



The Aftermath of Exoneration:
Insurance Coverage in Wrongful Incarceration Cases

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1989: First DNA Exoneration

As of today, there have been at least 570 post-conviction DNA-based exonerations in the United States.

As of today, there have been at least 2,706 post-conviction non-DNA-based exonerations in the United States.

3,478 exonerations since 1989

31,678 years lost



**14 Years: Average Amount of Time
Imprisoned**

Common Factors



Common Factors continued...

- Inadequate legal defense
- Informant evidence
- Police misconduct
- Prosecutorial misconduct

Not all incarceration cases are the same

Time on death row

Pled guilty to crimes they did not
commit



*Not all innocent inmates were
maliciously prosecuted...*

Tension

The call for better policing and the simultaneous truth that law enforcement is both under-supported and underfunded increases the tension present in law enforcement cases.



Tension = Risk and Exposure

A Matter of Trust

In a recent PEW Research Center survey, 32% of white adults said they have a great deal of confidence in police officers to act in the public's best interest, while only 10% of black adults reported the same.



Less than half of all Americans now trust police.





The Nuclear Age Has Arrived

Facing the possibility of a nuclear verdict, defense attorneys may attempt to settle their cases before a jury gets a chance to potentially render an enormous verdict.

The fear of nuclear verdicts has resulted in a new age of settlements. A significant number of cases now settle, simply to avoid the prospect of a nuclear verdict. The problem, of course, is that the price of settlement has gone up correspondingly, introducing nuclear settlements, and with a similar global impact on insurance.

\$537 million in statutory awards
\$1.7 billion in judgments and settlements

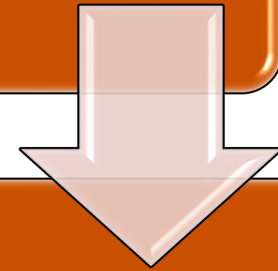
State and municipal governments have paid
more than \$2.2 billion in compensation.

Total compensation averages nearly \$220,000 per year in prison.

Actual compensation when litigated is much higher.

Impact on Insurance

In May 2021, a jury awarded two men who had been wrongfully convicted and imprisoned for over 30 years an award of \$75 million.



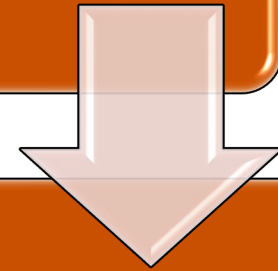
County-related defendants involved in the case settled for \$9 million.

A close-up photograph of a hand holding a white smartphone. The phone's screen displays a news application interface. At the top, the word "NEWS" is written in white capital letters on a red rectangular background. Below this, there are several news items with images and text, though they are out of focus. A finger is visible on the right side of the phone, appearing to interact with the screen. The background is dark and blurred.

The county's local newspaper reported soon thereafter that *“no taxpayer money will be used to pay the settlement”* and that, instead, *“[i]t will be paid primarily”* by insurance.

Unpredictability

In December 2021, a jury awarded one man who was wrongfully convicted and imprisoned for 23 years an award of \$6 million.



This result was widely considered a “win.”

Parties Involved in Arrest and Prosecution

- **Local law enforcement**
- **State law enforcement**
- **Federal law enforcement**
- **Prosecutors**
- **Witnesses**
- **State and local government**



Types of Claims



Claims relating to arrest and imprisonment

Claims relating to conduct after incarceration

Constitutional causes of action pursuant to 28 US 1983

State law claims



Question of Compensation

- Although those who have been freed typically receive financial compensation mandated by law, civil litigation often ensues, and the stakes are high.
 - No amount of money is enough to “compensate” for this loss.
 - What money is available must be strategically advanced.

The Complaint

Civil Rights action

Civil rights claims generally asserted are:

- Wrongful arrest
- False imprisonment
- Denial of Due Process

The Complaint:

State Law claims:

- Misrepresentation
- False arrest
- **Malicious prosecution**
- Obstruction of justice
- Negligence
- Defamation
- IIED
- State Constitutional Claims



Immunity Considerations

Where it matters and where it doesn't

Governmental Immunity

Public Officer's Immunity

Qualified Immunity

When Claims Accrue

1. Claims for false arrest and imprisonment and other claims based on allegations related to the plaintiff's incarceration for a crime he or she did not commit accrue when the plaintiff is arrested pursuant to a "warrant or other judicially issued process".
2. Claims for malicious prosecution, wrongful conviction, and others alleging a denial of due process in connection with the plaintiff's prosecution accrue when the plaintiff is exonerated.



Win the race to settle

Don't be the last defendant standing

A Question of Coverage



Insurance in Play

- Types of coverage:
 - Claims Made
 - Occurrence



Trigger in Occurrence Based Coverage

Majority, minority, particular policy approaches...



Majority Approach

First used in 1967, the Superior Court of New Jersey concluded:

“The tort of malicious prosecution is Sui generis. The tortious act is committed ordinarily by the filing of a criminal complaint with malice and without probable cause... Often, as here, the accused is arrested, required to post bail to secure his liberty pending trial, and his reputation is adversely affected... the essence of the tort is the wrongful conduct in making the criminal charge.”

Muller Fuel Oil Co. v. Ins. Co. of North Am., 95 N.J. Super. 564, 232 A.2d 168 (1967).

Majority Approach

Since 1967, the majority approach has been adopted by most jurisdictions.

“We join the reasoned decisions of the majority in holding that for purposes of an insurance policy which measures coverage by the period within which the “offense is committed”, the tort of malicious prosecution occurs upon the filing of the complaint.” *Zurich Insurance Co. v. Peterson*, 188 Cal.App.3d 438, 232 Cal. Rptr. 807, 813 (1986).

“The better rule, and the rule that is consistent with Florida law, is to consider the time of the arrest and incarceration the “trigger” in both malicious prosecution and false imprisonment cases.” *North River Ins. Co. v. Broward County Sheriff’s Office*, 428 F.Supp.2d 1284 (S.D. Fla. 2006).

Minority Approach

First used in 1974, the United States District Court in Florida concluded:

“The Court is compelled to the result as a matter of law that the Koubek claim against Roess for malicious prosecution did not mature until the taxpayer’s action was finally terminated in the Supreme Court of Florida...”

Roess v. St. Paul Fire & Marine Ins. Co., 383 F. Supp. 1231 (M.D. Fla. 1974).

Minority Approach

Since 1974, a few jurisdictions have adopted the minority approach.

“The complaint must contain facts which show (1) the commencement or continuance of an original criminal or civil judicial proceeding by the defendant; (2) the Termination of the proceeding in favor of the plaintiff...” *Security Mut. Cas. Co. v. Harbor Ins. Co.*, 382 N.E.2d 1 (Ill. App. Ct. 1978).

“Contrary decisions pay little attention to the language of the policies... occurrence in most policies identifies the tort rather than the misconduct as the occurrence.”
American Safety Cas. Ins. Co. v. City of Waukegan, 678 F.3d 475, 479 (7th Cir. 2012).

Specific Policy Language

The court determined that personal injury coverage looks at the alleged tort to determine if there is coverage while bodily injury coverage looks at the damage to determine if there is coverage and in the present case the Travelers policies at issue contained coverage for bodily injury. The court examined specific harms that the wrongfully imprisoned men alleged to determine coverage.

Travelers Indemnity Co. v. Mitchell, 925 F.3d 236 (5th Cir. 2019)

Specific Policy Language

The court held that its conclusion was not based on a continuing trigger theory, but rather the alleged bodily injuries during the policy period that were distinct from the conviction itself.

Travelers Indemnity Co. v. Mitchell, 925 F.3d 236 (5th Cir. 2019)

Alternative Theories

Separate trigger

Continuous trigger

Alternative Theory – Continuous Trigger

- Continuous trigger theories have been adopted in limited circumstances, like toxic tort.
- Under this approach, an insurer has a duty to defend and indemnify if it has issued a policy in effect at any time during a continuing tort or injury.
- **To date, this approach has been widely rejected.**
 - *TIG Ins. Co. v. City of Elkhart*, 122 F. Supp.3d 795 (N.D. Ind. 2015).
 - *Genesis Ins. Co. v. City of Council Bluffs*, 677 F.3d 806 (Eighth Circuit 2012).
 - *Chicago Ins. Co. v. City of Council Bluffs*, 713 F.3d 963 (Eighth Circuit 2013).

Continuous Trigger Theory

“[Multiple trigger approach] cases arise in the context of environmental contamination... unlike the immediate harm inflicted by false and malicious criminal charges, injuries due to exposure to toxic chemicals and similar instances of delayed manifestation of damage merit a different analysis and interpretation of the reasonable expectations of the parties to liability insurance policies... the same rationale is not applicable to malicious prosecution injuries.”

TIG Ins. Co. v. City of Elkhart, 122 F. Supp.3d 795 (N.D. Ind. 2015).

Continuous Trigger Theory


“We reject the contention that the tort of malicious prosecution constitutes a continuing injury.” *Genesis Ins. Co. v. City of Council Bluffs*, 677 F.3d 806 (Eighth Circuit 2012).

“There are allegations of continuing misconduct and continuing personal injury during the terms of the... policies was expressly rejected” *Chicago Ins. Co. v. City of Council Bluffs*, 713 F.3d 963 (Eighth Circuit 2013).



Separate Occurrences

- *City of Hickory v. Grimes*, 814 S.E.2d 625, 259 N.C. App. 937 (June 2018):
 - Insurer tried to argue that two wrongful acts are substantially the same and are logically, causally, or temporally related and should be treated as one wrongful act
 - Court differentiated how the two wrongful acts are separate and therefore the insurance company has a duty to defend



Coverage Questions
They're not just about comparing
policy language.

Identifying Applicable Coverage

- Regardless of your position in the case, identifying all applicable coverage is imperative.
 - Cases are high exposure and simply take a lot of money to settle and defend.
 - More policies in play make cases easier to settle.
 - Explanation of available *and unavailable* insurance is important.

EFFORT MATTERS!

Search the Insured's Records

- Search insured's records
- Search insured's records
- Search insured's records... again.

Don't limit your search to where the policies might be

Cases that Settle



Identify Insurance



Evaluate and Explain Coverage



Demonstrate Effort

Suggested Search Locations

File cabinets

Computers

Minutes

Prior retained attorneys

Insurance Agents

Other Insurers

Westlaw/Lexis

Long serving employees/officials

State Department of Insurance

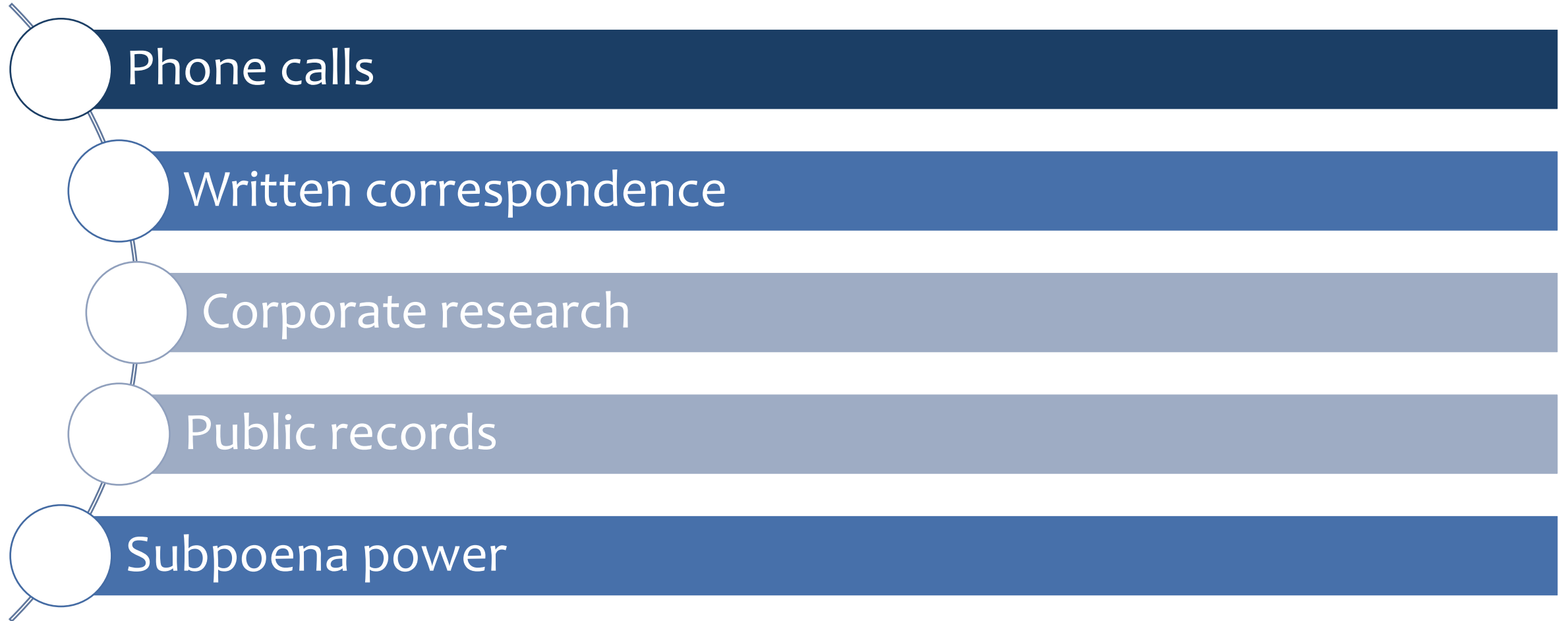
Roadblocks

- Resistance
- Laziness
- Misunderstanding



Solutions

Time, effort, and documentation



A question of motivation





Excess Verdict

Bad Faith

Duty to Defend

- Many jurisdictions provide that the wrongful denial of a duty will require the carrier to reimburse the insured for defense costs and obligate them to indemnify the insured for any reasonable settlement or judgment.
- The decision to deny a duty to defend could lead to a declaratory judgement on verdict that is well in excess of policy limits.

Allocation

- Efforts should be made to identify all the insurance carriers on the risk during the period alleged in the lawsuit.
- Consider whether coverage can be triggered over multiple policy years.
- Contribution will invariably come from the insured as well.



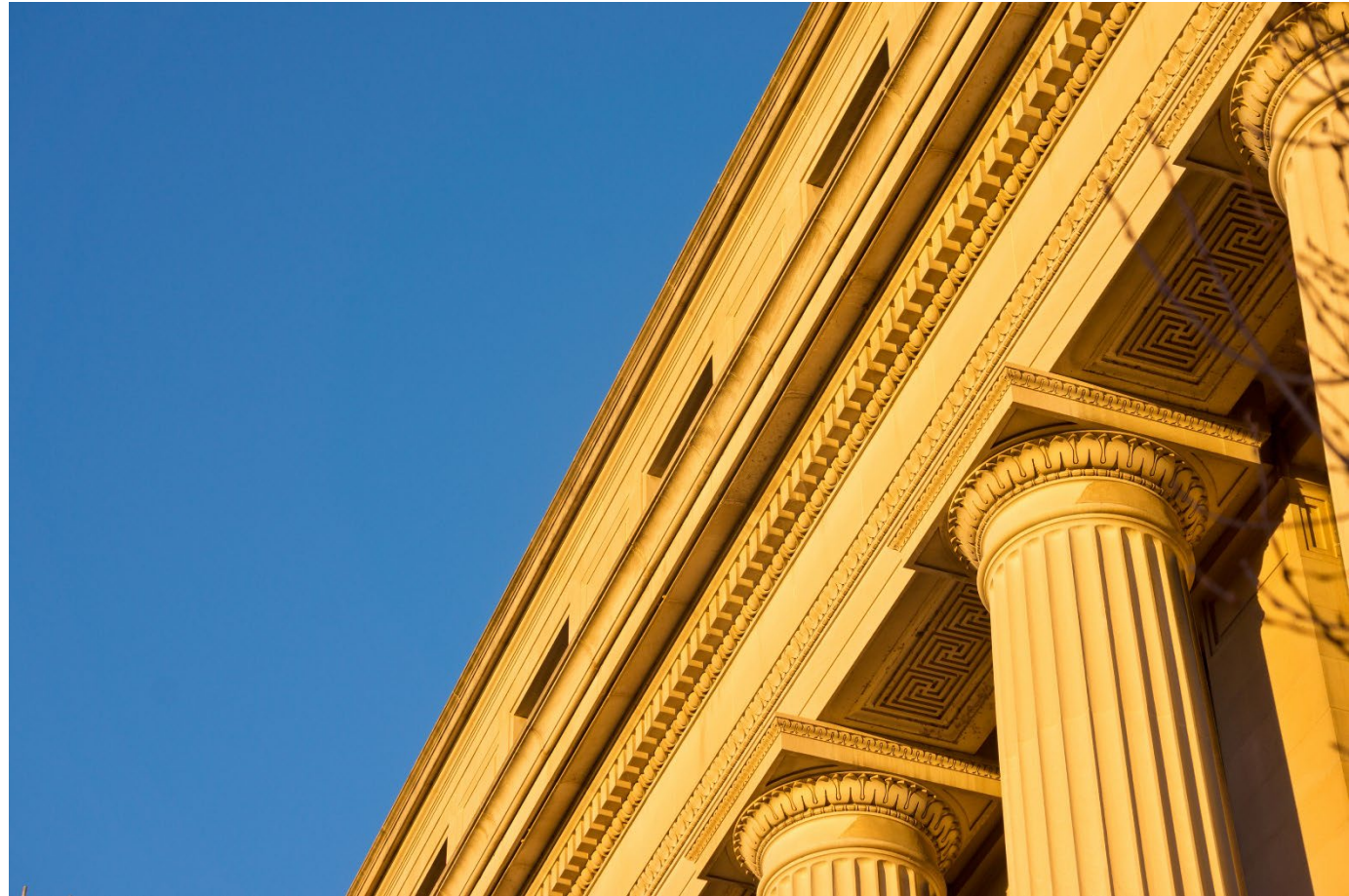
Working With Local Government Risk Pools

- Board of trustees comprised of local government officials and employees



Working With Local Governments

- Political considerations
- Funding considerations
- Personal considerations
- Protection of defense strategy



Strong Partnership with Coverage and Liability Counsel

- Talk to Coverage and Liability counsel at the start of the case
- Discuss all aspects of claim in order to form a cohesive strategy
- Troubling fact patterns
- Continued communication



Moving Forward Into The Aftermath

Coverage counsel must not only interpret coverage and advise on the duty to defend and indemnify, but also ensure their clients are aware of the impact of a series of practical considerations.

The humanity of judges and the natural desire to compensate individuals for such an egregious wrong must be considered in conjunction with any coverage analysis.



Questions?



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Thank you!

