5

Michael O'Quinn, J. Devereux Weeks, and Donald Cronin

Liability of Public Officials and the County

The role of county government has expanded into many different areas and touches the lives of individuals and businesses in many different ways. Local governments are providing an increasing number of services to the public. Associated with this increased interaction between local officials and the community are liability issues. Like individuals and corporations, counties are legal entities that are subject to lawsuits. However, because a county can only act through its elected officials and employees, there is an individual or a group responsible for every controversial decision, accident, failure to act, or error in judgment. Thus, elected officials and county employees can be sued for events that arise out of the performance of their duties, and while not a common occurrence, they may be personally liable or be forced to pay a judgment out of their personal assets. This chapter explains some of the liability rules that are unique to counties.

Lawsuits against counties and county officials fall into three broad categories: (1) federal civil rights and employment claims, (2) state law tort claims, and (3) state law claims that ask a judge to change or overrule a decision made by a board of commissioners. The subject matter or event being litigated determines the type of lawsuit. In all cases, the plaintiff (i.e., the person who filed the suit) almost always claims damages for which he or she seeks compensation in the form of money. A jury, rather than a judge, most often determines the amount of money to which a plaintiff is entitled. In some types of cases, there may be caps or limits on the amount awarded, but usually it is any amount that a jury deems fair. The county, individual county officers or employees, or both the county and its officials and employees may be liable. However, there

is a group of cases in which the county is immune to liability and only individual county officers can be liable.

If all of this seems confusing, do not be discouraged; it is confusing, even to lawyers and judges, particularly when one lawsuit attempts to combine two, or even all three, categories of claims into alternative theories of relief. The best advice is to accept the rules of liability and damages at face value. Do not try to find a rational basis for the distinctions or assume that there is any logical or coherent pattern or reason for the differences in the rules. These rules were established by different bodies: Congress, in conjunction with the federal courts, in the case of federal claims and the Georgia General Assembly in the case of state law claims. They have evolved over hundreds of years, starting with English common law. At the end of the Civil War, civil rights legislation was passed by Congress. More civil rights legislation was passed one hundred years later, during the 1960s, with significant revisions and additions during the 1990s. State legislation has a similarly complex history.[1] The rules of liability and damages have developed piecemeal, as a result of the political process, which is heavily influenced by changing events and is often the result of compromises struck between competing interest groups. Add to this mix the decades of judicial interpretations of these rules and it becomes apparent why there is no rhyme or reason to the complex set of liability rules faced by county government. This chapter describes the rules of liability for counties and their officials and employees, using the three categories of cases you are likely to encounter.

FEDERAL CIVIL RIGHTS AND EMPLOYMENT CLAIMS

Congress has enacted legislation authorizing suits for damages against counties and county officials when a person claims his or her rights, as guaranteed by the United States Constitution, have been violated. This statute is found at Title 42 of the United States Code (U.S.C.), Section 1983,[2] and these cases often are referred to as 1983 actions. Congress has also enacted statutes prohibiting unlawful discrimination in employment, and because counties are employers, they can be sued for these violations as well. A statute commonly referred to as Title VII[3] prohibits employment discrimination on the basis of race, sex, religion, or national origin. There are also federal statutes that prohibit age discrimination (protection for workers aged 40 and over)[4] and discrimination against the disabled.[5] The Family and Medical Leave Act[6] sets forth mandatory rules regarding time off from work, and the Fair Labor Standards Act[7] governs the payment of overtime compensation to employees. A

violation of any of these statutes by a county can result in a lawsuit being filed in federal court.[8] One particular disadvantage of being sued in federal court (as opposed to state court) is that few, if any, of the jurors who are impaneled to hear the case are residents of the county being sued. Those who live outside the county may therefore find it easier to return a verdict against the county when they do not have to pay taxes in that county. Moreover, a successful plaintiff in a federal suit is almost always entitled to a separate award of attorney fees[9] (which can often run in the hundreds of thousands of dollars), in addition to damages, whereas plaintiffs filing state law claims generally are not allowed to recover attorney fees. Because a plaintiff who prevails in federal court is generally entitled to attorney fees, plaintiffs understandably attempt to seek redress under federal law whenever possible. The rules of who can be sued, and for what, are different for each type of federal claim.

Claims under 42 U.S.C. §1983

The Bill of Rights of the Constitution guarantees each citizen the right of free speech (First Amendment), the right to be free from unreasonable searches and seizures (Fourth Amendment), the right not to have one's property taken without just compensation (Fifth Amendment), the right to be free from cruel and unusual punishment (Eighth Amendment), and the right to due process and equal protection of the laws (Fourteenth Amendment). These rights have been interpreted by the courts to cover a broad range of activities that may be infringed upon by the actions of counties and their officials.[10] For example, a county employee who believes she has been turned down for a promotion because she spoke in her capacity as a citizen concerning a matter of concern to the general public can file suit against the commissioners under §1983 for a violation of her right to free speech under the First Amendment.[11] Alternatively, a §1983 claim for an unlawful seizure under the Fourth Amendment may be justified if a person is arrested for "disorderly conduct" upon being unable to produce identification at the request of a county sheriff's deputy.[12] Inmates at county jails routinely file suits under §1983, alleging that jail conditions (e.g., food, lack of exercise, poor medical attention, etc.) constitute cruel and unusual punishment under the Eighth Amendment.[13] The due process and equal protection clauses of the Fourteenth Amendment have been used to challenge myriad decisions by local governments as arbitrary and capricious (a violation of "substantive" due process),[14] imposed without notice and an opportunity to respond (a violation of "procedural" due process),[15] or discriminatory (a violation of equal protection).[16]

Regardless of the factual basis underlying a §1983 suit, the county itself and the county officials actually involved in the conduct in question can be sued, although the rules of liability are very different. A third group—supervisors and officials who were not directly involved but who are alleged to have failed to intervene to prevent a violation or who are sued simply because they are in the chain of command—are sometimes drawn into §1983 suits. In general terms, the rules of liability depend on the class of defendant.

The Person Who Actually Committed the Violation

The individual county official or employee who actually violated the plaintiff's constitutional rights can be sued and held personally liable under 42 U.S.C. §1983. There is no limit or cap on the amount of damages the jury can award, and the jury can even award punitive damages in order to punish the county official.[17] As noted, attorney fees are added to the verdict.[18] Accused county officials, however, can assert a defense known as qualified immunity. The test for qualified immunity is whether a reasonable official who possesses the same knowledge as the official who is on trial would have known that his or her conduct violated the "clearly established" rights of the plaintiff.[19] Many claims do not involve clearly established rights, and qualified immunity can therefore be a powerful defense. In fact, it usually leads to the dismissal of the individual defendants in First Amendment cases[20] and in some Fourth Amendment cases.[21] Additionally, there can be no liability under §1983 when the deprivation was the result of simple negligence on the part of a county official.[22] Instead, there must be proof of an intentional act or at least gross negligence or recklessness.[23]

The County

Under §1983, a county is not held liable simply because one of its employees caused an injury while acting within the scope and course of his or her employment (referred to as vicarious liability or *respondeat superior*). In other words, counties are not automatically liable simply because a county employee violated someone's rights.[24] Rather, the county itself can be held liable only if the violation was the result of an official policy or custom adopted or followed by the county.[25] Official county policy, in most cases, can only be established by a majority vote of the county commissioners. A "custom" can be proved without any official action by the board of commissioners, but it generally takes more than a single or isolated event to prove a custom.[26] A single incident, if not undertaken

by someone who has final decision-making authority on behalf of the county, will not be enough to prove a custom or policy.[27] Argued correctly, this defense frequently will lead to the dismissal of the county from the lawsuit. If the defense is unsuccessful, qualified immunity is not available to the county itself.[28] In other words, the county cannot escape liability by arguing that the plaintiff's rights were not clearly established, as can the individual county official. However, counties (unlike individuals) cannot be held liable for punitive damages.[29] Attorney fees, however, are awarded against the county if the plaintiff wins the case.

Section 1983 liability is complicated regarding the law enforcement actions of sheriffs. Under Georgia law, sheriffs are "county officers,"[30] and courts historically have held counties liable for the actions of their sheriffs. Sheriffs do not answer to the board of commissioners, however, and the board is largely powerless to control the sheriff's law enforcement activities. Moreover, the sheriff generally enforces state law, not county ordinances, and in that sense the sheriff acts as an agent of the state, not the county. A 2002 federal decision[31] indicates that there may be a movement toward counties not being held responsible under §1983 for the sheriffs' acts.

Supervisors and "Chain-of-Command" Officials

Assuming that a county employee has violated a plaintiff's civil rights, the employee's supervisors, up to and perhaps including the county manager and the members of the board of commissioners, may be sued under §1983 for failing to train and supervise the guilty employee or for failing to have adopted adequate policies and procedures that might have prevented the injury. Just as a county cannot be held automatically liable for employing an individual who violates a citizen's civil rights, a supervisor cannot be held automatically liable merely because a subordinate violated a citizen's civil rights. Additionally, liability under §1983 will not be imposed if the plaintiff can show nothing more than negligence or poor planning on the part of supervisors.[32] In order for supervisors to be liable, there must be a "causal connection" between the supervisory deficiency and the deprivation, and the lack of supervision or training must be so severe and pervasive as to amount to "deliberate indifference."[33] In other words, there must be more than inadequate or incomplete training. For §1983 liability based upon negligent supervision, the plaintiff must prove that the negligence was so pervasive that a violation was inevitable. If the supervisor is found to be personally liable, punitive damages and attorney fees may be awarded, with no cap or limit on the amount of the award

that can be imposed. To avoid liability, counties should adopt appropriate policies and procedures regarding the activities of their employees and establish appropriate training and supervisory practices.

Legislative Immunity

Legislative immunity is available to county commissioners who are sued in their individual capacities for civil rights violations, and it provides an absolute bar to both suit and liability. The defense applies to comments or actions taken during a commission meeting while debating the merits of a resolution or ordinance.[34] The act of passing resolutions and ordinances is a legislative function, and commissioners cannot be held liable for anything they might say during the heat of discussion on an issue during a meeting. However, if a commissioner uses defamatory or disparaging remarks while discussing an issue outside of a regular or called meeting (such as at a restaurant, the golf course, or the commissioner's place of business), then legislative immunity does not apply because the setting is not part of the legislative process. There is a statutory defense for defamatory comments made outside of a meeting,[35] but it is not as broad or strong as legislative immunity; the statutory defense can be defeated with proof of malice or evidence that the commissioner knew his or her statements were not entirely factually accurate.[36] Thus, commissioners are well advised to reserve comments or statements of a controversial nature for meetings of the board.

The defense also applies to the actual votes cast by commissioners in favor of or against resolutions and ordinances as long as the resolutions and ordinances involve "policy-making."[37] In other words, the vote has to relate to the public at large. If the vote only addresses a particular entity or individual, the commissioner will not be entitled to legislative immunity.[38] For example, when a commissioner votes to deny a specific person a building or zoning permit, the defense of legislative immunity does not apply because such votes are not considered to be legislative in nature.[39]

Federal Employment Law

Even if a county is an "at will" employer under Georgia law, counties must nevertheless comply with federal employment law. The major statutes include Title VII,[40] the Age Discrimination in Employment Act,[41] and the Fair Labor Standards Act.[42]

Title VII prohibits discrimination based on race, sex, religion, and national origin. It covers all aspects of the employer-employee relation-

ship, including hiring, pay rates, promotion, discipline, and termination. Among the main prohibitions, an employer cannot discriminate on the basis of race or gender. Also prohibited is sexual harassment, including overt behavior such as pressuring an employee to have sex in exchange for a job benefit as well as more subtle forms of unwelcome, offensive behavior (i.e., offensive jokes, pictures, or office talk about sex) that constitutes a "hostile environment."[43] Counties should ensure that they have up-to-date policies against sexual harassment.[44]

Title VII claims that are perhaps less obvious but equally serious are retaliation and discrimination against nonminorities. It is a violation of Title VII to punish an employee because he or she either filed an unsuccessful charge of discrimination or testified on behalf of someone who filed a charge.[45] Many groundless Title VII claims are actually made stronger by employers who make the mistake of retaliating against the person who filed a frivolous allegation. Discrimination suits brought by nonminority individuals are becoming more frequent because of affirmative action or minority preferences adopted by some counties. Although well intentioned, any employment practice that takes race or gender into consideration is probably illegal and a violation of Title VII. Do not assume that helping minorities is legal; discrimination against a majority group can also be a violation of Title VII.[46]

Because Title VII suits may be filed only against the employer, not individuals such as department heads or county managers,[47] the county itself is the only properly named defendant. Since 1991, Title VII cases have been tried by a jury.[48] There is a cap on damages, depending on the number of people employed by the county.[49] Punitive damages are not allowed, but attorney fees may be recovered.[50]

The Age Discrimination in Employment Act protects workers over the age of 40.[51] Employment decisions should not be made on the basis of age. Older workers who have tenure tend to earn more, and their benefits package is usually higher than that of a newer, younger employee. When looking to reduce costs, it may be tempting to terminate older workers and to replace them with younger, "cheaper" employees, but this practice is a violation of the Age Discrimination in Employment Act. A county may lawfully impose a reduction in force in order to cut expenses, but the jobs that are cut must be consolidated or remain unfilled.[52] If the county instead intends to fill the same position with a younger employee who is willing to accept a lower salary, the older employee should be offered a generous severance package in exchange for a release that complies with the special procedural safeguards that protect older workers,[53] and the county must not retaliate if this offer is rejected. Age discrimination

cases may be filed against the county.[54] The case will be decided by a jury.[55] Recoverable damages include lost wages and benefits.[56] Punitive damages are not recoverable,[57] but attorney fees are.[58]

The Fair Labor Standards Act[59] governs overtime pay requirements for county employees and prohibits gender discrimination in the compensation of county employees. There are very specific, different rules for police, fire, and emergency medical personnel. Each county should periodically check its compliance with the Fair Labor Standards Act because even unintentional violations may result in extremely large awards or back pay to large groups of employees that typically are not covered by insurance. Only the county and certain employees in their official capacities can be sued under the Fair Labor Standards Act,[60] and punitive damages are not allowed.[61] Attorney fees are typically awarded to a successful plaintiff.[62] Fair Labor Standards Act cases may be tried by a jury.[63] For more information on federal employment laws, see Chapter 7.

STATE LAW CLAIMS

A tort claim usually involves an accidental injury, although there are intentional torts such as assault and battery and slander. The typical case arises when someone is hurt because a county official performed an act in a negligent manner or failed to act in a reasonable manner. Automobile accidents involving county vehicles and injuries that occur on county property or because of street and road defects are the most common reasons why counties are sued in the state court system. If a county employee operating a county vehicle while on county business causes a collision, a tort claim based on negligent operation of the vehicle can be filed in superior court or, where available, in state court. For example, there are a number of wrecks and lawsuits each year involving the operation of emergency vehicles. Additionally, plaintiffs may cite negligent roadway design, maintenance, or signage as the cause of an accident involving a single vehicle or only private vehicles. In these cases, the county road superintendent or public works director is sued under the theory that the accident was caused by a defect on the county road on which the accident occurred.

In every tort case, the defenses of sovereign immunity and official immunity come into play.[64] Sovereign immunity is a defense that belongs to the county itself.[65] Official immunity is a defense that can be asserted by a county official or employee who is sued in his or her individual capacity.[66] Although both defenses are derived from the same provision of the Georgia Constitution, Article I, Section II, Paragraph IX, they

are not identical. Sovereign immunity, when available to a county, is an absolute defense that bars any recovery. Whether or not sovereign immunity is available is a legal issue for the judge to decide; it is never a jury question.[67] Official immunity, however, is not an absolute defense; it is available only for discretionary duties performed in a nonmalicious manner.[68] If the duty did not require a discretionary judgment call but instead required the county official to act in a clear, direct, and readily apparent manner, it is called a ministerial duty, and there is no immunity from liability if a jury determines that the act or omission was performed in a negligent way.[69] Because official immunity is not as strong as sovereign immunity, it is not uncommon for the county itself to be dismissed from a lawsuit, whereas the county official or employee must remain a party until judgment.

Sovereign Immunity

A county is entitled to sovereign immunity in response to any tort claim except for claims involving the negligent operation of an insured county vehicle.[70] For example, in cases in which the injury was caused because county property was negligently maintained (e.g., broken playground equipment, road defects, a drowning in a county-owned swimming pool, etc.), the county itself is entitled to absolute sovereign immunity from suit because no insured county vehicle caused the injury. The discretionary versus ministerial distinction is irrelevant and inapplicable in determining a county's entitlement to sovereign immunity. Only one question must be answered: Did an insured county vehicle cause the injury? If not, then sovereign immunity applies. If so, then the county itself can be sued. There can be no recovery against the county in excess of the insurance policy limits,[71] and punitive damages are not allowed.[72]

Official Immunity

Regardless of the type of tort suit (e.g., automobile accident, road or park maintenance, public safety claims, etc.), every county official or employee, when sued in his or her individual capacity, can assert the defense of official immunity. The defense will succeed, however, only if the duty in question is ruled to be a discretionary function, and only if the act was performed without malice.[73] If the duty was ministerial (i.e., nondiscretionary), then official immunity does not apply, and it will be up to a jury to decide if the official or employee acted negligently. There is no limit on the amount of the verdict that can be returned against the county official or employee if the jury determines that there has been negligence. If insurance coverage is unavailable or exhausted, then the

judgment can be enforced against the personal assets of the official or employee. Punitive damages are recoverable in cases involving intentional torts.

Two examples from actual cases help explain these immunity provisions. In *Lincoln County v. Edmond*,[74] the county and the county road superintendent were sued for negligence when a felled tree caused a serious accident prior to the arrival of the work crew. The fallen tree had been reported early in the morning, before the workday began, but the superintendent did not go directly to the site as soon as he learned the road was blocked. The county was dismissed based on sovereign immunity because the accident involved only privately owned vehicles, no insured county vehicles. The road superintendent asserted official immunity, claiming he was performing a discretionary function, but his claim to immunity was denied. The court ruled that once the road superintendent knew that the downed tree created a road hazard, he had a ministerial duty to remove it. It was up to a jury to decide if he acted negligently. He therefore faced unlimited exposure, and the case was settled.

In *Cameron v. Lang*,[75] a county sheriff's deputy was pursuing a fleeing felon at a high rate of speed. The felon crossed the centerline and struck a third party's car head on, killing the driver. The deceased driver's widow sued the deputy and the sheriff in his official capacity, which was the equivalent of suing the county government. The deputy was granted official immunity because his actions in pursuing the fleeing felon, in the heat of an emergency, were held to be discretionary. Because, in his official capacity, the sheriff represented the county, he claimed sovereign immunity. However, because the deputy's patrol car was insured by the county, sovereign immunity had been waived, and his immunity defense was rejected. If a jury were to determine that the deputy acted negligently in starting or continuing the chase, then even though the deputy is immune, the sheriff would be liable because sovereign immunity had been waived. The sheriff's liability is limited, however, by the amount of insurance covering the patrol car.

These cases reveal that there are two key questions to be answered in every tort case against a county and its officials and employees: (1) Was there an insured county vehicle involved in causing the injury? (2) Was the official or employee performing a discretionary or ministerial function? If no insured county vehicle was involved, then the county will be dismissed, and the county official or employee will have to stand trial individually. If the county official or employee negligently performed a ministerial function, then there is no limit to his or her personal liability.

During the 2002 legislative session, the Georgia General Assembly decided that counties should not be able to avoid responsibility for accidents involving their county vehicles simply by choosing not to insure those vehicles.[76] Since 2005, counties have been liable for the negligent operation of county vehicles, whether they are insured or not. The limits of liability are $500,000 per person and $700,000 per occurrence.[77] The county employee who negligently operates the vehicle will not be subject to suit or personal liability.[78] Although the legislation did not require counties to insure their vehicles,[79] there is no longer a financial incentive for being uninsured. This legislation applies only to motor vehicle claims; the law of sovereign and official immunity remains the same for cases not involving the operation of county vehicles.

STATE LAW CHALLENGES TO THE DECISIONS OF THE BOARD OF COMMISSIONERS

There are some situations in which an aggrieved party is more interested in overruling a board of commissioners' decision than in suing for damages. The most common examples are zoning and land use decisions and denials or revocations of licenses and permits. In these instances, a person who files suit asks a judge to overrule the commissioners' decision and requests a particular permit or license or that an order be issued giving the property owner the right to use the land as desired. These types of cases seek remedies known as an injunction,[80] a writ of mandamus,[81] or a declaratory judgment.[82] An injunction is a court order to stop a certain type of conduct. For example, a nightclub owner may seek an injunction asking the court to stop the board of commissioners from enforcing an adult entertainment ordinance. The request may also be for an order to change the status quo, such as an order to the commissioners to stop tabling a request to rezone a piece of property. A writ of mandamus is an order from the court requiring that certain actions or decisions be made. For example, an unsuccessful applicant for a beer and wine license may ask the court for a writ of mandamus ordering the commissioners to grant the license. A declaratory judgment action is a request that the court declare the rights and obligations of the parties when there is an actual and present controversy about an issue. A person who believes an ordinance is illegal or unconstitutional can seek a declaratory judgment to have the ordinance stricken.

In each of these cases, commissioners will frequently be sued in their individual capacities because the order that is being sought is designed to

change or overrule the commissioners' conduct or decisions. Monetary compensation for damages allegedly caused by the decision may also be sought in a separate count or claim within the lawsuit, but these specific claims pertain to the correctness of the decision itself and are an effort to get the decision changed. Attorney fees are routinely sought and sometimes awarded if the court agrees with the person seeking the change.

There are a number of defenses that make these claims difficult to win. For example, an injunction will not be issued unless the plaintiff can show irreparable harm and that no other adequate remedy exists except for an injunction.[83] A writ of mandamus will not be issued except in cases in which the plaintiff has a clear, absolute, and nondiscretionary legal right to the relief being sought.[84] A declaratory judgment will not be entered if there is only a hypothetical or speculative dispute, as opposed to an actual controversy.[85] All of these defenses are the result of the judiciary's reluctance to second-guess legislative or executive decisions or to intervene in the day-to-day administration of government.

If the decision at issue is discretionary and involves the weighing or balancing of competing interests, and if there is a record (usually recorded in the minutes) that shows a careful and thoughtful decision was made based on rational factors, then the courts generally will not overturn a board of commissioners' actions. On the other hand, if the county's own ordinance is clear that if certain conditions are met, the rezoning, license, or permit must be issued, and if these conditions are met but the requested action was denied, then the courts will require a county to follow its own ordinance.[86] Similarly, even if the ordinance allows for discretion, if the record is devoid of any articulated reason for the decision or if improper or illegal factors were relied upon, then even discretionary decisions will be overturned. To avoid this type of litigation, therefore, county commissioners should know what their county ordinances say. Further, commissioners should be able to distinguish between ordinances that clearly require a specific decision from those that do allow for discretion and record in their minutes that all relevant factors were considered and no improper or illegal reasons were offered in support of the decision.

Citizens may use improper or illegal reasoning when voicing their opposition to a measure. During a public hearing session of a rezoning request, for example, citizens may state, "we don't need another auto parts store" or "we already have too many starter home subdivisions." The presiding officer needs to be able to tactfully note for the record that these are not appropriate reasons to deny a request. If the request

is denied, then proper reasons, as expressed in the ordinance, need to be recited as the board's (not the public's) reasons for the decision.

RISK MANAGEMENT, INSURANCE, AND INDEMNIFICATION AGREEMENTS

Risk management is a deliberate, proactive process designed to identify areas of potential liability exposure, to reduce the risk of losses, and to provide for the funding of liability losses that do occur. Identification of potential risks is particularly important in the areas of county law enforcement, personnel practices, road construction and maintenance, and land use regulations. A proactive process means identifying a potential problem and taking steps to prevent it rather than simply reacting to problems after they surface. A county risk management program should

- designate an appropriate official to be responsible for overseeing all liability prevention activities;
- increase awareness of liability exposure on the part of county officials and employees through training and seminars;
- monitor legal developments in the area of liability;
- monitor and update administrative policies and procedures, which should be in writing, in compliance with current law, and enforced;
- review personnel polices and practices and institute procedures for responding promptly and equitably to employee problems;
- respond to and record citizen complaints;
- monitor local media to help assess public opinion;
- obtain adequate and comprehensive insurance coverage (whether through commercial insurance, participation in an intercounty insurance pool, or through a self-insured fund); and
- adopt a policy to protect county officials and employees from personal liability for job-related claims.

Risk management has become a recognized discipline taught at colleges and universities, and specialists in this field, working in conjunction with the county attorney and department heads, often make up a county's risk management team. Some counties are able to hire individuals with risk management training or education as part of their permanent staff. Other counties contract for these services privately. Local Government

Risk Management Services, which operates under the direction of the ACCG and GMA, provides free or low-cost risk management services to counties that are insured by the interlocal risk management agency operated by ACCG known as ACCG-IRMA.

By continually assessing the county's risks and being proactive in taking steps to avoid losses, a county not only will avoid liability issues but also will be in a much better position to evaluate its insurance needs and coverage.

When it comes to covering the financial risk of loss, counties have three options: (1) purchase comprehensive general liability insurance from a private carrier, (2) participate in ACCG-IRMA, an entity created by state law[87] and authorized to administer a program of self-insurance for counties who pool together, or (3) self-insure by setting aside funds for contingent liabilities, or reserves, for losses as they occur. Careful consideration should be given to specific coverage provisions: Is there coverage for punitive damages and attorney fees? What role will the county play in settlement negotiations? Do defense costs erode the coverage limits? Will threats of litigation be covered, or will coverage apply only when suit is actually filed? Is there any risk management or loss prevention service that comes with this coverage? What acts or claims are excluded from coverage, rendering the county uninsured? These are some of the factors that good risk management practices must address.

Even if insurance coverage of $1 million or more is procured, an adverse verdict that exceeds the amount covered by insurance may nevertheless be returned against a county official or employee. In other words, there could be a loss that exceeds the county's insurance limits, and the personal assets of the county official or employee may be jeopardized. Some counties have elected to pass indemnification ordinances or resolutions, which basically say that the county will pay an excess verdict in order to protect its employees from personal financial disaster. Obviously, certain terms need to be considered, such as how much the county will pay and what type of conduct by an official or employee should be excluded from protection. Although these agreements are not legally required, there are at least two good reasons to have them: (1) it gives county officials and employees an added level of security, knowing that they will not lose their home or life savings as the result of a lawsuit, which should enable the county to attract and retain better personnel; and (2) without such an agreement, a county official or employee will often demand that cases with large verdict potential (e.g., involving death or paralysis) but with questionable liability be settled in order to eliminate their personal exposure, resulting in the settlement of some

cases that ought to be tried. As an alternative to an indemnification agreement, counties also have the option of buying either higher coverage limits ($3–$5 million is not unreasonable) or buying an excess or umbrella policy for the rare but catastrophic claim. These issues should be considered proactively by the county's risk management team before a multimillion-dollar loss occurs.

NOTES

1. Official Code of Georgia Annotated (O.C.G.A.) §36-92-1 et seq. See section on state law claims in this article.
2. The statute states, "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. . . ."
3. 42 United States Code Annotated (U.S.C.A.) §2000e.
4. 42 U.S.C.A. §623.
5. 29 U.S.C.A. §12101 et seq.
6. 29 U.S.C.A. §2601 et seq.
7. 29 U.S.C.A. §201 et seq.
8. 28 U.S.C.A. §§1331, 1343. Because enforcement of a federal statute is involved, there is no requirement of diversity of citizenship.
9. 42 U.S.C.A. §1988.
10. The United States Supreme Court ruled that counties could be sued as persons under Section 1983 in Monell v. Department of Social Services of City of New York, 436 U.S. 658 (1978).
11. In 2006, the Supreme Court significantly curtailed First Amendment retaliation suits by ruling that a governmental employee who speaks in his employment capacity cannot successfully sue for retaliation under the First Amendment (Garcetti v. Ceballos, 547 U.S. 410 (2006)). In other words, if the employee's speech is linked to the employee's job duties, the employee cannot successfully maintain a First Amendment claim (547 U.S. at 421).
12. See generally Ortega v. Christian, 85 F.3d 1521, 1525 (11th Cir. 1996).
13. Fambro v. Fulton County, Ga., 713 F.Supp. 1426 (N.D. Ga. 1989).
14. McKinney v. Pate, 20 F.3d 1550 (11th Cir. 1994).
15. Cleveland Board of Education v. Loudermill, 470 U.S. 532 (1985).
16. Johnson v. City of Fort Lauderdale, 148 F.3d 1228 (11th Cir. 1998).
17. Smith v. Wade, 461 U.S. 30 (1983).
18. 42 U.S.C.A. §1988.
19. Lassiter v. Alabama A & M University, Bd. of Trustees, 28 F.3d 1146 (11th Cir. 1994). The U.S. Supreme Court has recently clarified the doctrine of qualified immunity. See Hope v. Pelzer, 536 U.S. 730 (2002).
20. Maggio v. Sipple, 211 F.3d 1346 (11th Cir. 2000).
21. Jones v. City of Dothan, 121 F.3d 1456, 1460 (11th Cir. 1997).
22. Daniels v. Williams, 474 U.S. 327 (1986).

23. County of Sacramento v. Lewis, 523 U.S. 833 (1998).
24. Monell v. Department of Social Services of City of New York, 436 U.S. 658 (1978).
25. Ibid. at 690.
26. City of Oklahoma City v. Tuttle, 471 U.S. 808 (1985).
27. Pembaur v. Cincinnati, 475 U.S. 469 (1986).
28. Moore v. Morgan, 922 F.2d 1553, 1556 (11th Cir. 1991).
29. City of Newport v. Fact Concerts, 453 U.S. 247 (1981).
30. Ga. Const. art. IX, §1, ¶3.
31. Manders v. Lee, 338 F.3d 1304 (11th Cir. 2003).
32. Greason v. Kemp, 891 F.2d 829 (11th Cir. 1990). Of course, if the supervisor personally participated in the event causing the injury, or if he or she was physically present and failed to intervene, then personal liability can be established on this basis alone. Dean v. Barber, 951 F.2d 1210 (11th Cir. 1992).
33. Brown v. Crawford, 906 F.2d 667 (11th Cir. 1990).
34. Bogan v. Scott-Harris, 523 U.S. 44 (1998).
35. O.C.G.A. §51-5-7(9).
36. O.C.G.A. §51-5-9.
37. Crymes v. DeKalb County, 923 F.2d 1482, 1485 (11th Cir. 1991).
38. Corn v. City of Lauderdale Lake, 997 F.2d 1369, 1393 (11th Cir. 1993).
39. Corn, 997 F.2d at 1393; Crymes, 923 F.2d at 1486.
40. 42 U.S.C.A. §2000e.
41. 29 U.S.C.A. §621 et seq.
42. 29 U.S.C.A. §201 et seq.
43. Faragher v. City of Boca Raton, 524 U.S. 775 (1998).
44. In order for a county to avail itself of the defense recognized by the U.S. Supreme Court in Burlington Indus., Inc. v. Ellerth 524 U.S. 742, 118 S. Ct. 2257, 141 L. Ed. 2d 633 (1998) and Faragher v. City of Boca Raton, 524 U.S. 775, 118 S.Ct. 2275, 141 L.Ed. 2d 662 (1998), these policies should require employees who witness or experience sexual harassment to report the harassment in writing to the human resources manager of some other high-ranking official who did not participate in the harassment at issue.
45. 42 U.S.C.A. §2000e-3(a).
46. "Discrimination is discrimination no matter what the race, color, religion, sex, or national origin of the victim." Bass v. Board of County Commissioners, 256 F.3d 1095, 1102-03 (11th Cir. 2001).
47. Smith v. Lomax, 45 F.3d 402 (11th Cir. 1995).
48. 42 U.S.C.A. §1981a(c).
49. 42 U.S.C.A. §1981a(b)(3)(A)–(D), as follows: (A) in the case of a respondent who has more than 14 and fewer than 101 employees in each of 20 or more calendar weeks in the current or preceding calendar year, $50,000; and (B) in the case of a respondent who has more than 100 and fewer than 201 employees in each of 20 or more calendar weeks in the current or preceding calendar year, $100,000; and (C) in the case of a respondent who has more than 200 and fewer than 501 employees in each of 20 or more calendar weeks in the current or preceding calendar year, $200,000; and (D) in the case of a respondent who has more than 500 employees in each of 20 or more calendar weeks in the current or preceding calendar year, $300,000.

50. 42 U.S.C.A. §§1981a(b)(1), 2000e-5(k).
51. 29 U.S.C.A. §631(a).
52. Jameson v. Arrow Co., 75 F.3d 1528 (11th Cir. 1996).
53. In order for a settlement with an older worker to effectively protect the county from suit under the Age Discrimination in Employment Act, the release agreement must satisfy specific procedural requirements imposed under the Older Workers Benefit Protection Act, 29 U.S.C.A. §626 (f)(1)(F)(i).
54. Smith v. Lomax, 45 F.3d 402 (11th Cir. 1995).
55. 29 U.S.C.A. §626(c)(2).
56. Goldstein v. Manhattan Industries, Inc., 758 F.2d 1435 (11th Cir.), *cert. denied*, 474 U.S. 1005, 106 S.Ct. 525, 88 L.Ed.2d 457 (1985).
57. Ibid.
58. McKennon v. Nashville Banner Pub. Co., 513 U.S. 352 (1995) (citing 29 U.S.C.A. §626(b)).
59. 29 U.S.C.A. §201 et seq.
60. Welch v. Laney, 57 F.3d 1004, 1011 (11th Cir. 1995).
61. Snapp v. Unlimited Concepts, Inc., 208 F.3d 928 (11th Cir. 2000).
62. 29 U.S.C.A. §216(b).
63. Lorillard v. Pons, 434 U.S. 575 (1978).
64. Ga. Const. art. I, §2, ¶4.
65. Norris v. Emanuel County, 254 Ga. App. 114 (2002).
66. Ibid.
67. Cameron v. Lang, 274 Ga. 122 (2001).
68. Ga. Const. art. I, §2, ¶4(d).
69. Ross v. Taylor County, 231 Ga. App. 473 (1998).
70. Woodard v. Laurens County, 265 Ga. 404 (1995).
71. Ibid.; O.C.G.A. §33-24-51(d).
72. Martin v. Hospital Authority of Clarke County, 264 Ga. 626, 626–27, 449 S.E.2d 827, 828 (1994).
73. Stone v. Taylor, 233 Ga. App. 886 (1998).
74. Lincoln County v. Edmond, 231 Ga. App. 871 (1998).
75. Cameron v. Lang, 274 Ga. 122 (2001).
76. O.C.G.A. §36-92-1 et seq.
77. Ibid.; O.C.G.A. §36-92-2.
78. Ibid.; O.C.G.A. §36-92-3(a), (b).
79. Ibid.; O.C.G.A. §36-92-4(a).
80. O.C.G.A. §9-5-1 et seq.
81. O.C.G.A. §9-6-20 et seq.
82. O.C.G.A. §9-4-1 et seq.
83. Thomas v. Mayor of Savannah, 209 Ga. 866 (1953).
84. Torbett v. Butts County, 271 Ga. 521 (1999).
85. Baker v. City of Marietta, 271 Ga. 210 (1999); Johnson v. Fulton County, 216 Ga. 498 (1960).
86. Cain v. Town of Sparks, 256 Ga. 310 (1986); Hernandez v. Board of Commissioners, 242 Ga. 76 (1978).
87. O.C.G.A. §36-85-1 et seq.