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In The Line of Fire - Handling a Shooting Before & After It Takes Place

This discussion is about what companies, claims examiners and outside counsel can be doing to address potential shootings and violent events both before and after such events take place. We will not be giving any opinions on whether a retailer, restaurant or hospitality company should or should not allow guns or weapons on their property because that is a business decision that takes many things into considering.

One of the primary factors a company should consider when deciding to handle guns and weapons on its property and how to handle general security issues is the impact of civil liability and that will be the focus of our discussion.

It is important to look at this issue not just from the perspective of shootings but as the broader “violent events” because as we learned from a recent incident, there are many different weapons which can be used to attack your customers and employees.

I. BEFORE A SHOOTING / VIOLENT EVENT

Being prepared is the best defense to civil liability for a shooting or violent event. The most important aspect of being prepared is having formal policies and procedures and ensuring your employees are trained on what to do in certain situations. Another proactive way to address these issues is to have a pre-determined group of people who will be called to handle such a situation if it takes place. The group or committee should consist of someone from operations, human resources, security, media relations and legal.

A. *No-Gun Signs*

Every state has its own laws regarding open and concealed carry. Each state also has its own twist on how, when, where and if no-gun signs can be posted and the impact of such a sign. This is one of the greatest challenges for a company because it must create policies and procedures for states across the country but the laws change state by state. For this reason, broad policies and procedures are recommended when a company does business in many different states. Companies must also keep

up to date on the changing laws around the country and a handout will be provided which provides a summary of each state's current open and concealed carry laws, as well as a summary of the each state's laws for negligence based on the criminal act of a third party.

1. Decision on whether to post no-gun signs and how it will impact company and future incidents and litigation

Currently companies are taking three different approaches to allowing guns on their property: (1) comply with state law which means allowing the open and concealed carrying of guns where allowed by law in that state; (2) not allowing guns on the property with the use of no-gun signs; and (3) an informal request for guns not to be allowed on the property without the posting of no-gun signs. The first two approaches are most consistent with a company that has formally addressed the issue and developed a decision that is best for the company. The third tends to be used where companies do not want to take either position.

There are many non-legal / civil litigation issues that arise and impact a company when it makes a decision on whether to allow guns on its property or not. The legal department will have an opinion based on civil liability but there are many other factors that are highly relevant in this analysis and should be addressed. In the end, a company should have a logical explanation for its position, policies and procedures.

From a civil liability perspective, when making the decision on what approach to take as to guns on the property, the company needs to think about how the policy could be used against it if there is a shooting or violent incident on its property. The policies and procedures should not be too broad or too narrow and they should not create duties on company employees that are unrealistic. Once an incident takes place, a company's policies and procedures are one of the most analyzed and criticized piece of evidence.

2. Use of no-gun signs – How not to violate each state's law

Each state has different nuances to their gun laws and we will discuss those nuances and how to develop a program that can be used state by state without violating different state laws.

3. Legal impact of no-guns signs

Depending on the state law, the legal impact both criminally and civilly of using a no-gun sign changes. We will discuss how it changes so companies and claim professionals can decide how and if such signs should be implemented.

4. How the use or non-use of no-guns signs can impact a reasonable foreseeability analysis

The courts have not yet addressed this issue but based on general negligence and criminal acts of third party legal assessments we can evaluate how the courts are likely to view the use or non-use of no-gun signs and how Plaintiff's counsel is likely to argue their impact on reasonable foreseeability. This is an important issue to understand before a shooting or violent event takes place because it helps in-house counsel and claims professionals determine both policy and how to handle an incident after it occurs.

5. Detailed chart will be provided that summarize open and concealed carry laws in every state, along with a summary of each state's criminal acts of third party negligence laws

An analysis of the open carry, concealed carry and criminal acts of third party negligence laws for every state will be provided as the laws are different state by state.

B. Policy Development & Implementation

Once a company decides how it wants to address potential shootings and violent acts on its property, the company must develop and implement those policies. Insurance and claims examiners must also ensure it understands how a business is handling these issues and ensure there are no coverage issues that arise.

1. Gun/Weapon Possession

Policies need to be clear as to what, if any, weapons are allowed or prohibited on the property. Each state law differs as to what is a "weapon" and companies do not want to be caught in the nuances of those details.

2. Active Shooter

How an active shooter or violent person should be handled is something that should be included in company policy. There are many ways this can be addressed and there is training that can be provided to employees for handling these situations.

3. Policy Implementation

Development of these policies is not enough as they must be implemented and taught to employees. Failure to implement a policy can negatively impact a company if an event takes place. Claims professionals need to understand the company policy as well as training and be able to prove employees received the relevant training.

II. AFTER A SHOOTING / VIOLENT EVENT

A. *Example(s) of Incident*

We will discuss several examples of shootings and violent incidents to help set the stage for our discussion on how to respond to a shooting or violent event after it takes place. Some examples that will be discussed are: (1) Mass murder/shooting of employees at carwash; (2) Employee on-duty - throat slash during robbery; (3) Employee off-duty - shot in face by shotgun during robbery; and (4) Customer beaten in common parking lot.

B. *Important Things To Do And Not To Do After An Event*

1. Important Things to Do After a Shooting (After Calling the Police)

The following is a list of the types of things a company and its claims professionals should assess to determine if they need to be done after a shooting or violent event:

- a) Secure the store and make certain of the safety of each customer and employee.
- b) After report to proper company representative, first call should be to your lawyer-pick one you have confidence in and put them on the job immediately.
- c) Always assume the violent incident will result in litigation and handle it accordingly.
- d) Follow protocol, if any, established by management including all reports and investigation-but coordinate with your lawyer.
- e) Interview employees and witnesses, as soon as possible after the event, but do not take recorded statement. Prepare sworn declaration for each instead.
- f) Download all video from store for at least one hour before the event until the police clear/release the premises, maintain as part of your file and provide a duplicate to your lawyer.
- g) This is not a slip and fall. If one or more cameras or recording devices were inoperable or not in use, memorialize the reason and all efforts to repair and maintain equipment for the three months before and one month after the event.
- h) Select one person (perhaps two) to provide information to the media so that you can control the output of sensitive information and make certain that person consults with your lawyer and supervisors before the information is provided.
- i) Designate one person to coordinate with police and prosecutors concerning the status of the investigation and prosecution and to respond to questions and/or information requests. Always keep your lawyer updated on these issues.
- j) Begin gathering and securing evidence and information concerning the event, each employee on duty within two hours of the event and your business activities on the date of the event such as work schedules, computer or other time records, personnel files, sweep logs, vendor sign-ins, etc..
- k) Always cooperate with the police agencies, providing them access to the premises, answers to questions, surveillance video, access to witnesses and documentation. Make

certain and get business cards, badge numbers, and other information from as many officers, detectives and other police agency personnel or representatives as possible. The authorities are often a great source of formal or information.

- l) Prosecute and support the prosecution of the tortfeasor to the fullest extent possible, supplying evidence, witnesses and/or other cooperation.
- m) In the event of an injury or death to a customer or an employee, make certain to follow up with them or family members and show sincere concern.
- n) Always photograph and video the scene of the event, but do so under the direction of your lawyer.
- o) Consult with neighboring businesses about video showing the area before and after the incident and possibly witnesses with information about it.
- p) Always try to identify by name, telephone number and address, any customer, employee, vendor or other witnesses.
- q) Always work with your lawyer to preserve any physical evidence not preserved by the investigating police agency and always try to document (catalog, if possible) any evidence created and/or taken from the scene by the investigating police authorities.
- r) Make available to any employee, regardless of whether they were directly or physically harmed by the event, counseling and/or other emotional support or care.
- s) Gather information about what brought the shooting about, i.e. violation of company policy, dispute between lovers, altercation between individuals, gang violence.
- t) Get your expert involved early on to evaluate and guide investigation and defense.
- u) Gather all media reports on event-various services will gather for a fee.
- v) Cooperate with OSHA-Keep your lawyer involved in all aspects of any OSHA or government inquiry.
- w) Refer all inquiries from attorneys to your lawyer.

2. Important Things NOT to Do After a Shooting

Just as importantly, there are several things companies and claims professionals should not do after a shooting or violent event takes place:

- a) Do NOT take recorded statements.
- b) Do NOT let anyone other than the designated person speak to the media.
- c) Do NOT allow security video to be destroyed, cycled out or misplaced.
- d) Do NOT have committee, round table discussion or other recorded evaluation of the actions and/or omissions of the store, its management or employees in order to access fault or blame.
- e) Do NOT alter, clean or otherwise destroy any physical evidence or condition at the scene until it is cleared or released by the investigating police authorities and until you have consulted with your lawyer on evidence preservation.
- f) Do NOT make rash (precipitous) personnel decisions—i.e.: terminating, demoting and/or transferring management or other employees - you will need them as witnesses and any

such act could be seen as admission of negligence or placement of blame, and could get you sued by the employee (the key word is “rash”).

- g) Do NOT deal with OSHA without your lawyer and be careful in responding to information requests.
- h) Do NOT ever settle an OSHA citation without the involvement of your lawyer and without exculpatory language in the settlement documents.
- i) Do NOT deal with employee unions without your lawyer.
- j) Do NOT leave your attorney out of key discussion which will affect the defense of the case.

3. Media Control

Media control is one of the most aspects of a shooting or violent event and there should be a plan in place on who it is to be handled. Designate a single person to communicate with media and disseminate information and consult with your lawyer before you disseminate information. Companies and their claim professionals should know who is to be involved in the post-investigation and have those people contacted immediately. This should also include having a plan for the post-incident investigation and a decision on whether it will include a review of crime statistics in the area.

III. REASONABLE FORESEEABILITY ANALYSIS

A. **Key State Court Case Precedent**

Timberwalk – *Timberwalk Apts. V. Cain*, 972 S.W.2d 749 (Tex. 1999);

Quary Mall – *Tramel Crow Central Texas, Ltd. v. Gutierrez*, 267 S.W.3d 9 (Tex. 2008)

B. **Recent Cases**

JP Morgan Chase Bank, N.A. v. Borquez, 481 S.W.3d 255 (Dallas 2015, pet. filed Feb. 16, 2016).

Jenkins v. C.R.E.S. Management, L.L.C., 811 F.3d 753 (5th Cir. 2016).

C. **Pending Cases Before The Texas Supreme Court**

URD Texas Properties, LP, et al, v. Petrie, No. 14-13-00123-CV.