



## Illinois Supreme Court Follows Majority Rule that Coverage Trigger for Malicious Prosecution Is When Wrongful Charges Are First Brought.

Since 1989, there have been 2,535 exonerations in the United States.<sup>1</sup> With 309 of those exonerations occurring in Illinois,<sup>2</sup> it is to be expected that Illinois has been a hotbed of civil rights litigation filed on behalf of wrongfully convicted and imprisoned persons. And with the multi-million jury verdicts and settlements that often result from such lawsuits, it also is to be expected that there have been numerous insurance coverage lawsuits in Illinois regarding the coverage trigger for a malicious prosecution civil suit under liability policies issued to municipalities and police officers.

Coverage B of the standard Insurance Services Office, Inc. (“ISO”) CGL policy (CG 00 01) covers damages because of enumerated “personal and advertising injury” offenses committed during the policy period. Unlike the CGL policy’s coverage for damages because of bodily injury or property damage, which must be caused by an “occurrence” and result from bodily injury or property damage that occurs during the policy period, the personal and advertising injury coverage applies to injury arising out of one or more “offenses” committed during the policy period. Since 1986, Coverage B has included the “offense” of “malicious prosecution.” Moreover, although ISO’s 1973 Comprehensive General Liability Form did not provide personal injury coverage, coverage for damages arising out of malicious prosecution and other offenses was available pursuant to an optional 1976 ISO endorsement called the “Broad Form Comprehensive General Liability Endorsement,” and was available on non-ISO forms prior to 1976.<sup>3</sup> In addition, many municipalities maintain law enforcement liability policies, or similar policies, that provide coverage for damages caused by the “offense” of “malicious prosecution.”

The underlying malicious prosecution cases that have the highest verdict potential – and, therefore, the cases most likely to give rise to coverage disputes - typically involve prison sentences that lasted many years, if not decades. To bring a suit for malicious prosecution, the plaintiff must have been exonerated, as exoneration is when the malicious prosecution cause of action accrues. Thus, for purposes of triggering coverage, does the “offense” of “malicious prosecution” occur when the malicious prosecution cause of action accrues (*i.e.* at exoneration) or does it occur when the malicious prosecution commences? Given the passing of time between the commencement of the malicious prosecution and exoneration, it is rarely the

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same insurer that was on the risk when both events occurred. Typically, insurers that were on the risk when the underlying plaintiff was exonerated take the latter position, while insurers that were on the risk when the underlying plaintiff was wrongfully charged take the former position.

Most courts that have addressed the issue have held that the commencement of a malicious prosecution during the policy period is the event that triggers insurance coverage.<sup>4</sup> In so ruling, courts have focused on when the injury occurs (*i.e.* the filing of the improper charges or lawsuit), not when the cause of action accrues for statute of limitation purposes (*i.e.* the termination of the charges or suit in favor of the defendant). As one court explained:

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. Statutes of limitation function to expedite litigation and discourage stale claims. But when determining when a tort occurs for insurance purposes, courts have generally sought to protect the reasonable expectations of the parties to the insurance contract.<sup>5</sup>

As another court observed, “it is improbable that the term ‘personal injury’ is used in a technical sense to speak of time when a cause of action has fully matured. It 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 law suit is filed.”<sup>6</sup>

Courts applying Illinois law were split with regard to the appropriate coverage trigger for malicious prosecutions claims before the recent ruling by the Illinois Supreme Court in [Sanders v. Illinois Union Ins. Co., 2019 IL 124565](#). Before *Sanders*, the United States Court of Appeals for the Seventh Circuit had held in several decisions that under Illinois law, the “offense” of “malicious prosecution” occurs when the underlying plaintiff is exonerated because that is when the cause of action accrues.<sup>7</sup> Illinois appellate courts, on the other hand, held in at least five decisions that the “offense” occurs when the malicious prosecution commences, which is when the false charges are brought.<sup>8</sup> *Sanders* was the first time that the Illinois Supreme Court weighed in on the issue.

The Illinois Supreme Court held in *Sanders* that under Illinois law, the date on which the malicious prosecution commences, and not the date of exoneration, is the date on which the “offense” of “malicious prosecution” occurred for purposes of triggering Coverage B. The underlying suit in *Sanders* was a civil rights action brought by Rodell Sanders, who was convicted of murder in 1995 based on fabricated evidence.



Sanders was acquitted in 2014 and then filed a lawsuit for malicious prosecution against Chicago Heights, the police officers of which had fabricated the evidence used to convict him in 1995. Sanders settled with Chicago Heights in exchange for a cash payment, a covenant not to execute against Chicago Heights' for a portion of the settlement, and an assignment of Chicago Heights' claims against its insurers for the unpaid portion of the settlement. The insurance assignment was limited to policies in effect from 2011 to 2014. As such, Sanders argued that the date of exoneration was the date on which coverage was triggered. He also argued, in the alternative, that the policies were triggered when Sanders was re-tried in 2012, also based on fabricated evidence. The 2014 insurers argued that the bringing of wrongful charges was the triggering event.

While the policy language in the policies at issue in *Sanders* is not standard ISO CGL language, it is very similar. The policy covered damages for which Chicago Heights became legally obligated to pay as damages because of "malicious prosecution" "taking place during the Policy Period."<sup>9</sup> Thus, the key issue was whether "malicious prosecution" "takes place" when Chicago Heights brought the wrongful charges, when Sanders was exonerated, or at some other time.

The *Sanders* court agreed with the insurers and prior Illinois appellate decisions, concluding that "the most straightforward reading of this term [(offense)] indicates that coverage depends on whether the insured's offensive conduct was committed during the policy period."<sup>10</sup> Moreover, as the *Sanders* court observed, "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."<sup>11</sup> In so ruling, the *Sanders* court stated that "malicious prosecution neither happens nor takes place upon exoneration . . . Malicious prosecution' is the bringing of a suit known to be groundless."<sup>12</sup>

The *Sanders* court also stated that "the 'personal injury' of 'malicious prosecution' in the context of an insurance policy differs from the common-law elements of the tort of malicious prosecution."<sup>13</sup> Inherent in this distinction was the *Sanders* court's view that the parties' intent in issuing an occurrence-based policy, which contains "multiple references to coverage for occurrences or offenses happening during the term of the policy."<sup>14</sup> As the *Sanders* court explained, "[i]f we were to deem exoneration the trigger for coverage of a malicious prosecution insurance claim, liability could be shifted to a policy period in which none of the acts or omissions giving rise to the claim occurred. That would violate the intent of the parties to an occurrence-based policy."<sup>15</sup>

In Illinois and many other jurisdictions, the law is seemingly settled that the



commencement of malicious prosecution and not the date of exoneration is when the “offense” of “malicious prosecution” occurs for purposes of triggering CGL coverage. However, even in such jurisdictions, when evaluating coverage for malicious prosecution claims, it is important to be mindful of the fact that nonstandard policy language could support an alternative trigger theory. ➤

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### Endnotes

- 1 <http://www.law.umich.edu/special/exoneration/Pages/Exonerations-in-the-United-States-Map.aspx>.
- 2 *Id.*
- 3 See, e.g., [Roess v. St. Paul Fire & Marine Ins. Co.](#), 383 F. Supp. 1231, 1233 (M.D. Fla. 1974) (discussing “Top Brass Personal Catastrophe Policy” issued in 1968 that covered damages due to “personal injuries” including “malicious prosecution.”).
- 4 [Zook v. Arch Specialty Ins. Co.](#), 336 Ga. App. 669, 784 S.E.2d 119 (2016) (“we adopt the majority rule that when the contract does not specify, insurance coverage is triggered on a potential claim for malicious prosecution when the insured sets in motion the legal machinery of the state.”); [Northfield Ins. Co. v. City of Waukegan](#), 701 F.3d 1124, 1132 (7th Cir. 2012) (“the overwhelming majority of jurisdictions to address this issue consider the trigger date to be the date of the underlying criminal charges or conviction”); [Genesis Ins. Co. v. City of Council Bluffs](#), 677 F.3d 806, 812–813 (8th Cir. 2012) (collecting cases); [City of Erie, Pa. v. Guar. Nat. Ins. Co.](#), 109 F.3d 156, 160 (3d Cir. 1997) (“[T]he clear majority of courts have held the tort [of malicious prosecution] occurs [for insurance purposes] when the underlying criminal charges are filed.”).
- 5 [City of Erie, Pa.](#), 109 F.3d at 161.
- 6 [Genesis Ins. Co.](#), 677 F.3d at 813–14.
- 7 See, e.g., [Northfield Ins. Co.](#), 701 F.3d at 1130–31.
- 8 See, e.g., [First Mercury Ins. Co. v. Ciolino](#), 2018 IL App (1st) 171532, 107 N.E.3d 240, 247, appeal denied, 108 N.E.3d 840 (Ill. 2018); [St. Paul Fire & Marine Ins. Co. v. City of Waukegan](#), 2017 IL App (2d) 160381, 82 N.E.3d 823.
- 9 [Sanders](#), 2019 IL 124565, ¶¶ 8-9.
- 10 *Id.* at ¶ 25 (bracketed material in original).
- 11 *Id.* at ¶ 29, n.3.
- 12 *Id.* at ¶ 27 (citations omitted).
- 13 *Id.* (internal punctuation omitted).
- 14 *Id.* at ¶ 28.
- 15 *Id.*