

RISKY BUSINESS

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COUNSELOR'S COMMENTS

Clear as Mud: Hot Pursuit of a Misdemeanant Does Not Always Permit the Warrantless Entry into the Home

By Justin M. Burns, Esq., Dinsmore & Shohl

The “very core” of the Fourth Amendment is the right to “retreat into [one’s] home and there be free from unreasonable government intrusion. *Collins v. Virginia*, 138 S. Ct. 1663, 1670 (2018). This is why, for example, the Supreme Court has repeatedly recognized that “physical entry of the home [without a reasonable basis] is the chief evil” that the Fourth Amendment intends to protect against. *Payton v. New York*, 445 U.S. 573, 590 (1980). Although the line at the entrance to one’s home is firm, it is not inviolable. A police officer may enter the home with a proper warrant or when “exigent circumstances” justify entry. The contours of these “exigent circumstances,” however, remain murky at best.

One exigent circumstance is “hot pursuit.” In 1976, the Supreme Court held that a suspect could not escape arrest by “outrunning officers and finding refuge in her home.” *City of Middletown v. Flinchum*, 95 Ohio St. 3d 43, 44 (2002). The justification has been that when an officer initiates an arrest in a public place and the suspect flees into a private one (her home), an officer should be permitted to complete the arresting act. Otherwise, suspects would be encouraged to flee, or worse a suspect could fully escape, if an officer had to delay pursuit to obtain a warrant. A suspect cannot thwart arrest by taking advantage of the Constitutional protection of the home.

California officers relied on this background while investigating an incident involving a drunk driver, which in a surprise to some, ended with the Supreme Court demanding more to justify entry into the home. Arthur Lange blared music from his vehicle in the late evening, and an officer activated his overhead lights to conduct a traffic

Articles

<u>Counselor's Comments</u>	1–3
<u>FYI</u>	4–5
<u>Loss Control Lowdown</u>	5–6
<u>Broker's Beat</u>	7–8
<u>Events/From the Board</u>	9

Counselor's Comments...Continued

stop. Lange kept driving, and after eventually reaching his home, he entered his garage and began closing the garage door. The officer was in pursuit, and the officer used his foot to activate the garage door sensor to prevent it from closing. With the garage door open, the officer went inside and confronted Lange, observed signs of intoxication, and later determined that Lange was impaired. The officer arrested Lange for driving under the influence of alcohol and for violating a local noise ordinance.

The issue was whether the officer's entry into the garage was permissible. As an initial matter, the officer's entry into the garage (an extension of the home) was without a warrant, and thus under well-settled law, the entry was presumptively unconstitutional. *Minnesota v. Carter*, 525 U.S. 83, 94 (1998) (Scalia, J., concurring); *Ewolski v. City of Brunswick*, 287 F.3d 492, 501 (6th Cir. 2002). The officer argued that an exigency existed because he was in "hot pursuit" of Lange, who at the time, had committed a misdemeanor offense for violating a local noise ordinance. In applying the justifications noted above, the officer's argument was valid – Lange was attempting to escape arrest by fleeing into the home, and thus the officer should be able to pursue Lange rather than stop pursuit. In fact, for the decades, the Supreme Court of Ohio recognized such an argument, having held that "hot pursuit" permits entry regardless of whether the suspect committed a felony or misdemeanor. *City of Middletown*, 95 Ohio St. 3d at 45.

The Supreme Court of the United States saw things differently, and in so doing, rejected the officer's (and the Supreme Court of Ohio's) position. The Supreme Court held that "hot pursuit" is not a categorical rule that permits entry simply because a misdemeanant flees into the home – there must be more than flight to create an exigency. The Court emphasized that "exigent circumstances," whether hot pursuit or otherwise, vary from case-to-case, and they must consider the context of the situation rather than track a bright-line rule. This is particularly true in misdemeanor cases because a "minor offense" rarely creates an "emergency that can justify a warrantless home entry." *Lange v. California*, 141 S. Ct. 2011, 2020 (2021). There must be more than a minor offense and flight – there must be some exigency that suggests officers face an immediate risk of serious consequence. "When the nature of the crime, the nature of the flight, and surrounding facts present no such exigency, officers must respect the sanctity of the home – which means that they must get a warrant." *Id.* at 2021–2022.

Since the Supreme Court decided Lange's case, courts have varied in applying the case-by-case assessment to justify when entry to pursue a fleeing misdemeanant would be permissible. Although courts vary, the lesson is the same. When a misdemeanant flees into the home, an officer must obtain a warrant before entering unless the officer can identify a very real and immediate consequence in obtaining that warrant. For example, a federal court in Indiana found an exigency because the officer was aware of the fleeing suspect's past threats to "abduct women and children" and fight police, and thus there was an "emergency situation" to justify entry to protect officers, the public, and to prevent escape. *Caldwell v. Patston*, No. 2:19-CV-428, 2021 U.S. Dist. LEXIS 185375, at *10–11 (N.D. Ind. Sep. 28, 2021). The officer articulated specific facts that allowed the Court to see a real risk such that, after flight, officers had to enter the home to neutralize any threat.

Counselor's Comments...Continued

In sum, an officer should not go into a home to chase a suspect for a misdemeanor offense unless that officer can articulate specific circumstances suggesting there was a serious situation requiring immediate action. The Supreme Court identified common serious situations when this might be the case: “imminent harm to others, a threat to the officer himself, destruction of evidence, or escape from the home.” In those situations, an officer may “act without waiting.” *Lange*, 141 S. Ct. at 2021. Consequently, before an officer enters, he or she must point to specific facts that create a serious condition, and afterward, an officer should articulate those facts in any written report.

Finally, courts – and the Supreme Court justices themselves – have already observed the difficulty in assessing whether circumstances are sufficiently serious to warrant entry into the home. Justice Kagan, writing for the majority, emphasized that there must be some exigency *in addition to flight* to justify entry, while at the same time, she observed that “a great many cases [involving flight] creates a need for police to act swiftly.” *Id.* at 2020. Justice Kavanaugh suggested that fleeing misdemeanants will “almost always” involve a sufficient exigency, which could very well be “nine times out of 10 or more” of cases, thereby implying that flight (rather than the “flight-plus” requirement from the majority) was a rule. *Id.* at 2025 (summarizing *Lange*’s argument at oral argument). Chief Justice Roberts appears to have taken Justice Kavanaugh’s approach one step further by suggesting a uniform rule permitting entry to pursue misdemeanants because any rule otherwise was “famously difficult to apply.” *Id.* at 2035.

The holding in *Lange* has been publicly discussed before and it is now part of most officer training. In fact, curriculum from the Ohio Attorney General now references *Lange* and how it overruled the decades-old rule in Ohio. But in many respects, how *Lange*’s case will affect law enforcement is unknown, as there is still not a robust body of case law to indicate how much “more” must be present to justify entry. Because the line between when a sufficient exigency exists is murky, it is critically important that officers articulate specific facts and circumstances to justify warrantless entry – whether to support the argument later in any criminal proceeding or to invoke qualified immunity because of that murkiness.

FYI – Hurricane Ian

By Tom Judy



The full extent of Hurricane Ian's impact upon Southwest Florida is still being sorted out but it is clear that the lives of thousands have been forever changed. Many lost their loved ones, their livelihoods, retirement nest eggs, and the dreams of a life in "paradise." That said, I am struck by the resilience of the human spirit in the face of catastrophe and the willingness of thousands of others to come from near and far to give of themselves to serve others in their greatest time of need.

While this emotional and sometimes inspirational drama unfolds, the practical impact upon the wider market will take some time to sort out as well. Insurers are now assessing how the storm will affect their book of business and the rates they will charge in upcoming renewals. Certainly, residential property rates in Florida will be most affected; however, it is safe to assume rates throughout the country for commercial property, and perhaps other lines of coverage, will be impacted as well. As we at MVRMA are all too well aware, large losses from weather events triggered massive rate increases in commercial property rates over the last four to five years. More recently, this trend has been exacerbated by the spiraling costs of building materials. The commercial property market has been showing signs of settling down recently, but costly weather events could derail that movement toward stability.

FYI...Continued

Per an article at www.businessinsurance.com, the current estimated losses from Hurricane Ian have been projected at \$70 billion and up. The article goes on to say that the flooding from the storm surge caused major losses for auto insurers and marine insurers. While property insurers are also expecting big losses, these losses may be mitigated somewhat by the large windstorm deductibles generally assumed by Florida property owners.

Kevin Smith, Chicago-based president of global risk solutions, North America, at Liberty Mutual Insurance Co., said the storm will have a broad impact on the market. "It was clearly a homeowners' event, clearly an auto event, but I think there was enough widespread destruction that you're going to have some implications on the commercial side as well," he said.

The article points out that although there are certainly significant commercial property claims, Ian hit residential areas more strongly. "Speaking on behalf of our commercial book, we think it's actually going to be a pretty manageable event," said Jonathon Drummond, Chicago-based head of broking North America for Willis Towers Watson PLC.

It is still too early to know how this may affect our next MVRMA renewal, but we will continue to monitor the impact on the commercial market with the help of our broker. In the meantime, let's not forget those who will continue to suffer the consequences of this storm long after it has disappeared from the headlines.

Loss Control Lowdown...

Starr Markworth

Working in Cold Weather

With the arrival of winter not too far off, employees who work outdoors face an additional occupational hazard—exposure to the cold. Prolonged exposure to the freezing temperatures can result in health problems as serious as frostbite and hypothermia.

According to the Centers for Disease Control, from 2000 to 2021, a total of 13,310 deaths in the United States, an average of 1,331 per year were associated with exposure to excessive natural cold. Each year in the United States, more than 700 people die of hypothermia.

Loss Control Lowdown...Continued

It's important to remember that the wind can make the atmosphere considerably colder. Depending on the wind speed, it can make the outside temperature feel much colder and increase the risk of cold stress. Use this [**Wind Chill Calculator**](#) from the National Weather Service to calculate the wind chill temperature. The higher the wind chill, the faster it will be for frostbite to occur.

While cold weather can be hazardous for all workers, there are certain groups of people that have a higher risk of being affected. Workers with pre-existing health conditions like diabetes, hypertension, and hypothyroidism, as well as the elderly or those in poor physical health are more at risk for cold stress. Be mindful of your workers' health conditions to understand who might be more affected on the job site.

All employees who work out in the extreme winter weather should receive training and ongoing discussions on how to protect themselves while working outdoors.

How to Protect Workers:

- Recognize the environmental and workplace conditions that lead to potential cold-induced illnesses and injuries.
- Learn the signs and symptoms of cold-induced illnesses/injuries and what to do to help workers.
- Train workers about cold-induced illnesses and injuries.
- Encourage workers to wear proper clothing for cold, wet, and windy conditions. Layer clothing to adjust to changing environmental temperatures. Wear a hat and gloves, in addition to underwear that will keep water away from the skin (polypropylene).
- Be sure that workers take frequent short breaks in warm dry shelters to allow the body to warm up.
- Try to schedule work for the warmest part of the day.
- Avoid exhaustion or fatigue because energy is needed to keep muscles warm.
- Use the buddy system -- work in pairs so that one worker can recognize danger signs.
- Drink warm beverages (sugar water, sports-type drinks) and avoid drinks with caffeine or alcohol.
- Eat warm, high-calorie foods such as hot pasta dishes.

Remember, workers face increased risks when they take certain medications, are in poor physical condition or suffer from illnesses such as diabetes, hypertension, or cardiovascular disease.

For free copies of OSHA's Protecting Workers from Cold Stress Card, click link below: <https://www.osha.gov/Publications/OSHA3156.pdf>



Broker's Beat

Contracts

Undoubtedly one of the biggest headaches for risk managers and procurement staff is the development of appropriate insurance language for contracts. While this may seem mundane, it is one of the most critical and proactive risk management strategies in protecting an organization against unbudgeted losses. This article will help clarify some of the biggest misconceptions or mistakes made regarding Insurance Requirements in Contracts.

Using The Wrong Indemnification/Or Not Including Key Components - Every contract has two critical components: indemnification and insurance requirements. These sections are distinctly different, one being the agreement between parties, the other a promise to pay compensation for harm or loss. Both hold a crucial role in the risk transfer process. The indemnification (also called the "hold harmless") is the "promise", but the "promise" is only as good as the person making it. Therefore, what happens if the contractor cannot fulfill their promise, i.e., cannot pay the claim? The insurance requirements back up the indemnification and act as the guarantee the contractor can meet its obligations. Therefore, using the correct indemnification language is of utmost importance and this language should be reviewed and vetted by legal representatives. Even small changes to the hold harmless provision can weaken an organization's protection.

Choosing Limits Based On Project Values - Accidents happen daily on job sites for projects of various scopes and sizes, both small and large. It is known that freak things happen, often with no rhyme or reason. For example, a roofing contractor replacing broken tiles at a residential property could fall and suffer a brain injury, just like a roofing contractor performing work at a large commercial building. The project costs may be egregiously different, but the claim could be the same. For this reason, it makes no sense to relate the insurance requirements to the project value. Risk should be evaluated in a completely different context. When structuring the insurance requirements in a contract, staff must consider the risk involved and assume the worst-case scenario. You cannot take a cookie-cutter approach. Having the ability to increase limit requirements when a job is too risky is critical. After all, a small job doesn't necessarily mean a small risk.

Types Of Coverage Forms – How This Impacts Evidence of Coverage Beyond the Contact Term - Two primary coverage forms exist in the marketplace, and their coverage triggers are entirely different. If commercially available, it is always recommended that policies be written on an occurrence-based form. An occurrence policy is the broadest form because coverage ties back to the policy in force when the loss occurred. This means when the claim is reported, the policy in force on the date of loss shall respond. Under a claims-made policy, coverage is tied to the date the claim is reported.

Broker's Beat...Continued

Coverage will not be triggered if there is no policy in place when the claim is reported (which could be years after the work has been done). The wrong coverage trigger could result in an entity not having the protection it thought it had leaving the entity stuck paying the claim.

Types of Coverage Requested in a Contract - Because each contract's risk differs, the coverage requirements will also be unique. As a result, entities must know the different types of coverage required for each project. In most every contract, you will want to have three coverages: commercial general liability, auto liability, and worker's compensation. However, unique projects have unique needs. For example, a professional services contract may require professional liability; a technology contract may require professional and cyber liability. Whereas an environmental contract likely needs environmental coverage. It is of the utmost importance to review not just the limit requirements related to the risk involved with a contract but also whether the type of work being performed requires special insurance requirements.

Additional Insured Status – having additional insured status on your contractor's commercial general liability policy is vital. Without it, you may not be afforded any coverage if something happens and the insurance is triggered. Unfortunately, we often see several mistakes made in this respect:

1. It is essential to know that most insurance companies will not provide coverage for an additional insured if there is no written contract
2. Most entities believe being a certificate holder makes them an additional insured; it does not.
3. The additional insured requirement should have all of the following added to the coverage, the entity, its officers, officials, employees, and volunteers.

Additional insured status needs to cover your entity when the contractor is performing the work on-site and when it is completed. This is often accomplished with two separate endorsements and is why we always recommend getting copies of the Additional insured endorsements as part of the certificate of insurance.

Every transaction has some risk attached to it. As risk management professionals, the ultimate objective is to protect the organization by passing on that risk to another party. However, failing to understand some of the key components of hold harmless and insurance language could be detrimental. A proper appreciation of critical concepts and being conscious of common misconceptions will result in better contract language structure and preservation of your company. For additional information on Insurance requirements in Contracts or to request training, please reach out to your Alliant contact. You can also find additional information in Alliant Insurance Requirements in Contract manual, a lengthy and detailed guidebook for insurance contracts, available at no cost. ([click here.](#))

Calendar of Events

Upcoming Training Events

1/11/23 Emotional Survival for Law Enforcement — Centerville PD — Full Day Session

1/18/23 Communicating in a Crisis—Location TBD — Full Day Session

Upcoming Board Events

Committee Meetings - Via Zoom:

Risk Management - December 1st- 10:00 AM

Finance - December 1st - 1:30 PM

Board Meeting

December 19th, Kohler Presidential Banquet Center 9:30 AM

From The Board Room September, 2022

- Approved Financial Audit and Comprehensive Annual Financial Report
- Approved Seeking Proposals for Actuarial Services
- Approved 2023 Preliminary Budget
- Approved MVRMA Treasurer Nomination