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## **Wrongful Conviction: Practical Defense Tips & Coverage Analysis**

### **I. WRONGFUL CONVICTION: BACKGROUND AND PROBLEMS FACING THE MUNICIPAL POLICYHOLDER**

#### **A. The claims and context**

A wrongful conviction claim is one in which a legal determination is made years after incarceration that the charges and incarceration were erroneous. These claims often involve the most horrific crimes, followed by very reprehensible behavior by law enforcement aimed at finding a culprit, and ultimately followed by civil rights litigation against the law enforcement agencies and officials in an effort to recover for the years of wrongful incarceration. New advocacy groups have sprouted across the country to help inmates challenge their convictions using new evidence or technological advancements, and this has resulted in even more of these wrongful conviction matters. Such wrongful conviction claims are not difficult to prove, given that they are often preceded by court findings that the arrest, charging and incarceration was manufactured, improper, unconstitutional and/or without probable cause. Therefore, it is not uncommon for these claims to result in multi-million dollar judgments against the defendants.

#### **B. The pressures on the municipality**

Wrongful conviction claims present a series of unique pressures on municipal defendants, which then inevitably impact liability and insurance coverage issues. For example, in many communities the underlying crimes of rape, murder or abuse are often so horrific that law enforcement is under great pressure to show results for their investigation and satiate the public's expectation of justice. This is often a driving factor in the underlying temptation to cut corners, pressure witnesses and connect evidentiary dots where no connection may otherwise exist.

At the time wrongfully convicted inmates are exonerated, a new legal process often arises, with the municipality being sued over the processes and procedures that were employed, and the oversight and actions of its most trusted law enforcement departments. This gives rise to a new set of pressures whereby municipal officials and their counsel must determine how and when to draw the lines between defending and justifying the investigatory conduct that took place years earlier, and admitting or accepting responsibility for prior wrongful conduct—which may then have far reaching political and economic ramifications for the municipality.

Playing into these considerations is also a set of pressures associated with insurance coverage. The municipality is often tasked with recreating insurance programs from many decades past, which is not always easy. The determination of what coverage was purchased in which years, and what brokers or risk managers participated in these decisions, creates a new set of retroactive facts that come under the public magnifying glass. Insurers may argue that their coverage doesn't apply to the claims, or that their coverage

is not enough to properly cover the claims, bringing economic pressures barreling down on municipalities that are often strapped for cash.

### **C. A case example**

One very recent and well known example of these issues is the case of the “Beatrice Six” in Nebraska. A fascinating *New Yorker* article detailing the saga of this matter [can be found here](#).

On the morning of February 6, 1985, the body of Helen Wilson was discovered in the living room of her apartment in Beatrice, Nebraska. She had been brutally raped and murdered. Four years later, between March and May of 1989, the Gage County Sheriff’s Office reinstated their investigation, and met with various easily manipulated individuals, many of whom had received psychiatric counseling over the years from the County. County officials, zeroed in on six people, who they told information about the crime scene and then encouraged these individuals to “remember” through dreams. The officials obtained manipulated statements from each of these individuals to implicate each other, with the discussion that things could be much worse if they did not cooperate. These manipulated statements, line-ups, and arrests led to each of the six individuals being charged and incarcerated, all by May 1989. In the months and years after charging, some of the individuals were coerced to enter plea bargains, and/or provide additional manufactured evidence against the others.

By 2008, DNA evidence had indicated that a totally unrelated individual was the sole perpetrator of the crime and that each member of the Beatrice Six was innocent. The six claimants, having served various numbers of years in prison were exonerated by the State of Nebraska and sued Gage County in 2009 for violations of their civil rights. For seven years, Gage County engaged on the dual track of: 1) trying to litigate which of its officials may have immunity and what types of legal theories were and were not permissible, and 2) whether its insurance carrier in the years of the arrests and charges would provide any defense or indemnity, or whether any insurers in the subsequent years of the convictions and incarceration may provide funding.

In 2016, the Beatrice Six were awarded individual jury awards that totaled \$28.1 million. With no means to satisfy such a judgment, Gage County embarked upon a course of appealing the underlying awards, suing its insurers both from 1989 and from the years thereafter, and exploring a series of unpalatable options to satisfy the judgments.

## **II. PLAINTIFF’S THEORIES OF LIABILITY AND TE AVAILABLE DEFENSES**

### **A. False Arrest**

The Fourth Amendment protects against unreasonable searches and seizures by the Government, including brief investigatory stops of persons that fall short of traditional arrest. However, the Supreme Court has held that a police officer may, in appropriate circumstances and in an appropriate manner, approach a person for purposes of investigating possible criminal behavior even though there is no probable cause to make an arrest. *Terry v. Ohio*, 392 U.S. 1, 22 (1968).

On the other hand, an investigative detention amounts to an “arrest” under the Fourth Amendment if, in view of all the circumstances surrounding the incident, a reasonable person would have believed he was not free to leave. *United States v. Mendenhall*, 446 U.S. 544, 554 (1980). There is no bright line rule differentiating between an arrest and a detention, but courts look at factors such as the amount of force

used by the police, the need for such force, and the extent to which the individual's freedom of movement was restrained.

Probable cause to arrest exists when at the time of the arrest, an officer has knowledge or reasonably trustworthy information of facts and circumstances that are sufficient to warrant a person of reasonable caution to believe that the person to be arrested has committed or is committing a crime. Probable cause does not require overwhelmingly convincing evidence, nor does it require more probably than not (51%) – only “reasonably trustworthy information.”

When examining the lawfulness of an arrest under the Fourth Amendment, the correct standard is “objective reasonableness.” Whether a defendant officer's conduct was objectively reasonable is a mixed question of law and fact. The defense of qualified immunity – whether it was objectively reasonable for an officer to believe that his conduct did not violate a clearly established right – is decided by the court. However, the Court will determine whether it was objectively reasonable for an officer to believe that his acts did not violate the plaintiff's clearly established rights by analyzing the particular facts of the case.

In *Wallace v. Kato*, the Supreme Court held that a State's personal injury law provides the statute of limitations for a §1983 claim. 127 S. Ct. 1091 (2007). The Supreme Court explained that the standard rule is that accrual occurs when the plaintiff has a complete and present cause of action – that is when the plaintiff can file suit and obtain relief. In the context of false arrest, the accrual date begins as soon as the allegedly wrongful arrest occurs. Damages for a false arrest claim cover the time of the detention up until initiation of legal process or arraignment, but not more.

## **B. False Imprisonment/Wrongful Conviction**

False arrest and false imprisonment claims overlap; the former is a species of the latter. A §1983 false imprisonment claim seeks damages for injury caused by the plaintiff's detention without probable cause and is predicated on a violation of the Fourth Amendment.

### **Elements**

To state a §1983 claim for false imprisonment, the plaintiff must allege that (1) the defendant intended to confine him, (2) he was aware of the confinement, (3) he did not consent to the confinement, (4) and the confinement was not otherwise privileged. Moreover, a plaintiff must prove that the charges for which he was incarcerated were dismissed, or that the conviction or sentence has been reversed on direct appeal, expunged by executive order, declared invalid by a state tribunal, or called into question by a federal court's issuance of a writ of *habeas corpus*.

### **Accrual Date of Claim and Damages**

The statute of limitations for false imprisonment is subject to a distinctive rule: limitations begin to run when the alleged false imprisonment ends. In *Wallace v. Kato*, the Supreme Court explained that false imprisonment consists of detention without legal process; therefore, it follows that false imprisonment ends when the legal process is initiated against the victim. 127 S. Ct. 1091 (2007). For example, when he is bound over by a magistrate or arraigned on charges.

However, in *Heck v. Humphrey*, the Supreme Court held that if the constitutional tort undermines the integrity of the criminal trial, then the accrual date is deferred until the conviction is reversed. 114 S. Ct. 2364, 2371-2 (1994). In other words, the rule only delays the accrual date of a tort action until the setting aside of the criminal conviction which success in that tort action would impugn.

### **C. Malicious Prosecution**

Malicious prosecution is a common law intentional tort; therefore, it is typically pled as a state law claim. However, certain federal circuits also recognize a §1983 cause of action based on malicious prosecution. The Second, Third, Sixth, Eighth, Ninth, Tenth and Eleventh Circuits have recognized a §1983 claim for malicious prosecution in violation of the Fourth and Fifth Amendments. *Uboh v. Reno*, 141 F.3d 1000, 1002-3 (11th Cir. 1998). The Fourth, Fifth, and Seventh Circuits decline to recognize malicious prosecution as a Fourth/Fifth Amendment violation. *Lambert v. Williams*, 223 F.3d 257, 262 (4th Cir. 2000); *Castellano v. Fragozo*, 352 F.3d 939 (5th Cir. 2003). The First Circuit has not yet ruled on this issue.

#### **Elements**

A claim for malicious prosecution under state law requires a showing that: (1) the defendant initiated a criminal proceeding; (2) the proceeding terminated favorably for the plaintiff; (3) there was no probable cause for the criminal charge; and (4) the defendant acted maliciously. The termination requirement avoids parallel litigation in civil and criminal proceedings over the issues of probable cause and guilt and precludes the possibility of the plaintiff succeeding in a tort action after having been convicted in an underlying criminal prosecution.

To allege a cause of action for malicious prosecution under §1983, in addition to the elements under state law, a plaintiff must allege that there was a sufficient post-arraignment liberty restraint to implicate the plaintiff's Fourth Amendment rights. Typically, malicious prosecution under §1983 is supported and accompanied by other constitutional torts (Fifth Amendment violations, coerced confessions, *Brady* violations, etc.)

As with a claim for false arrest, probable cause is a complete defense to a claim for malicious prosecution. Because charges are typically filed, the probable cause standard in the malicious prosecution context is slightly higher than the standard for false arrest cases – it consists of facts and circumstances that would lead a reasonably prudent person in the circumstances to believe the plaintiff is guilty. The determination of probable cause in a malicious prosecution claim is assessed in light of the facts known or reasonably believed at the time the prosecution was initiated, as opposed to the time of the arrest.

#### **Accrual Date of Claim and Damages**

Malicious prosecution claims do not accrue until the termination of the criminal proceeding in the plaintiff's favor. A dismissal of the criminal charges does not necessarily equate to "termination." It must be a dismissal resulting from undermining the substantive criminal charge – versus witnesses not showing up for trial. In a successful malicious prosecution case, a plaintiff may recover, in addition to general damages, compensation for any arrest or imprisonment, including damages for discomfort or injury to health, or loss of liberty and deprivation of society.

### **D. Monell Claims**

There is no *respondeat superior* theory of municipal liability for a constitutional tort, so a city may not be held vicariously liable under §1983 for the actions of its agents. Instead, a local government may be sued under §1983 only for acts implementing an official policy, practice or custom that causes a constitution violation. This cause of action is generally referred to as a "*Monell* claim."

#### **Elements – Policy and Practice**

To state a claim for municipal liability, a plaintiff must show that a violation of his constitutional rights resulted from a municipal policy or custom. A plaintiff may establish such a violation in a number of ways, including by alleging: (1) an express policy or custom; (2) an authorization of a policymaker of the unconstitutional practice; (3) failure of the municipality to train its employees, which exhibits a “deliberate indifference” to the rights of its citizens; or (4) a practice of the municipal employees that is “so permanent and well settled as to imply the constructive acquiescence of senior policymaking officials.”

A municipality’s culpability is most tenuous when a claim is brought based on a failure to train theory. *Connick v. Thompson*, 131 S. Ct. 1350, 1359 (2011). A plaintiff must meet the stringent deliberate indifference standard, which requires proof that a municipal actor disregarded a known or obvious consequence of his action. The Supreme Court has identified that a pattern of similar constitutional violations by untrained employees is ordinarily necessary to demonstrate deliberate indifference for purposes of failure to train. *Id.* at 1360. However, it is possible for a plaintiff to establish deliberate indifference based on single-incident. *City of Canton, Ohio v. Harris*, 489 U.S. 378, 390 n.10 (1989); *Salvato v. Miley*, 790 F.3d 1286, 1296 (11th Cir. 2015).

### **Single-Incident Theory**

While it is possible to establish deliberate indifference based on a single incident, the bases to establish such a claim only exists in a very narrow range of circumstances. To find deliberate indifference from a single-incident violation, the risk of injury must be a highly predictable consequence of the municipality’s failure to train and supervise its officers. Liability in single-incident cases depends on the likelihood that the situation will recur and the predictability that an officer lacking specific tools or training to handle the situation will violate citizens’ rights.

Under the single-incident theory, *Monell* liability may lie against a city for a single instance of misconduct by an employee if, under the circumstances, the unconstitutional consequence of the failure to train was plainly obvious.

## **E. DEFENSES: §1983**

### **1. Statute of Limitations and Tolling Provisions**

The Supreme Court has held that the accrual date of a §1983 cause of action is a question of federal law that is not resolved by reference to state law; rather, accrual dates are governed by federal rules conforming in general to common-law tort principles. Therefore, the Court held that the appropriate statute of limitations for §1983 claims is the limitations period for personal-injury claims in the state where the alleged constitutional violation occurred. For example, in Georgia, the limitation period for personal injury torts is two years (Ga. Code. Ann. § 9-3-33); therefore, a plaintiff would need to bring a §1983 action within two years from the date the alleged constitutional violation occurred.

### **2. Actual Probable Cause**

The existence of probable cause constitutes justification and is a complete defense to an action for false arrest, false imprisonment, and malicious prosecution claims whether brought as a state tort or pursuant to §1983.

### **3. Immunities**

The Supreme Court has recognized two immunities for §1983 claims – absolute and qualified. Absolute immunity has been granted to officials whose special functions or constitutional status requires complete protection from suit. On the other hand, qualified immunity has generally been extended to any government officials performing discretionary functions so long as their conduct does not violate clearly established statutory or constitutional rights which a reasonable person or official would have known.

#### **4. Absolute Immunity**

The Supreme Court has recognized that some officials perform special functions, which due to the similarity of the functions that were immune when Congress enacted §1983, deserve absolute protection from liability or damages. The Supreme Court has granted absolute immunity to legislators, judges, prosecutors, witnesses while testifying in court, and the President of the United States. Absolute immunity contrasts with qualified immunity, which only applies if specific conditions are met.

#### **5. Qualified Immunity**

Qualified immunity is an affirmative defense that the defendant bears the burden of proving. The doctrine of qualified immunity aims to give officials room to act with confidence in gray areas by absolving from personal liability all but the plainly incompetent or those who knowingly violate the law.

Once the qualified immunity defense is raised, a two-part inquiry is triggered. First, a court determines whether the plaintiff's complaint states a constitutional violation. If so, the court then inquires whether the constitutional right was clearly established at the time of its alleged violation. A "clearly established" right generally turns on the objective legal reasonableness of the defendant's actions, assessed in light of the legal rules that were clearly established at the time of the incident. The issue of a defendant's qualified immunity is a question of law for the court; it is not a jury question. The "clearly established" legal rule must also be grounded on similar facts. *Gill v. City of Milwaukee*, 850 F.3d 335, 340 (7th Cir. 2017).

Even if probable cause is lacking, an officer will still be entitled to qualified immunity if he can establish that there was "arguable probable cause" to arrest – that is, if officers of reasonable competence could disagree on whether the probable cause test was met.

#### **6. State Tort Immunity/Third-Party Defenses**

State tort immunity defenses created by state statutes are unavailable for §1983 claims against local governments because these claims are based on constitutional violations and are governed by federal law. Further, attempting to apportion liability through third-party claims is generally not permitted in §1983 actions. Federal courts disfavor any attempt to deflect liability for constitutional violations in order to deter offenders and compensate victims. If, however, the pleadings are based on state causes of action for false arrest and/or malicious prosecution, third-party actions are encouraged.

### **III. INSURANCE COVERAGE FOR MALICIOUS PROSECUTION?**

#### **A. The policies and the terms at issue**

There are generally two types of policies that may apply to these claims: Law Enforcement Liability Policies or General Liability Policies. Each type of policy typically provides coverage for certain enumerated

“Personal Injury” Offenses. These offenses may include: 1) False arrest; 2) Malicious Prosecution; 3) Violation of Section 1983 Civil Rights.

Sometimes the “Personal Injury” must happen during the period in order for coverage to exist. Other times, the “Personal Injury” must be caused by an Occurrence or Wrongful Act that takes place during the period. So, in a wrongful conviction case, when does the “Occurrence” or “Injury” take place?

### **B. The majority rule of when the “injury” takes place to trigger insurance coverage**

The Majority Rule is that the “Injury” takes place at time of charging, and only at the time of charging. In other words, only a single policy period is “triggered.”

Cases adhering to this “single trigger” rule include the following: *Westport Insurance Group v. City of Waukegan*, Case No. 1:14-cv-00419 (N.D. Ill., Sept. 13, 2017); *St. Paul Fire and Marine Ins. Co. v. City of Waukegan*, 2017 IL App (2d) 160381 (date and arrest and charging is the only triggering event for purposes of insurance coverage); *Indian Harbor Ins. Co. v. City of Waukegan*, 2015 IL App(2d) 140293 (injury flows immediately from filing of criminal complaint); *St. Paul Fire & Marine Ins. Co. v. City of Zion*, 2014 IL App (2d) 131312 (“Because injury results upon the commencement of malicious prosecution, it is the commencement of the prosecution that triggers insurance coverage under the policy); *Chicago Ins. Co. v. City of Council Bluffs*, 713 F.3d 963 (8th Cir. 2013)(coverage is triggered when charges were filed); *City of Lee’s Summit v. Missouri Public Entity Risk Mgmt.*, 390 S.W.3d 214, 219; *North River Ins. Co. v. Broward County Sheriff’s Office*, 428 F. Supp. 2d 1284, 1289(S.D. Fla. 2006)(only the policy in effect when claimant is arrested and incarcerated is triggered); *City of Erie v. Guaranty National Insurance Co.*, 109 F.3d 156, 163, 165 (3d Cir. 1997) (policies in effect after charging are not triggered); *Paterson Tallow Co, Inc. v. Royal Globe Ins. Cos.*, 89 N.J. 24 (1982)(malicious prosecution only occurs on the date the underlying complaint is filed).

These cases typically hold that whether the policy requires an “occurrence,” “act,” or “injury” during the period, these take place simultaneously in the context of malicious prosecution, so the language really is not a differentiating factor. *Genesis Ins. Co. v. City of Council Bluffs*, 677 F.3d 806 (8th Cir. 2012)(“The wrong and damage are practically contemporaneous”)(quoting *Cont’l Ins. Cos. v. N.E. Pharm & Chem. Co.*, 811 F.2d 1180 (8th Cir. 1987)) *City of Lee’s Summit v. Missouri Public Entity Risk Management*, 390 S.W.3d 214 (Mo. App. W.D. 2012)(in the context of insurance, the injury and thus the “occurrence” takes place in malicious prosecution at charging); *Town of Newfane v. General Star National Ins. Co.*, 14 A.D.3d 72 (N.Y.A.D. 2004) (injury was contemporaneous with the initial of the criminal proceedings); *Muller Fuel Oil Co. v. Insurance Co. of North America*, 95 N.J. Super 564 (App. Div. 1967)(“damage begins to flow from the very commencement of the tortious conduct – the making of the criminal complaint ... the tortious act and injury are a *Fait accompli*”).

### **C. The potential exceptions to this majority rule are often argued, seldom accepted**

#### **1. Policy is not likely triggered at the time of exoneration.**

There used to be a line of federal cases that reasoned that because a malicious prosecution claim cannot exist before the date of exoneration, then it is the time of exoneration that is the earliest time insurance for malicious prosecution can exist. *National Cas. Co. v. McFatridge*, 604 F.3d 335 (7th Cir. 2010);

*American Safety Ins. Co. v. Waukegan*, 678 F.3d 475 (7th Cir. 2012); *Northfield Ins. Co. v. City of Waukegan*, 701 F.3d 1124 (7th Cir. 2012).

However, later courts recognized that these rulings were wrong because the time at which an underlying tort for malicious prosecution may accrue is a totally different analysis that determining when the “personal injury” was first inflicted for insurance purposes.

## **2. Unconstitutional conduct after charging does not trigger new coverage**

Insureds, such as Gage County, often argue that additional unconstitutional conduct that takes place *after charging* (i.e. leading up to trial) can constitute new constitutional violations and new injuries that may trigger new insurance coverage. The argument is that, when a person is going to trial, there is a new opportunity for that person to either be set free or to be convicted. Therefore, if the investigatory team decides to create new manufactured evidence or to withhold exculpatory evidence at that time, the policyholders argue that this “new conduct” can result in additional years in prison, causing allegedly new injuries, and allegedly triggering new coverage.

Courts have repeatedly rejected these arguments and found that continuing unconstitutional actions can cause INCREASED DAMAGES or EXACERBATED INJURY, but not a new “Personal Injury” or a new deprivation of liberty. *Indian Harbor Ins. Co. v. City of Waukegan*, 2015 IL App (2d) 140293 (unconstitutional acts that take place after charging are continuations of the same harm that was inflicted at time of charging); *St. Paul Fire and Marine Ins. Co. v. City of Waukegan*, 2017 IL App (2d) 160381 (the three convictions of the claimant that took place in years after charging may have increased the constitutional damages, but are not new injuries); *City of Lee’s Summit v. Missouri Public Entity Risk Mgmt.*, 390 S.W.3d 214 (Mo. App. W.D. 2012) (continuing §1983 claims are analogous to malicious prosecution, which triggers insurance only upon the initial deprivation of liberty at time of charging); *Paterson Tallow Co, Inc. v. Royal Globe Ins. Cos.*, 89 N.J. 24 (1982) (continued unconstitutional conduct may be a factor in assessing damages, but not new distinct injury); *Town of Newfane v. General Star National Ins. Co.*, 14 A.D.3d 72 (N.Y.A.D. 2004) (Same); *Harbor Ins. Co. v. Central National Ins. Co.*, 165 Cal. App. 3d 1029 (same).

## **3. Continuous incarceration is not a “continuous injury” or “continuous trigger**

Some courts use a “continuous trigger” when there is harm taking place continually over years. A continuous trigger actually is what applies when there is NEW HARM or NEW DAMAGE taking place each year, but it is just scientifically indivisible. *See U.S. Gypsum v. Admiral Insurance Co.*, 643 N.E.2d 1226 (Ill. App. 1994)(a new “injury in fact” takes place each year over time as asbestos fibers create new damage to an underlying claimant’s lungs). So, policyholders have argued that a continuous trigger should also apply to trigger each insurance policy in effect during all of the years a wrongfully incarcerated person is subject to incarceration.

Courts have uniformly rejected the application of a continuous trigger to malicious prosecution cases. A malicious prosecution claim presents A SINGLE INJURY that was inflicted upon charging, and it may linger for years of incarceration, but it is not a new injury over those years. *See Genesis Ins. Co. v. City of Council Bluffs*, 677 F.3d 806 (8th Cir. 2012)( because the occurrence and the injury happen at the same time and upon charging, no federal or state court decision has ever adopted a continuous trigger for malicious prosecution claims).



#### **4. Two outlier trigger decisions for malicious prosecution**

*Selective Ins. Co. v. RLI Ins. Co.*, 706 Fed. Appx. 260 (6th Cir. 2017): Court found that the policy was triggered in the period of trial, not the period of the charging. This was because the undisputed record showed no wrongful conduct causing constitutional harm at the time of charging. Instead, the unconstitutional conduct that caused harm came about later in second policy period

*Travelers Indem. Co. v. Forrest County*, 206 F. Supp.3d 1216 (S.D. Miss. 2016) Mississippi, awaiting decision on appeal. Court found continuous trigger because of ongoing injury. However, in this case there was no requirement of a “personal injury offense” during the period, but only a requirement of some sort of injury. This case was decided under the duty to defend, a very broad standard.

#### **IV. CLAIM HANDLING ISSUES AND DEFENSE STRATEGIES**

##### **A. Conflict Issues**

When a malicious prosecution claim presents various reasons that it might not be covered, a conflict between the insured and insurer may arise, giving the insured the right to independent counsel. This creates a series of difficult challenges in terms of the claims handler coordinating complicated defense issues with counsel who may have a decades-long relationship with the municipality, and who is not used to reporting and coordinating substantive or billing issues with an outside entity. In such situations, insurers consider the use of monitoring counsel.

Similarly, conflict issues may arise when the municipality itself may have a different view of the case than the individual defendants, often who may be prior employees. It is also often the case that even among a group of individual defendants, some believe that the protocols and procedures at issue were required or institute by one, and the blame game ensues. This also creates a series of conflict issues for the insurers to consider.

##### **B. Defense Strategies**

In defending these types of cases, a key issue for the defense team to consider is whether to bifurcate the *Monell* claims against the government entity from those claims against the individuals. There are many factors here to consider. This investigation is informed by a detailed history of the facts and personnel who were involved at the time of the arrest, and the testimony of department personnel who may be able to view that conduct in the perspective of historic norms and procedures. Another key defense consideration is the use of Rule 68 Offers of Judgment, which could have far reaching implications in civil rights cases in which attorney fee exposure is often a driving factor.

##### **C. Resolution**

Given that malicious prosecution cases often come to a claims handler with a pre-set judicial determination that conduct was wrongful, when it was wrongful and what incarceration it caused, these claims are particularly appropriate for early resolution. Factors that must be considered are the political and emotional investment of both the claimants and the suspect investigators. Furthermore, the insurer should address early on the significance of any coverage issues, and the likelihood that the municipality may need to free up money to contribute toward any resolution. Lastly, in the event that multiple acts over time could conceivable trigger new coverage, or in the event that both CGL and LEL policies may apply, it is imperative that insurers address and resolve contribution issues between each other so that a true path to resolution can be found.

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