

Quantifying Changes in Qualified Immunity Reform for Law Enforcement Liability

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Michael Stephenson
Chief of Liability Claims, FSRMF

Daniel A. Linton, FCAS, MAAA
Senior Consulting Actuary

Arthur R. Randolph II, FCAS, MAAA, CPCU
Principal and Consulting Actuary

Agenda

- Brief Overview of § 1983 Civil Rights Litigation for Police
- George Floyd Justice in Policing Act of 2021
- State of the Market
- So What's a Pool to Do?
- Quantifying Qualified Immunity
- Potential Market and Management Reactions

Brief Overview of § 1983 Civil Rights Liability for Police

1. The Law Creating Civil Rights Liability for Police

42 U.S.C. § 1983: Civil Action for Deprivation of Rights

“Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory..., 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...”

2. How § 1983 Impacts Police:

Most everything police do impacts a constitutional right and therefore falls under § 1983:

<u>Action/Event</u>	<u>Type of Claim</u>	<u>Primary Constitutional Right Impacted</u>
Make Arrest	False Arrest	4 th Amendment
Takedown, Tase, Shoot	Excessive Force	4 th Amendment
Search Person or Car	Unlawful Search	4 th Amendment
Enter Home	Unlawful Search/Entry	4 th Amendment
Trespass Warning/Arrest at Park	Retaliation for Speech	1 st Amendment
Jail Medical Care	Deliberate Indifference	14 th /8 th Amendment
Suicide in Jail	Deliberate Indifference	14 th /8 th Amendment

(Note: Each of these federal § 1983 claims has a state-law analogue)

3. Types of Claims Brought Against Police Under § 1983

A. Sue the police officer, personally, for:

- Directly violating the claimant's rights
 - The officer who made the arrest or used force
- Failing to stop another officer from violating claimant's rights
 - “Failure to intervene”
- Directing or permitting a subordinate to violate another's rights
 - “Supervisory liability”

But officers can assert the defense of Qualified Immunity!

3. Types of Claims Brought Against Police Under § 1983

What is Qualified Immunity?

Judicial doctrine that holds an officer can't be liable under § 1983 unless:

- The law was clearly established at the time of the incident that the action taken by the officer was unconstitutional
- No reasonable officer in the shoes of the defendant officer, knowing the law, could have believed the action taken was unconstitutional

Result: When the law is silent or unclear about the lawfulness of an officer's actions under the unique circumstances of the case, the officer wins

3. Types of Claims Brought Against Police Under § 1983

B. Sue the agency employing the police officer who violated claimant's rights, called a "Monell" claim, after Monell vs. Department of Soc. Svcs., 436 U.S. 658 (1978):

- Agency is not vicariously liable for the actions of the officer
- The claimant must prove the agency directly caused the officer's violation
- Difficult to establish

3 different ways to establish Monell liability:

- A policy of the agency directly caused the officer's violation, or
- Widespread prior similar violations put the agency on notice of a problem and the agency did not try to stop the problem (custom or practice), or
- The agency's final policymaker directed or ratified the violation

4. Damages Recoverable in a § 1983 Claim

- Uncapped compensatory damages, including pain and suffering
- Uncapped attorneys' fees for prevailing plaintiff
- Injunctive relief, primarily against agencies

Attorneys' fees are often the driving factor behind § 1983 suits

- Particularly in claims with clear liability and low damages

George Floyd Justice in Policing Act of 2021

The George Floyd Justice in Policing Act of 2021

H.R. 1280

Sponsor: Rep. Karen Bass (D-CA)

February 24, 2021: Bill introduced

March 3, 2021: Passed the U.S. House of Representatives

April – July 2021: Very active efforts in the Senate to produce a compromise bill, led by Sen. Tim Scott (R-SC), Sen. Cory Booker (D-NJ) and Sen. Lindsey Graham (R-SC)

August 2021: Press reports negotiations fall apart

Overview of the George Floyd Justice in Policing Act of 2021

Stated Purpose: “To hold law enforcement accountable for misconduct in court, improve transparency through data collection, and reform police training and policies.”

138 Pages – Comprehensive Changes Include:

- Criminal liability of police officers & prosecutorial oversight of police
- Civil liability/civil rights reform
- Accreditation & training standards linked to federal funding
- Establishment of National Police Misconduct Registry
- Hiring requirements
- Data collection
- DOJ investigations
- Applies § 1983 to federal law enforcement officers and federal LEO reforms
- Limits police access to military equipment

Overview of the George Floyd Justice in Policing Act of 2021

SEC. 102. QUALIFIED IMMUNITY REFORM.

42 U.S.C. 1983 is amended by adding at the end the following:

ELIMINATES QUALIFIED IMMUNITY

“(1) the defendant **was acting in good faith, or** that the **defendant believed, reasonably** or otherwise, that his or her **conduct was lawful** at the time when the conduct was committed; or

“(2) **the rights, privileges, or immunities** secured by the Constitution and laws **were not clearly established at the time** of their deprivation by the defendant, or that at such time, **the state of the law was otherwise such that the defendant could not reasonably have been expected to know whether his or her conduct was lawful.**”

Primary Effects of the George Floyd Justice in Policing Act

- Increased personal liability for police officers
- Elimination of “interlocutory” appeals between denial of summary judgment and trial to contest the lower court’s denial of qualified immunity
 - Less hesitancy by judges to grant summary judgment
 - More cases will proceed to trial
- Decreased number of cases resolved by summary judgment
 - More cases will require trial to resolve
- Increased settlement value of claims
- Increased number of § 1983 claims brought against officers

Secondary Effects of the George Floyd Justice in Policing Act

- Decreased availability of insurance & reinsurance
- Increase in insurance & reinsurance premiums, if available
- Decreased officer engagement and proactive policing
 - “Ferguson Effect”
- Decreased officer morale
- Increased retirements/resignations
- Increased union presence & engagement
- Reduction in number and quality of recruit candidates

Sen. Tim Scott “Compromise” Position

Media reported Sen. Tim Scott proposed to keep qualified immunity intact but create a new form of § 1983 liability: VICARIOUS LIABILITY AGAINST THE AGENCY

Effects:

- Officers will be happy . . . initially
- Agencies’ liability under § 1983 will be greatly increased
- Volume of § 1983 suits against agencies will skyrocket
- Agencies will have unlimited exposure for “rogue officers”
- Insurance and reinsurance rates will increase dramatically
- Insurance and reinsurance availability will shrink

State of the Market

State of the Market

- Underwriting Cycle
 - Designed to illustrate fluctuations in insurance business over time
- Drivers of a hard market
 - Reduced insurer competition
 - Insolvencies
 - Reduced tolerance for risk causing insurers to limit coverage or exit market
 - Reduced capacity
 - Sudden and material change in exposure to loss
 - Changes in public sentiment & jury attitudes

State of the Market

Changes in
public sentiment

Changes in
jury attitudes

Rapid increase in
average payouts

Rapid increase in
premiums



Reduced
competition

- Another factor to consider: Uncertainty

Uncertainty Reigns

- From a well-managed insurer's perspective, rising payouts are not necessarily a problem
 - These costs are just built into future premiums
 - Affordability, on the other hand, can become a concern
- Uncertainty is harder to price
 - Minneapolis reached a \$27 million settlement with George Floyd's family
 - Is this a sign of things to come?
 - Is this an outlier?
- Why take the risk?
 - Best to reduce limits or exit the market

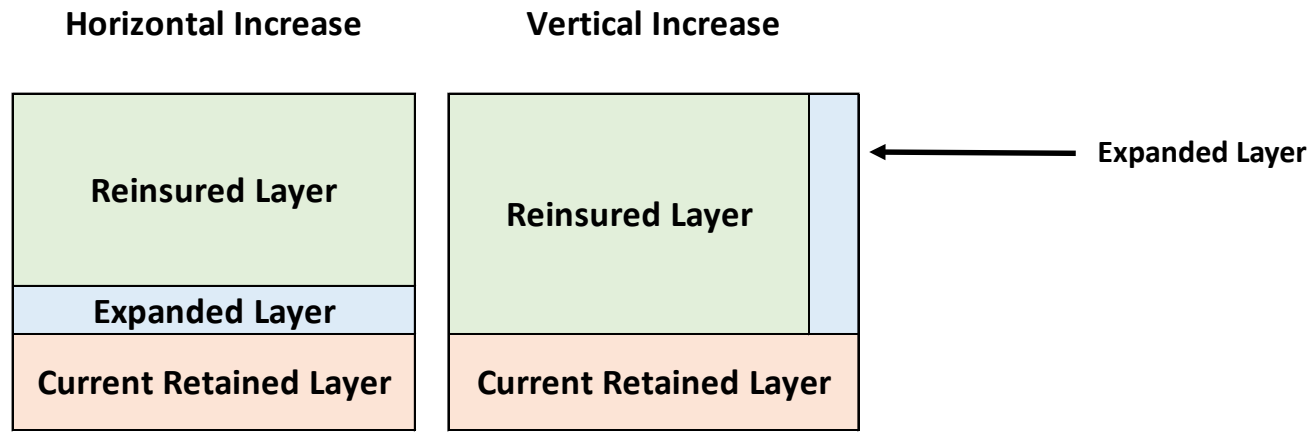
So What's a Pool to Do?

So What's a Pool to Do?

- Pools were made for this!
 - Born from a liability crisis
- Double down on loss control
 - Work closely with police departments on policies & training
 - Provide incentives for additional de-escalation training
 - Conduct site visits & audits
 - Put struggling departments on detailed performance improvement plans
- Resulting improved loss experience may allow for more leverage with insurance carriers at renewal

So What's a Pool to Do?

- Pool should evaluate if it can take on more risk
 - Increase the amount of risk retained horizontally or vertically



- Some questions to consider
 - Will this reduce the overall cost of risk?
 - Is there enough capital to do so?
 - How much uncertainty does this change introduce to the underwriting portfolio?

So What's a Pool to Do?

- Keep a pulse on prospective legislation
 - Changes to qualified immunity legislation on the horizon
 - Consider whether a legislative change such as this will force reinsurers to lower limits and increase attachment points
 - i.e., offer less coverage and demand higher self-insured retentions
- Important to understand the economic consequences of legislative changes
 - Impact to frequency/severity
 - Impact on excess coverage

Quantifying Qualified Immunity

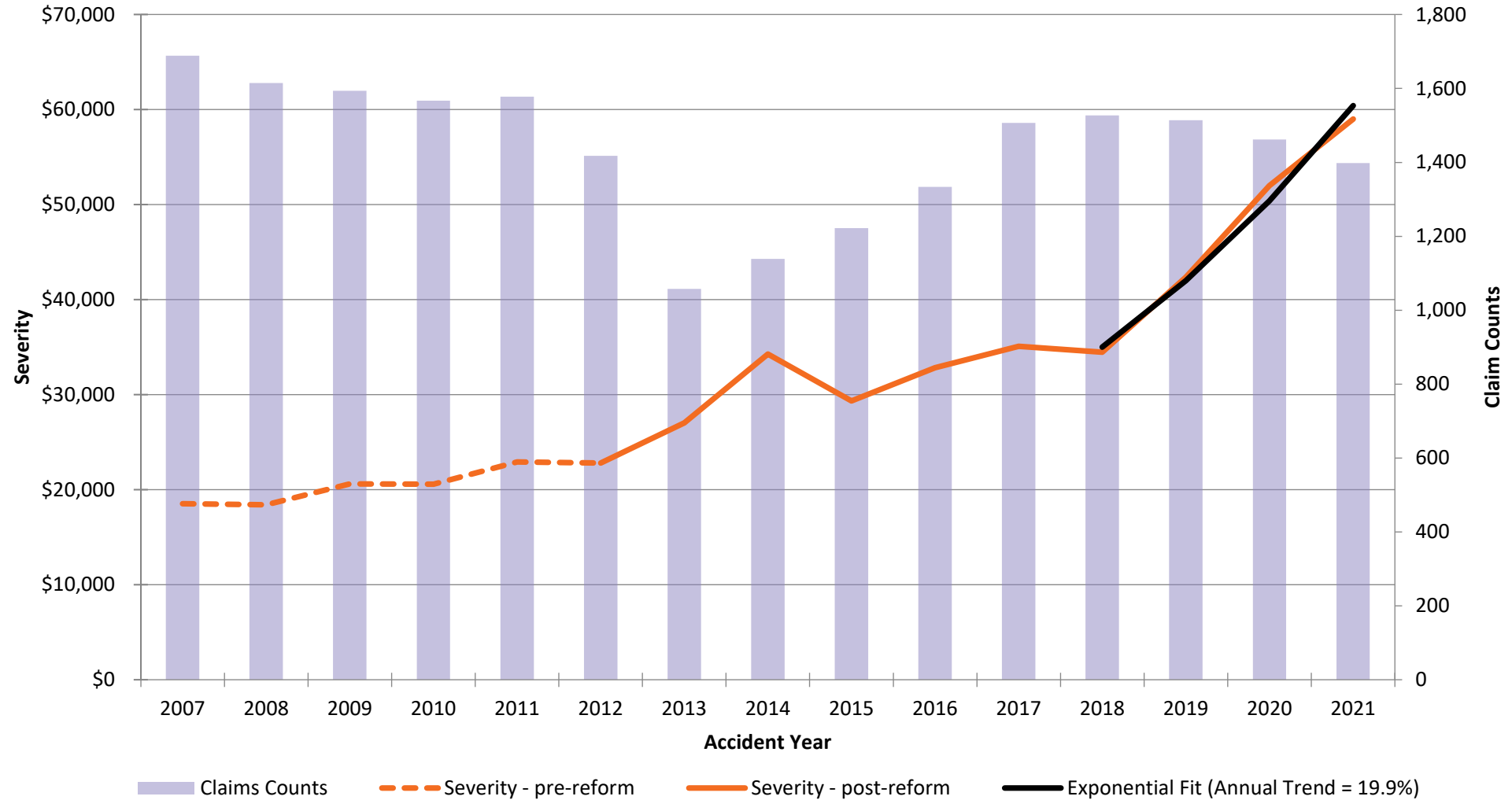
Quantifying Qualified Immunity

- Tantamount to legislative costing study
- Considerations:
 - Cost structures/changes in contiguous states
 - States with comparable litigation environments
 - Enacted tort reform for other professional liability exposures
 - Changes in behavior/sentiment – claimants, plaintiffs’ attorneys, juries
 - Litigation financing / “litigation economy”
- Legislation implementation basis
 - Occurrence – prospective
 - Claims-made – retrospective and prospective

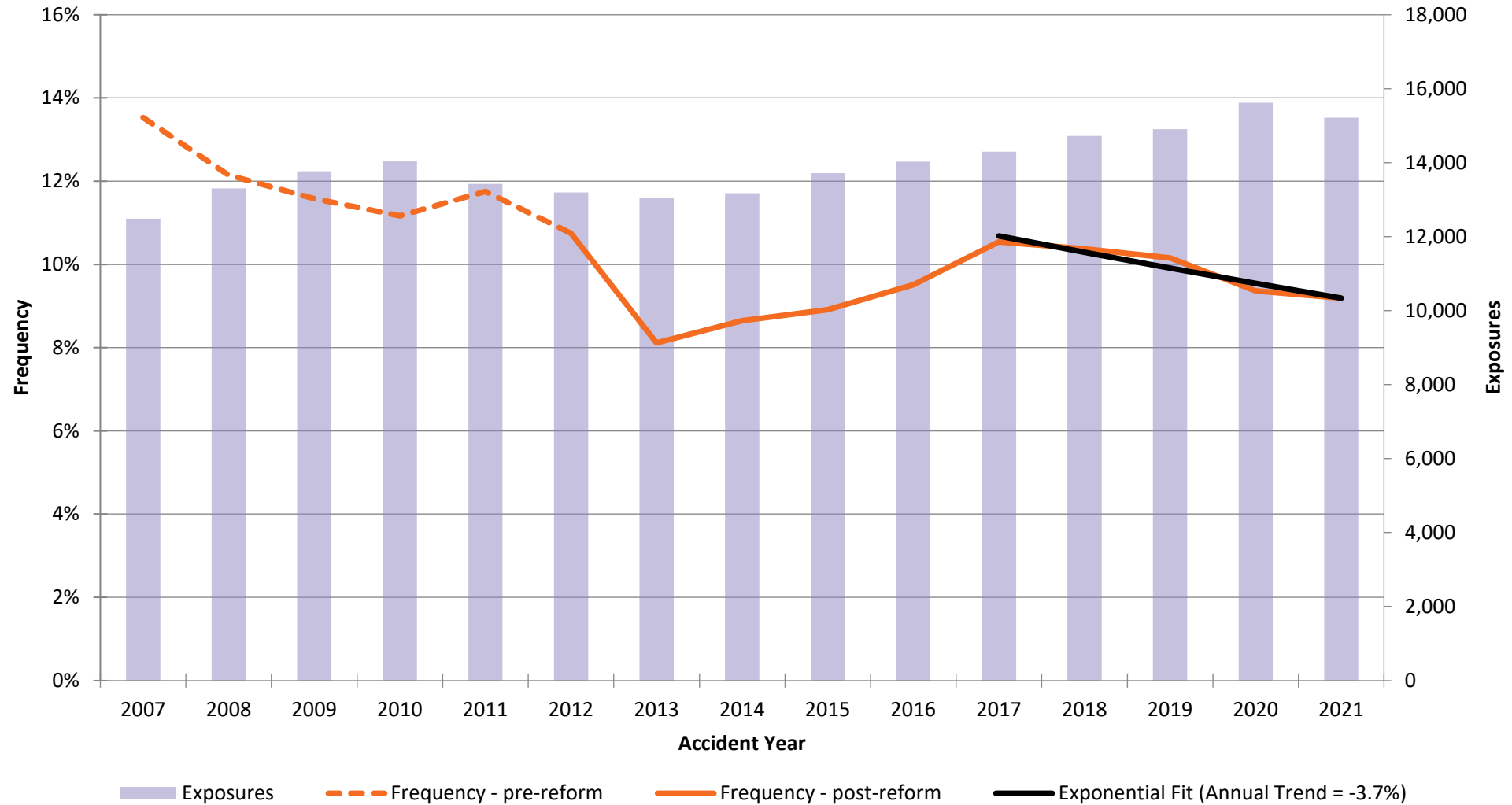
Quantifying Qualified Immunity

- Primary goal: indicated change in costs
 - Severity
 - Frequency (and claim durations)
 - Loss cost
 - Assumption sensitivity testing – confidence level intervals

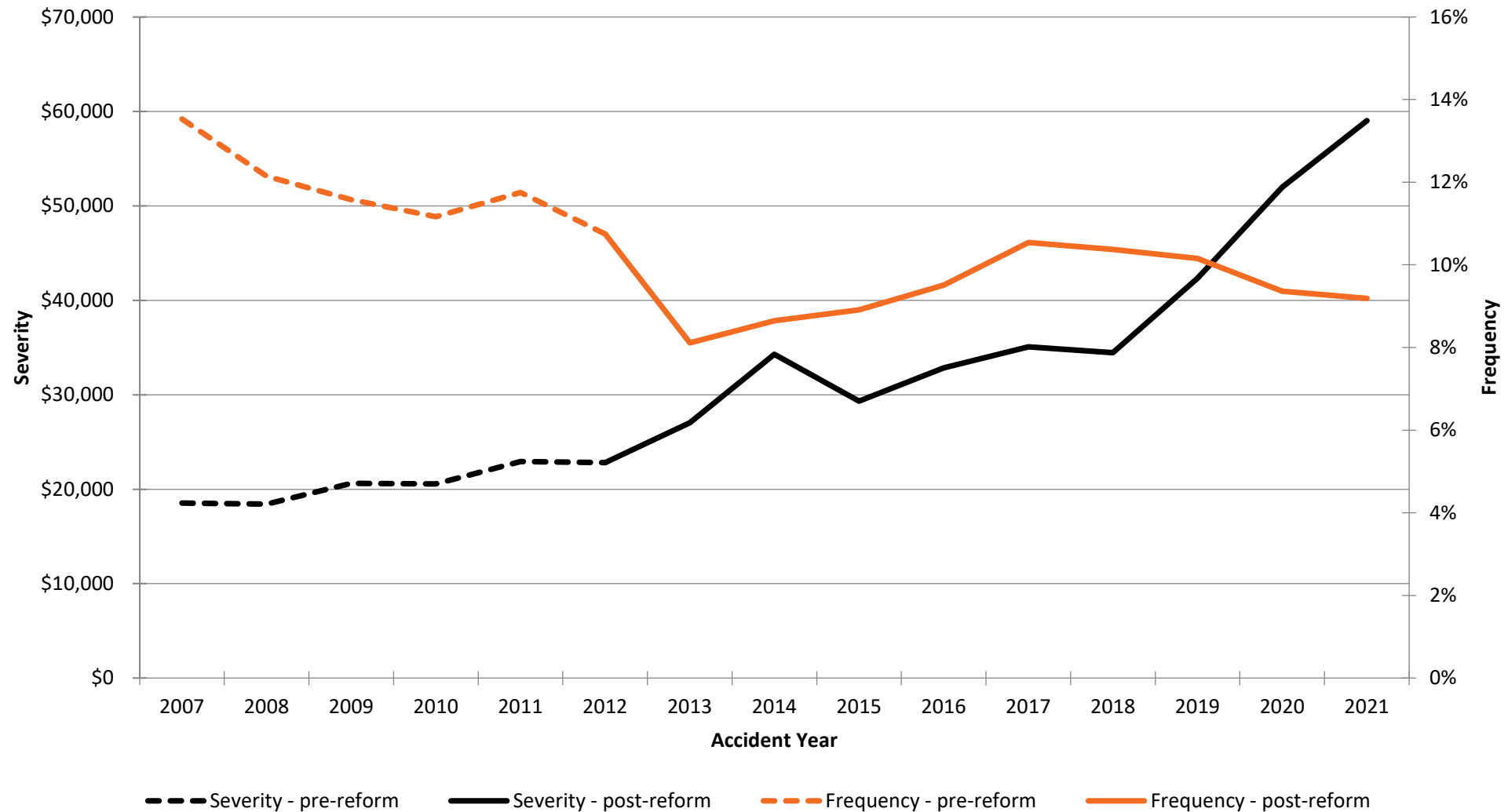
Severity Implications



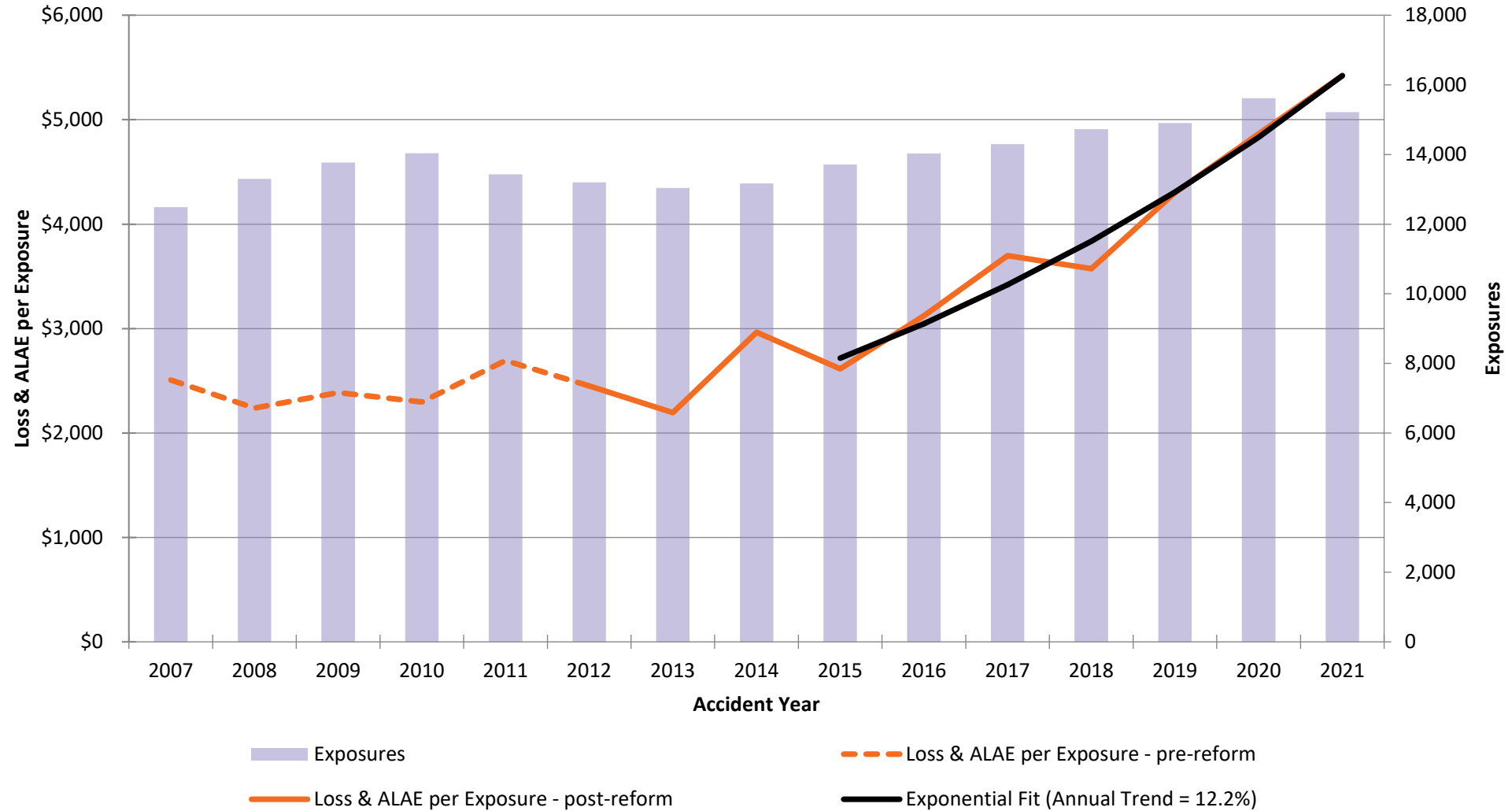
Frequency Implications



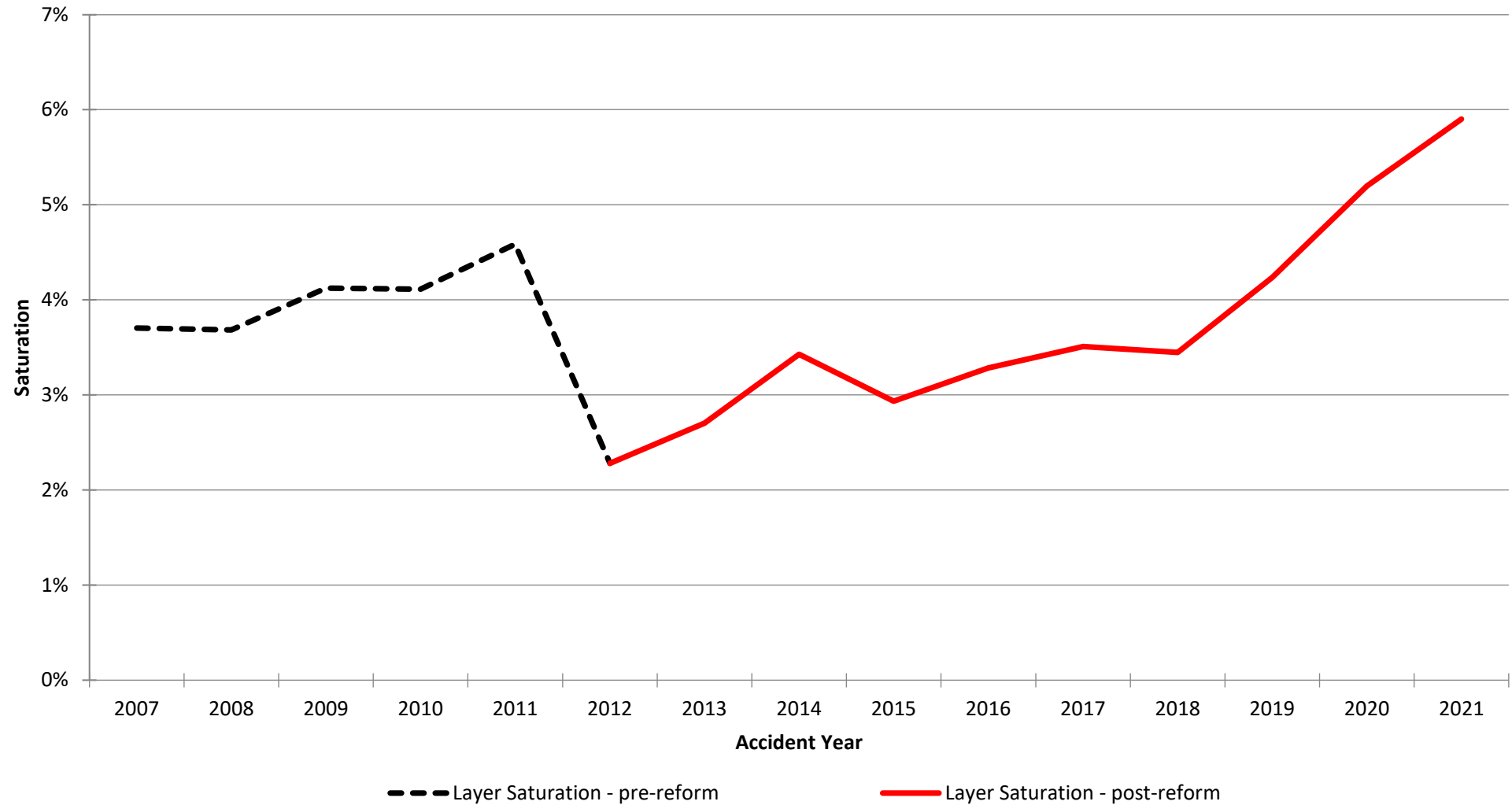
Frequency x Severity = Loss & ALAE per Exposure = Loss Cost



Loss Cost / Rate Implications



Layer Saturation



Potential Market and Management Reactions

Excess Insurance / Reinsurance Market Reactions

- Increase rates
- Increase attachment points – more risk sharing
- Require corridor participation
- Reduce coverage provisions
- Change policy trigger – occurrence to claims-made
- Eliminate coverage for select members – laser out
- Exit market

Pool Management Reactions

- Increase rates
- Increase deductible limits – more risk sharing
- Reduce coverage limits
- Reduce coverage provisions
- Change policy trigger – occurrence to claims-made
- Eliminate coverage for select members – laser out
- Cease underwriting coverage

Pool Management Reactions

- Increase rates
- Increase deductible limits – more risk sharing
- Reduce coverage limits
- Reduce coverage provisions
- Change policy trigger – occurrence to claims-made
- Eliminate coverage for select members – laser out
- Cease underwriting coverage
- **Aggregate impact: coverage availability and affordability crisis**

Thank You

Michael Stephenson

850.320.6886

Michael.Stephenson@fsrmf.org

Daniel A. Linton, FCAS, MAAA

309.807.2335

dlinton@pinnacleactuaries.com

Arthur R. Randolph II, FCAS, MAAA, CPCU

678.894.7258

arandolph@pinnacleactuaries.com

