

RISKY BUSINESS

A Publication of the
Miami **V**alley **R**isk **M**anagement **A**ssociation

November 2021

MVRMA OFFICERS

| | |
|----------------|-----------------------------|
| PRESIDENT | BILL KUCERA, BEAVERCREEK |
| VICE PRESIDENT | EMILY CHRISTIAN, MIAMISBURG |
| TREASURER | KATIE SMIDDY, MONTGOMERY |
| SECRETARY | SANDY CAUDILL, MVRMA |

MVRMA STAFF

| | |
|----------------------|-----------------|
| EXECUTIVE DIRECTOR | TOM JUDY |
| LOSS CONTROL MANAGER | STARR MARKWORTH |
| OFFICE MANAGER | SANDY CAUDILL |

FYI –

Cyber Insurance Update

By Tom Judy

The cyber insurance market has been changing rapidly as cyber risks are constantly evolving. The result is skyrocketing premiums. This is especially true for public entities as, it seems, the insurance marketplace deems the public sector to be particularly risky.

MVRMA provides its members with wide-ranging cyber insurance coverage for cyber exposures such as Business Interruption from a Security Breach, Cyber Extortion, Data Recovery, Data & Network Liability, Regulatory Defense & Penalties, Payment Card Liabilities & Costs, Media Liability, Business Interruption from System Failure, eCrimes (eg., Funds Transfer Fraud, Fraudulent Instruction), Invoice Manipulation, Reputation Loss, and other cyber risks. Also included is coverage for the ever-important Breach Response Costs

Unfortunately, the premium costs MVRMA pays to obtain cyber coverage are rising for the reasons discussed above. These premiums more than doubled at the 7/1/21 renewal. Nevertheless, these are necessary costs of doing business in this day and age.

Ransomware/cyber extortion is one of the big drivers of cyber insurance costs. According to the article "Ransomware has been a 'Game Changer' for Cyber Insurance" in a recent edition of *Insurance Journal*, ransomware attacks accounted for nearly one quarter of all cyber incidents globally last year.

Articles

| | |
|---|-------|
| <u>FYI</u> | 1 & 2 |
| <u>Counselor's Comments</u> | 3 |
| <u>Loss Control Lowdown</u> | 4 |
| <u>Broker's Beat</u> | 5 & 6 |
| <u>Events/From the Board Room</u> | 7 |

FYI...continued



The year 2019 appears to have been an inflection point for ransomware attacks. Per the article, the U.S. was hit by a barrage of ransomware attacks in 2019 that impacted at least 966 government agencies, educational establishments and healthcare providers at a potential cost in excess of \$7.5 billion. As time passes, these numbers continue to escalate.

Since the COVID-19 pandemic, all types of entities, including governments, have become increasingly dependent on technology and are conducting business from multiple locations, making them even more vulnerable to cyber attacks. Also, as there is often an interdependence between organizations, an attack on one can impact both downstream and upstream organizations.

The positive result from all this activity is that it has heightened awareness of the importance of good cyber “hygiene” in the workplace. Here is a link to a recent Risky Business article by Alliant Insurance with some suggestions: [Alliant Cybersecurity Article](#).

It is safe to say the cyber insurance market will continue to see increasing premiums and decreasing availability of coverage. Insurers will begin to issue coverage that is contingent upon the insured’s adoption of certain cyber best practices such as multi-factor authentication. Members are strongly encouraged to begin an evaluation of their cyber security practices and identify areas for improvement. MVRMA has begun to work with an IT vendor to develop services they can provide to MVRMA’s member cities at a discounted rate. Please contact Loss Control Manager Starr Markworth if you have questions about this service.

Please contact MVRMA staff if you have questions about cyber coverage or cyber loss control measures.

COUNSELOR'S COMMENTS

SUPREME COURT RESTRICTS ABILITY TO SEARCH FOLLOWING "HOT PURSUIT" OF MISDEMEANOR SUSPECTS

By Dinsmore and Shohl

The United States Supreme Court recently wasted an opportunity to adopt a "bright line" rule which would have been easy to implement, enforce and adjudicate, and instead adopted a "case by case" analysis for when police officers pursuing an individual for a misdemeanor offense can enter and search a home without first obtaining a warrant. Specifically, in Lange v. California, 594 U.S. ____ (2021), writing for a divided majority, Justice Elena Kagan held that "pursuit of a fleeing misdemeanor suspect does not always -- that is, categorically -- justify a warrantless entry into a home."

In Lange, a California Highway Patrol officer came upon a vehicle with its windows down playing music very loudly and honking its horn despite there being no other vehicles nearby. The officer found the behavior unusual and began following Lange. After several blocks, the officer activated his overhead lights "to signal that Lange should pull over" but Lange "failed to yield," and instead drove a short distance to his driveway and into his garage. The officer stopped and got out of his vehicle and was able to interrupt the closing garage door. Based on evidence obtained during the subsequent interaction with Lange, including Lange's poor performance on field sobriety tests, Lange was charged with driving under the influence. Tests ultimately confirmed that Lange's blood alcohol content was three times the legal limit.

Lange moved to suppress the evidence of his intoxication obtained inside his garage because the officer obtained the evidence without first obtaining a warrant to search the garage. The State argued that because Lange committed a misdemeanor when he failed to stop after the officer activated his overhead lights, the officer had probable cause to arrest Lange for failing to comply with a police signal. Noting that "a suspect cannot 'defeat an arrest begun in a public place by retreating into his home,'" the State argued that exigent circumstances -- i.e. "hot pursuit" -- justified the officer's warrantless entry into Lange's garage and the administration of the field sobriety tests.

In its review of the case, the United States Supreme Court started with the obvious premise that the Fourth Amendment ordinarily requires a police officer to obtain a warrant to enter a home unless there are exigent circumstances which create "a compelling need for official action and no time to secure a warrant." Lange, citing Kentucky v. King, 563 US 452, 460. "The Court has found that such exigencies exist when an officer must act to prevent imminent injury, the destruction of evidence, or a suspect's escape." In that regard, in United States v. Santana, 427 U.S. 38 (1976), the Court recognized that "hot pursuit" of a felony

Counselor's Comments...continued

suspect created such an exigency that justified warrantless entry into a home. Several states -- including Ohio in Middletown v. Flinchum (2002) 95 Oh.St.3d 43-- had extended the Santana exception to include the "hot pursuit" of a misdemeanor suspect. In Flinchum officers observed the defendant "engage in the reckless operation of his vehicle on more than one occasion." When the officers attempted to arrest Flinchum, he "not only ignored their commands to stop but also fled to his home in order to avoid arrest." Citing the U.S Supreme Court's decision in Santana, the Ohio Supreme Court stated "we see no reason to differentiate appellant's offense and give him a free pass merely because he was not charged with a more serious crime. The basic fact remains that appellant fled from police who were in lawful pursuit of him and who had identified themselves as police officers."

Although acknowledging that Ohio and several other states had adopted this approach, the Lange Court disagreed noting that the "[k]ey to resolving that issue are two facts about misdemeanors: They vary widely, but they may be (in a word) "minor." Lange, citing Welsh v. Wisconsin, 466 U.S. 740, 751 (1984). The Lange majority ultimately concluded that "pursuit of a misdemeanor does not trigger a categorical rule allowing a warrantless home entry." Rather, the Fourth Amendment and subsequent decisions interpreting the same require a "case by case" assessment of the exigencies arising from a misdemeanor suspect's flight to determine if a warrant is required to enter and search premises without a warrant.

"An officer must consider all the circumstances in a pursuit case to determine whether there is a law enforcement emergency. On many occasions, the officer will have good reason to enter -- to prevent imminent harms of violence, destruction of evidence, or escape from the home. But when the officer has time to get a warrant, he must do so -- even though the misdemeanor fled."

Lange, at 16.

The bottom line is that the Supreme Court in Lange declined to provide law enforcement officers with a "bright line rule" which would have eliminated the need for second guessing and ongoing litigation over what does or does not constitute an "exigency" justifying a warrantless search of a home following "hot pursuit" of a misdemeanor suspect.

Loss Control Lowdown...

Starr Markworth

The importance of Incident Investigation and Reports

When a workplace accident or incident occurs, prompt response is one of the most important factors. In order for accurate information to be gathered, the investigation must be completed in a timely manner so that all facts can be gathered while it is still fresh in the minds of both the employees and the witnesses.

Supervisors must ensure an investigation takes place immediately after the accident to discover what caused the accident and correct the problem. Finding out the cause of the accident is the key to preventing it from happening again.

Effective Incident Reports need to be clearly written. They should be written so a person that is not involved in the incident can understand what happened. Effective Incident Reports identify the facts and observations. They avoid inclusion of personal biases; they do not draw conclusions/predictions, or place blame.

A thorough accident investigation helps:

- Ensure any immediate unsafe conditions are corrected.
- Identify and correct/eliminate any unsafe conditions, acts or procedures that contributed to the accident.
- Determine if there was compliance with applicable safety regulations.
- Review if the response to the incident was sufficient.
- Document any statement from witnesses and employees.

How Do I Conduct an Investigation? The investigation normally includes these six steps:

1. Secure the scene and report the incident to the supervisor.
2. Collect data.
3. Develop a sequence of events.
4. Determine the cause of the accident.
5. Create recommendations to prevent reoccurrence.
6. Write the report.

Once the report is complete, supervisors should take action to implement the recommendations that control or eliminate the conditions that led to the accident or near miss.

For more detailed information, The National Safety Council has a very [comprehensive document](#) that would be a very valuable training tool for employees and supervisors.



Broker's Beat

SECTION 1983 CASES AND STRUCTURED SETTLEMENTS

Structured settlements have played a role in helping settle personal, physical injury claims for nearly a half century. A traditional structured settlement is usually comprised of a cash lump sum along with tax-free, guaranteed "periodic payments." Sections 104(a)(1) & (2) of the Internal Revenue Code allow for defendants to fund a structured settlement through an "assignment" process (IRC Section 130). In personal injury and workers' compensation cases, structured settlements are utilized as an effective resource to address an injured person's future wage loss, ongoing medical needs, or compensate a decedent's family members.

Civil Rights lawsuits, often referred to as Section 1983 cases (*42 U.S. Code § 1983*), can also be aided by the use of structured settlements, benefitting both the public entity and plaintiff. Below details a recent case study where early action and creative thinking led to an optimal outcome for all parties.

Police Shooting Case Study – Wrongful Death

Challenge

A police shooting left a 26 year-old male deceased. The decedent was unmarried, but did leave behind a minor child. The shooting led to enormous media attention because it appeared to be unjustified. The media coverage of the shooting was detrimental to both the public entity as well as to the decedent's family. The grieving family wanted the memory of their son intact and not be the subject of public scrutiny or fueled media coverage.

Action

The public entity assembled its defense team with the hopes of an early attempt at settlement to avoid costly litigation to both sides. With agreement from the family matriarch (grandmother), all parties met with the mindset of best providing for the minor child's future. Additionally, while the child's mother was not a legal party to the settlement, her intentions were clear when she stated, "I want my child taken care of now and after I am gone."

Broker's Beat...Continued

Result

Upon reaching a final settlement, we were able to creatively provide short-term, medium-term, and long-term financial security to the minor child. The structured settlement provided payments for an educational fund, periodic "life events" and lifetime payments that could not be outlived, therefore providing the child with financial security for the rest of his life. Ultimately, empathy and forward thinking allowed for the focus of the settlement negotiations to shift from grief to providing a well-executed financial plan and stable future for the minor child.

While the usual response to a verdict is to appeal, the verdict was within the pre-trial negotiating range of the defense and plaintiff. The parties decided to negotiate "off of the verdict" and began resuming discussions of a lump sum cash payment along with a structured settlement. Knowing that Doe had mental health issues and was a Medicaid recipient, a Special Needs Trust ("SNT") was established to preserve his eligibility. In the final compromised Release, we used the wording "in lieu of judgment and interest" to ultimately settle the matter for a combination of cash, to seed the SNT and satisfy attorney's fees and costs, and lifetime structured settlement payments to supplement any needs not covered by Medicaid.

Public entities can most effectively use structured settlements in the following cases: workers' compensation cases involving Medicare Set-Asides; third-party liability claims involving future wage loss, ongoing medical needs, minor children, and any matter involving catastrophic injuries or death. At no cost to the claim file, public entities can involve a structured settlement consultant to help evaluate a loss and creatively devise solutions to help bring difficult claims to a final resolution.

Calendar of Events

Upcoming Training Events

To Be Determined

Upcoming Board Events

Committee Meetings - Via Zoom

Risk Management - December 2nd, 10:00 AM

Finance - December 2nd, 1:30 PM

Board Meeting

December 20th, 9:30 AM, Kohler Banquet Center, Kettering

A Holiday luncheon will be held after the meeting

From The Board Room

September 20, 2021

- Approved Risk Management Committee to serve as the Claim Committee
- Accepted financial audit and comprehensive annual financial report for 12/31/20
- Accepted 2022 actuarial funding study
- Approved 2022 preliminary budget
- Approved amended prospective member list
- Approved amended award policy