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Civil Liability Law Section – March 2019

**Civil Liability and Arrests
With Warrants**

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❖ **Introduction**

Making arrests is a major part of law enforcement activity. Many arrests are made pursuant to arrest warrants. The Fourth Amendment of the U.S. Constitution, in

relevant part, mandates that “no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly ... the persons ...or to be seized.” Affidavits supporting applications for arrest warrants to be issued by a judge or magistrate state the factual basis supporting the belief that there is probable cause that a crime has been committed and that the person named and described was the one who committed it. This four-part article examines the circumstances in which law enforcement personnel may face civil liability in connection with seeking an arrest warrant or carrying out an arrest pursuant to one. The article does not address search warrants, arrests made without a warrant, or issues concerning the use of force or manner of execution of arrest warrants. At the end of the series, there is a listing of relevant and useful resources and references.

❖ Probable Cause

Probable cause for an arrest warrant may be supported by facts gathered from crime victims, eyewitnesses, informants, officer observations and investigations, forensic or scientific tests, or other reliable information. The facts stated in an affidavit for an arrest warrant do not have to all be based on the officer’s own personal knowledge, and the officer seeking the warrant may rely on the observations, interviews, and investigations carried out by other officers.

Illustrating this, in [White v. City of Chicago](#), #15-1280, 829 F.3d 837 (7th Cir. 2016), cert. denied, White v. City of Chicago, #16-547, 137 S. Ct. 526, 196 L. Ed. 2d 408, 2016 U.S. Lexis 7120, a narcotics investigation known as “Operation Blue Knight” was carried out over a two-year period by the FBI and Chicago Police Department. Towards the end, an officer applied for dozens of arrest warrants. Other officers had observed the plaintiff arrestee and his brother sell heroin to an informant. The observations were in a comprehensive report that the officer used as the basis for his arrest warrant application. The arrest was carried out, but the charges were later dropped, and the arrestee sued. Upholding the dismissal of the lawsuit, a federal appeals court held that the written application for the warrant, supported by his oral testimony about the investigative report or surveillance of the drug deal provided probable cause for the arrest.

To recover for false arrest when an arrest is carried out pursuant to a warrant, the plaintiff must specifically allege that the arrest was made without probable

cause. In [*Graves v. Mahoning County*](#), #15-3175, 821 F.3d 772 (6th Cir. 2016), “exotic dancers” were arrested on charges ranging from prostitution to assault to witness intimidation or drug distribution. They claimed that their arrests violated the warrant clause of the U.S. Constitution because the sole evidence the court clerks received before issuing arrest warrants consisted only of the officers’ conclusory statements that they had committed the offenses and the clerks lacked the power to issue arrest warrants to begin with. Affirming the dismissal of their false arrest lawsuit, a federal appeals court noted that they failed to allege that the officers arrested them without probable cause--a key allegation needed to show an unconstitutional arrest.

Probable cause may sometimes be stated in an affidavit for a warrant for the arrest of a specific person based on facts concerning them acting in concert with others in carrying out a criminal act even when they themselves did not carry out every single action needed to complete the crime. In [*Puller v. Baca*](#), #13-1156, 781 F.3d 1190 (10th Cir. 2015), after charges concerning suspected involvement in a racially motivated attack were dropped against an arrestee, he sued the detective who applied for and obtained the arrest warrant, claiming that he had both omitted material information and supplied false information, so the warrant lacked probable cause. A federal appeals court, upholding a grant of qualified immunity to the detective, found that the modified affidavit, even without the complained of omissions and alleged false information, still established probable cause to believe that the arrestee had committed a bias-motivated crime, involvement in an attack by a group of African-American gang members on a Caucasian man, even if he did not himself hit the man.

When probable cause for the arrest is not present, damages and attorneys’ fees/costs may be awarded. In [*McAfee v. Boczar*](#), #13-1356, 738 F.3d 81 (4th Cir. 2013), an animal control officer was not entitled to qualified immunity for obtaining an arrest warrant lacking evidentiary support and using it to arrest a woman for allegedly withholding information about rabid animals. Damages of \$2,943.60 were properly awarded, but an award of attorneys’ fees was reduced from \$322,340.50 to \$100,000, since the trial court overstated the extent of the plaintiff’s success.

Officers will not be held liable when purported crime victims or witnesses lie to them or even fabricate evidence for improper motives, absent a reason to disbelieve them. In [*Moore v. City of Desloge*](#), #10-2095, 647 F.3d 841 (8th Cir.), a

man claimed that his wife and son conspired together to have him arrested for, among other things, illegal possession and sale of Oxycontin, knowing that he lawfully possessed the drug as prescription medication for various illnesses. During execution of an arrest warrant for domestic violence and firearms offenses, a search was conducted during which a quantity of the drug was seized. He was released from custody when the status of the drug as his legal medication was shown. There was nothing in the arrest warrant, however, which would have caused a reasonable officer to question whether the warrant was valid.

❖ **False, Inaccurate, or Omitted Information in Affidavit**

Officers may be held liable when they intentionally or recklessly state false or inaccurate information in an affidavit seeking an arrest warrant or omit exculpatory information. However, even when they do, there may still be probable cause for the arrest made pursuant to the warrant if probable cause could be found on the basis of the affidavit once you strike the false or inaccurate statements, and when the inclusion of the omitted information would not have removed probable cause. In [Odom v. Kaizer](#), #16-2681, 864 F.3d 920 (8th Cir. 2017), because ample facts supported probable cause for issuance of an arrest warrant for possession of marijuana even without the officer's alleged inaccuracy in testimony at a probable cause hearing, the officer was entitled to qualified immunity for allegedly violating the plaintiff's constitutional rights by deliberately or recklessly giving partially inaccurate testimony.

Also see [Dempsey v. Bucknell Univ.](#) #15-1328, 834 F.3d 457 (3rd Cir. 2016), in which a female university student accused a male student of having sexually assaulted her in his dorm room. University police officers investigated and filed a criminal complaint for simple assault, harassment, and disorderly conduct, with an affidavit of probable cause. A warrant was issued and he was arraigned, but the charges were later dropped. He sued, claiming violation of his Fourth Amendment rights. A federal appeals court upheld summary judgment for the defendants.

There was evidence corroborating in large part the female student's story and there was a period of time during which no one disputed that the two were alone together in the dorm room. Accordingly, even taking into account certain facts allegedly

recklessly omitted from the affidavit of probable cause (certain witness statements, including about the conversations between the two students before they entered the dorm room), a reasonable jury could not find a lack of probable cause.

In [*Newman v. Twp. of Hamburg*](#), #14-1455, 773 F. 3d 769 (6th Cir. 2014), a man was arrested for murder based on an investigating police sergeant's affidavit for a warrant. He was subsequently convicted but the conviction was later overturned on appeal for insufficient evidence. He sued the sergeant for malicious prosecution, claiming that the affidavit for the warrant purposefully distorted a statement by a witness who saw a car containing two young men with light brown hair like the plaintiff's drive by the murdered man's home not long before the murder. A federal appeals court held that the sergeant was entitled to qualified immunity as there was ample evidence of probable cause for the arrest, including ballistics evidence showing that the plaintiff's gun, found in a duffle bag with hairs similar to his, was the murder weapon. There was no evidence that the sergeant had deliberately or recklessly misrepresented anything in the affidavit.

In [*Smith v. Almada*](#), #09-55334, 640 F.3d 931 (9th Cir.2011), even after making changes in an arrest warrant affidavit to correct what the arrestee claimed was false and omitted information, there was still probable cause to support the plaintiff's arrest for arson of a furniture store, which resulted in \$2.8 million in damages. The suggested changes did not support the conclusion that "a neutral magistrate would not have issued the warrant" had these changes been known. The omitted facts included descriptions of suspects in four previous dumpster fires behind the store, none of whom matched the arrestee, and the store owner's "demonstrably false" statement that she had seen him "gloating" at the crime scene sometime after the fire.

The fact remained that gasoline containing bottles which had been placed on a table inside the window of the store contained numerous gasoline soaked pieces of mail addressed to the arrestee or his wife over a five year period of time, which the arrestee could not explain, and there were also facts about a dispute he had with the store owner. The fact that juries in two trials of the arson case were not able to reach a unanimous verdict against the arrestee did not alter the fact that there had been probable cause for his arrest. The court ruled that even if the officer falsified and omitted the evidence in question when applying for the warrant, the corrected report

and warrant application absent this evidence would still have had facts sufficient to provide probable cause for the arrest.

When misrepresented or omitted facts in the search warrant affidavit caused an appearance of probable cause when none existed, however, substantial damages may be awarded. In [*Wesley v. Campbell*](#), #16-5431, 864 F.3d 433 (6th Cir. 2017), a seven-year-old boy with psychological problems told his mother that his school counselor sexually assaulted him. A social worker talked to the boy and contacted a police detective. The detective and social worker then interviewed 32 other students in contact with the counselor, none of whom disclosed inappropriate conduct. A medical exam of the boy revealed no evidence of abuse. The detective obtained a warrant for the counselor's arrest, but failed to interview employees who worked near the counselor's office, although the sexual abuse allegedly occurred there, with the door ajar and others able to see inside.

Charges were later dismissed. In the counselor's federal civil rights lawsuit, the jury found that the detective lacked probable cause to secure an arrest warrant, that facts misrepresented in or omitted from his affidavit and warrant application were material, and that the misrepresentations or omissions were done intentionally, deliberately, or with reckless disregard for the truth. It awarded \$589,000 in compensatory and \$500,000 in punitive damages.

A federal appeals court affirmed, rejecting the detective's arguments concerning failure to instruct the jury adequately about qualified immunity. A reasonable juror could find that the officer's conduct involved reckless or callous indifference to the counselor's federally protected rights, and the punitive damages award was not unconstitutionally excessive.

A similar ruling was reached in [*Andrews v. Sciuilli*](#), #15-3393, 853 F.3d 690 (3rd Cir. 2017). That case involved a 15-year-old girl walking home who encountered a man who demanded that she get in his car. He sped away when she refused and told him she was calling the police. Two officers responded to her call and took down her description of the car as a red, four-door sedan with a Pennsylvania license plate bearing the letters ACG, driven by a white male with dark hair, around 35 years old. The next day, she told her mother, who was driving her home, that a red car they encountered was the one that had stopped her the day before. Its license plate was

JDG4817. They followed the car to a parking lot and saw the driver. The girl's mother drove her to the police station.

Officers identified the car as belonging to a man, obtained his license photo, and created a photo array. The girl identified him, and an officer went to the parking lot and saw the car, a three-door coupe. The officer drafted an affidavit of probable cause, and a magistrate issued an arrest warrant. The man was charged with, but acquitted of, luring a child into a motor vehicle, stalking, corruption of a minor, and harassment. A federal appeals court reversed a grant of qualified immunity for the officer in a false arrest lawsuit, noting his omission of information about the license plate and vehicle description discrepancies from the affidavit.

The furnishing of false information to obtain a warrant was at issue in [*Olson v. Champaign County*](#), #12-3742, 749 F.3d 1093 (7th Cir. 2015). After a neighbor placed a deteriorated unlicensed trailer on his property, a man fixed and painted it, believing it to be abandoned. The trailer later disappeared, and then was found by a detective in a ditch. The detective suspected that the property owner had stolen the trailer and used it to transport lawn mowers stolen from another man's property during a burglary. The detective obtained warrants for the collection of DNA samples and fingerprints, and a search of the suspect's property. Despite the fact that no evidence implicating the suspect in any crime was found during the search, the detective and another detective who assisted him told an assistant state's attorney that he should be charged.

The prosecutor swore out an affidavit for an arrest warrant, despite having no personal knowledge, relying on the detectives. After charges were dismissed, the arrestee sued the prosecutor and detectives. The prosecutor was not protected by absolute prosecutorial immunity as he acted as a witness rather than a state advocate in swearing to the truth of the facts used to obtain the warrant. The prosecutor and the two detectives were also not entitled to qualified immunity from false arrest claims, as the lawsuit complaint permitted a reasonable inference that they all furnished false information in order to obtain the arrest warrant.

The distinction between false statements of fact and mistaken legal conclusions was at issue in [*Bowden v. Meinberg*](#), #14-3074, 807 F.3d 877 (8th Cir. 2015). In that case, a man encountered two men fishing on a bridge near his property and fired a shotgun at them from his deck when they failed to identify themselves. A verbal

altercation ensued and both sides called the police. The fishermen told a deputy that the man had shot at them while he claimed to have fired away from them. The deputy's supervisor, informed of this, ordered him to seize the shotgun and to draft a complaint stating that there was probable cause that the property owner had unlawfully used a shotgun. The deputy later admitted that he did not think that the use of the shotgun violated Missouri law. A prosecutor obtained an arrest warrant, and probable cause was found at a preliminary hearing, but the arrestee was acquitted.

A federal appeals court found that, under these circumstances, the deputy was entitled to qualified immunity on a false arrest claim, as the evidence, viewed in the light most favorable to the plaintiff, did not show a violation of his constitutional rights. The deputy made no false statement as the assertion that the plaintiff had committed an offense was not a false statement of fact, but a legal conclusion.

The actions of an arrestee following his arrest in [*Atkins v. City of Chicago*](#), #09-2998, 631 F.3d 823 (7th Cir. 2011), cert. denied, [*Atkins v. City of Chicago*](#), #11-7884, 565 U.S. 1213 (2012), served to justify, for a time, his continued detention under a warrant that was actually for another person. The trial court properly dismissed a false arrest lawsuit by a man mistakenly arrested and detained for 37 days before it was determined that he was not the parole violator sought in the arrest warrant. The suspect actually sought had the same name, day and month of birth, and the same first three digits of his Social Security number as the arrestee. The arrestee's continued detention after his arrest was reasonable, particularly as he gave inconsistent statements regarding whether he was or was not the individual named in the warrant.

On the other hand, in [*Lawson v. Veruchi*](#), #10-1318, 637 F.3d 699 (7th Cir. 2011), a trial judge acted erroneously in granting summary judgment to the defendants in a false arrest lawsuit. If the crime victim's deposition was true, she did not identify the arrestee as her attacker, but another person, which would mean that the officer's arrest warrant affidavit falsely indicated that the arrestee had been identified from a photo array.

Minor discrepancies are insufficient to undermine probable cause in a warrant. In [*Pair v. City of Parker Police Dept.*](#), #09-15073, 383 Fed. Appx. 835, 2010 U.S. App. Lexis 12384 (Unpub. 11th Cir.), the court found that a police officer did not act

outside of his discretionary authority when he obtained an arrest warrant for the plaintiff from a judge and executed it with the cooperation of a deputy sheriff. While there may have been some discrepancies in the arrest warrant, the plaintiff failed to show that any information presented by the officer in the affidavit was false. A reasonable officer would not have questioned whether there was probable cause to arrest the plaintiff for methamphetamine possession simply because there was a date discrepancy in the warrant.

Even when information used to obtain a warrant turns out to be incorrect, it may still be sufficient to provide probable cause when it appeared to be correct from the information available at the time. In [*Barton v. Curtis*](#), #08-4905, 355 Fed. Appx. 635, 2009 U.S. App. Lexis 26754 (Unpub. 3rd Cir.), an arrestee claimed that an affidavit used to obtain a warrant for his arrest contained misrepresentations concerning the nature of the findings of a special master in a child custody case. The appeals court found, however, from the plain language of a Florida court's decision in the child custody case that his wife had been made the primary residential parent because of his parental unfitness and drug use, and that he was required, under the terms of the decision to return his children to Florida.

While it subsequently became known that the Florida court's order was invalidated due to the plaintiff's objections, this was not known from the records available at the time the warrant was obtained, and there was no evidence that the investigator who obtained the warrant had any reason to doubt the statements he made in his warrant application, so he was entitled to qualified immunity.

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