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Wrongful Conviction 2020: The Rising Tide of Insurance Trigger Litigation

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This White Paper:

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Provides an overview of claims and defenses in wrongful conviction actions.	Examines wrongful conviction actions between 2010–2019.	Explores misconceptions about exposure for wrongful conviction.	Describes how most courts analyze trigger of coverage for wrongful conviction.	Surveys trigger decisions that at first blush do not fit neatly with the majority rule.

Introduction

In a perfect world, the criminal justice system would punish only the guilty, and the innocent would remain free. But the reality is different. Thousands of people have spent decades in prison for crimes they did not commit. Since the advent of DNA evidence 30 years ago, more than 2,500 people have been exonerated, according to the National Registry of Exonerations.[1]

After their convictions were vacated, many of those exonerees have brought civil rights lawsuits against public entities and officials seeking substantial damages. These lawsuits often assert that the claimant was wrongfully investigated, prosecuted, and convicted, resulting in imprisonment, sometimes for decades. By one estimate, $2.2 billion has been paid to exonerees by or on behalf of governmental units.[2]

Wrongful convictions have been the focus of academic study, public policy debate, and popular culture. Law professors have devoted substantial efforts to understanding the root of the problems with a criminal justice system requiring so many exonerations, often decades after conviction.[3] From a policy angle, a majority of states have developed new protections for the accused and enacted statutes that provide compensation and remedial benefits to exonerees.[4] *The Making a Murderer* Netflix series and *Serial* podcast have lodged wrongful conviction firmly into the public mind. Kim Kardashian has brought concerns about wrongful conviction and criminal justice reform to her 63 million Twitter followers.[5]

Against this backdrop, the last decade has seen widespread civil rights litigation for wrongful conviction. Once a public entity policyholder tenders a wrongful conviction action to its insurer, a recurring issue is the trigger of insurance coverage. That is, which policy is activated by the wrongful conviction action against the insured public entity and officials?

Any analysis of a duty to defend must naturally start with the allegations of the complaint compared to the terms of the insurance policy. A duty to indemnify for the damages incurred by the claimant requires a more focused analysis based on the actual causes of action for which the injuries are to be compensated. In both situations, dozens of trial and appellate court decisions have examined trigger of coverage under occurrence-based policies in the context of a range of state and federal causes of action for all aspects of the criminal process.

Viewed together, these decisions show that most courts have adopted a common approach to the trigger analysis. Courts typically hold that coverage is triggered when the claimant was first injured, and that events taking place after the onset of injury are not relevant. Despite a clear majority approach, the trigger of coverage for wrongful conviction remains hotly contested in courts nationwide. Exploring the framework of liability and damages for wrongful conviction litigation, which underpins the majority approach to trigger, may be helpful in evaluating date of loss, coverage obligations, and potential exposure for a specific lawsuit under a particular insurance contract.

1 An Overview of Wrongful Conviction Actions

Most wrongful conviction lawsuits assert causes of action under 42 U.S.C. § 1983 and similar causes of action under state law for misconduct in the investigation, arrest, prosecution, and conviction of the claimant. The defendants typically are counties, municipalities, and other local government units and their employees, such as police officers. Sometimes, claimants also name other individual defendants, including investigators, forensic experts, and prosecutors, who may be employed by state or local government units.

These lawsuits are not simple cases to prosecute or defend. Wrongful conviction actions sit at the intersection of criminal constitutional rights, immunity protections for government actors, and the elements of proof typical for a civil claim for damages. Causation, for instance.

On top of that, the chief practical challenge is the passage of time. The interval between investigation and exoneration in a typical wrongful conviction action is about 14 years. When a civil rights action is filed, sometimes years after exoneration, the pertinent events may have taken place as much as two decades earlier, or more. So, a lawsuit brought in 2020 may address events in the 1990s, the 1980s, or even the 1970s. The evidence is rarely fresh.

There are six common causes of wrongful conviction that may be advanced, usually against individual government officials.[6] These causes illuminate the timing of the wrongful conduct and injury that support the claimant's causes of action—and ultimately become the focus of the trigger of coverage analysis.

1. Failure to Disclose Evidence

Wrongful conviction plaintiffs often claim there was a violation of *Brady v. Maryland*,[7] which requires disclosure of material exculpatory or impeachment evidence to the criminal defendant. While *Brady* may be called a "trial right," the opportunity and failure to disclose normally happened earlier in the criminal process, such as during the investigation or early in the prosecution. In addition to proving a *Brady* violation, a claimant must show a causal connection between the disclosure violation and the conviction.[8]

2. Fabrication of Evidence

Plaintiffs have argued that police, and sometimes forensic experts, violated federal constitutional due process rights by manufacturing evidence that led to a conviction. It is often challenging to show that evidence was fabricated, especially given the passage of time involved. The claimant also must establish that the false evidence affected the judgment of the jury and caused the conviction.

3. Witness Misidentification

Claimants have sometimes asserted that police officials employed improperly suggestive witness identification techniques. The result is that a witness incorrectly fingered the claimant as the culprit of a crime. Sometimes, these allegations overlap with claimed *Brady* violations, in which police failed to disclose that they used undue identification procedures.

4. False Confession

Wrongful conviction plaintiffs have contended that their rights were violated when they falsely confessed to a crime because of unconstitutional coercion. The test for this claim is whether police used interrogation methods that improperly induced the accused to confess to a crime not committed.

5. Malicious Prosecution

Plaintiffs in wrongful conviction actions often bring federal civil rights causes of action for malicious prosecution. Generally, the claimant must show that the defendant government officials improperly influenced or participated in

the decision to prosecute, leading to a deprivation of liberty, which ultimately was resolved in favor of the claimant.

6. Failure to Supervise/Intervene

Plaintiffs also may look beyond an official who directly violated the claimant's rights. Plaintiffs may sue an individual officer's superior for failure to supervise or even officers of equal or inferior rank for failure to intervene. Importantly, these are not a *respondeat superior* or vicarious liability claims. Rather, they are for a supervisor's or non-supervisory official's individual acts or omissions that are connected to the violations of the accused officer.

Impact of Qualified Immunity

In defense of these federal causes of action, government officials may assert that the doctrine of qualified immunity is a complete defense to the lawsuit. At a basic level, qualified immunity provides a shield to government officials, even if they have violated the U.S. Constitution, so long as they have not violated "clearly established law" that a reasonable official would have known at the time.

The defense typically raises two questions: (1) whether a defendant violated a civil right, and (2) whether the civil right was clearly established at the time of its violation. The focus of this leading defense to federal causes of action is the time when the claimant's rights allegedly were violated. In evaluating the defense, courts do not examine civil rights standards from any time after the conviction, including the current law in 2020, which are irrelevant.

Monell Claims

In addition to contending that individual government officials violated a civil right, claimants have often sued the local government entity for a so-called *Monell* claim, named after *Monell v. New York City Dep't of Social Services*.[9]

Section 1983 litigation is unique in that municipalities cannot be held vicariously liable for the unconstitutional acts by an employee, even for acts in the course and scope of employment. Under *Monell*, a local government unit only can be liable under Section 1983 when the violation was caused by "a policy statement, ordinance, regulation or decision officially adopted or promulgated … [or for] deprivations visited pursuant to a governmental custom."[10]

To establish a *Monell* claim, a plaintiff must show that an action or custom rose to a level of official policy. The plaintiff typically must rely on evidence from decades ago in proving that

a policy or custom existed. Further, the policy must have caused the specific violation of rights committed by an individual government official. A *Monell* claim sometimes may be proven based on the local government's failure to train, which in turn led to the specific violation of rights.

Regardless of the type of allegation, *Monell* claims are incredibly challenging causes of action to win. The claimant typically must show that broad application of a policy or custom, or a failure to train, was the specific cause of the alleged injury committed by a government official. In other words, a government employee essentially was implementing the official policy of the local government unit when the claimant was prosecuted decades ago.

Impact of Official vs. Individual Capacity

A government official may be sued in two ways: (1) in an "official capacity" under *Monell* or (2) in an "individual capacity," or both capacities at the same time. Liability for a *Monell* "official capacity" claim against an individual defendant will not be imposed against that individual defendant. Instead, it is treated as a claim against the government entity that the individual represents.

In contrast, damages awarded against a government official in his "individual capacity" can be executed directly and only against his personal assets. That said, a government unit in practice may sometimes indemnify its employee, depending on the applicable local or state law.

In short, a claimant may recover damages for an "official capacity" claim only against the government entity itself, and recover damages for an "individual capacity" claim only against the individual, absent indemnity.

Although experienced plaintiffs' attorneys generally specify in the complaint whether a cause of action is asserted in an "individual capacity" or an "official capacity," or both, the complaint may be unclear at times. Some jurisdictions may presume the cause of action is in an "individual capacity," while others only in an "official capacity," compounding the uncertainty.

State Law Causes of Action

In addition to these federal claims and defenses, civil rights claimants may also bring state causes of action for false arrest, false imprisonment, malicious prosecution, negligent or intentional infliction of emotional distress, and state constitutional civil rights violations, as well as state vicarious liability and indemnity causes of action against individual officers or local governments. These causes of actions may implicate state immunity defenses, state tort claim statutes, and other considerations specific to the jurisdiction where the violations allegedly happened.

Each of these federal and state causes of action involves an act or omission, and resulting injury, that happens early in the prosecution. Sometimes, the injury occurs during the investigation. Or it may take place at the arrest or charging, or early in the criminal prosecution process, such as when *Brady* evidence is withheld. In any event, the violation and the injury necessarily must have occurred by the time of conviction, at the latest, and usually much earlier.

To be sure, many recognize that every day spent by a claimant in prison for a crime he never committed involves a continued effect from the constitutional violation—specifically, ongoing confinement and reputational harm. But that is a continuation of the same injury originally incurred at the time of the constitutional violation itself. It is much like the victim of an officer-involved shooting may long experience the effects of a catastrophic injury, such as quadriplegia that happened years earlier, but neither the event nor the injury are ongoing.

Malicious prosecution or a similar civil rights violation takes place at the outset of the prosecution, while the result of the prosecution may continue throughout imprisonment, which is the effect of the constitutional violation. But the violation and the injury happened before imprisonment and many years before the claimant was exonerated.

2 A Decade of Wrongful Conviction Litigation: 2010-2019

Lawsuits seeking compensation for official misconduct have been around as long as exonerations. Indeed, wrongful conviction actions precede even the "modern" era of exoneration through DNA evidence, which began in 1989. The main difference between wrongful conviction actions in the 1980s and those brought in the 2010s was the skyrocketing number of exonerations leading to lawsuits. The allegations have not changed much through the decades.

One early reported action, *Jones v. City of Chicago,* 856 F.2d 985 (7th Cir. 1988), did not technically involve a "wrongful conviction" because the claimant was never found guilty. Instead, the claimant was arrested, charged with murder, and jailed for a year. *Id.* at 988-92. After press reports during the underlying criminal trial led to the revelation that secret "street file" evidence exonerating the claimant had never been disclosed to prosecutors or defense counsel, a mistrial was declared in 1982, and the charges were dropped.[11]

A civil rights lawsuit followed in 1983. A Chicago jury awarded the claimant $801,000 in compensatory and punitive damages, and $270,000 in attorneys' fees were also awarded—substantial sums nearly 40 years ago and material even by any contemporary measure.[12]

Murder and Sexual Assault Exonerations

Today, as in the 1980s, the most common subjects of wrongful conviction actions are murder and sexual assault exonerations. Data collected by the National Registry of Exonerations shows that there has been a steady increase over the last 30 years in the number of exonerations involving murder and sexual assault convictions. In 1989, there were 14 exonerations for murder and sexual assault, and there were 15 in 1990. By contrast, there were 623 exonerations for murder and sexual assault in the decade between 2010 and 2019. Across that last decade, the annual number of exonerations for murder and sexual assault convictions averaged over 60 per year.

That number is still increasing as we enter the 2020s. There are now about five times as many exonerations as there were 30 years ago, and nearly twice as many as in 2010. In 2018, the most recent year for which comprehensive data is available, there were 79 exonerations for murder and sexual assault convictions, compared to 43 in 2010.[13] So far, 84 exonerations for murder and sexual assault convictions have been identified for 2019.[14]

Length of Imprisonment

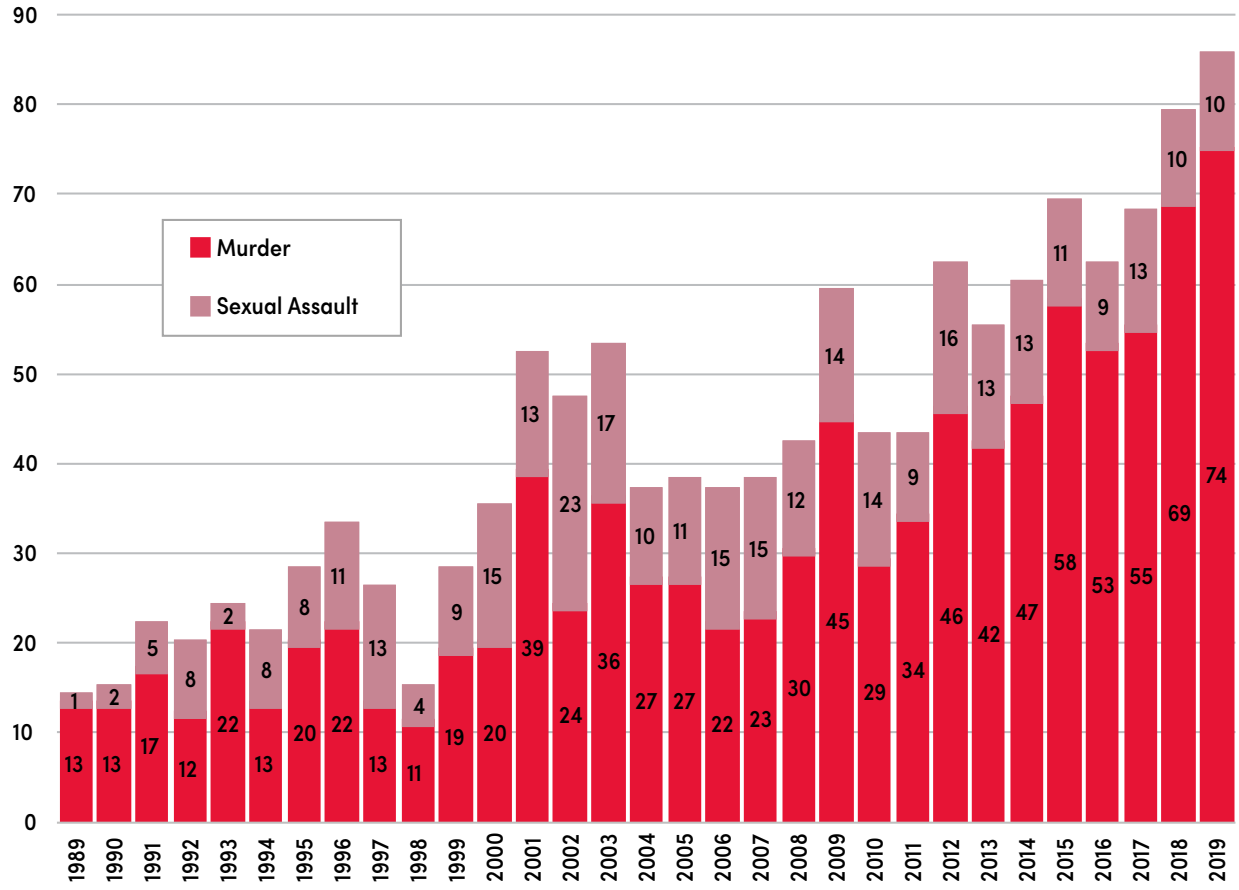
Recent exonerations also involved longer periods of incarceration.[15] The average imprisonment was about 14 years over the last three decades for exonerations of murder and sexual assault convictions. But average imprisonment was over 18 years for the same kinds of exonerations in 2018 and 2019.[16] As a result, there is a pool of about 160 exonerees in the last two years who might bring wrongful conviction actions concerning prison terms for murder and sexual assault that were significantly longer than historical norms.

The Rising Tide of Wrongful Conviction Actions

As exonerations have soared, so too have wrongful conviction actions. Commentators studying police misconduct data have identified trends about resulting claims over the last decade. As noted in one draft working paper in December 2019 by professors at the University of Pennsylvania and University of Chicago, lawsuits "involving alleged police misconduct have trended upwards over the past decade."[17]

Interestingly, another recent study, by Jeffrey Gutman and Lingxiao Sun of The George Washington University, suggests that there has been

Figure 1 Exonerations by Year for Murder and Sexual Assault.



no meaningful increase in the rate of wrongful conviction actions over the last decade.[18] Indeed, the Gutman and Sun study concluded that the rate of civil rights lawsuits resulting from exonerations for all types of crimes has remained steady, around 45%, since 1989.[19]

Notably, the rate of filing wrongful conviction actions varies by the type of underlying crime. Gutman and Sun found that about 60% of exonerations for murder result in civil rights litigation, while nearly 40% of sexual assault exonerations lead to litigation.[20] Exonerations for other crimes all were associated with lower rates of civil rights litigation.[21] As a result, the rate of filing wrongful conviction actions is highest among murder and sexual assault exonerations, which have grown five-fold over the last 30 years, and doubled over the last decade.

The Gutman and Sun study identified another pertinent variable affecting likelihood of bringing a wrongful conviction action—the length of incarceration. That "accords with one's intuition that the likelihood of filing [suit] rises with the length of the unjust incarceration," according to Gutman and Sun.[22] A person imprisoned for more than 15 years was more likely to bring a claim for compensation than someone with a shorter sentence.[23] As noted above, the period of imprisonment for recent murder and sexual assault exonerations is now around 18 years.

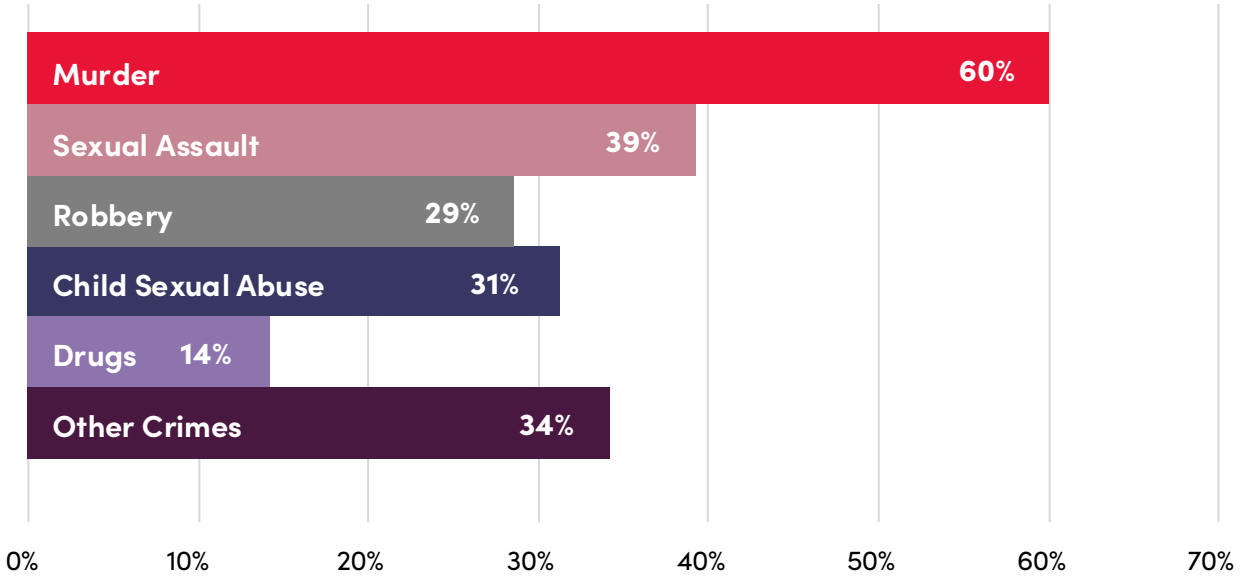
Mapping the findings of the Gutman and Sun study against the latest exoneration data tracks with anecdotal experience over the last decade. Even as the rate of wrongful conviction actions has held steady, the raw number of suits has risen as exonerations have surged.

Looking Forward

Recent studies and data also suggest that the number of wrongful conviction actions will continue to increase as exonerations and terms of imprisonment have grown among the more than 160 exonerations for murder and sexual assault over the last two years. Public officials and government units therefore likely can expect a continued rise in civil rights lawsuits for wrongful conviction in the coming years.

Quantifying and tracking this observation with more data and further analysis would be helpful given the exposure implications for the public fisc, as well as for governmental risk pools and private insurers of local government entities.

Figure 2 Percentage of Exonerees Filing Wrongful Conviction Actions.



3 Exposure for Wrongful Conviction Actions

Exonerations and wrongful conviction actions have ballooned over the last decade, but the story is a little different when it comes to the outcomes—exposure for damages to compensate exonerees.[24] We have not seen a material increase in payouts for wrongful conviction actions over the last decade matching the rise in exonerations and lawsuits.

Certainly, plaintiffs' attorneys sometimes assert that there is a growing trend of large verdicts, and that claimants ought to be compensated at a rate of $1 million or more per year of incarceration.[25] This approach argues that exposure should be assessed mechanically by multiplying the length of imprisonment in years by some coefficient, such as $1 million. A civil rights claim following a 10-year imprisonment supposedly is "worth" $10 million, according to this flawed method.

It's not that simple. Neither experience nor data bears out the validity of this approach. For starters, the attempt to argue that exposure hinges on the length of imprisonment oversimplifies the complexity of a claim. Though a long imprisonment presumably may be "worse" than a shorter one, our own observations of many wrongful conviction lawsuits has shown that the length of incarceration is a poor metric for jury awards or settlement negotiations.

Other factors tend to have far more influence on outcomes—such as the extent and severity of official misconduct, potential liability defenses, the circumstances of the exoneration, the jurisdiction, the quality of the counsel, and many other aspects of a claim. In other words, a "per year" metric does not fully capture the considerations that may affect exposure, and may overvalue or undervalue the claim depending on the situation.

The Gutman and Sun study illustrates this observation based on their analysis of over 800 wrongful conviction claims. Empirically, wrongful conviction plaintiffs are not typically compensated at a claimed rate of $1 million per year for imprisonments that average around 14 years.

The Gutman and Sun study concludes that the average total compensation to a claimant for a jury verdict or a settlement is around $3.8 million, which averages about $310,000 when

allocated per year of incarceration. That's much less than $1 million per year of imprisonment that is sometimes sought by claimants. Length of imprisonment does not move the needle on exposure in the way asserted by wrongful conviction claimants, according to the data.

What's more, Gutman and Sun "found … somewhat surprisingly, that the average annual award generally slopes downward over time."[26] The Gutman and Sun data shows that jury awards and settlements are comparatively smaller, calculated on the basis of per year of imprisonment, as the length of imprisonment grows.

In other words, a typical claimant serving two years of imprisonment received around $1 million total, which is allocated at about $500,000 on a basis of "per year" of imprisonment. But a claimant serving four years received an award averaging around $350,000 calculated on a "per year" basis (i.e., around $1.5 million total). A claimant serving 30 years received a civil award averaging around $300,000 calculated on a "per year" basis (i.e., around $9 million total), according to the study. Gutman and Sun noted "one large exception" involving a single large recovery in the range of 32 years to 34 years of imprisonment.

Gutman and Sun posit that the downward slope of the "per year" metric conforms to the view by juries that those in prison adapt to their lack of freedom and acclimate to the effects of the injury from wrongful prosecution.[27] While that may be a consideration, we believe the downward tilt in jury or settlement awards calculated on a "per year" basis is not entirely surprising.

Instead, it is a sign that more subjective factors other than length of imprisonment are affecting exposure more directly. The constitutional injury from the government official's wrongful conduct during the investigation and prosecution appears to be the primary driver of the outcome.

If the damage from the constitutional violation is "spread" over a longer period of incarceration, it logically follows that the "per year" calculation would trend downward. That's exactly what is shown by the data identified by Gutman and Sun.

Put differently, someone who loses a year of his liberty because he was wrongfully prosecuted did not necessarily experience one-tenth of the injury compared to someone else who experi-

Figure 3 Gutman and Sun Study: Annualized Amount of Recovery Per Year of Imprisonment.

enced the same civil rights violation and then was imprisoned for 10 years. They both experienced the same unconstitutional injury—that is, wrongful prosecution—even if the effect of the violation varied by length of imprisonment. Jurors appear to conclude that the wrongdoing and immediate resulting injury is what guides the compensation analysis. Primarily, this would include the severity of the police misconduct that led to the prosecution. The length of imprisonment is relevant and may be correlated with recovery, but length of imprisonment is not the most salient factor.

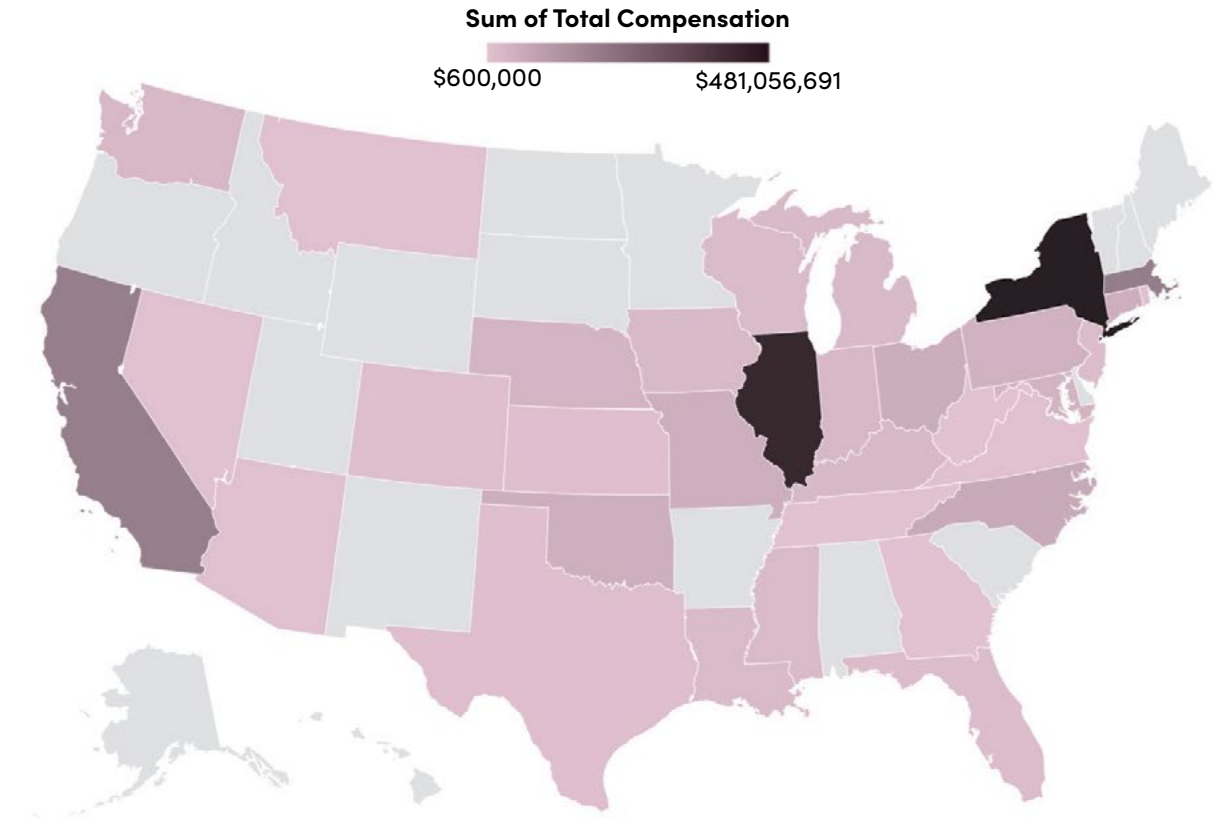
To be fair, large awards for lengthy imprisonments sometimes total above $20 million, and they garner widespread media attention. They are outliers. As noted by Gutman and Sun, over 25% of wrongful conviction actions were dismissed or resulted in no recovery for the claimant over the last 30 years.[28] Eighty-nine outcomes were less than $500,000 in total.[29]

Out of the many hundreds of wrongful conviction actions filed over the last three decades, about 10 resulted in a headline-grabbing jury verdict or settlement exceeding $20 million to a single person. And there's been no apparent increase in jury verdicts over the last decade, as some have claimed.

Indeed, based on our own analysis, both the average and median jury awards from 2015-2019 were lower than those between 2010-2014. And average and mean jury awards between 2010-2019 are somewhat lower than those issued between 2000-2009. We don't believe those calculations for the last two decades are a signal of a continued decline of awards by juries—far from it. We simply have not seen any material increase in total jury awards over the last two decades.

As a result, there is little merit to the effort by claimants who try to leverage settlement negotiations by blackboarding huge demands based on length of imprisonment and supposed verdict trends. More important, it is not an effective method for government entities, risk pools, and

Figure 4 Total Compensation for Wrongful Conviction Settlements and Jury Verdicts.



insurers to assess exposure objectively.

The better practice is to assess holistically whether liability and exposure may be affected by several factors other than length of imprisonment, against the backdrop that an average total recovery is less than $4 million, according to data identified by the Gutman and Sun study:

Strength of Liability and Defenses

Any exposure analysis appropriately starts with the facts surrounding potential arguments about liability and defenses, including the quality of the evidence given the passage of time. Wrongful conviction cases are no different. As noted above, about 25% of cases result in dismissal and no recovery for the wrongful conviction claimant.

Payment Capacity of the Government Unit

While large cities such as New York and Chicago have significant tax bases, about one-half of the more than 12,000 police departments nationwide serve communities with fewer than 100,000 residents.[30] Such jurisdictions with small tax bases may have limited payment capacity. For example, Gage County, Nebraska, has around 22,000 residents and has considered bankruptcy instead of raising taxes on residents to pay for a substantial $28 million wrongful conviction verdict awarded to six claimants.[31] Even if municipal bankruptcy is remote, juries often have an innate sense of their local government unit's financial capacity, which may affect a compensation award.

Assessment of "Official Capacity" Claims

"Official capacity" claims, also known as *Monell* claims, are extremely difficult to prove. Success on this type of claim is the only trial outcome where recovery is directly from a government unit based on the public entity's own liability.

Assessment of "Individual Capacity" Claims

Recovery for "individual capacity" claims must come directly from the individual defendant, who likely would have no way to pay any significant award. Or, recovery for an "individual capacity" claim potentially may come indirectly from an entity that may or may not have an obligation to pay on behalf of the public official or employee, such as a governmental unit, a risk pool, or a private insurer.

Unclear Indemnity Requirements for "Individual Capacity" Claims

While many public entities have a practice and incentive to indemnify their officials and employees for "individual capacity" claims, the government unit may not always want to, or even be legally obligated or allowed to indemnify. *Ayers v. City of Cleveland*, a case pending before the Ohio Supreme Court, addresses whether an Ohio city must indemnify its employees, who declared personal bankruptcy, for a $13.2 million wrongful conviction verdict. That verdict was only for "individual capacity" claims that the city otherwise has no direct obligation to pay to the claimant.[32]

Similarly, the plaintiff in *Schand v. City of Springfield* recently obtained a $27 million judgment in Massachusetts against four police officers for "individual capacity" claims.[33] However, Massachusetts law imposes a $1 million limit of discretionary indemnity that may be afforded to each public employee for an "individual capacity" claim. Thus, the claimant's collection of the $27 million judgment may be limited to what may be recovered directly from the individual officers, and up to $4 million in discretionary indemnity potentially available from the city.[34]

Local government units also increasingly are managing possible indemnity obligations on the front end of an exoneration, conditioning a stipulation to vacate a conviction in a manner to preclude a civil rights suit or even expressly requiring a liability release. Though controversial, that practice has been upheld on appeal. *See, e.g., Taylor v. Cty. of Pima*, 913 F.3d 930, 932 (9th Cir. 2019) (holding that claimant could not bring wrongful conviction action because he accepted a no contest plea with a sentence of time served in exchange for immediate release from prison without a habeas petition), appeal docketed (S. Ct. Case. No. 19-756).[35]

Uncertain Payment Obligations by Government Risk Pools or Private Insurers

While government units may self-insure, many participate in risk pools or purchase private insurance. The application of any particular policy, however, is not automatic and the coverage obligations need to be assessed through the lens of the specific policy language and how courts analyze potential coverage for wrongful conviction actions.

While the "per year" of imprisonment approach to exposure is embraced by claimants, the better and more reasoned approach is to assess potential exposure based on other factors.

4 Wrongful Conviction Trigger: The Majority Rule

Whether an insurance policy is implicated by a civil rights action, and may include a payment obligation, is the single most recurring coverage issue in the wrongful conviction context. While it is a term of art not found in a policy, "trigger" of coverage is the analysis and determination of which policy is activated by a lawsuit.

Across a spectrum of extraordinary allegations in wrongful conviction lawsuits, courts routinely hold that the trigger of coverage is when the claimant's rights were first violated, which usually is the start of the criminal process against the claimant. *See, e.g., Chicago Ins. Co. v. City of Council Bluffs*, 713 F.3d 963, 971 (8th Cir. 2013) (holding that only a policy in effect "when the underlying charges were filed" could be "potentially applicable"); *City of Erie v. Guar. Nat'l Ins. Co.*, 109 F.3d 156, 160 (3d Cir. 1997) (policy trigger is "when the underlying charges are filed"); *Royal Indem. Co. v. Werner*, 979 F.2d 1299, 1300 (8th Cir. 1992) (holding that trigger is "when harm begins to ensue, when injury occurs to the person, that is, in this case, when the relevant law suit is filed"). The concept of "criminal charges" is a shorthand reference to the document that initiates the criminal case, much like a complaint in the civil context. Under this analysis, the tort usually occurs when the indictment or criminal complaint was filed, or when the claimant was arrested shortly before charging.

This majority rule on trigger of coverage is not novel. Indeed, it has been adopted by many courts for decades. The mainstream approach traces its origin to a decision more than 50 years ago by a New Jersey appellate court in *Muller Fuel Oil Co. v. Insurance Company of North America*, 232 A.2d 168 (N.J. Super. Ct. App. Div. 1967). *Muller* held that the "essence" of a malicious prosecution cause of action is the initiation of the proceeding. Because the criminal charges were instituted before the inception of the policy issue at issue, *Muller* held that coverage was not triggered under a policy in effect after the charges were filed.

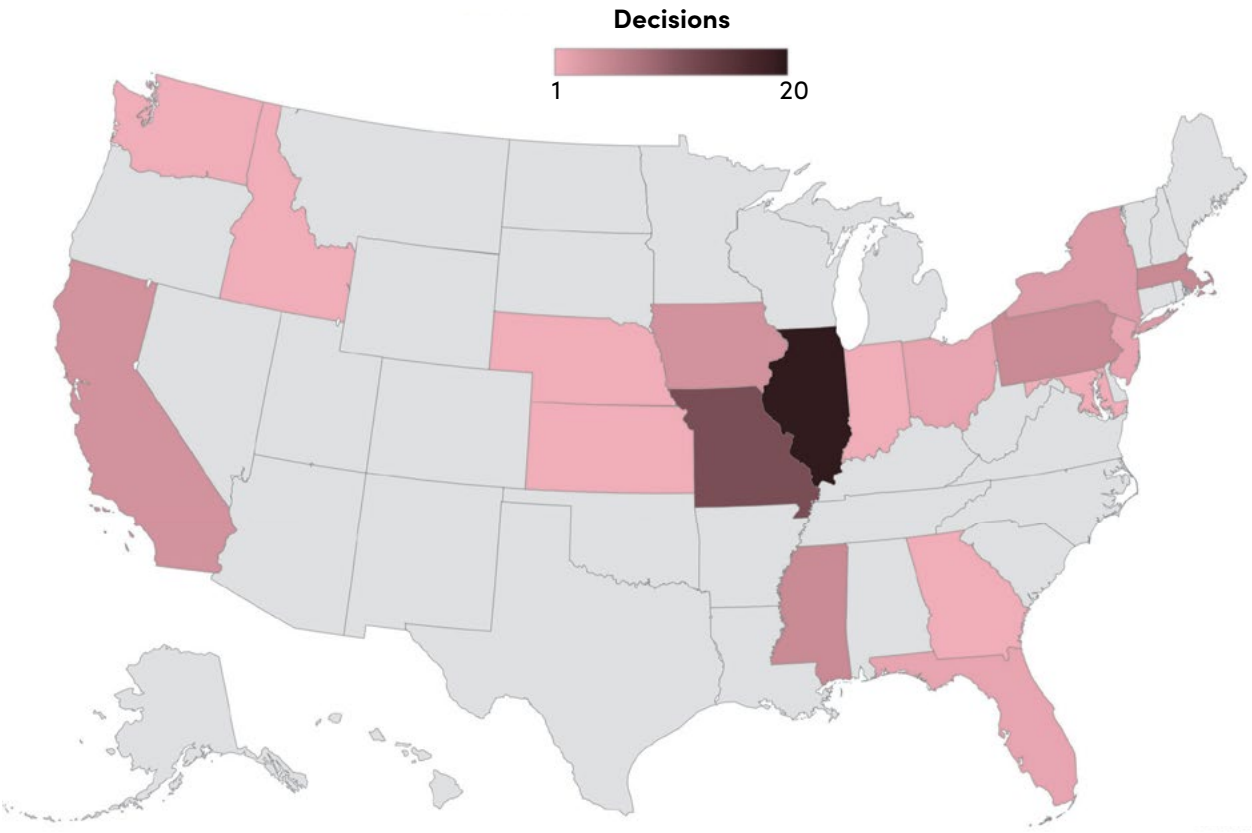
Twenty years later, a California court took the same approach. *See, e.g., Zurich Ins. Co. v. Peterson*, 188 Cal. App. 3d 438, 448 (Cal. Ct. App. 1986). *Peterson* held that "[w]e join the reasoned decisions of the majority in holding that for purposes of an insurance policy which measures coverage by the period within which the 'offense is committed,' the tort of malicious prosecution occurs upon the filing of the complaint." *Id.* The *Peterson* court also rejected the notion that policies in effect after the inception of the criminal action could be triggered, a persistent argument addressed further below. *Id.* at 447 n.3.

A decade after that, the United States Court of Appeals for the Third Circuit, applying Pennsylvania law, held that the trigger for malicious prosecution is "when the underlying charges are filed." *City of Erie v. Guar. Nat'l Ins. Co.*, 109 F.3d 156, 159 (3d Cir. 1997).

By the year 2010, after more than 40 years of litigation over the trigger issue, there were around two dozen decisions addressing trigger in a dozen jurisdictions. While not yet a frequent topic of coverage litigation, a clear trend had developed by courts that had adopted a shared view that the trigger was the inception of the criminal process.

In the last decade beginning in 2010, courts saw a surge in exonerations and resulting wrongful conviction civil rights actions, which unsurprisingly led to even more coverage litigation. Between 2010 and 2019, courts nationwide issued dozens of opinions addressing trigger of coverage in the context of wrongful conviction. By our count, more than 50 decisions addressed the topic. And nearly all of them adopted some variation of the view that the policy in effect at the initiation of the prosecution triggered coverage.

Figure 5 Wrongful Conviction Trigger Decisions by State.



Just last year, the Supreme Court for the State of Illinois issued one of the most definitive analyses of trigger in the wrongful conviction context. *See Sanders v. Illinois Union Ins. Co.*, 2019 IL 124565 (Ill. Nov. 21, 2019). In *Sanders*, the Illinois Supreme Court observed that "coverage depends on whether the insured's offensive conduct was committed during the policy period."[36] *Sanders* further explained:

> That this is an occurrence-based policy also weighs heavily into our decision. A typical occurrence-based policy, containing multiple references to coverage for occurrences or offenses happening during the term of the policy, reflects the intent to insure only for the insured's acts or omissions that happen during a policy period.[37]

Applying these principles, *Sanders* held that the trigger was "the wrongful conduct underlying the malicious prosecution."[38] The Illinois Supreme Court also 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."[39]

That same approach was taken recently in *St. Paul Guardian Insurance Co. v. City of Newport*, -- F. Supp. 3d --, No. 17-115-DLB, 2019 WL 6317873 (E.D. Ky. July 31, 2019). In *City of Newport*, a Kentucky federal court held that wrongful conviction injuries "happened—came to pass, occurred and resulted—when [the insureds] caused his wrongful arrest, prosecution and sentencing" that led to imprisonment. The *City of Newport* court agreed that "the majority of jurisdictions hold that injury stemming from a claim of malicious prosecution happens—thereby triggering policy coverage—when a person is wrongfully charged and incarcerated." *Id.* at *8.

In this way, *Sanders* and *City of Newport* are much like several decades of trial and appellate decisions from around the country that have examined trigger under occurrence-based policies for an array of state and federal causes of action in wrongful conviction actions.[40] These decisions align in holding that the trigger of coverage is when the claimant was first injured—typically, at charging or arrest.

The rationale behind these decisions is an echo of the same principles addressed in *Muller* over 50 years ago. That is, although wrongful conduct may implicate myriad constitutional and common law torts that have injurious effects over time, these causes of action closely approximate the common law tort of malicious prosecution. Most courts have held, again and again over many decades, that trigger for the tort of malicious prosecution is the date the prosecution begins. Most often, that is when the claimant was arrested or charged, exactly as determined by *Sanders* and *City of Newport*.

5 The Minority Approach to Trigger Has Been Abandoned

Despite a clear majority rule, a minority approach has challenged the initial injury trigger. The minority view was first mentioned in Roess v. St. Paul Fire & Marine Ins. Co., 383 F. Supp. 1231 (M.D. Fla. 1974), which held that the termination of the underlying lawsuit was the trigger. Roess then was cited with approval by an Illinois intermediate appellate court in Security Mutual Casualty Co. v. Harbor Insurance Co., 382 N.E.2d 1 (Ill. App. Ct. 1978), which likewise held that the trigger was the termination of the underlying action. For the next 30 years, the minority view lay fallow and found little success in courts.

Then, in the early 2010s, a handful of decisions by the United States Court of Appeals for the Seventh Circuit took their cue from *Roess* and *Security Mutual.* The Seventh Circuit predicted that Illinois courts would hold that the law is that the accrual of the claimant's causes of action against the policyholder, marked by exoneration, must be the trigger of coverage for causes of action challenging a criminal investigation prosecution and conviction. *See Nat'l Cas. Co. v. McFatridge*, 604 F.3d 335 (7th Cir. 2010); *Am. Safety Cas. Ins. Co. v. City of Waukegan*, 678 F.3d 475 (7th Cir. 2012); *Northfield Ins. Co. v. City of Waukegan*, 701 F.3d 1124 (7th Cir. 2012).

The theory espoused by the Seventh Circuit in *McFatridge*, *American Safety*, and *Northfield* was that a claimant is barred from asserting a civil cause of action for malicious prosecution until after the underlying criminal conviction has been set aside.[41] Because the cause of action was not yet "complete" until exoneration, and thus had never accrued in the first place, the Seventh Circuit reasoned that coverage for malicious prosecution could not be triggered at any earlier time.[42] In short, accrual of the cause of action must be the applicable trigger, as forecast by the Seventh Circuit.

As it turned out, the handful of opinions by the Seventh Circuit and other courts representing the minority view have been widely rejected by courts in Illinois and nationwide. They are not good law. While *Sanders* put to bed the prediction that

an accrual trigger exists, the Seventh Circuit's approach already had been rejected by many Illinois intermediate appellate courts. *See, e.g., Cty. of McLean v. States Self-Insurers Risk Retention Grp.*, 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. Ct. App. 2014); *see also City of Council Bluffs*, 677 F.3d at 815; *City of Lee's Summit*, 390 S.W.3d at 220-21; *Billings*, 936 N.E.2d 408 at 413; *City of Erie*, 109 F.3d at 160.

The continued viability of the widely discredited accrual trigger theory remains dubious. An exoneration trigger is not followed in any other jurisdictions because the accrual of an underlying tort has no logical bearing on the trigger analysis. As explained by the United States Court of Appeals for the Third Circuit:

> 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 generally sought to protect the reasonable expectations of the parties to the insurance contract. Because of this fundamental difference in purpose, courts have consistently rejected the idea that they are bound by the statutes of limitation when seeking to determine when a tort occurs for insurance purposes.

City of Erie, 109 F.3d at 161; *see also Gulf Underwriters Ins. Co. v. City of Council Bluffs*, 755 F. Supp. 2d 988, 1007-09 (S.D. Iowa 2010); *Billings*, 936 N.E.2d at 413; *Idaho Ctys.*, 205 P.3d at 1226.

While policyholders and claimants may still attempt to argue for an exoneration trigger, they now have little decisional support for this approach.

Events After Onset of Injury Do Not Trigger Coverage

In emphasizing that the trigger of coverage is the inception of the criminal process against the claimant, courts have confronted many common arguments about post-arrest events that some contend are the, or are an additional, trigger of coverage. Courts have rejected these arguments for a variety of events and theories of liability in wrongful conviction lawsuits.

Exoneration

The minority view that exoneration may trigger coverage has now been rejected, as discussed above. *Sanders v. Illinois Union Ins. Co.*, 2019 IL 124565 (Ill. Nov. 21, 2019).

Ongoing Misconduct

Consistent with the reasoning adopted by most states, courts generally do not consider ongoing misconduct or resulting effects of injuries to be a trigger of coverage. That is, if *Brady* evidence was withheld at several points, or over time, that is not a trigger each time.

For example, the Idaho Supreme Court reasoned that, "[w]hile the conduct and resulting injury alleged in these claims may have continued for many years, it all occurred, for purposes of the policy, prior to the time [the insurer] began insuring [the insured]. . . . Thus, the conduct was a continuation of an occurrence that took place prior to the policy period." *Idaho Ctys.*, 205 P.3d at 1227-28.

Continued Concealment

Courts routinely reject arguments that continuing concealment of past unconstitutional misconduct—such as a forced confession—triggers coverage. *See, e.g.*, *City of Council Bluffs*, 755 F. Supp. 2d at 999-1002 (holding that concealment of past coercion "could not, under the plain terms of the Gulf Primary Policy, constitute a new, separate 'wrongful act'"); *Sarsfield v. Great Am. Ins. Co. of New York*, 335 F. App'x 63, 67–68 (1st Cir. 2009) ("The clause stating that the defendants 'continued to cover up their misconduct' (the 'misconduct' being further described as including the suggestive identification, fabrication of evidence and false testimony at the trial) is not enough to allege a 'wrongful act' occurring during the

coverage period."); *Idaho Ctys.*, 205 P.3d at 1226 ("Allegedly, 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. Thus, under the policy, this claim alleged a single occurrence that took place prior to the policy period").

Retrials

Sometimes the claimant had a guilty verdict vacated, and was then tried a second or even a third time. The initial trial, as well each later trial, is not a trigger of coverage. In *Sanders*, for example, the Illinois Supreme 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." That analysis tracks the approach by many other courts considering the issue even without focus on deemer language found in the policy at issue in *Sanders*.[43]

Continuous Trigger

Courts uniformly have rejected attempts to argue that a continuous or other theory of multiple trigger applies in the context of a wrongful conviction action, even where state law has applied such triggers in situations such as latent or progressive injury cases. As one judge recently held:

> I am comfortable with this conclusion [that a multiple trigger approach is not sound] despite the existence of Indiana cases applying a multiple trigger approach in other contexts. These cases arise in the context of environmental contamination. . . . Unlike the immediate harm inflicted by false and malicious criminal charges, injuries due to exposure to toxic chemicals and similar instances of delayed manifestation of damage merit a different analysis and interpretation of the reasonable expectations of the parties to liability insurance policies.

City of Elkhart, 122 F.Supp. 3d at 806 (citations omitted). *See also Genesis Ins. Co.*, 677 F.3d at 815-16; *Chicago Ins. Co.*, 713 F.3d at 971.

Because the policy in effect at the time of initial injury is the applicable trigger, courts have consistently rejected attempts to argue that events after the onset of injury may also trigger coverage

The Perceived Outliers and Wrongful Conviction Trigger Litigation Going Forward

While there are more than five decades and more than 50 decisions embracing a trigger analysis that focuses on the initial injury to the claimant, policyholders and claimants continue to test the applicable trigger to maximize coverage.

Because many jurisdictions have not addressed wrongful conviction trigger, and even large jurisdictions may have only a few decisions, the approach is perhaps understandable from their perspective and leaves room for creative coverage arguments. Plus, sometimes a wrongful conviction lawsuit presents unique facts that may appear to call for a variation from the majority approach but instead serves to show that courts most often are still looking, analytically, for the initial injury to the claimant, even if that happens after arrest.

A good example is *Selective Insurance Co. v. RLI Insurance Co.*, No 16-4199, 2017 WL 3635197 (6th Cir. Aug. 24, 2017), where the Sixth Circuit confronted a situation in which there was no alleged police misconduct during the early investigation of the wrongful conviction claimant. In other words, at the time of arrest and criminal charging, there was no alleged misconduct.

In *Selective Insurance*, the claimant was identified as the assailant by a rape victim, and there was no alleged constitutional violation associated with the identification, arrest, or indictment. 2017 WL 3635197 at *1. Six months later, however, police officials learned of another man who acknowledged responsibility for the crime. The exculpatory information was documented in a memorandum never disclosed to the claimant who was actually accused of the rape. *Id.* at *2.

In analyzing trigger, the Sixth Circuit in *Selective Insurance* addressed whether the policy in effect at the time of the claimant's arrest and charging was triggered, or whether the policy in effect at the time of the failure to disclose exculpatory evidence to the claimant was triggered. *Id.* at *4. The Sixth Circuit noted that the constitutional

violation and the qualified immunity defense was unavailable only because of the failure to disclose the memorandum generated sixth months after the arrest and the filing of charges. *Id.*

Because the claimant was first injured by the failure to disclose the memorandum, and the police officials only could be liable for that failure, the *Selective Insurance* court held that the policy in effect at the time of the *Brady* violation was triggered. *Id.* at *5. In contrast, the policy in effect at the time of arrest and charging was not triggered because there was no injury to the claimant. *Id.* The result in *Selective Insurance* thus is much like the analytic approach by most courts addressing wrongful conviction trigger.

A recent decision by the Fifth Circuit in *Travelers Indemnity Co. v. Mitchell*, 925 F.3d 236 (5th Cir. 2019), tackled some of the same issues. In some contrast to the majority rule, the Fifth Circuit found there was a duty to defend based on discrete bodily injury experienced by the claimant during imprisonment. *Id.* at 244.

While those unique facts led to an unusual result, several aspects of the Fifth Circuit's decision reaffirm the same principles adopted by the majority approach, including that "ongoing imprisonment" cannot trigger a duty to defend and that the duty to indemnify would require an entirely different analysis because the events causing the imprisonment itself took place long before the policies at issue. *Id.* at 242 n.3 and 244.

And these issues remain actively tested in 2020. The Eighth Circuit has heard oral argument in *Argonaut Great Central Insurance Co. v. Lincoln County, Missouri*, Case No. 18-2930 (8th Cir. 2019), narrowly focused on the exact trigger of coverage at the outset of the underlying criminal action. An appeal is pending before the Sixth Circuit in *St. Paul v. City of Newport*, which will address some of these same issues concerning whether imprisonment may be a trigger of coverage under certain circumstances.

At bottom, the trigger of coverage is the policy in effect at the time of the initial injury, typically the arrest or charging. Events after the initial injury do not operate as a second trigger of coverage. When courts have reached a variation on that trigger analysis, the result is often due to unusual circumstances. A close reading of the decision may confirm the approach in fact is consistent with that taken by the clear majority of courts.

Conclusion

Chief Justice John Roberts observed at the cusp of the last decade that "DNA testing has an unparalleled ability both to exonerate the wrongfully convicted and to identify the guilty. It has the potential to significantly improve both the criminal justice system and police investigative practices."[44]

While hoped-for improvement in the criminal justice system may not yet be fully realized, exonerations of crimes from decades ago and resulting wrongful conviction actions have increased. That in turn has led to a rise in litigation over the trigger of coverage for wrongful conviction actions.

Most courts have reached a consensus that a lawsuit alleging wrongful conviction triggers insurance coverage only when the claimant first experienced injury. At the same time, many stakeholders will continue to fight for exonerations and then bring civil rights actions. That naturally leads to questions about who may foot the bill for successful wrongful conviction claims by exonerees. As a result, claimants and policyholders can be expected to continue to actively test the majority approach to the trigger of coverage for wrongful conviction.

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Endnotes

[1] The National Registry of Exonerations is a joint project by of the University of Michigan Law School, Michigan State University College of Law, and the University of California Irvine Newkirk Center for Science & Society to catalog known exonerations in the United States since 1989. The year 1989 is significant because most commentators mark the exoneration of Gary Dotson as the first one by use of forensic DNA evidence, which ushered the "modern" era of correction of wrongful convictions. *See* Brandon Garrett, *Judging Innocence*, 108 Columb. L. Rev. 101, 105 (2008). Approximately 370 exonerations have been identified prior to 1989 in the United States. *See* Meghan Cousino, *et al., Exonerations in the United States Before 1989*, National Registry of Exonerations white paper (March 14, 2018) (available at https://www.law.umich.edu/special/exoneration/Documents/ExonerationsBefore1989.pdf).

[2] Jeffrey Gutman, *An Empirical Reexamination of State Statutory Compensation for the Wrongly Convicted,* 82 Mo. L. Rev. 369 (2017); Jeffrey Gutman, *et al., Why is Mississippi the Best State in Which to be Exonerated? An Empirical Evaluation of State Statutory and Civil Compensation for the Wrongfully Convicted*, 11 Ne. U.L. Rev. 694, 724-34 (2019).

[3] *See, e.g.*, Brandon Garrett, *Innocence, Harmless Error, and Federal Wrongful Conviction Law*, 2005 Wisc L. Rev. 35-114 (2005); Brandon Garrett, *et al., Federal Habeas Corpus: Executive Detention and Post-Conviction Litigation* (Foundation Press, 2013); Jeffrey Gutman, *An Empirical Reexamination of State Statutory Compensation for the Wrongly Convicted,* 82 Mo. L. Rev. 369 (2017); Jeffrey Gutman, *et al., Why is Mississippi the Best State in Which to be Exonerated? An Empirical Evaluation of State Statutory and Civil Compensation for the Wrongfully Convicted*, 11 Ne. U.L. Rev. 694, 724-34 (2019); John Rappaport, *An Insurance-Based Typology of Police Misconduct*, 2016 U. Chi. Legal F. 369 (2016); John Rappaport, *How Private Insurers Regulate Public Police*, 130 Harv. L. Rev. 1539 (2017); Joanna Schwartz, *How Governments Pay: Lawsuits, Budgets, and Police Reform*, 63 UCLA L. Rev. 1144 (2016); Joanna Schwartz, *Civil Rights Ecosystems*, 114 Mich. L. Rev. (forthcoming 2020).

[4] As of the date of this paper, 35 states and the District of Columbia have developed statutory compensation schemes for wrongfully incarcerated persons under specified circumstances. In addition, criminal justice reform includes how police identify suspects, record interrogations, track jailhouse informants, identify police and prosecutorial misconduct, and use forensic evidence.

[5] *See, e.g.,* https://twitter.com/kimkardashian/ status/1179569643851141120 (tweeting support for Brendan Dassey, who was a subject of the *Making a Murderer* Netflix series).

[6] *See* Jeffrey Gutman, *Why is Mississippi the Best State in Which to be Exonerated? An Empirical Evaluation of State Statutory and Civil Compensation for the Wrongfully Convicted*, 11 Ne. U.L. Rev. 694, 724-34 (2019); Brandon Garrett, *Innocence, Harmless Error and Wrongful Conviction Law*, 2005 Wis. L. Rev. 35, 38 (2005).

[7] 373 U.S. 83 (1963).

[8] Open questions remain about potential disclosure obligations after conviction. A decade ago, the United States Supreme Court held that *Brady* did not apply in the post-conviction setting. *See District Attorney's Office for Third Judicial Dist. v. Osborne*, 557 U.S. 52 (U.S. 2009). *Osborne* held that the Ninth Circuit "went too far" in applying *Brady* to post-conviction proceedings, because after a defendant is convicted at a fair trial, he has fewer procedural due process rights than a defendant who has not been convicted. As a result, the Supreme Court also observed that *Brady* is "the wrong framework" for post-conviction proceedings. That said, *Osborne* acknowledged that convicted defendants likely retain some right post-conviction, but the nature of such right remains inchoate.

[9] 436 U.S. 658, 690 n.55 (1978).

[10] *Id.* at 690-91.

[11] *Id.* at 995-96.

[12] *See Jones v. City of Chicago*, No. 83 C 2430, 1987 WL 19800, at *1 (N.D. Ill. Nov. 10, 1987), *aff'd in part, rev'd in part*, 856 F.2d 985 (7th Cir. 1988).

[13] *See Exonerations in 2018*, National Registry of Exonerations (April 9, 2019) (available at http://www.law.umich.edu/special/exoneration/Documents/Exonerations%20in%202018.pdf).

[14] There generally is a lag between when exonerations take place and when they are identified and reported by the National Registry of Exonerations, which usually issues a report in April for the preceding calendar year. Even then, the number of exonerations identified for a particular year may climb.

[15] National Registry of Exonerations, Interactive Data Display (last visited January 9, 2020) (available at http://www.law.umich.edu/special/exoneration/Pages/Exonerations-in-the-United-States-Map.aspx).

[16] *Id.*

[17] Aurelie Ouss and John Rappaport, *Is Police Behavior Getting Worse? The Importance of Data Selection in Evaluating the Police*, Preliminary Draft (Jan. 31, 2019, updated Dec. 2019) (available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3325382).

[18] *See* Jeffrey Gutman, *et al., Why is Mississippi the Best State in Which to be Exonerated? An Empirical Evaluation of State Statutory and Civil Compensation for the Wrongfully Convicted*, 11 Ne. U.L. Rev. 694, 764-72 (2019).

[19] *Id.* at 764, 766 (Figure 4), and 788 (Column H, Row 55).

[20] *Id.* at 768 (Table 7).

[21] *Id.*

[22] *Id.* at 765 and 767 (Figure 5).

[23] *Id.* at 767 (Figure 5).

[24] *See* Rob Lenihan, *Losses mount from wrongful conviction suits, Business Insurance* (Aug. 7, 2017) (available at https://www.businessinsurance.com/article/00010101/NEWS06/912314967/Losses-mount-from-wrongful-conviction-suits).

[25] *See* Michelle Tsai, *18 Years in Prison? Priceless. How do they figure the payouts for people who were wrongful convicted?*, Slate (May 18, 2007) (available at https://slate.com/news-and-politics/2007/05/how-do-they-figure-out-compensation-for-people-who-were-wrongly-convicted.html).

[26] Gutman, 11 Ne. U.L. Rev. at 778 and Figure 6.

[27] *Id.* at 778.

[28] *Id.* at 772.

[29] *Id.*

[30] *See* Aurelie Ouss and John Rappaport, *Is Police Behavior Getting Worse? The Importance of Data Selection in Evaluating the Police*, at 7 (Preliminary Draft, December 2019) (available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3325382).

[31] *See* Jack Healy, *A Rural County Owes $28 Million for Wrongful Convictions. It Doesn't Want to Pay*, N.Y. Times (Apr. 1, 2019) (available at https://nytimes.com/2019/04/01/us/beatrice-six-nebraska.html).

[32] *See David Ayers v. City of Cleveland*, Case No. 2018-0852 (Ohio S. Ct.).

[33] *See* Karen Brown, J*ury Awards $27 Million To Massachusetts Man Wrongfullly Convicted of Murder*, NPR, Oct. 2, 2019) (available at https://www.npr.org/2019/10/02/765786518/jury-awards-27-million-to-massachusetts-man-wrongfully-convicted-of-murder).

[34] *See* Mass. Gen. Laws ch. 258, § 9. We noted that Schand has appealed to the First Circuit the summary judgment ruling on the "official capacity" claims, and the individuals have appealed the judgment against them.

[35] *See also* Maddy Gates, *Compensation Should Always be Available to the Wrongfully Convicted*, Harv. C.R.-C.L. L. Rev. (Oct. 11, 2019) (available at https://harvardcrcl.org/compensation-should-always-be-available-to-the-wrongfully-convicted/); Stephanie Clifford, *Wrongly Convicted, They Had to Choose: Freedom or Restitution, Prosecutors are adopting strategies to keep from having to pay for mistakes*, N.Y. Times (Sept. 30, 2019) (available at https://www.nytimes.com/2019/09/30/us/wrongful-convictions-civil-lawsuits.html).

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

[37] *Id.* ¶ 28 (citation and quotation omitted).

[38] *Id.* ¶ 26 (citation and quotation omitted).

[39] *Id.* ¶ 29, n.3 (citing *Genesis Ins. Co. v. City of Council Bluffs*, 677 F.3d 806 (8th Cir. 2012)).

[40] *See, e.g.*, Gov't Empls. Ins. *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.") (citation omitted). *See also S. Freedman & Sons, Inc. v. Hartford Fire Ins. 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. Program 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 Guardian Ins. Co. v. City of Newport*,– F. Supp. 3d –, No. 17-115-DLB-CJS, 2019 WL 6317873 (E.D. Ky. July 31, 2019); *S. Md. Agric. Ass'n, Inc. v. Bituminous 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. Mo. Pub. 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. Gen. 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 Cty v. Wash. Ctys. Risk Pool*, No. 12-2-00557-6 (Wash. Super. Ct., Cowlitz County Jan 11, 2013).

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

[42] *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").

[43] *See, e.g,. City of Lee's Summit* 390 S.W.3d at 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).

[44] *Osborne*, 557 U.S. 52, at 55.

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