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Richard M. Burgland
Pretzel & Stouffer, Chartered, Chicago

A "Malicious Prosecution" Problem

The Illinois Supreme Court seldom decides a true insurance coverage dispute. This is likely because each coverage case involves a unique set of facts, circumstances, and policy language, thereby frustrating the general importance of the question presented for review. However, the supreme court's decision to grant leave to appeal in *Sanders v. Illinois Union Insurance Co.*, 2019 IL 124565, seems born out of the existence of an irreconcilable conflict between two divisions of the Illinois Appellate Court First District.

This article will examine *Sanders* and discuss the implications of its holding that the event triggering insurance coverage for the offense of "malicious prosecution" was the initiation of the alleged wrongful prosecution, not exoneration of the claimant.

The Who, What, When and Where

The coverage issue in *Sanders* arose out of a December 1993 robbery and shooting in Chicago Heights in which a group of men attacked two individuals sitting in a car. The men robbed and shot both victims, fatally injuring one. The City of Chicago Heights Police arrested Rodell Sanders in connection with the crime even though Sanders did not match the survivor's physical descriptions of the assailants and had an alibi confirmed by witnesses. *Sanders*, 2019 IL 124565, ¶ 3.

To secure Sanders' conviction, officers altered his photograph to make him look like one of the assailants described by the surviving victim. *Id.* ¶ 4. The officers then showed the altered image to the survivor in a photographic lineup so that the victim would identify Sanders as one of the offenders. *Id.* Sanders claimed that the manipulation was brought on by a grudge and to shield the real murderer, who was assisting the prosecution in other cases. *Id*.

Sanders was convicted in January 1995 and sentenced to 80 years in prison. *Id.* In January 2011, the circuit court allowed his postconviction petition, overturned his conviction and vacated the 80-year sentence. *Id.* ¶ 5. The appellate court affirmed the decision in May 2012. *Id*.

In August 2013, the prosecution retried Sanders on a theory of accountability. *Id.* ¶ 6. The second trial ended in a mistrial. In July 2014, the prosecution retried Sanders a third time, and the jury acquitted Sanders on all charges. *Id.* After he was acquitted, Sanders amended his pending federal civil rights action against Chicago Heights to add claims of malicious prosecution. *Id*.

What About Insurance Coverage?

Sometime in 2012, Chicago Heights notified its primary insurer Illinois Union Insurance Company (Illinois Union) and its excess insurer Starr Indemnity & Liability Company (Starr) of a claim under policies issued by those carriers for the effective policy periods of November 1, 2011 through November 1, 2014. *Id.* ¶ 5.

The policies provided coverage, in pertinent part, for "a Claim first arising out of an Occurrence happening during the Policy Period in the Coverage Territory for Bodily Injury, Personal Injury, Advertising Injury, or Property Damage taking place during the Policy Period." *Id.* ¶ 8. "With respect to Personal Injury," the policies defined occurrence to mean "only those offenses specified in the Personal Injury Definition." *Id.*

In addition, the policies defined the term "Personal injury" as:

> [O]ne or more of the following offenses *** [f]alse arrest, false imprisonment, wrongful detention or malicious prosecution *** wrongful eviction from, wrongful entry into, or invasion of the right of private occupancy of a room, dwelling or premises that a person occupies by or on behalf of the owner, landlord or lessor.

Id. ¶ 9.

The policy further provided that "[a]ll damages arising out of substantially the same Personal Injury regardless of frequency, repetition, the number or kind of offenses, or number of claimants, will be considered as arising out of one Occurrence." *Id.*

Illinois Union and Starr denied Chicago Heights' tender on the basis that no covered events, namely, "malicious prosecution," occurred during their respective policy periods. *Id.* ¶ 7. Chicago Heights subsequently filed a complaint for declaratory judgment and other relief against Illinois Union and Starr, seeking a declaration that the insurers owed coverage to Chicago Heights for the alleged "malicious prosecution" under the policies in effect from 2012 to 2014. *Id.* ¶ 11. Ultimately, Chicago Heights agreed to a consent judgment in the amount of $15 million—$2 million of which would be paid by Chicago Heights and $3 million by its 1994 insurer. Chicago Heights assigned its rights under the Illinois Union and Starr policies to Sanders in exchange for a covenant not to seek the remaining $10 million of the judgment from the city. *Id.* ¶ 12.

The insurers moved to dismiss the declaratory complaint based on a theory that Sanders' injury for malicious prosecution occurred in 1994 and, thus, predated the effective dates of their policies. *Id.* ¶ 15. The circuit court agreed and dismissed the complaint. Sanders and Chicago Heights appealed. *Id.* ¶ 16.

Welcome to Splitsville

On appeal, the appellate court reversed in a split decision. *Id.* ¶ 18. Doing so, the majority found that coverage under the Illinois Union and Starr policies was not triggered until 2014, when the tort of malicious prosecution was completed upon Sanders' acquittal. *See id.*

The majority reasoned that an interpretation that the policies' reference to covered offenses by their proper legal name, *i.e.*, false arrest, wrongful eviction, and malicious prosecution, made clear that coverage was triggered by the occurrence of a completed cause of action and not merely by the underlying wrongful conduct. *Id.* ¶ 18. The majority concluded: "We believe such an interpretation is consistent with what the average person would understand to be covered under the Illinois Union policies." *Id.* ¶ 20.

Reaching this conclusion, the majority recognized a line of cases holding that the triggering event for the covered offense of malicious prosecution is the initiation of the alleged malicious prosecution, not the occurrence of a completed cause of action. *Id.* ¶ 22 (citing *First Mercury Ins. Co. v. Ciolino*, 2018 IL App (1st) 171532, *St. Paul Fire & Marine Ins. Co. v. City of Waukegan*, 2017 IL App (2d) 160381, *County of McLean v. States Self-Insurers Risk Retention Group, Inc.*, 2015 IL App (4th) 140628, *Indian Harbor Ins. Co. v. City of Waukegan*, 2015 IL App (2d) 140293, and *St. Paul Fire & Marine Ins. Co. v. City of Zion*, 2014 IL App (2d) 131312). However, the majority summarily distinguished *City of Zion*, *City of Waukegan*, and *Indian Harbor*, on the basis that the policies in those cases provided that the claimant's injury or the insured's wrongful act must take place during the policy period. *Sanders*, 2019 IL App (1st) 180158, ¶ 22. The court further noted that "the Illinois Union policies require the 'offense' of malicious prosecution to happen in the policy period, not the injury resulting from or the wrongful act giving rise to malicious prosecution." *Id.* ¶ 23.

The majority also rejected the insurer's reliance on *County of McLean* and *First Mercury* despite recognizing that the policies contained similar language. *Id*. According to the majority, *County of McLean* conflated the definitions of "occurrence" and "personal injury," resulting in an improper focus on the timing of the injury rather than when the "offense" of malicious prosecution occurred. *Id.* ¶ 24. With respect to *First Mercury*, the majority observed that the requirement that an offense be "committed" suggested an intent for the offense to include the initiation of wrongful prosecution. By contrast, the Illinois Union policies covered claims arising out of an offense "happening" during the policy period, which reflected an intent for the "offense" to be completed during the policy period. *Id.* ¶¶ 27-28.

Reading the policy's terms in context, the majority concluded that coverage for malicious prosecution "happening" within the policy period required all of the elements of the tort being met. As such, coverage was triggered under the Chicago Heights policies in 2014 upon Sanders' exoneration. *Id.* ¶ 32.

Justice Mary Anne Mason authored a lengthy dissent wherein she pointed out that the policies' insuring agreement provided coverage for claims arising out of an occurrence ("offense") "happening" during the policy period for "Personal Injury" "taking place" during the policy period. *Id.* ¶ 38 (Mason, J., dissenting). Substituting malicious prosecution in the coverage grant, the dissent found that the language was unambiguous and meant that "the occurrence and the personal injury/malicious prosecution giving rise to the claim must happen and take place during the policy period." *Id*.

Justice Mason noted that the weight of authority supported a reading of the policy that the commencement of wrongful prosecution triggered coverage for malicious prosecution. *Id.* ¶¶ 40-41. She also found unavailing the majority's reliance on "minor differences" in policy language with Illinois cases, *i.e.*, *First Mercury*. *Id.* ¶ 44. She further noted that the majority's opinion would create a significant hurdle for insureds faced with malicious prosecution claims to obtain insurance coverage after the commencement of an action. *Id.* ¶ 48.

In response to Sanders' alternative argument that the 2013 and 2014 retrials were also triggers of coverage, Justice Mason concluded that the subsequent retrials were not new injuries but merely continuations of the same wrongful prosecution. *Id.* ¶ 49 (citing *City of Waukegan*, 2017 IL App (2d) 160381)). The policy's definition of the term "occurrence," Justice Mason found, supported her conclusion: "[a]ll damages arising out of substantially the same offense [(read: malicious prosecution)] regardless of frequency, repetition, the number or kind of offenses***will be considered as arising out of one Occurrence." *Id.* Because Sanders' retrial arose out of the same false charges as his initial prosecution, Justice Mason found that his retrials were not independent occurrences triggering policy coverage. *Id.*

The Final Decision

On appeal from the appellate court, the Illinois Supreme Court held that the question of coverage for malicious prosecution under the relevant policy language depended on whether the "insured's offensive conduct was committed during the policy period." *Sanders*, 2019 IL 124565, ¶ 25 (quoting *First Mercury*, 2018 IL App (1st) 171532, ¶ 30). The court considered the meaning of the word "offense" along with the policy requirement that it must both "happen" and "take place" during the policy period to find that a malicious prosecution does not happen or take place upon exoneration but, rather, upon initiation of a groundless suit. *Id.* ¶ 27. In addition, the court observed that the "offense" of malicious prosecution, in the context of an insurance policy, has been distinguished from the actual tort of malicious prosecution such that the former occurs upon the initiation of the prosecution. *Id.*

The nature of the insurance policies issued to Chicago Heights also factored into the court's analysis. In an occurrence-based policy, such as the Illinois Union policies, coverage is typically provided for acts or omissions happening during a policy period. *Id.* ¶ 28. As such, shifting coverage to a period in which none of the acts or omissions giving rise to the claim occurred would frustrate the intent of the parties. *Id.*

The court additionally held that Sanders' retrials in 2013 and 2014 did not amount to separate coverage triggers. *Id.* ¶ 31. Like the dissent in the appellate court, the supreme court found that the policy language precluded this theory. The policy provided that all damages arising out of the same "personal injury" would be considered as arising out of one "occurrence," regardless of frequency, repetition, the number or kind of offenses. *Id.* The court considered the retrials to be the same "personal injury" despite another theory being added during the retrials. As such, the initiation of a suit in 1994 based on evidence manufactured by the Chicago Heights police was the basis of the alleged "personal injury," namely, "malicious prosecution." *Id.* ¶¶ 31-32.

Conclusion

With the common use of standard insurance policy coverage forms, the supreme court's decision in *Sanders* likely has import beyond settling a conflict between two divisions of the First District Appellate Court. Specifically, insureds, agents and brokers should take note of *Sanders* when deciding under which policy to tender a claim for malicious prosecution. *Sanders* puts insureds, agents and brokers on notice that the responding policy may not be that which was in effect when the claimant was exonerated, but instead, the policy that was in effect when the alleged wrongful prosecution began.

While the scope of insurance coverage almost always centers on the precise policy language, *Sanders* reminds practitioners and insurance industry professionals faced with a claim of malicious prosecution to look at the policy in effect when the prosecution first ensued—as that may be the source of policy coverage.

About the Author

Richard M. Burgland is a Partner with *Pretzel & Stouffer, Chartered* in Chicago. Mr. Burgland focuses his practice on insurance coverage disputes and appellate litigation.

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