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Illinois Resolves Dispute on When the Offense of Malicious Prosecution Occurs for Insurance Purposes

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Illinois recently joined the majority of jurisdictions holding that a claim for malicious prosecution for insurance purposes occurs at the commencement of the prosecution. The Illinois Supreme Court's decision in *Sanders v. Ill. Union Ins. Co., et al.*, 2019 IL 124565 (Nov. 21, 2019) resolves the split between the federal and state courts on this issue.

In 1994, Sanders was charged with murder, attempted murder, and armed robbery based on doctored evidence from the City of Chicago Heights Police Department. He was convicted of murder in 1995, and later retried in 2013, which resulted in a mistrial. In 2014, Sanders was retried again and this time acquitted. Sanders had filed a federal civil rights action against Chicago Heights in 2013, and after he was exonerated in 2014, he amended his complaint to add a claim of malicious prosecution. Chicago Heights tendered its defense to its insurer at the time, Illinois Union Insurance Company ("Illinois Union").

From 2011 through 2014, Illinois Union provided primary liability insurance coverage to Chicago Heights (the "Union Policy"). The Union Policy indemnified Chicago Heights for damages including those arising out of "personal injury," which was defined in the Union Policy as including the "offense" of "malicious prosecution." The policy was an occurrence-policy requiring the "occurrence" to happen during the policy period.

Chicago Heights argued that the personal injury offense occurred when all the elements of the malicious prosecution cause of action is complete, that is, when the verdict was set aside and Sanders was exonerated in 2014. Illinois Union, however, argued that the triggering offense was the wrongful conduct in commencing the prosecution, which occurred in 1994 when Sanders was arrested based on doctored evidence.

Previously, in a trio of cases, the Seventh Circuit had predicted that the Illinois Supreme Court would rule that exoneration was the trigger of insurance coverage for malicious prosecution. See *Northfield Ins. Co. v. City of Waukegan*, 701 F.3d 1124, 1130-31 (7th Cir. 2012); *Am. Safety Cas. Ins. Co. v. City of Waukegan*, 678 F.3d 475, 478 (7th Cir. 2012); *Nat'l Cas. Co. v. McFatridge*, 604 F.3d 335, 338 (7th Cir. 2010). The Seventh Circuit in *American Safety* reasoned that the tort of malicious prosecution could not occur until all elements of the tort are satisfied. As the tort requires exoneration to occur, insurance coverage was not triggered until the happening of that event. *Am. Safety*, 678 F.3d at 479-80.

The Illinois Appellate Court, First District, in *First Mercury Ins. co. v. Cioloino*, 2018 IL App (1st) 171532, reached a different result than the Seventh Circuit. In that case, the Court concluded that the most "straightforward reading of the term ["offense"] indicates that coverage depends upon whether the insured's offensive conduct was committed during the policy period." *Id.* at ¶ 30. The Appellate Court observed that there was no language in the policy indicating an "intent to limit the meaning of 'offense' by requiring a completion of tort law elements," and held that it is the wrongful conduct underlying the malicious prosecution claim that triggers coverage. *Id.* at ¶¶ 30-31.

The *Sanders* Court resolved the conflict, siding with the prior holding of the Illinois Appellate Court and rejecting the reasoning previously advanced by the Seventh Circuit. The majority in the *Sanders* observed that the list of offenses contained in the policy refer exclusively to the legal causes of action by their proper legal names, rather than the underlying wrongful acts. Thus, the Illinois Supreme Court concluded that the word “offense” in the insurance policy refers to the wrongful conduct underlying the malicious prosecution. In doing so, the Court pointed out that the meaning of the word “offense” and the contractual requirement that the offense must both happen and take place during the policy period. “A malicious prosecution neither happens nor takes place upon exoneration.” The Supreme Court explained that the fact that the policy at issue was an occurrence-based policy, also weighed heavily into its decision. The Court observed that a typical occurrence-based policy which contains 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. “If we were to deem exoneration the trigger of coverage of a malicious prosecution insurance claim, liability could be shifted to a policy in which none of the acts or omissions giving rise to the claim occurred. That would violate the intent of the parties....”.

The Illinois Supreme Court’s ruling in *Sanders* means that Illinois now joins approximately 16 other states holding that the trigger of coverage for a malicious prosecution claim occurs when the claimant was first injured.