

Insurance Considerations For Mass-Shooting Litigation

By **Monica Sullivan and Matthew Novaria** (April 23, 2018, 3:42 PM EDT)

Mass shootings are among the most tragic crimes inflicted upon our society.[1] They challenge our most basic sense of security, affecting innocent people in cherished public spaces — schools, churches, concert venues and movie theaters. Unfortunately, mass shootings do not appear to be slowing. Since the University of Texas clock tower mass shooting in 1966, there have been an estimated 150 mass shootings in the United States. In the past 12 months alone, there have been eight. Mass shootings have become increasingly violent. The two largest mass shootings in the United States (Pulse nightclub in Orlando, Florida, and the Route 91 Harvest Festival in Las Vegas, Nevada) took place within the last two years.[2] In 2017, an estimated 111 people died in mass shootings.[3]



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Despite the criminal nature of mass shootings, victims often turn to civil courts to seek compensation for their injuries. Since the Columbine High School mass shooting in 1999, victims and their families have increasingly brought lawsuits against property owners and managers, security companies, gun manufacturers, and, most recently, manufacturers of “bump stock” devices and other gun accessories.[4]



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Throughout the years, many of these cases have resulted in judgments in favor of the defense, with courts finding civil defendants did not cause the mass shooting or injuries at issue, and/or did not owe a duty to prevent the mass shooting, which was unforeseeable.[5] For example, in 2016, a Colorado jury found that Cinemark was not liable for the 2012 Aurora movie theater mass shooting because the incident was unforeseeable.[6] Similarly, suits against weapons manufacturers are routinely dismissed based on the immunities provided by the Protection of Lawful Commerce in Arms Act (PLCAA).[7] However, plaintiffs have had success against nonweapons manufacturers in other cases.[8] In fact, this September, a case arising out of a 2005 mass shooting at a mall in Tacoma, Washington, will go to trial against the mall owner/operator.[9]

Mass-shooting litigation raises a number of unique concerns for civil defendants, ranging from negative media attention to law enforcement investigations, and from community outreach to ultimate financial exposure. Not surprisingly, defendants in mass-shooting litigation may call upon liability insurers to defend and indemnify them, or pay for other expenses related to the mass shooting. Further, savvy plaintiffs’ attorneys understand the importance of triggering insurance coverage and may frame or

posture mass-shooting litigation to tap into what they consider “deep pockets.”

Accordingly, the availability of insurance for mass shootings has become an increasingly significant issue for victims, civil defendants and insurers and reinsurers, as well as public officials attempting to shift risks and ultimately find solutions to minimize mass shootings. This article examines fundamental insurance coverage issues that arise out of, and have the potential to shape, mass-shooting litigation.

Does Mass-Shooting Litigation Implicate an “Occurrence”?

Liability policies do not, by their terms, expressly cover mass-shooting litigation or exposure. The threshold question under a liability insurance policy is whether an underlying suit alleges an “occurrence” or accident. Despite the intentional criminal nature of a mass shooting, mass-shooting litigation may allege an “occurrence” if the underlying complaint asserts that the insured was negligent in failing to prevent the mass shooting.[10] While no court has squarely addressed whether a mass shooting implicates an “occurrence,” some cases addressing coverage for underlying criminal conduct suggest there may be no “occurrence” if allegations of negligent conduct are inextricably intertwined with allegations of intentional conduct.[11] In the mass-shooting context, however, theories of liability against an insured tend to sound in negligence, with claimants asserting that the insured should have known the mass shooting would occur, or should have taken greater measures to prevent or minimize injuries.

Emotional Distress Claims May Implicate “Bodily Injury”

Liability policies generally provide coverage for damages the insured is legally obligated to pay because of “bodily injury” caused by an “occurrence.” Not surprisingly, mass shootings often give rise to emotional distress claims, brought by bystanders or victims’ family members and friends. It is possible an insured might face greater exposure arising out of emotional distress claims than claims predicated on actual physical bodily injury. For instance, while 58 people were killed and roughly 500 were injured during the Route 91 Harvest Festival mass shooting in Las Vegas last fall, more than 20,000 other people were present at the concert venue during the shooting. Whether these claims are potentially covered turns in part on whether the policy definition of “bodily injury” encompasses mental anguish, mental injury, disability, shock and/or fright. If policies do not include these types of injuries in the definition of “bodily injury,” emotional distress claims may be uncovered.[12] Some jurisdictions, however, have found that emotional distress claims may be covered even if the definition of “bodily injury” does not expressly include mental anguish or emotional distress.[13]

Victims’ Compensation Funds and Other Forms of Settlement

Mass shootings may present the insured with an opportunity to establish or contribute to victims’ compensation funds or otherwise resolve claims outside of litigation.[14] Due to heightened media scrutiny and unique business/PR concerns that often accompany mass shootings, insureds may be especially inclined to initiate contact with potential claimants and resolve claims as expeditiously as possible. An insured might believe that funding early settlements and/or contributing to victims’ compensation funds will generate goodwill and minimize the number of eventual lawsuits.

However, insurers may wish to vigorously defend claims arising out of mass shootings, as there tend to be viable defenses to duty, liability and/or causation.[15] Moreover, most liability insurance policies contain “voluntary payments” or “consent to settle” provisions that preclude coverage for settlements the insured executes without the insurer’s consent.[16] Although application of this condition has not

arisen in the context of mass-shooting litigation, courts routinely find that an insured breaches the “voluntary payments” condition, and thus forfeits coverage, if the insured enters into a settlement without the insurer’s consent.[17] Further, voluntary payments provisions are generally enforceable without a showing that the insurer was prejudiced.[18]

Nevertheless, courts may evaluate the circumstances surrounding the settlement to determine whether an insured’s payment is truly “voluntary.” In *Jamestown Builders Inc. v. Gen. Star Indem. Co.*,[19] the California Supreme Court explained that an insured’s payment is involuntary — and thus covered — if the payment is made out of “economic necessity” or the insured is “faced with a situation requiring immediate response to protect its legal interests.”[20] Applying a similar standard, a Pennsylvania federal court recently held that an insured bank’s payments to reimburse its customers for fraudulent wire transfers were not “voluntary,” because a state statute required the insured to promptly reimburse banking customers whose assets were compromised by fraudulent wire transfers.[21]

A settlement made for purely reputational or business reasons, however, should not satisfy that standard, even if the insured believes the settlement is necessary to preserve its business and/or maintain clients.[22] In *Dietz Int’l Pub. Adjusters of California Inc. v. Evanston Insurance Co.*,[23] the court found the insured’s settlement payments were “voluntary,” even though the insured made the payments to quickly compensate its clients for losses they sustained due to the insured’s criminal embezzlement scheme. The insured argued there was a “pressing need” to reimburse its clients, many of whom faced “catastrophic losses” as a result of the embezzlement. However, the insured did not inform the insurer of these payments for months. The court concluded that the insured’s “desire to preserve its business” did not constitute “economic necessity or other extraordinary circumstances...”[24]

Other Insurance or Coverages: Crisis Management, Terrorism and Active Shooter

Unlike a standard commercial general liability policy, some liability policies may provide coverage for certain “crisis management” events, including funding for emergency response, public relations and/or media management costs.[25] Some crisis management forms specifically include “mass shootings” as a covered “crisis event.”[26] However, no reported decision has addressed coverage for mass-shooting-related expenses under a “crisis management” coverage. Notably, while primary liability policies may cover these types of expenses, excess policies may expressly exclude them.

Further, with the enactment of the Terrorism Risk Insurance Act (TRIA) in November 2002, some policies may provide coverage for terrorism-related events, which could ostensibly include a mass shooting.[27] In fact, TRIA requires property/casualty insurers to offer terrorism coverage.[28] However, terrorism coverage does not apply unless the U.S. Department of the Treasury officially certifies an event as an act of terrorism. To date, the Department of the Treasury has not certified any event as an act of terrorism, let alone a mass shooting. In light of this, it seems unlikely that terrorism coverage would apply to a mass shooting.

Most recently, in recognition of the growing risks posed by mass shootings and rising demand for insurance products that expressly cover mass shootings, some insurers have started offering “active shooter” or “active assailant” policies.[29] While no court has interpreted an active shooter policy, some of these policies may potentially cover not only liability arising out of mass shootings, but also crisis management expenses and preemptive vulnerability assessments and training tools.[30]

As mass-shooting victims continue to turn to the civil tort system to seek compensation for their

injuries, and as defendants continue to seek insurance coverage for mass shootings, it has become increasingly critical for all interested stakeholders to understand the scope of potential coverage afforded by commercial general liability policies, as well as specialized insurance products.

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[1] “Mass shooting” is typically defined as a shooting incident where four or more people are killed. https://www.washingtonpost.com/graphics/2018/national/mass-shootings-in-america/?utm_term=.0c391d73af3e.

[2] https://www.washingtonpost.com/graphics/2018/national/mass-shootings-in-america/?utm_term=.0c391d73af3e. 58 people were killed at the Route 91 Harvest Festival mass shooting on October 1, 2017. 49 people were killed at the Pulse nightclub mass shooting on June 12, 2016.

[3] https://www.washingtonpost.com/graphics/2018/national/mass-shootings-in-america/?utm_term=.0c391d73af3e.

[4] <https://www.reviewjournal.com/crime/courts/las-vegas-firm-files-lawsuit-against-bump-stock-manufacturer/>.

[5] See, e.g., *Com. v. Peterson*, 749 S.E.2d 307 (Va. 2013) (no duty to warn students about unforeseeable mass shooting at Virginia Tech); *Nowlan, et al., v. Cinemark Holdings, Inc., et al.*, No. 12-cv-02517-RBJ-MEH (D. Colo. June 24, 2016) (granting summary judgment to defendant movie theatre, finding plaintiffs could not establish theatre was substantial cause of injuries arising out of mass shooting).

[6] <https://www.denverpost.com/2016/05/19/cinemark-not-liable-for-aurora-theater-shooting-civil-jury-says/>.

[7] See 15 U.S.C. §§ 7901-7903.

[8] *Traynom v. Cinemark USA, Inc.*, 940 F. Supp. 2d 1339 (D. Colo. 2013) (denying movie theatre’s motion to dismiss claims arising out of 2012 Aurora movie theatre mass shooting).

[9] *McKown v. Simon Prop. Grp.*, No. C08-5754BHS (W.D. Wash.) (ECF 182).

[10] See, e.g., *Nationwide Mut. Fire Insurance Co. v. Molitor by Molitor*, No. CIV. A. 95-0503, 1995 WL 672397, at *4 (E.D. Pa. Nov. 9, 1995) (“[A]s a general rule, recovery under an insurance policy is not barred on public policy grounds simply because the underlying ‘occurrence’ involved criminal activity.”); *Allstate Insurance Co. v. Wilson*, 18 F. Supp. 3d 156, 163 (D. Conn. 2014) (analyzing whether insured’s failure to prevent sexual assault constituted an “occurrence”).

[11] See, e.g., *Metro. Prop. & Cas. Insurance Co. v. Spayd*, No. 5:16-CV-04693, 2017 WL 3141170, at *5 (E.D. Pa. July 24, 2017) (finding no “occurrence” because allegations that insured negligently failed to prevent sexual assault were “inherently intertwined” with allegations of intentional misconduct).

[12] *Chatton v. Nat’l Union Fire Insurance Co.*, 10 Cal. App. 4th 846, 855 (Cal. Ct. App. 1992) (collecting cases, and noting that policies defining “bodily injury” as “bodily injury, sickness, or disease” do not provide coverage for mental anguish or emotional distress); *Markel Insurance Co. v. Ebner Camps, Inc.*, No. 3:15-CV-01663-VLB, 2017 WL 3381005, at *5 (D. Conn. Aug. 4, 2017) (explaining that a policy endorsement modified the definition of “bodily injury” to include “mental anguish or emotional distress”).

[13] *Hill v. Shelter Mutual Insurance Co.*, 935 So. 2d 691, 694 (La. 2006).

[14] See generally Saul Levmore & Kyle D. Logue, *Insuring Against Terrorism - and Crime*, 102 Mich. L. Rev. 268, 275 (2003) (discussing the September 11th victims’ compensation fund).

[15] See, e.g., *Com. v. Peterson*, 749 S.E.2d 307 (Va. 2013) (no duty to warn students about unforeseeable mass-shooting at Virginia Tech).

[16] A typical voluntary payment provision states: “No insured will, except at that insured’s own cost, voluntarily make a payment, assume any obligation, or incur any expense, other than for first aid, without [the insurer’s] consent.”

[17] See, e.g., *Jamestown Builders Inc. v. Gen. Star Indem. Co.*, 77 Cal. App. 4th 341, 347-51 (Cal. Ct. App. 1999) (finding voluntary payments provision in CGL policy precluded coverage for pre-tender costs to repair construction defects).

[18] See, e.g., *Piedmont Office Realty Tr. Inc. v. XL Specialty Insurance Co.*, 771 S.E.2d 864, 866 (Ga. 2015) (dismissing insured’s bad-faith action based on failure to indemnify settlement, because insurer did not consent to the settlement; not requiring insurer to establish it was prejudiced).

[19] 77 Cal. App. 4th 341, 347-51 (Cal. Ct. App. 1999)

[20] *Id.*

[21] *First Commonwealth Bank v. St. Paul Mercury Insurance Co.*, No. CIV.A. 14-19, 2014 WL 4978383, at *1 (W.D. Pa. Oct. 6, 2014).

[22] See, e.g., *Tradewinds Escrow Inc. v. Truck Insurance Exch.*, 97 Cal. App. 4th 704, 710 (Cal. Ct. App. 2002) (insured’s payments made in the “urgency of time pressures” were voluntary, and thus insured breached voluntary payments provision).

[23] 796 F. Supp. 2d 1197, 1211 (C.D. Cal. 2011)

[24] Dietz Int'l Pub. Adjusters of California Inc. v. Evanston Insurance Co., 796 F. Supp. 2d 1197, 1211 (C.D. Cal. 2011).

[25] Catholic Med. Ctr. v. Fireman's Fund Insurance Co., 2015 DNH 110, 2015 WL 3463417, at *2 (D.N.H. June 1, 2015) (examining "Crisis Management Coverage Extension Endorsement" in policy issued to a hospital, which "obligated [insurer] to cover certain losses resulting from a 'covered crisis event'."); see generally <https://www.irmi.com/term/insurance-definitions/crisis-management-coverage>.

[26] See generally <https://www.insurancejournal.com/news/national/2016/08/11/422884.htm>.

[27] See <https://www.iii.org/article/does-my-business-need-terrorism-insurance>.

[28] Id.

[29] See <https://www.reuters.com/article/bc-finreg-mass-shooting-insurance/new-products-show-insurers-reassessing-risk-in-u-s-mass-shootings-idUSKCN1G42QA>; <http://www.ibtimes.com/political-capital/mass-shootings-create-demand-active-shooter-insurance-2601146>.

[30] See <https://www.reuters.com/article/bc-finreg-mass-shooting-insurance/new-products-show-insurers-reassessing-risk-in-u-s-mass-shootings-idUSKCN1G42QA>.