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III. Ruling Clarifies Wrongful Incarceration Insurance Triggers

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In Sanders v. Illinois Union Insurance Company, the Supreme Court of the State of Illinois resolved a split in state and federal decisions applying Illinois law on trigger of coverage in the context of wrongful incarceration.[1]

According to the Illinois Supreme Court, the City of Chicago Heights' insurers had no coverage obligation under policies in effect when the claimant was retried for murder and exonerated, two decades after the initiation of the prosecution. As a result, Illinois law on trigger of coverage for wrongful incarceration lawsuits is now on all fours with decisions by courts nationwide.

The Malicious Prosecution Lawsuit

Sanders arose out of a civil action brought by a claimant who was convicted of murder in 1995, and retried a second and third time in 2013 and 2014, based on evidence allegedly fabricated in 1994 by officers of the City of Chicago Heights. The claimant spent 20 years in prison and was acquitted in 2014. He then filed a lawsuit for malicious prosecution against Chicago Heights.

Coverage litigation ensued against Illinois Union and Starr Indemnity, which had issued primary and excess policies to Chicago Heights. Those policies were in effect when the original conviction was vacated in 2012, and when the claimant was twice retried in 2013 and 2014, based on evidence fabricated 20 years earlier.

The Trigger of Coverage Dispute

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The coverage litigation centered on when the offense of malicious prosecution took place under Illinois Union's and Starr's occurrence-based policies. The parties identified several dates potentially relevant to trigger: 1994, when the police allegedly manipulated evidence to implicate the claimant; 2012, when the claimant's original conviction was vacated; and 2013 and 2014, when the claimant was twice retried and eventually exonerated.

Chicago Heights and the claimant argued that the personal injury offense — specifically, all the elements of the malicious prosecution cause of action — was not complete until the verdict was set aside and the claimant was exonerated in 2014. Thus, coverage was triggered under the policies in effect in 2014 when the offense was complete, according to the insured and claimant.

In contrast, Illinois Union and Starr argued that the offense was the wrongful conduct initiating the prosecution in 1994, not the claimant's ultimate exoneration in 2014. In other words, the trigger of coverage was the commencement of the prosecution.

The Illinois Appellate Court, the state's intermediate appellate court, held in a 2-1 decision that the occurrence-based policies insured formal causes of action, not wrongful conduct.[2] That meant the primary and excess policies issued by Illinois Union and Starr were triggered by the accrual of the malicious prosecution cause of action brought against Chicago Heights in 2014, nearly 20 years after the prosecution was illegally begun as a result of misconduct by its officers.

The Illinois Supreme Court reversed and held that the Illinois Union and Starr policies were not triggered by the claimant's exoneration or second and third retrials.[3] The Sanders court explained that the insured's offensive conduct that resulted in the prosecution is the only trigger of coverage.[4]

We see four takeaways from the Illinois Supreme Court's trigger decision.

1. Until now, Illinois law has been applied unevenly by federal and state courts.

The Illinois Supreme Court's decision in Sanders is a welcome resolution to what triggers coverage for a wrongful incarceration claim in that jurisdiction. Illinois long has been one of the most common states for wrongful conviction litigation. Since 1989, more than 2500 people have been exonerated nationwide.

According to the National Registry of Exonerations, Illinois ranks number two among states with the most exonerations, with 309 exonerations in the last 30 years. And so far in 2019, at least 23 people have been exonerated in Illinois, more than any other state.[5]

Given the prevalence of exonerations, it's no surprise that there's an active bar of civil rights attorneys in Illinois filing lawsuits on behalf of those who have had their names cleared of wrongdoing. That in turn has led to many disputes about potential defense and indemnity coverage for those civil rights lawsuits.

As a result, there have been many lawsuits in Illinois focused on the threshold issue of which insurance policies are potentially triggered by a civil rights lawsuit asserting causes of action arising out of wrongful incarceration. By our count, there are about two dozen decisions applying Illinois law on trigger of coverage in this context.

More than a decade ago, courts first concluded that the applicable trigger in Illinois is the initial injury to the claimant, usually at the time of arrest or indictment.[6] Then, between 2010 and 2012, a trio of decisions by the United States Court of Appeals for the Seventh Circuit predicted that Illinois courts would apply a dual trigger to wrongful incarceration claims.[7]

Causes of action challenging the arrest would trigger coverage under policies at the time of arrest. On the other hand, causes of action challenging the conviction would trigger coverage under policies in effect at time of exoneration.

The theory was, according to the Seventh Circuit, a claimant cannot assert a civil cause of action for malicious prosecution until the underlying criminal conviction has been reversed or set aside.[8] Because the cause of action was not yet complete until exoneration, the Seventh Circuit reasoned that coverage for malicious prosecution could not be triggered at any earlier time.[9]

That prediction did not bear out, however. Since 2015, five Illinois intermediate appellate courts held that exoneration was not the trigger of coverage.[10] Under those decisions, the trigger was the start of the prosecution and not the exoneration of the claimant.

Then, in January 2019, the Illinois Appellate Court in Sanders reached the opposite result, in line with the Seventh Circuit, holding that insurance policies on the risk when Sanders was retried and ultimately acquitted were triggered.[11] This split and uneven analysis of trigger law by courts applying Illinois law were the backdrop to the Illinois Supreme Court's recent decision.

2. Illinois law is now aligned with most courts.

In Sanders, the Illinois Supreme Court has clarified that the applicable triggering event happens when the prosecution has begun. The Illinois Supreme Court explained that "the most straightforward reading of the term [offense] indicates that coverage depends on whether the insured's offensive conduct was committed during the policy period."[12]

The Illinois Supreme Court noted that "it has not escaped our notice that most courts that have considered this issue also have ruled that a malicious prosecution for purposes of insurance occurs at the commencement of the prosecution."[13]

In so doing, the Illinois Supreme Court has established that Illinois law is in line with the many courts

nationwide that have considered trigger of coverage in wrongful incarceration suits.

Numerous decisions by trial and appellate courts around the country have examined trigger under occurrence-based policies for an array of state and federal causes of action in wrongful incarceration actions, including: California, the District of Columbia, Florida, Georgia, Idaho, Indiana, Iowa, Kentucky, Maryland, Massachusetts, Missouri, New Jersey, New York, Ohio, Pennsylvania and Washington.[14] These courts uniformly take the approach that the trigger of coverage is when the claimant was first injured.

For example, a Kentucky federal court recently noted that "a majority of courts have held that the injury, for insurance purposes, occurs when the underlying criminal charges are filed."[15] And a Missouri federal district court observed last year that "the majority view [is] that in the context of insurance, malicious prosecution - either civil or criminal - occurs when the defendant begins to institute prosecution of charges against the plaintiff."[16] Illinois trigger law for wrongful incarceration now tracks the approach taken by nearly all courts.

3. The Illinois Supreme Court rejected trigger arguments focusing on exoneration or retrials.

The Sanders court was not persuaded by arguments for any trigger other than the start of the criminal process against the claimant. In response to the claimant's and insured's contention that exoneration should be a trigger, the Illinois Supreme Court held that the language in a typical occurrence-based policy "does not require that the elements of the tort [of malicious prosecution] be satisfied."[17]

Indeed, the Illinois Supreme Court put to bed the prediction by the Seventh Circuit earlier this decade that Illinois law allowed for an exoneration trigger. The Sanders court noted that the prediction was based on a misapplication of Illinois authority from 40 years ago. The Illinois Supreme court clarified that the "federal appellate court's attempt to predict Illinois law ... does not reflect our approach for determining when coverage for malicious prosecution occurs under an occurrence-based policy."[18]

Separately, the Illinois Supreme Court rejected the argument that a retrial of the claimant could constitute a separate trigger of coverage. Sanders considered the occurrence-based policy's language deeming that a single occurrence applied to all injuries arising out of "substantially the same Personal Injury."[19]

The court noted that it did not matter that "another theory of liability was added during the retrials" because the injury to the claimant — specifically, "the initiation of a suit based on evidence manufactured by Chicago Heights police officers" — remained the same.[20] That analysis tracks the approach by other courts considering the issue even without focus on such deemer language.[21]

In short, in establishing a single trigger for wrongful incarceration suits at the time of initiation of prosecution, Sanders clarified that other trigger arguments advanced by insureds and claimants lack merit under Illinois law.

4. Wrongful incarceration trigger litigation remains in development nationwide.

The Illinois Supreme Court's definitive statements about trigger provide clarity for litigants in that state. But insurers and insureds continue to have widespread disputes about trigger of coverage for wrongful incarceration lawsuits.

Indeed, the result in Sanders calls into question other decisions that have reached different results. For instance, in Travelers Indemnity Co. v. Mitchell,[22] the U.S. Court of Appeals for the Fifth Circuit found a duty to defend under polices in effect while the claimant was imprisoned.
That decision was based on unusual physical injures, and ignored other appellate authority holding that all damages flowing from continued incarceration that resulted from earlier misconduct are not a separate trigger. Given Sanders, and most other decisions in more than a dozen jurisdictions nationwide, insurers would have a solid basis to challenge the application of Mitchell in other circumstances.

Indeed, one court recently did exactly that.

A Kentucky federal court in July 2019 in St. Paul Guardian Insurance Co. v. City of Newport,[23] distinguished the Fifth Circuit's approach in Mitchell based on the unusual discrete physical injuries before the Fifth Circuit. The City of Newport decision made clear that "damages that flowed from [the claimant's] continued wrongful incarceration that came to pass as result of the malicious prosecution" did not trigger coverage under policies in effect during imprisonment. The district court decision in City of Newport has been appealed and is being briefed before the U.S. Court of Appeals for the Sixth Circuit.[24]

Despite the majority approach to trigger, we expect that trigger will continue to be tested by insureds and claimants. In addition to the Sixth Circuit's consideration of the issue, the U.S. Court of Appeals for the Eighth Circuit recently heard oral argument in Argonaut Great Central Insurance Co. v. Lincoln County, Missouri,[25] narrowly focused on the exact trigger of coverage at the outset of the underlying criminal action. On top of that, state court actions are pending in Missouri and Nebraska, among other states confronting these trigger issues.[26]

While Sanders provides clarity to important trigger questions, City of Newport, Lincoln County, Mitchell and other recent decisions show that courts still will be grappling with wrongful incarceration trigger litigation.

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[1] Sanders, et al. v. Illinois Union Ins. Co., et al., 2019 IL 124565 (Ill. Nov. 21, 2019).

[2] Sanders v. Illinois Union Ins. Co., 125 N.E.3d 1071, 1077 (Ill. App. Ct. 2019).

[3] Sanders v. Illinois Union Ins. Co., - N.E.3d -, 2019 IL 124565, ¶¶ 29-31 (Nov. 21, 2019).

[4] Id., ¶ 34.

[5] See National Registry of Exonerations, Interactive Data Map (available at https://www.law.umich.edu/special/exoneration/Pages/Exonerations-in-the-United-States-Map.aspx) (visited 11/26/2019).

[6] See, e.g., TIG Indem. Co. v. McFatridge, No. 06–2008, 2007 WL 1063018, at *2–3 (C.D. Ill. Mar. 30, 2007); Selective Ins. Co. v. City of Paris, 681 F. Supp. 2d 975 (C.D. Ill. 2010).

[7] See Northfield Ins. Co. v. City of Waukegan, 701 F.3d 1124, 1130-31 (7th Cir. 2012); Am. Safety Cas. Ins. Co. v. City of Waukegan, 678 F.3d 475, 478 (7th Cir. 2012); Nat'l Cas. Co. v. McFatridge, 604 F.3d 335, 338 (7th Cir. 2010).

[8] McFatridge, 604 F.3d at 344.

[9] Id. ("So Steidl did not have a complete cause of action, and there was no offense of wrongful conviction or deprivation of due process until June 17, 2003, when the district court issued the writ of habeas corpus. This is long after the CGL policies expired and the insurers have no duty to defend against these claims").

[10] See First Mercury Ins. Co. v. Ciolino, 107 N.E.3d 240, 247 (Ill. App. Ct. 2018); St. Paul Fire & Marine Ins. Co. v. City of Waukegan, 82 N.E.3d 823 (Ill. App. Ct. 2017); County of McLean v. States Self-Insurers Risk Retention Group, Inc., 33 N.E.3d 1012 (Ill. App. Ct. 2015); Indian Harbor Ins. Co. v. City of Waukegan, 33 N.E.3d 613 (Ill. App. Ct. 2015); St. Paul Fire & Marine Ins. Co. v. City of Zion, 18 N.E.3d 193 (Ill. App. Ct. 2014).

[11] See Sanders, 125 N.E.3d at 1077.

[12] Sanders, 2019 IL 124565, ¶ 25 (quoting First Mercury).

[13] Sanders, 2019 IL 124565, ¶ 29, n.3 (citing Genesis Ins. Co. v. City of Council Bluffs, 677 F.3d 806 (8th Cir. 2012)).

[14] See, e.g., Government Employees Insurance Co. v. Nadkarni, No. 19-cv-01302-LB, 2019 U.S. Dist. LEXIS 115709, at *19 (N.D. Cal. July. 11, 2019) ("for the tort of malicious prosecution, insurance-coverage cases hold that—for purposes of insurance policies that measure coverage from the time when the "offense is committed" —the tort of malicious prosecution occurs when the complaint is filed."). See also S. Freedman & Sons, Inc. v. Hartford Fire Insurance Co., 396 A.2d 195 (D.C. 1978); N. River Ins. Co. v. Broward Cnty. Sheriff's Office, 428 F. Supp. 2d 1284 (S.D. Fla. 2006); Zook v. Arch Specialty Ins. Co., 784 S.E.2d 119 (Ga. Ct. App. 2016); Idaho Cntys. Risk Mgmt. Prog. Underwriters v. Northland Ins. Cos., 205 P.3d 1220 (Idaho 2009); TIG Ins. Co. v. City of Elkhart, 122 F.Supp.3d 795 (N.D. Ind. 2015); Genesis Ins. Co. v. City of Council Bluffs, 677 F.3d 806 (8th Cir.

2012) (applying Iowa law); St. Paul v. City of Newport, 2019 WL 6317873, – F. Supp. 3d – (E.D. Ky. July 31, 2019); S. Md. Agric. Ass'n, Inc. Bitumious Cas. Corp., 539 F. Supp. 1295 (D. Md. 1982); Billings v. Commerce Ins. Co., 936 N.E. 408 Mass. 2010); City of Lee's Summit v. Missouri Public Entity Risk Mgmt., 390 S.W.3d 214 (Mo. Ct. App. 2012); Paterson Tallow Co. v. Royal Globe Ins. Cos., 444 A.2d 579 (N.J. 1982); Newfane v. General Star Nat'l Ins. Co., 14 A.D. 3d 72 (N.Y. App. Div. 2004); Selective Ins. Co. of the Se. v. RLI Ins. Co., 706 F. App'x 260 (6th Cir. 2017); City of Erie v. Guar. Nat'l Ins. Co., 109 F.3d 156 (3d Cir. 1997); Clark Cnty v. Wash. Cntys. Risk Pool, No. 12-2-00557-6 (Wash. Super. Ct., Cowlitz County Jan 10, 2013).

[15] See St. Paul Guardian Ins. Co., et al., v. City of Newport, et al., No. 2:17-cv-115, 2019 WL 6317873, at *18 (E.D. Ky. July 31, 2019) (quoting Sarsfield v. Great Am. Ins. Co. of N.Y., 833 F. Supp. 2d 125, 130-32 (D. Mass. 2008)).

[16] Argonaut Great Cent. Ins. Co. v. Lincoln Cty., Missouri, No. 4:17-CV-00762 JAR, 2018 WL 3756767, at *7 (E. D. Mo. Aug. 8, 2018).

[17] Sanders, 2019 IL 124565, ¶ 29.

[18] Id. ¶ 30.

[19] Id. ¶ 31.

[20] Id.

[21] See, e.g,. City of Lee's Summit v. Missouri Public Entity Risk Management, 390 S.W.3d 214, 221 (Mo. App. 2012) (rejecting argument that "there were multiple triggering events" because insured "withheld exculpatory evidence at each of his three criminal trials and his injuries were ongoing or repeated over a period of several years"); St. Paul Fire & Marine Ins. Co. v. City of Waukegan, 82 N.E.3d 823, 834 (Ill. App. Ct. 2017) ("The City's argument that each trial at which evidence was withheld constituted a separate triggering event mirrors an argument that was rejected by the Missouri Court of Appeals in City of Lee's Summit .... We agree with the conclusion in City of Lee's Summit."); Westport Ins. Corp. v. City of Waukegan, No. 14-CV-419, 2017 WL 4046343, at *1 (N.D. Ill. Sept. 13, 2017) (holding that coverage was not triggered by alleged misconduct taking place during second criminal trial).

[22] Travelers Indemnity Co. v. Mitchell, 925 F.3d 236 (5th Cir. 2019).

[23] St. Paul Guardian Insurance Co. v. City of Newport, Case No. 17-cv-0115, 2019 WL 6317873, - F. Supp. 3d - (E.D. Ky. July 31, 2019).

[24] See St. Paul Guardian Ins. Co., et al. v. City of Newport, No. 19-5948 (6th Cir.).

[25] Argonaut Great Central Insurance Co. v. Lincoln County, Missouri, Case No. 18-2930 (8th Cir.).

[23] See, e.g., Fergusen v. St. Paul Fire & Marine Ins. Co., et al., No. WD82090 (Mo. Ct. App.); Gage County v. Nebraska Intergovernmental Risk Management Association, Case No. CI 17-0339 (Lancaster County, NE).