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Law Enforcement Professional Liability: Navigating the Complicated and High Stakes World of Excessive Force Claims From the Plaintiff, Officer & Insurance Company's Perspective

I. Excessive Force Claims

A. The excessive force claim presents an excellent case study of typical issues confronted in the Police Professional Liability arena.

Police Professional Liability Claims have become front and center recently in the world of Public Entity Professional Liability. There has been a proliferation of cases where video of an arrest is captured and broadcasted. Once a Complaint or Claim is actually filed the Insurance Carrier must address difficult and complex coverage issues. Additionally these cases tend to be very emotional as reputations are at stake, and intentional wrongful acts are alleged. In addition to having to work through highly charged allegations, Defense Counsel, Plaintiff's and the Insurance Carrier or self insured Defendant must account for among other things fee shifting by virtue of 42 U.S.C. 1983 and punitive damages. The dynamics referenced above require unique expertise and a global perspective from all party's to help achieve the successful resolution of the typical excessive force, and for that matter, any Police Professional Liability Claim.

Allegations & Circumstances

From the Liability perspective we often see complaints of Assault & Battery, and an intent to injure in the typical Excessive force claim. The allegations inherent in these Complaints do not involve accidents or fortuity. If the scienter to cause the harm beyond that which is reasonably necessary is proven the Insurance Carrier may not have the duty to indemnify the Police Officer. When determining whether and to what degree force must be used the Officer must make process in a split decision and account for such factors as whether the suspect poses an immediate threat, whether the suspect is attempting to evade arrest, is anyone in imminent danger. When viewing the matter as to how much force is excessive there are additional factors that must be considered for both the Officer and the suspect, they include age, size, number of Officers or Subjects involved. Additionally on the continuum of force the Officer must consider whether a verbal command should be sufficient all the way up to whether Deadly Force is necessary. The Courts have ruled that they do not look back with 20/20 hind sight and the fact

that the Officers must make these decisions on a split second basis while under stress is accounted for.

II. Fee Shifting

42 USC § 1983 provides:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

Section (b) of the Civil Rights Attorney's Fees Awards Act of 1976, 42 U.S.C. § 1988, provides that : (b) Attorney's fees In any action or proceeding to enforce a provision of sections..., 1983... may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity such officer shall not be held liable for any costs, including attorney's fees, unless such action was clearly in excess of such officer's jurisdiction. The Plaintiff may be able to prove that there was some type of Constitutional violation under 42 USC 1983 but the damages may be relatively minimal. Even when the Damages are substantial, the Plaintiff's attorney's fees and costs through trial and appeal will often significantly exceed the amount of actual damages which the Jury would award. What can the practitioner and the Claims management specialist do to stop the ever increasing damages? The most effective way to limit exposure in many 1983 cases is through a rule 68 Offer of Judgment, or the state equivalent.

III. The Police Professional Liability Policy

The Carrier in these claims struggle caused by the tension between insurability and the element of fortuity with the necessity to cover a wrongful act. The term Law Enforcement activities are often not defined and if they are defined the definition will be by necessity very broad as the coverage must insured against a Police Officers wrongful act. The issue becomes difficult as the Officers are generally intending their act that causes the alleged physical Harm but may or may not be intending to cause the injury sustained.

A typical occurrence Police Professional Liability will contain an insuring agreement similar to the following:

The Company will pay on behalf of the **insured(s)** all **damages** resulting from a **wrongful act(s)** which arise out of the law enforcement activities. The **wrongful act(s)** must occur during the policy period and within the **policy territory**.

The intentional misconduct exclusion is much more narrow than that of the typical policy.

As the duty to defend is broader than the duty to indemnify the Insurer will defend while Reserving their Rights to deny coverage to Police Officers in the vast majority of the excessive force cases if there is the nexus between the Police Officer acting on behalf of a Municipality and the event that gives rise to the lawsuit.

The Carrier strikes the balance referenced above through the following typical exclusion:

This policy does not apply and the Company has no obligation to defend any **claim** or **suit**:

For **damages** arising out of the willful violation of a penal statute or ordinance committed by or with the knowledge or consent of the **insured**, or **claims** of injury arising out of acts of fraud committed by or at the direction of any **insured** with affirmative dishonesty or actual intent to deceive or defraud.

Consent to Settle

As reputations are at stake, the insured's through the years have sought to protect themselves from situations where a Carrier may wish to settle the claim and the insured does not. The ability to control whether the claim is settled or not comes at a price. The insured will typically have a shift of the burden of exposure when they refuse to consent to settle. The Police Professional Policy will often contain a consent to settle clause. This clause typically provides: We will not settle any claim or "suit" without the first Named Insured's consent. However, if the first Named Insured refuses to consent to the settlement of such claim or "suit" after receiving our request for consent to settle, and the first Named Insured elects to contest such claim or "suit" and continues legal proceedings for such claim or "suit", then our liability to pay damages under this policy will be the lesser of the following:

1. Up to and not to exceed the amount of the damages set forth in our request to settle, or
2. The Limits of Insurance as set forth On the Declarations.

Additionally, all further legal expenses, costs and supplementary payments, incurred by an insured after the date of such refusal of the consent to settle, will be the responsibility of such insured.

When interpreting the consent to settle clause the claims professional generally focuses Upon there elements:

- 1) A demand which the Carrier will pay and which will settle the case ;
- 2) A request to the insured to settle the claim for a specified amount; 3) The insured's refusal to consent to settlement.

IV. Case Management & Evaluation Considerations

Economic and non-economic considerations such as the Officer's reputation, and the toll which protracted litigation presents to all involved. The direct economic considerations can be viewed

in the light of the total cost associated with the case. This evaluation includes the exposure, the likelihood of a Plaintiff's verdict, the likelihood of dismissal via motion, and the costs associated with litigation. These economic decisions should be reflected in the Reserves which have been set.

In analyzing the economic value of the claim the preferred method is to account for the exposure as well as the litigation costs. The Claims management team is again dependent upon the accurate projections of Defense Counsel regarding the litigation budget as well as Counsel's exposure evaluation.

When evaluating the direct economic value of a case, the practitioner should consider providing the examiner with the following information:

- opinion as to the Percentage likelihood that the case will be dismissed via motion;
- opinion on the percentage probability of a plaintiff 's verdict;
- jury verdict range;
- 3 estimates of the percentage likelihood of verdict within the high end, medium end, and low end;
- settlement range;
- estimated length of trial strengths and weaknesses of the plaintiff's case;
- Defense Strategy;
- estimated costs to final resolution

Utilization of Offer's of Judgment:

The practitioner and the Claims Professional should note that consideration must be given whether to include the Plaintiff's costs and attorneys fees within the offer of Judgment. If the Plaintiff's fees are included in the offer of Judgment then in determining whether the Judgment obtained by the offeree is better than the offer made, the Court will add the reasonable attorney's fees and costs prior to the offer with the verdict amount. If the Offer does not include the attorney's fees then the Plaintiff can accept the award and the offering party will additionally be responsible for the Reasonable fees accrued to the date of the offer. Often the insured Defendant will not agree with providing the Plaintiff the Offer of Judgment because if the Offer is accepted than a Judgment is entered on the record against the Defendant.

Alternative Dispute Resolution

As reputations are at stake, Claims can become very political and parties may need the comfort of relying upon a mediator's valuation to help justify settlement or consenting to settlement. Additionally the practitioner may find that the mediator echo's the practitioners appropriate analysis about the value of a claim. Additionally, according to the trial statistics published by the Administrative Office of the United States Courts, the percentage of civil cases which have been completed by a Bench Trial or Jury Trial have been as low a 1.8% in a given year.

V. Conclusion

The environment to which Police Officers work is inexorably tied to the legal requirements that they must follow and the elements of various police professional causes of action. The practitioner must understand the interplay between Police Professional Liability Insurance Coverage, the rule of law and the practical and emotional considerations so that they can work toward an effective resolution of most Police Professional Liability claims. Defense Counsel does not have to choose between satisfying his client and satisfying the Insurance Carrier as the client must come first. By focusing upon the claims management process, and by promptly and accurately relaying information and prompt analysis, the practitioner will help cement the basis for a great team.

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