PRIMA'S 2017 RISK MANAGEMENT
WEBINAR SERIES

Current Trends in Law Enforcement Liability Claims

Presented By:
Aaron Stone
Vice President Claims
OneBeacon Government Risks

Overview

- Current Environment
- Types of Law Enforcement Liability Claims
- Claim Trends
- Risk Management Issues/Opportunities



Current Environment

- Significant amount of negative Media coverage
- Reports of increased excessive force- accurate?
  - Reliable data regarding law enforcement related shootings is incomplete. Bureau of Justice Statistics and FBI compile annual data from states, but not all states report. Media outlets, including Washington Post, are collecting public data.
  - Average Number of fatalities per year 2000-2014: 390
  - Number of fatalities in 2015: 990
  - Number of fatalities in 2016: 963
  - Number of fatalities to date in 2017: 581

Current Environment

- Criminal charges against law enforcement officers still rare; convictions even more rare
- Movement away from Grand Jury process
- Civil suits on increase
  - Juries seem to be more inclined to send message through monetary awards
  - Record settlements



Current Environment

- Recent verdicts/settlements:
  - $8.3M verdict: Long Island; Taser use resulting in death
  - $5.5M verdict: Ohio; Fatal shooting
  - $3M verdict: Missouri; Taser use resulting in death
  - $6M settlement: New York; Fatal shooting
  - $4M settlement: Los Angeles; Fatal shooting
  - $3.5M settlement: Kentucky; Fatal shooting

Current Environment

- Amounts paid by Cities between 2000-2014:
  - Chicago: $521M
  - New York: $348M
  - Los Angeles: $101M
  - Oakland: $74M
  - Philadelphia: $40M
  - Boston: $36M



Current Environment

- What does all this mean?
  - More skepticism of law enforcement, which can make the job more difficult and dangerous:
    - citizens more confrontational
    - more officer/citizens interactions being recorded
    - witnesses reluctant to cooperate with investigations
    - number of law enforcement officers killed in line of duty in 2016 was 135, a 10% increase over previous years
  - More claims being asserted
  - More suits being filed, resulting in more defense expenses being incurred

Types of Claims

- Section 1983 Constitutional violations: unlawful for anyone acting under the authority of state law to deprive another person of his or her rights under the Constitution or federal law.
  - 1st Amendment: Free Speech- Retaliation
  - 4th Amendment: Searches/Stops/Arrests/Excessive force
  - 8th Amendment: Cruel and Unusual Punishment/Excessive force
  - 14th Amendment: Liberty- Malicious Prosecution

Types of Claims

- Monell claims: Claims against entity rather than individual for policy or custom that caused injury. Typically argued as inadequate policy or failure to properly train.
- State law claims: Assault, Battery, Intentional Infliction of Emotional Distress, Wrongful Death.
- Fee shifting provisions.
- Expensive to defend.

Current Claim Trends

- Qualified Immunity Issues
  - QI is a defense for an individual who is being sued in their individual capacity for damages. It is meant to protect individuals not only from liability, but also from suit.
  - Applies where the individual's conduct does not violate a clearly established statutory or constitutional right of which a reasonable person would have known.
  - Usually asserted in a motion to dismiss, or a motion for summary judgment.
  - If denied, can be immediately appealed.

Current Claim Trends

- Qualified Immunity Issues (cont.)
  - Federal Judges were applying varying standards in deciding QI issues.
  - United States Supreme Court revisited issue in *White v. Pauly* in January 2017.
    - Officer who shot and killed plaintiff was entitled to qualified immunity. His use of deadly force was reasonable.
    - Qualified immunity is important to society as a whole and protects "all but the plainly incompetent or those who knowingly violate the law."
    - Reminded the lower courts that QI should be applied with greater frequency.
  - Waiting to see effects of *White* decision. Early indications are somewhat positive.

Current Claim Trends

- Americans with Disabilities Act and Conditions of Confinement
  - ADA applies to jails/prisons.
  - Must make reasonable accommodations for disabled inmates. But, not if they impose undue financial and administrative burdens, or if they would pose significant health and safety risks or direct threats to others.
  - DOJ has released guidance regarding placing disabled inmates in solitary confinement and has offered instructions on designed accessible cells.

Current Claim Trends

- Americans with Disabilities Act and Conditions of Confinement (cont.)
  - Suits filed for inadequate medical care and failure to provide medical supplies (wheelchairs, etc.).
  - Suits filed for inadequate conditions of confinement.
  - Claims are brought against the entity, so no qualified immunity defense.
  - Easier burden for plaintiff to meet- not a deliberate indifference standard.
  - Some class actions have been successful: Illinois state prison system treatment of hearing-impaired inmates.

Current Claim Trends

- Debtor's Prisons
  - Historically, being incarcerated for failure to pay a debt. Banned in the United States in 1833.
  - Primarily in Municipal Courts.
  - Individual assessed a monetary penalty for minor criminal offense (usually traffic tickets).
  - If they fail to pay, arrest warrant is issued and they are detained until they can pay.
  - No effort made to determine ability to pay, or to offer alternative measures such as community service.
  - Class actions suits pending in several states. Some have recently settled with Cities agreeing to change procedures. One case settled for payment of $500 per day of incarceration per class member.

Risk Management

- Body Cameras
  - Significant push to have law enforcement officers wear body cameras.
  - In 2016, DOJ awarded $20M to 100 police departments across the country to purchase body cameras.
  - Some studies have illustrated body camera usage leads to better evidentiary documentation, increased accountability for behavior (both for officers and citizens) and transparency to the public at large.
  - Privacy considerations: should they be used for public surveillance; retaliation against witnesses; used against officers in other arenas (employment issues).
  - Cost considerations: cameras, ancillary equipment and data storage.
  - Policy considerations: available to all officers or only some (what factors); when to record- continuous, or pursuant to specific triggers (any discretion); privacy limitations on recordings (public restrooms, locker rooms, private homes); pre-report viewing by officers; public access to recordings (data privacy laws, ongoing investigations); retention directives (how long to keep- evidence of crime or no crime); and disciplinary actions for violations.

Risk Management

- Training: De-escalation
  - Push to emphasize de-escalation and flexible tactics to minimize lethal force situations.
  - DOJ reviews the existence (or non-existence) of such training when investigating departments for civil rights violations.
  - Most states do not require it. Left to discretion of local Chiefs and Sheriffs.
  - Some studies show such training results in fewer lethal force situations without any increase in officer safety issues.

Risk Management

- Personal Liability Insurance
  - Currently, law enforcement agencies carry liability insurance that covers the costs/liability associated with claims. Such policies cover individual officers as long as the conduct occurred in the course and scope of employment and was not criminal in nature.
  - There is a growing call for individual officers to carry personal liability insurance rather than be covered by the entity's policy. Under this approach, the entity would pay for the policy, but any premium increase due to misconduct would be the officer's responsibility. Proponents argue higher premiums would weed out the "bad cops."
  - Opponents counter that it would be too hard to price and would encourage less active policing.
  - Currently, no department requires this.

Risk Management

- Positive Marketing
  - Many departments have social media managers.
  - Make concerted effort to control the department's reputation in the community.
  - Provides platform to share information, respond to tips and communicate directly with the public.
  - Share positive stories.



Q & A


why
when
who
where
what
why
QUESTIONS
who
how
where
who
what
how
how