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Trigger of Insurance Coverage for Wrongful Arrest, Prosecution and Conviction Lawsuits

ABA's Insurance Coverage Litigation
March 8, 2012

As Chief Justice John Roberts noted in a recent opinion, "DNA testing has an unparalleled ability both to exonerate the wrongfully convicted and to identify the guilty."[1] Justice Roberts's observation is clearly correct given that, in the last two decades, DNA testing has led courts to set aside nearly 300 criminal convictions of persons who later were found to be innocent. Hundreds of other individuals also have been exonerated through other means without DNA evidence. By some estimates, the rate of exonerations has been rapidly increasing, and as many as 50 wrongfully convicted persons are exonerated annually in states nationwide.[2]

Federal and state courts are wrestling with a range of complex issues presented by such exonerations, and in 2011, the United States Supreme Court ruled on or heard argument as to at least three cases bearing on wrongful convictions.[3] Meanwhile, exonerations have given rise to a surge in the filing of federal and state civil rights lawsuits seeking compensation from governmental entities and public officials for wrongful arrests, prosecutions, and convictions ("wrongful APC litigation").[4] Recent studies conclude that wrongful APC litigation can lead to millions of dollars of exposure for governments and their officials for payment of defense costs, settlements, and judgments.[5]

Such lawsuits, in turn, have led to disputes between insurers and their insureds concerning insurance coverage for wrongful APC litigation, with specific focus on the applicable trigger of coverage under public entity and officials liability policies or similar coverage. In the two years since the article *Trigger of Insurance Coverage for Wrongful Conviction Lawsuits* was published in the January/February 2010

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issue of this journal,[6] courts have issued at least seven opinions concerning the appropriate trigger of coverage for wrongful APC litigation.[7] These decisions are generally consistent with the established judicial consensus that the trigger of coverage typically is when the wrongfully accused first experiences injury, which, at the latest, is the date of conviction.

National Casualty Co. v. McFatridge, 604 F.3d 335 (7th Cir. 2010), however, is a notable exception to this general rule. In *McFatridge*, the United States Court of Appeals for the Seventh Circuit predicted that the Illinois Supreme Court would hold that two different triggers of coverage may apply in the context of wrongful APC litigation. A claim challenging an accused's *arrest* could trigger potential insurance coverage under a policy in effect at the time of arrest. A challenge to an accused's *conviction*, on the other hand, could trigger coverage under a policy in effect at the time the victim is exonerated, which might be decades after conviction.

McFatridge's approach to trigger is flawed and thus should not be adopted by other courts confronting insurance coverage disputes concerning wrongful APC litigation. The reasoning in *McFatridge* is contrary to the terms of liability policies typically at issue in such suits and improperly relies on authority relating to the accrual of a claim for statute of limitations purposes. In addition, the trigger analysis in *McFatridge* is at odds with nearly two dozen other decisions that have addressed trigger of coverage in analogous situations. Moreover, courts attempting to apply its novel and dubious holding have reached anomalous results. Consequently, a court confronting trigger issues in connection with wrongful APC litigation should not follow the approach taken by the court in *McFatridge*. Moreover, the Seventh Circuit soon will have two opportunities to revisit the trigger analysis set forth in *McFatridge*, as two Illinois federal court decisions involving the application of that decision recently have been appealed to the court.[8]

I. Framework for Assessing Trigger of Coverage in Wrongful APC Litigation

Wrongful APC litigation typically is brought by individuals whose criminal convictions have been set aside, generally through a judicial declaration of "actual innocence" or a ruling to vacate the conviction on some other grounds. Such individuals often assert both common law tort and constitutional causes of action under 42 U.S.C. § 1983, a federal statute that provides relief for civil rights violations committed by officials acting "under color of law."[9] Section 1983 lawsuits allow an exonerated individual to bring an action to seek damages from governmental entities and their officials, such as police officers, investigators, forensic lab workers and prosecutors. In addition to asserting causes of action under Section 1983 for false arrest and imprisonment and malicious prosecution, these lawsuits often also feature causes of action that focus on specific official misconduct. Most commonly, plaintiffs contend that police officials suppressed or failed to disclose exculpatory evidence to prosecutors, fabricated evidence, engaged in suggestive identification procedures, or conducted coercive interrogations.[10]

Courts are in widespread agreement that insurance coverage for wrongful APC litigation is triggered, at the latest, when the exonerated person was convicted of the crime. Many courts have held that coverage is triggered at the time that prosecution is initiated-either at the time of arrest, indictment, or detention in jail pending a criminal trial-because that date represents the point in time when the claimant's rights were first violated.[11] As observed recently by the court in *Northfield Insurance Co. v. City of Waukegan*, "[u]nder the

majority rule, civil rights claims such as malicious prosecution, false imprisonment, and wrongful conviction trigger insurance policies in effect when the injury first occurs, i.e., when the underlying charges are filed, or when the plaintiff is wrongfully arrested or first incarcerated."[12] The use of such a trigger date in part reflects courts' well-established approach to trigger of coverage for similar lawsuits. Most causes of action typically asserted in wrongful APC litigation approximate the common law tort of malicious prosecution, and courts historically have held that the trigger date for malicious prosecution actions is when the prosecution first commences.[13]

Alternatively, some courts have determined that the date of conviction may be the appropriate trigger, reasoning that any injuries alleged by a claimant would become manifest no later than the time of conviction. *Gulf Underwriters Insurance Co. v. City of Council Bluffs* is illustrative of this analysis. In that case, the court noted that because the claimants' alleged injuries "became apparent no later than 1978, the year in which [c]laimants were convicted of murder and given life sentences[,] . . . these injuries should be deemed to have occurred, for insurance purposes, no later than 1978."[14] Tying trigger of coverage to the date of conviction may be appropriate because the analysis focuses on the last possible point during the underlying criminal proceeding at which point the injuries or offenses giving rise to wrongful APC litigation actually took place.[15]

By contrast, courts repeatedly have rejected attempts to trigger coverage under policies in effect after the date of conviction. For example, the United States Court of Appeals for the First Circuit in *Sarsfield v. Great American Insurance Co.* made clear that an allegation of continuing misconduct by a government official will not trigger coverage under any policy issued after the accused was convicted.[16] As noted by the First Circuit, the allegation in the complaint that "the defendants 'continued to cover up their misconduct' . . . is not enough to allege a 'wrongful act' occurring during the coverage period [which incepted four years after conviction]."[17] In *Idaho Counties Risk Management Program Underwriters v. Northland Insurance Cos.*, the Idaho Supreme Court rejected the argument that an official's ongoing failure to disclose wrongfully withheld evidence affected the trigger of coverage, noting that "the initial failure led to the continued withholding of exculpatory evidence and thus continued injury; however, such continued action and ongoing injury arose out of a single occurrence . . . that took place prior to the policy period, and [the insurer] is not liable for it."[18]

Similarly, courts have held that a plaintiff's ongoing injury from civil rights violations (including those suffered during long-term incarcerations) cannot activate coverage under policies in effect after the conviction.[19] For example, the district court held in *Sarsfield* that once a claimant suffers a specific injury from a civil rights violation, all other injury will be viewed as part of the initial injury unless it is "distinct"-that is, wholly unrelated.[20] Most courts agree with this view that all potential violations of an exonerated individual's rights stem from the single event of the initial injury.

Courts also repeatedly have held that a "continuous" trigger of coverage is inapplicable in wrongful APC litigation in response to insureds that urge reliance on authority addressing trigger in the latent bodily injury context. The rationales that lead to the adoption of a continuous trigger in cases involving asbestosis and other gradually developing long-term diseases simply are not present in the context of wrongful arrest, prosecution, and conviction. Unlike a situation in which a latent injury caused by exposure to a hazardous substance or defective product is difficult to detect in its early stages or as of its date of origin, identifying the

relevant injury or offense in wrongful APC litigation is straightforward and must be evident to the victim from at least the time of conviction if not earlier. As one court noted, "the 'continuous trigger' theory . . . is not well-suited to a situation where, as here, any injury was evident from the outset and first occurred prior to the inception of insurance coverage."[21] Moreover, as the United States Court of Appeals for the Third Circuit observed in *City of Erie*, unlike asbestosis cases, "in malicious prosecution cases, there is no interval between arrest and injury that would allow an insurance company to terminate coverage."[22] Rather, a claimant's injuries all stem from the initial violation of his or her rights that accrues "as soon as charges are filed," which has led numerous courts to conclude that a continuous trigger is inapplicable in the context of wrongful APC litigation.[23]

II. The *McFatridge* Decision

Against this legal backdrop, in *National Casualty Co. v. McFatridge,* the Seventh Circuit considered the coverage implications raised by wrongful APC litigation filed by Gordon "Randy" Steidl, who was convicted of murder in 1987 in Edgar County, Illinois.[24] In 2003, a federal district court granted Steidl's writ of habeas corpus based on his claims of ineffective assistance of counsel and sentencing errors. Steidl subsequently brought a civil suit under state and federal law against various law enforcement officials and entities, including Edgar County and Michael McFatridge, the Edgar County State's Attorney who prosecuted the murder case. Steidl alleged that McFatridge led a conspiracy to frame him for murder and sought damages based on numerous tort claims, including false arrest, false imprisonment, malicious prosecution, conspiracy, and intentional infliction of emotional distress. National Casualty Company and Scottsdale Indemnity Company sought a declaratory judgment that they had no duty to defend or indemnify under any of the policies issued by the companies.[25]

After first determining that McFatridge was not an "insured" under either the Scottsdale-issued law-enforcement policy in effect while he was in office,[26] or the three CGL policies that took effect after he left the state's attorney office,[27] the court nevertheless went on to address the county's argument that McFatridge's alleged continued suppression of exculpatory evidence constituted an ongoing tort that began with Steidl's arrest in 1987 and continued until his release in 2003 and therefore triggered all policies in effect during that interval.[28] The court rejected this argument, holding that "[n]one of the tort offenses Steidl claims McFatridge committed . . . occurred during any of the policy periods."[29]

In support of the conclusion that McFatridge had not committed an offense during any of the policy periods at issue, the Seventh Circuit went on further to analyze trigger of coverage for Steidl's claims in two ways. First, concerning Steidl's claim for false imprisonment, the court held that the trigger of coverage coincided with the accrual of the claim for statute of limitations purposes, which, under Illinois law, occurred when Steidl first was held pursuant to a warrant or other judicially issued process.[30] Notably, however, the insurer on the risk at the time of arrest was not a party to the coverage litigation.

The Seventh Circuit also held that Steidl's claims relating to his conviction[31] did not accrue until the date of exoneration and thus could trigger coverage in 2003, when he was exonerated more than a decade after his arrest in 1987. As with the time of arrest, the insurer on the risk at the time of exoneration was not a party to the coverage litigation. To support its prediction that exoneration could trigger coverage under Illinois law, the

court cited United States Supreme Court precedent establishing that, to prove a claim for malicious prosecution or similar offenses, Steidl was required to show "that his conviction . . . has been reversed on direct appeal, . . . or called into question by a federal court's issuance of a writ of habeas corpus."[32] Because Steidl "did not have a complete cause of action" until the court granted his writ of habeas corpus, the Seventh Circuit reasoned that coverage was not triggered until exoneration, long after the policies at issue had lapsed. Thus, the court held that Steidl's suit potentially could trigger more than one policy (i.e., the policies in effect at the time of arrest and exoneration, respectively), although no such policy was issued by the insurers who were parties to the case.

In arriving at its conclusion that the subject insurers had no duty to defend, *McFatridge* undertook an especially unusual approach to the issue of trigger not suggested by the array of parties actually litigating before the court. The court conducted its bifurcated trigger analysis to refute the insured's argument in favor of continuous trigger and made rulings with respect to ostensibly triggered policies that were not even at issue in the litigation. The court thus reached its conclusion without full consideration of the implications of coverage and without any input by insurers affected by the result. The decision also registered no awareness of authority in other cases holding that ongoing injuries from civil rights violations do not trigger coverage under policies issued subsequent to the initial injury.[33] Instead, the *McFatridge* court conducted an unnecessary trigger-of-coverage analysis largely devoid of reason or support to reach conclusions about policies that were not at issue.[34]

III. *Mcfatridge* Is Flawed and Should Not Be Followed

The Seventh Circuit's decision in *McFatridge* to use the date of exoneration as one of two possible trigger dates for insurance coverage in wrongful APC litigation is problematic in several respects. It is inconsistent with the terms of the policies at issue in the case (and those typically found in policies procured by public entities and officials), departs from the reasoning adopted by the vast majority of other courts, and is doctrinally unsound on its own merits. Moreover, *McFatridge* stands to lead to inconsistent results for insureds and insurers, as subsequent authority demonstrates.

As an initial matter, the *McFatridge* decision is contrary to the terms of the liability policies at issue in the case and in wrongful APC litigation generally. The operative provisions of public entity or officials liability policies generally provide coverage based on whether specified injuries or offenses took place during the policy period.[35] Therefore, a court considering trigger necessarily must focus on when the alleged injury or offense first took place. Critically, no injury or offense takes place when an individual is cleared of a crime. Rather, exoneration is remedial.

As noted by one court, an accused is "not in any sense legally injured by the [municipality] when the criminal prosecution against him was dismissed on his motion, and the [municipality] at that juncture 'committed' no 'offense' against [the accused]."[36] Indeed, in many instances, an insured public official defending the wrongful APC litigation long ago lost all control over the underlying criminal action to prosecutors, meaning that termination of the criminal proceeding and exoneration are both outside of the control of the insured.[37] In other words, exoneration constitutes a remedy provided by a court rather than an insured's act or omission or an accused's injury. Using the date of exoneration to trigger coverage thus directly contradicts the plain

language of occurrence-based coverage provisions typically found in public officials and entity liability policies and other similar types of policies.

Furthermore, *McFatridge*'s adoption of a trigger rule that focuses on the date of exoneration improperly relies on the accrual of a claim for statute of limitations purposes. As noted by the Third Circuit, a confluence of trigger and accrual is illogical.

[T]hese dates need not necessarily correspond. Reliance on the commencement of the statute of limitation is not dispositive in determining when a tort occurs for insurance purposes. Statutes of limitation and triggering dates for insurance purposes serve distinct functions and reflect different policy concerns. . . . Because of this fundamental difference in purpose, courts have consistently rejected the idea they are bound by the statutes of limitation when seeking to determine when a tort occurs for insurance purposes. For this reason, we do not believe the date on which the statute of limitation begins to run on malicious prosecution claims should determine when the tort occurs for insurance coverage purposes.[38]

Consistent with this approach, courts typically have rejected arguments that a tort claim's accrual for statute of limitations purposes can control the question of when a tort "occurs" for purposes of trigger of insurance coverage.[39]

The *McFatridge* decision also contravenes the widely held principle in the majority of wrongful APC litigation that there is only a single trigger of coverage that takes place, at the latest, at the time of conviction.[40] By suggesting that more than one trigger of coverage date is possible (i.e., the date of arrest for some claims and the date of exoneration for malicious prosecution claims), *McFatridge* diverges from more than a decade of precedent from other jurisdictions that has made clear that an exonerated individual's damages are apparent from the date of the initial violation of rights, which is, at the latest, the date of his or her conviction.[41]

In addition to departing from the analysis employed by a majority of courts addressing trigger of coverage, *McFatridge* is doctrinally unsound because it relies on inapposite precedent that does not address the interpretation of insurance contracts. The Seventh Circuit's trigger analysis principally relies on *Heck v. Humphrey*, a U.S. Supreme Court decision that involved a civil rights claim and had nothing to do with contract law, insurance policies, or trigger of coverage. *Heck* involved a prisoner who had not exhausted his state and federal remedies to contest his criminal conviction. The prisoner instead filed a Section 1983 suit seeking damages against government officials for alleged violations of his civil rights. The Supreme Court's ruling in *Heck* thus "lies at the intersection of the two most fertile sources of federal-court prisoner litigation," Section 1983 claims and habeas corpus proceedings.[42] In an attempt to resolve some of the overlap between the two statutes, the court held that a claimant must prove his "conviction . . . has been reversed on direct appeal, . . . or called into question by a federal court's issuance of a writ of habeas corpus" in order to recover damages on unconstitutional conviction claim brought under Section 1983.[43]

The *Heck* Court's "favorable termination rule," as it is often referred to, primarily was designed to avoid the anomalous situation where Section 1983 claims and habeas corpus actions could produce inconsistent results, recognizing that "to permit a convicted criminal defendant to proceed with a malicious prosecution claim [absent a reversal of the criminal conviction] would permit a collateral attack on the conviction through the vehicle of a civil suit."[44] The policy concerns underpinning the *Heck* decision may be sound, but they are completely unrelated to the trigger-of-coverage analysis that is a fundamental aspect of insurance law. Trigger of coverage involves the application of the terms of an insurance contract relating to the determination of which insurance policy or policies is conceivably implicated by injuries or damages alleged by a third party to have resulted from an act or omission of the insured. The rules regarding the interpretation and application of such contract terms had no consideration in or impact on the *Heck* Court's holding, making the decision conceptually irrelevant to the determination of insurance coverage for a wrongful conviction claim or suit.

The shortcomings of the *McFatridge* trigger analysis, due in significant part to its misplaced reliance upon wholly inapposite civil rights authority, are well illustrated by *Northfield*, which was recently decided by a federal district court within the Seventh Circuit. In *Northfield*, the court struggled to apply *McFatridge* where the accused obtained relief as to one criminal conviction, but was being retried for that crime, and remained convicted as to yet another crime.[45] The court concluded that-because the accused had not yet achieved a "favorable termination" under *Heck* and "it is quite unclear whether [the accused] has been exonerated"-a strict application of *McFatridge* precluded any insurance coverage for the insured as to the wrongful APC litigation at issue.[46] As the court noted, *McFatridge* offers "imperfect guidance," and the Seventh Circuit court surely did not anticipate the "murky situation[s]" created by its ruling where exoneration is unclear yet wrongful APC litigation has been brought. Given that an exoneration date itself is not nearly as certain as the *McFatridge* decision presumes, it makes little sense to depart from the contract language and the numerous other well-reasoned decisions and instead impose the exoneration date as an anchor for a trigger determination. As *Northfield* intimates, the Seventh Circuit likely did not anticipate that a court applying its holding could fail to trigger potential coverage under *any* insurance policy even where the insured municipality maintained coverage during all times relevant to the dispute.[47]

The result in *Northfield* suggests that application of *McFatridge*'s trigger-of-coverage rules will result in vastly different outcomes from case to case, creating uncertainty for the parties to an insurance contract. It is critical for insurers and insureds to be able to rely on courts to interpret a contract according to its terms; otherwise, it is difficult to assess the risk that is assumed under the insurance contract. With the Seventh Circuit's decision in *McFatridge*, however, insurers and insureds face inconsistent results in wrongful APC litigation depending on the jurisdiction. In Illinois, at least,[48] insurers potentially are now exposed to much greater risk because wrongful conduct that occurred decades ago can lead to civil rights suits that trigger coverage under policies that are meant to cover only wrongful conduct taking place in the present policy period.[49] In short, courts that adopt the analysis employed in *McFatridge* would contradict the terms of public entity and officials liability policies and the vast majority of courts considering trigger of coverage in this context, and would introduce an array of other difficulties for insurers and insureds alike in analyzing trigger in wrongful APC litigation going forward.

IV. Conclusion

As noted in the introduction, the Seventh Circuit will have two opportunities to provide authoritative attention to the question of the trigger of coverage in wrongful APC litigation in *American Safety Casualty Insurance Co., et al. v. City of Waukegan* and *Northfield Insurance Co., et al. v. City of Waukegan.*[50] Both cases involve the application of *McFatridge* in wrongful APC litigation and provide the Seventh Circuit a chance to reconsider its earlier opinion and prediction about trigger of coverage under Illinois law. Because *McFatridge* is contrary to numerous decisions in other jurisdictions, the Seventh Circuit properly should revisit its earlier outlier decision and bring its jurisprudence in line with the nearly two dozen other decisions addressing policy trigger in a similar context.

The majority of courts have, until recently, maintained a clear consensus that wrongful APC litigation triggers insurance coverage, at the latest, at the time of the accused's conviction. The Seventh Circuit's decision in *McFatridge* not only departs from well-established precedent but also contravenes traditional principles of contract interpretation. The decision is also doctrinally unsound because of its misguided reliance on precedent that is irrelevant and outdated. Moreover, the decision stands to have undesirable policy consequences by introducing uncertainty into the trigger analysis in the context of wrongful APC litigation. For these reasons, regardless of the outcome of the two recent appeals to the Seventh Circuit regarding the application of *McFatridge*, subsequent courts considering arguments that exoneration should trigger cover should ignore *McFatridge*'s holding and analysis because it is simply out of step with the approach taken by the majority of courts in wrongful APC litigation.

[1] *District Attorney's Office v. Osborne*, 557 U.S. 52 (2009).

[2] Kevin Davis, *After Years, Even Decades, The Exonerated Leave Prison Wall Behind-Only To Find New Barriers*, ABA Journal (Jan. 1, 2011) ("Director Rob Warden [of Northwestern University's Center on Wrongful Convictions] estimates there are about 50 exonerations each year from both DNA and non-DNA cases."); Samuel R. Gross, et al., *Exonerations in the United States: 1989 through 2003*, 95 J. Crim. L. & Criminology 523, 527 (2005) ("The rate of exonerations has increased sharply over the fifteen year period of this study, from an average for twelve a year from 1989 through 1994, to an average of forty-two a year since 2000."). The increase in exonerations has exposed what some view as substantial weaknesses in the criminal justice system, which are being studied closely by policymakers and academics in an effort to better understand the factors that lead to wrongful convictions. *See, e.g.*, Brandon Garrett, *Convicting the Innocent* (2011).

[3] *Skinner v. Switzer*,-U.S. -, 131 S. Ct. 1289 (2011) (federal courts have subject matter jurisdiction under 28 U.S. C. § 1983 to entertain claims of post-conviction prisoners seeking access to DNA evidence); *Connick v. Thompson*,-U.S. -, 131 S. Ct. 1350 (2011) (prosecutor's office cannot be liable for wrongful conviction under 42 U.S.C. § 1983 for failure to train its prosecutors based on a single *Brady* violation); *Smith v. Cain*, U.S. Sup. Ct. Case No. 10-8194 (Nov. 8, 2011 oral argument regarding whether repeated failures to disclose exculpatory

evidence constituted prosecutorial misconduct and resulted in constitutional violations under *Brady*). The U.S. Supreme Court's focus on issues relating to wrongful convictions is not new. Prior to 2011, the U.S. Supreme Court recently decided several cases relating to wrongful convictions. *See, e.g.*, *In re Davis*, 130 S. Ct. 1 (2009) (granting writ of *habeas corpus* filed directly with the Supreme Court-for the first time in over 50 years-and ordering district court to hear testimony and argument concerning evidence of actual innocence not available at criminal trial); *Osborne*, 557 U.S. 52 (holding that there is no constitutional right to DNA testing following guilty verdict); *Pottawattamie Cnty. v. McGhee*, 129 S. Ct. 2002 (2009) (granting petition for *certiorari* regarding whether prosecutors are absolutely immune for procuring false testimony during criminal investigation); *Van De Kamp v. Goldstein*, 555 U.S. 335 (2009) (ruling that prosecutors have absolute immunity from supervisory liability concerning failure to disclose potentially exculpatory evidence related to jailhouse informant). In addition, reflecting that eyewitness misidentification is a chief cause of wrongful convictions (Garrett, *Convicting the Innocent* at 9), state supreme courts recently have implemented sweeping new procedures whenever a criminal defendant challenges a witness's identification. *New Jersey v. Henderson*, 27 A.3d 872 (N.J. 2011); *Minnesota v. Ferguson*, 804 N.W.2d 586 (Minn. 2011). *See also Perry v. New Hampshire*, U.S. S. Ct. Case No. 10-8974 (Nov. 2, 2011 oral argument before U.S. Supreme Court regarding procedural safeguards for and reliability of eyewitness identification).

[4] Brandon L. Garret*, Innocence, Harmless Error, and Federal Wrongful Conviction Law*, 2005 Wisc. L. Rev. 35, 36, 42-45 (2005).

[5] *See, e.g.*, John Conroy & Rob Warden, *The High Costs of Wrongful Convictions: Illinois Taxpayers Forced to Pick Up Big "Injustice Tab*," Better Government Association, *available at* http://www.bettergov.org/investigations/wrongful_convictions_financial_costs.aspx (last visited Dec. 1, 2011) (noting that over the last 20 years, Illinois taxpayers had spent more than $200 million on wrongful prosecution suits, including over $30 million in attorney fees); Ryan Murphy, *Interactive: Payouts to Exonerated Prisoners*, Texas Tribune, Sept. 16, 2011, *available at* http://www.texastribune.org/library/data/texas-exoneree-payouts) (last visited Dec. 1, 2011) (noting that Texas has spent more than $33 million in payouts in 2010 and 2011).

[6] Benjamin C. Eggert & Amanda Schwoerke, *Trigger of Insurance Coverage for Wrongful Conviction Lawsuits*, Coverage, Vol. 20, No. 1, January/February 2010 at 21-27.

[7] *See Nat'l Cas. Co. v. McFatridge*, 604 F.3d 335 (7th Cir. 2010); *Selective Ins. Co. v. City of Paris*, 681 F. Supp. 2d 975 (C.D. Ill. 2010); *Gulf Underwriters Ins. Co. v. City of Counsel Bluffs*, 755 F. Supp. 2d 988 (S.D. Iowa 2010); *Northfield v. City of Waukegan*, 761 F. Supp. 2d 766 (N.D. Ill. 2010); *Am. Safety Cas. Ins. Co. v. City of Waukegan*, 776 F. Supp. 2d 670 (N.D. Ill. 2011); *Billings v. Commerce Ins. Co.*, 936 N.E.2d 408 (Mass. 2010); *Waters v. W. World Ins. Co.*, No. MICV200800089, 2011 Mass. Super. LEXIS 229 (Mass. Super. Ct. Sept. 12, 2011).

[8] *Am. Safety Cas. Ins. Co. v. City of Waukegan*, Nos. 11-2775, 11-2789 and 11-2961 (7th Cir.) and *Northfield Ins. Co. v. City of Waukegan*, No. 11-1215 (7th Cir.).

[9] 42 U.S.C. § 1983 ("Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. . . .").

[10] *See* Michael Avery, *Obstacles to Litigating Civil Claims for Wrongful Conviction: An Overview*, 18 B.U. Pub. Int'l L. J. 439 (2008-09).

[11] *See City of Erie v. Guar. Nat'l Ins. Co.*, 109 F.3d 156, 159 (3d Cir. 1997) (trigger for malicious prosecution is "when the underlying charges are filed"); *Selective Ins. Co. of S.C.*, 681 F. Supp. 2d at 980 ("[T]he majority of courts have held the tort occurs when the underlying criminal charges are filed."); *N. River Ins. Co. v. Broward Cnty. Sheriff's Office*, 428 F. Supp. 2d 1284, 1290 (S.D. Fla. 2006) ("The better rule . . . is to consider the time of the arrest and incarceration the 'trigger' in both malicious prosecution and false imprisonment cases."); *Coregis Ins. Co. v. City of Harrisburg*, No. 1:03-CV-920, 2006 U.S. Dist. LEXIS 20340, at *32-38 (trigger related to time when claimant was arrested and incarcerated); *Town of Newfane v. Gen. Star Nat'l Ins. Co.*, 14 A.D.3d 72, 77 (N.Y. App. Div. 2004) (trigger for malicious prosecution is "date of the commencement of the underlying criminal prosecution").

[12] *Northfield Ins. Co.*, 761 F. Supp. 2d at 773.

[13] *See, e.g.*, *Zurich Ins. Co. v. Peterson*, 232 Cal. Rptr. 807, 813 (Cal. Ct. App. 1986) (California law) ("[A]n individual is first injured upon the filing of a complaint with malice and without probable cause."); *Harbor Ins. Co. v. Cent. Nat'l Ins. Co.*, 211 Cal. Rptr. 902, 907 (Cal. Ct. App. 1985) (California law) ("[T]he gist of the tort is committed when the malicious action is commenced and the defendant is subjected to process or other injurious impact by the action."); *N. River Ins. Co.*, 428 F. Supp. 2d at 1291 (Florida law) (holding that a municipality cannot invoke "personal injury" provisions of a policy "to cover allegations of malicious prosecution, false imprisonment and numerous allegations of negligence and civil rights violations" that took place prior to policy inception); *S. Md. Agric. Ass'n, Inc. v. Bituminous Cas. Corp.*, 539 F. Supp. 1295, 1302 (D. Md. 1982) (Maryland law) (holding that trigger is when "the alleged tortfeasor takes action resulting in the application of the state's criminal process to the claimant"); *Billings*, 936 N.E.2d at 412 (Massachusetts law) ("The majority of jurisdictions that have considered the issue have concluded that the 'occurrence' causing personal injury under an insurance policy is the filing of the underlying malicious suit."); *Royal Indem. Co., v. Werner*, 979 F.2d 1299, 1300 (8th Cir. 1992) (Missouri law) ("'personal injury' . . . is more likely intended to describe the time when harm begins to ensue, when injury occurs to the person, that is, in this case, when the relevant lawsuit is filed"); *Am. Family Mut. Ins. Co. v. McMullin*, 869 S.W.2d 862, 864 (Mo. Ct. App. 1994) (Missouri law) ("[T]he filing date of the underlying [malicious] lawsuit controls whether an insurance policy provides coverage."); *Newfane*, 14 A.D.3d at 77 (New York law) (holding that trigger of coverage is when the prosecution is initiated, and "not[ing] that our determination of the issue accords with the great weight of authority from other jurisdictions"); *Ethicon, Inc. v. Aetna Cas. & Sur. Co.*, 688 F. Supp. 119, 127 (S.D.N.Y. 1988) (New York law) ("in a criminal or civil prosecution that is malicious . . . injury begins to flow from the time when the [malicious] complaint is filed"); *Paterson Tallow Co. v. Royal Globe Ins. Cos.*, 444 A.2d 579, 586 (N.J. 1982)

(New Jersey law) ("We hold that for the purpose of determining the existence of coverage under this type of policy, in the absence of any qualifying exclusion or exception the offense of malicious prosecution occurs on the date when the underlying [malicious] complaint is filed."); *Consulting Eng'rs, Inc. v. Ins. Co. of N. Am.*, 710 A.2d 82, 86-88 (Pa. Super. Ct. 1998), *aff'd*, 743 A.2d 911 (Pa. 2000) (Pennsylvania law) (holding that trigger occurs when the allegedly wrongful suit is filed).

[14] *Gulf Underwriters Ins. Co.*, 755 F. Supp. 2d at 1007.

[15] *See also Sarsfield v. Great Am. Ins. Co. of N.Y.*, Civ. A. No. 07-11026-RWAZ, 2008 U.S. Dist. LEXIS 121421, at *11 (June 3, 2008 D. Mass. 2008), *aff'd*, 335 F. App'x. 63, 66-67 (1st Cir. 2009); *TIG Indem. Co. v. McFatridge*, No. 06-2008, 2007 U.S. Dist. LEXIS 23788, at *10 (C.D. Ill. Mar. 30, 2007); *Coregis Ins. Co.*, 2006 U.S. Dist. LEXIS 20340, at *34.

[16] *Sarsfield*, 335 F. App'x at 67-68.

[17] *Sarsfield*, 335 F. App'x at 68.

[18] *Idaho Cntys. Risk Mgmt. Program Underwriters v. Northland Ins. Cos.*, 205 P.3d 1220, 1226 (Idaho 2009).

[19] *See, e.g.*, *Sarsfield*, 2008 U.S. Dist. LEXIS 121421, at *15-19; *Coregis Ins. Co.*, 2006 U.S. Dist. LEXIS 20340, at *35 ("That the effects of [the claimant's] alleged injuries . . . may have extended into the respective policy periods does not change the Court's analysis); *Gulf Underwriters Ins. Co.*, 755 F. Supp. 2d at 1000 n.15.

[20] *Sarsfield*, 2008 U.S. Dist. LEXIS 121421, at *12-13. *See alsoCoregis Ins. Co.*, 2006 U.S. Dist. LEXIS 20340, at *38 ("[N]or does [the accused] suggest that he has incurred injuries distinct from those he suffered as a result of his arrest, prosecution and ultimate conviction.").

[21] *City of Erie*, 109 F.3d at 165.

[22] *City of Erie*, 109 F.3d at 165.

[23] *See City of Erie*, 109 F.3d at 165; *Am. Safety*, 776 F. Supp. 2d at 712-13 ("[A]lthough the 'multiple' trigger theory has been applied in cases involving latent injury, such as asbestosis, or progressively worsening injuries, such as sexual abuse and environmental contamination, courts have consistently rejected this approach in cases involving civil rights claims like those at issue here."); *Northfield Ins. Co.*, 761 F. Supp. 2d at 766 (rejecting continuous theory of trigger); *Billings*, 936 N.E.2d at 413 ("We also reject [the insured's] suggestion that malicious prosecution be treated as a continuing tort for the duration of the underlying litigation, and that an 'occurrence' under the policy continues from the date the underlying malicious complaint was filed until the termination of that underlying litigation."); *Coregis Ins. Co.*, 2006 U.S. Dist. LEXIS 20340, at *32-38 (rejecting continuous theory of trigger).

[24] *McFatridge*, 604 F.3d 335.

[25] Four different occurrence-based polices were at issue in the declaratory judgment action. Scottsdale issued a law enforcement policy naming the "County of Edgar S.D." as the insured that was in effect from May 25, 1989, until May 25, 1990. Scottsdale also issued two CGL policies to Edgar County for one-year periods between July 1, 1997, and July 1, 1999; National Casualty issued a CGL policy for the period covering July 1, 1999, to July 1, 2000. *McFatridge*, 604 F.3d at 337-38.

[26] In the first part of the opinion, the Seventh Circuit addressed whether coverage under the law enforcement policy issued by Scottsdale was triggered, given that the policy period (May 25, 1989 through May 25, 1990) included McFatridge's tenure as a state's attorney. The court ultimately held that McFatridge did not qualify as an insured under the terms of the policy because, *inter alia*, he was an employee of the state, not the Edgar County Sheriff's Department, the named policyholder. *McFatridge*, 609 F.3d at 339-43.

[27] In the second part of its opinion, the court addressed whether coverage was triggered under any of the three CGL policies at issue, all of which took effect after McFatridge left the state's attorney's office (from July 1, 1997 to July 1, 2000). At the outset of its discussion, the court held that McFatridge was not an insured under any of these three policies that covered only offenses committed by "employees," "elective officers," and "duly elected officials"-categories that did not include McFatridge during the policy period of 1997-2000, given that he left office in 1991. *McFatridge*, 604 F.3d at 343-44. The court did acknowledge the county's argument that the language of the third CGL policy referenced "all persons who *were* . . . your lawfully elected . . . officials" as insureds, but the court concluded that the allegations in the complaint did not allege any misconduct by McFatridge during the third policy period of 1999-2000. *McFatridge*, 604 F.3d at 343-44.

[28] *McFatridge*, 604 F.3d at 344.

[29] *McFatridge*, 604 F.3d at 344.

[30] *McFatridge*, 604 F.3d at 344.

[31] Steidl's suit included a state law malicious prosecution claim and federal claims for denial of due process, unconstitutional conviction, and unconstitutional imprisonment. *McFatridge*, 604 F.3d at 344.

[32] *McFatridge*, 604 F.3d at 344 (citing *Heck v. Humphrey*, 512 U.S. 477, 486-87 (1994)).

[33] *See* cases cited *supra* note 16-23.

[34] Indeed, the *McFatridge* court's statements about trigger arguably may be construed as dicta.

[35] *See, e.g.*, *McFatridge*, 604 F.3d at 339 (quoting insuring agreement and definition of "occurrence" in policies at issue).

[36] *Newfane*, 784 N.Y.S.2d at 792. *See also Billings*, 936 N.E.2d at 413 (exoneration "is not an event that causes harm to the plaintiff and therefore [is] not an 'occurrence' within the meaning of the policy").

[37] *See Newfane,* 784 N.Y.S.2d. at 793.

[38] *City of Erie*, 109 F.3d at 161.

[39] *See, e.g., AC & S, Inc. v. Aetna Cas. & Sur. Co.*, 764 F.2d 968, 972 (3d Cir. 1985) (statute of limitation cases "are not particularly relevant" to determining what event triggers insurance coverage); *Keene Corp. v. Ins. Co. of N.A.*, 667 F.2d 1034, 1044 (D.C. Cir. 1981) (statute of limitation cases "have no bearing" on a determination of when tort occurred for insurance purposes); *Ins. Co. of N.A. v. Forty-Eight Insulations, Inc.*, 633 F.2d 1212, 1220 (6th Cir. 1980) (because of differences in underlying policies, statute of limitations cases are irrelevant to determining when asbestos-related tort occurs for insurance purposes); *Commercial Union Assurance Co. v. Zurich Am. Ins. Co.*, 471 F. Supp. 1011, 1015 (S.D. Ala. 1979) ("[C]ases dealing with the determination of the date or occurrence of a continuing injury or disease for the purpose of applying appropriate statute of limitations are not controlling for purposes of determining insurance coverage."); *S. Md. Agric. Ass'n*, 539 F. Supp. at 1302-03 (date of accrual for statute of limitations is not determinative of date when tort of malicious prosecution occurs for insurance purposes); *S. Freedman & Sons v. Hartford Fire Ins. Co.*, 396 A.2d 195, 198-99 (D.C. 1978) (statute of limitations "provides little assistance" and "need not determine" when tort of malicious prosecution occurs).

[40] See *supra* notes 12-16 and accompanying text.

[41] *McFatridge* also improperly relied on a 30-year-old Illinois state intermediate appellate court decision, *Security Mutual Casualty Co. v. Harbor Insurance Co.*, for the proposition that, in Illinois, the offense of malicious prosecution "d[oes] not occur for insurance purposes, until [the date of exoneration]." *See Sec. Mut. Cas. Ins. Co. v. Harbor Ins.*, 382 N.E.2d 1, 5-6 (Ill. Ct. App. 1978) (citing *Roess v. St. Paul Fire & Marin Ins. Co.*, 383 F. Supp. 1231 (M.D. Fla. 1974)). Notably, *Security Mutual* decision was later overturned by the Illinois Supreme Court, though on grounds not relevant to *McFatridge*. *See Sec. Mut. Cas. Co. v. Harbor Ins. Co.*, 397 N.E.2d 839 (Ill. 1979). In addition, *Security Mutual* principally relied on a Florida district court decision addressing trigger of coverage for a malicious prosecution claim, a holding that had been abrogated by more recent Florida case law and has been "consistently criticized" by other courts declining to adopt its reasoning. *See N. River Ins. Co.*, 428 F. Supp. 2d at 1291 (noting that the *Roess* decision has been "consistently criticized" and declining to adhere to its holding); *Zurich*, 232 Cal. Rptr. at 813 (same); *Billings*, 936 N.E.2d at 413 (rejecting *Roess*). Finally, no other court addressing trigger of coverage in wrongful conviction cases has relied on *Security Mutual*'s holding; indeed, most courts have found that the Illinois Appellate Court's reasoning is lacking in logic. *See, e.g.*, *City of Erie*, 109 F.3d at 160 (acknowledging *Security Mutual* but declining to adopt its holding); *Selective Ins. Co. of S.C.*, 681 F. Supp. 2d at 980 (same).

[42] *Heck*, 512 U.S. at 484.

[43] *Heck*, 512 U.S. at 486-87.

[44] *Heck*, 512 U.S. at 484 (internal quotation marks omitted).

[45] *See Northfield Ins. Co.*, 761 F. Supp. 2d at 774-76.

[46] *Northfield Ins. Co.*, 761 F. Supp. 2d at 776.

[47] *Northfield Ins. Co.*, 761 F. Supp. 2d at 776. The anomalous result in *Northfield* is not unexpected given that "favorable termination" may not always exist. Indeed, the "favorable termination" requirement may be relaxed in Section 1983 suits in certain situations. *See, e.g., Spencer v. Kemna*, 523 U.S. 1, 20-21 (1998); *Wilson v. Johnson*, 535 F.3d 262, 267 (4th Cir. 2008). The variable application of *Heck*'s "favorable termination" requirement in some Section 1983 suits makes the Seventh Circuit's choice in *McFatridge* to anchor its trigger determination upon civil rights jurisprudence regarding accrual of Section 1983 claims impractical in the insurance context, which is premised on consistency of contractual meaning.

[48] The *McFatridge* decision applied Illinois law and thus is not necessarily binding authority for district courts within the Seventh Circuit applying the law of other states.

[49] Indeed, as a matter of public policy, using the date of exoneration to trigger liability potentially creates perverse incentives for Illinois insureds. As the Third Circuit observed in *City of Erie*, reliance on the time of favorable termination can potentially allow "tortfeasors with information about their own potential liability to shift the burden to unwary insurance companies." *City of Erie*, 109 F.3d at 160. A government with information regarding past prosecutorial misconduct potentially could secure prospective liability coverage from an unsuspecting insurer.

[50] The authors' firm, Wiley Rein LLP, has filed an amicus curiae brief on behalf of the American Insurance Association in *American Safety Casualty Insurance Co. v. City of Waukegan*.