CLM 2016 New York Conference
December 1, 2016
New York, NY

Third Party Violence: How to Analyze Coverage for Mass Shootings in Public Venues and Places of Employment

I. Overview of growing threat of third party terrorist acts/violence

Unfortunately, third party acts of mass violence have seen an increase since 9/11, particularly in the last two years. This is in part due to global factors such as the increase in violent activities by terrorist groups like ISIS and Al Qaeda both internationally and domestically, as well as the general increase in publicity/propaganda for violent mass shootings and the easy availability of direct methods of web-based collaboration with terrorist and pro-violence groups. Although the number of actual incidences are still relatively rare, the mere fact that they are rare means that claims personnel presented with such a scenario are likely to have little or no direct experience in evaluating these claims. Likewise, few courts will have experience evaluating the coverage disputes that will inevitably arise when such events occur. This seminar will thus address the coverage examination that a carrier would employ if presented with such a claim.

Generally, there are at least four different potential categories of third party violence that raise coverage questions for commercial general liability and/or employment insurance policies. Together, they demonstrate the complexities of our evolving understanding of what type of events are or are not, and should or should not be, covered by insurance products. For purposes of this presentation, the four areas of potential third party violence are:

a. Terrorist attacks by individuals or groups already identified and tracked by the FBI/law enforcement organizations as terrorists/terrorist sympathizers.
b. Attacks by individuals or groups not previously identified by FBI/law enforcement organizations as terrorists/terrorist sympathizers but who have in the past claimed allegiance to known terrorist organizations like ISIS or Al Qaeda.

c. Attacks by individuals or groups not previously identified by FBI/law enforcement organizations as terrorists who have not in the past claimed allegiance to known terrorist organizations but, in the moments before an attack on a group of unarmed civilians, claim allegiance to a known terrorist organization through communication on a terrorist website or by simply announcing said allegiance to police or witnesses during the attack.
d. Attacks by individuals or groups not previously identified by FBI/police organizations as terrorists who have also have never claimed allegiance to known terrorist organizations, but who carry out mass premeditated attacks on innocent civilians, either in the work place, or other venues.

The mere existence of this range of potential perpetrators highlights the inadequacies of the standard language of Commercial General Liability ("CGL") policies to address the variations on coverage analysis that might be triggered by these differing activities. Moreover, the varied possibilities create significant challenges to insurance underwriters who are considering how to offer specialized insurance products for these types of risk. This panel will explore all of these issues.

II. Analysis of Coverage Under Standard Commercial General Liability Policies

A. Is there a Triggering "Occurrence?"

Typical CGL policies based on standardized insurance forms promulgated by Insurance Services Inc. ("ISO") generally require a triggering "occurrence" in order to apply. These standard policies go on to define an "occurrence" as an "accidental" or "fortuitous" event. The commencement of any coverage analysis of third party violence thus begins with an examination of whether the intentional act of shooting other people is sufficient to cover a triggering, accidental "occurrence."

Most jurisdictions interpret the term "occurrence" according to the plain meaning of its policy definition, which is an "accidental or fortuitous event."[1] Such an event is viewed through the eyes of the insured, thus, to an insured business like a movie theatre or club, the sudden appearance of a violent individual or group who open fire on patrons is a fortuitous event, and one that is likely to satisfy the threshold for a triggering "occurrence." The only obvious exception would be one where the owner of the insured's business is the perpetrator or is somehow involved in the event, which would trigger multiple exclusions, addressed below.

B. Application of Exclusion for Criminal Acts

Many CGL policies contain an exclusion for criminal acts.

1 Specialty Surfaces Intern. Inc. v. Continental Cas. Co., 609 F.3d 223 (3rd Cir. 2010); VRV Development LP v. Mid-Continent Cas. Co., 630 F.3d 451 (5th Cir. 2011); Greystone Const. Inc. v. National Fire & Marine Ins. Co., 661 F.3d 1272 (10th Cir. 2011).

The difficulty in enforcing such exclusions in the setting of any of the four scenarios outlined above arises when the potential claimant, or class of claimants, allege that the insured had advance knowledge of a potential threat and ignored or failed to appropriately respond to said knowledge, creating a claim of negligence.

Such a scenario is of course more likely when the perpetrator made an announcement as to a potential attack location, either through news media or internet sources. This is more likely in the first two scenarios described above (a and b), but could also occur even if the perpetrator was a lone actor with no terrorist affiliation but instead was mentally disturbed and seeking attention. Such an individual might have therefore contacted a radio station or local police station to announce his or her intention to experience "suicide by cop" or to kill a certain class of people based on their religion, sexuality or political views.

It should be noted, however, that this scenario could also arguably occur when it is alleged that the security measures at a mall, gas station, entertainment venue or school failed to have even remedial measures to protect its patrons or students from harm, even when there was no warning of an impending event. These types of cases would be subject to strong liability defenses, but the question is how do individual state laws come down on the issue of whether insurers should have to provide coverage for the criminal acts of a third party.

In general, the criminal acts exclusion is one of the stronger barriers against coverage commonly found in a CGL policy for the types of terrorist activities addressed in this analysis. The panel will comment on this and the other coverage exclusions addressed below in the context of several recent mass violence events and the coverage disputes that are evolving from those events.[2]

Finally, the panel will also address the intersection of the duty to indemnify and the duty to defend in the context of this exclusion. The vast majority of jurisdictions in the United States define the duty to defend broader than the duty to indemnify, thus there might be situations where, in certain jurisdictions, a carrier is better off picking up a defense while they litigate indemnification coverage in a declaratory judgment action.

C. Application of Exclusion for Intentional Acts

Another potential exclusion that might come to mind in the context of a case involving a violent third party act is the exclusion for intentional acts. In most jurisdictions, however, this exclusion is limited to application where the *insured* intended the specific harm done.[3]

[2] For example, a New Jersey judge ruled in August of this year that insurers must defend The Mall at Short Hills in a lawsuit arising from the December 15, 2013 fatal shooting at the property, but must cover only judgments against the mall if a former security contractor is found liable as well. *Friedland v. First Specialty Ins.. Corp., et al*, case no. L-4155-15, in the Superior Court of New Jersey, County of Essex. That case centered

on what duty to defend and/or indemnify extended to additional insureds ("AIs"). The Court held that, given the AI endorsement, the mall defendants were entitled to "full indemnification" if it is proven that the security service was even 1 percent at fault.

[3] See e.g. *Liberty University Inc. v. Citizens Ins. Co. of America*, 792 F.3d 520 (4th Cir. 2015).

Thus, unless the perpetrator himself is the owner of an insured business or entity, it is unlikely that this exclusion would occur.

Complicating factors arise, however, when an employee of an insured is the perpetrator, such as scenarios where a disgruntled employee opens fire on an office. The panel will address whether the status of the insured organization (corporation, limited liability company, or other) affects the applicability of this exclusion with regard to coverage for the primary insured (and additional insurds) for the acts of the primary insured's employees.

D. Application of Exclusion for Acts of War

The difficulty in applying an exclusion for Acts of War is how to define a "war." It could be argued that, by definition, a terrorist activity is an "act of war," but given the shape-shifting and sometimes spontaneous nature of terrorist activity – as illuminated by the first three potential types of violence, a, b and c – one could foresee a vehement argument that a terrorist activity is not an "act of war." Rather, it is a series of random events, only loosely connected, that do not involve a declaration of war by one nation against another. Given the dearth of declared wars on this country's soil, carriers can expect a fight on the application of an Act of War exclusion in the setting of a mass shooting, even when allegiance to a particular known terrorist group is pledged, as in the case of examples a, b and even c.

E. Public policy analysis regarding whether insurers can or should be held liable for mass violence; i.e. what happened at Sandy Hook?

The underlying public policy consideration of all of the exclusions above is whether an insurer should be required to provide coverage to its insureds for random acts of violence, whether terrorist or otherwise, that involves large groups of people. On the one hand, insurance underwriters would argue that they are not contemplating coverage for enormous claims whose risks cannot be well-calculated and whose risks would wipe out smaller insurers caught in the cross-fire. On the other hand, proponents of insurance coverage would argue that businesses buy insurance precisely for those situations that they cannot foresee and that, without insurance products that protect them in the types of situations that involve rare but significant losses, an entire sector can be wiped out and the national economy endangered by insurers that do not pay such claims. The panel will provide their personal observations and analysis regarding this issue.

[4] For example, a New Jersey judge ruled in August of this year that insurers must defend The Mall at Short Hills in a lawsuit arising from the December 15, 2013 fatal shooting at the property, but must cover only judgments against the mall if a former security contractor is found liable as well. *Friedland v. First Specialty Ins.. Corp., et al*, case no. L-4155-15, in the Superior Court of New Jersey, County of Essex. That case centered on what duty to defend and/or indemnify extended to additional insureds ("AIs"). The Court held that, given the AI endorsement, the mall defendants were entitled to "full indemnification" if it is proven that the security service was even 1 percent at fault.

[5] See e.g. *Liberty University Inc. v. Citizens Ins. Co. of America*, 792 F.3d 520 (4th Cir. 2015).

III. New Insurance Products/Exclusions for Terrorist Acts

Given the spread of violent mass attacks, and the explicit desire of insurance customers to protect their businesses against claims that follow in their wake, some carriers are beginning to sell, or at least consider selling specific policies that cover terrorist attacks in at least some circumstances. This idea, however, requires underwriters to consider how best to articulate what is intended to be covered.

A. What is a "terrorist?"

The first inquiry is how the term "terrorist" is to be defined. When viewed within the backdrop of the four potential categories of perpetrators, the importance of this definition cannot be overstated. While a known terrorist included on an FBI or local law enforcement's most wanted list would obviously satisfy any definition of a "terrorist," the other three potential scenarios make the wordsmithing of a definition of "terrorist" very important.

One could define a "terrorist" by simply limiting the term to those known individuals or groups that have been identified as such by experts in the field, such as the FBI or law enforcement. But should there be a difference between a shooter with known Middle Eastern roots and a connection to ISIS who opens fire in a movie theatre and another individual who does the exact same thing, but hasn't been identified by any official law enforcement or governmental entity?

B. Does a perpetrator need to swear allegiance to an enemy of the state to satisfy the definition of a "terrorist?"

Part of the public's general understanding of the term "terrorist" are the following criteria: 1) random acts of violence; 2) directed at large groups of people; 3) in the name of a subversive group, most commonly those with extremist Islamic tendencies (although one could just as easily substitute in any dictatorial system of government); 4) for the purpose of "terrorizing" innocent civilians.

The question then becomes, should an insurer require that the perpetrator at least have sworn allegiance to a subversive group and/or enemy of the state in order for the insured to qualify for coverage? By creating this limitation, the insurer could arguably prevent coverage from extending to the acts of any deranged individual with a mental illness who acquires an assault rifle – an arguably more likely occurrence – which would allow underwriters to more accurately evaluate risk and assign a premium that would not be cost-prohibitive.

1. **What if the perpetrator had no affiliation with a known terrorist group but swears allegiance at the last moment?**

The natural next step in the coverage analysis for a policy that offers limited coverage for "terrorist" acts is, what happens if the perpetrator had no affiliation with a known terrorist group but, at the last moment posts an email, calls the police or shouts during a rampage that he or she pledges allegiance to a known terrorist group? Should that be enough to qualify the individual as a terrorist so that coverage should be extended?

If one steps back to look at this fact scenario, one might argue that, if the common understanding of a terrorist act is that it be a random act of violence against a lot of innocent people in the name of a subversive group, then it arguably would be a terrorist act. A difficulty arises, however, because now the scope of the risk to be evaluated by underwriting has expanded considerably. As a practical matter then, the price of the premium necessary to insure against this larger scope of risk might be cost-prohibitive. Moreover, as an analytical matter, can one really become a member of a group just be declaring it to be so? Doesn't by definition, membership require acceptance by the group? What if the group engages in post-shooting acceptance of the perpetrator's wish to gain admittance to the group? The panel will discuss these issues in light of recent events in the news.

2. **What if the perpetrator never declares affiliation with a known terrorist group?**

The last category of perpetrators is the most complicated for purposes of this analysis. Should someone who opens fire in a movie theatre due to mental illness or psychotic event and indeed "terrorizes" those inside be permitted to fall under the definition of a "terrorist?" Once again, the broader the definition of a "terrorist," the broader the scope of coverage for random acts of violence that have nothing to do with a subversive group. Arguably, expending the scope of the definition of "terrorist" or "terrorist activity" that wide would result in unintended coverage for any shooting that claims a large number of victims. And then the question becomes, how many victims constitutes a "mass shooting."

C. Is every mass shooting a terrorist activity, by definition?

Finally, the inquiries lead to the last question, which is, if there are unequivocally enough victims to be considered a "mass shooting," whether it be 100, 200 or more, does this automatically become a "terrorist activity?" On the one hand, without any known allegiance to a terrorist group, same would arguably be excluded from the definition. On the other, it is precisely

from these types of large claims that there is a growing interest in coverage. It is up to underwriters to decide if it is cost-efficient to try to provide coverage for these types of losses.

IV. Analysis of Coverage Under Worker's Compensation Statutes and Policies

A. Workers Compensation As Exclusive Remedy

An injured employee's rights against his/her employer for workplace injuries are generally limited to what it provided by state statute: those wage replacement and medical benefits falling within the Part A coverage of the standard workers compensation policy.

Virtually all states have established that these benefits are the employee's exclusive remedy for workplace injury.

The statutory exchange is that employees received certain benefits regardless of fault, but waive common law remedies for pain and suffering; loss of consortium; and all other awardable categories of damage.

The scope of workers compensation ("WC") as the sole remedy is frequently challenged. Employers and carriers are understandably concerned whenever there is a breach. Not only do exposures increase, but the costs of defending these suits are considerable in comparison to the administrative adjudication of WC claims. Moreover, whether there is coverage for employee-suits under Part B of the standard WC policy or under CGL formulations is unclear in many jurisdictions.

B. Exceptions to Sole Remedy

There are few exceptions to the exclusive remedy doctrine and all are jurisdiction specific. Two of the more common forms involve (1) an employer's "dual capacity" in the loss; or (2) acts that are intentional, unlawful, or otherwise constituting misconduct—generally perpetrated by someone having an ownership interest or holding a managerial position.

One means for employees to avoid the exclusive remedy doctrine (also known as the workers comp bar) is to demonstrate that the employer's tortious conduct arose from a role other than what is incident to its function as employer. By showing that the employer had a "dual capacity," some courts have permitted claimants to bring civil proceedings to recover for damages over and above what workers compensation provides. The most common exception courts permit involves an employer's ownership or leasing of the premises housing operations. See, *Sharp v. Gallagher*, 447 N.E.2d 786 (Ill. 1983); *Miller v. King*, 19 Cal.App.4th 1732 (1993). Other frequently recognized exceptions involve employers that manufacture products causing an employee's injury; medical facilities that treat employees (whether for compensable WC injuries or non-work conditions).

There are a broad range of exceptions for employer misconduct. Some jurisdictions have enacted statutes excluding malfeasance from the exclusive remedy, while others have accomplished this through case law. The first hurdle generally involves the level at which the misconduct originated. Co-worker or peer-level misconduct is seldom sufficient in most jurisdictions to overcome the preclusive WC bar. Management inaction in the face of known danger may permit a tort avenue in addition to what a WC statute provides. See, e.g., *Suarez v. Dickmont Plastics*, 639 A.2d 507 (Conn. 1994). Some state statutes combine the concepts, whereby serious misconduct by one having supervisory responsibility permits extraordinary relief. See, Mass. G.L.c. 152, sec. 28 (providing a doubling of sums paid for lost wages and medical expense, with the carrier having recoupment rights against the insured-employer for the extra payments).

Given the increasing incidence of workplace violence, employers and their insurers should anticipate the limits of the exclusive remedy will be further tested. It is easy to envision employees or their beneficiaries claiming inadequate security measures where the employer owns or controls the premises where an attack occurs. Moreover, an employer's role in post-termination job references, security clearance, non-disclosure of the dangerous propensities of certain job applicants (who have their own protections under ADA and recent EEOC guidance memoranda), or permitting access to weapons or hazardous material are avenues victims of workplace violence can be expected to pursue.

C. WC Policy Coverages Explained

Worker's compensation policies are often broken down into at least two essential parts. The first type, Part A or Part 1, generally provides for coverage of all claims for which an employer is liable under state law. Part A/1 coverage encompasses all benefits available under worker's compensation claims as determined by state requirements. It also usually has no cap, meaning that whatever benefits state law require is paid regardless of cost. (See Part A – Workers Compensation Insurance, Section A).[4]

While the common WC claim will be covered under Part A/1, there may be exceptions which leave employers open to additional liability. Part B/2 Coverage is intended to protect employers in these situations - for claims not covered by Part A/1, and sometimes those claims not covered by CGL policies.

Exclusions to CGL policies bar most claims by employees. This is balanced by state worker's compensation statutes that provide remedies to employees for injuries incurred in the course of employment, while shielding employers from liability for most injury claims.[5] (See e.g. *Sample Workers Compensation Policy*, *supra*, at pages 2-3).

Since most WC claims are covered under Part A/1 or GCL policies, there is comparatively little precedent on the reach of Part B/2 coverage. There are a few scenarios where Part B/2 coverage applies and why it is necessary. One example is in third-party over liability cases where an employer who could not be sued by the injured employee is sued for contribution

[4] *Sample Workers Compensation Policy,* pages 1-2, https://www.insurancebee.com/documents/wordings/Workers-Compensation-Policy-Form.pdf

[5] Podolak, Gregory. Misapplication of the Employers Liability Exclusion in CGL Policies: Precluding Coverage for Non-Employer Insureds. International Risk Management Institute, Inc.,2015. https://www.irmi.com/articles/expert-commentary/employers-liability-exclusion-in-cgl-policies

by a third party that the employee has initiated litigation against. Another application of Part B/2 is in jurisdictions that allow for dual capacity, where an employee sues the employer under a different legal theory. Additionally, this section may apply in jurisdictions where worker's compensation statutes do not preclude the employee from suing employers for intentional torts, or in jurisdictions that allow spouses or companions to sue for loss of consortium. [6] [7]

D. How does a workplace violence claim relate to Part B coverage?

The question of whether workplace violence is covered under worker's compensation laws is becoming increasingly disputed across jurisdictions. Some courts have found that workplace violence is covered under Part 1 provisions, determining that the injury "arises out of" the scope of employment.[8] That may be the best outcome for employers, but an undesirable result for an employee trying to circumvent the WC bar. Some jurisdictions, taking into account the position of employees are more liberal in finding that workplace injuries, specifically those arising out of workplace violence, fall into an exception to the exclusive remedy rule.[9]

Part 2/B may also apply where a third party sues an employer for injuries relating from a workplace violence incident. [10] These claims may be brought by another employee.[11] They may also be brought by a third party.[12]

E. Developing Insurance Products to Supplement WC & First-Party Protection

Some carriers have responded to the uncertainty created in coverage for workplace violence by developing products to address the perceived shortcomings in insurance available to more fully restore policyholders and victims in these circumstances. Counsel representing employers faced with these exposures will want to inquire whether these protections have been purchased to supplement the more traditional first-party and CGL coverages.

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[6] Farley, Nicole and Daniel O'Brien, *Liability Beyond Your Workers' Compensation Coverage*. Fisher Phillips, 2012.https://www.fisherphillips.com/resources-newsletters-article-liability-beyond-your-workers-compensation-coverage

[7] *The Three Parts of Worker's Compensation*, California State University, Sacremento www.csus.edu/.../**section-2**/.../mgmt%20139b

[8] See *Maxwell v. Hosp. Auth. of Dade*, 202 Ga. App. 92 (Ga. Ct. App. 1991); see also 2002 IA Wrk. Comp. LEXIS 782 (IA Wrk. Comp. 2002)

[9] See *McQueer v. Perfect Fence Co*., 2016 MIWCLR (LRP) LEXIS 50 (MIWCLR (LRP) 2016), (reversing a trial court's decision granting summary judgment to defendant employer who told employee there was no worker's compensation insurance when they were in fact covered, opining that it should be up to a jury to determine whether defendant's conduct amounted to willful deceit exception of worker's compensation statute

[10] PLC Labor & Employment, *Workplace Violence, Practical Law Practice Note* 7-505-7511 (2014), http://www.americanbar.org/content/dam/aba/events/labor_law/am/2014/1g_workplace_violence2.authcheckdam.pdf

[11] *Roberts v. Circuit-Wise, Inc*., 142 F. Supp. 2d 211 (D. Conn. 2001), (finding that employee who was victim of sexual assault in workplace was not barred from recovery under worker's compensation act)
[12] *Tyus v. Booth*, 64 Mich. App. 88 (Mich. Ct. App. 1975)

Some first-party product packages are specifically marketed to address workplace violence, as these events may not be construed as among the "insured perils" under traditional policies. Modeled after the more familiar business interruption benefits, some carriers are offering lost profits, remediation expenses, and other costs associated with putting companies back in business following these episodes.

A policy feature not traditionally offered in the first-party bundle provides reimbursement for public image restoration after workplace violence. Specifically included in these workplace violence endorsements are things such as the provision of public relations consultants, security, forensic analysis, crisis management and counseling services.

Some policies broaden the scope of who qualifies as an insured or beneficiary beyond the traditional formulations, and these can include directors, officers, volunteers, temporary workers and guests on the premises.

Other broad first-party protections are available under certain workplace violence endorsements, such as employee salaries for those not specifically injured for up to 90 days; reimbursement for sums paid to replacement workers; and earnings replacement for those affected, regardless of their entitlement to traditional workers compensation benefits. This latter benefit is especially important and may save employers and carriers in the long run, as often WC carriers are reluctant to commence weekly indemnity benefits for employees not physically injured. Those witnessing these incidents may sustain emotional injuries, as to which workers compensation does not always provide relief. Keeping the workforce together and loyal to the employer has considerable value, lest otherwise good employees be forced in the adversarial administrative arena for WC claim adjudication.