Wrongful Convictions and Insurance: New Trends in Trigger Analysis

By William Beck and Edward Currie, Jr.¹

I. The Growing “Trigger Dispute.”

The modern accessibility of DNA testing has led to an unprecedented rise in exonerations of the wrongfully imprisoned and a surge in civil rights lawsuits against public officials and municipalities for suppressing exculpatory evidence. These lawsuits present complex liability issues including qualified immunity and Monell liability for municipalities, among other things.

One of the most complex but important ancillary issues is whether these public entities are protected for civil rights claims under their insurance programs. Particularly for financially distressed municipalities, the availability of insurance proceeds is often the most critical issue because of the potentially enormous liabilities these entities face resulting from law enforcement misconduct claims.

Typically, the potentially available insurance comes from specialty insurance products long sold to law enforcement, counties, and municipalities, including law enforcement liability (“LEL”) policies and special public entity liability policies. Despite the specific nature and longstanding existence of these specialty policies, very few courts have squarely analyzed the application of these special-risk policies outside the context of traditional tort claims (such as claims for malicious prosecution).

In connection with civil rights claims associated with wrongful conviction, the wrongfully convicted person might be incarcerated for years, if not decades, before exoneration

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by DNA. During the span of those years the governmental entity and law enforcement may have LEL policies issued by different insurance companies. Moreover, the insuring language, exclusions and conditions of each insurer’s policy may have differed. As such, someone wrongfully convicted who files a civil rights case after exoneration may find that the defendants over the span of incarceration had LEL policies issued by three or more different insurers, each with multiple renewed policies. The claims asserted against the defendants, therefore, may have arisen at the time of arrest, the prosecution leading to the wrongful conviction, and during each successive year of incarceration. The predominant insurance coverage question regarding the defendants then focuses on which policies apply to the incarceration period over what sometimes is a long span of time, and sometimes with different policies issued by different insurers over that span.

Most often the dispute between an insurer and a defendant governmental entity involves a “trigger” issue. “Trigger” is a shorthand insurance concept used to describe what event must occur before a particular liability policy applies to a given loss. In recent years, there has been growing controversy over which policies are “triggered” for civil rights claims. A number of carriers have taken the position that only the liability policy in effect at the time the prosecution is initiated is “triggered” in civil rights abuse cases (i.e., only those policies provide insurance coverage). These carriers have advanced this “single trigger” argument as a “majority rule” that should always apply to civil rights abuse cases involving wrongfully imprisoned claimants regardless of the allegations in the underlying complaint.

To the contrary, policyholders and some carriers argue that courts should take a “textual approach” and construe the insurance contracts as written. These parties argue that a per se “single trigger” rule cannot be applied to specialty insurance products where the insuring
language differs widely from policy to policy. What events “trigger” coverage should wholly depend upon the language of each particular insurance contract, just like any other private contract negotiated between two parties. Accordingly, the textual approach argues that the “trigger” of coverage should be determined by comparing the insuring language of the policies with the allegations in the underlying civil rights lawsuit.

The following recent caselaw illustrate the growing dispute between the “single trigger” rule and the “textual approach.”

II. The “Single Trigger” Argument.

Those who advocate for a “single trigger” rule often cite to one or more of the following cases for the proposition that only the insurance policies in effect at the time the prosecution was commenced should apply to civil rights abuse cases.


In Sarsfield v. Great American Insurance Company of New York, Sarsfield was convicted of rape in 1987 and served almost ten years in prison before he was exonerated based on DNA evidence in 2000. Thereafter, he sued the City of Marlborough, Massachusetts, and several of its employees for federal civil rights and state law claims arising out of his arrest, prosecution, and imprisonment.

The City’s insurer, Great American, denied coverage for Sarsfield’s claims under policies providing coverage for “wrongful acts” occurring during the coverage period of July 1992 through July 2000 (i.e., five years after prosecution and during a period of incarceration only). See id. at 65-66. The district court granted summary judgment in Great American’s favor, holding that it had no duty to defend or indemnify the City, as Sarsfield did not allege any “wrongful acts” during the different Great American policy periods. On appeal, Sarsfield argued
that the “wrongful act” occurring after 1992 were the City police officers’ conduct in affirmatively covering up and failing to turn over exculpatory evidence once Sarsfield was in prison. Id. at 66. “Great American argued that the only relevant ‘wrongful acts’ at issue here were the arrest, malicious prosecution, and false imprisonment of Sarsfield, and since these all occurred before the policy became effective, they do not trigger coverage.” Id.

The First Circuit found that Great American’s policies were not triggered:

As the district court found, the only concealment specifically discussed was tied to concealment from the prosecutor. The clause stating that the defendants “continued to cover up their misconduct” (the “misconduct” being further described as including the suggestive identification, fabrication of evidence and false testimony at the trial) is not enough to allege a “wrongful act” occurring during the coverage period.

Id. at 67-68.


In Indian Harbor Insurance Company v. City of Waukegan, Juan Rivera, Jr. was wrongfully convicted of rape and murder in 1993, and was imprisoned until 2011 when he was exonerated as the result of DNA evidence. After his exoneration, Rivera filed suit against the City and six of its police officers, alleging “state claims for malicious prosecution and false imprisonment and due-process claims pursuant to 42 U.S.C. § 1983.” Id. at 616. Rivera also alleged that the City committed violations of Brady v. Maryland, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963), amounting to due process claims under 42 U.S.C. § 1983. Rivera contended that there was a duty to disclose exculpatory evidence before, during, and after trial.

The City was insured by law enforcement liability policies issued by Indian Harbor for the policy periods of November 1, 2011 to November 1, 2013, that provided coverage for “wrongful acts” “occur[ring] during the policy period[s].” Id. The court held that Rivera’s claims for continuing Brady violations did not trigger coverage under the policies because they were
allegations of “the continuing effects of Rivera’s arrest and ultimately his convictions of rape and murder.” See id. at 623.


In *St. Paul Fire & Marine Insurance Company v. City of Zion*, Jerry Hobbs III was charged with murder on May 9, 2005, and spent five years in jail awaiting trial until DNA evidence excluded him as the perpetrator and the charges were dismissed on August 4, 2010. Thereafter, Hobbs filed a malicious prosecution claim against several City police officers who allegedly coerced him into giving a false confession. St. Paul sought a declaration that it had no coverage for the claim under its law enforcement liability policies issued to the City from December 1, 2006 to December 5, 2010, which provided “coverage for a malicious-prosecution claim if the ‘injury’ caused by the malicious prosecution ‘happens while th[e] [policy] is in effect.’” *Id.* at 198. The trial court granted summary judgment in St. Paul’s favor, finding that the injury from the malicious prosecution claim “happened” before the St. Paul policy periods, when the charges were first brought against Hobbs, and the Appellate Court affirmed.

III. The “Textual Approach.”

In contrast to the “single trigger” approach, the following jurisdictions have rejected a *per se* “single trigger” rule in finding that LEL policies issued in post-conviction years provided coverage for civil rights abuse cases.


In *Waters v. Western World Insurance Company*, Kenneth Waters was convicted in May of 1983 and served 19 years in prison before being exonerated in 2001 based on DNA evidence proving his innocence.²

² Waters’ story is recounted in the 2010 film Conviction.
Waters died six months later, as the result of an accident. His estate brought a suit against the municipality, the town of Ayer, Massachusetts, which incarcerated him, and two individual employees of Ayer. That case settled, and as part of settlement Ayer assigned its rights under six consecutive LEL policies issued by Western World Insurance Company from 1985-1991.

Timing-wise, if the triggering event was the initial “act” (or acts) of wrongfully incarcerating Waters or the “injury” of the initial wrongful incarceration, Waters’ coverage claims were doomed. The Massachusetts state trial court held in favor of Western World on summary judgment, and Waters appealed. On appeal, the Massachusetts Court of Appeals reversed the trial court, holding that Western World had a duty to defend.

The policies at issue were “act-based” insuring agreements, requiring enumerated acts to be committed during the policy periods:

“The [c]ompany will pay on behalf of the [i]nsured all sums which the insured shall become legally obligated to pay as damages because of the negligent acts, errors, or omissions of the [i]nsured as follows: [c]overage A—[p]ersonal [i]njury ... to which this policy applies, and the [c]ompany shall [have] the right and duty to defend any suit against the [i]nsured seeking damages on account of such personal injury, bodily injury or property damage even if any of the allegations of the suit are groundless false or fraudulent ...” . . .

[Coverage applies] “only to acts committed or alleged to have been committed ... during the policy period.”

See id. at *1. (emphasis in original).

In its ruling, the appellate court held that the operative complaint plainly alleged wrongful acts during each separate policy period by alleging that the town “had a policy, custom, and practice ‘continuing throughout the incarceration’ of failing to adequately train and supervise employees with respect to the disclosure of exculpatory evidence,” and the town “failed to undertake any reinvestigation to discover and then remedy the fact that undisclosed exculpatory
evidence existed.” The complaint also alleged that the town “ignored its affirmative duty to disclose information that would have demonstrated Waters’ innocence.” *Id.*

The *Waters* decision reached its conclusion by comparing the plain language of the LEL insuring agreements and factual allegations, which broadly alleged wrongful acts during each of the policy periods. In doing so, it rejected any “single trigger” rule and found that post-conviction wrongs may be “wrongful acts” independently triggering coverage under the broad language of the LEL insuring agreement at issue.

**B. Jeffrey Deskovic v. Putnam County, 07 Civ 8150 (KMK) (S.D.N.Y., Nov. 25, 2014).**

On November 2, 2006, Jeff Deskovic's 1989 indictment charging him with murder, rape, and possession of a weapon was dismissed on the grounds of actual innocence. Postconviction DNA testing both proved Deskovic's innocence and identified the real perpetrator of the murder and rape. In 2007, Deskovic brought a civil action against Putnam County. The County’s insurer, New York Municipal Insurance Reciprocal (NYMIR), filed an intervenor complaint seeking a declaratory judgment that it had no duty to defend or indemnify the underlying defendants under its LEL policies issued six years after the indictment, beginning in 1995. In oral proceedings on November 25, 2014, the U.S. District Court for the Southern District of New York held that coverage was triggered by Deskovic’s injuries sustained during the policy periods.

The policies at issue in *Deskovic* were, unlike the “act-based” policies in *Waters*, “injury-based,” meaning they were triggered by the allegation or existence of one of the policy’s enumerated injuries during the policy period:

> [NYMIR will] “pay…all sums which the insured shall become legally obligated to pay as damages because of the wrongful acts which result in…personal injury…caused by an occurrence and arising out of the performance of the insured’s duties to provide law enforcement.” …
Proceeding at 34:5-16. Under these injury-based insuring agreements, the County argued that the timing of the causal act or acts giving rise to the injury is not relevant to the coverage analysis.

NYMIR advanced the “single trigger” rule, arguing that “insurance [policies] in civil rights claims… are triggered at the point in time when the injuries are first ascertained.” *Id.* at 4:23-25. NYMIR relied principally on a New York appellate decision, *Newfane v. Gen. Star Nat. Ins. Co.*, 784 N.Y.S.2d 787, 791 (N.Y. App. Div. 4th Dept. 2004), holding that “where the criminal prosecution was initiated before the effective date of the policy but terminated in favor of the accused during the policy period… there is no coverage for an underlying malicious prosecution cause of action….”

The court rejected NYMIR’s argument, finding that the timing of when the “tort” of malicious prosecution occurred was not relevant to the coverage analysis. Proceeding at 10:17-11:1. Specifically, the court found that an undue focus on the timing of the “tort” did not comport with policy language; the critical inquiry remained whether Deskovic sustained injuries during the policy periods at issue. Under the *Deskovic* court’s analysis, “false imprisonment” was, under the policy’s language, both a tort and an injury; while the tort of malicious prosecution occurred before the policy periods, there was an injury of false imprisonment in any year during which Deskovic was incarcerated arising out of malicious prosecution, which included the policy periods at issue.

NYMIR also argued that there was not a continuing injury or series of injuries, but instead the policy period during which any imprisonment injury first occurred should be the only
policy triggered. The court likewise rejected this argument as being inconsistent with the language of the policy: “I don’t understand this first occurred. Why does first occurred matter? The question is whether the injury occurred during the policy coverage period not when it was first felt by Mr. Deskovic. That’s not what the policy says.” 14:25-15:4.


On March 10, 2004, 19-year-old Ryan Ferguson was arrested on first degree murder charges. He was wrongfully convicted in the fall of 2005; his conviction was vacated in 2013 as the evidence used to convict him was disproven—and after it came out that the prosecution withheld evidence. In 2014, he filed a civil rights lawsuit against Boone County, the city of Columbia, Missouri, and eleven individuals to recover for the time in which he was wrongfully incarcerated. A settlement was reached by Ferguson and the city of Columbia before trial, and after trial, the Court entered judgment against multiple officers. As part of the settlement, the city assigned its policy rights to Ferguson.

St. Paul issued a series of LEL policies to the city of Columbia, Missouri beginning in 2006. Ultimately, Ferguson filed a garnishment lawsuit in Missouri state court, arguing that St. Paul breached its duty to defend under the policies, entitling Ferguson to the policy limits. The St. Paul forms at issue provided as follows:

**Law enforcement liability.** We’ll pay amounts any protected person is legally required to pay as damages for covered injury or damage that:

- results from law enforcement activities or operations by or for you;
- happens while this agreement is in effect; and
- is caused by a wrongful act that is committed while conducting law enforcement activities or operations.

In an order issued on July 25, 2018, the circuit court entered judgment in favor of Ferguson. The court held that the St. Paul policies provided “‘injury’ based coverage” which
nowhere required that the injury or damage “first” happen during a coverage period, had no “deemer clause,” and was silent as to the timing of the wrongful acts causing the injury or damage. As the court noted, “[t]o find for Travelers the Court must imply that one or all of these unwritten requirements is part of the St. Paul LEL. Under Missouri law the Court may not insert such policy terms by implication when the insurer did not state them expressly.” *Id.* at *5.

**D. City of Hickory v. Grimes, 814 S.E.2d 625 (N.C. App. 2018).**

In July of 1988, Willie James Grimes was wrongfully convicted of raping an elderly woman in Hickory, North Carolina and sentenced to life. Mr. Grimes was innocent, but because the lead detective’s brother was personal friends with the actual culprit, Grimes was framed—and the Hickory Police Department (“HPD”) withheld exculpatory evidence until Grimes was exonerated in October of 2012.

From 2005-2011, HPD was insured under LEL policies issued by Argonaut Insurance Company. Argonaut and other insurers refused to defend, and Hickory sued. The trial court granted Argonaut’s motion to dismiss, and Hickory appealed that judgment. The North Carolina Court of Appeals reversed, holding that Argonaut had a duty to defend.

The LEL policy was an act-based policy, insuring for delineated wrongful acts occurring during the policy period:

We will pay those sums that the insured becomes legally obligated to pay as “damages” resulting from a “wrongful act” to which this insurance applies that is committed during the course and scope of “law enforcement activities” ....

“Wrongful Acts” means any act, error or omission flowing from or originating out of a “law enforcement activity.” All acts, errors or omissions committed by one or more insured that are substantially the same or are in any way directly or indirectly related—either logically, causally, or temporally—shall be deemed to constitute one “wrongful act,” regardless of the number of claims or claimants. …

This insurance applies to “damages” arising out of a “wrongful act” only if the “wrongful act” was first committed or alleged first committed:
a. By an insured in the course of his or her “law enforcement activities” and

b. During the policy period.

As the conviction was far outside the policy period, the court addressed only alleged wrongful acts during the policy periods. The at-issue allegations were that, in 2003, the North Carolina Center on Actual Innocence (on Mr. Grimes’ behalf) formally requested that the HPD provide crime scene evidence from the 1987 rape, and then continued to make that same request through 2011. Argonaut argued that the policy’s deemer clause required the court to treat all failures to provide fingerprint evidence as “one wrongful act” first arising in 1987-1988, when the HPD first withheld that evidence.

The court disagreed. Instead, the court held that the failure to turn over evidence in years 2003 through 2011 was of a different character than in 1987-1988 and a triggering “wrongful act.” It was not substantially the same as it required HPD to examine its records and concerned archival evidence and protocols. It was not logically related as it did not necessarily follow from the 1987-1988 wrongful acts. And, it was not causally related as it was not an “effect” of the 1987-1988 wrongful act, nor was it temporally related given the gap in time.

IV. Conclusion.

The influx and evolving nature of civil rights abuse cases against public entities brought by exonerees—and the fact that insurance proceeds are often the most critical issue because of the potentially enormous liabilities these entities face—all but guarantees that the “trigger” issue will continue to be hotly litigated across all jurisdictions.