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Complications Arising From Multi-Jurisdiction Task Forces

I. Overview/Definitions

There are many issues to consider upon receipt of a new claim arising from activities of a multi-jurisdictional/multi-agency law enforcement task force. Depending upon how the Inter-Agency Agreement is fashioned (assuming there even is an Agreement), the task force could be a unique and separate entity from the law enforcement agency of the named insured. However, based upon the Agreement, the exposure may be as limited as the number of officers the insured agency has committed to the task force or could be multiplied by the number of agencies and number of officers involved in the entire task force.

Task Forces – What are they?

A group of individual law enforcement agents from multiple local government entities focused on targeting a specific type of criminal activity in a specific jurisdiction. Multijurisdictional task forces ("Task forces") can be made up of varying levels of superiority from different jurisdictions. They generally act as a separate entity from the various municipalities in which they are comprised.

Task forces are created to address and focus on a specific issue in a given community or communities. By combining resources, Task forces are better equipped to focus their attention on a single problem, instead of having a large force focusing on several smaller issues. In addition, these forces typically cover a larger geographical area, allowing them to police criminal activity that may span several cities, counties, or even states.

Task forces are typically found in larger cities or counties, where it is more effective to have a small group of law enforcement agents focusing on a particular issue in a larger area in lieu of officers patrolling certain districts and dealing with all of the crime in that area. However, recent economic realities have had the effect of having smaller, more rural jurisdictions combine their efforts and limited resources and utilizing Task forces as well.

Insurance

Questions that need to be addressed: Is the Task force insured? Are the individual members of the Task force insured, and if not, should they be insured under the Task force entity or under their original police force? Does each Task force member-jurisdiction have insurance that might cover the Task force members that are not from that jurisdiction?

Most often, the Task force itself does not have separate insurance coverage for the entity. Instead, each individual officer that is part of the Task force is insured via the municipality in which that officer is employed.

Are they a suable entity?

Issues have developed as to whether a given Task force is a separate governmental entity susceptible to being sued. There are some cases that have held that Task forces have been determined to be a suable entity under federal law, specifically under 42 USC § 1983. A § 1983 claim must allege both a violation or deprivation of civil rights and that the violation or deprivation was committed by a "person" acting under color of state law, the definition of "person," which can and has included local governmental units and municipalities. However, there is increasing debate whether the Task force itself is amenable to suit or if the proper parties are the individual officers who performed the alleged conduct and the respective municipalities under a theory of indemnification.

Are they entitled to Eleventh Amendment immunity?

A Task force is not a state entity, it is a local governmental unit, and thus, not entitled to Eleventh Amendment immunity. The Eleventh Amendment bars suits for damages against states, but it does not extend to employees of counties and similar municipal corporations.

The Inter-Agency Agreement

The Inter-Agency Agreement should identify, among other things, all agencies involved in the Task force, the command hierarchy, oversight responsibilities, funding, liability insurance and each of the jurisdictions in which the assigned officers have power. Other areas of concern that should be addressed include, but are not limited to, confidential informants, how salaries of command, support staff and the officers are paid, equipment, including vehicles, the operational policies & procedures, and training.

If the agency with oversight is the State Police or a federal agency such as the FBI, DEA or ATF, there will likely not be any such Agreement. The member-jurisdiction will dedicate one or more officers to the agency with oversight and any liability

arising from the actions of the officers while under the command of the state or federal agency will flow to that agency.

When assessing claims related to Task force activity, you should obtain a copy of the Inter-Agency Agreement and identify what agencies are signatory to that Agreement. Confirm if there is an agency with oversight, such as a state or federal agency as mentioned above. Does the Agreement provide authority to the officer while under the command of the task force? Does it then remove authority when the officer is outside of his or her normal jurisdiction, thus limiting authority to a single jurisdiction? Are the officers assigned to the Task force sworn officers of every agency represented on the Task force?

What is the command structure? Is a command hierarchy clearly identified and how is authority for command outlined in the Agreement? Is there a host agency? In other words, does the Task force share space with a member agency?

Is risk transfer addressed in the Agreement? Is there hold harmless/indemnification language? Is there mutual indemnification language?

Command Hierarchy and Oversight Responsibilities

Who is responsible for the oversight and day-to-day operations of the Task force? Is the Agreement specific as to the authority and powers designated to this individual? Is the command staff exclusive to the Task force or is their time divided between their home agency and the Task force? Likewise, are the officers dedicated on a 100% basis to the Task force or are they working for the Task force on a part time basis?

Funding

Questions in determining issues related to ultimate liability for the actions of a Task force and its officers often depend on how it is funded. The focus of these inquires often include the following: How is the Task force funded and how are operational expenses paid? Was a federal grant obtained to fund the agency? Determine who applied for the grant? The agency that applied for the grant is usually considered the implementing agency. Once the implementing agency receives the grant funds, how are the funds distributed? Who is managing the funds? Is the implementing agency responsible for confirming compliance with the grant requirements?

If there was no federal grant, was the funding for the Task force apportioned amongst the members? If so, how was apportionment determined and is liability for law enforcement activities outlined in the Agreement on the same basis of apportionment?

If the funding for the Task force comes from forfeiture proceeds, where do excess funds go after operational expenses are paid? Does the Task force have its own bank account? This is important to determine if the Task force is a separate and distinct legal entity.

Additional inquires include how are salaries of command staff, support staff and officers paid? If the salaries are paid by the home agencies, are the home agencies reimbursed by the Task force or by the agency with oversight?

With respect to equipment, how is equipment such as protective gear, weapons, ammunition, vehicle fuel procured? What vehicles are used in the operations and how were they provided? Since insurance typically follows the vehicle, a driver operating a vehicle used in a Task force operation will be considered a permissive user and, barring any bespoke policy language, coverage for that vehicle will be provided by the owner agency.

II. Insurance Concerns

Liability Insurance

Does the Inter-Agency Agreement specify that each member agency must maintain liability insurance for law enforcement activities with certain limits? If so, does the Agreement further outline that each member agency is responsible only for the liability arising from the actions of the officers dedicated to the Task force by the member agency?

In a recent claim, the Inter-Agency Agreement was specific that the Task force was an "independent law enforcement agency". However, that independent law enforcement agency did not obtain a liability policy and relied on the liability policies of the member agencies.

Liability arising from the Task force activities under the direction of a state or federal agency will most likely fall to the agency with oversight. However, it is likely that the home agencies of the defendant officers will be named defendants until they can be extracted from the litigation by voluntary dismissal or motion.

Is the Task force or are the other member agencies an additional insured on the policy by endorsement or by contract? The insuring agreement essentially provides that the company will pay on behalf of the named insured all sums the named insured is legally obligated to pay…or assumed under a covered contract. How does your specific policy form read?

Finally, does the state allow stacking of policies? When a Task force is comprised of multiple agencies with multiple insurers, or if the members are part of a larger pool, the court may stack the policies of all member agencies unless there is specific wording in the policy or memorandum of coverage prohibiting stacking.

Operational Policies and Procedures

It is important to recognize that the operational policies and procedures of a Task forces are separate and distinct from the Inter-Agency Agreement. The Agreement is the document that provides the formation of the Task force. The policies and procedures govern the operations and activities of the command staff and officers assigned to the Task force.

Task forces are comprised of officers assigned from different agencies, each with its own set of policies and procedures. While working under the authority of the Task force, there should be policies and procedures specific to the Task force that are provided by the authorizing agency.

Obtain a copy of the Task force policies and procedures. Did the officer(s) adhere to all policies and procedures during the event? How are internal affairs investigations handled and by whom? Will an outside agency be engaged, such as the state police, to conduct any IA investigation?

Confidential Informants

In most, if not all, Task force operations there will be confidential informants. Best practices typically dictate that a confidential informant ("CI") will sign a contract with the law enforcement agency he or she is working with. The typical confidential informant contract will specify that the confidential informant is not an employee of the member agency and that the member agency assumes no liability for the actions of the confidential informant. In practice, most Task forces assign control of the CI to the officer(s) in the specific jurisdiction in which the CI is working.

The contract will also specify the officer to whom the confidential informant is assigned. In practice, most Task forces assign control of the CI to the officer(s) in the specific jurisdiction in which the CI is working. From time to time, money will be given, not paid, to the CI for the purposes of purchasing drugs or other contraband while the transaction is being observed by officers. There are also situations that will involve money being given, not paid, to a CI in order for him or her to maintain appearances in the community so that they do not come under suspicion (ie. renting a car, buying clothing, paying rent).

If a claim arising from an incident involving a confidential informant, obtain a copy of the confidential informant contract as soon as this fact is confirmed. Who is the officer assigned to the CI? When was the CI contract signed? Does the Inter-Agency Agreement address how CIs will be handled, contracted and compensated? If the CI did receive funds, confirm the source of those funds. Also, make sure you have a copy of all policies related to the handling/control of CIs and that those policies were, in fact, followed.

If the CI is already contracted by a member agency, and subsequent to the date the contract was signed the officer assigned to the informant was transferred to the Task

force, was a new confidential informant contract signed? If not, it is likely that the CI is still contracted with the member agency and is not contracted to the Task force.

Further on Claim Handling

Civil rights claims and even automobile liability claims involving a Task force are complicated for even the most experienced claim professional. No two Task force agencies are the same and it is highly probable that there are no two Inter-Agency Agreements that are identical. Further, some states allow stacking of policies, some do not. Some insurance policies prohibit stacking and others do not.

In any liability claim involving a Task force, it is imperative a claims representative retain counsel immediately to protect and direct the investigation. It is likely that every officer assigned to the Task force is working undercover and every effort must be made to protect the officers' cover. This is not only for the officers' protection, but also so that the work conducted by the Task force is not wasted. Never take a recorded statement in a claim involving a Task force. Allow counsel to conduct the interviews so that the interviews are protected by attorney-client privilege.

In a case involving multiple contracts and possibly multiple insurance policies, it is recommended the claim professional obtain a copy of all contracts and insurance policies of the members. Engage coverage counsel to assist with the preparation of a thorough reservation of rights letter to be sent to the named insured, additional insured agencies or officers as well defendant officers employed by the named insured. If the named insured has specific issues with the actions of the officer involved, the need to retain conflict counsel to represent the defendant officer(s) should be reviewed with counsel.

The coverage issues arising from claims involving a multi-agency Task force are complicated. While the facts of the actual law enforcement claim itself will be investigated as any other law enforcement claim, the number of agencies and officers involved in the Task force will result in the coverage investigation continuing well into the life of the claim.

III. Lawsuits and Legal Considerations

Initial notice of a potential lawsuit

Initial notice

It is not unusual to first learn of a potential lawsuit involving law enforcement by turning on the television or picking up a newspaper. Indeed, these cases have been a hot-topic for news outlets across the nation. From your initial observation, you, as an

attorney who represents local governments or a claim representative handling government files, can get a base understanding of what occurred and the potential agencies and local governments involved. You can also learn whether the incident involved a local government which you have represented/adjusted in the past. For the attorney, the question is: what do you do if you learn that the incident does involve a local government you have represented?

Initial contacts

The first thing you need to do is make a decision on who to contact regarding the potential lawsuit or claim. The first person you reach out to, as outside counsel, should not be any of the parties involved. If you have a relationship with local counsel for the local government, you should contact them. Additionally, under a circumstance like this involving the complexities of a multi-jurisdictional Task force, you should also reach out to the insurer to inform of the potential claim. Doing so will allow the insurer to begin the process of assigning panel counsel and also so that an initial investigation can immediately begin. Depending on the situation and urgency of the matter, these communications may be by telephone, mail, or e-mail. In the initial contact, you will want to try to obtain a copy of the joint-task force agreement, if any, to determine whether there are any indemnity provisions.

Retention

After you have contacted the insurer and local counsel, you are informed that you and your law firm will be getting the assignment, which is currently pre-suit. The first thing you should do is determine all the people who were involved and meet with them to gain an understanding of what occurred and the potential "warts" in the case. It would be best to have this meeting in-person at the local agency as quickly as possible. You should also seek to determine what the potential claims and defenses will be as well as whether there will be any conflict with representing the individuals and the local governments. Indeed, when defending municipalities and individual public employees, it is paramount when beginning the defense to consider issues related to conflicts. Often, cases involving multiple parties and agencies will involve finger-pointing on the part of the various defendants. Questions may also arise regarding the scope of who knew what when, and who told what to whom. Those questions need to be asked early in the defense so that determinations can be made as to which, if any, defendants require their own defense counsel. In the event of a conflict, an assessment should be made as to whether the conflict can be waived or if conflict counsel should be retained. Assuming that based on the information

provided by the individuals you determine that there is no conflict, what should you do next?

Build your file

It is absolutely critical to gather the universe of documents for your file. It is important to obtain these documents from all agencies involved. Some important records to obtain are: 911 audio calls, radio traffic, CAD detail reports, videos, incident reports, after action reports, and EMS records. If there are videos, either from police units or body cameras, those should be isolated and copied immediately.

You should also obtain each agency's standard operating procedures and any policy implemented by the Task force. It will also be wise to obtain the personnel files of the individual officers involved, and if contained in another file, any disciplinary and internal affairs files involving these officers. To the extent that the investigation has been turned over to any outside agencies, such as a state agency, depending on the stage of the case, you will want to seek records from this outside agency, including any witness interviews of your clients and any findings.

Lastly, in some instances the district attorney's office may be called-in to determine whether any criminal charges should be brought against the individuals involved. If this is the case, you will want to seek records from the DA's office as well. It is important in the defense to know whether the DA will bring or intends to bring any criminal charges against your clients. Most DAs will be far more receptive to in-person discussions instead of cold, impersonal written document requests – so pick up the phone and call them to set up a time to sit down and find out what they can tell you (where they might not otherwise be able to release documents to you at that time).

Liability Issues

Potential defendants

The potential defendants to any suit involving law enforcement are the individual officers involved, both individually and in their official capacities. A claim against an individual in his or her official capacity is, under most circumstances, a claim against the governmental entity that employs the officer.[1] The city and/or county involved may also get named in the lawsuit. Moreover, any supervisors listed on any incident report may get named along with the Sheriff and/or Chief of Police. Lastly,

[1] *Kentucky v. Graham*, 473 U.S. 159, 165-66 (1985).

a plaintiff will likely name the police department itself and/or the sheriff's office as parties. Generally, these departments are not entities capable of being sued.[2] Although there are no federal or state cases which have discussed whether Task forces are entities capable of being sued, it is likely that under the same rationale applied to police departments and sheriff's offices, they are not. As we know, however, this will likely not prevent a plaintiff from initially naming these entities as defendants in the lawsuit nevertheless.

Potential federal claims

The first types of claims discussed below are federal claims under 42 U.S.C. § 1983. This statute allows an individual to file a civil action for an alleged deprivation of their constitutional or federal statutory rights against a municipality or a person who is acting under the color of law. In addition to a monetary award, attorney's fees and costs are allowable under Section 1988.

Excessive Force

Claims of excessive force are governed by the reasonableness standard of the Fourth Amendment.[3] Reasonableness under the Fourth Amendment turns on "whether the officers' actions are 'objectively reasonable' in light of the facts and circumstances confronting them, without regard to their underlying intention or motivation."[4] In determining whether the force utilized to effect a seizure was "objectively reasonable," the court must evaluate a number of factors, "including the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officers or others, and whether he is actively resisting arrest or attempting to evade arrest by flight."[5] Under the seminal case of *Tennessee v. Garner*, 471 U.S. 1, 9 (1985), deadly force is reasonable if the suspect "poses a threat of serious physical harm, either to the officer or to others." Further, "[t]he 'reasonableness' of a particular use of force must be judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight."[6] As the United States Supreme Court explained in 2014, "[w]e thus 'allo[w] for the fact that police officers are often forced to make split-second judgments—in circumstances that are tense, uncertain, and rapidly evolving—about the amount of force that is necessary in a particular situation.'"[7]

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[2] *See, e.g., Nettles v. Pensacola Police Dep't*, 423 F. App'x 853, 854 (11th Cir. 2011) (finding that police department is not an entity capable of being sued); *Petty v. Cty. of Franklin, Ohio*, 478 F.3d 341, 347 (6th Cir. 2007) (finding that sheriff's office is not an entity capable of being sued).
[3] *Graham v. Connor*, 490 U.S. 386 (1989).
[4] *Graham*, 490 U.S. at 397.
[5] *Id.*
[6] *Graham*, 490 U.S. at 396.
[7] *Plumhoff v. Rickard*, 134 S.Ct. 2012, 2020 (2014).

Unlawful Search

The Fourth Amendment protects "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures."[8] It is well established that "a search conducted without a warrant issued upon probable cause is 'per se unreasonable ... subject only to a few specifically established and well-delineated exceptions.'"[9] One of the well settled and "established exceptions to the requirements of both a warrant and probable cause is a search that is conducted pursuant to consent."[10] Additionally, a "search…supported by reasonable suspicion and authorized by a condition of probation, [is] reasonable within the meaning of the Fourth Amendment."[11]

Where the alleged Fourth Amendment violation involves a search or seizure pursuant to a warrant, the fact that a neutral magistrate has issued a warrant is the clearest indication that the officers acted in an objectively reasonable manner or, as we have sometimes put it, in "objective good faith."[12] The task of the magistrate issuing a warrant is "simply to make a practical, common-sense decision whether, given all the circumstances set forth in the affidavit before him, including the 'veracity' and 'basis of knowledge' of persons supplying hearsay information, there exists a fair probability that contraband or evidence of a crime will be found in a particular place."[13]

Monell Claims

In the event that there is no underlying constitutional violation, any Section 1983 claim for municipal or county liability will fail at the outset.[14] Moreover, a local government cannot be held liable for the actions of individual officers based upon a *respondeat superior* theory of liability.[15] Rather, a local government may be held liable under § 1983 for the acts of one of their employees when a constitutional violation was inflicted pursuant to a policy or custom which was the "moving force" behind the constitutional violation that was actually suffered.[16] To establish this moving force, a plaintiff must demonstrate that a constitutional deprivation occurred pursuant to an official policy, as the result of a decision made by a final policymaker, or as the result of actions taken pursuant to practices "so permanent and well settled as to constitute a 'custom or usage' with the force of law."[17]

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[8] *U.S. Const. Amend. IV.*
[9] *Schneckloth v. Bustamonte*, 412 U.S. 218, 219 (1973).
[10] *Schneckloth*, 412 U.S. at 219.
[11] *United States v. Knights*, 534 U.S. 112, 122 (2001); *Messerschmidt v. Millender*, 132 S. Ct. 1235 (2012).
[12] *United States v. Leon*, 468 U.S. 897, 922–923, 104 S.Ct. 3405 (1984).
[13] *Illinois v. Gates*, 462 U.S. 213, 238, 103 S.Ct. 2317, 2332 (1983).
[14] *City of Los Angeles v. Heller*, 475 U.S. 796, 798-99 (1986).
[15] *Board of Cnty Comm'rs of Bryan Cnty v. Brown*, 520 U.S. 397, 404 (1997).
[16] *Monell v. Dep't of Soc. Servs.*, 436 U.S. 658, 691 (1978).
[17] *Monell*, 436 U.S. at 690-91.

Practically speaking, a plaintiff will need to uncover a policy or custom of the city/county/Task force that was the moving force behind the alleged constitutional violation. This is very difficult to prove and requires a review of prior similar incidents involving the local government. A single isolated incident is generally insufficient to establish a custom or policy under § 1983.[18]

A plaintiff could also establish liability by showing that the Chief or the Sheriff was the final policymaker and that the constitutional deprivation occurred as a result of their decisions.

Additionally, a local government's "failure to train" its officers can give rise to a cause of action in limited circumstances, but only if the failure "amounts to deliberate indifference to the rights of persons with whom the police come into contact."[19] A plaintiff must show that the government knew that a need to train or supervise its employees existed but made a deliberate choice not to take any action.[20] To prove that a local government knew of the need for supervision or training, a plaintiff must demonstrate a <u>pattern</u> of constitutional violations that placed the local government on notice of the need for corrective measures.[21] Again, this is going to be difficult for a plaintiff to prove. A plaintiff will need to show that the local government was made aware of a need to train in use of force and searches, but made a choice not do anything.

Supervisory Liability

An official may be liable in a supervisory capacity under § 1983 when there is a causal connection between his subordinates' unconstitutional conduct and the official's own actions. There are two separate ways liability can be imposed upon a supervisor: (1) personal participation in the alleged constitutional violation or (2) causal connection between the supervisor's actions and the alleged violation.[22] Each theory requires a plaintiff to make a different showing of proof and also an entirely different focus in discovery. While the first theory requires a plaintiff to establish that the supervisor personally participated in the constitutional violation, the second requires a plaintiff to prove that: (1) a "history of widespread abuse" put the supervisor on notice of the need to correct the alleged deprivation, and he or she fails to do so; (2) a supervisor's custom or policy results in deliberate indifference to constitutional rights; or (3) facts support an inference that the supervisor directed subordinates to act unlawfully or knew that subordinates would act unlawfully and failed to stop them from doing so.[23]

[18] *Harris v. Goderick*, 608 F. App'x 760, 763 (11th Cir. 2015).
[19] *City of Canton, Ohio v. Harris*, 489 U.S. 378, 379 (1989).
[20] *Gold v. City of Miami*, 151 F.3d 1346, 1351 (11th Cir. 1998).
[21] *Young v. City of Augusta, Ga. Through DeVaney*, 59 F.3d 1160, 1172 (11th Cir. 1995).
[22] *Gonzalez v. Reno*, 325 F.3d 1228, 1234 (11th Cir. 2003).
[23] *Mathews v. Crosby*, 480 F.3d 1265, 1270 (11th Cir. 2007).

Qualified Immunity

Of course, like any other § 1983 claim, an individual officer is protected from liability if qualified immunity applies. Only in exceptional cases will government actors have no shield against claims made against them in their individual capacities.[24] Assuming that the public employee is acting within his discretionary authority,[25] in making this determination, a court must ask, "[t]aken in the light most favorable to the party asserting the injury, do the facts alleged show the officer's conduct violated a constitutional right?" If a constitutional right would have been violated under the *plaintiff's* version of the facts, the court must then determine "whether the right was clearly established."[26] This second inquiry "must be undertaken in light of the specific context of the case, not as a broad general proposition."[27]

Potential state law claims/immunities

A plaintiff will almost inevitably assert state law claims as well in cases involving law enforcement. This will provide a plaintiff with another avenue for relief in the event that her federal claims are not viable either on their merits or by qualified immunity.

In these cases, a plaintiff may seek to assert a claim of negligence. A plaintiff might also try to hold the individual personally liable for a number of intentional torts depending on the circumstances of the case, such as assault and battery, false imprisonment/arrest, emotional distress, and malicious prosecution/arrest. In many states, municipal entities may be liable through *respondeat superior* for intentional torts.[28]

It goes without saying that in the vast majority of cases, the primary defense that the local government and individual will be asserting is some version of immunity. These defenses are, of course, state specific and will vary in the level of protection from state to state. For example, many states have sovereign immunity that derives specifically from the state constitution. In some states, this provides an absolute immunity while in others it is waived to a certain amount (while in others, it may be waived only up to the amount of insurance the public entity has to cover the event at issue). Some states afford this "sovereign" immunity to its public employees, while others provide different types of immunities to their employees, such as "qualified," "statutory" or "official" immunity.

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[24] *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982).
[25] *Plumhoff v. Rickard, 134 S. Ct. 2012, 202 (2014) (*finding that use of force by a police officer is plainly within his "discretionary authority" for purposes of qualified immunity).
[26] *Saucier v. Katz,* 533 U.S. 194 (2001); *Pearson v. Callahan*, 555 U.S. 223 (2009).
[27] *Saucier*, 533 U.S. at 202.
[28] *Dawkins v. City of Honolulu*, 761 F.Supp.2d 1080, 1094 (D. Haw. 2010)

In many situations, these immunities are not available when the tort alleged to have occurred is intentional or performed with actual intent to injure. If immunities are not available, then it becomes a matter of defending the claim against a public employee as if she were simply a private citizen.