

§1983 Litigation: Big Picture Tips

FROM THE PLAINTIFF'S SIDE

Plaintiff's Side Tips

1. Conflicts – whose interest are you representing?
2. Indemnification
3. Insurance
4. Should the case be tried?
5. How to reduce liability risks going forward



Conflicts

- Between individual defendant and municipality
- Among individual defendants
- Between defendants and insurer
- May arise and/or change as case progresses
- Often come to a head at time of trial

Conflicts

Dunton v. Suffolk County, 729 F.2d 903 (2d Cir. 1984)

- Officer assaults plaintiff after finding him with his wife
- County attorney defends both officer and county
- At trial, county attorney argues officer “was acting as an irate husband rather than a police officer”
- Jury finds against officer only, not county

Conflicts

Dunton v. Suffolk County, 729 F.2d 903 (2d Cir. 1984)

- Second Circuit holds this “was a good defense for the county” but “not in the best interest of” officer
- Finds County attorney had an actual conflict
- Vacates and remands for new trial

Conflicts

More typical examples -- *Ballew v. City of Pasadena*, (C.D. Cal.)

- Were defendants acting according to policies and procedure?
- Asymmetrical damages claims (i.e. punitives)
- Settlement proposals
- Pending Internal Affairs investigation

Indemnification

- Conflicts among individual defendants or between them and municipality often come down to $$ (who will pay)
- Typically no unwaivable conflicts early in case, but that can change quickly
- If commit to indemnification, almost certainly no conflict
- If representing individual, top priority should be commitment to indemnification

Insurance

- Coverage is complicated, may be broader than you expect
  - e.g. *Travelers Indemnity Co. v. Mitchell*, 925 F.3d 236 (5th Cir. 2019)
  - *St. Paul Guardian Insurance Company v. Newport,* 804 Fed. Appx. 379 (6th Cir. 2020)
- Consult an expert
- Possibility for more conflicts

Insurance

- Consider possible coverage from the beginning
- Don’t move to dismiss claims before learning what triggers coverage
- Duty to defend on one claim can trigger obligation to pay defense costs for whole suit
- Consider insurance implications of strategy at summary judgment and trial

Should the case be tried?

- Impartially evaluate evidence and risk to client
- Particularly in light of changing environment post-George Floyd
- Juries may be much more likely to find officers engaged in misconduct

What can be learned from litigation?

- Taking steps to make changes to limit liability (and prevent future constitutional violations)
- What happens with information learned in lawsuit about misconduct, insufficient training, lapses in supervision, etc?
- Personnel changes
- Changes to policies can be part of a settlement agreement

Defense's Tips

1. Summary Judgment Motion
2. Preparing for trial
3. Trying the case
4. Post-trial motion practice

Summary Judgment

- Is summary judgment appropriate?
- Consequences of filing summary judgment

Preparing for trial

- Staffing
- Plaintiff's theory of the case
- Weaknesses
- Theme
- *In Limine* motions

Trying the case

- Examining the plaintiff
- Examining the experts
- File Motion for Judgment as a Matter of Law (FRCP 50)

Examining the law enforcement officer

- Recognize that your client had a reason for his or her actions v. all of the wrongs alleged by the plaintiff
- Prepare your client for cross-examination
- On Cross-Examination: acknowledge, instead of explain, actions that were not taken
- On Redirect: explain

Post-trial motions

- Notice of Appeal
- Fee Petition
  - Staffing/hours
  - Block billing
  - Soft time
  - Accommodations that were the benefit of counsel
  - Travel time
  - Room and board – GSA (General Services Administration) for local rates