

**Crime Doesn't Pay—
and Neither Should You: Crime Proof Your Leases**

In the Winter 2008 *Petrogram*, we discussed liability exposure on an owner of a retail outlet that leases the premises to a dealer where one of the dealer's customers slips and falls. In that article, we explored that if an owner does not adequately protect itself in a written lease it could find itself defending a lawsuit because the dealer failed to adequately maintain the premises. Are the rules the same if a third party enters onto the premises and commits a crime that injures one of the dealer's customers?

Consider this example. You lease a retail outlet to a dealer under the terms of a written lease and supply agreement. You do not trust the dealer to properly maintain the exterior of the premises to the standards required by your brand supplier. As such, you charge the dealer a maintenance fee and retain the services of a maintenance company to maintain the exterior areas of the premises. One day you get a call from the dealer informing you that one of its customers was shot in the parking lot during a robbery of the convenience store. The dealer tells you that you are responsible for the injuries because his cousin, who is a lawyer in Wyoming, told him that you failed to provide adequate security at the premises. There had never been any prior criminal activity at the premises or in the vicinity of the premises. Further, you think to yourself that the dealer is crazy because you did not have any employees at the premises, and you certainly did not agree to provide security although the written lease is silent with regard to security. A month later you get served with a lawsuit from the victim's family alleging that you failed to provide adequate security to protect the victim.

Under Florida law, a landowner has no duty to protect an invitee on the premises from a criminal attack by a person over whom the landowner has no control unless the attack is reasonably foreseeable. Whether you have legal exposure for failing to provide adequate security is going to depend on the language in your lease and supply agreement, and whether the criminal attack was foreseeable. Specifically, under the terms of the lease (or through your actions), have you retained substantial control (for a more detailed discussion on what constitutes "substantial control" see the article in the Winter 2008 *Petrogram* magazine entitled "Caution! Leases Slippery When Unclear") of the premises or a portion of the premises sufficient to create a duty to protect invitees from foreseeable criminal conduct?

Generally, the most critical element in a negligent security lawsuit is whether the criminal conduct was foreseeable because protection is only required against those risks that are foreseeable. When determining whether a criminal act was foreseeable a court will look at the facts of each situation to make its determination. However, courts have consistently relied upon certain facts as evidence of foreseeability. This evidence includes prior criminal activity at the premises, prior criminal activity in the vicinity of the premises, and an owner/operator's notice of specific threats.

Based on the above, do you have legal exposure for failing to provide adequate security under the above example? Even though you did not have any employees on the premises and you did not agree to provide security, you would likely be found to have “substantial control” over the exterior of the premises because you agreed to retain a maintenance company to maintain such areas. The shooting took place in the parking lot. Your “substantial control” over the parking lot would create a duty on you to protect invitees from foreseeable criminal conduct. As such, whether you have legal exposure will turn on whether the criminal activity was foreseeable. In the above example, you will likely dodge a bullet (no pun intended) because there were no prior crimes at the premises or in the vicinity of the premises. However, because you did not adequately protect yourself on the front end you have now incurred a significant amount of costs defending the lawsuit brought against you.

Fortunately, as with premises liability cases, you have the ability to avoid liability in negligent security cases by doing the following:

- ALWAYS have a written lease.
- Include language in your written lease that the dealer is responsible to provide all security at the premises, and is required to comply with all applicable provisions of the Convenience Business Security Act. (Significantly, an owner or operator that substantially implements the applicable security measures under the Convenience Business Security Act gains a presumption against liability in connection with criminal acts of third parties on the premises.)
- Include language in your written leases that the dealer is responsible to perform all maintenance and repairs at the premises (both inside and outside the building).
- Include language in your written leases specifically stating that the dealer is an independent contractor and is not your agent, and that you have no control over the day-to-day operations of the business.
- Include an indemnity provision in your written leases requiring the dealer to indemnify you from any claims brought by a third party relating to the dealer’s operation of its business.
- Require the dealer to carry sufficient general liability insurance that names you as an additional insured, and require the dealer to give you proof that such insurance is in effect.

Lawsuits based on failure to provide adequate security can be high profile, high dollar cases that cost a significant amount of money to defend. As such, take the time on the front end to review your leases and make sure you are doing everything you can to protect yourself against claims for failure to provide adequate security. If you have any questions relating to protecting yourself against such claims or relating to other petroleum matters, feel free to call us on the Petroleum Hotline (800-226-7091).

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