Are Your Clients Exposed to Premises Liability for Third-Party Criminal Acts?

A Top-10 List to Reduce Risks

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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 Washington, D.C., case in the 1970s is now occurring regularly. See *Kline v. 1500 Massachusetts Ave. Apartment Corp.*, 439 F.2d 477 (D.C. Cir. 1970) (in action by an apartment building tenant assaulted and robbed in a common area, finding the landlord liable on the basis that the landlord knew of an increase in criminal activity on the premises). Consider the number of recent lawsuits arising out of shootings or other criminal activities in schools, churches, movie theaters, shopping centers, hotels, airports, and other places. In 2014 alone, the FBI indicated an estimated 1,165,383 violent crimes were reported. See Federal Bureau of Investigation, Uniform Crime Reports (2014), https://www.fbi.gov/about-us/cjis/ucr/crime-in-the-u.s/2014/crime-in-the-u.s.-2014/offenses-known-to-law-enforcement/violent-crime. 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. Foreseeability can involve a variety of factors, including prior similar and prior violent incidents. See, e.g., *Masek v. Warren Redevelopment & Planning Corp.*, 2010-Ohio-819, ¶ 17 (Ohio Ct. App. 2010) (affirming the trial court's grant of summary judgment because the property owner was aware of only two prior incidents at the scene of the crime, which was not thought to make the incident foreseeable); and *McKown v. Simon Prop. Grp.*, 344 P.3d 661, 661 (Wash. 2015) (in which the court held that prior acts of violence on the premises must be similar in nature and location to the act that resulted in plaintiff's injury for the defendant to be liable).

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. In 1991, the Alabama Supreme Court held that the murder of a tenant was foreseeable even

though there were no prior occurrences on the property. *Brock v. Watts Realty Co.,* 582 So. 2d 438 (Ala. 1991). 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 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 obligations. For example, the Ohio Revised Code obligates residential property landlords to "[c]omply with the requirements of all applicable building, 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). Courts are divided, however, as to whether these statutory warranties create tort liability. Compare *Isbell v. Commercial Inv. Assocs., Inc.,* 614, 644 S.E.2d 72, 76 (Va. 2007) (rejecting tenant's claim that duties imposed on landlord by state's statute created a statutory cause of action in tort) with *Newton v. Magill*, 872 P.2d 1213, 1216–18 (Alaska 1994) ("it would be inconsistent with a landlord's continuing duty to repair premises imposed under the URLTA to exempt from tort liability a landlord who fails in this duty").

State employment laws also can come into play and require an employer to provide a safe place of employment. See, e.g., Ohio Rev. Code § 4101.12 (providing, in part, that "[n]o employer shall require, permit, or suffer any employee to go or be in any employment or place of employment which is not safe, and no such employer shall fail to furnish, provide, and use safety devices and safeguards, or fail to obey and follow orders or to adopt and use methods and processes reasonably adequate to render such employment and place of employment safe").

Laws relating to safety at the local (municipal) level are also relevant. For example, Chapter 767 of the City of Euclid, Ohio, Ordinances 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 lot(s) 24 hours a day, with one additional private policeman or security guard on weekdays between the hours of 5:00 p.m. and 1:00 a.m. of the following day, and between the hours of 7:00 p.m. and 3:00 a.m. 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. It is tempting, for a variety of reasons, to reduce levels of security. For example, replacing a 24-hour security guard with a video camera can reduce costs. Reducing the level of security, however, 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. In addition, if there is a criminal incident and the victim sues Deep Pock-

ets, admitting that it reduced security for cost considerations is unlikely to go over well in the courtroom. See, e.g., Per*ez v. DNT Global Star, L.L.C., 3*39 S.W.3d 692, 701 (Tex. App. 2011) (in which an expert witness testified that the property owner should have "collected the relevant crime data from the neighborhood and shared it with its residents, created a neighborhood watch, and hired a dedicated patrol for the property").

2. Deep Pockets should not use fake (nonworking) security devices, such as imitation video cameras. Imitation security devices, in theory, operate like scarecrows to deter criminal activities. Here is the problem: s*carecrows don't work when it comes to security*. *I*n practice, if there is a criminal incident, the victim can allege that he relied, to his 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. See, e.g., Eri*cson v. Fed. Express Corp., 77* Cal. Rptr. 3d, 1, 4 (Ct. App. 2008) (plaintiff was "never told that the cameras and guards were not there for [his] protection" and it was "undisputed that the camera system was inoperative when [the victim] was attacked").

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. See, e.g., Amb*riz v. Kelegian, 5*3 Cal. Rptr. 3d 700, 713 (Ct. App. 2007) (describing "that it was more probable than not that the rapist gained entry through an improperly maintained door rather than by any of the alternative methods").

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. See, e.g., Nov*ak v. Capital Mgmt. & Dev. Corp., 452* F.3d 902, 943 (D.C. Cir. 2006) (reversing the trial court's grant of summary judgment for a property owner since plaintiffs "proffered testimony from the club's security guards . . . that fights occurred in the club [regularly]"). 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 similar 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. See, e.g., McK*enna v. AlliedBarton Sec. Servs., LLC, 3*5 N.E.3d 1007, 1016 (Ill. App. Ct. 2015) (explaining that the trial court improperly dismissed claims against the property owner because the owner failed to follow specific recommendations of security consultants).

6. 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 per-

sonal attacks. See, e.g., Cas*taneda v. Olsher, 1*62 P.3d 610, 623 (Cal. 2007) (plaintiff unsuccessfully argued, as part of the premises liability claim, that "[t]he lights in the mobilehome [sic] park were constantly being broken").

7. Review Deep Pockets's leases and promotional materials for references to security, because these references can 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. See, e.g., Mit*chell v. Brandon Mill Assocs. Ltd., N*o. 05-96-00688-CV, 1998 WL 548822, at *7 (Tex. App. Aug. 31, 1998) (explaining that, "[c]ontrary to many of these assurances, the record indicates that [property owner] did not provide the high degree of security it promised").

8. Deep Pockets should make certain that complaints and incidents regarding criminal activity are documented, including what was done in response thereto. Advise Deep Pockets that, if there are serious, numerous, or repeated incidents, then Deep Pockets should consider retaining a security consultant to review existing security practices. See, e.g., McK*own, 3*44 P.3d at 670 (holding that "when a landowner or possessor's duty to protect business invitees from third party criminal conduct arises from his prior experience, that duty generally requires a history of prior similar incidents on the business premises within the prior experience of the landowner or possessor's business").

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 for new space is when it will be most cost-effective to implement security measures. An ounce of prevention is worth a pound of cure.

Conclusion

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. n