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Recent Developments in Qualified Immunity for Law Enforcement Officers

Section I: Background and History of Qualified Immunity

A. Early Decisions: Combination of Subjective and Objective Factors

Scheuer v. Rhodes, 94 S.Ct. 1683 (1974)

The estates of three students filed suit against the Governor of Ohio and other state officials for their role in employing the Ohio National Guard during the 1970 Kent State shooting, which resulted in the death of plaintiffs' decedents. The District Court dismissed the complaints for lack of jurisdiction, without the filing of an answer to any of the complaints. The Court of Appeals relied upon absolute executive immunity as an alternative ground for sustaining the dismissal by the District Court.

The Supreme Court stated that the level of qualified immunity depends upon the amount of discretion afforded the government official. For instance, the Court acknowledged that high officials required greater protection than those with less complex discretionary functions. Additionally, the Court opined that qualified immunity is a combination of subjective and objective factors. In its ruling, the Court ultimately remanded the case for further proceedings, holding that the decedents' estates were entitled to have their allegations judicially resolved.

Wood v. Strickland, 95 S.Ct. 992 (1975)

Public high school students were expelled from school for violating a regulation prohibiting the use or possession of alcoholic beverages at school. These students brought suit against school officials claiming that their constitutional rights to due process were violated by their expulsion. The defendants asserted absolute immunity from liability.

In its ruling, the Supreme Court stated that the appropriate standard of qualified immunity contains both subjective and objective elements. Additionally, the Court held that government officials are not immune from liability if they knew or reasonably should have known that the action they took within their sphere of official responsibility would violate constitutional rights.

B. Shift Toward Objective Factors Only

Harlow v. Fitzgerald, 102 S.Ct. 2727 (1982)

Fitzgerald was a discharged Air Force employee who alleged that two senior White House aides conspired to fire him from his position in the Air Force for his congressional testimony one year earlier discussing serious budget concerns for plane purchases. The aides moved for summary judgment based on absolute immunity.

The Supreme Court rejected the argument that the two senior White House aides were entitled to absolute immunity. However, the Court stated that their previous decisions have consistently held that government officials are entitled to some form of immunity from suits for damages. Further, the Court held that government officials performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known. Importantly, the Court eliminated the subjective element of qualified immunity in favor of the objective test.

C. Rigid Two-Part Inquiry into Qualified Immunity

Saucier v. Katz, 533 U.S. 194 (2001)

In 1994, Elliot Katz was the president of a group called "In Defense of Animals" and was concerned that the U.S. Army's hospital in San Francisco would be used for conducting experiments on animals. To voice his opposition, Katz attended an event at the Army Base in San Francisco and protested during Vice President Gore's speech. Donald Saucier was a military police officer who was on duty that day. Saucier identified Katz as a protester and grabbed him during the speech. Saucier then rushed Katz out of the area, dragged him to a nearby military van, and shoved Katz inside the van. Katz filed suit against Saucier and alleged that Saucier had violated his Fourth Amendment rights by using excessive force during the arrest. The District Court declined to grant Saucier summary judgment on qualified immunity grounds. The Ninth Circuit affirmed.

The Supreme Court, however, ruled that Saucier was entitled to qualified immunity. The Court stated that a qualified immunity ruling requires an analysis not susceptible of fusion with the question whether unreasonable force was used in making the arrest. Further, the Court mandated a two-part test for determining qualified immunity: (1) whether a government official's conduct violated a constitutional right; and (2) whether that right was clearly established. The Court stated that Saucier had a duty to protect the Vice President's safety. The Court found there was no clearly established rule prohibiting Saucier from acting as he did.

D. Distinguishing Saucier

Pearson v. Callahan, 129 S.Ct. 808 (2009)

A narcotics task force sent an informant to purchase methamphetamine from Afton Callahan. The informant met with the task force and told them he would buy a gram of methamphetamine from Callahan for $100. The task force provided the informant with a marked $100 bill and drove him to Callahan's trailer, where Callahan's daughter let him inside. Callahan then sold the informant a gram of methamphetamine. The task force entered Callahan's trailer through a porch door and conducted a sweep of the premises. Callahan was charged with unlawful possession and distribution of methamphetamine. The Court of Appeals vacated Callahan's conviction due to the warrantless arrest. As a result, Callahan brought a damages action alleging that the officers violated the Fourth Amendment by entering his home without a warrant. The officers moved for summary judgment based on qualified immunity. The District Court held that the officers were entitled to qualified immunity, but the Tenth Circuit reversed.

The Supreme Court concluded that, while the two-part test set forth in Saucier is often appropriate, it should no longer be regarded as mandatory in all qualified immunity cases. The Court opined that an officer conducting a search is entitled to qualified immunity where clearly established law does not show that the search violated the Fourth Amendment. Further, the Court stated that the officers are entitled to qualified immunity on the ground that it was not clearly established at the time of the search that their conduct was unconstitutional.

Section II: Recent Cases and Issues

A. Reviewing the Record and Deciding Factual Questions on Immunity Grounds

Scott v. Harris, 127 S.Ct. 1769 (2007)

A Georgia county deputy, Timothy Scott, clocked the plaintiff driving 73 miles per hour in a 55 mile zone. After Scott activated his lights, plaintiff sped away leading the officer on a ten mile chase at speeds exceeding 85 miles per hour. To end the encounter, Scott initiated the Precision Intervention Technique ("PIT") maneuver designed to cause the fleeing vehicle to spin to a stop. As a result, Harris lost control of his vehicle, which left the roadway, fell down an embankment, overturned and crashed, rendering him paraplegic.

In this post-Saucier, pre-Pearson case, the court was compelled to decide the threshold constitutional question before determining whether the right was clearly established. While noting that in reviewing a determination on summary judgment appellate courts typically adopt the plaintiff's version of the facts, this record contained videographic evidence of the pursuit. Therefore, despite the plaintiff's claims that the roadways were empty and plaintiff posed no threat to others, Justice Scalia noted the video showed "a Hollywood-style car chase of the most frightening sort, placing police officers and innocent bystanders alike at great risk of serious injury." Since the plaintiff's allegations were "blatantly contradicted by the record so that no reasonable jury count believe it, a court should not adopt that version of the facts for purposes of ruling on a motion for summary judgment." The Court found no constitutional violation, avoiding the second-tier, clearly established inquiry.

B. Jumping to the Second Prong

Mullenix v. Luna, 136 S.Ct. 305 (2015)

In this police pursuit case, Sergeant Randy Baker approached a suspect, Israel Lejia, with a warrant for his arrest. The suspect fled, leading police on a high-speed chase, during which Lejia called the dispatcher, said he had a gun, and threatened to shoot at the officers if they did not abandon their pursuit. Officers set up tire spikes at three locations to stop the fleeing suspect. Trooper Mullenix situated himself with his service rifle on an overpass, 20 feet above the highway, but his supervisor told him to "stand by" and "see if the spikes work first." Mullenix nonetheless fired six shots at the car, four of which hit the suspect. Lejia's car continued past the overpass where it engaged the spike strips, hit the median and rolled two and a half times.

The Court addressed only the immunity question, avoiding the constitutional issue altogether. The Court warned about deciding clearly established law at a high level of generality. It rejected the Fifth Circuit's general formulation: whether an officer may not "use deadly force against a fleeing felon who does not pose a sufficient threat of harm to the officers or others." Rather, it reiterated the formulation from Brosseau v. Haugen, 543

U.S. 194, 125 S. Ct. 596, 160 L. Ed. 2d 583 (2004) – "whether it was clearly established that the Fourth Amendment prohibited the officer's conduct in the situation she confronted: whether to shoot a disturbed felon, set on avoiding capture through vehicular flight, when persons in the immediate area are at risk from that flight." The Court did not require a case directly on point, but reaffirmed that existing precedent must have placed the statutory or constitutional question "beyond debate." Id. (citing Ashcroft v. al–Kidd, 563 U.S. 731, 741, 131 S.Ct. 2074, 179 L.Ed.2d 1149 (2011)).

C. What is "Clearly Established" Law?

Reichle v. Howards, 132 S.Ct. 2088 (2012)

Secret Service agents Reichle and Doyle were part of a detail protecting Vice President Richard Cheney at a mall. They overheard Steven Howards state on his cell phone that he was going to ask the Vice President "how many kids he's killed today." They monitored Howards closely, as he waited on line to greet Cheney. When he approached Cheney, he made some disparaging remarks and touched the Vice President on the shoulder. Agent Reichle approached Howards, who attempted to walk away. Howards denied touching Vice President Cheney, and was arrested for harassment under state law. Howards brought suit, alleging violations of First and Fourth Amendments.

The Court addressed the questions of whether a First Amendment retaliatory arrest claim may lie despite the existence of probable cause for the arrest, and whether clearly established law at the time so held. But the Court elected only to address the second question, and granted qualified immunity stating, "This approach comports with our usual reluctance to decide constitutional questions unnecessarily." The Court defined the right, not as the general right to be free from retaliation for one's speech, "but the more specific right to be free from a retaliatory arrest that is otherwise supported by probable cause." Although the Court analyzed and distinguished the Circuit precedent upon which the 10th Circuit had relied, it called into question the use of circuit precedent to clearly establish constitutional law, holding, "*Assuming arguendo* that controlling Court of Appeals' authority could be a dispositive source of clearly established law in the circumstances of this case, the Tenth Circuit's cases do not satisfy the 'clearly established' standard here."

Carroll v. Carman, 135 S.Ct. 348 (2014) (per curiam)

Police entered and searched an entry area and deck of a house for an armed robber who was not there. Plaintiffs sued under the Fourth Amendment based on the officers' entry into their backyard and deck. The Court granted qualified immunity, distinguishing the

sole case upon which the Third Circuit had relied in denying immunity. In doing so, the Court seemed to question whether "a controlling circuit precedent could constitute clearly established law" when it was based on a single decision from that Circuit court.

Taylor v. Barkes, 135 S.Ct. 2042 (2015) (per curiam)

Plaintiff's decedent was arrested for violating probation. After his arrest, the nurse did an intake evaluation to determine, among other things, whether the inmate was a suicide risk. Decedent admitted to a history of psychiatric treatment and use of medication and a prior suicide attempt. After the intake evaluation was completed, however, the nurse did not initiate any special suicide prevention measures. The following day, decedent hanged himself in his cell.

The Court ruled that there was no clearly established constitutional right for an incarcerated person to have access to adequate suicide prevention protocols in a way that placed the unconstitutionality of defendants' procedures "beyond debate." There was no Supreme Court case discussing such screening or prevention protocols. To the extent a "robust consensus of cases of persuasive authority in the Courts of Appeals" could clearly establish the federal right, the weight of that authority suggested that no right existed. To the extent the Third Circuit had found the right clearly established by virtue of its own prior decisions, the Supreme Court seemingly called into question the issue of whether Circuit precedent itself may clearly establish the law in a particular area when there is disagreement among the Courts of Appeals.

Ashcroft v. al-Kidd, 563 U.S. 731, 131 S. Ct. 2074, 179 L. Ed. 2d 1149 (2011)

"Government official's conduct violates clearly established law when, at the time of the challenged conduct, "the contours of a right are sufficiently clear that every reasonable official would have understood that what he is doing violates that right." (quoting Anderson v. Creighton, 483 U.S. 635, 640, 107 S.Ct. 3034, 97 L.Ed.2d 523 (1987)).

"We do not require a case directly on point, but existing precedent must have placed the statutory or constitutional question beyond debate." (emphasis supplied).

D. Defining the Contours of the Right: High Level of Generality

City of San Francisco v. Sheehan, 135 S.Ct. 1765 (2015)

Teresa Sheehan lived in a group home for individuals with mental illness. After she began acting erratically and threatened to kill a social worker, the police arrived. When

the officers entered her room, she threatened to kill them with a knife. They retreated and closed the door, but soon re-entered, pepper-sprayed her and, when she continued at them with a knife, they shot her several times.

The Court was confronted with several issues: whether the police were required to "reasonably accommodate plaintiff" under the Americans with Disabilities Act, whether the entries were lawful, and whether the use of force was excessive. After certiorari was granted, the City withdrew its argument that the ADA did not apply in these circumstances, and asserted only that Sheehan was not "qualified" for an accommodation. The Court therefore refused to address that issue. It found "no question" that the officer did not violate Sheehan's rights when they opened the door the first time and when they used deadly force.

The Court granted qualified immunity for the second entry, sidestepping the constitutional issue because the City had not directly briefed it. Had Sheehan not been disabled, the officers were entitled to open the door a second time without accommodating her disability, as both entries were part of a "single, continuous seizure." Even though various prior 9th Circuit cases held it to be unreasonable to forcibly enter the home of an armed mentally ill subject who had threatened anyone who would enter where there was no need for immediate entry, the Court found that "no precedent clearly established there was not an objective need for immediate entry here." The Court seemed to view the specific facts of this case in a veritable vacuum. The Court held the officers did not have "fair notice" that the second opening of the door was unconstitutional.

Section III: Coverage and Claims Issues

A. Coverage

<u>CGL policies with language containing intentional/expected-intended exclusions</u>

ISO EXCLUSIONS

While different versions of the ISO general liability forms vary slightly, most of the exclusions are similar in language and intent.

Coverage A: Bodily Injury and Property Damage Liability.

Expected or Intended Injury: Exclusion (a.)

"Bodily injury" or "property damage" expected or intended from the standpoint of the insured.

Exclusion (a.) complements and reinforces the definition of "occurrence." Prior to 1986, the ISO definition of "occurrence" required that it be unexpected or unintended. Significantly, the exclusion focuses on the standpoint of the insured, not the claimant. This language is also subject to the severability clause, so conduct intended by one insured may not be excluded as to another.

Intentional conduct that has unforeseeable consequences will not trigger the exclusion.

Policies with outside scope and course of employment exclusions

Imposition of liability on employers for the acts of their employees typically turns on whether the employees' actions were taken within the course and scope of employment. That question is not always easily resolved. Sometimes it is necessary to provide a defense to the employee, even when it is ultimately decided that the employee was not acting within the course and scope of employment.

Law Enforcement Liability (LEL) policies with endorsements

Newer law enforcement policies contain this language, in order to delineate the actions of law enforcement officers within scope and course of duties:

"This exclusion does not apply to "bodily injury" or "property damage", resulting from the use of reasonable force to protect persons or property."

This language opens doors for questions to the contrary, but makes it easier for both insured and insurer to have clarity in application of coverage.

State law definitions regarding qualified immunity and duty to defend/indemnify

The term *"four corners of a document,"* whether a contract or a complaint, means that you are not referring to any information or behavior or evidence that is not in the document.

States differ on applicability of insurers' obligation to defend as to the "Four Corners" Rule. However, in Ohio, the obligation to defend is relatively similar to most:

"Where insurer's duty to defend is not apparent from the pleadings, but the allegations state a claim potentially or arguably covered, or there is doubt whether the theory of recovery pleaded is within policy coverage, the insurer must defend the claim. In particular, a policy provision that insurer has the obligation to defend, even if allegations in complaint are "groundless, false, or fraudulent," imposes on insurer absolute duty to defend where underlying complaint states a claim potentially or arguably covered under the policy."

B. Conflicts of Interest

Multiple defendants in single action

Definition of "insured" will be primary consideration. There may be levels of "insureds" based on employment, contract agreement, and agency. If all are considered "insureds," then all may be considered for defense. This will lead to individual assessment of conflicts.

Potential conflicts when officers can assert qualified immunity

This will come under consideration at not only the federal levels, but even more so at the state law claim level. For example: under Ohio statute, qualified immunity for employees reads, in part, as follows:

Sec. 2744.03. (A) In a civil action brought against a political subdivision or an employee of a political subdivision to recover damages for injury, death, or loss to persons or property allegedly caused by any act or omission in connection with a governmental or proprietary function, the following defenses or immunities may be asserted to establish non-liability:

(a) The employee's acts or omissions were manifestly outside the scope of the employee's employment or official responsibilities;

(b) The employee's acts or omissions were with malicious purpose, in bad faith, or in a wanton or reckless manner.

Again, the claims against individual "insureds" are to be considered when assessing coverage and conflicts.

Reservation of rights letters

Important to structure these specific to the involved party(ies) as to the claims made against them. Also to advise specifically what you, as the carrier, will be applying or not applying towards their defense and/or indemnification. These should always be updated as a case progresses, and coverage or conflict issues develop.

Potential risks and bad faith

As in the duty to defend question, the risks associated with multiple defendants take on individual issues as to application of coverage. Failure to appropriate equitably certainly exposes the insurer to one or more bad faith actions.

C. Assignment of Counsel

Counsel will be assigned as to their individual client(s) and instructions given accordingly.

Clearly defined duties of representation to involved counsel

These are critical to equitable and fair provision of defense for multiple defendants. These are not one size fits all.

Identifying when separate counsel involved are for different parties and/or Insurer

Litigation may be brought against the involved officer(s), their superior officers, their department, and even against judicial entities.

Determination as to whether one defense attorney may represent all parties, or whether the known facts present a clear conflict, will determine separate counsel.

In some insurance instances, the coverage for different departments within the entity may be different. Coordination of defense allocation, and proper reporting, are very important.

Additionally, it may become necessary for separate claims handlers be assigned towards different components of the overall case. Example: one claim handler for coverage, one for the litigation.

D. Establishing Reserves

Recognition of bad facts early-on

If the initial facts from the initial investigation reveal the virtual certainty of adversity against an "insured", the opening reserve—especially for indemnity—should be factored accordingly. Past cases of a similar nature may be used for this sort of evaluation.

Federal venue

Some districts have variations concerning favorability towards law enforcement. It may come down to an analysis of the judge or magistrate assigned to the case.

Exposure at the indemnity and plaintiff's attorney's fees levels

This will drive up the evaluation in these areas—especially the plaintiff's attorney's fee level. Even a moderate or minor exposure at the plaintiff level can still drive the exposure for an excessive fee award. This, again, may depend on the federal district and/or judge involved.

Areas of exposure excluded under the policy of insurance

Items such as punitive damages, intentional act(s), etc. will affect reserving.

Qualified Immunity components reducing or increasing exposure to defendant(s)

All of these elements go into the establishment of realistic and appropriate reserves. For example: if the state law qualified immunity allows for collateral source set-offs.

E. Early Settlement

Case-by-Case

No two cases have exactly the same facts or potential exposures. Indeed, no two plaintiffs or their counsel will be the same when factoring for early settlement potential.

Recognizing ultimate exposures early-on and prospects of prevailing at dispositive motions/trial

As in the recognition of "bad facts," the initial fact pattern—along with the venue/judges—will determine the likelihood of getting out on motion. This will also assist in preventing unnecessary discovery from being conducted.

Prospects for reasonable resolution given awareness of qualified immunity issues

The greater the likelihood of successful application of qualified immunity in the discovery/motion process, the greater the opportunity towards moving the plaintiff towards resolution (mediation).

F. Offers of Judgment

The last resort

In cases where there combinations of bad facts, unreasonable plaintiffs/attorneys, non-involved judges, etc., this option can at least have the potential of limiting plaintiff's attorneys' fees. The downside is it does, in effect, take away arguments as to liability. In multiple obligations for multiple "insureds," there may also be resistance from individuals towards this approach.