



National Trends & Emerging Claim Issues

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SEPTEMBER 12-15, 2017
SOUTH LAKE TAHOE, CA



Agenda: National Trends and Emerging Claims Issues

- National Trends and Verdicts
- Public Entity Trends and Verdicts
- Public Entity Emerging Claim Exposures
 - Law Enforcement
 - General Trends
 - Exoneration
 - Deliberate Indifference
 - Responsibilities to the mentally ill
 - Employment Practices Liability



National Trends and Verdicts

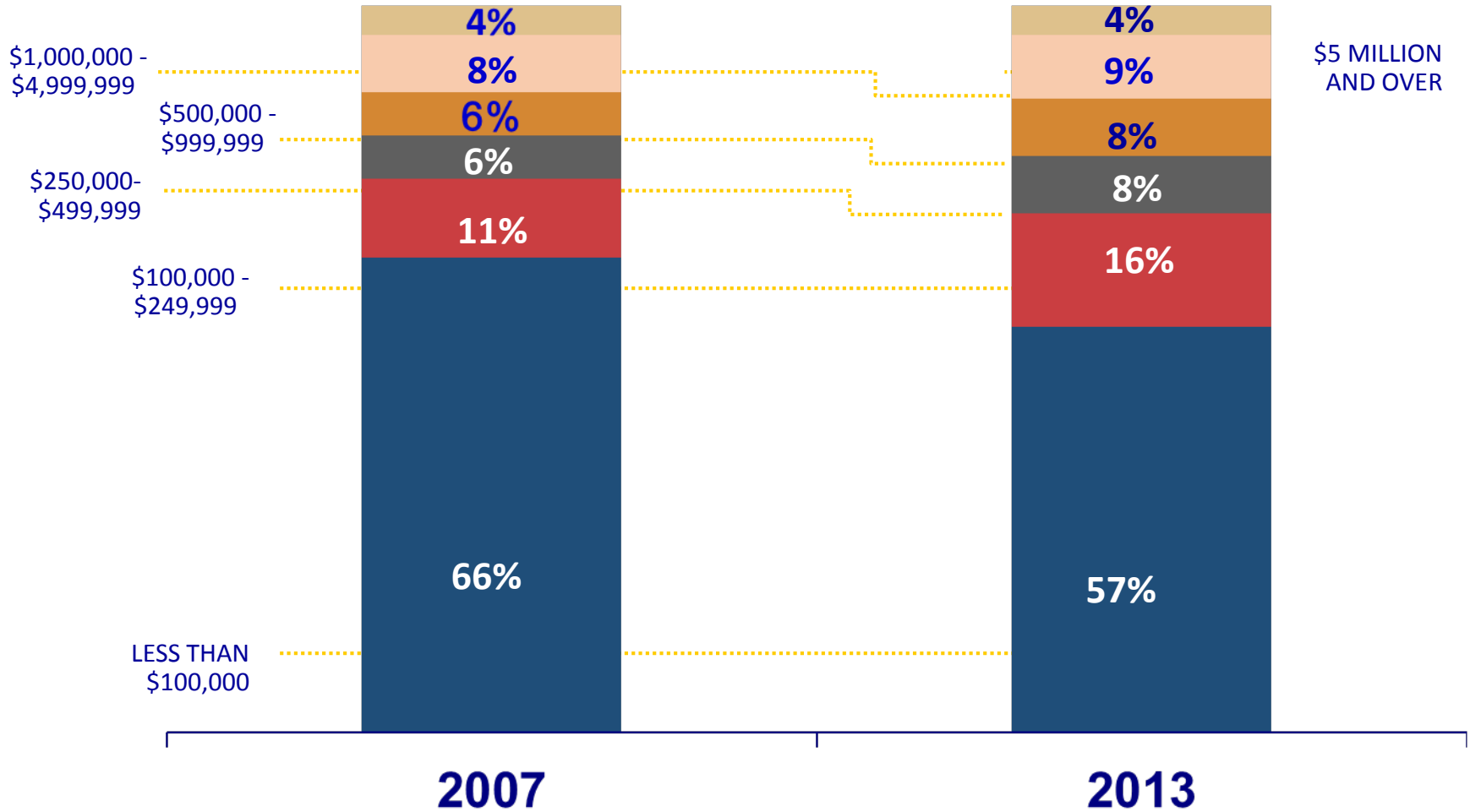


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Rising Jury Awards



Source: Jury Verdict Research. *Current Award Trends in Personal Injury*, 54th Edition 2015



Summary of Top 100 Verdicts by Year

	2012	2013	2014	2015	2016
Top Awards	\$11.6B	\$10B	\$40.5B	\$7.7B	\$17B
Number of Top 100 Awards Greater Than \$20 Million	88	100	100	100	100
Median Award for Top 100 Verdicts	\$41.0M	\$38.5M	\$40.5 M	\$40M	\$38.6M

Source: TopVerdict, Top 100 Verdicts, 2012, 2013, 2014, 2015, 2016



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Percentage of Awards of \$1 Million or More Total Awards

Region	2007 -2009	2010-2011	2012-2013	Overall
Mid-Atlantic	12%	10%	10%	11%
Midwest	11%	18%	20%	13%
North Central	11%	8%	9%	10%
Northeast	20%	16%	18%	19%
Northwest	8%	11%	18%	11%
South Central	11%	15%	20%	13%
Southeast	14%	18%	28%	16%
Southwest*	19%	20%	18%	19%

*Southwest includes; Arizona, California, Colorado, Hawaii, New Mexico, Nevada and Utah.

Source: Jury Verdict Research, *Current Award Trends in Personal Injury*, 54th Edition , 2015



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Median Compensatory Awards for Personal Injury (2007-2013)

State	Median Award
New York	\$280,000
Louisiana	\$166,475
California	\$123,067
Texas	\$13,137
Oklahoma	\$10,000
National, Overall	\$45,001

Source: Jury Verdict Research, *Current Award Trends in Personal Injury*, 54th Edition 2015



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2016 Top 10 Verdicts - Nationwide

Verdict	Issue
\$3.014B	Breach of Contract – <i>Hewlett Packard v. Oracle Corporation</i>
\$2.64B	Wrongful Death; Rape; Murder – <i>Estate of Thomas v. State of Nebraska</i>
\$2.54B	Patent Infringement – <i>Ideniz Pharmaceuticals Inc. v. Gilead Sciences Inc.</i>
\$1.041B	Personal Injury; Negligent Misrepresentation; Product Liability - <i>Andrews., et al. v. DePuy Orthopaedics Inc., et al.</i>
\$940M	Intellectual Property Infringement - <i>Epic Systems Corp. v. Tata Consultancy Services Limited</i>
\$775M	Securities Fraud - <i>Liberty Media Corp., et al. v. Vivendi Universal S.A., et al.</i>
\$625.6M	Patent Infringement - <i>Virnetx Inc., et al. v. Apple Inc.</i>
\$504.8M	Wrongful Death; Murder - <i>Estate of Rotell v. Gaime, Hillsborough Co.</i>
\$502M	Personal Injury; Negligent Misrepresentation; Product Liability - <i>Aoki v. Depuy Orthopaedics Inc., et al.</i>
\$302.4M	Patent Infringement - <i>VirnetX Inc. v. Cisco Systems Inc.</i>

Source: TopVerdict.com



California – Top 10 Personal Injury Verdicts in 2016

Amount	Type	Case
\$125,168,202	Car Accident	Briones v. Zink
\$ 46,000,000	Car Accident	Solorio v. Nissan Of Fontana Inc. et al.
\$ 29,062,351	Car Accident	J.P., pro ami Rojas v. Sunde
\$ 22,588,041	Motorcycle Accident; Premises Liability	McCoy v. California Department of Transportation
\$ 21,657,000	Moped Accident	Danielle Laws v. Chen
\$ 18,070,000	Asbestos Exposure	Depoian v. American International Industries, Inc., et al.
\$ 14,967,421	Car Accident; Product Liability	Gray v. Mazda Motor of America Inc.
\$ 11,980,000	Work Accident; Duty to Warn	Hukill, et al v. California Department of Transportation
\$ 11,000,000	Pedestrian Accident	Kim v. Baltayan
\$ 9,860,631	Pedestrian Accident	Carly Bray v. Kassandra Hoelscher

Source: TopVerdict.com



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Nuclear Verdicts

- Generally defined as a verdict in excess of \$10 million, or perhaps less than \$10 million, but still high considering the injuries and damages.
- Typically involve aggravating factors such as a fatigued driver, distracted driving, maintenance issues, etc.

Source: Wall Street Journal, Nuclear' Verdicts Have Insurers Running From Trucks 10/14/15

Source: PCI Commercial Auto Insurance Bulletins, Commercial Auto Nuclear Verdicts, 5/8/17, 5/23/17 & 7/17/17



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What's Behind Some of These Trends

- Rising medical costs
- Automobile results
- Plaintiff attorney strategies
- Social inflation



Social Inflation

Social inflation is the increase in insurance losses caused by factors such as higher jury awards, changing judicial decisions and/or legislative changes.

- Media attention
- Federal judiciary
- Advertising for legal services
- Third party litigation funding

2017 Assured Research Report “Social Inflation is Back”



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Legal climate overall rankings by state

LEGEND BY RANKINGS

1-10

11-20

21-30

31-40

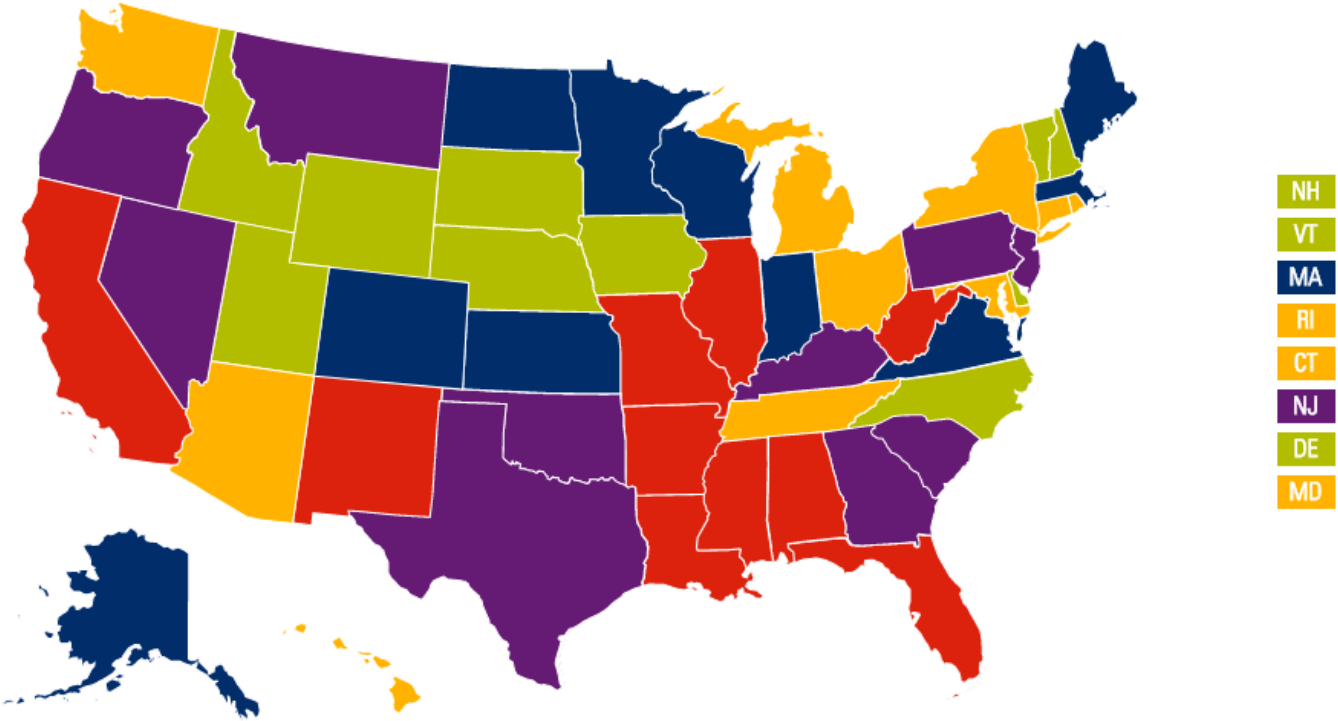
41-50

CHOOSE A YEAR

'15

'12

'10



Source: US Chamber of Commerce Institute for Legal Reform, "Legal Climate Overall Rankings by State," accessed 7-7-2017



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Cities or Counties with the Least Fair and Reasonable Litigation Environment

State	Total %
East Texas	26%
Chicago or Cook County, Illinois	20%
Los Angeles, California	16%
Madison County, Illinois	16%
New Orleans or Orleans Parish, Louisiana	15%
New York, New York	10%
San Francisco, California	10%
Miami or Dade County, Florida	10%
Philadelphia, Pennsylvania	7%
St. Louis, Missouri	7%

Source: US Chamber Institute for Legal Reform - “2015 State liability systems survey lawsuit climate ranking the states”



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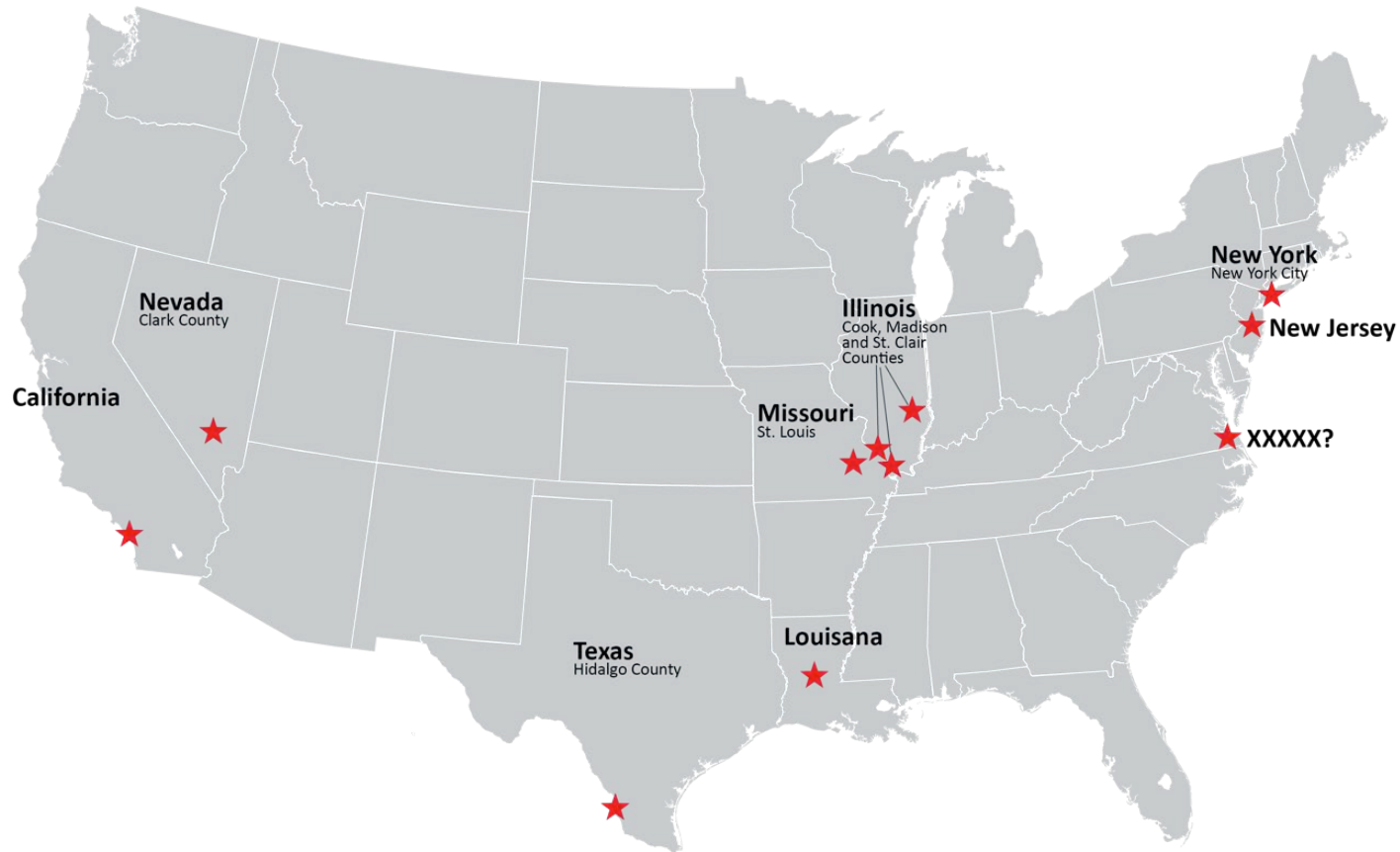
Top/Bottom 5 States for Juries' Fairness – 2015

Best	Worst
Nebraska	Louisiana
Delaware	California
New Hampshire	Illinois
Iowa	West Virginia
Vermont	Alabama

Source: US Chamber Institute for Legal Reform - "2015 State liability systems survey lawsuit climate ranking the states"



ATRA's 2016-2017 "Judicial Hellholes"



- According to ATRA, a number of factors contribute to a Judicial Hellhole designation, including forum shopping; novel legal theories; discovery abuse; improper certification of class action lawsuits; proliferation of junk science; alliances between lawyers, judges and attorney generals; and uneven application of evidentiary rules.

Source: American Tort Reform Association, Judicial Hellholes 2016-2017



Public Entity Trends and Verdicts



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Million-Dollar Total Awards Reported by Liability

Liability	2007 – 2009	2010 – 2011	2012 – 2013
Products Liability	64%	70%	71%
Medical Malpractice	55%	52%	53%
Government Negligence	42%	18%	30%
Business Negligence	24%	29%	22%
Premises Liability	15%	15%	12%
Personal Negligence	16%	11%	10%
Vehicular Liability	6%	5%	7%
All Liabilities	14%	14%	16%

Source: Jury Verdict Research, *Current Award Trends in Personal Injury*, 54th Edition, 2015



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Examples of Large Jury Verdicts Against Public Entities Throughout the US in 2013 - 2014

Verdict	Issue	Venue
\$172M	Negligence (New York City)	New York
\$40M	Wrongful Conviction (New York City)	New York
\$18M	Civil Rights (New York City)	New York
\$16.3M	Negligence & Careless/Reckless (Connecticut State Patrol)	Connecticut
\$16M	Dangerous Conditions/Public Property (New York City Transit Authority)	New York
\$15M	Discrimination/Hostile Work Environment (Newark Public Schools)	New Jersey
\$14.9M	Civil Rights/Workplace Negligence (City of Duluth)	Minnesota
\$12.1M	Sexual Abuse (Archdiocese of Seattle)	Washington

*Note: These verdicts do not include California cases.

Source: Munich Re Public Entity Claims Handling Research Guide, 2nd Edition, 2014 /Verdict Search



Examples of Large Jury Verdicts/Settlements Against California Public Entities in 2013-2014

Verdict	Issue	Defendant
\$15.3M	Motor Vehicle/Bus Accident	Alameda-Contra Costa Transit District, Oakland, CA
\$15M	Motor Vehicle Accident	CAL Fire
\$13M	Sexual Abuse	Arch Diocese of Los Angeles
\$12.3M	Disability Discrimination	City of Los Angeles
\$10.6M	Motor Vehicle Accident/Dangerous Conditions	State of California
\$8.8M	Motor Vehicle Accident	Kern County
\$7.5M	Motor Vehicle/Bus Accident	Sacramento Regional Transit District
\$4.5M	Excessive Force	City of Downey

Source: Munich Re Public Entity Claims Handling Research Guide, 2nd Edition, 2014/Verdict Search



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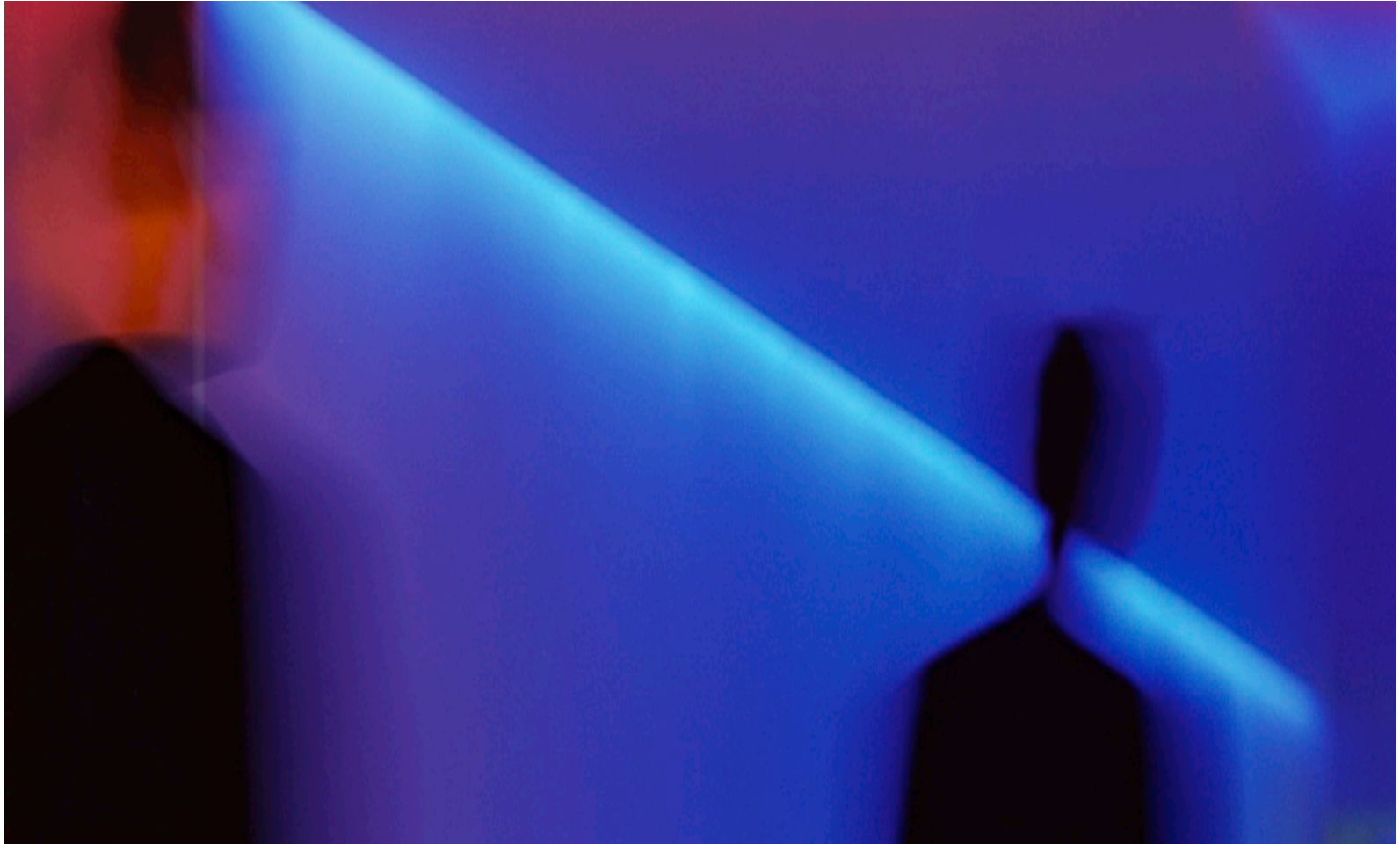


More recent Examples of Large Jury Settlements Against Public Entities

- June 2017 - Panish Shea & Boyle LLP obtained a \$23.5M settlement on behalf of the family of a 19-year-old non-verbal autistic student who died after being left along for hours on a school bus. The driver was accused of engaging in a sexual tryst with a co-worker at the time of the incident. (ABC News 6/12/17)
- The Los Angeles Unified School District agreed to pay \$88 million to settle two sexual abuse cases. The families of 30 children abused at two different elementary schools will receive about \$3 million apiece. (USA Today 5/16/16)
- The families of five Washington state high school students shot in a high school cafeteria in 2014 settled a lawsuit against the school district's insurance company for \$18 million. The settlement amount was determined by the cap of the Marysville School District's insurance policy. Plaintiffs elected not to pursue amounts that would erode the school district's general budget designated for educating and protecting students. The lawsuit alleged that a substitute teacher had been told of the possibility of a shooting but failed to alert school officials. (Insurance Journal 8/2/17)



Public Entity Emerging Claim Exposures



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Law Enforcement Liability (LEL)



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Anatomy of a Civil Rights Action

The Civil Rights Act, also known as § 1983, provides

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... 42 U.S.C. § 1983.



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Bill of Rights

- **Amendment I:** Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.
- **Amendment IV:** The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.
- **Amendment V:** No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury,... nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law;...
- **Amendment VI:** In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.
- **Amendment VIII:** Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.
- **Amendment XIV, § 1:**... No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws. U.S. Const. Amend. I-X, XIV, § 1.



Damages in a Civil Right Action

- Compensatory damages
- Attorneys fees
- Punitive damages



Trends

- General trends
- Exoneration claims
- Deliberate indifference
- Responsibilities to the mentally ill



General Trends

- Media attention
- Video
 - Body cams / dash cams / surveillance video / cell phone video



Video Conundrum

- If it doesn't exist, people are suspicious
- Inherent bias
- Ray Rice Effect



Police Deaths

- Michael Brown / Ferguson, MO
- Tamir Rice / Cleveland, OH
- Freddy Gray / Baltimore, MD
- Eric Garner / Staten Island, NY
- Keith Lamont Scott / Charlotte, NC
- Alton Sterling / Baton Rouge, LA
- Walter Scott / North Charleston, SC
- Akai Gurley / Brooklyn, NY
- Terence Crutcher / Oklahoma
- Philando Castille / Minnesota



The Cost of LEL Events

- Settlements/verdicts
- Civil unrest
- Lawsuits filed by protestors
- Retaliatory shootings

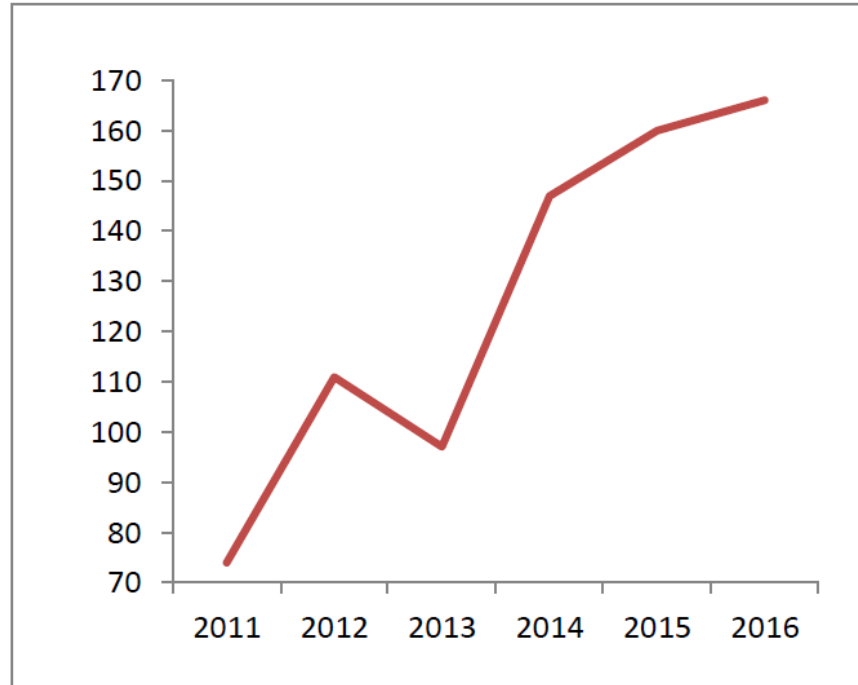


Other Common LEL Claims

- Excessive force
- Suicide
- Pursuit
- Wrongful conviction / exoneration
- Deliberate indifference to the medical needs of an individual in custody
- Mentally ill



Number of Exonerations per Year 2011 – 2016



- 166 Exonerations in 2016
- 84 Exonerations in 2017 as of 8/7/17

Source: National Registry of Exonerations, University of California Irvine



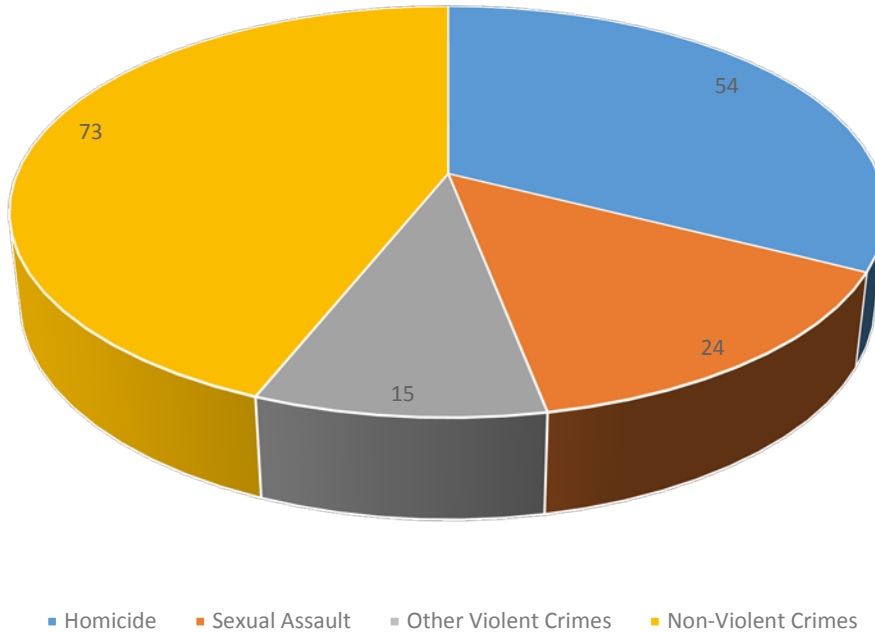
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2016 Exonerations – By Crime

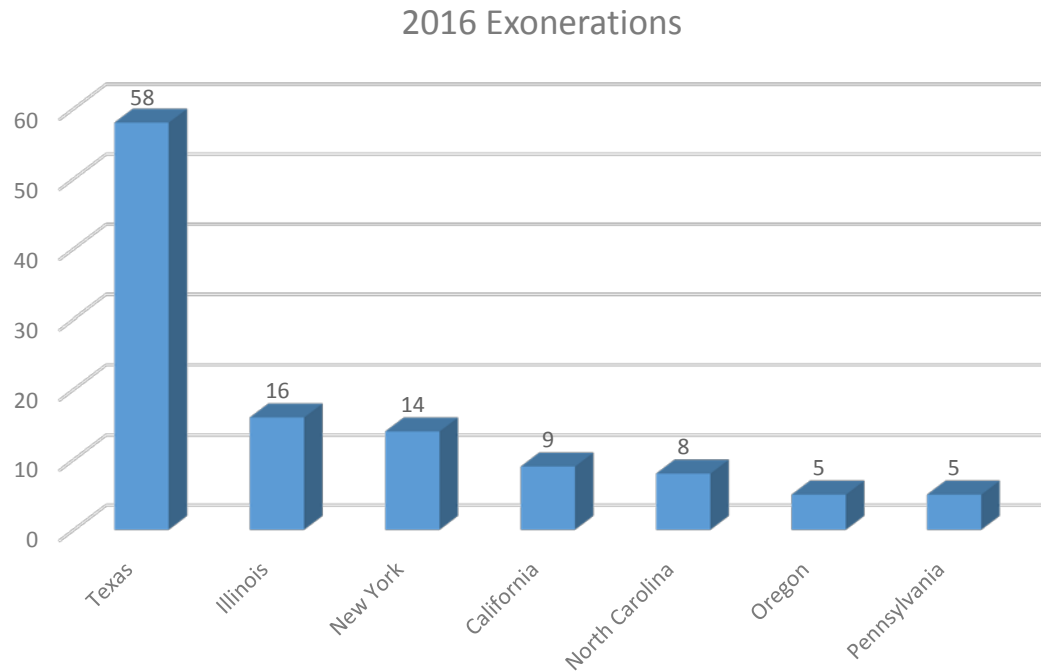
216 Exonerations



Source: National Registry of Exonerations, University of California Irvine



Top States for Exonerations in 2016



Source: National Registry of Exonerations, University of California Irvine



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Drug Exoneration Cases – Harris County, TX

- Third straight year with record numbers of exonerations in drug cases.
 - 43 in 2014, 53 in 2015, and 61 in 2016.
 - Each year, the vast majority of these were the result of a Conviction Integrity Unity (CIU) in Harris County (Houston) Texas
 - 72% in 2014, 83% in 2015, and 79% in 2016.
- In 2014, a Deputy District Attorney newly noticed a number of cases in which defendants pled guilty to possession of illegal drugs, and then, months or years later, a crime lab report revealed that the materials seized contained no controlled substances.
 - 94 of the 140 exonerations, the defendants were arrested on the basis of “field tests” that indicated the presence of controlled substances. Drug field tests are notoriously unreliable; routinely misidentify everything from Jolly Ranchers, soap or cat litter as illegal drugs. They are inadmissible as evidence in court but sufficient to justify an arrest.
 - In the other cases, the arresting officers mistook an innocent white powder for cocaine, a hand-rolled cigarette for marijuana, or non-prescription pills for controlled drugs.

Source: National Registry of Exonerations, University of California Irvine



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Characteristics of 2016 Exoneration Cases

- Official misconduct: 70 exonerations (42%) involved misconduct, a record number
- Guilty Pleas: 74 exonerations were for convictions based on guilty pleas, also a record
 - 47 of the 74 drug cases (77%)
 - 6 of the 54 homicide cases (11%)
 - 4 of which involved false confessions
- No Crime Cases: 94 exonerations were cases in which no crime actually occurred, also a record
 - 2/3 drug cases
 - 1 murder
 - 16 sex crimes (all but one for child abuse)

Source: National Registry of Exonerations, University of California Irvine

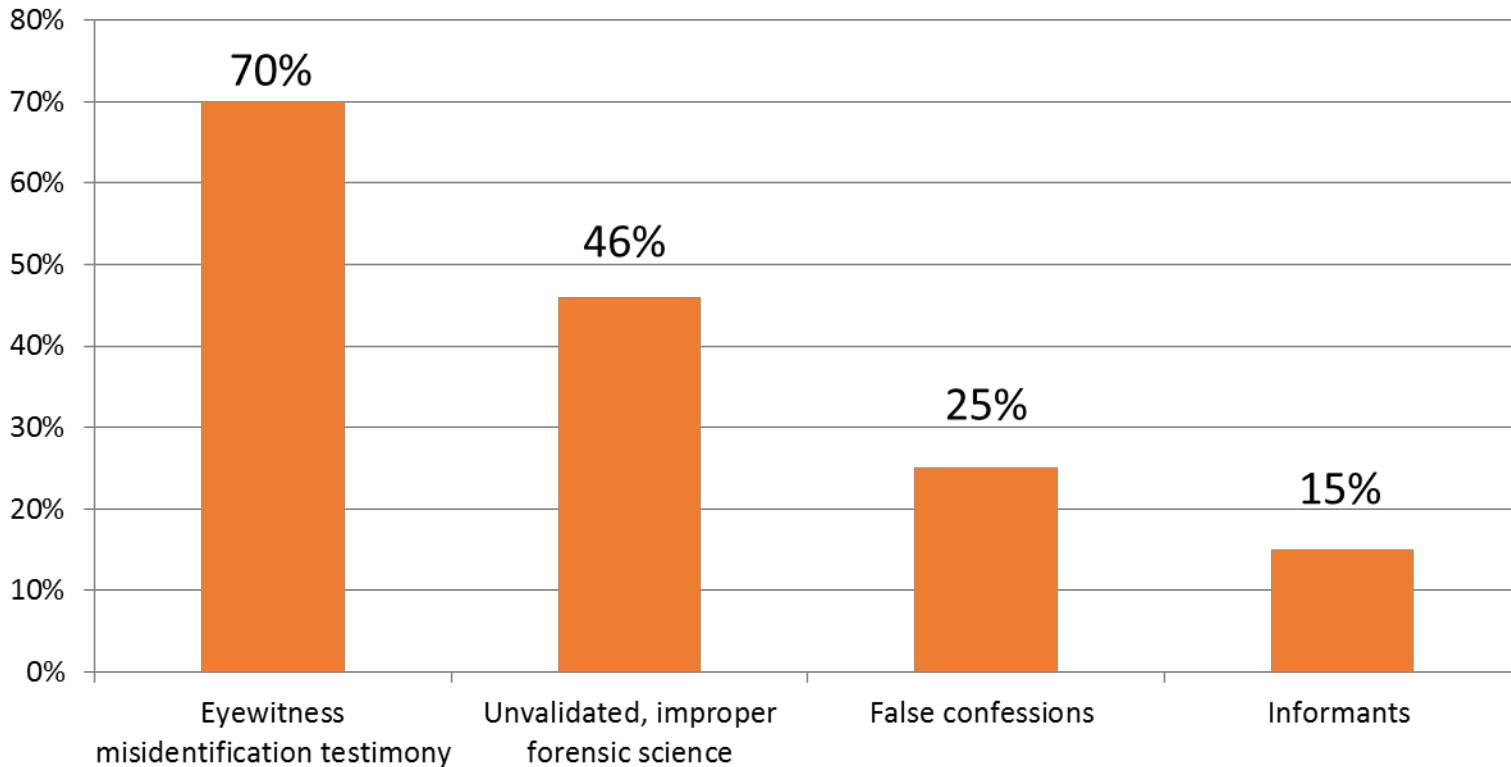


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Leading Causes of Wrongful Convictions

Leading causes / contribution percentage



Source: The Innocence Project, "The causes," accessed 6/23/2017



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Eyewitness Testimony

Research illustrates that the human mind is not like a tape recorder; we neither record events exactly as we see them, nor recall them like a tape that has been rewound. In eyewitness identifications, witness memory is impacted by a variety of factors that occur from the time of the crime onwards, and their memories can be easily contaminated.

Source: The Innocence Project, "The causes," accessed 7/27/2017



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Conviction Integrity Units (CIU)

A Conviction Integrity Unit (CIU) is a division of a prosecutorial office that works to prevent, identify and correct false convictions.

- There were 29 CIUs in the United States in 2016, more than double the number in 2013 and almost five times the number in 2011.
- **A record 70 CIU-exonerations** took place in 2016. Overall, CIUs have helped secure 225 exonerations from 2003 through 2016; more than 80% occurred since 2014.

Source: National Registry of Exonerations, University of California Irvine



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Conviction Integrity Units @ 2016

County	State	Population	Exonerations
Santa Clara	CA	1,862,041	4
Dallas	TX	2,368,139	25
Harris	TX	4,092,459	128
New York	NY	1,585,873	5
Kings	NY	2,504,700	23
Baltimore City	MD	621,342	4
Cook	IL	5,194,675	20
San Diego	CA	3,211,252	1
Lake	IL	703,462	2
Oneida	NY	234,878	0
Middlesex	MA	1,503,085	1
Nassau	NY	1,339,532	0
Sacramento	CA	1,418,788	0
Suffolk	MA	722,023	0
Ventura	CA	839,620	1
Cuyahoga	OH	1,280,122	0
Dist. Columbia	DC	601,723	0
Multnomah	OR	756,530	5
Philadelphia	PA	1,526,006	2
Pima	AZ	1,003,235	0
Yolo	CA	204,593	0
Bexar	TX	1,714,773	2
Los Angeles	CA	9,818,605	0
Orleans	LA	NA	1
Tarrant	TX	1,809,537	0
Travis	TX	1,024,266	0
Putnam	NY	99,710	1
Clark	NV	1,951,269	0
Orange	NY	372,813	0
San Francisco	CA	805,235	0

Source: National Registry of Exonerations, University of California Irvine



Wrongful Conviction Verdicts/Settlements

- **Federal jury** awarded almost **\$13.4 million** to a **Chicago** man who alleged police and prosecutors coerced him into confessing to a 1992 double murder that landed him in prison for more than two decades and became a defining case in the city's long history of wrongful convictions. (Chicago Tribune, 4/12/17)
- **Federal jury** awarded a whopping **\$22 million** in damages to a former El Rukn gang member who alleged two **Chicago** police detectives framed him for an infamous 1984 double murder that sent him to death row. (Chicago Tribune, 12/15/16)
- On April 21, 2016, **New York City** agreed to pay **\$40 million** in settlement with five Bronx residents who were convicted in various capacities in connection with the 1995 murders of livery cab driver and Federal Express employee following misconduct on the part of the investigating detectives. (National Police Accountability Project, 8/4/16)
- **\$16.5 million** for the plaintiffs, which includes the families of the three men, for a lawsuit that claimed the men were imprisoned for decades because they were forced to confess to a crime they did not commit. The courtroom was full of attorneys for the families, **Hattiesburg (MS)** and Forrest County and half a dozen insurance companies. (Hattiesburg American, 8/1/16)
- Two **suburban New York** men who spent 18 years in prison for the 1984 rape and murder of a 16-year-old girl, only to be exonerated when a DNA test showed that another unknown assailant had committed the crimes, were awarded **\$18 million each** in a federal civil rights lawsuit. (Associated Press, 4/17/14)



Final Comments - Exoneration

- Low frequency – High severity
- Complex case with respect to
 - Liability
 - Damages
 - Coverage



Deliberate Indifference to a Serious Medical Need - Inmate Claims



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Legal Precedent

- The U.S. Supreme Court has established that there is an obligation to provide adequate medical care to detainees and prisoners.
 - Estelle v. Gamble, 429 U.S. 97 (1976)
 - Created the precedent for convicted prisoners and establishes the source of the obligation stems from the Eighth Amendment to the U.S. Constitution, and its prohibition on “cruel and unusual punishment.”
 - Bell v. Wolfish, 441 U.S. 520 (1979)
 - Court ruled that the obligation to provide such care to pre-trial detainees arises from the due process guarantees of the Fourteenth Amendment, and that failure to provide such care would essentially constitute a form of punishment imposed on persons not convicted of a crime, which is impermissible.
- The standard to establish a constitutional violation is the same regardless of whether plaintiff is a detainee or a convicted prisoner

Source: 2007 (9) AELE Mo. L. J. 301
Jail & Prisoner Law Section – September, 2007



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What is Deliberate Indifference?

Farmer v. Brennan, 511 U.S. 825 (1994). Plaintiff needs to show three elements:

1. Substantial risk of harm to the inmate (Objective)

2. Knowledge of the risk (Subjective)

- Actual knowledge of a medical need; or
- Constructive knowledge – a risk so obvious that a reasonable person would have known that it existed

3. Defendant consciously disregarded that risk (Subjective)

- More than simple negligence or lack of ordinary due care
- “Recklessness”

Source: Risk Management of Deliberate Indifference, A Conundrum? T. Allen Usry - Usry, Weeks & Matthews.



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Municipal Liability

- Policies/Procedures

- Gibson v. County of Washoe, Nevada, 290 F3d 1175 (9th Cir. 2001) established that a municipality held liable if:
 - (1) it's policy poses a substantial risk of serious harm
 - (2) knows its policy poses such a risk; and
 - (3) the policy must have been a moving force behind a violation of the plaintiffs rights.

- Failure to Train

- Canton v Harris, 489 U.S. 378 (1989) established that a municipality can be held liable under Section 1983 for deliberate indifference for its failure to adequately train employees.

Source: Risk Management of Deliberate Indifference, A Conundrum? T. Allen Usry - Usry, Weeks & Matthews.



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Trends - Deliberate Indifference to Medical Needs

- Anecdotally seem to be on the rise
- These cases are difficult in the current law enforcement liability environment.
- Case law continues to develop addressing actual or constructive knowledge of the medical need and regarding what constitutes a conscious disregard of that risk that seemingly expand the duties of law enforcement officials.
- Changing demographics and other relevant societal trends.



Demographic / Societal Considerations

- Some Relevant statistics

- 9.4% of the population has diabetes (US Food & Drug Administration (fda.gov)/For Patients/Diabetes. Accessed 8/8/17)
- 32% of adults have high blood pressure (Centers for Disease Control and Prevention (cdc.gov)/Division for Heart Disease and Stroke Prevention/Data & Statistics/Fact Sheets. Accessed 8/8/17)
- 36.5% of adults are obese (Centers for Disease Control and Prevention (cdc.gov)/Overweight & Obesity/Data & Statistics. Accessed 8/8/17)
- About 1.8% of adults aged 18 years or older have had a diagnosis of epilepsy or seizure disorder. (Centers for Disease Control and Prevention (cdc.gov)/Epilepsy /Basics/Fast Facts. Accessed 8/8/17)
- As of 2012, about half of all adults—117 million people—had one or more chronic health conditions (Centers for Disease Control and Prevention (cdc.gov)/Chronic Disease Prevention and Health Promotion/Publications/Chronic Disease Overview. Accessed 8/8/17)



Recommendations to Mitigate Against Risk of Deliberate Indifference Claims

- Policies and procedures
- Training and testing
- Screening and hiring
- Discipline
- Staffing levels
- Logs
- Equipment – to respond to medical emergencies
- Corrective measures
- Intake - Proper screening, documentation and follow up
- Faking
- Follow up
- Legal access / risk management - hotline

Source: Risk Management of Deliberate Indifference, A Conundrum? T. Allen Usry - Usry, Weeks & Matthews.



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Law Enforcement Responsibilities to the Mentally Ill



Statistics

- According to the Substance Abuse and Mental Health Services Administration's (SAMHSA) 2014 National Survey on Drug Use and Health (NSDUH),
 - 43.6 million (18.1%) Americans ages 18 and up experienced some form of mental illness.
 - 20.2 million adults (8.4%) had a substance use disorder in the past year.
 - 7.9 million people (3.3%) had both a mental disorder and substance use disorder,
- National Alliance on Mental Illness ("NAMI") estimates that
 - 1 in 4 Persons killed in Police Involved Shootings have serious mental illness
 - 15% of men and 30% of women in local jails have a serious mental illness.
- According to a December 2015 study by the Treatment Advocacy Center.
 - People with untreated mental illness are 16 times more likely to be killed during a police encounter than other civilians when approached or stopped by law enforcement,
 - 1 in 4 fatal law enforcement encounters involves an individual with serious mental illness.



The Problem

- Traditional police tactics and individuals with mental illness do not mix
 - Incidents where police arrive while a mentally ill person is out of control and does not respond to verbal commands or physical constraints can escalate resulting in the police using force, leading in some cases to death.
 - Police tactics often exacerbate the situation.

Source: Police & The Mentally Ill: A Complex Combination - 2017 Federation of Defense & Corporate Counsel (FDCC) Annual Meeting



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Duties of Law Enforcement

Qualified immunity

- Shields law enforcement officers public officials from damages for civil liability so long as they did not violate an individual's "clearly established" statutory or constitutional rights.
- When determining whether or not a right was “clearly established,” courts consider whether a reasonable officer would have known that the defendant’s conduct violated the plaintiff’s rights.

Source: The Lectric Law Library’s Lexicon (lectlaw.com) accessed 8/4/17



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City and County Of San Francisco v. Sheehan, 575 US (2015)

- The Supreme Court reviewed two questions.
 1. Were the officers in this case entitled to qualified immunity from liability for the injuries suffered by the woman they were responding to?
 2. Does the Americans with Disabilities Act (ADA) require law enforcement officers to provide accommodations to an individual with a known mental illness who is armed and potentially violent?
- Ruled in favor of the City and Officers on the issue of qualified immunity, holding that they did not violate a “clearly established statutory or constitutional right” when they opened the woman’s door the second time.
- Dismissed the ADA question, because San Francisco, after raising this issue in its petition to the Supreme Court, did not argue it either in its brief or in oral arguments before the Court.

Source: Legal & Liability Risk Management Institute, US SUPREME COURT - NO ANSWER TO WHETHER ADA APPLIES WHEN OFFICERS ARE DEALING WITH A MENTALLY IMPAIRED, VIOLENT AND ARMED SUBJECT, *San Francisco v. Sheehan*, May 2015, By Jack Ryan



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Hughes v. Kisela, 841 F.3d 1081, 1086 (9th Cir. 2016).

- This Court has “refused to create two tracks of excessive force analysis, one for the mentally ill and one for serious criminals.” ... The Court has, however, “found that even when an emotionally disturbed individual is acting out and inviting officers to use deadly force to subdue him, the governmental interest in using such force is diminished by the fact that the officers are confronted ... with a mentally ill individual.”
- In a 42 U.S.C. section 1983 action, arising after defendant, a university police officer, shot plaintiff for walking down her driveway to approach a third party while holding a kitchen knife, and not complying with police orders, the district court's summary judgment in favor of defendant is reversed where: 1) material questions of fact were plainly in dispute; and 2) a rational jury could find that plaintiff had a constitutional right to walk down her driveway holding a knife without being shot.

Source: Police & The Mentally Ill: A Complex Combination - 2017 Federation of Defense & Corporate Counsel (FDCC) Annual Meeting



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Summary – LEL and the Mentally Ill

- San Francisco v. Sheehan did not answer the question of whether municipalities are legally responsible for training police officers on how respond to people experiencing psychiatric crises.
- Pending guidance from the Supreme Court, future case law will shape the issue and potentially raise the bar for law enforcement, particularly in venues such as California.



Approaches that Work

Crisis Intervention Training (“CIT”)

- More than 3,000 of the nation’s roughly 18,000 police departments have some or all of their officers go through Crisis Intervention Team (CIT) training, according to Laura Usher, a program manager for the National Alliance on Mental Illness (NAMI).
- The model for the program, which was pioneered in the late 1980s by the Memphis Police Department, calls for 40 hours of training that includes teaching officers
 - verbal de-escalation skills
 - scenario-based training; and
 - having officers spend time interacting with individuals who have gone through a mental health crisis.

Source: USA Today, Memphis program offers example for police and mentally ill, 10/2/16



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Approaches that Work

- Policy adjustments
 - Allowing more time for situations to resolve
 - Incorporating de-escalation into use of force policies
 - Utilizing mental health and other resources
- Re-routing 911 calls
 - Partnerships with mental health crisis hot lines to allow 911 calls to be triaged.
- Jail diversion programs

Source: Police & The Mentally Ill: A Complex Combination - 2017 Federation of Defense & Corporate Counsel (FDCC) Annual Meeting



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Employment Practice Liability



Employment Practices Liability (EPL) Insurance

- A type of liability insurance covering wrongful acts arising from the employment process, including wrongful termination, discrimination, sexual harassment, and retaliation.
- Policies may also cover claims from a variety of other types of inappropriate workplace conduct, including employment-related; defamation, invasion of privacy, failure to promote, deprivation of a career opportunity, and negligent evaluation.

Source: International Risk Management Institute, Inc. (IRMI) Online Glossary. Accessed 8/8/17



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Sources of EPL

- Title VII of the Civil Rights Act of 1964, which prohibits discrimination on the basis of race, color, religion, national origin and sex. It also prohibits sex discrimination on the basis of pregnancy and sexual harassment.
- The Civil Rights Act of 1966, which prohibits discrimination based on race or ethnic origin.
- The Equal Pay Act of 1963, which prohibits employers from paying different wages to men and women who perform essentially the same work under similar working conditions.
- The Americans with Disabilities Act of 1990, which prohibits discrimination against persons with disabilities.
- Equal Employment Opportunity Act of 1972, which prohibits discrimination against minorities based on poor credit ratings.
- The Bankruptcy Code, which prohibits discrimination against anyone who has declared bankruptcy.
- The Age Discrimination in Employment Act, which prohibits discrimination against individuals who are age 40 or older.
- The Immigration Reform and Control Act of 1986, which prohibits discrimination on the basis of national origin or citizenship of persons who are authorized to work in the United States.
- Discrimination based on protected categories (e.g., sexual orientation) that are not covered under federal discrimination statutes, but may be covered by **state or local law**.
- Family and Medical Leave Act (FMLA)
- Genetic Information Discrimination (GINA)
- State and Local laws



U.S. Equal Employment Opportunity Commission

- The EEOC is responsible for enforcing federal laws that make it illegal to discriminate against a job applicant or an employee.
- Most employers with at least 15 employees are covered by EEOC laws.
- The laws apply to all types of work situations, including hiring, firing, promotions, harassment, training, wages, and benefits.

Source: US Equal Employment Opportunity Commission, Overview from www.eeoc.gov



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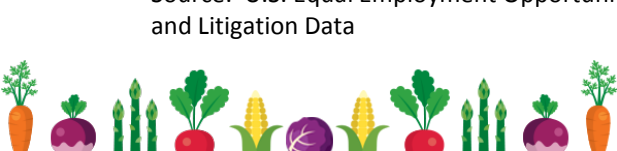
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EEOC 2016 Enforcement Data Highlights

- EEOC received 91,503 charges of discrimination in fiscal year 2016. This is the second year in a row that the number of charges filed with EEOC has increased.
- EEOC resolved 97,443 charges and secured more than \$482 million for victims of discrimination in private, federal and state and local government workplaces
- EEOC Resolved 139 lawsuits and filed 86 lawsuits alleging discrimination in fiscal year 2016. The lawsuits filed by EEOC included 55 individual suits and 31 suits involving multiple victims or discriminatory policies.
 - At year end, the EEOC had 168 cases on its active docket, of which 48 (28.6 percent) involve challenges to systemic discrimination and an additional 32 (19 percent) are multiple-victim cases.
 - EEOC achieved a successful outcome in 90.6 percent of all suit resolutions.

Source: U.S. Equal Employment Opportunity Commission Press Release 1-18-17 EEOC Releases Fiscal Year 2016 Enforcement and Litigation Data



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2016 EEOC Charges by State

State	Number of Charges	% of Total US Charges
Texas	9,308	10.2%
Florida	7,610	8.3%
California	5,870	6.4%
Georgia	5,273	5.8%
Illinois	5,072	5.5%
Pennsylvania	4,564	5.0%
North Carolina	4,372	4.8%
New York	3,740	4.1%
Alabama	3,371	3.7%

Source: U.S. Equal Employment Opportunity Commission Enforcement and Litigation Statistics
(<https://www.eeoc.gov/eeoc/statistics/enforcement/>)



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EEOC Charges by Bases

- **Retaliation:** 42,018 (45.9% of all charges filed)
- **Race:** 32,309 (35.3%)
- **Disability:** 28,073 (30.7%)
- **Sex:** 26,934 (29.4%)
- **Age:** 20,857 (22.8%)
- **National origin:** 9,840 (10.8%)
- **Religion:** 3,825 (4.2%)
- **Color:** 3,102 (3.4%)
- **Equal Pay Act:** 1,075 (1.2%)
- **Genetic Information Non-Discrimination Act:** 238 (.3%)

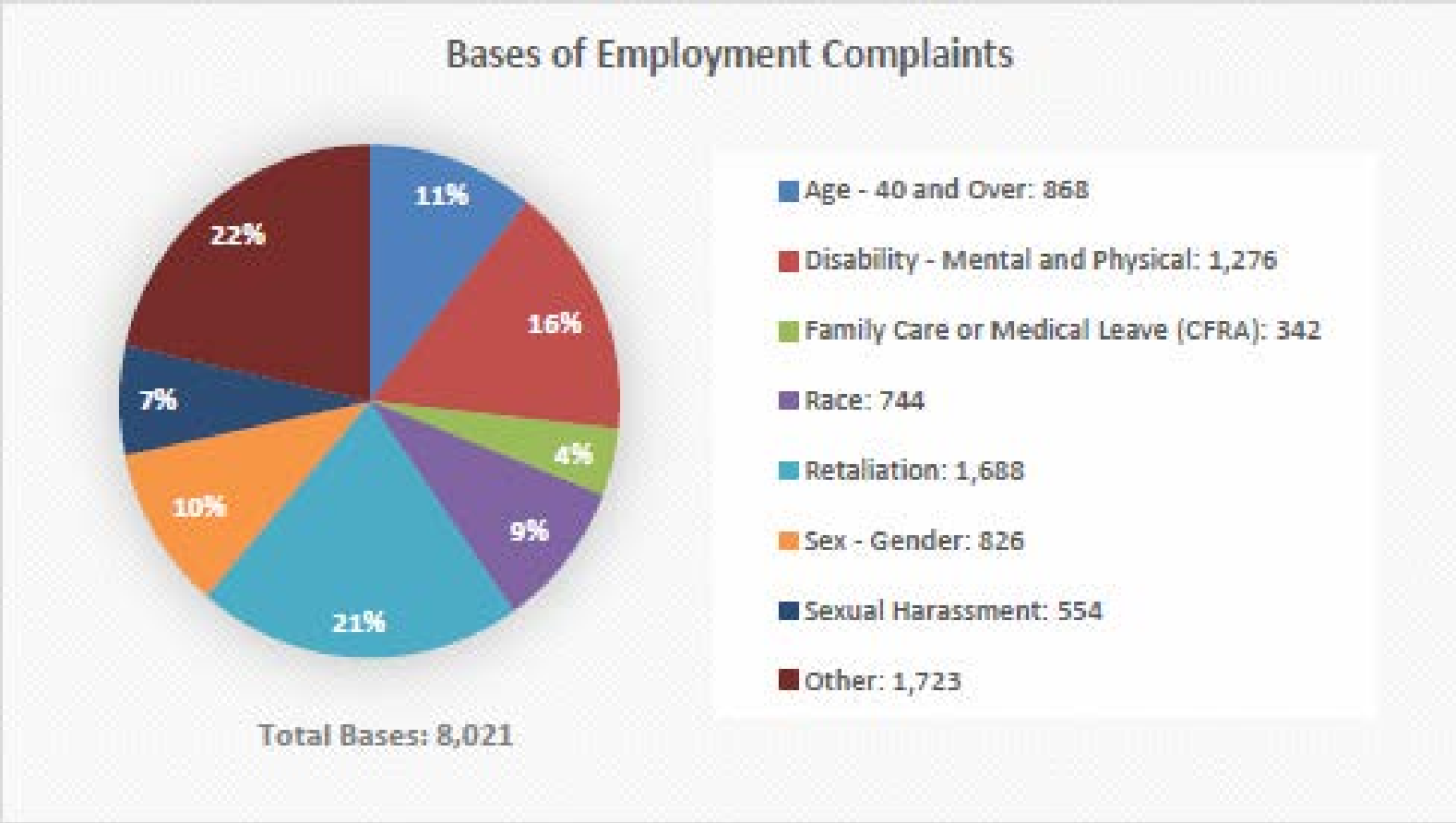
Source: Department of Fair Employment and Housing 2016 Annual Report, June 15, 2017



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California Department of Fair Employment and Housing Statistics (DFEH)



Source: <https://www.dfeh.ca.gov/wp-content/uploads/sites/32/2017/07/DFEH-AnnualReport-2016July6.pdf>



Trends / Hot-buttons

- Social inflation
- LGBTQ
- ADA
- Equal pay
- Marijuana
- Social media policies
- Joint employers
- New administration
- Ban the box



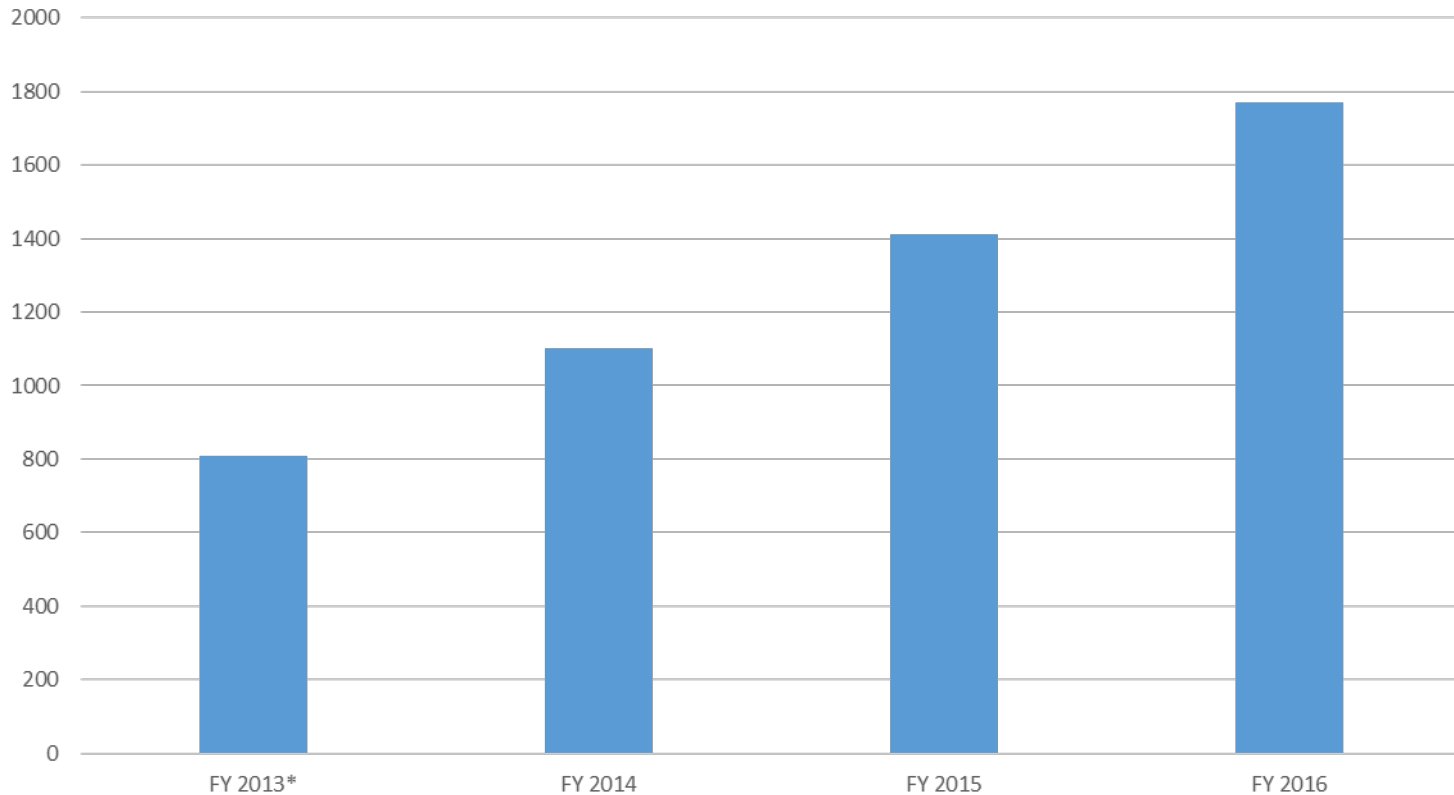
Social Inflation

- Media attention
- Legal developments



Lesbian, Gay, Bisexual, and Transgender (LGBTQ)

EEOC Receipts - LGBT



Source: U.S. Equal Employment Opportunity Commission Enforcement and Litigation Statistics (<https://www.eeoc.gov/eeoc/statistics/enforcement/>)

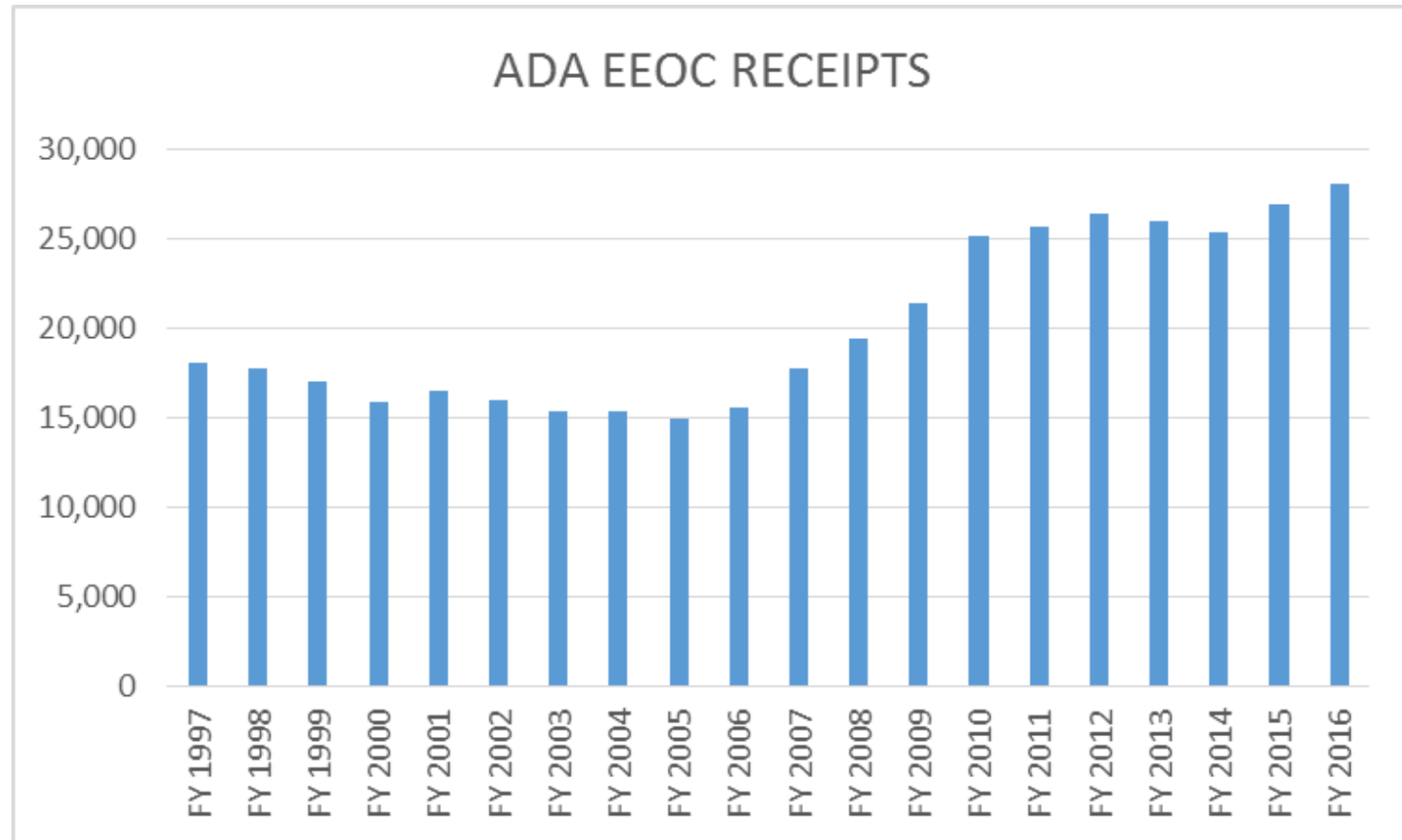


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American with Disabilities Act (ADA)



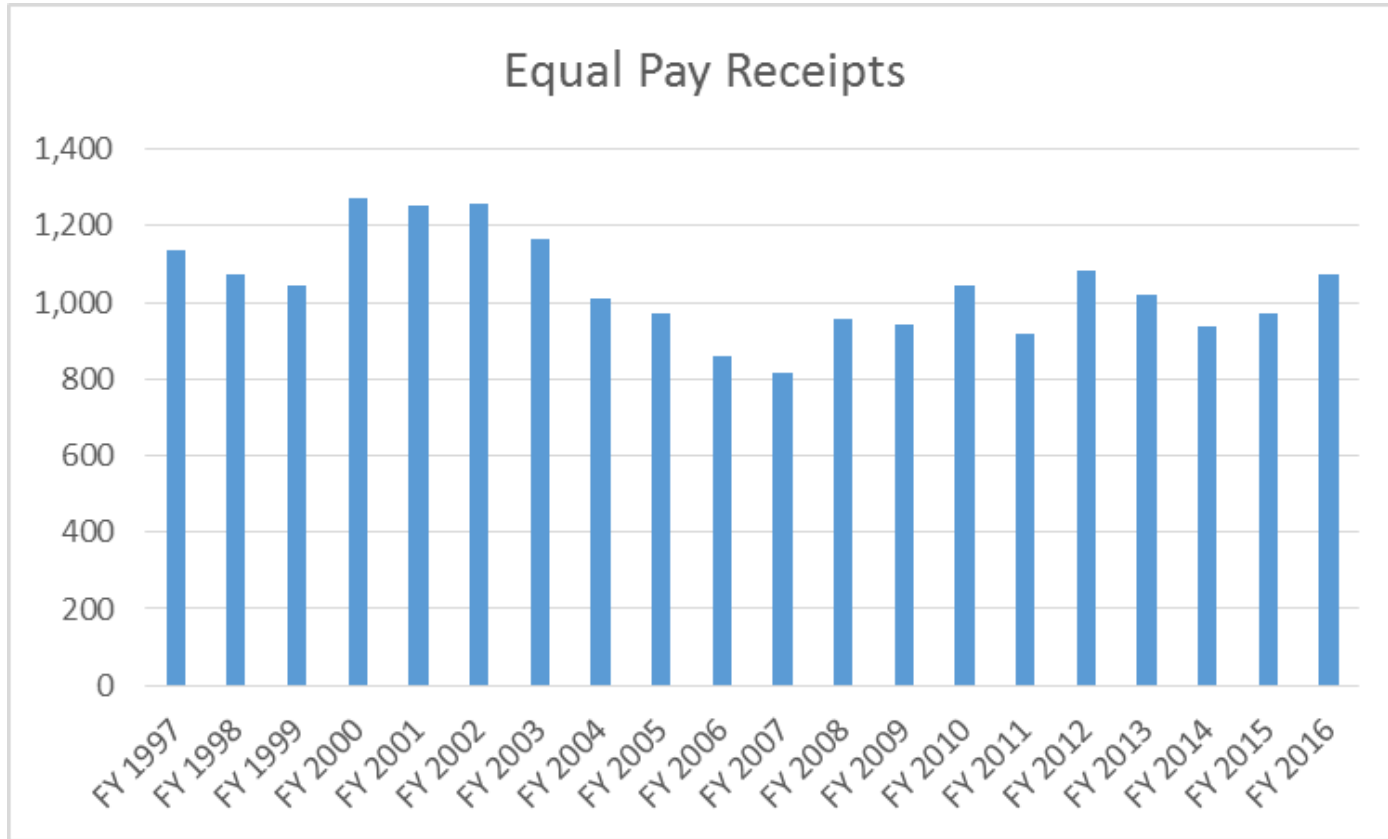
Source: U.S. Equal Employment Opportunity Commission Enforcement and Litigation Statistics (<https://www.eeoc.gov/eeoc/statistics/enforcement/>)



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Equal Pay



Source: U.S. Equal Employment Opportunity Commission Enforcement and Litigation Statistics (<https://www.eeoc.gov/eeoc/statistics/enforcement/>)



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California's Fair Pay Act

- Effective January 1, 2016 for employers with California-based employees.
 - Provides wage protections beyond employees working in the same establishment. This means that the pay of employees of the opposite sex may be compared even if they do not work at the same office or even in the same city.
 - Employers prohibited from paying any of their employees less than employees of the opposite sex for “substantially similar work,” when viewed as a composite of skill, effort, and responsibility.
- Amended January 1, 2017T
 - Expanded to compensation differences between members of one race or ethnicity and those of another.
 - Prohibits an employer from justifying an otherwise unlawful difference in pay on an employee's or applicant's prior salary alone.

Source: Gordon & Rees Scully Mansukhani 2017 Legal Education Conference

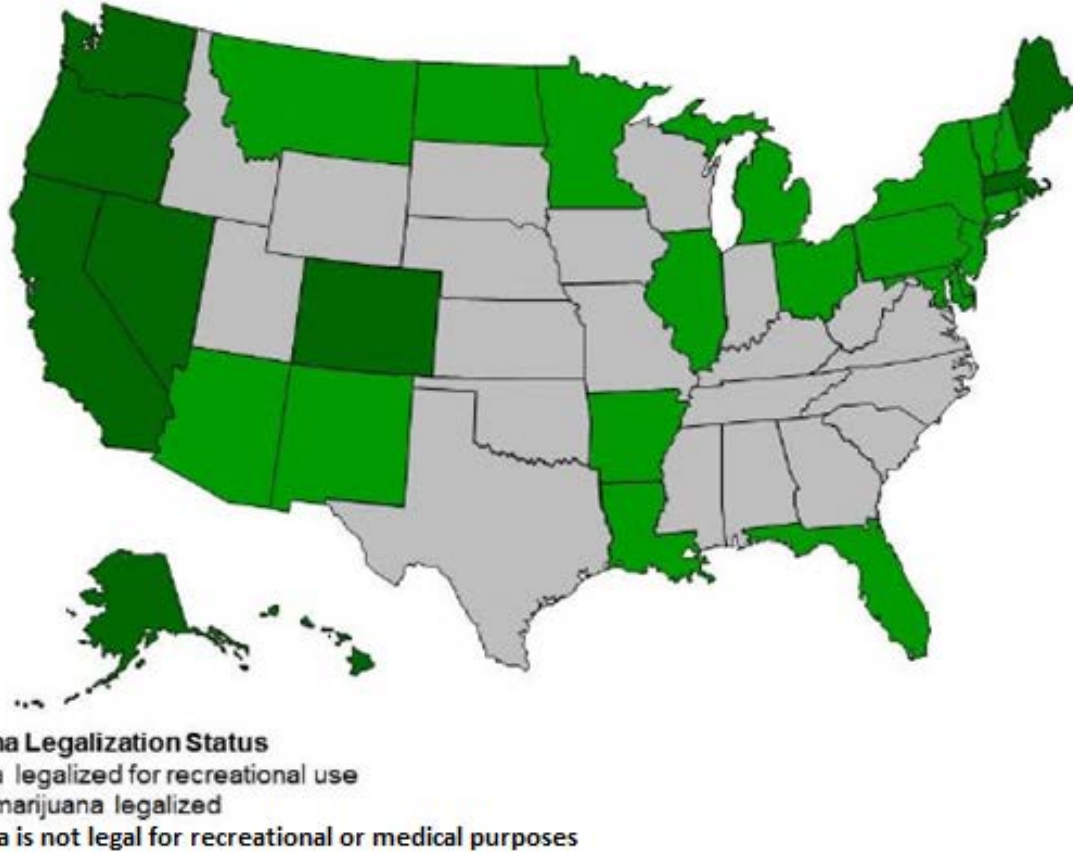


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Marijuana

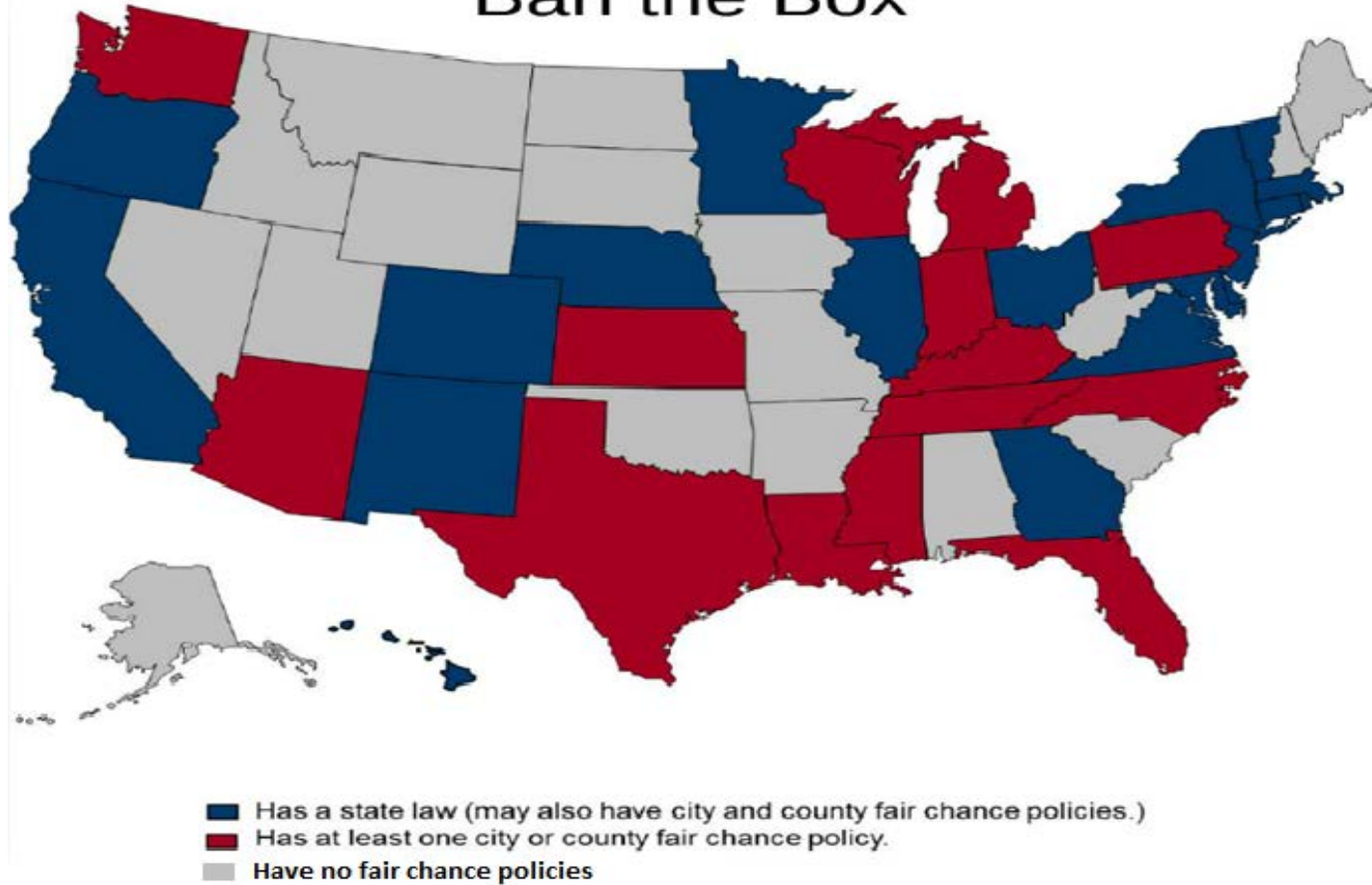


Source: Gordon & Rees Scully Mansukhani 2017 Legal Education Conference



Failure to Hire Claims

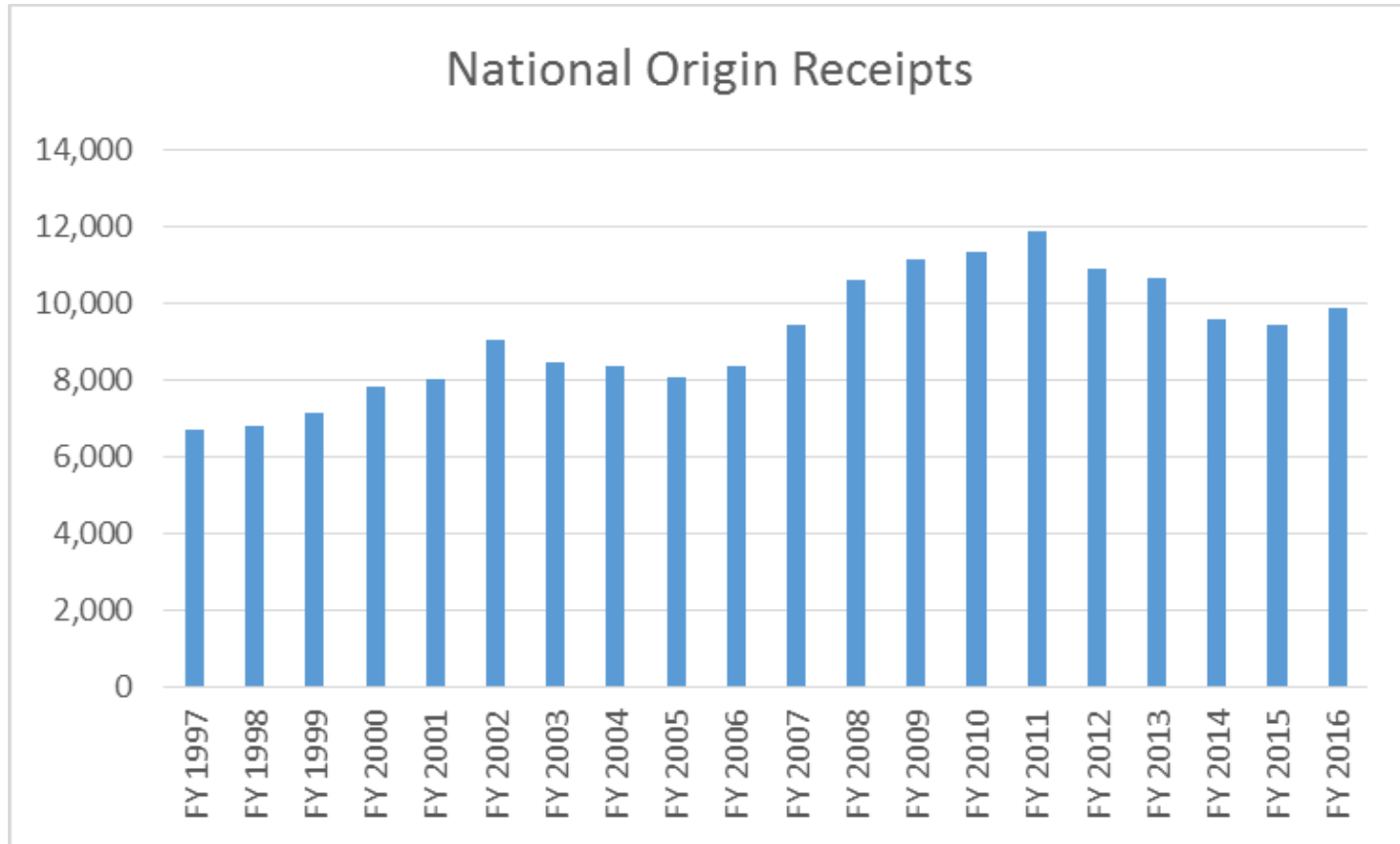
Ban the Box



Source: National Employment Law Project, Ban The Box: U.S. Cities, Counties and States Adopt Fair Hiring Policies, August 1, 2017
Gordon & Rees Scully Mansukhani 2017 Legal Education Conference



National Origin



Source: U.S. Equal Employment Opportunity Commission Enforcement and Litigation Statistics (<https://www.eeoc.gov/eeoc/statistics/enforcement/>)



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EPL Claim Impacts

- EEOC investigations, resolutions & litigation
- Civil litigation
 - Compensatory damages
 - Punitive damages
 - Attorneys' fees
- Reputational damages
- Morale / disruption
- Coverage issues



EPL Conclusions

- As new technology emerges and the political landscape shifts, employers will face additional or changing exposures with respect to their employment practices.
- EPL risks are projected to grow over the next few years—making EPLI policies all the more consequential.

Source: American Bar Association, Publications, Employment Practices Liability Insurance Policies, 11/21/16



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Thank you for your attention

Chuck Kroh & Michael Duffy

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