

CRIME IN YOUR COMMUNITY: LEGAL LIABILITY FOR THE ASSOCIATION?

By

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Crime affects everyone. The most recent Federal Bureau of Investigation's Uniform Crime Report shows a slight increase in violent and property crimes across the nation. Crime will invariably happen – the only question is when and where. What if it happens in your neighborhood? Can the owners' association be held liable? The answer depends on the extent that the association assumes a duty to provide security.

Liability Must Be Based Upon a Duty to Provide Security

In Texas, the general rule is there is no duty to protect a person from the criminal acts of a third person. The legal theory that provides an exception to this general rule is premises liability, which is a type of negligence claim. If a legal duty to provide security exists in the premises liability context, then a breach of that duty can serve as a basis for tort liability for foreseeable criminal activity.

The Texas Supreme Court has declined to squarely hold that an owners' association automatically owes such a duty to owners, although it has acknowledged that courts in other states have declared the existence of a duty (Florida, for example, has applied landlord duty to owners' associations to provide protection to tenants from foreseeable criminal activity, and California has applied landlord duty to an association for crimes occurring on the common areas over which the associations have control). In contrast, to be liable in Texas for a criminal act of another person, an association



has to have “specific control over the safety and security of the premises [where the crime occurred].” In the 1995 case of *Centeq Realty, Inc. v. Siegler*, 899 S.W.2d 195, the Texas Supreme Court ruled in favor of a corporation with majority voting rights to elect the board of directors of a condominium association because it did not control the security of the parking garage where the plaintiff was attacked. The court determined that a “general right of control” over the premises is not enough. *Id. at 199.*

If a duty to provide security is established, the association can be liable only if causation is found – i.e., did the breach of the duty to provide security cause the plaintiff to suffer damages from a third party crime? In a recent unpublished California opinion, *Girardi v. San Rafael Homeowners Association*, owners sued the association alleging it breached a duty to protect the owner from theft after two burglaries took place in their home. The court found that the association did not have a duty to protect the owners’ property from theft. The court further determined that even if such a duty existed, the plaintiffs failed to present evidence that breach of that duty actually caused the burglaries to take place. The court noted that the plaintiffs could not prove who had committed the burglaries, and the testimony of the plaintiffs’ security expert did not provide a factual basis to support the opinion that the lack of repaired street lighting and secured gates, and the failure to hire security guards and install surveillance cameras, contributed to the burglaries.

What if an association does provide a security function and thereby has a clear duty? An association can assume a duty to provide security either expressly (in their governing documents) or implied, (by acting in a manner that provides security measures). The provision of security to owners comes with a legal duty of care in providing security. Under these circumstances, an association could be liable for foreseeable crimes. To determine if a crime was foreseeable to the association, a court will consider

evidence of whether prior crimes had occurred in or near the neighborhood, the frequency and timing of the prior crimes, whether the prior crimes were similar, and if the association knew of the prior crimes (or should have known).

What can an association do to minimize the potential for liability?

Best Practice: do not create a duty to provide security if one does not already exist. If the association truly does not provide security measures, do not state anything to the contrary. If the association provides an employee or agent at the gate or entrance that checks the identification of persons seeking admission, do not refer to them as a “security guard.” Use terms such as “gate monitor” instead. Advise owners that the association does not provide security and they are responsible for their own safety. Maintain proper upkeep of common areas by appropriate light bulb replacement, and periodic checks of locks and gate function. Communicate any knowledge of crime in the area to owners, and advise them to take precautions. Think twice before endorsing a neighborhood watch program.

Neighborhood Watch Programs Are A Potential Basis For Liability

A Neighborhood Watch program can create liability for an association. Most people are aware of the tragic Trayvon Martin fatal shooting that took place in Florida on February 26, 2012. The volunteer captain of the neighborhood watch for The Retreat at Twin Lakes Homeowners’ Association, George Zimmerman, shot Martin allegedly in self-defense, and will stand trial for second-degree murder. Since the shooting, there has been much discussion about the homeowners’ association’s potential liability for the incident. A settlement was announced in April 2013 between the parents of Trayvon Martin, the Twin Lakes Association and its insurance company. According to the *Orlando Sentinel*, although the amount of the settlement is confidential, it is expected to have been over one million dollars.

Issues that likely played a factor in the settlement include whether the Twin Lakes Association crossed the line and stepped into a law enforcement role by appointing the volunteer to provide a security function, whether the Association adequately screened volunteers before placing them in the neighborhood watch program, and how well the Association monitored volunteer activities. Did the Board run a background check looking for prior violent behavior by the volunteer to determine if he was fit for the neighborhood watch program? Did they know their volunteer carried a gun? Negligent training or supervision of volunteers can create liability. Traditional neighborhood watch programs instruct volunteers to report suspicious activity to local police authorities. Actual pursuit of any potential criminal should be left to the police authorities, not the volunteer.

If an association creates or runs a neighborhood watch program it could serve as a basis for a duty to provide security. Neighborhood watch programs, sponsored by the National Sheriff’s Association, are set up in conjunction with local law enforcement. If your neighborhood does not have one, consider carefully whether to start such a program. Communicate to owners that any neighborhood watch program created is maintained by owners in conjunction with local authorities and is not affiliated with the association. An association should clearly communicate to owners that the neighborhood watch program is merely an awareness mechanism, and not a provision of security to the owners.

If your neighborhood already has a watch program that has been endorsed by the board of directors, consult your insurance provider to confirm that coverage is available and the scope of such coverage. Check the governing documents to ensure the board has the authority to create and maintain such a program. Any existing neighborhood watch program that is already affiliated with an association should have proper procedures to select, train and monitor volunteers. It is incumbent upon associations to instruct their

neighborhood watch volunteers on the proper course of action. Having a committee charter setting forth the parameters could help protect an association from potential liability.

The procedures should expressly prohibit volunteers from carrying a weapon. Although Texas, like many states that have "Castle Doctrine" statutes or "Stand Your Ground" laws, currently does not impose a duty to retreat, volunteers should be directed to not engage or pursue a potential criminal. If a volunteer observes suspicious activity, they should only contact law enforcement authorities.

"Castle Doctrine" statutes vary in degree as to what protection is afforded a person from liability for the use of deadly force in response to an assault in the person's home or vehicle. "Stand Your Ground" laws have broader application and generally apply when the person is in a place where they have a right to be. In Texas, the statute (found in Chapter 9 of the Texas Penal Code) currently provides that there is no duty to retreat and the person may use lethal force if the person reasonably believes the use of force is necessary for protection against an attack in a place where they have a right to be. Many states have pending bills to weaken "Castle Doctrine" and "Stand Your Ground" statutes in the wake of the Trayvon Martin shooting death. In Texas, a bill is pending that proposes to modify the Texas "Castle Doctrine/Stand Your Ground" statute to remove the presumption that the person's use of force was reasonable for protection, and to restrict the "no duty to retreat"

to one's own habitation for the justified use of deadly force. Regardless of the wording of the "Castle Doctrine" statute, it will not protect an association from civil liability if a volunteer pursues and injures another person through the use of deadly force.

Minimize Association Exposure Through Insurance

Associations can maximize protection with strong insurance coverage, including a commercial general liability policy, directors and officers' liability protection, and umbrella coverage. With the rise of financial crimes against associations through embezzlement and fraud, a fidelity bond is a good idea and may be required by the governing documents. Carry the fidelity bond in the name of the association with a managing agent rider that extends coverage to your management company. Consult an insurance professional who specializes in community associations to determine the best options for your association. Discuss whether exclusions and endorsements could apply to leave the association exposed. The insurer for the Retreat at Twin Lakes Association contested coverage for the shooting death of Trayvon Martin through a declaratory judgment lawsuit against the association, which sought a ruling that the policy's exclusion for bodily injury (including death) applied. The lawsuit was dropped in November 2012, however, and the party paying the settlement proceeds from the announced settlement with Trayvon Martin's parents remains confidential.

In conjunction with an insurance assessment, an annual legal audit with your attorney that includes an association risk management plan can go a long way to reduce exposure. Be sure association board members are aware of whether the association provides security and the importance of the distinction. If the association does not provide security, continuously communicate that fact to the owners. Follow your risk management plan. If a crime occurs in surrounding areas, notify the owners of the specifics and advise them to take extra precautions. In the unfortunate event that a crime does happen in your neighborhood, immediately contact law enforcement, your insurance carrier and your attorney.

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