The Aftermath of Exoneration:
Post-incarceration litigation and the importance of insurance in resolving risk

As of the drafting of this paper, there have been at least 575 post- conviction DNA-based exonerations in the United States. Selby, Daniele, *DNA and Wrongful Conviction: Five Facts You Should Know*, The Innocence Project, April 25, 2023, *https://innocenceproject.org/news/dna-and-wrongful-conviction-five-facts-you-should-know/*. There have been at least 2,706 post-conviction non-DNA-based exonerations in the United States. Since 1989, 3,284 people have been exonerated.. *2022 Annual Report*, The National Registry of Exonerations, May 8, 2023, *https://www.law.umich.edu/special/exoneration/Documents/NRE%20Annual%20Report%202022.pdf*. With an average of 14 years served, over 29,000 years have been lost to wrongful incarceration. *Id*. Although those who have been freed typically receive financial compensation mandated by law, civil litigation often ensues, and the stakes are high.

Post-conviction litigation comes at a time of unprecedented risk in law enforcement litigation. National media coverage of high-profile cases has sparked a change in the national conversation on policing. This conversation is fueled and informed by the increased availability of information with which to evaluate certain law enforcement practices. Cameras, whether worn by law enforcement or held by bystanders, have given a "real time" perspective on policing. Televisions series, dramatizing incarcerated life have added to the public's curiosity. Most importantly, science has conclusively proven that our criminal justice system has been flawed. Men and women have spent years of their life in prison for crimes they did not commit. The unspoken reality is that others, for years, have been put to death under similar circumstances.

In a recent PEW Research Center survey, 32% of white adults said they have a great deal of confidence in police officers to act in the public's best interest, while only 10% of black adults reported the same. *Trust in America: Do Americans Trust the Police?*, Pew Research Center, January 5, 2022, https://www.pewresearch.org/2022/01/05/trust-in-america-do-americans-trust-the-police/. While this breakdown alone is worthy of conversation, the practical conclusion of this study is that less than half of all Americans now trust police. The call for better policing and the simultaneous truth that law enforcement is both under-supported and underfunded increases the tension present in law enforcement-related cases. As the number and size of verdicts against government actors grows, fueled in part by a desire for social change, insurers will continue to be asked to carry the load. Over the past decade, more than $3.2 billion has been spent to resolve nearly 40,000 claims at twenty-five (25) of the nation's largest police and sheriff's departments. Alexander, Keith L.; Rich, Steven; Thacker, Hannah, *The Hidden Billion-Dollar Cost of Repeated Police Misconduct*, The Washington Post, March 9, 2022, *https://www.washingtonpost.com/investigations/interactive/2022/police-misconduct-repeated-settlements/*. In the wrongful incarceration context alone, state and municipal governments have paid more than $2.2 billion in compensation, comprised of $537 million in statutory awards and $1.7 billion in judgments and settlements. Gutman, Jeffrey, *Why Is Mississippi the Best State in Which to Be Exonerated? An Empirical Evaluation of State Statutory and Civil Compensation for the Wrongfully Convicted*, Northeastern University Law Review Vol. 11, No. 2, 2019.

Civil lawsuits arising from wrongful incarceration present a variety of legal issues. The exonerated plaintiff often alleges conduct that occurred over the course of decades, raising questions of what insurance policy should respond to the risk and whether coverage is available under multiple policies. Many of the allegations made in wrongful incarceration civil lawsuits, such as intentional wrongdoing, are typically excluded from coverage. At the same time, savvy plaintiffs' counsel will craft pleadings to trigger insurance coverage where possible. With causes of action often extending beyond 30 years and prospective damages in the millions, the cost of investigation and defense can be significant and the risk of misunderstanding insurance can be catastrophic.

Because wrongful incarceration cases begin with an arrest and conviction, followed by years in prison, relevant insurance policies are often old and can be difficult to locate. The companies that issued the policies are often defunct or may have changed hands multiple times. As with any case involving policies that are old or which have multiple origins, identification and interpretation of the proper policy(cies) is critical. With increased frequency, cases arising from an alleged wrongful incarceration will include causes of action based both on the wrongful conviction itself and alleged errors, omissions, and misconduct in the handling and production of exonerating evidence. Thus, even if a conviction itself were justified based on the evidence available at the time, where the mishandling of evidence extends the period of incarceration, a separate cause of action and, conceivably, a second (and, at times, a third or more) triggering event for insurance coverage can occur. With some policies, the nature and extent of bodily injury in any particular year of incarceration can also be relevant.

Claims Typically Asserted in Wrongful Incarceration Lawsuits

Wrongful incarceration cases often involve multiple causes of action against a variety of defendants. State and local actors give rise to both federal and state claims and administrative actions as well. The plaintiff's civil complaint is generally styled as a civil rights action brought pursuant to 28 U.S.C. §1983 for a deprivation of the plaintiff's rights under the United States Constitution.

Civil rights claims for wrongful arrest, false imprisonment, and a denial of Due Process actionable under §1983 are often asserted in conjunction with state law claims relating to the crime investigation phase (gathering of tangible evidence, witness interviews, interrogation of the plaintiff), and the storage, maintenance, record-keeping, disclosure, and production of exculpatory evidence before and after trial. These state law claims include misrepresentation, false arrest, malicious prosecution, obstruction of justice, negligence, defamation, and intentional and/or negligent infliction of emotional distress. State constitutional claims which mirror the federal claims are also often made.

In most cases, the ability to substantively defend these matters is limited. The body of evidence used to exonerate is often deemed dispositive in subsequent criminal trials. Judge's and juries alike are understandably sympathetic to the plight of the plaintiff. Still, it is important to understand what is alleged and how it relates to the underlying incarceration. Not all wrongfully incarcerated prisoners were wrongfully convicted based on the evidence. Moreover, the proof required to demonstrate various causes of action will have a direct impact on available insurance.

Evaluating the Duty to Defend

An insurer must carefully analyze whether there is a duty to defend in any lawsuit. This analysis is even more critical in the context of wrongful incarceration cases, which are typically very expensive to defend and carry significant prospective risk to any putative insured. *See American Safety Cas. Ins. Co. v. City of Waukegan*, 678 F.3d 475, 482 (7th Cir. 2012)(municipal defendant incurred and paid more than $1 million in defense of the lawsuit). Qualified counsel capable of navigating the federal court system and understanding the breadth of issues involved are more costly. Moreover, the sheer volume of information to be processed and number of clients to be represented often necessitates staffing by more than one attorney on both sides of the litigation. Invariably, conflicts counsel will need to be assigned.

The risk associated with an improper denial is significant in wrongful incarceration cases. Consider that many jurisdictions provide that the wrongful denial of a duty will require the carrier to reimburse the insured for defense costs and obligate them to indemnify the insured for any reasonable settlement or judgment. *Talen v. Employers Mut. Cas. Co.*, 703 N.W.2d 395, 408 (Iowa 2005); *SL Indus., Inc. v. Am. Motorists Ins. Co.*, 607 A.2d 1266, 1272– 73 (1992); *First Bank of Turley v. Fid. and Dep. Ins. Co. of Maryland*, 928 P.2d 298, 305 (Okla. 1996); *Mesmer v. Md. Auto. Ins. Fund*, 725 A.2d 1053, 1058 (Md. 1999); *Premier Homes, Inc. v. Lawyers Title Ins. Corp.*, 76 F. Supp. 2d 110, 119 (D. Mass. 1999); *Frazier, Inc. v. 20th Century Builders, Inc.*, 198 N.W.2d 478, 482 (Neb. 1972).

Setting the cost of defense aside for a moment, a very realistic jury verdict is $1 million per year incarcerated or more. Now consider that the average time served by a plaintiff in a wrongful incarceration case is 14 years. Even assuming an 85 percent chance of defense verdict, a reasonable settlement for such a case could easily exceed $2 million. With many older professional law enforcement policies having limits of less than $2 million, the prospect of a verdict that greatly exceeds the amount of any applicable coverage is a very real. The practical consequences on a community that faces such a verdict would be disastrous.

While the cost of defense is not (and generally should not be) a factor in the determination of available coverage, it can be an issue when dealing with wrongful incarceration cases. Certainly, it does not influence whether there is a duty to defend, but it can absolutely influence how to defend. If a defense is provided, reservations of rights must be carefully drafted and sent to multiple defendants, some of whom will be retired, or even deceased. It is also important to point out that older policies that are triggered often have lower and/or eroding limits. When limits are eroding, regular monitoring and communication to the insured is imperative.

Evaluating When Coverage Is Triggered

The insurance policies implicated in wrongful incarceration cases against local governments typically fall into two categories: (1) third party liability coverage for an "occurrence" or "wrongful act" during the period of coverage under the policy and (2) claims made coverage. The intent of occurrence-based policies is to insure only for injury or damage that occurs during the policy period. Claims made policies, on the other hand, typically require a claim to be made within the policy period, often with a finite time following for the reporting of such a claim.

In many cases, pinpointing the date of the "occurrence" or "wrongful act" requires little analysis. However, this analysis is considerably more complex in wrongful conviction cases; particularly where a plaintiff asserts a variety of claims for injury during a chain of events spanning decades.

Despite the quantity and variety of claims asserted in wrongful incarceration lawsuits, each claim essentially falls into one of three categories for purposes of determining when the claim accrues. Claims for false arrest and imprisonment and other claims based on allegations related to the plaintiff's incarceration for a crime he or she did not commit accrue when the plaintiff is arrested pursuant to a "warrant or other judicially issued process." *Nat'l Cas. Co. v. McFatridge*, 604 F.3d 335, 334 (7th Cir. 2010) (Illinois law). Claims for malicious prosecution, wrongful conviction, and others alleging a denial of due process in connection with the plaintiff's prosecution accrue when the plaintiff is exonerated. *Brooks v. Ross*, 578 F.3d 574, 579 (7th Cir. 2009). Claims related to emotional distress typically trigger coverage when the plaintiff is arrested. See *Northfield Ins. Co. v. City of Waukegan*, 701 F.3d 1124, 1133 (2012)(Illinois law), and compare *Parish v. City of Elkhart*, 614 F.3d 677, 638–84 (7th Cir. 2010)(Indiana law).

For purposes of determining when occurrence-based coverage is triggered for each of the claims asserted in a wrongful incarceration lawsuit, most jurisdictions further simplify the analysis by construing all of the plaintiff's claims as seeking relief for malicious prosecution. See e.g. *City of Lee's Summit v. Missouri Public Entity Risk Mgmt.,* 390 S.W.3d 214 (Mo. App. 2012).

However, there is a split of authority among these jurisdictions on when a claim for malicious prosecution triggers occurrence- based coverage.

The Majority Approach

Under the majority approach, malicious prosecution claims trigger occurrence- based policies in effect when the exonerated plaintiff is first charged or arrested. The majority approach was first applied in *Muller Fuel Oil Co. v. Ins. Co. of North Am.*, 95 N.J. Super. 564, 232 A.2d 168 (1967). In *North River Ins. Co. v. Broward County Sheriff's Office*, 428 F.Supp.2d 1284 (S.D. Fla. 2006), the court provided a rationale for the majority view, explaining that it would "strain logic" to impose on an insurer a risk "based on the fortuitous occasion of the date of exoneration as opposed to the date when the damage first manifests itself." Since the *Muller Fuel Oil* case, the majority view has been adopted by the following state court decisions: *Zurich Insurance Co. v. Peterson*, 188 Cal.App.3d 438, 232 Cal. Rptr. 807, 813 (1986); *Billings v. Commerce Insurance Co.*, 458 Mass. 194, 197–200, 936 N.E.2d 408 (2010); *American Family Mutual Insurance Co. v. McMullin*, 869 S.W.2d 862, 864 (Mo. App.1994); *Paterson Tallow Co. v. Royal Globe Insurance Cos.*, 89 N.J. 24, 36–37, 444 A.2d 579 (1982); *Town of Newfane v. General Star National Insurance Co.*, 14 A.D.3d 72, 76–77, 784 N.Y.S.2d 787 (N.Y.A.D. 2004); Co*nsulting Engineers, Inc. v. Insurance Co. of North America*, 710 A.2d 82, 86–88 (Pa.Super.1998), aff'd, 560 Pa. 247, 743 A.2d 911 (2000).

There are also two Illinois state appellate court decisions which appear to have adopted the majority view in Illinois. *Indian Harbor Ins. Co. v. City of Waukegan*, 392 Ill. Dec. 812, 33 N.E.3d 613 (2015) and *County of McLean v. States Self-Insurers Risk Retention Group*, 393 Ill. Dec. 268, 33 N.E.3d 1012 (2015). The 2020 case of *Argonaut Great Casualty Insurance Company v. Lincoln*

County, Missouri, focused on the exact trigger of coverage and held that an insurable event occurs when the victim was first damaged. This is generally when the victim is first arrested and charged with the crime. 952 F.3d 992 (March 2020).

The Minority Approach

The minority approach holds that insurance coverage for a malicious prosecution claim is trigged when the plaintiff is exonerated. The minority approach has been applied by federal courts in the Seventh Circuit (relying on Illinois law), *see e.g. McFatridge*, 604 F.3d at 335, and the Louisiana Court of Appeals in *Sauviac v. Dobbins*, 949 So.2d 513 (La. Ct. App. 2006).

The cases in which the minority view has been applied criticize the majority view because it imposes a long tail on liability, contrary to the insurance industry's view that liability should be closely tied to the period of coverage. In addition, the court in *American Safety Cas. Ins. Co. v. City of Waukegan,* 678 F.3d 475, 479 (7th Cir. 2012) pointed out that majority rule cases "pay little attention to the language of the policies," in that the definition of "occurrence" in most policies "identifies the *tort* rather than the *misconduct* as the 'occurrence.'" (emphasis in the original).

The federal decisions applying Illinois laws appear to have been derived from *Security Mut. Cas. Co. v. Harbor Ins. Co.*, 65 Ill. App. 3d 198, 382 N.E.2d 1 (1978), which held that a malicious prosecution claim "occurs" for purposes of insurance coverage when the criminal proceedings against the plaintiff are terminated in the plaintiff's favor. However, in light of the two recent Illinois appellate decisions in *Indian Harbor* and *McClean*, it appears that the triggering event for determining coverage for a wrongful incarceration claim under Illinois law is the date prosecution was initiated. *TIG Ins. Co. v. City of Elkhart*, No. 3:13-cv-902, 2015 WL 48999425 (N.D. Ind.).

Specific Policy Language Approach

Still other Courts have focused on the unique language of a particular policy. The court in *Travelers Indemnity Co. v. Mitchell*, for example, held that multiple policies were triggered over an extended period of time. This finding was not based on a continuing trigger theory, but rather the alleged bodily injuries during the policy period that were distinct from the conviction itself. 925 F.3d 236 (5th Cir. 2019). Travelers argued that the continued imprisonment alone did not trigger coverage, and while the court agreed with this argument the court clarified that bodily injury coverage is not tethered to a list of causal events, rather bodily injury coverage looks at the damages to determine if there is coverage. Because the wrongfully convicted men in this case alleged several distinct injuries during incarceration on dates that fell within the Travelers policy period, the court concluded that Travelers had a duty to defend under the eight-corners rule. *Id*. Additionally, the court stated that coverage was triggered in more than one year by more than one injury and therefore had to analyze the different policy language from the different years when an injury was alleged.

The *Travelers* rational was upheld further in *Ferguson v. St. Paul Fire and Marine Insurance Company*, where the Court held that, if a plaintiff shows they sustained the loss of liberty, loss of time, and deprivation of society each day of their incarceration, he/she meets the burden of

demonstrating the Insurers have a duty to indemnify. 597 S.W.3d 249 (Dec. 2019). As a consequence of these two policy-specific outcomes, plaintiff's counsel are frequently employing their own insurance coverage counsel to identify and exploit potential outliers when crafting pleadings and prosecuting wrongful incarceration claims.

Alternative Approaches

A third, multiple-trigger approach has been advocated in a number of cases as a solution for resolving the difficulty in pinpointing a single occurrence triggering coverage. Under this approach, an insurer has a duty to defend and indemnify if it has issued a policy in effect at any time during a continuing tort or injury. *Genesis Ins. Co. v. City of Council Bluffs*, 677 F.3d 806, 815 (8th Cir. 2012)(reviewing cases and observing that no court has adopted a multiple trigger theory of insurance coverage for malicious prosecution claims). To date, however, courts have unanimously rejected this approach. *See e.g. Coregis Ins. Co. v. City of Harrisburg*, No. 1:03-cv-920, 2006 WL 860710 (M.D. Pa. Mar. 30, 2006).

Courts have criticized a "multiple trigger" theory of liability, noting that a "continuous or repeated exposure…has doubtful application in a situation" involving a wrongful incarceration because "there is no interval between arrest and injury that would allow an insurance company to terminate coverage." *North River Ins. Co.*, 428 F.Supp.2d at 1292 ("The better rule…is to consider the time of the arrest and incarceration the 'trigger' in both malicious prosecution and false imprisonment cases cases."). Even where the plaintiff alleges that law enforcement continued to fail to disclose exculpatory evidence during an extended period of the plaintiff's incarceration, such "acts or omissions alleged to have occurred after the date [the plaintiff] was charged are really continuations of the same alleged harm." *See Indian Harbor Ins. Co. v. City of Waukegan*, 392 Ill. Dec. at 822, 33 N.E.3d at 623; *see also Sarsfield v. Great Am. Ins. Co. of N.Y.*, 335 Fed. Appx. 63, 67 (1st Cir. 2009).

Notwithstanding the current trend toward rejection of a continuing harm, multiple trigger approach, there remains support for the theory in analogous case law. Consider, for example, those cases where injuries existed but were unknown at the time the insured purchased insurance. Multiple trigger theories have been adopted in limited circumstances, such as environmental contamination and asbestosis litigation, where the injuries caused by exposure do not manifest themselves until long after the exposure causing the injury. *Cf. Taco Bell Corp. v. Continental Cas. Co.*, 388 F.3d 1069 (7th Cir. 2004)(misappropriation of separate advertising ideas); *Catholic Diocese of Joliet v. Lee*, 292 Ill.App.3d 447, 685 N.E.2d 932 (1997)(policies triggered at each time of alleged instance of sexual abuse).

Most wrongful incarceration cases involve allegations of misconduct relating to the investigation, arrest and conviction. With increased frequency, however, there are allegations of neglect surrounding the production of exculpatory evidence. Though the majority of courts have found post-conviction harm to be one and the same with the conviction, there is an argument that the two are mutually exclusive— particularly when DNA is involved. It is entirely foreseeable, based on the evidence available in 1986 that an individual could be convicted by a jury of their peers after reasonable investigation and arrest. That individual could, at the same time, be innocent of the

crime as proven by DNA. If the production of DNA evidence was delayed and incarceration continued as a result of the negligence or wrongdoing of some third party, a separate wrong and resultant cause of action would accrue. If no harm is alleged at the time of the conviction, it is unlikely that the policy on the risk at the time of conviction would be triggered. Rather, the policy on the risk at the time of the alleged misconduct relating to exculpation would be triggered.

It is unlikely that a wrongfully incarcerated individual would concede the correctness of his or her initial incarceration, but the fact pattern above illustrates the point. The wrongs alleged can be wholly distinct from one another. If they are, the coverage analysis may not be as simple as the majority rule.

Such a theory was tested and successfully pursued in *City of Hickory v. Grimes*, 814 S.E.2d 625, 259 N.C. App. 937 (June 2018). In *City of Hickory,* the insurer argued that two wrongful acts, occurring decades apart, were substantially the same and, thus, were logically, causally, or temporally related and should be treated as one wrongful act. The North Carolina Court of Appeals rejected this position, differentiating how the two wrongful acts were separate. In doing so, it concluded that the insurance company owed a duty to defend.

Uncommon Issues in Assessing Coverage for Wrongful Incarceration Cases

The unique coverage issues in wrongful incarceration cases are not limited to the application of a policy to the particular allegations of a Complaint. Indeed, the very existence of a policy with which to evaluate coverage cannot be presumed. And what happens when the policy cannot be located?

On one hand, it would be difficult for a potential insured to prosecute a claim for coverage without a policy to substantiate the claim. On the other hand, insurers are often aware of the fact that they are on the risk for particular period of time. If the insured can demonstrate that it falls within coverage, most jurisdictions hold that the burden of proving restrictions against coverage will shift to the insurer. Without the adequate policy material, key exclusions can be lost.

Regardless of a party's position in the case, identifying all applicable coverage is imperative. Cases are high exposure and simply take a lot of money to settle. The more policies in play, the easier it is to settle. As such, an explanation of available *and unavailable* insurance is important. It is imperative to search the insureds records and to do so multiple times. Moreover, the search should not be limited only to those locations where policies would be expected. Key locations include the following:

- File cabinets
- Computers
- Minutes
- Prior retained attorneys
- Insurance Agents
- Other Insurers

- Westlaw/Lexis
- Long serving employees/officials
- State Department of Insurance

Due to the extended length of time wrongful conviction cases cover, it is crucial to search for insurance policies, documents, and leads in a variety of areas. Most entities that will have insurance documents do not hold onto files that are older than seven years. However, this does not mean that they do not have the file. Often times entities will place old files in file cabinets, in storage, and even on a computer filing system. When this type of search becomes futile it is important to continue the search in a creative way. For example, utilize Westlaw/Lexis to search the insured's name and obtain a list of results where that insured was a party. Representing counsel in those cases can then be approached and asked about any insurance relationship during the period of their representation. Simple, yet important follow ups, such as physically visiting the Department of Insurance or prior insurance agents may also be helpful to track down more leads. The more avenues taken to obtain insurance documents, the easier it is to explain why insurance is available or, in many cases, is not available, which will be important when talks of settlement enter the picture.

Allocation Issues

After a wrongful incarceration lawsuit is filed and a coverage analysis is complete, efforts should be made to identify all of the insurance carriers on the risk during the period of time alleged in the lawsuit. As discussed above, this analysis is often times complicated by the policies in play for any particular year. Consideration should be given as to whether coverage can be triggered over multiple policy years. Where different carriers hold risk in those different years, allocation issues necessarily arise. A debate as to whether or not a "pro rata" approach is appropriate invariably ensues. Courts are not consistent on this issue. Idaho, for example, has declined to formally follow the "pro rata" approach for allocation, despite Idaho courts having recognized this theory of allocation is based on logic and fairness. *Huntsman Advanced Materials, LLC v. OneBeacon Am. Ins. Co*., No. 08-229, 2011 WL 3202936, at 9 (d. Idaho July 21, 2011). The Ninth Circuit, interpreting California law, held that the pro rata approach likely leads to the fairest result in most cases. *Clarendon Nat'l Ins. Co. v. Nat'l Fire & Marine Ins. Co*., 512 F. App'x 671, 673 (9th Cir. 2013).

Invariably, the insured will face periods of uninsured risk in a wrongful incarceration case. The insured's participation, whether for defense or indemnity, is also a crucial part of any claim resolution. This is true, not only because of the legal issues associated with allocation, but also the practical messaging that comes with the community itself working to right a significant wrong. Most wrongful incarceration cases settle with contribution from the insured and a clear signal from that insured as to why what is being offered is significant.

Moving Forward into the Aftermath

Even when the applicable coverage is identified and where exclusions apply, the underlying facts of a wrongful incarceration case create strong incentive for courts to rule in favor of coverage.

Charged with heinous crimes, many of those who claim to have been wrongfully convicted have lost the better part of their lives to prison. Potential verdicts are in the tens of millions. "Reasonable" settlements often meet or exceed available coverage under a single policy.

Faced with these challenges, coverage counsel must not only interpret coverage and advise on the duty to defend and indemnify, but also ensure their clients are aware of the impact of a series of practical considerations. Losing freedom for a crime one did not commit is a troubling fact pattern. While the interpretation of coverage is a matter of law which is meant to be made without emotion, the humanity of judges and the natural desire to compensate individuals for such an egregious wrong must be considered in conjunction with any coverage analysis. If ever there was a case where "bad facts" make "bad law," it is in the context of wrongful incarceration litigation.

Notwithstanding the significant risk associated with post-incarceration litigation, insurers can work carefully to resolve these claims. A keen understanding of the social and political climate associated with the claims and hiring of both defense and coverage counsel who can navigate this complex landscape are critical. By understanding the legal and practical considerations set forth above, these cases can be resolved effectively.