

## Local Government Insurance Trust

# RISK MANAGEMENT BULLETIN

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### Law Enforcement Vehicle Pursuits

Vehicle pursuits by law enforcement personnel can lead to serious property and liability losses. Local governments and law enforcement agencies must deal with this risk by adopting policies and procedures that instruct officers on whether and when they may pursue suspects. The enclosed article, "To Pursue or Not to Pursue" from the March 2003 issue of *Public Risk Magazine*, describes the implications of improper pursuits, alternatives to pursuits, and various risk factors that should be considered to evaluate how prepared an agency is to face the risks of pursuing suspects. The article was reprinted with permission from Public Risk magazine, the official publication of the Public Risk Management Association (PRIMA).

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# To Pursue Or Not to Pursue?



## A Risk Management Approach

For years, law enforcement agencies' executives across the country have struggled with the question of when to allow vehicle pursuits, or whether to allow pursuits at all. Agencies' solutions to the issue have ranged from allowing pursuits under all circumstances to totally banning pursuits regardless of the circumstances. Other questions related to pursuits include: roadblocks, tactical vehicle intercepts, Precision Immobilization Techniques ("PIT"), and multi-jurisdiction pursuits, among others. This article identifies some of the risk management factors to consider when making the decision whether to pursue.

First, it is important to note that under federal law, the scenario under which a pursuit may rise to the level of a viable federal constitutional rights claim is when an officer "seizes" (pursuant to the fourth amendment of the U.S. Constitution) a person during the pursuit. A seizure will usually only occur during a pursuit when officers seize a person by "means intentionally applied." This type of pursuit-related seizure will likely only occur

when officers intentionally ram a vehicle, box in a vehicle, utilize controlled deflation devices or a roadblock, or discharge a firearm at the pursued vehicle or its occupants.

If officers are involved in a pursuit and no one is "seized" by the officers' actions, then the pursuit will most likely not rise to the level of a constitutional deprivation cognizable under federal law. Therefore, this article assumes that agencies understand the distinctions between officers' acts amounting to seizures, and officers' acts that are not seizures. Obviously, agencies must also manage pursuit risks that may rise to the level of federal constitutional violations.

In pursuits, officers and agencies are damned if they do (pursue), damned if they do not, and damned if they do and then call it off. In other words, officers – and agencies – are often criticized when they pursue, when they do not pursue, or when they initiate a pursuit and then call it off. If officers initiate a pursuit that later ends in tragedy or injury, then the pursuit will likely be criticized.

If the officers do not initiate a pursuit and the person being pursued (the "pursuee") crashes into an innocent person, then the officers will likely be criticized for not pursuing and not preventing the innocent person from being injured. If the officers initiate a pursuit and then abandon it, and the pursuee subsequently crashes, or crashes into an innocent person, then the officers will likely be criticized. Pursuits, whether initiated or not, and whether continued of not, often placing officers and their agencies into no-win situations.

Law enforcement is far too often wrongly criticized for the outcomes of incidents as opposed to their decisions. In other words, if officers pursue, but make very bad/dangerous decisions during the pursuit, yet the pursuee is apprehended and no one is injured, then there usually is no criticism of the officers' improper actions or decisions. On the other hand, consider the following: officers engage in a very short pursuit, making all the right decisions, and the pursuee crashes into an innocent person inflicting major

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injuries on the pursuee and the innocent person. The officers will likely be criticized because of the outcome of the pursuit, rather than their actions or decisions during the pursuit. As you can see, while officers should be judged on their actions and decisions, they are far too often wrongly judged primarily on the event's outcome.

Also, when thought is given to who controls a law enforcement event, such as a pursuit, too many people jump to the conclusion that the officers control the event. This conclusion is usually erroneous. When officers arrest a person, whose behavior drives the events, e.g., how much force is going to be used? It is not the officers, but rather the person being arrested. If the arrestee does not produce a weapon or exhibit assaultive or resistive behavior to the officers, then the officers will not use force. However, if the person produces a weapon, attempts to assault the officers, or resists the officers' attempts at restraint, then the officers will use force. So who drives the officers' force response? Clearly, the arrestee drives the events, while the officers may choose the method and degree of response.

The "control" issues with regard to police pursuits are similar. Who controls the pursuit — the officers or the pursuee? If the driver of the vehicle officers are attempting to stop pulls over when the officers activate their vehicles' lights and siren, then there is no pursuit. In the alternative, if the pursuee ignores the officers' direction to stop, then accelerates his vehicle, thereby initiating a pursuit, who is controlling the pursuit? Obviously, it is the offender, and not the officers. Of course, agencies can stop a pursuit before it occurs by developing restrictive pursuit policies directing their officers not to pursue. However, many officers and agencies believe that they have a sworn duty to enforce the law, and that failing to pursue a violator violates this oath.

Some agencies enact restrictive pursuit directives because they offer the path of least resistance — not to mention less potential criticism and risk. What this means in relation to law enforcement, however, is that if officers take no action, then there are no negative potential consequences. With regard to pursuits, if officers never pursue then there will never be any vehicle crashes caused by pursuits. As a result, there will be no pursuit-related disciplinary actions taken against

the officers, there will be (virtually) no viable civil litigation, and there will be no pursuit-related criminal prosecutions against the officers.

Thus, from a pure risk management perspective, one way to control the risks associated with pursuits would be to ban pursuits under all circumstances. In the same vein, one way to eliminate the risks associated with false arrests and the use of force is to ban arrests. One way to eliminate the risks associated with officers shooting someone would be to disarm officers. From these ludicrous examples, it becomes clear that the elimination of risk is not the only concern of law enforcement. As noted above, society still needs law enforcement officers to perform their sworn duties and to enforce the law — in other words, to make arrests, to use firearms, and to pursue.

However, whether an agency allows pursuits — and under what circumstances officers may pursue — may be dictated by the foreseeable risks associated with pursuits. The core risks associated with pursuits can include civil liability, employment practices liability, workers' compensation-related injuries, and criminal prosecution. The primary loss exposures associated with pursuits can include administrative consequences to officers (discipline, termination), injuries to officers, injuries to the pursuee and his passengers, injuries to innocent third persons, property

control factors, and secondary (non-financial) issues and concerns. I've addressed each of these factors below:

- **Federal law** — as noted above, federal constraints on pursuits will normally only be present in pursuit activities (including pursuits, roadblocks, vehicle interception techniques, PIT, etc.) involving "seizures." If no "seizure" occurs, then there will most likely not be a viable federal constitutional claim. If a "seizure" does occur, then the officers' actions in seizing the person must be "objectively reasonable" to be constitutionally acceptable.

- **State law** — states have differing degrees of potential litigation efficacy, liability, and damages relating to pursuit activities. Put another way, in a pursuit-related lawsuit in some states, a plaintiff is virtually barred from any form of financial recovery (or even from initiating a lawsuit). In other states, on the other hand, a plaintiff may have a strong likelihood of possibly recovering millions of dollars. These distinctions are determined by a number of factors, including: the state's legal liability-shielding mechanisms; its liability threshold; its definition of "due regard" (as in officers shall operate their vehicles with "due regard" for the safety of all persons) and whose actions are included within the duty to act with "due regard;" any liability damages caps; the state's joint and several liability stratagem; the comparative fault scheme at

## The core risks associated with pursuits can include civil liability, employment practices liability, workers' compensation-related injuries, and criminal prosecution.

damage, and criminal prosecution of the officers involved. Secondary exposures can include negative media chastisement, bureaucratic consequences, and complaints by special interest groups.

As agencies consider police pursuits from a risk management perspective, they may consider risk factors created by, or associated with, the following: federal law, state law, law enforcement agency factors, assisting agency factors, mechanisms in place to bring pursuits to expeditious and acceptable conclusions, presence or absence of risk

issue; the restrictiveness of state law compared to federal law regarding pursuit activities; the potential for agencies' policies to create a standard of care that can result in liability; extrajurisdictional authority; and justice systems attitudes toward law enforcement.

- **Law enforcement agency factors** — with regard to risk management considerations, include: the agency's philosophy towards pursuits, pursuit alternatives, the agency's geographical area, the availability of backup officers, agency's

policies and directives, pursuit activities training, vehicle equipment, agency supervision, the report writing system, and officer accountability.

- **Assisting agency factors** — include the proximity and likelihood of assisting officers; whether there are multi-agency accepted pursuit guidelines and communications capabilities; the levels of professionalism of the assisting agencies; and whether the assisting officers have pursuit termination equipment (controlled deflation devices) and techniques (roadblocks, vehicle intercept, PIT).

- **Mechanisms in place to bring pursuits to expeditious and acceptable conclusions** — including the agency's equipment (e.g. controlled deflation devices, common pursuit communications frequencies between agencies, etc.); whether the agency's officers have techniques that allow roadblocks, vehicle intercept techniques, and PIT; and the agency's ability to immediately and continuously oversee/supervise pursuits.

- **Presence or absence of risk control factors — factors to be considered include:** officer training in pursuit activities; procedural

directives that can be, and are, followed by officers in pursuit activities; well-developed incident report generation procedures; post-pursuit review process; and a vehicle operations accountability program.

- **Secondary (non-financial) issues and concerns** — what are the governing bodies' attitudes regarding law enforcement activities, and how pro-law enforcement is the local media?

Thus, from a risk management perspective, decisions regarding whether to permit pursuit activities will be dependent upon the above-listed, and possibly other, factors. To put it another way, if an agency's foreseeable conclusions to a pursuit are limited to: (1) the pursuee crashes, (2) the officer crashes, (3) the pursuee or the officer crashes into a third-person, (4) the pursuee and the officer crash together, (5) the pursuee runs out of gas, (6) the officer runs out of gas, or (7) the pursuee gets away — then what is the point of pursuing? Pursuit policy should necessarily be more restrictive if the law enforcement agency is poorly managed and located in a state where pursuits are likely to result in enormous losses because of the state's civil liability stratagems.

At the opposite end of the risk management spectrum, consider a law enforcement agency that is located in a state where there is virtually no possibility of state-level liability. If that agency has put into place every liability-shielding mechanism possible, carefully manages pursuits, has equipped its officers well, trains its officers in road blocks and vehicle intercept techniques, works closely with foreseeable assisting agencies to have a common pursuit communications frequency and comparable pursuit policies, then aren't that agency's pursuits more likely to come to an acceptable conclusion from a risk management perspective? In other words, when agencies have carefully considered the pursuit question and conscientiously created conditions that minimize risk, aren't those agencies more likely to bring almost any pursuit to an expeditious and safer conclusion?

Carefully examine the Pursuit Risk Management Considerations Chart and determine where your agency stands with regard to the risks of pursuit. Once you have performed your analysis, then decide: to pursue, or not to pursue? •

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## Risk Management Considerations: Police Pursuits

HIGH RISK FACTORS	RELEVANT RISK MANAGEMENT FACTORS	LOW RISK FACTORS
FEDERAL LAW FACTORS		
STATE LAW FACTORS		
No liability shielding under state law	Liability Shielding Mechanisms	Strong liability shielding mechanisms
"Negligence" threshold	Vehicle Operations Liability Threshold	"Willful misconduct" threshold
Includes pursuees' actions	Definition of "Due Regard"	Only applies to officers' actions
No cap on damages (unlimited \$)	Liability/Damages Cap/Limits	Low damage cap (e.g. \$50,000)
Pure joint & several liability present	Joint & Several Liability Stratagem	No joint & several liability
Pure comparative fault	Comparative Fault Parameters/Scheme	50% or 51% bar to liability
State law is more restrictive than federal law (e.g. roadblocks, checkpoints, etc.)	Restrictiveness - state law compared to federal law on pursuit activities	State law is virtually identical to federal law standards of conduct/restrictiveness
Policies can create "standards of care"	Policies creating liability standards of care	Policies cannot create "standard of care"
Limited extra-jurisdictional authority	Extra-jurisdictional authority	Broad extra-jurisdictional authority
Pro plaintiffs, anti-law enforcement/defendants	Justice systems attitudes toward law enforcement	Pro-law enforcement/defendants
LAW ENFORCEMENT AGENCY FACTORS:		
Pursue everyone	Basic Philosophy - Restrictiveness	Ban pursuits, pursue only more dangerous persons, or allow less restrictive pursuits – but the pursuits are well managed
Pursue until: (1) Pursuee crashes, (2) Officer crashes, (3) Pursuee escapes, (4) Pursuee runs out of gas, (5) Pursuee and Officer crash, etc. No equipment or techniques in place to bring pursuits to a successful conclusion	Basic Philosophy - Pursuit Alternatives	Bring pursuit to a non-injurious conclusion as expeditiously as possible. Agency utilizes numerous pursuit concluding options, including: controlled deflation devices, roadblocks, PIT, multi-agency emergency communications frequency etc.
Patrol area - primarily urban, high population density	Agency Geographical Area - Patrol Area	Patrol area - primarily rural, low population density
No, or few, backup/assist officers available	Backup/assisting officers	Several backup/assist officers available.
None existent, not followed, not workable, or very limited, direction, policy, or directives	Direction/Policy	Well-developed, carefully constructed policies and directives that are officer friendly and field workable. Policies do not create a standard of care.
No, or very limited, training	Training	Initial and ongoing training, including: parking, emergency driving, pursuits (including decision making), PIT, controlled deflation devices, roadblocks, supervisory oversight, multi-vehicle coordination, etc.

chart continued on next page

## Risk Management Considerations: Police Pursuits

Older, poorly maintained, equipment arranged/mounted in such a way to require officers to take their eyes off of the road to operate	Vehicle Equipment	Newer, well maintained vehicles, equipment arranged/mounted to avoid officers taking their eyes off of the road
Unworkable supervision/pursuit oversight policies.	Supervision	Workable supervision/pursuit oversight policies.
Officers write very poor reports.	Report Writing System	Officers are well trained in writing reports and a well developed systems exists to assist officers with pursuit reporting
Officers seldom held accountable for their pursuit related actions	Accountability	Every pursuit analyzed for appropriate officer behavior and officers are held accountable for policy violations

### ASSISTING AGENCY FACTORS

Few officers available	Proximity and likelihood of assisting officers	Numerous assisting officer available
No agreed upon multi-agency pursuit guidelines	Multi-agency pursuit guidelines	Well developed multi-agency pursuit guidelines
No common communications frequency	Multi-agency pursuit communications	Common multi-agency pursuit communications frequencies
Poor professionalism	Assisting agency's officers' professionalism	High level of professionalism
No equipment, techniques, or training for ending pursuits	Assisting officers' equipment/techniques	Officers have controlled deflation devices, officers are trained in roadblocks, intercept techniques, PIT, etc.

### EQUIPMENT/TECHNIQUES TO CONTROL OR END PURSUITS

No controlled deflation devices	Equipment	Every vehicle equipped with controlled deflation devices
No common pursuit communications frequency	Pursuit communications frequency	Common pursuit communications frequency
No training in roadblocks, vehicle intercept techniques, PIT	Pursuit termination techniques	Officers trained in roadblocks, vehicle intercept techniques, PIT
Supervisors not available, not trained in pursuit oversight	Pursuit oversight	Supervisors continuously available to oversee pursuit, and pursuit guidelines workable for supervisor's input

### SECONDARY (NON-FINANCIAL) ISSUES AND CONCERNs

Governing bodies constantly battling with law enforcement	Governing bodies attitudes	Governing bodies helpful to law enforcement and do not inappropriately criticize actions
Local media constantly inappropriately criticizing law enforcement actions	Local media	Good relationship between local media and law enforcement