

## Violent Criminal Attacks—Preparation, Response, and Action



When violent criminal attacks occur, they can cause irreparable harm to those involved and be costly to a

company's reputation and its bottom line. Regardless of whether the attack involves a customer, employee, or a third party, the key to handling these situations properly is preparation, response, and action.

Even though the vast majority of violent criminal attacks occur at random and

without warning, it is important for retailers, restaurants, hospitality companies, and other industries open to the public to be prepared in case they became a target of such an attack. This article evaluates what companies, claims examiners, and in-house counsel can do to ensure that they are properly prepared in anticipation of a violent criminal attack and then properly respond and act once one occurs on their property.

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**Preparation, Preparation, Preparation**  
Being prepared is the best defense to civil liability for a violent criminal attack. The most important aspect of being prepared is having well-developed policies, procedures, or best practices and ensuring that employ-

ees are trained on what to do when an attack takes place. The following is a review of the steps to follow to ensure that a company is fully prepared for a violent criminal attack.

#### Written Policies / Practices

When developing written policies, procedures or best practices for handling violent criminal attacks, be sure to keep the following in mind:

- Include representatives from legal, security, operations, human resources, and outside defense counsel while developing the policy or practice to ensure that everyone's concerns are addressed and it is written properly.
- Keep the written policy or practice short and concise because the longer and wordier it is, the more likely employees are not to follow it properly.
- Determine the point or focus of the policy or practice and stick with it—possibly creating multiple policies, each with a specific focus. For example, handling an active shooter situation is different from a random stabbing.
- Do not mix preventive steps with reactive steps. Any steps that a property or store should take to prevent an incident should not be included in a policy or practice that outlines what to do during or immediately after an attack because those are very different topics and situations for the property or store to address.
- Determine who must be trained on the policies or practices and be sure that at least one of those employees is always on duty during every shift. Having a majority of the employees trained in at least some of the procedures is better than fewer. Determine if some of the procedures should be posted for all employees to see.
- Developing a step-by-step policy and practice for what is to be done relating to evidence preservation after an attack is very useful to ensure being able to properly respond and act.

The written policies, procedures, and practices about security are typically key pieces of evidence in a civil litigation proceeding after a violent criminal act, so it is imperative that they are written with litigation in mind and with the assistance of outside defense counsel. A plaintiff's coun-

sel will look for any violation of a policy, so ensuring that the policies are well written, easy to follow, and properly implemented should be a priority.

#### No-Gun / Weapon Signs

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

Currently companies are taking three different approaches to allowing guns or knives on their property: (1) comply with state law, which means allowing the open and concealed carrying of guns and knives where it is allowed by law in that state; (2) not allowing guns or knives on the property with the use of no-gun and no weapons signs; and (3) making an informal request for no guns and or weapons to be on the property but without posting no gun or weapon signs. The first two approaches are most consistent with a company that has formally addressed the issue

and developed a decision that is best for the company. The third tends to be used when companies do not want to take either position or take a particular position on the issue.

There are many non-legal and non-civil litigation issues that arise and affect a company when it makes a decision on whether to allow guns and knives on its property. The legal department will have an opinion based on civil liability but there are many other factors that are highly relevant in this analysis and should be addressed. In the end, a company should have a logical explanation for its position, policies, and procedures.

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

#### Implementation and Training

Once the policies and practices are developed, the focus turns to implementation and employee training. Failing to implement a policy properly can negatively affect a company if an event takes place. Part of the development process must include determining how the policies will be implemented, (for instance, by in-person training, webinar, or online training), and who will conduct the training (security, human resources, or operations staff). Regardless of how this is done, be sure that the proper employees are trained and ensure that there is documentation of the training for later use as evidence if needed. It is also important for a company's in-house counsel and claims professionals to understand not just the company policy, but the training protocol as well so that they can properly defend any claim.

Another proactive approach to addressing the more significant violent criminal attacks is having a predetermined group

of people (a rapid-response team) to handle such a situation if it takes place. When creating the team, at least some team members should be somewhat local so that they can respond quickly. Depending on the company, the team should consist of someone from operations, human resources, security, media relations, and legal. It is also a good idea to include outside defense counsel since litigation is likely and typically quickly filed after major events.

#### Post-Event Response

Once a violent criminal attack takes place, a store or property manager will be completely overwhelmed and bombarded with demands and requests from every direction. There are many important tasks to complete and preserving evidence is not typically placed anywhere near the top of the list. It cannot be assumed that the police will collect and preserve all relevant and necessary evidence because every police department is different, and a police investigation's focus is different from a store or a property's civil liability defense focus.

In cases involving violent criminal attacks by third parties, plaintiffs' counsel typically have a very difficult time proving reasonable foreseeability—so they look for holes in the evidence or the violation of the smallest policy to sneak past summary judgment and force a settlement. To best protect a company from future liability and help support a summary judgment ruling, it is imperative to make the evidence preservation task simple to complete so that it can be done quickly and efficiently after the attack.

A person other than the store manager should be assigned to accumulate and to organize evidence. This person can be from the store or the property, but it would be best if the person was from the corporate security department or the legal department or outside defense counsel. Provide the person with a clear and concise list of everything that needs to be collected and advise where it should be preserved and stored once it is collected. The content of this list depends on the company involved and the type of property, but some recommendations for the list follow:

- Be sure that incident reports were prepared by store personnel relating to the violent criminal attack and collect all *original* reports. Be sure that all are signed and dated.
- Preservation of surveillance footage is

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- If the event is significant (multiple victims), consider preserving all of the digital video recorders and replace them with others so that all footage is preserved, but this is a very extreme measure.
- Most events would require preservation of all public area cameras for at least an hour before any event started and then until the location is cleared or released. Other cameras may need to be preserved as well, depending on the event.
- If there is a preservation of evidence demand, be sure that it is handled immediately. Either preserve what is requested or handle any objections while there is still time to preserve the evidence.
- Quickly make a copy of the preserved footage and provide it to outside defense counsel. Also watch all copies as soon as they are made to be sure that they were copied correctly and completely.
- Never rely on footage preserved by the police as the only copy because some-

thing can happen to it, or it can be difficult to obtain it at a later date if there are criminal proceedings.

- Document the type of surveillance equipment involved in an incident in case it is changed at a later date.
- If there is a floor plan that shows the location of all security cameras, get a copy of it and determine which cameras are fixed and which can move.
- If it is learned that any of the surveillance cameras were not operating at the time of an incident, conduct a full investigation and determine why and for how long. Also get copies of all repair requests and orders for the cameras to prove when it was known that a camera was inoperable and what was being done to resolve it.
- Develop a list of all store employees who were present at the time of an incident and any security personnel, vendors, customers, or others who were on the property at the time of the incident. Have contact information for everyone and know their involvement.
- Collect all security-related incident reports for the property for three years before an incident.
- Collect a copy of all security-related policies, procedures, and practices that were in effect for the property for the day of an incident. If a security vendor was involved, secure those contracts and any protocols that the vendor was to follow at the property. Be aware that oftentimes there is one contract but different protocols or directives for individual stores so be sure to learn the specific duties of the security company at the store or the property at issue and collect any documents that memorialize that understanding.
- Have a clear understanding of the practices of the corporate security department, who was responsible at each level for the store or the property, and what types of meetings or conferences they had to discuss issues about the property. If there were any documents generated from those meetings, collect them for three years before the attack.
- Evaluate what the company did to determine the security needs for the property location and if the security was sufficient. Who was involved with the anal-

ysis, how was it done, and how often was it done? If anyone at the company had access to CAP (Crimes Against Persons or Property) Index data or similar data of neighborhood crime statistics, obtain a copy. Also determine if anything was being done within the neighborhood or community to evaluate crime and if the store or the company had meetings about crime with the local police.

- For any employees directly involved with an incident, determine what security policies and procedures they were trained on and when, and get copies of all documentation proving the training.
- Interview all employees and witnesses as soon as possible after an event. Determine ahead of time, with assistance from outside defense counsel, if handwritten statements or recorded statements will be taken, although typically this is not recommended because they are discoverable. If not, some other form of sworn declaration or summary could be prepared.
- If a perpetrator was a known customer or visitor to the property, locate as much information as possible about his or her previous visits to the property and the information known about him or her before to the incident. Specifically look for any previous incident reports or shoplifting reports involving the person.
- Photograph the property as soon as possible after an event so that there is documentation of how it appeared at the time. This can include areas that could be relevant such as the security room, among other places.
- If there are other businesses nearby, determine if they have any relevant surveillance footage, and if so, secure copies.
- Gather copies of all media reports about an incident and investigation.
- Get copies of police reports relating to the incident and investigation.

Once this evidence is collected, be sure that it is kept safe and secure. The best place for it is with your outside defense counsel. Your outside defense counsel is the only person who will need the evidence since it was collected in anticipation of civil litigation, and he or she likely has a safe and secure place to keep it as long as necessary.

#### Action!

In addition to preserving evidence, it is also important to have identified someone to respond to all media requests, handle victim assistance, and work with the police and prosecutors. It is best to have one person responsible for speaking to the media because this ensures a clear and concise

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message. If possible, keep the name of the store or the property out of all photos and stories. The goal is for the event not to be connected directly with the location where it occurred. If the violent criminal attack is significant and involves numerous casualties, consider hiring a media consultant.

Be sure that victims are receiving caring and thoughtful responses on the local level. This could involve sending food to the home, attending a funeral, or making some other thoughtful gestures. The family needs to know that the store or the property is sorry for their loss and the senseless tragedy that took place. This can easily be done without any hint of liability admission. Along the same line, remember to offer assistance to the employees who were present during the attack because it may have been upsetting for them as well, and counseling or time off may be needed.

It is also important to work with the police and prosecutors and assist them with any criminal investigations. If criminal proceedings take place, be sure to have outside defense counsel attend those proceedings because they will involve many of the same issues, witnesses, and testimony

as any future civil litigation. Defense counsel should also assist with preparing any employees who are asked to testify during a criminal trial because that testimony can be used in the civil case.

Depending on the type of attack and the likelihood of litigation, it can be very useful to involve a security expert early on to evaluate the incident, guide the investigation, and assist with the defense. The expert should visit the attack location and speak directly with employees who were involved.

On the flip side, there are actions that should *not* be done after a violent criminal attack, and sometimes those are just as important. Several of the most important are mentioned below:

- Do not clean or clear the scene. The police must remain in control of the physical scene of an attack and nothing should be done to the scene until it is completely cleared by the police. If any evidence is left at the scene once it is released from the police, discuss how to handle it with outside defense counsel.
- Do not have meetings (“safety meetings”) at the store or the property that are documented or recorded that evaluate the event or discuss blame. Those discussions should be done with legal representation involved so that they are done properly and cannot be used as evidence in any future civil proceedings.
- Do not make any rash or quick decisions about personnel issues such as firing or demotions. Remember that anyone involved will be a witness. Talk to outside defense counsel before any personnel changes involving any employee who is a potential witness are made.
- After the initial contact with the police, have outside defense counsel involved for any future dealings with the police, OSHA, or unions.

The biggest “don’t” is don’t forget to get outside defense counsel involved as quickly as possible because that will ensure that proper evidence preservation happens and witness interviews can be conducted so that they remain privileged.

#### The Law—Reasonable Foreseeability

Throughout the 50 states, the law is fairly consistent as it relates to liability for the criminal act of a third party. To impose

customer-shooting case because no evidence was presented to show that the defendant knew or should have known that the plaintiff was in danger of being shot by someone in the store.

- **Connecticut** – *O’Connell v. Salon Shahin, Inc.*, 2013 WL 6925920 (Conn. Super. Ct. 2013). An exception to the general rule that one has no legal obligation to protect another may arise when the defen-

*ments, Ltd.*, 405 So.2d 485 (Fla. Dist. Ct. App. 1981). The duty of care owed by a landowner to an invitee with respect to protection from criminal acts of a third person is dependent upon the foreseeability of that third party’s activity.


- **Illinois** – *Ignarski v. Norbut*, 271 Ill. App. 3d 522, 527 (Ill. App. Ct. 1995). Generally, to establish that a business has a duty to protect others from the crimi-

be of the same or similar type to the crime in question to warrant a finding of foreseeability.

- **Pennsylvania** – *Barbara Thompson and George Thompson, h/w v. Strawbridge & Clothier and Kimco Development Corp.*, 1988 WL 679794 (Penn. Com. Pl. 1988). Only if criminal acts are proved foreseeable may the jury consider whether defendants breached a duty to protect patrons against third-party criminal acts.

What amounts to reasonable foreseeability can differ from state to state, but typically, the courts want to see a property being aware of similar acts occurring in the past. In other words, a history of shoplifting is typically insufficient to prove that a store had reasonable foreseeability of a shooting. The specific locations of the previous events could also be relevant to the analysis, specifically parking lot versus inside a store. This analysis is why collecting evidence about the current attack, as well as all previous events over three years, is extremely relevant and necessary.

Another way that plaintiffs try to prove reasonable foreseeability is not simply by a history of prior acts but based on the behavior or actions of a perpetrator. If a perpetrator is known to a store, a plaintiff may argue that a defendant should have known that he or she was dangerous and it was reasonable to foresee that he or she would become violent. This type of argument is why any information known about a perpetrator should be organized after an attack.

Cases involving criminal acts of third parties are ever-evolving, with plaintiffs’ counsel always searching for new and innovative ways to sneak past a summary judgment ruling. The best protection is having a well-written policy, implementing that policy, and responding quickly and appropriately after an attack by preserving all necessary information and evidence. Any company that can properly prepare, respond, and act has a better chance of success once civil litigation proceedings are filed. 

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