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George A. Mocsary

University of Wyoming - College of Law, gmocsary@bigfoot.com

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INSURING THE UNTHINKABLE

by: George A. Mocsary*

I. INTRODUCTION

Recent mass shootings have led to public and private responses implicating insurance. The public response consisted of calls to require firearm owners to purchase liability insurance, and has been discussed at length elsewhere.¹ This article examines the private response: the steady proliferation of “active shooter insurance,” more recently called “active assailant insurance.” (collectively, AS/AA insurance).² Although these policies cover the for-profit businesses, nonprofit institutions, and even municipalities³ that purchase them, rather than shooting victims or others impacted by a tragic event, benefits would flow through to these individuals if a covered event occurs.

A number of insurance providers offer AS/AA coverage,⁴ which typically includes the costs of:

* Assistant Professor, Southern Illinois University School of Law. Fordham University School of Law, J.D., *summa cum laude*, 2009; University of Rochester Simon School of Business, M.B.A., 1997. I would like to thank David Karpis for his valuable insights and feedback. I am grateful to Mark Collins, Victoria Fuller, Jessica Hostert, Justin Johnson, and Derrick McDowell for their excellent research and editing. Because the author hopes that this article will have appeal to scholars and practitioners in the firearms law, public safety, and other fields, the author begs Appleman’s regular readers’ forgiveness for defining more terms and explaining more basic concepts than may be usual in this most excellent publication.

¹ See George Mocsary, *Insuring Against Guns?*, 46 CONN. L. REV. 1209 (2014); Peter Kochenburger, *Liability Insurance and Gun Violence*, 46 CONN. L. REV. 1265 (2014). These proposals have, for the most part, been dismissed as untenable and even counterproductive.

² As this article uses the term, “active shooter insurance” includes workplace violence insurance. It excludes terrorism insurance, though the two may be sold bundled. *E.g.*, *War & Terrorism: Stand-alone Terrorism & Sabotage Insurance*, IRONSHORE (2017).

³ See Jessica Lipscomb, *Miami Beach Buys Insurance for Terrorism, Active Shooter Incidents*, MIAMI NEW TIMES (June 22, 2017, 8:30 AM), <http://www.miaminewtimes.com/news/miami-beach-secures-insurance-coverage-for-terrorism-and-active-shooter-incidents-9432601>.

⁴ *E.g.*, GDP ADVISORS LLC, ACTIVE SHOOTER PROTECTION PROGRAM, <http://gdpadvisors.com/active-shooter> (last visited Dec. 18, 2017); HISCOX LONDON MARKET, ACTIVE SHOOTER: TAILORED LIABILITY COVER FOR EDUCATIONAL INSTITUTIONS (2016); LLOYD’S OF LONDON, ACTIVE SHOOTER PROTECTION: THIRD PARTY LIABILITY INSURANCE POLICY AND CRISIS MANAGEMENT SERVICES, <http://activeshooterins.com/wp-content/uploads/2017/01/siu-active-shooter-speciment-policy-2017.pdf> (last visited Dec. 18, 2017); MARSH, PROTECTING PEOPLE AND OPERATIONS FROM ACTIVE SHOOTER THREATS (2017), <https://www.marsh.com/content/dam/marsh/Documents/PDF/US-en/Active%20Shooter%20White%20Paper-11-30-17.pdf>; MCGOWAN PROGRAM ADMINISTRATORS, ACTIVE SHOOTER/WORKPLACE VIOLENCE INSURANCE, <http://mcgowanprograms.com/wp-content/uploads/sites/2/2016/07/MPA-Workplace-Violence-v1.07.17.17.pdf> (last visited Feb. 18, 2017) [hereinafter MCGOWAN ACTIVE SHOOTER]; MCGOWAN PROGRAM ADMINISTRATORS, BUYER’S GUIDE: ACTIVE SHOOTER INSURANCE, <http://mcgowanprograms.com/blog/download-active-shooter-insurance-guide/> (last visited Dec. 18, 2017) [hereinafter MCGOWAN BUYER’S

- liability not otherwise covered by a general liability policy;⁵
- business⁶ interruption not covered by a property and casualty (P&C) policy, like an interruption that is unrelated to the inability to conduct business because of damage to property necessary in business, civil and military authority orders, ingress/egress blockage, and loss of attraction coverage;⁷
- property damage not otherwise covered by a P&C policy;
- situation management, investigation, and temporary security;
- counseling and other support services;
- funerals;
- business and employee relocation;
- personnel retraining; and
- public relations services.⁸

Coverage limits are typically available up to \$20 million,⁹ but one carrier will go as high as \$35 million,¹⁰ and some stop at \$5 million,¹¹ with sublimits for the above-listed items.¹² Some policies require the involvement of three or more victims, while others have no minimum victim requirement; some cover only

GUIDE]; ROCKWOOD BROKERAGE DIVISION, AN AGENTS GUIDE TO: ACTIVE ASSAILANT INSURANCE, http://www.rockwoodbrokerage.com/Agents_Guide_to_Active_Assailant_Coverage.pdf (last visited Dec. 18, 2017); WILLIS TOWERS WATSON, ACTIVE SHOOTER-PROTECTING AGAINST VIOLENT MALICIOUS ACTS (2016), https://www.willis.com/documents/publications/Services/Political_Risk/15405%20PUBLICATION_Active%20Shooter%20Coverage.pdf; XL CATLIN, ACTIVE ASSAILANT INSURANCE (2016), <http://xlcatlin.com/~media/xlinsurance/pdfs/specialty/crisisgmt-activeassailant-productsheet-xlcatlin-us.pdf>. Hereinafter, this article refers to all of these brochures, collectively, as *AS/AA Brochures*.

⁵ Some items, like those which might be covered by workers' compensation insurance, may not be covered.

⁶ Including the operations of both for-profit and nonprofit entities.

⁷ Business interruption is ordinarily covered only if physical damage to property makes it impossible to conduct business.

⁸ See *AS/AA Brochures*, *supra* note 4.

⁹ *Id.*

¹⁰ See XL CATLIN, *supra* note 4. One insurer's representative said that it "has the appetite to go up to a \$50 million maximum." Matthew Lerner, *Mass Casualty Events Spur Product Development*, BUS. INSURANCE (Sept. 4, 2017 12:00 AM), <http://www.businessinsurance.com/article/20170904/NEWS06/912315547/Mass-casualty-insurance-product-development-disaster-Beazley-Hiscox-XL-Ironshore>. However, that insurer's brochure does not discuss limits. HISCOX LONDON MARKET, *supra* note 4.

¹¹ Lori Chordas, *Take Cover: Recent Active Shooter Incidents are Leading Insurers to Develop Specialized Insurance Policies Targeting Those Events*, 24 BEST'S REV., June 2016, at 24, 27.

¹² E.g., MCGOWAN ACTIVE SHOOTER, *supra* note 4, at 8; see *supra* text accompanying note 8.

firearm-related injuries, sometimes with exclusions, while others include a range of weapons.¹³ Coverage also comes with loss-prevention services and guidance.¹⁴

Although individual indicia—largely anecdotal—of uptake in AS/AA policies are mixed,¹⁵ the number of providers writing and marketing the coverage, and the categories of organizations covered by such policies, continue to increase.

This article assays AS/AA insurance along several dimensions. Part II considers factors impacting the effectiveness of the insurance in compensating insureds for losses stemming from AS/AA incidents. Part III reviews the ways in which AS/AA insurers can provide loss prevention services, enable insureds to prevent or mitigate losses, and efficiently manage claims and resulting litigation.

II. AS/AA INSURANCE AS COMPENSATOR

A. Pricing

At base, “[t]he decision to purchase insurance can be justified if the insurance company has a comparative advantage over the policyholder in bearing the risks in question.”¹⁶ The risk-bearing determination necessarily includes consideration of expected returns on coverage, as well as entity size, capitalization, and ownership.

This Section examines the pricing of AS/AA coverage by insurers and the corresponding buying decision by potential insureds. It begins by examining the application of insurers’ chief competitive advantage, risk-based pricing, to AS/AA risks. It then discusses the effect of market dynamics on coverage price. It concludes with a discussion of the likely utility of AS/AA coverage to various entity types.

1. Risk-Based Pricing

Insurers are expert at collecting and analyzing data on event frequencies, and measuring the risks associated with those events. Their loss-forecasting abilities depend, however, on having a critical mass of data on which to base rates. AS/AA events are very rare,¹⁷ and because AS/AA coverage is new, insurers have almost no accumulated loss data.¹⁸ With a few exceptions, public violence is also a specialized area in which security firms and law enforcement, rather than insurers,

¹³ See *AS/AA Brochures*, *supra* note 4.

¹⁴ *Id.*

¹⁵ Lydia O’Neal, *Mass Shootings Create Demand for ‘Active Shooter Insurance’*, INTERNATIONAL BUSINESS TIMES (Oct. 13, 2017, 12:41 PM), <http://www.ibtimes.com/political-capital/mass-shootings-create-demand-active-shooter-insurance-2601146>.

¹⁶ Neil A. Doherty & Clifford W. Smith, Jr., *Corporate Insurance Strategy*, 6 J. APPLIED CORP. FIN. 3, 5 (1993).

¹⁷ See *infra* notes 31–36 and accompanying text.

¹⁸ The author found no reports of claims against AS/AA policies. See also O’Neal, *supra* note 15.

traditionally hold expertise.¹⁹ Insurers therefore have relatively little to go on in an actuarial pricing process based on incorporating known risks and experience rating.²⁰

As is normal in new areas of business, insureds should expect a higher premium load on AS/AA coverage.²¹ And profits for insurers are indeed high.²² Insurers must build in a risk premium to compensate for their relative disadvantage, compared to other lines in which they are more experienced, in setting rates with precision. Insurers can, and do, rely on outside security consulting firms for assistance in identifying signs of risk,²³ but this also comes with costs that must be passed on to insureds, and the translation of warning signs into premium adjustments is necessarily imperfect.

It is also possible, given insurers' limited knowledge about the area, that potential insureds are better equipped to assess their risk of attack than an insurer, exacerbating the adverse selection problem, for which insurers must price.²⁴ Although potential insureds would be unlikely to know their risks better than security specialists, they can hire such specialists to advise them, just as insurers do. While the insurers' use of the specialists would partially offset their use by insureds, insureds have more incentive to work especially closely with their own consultants. Potential insureds would also know more than insurers about specific threats. However, such threats should be more likely to come to light in a post-event investigation than in other areas, and an exclusion for known, but undisclosed, threats should handle this problem rather efficiently.

2. Market Dynamics

Insurance markets for specialized and unusual risks are characterized by little competition and high insurer profits.²⁵ This appears to be especially true in the

¹⁹ One notable exception is workplace violence inasmuch as it involves workers' compensation insurance. Although workplace violence rarely involves mass shootings, there may nonetheless be some knowledge from the workers' compensation area that can be put to good use in the AS/AA context.

²⁰ "Experience rating" is the practice of basing premiums on past loss activity. Mocsary, *supra* note 1, at 1232.

²¹ "Premium load" is defined as the difference between the premium paid and the *expected* present value of losses. Doherty & Smith, *supra* note 16, at 5

²² O'Neal, *supra* note 15.

²³ Steve Giegerich, *Architects of Fear Workplace Shootings: Big Threat or Media Hype?*, LEADERS EDGE (May 2016), <http://leadersedgemagazine.com/articles/%202016/05/architects-of-fear>; *see also infra* Part III.A (discussing how insurers use such firms to provide loss-prevention services).

²⁴ "Adverse selection" is the tendency of insurance to be purchased by those who are disproportionately likely to experience an insured-against event. Mocsary, *supra* note 1, at 1251.

²⁵ Doherty & Smith, *supra* note 16, at 10.

AS/AA market, at least until competition develops or insureds become more educated about the costs and benefits of the coverage.²⁶

Potential insureds may be slow to become educated, however, because mass shootings are fearsome events that receive media attention disproportionate to their low frequency. As Professor Peter Kochenburger, Deputy Director of the Insurance Law Center at the University of Connecticut School of Law said, the apparent dangers of active shooter incidents are often “greatly exaggerated.”²⁷ Well-known research on the availability heuristic shows that decision makers tend to assign heightened probabilities to the occurrence of events that they have heard about more recently and frequently.²⁸

Unfortunately, some marketing materials seem to be leveraging the media’s inflation of the actual danger posed by AS/AA events by creating fear in the minds of potential insureds. Rather benignly, nearly all the brochures advertising the coverage tend to show windows with bullet holes, crime scenes, or individuals holding weapons in threatening situations.²⁹

More problematically, some are engaging in less-than-honest marketing. One broker’s sales guide, for example, includes a selling point claiming that there were 385 mass shootings in 2016.³⁰ But this figure includes shootings resulting from events like street shootings, street-gang warfare, and domestic violence.³¹ These events would not ordinarily be covered by AS/AA policies because they did not take place at a premises eligible for coverage, but on a public street (and not at an organized parade or similar activity eligible for coverage) or a private residence.³² A program administrator’s brochure took the rhetoric to another level. Citing 334 mass shootings through November 2016, it stated that “by the time you begin and end this article the numbers are likely to be outdated just as quickly.”³³ The firm’s Managing Director upped the ante, opining that AS/AA insurance should be

²⁶ O’Neal, *supra* note 15.

²⁷ *Id.* Professor Kochenburger and the author are former colleagues.

²⁸ Amos Tversky & Daniel Kahneman, *Availability: A Heuristic for Judging Frequency and Probability*, 5 *COGNITIVE PSYCHOL.* 207, 230 (1973).

²⁹ See *AS/AA Brochures*, *supra* note 4.

³⁰ See ROCKWOOD BROKERAGE DIVISION, *supra* note 4, at 5 (citing GUN VIOLENCE ARCHIVE, PAST SUMMARY LEDGERS, <http://www.gunviolencearchive.org/past-tolls> (last visited Dec. 19, 2017)).

³¹ GUN VIOLENCE ARCHIVE, *Mass Shootings*, <http://www.gunviolencearchive.org/reports/mass-shooting?year=2016> (last visited Dec. 19, 2017) (click on “View Source” for the details of each event; click on the navigation below the list to view subsequent pages).

³² See *AS/AA Brochures*, *supra* note 4.

³³ MCGOWAN BUYER’S GUIDE, *supra* note 4, at 2.

mandatory.³⁴ About six mass shootings in 2016 would have qualified for AS/AA coverage.³⁵ Statistics are similar for other years.³⁶

3. Buyer Profile

By pooling risk, insurers have greater ability to bear financial risk than small and thinly capitalized, and to a lesser extent, private or closely held, entities.³⁷ Nevertheless, AS/AA coverage should be expected to make sense for these types of entities if two conditions are met. First, where, in the event of a claim, closing the entity and forming a new one is not a practical option, such as when the entity's owners or managers do not enjoy limited-liability protection. Second, when the premium is both actuarially fair and comprises a very small part of the entity's budget. As discussed above, this latter proposition is unlikely, at least in the foreseeable future.³⁸

³⁴ O'Neal, *supra* note 15.

³⁵ Mark Follman, Gavin Aronsen & Deanna Pan, *US Mass Shootings, 1982–2018: Data From Mother Jones' Investigation*, MOTHER JONES (Feb. 14, 2018, 2:00 PM), <http://www.motherjones.com/politics/2012/12/mass-shootings-mother-jones-full-data/#> (this database excludes shootings in which fewer than three people were killed, and includes some shootings that would not be covered by an AS/AA policy) [hereinafter Follman, Aronsen & Pan, *US Mass Shootings*]; Mark Follman, Gavin Aronsen & Deanna Pan, *A Guide to Mass Shootings in America*, MOTHER JONES (Feb. 14, 2018, 2:00 PM), <http://www.motherjones.com/politics/2012/07/mass-shootings-map/> (describing MotherJones's methodology as including those attacks in which three or more victims were killed and "exclud[ing] shootings stemming from more conventional crimes such as armed robbery or gang violence") [hereinafter Follman, Aronsen & Pan, *A Guide to Mass Shootings*]; see also LLOYD'S OF LONDON, *supra* note 4, at 10 (excluding injury and death to the insured's employees).

One industry commentator noted that a "business has a much better chance of being hit by lightning" than "incurring an active shooter event," although "[t]he number of people killed per event is greater than in the case of lightning strikes." CRAIN INSURANCE, *Insurance: Please Don't Buy This!* (Aug. 10, 2016), <http://craininsurancellc.com/?p=538>.

³⁶ See U.S. DEPT. OF JUSTICE, FED. BUREAU OF INVESTIGATION, *A STUDY OF ACTIVE SHOOTER INCIDENTS IN THE UNITED STATES BETWEEN 2000 AND 2013*, at 5, 6, 14 (2013) (defining an AS incident as "individual[s] actively engaged in killing of attempting to kill people in a . . . populated area [with] firearms," and stating that there were an average of 11.4 AS incidents per year from 2000 to 2013, and that 73, or 45.6 percent, of the 160 incidents "occurred in an environment related to commerce"); Follman, Aronsen & Pan, *A Guide to Mass Shootings*, *supra* note 35, (defining a mass shooting as one in which three or more victims are killed); Follman, Aronsen & Pan, *US Mass Shootings*, *supra* note 35.

As this discussion shows, there are multiple definitions of "mass shooting." See also NICHOLAS J. JOHNSON, DAVID B. KOPEL, GEORGE A. MOCSARY & MICHAEL P. O'SHEA, *FIREARMS LAW AND THE SECOND AMENDMENT: REGULATION, RIGHTS, AND POLICY* 64–65 (2d ed. 2017); Callum Borchers, *The Squishy Definition of 'Mass Shooting' Complicates Media Coverage*, WASH. POST (Oct. 4, 2017), https://www.washingtonpost.com/news/the-fix/wp/2017/10/04/the-squishy-definition-of-mass-shooting-complicates-media-coverage/?utm_term=.6cfb1e6ae1a3.

³⁷ See *id.* at 5, 8. Small and thinly capitalized entities are the most likely to be private and closely held.

³⁸ See O'Neal, *supra* note 15; *supra* Sections II.A.1–2.

At the same time, large and widely held entities whose owners enjoy limited liability have far greater ability to self-insure for AS/AA events. Although aggregate financial losses from such tragedies may be very high, they are typically spread among many entities outside the insured's business and already covered by existing insurance.³⁹ AS/AA policies also have relatively low (compared to large entities' resources) coverage limits. Larger potential insureds' survival is thus unlikely to be threatened by the occurrence of a tragic event covered by such policies.⁴⁰ Neither is such an event likely to do more than delay planned business activities.

Given the high premium loading of AS/AA policies,⁴¹ there is likely only a small segment of entities—those which the occurrence of a covered event would materially increase the likelihood of insolvency,⁴² and which have some special (and, likely, unknown to the insurer) knowledge of their own heightened risk⁴³—for which coverage makes economic sense. But entities may nevertheless purchase AS/AA coverage for other reasons, discussed next.

B. *Incentive Considerations*

1. *Managerial Incentives*

Notwithstanding its currently outsized cost, potential insureds' managers may be motivated to purchase AS/AA coverage to limit their personal (as opposed to their principals') risk. First, managers (and other employees to whom managers may feel a greater sense of loyalty than to their employer principals) have significant personal risk tied to their jobs, on which their livelihoods likely depend. Just as a low-expected-cost event may present a greater risk to a small entity than a large one,⁴⁴ it may present a greater risk to an employee than his or her employer or the employer's owners. This is especially true in public corporations where stockholders can diversify away firm-specific risk.⁴⁵ Second, and relatedly, managers spending other peoples' money may buy the insurance

³⁹ See Hannah Levitt & Sonali Basak, *Las Vegas Massacre Could Cost Insurers More Than \$1 Billion*, BLOOMBERG (Nov. 10, 2017, 10:15 AM), <https://www.bloomberg.com/news/articles/2017-11-10/las-vegas-massacre-may-add-more-than-1-billion-to-insurer-costs>. The costs are also likely to be diffuse among insurers.

⁴⁰ See *supra* text accompanying notes 9–12.

⁴¹ See *supra* Sections II.A.1–2.

⁴² Cf. Doherty & Smith, *supra* note 16, at 6–7 (describing what the authors term “underinvestment” and “illiquidity” problems associated with underinsuring against losses that have a meaningful chance of causing insolvency).

⁴³ See *supra* text surrounding note 24.

⁴⁴ See *supra* Section II.A.3.

⁴⁵ See Stephen M. Bainbridge, *The Business Judgment Rule as Abstention Doctrine*, 57 VAND. L. REV. 83, 110–14 (2004). But see George A. Mocsary, *Statistically Insignificant Deaths: Disclosing Drug Harms to Investors (and Patients) Under SEC Rule 10b-5*, 82 GEO. WASH. L. REV. 111, 160 (2013) (noting that investors value predictability).

thinking that the expense may go relatively unnoticed,⁴⁶ but that if the unthinkable happens, they will look like heroes with great foresight to protect against such an event. The true party-in-interest in AS/AA coverage may thus be the managers who purchase it.

2. Ever-Present “Negligence”

A less cynical, but very real reason to purchase AS/AA insurance is to protect against the negligence lawsuits that are nearly certain to follow a covered event. Negligence theories are easy to construct even for situations where law enforcement agrees that an event could not have been prevented, there were no signs of danger,⁴⁷ and every reasonable precaution was taken. Given the emotionally charged nature of the events in question, there is always a real risk of a large sympathy verdict once an allegation that the defendant could have done something more reaches a jury. The potential to limit losses from AS/AA occurrences, and to handle claims and lawsuits efficiently, must therefore become part of the purchase-decision calculus, as discussed next.

III. AS/AA INSURANCE AS LOSS LIMITER

A. Loss-Prevention Services

Insurers have incentive to study AS/AA incidents to determine whether there may be effective ways to reduce their frequency and harmfulness. They can either offer better rates to insureds who comply with loss-minimization methods or insist on the methods’ implementation as a condition of writing coverage and paying losses.⁴⁸ Insurers are adept at collecting information on insurable events and their insureds, and coordinating broad-based prevention plans involving the insurer and multiple third-party expert vendors. Loss prevention can occur both in anticipation of and in response to an AS/AA occurrence.

Carriers are providing pre-occurrence on-site assessments of building vulnerability and security, which are carried out by outside security consultants.⁴⁹ They are also providing training on how to identify potential active assailants and respond to ongoing AS/AA events.⁵⁰ This training covers topics like “general Active Shooter awareness”; “raising awareness of key behaviours that represent

⁴⁶ *But cf. supra* Sections II.A.1–2 (discussing the high profit margins on AS/AA policies).

⁴⁷ *E.g.*, Harriet Sinclair, *Nevada Sheriff on Las Vegas Shooting: ‘I Don’t Know How It Could Have Been Prevented’*, NEWSWEEK (Oct. 2, 2017, 4:30 PM), <http://www.newsweek.com/nevada-sheriff-las-vegas-shooting-i-dont-know-how-it-could-have-been-prevented-675994> (quoting the Nevada sheriff whose jurisdiction includes Las Vegas saying of the Mandalay Bay shooting that “I don’t know how it could have been prevented,” and noting that “employees going to and from” the murderer’s room did not notice anything unusual). It should not be surprising that a shooter’s intentions are not found out until after he or she begins to act given that he or she is likely to take precautions against discovery.

⁴⁸ Mocsary, *supra* note 1, at 1234–36, 1239.

⁴⁹ *AS/AA Brochures*, *supra* note 4; Chordas, *supra* note 11, at 27–28; Geigerich, *supra* note 23.

⁵⁰ LLOYD’S OF LONDON, *supra* note 4, at 6, 18; Geigerich, *supra* note 23.

pre-incident indicators and characteristics of Active Shooters,” including in employees; “scenario training for an Active Shooter situation,” including “ ‘training people trapped inside to fight’ ”; response plan creation; the importance of providing law enforcement with building layouts, and the like.⁵¹

The recommendations tend to be quite specific. For example, training typically includes instructions to find a windowless room, turn off the lights, lock and block the door, and *then* call police.⁵² Context can make the recommendations even more specialized. In employment-related situations, for example, the recommendations might cover warning signs to watch for in colleagues, providing mental health services, pre-employment screening, termination procedures (including notifying law enforcement in advance of especially apprehensive firings), and so on.⁵³

Although implementing the recommendations may be optional, at least one common policy has a bilateral 30-day cancellation provision.⁵⁴ (Interestingly, one program charges an additional fee of “\$5,000 on average” for risk assessments.⁵⁵) And monitoring the compliance with loss-prevention mandates of businesses and other entities should be much easier than monitoring that of individuals.⁵⁶ Indeed, allowing inspection is likely to be a condition of coverage.⁵⁷

Insurers also provide a basket of crisis management and public-relations services after a tragedy. Crisis management is typically included in the coverage and provided by outside vendors.⁵⁸ Public relations services, which may also be included in coverage, range from typical activities like shaping the public message surrounding an event to setting up information hotlines and reaching out to victims and law enforcement to offer assistance on behalf of the insured.⁵⁹ These efforts have been extraordinarily effective in avoiding or diverting lawsuits.⁶⁰

Although most loss-prevention is provided by third-party vendors with whom entities can contract directly, insurers can add value to the process by relying on

⁵¹ LLOYD’S OF LONDON, *supra* note 4, at 6; Amy O’Connor, *As Active Shooter Incidents Increase, Industry Addresses Coverage ‘Gray Area’* INSURANCE J. (Aug. 11, 2016), <https://www.insurancejournal.com/news/national/2016/08/11/422884.htm> (“‘What they are doing is training people trapped inside to fight—because they know it will be over in seven minutes and average response from police is four minutes’”); Geigerich, *supra* note 23.

⁵² See Geigerich, *supra* note 23. The author has participated in such training.

⁵³ Injury or death to any employee may not be covered by AS/AA policies. See LLOYD’S OF LONDON, *supra* note 4, at 10.

⁵⁴ LLOYD’S OF LONDON, *supra* note 4, at 6, 8, 15, 17.

⁵⁵ GDP ADVISORS LLC, *supra* note 4, at 2.

⁵⁶ Mocsary, *supra* note 1, at 1235.

⁵⁷ LLOYD’S OF LONDON, *supra* note 4, at 14, 22.

⁵⁸ See *supra* note 8 and accompanying text.

⁵⁹ Chordas, *supra* note 11, at 27–28.

⁶⁰ *Id.*

their skill at coordinating vendors, market power in purchasing services, and prior relationship with all parties to bring them together. But insurance also has the potential to enable an early end to an AS/AA incident.

B. *Enabling Active Response*

Insurance can also enable active response activities. As discussed above, some insurer-provided AS/AA training includes a self-defense component.⁶¹ AS/AA carriers might consider including or offering add-on coverage for armed-defender liability. This would enable employers that would like, based on an analysis of their “particular circumstances of time and place,”⁶² to give their employees the option to be armed, the ability to do so with one less worry.

Most AS/AA events end quickly. Even when they do not, police still have difficulty effectively engaging the perpetrators. As stated in a 2013 Federal Bureau of Investigation Report,

In 63 incidents where the duration of the incident could be ascertained, 44 (69.8%) of 63 incidents ended in 5 minutes or less, with 23 ending in 2 minutes or less. Even when law enforcement was present or able to respond within minutes, civilians often had to make life and death decisions, and, therefore, should be engaged in training and discussions on decisions they may face.

As expected, therefore, many incidents ended before police arrived. Of the [total] 160 incidents, at least 107 (66.9%) ended before police arrived and could engage the shooter, either because a citizen intervened, the shooter fled, or the shooter committed suicide or was killed by someone at the scene.⁶³

Police rarely arrive in fewer than five minutes in response to the highest-priority calls.⁶⁴ But even when law enforcement does arrive in time, they are often powerless to help because they do not know either the shooter’s identity or where in a building to find him or her. In one example recounted by a police-Captain-turned-security-consultant, first responders did not know whether the assailant was among those fleeing the scene.⁶⁵ When the responders entered the building and learned from panicked employees where the shooter was seen, they could not get reliable directions to the room.⁶⁶ Further, they needed key cards, which they

⁶¹ See *supra* note 51 and accompanying text.

⁶² Todd J. Zywicki & Anthony B. Sanders, *Posner, Hayek & the Economic Analysis of Law*, 93 IOWA L. REV. 559, 561–62, 568 (2008).

⁶³ U.S. DEPT. OF JUSTICE, *supra* note 36, at 8–9.

⁶⁴ See JOHNSON ET AL., *supra* note 36, at 47–48 (of nine cities studied, only Houston, at 3.87 minutes had a mean response time under five minutes; the others ranged from 6.89 minutes to 14.52 minutes); U.S. DEPT. OF JUSTICE, *supra* note 36, at 9 n.18 (“According to the 2007 National Crime Victimization Survey, 53.4% of the time, law enforcement was able to respond to a reported violent crime in less than 10 minutes.”) (internal citations omitted); see also O’Connor, *supra* note 51 (quoting similar times).

⁶⁵ Geigerich, *supra* note 23.

⁶⁶ *Id.*

did not have, to get to and access the room.⁶⁷ It took over two hours and deployment of a robot shield before police could begin processing the scene.⁶⁸

Employees, however, were present when the shooting began. They were the targets and knew who the shooter was. Although not every AS/AA situation is one that can be stopped by an armed potential victim,⁶⁹ most are. And armed citizens are able to respond effectively.⁷⁰ Indeed, armed individuals are more likely than police to thwart criminal attacks and less than one-fifth as likely to shoot an innocent person mistakenly thought to be a criminal.⁷¹ Gun-using crime victims also experience substantially lower injury (and property-loss) rates than unarmed ones.⁷² As the dynamics described in the previous paragraph suggest, AS/AA

⁶⁷ *Id.*

⁶⁸ *Id.*

⁶⁹ The Las Vegas shooting of October 2017 is one such example. The shooter was firing down onto a crowd from a distance well out of handgun range. Melina Delkic, *Las Vegas Shooter Stephen Paddock Had 19 Guns in His Hotel Room*, NEWSWEEK (Oct. 2, 2017, 10:02 AM), <http://www.newsweek.com/las-vegas-gunman-had-10-rifles-stephen-paddock-675449>; see also Sinclair, *supra* note 47.

⁷⁰ One otherwise excellent article, which is cited heavily herein, says otherwise. Geigerich, *supra* note 23. That article quotes this author out of context to suggest that armed employees would be ineffective in resisting an attack. This Section corrects that misunderstanding, showing that armed citizens are quite capable of armed self-defense. That is not so say, of course, that armed citizens, *id.*, or police, *infra* note 71 and accompanying text, do not make mistakes. Although workplace shooting sprees on which that article focuses are not often stopped by armed employees, as the article correctly states, it is not because employees would be incompetent to do so. Instead, most employers do not allow employees to carry firearms in the workplace.

This author also disagrees with that article's statement that it is "difficult to shoot a handgun accurately, 'especially under stress,' from a distance of more than seven feet." It is generally agreed that seven yards is the reasonable defensive range.

This footnote does not intend to criticize an otherwise informative piece, but merely to correct the record on the points discussed herein.

⁷¹ See Clayton E. Cramer & David B. Kopel, "Shall Issue": *The New Wave of Concealed Handgun Permit Laws*, 62 TENN. L. REV. 679, 733 (1995); Don B. Kates, Jr., *The Value of Civilian Handgun Possession as Deterrent to Crime or a Defense Against Crime*, 18 AM. J. CRIM. L. 113, 130 (1991); John R. Lott, Jr., *Now that the Brady Law is Law, You Are Not Any Safer than Before*, PHILA. INQUIRER, Feb. 1, 1994, at A9.

⁷² PRIORITIES FOR RESEARCH TO REDUCE THE THREAT OF FIREARM-RELATED VIOLENCE 15–16 (2013) (Alan I. Leshner et al. eds., 2013); FIREARMS AND VIOLENCE: A CRITICAL REVIEW 115–16 (Charles F. Wellford et al. eds., 2005) (stating that defending with a gun reduces the probability of injury in assaults and robberies by 49% and 46%, respectively, and property loss in robberies by 83%, versus not defending, and that resisting without a gun is substantially more likely to lead to injury than not resisting at all). The former report was ordered by President Barack Obama and commissioned by the Centers for Disease Control and Prevention (CDC). PRIORITIES FOR RESEARCH TO REDUCE THE THREAT OF FIREARM-RELATED VIOLENCE, *supra*, at 11–12. The latter report was developed by the National Academies at the request of a consortium of federal agencies and private foundations, including the CDC and the Joyce Foundation, both of which have historically "taken positions strongly favoring increased gun control." JOHNSON ET AL., *supra* note 36, at 4.

situations are ones in which victim firearm use against an assailant is likely to be more effective and safer for third parties than police intervention.

Yet employers (and employees) face legitimate liability concerns, relating to the law's treatment of mistakes made by armed defenders, about allowing employees to be armed.⁷³ Insurers have already stepped in to enable schools to arm their staff to protect against violent attack.⁷⁴ Although some liability insurers threatened to drop coverage if their insureds armed their teachers,⁷⁵ determined school administrators found that their “‘search for another insurance provider was easier than expected,’ and even resulted in decreased premiums.”⁷⁶ This is not surprising given that commercial liability premiums are typically unchanged for businesses that keep firearms ready on-premises for security purposes, and for businesses open to the public where concealed-carry laws have become permissive.⁷⁷

C. *Service Efficiencies*

All the benefits of insurance described so far—from reducing risk to compensating victims to limiting losses—provide both financial and nonfinancial value to insureds. This Section briefly discusses two additional benefits: the service efficiencies provided by defending insureds and managing the claims process. Both should translate well into the AS/AA area.

During a very stressful and emotional time, it is a great benefit to insureds' employees, and thus to the insureds, to have the ability to call an insurer whose staff is trained to deal with unfortunate situations. The insurer, in turn, can call upon attorneys likewise experienced in dealing with their clients' difficulties. Removing this burden from insureds allows them to focus on getting their business into order while allowing the legal trouble that is likely to follow⁷⁸ to be dealt with clear-headedly.

It is, of course, standard practice for, and typically the obligation of, insurers to directly defend their insureds. The defense expertise—in the form of expert lawyers and other resources—built up across many clients in many areas almost certainly makes insurers better at defending AS/AA liability claims. Although

⁷³ Chordas, *supra* note 11, at 27; see Mocsary, *supra* note 1, at 1249.

⁷⁴ See Mocsary, *supra* note 1, at 1249 & n.256 (citing John Eligon, *A Missouri School Trains Its Teachers to Carry Guns, and Most Parents Approve*, N.Y. TIMES, Apr. 15, 2013, at A10). Most parents approved of the measures. *Id.*

⁷⁵ See *id.* at 1249–50 & n. 257 (citing Steven Yaccino, *Schools Seeking to Arm Employees Hit Hurdle on Insurance*, N.Y. TIMES, July 8, 2013, at A9).

⁷⁶ *Id.* at 1250 (quoting Yaccino, *supra* note 74).

⁷⁷ *Id.* at 1233 (citing Tom Baker & Thomas O. Farrish, *Liability Insurance & the Regulation of Firearms*, in *SUING THE GUN INDUSTRY: A BATTLE AT THE CROSSROADS OF GUN CONTROL AND MASS TORTS* 301–07, 308–10 (Timothy D. Layton ed., 2005); Michael Cooper & Mary Williams Walsh, *Buying a Gun? States Consider Insurance Rule*, N.Y. TIMES, Feb. 22, 2013, at A1).

⁷⁸ *But cf. supra* text accompanying notes 59–60 (describing how a proper public response can reduce the number of lawsuits an insured might face).

insurers have little experience defending AS/AA claims, the particular legal theories likely to result from an AS/AA incident are unlikely to differ meaningfully from the theories in other liability lawsuits.

Relatedly, insurers are also superior in processing claims, assessing losses, and settling claims. As with litigation defense, the components of an AS/AA claim are unlikely to differ much from what insurers regularly handle in other contexts. For example, an insurer is likely to be able to efficiently assess the loss resulting from, and negotiate the payout according to industry standards for, a certain type of injury, irrespective of whether the injury occurred during an AS/AA event.

IV. CONCLUSION

The nascent field of Active Shooter/Active Assailant insurance is a major private response to the growth of mass shootings since the early 1980s.⁷⁹ It includes coverage for both traditional liability and a basket of services for policyholders and individuals impacted by the horrific covered events. There are issues to be worked out with respect to pricing and marketing. If they are resolved, AS/AA insurance has the potential to provide meaningful financial and nonfinancial value to the insureds most likely to be involved in an AS/AA occurrence.

⁷⁹ See Clayton E. Cramer, *Mental Illness and the Second Amendment*, 46 CONN. L. REV. 1301, 1330–31 (2014).