



Better Think “FAST”

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**WARNING:** If a crime occurs on your client’s property and it results in bodily harm, your client may be subject to liability.

# Defending Negligent Security Claims

How your client responds to a criminal incident will play a critical role in the defense of any resulting litigation and mitigation of excessive damages. The most common types of crimes giving rise to negligent security claims are the

specific intent crimes of burglary, assault, murder, larceny, robbery, kidnapping, and rape. Acts of terrorism, such as the attacks of September 11, 2001, and the Boston Marathon bombing, also may give rise to negligent security claims. Violent criminal activity may occur on any commercial property, but most incidents commonly occur in apartment buildings, fast food restaurants, stores, hotels, schools, dormitories and parking facilities. Should a crime take place on your client’s property, immediate action is required to prepare a defense to a negligent security claim.

Certain factors contribute to the need for fast action. First, either big or small, a crime on your client’s property is a business crisis. Decisions need to be made quickly and intelligently. Second, the potential for an adverse liability determination is relatively high given that the fact finder will be able to empathize with the victim and as a

result will likely have a visceral response to the crime. Third, if a lawsuit does result from the criminal activity, your client may be the only party that is financially capable of compensating the victim. Finally, the local authorities will conduct an investigation from a criminal justice standpoint, not in anticipation of civil litigation. For these and various other reasons, your client needs a “FAST”—Fast Action Support Team—response to provide a full and complete defense to negligent security claims.

## Fast Action Support Team

A Fast Action Support Team (FAST) is composed of a claims professional, a company representative (such as the risk manager), and an attorney who is experienced in tort litigation. This team has one purpose: to coordinate the effective defense of the company during a crisis situation. Its mission is to investigate the incident fully,



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interview witnesses, preserve testimonial and documentary evidence, evaluate avenues for early resolution, and set the framework for liability defenses.

The team should be designated well in advance of a crisis so that an efficient response may be orchestrated when an incident occurs. Once the team is designated, a FAST plan with clearly defined roles and

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tasks should be developed and distributed to the team members. When the team arrives at the crime scene, time is of the essence. Working together within a shared crisis mindset, the team can recognize and evaluate potential areas of liability and ways to strengthen defenses. The team's primary considerations will be (1) the applicable law, (2) preserving evidence.

### Reasonableness Standard

Negligent security is a branch of premises liability law. In most cases, your client's liability will be evaluated against a reasonableness standard, under which the foreseeability of the criminal activity will be at issue, together with the reasonableness of the steps taken by your client to prevent the harm or to intervene to prevent further harm. Most states follow the Restatement (Second) of Torts §344, which provides that a business owner has a duty to take reasonable action to protect its invitees against foreseeable intentional or criminal acts.

A possessor of land who holds it open to the public for entry for his business purposes is subject to liability to members of the public while they are upon the land for such a purpose, for physical harm caused by the accidental, negligent, or intentionally harmful acts of third persons or an-

imals, and by the failure of the possessor to exercise reasonable care to (a) discover that such acts are being done or are likely to be done, or (b) give a warning adequate to enable the visitors to avoid the harm, or otherwise to protect them against it.

Restatement (Second) of Torts §344 (1965).

In a negligent security case, the focus will be on whether it was reasonably foreseeable that the criminal activity would occur, and the steps that your client took to protect its patrons from harm. The question of foreseeability will focus both on what could have been reasonably anticipated in advance of an incident, as well as any signs of escalating behavior that were apparent immediately before the incident. The team's job is to gather all of the information, both good and bad.

### Establish a Legal Presence at the Scene of the Crime

It is highly recommended that the attorney team member travel to the site of an incident to conduct an on-site investigation. Doing so will help protect the attorney-client privilege for all meetings and communications with employees. Furthermore, this attorney will conduct a more thorough, pointed, and legally relevant investigation designed to minimize exposure. For your client, the presence of a lawyer conducting a formal on-site investigation with scheduled witness interviews sends a message to employees, and to the public, that the corporate office takes matters relating to safety very seriously.

A further benefit to having the team attorney on-site is that he or she will gain insights into the effect of the criminal activity on the community, as well as into how the police are conducting their investigation. This will aid in the development of case theories and themes. Additionally, the value of first-person jury pool analysis cannot be overstated. Being on-site at the scene of a crime, interacting with individuals immediately after the incident, and observing the community reaction first-hand is very different from reading demographic statistics.

### Conduct Fact Witness Interviews

As soon as possible after an incident, the risk manager and the attorney should interview all personnel regarding their recollection of the incident, the events leading up to the incident, and the immediate after-

math. Ideally, the interview will establish that the criminal activity broke out spontaneously, without any signs of escalation or the opportunity to intervene. If any warnings were given to the involved parties, or any other attempts to intervene were made, all such efforts should be documented. As a starting point, the attorney should arrange on-site interviews with the following individuals over a one- to two-day period:

- All employees named in any incident report;
- All persons who called 9-1-1 to report the incident;
- All maintenance people who performed maintenance on any incident broken lock, barrier or alarm;
- All management personnel, including those on duty when the incident occurred;
- All personnel, including those on duty when the incident occurred.

These employee interviews should focus on several areas, including facts relevant to security and to the escalation of behavior and foreseeability of the criminal incident; policies and procedures for customer safety; and your client's safety culture and management's emphasis on customer safety. Your client's prior history (or lack of one) of experiencing violent activity on the premises and in the surrounding area should also be discussed.

In interviewing the employees, the lawyer should be aware of the fact that some employees may subsequently leave the company and may not be available years down the road should a lawsuit be filed. As a consequence, all employees should be interviewed thoroughly, and all favorable information should be recorded. This helps not only to record memories while they are still fresh, but also locks-in testimony in the event that an employee becomes disgruntled at a later time as a result of being terminated or for any other reason and desires to change his or her story. If possible, permanent contact information for a parent or close relative should be obtained for all employees.

The claims professional and the attorney should interview a number of individuals, including any regular customers or witnesses known to have been on the premises at the time of an incident, who are willing to cooperate in the investigation; any security guards on duty; any security guards

working for the neighboring businesses who may have witnessed the incident; any witnesses identified in the police report; and any witnesses who might have been interviewed by local media. All testimony from non-employee fact witnesses should be preserved in signed affidavits.

### **Work with Risk Management to Preserve Documentary Evidence**

By responding directly to the crime scene, the team will be able to analyze the same facts and evidence that the police analyze, not just the information contained in the police report. The team should take photographs of the scene as well as photographs of any evidence removed by the police. The photographs will document the scene and give the team something to look back to as the case progresses.

A variety of documents, electronic evidence, and video evidence will be critical to an investigation. Certain types of electronic and video evidence can be deleted or overwritten within a prescribed period of time, making timely preservation imperative. Creative thought is required to consider the types of relevant evidence that may not be readily apparent, from both internal and external sources. The type of documentary evidence will vary greatly depending on the type of crime committed.

There are several evidentiary documents that must be obtained from your client. The risk manager should be able to provide the attorney with a virtual site map of document storage locations and specific types of documents. The risk manager should also be able to facilitate the population of the site map.

The very first document that the attorney should locate is the physical security audit report, if available. This report will reveal the number and types of crimes committed in the general vicinity of an incident, and it will likely be a key area of focus for the plaintiff's counsel. The more crimes that are identified in the area, the more ammunition that a plaintiff will have to support foreseeability arguments related to an incident, which will directly affect your defense strategy. Hopefully, your client was proactive and had an audit conducted and then implemented the recommended security measures. This will go a long way in supporting your case.

The attorney should also work with the risk manager to get any and all information regarding video surveillance. He or she should determine the number and the location of all security cameras and make a diagram of the locations, camera angles, and parameters of the recording devices. For example, if a camera is stop action instead of a stream, it should be noted and documented. Also, it is not uncommon for companies to move cameras around and change the camera angles. The exact orientation of all cameras and all footage needs to be preserved and analyzed for the presence of potential relevant evidence. Preservation by the team will avoid any spoliation of evidence argument in the event that the original data storage device is later deleted or overwritten in accordance with retention policies.

If an incident occurred at a retail establishment or restaurant, copies of all of the credit card information and receipts for all patrons who may have been involved in the incident should be obtained. A credit card cash register receipt can be used to identify the names of some or all of the involved parties. Management should also generate a list of all employees who were on duty at the time in question.

If an incident occurred in a multi-family apartment community, any related marketing materials should be reviewed thoroughly. Marketing language and images, which may stand in contrast to existing conditions, should be noted. For example, if the marketing literature contains pictures of a pristine apartment complex surrounded by lush green lawn when in reality the building is dilapidated and the outdoor area is a brown field, this could be probative of unreasonableness.

Along with marketing materials, be sure to locate any and all bulletins, press releases, and other notices that were distributed to tenants regarding any previous criminal activity that may have occurred on or near the premises. If any previous incident occurred that might have bearing on the matter at hand, such as maintenance issues involving a broken light, lock, barrier, or alarm, it is important to understand how maintenance requests are handled. Obtain copies of any maintenance requests, logs, and completed maintenance work tickets. Copies of any policy manuals, especially if they include policies regarding

security, safety, and maintenance, should also be obtained. If your client has a management company, copies of management agreements should be obtained.

Likewise, if your client holds a contract with a private security company, the security contract should be examined for defense and indemnification provisions. If there are such provisions, the claims pro-

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fessional and the attorney should craft a strong defense tender letter and transmit it to the principals of the security company. The risk manager and the attorney should also obtain any security service schedules, security guard personnel files, invoices, and correspondence sent to and received from the security company.

While compiling documents from your client, be mindful to flag documents that may be subject to privilege, including documents that were made in anticipation of litigation. Plaintiffs' attorneys may request these documents. Determinations concerning relevancy, responsiveness, and potential production in discovery should be made as soon as possible. Such documents might include any previous incident reports; prior claims and lawsuits; a certified insurance policy, including any and all riders and additional insured information; internal client correspondence immediately before and after the incident; client budgets; personnel files; and other documentation, including expert reports from previous litigation.

### **Work with the Claims Professional to Obtain Evidence from Third Parties and Governmental Entities**

In addition to obtaining evidence from your client, the claims professional and the attorney play a critical role in obtaining important documents from third parties after an incident. Governmental and corporate entities may have complicated document pro-

curement policies. An experienced attorney will know which tools to use to get the documents, and he or she will have the tenacity to persist until all of the documents are retrieved. Such third-party and governmental documents may include police precinct data, 911 recordings, district attorney case files, information resources held by neighboring properties, and information com-

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piled by news outlets, explained in more detail in the next sections.

#### **Police Precinct Data**

Preservation letters should be distributed to all law enforcement personnel as soon as possible after an incident occurs. It is important to contact the local police precinct to secure the police department incident report and determine the complete universe of documents that are available both in hard copy and electronic format. Police reports found here may include the names of and information held by additional witnesses. If any suspects were caught and identified, blood alcohol and toxicology testing may have been performed, and all such results will be pertinent to the legal investigation. Depending on the complexity of the criminal activity and the jurisdiction, a detective file, in addition to the police report, may be available. Handwritten notes, interviews, photographs, and the final report should be subpoenaed. The police department may also have crime grids and security surveys for the area. In the event that the police department wears body cameras, the camera footage from the body cameras of all of the responding officers should be subpoenaed.

#### **911 Recordings**

The Public Safety Answering Point (PSAP) or 911 dispatch center will have recordings of all reporting calls for the incident. The 911 calls are most often the first notice of an incident and create a time-code from which all events will be measured. Depending on the type of call, you can follow up with emergency medical responders, police, and firefighters who reported to the scene.

#### **District Attorney Case Files**

A D.A.'s case file will contain very important information including the grand jury presentment. A presentment is the written report that details the proposed criminal charges and the facts that were discovered during an investigation. It may contain the names and the contact information for co-conspirators and witnesses. These are people who should be contacted and monitored. The file may also contain a press release with relevant information.

#### **Information Held by Neighboring Properties**

Neighboring businesses should be contacted because they may have relevant information, such as footage from exterior cameras that may have captured the criminal activity in question. These entities may release their footage voluntarily or they may require a subpoena. A preservation letter sent by the attorney is the first step to protecting this evidence as the procurement progresses.

#### **Information Compiled by News Outlets**

Print and broadcast media outlets should be monitored for news coverage of an incident. The team should create Google alerts to keep on top of emerging news coverage in real-time. Any print or video features concerning an incident should be obtained and preserved.

#### **Preservation of Social Media Evidence**

Social media information is some of the most ephemeral evidence that exists. As a result, the team should initiate a search of social media as soon as notice of an incident is received. A representative sampling of social media sites that should be searched are Facebook, Twitter, Google+, Tumblr, Instagram, and Vine. Search for posts that mention your client in the geographic area where

the incident occurred. There may be photos, videos, or live "Tweet" feeds of the event. Additionally, look for hash tags naming your client, the perpetrator, or the victim.

Please keep in mind that there are many social media sites and some are more popular with different demographic groups than others. For instance VK is the most popular social media website in Russia and Sina Weibo is the most popular social media website in China. If the persons involved in the criminal activity are from distinct ethnic groups, be sure to search the popular social media sites of those countries, not just the ones that are most popular in the United States.

Social media can be a treasure trove or a Pandora's box. Depending on the jurisdiction, information may or may not be discoverable or admissible. However, a thorough search may help uncover additional potential sources of information to help defend your client. Social media can also give you an idea of the types of information that a potential jury may be privy to regarding the criminal activity before a trial.

#### **Claim Assessment**

As the information is discovered, it should be communicated to the claims representative. The claims representative will evaluate all of the information to come up with a true value for the case. The true value for a case is the essential number that will dictate whether the case is settled pre-litigation or will litigate. The claims professional using various metrics and actuarial tables is the sole determiner of whether settlement authority should be vested. It is the job of the attorney and the risk manager to work efficiently and effectively to learn as much as possible immediately after an incident so that the claim representative can make an accurate assessment.

#### **Conclusion**

Claims for negligent security pose many dangers for clients due to the overlap of criminal and civil law. During an investigation of an incident, there are many moving parts in play and various disparate interests and evidentiary issues. Given the complexity and the interactions among your client, the victim, and law enforcement officials, a Fast Action Support Team with an on-site litigation attorney is integral to a strong and sound defense. 