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Tort Trial and Insurance Practice Section

RAISING THE BAR

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COMMITTEE NEWS

Insurance Coverage Litigation

Sanders v. Illinois Union: The Start of a New Trend on Malicious Prosecution Trigger, or Simply an Outlier?

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Malicious prosecution claims often raise interesting coverage issues. In a typical malicious prosecution claim, there is a significant time lag between when the government takes the first prosecutorial actions against the accused and when the accused's innocence is vindicated in a court of law.

During this time lag, the accused has typically expended significant sums fighting the charges or sitting in prison. The price tag for a malicious prosecution claim may often approach or exceed a municipality's policy limits.

In standard commercial general liability policies, coverage for malicious prosecution claims is available under the "Personal Injury" coverage. "Personal Injury" is typically defined to include specific offenses, such as malicious prosecution, false arrest, defamation, and wrongful eviction. While property damage and bodily injury

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In This Issue

Chair Message

Joanne L. Zimolzak
Leclairryan PLLC

On behalf of the ABA's Tort Trial and Insurance Practice Insurance Coverage Litigation Committee (TIPS/ICLC), we are pleased to be sharing the latest edition of the TIPS ICLC Newsletter. We have much to report on since our last Newsletter, including our successful mid-year meeting held this past February in Phoenix; our strong showing at the TIPS Section Conference in May, for which our insurance-focused members convened in NYC; and the latest developments in the exciting world of insurance coverage, courtesy of authors Greg Mann and Robert Tugander (Rivkin Radler) and Tim Thornton (Gray Duffy). Be sure to check out our featured practitioner profile of Agnieszka Wilewicz as well. We hope you find something of interest in our latest edition, and we welcome your contributions to the next – please reach out to our editor, Jennifer Meeker (Nossaman) at jmeeker@nossaman.com.

Best,
JZ

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website

Stay Connected with TIPS

We encourage you to stay up-to-date on important Section news, TIPS meetings and events and important topics in your area of practice by following TIPS on **Twitter** @ABATIPS, joining our groups on **LinkedIn**, following us on **Instagram**, and visiting our **YouTube** page! In addition, you can easily connect with TIPS substantive committees on these various social media outlets by clicking on any of the links.

TIPS MEMBER MONDAYS

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TIPS Member Monday provides quality CLE programing and practice-specific committee involvement designed to enhance members' trial skills, learn about emerging state and national issues, and to keep our members on the cutting edge of tort and insurance law.

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The 27th Annual Mid-Year Meeting – February 2019

The 27th Annual Mid-Year Meeting of the ABA's Tort Trial and Insurance Practice Insurance Coverage Litigation Committee, held at the Arizona Biltmore in Phoenix this past February, was a resounding success. While the weather was largely uncooperative – we did not sign up for cold and rainy, Phoenix! – it was a terrific conference featuring excellent substantive content from our outstanding panelists. Among other topics, our presenters addressed insurance coverage issues relating to the #MeToo movement, the opioid crisis, and mass shootings, as well as the latest developments relating to D&O, E&O, CGL and property coverage. Our attendees found time to have some fun, too, in the form of our dine-around dinners at local restaurants across Phoenix – the extensive vegan menu available at the otherwise carnivore-centric Bobby-Q was a highlight – and of course, our annual karaoke outing to the fabulous Geisha-A-Go-Go in Scottsdale. Special thanks to our Program Chair, Teresa Milano (Head of Management and Professional Liability Claims - Starstone/Enstar) for her leadership and to the ABA's Janet Hummons and Danielle Daly for their invaluable assistance. **We came, we saw, we talked about coverage, and we conquered - well done, all!**

TIPS Section Conference – May 2019

Members of the Insurance Coverage Litigation Committee made a splash as the TIPS Fifth Annual Section Conference at the Westin Times Square on May 1–4, 2019 in New York City. The program included an extraordinary set of programs and faculty including more than 50 corporate counsel and insurance claims leaders. ICLC joined other committee members to speak on several panels, including: "Insurance proceeds to the rescue - will insurance pay for some of the biggest public health and welfare issues of today and tomorrow?"; "Good Faith": The Current Landscape of Claims Handling and Policyholder Expectations; and Mediation Mayhem: Get Results by Avoiding the Traps.

The section dinner was held at the famous Rainbow Room with gorgeous views of New York City. ICLC members enjoyed getting to know one another more at the committee dinner held at Charlie Palmer Steak near Times Square.

Is Loss of a Business License or Permit a Loss of Use of Tangible Property?

Timothy Thornton
Gray·Duffy, LLP

Timothy Thornton is a partner at Gray·Duffy, LLP. He represents and advises insurers in complex coverage matters.

In *Thee Sombrero, Inc. v. Scottsdale Ins. Co.*, 28 Cal. App. 5th 729, 239 Cal. Rptr. 3d 416 (Ct. App. 2018), *review denied* (Jan. 30, 2019) (review denied) Sombrero owned property. Its lessees operated that property as a nightclub pursuant to a conditional use permit. CES provided security guard services at the nightclub. The permit was revoked after a fatal shooting at the nightclub. The permit was replaced with a permit that only allowed operation as a banquet hall.

Sombrero sued CES for negligence alleging that CES's negligence caused the shooting, which in turn caused the revocation of the CUP, which in turn caused a diminution in value of the property. Sombrero obtained a default judgment against CES.

Sombrero then sued CES's general liability insurer, Scottsdale, in a direct action on the judgment under Cal. Ins. Code § 11580 (b)(2) (West). Scottsdale argued that the loss was an economic loss and not "property damage". The trial court ruled for Scottsdale. The Court of Appeal reversed. It held that Sombrero's loss of the ability to use the property as a nightclub constituted loss of use of tangible property and thus was "property damage" within the meaning of the general liability policy.

One condition of the conditional use permit issued for use of the property was that the city had to approve the floor plan, which then could not be modified without city approval. Part of that floor plan included a single door with a metal detector.

One patron shot and killed another. After that Sombrero learned that CES has converted a storage area into a "VIP entrance" with no metal detector. The gun used in the shooting was brought in through that entrance.

At the default prove-up hearing Sombrero submitted an affidavit averring that the property had been valued at $2,769,231with its nightclub entitlement, and after the shooting was valued at $1,846,153 with the modified conditional use permit allowing for private banquet use. The difference in value was $923,078. Judgment was entered for that amount against CES.

The court held that "The loss of the ability to use the property as a nightclub is, by definition, a 'loss of use' of 'tangible property.'

The court was not persuaded by the insurer's arguments based on *Scottsdale Ins. Co. v. Int'l Protective Agency, Inc.*, 105 Wash. App. 244, 19 P.3d 1058 (2001). There

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Member Spotlight: Agnieszka Wilewicz

Name/firm affiliation:

Hurwitz & Fine, P.C. Member (and recently promoted Shareholder)

Policyholder/insurer/both

Currently my practice is almost exclusively insurer-oriented coverage litigation, although I also dabble in environmental defense.

Role with ICLC/years of involvement, and why you participate

Though I have been a card-carrying member of the ABA since my first year of law school, I have only been active in ICLC for a couple of years. Previously I was quite active in DRI and held a leadership position there (Long Tail & Toxic Torts SLG Chair of the Insurance Law Committee). However, as a firm we decided to branch out our practice further and get more involved in the ABA. At first I was involved in the Section of Litigation, but found my home with the ICLC and have stayed since. I participate because the group of practioners is lively, engaged, intelligent, and like-minded. It's wonderful to have a growing group of coverage friends around the county to talk shop.

How/why did you first become interested in insurance practice?

While most people "fall into" insurance and/or coverage, I was almost literally born into it. My father is a major claims adjuster, my mother is a broker, and my brother recently started a position as an underwriter. We actually used to discuss antisubrogation and additional insured endorsements at the dinner table while I was in high school. The running joke growing up was that I would be the coverage attorney to round it out, so after law school it was a natural fit (and I already had many industry connections).

What keeps you interested in insurance practice?

I geekily and readily admit that coverage is fun. Every day is a new issue, a new strategy, a new form, or a new angle in this ever-evolving area of law. Not only do you get to litigate cases, but you get to counsel clients on recommendations of things they can implement that can impact their entire customer base. No one day is the same as the last. The best part for me is that there's "an answer" in nearly every case. Unlike in personal injury litigation or even products liability matters, in

insurance policy interpretation cases you can get to an answer almost at the outset. It is incredibly satisfying to brief your position and have the Judge agree with you in writing and close a case. The best is when that Judge cites some of your motion paper language in her decision. It's incredibly motivating.

What is the most interesting insurance-related issue currently on your desk?

I have a number of environmental coverage cases on my desk currently and I frequently counsel clients on long-tail and toxic tort cases. Some of the recent MDL litigation regarding increasingly-complicated chemicals has spawned really interesting coverage issues from things as simple as definition interpretation to applicability of manuscript exclusions and how they interplay with multiple policies

What insurance-related issues are you telling clients to watch going forward?

Most recently, our firm has been advising our clients about New York's Child Victim's Act and all of the potential claims and ramifications thereof. This law expanded the statute of limitations for child victims to seek prosecution for abuse that happened years ago. It opens a temporary look-back window for victims to file claims, some as far back as half a century ago. Given the recent developments in how courts have been interpreting the definition of an "occurrence", these claims have significant potential for wide-spread coverage implications. The window opens on August 14th of this year, so it is particularly pressing.

When you are not focused on insurance matters, what do you like to do?

I am an avid and otherwise voracious reader. I own more books that I care to admit (though my family will readily explain how we have a book case in every room of the house, and I'm under constant, albeit ineffective, moratorium on buying more). I also hoard books on my multiple kindles. Contemporaneously, I love to travel. We make it to Europe at least once a year, and I am never bored if on the move. Hence, I love participating in the ABA's conferences as I get to go explore parts of the country I haven't seen before.

Your go-to karaoke song is:

Appropriately for a lawyer, my go-to has often been Fiona Apple's *Criminal*. However, I no longer perform in public following a late-night margherita incident that resulted in a burned down restaurant. The rest is history.

What advice would you offer to young practitioners?

Pace yourself. The practice of law is a lesson in ebbs and flows, and though one day might be overwhelming the next might be calmer. It is thus important to be mindful of yourself and know that the work will always be there (hopefully). I also repeat a word of advice that I received from a managing partner at the start of my own career – you will always be behind at work. It's often the nature of litigation. Once you're completely caught up on everything on your desk, it might be time to quit or retire. Before then, however, the sooner you make peace with the fact that you're always swimming upstream, the sooner you will learn to balance the various pressures in life.

https://www.hurwitzfine.com/lawyers/profile/agnieszka-wilewicz

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coverage typically requires that the injury occur during the policy period, "Personal Injury" coverage typically requires that the enumerated offense be "committed" during the policy. The question of when a malicious prosecution claim is "committed" (or otherwise occurs depending on the specific policy language) raises interesting coverage issues.

In an effort to maximize coverage, policyholders sued for malicious prosecution have sometimes argued that all policies in effect from the time the claimant was wrongfully arrested until the date of exoneration are obligated to provide coverage. But courts have rejected the continuous trigger approach for malicious prosecution claims, finding that the claim takes place at a distinct point in time.[1] Most courts have held that the coverage trigger date for the "offense" of malicious prosecution is the date when the wrongful prosecution against the claimant began.[2]

A recent decision by an Illinois appellate court – *Sanders v. Illinois Union Insurance Company*[3] – expressed a different view. *Sanders* ruled that a malicious prosecution claim was triggered when the underlying plaintiff was exonerated and not when the underlying plaintiff was prosecuted. *Sanders* departed from rulings by other appellate decisions in Illinois (including one by a different division of the First District last year).

Sanders has caught the attention of the Illinois Supreme Court, which granted leave to appeal the decision on May 22, 2019.

The Majority View

The majority view focuses on the date of prosecution for several reasons.

Standard commercial general liability policies require that the claimant's injury or the insured's wrongful act must take place during the policy period. These courts note

1 No court appears to have adopted a continuous trigger theory of coverage for malicious prosecution claims. *See Northfield Ins. Co. v. City of Waukegan*, 761 F. Supp. 2d 766, 773 (N.D. Ill. 2010) ("Despite the split in views on insurance coverage for civil rights claims, neither strain of cases endorses the continuing violation theory proposed by Defendants."), *aff'd*, 701 F.3d 1124 (7th Cir. 2012); *see also Billings v. Commerce Ins. Co.*, 458 Mass. 194, 199, 936 N.E.2d 408 (2010); (rejecting continuing trigger theory); *Zurich Ins. Co. v. Peterson*, 188 Cal. App. 3d 438, 447–448, 232 Cal. Rptr. 807 (Ct. App. 1986) (same); *Hampton v. Carter Enterprises, Inc.*, 238 S.W.3d 170, 176–77 (Mo. Ct. App. 2007) (same).

2 *See, e.g., Billings*, 458 Mass. at 197-200 (applying Massachusetts law); *Zook v. Arch Specialty Ins. Co.*, 336 Ga. App. 669, 674 (Ga. Ct. App. 2016) (applying Georgia law); *Hampton*, 238 S.W.3d at 177 (Mo. Ct. App. 2007) (applying Missouri law); *Town of Newfane v. General Star Nat'l Ins. Co.*, 14 A.D.3d 72, 79 (4th Dep't 2004); *City of Erie, Pa. v. Guaranty Nat'l Ins. Co.*, 109 F.3d 156, 160-165 (3d Cir. 1997) (applying Pennsylvania law); *Ethicon, Inc. v. Aetna Cas. & Sur. Co.*, 688 F. Supp. 119, 124, 127 (S.D.N.Y. 1988) (applying New Jersey law); *Zurich Ins. Co.*, 188 Cal. App. 3d at 445-49 (applying California law); *Southern Md. Agric. Ass'n, Inc. v. Bituminous Cas. Corp.*, 539 F. Supp. 1295, 1302-1303 (1982) (applying Maryland law); *see generally Selective Ins. Co. of the Southeast v RLI Ins. Co.*, 2015 WL 4250364 at *9 (N.D. Ohio July 13, 2015) (predicting that Ohio Court would follow majority rule); *S. Freedman & Sons v. Hartford Fire Ins. Co.*, 396 A.2d 195, 199–200 (D.C. App. 1978) (applying D.C. law).

3 *Sanders v. Illinois Union Ins. Co.*, 2019 IL App (1st) 180158, *appeal allowed*, 124 N.E.3d 493 (Ill. 2019).

that a claimant's exoneration from wrongfully filed criminal charges isn't an "injury" – to the contrary, the exoneration is considered the first step in the legal system to rectify the wrong done to the claimant.

The majority view reasons that the "injury" in a malicious prosecution claim occurs when the prosecutorial machinery of the state is set in motion against a claimant. These courts hold that, unlike latent injury cases, the injury to the claimant occurs the day he or she is accused of the crime by authorities. At that point, the claimant's reputation is damaged and his or her legal expenses begin to incur.[4] Thus, the majority view reasons that the policy in effect when the prosecution is first commenced responds, assuming the other elements for coverage are satisfied.

The majority view is also supported by public policy considerations. Frequently, at the time liability coverage is written, whether a policy applicant or policyholder faces a potential claim for malicious prosecution is information known only by the policyholder. This creates opportunities for deception by policy applicants. For example, if the trigger date for a malicious prosecution claim is linked to a claimant's exoneration, the tortfeasor could shift the risk for that claim to an unwitting insurance company by procuring insurance coverage during the pendency of the criminal prosecution, even just before the ultimate dismissal or favorable termination of the criminal charges.[5] But then again, insurers have recourse if an applicant withholds pertinent information during the application process.

The Minority View

Early decisions adopting the minority view – that a claim for malicious prosecution under a commercial liability policy isn't triggered until exoneration – emphasized that a cause of action for such claim didn't ripen substantively, or accrue for purposes of the statute of limitations, until the ultimate termination of the criminal action.[6] This reasoning has been widely criticized. The majority points out that when a cause of action accrues for statute of limitations purposes and when a policy is triggered for insurance purposes, are distinct conceptual issues.[7] The majority notes that

4 *Zurich*, 188 Cal. App. 3d at 448 ("While some of the adverse consequences to the injured party will depend on whether a criminal prosecution is begun or a civil suit prosecuted, in each case a party's reputation is injured and legal expenses are incurred at the initiation of the malicious complaint.") (internal citations omitted); *see also City of Erie, Pa.*, 109 F.3d at 165 *Ethicon, Inc.*, 688 F. Supp. at 127.

5 *See, e.g., Royal Indem. Co. v. Werner*, 979 F.2d 1299, 1300 (8th Cir. 1992) ("a contrary rule might well enable plaintiffs to lull an unwary insurer into extending coverage after they perceive an impending difficulty from a suit in which they are already engaged"); *Newfane*, 14 A.D.3d at 81; *see also City of Erie, Pa.*, 109 F.3d at 160–161.

6 *Sauviac v. Dobbins*, 06-666 (La. App. 5 Cir. 12/27/06), 949 So. 2d 513, 519–20, *writ denied*, 2007-0181 (La. 3/16/07), 952 So. 2d 701; *Roess v. St. Paul Fire & Marine Ins. Co.*, 383 F. Supp. 1231 (M.D. Fla. 1974); *Sec. Mut. Cas. Co. v. Harbor Ins. Co.*, 65 Ill. App. 3d 198, 382 N.E.2d 1 (1978), *rev'd*, 77 Ill. 2d 446, 397 N.E.2d 839 (1979).

7 *See, e.g., Billings*, 458 Mass. at 198.

statutes of limitations are designed to promote justice by expediting litigation and discouraging stale claims.[8] Further, insurance recovery is driven by the reasonable expectations of the insured.[9]

More recent minority decisions, including *Sanders*, have reached their conclusion on different grounds – that the insurance coverage is offense driven. For example, in *American Safety Casualty Insurance Company v. City of Waukegan*,[10] the Seventh Circuit declined to look to the statute of limitations as a basis for supporting its decision. Although the court relied on a 1978 Illinois appeals court decision, *Security Mutual,*[11] the Seventh Circuit gave other reasons for adopting the minority view.

In a unanimous opinion by Judge Frank Easterbrook, the Seventh Circuit observed that the policy defined "occurrence" based on the tort, not the misconduct. It noted that malicious prosecution is a unique tort. For most other torts, the injury is the final chronological element. For malicious prosecution, however, exoneration is the final element.

The *American Safety* court also noted that the minority view has public policy reasons working in its favor. While some cases adopting the majority view expressed concern about unscrupulous torfeasors, the minority view allows the insurance market to work more freely. For instance, if insurers are concerned about exposure for damages incurred years earlier due to a malicious prosecution, they are free to change the language in their policies by defining the "occurrence" as the misconduct rather than the completed tort.

But, in a series of cases after *American Safety*, Illinois appellate courts unequivocally adopted the majority position that a malicious prosecution claim triggers insurance coverage when the prosecution is initiated, not when there is an exoneration.[12] This trend continued as recently as mid-2018 when another division of the Illinois Court of Appeals First District in *First Mercury Ins. Co. v. Ciolino*[13] followed the majority view.

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8 *See City of Erie, Pa.*, 109 F.3d at 161.

9 *Id.*

10 *Am. Safety Cas. Ins. Co. v. City of Waukegan, Ill.*, 678 F.3d 475, 479 (7th Cir. 2012).

11 *Security Mut. Cas. Co.*, 65 Ill. App. 3d 198.

12 *See St. Paul Fire & Marine Ins. Co. v. City of Waukegan*, 2017 IL App (2d) 160381, 82 N.E.3d 823; *Cty. of McLean v. States Self-Insurers Risk Retention Grp., Inc.*, 2015 IL App (4th) 140628, 33 N.E.3d 1012; *Indian Harbor Ins. Co. v. City of Waukegan*, 2015 IL App (2d) 140293, 33 N.E.3d 613; *St. Paul Fire & Marine Ins. Co. v. City of Zion*, 2014 IL App (2d) 131312, 18 N.E.3d 193.

13 *First Mercury Ins. Co. v. Ciolino*, 2018 IL App (1st) 171532, 107 N.E.3d 240, *appeal denied,* 108 N.E.3d 840 (Ill. 2018).

Sanders Bucks the Trend

Sanders parts ways with the majority of jurisdictions addressing the issue. Most cases have been decided by intermediate state courts. This may be because the majority view has received little substantive pushback in the state courts, at least until *Sanders*. *Sanders* may begin a new stage in the battle between the majority and minority views.

In *Sanders*, the claimant brought a malicious prosecution claim against the City of Chicago Heights and some of its employees, alleging that members of the city's police department had manipulated and coerced false witness identifications of claimant as being involved in a December 1993 shooting. The claimant was wrongly convicted of murder, attempted murder, and armed robbery arising out of that shooting. The claimant sued the city for wrongful prosecution, and ultimately settled for $15 million. The claimant then sued some of the city's insurers. The city assigned its rights to pursue recovery to the claimant.

The court ruled that coverage under the insurance policies was not triggered by the initiation of the alleged malicious prosecution, but rather, by the exoneration. *Sanders* didn't rest its conclusion on the fact that the statute of limitations on a claim for malicious prosecution doesn't accrue until exoneration.

Rather, *Sanders* focused on the policy terms; specifically, that the policy language described the "tort" of malicious prosecution, instead of the misconduct giving rise to the tort. The policy at issue applied to "offenses." Similar to *American Safety, Sanders* found that the plain and ordinary meaning of the word "offense" refers to a legal cause of action that arises from wrongful conduct. *Sanders* further reasoned that the "Personal Injury" definition described the offenses by their proper legal names (*e.g.,* false arrest, false imprisonment, malicious prosecution) as opposed to the underlying wrongful acts (*e.g.,* arresting, imprisoning, or prosecuting someone without probable cause). In the court's view, the policies' reference to the offenses by their proper legal

names, instead of the underlying wrongful conduct, "makes clear that coverage is triggered by the occurrence of the completed cause of action (in this case, upon Sanders's exoneration) and not by merely the underlying wrongful conduct."[14] The court found that the average insured would believe the policies provided coverage for the legal causes of action.

The *Sanders* majority sought to harmonize its ruling with *First Mercury* by pointing to policy wording differences. The policy in *First Mercury* required the offense to have

14 *See* *Sanders*, 2019 IL App (1st) 180158, at ¶ 19.

been "committed" during the policy period, whereas the language in the policies before the *Sanders* court applied to claims arising out of an "occurrence happening" during the policy period. The *Sanders* court reasoned that use of the word "commit" denotes an affirmative, deliberate act by a person, whereas the use of the word "happening" suggests the completion of a process. Thus, the court explained, "when the term 'offense' is read in the context of the *First Mercury* policy, which required that the offense be 'committed,' it is not unreasonable to conclude that the parties to the policy intended 'offense' to refer to an affirmative act by the insured, *i.e.*, the initiation of the wrongful prosecution."[15]

The *Sanders* majority acknowledged that its interpretation of "offense" puts insurers at risk of having to cover acts that were committed years in the past. But it suggested that insurers are free to redraft their policies to define an occurrence based on the insured's misconduct, rather than the legal offense.

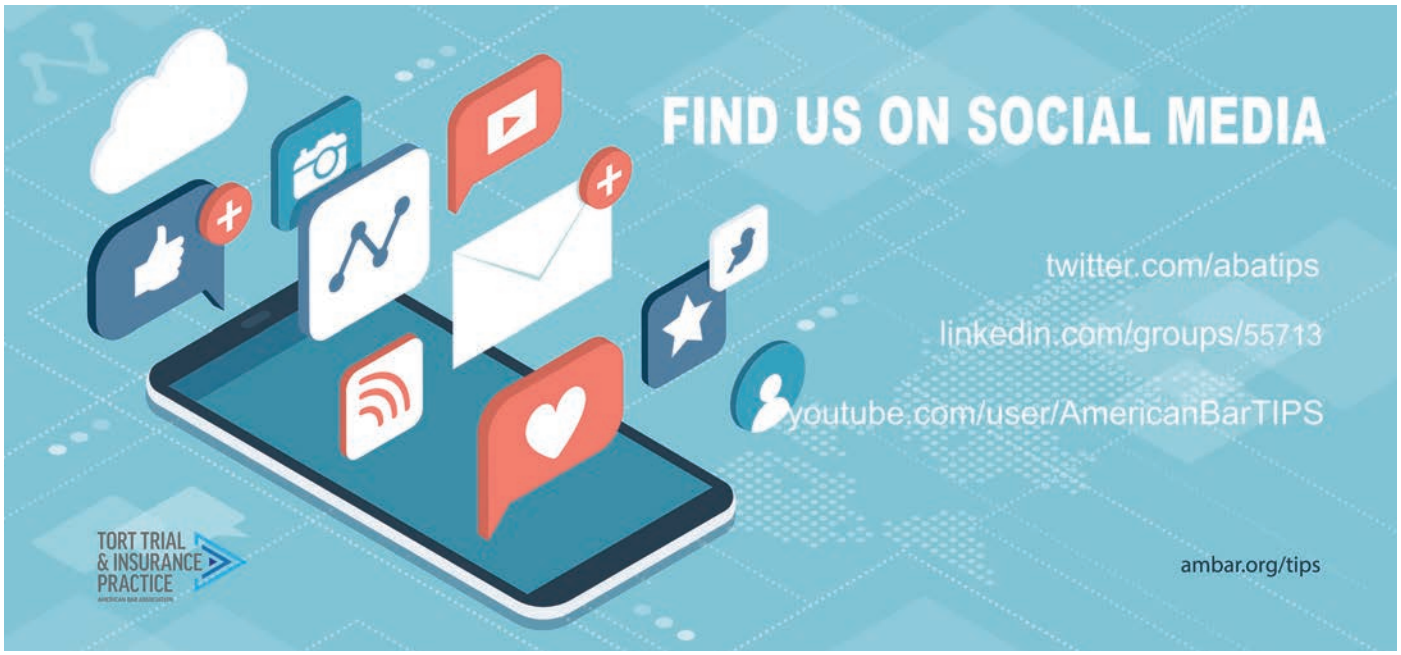
Sanders produced a lengthy dissent. The dissent criticized the majority for departing from prior Illinois case law. The dissent ascribed little weight to the fact that the policy refers to offenses by their proper legal names. It noted that most liability policies providing personal injury coverage refer to offenses by their proper legal names. There was nothing unique about the language before it. Yet, other courts construing such language did not equate the occurrence of these offenses with the accrual of a claimant's right to sue.

Addressing the majority's suggestion that insurers can rewrite their policies, the dissent also noted that, as a practical matter, it would be impossible to draft an insurance policy that described all the possible wrongful acts that could give rise to a claim for such an offense. The enumerated offenses in the "Personal Injury" definition – including malicious prosecution – can be committed in a number of ways. Attempting to articulate all of those ways, the dissent noted, would be verbose and unintelligible.

Whether *Sanders* is an aberration, or whether it constitutes the beginning of a new trend in favor of the minority view, remains to be seen. The dissent in *Sanders* noted that it's not easy to distinguish the outcome of *Sanders* from other decisions based on policy wording alone.

In *American Safety*, the Seventh Circuit declined to certify this issue to the Supreme Court of Illinois. The Seventh Circuit noted that, at that time, there was no conflict in the intermediate state courts. *Sanders* now heads for the Illinois Supreme Court. But, even if *Sanders* is overruled, its take on the issue could provide a roadmap for other jurisdictions that have yet to address the issue.

15 *Id.* at ¶ 28.



Is Loss... Continued from page 6

IPA allowed a minor to enter a restaurant owned by Northwest. Because of that Northwest lost its liquor license. Northwest sued IPA. That appellate court ruled for Scottsdale. It reasoned that a liquor license represents a privilege granted by the state. Therefore it is intangible property. So loss of a liquor license is not "property damage". Northwest did not lose the right to occupy the premises.

The Court of Appeal in *Thee Sombrero* did not follow *IPA*. First, while it agreed that a liquor license is intangible property, the court stated that the loss of the license leads to a loss of use of the premises.

Second, the court held that the reasonable expectations of the insured would be that "loss of use" would be any significant use of the premises, not merely the total loss of all uses.

Third as to *IPA's* holding that "a right to occupy premises is not a tangible property interest" the court in *Thee Sombrero* disagreed. Land and buildings are tangible. The question is whether an insured would understand "tangible property" to include property he leases.

Scottsdale argued that this was a "mere economic loss" and therefore it was not a loss of use of tangible property. The court noted the rule regarding "strictly economic losses" not being "property damage". "Strictly economic" losses like "lost profits, loss of goodwill, loss of the anticipated benefit of a bargain, and loss of an investment, do not constitute damage or injury to tangible property covered by a comprehensive general liability policy." However, where these intangible economic losses provide 'a measure of damages to physical property this is within a general liability insurance policy's coverage for property damage. Diminution in value is accepted as a method of measuring any property damage that may have been sustained. It can be an alternative measure of any property damage actually sustained.

The court held that the correct principle is not that economic losses, by definition, do not constitute property damage. Rather, the correct principle is that losses that are exclusively economic, without any accompanying physical damage or loss of use tangible property, do not constitute property damage.

In *Scottsdale Ins. Co. v. Int'l Protective Agency, Inc.*, 105 Wash. App. 244, 19 P.3d 1058 (2001) IPA provided security services at Cheers West, a restaurant which Northwest Visions owned and operated. Under the service contract, IPA agreed to be responsible for crowd control and safeguarding of property. Northwest Visions and its on-site manager, Oleson, sued IPA under theories of negligence and breach of contract, alleging that IPA's services included checking and policing customers,

so that minors were not admitted to the premises. Nonetheless a minor gained admission. As a result Northwest Visions lost its liquor license. This destroyed the business of the restaurant and caused great economic loss to it and Oleson.

Scottsdale insured IPA. The policy's security and patrol agencies endorsement provided coverage for sums that IPA would be legally obligated to pay because of any negligent act, error or omission committed by which resulted in property damage. The policy defined property damage as physical injury to tangible property, including all resulting loss of use of that property, and loss of use of tangible property that is not physically injured.

The court held that a liquor license "is merely representative of a privilege granted by the state and, as such, is intangible property." In this regard it cited a statute, Wash. Rev. Code Ann. § 84.36.070(2)(c) (West), which provides that a license is intangible property for tax purposes. The court also held that a business is likewise intangible for it merely describes a "commercial activity engaged in for gain or livelihood."

Although Northwest Visions alleged that it lost its liquor license and that this destroyed its business, it did not allege, nor was there evidence in the record, that Northwest Visions lost its use of or right to occupy the premises. "Even if it had, a right to occupy premises is not a tangible property interest." Nor did plaintiffs allege that Oleson, the manager, suffered property damage as defined by the policy.

As a point of comparison the court cited *United Pac. Ins. Co. v. Van's Westlake Union, Inc.*, 34 Wash. App. 708, 664 P.2d 1262 (1983). In that case businesses near a service station spill were closed after an 80,000 gallon gasoline leak. Government authorities promptly closed the service station and cordoned it off along with an adjacent several square block area while the gasoline was pumped out of the ground. The court held that third party claims for damages resulting from the 6-week closure of the nearby businesses while the spilled gasoline was being pumped out of the ground were losses contemplated by the definition of "property damage".

Thee Sombrero and *IPA* provide different answers to the question of whether the loss of a business license or permit is a loss of use of tangible property. *Thee Sombrero* holds that a change in a conditional use permit was "property damage". *IPA* holds that loss of a liquor license was not "property damage".

Calendar

September 19-20, 2019	**Cannabis Conference** Contact: Janet Hummons – 312/988-5656 Danielle Daly – 312/988-5708	InterContinental Hotel Chicago, IL
October 16-19, 2019	**TIPS Fall Leadership Meeting** Contact: Janet Hummons – 312/988-5656 Juel Jones – 312/988-5596	Grand Wailea Hotel Wailea, HI
October 24-25, 2019	**Aviation Litigation** Contact: Danielle Daly – 312/988-5708	Ritz-Carlton Washington, DC
November 6-8, 2019	**Fidelity & Surety Law Fall Conference** Contact: Janet Hummons – 312/988-5656 Danielle Daly – 312/988-5708	Hilton Boston Back Bay Boston, MA
January 16-18, 2020	**Life Health & Disability** Contact: Danielle Daly – 312/988-5708	Hotel Van Zandt Austin, TX
January 29-31, 2020	**Fidelity & Surety Law Midwinter Conference** Contact: Janet Hummons – 312/988-5656 Speaker Contact: Juel Jones – 312/988-5597	Grand Hyatt New York New York, NY
February 12-16, 2020	**ABA Midyear Meeting** Contact: Juel Jones – 312/988-5597 Janet Hummons – 312/988-5656	JW Marriott Austin, TX
February 20-22, 2020	**Insurance Coverage Litigation Midyear Conference** Contact: Janet Hummons – 312/988-5656 Danielle Daly – 312/988-5708	Arizona Biltmore Resort Phoenix, AZ
March 5-6, 2020	**Cyber Security Conference** Contact: Janet Hummons – 312/988-5597	TBD Atlanta, GA
March 14-18, 2020	**20th National Trial Academy** Contact: Janet Hummons – 312/988-5656 Danielle Daly – 312/988-5708	National Judicial College Reno, NV
March 27-28, 2020	**Workers Compensation Conference** Contact: Danielle Daly – 312/988-5708	TBD New Orleans, LA

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