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**TO:** BOMA San Francisco Building Security Task Force  
**FROM:** Manuel Fishman  
**DATE:** October 29, 2001  
**FILE NO:** 999.002  
**RE:** Reviewing Property Management Procedures in the Aftermath of September 11 Attacks

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In the aftermath of the September 11, 2001 terrorist attacks and the recent biochemical threats, building owners and managers are focusing their attention on building security and access issues. This requires close interaction with law enforcement, consultants, building engineers, key tenants and legal counsel.

### **Standard of Care and Legal Issues**

Certain legal issues are important to keep in mind when considering the implementation of a building security and evacuation plan:

While California may be more tenant protective in landlord/tenant matters than other states, California case law is sufficiently well developed to the effect that even though a building owner owes a duty of care to its tenants and its tenants' employees to protect them from third party misconduct and criminal activity when there is a reasonable basis to anticipate such conduct or activity, a building owner's failure to institute reasonable procedures to prevent such conduct or activity must be a "substantial factor" in bringing about the injuries sustained. In other words, there must be a substantial link between the building owner's omission or failure to provide certain security measures and the injury suffered, and the "substantial link" must be supported by something more than an expert's inferences, speculation and conjecture.

When confronted with terrorism (whether the weapon that is utilized is a bomb or a biochemical threat), it is likely that no security measure would be effective to stop the terrorist from targeting a building. An example from the not so recent past is the 1984 mass murder that occurred in San Ysidro, California. In that case, a deranged and heavily armed man walked into a McDonalds restaurant and indiscriminately killed 21 patrons and employees before being killed by a police sharpshooter. The evidence disclosed that McDonalds had refused to hire security guards for the restaurant despite the fact that there were several

reported incidents of theft related and property crimes in the vicinity of the restaurant, and that another fast food restaurant had instituted a policy of placing unarmed guards at its restaurant. Various family members sued McDonalds and the local franchisee alleging that the restaurant was negligent for failing to hire and post unarmed security guards at the fast food restaurant. Both the trial court and the California appellate court held that as a matter of law McDonalds did not breach its duty to protect its patrons from reasonably foreseeable criminal activity because no reasonable person could conclude that unarmed, uniformed security guards could have acted as a deterrent and prevented the event that had occurred or even minimized the extent of the injuries suffered. As the court noted, people intent on committing senseless and indiscriminate crimes cannot be deterred by anything short of impenetrable walls and armed guards.

Therefore, a building owner who is guided by certain basic principles in implementing building security policies and procedures should not be exposed to increased negligence liability based on terrorist activity that targets a specific building. It should be emphasized that building owners should exercise care in establishing heightened security procedures at their buildings, because once these procedures are put in place they may create an expectation by tenants and others that requires the building owner to maintain the same or a higher level of security for an extended period of time. In addition, implementing security procedures that involve remote technology, such as video cameras, card scans, and visible alarms, requires that these technologies be monitored and maintained in operational order. There may indeed be liability when a property owner portrays to its employees and the public that certain security procedures are in place when, in fact, the procedures are either not being monitored for response or are not operational (creating a “false sense” of security).

With respect to casualty, interruption of service and/or access, rent abatement and constructive eviction, building owners and managers should review whether their rental income interruption insurance coverage extends to occurrences other than a fire or other weather related casualty. The basic rule is that there must be a “covered cause of loss” in order to trigger an owner’s “business income” insurance coverage, regardless of whether the owner has given its tenant the right of rent abatement under its lease. In other words, a building owner’s closure of its building (whether voluntary or mandated by a governmental agency) in response to a terrorist threat or due to a casualty from a terrorist act at an adjacent building that does not result in actual physical damage to the owner’s building, may not be a covered loss under the owner’s property insurance policy. Building lease forms may need to be more clear than they are now as to a tenant’s right to terminate a lease following incidents, either at the building or in the immediate vicinity of the building, that prevent access to a tenant’s premises, or that cause damage to a tenant’s premises, and in either case result in a tenant not being able to conduct its business from or use the premises for an extended period of time. Tenants will begin to negotiate these clauses more carefully. One of the consequences of the New York attack will be various landlord/tenant disputes that may result in reported decisions interpreting lease clauses that have, to date, been

applied only in a theoretical context or only in the context of a confined fire.

New building rules and regulations governing screening of mail and packages and voluntary closure of the building should be considered for inclusion in a lease form.

Building owners that institute any search or video monitoring procedures, or authorize their agents (such as parking operators) to institute such procedures, must also implement procedures that notify tenants and their guests that they are subject to search when entering a building or being monitored while in the building, and accommodations must be made for disabled persons in connection with any such search. A person does not give up their constitutional right against unauthorized searches and seizures merely by entering into an office building.

Lastly, building owners may wish to consider notifying tenants now that there will be additional operating expense costs incurred this year for building security procedures.