Trigger of Insurance Coverage for Wrongful Conviction Lawsuits

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Since DNA evidence first was used to exonerate an innocent person in 1989, hundreds of people have established in court that they were wrongfully convicted of crimes they did not commit, and the rate of exonerations has increased dramatically this decade. Responding to the influx of wrongful convictions, the United States Supreme Court ruled on or heard argument in four cases related to exonerations in 2009 alone. Policymakers also have confronted the issue. For example, President Bush signed the Innocence Protection Act in 2004, which addressed DNA testing and contained provisions dealing with the rights of the wrongfully convicted.

Recognizing these legal and public policy developments, wrongful conviction has captivated the news and popular media. “[T]he proliferation of magazine-format television programs and the advent of around the clock news programming on cable television” has created “a seemingly insatiable appetite for material. As a consequence, hardly a week goes by when there is not a television expose of a possible wrongful conviction.” The Duke University lacrosse scandal involving sexual assault allegations that later proved to be unfounded and fabricated in part by the prosecutor is one example of the media’s fascination with actual or potential wrongful conviction, an aspect of the criminal justice system that barely existed 20 years ago.

As part of this emerging area of criminal and civil rights law, courts only recently have begun to confront the liability insurance implications of wrongful conviction lawsuits, particularly the question of which policy or policies may be triggered by such claims.

Much less appreciated is that the increasing number of exonerations have given rise to a wave of civil rights lawsuits seeking compensation from state and local governments and public officials, sometimes resulting in large, multimillion dollar jury verdicts and settlements. For example, the United States Court of Appeals for the First Circuit recently upheld a bench trial award of over $100 million dollars to four men who were wrongfully convicted. As part of this emerging area of criminal and civil rights law, courts only recently have begun to confront the liability insurance implications of wrongful conviction lawsuits, particularly the question of which policy or policies may be triggered by such claims.

Few areas of insurance law have been litigated as widely and thoroughly as trigger of coverage for bodily injury and property damage claims. Wrongful conviction lawsuits, however, generally involve alleged violations of a person’s civil rights, not bodily injury. Consequently, these lawsuits typically involve coverage for “personal and advertising injury” under CGL policies or a more tailored version of such coverage issued as public official or law enforcement liability policies.

Compared to the thousands of court decisions addressing trigger of coverage in the context of bodily injury and property damage claims, judicial guidance as to trigger for personal and advertising injury claims is surprisingly scarce. Approximately a dozen cases have addressed trigger of coverage for wrongful conviction claims, but this number likely will grow given the proliferation of exonerations and resulting wrongful conviction actions.
These courts have recognized that there is no logical or legal basis under the relevant policy language or case law to link wrongful conviction to the types of latent bodily injury claims that gave rise to the judicial formulation of the continuous trigger of coverage concept.

In light of the financial stakes, insureds have attempted to analogize wrongful conviction to latent bodily injury to persuade courts to apply a continuous trigger, potentially implicating every policy in effect while the claimant was imprisoned. However, courts have uniformly—and correctly—rejected the application of a continuous trigger to wrongful conviction lawsuits. These courts have recognized that there is no logical or legal basis under the relevant policy language or case law to link wrongful conviction to the types of latent bodily injury claims that gave rise to the judicial formulation of the continuous trigger of coverage concept.

**Personal and Advertising Injury Coverage**

Given the relative novelty of the underlying facts, legal claims and coverage issues implicated by wrongful conviction lawsuits, it is important to keep in mind that the specific policy provisions relevant to these claims generally differ from those at issue in bodily injury or property damage cases. CGL policies contain three coverage parts. Coverage A relates to bodily injury and property damage; Coverage B relates to personal and advertising injury; and Coverage C relates to medical payments. A typical Coverage B insuring agreement states:

We will pay those sums that the insured becomes legally obligated to pay as damages because of “personal and advertising injury” to which this insurance applies. . . . This insurance applies to “personal and advertising injury” caused by an offense arising out of your business but only if the offense was committed in the “coverage territory” during the policy period.

Although the terminology in the Coverage B provision is analogous to the more familiar Coverage A, Coverage B is typically activated by an “offense”—rather than an “occurrence” and resulting injury or damage—that is first committed during the policy period. In analyzing potential coverage for personal and advertising injury, the defined policy term “occurrence” generally has nothing to do with whether coverage is triggered. As a result, the concepts of “accident,” “expected” and “intended,” which sometimes drive the coverage analysis for bodily injury and property damage, are largely, if not entirely, inapplicable to Coverage B, which does not contain these terms.

Indeed, the conduct giving rise to personal and advertising injury is seldom accidental and may even be intentional (i.e., “expected” and “intended”). Coverage B addresses torts that fall outside of Coverage A insofar as the conduct at issue often is deliberate and results in some form of injury or damage other than bodily injury or property damage. In contrast to Coverage A, which generally provides coverage for defined injury or damage resulting from an accident, Coverage B takes a “named peril” approach to coverage for personal and advertising injury and covers only specified offenses. “Personal and advertising injury” typically is defined to mean:

a. False arrest, detention or imprisonment;

b. Malicious prosecution;

c. The wrongful eviction from, wrongful entry into, or invasion of the right of private occupancy of a room, dwelling or premises that a person occupies committed by or on behalf of its owner, landlord or lessor;

d. Oral or written publication, in any manner, of material that slanders or libels a person or organization or disparages a person’s or organization’s goods, products or services;

e. Oral or written publication, in any manner, of material that violates a person’s right of privacy;

f. The use of another’s advertising idea in your “advertisement”; or

g. Infringing upon another’s copyright, trade dress or slogan in your “advertisement.”

In addition, the definition of personal or advertising injury in public official or law enforcement liability policies often includes the violation of federal or state civil rights laws. Unlike Coverage A, Coverage B is limited to specifically listed offenses or acts of an insured. In other words, an act that somehow violates or infringes on a specified right of another, referred to as an “offense,” is the subject of the coverage afforded under Coverage B. Determining whether an insured’s offense activates Coverage B thus requires reference to the rights being protected and what constitutes alleged infringement of those rights.

**Wrongful Conviction Cases**

Against this coverage framework, it is useful to understand a typical wrongful conviction case and the legal claims involved. The lawsuit often involves a person convicted of murder or a sexual crime for which he has spent years in prison. The criminal
conviction is set aside, usually through a declaration of actual innocence or a vacated criminal conviction. DNA evidence often leads to exoneration, although a conviction may be set aside for other reasons, such as the discovery of official misconduct in fabricating inculpatory or suppressing exculpatory evidence.

In bringing a civil suit for wrongful conviction, claimants commonly assert several causes of action under 42 U.S.C. §1983 for violation of their civil rights, which focus on official acts or omissions “under color of law” during the investigation, arrest and prosecution. For example, most wrongful conviction lawsuits include counts under Section 1983 for false arrest or false imprisonment, or both. Following recent U.S. Supreme Court jurisprudence, these causes of action have a very narrow scope.

In Wallace v. Kato, the Supreme Court held that false arrest and false imprisonment essentially are the same and should be treated as a single tort claim encompassing wrongful detention without legal process. According to Wallace, false imprisonment ends upon the issuance of legal process, such as an indictment, a formal criminal complaint or a court decision instituting prosecution. In other words, the conduct and damages relevant to false imprisonment are limited to the period of detention before criminal process ensues—that is, the time between arrest and the filing of a criminal complaint by the prosecution or an indictment issued by a grand jury.

Once one of those events takes place, “any damages recoverable must be based on a malicious prosecution claim and on the wrongful use of judicial process rather than detention itself.” Malicious prosecution requires the plaintiff to prove that the police officer or prosecutor initiated a criminal prosecution, (2) without probable cause, and (3) with malice; and (4) that the prosecution later terminated in the plaintiffs’ favor. The plaintiff must also prove that, as a result, (5) he suffered “a deprivation of a federally-protected right.” Thus, the focus of the malicious prosecution claim is on the insureds’ conduct and alleged violations of rights between the time of the initiation of criminal process and the conviction.

In addition to general causes of action for false imprisonment and malicious prosecution, wrongful conviction lawsuits often also assert Section 1983 causes of action that focus on specific official misconduct that allegedly led to the conviction. Most commonly, plaintiffs contend that exculpatory evidence was not disclosed by police officials to prosecutors. Plaintiffs also increasingly argue that fabrication of evidence, suggestive identification procedures, and coercive interrogations, among other misconduct, led to a wrongful conviction.

Trigger of Coverage Generally

Because the vast majority of cases addressing whether a CGL policy is triggered under Coverage A, it is worth reviewing briefly how trigger of coverage usually is analyzed by courts under this coverage part. To determine whether an occurrence giving rise to potentially covered bodily injury or property damage took place during a particular policy period, courts have developed four main approaches to trigger of coverage: injury-in-fact, manifestation, exposure, and continuous (sometimes referred to as multiple- or triple-trigger).

- The injury-in-fact theory provides that a policy is triggered when the injury or damage in question initially takes place, irrespective of the time of exposure or discovery of the injury or damage and even if the damages ultimately extend beyond the policy period.
- The application of a manifestation theory of trigger means that a policy is activated when the injury or damage is first discovered.
- The exposure theory of trigger provides that a policy is triggered whenever the claimant or the claimant’s property is “exposed” to an injury-causing agent, even if the injury-causing act precedes the policy period and the injury is first discovery later.
- The application of a continuous theory of trigger means that a policy is activated whenever any of the above take place—that is, when the injury first takes place, when the injury manifests or when the claimant is exposed to a harmful condition.

Courts generally apply exposure and continuous trigger theories only in cases of latent and progressive injury or damage. An exposure theory sometimes is applied in asbestososis and long-latency disease cases where the “lengthy latency period . . . renders efforts to pinpoint the date on which the disease was contracted virtually impossible, medically and legally.”

Similarly, courts have applied the continuous trigger theory where injury occurs over time. For example, in Owens-Illinois, the court justified the application of a continuous trigger to asbestososis claims because asbestos fibers cause progressive harm to the body from the time they are inhaled through the time of diagnosis of asbestosis. The breadth of the continuous trigger theory means that cases applying this trigger frequently implicate coverage under numerous successive policies.
**Trigger of Coverage in Wrongful Conviction Cases**

In contrast to the many cases addressing trigger of coverage under Coverage A, there are very few trigger cases in the context of personal and advertising injury, including wrongful conviction. That said, the handful of courts that have considered trigger in wrongful conviction cases generally are in consensus on two important issues.

*In wrongful conviction cases, the asserted offenses and violations of rights take place no later than the time of conviction. Imprisonment during the policy period is insufficient to trigger coverage.*

First, courts hold that the trigger of coverage is, at the latest, when the exonerated person was convicted. In light of the policy language, the rights at issue and the causes of action asserted in connection with most wrongful conviction claims, the trigger of coverage naturally centers on the criminal process that gave rise to the litigation. As noted above, Coverage B requires a focus on the specific offenses committed and rights allegedly violated by the insured. In other words, unless the offenses that led to the wrongful conviction take place during the effective period of the policy at issue, coverage should not be triggered. In wrongful conviction cases, the asserted offenses and violations of rights take place no later than the time of conviction. Imprisonment during the policy period is insufficient to trigger coverage.

The second uniformly accepted principle is that a continuous trigger does not apply in a wrongful conviction case. This conclusion is the logical corollary to the fact that an offense taking place no later than the conviction triggers coverage for liabilities arising from wrongful conviction. An additional and equally important consideration, however, is that wrongful conviction matters do not implicate the same sorts of concerns that underlie the application of continuous trigger in latent bodily injury and property damage cases. Such cases typically involve either the situation where it is impossible to pinpoint exactly when injury or damage first began or where injury or damage slowly developed over a long period of time. In contrast, in wrongful conviction cases, assessing the offense and the related protected rights is straightforward—the offenses that may have taken place have fully accrued by the time of conviction.

Several court decisions reflect these common sense principles. For example, in *Sarsfield v. Great American Insurance Company of New York*, the United States Court of Appeals for the First Circuit considered coverage for claims that exemplify the typical wrongful conviction lawsuits. Sarsfield, the claimant, was wrongfully convicted and imprisoned, serving ten years in prison for a rape that he did not commit. He asserted claims against the city of Marlborough, Massachusetts based upon federal and state civil rights violations related to a suggestive identification process used by police, the failure to disclose exculpatory evidence and a falsified police report. After Sarsfield entered into a stipulated judgment with the city, he received an assignment of rights under a series of general liability policies containing law enforcement liability coverage parts, which were issued to the city during the time in which Sarsfield was incarcerated, but after the date of his conviction. Sarsfield then brought suit against the city’s insurers. The district court ruled in favor of the insurers and Sarsfield appealed.

Focusing on the alleged violation of rights, the First Circuit held there was no wrongful act or personal injury under the policies in effect during imprisonment because the alleged misconduct—that is, the police officers’ concealment of evidence from the prosecutor, suggestive identification and fabrication of evidence—all took place prior to conviction.

Specifically, the First Circuit affirmed the district court’s finding that the misconduct took place “before the policy period because these claims were presented as the officers’ concealment from the prosecutor, and therefore the wrongful acts ended before Sarsfield was incarcerated and the policy period began.” The *Sarsfield* court further held that an alleged continuing cover up of this misconduct during incarceration did not trigger coverage under the policies.

While the First Circuit’s ruling is important in that it confirms that trigger takes place, at the latest, by the time of conviction and that concealment of earlier misconduct does not itself constitute a trigger of coverage, the *Sarsfield* district court opinion is perhaps more significant. The district court held that even if Sarsfield incurred damages during the policy periods based on the officers’ alleged violation of an assumed continuing duty to disclose their misconduct, such alleged damages did not trigger coverage because the damages were not “distinct from the injuries he incurred when he was convicted and imprisoned.” Thus, the court treated all potential violations of rights from the wrongful conviction stemming from a single event—the initial conviction.

The *Sarsfield* district court also rejected the argument that a continuous trigger should apply. The court reasoned that a continuous trigger theory could be implicated only in latent injury cases where injury
was gradual and unknown for a long period of time. The court noted that a continuous trigger was developed in response to concerns that if manifestation of injury was the trigger of coverage, insurance companies would cease providing coverage for asbestos injuries, largely eliminating coverage for asbestos-related claims. 39

The Sarsfield district court held that “[t]he rationale underlying application of the ‘continuous trigger’ theory in the insurance coverage context makes clear that it is not well-suited to a situation, where, as here, any injury was evident from the outset and first occurred prior to the inception of insurance coverage.” 40 Focusing on claims for malicious prosecution, the court held that the personal injury was evident when the criminal charges were filed, and no insured would expect to obtain coverage for claims arising out of criminal charges prior to the inception of the policy. 41

Other courts have reached similar results. The Iowa Supreme Court in Idaho Counties Risk Management Program Underwriters v. Northland Insurance Companies, likewise treated all violations of rights from the wrongful conviction as results of the conviction, and the court rejected the application of a continuous trigger under similar facts. In Idaho Counties, a municipal risk management program sought coverage for the defense and settlement costs it incurred in connection with claims brought by a person who was wrongfully convicted and imprisoned for nearly 20 years. 42 The underlying wrongful conviction suit asserted causes of action for violations of civil rights, malicious prosecution, false arrest and similar claims, and the risk management program contended that such claims were covered under policies in effect while the claimant was incarcerated. 43

The risk management program argued that, because the underlying civil rights claims constituted “continuing torts,” coverage was triggered during the 15 years that the program had obtained the policies at issue. 44 The court rejected this argument, holding that continuous torts are considered a single occurrence. Reviewing each cause of action in the complaint, the court held that the arrest, prosecution and conviction did not trigger coverage because they predated the policies. 45 Like Sarsfield, the Idaho Counties court held that concealment of evidence and false statements during imprisonment, while the policies were in effect, did not trigger coverage because such acts were a continuation of pre-policy actions during the arrest, prosecution and conviction of the claimant. 46

The United States Court of Appeals for the Third Circuit confronted analogous circumstances in City of Erie v. Guaranty National Insurance Co. There, the insured sought defense and indemnity coverage related to claims for civil rights violations, false arrest and imprisonment, malicious prosecution and other claims. 47 The insured asserted that such claims were covered under policies that insured the city while the claimant was prosecuted and incarcerated, but which came into effect after he was arrested and charged with criminal offenses. 48 Treating all of the underlying civil rights claims as causes of action for malicious prosecution, the City of Erie court held that the trigger of coverage was when the injurious effects of the malicious prosecution manifested themselves—that is, at the time criminal charges were filed. 49

Sarsfield, Idaho Counties and City of Erie reflect the clear consensus of federal and state appellate courts that the trigger of coverage for wrongful conviction lawsuits takes place, at the latest, at the time of conviction and that a continuous trigger should not apply to wrongful convictions.

The Third Circuit further held that a continuous trigger would not apply to wrongful conviction cases. 50 The appellate court reasoned that courts adopted a continuous trigger in latent disease cases because the injuries involved were not discoverable until long after exposure. Fearing that insurance companies would terminate coverage for companies facing liability for asbestos claims, courts adopted the continuous trigger to prevent “insurance companies facing countless future claims [from] terminating coverage during [the diseases’] long latency period.” 51 Otherwise, “the entire burden of compensation” for hundreds of thousands of claims “would have shifted to the manufacturers even though the exposure causing injury occurred during the periods of insurance coverage.” 52 However, the court found this concern absent in wrongful conviction cases because “there is no interval between arrest and injury.” 53 Rather, in a wrongful conviction case, all injury flowing from the violation of the claimant’s rights fully accrues “as soon as charges are filed.” 54

Sarsfield, Idaho Counties and City of Erie reflect the clear consensus of federal and state appellate courts that the trigger of coverage for wrongful conviction lawsuits takes place, at the latest, at the time of conviction and that a continuous trigger should not apply to wrongful convictions.
Recent exonerees increasingly pursue civil claims for wrongful conviction, and these claims generate substantial demands directed at public entities, public officials and their liability insurers. With few cases addressing trigger of coverage in the context of personal and advertising injury, insureds or claimants to whom the insureds’ rights have been assigned have pushed courts to consider whether a continuous trigger applies.

To date, however, the cases to consider trigger of coverage for wrongful conviction have rejected the application of a continuous trigger in this context. These decisions recognize that a continuous trigger is inapplicable because the acts or omissions leading to the circumstances of which the exoneree complains were committed, at the latest, by the time of conviction. Furthermore, these decisions recognize that wrongful conviction claims do not implicate the underlying concerns that sparked the development of the continuous trigger.

**Conclusion**

**Footnotes**

2. According to one study, more than three hundred people were exonerated between 1989 and 2003. “The rate of exonerations has increased sharply over the fifteen year period of this study, from an average of twelve a year from 1989 through 1994, to an average of forty two a year since 2000.” Samuel R. Gross, et al., *Exonerations in the United States 1989 through 2003*, 95 J. CRIM. L. & CRIMINOLOGY 523, 527 (2005).
3. *In re Davis*, __ U.S. __, 130 S. Ct. 1 (2009) (granting writ of habeas corpus filed directly with the Supreme Court—for the first time in over 50 years—and ordering district court to hear testimony and argument concerning evidence of actual innocence not available at criminal trial); District Attorney’s Office v. Osborne, __ U.S. __, 129 S. Ct. 2308 (2009) (holding that there is no constitutional right to DNA testing following guilty verdict); Pottawattamie County v. McGhee, __ U.S. __, 129 S. Ct. 2002 (2009) (granting petition for certiorari regarding whether prosecutors are absolutely immune for procuring false testimony during criminal investigation); Van De Kamp v. Goldstein, __ U.S. __, 129 S. Ct. 855 (2009) (ruling that prosecutors have absolute immunity from supervisory liability concerning failure to disclose potentially exculpatory evidence related to jailhouse informant).
6. See Robert P. Mosteller, *The Duke Lacrosse Case, Innocence, and False Identifications: A Fundamental Failure to “Do Justice,”* 76 FORDHAM L. REV. 1337 (2007). Other examples are prevalent. John Grisham published *The Innocent Man* in 2006, which chronicled a minor league baseball player’s efforts over a decade to establish that he was wrongfully convicted. John Grisham, *The Innocent Man: Murder and Injustice in a Small Town* (2006). Betty Anne Waters, a film to be released in 2010 starring Hillary Swank in the eponymous title role, will tell the real-life story of an unemployed single mother who put herself through college and law school in order to demonstrate that her brother was wrongfully convicted of murder.
7. Limone v. United States, 579 F.3d 79 (1st Cir. 2009).
8. Insurance Services Office (ISO) Policy Form CG 00 01 10 01, Section I.B.
9. ISO Policy Form CG 00 01 10 01, Section V.14.
11. Wallace v. Kato, 549 U.S. 384, 388–90 (2007) (“False arrest and false imprisonment overlap; the former is a species of latter. . . . We shall thus refer to the two torts together as false imprisonment. . . . The sort of unlawful detention remediable by the tort of false imprisonment is detention without legal process”) (emphasis in original).
14. Wallace, 549 U.S. at 390 (citation and quotation omitted).
18. See, e.g., Wilkins v. DeReyes, 528 F.3d 790, 795 (10th Cir. 2008) (liability for fabrication of evidence by coercing false statements from witnesses); Brown v. Miller, 519 F.3d 231, 237 (5th Cir. 2008) (liability for laboratory technician’s misleading and scientifically inaccurate serology report).
19. See, e.g., Wray v. City of New York, 490 F.3d 189 (2d Cir. 2007); Gregory v. City of Louisville, 444 F.3d 725, 746–47 (6th Cir. 2006).
20 See, e.g., Higazy v. Templeton, 505 F.3d 161, 173 (2d Cir. 2007); Cunningham v. City of Wenatchee, 345 F.3d 802, 810 (9th Cir. 2003).
21 See, e.g., StoneWall Insurance Company v. Asbestos Claims Management Corporation, 73 F.3d 1178 (2d Cir. 1995).
22 See, e.g., Eagle-Picher Industries, Inc. v. Liberty Mutual Insurance Company, 682 F.3d 12 (1st Cir. 1982).
26 Owens-Illinois, 650 A.2d at 983–84.
29 For example, in Trizec Properties, Inc. v. Biltmore Construction Company, the United States Court of Appeals for the Eleventh Circuit applied a continuous trigger theory in a property damage case where it “ha[d] no way of conclusively knowing exactly when the damage occurred” since leakage resulting from the faulty roof installation “continued gradually over a period of time.” 767 F.2d 810, 813 (11th Cir. 1985). The Trizec court found that such situation was analogous to asbestosis cases, where the “lengthly latency period ... renders efforts to pinpoint the date on which the disease was contracted virtually impossible, medically and legally.” Trizec, 767 F.2d at 813.
30 Sarsfield, 2009 U.S. App. LEXIS 14304 (1st Cir. 2009).
34 Sarsfield, 2009 U.S. App. LEXIS 14304, at *7, 10–11.
35 Sarsfield, 2009 U.S. App. LEXIS 14304, at *7–8 (emphasis in original). Because it found that coverage was not triggered, the First Circuit did not address additional points raised by the district court, which are discussed below.
36 Sarsfield, 2009 U.S. App. LEXIS 14304, at *11 (“The clause [in the underlying wrongful conviction complaint] stating that the defendants ‘continued to cover up their misconduct’ ... is not enough to allege a ‘wrongful act’ [defined to include personal injury] occurring during the coverage period.”).
37 Sarsfield, 07-11026-RWZ at 8–9 (“Plaintiff fails to identify any injury resulting from the alleged concealment during the policy period that is distinct from the injuries he incurred when he was convicted and imprisoned. Moreover, even if the concealment could be said to cause a distinct injury, as noted above the concealment first occurred prior to the policy period and any resulting injury would predate the policy.”) (citation omitted). See also Coregis, 2006 U.S. Dist. LEXIS 20340, at *35–36 (“the underlying [wrongful conviction] complaint is devoid of any specific allegations of distinct wrongful acts or offenses committed after Crawford’s third conviction for Mitchell’s murder. More importantly, the Crawford Complaint does not allege any specific wrongful acts occurring during the respective policy periods that allegedly caused personal injury distinct from the injuries Crawford allegedly incurred in the 1970s.”).