

# EXPOSURE TO PREMISES LIABILITY FOR THIRD-PARTY CRIMINAL ACTS

By Norman W. Gutmacher

On an ever more frequent basis, injured employees, customers, and invitees are suing property owners, property managers, and tenants (referred to in this article together as “Deep Pockets”) for injuries arising out of criminal acts on the property in question (sometimes referred to as “premises liability”) committed against them by unknown third parties. What appears to have started with a relatively isolated case in Washington, D.C., *Kline v. 1500 Massachusetts Ave. Apartment Corp.*, 439 F.2d 477 (D.C. Cir. 1970), is now occurring regularly. As these incidents and lawsuits continue to grow in frequency, it becomes more important to take steps to try to minimize both the problem and the exposure for premises liability.

Although a variety of legal theories have been proffered from state to state, the most common theory of premises liability against Deep Pockets is foreseeability of the criminal act and failure of Deep Pockets to take reasonable precautions in light of that foreseeability.

Historically, although many courts have judged foreseeability based on similar, violent criminal acts on the property site that “should” have placed Deep Pockets on notice of possible criminal activity, some recent cases do not require a showing of either prior on-site criminal activity or prior on-site violent conduct. Today, to determine Deep Pockets’ foreseeability, courts may look to nearby off-site incidents, which may or may not be violent in nature, and the “totality of the circumstances.”

In addition to potential liability under

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the common law, Deep Pockets can be liable for third-party criminal acts under various statutes. Violation of a statute or ordinance could result in “strict liability” for Deep Pockets.

State landlord-tenant laws and regulations are a source for imposing safety or security obligations. For example, the Ohio Revised Code obligates residential property landlords to “[c]omply with the requirements of all applicable building,

APARTMENT BROCHURES INDICATING 24-HOUR SECURITY CAN BE INTERPRETED AS CONTRACTUAL OBLIGATIONS.

housing, health, and safety codes that materially affect health and safety” and to keep “all common areas of the premises in a safe and sanitary condition[.]” Ohio Rev. Code § 5321.04(A)(1), (3). State employment laws also often require an employer to provide a safe place of employment.

Laws relating to safety at the local level are also relevant. For example, Chapter 767 of the City of Euclid, Ohio,

Ordinance requires the owners of larger apartment complexes to have security guards. Ordinance 767.01 provides, in part, that any apartment building or complex that “contains 400 or more dwelling units with a private parking lot for use by the tenants therein, shall provide one private policeman or security guard to patrol the buildings and private parking lots(s) 24 hours a day, with one additional private policeman or security guard on weekdays between the hours of 5:00 PM and 1:00 AM of the following day, and between the hours of 7:00 PM and 3:00 AM of the following day on Friday and Saturday.”

Counsel can use a variety of strategies and techniques to help Deep Pockets reduce their risk of liability for third-party criminal acts on their properties. My top ten strategies are as follows:

1. Consider the possible ramifications of reducing existing levels of security at the property—for example by replacing a 24-hour security guard with a video camera to lower costs. Reducing the level of security, however tempting, can expose Deep Pockets to a detrimental-reliance claim by a tenant or customer who moved in or was a customer when a higher level of security was in place.

2. Deep Pockets should not use fake security devices, such as imitation video cameras. Imitation security devices, in theory, operate like scarecrows to deter criminal activities. Here is the problem: Scarecrows don’t work when it comes to security. In practice, if there is a criminal incident, the victim can allege that he or she relied, to his or her detriment, on the fake security device and did not realize that it was not a real, working device. The fake device also can serve as evidence of an underlying problem that was not properly addressed.

3. Deep Pockets should maintain all

security systems and devices in good operating condition and repair. Broken or deactivated door or window locks, damaged security cameras, inoperative alarms, and other similar problems increase the risk of criminal activity and the liability potential for Deep Pockets. Deep Pockets who want to keep their pockets deep should promptly investigate reports of broken or malfunctioning security devices and promptly repair or replace them.

4. Deep Pockets should speak with the local police department to determine if particular or recurring crimes happen in the area, especially violent crimes. If so, Deep Pockets should consider upgrading their security measures to proactively deal with these issues. Deep Pockets should not allow security measures at their properties to fall below the levels generally maintained by other businesses in the area or other similarly situated businesses.

5. Deep Pockets should educate all property managers, employees, and tenants on safety techniques and the importance of reporting and following up on suspicious activities. The local police or a security consultant can speak with the landlord's property manager, employees, and tenants on how to reduce the risk of violent crimes.

6. Deep Pockets should make certain that common areas, such as parking lots, garages, elevators, stairways, hallways, refuse disposal areas, and laundry rooms, are well lit at all times. Outdoor parking areas should remain well lit for a reasonable period of time after the last employee, tenant, or customer leaves the building, area, or shopping center. A poorly lit area (particularly one with broken lights) has significant potential for personal attacks.

7. Review Deep Pockets' leases and promotional materials for references to security because these references can

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create an implied warranty or contract for security and form the basis for claims of detrimental reliance and breach of contract. An apartment or office brochure that indicates 24-hour security can be interpreted as a contractual obligation.

8. Deep Pockets should make certain that complaints and incidents regarding criminal activity are documented, including what was done in response. If there are serious, numerous, or repeated incidents, Deep Pockets should consider retaining a security consultant to review existing security practices.

9. Discuss with Deep Pockets' insurance agent whether the insurance coverage should be written on an "occurrence" basis or a "claims-made" basis. If Deep Pockets are switching insurance coverage types, then "gap" or "tail" insurance coverage for historic incidents may be advisable.

10. When considering constructing or leasing a new facility, investigate what types of criminal activities have occurred

and what security measures are or should be put into effect. The design stage is when it will be most cost-effective to implement security measures for new space.

Property owners, managers, and tenants are well advised to proactively plan for third-party criminal conduct on their properties. By investigating crimes and trends in the area, documenting incidents, maintaining lighting, doors, windows, security cameras, and other security devices, and employing reliable security personnel and techniques, owners, tenants, and managers can reduce the risk of criminal activity giving rise to possible high-cost litigation. Liability for third-party criminal acts may not be completely avoidable, but by knowing what the law requires and the history of criminal and violent activities in the area, appropriate security measures can be implemented to reduce risk, not only for the property owner, manager, or tenant, but also for employees, customers, and other invitees. ■