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New Appleman on Insurance Law Library Edition
2014

NEWAPL Volume 4 -- Specific Types of Liability Insurance
Chapter 33 LAW ENFORCEMENT LIABILITY INSURANCE

4-33 New Appleman on Insurance Law Library Edition 33.syn

AUTHOR: William G. Beck, Ian Hale, Sarah E. Millin and Jennifer M. McAdam

§ 33.syn Synopsis to Chapter 33: LAW ENFORCEMENT LIABILITY INSURANCE

William G. Beck, Ian Hale, Sarah E. Millin and Jennifer M. McAdam n*

FOOTNOTES:

(n1)Footnote *. William G. Beck, Ian Hale, Sarah E. Millin and Jennifer M. McAdam practice in the insurance recovery group of Lathrop & Gage LLP and have significant experience in obtaining insurance recoveries for innocence and other civil rights cases.

The authors would like to thank Jordan Bergsten and Amanda Sisney for their contributions to this chapter, and would also like to thank the attorneys at Neufeld Scheck & Brustin LLP for their many contributions to the authors' understanding of this fast-developing area of insurance law.

Updates by Publisher's editorial staff.

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NEWAPL Volume 4 -- Specific Types of Liability Insurance
Chapter 33 LAW ENFORCEMENT LIABILITY INSURANCE

4-33 New Appleman on Insurance Law Library Edition Scope

AUTHOR: William G. Beck, Ian Hale, Sarah E. Millin and Jennifer M. McAdam

Scope

William G. Beck, Ian Hale, Sarah E. Millin and Jennifer M. McAdam n* Abstract

* * *

Insurance law as it relates to most areas of law enforcement liability is developed enough to understand the risks that are covered under any given policy. This law developed in a very traditional sense, in the context of cases seeking a remedy for very specific and readily identifiable injuries arising from single or linear acts and events. Innocence cases break from the law enforcement liability paradigm, presenting themselves as a fusion of traditional tort claims and state and federal civil rights claims, often asserted against numerous defendants and alleging multiple injuries from discrete and successive acts occurring over decades.

Innocence cases thus resist traditional insurance analysis developed under Commercial General Liability ("CGL") insurance policies purchased by the private sector, and bring to the fore the language and operation of the special-risk Law Enforcement Liability ("LEL") and Public Official Liability ("POL") policies issued to law enforcement.

Section 33.02 examines the ever-growing frequency of exonerations and subsequent innocence cases and recent studies estimating between 23,000 and 115,000 currently incarcerated people are innocent. This section also discusses the average length of time served by these people--12 to13 years--and awards handed out to these people in innocence cases--$1 million per year in compensatory damages alone. This section also notes the long-standing awareness of the possibility of these systemic failures in our system, and Insurers historic marketing and selling of LEL and POL policies to cover this exact risk without ever accounting for the technological developments such as DNA testing and the impact this might have on the calculus for the risks being written.

The types of policies that might be implicated in a typical innocence case are

discussed in Section 33.03, as are the efforts that should be undertaken to locate all such historical policies in effect from the time of the first alleged misconduct through exoneration and the filing of the innocence case.

Section 33.04 and 33.05 examine the various language, provisions and operation of the most common of these special-risk policies, including both coverage and exclusionary language, and how they can differ from CGL policies. This includes a discussion of the few decisions interpreting LEL, POL and, where instructive, CGL policies.

In Section 33.06 the chapter introduces the various trigger of coverage theories, which courts sometimes employ to determine when a progressive or continuing injury will be deemed to occur for insurance purposes, as well as how these theories can effect coverage for claims under policies with injury-based, but not act-based, Insuring Agreements. Section 33.07 goes on to explore claims commonly asserted in innocence cases, and examines the existing insurance law on these claims under LEL, POL and CGL policies, as well as an examination of the elements of each of these claims and the impact those may have on coverage determinations.

Section 33.08 examines the various State Defense Acts, which typically provide defense of and some amount of capped indemnity for claims against State employees, and the ways these Acts can affect coverage. Section 33.09 reviews the unanimous rule that State tort caps will not apply to 42 U.S.C. section 1983 claims for civil rights violations, and the rationale underlying this rule.

The chapter concludes with a review of state law on insurance coverage for both punitive damages and attorney's fees awarded to a successful section 1983 claimant. Section 33.10 also overviews the State and federal statutory Compensation Acts enacted to provide some monetary compensation to exonerees.

* * *

FOOTNOTES:

(n2)Footnote *. William G. Beck, Ian Hale, Sarah E. Millin and Jennifer M. McAdam practice in the insurance recovery group of Lathrop & Gage LLP and have significant experience in obtaining insurance recoveries for innocence and other civil rights cases.

The authors would like to thank Jordan Bergsten and Amanda Sisney for their contributions to this chapter, and would also like to thank the attorneys at Neufeld Scheck & Brustin LLP for their many contributions to the authors' understanding of this fast-developing area of insurance law.

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NEWAPL Volume 4 -- Specific Types of Liability Insurance
Chapter 33 LAW ENFORCEMENT LIABILITY INSURANCE

4-33 New Appleman on Insurance Law Library Edition § 33.01

AUTHOR: William G. Beck, Ian Hale, Sarah E. Millin and Jennifer M. McAdam

§ 33.01 Introduction to Law Enforcement Liability

Like most governmental enterprises, law enforcement touches the lives of every member of the populace on a daily basis. The pervasive, and sometimes invasive, nature of this undertaking gives rise to an almost limitless number of circumstances in which actionable injury and damage can occur.

For example, liability can, and frequently does, arise from the conduct of the high-visibility individuals that are most commonly associated with law enforcement, such as police officers, sheriff's deputies, state troopers, and state and federal investigation and enforcement agents. The liability faced by these frontline officers is direct liability, based upon their own actions and omissions, and the nature of their activities exposes them to allegations of both negligent and intentional or quasi-intentional conduct.

Liability can also arise from the actions and omissions of those further removed from the front lines of enforcement, such as city and county boards of commissioners, police chiefs, sheriffs, other department and agency heads, and ultimately the municipal, state and federal governments, whose functions are to craft law enforcement policy, create procedures to effect that policy, and supervise the implementation of these procedures. These high-level officials and governmental entities face direct liability arising out of their policy-making and supervisory conduct, and in certain circumstances may also face vicarious liability for the separate actions of the frontline officers.

Many cases involving law enforcement misconduct seek to collect damages based upon the separate liability of each of these two levels of law enforcement.

When confronted with a potentially insured law enforcement claim, or when purchasing or writing insurance to cover law enforcement claims, it is important to possess a specific, detailed understanding of the structure, administration and operation of all aspects of the particular law enforcement entity or entities at issue. Recognizing law enforcement as a multi-faceted endeavor that

can involve many entities that operate on many different levels, sometimes in conjunction with each other, will ensure a full and complete evaluation.

Insurance law as it relates to most areas of law enforcement liability is developed enough to understand the risks that are covered under any given policy. However, this law developed in a very traditional sense, in the context of cases that usually sought a remedy for very specific and readily identifiable injuries arising from single or linear acts and events that could be fixed at a particular point in time. Thus, most insurance law on this topic is subject to a compartmentalized analysis under the same well-established tort claims and principles that are applicable to the private sector and the public at large.

There is now an emerging and rapidly expanding area of law enforcement liability for which the law currently offers little guidance--innocence cases. These cases break from the law enforcement liability paradigm, presenting themselves as an amalgamation of traditional and modified tort claims, often asserted with state and federal civil rights claims, and levied against multiple defendants and alleging numerous separate injuries arising from both discrete and successive acts that can occur over the course of decades.

Innocence cases defy traditional analysis under the General Liability and Commercial General Liability ("CGL") policies purchased by the private sector and public at large, and bring into sharp focus the specialty insurance policies long issued to law enforcement. Despite their specific nature and long-standing existence, insureds, insurers and courts have usually analyzed these special-risk policies only in the context of traditional tort claims, and have seldom had occasion to note differences between the structure, language and purpose of these and CGL policies.

This chapter seeks to clarify at least some of the considerations relevant to evaluating these special-risk policies in the new innocence era of law enforcement liability claims.

Legal Topics:

For related research and practice materials, see the following legal topics: Insurance LawGeneral Liability InsurancePersons InsuredGeneral OverviewTortsPublic Entity LiabilityGeneral Overview

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4-33 New Appleman on Insurance Law Library Edition § 33.02

AUTHOR: William G. Beck, Ian Hale, Sarah E. Millin and Jennifer M. McAdam

§ 33.02 The "Innocence Revolution"--A Multi-Billion Dollar Bet

Society has long been loath to admit of even the possibility that an innocent person could be arrested and imprisoned for a crime they did not commit. One of the most respected minds in the history of American jurisprudence, the Honorable Learned Hand, emphatically and publicly dismissed this possibility as nothing more than an expression of self-doubt:

> Our dangers do not lie in too little tenderness to the accused. Our procedure has always been haunted by the ghost of the innocent man convicted. It is an unreal dream. What we need to fear is the archaic formalism and the watery sentiment that obstructs, delays, and defeats the prosecution of crime. n1

We now know that this "unreal dream" is in fact a very real nightmare for those who have been wrongfully arrested, prosecuted, convicted, imprisoned--and even put to death. n2

Indeed, the real surprise is probably no longer the mere existence of these failures within our criminal justice system, but rather the frequency with which they occur. Recent studies suggest that between one and five percent of the current prison population--or between 23,000 and 115,000 people n3--are actually innocent of the crime for which they are now incarcerated. n4

Studies also show that there has been a steady and marked increase in the number of exonerations over the last two decades, from an average of 10 per year in 1989 and 1990, to an average of 43 per year in 2001, 2002 and 2003. n5 This increase appears due, at least in part, to the ever-growing access to, and sophistication of, DNA testing. n6 Of course, as numerous writers have noted, exonerations represent only those wrongs that have been discovered and remedied, and thus are but a small subset of the innocent people that our justice system has failed.

Law enforcement officer and governmental misconduct, whether intentional or otherwise, appears to be one of the more common causes of innocence cases. n7 This conduct can range from overly suggestive identification procedures employed with witnesses, to fabrications of evidence by individual officers, to widespread failures in both policy and supervision. n8

It is not within our power to restore the time or relationships that exonerated individuals have lost, nor to take away the physical and psychological injuries that many of them have suffered and continue to suffer long after they are exonerated. We are limited, instead, to remedying and acknowledging wrong, and then providing monetary compensation for their injuries.

More and more states are enacting compensation statutes that provide some amount of funding to certain classes of the exonerated. n9 Most if not all of these compensation statutes, however, provide for a relatively small monetary payment, and very few if any provide for any psychological or other social support services. n10 Thus, the only remedy available is often the filing of a civil lawsuit, and when law enforcement misconduct is alleged, individual officers and the municipal, state, or federal governments that employ them can face potentially devastating liability.

It is not atypical for exonerated individuals that prevail in an action alleging officer and/or governmental misconduct to receive compensatory awards of $1 million or more for each year spent wrongfully incarcerated. n11 The average amount of time served by a wrongfully incarcerated individual before exoneration is 12 to13 years, n12 meaning that a successful claim will average $12 to $13 million in compensatory damages alone. If even a small percentage of the estimated 23,000 to 115,000 that are currently wrongfully imprisoned have viable claims, n13 then the existing, latent liability of law enforcement for innocence cases could reach well into the multi-billion dollar range.

Expert Insight:

> Damages that occur post-incarceration but pre-exoneration can also be quite significant. This is especially true in cases where the released but not yet exonerated individual was forced to spend significant amounts of time in sex offender programs or registries, or was subject to other intrusive or onerous conditions of release.

Nor do such compensatory amounts take into account any additional award of punitive damages, the costs and expenses incurred in defending the case, interest, or awards of attorney fees to claimants whose suit involves a successful claim under 42 U.S.C. § 1983. n14

For many smaller municipalities, insurance coverage may be the only resource available to satisfy these losses, and many of the larger municipalities and even states may have problems funding such immense losses solely from existing reserves or new bond initiatives.

Many commentators and professionals working in the insurance arena draw comparisons between this Innocence Revolution and the enactment of the Comprehensive Environmental Response, Compensation and Liability Act ("CERCLA") n15 in 1980. CERCLA imposed retroactive and perpetual environmental-related

liability for what previously had been lawful waste disposal, shocking both the manufacturing industry and its Insurers, which for years had written insurance policies broad enough to cover this unaccounted for risk.

Cross Reference:

For a more in-depth discussion of the repercussions of the enactment of CERCLA on the insurance industry, see Section 27.01 above.

While there are similarities between these two scenarios, there is also one fundamental difference: there has long been an awareness of the possibility that innocent people would suffer from flaws in our criminal justice system, and insurers marketed and sold specialty policies to law enforcement that were intended to cover this very risk. Thus, the risk was not one that was unaccounted for, but was instead one that was simply miscalculated. What appears to have been left unaccounted for by the insurance industry was the incredible advances in technology that have occurred in the last few decades, such as DNA testing, and its subsequent application in the exoneration context.

Legal Topics:

For related research and practice materials, see the following legal topics: Insurance LawGeneral Liability InsurancePersons InsuredGeneral OverviewTortsIntentional TortsFalse ArrestGeneral OverviewTortsIntentional TortsFalse ImprisonmentGeneral OverviewTortsPublic Entity LiabilityGeneral Overview

FOOTNOTES:

(n1)Footnote 1. **US--** United States v. Garsson, 291 F. 646, 649 (S.D.N.Y. 1923).

(n2)Footnote 2. For a comprehensive listing of the known wrongfully convicted, *see* Jay Robert Nash, I Am Innocent!: A Comprehensive Encyclopedic History Of The World's Wrongly Convicted Persons 725-808 (Da Capo Press 2008). *See also* The Innocence Project--Know the Cases, http://www.innocenceproject.org/know (last visited July 12, 2012); Meet the Exonerated, Center on Wrongful Convictions, http://www.law.northwestern.edu/wrongfulconvictions/exonerations/ (last visited July 12, 2012); and The Innocents Database, http://forejustice.org/search_idb.htm (last visited July 12, 2012). *See also* Pepson and Sharifi, Lego v. Twomey: *The Improbable Relationship Between an Obscure Supreme Court Decision and Wrongful Convictions*, 47 Am. Crim. L. Rev. 1185 (2010).

For a listing and discussion of those actually executed for a crime they did not commit, *see* Talia Roitberg Harmon & William S. Lofquist, *Too Late for Luck: A Comparison of Post-Furman Exonerations and Executions of the Innocent*, 51 Crime & Delinq. 498 (2005).

(n3)Footnote 3. The United States Department of Justice, Bureau of Justice Statistics reports that, as of December 31, 2008, there were 2,304,115 people in state and federal jails and prisons. United States Bureau of Justice Statistics, Key Facts at a Glance: Correctional Populations, available at http://bjs.ojp.usdoj.gov/content/glance/tables/corr2tab.cfm.

(n4)Footnote 4. D. Michael Risinger, *Innocents Convicted: An Empirically Justified Factual Wrongful Conviction Rate*, 97 J. Crim. L. & Criminology 761 (2007) (concluding there is a minimum rate of 3.3% of "wrongful convictions," a percentage that *does not* include those whose convictions were overturned by technical or procedural errors. Of course, there are other sources that suggest both higher and lower percentages.).

(n5)Footnote 5. Samuel R. Gross et al., *Exonerations in the United States 1989 Through 2003*, 95 J. Crim. L. & Criminology, 523, 526 n. 9 (2005).

(n6)Footnote 6. Samuel R. Gross et al., *Exonerations in the United States 1989 Through 2003*, 95 J. Crim. L. & Criminology, 523, 526 n.9 (2005) (Other factors identified as playing a significant role in the rising number of exonerations include the increase in public awareness of the issue and the corollary, the increase in resources allocated to investigating claims of the wrongfully convicted.).

(n7)Footnote 7. *E.g.*, H. Patrick Furman, *Wrongful Convictions and the Accuracy of the Criminal Justice System*, Colo. Law., Sept. 2003, at 11, 12; Jeffrey Chinn & Ashley Ratliff, "*I Was Put Out the Door With Nothing"--Addressing the Needs of the Exonerated Under a Refugee Model*, 45 Cal. W. L. Rev. 405, 411 (2009); The Innocence Project--Understand the Causes: Forensic Science Misconduct, http://www.innocenceproject.org/understand/Government-Misconduct.php (last visited July 12, 2012); and Innocence Project, Facts on Post-Conviction DNA Exonerations, http://www.innocenceproject.org/Content/Facts_on_PostConviction_DNA_Exonerations.php (last visited July 12, 2012).

(n8)Footnote 8. *E.g.*, Brandon L. Garrett, *Innocence, Harmless Error, and Federal Wrongful Conviction Law*, 2005 Wis. L. Rev. 35, 79-102 (2005) (discussing the factors that lead to wrongful convictions); *see also* The Innocence Project--Understand the Causes: Forensic Science Misconduct, http://www.innocenceproject.org/understand/Government-Misconduct.php (last visited July 12, 2012).

(n9)Footnote 9. *See* discussion at Section 33.10[3] below, *Federal and State Statutory Compensation Acts May Provide An Additional Source of Recovery*.

(n10)Footnote 10. *See* discussion at Section 33.10[3] below, *Federal and State Statutory Compensation Acts May Provide An Additional Source of Recovery*.

(n11)Footnote 11. *E.g.*, **US--** Limone v. United States, 579 F.3d 79, 104 (1st Cir. 2009) (affirming a $100 million award for four plaintiffs based on a $1 million per year of wrongful imprisonment baseline); White v. McKinley, 605 F.3d 525, 539 (8th Cir. 2010) (affirming total damages award of $16 million to a civil rights plaintiff who spent only five years in prison after being wrongly convicted of molesting step-daughter); Dominguez v. Hendley, 545 F.3d 585, 588 (7th Cir. 2008) (affirming a $9 million award for a plaintiff who spent four years in prison after being wrongfully convicted of a rape and home invasion when he was 16 years old); Newsome v. McCabe, 319 F.3d 301, 303 (7th Cir. 2003) (affirming a $15 million award for a plaintiff who spent 15 years in prison).

(n12)Footnote 12. Life Intervention for Exonerees, http://www.exonereelife.org/exonerated.html (last visited July 12, 2012) (stating a 12 year average for exonerees); *The Undisputed Facts*, 1 Just Project

Q., Volume 1 Issue 1 at 2,.http://www.azjusticeproject.org/Assets/newsletter/jp_quarterly_01.pdf (same). But see Innocence Project, Facts on Post-Conviction DNA Exonerations, http://www.innocenceproject.org/Content/Facts_on_PostConviction_DNA_Exonerations.php (last visited July 12, 2012) (stating a 13 year average *for DNA* exonerees); Mid-Atlantic Innocence Project, http://www.exonerate.org/facts (last visited July 12, 2010) (same).

(n13)Footnote 13. The authors of this chapter are unaware of any reliable source that estimates what percentage of exonerees have actionable claims.

(n14)Footnote 14. **US--** 42 U.S.C. § 1988 allows for an award of attorney fees for a successful claim under 42 U.S.C. § 1983.

(n15)Footnote 15. **US--** 42 U.S.C. § 9601 *et seq.*

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4-33 New Appleman on Insurance Law Library Edition § 33.03

AUTHOR: William G. Beck, Ian Hale, Sarah E. Millin and Jennifer M. McAdam

§ 33.03 There Are Several Types of Insurance Policies Commonly Purchased by Law Enforcement

When faced with the numerous and varied risks that arise for entities engaged in law enforcement, prudence has long counseled the purchase of a different type of insurance coverage for each risk or group of risks. In the past, such coverages were often purchased as discrete policies from insurers that specialized in writing a single type of risk, so that in any given year an entity could have several policies all written by different insurers.

Cross References:

See Section 27.01[1][b] above. *See generally* Brownfields Law & Practice § 28.01[4][a] (Michael B. Gerrard ed.).

Expert Insight:

Municipal, state and federal government entities appear to have historically purchased multiple types of insurance coverage for each annual policy period with a high degree of frequency. Accordingly, coverage analyses for these entities--especially those involving innocence cases--are more likely to require an examination of different special-risk policies.

When presented with claims in an innocence case, an insured and each of its insurers should first identify the universe of potentially applicable insurance policies that may cover the costs and expenses for any required investigation, defense and payment of settlements or judgments. An insured's entire insurance coverage profile should be evaluated, including all historic policies issued from the beginning of the investigation through the date of exoneration, as well

as any insurance policies in effect at the time the case is filed.

If the insured is an individual officer, this evaluation should include the insurance coverage profile of the entity employing the individual officer. If the insured was employed by a municipality or other governmental entity that was served by a shared law enforcement agency, or if the insured is or was employed by such a shared agency, this evaluation should also include the insurance coverage profile of every entity that participated in this shared relationship.

Locating historic insurance policies issued to a particular entity is often the first real challenge faced in evaluating an insurance coverage claim. When searching for historic insurance policies, or secondary evidence of such policies, consider the following sources:

- record storage locations such as warehouses, computer systems, and indices;
- known insurance policies issued to the insured, which often refer to other policies;
- current and prior insurance agents or brokers;
- accounting records, corporate ledgers, and similar-type bookkeeping systems that may contain evidence of premium payments;
- legal files and records that involve prior insurance claims, which will often contain insurance claims correspondence and records; and
- record searches from current or known insurers of the insured.

Expert Insight:

The field of insurance policy archeology has advanced considerably in recent years, and there are numerous companies that now specialize in locating historic insurance policies and secondary evidence of coverage. Because of the staggering liabilities associated with these type of cases, the expense of hiring an insurance archaeologist or experienced coverage counsel may often be justified.

Once located, there are three categories of insurance policies that are most likely to provide coverage for these types of cases: Law Enforcement Liability policies ("LEL policies"), Public Officials Liability policies ("POL policies"), and General Liability/ Commercial General Liability policies ("CGL policies").

Lexis.com Search:
To find materials discussing LEL and POL policies of insurance coverage, after choosing the appropriate jurisdiction or treatise, use

"law enforce!" and "public official" /p insur! as the terms and connectors.

The policies within each of these categories are tailored to manage the risks associated with the specific class of Insured for which they are written, and the form, scope and substance of these categories of policies can differ quite dramatically.

Lexis.com Search:

To find materials discussing commercial general liability insurance policies generally, use the Search by Topic feature: Click the Search tab and the Search by Topic or Headnote sub-tab. Click through the following topical hierarchy and select your jurisdiction. Search by Topic: Insurance Law > General Liability Insurance > General Overview.

Legal Topics:

For related research and practice materials, see the following legal topics: Insurance LawGeneral Liability InsuranceGeneral Overview

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4-33 New Appleman on Insurance Law Library Edition § 33.04

AUTHOR: William G. Beck, Ian Hale, Sarah E. Millin and Jennifer M. McAdam

§ 33.04 LEL Policies Are Different Than CGL Policies, and Were Created to Ensure Against the Specific Risks Faced by Law Enforcement Officers

[1] Coverage Provisions in LEL Policies Can Be Unique

[a] The Majority of LEL Policies Contain One of Two Types of Insuring Agreement

[i] True Act-Based Insuring Agreement Merely Requires an Act During the Policy Period to Invoke Coverage

The insuring agreement of an LEL policy will generally require either the causal act or the resultant injury to happen during the policy period to invoke coverage, but not both. Moreover, most true act- and injury-based insuring agreements in LEL policies do not directly tether the act or injury to an "occurrence" or "accident," as typical CGL policies do. As a practical matter, this means that coverage under most LEL policies may be easier to invoke than coverage under a CGL policy, especially CGL policies that purport to require both the "occurrence" or "accident" and an injury during the policy period.

A large percentage of LEL policies contain what can be termed an act-based insuring agreement. Under a policy with an act-based insuring agreement, the material requirement to invoke coverage is the allegation or existence of one of the policy's defined or enumerated "acts" during the policy period. n15.1 When the resultant injury happened or is deemed to have happened--during or after the policy period--has no bearing on coverage analyses under true act-based insuring agreements.

A typical example of an act-based insuring agreement will read:

The Company will pay on behalf of the Insured all sums which the Insured shall become legally obligated to pay as damages because of any "wrongful act" that results in personal injury to which this policy applies. ...

This insurance applies only to "wrongful acts" that occur ... *during the policy period* ... .

"Wrongful Act" means any actual or alleged event, act, error or omission, neglect or breach of duty, misstatement, or misleading statement.

Thus, under act-based insuring agreements, the only coverage condition with a temporal limitation is the "act" element, and the primary focus of any coverage inquiry is the existence of one of the defined or enumerated acts during the policy period.

LEL policies that contain act-based insuring agreements give rise to somewhat different scope of coverage and related coverage considerations than CGL policies, or even LEL policies with injury-based insuring agreements.

For example, the defined or enumerated acts covered are generally very broad, such as "any event, act or omission. ..." This means there is generally less concern over whether the act complained of will fall within the coverage provisions set forth in the insuring agreement, though it is of course still important to know the specific acts listed as covered in a policy.

More salient, however, is the related fact that policies insuring against the act that caused an injury are recognized as providing broader coverage than policies insuring against an "occurrence" or "accident" giving rise to an injury. n16 In situations where multiple or serial acts lead to an injury, and the multiple or serial acts occur within the period of two successive insurance policies, some courts interpreting occurrence- or accident-based insuring agreements (in CGL policies) have held that the occurrence or accident is not deemed to occur until the claimant is injured, thereby limiting coverage to a single policy. n17 Policies that insure against the act, by contrast, should not face such interpretive limitations.

Lexis.com Search:

To find materials discussing when an act done during a policy period will invoke Law Enforcement Liability coverage, after choosing the appropriate jurisdiction or treatise, use "law enforce!" /s act and insur! as the terms and connectors.

[ii] True Injury-Based Insuring Agreements Merely Requires an Injury During the Policy Period to Invoke Coverage

A large percentage of LEL policies contain what can be termed an injury-based Insuring Agreement. Under an injury-based insuring agreement, the material requirement to invoke coverage is the allegation or existence of one of the policy's defined or enumerated "injuries" during the policy period. Whether or not the causal act or acts that gave rise to the injury occurred during the policy period is irrelevant to the coverage analysis undertaken with a true injury-based insuring agreement.

The operative language of injury-based insuring agreements in LEL policies may appear to come in two entirely different varieties. However, while these two ostensibly different varieties of insuring agreements employ different terms and structures, closer analysis reveals that there is little to no practical difference in their application.

In the first variety, the Insuring Agreement's material requirement to invoke coverage is phrased directly in terms of the existence of an "injury" or "personal injury" during the policy period. A typical example of such an insuring agreement reads:

> The Company will pay on behalf of the Insured all sums which the Insured shall become legally obligated to pay as damages because of any act, error, omission, neglect or breach of duty that results in "personal injury" to which this policy applies. ...
>
> *This policy applies only to "personal injury" ... that occurs during the policy period.*
>
> "Personal Injury" means any or all of the following:
>
> (a) false arrest;
>
> (b) malicious prosecution;
>
> (c) false imprisonment;
>
> (d) deprivation of any rights, privileges or immunities secured by the Constitution and Laws of the United States of America or the State;
>
> (e) humiliation or mental distress; ...

Under an LEL policy that contains this variety of insuring agreement, it is clear that the only material requirement to invoke coverage is the happening of an enumerated "injury" during the policy period. n18 Again, when the causal act, error, omission, neglect or breach of duty or other enumerated "act" happened is wholly irrelevant in determining whether the policy is invoked.

In the second variety, the insuring agreement's material requirement to invoke coverage is actually phrased in terms of the happening of an "offense" during the policy period. A typical example of such an insuring agreement reads:

> The Company will pay on behalf of the Insured all sums which the Insured shall become legally obligated to pay as damages because of any act, error, omission, or breach of duty that results in "personal injury" to which this policy applies. ...
>
> This insurance applies to "personal injury" *only if caused by an offense committed ... during the policy period*. ...
>
> "Personal Injury" means any injury arising out of one or more of the following offenses:
>
> (a) false arrest;
>
> (b) malicious prosecution;
>
> (c) false imprisonment;

> (d) deprivation of any rights, privileges or immunities secured by the Constitution and Laws of the United States of America or the State;
>
> (e) humiliation or mental distress; ...

This second variety of injury-based insuring agreements defines "offense" in the exact way the first variety defines "injury," and while the second variety may seem to contain a separate "injury" requirement in addition to the "offense" requirement, there is no separate definition of this "injury," nor is there a requirement that this "injury" happen during the policy period. Stated another way, the "offense" can, in most circumstances, simply be viewed as the "injury" for all practical purposes under this second variety of insuring agreement.

Thus, there is no analytical difference between the two varieties of injury-based insuring agreements, and both merely require the happening of one of the enumerated injuries during the policy period to invoke coverage, regardless of when the causal act happened.

Expert Insight:

The injuries or offenses enumerated within LEL policies will vary. As with policies containing act-based Insuring Agreements, it is important to be aware of the particular injuries or offenses listed within the particular policy being analyzed, as these will determine the scope of coverage afforded by the policy and, ultimately, whether the allegations, facts and claims asserted fall within that scope of coverage.

Lexis.com Search:
To find materials discussing when an injury occurring during a policy period will invoke Law Enforcement Liability coverage, after choosing the appropriate jurisdiction or treatise, use "law enforce!" /s injury and insur! as the terms and connectors.

Almost every LEL policy with true act-based Insuring Agreements cover, *separately*, false arrest, malicious prosecution, and false imprisonment, and the majority cover, *separately*, violations of civil rights and humiliation and mental distress. Notably, the first three of these "injuries" arise sequentially in innocence cases: first the individual is arrested, then prosecuted, then imprisoned. This, viewed in conjunction with the fact that LEL policies are written to insure law enforcement against the very risk represented by an innocence case, strongly suggests that policies covering multiple years may be implicated.

[b] Some Outlier LEL Policies Contain Different Insuring Agreements That May Have Other Requirements to Invoke Coverage

While the majority of LEL policies appear to have either an injury-based or an act-based insuring agreement, there are some outlier LEL policies that contain different--and sometimes substantially different--insuring agreements. There is

a wide range of nonstandard coverage language that can appear in such policies, and a commonsense, literal reading is recommended when analyzing such language in an attempt to determine the scope of coverage provided.

The two most common outlier insuring agreements contain (1) language that requires both an act and injury during the policy period to invoke coverage, or (2) language similar to that used in the occurrence-based insuring agreements found in some CGL policies.

Expert Insight:

LEL policies that contain an insuring agreement that requires both an act and an injury during the policy period to invoke coverage are much more restrictive. These policies will also necessitate much more analysis, both in determining the scope of coverage afforded, and in determining whether the specific claims being asserted fall within that coverage.

LEL policies that employ language similar to that used in the occurrence-based insuring agreements in some CGL policies may purport to require that the act or injury arise out of an "accident," while at the same time purporting to cover intentional torts such as false arrest, malicious prosecution, and false imprisonment. n19 In the CGL context, "courts are split as to whether the requirement for an occurrence, that the injury be expected or intended by the insured, is inconsistent with the nature of personal injury/advertising injury coverage, thereby making the occurrence requirement unenforceable." n20

A small minority of courts have tried to harmonize the personal injury provisions with the definition of "occurrence" by focusing on definition of "accident" as "an unexpected injury-causing event." n21 These courts rationalize that "coverage is afforded under the policy for the personal injuries defined when either the external cause or the resulting injury was unexpected or accidental." n22 However, "when the intent to harm is present, the exclusion applies." n23

Most courts have adopted the more reasoned viewpoint, holding that where personal injury coverage does require an occurrence, "[t]he offenses listed in the definitions of personal injury/advertising injury cannot be reconciled with the requirement that there be an accident." n24 Indeed, courts agree that "the 'accident' component of the definition of 'occurrence' is [directly] contrary to the intentional component of ... the offenses which the policy recognizes as those triggering 'personal injury.' " n25 Courts adopting this viewpoint note that in trying to construe "the 'personal injury' definition and the 'occurrence' definition together, the policy apparently provides coverage for 'unintentional intentional torts' not committed by or at the direction of the insured," and that such an interpretation is "complete nonsense." n26

The approach adopted by the latter group of courts is even more compelling when the policy at issue is an LEL policy, as no group is more susceptible to allegations of intentional torts and quasi-intentional civil rights violations than law enforcement.

[c] "Scope of Duty" Requirements Are of Limited Application

Many LEL policies may also require that the causal act be performed within the "course and scope" the Insured's employment. n27 Because this language is substantially identical to the language of the standard applied in tort law for determining an employer's vicarious liability, most courts have simply lifted the analysis. n28 Most courts to have considered the question hold that "acts are within the scope of employment if the acts are 'so closely connected with what the servant is employed to do and so fairly and reasonably incidental to it, that they may be regarded as methods, even though quite improper ones, of carrying out the objectives of the employment.' " n29 An employee is generally found not to be acting within the scope of employment "where an employee's behavior is 'the result of, or impelled by, wholly personal motives[.]' " n30 This rule seems well suited to the law enforcement area, where misleading and even outright lying to obtain information is expected and condoned. n31

Examples of cases where officers have been held to be "acting within the scope of their employment" include those "in which the activity is arguably an outgrowth of a police officer's duties, such as in the arrest of a suspect, the investigation of a crime, or the handling of evidence[.]" n32 In the tort context, many courts have found that the use of excessive force during an arrest falls within the scope of employment. n33

Sexual assault, however, is one type of claim courts appear more inclined to adopt a narrower reading of, n34 although even this will depend on the exact language used in the policy. n35 A telling example is *City of Greenville v. Haywood*, where coverage was sought for an officer's sexual assault of a victim inside the victim's home. The policy insured "wrongful act(s) which result in personal injury ... caused by an occurrence and *arising out of the performance of the INSURED'S duties to provide law enforcement and/or other departmentally approved activities*[.]" n36 The court interpreted the language "arising out of" broadly based upon the rule that "provisions which extend coverage 'must be construed liberally so as to provide coverage, whenever possible by reasonable construction.' " n37 The court explained that "arising out of" required only a "causal nexus," and held that coverage was afforded because the officer would not have been at the victim's home but for his position as a police officer. n38

Lexis.com Search:

To find materials discussing the requirement under a law enforcement liability policy that a causal act be performed within the "course and scope" of an insured's employment, after choosing the appropriate jurisdiction or treatise, use "law enforce!" /p "scope of employ!" and insur! as the terms and connectors.

[2] Most Exclusionary Provisions in LEL Policies Are the Same Exclusions That Typically Appear in CGL Policies, But May Be Interpreted More Narrowly

[a] When Coverage Provisions Conflict With Exclusionary Provisions, Conflicts Are Often Resolved in Favor of Coverage

Odd though it may seem to those with an understanding of the risks insured by each type of policy and how those risks arise, LEL and POL policies will generally contain some version of the same exclusions found in CGL policies.

There are two notable exceptions: (1) most LEL policies will not contain the intended/expected-injury and intentional-acts exclusions that are found in most

CGL policies, and (2) POL and CGL policies (especially those sold in packages with LEL policies) often contain exclusions styled law-enforcement exclusions.

As discussed throughout this chapter, however, courts often recognize when coverage provisions are at odds with exclusionary provisions, and the general rule in such situations is to resolve all conflicts in favor of coverage. n39 As courts become more attuned to the special-risk coverage provided by LEL policies, they may also become more apt to apply this rule to broad exclusions asserted as a bar to coverage for liabilities of the general type these policies were created to cover.

[b] Criminal-Act Exclusions Are Generally of Limited Applicability

[i] When the Policy Remains Silent as to When the Criminal-Act Exclusion Will Apply, Courts Are Split

Almost every LEL, POL and CGL policy contains some version of the so-called criminal-act exclusion. Not surprisingly, numerous courts have had the opportunity to weigh in on its proper application, though most of these decisions have occurred in the context of interpreting CGL policies. Nonetheless, these decisions are instructive, as criminal-act exclusions employ identical or substantially identical wording across all three types of policy.

There are two general versions of this exclusion, n40 an earlier version that bars coverage for injuries "resulting from a criminal act or omission," n41 and a more recent version which bars coverage for the "willful violation of a penal statute committed by or with the knowledge or consent of any insured." n42 The latter of these two exclusions is clearly the narrower, limiting its application to violations of a "penal" statute, n43 and further limiting its application to only those violations that were "willful" n44 and undertaken "with the knowledge and consent of the insured."

Expert Insight:

This exclusion actually comes in a wide array of specific phrasings, and the need to appreciate the wording of the criminal-act exclusion contained in a particular policy cannot be overstated. It is also important to be aware of the effect that other provisions, such as Separation of Insureds provisions, may have on this exclusion. n45 This can be particularly useful in those innocence cases where both the individual actors and the governmental entity or entities that employed them are named defendants, and where each will often qualify as a separate insured under each implicated policy. In these circumstances, Separation of Insured-type provisions may operate to the limit the exclusion's application to only select defendants.

Application of the criminal-act exclusion to bar coverage is nearly uniform when the Insured has already been convicted of a crime based upon the identical conduct for which civil damages are being sought, n46 though a few courts have suggested that the exclusion will apply only if the criminal conduct the Insured was convicted of is the sole cause of the civil injury sought to be remedied. n47

Some insurers have added language to the exclusion that appears intended to address this precise question, most typically a residual phrase stating that the application of the exclusion is predicated upon either "a court determination that criminal ... conduct was committed by the protected person or with the consent or knowledge of the protected person," n48 or upon "determin[ation] by a judgment or other final adjudication." n49 A few Insurers have taken the opposite approach, appending "regardless of whether anyone is charged with or convicted of a crime" or similar phrases to the exclusion. n50

Most policies still remain silent as to when the criminal-act exclusion will apply. When the policy remains silent, courts are split as to when the exclusion will bar coverage.

[ii] Majority View: Exclusion Applies Only If Convicted of a Crime for the Same Conduct

The majority of courts to have addressed the question of when a criminal-act exclusion applies have adopted a bright-line rule requiring an actual conviction as a predicate to application. n51 Some of these courts have gone even further, requiring the conviction to be based upon the exact same conduct alleged to have led to the damage or injuries complained of in the civil action. n52

One of the most commonly articulated rationales in support of this majority view is the provision found in most policies promising to defend any suit, even if the "allegations [] are groundless, false, or fraudulent." n53 Courts following the majority view have also rejected the notion that public policy requires that coverage be excluded for particularly malicious behavior, even absent charges or a conviction. n54

The criminal-act exclusion is thus of extremely limited application under the interpretation adopted by the majority of courts.

[iii] Minority View: Exclusion Applies If There Are Allegations That the Conduct Was Criminal

A minority of courts have refused to adopt such a narrow reading of the criminal-act exclusion, instead holding the exclusion will bar coverage if the essence of the civil claim is that the insured was engaged in criminal conduct. n55 However, most courts that follow the minority view will still find the exclusion inapplicable if the causal action complained of encompasses both criminal and non-criminal acts. n56

Thus, even under the minority view, the criminal-act exclusion will have only limited application.

[iv] Courts May Find Ambiguity Created By Criminal-Act Exclusions In LEL Policies

While the question has seldom been considered, a few courts have found an inherent conflict between a criminal-act exclusion and the insuring agreement of a typical LEL policy, which expressly covers injuries arising from potentially criminal conduct, such as assault and battery, false arrest and false imprisonment. n57 Applying the general rule of resolving all conflicts in favor of the insured, n58 these courts went on to hold that the conduct was not excluded. n59

[c] Fraud and Dishonesty Exclusions May Bar Coverage With or Without an Actual Finding that the Conduct Was Fraudulent or Dishonest

Nearly every LEL, POL and CGL policy also contains an exclusion barring coverage for fraud and dishonest conduct, n60 and this exclusion has been litigated with almost as much frequency as the criminal-act exclusion. Like the criminal-act exclusion, fraud and dishonesty exclusions can come in myriad forms, making an awareness of the specific language of the particular exclusion critical to understanding how the exclusion will be applied.

Many policies contain a version of the exclusion that bars coverage only to the extent that damages are found to be attributable to an insured's fraud or dishonesty; unless and until such a finding is made, the exclusion is inapplicable, and the Insurer must continue meet its obligations under the policy. n61 Common phrasings of this version of the exclusion can include a required showing of "affirmative dishonesty or actual intent to deceive or defraud," n62 or a requirement that the fraud or dishonesty have been "determined by a judgment or other final adjudication." n63 Some policies, in addition to one of these two requirements, will further limit the exclusion by requiring the fraud or dishonest acts also be "material" to the claims asserted against the Insured. n64

There are still a significant number of policies that contain fraud and dishonesty exclusions that do not explicitly state when and how the exclusion should be applied, which has forced courts to step in and offer their own interpretations. Decisions have been surprisingly uniform.

With respect to exclusions that purport to bar coverage simply for "fraud and dishonesty," without any additional limiting language, courts have consistently held that an Insurer cannot walk away from obligation with impunity merely because of *unproven allegations* of wrongdoing." n65 Most of these courts appear to adhere to the idea that the exclusion contains an implicit requirement for a determination that the conduct was "in fact" fraudulent or dishonest before coverage can be denied, even absent such language. n66 This adherence is probably a function of the duty to defend standard, which requires an insurer to defend its insured against claims if there is even the mere possibility of coverage. n67

No court has yet addressed whether an LEL policy containing a fraud and dishonesty exclusion is inherently ambiguous, and thus unenforceable. Such an argument would appear to have some merit, as it is well known that law enforcement officers are permitted, expected and encouraged to mislead and even lie to suspects in order to obtain information, and LEL policies are written specifically to cover such core law enforcement officer conduct.

[d] Prior-Act Exclusions, Related-Act Exclusions, and Deemer Clauses Are Uncommon, But May Bar or Significantly Limit Coverage

Prior-act exclusions, related-act exclusions and deemer clauses all operate to effectively limit coverage for related or continuing acts or damages to the single policy year when the first such act or injury began.

Expert Insight:

> Because innocence cases involve such immense amounts of liability, and because these cases tend to contain allegations of both discrete and separate continuing injuries and acts over the course of many years, the number of policies implicated is generally of momentous concern to everyone involved. To this end, prior-act exclusions, related-act exclusions and deemer clauses have the potential to drastically reduce the amount of insurance available to fund this liability.

Prior-act and related-act exclusions can come in several forms, but all operate in the same general manner. A common articulation of this exclusion will provide that "Losses arising out of the same or related Wrongful Act(s) shall be deemed to arise from the first such same or related Wrongful Act." n68 When coupled with the temporal limitation in act-based insuring agreements, which limit the policy's application to act that occurred during the policy period, prior-act and related-act exclusions can be one of the most effective methods of limiting coverage for related or continuing acts and injuries to a single policy year.

Deemer clauses, though employing different language, function in a similar way. Deemer clauses take their name from their effect, which is to "deem" when an act or injury occurred for coverage purposes, usually at either at the time of the first or last such act or injury. n69 A typical formulation of a deemer clauses will state that "Each occurrence shall be deemed to commence on the first happening of any material damage not within the period of any previous occurrence" n70 or that "All damages arising from continuous or repeated exposure to the same general harmful conditions shall be deemed to arise from one 'incident.' " n71

Though long known to the insurance industry, and even commonplace among the policies written by certain insurers, prior-act exclusions, related-act exclusions and deemer clauses are rarely included in LEL policies.

Expert Insight:

> The absence of such well-known exclusions from a policy can be telling, as one would expect an insurer that intended to bar coverage for prior or related acts or injuries to have included such a provision in the policy. This logic has even more force for LEL policies, as they are special-risk policies designed to cover both related and continuing injuries such as "false arrest," "malicious prosecution," "false imprisonment," and "violations of civil rights," as well as related and continuing acts such as "breach of duty" and "omissions." Simply reading an otherwise absent exclusion into a policy contravene the rules of interpretation as they are articulated in every jurisdiction. n72

[e] Intentional-Act and Expected-and-Intended-Injury Exclusions Are Unlikely to Appear In LEL Policies

Though common in CGL and, to a lesser extent, even POL policies, intentional-act and expected-and-intended exclusions are not included in typical LEL policies

because of the inherent ambiguity that would result given of the unique type of risk these policies insure against, including the intentional torts of assault and battery, false arrest, abuse of process, malicious prosecution, and false imprisonment. n73

Notwithstanding the antipodes created by an LEL policy that expressly covers intentional torts while simultaneously excluding coverage for intentional acts, a few early LEL policies followed this exact paradigm. n74 Moreover, at least one court interpreting such an LEL policy has chosen to apply the exclusion to bar coverage notwithstanding this inherent ambiguity. n75 The more sound and reasoned approach, which is also employed by the majority of courts to have examined the issue in the context of CGL coverage, is to find that a conflict or ambiguity exists, and follow the general rule requiring all such conflict be resolved against the drafting Insurer and in favor of coverage. n76 The discussion in Section 33.04[1][b] concerns the analogous issue of policies that insure against intentional torts but contain an occurrence-based Insuring Agreement requiring the causal act be "accidental."

Traditional intentional-act exclusions purport to bar coverage for injury or damage that "results directly or indirectly from an intentional act of an Insured or an act done at the direction of an Insured." n77 Given the clear language used in this exclusion, it may come as a surprise that there is a split of authority whether its intentionality requirement relates to the causal act, the resultant injury, or both.

Some courts interpret this exclusion as it is actually phrased and only look to determine whether the act that resulted in injury or damage was intended. n78 However, an almost equal number have found the exclusion too broad, and have chosen to limit its application by holding that "only the intended injuries [also] flowing from an intentional act" are barred by this exclusion. n79 In what appears to be an attempt to restrict such interpretations, some Insurers have recently begun to modify the exclusion, adding language emphasizing that it is meant to apply to "liability which results directly or indirectly from any act intended by an insured *whether or not the bodily injury or property damage was intended*." n80

The expected-and-intended-injury exclusion is a similar exclusion that is also found in many CGL and POL policies, and typically bars coverage for injury or damage that is "expected or intended from the standpoint of the Insured." As with the intentional-act exclusion, the "expected and intended exclusion" is seldom included in LEL policies.

The key distinction between the intentional-act exclusion and the expected-and-intended-injury exclusion should be obvious from the language of the two exclusions: the language of the former exclusion focuses on whether an Insured's *actions* were intended, while the latter focuses on whether the resultant *injury* was intended. Nevertheless, the line between these two exclusions can be blurred when interpreted by courts.

There is little doubt that the test to determine the applicability of an expected-and-intended-injury exclusion "is not whether the insured intended his actions, but whether the insured specifically intended to cause harm." n81 In some jurisdictions, "[a]n insured intends an injury if he desired to cause the consequences of his act or if he acted knowing that such consequences were substantially certain to result." n82 In others jurisdictions, an "insured's

intent to injure can be inferred when the resulting injury is a natural and probable consequence of the insured's act." n83

Courts have failed to reach a consensus on the question of whether an Insured must intend to cause *the specific* injury that resulted, or whether an intent to cause *any* injury is sufficient to trigger the exclusion. Some courts hold the fact that the "injury inflicted was different from that intended" to be wholly irrelevant, n84 while others hold that the "injury and damage [must be] of the same general type which the insured intended to cause" for the exclusion to apply n85

Including an expected-and-intended-injury exclusion in an LEL policy creates just as much confusion as the inclusion of its counterpart intended-act exclusion. Some Insurers have attempted to remedy this by including an exception to the expected-and-intended-injury exclusion where the insured has an "objectively good faith reason" to cause injury or damage. n86 At least one court has held that this exception does not resolve the ambiguity. n87

Lexis.com Search:

To find materials discussing exclusions in law enforcement liability policies generally, after choosing the appropriate jurisdiction or treatise, use "law enforce!" /p "exclusion!" and insur! as the terms and connectors.

Cross References:

For comprehensive coverage of liability for law enforcement activities, see Insurance and Risk Management For State & Local Governments, Chapter 9. For further discussion of law enforcement liability insurance, see Insurance and Risk Management For State & Local Governments § 26.06.

Legal Topics:

For related research and practice materials, see the following legal topics: Insurance LawGeneral Liability InsuranceExclusionsGeneral OverviewInsurance LawGeneral Liability InsuranceExclusionsCriminal ActsInsurance LawGeneral Liability InsuranceExclusionsIntentional Acts

FOOTNOTES:

(n1)Footnote 15.1. *Consider* **US/IA--** Gulf Underwriters Ins. Co. v. City of Council Bluffs, 755 F. Supp. 2d 988 (S.D. Iowa 2010) , *aff'd*, 677 F.3d 806 (8th Cir. 2012) (alleged misconduct--fabricating evidence and coaching or coercing witnesses into giving perjured testimony--took place well before beginning of policy period and instances of purported wrongful conduct cited by insureds at best only raised vague, "metaphysical doubt" as to material facts; even assuming existence of act of affirmative tortious conduct during policy period, that conduct could not constitute "wrongful act" unless it resulted in injury and underlying claimants did not specifically allege they were injured by any wrongful conduct during policy period).

(n2)Footnote 16. **MA--** Hernandez v. Scottsdale Ins. Co., 26 Mass. L. Rep. 15 (Mass. Super. Ct. 2009) (finding that "Only specific policy language will trigger coverage based on the wrongful acts of the insured.").

(n3)Footnote 17. *E.g.*:

US-- Baylor Heating & Air Conditioning, Inc. v. Federated Mut. Ins. Co., 987 F.2d 415, 418 (7th Cir.1993) (applying Indiana law);

ID-- Millers Mutual Fire Ins. Co. v. Ed Bailey, Inc., 647 P.2d 1249, 1251 (Idaho 1982) ;

IL-- Great American Ins. Co. v. Tinley Park Recreation Comm'n, 259 N.E.2d 867 (Ill. App. Ct. 1970) .

(n4)Footnote 18. This second variety of Insuring Agreement employs the same structure that many modern CGL policies employ for Coverage B-Personal Injury coverage. *See* ISO Commercial General Liability Coverage Form CG 00 01 12 07, Section I--Coverages, Insurance Services Office, Inc., 2006.

(n5)Footnote 19. *See, e.g.*, Missouri Prop. & Cas. Ins. Guaranty Ass'n v. Petrolite Corp., 918 S.W.2d 869, 873 (Mo. Ct. App. 1996) (interpreting CGL policy requiring "personal injury," defined to include a number of intentional torts, to arise out of an "occurrence," which was defined as an "accident").

(n6)Footnote 20. Windt, Insurance Claims and Disputes 3d, § 11:28.

(n7)Footnote 21. *See, e.g.*, **AZ--** State Farm Fire and Cas. Co. v. Doe By and Through Doe, 797 P.2d 718 (Ariz. Ct. App. 1990) .

(n8)Footnote 22. *See, e.g.*, **AZ--** *State Farm Fire and Cas.,* 797 P.2d at 719 .

(n9)Footnote 23. *See, e.g.*, **AZ--** *State Farm Fire and Cas.,* 797 P.2d at 719 .

(n10)Footnote 24. Windt, Insurance Claims and Disputes 3d, § 11:28.

(n11)Footnote 25. *E.g.*, **MO--** Am. States Preferred Ins. Co. v. McKinley, No. 07-0584-CV-W-NKL, 2009 U.S. Dist. LEXIS 35784, at *14 (W.D. Mo. Apr. 28, 2009) .

(n12)Footnote 26. *E.g.*:

MO-- Missouri Prop. & Cas. Ins. Guar. Ass'n v. Petrolite Corp., 918 S.W.2d 869, 873 (Mo. Ct. App. 1996) (where definition of "personal injury" included a number of intentional torts, intentional age discrimination was covered "occurrence" despite the requirement that an "occurrence" be accidental);

RI-- Town of Cumberland v. Rhode Island Interlocal Risk Mgmt.Trust, Inc., No. 99-0023, 2000 R.I. Super. LEXIS 107, at *13 (R.I. Super. Ct. Oct. 2, 2000) ("[D]efendants cannot argue that they will indemnify for losses arising from personal injuries only when they arise out of an occurrence, because the definition of personal injuries includes torts that cannot possibly arise out of an occurrence. To interpret the contract as stating that the insurer will indemnify for losses due to accidental or unexpected intentional torts is illogical and constitutes sophistry.").

See also:

US/IL-- Hurst-Rosche Engineers, Inc. v. Commercial Union Ins. Co., 51 F.3d 1336 (7th Cir. 1995) (commercial liability policy's definition of "occurrence" as accident which unexpectedly or unintentionally results in personal injury did

not preclude coverage for claim of libel with malice where policy also specifically covered claims for libel, slander, defamation of character, and other intentional torts, which created ambiguity with regard to coverage for intentional torts that had to be resolved in favor of coverage);

US/MI-- North Bank v. Cincinnati Ins. Companies, 125 F.3d 983 (6th Cir. 1997) (insurance policy containing definition of covered "personal injury" that included intentional torts and definition of covered "occurrences" that excluded intentional torts contained "studied ambiguity," and thus would be construed against drafter to cover intentional torts);

US/PA--CGU Ins. v. Tyson Assocs., 140 F. Supp. 2d 415, 422 (E.D. Pa. 2001) ;

MA-- Dilbert v. Hanover Ins. Co., 825 N.E.2d 1071 (Mass. App. Ct. 2005) ("a limiting construction of the 'occurrence' requirement must give way in favor of coverage" for personal injury which was defined to include intentional torts; and the policy was, "at best, ambiguous or, at worst, in direct conflict");

MO-- Am. States Preferred Ins. Co. v. McKinley, No. 07-0584-CV-W-NKL, 2009 U.S. Dist. LEXIS 35784, at *19 (W.D. Mo. Apr. 28, 2009) (finding the definition of "occurrence" in the policies to be "ambiguous" when viewed in conjunction with the intentional torts covered under personal injury insurance, and "[r]esolving this ambiguity in favor of the insured");

RI-- Town of Cumberland v. Rhode Island Interlocal Risk Mgmt. Trust, Inc., 860 A.2d 1210 (R.I. 2004) (ambiguity created by policy's definition of "personal injuries" to include intentional torts, and its definition of "occurrences" as unexpected or unintentional events resulting in personal injury required policy to be construed in favor of coverage for the intentional torts listed in "personal injuries" definition, including civil rights violations under 42 U.S.C. § 1983);

SC-- South Carolina State Budget & Control Bd. v. Prince, 403 S.E.2d 643, 647-648 (S.C. 1991) ("[T]he policy purports to provide coverage for certain intentional torts under the policy's definition of covered personal injuries, yet it attempts to deny coverage for injuries expected or intended under the definition of an occurrence. This internal inconsistency in the policy renders it ambiguous and when a policy is susceptible to more than one reasonable interpretation, one of which would provide coverage, this Court must hold as a matter of law in favor of coverage.").

(n13)Footnote 27. *E.g.*:

US/AL-- Titan Indem. Co. v. Newton, 39 F. Supp. 2d 1336 (N.D. Ala. 1999) (officer accused of fabricating evidence acted within scope of his employment);

OH-- City of Sharonville v. Am. Emplrs. Ins. Co., 109 Ohio St. 3d 186, 188 (Ohio 2006) (officers who violated civil rights of underlying plaintiffs by destroying evidence and covering up the truth acted within the scope of their employment).

(n14)Footnote 28. *E.g.*:

US/AL-- Titan Indem. Co. v. Newton, 39 F. Supp. 2d 1336 (N.D. Ala. 1999) .

OH-- City of Sharonville v. Am. Emplrs. Ins. Co., 109 Ohio St. 3d 186, 188 (Ohio 2006) .

(n15)Footnote 29. *E.g.*, **US/AL--** Titan Indem. Co. v. Newton, 39 F. Supp. 2d 1336, 1342 (N.D. Ala. 1999) (quoting *Ex Parte* Atmore Community Hosp., 719 So. 2d 1190, 1194 (Ala. 1998)) .

(n16)Footnote 30. *E.g.*, **US/AL--** Titan Indem. Co. v. Newton, 39 F. Supp. 2d 1336, 1342 (N.D. Ala. 1999) (quoting Koonce v. Craft, 174 So. 478 (Ala. 1937) .

(n17)Footnote 31. *See* **US-** United States v. Janis, 428 U.S. 433, 447 n.18 (U.S. 1976) , *superseded by statute*, 26 U.S.C. § 7491, *as recognized in* Thompson v. United States, 523 F. Supp. 2d 1291, 1294-1295 (N.D. Ala. 2007) ("There are studies and commentaries to the effect that the exclusionary rule tends to lessen the accuracy of the evidence presented in court because it encourages the police to lie in order to avoid suppression of evidence.") (citing Garbus, *Police Perjury: An Interview*, 8 Crim. L. Bull. 363 (1972); Kuh, *The* Mapp *Case One Year After; An Appraisal of Its Impact in New York*, 148 N.Y.L.J. Nos. 55 and 56 (1962); Comment, *Police Perjury in Narcotics "Dropsy" Cases: A New Credibility Gap*, 60 Geo. L.J. 507 (1971); *Effect of* Mapp v. Ohio *on Police Search-and-Seizure Practices in Narcotics Cases*, 4 Colum. J.L. & Soc. Probs. 87 (1968));

FL-- Ruiz v. State, 50 So. 3d 1229 (Fla. Dist. Ct. App. 2011) .

NY-- People v. McMurty, 314 N.Y.S.2d 194 (N.Y.C. Crim. Ct. 1970)) .

(n18)Footnote 32. *E.g.*, **OH--** City of Sharonville v. Am. Emplrs. Ins. Co., 109 Ohio St. 3d 186, 190 (Ohio 2006) .

(n19)Footnote 33. *See, e.g.*:

US/OK-- Chaplin v. City of Muskogee, No. CIV-11-158-RAW, 2012 U.S. Dist. LEXIS 9070 (E.D. Okla, Jan. 26, 2012) (action that is within scope of employment includes misconduct by officer that though illegal, clearly was accomplished through abuse of power lawfully vested in officer, not unlawful usurpation of power officer did not rightfully possess; finding that officer at some time during episode went beyond bounds of good faith is not necessarily inconsistent with finding that officer acted within scope of employment);

US/OR-- Sistrunk v. Hall, No. 3:09-cv-01122-BR, 2012 U.S. Dist. LEXIS 55104 (D. Or. Apr. 19, 2012) ;

FL-- McGhee v, Volusia County, 679 So. 2d 729 (Fla. 1996) (police officer who grabbed an arrestee by the throat and kicked him acted within the scope of his authority);

LA-- Cheatham v. City of New Orleans, 378 So. 2d 369 (La. 1979) (off-duty police officers who were drinking and shot and killed an unarmed civilian who had intervened in an altercation between the police officers and a shoeshine boy were acting within the scope of their employment);

NH-- Daigle v. City of Portsmouth, 534 A.2d 689, 699-701 (N.H. 1987) (police officer who assaulted a theft suspect while officer was off duty acted within the scope of his employment);

OR-- Brungardt v. Barton, 685 P.2d 1021, 1023 (Or. Ct. App. 1984) (police officer who assaulted the driver of a car while investigating a traffic violation acted within the scope of his employment).

Contra, **FL--** Woodall v. City of Miami Beach, 599 So. 2d 231 (Fla. Dist. Ct. App. 1992) (officer who used excessive force while arresting a person with whom he had an altercation while waiting in line at the bank was not acting within the scope of his employment).

(n20)Footnote 34. *E.g.*:

US/TX-- McLaren v. Imperial Cas. & Indem. Co., 767 F. Supp. 1364, 1371 (N.D. Tex. 1991) ;

CT-- Rawling v. New Haven, 537 A.2d 439 (Conn. 1988) ;

NC-- Young v. Great Am. Ins. Co. of New York, 602 S.E.2d 673 (N.C. 2004) , *adopting dissent in* Young v. Great Am. Ins. Co. of New York, 590 S.E.2d 4 (N.C. Ct. App. 2004) .

(n21)Footnote 35. *E.g.*:

US/TX-- McLaren v. Imperial Cas. & Indem. Co., 767 F. Supp. 1364, 1371 (N.D. Tex. 1991) ;

NC-- Young v. Great Am. Ins. Co. of New York, 602 S.E.2d 673 (N.C. 2004) .

(n22)Footnote 36. **NC--** City of Greenville v. Haywood, 502 S.E.2d 430, 432 (N.C. Ct. App. 1998) .

(n23)Footnote 37. **NC--** City of Greenville v. Haywood, 502 S.E.2d 430, 433 (N.C. Ct. App. 1998) (quoting State Capital Ins. Co. v. Nationwide Mut. Ins. Co., 350 S.E.2d 66, 68 (N.C. 1986)) .

(n24)Footnote 38. **NC--** City of Greenville v. Haywood, 502 S.E.2d 430, 434 (N.C. Ct. App. 1998) .

(n25)Footnote 39. *See, e.g.*, **NC--** City of Greenville v. Haywood, 502 S.E.2d 430, 435 (N.C. Ct. App. 1998) .

(n26)Footnote 40. The observant reader may notice that one of these versions of the exclusion is phrased in terms of injuries excluded, and the other is phrased in terms of acts excluded. However, there is no correlation between the phrasing of this exclusion and the insuring agreement of the policy in which the exclusion appears; either version of the exclusion can appear in any LEL policy, regardless of the type of insuring agreement contained.

(n27)Footnote 41. *See, e.g.*, **CO--** Lincoln Gen. Ins. Co. v. Bailey, 224 P.3d 336, 340 (Colo. Ct. App. 2009) , *aff'd*, 255 P.3d 1039 (Colo. 2011) .

(n28)Footnote 42. *See, e.g.*, **US/MO--** Western Cas. & Surety Co. v. City of Palmyra, 650 F. Supp. 981, 983 (E.D. Mo. 1987) .

(n29)Footnote 43. **US/TX--** Trammell Crow Residential Co. v. Virginia Sur. Co., Inc., 643 F. Supp. 2d 844, 854 (N.D. Tex. 2008) (application of

criminal-acts exclusion requires showing statute at issue is a "penal statute or ordinance" within the meaning of the exclusion).

(n30)Footnote 44. Courts will uphold the limitation requiring violations of a statute to be "willful" if it is expressly stated in the exclusion.

See, e.g., **OR--** American Cas. Co. v. Corum, 917 P.2d 39, 40-41 (Or. Ct. App. 1996) .

However, when interpreting policies without this additional limitation, courts appear split on whether an otherwise applicable criminal-acts exclusion should be applied to both intentional and unintentional violations.

See, e.g.:

US/TN-- Progressive Direct Ins. Co. v. Harrison, No. 11-2493, 2012 U.S. Dist. LEXIS 121004 (W.D. Tenn., Aug. 27, 2012) (applying South Dakota law and finding that where intentional and criminal acts are enumerated as separate and distinct exclusions and criminal exclusion does not contain language of intent, intent is not required in order to activate criminal conviction exclusion; defendant bound by her guilty plea, and exclusion applied to her actions);

MN-- SECURA Supreme Ins. Co. v. M.S.M., 755 N.W.2d 320, 329 (Minn. Ct. App. 2008) (in order to trigger a criminal-act exclusion, an insurer must establish that the insured committed a criminal act; but it is not required to also show that an insured possessed an intent to injure; criminal-act exclusion is unambiguous);

NE-- American Family Mut. Ins. Co. v. Hadley, 648 N.W.2d 769, 780-781 (Neb. 2002) (where legislature determines conduct to be a crime whether committed knowingly, intentionally, or negligently, and insured is convicted of such a crime, a criminal-acts exclusion will bar coverage regardless of insured's intent);

SD-- American Family Mut. Ins. Group v. Kostaneski, 688 N.W.2d 410, 415 (S.D. 2004) (criminal-act exclusion is unambiguous, and the difference between intentional and negligent criminal conduct irrelevant);

WA-- Allstate Ins. Co. v. Peasley, 910 P.2d 483, 484 (Wash. Ct. App. 1996) ("criminal act" means any act for which criminal conviction may result, including unintentional acts).

(n31)Footnote 45. A typical Separation of Insureds provision reads: "The terms of this policy shall apply separately to each Insured. ... "

See, e.g., **DE--** Goodman v. Continental Casualty Co., 347 A.2d 662, 665 (Del. Super. Ct. 1975) .

Exclusion for "an insured" prevails over severability clause:

> The former husband of a homeowner murdered the plaintiff's daughter. The plaintiff sought coverage under a homeowners' insurance policy claiming negligent supervision by the former wife. Both the homeowner wife and her former husband were named insureds. The policy contained an intentional-acts exclusion applicable to "an insured"

and, under the definition of "insured," also stated that "Each of the above is a separate 'insured.' " The plaintiff father argued that the alleged intentional acts did not preclude coverage for the homeowner because the policy contained the severability clause. The court said that when a policy excludes coverage when "an insured" commits an intentional act, that exclusion applies to all claims that arise from the intentional acts of any one insured. Since the acts of the former husband were intentional under the terms of the policy, the homeowner would ordinarily also be barred from coverage because the policy used the collective term "an insured." The court agreed that courts were divided over whether a severability clause conflicts with an intentional-acts exclusion, thus creating ambiguity. It assumed, without deciding, that the provision in question was a severability clause, but concluded it had no effect on--that is, could not override--the intentional-acts exclusion. Even if each insured was treated as having separate coverage, the exclusionary language would remain unambiguous as the word "an" is collective. Therefore, the exclusion for "an insured" served to collectively bar all insureds. Co-operative Ins. Cos. v. Woodward, 45 A.3d 89 (Vt. 2012) .

(n32)Footnote 46. *E.g.*, **NC--** Myers v. Bryant, 655 S.E.2d 882, 886 (N.C. Ct. App. 2008) .

(n33)Footnote 47. *E.g.*, **NC--** Myers v. Bryant, 655 S.E.2d 882, 886 (N.C.Ct. App. 2008) .

(n34)Footnote 48. *E.g.*, **NC--**Braswell v. St. Paul Mercury Ins. Co., No. COA06-157, 2007 N.C. App. LEXIS 202, at *8 (N.C. Ct. App. Feb. 6, 2007) .

(n35)Footnote 49. *E.g.*, **US/OR--** Alexander Mfg., Inc. v. Illinois Union Ins. Co., 666 F. Supp. 2d 1185, 1192 (D. Or. 2009) .

(n36)Footnote 50. *E.g.*, **MI--** Auto Club Group Ins. Co. v. Mitchell, No. 284335, 2009 Mich. App. LEXIS 1359, at *2, *5-6 (Mich. Ct. App. June 18, 2009) .

(n37)Footnote 51. *E.g.*:

US/PA-- CGU Ins. v. Tyson Assocs., 140 F. Supp. 2d 415, 421 (E.D. Pa. 2001) (under Pennsylvania law, allegation that insured violated federal Constitution and state law was not within exclusion for "personal injury arising out of willful violation of penal statute or ordinance" where insured was never convicted of or charged with any crimes);

OH-- City of Sharonville v. Am. Emplrs. Ins. Co., 846 N.E.2d 833, 838 (Ohio 2006) (exclusion for claims arising out of "willful violation of a penal statute or ordinance" not applicable where record did not show that the police officers who purportedly committed the wrongful acts alleged in the underlying complaint "were ever charged with, let alone convicted of, a crime").

(n38)Footnote 52. *E.g.*:

US/FL-- Penzer v. Transportation Ins. Co., 545 F.3d 1303, 1310 (11th Cir. 2008) (under Florida law, exclusion for injuries "[a]rising out of the willful violation of a penal statute or ordinance committed by or with the consent of the insured" was limited to statute giving rise to liability);

MI-- Farm Bureau Gen. Ins. Co. v. Harleysville Lake States Ins. Co., No. 272930, 2008 Mich. App. LEXIS 611, at *5 (Mich. Ct. App. Mar. 25, 2008) (insurer not entitled to apply the criminal acts exclusion to avoid providing defense where alleged criminal conduct did not lead to purported injuries).

(n39)Footnote 53. *E.g.*, **OH--** *Sharonville*, 846 N.E.2d at 837 .

(n40)Footnote 54. **OH--** *Sharonville*, 846 N.E.2d at 837 ; Am. Family Mut. Ins. Co. v. Scott, No. 07-CA-28, 2008 Ohio App. LEXIS 1589, at *9 (Ohio Ct. App. Apr. 18, 2008) (noting that "absent a conviction, a finding that a particular act was in fact a criminal act may be problematic").

(n41)Footnote 55. **AZ--** State v. Heinze, 993 P.2d 1090, 1095 (Ariz. Ct. App. 1999) (while a conviction is not a prerequisite to the application of a criminal-acts exclusion, it will suffice for a civil court, in proceedings concerning the applicability of the exclusion to "determine whether the losses in question have arisen out of and are directly attributable to a felonious act or omission by a state officer or agent").

(n42)Footnote 56. *E.g.*:

US/ME-- Teachers Ins. Co. v. Schofield, 284 F. Supp. 2d 161, 165 (D. Me. 2003) (under Maine law, insurer had duty to defend insured in underlying negligence-based action, even though insured was convicted of manslaughter and policy contained criminal acts exclusion, where allegations were not limited to insured's conduct resulting in claimant's death, but instead included allegations of separate bodily injury to the deceased, which raised possibility of coverage under policy);

AK-- C.P. v. Allstate Ins. Co., 996 P.2d 1216, 1226 (Alaska 2000) ("From the perspective of insureds whose acts are alleged to have negligently, but not criminally or intentionally, been a cause of a claimant's injury, these exclusions do not apply to the negligence claims against them.");

PA-- Board of Pub. Educ. of the Sch. Dist. v. National Union Fire Ins. Co., 709 A.2d 910, 911 (Pa. Super. Ct. 1998) ("Where it is alleged that negligence allowed a crime to occur, does the claim against the negligent arise from the negligence or from the criminality? We believe it is the former.").

Contra:

US/KY-- W. Am. Ins. Co. v. Embry, No. 3:04CV-47-H, 2005 U.S. Dist. LEXIS 9387 (W.D. Ky. Apr. 25, 2005) (exclusion evidenced "a clear and specific intent to exclude all claims arising from sexual molestation," even those based on some theory such as negligence);

US/MN-- Ill. Farmers Ins. Co. v. M.S., No. 04-3102 (RHK/JSM), 2005 U.S. Dist. LEXIS 5292 (D. Minn. Mar. 31, 2005) ("[W]hen an insurance policy excludes coverage for an injury 'arising out of' or 'resulting from' certain specified conduct ... and such conduct occurs, coverage is also excluded for the insured's negligent supervision if the injury would not have occurred *but for* the specified conduct.") (Emphasis in original.).

See also:

US/WA-- Allstate Indem. Co. v. Riverson, No. 3:10-cv-05366 RBL, 2012 U.S. Dist. LEXIS 78687 (W.D. Wash, June 6, 2012) (finding that acts of daughter--listed as "an insured" under policy--were binding on insured mother under joint obligations clause);

IA-- American Fam. Mut. Ins. Co. v. Corrigan, 697 N.W.2d 108, 118-119 (Iowa 2005) (holding claims against one insured for negligent supervision were not independent of other insured's criminal acts, and were thus excluded);

ND-- Northwest G.F. Mut. Ins. Co. v. Norgard, 518 N.W.2d 179, 184 (N.D. 1994) ;

VT-- Co-operative Ins. Cos. v. Woodward, 45 A.3d 89 (Vt. 2012) (claim for negligent supervision against one insured barred by intentional acts of other insured);

WI-- J.G. v. Wangard, 753 N.W.2d 475 (Wis. 2008) .

(n43)Footnote 57. *See*: **GA--** Isdoll v. Scottsdale Ins. Co., 466 S.E.2d 48, 50 (Ga. Ct. App. 1995) (policy providing coverage for assault and battery and violation of a person's civil rights pursuant to 42 U.S.C. § 1981, *et seq.* or state law, but excluding "damages arising out of the willful violation of a penal statute or ordinance committed by or with the knowledge or consent of any insured" was fatally ambiguous);

NC-- City of Greenville v. Haywood, 502 S.E.2d 430 (N.C. Ct. App. 1998) (provision of a city's LEL policy excluding coverage for "willful violation of a penal statute" conflicted so much with a provision allowing coverage for assault and battery as to "make it virtually impossible for either an insured or a beneficiary to determine precisely which perils were covered and which were not," and therefore court refused to apply the exclusion to bar coverage for claim of sexual assault).

See also:

US/SD-- American Justice Ins. Reciprocal v. Cates, No. 95-5038, 1996 U.S. Dist. LEXIS 22834 (D.S.D. Feb. 13, 1996) ;

NC-- Graham v. James F. Jackson Assocs., Inc., 352 S.E.2d 878, 881 (N.C. Ct. App. 1987) .

Contra:

US/CO-- Pompa v. American Fam. Mut. Ins. Co., 520 F.3d 1139, 1145 (10th Cir. 2008) ("[T]he criminal-conviction exclusion leaves the vast majority of otherwise covered conduct untouched--namely, all negligent acts for which the insured is not criminally convicted");

CO-- Lincoln Gen. Ins. Co. v. Bailey, 224 P.3d 336, 340 (Colo. Ct. App. 2009) , *aff'd*, 255 P.3d 1039 (Colo. 2011) ("[W]e perceive no violation of public policy because, as discussed, the policy's coverage grant and exclusion clause are consistent, and the criminal act exclusion does not eviscerate the grant clause, but merely excludes a reasonable subset of injuries--those resulting from criminal acts.").

(n44)Footnote 58. *See, e.g.*:

US/GA-- Lincoln Nat'l Health and Cas. Ins. Co. v. Brown, 782 F. Supp. 110, 113 (M.D. Ga. 1992) (a policy providing coverage for personal injury, including false arrest, malicious prosecution, and assault and battery, but excluding intentional and expected personal injury, was "complete nonsense");

AL-- Titan Indem. Co. v. Riley, 641 So. 2d 766, 768 (Ala. 1994) (a policy providing coverage for claims brought under the Federal Civil Rights Act and acts of malicious prosecution, assault and battery, wrongful entry, piracy, and other offenses that require proof of intent, but precluding coverage for intentional acts, was fatally ambiguous);

GA-- Isdoll v. Scottsdale Ins. Co., 466 S.E.2d 48, 50 (Ga. Ct. App. 1995) (a policy providing coverage for assault and battery and violation of a person's civil rights pursuant to 42 U.S.C. § 1981, *et seq.* or state law, but excluding "damages arising out of the willful violation of a penal statute or ordinance," was fatally ambiguous), *cert. denied,* No. S96C0637, 1996 Ga. LEXIS 697 (Ga. Apr. 5, 1996) ;

NC-- Graham v. James F. Jackson Assocs., Inc., 352 S.E.2d 878, 881 (N.C. Ct. App. 1987) (a policy providing coverage for negligently inflicted bodily injury, but excluding coverage for claims arising out of any criminal act, was fatally ambiguous).

(n45)Footnote 59. *See, e.g.*:

GA-- Isdoll v. Scottsdale Ins. Co., 466 S.E.2d 48, 50 (Ga. Ct. App. 1995) ;

NC-- City of Greenville v. Haywood, 502 S.E.2d 430 (N.C. Ct. App. 1998) .

(n46)Footnote 60. In many policies, exclusions for fraud, dishonesty and criminal acts all appear within the same exclusionary provision. *See*:

OH-- City of Sharonville v. Am. Emplrs. Ins. Co., 846 N.E.2d 833, 837 (Ohio 2006) (discussing exclusion for "dishonest or fraudulent act or omission, or any criminal or malicious act or omission, or any willful violation of law");

TX-- Tex. Ass'n of Political Subdivisions--Law Enforcement v. Bernal, No. 04-04-00425-CV, 2005 Tex. App. LEXIS 3135, at *5 (Tex. App. 2005) (discussing exclusion for any "act, error or omission which is dishonest, fraudulent or criminal").

(n47)Footnote 61. *E.g.*, NY-Brewer v. Vill. of Old Field, 311 F. Supp. 2d 382, 387 (E.D.N.Y. 2004) .

(n48)Footnote 62. **NY--** Brewer v. Vill. of Old Field, 311 F. Supp. 2d 382, 387 (E.D.N.Y. 2004) .

(n49)Footnote 63. *E.g.*, **US/CA--**PMI Mortgage Ins. Co. v. American Int'l Specialty Lines Ins. Co., No. C 02-1774 PJH, 2006 U.S. Dist. LEXIS 24853, at *15 (N.D. Cal. Mar. 29, 2006).

(n50)Footnote 64. **AL--** Blackburn v. Fid. and Deposit Co. of Maryland, 667 So. 2d 661, 671 (Ala. 1995) (explaining that the policy at issue provided that

fraud and dishonesty exclusion would only apply where a judgment or other final adjudication "establish[ed] that acts of active dishonesty committed by such Insured were material to the cause so adjudicated").

(n51)Footnote 65. John B. Berringer and Jill N. Averett, "Reed Smith LLP on The Duty to Pay Defense Costs Under D&O Insurance Policies," LexisNexis(R) Emerging Issues, 2010 Emerging Issues 4921 (Mar. 2010) (emphasis added).

Some policies may actually contain exclusions with language that make them applicable only if the insured's acts were "in fact" fraudulent or dishonest. Most courts have found that this "in fact" requirement is the functional equivalent of the "as determined by final adjudication" requirement found in some versions of the exclusion, reasoning that "an actual adjudication or determination of fact prior to application" of such an exclusion "more appropriately effectuate[s] the goal of giving the phrase 'in fact' its ordinary and popular meaning." *See, e.g.*, PMI Mortgage Ins. Co. v. American Int'l Specialty Lines Ins. Co., No. C 02-1774 PJH, 2006 U.S. Dist. LEXIS 24853, at *15 (N.D. Cal. Mar. 29, 2006).

(n52)Footnote 66. **OK--** Conner v. Transamerica Ins. Co., 496 P.2d 770, 775 (Okla.1972) .

(n53)Footnote 67. *See* **OK--** Conner v. Transamerica Ins. Co., 496 P.2d 770, 775 (Okla. 1972) ("It is certainly not consonant with the objects to be accomplished by a professional insurance policy to say that by its terms no protection is afforded the insured when groundless charges of fraud and dishonesty are alleged in a suit against him.").

See also **CA--** Gray v. Zurich Ins. Co., 419 P.2d 168, 174 (Cal. 1966) .

(n54)Footnote 68. **US/TX--** Med. Care Am., Inc. v. Nat'l Union Fire Ins. Co. of Pittsburgh, Pa., 341 F.3d 415, 424-425 (5th Cir. 2003) (applying a prior-acts exclusion in a D&O policy).

(n55)Footnote 69. *See, e.g.*, **US/DC--** Abex Corp. v. Maryland Cas. Co., 790 F.2d 119, 122 n.10 (D.C. Cir. 1986) .

(n56)Footnote 70. *See, e.g.*, **IL--** Illinois Cent. R.R. Co. v. Accident & Cas. Co. of Winterthur, 739 N.E.2d 1049, 1056 (Ill. App. Ct. 2000) , *appeal denied*, 744 N.E.2d 284 (Ill. 2001) .

(n57)Footnote 71. **MS--** U.S. Fid. & Guar. Co. v. OmniBank, 812 So. 2d 196, 199 (Miss. 2002) .

(n58)Footnote 72. *See, e.g.*: **US/IL--** Cozzie v. Metropolitan Life Ins. Co., 140 F.3d 1104, 1111 (7th Cir. 1998) ("The absence of an explicit exclusion must be given significant weight in any review of the reasonableness of a decision by the fiduciary to deny coverage.");

US/MO-- New Madrid County Reorganized School Dist. No. 1, Enlarged v. Continental Casualty Co., 904 F.2d 1236, 1240-1241 (8th Cir. 1990) ("Absent an explicit exclusion, we must apply the language as written.");

US/NY-- Lumbermens Mut. Casualty Co. v. Pound Ridge, 362 F.2d 430, 434 (2d Cir. 1966) ("We say only that such an exclusion must be explicit and unambiguous to a person of average intelligence.");

IN-- Everett Cash Mut. Ins. Co. v. Taylor, 926 N.E.2d 1008 (Ind. 2010) (an insurance policy exclusion must be explicit).

(n59)Footnote 73. *E.g.*, **US/MI--** Orr v. City of Roseville, No. 10-11389, 2010 U.S. Dist. LEXIS 62610, at *11 (E.D. Mich. June 24, 2010) ("[A]ssault & battery, false arrest, false imprisonment, abuse of process, malicious prosecution ... are all intentional torts.").

(n60)Footnote 74. *See, e.g.*, **AL--** Titan Indem. Co. v. Riley, 641 So. 2d 766, 768 (Ala. 1994) (noting that "[t]he language of the policy ... preclude[d] coverage for intentional acts, but it also specifically provide[d] coverage for acts of malicious prosecution, assault and battery, wrongful entry, piracy, and other offenses that require proof of intent").

(n61)Footnote 75. **LA--** Lamkin v. Brooks, 498 So. 2d 1068 (La. 1986) .

(n62)Footnote 76. *E.g.,* **AL--** Titan Indem. Co. v. Riley, 641 So.2d 766, 768 (Ala. 1994) .

(n63)Footnote 77. *See, e.g.*:

IA-- Postell v. American Family Mut. Ins. Co., 823 N.W.2d 35 (Iowa 2012) (intentional loss exclusion applied where insured set fire to insured dwelling to commit suicide and had requisite intent to "cause a loss" under policy; innocent coinsured spouse, who did not participate in intentional acts of other coinsured, could not recover because of intentional loss exclusion);

MA-- Hingham Mut. Fire Ins. Co. v. Smith, 865 N.E.2d 1168, 1171 (Mass. App. Ct. 2007) ;

MI--Northern Mut. Ins. Co. v. McLeod *ex rel*. McLeod, No. 196548, 1997 Mich. App. LEXIS 2506, at *5 (Mich. Ct. App. Oct. 28, 1997) ;

WI-- Zieve v. Hayes, No. 02-0235, 2002 Wisc. App. LEXIS 1052, at *3 (Wis. Ct. App. Sept. 24, 2002) .

See generally Christopher C. French, *Debunking the Myth that Insurance Coverage Is Not Available or Allowed for Intentional Torts or Damages*, 8 Hastings Bus. L.J. 65 (2012), noting that while liability policies often exclude coverage for intentional torts, they also frequently explicitly provide coverage for actions such as malicious prosecution or false imprisonment that generally involve intentional acts.

(n64)Footnote 78. *E.g.*, **VT--** Serecky v. Nat'l Grange Mut. Ins., 857 A.2d 775, 779 (Vt. 2004) .

(n65)Footnote 79. *E.g.*, **MA--** Preferred Mut. Ins. Co. v. Gamache, 686 N.E.2d 989, 990-991 (Mass. 1997) (emphasis added) (stating, as a rationale, that "the broad interpretation urged by [the Insurer]--to the effect that the exclusion bars any accident resulting from a volitional act of the insured irrespective of the insured's intent to cause injury--lacks any limiting principle and would logically tend to negate coverage in a substantial number of, if not all, accidents") (*quoting* **John** Appleman, Insurance Law and Practice (archive file) § 4492.02.

(n66)Footnote 80. **MN--** RAM Mut. Ins. Co. v. Meyer, 768 N.W.2d 399, 402 (Minn. Ct. App. 2009) .

(n67)Footnote 81. **US/PA--** Titan Indem. Co. v. Cameron, 77 Fed. Appx. 91, 95 (3d Cir. Sep. 17, 2003) (citing United Serv. Auto. Ass'n v. Elitzky,, 517 A.2d 982, 986-987 (Pa. Super. Ct.1986)) .

See also US/MD- Western World Ins. Co. v. Harford Mut. Ins. Co., 600 F. Supp. 313, 318 (D. Md. 1984) (coverage exists for unintended results of intentional acts).

(n68)Footnote 82. *E.g.*, US/PA-Aetna Life and Cas. Co. v. Barthelemy, 33 F.3d 189, 191 (3d Cir. 1994) (citing *Elitzky*, 517 A.2d at 987, 989 (Pa. Super. Ct. 1986) (expected-and-intended-injury exclusion was "inapplicable even if the insured should reasonably have foreseen the injury which his actions caused")).

(n69)Footnote 83. **KS--** Harris v. Richards, 867 P.2d 325, 327-328 (Kan. 1994) .

(n70)Footnote 84. *See*:

US/MD-- Western World Ins. Co. v. Harford Mut. Ins. Co., 600 F. Supp. 313, 318 (D. Md. 1984) (Where police officer, afraid that his life was in danger, drew his gun and fired one shot at fleeing suspect, the fact that the bullet ricocheted off a wall before striking suspect indicated that injury inflicted was different from that intended. Nevertheless, the court held that the resulting claim was still excluded from coverage.);

NE-- State Farm Fire & Cas. Co. v. Victor, 442 N.W.2d 880, 882-883 (Neb.1989) (where insured admitted intent to cause bodily harm to one individual, but shot another individual, the injury was "expected or intended," and noted that it was the intent to cause bodily injury to someone that was the key consideration).

(n71)Footnote 85. *E.g.*, **US/PA--**Coregis Ins. Co. v. Elizabeth Twp., Pa., No. 2:05cv582, 2007 U.S. Dist. LEXIS 23574, at *5 (W.D. Pa. Mar. 30, 2007) .

(n72)Footnote 86. **US/AL--** Titan Indem. Co. v. Newton, 39 F. Supp. 2d 1336, 1340 (M.D. Ala. 1999) .

(n73)Footnote 87. **US/AL--** *Titan Indem. Co.*, 39 F. Supp. 2d at 1340 .

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New Appleman on Insurance Law Library Edition
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NEWAPL Volume 4 -- Specific Types of Liability Insurance
Chapter 33 LAW ENFORCEMENT LIABILITY INSURANCE

4-33 New Appleman on Insurance Law Library Edition § 33.05

AUTHOR: William G. Beck, Ian Hale, Sarah E. Millin and Jennifer M. McAdam

§ 33.05 Public Officer Liability ("POL") Policies Were Created to Insure Against the Specific Risks Faced by Law Enforcement Officials

[1] Coverage Provisions in POL Can Contain Any of Several Different Types of Insuring Agreement, But Typically Apply to Only Claims Made or Claims Made and Reported During the Policy Period

[a] Overview

POL policies are similar in concept to Director & Officer ("D&O") insurance policies n88 which insure Directors and Officers of both private and publicly traded companies against liabilities arising out of crafting and implementing corporate policy and procedure. Unlike D&O policies, a POL policy will commonly extend coverage to a broad class of employees, as well as to the entity itself. n89 Thus, in addition to *Monell* and supervisory-type claims asserted against the law enforcement officials and even the government entity, POL policies may also provide coverage for the other claims that are often asserted against the front line officers in innocence cases.

Lexis.com Search:
To find materials discussing Directors and Officers Liability Insurance generally, use the Search by Topic feature: Click the Search tab and the Search by Topic or Headnote sub-tab. Click through the following topical hierarchy and select your jurisdiction. Search by Topic: Insurance Law > Business Insurance > Directors & Officers Liability Insurance > General Overview.

Cross References:

See Section 33.07, *Almost Every Decision Analyzing Coverage For Claims In Innocence Cases Involved Only CGL Policies, and Even Under CGL Policies There Are More Open Questions Than Answers*, below.

POL policies can contain act-based, injury-based or any of several other types of Insuring Agreements, though act-based are most common among modern POL policies.

Cross Reference:

See discussion at Section 33.04[1][a][i] -[ii], *The Majority of LEL Policies Contain One of Two Types of Insuring Agreements*, below.

However, almost every POL policy applies on a claims-made or claims-made-and-reported basis, and therefore has no temporal policy-period requirement attached to the act, injury or other coverage condition stated in the Insuring Agreement.

This is not to say that there will be no temporal requirement at all associated with the coverage condition set forth in a POL policy's insuring agreement, as many policies do contain a "Retro Date" before which the coverage condition stated in the insuring agreement cannot have occurred. Nevertheless, the Retro Date is often set well before the beginning of the policy period, n90 and can usually be extended back to a date of the insured's choosing for an additional or increased premium.

The major distinction between a claims-made and a claims-made and reported policy is just as the names suggest. Under a claims-made policy, a claim must be made against the insured during the policy period, but need only be reported to the insurer "promptly," or "as soon as practicable," but not necessarily during the policy period. n91 By contrast, a claims-made and reported policy requires the claim both be made against the insured and reported to the insurer during the policy period, or any extended reporting period.

Cross Reference:

Environmental Practice Law Guide § 8.14 (Michael B. Gerrard ed.) (attaching specimen "claims-made and reported policy" from Greenwich Insurance Company).

Lexis.com Search:

To find materials discussing claims-made insurance policies, use the Search by Topic feature: Click the Search tab and the Search by Topic or Headnote sub-tab. Click through the following topical hierarchy and select your jurisdiction. Search by Topic: Insurance Law > Claims & Contracts > Claims Made Policies > General Overview.

Expert Insight:

Policies can sometimes state they are "Claims-Made," sometimes even in bold letters, in the policy's Declarations page, when in fact they are claims-made and reported policies. It is important to examine the reporting provisions within a policy's Notice of Claims section to ensure a correct assessment of the type of policy at issue.

Claims-made policies benefit insurers by "minimiz[ing] the span of time between

the insured event and the expiration of the insurer's liability to make payment for the event, and thus allow insurers to 'close the books' on a policy at its expiration date." n92 As a corollary, because the insurer's liability does not extend beyond the end of a specific term of the claims-made policy, the "insurer can establish his reserves without having to consider the possibilities of inflation beyond the policy period, upward-spiraling jury awards, or later changes in the definition and application of negligence." n93

On the other hand, insureds also stand to benefit from claims-made policies. The "restricted and finite period of time" for which coverage is afforded "permits a level of predictability of liability that is not available under occurrence policies," and this "predictability in turn allows lower costs to the insured for the policies." n94 Moreover, a claims-made policy can benefit the insured by covering conduct occurring before the policy term if no Retro Date is specified, n95 and can thus offer additional coverage to claims that are also covered by historic, non claims-made policies.

[b] A Claim Can Be Deemed "Made" Upon Receipt of an Oral Demand, an Intent-to-Sue Letter, or When Suit Is Filed or Served

One of the fundamental issues in analyzing whether a claim is covered under a claims-made POL policy is determining when the claim will be deemed to have been made. As with most other insurance issues, analysis begins with the language of the particular POL policy, and most POL policies state that a claim is deemed made at the time the insured receives a oral or written demand for monetary or non-monetary from the claimant, or when suit is actually filed or served on the insured, whichever occurs first. n96 This information is typically found within the policy's definition of the term "Claim." n97

Some POL policies are silent on the issue of when a claim will be deemed made, or even what constitutes a "claim," which can lead to stark differences of opinion between the Insurer and Insured. When interpreting such policies, courts have held that the term cannot be limited solely to the filing of a lawsuit, but must instead be construed to encompass less formal demands, n98 including both formal and informal demand letters and intent-to-sue letters. n99 Most courts find that a mere "accusation that wrongdoing occurred is not by itself a claim." n100

Lexis.com Search:

To find materials discussing the notice requirements for claims-made insurance policies, use the Search by Topic feature: Click the Search tab and the Search by Topic or Headnote sub-tab. Click through the following topical hierarchy and select your jurisdiction. Search by Topic: Insurance Law > Claims & Contracts > Claims Made Policies > Notice Requirements.

[c] Relation-Back Provisions Are Capable of Affecting Coverage

Most modern claims-made policies also contain "relation back" provisions that apply to related or interrelated wrongful acts. A typical relation-back provision, also known as a multiple-claims provisions, will state that any claims arising out of the same wrongful act or series of interrelated wrongful acts will be treated as a single claim and deemed to have been made at the time of the first such claim. n101 Thus, subsequent related claims will be considered made at the time the first such claim was made, which has the effect of limiting

the number of policies implicated. (This can have a similar-type effect as the prior-acts and related-acts exclusions sometimes found in LEL and CGL policies have.)

Cross Reference:

See the discussion at Section 33.04[2][c], *Prior-Act Exclusions, Related-Act Exclusions, and Deemer Clauses Are Uncommon, But May Bar or Significantly Limit Coverage*, below.

Relation-back provisions are usually invoked in one of two circumstances: "where [an insured] wants a claim to relate back in order to gain coverage in a prior policy as opposed to its current one, or [] where [an insurer] disclaims coverage by asserting that a new claim relates back to an earlier policy." n102

In circumstanced where the insured is presented with multiple high-value claims, relation-back provisions can benefit the insurer by capping it exposure for all such claims to the limits of a single policy. Conversely, where multiple low-value claims are present, relation-back provisions can benefit the insured by requiring payment of just a single retention or deductible for all claims.

Relation-back provisions can have a significant impact in the context of POL policies, as claims against public officials in innocence cases often involve allegations of wrongful acts that were performed at different times and by different insureds. How a court chooses to interpret and apply a "relation-back" provision in this context can play a decisive role in determining whether, and how much, coverage is available for any of the claims asserted.

Courts are divided as to whether the terms "related" and "interrelated" are ambiguous when the policy fails to define them. n103 Courts that find the terms unambiguous generally emphasize the term's breadth, often noting an insurer's intention to encompass a "myriad of relationships" in choosing these terms. n104 Courts following this view may consider "whether the claims all arise from the same transactions, whether the 'wrongful acts' are contemporaneous, and whether there is a common scheme or plan underlying the acts." n105 Additionally, courts may assess whether the claims are connected by time, place, opportunity, pattern, method, or modus operandi. n106

Such qualitative assessments invariably lead to disparate results. For instance, courts have found claims related because they arose out of a single entity's "course of conduct," even where though that course of conduct involved different types of acts performed at different times to different people that were harmed in different ways and thus brought different types of claims. n107 Other courts, however, adopt a more narrow interpretation of the word, holding that, even if two claims are similar, they will not be "related" unless a common nexus of fact, circumstance, or events can be established. n108 Under this latter interpretation, two claims may not be related even where they both arose out of the same business practices if they involved different time or factual circumstances. n109

Courts that do find the terms "related" and "interrelated" ambiguous usually follow the general rule requiring all ambiguities be construed in favor of the insured. n110 This will result in a finding that claims or acts are related if doing so increases the amount of coverage available, and a finding of unrelated

if finding otherwise would result in a bar to or reduced coverage.

[2] POL Policies "Operational and Administrative" Law-Enforcement Exclusions May or May Not Bar Coverage for *Monell* and Similar-Type Claims, Depending on Their Language

It is not unusual for POL and CGL policies (especial when sold as part of a package policy that also contains an LEL Coverage Part) to contain an exclusion that purports to bar coverage for so-called "law enforcement activities." n111

This exclusion can come in many forms, and is sometimes phrased broadly to exclude coverage for the entire spectrum of claims that may arise from any administrative or operational law enforcement activity, or any law enforcement activity. n112 Courts considering this broader variation of the exclusion will generally hold that it bars coverage for a broad array of claims, including *Monell* and similar-type claims. n113

Other forms of the exclusion are expressed in much more narrow terms. A common rendering of this version of the exclusion purports to apply only to "any *operational* law enforcement activity." n114 *Monell* claims are premised upon the separate acts or omissions of the officials and supervisors in establishing unconstitutional policies and customs, and are not vicarious liability claims for the action of the individual officers. n115 In other words, the acts complained of in *Monell* and similar-type claims are separate administrative and policy-making acts of high officials and the Government entity itself--the very acts and actors that POL policies are written to cover--and not the "operational" acts undertaken by the individual law enforcement officers.

There are no decisions analyzing the scope of a law-enforcement exclusion that purports to bar only for "operational" law enforcement activities in the context of *Monell* claims, nor are there any decisions that even offer a meaningful discussion of the difference between "operational" and "administrative" law-enforcement activities.

Giving effect to the intent of the parties as expressed in the language of the policy (the premise most courts proceed from in interpreting an insurance policy), n116 the sound approach is to avoid reading a redundancy into the policy. n117

Cross Reference:

See Section 5.03[1], *Regularly Used Canons of Construction*, above.

This would result in a bright-line rule *Monell* and all other law enforcement claims are barred by the broader law-enforcement exclusions that expressly apply to "administrative and operational" activities, but are not barred by law-enforcement exclusions that purport to apply only to "operational" activities.

Lexis.com Search:

To find materials discussing POL policies that contain an exclusion that purport to bar coverage for so-called "law enforcement activities," after choosing the appropriate jurisdiction or treatise, use "public official!" /p "law enforce!" and "exclusion!" and insur! as the terms and connectors.

Cross Reference:

For further commentary on the *Monell* decision, its impact and its progeny, see Section 33.07[2][d], below.

Legal Topics:

For related research and practice materials, see the following legal topics:
Insurance LawBusiness InsuranceDirectors & Officers Liability InsuranceGeneral OverviewInsurance LawClaims & ContractsClaims Made PoliciesGeneral OverviewInsurance LawClaims & ContractsClaims Made PoliciesNotice Requirements

FOOTNOTES:

(n1)Footnote 88. Donald S. Malecki, Public Official Liability Policies, CBS MoneyWatch.com, Rough Notes, April 2006.

(n2)Footnote 89. Donald S. Malecki, Public Official Liability Policies, CBS MoneyWatch.com, Rough Notes, April 2006.

(n3)Footnote 90. Some insurers default the Retro Date to the continuity date, the first day the insured's successive and uninterrupted insurance coverage began with that insured. This creates an incentive to renew with the same insurer, but one based almost entirely on the potential coverage void that would be created if coverage was moved to a different insurer that employed a similar default Retro Date.

(n4)Footnote 91. *See, e.g.*, **US/MS--** Yazoo County, Miss. v. Int'l Surplus Lines Ins. Co., 616 F. Supp. 153, 154 (S.D. Miss. 1985) .

(n5)Footnote 92. **US/PA--** Upper Allen Township v. Scottsdale Ins. Co., No. 1: CV-92-1557, 1994 U.S. Dist. LEXIS 19878, at *13 (M.D. Pa. Apr. 29, 1994) .

(n6)Footnote 93. **US/PA--** Harrisburg v. Int'l Surplus Lines Ins. Co., 596 F. Supp. 954, 961 (M.D. Pa. 1984) (quoting Comment, *The "Claims Made" Dilemma In Professional Liability Insurance*, 22 U.C.L.A. L. Rev. 925, 928 (1975)).

(n7)Footnote 94. **US/PA--** Upper Allen Township v. Scottsdale Ins. Co., No. 1: CV-92-1557, 1994 U.S. Dist. LEXIS 19878, at *5 (M.D. Pa. Apr. 29, 1994) .

(n8)Footnote 95. **US/PA--** Harrisburg v. Int'l Surplus Lines Ins. Co., 596 F. Supp. 954, 961 (M.D. Pa. 1984) (quoting Comment, *The "Claims Made" Dilemma In Professional Liability Insurance*, 22 U.C.L.A. L. Rev. 925, 928 (1975)).

(n9)Footnote 96. Diana Shafter Gliedman, The Claim Game--Maximizing Recovery Under Your Claims-Made Insurance Policy By Determining What Constitutes A "Related Claim", The John Liner Rev., Winter 2009, at 85, 86.

(n10)Footnote 97. *See, e.g.*, **US/CO--** Berry & Murphy, P.C. v. Carolina Cas. Ins. Co., 586 F.3d 803, 809 (10th Cir. 2009) .

(n11)Footnote 98. **IA--** City of Marion v. National Cas. Co, 431 N.W.2d 370, 374 (Iowa 1988) (holding that when not specified with a claims-made public officials' liability policy, a "claim" included "the assertion of a legal right, as distinguished from a recognition of that right," and finding that repeated agreements by police officers to postpone the filing of a lawsuit and numerous

settlement offers exchanged by the city and its police officers demonstrated that a "claim" had been made).

(n12)Footnote 99. *See* **US/MS--** Mississippi v. Richardson, 817 F.2d 1203, 1206 (5th Cir. 1987) .

(n13)Footnote 100. **US--** MGIC Indem. Corp. v. Home State Sav. Ass'n, 797 F.2d 285, 288 (6th Cir. 1986) .

(n14)Footnote 101. **US/PA--** Upper Allen Township v. Scottsdale Ins. Co., No. 1: CV-92-1557, 1994 U.S. Dist. LEXIS 19878, at *11, n.11 (M.D. Pa. Apr. 29, 1994) (noting that a complete relation-back provision typically reads as follows: "Two or more claims arising out of a single act, omission, or personal injury or a series of related acts, errors, omissions or personal injuries shall be treated as a single claims All such claims, whenever made, shall be considered first made during the policy period or Optional Extension period in which the earliest claim arising out of such act, error, omission or personal injury was first made, and all such claims shall be subject to the same limits of liability").

Compare **US/IA--** Gulf Underwriters Ins. Co. v. City of Council Bluffs, 755 F. Supp. 2d 988 (S.D. Iowa 2010) , *aff'd*, 677 F.3d 806 (8th Cir. 2012) . In Council Bluffs the insureds argued in essence that if they made any past errors and failed to correct them during the policy period, that failure itself would constitute an affirmative "act, error or omission, neglect or breach of duty." The court rejected the argument noting an absence of authority for the broad, continuing duty proposed by the insureds. The court added that even if that duty existed, continuous failure to correct past errors would, at worse, subject the underlying claimants to continuous or repeated exposure to substantially the same generally harmful conditions that began earlier and could not, under the plain terms of the policy, constitute a new, separate "wrongful act." In other words, the purported failure to right past wrongs in the policy period could not constitute a separate wrongful act during the policy period.

(n15)Footnote 102. Robert D. Chesler and Syrion Anthony Jack, *Interrelated Acts, Unrelated Case Law*, Coverage, March/April 2009, at 1.

(n16)Footnote 103. *E.g.*, David v. American Home Assurance Co., No. 95 Civ. 10290 (LAP), 1997 U.S. Dist. LEXIS 4177, at *8 (S.D.N.Y. Apr. 3, 1997) ("[T]he term ... 'related' [is] 'so elastic,' so lacking in concrete content, that [it] import[s] into the contract ... substantial ambiguities.");

Contra:

US/MI-- URS Corp. v. Travelers Indem. Co., 501 F. Supp. 2d 968, 977 (E.D. Mich. 2007) (holding term "related" has "a clear definition in the language generally, as well as in the insurance industry in particular");

US/NY--Seneca Ins. Co. v. Kemper Ins. Co., No. 02 Civ. 10088 (PKL), 2004 U.S. Dist. LEXIS 9159, at *15-16 (S.D.N.Y. 2004) (same).

(n17)Footnote 104. **CA--** Bay Cities Paving & Grading, Inc. v. Lawyers' Mut. Ins. Co., 855 P.2d 1263, 1271 (Cal. 1993) .

See also US/VT-Prof'l Consultants Ins. Co. v. Employers Reinsurance Co., No.

1:03-CV-216, 2006 U.S. Dist. LEXIS 24170, at *62 (D. Vt. Mar. 8, 2006) (finding that, by using the term "related," insurer "apparently intended to give broad meaning" to the provision).

(n18)Footnote 105. **US/FL--** Capital Growth Fin. LLC v. Quanta Specialty Lines Ins. Co., No. 07-80908-CIV-HURLEY, 2008 U.S. Dist. LEXIS 65814, at *12 (S.D. Fla. July 30, 2008) .

See also **TX--** Reeves County v. Houston Cas. Co., 356 S.W.3d 664 (Tex. App.--El Paso 2011) (two law suits by same plaintiff against sheriff involved interrelated wrongful acts; more than slight or attenuated connection existed between two sets of wrongful acts).

(n19)Footnote 106. **US/FL--** Capital Growth Fin. LLC v. Quanta Specialty Lines Ins. Co., No. 07-80908-CIV-HURLEY, 2008 U.S. Dist. LEXIS 65814, at *12 (S.D. Fla. July 30, 2008) .

(n20)Footnote 107. *See* **US/FL--** Continental Cas. Co. v. Wendt, 205 F.3d 1258, 1264 (11th Cir. 2000) .

See also **US/WI--** American Med. Sec., Inc. v. Executive Risk Specialty Ins. Co., 393 F. Supp. 2d 693, 707 (E.D. Wis. 2005) (39 lawsuits, many of which were brought as class actions, were "'related' in any meaningful sense of the word," as they all flowed from the company's single "business decision" on operating procedures).

(n21)Footnote 108. *E.g.*, **US/MD--** Ace Am. Ins. Co. v. Ascend One Corp., 570 F. Supp. 2d 789, 794 (D. Md. 2008) .

(n22)Footnote 109. *See, e.g.*, **US/MD --** *Ace Am. Ins.*, 570 F. Supp. 2d at 794.

(n23)Footnote 110. *E.g.*, **NY--** MDW Enters. v. CNA Ins. Co., 4 A.D.3d 338, 340 (N.Y. App. Div. 2004) .

(n24)Footnote 111. **US/PA--**Scottsdale Ins. Co. v. Westfall Twp., Pa., No. 3:04-CV-0994, 2006 U.S. Dist. LEXIS 75999, at *11 (M.D. Pa. Oct. 19, 2006) (discussing exclusion in POL Coverage Part purporting to bar coverage "for suits arising out of law enforcement activities");

LA-- Lemelle v. Town of Sunset, 796 So. 2d 876, 878 (La. Ct. App. 2001) (discussing POL policy that excluded coverage for the operations and activities of a town's "police, sheriff and other law enforcement departments").

(n25)Footnote 112. *E.g.*, **US/PA--** Clarendon Nat'l Ins. Co. v. City of York, Pa., 290 F. Supp. 2d 500, 507 (M.D. Pa. 2003) .

See also **US/PA--**Lebanon School District v. The Netherlands Ins. Co., No. 1:12-cv-988, 2013 U.S. Dist. LEXIS 21581 (M.D. Pa., Jan. 25, 2013) (Law Enforcement Professional Liability exclusion defining law enforcement activities as those within scope of authorized duties of educational institution's law enforcement or security guard personnel applied where claim was based on activities within scope of duties to enforce compulsory school attendance law; claims arose out of performance of law enforcement activities where underlying complaint alleged school district violated the federal Equal Protection Clause when it colluded with magisterial district courts to selectively reduce only unpaid excessive truancy fines, while retaining any paid truancy fines as

alleged selective adjustment of fines would not have occurred but for school district's alleged seeking of excessive fines through filing improper truancy citations).

(n26)Footnote 113. *See, e.g.*:

US/NH-- Murdock v. Dinsmoor, 892 F.2d 7, 8 (1st Cir. 1989) (construing "arising out of" broadly as "originating from, growing out of, flowing from, incidental to or having connection with");

US/PA-- Borough of Kennett Square v. First Mercury Syndicate, Inc., No. 98-0168, 1998 U.S. Dist. LEXIS 10596, at *24 (E.D. Pa. July 9, 1998) (applying exclusion to include acts of retaliation and harassment by the chief of police); Western World Ins. Co. v. Reliance Ins. Co., 892 F. Supp. 659, 668 (M.D. Pa. 1995) (applying exclusion to civil rights claims against Wilkes-Barre police officers arising out of the plaintiff's death while he was in police custody);

US/WI-- Pfeifer v. Sentry Ins., 745 F. Supp. 1434, 1440 (E.D.Wis.1990) (applying exclusion to sexual assault of plaintiff by police officer).

(n27)Footnote 114. *See, e.g.*:

US/PA-- Clarendon Nat'l Ins. Co. v. City of York, Pa., 290 F. Supp. 2d 500, 507 (M.D. Pa. 2003) ;

MA-- County of Barnstable v. American Fin. Corp., 744 N.E.2d 1107, 1109 (Mass. App. Ct. 2001) .

(n28)Footnote 115. **US--** Monell v. Dep't of Soc. Servs., 436 U.S. 658, 694 (1978) ("government may not be sued under § 1983 for an injury inflicted solely by its employees or agents. Instead, it is when execution of a government's policy or custom, whether made by its lawmakers or by those whose edicts or acts may fairly be said to represent official policy, inflicts the injury that the government as an entity is responsible under § 1983.").

See also:

US/ME-- Hegarty v. Somerset County, 53 F.3d 1367, 1379 (1st Cir. 1995) (supervisory liability is direct, not vicarious);

US/MA-- Baron v. Suffolk County Sheriff's Dep't, 402 F.3d 225, 236 (1st Cir. 2005) (holding same as to municipalities).

(n29)Footnote 116. *See, e.g.*, **US/NY--** Mount Vernon Fire Ins. Co. v. Belize NY, Inc., 277 F.3d 232, 236 (2d Cir. 2002) ("The New York approach to the interpretation of contracts of insurance is to give effect to the intent of the parties as expressed in the clear language of the contract.") (internal quotation marks omitted).

See also **US/NY--** Duane Reade, Inc. v. St. Paul Fire & Marine Ins. Co., 600 F.3d 190, 201 (2d Cir. N.Y. 2010) .

Some courts follow a more insured-friendly approach, often expressed as considering the "reasonable expectations of the insured." *See, e.g.*, **LA--** Louisiana Ins. Guar. Ass'n v. Interstate Fire & Cas. Co., 630 So. 2d 759, 764

(La. 1994) "in cases of ambiguity, '[t]he court should construe the policy to fulfill the reasonable expectations of the parties in the light of the customs and usages of the industry.' " La. Ins. Guar. Ass'n, 630 So. 2d at 764 (quoting Trinity Indus., Inc. v. Ins. Co. of N. Am., 916 F.2d 267, 269 (5th Cir. 1990)) .

(n30)Footnote 117. *See, e.g.*, **CA--** La Jolla Beach & Tennis Club v. Industrial Indemnity Co., 884 P.2d 1048, 1056 (Cal. 1994) .

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New Appleman on Insurance Law Library Edition
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NEWAPL Volume 4 -- Specific Types of Liability Insurance
Chapter 33 LAW ENFORCEMENT LIABILITY INSURANCE

3-33 New Appleman on Insurance Law Library Edition § 33.06

AUTHOR: William G. Beck, Ian Hale, Sarah E. Millin and Jennifer M. McAdam

§ 33.06 "Trigger of Coverage" Theories May Apply to Coverage Claims Under Policies With Injury-Based Insuring Agreements

"Trigger of coverage" is a term of art referring to the theories crafted by courts in latent- and progressive-injury cases to determine when an injury will be deemed to have happened for insurance purposes. n118 Such trigger of coverage theories have no relevance to coverage analyses under policies that have an act-based Insuring Agreement, as the timing of actual or alleged injuries plays no role in determining the existence or nonexistence of coverage under such a policy. n119 Even under policies with injury-based Insuring Agreements, trigger of coverage theories should only play a role with respect to progressive or continuing injuries, and not those discrete injuries that occur at a particular, readily identifiable moment in time.

Expert Insight:

The terms "trigger" and "trigger of coverage" are sometimes used more generically to describe *any* condition required to invoke coverage under a policy.

There are four traditional trigger of coverage theories, n120 and each prescribes a different method for determining when a latent or ongoing injury will be deemed to have occurred: (1) the Exposure trigger, (2) the Manifestation trigger, (3) the Continuous trigger, and the (4) Injury-in-Fact trigger. Of these four traditional trigger of coverage theories, only the Manifestation trigger limits coverage to a single policy year. n121

Cross Reference:

For further discussion of trigger of coverage issues, see Section

27.01[3], *CGL Policies Generally Require an "Occurrence" to Trigger Environmental Coverage for Property Damage or Bodily Injury*, above.

The Exposure trigger was the first of these theories, and was crafted by the Sixth Circuit in response to the asbestos-related coverage claims presented in *INA v. Forty-Eight Insulations, Inc.* n122 Examining the bodily injury coverage provided under the Insured's CGL policies, which required an injury during the policy period to trigger coverage, n123 the *INA* court reasoned that Plaintiff's asbestos-related injury had actually occurred while he was inhaling asbestos fibers, regardless of when the illness was diagnosed, and therefore held that coverage was available under each of the policies that were in effect during the time of exposure. n124

As the *INA* court noted, application of the Exposure trigger can result in coverage for a single claim under policies in multiple years, depending upon the length of the exposure period, and that this reflected the intent of the parties to maximize coverage for the Insured. n125 Courts have gone on to apply the Exposure trigger in bodily injury, n126 environmental remediation, n127 and third-party property damage cases. n128

Lexis.com Search:
To find materials discussing exposure triggers, use the Search by Topic feature: Click the Search tab and the Search by Topic or Headnote sub-tab. Click through the following topical hierarchy and select your jurisdiction. Search by Topic: Insurance Law > General Liability Insurance > Coverage > Triggers > Exposure Triggers.

The Manifestation trigger was ushered in by the First Circuit's rejection of the Exposure trigger in *Eagle-Picher Industries, Inc. v. Liberty Mut. Ins. Co.* n129 In *Eagle Picher*, which again involved an asbestos-related injury, the First Circuit reasoned that plaintiff's injury was more appropriately viewed as taking place at the first moment in time that it was capable of being detected, and therefore coverage was available only under the policy or policies in effect at the time that plaintiff's injury was diagnosed or reasonably susceptible of detection. n130

As previously noted, this is the only trigger of coverage theory that necessarily limits coverage for a claim to a single policy year, and numerous courts have rejected this theory on the grounds that it "unfairly transforms the more expensive 'occurrence' policy into a cheaper 'claims made' policy. ... " n131

Lexis.com Search:
To find materials discussing manifestation triggers, use the Search by Topic feature: Click the Search tab and the Search by Topic or Headnote sub-tab. Click through the following topical hierarchy and select your jurisdiction. Search by Topic: Insurance Law > General Liability Insurance > Coverage > Triggers > Manifestation Triggers.

The Continuous trigger was developed by the D.C. Circuit in *Keene v. INA.*, which rejected both the Exposure and Manifestation triggers. n132 In *Keene*, which also involved a claim for an asbestos-related injury, the D.C. Circuit reasoned that the injury was most best viewed as an "injurious process" that occurred over the course of time, and therefore coverage was available under each of the policies that were in effect from the time of first exposure, through any latent or

dormant injury period, to the time of manifestation. n133 The *Keene* court also went out of its way to note that the rights established by the insurance policies would be undermined if only exposure or only manifestation of the disease triggered coverage. n134

Lexis.com Search:
To find materials discussing continuous triggers, use the Search by Topic feature: Click the Search tab and the Search by Topic or Headnote sub-tab. Click through the following topical hierarchy and select your jurisdiction. Search by Topic: Insurance Law > General Liability Insurance > Coverage > Triggers > Continuous Triggers.

The last of the traditional trigger of coverage theories is the Injury-in-Fact trigger, developed by the Second Circuit in *American Home Products Corporation v. Liberty Mutual Insurance Company*. n135 Under this theory, every policy in effect when the injury actually occurs provides coverage. The concept propounded by this theory is often described as "flexible," as a court can find that the injury actually occurred "at any number of points, from initial exposure through manifestation." n136 Notably, courts often find that there are multiple injuries-in-fact, as "injury may occur repeatedly through numerous consecutive policy periods." n137 Many courts view the Injury-in-Fact trigger as "closely tracking" the Continuous trigger. n138

Lexis.com Search:
To find materials discussing injury in fact triggers, use the Search by Topic feature: Click the Search tab and the Search by Topic or Headnote sub-tab. Click through the following topical hierarchy and select your jurisdiction. Search by Topic: Insurance Law > General Liability Insurance > Coverage > Triggers > Injury in Fact Triggers.

There are a few cases applying trigger of coverage theories in the context of coverage claims for innocence cases. n139 However, all are in jurisdictions that had already adopted a Manifestation trigger, n140 almost all addressed claims solely for false arrest or malicious prosecution, n141 and only under occurrence-based policies. n142

Cross Reference:

See the discussion at Section 33.07[2][a], *False Arrest and Malicious Prosecution Implicate Policies in Multiple Years, But Which and How Many Years Remains Unsettled*, below.

How trigger of coverage theories will be applied to other types of claims in innocence cases, and even how trigger of coverage theories will be applied to malicious prosecution claims under LEL policies, or in jurisdictions that have not adopted a Manifestation trigger of coverage theory, remain open questions.

A Missouri appellate court considered coverage for a civil rights action. It noted that the general Missouri rule is that in an indemnity policy the time of occurrence of an event is when the complaining party is actually damaged, not when the wrongful act is committed. The court acknowledged that Missouri courts have not addressed application of the general rule in the context of a 42 U.S.C. § 1983 civil rights action for deprivation of procedural due process, but noted that cases that have addressed when insurance coverage is triggered for civil rights claims have found that claims seeking damages for constitutional injuries

from arrest, conviction, and incarceration are analogous to those for malicious prosecution. Thus, the injury would be when the underlying criminal charges were filed. Since that was the case, circumstances justifying application of a multiple trigger were absent. The appellee did not have an insurance contract with the appellant city when the underlying charges were filed, and thus it did not have a duty to defend and indemnify the city against the lawsuit. n143

Cross Reference:

For further discussion of public officials liability insurance, see Insurance And Risk Management For State & Local Governments § 26.05.

Legal Topics:

For related research and practice materials, see the following legal topics: Insurance LawGeneral Liability InsuranceCoverageTriggersContinuous TriggersInsurance LawGeneral Liability InsuranceCoverageTriggersExposure TriggersInsurance LawGeneral Liability InsuranceCoverageTriggersInjury in FactInsurance LawGeneral Liability InsuranceCoverageTriggersManifestation Triggers

FOOTNOTES:

(n1)Footnote 118. Law and Practice of Insurance Coverage Litigation § 44:20 (David L. Leitner et. al eds., 2005).

(n2)Footnote 119. *E.g.*, **NY--** National Cas. Ins. Co. v. City of Mount Vernon, 128 A.D.2d 332, 335-336 (N.Y. App. Div. 1987) .

(n3)Footnote 120. Courts have begun to develop, and are still developing, new trigger of coverage theories. For a more detailed discussion *see* Section 27.01[7], Courts Have Developed Numerous "Trigger" Theories to Determine Which Policies Apply to Ongoing Environmental Injury or Damage.

(n4)Footnote 121. Law and Practice of Insurance Coverage Litigation § 44:26 (David L. Leitner et. al eds., 2005).

(n5)Footnote 122. **US--** Insurance Co. of N. Am. v. Forty-Eight Insulations, 633 F.2d 1212 (6th Cir. 1980) .

(n6)Footnote 123. **US--** *Forty-Eight Insulations*, 633 F.2d at 1216 .

(n7)Footnote 124. **US--** *Forty-Eight Insulations*, 633 F.2d at 1224-1225 .

(n8)Footnote 125. **US--** *Forty-Eight Insulations*, 633 F.2d at 1224-1225 .

(n9)Footnote 126. *See*:

US/MA-- U.S. Liab. Ins. Co. v. Selman, 70 F.3d 684, 689-690 (1st Cir. 1995) (each exposure to lead-paint chips could be seen as a separate injury-producing occurrence);

US/NC-- Imperial Cas. & Indem. Co. v. Radiator Specialty Co., 862 F. Supp. 1437, 1443 (E.D.N.C. 1994) , *aff'd*, 67 F.3d 534 (4th Cir. 1995) (predicting that N.C. would adopt exposure theory in case of asbestos inhalation);

US/TN-- State Farm Fire & Cas. Co. v. McGowan, 421 F.3d 433, 437-440 (6th Cir. 2005) (applying Tennessee law) (former building owner's alleged negligence in failing to take care of rotting tree constituted "occurrence");

CA-- Clemco Indus. v. Commercial Union Ins. Co., 665 F. Supp. 816, 817 (N.D. Cal. 1987) (California courts likely to hold that silicosis occurs under policy when victim exposed to silica dust);

LA-- Johnson v. Orleans Parish Sch. Bd., 975 So. 2d 698, 714 (La. Ct. App. 2008) (exposure to toxic chemicals from landfill site);

MD-- Chantel Assocs. v. Mount Vernon Fire Ins. Co., 656 A.2d 779, 786 (Md. 1995) (ingestion of lead paint chips).

(n10)Footnote 127. *See*:

US/AK-- MAPCO Alaska Petroleum, Inc. v. Cent. Nat'l Ins. Co. of Omaha, 795 F. Supp. 941, 948 (D. Alaska 1991) (applying Alaska law, groundwater contamination, not discovery, triggered coverage; analogy to silicosis);

US/GA-- Scott's Liquid Gold, Inc. v. Lexington Ins. Co., 293 F.3d 1180, 1184 (10th Cir. 2002) (applying Colorado law, groundwater contamination; event that later results in property damage is "occurrence," regardless of when damage manifests); Boardman Petroleum, Inc. v. Federated Mut. Ins. Co., 926 F. Supp. 1566, 1578 (S.D. Ga. 1995) , *rev'd on other grounds*, 150 F.3d 1327 (11th Cir. 1998) (applying Georgia law);

US/MO-- Cont'l Ins. Cos. v. Northeastern Pharm. & Chem. Co., Inc., 842 F.2d 977, 984 (8th Cir. 1998) (en banc) (predicting Missouri law in case involving dioxin contamination);

LA-- Norfolk Southern Corp. v. Cal. Union Ins. Co., 859 So. 2d 167, 191-193 (La. Ct. App. 2003) (plants' wood-preserving operations constituted exposure and triggered policy; parallel drawn to asbestos injuries);

MO--Trans World Airlines, Inc. v. Associated Aviation Underwriters, No. 942-01848 (Mo. Cir. Ct. Oct. 20, 1998) (finding that every release of hazardous waste triggers coverage under exposure theory);

TX-- Pilgrim Enters., Inc. v. Md. Cas. Co., 24 S.W.3d 488, 499 (Tex. App. 2000) (underground contamination from dry cleaner).

See also **UT--** One Beacon Am. Ins. Co. v. Huntsman Polymers Corp., 276 P.3d 1156 (Utah Ct. App.) , *cert. denied*, 285 P.3d 1229 (Utah 2012) (decisions applying exposure trigger theory to bodily injury, including progressive disease bodily injury, remain good law; exposure trigger theory has been rejected in cases involving property damage claims).

(n11)Footnote 128. *See*:

CO-- American Employer's Ins. Co. v. Pinkard Constr. Co., 806 P.2d 954, 956 (Colo. Ct. App. 1990) (roofing fill material caused gradual corrosion; damages sustained during any period in which there was exposure to material);

WI-- Lund v. Am. Motorists Ins. Co., 797 F.2d 544, 546 (7th Cir. 1986)

(applying Wisconsin law, collapse of allegedly faulty roof after expiration of policy).

(n12)Footnote 129. **US--** Eagle-Picher Industries, Inc. v. Liberty Mut. Ins. Co., 682 F.2d 12 (1st Cir. 1982) .

(n13)Footnote 130. **US--** *Eagle-Picher Industries*, 682 F.2d at 24-25 .

(n14)Footnote 131. *See*:

US/MI-- Marathon Flint Oil v. American States Ins., 810 F. Supp. 850, 853 (E.D.Mich. 1992) ("The manifestation theory ... provides the same protection for the insurance company as a claims made policy without the reduction in premiums for the insured.");

HI-- Sentinel Ins. Co. v. First Ins. Co., 875 P.2d 894, 918 (Haw. 1994) ;

MD-- Harford County v. Harford Mut. Ins., 610 A.2d 286, 295 (Md. 1992) ;

ND-- Kief Farmers Cooperative Elevator Co. v. Farmland Mut. Ins. Co., 534 N.W.2d 28, 36 (N.D. 1995) (citing Scottsdale Ins. Co. v. American Empire Surplus Lines Ins. Co., 811 F. Supp. 210, 215 (D. Md. 1993) .

(n15)Footnote 132. **US--** Keene v. Ins. Co. of N. Am., 667 F.2d 1034 (D.C. Cir. 1981) .

(n16)Footnote 133. **US --** *Keene*, 667 F.2d at 1047, 1049.

(n17)Footnote 134. **US --** *Keene*, 667 F.2d at 1047.

(n18)Footnote 135. **NY--** American Home Products Corp. v. Liberty Mut. Ins. Co., 748 F.2d 760 (2d Cir. 1984) .

(n19)Footnote 136. *E.g.*, **MI--** Wolverine World Wide, Inc. v. Liberty Mut. Ins. Co., No. 260330, 2007 Mich. App. LEXIS 657 (Mich. Ct. App. March 8, 2007) .

(n20)Footnote 137. **MI--** Wolverine World Wide, Inc. v. Liberty Mut. Ins. Co., No. 260330, 2007 Mich. App. LEXIS 657 (March 8, 2007) .

See also **US/CT--** United Techs. Corp. v. Am. Home Assurance Co., 989 F. Supp. 128, 153 (D. Conn. 1997) .

(n21)Footnote 138. **US/OH--** GenCorp, Inc. v. AIU Ins. Co., 104 F. Supp. 2d 740, 748 (N.D. Ohio 2000) (applying Ohio law) (noting that the continuous trigger '"closely tracks the injury-in-fact trigger' ").

See also:

CO-- Public Serv. Co. of Colo. v. Wallis & Cos., 986 P.2d 924, 939 n.12 (Colo. 1999) ;

IL-- U.S. Gypsum Co. v. Admiral Ins. Co., 268 Ill. App. 3d 598, 643 N.E.2d 1226, 1257 (1994) (describing rationale of continuous trigger as substitute for injury-in-fact when actual continuous injury would be impossible to prove).

(n22)Footnote 139. **US/PA--** City of Erie v. Guar. Nat'l Ins. Co., 109 F.3d

156, 159 (3d Cir. 1997) (applying Manifestation trigger of coverage theory to state tort claim for malicious prosecution under Pennsylvania law); Coregis Ins. Co. v. City of Harrisburg, No. 1:03-CV-920, 2006 U.S. Dist. LEXIS 20340 (M.D. Pa. March 30, 2006) (same);

ID-- Idaho Counties Risk Management Program Underwriters v. Northland Ins. Cos., 205 P.3d 1220 (Idaho 2009) (applying Manifestation trigger of coverage theory to state tort claim for malicious prosecution, and civil rights claims under 42 U.S.C. § 1983, under Idaho law).

See also **US/IA--** Genesis Ins. Co. v. City of Council Bluffs, 677 F.3d 806 (8th Cir. 2012) (in context of malicious prosecution claim, where underlying criminal charges were filed in 1977, injuries "occurred" for insurance purposes, in that year, not during policy periods from 2002 to 2004).

(n23)Footnote 140. **US/PA--** City of Erie v. Guar. Nat'l Ins. Co., 109 F.3d 156, 159 (3d Cir. Pa. 1997) ("Under Pennsylvania law, the general rule is that a tort 'occurs' for insurance coverage purposes when the injuries caused by the tort first become apparent or manifest themselves. In the case of malicious prosecution, it is undisputed that the injuries caused by the tort first manifest themselves at the time the underlying criminal charges are filed.") (citing Appalachian Ins. Co. v. Liberty Mut. Ins. Co., 676 F.2d 56, 62 (3d Cir. 1982) ("in this type of a case the occurrence takes place when the injuries first manifest themselves."); D'Auria v. Zurich Ins. Co., 507 A.2d 857 (Pa. Super. Ct. 1986) ("an occurrence happens when the injurious effects of the negligent act first manifest themselves in a way that would put a reasonable person on notice of injury."); Keystone Automated Equipment v. Reliance Ins. Co., 535 A.2d 648, 651 (Pa. Super. Ct. 1988) (same)); Coregis Ins. Co. v. City of Harrisburg, No. 1:03-CV-920, 2006 U.S. Dist. LEXIS 20340 (M.D. Pa. March 30, 2006) (citing Appalachian Ins. Co. v. Liberty Mut. Ins. Co., 676 F.2d 56, 62 (3d Cir. 1982) ;

ID-- Idaho Counties Risk Mgmt. Program Underwriters v. Northland Ins. Cos., 205 P.3d 1220, 1225-1226 (Idaho 2009) (adopting the district court's opinion that "in this type of a case the occurrence takes place when the injuries first manifest themselves") (citing Kootenai County v. Western Cas. and Sur. Co., 113 Idaho 908, 750 P.2d 87 (1988)) .

(n24)Footnote 141. *But see* **ID--** Idaho Counties Risk Mgmt. Program Underwriters v. Northland Ins. Cos., 205 P.3d 1220 (Idaho 2009) (applying Manifestation trigger of coverage theory to civil rights claims under 42 U.S.C. § 1983).

(n25)Footnote 142. *See*:

US/PA-- City of Erie v. Guar. Nat'l Ins. Co., 109 F.3d 156, 159 n.4 (3d Cir. 1997) ; Coregis Ins. Co. v. City of Harrisburg, No. 1:03-CV-920, 2006 U.S. Dist. LEXIS 20340, at * 6-10 (M.D. Pa. March 30, 2006) ;

ID-- Idaho Counties Risk Mgmt. Program Underwriters v. Northland Ins. Cos., 205 P.3d 1220, 1224 (Idaho 2009) .

(n26)Footnote 143. City of Lee's Summit v. Missouri Public Entity Risk Management, 390 S.W.3d 214 (Mo. Ct. App. 2012) (courts that have analyzed malicious prosecution and 42 U.S.C. § 1983 claims have found that rationale

underlying application of multiple trigger theory is not well-suited in those cases, where any injury was evident from outset).

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NEWAPL Volume 4 -- Specific Types of Liability Insurance
Chapter 33 LAW ENFORCEMENT LIABILITY INSURANCE

4-33 New Appleman on Insurance Law Library Edition § 33.07

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§ 33.07 Almost Every Decision Analyzing Coverage for Claims in Innocence Cases Involves Only CGL Policies, and Even Under CGL Policies There Are More Open Questions Than Answers

[1] Innocence Cases Can Contain Numerous Allegations Against Several Defendants for Acts and Injuries During Multiple Time Frames

Innocence cases can contain numerous allegations against several defendants for acts and injuries during multiple time frames. These allegations can also take the form of any number of claims, the most common of which are tort claims for false arrest, malicious prosecution, false imprisonment, intentional infliction of emotional distress, and 42 U.S.C. § 1983 (and corresponding state) federal civil rights claims for suppression of exculpatory evidence, fabrication of evidence, denial of access to courts, and unconstitutional supervisory and policy-making functions.

There are only a handful of insurance opinions addressing these claims in innocence cases, and almost all involve coverage analyses under CGL and other occurrence-based policies. In fact some of the claims have never been addressed in the insurance coverage context under any type of policy, and the scarcity of law on many of those that have make drawing general rules, or even identifying general approaches or rationales, difficult.

As a result, the coverage landscape for most claims in this type of case will present itself in various shades of gray, and logical, reasoned extrapolation is often the only real touchstone. In these circumstances, cases interpreting the underlying claim itself will offer the most guidance, n144 especially as such cases relate to the timing of the act and injury elements.

[2] Common State Law Claims in Innocence Cases

[a] False Arrest and Malicious Prosecution Implicate Policies in Multiple Years, But Which and How Many Years Remains Unsettled

To date, decisions addressing the availability of insurance coverage for innocence cases have been limited almost exclusively to claims for false arrest and malicious prosecution. However, these few cases are less than determinative on even these two claims, much less the numerous other claims that can be asserted in innocence cases.

The courts that have addressed the question of which policies are implicated by false arrest and malicious prosecution appear split.

One side of this split holds that false arrest and malicious prosecution claims are covered only by the policies in effect at the time of the arrest and at the time charges are filed or the conviction occurred provide coverage, respectively. n145 However, the first two of these cases, *City of Erie* n146 and *Coregis*, n147 both apply Pennsylvania law, which had already adopted a Manifestation trigger of coverage theory. n148 Moreover, the courts in both expressly applied the Manifestation trigger in reaching their conclusions. n149 The courts in *North River* n150 and *Idaho Counties* n151 also expressly applied the Manifestation triggers in reaching its conclusion; n152 as both Florida and Idaho had already adopted a Manifestation trigger as well. n153 It is worth noting that the Manifestation trigger of coverage theory is a minority view, and is the only one of the trigger of coverage theories that limits coverage to policies in a single year.

Cross Reference:

See Section 33.06, *"Trigger of Coverage" Theories May Apply to Coverage Claims Under Policies With Injury-Based Insuring Agreements*, above.

There are two additional points to consider when evaluating this line of cases. First, all of these cases analyzed only CGL and other occurrence-based policies. n154 Second, and perhaps of equal interest, none of the cases involved an additional, separate tort claim for false imprisonment that was alleged to have begun only after the conviction. As most injury-based LEL policies and most personal injury coverage under CGL policies purport to cover "false arrest," "malicious prosecution," and "false imprisonment"--the sequential, separate, events that happen to most exonerated indviduals--a different result may have been reached were such a claim included. Of course, in *City of Erie*, *Coregis*, and *Idaho Counties*, which were jurisdictions that had adopted a Manifestation trigger, it is unclear whether the inclusion of a false imprisonment claim would have yielded a different result, or what that result would have been.

Cross Reference:

See the discussion at Section 33.04[1][a][ii], *True Injury-Based Insuring Agreements Merely Require An Injury During the Policy Period to Invoke Coverage*, above.

On the other side of this split, one court has held that, under policies containing injury-based insuring agreements that include "false imprisonment" within the policy's definition of covered injuries, false arrest and malicious prosecution claims are covered under all policies that are in effect during any portion of the imprisonment. n155 This decision is based on a literal reading of

the policies' language. n156 Further, the court's analysis in this case involved LEL (not CGL) policies with injury-based Insuring Agreements. n157

No case on either side of this split addressed false arrest and malicious prosecution claims under an act-based insurance policy.

To some extent, these two lines of cases seem to have undertaken entirely divergent analysis, and not merely reached different conclusions from the same analysis. While this could certainly be accounted for by the difference in policy language being interpreted by both sides, or the trigger of coverage theory involved, or both, a close reading of the analysis set forth on both sides suggests a more fundamental disconnect.

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To find decisions discussing insurance coverage for innocence claims, after choosing the appropriate jurisdiction or treatise, use innocence /p insur! as the terms and connectors.

[b] No Court Has Yet Addressed Coverage for Tort Claims Based Upon Restatement (Second) of Torts Section 321(1) or Cases Like *Limone v. United States*

Courts have long recognized causes of action based specifically upon allegations of ongoing or continuing improper conduct. The traditional statement of such claims is set forth in condensed and general form in Restatement (Second) of Torts section 321(1):

> (1) If the actor does an act, and subsequently realizes or should realize that it has created an unreasonable risk of causing physical harm to another, he is under a duty to exercise reasonable care to prevent the risk from taking effect.
>
> Comment *a.* The rule stated in Subsection (1) applies whenever the actor realizes or should realize that his act has created a condition which involves an unreasonable risk of harm to another, or is leading to consequences which involve such a risk. The rule applies whether the original act is tortious or innocent. *If the act is negligent, the actor's responsibility continues in the form of a duty to exercise reasonable care to avert the consequences* which he recognizes or should recognize as likely to follow. n158

To be clear, section 321(1) is not addressed specifically to insurance coverage claims, but rather to the act element in the underlying tort claim. Courts have yet to consider how claims such as those set forth in section 321(1) will be interpreted for purposes of determining whether a particular policy is implicated. However, under policies containing act-based insuring agreements that purport to cover any act, omission or breach of duty, logic would dictate the conclusion that such policies in multiple years could provide coverage for such claims.

A number of the states to have addressed the issue have adopted or indicated that they would adopt claims based upon section 321(1), n159 although a few States have expressly refused to do so. n160 The majority of states have either not yet considered the issue, or have raised the issue without indicating a likely outcome. n161

Of all of the cases involving section 321(1), *Limone v. United States* is the most instructive. n162 In *Limone*, four wrongfully convicted and imprisoned Plaintiffs brought a number of claims against the government, alleging that agents of the Federal Bureau of Investigations had suborned perjury in order to frame them, and then conspired to keep them in jail for three decades. n163

In addressing plaintiffs' claims, the *Limone* court held that the FBI agents, by suborning testimony from a witness that they knew was false, were directly responsible for creating an unreasonable risk of harm to the plaintiffs, and therefore had "a duty to exercise reasonable care to prevent the risk from taking effect." n164 As the *Limone* court went on to cogently observed:

> It is true that, in general, one does not have a duty to take affirmative action, *however, a duty to prevent harm to others arises when one creates a dangerous situation, whether that situation was created intentionally or negligently*. ...
>
> *I emphasize that this is not liability based merely on failure to act; it is affirmative action exacerbated by later inaction*. This is not "the situation of a mere passerby who observes a fire and fails to alert authorities; the defendant started the fire and then increased the risk of harm from that fire by allowing it to burn without taking adequate steps either to control it or to report it to the proper authorities." I reject defendant's argument that, having labored so intensively to bring together spark and kindling, it had no duty to intervene in the resulting fire. Indeed, this fire, if the metaphor can be so extended, was to burn for many years. *Each time an imprisoned man petitioned for commutation, the FBI did not merely fail to go to the authorities with what they knew--the state authorities came to them, and they actively renewed their commitment to keeping the fire burning.* n165

Reason suggests that section 321(1)-type claims that are adopted within a jurisdiction as *Limone* was by the First Circuit would be highly persuasive, if not dispositive, on subsequent coverage issues involving the timing of any temporally restricted act requirement in a policy, especially as most LEL policies define the act coverage condition to include "breach of duty." A jurisdiction that recognizes a separate tort, a necessary element of which is a subsequent act or omission, would be unlikely to deny coverage under any act-based policy in effect while the subsequent act or omission, absent a clear exclusion in the policy.

Section 321(1) claims in cases like *Limone* appear similar to, yet broader than section 1983 claims for denial of access to courts in cases like *Germany v. Vance*. n166

Cross Reference:

See the discussion at Section 33.07[2][c], *Access to Court Claims*, above.

[3] Common Federal Civil Rights Claims in Innocence Cases

[a] *Brady* Claims

There is almost no law interpreting insurance coverage claims premised on *Brady* violations asserted in innocence cases. In these circumstances, cases interpreting the section 1983 claim for the violation itself will offer the most guidance, especially as such cases relate to the timing of the act and injury elements of a *Brady* violation.

In the seminal case of *Brady v. Maryland*, the United States Supreme Court held that due process requires the government, including law enforcement officers, n167 to disclose material exculpatory evidence in the government's possession to the defense. n168

For evidence known to the government during or before the time of trial, courts have consistently held that "[a] prosecutor's decision not to preserve or turn over exculpatory material before trial, during trial, or after conviction is a violation of due process" under *Brady*. n169 In other words, courts are uniform in their recognition of *Brady* as imposing a duty to come forward with exculpatory evidence both pre- and post-conviction. This is relevant to policies with both act- and injury-based Insuring Agreements.

One case, *Steidl v. Fermon*, is also instructive. n170 In *Steidl*, Plaintiff asserted a section a 1983 claim asserting *Brady* violations for a police officer's failure to disclose exculpatory evidence. After striking down the officer's qualified immunity defense, the Seventh Circuit went on to expressly recognize that plaintiff's claim entitled him to relief from the time that the officer discovered the exculpatory evidence through the time of Plaintiff's eventual release. n171 On other words, injuries for a *Brady* violation also continue from the first act through the time of release.

Whether *Brady* imposes a duty to disclose exculpatory evidence that is only discovered to exist after the trial is unclear, as federal circuit courts appear to split on the question. n172 Requiring such a duty would seem preferable, not only because it better effectuates constitutional norms, n173 but also because it better comports with our notions of justice.

Even in a jurisdiction where the *Brady* duty is held not extend to evidence discovered by the government post-trial, the failure to come forward with such evidence may support a section 1983 claim for the denial of access to courts, or potentially a state law claim in jurisdictions that have adopted Restatement (Second) of Torts section 321(1).

Cross References:

See the discussions at Section 33.07[2][c], *Access to Court Claims* and Section 33.07[1][b], *No Court Has Yet Addressed Coverage For Tort Claims Based Upon Restatement Section 321(1) or Cases Like Limone v. United States,* above.

[b] Fabrication Claims

Officers may be liable under 42 U.S.C. § 1983 "when they conspire to procure groundless state indictments and charges based upon fabricated evidence or false, distorted, perjurious testimony presented to official bodies in order to maliciously bring about a citizen's trial or conviction." n174 Fabrication is a

term of art, and can include any number of acts, including but not limited to the use of a false or misleading police document, coercing or provoking a false or untrue confession, or any tampering with evidence. n175

As the Supreme Court has noted, it is not the creation or existence of a fabrication, but "its use in a fashion that deprives someone of a fair trial or otherwise harms him, [that] violates the Constitution." n176 Lower courts note and follow this rule, and several have applied it to hold that an officer who fabricates evidence and then puts it "in a drawer, or frame[s] it and [hangs] it on the wall *but [takes] no other step,*" has not violated the constitution. n177 Understanding the timing of this element is thus highly relevant to analyzing whether the temporally restricted coverage condition in a policy is invoked.

One point that is unclear is whether each use would support a claim for separate, stand alone violation. For example, fabricated evidence is used at trial and then, after conviction, used to defeat a habeas proceeding. From an insurance coverage perspective, the fact that *either* use is a violation and would support a section 1983 claim is perhaps the more salient point.

[c] Access to Court Claims

Yet another claim frequently asserted in innocence cases stems from the denial of the constitutional right of access to courts. n178 While an individual is in state custody, the Fourteenth Amendment places an affirmative duty on state officials to ensure continuing, meaningful access to the courts. n179 It is well settled that the constitutional right of access to courts continues even after an incarceration: "Prisoners, no less than any other citizens, have a constitutional right of access to the courts," n180 and this access must be "adequate, effective, and meaningful." n181

Courts have explicitly recognized that this "right to adequate, effective and meaningful access to the courts" is violated where a government actor who, after a conviction, "withholds evidence that would enable an individual to prove a claim in court violates the individual's constitutional right of access." n182 Stated another way, the withholding of exculpatory evidence and discovery necessary for a prisoner to prepare and file an effective post-conviction application for relief--and thereby meaningfully access the courts for review--constitutes a due process violation actionable under Section 1983.

This scenario can arise when evidence is withheld during appeal, during a habeas petition, or during any other post-conviction relief mechanism attempted, n183 though no court has ever addressed whether a denial of access to courts claim would also arise in the context of applications for executive clemency.

This recognition that post-conviction concealment of exculpatory evidence constitutes a separate and distinct due process violation has significant coverage implications. Indeed, under both injury-based and act-based policies, these due process violations may constitute acts

[d] *Monell* Claims

In addition to claims against officers and other frontline individuals, innocence cases often assert separate claims against the government entity itself for constitutional violations.

In *Monell v. Department of Social Services*, the Supreme Court held that although a municipality cannot be held vicariously liable for the unconstitutional actions of its employees under section 1983, it can be held directly liable for implementation of its own unconstitutional policies, n184 and can be sued for "monetary, declaratory, or injunctive relief". n185

There are several ways of establishing a liability against a municipality or other local government entity under 42 U.S.C. § 1983: n186

- the implementation or execution of a "policy statement, ordinance, regulation, or decision officially adopted and promulgated by th[e] body's officers;" n187

- a long-standing unconstitutional custom or practice that was not formally adopted by lawmakers; n188

- a failure to properly train or supervise its employees; n189

- failing to adequately screen its employee before hiring if an "adequate screening would have shown that 'this officer was highly likely to inflict the particular injury suffered by the plaintiff;' " n190 and

- when a final policymaker of the entity makes an unconstitutional decision or acts in an unconstitutional manner. n191

Claims based on any or all of this conduct are routinely brought in innocence cases. n192

It is relevant to coverage analyses that *Monell* claims are not vicarious liability claims, but are instead separate claims based upon the direct actions or omissions of the entity, through its officers and supervisors. n193 To this end, while a constitutional violation by an officer or other non-supervisory individual actor is a predicate to a *Monell* claim, n194 the claim against that officer or other non-supervisory individual need not be actionable or even brought for the *Monell* claim to succeed. n195

And the Third Circuit has simply held that "the district court [is required] to review the plaintiffs' municipal liability claims independently of the section 1983 claims against the individual police officers, as the City's liability for a substantive due process violation does not depend upon the liability of any police officer." n196

There is a scarcity of case law regarding insurance coverage for *Monell* claims. But there are two insurance cases analyzing *Monell* claims in innocence cases. n197 In *North River*, the underlying plaintiff brought claims for malicious prosecution and a number civil rights violations, including failure to supervise and train. n198 The insured had a CGL policy, covering claims for bodily injury and personal injury. n199 The court, without analysis or elaboration on the section 1983 claims, treated all claims to the same analysis used for malicious

prosecution--where the only predicate officer violation was alleged to have happened--and applied the Manifestation trigger of coverage theory to hold that all injuries occurred upon conviction, and hence a single policy applied. n200

It is an open question which policies would be implicated in a jurisdiction that had rejected the Manifestation trigger, which is the majority of jurisdictions. n201 It is also an open question how any jurisdiction would apply a coverage analysis to a *Monell* claim that asserted a denial of access to courts violation in connection with a post-conviction appeal or habeas petition, or post-conviction fabrication claim as the predicate officer violation.

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To find decisions discussing *Monell* claims against a government entity itself, after choosing the appropriate jurisdiction or treatise, use "monell" and innocence /p insur! as the terms and connectors.

Legal Topics:

For related research and practice materials, see the following legal topics:
Criminal Law & ProcedureDiscovery & InspectionBrady MaterialsBrady Claims

FOOTNOTES:
(n1)Footnote 144. *See, e.g.*, **US/PA--** City of Erie, Pa. v. Guar. Nat'l Ins. Co., 109 F.3d 156, 158 (3d Cir. 1997) .

(n2)Footnote 145. *See, e.g.*:

US/FL-- North River Ins. Co. v. Broward County Sheriff's Office, 428 F. Supp. 2d 1284 (S.D. Fla. 2006) ;

US/IA-- Genesis Ins. Co. v. City of Council Bluffs, 677 F.3d 806 (8th Cir. 2012) (in context of malicious prosecution claim, where underlying criminal charges were filed in 1977, injuries "occurred" for insurance purposes, in that year, not during policy periods from 2002 to 2004);

US/IL-- TIG Indem. Co. v. McFatridge, No. 06-2008, 2007 U.S. Dist. LEXIS 23788 (C.D. Ill. 2007) ; Northfield Ins. Co. v. City of Waukegan, 761 F. Supp. 2d 766 (N.D. Ill. 2010) , *aff'd*, 701 F.3d 1124 (7th Cir. 2012) ;

US/PA-- City of Erie v. Guar. Nat'l Ins. Co., 109 F.3d 156 (3d Cir. 1997) ; Coregis Ins. Co. v. City of Harrisburg, No. 1:03-CV-920, 2006 U.S. Dist. LEXIS 20340 (M.D. Pa. March 30, 2006) ;

ID-- Idaho Counties Risk Mgmt. Program Underwriters v. Northland Ins. Cos., 205 P.3d 1220 (Idaho 2009) .

(n3)Footnote 146. **US/PA--** City of Erie, Pa. v. Guar. Nat'l Ins. Co., 109 F.3d 156 (3d Cir. 1997) .

(n4)Footnote 147. **US/PA--**Coregis Ins. Co. v. City of Harrisburg, No. 1:03-CV-920, 2006 U.S. Dist. LEXIS 20340 (M.D. Pa. March 30, 2006) .

(n5)Footnote 148. *See* **US/PA--** City of Erie v. Guar. Nat'l Ins. Co., 109 F.3d 156, 159, 162-163 (3d Cir. 1997) (finding that "a tort occurs for insurance purposes under Pennsylvania law at the time when the injuries caused by the tort

first manifest themselves.") (citing Appalachian Ins. Co. v. Liberty Mut. Ins. Co., 676 F.2d 56, 62 (3d Cir. 1982) ("in this type of a case the occurrence takes place when the injuries first manifest themselves.");

PA-- D'Auria v. Zurich Ins. Co., 507 A.2d 857 (Pa. Super. Ct. 1986) ("an occurrence happens when the injurious effects of the negligent act first manifest themselves in a way that would put a reasonable person on notice of injury."); Keystone Automated Equipment v. Reliance Ins. Co., 535 A.2d 648, 651 (Pa. Super. Ct. 1988) (same)).

Under the Manifestation trigger, only the policy in effect at the time the injury is first reasonably susceptible of detection is triggered. The Manifestation trigger is a minority view, and is the only one of the trigger of coverage theories that limits coverage to policies in a single year. *See* discussion at Section 33.06, *Trigger of Coverage" Theories May Apply to Coverage Claims Under Policies With Injury-Based Insuring Agreements*, above.

(n6)Footnote 149. **US/PA--** City of Erie v. Guar. Nat'l Ins. Co., 109 F.3d 156, 159 (3d Cir. 1997) (the tort of malicious prosecution "occurs" when "the injuries caused by the tort first become apparent or manifest themselves. In the case of malicious prosecution, it is undisputed that the injuries caused by the tort first manifest themselves at the time the underlying criminal charges are filed"); Coregis Ins. Co. v. City of Harrisburg, No. 1:03-CV-920, 2006 U.S. Dist. LEXIS 20340, at *25 (M.D. Pa. March 30, 2006) ("We hold that in this type of a case the occurrence takes place when the injuries first manifest themselves") (quoting Appalachian Ins. Co. v. Liberty Mut. Ins. Co., 676 F.2d 56, 62 (3d Cir. 1982)) .

(n7)Footnote 150. **US/FL--** North River Ins. Co. v. Broward County Sheriff's Office, 428 F. Supp. 2d 1284 (S.D. Fla. 2006) .

(n8)Footnote 151. **ID--** Idaho Counties Risk Mgmt. Program Underwriters v. Northland Ins. Cos., 205 P.3d 1220 (Idaho 2009) .

(n9)Footnote 152. **ID--** Idaho Counties Risk Mgmt. Program Underwriters v. Northland Ins. Cos., 205 P.3d 1220, 1225-1226 (Idaho 2009) (adopting the district court's opinion that "in this type of a case the occurrence takes place when the injuries first manifest themselves") (citing Appalachian Ins. Co. v. Liberty Mut. Ins. Co., 676 F.2d 56, 62 (3d Cir. 1982) ; Kootenai County v. Western Cas. and Sur. Co., 750 P.2d 87 (Idaho 1988)) .

(n10)Footnote 153. *E.g.*:

US/FL-- N. River Ins. Co. v. Broward County Sheriff's Office, 428 F. Supp. 2d 1284, 1289-1290 (S.D. Fla. 2006) ("Although there does not appear to be a Florida case directly on point, 'Florida courts follow the general rule that the time of occurrence within the meaning of an indemnity policy is the time at which the plaintiff's injury first manifest. ... The Florida courts have also stated that bodily injury or other identifiable event must occur during the policy period.' ") (citing American Motorists Ins. Co. v. Southern Security Life Ins. Co., 80 F. Supp. 2d 1280, 1284 (M.D. Ala. 2000) (declining to extend insurance coverage to plaintiffs' alleged mental anguish, which occurred after the policy period had expired, and after the alleged fraud that caused the mental anguish occurred); Travelers Ins. Co. v. C. J. Gayfer's & Co., 366 So. 2d 1199, 1202 (Fla. Dist. Ct. App. 1979) (refusing to extend coverage "to include

liability for the consequences of an occurrence beyond the policy period"); Auto Owners Ins. Co. v. Travelers Cas. & Sur. Co., 227 F. Supp. 2d 1248, 1266 (M.D. Fla. 2002) ("It is the damage itself which must occur during the policy period for coverage to be effective. ... The 'trigger' for coverage [under the] policies is when the damage occurs and if damage is continuously occurring, the 'trigger' is the time the damage 'manifests' itself or is discovered")); Axis Surplus Ins. Co. v. Contravest Constr. Co., No. 6:11-cv-320-Orl-28DAB, 2012 U.S. Dist. LEXIS 77489 (M.D. Fla., June 5, 2012) (applying injury-in-fact trigger theory and distinguishing *Gayfer's*);

ID-- Idaho Counties Risk Mgmt. Program Underwriters v. Northland Ins. Cos., 205 P.3d 1220, 1225-1226 (Idaho 2009) (citing Kootenai County v. Western Cas. and Sur. Co., 750 P.2d 87 (Idaho 1988)) .

(n11)Footnote 154. *See*:

US/FL-- North River Ins. Co. v. Broward County Sheriff's Office, 428 F. Supp. 2d 1284, 1286-1287 (S.D. Fla. 2006) ;

US/IL-- TIG Indemnity Co. v. McFatridge, No. 06-2008, 2007 U.S. Dist. LEXIS 23788, at *3 (C.D. Ill. Mar. 30, 2007) ;

US/PA-- City of Erie v. Guar. Nat'l Ins. Co., 109 F.3d 156, 159 (3d Cir. 1997) (failing to distinguish between occurrence-based and wrongful act policies); Coregis Ins. Co. v. City of Harrisburg, No. 1:03-CV-920, 2006 U.S. Dist. LEXIS 20340, at *6-10 (M.D. Pa. March 30, 2006) ;

ID-- Idaho Counties Risk Mgmt. Program Underwriters v. Northland Ins. Cos., 205 P.3d 1220 (Idaho 2009) .

(n12)Footnote 155. **NY--** National Casualty Ins. Co. v. Mt. Vernon, 128 A.D.2d 332, 334 (N.Y. App. Div. 1987) .

This authority is likely distinguishable under policies that do not include "imprisonment" within the enumerated injuries covered.

(n13)Footnote 156. **NY--** National Casualty Ins. Co. v. Mt. Vernon, 128 A.D.2d 332, 336-337 (N.Y. App. Div. 1987) .

(n14)Footnote 157. **NY--** National Casualty Ins. Co. v. Mt. Vernon, 128 A.D.2d 332, 334 (N.Y. App. Div. 2d Dept 1987) .

(n15)Footnote 158. Restatement (Second) of Torts § 321(1) (1965) (emphasis added).

(n16)Footnote 159. *See, e.g.*:

AK-- Bryson v. Banner Health Sys., 89 P.3d 800, 805 n.11 (Alaska 2004) ;

CA-- Davidson v. City of Westminster, 32 Cal. 3d 197, 207 (1982) (declining to extend doctrine to police officers who failed to prevent stabbing); People v. Oliver, 210 Cal. App. 3d 138, 143 (1989) ; Johnson v. County of Los Angeles, 143 Cal. App. 3d 298, 310 (1983) ;

MA-- Commonwealth v. Levesque, 766 N.E.2d 50, 56-57 (Mass. 2002) (applied in

criminal context);

NM-- Segura v. K-Mart Corp., 62 P.3d 283, 289 (N.M. Ct. App. 2002) ;

SC-- Faile v. S. Carolina Dept. of Juv. Justice, 566 S.E.2d 536, 546 n.8 (S.C. 2002) ;

WA-- Parrilla v. King County, 157 P.3d 879, 884 (Wash. Ct. App. 2007) ;

WV-- Courtney v. Courtney, 413 S.E.2d 418, 425 (W. Va. 1991) ;

WI-- Schicker v. Leick, 162 N.W.2d 66, 71 (Wis. 1968) (applying RESTATEMENT (SECOND) OF TORTS § 321(1) to farmer who maintained property in dangerous condition).

See also:

AL-- Cochran v. Keeton, 252 So. 2d 307, 312 (Ala. Civ. App. 1970) (cited but not applied);

DE-- Pipher v. Burr, No. 96C-08-011-WTQ, 1998 Del. Super. LEXIS 26, at *32 (Del. Super. Ct. Jan. 29, 1998) (mentioned but not adopted in unreported case);

FL-- White v. City of Waldo, 659 So. 2d 707, 710 (Fla. Dist. Ct. App. 1995) (mentioned but not adopted);

KS-- Patton v. Hutchinson Wil-Rich Mfg. Co., 861 P.2d 1299, 1307 (Kan. 1993) (mentioned but not adopted);

ME-- Trusiani v. Cumberland & York Distributors, Inc., 538 A.2d 258, 263 (Me. 1998) (discussed in dicta);

NH-- Walls v. Oxford Mgmt. Co., Inc., 633 A.2d 103, 106 (N.H. 1993) (discussed as general rule, but in context of duty of landlord to prevent criminal attack);

NJ-- Podias v. Mairs, 926 A.2d 859, 864 (N.J. Super. Ct. App. Div. 2007) (cited in general discussion but not adopted);

OR-- Fireman's Fund Amer. Ins. Co. v. Pac. Power & Light Co., 525 P.2d 157, 163 n.9, 164 n.14 (Or. 1974) (cited to compare another Restatement provision);

VA-- Keophumihae v. Brewer, 6 Va. Cir. 80, 81 (1983) (cited but not adopted).

(n17)Footnote 160. See:

CT-- Murillo v. Seymour Ambulance Ass'n, Inc., 823 A.2d 1202, 1207 (Conn. 2003) ;

IL-- Brewster v. Rush-Presbyterian-St. Luke's Medical Center, 836 N.E.2d 635, 639 (Ill. App. Ct. 2005) ("This section of the Restatement has been criticized for its vagueness and seemingly limitless scope.");

MI-- Gregory v. Cincinnati Inc., 538 N.W.2d 325, 334 n.29 (Mich. 1995)

("Plaintiff has not cited any case wherein a Michigan court has adopted [§ 321(1)] and has not demonstrated that such a duty was intended to apply to products liability actions.");

MN-- Domagala v. Rolland, 805 N.W.2d 14 (Minn. 2011) ;

PA-- Glick v. Martin & Mohler, Inc., 535 A.2d 626, 629 (Pa. Super. Ct. 1987) ("The Supreme Court of Pennsylvania has never adopted section 321 as the law of Pennsylvania, and as the intermediate appellate court we decline to do so.");

TX-- American Tobacco, Inc. v. Grinnell, 951 S.W.2d 420, 438 (Tex. 1997) .

(n18)Footnote 161. Arizona, Arkansas, Colorado, District of Columbia, Georgia, Hawaii, Idaho, Indiana, Iowa, Kentucky, Louisiana, Maryland, Mississippi, Missouri (applied in a federal district case, Allen v. United States, 370 F. Supp. 992, 1001-1002 (E.D. Mo. 1973)) , Montana, Nebraska, Nevada, New York, North Carolina, North Dakota, Ohio, Oklahoma, Rhode Island, South Dakota, Utah (cited in a federal district court case, Orr v. Brigham Young Univ., 960 F. Supp. 1522, 1529 (D. Utah 1994)) , Tennessee, Vermont, and Wyoming.

(n19)Footnote 162. **MA--** Limone v. United States, 497 F. Supp. 2d 143 (D. Mass. 2007) .

(n20)Footnote 163. **MA--** Limone v. United States, 497 F. Supp. 2d 143, 151 (D. Mass. 2007) .

(n21)Footnote 164. **MA--** Limone v. United States, 497 F. Supp. 2d 143, 230 (D. Mass. 2007) .

(n22)Footnote 165. **MA--** Limone v. United States, 497 F. Supp. 2d 143, 230-231 (D. Mass. 2007) .

(n23)Footnote 166. **US/MA--** Germany v. Vance, 868 F.2d 9 (1st Cir. 1989) .

(n24)Footnote 167. **US--** Youngblood v. West Virginia, 547 U.S. 867 (2006) ("[A] Brady violation occurs when the government fails to disclose evidence materially favorable to the accused ... even evidence that is known only to police investigators and not to the prosecutor. ... ").

See also **US/FL--**United States of America v. Lebron, No. 8:10-cr-258-T-17MAP, 2012 U.S. Dist. LEXIS 142434 (M.D. Fla., Oct. 2, 2012) (while *Brady* would require government to turn over all material to extent request sought exculpatory material or impeachment material relating to financial institution at issue, nothing in *Youngblood* suggests expansion of *Brady* to include evidence related to investigation of institution, as opposed to individual who testifies adverse to defendant).

(n25)Footnote 168. **US--** Brady v. Maryland, 373 U.S. 83, 86 (1963) .

(n26)Footnote 169. *See:*

US-- Broam v. Bogan, 320 F.3d 1023, 1030 (9th Cir. 2003) (emphasis added). *See also* Steidl v. Fermon, 494 F.3d 623, 625 (7th Cir. 2007) ; Tennison v. City & County of San Francisco, 570 F.3d 1078, 1094 (9th Cir. 2009) ; Smith v. Roberts, 115 F.3d 818, 820 (10th Cir. 1997) ; Posey v. Pruger, 762 F. Supp. 2d

1086 (N.D. Ill. 2011) .

(n27)Footnote 170. **US--** Steidl v. Fermon, 494 F.3d 623, 625 (7th Cir. 2007) .

(n28)Footnote 171. **US--** Steidl v. Fermon, 494 F.3d 623, 633 (7th Cir. 2007) .

(n29)Footnote 172. *Compare* **US-**Leka v. Portuondo, 257 F.3d 89, 100 (2d Cir. 2001) ("*Brady* requires disclosure of information that the prosecution acquires during the trial itself, or even afterward") *and* Smith v. Roberts, 115 F.3d 818, 820 (10th Cir. 1997) (applying the *Brady* duty to evidence discovered after trial but during direct appeal) *with* United States v. Jones, 399 F.3d 640, 647-648 (6th Cir. 2005) (holding that exculpatory evidence discovered after trial is not Brady evidence, but may support a motion for a new trial under Fed. R. Crim. P. 33) *and* Gibson v. Superintendent of N.J. Dep't of Law & Pub. Safety, 411 F.3d 427, 444 (3d Cir. 2005) , *overruled on other grounds by* Dique v. N.J. State Police, 603 F.3d 181 (3d Cir. 2010)) ("However, Gibson has pointed to no constitutional duty to disclose potentially exculpatory evidence to a convicted criminal after the criminal proceedings have concluded and we decline to conclude that such a duty exists.").

(n30)Footnote 173. *See* **US/KY--** Jones v. Comonwealth of Kentucky, 97 F.2d 335 (6th Cir. 1938) ("[T]he fundamental conceptions of justice which lie at the base of our civil and political institutions must with equal abhorrence condemn as a travesty a conviction upon perjured testimony if later, but fortunately not too late, its falseness is discovered ... the state in the one case as in the other is required to afford a corrective judicial process to remedy the alleged wrong, if constitutional rights are not to be impaired.").

(n31)Footnote 174. *E.g.*, **US--** Anthony v. Baker, 767 F.2d 657, 662 (10th Cir. 1985) . *See also* Winslow v. Smith, 696 F.3d 716 (8th Cir. 2012) (failure to investigate claim may be inextricably bound with false evidence claim, where plaintiff's theory is that investigators recognized deficiencies in case and manufactured false evidence to fill those gaps); Devereaux v. Abbey, 263 F.3d 1070, 1075 (9th Cir. 2001) (recognizing "a clearly established constitutional due process right not to be subjected to criminal charges on the basis of false evidence that is deliberately fabricated by the government"); Pierce v. Gilchrist, 359 F.3d 1279, 1285 (10th Cir. 2004) ("[The Fourteenth Amendment establishes the] right not to be deprived of liberty without due process of law, or more specifically, as the result of the fabrication of evidence by a government officer acting in an investigative capacity.").

(n32)Footnote 175. *See, e.g.*, **US/AL--** Titan Indem. Co. v. Newton, 39 F. Supp. 2d 1336 (N.D. Ala. 1999) (finding insurance coverage for fabrication of evidence where officer planted drugs to secure conviction).

(n33)Footnote 176. **US--** Buckley v. Fitzsimmons, 509 U.S. 259, 273 (1993) .

(n34)Footnote 177. **US--** Buckley v. Fitzsimmons, 20 F.3d 789, 795 (7th Cir. 1994) (emphasis added).

See also:

US/MN-- Lawrence v. City of St. Paul, 740 F. Supp. 2d 1026 (D. Minn. 2010) ;

US/RI- Landrigan v. Warwick, 628 F.2d 736, 744 (1st Cir. 1980) ("[W]e do not see how the existence of a false police report, sitting in a drawer in a police station, by itself deprives a person of a right secured by the Constitution and laws.");

US/TX--Perkins v. Metro. Transit Auth., No. H-11-1102, 2012 U.S. Dist. LEXIS 150780 (S.D. Tex., Oct. 19, 2012) (where plaintiff complained about police interrogation of third party, not of himself, even if he could allege violation of his substantive due process rights, that claim would not inure to his benefit).

E.g., **US/NY--** Zahrey v. Coffey, 221 F.3d 342, 348 (2d Cir. 2000) (citing Zahrey v. City of New York, No. 98 Civ. 4546 (LAP), 1999 U.S. Dist. LEXIS 11912 (S.D.N.Y. Aug.4, 1999)); Landrigan v. City of Warwick, 628 F.2d 736, 744 (1st Cir. 1980) ; Bertuglia v. City of New York, 839 F. Supp. 2d 703 (S.D.N.Y. Mar. 19, 2012) .

(n35)Footnote 178. *See generally Annual Review of Criminal Procedure*, 40 Geo. L.J. Ann. Rev. Crim. Proc., 1007, 1009-1014 (2011).

(n36)Footnote 179. *See* **US--** Bounds v. Smith, 430 U.S. 817, 824 (1977) .

(n37)Footnote 180. **US--** Beauchamp v. Murphy, 37 F.3d 700, 709 (1st Cir. 1994) (citing Bounds v. Smith, 430 U.S. 817, 821 (1977) ; Wolff v. McDonnell, 418 U.S. 539, 71 Ohio Op. 2d 336 (1974) ; Johnson v. Avery, 393 U.S. 483 (1969) .

(n38)Footnote 181. **US/MA--** Germany v. Vance, 868 F.2d 9, 14 (1989) (quoting *Bounds,* 430 U.S. at 822).

(n39)Footnote 182. *See*:

US/MA -- *Germany*, 868 F.2d at 14, 16 (noting that a "reasonable official" should understand that the right of access to courts "would be violated by the intentional or recklessly indifferent withholding of potentially exculpatory information from an adjudicated delinquent or from the court itself") (citing **US/WI--** Bell v. City of Milwaukee, 746 F.2d 1205, 1260-1263 (7th Cir. 1984) ; **US/LA--** Ryland v. Shapiro, 708 F.2d 967, 971-975 (5th Cir. 1983)) .

See also **US--** Smith v. Maloney, No. 93-1297, 1993 U.S. App. LEXIS 28329, at *2 (1st Cir. Nov. 1, 1993) .

(n40)Footnote 183. *See, e.g.*, **US/MA--** *Germany*, 868 F.2d at 14 (citing US/WI-Bell v. City of Milwaukee, 746 F.2d 1205, 1260-1263 (7th Cir. 1984) ; US/LA- Ryland v. Shapiro, 708 F.2d 967, 971-975 (5th Cir. 1983)).

See also US- Smith v. Maloney, No. 93-1297, 1993 U.S. App. LEXIS 28329, at *2 (1st Cir. Nov. 1, 1993) .

(n41)Footnote 184. **US--** Monell v. Dep't of Soc. Servs., 436 U.S. 658 (1978) .

(n42)Footnote 185. **US --** *Monell*, 436 U.S. at 690 .

(n43)Footnote 186. *See, e.g.*, T. Owen Farist, *Municipal Liability? Not So Fast: What Connick v. Thompson Means For Future Prosecutorial Misconduct*, 63

Mercer L. Rev. 1113 (2012); Karen M. Blum, *Making Out the Monell Claim Under Section 1983*, 25 Touro L. Rev. 829 (2009); David Jacks Achtenberg, *Taking History Seriously: Municipal Liability Under 42 U.S.C. § 1983 and the Debate Over Respondeat Superior*, 73 Fordham L. Rev. 2183, 2188 (2005).

(n44)Footnote 187. **US --** *Monell*, 436 U.S. at 690 .

(n45)Footnote 188. *See* Karen M. Blum, *Making Out the Monell Claim Under Section 1983*, 25 Touro L. Rev. 829 (2009); David Jacks Achtenberg, *Taking History Seriously: Municipal Liability Under 42 U.S.C. § 1983 and the Debate Over Respondeat Superior*, 73 Fordham L. Rev. 2183, 2188 (2005).

(n46)Footnote 189. David Jacks Achtenberg, *Taking History Seriously: Municipal Liability Under 42 U.S.C. § 1983 and the Debate Over Respondeat Superior*, 73 Fordham L. Rev. 2183, 2188 (2005).

However, liability based on failure to train was severely restricted in Connick v. Thompson, 131 S. Ct. 1350, 179 L. Ed. 2d 417 (2011) where the court held liability for failure to train could not be based on a single *Brady* violation. The decision has been the subject of considerable scholarly analysis and criticism. *See e.g.* Rosalie Berger Levinson, *Who Will Supervise the Supervisors? Establishing Liability for Failure to Train, Supervise, or Discipline Subordinates in a Post-Iqbal/Connick World*, 47 Harv. C.R.-C.L. L. Rev. 273 (2012); Randall Grometstein & Jennifer M. Balboni, *Backing Out of a Constitutional Ditch: Constitutional Remedies for Gross Prosecutorial Misconduct Post Thompson*, 75 Alb. L. Rev. 1243 (2011 / 2012). *See also* Bertuglia v. City of New York, 839 F. Supp. 2d 703 (S.D.N.Y. 2012) .

(n47)Footnote 190. David Jacks Achtenberg, *Taking History Seriously: Municipal Liability Under 42 U.S.C. § 1983 and the Debate Over Respondeat Superior*, 73 Fordham L. Rev. 2183, 2188 (2005) (citing **US--** Bd. Of County Comm'rs v. Brown, 520 U.S. 397, 411 (1997) .

(n48)Footnote 191. Karen M. Blum, *Making Out the Monell Claim Under Section 1983*, 25 Touro L. Rev. 829 (2009).

(n49)Footnote 192. *See, e.g.*, **US--** Whitley v. Allegheny County, No. 07-403, 2010 U.S. Dist. LEXIS 21262 (W.D. Pa. Mar. 9, 2010) , *cert. denied*, 131 S. Ct. 2153, 179 L. Ed. 2d 936 (2011) ; Doswell v. City of Pittsburgh, No. 07-0761, 2009 U.S. Dist. LEXIS 51435 (W.D. Pa. June 16, 2009) ; Deskovic v. City of Peekskill, 673 F. Supp. 2d 154, 173 (S.D.N.Y. 2009) ; Bibbins v. City of Baton Rouge, 489 F. Supp. 2d 562, 581 (M.D. La. 2007) .

(n50)Footnote 193. **US--** Graves v. Thomas, 450 F.3d 1215, 1218 (10th Cir. 2006) (requiring a direct causal link between the policy or custom and the injury alleged) (citing City of Canton v. Harris, 489 U.S. 378, 385 (1989)) . *See also* Connick v. Thompson, 131 S. Ct. 1350, 179 L. Ed. 2d 417 (2011) (single-incident liability does not, as legal matter, encompass failure to train prosecutors in their *Brady* obligation because attorneys, unlike police officers, are equipped with tools to find, interpret, and apply legal principles); Ulibarri v. City & County of Denver, 742 F. Supp. 2d 1192 (D. Colo. 2010) . *See generally* Weiss, *Prosecutorial Accountability After* Connick v. Thompson, 60 Drake L. Rev. 199 (2011).

(n51)Footnote 194. **US--** City of Los Angeles v. Heller, 475 U.S. 796, 799 (1986) ("[N]either [*Monell*] nor any other of our cases authorizes the award of

damages against a municipal corporation based on the actions of one of its officers when in fact the jury has concluded that the officer inflicted no constitutional harm. If a person has suffered no constitutional injury at the hands of the individual police officer, the fact that the departmental regulations might have *authorized* the use of constitutionally excessive force is quite beside the point."); *see also* Best v. Cobb County, No. 07-11007, 2007 U.S. App. LEXIS 15877 (11th Cir. July 3, 2007) (holding that there was no municipal liability where the officers did not have the intent to harm necessary to prove a substantive due process violation); Trigalet v. City of Tulsa, 239 F. 3d 1150 (10th Cir. 2001) (same); Ortega v. City & County of Denver, No. 11-cv-02394-WJM-CBS, 2013 U.S. Dist. LEXIS 16086 (D. Colo. Feb. 6, 2013) .

(n52)Footnote 195. *E.g.*:

US-- Tennessee v. Garner, 471 U.S. 1 (1985) (holding that a *Monell* claim against the City of Memphis could stand where other defendants were dismissed because the state had immunity under the Eleventh Amendment and the officer received qualified immunity since his actions were not clearly unconstitutional at the time of violation); Kneipp by Cusack v. Tedder, 95 F.3d 1199, 1213 (3d Cir. 1996) ("[T]he district court [is required] to review the plaintiffs' municipal liability claims independently of the section 1983 claims against the individual police officers, as the City's liability for a substantive due process violation does not depend upon the liability of any police officer"); McCoy v. City of New York, CV 07-4143 (RJD) (JO), 2008 U.S. Dist. LEXIS 62567 (E.D.N.Y. Aug. 13, 2008) (holding that a municipal government can be held liable in the absence of individual liability where a jury determines that "the individual defendants violated the plaintiff's rights but enjoy qualified immunity, or of a finding that the plaintiff's injuries are not solely attributable to the actions of the named individual defendants"); Curley v. Village of Suffern, 268 F.3d 65, 71 (2d Cir. N.Y. 2001) ("*Heller* will not save a defendant municipality from liability where an individual officer is found not liable because of qualified immunity."); Escobar v. City of New York, 766 F. Supp. 2d 415 (E.D.N.Y. 2011) (*Heller* will not save defendant municipality from liability where individual officers are simply dismissed for failure of service); Kaminski v. City of Utica, No. 9:10-CV-0895 (TJM/DEP), 2012 U.S. Dist. LEXIS 139381 (N.D.N.Y. June 28, 2012) (while there can be no municipal liability when plaintiff fails to show he or she suffered constitutional violation at hands of individual actor, municipal liability rests on claim that municipal policy or custom resulted in violation of plaintiff's constitutional rights);

US/OK-- Myers v. Oklahoma County Bd. of County Comm'rs, 151 F.3d 1313, 1317 (10th Cir. 1998) ("Although individual officers may receive the protection of qualified immunity, municipalities enjoy no such shield. Thus, if a jury returns a general verdict for an individual officer premised on qualified immunity, there is no inherent inconsistency in allowing suit against the municipality to proceed since the jury's verdict has not answered the question whether the officer actually committed the alleged constitutional violation."). *See generally* Teressa E. Ravenell, *Blame It on the Man: Theorizing the Relationship Between § 1983 Municipal Liability and the Qualified Immunity Defense*, 41 Seton Hall L. Rev. 153 (2011).

(n53)Footnote 196. **US/PA--** Kneipp by Cusack v. Tedder, 95 F.3d 1199, 1213 (3d Cir. 1996) .

(n54)Footnote 197. *E.g.*:

US/FL-- N. River Ins. Co. v. Broward County Sheriff's Office, 428 F. Supp. 2d 1284, 1289 (S.D. Fla. 2006) ;

US/IL-- Northfield Ins. Co. v. City of Waukegan, 761 F. Supp. 2d 766 (N.D. Ill. 2010) , *aff'd*, 701 F.3d 1124 (7th Cir. 2012) ; Selective Ins. Co. v. City of Paris, 681 F. Supp. 2d 975 (C.D. Ill. 2010) ;

ID-- Idaho Counties Risk Mgmt. Program Underwriters v. Northland Ins. Cos., 147 Idaho 84, 90 (Idaho 2009) .

See also **US/IL--** Am. Safety Cas. Ins. Co. v. City of Waukegan, 776 F. Supp. 2d 670 (N.D. Ill. 2011) , *aff'd*, 678 F.3d 475 (7th Cir. 2012) .

(n55)Footnote 198. **US/FL --** *N. River Ins.,* 428 F. Supp. 2d at 1289 n.2.

(n56)Footnote 199. **US/FL --** *N. River Ins.,* 428 F. Supp. 2d at 1286.

(n57)Footnote 200. **US/FL --** *N. River Ins.,* 428 F. Supp. 2d at 1286.

(n58)Footnote 201. *See* discussion at Section 33.06 *, "Trigger of Coverage" Theories May Apply to Coverage Claims Under Policies With Injury-Based Insuring Agreements*, above.

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New Appleman on Insurance Law Library Edition
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NEWAPL Volume 4 -- Specific Types of Liability Insurance
Chapter 33 LAW ENFORCEMENT LIABILITY INSURANCE

4-33 New Appleman on Insurance Law Library Edition § 33.08

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§ 33.08 Defense Acts May Play a Role in Coverage Determination

Many states have enacted State Employee Defense Acts ("Defense Acts"), which typically provide for the defense of, and some amount of indemnity for, claims against State employees arising out of the performance of their employment duties. n202 As one commentator has noted, these states have enacted legislation that grants a limited waiver of sovereign immunity, "exposing governmental entities to liability for the negligence of their officers and employees." n203

Although a few Defense Acts offer employees indemnity for the full amount of any judgment or settlement, the vast majority include damage caps, above which the State will not indemnify. Most of these damage caps are relatively low, n204 and the legislative intent was not to provide a complete remedy to the claimant. Many apply on an aggregated per-claimant or per-occurrence basis. n205

In some circumstances, the employee or employees are personally liable for any claim amounts in excess of the damage cap. n206 Fortunately, many Defense Acts with capped damages expressly permit the state or state entity to procure insurance to cover any damages exceeding the cap amount. n207 Under Defense Acts that do not expressly grant this authority, there may be a question as to whether the state has waived its sovereign immunity up to the limits of any insurance it has purchased. n208

State entities and insurers are usually careful to ensure that the policies they purchase and write contain retention or deductible amounts equal to the applicable damages cap, as the failure to do so can have costly consequences. In one instance, an Insurer that issued a policy with a retention larger than the cap in the Defense Act was forced to absorb the $300,000.00 difference between the two amounts. n209

Most State Defense Acts contain specified circumstances under which neither defense nor indemnity will be afforded. Most of these circumstances or exclusions focus on the conduct of the employee, and a State will typically have

no duty under the Defense Act to defend or indemnify intentional or criminal misconduct. n210 Policies that sit above a Defense Act and provide coverage in excess of a damage cap often contain exclusions that mirror those contained in the Defense Acts, so that if no defense and indemnity are afforded under the Act, then no coverage exists under the policy.

However, many Defense Acts specify that the State Attorney General or some other state official is responsible for determining whether the employee qualifies for defense and indemnity under the Act. n211 This determination necessarily entails a decision on whether the exclusions stated in the Defense Act apply. Courts in at least one jurisdiction has held that this determination is also dispositive on the application of any exclusions that are mirrored in the policy, and that the Insurer has no right to challenge the determinations or otherwise argue that the exclusions apply. n212

Legal Topics:

For related research and practice materials, see the following legal topics:
Insurance LawGeneral Liability InsurancePersons InsuredGeneral OverviewTortsPublic Entity LiabilityGeneral Overview

FOOTNOTES:
(n1)Footnote 202. 1 Civ. Actions Against State & Loc. Gov't § 3:20 (2010) (listing States with Defense Acts).

(n2)Footnote 203. 1 Civ. Actions Against State & Loc. Gov't § 3:20.

(n3)Footnote 204. 1 1 Civ. Actions Against State & Loc. Gov't § 6:12 (listing states that offer both full and capped indemnity).

(n4)Footnote 205. *See, e.g.*:

AL-- Ala. Code § 11-47-190 ("no city or town shall be liable for damages ... unless such injury or wrong was done or suffered through the neglect, carelessness, or unskillfulness of some agent, officer or employee of the municipality engaged in work therefor and while acting in the line of his or her duty");

CA-- Cal. Govt. Code § 815.2(a) ("public entity is liable for injury proximately caused by an act or omission of an employee ... within scope of his employment if the act or omission would ... have given rise to a cause of action against that employee");

FL-- Fla. Stat. Ann. § 768.28(9)(a) ("state or its subdivisions shall not be liable in tort for acts or omissions of an officer, employee, or agent committed while acting outside the course and scope of her or his employment or committed in bad faith or with malicious purpose or in a manner exhibiting wanton and willful disregard of human rights, safety, or property");

HI-- Haw. Rev. Stat. Ann. § 662-2 (state "waives its immunity for liability for the torts of its employees");

ID-- Idaho Code Ann. § 6-903(1) ("Except as otherwise provided in this act, every governmental entity is subject to liability for money damages arising out of negligent or otherwise wrongful acts or omissions and those of its employees

acting within the course and scope of their employment or duties"); Doe v. Durtschi, 110 Idaho 466, 471 (1986) ("With the enactment of the [Idaho Tort Claims Act], the state has subjected itself to liability for ... the negligent acts of its employees");

IA-- Iowa Code § 670.2 (except as otherwise provided, "every municipality is subject to liability for its torts and those of its officers and employees, acting within scope of their employment or duties");

KS-- Kan. Stat. Ann. § 75-6103(a) ("subject to limitations of this act, each governmental entity shall be liable for damages caused by the negligent or wrongful act or omission of any of its employees while acting within the scope of their employment");

MA-- Mass. Ann. Laws ch. 258, § 2 ("Public employers shall be liable for injury or loss ... caused by negligent or wrongful act or omission of any public employee while acting within the scope of his office or employment");

MN-- Minn. Stat. § 3.736 ("state will pay compensation for injury to or loss ... caused by act or omission of an employee of the state while acting within the scope of office or employment"); Minn. Stat § 466.02 (2009) ("subject to the limitations of [Act], every municipality is subject to liability for its torts those of its officers, employees, or agents acting within the scope of their employment or duties");

MS-- Miss. Code Ann. § 11-46-5(1) ("immunity of the state and its political subdivisions from claims for money damages arising out of torts of such governmental ... employees while acting within the course and scope of their employment is hereby waived from and after July 1, 1993, as to the state, and from and after October 1, 1993, as to political subdivisions");

ND-- N.D. Cent. Code § 32-12.1-03 ("Each political subdivision is liable for money damages for injuries ... proximately caused by the negligence ... of any employee acting within the scope of the employee's employment or office");

OK-- Okla. Stat. tit. 51, § 153 ("state or a political subdivision shall be liable for loss resulting from ... torts of its employees acting within the scope of their employment ... if a private person or entity would be liable for money damages under the laws of this state" but the state is not liable for an employee acting outside the scope of employment);

OR-- Or. Rev. Stat. § 30.265(1) ("every public body is subject to action or suit for its torts and those of its officers, employees and agents acting within scope of their employment or duties");

PA-- 42 Pa. Cons. Stat. § 8542(a) (A local agency shall be liable for damages of an injury caused by the negligent acts of an employee acting within the scope of his duties with respect to one of the categories for which immunity is waived);

SC-- S.C. Code Ann. § 15-78-50(a) ("Any person who may suffer a loss proximately caused by a tort of the State ... and its employee acting within the scope of his official duty may file a claim");

TN-- Tenn. Code Ann. § 29-20-205 ("Immunity from suit of all governmental

entities is removed for injury proximately caused by a negligent act or omission of any employee within the scope of his employment" unless the injury arises out of listed exceptions);

UT-- Utah Code Ann. § 63G-7-301 ("Immunity from suit ... is waived as to any injury proximately caused by a negligent act or omission of an employee committed within the scope of employment" unless injury arises out of listed exceptions);

VA-- Va. Code Ann. § 8.01-195.3 (Commonwealth is liable for claims "caused by the negligent or wrongful act or omission of any employee while acting within the scope of his employment");

WA-- Wash. Rev. Code Ann. § 4.96.010 (governmental entities are liable for damages arising out of tortious conduct of employees);

WV-- W. Va. Code Ann. § 29-12A-4(c) ("political subdivisions are liable for ... loss to persons or property caused by the negligent performance of acts by their employees while acting within the scope of employment").

(n5)Footnote 206. *See, e.g.*, **AL--** Benson v. City of Birmingham, 659 So. 2d 82 (Ala. 1995) (affirming the trial court's holding that a city fulfilled its obligation by indemnifying a police officer up to $100,000 in a $1.6 million suit, where the statutory cap on municipal damages was $100,000).

(n6)Footnote 207. *See, e.g.*:

FL-- Fla. Stat. Ann. § 768.28(16)(2);

ID-- Idaho Code Ann. § 6-926(1) ("aggregate liability of a governmental entity and its employees for damages, costs and attorney's fees ... on account of bodily or personal injury, death or property damage, or other loss as the result of any one (1) occurrence or accident regardless of the number of persons injured or the number of claimants, shall not exceed and is limited to five hundred thousand dollars ($500,000), unless the governmental entity has purchased applicable, valid, collectible liability insurance coverage in excess of said limit, in which event the controlling limit shall be the remaining available proceeds of such insurance.");

NC-- N.C. Gen. Stat. §143-291(b) ("If a State agency, otherwise authorized to purchase insurance, purchases a policy of commercial liability insurance providing coverage in an amount at least equal to the limits of the State Tort Claims Act, such insurance coverage shall be in lieu of the State's obligation for payment under this Article.").

(n7)Footnote 208. *See, e.g.*:

FL-- Lower Florida Keys Hospital Dist. v. Littlejohn, 520 So. 2d 56, 57 (Fla. Dist. Ct. App. 1988) (hospital, as special hospital taxing district, "is not entitled to $100,000 limitation of liability contained in said statute because it, admittedly, has purchased liability insurance for the attorney's fee award in issue, and, accordingly, has waived its sovereign immunity to the full extent of insurance coverage.");

KS-- Jackson v. City of Kansas City, 680 P.2d 877, 910 (Kan. 1984) ("The

$500,000 limit of liability is ... inapplicable where insurance has been purchased providing greater coverage");

NC-- Wood v. N.C. State Univ., 556 S.E.2d 38, 44 (N.C. Ct. App. 2001) ("Although the agency itself is not liable for an amount exceeding the limit in the Tort Claims Act, it may purchase insurance to cover the liability of an employee.");

ND-- Fastow v. Burleigh County Water Res. Dist., 415 N.W.2d 505, 510 (N.D. 1987) ("If a political subdivision has no liability insurance coverage its exposure for liabilities established by the chapter is limited to $250,000 per person and $500,000 per occurrence. If, however, political subdivision purchases insurance coverage in excess of those amounts, an injured plaintiff may receive judgment in the amount of insurance coverage.").

Contra, **SC--** Wright v. Colleton County Sch. Dist., 391 S.E.2d 564 (S.C. 1990) ("possession of liability coverage in excess of the statutory limit on damages does not constitute a waiver of immunity up to the coverage limit" because "to hold otherwise, would defeat the express legislative intent that 'the State, and its political subdivisions, are only liable for torts within the limitations of this chapter").

(n8)Footnote 209. **FL--** Evanston Ins. Co. v. City of Homestead, 563 So. 2d 755, 757 (Fla. Dist. Ct. App. 3d Dist. 1990) .

(n9)Footnote 210. *See*:

ID-- Doe v. Durtschi, 716 P.2d 1238, 1243, 60 A.L.R.4th 225 (1986) (school district was not required to indemnify teacher in action alleging damages for sexual assault on students where teacher admitted such conduct);

MS-- Miss. Code Ann. § 11-46-5(2) ("employee shall not be considered as acting within the course and scope of his employment and a governmental entity shall not be liable or be considered as to have waived immunity for any conduct of its employee if the employee's conduct constituted fraud, malice, libel, slander, defamation, or any criminal offense other than traffic violations");

NC-- N.C. Gen. Stat. § 143-300.4(a) (" ... the State shall refuse to provide for the defense ... if the State determines that," among other things, the "employee or former employee acted or failed to act because of actual fraud, corruption, or actual malice");

OK-- Okla. Stat. tit. 51, § 153 ("The state or a political subdivision shall not be liable ... for any act or omission of an employee acting outside the scope of his employment");

SC-- S.C. Code Ann. § 15-78-60 ("The governmental entity is not liable for a loss resulting from ... employee conduct outside the scope of his official duties");

TN-- Tenn. Code Ann. § 29-20-205 ("Immunity from suit of all governmental entities is removed for injury proximately caused by a negligent act or omission of any employee within the scope of his employment except if the injury arises out of ... false imprisonment pursuant to a mittimus from a court, false arrest, malicious prosecution, intentional trespass, abuse of process, libel, slander,

deceit, interference with contract rights, infliction of mental anguish, invasion of privacy, or civil rights").

(n10)Footnote 211. *See, e.g.*, **NC**-N.C. Gen. Stat. § 143-300.4(a) (" ... *the State* shall refuse to provide for the defense ... *if the State determines* that," among other things, the "employee or former employee acted or failed to act because of actual fraud, corruption, or actual malice") (emphasis added); N.C. Gen. Stat. § 143-300.4(b) ("The determinations required by subsection (a) of this section *shall be made by the Attorney General.*").

(n11)Footnote 212. *See generally* **US/NC--** Houck & Sons, Inc. v. Transylvania County, 852 F. Supp. 442, 450, (W.D.N.C. 1993) (rejecting a challenge to the State's determination that the Defense Act applied to a claim and stating "[t]he Attorney General's office possesses the responsibility for determining whether it represents an employee, and this determination is not made post-hoc by a jury verdict").

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New Appleman on Insurance Law Library Edition
2014

NEWAPL Volume 4 -- Specific Types of Liability Insurance
Chapter 33 LAW ENFORCEMENT LIABILITY INSURANCE

4-33 New Appleman on Insurance Law Library Edition § 33.09

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§ 33.09 State Tort Caps Are Inapplicable to Federal Civil Rights Claims

Courts addressing the issue have unanimously refused to apply state tort caps limiting the amount of damage available in tort claims to claims under 42 U.S.C. § 1983 for violations of civil rights. n213 Even courts that have not yet directly confronted the question have suggested that they would follow this unanimous rule. n214

The most common rationale in support of this rule is that application of the state tort cap to such claims would "frustrate the purposes" of 42 U.S.C. § 1983, which "include compensation of persons injured by deprivation of federal rights and prevention of abuses of power by those acting under color of state law." n215 The United States Supreme Court has repeatedly held that the applications of state law that adversely impact a plaintiff's rights under section 1983 will not be tolerated. n216

Legal Topics:

For related research and practice materials, see the following legal topics:
Insurance LawGeneral Liability InsurancePersons InsuredGeneral OverviewTortsPublic Entity LiabilityGeneral OverviewTortsPublic Entity LiabilityLiabilityState Tort Claims ActsEmployeesTortsPublic Entity LiabilityLiabilityState Tort Claims ActsRemedies

FOOTNOTES:
(n1)Footnote 213. *See:*

US/AL-- Patrick v. City of Florala, 793 F. Supp. 301, 302 (M.D. Ala. 1992) ;

US/KS-- Scheideman v. Shawnee County Bd. of County Comm'rs, 895 F. Supp. 279, 282 (D. Kan. 1995) ("It is well-established that federal civil rights claims are not subject to the Kansas Tort Claims Act.");

CA-- Rossiter v. Benoit, 88 Cal. App. 3d 706, 713 (1979) ;

NH-- Snelling v. City of Claremont, 931 A.2d 1272, 1288 (N.H. 2007) ("[W]e conclude that when a suit against a governmental unit involves both claims under § 1983 and claims under state law, the claims under § 1983 are not subject to the cap in RSA 507-B:4 ... ");

NJ-- Fuchilla v. Layman, 510 A.2d 281, 286 (N.J. Super. Ct. App. Div. 1986) (providing, however, that such claims could borrow the general statute of limitations from state law);

OK-- Duncan v. City of Nichols Hills, 913 P.2d 1303, 1309 (Okla. 1996) ;

OR-- Rogers v. Saylor, 760 P.2d 232, 239 (Or. 1988) (explicitly noting that neither compensatory nor punitive damages can be limited beyond that provided by federal law);

WI-- Thompson v. Village of Hales Corners, 340 N.W.2d 704, 711 (Wis. 1983) (examining only the application of state law limits on claims of municipal liability).

See also 4 I.E. Brodensteiner & R. Levinson State & Local Government Civil Rights Liability § 10:5, at 149-150 (Supp. 2007).

(n2)Footnote 214. *See*;

US/MA-- Natriello v. Flynn, 837 F. Supp. 17, 19 (D. Mass. 1993) ;

US/NY-- Banks *ex rel.* Banks v. Yokemick, 177 F. Supp. 2d 239, 250 (S.D.N.Y. 2001) ("Uniformly, the courts have ruled that when a violation of federal rights protected by 42 U.S.C.§ 1983 does cause the decedent's death, state laws that either extinguish the survival action or bar recovery for loss of life, effectively abate a § 1983 claim of deprivation of life, are inconsistent with § 1983, and warrant application of a federal rule of decision pursuant to § 1988.");

CO-- Espinoza v. O'Dell, 633 P.2d 455, 465 (Colo. 1981) ("If the state wrongful death limitation on damages were imposed in this case, it would have an 'independent adverse effect' on the children's right to compensation for the deprivation of their constitutional liberty interest. ... Therefore, we hold that the plaintiff children are not subject to a net pecuniary loss limitation on their right to recover damages in a section 1983 action brought in state court.");

RI-- L.A. Ray Realty v. Town Council of Town of Cumberland, 698 A.2d 202, 214 (R.I. 1997) ("[A] state limitation on the availability of prejudgment interest may not be applied if such a limitation would contravene the goal of § 1983 to fully compensate the injured party.").

(n3)Footnote 215. *E.g.*, **US--** Carey v. Piphus, 435 U.S. 247, 266 (1978) (explaining that while common law tort rules governing damages may be an appropriate starting point for determining damages in a 42 U.S.C. § 1983 action, these rules must be abandoned in situations where their application would frustrate the purposes of section 1983, and going on to state that one of the purposes of section 1983 was to provide a remedy for damages that were not

necessarily compensable under common law damages principles); Robertson v. Wegmann, 436 U.S. 584, 591 (U.S. 1978) ("The policies underlying § 1983 include compensation of persons injured by deprivation of federal rights and prevention of abuses of power by those acting under color of state law.").

(n4)Footnote 216. **US--** Carey v. Piphus, 435 U.S. 247, 266 (1978) (explaining that while common law tort rules governing damages may be an appropriate starting point for determining damages in a section 1983 action, these rules must be abandoned in situations where their application would frustrate the purposes of section 1983, and going on to state that one of the purposes of section 1983 was to provide a remedy for damages that were not necessarily compensable under common law damages principles); Robertson v. Wegmann, 436 U.S. 584, 591 (1978) (holding that state law should not be applied to federal claims if inconsistent with the policy goals underlying the federal claim, and that these goals "include compensation of persons injured by deprivation of federal rights and prevention of abuses of power by those acting under color of state law"); Felder v. Casey, 487 U.S. 131, 138 (1988) (reaffirming the impropriety of applying state law limitations where they would detract from a remedy established by federal law, and going on to hold State notice-of-claim provision preempted where application would bar section 1983 claim).

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New Appleman on Insurance Law Library Edition
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NEWAPL Volume 4 -- Specific Types of Liability Insurance
Chapter 33 LAW ENFORCEMENT LIABILITY INSURANCE

4-33 New Appleman on Insurance Law Library Edition § 33.10

AUTHOR: William G. Beck, Ian Hale, Sarah E. Millin and Jennifer M. McAdam

§ 33.10 Additional Damages

[1] Plaintiffs Bringing Successful Section 1983 Claims Are Entitled to Attorney Fees, Which May or May Not Be Insured

As a mechanism to ensure that federal rights are adequately enforced, a claimant asserting a successful 42 U.S.C. § 1983 claim is entitled to an award of "a reasonable attorney's fee as part of the costs." n217 What constitutes a "reasonable" attorney's fee has been the subject of much debate, n218 as has the question of whether that amount may be "enhanced," and under certain circumstances. n219

Attorney fee awards in innocence cases that contain 42 U.S.C. § 1983 claims can be substantial, especially when cases are hotly contested, which can drive fees into the seven-figure range. The question of whether these damages are covered under a insured defendant's insurance policy is thus an important one, but has been addressed by surprisingly few courts.

The courts that have addressed the question appear split, and while policy language is always the focus of the analysis, uniform rules and rationales have yet to emerge. n220

For example, in *Ypsilanti v. Appalachian Ins. Co.*, a federal district court held that coverage was afforded for section 1988 attorney fees where the policy agreed to insure "all sums which the Insured shall become legally obligated to pay as damages". n221 By contrast, the Sixth Circuit in *Sullivan Cty., Tenn. v. Home Indem. Co.* held that no coverage existed for section 1988 attorney fees under the exact same policy language. n222

[2] Punitive Damages Awards Can Be Significant and May or May Not Be Insured

Punitive damage awards in innocence cases can be substantial, n223 and have the potential to meet or exceed the amount of compensatory damages awarded. Whether

punitive damages are insurable varies from state to state, and this difference in views is driven primarily by public policy concerns.

The majority of states allow insurance coverage for some form of punitive damages. n224 Of these states, some deny the insurability of punitive damages for intentional acts, n225 and others allow parties to insure for vicarious, but not direct liability, reasoning that where the principal is not involved in the activity leading to punitive damages, allowing coverage for the principal poses no danger of incentivizing intentional wrongdoing. n226

However, even among jurisdiction where public policy does not prevent the insurability of punitive damages, courts are split on what policy is broad enough to encompass such damages. The majority rule is that policies covering "*all sums* which the insured shall become legally obligated to pay as damages because of ... bodily injury or ... property damage" n227 is broad enough to include punitive damages. Other courts have allowed insurance coverage for punitive damages where the policy insured "damages for bodily injury or property damage for which any covered person becomes legally responsible[.]" n228

[3] Federal and State Statutory Compensation Acts May Provide an Additional Source of Recovery

The federal government, the District of Columbia, and 28 states currently have enacted some type of statutory Compensation Act for exonerees. n229

Eligibility requirements under statutory Compensation Acts can vary. For example, Missouri limits eligibility to those exonerated by DNA evidence, n230 Utah to those found actually innocent by "clear and convincing evidence", n231 and the District of Columbia to those exonerated after 1979. n232 The Federal statutory Compensation Act, which was passed as part of the Innocence Protection Act, and a large number of State Compensation acts, require a determination that the exoneree did not "contribute" to his or her false conviction, n233 and several simply disqualify exonerees who pled guilty, regardless of whether they are actually innocent. n234 In Alabama, a new conviction for an entirely different offense results in a forfeiture of eligibility. n235

There are also procedural hurdles that can make it difficult to collect under statutory Compensation Acts. Several have statutes of limitation ranging from one to three years, n236 and a handful of Compensation Acts also impose a wait period between the date of exoneration and eligibility for compensation. n237

Compensation amounts vary, and most statutory Compensation Acts include a clear maximum on the total amount of monetary compensation that is available. n238 These amounts range from $2 million (Florida) to $20,000.00 (New Hampshire), and the median under all Compensation Acts is $300,000.00. n239 Acts that compensate on a per-year-of-incarceration basis may also limit the number of years for which an exoneree can collect, n240 though the Federal and a handful of State statutory Compensation Acts do not include a compensation maximum. n241 Alabama's Act actually includes a yearly minimum. n242

Legal Topics:

For related research and practice materials, see the following legal topics:
Insurance LawClaims & ContractsCosts & Attorney FeesGeneral Overview

FOOTNOTES:

(n1)Footnote 217. **US--** 42 U.S.C. § 1988; Perdue v. Kenny A ., 130 S. Ct. 1662, 1671 (2010) .

(n2)Footnote 218. **US--** Perdue v. Kenny A, 130 S. Ct. 1662, 1671 (2010) .

(n3)Footnote 219. **US--** Perdue v. Kenny A, 130 S. Ct. 1662, 1671, 1674-1675 (2010) (setting out and discussing the circumstances under which an enhancement may be appropriate).

(n4)Footnote 220. Courts finding insurance coverage for section 1988 attorney fees:

US/MI-- Ypsilanti v. Appalachian Ins. Co., 547 F. Supp. 823, 828 (E.D. Mich. 1982) (finding coverage of attorney fees where the policy ambiguously agrees to insure "all sums which the Insured shall become legally obligated to pay as damages");

OH-- Sylvania Twp. Bd. of Trustees v. Twin City Fire Ins. Co., No. L-03-1075, 2004 Ohio App. LEXIS 420, at *11-15 (Ohio Ct. App. Feb. 6, 2004) (finding coverage for state statutory attorney fees where the policy defined "damages" as "monetary judgment, award or settlement but does not include fines or penalties or damages for which insurance is prohibited by law applicable to the construction of this policy" since attorney fees are part of a "judgment"); City of Kirtland v. Western World Ins. Co., 540 N.E.2d 282, 283-284 (Ohio Ct. App. 1988) (finding coverage for § 1988 attorney fees where the insurer agreed to pay "Loss" including "damages, judgements, settlements, and costs" but excluded "Loss" other than "money damages" where "money damages" was undefined).

Courts finding no insurance coverage for section 1988 attorney fees:

US-- City of Sandusky v. Coregis Ins. Co., No. 04-4047, 2006 U.S. App. LEXIS 18002, at *8-13 (6th Cir. Jul. 14, 2006) (finding no coverage for § 1988 attorney fees in a policy where "damages" means "monetary sums and excludes all forms of injunctive relief and declaratory judgments."); Dotson v. Chester, No. 94-1194, 1994 U.S. App. LEXIS 28279, at *15 (4th Cir. Oct. 12, 1994) (finding no coverage for § 1988 attorney fees where the policy only covered "costs" associated with "suits" in which "damages" are alleged); Sullivan Cty., Tenn. v. Home Indem. Co., 925 F.2d 152, 153 (6th Cir. 1991) (finding no coverage for § 1988 attorney fees where the insurer obligated itself to "pay on behalf of the insured all sums which the insured shall become legally obligated to pay as damages ... ." and a "Supplementary Payments" provision was nullified by endorsement).

(n5)Footnote 221. **US/MI--** Ypsilanti v. Appalachian Ins. Co., 547 F. Supp. 823, 828 (E.D. Mich. 1982) (finding coverage of attorney fees where the policy ambiguously agrees to insure "all sums which the Insured shall become legally obligated to pay as damages").

(n6)Footnote 222. **US--** Sullivan County., Tenn. v. Home Indem. Co., 925 F.2d 152, 153 (6th Cir. 1991) (finding no coverage for 42 U.S.C.§ 1988 attorney fees where the insurer obligated itself to "pay on behalf of the insured all sums which the insured shall become legally obligated to pay as damages. ... ").

(n7)Footnote 223. As just a few examples:

US/MS--In *Kelly v. Moore*, a federal jury in the Southern District of Mississippi awarded $1.5 million, including $500,000 (or 50% of compensatory damages) in punitive damages, for false arrest and malicious prosecution claims relating to a *two-hour* long detention.

US/IL --In 2007, an Illinois federal jury awarded Kevin Fox $9,300,000, including $3,700,000 in punitive damages (66% of compensatory damages), for *8 months* pretrial detention while he was falsely accused of raping and murdering his daughter.

MD--Similarly, Keith Longtin, who was coerced into confessing to the murder of his estranged wife and also held for *8 months* before he was cleared by DNA, was awarded $6.4 million, including $1.2 million in punitive damages (23% of compensatory damages) by a 2006 Maryland jury.

(n8)Footnote 224. *See, e.g.*:

AL-- Omni Ins. Co. v. Foreman, 802 So. 2d 195, 199 (Ala. 2001) ;

AK-- Aetna Cas. & Surety Co. v. Marion Equip. Co., 894 P.2d 664, 671 (Alaska 1995) ;

DE-- Whalen v. On-Deck, Inc., 514 A.2d 1072, 1074 (Del. 1986) ;

GA-- Greenwood Cemetery v. Travelers Indem. Co., 232 S.E.2d 910, 913 (Ga. 1977) ;

IA-- Skyline Harvestore Systems, Inc. v. Centennial Ins. Co., 331 N.W.2d 106, 109 (Iowa 1983) ;

KY-- Continental Ins. Co. v. Hancock, 507 S.W.2d 146, 151 (Ky. Ct. App. 1973) ;

MD-- First Nat'l Bank v. Fidelity & Deposit Co., 389 A.2d 359 (Md. 1978) ;

MT-- First Bank (N.A.)-Billings v. Transamerica Ins. Co., 679 P.2d 1217, 1218 (Mont. 1984) ;

NM-- Baker v. Armstrong, 744 P.2d 170, 172 (N.M. 1987) ;

OR-- Harrell v. Travelers Indem. Co., 567 P.2d 1013, 1021 (Or. 1977) ;

TN-- Lazenby v. Universal Underwriters Ins. Co., 383 S.W.2d 1 (Tenn. 1964) ;

VA-- Allstate Ins. Co. v. Wade, 579 S.E.2d 180, 184 (Va. 2003) ;

WI-- Brown v. Maxey, 369 N.W.2d 677, 688 (Wis. 1985) .

(n9)Footnote 225. *See, e.g.*:

AR-- Unigard Sec. Ins. Co. v. Murphy Oil USA, Inc., 962 S.W.2d 735, 742 (Ark. 1998) ;

KY-- Continental Ins. Co. v. Hancock, 507 S.W.2d 146, 151 (Ky. Ct. App.

1973) ;

MT-- Smith v. State Farm Ins. Co., 870 P.2d 74, 76 (Mont. 1994) ;

OR-- Snyder v. Nelson, 564 P.2d 681, 684 (Or. 1977) ;

TN-- Lazenby v. Universal Underwriters Ins. Co., 383 S.W.2d 1, 6 (Tenn. 1964) ;

VA-- Va. Code Ann. § 38.2-227.

(n10)Footnote 226. *See e.g.*:

US/PA-- Pennbank v. St. Paul Fire & Marine Ins. Co., 669 F. Supp. 122, 126 (W.D. Pa. 1987) ;

CA-- Arenson v. Nat'l Auto. and Cas. Ins. Co., 286 P.2d 816, 818 (Cal. 1955) ;

CT-- Avis Rent A Car System, Inc. v. Liberty Mut. Ins. Co., 526 A.2d 522, 524 (Conn. 1987) ;

FL-- United States Concrete Pipe Co. v. Bould, 437 So. 2d 1061, 1064 (Fla. 1983) ("[I]t is generally held that there is a distinction between the actual tort-feasor and one only vicariously liable and that therefore public policy is not violated by construing a liability policy to include punitive damages recovered by an injured person where the insured did not participate in or authorize the act.");

IL-- Scott v. Instant Parking, Inc., 245 N.E.2d 124, 126 (Ill. App. Ct. 1969) ;

IN-- Norfolk & W. R. Co. v. Hartford Acc. & Indem. Co., 420 F. Supp. 92, 94 (N.D. Ind. 1976) ;

KS-- Kan. Stat. Ann. § 40-2,115;

MN-- Lake Cable Partners v. Interstate Power Co., 563 N.W.2d 81, 86 (Minn. Ct. App. 1997) .

(n11)Footnote 227. *See, e.g.*, **ID--** Abbie Uriguen Oldsmobile Buick v. United States Fire Ins. Co., 511 P.2d 783, 789 (Idaho 1973) .

(n12)Footnote 228. **NM--** Baker v. Armstrong, 744 P.2d 170, 171 (N.M. 1987) .

(n13)Footnote 229. *See*:

US-- 28 U.S.C. § 2513;

AL-- Ala. Code §§ 29-2-150 to 29-2-165;

CA-- Cal. Penal Code §§ 4900 to 4906;

CT-- Conn. Gen. Stat. § 54-102uu;

DC-- D.C. Code §§ 2-421 to 2-425;

FL-- Fla. Stat. Ann. § 961.01 *et seq.* ;

IA-- Iowa Code § 663A.1;

IL-- 20 Ill. Comp. Stat. 1015/2, 705 Ill. Comp. Stat. 505/8;

LA-- La. Rev. Stat. Ann. § 15: 572.8 *et seq.*;

ME-- Me. Rev. Stat. Ann. tit. 14, §§ 8241 to 8244;

MD-- Md. Code Ann., State Fin & Proc. § 10-501;

MA-- Mass. Ann. Laws ch. 258D, §§ 1 to 9;

MS-- Miss. Code Ann. §§ 11-44-1 to 11-44-15;

MO-- Mo. Rev. Stat. 650.058;

MT-- Mont. Code Ann. § 53-1-214;

NE-- Neb. Rev. Stat. Ann. §§ 29-4601 to 29-4608;

NH-- N.H. Rev. Stat. Ann. § 541-B:14;

NJ-- N.J. Rev. Stat. §§ 52:4C-1 to 52:4C-6;

NY-- N.Y. Ct. of Claims Act § 8-b;

NC-- N.C. Gen. Stat. Ann. §§ 148-82 to 148-84;

OH-- Ohio Rev. Code Ann. § 2743.48;

OK-- Okla. Stat. tit. 51, § 154;

TN-- Tenn. Code Ann. § 9-8-108;

TX-- Tex. Civ. Prac. & Rem. Code Ann. §§ 103.001 to 103.154;

UT-- Utah Code Ann. § 78B-9-405;

VT-- Vt. Stat. Ann. tit. 13, §§ 5572 to 5577;

VA-- Va. Code Ann. §§ 8.01-195.10 to 8.01-195.12;

WV-- W. Va. Code Ann. § 14-2-13a;

WI-- Wis. Stat. § 775.05.

Links to each statute, accompanied by an overview of its contents, is available on the Innocence Project website: http://www.innocenceproject.org/news/LawView1.php (last visited 7/13/12).

(n14)Footnote 230. **MO--** Mo. Rev. Stat. § 650.055(9).

(n15)Footnote 231. **UT--** Utah Code Ann. §§ 78B-9-405, 78B-9-303.

(n16)Footnote 232. **DC--** D.C. Code § 2-424.

(n17)Footnote 233. *See*:

US-- 28 U.S.C. § 2513;

CA-- Cal. Penal Code §§ 4900 to 4906;

DC-- D.C. Code §§ 2-421 to 2-425;

IA-- Iowa Code § 663A.1;

MA-- Mass. Ann. Laws ch. 258D, §§ 1 to 9;

NJ-- N.J. Rev. Stat. §§ 52:4C-1 to 4C-6;

NY-- N.Y. Ct. of Claims Act § 8-b;

OH-- Ohio Rev. Code Ann. § 2743.48;

OK-- Okla. Stat. tit. 51, § 154;

VA-- Va. Code Ann. §§ 8.01-195.10 to 8.01-195.12;

WV-- W. Va. Code Ann. 14-2-13a;

WI-- Wis. Stat. § 775.05.

(n18)Footnote 234. *See*:

DC-- D.C. Code §§ 2-421 to 2-425;

IA-- Iowa Code § 663A.1;

MA-- Mass. Ann. Laws ch. 258D, §§ 1 to 9;

OH-- Ohio Rev. Code Ann. § 2743.48;

OK-- Okla. Stat. tit. 51, § 154;

VA-- Va. Code Ann. §§ 8.01-195.10 to 8.01-195.12 (excepting capital crimes).

(n19)Footnote 235. **AL--** Ala. Code § 29-2-161.

(n20)Footnote 236. *See*:

CT-- Conn. Gen. Stat. § 54-102uu;

DC-- D.C. Code §§ 2-421 to 2-425;

MO-- Mo. Rev. Stat. 650.058;

NJ-- N.J. Rev. Stat. §§ 52:4C-1 to 52:4C-6;

NY-- N.Y. Ct. of Claims Act § 8-b;

OH-- Ohio Rev. Code Ann. § 2743.48;

TN-- Tenn. Code Ann. § 9-8-108;

VT-- Vt. Stat. Ann. tit. 13, § 5572 to § 5577;

WV-- W. Va. Code Ann. 14-2-13a.

(n21)Footnote 237. *See*:

AL-- Ala. Code §§ 29-2-150 to 29-2-165;

CA-- Cal. Penal Code §§ 4900 to 4906;

MA-- Mass. Ann. Laws ch. 258D, §§ 1 to 9;

MS-- Miss. Code Ann. §§ 11-44-1 to 11-44-1-15.

(n22)Footnote 238. *See*:

FL-- Fla. Stat. Ann. § 961.01 *et seq.* ;

IL-- **705** Ill. Comp. Stat. 505/8; 20 Ill. Comp. Stat. 1015/2;

LA-- La. Rev. Stat. Ann. § 15: 572.8 *et seq.*;

ME-- Me. Rev. Stat. Ann. tit. 14, §§ 8241 to 8244;

MA-- Mass. Ann. Laws ch. 258D, §§ 1 to 9;

MS-- Miss. Code Ann. §§ 11-44-1 to 11-44-15;

MT-- Mont. Code Ann. § 53-1-214;

NE-- Neb. Rev. Stat. Ann. §§ 29-4601 to 29-4608;

NH-- N.H. Rev. Stat. Ann. § 541-B:14;

NC -- N.C. Gen. Stat. § 148-82-84;

OK-- Okla. Stat. tit. 51, § 154;

TN-- Tenn. Code Ann. § 9-8-108;

WI-- Wis. Stat. § 775.05.

(n23)Footnote 239. **MT--**This calculation includes Montana, which offers no monetary compensation but only "educational aid." Mont. Code Ann. § 53-1-214. Removing Montana from the equation provides a median of $500,000.00.

(n24)Footnote 240. *See*:

UT-- Utah Code Ann. § 78B-9-405;

VA-- Va. Code Ann. §§ 8.01-195.10 to 8.01-195.12.

(n25)Footnote 241. See:

US-- 28 U.S.C. § 2513;

AL-- Ala. Code §§ 29-2-150 to 29-2-165;

CA-- Cal. Penal Code §§ 4900 to 4906;

CT-- Conn. Gen. Stat. § 54-102uu;

DC-- D.C. Code §§ 2-421 to 2-425;

MD-- Md. Code Ann., State Fin & Proc. § 10-501;

MO-- Mo. Rev. Stat. § 650.058;

NJ-- N.J. Rev. Stat. §§ 52:4C-1 to 52:4C-6;

NY-- N.Y. Ct. of Claims Act § 8-b;

TX-- Tex. Civ. Prac. & Rem. Code Ann. §§ 103.001 to 103.154;

WV-- W. Va. Code Ann. 14-2-13a.

(n26)Footnote 242. **AL--** Ala. Code § 29-2-159. ($50,000 per year of incarceration).