



CLM 2015 RR & H Mini Conference  
February 5 – 6, 2015 Orlando, Florida

## **What Security is Required? Defending Against Negligent Security Claims.**

### **I. What is the Duty?**

In order to properly protect a business from liability for negligent security claims it is essential to understand the legal duties owed by the businesses. While precise legal duties vary by state, the common thread in all is to protect those on the premises from foreseeable criminal acts. The general standard is found in the Restatement Second of Torts, Section 344.

Recently, the Restatement Third of Torts was issued. The new Restatement departed significantly from the Restatement Second in its language. The Restatement Third has indicated that the risk of harm was sufficiently foreseeable when sufficient knowledge exists of the immediate circumstances or the general character of the third party (criminal actor) to foresee the third party's misconduct. Most states have not yet adopted the Restatement Third of Torts, however, some states like Iowa, has established wholly new standards for premise liability relying upon the Restatement Third of Torts.

For the most part, each state will employ a test of whether the criminal conduct and resulting harm was foreseeable and whether proper precautions were taken to prevent the foreseeable conduct from occurring by way of security measures in place.

### **II. The Best Defense is a Good Offense.**

Violent crime has risen over the past two years in the United States. Various national statistics show that 26 of every 1,000 people experience violent crime. Property crime, including burglary, theft and car theft, are also on the rise. If crime occurs at a business, statistics like these will be used to show that the resulting harm was foreseeable to the business and evidence that security should have been in place.

#### **1. Components of a Crime Foreseeability Evaluation**

For property owners and business operators to fulfill their legal duty to protect those on their land through security measures, they must know the crimes types that are reasonably foreseeable, the expected frequency of those crimes, and what steps can be

taken from a security perspective that will later be deemed adequate should a criminal incident occur.

Actual crime demographics differ in frequency and crime type for each premises; therefore it is necessary to analyze the statistics to distinguish between them. The results of this analysis should enable a security expert to determine a relative level of crime foreseeability for the premises evaluated. The analysis should further identify what crime types are more foreseeable than others and in what specific locations within the premises that crime is likely to occur. This way a proper security plan can be put in place.

Four main factors should be considered when assessing crime foreseeability, which will be applied by any security expert whether Plaintiff's or Defense and which are critical

The four factors are:

- i. nature of the premises;
- ii. crime demographics;
- iii. location; and
- iv. conditions

If an analysis of any one of these factors indicates foreseeable crime, then it is impossible to escape the issue of foreseeability. However, in order to determine the level and type of crime foreseeability, all four factors must be evaluated and each of the factors can be argued by the defense to support that a particular crime was not foreseeable.

These factors can be used to defend a claim of foreseeability and should be the focus of any defense involving negligent security. The best defense however, is to perform this analysis (a security assessment) before an incident occurs so that a business can demonstrate the adequacy of its security program.

**i. Nature of the Premises**

It is essential to a security assessment and subsequent determination of the foreseeability of crime to first have a thorough understanding of the nature of the premises. The premises type and usage will assist in identifying the different crime classifications to be considered during the assessment. For example, theft offenses in a retail establishment, while significant to assess risks associated inside the store are excluded when evaluating the foreseeability of assaultive conduct in the parking garage.

The primary considerations regarding the nature of the premises for businesses are, the hours of operation, the extent that the premises is open to public, the customer base, and the type of service or products available. A business that remains open to the public 24 hours a day will have foreseeable crime types which are different from a limited-hour semi-private business. For example, restaurants and nightclubs that provide

alcoholic beverages and entertainment which generally host younger crowds would likely have more crime problems than a subdued establishment serving an older clientele.

In several states, court decisions have included language indicating that there is an inherent risk of crime in the overnight hours of a 24 hour convenience store. Thereby holding that those business establishments are on constructive notice of the foreseeability of criminal acts occurring for which they have a duty to protect against and therefore provide security.

## **ii. Crime Demographics**

Previous crimes determine which crime classifications are relevant. When evaluating previous crime, factors which are critical to determining foreseeability of future crime (Crime Demographics) at your establishment include:

1. the radius around the prior criminal activity;
2. the time frame of the prior crime, including time of day, time of year and age of the prior event;
3. the specific type of crime, including victim demographics;  
and
4. the number of prior crimes that are officially documented.

Crime demographics are important aspects of defending against foreseeability and a respective security program. When used proactively, crime demographics assist in establishing the proper security plan and preventing criminal acts from occurring. When defending claims involving injuries from criminal acts, the crime demographics become relevant to establish that the demographics (1) supported the particularized security plan in place, therefore the security was adequate; and (2) that the particular criminal act and ensuing harm were not foreseeable because neither was supported by the crime demographics.

You can successfully challenge foreseeability based on crime demographics where the other two factors, nature and location of premises, do not produce strong and/or compelling indicators for a foreseeable criminal event, and there is an absence of significant and relevant crime demographics to support an expert opinion that the offending third-party criminal act was foreseeable.

## **iii. Location**

The location of the premises is one of the most commonly cited factors by Plaintiff's counsel in arguing foreseeability and negligent security. However, experts performing a foreseeability analysis often conclude that a business' location is the least relevant factor determining foreseeability of a criminal act.

Relevant factors concerning the location of a business in determining foreseeability involve:

- i. its proximity to a city;
- ii. its geographic relationship to other businesses and residences;
- iii. the population density of the geographic area;
- iv. the economic demographics of the relevant area; and
- v. proximity to major traffic arteries.

Additional factors involving location that should be considered for the purpose of arguing against foreseeability or the adequacy of a security plan are the physical location of the business within a building, its ingress and egress points, and the areas at which customers would traverse to access the business.

A key aspect of defending a claim based on injuries resulting from negligent security is to argue that all crime types are not foreseeable everywhere and security plans are effective against those crimes that are foreseeable, not crimes that are possible. The critical distinction between a burden of protecting against foreseeable crime and one of protecting against possible crime is one of the keys to successfully defending these claims.

For instance, a skilled criminal who gained access to the business through a fifth floor exterior window of a multi-story building by using climbing gear would not be reasonably foreseeable. However, a new 24 hour convenience store in the highest crime zone in the city would expect and therefore foresee a risk and incidence of property crimes based upon its location alone from the outset. A targeted attack by an assailant known to the victim would not be foreseeable, where an assault in a dark parking garage adjacent to public transportation would be. The key to a good defense is to draw the distinctions and utilize the foreseeability analysis to establish the lack of foreseeability and the adequacy of the security plan.

#### **iv. Conditions**

Conditions affect the other factors and can influence whether the other factors suggest foreseeability and the necessity of a security program. Conditions involve both physical conditions and security procedures. Physical conditions include lighting, sound, locks, fences, alarms, video cameras, foliage, signage, structure, visibility, and pedestrian and vehicle traffic flow. Security procedures include cash handling policies, a schedule for locking certain doors and turning on lights, a key control system, and security guard patrol methods, as well as procedures for documenting and reporting incidents and remediating problems.

Often in premises liability cases, a Plaintiff's counsel will argue that the proximate cause of a client's assault and harm was inadequate lighting or uniformed security patrols in a parking lot. Although, these are just conditions, cases have been won and lost based solely on these issues. A salient point for the Defense to argue is that there are tens of thousands of parking lots, with similar lighting and no security patrols, which have operated safely for many years across the county. Therefore, the effect of

poor lighting and guard patrols alone does not indicate that crime was foreseeable just because a single incident occurred. The Defense would argue in this instance, the absence of the other factors involved in the foreseeability analysis to negate that the business owner had a duty to change the conditions and that Plaintiff needs to demonstrate why this particular location made it foreseeable that such crime would occur.

## **2. How to Use a Foreseeability Analysis to Defend a Claim**

Whether done in advance, as a proactive measure to understanding the vulnerabilities of a business and establish an appropriate security plan, or after litigation has ensued, a foreseeability analysis is an excellent defense tool. When performed a foreseeability analysis is an assigned level of the foreseeability of a crime type occurring. In litigation, if the crime type is not indicated by the foreseeability level, the defense can successfully challenge against allegations of inadequate security measures, reiterating theme that the duty upon the landowner is not to prevent against crime that could happen, but only to protect against foreseeable acts.

The levels of foreseeability, though differentiating among experts, generally would include:

- a. **Not Foreseeable**
- b. **Low Foreseeable**
- c. **Moderately Foreseeable**
- d. **Highly Foreseeable**

When a criminal act is deemed not foreseeable, a business owner cannot be held to have breached a duty to the Plaintiff. The three remaining levels of foreseeability are used to identify that amount of security that is, or was, required for the premises owner or operator to meet and discharge their legal duty. Variables such as accuracy of data, uniqueness of the premises, and the fact that criminals cannot be counted on to act in a consistent manner should be used by your expert, and during the discovery process in depositions to argue against the Plaintiff's expert's assigned value of foreseeability. Again, just because a crime was possible, does not mean that it was foreseeable or that a business owner had a duty to protect against the ensuing harm.

Trained and experienced security experts have an advantage of having a basis of comparison from performing volumes of prior security assessments and crime demographic studies to offer persuasive conclusions to a jury of the lack of foreseeability of a given event.

At each level of foreseeability different security measures are triggered. Therefore, if the result of the foreseeability analysis is Low a business owner would not have the burden of providing the same type of security program as that triggered by a foreseeability analysis resulting in High.

- a. **Setting the Stage**

The goal of any defense is to demonstrate that the alleged crime which resulted in injury to the plaintiff, was not foreseeable. As a general rule, if a particular criminal act on the premises is found not foreseeable by the court, the matter can be dismissed by the court in response to a motion for summary judgment. If not dismissed, your defense will focus on demonstrating to the jury that the criminal act was not foreseeable and therefore your client did not breach its duty to protect against foreseeable criminal acts.

After considering the nature, location, and crime demographics involving a particular business a foreseeability level of no, low, moderate or high is established. As a defense attorney, it is critical to set up a defense that involves affirmatively establishing the support needed to have your expert render a strong opinion of the lowest level of foreseeability. Such data and strategy includes:

i. Collecting the right crime statistics

A Plaintiff will collect crime statistics that cast the widest net possible, including for an entire area of a city and a long time frame. In order to combat this, you must collect the data which affects the area in which the alleged criminal assault occurred for a limited time frame. A motion in limine should be filed to preclude the broad based statistics from use at trial. If granted, the Plaintiff's expert will have to rely upon only those statistics which are relevant to the area where the assault allegedly occurred. If not granted, you have provided yourself with an area of potential appeal.

If statistics initially seem to support a finding of a moderate to high foreseeability level, additional security procedures which were put in place after a prior crime could form the basis of a conclusion that the foreseeability is low. Investigation needs to be done to determine any changes in procedure following any prior criminal acts on the premises.

ii. Challenge the Account

While shocking some Plaintiff's lie. It is important to elicit as many details about the alleged assault as possible from the Plaintiff, so that you can compare them with previous versions and cast doubt on the Plaintiff himself. Information about how the assault happened, where it happened, the identity of the perpetrator, identifying features, any witnesses, the time of night, receipts to confirm business at the establishment, Plaintiff's theory of why it happened, the alleged failures of the business, what the business could have done to have prevented the incident help you to craft a defense that suggests that the Plaintiff may not be honest. Answers to these questions are also often a defense attorney's best cross of the Plaintiff's security expert.

If the police were called, the police reports may recount a different story than the one now told by Plaintiff. Police officers are keen observers and generally have a good sense of whether someone is telling the truth. Depositions of police officers often yield information that would not otherwise have come to light. Many police departments

provide only the basic information in their reports, but at a deposition those same officers may enlighten you with facts like, the Plaintiff seemed high, or drunk and kept changing his story. Police officers who arrived at the location of the alleged assault can provide opinion testimony regarding lighting and conditions that otherwise may seem bias coming from a defense expert.

### **b. Challenge the Expert and the Data**

In almost every case involving a Plaintiff's security expert, you will need to craft Pre-trial motions seeking to exclude irrelevant data and statistics relied upon by the Plaintiff's expert. As indicated above, it benefits Plaintiff to use a wide area and time frame from which to draw statistics for inclusion of more crimes. Also, look at the conclusions and determine if they are properly supported by the stated facts. Often an expert's opinion lacks the proper foundation and conclusions can be stricken.

## **III. Coverage Issues Arising in Negligent Security Cases**

Upon first notice of the claim, a decision needs to be made as to what is covered and what is not covered.

### **1. What fact patterns trigger a potential loss in coverage?**

The coverage issues most likely arise in the context of "negligent security cases" are the intentional acts exclusion (including the self-defense exception), the potential for a manuscripted "assault and battery" exclusion, the question of coverage for punitive damages, whether the allegations set forth an "occurrence," the contractual indemnity exclusion, and the applicability of a deductible/SIR. The critical issue of coverage for punitive damages can be impacted by specific policy language as well as "public policy" of the particular jurisdiction at issue. Coverage for vicarious and derivative liability for intentional torts (individual and corporation likely to both be sued) is jurisdictionally dependent and not every jurisdiction is clear on these issues.

Whether or not an intentional acts exclusion or an "assault and battery" exclusion may preclude coverage depends upon the language of the policy and the allegations as asserted. Many, although not all, "assault and battery" exclusions utilize the language "arising out of" an assault and battery. A standard assault and battery exclusion clause reads as follows:

"It is agreed this policy does not cover any claims arising out of assault and battery or out of any act or omission in connection with the prevention or suppression of such acts. Whether caused by or at the instigation or direction of the Insured, Insured's Employees, patrons or any other person. Further, claims accusations or charges of negligent hiring, placement, training or supervision arising from the foregoing are not covered.

Although it depends on the jurisdiction, most have defined the three-word expression “arising out of” as broader in meaning that the terms “caused by,” “originating from,” “incident to,” or “having connection with.” Additionally, there is a general consensus in most jurisdictions that “arising out of” only requires some causal connection to the injuries suffered - it does not require proximate cause in the legal sense. Accordingly, this exclusion is frequently utilized by insurers to preclude coverage in situations such as where an employee of a hospitality facility assaults a patron, or a guest at a hotel is assaulted in the hotel’s parking lot or in the guest’s hotel room.

Generally, if an insurance policy does not contain a clear assault and battery exclusion clause, but instead only includes a general “intentional acts” exclusion (again, depending upon the language of the policy and the facts at hand), an insured has a greater chance of obtaining coverage for defense and indemnity. It is also important to keep in mind that an insured retail restaurant or hospitality facility may be entitled to a defense (and possibly indemnification) where an assault and battery are alleged if the allegations also include a potentially covered claim. For instance, allegations of negligence against a bar which include the possibility that an employee discharged his weapon due to negligence may require the insurer to defend its insured bar.

## **2. Why and when to issue a reservation of rights**

Reservation of rights letters are intended to inform the insured of coverage and policy defenses. These letters are principally drafted to preserve the insurer’s right to assert defenses, such as those identified above. A reservation of rights allows the insurer to withdraw from the defense when there is no potential for coverage under the policy, and permits the insurer to decline to cover the insured for that portion of a judgment not insured. However, an ROR can lead to unintended consequences like permitting the insured to choose its own defense counsel or settle claims without insurer consent. It is important to review requirements and effect which vary by jurisdiction.

The duty to defend is broader than the duty to indemnify. Generally, the duty to defend will exist where a complaint alleges potentially covered claims, regardless of their merit. In some jurisdictions, where a complaint alleges both covered and uncovered claims, the duty to defend exists until such time as the allegations are confined solely to uncovered claims. Thus, depending on the allegations and the state of the factual record, it is often uncertain whether a claim will ultimately be covered, though there is enough to trigger the duty to defend. In those situations, reservation of rights letters are intended to inform the insured of potentially applicable coverage defenses and ultimately permit an insurer to withdraw from the defense when there is no potential for coverage under the policy and/or decline to cover the insured for that portion of a judgment not insured. For example, a complaint may allege both uncovered intentional acts and covered negligence. Where it is unclear what the plaintiff may ultimately be able to prove, an insurer would provide a defense subject to a reservation of its right to withdraw the defense and disclaim any indemnity obligation should it become clear that the alleged acts were intentional and not the result of negligence.



Requirements for what to include in a reservation of rights letter vary among jurisdictions, with some requiring an explicit recitation of all potentially available coverage defenses lest they be deemed waived. Other jurisdictions may permit an insurer to reserve the right to seek reimbursement of defense costs paid for what are ultimately determined to be uncovered claims. Accordingly, an insurer must examine the particular requirements of each jurisdiction to ensure a reservation of rights letter is fully compliant and protective of the insurer's rights. Depending on the jurisdiction, an ROR letter can also lead to unintended consequences, like permitting the insured to choose its own independent defense counsel where it is alleged that a conflict exists in permitting an insurer to control the defense because it may be possible to for appointed counsel to "steer" the underlying case out of coverage. An ROR letter might also permit an insured to settle claims without the insurer's consent. Thus, while a reservation of rights letter is always a good idea where the question of entitlement to coverage exists, it should be approached with the appropriate attention to detail.

### **3. The primary/excess relationship**

The relationship between primary and excess insurer can be particularly critical in the context of security cases because of the potential volatile and unpredictable nature of those claims. The language of the particular policies will dictate the rights and responsibilities of primary and excess in each particular case, but excess insurers should be carefully monitor security cases, especially those involving assault.