No. 124565

IN THE SUPREME COURT OF ILLINOIS

RODELL SANDERS and THE CITY OF CHICAGO HEIGHTS, ILLINOIS,	)	
Plaintiffs-Appellees,	)	On Appeal from the Illinois Appellate Court, First Judicial District, Second Division, No. 01-18-0158
v.	)	On Appeal from the Circuit Court of Cook County, Illinois, No. 16 CH 02605, Honorable Celia Gamrath, Presiding
ILLINOIS UNION INS. CO. and STARR INDEMNITY AND LIABILITY CO.,	)	
Defendants-Appellants.	)	

MERIT BRIEF OF PLAINTIFF-APPELLEE RODELL SANDERS

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POINTS AND AUTHORITIES

RULE 341(h)(2) STATEMENT

Plaintiffs City of Chicago Heights and Rodell Sanders sued Defendants Illinois Union Insurance Company (ñIllinois Unionò) and Starr Indemnity & Liability Company (ñStarrò) (collectively, ñInsurersò), to recover damages and penalties for breach of insurance contracts and bad faith and unreasonable denial of insurance claims. Insurers moved to dismiss the action, arguing that their policies did not cover Mr. Sandersô malicious prosecution claims in the underlying litigation. The appellate court disagreed, holding that Insurersô policy language was triggered once the elements of the underlying malicious prosecution claim were satisfied. Insurers appeal from that judgment. The question, raised on the pleadings, is whether Insurers can avoid coverage, or alternatively, as the appellate court held, must pay the insurance proceeds owed.

ISSUES PRESENTED FOR REVIEW

I. Whether Insurersô malicious prosecution coverage was triggered in 2014 upon completion of the elements of malicious prosecution, in accordance with Insurersô selected trigger: the offense of malicious prosecution.

II. Whether Insurersô malicious prosecution coverage was triggered in 2013 and 2014, when Mr. Sanders was twice tried due to the insured police officersô continuation of the prosecution through discrete wrongful acts.

SUMMARY OF ARGUMENT

The appellate court correctly held that Insurersô policies were triggered in 2014 upon completion of the tort of malicious prosecution, in accordance with Insurersôselected trigger: the ñoffenseò of ñmalicious prosecution.ò ñOffenseò in Insurersô policies means a legal tort, as evidenced by its use in the phrase ñone or more of the following offenses,ò followed by a list of legal torts. And ñmalicious prosecutionò is an established legal term that has but one definition: a tort with six ñessential elements,ò all of which are required for the tort. No textual basis exists in the policy for focusing on less than all six elements.

A purchaser, following the plain meaning of the term ñoffense,ò in the context of the surrounding provisions, could reasonably conclude that the policies were triggered when the tort of malicious prosecution was completed during the policy periodð that is, upon satisfaction of all six elements, which occurred, in Mr. Sandersôs criminal case, in 2014. Accordingly, the policies must be construed in favor of coverage.

Insurers do not dispute that ñmalicious prosecutionò has an established legal meaning as a tort with a defined set of six elements. Yet to avoid paying what is owed, they contend the term ñoffenseò of ñmalicious prosecutionò somehow means fewer than its required elements. In doing so, they begin a series of contradictory positions, none of which square with the contractual language. Often, they claim that one element in particularð the commencement of a prosecutionð is the touchstone of the offense, and triggers coverage. Other times, they focus on the insured officersôconduct, claiming one possible meaning of the term ñoffenseò is a ñwrongful actò (a term used by other occurrence-based insurers that appears nowhere in the applicable provisions). In the context of malicious prosecution torts, however, the ñwrongful actò committed by the insured tortfeasorð for example, a police officerôs coercion of a false confession or fabrication of witness testimonyð is distinct from the act of the initiation (or continuation) of the charges and need not occur in the same policy period. Because the prosecutor controls the timing, the two events can ñhappenò years apart. Thus, Insurers offer no principled reason for why the trigger would turn on the commencement of the prosecution, but not its favorable terminationð neither of which are the insured tortfeasorôs wrongful acts and both of which are required to support a cause of action.

Insurers also resort to a blunt blanket rule with little support from the policy terms Insurers themselves drafted: that all occurrence policies are triggered upon the initiation of the prosecution, regardless of an insurerôs selected policy language. Yet this Courtôs precedents command the exact opposite approach: analysis of the specific contract language agreed upon by the parties. The non-binding Illinois and foreign authorities upon which Insurers rely are not to the contrary, because they construe policy provisions that differ markedly from the language in Insurersô policies. Nor can Insurers prevail by resorting to selective and self-serving policy arguments. Insurers are required to express the coverage trigger unambiguously in their own policy language. The law does not permit them to escape the agreed-upon language, by imposing after-the-fact assertions about supposed better policy considerations. Regardless, there are countervailing policy considerations, too, that warrant rejection of Insurersô argument.

Finally, even if the trigger should be the insuredôs wrongful act prior to completion of the tort, an alternative basis exists for affirming the appellate court. That is because the insureds committed independent wrongful conduct, causing additional injuries, during the policy period by continuing Mr. Sandersô prosecution after his conviction was vacated, causing Mr. Sanders to stand trial two additional times in 2013 and 2014. Continuing an extant prosecution is a well-accepted basis for liability under the common law and the insuredsô continuation undisputedly caused additional injury on the facts at bar. Having drafted their own policy terms and tendered them to the City, which dutifully paid its premiums and relied upon the policy language, Insurers cannot now duck their coverage obligations. This Court should affirm the appellate courtôs correct decision.

STANDARD OF REVIEW

Insurers moved to dismiss pursuant to 735 ILCS 5/2-619(a)(9), which establishes a basis for dismissal only if a claim ñis barred by . . . affirmative matter avoiding the legal effect of or defeating the claim.ò Dismissal under Section 2-619(a)(9) requires the movant to admit the legal sufficiency of the complaintò; ñaccept as true all well-pleaded facts in plaintiff's complaintò; and draw ñall inferences that may reasonably be drawn in plaintiffôs favor,ò from both pleadings and supporting documents. *Van Meter v. Darien Park Dist.*, 207 Ill. 2d 359, 367 (2003) (quotation omitted); *Sandholm v. Kuecker*, 2012 IL 111443, ¶ 55. ñThe motion should be granted only if the plaintiff can prove no set of facts that would support a cause of action.ò *Snyder v. Heidelberger*, 2011 IL 111052, ¶ 8.

The appellate courtôs denial of Insurersô 2-619(a)(9) motion is subject to *de novo* review, as is the question of whether an insurance agreement is ambiguous. *Van Meter*, 207 Ill. 2d at 377; *Cent. Illinois Light Co. v. Home Ins. Co.*, 213 Ill. 2d 141, 153-54 (2004).

STATEMENT OF FACTS[1]

A. The City purchases insurance from Illinois Union and Starr Indemnity

To secure itself against the risk of economic loss from torts committed by municipal employees, the City of Chicago Heights bought insurance. A48-54. As is typical for municipalities, the City purchased policies covering police misconduct from multiple insurers. *See id.*

Pertinent here, the City paid Illinois Union for primary insurance policies covering the time period of November 1, 2010 to November 1, 2014. A48; A107 (2012-2013 policy);

[1] References to ñA_ò are to the appendix provided at the end of Appellant Starr Indemnityôs opening merits brief, followed by the page number(s). The record on appeal is cited as: ñR.ò, followed by the volume number (V_), and corresponding page numbers.

A168 (2013-2014 policy). The City also purchased excess liability coverage from Starr for the same time period. A51-52; A226 (2012-2013 policy); A256 (2013-2014 policy). The Starr policies were follow-form policies providing coverage over the underlying Illinois Union policies, and insured the City for up to $10 million per occurrence. A51-52. The Starr policies tracked the terms of the Illinois Union policies, and were materially identical for purposes of this appeal. A48, 52.[2] The City paid nearly half a million dollars annually for the insurance coverage provided by these Insurers. A48, 52.

Insurersô policies required them to indemnify the City as follows:

> 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.

A49-50, 130. The Policies defined the term ñOccurrenceò as follows:

> b. With respect to Personal Injury, only those offenses specified in the Personal Injury Definition.

A51, 120. In turn: ñPersonal Injury means one or more of the following offenses:ò

> 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 personôs 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.

A51, 121. Thus, the policies required that the ñoffenseò of ñmalicious prosecutionò ñhappen[] during the Policy Periodò and that the ñoffenseò of ñmalicious prosecutionò ñtake place during the Policy Period.ò The policies did not define ñoffense.ò A120.

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[2] For brevity, this brief cites to the 2012- 2013 Illinois Union policy. A107.

B. Mr. Sanders sues the City and its officers to redress his wrongful prosecution and conviction

Rodell Sanders was prosecuted for a tragic 1993 crime by four perpetrators that resulted in the death of Phillip Atkins and the near-fatal shooting of Stacy Armstrong. A36-45, 78, 80. Mr. Sanders had nothing to do with this crime, nor did any physical evidence link him to it. A38-39, 80-81. However, as Mr. Sanders alleges in his complaint, two City police officers hostile to him manipulated the surviving victim to change her testimony and falsely identify Mr. Sanders as that perpetrator who ordered the shooting. A40-43, 81-84. Another man, Germaine Haslett, repeatedly confessed to having that role in the crime. A41-45. At the time, however, Haslett was cooperating as a ñsnitchò in another prosecution, and thus the City officers were motivated to inculpate Mr. Sanders in his stead. A41-42, 83-84.

Mr. Sanders was arrested based on Armstrongôs faulty identification and charged with murder. A43. The Cityôs officers proceeded to withhold exculpatory information from his defense, including Haslettôs alleged repeated confessions, Haslettôs disclosure of the identity of the shooter, and promises made and benefits provided to Haslett, Armstrong, and others in exchange for testimony against Mr. Sanders. A44-46, 83-86. Although Mr. Sanders consistently maintained his innocence, he was convicted solely on the basis of the two false identifications manufactured against him. A45, 86.

After years of appeals and post-conviction proceedings, Illinois courts vacated Mr. Sanders conviction. A45. Nonetheless, City officers engaged in further misconduct in an attempt to have him convicted again. A45-47, 55, 57, 64, 71. In 2013, as a result of this misconduct, Sanders was tried again, this time under an additional theory of liability. A47. That second trial resulted in a hung jury. *Id.* Still, City officers continued to engage in misconduct until a third trial in 2014 resulted in an acquittal. *Id.*

After more than 20 years of imprisonment as an innocent man, Mr. Sanders walked free. A36, 39. He then sued, asserting malicious prosecution and other claims against the City and some of its police officers (ñthe City Actorsò). A46-47. Mr. Sandersô malicious-prosecution claims alleged that the City Actors had fabricated inculpatory evidence and hid exculpatory evidence from his defense at each of his three trials. A40-57, 64, 71. Mr. Sanders alleged not only that the City Actorsôactions led to the initiation of charges against him, but also that they caused the continuation of his charges after they were vacated, as well as his continued incarceration. *Id.* That is, Mr. Sanders alleged that the City Actors continued to deprive him of his constitutional rights up through and during his 2013 and 2014 trials, and, absent that deprivation, he would have been exonerated earlier. *Id.*

C. The City's insurers fail to meet their obligations

The City had liability insurance covering malicious-prosecution suits, and it tendered Mr. Sandersôs suit to its three insurers. A37, 54-55. Illinois Union and Starr denied coverage, even though they had sold the City coverage for all of 2013 and most of 2014ð the years in which Mr. Sanders was tried a second and third time and finally acquitted. *Id.* A third insurer, United National Insurance Company, acknowledged coverage obligations under a reservation of rights.[3] A58-61.

After failing to get Sandersôs lawsuit dismissed on the pleadings or at summary

[3] It thus makes no difference that the City purchased insurance from United National. Insurers make much of the fact that this insurer did not deny coverage, apparently to suggest that the City is being duplicitousð taking one position to collect from United National and another to collect from Insurers. Not so. That the City and United National agreed in 1994 to a policy that was triggered by wrongful conduct has absolutely no bearing on what the City and Insurers agreed to in 2013 and 2014. There is no rule limiting the City to just one insurance policy to cover lawsuits such as Mr. Sandersôs, and indeed, municipalities frequently secure coverage, responsibly, from multiple insurers.

judgment, the City Actors consented to entry of judgment in Mr. Sandersô favor, for $15 million, with no admission of fault. A37, 58-61. The City Actors agreed to the settlement to avoid risking a much larger jury verdict at trial. A59. The federal court that oversaw the civil rights case approved the consent judgment and found that it was ñjust, reasonable, and [] determined in good faith.ò R.V6 C 2912. As a result of payments from the City Actors and United National (which contributed its full policy limit of $3 million), the consent judgment was partially satisfied for $5 million. A61. Illinois Union and Starr refused to contribute any sums toward the settlement. A37-38, 54-60.

D. The City brings this action against its insurers

The City brought this suit against Illinois Union and Starr seeking a declaration that it is entitled to policy coverage and enforcement of their contractual obligations. A36. The coverage includes, but is not limited to, participation in settlement funding by both Illinois Union and Starr and payments for the City Actorsôdefense costs. A48-54. In his settlement with the City, Sanders was assigned many of the Cityôs rights against Insurers and became a co-plaintiff here. A61. The City reserved its right to recover against Insurers. A61-62.

E. The appellate court denies Insurers' motion to dismiss

Insurers moved to dismiss pursuant to 735 ILCS 5/2-619(a)(9), admitting that they insured the City Actors from 2010 to 2014 against offenses of malicious prosecution, but claiming that nothing happened during that time period to trigger coverage. R.V5 2602.

The circuit court initially granted the insurersô motion to dismiss (A1), but the appellate court reversed (A12). The appellate court based its decision on the policy language, holding that the term ñoffenseò as used in Insurersô policies ñrefers to the completed, legal cause of action of malicious prosecution,ò rather than a particular act or

conduct of the insured. A20-21. The appellate court also held that the Illinois cases cited by the Insurers in support of a contrary result did not control due to their different policy language. A21-26. The court concluded that Mr. Sandersô 2014 exoneration triggered the Insurersôcoverage obligations. A9-10. Insurers filed this appeal.

ARGUMENT

I. Mr. Sanders's 2014 exoneration triggered Insurers' coverage obligations

As all parties agree, Insurers drafted their policies to trigger coverage upon the ñoffenseò of ñmalicious prosecution.ò *See, e.g.*, Ill. Union Br. 3. Specifically, the policies required Insurers to indemnify the City Actors for claims ñfirst arising out of an Occurrence happening during the Policy Period . . . for Personal Injury taking place during the Policy Period.ò A130. The policies defined ñOccurrenceò as ñonly those offenses specified in the Personal Injury Definition.ò A120. And the policies defined ñPersonal Injury,ò too, as the list of ñoffenses,ò including malicious prosecution. A121.

The policy does not attempt to define the term ñoffenseò nor ñmalicious prosecutionò (nor any of the personal injury torts it lists as ñoffensesò). Rather, the only definition of the ñoffenseò of ñmalicious prosecutionò is the one long provided in case law, comprising six ñessentialò elements that this Court holds ñmust be present.ò *Freides v. Sani-Mode Mfg. Co.*, 33 Ill. 2d 291, 295 (1965). No colloquial or commonly-accepted lay understanding of the term ñmalicious prosecutionò exists apart from the tort for which people sue each other. Rather, longstanding case law provides this clear and unambiguous definition, the type of definition an insurer owes its insured up front. Mr. Sandersôs construction is confirmed by accepted understandings of the term ñoffenseò and the policiesôpassive characterization of the trigger as ñhappeningò during the policy period. In

short, the ñoffenseò did not happen until the tort happened, which was in 2014, when Mr. Sandersôs criminal case terminated in his favor, and thus Insurersô policies are triggered.

Importantly, Insurersô policies never say that the ñoffenseò of malicious prosecution means anything less than the complete tort. Rather, the Insurers introduce that idea, after-the-fact, to serve their argument against coverage. But, in doing so, they open a can of worms from which ambiguity spills. Which part or parts of the defined term ñmalicious prosecutionò is the ñoffenseò? The insurance policy does not expressly tell us, so if we indulge that ñmalicious prosecutionò means less than all its elements, Insurers can pick and choose whatever trigger best supports their coverage denial on the facts of a given case. They can claim it means ñwrongful actsò ñcommittedò by the officer that caused a malicious prosecution, although the policy they issued uses neither of those terms. *See Beaman v. Freesmeyer*, 2019 IL 122654, ¶ 33. Or they can claim the ñoffenseò ñhappensò when the prosecutor initiates charges even though the tortfeasor officers do not control the prosecutorôs timing and the prosecutor commits no ñoffenseò in causing charges to ñhappen.ò They can claim the ñoffenseò happens as soon as there is ñinjury,ò even though, again, the policy does not use the term ñinjuryò in describing the trigger as other occurrence policies sometimes do.

Contrast this free-for-all with the certainty and clarity of holding the Insurers to the accepted definition of ñmalicious prosecutionò in case law: we know that the ñoffenseò ñhappensò exactly upon the completion of the six elements of ñmalicious prosecution.ò

Even assuming the policy is ambiguous, the law does not allow an insurance company to pick the most advantageous among ambiguous possible meanings of its coverage triggers. It is incumbent upon the insurer, as the policy drafter, to outline coverage

clearly. If the insurerôs policy language is ambiguous, the insurer must accept the meaning most favorable to coverage. Here, Insurers not only pick and choose different elements of the tort to call the ñoffense,ò but they disagree with one another (and at times, themselves) on which element, as they try to explain how the supposed ambiguity of the ñoffenseò of ñmalicious prosecutionò means they need not pay.

The definition that Illinois Union advances is perhaps the least tenable of the lot. Illinois Union contends that the term ñoffenseò means the insuredôs wrongful conduct, so the ñoffenseò of ñmalicious prosecutionò means the initiation of charges. *See, e.g.*, Ill. Union Br. 12, 13, 14, 24. Yet the initiation of charges is *not* the wrongful act of the insured tortfeasor; it is the charging decision of the prosecutor, the timing of which is often a fortuity that the tortfeasor does not control. If ñoffenseò refers to the insuredôs wrongful conduct, there is no principled reason for why the ñoffenseò of malicious prosecution would constitute the commencement by the prosecution, but not its favorable terminationð neither of which are the insuredôs wrongful act and both of which are essential elements of the tort. *Freides*, 33 Ill. 2d at 295.

Illinois Union alsoð intermittently and inconsistentlyð contends that the ñoffenseò is not the insuredôs wrongful act, but actually the injury it causes (*e.g.*, Ill. Union Br. 13), making use of the fact that the injury in a malicious prosecution often (though not necessarily) first occurs at the time of the initial charges. Yet then, there is a stark disconnect between Illinois Unionôs interpretation of the phrase ñoffense of malicious prosecutionò as incorporating the insuredôs wrongful act, and the injury trigger it claims is unambiguous in its policy language. Moreover, the law is also clear that a tortfeasor can be liable for continuing the prosecution when probable cause ceases. *Beaman*, 2019 IL

122654, ¶ 33. Characterizing the ñoffenseò of ñmalicious prosecutionò as the initiation of charges contravenes the case law on malice from continuation of a prosecution.

For its part, Starr advances a contradictory, and even less viable theory: that Insurers required *both* the insuredôs wrongful act and the resulting injury of an initiated prosecution to have taken place during the policy period. Starr Br. 9. Yet for this construction to comport with the policiesô language and definitions, the purchasing City would have had to somehow divine that Insurers used the exact same termð ñoffenseòð to convey two different meanings. Such a conclusion is untenable.

Insurersô claim that ñoffenseò of ñmalicious prosecutionò necessarily means the initiation of charges by the state, cannot be correct. Rather, as explained below, the Insurers either left its meaning ambiguous, in which case the phrase must be interpreted to mean the completed tort as defined in case law, or the intrinsic aides to interpretation lead to the same result: the ñoffenseò of malicious prosecution is the completed tort on the language of the policy here. This Court should affirm the appellate courtôs correct analysis.

A. Insurance companies must unambiguously identify the trigger for their coverage obligations

Insurers select the trigger for their coverage obligations, but must do so unambiguously in the policy language. In an occurrence policy, the insurer selects a particular ñoccurrenceò that triggers coverage. *See Zurich Ins. Co. v. Raymark Indus., Inc.*, 118 Ill. 2d 23, 43-44 (1987). As Insurers concede, the insurer may choose to define the ñoccurrenceò as an injury, a wrongful act by the insured, a completed offense, or some other occurrenceð that decision is the insurerôs prerogative. *See, e.g.*, Starr Br. at 9 (recognizing that ñ[o]ccurrence-based policies employ various terms to articulate the event during the policy period that triggers coverage: ódamage[s];ô óinjury;ô óoccurrence;ô

óoffense;ô ópersonal injury;ô or ówrongful actôò); *id.* at 6 (identifying wrongful conduct, injury, or the satisfaction of the elements of the claim as possible triggers for malicious prosecution coverage).

Insurers are expected to be clear and unambiguous in their policy language. *See Rich v. Principal Life Ins. Co.*, 226 Ill. 2d 359, 371 (2007). Clarity is ñespeciallyò required ñwith respect to provisions that limit or exclude coverageò such as coverage triggers. *Id.* at 371. ñThis is so because there is little or no bargaining involved in the insurance contracting processò and ñthe insurer has control in the drafting process.ò *Outboard Marine Corp. v. Liberty Mut. Ins.*, 154 Ill. 2d 90, 119 (1992) (citations omitted); *see also Cherry v. Elephant Ins. Co.*, 2018 IL App (5th) 170072, ¶ 12. Moreover, there can be no doubt that an insurer ñhas the capacity to draft intelligible contracts.ò *Gillen*, 215 Ill. 2d at 396; *see also Cherry*, 2018 IL App (5th) 170072, ¶ 12.

It is beyond dispute that an insurer cannot insert an ambiguous trigger into its policy language; collect premiums from the insured; and then use the wiggle room created by the insurerôs own policy language to dodge coverage when the time comes to pay. Rather, if an insurer selects an ambiguous trigger that is subject to multiple reasonable interpretations, Illinois law prohibits the insurer from leveraging its own ambiguous language to deny coverage after premiums have long been paid and the insured deprived of an opportunity to secure alterative coverage. Pursuant to longstanding rule, ñif the words used in the policy are reasonably susceptible to more than one meaning, they are ambiguous and will be strictly construedò against the insurer. *Cent. Illinois Light Co.*, 213 Ill. 2d at 153; *see also U.S. Fid. & Guar. Co. v. Wilkin Insulation Co.*, 144 Ill. 2d 64, 80 (1991); *Cherry*, 2018 IL App (5th) 170072, ¶ 12. Courts may not choose between competing

reasonable interpretations of a policy term, whether based on policy preferences or other considerations. *See Gillen*, 215 Ill. 2d at 395-96; *U.S. Fid. & Guar. Co.*, 144 Ill. 2d at 80. Ambiguities must be resolved in favor of coverage. *Dora Twp.*, 78 Ill. 2d at 379-81.

B. The only tenable meaning for "offense" of "malicious prosecution" is the completion of all elements of the tort

1. "Malicious prosecution" has a single meaning: a defined tort

The phrase ñoffenseò of ñmalicious prosecutionò can mean only one thing: the complete tort. This is because ñmalicious prosecutionò has no generally-accepted colloquial or common meaning other than the tort for which people sue each other; it is a legal term of art that refers to a defined tort. *See Carolina Cas. Ins. v. Nanodetex Corp.*, 733 F.3d 1018, 1023, 1025 (10th Cir. 2013) (malicious prosecution ñis obvious legal jargon, a term that would rarely be heard in everyday speechò and therefore a court interpreting an insurance policy must ñlook to its meaning in legal sources,ò which indicate that it is a claim with ñwell-understoodò elements, including favorable termination). Malicious prosecution has been a legal cause of action in Illinois for well over one hundred years. *Reynolds v. De Geer*, 13 Ill. App. 113, 116 (Ill. App. Ct. 1883). Its status as a tort with defined elements thus constitutes an ñestablished legal meaningò that must be considered when construing the insurance policiesô terms. *Nicor, Inc. v. Assoc. Elec.*, 223 Ill. 2d at 417; *see also Rich*, 226 Ill. 2d at 373 (same); *In re Estate of Muhammad*, 123 Ill. App. 3d 756, 763 (1984) (ñabsent a contrary expression of intentò from the drafters, the word ócconversionô in a statute should be given its tort-law meaning, including all of its elements).

Application of the established legal meaning of ñmalicious prosecutionò is particularly appropriate here because the term has no lay, colloquial, or non-legal meaning

in common parlance. *See* Merriam-Webster Online Dictionary, https://www.merriam-webster.com/legal/malicious%20prosecution (last visited July 21, 2019) (providing only ñlegalò definitions for ñmalicious prosecutionò and defining it as a ñtortò that ñrequires proof of four elements,ò including favorable termination). Nor did Insurers opt to define ñmalicious prosecutionò to give it an alternative meaning.

Thus, the *only* definition of the malicious prosecution available to the parties to the contract is the legal tort, comprised of six ñessential elements,ò which means:

> (1) the commencement or continuance of an original criminal or civil judicial proceeding, (2) its legal causation by the present defendant against plaintiff who was the defendant in the original proceeding, (3) its bona fide termination in favor of the present plaintiff, (4) the absence of probable cause for such proceeding, (5) the presence of malice, and (6) damages resulting to plaintiff. Each of these elements must be present.

Freides, 33 Ill. 2d at 295; *see also, e.g.*, *Cult Awareness Network v. Church of Scientology Int'l*, 177 Ill. 2d 267, 272 (1997).

The elements culminating in a malicious prosecution may span years.[4] For example, misconduct can occur in the initial stages of an investigationð perhaps a municipal police officer or complaining witness intentionally destroys evidence on the scene or plants false ñevidence.ò Or misconduct can arise later in the investigation, as when a police officer beats or coerces a suspect into falsely confessing. Still later, municipal police officers may selectively provide inculpatory information to the state prosecutor but fail to disclose information that exculpates an innocent defendant and demonstrates lack of probable cause

[4] It is not unique to malicious prosecution that the tortfeasorôs wrongful act, the resulting injury, and the completed offense do not occur simultaneously. For example, a defamatory statement by a tortfeasor may not give rise to a completed tort of libel until the time of publication; a negligently drafted will may cause no injury until after the death of the decedent; and a defective part installed in a product may not injure the victim until years down the road.

to initiate a prosecution. Likewise, police misconduct may not ever result in a prosecution for years, as police do not control the prosecutorôs timing. Sometimes, in fact, the prosecution is initiated with probable cause, but police officers later discover and suppress information that defeats probable cause, and thus, it is the continuation of the prosecution, rather than its initiation, that supports the claim. When police misconduct results in charges, it can take years to exonerate the victim, and in that time the victim may be tried multiple times, with further police misconduct occurring at the subsequent trials to continue the prosecution.

There is no principled way to pick and choose amongst the elements of this tort such that some of them constitute the ñgistò or ñessenceò of the tort. Rather, as this Court has made clear, each of the six components of malicious prosecution is ñessentialò to its meaning, and without any one of the elements, a malicious prosecution has not occurred. *Freides*, 33 Ill. 2d at 295. Until the final elementð favorable terminationð the malicious-prosecution offense is not complete, *Cult Awareness*, 177 Ill. 2d at 272, and indeed ñhas not yet arisen,ò *Heck v. Humphrey*, 512 U.S. 477, 489 (1994). *See also Lieberman v. Liberty Healthcare Corp.*, 408 Ill. App. 3d 1102, 1110-13 (2011) (adopting the *Heck* rule for state-law malicious-prosecution claims).

Even if the ñoffenseò of ñmalicious prosecutionò did have a popular or colloquial meaning as a specified wrongful act (which it does not), there is no ordinary, lay meaning of the phrase ñoffenseò of ñ[f]alse arrest, false imprisonment, wrongful detention or malicious prosecutionò in Insuredôs definition of Personal Injury that gives each of those terms a non-redundant meaning. A121. The same wrongful act could satisfy an element of each of the torts; only the tort elements make them non-redundant. The same is true of

ñ[l]ibel, slander, [and] defamation of character.ò *Id.* If one consults only the layperson and asks what the ñgistò or ñessenceò of those terms are, as Insurers ask this Court to do, the terms become redundant. Adopting the established legal meaningð that is, the ñoffensesò are the legal torts with all their elementsð avoids redundancy. See *Outboard Marine Corp.*, 154 Ill. 2d at 123 (1992); *Dowd & Dowd, Ltd. v. Gleason*, 181 Ill. 2d 460, 479 (1998). Thus, read in context, it is even more apparent that the phrase ñoffenseò of ñmalicious prosecutionò refers to a completed legal tort.

2. "Offense" means a completed tort

In context, the only tenable construction of the term ñoffenseò is to connote the completion of the tort of malicious prosecution. Alternatively, the term is ambiguous and must be construed to that effect, in favor of coverage.

The primary definition of ñoffenseò in Blackôs Law Dictionary is ñ[a] violation of the law,ò connoting a completed legal violation. OFFENSE, Blackôs Law Dictionary (11th ed. 2019). Blackôs Law Dictionary provides a secondary definition of ñoffenseò as ñan intentional unlawful act that causes injury or loss to another and that gives rise to a claim for damages,ò a ñsense of offense that is essentially the same as the common-law intentional tortòð a definition that connotes both a wrongful act or a completed tort. Merriam-Websterôs dictionary definitions support multiple meanings for ñoffenseò in the context of an insurance coverage trigger. An ñoffenseò can refer to a completed legal violation (ñan infraction of lawò), or it can connote an injury or a wrongful act (ñthe act of displeasing or affrontingò; ñsomething that outrages the moral or physical sensesò). Merriam-Webster Online Dictionary, https://www.merriam-webster.com/dictionary/offense (last visited July 18, 2019).

Here, when the phrase ñoffenseò of ñmalicious prosecutionò is considered, it is apparent that the only reasonable construction of ñoffenseò is to refer to the completed legal violationð that is, satisfaction of all six elements of malicious prosecution. This is so because ñmalicious prosecutionò has no other meaning. *Supra* at 14-15.

Abundant authority supports of a construction of the term ñoffenseò to refer to a completed legal cause of action. As the appellate court properly reasoned, the primary definition of ñoffenseò in Blackôs Law Dictionary is a ñviolation of the law":

> This definition suggests that the term ñoffenseò 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.

A19; *see also, e.g.*, *Nat'l Cas. Co. v. McFatridge*, 604 F.3d 335, 344-45 (7th Cir. 2010) (ñoffenseò of malicious prosecution was not committed for purposes of an occurrence policy until completion of the tort); *Am. Safety Cas. Ins. Co. v. City of Waukegan, Ill.*, 678 F.3d 475, 478-79 (7th Cir. 2012) (insurance policy was triggered upon completion of the tort of malicious prosecution, including the favorable termination element, and not upon wrongful acts of misconduct); *Northfield Ins. Co. v. City of Waukegan*, 701 F.3d 1124, 1130 (7th Cir. 2012); *Roess v. St. Paul Fire*, 383 F.Supp. 1233 (M.D. Fla. 1974).

Likewise, in *American Guarantee*, the court construed the phrase ñoffense committed during the policy periodò to refer to ñan accrued or completed tort,ò meaning ñthe right to sueò had vested and courts would ñimpose civil liability.ò *Am. Guarantee & Liab. Ins. Co. v. 1906 Co.*, 273 F.3d 605, 617-18 (5th Cir. 2001) (ñThe ordinary meaning of óoffenseô is óa breach of a moral or social codeô or óan infraction of law.ô Because the

policy insures against liability arising out of certain ófoffenses,ô the word in this context conveys the same meaning as ótort.ôò). In that case, coverage was triggered not at the time the tortfeasor wrongfully invaded the plaintiffsôprivacy, but years later, when the plaintiffs discovered the invasion. *Id.* at 618. Just recently, the United States Supreme Court held that the term ñoffenceò in the federal Constitution refers to a violation of the law, as distinguished from wrongful conduct or actions. *Gamble v. United States*, 139 S. Ct. 1960, 1965 (2019) (construing the Double Jeopardy Clause).

Mr. Sandersôs construction is confirmed by Insurersô definitions, which used ñoffenseò to refer to an entire list of defined legal tortsð not injuries or wrongful acts. A121 (ñPersonal Injury means one or more of the following offenses . . . . ò). As the appellate court properly reasoned, this list, referring ñexclusively to legal causes of actions by their proper, legal names,ò suggests that if any clear meaning can fairly be attributed to the term ñoffense,ò it ñrefers to the legal cause of action.ò A19. The appellate court explained:

> Nowhere in the policiesô 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 policiesô 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 Sandersôs exoneration) and not by merely the underlying wrongful conduct.
>
> The average person would have no reason to think that although the ñoffensesò were identified by the proper, legal names of whole causes of action, they actually only were intended to refer to the underlying wrongful conduct.
>
> . . . . Where the term ñoffenseò 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 ñadopt an interpretation which rests on ógossamer distinctionsô that the average person, for whom the policy is written, cannot be expected to understand.ò

A20 (quoting *Founders Insurance Co.,* 237 Ill. 2d at 433).

Other courts, too, have found ñoffenseò to serve as a synonym for a completed tort, when asked to interpret the word ñoffenseò defined as a subsequent list of recognized torts. *See, e.g.*, *Vermont Mut. Ins. Co. v. Parsons Hill P'ship*, 2010 VT 44 ¶ 22 (2010) (collecting cases); *Lopez & Medina Corp. v. Marsh USA, Inc.*, 694 F.Supp.2d 119, 127-28 (D.P.R. 2010); *St. Paul Fire Ins. v. Green Tree Fin. Corp.*, 249 F.3d 389, 393 (5th Cir. 2001) (holding that, in context, ñoffenseò ñsimply refers to the causes of action listed under the personal injury definitionò) (emphasis added).

Insurers argue otherwise, contending that it would be impractical for an insurance policy to refer to wrongful acts without resorting to the use of legal tort names. This is a red herring: regardless of how Insurers chose to refer to the torts covered by their policies, nothing prohibited them from defining the associated coverage-trigger as ñmisconduct resulting inò malicious prosecution or ñinjury arising out ofò malicious prosecution. Rather, Insurers chose the ñoffenseò of malicious prosecution, which means the tort itself. Notably, Insurersô decision to tie coverage to an ñoffenseò reflects a markedly different choice than that made by many of their counterparts, who instead expressly tied coverage to an ñinjuryò or ñwrongful actò in cases upon which Insurers now rely. *Cf. St. Paul Fire & Marine Ins. Co. v. City of Zion*, 2014 IL App (2d) 131312, ¶¶ 13-14 (insurer provided coverage ñif the óinjuryô caused by malicious prosecution óhappensô while the policy is in effectò); *Indian Harbor Ins. v. City of Waukegan*, 2015 IL App (2d) 140293 (insurer provided coverage if the ñwrongful act(s) [] occur during the policy periodò).

Illinois Union also contends that each of the dictionary definitions for the term ñoffenseòð despite their varietyð refers unambiguously to the same thing: an insuredôs wrongful conduct. *E.g.*, Ill. Union Br. 12 (citing *First Mercury Ins. Co. v. Ciolino*, 2018 IL

App (1st) 171532, ¶ 30). This argument is disproved by a reading of the definitions themselves (*supra* at 18-19), judicial decisions holding otherwise (*supra* at 18-20), and Insurersô own briefs, in which they alternate between construing the term to connote a tortfeasorôs wrongful act, the injury caused by such an act, and a third-party prosecutorôs initiation of charges. *Compare* Ill. Union Br. 13-14 (ñoffenseò refers to ñthe insuredôs wrongful conductò); *with id.* 13 (ñoffenseò ñinvokes the concept of legal injuryò) (quotation omitted); *with* Starr Br. 10 (ñoffenseò has two meanings in Insurersô policies, both the ñcausative conductò *and* ñresulting harmò). If Insurers themselves cannot settle on any definition of less than six elements, the term is highly ambiguous to an insured.

The initiation of charges is not an act that is an ñoffenseò under any commonly understood meaning of that termô it is not ña violation of the law,ò nor ñsomething that outrages the moral or physical senses,ò nor is it ñthe act of displeasing or affronting.ò Moreover, any definition of ñoffenseò that is tied to non-tortfeasorôs conduct is untenable. Nor does this argument cohere with Insurersô briefs, which elsewhere argue that that the term ñoffenseò refers unambiguously to a different act: the insured tortfeasorôs wrongful conduct prior to charging. *See, e.g.*, Ill. Union Br. 12, 13, 14, 24.[5]

Nor can Insurers prevail by contending that the use of the word ñoffenseò to refer to a completed tort conflicts with the ñintended operation of an occurrence-based policy.ò *See, e.g*. Ill. Union Br. 19. This assertion merely repackages Insurersô impermissible policy arguments and tries to serve them up to the Court as a matter of construction of policy

[5] Because malicious prosecution includes not only initiating but continuing charges, any wrongful conduct trigger must be implicated in each year that the police continued the prosecution by suppressing the evidence of Mr. Sandersôs innocence that vitiated probable cause. Insurers, therefore, do not escape coverage under their own definition (or at least one of their own definitions).

terms, an impermissible approach refuted below. *Infra* at 41-44. As Insurers concede, they chose not to define the term ñoffenseò in their policies to clarify its meaning. Thus, at best, ñoffenseò is ambiguous and must be construed in favor of coverage.

3. Insurers' requirement that the offense of malicious prosecution "happen" during the policy period further suggests the passive completion of a tort

As the appellate court held, Insurersô passive characterization of the triggering offense as ñhappeningò during the policy period further supports Mr. Sandersôs construction. A25. This Court should adopt the same reasoning.

Insurers could have instead specified that the offense be ñcommittedò during the policy period, which has been interpreted to connote a wrongful act trigger, because ñcommitò means ñto carry into action deliberately: PERPETRATEò as in to ñcommit a crime.ò Merriam-Webster Online Dictionary, https://www.merriamwebster.com/dictionary/commit (last visited July 27, 2019). Because the use of the verb ñcommitò denotes an affirmative, deliberative act by a person, some courts have concluded that parties agreeing on that language intended for the phrase ñoffense committed during the policy periodò to refer to an affirmative, wrongful act by the insured. *See, e.g. First Mercury*, 2018 IL App (1st) 171532, ¶ 8, appeal denied, 108 N.E.3d 840 (Ill. 2018) (policy covered ñ[P]ersonal injuryô caused by an offense arising out of your business * * * but only if the offense was committed * * * during the policy period.ò); *Newfane v. Gen. Star Nat. Ins.*, 784 N.Y.S.2d 787, 792 (2004) (policy speaks of ñwhen the óoffense [was] committedôò); *Harbor Ins. Co. v. Cent. Nat'l Ins. Co.*, 211 Cal. Rptr. 902, 906-07 (Ct. App. 1985) (policy trigged when ñoffense is committed during the policy periodò and favorable termination ñis not a part of the wrong committed by the prosecuting plaintiffò); *S.*

Freedman & Sons v. Hartford Fire Ins., 396 A.2d 195, 198 (D.C. 1978) (trigger applies ñif the offense is committed in the conduct of (Freedmanôs) business during the policy periodò).

Here, in contrast, Insurers drafted the triggering ñoffenseò as one ñ*happening* during the Policy Period.ò Merriam-Webster defines ñhappenò as ñto occur by chanceò and ñto come into being or occur as an event, process, or result.ò Merriam-Webster Online Dictionary, https://www.merriamwebster.com/dictionary/happen (last visited July 21, 2019). Thus, the use of the passive verb ñhappenò suggests the completion of a process or the passive coming into existence of something, supporting construction of ñoffenseò as a completed tort and not the insuredôs active commission of a wrongful act. This is because a completed tort ñcome[s] into being,ò while, in contrast, the insuredôs wrongful act or an initiated prosecution is deliberately ñcarr[ied] into action.ò[6]

Insurers cannot dispute the differing definitions of the words ñcommittedò and ñhappeningò nor the different connotations they each suggest when coupled with the term ñoffense.ò Indeed, Insurers themselves refer throughout their briefs to offensive conduct ñcommittedò by the insuredð even though their policy language does not use such a term. *E.g.*, Ill. Union Br. at 12 (ñThe plain, ordinary, and popular meaning of óoffense,ô as used in this context, órefers to a wrongful act or conduct committed during the policy period.ôò) (quotation omitted); *id.* at 18. Thus, Insurers resort to characterizing the distinction as ñmeaninglessò or ñstrained,ò without any reasoning or discussion of the applicable

[6] It is of no import if Insurersô policies required the qualifying Personal Injury (the offense of malicious prosecution) to ñtake placeò during the policy period. ñTake placeò is synonymous with ñhappen,ò and likewise does not connote a deliberate act. Merriam-Webster Online Dictionary, https://www.merriamwebster.com/dictionary/take (sole definition provided for ñtake placeò is ñto come about or occur: HAPPENò).

dictionary definitions. See Ill. Union Br. 26-27; Starr Br. 16. Nor does dicta about a ñtypical occurrence-based policyò taken out of context from *Indian Harbor* compel a different result. Ill. Union Br. at 26-27.

4. Insurers did not provide surrounding language that forecloses construction of "offense" as a completed tort

Insurers not only failed to define ñoffenseòð the term they themselves selected as their trigger for personal injury coverageð they failed to clarify the meaning of the term through its relationship to other terms. Insurers indicated no intent to use a wrongful act trigger by stating that the triggering occurrence *caused* injury, nor intent to use an injury trigger by stating that the triggering occurrence was *caused by* wrongful acts.

Insurers likewise failed to insert protective language to provide adequate notice of the trigger date. Insurers included no provision that: ñFor coverage to apply and exist, all wrongful acts that form the basis for the alleged offense must have occurred in the policy period.ò Nor did Insurers specify: ñConduct in the policy period that merely provides one element of a cause of action or offense shall not confer coverage for that offense.ò

Nor, even while claiming that malicious prosecution is ñuniqueò (Ill. Union Br. 17), did Insurers specify a coverage trigger for malicious prosecution. If malicious prosecution is ñunique,ò it has been so for decades. *See, e.g.*, *Freides*, 33 Ill. 2d at 295. Having chosen to insure against malicious prosecution and collect premiums for that service, it was incumbent upon Insurersð not the Cityð to make clear the meaning of the phrase ñoffenseò of ñmalicious prosecution.ò Insurers certainly knew how to include in their policies provisions specific to particular aspects of liability. *E.g.*, A-118, 119, 121, 124-126 (specific provisions addressing employment practices, sexual harassment, medical malpractice, hostile fires, fungi, pollutants, aviation activities, failures to arrest, and many

other matters). This Court should not rewrite Insurersô ambiguous policy language.

C. Insurers' attempt to pick and choose from the essential elements of malicious prosecution is untenable

In an attempt to defeat coverage, Insurers contendð without reference to any language in their policies nor any external commonly-accepted definitionð that the offense of malicious prosecution means something less than the complete tort, which has six ñessential elementsò required as a matter of established law. *Freides*, 33 Ill. 2d at 295. Insurers settle on the initiation of the prosecution, conveniently selected to disallow coverage. Yet they do not coherently explain why ñmalicious prosecutionò should refer to the initiation of a prosecution, but not, for example, to the wrongful acts of the insured tortfeasor, the onset of an insured tortfeasorôs malicious intent, the injury to the victim, or the continuation of the prosecution absent probable cause. No definition in Insurersô policies, nor any external definition, undergirds Insurersôposition. And *Freides* establishes that no element of the tort has primacy; all are equally required, including favorable termination, to come to fruition for a malicious prosecution cause of action to arise.

Insurersô approach of selecting between essential elements of the claim has been rejected in numerous cases. One instructive case is *Great American Insurance Company v. Tinley Park Recreation Commission*, 124 Ill. App. 2d 19 (1st Dist. 1970). There, a parks commission purchased liability insurance for an outdoor carnival and fireworks display, with the policy period ending at 12:01 a.m. on the last night of the carnival. *Id.* at 20-21. Shortly before the end of the policy period, when the carnival was over, workers negligently failed to remove unexploded fireworks. *Id.* at 20. Two days laterð outside the policy periodð those fireworks exploded and injured a child. Even though the policy covered only damages caused by ñaccidents which occurò during the policy period, *id.* at

21, the plaintiffs argued for coverage on the basis that the negligent acts constituted the significant ñportionò of the ñaccident.ò *Id.* at 22-23. The court properly rejected the argument, disputing that ñcompletion of a portion of the accidentò was sufficient to trigger coverage. *Id.* at 23. A contrary holding would improperly equate ñnegligent actò with ñaccident,ò *id.*, just as in this case, accepting Insurersô argument would improperly equate a portion of malicious prosecution with the complete ñoffense.ò

The infirmity of Insurersô approach is borne out by its application. Illinois Union and Starr advance multiple different explanations for arriving at their preferred result. Over the course of their efforts to justify the rule they propose, they identify a number of different, conflicting packages of the six tort elementsð claiming, for example, the ñoffenseò of malicious prosecution means the tortfeasorôs wrongful act, the injury it causes, the commencement of the prosecution, or two and three of these elements combined. These arguments conflict and establish, rather than disprove, ambiguity. Insurers cannot demonstrate the offense of malicious prosecution necessarily means the initiation of charges by the state, and thus this Court must construe the policies in favor of coverage.

1. Illinois Union's approach

Illinois Union contends the term ñoffenseò must refer to a wrongful act,[7] and therefore, the phrase ñoffenseò of ñmalicious prosecutionò must refer, specifically, to the timing of the insuredôs wrongful conduct that later causes a prosecution. *E.g.*, Ill. Union Br. 12, 13, 14, 24. This argument fails for the same reasons in the previous section.

In addition, Illinois Unionôs argument conflates different elements of the tort: ñ(1)

[7] At least it contends this at some parts of its brief. Elsewhere, it contends that ñoffenseò means injury or the initiation of charges by the prosecutor.

the commencement or continuance of an original criminal or civil judicial proceedingò with ñ(2) its legal causation by the present defendant against plaintiff who was the defendant in the original proceeding,ò acting with malice. *Freides*, 33 Ill. 2d at 295; *see also, e.g.*, *Beaman*, 2019 IL 122654, ¶ 33.

In the context of malicious prosecution torts, the ñwrongful actò committed by the tortfeasorð for example, a police officerôs coercion of a false confession or a witnessôs fabrication of a statementð is distinct from the act of the initiation (or continuation) of the charges. *See Freides*, 33 Ill. 2d at 295; *Beaman*, 2019 IL 122654, ¶ 33. As Illinois Union itself acknowledges, the tortfeasor in a malicious prosecution claim may include ñthe police, the complainant in a criminal case, . . . or a civil litigantòð not just prosecutorsð and the tortfeasorôs wrongful acts, in turn, may include the ñmanufacturing of false evidence, the procurement of false testimony, [or] the withholding of evidenceòð acts that are not coterminous with the filing of charges. Ill. Union Br. 25-26 (quoting A-22). In contrast, the act of commencing charges is typically performed unwittingly, without malice, by a state prosecutor that is neither an insured nor a defendant, at a time that the tortfeasor does not control.

Thus, if Illinois Union intended a wrongful act trigger, as it claims, there is no principled reason for why that trigger would turn on the commencement of the prosecution, but not its favorable terminationð neither of which are the insured tortfeasorôs wrongful act and both of which are required to support a cause of action.

Illinois Union alsoð intermittently and inconsistentlyð contends that the ñoffenseò is not the insuredôs wrongful act, but actually the injury it causes (*e.g.*, Ill. Union Br. 13), making use of the fact that the injury in a malicious prosecution often (though not

necessarily) first takes place at the time of the initial charges. Yet then, there is a stark disconnect between Illinois Unionôs interpretation of the phrase ñoffense of malicious prosecutionò as incorporating the insuredôs wrongful act, and the injury trigger it claims is unambiguous in its policy language. Moreover, the law is also clear that a tortfeasor can be liable for causing the continuation of the prosecution when probable cause ceases. *Beaman*, 2019 IL 122654, ¶ 33. Characterizing the ñoffenseò of ñmalicious prosecutionò as the initiation of charges contravenes the case law on malice from continuation of a prosecution.

2. Starr's approach

Starr purports to adopt Illinois Unionôs approach, yet it goes on to advance a different, conflicting construction. According to Starr, the policies require *both* the insuredôs wrongful act and a resulting injury to have taken place during the policy period. Starr bases this argument on the requirement that ñan Occurrence happen[] during the Policy Periodò and that ñBodily Injury, Personal Injury, Advertising Injury, or Property Damage tak[e] place during the Policy Period.ò A49-50, 130. In its view, ñOccurrenceò refers to wrongful conduct, while ñPersonal Injuryò refers to injury.

Yet this construction is incompatible with the definitions that Insurers chose for the terms ñOccurrenceò and ñPersonal Injury.ò Insurers defined ñOccurrenceò as ñonly those offenses specified in the Personal Injury Definition.ò A120. They then defined ñPersonal Injuryò as the same list of offenses (A121), unlike other insurance policies that define the term to mean *injury* caused by the offenses themselves. Both ñOccurrenceò and ñPersonal Injuryò as used in this policy thus refer to the same thing: the offense of malicious prosecution. Reading these definitions, no insured could be expected to understand that Insurers intended for the exact same termð offenseð to convey two different meanings: in

one case, wrongful conduct; and in the other, injury.[8] Nor is a court permitted to disregard the express definitions in the partiesô chosen language.

Anticipating this shortcoming, Starr claims that the same term (ñoffenseò) can unambiguously convey two different meanings in the same insurance policy (a wrongful act and resulting injury) because ñin the malicious prosecution context, those events take place virtually simultaneously.ò Starr Br. 10. This argument is untenable for at least four independent reasons. First, Starr is simply incorrect: the timing of an insuredôs wrongful act and the filing of charges often diverge by years and can come in alternative orders. *See supra* at 27. Moreover, even approximately simultaneous occurrence would not resolve how the policies can feasibly convey two different meanings for the exact same term (ñoffenseò), without so stating or suffering ambiguity. And, the Insuring Agreement, and its incorporated definitions, apply to a list of tortsô not just malicious prosecution. Starr cannot establish that the wrongful act(s) and injury occur simultaneously for *every* listed tortô for example, in the case of libel, a defamatory statement made by a tortfeasor does not give rise to injury until the time of publication. Starrôs construction would render meaningless the distinction between wrongful act and injury, and begs the question of why, if the wrongful act and injury always occur simultaneously, the insurer would need to

[8] Starr also draws unclear parallels between the Insuring Agreements applicable to bodily injury, property damage, and advertising injury. Yet it omits reference to other Insuring Agreements that do not follow its claimed pattern. *See, e.g.*, A148 (Sexual Abuse); A138 (Public Officials & Employment Practices); A135 (Automobile Liability). If any conclusion can be drawn by comparing the body of divergent Insuring Agreements, it is that Insurers knew how to set forth different coverage triggers, including by referring to wrongful acts and injuries, where they so intended. Having chosen to define ñPersonal Injuryò as an ñoffenseòô without reference to injuryô and to define ñOccurrenceò also as the same offenseô without reference to wrongful actsô Starr cannot now establish that its policy language forecloses Mr. Sandersôs alternative construction. Nor should an insured fairly be required to perform this kind of analysis just to comprehend coverage terms.

require that both occurred during the policy period in the first place.

Starrôs citations to authority do not establish a contrary rule. Starr Br. 10-11. Three of the four identified passages merely state that the injury in a malicious prosecution tort first occurs at the timing of the initiation of charges, and do not discuss the timing of the insuredôs wrongful act. *See* Indian Harbor, 2015 IL App (2d) 140293, ¶ 26; *City of Zion*, 2014 IL App (2d), ¶ 26; *Genesis Ins. Co. v. City of Council Bluffs*, 677 F.3d 806, 814 (8th Cir. 2012). The fourth merely observes that by the time of the initiation of charges, the insuredôs wrongful act and the resulting injury have both already occurredô a different proposition than that they occurred simultaneously. *Harbor Ins. Co. v. Cent. Nat'l Ins. Co.*, 165 Cal. App. 3d 1029, 1037 (1985).

Importantly, Starrôs entire approach flouts this Courtôs settled principles of insurance contract interpretation. Starrôs argument is based on conclusory and unsupported opinions about other ñstandard occurrence-based policiesò and how they operate generally. *E.g.*, Starr Br. 9. Starr asks this Court gloss over the words selected in its policiesô and the different words selected by other insurers in cases upon which it relies, which Starr characterizes as ñdifferences without distinctionòô in favor of a blanket rule. *Id.* at 11-12. This Courtôs precedents do not allow such an approach. *See supra* at 12-14; *infra* at 41-42.

D. Inapposite and non-binding decisions construing different policies cannot save Insurers from the consequence of their policy language

Unable to establish that their policy terms unambiguously support their construction, Insurers appeal to this Court to apply a ñmajority ruleò holding that coverage of malicious prosecution in all occurrence policies is triggered upon the initiation of the prosecution, regardless of the commitments made in an insurerôs selected policy language. In support, Insurers rely on non-binding analysis from lower courts and courts in foreign

jurisdictions. Insurersô approach contravenes established rules of insurance contract interpretation. Illinois law requires courts to conduct an analysis of the specific contract language agreed upon by the parties, not apply blanket rules. And examination of the individual policies in the cases upon which Insurers reveals that the underlying policy language differs, exposing the citations as inapposite and unpersuasive. Insurersô appeal to foreign precedent must be rejected.

1. Illinois courts construe insurance policies individually, based on the policy language therein, not blanket or "majority" rules

This Court has clarified repeatedly that insurance policies are contracts, and as such, must be interpreted based on the words the contracting parties agreed on, not on blanket rules, policy preferences, or any other shortcuts. ñInsurance policies are subject to the same rules of construction applicable to other types of contracts.ò *Nicor*, 223 Ill. 2d at 416; *see also Standard Mut. Ins. Co. v. Lay*, 2013 IL 114617, ¶ 24; *Founders Ins. Co. v. Munoz*, 237 Ill. 2d 424, 433 (2010). Accordingly, when interpreting an insurance policy, ñ[a] courtôs primary objective is to ascertain and give effect to the intention of the parties as expressed in the agreement.ò *Nicor*, 223 Ill. 2d at 416.

This ñparamount ruleò must be followed, as private agreements to exchange premiums for insurance coverage could not be reached if courts could later rewrite those agreements, eviscerating the partiesôbargain. *See Progressive Universal Ins. Co. of Illinois v. Liberty Mut. Fire Ins. Co.*, 215 Ill. 2d 121, 135 (2005); *Nicor*, 223 Ill. 2d at 436. Subjugation of the policy language in favor of a blanket rule does not comport ñwith Illinois public policy, which favors freedom of contract.ò *Braye v. Archer-Daniels-Midland Co.*, 175 Ill. 2d 201, 212 (1997). Nor would after-the-fact judicial application of a majority rule safeguard layperson insuredôs entitlement to notice, based on the policy language, of the

scope of the purchased coverage. When lower courts have construed insurance contracts based on one-size-fits-all rules or considerations other than the agreed-upon policy terms, this Court has corrected their analysis. *See, e.g.*, *Travelers Ins. Co. v. Eljer Mftr., Inc.*, 197 Ill. 2d 278, 303-304, 307-308 (2001). *Cf. Travelers Indem. Co. v. Forrest Cty.*, 206 F. Supp. 3d 1216, 1223 (S.D. Miss. 2016) (ñApplication of a blanket triggering rule may be expedient, but it does not comport with Mississippi law governing the interpretation of insurance contracts and determination of an insurerôs duty to defend.ò).

Indeed, in the Illinois cases Insurers rely on, courts explicitly limited their holdings to the specific contractual language up for interpretation, and, in one case, even clarified that it would be ñimproperò and a ñmistakeò to impose a blanket rule. *City of Zion*, 2014 IL App (2d) 131312, ¶ 34 (ñOur holding is limited to the language of the policy at issue. We have been careful not to repeat the mistake, made by a number of courts, of adopting a broad óoccurrenceô rule for coverage of malicious-prosecution claims in general. . . . Adopting a broad, sweeping rule would be improper, as a courtôs task in construing an insurance policy is to ascertain the partiesô intent from the language of the policy.ò); *Indian Harbor*, 2015 IL App (2d) 140293, ¶¶ 28 (ñAs in [*City of Zion*], our holding in the present case is limited to construing the relevant language of the policies.ò); *County of McLean*, 2018 IL App (1st) 171532, ¶ 26, 30-34 (analyzing ñthe óoccurrenceô that resulted in [the plaintiffôs] ópersonal injuryô within the meaning of the insurance policyò and resting its analysis on the ñlanguage of the policy describing when coverage appliesò); *First Mercury*, 2015 IL App (4th) 140628, ¶ 35 (explaining that ñthe coverage question is governed by the plain language of the policyò and concluding only that the term ñoffenseò as used ñin Coverage B of the 2014-15 policy refers to the alleged wrongful conduct by the insuredò).

This Court should decline Insurersô invitation to make the ñimproperò ñmistakeò *City of Zion* warned against. Insurersô policies must be judged based on their text, construed against the drafter.

2. Insurers' contrary Illinois authority is inapposite

Nor do Insurersô cited Illinois appellate decisions warrant judgment in their favor. These cases are inapposite. As the appellate court properly recognized (A21-22), three of the cases did not even use the term ñoffenseò and instead expressly conditioned coverage upon the timing of the injury or the insuredôs wrongful acts. *See, e.g.*, *City of Waukegan,* 2017 IL App (2d) 160381, at ¶ 12 (policy covers ñinjury or damage that *** happens while this agreement is in effectò); *City of Zion,* 2014 IL App (2d) 131312, 112 (policy covers injury or damage that ñhappens while this agreement is in effectò); *Indian Harbor,* 2015 IL App (2d) 140293, at ¶ 4 (policy covered ñdamages resulting from a wrongful act(s)ò and ñ[t]he wrongful act(s) must occur during the policy periodò). These cases not only fail to support Insurersô argument, but they also underscore how easily Insurers could have provided notice to the City that they were bargaining for an injury trigger, a wrongful act trigger, or both, had they so intended.

Nor is Mr. Sandersô position undermined by *County of McLean*. The policy in that case covered ñpersonal injuryò that resulted from ñan occurrence during the policy period.ò 2015 IL App (4th) 140628, ¶ 30. Properly interpreted, the policy covered personal injury happening indefinitely, so long as the occurrence happened during the policy period. But the Fourth District erred and believed that the ñpersonal injuryò had to happen during the policy period. *Id.* ¶ 33. Accordingly, it asked when the injury happened, and naturally reached the same result as in *City of Zion* and *Indian Harbor*. *Id.* ¶¶ 33-39. As the appellate court correctly noted, this analysis said nothing about when the ñoffenseò of malicious

prosecution happens, so it offers no guidance to this Court. A22-23.

This leaves the non-binding decision in *First Mercury Insurance Co. v. Ciolino*, 2018 IL App (1st) 171532, which construed a notably different policy provision. There, the court held that the policy at issue was triggered ñwhen the insuredôs offensive conduct was committed,ò rather than upon exoneration. Id. ¶ 30 (emphasis omitted). As set forth above, *First Mercury* construed a notably different policy provision which asked when the offense was ñcommitted,ò suggesting that ñoffenseò refers to wrongful conduct by the tortfeasor. The use of the term ñcommittedò was critical to the courtôs analysis. *E.g.*, *First Mercury Ins. Co. v. Ciolino*, 2018 IL App (1st) 171532, ¶ 25, appeal denied, 108 N.E.3d 840 (Ill. 2018) (ñWe thus face the issue of whether the Simon complaint alleges an ñoffenseò of malicious prosecution that was ñcommittedò during the 2014-15 policy period.ò); *id.* at ¶ 30 (ñcoverage depends upon whether the insuredôs offensive conduct was committed during the policy periodò); *id.* (ñCiolino does not contend that the term óoffenseô is ambiguous. Thus, . . . we conclude that the policy refers to a wrongful act or conduct committed during the policy period.ò); *id.* at ¶ 35 (ñthe óoffenseô was the misconduct allegedly committed by Ciolino leading to Simonôs 1999 plea and convictionò). In contrast, the policies here ask when the offense of malicious prosecution ñhappen[ed].ò A130. It is contrary to law and unnatural to say that an offense has happened before all of its required elements have happened.[9]

The policy language in *First Mercury* also required that the qualifying ñoffenseò predate the plaintiffôs injury (and of course, only wrongful acts, and not exoneration, satisfy

[9] If a plaintiff files a malicious-prosecution suit and proves every element except exoneration, he will lose. Although all of the police misconduct has been ñcommitted,ò the offense of malicious prosecution has not ñhappenedò and the insured is not liable.

this criterion). Specifically, the policy required that the ñoffenseò cause (and therefore predate) a ñpersonal injury,ò which was defined as an ñinjury.ò *First Mercury*, 2018 IL App (1st) 171532, ¶¶ 8-9 (the ñoffenseò must cause a ñpersonal injuryò); *id.* ¶ 9 (ñpersonal injuryò is an injury). Here, in stark contrast, Insurersô policies require only that the triggering offense predate the plaintiffôs lawsuit: ñpersonal injuryò is not caused by an ñoffense,ò it *is* an ñoffenseò; and what needs to arise out of the ñoffenseò is not an injury, but a lawsuit. A117 (a ñClaimò is a lawsuit); A130 (a ñClaimò is what must arise out of the ñOccurrenceò); A120 (ñOccurrenceò is an ñoffenseò listed in the ñPersonal Injuryò definition); A121 (ñPersonal Injuryò is an ñoffenseò).

The *First Mercury* court carefully circumscribed its analysis in two ways. First, like every other case endeavoring to apply this Courtôs principles of insurance contract construction, *First Mercury* limits its holding to the specific policy language. Ciolino, 2018 IL App (1st) 171532, ¶ 35. Second, the court wrote that it was ñnot convincedò of the correctness of Mr. Ciolinoôs view because Mr. Ciolino did not contend that the policy was ambiguous, leaving open the possibility of entertaining such an argument in future case. 2018 IL App (1st) 171532, ¶ 30. Here, Mr. Sanders strenuously contends that Insurersô policy is ambiguous at best, and at worst, forecloses a construction that refers to anything other than the completed legal tort.

Even if the analysis were to apply here, *First Mercury* made a number of mistakes this Court should not repeat. *Cf. Sauviac v. Dobbins*, 949 So. 2d 513, 518 (La. Ct. App. 2006) (construing similar language and reaching a contrary result). First, *First Mercury* used a dictionary to determine the ñplain, ordinary, and popularò meaning of the word ñoffense,ò but brushed aside that one of the dictionary definitions was ñan infraction of

law,ò even though its meaning was reasonable and injected ambiguity into the policy. Id. ¶ 30 n.3. The court also reached for a ñpopularò meaning of the word ñoffenseò without considering the context in which that word appearsð that is, preceding a list of recognized torts. Accordingly, the court said nothing about the rule that contract terms such as malicious prosecution ñcan have established legal meanings. *Nicor*, 223 Ill. 2d at 417; Muhammad, 123 Ill. App. 3d at 763. Nor did the court address how the list of recognized torts should affect the interpretation of ñoffenseòð another legal error. *Nicor*, 223 Ill. 2d at 416 (ñthe court must construe the policy as a wholeò).

Also unaddressed was the fact that if the ñoffensesò listed as ñpersonal injuryò are interpreted only according to what the layman thinks, or according to their ñgistò or ñessence,ò the terms become redundant. Nor did *First Mercury* provide a principled basis for marking the ñgistò of the term as the initiation of the prosecution, rather than the insuredôs wrongful act. This Court need not follow its inapposite, flawed, and non-binding analysis.

3. Law from foreign jurisdictions provides no basis to overturn the appellate court's ruling

Law from foreign jurisdictions is even less instructive for purposes of determining the coverage issues that are currently before this Court. Insurers string-cite thirteen different cases, but decline to compare the underlying insurance contract language with the language in this case. *See, e.g.*, Ill. Union Br. 14-15. Because the correct approach is to simply interpret the specific language of the contracts at issue, Mr. Sanders will not discuss every case. *See Munoz*, 237 Ill. 2d at 436 (ñRather than engaging in a detailed discussion of out-of-state cases of limited and questionable applicability, we will conduct our own review of the policy language, applying the rules of contract construction set forth above.ò).

Review of the cases confirms why Insurers opted not to discuss their policy language. None are on all fours with this case. Some decisions, such as *TIG Insurance Co. v. City of Elkhart*, 2015 WL 4899426 (N.D. Ind. Aug. 17, 2015), are inapposite because they construe policies with express injury or wrongful act triggers. Others, such as *Town of Newfane* and *Peterson* (like *First Mercury*). construe policy language that asks when the offense was ñcommittedò and requires the offense to predate and cause an injury. See *Town of Newfane*, 784 N.Y.S.2d at 789-90; *Peterson*, 232 Cal. Rptr. at 808. Still others rely on blanket rules, not policy language, in contravention of the governing law in this State. Insurers point to no case that analyzes the same language they chose to use in their policies. As such, these cases do not aid Insurers.

4. Insurers' out-of-context quotations provide no support for their proposed rule

Insurers likewise cannot prevail by taking out of context language from different insurance policies whose language unambiguously set forth a wrongful act trigger. Insurers cite judicial opinions noting that, for example, exoneration is ñnot a part of the wrong committed by the prosecuting plaintiffò (*Harbor Insurance*, 211 Cal. Rptr. at 1036), or that exoneration marks ñthe beginning of the judicial systemôs remediationò of the wrong done to the victim and therefore cannot be the triggering offense (*Indian Harbor*, 2015 IL App (2d) 140293, ¶ 24). Ill. Union Br. 18. Although powerfully-worded, the cited passages merely explain that wrongful act triggers (by definition) do not include exoneration. They provide no basis to overturn the appellate courtôs construction of the different policy language here, which uses the tort itself as an occurrence. Moreover, the trigger is not the exoneration itself, but satisfaction of all the elements of the tort.

Insurers also take out of context language indicating that ñthe time of occurrence in

insurance law is different from the time of accrual in tort law.ò Ill. Union Br. at 17 (quoting *St. Paul Fire & Marine Ins. Co. v. City of Waukegan*, 2017 IL App (2d) 160381 (ñCity of Waukeganò)), ¶ 48. That quoted line conveys the uncontroversial proposition that the triggering occurrence in an insurance policy is not necessarily the same as the accrual of the tort. *Id.* ¶ 45; *see also City of Erie v. Guar. Nat. Ins.*, 109 F.3d 156, 161 (3d Cir. 1997) (same). But an insured can use completion of the tort as the trigger, in which case completion is the trigger. That is the definition of ñOccurrenceò in Insurersô policies: the offenses specified. Moreover, *City of Waukegan* correctly confirmed that insurance policies are construed pursuant to their language. *Id.* at ¶¶ 24, 26. This Court should reject Insurersô invitation to misconstrue this language to suggest a blanket rule.

E. Mr. Sanders's construction—not Insurers'—is consistent with the City's expectations at the time of the agreement

Starr claims that its ñexpectationsò at the time of entry into the contract supports construction in its favor. Not so.

1. Insurers' expectations are immaterial

First, all the Insurersô claims about their expectations must be rejected at the outset because they are extraneous to the underlying complaint and improper on a motion to dismiss. Second, as even Insurersô cited authority recognizes, Illinois law requires construction of contracts consistent with the reasonable expectations of the *insured policyholder*ð not the insurer, who has already had the opportunity to communicate any ñexpectationsò regarding the scope of coverage directly in the policy language that it drafts and offers to the policyholder. *See* Starr Br. 17; *see also Cummins v. Country Mut. Ins. Co.*, 178 Ill. 2d 474, 485 (1997) (ñthis court can . . . consider a policyholderôs reasonable expectations and the coverage intended by the insurance policyò); *Hoglund v. State Farm*

Mut. Auto. Ins. Co., 148 Ill. 2d 272, 279 (1992); *Crawford Labs., Inc. v. St. Paul Ins. Co. of Illinois*, 306 Ill. App. 3d 538, 544 (1999) (citing *Posing v. Merit Insurance Co.*, 258 Ill.App.3d 827 (1994)). With regard to the intent of the insurer, courts look only at ñthe intention of the parties as expressed in the agreement.ò *Nicor*, 223 Ill. 2d at 416. Thus, the law does not permit insurers to evade liability for an ambiguous policy through self-serving claims, rendered long after contract formation, regarding expectations that they did not express in the policy language they drafted. *See supra* at 12-14. This Court can thus easily dispose of Insurersô unsupported arguments regarding their general understanding of occurrence-based policies, and how they typically operate, as insureds are not expected to maintain any expectations about the coverage provided that are not reflected in the policy language.

2. The governing law at the time the parties' entered into the insurance agreement supports an expectation that coverage is triggered upon exoneration

Nor can Insurers credibly claim to have held ñexpectationsò at the time of contract formation about a majority rule triggering coverage for malicious prosecution at the initiation of charges. If the caselaw on coverage triggers is to be taken into consideration, it is ñthe law existing at the time and place of the making of the contractò that informed the partiesô intent. *Schiro v. W. E. Gould & Co.*, 18 Ill. 2d 538, 544; *see also Mitchell Buick & Oldsmobile Sales, Inc. v. McHenry Sav. Bank*, 235 Ill. App. 3d 978, 985; *Braye*, 175 Ill. 2d at 217; *Smiley v. Toney's Estate*, 100 Ill. App. 2d 271, 276 (1968), affôd, 44 Ill. 2d 127 (1969); *933 Van Buren Condo. Ass'n v. W. Van Buren, LLC*, 2016 IL App (1st) 143490, ¶ 36. Quite simply, Insurersô policies were drafted *prior* any Illinois decision construed any policiesô coverage trigger for malicious prosecution to mean the initiation of charges.

At the time Insurers drafted the first contract in 2010, Illinois state and federal decisions had held for over three decades that insurance coverage for malicious prosecution was triggered upon exoneration, not commencement of the prosecution. Pursuant to Illinois and federal law, malicious prosecution had long required, as an element, favorable termination. *See, e.g.*, *Cult Awareness*, 177 Ill. 2d at 272; *Ritchey v. Maksin*, 71 Ill. 2d 470, 475 (1978). In 1978, the First District held in *Security Mutual* that malicious prosecutions occurs, for insurance coverage purposes, upon completion of the last element of the tortð favorable termination. *Sec. Mut. Cas. Co. v. Harbor Ins. Co.*, 65 Ill. App. 3d 198 (1978), vacated on other grounds, 77 Ill.2d 446 (1979). The First Districtôs decision explained that a cause of action for malicious prosecution ñdid not ariseò until ñsuccessful conclusion of the original action,ò citing with approval authority indicating that ñno element of the tort was more important or essential than any other element.ò *Id.* at 205-06. Although this Court vacated the decision, it did so only on arbitrability grounds and expressed no criticism of the First Districtôs reasoning regarding the malicious prosecution coverage trigger. *See id.*; *Am. Safety*, 678 F.3d at 478. As even Insurers concede, ñcourts nevertheless cited *Security Mutual* as Illinois law because it was considered óthe only Illinois appellate decision on this issue.ôò Ill. Union Br. 28 n.4 (quoting *Am. Safety*, 678 F.3d at 478-79).

Between 2010 and 2012, a line of federal cases further confirmed that the date of favorable termination constituted a triggering occurrence for malicious prosecution coverage. *See McFatridge*, 604 F.3d at 344-45; *Am. Safety Cas. Ins. Co. v. City of Waukegan, Ill.*, 678 F.3d 475, 478-79 (7th Cir. 2012); *Northfield Ins. Co. v. City of Waukegan*, 701 F.3d 1124, 1130 (7th Cir. 2012) (same). Insurers could not have relied upon the 2014 decision in *City of Zion* and other Illinois appellate decisions that followed,

because those decisions were published *after* the parties entered into the insurance contracts at issue here.

Notably, the March 2012 *American Safety* decision cautioned that ñinsurers can adjust their exposure by changing the language in their policies, defining the óoccurrenceô as the misconduct rather than the completed tort.ò 678 F.3d at 480. Illinois Union and Starr did not adjust their language to depart from this body of law. *See Gillen*, 215 Ill. 2d at 397 (declining to allow insurer ñto avoid its obligation under the policyò because insurer ñeasily could have modified the policy languageò in response to the existing law had it intended a different outcome). Thus, if Insurers had any ñexpectationsò under the state of Illinois law at the time of contracting that permissibly factor into this Courtôs analysis, such expectations would support Mr. Sandersôs argument, not Insurersô.

F. Insurers' policy arguments provide no basis for disregarding the contract language

Insurers failed to express in contractual language the policy preferences they now ask this Court to judicially impose on insurance contractsð namely, that malicious prosecution coverage is triggered by the initiation of charges. To dodge payment, Insurers ask this Court adopt their proposed trigger on the ground that holding otherwise would, in their opinion, be ñunwise.ò *E.g.*, Ill. Union Br. 21. This Court should decline this invitation.

1. This Court cannot rewrite the parties' private agreement based on judicial policy preferences

Insurers are required to use clear language in their contracts to effectuate their policy preferences. Had Insurers truly believed at the time of contract formation that setting the initiation of a prosecution as the triggering act for malicious prosecution coverage was wise, practical, and superior, and that defining the trigger as the completed tort would be

disastrous, they had every opportunity to so state in their policies, thereby fairly apprising the City of the scope of the insurance coverage. Having failed to do so, to the Cityôs detriment, Insurers cannot now fairly ask this Court to release them from the consequences of their (at best) ambiguous policies. *Cf. Nicor*, 223 Ill. 2d at 435 (rejecting Nicorôs argument that interpreting the language ñwill somehow deny it the benefit of its bargainò).

Nor, for similar reasons, are courts permitted to construe ambiguous insurance policy language against the insured to effectuate policy preferences or a uniform rule of construction. A court may not ñconstrueò a policy by second-guessing the deal that was struck or imposing the courtôs own views about the ñpurposeò of insurance. *E.g.*, *Progressive Univ. Ins.*, 215 Ill. 2d at 134-35; *Travelers Ins.*, 197 Ill. 2d at 303; *Nicor*, 223 Ill. 2d at 436. The law recognizes that private parties are free to contract insurance obligations as they see fit, tailoring those obligations to their specific circumstances, needs, and preferences. *Braye*, 175 Ill. 2d at 211-12. Policy preferences must be reflected in the words selected by the drafting insurers and agreed to by the insureds. A one-size-fits-all rule judicially imposed would allow insurers to escape their chosen language and contravene the policy considerations that underlie the rule requiring construction of ambiguous terms in the insuredôs favor. This Court should thus disregard Insurersô after-the-fact appeals to what constitutes ñwiserò policy.

In short, there is already a rule, which is that the completed tort is the ñoffenseò unless the insurer unambiguously states a different trigger in the policy. This is the only blanket rule that squares with the duty to examine the policy language. Restriction of this Courtôs analysis to the policy language at issue here will preserve the rights of insurers and insureds alike to agree upon the coverage trigger of their choice.

2. Policy considerations favor a completion-of-tort trigger

Even if this Court were to consider policy preferences, such considerations support Mr. Sandersôs construction, not Insurersô. First, triggering insurance for malicious prosecution at exoneration allows for the insurer and the insured to better assess coverage and risk during an insurance policy period, because the policy period is closer in time to the litigation. A long gap between the triggering act and the fulfillment of insurance obligations, in turn, would require insurers to include in their premium calculations analysis of an unknown number of prosecutions stretching many decades into the future, until the time of exoneration, and that give rise to civil rights claims likewise tried decades later, based on evolving legal standards and jury verdicts.

Long tails on liability can also be problematic for insureds because the company may long have gone out of business, leaving the municipality without recourse. *See American Safety*, 678 F.3d at 480. Municipalities may not be able to find insurance policies issued decades earlier, as the personnel with knowledge of those policies will long have concluded their employment, complicating efforts to determine past coverage. *See id.*

Applying a trigger at exoneration provides for significantly more certainty, because insurers would have no concern for decades-old claims sprouting up against them. Insurers want to ñbe able to close the books on their obligations, so that they know whether they have made a profitð and so that they can adjust prices to reflect the current riskiness of the activity they are insuring.ò *American Safety*, 678 F.3d at 480. Establishing a ñlong tail on liabilityò would require an insurer to retain reserves for decades to protect against suits that could easily arise two or three decades after the first instances of misconduct. *Id.*

Insurersô rule, too, would limit municipalitiesô ability to purchase multiple policies with different triggers to offset risk for the same misconductð an important strategy for municipalities given the degree of risk arising from malicious prosecution litigation and need to procure adequate coverage. In fact, the rule could even hurt insurers because they get to spread the liability when multiple policies cover the same risk.

Insurers argue that a favorable termination trigger would enable insureds to lull an unwary insurer into extending coverage after they perceive an impending difficulty from a suit in which they are already engaged. Such a concern is unwarranted. Just as *Roess* recognized, an insurance company could easily question potential insureds in advance about any and all outstanding claims before the insurance contract is entered into. 383 F. Supp. at 1235. The concern about insurance companies being caught unwary would be much greater under the Insurersô proposed triggering rule, which would create uncertainty for insurers by always saddling them with decades-old claims despite their chosen trigger.

Insurers also suggest that there is great uncertainty in insuring misconduct that happened years earlier. Yet an even greater uncertainty exists in insuring liability that happens decades into the future, while having to guess at the future state of the law. Indeed, the ñconstant evolution of the principles of tort lawò that Starr believes make a favorable termination trigger unworkable poses analogous difficulties to insurers employing a commencement-of-prosecution trigger.

Most importantly, as the appellate court explained, ñit rests exclusively within [Insurersô] 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 insuredôs misconduct rather than on the ñoffenseò of malicious prosecution.ò A27.

G. A trigger based on completion of the tort does not convert an occurrence policy into a claims-made policy

A trigger upon favorable termination in no way turns an occurrence-based policy into a claims-made policy. In the first case, the trigger occurs upon exoneration. In the second, coverage is triggered when the legal claim is filed. As an example, if a plaintiff is exonerated in 2011 and then timely files suit in 2013, a claims-made policy in effect in 2013 would be triggered. But an occurrence-based policy in effect in 2013 that was triggered by the time of exoneration would not apply. No authority prohibits an insurer from drafting a private insurance agreement that sets the time of the completed offense as the coverage-triggering occurrence. This argument thus provides no basis for reversal.

II. Alternatively, Mr. Sanders's 2013 and 2014 trials constitute discrete triggers of Insurers' coverage obligations

For the reasons explained above, Insurersô policies were triggered when the legal tort of malicious prosecution was complete, meaning upon exoneration. But even if Mr. Sanders is wrong about that, Insurersôpolicies were nonetheless triggered. That is because there was independent wrongful conduct, causing additional injuries, when the police officers continued the prosecution by causing Sanders to be tried two more times, in 2013 and 2014. Insurersô policies were in effect not only when the criminal proceedings finally terminated in Mr. Sandersôs favor, but also in 2013 and 2014, when he was tried without probable cause, twice.

If Insurers are right that the ñoffenseò of malicious prosecution in their policies does not wait for favorable termination, then continuing the prosecution through two additional trial was misconduct causing additional injury. *See Cult Awareness*, 177 Ill. 2d at 272 (listing elements of malicious prosecution). Mr. Sanders could have been released

when his initial conviction was vacated. But Defendants encouraged and thereby continued the prosecution knowing that probable cause was lacking. That is a wrongful act trigger according to Insurers. Also standing trial a second time is a new injury, by the Insurersô definition, occurring during the policy period. Illinois law provided a 120-day period for a determination on whether Mr. Sanders would be tried again. 725 ILCS 5/103-5; *People v. Crane*, 195 Ill. 2d 42, 49 n.2 (2001). And the appellate court had warned the City Actors that the governmentôs key witnesses had credibility problems. *See People v. Sanders*, 2012 IL App (1st) 110373-U, ¶ 33 (noting there were ñreasons for jurors to doubt Haslettôs credibility and Armstrongôs ability to identify the men who took part in the murderò). Yet, each time, the City Actors made the affirmative decision to push forward. And they did not rest upon their prior wrongs, they redoubled their efforts and committed new misconduct.

The analysis is straightforward. If the policies are triggered by the insuredôs wrongful conduct, the Court must look for allegations of misconduct in 2013 or 2014. *E.g.*, A45-57, 64, 71.[10] Once that misconduct is found, the analysis ends, and the policies are triggeredð there is no step that requires checking for other misconduct outside the policy period. The analysis is not meaningfully different from a homeowner who suffers floods in 1994, 2013, and 2014. The insurer in 2013 and 2014 is not off the hook because the homeowner was also unlucky two decades earlier, when insured by a different company.

The later trials are independent occurrences as a matter of law. But if the conclusion turns on factual questions about just how different the trials were, the result here is the same: the judgment on the pleadings was improper and the case should be sent back to the

[10] Indeed, Mr. Sandersôs second trial presented a new liability theory: that Sanders was not the killer, but instead ordered the killing, and was accountable for the murder. A47.

circuit court for further proceedings.

In response, Insurers rely heavily on *City of Waukegan*, in which the appellate court rejected the argument that a criminal defendantôs third trial triggered insurance coverage, concluding instead that coverage was only triggered when charges were first brought against the defendant decades earlier. 2017 IL App (2d) 160381, ¶¶ 18, et seq. That decision was erroneous because the court believed it was bound by *stare decisis* to ñfollowò *Indian Harbor*, though *Indian Harbor* was inapposite. 2017 IL App (2d) 160381, ¶¶ 29-30, 34. *Indian Harbor* had rejected the argument that once a police officer suppresses evidence, then every single day the evidence continues to be suppressed establishes a separate occurrence triggering insurance coverage. *Indian Harbor*, 2015 IL App (2d) 140293, ¶¶ 39-40. In other words, it addressed an insuredôs commission of the same continuing wrongð a *Brady* disclosure violation, with no added misconduct. Mr. Sanders concedes that, if there was no new misconduct by the insureds, then his malicious prosecution is but one occurrence under the policies. But that is not what he pleaded. He pleaded additional misconduct and survived summary judgment relying on such evidence. A45-47, 55, 57, 64, 71. Because *Indian Harbor* did not address instances where additional misconduct occurred to continue the prosecution, *City of Waukegan*ôs blind reliance on *Indian Harbor*, without comparing the policy terms to the underlying facts, is wholly unpersuasive. Thus, there is no analysis that can be considered persuasive authority for this Court to follow, let alone binding authority.[11]

[11] Insurers claim that their position is ñbuttressedò by the fact that an Illinois statute defines ñprosecutionò as ñallò proceedings through final disposition (Starr Br. 28); *see also City of Waukegan*, 2017 IL App (2d) 160381, ¶ 36. Yet this statute does not establish a single occurrence. Insurers fail to address why this Court should consult a criminal statute to interpret policy language agreed to by the parties. Insurers have advanced no justification

City of Waukegan aside, Sandersô second and third trials were themselves occurrences of malicious prosecution (that is, if Insurers are right that the triggering occurrence is not the completed tort). Absolutely nothing in the text of the policies, nor in any relevant precedent, instructs this Court to ignore the fact that were it not for new misconduct, Mr. Sanders would have regained his freedom several years earlier.

To the extent the Court disagrees, then the policies are ambiguous as to how to treat multiple criminal trials when convictions are overturned. *Am. States Ins. Co. v. Koloms*, 177 Ill. 2d 473, 481 (1997) (an otherwise unambiguous term can become ambiguous when applied to a particular circumstance). And in that case, the policies should be interpreted liberally in favor of coverage. *Nicor*, 223 Ill. 2d at 417; *Koloms*, 177 Ill. 2d at 479.

Separately, Illinois Union notes that the policy states ñ[a]ll 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.ò Ill. Union Br. 31. Insurers fail to explain the relevance of this provision, because there is none. The provision does not say that multiple ñoccurrencesò will be considered just one, or that later ñoccurrencesò will be considered to have ñhappen[ed]ò earlier than they truly did. Instead the provision, which is common, serves an important role totally unrelated to the timing of occurrences: it controls how damages will be apportioned among occurrences happening in a single policy period, which impacts the application of per-occurrence deductibles and per-occurrence caps.

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for incorporating all of Illinoisô statutory law into the policy, to trump the policy language. Rather, if a wrongful act triggers coverage, and if the insureds committed wrongful acts in 2013 and 2014, then coverage is triggered under the policy.

To illustrate, the Illinois Union policy has a $50,000 per-occurrence deductible. R.C.-2428; A-84. Suppose an insured files ten claims, each for $50,000. If the damages are considered to arise out of a single occurrence, then Illinois Union must pay $450,000 (10 claims x $50,000 per claim, minus one $50,000 deductible). But if the damages arise out of ten separate occurrences, Illinois Union owes nothing: once the insured satisfies its $50,000 deductible for each claim, there is nothing left for Illinois Union to pay.

This Court examined very similar language in *Nicor,* where the policies included language that ñ[a]ll damages arising out of such exposure to substantially the same general conditions shall be considered as arising out of one occurrence.ò 223 Ill. 2d at 413. The insurance company had issued policies to the insured for every year from 1961 through 1978. *Id.* at 413. In that time, the replacement of old residential gas meters with new meters resulted in 195 mercury spills that were covered by the policies. *Id.* at 414. At least one spill happened in each policy year. *Id.* 415. The policies all had a per-occurrence deductible and no single spill caused more in damages than that deductible. *Id.* at 413-14. So, if each spill was its own occurrence, the insured was entitled to nothing.

On the other hand, if all 195 spills were considered just a single occurrence that happened way back in 1961, then the insured would have to pay a single deductible, and the insurance company would be on the hook for the rest. But, importantly for present purposes, neither the parties nor the Court even suggested that might be the case. The language considering ñall damagesò from ñsubstantially the sameò injury to have arisen from just a single ñoccurrenceò aggregates damages only in a single policy period. It does not take occurrences that actually happen in one policy period and deem them to have happened in another. So, in *Nicor,* the insured did not urge the court to find that it owed

only a single deductible; it acknowledged that at the very least it owed a single deductible *each policy period. Id.* at 415.

Finally, Starr argues that because the policies cover claims that ñfirst ariseò from an occurrence, claims can only ñfirst ariseò once ï at the time of charging. Starr Br. at 27. Starrôs argument is entirely circular. If the malicious prosecution is one occurrence, spanning from 1994 to 2014, then the ñfirst ariseò language clarifies that the 2013 and 2014 policies afford no coverage; because the occurrence did not first arise in those years. But if there are multiple occurrencesð as there must be if continuing a prosecution is actionableð and there were junctures to end the prosecution in 2013 and 2014, then the ñfirst aris[ing]ò policy language does not prohibit coverage in those years, because the occurrences would have first arisen in 2013 and 2014. The ñfirst ariseò language is no help to determining the number of occurrences occasioned by multiple acts of misconduct.

CONCLUSION

The appellate court correctly held that Insurersô policies covered Mr. Sandersôs malicious-prosecution suit. Mr. Sanders therefore asks this Court to affirm the appellate courtôs denial of Insurersô motions to dismiss; enter an order in favor of Mr. Sanders and the City finding that Insurersô policies are triggered; remand the case to the Circuit Court for resolution of Plaintiffsôclaims; and grant such additional relief as this Court deems just.

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 or words 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 50 pages.

By: /s/ Ruth Brown
Ruth Brown
Counsel for Rodell Sanders

CERTIFICATE OF SERVICE

I certify that on August 2, 2019, the foregoing Brief of Plaintiff-Appellee Rodell Sanders, which complies with Illinois Supreme Court Rule 341, was filed with the Clerk of the Illinois Supreme Court using the Courtôs Odyssey electronic filing system, and copies were served by email to the following counsel. 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.

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