

Law Enforcement + Force = Liability

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Agenda

1. About CIS and Our Public Safety Program Services
2. Claims Costs
3. Use of Force
 - Law & Policy
 - Legislation
 - Administrative Investigation & Process

CIS Overview



History

Over 40 years of
coverage for
Oregon cities and
counties



Coverage

Liability, Property,
Medical, Dental,
Vision, Life &
Disability



Members

98% of Oregon
cities and over
78% of Oregon
counties



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CIS Public Safety Program Services

- Best practice and risk management plans
- Claim reviews
- Grant management
- Critical incident management
- Online learning center including Public Safety Catalog



Risk Management

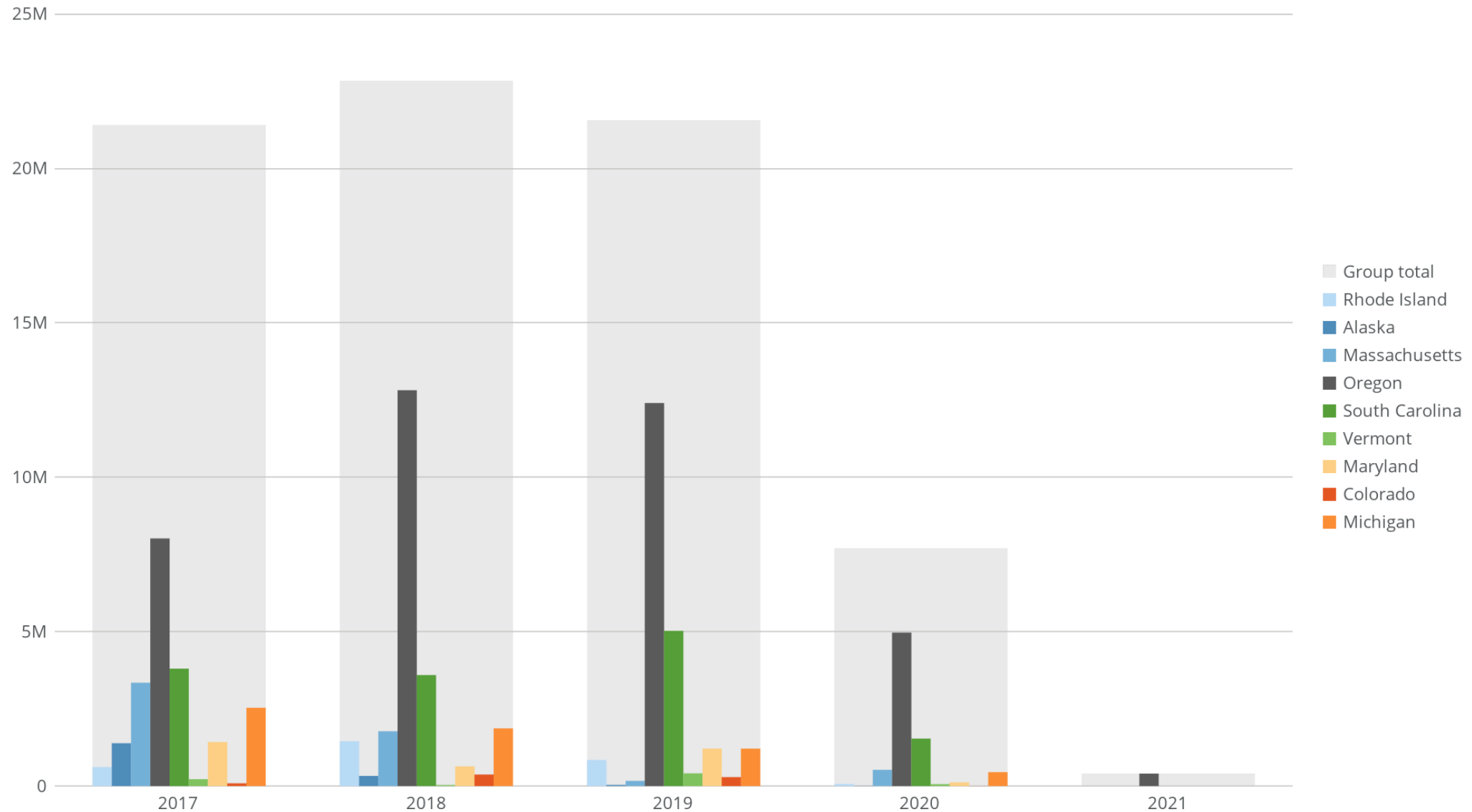
Top 5 Liability Categories

- 1. Law Enforcement = 33%**
2. Corrections = 18%
3. Employment = 18%
4. Vehicle Operation = 9%
5. Roadways/Walkways = 5%

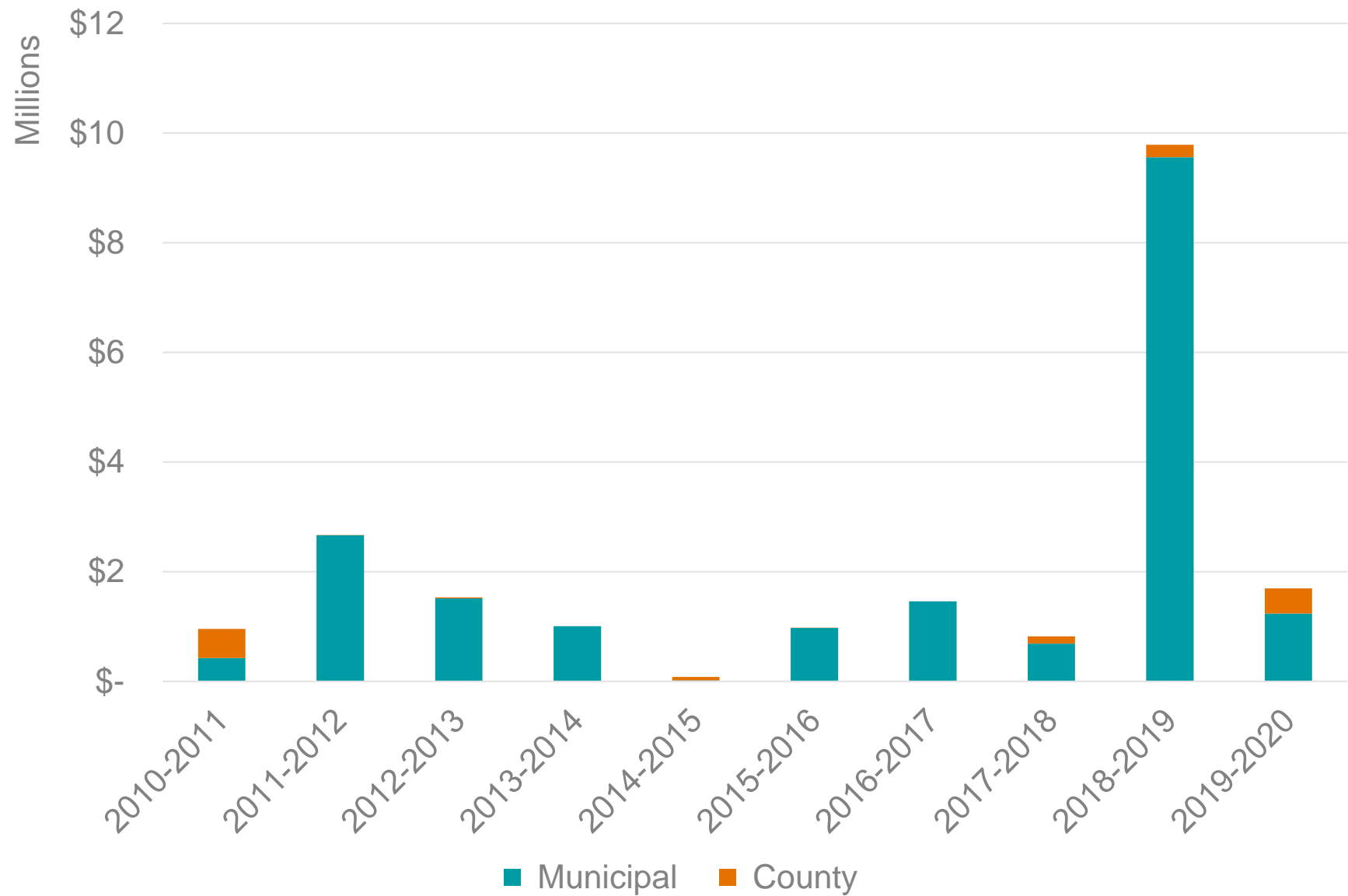
Most recent 5 fiscal years as of 12.31.2020



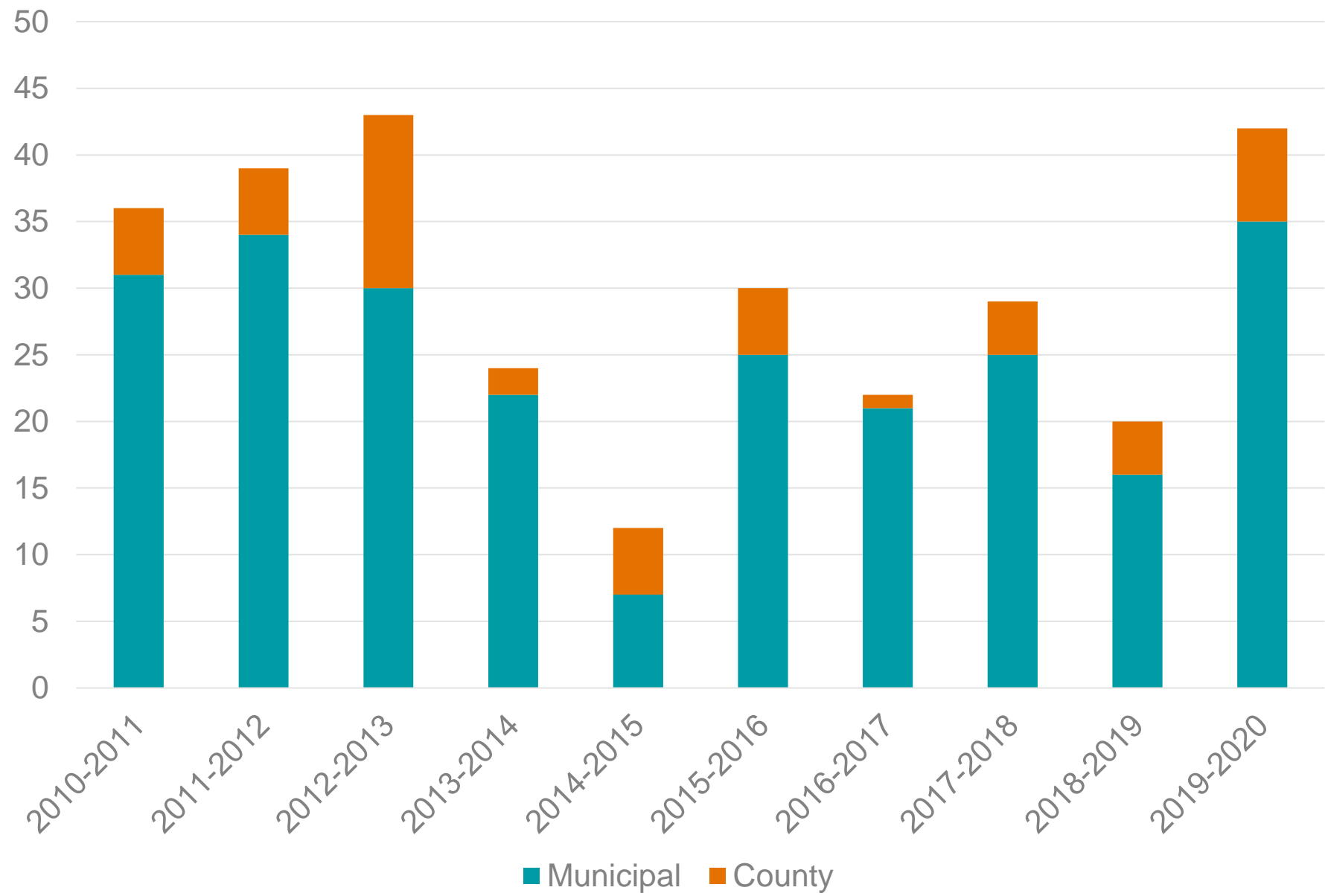
Law Enforcement Costs: CIS vs. Other Pools



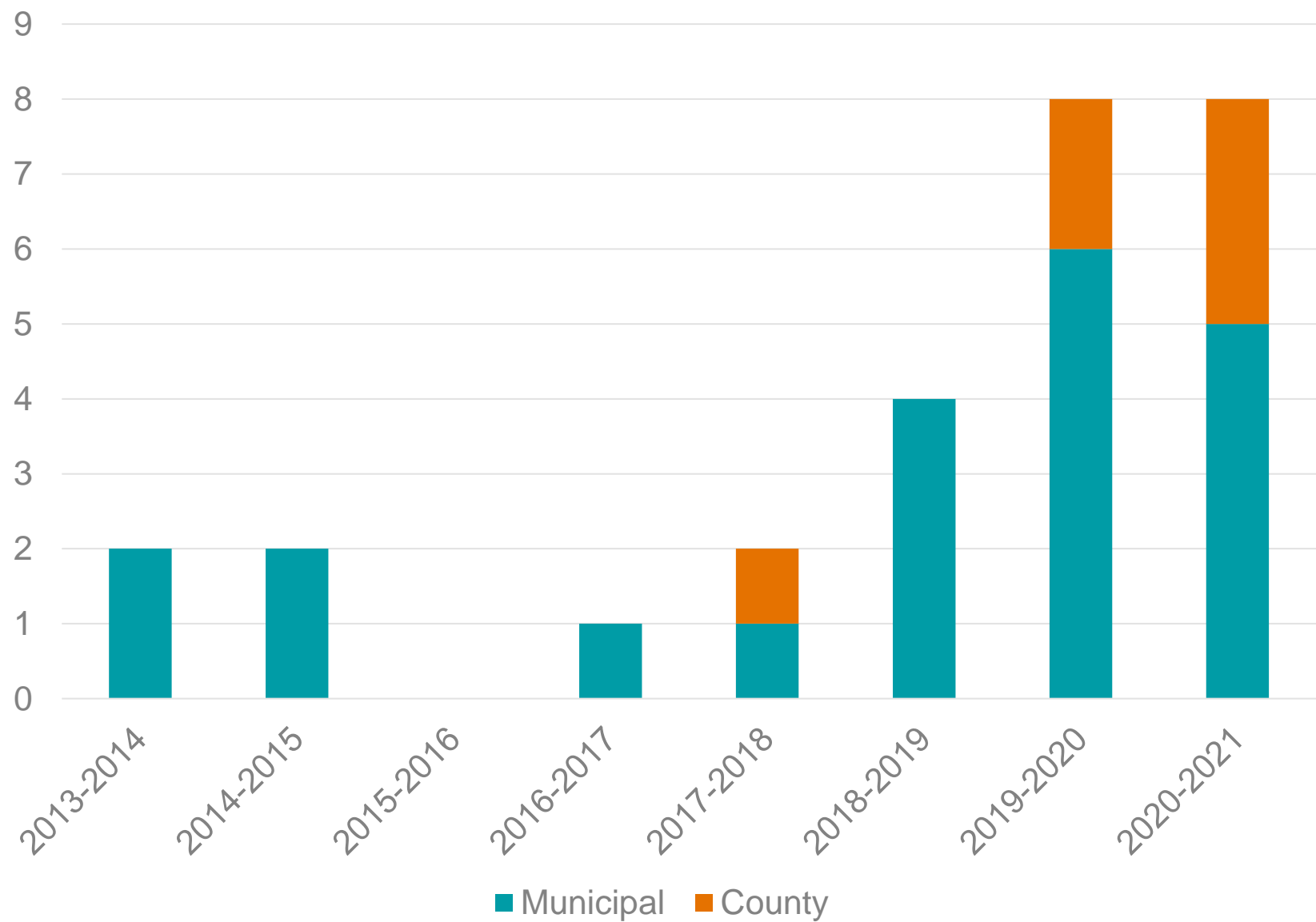
Law Enforcement Excessive Force Claim Costs by Coverage Year



Law Enforcement Excessive Force Claims by Coverage Year

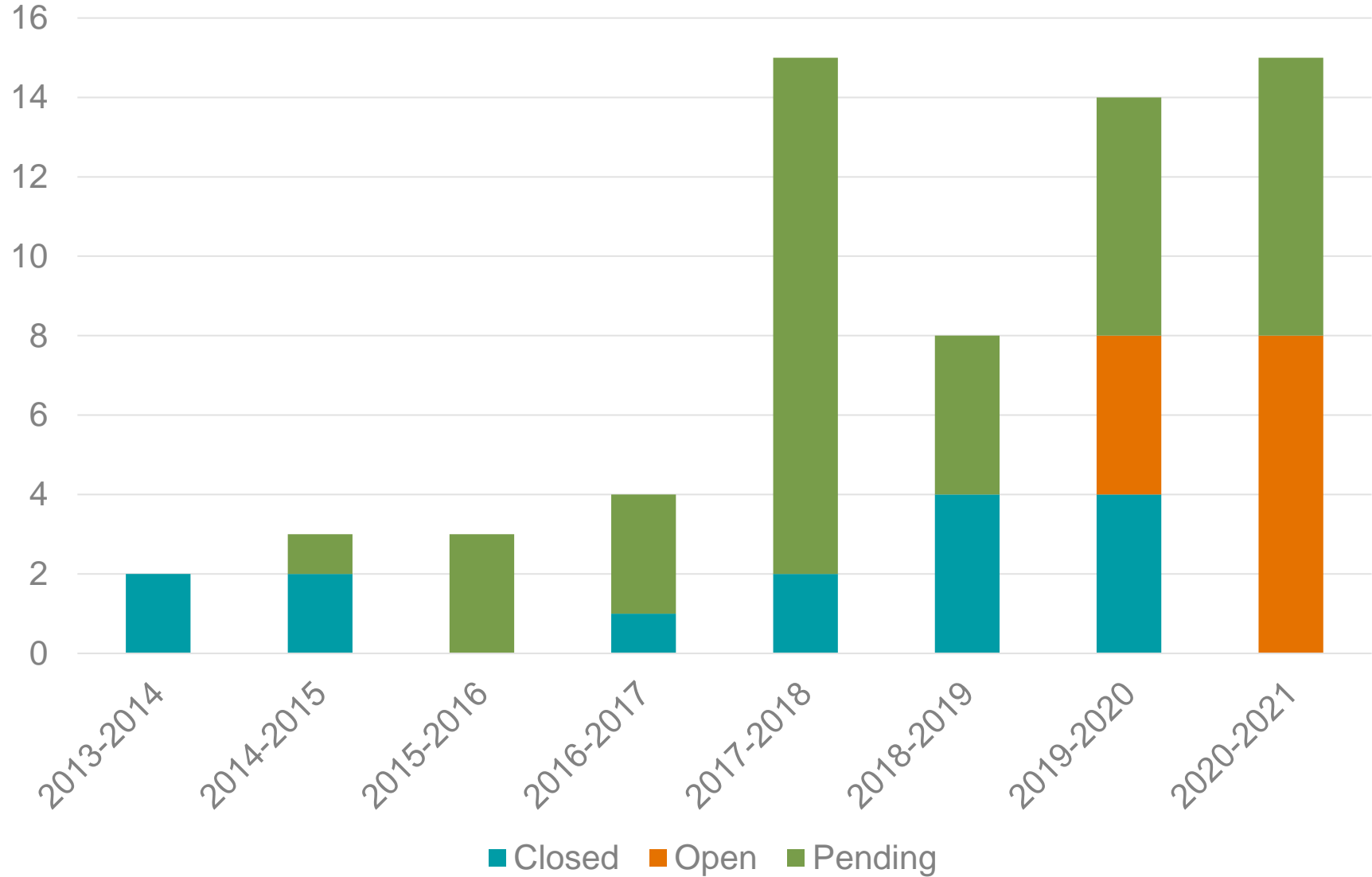


Officer Involved Shooting Claims by Coverage Year



Officer Involved Shooting Claims by Status and Coverage Year

(Municipal & County)



Justified?

September 20, 2018

<https://www.youtube.com/watch?v=VjC7audSUB0&t=5s>

Use of Force in Oregon

ORS 161.235 (Use of physical force in making an arrest or in preventing an escape)

For police officers: Except as provided in ORS [161.239](#), a peace officer is justified in using physical force upon another person **only** when and to the extent that the peace officer **reasonably believes** it necessary:

- (1)** *To make an arrest or to prevent the escape from custody of an arrested person unless the peace officer knows that the arrest is unlawful; or*
- (2)** *For self-defense or to defend a third person from what the peace officer **reasonably believes** to be the use or imminent use of physical force while making or attempting to make an arrest or while preventing or attempting to prevent an escape.*

Use of Force in Oregon - Deadly

(1) Notwithstanding the provisions of [ORS 161.235 \(Use of physical force in making an arrest or in preventing an escape\)](#), a peace officer may use deadly physical force **only when the peace officer reasonably believes that:**

- (a) The crime committed by the person was a felony or an attempt to commit a **felony involving the use or threatened imminent use of physical force** against a person; or
- (b) The crime committed by the person was kidnapping, arson, escape in the first degree, burglary in the first degree or any attempt to commit such a crime; or
- (c) Regardless of the particular offense which is the subject of the arrest or **attempted escape, the use of deadly physical force is necessary to defend the peace officer or another person from the use or threatened imminent use of deadly physical force**; or

Use of Force in Oregon

(d) The crime committed by the person was a **felony or an attempt to commit a felony and under the totality of the circumstances existing at the time and place**, the use of such force is necessary; or

(e) The officer's life or personal safety is endangered in the particular circumstances involved.

(2) **Nothing in subsection (1) of this section constitutes justification for reckless or criminally negligent conduct by a peace officer amounting to an offense** against or with respect to innocent persons whom the peace officer is not seeking to arrest or retain in custody. [1971 c.743 § 28]

Use of Force in Oregon

ORS 161.267 (Use of physical force by corrections officer or official employed by Department of Corrections)

For corrections officers: Subject to ORS 421.107, a corrections officer or other official employed by the Department of Corrections is justified in using physical force, including deadly physical force, *when and to the extent that the officer or official **reasonably believes** it necessary* to:

- (a) Prevent the escape of an adult in custody from a Department of Corrections institution, including the grounds of the institution, or from custody;
- (b) Maintain or restore order and discipline in a Department of Corrections institution, or any part of the institution, in the event of a riot, disturbance or other occurrence that threatens the safety of adults in custody, department employees or other persons; or
- (c) Prevent serious physical injury to or the death of the officer, official or another person.

Use of Deadly Physical Force

U.S. Supreme Court, *Tennessee v. Garner*, 471 U.S. 1 (1985)

Fleeing Felon

- A Tennessee statute provides that, if, after a police officer has given notice of an intent to arrest a criminal suspect, the suspect flees or forcibly resists, **"the officer may use all the necessary means to effect the arrest."**



Use of Deadly Physical Force

- **A Memphis police officer shot and killed Garner's son...**after being told to halt, the son fled over a fence at night in the backyard of a house he was suspected of burglarizing. The officer used deadly force despite being "reasonably sure" the suspect was unarmed and thinking that he was 17 or 18 years old, and of slight build.
- **Father:** 42 U.S.C. § 1983 for asserted violations of his son's constitutional rights. The **District Court** held that the statute and the officer's actions were constitutional.



Use of Deadly Physical Force

U.S. Supreme Court, *Tennessee v. Garner*, 471 U.S. 1 (1985)

The Court of Appeals reversed.

- **Held:** The Tennessee statute is unconstitutional insofar as it authorizes the use of deadly force against, as in this case, an apparently unarmed, non-dangerous fleeing suspect; such force may not be used unless necessary to prevent the escape and the officer has probable cause to believe that the suspect poses a significant threat of death or serious physical injury to the officer or others.

Prevailing Case Law

Graham v. Connor, 490 U.S. 386 (1989)

- Graham, a diabetic, asked his friend to drive him to a convenience store to purchase orange juice to counteract the onset of an insulin reaction.
- Upon entering the store and seeing the number of people ahead of him, Graham hurried out to go to a friend's house instead.
- A city police officer, became suspicious after seeing Graham hastily enter and leave the store, and made an investigative stop, ordering Graham to wait while he found out what had happened in the store.
- Backup police officers arrived on the scene, handcuffed Graham, and ignored his attempts to explain. During the encounter, Graham sustained multiple injuries.
- He was released when Conner learned that nothing had happened in the store.

Prevailing Case Law

Graham v. Connor, 490 U.S. 386 (1989)

- Graham 42 U.S.C. § 1983 against respondents, alleging that they had used excessive force in making the stop, in violation of rights secured to him under the Fourteenth Amendment to the United States Constitution and 42 U.S.C. § 1983.
- The District Court granted respondents' motion for a directed verdict at the close of Graham's evidence, applying a four-factor test for determining when excessive use of force gives rise to a § 1983 cause of action...The Court of Appeals affirmed, endorsing this test as generally applicable to all claims of constitutionally excessive force.

Use of Deadly Physical Force

Graham v. Connor, 490 U.S. 386 (1989)

The Court of Appeals Held.

- **Held:** All claims that law enforcement officials have used excessive force -- deadly or not -- in the course of an arrest, investigatory stop, or other "seizure" of a free citizen are properly analyzed under the Fourth Amendment's "**objective reasonableness**" standard, rather than under a substantive due process standard.

Prevailing Case Law – Graham Factors

Graham Factors:

1. Poses Immediate/Imminent Threat of Safety (Intent, Means, and Opportunity)
 - To who? (LE, third-party, or self)
 - Beware “*possible*” threat fallacy...must see, hear, or feel yourself
2. Actively resisting arrest/Attempting to escape/evade arrest
 - Flight from serious event

Prevailing Case Law – Graham Factors

Graham Factors:

3. Severity of the crime committed

+

4. Availability of less-intrusive methods of capturing, controlling, restraining, or subduing subject

5. What officers knew/knows about subject's health, mental condition, or other relevant frailties

Oregon Legislature (2021)

HB 4301: Provides that peace officer or corrections officer may not use force that impedes normal breathing or circulation of blood of another person by applying pressure on throat or neck except in specified circumstances.

- Modifies justification defenses available to peace officer who uses physical force or deadly physical force upon another person.
- **Requires peace officer** to **give verbal warning, and reasonable opportunity to comply, before using physical force or deadly physical force** if reasonable opportunity to do so exists. Requires peace officer to consider alternatives to physical force or deadly physical force if reasonable opportunity to do so exists.

Use of Force Policy

Lexipol – 125 Agencies

General Statement of Purpose & Scope (Dignity, Respect, Integrity, Transparency)

- This policy provides guidelines on the **reasonable use of force**. While there is no way to specify the exact amount or type of reasonable force to be applied in any situation, **every member** of this department is expected to use these **guidelines** to make such **decisions in a professional, impartial, and reasonable manner**.
- In addition to those methods, techniques, and tools set forth below, the guidelines for the reasonable application of force contained in this policy shall apply to all policies addressing the potential use of force, **including but not limited to the Control Devices and Techniques and Conducted Energy Device policies**.

Use of Force Policy

Definitions

1. **Deadly force** - Force **reasonably anticipated and intended** to create a substantial likelihood of causing death or very serious injury.
2. **Feasible** - **Reasonably capable** of being done or carried out under the circumstances to successfully achieve the arrest or lawful objective without increasing risk to the officer or another person.
3. **Force** - The **application of physical techniques or tactics**, pointing a firearm, chemical agents, or weapons to/at another person. It is not a use of force when a person allows him/herself to be searched, escorted, handcuffed, or restrained.

Use of Force Policy

Definitions

4. **Imminent** - Ready to take place; impending. Note that **imminent does not mean immediate or instantaneous.**
5. **Totality of the circumstances** - **All facts and circumstances known to the officer at the time**, taken as a whole, including the conduct of the officer and the subject leading up to the use of force.

Use of Force Policy

Policy

The Department **recognizes and respects the value of all human life and dignity without prejudice** to anyone. Vesting officers with the authority to use reasonable force and to protect the public welfare requires monitoring, evaluation, and a careful balancing of all interests.

- Duty To Intervene (HB 4205/HB 2929)
- Perspective (Reasonable officer faced with same circumstances)
- Applied Force **De-Escalation and Verbal Warning-New** (HB 4301)
- Justification (Graham Factors)
- Respiratory Restraints – Choke holds (HB 4301 § 8...when deadly force justified-2020)

Use of Force Policy

Applications

- Pain compliance techniques
- Impact weapons/chemical munitions (Crowd Mgt - HB 2928 & 4008)
- Choke Holds
- Vehicles
- Deadly Physical

Use of Force Policy

Other

- Medical (HB 2513)
- Training
- Reporting
 - Supervisor
 - Administration
 - FBI Database (HB 2932)
 - **Uniform Statewide?**
- Review/Analysis



**RISKS
AHEAD**

2020 Legislation – Police Reform

2020 Special Session (16)

- HB 4201-A: Joint Committee on Transparent Policing
 - Establishes the “Joint Committee on Transparent Policing and Use of Force Reform”
 - Specified the committee objectives relating to transparent policing and use of force reform
- HB 4203-A: Police Chokehold Ban



2020 Legislation – Police Reform

- HB 4205-A: Duty to Intervene & Report
- HB 4208-A: Restrictions on use of tear gas
 - Prohibits a law enforcement agency from using tear gas for the purposes of crowd control except in circumstances constituting a riot, as described in ORS 166.015
- HB 4301: Extension of *Graham v. Connor*, 490 U.S. 386 (1989)

2021 Legislation – Police Reform (23)

2021 Long Session

- 16 total reform bills proposed/passed...5 Use of Force related
 - HB 2928: Crowd Control/Civil Unrest
 - **HB 2929**: Duty to Intervene clean up (When physical or another agency)
 - **HB 2932**: FBI Use of Force Database Requirement (Oregon 80%)
 - **HB 3059**: Riot – Arrest language from “shall” to “may”
 - **HB 3355**: Crowd Management/Officer Identification (Population 60,000+ w/ 50 or more persons)

2021 Legislation – Police Reform

2021 Long Session

- Other
 - HB 2162: Accreditation (Policy, Practice, Training)
 - HB 2936: Speech on/off-duty
 - **HB 3145**: Requirement to report discipline that includes “economic sanction” to DPSST

2022 Legislation – Police Reform

- Language reworks
- Total reform bills from 16 to 23
- OACP/OSSA
 - [IMPLEMENTATION CHECKLIST - 2021-2022 Law Enforcement Legislation - Agency Requirements & Workgroup Resources, Updated 3-14-2022.pdf \(memberclicks.net\)](#)

Investigations

Criminal v. Administrative

- **Criminal**

- Generally outside agency or in case of SB 111 Plan...multi-jurisdictional team
- Typically involves administrative leave paid/unpaid
- ****Information sharing with CIS critical incidents and/or exposure events**

- **Administrative**

- Investigator at least two steps from department head/decision-maker

Investigations

- Determination of leave (CIS notification...per Agreements Pre-Loss required suspension/termination)
- Due Process notification of investigation, potential policy violations, and range of potential sanction
- Investigation...First-Line Supervisor or Professional Standards
- Investigative finding/recommendation (Consult with CIS Pre-Loss...Again, Agreements require following advice).
 - Loudermill Hearing

Investigations

- Department Head/Decision-Maker final determination
 - Consult progressive discipline matrix (Ensure consistency/uniformity)
 - Communicate final order with CIS, Employee, Others (contingent upon CBA, employer practice, circumstances)
 - If economic sanction...report to DPSST (discuss/DPSST Rule)
 - Standards of “Just Cause”
- Grievance per CBA
 - Consult with labor attorney
- Tort Claim Notice/Lawsuit
 - Communicate with CIS Pre-Loss and labor attorney

Relationships Matter

ORS 30.287

- Counsel for Public Officer
 - When public funds no to be paid in settlement
 - Effect on liability limit
 - Defense by insurer

CIS v. Member Roles

- Full cooperation does not mean redaction or denial
 - Information that is not needed to evaluate member exposure will not be requested

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