



# MASS SHOOTINGS AND INSURANCE COVERAGE

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This paper provides background and context for the issues to be covered in the Mass Shootings and Insurance Coverage Panel at the 27th Annual ABA/TIPS Insurance Coverage Litigation Midyear Conference.

## I. Introduction

When it comes to gun ownership and shootings, insurers have traditionally relied on the low incidence of such events, favorable liability laws, and their ability to selectively exclude such risks to justify a hands-

off approach to assessing and managing such risks. However, with the increasing number of mass shooting incidents in recent years and the significant and unique impacts and liability they spawn, insurers are placing greater emphasis on recognizing and addressing these types of risks.

## II. Insurers' Historical Approach to Guns

In *Liability Insurance and the Regulation of Firearms*, the authors examined the insurance industry's treatment of gun risks

as a form of de facto regulation.<sup>1</sup> They concluded that liability insurers generally do not inquire whether an applicant owns or possesses guns in the home and, as a result, do not engage in the regulation of guns through underwriting, pricing, education or loss control. Instead, personal lines liability insurers have historically adopted selective exclusion as their main approach to gun-related injuries and liability, through the application of the intentional act exclusion and other limitations on coverage.

The primary reason that insurers do not inquire and account for gun ownership in

most types of insurance is due to the inability of actuarial science to reliably correlate gun ownership with increased liability exposure or risk of loss. While statistical analysis may be capable of predicting, for instance, the increased risk associated with guns in the hands of convicted felons, those risk factors cannot be applied to the general population of law-abiding gun owners.<sup>2</sup> This lack of reliable data, coupled with the low incidence of firearm accidents in the home relative to other causes of loss (see Appendix, Comparative Risk Table), is the reason that insurance does not traditionally recognize or price for an increased risk of injury and liability exposure associated with guns in the home.

A second factor behind the insurance industry's traditional "hands off" approach to gun possession and ownership in underwriting lies in the recognition that linking guns to increased risk and higher insurance costs would disincentivize gun ownership, which gun rights groups are vigilant to prevent. The NRA has consistently opposed requiring liability insurance for gun owners, claiming such requirements economically discriminate against gun ownership (i.e. "you don't have to carry insurance to exercise any other constitutional right."). These groups would undoubtedly take a similar view of underwriting practices that target lawful gun ownership. Such concerns (among others) are behind the insurance industry's historical opposition to proposals to

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<sup>1</sup>T. Baker and T. Farrish, *Liability Insurance and the Regulation of Firearms*, SUING THE FIREARMS INDUSTRY, 292-314 (T. Lytton. Ed. U. Michigan Press 2005).



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<sup>2</sup>R. Borum, R. Fein, B. Vossekuil and J. Berglund, *Threat Assessment: Defining an Approach for Evaluating Risk of Targeted Violence*, Behav. Sci. Law 17:323-337, at 325 (1999).

impose insurance requirements on gun ownership.<sup>3</sup>

### III. Limits on Tort Liability for Criminal Acts of Third Parties

Another factor limiting insurers' focus on liability for shootings is the fact that, in most jurisdictions, a business owner is not liable to a person injured by the criminal acts of a third party unless the criminal act was foreseeable. Restatement (Second) of Torts § 344, Comment f (1965)<sup>4</sup>; Colorado Revised Statute § 13-21-115(3)(c)(1)("[A]n invitee may recover for damages caused by a landowner's unreasonable failure to exercise reasonable care to protect against dangers of which he actually knew or should have known."); *Commonwealth of Virginia v. Peterson*,

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<sup>3</sup>*Gun Liability Insurance Bills Aren't the Answer, Says Insurance Industry*, Insurance Journal (April 10, 2013).

<sup>4</sup>Section 344 of the Second Restatement of Torts provides in relevant part

Since the possessor is not an insurer of the visitor's safety, he is ordinarily under no duty to exercise any care until he knows or has reason to know that the acts of the third person are occurring, or are about to occur. He may, however, know or have reason to know, from past experience, that there is a likelihood of conduct on the part of third persons in general which is likely to endanger the safety of the visitor, even though he has no reason to expect it on the part of any particular individual. If the place or character of his business, or his past experience, is such that he should reasonably anticipate careless or criminal conduct on the part of third persons, either generally or at some particular time, he may be under a duty to take precautions against it, and to provide a reasonably sufficient number of servants to afford a reasonable protection.

Restatement (Second) of Torts § 344, Comment f (1965).

749 S.E.2d 307 (Va. 2013) (As a general rule, a person does not have a duty to warn or protect another from the criminal acts of a third person. "This is particularly so when the third person commits acts of assaultive criminal behavior because such acts cannot reasonably be foreseen."); *DeLorenzo v. HP Enterprise Services, LLC*, 2016 WL 6459550 (D.D.C. Oct. 31, 2016)("[w]here an injury is caused by the intervening criminal act of a third party, ... liability depends upon a more heightened showing of foreseeability than would be required if the act was merely negligent," but holding lower standard of foreseeability applies to claims of negligent supervision and retention); *McKown v. Simon Prop. Grp. Inc.*, 344 P.3d 661 (Wash. 2015).<sup>5</sup>

Similarly, most courts do not impose a special duty on an employer to protect an employee against criminal actions on the employer's premises unless the act is foreseeable. *Wiener v. Southcoast Childcare Ctrs., Inc.*, 32 Cal. 4th 1138, 88 P.3d 517 (2004) (California law); *A.H. v. Rocking-*

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<sup>5</sup>In *McKown*, a store employee in a shopping mall who was injured in a shooting rampage by a third party brought a negligence action against the mall owner and contractor that provided security services at the mall. The district court granted summary judgment for defendants. The Ninth Circuit certified questions to the Washington Supreme Court, including whether Washington adopted Restatement Second of Torts § 344 and Comments *d* and *f* as controlling law in limiting the nature and scope of the duty owed by a business to protect its invitees from harm by third persons. *McKown v. Simon Property Group Inc.*, 689 F.3d 1086 (9th Cir. 2012). The court noted that the Washington Supreme Court seemed to follow a broad view of the foreseeability of third-party criminal conduct, whereas the Washington intermediate appellate courts had refined the foreseeability inquiry in a way that seemed to narrow the duty owed. *Id.* at 1092.

*ham Pub. Co., Inc.*, 495 S.E.2d 482, 486 (Va. 1998) (an employer has no duty to protect an employee from third party criminal acts unless the danger is “known or reasonably foreseeable” as a matter of law and concluding that knowledge of similar assaults in the preceding five years was not sufficient); *Circle K Corp. v. Rosenthal*, 118 Ariz. 63, 574 P.2d 856 (1977) (“An employer in Arizona has a duty to provide its employees with a reasonably safe place to work and may be liable for mere failure to act to protect its employees from reasonably foreseeable criminal conduct.”)

Historically, courts have found the threat posed by mass shooters to be so unexpected and remote that, as a matter of law, no rational juror could find that a landowner should have foreseen or known about it. A prime example of this is *Lopez v. McDonald’s Corp.*<sup>6</sup>—a case arising out the 1984 mass shooting at a McDonald’s restaurant in San Ysidro, California, where an assailant, armed with a rifle, a handgun, and a shotgun, indiscriminately shot patrons and employees, leaving 21 persons dead and 11 others injured. Survivors and surviving family members sued McDonalds, arguing that the restaurant was in a high-crime area; that it had considered but ultimately declined to retain a private security company; and that McDonalds should be liable on theories of negligence and premises liability. McDonalds countered that, as a matter of law, the incident was so unlike-

ly as to fall outside the boundaries of a restaurant’s general duty to protect patrons from reasonably foreseeable criminal acts. The court agreed with McDonalds that its general duty to its patrons did not include protection against a “once-in-a-lifetime” massacre. *Id.* at 504.

On appeal, the court of appeal held that the attack was not foreseeable as a matter of law:

[T]he likelihood of this unprecedented murderous assault was so remote and unexpected that, as a matter of law, the general character of McDonald’s nonfeasance did not facilitate its happening. Huberty’s deranged and motiveless attack, apparently the worst mass killing by a single assailant in recent American history, is so unlikely to occur within the setting of modern life that a reasonably prudent business enterprise would not consider its occurrence in attempting to satisfy its general obligation to protect business invitees from reasonably foreseeable criminal conduct.

*Id.* at 509–10. In affirming the trial court’s grant of summary judgment, the court of appeal agreed that “the theft-related and property crimes of the type shown by the history of its operations, or the general assaultive-type activity which had occurred in the vicinity bear no relationship to purposeful homicide or assassination.” *Id.*; accord, *Sigmund v. Starwood Urban Inv.*, 475 F. Supp. 2d 36 (D.D.C. 2007) (foreseeability requirement cannot be satisfied through generic information such as local crime rates or evidence of a criminally active environment.)

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<sup>6</sup>193 Cal.App.3d 495, 238 Cal.Rptr. 436 (1987)

As mass shooting incidents become more commonplace, it is possible that the perception of whether such events are foreseeable may begin to shift. There were signs of this in *Axelrod v. Cinemark Holdings, Inc.*<sup>7</sup>—a case that arose from the shootings at the movie theater complex in Aurora, Colorado in July 2012. There, the court described its view of the foreseeability issue as follows:

To establish that an incident is foreseeable, it is not necessary that an owner or occupier of land held open for business purposes be able to ascertain precisely when or how an incident will occur. Rather, foreseeability includes whatever is likely enough in the setting of modern life that a reasonably thoughtful person would take account of it in guiding practical conduct.... Simply because something has not yet happened does not mean that its happening is not foreseeable. Instead, foreseeability is based on common sense perceptions of the risks created by various conditions and circumstances.

65 F.Supp.3d at 1100 (quoting *Taco Bell, Inc. v. Lannon*, 744 P.2d 43 (Colo.1987)). The court noted its agreement with the holding in *Lopez*, but observed that “*what was ‘so unlikely to occur within the setting of modern life’ as to be unforeseeable in 1984 was not necessarily so unlikely by 2012.*” *Id.* at 1099. Based on “the grim history of mass shootings and killings that have occurred in more recent times,” together with ev-

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<sup>7</sup>65 F.Supp.3d 1093 (D. Col. 2014)

idence of warnings that Homeland Security issued to theaters before the shooting<sup>8</sup> and other policies the theater had in place, the *Axelrod* court denied the theater owner’s motion for summary judgment, finding that plaintiffs had presented enough evidence to create a genuine dispute of fact as to whether defendants knew or should have known of security risks. *Id.* at 1102.

Still, in most jurisdictions, imposing liability on business owners for the criminal acts of third party shooters remains a difficult case for victims to make. Even the theater owner in *Axelrod* was ultimately granted summary judgment on the issue of causation, after the court found that a reasonable jury could not plausibly find that Cinemark’s actions or inactions were a substantial factor in causing the harm. *Nowlan v. Cinemark Holdings, Inc.*, 2016 WL 4092468 (D. Colo. June

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<sup>8</sup>The release issued by the United States Department of Homeland Security to Cinemark and other theater chains in May 2012 entitled “Terrorists’ Interest in Attacking Theaters and Similar Mass Gatherings” notified the theaters of two incidents of concern: an April 4, 2012 suicide bombing of the National Theater in Mogadishu, Somalia during a speech by the Somali prime minister; and a communication from an al-Qaida-linked extremist advocating attacks on U.S. theaters. *Id.* The document states, “[a]lthough we have no specific or credible information indicating that terrorists plan to attack theaters in the United States, terrorists may seek to emulate overseas attacks on theaters here in the United States because they have the potential to inflict mass casualties and cause local economic damage.” It concludes, “[t]hese recent instances demonstrate that mass gatherings such as those associated with theaters likely remain attractive terrorist targets. We encourage facility owners and operators, security personnel, and first responders to remain vigilant and report suspicious activities and behaviors that may indicate a potential attack.” *Id.*

24, 2016). Citing prior decisions involving the Columbine school shooting, the court held that even if defendant's omissions in failing to provide certain safety and security measures contributed in some way to the injuries and deaths, the gunman's premeditated and intentional actions were the predominant cause of plaintiffs' losses. *Id.*

In *Commonwealth of Virginia v. Peterson*, 749 S.E.2d 307 (Va. 2013)—a case arising out of the 2007 slayings of 32 people on the Virginia Tech campus—the Virginia Supreme Court held that even if there was a special relationship between the University and its students, under the facts of the case, there was no duty for the University to warn students about the potential for criminal acts by third parties. The Virginia Supreme Court began from the “general rule” that a person does not have a duty to warn or protect another from the criminal acts of a third person unless a special relationship exists.<sup>9</sup> After reviewing numerous cases where no duty to warn was found to exist, and considering the information known to the university at the time of the shootings, the Supreme Court concluded that even under the less stringent standard of “know or have reasonably foreseen,” there were not sufficient facts from which the court could conclude that the duty to protect students against

third party criminal acts arose as a matter of law.<sup>10</sup>

#### IV. Gun Manufacturer Immunity

Another significant factor that limits the types of claims that arise out of mass shootings is the immunity granted to gun manufacturers and sellers. In the late 1990s and early 2000s, gun manufacturers, dealers and distributors faced a deluge of lawsuits by cities and counties across the United States seeking to recover costs associated with the manufacture, marketing, promotion, and sale of firearms. *See, e.g. City of New York v. Beretta U.S.A. Corp.*, 315 F.Supp.2d 256 (E.D.N.Y. 2004); *In re Firearm Cases*, 126 Cal. App. 4th 959, 24 Cal. Rptr. 3d 659 (2005). The lawsuits generally alleged that the firearms manufactured and sold by the defendants are unreasonably dangerous and constituted a

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<sup>10</sup>The Supreme Court summarized its understanding of the facts as follows:

In this case, the Commonwealth knew that there had been a shooting in a dormitory in which one student was critically wounded and one was murdered. The Commonwealth also knew that the shooter had not been apprehended. At that time, the Commonwealth did not know who the shooter was, as law enforcement was in the early stages of its investigation of the crime. However, based on representations from three different police departments, Virginia Tech officials believed that the shooting was a domestic incident and that the shooter may have been the boyfriend of one of the victims. Most importantly, based on the information available at that time, the defendants believed that the shooter had fled the area and posed no danger to others. (emphasis in original)

*Id.* at 313.

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<sup>9</sup>*Id.* at 311.

public nuisance, that the defendants were negligent in marketing and selling the firearms, and that their marketing of the firearms is deceptive.

Many gun manufacturers tendered these suits to their insurers. Those insurers, in turn, raised defenses to the claims, alleging that the suits did not allege a covered loss. Courts that ruled on the coverage issues generally held that the insurers were obligated to defend the municipality suits. *See, e.g., SIG Arms v. Zurich*, 122 F.Supp.2d 255 (D. N.H. 2000); *Scottsdale Ins. Co. v. Nat'l Shooting Sports Found.*, 2000 WL 1672997 (E.D.La. Nov. 6, 2000); *Beretta, U.S.A., Corp. v. Fed. Ins. Co.*, 117 F.Supp.2d 489 (D.Md. 2000).

Eventually, Congress got involved. In 2005, Congress enacted the Protection of Lawful Commerce in Arms Act (“PLCAA”) which sought to ensure that manufacturers and sellers of firearms and ammunition would not “be liable for the harm caused by those who criminally or unlawfully misuse firearm products ... that function as designed and intended.” *Ileto v. Glock, Inc.*, 565 F.3d 1126, 1135 (9th Cir. 2009) (quoting 15 U.S.C. § 7901(a)(5)). The statute provides that federal courts shall dismiss any civil liability action “brought by any person against a manufacturer or seller of a qualified product ... for damages ... or other relief, resulting from the criminal or unlawful misuse of a qualified product by the person or a third party.” *Id.* §7903(5)(A). The PLCAA was held to apply retroactively to actions pending at the time of the Act’s ef-

fective date,<sup>11</sup> effectively ending most litigation threats to the industry.

PLCAA has proved to be an effective and reliable fire wall against most claims or lawsuits that plaintiffs have mounted against the gun industry arising out of mass shootings. Most recently, in *Prescott v. Slide Fire Solutions, LP*, 2018 WL 4409369 (D.Nev. Sept. 17, 2018) – a case arising out the 2017 Las Vegas shooting – the court found that PLCAA immunity extended to the manufacturer of the bump stocks used by the shooter to increase the fire rate and resulting harm inflicted on the victims. The court specifically found that the bump stocks are not an accessory, but are “component parts” of a firearm, and therefore “qualified products” under the PLCAA. *Id.* at \*8–9.

PLCAA immunity is subject to certain enumerated exceptions.<sup>12</sup> The most commonly invoked exceptions in mass shooting situations involve claims of “negligent entrustment” and claims that a manufacturer or seller knowingly violated a state or federal statute applicable to the sale or marketing of the product. Both of these exceptions are currently under review by the Connecticut Supreme Court in *Soto v. Bushmaster Firearms*, in connection with efforts to impose liability on the manufacturer, distributor and seller of the AR–15 assault rifle used by the gunman in the Sandy Hook Elementary massacre.<sup>13</sup>

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<sup>11</sup>*Jefferies v. District of Columbia*, 916 F.Supp.2d 42 (D.D.C. 2013)

<sup>12</sup>15 U.S.C.A. § 7903 (West)

<sup>13</sup>*Soto et al. v. Bushmaster et al.*, Case Nos. 19832 & 19833 (Connecticut Supreme Court) (oral argument heard on Nov. 24, 2017)

## V. Modern Mass Shootings and the Harm They Cause

Researchers estimate that gun violence costs the American economy at least \$229 billion every year, including \$8.6 billion in direct expenses such as for emergency and medical care. Half of these costs are born by U.S. taxpayers.<sup>14</sup>

The number of mass shootings depends upon how you define them. But there is no question they are increasing in number and impact. According to data from the FBI and the Advanced Law Enforcement Rapid Response Training (ALERRT) Center at Texas State University, between 2000 and 2008, the U.S. experienced an average of 7 active shooter events per year. From 2009 to 2016 there were 153 such events, or about 19 per year. Of the 220 incidents that occurred from 2000 to 2016, nearly half (107) took place in an education, retail, or government/military setting.<sup>15</sup>

Regardless of where they occur, mass shootings cause a wide range of damage, loss and expense to victims and impacted businesses. The economic losses can include:

- Property damage (including repair and replacement of buildings)
- Clean up/Extra Expense
- Additional security/security upgrades
- Crisis Management

- Business Interruption/Event cancellation
- Workers Comp – injury, death benefits, mental health (varies state-by-state)
- Medical costs
- Mental health counseling
- Funeral expenses
- Fines/Penalties

Mass shooting incidents can also lead to significant and unique litigation exposures. The types of businesses that could be targeted for liability in a mass shooting event depends upon the circumstances, but can potentially include:

- Owners and operators of businesses or facilities where the shooting occurs
- Event promoters
- Security firms
- Law enforcement<sup>16</sup>
- Parents/relatives of the shooter
- Employers
- Mental health providers
- Retailers or gun shops where the assailant acquired weapons (if acquired illegally)
- Straw purchasers

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<sup>14</sup>Statistics on the Costs of Gun Violence, Giffords Law Center, <https://lawcenter.giffords.org/costs-of-gun-violence-statistics/>

<sup>15</sup><https://www.marsh.com/us/insights/research/addressing-the-risk-of-an-active-shooter.html>

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<sup>16</sup>*Andrade v. City of Somerville*, 92 Mass. App. Ct. 425, 87 N.E.3d 108 (2017) (alleging that gun used to shoot victim had been wrongly returned to shooter by city's police department); *Chen v. County of Santa Barbara*, 2015 WL 1262150 (C.D.Cal.) (alleging law enforcement "created a dangerous condition by failing to reasonably investigate, reasonably perform any background check, and reasonably investigate the on-line postings of [mass murderer] as part of 'wellness check' despite the fact that they had been made aware of [his] online postings and violent intentions.")

- Organizations that fail to report disqualifying information to authorities
- Anyone in a position to know of/ intervene in the shooter's plan
- Media outlets/content providers that encourage or incite violence

In the wake of the 2002 Columbine school massacre, victims even tried to sue video game makers and movie producers and distributors alleging that violent movie and video games were the cause of the shootings.<sup>17</sup> The United States District Court in Colorado held that: (1) defendants owed no duty of care to shooting spree victim; (2) students' intentional violent act were not foreseeable and were the superseding cause of teacher's death; (3) under Colorado law, as predicted by the district court, intangible thoughts, ideas, and expressive content contained in movies and video games are not "products" as contemplated by the strict liability doctrine; and (4) movie and games were protected under the First Amendment.<sup>18</sup>

More recently, victims and family members of deceased victims of the 2016 mass shooting at the Pulse Night Club in Orlando, Florida, brought an action against providers of three social media platforms, which plaintiffs alleged were used to spread messages of violence and hate that motivated the shooter to perpetrate the shooting.<sup>19</sup> The plaintiffs claimed that the access that the defendants furnished to the

Islamic State of Iraq and Syria (ISIS), which apparently allowed the gunman to hear its messages via the Internet and become radicalized, triggers liability for the shooting. The plaintiffs brought claims under federal statutes that create causes of action for aiding acts of international terrorism and providing material support to terrorists and foreign terrorist organizations. They also alleged claims under state law.

Summaries of the recent mass shootings in Aurora, Colorado, Las Vegas, Nevada, and Sutherland Springs, Texas, illustrating the different types of lawsuits that such incidents can spawn are included in the attached Appendix.

### **SAFETY Act Immunity**

The music festival massacre in Las Vegas last year has also seen the first attempt by a defendant to claim immunity under the Support Anti-Terrorism by Fostering Effective Technologies (SAFETY) Act. Congress enacted the SAFETY Act as part of the Homeland Security Act of 2002. The law was intended to ensure that companies would not let the considerable liability risks associated with a potential terrorist attack deter them from creating or using technologies that could help protect the public.<sup>20</sup> It provides certain liability limitations for providers of "qualified anti-terrorism technologies" that could save lives in the event of a terrorist attack. Pro-

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<sup>17</sup>*Sanders v. Acclaim Entertainment, Inc.*, 188 F.Supp.2d 1264 (D. Colo. 2002)

<sup>18</sup>*Id.* at 1272-73, 1276.

<sup>19</sup>*Crosby v. Twitter, Inc.*, 303 F.Supp.3d 564 (E.D. Mich. 2018)

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<sup>20</sup>See Regulations Implementing the Support Anti-terrorism by Fostering Effective Technologies Act of 2002 (the SAFETY Act), 71 FR 33147-01, 2006 WL 1547230 (June 8, 2006).

tections apply only to claims arising out of, relating to, or resulting from an act of terrorism when such qualified technologies have been deployed.

The SAFETY Act applies to a broad range of technologies, including any product, equipment, service (including support services), device, or technology (including information technology) designed, developed, modified, or procured for the specific purpose of preventing, detecting, identifying, or deterring acts of terrorism or limiting the harm such acts might otherwise cause, that is designated as such by the Secretary. The U.S. Department of Homeland Security has certified hundreds of security systems, software and equipment, and services, ranging from unarmed guards at shopping malls to flight deck doors. Certification under the statute also has been obtained by stadiums, corporate buildings and facilities that draw crowds and have strengthened security to prevent terrorist acts. The list does not appear to include hotels, hospitals or schools. Homeland Security does not disclose what companies have sought approvals and were denied.

The Safety Act comes into play only when an act of terrorism has occurred. Under the law, the DHS secretary can declare an act of terrorism based on whether the attack was (1) unlawful; (2) caused harm to persons, property, or other entity within the United States; and (3) the attack used or attempted to cause mass destruction, injury or other losses. The secretary has the authority to further refine what terms such as “mass destruction” actually

mean. It remains unclear whether mass shooting acts perpetrated by lone gunmen will be recognized as coming within the definition.

In the case of the Las Vegas mass shooting, the party invoking the SAFETY Act is the owner of the hotel from which the shooter staged his assault. Interestingly, however, the hotel itself was never certified under the SAFETY Act. Instead, the hotel seeks to piggy-back off of the certification obtained by the security provider for the concert, Contemporary Services Corp., which had years earlier received DHS designation and certification under the SAFETY Act. The hotel owner, MGM Resorts International, claims that it is protected under the umbrella of Contemporary’s designation and has filed lawsuits against survivors seeking a declaration to this effect. There is some basis for this claim, as the SAFETY Act protections appear to extend to users of Qualified Anti-Terrorism Technology under the statute and implementing regulations, which state: “Such cause of action ... may not be brought against the buyers, the buyers’ contractors, downstream users of the Qualified Anti-Terrorism Technology, the Seller’s suppliers or contractors, or any other person or entity...”<sup>21</sup>

The potential benefits to MGM, and companies in general, from the designation are significant. They include a cap on liability tied to the amount of liability insurance coverage specified and reasonably available for each qualified technolo-

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<sup>21</sup>*Id.*

gy<sup>22</sup>; the right to exclusive jurisdiction in federal court, insulation from joint and several liability for noneconomic damages, and immunity from punitive damages or prejudgment interest. In certain circumstances, a company may also be entitled to assert a Government Contractor Defense that further immunizes sellers of qualified anti-terrorism technologies from liability. For MGM, the resolution of its SAFETY Act immunity claims will hinge on wheth-

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<sup>22</sup>Regarding the insurance requirement, the regulations further state:

The SAFETY Act provides that the Secretary will examine the amount of liability insurance the Seller of the technology proposes to maintain for coverage of the anti-terrorism technology at issue. Under section 864(a), the Secretary must certify that the coverage level is appropriate “to satisfy otherwise compensable third-party claims arising out of, relating to, or resulting from an act of terrorism when qualified anti-terrorism technologies have been deployed.” § 864(a)(1). While the Act provides the Secretary with significant discretion in this regard, the Secretary may not require the Seller to obtain liability insurance of more than the maximum amount of liability insurance reasonably available from private sources on the world market. Likewise, the Secretary may not require a Seller to obtain insurance, the cost of which would unreasonably distort the sales price of Seller's anti-terrorism technologies. § 864(a)(2). Although the Secretary may permit the Seller to self-insure, he may not require the Seller to self-insure if appropriate insurance is unavailable. § 864(a)(2).

[T]he inquiry will be specific to each application and may involve an examination of several factors, including without limitation the following: (i) The amount of insurance the Seller has previously maintained; (ii) the amount of insurance maintained by the Seller for other related technologies or for the Seller's business as a whole; (iii) the amount of insurance typically maintained by Sellers of comparable technologies; (iv) data and history regarding mass casualty losses; and (v) the particular technology at issue.

*Id.*

er the DHS Secretary officially declares the Las Vegas attack an act of terrorism, or defers that determination to the courts.

## VI. Insurance Response to Mass Shootings

### A. Coverage under Liability Policies

Individual coverage for non-occupational liability risks is traditionally provided as part of standard residential insurance policies (such as homeowners' and renters' policies) and umbrella policies. Homeowners' and umbrella policies universally include an exclusion for intentional harm, which eliminates coverage for the vast majority of gun-related injuries committed by an insured. Insurers have applied such exclusions to accidental injuries involving firearms and, on the whole, courts have upheld this approach. Some insurers have adopted an even more restrictive version of the intentional harm exclusion that excludes coverage for harm resulting from criminal acts, which could include owning an unlicensed firearm. Finally, many policies do not cover liability between family members, which further limits potential insured liability exposure arising from the discharge of a gun in the home.

#### 1. Intent Issues: Caused by an Occurrence, Expected and Intended Injury Exclusion, Statutory and Public Policy Considerations

Since 1986, standard form CGL and homeowner's policies have defined an

“occurrence” as “an accident, including continuous or repeated exposure to substantially the same general harmful conditions.” Older occurrence definitions include the language “neither expected or intended from the standpoint of the insured.” This language is now more commonly incorporated in a separate intentional acts exclusion.

Coverage in shooting cases most often comes down to a question of intent: was the injury or damage caused by an occurrence or accident? Does the exclusion for injury or damage expected or intended by the insured apply, and to whom? Do any statutes apply, or does public policy affect the outcome of the coverage analysis?

**Coverage for Perpetrators.** In mass shooting situations, courts generally do not hesitate to find intent to injure from the assailant’s actions and deny coverage on that basis. *Germantown Ins. Co. v. Martin*, 595 A.2d 1172 (Pa. Super. Ct. 1991) (injuries caused by a shooting spree were expected or intended and, thus, were not covered under the policy; insured’s intent to shoot and kill “everyone” in a house could be transferred to a victim whose identity or presence was unknown to the insured at the time); *Donegal Mut. Ins. Co. v. Baumhammers*, 938 A.2d 286 (Pa. 2007) (finding no coverage for insured who went on two hour shooting spree, killing 5 people in three different townships); *Allstate Ins. Co. v. Neal*, 304 Ga. App. 267, 696 S.E.2d 103 (2010) (insured’s action of shooting police officer while the officer was attempting to serve arrest warrant was not a covered “accident.”); Cal. Ins. Code

§ 533 (West 1972) (“[a]n insurer is not liable for a loss caused by the willful act of the insured”); *Couch on Insurance* § 101:22 (3d ed.2006) (“In general, it is against public policy for an insurance contract to provide coverage for the intentional or willful misconduct of an insured.”)

Because the purpose of intentional act exclusion is to exclude insurance coverage for wanton and malicious acts by an insured, most states recognize that the Court may, absent a finding of actual intent to injure, infer intent to injure as a matter of law. *Allstate Ins. Co. v. Pond Bar*, No. 3-97-cv-1310, 1995 WL 568399, at \*9 (D. Minn. May 19, 1995) (intent inferred as a matter of law where the insured engaged in a “shooting rampage” resulting in the death of several individuals); *Allstate Ins. Co. v. Roelfs*, 698 F. Supp. 815, 818 (D. Alaska 1987) (intent to injure is established as a matter of law from the intent to commit acts of sexual assault and molestation); *State Farm Fire & Cas. Co. v. Bomke*, 849 F.2d 1218, 1219 (9th Cir. 1988) (finding intent to harm inherent in the actions on an accomplice). Courts will look to the nature of the insured’s actions and other circumstances in determining whether intent can be inferred.

Even where the shooting is indiscriminate, courts may infer intent as a matter of law. *Woida v. North Star Mut. Ins. Co.*, 306 N.W.2d 570, 572-74 (Minn. 1981) (intent inferred where the insured was involved in shooting a gun at a truck with the knowledge that the truck was occupied, resulting in injury to the occupant, despite the insured’s insistence that he did

not mean to injure anyone); *Safeco Ins. Co. of America v. Butler*, 118 Wash.2d 383 (Wash. 1992) (injuries caused by insured firing pistol into truck, striking its driver, were not caused by an “accident” within the meaning of the policy).

Questions of whether the assailant harbored the requisite intent are sometimes informed by reference to related statutes. For instance, in *Allstate Ins. Co. v. Pond Bar*, No. 3-97-cv-1310, 1995 WL 568399, at \*9 (D. Minn. May 19, 1995), the Court noted that the act of intentionally pointing a gun at a person was regarded as a “crime of violence” under Minnesota law. With that in mind, the Court found, as a matter of law, that the act of pointing a gun at a victim’s chest in the midst of a shooting rampage supported an inference of intent to injure.

Evidence of the insured’s conviction of a shooting-related crime will generally be determinative of intent. However, the question may still come down to the elements of the crime on which the insured is convicted, and whether they match with the exclusion. Compare *Amica Mut. Ins. Co. v. Edwards*, 8:10-CV-1143-GRA, 2011 WL 2971935 (D.S.C. 2011) (insured’s murder conviction forecloses a finding that the actions giving rise to this claim were not intentional, even if the resulting bodily injury is of a different kind, quality, or degree than intended) and *Allstate Ins. Co. v. Zuk*, 574 N.E.2d 1035 (N.Y. 1991) (conviction for second-degree manslaughter did not establish as matter of law that insured reasonably expected victim’s death to result from criminal act,

within meaning of exclusionary clause in policy). Even in situations where the insured’s conviction of a crime is determinative of coverage, non-shooter insureds may still be entitled to coverage.

Finally, jurisdictions and policy forms differ regarding the impact that an insured’s mental illness may have on the existence of intent under the policy. In *State Farm Fire & Cas. Co. v. Wicka*, 474 N.W.2d 324 (Minn. 1991), the Minnesota Supreme Court held that the insured’s acts were unintentional for purposes of the intentional act exclusion in the policy where the insured, because of mental illness or defect, either does not know the nature or wrongfulness of his act, or is deprived of the ability to control his conduct regardless of any understanding of the nature of act or its wrongfulness. Compare *Auto-Owners Ins. Co. v. Churchman*, 489 N.W.2d 431 (Mich. 1992), where the Michigan Supreme Court held that an insane or mentally ill person can intend or expect the results of his actions within the meaning of the policy’s exclusionary clause.

**Coverage for Other Insureds/Secondary Actors.** Expected and intended injury exclusions have wording differences that can affect coverage for insureds other than the perpetrator. Generally if the exclusion applies to injury or damage expected or intended by “the” insured, courts analyze the intent of each insured separately. *Pawtucket Mut. Ins. Co. v. Lebrecht*, 104 N.H. 465 190 A.2d 420 (1963) (policy excluded injury “caused intentionally by or at the direction of the Insured”; the insured parents’ child assaulted another; the

exclusion did not apply to them for their negligence). Thus, in *Donegal Mutual Insurance Company v. Baumhammers*, 938 A.2d 286 (Pa. 2007), the Supreme Court affirmed a duty to defend the parents of a gunman who went on a two hour shooting spree, holding:

The extraordinary shooting spree embarked upon by Baumhammers resulting in injuries to Plaintiffs cannot be said to be the natural and expected result of Parents alleged acts of negligence. Rather, Plaintiffs' injuries were caused by an event so unexpected, undesigned and fortuitous as to qualify as accidental within the terms of the policy. Because the alleged negligence of Parents resulted in the tragic accidental injuries to the individual plaintiffs, Donegal is therefore required to defend Parents. *Id.* at 293.

But if the exclusion applies to injury or damage expected or intended by “an” or “any” insured, courts often find that intent to injure on the part of one insured results in exclusion of coverage for all insureds. *Allstate Ins. Co. v. Freeman*, 432 Mich. 656, 443 N.W.2d 734 (1989) (holding that a husband who negligently made a gun available to his wife was not covered where the intentional act exclusion referred to “an insured.”)

Some courts apply the separation of insureds provision in this context to avoid the loss of coverage for innocent co-insureds. *Minkler v. Safeco Ins. Co. of America*, 49 Cal.4th 315, 110 Cal.Rptr.3d 612, 232 P.3d 612 (2010) (husband sued for molesting little leaguer he was coaching; policy excluded injury expected or intended by an

insured; the policy contained a separation of insureds clause; the court held that the exclusion of coverage for injuries arising from “an” insured’s intentional acts did not preclude coverage for the wife’s liability, if any, arising from the molestations for the sole reason that *the husband*, another insured under the policies, had committed intentional, and thus excludable, acts; the wife’s coverage must be analyzed on the basis of whether *she herself* committed an act or acts that fell within the intentional act exclusion). *Minkler* noted a split nationwide on this issue. And it suggested that an exclusion for injury expected or intended by any insured would have provided a defense to coverage here.

Finally, courts generally find that intent is not imputed to innocent secondary actors. In *Nationwide Mutual Fire Ins. Co. v. Pipher*, 140 F.3d 222 (3d Cir.1998), the insured owned a rental unit. He failed to install doors on the second floor apartment of the property before leasing it to a tenant. The tenant was murdered in the apartment. Nationwide sued for a declaratory judgment that because the victim's death was caused by the intentional acts of a third party, no “accident” or “occurrence” had occurred and therefore Nationwide had no duty to defend or indemnify its insured. The Third Circuit held that Nationwide had a duty to defend its insured against complaints alleging negligent conduct on the part of the insured and that although a third party may have intentionally injured or killed the plaintiff, the death or injury may still be deemed to be an accident under the terms of the policy. *Id.* at 225–26.

## 2. Criminal Act Exclusions

Homeowners and commercial liability policies may also contain a “criminal acts” exclusion. This exclusion typically bars coverage for bodily injury or property damage resulting from “a criminal act or omission.” The exclusion is often stated to apply regardless of (1) whether the insured person possessed the mental capacity to appreciate the criminal nature or wrongfulness of the act or omission or to conform his or her conduct to the requirements of the law or to form the necessary intent under the law; or (2) whether the insured person is actually charged with, or convicted of, a crime. Injury resulting from a criminal act invokes the criminal act exclusion and precludes coverage as a matter of law. *Liebenstein v. Allstate Ins. Co.* 517 N.W.2d 73, 75 (Minn. App. 1994). Intent to injure is immaterial to the applicability of the criminal acts exclusion. *Id.*

*See also Slayko v. Sec. Mut. Ins. Co.*, 98 N.Y.2d 289, 774 N.E.2d 208 (N.Y. 2002) (holding criminal activity exclusion did not violate public policy.); *Auto Club Group Ins. Co. v. Booth*, 797 N.W.2d 695 (Mich. Ct. App. 2010) (defendant pleaded no contest to a misdemeanor charge of careless, reckless, or negligent discharge of a firearm resulting in injury; Court of Appeal held that the trial court erred when it granted summary disposition to defendant concerning the applicability of the criminal act exclusion contained in homeowner’s insurance policy, and ordered summary judgment in favor of insurer.)

## 3. Assault and Battery Exclusions

Assault and battery exclusion typically exclude bodily injury arising out of “actual or alleged assault or battery.” Sometimes such exclusion also exclude injury arising out of “physical altercation” or acts or omissions in connection with the prevention or suppression of such acts, or failure to provide adequate security.

In *Geovera Specialty Ins. Co. v. Hutchins*, 831 F. Supp. 2d 1306, 1309 (M.D. Fla. 2011) the insured’s grandson shot the decedent in the neck, resulting in decedent’s death. At the time of the shooting, the grandson was living with the insured. The insurer brought an action seeking a declaration that it had no duty to defend or indemnify the wrongful death action against the grandson by the survivors of the decedent. All parties moved for summary judgment, and the court awarded summary judgment to the insurer, stating that the policy’s exclusion for bodily injury arising out of assault or battery absolved the insurer of any duty to defend or indemnify the insured.

More recently, in *Nautilus Ins. Co. v. EJII Dev. Co.*, U.S.D.C. N.D. Ga. July 19, 2018, 1:17-cv-2048-TCB, Martin shot and killed Mosley at a Waffle House. EJII provided security to the Waffle House. Martin was a Waffle House employee, allegedly acting within the course and scope of employment at the time of the shooting. Waffle House was sued for negligent training, employment, supervision and training, and for failure to maintain a safe premises. EJII was sued for neg-

ligent failure to provide or properly train security guards, failure to implement adequate security policies, failure to identify hazards, failure to warn patrons,

Nautilus insured EJII. That policy provided standard general liability coverage for bodily injury caused by an occurrence. It was endorsed with a Security and Patrol Agency Professional Liability coverage extension which provided coverage for sums the insured became legally obligated to pay as damages because of the rendering of or failure to render “professional services” in providing “security and patrol agency services.” This endorsement added this coverage to the bodily injury and property damage coverage part. The policy also contained an assault and battery exclusion that excluded bodily injury arising out of “actual or alleged assault or battery,” “physical altercation” or “any act or omission in connection with the prevention or suppression of such acts, including the failure to provide adequate security.”

Nautilus defended EJII under a reservation of rights and then sued for declaratory relief. The court found it “pretty clear” that the suit arose from an alleged assault and battery or physical altercation. EJIII and Waffle House did not contest this point but instead argued that the professional liability endorsement overrides and negates the assault and battery exclusion. The court rejected this argument, finding that the exclusion was clear and unambiguous. The professional liability endorsement was added to the bodily injury and property damage coverage part, and the assault and battery exclusion was written to

exclude coverage for that coverage part. Therefore the assault and battery exclusion applied to the professional liability endorsement.

Note that assault and battery exclusions are much more limited in use. They are not, for instance, part of the standard ISO CGL language. But in certain classes of risks, such as bars, they are in frequent use.

#### 4. Number of Occurrences

In most jurisdictions, there is a relationship between the intent analysis and the number of occurrences. If the event is viewed from the perspective of the perpetrator, there is a strong argument for no coverage based on intentional conduct, but an argument for many more occurrences. Alternatively, if the event is viewed from the perspective of another party—a business entity or a family member—there is a stronger argument to avoid intentional conduct exclusions, but also a stronger argument for a single occurrence.

In *Koikos v. Travelers Ins. Co.*, 849 So. 2d 263 (Fla. 2003), Koikos rented his restaurant to a fraternity for a graduation party. During the party Bell and Anderson tried to enter the restaurant. They were turned away after a heated exchange with fraternity members who were charging admission. Bell and Anderson returned in a few minutes and a fight broke out between Anderson and some fraternity members. Anderson was knocked to the ground. Bell brandished a handgun and began firing as he helped Anderson up. Bell fired two separate but nearly concurrent rounds. Arm-

strong and Harris were each hit by separate bullets, both from the first round of shots. Three other guests were injured.

Armstrong and Harris sued Koikos for failing to provide security. Koikos sued Travelers for declaratory relief. Travelers provided coverage with a limit of \$500,000 per occurrence, subject to a \$1,000,000 general aggregate. The policy defined occurrence as an accident, including continuous or repeated exposure to substantially the same general harmful conditions. Travelers argued there was one occurrence—Koikos’ alleged negligence. Koikos argued that each shot was a separate occurrence.

On a certified question from the Eleventh Circuit, the Florida Supreme Court found that there was more than one occurrence. The court rejected Travelers reliance on the “continuous or repeated exposure” language, and found that this was a mismatch for this type of circumstance, citing a number of decisions concerning coverage for clergy sexual abuse. Thus the number of occurrence came down to the definition of accident, a term not defined in the policy, but defined in case law.

The court found that the “cause” analysis did not answer the question of the number of occurrences because there were two possible causes: Koikos’ failure to provide security and failure to warn, and the intruder’s gunshots. The court focused on the immediate injury producing act—the shooting which was the act that caused the damage—rather than the underlying tortious omission—the insured’s negligence, the basis on which it is being sued.

In *RLI Ins. Co. v. Simon’s Rock Early College*, 54 Mass. App. Ct. 286 (2002), Lo, a student, went on a shooting spree for 18 minutes, spanning a quarter mile, resulting in two killed and four injured. College policy prohibited weapons on the property. When the school received a package addressed to Lo from an arms store, the Dean advised the residence directors to allow the package to be delivered to Lo, followed by prompt inquiry to determine the contents. A residence director asked Lo to show her the contents. He refused, relying on college policy that required a dean to authorize a search and that the search be in the presence of one other college staff member. The residence director obtained authorization from the dean and returned with another college staff member. They found empty black plastic boxes, a black plastic rifle stock, and empty metallic army surplus cartridge box but no ammunition or gun. Lo had explanations for all of this, and was calm and not defensive, when interviewed by the residence director and by the dean. Later that day he traveled to a sporting goods store and bought an assault rifle. Later that night an unidentified caller warned the residence director. She called a provost and went with her family to the provost’s house. They were calling the dean as they heard shots nearby.

American provided primary coverage, RLI provided excess coverage. RLI filed suit seeking a declaration that the aggregate limit of \$3,000,000 applied. American counterclaimed arguing that a single per occurrence limit of \$1,000,000 applied.

The court found a single occurrence. “In this case, where the underlying claims against the school and its employees are for negligence, it is their allegedly negligent acts or omissions in failing to prevent Lo from using his gun that constitute the occurrence for purposes of determining general liability coverage provided by American’s policy. [Citation omitted].” *Id.* at 291. Since the policy is intended to insure the college for its liabilities, the occurrence should be an event over which it had some control. *Id.* at 293. Occurrence must be defined in such a way as to give meaning to the insured’s connection to liability. *Id.*

In *Bomba v. State Farm Fire & Cas. Co.*, 379 N.J. Super. 589 (App. Div. 2005) two police officers, Bomba and Bouthillette, responded to a report of gun shots. Edward Abrams, Jr. emerged from behind a van, dressed in camouflage, holding a pump action shotgun pointed up. He fired into the police car, striking and injuring both officers. He moved in front of the car, fired again, striking both officers again. Bouthillette exited the car and fell down. Bomba radioed for help, and fired several shots at Junior. Junior pointed the gun at Bouthillette and retreated slightly. Bomba put himself between Junior and Bouthillette. Junior reloaded, knelt and fired at Bomba, hitting him and causing him to collapse. Another officer arrived, fired at Junior and wounded him fatally.

Edward Abrams, Jr. was the son of insured homeowners, Edward Abrams, Sr. and Joyce Abrams. He resided with them. They had a homeowners’ insurance policy with State Farm with a limit of \$100,000

per occurrence. The policy defined occurrence as an accident including exposure to conditions; “Repeated or continuous exposure to the same general conditions is considered to be one occurrence.”

State Farm deposited a single limit of \$100,000 into court, and the plaintiffs then filed a declaratory judgment action against Mr. and Mrs. Abrams and State Farm. State Farm argued a single occurrence—that the claimed negligence of the parents in permitting their adult son to have access to a gun was the one occurrence. Plaintiffs argued each gunshot was a separate occurrence. The court found that there was one occurrence here—the negligence of the gunman’s parents in permitting him to have access to the firearms in their home.

In *Donegal Mut. Ins. Co. v. Baumhammers*, 938 A.2d 286 (Pa. 2007), where the son of the insureds went on a two hour, three township shooting spree, targeting different people in each town, the court rejected an argument that there were six occurrences, finding but one occurrence.

Parents’ liability in the instant case is premised on their negligence in failing to confiscate Baumhammers’ weapon and/or notify law enforcement or Baumhammers’ mental health care providers of his unstable condition. Because coverage is predicated on Parents’ inaction, and the resulting injuries to the several victims stem from that one cause, we hold that Parents’ alleged single act of negligence constitutes one accident and one occurrence. *Id.* at 295.

In *Travelers Indem. Co. v. Olive’s Sporting Goods, Inc.* 2997 Ark. 516 (1989), the insured store sold pistol and

shotgun to a would be assailant, who used the weapons to shoot a police officer and kill and wound several others, before committing suicide. The court found the sale of the weapons was the occurrence.

Some cases involve claims by the shooters or others seeking coverage for the shooter, and that analysis is different. See *State Farm Lloyds, Inc. v. Williams*, 960 S.W. 2d 781, 785 (Tex. App. 1997) (insured shooter was covered under a homeowners policy; insured's liability arose out of the shootings, and more than one per occurrence limit applied); *American Indem. Co. v. McQuaig*, 435 So. 2d 414 (Fla. Dist. Ct. App. 1983) (insured, who claimed insanity, fired three shotgun shots in a two minute period, injuring two different people; court held that there were three occurrences); *New Hampshire Ins. Co. v. RLI Ins. Co.*, 807 So.2d 171 (Fla. 3d Dist.Ct.App. 2002) (held that three gunshots fired by a condominium resident, each of which injured a different person, constituted three occurrences under the condominium association's insurance policy).

The exposure created by multiple occurrence holdings is tempered in general liability coverage by the use of aggregate limits. But aggregate limits are generally not a feature of personal liability coverages like homeowners policies, and multiple occurrence holdings could conceivably greatly increase exposure under these policies.

## 5. Property Damage

The focus in mass shooting cases is on bodily injury. But there can be property

damage. Property damage claims can be subject to a number of the same exclusions discussed below. One interesting case on property damage was recently released by a California Court of Appeal.

In *Thee Sombrero, Inc. v. Scottsdale Ins. Co.*, Cal. App. 4th DCA, No. E067505, the insured, Sombrero, owned commercial property. Its lessees operated that property as a nightclub pursuant to a conditional use permit (CUP). One condition of the conditional use permit was that the city had to approve the floor plan, which then could not be modified without city approval. Part of that floor plan included a single door with a metal detector.

On night, a patron shot and killed another patron. After that Sombrero learned that CES has converted a storage area into a "VIP entrance" with no metal detector. The gun used in the shooting was brought in through that entrance.

CES provides security guard services at the nightclub. The CUP was revoked after a fatal shooting at the nightclub. The CUP was replaced with a permit that only allowed operation as a banquet hall.

Sombrero sued CES for negligence alleging that this caused revocation of the permit which caused diminution in the value of the property. Sombrero obtained a default judgment against CES. At the default prove-up Sombrero submitted an affidavit that the property value with the modified permit was \$923,078 less than before. Judgment was entered for that amount.

Sombrero then sued CES's general liability insurer, Scottsdale, in a direct action on the judgment under Insurance Code

11580 section 11580 (b)(2). Scottsdale argued that the loss was an economic loss and not “property damage.” The trial court ruled for Scottsdale. The Court of Appeal reversed. It held that Sombbrero’s loss of the ability to use the property as a nightclub constituted loss is use of tangible property and thus was “property damage.”

The court held that “The loss of the ability to use the property as a nightclub is, by definition, a ‘loss of use’ of ‘tangible property.’” The court agreed that a liquor license is intangible property, but it reasoned that loss of license lead to a loss of use of the premises. Scottsdale argued that this was a “mere economic loss “and so it was not a loss of use of tangible property. The court stated the rule regarding “strictly economic losses” not being “property damage.” But it reasoned that diminution in value is accepted as a method of measuring any property damage that may have been sustained. It can be an alternative measure of any property damage actually sustained.

The correct principle is not that economic losses, by definition, do not constitute property damage. Rather, the correct principle is that losses that are exclusively economic, without any accompanying physical damage or loss of use tangible property, do not constitute property damage.

### **B. Coverage under First-Party Policies**

Apart from the individual victims of mass shooting events, the commercial or public settings of many of these events suffer distinct and direct damages. For these

types of damages, an organization may look for coverage in policies for commercial property, business interruption, workers’ compensation, or even directors and officers. Organizations that may be most interested in reviewing active shooter coverage include schools, churches, local governments, shopping mall operators, senior care facilities, and hotels.

Some of the damages these organizations suffer are straightforward, such as a bullet hole in a wall. Other damages are more subtle or more substantial and may present more nuanced coverage questions -- the stigma of an event may create the need or desire to replace facilities; an organization will need crisis management, ranging from a public relations firm to counseling for stakeholders. In the wake of some mass shooting events, particularly at churches or schools, there has been an outpouring of community giving. While such giving reduces the overall damage from the event, it necessitates a response, including secretarial help to process mail and legal help to establish a foundation for donations.

As noted above, categories of damages insureds have faced include property damage, clean up/extra expense, additional security/security upgrades, crisis management, business interruption/event cancellation, workers comp, medical costs, mental health counseling, and funeral expenses.<sup>23</sup> Three recurring areas that pres-

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<sup>23</sup>See, e.g., 11 No. 4 In-House Def. Q. 58, “The Insurance Coverage Aftermath of Mass Shooting Events (Fall 206) (noting possible workers comp claims, business interruption, property damage, and business interruption for nearby businesses).

ent thorny coverage questions under existing policies are (1) preventative risk assessment, (2) replacement of buildings, and (3) upgraded security systems.

Traditional policies adapt to changing needs, but most were not designed with the particular circumstance of a mass shooting event in mind. Invariably there are gaps even after combining coverages for liability, property, business interruption, and workers' compensation. That has led to specially designed named-perils policies for mass shooting events that straddle the traditional divide between first party and third party coverage. One underwriter reported that demand for his insurance company's Deadly Weapon Protection policy doubled from 2017 to 2018.<sup>24</sup> That burgeoning area of coverage is discussed in more detail below.

### 1. The Scope of the Risk

One of the obvious questions a risk manager must face is how widespread mass shooting events have become. The answer, however, is not so obvious. The number of mass shooting events depends on the definition and nomenclature used. Although there is no settled legal definition, the most widely used definitions range from at least four victims killed in a public setting (the most restrictive) to at least four victims injured in any setting (the most in-

clusive). For example, the Congressional Research Service reported 4.5 "mass public shootings" per year from 2010 to 2013; whereas, the Gun Violence Archive reports 336 mass shooting events in 2018 alone.<sup>25</sup>

For organizations trying to plan coverage, it makes sense to rely on more inclusive definitions because an event with multiple injuries can cause significant damage, even if the victims survive. Although factors such as geographic distribution of mass shooting events and most likely settings for attacks will play a role in risk assessment, the sheer number of mass shooting events drives the need to review coverage. As more insurance companies offer policies specifically designed for mass shooting events, which is discussed below, it is important to review the specific language of the policy to determine what definition is being used for coverage. A casualty threshold in the named-perils policy may preclude coverage for an active shooter event that involves one or two victims.

The costs of such an event can be devastating. The 2007 Virginia Tech shooting caused an estimated \$48.2 million in litigation.

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<sup>24</sup>See Risk & Insurance, Graham Buck, Oct. 15, 2018, <http://riskandinsurance.com/removing-the-target-for-mass-shooters/> (underwriter Chris Parker of Beazley reported that demand for the company's Deadly Weapon Protection policy doubled from 2017 to 2018).

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<sup>25</sup>See, *Mass Murder with Firearms: Incidents and Victims, 1999-2013*, William J. Krouse and Daniel J. Richardson, Congressional Research Service, published July 30, 2015, <https://fas.org/sgp/crs/misc/R44126.pdf> (explaining that after Newtown Congress defined "mass killings" as three or more killings in a single incident; the FBI uses the term "mass murder" for a single incident in which four or more victims are killed; and the report examined "mass public shootings," in which at least four victims are murdered by firearms, in a single event, in one or more public locations); <https://www.gunviolencearchive.org/> (threshold of four victims injured).

tion and recovery costs, and building replacement alone has cost more than that following other mass shooting events.<sup>26</sup> The Las Vegas shooting could cost insurers more than \$1 billion.<sup>27</sup>

### 2. Preventative Risk Assessment

By its nature, most insurance coverage is reactive. But, unlike an earthquake or a hurricane, a mass shooting event is a man-made disaster and steps can be taken to reduce the likelihood it will occur. Coverage for risk assessment and training is not available under most traditional commercial property or business interruption policies.

Perhaps that is why coverage for prevention is quickly becoming one of the hallmarks of mass shooting event policies.<sup>28</sup> Insurance companies have reported that one of the most sought-after aspects of the new coverage is preventative risk assessment and training services.<sup>29</sup> After the Parkland attack, Florida's Palm Beach County School District acquired active

shooter coverage specifically because it wanted the risk assessment and training service, according to Dianne Howard, the district's director of risk and benefits management.<sup>30</sup>

### 3. Replacement of Facilities

Although mass shooting events typically do not destroy buildings, the tragedies that unfolded within often do destroy the value of those facilities for the survivors and the community. While perhaps not strictly necessary, many of the communities in which these tragedies occur have decided it is worth the investment to demolish or renovate the building where the attack happened. Whether characterized as stigma damage or property damage (loss of use), it is difficult to find coverage for replacement of a building that is being replaced for primarily emotional reasons. Not even active shooter policies would typically cover this cost.<sup>31</sup>

The communities replacing buildings seem to be paying for replacement through means other than insurance coverage. The Newtown, Connecticut community voted in 2013 to demolish the elementary school attacked and build a new school, funding the \$50 million cost with taxpayer money; in Parkland, Florida, a school safety law

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<sup>26</sup>Risk Management Magazine, "Insurance Coverage for Active Shooter Risks," Paul Marshall, Sept. 4, 2018, <http://www.rmmagazine.com/2018/09/04/insurance-coverage-for-active-shooter-risks/>.

<sup>27</sup><https://www.propertycasualty360.com/2018/01/19/how-does-insurance-cover-mass-shooting-events/>.

<sup>28</sup>12 No. 4 In-House Def. Q. 56, "Business Owners' Duty to Protect Invitees from Violent Crimes (Fall 2017).

<sup>29</sup>See Risk & Insurance, Graham Buck, Oct. 15, 2018, <http://riskandinsurance.com/removing-the-target-for-mass-shooters/> (underwriter Chris Parker of Beazley reported that the company's Deadly Weapon Protection offers benefits that may be lacking in traditional policies, such as pre- and post-event crisis management coverage).

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<sup>30</sup><https://www.cbsnews.com/news/schools-are-now-buying-insurance-against-mass-shootings/>.

<sup>31</sup><http://riskandinsurance.com/after-a-mass-shooting-what-happens-to-the-building/> ("A typical active shooter policy would be focused on medical expenses, funeral costs, public relations firms, security firms and the like. It would not cover the demolition or rebuild of the building").

passed in March 2018 allocated more than \$25 million to tear down and rebuild parts of Marjory Stoneman Douglas High School.<sup>32</sup> Yet, determined risk managers are working with insurers to develop new products that at least offer matching funds for the cost of rebuild triggered by “emotional duress.”<sup>33</sup>

#### 4. Upgraded Security Systems

Another expense that has fallen on the locations where shootings occur (or locations taking preventative measures) is the cost of upgrading security systems.<sup>34</sup> Understandably, risk managers want to do everything possible to decrease the chances of another mass shooting event. But upgrading security is a category of expense that does not typically fall within traditional property coverage. First, the security system itself may not have been damaged in the attack; rather than being destroyed, it is deemed to be insufficient. Second, even if the security system is damaged, most property policies are designed to replace damaged property with new property of similar quality. A substantially upgraded system may fall outside this coverage and be char-

acterized as a betterment rather than a reasonable replacement.

### VII. Conclusion

As the above cases demonstrate, even if an insured entity is not ultimately found liable for the actions of a mass shooter, the cost of defending businesses, employers and building owners from claims arising out of mass shooting incidents is a significant exposure. Moreover, a time may come when general perception, institutional awareness and practices, and public policy converge to place greater duties and responsibilities on businesses, institutions, professionals to affirmatively act to intervene and prevent mass shootings. Until then, count on insurance companies to continue responding to insureds’ concerns with new coverages and endorsements designed to help entities prepare for and respond to active assailant and mass shooting events.

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<sup>32</sup><https://www.cbsnews.com/news/schools-are-now-buying-insurance-against-mass-shootings/>.

<sup>33</sup><http://riskandinsurance.com/after-a-mass-shooting-what-happens-to-the-building/>.

<sup>34</sup>Security Magazine, “Facing Litigation, Organizations Buy Into Active Shooter Insurance,” (Dec. 3, 2018) <https://www.securitymagazine.com/blogs/14-security-blog/post/89648-facing-litigation-organizations-buy-into-active-shooter-insurance>.



# Appendix

## COMPARATIVE RISK TABLE

Average loss of life expectancy [in days] due to different causes

CAUSE	DAYS LOST	CAUSE	DAYS LOST
Being male and unmarried	3500	Legal drug misuse	90
Cigarette smoking (male)	2250	Average job, accidents	74
Heart disease	2100	Drowning	41
Being female and unmarried	1600	Occupational radiation exposure	40
Being 30% overweight	1300	Accidental falls	39
Being a coal miner	1100	Safe job, accidents	30
Cancer	900	Fire, burns	27
Being 20% overweight	900	Energy generation	24
Cigarette smoking (female)	800	Illicit drug use (US average)	18
< 8th grade education	850	Poison	17
Dangers job, accidents	300	Firearm accidents	13
Consuming additional 100 Cal/day	210	Natural radiation	11
Motor vehicle accidents	207	Medical x-rays	7
Pneumonia or flu	141	Drinking coffee	6
Drinking alcohol (US average)	130	Bicycle accident	5
Accidents in home	95	All catastrophes combined	4
Suicide	95	Diet drinks	2
Diabetes	95	Nuclear reactor accident	1
Homicide	90		

Source: Cohen, Bernard L. and Lee. I-sing, "A Catalog of Risks." Health Physics (36) 707-722 (1979).

## Sutherland Springs Church Shootings

The attack on the First Baptist Church in Sutherland Springs, Texas, on November 5, 2017, was the deadliest mass shooting in Texas and, at the time, the deadliest shooting in an American place of worship in modern history. The gunman entered the church during Sunday services and opened fire on the congregation, killing twenty-six people and injuring twenty others. The gunman was shot by a male civilian as he exited the church, and after a high-speed chase, was found dead with multiple gunshot wounds, including a self-inflicted shot to the head.

The gunman was a former Air Force service member who had received a bad-conduct discharge after being court-martialed and convicted of assault against his wife and stepson. The general court-martial guilty plea made it illegal for him to own, buy, or possess a firearm or ammunition. Despite this prohibition, he was able to purchase the semi-automatic rifle used in the shooting from a Texas sporting goods store by falsifying the required ATF Form, indicating that he did not have a disqualifying criminal history. It was later learned that the Air Force failed to relay the court-martial convictions to the FBI for inclusion in the National Crime Information Center (NCIS) database, which would have prevented him from making the purchase.

We are not aware of any lawsuits against the church where the shooting occurred, likely due to the strong Texas law holding that criminal acts of this nature are

not foreseeable and therefore the church had no legal duty to anticipate or prevent the attack.

Some survivors did sue the sporting goods retailer that sold the gun used in the attack, claiming that the gun and magazine was purchased illegally and negligently sold in violation of federal law. Specifically, the lawsuit claims that, while the firearm was legal in Texas, the shooter was a resident of Colorado, where it is illegal to sell or possess a magazine that holds more than 15 rounds. The suit accuses the retailer of gross negligence and seeks damages of more than \$1 million per plaintiff for physical and mental anguish, disfigurement and medical expenses. Experts disagree on whether the lawsuit has merit. However, a prior Texas appellate court ruling involving the same retailer in 2017, upheld the dismissal of claims relating to the sale of a gun to a “straw buyer” that was later used in a homicide, suggesting that such claims are difficult to win.

Families of persons injured or killed in the church attack also sued the Air Force and Defense Department, alleging that the government was negligent in failing to report the gunman’s prior criminal conviction to the FBI background check system. These lawsuits have been consolidated and are working their way through the court, but face a significant hurdle in the federal government’s sovereign immunity.<sup>35</sup>

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<sup>35</sup>The Department of Defense and various branches of the military also face lawsuits by several cities requiring them to fully report disqualifying criminal convictions to the agency that compiles the NCIS database. That lawsuit is currently on appeal before the United States Court of Appeals for the Fourth Circuit.

## Route 91 Harvest Festival Shootings In Las Vegas, Nevada

On October 1, 2017, a gunman opened fire on a concert crowd at the Route 91 Harvest Music Festival in Las Vegas. The attacker fired from a hotel room on the thirty-second floor of the Mandalay Bay hotel across the street from the festival. In the span of barely ten minutes, the attacker unleashed hundreds of rounds of ammunition, killing 58 people and injuring more than 850, making it the deadliest mass shooting in the modern era. The shooter used semi-automatic rifles modified with devices known as “bump stocks,” which enabled rapid fire approaching the rate of a fully automatic machine gun.

The owner of Mandalay Bay (MGM), the concert promoter (Live Nation) and the security firm at the concert face potentially hundreds of lawsuits for failing to employ adequate security measures with respect to its hotel operations and management of the concert venue that allegedly could have prevented the shooting. The lawsuits question, among other things, how the gunman was able to bring more than 20 rifles into his room without being detected.

MGM claims that it has received pre-litigation hold letters from at least 63 attorneys on behalf of 2,462 individuals. *In re Route 91 Harvest Festival Shootings in Las Vegas, Nevada, on Oct. 1, 2017*, No. MDL 2864, 2018 WL 4905479, at \*2 (U.S. Jud. Pan. Mult. Lit. Oct. 3, 2018). As of October 2018, only 38 negligence actions have been filed against MGM, and of

those, 34 were voluntarily dismissed, presumably following settlements. *Id.* The remaining negligence actions are pending in the Central District of California and Nevada federal court.

MGM has also incurred significant and unique first party losses, from losses from cancelled bookings following the incident to loss of use of the room and floor where the shooting occurred due to investigations and in the longer term due to the stigma associated with the attack.

As previously discussed, MGM preemptively filed nine declaratory judgment actions against nearly 2000 individuals who either previously sued or have threatened to sue MGM. In these actions, MGM seeks a declaration that any state-law claims arising against MGM from the Harvest Festival Shooting are barred by the SAFETY Act of 2002, 6 U.S.C. §§ 441-444, and that MGM has no liability to plaintiffs under the Act.

Victims and their families have also filed lawsuits against the police over the response to the Las Vegas massacre, and in particular why they didn't act more quickly to stop the gunman. The lawsuit claims six minutes passed without a police response from the time the gunman strafed a hallway of the hotel with 200 rounds until he started firing on people at the concert.

Early estimates suggest that between life and health insurance, workers comp, and property and liability claims the insurance industry may end up paying more than \$1 billion related to the massacre.<sup>36</sup>

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<sup>36</sup><https://www.insurancejournal.com/news/national/2017/11/13/470933.htm>.

MGM has publically stated that it expects its insurance to cover its liabilities.

## Aurora, Colorado, Theater Shootings

On July 20, 2012, during a midnight premiere of the movie the “The Dark Knight Rises,” a 24 year old gunman entered a propped open emergency exit to the crowded theater with a cache of weapons he had retrieved from his car and opened fire on the audience, killing twelve people and injuring seventy others. The gunman had purchased a ticket and entered the auditorium through the normal patron entrance. After the theater was dark and the movie began the gunman left his seat and exited the theater to the outside parking area through a door located at the right, front side of the movie screen, leaving the door ajar so that it would remain open. The gunman made one or more trips from his car through the open exterior door to the auditorium, with his firearms, ammunition and tear gas. This took an extended period of time, but he was not monitored, deterred or contacted by theater personnel.

Predictably, the theater owner faced numerous lawsuits by victims and surviving family members alleging premises liability, negligence, and wrongful death claims under Colorado law for failing to prevent the attack. *Traynom v. Cinemark USA, Inc.*, 940 F.Supp.2d 1339 (2013); *Axelrod v. Cinemark Holdings, Inc.*, 65 F.Supp.3d 1093 (2014). The cases were consolidated before a single federal judge,

who early on denied defendants’ motions to dismiss and for summary judgment on the issue of whether defendants owed a duty and whether the harm was foreseeable. However, after three years of litigation, the federal district court ultimately granted defendants summary judgment, finding that their alleged actions and omissions in failing to prevent the attack were not the proximate cause of the plaintiffs’ losses. *Nowlan v. Cinemark Holdings, Inc.*, 2016 WL 4092468, at \*3 (D. Colo. June 24, 2016).

Parents of the victims also sued gun shops who sold the gunman ammunition and equipment used in the shootings, asserting claims for negligence, negligent entrustment, and public nuisance, and injunctive relief. *Phillips v. Lucky Gunner, LLC*, 84 F.Supp.3d 1216 (2015). The United States District Court for the District of Colorado dismissed the claims, holding that the sellers were immune from liability under the Colorado immunity statute and that claimed exceptions to the federal immunity law (PLCAA) did not apply.<sup>37</sup> The court observed that even in the absence of immunity, the sellers did not owe a duty to prevent the plaintiffs’ death from a mass shooting, and that sales of ammunition and tear gas grenades, both online and face-to-face, were not the proximate cause of the plaintiffs’ losses.

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<sup>37</sup>The court also found that the PLCAA, which provides multiple exceptions to immunity from liability for sellers or manufacturers of firearm and weapons products for harm caused by acts of third parties, did not preempt the Colorado statute that expressly prohibited cause of actions that were excepted under the federal statute.

Survivors and victims of the Aurora shooting also sued a psychiatrist who worked for the University of Colorado, where the gunman attended school, and the university, for failing to act on statements the gunman allegedly made to the psychiatrist less than a month before the shooting—including “that he fantasized about killing a lot of people.” The lawsuit claimed that the psychiatrist had alerted the university’s threat assessment team regarding the statements, but when campus police asked the psychiatrist if they should apprehend the assailant and place him on a psychiatric hold, she rejected the idea. The suit was stayed during the pendency of the criminal trial (where the psychiatrist was a witness) and ultimately resolved out of court. Commentators questioned whether the plaintiffs would be able to overcome the significant causation issues presented by the claims. The claims were similar to claims made following the Virginia Tech massacre, where the gunman had numerous contacts with the school’s counselling center a year before the incident, demonstrated bizarre and troubling behavior, including suicidal and homicidal thoughts, and was even ordered by a judge to receive involuntary outpatient treatment, which the center never acted upon.

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