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A CHANGING WORLD: A COMMERCIAL LANDLORD'S DUTY TO PREVENT TERRORIST ATTACKS IN POST- SEPTEMBER 11TH AMERICA

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I. A CHANGING WORLD

Whether a commercial landlord has a general duty to provide premises that are safe and secure from third-party criminal acts varies greatly by jurisdiction.¹ At present, the question of whether the duty exists is often answered on a case-by-case basis, hinging on factors such as whether the landlord should have reasonably foreseen the third-party criminal act, whether the act occurred in a common area under the landlord's control, or whether the landlord assumed a duty to provide security or other measures to make the premises safe for its tenants.² In addition to this uncertainty, the attacks on the World Trade Center and the Pentagon on September 11, 2001 compel a commercial landlord to address potential liability for another potential duty to its tenants: providing premises that are safe and secure from terrorist acts. This article will demonstrate that the commercial landlord's duty to its tenants concerning third-party criminal attacks on the premises will con-

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1. See generally B.A. Glesner, *Landlords as Cops: Torts, Nuisance & Forfeiture Standards Imposing Liability on Landlords for Crime on the Premises*, 42 CASE W. RES. L. REV. 679 (1992) (exploring the landlord's expanding common law duty to protect tenants from third-party crimes and noting responses from residential and commercial landlords).

2. See cases cited *infra* note 6 (providing examples of states that impose no general duty on landlord). See also cases cited *infra* note 7 (providing examples of states that impose a duty under circumstances charging landlord with knowledge that the criminal act and resulting injury were foreseeable) and cases cited *infra* note 10 (providing examples of states that impose duty only where landlord gratuitously or contractually undertakes duty to provide security for premises).

tinue to evolve, and likely will include some duty to protect against terrorist attacks.

The issues underlying a commercial landlord's assessment of liability for third-party terrorist acts are in some ways similar to, and in others quite different from, the issues that the landlord faces in providing security against conventional crimes like robberies and assaults. That courts have not yet addressed a commercial landlord's duty to protect against terrorist attacks further complicates the landlord's situation.³ However, a duty to protect against terrorist attacks that involve, for example, explosive, chemical or biological weapons, might evolve from the landlord's present duty to prevent foreseeable crimes on the premises.⁴ This evolving duty to secure against terrorist attacks might arise from three major sources: 1) the foreseeability of a terrorist attack on a particular building; 2) a landlord's assumption of liability by voluntarily undertaking new responsibilities to provide security against terrorist attacks; or 3) a duty imposed by local or state legislation.⁵

This article first analyzes the present law controlling a landlord's pre-September 11th duty to secure premises against third-party criminal attacks. This article then concludes that the principles supporting the commercial landlord's present duty will likely form the basis for a landlord's post-September 11th duty to protect against terrorist attacks.

II. PRE-SEPTEMBER 11, 2001 DUTY

A. *The Evolution of a Landlord's Duty to Provide Security Against Third-Party Criminal Acts*

Historically, a commercial landlord had no legal duty to secure against third-party criminal acts unless it specifically assumed the duty or a statute or regulation imposed the duty upon the landlord.⁶ Now, the duty to protect against third-party crimi-

3. As of this writing, no reported case has analyzed whether a commercial landlord's duty to secure premises from third-party criminal attacks extends to protection against terrorist attacks.

4. See Glesner, *supra* note 1, at 702 (stating most courts analyze landlord liability for third-party criminal activities under general negligence theory). See also *id.* at 704 (asserting foreseeability requires landlord have notice of risk of crime and of a condition of the premises that enhances the risk).

5. See *id.* at 689-708 (discussing landlord's duty to protect tenants has arisen by a variety of theories). The theories include: (1) control of the common premises; (2) voluntary assumption of a duty to provide security; (3) a duty inherent in the landlord-tenant relationship; (4) special circumstances; and (5) state or local legislation. *Id.* at 689.

6. See, e.g., *Bartley v. Sweetser*, 890 S.W.2d 250, 251 (Ark. 1994) (stating general rule in Arkansas since 1932 has been that landlord has no duty to protect tenant or social guest against criminal acts absent statutory or contrac-

nal acts has been found, in some form, in a number of states.⁷ This

tual obligation); *Rowe v. State Bank of Lombard*, 531 N.E.2d 1358, 1367 (Ill. 1998) (stating landlord-tenant relationship is not a "special relationship" imposing duty on landlord to protect against criminal acts of others); *Shea v. Pres. Chi., Inc.*, 565 N.E.2d 20, 23 (Ill. App. Ct. 1991) (reiterating that landlord has no duty to protect tenants from third-party criminal attacks); *Spitzak v. Hylands, Inc.*, 500 N.W.2d 154, 156-57 (Minn. App. 1993) (finding absence of special relationship that traditionally would impose on landlord duty to control tenants from criminal acts of third parties); *Fontanez v. N.Y. Cty. Hous. Auth.*, 638 N.Y.S.2d 77, 78 (N.Y. App. Div. 1996) (reiterating landlord has no duty to protect against third-party criminal attacks); *Cordes v. Wood*, 918 P.2d 76, 78 (Okla. 1996) (reciting that landlord's duty does not include obligation to insure against criminal attack); *Walther v. KPKA Meadowlands Ltd. P'ship*, 581 N.W.2d 527, 535 (S.D. 1998) (holding no special relationship exists between landlord and tenant to create duty to protect against unlawful acts of a third person); *Centeq Realty v. Siegler*, 899 S.W.2d 195, 197 (Tex. 1995) (implying that absent a landlord's control over security and safety of premises, no duty is owed to exercise ordinary care to prevent risk of harm of criminal acts from third parties); *Krier v. Safeway Stores, Inc.*, 943 P.2d 405, 410 (Wyo. 1997) (noting that absent control of the premises, landlord has no duty to secure premises against third-party attacks); *Glesner*, *supra* note 1, at 689 n.36, 690 n.41 (citing authorities). See also W. PAGE KEETON ET AL., *PROSSER AND KEETON ON THE LAW OF TORTS* 375 (5th ed. 1984) (noting the law's consistent refusal to impose duty to rescue); Raymond H. Harkrider, *Tort Liability of a Landlord*, 26 MICH. L. REV. 260 (1928) (explaining landlord-tenant law in 1928 followed general precepts of caveat emptor). See generally Tracy A. Bateman and Susan Thomas, *Landlord's Liability for Failure to Protect Tenant from Criminal Acts of Third Person*, 43 A.L.R.5th 207, 253-57 (1996) (collecting cases that held, explicitly or implicitly, that the mere relationship of landlord and tenant does not impose upon landlord a duty to protect tenant against criminal activities of third persons. Bateman and Thomas cite cases from Arkansas, Connecticut, Hawaii, Illinois, Kansas, Kentucky, Louisiana, Massachusetts, Minnesota, Missouri, New Hampshire, New Jersey, New York, South Carolina, Texas and Virginia that hold a landlord does not have a duty to protect tenants against criminal activities of third persons. Bateman & Thomas, *supra*, at 253-57.

7. See *Kline v. 1500 Mass. Ave. Apartment Corp.*, 439 F.2d 477, 481 (D.C. 1970) (extending landlord's duty to provide premises free of dangerous conditions to include duty to protect against foreseeable third-party criminal acts); *Sharon P. v. Arman, Ltd.*, 989 P.2d 121, 125 (Cal. 1999) (stating "it is well established" in California that landowner's general duty to maintain includes duty to take reasonable measures to secure common areas against foreseeable criminal acts that are likely to occur in absence of those measures); *L.K. v. Water's Edge Ass'n*, 532 So. 2d 1097, 1098-99 (Fla. Dist. Ct. App. 1988) (reversing lower court for not instructing jury that as matter of law landlord was obliged to protect tenant from reasonably foreseeable criminal conduct); *Holland v. Liedel*, 494 N.W.2d 772, 774 (Mich. App. 1992) (stating landlord has duty to protect tenant from foreseeable third-party criminal acts in common areas on landlord's premises); *Foster v. Winston-Salem Joint Venture*, 281 S.E.2d 36, 39 (N.C. 1981) (restating that landlord's duty to safeguard business invitees from third-party criminal acts is determined by foreseeability); *Sciascia v. Riverpark Apartments*, 444 N.E.2d 40, 42 (Ohio App. 1981) (holding that, generally, where lease is silent on landlord's obligation to provide security on premises, "tenant may expect only" for landlord to take reasonable

evolution resulted from courts' reliance upon various theories,⁸ such as the common law duty to take reasonable steps to prevent foreseeable crimes,⁹ and the landlord's assumption of a duty to provide safe premises.¹⁰

measures); *Zang v. Leonard*, 643 S.W.2d 657, 664 (Tenn. App. 1987) (holding landlord liable for tenant's injury by third party where injury was made possible by landlord's failure to exercise care in the circumstances). *See generally*, Bateman & Thomas, *supra* note 6, at 257-62 (collecting cases that recognized, generally or under the particular circumstances, that landlord has duty to exercise reasonable care to protect tenants against foreseeable third-party criminal acts, and citing cases from California, District of Columbia, Florida, Georgia, Idaho, Kentucky, Nebraska, New York, North Carolina, Pennsylvania and Tennessee); *id.* at 262-66 (collecting cases that held landlord has duty to protect against foreseeable third-party crime only where act is based on physical defect of the premises, and citing cases from Alabama, Illinois, New Hampshire and New York); *and* Bateman & Thomas, *supra*, note 6., at 266-69 (collecting cases that recognized generally or under particular circumstances that landlord has duty to exercise reasonable care to protect tenants against foreseeable third-party criminal acts in common areas or areas over which landlord retained control, and citing cases from District of Columbia, Georgia, Illinois, Massachusetts, Michigan, New Mexico, New York and Ohio).

8. *See* Glesner, *supra* note 1, at 689-704 (discussing various theories of landlord liability for third-party criminal acts).

9. *See, e.g.*, *Saelzler v. Advanced Group 400*, 23 P.3d 1123, 1149 (Cal. 2001) (summarizing analysis under general negligence principles and focusing on whether landlord's failure to provide adequate security was proximate cause of tenant's assault by unknown assistants); *Morgan v. 253 E. Del. Condo. Ass'n*, 595 N.E.2d 36, 38 (Ill. App. Ct. 1992) (stating general rule in Illinois that there is no duty to protect others from third-party criminal act, and noting exception to general rule that duty exists where parties have special relationship and criminal act is reasonably foreseeable); *Nero v. Kan. State Univ.*, 861 P.2d 768, 780 (Kan. 1993) (reiterating that university owes student tenants same duty to exercise due care for their protection as a private landowner owes its tenants, and only owes duty to protect student-tenants from third-party criminal attack if attack is reasonably foreseeable); *Yuzefovsky v. St. John's Wood Apartments*, 540 S.E.2d 134, 141 (Va. 2001) (adopting standard of care for business owner to invitee for landlord-tenant relationship, requiring the landlord to take measures to protect tenant against criminal assault where landlord knows criminal assaults occur or are about to occur on premises and such assaults indicate an imminent probability of harm to tenant). *See* Glesner, *supra* note 1, at 682 (stating foreseeability as one ground for holding landlord liable for tenant's injury from third-party criminal acts).

10. *See, e.g.*, *Sharp v. W.H. Moore, Inc.*, 796 P.2d 506, 509 (Idaho 1990) (stating landlord who installs security system may be liable if system fails because of landlord's negligence); *Pippin v. Chi. Hous. Auth.*, 399 N.E.2d 596, 599-600 (Ill. 1979) (concluding landlord who hired independent security firm to provide protective services for premises did not owe duty to protect tenants from third-party attacks but did assume duty to exercise reasonable care in hiring security firm); *Wright v. St. Louis Mkt., Inc.*, 43 S.W.3d 404, 410 n.5 (Mo. App. E.D. 2001) (concluding landlord's provision of security for entrance, exit and common areas of premises implies duty to protect tenant from criminal attack); *Walls v. Oxford Mgmt. Co.*, 633 A.2d 103, 106-07 (N.H. 1993)

1. *The Common-Law Duty to Provide Safe Premises*

Generally, a landlord has a duty to protect tenants and others from injuries in common areas, such as stairways, entrances and lobbies.¹¹ A landlord also has a duty to protect tenants from injuries caused by common facilities, such as utility lines, heating, ventilation and air conditioning (HVAC) systems, and plumbing systems, that are under the landlord's control.¹² This duty extends to entire common facilities, even those that are located in entirely demised premises.¹³ When injuries result from improper maintenance of these common areas or facilities, a landlord breaches its duty and is liable for negligence.¹⁴ Although in the past the law distinguished a landlord's liability for negligence by the class of plaintiff (for example, by inquiring whether the aggrieved party

(stating landlord who undertakes gratuitously or contractually to provide security has duty to act with reasonable care); *Sherman v. Concourse Realty Corp.*, 365 N.Y.S.2d 239, 243 (N.Y. App. Div. 1975) (concluding landlord assumed a "limited duty of protection" by installing bell and buzzer system for additional rent and which system it allowed to fall into disrepair); *Feld v. Merriam*, 485 A.2d 742, 747 (Pa. 1984) (stating landlord may voluntarily incur duty if it provides security program to attract or keep tenants). *But see* *Hall v. Rental Mgmt., Inc.*, 913 S.W.2d 293, 297 (Ark. 1996) (holding security provisions taken by landlord "[did] not rise to such a level that [landlord] h[ad] assumed a duty to protect its tenants from criminal attacks by third parties"); *Good v. St. Stephens United Methodist Ch.*, 494 S.E.2d 827, 833 (S.C. App. 1997) (concluding apartment complex owner did not assume duty to protect guests from third-party attacks on premises by providing security which court found was intended solely for protection of tenants). *See* Glesner, *supra* note 1, at 695-99 (discussing Restatement (Second) of Torts § 323 and its application in context of landlord's voluntary assumption of duty to provide security). *See generally*, Bateman & Thomas, *supra* note 6, at 277-85 (collecting cases that recognized that even if landlord has no general duty to protect tenants from third-party criminal acts, it will become liable if it undertakes to provide security measures and does so negligently, and citing cases from Alabama, Arkansas, California, Idaho, Illinois, Indiana, Louisiana, Maryland, Michigan, New Hampshire, New York, Ohio, Oklahoma, Pennsylvania and South Carolina).

11. *See* MILTON R. FRIEDMAN, *FRIEDMAN ON LEASES* § 10.103a, at 633 & n.1 (4th ed. 1997) (stating landlord owes tenant, and tenant's family, employees and invitees, a duty to exercise reasonable care to keep premises in safe condition and citing cases so holding).

12. *Id.* at 636.

13. *See, e.g.*, *Kendall v. Gore Props., Inc.*, 236 F.2d 673 (D.C. Cir. 1956) (holding landlord liable for murder of tenant); *Ten Assocs. v. McCutchen*, 398 So. 2d 860 (Fla. App. 1981) (holding landlord liable for rape of tenant in tenant's apartment); *Duncavage v. Allen*, 497 N.E.2d 433 (Ill. App. Ct. 1986) (holding landlord liable for rape and murder of tenant in tenant's apartment).

14. *See* *Niman v. Plaza House, Inc.*, 471 S.W.2d 207-08 & 211 (Mo. 1971) (holding residential landlord liable for failing to maintain a heating system). *See also* FRIEDMAN, *supra* note 11, at 652 (stating if landlord is negligent in maintaining common areas, it is liable even "though resultant injuries occurred within wholly demised premises").

was an invitee, a licensee or a guest), the law increasingly blurs those distinctions.¹⁵ The majority rule now appears to be that a landlord must exercise reasonable care to prevent injury to anyone who may foreseeably occupy the landlord's leased space.¹⁶

2. *The Modern Trend? A Duty to Secure Against Third-Party Criminal Acts*

While it has a duty to provide safe and secure common areas, a landlord historically has not had the obligation to prevent third-party criminal acts in those common areas.¹⁷ More recently, however, many jurisdictions have imposed a common-law duty upon a landlord to take measures to prevent foreseeable third-party criminal acts within both common areas and leased premises.¹⁸ This changing body of law is complicated by the case-by-case manner in which courts, with the benefit of hindsight, impose duties based on the foreseeability of a crime in the common area or leased premises.¹⁹

The law providing for landlord liability for third-party criminal acts has evolved at a remarkable rate, given that as recently as thirty years ago courts did not recognize a landlord's duty to protect tenants from foreseeable third-party criminal acts. In an opinion reflective of the law in 1962, the New Jersey Supreme Court stated:

Everyone can foresee the commission of crime virtually anywhere and at any time. If foreseeability itself gave rise to a duty to provide "police" protection for others, every residential curtilage, every shop, every store, every manufacturing plant would have to be patrolled by the private arm of the owner Of course, none of this is at all palatable.²⁰

The law began to evolve in 1970. In *Kline v. 1500 Massachusetts Avenue Apartment Corporation*, the U.S. Court of Appeals for the D.C. Circuit extended the landlord's duty to provide common areas free from dangerous conditions to include protection from foreseeable third-party criminal acts.²¹ The court held that the

15. FRIEDMAN, *supra* note 11, at 639.

16. *Id.* at 639-40.

17. See *Kline v. 1500 Mass. Ave. Apartment Corp.*, 439 F.2d 477, 481 (D.C. Cir. 1970) (recognizing landlords traditionally were required to provide their tenants and guests with safe common areas but were not required to prevent third-party criminal acts in those areas).

18. FRIEDMAN, *supra* note 11, at 644.

19. The cases cited *supra* notes 6, 7, 9 and 10 demonstrate the fact-intensive analysis in which courts often engage to determine landlord liability for third-party criminal acts on its premises.

20. *Goldberg v. Hous. Auth. of Newark*, 186 A.2d 291, 293 (N.J. 1962).

21. *Kline*, 439 F.2d at 483-84.

breach of that duty should be determined in light of "reasonable care in all the circumstances."²² But, the court emphasized that particular landlord-tenant situations and evidence of custom among landlords of the same building type "may play a significant role in determining if this standard has been met."²³ The *Kline* court found that the defendant landlord had notice of several similar crimes in the common areas of the building but had ceased to consistently staff the security desk and provide other security measures.²⁴ In other words, the court concluded that the landlord should have foreseen the risk of crime in the common areas.²⁵ Foreseeability quickly wound its way throughout the cases as the law in this area developed.²⁶

In the thirty years since *Kline*, a number of jurisdictions have imposed upon landlords a duty to protect against foreseeable third-party crimes.²⁷ Further, *Kline's* relatively narrow holding has been expanded to include both crimes committed in common areas and crimes committed wholly within demised premises.²⁸ In addition, while *Kline* originally imposed this duty upon residential landlords, the law has since expanded *Kline's* holding to include commercial landlords.²⁹

The rationale by which courts impose the duty of protection varies by jurisdiction. Several jurisdictions follow *Kline's* rationale and base the duty to protect on the landlord's exclusive control of the common areas.³⁰ Alternately, some courts impose the duty because the landlords have voluntarily assumed it.³¹ These courts

22. *Id.* at 485-86.

23. *Id.* at 486 & n.21.

24. *Id.* at 479 n.2 (noting landlord stipulated to these allegations in plaintiff's complaint and never challenged allegations of frequency of assaults and other crimes against its tenants on the premises).

25. *See Kline* at 481 (stating, "it does not seem unfair to place upon the landlord a duty to take those steps which are within his power to minimize the predictable risk to his tenants") (emphasis added).

26. *See* cases cited *supra* note 9 (collecting cases using foreseeability as essential element in determining landlord liability for third-party crimes on its premises). *But see* Glesner, *supra* note 1, at 684-95 and cited authorities therein (outlining the slow development of this area of law and the cases utilizing the approach).

27. *See* FRIEDMAN, *supra* note 11, at 644 & n.45 and cases cited therein (stating the development of implied warranty of habitability has led to holdings that landlords have the duty to protect tenants from foreseeable crimes in common areas and collecting cases supporting and contradicting this proposition).

28. FRIEDMAN, *supra* note 11, at 644-47.

29. *Id.* at 650-51.

30. *See* cases cited *supra* notes 13 & 14 (collecting cases using control as important factor in determining whether landlord is liable for third-party criminal acts on premises); Glesner, *supra* note 1, at 689-90.

31. *See* cases cited *supra* note 10 (noting cases recognizing liability where

apply the principles of the cases interpreting "defective conditions" on the premises to cases involving third-party criminal acts.³² Under the "defective conditions" class of cases, a landlord is liable for a tenant's injuries resulting from defects in the common areas.³³ Other jurisdictions, while acknowledging that the landlord-tenant relationship is not a "special relationship which creates a duty of protection on landlords," impose this duty if "special circumstances," such as prior similar criminal acts, are present.³⁴ Finally, other courts conclude that a landlord's failure to comply with specific statutory requirements is evidence of the landlord's failure to perform a duty.³⁵ In sum, courts from most jurisdictions have imposed on landlords some duty to protect against third-party criminal acts.

In this connection, however, it is important to note that courts have also found that a landlord is not an insurer of its premises against third-party criminal acts.³⁶ If the duty to provide safe and secure premises exists in the jurisdiction, a landlord must only take reasonable steps to protect its tenants against foreseeable third-party criminal acts.³⁷ Absent a statutory or contractual obligation to assume the duty, if the landlord takes these reasonable steps, it will not be liable for the tenant's injuries resulting from third-party criminal acts on the premises.³⁸ However, a landlord

landlord voluntarily, either gratuitously or for consideration, undertook provision of security on premises); Glesner, *supra* note 1, at 689-90.

32. See Glesner, *supra* note 1, at 692 (stating no actionable defective condition exists where landlord "fails to provide greater than customary security measures" or, assuming an actionable defect is proven, where criminal act does not occur in an area where landlord "retains a superior ability to control").

33. See, e.g., Prescott Marsh v. Bliss Realty, Inc., 195 A.2d 331, 333 (R.I. 1963) (citing proposition that landlord is liable in tort where proximate cause of tenant's injury arises out of latent defect known to landlord at time of letting and not made known to tenant).

34. See Glesner, *supra* note 1, at 689 (discussing landlord liability arising out of "special circumstances").

35. See *id.* at 700-02 (discussing landlord's statutory liability).

36. See, e.g., Faheen v. Cty. Parking Corp., 734 S.W.2d 270, 273 (Mo. App. 1987) (stating landlord not ordinarily under duty to exercise care against third-party criminal acts).

37. See Faheen, 734 S.W.2d at 273 (discussing three elements of Missouri's violent crime exception to general rule that party has no duty to protect another from a deliberate, third-party criminal attack). This exception requires (1) a "special relationship;" (2) sufficiently numerous, prior specific violent crimes on the premises to put the party on notice of a likelihood that third parties will endanger the safety of the party's invitees; and (3) the prior incidents would lead a reasonable person to take precautions to protect invitees from that type of activity. *Id.*

38. See, e.g., Faheen, 734 S.W.2d at 274 (listing requirements of notice, specificity, probability, public policy, and general fairness).

cannot look to contract law for relief from liability for its negligence. Exculpatory clauses in leases purporting to excuse the landlord's negligent performance of the duty (to provide adequate security, for example) will not relieve a landlord of liability for its tenants' injuries that result from third-party criminal acts. The acrimony toward exculpatory clauses in this area derives from the principle that a party's attempt to excuse itself from the consequences of its own negligence is void as a violation of public policy.³⁹

Foreseeability of the third-party criminal act is arguably the key element in determining a landlord's liability to tenants for resulting injuries. In New York, for example, the landlord's duty extends to taking "minimal precautions" to protect its tenants from foreseeable harm.⁴⁰

Georgia makes foreseeability an element of the landlord's duty to protect against third-party criminal acts, but bases foreseeability on statute.⁴¹ Thus in Georgia, where an unforeseeable third-party criminal act injures a tenant, the criminal act—and not the landlord's failure to provide adequate security — is the proximate cause of the tenant's injury and the landlord is not liable. On the other hand, the landlord's failure to provide adequate security will be the proximate cause of injuries caused by an intervening criminal act if "by ordinary prudence the [landlord] could have foreseen that some injury or injurious consequence might have been anticipated from the act."⁴² Although states that follow

39. See *Cain v. Vontz*, 703 F.2d 1279, 1281 (11th Cir. 1983) (applying Georgia statute declaring exculpatory clauses in residential leases unenforceable).

40. *Jacqueline S. v. City of N.Y.*, 614 N.E.2d 723, 725-26 (N.Y. 1993).

41. The applicable Georgia statute reads:

Where an owner or occupier of land, by express or implied invitation, induces or leads others to come upon his premises for any lawful purpose, he is liable in damages to such persons for injuries caused by his failure to exercise ordinary care in keeping the premises and approaches safe.

GA. CODE ANN. § 51-3-1 (2002).

Georgia courts interpret this statute to impose a duty on a landlord to exercise reasonable care to keep the premises and approaches safe where the landlord could reasonably foresee the criminal act and risk of injury in light of prior substantially similar criminal conduct on the premises. *Days Inn of Am. v. Matt*, 454 S.E.2d 507, 508 (Ga. 1995); *Lau's Corp. v. Haskins*, 405 S.E.2d 474, 475 (Ga. 1991); *FPI, L.P. v. Seaton*, 524 S.E.2d 524, 528 (Ga. App. 1999).

42. *Cain*, 703 F.2d at 1283 (reversing district court for determining proximate cause of tenant's death on premises as a matter of law because the district court interpreted Georgia law as requiring landlord to anticipate particular injury or person injured before landlord could be liable); *Stern v. Wyatt*, 231 S.E.2d 519, 521 (Ga. App. 1976) (stating plaintiff in wrongful death suit arising out of defendant's loss of control of her automobile that collided with plaintiff's decedent's vehicle need only allege that defendant "should have anticipated that some injury or harm would result from her conduct") (emphasis

Georgia's approach analyze foreseeability in terms of causation rather than duty, the results are nearly identical: the landlord is liable for foreseeable injuries that it could have prevented.

Whichever theory its jurisdiction utilizes, a commercial landlord must be aware that the definition of foreseeability continues to expand. In the past, courts based foreseeability only on similar events that occurred at the same location. Today, however, courts often apply a case-by-case approach.⁴³ In New York, for example, to make a *prima facie* case of foreseeability, tenants are not limited to evidence of prior, similar crimes in the same building. Rather, foreseeability is determined by weighing "the location, nature and extent of those previous criminal activities [against] their similarity, proximity or other relationship to the crime in question."⁴⁴

B. A Landlord's Assumption of Duty to Provide Safe Premises

Another approach used to impose a duty on a landlord to protect tenants is the landlord's voluntary assumption of the duty. Many jurisdictions recognize a duty to protect tenants if the landowner has expressly or implicitly promised to provide security. Courts determine on a case-by-case basis whether the landlord has assumed this duty.⁴⁵

The landlord may contractually undertake to provide security for its tenants. Typical express lease covenants to provide security include provisions to "maintain premises" in a "safe and secure manner."⁴⁶

A landlord may impliedly assume the duty to protect against third-party criminal acts by marketing its premises as safe and secure from crime or through oral representations of the landlord's leasing representatives. Finding an implied duty to provide security is at odds with the parol evidence rule, especially if a lease

added); *Stuart v. Berry*, 130 S.E.2d 838, 843-44 (Ga. App. 1963) (reciting rule that defendant is liable for natural and probable results of his negligence despite his inability to reasonably anticipate the particular injury, and concluding installer of electrical wiring "must have known electricity travels along metal surfaces" where plaintiff's decedent was electrocuted when he touched a metal swimming pool ladder that also touched upon exposed electrical wiring).

43. The cases cited *supra* notes 6, 7, 9 and 10 demonstrate the fact-intensive analysis in which courts often engage to determine landlord liability for third-party criminal acts on its premises.

44. *Jacqueline S.*, 614 N.E.2d at 726. *But see Shea*, 565 N.E.2d at 27 (finding requirement that landlord keep common areas in "safe condition" did not encompass a contractually assumed obligation to provide safety from third-party criminal attacks).

45. *Shea*, 565 N.E.2d at 24-25.

46. *See id.* at 26 (concluding that lease that required landlord to keep premises in "safe condition" did not require landlord to repair and maintain interior safety door and lock to protect tenant from third-party attacks).

purports to include of all the terms governing the relationship of the landlord and supercedes all earlier discussions.⁴⁷

The implied duty to provide security may also arise if the landlord provides security measures, even if not contractually obligated to do so. The Restatement (Second) of Torts, on which many courts rely, states:

One who undertakes, gratuitously or for consideration, to render services to another which he should recognize as necessary for the protection of the other's person or things, is subject to liability to the other for physical harm resulting from his failure to exercise reasonable care to perform his undertaking, if (a) his failure to exercise such care increases the risk of such harm, or (b) the harm is suffered because of the other's reliance upon the undertaking.⁴⁸

Therefore, under this approach, a landlord that fails to exercise reasonable care in providing security for its tenants will be liable for harm resulting from third-party criminal acts on the premises if either (1) the landlord's negligence increased the risk of the harm from the crime or (2) the tenant suffered harm because it relied on the landlord's provision of security.

C. A Statutory Duty to Provide Safe Premises

Statutes and regulations often impose duties upon landlords to provide protection against third-party crimes. State and local landlord-tenant acts, for example, might impose duties of providing safety upon landlords. The Uniform Landlord-Tenant Act requires that landlords provide safe and secure housing.⁴⁹ Courts have used such statutory provisions to eliminate the foreseeability requirements.⁵⁰ For example, landlords have been liable for tenants' injuries where the landlords have failed to comply with municipal codes requiring adequate locks even when the criminal act causing the injury was not foreseeable.⁵¹

III. POST-SEPTEMBER 11, 2001 DUTY

No matter what test a court applies, if a landlord's lapse in common area security causes a foreseeable injury to a tenant, the landlord likely will be liable for the tenant's injuries.⁵² Most reported cases deal with common crimes such as burglaries, as-

47. See *id.* (referring to Illinois' application of the parol evidence rule in cases involving residential lease agreements).

48. RESTATEMENT (SECOND) OF TORTS § 323 (1965).

49. UNIFORM RESIDENTIAL LANDLORD TENANT ACT § 2.104(a)(3).

50. Glesner, *supra* note 1, at 701-02.

51. *Id.*

52. See discussion *supra* note 9 and accompanying text (discussing landlord liability for foreseeable third-party criminal acts).

saults, rapes and murders.⁵³ Further, these cases are often relatively easily resolved because foreseeability is predicated on repeated similar crimes in particular buildings or neighborhoods.⁵⁴ The two questions this article presents are (1) will these above-mentioned tests apply to a landlord's responsibility to protect tenants from the ultimate third-party criminal act — a terrorist attack, and (2) if so, how? To forecast the outcome of these issues, a review of the factors courts consider in connection with more standard crimes will provide guidance.

A. What Is Foreseeable?

The requirement that a landlord should have reasonably foreseen the crime on its premises is commonly found in cases addressing the landlord's common-law duty to protect against third-party criminal acts.⁵⁵ In the context of terrorist acts, however, foreseeability is more difficult. In light of the September 11th attacks, is any terrorist attack now foreseeable, even in parts of the United States far removed from major U.S. cities like New York City and Washington, D.C.? Certainly cities like Chicago and Los Angeles, which have high-profile buildings, are now more likely to be targets for future terrorist attacks. For example, owners of the Sears Tower in Chicago could hardly take the position that a crime committed against the World Trade Center, an office building consisting of two tall towers in New York, could not be repeated on the Sears Tower, a taller office building in Chicago. The attack on the Sears Tower is therefore foreseeable. The owners of the Sears Tower likely owe its tenants a duty to exercise reasonable care in providing security measures against terrorist attacks. Prudent owners of higher profile buildings in cities that are potential targets should analyze what is foreseeable in the current domestic and international political climates and act accordingly. David P. Bergsma, Chief Executive Officer of Chicago-based Levy Security Corporation, which provides security guards for several buildings, including the John Hancock Center in Chicago, cites the high-profile nature of a building as a major factor to be evaluated in deciding whether to increase security measures.⁵⁶ Because there is little doubt that the World Trade Center's prominence was a factor in it being targeted for the September 11th attacks, owners of other higher profile buildings should heed Mr. Bergsma's advice and analyze the security at their high-profile buildings.

53. *Kline*, 439 F.2d at 477.

54. *Id.*

55. See discussion *supra* note 9 and accompanying text (discussing landlord liability for foreseeable third-party criminal acts).

56. Patricia Richardson, *A Downtown Clampdown*, CRAIN'S CHICAGO BUSINESS, 3, 50 (Oct. 29, 2001).

Recent history teaches that prominence is not the only factor in choosing targets for terrorist attacks. In what appears to be an era of terror, the world has seen attacks not only on high-profile buildings like the towers of the World Trade Center, but also on low-profile buildings like the Pentagon, a federal building in Oklahoma City, U.S. embassies in Kenya and Tanzania, and the Navy destroyer *USS Cole* in Yemen. Most of these targets share symbolic values as targets. Given the modern media's relentless coverage of such disasters, the Western World and commercial landlords are on notice of these events. Building owners of all types and sizes must ask themselves if their buildings are likely targets.

If pre-September 11th law serves as a prologue, the real issue faced by the commercial landlord attempting to protect tenants from terrorist acts is determining what is foreseeable.⁵⁷ The old standard of finding foreseeability where prior similar crimes occurred in the same building or in the same neighborhood will not likely apply to the foreseeability of a terrorist attack. In the past, a pattern of armed robberies in a housing project in New York City would not have made robberies foreseeable to a landlord in a high-rent apartment building in Minneapolis. After September 11th, however, owners of apartment buildings, shopping centers, office buildings and industrial sites must rethink whether their buildings now become foreseeable targets of terrorist crimes. The attack by religious extremists on an office building in lower Manhattan has put owners of all types of real estate on notice that terror can strike anywhere at anytime.

Society has learned that what once was unthinkable is now not only imaginable but is likely foreseeable. Combining the willingness of religious extremists to commit suicide-missions with the devastation brought to America's Heartland by a home-grown terrorist leads one to the logical conclusion that anything can become foreseeable.

Further, the threats to America's buildings are in the United States as well as abroad. These targets have been chosen based upon their high profile, symbolic significance, and their vulnerability to attacks. While owners of high-profile buildings such as the Empire State Building and the Sears Tower have reason to foresee attacks, the owner of a federal office building in Oklahoma City did not. Although the issue of foreseeability in this area is untested, juries may find that, given the events of September 11th, terrorist attacks on any United States building are foreseeable and that a landlord has a common-law duty to take reasonable measures to avoid the attacks. Like a landlord's pre-September 11th

57. See discussion *supra* note 9 and accompanying text (discussing landlord liability for foreseeable third-party criminal acts).

common-law duty to protect against third-party criminal acts, a landlord is not an insurer against such terrorist acts from occurring. A landlord, however, might now be required to take all reasonable steps to make the premises safe and secure from terrorist attacks because these attacks are now foreseeable.⁵⁸

B. Commercial Landlords' Post-September 11th Responses

Since the attacks on the World Trade Center and the Pentagon, building owners have rushed to increase building security in many urban centers throughout the United States. Chicago provides good examples of what is happening outside of New York and Washington and of the different levels of security implemented by building owners. At Chicago's IBM Plaza, shortly after the September 11th attacks, patrons of the first floor coffee shop were required to sign in with security and present photo identification before being admitted to the building.⁵⁹ On the other hand, at NBC Tower, the tenant (NBC), increased its own security by utilizing surveillance cameras and limiting access. Building management, however, took a less intrusive approach.⁶⁰ Building security manpower increased, but building management avoided interference with the manner in which business was carried on in NBC Tower before September 11th.⁶¹ Additional security measures undertaken at Chicago's John Hancock Center include a sixty percent increase in security staff, checkpoints for the purpose of checking visitors' photo IDs and bags, restricted access to parking garages and random searches of vehicle trunks.⁶² Other measures, including permanent turnstiles at elevator banks, limited entrances and X-ray machines are being considered at buildings like the Sears Tower.⁶³ Chicago landlords are also exploring ways to secure the building mail systems and ventilation systems to prevent bio-terrorist attacks.⁶⁴

C. Assumption of Duty Associated with Voluntary Security Measures

Under pre-September 11th law, a landlord was liable for failure to protect tenants against third-party crimes if the landlords assumed the duty to provide this type of protection.⁶⁵ In the post-

58. See discussion *supra* note 9 and accompanying text (discussing landlord liability for foreseeable third-party criminal acts).

59. Richardson, *supra* note 56, at 3.

60. *Id.*

61. *Id.*

62. *Id.* at 50.

63. *Id.*

64. *Id.*

65. See *supra* note 10 and accompanying text (discussing landlord's as-

September 11th environment, to attract and retain tenants, owners of high-profile and landmark buildings are implementing many of the security measures described above to prevent terrorist attacks.⁶⁶ While increased security is both prudent and legally advisable, this situation raises an issue of assumption of a duty. These landlords should be aware that by increasing security measures similar to those described, they encourage tenants to rely on those measures in making their leasing decisions.⁶⁷ If tenants lease space in a building because of the security measures in place at the time the lease is signed and a later event occurs because the landlord has either relaxed its security procedures or has failed to use reasonable care, the landlord likely will be liable under an assumption of duty theory.⁶⁸ While a commercial landlord is not likely to be found to be an insurer against a successful terrorist attack, if security procedures are in place, the landlord must exercise reasonable diligence to avoid being held liable where liability would not have been found had the security measures not been in effect.⁶⁹

D. A New Era of Leasing Concerns

Questions regarding existing leases will have to be answered in light of the events of September 11th. For example, notwithstanding an exculpatory provision in the lease, will the commercial landlord remain liable if it negligently provides security against terrorist attacks?⁷⁰ Or, will the landlord's providing security against terrorist attacks be found as a voluntary assumption of the duty to take reasonable steps to prevent foreseeable terrorist attacks beyond whatever common-law duty exists?⁷¹ Is adding security measures like those described in the Chicago area consistent with a lease provision requiring the tenant have free access to its premises? Can the increased expenses of providing these enhanced security measures be passed on to the tenants as increased operating costs? Only time will tell how these questions are resolved because most lease provisions in effect today were likely not drafted with a terrorist attack in mind.

Leases entered into after September 11th will have to reflect

sumption of duty).

66. See *supra* notes 60-65 and accompanying text (noting steps taken by building owners in Chicago).

67. See *supra* note 10 and accompanying text (discussing landlord's assumption of duty).

68. *Id.*

69. *Id.*

70. See *Cain*, 703 F.2d at 1279 (applying Georgia statute declaring exculpatory clauses in residential leases unenforceable).

71. See *supra* note 10 and accompanying text (discussing landlord's assumption of duty).

the changed state of affairs created by the terrorist attacks. As tenants seek more security from landlords and landlords seek to make their buildings competitive, leases are likely to provide for important security measures. As these lease provisions develop, however, the traditional assumption of liability theory will mean that the landlord's obligations to take all reasonable steps to provide the promised security measures will be the basis for liability should a future terrorist attack occur.⁷²

A landlord might seek to limit liability by including exculpatory clauses that (1) define the security measures that the landlord will undertake but (2) limit liability should those measures fail. This contractual attempt to limit liability will likely raise the ire of many courts, at least if courts continue to disfavor exculpatory clauses generally.⁷³

However, other strategies are available to minimize landlord liability in the wake of the terror attacks. These other strategies can be summarized by examining three principles: (1) local laws regarding security and tenant safety; (2) express and implied promises to provide security; and (3) exercise of reasonable care in fulfilling security duties.

First, a landlord must know and follow the local laws regarding security and tenant safety. This is especially true in light of pre-September 11th judicial rulings that violations of statutes or regulations are strong evidence of breaches of the duty to provide premises that are safe from third-party criminal acts, whether or not the acts were foreseeable. Although the definition of foreseeability is expanding, a landlord defendant has a much greater chance of prevailing when it has complied with the local laws. Once a landlord has failed to comply with the local laws, the landlord may be liable regardless of foreseeability.

Second, a landlord must avoid unwarranted express and implied promises to provide specific security measures or to protect against specific injuries. This will greatly avoid an appearance of assumption of duty and a judicial finding that the landlord has assumed a greater duty than the law would otherwise require. In this regard, a landlord should also be aware that lease provisions and promotional materials that touch upon security commitments might create contractual obligations that heighten the standard of care the landlord must exercise for it not to be found negligent.

Third, a commercial landlord should act with all reasonable care in the fulfillment of the security measures which the landlord has promised to provide. Presumably, a landlord will continue not

72. See *supra* note 10 and accompanying text (discussing landlord's assumption of duty).

73. See *Cain*, 703 F.2d at 1279 (applying Georgia statute declaring exculpatory clauses in residential leases unenforceable).

to be an insurer against third-party criminal acts, including terrorist attacks, and will only be obligated to take reasonable steps to prevent those attacks against which the landlord has promised to protect.

A number of steps can be taken by a landlord to verify that it has acted reasonably. First, a reasonable landlord should have a written security plan. A jury is more likely to find a lack of reasonableness where the landlord did not have a plan or did not take the time to commit the plan to paper. Next, the landlord should follow the plan. A jury presented with a security plan that was not followed will likely find that the landlord acted unreasonably because the landlord did not follow its own security plan.

A security plan should include the following:

1. Employing a security staff (possibly 24-hour);
2. Conducting periodic reviews and repairs of electronic locks;
3. Utilizing local law enforcement as consultants;
4. Ensuring adequate lighting;
5. Investigating potential problems;
6. Employing central phone numbers for emergencies and suspicious activities;
7. Requiring ID badges for office tenants;
8. Limiting access to parking and monitoring the parking area; and
9. Implementing an emergency evacuation plan.⁷⁴

Increased security costs accompany security enhancements like those found in the security plan described above. Some experts estimate that the added security in some buildings will cost as much as one dollar per square foot.⁷⁵ Because leases often contain pass-through provisions for maintenance of common areas, tenants may be charged with dramatic and unexpected increased costs associated with security enhancements.⁷⁶ Operating cost

74. This security plan is based on Howard A. Steindler, *The Purchase and Sale of Real Property: Post-Closing Issues*, National CLE Conference Real Estate Law 2002.

75. Richardson, *supra* note 56, at 50.

76. "Pass through" provisions allow a landlord to charge to tenants the costs of capital expenditures the landlord made to comply with newly enacted laws. Michael W. Meyer, *Operating Expenses and CAM/Hidden Agendas and Corporate Guerrilla Warfare Tactics*, in Practising Law Institute, PLI Order

pass-through lease provisions must be carefully drafted to clarify the extent of the parties' respective obligations to pay for these increased costs. Absent a clear statement, the landlord may encounter difficulty in getting the tenants to pay for the enhanced security. The landlord's obligations to provide security and questions of which party will bear the costs associated with the increased security will become more prominent factors in post-September 11th lease negotiations.

In addition to added costs, increased security measures may lead to disputes with neighboring property owners. An example of a potential source of dispute is added lighting. A landlord may be vigilantly attempting to provide security for its tenants by installing bright lights in the building parking lot. Although the additional lighting may demonstrate that the landlord is acting reasonably in meeting the security needs of its tenants, the lighting may also subject the landlord to complaints and nuisance actions from neighbors who are adversely affected by the lighting. The landlord, therefore, must carefully weigh the benefits of providing adequate protection to its tenants against the costs to the landlord for these additional measures and the potential problems which may arise with respect to neighboring landowners.

IV. CHANGING PRACTICES FOR A CHANGING WORLD

The world has changed since the September 11th terrorist attacks. The world of commercial leasing is no exception. Whether a landlord has a duty to take steps to prevent terrorist attacks on its premises has yet to be defined. But, the law involving a landlord's duty to take steps to make its premises safe and secure from third-party criminal attacks may provide much needed guidance in this evolving area. As this article has demonstrated, the pre-September 11th law interpreting the commercial landlord's duty to protect against third-party crimes varies widely by jurisdiction, and sometimes even within the same jurisdiction. Undoubtedly, so will the area of law that will arise in post-September 11th America.

In the meantime, a commercial landlord can best protect itself by (1) understanding its present duty for third-party criminal acts on the premises; (2) implementing a security plan similar to the one described in this article; and (3) redrafting its leases to allocate among the parties the increased costs of security and the risks should a terrorist attack occur on the premises.