

# Active Assailant Risk

## Episode 4

### Claims management and mitigation considerations

#### Dave Rapp:

Thank you for joining us for Marsh's podcast on active assailant risk. I'm Dave Rapp, your host. I'm currently the Casualty Advisory Practice Leader for Southern California, based in Los Angeles. Prior to joining Marsh, I was the US Risk Manager for Westfield Shopping Centers for eight years.

As we think about the topic of active assailant, it's a risk we don't think about often — it's not easily quantifiable, and it's not a daily event in our individual worlds...but it does, unfortunately, happen far too often in the broader world. As risk professionals, we tend to focus on the things that occur more often within our companies; however, I think it's an important topic to bring to light and to have a conversation around what active assailant risk is and what we can do to better manage it.

This podcast is four episodes, and in each I'll be joined by experts on specific topics of:

- Threat assessment and preparation
- Workplace violence and threat other than shooters
- Crisis management and emergency response programs
- Claims management and mitigation considerations

In today's session, we're going to discuss the realities, key considerations and best practices in managing the claims and litigation that often ensue following an active assailant or other mass casualty event. Joining me today is prominent Los Angeles defense attorney Reggie Roberts of Sanders and Roberts. Reggie has

significant experience in dealing with active shooter litigation. Reggie, welcome to the podcast.

#### Reggie Roberts:

Dave, thank you for having me.

#### Dave Rapp:

So if you could take a moment for the audience and just give folks your background and experience, that'd be great.

#### Reggie Roberts:

Thank you for the opportunity to speak to you and for the audience, Dave. I am a litigator, a trial lawyer. I've been practicing for about 22 years now, and I handle a variety of matters, particularly those involving death on premises, shooting cases, serious injuries and the like. And so, I have a good deal of experience including ongoing litigation involving shooters on premises, both in shopping malls and bar settings and restaurant settings. And I'm here to talk about some of the implications of mass shootings and active shooting development in case law and occurrences around the nation.

#### Dave Rapp:

Very important topic. Just to recap for our listening audience, in our first three podcasts, we kind of covered off on the reality and threat of active assailant events, how to recognize and manage workplace violence issues and develop then appropriate crisis management and response protocols. And so, as Reggie you touched on, we're going to talk today about managing the litigation component of this. All of us as risk managers listening today, generally have robust and large excess liability insurance programs, many times with hundreds of millions of dollars in limits. And we take that for granted, because we think we need it, but I think in most situations, as we'll discuss, we'll find out that the cost of these active assailant litigation claims continue to rise. You couple that source of recovery, along with many instances, a large and healthy balance sheet for our companies as well as many times a very public and prominent image.

It's not surprising that many times we find ourselves a target of litigation even if we think we're only remotely

connected or not connected at all to the incident. And the cost of these claims are significant, both in terms of settlement dollars as well as defense costs. And moreover, the reputational impact on our corporate image and brand is important as well. Just want to touch on real quickly some recent actual litigation on some settlements. We had the Parkland Florida shooting in 2018, Marjory Stoneman Douglas High School, recently the plaintiffs in that case settled with Broward County High School District for \$25 million. It was a class action settlement involving 52 families.

There have been a number of notable active assailant settlements important both in terms of underscoring the potential financial cost of a claim, but also from a theory of liability perspective. I believe all of our listeners will be aware of the \$800 million settlement related to the Las Vegas active assailant claim from 2017, which clearly underscores the potential scale of these incidents, both from a human casualty perspective, but also from a cost.

We also have a recent \$43 million one against a retailer for shooting in a common area parking lot outside of the retail establishment that focused on the owner's awareness of crime in the area and the concept of foreseeability. And then there's the case from a shooting in 2018 that touched on an interesting aspect related to the open carry firearm law of the state where the incident occurred. Let's touch on some of the evolving legal nuances, Reggie, and the impact these cases will likely have on future active assailant claims. Let's first talk about the influence of that open carry law, the influence that that case might have on cases going forward.

### **Reggie Roberts:**

Absolutely, Dave, thank you. So for the listeners, if you operate a facility, any facility in an open carry state, then you should pay very close attention to the segment. The shooting you mentioned, Dave, happened in Kentucky, which is a state that allows open carry. In that case, the defendant did not have a policy preventing the carrying of loaded firearms on their premises, and it created a number of issues for them.

First, if you allow people to carry firearms into your establishment, there's no way to verify that the people carrying those firearms are properly licensed or properly trained. So a key factor is if you do not want people to carry firearms onto your premises, you need to have a

policy prohibiting the carrying of all firearms at your locations. First, the policy. You have to have a written policy, that is key.

Second, in the Kentucky case, a customer entered a retail establishment and then shot two other customers. That person is currently convicted of double murder and serving life in prison, but there's still a civil lawsuit going on involving the retailer because it happened on their premises. And one of the issues for the retailer is they had no policies prohibiting the shooter from carrying a firearm into the grocery store. So be very cautious of not having written policies regarding loaded firearms on your premises, even if you live in an open carry state.

### **Dave Rapp:**

So that's an important point, Reggie, but if we have a written policy as a company, what do we do though from a practical perspective in terms of like, do we have to display that policy? Do we have to be conspicuous about it and post inside of our establishments? What's your advice for our listeners in regard to actually communicating to the public on a more visible basis that there is a policy in place?

### **Reggie Roberts:**

Excellent question, Dave, and you touched on a number of the key factors for establishments trying to limit liability and exposure in cases like this. You have to use common sense when interacting with the public in terms of policies like policies when you live in an open carry state. You need to place signage at all places of entrance onto your property and the signage must be prominent or conspicuous, as you said, Dave, so that people coming onto your location are made aware of your prohibition against open carry.

For instance, if you operate a grocery store, you need to have not only signage, but also training for management personnel. So if they visually see someone that appears to be carrying a firearm, they have certain protocol in place for notifying the person that firearms are not permitted, and even if they are allowed in the open road space or out in the public, you at your establishment do not permit open carry. So there's a series of common sense things that each establishment needs to do based on the type of premises you own or operate and the ways in which people come onto and exit from your property. But mainly, proper policies, posting of policies, and rules,

and proper training of management on how to deal with persons coming onto your location or your premises armed are essential for limiting or prohibiting liability under these circumstances.

### **Dave Rapp:**

Yeah, I think that is super important to make sure that it's conspicuous and that everybody's aware. So that's really good. Let's turn then, Reggie, to our parking lot incident. As I mentioned, that's a case involving a shooting outside the retail establishment. And it really kind of focused in on kind of crime in the area and foreseeability which we'll touch on a bit more later on here. But just on that case specifically, can you touch on some of the implications that that case could have on litigation going forward?

### **Reggie Roberts:**

Absolutely. So the parking lot case you referred to is another step in what I believe to be the erosion of defenses based on lack of notice. In this case, a person drove from a different state, Alabama into Georgia to purchase an iPad from another individual. And the intended meeting place was the parking lot of the establishment, and neither of the persons involved in this incident entered into the structure of the establishment. Everything occurred in the parking lot. And so what happened was, when the two people met, the person tried to rob the man that drove in from Alabama, and a shootout occurred between the two persons. The eventual plaintiff was severely injured, went through many surgeries, and then sued the establishment for the dangerous condition of their location. And there were a few factors that were vitally important to the resolution of the case. And that resolution was a \$45 million jury verdict, but they attributed only 5% to the plaintiff who was also a shooter in the case, who was shot and injured. So the total payout was \$43 million.

And here are the two key factors that led to that result. Number one, employees of the retailer had previously reported their fears of crimes occurring in the parking lot. In addition, the retailer was aware of two prior robberies that occurred in the parking lot on the exterior of their brick and mortar location. And number two, the retailer at some point prior to the shooting incident, decided to eliminate the security for the parking lot due to budget constraints. Now, the combination of both having notice of people reporting fears of being robbed in the parking lot, and two, cutting security after having

that information led the jury in this case to side in favor of the plaintiff even though the plaintiff never entered into the physical building. And these two factors are something that retailers need to be aware of. Your notice of things that occur in your surrounding premises and parking lots and other areas, used possibly for ingress and egress to and from your place, are very important for you to consider when taking security measures to protect potential customers or visitors to the location.

### **Dave Rapp:**

Let's turn our discussion to the concept of foreseeability. 1984, the Lopez versus McDonald's case reaffirmed the concept of reasonable foreseeability of a criminal act, and in that case, McDonald's prevailed. However, there's been other cases between then and now that have continued to erode this defense. In the parking lot case we just discussed, you mentioned the retailer's awareness of prior criminal acts as a factor in determining liability. Can you please share and talk a little bit more with our listeners on your thoughts as to how this concept of foreseeability and this particular defense has continued to erode over time and the importance of understanding crime statistics in the area?

### **Reggie Roberts:**

So a number of things have happened over time. The concept of reasonable foreseeability, if you think of it in terms of just perspective, originally it was just what could you expect at your particular location at that particular time? What does that mean? Have you had any other shootings at your location, any other violent crimes at that particular location? But over time that concept has expanded and so now courts are allowing more data, more information to be used to support the reasonable foreseeability of the type of incident that occurs. And so, how does that relate to us? When you hear about mass shootings in the media, it makes everyone collectively more aware of the possibility of a mass shooting. Now, that is really an undo and unfair burden to place on property owners that invite a lot of people in, but courts are allowing a number of things to happen.

By way of example, the El Paso case in 2019 in Walmart, there was a shooting with 21 fatalities, and we didn't go through the details of it, but the information that the court looked into was pretty interesting. They allowed for discovery of not just video information, but

security budget information for not just the location where the shooting happened, but for other locations, which is an expansion of reasonable foreseeability. So if the courts are allowing plaintiffs to delve into, well, how much do you spend on security at a different location versus this location to see if there is a disparity in your spend, a prioritization of where you will spend your security money, potentially at the peril of people in a different location. The court also allowed for plaintiffs to discover the corporate minutes for the previous five years regarding security. Now, take a moment and think about that.

A court is allowing a plaintiff or plaintiffs that were involved in a shooting at one particular store location to discover the corporate minutes for the entire Walmart organization for five years, where there is any discussion about security. That perspective is one that broadens the scope of what becomes reasonably foreseeable, what courts allow plaintiffs to look into, crime statistics are becoming a part of it, not just one location, but if you've had other crimes in other locations that are similarly set up, it can be used to overcome a defense of lack of notice. So there are a number of issues that are happening across a broad number of states in a variety of cases that is really expanding the notion that reasonable foreseeability is really a rock solid defense if you haven't had the same type of incident at that very location.

### **Dave Rapp:**

So you touched on that just quickly. Where do you see from a jurisdictional perspective, is there a part of the country that's more problematic than another as you see it, or is it all kind of sweeping across all jurisdictions at an even pace?

### **Reggie Roberts:**

It appears as though it's happening everywhere, which is a bit curious to me. I would expect places like Texas or Florida to potentially have a more conservative approach to notice than places like California and some of the other coastal states. But it doesn't appear as though things are happening that way. Several of these cases, the Walmart case in 2019 is out of El Paso, Texas, and there are other cases, the Parkland, Florida shooting case is obviously in Florida. So there are a number of cases that are in various locations that are eroding the defense of reasonable foreseeability. And the last case, the Axelrod case is also in Colorado. So

there are interior states that are also participating in the expansion of notice to property owners.

### **Dave Rapp:**

And I think the lesson here too, for our risk management audience is to understand that, that threshold has in fact changed and where you might have thought you had safe harbor even five years ago, that simply isn't the case anymore. Would you agree?

### **Reggie Roberts:**

I would agree completely. What it means is that from a risk management perspective, if you want to mitigate your risk of litigation or strengthen your defenses, if a matter does make it to litigation and finds its way to my desk, you need to be proactive about the policies and the training and the procedures that you have in place at all of your locations, if anything happens at any of your locations. So just because something happens at location A does not mean that locations B and C are potentially immune based on a notice defense that hey, it's never happened at locations B and C. You have to be more proactive these days, train your people, create policies and consult with informed person, including lawyers about how to provide the best defense, should a matter land in civil litigation.

### **Dave Rapp:**

Yep, absolutely. Let's pivot just a bit and talk about targeted defendants and some claim cost components. In our first podcast with Dan Kennedy, we talked about different targets, whether they be vulnerable targets like public open venues or more difficult, secure targets like government facilities and the like. Would love your perspective as a litigator, if you see any particular type of defendant being more vulnerable than others and how that plays out in court. Is that property owners more specifically? Is it event promoters, retailers? What other defendants are you seeing from a practical matter as you litigate these cases?

### **Reggie Roberts:**

Well, Dave, unfortunately, history has taught us something and that is anyone that believes they have a claim will always look for the deepest pocket around what they believe they can attach liability to. So we've seen cases involving Walmart, Kroger, but we've also seen cases like the Las Vegas case where an event promoter was just having a concert, and they were also

named in the lawsuit that was found both against the MGM and against the concert promoters.

I think the dynamics of defending yourself against the claim shifts based on what type of owner you are. If you are the owner of a particular location, you have a bit more information and control over your particular location. If you are an event planner, it means that your responsibility to do more work regarding security before hosting the event has now ratcheted up multiple levels. You have to do a security assessment of your venue. You have to not just rely on having a couple security guards, screening people for weapons inside of your location, but you have to understand if something happens, where are your points of ingress and egress? How do I need to train my people? How do I need to make sure that no weapons make it into my event aside from just your typical, everyone passes through a turn style. And if you have a particular location like a grocery store, as we mentioned earlier, make sure you have policies that are clearly posted and staff that is trained on making sure that customers don't openly carry weapons onto your premises.

### **Dave Rapp:**

Absolutely. Let me ask you a little bit about that then, because we've got obviously some listeners, risk managers who maybe don't have a portfolio or special events or open venues. They simply have office space, class A office space. And I think if you look at the statistics for active assailant, many times it happens in just a class A office building or other relatively controlled environment. Any thoughts from your perspective in terms of less obvious potential targets and properties as you think about from a defensive posture perspective?

### **Reggie Roberts:**

So the class A office occurrences are a bit more difficult in that they typically involve disgruntled employees, terminations, and the like. And it makes it difficult to predict. And when you have difficulty predicting, you have difficulty preparing for and defending against someone that may decide, "My feelings are hurt because I've lost my job, so I want to come back and do harm." And it's a different setup than when you're inviting in members of the public. So you have a bit more control because typically the people that do this are people that have had some relationship and you have restricted access. It's not typically a place that is open to the public, which means that you have a

different type of defense. You probably have more defenses that you can utilize than someone that opens up their space for purposes of bringing the public in, in order to make money or to sustain their business.

But it is more difficult in the sense that it's hard to predict that those things will happen or to put in place measures to prevent them, because you're not going to typically pay an armed security guard just to sit in an office space all day, in the off chance that if you terminate someone they might come back and do harm.

What it does mean though is, if an employee or a person within your working environment shows any signs, meaning they have made verbal threats, they have made comments that are threatening to coworkers on social media sites, they have sent text or email messages with any type of threat of physical harm, you have to treat it as though it is a real threat. You cannot tolerate situations where a threat of physical violence is made in the workplace and you do not take it seriously, because if that ever happens and you don't take it seriously and that person returns, you will have a problem. So it shifts the tolerance for workplace threats of violence, be they perceived as serious or joking or not, you cannot allow that in your workplace under any circumstances.

### **Dave Rapp:**

Absolutely makes complete sense. Let's kind of move forward in terms of our topic of discussion. Let's say unfortunately we've had an event of some kind happen in our life, and we anticipate litigation coming our way, but we haven't received it yet. Maybe it's 24 hours post event or 48 hours, and folks haven't had a chance to lawyer up and file petitions and all that. From a practical consideration perspective, pre-litigation very quickly, some thoughts around what a risk management community can do if an event has occurred and they're now in anticipation of litigation.

### **Reggie Roberts:**

Absolutely, Dave, and for all of your listeners, this is a critical phase in putting up a defense against claims that might come, should litigation ensue. When something serious happens, treat it as though litigation will occur and count yourself lucky if litigation does not occur. But these are some things that everyone should do. Immediately preserve evidence. That means videos, photos, emails, make sure that litigation hold letters are distributed immediately to all persons that might have

control over video, email communications, any form of evidence that could be relevant to your defense later on. You'd be surprised at how often you see employees receive litigation hold letters, but for some reason it does not make it to IT. And IT is where automatic overrides are controlled or automatic deletions are controlled. So you need to make sure you preserve your evidence and get your litigation hold letter out.

Also early on, include lawyers. Include counsel in your discussions about the matter in order to create as much privilege as you can, because you can choose to waive privilege, but if you do not include a lawyer, there is less chance that you can claim privilege. So even if that's an in-house lawyer, if you're going to email about an event that has occurred that is a serious event and it's before litigation, copy your in-house lawyer on the email communications while you're trying to figure out what happened or what to do. Because, when events like this occur, people tend not to respond immediately in a way where they anticipate that might be exhibit number one for the plaintiff in a trial. Maybe they're still trying to figure out what's next, but you don't want the plaintiff to get your email where you say, "What do I do now?" You want your lawyer on that email and you can say, "I wanted my lawyer to advise me on what to do, not because I wasn't familiar with our policies on how to react to this." And those two things play out very differently.

There are a number of other ways to do it, but for sake of time, I'll say if you can hire an investigator where appropriate, conduct social media searches for any individuals involved if it's a serious event, because you'll be surprised that either the participants in the event or onlookers will post on social media about what has occurred. And then as soon as possible, contact your trusted outside counsel, so that they can get involved as early as possible with helping to mitigate any risk that might follow in litigation.

### **Dave Rapp:**

So now we're in litigation, we've received the lawsuit, discovery has commenced. What are the two or three kind of critical things at this stage? I mean, obviously all of our listeners have probably been involved in litigation of some kind, so I think folks are going to be familiar with your basic discovery procedures and all those types of things. But specific to active assailant, Reggie, is there anything, once the litigation actually ensues, anything unique or specific based on your experience

that our folks should be watching out for as they go through that process?

### **Reggie Roberts:**

Yes, Dave. First, to restate the basics, make sure you have a protective order in place before producing any confidential documents. That is critical. Don't start turning over documents until you have a signed protective order. Secondly, you want to make sure that any corporate representatives in the case have the proper training and expertise and that they are adequately prepared for depositions and their participation in the trial. The last thing you want to have is a corporate representative who testifies under oath and does not do so well about your policies, your procedures, or what was done in response to or in order to prevent the traumatic event that has occurred. So make sure you have trained, talented corporate representatives that deal with these types of situations. And if they're not, they need to spend time with in-house counsel and outside counsel.

And also there are some other things to do like during depositions for your outside counsel, guard against hypothetical questions and make sure that outside council is familiar with and has countermeasures for reptile theory presentation style by plaintiff's lawyers.

### **Dave Rapp:**

Absolutely. So the last thing I just want to touch on real quick, because most of the folks listening are going to be insurance people, risk managers. Obviously, when a claim such as an active assailant or other mass casualty event occurs, insurance is going to feature prominently in that consideration. Just last topic for our listeners today, Reggie, in terms of any practical considerations or advice in terms of working with insurance companies as you defend the incident, any particular thoughts based on your experience that you can share with our listeners?

### **Reggie Roberts:**

Most often you want to survey the landscape to see if there are any other companies, individuals or insurances that might share some stake in the claim and might be able to participate in both defending against or paying to resolve a claim that might arise. And that starts with you, the property owner, because sometimes there are complex business relationships and you need to decide internally whether, if something

happens at one of your establishments, so say you rent out particular spaces and something happens at that establishment, do you want to sue that establishment or cross-claim against that establishment in order to get their insurance or their pocketbook on board with defending against the claims or paying any judgment?

Or is the business relationship one that you don't want to sue them, so you need to advise your counsel early on that they're not going to be a target for possible cross claims. That impacts your own insured's responsibility, and you need to make sure that everybody's on board with that as early as possible. And then you just have to do the basic things upfront about making sure that your information is lined up and ready to go to put on your defense so that you reduce the risk to yourself, to your insurance companies, or to your co-defendants who you also might have business relationships with.

### **Dave Rapp:**

Reggie, that's so true. And I just want to thank you so much for your insights and your experience. I'm sure listeners found your comments really, really valuable. Folks, that concludes our final podcast on the topic of active assailant.

Please mark your calendars for Thursday, January 26 at 2pm eastern time. To round out our active assailant conversation, Marsh will be hosting a webcast where I'll be joined by all of the guests featured on our podcast episodes. We'll be discussing available risk assessment tools and demonstrating some emerging active assailant and mass casualty scenario modeling. We'll also share some options the insurance market has developed to address this risk. You can find webcast registration information in the show notes.

Thanks for joining us. If you have comment or questions for me, please send me a note at [dave.rapp@marsh.com](mailto:dave.rapp@marsh.com).

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