MUNICIPAL DUTY TO INDEMNIFY: OBLIGATIONS AND LIMITATIONS

COLORADO MUNICIPAL LEAGUE
ANNUAL CONFERENCE

JUNE 21, 2019

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I. COLORADO LAW PROVIDING FOR DEFENSE AND INDEMNIFICATION[1]

A. COLORADO GOVERNMENTAL IMMUNITY ACT (CGIA)

24-10-110. Defense of public employees - payment of judgments or settlements against public employees.

(1) A public entity shall be liable for:

(a) The costs of the defense of any of its public employees, whether such defense is assumed by the public entity or handled by the legal staff of the public entity or by other counsel, in the discretion of the public entity, where the claim against the public employee arises out of injuries sustained from an act or omission of such employee occurring during the performance of his duties and within the scope of his employment, except where such act or omission is willful and wanton;

(b) (I) The payment of all judgments and settlements of claims against any of its public employees where the claim against the public employee arises out of injuries sustained from an act or omission of such employee occurring during the performance of his duties and within the scope of his employment, except where such act or omission is willful and wanton or where sovereign immunity bars the action against the public entity, if the employee does not compromise or settle the claim without the consent of the public entity; and

(II) The payment of all judgments and settlements of claims against any of its public employees where the claim against the public employee arises out of injuries sustained from an act or omission of such employee occurring during the performance of his or her duties and within the scope of employment, except where such act or omission is willful and wanton, even though sovereign immunity would otherwise bar the action, when the public employee is operating an emergency vehicle within the provisions of section 42-4-108 (2) and (3), C.R.S., if the employee does not compromise or settle the claim without the consent of the public entity.

(1.5) Where a claim against a public employee arises out of injuries sustained from an act or omission of such employee which occurred or is alleged in the complaint to have occurred during the performance of his duties and within the scope of his employment, the public entity shall be liable for the reasonable costs of the defense and reasonable attorney fees of its public employee unless:

(a) It is determined by a court that the injuries did not arise out of an act or omission of such employee occurring during the performance of his duties and within the scope of his employment or that the act or omission of such employee was willful and wanton. If it is so determined, the public entity may request and the court shall order such employee to reimburse the public entity for reasonable costs and reasonable attorney fees incurred in the defense of such employee; or

(b) The public employee compromises or settles the claim without the consent of the public entity.

(2) The provisions of subsection (1) of this section shall not apply where a public entity is not made a party defendant in an action and such public entity is not notified of the existence of such action in writing by the plaintiff or such employee within fifteen days after commencement of the

action. In addition, the provisions of subsection (1) of this section shall not apply where such employee willfully and knowingly fails to notify the public entity of the incident or occurrence which led to the claim within a reasonable time after such incident or occurrence, if such incident or occurrence could reasonably have been expected to lead to a claim.

(3) Repealed.

(4) Where the public entity is made a codefendant with its public employee, it shall notify such employee in writing within fifteen days after the commencement of such action whether it will assume the defense of such employee. Where the public entity is not made a codefendant, it shall notify such employee whether it will assume such defense within fifteen days after receiving written notice from the public employee of the existence of such action.

(5) (a) In any action in which allegations are made that an act or omission of a public employee was willful and wanton, the specific factual basis of such allegations shall be stated in the complaint.

(b) Failure to plead the factual basis of an allegation that an act or omission of a public employee was willful and wanton shall result in dismissal of the claim for failure to state a claim upon which relief can be granted.

(c) In any action against a public employee in which exemplary damages are sought based on allegations that an act or omission of a public employee was willful and wanton, if the plaintiff does not substantially prevail on his claim that such act or omission was willful and wanton, the court shall award attorney fees against the plaintiff or the plaintiff's attorney or both and in favor of the public employee.

(6) The provisions of subsection (5) of this section are in addition to and not in lieu of the provisions of article 17 of title 13, C.R.S.

24-10-113. Payment of judgments.

(1) A public entity or designated insurer shall pay any compromise, settlement, or final judgment in the manner provided in this section, and an action pursuant to the Colorado rules of civil procedure shall be an appropriate remedy to compel a public entity to perform an act required under this section.

(2) The state and the governing body of any other public entity shall pay, to the extent funds are available in the fiscal year in which it becomes final, any judgment out of any funds to the credit of the public entity that are available from any or all of the following:

(a) A self-insurance reserve fund;

(b) Funds that are unappropriated for any other purpose unless the use of such funds is restricted by law or contract to other purposes;

(c) Funds that are appropriated for the current fiscal year for the payment of such judgments and not previously encumbered.

(3) If a public entity is unable to pay a judgment during the fiscal year in which it becomes final because of lack of available funds, the public entity shall levy a tax, in a separate item to cover such judgment, sufficient to discharge such judgment in the next fiscal year or in the succeeding fiscal year if the budget of the public entity has been finally adopted for the fiscal year in which

the judgment becomes final before such judgment becomes final; but in no event shall such annual levy for one or more judgments exceed a total of ten mills, exclusive of existing mill levies. The public entity shall continue to levy such tax, not to exceed a total annual levy of ten mills, exclusive of existing mill levies, but in no event less than ten mills if such judgment will not be discharged by a lesser levy, until such judgment is discharged. In the event that more than one judgment is unsatisfied and a ten-mill levy is insufficient to satisfy the judgments in one year, the proceeds of the ten-mill levy shall be prorated annually among the judgment creditors in the proportion that each outstanding judgment bears to the total judgments outstanding.

24-10-114. Limitations on judgments - recommendation to general assembly - authorization of additional payment - lower north fork wildfire claims.

(1) (a) The maximum amount that may be recovered under this article in any single occurrence, whether from one or more public entities and public employees, shall be:

(I) For any injury to one person in any single occurrence, the sum of three hundred fifty thousand dollars;

(II) For an injury to two or more persons in any single occurrence, the sum of nine hundred ninety thousand dollars; except that, in such instance, no person may recover in excess of three hundred fifty thousand dollars.

(b) The amounts specified in subsection (1)(a) of this section shall be adjusted by an amount reflecting the percentage change over a four-year period in the United States department of labor, bureau of labor statistics, consumer price index for Denver-Aurora-Lakewood for all items and all urban consumers, or its applicable predecessor or successor index. On or before January 1, 2018, and by January 1 every fourth year thereafter, the secretary of state shall calculate the adjusted dollar amount for the immediately preceding four-year period as of the date of the calculation. The adjusted amount shall be rounded upward to the nearest one-thousand-dollar increment. The secretary of state shall certify the amount of the adjustment for the particular four-year period and shall publish the amount of the adjustment on the secretary of state's website.

(1.5) For purposes of subsection (1) of this section, an assignment or subrogation to recover damages paid or payable for an injury shall not be deemed to be a separate occurrence.

(2) The governing body of a public entity, by resolution, may increase any maximum amount set out in subsection (1) of this section that may be recovered from the public entity for the type of injury described in the resolution. The amount of the recovery that may be had shall not exceed the amount set out in such resolution for the type of injury described therein. Any such increase may be reduced, increased, or repealed by the governing body by resolution. A resolution adopted pursuant to this subsection (2) shall apply only to injuries occurring subsequent to the adoption of such resolution.

(3) Nothing in this section shall be construed to permit the recovery of damages for types of actions authorized under part 2 of article 21 of title 13, C.R.S., in an amount in excess of the amounts specified in said article.

(4) (a) A public entity shall not be liable either directly or by indemnification for punitive or exemplary damages or for damages for outrageous conduct, except as otherwise determined by a public entity pursuant to section 24-10-118 (5).

(b) A railroad operating in interstate commerce that sells to a public entity, or allows the public entity to use, such railroad's property or tracks for the provision of public passenger rail service shall not be liable either directly or by indemnification for punitive or exemplary damages or for damages for outrageous conduct to any person for any accident or injury arising out of the operation and maintenance of the public passenger rail service by a public entity.

(5) Notwithstanding the maximum amounts that may be recovered from a public entity set forth in subsection (1) of this section, an amount may be recovered from the state under this article in excess of the maximum amounts only if paragraph (a) or (b) of this subsection (5) applies:

(a) The general assembly acting by bill authorizes payment of all or a portion of any judgment against the state that exceeds the maximum amount. Any claimant may present either proof of judgment or an order of a district court granting a claimant's request for entry of judgment in the amount of an award of damages recommended by a special master or a comparable order to the general assembly and request payment of that portion of the judgment or order that exceeds the maximum amount. Any such judgment or order approved for payment by the general assembly shall be paid from the general fund.

(b)

(I) Except as otherwise provided in subparagraphs (II) and (III) of this paragraph (b), the state claims board created in section 24-30-1508 (1), referred to in this paragraph (b) as the board, acting in accordance with its authority under section 24-30-1515, compromises or settles a claim on behalf of the state for the maximum liability limits under this article and determines, in its sole discretion, to recommend to the general assembly that an additional payment be made and the general assembly, by bill, authorizes all or any portion of the additional payment. In determining whether to make such recommendation, the board shall consider interests of fairness, the public interest, and the interests of the state. A recommendation made under this paragraph (b) shall not include payment for noneconomic loss or injury and shall be reduced to the extent the claimant's loss is or will be covered by another source, including, without limitation, any insurance proceeds that have been paid or will be paid, and no insurer has a right of subrogation, assignment, or any other right against the claimant or the state for any additional payment or any portion of such payment that is approved by the general assembly. Any additional payment or any portion of such payment approved by the general assembly shall be paid from the general fund. For purposes of this paragraph (b), an "additional payment" means the payment to a claimant in excess of the maximum liability limits pursuant to this paragraph (b) that may be authorized by the general assembly upon a recommendation from the board.

(II) In connection with a recommendation made by the board under subparagraph (I) of this paragraph (b) to make an additional payment to one or more claimants resulting from a claim of an injury arising out of the lower north fork wildfire in March 2012 that is received by the general assembly while the general assembly is adjourned sine die, upon certification from the department of law that the requirements of this paragraph (b) have been satisfied and on or after July 1, 2013, the office of the state controller may pay one or more additional payments to such claimants from moneys previously appropriated by bill until such specifically appropriated moneys are exhausted or replenished.

(III) In connection with any claim arising out of an injury occurring on or after May 25, 2013, that is not described in subparagraph (II) of this paragraph (b), where the board has made a recommendation to the general assembly for an additional payment under this paragraph (b) while the general assembly is adjourned sine die, the payment is authorized where all of the members of the joint budget committee have voted to authorize the additional payment; except that payment in accordance with the recommendation shall not be made until the general assembly has ratified by bill the authorization to make the payment.

24-10-115. Authority for public entities other than the state to obtain insurance.

(1) A public entity, other than the state, either by itself or in conjunction with any one or more public entities may:

(a) Insure against all or any part of its liability for an injury for which it might be liable under this article;

(b) Insure any public employee acting within the scope of his employment against all or any part of such liability for an injury for which he might be liable under this article;

(c) Insure against the expense of defending a claim for injury against the public entity or its employees, whether or not liability exists on such claim;

(d) Insure against all or part of its liability or the liability of a railroad for claims arising from the passenger rail operations of a public entity on property or tracks owned by, or purchased from, a railroad.

(2) The insurance authorized by subsection (1) of this section may be provided by:

(a) Self-insurance, which may be funded by appropriations to establish or maintain reserves for self-insurance purposes;

(b) An insurance company authorized to do business in this state which meets all of the requirements of the division of insurance for that purpose;

(c) A combination of the methods of obtaining insurance authorized in paragraphs (a) and (b) of this subsection (2);

(d) Any risk management pool of public passenger rail services authorized to be created pursuant to the federal "Product Liability Risk Retention Act of 1981", 15 U.S.C. sec. 3901 et seq., as amended.

(3) A public entity, other than the state and other than a school district, may establish and maintain an insurance reserve fund for self-insurance purposes and may include in the annual tax levy of the public entity such amounts as are determined by its governing body to be necessary for the uses and purposes of the insurance reserve fund, subject to the limitations imposed by section 29-1-301, C.R.S., or such public entity may appropriate from any unexpended balance in the general fund such amounts as the governing body shall deem necessary for the purposes and uses of the insurance reserve fund, or both. A school district shall establish and maintain an insurance reserve fund in accordance with the provisions of section 22-45-103 (1)(e), C.R.S., for liability and property damage self-insurance purposes, including workers' compensation pursuant to section 8-44-204 (2), C.R.S., using moneys allocated thereto pursuant to the provisions of section 22-54-105 (2), C.R.S. The fund established pursuant to this subsection (3) shall be kept separate and apart from all other funds and shall be used only for the payment of administrative and legal expenses

necessary for the operation of the fund and for the payment of claims against the public entity which have been settled or compromised or judgments rendered against the public entity for injury under the provisions of this article and for attorney fees and for the costs of defense of claims and to secure and pay for premiums on insurance as provided in this article.

(4) Policies written pursuant to this section and section 24-10-116 shall insure all of the risks and liabilities arising under this article, including costs of defense, unless the public entity requests in writing and obtains lesser coverage, in which event the policy issued shall conspicuously itemize the risks and liabilities not covered.

(5) A self-insurance fund established by a public entity which is subject to section 29-1-108, C.R.S., shall not be construed to be unexpended funds for budgetary purposes and shall be accumulated and held over for use in subsequent years.

(6) Repealed.

(7) Policies written, self-insurance funds established, or risk management pools entered into by a public entity for the purpose of insuring a public entity as described in paragraph (d) of subsection (1) of this section shall maintain such levels of insurance as are sufficient to insure against the maximum liability permitted against a railroad or its indemnitor pursuant to 49 U.S.C. sec. 28103.

24-10-115.5. Authority for public entities to pool insurance coverage.

(1) Public entities may cooperate with one another to form a self-insurance pool to provide all or part of the insurance coverage authorized by this article or by section 29-5-111, C.R.S., for the cooperating public entities. Any such self-insurance pool may provide such coverage by the methods authorized in sections 24-10-115 (2) and 24-10-116 (2), by any different methods if approved by the commissioner of insurance, or by any combination thereof. Any such insurance pool shall be formed pursuant to the provisions of part 2 of article 1 of title 29, C.R.S. The provisions of articles 10.5 and 47 of title 11, C.R.S., shall apply to moneys of such self-insurance pool.

(2) Any self-insurance pool authorized by subsection (1) of this section shall not be construed to be an insurance company nor otherwise subject to the laws of this state regulating insurance or insurance companies; except that the pool shall comply with the applicable provisions of sections 10-1-203 and 10-1-204 (1) to (5).

(3) Prior to the formation of a self-insurance pool, there shall be submitted to the commissioner of insurance a complete written proposal of the pool's operation, including, but not limited to, the administration, claims adjusting, membership, and capitalization of the pool. The commissioner shall review the proposal within thirty days after receipt to assure that proper insurance techniques and procedures are included in the proposal. After such review, the commissioner shall have the right to approve or disapprove the proposal. If the commissioner approves the proposal, he shall issue a certificate of authority. The costs of such review shall be paid by the public entities desiring to form such a pool. Any such payment received by the commissioner is hereby appropriated to the division of insurance in addition to any other funds appropriated for its normal operation.

(4) Each self-insurance pool for public entities created in this state shall file, with the commissioner of insurance on or before March 30 of each year, a written report in a form prescribed by the commissioner, signed and verified by its chief executive officer as to its condition. Such report shall include a detailed statement of assets and liabilities, the amount and character of the business transacted, and the moneys reserved and expended during the year.

(5) The commissioner of insurance, or any person authorized by him, shall conduct an insurance examination at least once a year to determine that proper underwriting techniques and sound funding, loss reserves, and claims procedures are being followed. This examination shall be paid for by the self-insurance pool out of its funds at the same rate as provided for foreign insurance companies under section 10-1-204 (9), C.R.S.

(6) (a) The certificate of authority issued to a public entity under this section may be revoked or suspended by the commissioner of insurance for any of the following reasons:

(I) Insolvency or impairment;

(II) Refusal or failure to submit an annual report as required by subsection (4) of this section;

(III) Failure to comply with the provisions of its own ordinances, resolutions, contracts, or other conditions relating to the self-insurance pool;

(IV) Failure to submit to examination or any legal obligation relative thereto;

(V) Refusal to pay the cost of examination as required by subsection (5) of this section;

(VI) Use of methods which, although not otherwise specifically proscribed by law, nevertheless render the operation of the self-insurance pool hazardous, or its condition unsound, to the public;

(VII) Failure to otherwise comply with the law of this state, if such failure renders the operation of the self-insurance pool hazardous to the public.

(b) If the commissioner of insurance finds upon examination, hearing, or other evidence that any participating public entity has committed any of the acts specified in paragraph (a) of this subsection (6) or any act otherwise prohibited in this section, the commissioner may suspend or revoke such certificate of authority if he deems it in the best interest of the public. Notice of any revocation shall be published in one or more daily newspapers in Denver which have a general state circulation. Before suspending or revoking any certificate of authority of a public entity, the commissioner shall grant the public entity fifteen days in which to show cause why such action should not be taken.

(7) Any public entity pool formed under this article and under article 13 of title 29, C.R.S., and the members thereof, may combine and commingle all funds appropriated by the members and received by the pool for liability or property insurance or self-insurance or for other purposes of the pool.

(8) (a) Any self-insurance pool organized pursuant to this section may invest in securities meeting the investment requirements established in part 6 of article 75 of this title and may also

invest in membership claim deductibles and in any other security or other investment authorized for such pools by the commissioner of insurance.

(b) Any public entity which is a member of a self-insurance pool which is organized pursuant to this section or any instrumentality formed by two or more of such members may invest in subordinated debentures issued by such self-insurance pool.

(9) In addition to liability coverage pursuant to subsection (1) of this section and property coverage pursuant to section 29-13-102, C.R.S., a self-insurance pool authorized by subsection (1) of this section may provide workers' compensation coverage pursuant to section 8-44-204, C.R.S., and firefighter heart and circulatory malfunction benefits pursuant to section 29-5-302, C.R.S.

24-10-118. Actions against public employees - requirements and limitations.

(1) Any action against a public employee, whether brought pursuant to this article, section 29-5-111, C.R.S., the common law, or otherwise, which lies in tort or could lie in tort regardless of whether that may be the type of action or the form of relief chosen by the claimant and which arises out of injuries sustained from an act or omission of such employee which occurred or is alleged in the complaint to have occurred during the performance of his duties and within the scope of his employment, unless the act or omission causing such injury was willful and wanton, shall be subject to the following requirements and limitations, regardless of whether or not such action against a public employee is one for which the public entity might be liable for costs of defense, attorney fees, or payment of judgment or settlement under section 24-10-110:

(a) Compliance with the provisions of section 24-10-109, in the forms and within the times provided by section 24-10-109, shall be a jurisdictional prerequisite to any such action against a public employee, and shall be required whether or not the injury sustained is alleged in the complaint to have occurred as the result of the willful and wanton act of such employee, and failure of compliance shall forever bar any such action against a public employee. Any such action against a public employee shall be commenced within the time period provided for that type of action in articles 80 and 81 of title 13, C.R.S., relating to limitation of actions, or it shall be forever barred.

(b) The maximum amounts that may be recovered in any such action against a public employee shall be as provided in section 24-10-114 (1), (2), and (3).

(c) A public employee shall not be liable for punitive or exemplary damages arising out of an act or omission occurring during the performance of his duties and within the scope of his employment, unless such act or omission was willful and wanton.

(d) The fact that a plaintiff sues both a public entity and a public employee shall not be deemed to increase any of the maximum amounts that may be recovered in any such action as provided in this section or in section 24-10-114.

(2) (a) A public employee shall be immune from liability in any claim for injury, whether brought pursuant to this article, section 29-5-111, C.R.S., the common law, or otherwise, which lies in tort or could lie in tort regardless of whether that may be the type of action or the form of relief chosen by a claimant and which arises out of an act or omission of such employee occurring during the performance of his duties and within the scope of his employment unless the act or omission causing such injury was willful and wanton; except that no such immunity may be asserted in an action for injuries resulting from the circumstances specified in section 24-10-106 (1).

(b) Any member of any state board, commission, or other advisory body appointed pursuant to statute, executive order, or otherwise, and any other person acting as a consultant or witness before any such body, shall be immune from liability in any civil action brought against said person for acts occurring while the person was acting as such a member, consultant, or witness, if such person was acting in good faith within the scope of such person's respective capacity, makes a reasonable effort to obtain the facts of the matter as to which action was taken, and acts in the reasonable belief that the action taken by such person was warranted by the facts.

(2.5) If a public employee raises the issue of sovereign immunity prior to or after the commencement of discovery, the court shall suspend discovery; except that any discovery necessary to decide the issue of sovereign immunity shall be allowed to proceed, and the court shall decide such issue on motion. The court's decision on such motion shall be a final judgment and shall be subject to interlocutory appeal.

(3) Nothing in this section shall be construed to allow any action which lies in tort or could lie in tort regardless of whether that may be the type of action or the form or relief chosen by a claimant to be brought against a public employee except in compliance with the requirements of this article.

(4) The immunities provided for in this article shall be in addition to any common-law immunity applicable to a public employee.

(5) Notwithstanding any provision of this article to the contrary, a public entity may, if it determines by resolution adopted at an open public meeting by the governing body of the public entity that it is in the public interest to do so, defend a public employee against a claim for punitive damages or pay or settle any punitive damage claim against a public employee.

24-10-119. Applicability of article to claims under federal law. The provisions of this article shall apply to any action against a public entity or a public employee in any court of this state having jurisdiction over any claim brought pursuant to any federal law, if such action lies in tort or could lie in tort regardless of whether that may be the type of action or the form of relief chosen by the claimant

B. DO THE DEFENSE AND INDEMNIFICATION OBLIGATIONS OF THE CGIA APPLY TO FEDERAL CLAIMS?

See Robbins v. Jefferson County School Dist. R-1, 186 F.3d 1253 (10th Cir. 1999):[2]

> We first note that § 24-10-119 simply makes clear that the Colorado Governmental Immunity Act…also applies to federal claims brought in state courts."[3]…Nothing in *Griess*[4] or § 24-10-119 indicates that a federal court cannot apply the attorney fee provision, § 24-10-110(5)(c), to state claims over which the federal court exercises supplemental jurisdiction.[5] Tenth Circuit case law acknowledges that federal courts may apply the CGIA to state claims not barred by the Eleventh Amendment.[6]

See Haynes v. City of Gunnison, 214 F. Supp. 2d 1119, 1120 (2002): C.R.S. § 24-10-110(5)(c) applies only to claims made under state law against public employees in which exemplary damages are sought based on allegations that the public employee acted willfully or wantonly, citing *Cherry Creek Aviation, Inc. v. City of Steamboat Springs*, 969 P.2d 812, 814 (Colo. App. 1998), (holding that the statute is not applicable to federal civil rights claims). A defendant may not rely on the statute to recover attorney fees incurred in defending a § 1983 action. Fees cannot be awarded under Colorado law for work performed defending the overlapping § 1983 claims. *Id*. at 1122.

See also Carani v. Meisner, D. Colo. 2011, (not reported in F. Supp. 2d), 2011 WL 1221748: C.R.S. § 24-10-110(5)(c) applies to all state-law claims, regardless of whether they are brought in state court or federal court; however, attorney fees are not automatically awarded under this statute for claims brought under federal law. The award of attorney fees for unsuccessful federal civil rights claims is governed by 42 U.S.C. § 1988.

C. LIABILITY OF PEACE OFFICERS STATUTE

29-5-111. Liability of peace officers.

(1) Notwithstanding the doctrines of sovereign immunity and respondeat superior, a city, town, county, or city and county or other political subdivision of the state or a state institution of higher education employing peace officers in accordance with article 7.5 of title 24, C.R.S., shall indemnify its paid peace officers and reserve officers, as defined in section 16-2.5-110, C.R.S., while the peace officers and reserve officers are on duty for any liability incurred by them and for any judgment, except a judgment for exemplary damages, entered against them for torts committed within the scope of their employment if the person claiming damages serves the political subdivision or state institution of higher education with a copy of the summons within ten days from the date when a copy of the summons is served on the peace officer or reserve officer. In no event shall any political subdivision or state institution of higher education be required so to indemnify its peace officers in excess of one hundred thousand dollars for one person in any single occurrence or three hundred thousand dollars for two or more persons for any single occurrence; except that in such instance no indemnity shall be allowed for any person in excess of one hundred thousand dollars. It is the duty of the city, town, county, city and county, or other political subdivision and of the state institution of higher education to provide the defense handled by the

legal staff of the public entity or by other counsel, in the discretion of the public entity, for the peace officer in the claim or civil action. However, in the event that the court determines that a reserve officer, as defined in section 16-2.5-110, C.R.S., incurred the liability while acting outside the scope of his or her assigned duties or that the reserve officer acted in a willful and wanton manner in incurring the liability, the court shall order the reserve officer to reimburse the political subdivision or the state institution of higher education for reasonable costs and reasonable attorney fees expended for the defense of the reserve officer. With the approval of the governing body of the city, town, county, city and county, or other political subdivision or of the state institution of higher education, the claim or civil action may be settled or compromised. A city, town, county, city and county, or other political subdivision or a state institution of higher education may carry liability insurance to insure itself and its peace officers. If the political subdivision or state institution of higher education purchases insurance that provides substantial coverage for the peace officers with a policy limitation of at least one hundred thousand dollars for one person in any single occurrence and three hundred thousand dollars for two or more persons for any single occurrence, except that in such instance no indemnity shall be allowed for any person in excess of one hundred thousand dollars, then the political subdivision or state institution of higher education shall be liable under this section to indemnify the peace officers only to the extent of the limits and for such torts as are covered by the policy and only to the extent of the coverage of the policy. Nothing in this section shall be deemed to condone the conduct of any peace officer who uses excessive force or who violates the statutory or constitutional rights of any person.

(2) This section shall apply only with respect to causes of action accruing on or after July 1, 1972.

II. INSURANCE CONTRACTS PROVIDING FOR DEFENSE AND INDEMNIFICATION FROM STATE AND FEDERAL TORTS

A. CASE LAW

When determining whether coverage exists under an insurance contract, a court looks to the factual allegations in the complaint. *Hecla Mining Co. v. New Hampshire Ins. Co*., 811 P.2d 1083 (Colo. 1991). If the factual allegations in the underlying complaint reveal a situation that is entirely within the exclusions of the policy, the insurer has no duty to provide coverage for the claim. *Colo. Farm Bureau Mut. Ins. Co. v. Snowbarger*, 934 P.2d 909 (Colo. App. 1997), citing *Allstate Ins. Co. v. Juniel*, 931 P.2d 511 (Colo. App. 1996).

However, an insurer's duty to defend arises when the underlying complaint alleges any facts that might fall within the Policy's coverage. *See Hecla, supra*. When determining the rights and obligations that exist under an insurance policy, courts apply principles of contract interpretation and attempt to carry out the parties' reasonable expectations when the policy was issued. *Cotter Corp. v. Am. Empire Surplus Lines Ins. Co*., 90 P.3d 814 (Colo. 2004).

B. INSURANCE – COVERAGE DETERMINED BY THE EXPRESS PROVISIONS OF THE INSURANCE CONTRACT

KEY CONSIDERATIONS

1. Coverage for conduct of municipal employee/representative/official while in the performance of duties and within the scope of employment by the municipality.

2. Coverage for State and Federal Torts.

3. Common Exclusions
   - Willful and Wanton Conduct.
   - Punitive/Exemplary Damages.
   - Breach of Contract.
   - Expected or Intended Injury.
   - Professional Liability from Legal Staff.
   - Criminal Conduct.
   - Condemnation, including inverse condemnation, eminent domain, taking of property rights without just compensation, impairment of vested rights.
   - Non-monetary Claims for injunctive relief, declaratory judgments.
   - Government Fines or Penalties.

4. Rule 106(a)(4) Claims – CIRSA $10,000 Sublimit.

5. Defense under a reservation of rights.

6. Indemnification Coverage Limits.

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[1] Distinguish official liability from individual liability.
[2] Federal district court did not err in awarding attorney fees under § 24-10-110(5)(c) due to the plaintiff's failure to substantially prevail on her state exemplary damages claim.
[3] *Id.* at 1260.
[4] *Griess v. Colorado*, 841 F.2d 1042 (10th Cir. 1988).
[5] *Id.*
[6] *Id.* at 1261.