Counties & Sheriffs: How Their Relationship Can Lead to Federal Liability

By John F. Breads, Jr., Director of Legal Services, Local Government Insurance Trust

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Introduction:

The relationship between each county and its sheriff is fraught with political, budgetary, territorial, and performance issues. Always lurking just below the surface is the issue of county liability for the acts or omissions of sheriffs and/or deputy sheriffs. The liability landscape for counties seemingly brightened in 1989 with the decision of the Court of Appeals of Maryland in *Rucker v. Harford County* , 316 Md. 275 (1989). However, slowly developing events since *Rucker* make clear many complicated liability issues remain, especially under federal law, both constitutional and statutory. The contours of potential liability faced by each county are dependent on its formal and informal relationship with the Office of the Sheriff and those that it employs.

The Office of the Sheriff: The Historical and Constitutional Configuration

In the words of the Court of Appeals of Maryland, "[t]he common law office of sheriff is of ancient origin, and the elective office of sheriff has been provided for in Maryland's Constitutions since 1776." Under the current Constitution of Maryland, Art. IV, § 44, mandates the election of a sheriff in each county and in Baltimore City. Section 44 establishes the term of office for sheriff and imposes age and residency requirements on those seeking the office. Furthermore, § 44 provides that the Governor shall appoint a replacement if a sheriff dies, resigns, or cannot serve out his term. As far as local control, we know that a sheriff is required by an act of the General Assembly to submit a budget to the county in compliance with the county's budget procedure.

Even this framework in mind, the question remained sheriffs and deputy sheriffs State or county officials/employees?

1989: *Rucker v. Harford County* - What it Settled

In this pivotal case decided in 1989, the Court of Appeals of Maryland squarely faced the issue of whether sheriffs and deputy sheriffs were State or county employees when they were sued under State tort law. The Court held that sheriff and deputy sheriffs are officials and/or employees of the State of Maryland rather than of Maryland counties when sued under State law. The Court found that the role of a sheriff as a State constitutional officer whose duties are subject to control by the General Assembly led to the conclusion that sheriffs are State rather than local government employees. The control of the functions of the sheriffs by State common law, by the General Assembly and by the judiciary, coupled with the statewide nature of many of the sheriffs' duties,

strongly reinforced the view that sheriffs are State rather than local government officials. Because a deputy sheriff functions as the alter ego of the sheriff, and exercises the same authority, the Court reached the same conclusion with respect to deputy sheriffs. In short, when the lawsuits came, the State had to defend them.

1990: The State of Maryland's Response to *Rucker*: § 9-108 (State Finance and Procurement Article)

For apparent reasons, the State of Maryland was not willing to embrace the liability flowing from the tortuous acts or omissions of sheriffs and deputy sheriffs. The State's reticence was understandable in light of its long held belief that the Maryland Tort Claims Act ("the MTCA") was inapplicable to sheriffs and their deputies because they were not "State personnel" for purposes of the Act. In response to *Rucker*, however, the MTCA was expressly amended to include sheriffs and their deputies in the definition of "State personnel." The second legislative change that came in *Rucker's* wake was the enactment of § 9-108 of the State Finance and Procurement Article in 1990. This statute was an obvious afterthought to limit the damage to the State caused by *Rucker*, specifically the State's newly found responsibility for tort liability claims against sheriffs and deputy sheriffs. Immediately after Rucker, the State's quandary was apparent: Why should the State be responsible for judgments against sheriffs and/or deputy sheriffs arising from the performance of purely local functions such as functions law enforcement or operation of a county detention center? The State's unwillingness to accept the dictates of *Rucker* in this regard led to the enactment of § 9-108 in 1990.

Section 9-108 is titled "Coverage and defense for personnel other than those providing courthouse security, serving process, or transporting inmates." In essence, § 9-108 categorizes the "functions" performed by sheriffs as "State" or "County." It does so expressly. At the time of passage, and in the early years afterward, State functions included: courthouse security; service of process; the transportation of inmates to and from court proceedings, activities, including activities relating to performing law enforcement functions, arising under a multijurisdictional agreement under the supervision of the Maryland State Police or other State agency; or any other activities. Excepted "State", and, by default, "County" functions were the performance of county law enforcement and the operation of county detention centers.

As to the duty to insure, defend, and indemnify related to performance of the "County" functions, § 9-108 authorizes counties and Baltimore City to obtain insurance to provide the coverage and defense necessary under the MTCA for the State personnel (sheriffs and deputy sheriffs) covered by the statute. The statute also contains a not-so-veiled

threat: "If a county or Baltimore City does not obtain adequate insurance coverage to satisfy the coverage and defense necessary under the MTCA, an assessment for coverage and payment of any litigation expenses, other than compensation for the time spent by any State employee working for the Attorney General, shall be set off from: (1) any tax which has been appropriated in the State budget to the county or Baltimore City; or (ii) the subdivision's share of any income tax collected by the State Comptroller."

In response to § 9-108, those counties in which the sheriff performs the law enforcement and/or detention center functions have insured against potential loss through self-insurance, insurance pooling (the Local Government Insurance Trust), or private insurance.

1991: *Dotson v. Chester* - What *Rucker* Didn't Settle

The *Rucker* Court answered only the certified question of whether a sheriff and deputy sheriff were, *for the purposes of Maryland law,* State or county employees. Relying on Maryland law, the Court classified sheriffs and deputies as State employees. What about federal law? How are sheriffs and deputy sheriffs to be classified when they are sued under federal law? *Rucker v. Harford County* provided no answer. To the contrary, the *Rucker* Court made clear that whether a sheriff's office is to be regarded as a State or local government agency, and whether a sheriff and deputy sheriff are to be regarded as State or local government employees, for purposes of the Eleventh Amendment of the Constitution of the United States or § 1983 of Title 42 of the United States Code, were federal law issues which were not before it. In other words, the issue the Court decided was, in fact, a narrow one. The Court made clear that its decision would have no impact when sheriffs and/or deputy sheriffs were sued under federal law. As fate would have it, it did not take long before a federal court weighed in.

In *Dotson v. Chester*, 937 F. 2d 920 (4th Cir. 1991), the United States Court of Appeals for the Fourth Circuit considered the appeal in a jail conditions lawsuit brought under 42 U.S.C. § 1983 by inmates at the Dorchester County Jail. Section 1983, which is part of the Civil Rights Act of 1871, authorizes plaintiffs to recover damages when officials acting under color of state law violate federally created rights. Section 1983 is merely a vehicle by which to bring suit in federal court; it does not create substantive rights. In 1978, the Supreme Court, in *Monell v. Dep't of Soc. Servs.*, 436 U.S. 658 (1978), recognized local governments as "persons" capable of being sued under the statute. Such "municipal" or "local government" liability however, cannot be based merely on the fact that the municipality or county employs the official or officer who committed the

wrongful act. Instead, local government liability under § 1983 must be premised upon the government's own "wrongdoing." In other words, the local government can only be liable if the constitutional wrong is occasioned by local law, regulation, governmental policy, or custom. An example would be police misconduct where it is alleged that the officer engaged in the use of excessive force because the county police agency had an official policy or unofficial custom of allowing officers to use excessive force in making arrests. *Monell* liability can attach to a *single decision* if the decisionmaker possesses final authority to establish local government policy with respect to the action ordered. *See Pembaur v. City of Cincinnati*, 475 U.S. 469 (1986).

In *Dotson*, the federal appeals court agreed with the federal trial court that, under both State and county law, the Dorchester County Sheriff possessed final policymaking authority for Dorchester County in his operation of the County Jail. Consequently, since, at least in this regard, the sheriff was a county "final policymaker," the county bore responsibility for the unconstitutional conditions created at the jail by the sheriff's policies. As such, the County could be held responsible for attorneys' fees and expenses arising out of the lawsuit.

In reaching his conclusion, the trial judge in the United States District Court had relied on the report and recommendation of the magistrate judge. The magistrate judge had found that a "symbiotic relationship" existed in Dorchester County: "While the sheriff, an independently elected official, is charged with the care and custody of prisoners committed to him, he cannot operate without the fiscal cooperation and agreement of the Board of County Commissioners." The trial judge then added, "The Commissioners maintain the Jail through local funding; they have delegated the responsibility of operating the Jail to the Dorchester County Sheriff, the *de facto* administrator of the Jail." The Fourth Circuit's approval of what had been decided by the trial court cemented the fact that the classification of sheriffs and deputy sheriffs as State personnel under State law would have virtually no impact on their classification under federal law.

2001: The Continued Tug of War Between the State and Counties Over Sheriffs

An uneasy peace (seemingly) existed between the State of Maryland and its counties in the ten years after *Rucker* was decided. One area of contention, however, would lead to the amendment of § 9-108 in 2001. This area, or function, was labeled "personnel and other administrative activities." The change came when many counties voiced concern that they were being compelled to defend sheriffs and pay judgments in lawsuits alleging discrimination in employment. The most vocal opponents of such liability were, obviously, counties that excluded sheriffs and deputy sheriffs from their merit or

classified employment systems. Their thinking was as follows: If a county is really not the sheriff's "employer," why should it become enmeshed in disputes related to the sheriff's personnel decisions? More specifically, if the county had no control over the employment decision in question, such as a hiring or firing, why should it be defending against any administrative charge of employment discrimination lodged against the sheriff by the Equal Employment Opportunity Commission, the Maryland Commission on Civil Rights, or County Human Relations Commission? And, when lawsuits were filed, why should the county be providing the defense and satisfying adverse judgments in employment cases brought under federal law? The argument proved compelling enough to force amendment of § 9-108 in 2001. The amendment resulted in the inclusion and designation of a sheriff's performance of "personnel and other administrative activities" as a State function, at least under State law. Whether the classification of this function in State law would have any bearing on federal law would have to await future litigation.

2012: Change on the Horizon: *Durham v. Somerset County* and Cases Under 42 U.S.C. § 1983

For well over a decade after the decision in *Dotson v. Chester*, the issue of whether a Maryland sheriff or deputy sheriff sued in his or her *official* (as opposed to personal) capacity was a State or local official under federal law (especially the Eleventh Amendment to the Constitution of the United States which, absent express waiver, prevents a State from being sued for monetary damages in federal court), seemed resolved. Beginning in 1991 and running into 2012, a long line of decisions from the United States District Court for the District of Maryland held that suing a sheriff and/or a deputy sheriff in his or her official capacity for money damages in federal court was tantamount to suing the State, and that such suits were barred under the Eleventh Amendment. But no good thing lasts forever and change, or at least a reassessment, was coming.

It came in the form of litigation in the United States District Court in the case of *James "Troy" Durham v. Somerset County, et al.*, 1:10-cv-02534-WMN, and related cases in the same court. The litigation in the various cases has resulted in a verdict against the Sheriff of Somerset County in his personal capacity in excess of $1,000,000.00; a refusal by the State of Maryland to pay the judgment although the State defended the sheriff at trial through the unsuccessful appeal to the Fourth Circuit; a refusal by the County, which was voluntarily dismissed as a defendant in the initial case, to pay the judgment; the garnishment of the sheriff's wages by the deputy who sued him; the recusal of a

federal judge at the request of the county's defense counsel; and threatened sanctions against at least one attorney (me) in the fiercely contested cases.

The tortured history of the *Durham* cases need not be laid out here. The essentials are that a deputy sheriff sued the sheriff when he was terminated for disciplinary reasons under the Law Enforcement Officers' Bill of Rights ("LEOBR"). The sheriff decided to enhance the punishment recommended by the hearing panel convened under the LEOBR from suspension to termination. The deputy claimed his termination was in retaliation for his having engaged in protected speech during the investigative process. Specifically, the deputy sent documents internal to the Office of the Sheriff that touched on the matter, as well as a litany of his complaints about the agency, to various State officials and media outlets. He sued the sheriff and the county in federal court. After the county was dismissed, the case proceeded against the sheriff and resulted in the verdict mentioned above.

With the $1,000,000 verdict unpaid in the first case, the deputy sued again under § 1983 – naming the county, the county attorney, as well as the sheriff, as defendants. In a third suit, he has sued each and every member of the Maryland Police Training Commission. In the suit naming the county and county attorney, the deputy is alleging post-verdict retaliation in violation of the First Amendment and, of particular interest here, *Monell* liability against the county. In the *Durham* case against the county, the deputy alleges that the county commissioners were intricately involved in the hiring, discipline, and firing of deputy sheriffs. He further alleges that the sheriff has stated that the county commissioners "agreed and approved" of his decision to terminate the deputy. Thus, the deputy urges that a jury could find that the sheriff set county policy with respect to the disciplining of deputy sheriffs and that his unlawful decision to terminate is directly attributable to the county.

But what about the long line of cases rejecting even the suggestion that a sheriff is a county official, much less a county policymaker under §1983? What about § 9-108 as amended in 2001 which identifies "personnel and other administrative activities" as being in the purview of the sheriffs, not the counties? In answering these questions, the *Durham* case(s) seemingly announce a change as how the United States District Court will examine the relationship between county and sheriff in determining federal constitutional liability. The emphasis will be far more one of function over form. In other words, the court will focus far more on the specific function being performed by the sheriff that gives rise to the lawsuit, as opposed to merely focusing on the state aspects and control of the elective office held by the sheriff.

As to § 9-108, we know that the classifications it provides apply only to State law, not federal law. As to the long line of cases under § 1983 rejecting federal suits for money damages against sheriffs and deputies in their official capacities, one judge in one of the ongoing *Durham* cases has suggested that at least some of those cases "may have been wrongly decided." He also said that the issue should not be definitively decided "without a more fully developed factual record." Another judge of the same court agrees.

As a result of this sea change, it must be anticipated that counties will be required to more frequently defend themselves from allegations that the sheriff acted as their "final policymaker" in an area that resulted in constitutional injury. In counties where the sheriff performs law enforcement and/or detention center functions, this may not be a battle even worth fighting. As to alleged constitutional injury resulting from employment decisions, however, it seems that all counties would be unified in defending on grounds that the sheriff does not establish personnel policy for their local governments. The defense or lack of defense, in each case will be dependent on the county's formal, and informal, relationship with the Office of the Sheriff. Does the sheriff perform the law enforcement function in the county? Does the sheriff operate the county detention center? Is the county formally or informally involved in making, approving, or ratifying personnel decisions affecting deputy sheriffs, such as hiring or firing, demoting or suspending? The answer to these questions, many of which are found in statutes (including § 2-309 of the Courts and Judicial Proceedings Article), county ordinances, and personnel handbooks and manuals, will dictate the outcome in each case.

Beyond Federal Constitutional Liability: Title VII and Federal Anti-Discrimination Laws

Beyond the potential for federal constitutional liability we have discussed here, counties may be exposed to federal statutory liability resulting from a sheriff's violation of federal anti-discrimination laws, such as Title VII of the Civil Rights Act of 1964, the Americans With Disabilities Act, and the Age Discrimination in Employment Act. Unlike § 1983, these statutes directly seek out "employers" of those engaging in acts of discrimination, and liability essentially rests on the employment relationship alone. The path leading to local government liability under these anti-discrimination laws is based on the agency law concept of "joint employers" which recognizes that an "agent" (an employee) may answer to one or more "principals" (employers). So, it is feasible that an employee may have more than one employer. If that is the case, who employs a deputy sheriff for the purposes of these anti-discrimination laws? Is it the sheriff? The

State? The county? A combination of these? The answer is unknown but, again, is dependent on each county's unique relationship with its Office of the Sheriff.

There is little authority applying the common law concept of "joint employer" in the employment discrimination context. Being a pessimist, however, I think there is little chance of the doctrine not being applied in an appropriate case, including one against governmental entities. To be a "joint employer," an entity must share or co-determine the essential terms and conditions of a worker's employment. To determine whether an entity is the plaintiff's joint employer, courts will look to an entity's ability to hire, fire or discipline employees, affect their compensation and benefits, and direct and supervise their performance. Courts may also look to see if the human resources function is shared between units of government. For example, does the Office of the Sheriff have its own Human Resources Department or does it utilize the County's department for personnel administration? Also, it must be kept in mind that even if a county were deemed to be a deputy's "joint employer," under a federal anti-discrimination law, the inquiry would be far from over. That is because, even where two entities are deemed a joint employer, it is not necessarily the case that both are liable for discriminatory conduct. In this regard, the issue would turn on the extent of the county's control over the sheriff and its legal responsibility for his conduct in office.

What we do know can only hurt us so much. And we do know this: Regardless of whether a county is a defendant in one of these cases, it is still in peril. That is because under many of these statutes, including Title VII, both back pay (from termination to judgment) and front pay (from judgment to reinstatement, if feasible) are recoverable as damages. Under the IRS code, awards of back pay and front pay are treated as income. Under State law (§ 2-309 of the Courts and Judicial Proceedings Article), it is the counties, not the State, who are saddled with the obligation of paying the salaries of sheriffs and sheriffs' deputies. So, even in instances where the State has assumed the defense of the sheriff and other defendants, a judgment for back and/or front pay must still be satisfied by the county. It is a no win proposition.

In any event, forewarned is forearmed. It is important to know that this additional avenue of federal liability exists and that it may be coming soon to a county near you - even your own.

Conclusion: Eyes Wide Open

Based on historical roots and long standing practices, each Maryland County is connected to its duly elected sheriff. Based on Maryland law, each county is vested with some degree of local control over the operation of the sheriff's office, which results

from the provision for local funding. As we know, a sheriff is required by an act of the General Assembly to submit a budget to the county in compliance with the county's budget procedure. Nevertheless, county officials may not directly abridge the functions and duties of a sheriff under the common law and enactments of the General Assembly - only the General Assembly can change the duties and functions of the sheriffs. The resulting entangled and complicated relationship between sheriff and county in each jurisdiction can have both positive-and disastrous results.

Understanding your county's formal and informal relationship with the sheriff is important—and and there is no template for what each county should or shouldn't do. However, your eyes must be open. Recognizing how that relationship may lead to federal constitutional liability and beyond is something each county official must understand. And, if that understanding leads to change, informed change is best.

Analysis of Md. Code Ann., Cts. & Jud. Proc. § 2-309 – Deputy Sheriffs and County Personnel Systems

County	Location in Statute	Reference to Deputy Sheriffs in County Merit System or to County Personnel Law	Specific Location in Statute
Allegany	§ 2-309 (b)	No reference to being in the merit system or subject to county personnel law	
Anne Arundel	§ 2-309 (c)	In the merit system	§2-309(c)(3)
Baltimore City	§ 2-309 (d)	No reference to being in the merit system or subject to county personnel law	
Baltimore	§ 2-309 (e)	No reference to being in the merit system or subject to county personnel law	
Calvert	§ 2-309 (f)	In the merit system after probation ends	§ 2-309 (f)(2)
Caroline	§ 2-309 (g)	No reference to being in the merit system or subject to county personnel law	
Carroll	§ 2-309 (h)	No reference to being in the merit system or subject to county personnel law	
Cecil	§ 2-309 (i)	Upon completion of probationary period deputies subject to the County "personnel regulations and policies in all matters."	§ 2-309 (i)(1)(vii)(2)
Charles	§ 2-309 (j)	Sergeants and below in the merit system	§ 2-309 (j)(5)
Dorchester	§ 2-309 (k)	No reference to being in the merit system or subject to county personnel law	
Frederick	§ 2-309 (l)	Deputies subject to county personnel regulations with regards to "hiring, promotion and compensation" subject to LEOBR	§ 2-309 (l)(3)
Garrett	§ 2-309 (m)	Deputies are included in the County's "classified service system"	§ 2-309 (m)(5)(ii)
Harford	§ 2-309 (n)	No reference to being in the merit system or subject to county personnel law	
Howard	§ 2-309 (o)	No reference to being in the merit system or subject to county personnel law	
Kent	§ 2-309 (p)	No reference to being in the merit system or subject to county personnel law	
Montgomery	§ 2-309 (q)	Deputies are included in the County's merit system law	§ 2-309 (q)(4)(i & ii)
Prince George's	§ 2-309 (r)	Deputies – all ranks – are subject to the "county personnel law"	§ 2-309 (r)(6)
Queen Anne's	§ 2-309 (s)	No reference to being in the merit system or subject to county personnel law	
St. Mary's	§ 2-309 (t)	No reference to being in the merit system or subject to county personnel law	
Somerset	§ 2-309 (u)	Deputies in the merit system after probation is completed	§ 2-309 (u)(1)(vi)
Talbot	§ 2-309 (v)	No reference to being in the merit system or subject to county personnel law	
Washington	§ 2-309 (w)	No reference to being in the merit system or subject to county personnel law	
Wicomico	§ 2-309 (x)	Deputies, except the chief deputy, subject to the "personnel provisions of the County Charter" as well as rules & regulations approved by the Council	§ 2-309 (x)(5)
Worcester	§ 2-309 (y)	Deputies – except the chief deputy – subject to the personnel rules & regulations set by County	§ 2-309 (y)(4)

Functions Performed by Sheriffs

County	Court Security / Service of Process	Law Enforcement	Operation of Detention Center
Allegany	Yes	Yes	Yes
Anne Arundel	Yes	No	No
Baltimore City	Yes	No	No
Baltimore	Yes	No	No
Calvert	Yes	Yes	Yes
Caroline	Yes	Yes	No
Carroll	Yes	Yes	Yes
Cecil	Yes	Yes	Yes
Charles	Yes	Yes	Yes
Dorchester	Yes	Yes	No
Frederick	Yes	Yes	Yes
Garrett	Yes	Yes	Yes
Harford	Yes	Yes	Yes
Howard	Yes	No	No
Kent	Yes	Yes	No
Montgomery	Yes	No	No
Prince George's	Yes	No	No
Queen Anne's	Yes	Yes	No
St. Mary's	Yes	Yes	Yes
Somerset	Yes	Yes	Yes
Talbot	Yes	Yes	No
Washington	Yes	Yes	Yes
Wicomico	Yes	Yes	No
Worcester	Yes	Yes	No

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