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## Insurance Coverage for Active Shooter Incidents After Recent Court Decisions Enforcing Broad Policy Exclusions

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Active shooter incidents<sup>1</sup> are occurring with greater frequency in the United States, resulting in a new type of premises liability exposure for most companies. The broad insuring agreement in CGL policies typically covers, among other things, lawsuits alleging “bodily injury” arising out of an “occurrence” or “accident.” Therefore, most companies assume they are protected against the vast array of potential premises liability exposures that can arise when a customer, vendor, or guest is injured while on company property or at company-sanctioned events. Now two recent federal court decisions—one from the Sixth Circuit Court of Appeals and another from the Middle District of Georgia—illustrate the types of exclusions that CGL insurers have successfully relied upon to avoid liability for active shooter exposures. In light of these decisions, any company who owns or operates premises that host gatherings of people or often have third-parties on site—including retailers, restaurants, schools, stadiums, hospitals, and hotels—should carefully evaluate their liability coverage to ensure that their insurance policies do not contain exclusions that could bar or limit coverage if tragedy strikes.

### SIXTH CIRCUIT AFFIRMS COVERAGE DENIAL FOR SHOOTING BASED ON ASSAULT & BATTERY EXCLUSION

On August 22, 2019, the Sixth Circuit issued a 2-1 decision in *United Specialty Insurance Co. v. Cole’s Place, Inc.*, No. 18-5545 (6th Cir. Aug. 22, 2019), affirming a denial of coverage for a mass shooting incident under a CGL policy. The *Cole’s Place* insurance coverage litigation arose out of “gunshot blasts [that] pulverized” a nightclub in Louisville, Kentucky.<sup>2</sup> The gunshots struck eight people, six of whom sued the nightclub owner: Cole’s Place, Inc. (“Cole’s Place”).<sup>3</sup> The plaintiffs argued that Cole’s Place failed to protect them from a foreseeable harm.<sup>4</sup> Cole’s Place turned to its CGL insurer, United Specialty Insurance Company (“USIC”), to defend the nightclub in the underlying litigation. USIC had issued an insurance policy



to Cole's Place under which USIC promised to "pay those sums that [Cole's Place] becomes legally obligated to pay as damages because of 'bodily injury'" and "to defend [Cole's Place] against any 'suit' seeking those damages."<sup>5</sup> Coverage under the policy was subject to certain exclusions, including a broad exclusion for "bodily injury" arising out of or resulting from assault or battery, including the failure to prevent an assault or battery.<sup>6</sup> Moreover, the assault and battery exclusion in Cole's Place's policy also contained anti-concurrent causation language, providing that the exclusion barred coverage even if the alleged injury arose out of a combination of an assault or battery-related cause and a non-assault or battery-related cause.<sup>7</sup> USIC undertook Cole's Place's defense in the underlying litigation, but it reserved its right to deny coverage.<sup>8</sup> USIC subsequently filed a declaratory judgment lawsuit in federal district court, seeking a declaration that the assault and battery exclusion (among other provisions in the policy) barred coverage for the underlying litigation.<sup>9</sup>

The district court granted USIC's motion for summary judgment and held that the assault and battery exclusion precluded any coverage obligations for the underlying litigation arising out of the nightclub shooting.<sup>10</sup> The Sixth Circuit affirmed the district court's decision that USIC had no coverage obligation.<sup>11</sup> The Sixth Circuit explained that all of the claims in the underlying litigation arose out of or resulted from the battery, thus triggering the exclusion.<sup>12</sup> The court relied on the legal definition of "battery" as defined under Kentucky law: "any unlawful touching of the person of another, either by the aggressor himself, or by any substance set in motion by him," and "intent is an essential element."<sup>13</sup> Based on this definition, the court concluded: "we cannot read the allegations in the [underlying litigation] as consistent with anything less than battery" because the complaints did not suggest that the shootings were accidental or reckless.<sup>14</sup> The court further concluded that the claims based on Cole's Place's alleged failure to protect also arose from the battery.<sup>15</sup> Accordingly, the Sixth Circuit held that because "a battery has been alleged, there can be no genuine doubt . . . that Cole's Place's policy with USIC excludes coverage for litigation over an alleged failure to prevent that battery."<sup>16</sup>

### GEORGIA FEDERAL COURT DENIES COVERAGE FOR FATAL SHOOTING BASED ON FIREARMS EXCLUSION

The Federal District Court in Georgia also issued a recent opinion denying coverage under a CGL policy for a shooting at a bar.<sup>17</sup> There, the underlying claims arose out of a fatal shooting that occurred on the premises of policyholder, Snappy Slappy LLC ("Snappy").<sup>18</sup> The decedent's mother filed a wrongful death action against Snappy.<sup>19</sup> Although Snappy's policy provided coverage for "bodily injury," the insurer had added a firearms exclusion in an endorsement to Snappy's policy that barred coverage for "'bodily injury' . . . arising out of the manufacture, importation, sales, distribution, gunsmithing, ownership, maintenance, or use of firearms or weapons."<sup>20</sup> Snappy argued that the exclusion should not apply because of the absence of language in the exclusion limiting it to a specific actor or gun user.<sup>21</sup> To the contrary, the court held that the lack of limiting language before the word "use" "means that [the exclusion] applies to *anyone's use* of a firearm."<sup>22</sup> Therefore, the court held that the firearms exclusion barred coverage "[b]ecause the bodily injuries on [Snappy's] premises clearly arise 'out of the . . . use of firearms or weapons.'"<sup>23</sup>

### THE BROADER IMPLICATIONS OF THESE DECISIONS

While some commentators may argue that the *Cole's Place* and *Snappy* decisions are outliers because they arose out of shootings at bars,<sup>24</sup> these cases serve as reminders to policyholders that their CGL insurance may not guarantee coverage for losses arising from a mass shooting, notwithstanding that CGL policies are meant to cover premises liability claims involving alleged "bodily injury." Given the increasing numbers of mass shootings, broad assault and battery exclusions and firearms exclusions are becoming increasingly prevalent in CGL policies. Policyholders should carefully review their insurance policies for exclusions that insurers may rely on to deny or limit coverage for litigation arising out of an active shooter incident. Many insurers now offer policies that specifically cover damages arising out of active shooter incidents. These policies also provide some first party coverage that is unavailable under CGL policies, including coverage for crisis management services and business interruption losses that a business may suffer after a



shooting incident. These policies will become more important in the future as CGL insurers seek to add new exclusions to their policies in an effort to restrict coverage for shooting related exposures.

**We work closely with our clients and their risk managers to review and seek removal or amendments to certain exclusions and limiting provisions in our clients’ CGL and other policies. When needed we have also assisted our clients in collecting insurance recoveries from their insurers for losses arising from bodily injury, property damage, and business interruption caused by catastrophic events, and have obtained billions of dollars in insurance recoveries for our policyholder clients.**

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<sup>1</sup> The FBI defines “active shooter incident” “as one or more individuals actively engaged in killing or attempting to kill people in a populated area.”  
<sup>2</sup> *United Specialty Ins. Co. v. Cole’s Place, Inc.*, No. 18-5545, slip op. at 2 (6th Cir. Aug. 22, 2019).  
<sup>3</sup> *Id.*  
<sup>4</sup> *Id.*  
<sup>5</sup> *Id.* at 5.  
<sup>6</sup> *Id.* at 5-6.  
<sup>7</sup> *Id.*  
<sup>8</sup> *Id.* at 7.  
<sup>9</sup> *Id.*  
<sup>10</sup> *Id.*  
<sup>11</sup> *Id.* at 18.  
<sup>12</sup> *Id.* at 20-21.  
<sup>13</sup> *Id.* at 22 (citing *Vitale v. Henchey*, 24 S.W.3d 651, 657 (Ky. 2000)).  
<sup>14</sup> *Id.*  
<sup>15</sup> *Id.* at 24.  
<sup>16</sup> *Id.*  
<sup>17</sup> *Hudson Specialty Ins. Co. v. Snappy Slappy LLC d/b/a Jus One More*, No. 5:18-cv-00104-TES, 2019 WL 1938801 (M.D. Ga. May 1, 2019).  
<sup>18</sup> *Id.* at \*1.  
<sup>19</sup> *Id.* at \*1 n.1.  
<sup>20</sup> *Id.* at \*2.  
<sup>21</sup> *Id.*  
<sup>22</sup> *Id.* at \*3 (emphasis in original).  
<sup>23</sup> *Id.*



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<sup>24</sup> See *Seneca Specialty Insurance Co. v. 845 North, Inc.*, No. 3:14-cv-922-J-34PDB, 2015 WL 3400415 (M.D. Fla. May 26, 2015) for another example of an insurer denying coverage under a CGL policy for a shooting at a bar or night club. There, the policyholder's CGL policy contained both an assault and battery and a weapons exclusion, similar to the applicable exclusions in the policies at issue in *Cole's Place* and *Snappy*.