IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, CHANCERY DIVISION

RODELL SANDERS and THE CITY OF CHICAGO HEIGHTS,

Plaintiffs,

v.

ILLINOIS UNION INS. CO. and STARR INDEMNITY AND LIABILITY CO.,

Defendants.

Case No. 16 CH 2605

Judge Celia Gamrath

Calendar 6

MEMORANDUM OPINION AND ORDER

This matter comes before the court on Illinois Union Insurance and Starr Indemnity's amended motion to dismiss Plaintiffs' second amended complaint under 735 ILCS 5/2-619(a)(9). A section 2-619 motion to dismiss raises affirmative matter outside the complaint and "allows for the dismissal of a complaint on the basis of issues of law or easily proven issues of fact." *Advocate Health and Hospitals Corp. v. First Nat'l Bank of Chicago,* 348 Ill. App. 3d 755, 759 (1st Dist. 2004). In deciding a motion to dismiss, the court accepts all well-pled facts and draws all reasonable inferences in favor of the nonmoving party. For the following reasons, the amended motion to dismiss is granted.

I. BACKGROUND

This coverage dispute arises from the malicious prosecution of Rodell Sanders who was exonerated in 2011 of a 1993 murder. Sanders sued the City of Chicago Heights, which had pursued the criminal cases against him, alleging violations of state law and his federal constitutional rights. The civil case was settled for $15 million after Sanders was exonerated.

Of the $15 million, the City agreed to pay Sanders $2 million. United National, the City's insurer in 1994 (the year Sanders was charged), agreed to pay an additional $3 million. The City had insurance policies with Defendants Illinois Union and Starr between 2010 and 2014. Both insurers refused to contribute to the $15 million settlement and denied coverage on the ground that the malicious prosecution of Sanders did not occur during the policy period. The City assigned its rights to seek recovery against these insurers to Sanders, subject to certain conditions. Both Sanders and the City were aware at the time of settlement that the insurers were denying coverage.

Sanders and the City filed a second amended complaint seeking a determination as to whether the City was entitled to a defense and indemnity under the policies. The issue presented here is whether the malicious prosecution of Sanders occurred for purposes of insurance coverage at the time charges were filed in 1994 or at the time of exoneration in 2011. Defendants maintain coverage was triggered in 1994, before the policies were issued. Sanders and the City contend the offense of malicious prosecution occurred at the time of exoneration in 2011, triggering coverage under the policies. The court holds, consistent with the overwhelming majority view throughout the country, coverage was triggered at the commencement of the malicious prosecution and upon injury in 1994, before the policies issued.

II. TRIGGER DATE

The court must determine, based on the relevant insurance policies, when the offense of malicious prosecution occurred to trigger coverage. The question boils down to whether the term offense means the accrual of the completed cause of action of malicious prosecution or the act and injury giving rise to the claim. As the insurers see it, the malicious prosecution occurred

when charges were brought against Sanders. This, they contend, is the offense because it is when the misconduct and injury occurred. If true, the occurrence would fall outside the policy period. Their argument is supported by the common definition of offense, which refers to a crime, misconduct, or wrongdoing, rather than the accrual of a completed cause of action.

Sanders and the City contend the offense happened upon exoneration. Until then, there was no offense of malicious prosecution because not all tort elements were met. They agree the injury and wrongful act anteceded the offense, but contend this does not matter because the policies define personal injury as discrete offenses of false arrest, false imprisonment, wrongful detention, or malicious prosecution. Sanders and the City equate the word offense with a completed tort or accrual of a cause of action, but the policy language does not support their interpretation. The policy language uses the word offense, not tort. Nonetheless, a tort is an offense against an individual, referring to a wrongful action that causes harm. This is the essence of what triggers coverage; exoneration is merely the remedy years later that allows a cause of action for malicious prosecution to ensue.

The court has carefully analyzed the language of the policies, comparing it to language in many other cases. An insurance policy is a contract and its terms are to be given their plain and ordinary meaning. In construing an insurance policy, the primary function of the court is to ascertain and enforce the intentions of the parties as expressed in the agreement. *Outboard Marine Corp. v. Liberty Mutual Insurance Co.,* 154 Ill. 2d 90, 108 (1992). If provisions are susceptible of more than one interpretation or are ambiguous, they will be construed against the insurer and liberally in favor of the insured. *Oakley Transport, Inc. v. Zurich Insurance Co.,* 271 Ill. App. 3d 716, 722 (1st Dist. 1995). A court must not read policy provisions in an unreasonable way in order to create an ambiguity. *Sims v. Allstate Ins. Co.,* 365 Ill.App.3d 997, 1001 (5th

Dist. 2006). Looking at the policy language most favorably to Sanders and the City, the court finds no ambiguity or a legal or factual basis to hold coverage was triggered upon exoneration.

III. OCCURRENCE POLICY LANGUAGE

The parties agree the Illinois Union policy is an occurrence policy, not a claims-made policy. The Starr policy tracks the terms of the Illinois Union policy. The General Liability Coverage Part of the Illinois Union policy provides:

> The Insurer will indemnify the Insured for Damages and Claim Expenses in excess of the Retained Limit for which the Insured becomes legally obligated to pay because of a Claim first arising out of an Occurrence happening during the Policy Period in the Coverage Territory for Bodily Injury, Personal Injury, Advertising Injury, or Property Damage taking place during the Policy Period.

Occurrence means:

> b. With respect to Personal Injury, only those offenses specified in the Personal Injury Definition. All damages arising out of substantially the same Personal Injury regardless of frequency, repetition, the number or kind of offenses, or number of claimants, will be considered as arising out of one Occurrence.

Personal Injury means one or more of the following offenses:

> a. False arrest, false imprisonment, wrongful detention or malicious prosecution.

In essence, the policies provide that if a suit is brought against the City for damages for personal injury (the offense of malicious prosecution, false arrest, *etc.*) first arising out of an occurrence during the policy period, Illinois Union and Starr would provide coverage. Both the occurrence and personal injury must happen or take place during the policy period.

The court joins the majority of courts in Illinois and across the nation that have concluded the coverage trigger is the filing of the malicious prosecution action, not its termination or the

accused's exoneration. To hold otherwise would impermissibly convert the occurrence policy into a claims-made policy, contrary to the parties' intent. *See Indian Harbor Ins. Co. v. City of Waukegan,* 2015 IL App (2d) 140293, ¶¶32-33 (describing occurrence-based policy).

IV. FOLLOWING THE MAJORITY VIEW

To prevail on a claim of malicious prosecution, a plaintiff must prove the defendant instituted a prior civil or criminal proceeding without probable cause and with improper purpose, and that the prior proceeding terminated in his favor. A plaintiff's cause of action accrues upon exoneration and he is then entitled to seek recovery of damages. Under the policies, Illinois Union and Starr would owe the City a duty to indemnify against a claim brought against it for damages for personal injury – the offense of malicious prosecution – taking place during the policy period if the claim first arose out of an occurrence happening during the policy period. An occurrence, as defined in the policy, relates to the personal injury itself, which in turn means one of the enumerated offenses taking place during the coverage period. The focus is on the act and injury, not the exoneration or accrual of a completed cause of action.

Sanders and the City contend that the offense of malicious prosecution does not occur under the policy until exoneration. The vast majority of Illinois courts that have considered the issue have held that the occurrence causing personal injury under an insurance policy is the filing of the underlying malicious suit, not its termination. *See St. Paul Fire & Marine Ins. Co. v. City of Zion,* 2014 IL App (2d) 131312; *Indian Harbor,* 2015 IL App (2d) 140293; *County of McLean v. States Self-Insurers Risk Retention Group, Inc.,* 2015 IL App (4th) 140628 (all holding the trigger of coverage for the malicious prosecution is the conviction, not exoneration or favorable termination of the proceeding); and *St. Paul Fire & Marine Insurance Co. v. City of Waukegan,*

2017 IL App (2d) 160381 (applying the same approach in the context of *Brady* and Fifth Amendment claims, observing that the time of occurrence in insurance law is different than the time of accrual in tort law). This is consistent with the majority view throughout the country.

The 1978 case of *Security Mutual Cas. Co. v. Harbor Ins. Co.,* 65 Ill. App. 3d 198 (1st Dist. 1978), *rev'd,* 77 Ill. 2d 446 (1979), and federal cases relying on it, have been called into question or squarely rejected. The Illinois Supreme Court reversed *Security Mutual* and no Illinois state court has followed it since. The court in *Westport Ins. Corp. v. City of Waukegan,* 2017 U.S. Dist. LEXIS 148107, reversed itself on the trigger of coverage issue and abandoned all reliance on *Security Mutual* and the 7th Circuit case of *American Safety Cas. Ins. Co. v. City of Waukegan,* 678 F.3d 475 (7th Cir. 2012), which followed *Security Mutual.* Relying instead on *Indian Harbor, St. Paul,* and *County of McLean,* the *Westport* court held the policy could be triggered only if the misconduct that led to the wrongful conviction occurred during the policy period; the accrual of the underlying cause of action was not the trigger.

Notably, the 7th Circuit in *American Safety* did not have the benefit of these three decisions; it had only *Security Mutual* to rely on. No court since has followed *American Safety* nor the appellate opinion of *Security Mutual.* In addition, *Security Mutual* relied on *Roess v. St. Paul Fire & Marine Ins. Co.*, 383 F.Supp. 1231 (M.D. Fla. 1974), which has been "consistently criticized" by other courts declining to adopt its minority view. *See North River Ins. Co. v. Broward Cnty. Sheriff's Office*, 428 F.Supp.2d 1284, 1291 (S.D. Fla. 2006) (collecting cases).

Sanders and the City ask the court to follow the reversed decision of *Security Mutual* instead of the more recent Illinois appellate decisions. However, under *stare decisis,* the court is

duty bound to follow the precedential decisions of *Indian Harbor, St. Paul,* and *County of McLean* and their progeny.

In analyzing the trigger of coverage question, this court is persuaded that occurrence and offense do not equate with exoneration or a completed tort or accrual of a cause of action. As the Illinois Appellate Court has recognized, occurrence policies insure for acts or omissions that result in injury during a policy period. *Indian Harbor*, 2015 IL App (2d) 140293. The accrual of the cause of action is not the event that triggers coverage; rather, the occurrence with respect to personal injury at the commencement of the prosecution is the triggering event. *See St. Paul,* 2014 IL App (2d) 131312. The malicious act or tortious conduct is over by the time of exoneration and so too is the injury. The injury and "gist" of the malicious prosecution first occurs upon the filing of the charges, arrest, and incarceration. While exoneration is a required element and a necessary condition precedent before the malicious prosecution claim accrues, it is not an occurrence that causes injury or harm within the meaning of the policy. "[T]he time of occurrence in insurance law if different from the time of accrual in tort law." *St. Paul,* 2014 IL App (2d) 131312, ¶48.

As noted above, the parties agree the Illinois Union and Starr policies are occurrence policies, not claims-made policies. The policies define personal injury as a category of insurable offenses or acts that produce harm. This is not materially different than language defining personal injury as an injury arising out of or caused by an insurable offense or wrongful act. Neither gives rise to an interpretation that would require full completion and accrual of the claim of malicious prosecution, for it is the wrongful act of the insured that triggers coverage in an occurrence policy, not the fortuitous date of the accused's exoneration. Moreover, in *County of McLean*, the policy defined occurrence the same way as here and held the commencement of the

offense of malicious prosecution triggered coverage. *County of McLean* answers the question left open in *St. Paul* as to when coverage is triggered where the policy refers to the offense of malicious prosecution.

Several courts prefer this majority rule because the essence of the malicious prosecution claim is the filing of charges, not the favorable termination of the legal proceeding. The damage flows immediately from the tortious act, which subjects the accused to arrest and incarceration. Using a date of exoneration could permit a tortfeasor to shift the burden of damages to an unwary insurance company for prior acts of misconduct that caused harm at the outset. *See City of Erie v. Guaranty Nat'l Ins. Co.*, 109 F.3d 156, 160 (3d Cir.1997). This makes sense with occurrence policies that insure for events, accidents, occurrences, wrongful acts, and omissions that cause injury. Exoneration is not part of the wrongdoing or the injury; rather it "marks the 'beginning of the judicial system's remediation' of the wrong committed." *St. Paul*, 2014 IL App (2d) 131312, ¶¶ 23, 25 (internal quotations omitted). Placing importance on the date of exoneration to trigger coverage would be inconsistent with the parties' intent reflected in their occurrence policy to provide coverage for a claim first arising out of an occurrence for personal injury taking place during the policy period.

In reaching this conclusion, the court has analyzed and is persuaded by a multitude of out-of-state cases and federal decisions that have adopted the majority rule. *See City of Erie*, 109 F.3d at 163 (applying Pennsylvania law, "tort of malicious prosecution occurs for insurance purposes at the time the underlying charges are filed"); *Selective Ins. Co. v. Paris*, 681 F.Supp.2d 975, 983 (C.D.Ill.2010) (applying Illinois law; tort of malicious prosecution occurred for insurance purposes at time criminal charges were filed); *North River Ins. Co.*, 428 F.Supp.2d at 1291 (applying Florida law; "an 'occurrence' in a malicious prosecution case is the date the

[p]laintiffs in the [u]nderlying [c]omplaints were actually harmed, not the date they were allegedly vindicated"); *Royal Indem. Co. v. Werner,* 784 F.Supp. 690, 692 (E.D.Mo.), *aff'd*, 979 F.2d 1299, 1300 (8th Cir.1992) (applying Missouri law); *Ethicon, Inc. v. Aetna Cas. & Sur. Co.*, 688 F.Supp. 119, 127 (S.D.N.Y.1988) (applying New Jersey law; injury begins to flow when complaint is filed); *Zurich Ins. Co. v. Peterson,* 188 Cal.App.3d 438, 448, 232 Cal.Rptr. 807 (Cal.Ct.App.1986) (rejecting *Roess* and minority view); *S. Freedman & Sons v. Hartford Fire Ins. Co.*, 396 A.2d 195 (D.C.1978); *Paterson Tallow Co. v. Royal Globe Ins. Cos.,* 89 N.J. 24, 31, 444 A.2d 579 (1982); *Newfane v. General Star Nat'l Ins. Co.*, 14 A.D.3d 72, 79, 784 N.Y.S.2d 787 (N.Y.2004) (offense of malicious prosecution was committed when the prosecution was instituted, not when the action could have been brought); *Hampton v. Carter Enterprises, Inc.,* 238 S.W.3d 170, 176 (Mo.App.2007); *American Family Mutual Ins. Co. v. McMullin,* 869 S.W.2d 862 (Mo.App.1994); *Genesis Ins. Co. v. City of Council Bluffs,* 677 F.3d 806, 813 (8th Cir. 2012) (offense of malicious prosecution occurs when underlying charges are filed); *Harbor Ins. Co. v. Central Nat. Ins. Co.,* 165 Cal.App.3d 1029, 211 Cal.Rptr. 902, 906-07 (Cal.Ct.App.1985) (cited in *Indian Harbor,* 2015 IL App (2d) 140293, for proposition that the initial wrong and harm are committed upon initiation of the malicious prosecution).

This court also looked to the language of the policies as a whole. The use of the phrase "first arising out of" in the General Liability Coverage Part suggests the initiating act is the trigger. This is bolstered by occurrence language that provides, "All damages arising out of substantially the same Personal Injury regardless of frequency, repetition, the number or kind of offenses, or number of claimants, will be considered as arising out of one Occurrence." It would be logically inconsistent to hold that coverage is triggered by exoneration twenty years after the personal injury in light of this clear language indicating a continuation of an offense and

continuing damages presents a single occurrence. Further, it is well established that Illinois law does not treat a malicious prosecution claim as a continuing tort that triggers coverage each year its effects are felt. Rather, the acts or omissions alleged to have occurred after the accused is charged are a continuation of the same alleged harm. *See Indian Harbor,* 2015 IL App (2d) 140293, ¶ 40.

In sum, it is commonly understood that the standard general liability occurrence-based policy provides coverage for injury or damage caused by an occurrence resulting in loss during the policy period, as well as personal injury caused by an offense committed during the policy period. Occurrence generally means an accidental act, whereas an offense generally connotes an intentional act. The policy here delineates the specific offense of malicious prosecution and requires the personal injury take place during the policy period. The term occurrence specifically relates back to the personal injury itself and specified offenses. Accordingly, coverage for personal injury is only triggered if the offense causing the injury and the injury itself is committed during the policy period.

In the absence of language demonstrating an intent that a completed cause of action is what triggers coverage, the court finds the malicious prosecution of Sanders first occurred for coverage purposes when the charges were filed and he suffered personal injury. This occurred years before the Illinois Union and Starr policies were in effect, which precludes coverage. Had the City obtained a claims-made policy in effect at the time of exoneration, perhaps there would be coverage. But the Illinois Union and Starr policies are occurrence policies that were not in effect when the gist of the offense of malicious prosecution happened and when injury to Sanders occurred.

V. REJECTING MULTIPLE TRIGGERS

The court rejects Sanders and the City's contention that malicious prosecution be treated as having multiple triggers. Courts nationwide, including Illinois, have rejected the notion that malicious prosecution constitutes a continuing injury. They conclude instead that a claim for malicious prosecution does not trigger multiple policies, but instead triggers only the policy in effect at the time the charges are filed. *See Indian Harbor,* 2015 IL App (2d) 140293; *St. Paul,* 2017 IL App (2d) 160381, ¶36; *Billings v. Commerce Ins. Co.*, 458 Mass. 194 (2010); *City of Lee's Summit v. Missouri Public Entity Risk Mang.,* 2012 WL 6681961 (Mo. App. Ct. Dec. 26, 2012); *Genesis Ins. Co.,* 677 F.3d at 816; *Idaho Cty. Risk Mang. Prog. Und. v. Northland Ins. Cos.,* 205 P.3d 1220 (2009); *City of Erie*, 109 F.3d at 165. As these cases observe, the multiple trigger theory has been used in very limited circumstances, such as asbestos cases. The court finds no legal or factual reason to expand this theory or depart from settled case law.

VI. CONCLUSION

The court concludes the triggering event under the Illinois Union and Starr occurrence policies is the institution of the malicious prosecution and injury to Sanders, not his exoneration. Although his legal claim for malicious prosecution was contingent on exoneration, the claim first arose out of an occurrence for personal injury that took place years before the policies were in effect.

IT IS ORDERED: Illinois Union Insurance and Starr Indemnity's amended motion to dismiss Plaintiffs' second amended complaint is granted under 735 ILCS 5/2-619(a)(9).

Judge Celia Gamrath

ENTERED: JAN 02 2018

Hon. Celia Gamrath, No. 2031
Circuit Court of Cook County, Chancery Division

Circuit Court - 2031