



WRONGFUL CONVICTIONS

WHAT GOVERNMENTAL
RISK POOLS, AND THE
PUBLIC ENTITIES THEY
INSURE, NEED TO KNOW

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For as long as criminal laws have been on the books, police, prosecutors, defense attorneys and judges have made errors, resulting in wrongful convictions. Sometimes these errors result from good faith mistakes; other times from conscious wrongdoing. Generally-accepted statistics about the number of wrongful convictions are difficult to obtain, though the statistics that are available paint a sobering picture.

One study from 2005 identified 340 exonerations between 1989 and 2003,¹ and the pace may be accelerating. Advances in forensic science have changed the way that many crimes are investigated and prosecuted. DNA and other scientific advances in evidence gathering are providing an increased level of certainty to decisions regarding arrest and prosecution. The federal government and many state governments are passing new laws to ensure the proper access to, and use of, such scientific advances in order to minimize the risk of arresting and convicting the wrong person.² Advocates of such laws expect them to lead to a decrease in mistakes and misconduct in the criminal justice system.³

These same developments have led defense and public interest attorneys to take a second look at an increasing number of older convictions. Attorneys are reexamining physical evidence with scientific tools that were not available or not used properly at the time of conviction. In a growing number of cases, convictions are being overturned, often based on strong scientific evidence of actual innocence.

Exoneration of innocent men and women is surely a development that our society should welcome and encourage. Nevertheless exoneration also presents a significant legal and financial challenge for public entities and the governmental risk pools that insure them. More often than not,



exoneration is followed by a civil suit seeking damages. The cost to defend these suits can run to the millions. Settlements and judgments can reach tens of millions.

This Genesis *Insights* article will provide an overview of wrongful convictions and civil wrongful conviction litigation. **First**, we introduce some of the key organizations leading the charge in these areas and provide some additional statistics on exonerations. **Second**, we provide an overview of compensation statutes on the books in many states, as well as private legislation. **Third**, we summarize both the types of civil claims typically brought following exoneration and the defendants and their defenses in such claims, and we give examples of judgments and settlements. **Fourth**, we discuss the three approaches to the trigger date coverage issue that arises in most wrongful conviction claims. **Finally**, we conclude with some thoughts for governmental risk pools and public entities to consider in managing this significant exposure.

The Key Players Pursuing Wrongful Conviction Litigation and Some Facts About Exonerations and Exonerees

A few years before coming to national prominence in the O.J. Simpson trial, Barry Scheck and Peter Neufeld, two defense attorneys and law professors in New York, founded the Innocence Project. The mission of the Innocence Project is to assist prisoners in proving their innocence through DNA testing. According to its website, the Innocence Project "only accepts cases on post-conviction appeal in which DNA testing can prove innocence."⁴

As noted in the introduction to this article, there is a dearth of accurate statistics on wrongful convictions. DNA exonerations, however, are accurately documented. According to the Innocence Project, there have been 289 DNA-based exonerations in 35 states and the District of Columbia since the first such exoneration in 1989.⁵ Of these 289 exonerations, 222 have occurred since 2000.⁶ The states with the highest number of DNA exonerations are:

- > Texas (44)
- > Illinois (41)
- > New York (27)
- > Virginia (14)
- > Florida (13)
- > Louisiana (12)
- > Pennsylvania (11)
- > Ohio (10)
- > Oklahoma (10)
- > California (9)
- > Massachusetts (9)
- > North Carolina (9)
- > Missouri (7)
- > Nebraska (6)
- > West Virginia (6)
- > Wisconsin (6)⁷

The average age of the 289 DNA exonerees at the time of conviction was 27.⁸ The average number of years served in prison before exoneration was 13.5.⁹ Exonerees are disproportionately African-American, comprising over 60% of the 289 DNA exonerees since 1989.¹⁰

While the Innocence Project has focused on situations where DNA evidence could be used to overturn a conviction, improper use of scientific evidence was not necessarily the primary cause of the conviction in all those situations. The Innocence Project has identified what it believes to be the seven most common causes of a wrongful conviction. They are: eyewitness misidentification, unvalidated or improper forensic science, false confessions or admissions, government misconduct, informants or snitches and bad lawyering.¹¹ Based on its own research, the Innocence Project asserts that of the first 225 DNA exonerations, 173 involved eyewitness misidentification, 116 unvalidated or improper forensic science, 51 false confessions and 36 informants or snitches.¹²

Since the founding of the Innocence Project, similar organizations have arisen in 46 states. These include local innocence projects and law school legal clinics. These organizations coordinate through the Innocence Network, which describes itself as "an affiliation of organizations dedicated to providing pro bono legal and investigative services to individuals seeking to prove innocence of crimes for which they have been convicted and working to redress the causes of wrongful convictions."¹³ Each of these organizations differs in the types of cases it will handle and the jurisdictions in which it will handle them. Unlike the original Innocence Project, many do not limit themselves to handling cases involving DNA evidence. The most recent annual report published by the Innocence Network identifies 21 exonerations obtained by its member organizations in 2011.¹⁴

Finally, these organizations are increasingly using the press to tell the story of the exonerees. Newspapers across the country have long reported on wrongful convictions and exonerations. In recent years, stories on wrongful convictions have run in

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magazines as diverse as *Sports Illustrated*,¹⁵ *The New Yorker*,¹⁶ *Reason Magazine*¹⁷ and *Harper's*.¹⁸ Television is also covering wrongful convictions. On March 25, 2012, the news program 60 Minutes ran a story on Michael Morton, who spent 25 years in prison for murdering his wife before DNA evidence exonerated him.¹⁹ On the same date, CNN ran a story on the difficulty many exonerees face in recovering compensation.²⁰ In addition to these news stories, newspaper editorials often support reforms advocated by the Innocence Project.²¹

State Compensation Statutes and Private Bills

Twenty-seven states and the District of Columbia have passed compensation statutes in order to provide one means of compensating those whose convictions are overturned.²² These state laws vary significantly in the amount of compensation and the requirements to be eligible for compensation.²³ Some of these state statutes simply amend state tort claims acts to provide a specific remedy for wrongful conviction while others set up boards to evaluate compensation requests. Many of these laws are so restrictive that they provide compensation in only very narrow circumstances.

The following is a sampling of some of provisions of selected state compensation statutes. Interested readers should review their own state's laws to determine whether there is a compensation statute and if so how it operates.

California law provides for up to \$100 in compensation for each day of wrongful imprisonment.²⁴ Under Florida's Victims of Wrongful Incarceration Compensation Act, the wrongfully convicted are entitled to recover \$50,000 for each year of incarceration, up to a maximum of \$2 million.²⁵ New Jersey provides compensation of twice the claimant's annual income in the year prior to incarceration, or \$20,000, whichever is greater.²⁶ New York law provides simply for "such sum of money as the court determines will fairly and reasonably compensate" the wrongfully convicted claimant.²⁷

Some states require proof of actual innocence in order to obtain compensation. Louisiana requires that the conviction be overturned or vacated and that the claimant prove by clear and convincing evidence that he is "factually innocent of the crime for which he was convicted."²⁸ Many state

statutes deny compensation for circumstances unrelated to the crime for which the claimant was wrongfully convicted. Florida, for example, precludes compensation when the claimant was convicted of another unrelated felony before or during the period of wrongful incarceration.²⁹ Massachusetts denies compensation to an individual guilty of committing a felony "reasonably connected" to the one for which he was wrongfully convicted.³⁰

Many of the state compensation statutes are silent on whether they preclude the wrongfully convicted from seeking other types of relief against state or local government employees or entities in connection with a wrongful conviction. A few of the statutes, such as Connecticut's, expressly provide that the claimant may pursue other available remedies.³¹ Other statutes, however, purport to make their compensation scheme the exclusive remedy or preclude the wrongfully convicted from seeking relief under the statutory scheme if they have filed suit or otherwise obtained a settlement or judgment arising out of their wrongful conviction.³² Here again, Florida precludes a person from seeking compensation under its statute if he or she has sued in state or federal court seeking damages for the wrongful incarceration.³³ An award under the Massachusetts statute acts as a bar to any further claim against the commonwealth.³⁴ Mississippi requires the wrongfully convicted to seek relief under the compensation statute or the Mississippi Tort Claims Act, but not both.³⁵ Texas precludes a person obtaining relief under its compensation statute from bringing any other civil action involving the wrongful conviction.³⁶

Finally, a number of states, including some that incorporate this into their compensation statutes, permit private bills to be enacted to compensate the wrongfully convicted. Alabama, Georgia, Florida and Virginia have enacted private bills in recent years to compensate individual exonerees.³⁷ The obvious criticism of this remedy is that it leaves compensation to the whims of state legislators.

Civil Wrongful Conviction Claims—Typical Causes of Action, Immunity Defenses, Judgments and Settlements, and Costs of Defense

Given the limitations and restrictions of compensation statutes, not to mention that 23 states do not have any such statute, many

exonerees pursue compensation through civil litigation.

An exoneree plaintiff typically will bring both state and federal claims. Federal claims are usually brought under 42 U.S.C. §1983.³⁸ A §1983 suit can be filed in federal or state court. State claims are typically brought under state constitutional or common law tort theories. Whether the claim is brought pursuant to state law or §1983, exonerees typically allege a variety of theories and causes of action, including false arrest or imprisonment, malicious prosecution, fabrication or destruction of evidence, failure to disclose exculpatory evidence, ineffective assistance of counsel, coerced confession and claims alleging that witness identification procedures violated the plaintiff's rights. Each of these has its own challenges and constraints and the law can vary widely from state to state and by circuit in the federal system.³⁹ The law in this area continues to evolve as the Supreme Court decides more cases clarifying issues bearing on wrongful conviction litigation.⁴⁰

Typical defendants in a wrongful conviction claim can include the relevant governmental entity, police officers, investigators (the FBI or state equivalent), crime lab employees, the medical examiner and prosecutors. As with any litigation involving public entities and their employees, there are a variety of defenses available. Many states have tort caps that may limit recovery of certain damages against certain defendants. All states have immunity defenses available to certain defendants in certain circumstances. Given the many differences in the various state laws, this topic is too large and complex to cover in detail here, except to note that state tort caps and state immunities would only apply to state law claims. They would not apply to claims brought under §1983.

Some defendants in §1983 claims have their own immunity defenses available. As is the case with state tort caps and

immunities, whether and to what extent these federal immunity defenses apply in a given situation is a complex topic that is beyond the scope of this article. Still, we can make a few observations about immunity defenses in civil wrongful conviction litigation brought pursuant to §1983.

Prosecutors and judges tend to have stronger immunity defenses available to them than do police officers and investigators. Judges⁴¹ and prosecutors⁴² generally have absolute immunity for their actions during the conduct of a trial. This can be overcome in the case of a prosecutor, for instance, for actions taken in an investigatory capacity before trial, although a prosecutor could still be entitled to qualified immunity for such investigatory actions.⁴³

Municipal defendants do not have any immunity defense to a §1983 claim.⁴⁴ The same is true of individuals sued in their official capacity, which is essentially a claim against the government entity.

Police officers and investigators sued in their individual capacity can avail themselves of qualified immunity. The test for qualified immunity involves generally a two part inquiry: whether the plaintiff has stated a constitutional violation and if so whether the constitutional right was clearly established at the time of its violation.⁴⁵ Beyond these very general observations, the availability of a qualified immunity defense is a fact-intensive inquiry.

Assuming the exoneree is able to overcome the immunity and other defenses and proceed to trial against one or more defendants, damages awarded in wrongful conviction claims vary significantly. Indeed, it isn't unheard of for the wrongfully convicted to recover nothing or a trivial amount.⁴⁶ Some of this variability depends on the impact of immunity and other defenses on the exoneree's ability to prove his claim. Sympathy for the plight of the

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exoneree no doubt also plays a factor as does the propensity of jurors in the applicable jurisdiction to award large sums of damages.

An individual may be exonerated for procedural reasons such as the police denying him his constitutional rights. These types of exonerations do not necessarily resolve the question of whether the exoneree in fact committed the crime for which he was wrongfully convicted. DNA exoneration, on the other hand, conclusively establishes the exoneree's innocence. An individual who has been determined to be innocent of the crime for which he was wrongfully convicted generally will present a more sympathetic plaintiff than does an individual who was exonerated on what some may view as a technicality.

There are plenty of examples of the large damages awards and settlements received by wrongful conviction plaintiffs. Several reported decisions have sustained damages awarded in the millions:

- > *Limone v. United States*, 579 F.3d 79 (1st Cir. 2009) (upholding \$102 million award to four men based on \$1 million per year rule of thumb employed by the district court), *cert. denied*, 460 U.S. 1011 (1983).
- > *Dominguez v. Hendley*, 545 F.3d 585 (7th Cir. 2008) (affirming \$9 million award for four years of incarceration), *cert. denied*, 556 U.S. 1235 (2009).
- > *Newsome v. McCabe*, 319 F.3d 301 (7th Cir. 2003) (affirming \$15 million award for 15 years of incarceration), *cert. denied*, 539 U.S. 943 (2003).
- > *White v. McKinley*, No. 05-203, 2009 U.S. Dist. LEXIS 24556 (W.D. Mo. Mar. 26, 2009) (upholding jury award of \$14 million award for over five years of incarceration), *aff'd*, 605 F.3d 525 (8th Cir. 2010), *cert denied*, 131 S.Ct. 799 (2010).
- > *Sarsfield v. City of Marlborough*, No. 03-10319, 2006 WL 2850359 (D. Mass. Oct. 4, 2006) (\$13 million award for over nine years of incarceration).

In addition to these reported decisions, examples of judgments and settlements can be found in press reports available through an Internet search. Examples include the following:

- > In 2012, Chicago, Illinois agreed to pay \$3.6 million to settle a lawsuit filed by a man who



spent nine years in prison after being wrongfully convicted of murder.⁴⁷

- > In 2011, Lee's Summit, Missouri agreed to pay \$15.5 million to a man who spent two years in prison after being wrongfully convicted of molesting his stepdaughter. The settlement followed a \$16 million jury verdict.⁴⁸
- > In 2010, New York City agreed to pay \$9.9 million to a man who served nearly 20 years in prison after being wrongfully convicted of murder. The exoneree settled separately with the State of New York for \$1.9 million, bringing his total recovery to \$11.8 million.⁴⁹
- > In 2010, Long Beach, California agreed to pay nearly \$8 million to settle a lawsuit filed by a man who spent 24 years in prison after being wrongfully convicted of murder.⁵⁰
- > In 2008, Hammond, Indiana agreed to pay \$4.5 million to settle with a man who spent 18 years in prison after being wrongfully convicted of rape. The settlement followed a \$9 million jury verdict.⁵¹
- > In 2006, Tulsa, Oklahoma agreed to pay \$12.25 million to settle with a man who spent 14 years in prison after being wrongfully convicted of rape and kidnapping. The settlement followed a \$14.5 million jury verdict.⁵²

In addition to recovering damages, if an exoneree prevails in a §1983 action, the court has discretion to award attorneys' fees pursuant to 42 U.S.C. §1988. The routine availability of fees puts upward pressure on settlement costs. In the cases that go to trial, the fees can constitute a substantial portion of the total cash award.

Finally, while information about the cost of defending these types of claims is harder to come by, there are several sources indicating that the costs can be substantial. A joint study of 85 exonerations between 1989 and 2010 in Illinois concluded that private attorneys were paid nearly \$32 million to defend governments and their employees in the suits that followed the exonerations.⁵³ Similarly, a former Illinois State Representative reported on his weblog, based on a Freedom of Information Act request, that McHenry County, Illinois spent \$1,749,530.74 on outside law firm legal fees in connection with the litigation arising from an exoneree's wrongful conviction for murdering his parents.⁵⁴ While these fees were only through July 2009, which preceded the civil damages trial, a subsequent blog posting reported that the fees and costs for the trial in August 2009 were an additional \$152,582.64.⁵⁵ The author claims that only about \$530,000 of the legal fees and costs were reimbursed by insurers, leaving over \$1.3 million to be paid by the County.

Trigger Date—The Recurring Coverage Issue

Unlike policies issued by traditional insurers, which tend to follow ISO wording, a wide variance in the policy language appears in the memorandums of coverage issued by governmental risk pools. Any discussion about coverage issues therefore must begin with the warning that the specific contract language will play a significant role in a court's rulings on coverage. In addition, in some states, memorandums of coverage may not be interpreted by the courts using traditional rules of construction applied to insurance contracts. None of what follows should be taken to suggest that a court would adopt a particular rule when confronted with specific policy language, particularly when it differs materially from the language at issue in the reported cases. Subject to that caveat, what follows is an overview

of the three main approaches to addressing the issue of trigger date in wrongful conviction claims. Our goal here is to describe each approach generally and make a few observations about its acceptance by the courts. We will not delve into the reasoning behind each approach or take a position on whether one approach is sounder than the others.⁵⁶

Wrongful conviction claims typically trigger a CGL-type policy's personal injury coverage, as opposed to its bodily injury or property damage coverage. Personal injury coverage is generally triggered by an offence, rather than an occurrence, during the coverage period. Offence usually is defined to include malicious prosecution, false arrest, false imprisonment and civil rights violations. Coverage for these intentional torts usually does not require that the personal injury be caused by an accident; likewise, the "neither expected or intended" conditions typically do not apply to personal injury claims. Again, however, policies may vary.⁵⁷

When determining the trigger date under this type of coverage, there are essentially three approaches that the courts have adopted, or the parties have urged, in wrongful conviction claims: 1) coverage is triggered under the policy in force on the date of conviction, or some earlier date, typically arrest or indictment; 2) coverage is triggered under the policy in force on the date of exoneration; 3) coverage is triggered under each policy in force during the entire period of incarceration.

The first approach, that coverage is triggered only under the policy in force on the date of conviction or earlier, is followed by the overwhelming majority of federal and state courts to have addressed trigger in these types of claims. Although there is no general agreement by these courts on whether the trigger date is arrest, indictment or conviction, these courts all agree that conviction is the last possible date

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for coverage to be triggered.⁵⁸ Absent some unexpected change in the judicial winds, there seems to be enough case law at this point to expect that most courts will continue to follow this approach. Again, however, unusual policy language may dictate a different approach in an individual case.

The second approach is followed by just a few courts. Most recently, in *American Safety Casualty Ins. Co. v. City of Waukegan*,⁵⁹ the United States Court of Appeals for the Seventh Circuit, applying Illinois law, held that for purposes of a malicious prosecution claim under §1983, exoneration is the trigger date.⁶⁰ The court acknowledged that its position is in the minority, but felt constrained to follow an earlier decision of an Illinois appellate court, even though that decision had been reversed, albeit on other grounds.⁶¹ Under the circumstances, *City of Waukegan* is something less than a definitive statement of Illinois law. A federal district court interpreting a policy under Illinois law would be bound to follow the ruling; Illinois state courts would not. Until the Illinois Supreme Court rules on the trigger date issue, therefore, a significant question will remain whether *City of Waukegan* accurately predicts how the trigger issue should be decided under Illinois law.⁶²

The third approach is advocated by counsel for the exonerees and some public entity insureds. The aim of this approach is to maximize coverage by triggering all or most policies in force at any time from conviction (or even arrest) through exoneration. The plaintiffs variously argue that the ongoing failure to correct the prior errors that led wrongfully to conviction is either a continuing tort or a series separate occurrences (or offences). In doing so, they seek to adopt the reasoning of certain toxic tort claims where exposure over a period of time caused damages. Courts have overwhelmingly rejected this position in wrongful conviction claims. Indeed, *City of Waukegan*, which adopted the minority position on the trigger date for a malicious prosecution claim, expressly rejected the argument that a continuous or multiple trigger should apply in these types of claims.⁶³ There is nothing in any of the decisions to date to suggest that the plaintiffs are likely to have any future success persuading a significant number of courts to adopt this approach.⁶⁴

Some Thoughts for Governmental Risk Pools and Public Entities to Consider

As should be apparent from this overview, exonerations and the likely civil damage suits that follow in their wake present particular challenges for public entities and governmental risk pools. The following are a few suggestions for evaluating and responding to this exposure.

Challenges Arising From Coverage Issues

The coverage trigger issues arising from these claims can cause tension between the public entities and the governmental risk pools that insure them. This is particularly true if a public entity had no or inadequate insurance coverage in place on the applicable trigger date, which in most cases will have been years or decades in the past. To be sure, governmental risk pools have an obligation to their members to preserve surplus by resisting claims that clearly are not covered. On the other hand, decisions like *City of Waukegan* may encourage a public entity to initiate coverage litigation in an attempt to trigger insurance coverage under the coverage document in force on the date of exoneration. Similarly, while there is little support for treating the period of incarceration as a continuing tort or a series of separate occurrences or offences that triggers coverage under multiple policies, given the potential for large damages and attorneys' fees awards in these cases, counsel for the exonerees are likely to continue pushing the continuous trigger argument, at the least until there is further clarity and certainty in the law.⁶⁵ All of this adds up to a potential coverage litigation expense for the public entity and the governmental risk pool as well as a degree of uncertainty about the amount of coverage that ultimately may be available to satisfy a settlement or judgment.

A governmental risk pool can't do anything retroactively to rewrite occurrence-type coverage that was in place many years ago. It can, however, take the following concrete steps to evaluate and manage its ongoing exposure:

- > A pool should consider first whether it needs to tighten the language in its current coverage documents to make it even more difficult for an exoneree to prevail in a continuous trigger argument. The case law cited in this article can assist the pool and its counsel in evaluating its current policy language. While this won't cure shortcomings in prior coverage documents, it at least starts to address the issue for the future.

- > A pool should next review its current and past coverage documents to make sure wrongful conviction claims are not covered under multiple coverage parts. As noted above, the reported decisions deal primarily with ISO-based coverage documents in which the claims present a GL personal injury exposure. It's possible, however, that different policy wording could result in coverage being triggered under E&O, police professional or other types of coverage that might be offered by a pool. Strong anti-stacking provisions should prevent separate coverage parts in a single coverage document from being triggered. The issue can be a bit trickier if one of these other coverages is offered on a claims made basis. In that circumstance, a pool could be faced with claims made coverage being triggered under the current coverage documents and occurrence coverage being triggered under one or more previous coverage documents. A pool would be well advised to examine the possibility of this scenario and adjust its current anti-stacking language as necessary.
- > Finally, a pool that wants to minimize the risk of exposing multiple policy years to a single wrongful conviction suit should consider amending its coverage documents to state explicitly that the trigger date for a malicious

prosecution claim is the date of conviction, at the latest. This should help prevent a court from following the *City of Waukegan* ruling.

Challenges Arising From the Long Tail

There usually will be a very long tail between the coverage triggering event—assuming that to be the arrest or conviction—and the civil damages suit. As noted earlier, the average time a DNA exoneree has served in prison is over 13 years. That means on average the civil suit following exoneration will be filed at least 13 years, and usually more, after the trigger date. It would not be unusual for a governmental risk pool to have little or no remaining IBNR reserves in the accident year in which the trigger date falls. This means a single significant claim could put significant pressure on the pool's surplus.

At a minimum, a pool would be well advised to discuss this issue with its actuaries in order to evaluate whether reserves should be strengthened in earlier accident years. There is not necessarily a single correct answer for whether reserve strengthening should be undertaken. There is no way for a pool to predict the likelihood or volume of exonerations and civil claims. Still, there are certain factors a pool can examine in evaluating its exposure that may inform the reserve decision. These include answers to the following questions:

- > What is the historical coverage structure provided by the pool and how is it likely to respond in the event of a wrongful conviction claim?
- > Has there been any history of wrongful conviction claims in the state and in particular with current or former pool members?
- > Is there an active innocence project, law school clinic or other entity in the state that could be expected to bring wrongful conviction claims in appropriate circumstances? In

answering this question, however, be mindful of the fact that many of the innocence projects handle wrongful conviction claims from all over the country.

- > Are there any news reports in the jurisdiction that suggest problems with any prior convictions that could give rise to future claims?
- > Are there any news reports of past problems with police procedures, including in particular problems with rogue police officers or inadequate crime lab procedures?

Public entities can ask themselves many of the same questions. In addition, they should be examining the coverage they had in place going back perhaps 20 years or more, given the long tail of these claims. If there are gaps or periods of underinsurance, the public entity should be asking itself how it would fund the costs of defense and judgment or settlement in the event a wrongful conviction suit arises from a trigger date on which it has limited or no insurance.

Challenges Arising From Costs and Complexity of Defense

Civil damages suits following exoneration can be extremely expensive to defend. As shown, public entities can spend millions of dollars defending them. Given the complexity of the issues in these suits, particularly some of the immunity issues, it is not at all unusual to see multiple appeals. In addition, frequently there are conflicts between and among defendants, requiring separate counsel for each of them. While some contract language anticipates this by requiring the use of shared counsel, it is questionable whether such policy language can overcome real conflicts of interest that would preclude counsel from representing multiple parties. Public entities and governmental risk pools need to evaluate the structure and the amount of coverage available to pay for the defense of these types of actions, at least in the current coverage documents.



Conclusion

This article only scratches the surface of the many issues surrounding wrongful convictions. Wrongful convictions are a growing challenge for governmental risk pools and public entities. The civil suits that follow exoneration raise complex factual and legal issues that make them difficult and costly to defend. The public interest lawyers bringing these claims are sophisticated. The exonerees often make sympathetic plaintiffs, particularly those who have established actual innocence, typically through DNA testing. Governmental risk pools and public entities would be well advised to take steps now to understand and manage their exposure to these claims. ■

Endnotes

¹ Samuel R. Gross, et al., *Exonerations in the United States 1989 Through 2003*, 95 J. Crim. L. & Criminology 523, 524 (2005) (the authors concluded that of the 340 exonerations studied, 144 individuals were cleared through DNA evidence and 196 by other means); see also Marvin Zalman, *An Integrated Justice Model of Wrongful Convictions*, 74 Alb. L. Rev. 1465, 1473 (2010 /2011) (after outlining the difficulties in arriving at a precise number of wrongful convictions and exonerations, the author estimates that there may be 5,000 to 10,000 wrongful convictions and 2000 to 4000 wrongful prison sentences each year).

² See, e.g., *Statutes and Case Law on Forensic DNA*, National Institute of Justice, DNA Initiative, available at <http://www.dna.gov/statutes-caselaw/> (providing links to state and federal laws on DNA access, including post-conviction access to DNA) (last visited April 5, 2012); *Access to Post-Conviction DNA Testing*, Innocence Project, http://www.innocenceproject.org/Content/Access_To_PostConviction_DNA_Testing.php (last visited April 5, 2012) (explaining that all states except Oklahoma have post-conviction DNA testing access statutes and providing summaries and links to the laws).

³ Of course not all scientific advances are equally valid. Nor are all valid scientific advances properly applied. As one advocacy group for the wrongfully convicted has argued, a leading cause of wrongful convictions includes both unvalidated science (such as “hair microscopy, bite mark comparisons, firearm tool mark analysis and shoe print comparisons”) and misapplication of valid science (such as DNA testing). See *Facts on Post-Conviction DNA Exonerations*, Innocence Project, available at http://www.innocenceproject.org/Content/Facts_on_PostConviction_DNA_Exonerations.php (last visited April 5, 2012).

⁴ See *Contact Us, To submit a case to the Innocence Project*, Innocence Project, available at <http://www.innocenceproject.org/about/Contact-Us.php> (last visited April 5, 2012).

⁵ See *Facts on Post-Conviction DNA Exonerations*, *supra* note 3.

⁶ See *id.*

⁷ See *Exonerations by State*, Innocence Project, <http://www.innocenceproject.org/know/National-View.php> (last visited April 5, 2012). The numbers for all exonerations are substantially higher. For instance, while the Innocence Project identifies 41 DNA exonerations in Illinois from 1989 to the present, a joint study by the Better Government Association and the Center on Wrongful Convictions at Northwestern University School of Law examined 85 exonerations in Illinois between 1989 and 2010. John Conroy & Rob Warden, *The High Costs of Wrongful Convictions*, Better Government Association, June 18, 2011, http://www.bettergov.org/investigations/wrongful_convictions_1.aspx (last visited April 5, 2012).

⁸ See *Facts on Post-Conviction DNA Exonerations*, *supra* n. 3.

⁹ See *id.*

¹⁰ See *id.*

¹¹ *The Causes of Wrongful Conviction*, Innocence Project, <http://www.innocenceproject.org/understand/#> (last visited April 5, 2012).

¹² *Id.*

¹³ *About the Innocence Network*, The Innocence Network, <http://www.innocencenetwork.org/> (last visited April 5, 2012).

¹⁴ *Innocence Network Exonerations 2011*, The Innocence Network, <http://www.innocencenetwork.org/annual-reports/innocence-network-report-2011> (last visited April 5, 2012).

¹⁵ Jon Wertheim, “Wrongly Accused—Terry Harrington spent 25 years in prison for a murder he did not commit,” *Sports Illustrated*, June 25, 2011, http://sportsillustrated.cnn.com/2011/writers/the_bonus/01/25/terry.harrington/index.html (last visited April 5, 2012).

¹⁶ David Grann, “Trial By Fire—Did Texas execute an innocent man?” *The New Yorker*, September 7, 2009, http://www.newyorker.com/reporting/2009/09/07/090907fa_fact_grann (last visited April 5, 2012).

¹⁷ Radley Balko, “Wrongful Convictions,” *Reason Magazine*, July 2011, <http://reason.com/archives/2011/06/07/wrongful-convictions/singlepage> (last visited April 6, 2012).

¹⁸ Scott Horton, “In Texas, 41 Exonerations from DNA Evidence in 9 Years,” *Harper’s Magazine*, January 5, 2011, <http://harpers.org/archive/2011/01/hbc-90007895> (last visited April 5, 2012).

¹⁹ "Evidence of Innocence: The Case of Michael Morton," 60 Minutes, March 25, 2012, http://www.cbsnews.com/8301-18560_162-57403923/evidence-of-innocence-the-case-of-michael-morton/?tag=contentMain;pbsCarousel (last visited April 5, 2012).

²⁰ Brian Rokus, "Time doesn't pay, wrongfully imprisoned find," CNN, March 25, 2012, http://edition.cnn.com/2012/03/25/justice/wrongful-conviction-payments/?hpt=us_mid (last visited April 5, 2012).

²¹ See, e.g., "Editorial, An Incomplete DNA Deal," *The New York Times*, March 26, 2012, <http://www.nytimes.com/2012/03/27/opinion/an-incomplete-dna-deal.html> (last visited April 5, 2012) (arguing that New York should adopt laws mandating videotaping of police interrogations and requiring "double blind" police line ups).

²² The states that do not have compensation statutes are Alaska, Arizona, Arkansas, Colorado, Delaware, Georgia, Hawaii, Idaho, Indiana, Kansas, Kentucky, Michigan, Minnesota, Nevada, New Mexico, North Dakota, Oregon, Pennsylvania, Rhode Island, South Carolina, South Dakota, Washington and Wyoming. See *Compensating the Wrongfully Convicted*, Innocence Project, http://www.innocenceproject.org/Content/Compensating_The_Wrongly_Convicted.php (last visited April 5, 2012) (compiling list of states).

²³ For an interactive map with links to all state compensation laws, see *Reforms by State*, Innocence Project, <http://www.innocenceproject.org/news/LawView1.php> (last visited April 5, 2012).

²⁴ Cal. Pen. Code §4904 (2012).

²⁵ Fla. Stat. §961.06(1)(a) (2012).

²⁶ N.J. Stat. §52:4C-5 (2012).

²⁷ N.Y. CLS Ct. Cl. Act §8-b(6) (2012).

²⁸ La. R.S. §15:572.8(A) (2012).

²⁹ Fla. Stat. §961.04 (2012).

³⁰ Mass. Gen. Laws ch. 285D, §1(C) (2012)

³¹ Conn. Gen. Stat. §54-102uu(g) (2012).

³² None of these restrictions would preclude or limit the ability of an exoneree to pursue damages under federal law.

³³ Fla. Stat. §961.06(6)(a) (2012).

³⁴ Mass. Gen. Laws ch. 285D, §4 (2012).

³⁵ Miss. Code Ann. §11-44-7(4) (2012).

³⁶ Tex. Civ. Prac. & Rem. Code §103.153 (2012).

³⁷ See Adele Bernard, "A Short Overview of the Statutory Remedies for the Wrongfully Convicted: What Works, What Doesn't and Why," 18 B.U. Pub. Int. L.J. 403, 407-408 (2009); see also Aaron Deslatte, "Scott Apologizes, signs bill giving William Dillon \$1.35M," *Orlando Sentinel*, March 1, 2012, <http://www.sun-sentinel.com/news/local/breakingnews/os-dillon-claims-bill-passes-20120301,0,3942466.story> (last visited April 5, 2012).

³⁸ This statute provides that: "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proceeding for redress. . ."

³⁹ For a general overview of some of the challenges in asserting these various causes of action under §1983, see Michael Avery, "Obstacles to Litigating Civil Claims for Wrongful Conviction: An Overview," 18 B.U. Pub. Int. L.J. 439 (2009).

⁴⁰ See, e.g., *Perry v. New Hampshire*, ___ U.S. ___, 132 S. Ct. 716 (2012) (holding that the Due Process Clause does not require a court to inquire into the reliability of an eye witness identification when it was not procured under unnecessarily suggestive circumstances by law enforcement); *Wallace v. Kato*, 549 U.S. 384 (2007) (holding that false arrest and false imprisonment are essentially a single tort that encompass only the period between arrest and/or imprisonment and the commencement of legal process, such as an indictment).

⁴¹ See, e.g., *Mireles v. Waco*, 502 U.S. 9 (1991); *Burns v. Reed*, 500 U.S. 478 (1991).

⁴² See *Buckley v. Fitzsimmons*, 509 U.S. 259, 275 (1993).

⁴³ See, e.g., *Kijonka v. Seitzinger*, 363 F.3d 645 (7th Cir. 2004) (holding that prosecutor not entitled to qualified immunity).

⁴⁴ *Owen v. City of Independence*, 445 U.S. 622 (1980).

⁴⁵ E.g., *Denius v. Dunlap*, 209 F.3d 944, 950 (7th Cir. 2000).

⁴⁶ See, e.g., *Gauger v. Beverly Hendle*, 954 N.E.2d 307 (Ill. App. 2011) (affirming jury verdict in favor of defendants in claim arising out of plaintiff's wrongful conviction for the

murder of his parents).

⁴⁷ Fran Spielman, "City of Chicago to pay man \$3.6 million for wrongful conviction," *Chicago Sun-Times*, March 12, 2012, <http://www.suntimes.com/news/crime/11239478-418/city-of-chicago-to-pay-man-36-million-for-wrongful-conviction.html> (last visited April 5, 2012).

⁴⁸ "\$15 million settlement in wrongful molestation conviction," *The Associated Press*, July 23, 2011, http://www.stltoday.com/news/million-settlement-in-wrongful-molestation-conviction/article_1e70d01e-b545-11e0-9fec-001a4bcf6878.html (last visited April 5, 2012).

⁴⁹ A.G. Sulzberger, "City to Pay \$9.9 Million Over Man's Imprisonment," *The New York Times*, June 3, 2010, <http://www.nytimes.com/2010/06/04/nyregion/04gibbs.html> (last visited April 5, 2012).

⁵⁰ Andrew Blankstein, "Long Beach to pay nearly \$8 million to man who was in prison for 24 years on wrongful murder conviction," *The Los Angeles Times*, August 11, 2010, <http://latimesblogs.latimes.com/lanow/2010/08/long-beach-settles-for-795-million-in-case-of-man-wrongly-imprisoned-for-murder.html> (last visited April 5, 2012).

⁵¹ Joe Carlson, "City settles lawsuit for \$4.5M," *Northwest Indiana Times*, March 12, 2008, http://www.nwitimes.com/news/local/city-settles-lawsuit-for-m/article_5956b4eb-5a53-5760-aba6-b2f3d5a88278.html (last visited April 5, 2012).

⁵² David Harper, "McGee case: City to pay: Lawsuit is settled for \$12.25 million," *Tulsa World*, June 3, 2006, http://www.tulsaworld.com/news/article.aspx?subjectid=11&articleid=060603_Ne_A1_Lawsu7600 (last visited April 5, 2012).

⁵³ See *The High Cost of Wrongful Convictions*, Better Government Association, *supra* note 7.

⁵⁴ Cal Skinner, "\$1.2 Million Cost for McHenry County Taxpayers for Gary Gauger Trials thru July," McHenry County Blog, <http://mchenrycountyblog.com/2009/09/03/1-2-million-cost-for-mchenry-county-taxpayers-for-gary-gauger-trials-thru-july/> (last visited April 5, 2012).

⁵⁵ Cal Skinner, "Trial Part of the Defense of Gary Gauger Case Cost McHenry County Taxpayers \$153,000," McHenry County Blog, <http://mchenrycountyblog.com/category/gary-gauger/> (last visited April 5, 2012).

⁵⁶ For a detailed analysis of the case law, including a critique of the approach that holds the trigger for a malicious prosecution claim to be the date of exoneration, see Benjamin C. Eggert & Ashley Eiler, "Trigger of Insurance Coverage for Wrongful Arrest, Prosecution and Conviction Lawsuits," 22 Coverage 50, January/February 2012.

⁵⁷ See, e.g., *Chicago Insurance Company v. The City of Council Bluffs*, No. 1:07-cv-21 RP-TJS, Memorandum and Opinion at 32-37 (S.D. Iowa March 12, 2012) (interpreting and enforcing policy language requiring personal injury type claims to be caused by an occurrence and that personal injury be neither expected nor intended).

⁵⁸ See, e.g., *Gulf Underwriters Insurance Co. v. City of Council Bluffs*, 755 F. Supp. 988 (S.D. Iowa 2010) (holding that injuries became apparent no later than date of conviction and therefore the occurrence was no later than that date); see also *North River Insurance Company v. Broward County Sheriff's Office*, 428 F. Supp.2d 1284, 1290 (S.D. Fla. 2006); *Newfane v. General Star National Insurance Company*, 784 N.Y.S.2d 787,791 (N.Y. App. Div. 2004); *Coregis Insurance Company v. City of Harrisburg*, No. 1:03-CV-920, 2006 U.S. Dist. LEXIS 20340, at *33-36 (M.D. Pa. Nov. 8, 2005); *S. Freedman & Sons, Inc. v. Hartford Fire Insurance Company*, 396 A.2d 195, 198-99 (D.C. 1978).

⁵⁹ Nos. 11-2775, 11-2789 & 11-2961, 2012 U.S. App. LEXIS 5496 (7th Cir. Mar. 16, 2012).

⁶⁰ The court also held that the trigger date for a wrongful arrest claim is the date of arrest. 2012 U.S. App. LEXIS 5496, at *12-13. The Seventh Circuit therefore actually ruled there are two trigger dates for the claims asserted in a civil damages suit by an exoneree.

⁶¹ *Security Mutual Casualty Co. v. Harbor Insurance Co.*, 65 Ill. App.3d 198 (1978) *rev'd*, 77 Ill.2d 446 (1979). The court in *City of Waukegan* acknowledged that only one state court, from Louisiana, had followed its exoneration trigger rule while courts from California, Massachusetts, Missouri, New York, Pennsylvania and the District of Columbia had

rejected it. See 2012 U.S. App. LEXIS 5496, at *7-8 (citing cases). The court ignored other federal court rulings on the same trigger issue for reasons that suggest other federal courts that are not compelled to follow its holding should ignore *City of Waukegan* as persuasive authority. *Id.*

⁶² Illinois is home to some of the more active members of the Innocence Network in the Center on Wrongful Convictions at Northwestern University School of Law and the Medill Innocence Project at Northwestern University. As these organizations continue to investigate and seek relief for the wrongfully convicted in Illinois, it is likely that the trigger issue will come again before Illinois courts. In the near term, a significant impact of the *City of Waukegan* ruling is likely that an insurer seeking to avoid coverage by arguing for the first approach will file a coverage suit in Illinois state court, which, as noted, would not be bound to follow the ruling.

⁶³ See 2012 U.S. App. LEXIS 5496, at *12; see also *City of Erie v. Guaranty National Insurance Company*, 109 F.3d 156, 165 (3rd Cir. 1997); *Gulf Underwriters*, 755 F. Supp.2d at 1002, 1006; *Coregis*, 2006 U.S. Dist. LEXIS 20340, at *11; *North River*, 428 F. Supp. 2d at 1292; *Idaho Counties*, 205 P.3d at 1220, 1226.

⁶⁴ For a detailed analysis of why the continuous trigger theory should not apply to wrongful conviction claims, see Benjamin C. Eggert & Amanda Schwoerke, "Trigger of Insurance Coverage for Wrongful Conviction Lawsuits," 20 Coverage 21, January/February 2010.

⁶⁵ The extent to which a public entity, as opposed to just counsel for the exoneree, will argue for the continuous trigger approach may depend on the coverage structure. For instance, if a court adopts a continuous trigger argument, the public entity may have to satisfy a separate retention for each policy, adding potentially millions of dollars of uninsured exposure. This may discourage a public entity from supporting the exoneree in advocating the continuous trigger argument for each policy.



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