

Crime Doesn't Pay: The Criminal Act Exclusion

It is a common situation in the United States; a party is injured in a bar fight or similar type of assault. The injured party then brings a lawsuit for injuries stemming from the intentional and criminal act of a defendant. The injured party is keenly aware that the defendant is the proverbial turnip with no blood to squeeze and, therefore, looks to the defendant's liability insurance. Generally, the issue primarily litigated in these cases is not liability or damages, but whether the defendant's liability policy provides coverage for the claims in the lawsuit.

With increasing frequency, policies providing liability coverage contain a criminal act exclusion. The criminal act exclusion eliminates coverage for damages caused by criminal acts of the insured. The exclusion's result is to eliminate insurance coverage at an earlier stage of litigation, thereby easing the burden of court-related costs and fees to insurers. As a result, the exclusion can be a powerful tool for insurers. Insurers whose policies do not currently contain the exclusion should consider adopting such an exclusion for this very reason. However, insurers should be mindful that courts have been willing to limit the application of the exclusion and that there remain some unanswered questions regarding the exclusion's scope and application. Regardless, the exclusion can be used successfully and will likely be used with more frequency.

THE EXCLUSION

While the language of the criminal act exclusion varies by policy, examples include:

- "This policy does not apply to 'bodily injury' or 'property damage' that is the result of a criminal act of an insured."
- "We will not pay for loss or damage caused by or resulting from any . . . dishonest or criminal act by you."¹
- "Coverage . . . will not apply to any insured person for: bodily injury or property damage caused by, or reasonably expected to result from, a criminal act or omission of that insured person. This exclusion applies regardless of whether that insured person is actually charged with, or convicted of, a crime. For purposes of this exclusion, criminal acts or omissions do not include traffic violations."²

The Minnesota Supreme Court has not specifically addressed the use and scope of criminal act exclusions in the first party context. However, the exclusion has been examined by the Minnesota Court of Appeals and other courts across the country. A review of this case law demonstrates that questions remain as to the interpretation and application of the exclusion.

The purpose of the criminal act exclusion is akin to that of the more commonly litigated intentional act exclusion. The intentional act exclusion is meant to bar coverage for damages resulting from intentional actions of the insured. Some insurance policies only contain an intentional act exclusion, which arguably covers most criminal acts.³ However, the criminal act exclusion can prevent coverage in many instances where an intentional act exclusion may not. Furthermore, in those instances where the

intentional act exclusion would eventually preclude coverage, the criminal act exclusion often will allow an easier and quicker route for the insurance companies to prevail in a declaratory judgment action. The absence of an intent to injure element makes courts more likely to apply the criminal act exclusion at the summary judgment phase of a declaratory judgment action. The criminal act and intentional act exclusions complement each other well, and insurers have begun to include the criminal act exclusion for the advantages it offers more frequently.

INTENT TO INJURE

The primary advantage of a criminal act exclusion over an intentional act exclusion



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arises when the insured did not intend the injury, or a facts issue exists as to whether the insured had the intent to injure, precluding summary judgment. Where an insurance policy contains a criminal act exclusion separate from the intentional act exclusion, coverage is barred even for unintentional damage resulting from criminal acts.⁴ In *Liebenstein v. Allstate Ins. Co.*, the Minnesota Court of Appeals held that the plain language of the policy indicated that coverage was excluded for injuries resulting from a criminal act, regardless of intent, where the policy excluded bodily injury "resulting from ... a criminal act or omission" and where the policy placed such exclusion in a separate numbered paragraph from the intentional damage exclusion.⁵ Because the criminal act exclusion does not specifically require intent to harm, the exclusion extends to criminal acts causing injury even when the perpetrator possessed no specific intent to injure the victim.⁶ The intent to injure element of the intentional act exclusion so often prevents summary judgment because a fact question can be created by a simple denial of the intent to injure by the insured. The criminal act exclusion prevents this easy by-pass.

COMMON LAW USE OF CRIMINAL ACTS TO SATISFY INTENT TO INJURE

Even in those instances where the policy does not contain a criminal act exclusion, some courts have used the commission of a crime to bar insurance coverage under the intentional act exclusion without the proof of actual intent to injure. These courts simply infer intent to injure based on the commission of a serious crime, to broaden the intentional act exclusion, thus satisfying the toughest element to prove in intentional act exclusion cases: the intent to injure.⁷ Others courts have found that there was no occurrence under the policy because the harm was expected.⁸ Thus, even without a criminal act exclusion, the main advantage of the exclusion can be achieved by a court if the court is willing to use the commission of the crime as an inference of intent to injure. Still other courts have applied an exclusion for willful and malicious acts to criminal

offense cases to prevent coverage without requiring intent to injure.⁹ However, these examples are by no means universal, and insurers should include the criminal act exclusion in the policy to obtain a more uniform and predictable result.

INTENT TO COMMIT THE CRIMINAL ACT

While the law is clear that there is no need to establish intent to injure to apply the criminal act exclusion, the issue of whether there is a need to prove intent to commit the criminal act itself is less clear. In a recent decision, *Progressive Northern Ins. Co. v. Sean McDonough*, the 8th Circuit held that Progressive did not need to prove any intent element for the criminal act exclusion to apply because the plain language of the exclusion had no intent requirement.¹⁰ The insured in *McDonough* had pled guilty to attempted assault after he drove his vehicle into the civil plaintiff on a sidewalk, causing bodily injury. The incident occurred after a night of drinking and numerous confrontations between the insured and the civil plaintiff. In a deposition, following a guilty plea in the criminal case, the insured changed his story and said he drove the vehicle into the plaintiff inadvertently when he was looking for a cell phone on the floor of the car. The insured testified that he lied during the criminal plea because his lawyer told him he had to lie to plead guilty. The district court granted summary judgment to the insurer in the declaratory judgment action. On appeal, the civil plaintiff argued that there was a fact issue as to whether or not the insured had the requisite intent to commit the crime. The 8th Circuit held that the criminal plea (which included a factual basis where the insured admitted to intentionally driving his car into a group of people) was enough to apply the criminal act exclusion, and that whether the insured "intended to complete the act is irrelevant to determining if the exclusion applies."¹¹

SHAM TESTIMONY DISPUTING PRIOR PLEA

A recurring fact scenario in cases involving the criminal act exclusion, as demonstrated in *McDonough*, is that the insured previously

entered a guilty plea for the criminal act that led to the injury. In Minnesota, a criminal plea requires a factual basis where the insured admits to the facts surrounding the criminal charge.¹² In the factual basis, the criminal court will often require that the defendant admit to the elements of the crime. Occasionally, the insured admits to the criminal activity in the criminal case during the fact basis, but then, in the civil matter, the insured changes the story and denies the criminal activity.

Numerous decisions from Minnesota courts have ruled that sham testimony may not be relied upon to create a fact dispute for purposes of opposing a motion for summary judgment.¹³ The most common example of this is an attempt to use a "sham affidavit" and contradict previous deposition testimony.¹⁴ The cases demonstrate that subsequent sham deposition testimony is treated the same as a subsequent sham affidavit.¹⁵

Both the Minnesota Court of Appeals and the Federal Court for the District of Minnesota recently addressed the scenario where an insured testified under oath at a plea hearing, but later contradicted the plea testimony in a deposition in the declaratory judgment action brought by the insurer. In *State Farm Fire & Casualty Co. v. Kistner*, the court affirmed a district court's decision that no coverage existed under the intentional act exclusion, and rejected an attempt by the insured to rely upon subsequent sham testimony.¹⁶ In *Progressive v. Morelli*, the court refused to allow an insured's deposition testimony that he simply lied during the criminal plea to create a fact issue in the subsequent civil lawsuit.¹⁷

NO MATERIAL FACT DISPUTE

The *McDonough* and *Kistner* cases make clear that a criminal plea and accompanying factual basis admitting to the crime are sufficient grounds to grant summary judgment to the insurer in a declaratory judgment action. However, issues remain as to how the court would apply a criminal plea with no factual basis and a subsequent denial of the criminal act.¹⁸ Furthermore, if the criminal case is brought to trial and the insured is convicted of the crime, can the

civil plaintiff present the same issue to the civil jury? Collateral estoppel would likely not apply because the civil plaintiff was not a party to the criminal matter.¹⁹ Thus, the civil plaintiff may have the right to present evidence on the insured's intent to commit the criminal act. Cases that apply the criminal act exclusion based on prior criminal pleas have not applied the principles of collateral estoppel. Rather, the courts' analysis is based on one of two lines of reasoning: (1) that the subsequent denial of the act is sham testimony rendering it inadmissible or (2) that the criminal plea establishes as a matter of evidence that no disputed fact exists. Even if the court does not directly apply the sham doctrine, a criminal plea with a factual basis presented by the insured is enough to present undisputed facts even with a subsequent denial of the criminal act by the insured. Therefore, a collateral estoppel analysis is not implicated.

SCOPE OF CRIMINAL ACT EXCLUSIONS: WHAT CRIMES COUNT?

Although the criminal act exclusion's plain meaning encompasses all criminal acts, this does not mean that the courts will construe every criminal offense, as defined by the laws of Minnesota, to fall within the term "criminal act."²⁰ It is clear that the criminal act exclusions will never be applied to bar coverage for injuries sustained during the insured's commission of every criminal offense. For example, a court will not bar coverage for injuries sustained in an auto accident simply because the insured was speeding, failed to yield, or ran a red light. Such an application would be contrary to public policy and outside the reasonable expectations of the insured. In fact, some policies specifically exclude traffic violations from the definition of criminal acts.²¹ In *Secura Supreme*, the Minnesota Court of Appeals emphasized that its application of the criminal act exclusion without an intent to injure element "does not mean that every offense as defined by the laws of this state necessarily falls within the term 'criminal acts.'"²² There is little doubt that many offenses will never be brought into the scope of this exclusion, but there is no

clear indication of where the line is between criminal offenses that invoke the exclusion and those that do not.

At the summary judgment phase in a coverage action it is likely that a judge will ask whether the criminal offense is one that is sufficient for the court to apply the criminal act exclusion. In Minnesota, cases do provide examples of offenses that are severe enough, but there is a lack of guidance as to the offenses that are not severe enough to trigger application of the exclusion. In *Liebenstein v. Allstate* a fifth degree assault charge was enough to bar coverage under the exclusion.²³ In *McDonough*, attempted assault was enough.²⁴

When courts are looking at which crimes to include within the scope of the exclusion, public policy considerations weigh on both sides of the scale. On one side, liability insurance for serious criminal acts is contrary to public policy. Even without a criminal act exclusion in the liability policy, some courts have applied an inherent criminal act exclusion by holding that coverage for liability resulting from a serious crime is contrary to public policy.²⁵ For example, public policy precludes liability coverage for injury caused by providing a Schedule I drug to another.²⁶ Further, a willingness to infer intent to injure based on the commission of a crime or malicious act, even without a criminal act exclusion in the policy, further shows the recognition of the public policy concerns of insuring criminal conduct.

On the other side of the scale, courts must weigh the burden placed on the injured party when no insurance coverage is available to compensate him or her for damages. It is for this reason that courts are unwilling to extend the criminal act exclusion to lesser offenses. When drafting the criminal act exclusion, insurers should be mindful of this public policy concern and aware that a stronger exclusion may be one that is self-limiting by not excluding annunciated lesser offenses. If the exclusion sets a bright line rule that is generally reasonable and mindful of public policy, courts may be more willing to apply it in cases which are closer calls. Insurance policies should expressly exclude strict liability traffic violations from the definition of criminal acts because it

is very unlikely that a court will apply the exclusion to such a crime anyway.²⁷ Some commentators suggest limiting the exclusion to only those crimes whose sentences can result in incarceration or to felonies.²⁸

Across the country, courts are struggling to determine what acts are "criminal acts" falling within the exclusion. This has led to differing authority. For example, in cases involving coverage under an auto policy for damage resulting from an insured evading police, many courts have held that damages were expected from the criminal conduct of evading police and as a result coverage is barred under the criminal act exclusion.²⁹ The holdings in these cases are limited to the evading-of-police realm, and the courts are quick to reference that a public policy analysis should be conducted on the exclusion.

Evading police cases do beg the question, are damages more expected when evading police than when engaging in other criminal activity when driving? For example, isn't it just as likely damage will occur when an insured is driving while severely intoxicated or when drivers are drag racing? There does not appear to be any case where a court applied the exclusion based on the insured drinking and driving. However, courts have applied the exclusion to a claim of furnishing alcohol to a minor who then drove because "[a] minor's driving of a car while intoxicated and causing an accident is the natural, foreseeable, expected, and anticipated consequence of alcohol knowingly being furnished to the minor . . ."³⁰ The same rationale would apply to coverage for the insured who actually drove. The answer may be that public policy prevents criminal act exclusions from being applied to drinking and driving offenses because the injured parties should be compensated and the expectation of the insurer and the insured when entering into the policy is that such damages will be covered claims. However, an increasing number of courts are allowing uncovered punitive damage claims in cases involving drinking and driving. Of course, this still allows the injured party to, at a very minimum, collect the compensatory damages from the insurance.

APPLICATION OF REASONABLE EXPECTATIONS DOCTRINE TO CRIMINAL ACT EXCLUSION


Minnesota's reasonable expectations doctrine acts as a limitation on criminal act exclusion coverage.³¹ Under the doctrine, the "expectations of coverage by the insured [must] be reasonable under the circumstances."³²

In *Tower Insurance Co. v. Judge*, the federal district court applied the reasonable expectations doctrine in the context of a criminal act exclusion.³³ In *Tower*, the insureds applied electrical shocks to their intoxicated, sleeping friend, to "shock" him awake, which ultimately led to his death by electrocution.³⁴ After they were sued, their insurer sought to apply the criminal act exclusion, which excluded coverage for bodily injury "which (1) is expected or intended by an insured; (2) may reasonably be expected to result from the intentional acts of an insured; or (3) result from the criminal acts of an insured."³⁵ The court ultimately refused to enforce the criminal act exclusion, holding that it is "objectively reasonable to expect that the criminal act exclusion would not apply unless bodily injury was a reasonably expected result of the act."³⁶ Moreover, the court stated that public policy favors a narrow construction of the criminal act exclusion, and that it would be bad policy to find that the exclusion applies merely because the state decided to pursue criminal charges.³⁷

Since *Tower*, Minnesota courts have clarified the use of the reasonable expectations doctrine as a limitation to criminal act exclusion coverage.³⁸ For example, the Minnesota Court of Appeals found error when the district court held that a spinal injury was not a reasonably expected result of the insured's act because such holding requires a determination that the insured needed to expect the precise result of his act before the criminal act exclusion will apply.³⁹ Rather, "the insured need only expect some injury, not necessarily the precise injury that occurred." The insured expected insurance would apply in those instances where no injury was expected from the conduct. The full application of the reasonable expecta-

tions doctrine in criminal act cases is not yet known, but it is a consideration in those cases where the criminal activity is of the type for which an insured reasonably expects the insurance to apply.

CONCLUSION

The use of the criminal act exclusion is becoming more common because of the advantages it holds over similar exclusions. It can often be a sharp knife to cut off coverage early in a declaratory judgment action and its inclusion in an insurance policy can only benefit the insurer when coverage is disputed in these types of cases. Public policy concerns will dictate the exclusion's full scope as additional cases are decided. Courts will need to balance the risk of rendering injured plaintiffs uncompensated with the concern over allowing people to insure their own criminal acts. Regardless of the lingering uncertainty with the exclusion, the criminal act exclusion will likely become more commonplace because of its ability to provide more certainty in cases involving criminal acts by the insured. 

¹ Northwestern Nat. Cas. Co. v. Khosa, Inc., 520 N.W.2d 771, 773 (Minn. Ct. App. 1994).

² Progressive Northern Ins. Co. v. Sean McDonough, ___ F.Supp. ___, 2010 WL 2557402 (No. 09-2520) (8th Cir. June 28, 2010).

³ See, e.g., German Mutual Ins. Co. v. Yeager, 554 N.W.2d 116, 117 (Minn. Ct. App. 1996).

⁴ See Liebenstein v. Allstate Ins. Co., 517 N.W.2d 73 (Minn. Ct. App. 1994).

⁵ *Id.* at 75.

⁶ Secura Supreme Ins. Co. v. M.S.M., 755 N.W.2d 320, 325 (Minn. Ct. App. 2008) (noting that this interpretation is consistent with the majority of courts in other jurisdictions that have considered this question) (citations omitted).

⁷ See, e.g., Woida v. North Star Mut. Ins. Co., 306 N.W.2d 570, 573 (Minn. 1981) (shooting at an occupied truck with a high-powered rifle); Cont'l Western Ins. Co. v. Toal, 309 Minn. 169, 177-78, 244 N.W.2d 121, 126 (1976) (committing armed robbery).

⁸ See Diocese of Winona v. Interstate Fire & Cas. Co., 89 F.3d 1386, 1391 (8th Cir. 1996) (continuing to give known pedophile pastoral assignments).

⁹ Am. Family Ins. Co. v. Walser, 628 N.W.2d 605, 613-14 (Minn. 2001).

¹⁰ McDonough, 2010 WL 2557402.

¹¹ *Id.* at *3.

¹² State v. Warren, 419 N.W.2d 795, 798 (Minn. 1988).

¹³ Uhren v. Bristol-Myers Squibb Co., 346 F.3d 824, 829 (8th Cir. 2003); Banbury v. Omnitrition Int'l, Inc., 533

N.W.2d 876, 881 (Minn. Ct. App. 1995) (where earlier deposition testimony did not show any confusion or mistake, a subsequent affidavit contradicting testimony, offered in response to summary judgment motion, should not be considered as sufficient to create material issue of fact; to do so would diminish the utility of summary judgment).

¹⁴ Camfield Tires, Inc. v. Michelin Tire Corp., 719 F.2d 1361 (8th Cir. 1983); Oreck v. Harvey Homes, 602 N.W.2d 424, 429 (Minn. Ct. App. 1999).

¹⁵ See American Airlines, Inc. v. KLM Royal Dutch Airlines, Inc., 114 F.3d 108, 110-11 (8th Cir. 1997).

¹⁶ 2009 WL 2852618 (Minn. Ct. App. Sep. 8, 2009).

¹⁷ McDonough, 2010 WL 2557402.

¹⁸ Allstate Ins. Co. v. Takeda, 243 F.Supp.2d 1100 (D.Haw. 2003).

¹⁹ Ill. Farmers Ins. Co. v. Reed, 647 N.W.2d 553 (Minn. Ct. App. 2002), *rev'd*, 662 N.W.2d 529 (Minn. 2003).

²⁰ See Secura Supreme Ins. Co. v. M.S.M., 755 N.W.2d 320, n.2 (Minn. Ct. App. 2008).

²¹ McDonough, 2010 WL 2557402.

²² Secura, 755 N.W.2d at n.2 (citing Allstate Ins. Co. v. Burrough, 914 F. Supp. 308, 312 (W.D. Ark. 1996), *aff'd*, 120 F.3d 834 (8th Cir. 1997) (stating that "[s]ome courts have either limited the application of the criminal act exclusion to not include technical violations, public welfare crimes, and criminal negligence, or they have stated they might be willing to do so" and listing cases)).

²³ 517 N.W.2d 73 (Minn. Ct. App. 1994).

²⁴ McDonough, 2010 WL 2557402.

²⁵ State Farm Fire & Cas. Co. v. Schwich, 749 N.W.2d 108, 114-15 (Minn. Ct. App. 2008).

²⁶ *Id.* at 115.

²⁷ See, e.g., McDonough, 2010 WL 2557402.

²⁸ Daniel C. Eidsmoe & Pamela K. Edwards, *Home Liability Coverage: Does the Criminal Act Exclusion Work Where the "Expected or Intended" Exclusion Failed?*, 5 Conn. Ins. L.J. 707 (1999).

²⁹ See, e.g., Alfa Specialty Ins. Co. v. Jennings, 906 So. 2d 195 (Ala. Civ. App. 2005).

³⁰ Allstate Ins. Co. v. Keillor, 511 N.W.2d 702, 705 (Mich. App. 1993).

³¹ In Atwater Creamery Co. v. W. Nat'l Mut. Ins. Co., 366 N.W.2d 271 (Minn. 1985), the Minnesota Supreme Court adopted the reasonable expectations doctrine.

³² *Id.* at 278.

³³ 840 F. Supp. 679 (D. Minn. 1993).

³⁴ *Id.* at 682-83.

³⁵ *Id.* at 691.

³⁶ *Id.* at 692 (emphasis added).

³⁷ *Id.* at 693.

³⁸ The Minnesota Court of Appeals has adopted the *Tower* analysis. Illinois Farmers Ins. Co. v. Rodgers, 2002 WL 31554598, *3 (Minn. Ct. App. Nov. 19, 2002) ("We find the *Tower* analysis persuasive. While there is no ambiguity in the language of the exclusion, its application would conflict with the [insureds'] reasonable expectations when they purchased the insurance").

³⁹ Grinnell Mutual Reinsurance Co. v. Winch, 2003 WL 1484114 (Minn. Ct. App. Mar. 25, 2003).