

### III. Joins State Trend On Malicious Prosecution Claims

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A recent Illinois appellate decision clarified 35 years of confusing precedent and shed light on a challenging coverage question: When an exonerated prisoner sues a public entity for malicious prosecution, is the public entity's insurance triggered in the year in which the wrongful evidence or coerced confessions were first fabricated, or is insurance triggered in the year when the exoneration occurs and the tort of malicious prosecution ripens? This coverage debate may be of growing significance, given that criminal exonerations seem to be increasing across the country.



Last year, the U.S. saw more documented exonerations of wrongfully convicted defendants than ever before, according to a recent report from the National Registry of Exonerations, a joint project between the University of Michigan Law School and the Center on Wrongful Convictions at Northwestern University School of Law. The report also documented a steady increase of exonerations for cases unrelated to DNA or violent crime, meaning that the trend of increasing exonerations is no longer centered around only high-profile rape and murder cases.



With the number of malicious prosecution cases increasing — and the value of those cases increasing too — public entities have looked to their law enforcement liability policies to defend the claims, often with the trigger issue presenting a challenging initial hurdle for all parties to resolve. The majority view of courts that have examined the proper coverage trigger for malicious prosecution cases is that the triggering event occurs upon the commencement of the underlying malicious action, while the minority view is that insurance for malicious prosecution is triggered only after the prosecution is favorably terminated (i.e., exoneration), with the trigger analysis sometimes turning on the precise policy language at issue.

On Sept. 10, 2014, the Illinois Appellate Court for the Second District in *St. Paul Fire and Marine Insurance Co. v. The City of Zion* became the first state appellate court since 1979 to address the issue of trigger for malicious prosecution claims. In finding that coverage is triggered by the year in which the underlying malicious acts first occurred, and not the year of exoneration, the St. Paul holding appears to have pushed Illinois firmly in the direction of the majority trend.

St. Paul arose from the underlying plight of Jerry Hobbs, who was charged in 2005 with murdering his eight-year-old daughter and her nine-year-old friend. After DNA evidence excluded Hobbs as the perpetrator, criminal charges were dismissed, but not until Hobbs had already served five years in jail awaiting trial. In December 2010, Hobbs initiated a civil

lawsuit in federal court alleging state and federal constitutional violations committed by police officers, prosecutors and other employees of several municipal entities. Among other claims, Hobbs alleged malicious prosecution under Illinois law.

St. Paul issued policies of insurance to Zion during the period when charges against Hobbs were dropped in 2010, coinciding with the accrual of a malicious prosecution claim. However, St. Paul did not insure Zion during the 2005 period in which Hobbs was arrested and charged. The law enforcement liability section of the St. Paul policies provides that St. Paul will "pay amounts any protected person is legally required to pay as damages for covered injury or damage" that "happens while this agreement is in effect." It then defines "[i]njury or damage" as including "personal injury," and defines "[p]ersonal injury" as including "injury ... caused by ... [m]alicious prosecution." In other words, the St. Paul policy covers injury during the policy period when that injury is caused by malicious prosecution.

St. Paul filed a declaratory judgment action in the Circuit Court of Lake County, Illinois seeking a ruling that its 2010 policy was not triggered because Hobbs' "injury" took place five years earlier, in 2005, when the wrongful acts first occurred. On May 10, 2013, the circuit court issued a 91-page written opinion granting summary judgment in favor of St. Paul, finding that malicious prosecution claims trigger insurance policies that are in effect only at the time of the initial filing of the criminal prosecution against the accused, and not at the time of the favorable outcome of prosecution. Therefore, because the allegedly malicious criminal action against Hobbs was first initiated before the inception of any of the St. Paul policies, the court held that the St. Paul policies were not triggered. Hobbs (as assignee of Zion) appealed.

On Sept. 10, 2014, the appellate court affirmed the entry of summary judgment in favor of St. Paul. In so holding, the court criticized the reasoning of a three-decade old appellate decision, *Security Mutual Casualty Co. v. Harbor Insurance Co.*, on trigger of coverage for malicious prosecution. Even though the Illinois Supreme Court had reversed *Security Mutual*, finding that the court had not needed to reach the issue of coverage trigger at all, a series of Seventh Circuit cases nevertheless struggled with the *Security Mutual* appellate reasoning that insurance for malicious prosecution could only be triggered upon exoneration — when the malicious prosecution claim accrued. (See, e.g., *National Casualty Co. v. McFatrige*, 604 F.3d 335 (7th Cir. 2010); *American Safety Casualty Insurance Co. v. City of Waukegan*, 678 F.3d 475 (7th Cir. 2012); *Northfield Insurance Co. v. City of Waukegan*, 701 F.3d 1124 (7th Cir. 2012).)

In criticizing the reasoning of *Security Mutual*, the Illinois appellate court in *St. Paul* noted that, not only was the ruling reversed by the Illinois Supreme Court, but the *Security Mutual* court had mistakenly determined trigger of coverage by looking solely at when the elements of a malicious prosecution claim accrue, while not focusing on the wording or intent of the insurance contract itself. Consequently, the *St. Paul* Court looked to out-of-state for guidance. The court agreed with the majority of other rulings throughout the country that have addressed the issue, which generally hold that the injury takes place immediately upon the initial tortious act of filing a criminal complaint with malice and without probable cause. It further agreed that favorable termination of the prosecution cannot be the "injury" that triggers coverage, because termination marks the "beginning of the judicial system's remediation" of the wrong committed, not the commencement of the injury or damage. The court went on to state that, because injury to the accused results upon the commencement of a malicious prosecution, only the policy in effect at the time of the initial prosecution is triggered. Summary judgment was affirmed on this basis.

The *St. Paul* ruling could be limited to law enforcement liability policies that have language similar to that of the *St. Paul* policies at issue, which required the "injury" caused by the malicious prosecution to "happen" during the policy period. The court was careful to avoid

commenting as to whether its reasoning could also apply to policies that require the “offense” of malicious prosecution during the period. That said, St. Paul goes a long way toward pulling Illinois out of the minority, and setting forth a template for malicious prosecution coverage analysis that recognizes insurance coverage is triggered not by the accrual of an underlying tort claim, but by the policy language and intent of the insurance contract itself.

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