

TO: Logistics Subcommittee, Police Accountability Task Force
From: Peter Kochenburger & Peter Siegelman, UConn Insurance Law Center
Date: January 5, 2021
RE: Preliminary report on insurance related issues

The Insurance Law Center¹ at UConn Law School has been asked to review several insurance issues related to recent changes in Connecticut law in Public Act No. 20-1. Pursuant to this Act the Police Accountability Task Force (“**Task Force**”) has been expressly tasked with examining:

- (i) the merits and feasibility of requiring police officers to procure and maintain professional liability insurance (“**PL Insurance**”) as a condition of employment;
- (ii) the merits and feasibility of requiring a municipality to maintain PL Insurance on behalf of its police officers; and
- (iii) the impact that Section 41 of the Act (which modifies the scope of the “qualified immunity” defense available to a police officer if that police officer has been accused in a civil lawsuit of violating a person’s constitutional rights) will have on the ability of a police officer or municipality to obtain PL Insurance.

Working with the Logistics Subcommittee, we have reviewed and synthesized the following information:

- Presentations and written material from the Connecticut Bar Association’s Policing Task Force (CBA), Connecticut Interlocal Risk Management Agency (CIRMA), Connecticut Council of Municipalities, and police unions.
- Various law enforcement liability insurance forms provided by CIRMA.
- Our own research, including loss control and risk management resources provided by CIRMA and several private insurers, comparing relevant Connecticut and federal qualified immunity provisions for government actors, a brief analysis of the private insurance market for individual police officers, and our background knowledge of insurance markets.

While providing a list of caveats is routine for these types of reports, we need to emphasize that the Subcommittee was not able to obtain the information from insurers— at least as of now – that would be necessary to provide a more confident and complete analysis. This includes information about the aggregate premiums collected for municipal liability insurance, aggregate claims paid, and of this amount the total dollar amount paid for law enforcement liability coverage. Nor could we obtain information about how—if at all—insurers plan to change underwriting or pricing practices in light of the new statute.

¹ The Insurance Law Center is the pre-eminent academic center for the study of insurance law and regulation in the US, and offers the only LL.M. Program in Insurance Law in the country. <https://ilc.law.uconn.edu/>

Merits and feasibility of requiring police officers and municipalities to maintain professional liability insurance [questions (i) and (ii)].

Perhaps the best way to answer these questions is through reviewing how police officers and municipalities are already covered. We assume that all municipalities in Connecticut have some form of liability insurance that covers law enforcement actions, or are self-insured.² As is standard with most liability insurance purchased by any organization, employees such as police officers are included as insureds provided they are acting in the scope of their employment. This means they would normally be covered under the municipality's liability insurance, and defended along with the municipality in civil lawsuits arising out of law enforcement activities. A typical description of "who is an insured" reads:³

WHO IS AN INSURED

1. The individual Coverage Sections may contain specific provisions regarding WHO IS AN INSURED. It is important to refer to each Coverage Section in addition to the following provisions.
2. **You are an insured as shown as named insured in the Declarations.**
3. Each of the following is also an insured to the extent indicated:
 - a. Your elected or appointed directors, officers, officials, and members of any boards or commissions, but only with respect to their duties as your directors, officers, officials, or board or commission members.
 - b. Employees of any school district named in the Declarations who hold the position of Superintendent or Assistant Superintendent, Administrator or Assistant Administrator, Principal or Assistant Principal or any equivalent administrative position, but only for acts within the scope of their employment by you.
 - c. **Your employees, other than those included in a. and b. above, but only for acts within the scope of their employment by you,** or in the case of a "leased worker," while performing duties related to the conduct of your business. However, none of these employees are covered for:
 - (1) "Bodily injury" or "personal injury" to you; or
 - (2) "Property damage" to property owned or occupied by or rented or loaned to that employee, or any of your other employees except "autos."

CIRMA's "Law Enforcement Liability" insuring agreement incorporates this definition and defines "personal injury" to include coverage for claims alleging civil rights violations and assault and battery.⁴

While CIRMA's insurance policy expands the scope of actions and claims that would be covered under "Law Enforcement Liability," individual police officers must still be acting within "the scope of their employment" to be covered under the municipality's liability policy. However, Connecticut law (and essentially that of every other state) generally requires liability insurers to defend *all* claims in a lawsuit if even one allegation or cause of action is potentially covered under the insurance policy, unless and until a final determination is reached that an individual officer's actions were so egregious as to be considered intentionally malicious.⁵ Since most lawsuits would very likely allege some violations that are covered, we believe that as a practical matter this potential coverage gap would not result in municipalities and police

² CIRMA insures XX municipalities in Connecticut. The larger cities tend to be "self-insured," though very likely they have excess insurance to cover larger claims against them. We have not explored this area.

³ This language is from CIRMA's "specimen policy language" it provided the Subcommittee on December 15, 2020, page 11. The yellow highlighting is ours.

⁴ CIRMA's policy, pp. 56-62; the expanded personal injury definition is on page 62.

⁵ This means that the insurer would not have to pay the damages awarded by a jury for intentionally malicious conduct.

officers also named in the complaint losing an insurer-provided defense.⁶ As we briefly discuss below, any personal liability insurance an officer obtains would likely similarly exclude such actions from coverage under that policy.

Questions (i) and (ii) reference police officers obtaining their own professional liability insurance to cover them for civil liability associated with their work. Based on our research, there is at best a limited market for individual liability insurance for police officers.⁷ At least one provider of liability insurance for law enforcement personnel, the National Rifle Association, appears to no longer sponsor this product. The Subcommittee has asked individuals and organizations who have brought this issue up about specific policies and insurers and no relevant evidence has been forthcoming. Further, we believe it is likely that obtaining such insurance would provide minimal value to the individual officer for the following reasons:

- 1) As discussed above, municipal liability insurance policies would generally cover individual police officers, as well as the municipality in civil claims;
- 2) An individual policy would likely include the same limitations or exclusions that exist in municipal policies;⁸ and
- 3) The policy limits (amount of coverage) of a municipal policy would be significantly more than what individual officers could obtain on their own.

Similarly, it is unlikely that most homeowners and renters insurance would cover police officers for claims arising while on duty. These policies typically exclude liability arising from “professional services” and similar work-related activities. While the Subcommittee has heard anecdotally of police officers purchasing endorsements to their homeowner’s policy that would provide this coverage, it has not been provided any examples. We are also skeptical that such insurance would provide any more coverage than already included within municipal liability policies, and would likely include similar exclusions, as we described above.

To summarize, standard municipal liability policies already cover claims against individual police officers along with the municipality. This is not a unique feature, as employees are typically included as “insureds” in any commercial liability insurance policy. While there are specific exclusions within this coverage, as there are for any liability policy, these exclusions have been narrowed for purposes of law enforcement liability, at least for the CIRMA policy form we have been provided. There appears to be at best a very limited market for individual liability insurance covering law enforcement personnel, and we have seen no evidence that these policies would provide additional coverage above that already provided municipalities.

The impact that Section 41 of the Act . . . will have on the ability of a police officer or municipality to obtain PL Insurance [question (iii)].

⁶ CIRMA’s Law Enforcement Liability policy covers claims alleging civil rights violations, along with assault and battery. We do not know if police officers or municipalities have ever lost insurance coverage due to the allegations in a lawsuit—anecdotal information suggests they have not.

⁷ CIRMA told us they were unfamiliar with any such products in Connecticut.

⁸ Liability Insurance is generally reluctant to provide coverage for “intentional acts,” defined loosely as behaviors that are under a policyholder’s control. The reason is moral hazard: insured policyholders cannot be granted *carte blanche* to undertake risky or tortious conduct, knowing that their insurer will pay for any liability that results.

This is the most difficult of the three questions to respond to, as the lack of actual data renders any conclusion necessarily tentative. Our bottom line, however, is that we have seen no evidence that would lead us to believe that Section 41 will have significant impact on the market for municipal Professional Liability insurance.

Police Liability Claims

The cost of liability insurance generally tracks how insurers perceive and evaluate the risks of a claim—the potential number of claims, the defenses available, and the costs of defending policyholders and paying for settlements or adverse verdicts.⁹ Assessing these complexities is what actuaries do, and is a vital part of the underwriting process.

We believe the CBA's draft analysis of Section 41¹⁰ is the most persuasive of the outside presentations to the Task Force on Section 41's effects.¹¹ The CBA notes that Section 41 does not eliminate qualified immunity for municipalities and police officers, but rather reorients Connecticut law to resemble existing federal law in these areas. Municipalities and individual police officers have always been subject to lawsuits under federal as well as state law, and Section 41 should not significantly expand existing liability in this area.

To assess whether Section 41 will raise insurance premiums for municipalities, we would ideally seek to estimate quantitatively whether it will increase the cost of defense and the total volume or the success rate of claims against police departments. We lack the data to do this. Nevertheless, we believe that the law does not significantly expand liability. The law does create a new cause of action in state court, mirroring almost exactly the existing federal liability structure; but it does not expand liability beyond what is already illegal under current law. It is possible that state juries might be more willing to find officers or municipalities liable than federal juries are, but we have not seen any reason to believe that would occur, and short of that, there is little reason to think that Section 41 will increase either the number or the size of payouts by defendants or their insurers. Hence, it should have little or no effect on premiums.

Section 41 does eliminate the interlocutory appeal in state court actions, meaning that defendants cannot appeal a decision (e.g., denial of a summary judgment motion) until after a verdict has been reached. In theory, the elimination of the interlocutory appeals is disadvantageous to defendants, because they are obliged to go through the entire process of a trial before they can seek to correct a "false negative" (erroneous denial of their motion to dismiss). In practice, however, the effects of eliminating

⁹ Also relevant are how municipalities and individual police officers perceive and respond to these changes (e.g., additional training or changes in use of force protocols), how plaintiffs' attorney evaluate laws, and ultimately determinations by courts and juries.

¹⁰ The CBA's Policing Task Force met virtually with the Subcommittee on October 20, 2020 and provided several draft recommendations (subject to later approval by the CBA) on the impact Section 41 may have on litigation in this area. The Connecticut Conference of Municipalities' November 6, 2020 memo to the Subcommittee believes changes in Section 41 would expand claims and litigation under state law, though it does not provide information supporting its conclusion.

¹¹ We have not independently evaluated or conducted our own examination on whether and how Section 41 would measurably alter the litigation climate for claims and lawsuits against municipalities and individual police officers. This would be a much larger project and one requiring both additional time and resources.

interlocutory appeals are likely to be small, for two reasons. First, such appealable false negatives are quite rare, according to the best empirical evidence available.¹² And second, interlocutory appeals do not seem to play a major role in limiting defendant exposure: The Schwartz study found that only 12% of those appeals led to a reversal in whole (which would be necessary to avoid a jury trial).¹³

Overall Municipal Liability Coverage

Law enforcement liability coverage is only one component of a package of liability coverages that are included in a municipal insurance policy. For example, such policies also include, among others, property and auto insurance (at least for CIRMA). Even if Section 41 were to increase liability exposure for municipalities, and accordingly raise the cost of law enforcement liability insurance, the overall effect on the pricing and affordability of liability insurance for municipalities depends on the share of law enforcement liability premiums in the total premium paid for liability coverage.¹⁴ The Subcommittee has asked for this information, but has not yet received it. Based on our own experience and anecdotal evidence, we believe that law enforcement liability premiums likely are a small percentage of the overall premium for municipal liability insurance. If true, then increases in the law enforcement liability component of a comprehensive liability policy should have a negligible overall impact on the cost of liability insurance for municipalities. Of course, this tentative conclusion could easily be tested and re-evaluated if the Subcommittee were able to obtain information over a multi-year period on the premiums collected and number and cost of claims overall under municipal liability insurance programs, and this same information for the subset of law enforcement liability insurance coverage.

Absence of Industry Response to Section 41

When asked, CIRMA stated at its October 27 presentation that they had not conducted an analysis or forecast of Section 41 to evaluate whether it would generate significant new liability or increase the number and cost of claims against municipalities and police officers, nor did they plan to do so. As part of the underwriting process, insurers routinely examine changes in liability laws to evaluate what their future effects may be. This allows them to set appropriate premiums and to design or redesign insurance policy forms; insurers' solvency and profitability depend in part on these evaluations. This is an ongoing process as new information, including claims, become available after the laws take effect. That CIRMA has not evaluated Section 41 to determine its potential effects on municipal liability suggests to us that CIRMA believes Section 41 will not appreciably effect the liability of municipalities for law enforcement activities. CIRMA has also told the Subcommittee it is not modifying the law enforcement liability coverage form (terms and conditions of coverage) for the upcoming policy year (2021-2022).

¹² A study of 1,183 police misconduct cases filed in five federal districts around the country revealed that just seven (0.6%) were dismissed at the motion to dismiss stage and just thirty-one (2.6%) were dismissed at summary judgment on qualified immunity grounds. So the basis for interlocutory appeals is quite limited. Joanna C. Schwartz, *How Qualified Immunity Fails*, 127 YALE L.J. 2 (2017).

¹³ Schwartz, *Id.* at 40. The CBA's Policing Task Force draft recommendation on this issue states "There should be consideration given" to whether interlocutory appeals in "a limited set of circumstances" should be allowed.

¹⁴ For example, if law enforcement liability accounts for 20% of the total costs of a municipal liability policy, and Section 41 increases the cost of law enforcement liability by 10%—which seems unlikely—the *overall* cost of municipal liability would go up by $20\% \times 10\% = 2\%$.

Accordingly, we do not believe, based on the limited evidence available, that Section 41 will measurably increase liability premiums for municipalities. Of course, that conclusion is subject to revision if additional information is forthcoming.

Conclusion:

Municipal liability insurance already includes individual police officers as insureds under the policy, and defends them along with the municipality so long as the police officer is acting within the scope of their duties. We have not seen evidence that individual officers have actually incurred personal liability not otherwise covered by the municipality's insurance policy. While it is possible that police officers may be able to obtain their own insurance covering their actions, the market appears to be very limited and the policies available would almost certainly come with similar exclusions and conditions to those in the municipal liability policy, providing little additional coverage as a result.

We agree with the Subcommittee that to date no evidence has been provided demonstrating that Section 41 would significantly alter existing liability laws and defenses or substantially increase the cost of municipal liability insurance.

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