Nolo Contendere Debated

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The plea of nolo contendere is a bit of an odd duck in the world of criminal procedure. Wikipedia (the source of all that is true) tells us that the words "come from the Latin phrase for 'I do not wish to contend'" and that the plea is "also referred to as a plea of no contest." We inherited the concept from the English common law without, as best we have been able to discover, much critical thought being devoted to the manner of either its adoption or its use. Still, the nolo plea is said to further two primary purposes. First, to aid plea negotiation in criminal cases, by allowing a defendant to concede a conviction without admitting guilt. Second, to prevent collateral consequences befalling the "nolo" defendant in subsequent proceedings.

As a practical matter, a nolo plea differs very little from a guilty plea. The procedures for both are largely the same, as is the result. Indeed, Practice Book § 39-18(b) mandates that when accepted by the court, a plea of nolo contendere "shall be followed by a finding of guilty." Thus, in terms of aiding plea bargaining, a nolo plea differs from a guilty plea only by allowing a defendant the ability to maintain his or her innocence despite a conviction on the underlying charges. But this unwillingness to admit guilt inhibits acceptance of responsibility by and rehabilitation of criminal defendants, both of which are said to be cornerstones of a criminal justice system in which plea bargaining is encouraged and most often rewarded in terms of sentencing. After all, it's hard to see how the criminal justice system is served by allowing defendants to maintain their innocence despite having accepted punishment for a conviction.

Understanding this, preventing collateral consequences becomes the much more dominant of the two policies that courts rely on when discussing the underpinnings and justifications for nolo pleas. For better or worse, the general rule is that a plea of nolo contendere cannot be admitted in a subsequent proceeding to prove the happening of a criminal act. This general rule is memorialized in Section 4-8A of our Code of Evidence and appears to allow a financially strapped criminal defendant to marshal his or her resources in defense of a subsequent civil action brought by their victim rather than having to expend those resources in defense of both a civil and a criminal case. If you're like us, you might wonder why the civil case plaintiff gets the short end of this particular stick, but our current purpose is not to debate the validity of nolo pleas.

Instead, we're here to discuss the Supreme Court's recent decision in *Allstate Insurance Co. v. Tenn*, 342 Conn. 292 (2022), a case in which the Court explored and debated the contours and limits of the general rule precluding admission of a nolo plea in a subsequent civil proceeding. The issue came to the Court by way of a certified question from a federal judge: "Whether a plea of nolo contendere and the resulting conviction can be used to

trigger a criminal acts exclusion in an insurance policy."

Some history might be helpful. Donte Tenn was charged with assaulting Tailan Moscaritolo with a baseball bat and entered a nolo plea to the charge of assault in the first degree. In the meantime, Mr. Moscaritolo brought a civil action in Superior Court against Mr. Tenn, alleging counts for: 1) assault; 2) negligent assault; 3) intentional infliction of emotional distress; and 4) negligent infliction of emotional distress. Mr. Tenn was evidently cooperating in this action, while Allstate provided him with a legal defense (subject to a reservation of rights) under a homeowner's policy bought by Mr. Tenn's mother. A second civil action, brought by Allstate in federal district court, sought a declaration that Allstate had no obligation to either defend or indemnify Mr. Tenn in the lawsuit brought by Mr. Moscaritolo.

Allstate grounded its argument on the policy's criminal acts exclusion, which rejects coverage for "bodily injury or property damage intended by, or which may reasonably be expected to result from the intentional or criminal acts of the insured person." The exclusion applies "regardless of whether or not such insured person is actually charged with, or convicted of a crime…." Allstate sought summary judgment as to coverage, arguing that Mr. Tenn's nolo plea trounced any argument that he had not committed a crime. The district court reserved decision and certified the legal issue to the Supreme Court.

The majority, Justice Kahn (for herself, Chief Justice Robinson, and Justices Mullins, Ecker and Keller), began its analysis with the general rule – "a plea of nolo contendere in a criminal case is inadmissible in a subsequent proceeding to prove the occurrence of a criminal act." Highlighting this aspect of nolo pleas, Justice Kahn emphasized that the ban on collateral usage was the only factor that distinguished a nolo plea from a guilty plea. The importance of this difference is, according to Justice Kahn, exemplified by the prohibition against collateral use specifically enshrined in the Code of Evidence, Section 4-8A(a)(2), which precludes admission of a nolo contendere plea against the person who entered the plea in any subsequent civil or criminal case. Given the common law origins of the general rule, as codified in the Code of Evidence, the "simple answer" to the certified question is that a "plea of nolo contendere cannot be used as proof of criminal conduct."

For the majority, use of a nolo plea as proof of criminal conduct in a subsequent case would "undermine the very essence of the nolo contendere plea itself." In this context, the fact that a nolo plea does not act as an absolute privilege against all collateral consequences (there are some statutory exceptions) makes no difference. This is because Allstate's policy exclusion does not depend on a criminal conviction and is, instead, triggered by criminal acts committed by the insured person. And Mr. Tenn's nolo plea is inadmissible as a matter of evidence and policy. Case solved, question answered.

For Justices D'Auria and Justice McDonald, who concurred in part and dissented in part, the analysis was a touch more complicated. To begin with, they agreed with the majority that Mr. Tenn's nolo plea does not necessarily "trigger" Allstate's criminal acts exclusion. They disagreed, however, with the "majority's balancing of…competing public policy concerns" and would hold that the plea was admissible in Allstate's declaratory judgment action. In support, Justice D'Auria began with the proposition that Mr. Tenn's plea is relevant evidence on the coverage issue and moved then to the notion that a court should admit relevant evidence. The dissent then notes that the salutary purpose underlying nolo pleas—the efficient disposition of criminal cases—comes with a sacrifice of other equally beneficial purposes—rehabilitation of the defendant and restitution to the victim. The task for the Court in this case was to determine "what lengths must the judiciary, through its rules of evidence, go to encourage plea bargaining and thereby deprive one or more forums of relevant evidence to resolve a subsequent controversy."

For the dissent, admission of Mr. Tenn's nolo plea in Allstate's case would not undermine the essence of the plea and would, instead, further the public policy of not indemnifying insureds for criminal acts. Given the context in which Allstate raised the issue, the dissent was "not convinced that admitting a defendant's conviction into evidence in a coverage dispute will result in so many fewer plea bargains that it merits excluding relevant evidence from this collateral controversy." The result, for the dissenters, may well have been different if the issue had arisen between Mr. Tenn and Mr. Moscaritolo in the civil action.

Is there a "right" answer to all of this? Certainly not. The case does demonstrate, however, that the role of a judge can, and often does, involve the balancing of competing public policy interests. Like or not, that's what we pay judges to do.■

■ Any views expressed herein are the personal views of DASA Weiner and do not necessarily reflect the views of the Office of the Chief State's Attorney and/or the Division of Criminal Justice.

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