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Active Shooters, Insurance Coverage, and Risk Prevention in Facing an Active Shooter Incident

I. Active Shooter Events Across the United States

Pittsburgh, Parkland, Las Vegas, Orlando. All cities are dealing with the aftermaths of active shooter events. The nation as a whole is grappling with why such events occur and how to prevent such attacks. The FBI defines the term “active shooter” as “an individual actively engaged in killing or attempting to kill people in a populated area.” Active shootings can happen at any number of places, including churches, schools, music venues, bars and clubs, restaurants, malls, hotels and more.

Between 2016 and 2017, 50 shootings in 21 states were identified by the FBI as active shooter incidents. There were 943 casualties – 221 killed and 722 wounded. The highest number of casualties occurred during the Route 91 Harvest Festival in Las Vegas, Nevada, in 2017. The second highest number of casualties occurred at Pulse, a nightclub in Orlando, Florida, in 2016. The third highest number of casualties occurred at the First Baptist Church in Sutherland Springs, Texas. All shooters were male.

Seventeen of the 50 incidents occurred in areas of commerce. Fourteen occurred in a variety of open space locations. U.S. Department of Justice, Federal Bureau of Investigation, *Active Shooter Incidents in the United States in 2016 and 2017*.

II. Active Shooter Events in the Workplace

According to FBI statistics, in nearly half of all active shooter events the shooter did not have any known connection with the location of the shooting or the victims. Even so, targeted attacks of employees and others by coworkers, family members and acquaintances remain a significant risk for employers. Despite less media attention in workplace violence incidents directed at individuals, shooting incidents are occurring and employers should be concerned about the risks of both types of attacks.

OSHA’s General Duty Clause requires an employer protect its employees against “recognized hazards likely to cause serious injury or death.” The principle issue in active shooter events is foreseeability, i.e., whether the incident was foreseeable to the company such that a business has liability. With the number of shootings on the rise so too is the body of case law

addressing the legal liabilities faced by businesses. We will address some of the key decisions and legal standards applied, as well as pending litigation.

Legal Liability - Prior Decisions

The Aurora movie theater shooting took place in July 2012. During a premiere screening of the film *The Dark Knight Rises*, James Holmes, a patron, exited the theater through an emergency door exit he left open. He went to his car, parked near the exterior door, and withdrew one or more fully loaded shotguns, an AR-15 assault rifle, automatic Glock handguns, additional ammunition and several tear gas canisters. He also put on body armor and a gas mask. He returned to the theater, throwing tear gas canisters into the auditorium, and opening fire. After one of his weapons jammed, he walked out the exterior door and sat in his car until arrested by police. Theater personnel did not intervene during the shooting, or even several minutes after the shooting. There were twelve fatalities, and 70 people injured.

A number of lawsuits were filed against Cinemark sounding in premises liability. Plaintiffs alleged the company failed to provide adequate safety and security measures. Although the theater had security personnel present for when box office cash was to be transferred for deposit, the theater had no security personnel onsite, or even hired to be onsite, when the movie was to be shown. The exterior doors to the theaters did not have an alarm system, an interlocking security system, or any other security or alarm feature that would notify Cinemark employees if someone exited the theater through an exterior door or left it in an open position.

The lawsuits against Cinemark brought claims of premises liability under the Colorado Premises Liability Act, common law negligence, and statutory wrongful death claims. The lawsuits filed in federal court were consolidated. Cinemark moved to dismiss the cases, arguing the plaintiffs could not show facts giving rise to a duty to protect against the criminal actions of Holmes. *Traynom v. Cinemark USA, Inc.*, 940 F.Supp.2d 1339, 1345 (D. Co. 2013). Cinemark's motion referred to a landmark California appellate opinion that held McDonald's had no duty to prevent the 1984 San Ysidro McDonald's massacre. The motion was not successful, with the court focusing on what factual evidence existed to show Cinemark's knowledge of risks that one could access the theater directly from the outside using the emergency exit. *Id.* at 1344.

Ultimately, however, Cinemark was successful on its summary judgment on the element of causation. Cinemark argued that even if it should have taken greater security protections, failure to do so was not a substantial factor in causing the shooting. The Court determined that the criminal actor's premeditated and intentional actions were the predominant cause of the plaintiff's losses. *Nowlan v. Cinemark Holdings, Inc.*, No. 12-CV-02517-RBJ-MEH, 2016 WL 4092468, at *2 (D. Colo. June 24, 2016).

Cinemark was also sued in a separate lawsuit in state court, with plaintiffs alleging the theater chain should have had security measures to prevent a shooting. The jury ultimately sided with Cinemark, finding it was not liable. Colorado law permits the winning side of civil cases to seek costs, and plaintiffs were ordered to pay more than \$700,000 to Cinemark to reimburse the theater chain's legal fees. Cinemark thereafter withdrew its request for legal fees.

Likewise, in *Commonwealth v. Petersen*, 749 S.E.2d 307 (Va. 2013), the Virginia Supreme Court reversed a judgment against Virginia Tech that followed a mass shooting event killing 30 people and wounding 17 people. The Virginia Supreme Court concluded that assuming a special relationship existed between the university and students, it was not known, nor reasonably foreseeable, that students faced risk of injury or death from a mass shooting on campus after officials began investigating a shooting in a dormitory earlier that morning where one student was killed and another injured. *Id.* at 313.

Legal Liability - Active Litigation

Litigation is ongoing in the Las Vegas shooting. Now known as 1 October in Las Vegas, this mass shooting was committed in 2017 by a lone gunman holed up in a room on the 32nd floor of the Mandalay Bay Hotel, a property owned by MGM Resorts. The Route 91 festival, promoted by Live Nation, and attended by roughly 22,000 people, was held at a lot also owned by MGM, across Las Vegas Boulevard from the Mandalay. The shooter, who committed suicide, fired hundreds of rounds from his room at concertgoers 450 meters away, killing 58 people and injuring over 850.

Multiple lawsuits have been filed seeking to hold MGM Resorts legally liable and financially responsible. MGM recently announced it is in meetings with opposing counsel to take the steps towards a settlement process. Litigation will be stayed while the parties enter into mediation.

Costs to Businesses

In addition to the legal liability faced by businesses following active shooter incidents, the business costs can be astronomical. Virginia Tech reportedly incurred over \$48 million in litigation and recovery costs. Over \$50 million was spent rebuilding the Sandy Hook elementary school. Following a lone-wolf shooting at Ft. Lauderdale-Hollywood International Airport in 2017, Broward County is said to have incurred roughly \$1.2 million in costs. Of that amount, \$562,000 was for reuniting travelers with their luggage, \$270,000 was for carpet and tile replacement, and \$314,000 was for crisis management and response. The costs to businesses in dealing with the aftermath of shootings can be staggering.

III. Insurance Coverage

Due to the number of active shootings increasing each year, risk managers are looking to secure insurance to cover any gaps that may exist in current insurance programs. Insurers are offering active shooter coverage to fill such gaps, and to aid in responding to attacks. Herein, we discuss the coverages available, and the types of policies commercial insureds may seek out to respond to active shooter incidents.

Active Shooter Insurance

Many insurers have begun to offer active shooter insurance. Similar industry coverages may be identified as Workplace Violence, Active Assailant, "Deadly Weapons" and others.

Carriers include AXA XL, Beazley, and McGowan Program Administrators, among others, and with the list growing in response to the need for such coverages. These policies may include coverage for crisis management, victim counseling, medical disability, funeral expenses and death benefits, business interruption, property costs, third-party litigation, and prevention costs. However, such coverages often exclude injuries to employees and may have sublimits or casualty thresholds, i.e., requiring a specific number of casualties or persons affected. Working with a broker and insurer will assist companies in identifying the gaps in coverage these active shooter policies can fill in conjunction with a company's overall insurance program.

CGL Policies

Commercial General Liability insurance policies typically provide defense and indemnity coverage against third-party claims for bodily injury, property damage, and personal and advertising injury. CGL policies pay those damages an insured is legally obligated to pay. Coverage issues may arise under CGL policies in active shooter incidents. For example, the shooting must arise out of an "occurrence", meaning it was accidental. Additionally, CGL policies may carve out coverage where an employee is a perpetrator, exclude damage to the insured's property, contain an assault and battery exclusion, or not offer terrorism insurance. Such policies may also not afford business interruption coverage, or include crisis management coverage found in an active shooter policy.

Professional Liability Policies

Professional liability policies, such as directors and officers liability, may contain crisis response endorsements providing coverage for expenses incurred as a result of a shooting event.

Workers Compensation / Employers Liability

Workers Compensation and Employers Liability policies respond in the event of injury to an employee. However, such policies do not insure against third-party liability claims, nor do they cover business interruption or property damage.

Property and Business Interruption

Businesses may look to their first-party property and business interruption coverages following an active shooter event. Any business closures will need to be assessed and reviewed with the terms of such coverages to ensure the policy responds.

Umbrella and Excess Casualty

Lastly, there may be umbrella and excess coverage that could or would respond to claims involving active shooter events.

IV. Risk Prevention

Now that the risks have been addressed, we consider what steps businesses can take to prepare for an active shooter event. According to the FBI, over 40% of active shooter incidents between 2000 and 2016 took place in businesses. Because an employer is required to protect against recognized hazards, it should give thought to developing a risk prevention plan, event plan, and post-incident plan.

Security checks can be undertaken. Employers can establish zero tolerance policies towards threats or acts of violence, and provide confidential reporting mechanisms. Employers might also set up crisis management and response teams, working with human resources, security and counsel. Such teams could prepare an active shooter response plan that addresses securing the workplace, contacting law enforcement, informing employees and patrons of dangers, and post-incident measures for counseling and work interruption. Resources for such steps include local police departments and business consultants.

Finally, there are a number of resources for businesses to consult with in conjunction with local authorities and security experts to prevent against, address, and deal with the aftermath of these tragic events.

- U.S. Department of Homeland Security, “Active Shooter Preparedness” – <https://www.dhs.gov>
- Houston, Texas officials video, “Run, Hide, Fight” – <https://www.activeshooterlasd.org> (also available on You Tube)
- Active Shooter Resources, <https://www.fbi.gov>
- FBI, “Making Prevention a Reality: Identifying, Assessing, and Managing the Threat of Targeted Attacks - <https://www.fbi.gov/file-repository/making-prevention-a-reality>
- Los Angeles County Sheriff, “Surviving an Active Shooter Event” video
- Texas State University video, “Avoid | Deny | Defend™ –It Matters – <https://www.avoiddenydefend.org>