louisiana district court held that Federal Rule of Evidence 410 prevented the use of a no contest plea in a civil dispute involving insurance coverage. A Minnesota district court ruled the same way in *Tower Insurance Company v. John Paul Judge*, 840 F.Supp. 679 (D. Minn. 1993).

RULE 410 IS INTENDED TO BE USED AS A SHIELD NOT AS A SWORD

Although Michigan generally does not permit a no contest plea to be used in a civil lawsuit, Michigan's evidence rules were amended to make it possible for a no contest plea to be used in certain situations. This amendment was enacted after the 1990 Michigan Supreme Court decision in *Lichon v. American Universal Insurance Company*, 459 NW2d 288 (Mich. 1990).

In *Lichon*, the insured's party store was damaged by a fire and he entered a plea of no contest to the criminal charge of attempting to burn real property. He was convicted and served one year in jail. The insured had also filed suit to obtain policy benefits from his insurer and the insurer argued that the no contest plea and conviction barred his recovery. The Michigan Supreme Court held that the no contest plea was not an admission of guilt that could be used against the insured. It was persuaded by Michigan Rules of Evidence 410 and 803 (22), which generally bar the use of no contest pleas in a subsequent civil or criminal proceeding as substantive evidence that the defendant committed the crime. In this case, that meant that the insured's no contest plea could not be used as substantive evidence that he was involved in the fire that damaged his store.

After *Lichon*, however, Michigan Rule of Evidence (MRE) 410 was amended to provide, in part:

> evidence of a plea of nolo contendere to a criminal charge may be admitted in a civil proceeding to support a defense against a claim asserted by the person who entered the plea.

In *Home-Owners Insurance Company v. Craig John Bonnville*, 2006 Mich App. LEXIS 1806 (Mich. App. 2006), the amended rule was analyzed in the context of an insurance coverage dispute. In that case, it was alleged that the insured, Lange, shot Bonnville with a nail gun while working on a remodeling project at the Lange residence. There was a dispute about whether this was intentional or whether Lange was only attempting to scare Bonnville. Lange pleaded no contest to a criminal assault charge and sought coverage under his father's homeowners insurance policy, arguing that Bonnville's injuries did arise out of an occurrence because he was only trying to scare him and didn't mean to shoot him. In the declaratory judgment action, the insurer sought to use Lange's no contest plea against him.

The key issue was the meaning of the word "claim" in the amendment to MRE 410. According to the insurer, the plea could be used against the insured because he filed an insurance "claim" under his policy. The Michigan appellate court, however, disagreed and ruled that the word "claim" referred to formal legal proceedings brought by a plaintiff against a defendant. In other words, the

amendment applies when the person who entered the plea in the criminal case files a civil lawsuit that is related to the facts upon which the no contest plea was based. The court reasoned that "the protection afforded a defendant who chooses not to contest a charge may act as a shield where that defendant is a defendant again in a civil action, but not as a sword if a defendant in a criminal proceeding later becomes a plaintiff in a related civil action." The Michigan appellate court held that the amendment did not apply in *Bonnville* because the insured, Paul Lange, was not a plaintiff in a civil action and never filed a civil suit against anyone. It was the insurer, Home-Owners Insurance Company, that filed the declaratory judgment action making the insurer, not the insured, the plaintiff in the civil proceeding. As a result, the insurer could not rely on the amendment as a means of using the no contest plea against the insured.

The Michigan appellate court did provide some insight as to how the plea could have been used if the amendment had applied:

> However, even if evidence of the plea could be considered, it would not entitle Home-Owners to summary disposition. An assault conviction requires proof of "an intent to injure *or* an intent to put the victim in reasonable fear or apprehension of an immediate battery." ... Thus, the fact that Paul was convicted of aggravated assault does not necessarily mean he acted with intent to injure. Rather, Paul's plea is also consistent with his having intended to only scare Dimitri, as he claims. Further, even where a no contest plea is admissible, it is only additional evidence to be considered; it is not conclusive of the facts essential to sustain the judgment.

CONCLUSION

The decision of the Alaska Supreme Court in *Bearden* allowed the insured's no contest plea to be used against the insured in the subsequent civil action brought to determine the insurer's obligation to defend and indemnify him. The court's decision was based, in part, on the rationale that there is no need to relitigate issues that were already decided based on a fair hearing in a prior criminal proceeding. It is important to understand, however, that many courts that have considered this issue have held that evidence of an insured's no contest plea and resulting conviction are not admissible in a civil action based on a related insurance coverage dispute. These courts base their decisions on the language of Federal Rule of Evidence 410 and the intent of the rule to encourage the resolution of criminal charges through plea agreements. Even in states that generally do not permit evidence of a no contest plea in a subsequent civil action, courts do not allow the pleader to use this protection as a sword rather than a shield.

The outcome in these cases depends on the nature of the criminal charges to which the insured has entered a plea of no contest, the nature of the subsequent civil action, and, of course, the statutes, rules of evidence, and case law in the jurisdiction.