No. 124565

In the

Supreme Court of Illinois

RODELL SANDERS and THE CITY OF CHICAGO HEIGHTS,

Plaintiffs-Appellees,

v.

ILLINOIS UNION INSURANCE COMPANY and
STARR INDEMNITY & LIABILITY COMPANY,

Defendants-Appellants.

On Appeal from the Appellate Court of Illinois, First Judicial District,
County Department, Law Division, No. 1-18-0158.
There Heard on Appeal from the Circuit Court of Cook County, Illinois,
County Department, Chancery Division, No. 16 CH 02605.
The Honorable **Celia Gamrath**, Judge Presiding.

BRIEF AND APPENDIX OF DEFENDANT-APPELLANT ILLINOIS UNION INSURANCE COMPANY

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POINTS AND AUTHORITIES

NATURE OF THE CASE

This insurance coverage case arises from the 1994 criminal prosecution of Rodell Sanders by the City of Chicago Heights (City) for murder and other crimes. *People v. Sanders*, 2012 IL App (1st) 110373-U. The City based the charges on false witness statements implicating Sanders that were manufactured by the City's police officers, who held a grudge against Sanders and sought to frame him. (R. V5, C2340-45 [A81-86].) Sanders was convicted based on the City's false evidence and spent nearly 20 years in prison for crimes he did not commit. (R. V5, C2345 [A86].) In 2011, Sanders's conviction was vacated due to ineffective assistance of counsel, and a new trial was ordered on the 1994 criminal charges. *Sanders*, 2012 IL App (1st) 110373-U, ¶ 1. In 2013, Sanders was retried on those charges, but a mistrial was declared. (R. V5, C2304 [A45].) In 2014, Sanders was retried again on the 1994 criminal charges and was acquitted, thus exonerating him and setting him free. (R. V5, C2304-05 [A45-A46].)

Sanders filed a civil suit against the City for malicious prosecution based on the police officers' misconduct. (R. V5, C2306 [A47].) The City tendered the civil suit to Illinois Union Insurance Company (Illinois Union) and Starr Indemnity & Liability Company (Starr), whose policies were in effect when Sanders was exonerated in 2014. (R. V5, C2296 [A37], C2307-13 [A48-55].) The policies provided coverage for an "occurrence" and "personal injury," defined to include the "offense" of "malicious prosecution," that occurred "during" the policy period. (R. V5, C2309-11 [A50-52].) Consistent with appellate precedent in Illinois, the carriers denied coverage because the "offense" of malicious prosecution occurred in 1994, when the City commenced Sanders's criminal prosecution based on false evidence, not in 2014 when Sanders was exonerated. (R. V5, C2318 [A59].)

The City settled the malicious prosecution civil suit by (a) agreeing to the entry of a $15 million consent judgment in favor of Sanders; (b) paying Sanders $5 million of the consent judgment (including $3 million paid by an insurer whose policy was in effect in 1994); and (c) assigning the City's rights against Illinois Union and Starr to Sanders. (R. V5, C2317-21 [A58-62].)

Sanders and the City then jointly sued Illinois Union and Starr to (a) collect for Sanders the remaining $10 million of the consent judgment and (b) recover for the City the amounts it paid in the defense and settlement of the underlying civil suit. (R. V5, C2295-97 [A36-38], C2321-35 [A62-76].) The circuit court dismissed the suit against the insurers, holding that no "offense" of "malicious prosecution" occurred while the policies were in effect. (R. V6, C3087 [A35].) Rather, the circuit court held, the "triggering event" for coverage purposes under the policies was the "institution of the malicious prosecution and injury to Sanders, and not his exoneration." (R. V6, C3087 [A35].) In reaching that conclusion, the circuit court relied upon numerous Illinois appellate decisions. (R. V6, C3081-82 [A29-30].)

The appellate court reversed in a two-to-one decision. *Sanders v. Illinois Union Insurance Co.*, 2019 IL App (1st) 180158. (A1-24.) The majority concluded that the "offense" of "malicious prosecution" did not occur until 2014, when Sanders was exonerated, because under tort law a cause of action for malicious prosecution does not accrue until the claimant is exonerated. *Id.* ¶ 21. (A9-10.) In doing so, the majority departed from prior case law, including *First Mercury Insurance Co. v. Ciolino*, 2018 IL App (1st) 171532, ¶ 30, where the court held that "offense" "refers to a wrongful act or

conduct committed during the policy period," *i.e.*, the insured's conduct in commencing the malicious prosecution, "regardless of whether the elements of a tort have accrued."

Presiding Justice Mason dissented, opining that the "offense" mentioned in the policies refers to the insured's "wrongful conduct or unlawful act" in commencing the malicious prosecution. *Sanders*, 2019 IL App (1st) 180158, ¶ 40 (Mason, J., dissenting). (A18.) Justice Mason thus concluded that "the malicious prosecution of Sanders happened in 1994 when he was wrongfully charged with murder," not in 2014 when he was exonerated. *Id.* ¶ 37 (A16-17.) Justice Mason also observed that the majority's decision "unavoidably creates a split of authority" within the appellate court on this issue. *Id.* ¶ 44 (A20-21.)

This Court allowed leave to appeal on May 22, 2019.

ISSUE PRESENTED FOR REVIEW

When does the "offense" of "malicious prosecution" take place for purposes of triggering coverage under an occurrence-based liability insurance policy?

JURISDICTION

This Court has jurisdiction under Illinois Supreme Court Rule 315(a). The appellate court issued its decision on January 15, 2019. Illinois Union and Starr filed a petition for leave to appeal on February 19, 2019, and this Court allowed the petition on May 22, 2019.

The appellate court had jurisdiction under Illinois Supreme Court Rules 301 and 303. The circuit court entered a final judgment dismissing Sanders's and the City's complaint on January 2, 2018. Sanders and the City filed notices of appeal on January 16, 2018 and January 24, 2018, respectively.

STATEMENT OF FACTS

Sanders Is Framed in 1994 and Exonerated in 2014

On December 15, 1993, Phillip Atkins and Stacy Armstrong were accosted by a group of men and taken to an abandoned garage, where they were shot and robbed. (R. V5, C2339 [A80].) Atkins was killed, but Armstrong survived. (R. V5, C2339 [A80].) There was no physical evidence linking Sanders to the crime. (R. V5, C2340 [A81].) Nonetheless, City police officers held a grudge against Sanders and decided to pin the shooting on him. (R. V5, C2340 [A81].)

The officers framed Sanders by obtaining false witness statements from Armstrong and another individual, Germaine Haslett. (R. V5, C2340-45 [A81-A86].) First, the officers manipulated Armstrong into identifying Sanders as the man who ordered the shootings, even though Sanders did not fit the description given by Armstrong. (R. V5, C2341 [A82].) Specifically, Armstrong described the perpetrator as six feet tall and skinny, while Sanders was only five feet, eight inches tall and weighed 200 pounds. (R. V5, C2341 [A82].) Despite this clear discrepancy, the officers prompted Armstrong to identify Sanders by "concoct[ing] a flawed photographic line-up designed to improperly implicate *** Sanders," including altering Sanders's photograph "to make him look taller and thinner than he truly was." (R. V5, C2342 [A83].) The officers also promised to relocate Armstrong out of state. (R. V5, C2301-02 [A42-A43].)

Meanwhile, Haslett fit Armstrong's original description (six feet tall and skinny), and he confessed during the investigation to ordering the shootings. (R. V5, C2300 [A41], C2302 [A43].) Haslett was, however, a key witness in another prosecution. (R. V5, C2343 [A84].) For that reason, the officers sought to protect Haslett and minimize his complicity in the murder of Atkins and the shooting of Armstrong. (R. V5, C2343

[A84].) The officers did that by permitting Haslett to portray himself as merely a lookout, rather than the person who ordered the shootings, and to negotiate a plea deal in exchange for continued implication of Sanders. (R. V5, C2343 [A84].) The officers also provided Haslett with other benefits, including housing him in protective custody, terminating his probation in another case, transferring money on his behalf, and allowing unsupervised visits with his girlfriend. (R. V5, C2344 [A85].)

City officers arrested Sanders on January 14, 1994, and he was charged with various crimes, including murder. *People v. Sanders*, 2012 IL App (1st) 110373-U, ¶ 5. (R. V6, C2948.) Following a jury trial, Sanders was convicted of the charges based on the false identifications procured by the City's police officers. (R. V5, C2345 [A86].) Sanders was sentenced to serve 80 years in prison. (R. V5, C2345 [A86].)

On January 24, 2011, the circuit court vacated Sanders's conviction and granted him a new trial based on ineffective assistance of counsel. *Sanders*, 2012 IL App (1st) 110373-U, ¶ 1. (R. V5, C2345 [A86].) The appellate court affirmed on May 30, 2012. *Sanders*, 2012 IL App (1st) 110373-U, ¶ 1. (R. V5, C2346 [A87].) Sanders was later retried twice. The first retrial occurred in July 2013 and resulted in a mistrial. (R. V5, C2304 [A45].) The second retrial occurred in July 2014 and resulted in an acquittal. (R. V5, C2304 [A45].) Sanders was then released from custody after being incarcerated for nearly 20 years. (R. V5, C2305 [A46].)

Sanders Sues the City and Obtains a $15 Million Consent Judgment, With the Insurer on the Risk in 1994 Paying Its Full Policy Limits

In the meantime, on January 11, 2013, Sanders filed a civil lawsuit against the City claiming, among other things, violations of his right to due process. (R. V5, C2305-06 [A46-A47].) On August 5, 2014, after Sanders was acquitted, he filed an amended

complaint adding a claim for malicious prosecution. (R. V5, C2306 [A47].) In support of that claim, Sanders asserted that the City's police officers "caused [him] to be improperly subjected to judicial proceedings for which there was no probable cause." (R. V5, C2361 [A102].)

The City settled Sanders's lawsuit by agreeing to a $15 million consent judgment against it. (R. V5, C2319 [A60].) The City paid $2 million of that amount. (R. V5, C2318 [A59].) United National Insurance Company, which insured the City in 1994 (when the criminal charges against Sanders were commenced), paid $3 million, representing the entire liability limit of its policy. (R. V5, C2318 [A59], C2558-59.) In exchange, Sanders promised not to execute the remaining $10 million of the judgment against the City. (R. V5, C2551.) The City assigned its rights against Illinois Union and Starr, which issued policies to the City nearly 20 years after the framing of Sanders, and Sanders agreed to attempt to collect the balance of the judgment only from those two insurers. (R. V5, C2320 [A61], C2550-51.)

Illinois Union's and Starr's Policies Cover Malicious Prosecution Taking Place Between November 1, 2011 and November 1, 2014

The City purchased annual liability policies from Illinois Union and Starr from November 1, 2011 to November 1, 2014. (R. V5, C2307 [A48], C2310-11 [A51-A52].) The Illinois Union policies provide primary coverage with a liability limit of $1 million per "**Occurrence**."[1] (R. V5, C2307 [A48].) The Starr policies provide excess coverage with a liability limit of $10 million per "**Occurrence**." (R. V5, C2311 [A52].) The Starr

[1] Terms that are defined in the policies appear in the policies in boldface type. They are reproduced using the same typeface in this brief.

policies generally follow the terms and conditions of the Illinois Union policies. (R. V5, C2311 [A52], C2522.)

The Illinois Union and Starr policies cover the City's liability for damages due to claims first arising out of an **"Occurrence** happening during the **Policy Period**" for "**Personal Injury** *** taking place during the **Policy Period**." (R. V5, C2310 [A51], C2450.) The policies define "**Occurrence**" to mean "those offenses specified in the **Personal Injury** Definition." (R. V5, C2309 [A50], C2440.) The policies define "**Personal Injury**" to mean various "offenses," including "malicious prosecution." (R. V5, C2310 [A51], C2441.) The policies also state that "[a]ll damages arising out of substantially the same **Personal Injury** regardless of frequency, repetition, the number of kind of offenses, or number of claimants, will be considered as arising out of one **Occurrence**." (R. V5, C2309 [A50], C2440.)

Sanders and the City Sue Illinois Union and Starr for Coverage

Illinois Union and Starr denied coverage for Sanders's lawsuit. (R. V5, C2313 [A54].) On February 23, 2016, the City sued Illinois Union and Starr, claiming breach of contract. (R. V1, C41-73.) After the City settled with Sanders, Sanders joined the City as a plaintiff, and they together filed an amended complaint seeking to recover the unpaid $10 million balance of the $15 million consent judgment in the underlying case, plus the sums the City paid to settle and defend Sanders's lawsuit. (R. V5, C2295-97 [A36-38], C2321-35 [A62-A76].)

The Circuit Court Dismisses Sanders's and the City's Complaint

Illinois Union and Starr moved to dismiss the complaint under section 2-619(a)(9) of the Code of Civil Procedure (Code) (735 ILCS 5/2-619(a)(9)), arguing that Sanders's

lawsuit did not trigger coverage because the "offense" of "malicious prosecution" took place in 1994 when Sanders was arrested and charged, and therefore no "**Occurrence**" or "**Personal Injury**" happened while their policies were in effect. (R. V5, C2602-16.) In response, Sanders and the City argued that the "offense" of "malicious prosecution" occurred in 2014, when Sanders was exonerated. (R. V6, C3040-49.) Alternatively, Sanders and the City argued that a separate "offense" of "malicious prosecution" occurred at each of Sanders's retrials in 2013 and 2014. (R. V6, C3049-57.)

The circuit court granted Illinois Union's and Starr's motion, concluding that "the triggering event" under the policies was "the institution of the malicious prosecution and injury to Sanders, not his exoneration." (R. V6, C3087 [A35].) The circuit court also rejected Sanders's and the City's arguments that separate "offenses" of "malicious prosecution" occurred at each retrial. Instead, the circuit court concluded that "a claim for malicious prosecution *** triggers only the policy in effect at the time the charges are filed." (R. V6, C3087 [A35].)

The Appellate Court Reverses in a Two-to-One Decision

The appellate court reversed in a two-to-one decision. *Sanders*, 2019 IL App (1st) 180158. (A16.) The majority concluded that "the offense of malicious prosecution only happens once all of the elements of the tort are met." *Id.* ¶ 31. (A16.) The majority thus held that "the coverage trigger was Sanders's exoneration in 2014," within the policy periods of the Illinois Union and Starr policies. *Id.* (A16.) Having reached that conclusion, the majority did not address Sanders's and the City's alternative argument that Sanders's retrials were additional triggers for coverage. *Id.* ¶ 32. (A16.)

Presiding Justice Mason dissented, concluding that "the malicious prosecution of Sanders happened in 1994 when he was wrongfully charged with murder; it did not happen in either 2013, when he was retried, or in 2014, when after his third trial, he was acquitted." *Id.* ¶ 37 (Mason, J., dissenting). (A16-17.) Justice Mason reasoned that "offense" refers to "the wrongful conduct or unlawful act," *i.e.*, the City's conduct in causing false criminal charges to be filed against Sanders, rather than the "completed tort that triggers the running of the statute of limitations and the concomitant right to sue." *Id.* ¶ 40. (A18.) Justice Mason also opined that Sanders's retrials were "not new and separate prosecutions" and, therefore, "were not independent occurrences triggering coverage." *Id.* ¶ 49. (A23-24.)

STANDARD OF REVIEW

The circuit court granted Illinois Union's and Starr's motion to dismiss under Code section 2-619(a)(9), which permits involuntary dismissal where "the claim asserted against defendant is barred by other affirmative matter avoiding the legal effect of or defeating the claim." 735 ILCS 5/2-619(a)(9). An "affirmative matter" is "something in the nature of a defense which negates the cause of action completely or refutes crucial conclusions of law or conclusions of material fact contained in or inferred from the complaint." *Illinois Graphics Co. v. Nickum*, 159 Ill. 2d 469, 486 (1994). A motion to dismiss under section 2-619(a)(9) "admits well-pleaded facts but does not admit conclusions of law and conclusory factual allegations unsupported by allegations of specific facts." *Better Government Ass'n v. Illinois High School Ass'n*, 2017 IL 121124, ¶ 21.

In considering a dismissal under section 2-619(a)(9), this Court's task "is ultimately to consider whether 'the existence of a genuine issue of material fact should have

precluded the dismissal or, absent such an issue of fact, whether dismissal is proper as a matter of law.'" *Id.* (quoting *Kedzie & 103rd Currency Exchange, Inc. v. Hodge*, 156 Ill. 2d 112, 116 (1993)). The Court reviews a section 2-619(a)(9) dismissal *de novo*. *Id.* Additionally, the construction of the provisions of an insurance policy is a question of law for which the Court's review is *de novo*. *Pekin Insurance Co. v. Wilson*, 237 Ill. 2d 446, 455 (2010).

ARGUMENT

I. This Court Should Reverse the Appellate Court's Decision and Affirm the Circuit Court's Judgment Because No "Offense" of "Malicious Prosecution" Took Place "During" Any Illinois Union Policy Period.

Under the policies, Illinois Union agreed to insure the City against claims that arise out of an "**Occurrence**" (defined to mean "those offenses specified in the definition of **Personal Injury**") happening "during" the policy period for "**Personal Injury**" (defined to include various "offenses," including "malicious prosecution") taking place "during" the policy period. (R. V5, C2309-10 [A50-51], C2440-41, C2450.) In other words, Illinois Union agreed to cover liability for an "offense" of "malicious prosecution" only if the "offense" occurred while the policies were in effect.

In this case, the "offense" of "malicious prosecution" took place in 1994, when the City's police officers framed Sanders and caused false criminal charges to be filed against him maliciously and without probable cause. No "offense" happened in 2014, when Sanders was acquitted, or in 2013, when Sanders was retried on the same criminal charges. The circuit court therefore properly dismissed Sanders's and the City's complaint, and the appellate court erred when it reversed the circuit court's judgment. Consequently, this Court should reverse the appellate court's decision and affirm the circuit court's judgment.

A. The "Offense" of "Malicious Prosecution" Took Place in 1994, When the City's Police Officers Framed Sanders and Caused Criminal Charges to Be Filed Against Him Maliciously and Without Probable Cause.

1. Illinois Courts Interpret Insurance Policy Terms in Accordance With Their Plain, Ordinary, and Popular Meaning.

An insurance policy is a contract, which a court interprets according to the rules applicable to contract interpretation. *Thounsavath v. State Farm Automobile Insurance Co.*, 2018 IL 122558, ¶ 17. In doing so, "[a] court's primary function is to ascertain and give effect to the intention of the parties, as expressed in the policy language." *Id.*

"In order to ascertain the meaning of the policy's language and the parties' intent, the court must construe the policy as a whole and 'take into account the type of insurance purchased, the nature of the risks involved, and the overall purpose of the contract.'" *Travelers Insurance Co. v. Eljer Manufacturing, Inc.*, 197 Ill. 2d 278, 292 (2001) (quoting *American States Insurance Co. v. Koloms*, 177 Ill. 2d 473, 479 (1997)). "If the words of a policy are clear and unambiguous, 'a court must afford them their *plain, ordinary, and popular meaning*.'" (Emphasis in original.) *Id.* (quoting *Outboard Marine Corp. v. Liberty Mutual Insurance Co.*, 154 Ill. 2d 90, 108 (1992)). "Conversely, if the language of the policy is susceptible to more than one meaning, it is considered ambiguous and will be construed strictly against the insurer who drafted the policy and in favor of the insured." *Id.*

A court will not, however, "strain to find ambiguity in an insurance policy where none exists." *McKinney v. Allstate Insurance Co.*, 188 Ill. 2d 493, 497 (1999). Moreover, "[a] policy provision is not rendered ambiguous simply because the parties disagree as to its meaning." *Founders Insurance Co. v. Munoz*, 237 Ill. 2d 424, 433 (2010). Rather, an ambiguity will be found only "where the policy language is susceptible to more than one

reasonable interpretation." *Id.* A court is "not warranted, under the cloak of construction, in making a new contract for the parties." *Rich v. Principal Life Insurance Co.*, 226 Ill. 2d 359, 381 (2007) (quoting *Pioneer Life Insurance Co. v. Alliance Life Insurance Co.*, 374 Ill. 576, 590 (1940)).

2. The "Offense" of "Malicious Prosecution" Occurs When the Insured Engages in Wrongful Conduct That Results in the Commencement of a Malicious Criminal Prosecution Against the Claimant.

In this case, the policies' terms are clear and unambiguous. They cover liability for the "offense" of "malicious prosecution" only if the "offense" takes place "during" the policy period. The plain, ordinary, and popular meaning of "offense," as used in this context, "refers to a wrongful act or conduct committed during the policy period." *First Mercury Insurance Co. v. Ciolino*, 2018 IL App (1st) 171532, ¶ 30. That interpretation is supported by the dictionary definition of "offense," which indicates that the term "is primarily used to mean 'something that outrages the moral or physical senses'; 'the act of attacking'; 'the act of displeasing or affronting' or 'a breach of a moral or social code.'" *Id.* ¶ 30 (quoting *Offense*, Merriam-Webster Online Dictionary, https://www.merriam-webster.com/dictionary/offense (visited May 2, 2018)).

In a malicious prosecution action involving police misconduct, the wrongful act or "offense" occurs when a police officer engages in misconduct that causes false criminal charges to be filed against the claimant. *Beaman v. Freesmeyer*, 2019 IL 122654, ¶ 33. That is the point at which "the tortfeasor has invoked the judicial process against the victim maliciously and without probable cause, and the victim has thereby suffered damage." *St. Paul Fire & Marine Insurance Co. v. City of Zion*, 2014 IL App (2d) 131312, ¶ 26 (*City of Zion*) (quoting *Harbor Insurance Co. v. Central National Insurance*

Co., 211 Cal. Rptr. 902, 907 (Ct. App. 1985)). Accordingly, insurance coverage for the "offense" of malicious prosecution is triggered when the insured's conduct results in the commencement of a malicious criminal prosecution against the claimant. *First Mercury*, ¶ 30. See also *Town of Newfane v. General Star National Insurance Co.*, 784 N.Y.S.2d 787, 792-93 (App. Div. 2004) ("In referring to the 'offense,' the policy invokes the concept of legal injury or wrong," which occurs "when the prosecution [is] instituted, allegedly without probable cause.").

3. Interpreting "Offense" to Refer to the Insured's Wrongful Conduct Is Consistent With the Intended Operation of Occurrence-Based Policies.

Interpreting "offense" to refer to the insured's wrongful act is consistent with the intended operation of occurrence-based policies like Illinois Union's. "In an occurrence-based policy, coverage is triggered by an act or injury that occurs during the policy period." *Indian Harbor Insurance Co. v. City of Waukegan*, 2015 IL App (2d) 140293, ¶ 32 (*Indian Harbor*). "A typical occurrence-based policy, containing multiple references to coverage for occurrences or offenses happening during the policy period, reflects the intent to insure only for the insured's acts or omissions that happen during a policy period." *Id.* ¶ 33.

"[A] maliciously prosecuted criminal defendant suffers injury and damage immediately upon being prosecuted." *City of Zion*, 2014 IL App (2d) 131312, ¶ 26. Accordingly, an insured would reasonably expect coverage under an occurrence-based policy "if the insured's conduct in instituting [a malicious] prosecution took place during the covered period." *Zook v. Arch Specialty Insurance Co.*, 784 S.E.2d 119, 123 (Ga. Ct. App. 2016).

4. Interpreting "Offense" to Refer to the Insured's Wrongful Conduct Is in Accord with the Overwhelming Weight of Authority in Illinois and Elsewhere.

Interpreting "offense" to refer to the insured's wrongful conduct is also in accord with the overwhelming weight of authority in Illinois and elsewhere. In Illinois, the appellate court on four prior occasions has held that a malicious-prosecution action triggers coverage under the policy in effect when the criminal charges were commenced, and this Court denied leave to appeal each time. *First Mercury*, 2018 IL App (1st) 171532, ¶ 35, *leave to appeal denied*, No. 123695 (Ill. Sept. 26, 2018); *County of McLean v. States Self-Insurers Risk Retention Group, Inc.*, 2015 IL App (4th) 140628, ¶ 4, *leave to appeal denied*, No. 119494 (Ill. Sept. 30, 2015); *Indian Harbor*, 2015 IL App (2d) 140293, ¶ 17, *leave to appeal denied*, Nos. 118830, 118857 (Ill. May 27, 2015); *City of Zion*, 2014 IL App (2d) 131312, ¶ 1, *leave to appeal denied*, No. 118373 (Ill. Jan. 28, 2015). In two of those cases, the policies specifically covered the "offense" of "malicious prosecution" occurring "during" the policy period, just like Illinois Union's policies in this case. *First Mercury*, 2018 IL App (1st) 171532, ¶ 35; *County of McLean*, 2015 IL App (4th) 140628, ¶¶ 30-31. At least one federal court applying Illinois law has also reached that conclusion. *Selective Insurance Co. of South Carolina v. City of Paris*, 681 F. Supp. 2d 975, 982-83 (C.D. Ill. 2010).

Likewise, in other jurisdictions, "[m]ost courts that have addressed the issue have held that the commencement of a malicious prosecution is the event that triggers insurance coverage." *City of Zion*, 2014 IL App (2d) 131312, ¶ 19. This precedent includes cases in over a dozen jurisdictions in which courts have specifically held that the "offense" of "malicious prosecution" occurs when the underlying malicious prosecution is commenced. *Genesis Insurance Co. v. City of Council Bluffs*, 677 F.3d 806, 814-15

(8th Cir. 2012) (Iowa law); *TIG Insurance Co. v. City of Elkhart*, 122 F. Supp. 3d 795, 806 (N.D. Ind. 2015); *Selective Insurance Co. of the Southeast v. RLI Insurance Co.*, No. 5:12-cv-02126, 2015 WL 4250364, at *9 (N.D. Ohio July 13, 2015); *North River Insurance Co. v. Broward County Sheriff's Office*, 428 F. Supp. 2d 1284, 1290 (S.D. Fla. 2006); *Southern Maryland Agricultural Ass'n v. Bituminous Casualty Corp.*, 539 F. Supp. 1295, 1302 (D. Md. 1982); *Harbor Insurance*, 211 at 906; *S. Freedman & Sons, Inc. v. Hartford Fire Insurance Co.*, 396 A.2d 195, 199 (D.C. 1978); *Zook*, 784 S.E.2d at 123-24; *Billings v. Commerce Insurance Co.*, 936 N.E.2d 408, 413-14 (Mass. 2010); *American Family Mutual Insurance Co. v. McMullin*, 869 S.W.2d 862, 864 (Mo. 1994); *Paterson Tallow Co. v. Royal Globe Insurance Cos.*, 444 A.2d 579, 586 (N.J. 1982); *Town of Newfane*, 784 N.Y.S.2d at 791-92; *Consulting Engineers, Inc. v. Insurance Co. of North America*, 710 A.2d 82, 88 (Pa. Super. Ct. 1998).

Interpreting the instant policies in the same manner is, therefore, not only consistent with the policy's terms, but also "assists in the development of a uniform national rule, an important consideration in view of the interstate nature of insurance." *City of Erie, Pa. v. Guaranty National Insurance Co.*, 109 F.3d 156, 163 (3d Cir. 1997). The decision of the appellate court in the present case puts Illinois at odds with the rule developed in nearly every other jurisdiction. See *infra* at 28 (explaining that Louisiana is the only jurisdiction not to hold that coverage for malicious prosecution is triggered by the commencement of the malicious prosecution).

Based on the above, in this case, the "offense" of "malicious prosecution" took place in 1994, when false criminal charges were filed against Sanders based on City police officers' egregious and calculated misconduct. At that point, the City invoked the

judicial process against Sanders maliciously and without probable cause, and Sanders thereby suffered damage. *First Mercury*, 2018 IL App (1st) 171532, ¶ 35 (holding the "offense" of "malicious prosecution" was "the misconduct allegedly committed by [the insured] leading to [the claimant's] *** plea and conviction"). Accordingly, the "offense" occurred on that date.

B. No "Offense" of "Malicious Prosecution" Occurred in 2014, When Sanders Was Acquitted.

The majority below concluded that the "offense" of "malicious prosecution" occurred not in 1994, when the malicious prosecution was commenced, but in 2014, when Sanders was acquitted. *Sanders*, 2019 IL App (1st) 180158, ¶ 21. (A9-10.) The majority reasoned that "offense" "refers to the completed, legal cause of action of malicious prosecution," which requires proof of exoneration before allowing a claimant to sue for damages. *Id.* (A9-10.) The majority thus held that the "offense" did not occur until Sanders was exonerated because that is when his cause of action accrued under tort law. *Id.* (A9-10.)

The majority's holding was incorrect. For the reasons discussed below, no "offense" of "malicious prosecution" occurred in 2014, when Sanders was acquitted.

1. The Appellate Court Majority Improperly Conflated the Occurrence of the "Offense" for Purposes of Triggering Insurance Coverage With the Accrual of a Cause of Action Under Tort Law.

First, the majority improperly conflated (a) the occurrence of the "offense" for purposes of triggering a tortfeasor's insurance coverage with (b) the accrual of a cause of action against the tortfeasor under tort law. The policies do not speak of the date upon which an action may be brought, but of when the "offense" of "malicious prosecution" actually occurred. Nothing in the policies indicates that an "offense" requires the

fulfillment of all elements of the civil tort cause of action. *First Mercury*, 2018 IL App (1st) 171532, ¶ 31. See also *Town of Newfane*, 784 N.Y.S.2d at 792 (observing that the date upon which a cause of action accrues does not determine the trigger date for insurance coverage because "the policy speaks not of the date upon which an action could have been brought or the damages fully ascertained, but of when the 'offense [was] committed'").

Indeed, Illinois courts have recognized that "the time of occurrence in insurance law is different from the time of accrual in tort law." *St. Paul Fire & Marine Insurance Co. v. City of Waukegan*, 2017 IL App (2d) 160381, ¶ 48 (*City of Waukegan*). "In insurance law, the time of occurrence is used to determine when the operative terms of the policy provide coverage." *Id.* "In tort law, the time of accrual is used to determine when the statute of limitations begins to run," which is "a separate consideration." *Id.* Thus, the time of accrual is not determinative of when an "offense" occurs for purposes of triggering insurance coverage. *Id.* See also *City of Erie,* 109 F.3d 156 at 161 ("Statutes of limitation and triggering dates for insurance purposes serve distinct functions and reflect different policy concerns. *** Because of this fundamental difference in purpose, courts have consistently rejected the idea that they are bound by the statutes of limitations when seeking to determine when a tort occurs for insurance purposes.").

In that regard, it bears noting that the tort of malicious prosecution is unique. *City of Zion*, 2014 IL App (2d) 131312, ¶ 22. For most torts, "the sustaining of damage is the final element that marks the accrual of the cause of action; thus, the occurrence triggering insurance coverage is simultaneous with the accrual of the cause of action." *Id.* "In the malicious-prosecution context, by contrast, the sustaining of damages is not the final

element." *Id.* "Rather, the cause of action accrues when the criminal proceeding has been favorably terminated." *Id.* Hence, unlike most torts, a tort cause of action for malicious prosecution may not accrue until years or even decades after the actual tortious act and injury take place.

Yet, the element of favorable termination "is not part of the wrong committed by the prosecuting plaintiff." *Harbor Insurance*, 211 Cal. Rptr. at 1036. "A malicious prosecution action is a civil tort brought by a plaintiff 'for recovery of damages which have proximately resulted to person, property or reputation from a previous unsuccessful civil or criminal proceeding, *which was prosecuted without probable cause and with malice*.'" (Emphasis added.) *Beaman*, 2019 IL 122654, ¶ 23 (quoting *Freides v. Sani-Mode Manufacturing Co.*, 33 Ill. 2d 291, 295 (1965)). Thus, a claimant "can secure a favorable termination and yet fail to prove that the insured is liable." *S. Freedman & Sons*, 396 A.2d at 199. "Moreover, in most criminal matters, the original criminal complainant quickly loses control of the prosecution to the pertinent prosecutorial authorities, meaning that the fact of termination is likewise generally outside the control of the insured." *Town of Newfane*, 784 N.Y.S.2d at 793.

The favorable-termination requirement, instead of being part of the wrong, "constitutes a precondition for the cause of action because the defendant's success in the malicious action refutes a presumption of probable cause that would otherwise appertain." *Harbor Insurance*, 211 Cal. Rptr. at 1036. In fact, the favorable-termination element is met *only* if the underlying case is terminated in a manner "that can give rise to an inference of lack of probable cause." *Cult Awareness Network v. Church of Scientology International*, 177 Ill. 2d 267, 277 (1997). The favorable-termination

requirement also "serves practical concerns of judicial economy, by forestalling unnecessary and unfounded actions and by facilitating proof of the remaining elements of the tort." *Harbor Insurance*, 211 Cal. Rptr. at 1037. See also *March v. Cacioppo*, 37 Ill. App. 2d 235, 246 (1962) (explaining the reasons for the favorable-termination requirement, including the necessity of rebutting the presumption of probable cause established by the underlying criminal judgment, prohibiting a collateral attack on the criminal judgment, establishing damages, and preventing inconsistency in the results of the two actions).

Accordingly, "[a]lthough favorable termination serves to confirm the element of lack of probable cause, the focus of the wrong is upon the [insured's] institution of the suit, with malice and without such probable cause." *Harbor Insurance*, 211 Cal. Rptr. at 907. In other words, "the 'essence,' 'gist,' or 'focus' of malicious prosecution is the filing of the underlying charges," not their termination in a manner favorable to the accused. *City of Erie*, 109 F.3d at 160. "The time interval for seeking a redress of the wrong of malicious prosecution in the form of a suit to recover money damages is due to the need of awaiting a favorable termination of the criminal proceeding." *Muller Fuel Oil Co. v. Insurance Co. of North America*, 232 A.2d 168, 174 (N.J. Super. Ct. App. Div. 1967). "But the tortious act and injury are a [f]ait accompli." *Id.* The cause of action does not accrue until favorable termination, but from the insured's and the claimant's standpoint, the "offense" occurs upon commencement of the malicious action. *Harbor Insurance*, 211 Cal. Rptr. at 907.

2. Interpreting "Offense" to Encompass Favorable Termination Distorts the Meaning of the Term and Is Contrary to the Intended Operation of an Occurrence-Based Policy.

The majority's decision was also incorrect because interpreting "offense" to encompass favorable termination of the malicious prosecution "distort[s] the common, popular meaning of what is meant by an 'offense.'" *First Mercury*, 2018 IL App (1st) 171532, ¶ 32. "It defies common sense to construe the exoneration of an innocent person as 'offensive' or wrongful conduct." *Id.* No "offense" occurs at that time. Rather, the dismissal of criminal charges marks "the beginning of the judicial system's *remediation* of whatever alleged 'offense' or 'personal injury' may have been suffered by [the claimant]." (Emphasis added.) *Town of Newfane*, 784 N.Y.S.2d at 792. See also *City of Zion*, 2014 IL App (2d) 131312, ¶ 23 (quoting *Town of Newfane*).

Interpreting "offense" to include exoneration is also inconsistent with the intended operation of an occurrence-based policy. It is unreasonable to infer that, upon issuing an occurrence-based insurance policy covering the "offense" of "malicious prosecution," an insurer intends to assume the risk of liability for damages resulting from malicious prosecutions that may have occurred long before the policy was issued. *Town of Newfane*, 784 N.Y.S.2d at 794. Such an inference "strain[s] logic" because "it would hold that a policy could be retroactively applied to activities taken twenty years earlier, and would impose upon [the insurer] a risk based on the fortuitous date of exoneration as opposed to the date when the damage first manifested itself, *i.e.*, the date of arrest, arraignment or incarceration." *City of Paris*, 681 F. Supp. 2d at 983. It is "inconceivable" that an insurer's calculation of premium for an occurrence-based policy includes an analysis of earlier prosecutions and the likelihood of malfeasance over the course of those prosecutions. *Id.*

Interpreting an occurrence-based policy in that manner would effectively change it "into something similar to a claims-made policy" because "the policy would cover prior acts or omissions that merely happen to accrue as a cause of action while the policy is in effect, just as a claims-made policy covers claims filed during a policy period, regardless of when the underlying acts or omissions occurred."[2] *Indian Harbor*, 2015 IL App (2d) 140293, ¶ 33. That is not consistent with the operation of an occurrence-based policy, which "reflects an intent to insure only for the insured's acts or omissions that happen during a policy period." *Id.*

3. Interpreting "Offense" to Trigger Coverage Upon Exoneration Has "Unwise Policy Implications."

Interpreting "offense" to trigger coverage upon exoneration, as the majority did below, also has "unwise policy implications." *City of Erie*, 109 F.3d at 160. On one hand, it "would give an unscrupulous tortfeasor license to foist its liability onto an unwary insurer, such as by procuring coverage for malicious prosecution at any time during the pendency of the criminal prosecution, even just prior to an anticipated acquittal or other dismissal." *Town of Newfane*, 784 N.Y.S.2d at 794. "Conversely, to afford coverage based upon a supposed delay between the initiation of the allegedly wrongful criminal prosecution and the commission of the 'offense' would allow an insurer to terminate coverage before incurring any liability for a claim of personal injury arising from a criminal prosecution initiated during the policy period." *Id.* The latter concern was

[2] "Unlike an occurrence-based policy, the discovery clause in a claims-made policy provides that coverage exists when an act or omission is discovered and brought to the attention of the insurer during the policy period, regardless of when the act or injury occurred." *Indian Harbor*, 2015 IL App (2d) 140293, ¶ 32. See also *Insurance*, Black's Law Dictionary (11th ed. 2019) (defining "claims-made insurance" as "[i]nsurance that indemnifies against all claims made during a specified period, regardless of when the incidents that gave rise to the claims occurred").

highlighted by Justice Mason in her dissent below, where she observed that the majority's decision "would invite insurers to selectively decline to write or renew insurance once the insured's potential liability for malicious prosecution was raised but before the right to sue – the trigger of coverage according to the majority – accrued." *Sanders*, 2019 IL App (1st) 180158, ¶ 48 (Mason, J., dissenting). (A22.)

The facts of this case illustrate that point. Sanders was charged, tried, and convicted in 1994, based on the City's misconduct in framing him for crimes he did not commit. Sanders sued the City on January 11, 2013, *before* he was exonerated, claiming that the City's police officers violated his right to due process by fabricating and withholding evidence. (R. V5, C2306 [A47].) Then, on August 5, 2014, after Sanders was acquitted, he amended his complaint to add a claim for malicious prosecution based on the same misconduct. (R. V5, C2306 [A47].)

Triggering coverage upon exoneration, rather than commencement of the malicious action, would create a moral hazard under standard occurrence-based policies. The City knew long before the exoneration (certainly by January 2013 at the latest) that Sanders was accusing its police officers of misconduct that could give rise to a claim for malicious prosecution. Anticipating an exoneration, the City could at that time have purchased new insurance coverage that would be triggered upon a later exoneration. Conversely, an existing carrier, upon learning that an exoneration was looming, could try to cancel or decline to renew its existing policy, eliminating coverage for the malicious prosecution claim that followed Sanders's exoneration.[3] Other carriers might decline to

[3] Illinois law permits an insurer to cancel a casualty policy if "[t]he risk originally accepted has measurably increased." 215 ILCS 5/143.16a. An insurer may decide not to renew an expiring policy for any reason, so long as proper notice is provided. 215 ILCS

issue a policy or specifically exclude coverage for any malicious prosecution action based on the City's prior conduct.

An exoneration trigger also creates another, related problem. If the "offense" does not occur until exoneration, but the claimant nevertheless files suit before the underlying prosecution has ended (as Sanders did here), the insurer can disclaim coverage and refuse to defend because no "offense" has occurred and coverage has not yet been triggered. The lawsuit might be premature because the underlying prosecution remains ongoing, but the insured would still be required to defend itself in the meantime. That would be true even though the insured had insurance when (a) it engaged in the tortious conduct giving rise to the claim and (b) the claimant suffered injury. Courts have cited this point as another reason why "the date of favorable termination cannot be regarded as equivalent to the date that the offense is committed.'" *S. Freedman & Sons*, 396 A.2d at 199. See also *Town of Newfane*, 784 N.Y.S.2d at 793 (same).

4. The Appellate Court Majority's Reliance on Black's Law Dictionary to Support Its Interpretation of the Policy Was Misplaced.

Notwithstanding the above, the majority below relied on a definition of "offense" from Black's Law Dictionary, which includes among its definitions "[a] violation of the law; a crime, often a minor one," to support its conclusion that "offense" refers to the completed tort, including exoneration, rather than the insured's tortious conduct. *Sanders*, 2019 IL App (1st) 180158, ¶ 4 (quoting *Offense*, Black's Law Dictionary (10th ed. 2014)). (A2.) As Justice Mason pointed out in her dissent, however, Black's Law Dictionary also defines "offense" as "an intentional unlawful act that causes injury or loss

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5/147a. Illinois Union's policies contained provisions consistent with Illinois law in that regard. (R. V5, C2473-74.)

to another and that gives rise to a claim for damages." *Id.* ¶ 39 (Mason, J., dissenting). (A17-18.) Justice Mason also observed that the Merriam-Webster dictionary similarly defines "offense" as "something that outrages the moral or physical senses"; "the act of attacking"; "the act of displeasing or affronting"; or "a breach of moral or social code." *Id.* (quoting Merriam-Webster Online Dictionary, https://www.merriam-webster.com/dictionary/offense (visited Jan. 7, 2019)). (A17-18.) Indeed, as previously noted, the appellate court in *First Mercury* cited Merriam-Webster's definition of "offense" to support its conclusion that the term "refers to a wrongful act or conduct committed during the policy period, regardless of whether the elements of a tort have accrued." 2018 IL App (1st) 171532, ¶ 30.

More importantly, all of these definitions, including the one cited by the majority, support the conclusion that the "offense" is the insured's wrongful conduct or unlawful act. As Justice Mason explained, "It was a 'violation of the law' for [the City's] police officers to bring false murder charges against Sanders, just as those false charges constituted an 'intentional unlawful act' and 'something that outrages the moral senses.'" *Sanders*, 2019 IL App (1st) 180158, ¶ 40 (Mason, J. dissenting). (A18.) Moreover, "[n]one of these definitions associates 'offense' with a completed tort that triggers the running of the statute of limitation and the concomitant right to sue." *Id.* (A18.) Accordingly, the majority's reliance on Black's Law Dictionary to conclude that no "offense" occurred until Sanders was exonerated was misplaced.

5. The Appellate Court Majority's Attempt to Support Its Decision Based on the Policy's Reference to Covered "Offenses" by Their "Proper, Legal Names" Was Without Merit.

The majority also supported its decision by stating that the list of "offenses" in the policies "refers exclusively to legal causes of action by their proper, legal names, *e.g.*,

false arrest, false imprisonment, malicious prosecution, libel, defamation, wrongful eviction, *etc.*," rather than "refer[ring] to the underlying wrongful acts themselves, *i.e.,* arresting, imprisoning, or prosecuting someone without probable cause; telling lies about someone; or physically removing someone from property." *Sanders*, 2019 IL App (1st) 180158, ¶ 19. (A8-9.) The majority reasoned that "[t]he policies' reference to the offenses by their proper, legal names instead of by their underlying wrongful conduct makes clear that coverage is triggered by the completed cause of action (in this case, upon Sanders's exoneration) and not merely by the underlying wrongful conduct." *Id.* (A9.)

The majority's reasoning was flawed in that regard as well, for reasons Justice Mason aptly explained. "First, virtually every liability policy providing coverage for such offenses describes them by their 'proper, legal names'"; yet, "no court has used that common language to equate the 'occurrence' of those offenses with the accrual of a claimant's right to sue." *Id.* ¶ 46 (Mason, J., dissenting). (A21.) To the contrary, courts have repeatedly stressed that "the time of the occurrence in insurance law is different from the time of accrual in tort law." *First Mercury*, 2018 IL App (1st) 171532, ¶ 31 (quoting *City of Waukegan*, 2017 IL App (2d) 160381, ¶ 48). See also *County of McLean*, 2015 IL App (4th) 140628, ¶ 33 ("[P]laintiffs erroneously equate the 'personal injury' of 'malicious prosecution' (as the *policy* uses those terms) with the common-law elements of the tort of malicious prosecution. However, the two are not the same.").

"Second, as a practical matter, it would be impossible to draft an insurance policy that described all the possible wrongful acts that could give rise to a claim for such offenses." *Sanders*, 2019 IL App (1st) ¶ 47 (Mason, J., dissenting). (A21.) There are, in fact, innumerable ways in which an insured can commit the various offenses listed in the

policy. For example, malicious prosecution "may be committed by the police, the complainant in a criminal case, the prosecution, or a civil litigant," and it can involve, among other things, "manufacturing of false evidence, the procurement of false testimony, the withholding of evidence, or the pursuit of a case, civil or criminal, without factual or legal justification or for an improper purpose." *Id.* (A22.) "A policy that attempted to articulate all of the wrongful acts that could possibly give rise to a claim for one of the enumerated offenses would be verbose in the extreme and, for that reason, unintelligible." *Id.* (A22.) Thus, the policies' reference to the enumerated offenses by their "proper, legal names" does not evince an intent to tie coverage to the date of accrual under tort law, rather than the date of the wrongful act.

6. The Appellate Court Majority's Attempt to Distinguish Prior Case Law Was Incomplete and Erroneous.

The majority below also attempted to distinguish prior case law, including *First Mercury*, by stating that the instant policies are triggered by the "offense" "happening" during the policy period, rather than the "offense" being "committed" during the policy period. *Sanders*, 2019 IL App (1st) 180158, ¶ 27. (A14.) The majority reasoned that "the word 'commit' denotes an affirmative, deliberative act by a person, whereas the use of the word 'happen' suggests the completion of a process or the passive coming into existence of something." *Id.* ¶ 28. (A14.) The majority thus concluded that the policies' use of the word "happening," rather than "committed," "supports a conclusion that the parties intended 'offense' to refer to the completed tort of malicious prosecution and not the initiation of the prosecution." *Id.* (A14-15.)

As Justice Mason observed, the majority's reasoning was erroneous here, too, because there is "no meaningful difference" between when an "offense" is "committed"

and when it "happens." *Id.* ¶ 44 (Mason, J., dissenting). (A20.) Indeed, in *Indian Harbor*, the appellate court specifically explained that "[a] typical occurrence-based policy, containing multiple references to coverage for occurrences or *offenses happening* during the term of the policy, reflects the intent to insure only for the insured's acts or omissions that happen during the term of the policy." (Emphasis added.) 2015 IL App (2d) 140293, ¶ 33. Thus, the policies' use of the term "happening," rather than "committed," did not provide the majority with a proper basis to reach the "polar opposite" conclusion with respect to trigger of coverage. *Sanders*, 2019 IL App (1st) 180158, ¶ 44 (Mason, J., dissenting). (A21.)

Moreover, to trigger coverage under the subject policies, the offense of malicious prosecution also had to "take place" during the policy period. (R. V5, C2310 [A51], C2450.) The majority, however, failed to analyze that phrase in its attempt to distinguish prior case law. Nevertheless, the majority implicitly acknowledged that there is no difference between the phrase "take place" and the word "committed" by equating the two when discussing the *First Mercury* policy (which used the word "committed," rather than the phrase "take place"). Specifically, the majority observed that, "[l]ike the present case, the insurance policy [in *First Mercury*] required that the 'offense' of malicious prosecution *take place* within the policy period." (Emphasis added.) *Sanders*, 2019 IL App (1st) 180158, ¶ 25. (A13.) Consequently, the majority's attempt to distinguish *First Mercury* based on purported differences in the policies' terms was both incomplete (because the majority failed to consider the phrase "take place") and erroneous (because there is, in fact, no meaningful difference in the policies' terms).

7. The Appellate Court Majority's Conclusion Was Out of Step with Existing Precedent in Illinois and Elsewhere.

Last, the majority's conclusion was out of step with not only Illinois precedent, but also case law in almost every other jurisdiction that has decided this issue. In fact, Illinois Union is aware of only one jurisdiction which currently holds that exoneration is the trigger of coverage for malicious prosecution. *Sauviac v. Dobbins*, 949 So. 2d 513, 519 (La. Ct. App. 2006). The *Sauviac* court's analysis of the issue was scant, however, and it made the mistake of equating the time of the occurrence for purposes of triggering insurance coverage with the time of accrual under tort law. For those reasons, courts in this state and elsewhere have declined to follow *Sauviac*.[4] *City of Zion*, 2014 IL App (2d) 131312, ¶ 33. See also *Selective Insurance Co. of the Southeast*, 2015 WL 4250364, at *7-*9; *Zook*, 784 S.E.2d at 122; *City of Lee's Summit v. Missouri Public Entity Risk Management*, 390 S.W.3d 214, 221 (Mo. Ct. App. 2012).

[4] Until *City of Zion* was decided in 2014, Illinois was perceived as following an exoneration trigger, based on *Security Mutual Casualty Co. v. Harbor Insurance Co.*, 65 Ill. App. 3d 198 (1979), *rev'd*, 77 Ill. 2d 446 (1979). In *Security Mutual*, the appellate court held that coverage was not triggered until the malicious prosecution was favorably terminated but based its decision on the elements of the tort rather than the policy's terms. *Id.* at 205-06. This Court reversed *Security Mutual* on other grounds, but other courts nevertheless cited *Security Mutual* as Illinois law because it was considered "the only Illinois appellate decision on this issue." *American Safety Casualty Insurance Co. v. City of Waukegan*, 678 F.3d 475, 478-79 (7th Cir. 2012). All that changed, however, when the appellate court decided *City of Zion*, where the court criticized and declined to follow *Security Mutual* because it had "looked solely to the elements of a cause of action for malicious prosecution in determining which occurrence triggered insurance coverage." *City of Zion*, 2014 IL App (2d) 131312, ¶ 18. See also *Indian Harbor*, 2015 IL App (2d) 140293, ¶¶ 15-16 (repeating *City of Zion*'s criticism of *Security Mutual*). Courts have since relied on *City of Zion* and its progeny for the proposition that, under Illinois law, "coverage for a malicious prosecution claim is triggered at the time the malicious prosecution is initiated, not at the time the tort accrues." *Westport Insurance Corp. v. City of Waukegan*, No. 14-cv-419, 2017 WL 4046343, at *2 (N.D. Ill. Sept. 3, 2017) (citing *County of McLean* and *Indian Harbor*); See also *City of Elkhart*, 122 F. Supp. 3d at 802 (citing *Indian Harbor* and *City of Zion*); *Zook*, 784 S.E.2d at 123 n.15 (citing *City of Zion*).

Based on the above, the appellate court majority's conclusion in this case that an "offense" of "malicious prosecution" took place in 2014, when Sanders was exonerated, was in error.

C. No "Offense" of "Malicious Prosecution" Took Place in 2013 or 2014 When Sanders was Retried.

Sanders and the City have alternatively argued that, even if "offense" refers to the City's wrongful conduct in commencing Sanders's criminal prosecution, a separate "offense" of "malicious prosecution" occurred at each of Sanders's retrials in 2013 and 2014. That argument, however, has no merit.

The appellate court rejected an identical argument in *City of Waukegan*, 2017 IL App (2d) 160381, ¶¶ 36-37, and its reasoning applies with equal force here. In that case, city police officers arrested Juan Rivera and charged him with rape and murder in 1992. *Id.* ¶ 3. Rivera was tried and convicted on three separate occasions from 1993 to 2009, but each conviction was vacated. *Id.* ¶¶ 3-5 After Rivera's third conviction was vacated, he was released from prison and sued the city for malicious prosecution and civil-rights violations. *Id.* ¶¶ 5-6.

The city sought coverage under various policies, including policies in effect during Rivera's third trial. *Id.* ¶ 11. The policies covered malicious prosecution and civil-rights violations if the injury or damage happened while the policies were in effect. *Id.* ¶¶ 12-13. The insurers denied coverage on the grounds that their policies were not triggered by Rivera's claims, and the circuit court agreed, entering summary judgment in their favor. *Id.* ¶ 16.

The city appealed and argued that the policies were triggered by Rivera's retrial during the policy period. *Id.* ¶ 36. In support, the city contended that, "when a conviction

is reversed, 'the slate has been wiped clean and the conviction is wholly nullified, and a defendant is not placed in double jeopardy at a retrial.'" *Id.* The city further contended that, since Rivera was "convicted anew in 2009," his third conviction could not be "deemed a continuation of his previous conviction." *Id.*

The appellate court rejected the city's argument. *Id.* In doing so, the court reasoned that, "[u]nder Illinois law, a prosecution is defined as 'all legal proceedings by which a person's liability for an offense is determined, commencing with the return of the indictment or the issuance of the information, and including the final disposition of the case upon appeal." *Id.* (quoting 720 ILCS 5/2-16). The court thus observed that "Rivera's second and third trials were continuations of his wrongful prosecution, which increased his damages but were not new injuries." *Id.* Consequently, the court concluded that Rivera's claim "presented a 'single cause and therefore a single occurrence' [citation], which occurred long before the effective dates of the policies." *Id.* ¶ 48. See also *Indian Harbor*, 2015 IL App (2d) 140293, ¶ 40 (similarly concluding that the city's ongoing efforts to prosecute Rivera were "not new harmful acts," but were, instead, "the continuing effects of [the claimant's] arrest and ultimately his convictions of rape and murder); *City of Zion*, 2014 IL App (2d) 131312, ¶ 26 ("Although continued proceedings after the commencement of the action will increase and aggravate the defendant's damages, the initial wrong and consequent harm have been committed upon commencement of the action and initial impact thereof on the defendant.").[5]

[5] The "overwhelming majority of jurisdictions" have also "rejected variations of the multiple-trigger theory in wrongful conviction coverage cases." *City of Waukegan*, 2017 IL App (2d) 160381, ¶ 48. See, *e.g.*, *City of Erie*, 109 F.3d at 164-65; *Harbor Insurance*, 211 Cal. Rptr. at 908; *Billings*, 936 N.E.2d at 413; *Paterson Tallow*, 444 A.2d at 584 n.3; *Town of Newfane*, 784 N.Y.S.2d at 793-94; *Consulting Engineers*, 710 A.2d at 86-88.

The same reasoning applies in this case. Here, Sanders's retrials were not new and separate "offenses" of "malicious prosecution." Rather, they were retrials in the same malicious prosecution that was commenced in 1994. The "offense" of "malicious prosecution" therefore occurred once, when Sanders was charged, not during each individual trial (or any other proceeding that occurred in the course of the prosecution).

Finally, other policy language also supports this conclusion. The "**Occurrence**" definition states that "[a]ll damages arising out of substantially the same **Personal Injury** regardless of frequency, repetition, [or] the number or kind of offenses *** will be considered as arising out of one **Occurrence**." (R. V5, C2309 [A50], C2440.) Sanders's initial prosecution and retrials all arose out of the same false charges. Thus, Sanders's retrials in 2013 and 2014 were not separate "**Occurrences**" triggering coverage.

CONCLUSION

The "offense" of "malicious prosecution" occurred in 1994, when the City's police officers framed Sanders and caused criminal charges to be filed against him maliciously and without probable cause. The tortious act and injury both occurred at that time. No "offense" occurred in 2014, when Sanders was acquitted. Likewise, Sanders's retrials in 2013 and 2014 did not constitute separate "offenses" because they were continuations of the same criminal charges and malicious prosecution of those charges. Consequently, no "offense" of "malicious prosecution" occurred during any of Illinois Union's policy periods.

Based on the above, the circuit court properly dismissed Sanders's and the City's complaint against Illinois Union. The appellate court erred when it reversed the circuit court. Accordingly, this Court should reverse the appellate court and affirm the trial court's judgment dismissing Sanders's and the City's complaint.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that this brief conforms to the requirements of Rules 341(a) and (b). The length of this brief, excluding the pages contained in the Rule 341(d) cover, the Rule 341(h)(1) statement of points and authorities, the Rule 341(c) certificate of compliance, the certificate of service, and those matters to be appended to the brief under Rule 342(a), is 32 pages.

/s/ Christopher A. Wadley
Christopher A. Wadley

APPENDIX

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2019 IL App (1st) 180158
No. 1-18-0158

SECOND DIVISION
January 15, 2019

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

RODELL SANDERS and THE CITY OF CHICAGO HEIGHTS, Plaintiffs-Appellants, v. ILLINOIS UNION INSURANCE COMPANY and STARR INDEMNITY & LIABILITY COMPANY, Defendants-Appellees.	)	Appeal from the Circuit Court of Cook County. No. 16 CH 02605 The Honorable Celia Gamrath, Judge Presiding.

JUSTICE PUCINSKI delivered the judgment of the court, with opinion.
Justice Hyman concurred in the judgment and opinion.
Presiding Justice Mason dissented, with opinion.

OPINION

¶ 1 Plaintiffs, Rodell Sanders and City of Chicago Heights (City), appeal from the trial court's dismissal with prejudice of their second amended complaint pursuant to section 2-619(a)(9) of the Code of Civil Procedure (Code) (735 ILCS 5/2-619(a)(9) (West 2016)). On appeal, plaintiffs argue that the trial court erred in concluding that the insurance policies issued by defendants, Illinois Union Insurance Company (Illinois Union) and Starr Indemnity & Liability Company (Starr), did not provide coverage for Sanders's underlying claim of malicious prosecution against the City (*Sanders* suit). For the reasons that follow, we reverse and remand.

¶ 2 BACKGROUND

¶ 3 In the *Sanders* suit, filed in the federal court, Sanders brought, among others, a claim of malicious prosecution against the City and some of its employees. In it, Sanders alleged that members of the City's police department manipulated and coerced false witness identifications of Sanders as being involved in a December 1993 shooting. Sanders also alleged that members of the City's police department made false statements to prosecutors to encourage his prosecution, fabricated evidence, and withheld exculpatory information in connection with his prosecution for the shooting. As a result, Sanders alleged, he was wrongly convicted of murder, attempt (murder), and armed robbery arising out of that shooting

¶ 4 The *Sanders* suit ultimately settled for $15 million. Under the terms of the settlement, the City agreed to pay $2 million of the settlement and United National Insurance Company, the City's insurer at the time Sanders was initially charged with the crimes, agreed to pay $3 million. The City also assigned to Sanders its rights to pursue recovery from defendants, the City's other insurers.

¶ 5 Pursuant to that assignment, Sanders became a plaintiff in the present action, joined by the City. In their second amended complaint in the present action, plaintiffs alleged that Sanders was sentenced to 55 years' imprisonment on the murder conviction, to run consecutively to his 25-year sentence on the attempt (murder) conviction and concurrently with his 20-year sentence on the armed robbery conviction. In January 2011, Sanders's convictions were vacated and that ruling was affirmed by the Illinois Appellate Court in May 2012. *People v. Sanders*, 2012 IL App (1st) 110373-U. In 2013, Sanders was retried, which resulted in a mistrial. He was retried again in July 2014, at which time he was finally acquitted.

¶ 6 The second amended complaint in the present action further alleged that Illinois Union issued primary insurance policies to the City that were collectively in effect for the period of November 1, 2010, through November 1, 2014. Starr issued excess insurance policies to the City that collectively were in effect from November 1, 2011, through November 1, 2014.[1] Despite the City's repeated demands for coverage for the *Sanders* suit, Illinois Union and Starr denied coverage and refused to contribute to the settlement of the *Sanders* suit. As a result, plaintiffs alleged claims for breach of contract and improper claims practices and sought a declaratory judgment that defendants owed coverage under their respective policies for the claims made in the *Sanders* suit.

¶ 7 Defendants filed a motion to dismiss the second amended complaint pursuant to section 2-619(a)(9) of the Code (735 ILCS 5/2-619(a)(9) (West 2016)). In it, they argued that their policies did not provide coverage for the claims in the *Sanders* suit because the trigger for coverage under the policies was the filing of the criminal charges against Sanders, an act that took place before defendants' policies went into effect. Defendants further argued that the retrials of Sanders did not qualify as additional coverage triggers because they were simply continuations of the original 1994 prosecution. In response, plaintiffs argued that because defendants' policies provided coverage for the "offense" of malicious prosecution, the coverage trigger was not the filing of the criminal charges against Sanders but was, instead, the completed tort of malicious prosecution. Here, all of the elements of Sanders's claim for malicious prosecution were alleged to have been met upon his exoneration in 2014. The plaintiffs also argued that, even if coverage were triggered by the wrongful conduct of the City's police officers

[1]Plaintiffs attached to their second amended complaint only defendants' policies covering the period of November 1, 2012, through November 1, 2014, and focused primarily on those policies in their allegations against defendants.

and not Sanders's exoneration, then the retrials of Sanders, which occurred while defendants' policies were in effect, were additional triggers for coverage.

¶ 8 After a hearing on the matter, the trial court issued its memorandum opinion and order, granting defendants' motion to dismiss. In doing so, the trial court found that the language of the policies, in conjunction with existing case law, dictated the conclusion that coverage for a malicious prosecution claim under defendants' policies was triggered by the initiation of Sanders's prosecution, not his subsequent exoneration. The trial court also rejected plaintiffs' argument that the retrials of Sanders were additional triggers of coverage, instead concluding that they were merely a continuation of the original prosecution.

¶ 9 Following the trial court's dismissal of the second amended complaint, plaintiffs filed this timely appeal.

¶ 10 ANALYSIS

¶ 11 On appeal, plaintiffs argue that the trial court erred in dismissing the second amended complaint on the basis that the coverage trigger—the filing of the criminal charges against Sanders—occurred outside the effective dates of defendants' policies. Plaintiffs argue that the language of the policies requires a conclusion that coverage was not triggered until the tort of malicious prosecution was complete, *i.e.*, Sanders was exonerated, which occurred while defendants' policies were in effect. Alternatively, plaintiffs argue that even if it was the wrongful conduct of the City, and not the satisfaction of the elements of the malicious prosecution, that triggered coverage under defendants' policies, then Sanders's retrials during the effective dates of defendants' policies triggered coverage. For the reasons that follow, we conclude that coverage under the policies was triggered upon the completion of the tort of malicious prosecution, *i.e.*, Sanders's exoneration, which occurred while the policies were in effect.

Accordingly, the trial court's dismissal of plaintiffs' second amended complaint must be reversed and the matter remanded for further proceedings.

¶ 12 Defendants' motion to dismiss was brought pursuant to section 2-619(a)(9) of the Code (735 ILCS 5/2-619(a)(9) (West 2016)), which provides for the dismissal of a complaint on the basis that "the claim asserted against defendant is barred by other affirmative matter avoiding the legal effect of or defeating the claim." In making such a motion, the movant admits the legal sufficiency of the complaint but asserts that an affirmative defense or some other matter defeats the claims contained therein. *Van Meter v. Darien Park District*, 207 Ill. 2d 359, 367 (2003). We review dismissals under section 2-619(a)(9) *de novo*. *Id.* at 368.

¶ 13 The propriety of the trial court's dismissal of plaintiffs' second amended complaint turns on the interpretation of the insurance policies issued by defendants, namely, whether coverage under those policies is triggered by the initiation of the alleged malicious prosecution or the exoneration of Sanders. Although plaintiffs alleged in their second amended complaint that Illinois Union's policies covered the collective period of November 1, 2010, through November 1, 2014, and Starr's policies covered a collective period of November 1, 2011, through November 1, 2014, plaintiffs' focus on appeal is on defendants' policies covering the period of November 1, 2012, through November 1, 2014, the policies in effect during Sanders's retrials. Accordingly, our focus will be the same.

¶ 14 Our supreme court has summarized the principles governing our interpretation of insurance policies:

> "Because an insurance policy is a contract, the rules applicable to contract interpretation govern the interpretation of an insurance policy. [Citations.] Our primary function is to ascertain and give effect to the intention of the parties, as expressed in the

policy language. [Citations.] If the language is unambiguous, the provision will be applied as written, unless it contravenes public policy. [Citations.] The rule that policy provisions limiting an insurer's liability will be construed liberally in favor of coverage only applies where the provision is ambiguous. [Citations.] A policy provision is not rendered ambiguous simply because the parties disagree as to its meaning. [Citation.] Rather, an ambiguity will be found where the policy language is susceptible to more than one reasonable interpretation. [Citations.] While we will not strain to find an ambiguity where none exists [citation], neither will we adopt an interpretation which rests on 'gossamer distinctions' that the average person, for whom the policy is written, cannot be expected to understand [citation]." *Founders Insurance Co. v. Munoz*, 237 Ill. 2d 424, 433 (2010).

¶ 15 In its policies, Illinois Union agreed to the following:

> "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*." (Emphases in original.)

With respect to "Personal Injury," "Occurrence" is defined under the Illinois Union policies as "only those offenses specified in the *Personal Injury* Definition." (Emphasis in original.) The definition of "Personal Injury" provides:

> "*Personal Injury* means one or more of the following offenses:
>
> a. False arrest, false imprisonment, wrongful detention or malicious prosecution;

b. Libel, slander, defamation of character, or oral or written publication of material that violates a person's right of privacy, unless arising out of advertising activities in electronic chat rooms or bulletin boards;

c. Wrongful eviction from, wrongful entry into, or invasion of the right of private occupancy of a room, dwelling or premises that a person occupies by or on behalf of the owner, landlord or lessor, or by a person claiming to be acting on behalf of the owner, landlord or lessor." (Emphasis in original.)

¶ 16 The Starr policies, as excess policies, essentially follow the terms of the primary policies issued by Illinois Union. In other words, subject to specific terms and exclusions that are not relevant here, if coverage under the Illinois Union policies is triggered, excess coverage under the Starr policies is also triggered.

¶ 17 None of the parties dispute that the above provisions require the "offense" of malicious prosecution to take place during the relevant policy periods.[2] Rather, the dispute centers around when the "offense" of malicious prosecution is deemed to occur under the policies. According to plaintiffs, because the policies define an occurrence as the "offense" of malicious prosecution, the policies refer to the completed tort of malicious prosecution and, thus, the "offense" of malicious prosecution does not happen until all the elements of the tort of malicious prosecution are satisfied. In Sanders's situation, the tort elements of malicious prosecution were not complete until he was exonerated in 2014. See *Ferguson v. City of Chicago*, 213 Ill. 2d 94, 99 (2004) ("A cause of action for malicious prosecution does not accrue until the criminal proceeding on which it is based has been terminated in the plaintiff's favor."). At that point, according to plaintiffs, the

[2]The insuring agreement of the Illinois Union policies requires that the "*Occurrence* happen[ ] during the *Policy Period*." (Emphases in original.) An occurrence is any "offense" listed in the personal injury definition. The definition of personal injury lists malicious prosecution as one of the qualifying offenses. Thus, the offense of malicious prosecution must happen during the policy period.

offense of malicious prosecution "happen[ed]" and coverage was triggered under defendants' policies. In contrast, defendants argue that the "offense" of malicious prosecution is not the completed tort of malicious prosecution but is the offensive act of maliciously prosecuting someone, *i.e.*, charging someone with malice and without probable cause. Thus, coverage is triggered by initiation of the alleged malicious prosecution.

¶ 18 None of defendants' policies define the term "offense." In situations where an insurance policy does not define a term, that term is to be given its plain and ordinary meaning, and courts often refer to dictionaries in making this determination. *Muller v. Firemen's Fund Insurance Co.*, 289 Ill. App. 3d 719, 725 (1997). Black's Law Dictionary defines "offense" as "[a] violation of the law; a crime, often a minor one." Black's Law Dictionary (10th ed. 2014). This definition suggests that the term "offense" refers to the legal cause of action that arises out of wrongful conduct, not just the wrongful conduct itself. After all, crimes and other violations of law, like tort causes of action, are typically comprised of a number of elements, only one of which is the wrongful act itself. The crime, legal violation, and tort cause of action does not arise or exist until all those elements have been satisfied; thus, only upon completion of the final element is a wrongful act transformed into a crime or a tort.

¶ 19 Although defendants advance other definitions of "offense" that are more favorable to them, the other language of the Illinois Union policies supports a conclusion that the term "offense" refers to the legal cause of action for malicious prosecution, not the underlying wrongful conduct giving rise to a legal cause of action for malicious prosecution. As noted, the Illinois Union policies define "personal injury" by reference to a list of "offenses." Importantly, this list of offenses refers exclusively to legal causes of actions by their proper, legal names, *e.g.*, false arrest, false imprisonment, malicious prosecution, libel, defamation, wrongful eviction, etc.

Nowhere in the policies' list of offenses does it refer to the underlying wrongful acts themselves, *i.e.*, arresting, imprisoning, or prosecuting someone without probable cause; telling lies about someone; or physically removing someone from a property. The policies' reference to the offenses by their proper, legal names instead of by their underlying wrongful conduct makes clear that coverage is triggered by the occurrence of the completed cause of action (in this case, upon Sanders's exoneration) and not by merely the underlying wrongful conduct. See *Milwaukee Guardian Insurance, Inc. v. Taraska*, 236 Ill. App. 3d 973, 975 (1992) ("[T]he provisions of an insurance policy should be read and interpreted as an integrated whole, not as isolated parts.").

¶ 20 We believe such an interpretation is consistent with what the average person would understand to be covered under the Illinois Union policies. For the reasons discussed above, the average person, reading that the Illinois Union policies provided coverage for the "offenses" of false arrest, malicious prosecution, libel, wrongful eviction, etc., would believe that the policies provided coverage for the legal claims of false arrest, malicious prosecution, libel, wrongful eviction, etc. The average person would have no reason to think that although the "offenses" were identified by the proper, legal names of whole causes of action, they actually only were intended to refer to the underlying wrongful conduct. Thus, at the point the elements of those causes of actions were met, the average insured would believe that coverage is triggered. Where the term "offense" is coupled with the titles of legal causes of action and does not specifically refer to the base wrongful acts alone, to conclude otherwise would be to "adopt an interpretation which rests on 'gossamer distinctions' that the average person, for whom the policy is written, cannot be expected to understand." *Founders Insurance Co.*, 237 Ill. 2d at 433.

¶ 21 For the above reasons, we conclude that the plain and ordinary meaning of the term "offense," as it is used in relation to "malicious prosecution" in the Illinois Union policies, refers

to the completed, legal cause of action of malicious prosecution. The tort of malicious prosecution requires proof of five elements: "(1) the commencement or continuation by the defendant of an original judicial proceeding against the plaintiff; (2) termination of the original proceeding in favor of the plaintiff; (3) absence of probable cause for the proceeding; (4) malice; and (5) special damages." *Grundhoefer v. Sorin*, 2014 IL App (1st) 131276, ¶ 11. Here, Sanders's claim for malicious prosecution was not complete until he was exonerated in 2014. See *Ferguson*, 213 Ill. 2d at 99 ("A cause of action for malicious prosecution does not accrue until the criminal proceeding on which it is based has been terminated in the plaintiff's favor."). Accordingly, coverage under the defendants' policies was not triggered until 2014, when Sanders was acquitted after his third trial.

¶ 22 In opposition, defendants argue that we should follow a line of Illinois cases holding that the triggering event for coverage of a claim of malicious prosecution is the initiation of the alleged malicious prosecution against the claimant. See *First Mercury Insurance Co. v. Ciolino*, 2018 IL App (1st) 171532; *St. Paul Fire & Marine Insurance Co. v. City of Waukegan*, 2017 IL App (2d) 160381; *County of McLean v. States Self-Insurers Risk Retention Group, Inc.*, 2015 IL App (4th) 140628; *Indian Harbor Insurance Co. v. City of Waukegan*, 2015 IL App (2d) 140293; *St. Paul Fire & Marine Insurance Co. v. City of Zion*, 2014 IL App (2d) 131312. Of these cases, three of them are not applicable here because the relevant policy language was markedly different than the language in Illinois Union's policies. Specifically, the policies in these three cases provided that the claimant's injury or the insured's wrongful act must take place during the policy period. See *City of Waukegan*, 2017 IL App (2d) 160381, ¶ 12 (the policy covered " 'injury or damage that *** happens while this agreement is in effect' "); *Indian Harbor*, 2015 IL App (2d) 140293, ¶ 4 (the policy covered " 'damages resulting from a wrongful act(s),' " but

required that " '[t]he wrongful act(s) must occur during the policy period' "); *City of Zion*, 2014 IL App (2d) 131312, ¶ 12 (the policy covered an injury or damage that " 'happens while this agreement is in effect' "). Thus, it is no surprise that these courts concluded that the triggering event was the initiation of the wrongful prosecution, as the claimant's injury occurs immediately upon the insured's wrongful act of filing criminal charges with malice and without probable cause. See *City of Zion*, 2014 IL App (2d) 131312, ¶ 23. In this case, however, the Illinois Union policies require the "offense" of malicious prosecution to happen in the policy period, not the injury resulting from or the wrongful act giving rise to malicious prosecution. Accordingly, these cases are irrelevant to our analysis.

¶ 23 Two of the cases cited by defendants contain similar language to the policies in this case: *County of McLean* and *First Mercury*. Nevertheless, we conclude that these cases do not govern our decision in the present case. In *County of McLean*, the policy at issue provided coverage for, among other things, damages from personal injury, so long as the personal injury was " 'the result of an *occurrence* during the *policy period*.' " (Emphases in original.) *County of McLean*, 2015 IL App (4th) 140628, ¶ 16. An occurrence was defined as follows: " 'With respect to *personal injury*, only the offenses defined under *personal injury*. For any claim for *personal injury*, the date of the *occurrence* is the date that the first offense took place or is alleged to have taken place.' " (Emphases in original.) *Id.* ¶ 17. The term personal injury was defined in relevant part as " 'injury (other than *bodily injury* or *property damage*) caused by one or more of the following offenses: 1. False or wrongful arrest, detention, imprisonment[,] or malicious prosecution.' " (Emphases in original.) *Id.*

¶ 24 Despite the fact that the policy in *County of McLean*, like the Illinois Union policies here, plainly required the "occurrence" to take place during the policy period, the court in *County of*

McLean improperly read the policy as if it specifically required the claimant's injury to take place during the policy period. The court appears to have reached this conclusion by conflating the definitions of occurrence and personal injury:

> "Construing the terms as a whole, the policy clearly defines 'personal injury' as '*injury* *** *caused by* *** malicious prosecution.' (Emphasis added.) Accordingly, to conclude that the 'occurrence' resulting in Beaman's 'personal injury' happened within the policy period, the *injury caused by* the malicious prosecution must have taken place within the policy period. In other words, the event that triggers coverage is the actual *injury* suffered by the prosecuted party, not the accrual of the *tort* of malicious prosecution." (Emphases in original.) *Id.* ¶ 33.

As this excerpt of the court's analysis demonstrates, although the court correctly recognized that the "occurrence" must take place within the policy period, it incorrectly equated an occurrence with personal injury, which was defined as an injury caused by malicious prosecution. The policy, however, specifically provided that an occurrence was any of the *offenses* listed in the personal injury definition; it did not provide that an occurrence was the same as a personal injury, *i.e.*, an injury caused by the listed offenses. As a result of this confusion, the court in *County of McLean* focused on the timing of the claimant's injury and did not actually examine when the "offense" of malicious prosecution occurs. Accordingly, although the policy in *County of McLean*, like the Illinois Union policies here, provided that coverage was triggered by the "offense" of malicious prosecution, the court in *County of McLean* interpreted the policy as if it provided that coverage was triggered by the claimant's injury, thereby making the decision irrelevant to our analysis.

¶ 25 That brings us to *First Mercury*, the case on which defendants primarily rely. Like here, the issue presented in *First Mercury* was when coverage was triggered for an underlying claim of malicious prosecution—at the initiation of the allegedly malicious prosecution or at the claimant's exoneration. Also like here, the insurance policy at issue was in effect at the time the claimant in the underlying malicious prosecution suit was exonerated but was not in effect when the claimant was initially charged. *First Mercury*, 2018 IL App (1st) 171532, ¶ 7. The insurance policy provided that the insurer would cover damages because of personal injury " 'caused by an offense arising out of your business *** but only if the offense was committed *** during the policy period.' " *Id.* ¶ 8. The term personal injury was defined as an " 'injury, other than "bodily injury," arising out of one or more of the following offenses.' " *Id.* ¶ 9. Malicious prosecution was included as one of the offenses listed in the definition of personal injury. *Id.* Thus, like in the present case, the insurance policy required that the "offense" of malicious prosecution take place within the policy period, and the parties disagreed about when that was deemed to have occurred. *Id.* ¶ 25.

¶ 26 In answering that question, the *First Mercury* court disagreed with the defendant's contention that the term "offense" referred to the completed tort of malicious prosecution. *Id.* ¶ 29. The court concluded that the use of the word "offense" did not necessarily indicate an intent by the parties that coverage under the policy be triggered only by the completed tort of malicious prosecution. *Id.* ¶ 30. Instead, the court held that a more straightforward reading of the term "offense" was that the policy required the offensive conduct to take place within the policy period. *Id.* "[A]pplying the common and popular understanding of the word," the court concluded that "the policy refers to a wrongful act or conduct committed during the policy period, regardless of whether the elements of a tort have accrued." *Id.* The court also observed

that it defied common sense to characterize the exoneration of an innocent person as offensive or wrongful conduct and, thus, interpreting the word "offense" to include exoneration would distort the term's common and popular understanding. *Id.* ¶ 32.

¶ 27 As discussed above, we disagree with the *First Mercury* court's opinion on the common understanding of the term "offense," specifically when it is used to describe a list of legal causes of action and not wrongful acts or misconduct. Even putting that fundamental disagreement aside, we note an important factor that distinguishes the language of the *First Mercury* policy from the language of the Illinois Union policies. The policy in *First Mercury* required the offense to have been "committed" during the policy period, while the Illinois Union policies provide coverage for claims arising out of an occurrence (*i.e.*, the offense) "happening" during the policy period. Merriam-Webster defines "commit" as "to carry into action deliberately: PERPETRATE." Merriam-Webster Online Dictionary, https://www.merriam-webster.com/dictionary/commit (last visited Jan. 7, 2019) [https://perma.cc/KP7E-NR8H]. In contrast, it defines "happen" as "to occur by chance" and "to come into being or occur as an event, process, or result." Merriam-Webster Online Dictionary, https://www.merriam-webster.com/dictionary/happen (last visited Jan. 7, 2019) [https://perma.cc/3RKK-DC6X].

¶ 28 As these definitions make clear, the use of the word "commit" denotes an affirmative, deliberative act by a person, whereas the use of the word "happen" suggests the completion of a process or the passive coming into existence of something. Thus, when the term "offense" is read in the context of the *First Mercury* policy, which required that the offense be "committed," it is not unreasonable to conclude that the parties to the policy intended "offense" to refer to an affirmative act by the insured, *i.e.*, the initiation of the wrongful prosecution. In contrast, the Illinois Union policies refer to malicious prosecution "happening" during the policy period,

which supports a conclusion that the parties intended "offense" to refer to the completed tort of malicious prosecution and not the initiation of the prosecution. This is because a completed tort "come[s] into being," while, in contrast, the filing of charges is deliberately "carr[ied] into action." Thus, due to this distinction in language and for the other reasons discussed above, we disagree that we are bound by the interpretation of "offense" utilized in *First Mercury*.

¶ 29 Defendants make a number of other arguments in support of their position that warrant discussion. First, defendants, as some of the courts in the above-discussed cases have, argue that the exoneration of a claimant in a wrongful prosecution claim cannot be considered the trigger for coverage because there is nothing offensive about the exoneration. Instead, the exoneration is the judicial system's first step in rectifying the wrong done to the claimant. This argument is without merit because it misstates the coverage trigger. The trigger of coverage is not the exoneration alone but instead is the satisfaction of all the elements of the tort of malicious prosecution. Although it is true that the claimant's exoneration is typically the final element of a claim of malicious prosecution to be met, there is nothing about the exoneration itself that triggers coverage.

¶ 30 Defendants also argue that if coverage is triggered by the completed tort of malicious prosecution, then where the same set of facts give rise to claims for both false arrest and malicious prosecution, it is possible that one insurer would provide coverage for the false arrest claim while a different insurer would cover the malicious prosecution claim. In addition, defendants contend that our interpretation of "offense" puts insurers at risk of having to cover acts that were committed in years past. We do not disagree that these are potential effects of our interpretation, but we do disagree that they render our conclusion incorrect. If defendants or insurers do not wish to subject themselves to these possible effects, it is well within their

power—in fact, it rests exclusively within their power—to issue policies that limit or preclude these effects. Specifically, defendants and other insurers are free to redraft their policies to define an occurrence based on the insured's misconduct rather than on the "offense" of malicious prosecution (*i.e.*, the completed tort). In addition, defendants and other insurers are free to include retroactive dates in their policies, thereby limiting their risk of exposure for acts committed in years past.

¶ 31 In sum, we conclude that the language of the Illinois Union policies, when read in context, is plain in providing that coverage is triggered by the "offense" of malicious prosecution "happening" within the policy period and the offense of malicious prosecution only happens once all of the elements of the tort are met. In the present case, that means that the coverage trigger was Sanders's exoneration in 2014, which was well within the effective periods of the Illinois Union and Starr policies. Thus, the trial court erred when it dismissed plaintiffs' second amended complaint with prejudice.

¶ 32 Because we conclude that Sanders's exoneration triggered coverage under defendants' policies, we need not address plaintiffs' alternative argument that Sanders's retrials were additional triggers for coverage.

¶ 33 CONCLUSION

¶ 34 For the foregoing reasons, the judgment of the circuit court of Cook County is reversed, and this matter is remanded for further proceedings.

¶ 35 Reversed and remanded.

¶ 36 PRESIDING JUSTICE MASON, dissenting:

¶ 37 I agree with my colleagues that the language of an insurance policy governs its interpretation and that, depending on the policy language, the same occurrence may be covered

under one policy and not another. But if the offense of malicious prosecution is not *committed* when the defendant in the underlying case is exonerated (*First Mercury*, 2018 IL App (1st) 171532, ¶¶ 35-36), I see no legal or grammatical reason why, under the insurance policies here, we should conclude that malicious prosecution *happens* or *takes place* upon exoneration. Under the clear and unambiguous language of the Illinois Union/Starr policies, the malicious prosecution of Sanders happened in 1994 when he was wrongfully charged with murder; it did not happen in either 2013, when he was retried, or in 2014, when after his third trial, he was acquitted. Because I believe the trial court properly granted summary judgment to defendants, I respectfully dissent.

¶ 38 Illinois Union agreed to provide coverage for claims arising out of an occurrence (defined, in relevant part, as "those offenses specified in the definition of Personal Injury," including malicious prosecution) "happening" during the policy period for "Personal Injury" (defined to include "malicious prosecution") "taking place" during the policy period. If we substitute "malicious prosecution" in the policy's coverage grant, it provides coverage for "claims arising out of malicious prosecution happening during the policy period for malicious prosecution taking place during the policy period." This language may be redundant, but it is not ambiguous: the occurrence and the personal injury/malicious prosecution giving rise to the claim must happen and take place during the policy period.

¶ 39 To support the conclusion that the offense of malicious prosecution takes place or happens when a defendant is exonerated, my colleagues rely on a definition of "offense" from Black's Law Dictionary, which includes among its definitions "[a] violation of the law; a crime, often a minor one." Black's Law Dictionary (10th ed. 2014). Black's Law Dictionary also defines "offense" as "an intentional unlawful act that causes injury or loss to another and that

gives rise to a claim for damages." *Id.* And Merriam-Webster defines offense as "something that outrages the moral or physical senses"; "the act of attacking"; "the act of displeasing or affronting"; or "a breach of moral or social code." Merriam-Webster Online Dictionary, https://www.merriam-webster.com/dictionary/offense (last visited Jan. 7, 2019). [https://perma.cc/KG27-NBK9].

¶ 40 In my view, any one of these definitions, including the one relied on by the majority, suggests that an "offense" is the wrongful conduct or unlawful act. It was a "violation of the law" for Chicago Heights police officers to bring false murder charges against Sanders, just as those false charges constituted an "intentional unlawful act" and "something that outrages the moral sense." None of these definitions associates "offense" with a completed tort that triggers the running of the statute of limitation and the concomitant right to sue. See *First Mercury*, 2018 IL App (1st) 171532, ¶ 30.

¶ 41 The overwhelming weight of authority in Illinois supports the conclusion that it is the commencement of prosecution, and not exoneration, that triggers coverage for malicious prosecution. *See id.* ¶ 35 (concluding that "offense" as used in the policy referred to the insured's wrongful conduct that led to the claimant's conviction rather than the claimant's exoneration, which could not "logically be considered part of an 'injury' to the [claimant]"); *Indian Harbor*, 2015 IL App (2d) 140293, ¶ 24 ("[T]he favorable termination of a malicious prosecution marks the beginning of the judicial system's remediation of the wrong committed, not the commencement of the injury or damage." (Internal quotation marks omitted.)); *City of Waukegan*, 2017 IL App (2d) 160381, ¶ 48 (explaining that "the time of occurrence in insurance law is different from the time of accrual in tort law. In insurance law, the time of occurrence is used to determine when the operative terms of the policy provide coverage. In tort law, the time

of accrual is used to determine when the statute of limitations begins to run, a separate consideration ***."); see also *City of Zion*, 2014 IL App (2d) 131312, ¶¶ 12, 26 (claimant charged with murder before inception of policy, but exonerated during policy period not entitled to coverage under policy covering claims for malicious prosecution that " 'happens while this agreement is in effect' "); *County of McLean*, 2015 IL App (4th) 140628, ¶¶ 26, 32-34 (the "occurrence" of the alleged "personal injury" was each underlying plaintiff's "arrest and prosecution, not his exoneration").

¶ 42 And Illinois is not alone in reaching this conclusion. See *Hampton v. Carter Enterprises, Inc.*, 238 S.W.3d 170, 177 (Mo. Ct. App. 2007) ("offense" of malicious prosecution occurs upon the institution of the underlying action as "[t]hat is the point *** at which the defendant invoked the judicial process against the victim maliciously and without probable cause, causing the victim's injury"); *Zurich Insurance Co. v. Peterson*, 232 Cal. Rptr. 807, 813 (Ct. App. 1986) (the "occurrence" is the filing of criminal complaint, which triggers coverage under insurance policy); *Harbor Insurance Co. v. Central National Insurance Co.*, 211 Cal. Rptr. 902, 907 (Ct. App. 1985) ("[a]lthough favorable termination thus serves to confirm the element of lack of probable cause, the focus of the wrong is upon the institution of the suit, with malice and without such probable cause").

¶ 43 The results reached in these cases dealing with insurance coverage comport with the point in time at which a prosecution is determined to be "malicious," *i.e.*, at its outset. See *Miller v. Rosenberg*, 196 Ill. 2d 50, 58 (2001) (recognizing that element of claim for malicious prosecution is showing that the defendant "instituted the underlying suit without probable cause and with malice"); *Howard v. Firmand*, 378 Ill. App. 3d 147, 150 (2007) (complaint for malicious prosecution arose out of petition for order of protection: There must be "an *honest*

belief by the complainant at the time of subscribing a criminal complaint that another is probably guilty of an offense; it is immaterial that the accused may thereafter be found not guilty." (Emphasis in original and internal quotation marks omitted.)); *Johnson v. Target Stores, Inc.*, 341 Ill. App. 3d 56, 72 (2003) ("It is the state of mind of the one commencing the prosecution, and not the actual facts of the case or the guilt or innocence of the accused, that is at issue." (Internal quotation marks omitted.)); *Turner v. City of Chicago*, 91 Ill. App. 3d 931, 937 (1980) (in malicious prosecution case against prosecutor, "[m]alice *** is proved by showing that the prosecutor was actuated by improper motives"); see also *Beaman v. Freesmeyer*, 2017 IL App (4th) 160527, ¶¶ 57-58 (in order to find police officer liable in malicious prosecution case when decision to prosecute rests with State's Attorney, plaintiff must show that the "officer pressured or exercised influence on the prosecutor's decision or made knowing misstatements upon which the prosecutor relied"). Malicious prosecution focuses on the state of mind of the defendant at the time the underlying proceedings were commenced. Here, Sanders's acquittal, absent a showing that the prosecution was malicious, does not give rise to any claim. And because Illinois Union's policy covers *malicious* prosecution that "happens" and "takes place" during the policy period, the trigger of coverage is when the wrongful prosecution was commenced.

¶ 44 The majority's attempt to distinguish relevant Illinois authority based on minor differences in policy language is unpersuasive. I find no meaningful difference between Illinois Union's policy language and the language at issue in other Illinois cases, all of which have reached uniform conclusions. For example, in *First Mercury*, a case decided by a different division of this district less than a year ago and very closely analogous to this case, the policy provided coverage for an " 'offense' " (read: malicious prosecution) that was " 'committed' " during the policy period. 2018 IL App (1st) 171532, ¶ 8. Here, the policy covers an occurrence

(read: malicious prosecution) "happening" and "taking place" during the policy period. There is no sound reason to reach a polar opposite conclusion regarding the trigger of coverage in this case, particularly since it unavoidably creates a split of authority within this district.

¶ 45 Unlike the majority, I ascribe little weight to the fact that the policy refers to offenses by their "proper, legal names" as opposed to the "underlying wrongful acts." *Supra* ¶ 20.

¶ 46 First, virtually every liability policy providing coverage for such offenses describes them by their "proper, legal names." See, *e.g.*, *First Mercury*, 2018 IL App (1st) 171532, ¶ 9 (policy referred to the offense of "malicious prosecution"); *Allstate Insurance Co. v. Amato*, 372 Ill. App. 3d 139 (2007) (policy referred to, among other things, offenses of "false arrest," "wrongful entry," "libel," "slander," and "defamation of character" (internal quotation marks omitted)); *John T. Doyle Trust v. Country Mutual Insurance Co.*, 2014 IL App (2d) 121238, ¶ 6 (policy referred to "wrongful eviction," "wrongful entry," and "invasion of the right of private occupancy" (internal quotation marks omitted)); *Dixon Distributing Co. v. Hanover Insurance Co.*, 244 Ill. App. 3d 837, 842 (1993) (policy listed offenses of " 'libel, slander, defamation of character, discrimination, false arrest, false imprisonment, wrongful eviction, wrongful detention, malicious prosecution or humiliation' "). And, to date, no court has used that common language to equate the "occurrence" of these offenses with the accrual of a claimant's right to sue.

¶ 47 Second, as a practical matter, it would be impossible to draft an insurance policy that described all of the possible wrongful acts that could give rise to a claim for such offenses. For example, there are many ways a person can commit the policy's enumerated offense of defamation of character. An insured could publish (by speaking, writing or otherwise disseminating (*Goldberg v. Brooks*, 409 Ill. App. 3d 106, 110 (2011)) a statement that a third

party committed a crime or is infected with a loathsome communicable disease or lacks integrity or ability in the performance of duties of office or employment (*Tunca v. Painter*, 2012 IL App (1st) 093384, ¶¶ 41-42) or otherwise "expose[s] [the third party] to hatred, ridicule, or contempt" by damaging the party's personal reputation, financial reputation, or deterring others from associating with the third party (Restatement (Second) of Torts § 559 cmt. b, c (1977)). And these are by no means all of the ways a person can defame the character of another. The same is true of malicious prosecution. The tort may be committed by the police, the complainant in a criminal case, the prosecution, or a civil litigant. It can involve, among other things, the manufacturing of false evidence, the procurement of false testimony, the withholding of evidence, or the pursuit of a case, civil or criminal, without factual or legal justification or for an improper purpose. A policy that attempted to articulate all of the wrongful acts that could possibly give rise to a claim for one of the enumerated offenses would be verbose in the extreme and, for that reason, unintelligible.

¶ 48 As Illinois Union pointed out at oral argument, the interpretation of the policy adopted by the majority would invite insurers to selectively decline to write or renew insurance once the insured's potential liability for malicious prosecution was raised but before the right to sue—the trigger of coverage according to the majority—accrued. This case is an excellent example. Sanders was charged with murder in 1994. The policy period at issue here is November 1, 2013, through November 1, 2014. By January 2013, in the middle of the previous policy period, Sanders had enough information to file a federal civil rights lawsuit in which he made detailed factual allegations about fabricated and withheld evidence and asserted claims against Chicago Heights and its officers for violations of due process, conspiracy, malicious prosecution, and intentional infliction of emotional distress. Since Sanders had not yet been acquitted after his

third trial, he admits his malicious prosecution claim was premature. If the majority's interpretation of the date the "offense" of malicious prosecution occurs under Illinois Union's policy is correct, upon being advised of the federal lawsuit, Chicago Heights' current carrier, believing that it could potentially be on the hook for decades of wrongful incarceration, would likely decline to renew the municipality's insurance. Any other insurer, understanding that it was assuming the risk of an adverse judgment once Sanders was exonerated, would either charge an exorbitant premium, exclude the risk via an endorsement, or refuse to insure the municipality altogether.

¶ 49 Because I conclude that the offense of malicious prosecution occurs, under the language of Illinois Union's policy, when the prosecution is initiated, I would address Sanders's alternative argument that his retrials were additional triggers for coverage. This court rejected an identical argument in *City of Waukegan*, 2017 IL App (2d) 160381, which I find persuasive. There, the insured argued that the State's use of a coerced confession and its continued withholding of evidence during retrials of the claimant, Juan Rivera, were independent acts triggering coverage. *Id.* ¶ 18. We disagreed, stating that "Rivera's second and third trials were continuations of his wrongful prosecution, which increased his damages but were not new injuries." *Id.* ¶ 36. The same holds true here. Retrials are new trials on existing charges; they are not new and separate prosecutions. It is the charging of the claimant, not the trial of the claimant on those charges, that constitutes an "occurrence" for policy purposes. Other language of Illinois Union's policy also supports this result. In its definition of "occurrence," the policy provides that "[a]ll damages arising out of substantially the same offense [(read: malicious prosecution)] regardless of frequency, repetition, the number or kind of offenses *** will be considered as arising out of one Occurrence." Sanders's initial prosecution and his retrials all arose out of the

same false charges against him. As such, the retrials were not independent occurrences triggering coverage.

¶ 50 For these reasons, I would affirm the decision of the trial court.

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

4246

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

JAN 02 2018

Circuit Court - 2031

ENTERED: _____

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

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

RODELL SANDERS and CITY OF CHICAGO HEIGHTS,	)	
Plaintiffs,	)	Case No. 16 CH 02605
	)	Calendar: 05
v.	)	Hon. Celia Gamrath
	)	Jury Demanded
ILLINOIS UNION INSURANCE COMPANY and STARR INDEMNITY & LIABILITY COMPANY,	)	
Defendants.	)	

SECOND AMENDED COMPLAINT

NOW COMES Plaintiff, RODELL SANDERS, by his attorneys, LOEVY & LOEVY, complaining of Defendants ILLINOIS UNION INSURANCE COMPANY and STARR INDEMNITY & LIABILITY COMPANY, and joining as a necessary party plaintiff CITY OF CHICAGO HEIGHTS, alleges as follows:

OVERVIEW

1. The case seeks to recover damages for injuries that Defendants Illinois Union Insurance Company ("Illinois Union") and Starr Indemnity & Liability Company ("Starr") inflicted both on Plaintiff Rodell Sanders and on the City of Chicago Heights and its taxpayers.

2. Mr. Sanders spent two decades of his life wrongfully convicted of a murder he did not commit. As a result of the alleged violation of his constitutional rights, Mr. Sanders filed a federal civil rights lawsuit titled *Rodell Sanders v. City of Chicago Heights, et al*., Case No. 13-CV-221 (N.D. Ill.). The defendants in that suit were the City of Chicago Heights and certain of its police department personnel.

3. Chicago Heights and the individual defendants tendered Mr. Sanders's lawsuit to three of their insurance companies—United National Insurance Company, Illinois Union Insurance Company, and Starr Indemnity & Liability Company.

4. United National acknowledged coverage obligations under a reservation of rights, but Illinois Union and Starr Indemnity denied coverage. The denials were wrongful, unreasonable, and vexatious. In response, Chicago Heights and the individual defendants filed this lawsuit, seeking a declaration that Illinois Union and Starr Indemnity owe coverage obligations for Mr. Sanders's suit.

5. Mr. Sanders was also named as a defendant in this lawsuit, solely to the extent he may be deemed a necessary party with an interest in the outcome. No separate relief was sought from Mr. Sanders.

6. In Mr. Sanders's federal civil rights suit, after motions to dismiss and summary judgment dismissed some defendants, the remaining defendants were Chicago Heights, Jeffrey Bohlen, and Robert Pinnow (collectively, the "Chicago Heights Actors").

7. Mr. Sanders and the Chicago Heights Actors recently concluded Mr. Sanders's civil rights suit. On September 28, 2016, a consent judgment was entered in Mr. Sanders's favor, for $15 million. The Chicago Heights Actors agreed to contribute $2 million, without admission of liability or wrongdoing, and United National agreed to contribute its $3 million policy.

8. Illinois Union and Starr Indemnity refused to pay a dime. Their refusal to provide insurance coverage was wrongful, unreasonable, and vexatious.

9. The present Complaint is based on an assignment Mr. Sanders received from the Chicago Heights Actors, to pursue their claims against Illinois Union and Starr Indemnity,

including their claims in this declaratory judgment lawsuit. Mr. Sanders hereby incorporates by reference the factual allegations in the original complaint in this lawsuit.

10. On November 17, 2016, this Court entered an order realigning the parties to properly identify Mr. Sanders as the plaintiff and Illinois Union and Starr Indemnity as the defendants. On May 10, 2017, this Court entered an agreed order granting Mr. Sanders leave to file this second amended complaint, naming the City of Chicago Heights as a necessary party plaintiff.

JURISDICTION AND VENUE

11. The Court has jurisdiction of this action pursuant to Article VI § 9 of the Illinois Constitution and 735 ILCS § 5/2-209.

12. Venue is proper pursuant to 735 ILCS § 5/2-101 and 735 ILCS § 5/2-102.

PARTIES AND OTHER RELEVANT PERSONS AND ENTITIES

13. Plaintiff Rodell Sanders is an individual, resident and citizen of Illinois.

14. Defendant Illinois Union is a for-profit corporation organized and existing under the laws of Illinois, with its principal place of business located in Illinois.

15. Defendant Starr Indemnity is a for-profit corporation organized and existing under the laws of Texas, with a registered agent in Illinois.

16. The City of Chicago Heights is a necessary party plaintiff because it may have a right to relief arising out of the same transaction or series of transactions based on common questions of law.

FACTS ALLEGED IN THE UNDERLYING CIVIL RIGHTS COMPLAINT

Introduction

17. There was no physical evidence linking Mr. Sanders to this crime. Rather, the only purported evidence against Mr. Sanders consisted of two allegedly false witness

identifications. These wrongful identifications were procured through alleged manipulation and coercion by members of the City of Chicago Heights's police department.

18. The misconduct that caused Mr. Sanders' wrongful conviction was allegedly widespread. Prior to Mr. Sanders' unlawful prosecution, other individuals were allegedly unlawfully arrested by the same group of Chicago Heights Police Detectives, led by Jeffrey Bohlen, Robert Pinnow, and their former Chief.

19. Although Mr. Sanders's conviction has been reversed, he will never regain the lost decades of his life. He brought his federal civil rights lawsuit seeking redress for his injuries.

Federal Civil Rights Lawsuit

20. When Rodell Sanders brought his federal civil rights lawsuit, he was 48 years-old. Mr. Sanders was born and raised in Chicago Heights. He has two daughters. When he was wrongfully imprisoned, his oldest daughter was 13 years old and his youngest was not yet born. His daughters grew up without having a father in their lives, as a result of Mr. Sanders's wrongful incarceration.

21. Apart from the wrongful conviction that was the subject of his federal civil rights lawsuit, Mr. Sanders has no felony criminal convictions.

22. The City of Chicago Heights is an Illinois municipal corporation, and is and/or was the employer of Bohlen and Pinnow. The City of Chicago Heights is responsible for the acts of those Officers while employed by the City of Chicago Heights and while acting within the scope of their employment.

23. At all times relevant hereto, Jeffrey Bohlen and Robert Pinnow were police officers in the Chicago Heights Police Department acting under color of law and within the scope of their employment for the City of Chicago Heights.

The Shooting

24. On December 15, 1993, Stacy Armstrong and Phillip Atkins were sleeping in a parked car around two in the morning. After being abruptly awoken, Ms. Armstrong and Mr. Atkins were accosted by a group of men and led to an abandoned garage.

25. The garage was so dark that the offenders used a lighter to carry out the robbery and shooting that followed.

26. Mr. Atkins was killed and Ms. Armstrong was shot multiple times and left for dead. Ms. Armstrong blacked out after being shot. Once she regained consciousness, Ms. Armstrong sought help by going to a nearby house and she was taken to the hospital. Ms. Armstrong survived the shooting.

Mr. Sanders' Innocence

27. Mr. Sanders had absolutely nothing to do with the crime.

28. At the time of the shooting, Mr. Sanders was nowhere nearby. Rather, Mr. Sanders was at his friend Vicky Ross's apartment. According to Ms. Ross and many others, Mr. Sanders was playing cards and hanging out with them at all relevant times on the night of December 14, 1993. The alibi witnesses recall that Mr. Sanders stayed at the apartment into the early morning hours of the following day.

Chicago Heights Actors' Alleged Misconduct

29. There was never any physical evidence linking Mr. Sanders to this crime. None of his fingerprints or his DNA was found at the crime scene, nor was any incriminating evidence of any kind ever discovered in his possession.

30. Bohlen and Pinnow knew Mr. Sanders and allegedly bore a grudge against him. Despite the lack of evidence against him, the Chicago Heights Actors allegedly pinned the shootings on Mr. Sanders.

31. The Chicago Heights Actors first spoke with Ms. Armstrong at the hospital on the night of the shooting. However, Ms. Armstrong's fragile condition prevented her from having anything more than a brief conversation with the Chicago Heights Actors at that time.

32. After a couple of weeks, Bohlen and Pinnow interviewed Ms. Armstrong again. During this subsequent interview, Ms. Armstrong gave a detailed account of the shooting.

33. In particular, Ms. Armstrong informed Bohlen and Pinnow that four people committed the crime. She could not identify the first and the fourth offenders, whom she described only as black men who acted as lookouts.

34. Ms. Armstrong, however, allegedly gave a detailed description of the shooter and the individual who ordered the shooting.

35. As to the shooter, Ms. Armstrong allegedly informed Pinnow and Bohlen that he was a 16-year-old, short black male (between five feet, five inches and five feet, seven inches) with a medium build and medium complexion who was wearing a black shirt with a black hood and black pants.

36. Ms. Armstrong further allegedly described the man who ordered the shooting (who will be hereafter referred to alternatively as Offender Number Three) as a 30-year-old, taller (approximately six feet) and skinny black man who was wearing black and grey faded pants and an olive, knit ski cap.

37. Germaine Haslett, approximately six feet tall and skinny, has confessed that he was the person who acted as Offender Number Three.

38. The Chicago Heights Actors were allegedly already well acquainted with Mr. Haslett. He allegedly had been working as their snitch in another Chicago Heights prosecution against a man named Bernard Ellis. Although the Ellis prosecution later fell apart when the

courts learned that the police had provided undisclosed benefits to the State witnesses, at the time of the investigation into the Atkins and Armstrong shooting, Mr. Haslett was an important witness for the Chicago Heights Actors.

39. Because the Chicago Heights Actors were allegedly focused on protecting Mr. Haslett, the Chicago Heights Actors allegedly sought to minimize Mr. Haslett's complicity in the crime by finding someone else to take his place as Offender Number Three, namely Mr. Sanders.

40. At the time of the shooting, Mr. Sanders stood five feet eight inches tall, weighed close to 200 pounds, and was 30 years old. He did not match the alleged description of Offender Number Three (a tall skinny guy) or that of the shooter (a sixteen-year-old teenager). Nor did Mr. Sanders have anything whatsoever to do with this crime.

41. Because Mr. Sanders did not match Ms. Armstrong's description, the Chicago Heights Actors allegedly manipulated Ms. Armstrong into changing her identification of Offender Number Three from tall and skinny Mr. Haslett to short and stocky Mr. Sanders.

42. To accomplish the task of having Ms. Armstrong misidentify Mr. Sanders, the Chicago Heights Actors allegedly concocted a flawed photographic line-up designed to improperly implicate Mr. Sanders. To begin, although Ms. Armstrong had allegedly described Offender Number Three as tall and skinny, the Chicago Heights Actors allegedly inserted the short and stocky Mr. Sanders into the photo line-up shown to Ms. Armstrong. Furthermore, the Chicago Heights Actors allegedly did not include tall and skinny Germaine Haslett's photograph in the photo line-up.

43. The Chicago Heights Actors allegedly used additional means to improperly influence Ms. Armstrong into picking Mr. Sanders' photograph out of the photo line-up. Among other manipulation that was used, the Chicago Heights Actors allegedly arranged for Ms.

Armstrong to be relocated out of state in exchange for her identification of Mr. Sanders. Neither that relocation nor any of the other alleged manipulation to which Ms. Armstrong was subjected was ever disclosed to Mr. Sanders.

44. As a result of the Chicago Heights Actors' alleged unlawful conduct, Ms. Armstrong also identified Mr. Sanders in a subsequent live lineup.

Mr. Sanders' Unlawful Arrest

45. Several weeks after the shooting, the Chicago Heights Actors arrested Mr. Sanders based on Armstrong's allegedly false identification.

46. According to Pinnow, he arrested Mr. Sanders because he was aware of an "arrest card" that the Chicago Heights Police Department had issued for Mr. Sanders, although that arrest card was never produced during discovery or at the trial.

47. At the police station, Mr. Sanders was interrogated. During that interrogation, and on all subsequent occasions, Mr. Sanders steadfastly maintained his innocence, denying that he had any knowledge or involvement in the crime.

48. The Chicago Heights Actors also questioned Mr. Haslett about the shootings. Unlike Mr. Sanders, Mr. Haslett confessed his involvement as Offender Number Three to the Chicago Heights Actors. Indeed, since the morning of the shooting, Mr. Haslett allegedly has repeatedly confessed to having ordered the shooting of Mr. Atkins and Ms. Armstrong to family and friends.

49. Moreover, Haslett allegedly told the Chicago Heights Actors that the person who actually shot Atkins and Armstrong was present at the crime scene. The Chicago Heights Actors allegedly withheld this revelation from Mr. Sanders, withholding both the shooter's name and the fact that Haslett said he was present at the scene of the crime. This information was allegedly

withheld from Mr. Sanders during the entirety of his criminal proceedings and was not discovered until after his acquittal.

50. Although the Chicago Heights Actors allegedly knew that Mr. Haslett was guilty and Mr. Sanders was innocent of this crime, the Chicago Heights Actors endeavored to protect Mr. Haslett. They allegedly offered Mr. Haslett a deal—if he would falsely implicate Mr. Sanders as Offender Number Three, they would allow Mr. Haslett to paint himself as just one of the look-outs and give him a generous plea deal.

Haslett's Undisclosed Benefits

51. Mr. Haslett allegedly agreed to participate in the illicit scheme. In exchange for his false statement inculpating Mr. Sanders, Mr. Haslett allegedly received a deal on the Atkins and Armstrong case, allegedly allowing him to plead guilty to armed robbery instead of facing charges for murder and attempt murder.

52. That, however, was not the only benefit that Mr. Haslett allegedly received. Unbeknownst to Mr. Sanders, during the pendency of Mr. Sanders' case, Bohlen allegedly arranged for Mr. Haslett to continue his career as an FBI and Chicago Heights police informant, including by giving testimony against Mr. Sanders. In doing so, Mr. Haslett was able to allegedly curry multiple additional, undisclosed favors for himself.

53. First, in exchange for Haslett's testimony against Mr. Sanders, the Chicago Heights Actors allegedly agreed to terminate Mr. Haslett's probation in an unrelated drug case. That consideration was never disclosed to Mr. Sanders or his defense.

54. Second, the Chicago Heights Actors allegedly arranged for Mr. Haslett to receive a two-year reduction on the 12-year sentence he was given as part of his plea in the Atkins and Armstrong case. As a result, Mr. Haslett allegedly served fewer than five years in prison. In addition, the Chicago Heights Actors allegedly ensured that Mr. Haslett was housed during those

five years in the witness quarters in the State's Attorney's Office, protective custody at the Cook County Jail or in the federal system. The alleged reduction in Mr. Haslett's sentence and his preferred housing while incarcerated were both withheld from Mr. Sanders and his defense.

The Wrongful Conviction

55. At trial, the only evidence introduced against Mr. Sanders consisted of the allegedly false identifications by Ms. Armstrong and Mr. Haslett. All other evidence, including the physical evidence collected by the Chicago Heights Actors, allegedly exculpated Mr. Sanders.

56. Nevertheless, on the basis of the allegedly false identifications procured by the Chicago Heights Actors, the jury convicted Mr. Sanders of attempt murder, armed robbery and murder.

57. Mr. Sanders was then sentenced to 55 years of incarceration for the murder and 25 years of incarceration for the attempt murder to run consecutively. In addition, Mr. Sanders was sentenced to a concurrent 20 years of imprisonment on the armed robbery charge.

Mr. Sanders' Exoneration

58. Mr. Sanders fought tirelessly to overturn his wrongful conviction. After almost two decades of incarceration, Rodell Sanders' unjust conviction was finally vacated on January 14, 2011.

59. The Circuit Court's ruling overturning Mr. Sanders' conviction and vacating his sentence was affirmed by the Illinois Court of Appeals on May 30, 2012.

60. Mr. Sanders had to stand retrial in July 2013, which resulted in a mistrial, and in July 2014, when he was acquitted of all charges.

61. The Chicago Heights Actors allegedly violated Mr. Sanders's constitutional rights during the 2013 and 2014 trials, including by withholding allegedly exculpatory evidence, such

as Haslett's confession that he was Offender Number Three, Haslett's statements placing the true shooter at the scene, and their alleged manipulation of Armstrong's identification of Mr. Sanders, as well as by fabricating Mr. Haslett's false testimony implicating Plaintiff.

62. Absent those alleged constitutional violations, Mr. Sanders would not have been retried after the vacation of his conviction was affirmed in 2012.

Mr. Sanders' Injuries

63. In serving nearly two decades behind bars, Mr. Sanders has been, and continues to be, wrongfully deprived of much of his adult life. Mr. Sanders has been stripped of the various pleasures of basic human experience, from the simplest to the most important, which all free people enjoy as a matter of right. He missed out on the ability to raise his daughters, share holidays, births, funerals, and other life events with loved ones, and the fundamental freedom to live one's life as an autonomous human being.

64. Further, despite having had his wrongful conviction overturned, Mr. Sanders had to face trial in 2013 and 2014 based on evidence allegedly fabricated by the Chicago Heights Actors, while other exculpatory evidence was allegedly withheld from him by those same individuals.

65. As a result of his wrongful incarceration, Mr. Sanders must now attempt to rebuild his life, all without the benefit of the life experiences that ordinarily equip adults for that task.

Federal Civil Rights Lawsuit

66. Mr. Sanders filed a federal civil rights lawsuit titled *Rodell Sanders v. City of Chicago Heights, et al*., Case No. 13-CV-221 (N.D. Ill.). The defendants in that suit were the City of Chicago Heights and the officers involved in allegedly wrongfully convicting Mr. Sanders.

67. Mr. Sanders alleged, among other things, violations of due process, conspiracy, failure to intervene, malicious prosecution, and intentional infliction of emotional distress. *See Rodell Sanders v. City of Chicago Heights, et al*., Case No. 13-CV-221 (N.D. Ill.). Mr. Sanders alleged that the officers acted individually, jointly, in conspiracy, within the scope of their employment, under color of law, and pursuant to the policy and practice of the Chicago Heights Police Department. Accordingly, Mr. Sanders sought to hold the individual defendants liable for their own actions, and sought to hold the City of Chicago Heights liable in its own right as well as in its role as an indemnitor. Mr. Sanders sought compensatory damages, costs, attorneys' fees, and other relief.

68. Mr. Sanders filed his initial Complaint on January 11, 2013. At that time, his wrongful convictions had not been fully and finally overturned in his favor (a legal requirement to the assertion of a malicious prosecution claim).

69. Until his criminal proceedings were concluded, Mr. Sanders could not bring a claim for malicious prosecution.

70. Mr. Sanders was retried in August of 2013, resulting in a hung jury. He was tried again in July 2014, resulting in a full acquittal.

71. At his 2013 and 2014 re-trials, the prosecution added theories that had never been tried before – specifically, asking the jury to convict Mr. Sanders based on a theory of accountability.

72. He filed a First Amended Complaint on August 5, 2014, adding claims of malicious prosecution. He later filed a Second Amended Complaint on April 10, 2015. The Second Amended Complaint is attached hereto as Exhibit A.

Illinois Union Insurance Policies

73. Illinois Union issued primary insurance policies to the City of Chicago Heights for the time periods of: (1) November 1, 2010, to November 1, 2011 (Policy No. PEP G24891562); (2) November 1, 2011, to November 1, 2012 (Policy No. PEP G24891562 002); (3) November 1, 2012, to November 1, 2013 (Policy No. PEP G24891562 003); and (4) November 1, 2013, to November 1, 2014 (Policy No. PEP G24891562 004). These policies are referred to collectively as the "Illinois Union policies." The 2012–13 policy is attached as Exhibit B (this policy period covers Mr. Sanders's first retrial). The 2013–14 policy is attached as Exhibit C (this policy period covers Mr. Sanders's second retrial, and his acquittal). On information and belief, the 2010–11 and 2011–12 policies are substantially similar to the attached policies.

74. The Illinois Union policies have a one hundred thousand dollar ($100,000) self-insured retention limit.

75. The Illinois Union policies include law enforcement liability as part of the General Liability Coverage Part, with a total coverage limit of one million dollars ($1,000,000) for each occurrence and two million dollars ($2,000,000) in the aggregate for each policy period.

76. On information and belief, the City of Chicago Heights paid a total premium of $325,445 for the 2012–13 Illinois Union policy, and $355,091 for the 2013–14 Illinois Union policy.

77. The Illinois Union policies provide primary coverage for claims of the offense of malicious prosecution made against the Chicago Heights Actors for alleged conduct undertaken in the course of and within the scope of law enforcement duties and responsibilities.

78. The Illinois Union policies promise to indemnify the Chicago Heights Actors for damages and claims expenses, which include attorneys' fees and costs, when the insureds have

satisfied the $100,000 self-insured retention limit. With regard to defense and settlement, the Illinois Union primary policies Common Conditions, Definitions and Exclusions provides in relevant part:

> **7. Defense and Settlement**
>
> ***
>
> d. When the **Damages** and **Claim Expenses** for which **You** become legally obligated to pay exceed the **Retained Limit**, **You** will be entitled to indemnification by **Us**. You shall submit any request for indemnification to **Us** as soon as practicable after the **Damages** and **Claim Expenses** exceed the Retained Limit. **We** will promptly indemnify **You** in excess of the **Retained Limit** subject to the Limit of Insurance for the applicable Coverage Part as shown on the Declarations. The **Retained Limit** must be satisfied by actual payment by **You**. The **Retained Limit** may not be satisfied by payment by the **Insured** of any deductible of any other **Policy** or payments made on behalf of the **Insured** by any other insurer, person or entity. The **Insured** must make actual payment of the **Retained Limit** under this **Policy** without regard to whether the **Insured** must pay other amounts under any other **Policy**, even if the claimed amounts are deemed to have been caused by one **Occurrence**, **Accident** or **Wrongful Act**. The **Retained Limit** shall not be impaired by any **Claim** brought against an **Insured** which is not covered under the applicable Coverage Part.

79. The Illinois Union policies include definitions that describe the types of claims alleged in Mr. Sanders's federal civil rights lawsuit. The Common Policy Definitions of the Illinois Union policies provide definitions including, but not limited to the following:

> **Definitions**
>
> ***
>
> 6. **Bodily Injury** means physical injury to the body, sickness or disease, including death resulting from any of these at any time, and if arising out of the foregoing, mental anguish, mental injury, mental tension, emotional distress, disability, pain and suffering, shock or fright.
>
> ***

8. **Claims Expenses** means:

***

c. Pre-judgment and post-judgment interest awarded in any **Claim**.

***

17. **Insured** means each of the following to the extent set forth below:

a. The **Named Insured**;

b. While acting within the scope of their duties for the **Named Insured**:

***

iii. All of **Your** current or former **Employees**.

20. **Law Enforcement Activities** means any of the official activities or operations of **Your** police force or any other public safety organization, including their agents or employees, which enforces the law and protects persons or property.

***

23. **Occurrence** means:

a. With respect to **Bodily Injury** and **Property Damage**, an accidental happening including continuous or repeated exposure to substantially the same general harmful conditions which results in **Bodily Injury** or **Property Damage**. All such exposure to substantially the same general conditions will be considered as arising out of one **Occurrence**;

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 of kind of offenses, or number of claimants, will be considered as arising out of one **Occurrence**.

***

24. **Personal Injury** means one or more of the following offenses:

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

***

80. The Insuring Agreement in the General Liability Coverage Part of the Illinois Union policies provides as follows:

General Liability Coverage Part

THE LIMITS OF INSURANCE AVAILABLE TO PAY INSURED DAMAGS SHALL BE REDUCED BY AMOUNTS INCURRED FOR CLAIMS EXPENSES. AMOUNTS INCURRED FOR DAMAGES AND CLAIMS EXPENSES SHALL ALSO BE APPLIED AGAINST THE RETAINED LIMIT AMOUNTS.

In consideration of the payment of the premium, in reliance upon the **Application**, and subject to the Declarations and the terms and conditions of this **Policy**, the **Insureds** and the **Insurer** agree as follows:

A. Insuring Agreement

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**.

No other obligation to pay any additional sums, perform ats or provide services is covered.

***

Starr Indemnity Excess Liability Policy

81. Starr Indemnity issued excess liability policies, to the City of Chicago Heights for the time periods of: (1) November 1, 2011, to November 1, 2012 (Policy No. SISCPEL00011411); (2) November 1, 2012, to November 1, 2013 (Policy No.

SISCPEL01944312, Renewal of SISCPEL00011411); and (3) November 1, 2013, to November 1, 2014 (Policy No. 1000005129, Renewal of SISCPEL01944312). These policies are referred to collectively as the "Starr Indemnity policies." The 2012–13 policy is attached as Exhibit D (this policy period covers Mr. Sanders's first retrial). The 2013–14 policy is attached as Exhibit E (this policy period covers Mr. Sanders's second retrial, and his acquittal). On information and belief, the 2011–12 policy is substantially similar to the attached policies.

82. The Starr Indemnity policies are follow form excess liability policies providing coverage over the underlying Illinois Union policies. The Starr Indemnity policies have a limit of ten million dollars ($10,000,000) for each occurrence.

83. The Starr Indemnity policies identify the Illinois Union policies as the underlying insurance.

84. On information and belief, the City of Chicago Heights paid a policy premium of $115,800 for the 2012–13 Starr Indemnity policy, and a policy premium of $121,600 for the 2013–14 Starr Indemnity policy.

85. Section I. Coverage of the Starr Indemnity Excess Liability Policy provides:

> **SECTION I. COVERAGE**
>
> **A.** We will pay on behalf of the Insured, the "Ultimate Net Loss" in excess of the "Underlying Insurance" as shown in **ITEM 5.** of the Declarations, that the Insured becomes legally obligated to pay for loss or damage to which this insurance applies and that takes place in the Coverage Territory. Except for the terms, definitions, conditions and exclusions of this Policy, the coverage provided by this Policy shall follow the terms, definitions, conditions and exclusions of the applicable First Underlying Insurance Policy(ies) shown in **ITEM 5.A.** of the Declarations.
>
> **B.** Regardless of any other warranties, terms, conditions, exclusions or limitations of this Policy, if any applicable Underlying Insurance Policy(ies) does not cover "Ultimate Net Loss" for reasons other than exhaustion of its limit of liability

by payment of claims or suits, then this Policy will not cover such "Ultimate Net Loss".

C. The amount we will pay for the "Ultimate Net Loss" is limited as described in **SECTION II. LIMITS OF INSURANCE.**

86. Section II. Limits of Insurance of the Starr Indemnity Excess Liability Policy provides:

SECTION II. LIMITS OF INSURANCE

A. The Limits of Insurance shown in the Declarations and the rules below describe the most we will pay regardless of the number of:
1. Insureds;
2. Claims made or suits brought; or
3. Persons or organizations making claims or bringing suits.

B. The Limits of Insurance of this Policy will apply as follows:
1. This Policy applies only in excess of the "Underlying Insurance" scheduled in **ITEM 5.** of the Declarations.

***

7. The Limits of Insurance shown in **ITEM 4.** of the Declarations apply separately to each consecutive annual period and to any remaining period of less than 12 months, starting with the beginning of the Policy Period shown in the Declarations, unless the Policy Period is extended after issuance for an additional period of less than 12 months. In that case, the additional period will be deemed part of the preceding period for purposes of determining the Limits of Insurance.

87. Section III. Definitions of the Starr Indemnity Excess Liability policies provides:

SECTION III. DEFINITIONS

A. "Ultimate Net Loss"
"Ultimate Net Loss" means the total sum, after reduction for all recoveries including other valid and collectible insurance, excepting only the "Underlying Insurance" scheduled under **ITEM 5.** of the Declarations, actually paid or payable due to a claim or suit for which you or an Insured are liable either by a settlement to which we agreed or a final judgment.

The term "Ultimate Net Loss" shall also include defense costs

when such defense costs are included within the limits of insurance of any applicable "Underlying Insurance."

B. "Underlying Insurance"
"Underlying Insurance" means the Policy(ies) and/or self-insured retention identified in **ITEM 5.** of the Declarations. "Underlying Insurance" shall include:

1. The First Underlying Insurance Policy(ies) scheduled in **ITEM 5.A.** of the Declarations;

2. Any additional Underlying Insurance Policy(ies) scheduled in **ITEM 5.B.** of the Declarations, and

3. Any renewal or replacement of such Policy(ies).

88. The Declarations specify that Illinois Union is the underlying insurance.

Denials of Coverage

89. The allegations in this section concern primarily communications between the Chicago Heights Actors and either Illinois Union or Starr Indemnity. These allegations are made on information and belief.

90. The Chicago Heights Actors tendered Mr. Sanders's lawsuit to three of their insurance companies—United National Insurance Company, Illinois Union Insurance Company, and Starr Indemnity & Liability Company. United National acknowledged coverage obligations under a reservation of rights, but Illinois Union and Starr Indemnity denied coverage. The denials were wrongful, unreasonable, and vexatious.

91. Illinois Union, as primary carrier, and Starr Indemnity, as excess carrier, failed to promptly acknowledge claims, failed to timely affirm or deny coverage, failed to provide a reasonable explanation of the basis of denying coverage, failed to participate in settlement negotiations, and thereby compelled the Chicago Heights Actors to pursue this litigation to enforce their rights under the insurance policies.

92. The Chicago Heights Actors tendered Mr. Sanders's lawsuit to Illinois Union (primary carrier) and Starr Indemnity (excess carrier) for coverage under the law enforcement liability ("LEL") policy provisions, as well as any other applicable provisions of the primary and excess policies issued from November 1, 2011, through November 1, 2014.

93. Upon developments in Mr. Sanders's federal civil rights lawsuit, the Chicago Heights Actors reasserted their claims for coverage. For example, when Mr. Sanders's claims for malicious prosecution ripened after his acquittal, the Chicago Heights Actors reasserted their claims for coverage from Illinois Union and Starr Indemnity. The notice of claim also alerted Illinois Union and Starr Indemnity that Mr. Sanders was retried, twice, during the coverage periods. And Mr. Sanders's federal civil rights suit alleged that the Chicago Heights Actors' actions not only led to Mr. Sanders's wrongful incarceration, but also to his *continued* incarceration. That is, Mr. Sanders alleged that the Chicago Heights Actors continued to deprive him of his constitutional rights up through and during his re-trials in 2013 and 2014, and absent that denial he would have been exonerated even earlier than he in fact was.

94. Illinois Union was non-responsive to the Chicago Heights Actors' coverage claims for approximately two years. On December 22, 2014, Illinois Union declined coverage, even though the Illinois Union claims adjuster admitted that the policies included a duty to defend. This initial declination was conclusory in substance and devoid of legal or factual authority to support denial.

95. Upon receipt of Illinois Union's declination letter, the City of Chicago Heights' third party administrator ("TPA") immediately asked Illinois Union to reconsider its position in light of recent case law. Illinois Union rejected the TPA's request.

96. In addition to Mr. Sanders's date of exoneration, the TPA expressly notified Illinois Union and Starr Indemnity of the retrial dates—August 2013 and July 2014—as discrete dates of loss.

97. Further, in January 2015, the TPA notified Illinois Union and Starr Indemnity of Mr. Sanders's settlement demand, which fell within the limits of the combined primary and excess coverage.

98. Starr Indemnity never responded to the notice of claim or notice of the settlement demand sent by the TPA.

99. When Illinois Union acknowledged receipt of the additional claims in February 2015, it sent a declination letter to the TPA, mirroring its initial declination letter, and declining coverage under the 2010–11 policy, even though the dates of loss for which Illinois Union was on notice occurred during the 2012–13 and 2013–14 policy periods. The Illinois Union declination letter once again acknowledged a duty to defend under the policy, but denied coverage.

100. In June 2015, the Chicago Heights Actors, through legal counsel, sent Illinois Union and Starr Indemnity correspondence once again demanding coverage, and including a detailed coverage analysis discussing relevant case law that supported the Chicago Heights Actors' coverage position.

101. In response, Illinois Union remained steadfast in a blanket denial of coverage.

102. In October 2015, counsel for the Chicago Heights Actors sent another letter to Illinois Union, discussing additional authority in support of the Chicago Heights Actors' coverage position, and putting Illinois Union on notice that the Chicago Heights Actors have paid claims expenses in excess of the self-insured retention amount ($100,000), and demanding

indemnification pursuant to the provisions of Illinois Union's policies. Thereafter, Illinois Union continued to deny coverage.

103. Starr Indemnity did not respond to the Chicago Heights Actors' June 2015 or October 2015 coverage correspondence until December 2015, almost one year after Illinois Union's initial declination. At that time, Starr Indemnity delivered a declination, piggybacking on Illinois Union's position that no malicious prosecution fell within the coverage period. This theory for declining coverage is wrong, unreasonable, and vexatious. Mr. Sanders's malicious prosecution claim occurred in July 2014 (when Mr. Sanders was acquitted), during the coverage period. Furthermore, Mr. Sanders was retried during the coverage period, and at his retrials he was subjected to the deprivation of his constitutional rights as a result of the Chicago Heights Actors' misconduct, as well as false charges, false imprisonment, wrongful detention, emotional distress, mental injury, and pain and suffering.

104. Both Illinois Union and Starr Indemnity were notified that Mr. Sanders tendered a settlement demand that fell within the limits of the insurers' collective liability. But both carriers ignored their obligations to participate with the Chicago Heights Actors in response to the settlement demand. Instead, the carriers shunned the Chicago Heights Actors and unequivocally denied coverage despite the existence of legal authority supporting the Chicago Heights Actors' coverage position. Neither carrier filed a declaratory judgment action to obtain a judicial determination and interpretation of whether the policies were triggered by Mr. Sanders's federal civil rights lawsuit.

105. The Chicago Heights Actors notified the carriers that governing law from the First District Illinois Appellate Court supports a determination that Mr. Sanders's claims trigger coverage under policies in effect at the time of Mr. Sanders's acquittal. The Chicago Heights

Actors alerted the carriers that the Illinois precedent they cited has been relied upon by the United States Court of Appeals for the Seventh Circuit, in wrongful conviction coverage cases that are directly applicable to Mr. Sanders's case. Nonetheless, Illinois Union and Starr Indemnity refused to acknowledge the relevance of the First District precedent described above.

106. Accordingly, the Chicago Heights Actors filed a declaratory judgment action, seeking a declaration that they are entitled to coverage under the subject insurance policies. The coverage includes, but is not limited to, participation in settlement funding by both Illinois Union and Starr Indemnity.

107. It is approaching four years since Mr. Sanders filed his initial federal civil rights Complaint. During this time, both Illinois Union and Starr Indemnity have abandoned the Chicago Heights Actors.

108. At no point did Illinois Union or Starr Indemnity undertake the Chicago Heights Actors' defense under a reservation of rights. Nor did either insurer initiate a declaratory judgment action to resolve the coverage disputes.

109. At no point has Illinois Union or Starr Indemnity attempted in good faith to effectuate prompt, fair, and equitable settlement of Mr. Sanders's claims.

Settlement and Continued Denial of Coverage

110. On July 27, 2016, Mr. Sanders made a settlement demand of fifteen million dollars ($15,000,000) to settle all of his claims against the Chicago Heights Actors as a means of compensating him for harms caused by the Chicago Heights Actors' alleged wrongful conduct.

111. In the course of settlement negotiations, Mr. Sanders agreed to voluntarily withdraw with prejudice his claims for punitive damages.

112. Upon receipt of that demand, the Chicago Heights Actors notified United National, Illinois Union and Starr Indemnity of the demand and sought settlement contribution.

113. In assessing Mr. Sanders's demand, the Chicago Heights Actors investigated jury verdicts awarded to comparable wrongfully convicted plaintiffs who have filed civil rights lawsuits after being exonerated subsequent to long periods of incarceration. It is a matter of public record that Illinois juries have rendered large verdicts to wrongfully convicted plaintiffs. These verdicts have been upheld by Illinois Appellate Courts. *Dominguez v. Hendley*, 545 F.3d 585 (7th Cir. 2008) (affirming $9.6 million award for 4.5 years of incarceration); *Newsome v. McCabe*, 319 F.3d 301 (7th Cir. 2003) (affirming $15 million award for 15 years of incarceration). Awards to plaintiffs similar to Mr. Sanders provide evidence of actual recovery of large verdicts, often equal to $1 million to $2 million for every year incarcerated. *Id.*

114. In agreeing to settle the federal civil rights lawsuit, the Chicago Heights Actors took into account the size of verdicts awarded to wrongfully convicted plaintiffs incarcerated for many years, the attorneys' fees and costs which can be collected under §1988, and the likelihood of a verdict against one or more of the Chicago Heights Actors. Given the risks of liability and the likely outcome in the event of an adverse judgment, fifteen million dollars ($15,000,000) is a reasonable settlement figure.

115. As part of the settlement agreement, United National agreed to contribute three million dollars ($3,000,000), which represents the limits of liability for its applicable policy.

116. In response to notice of Mr. Sanders's demand, Illinois Union and Starr Indemnity both declined to contribute to settlement, stating their position that no covered events occurred during their policy periods.

117. After United National agreed to contribute three million dollars ($3,000,000) and the Chicago Heights Actors agreed to pay two million dollars ($2,000,000), without admission of

liability or wrongdoing, Illinois Union and Starr Indemnity still refused to contribute any sums to negotiate a settlement.

118. Those refusals came, for example, in correspondence dated August 5, 2016, and August 29, 2016, sent by Attorney Christopher A. Wadley on behalf of Illinois Union (denying coverage and refusing defense indemnification and settlement contribution), and correspondence dated August 8, 2016, and August 25, 2016, sent by Attorney Kimberly H. Petrina on behalf of Starr Indemnity (denying coverage and refusing defense indemnification and settlement contribution).

119. The Chicago Heights Actors' settlement decision was also based on the understanding that there would be no admission of liability and that settling the federal civil rights lawsuit: (1) settled any and all claims against the Chicago Heights Actors related to that lawsuit and would result in their release with no additional funding beyond Chicago Heights' two million dollar ($2,000,000) settlement payment; and (2) would result in the release of United National such that United National owes no additional amounts beyond its three million dollar ($3,000,000) settlement payment.

120. For the purpose of compromising disputed claims and without admission of fault, Mr. Sanders and the Chicago Heights Actors consented to entry of judgment in Mr. Sanders's favor, for fifteen million dollars ($15,000,000).

121. Mr. Sanders and the Chicago Heights Actors sought approval of the consent judgment by the federal court. Illinois Union and Starr Indemnity were provided notice of the parties' intent to seek approval for the consent judgment by the federal court.

122. Neither Illinois Union nor Starr Indemnity objected to entry of the consent judgment on any ground.

123. As determined by the federal district court, the parties consented to judgment in the interest of avoiding the expense, inconvenience, uncertainty, risk, and delay of litigation. The court found that the amount of the consent judgment was just and reasonable, and was agreed upon in good faith. The district court's order is attached as Exhibit F.

124. As a result of the payments from the Chicago Heights Actors and United National, the consent judgment will be partially satisfied for five million dollars ($5,000,000). In consideration for a covenant not to enforce the remaining ten million dollars ($10,000,000) of the judgment against the Chicago Heights Actors or United National, the Chicago Heights Actors assigned to Sanders, to the fullest extent of the law, all of the rights, claims, and causes of action of the Chicago Heights Actors against Illinois Union and Starr Indemnity and their agents, brokers, employees, officers and all other persons or entities, relating to or arising out of any applicable insurance policy or policies issued by Illinois Union and/or Starr Indemnity, consisting of rights to insurance coverage for the federal civil rights lawsuit, including but not limited to all statutory rights, contractual rights, and rights arising in tort or any other cause of action, relating to Illinois Union's and Starr Indemnity's duties to indemnify the Chicago Heights Actors, to fund the settlement, and to satisfy of the Consent Judgment. The assignment from the Chicago Heights Actors to Mr. Sanders is attached as Exhibit G.

125. As a result of his assignment, Mr. Sanders is entitled to recover as damages at least the ten million dollars ($10,000,000) in insurance coverage, attorneys' fees and costs, and pre- and post-judgment interest, plus any other damages the Court determines appropriate.

126. The City of Chicago Heights reserved its right to seek reimbursement from Illinois Union and Starr Indemnity for money that the City of Chicago Heights spent to defend against Mr. Sanders's federal civil rights suit, and to pay a portion of the consent judgment in

that suit. However, under its settlement agreement with, and assignment of rights to, Mr. Sanders, the City of Chicago Heights "cannot pursue this reservation unless and until Mr. Sanders has recovered $10,000,000 from Illinois Union and/or Starr Indemnity, and Mr. Sanders's lawsuit against Illinois and Starr Indemnity reaches a final judgment at the circuit court level." The settlement agreement between Mr. Sanders and the City of Chicago Heights is attached as Exhibit H.

127. Based on requests raised by Illinois Union and Starr Indemnity, which petitioned that all coverage disputes that relate to coverage for the Sanders claim be adjudicated in one lawsuit, Chicago Heights has been made a necessary party to this action.

128. In accordance with the settlement agreement between Mr. Sanders and Chicago Heights, attached hereto as Exhibit H, Mr. Sanders and Chicago Heights agree that this Court may adjudicate requested relief in sequence, with Mr. Sanders's request taking first priority.

COUNT I — BREACH OF CONTRACT AGAINST ILLINOIS UNION AND STARR INDEMNITY

129. Mr. Sanders and Chicago Heights incorporate each and every allegation in this Complaint as if fully set forth herein.

130. Illinois Union and Starr Indemnity entered into valid insurance contracts, requiring them to provide insurance coverage to the Chicago Heights Actors related to Mr. Sanders's federal civil rights lawsuit.

131. The relevant policies provide coverage for claims arising out of false arrest, false imprisonment, wrongful detention, and malicious prosecution—all of which were at issue in Mr. Sanders's federal civil rights lawsuit.

132. The relevant policies provide coverage for claims of bodily injury, which includes sickness or disease, mental anguish, mental injury, mental tension, emotional distress, and pain and suffering—which Mr. Sanders alleged in his federal civil rights lawsuit.

133. At least the following covered events occurred within the relevant policy periods: Mr. Sanders's first retrial, Mr. Sanders's second retrial, and Mr. Sanders's acquittal.

134. Illinois Union's and Starr Indemnity's conduct constitute a breach of contract in that from on or about November 1, 2012 to November 1, 2014, Illinois Union, through its duly authorized agents and employees, made unambiguous written promises in the form of written insurance contracts with the City, which established an agreement for insurance coverage, including law enforcement liability coverage. *See* Exhibits B and C attached hereto.

135. From on or about November 1, 2012 to November 1, 2014, Starr Indemnity, through its duly authorized agents and employees, made unambiguous written promises in the form of written insurance contracts with the City, which established an agreement for law enforcement liability coverage. *See* Exhibits D and E, attached hereto.

136. The promises set forth in the Illinois Union primary insurance contracts, Policy Nos. PEP G24891562 003 and PEP G24891562 004, began in November 1, 2012 and were in effect through November 1, 2014. *See* Exhibits B and C, attached hereto.

137. The promises set forth in the Starr Indemnity excess insurance contracts, Policy Nos. SISCPEL01944312 and 1000005129, began in November 1, 2012 and were in effect through November 1, 2014. *See* Exhibits D and E, attached hereto.

138. The City of Chicago Heights accepted Illinois Union's and Starr Indemnity's offers to provide insurance coverage and paid monetary consideration in the form of annual

premiums to Illinois Union and Starr Indemnity in exchange for its promises of coverage. *See* Exhibits B through E, policy declarations, attached hereto.

139. On or about January 2013 and continuing up and through the present, Illinois Union breached its promises when it failed to honor its agreements to provide insurance coverage for claims covered by its policy provisions and to indemnify the Chicago Heights Insureds for expenses, costs, and attorneys' fees incurred as a result of being named defendants in the *Sanders* Lawsuit.

140. On or about January of 2015 and continuing up and through the present, Starr Indemnity breached its promises when it failed to honor its agreements to provide insurance coverage for claims covered by its policy provisions and to participate with the Chicago Heights Insureds in response to Sanders's settlement demand, which fell within Starr Indemnity's limits of liability.

141. The *Sanders* Lawsuit, about which Illinois Union and Starr Indemnity are on actual notice, among other claims, alleges a claim for malicious prosecution. This claim accrued upon Sanders' acquittal on July 22, 2014, which is an occurrence falling within the period of Illinois Union's and Starr Indemnity's coverage.

142. The *Sanders* Lawsuit, about which Illinois Union and Starr Indemnity are on actual notice also alleges discrete claims of false imprisonment, wrongful detention, intentional infliction of emotional distress, physical injury, sickness, mental injury, and pain and suffering that are alleged to have occurred at the times of Sanders's second and third trials occurring in August 2013 and July 2014. All such alleged covered acts occurred within the policy periods covered by the Illinois Union primary policies and the Starr Indemnity excess policies.

143. As a direct result of Illinois Union's and Starr Indemnity's breach of their insurance contracts, Mr. Sanders has been injured in that he has been deprived of ten million dollars ($10,000,000) from Illinois Union and Starr Indemnity to which he is entitled by order of the U.S. District Court for the Northern District of Illinois, attached hereto as Exhibit F.

144. As a direct result of Illinois Union's and Starr Indemnity's breach of their insurance contracts, Chicago Heights has been injured, and has incurred damages in excess of two million six hundred thousand dollars ($2,600,000), which represents defense attorneys' fees and costs and settlement funding that should be subject to coverage by Illinois Union and Starr Indemnity, pursuant to the terms of the insurance contracts.

Wherefore, the Mr. Sanders and Chicago Heights pray for judgment on Count I in favor of Mr. Sanders and Chicago Heights against Illinois Union and Starr Indemnity and request relief in the form of direct, compensatory and consequential damages as a result of Illinois Union's and Starr Indemnity's breach of contract, which has resulted in damages. Mr. Sanders prays that this Court order relief on Count I, in an amount commensurate with satisfaction of the Judgment attached hereto as Exhibit F; and Chicago Heights prays for reimbursement for amounts incurred by Chicago Heights to satisfy defense fees and costs and settlement funding and for any other compensatory and consequential damages incurred by the Plaintiffs.

Wherefore, Mr. Sanders and Chicago Heights pray for:

A. An order finding that Illinois Union and Starr Indemnity have breached the provisions of their insurance contracts and, accordingly, are obligated to pay Mr. Sanders ten million dollars ($10,000,000) in satisfaction of the Order attached hereto as Exhibit F; and are obligated to indemnify Mr. Sanders for any compensatory and consequential damages, plus such additional amounts as are determined, including but not limited to pre- and post-judgment interest and costs; and

B. An order finding that Illinois Union and Starr Indemnity have breached the provisions of their insurance contracts and, accordingly, are obligated to pay the

Chicago Heights Insureds' attorneys' fees, costs and settlement funding incurred in defending and settling the *Sanders* Lawsuit, in an amount in excess of two million six hundred thousand dollars ($2,600,000); and are obligated to indemnify Chicago Heights for any compensatory and consequential damages, plus such additional amounts as are determined, including but not limited to pre- and post-judgment interest and costs.

COUNT II — IMPROPER CLAIMS PRACTICE AGAINST ILLINOIS UNION AND STARR INDEMNITY

145. Mr. Sanders and Chicago Heights incorporate each and every preceding allegation as if fully set forth herein.

146. Illinois Union and Starr Indemnity engaged in unfair claims practices as defined by Sections 154.5 and 154.6 of the Illinois Insurance Code. Their delays and coverage denials were vexatious and unreasonable, as those terms are used in Section 155 of that Code.Illinois Union and Starr Indemnity have engaged in unfair claims practices as prohibited by Sections 154.5 and 154.6 of the *Illinois Insurance Code*, which provide in pertinent part:

> Sec.154.5. (Improper Claims Practices) It is an improper claims practice for any domestic, foreign or alien company transacting business in this State to commit any of the acts contained in Section 154.6 if:
>
> (a) it is committed knowingly in violation of this Act or any rules promulgated hereunder; or
>
> (b) it has been committed with such frequency to indicate a persistent tendency to engage in that type of conduct.

215 ILCS 5/145.5.

> Sec. 154.6. Acts constituting improper claims practice. Any of the following acts by a company, if committed without just cause and in violation of Section 154.5, constitutes an improper claims practice:
>
> ***
>
> (b) Failing to acknowledge with reasonable promptness pertinent communications with respect to claims arising under its policies;
>
> ***

> (d) Not attempting in good faith to effectuate prompt, fair and equitable settlement of claims submitted in which liability has become reasonably clear;
>
> (e) Compelling policyholders to institute suits to recover amounts due under its policies by offering substantially less than the amounts ultimately recovered in suits brought by them;
>
> ***
>
> (i) Failing to affirm or deny coverage of claims within a reasonable time after proof of loss statements have been completed;
>
> ***
>
> (n) Failing in the case of the denial of a claim or the offer of a compromise settlement to promptly provide a reasonable and accurate explanation of the basis in the insurance policy or applicable law for such denial or compromise settlement;
>
> ***

215CS 5/154.5.

147. As set forth above, upon notice of Sanders's claims to Illinois Union and Starr Indemnity, both carriers delayed providing any substantive response as to coverage. Illinois Union delayed for more than two years and Starr Indemnity delayed for almost one year. Indeed, when Illinois Union first responded in December of 2014, it declined coverage without any supporting legal authority, while admitting it had a duty to defend.

148. When the Chicago Heights Insureds invoked indemnification under the Illinois Union policies for the ongoing defense fees and costs that are being incurred, Illinois Union denied coverage and simply turned its back on the Chicago Heights Insureds.

149. When both Illinois Union and Starr Indemnity were notified of Sanders' settlement demand in January of 2015, which fell within the limits of the combined primary and excess coverage, the carriers did nothing to attempt in good faith to effectuate prompt, fair and equitable settlement of Sanders' claims.

150. Illinois Union and Starr Indemnity have failed to acknowledge with reasonable promptness pertinent communications with respect to claims arising under their policies; failed to adopt and implement reasonable standards for the prompt investigations and settlement of claims arising under their policies; failed to attempt in good faith to effectuate prompt, fair and equitable settlement of claims in which liability has become reasonably clear; refused to pay claims without conducting a reasonable investigation based on all available information; and failed to promptly provide a reasonable and accurate explanation of the basis in the insurance policy or applicable law for denial of a claim or an offer of compromise settlement, all in violation of Section 154.6 of the *Illinois Insurance Code*.

151. Section 154.5 of *Illinois Insurance Code* provides that it is an improper claims practice for an insurance company to commit any of the acts set forth in Section 154.6.

152. The *Illinois Insurance Code* provides a means to assess sanctions against insurance companies that engage in unreasonable and vexatious conduct. 215 ILCS 5/155 provides as follows:

> Sec. 155. Attorney fees.
>
> (1) In any action by or against a company wherein there is in issue the liability of a company on a policy or policies or insurance or the amount of the loss payable thereunder, or for an unreasonable delay in settling a claim, and it appears to the court that such action or delay is vexatious and unreasonable, the court may allow as part of the taxable costs in the action reasonable attorney fees, other costs, plus an amount not to exceed any one of the following amounts:
>
> (a) 60% of the amount which the court or jury finds such party is entitled to recover against the company, exclusive of all costs;
>
> (b) $60,000;
>
> (c) the excess of the amount which the court or jury finds such party is entitled to recover, exclusive of costs, over the amount, if any, which the company offered to pay in settlement of the claim prior to the action.

> (2) Where there are several policies insuring the same insured against the same loss whether issued by the same or by different companies, the court may fix the amount of the allowance so that the total attorney fees on account of one loss shall not be increased by reason of the fact that the insured brings separate suits on such policies.

153. Mr, Sanders and Chicago Heights maintain that Illinois Union has acted in contravention of its promises to indemnify the Chicago Heights Insureds for claims expenses in excess of the $100,000 self-insured retention. As a result of Illinois Union's unreasonable and vexatious conduct, Chicago Heights has incurred in excess of $700,000 in fees and costs to date, with fees and costs increasing daily.

154. Mr. Sanders and Chicago Heights further maintain that Starr Indemnity has acted in contravention of its promises to provide coverage for defense, judgments and settlements that come within the limits of liability set forth in its policies. Starr Indemnity was notified of Sanders' settlement demand falling within the limits of its liability. In response, Starr Indemnity denied coverage and has turned its back on the Chicago Heights.

155. Accordingly, as set forth in this Count, in the Background allegations set forth above, and in the other Counts set forth herein, Illinois Union's and Starr Indemnity's unreasonable and vexatious conduct, as manifested by their refusal to provide indemnification coverage for defense fees and costs and failure to show a good faith effort to participate in settlement negotiations provides grounds for sanctions under Section 155 of the *Illinois Insurance Code.*

156. Mr. Sanders and Chicago Heights have been harmed by Illinois Union's and Starr Indemnity's actions and have suffered damages and will continue to incur damages.

157. Wherefore, the Mr. Sanders and Chicago Heights pray for judgment in their favor and against Illinois Union and Starr Indemnity on Count II and pray that a jury or this Court make a finding that Illinois Union and Starr Indemnity, pursuant to Sections 154.5 and 154.6 of the *Illinois Insurance Code* (215 ILCS 5/154.5; 6), have engaged in improper claims practices and should be subjected to sanctions therefore, pursuant to Section 155 of the *Illinois Insurance Code* (215 ILCS 5/155), as follows:

A. To reimburse and indemnify Mr. Sanders and Chicago Heights for all attorneys' fees and costs incurred related to the *Sanders* Lawsuit.

B. To reimburse and indemnify Mr. Sanders and Chicago Heights for all attorneys' fees and costs incurred related to this pending declaratory judgment action.

C. To award Mr. Sanders and Chicago Heights the maximum additional amount awardable under §155 of the *Insurance Code*. 215 ILCS 5/155, which would be the greater of one of the following amounts: (1) 60% of the amount which the court or a jury finds that the Chicago Heights Insured are entitled to recover; or (2) $60,000; or (3) the excess of the amount which the court or jury finds the Chicago Heights Insured are entitled to recover over the amount, if any, which the insurers offered to pay in settlement of the claim prior to the action.

COUNT III — DECLARATORY JUDGMENT BY SANDERS AND CITY OF CHICAGO HEIGHTS AGAINST ILLINOIS UNION AND STARR INDEMNITY ON ISSUE OF TRIGGER

158. Mr. Sanders and Chicago Heights incorporate each and every preceding allegation as if fully set forth herein.

159. The *Sanders* Lawsuit alleges that after almost two decades of incarceration, Sanders' conviction was vacated on January 14, 2011. *Sanders* Complaint attached hereto as Exhibit A, ¶40; and that the Illinois Court of Appeals affirmed the Circuit Court's ruling overturning Sanders' conviction and vacating his sentence on May 30, 2012. *See Sanders* Complaint attached hereto as Exhibit A, ¶42.

160. Notwithstanding this reversal, Sanders alleges that he was subjected to years of ongoing judicial proceedings, which ultimately resulted in a third trial on July 22, 2014, during which a jury acquitted Sanders of all the charges against him. *See Sanders* Complaint attached hereto as Exhibit A, ¶43. Sanders' complaint alleges he was wrongfully charged without probable cause and subject to a series of judicial proceedings that resulted in favorable termination on July 22, 2014. By these allegations, Sanders sets forth the elements to state a claim of the offense of malicious prosecution. It is well-established that under state and federal law that the offense of malicious prosecution ripens at the time that all elements of the offense are in place, which occurs at the time of favorable termination of criminal proceedings. *Security Mutual Casualty Co. v. Harbor Insurance Co.,* 65 Ill. App. 3d 198, 206, 382 N.E.2d 1, 6 (1st Dist. 1978), rev'd on other grounds, 77 Ill.2d 446, 397 N.E.2d 839 (1979); *Heck v. Humphrey*, 512 U.S. 477, 114 S.Ct. 2364 (1994).

161. Sanders alleges that the criminal proceedings against him were favorably terminated on July 22, 2014, a date falling within the period when Illinois Union's and Starr Indemnity's policies were in place.

162. Sanders has also alleged injury from ongoing judicial proceedings, which included charges initiated at the outset of each of his three trials, two of which trials (August 2013 and July 2014) took place within Illinois Union's and Starr Indemnity's policy periods.

163. The *Sanders* Lawsuit alleges Sanders was injured by the alleged conduct of Chicago Heights' employees and others while they were engaged in LEL activities and were operating within the scope of their duties. *See Sanders* Complaint attached hereto as Exhibit A, ¶¶10, 54, 128, and 132.

164. To determine whether there is coverage under an insurance policy, the allegations of the underlying complaint are applied in the context of the provisions of the insurance policy.

165. As set forth above, Illinois Union's and Starr Indemnity's policies include law enforcement liability coverage for the City of Chicago Heights, and its employees acting within the scope of their employment.

166. As set forth above, the Illinois Union's and Starr Indemnity's policies expressly provide coverage for the claims arising out of the offenses of false arrest, false imprisonment, wrongful detention and malicious prosecution, all offenses which are alleged by Sanders.

167. As set forth above, the Illinois Union's and Starr Indemnity's policies expressly provide coverage for claims of bodily injury, which includes sickness or disease, mental anguish, mental injury, mental tension, emotional distress and pain and suffering, which are alleged by Sanders.

168. The *Sanders* Lawsuit alleges wrongdoing against the City of Chicago Heights Insureds occurring during the period from 1994 to the present, including false arrest, false imprisonment, wrongful detention, malicious prosecution, physical injury, sickness, mental injury and pain and suffering, all of which come within the parameters of coverage promised by Illinois Union and Starr Indemnity.

169. The Chicago Heights Insureds demanded coverage from Illinois Union and Starr Indemnity, both of which denied coverage.

170. An actual controversy exists between Mr. Sanders/Chicago Heights and Illinois Union/Starr Indemnity and this Court is vested with the power to declare the rights and liabilities of the parties.

171. Wherefore, Mr. Sanders and Chicago Heights pray that this Court grant declaratory judgment relief in favor of Mr. Sanders and Chicago Heights and against Illinois Union and Starr Indemnity on Count III as follows:

A. Determine and adjudicate the rights and liabilities of the parties hereto with respect to the application of policies of insurance described above.

B. Find and declare that there is one or more occurrence or potential occurrence, as defined under Illinois Union primary policies policy nos. PEP G24891562 003, effective November 1, 2012 to November 1, 2013 and PEP G24891562 004, effective November 1, 2013 to November 1, 2014, related to the *Sanders* Lawsuit and, therefore, that the *Sanders* Lawsuit triggers coverage under the Illinois Union policies.

C. Find and declare that there is one or more occurrence or potential occurrence, as defined under Starr Indemnity Excess Policy No. SISCPEL01944312, effective November 1, 2012 to November 1, 2013; and Starr Indemnity Excess Policy No. 1000005129, effective November 1, 2013 to November 1, 2014, related to the *Sanders* Lawsuit and, therefore, that the *Sanders* Lawsuit triggers coverage under the Starr Indemnity policies.

D. Grant to Mr. Sanders and Chicago Heights such other and further relief that this Court deems proper under the evidence and circumstances.

COUNT IV — DECLARATORY JUDGMENT BY SANDERS AND CHICAGO HEIGHTS AGAINST ILLINOIS UNION AND STARR INDEMNITY FOR INDEMNIFICATION OF JUDGMENT, DEFENSE FEES AND COSTS AND SETTLEMENT FUNDING

172. Mr. Sanders and Chicago Heights incorporate each and every preceding allegation as if fully set forth herein.

173. The claims in the *Sanders* Lawsuit fall within and/or potentially fall within the Illinois Union and Starr Indemnity policies coverage.

174. The Illinois Union primary policies provide a duty to indemnify for defense fees and costs, with the express promise that: "When the **Damages** and **Claim Expenses** for which **You** become legally obligated to pay exceed the **Retained Limit**, **You** will be entitled to

indemnification by **Us**…" *See* Exhibits 2 and 4, Common Conditions, Definitions, and Exclusions p. 2 of 20.

175. Chicago Heights has incurred damage and claim expenses in excess of the SIR of $100,000 set forth in the Illinois Union policies. *See* Underwriters Safety & Claims, Inc. 2/11/16 Payment History, attached to the original declaratory judgment complaint as Exhibit I. The Payment History shows payments in the amount of $582,657.28 as of February 11, 2016. Additionally, since February 11, 2016 additional fees and costs were incurred, which total more than $700,000, which total will be proved up at trial.

176. Mr. Sanders and Chicago Heights maintain that, pursuant to the terms of the Illinois Union primary policies and the Starr Indemnity excess policies, the carriers have a duty to participate with Chicago Heights in responding to Sanders' settlement demand and/or satisfying judgments in Mr. Sanders's favor, which fall within the combined liability limits of the carriers' policies.

177. Chicago Heights notified the carriers of Sanders' settlement demand, which fell within the carriers' combined limits. Chicago Heights also notified the carriers of the entry of the consent judgment awarding Mr. Sanders relief within their policy limits, attached hereto as Exhibit F, to which the carriers did not present any objection.

178. Illinois Union and Starr Indemnity denied any coverage obligations and denied any duty to participate in settlement discussions.

179 Illinois Union and Starr Indemnity refused to honor coverage obligations to participate in settlement negotiations and have denied any liability to satisfy the remaining $10,000,000 of the award granted by the consent judgment entered in favor of Mr. Sanders by the U.S. District Court for the Northern District of Illinois, attached hereto as Exhibit F.

180. Additionally, Illinois Union has refused to indemnify Chicago Heights and has thereby unjustifiably breached its duty to provide indemnification for defense fees and costs, in the approximate amount of $700,000, and settlement funding, in the amount of $2,000,000, even after receiving notice of the City of Chicago Heights satisfaction of the SIR.

181. An actual controversy exists between Mr. Sanders/Chicago Heights and Illinois Union/Starr Indemnity and this Court is vested with the power to declare the rights and liabilities of the parties.

WHEREFORE, Mr. Sanders and Chicago Heights demand judgment in their favor and indemnification as follows:

A. An award against all Defendants Illinois Union and Starr Indemnity, jointly and severally, for at least ten million dollars ($10,000,000) in compensatory damages;

B. Attorneys' fees;

C. Taxable fees and costs, including reasonable attorneys' fees, other costs, plus an amount not to exceed (a) 60% of the amount which the court or jury finds Mr. Sanders is entitled to recover against Illinois Union and Starr Indemnity, exclusive of all costs; (b) $60,000; (c) the excess of the amount which the court or jury finds Mr. Sanders is entitled to recover, exclusive of costs, over the amount, if any, which Illinois Union or Starr Indemnity offered to pay in settlement of the claim prior to the action;

D. Any other damages which may appear proper; and

E. Pre- and post-judgment interest on all sums awarded.

WHEREFORE, subject to relief being granted to Mr. Sanders in the amount of at least ten million dollars ($10,000,000), Chicago Heights prays for judgment in its favor and indemnification as follows:

A. An award against Illinois Union and Starr Indemnity, jointly and severally, for undred thousand dollars ($2,600,000) in compensatory damages;

B. Attorneys' fees;

C. Any other damages which may appear proper; and

D. Pre- and post-judgment interest on all sums awarded.

Jury Demand

Mr. Sanders and Chicago Heights demand trial by jury on all issues so triable.

RESPECTFULLY SUBMITTED,

/s/ Russell Ainsworth
Attorney for Rodell Sanders

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UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

RODELL SANDERS, Plaintiff, v. CITY OF CHICAGO HEIGHTS, JEFFREY BOHLEN, SAM MANGIALARDI, ROBERT PINNOW, MAUREEN TEED, CHARLES NARDONI, ANTHONY MURPHY, JOSEPH RUBESTELLI, JEFFREY GOSS, and UNIDENTIFIED EMPLOYEES OF THE CITY OF CHICAGO HEIGHTS, Defendants.	)	13-CV-221 Judge St. Eve JURY TRIAL DEMANDED

SECOND AMENDED COMPLAINT

NOW COMES Plaintiff, RODELL SANDERS, by his attorneys, LOEVY & LOEVY, and complaining of Defendants, JEFFREY BOHLEN, SAM MANGIALARDI, ROBERT PINNOW, CHARLES NARDONI, ANTHONY MURPHY, JOSEPH RUBESTELLI, JEFFREY GOSS, and UNIDENTIFIED EMPLOYEES of the CITY OF CHICAGO HEIGHTS, acting pursuant to the City's policies and practices (collectively, "Defendant Officers"), Federal Bureau of Investigation ("FBI") Agent MAUREEN TEED and the CITY OF CHICAGO HEIGHTS (hereinafter "City"), alleges as follows:

EXHIBIT A

C 2336 V5

Introduction

1. Rodell Sanders spent more than 20 years incarcerated for a murder and attempt murder that he did not commit.

2. There was no physical evidence linking Mr. Sanders to this crime. Rather, the only purported evidence against Mr. Sanders were two purchased and patently false witness identifications. These wrongful misidentifications were procured through manipulation and bribes by members of the City of Chicago Heights's infamously corrupt police department.

3. Unfortunately, the widespread misconduct that caused Mr. Sanders' wrongful conviction was not an isolated event. Prior to Mr. Sanders' unlawful prosecution, other individuals were unlawfully arrested by the same group of Chicago Heights Police Detectives, led by Defendants Jeffrey Bohlen, Robert Pinnow and their former Chief, Defendant Sam Mangialardi, a man who has since been convicted of racketeering, witness tampering, bribery, extortion, and money laundering.

4. Although Mr. Sanders' has been acquitted of all the false charges lodged by Defendants, he will never regain the lost decades of his life. This lawsuit seeks redress for his injuries.

Jurisdiction and Venue

5. This action is brought pursuant to 42 U.S.C. § 1983 to redress the deprivation under color of law of Plaintiff's rights

as secured by the United States Constitution.

6. This court has jurisdiction pursuant to 28 U.S.C. §§ 1331 and 1367. Venue is proper under 28. U.S.C. § 1391(b). A number of the parties reside in this judicial district, and the events giving rise to the claims asserted herein occurred here as well.

The Parties

7. Plaintiff Rodell Sanders is 49 years old. Mr. Sanders has two daughters. When he was wrongfully imprisoned, his oldest daughter was 13 years old and his youngest was not yet born. Both daughters grew up without having a father in their lives as a result of Mr. Sanders' wrongful incarceration.

8. Apart from the wrongful conviction that is the subject of this lawsuit, Mr. Sanders has no other criminal convictions. Moreover, although he spent the past two decades incarcerated for a crime that he did not commit, Mr. Sanders sought to better himself while in prison, earning a law clerk certificate and never having been put in segregation.

9. Defendant City of Chicago Heights is an Illinois municipal corporation, and is and/or was the employer of Defendants Mangialardi, Bohlen, Pinnow, Goss , Nardoni, Murphy and Rubestelli. The City of Chicago Heights is responsible for the acts of the Defendant Officers while

employed by the City of Chicago Heights and while acting within the scope of their employment.

10. At all times relevant hereto, Defendants Mangialardi, Pinnow, Bohlen, Goss, Murphy and Rubestelli were police officers in the Chicago Heights Police Department acting under color of law and within the scope of their employment for the City of Chicago Heights.

11. Defendant Maureen Teed is or was employed by the Federal Bureau of Investigation. At all times relevant hereto, Defendant Teed was an agent with the FBI, acting under color of law and within the scope of her employment.

The Shooting

12. On December 15, 1993, Stacy Armstrong and Phillip Atkins were sitting in a parked car around two in the morning. After being abruptly awoken, Ms. Armstrong and Mr. Atkins were accosted by a group of men and led to an abandoned garage.

13. The garage was so dark that the offenders used a lighter to carry out the robbery and shooting that followed.

14. Mr. Atkins was killed and Ms. Armstrong was shot multiple times and left for dead. Ms. Armstrong blacked out after being shot. Once she regained consciousness, Ms. Armstrong sought help by going to a nearby house and was eventually taken to the hospital. Ms. Armstrong survived the shooting.

Plaintiff's Innocence

15. Mr. Sanders had absolutely nothing to do with the crime.

16. At the time of the shooting, Mr. Sanders was nowhere nearby. Rather, Mr. Sanders was at his friend Vicky Ross's apartment. According to Ms. Ross and many others, Mr. Sanders was playing cards and hanging out with them at all relevant times on the night of December 14, 1993. The alibi witnesses recall that Mr. Sanders stayed at the apartment into the early morning hours of the following day.

Defendants' Misconduct

17. There was never any physical evidence linking Mr. Sanders to this crime. None of his fingerprints or DNA were found at the crime scene, nor was any incriminating evidence of any kind ever discovered in his possession.

18. Defendants Bohlen and Pinnow knew Mr. Sanders and bore a grudge against him. Despite the lack of evidence against Mr. Sanders, the Defendants unlawfully pinned the shootings on him.

17. The Defendants first spoke with Ms. Armstrong at the hospital on the night of the shooting. However, Ms. Armstrong was unable to describe the offenders at all at that time.

18. Two weeks later, Defendants Bohlen and Pinnow interviewed Ms. Armstrong again. During this subsequent interview, Ms. Armstrong gave the Defendants a detailed account

of the shooting.

19. According to the Defendants, Ms. Armstrong related that four people committed the crime. She could not identify the first and the fourth offenders, whom she described only as black men.

20. Ms. Armstrong, however, described the shooter and the individual who ordered the shooting.

21. As to the shooter, Ms. Armstrong informed Defendants Pinnow and Bohlen that he was a 16 year-old, short black male (between five feet, five inches and five feet, seven inches tall) with a medium build and medium complexion who was wearing a black shirt with a black hood and black pants.

22. Ms. Armstrong further told the Defendants that the man who ordered the shooting (who will be hereinafter referred to alternatively as Offender Number Three) was a six foot tall skinny black man who was wearing black and grey faded pants and an olive, knit ski cap in his thirties. Ms. Armstrong told the Defendants that Offender Number Three had a mustache and goatee.

23. At the time of the shooting, Mr. Sanders stood five feet eight inches tall and weighed close to 200 pounds, and was 29 years old. He did not match the description of Offender Number Three (a tall skinny guy) or that of the shooter (a sixteen year-old teenager). Nor did Mr. Sanders have anything whatsoever to do with this crime.

24. Although the Defendants knew that Rodell Sanders was not Offender Number Three, the Defendants manipulated Ms. Armstrong into identifying Mr. Sanders as Offender Number Three.

25. To accomplish the task of having Ms. Armstrong misidentify Mr. Sanders, the Defendants concocted a flawed photographic line-up designed to improperly implicate Mr. Sanders. To begin, although Ms. Armstrong had described Offender Number Three as tall and skinny, the Defendants inserted Mr. Sanders into the photo array shown to Ms. Armstrong, despite the fact that Mr. Sanders was 5'8 and weighed close to 200 pounds. Among other misconduct, the Defendants manipulated Mr. Sanders' photograph to make him look taller and thinner than he truly was.

26. As a result of the Defendants' unlawful conduct, Ms. Armstrong also falsely identified Mr. Sanders in a subsequent live lineup.

27. The Defendants never disclosed to Mr. Sanders or his attorneys the means by which they manipulated Ms. Armstrong into identifying him.

28. Thereafter, according to Defendants, they arrested Germaine Haslett, an acquaintance of Mr. Sanders, in January 1994 on an unrelated crime. The Defendants were already well acquainted with Haslett. He had been cooperating with the Chicago Heights Police Department against a man named Bernard

Ellis. Although the Ellis prosecution later fell apart when the courts learned that the police had been withholding exculpatory evidence from Ellis, at the time of the investigation into the Atkins and Armstrong shooting, Haslett was an important witness for the Defendants.

29. On the day of his arrest, Haslett confessed to Defendants his role in the Atkins murder - namely, that he was Offender Number Three.

30. To protect Haslett, their main witness against the Ellis, the Defendants sought to minimize Haslett's complicity in the crime by permitting him to claim he was simply a lookout in exchange for falsely pointing the finger at Mr. Sanders.

Haslett's Undisclosed Benefits

31. Mr. Haslett agreed to participate in the illicit scheme. In exchange for his false statement inculpating Mr. Sanders, Haslett received a deal on the Atkins and Armstrong case, allowing him to plead guilty to armed robbery instead of facing charges for murder and attempt murder.

32. That, however, was not the only benefit that Haslett received. Unbeknownst to Mr. Sanders, during the pendency of Mr. Sanders' case, Defendant Bohlen arranged for Haslett to continue his career as an FBI and Chicago Heights police informant, including by giving testimony against Mr. Sanders.

In doing so, Haslett was able to curry multiple additional, undisclosed favors for himself.

33. First, in exchange for Haslett's testimony against Mr. Sanders, the Defendants agreed to terminate Haslett's probation in an unrelated drug case. That consideration was never disclosed to Mr. Sanders or his defense prior to his wrongful incarceration.

34. Second, the Defendants arranged for Haslett to receive a two-year reduction on the 12-year sentence he was given as part of his plea in the Atkins and Armstrong case. As a result, Haslett served just five and a half years in prison. In addition, the Defendants ensured that Haslett was housed during those five years in the witness quarters in the State's Attorney's Office, protective custody at the Cook County Jail or in the federal system. The reduction in Haslett's sentence and his preferred housing while incarcerated were both withheld from Mr. Sanders and his defense.

35. Third, the Defendants (including Maureen Teed) helped arrange for thousands of dollars to be paid to Haslett and his-then girlfriend and the mother of his children in exchange for Haslett's testimony against Sanders. They also arranged for Haslett and his then-girlfriend to have unsupervised visits.

36. None of the payments to Haslett or his girlfriend or the visits they were permitted to have were disclosed to Mr.

Sanders or his defense prior to his wrongful conviction.

The Wrongful Conviction

37. At his first trial, the only evidence introduced against Mr. Sanders were the false identifications by Ms. Armstrong and Mr. Haslett. All other evidence, including the physical evidence collected by the Defendants, exculpated Mr. Sanders.

38. Nevertheless, on the basis of the false identifications procured by Defendants, the jury convicted Mr. Sanders of attempt murder, armed robbery and murder.

39. Mr. Sanders was then sentenced to 80 years of incarceration for the murder attempt murder. In addition, Mr. Sanders was sentenced to a concurrent 20 years of imprisonment on the armed robbery charge.

Plaintiff's Exoneration

40. Mr. Sanders fought tirelessly to overturn his wrongful conviction. After almost two decades of incarceration, Rodell Sanders' unjust conviction was finally vacated on January 14, 2011.

41. Remarkably, Mr. Sanders spent years learning the law and obtaining evidence via Freedom of Information Act requests and ordering transcripts that directly led to his exoneration. Despite only a high school education, Mr. Sanders litigated his

post-conviction claims *pro se* and convinced a court to overturn his conviction.

42. The Illinois Court of Appeals affirmed the Circuit Court's ruling overturning Mr. Sanders' conviction and vacating his sentence on May 30, 2012.

43. Mr. Sanders was then retried. On July 22, 2014, a jury acquitted Mr. Sanders of all the charges against him.

Chicago Heights' Pattern of Misconduct

44. The misconduct that caused Mr. Sanders' wrongful conviction was not an isolated event. Rather, the Chicago Heights Police Department has a storied history of police misconduct.

45. Most notably, in 1993, Defendant Mangialardi was arrested and charged with racketeering, witness tampering, and extortion. A year later he was convicted of those charges, and was sentenced to over a decade in prison.

46. The arrest, trial, and conviction of Defendant Mangialardi centered on Defendant Mangialardi's extortion of Otis Moore, the leader of a flourishing drug ring.

47. For a number of years, Defendant Mangialardi demanded that Moore pay him $10,000 per month. In exchange, Defendant Mangialardi diverted officers from Moore's drug turf and directed those officers to investigate Moore's competitors.

48. Yet, the corruption did not stop with Defendant Mangialardi's conviction. Rather, the misconduct in Chicago Heights was so widespread that a total of six police officers, and 15 public officials, including the former mayor, Charles Pinici, were convicted and sentenced to lengthy prison sentences and large fines.

49. The corruption was so widespread among the City of Chicago Heights police department that the Mayor enlisted a retired Illinois Supreme Court Justice to investigate the entire police department.

50. For instance, around the same time as Mr. Sanders was facing false charges for murder, Bernard Ellis was facing trial for murder. Ellis was eventually found guilty, but his conviction was reversed when the appellate court found that the very Defendants involved in Mr. Sanders' case had not disclosed benefits that were provided to two of the eyewitnesses to the shooting. Even more, the appellate court also found that the various Defendants coached, threatened, and bribed witnesses in exchange for false identifications of Ellis.

Plaintiff's Injuries

51. In serving two decades behind bars, Mr. Sanders was wrongfully deprived of much of his adult life. Mr. Sanders has been stripped of the various pleasures of basic human experience, from the simplest to the most important, which all

free people enjoy as a matter of right. He missed out on the ability to raise his daughters, share holidays, births, funerals, and other life events with loved ones, and the fundamental freedom to live one's life as an autonomous human being.

52. As a result of his wrongful incarceration, Mr. Sanders must now attempt to rebuild his life, all without the benefit of the life experiences that ordinarily equip adults for that task.

Count I – Due Process

42 U.S.C. § 1983

53. Each of the Paragraphs of this Complaint is incorporated as if restated fully herein.

54. As described more fully above, the Defendant Officers, while acting individually, jointly, and in conspiracy with other named and unnamed individuals, as well as under color of law and within the scope of their employment, deprived Plaintiff of his constitutional right to a fair trial.

55. In the manner described more fully above, the Defendant Officers deliberately withheld exculpatory evidence, and fabricated false reports and other evidence, thereby misleading and misdirecting the criminal prosecution of Plaintiff. Absent this misconduct, the prosecution of Plaintiff could not and would not have been pursued.

56. The Defendant Officers' misconduct also directly resulted in the unjust criminal conviction of Plaintiff, thereby denying him his constitutional right to a fair trial, and a fair appeal thereof, in violation of the Due Process Clause of the Fourteenth Amendment to the United States Constitution.

57. As a result of this violation of his constitutional right to a fair trial, Plaintiff suffered injuries, including, but not limited to, physical sickness and injury, and emotional distress, as is more fully alleged above.

58. The misconduct described in this Count was objectively unreasonable and was undertaken intentionally with willful indifference to Plaintiff's constitutional rights.

59. The misconduct by the Defendant Officers described in this Count was undertaken pursuant to the policy and practice of the Chicago Heights Police Department, which Mr. Sanders was the victim of, and his injuries were proximately caused by a policy and practice on the part of the City of Chicago Heights to pursue and secure false convictions through profoundly flawed investigations.

60. Specifically, throughout the 1990s, a group of Chicago Police Heights Officers, including some or all of the Defendant Officers herein, engaged in a systematic pattern of coercion, fabrication of evidence, withholding of exculpatory information,

and other illegal tactics, the sum total of which completely corrupted the investigative process.

61. This institutional desire to close cases through unconstitutional tactics regardless of actual guilt or innocence, in order to enhance police officers' personal standing in the Department, was known to the command personnel, who themselves participated in the practice.

62. The above-described widespread practices, so well-settled as to constitute *de facto* policy in the Chicago Heights Police Department during the time period at issue, were able to exist and thrive because municipal policymakers with authority over the same either concurred with the practices or exhibited deliberate indifference to the problem.

63. The widespread practices described in the preceding paragraphs were allowed to take place because the City declined to implement sufficient training and/or any legitimate mechanism for oversight or punishment. Indeed, the Department's system for investigating and disciplining police officers accused of the type of misconduct that befell Plaintiff was, and is, for all practical purposes, nonexistent.

64. Chicago Heights police officers who manufactured criminal cases against individuals such as Plaintiff had every reason to know that they not only enjoyed *de facto* immunity from criminal prosecution and/or Departmental discipline, but that

they also stood to be rewarded for closing cases no matter the costs. In this way, this system proximately caused abuses, such as the Defendant Officers' misconduct at issue in this case.

Count II Due Process

***Bivens v. Six Unknown Named Agents of the FBI*, 403 U.S. 388 (1971)**

65. Each of the Paragraphs of this Complaint is incorporated as if restated fully herein.

66. As described more fully above, Defendant Teed, while acting individually, jointly, and in conspiracy with other named and unnamed individuals, as well as under color of law and within the scope of her employment, deprived Plaintiff of his constitutional right to a fair trial.

67. In the manner described more fully above, Defendant Teed deliberately withheld exculpatory evidence, and fabricated false reports and other evidence, thereby misleading and misdirecting the criminal prosecution of Plaintiff. Absent this misconduct, the prosecution of Plaintiff could not and would not have been pursued.

68. Defendant Teed's misconduct also directly resulted in the unjust criminal conviction of Plaintiff, thereby denying him his constitutional right to a fair trial, and a fair appeal

thereof, in violation of the Due Process Clause of the Fourteenth Amendment to the United States Constitution.

69. As a result of this violation of his constitutional right to a fair trial, Plaintiff was injured, including, but not limited to, physical injury and sickness, and emotional distress, as is more fully alleged above.

70. The misconduct described in this Count was objectively unreasonable and was undertaken intentionally with willful indifference to Plaintiff's constitutional rights.

Count III - Conspiracy

42 U.S.C. § 1983

71. Each of the Paragraphs of this Complaint is incorporated as if restated fully herein.

72. Prior to arresting Plaintiff, the Defendant Officers reached an agreement amongst themselves to frame Plaintiff for the crime, and to thereby deprive Plaintiff of his constitutional rights, all as described in the various Paragraphs of this Complaint.

73. In addition, before and after Plaintiff's conviction, each of the Defendant Officers further conspired, and continue to conspire, to deprive Plaintiff of exculpatory materials to which he was lawfully entitled and which would have led to his more timely exoneration of the false charges as described in the various Paragraphs of this Complaint.

74. In this manner, the Defendant Officers, acting in concert with each other and with Defendant Teed and other unknown co-conspirators, including persons who are and who are not members of the Chicago Heights Police Department or FBI, have conspired by concerted action to accomplish an unlawful purpose by an unlawful means.

75. In furtherance of the conspiracy, each of the co-conspirators committed overt acts and was an otherwise willful participant in joint activity.

76. As a direct and proximate result of the illicit prior agreement referenced above, Plaintiff's rights were violated, and he suffered financial damages, as well as physical injury and sickness, and severe emotional distress and anguish, as is more fully alleged above.

77. The misconduct described in this Count was undertaken with malice, willfulness, and reckless indifference to the rights of others.

78. The Defendant Officers' misconduct described in this Count was undertaken pursuant to the policy and practice of the Chicago Heights Police Department in the manner described more fully in preceding paragraphs, and was tacitly ratified by policy-makers for the City of Chicago Heights with final policymaking authority.

Count IV - Conspiracy

***Bivens v. Six Unknown Named Agents of the FBI*, 403 U.S. 388 (1971)**

79. Each of the Paragraphs of this Complaint is incorporated as if restated fully herein.

80. Prior to arresting Plaintiff, Defendant Teed reached an agreement with the other Defendants to frame Plaintiff for the crime, and to thereby deprive Plaintiff of his constitutional rights, all as described in the various Paragraphs of this Complaint.

81. In addition, before and after Plaintiff's conviction, Defendant Teed further conspired, and continues to conspire, to deprive Plaintiff of exculpatory materials to which he was lawfully entitled and which would have led to his more timely exoneration of the false charges as described in the various Paragraphs of this Complaint.

82. In this manner, Defendant Teed, acting in concert with the other Defendants and other unknown co-conspirators, including persons who are and who are not members of the Chicago Heights Police Department or FBI, has conspired by concerted action to accomplish an unlawful purpose by an unlawful means.

83. In furtherance of the conspiracy, Defendant Teed committed overt acts and was an otherwise willful participant in joint activity.

84. As a direct and proximate result of the illicit prior agreement referenced above, Plaintiff's rights were violated, and he suffered financial damages, physical injury and sickness, as well as severe emotional distress and anguish, as is more fully alleged above.

85. The misconduct described in this Count was undertaken with malice, willfulness, and reckless indifference to the rights of others.

Count V - Failure to Intervene

42 U.S.C. § 1983

86. Each of the Paragraphs of this Complaint is incorporated as if restated fully herein.

87. In the manner described above, during the Constitutional violations described above, one or more of the Defendant Officers (including as-yet-unknown Police Officers) stood by without intervening to prevent the misconduct.

88. As a result of the Defendant Officers' failure to intervene to prevent the violation of Plaintiff's constitutional rights, Plaintiff suffered damages, including physical sickness and injury, as well as emotional distress. These Defendants had a reasonable opportunity to prevent this harm, but failed to do so.

89. The misconduct described in this Count was objectively unreasonable and was undertaken intentionally with willful

indifference to Plaintiff's constitutional rights.

90. The Defendant Officers' misconduct described in this Count was undertaken pursuant to Chicago Height's policy and practice in the manner described in preceding paragraphs.

Count VI - Failure to Intervene

***Bivens v. Six Unknown Named Agents of the FBI*, 403 U.S. 388 (1971)**

91. Each of the Paragraphs of this Complaint is incorporated as if restated fully herein.

92. In the manner described above, during the constitutional violations described above, Defendant Teed stood by without intervening to prevent the misconduct.

93. As a result of Defendant Teed's failure to intervene to prevent the violation of Plaintiff's constitutional rights, Plaintiff suffered damages, including physical sickness and injury, as well as emotional distress. Defendant Teed had a reasonable opportunity to prevent this harm, but failed to do so.

94. The misconduct described in this Count was objectively unreasonable and was undertaken intentionally with willful indifference to Plaintiff's constitutional rights.

Count VII - Supervisor Liability

42 U.S.C. § 1983

95. Each of the Paragraphs of this Complaint is incorporated as if restated fully herein.

96. The constitutional injuries complained of herein were proximately caused by a pattern and practice of misconduct, which occurred with the knowledge and consent of those of the Defendant Officers who acted in a supervisory capacity, including Defendants Mangialardi, Nardoni, Murphy, and Rubestelli, such that these officers personally knew about, facilitated, approved, and/or condoned this pattern and practice of misconduct, or least recklessly caused the alleged deprivation by their actions or by their deliberately indifferent failure to act.

97. The misconduct described in this Count was undertaken with malice, willfulness, and reckless indifference to the rights of others.

98. The misconduct described in this Count was undertaken pursuant to the City's policy and practice in the manner more fully described above.

99. As a result of this violation, Plaintiff suffered injuries, including but not limited to physical sickness and injuries, and emotional distress, as is more fully alleged above.

100. Absent knowing participation by the command personnel responsible for supervising the Defendant Officers, the misconduct alleged in this Complaint could not have occurred.

Count VIII - Malicious Prosecution

42 U.S.C. § 1983[1]

101. Each of the Paragraphs of this Complaint is incorporated as if restated fully herein.

102. Defendant Officers caused Plaintiff to be improperly subjected to judicial proceedings for which there was no legitimate probable cause. These judicial proceedings were instituted and continued maliciously, resulting in injury, and all such proceedings were ultimately terminated in Plaintiff's favor in a manner indicative of his innocence.

103. The Defendant Officers accused Plaintiff of criminal activity knowing those accusations to be without genuine probable cause, and they made statements to prosecutors with the intent of exerting influence to institute and continue the judicial proceedings.

104. Statements of the Defendant Officers regarding Plaintiff's alleged culpability were made with knowledge that said statements were false and perjured. In so doing, the

1 Plaintiff is including this claim in his First Amended Complaint to preserve it in the event that the Seventh Circuit overturns its ruling in *Newsome v. McCabe*, 256 F.3d 747 (7th Cir. 2001).

Defendant Officers fabricated evidence and withheld exculpatory information.

105. The misconduct in this Count violated Plaintiff's rights under the Fourth Amendment and the procedural and substantive due process components of the Fourteenth Amendment.

106. The misconduct described in this Court was undertaken with malice, willfulness, and reckless indifference to the rights of others.

107. The misconduct described in this Count was undertaken pursuant to the City's policy and practice in the manner more fully described above.

108. As a result of this misconduct, Plaintiff sustained, and continues to sustain, injuries including physical injury and sickness, and emotional pain and suffering.

Count IX - Malicious Prosecution

***Bivens v. Six Unknown Named Agents of the FBI*, 403 U.S. 388 (1971)**

109. Each of the Paragraphs of this Complaint is incorporated as if restated fully herein.

110. Defendant Teed caused Plaintiff to be improperly subjected to judicial proceedings for which there was no legitimate probable cause. These judicial proceedings were instituted and continued maliciously, resulting in injury, and

all such proceedings were ultimately terminated in Plaintiff's favor in a manner indicative of his innocence.

111. Defendant Teed accused Plaintiff of criminal activity knowing those accusations to be without genuine probable cause, and made statements to prosecutors with the intent of exerting influence to institute and continue the judicial proceedings.

112. Statements of Defendant Teed regarding Plaintiff's alleged culpability were made with knowledge that said statements were false and perjured. In so doing, the Defendant fabricated evidence and withheld exculpatory information.

113. The misconduct in this Count violated Plaintiff's rights under the Fourth Amendment and the procedural and substantive due process component of the Fourteenth Amendment.

114. The misconduct described in this Court was undertaken with malice, willfulness, and reckless indifference to the rights of others.

115. As a result of this misconduct, Plaintiff sustained, and continues to sustain, injuries including physical injury and sickness, and emotional pain and suffering.

Count X - State Law Claim

Malicious Prosecution

116. Each of the Paragraphs of this Complaint is incorporated as if restated fully herein.

117. Defendant Officers caused Plaintiff to be improperly subjected to judicial proceedings for which there was no legitimate probable cause. These judicial proceedings were instituted and continued maliciously, resulting in injury, and all such proceedings were ultimately terminated in Plaintiff's favor in a manner indicative of innocence.

118. Defendant Officers accused Plaintiff of criminal activities knowing those accusations to be without genuine probable cause, and made statements to the police and/or prosecutors with the intent of exerting influence to institute and continue the judicial proceedings.

119. Defendant Officers also fabricated evidence and failed to disclose the manner in which that evidence was fabricated. Additionally, the Defendant Officers withheld evidence that would have proven Plaintiff's innocence.

120. The misconduct described in this Count was undertaken with malice, willfulness, and reckless indifference to the rights of others.

121. As a result of this misconduct, Plaintiff sustained injuries, including physical injury and sickness, and emotional pain and suffering, as more fully alleged above.

Count XI -- State Law Claim

Intentional Infliction of Emotional Distress

122. Each of the Paragraphs of this Complaint is incorporated as if restated fully herein.

123. In the manner described more fully above, by wrongfully inculpating Plaintiff in a crime he did not commit, Defendant Officers intended to cause emotional distress.

124. In doing so, Defendant Officers' conduct was extreme and outrageous and caused Plaintiff severe, disabling emotional distress.

125. The misconduct described in this Count was undertaken with malice, willfulness, and reckless indifference to the rights of others.

126. As a result of this misconduct, Plaintiff sustained injuries, including physical injury and sickness, and emotional pain and suffering, as is more fully alleged above.

Count XII -- State Law Claim

Respondeat Superior

127. Each of the Paragraphs of this Complaint is incorporated as if restated fully herein.

128. In committing the acts alleged in the preceding paragraphs, Defendant Officers were members of the Chicago Police Department, acting at all relevant times within the scope of their employment.

129. Defendant City of Chicago is liable as the principal for all torts committed by its agents.

Count XIII -- State Law Claim

Indemnification

130. Each of the Paragraphs of this Complaint is incorporated as if restated fully herein.

131. Illinois law provides that public entities are directed to pay any tort judgment for compensatory damages for which employees are liable within the scope of their employment activities.

132. The Defendant Officers are or were employees of the Chicago Police Department, and acted within the scope of their employment in committing the misconduct described herein.

WHEREFORE, Plaintiff, RODELL SANDERS, respectfully requests that this Court enter judgment in his favor and against Defendants, CITY OF CHICAGO HEIGHTS, MAUREEN TEED, JEFFREY BOHLEN, ROBERT PINNOW, SAM MANGIALARDI, Det. J. CHARLES NARDONI, ANTHONY MURPHY, JOSEPH RUBESTELLI, JEFFREY GOSS, and UNIDENTIFIED EMPLOYEES of the CITY OF CHICAGO HEIGHTS, awarding compensatory damages, costs, and attorneys' fees, as well as punitive damages against all individual defendants, and any other relief this Court deems just and appropriate.

JURY DEMAND

Plaintiff, RODELL SANDERS, hereby demands a trial by jury pursuant to Federal Rule of Civil Procedure 38(b) on all issues so triable.

RESPECTFULLY SUBMITTED:

s/ Elliot Slosar
Attorneys for Rodell Sanders

Arthur Loevy
Jon Loevy
Michael Kanovitz
Russell Ainsworth
Gayle Horn
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(312) 243-5900

Notice of Appeal **(10/18/17) CCA 0256 A**

APPEAL TO THE APPELLATE COURT OF ILLINOIS
FROM THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS

COUNTY **DEPARTMENT,** CHANCERY **DIVISION/DISTRICT**

RODELL SANDERS and THE CITY OF CHICAGO HEIGHTS

Plaintiff/ (•) Appellant ( ) Appellee

v.

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

Defendant/ ( ) Appellant (•) Appellee

Reviewing Court No.: _____

Circuit Court No.: 16 CH 2605

NOTICE OF APPEAL

(Check if applicable. See IL Sup. Ct. Rule 303(a))(3).

☐ Joining Prior Appeal ☑ Separate Appeal ☐ Cross Appeal

Appellant's Name: Rodell Sanders

(•) Atty. No.: 41295 ( ) Pro Se 99500

Atty Name: Russell Ainsworth of Loevy & Loevy

Address: 311 North Aberdeen, Third Floor

City: Chicago State: IL

Zip: 60515

Telephone: 312-243-5900

Primary Email: russell@loevy.com

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Tertiary Email: lauren@loevy.com

Appellee's Name: _____

( ) Atty. No.: _____ ( ) Pro Se 99500

Atty Name: _____

Address: _____

City: _____ State: _____

Zip: _____

Telephone: _____

Primary Email: _____

Secondary Email: _____

Tertiary Email: _____

An appeal is taken from the order or judgment described below:

Date of the judgment/order being appealed: 1/2/18

Name of judge who entered the judgment/order being appealed: Judge Celia Gamrath

C 3088 V6

Notice of Appeal **(10/18/17) CCA 0256 B**

Relief sought from Reviewing Court:

Plaintiff-Appellant Rodell Sanders appeals the circuit court's January 2, 2018 opinion and order granting Defendants Illinois Union Insurance and Starr Indemnity's motion to dismiss under Rule 2-619. Plaintiff-Appellant asks that the Appellate Court reverse the circuit court's decision and remand the case for further proceedings.

I understand that a *"Request for Preparation of Record on Appeal"* form (CCA 0025) must be completed and the initial payment of $110 made prior to the preparation of the Record on Appeal. The Clerk's Office will not begin preparation of the ROA until the Request form and payment are received. Failure to request preparation of the ROA in a timely manner, i.e., at least 30 days before the ROA is due to the Appellate Court, may require the Appellant to file a request for extension of time with the Appellate Court. A *"Request for Preparation of Supplemental Record on Appeal"* form (CCA 0023) must be completed prior to the preparation of the Supplemental ROA.

Russell Ainsworth (IL)

To be signed by Appellant or Appellant's Attorney

Notice of Appeal (10/18/17) CCA 0256 A

APPEAL TO THE APPELLATE COURT OF ILLINOIS
FROM THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS

COUNTY DEPARTMENT, CHANCERY DIVISION/DISTRICT

Rodell Sanders and the City of Chicago Heights

Plaintiff/ ◉ Appellant ○ Appellee

v.

Illinois Union Ins. Co. and Starr Indemnity and Liability Co.

Defendant/ ○ Appellant ◉ Appellee

Reviewing Court No.: 1-18-0158

Circuit Court No.: 16 CH 2605

City of Chicago Heights **NOTICE OF APPEAL**

(Check if applicable. See IL Sup. Ct. Rule 303(a))(3).

☑ Joining Prior Appeal ☐ Separate Appeal ☐ Cross Appeal

Appellant's Name: City of Chicago Heights
◉ Atty. No.: 59943 ○ Pro Se 99500
Atty Name: Paulette A. Petretti
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Tertiary Email: emcnulty@edlawyer.com

Appellee's Name: Illinois Union & Star Indemnity
○ Atty. No.: To be provided ○ Pro Se 99500
Atty Name: To be provided by Appellees
Address:
City: State:
Zip:
Telephone:
Primary Email:
Secondary Email:
Tertiary Email:

An appeal is taken from the order or judgment described below:

Date of the judgment/order being appealed: 1/2/18

Name of judge who entered the judgment/order being appealed: Judge Celia Gamrath

C 3097 V7

Notice of Appeal **(10/18/17) CCA 0256 B**

Relief sought from Reviewing Court:

Plaintiff-Appellant City of Chicago Heights appeals the Circuit Court's January 2, 2018 Opinion & Order granting Defendants Illinois Union Ins. Co. and Starr Indem. and Liab. Co's Rule 2-619 Motion to Dismiss. Plaintiff-Appellant asks the Appellate Court to reverse the Cir. Court's decision and remand the case for further proceedings

I understand that a *"Request for Preparation of Record on Appeal"* form (CCA 0025) must be completed and the initial payment of $110 made prior to the preparation of the Record on Appeal. The Clerk's Office will not begin preparation of the ROA until the Request form and payment are received. Failure to request preparation of the ROA in a timely manner, i.e., at least 30 days before the ROA is due to the Appellate Court, may require the Appellant to file a request for extension of time with the Appellate Court. A *"Request for Preparation of Supplemental Record on Appeal"* form (CCA 0023) must be completed prior to the preparation of the Supplemental ROA.

Paulette A. Pistutti

To be signed by Appellant or Appellant's Attorney
Attorney for City of Chicago Heights

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APPEAL TO THE APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT
FROM THE CIRCUIT COURT OF THE COOK JUDICIAL CIRCUIT
COOK COUNTY, ILLINOIS

RODELL SANDERS
Plaintiff/Petitioner

Reviewing Court No: 1-18-0158
Circuit Court No: 2016CH002605
Trial Judge: CELIA GAMRATH

v.

ILLINOIS UNION INS.ET AL.
Defendant/Respondent

E-FILED
Transaction ID: 1-18-0158
File Date: 3/20/2018 1:08 PM
Thomas D. Palella
Clerk of the Appellate Court
APPELLATE COURT 1ST DISTRICT

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NOTICE OF FILING and PROOF OF SERVICE

In the Supreme Court of Illinois

RODELL SANDERS and THE CITY OF CHICAGO HEIGHTS, *Plaintiffs-Appellees,* v. ILLINOIS UNION INSURANCE COMPANY and STARR INDEMNITY & LIABILITY COMPANY, *Defendants-Appellants.*	)	No. 124565

The undersigned, being first duly sworn, deposes and states that on June 26, 2019, there was electronically filed and served upon the Clerk of the above court the Brief and Appendix of Defendant-Appellant Illinois Union Insurance Company. Service of the Brief will be accomplished by email as well as electronically through the filing manager, Odyssey EfileIL, to the following counsel of record:

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Within five days of acceptance by the Court, the undersigned states that thirteen copies of the Brief bearing the court's file-stamp will be sent to the above court.

/s/ Christopher A. Wadley
Christopher A. Wadley

Under penalties as provided by law pursuant to Section 1-109 of the Code of Civil Procedure, the undersigned certifies that the statements set forth in this instrument are true and correct.

/s/ Christopher A. Wadley
Christopher A. Wadley