BINDING AUTHORITY
Insurance Coverage Decisions: Issued Today - Impact Tomorrow
White and Williams LLP
Randy J. Maniloff
maniloffr@whiteandwilliams.com

November 6, 2010

Claim Chowder: Massachusetts High Court Shoots Down Continuous Trigger For Malicious Prosecution Claims

Significant Win for Insurers in DNA Exoneration Cases

I closely follow coverage cases for DNA exoneration claims. I've been involved in a few of these claims and also happen to find them compelling. At issue is how much insurance money is available to compensate someone who spent years in prison for a crime that it was later determined they did not commit? The choice may range from not much to multiple millions. Now that's compelling. Much more so than whether coverage is owed for leaking windows.

Thankfully, actually knowing something about DNA is not a prerequisite to involvement in DNA exoneration coverage cases. While I'm pleased to report that I can spell DNA, my knowledge of it is limited after that.

> Don't know much about history
>
> Don't know much biology
>
> Don't know much about a science book
>
> Don't know much about the French I took
>
> --Sam Cooke, "(What a) Wonderful World" (emphasis added).

It goes without saying that DNA profiling, or genetic fingerprinting, has dramatically changed the face of criminal investigation today (not to mention what it did to blow the lid off a certain White House intern investigation a few years back). DNA profiling was developed in 1984 and first used to establish a murder suspect's guilt (and another's innocence) in 1987-88 (Wikipedia – how else would I know that). In addition to its use by law enforcement, DNA profiling has also been used by individuals to prove that they were wrongfully convicted of a crime that took place at a time before such technique was available.

According to The Innocence Project, an organization that assists prisoners with proving their innocence through DNA testing, there have been 261 post-conviction DNA exonerations in the United States (34 states and D.C.). The average length of time served by exonerees is thirteen years and seventeen of the exonerees served time on death row. Innocence Project Case Profiles, http://www.innocenceproject.org/know/.

It is not uncommon for exonerees to file suit against various individuals and entities, such as prosecutors, police officers, police departments and municipalities, whom they blame for their wrongful conviction and imprisonment. These are very complex liability cases, not to mention possibly raising issues of governmental immunity and statutory damage caps.

But putting all of this inordinate complexity aside, there are a few things about these cases that are simple. First, upon being sued, the defendants will likely seek coverage under various insurance policies, such as Commercial General Liability, Law Enforcement Liability and Public Officials Liability. Second, and needless to say, given that the underlying plaintiff may have spent many years in prison, for a crime that has now been conclusively determined he or she did not commit, the potential damages could be (and the settlement demand will be) significant. Third, the damages or settlement demand are likely to far exceed the limits of liability available under a single policy year. As a result, it will not take long before an argument is presented by an insured, or plaintiff, that the available limits are not tied to a single year. Rather, expect an argument that a continuous trigger applies (*i.e.*, all policies on the risk from the time that the plaintiff was wrongfully arrested until the date of exoneration, or some time frame along those lines, are obligated to provide coverage).

Simply put, whether a court adopts a continuous trigger is likely the difference between a plaintiff's ability to recover significant versus minimal compensation from some defendants for having years of their lives taken from them. This point was recently made very clear by a Massachusetts federal judge, after declining to adopt a continuous trigger in a DNA exoneration case, involving a man who spent close to ten years in prison for a rape that he did not commit: "I am sympathetic to plaintiff's position and recognize that this decision may preclude him from ever being fully compensated for the losses he has suffered." *Sarsfield v. City of Malborough*, No. 07-11026-RWZ, 2007 U.S. Dist. Lexis 5445 (D. Mass. June 3, 2008), *aff'd,* 2009 U.S. App. Lexis 14304 (1st Cir. July 1, 2009).

On Thursday the Supreme Judicial Court of Massachusetts issued a decision addressing trigger of coverage for malicious prosecution. On one hand, the case has nothing whatsoever to do with DNA exoneration. On the other hand, the case has everything to do with DNA exoneration.

The court's decision – rejecting a continuous trigger -- is consistent with the majority of courts around the country that have addressed trigger of coverage for malicious

prosecution. But because the decision is one of the first supreme courts to address this unique trigger issue, it is a significant addition to this body of case law.

In *Billings v. Commerce Insurance Company*, Massachusetts's highest court addressed trigger of coverage for a malicious prosecution suit that grew out of an original suit filed by the insured, Billings, and others, involving zoning and the permissibility of construction by others. The particulars are not important to address the coverage issue. What matters is that the original suit was filed by Billings in 1998 – before he was insured under a policy issued by Commerce Insurance Company. In 2000, while Billings was insured by Commerce, the 1998 action was dismissed.

Thereafter, the defendants in the original action filed a malicious prosecution suit against the plaintiffs in the original action, including Billings. Commerce denied coverage to Billings, for the malicious prosecution suit, on the basis that there was no allegation in the complaint of an offense committed during the policy period. Putting aside the procedural details of how the case reached Massachusetts's highest court (although interesting), the court upheld Commerce's determination that no coverage was owed.

The *Billings* Court held:

"The time of the 'occurrence' under an indemnity policy is not the time the wrongful act was committed, but the time when the complaining party was actually damaged. A plaintiff suffers actual damages from a malicious prosecution on the filing of the underlying complaint, which at a minimum triggers the need to invest the time, money, and effort to prepare a defense. While the termination of the underlying action is a required element and a necessary condition precedent before the malicious prosecution claim accrues for purposes of the statute of limitations, it is not an event that causes harm to the plaintiff and therefore not an 'occurrence' within the meaning of the policy."

Billings at 3 (citations and internal quotes omitted).

Therefore, Commerce did not owe coverage because it was not on the risk in 1998, when the underlying – malicious -- complaint was filed, and, hence, damage took place.

This timeline resembles the one that typically arises in DNA exoneration cases and that set up the argument whether a continuous trigger applies. In a DNA exoneration case, the malicious prosecution took place years ago – before the defendant's current carriers were even remotely on the risk. But because the current carriers likely have higher limits than a policy from long ago, or because the long-ago carrier is no longer around, the argument is made that the policy on the risk at the time that the original suit was terminated (*i.e.*, later in time, when the person was exonerated) is triggered. This argument has been almost universally rejected, in favor of the rule that the policy on the risk at the time of the wrongful arrest is the only one triggered. Thus, DNA exoneration cases typically trigger only a single policy year of coverage – and likely a low limits year at that.

But *Billings* also addressed the real issue in DNA exoneration-malicious prosecution cases -- whether a continuous trigger applies, *i.e.*, whether all policies on the risk from the time that the plaintiff was wrongfully arrested until the date of exoneration, or some

time frame along those lines, are obligated to provide coverage. Just as in asbestos and hazardous waste, the adoption of a continuous trigger would result in gobs more money available to satisfy DNA claims than if a single-point trigger applied.

Like almost all other courts, the *Billing* Court rejected the application of a continuous trigger -- on the basis that the factual predicate of latent injury asbestos claims differs from a malicious prosecution claim:

We also reject Billings's suggestion that malicious prosecution be treated as a continuing tort for the duration of the underlying litigation, and that an 'occurrence' under the policy continues from the date the underlying malicious complaint was filed until the termination of that underlying litigation. A malicious prosecution is not a tort where it is difficult to ascertain when the injurious effects of the tortious conduct first become manifest; any reasonable person recognizes that the injury occurs on the filing. See *Cole v. Pulley*, 18 Mass.App.Ct. 950, 951 (1984) ('Unlike the asbestos-caused latent injuries ... the injury to the person maliciously prosecuted is apparent the day he is served with process'). It is clearer, simpler, and fairer to define the time of the 'occurrence' as the time the injurious effects 'first became apparent,' i.e., the date of filing. *Erie v. Guaranty Nat'l Ins. Co., supra* at 162.

Id.

A copy of the Supreme Judicial Court of Massachusetts's November 4 decision in *Billings v. Commerce Insurance Company* can be accessed here:

http://weblinks.westlaw.com/result/default.aspx?action=Search&cnt=DOC&db=MA%2DORSLIP&eq=search&fmqv=c&fn=%5Ftop&method=TNC&n=2&origin=Search&query=TO%28ALLSCT+ALLSCTRS+ALLSCTOJ%29&rlt=CLID%5FQRYRLT782141714146 11&rltdb=CLID%5FDB88701614146 11&rlti=1&rp=%2Fsearch%2Fdefault%2Ewl&rs=MAOR1%2E0&service=Search&sp=MassOF%2D1001&srch=TRUE&ss=CNT&sskey=CLID%5FSSSA508861614146 11&sv=Split&vr=1%2E0

Please let me know if you have any questions.

Randy
Randy J. Maniloff
White and Williams LLP
1800 One Liberty Place | Philadelphia, PA 19103-7395
Direct Dial: 215.864.6311 | Direct Fax: 215.789.7608
maniloffr@whiteandwilliams.com