



Section 1983 Liability: Best Practices for Cities to Manage and Mitigate Risk in a Changing World

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Section 1983 Litigation: Best Practices for Cities to Manage and Mitigate Risk in a Changing World

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INTRODUCTION

Over the last five years, law enforcement has become a target for civil litigation whether it be a claim for excessive force, false arrest, wrongful search and seizure, or for taking or failing to take action in certain circumstances. If an officer is confronted with a situation where a citizen is threatening someone or threatening to harm themselves, law enforcement officers seem to inevitably be sued for whatever actions they take. Officers are frequently placed in a position in which they have to make a split-second decision and, while Section 1983 case law over the years has recognized this, juries often fail to take this into consideration.

Between the negative attention that law enforcement receives in the media and the large verdicts against officers that have been rendered across the country, it is a challenging time for cities in managing the risks that come with having a police department. Because of the nature of the liability claims that are asserted against law enforcement, the jury verdicts and high settlements, insurers across the country have become much more circumspect about how much capacity to deploy in insuring public entities for law enforcement claims. As a result, the cost of procuring insurance for law enforcement liability has never been higher. Awareness of this issue and investing in personnel, technology, analytics and training are important in trying to reduce exposure and positively impact rising insurance costs. This paper explores the status of the insurance markets as it pertains to law enforcement claims and offers some strategies and practice tips for helping to mitigate the risk of law enforcement claims. The mitigation strategies and practice tips can also be applied to other Section 1983 claims as well.

THE LAW ENFORCEMENT LIABILITY INSURANCE MARKET

The general liability insurance market has been plagued with an increase in the number and size of very large claims in recent years. For almost a decade now, the claims activity has been drastically different than it had been historically. What might have been a \$3M-\$5M claim in 2012 is now likely to cost \$8M-\$12M or more. This trend started in traditionally more difficult states like California and Washington, but has now spread across the country.

We have also seen a dramatic increase in the number of “nuclear verdicts”, i.e. verdicts over \$10M. These are becoming more and more common which is resulting in higher settlement values, both because Plaintiffs’ attorneys feel emboldened and because entities are concerned about taking law enforcement cases to trial. Public entities, whom Plaintiffs’ attorneys perceive to have deep pockets, are particularly susceptible to these extreme case outcomes. The table below shows an informal tally of large US public entity claims since 2012, as provided by AmWins, a large wholesale broker.

Claim Amount	Number of Claims
\$50M or Greater	7
\$25M or Greater	24
\$10M or Greater	98
\$1M or Greater	328

Source: AmWins informal tally since 2012. Likely understated

These large claim values are certainly not restricted solely to police liability, but law enforcement accounts for more than its fair share. According to the Marshall Project, a non-profit online news organization with the mission of raising the profile of criminal justice issues and encouraging criminal justice reform, US cities spent upwards of \$3 billion to settle police misconduct lawsuits between 2010-2019. And the insurance carriers are noticing. In their 22/23 Law Enforcement Legal Liability update, Travelers Insurance Company

noted a 250% increase in the average cost of indemnity claims between 2016 and 2021. They identified that the probability of a large claim (defined as \$500,000 or higher) was 6 times higher in 2021 than in 2016.

A. Why is this happening?

Specific to law enforcement, there seems to be a general distrust of law enforcement with more of an assumption that the officer did something wrong when something bad happens rather than an assumption that the officer acted appropriately. The “Defund the Police” movement from a couple of years ago is the most obvious sign of the escalating scrutiny police forces are under from both a political and societal perspective. Of course, the increased media scrutiny and sensationalistic journalism doesn’t help either. These factors have led to decreased funding, staffing shortages, reduced recruitment standards and passive policing. Add to that mix a general increase in criminal activity and the mental health and substance abuse crises across the country, and it is not difficult to understand why larger law enforcement liability claims are occurring more frequently.

B. Impact on the Insurance Market

As noted above, the insurance industry is very aware of the new normal in terms of general liability claims costs and is taking steps to protect their bottom line. Some carriers have left the market entirely, or at least in certain jurisdictions. Others are increasing deductibles and self-insured retentions in an effort to shift more of the financial burden of claims to the insured. Carriers are also reducing the limits they will provide and implementing annual aggregate limits to cap the maximum amount they will pay for a claim and for the policy period. Carriers are also much more diligent in their underwriting efforts with considerably more scrutiny about mitigation measures being undertaken by entities as respects their law enforcement departments when considering quoting an account. Specific to police exposure this includes review of the following:

- A Police Department’s accreditation status
- Officer training policies and protocols
- Use of body cameras and dash cameras
- Use of force, high-speed pursuit and de-escalation policies
- Loss experience and officer incident histories.

For those carriers who already ensure public agencies that have a law enforcement component, all carriers are increasing their rates to try and keep pace with the increased claims costs and many are also looking to restrict coverage through implementing new policy exclusions pertaining to law enforcement activities.

C. What can a public entity do?

1. Impacting the officers

While the above paints a pretty bleak picture, there are things that public entities can do to try and mitigate the cost increases noted. Some municipalities are trying to combat staffing shortages by increasing their compensation packages, offering signing bonuses and enhancing training and officer support.

One public entity pool in California has implemented an EAP program specifically for law enforcement officers (and other first responders) to provide mental health and other support to those high-risk employees. The idea behind this is that providing these specialized mental health services can help officers get the help they need after a critical incident and that by getting the help they need they will be in a better position mentally to deal with the next critical incident that comes along.

Other entities are investing in predictive analytics in an attempt to identify the 5% of the policing workforce that show an elevated risk, and that account for over 65% of all incidents. These analytics can be used to determine who the potential “bad apples” are and implement programs to modify their behavior.

Some states are also getting into the mix by considering legislation that would make police officers more accountable. A proposed Colorado law, if passed, would result in officers being held partially responsible for wrongdoing from a financial standpoint. Under this proposed law, an officer could be made to pay up to 5% of a verdict up to a maximum of \$25,000. Other states are considering legislation that would require

police officers to purchase their own professional liability insurance. The above are just some ways that public entities are exploring what can be done to bring down insurance costs and/or reduce law enforcement liability claims.

2. Take a more pro-active role during the claim/pre-litigation stage

While addressing officer behavior at an early stage can help avoid claims, once a claim has happened there are actions that an entity can take to help mitigate the ultimate exposure on a claim. One such action that an entity can take is to have litigation staff (attorneys, risk managers) review footage from body worn cameras (BWC) or drones as soon as possible after any critical incidents or incidents that may lead to a claim or litigation so that an initial evaluation of the incident, potential exposure, and investigative strategy can start to take shape.

When reviewing BWC and drone footage, some things to look for include:

- The good and bad aspects of the officer's conduct.
- How did the suspect/individual behave relative to the officer(s)?
 - Are mental illness issues driving the incident? If so, how might the officer's actions be perceived by a jury?
 - Was the suspect/individual involved under the influence of any substances?
 - Were there any attempts to de-escalate?
- How might a jury perceive what they see on the video? For example, if you or your staff have a visceral reaction to something, a jury likely will as well.
- Does the officer's conduct violate any laws/rights?
- Did the officer(s) violate any departmental policies?
- Once a claim and/or lawsuit is filed, evaluate how all parties behaved relative to the allegations in the claim/lawsuit.

After viewing the BWC and/or drone footage, if the incident is viewed as problematic or liability seems certain, have a frank discussion with the client regarding the positive and negative aspects of the incident relative to the realities of civil litigation and determine if exploring early settlement to cap risk is a desired path. If resolution is desirable, then determine what would be a reasonable and acceptable range for settlement.

By resolving a claim early, the entity can potentially avoid or limit the amount of publicity regarding the incident or case. In addition, it accelerates the timeframe for having the difficult conversations with the client about the realities of civil litigation including the potential for punitive damage exposure to the officer. This helps the client better understand the realities and risks of litigating the case rather than having the client learn these risks later after the entity has spent significant money and time defending the case. In addition, if an early resolution is negotiated, the entity can attempt to negotiate a unilateral confidentiality agreement language that would bind the plaintiff thereby decreasing the risk of additional publicity, although the agreement itself would be a public document. An example of confidentiality language that can be proposed is attached hereto as Exhibit A.

If the BWC/drone footage shows there clearly were no violations of any laws or rights and there is a bona fide belief that the claim or litigation has absolutely no merit, then consider offering an informal viewing of the BWC to opposing counsel. When doing this, we suggest that the entity place some conditions on the informal viewing. The suggested conditions include:

- Attorneys only – no clients;
- The viewing must take place in the city attorney's office with an entity attorney present the entire time;
- A copy of the video will not be provided to plaintiff's counsel;
- No videos or photos of the recording may be taken while the footage is playing, but note taking is allowed.

While this may be an approach that an entity takes only once in a while, if the footage clearly shows no wrongdoing on the part of the officer(s), then there is a strong possibility that taking this approach will result

in the Plaintiff's attorney dropping the case, withdrawing from representation, or proposing a nominal settlement.

3. Strategies for after litigation has been commenced

After litigation has been commenced it is important to work with defense counsel to evaluate the risks in the case at the earliest possible stage of the litigation. A key element to success is making sure that you have the right attorney handling the case. Whether using outside counsel or handling in-house, it is critical to have someone handling the case who is familiar with defending law enforcement officers in the area of Section 1983 liability as the law in this area is complex. It is important to stress the need for realistic assessment of liability and settlement value so that the client is not surprised at trial or in mediation, and so that you can avoid obstacles to obtaining settlement authority if you need it.

If the case could present significant exposure for the entity, consider what is currently happening in the community and research what other agencies are seeing with juries. It is critical to have a sense of how juries in the jurisdiction of the court view law enforcement and law enforcement cases. Knowing this information will help inform the defense team on how current events and juror trends could impact trial and how the team might overcome any negative juror attitudes toward law enforcement. Along these lines, one thing to look at is whether there are any recent nuclear verdicts locally or involving the same opposing counsel in similar cases that may be indicative of a trial verdict in your case.

From a defense handling standpoint, after the litigation is filed and served it is important to immediately set up a meeting with each involved officer to obtain their story/memory before it fades any further. It is also important to review BWC/drone footage and reports with the officers and discuss what training they have had that might be implicated by the incident (i.e., de-escalation, implicit bias, misuse of muscling techniques, PERT). Another topic of conversation should be their knowledge of department policies as the applicable policies relate to their conduct during the incident (i.e., use of force, handcuffing). Each officer should also be asked whether they have been involved in any similar prior incidents or have any discipline in their file as that will inevitably come out during the litigation. As these interviews are completed, consider all of the above and how each officer might present during deposition and at trial.

In preparing the case it is critical to develop a theme early in the process. If opposing counsel is unfamiliar, research other cases they have handled and reach out to defense counsel for insight into any tactics they frequently employ so the defense can be prepared ahead of depositions and can incorporate anything useful into the defense theme. As discovery progresses, incorporate the defense theme repeatedly into written discovery and depositions both when asking questions and when preparing the officers for deposition. In deposing others, defense should identify specific witnesses that can be used to anchor the defense theme. All defense witnesses should be prepared to deal with aggressive questioning and to counter reptile theory tactics employed by opposing counsel.

Developing an alternate explanation or story for the jury is a key component to the trial preparation process. For example, how are officers trained to respond in the circumstances of the case? Did the involved officers adhere to that training? In doing this, also consider how best to own and address any bad facts. If these are not addressed at the outset it is likely that jurors will perceive this as the government entity trying to hide something.

In law enforcement cases, having the right experts is extremely important. To give your entity the best chance at success, retain experts early and consult with them when formulating the defense discovery plan, case theme, and in preparing for depositions. They can be a big asset in helping to formulate and build on the defense theme as well as help prepare the defense for Plaintiff's anticipated line of attack.

Typically, police officers often make good witnesses and are used to testifying in court in criminal matters. However, civil litigation is different. When the officers are defendants in a civil action, they should receive extensive and repeated deposition and trial preparation so that they are best prepared to give their best testimony. To this end, defense should provide the officer who is named as a defendant with a sample deposition transcript, if possible, to help them see what will be coming question-wise in their deposition.

The defense team should conduct multiple mock direct and cross examinations and employ known tactics of opposing counsel throughout. The officer should also be prepared on how to best present that their conduct complied with their training and policies, or explain why it did not and why it is not an issue in the case. Last, it is important to prepare the officer for owning and addressing any bad facts and to help them tell their side of the story.

Defense counsel should check in with the officer and entity clients, stakeholders, and pooled risk representative early and often (if case value warrants) to discuss information gleaned in depositions and written discovery and whether it alters or confirms the case evaluation. Doing so increases defense counsel's credibility with all involved and avoids putting your client in a bind if settlement authority is suddenly needed and your representative has not been kept in the loop or there is not time for obtaining the necessary authority.

Pooled risk representatives are a great resource and should not be overlooked. They can provide great insight on what they are seeing statewide in similar cases in terms of successful defense strategies, verdicts, and settlements. They also have good information on which experts or mediators they are finding to be effective in cases.

If the case looks like it will go to trial, the defense team should evaluate whether employing a defense version of the nuclear verdict strategy would be beneficial. For example, if liability is possible and plaintiffs are going to ask for a verdict in the stratosphere, be prepared to argue to the jury that while defendants do not believe the jury will find for plaintiff, if they were to find liability a reasonable amount to award would be XXX. If defense takes this approach (and it is something that should be considered in every case), then the number should be stated in voir dire and again multiple times throughout the case and IT SHOULD NEVER CHANGE. Taking this approach provides the jury with a reasonable number that is not zero should it find in favor of plaintiff and allows defense to take the approach that it is the one that is being reasonable.

If participating in private mediation, consider reaching out to the mediator for an informal discussion of the case in advance of mediation. This primes them for your client's version of the case and can help give you a preview of how the mediator may see the facts. Many mediators are now taking the approach of offering a mediator's proposal when they are not able to bring the parties together. Evaluate whether a mediator's proposal is really needed. In other words, will it be something reasonable that the defense can live with or will it end up setting an unreasonably high floor for future negotiations or for other cases that are early in litigation or for future cases.

4. Take on more risk to decrease insurance costs

In addition to the mitigation and litigation tactics set forth above, another way for entities to reduce their insurance costs and address law enforcement liability claims is for an entity to take on a much higher self-insured retention for its police liability exposure. Separating that exposure from the rest of the city's general liability insurance placement so that the entity can save on insurance costs across the entire book of general liability exposure.

CONCLUSION

While it is a challenging litigation and insurance environment for law enforcement cases, all hope is not lost. There are still mitigation approaches that can be explored and new and evolving litigation tactics to implement. Entities are still out there trying and winning law enforcement cases and hopefully the above strategies will assist your entity in reducing your law enforcement liability risk.

EXHIBIT A
SAMPLE UNILATERAL CONFIDENTIALITY PROVISION

6.0 CONFIDENTIALITY

6.1 Claimant and City, and their attorneys, representatives, consultants, agents, experts, and anyone acting on their behalf or with their knowledge, agree that they may disclose only the fact that the Claim settled and will from this point forward keep confidential all video and audio of the events, except in certain circumstances wherein the law may require City to disclose audio and/or video of the incident as discussed below.

6.2 The Parties acknowledge that reports related to the Incident, the terms of the settlement, and the Agreement are subject to disclosure by City in response to requests made pursuant to the California Public Records Act (Cal. Gov. Code section 7920 et. seq. [formerly section 6250 et seq.]). In the event that a Public Records Act request is made for any documents related to the Incident, including this Agreement, the City of Chula Vista shall use reasonable efforts to notify Claimant and her attorneys within 10 days of the request and will redact personal identifying and private information from any documents disclosed, as permissible by law. In the event a request is made pursuant to the California Public Records Act which seeks or encompasses the audio or video of this Incident, City will endeavor to shield disclosure of any audio and video of the Incident to protect Claimant's privacy, with such efforts being within the bounds of California law. However, Claimant and her attorneys acknowledge and understand that disclosure of audio, video, and/or reports relating to this incident may still occur if a Court so orders or other circumstances mandate disclosure under the law. Notwithstanding the foregoing, if City is requested or required (by law, regulatory or government authority, oral questions, interrogatories, requests for information or documents, subpoena, civil investigative demand or similar process, under the California Public Records Act or otherwise) to disclose any documents related to the Incident, or requests disclosure of the audio or video of this Incident City will provide Claimant with prompt notice of such request(s) so that Claimant may seek an appropriate protective order and/or waive compliance with the provisions of this Agreement unless such notice is prohibited by law or legal process.

6.3 In the event any Party receives media requests relating to this Incident, the Parties will attempt, in good faith, to release a mutually agreeable joint statement before responding to any media request, after which the Parties may provide additional statements in accordance with this confidentiality provision.

6.4 Claimant and the Released Parties acknowledge and understand that this confidentiality provision is a material condition, consideration, and covenant of this Agreement and that violation thereof shall constitute a default and material breach by such party. Any breach of this provision by Claimant, at the election of Released Parties could cause a forfeiture of monies paid to Claimant hereunder, or subject Claimant to an action for damages at Released Parties' election.