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5th Circ. Insights On Wrongful Conviction Insurance Coverage

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In a long-running insurance coverage dispute, the United States Court of Appeals for the Fifth Circuit recently issued a decision addressing trigger of coverage in the context of three wrongful convictions in *Travelers Indemnity Co. v. Mitchell*.

The coverage dispute arose out of an underlying civil rights action brought by the estates of three claimants who had allegedly been pressured into confessing to a 1979 rape and murder. The claimants were convicted in 1980 and spent a collective 83 years in prison. In 2010 and 2011, the claimants were proven innocent by DNA testing of evidence recovered from the victim's body.

Thereafter, the estates of the three claimants filed a civil rights action against Forrest County, Mississippi, the City of Hattiesburg, Mississippi, and individual police officers. The claimants asserted 18 causes of action under 42 U.S.C. §§ 1983 and 1985, alleging coerced confession, fabricated evidence, disregarded exculpatory evidence and prosecution without probable cause for events taking place in 1979 and 1980. The civil rights action reportedly was settled for \$16.5 million.

Coverage litigation followed regarding whether law enforcement liability policies issued by numerous insurers to Forrest County over many years responded to the civil rights action. A Mississippi federal district court held that a number of insurers owed no duty to defend or indemnify Forrest County in the civil rights action.

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But the Mississippi federal district court also held that Travelers had a duty to defend under policies in effect between 2005 and 2011, and that Scottsdale likewise had a duty to defend under a policy in effect from 1985 to 1986. Those rulings were appealed.

The Fifth Circuit affirmed and held that Travelers and Scottsdale policies containing a duty to defend were triggered by bodily injury allegedly incurred by the claimants in the relevant policy periods.

We see six main takeaways from the Fifth Circuit's trigger decision:

A continuous trigger does not apply to wrongful conviction.

The Fifth Circuit admonished the insurers for devoting "substantial energy" to the point that continuous trigger or multiple trigger theories should not apply to wrongful conviction actions.[1]

Given the decision below, the insurers' focus on continuous trigger was sensible. The district court's opinion had extensively discussed continuous trigger and concluded that the duty to defend arose based on the allegation that the claimants "were in prison for a crime they did not commit during the policy period." [2]

The Fifth Circuit put to bed any notion that imprisonment alone can result in a continuous trigger. The Fifth Circuit "agree[d] that such extracontractual rules have no role to play" and that the trigger analysis properly should focus on the underlying complaint, the policies and relevant authority.[3]

Discrete "bodily injury" may be a trigger of the duty to defend in unusual circumstances.

The core of the Fifth Circuit's decision is that the insurers had a duty to defend based on discrete physical injuries during incarceration while the policies were in effect between 1985-1986 and 2005-2011.[4]

To explain this result, the Fifth Circuit did not rely on legal authority addressing wrongful conviction trigger but instead posed an analogy.[5] Under the court's hypothetical, an insurance policy would pay on behalf of an apple farmer for any bodily injury to passersby caused by fallen apples in particular years (1985 and 2010), no matter when the tree was planted. As long as an apple fell during those years, the policy's coverage would be triggered, according to the Fifth Circuit.

The analogy is inapt, however, as it misses important context to the trigger analysis based on the timing of injury, the causes of the civil rights violations for which a defense was sought, and intervening causes of the discrete injuries unconnected to the earlier civil rights violations.

In the Fifth Circuit's analogy, the only injury took place in 1985 and 2010. The passersby would seek recovery from the farmer for injury in 1985 and 2010 based on his planting of the tree in 1979. In other words, there was a long interval between act and the only injury.

Unlike the passersby in the apple analogy, however, the Mississippi claimants were immediately injured in 1979 upon arrest, and the civil rights causes of action against the defendants were premised on events in 1979. The claimants' additional injuries in 1985 and 2010 – that is, their diagnosed maladies – did not result

from the 1979 civil rights violations. Instead, the 1985 and 2010 maladies were directly caused by the conditions of imprisonment that were the responsibility of third-party prison officials, which had nothing to do with acts or omissions by the officers in 1979.

So the Mississippi claimants were nothing like the passersby who were first injured, and only injured, by a falling apple in 1985 and 2010. The analogy's inability to explain the result here highlights why the Fifth Circuit's approach has not been adopted elsewhere.

The Fifth Circuit's discussion of trigger is not aligned with most courts.

In supporting its trigger holding, the Fifth Circuit muddled an attempt to organize the world of law enforcement liability coverage into so-called "act-based" and "injury-based" policies not recognized by any other court in this context.

The Fifth Circuit held that "act-based" law enforcement liability policies "are usually triggered on or around the time of conviction."^[6] While aiming to distinguish decisions involving such "act-based" policies, the Fifth Circuit misread the decisions and misinterpreted the majority rule.

Dozens of trial and appellate court decisions have examined trigger under occurrence-based policies — embracing both so-called "act-based" and "injury-based" policy terms — for a range of state and federal causes of action in wrongful convictions. Courts typically hold that the trigger of coverage is when the claimant was first injured by an insured, not the "time of conviction," as stated by the Fifth Circuit.

That means the trigger of coverage usually is when the criminal process started, such as the time of arrest or indictment. A federal district court observed last year that "the majority view [is] that in the context of insurance, malicious prosecution — either civil or criminal — occurs when the defendant begins to institute prosecution of charges against the plaintiff."^[7] Over the last 50 years, there are dozens of decisions with similar analysis focusing on the inception of the underlying criminal proceeding, not post-arrest or post-conviction injury.^[8]

The Fifth Circuit's trigger holding conflicts with, but did not discuss, another appellate court addressing the identical policy language.

Apart from misjudging the majority rule, the Fifth Circuit's decision is in tension with how another appellate court analyzed trigger under the same so-called "injury-based" policy language in the Travelers policy. The Appellate Court of Illinois, Second District, addressed the exact same policy language in the Travelers policy in *St. Paul Fire & Marine Ins. Co. v. City of Waukegan*.^[9]

In *City of Waukegan*, the Illinois appellate court commented that the district court decision on appeal in *Travelers v. Mitchell* was "not ... helpful to our analysis" and held that any injury resulting from "[m]ere incarceration is not a triggering event in Illinois law."^[10]

Unlike the Fifth Circuit, the City of Waukegan court acknowledged that “the overwhelming majority of jurisdictions have rejected variations of the multiple-trigger theory in wrongful conviction coverage cases.”[11] Even where the underlying lawsuit alleges specific misconduct or injury during a post-arrest policy period, the City of Waukegan court stated that “we follow[] the reasoning of the majority of jurisdictions, which had held that the commencement of a malicious prosecution is the event that triggers insurance coverage.”[12]

Seemingly aware that its approach is out of step with the majority rule, the Fifth Circuit acknowledged that “some wrongful conviction cases have applied a rule that even injury-based coverage is triggered only when the injury first manifests itself – a single, exclusive trigger.”[13] That’s the majority rule established by a vast lineup of decisions by courts nationwide, not a handful as suggested by the Fifth Circuit.

Perhaps the best that can be said to harmonize the Fifth Circuit’s analysis with the dozens of cases taking a different approach to trigger is that the Fifth Circuit was focused narrowly on a duty to defend question based on the unusual bodily injury alleged by the claimants in that case.

The duty to indemnify for wrongful conviction must be governed by different considerations.

Whatever the basis for the duty to defend holding in *Travelers v. Mitchell*, the Fifth Circuit accepted that the rule cannot apply in the same way to the often more financially significant issue of the duty to indemnify.

Though consigned to footnotes, the Fifth Circuit recognized the argument that the “officers’ civil rights violations did not proximately cause” the claimants’ bodily injuries “because they were more proximately caused by prosecutors and prison officials.”[14] The Fifth Circuit acknowledged that the indemnity trigger analysis turns on actual proof that the “distinct bodily injuries” were caused by the insureds and “occurred during the policy period.”[15]

From a damages and recovery perspective, wrongful conviction actions are about events and injuries that often took place decades earlier. Here, the underlying civil rights action was about what happened in 1979 and 1980, and the ensuing 83 collective years in prison marked the extent of alleged damage from those events. Put differently, the civil rights action was not a case about the “discrete” medical conditions in 1985 or 2010, such as “sinusitis, high blood pressure and hypertension,” that supported the Fifth Circuit’s conclusion that a duty to defend was triggered.

Wrongful conviction coverage litigation can be sprawling and complex.

While the appeal to the Fifth Circuit concerned a handful of policies issued by Travelers and Scottsdale, the coverage litigation below involved many policies issued by many other carriers. Other insurance companies involved included First Mercury, Gemini, Great American, Steadfast and Zurich.

Given the roster of insurers and law firms involved, the broader coverage dispute had much in common with high-stakes commercial disputes. In that regard, claimants and public entities are increasingly represented by sophisticated policyholder counsel. As one might expect, they dispute conventional coverage positions by insurers and employ strategies to maximize coverage under an entire insurance program spanning decades.

In *Travelers v. Mitchell*, because of the number of policies implicated during the period between arrest in 1979 and exoneration in 2011, there were some 18 motions for summary judgment more than a dozen decisions by the Mississippi federal district court about trigger of coverage not challenged on appeal.[16]

So the result in the Fifth Circuit's decision, viewed in a broader context of the entire coverage dispute, is limited to the duty to defend under unique policy language and allegations in the underlying complaint.

Conclusion

Bottom line: Wrongful conviction trigger litigation remains an area in development. By our count, several dozen decisions addressing trigger of coverage in the wrongful conviction context have been issued over the last decade, tracking the rise in the number of and exposure from underlying civil rights lawsuits in this arena.[17] And there are pending trial court actions and appeals addressing wrongful conviction trigger in state and federal appellate courts.[18]

The coverage issues confronted by the Fifth Circuit in *Travelers v. Mitchell*, even if involving unique bodily injury claims, show that the wrongful conviction trigger issue likely will continue to be actively tested in courts nationwide.

[1] *Travelers Indem. Co. v. Mitchell*, – F.3d –, 2019 U.S. App. LEXIS 15915, *15.

[2] *Travelers Indem. Co. v. Forrest County*, 206 F. Supp.3d 1216, 1224-45 (S.D. Miss. 2016).

[3] *Travelers Indem. Co. v. Mitchell*, – F.3d –, 2019 U.S. App. LEXIS 15915, *15.

[4] *Travelers Indem. Co. v. Mitchell*, – F.3d –, 2019 U.S. App. LEXIS 15915, *9-14.

[5] *Travelers Indem. Co. v. Mitchell*, – F.3d –, 2019 U.S. App. LEXIS 15915, *17-18.

[6] *Travelers Indem. Co. v. Mitchell*, – F.3d –, 2019 U.S. App. LEXIS 15915, *18.

[7] *Argonaut Great Cent. Ins. Co. v. Lincoln Cty., Missouri*, No. 4:17-CV-00762 JAR, 2018 U.S. Dist. LEXIS 133415, at *18 (E.D. Mo. Aug. 8, 2018).

[8] See, e.g., *Zook v. Arch Spec. Ins. Co.*, 784 S.E.2d 119, 122 (Ga. Ct. App. 2016) (“the majority [of courts] hold [] that coverage is triggered when the insured sets in motion the legal machinery of the state”); *TIG Ins. Co. v. City of Elkhart*, 122 F.Supp.3d 795, 806 (N.D. Ind. 2015) (“So the ‘occurrence’ here dates to 1996 when [the claimant] was wrongly charged in violation of his due process rights”); *Chicago Ins. Co. v. City of Council Bluffs*, 713 F.3d 963, 971 (8th Cir. 2013) (holding that only a policy in effect “when the underlying charges were filed” could be “potentially applicable”); *City of Erie v. Guar. Nat’l Ins. Co.*, 109 F.3d 156, 160 (3d Cir. 1997) (policy trigger is “when the underlying charges are filed”).

[9] Compare *St. Paul Fire & Marine Ins. Co. v. City of Waukegan*, 2017 IL App (2d) 160381, ¶ 2, 82 N.E.3d 823, 827-28 (App. Ct. 2017) with *Travelers Indemnity Co. v. Mitchell*, – F.3d –, 2019 U.S. App. LEXIS 15915, *6-7.

[10] City of Waukegan, 2017 IL App (2d) 160381, ¶42, 82 N.E.3d 823, 836.

[11] City of Waukegan, 2017 IL App (2d) 160381, ¶48, 82 N.E.3d 823, 838.

[12] City of Waukegan, 2017 IL App (2d) 160381, ¶31, 82 N.E.3d 823, 832.

[13] Travelers Indem. Co. v. Mitchell, – F.3d –, 2019 U.S. App. LEXIS 15915, *18-19.

[14] Travelers Indem. Co. v. Mitchell, – F.3d –, 2019 U.S. App. LEXIS 15915, *11 n.3.

[15] Travelers Indem. Co. v. Mitchell, – F.3d –, 2019 U.S. App. LEXIS 15915, *19 n.5.

[16] See, e.g., Travelers Indem. Co. v. Forrest Cnty., 164 F. Supp. 3d 899 (S.D. Miss. 2016) (“an official’s failure to come forward during the applicable policy period and rectify civil rights violations which occurred prior to the policy period does not trigger coverage under an occurrence policy issued years after the wrongful arrest and conviction, absent a new, independent wrongful act during the policy period”); see also Travelers Indem. Co. v. Forrest County, 2016 U.S. Dist. LEXIS 81206 (S.D. Miss. June 22, 2016); Travelers Indem. Co. v. Forrest Cnty., 2016 U.S. Dist. LEXIS 81826 (S.D. Miss. June 23, 2016); Travelers Indem. Co. v. Forrest Cnty., 2016 U.S. Dist. LEXIS 85399 (S.D. Miss. June 30, 2016); Travelers Indem. Co. v. Forrest Cnty., 2016 U.S. Dist. LEXIS 86108 (S.D. Miss. July 1, 2016); Travelers Indem. Co. v. Forrest Cnty., 2016 U.S. Dist. LEXIS 88095 (S.D. Miss. July 7, 2016); Travelers Indem. Co. v. Forrest Cnty., 2016 U.S. Dist. LEXIS 89513 (S.D. Miss. July 11, 2016); Travelers Indem. Co. v. Forrest Cnty., 2016 U.S. Dist. LEXIS 90223 (S.D. Miss. July 12, 2016); Travelers Indem. Co. v. Forrest County, 195 F. Supp. 3d 890 (S.D. Miss. 2016); Travelers Indem. Co. v. Forrest Cnty., 2016 U.S. Dist. LEXIS 93046 (July 18, 2016); Travelers Indem. Co. v. Forrest Cnty., 2017 U.S. Dist. LEXIS 217767 (S.D. Miss. Mar. 30, 2017).

[17] Ouss, Aurelie and Rappaport, John, Is Police Behavior Getting Worse? The Importance of Data Selection in Evaluating the Police (January 28, 2019 and updated May 20, 2019), University of Chicago Coase-Sandor Institute for Law & Economics Research Paper No. 865; U of Chicago, Public Law Working Paper No. 693 (available at <https://ssrn.com/abstract=3325382>) (noting that “lawsuits and payouts have trended upwards over the past decade”).

[18] See, e.g., Sanders v. Illinois Union Ins. Co., 2019 IL App (1st) 180158, – N.E.3d –, appeal allowed, No. 124565, 2019 Ill. LEXIS 624 (Ill. May 22, 2019); Argonaut Great Cent. Ins. Co. v. Lincoln Cty., Missouri, No. 4:17-CV-00762 JAR, 2018 U.S. Dist. LEXIS 133415 (E.D. Mo. Aug. 8, 2018), on appeal, Case No. 18-2930 (8th Cir.).

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