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April 19, 2015

BY CERTIFIED MAIL

National Gun Victims Action Council
Attn: Elliot Fineman, Chief Executive Officer

Re: Illinois Property Owners Research Memorandum

Dear Mr. Fineman:

In response to the National Gun Victims Action Council's inquiry regarding proper risk management techniques for Illinois property owners in response to the Firearm Concealed Carry Act, please find attached a research memorandum prepared by our office.

If you have any questions, please call me.

Yours truly,

MAYER BROWN LLP

By: _____
Marc R. Kadish

MEMORANDUM

April 19, 2015

TO: National Gun Victims Action Council

FROM: Mayer Brown LLP

RE: Concealed-Carry Laws for Illinois Property Owners

Introduction

Commercial and residential property owners in the State of Illinois should be aware of the current status of concealed-carry laws in the state. We are entering the second year of concealed carry, and while no incident has yet forced the courts to consider the common-law duty of care owed to entrants and occupants on private property in light of concealed-carry laws, businesses should be prepared for such an incident and, in order to eliminate exposure to significant financial risk, should institute policies accordingly. These practices will serve to eliminate the risk that a jury will find a duty of care to have been breached by a property owner and order that a plaintiff be paid large sums of money. This memorandum discusses the concealed-carry statute, concludes that the best way for property owners to eliminate this potential significant financial liability is to place signs[1] on their properties prohibiting concealed carry, and explores several difficult questions property owners may face.

Background

On July 9, 2013, the Illinois legislature passed the Firearm Concealed Carry Act, enabling Illinois residents to carry handguns in public for the first time. The first wave of concealed-carry licenses was sent to recipients at the end of February 2014, and by the end of

[1] This memorandum refers to the standardized "no carrying of firearms" signs referred to in Section 65(d) of the Firearm Concealed Carry Act as simply "signs" throughout.

2014, the number of permits issued reached 91,651, with 23,921 of those issued in Cook County.[2]

The statute provides a list of places a licensee "shall not knowingly carry a firearm on or into."[3] These places include government buildings,[4] hospitals,[5] parks,[6] libraries,[7] airports,[8] and a variety of other public places; these prohibitions recognize a public policy that guns would be a threat to public safety in such areas. In addition, concealed carry is automatically prohibited on some private property, including private schools[9] and establishments where alcohol is sold on the premises, if more than 50% of the establishment's gross receipts within the prior three months are from the sale of alcohol.[10] The statutory text for establishments that sell alcohol and reach the 50% threshold, which threatens owners who "knowingly fail" to prohibit firearms with the possible revocation of their liquor licenses, strongly suggests that there is a legal "safe haven" created by putting up the signs.

All private property that does not fall within the purview of the prohibited areas mentioned above is subject to 430 ILCS 66/65(a-10), which provides that:

> The owner of private real property of any type may prohibit the carrying of concealed firearms on the property under his or her control. The owner must post a sign in accordance of subsection (d) of this Section indicating that firearms are prohibited on the property, unless the property is a private residence.

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[2] "Concealed-carry permits in Illinois top 91,000." *Chicago Tribune.* January 16, 2015. <http://www.chicagotribune.com/news/local/breaking/chi-police-2014-concealedcarry-permits-in-illinois-top-91000-20150116-story.html> (accessed February 12, 2015).
[3] 430 ILCS 66/65(a).
[4] 430 ILCS 66/65(a)(5).
[5] 430 ILCS 66/65(a)(7).
[6] 430 ILCS 66/65(a)(13).
[7] 430 ILCS 66/65(a)(18).
[8] 430 ILCS 66/65(a)(19).
[9] 430 ILCS 66/65(a)(1).
[10] 430 ILCS 66/65(a)(9). This subsection adds that "[t]he owner of an establishment who knowingly fails to prohibit concealed firearms on its premises as provided in this paragraph or who knowingly makes a false statement or record to avoid the prohibition on concealed firearms under this paragraph is subject to the penalty under subsection (c-5) of Section 10-1 of the Liquor Control Act of 1934." Under the Liquor Control Act, that penalty is "a fine up to $5,000" and the possibility that the owner's liquor license will be revoked. 235 ILCS 5/10-1(c-5); 235 ILCS 5/10-4.

430 ILCS 66/65(d), referenced by (a-10) above, merely provides basic information about where the signs should be posted and what they should look like.[11]

Whose Decision?

As a starting point, the statute is somewhat vague about who chooses whether signs should be put up. If the property is currently being leased by one or more tenants, the landlord may believe that the property is not currently under "his or her control" (as the statute requires), and so the decision whether to put up a sign is one for the tenant. A tenant may respond by pointing to the fact that the statute explicitly refers to the "owner." Furthermore, terms such as "private real property" are undefined by the statute. This uncertainty creates exposure to financial liability for the unprepared property owner, and putting up the signs is the only way to eliminate this risk.

The Illinois State Police Department states on its website that the authority to allow or prohibit concealed firearms in a business rests with property owners, unless specified otherwise in a rental or lease agreement.[12] In addition to this guidance, the statute offers no penalties for anyone who wrongfully puts up a sign, suggesting that even if there is doubt over who has the authority, there is no negative consequence for either tenant or landlord to make the decision. The safest practice for property owners is to write into their leases that signs must be placed on the leased premises, but no matter whether such language is put into the lease, property owners should proactively ensure that signs are put up in order to avoid being on the losing side of litigation alleging a breach of a duty of care. The next sections explore why this is and approach potentially ambiguous situations.

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[11] The signs must be "clearly and conspicuously posted at the entrance" of the property in question, must be of the design established by Department of State Police, and must be four inches by six inches.

[12] "Concealed Carry Frequently Asked Questions." Illinois State Police. <https://www.ccl4illinois.com/ccw/Public/Faq.aspx> (accessed February 12, 2015). Property owners have the option of designating discretion on whether to put up signs to tenants, but an injured party will almost certainly sue all possible parties, including the property owner, and a jury could find that a property owner had a responsibility not to be silent on the important question of whether to allow concealed carry.

Why Prohibit Concealed Carry?

There is no doubt that concealed carry policies divide voters. Businesses who have taken public stances on the issue over the past few years have found themselves in the crossfire of those on both sides of the debate, who have signaled their displeasure with such policies with boycotts and, in response to the boycotts, "buycotts." The political reasons for a property owner to favor one side of the debate are beyond the scope of this memorandum. Instead, this memorandum contends that, from a risk management and liability standpoint, the most financially prudent choice for a property owner is to prohibit concealed carry.

As delineated by Illinois's Premises Liability Act and as elaborated upon by case law, the duty owed to non-trespassers who enter onto another's property is that of "reasonable care."[13] If a court finds that such a duty exists in a given case, it will then look to four factors to determine whether an owner or occupier is liable: (1) the reasonable foreseeability of injury; (2) the reasonable likelihood of injury; (3) the magnitude of the burden that guarding against injury places on the defendant-landowner; and (4) the consequences of placing that burden on the defendant-landowner.[14] A deeper discussion of the intricacies of Illinois premises-liability law is beyond the scope of this memorandum; it will suffice to say that someone injured in a shooting on private property will look to sue the property owner under a premises-liability theory, and property owners should seek to eliminate this exposure to risk, lest plaintiffs eagerly sue them in the hopes of finding a jury that will award massive damages.[15]

The choice presented to property owners is a binary one—either put up signs or don't put up signs. Imagine a scenario where a person with a valid concealed carry permit enters an office building in downtown Chicago with his handgun lawfully hidden on his person. The handgun

[13] 740 ILCS 130/2. Specifically, the Premises Liability Act says that "[t]he duty of care owed to [invitees and licensees] is that of reasonable care under the circumstances regarding the state of the premises or acts done or omitted by them."
[14] *Sollami v. Eaton*, 201 Ill. 2d 1, 17 (Ill. 2002).
[15] See, for example, two Illinois cases: *Van Gelderen v. Hokin*, 958 N.E.2d 1029 (upholding jury verdict of over $1.5 million due to injury caused in part by unsafe condition created by stairwell in defendant's home); *Smart v. City of Chicago*, 2013 IL App (1st) 120901 (upholding jury verdict of over $1.9 million against city on a negligence and not a premises liability theory due to city's failure to exercise ordinary care to keep property reasonably safe).

discharges unexpectedly—which could happen for any number of innocent reasons, including a faulty holster, a person bumping into the carrier, the carrier bumping into a person, the carrier slipping, or the carrier mistaking a situation for one in which he is legally entitled to use a gun for self-defense or to save others—and another person in the building is shot and badly injured. This victim, in addition to suing other parties, may sue the owner of the property under a theory that the owner did not fulfill the duty of reasonable care owed to the victim. A property owner who put up the signs will be able to argue that it guarded against the possibility of such an injury by placing the signs; thus, the person with the gun was trespassing on the property and the injury was unforeseeable, since there is only so much a business can do in order to prevent trespassers.[16] A property owner who did not put up the signs, on the other hand, will face the argument that it was entirely foreseeable such an accident would occur, since he or she failed to prohibit concealed carry. Within this set of facts, an accidental discharge is far more foreseeable and likely when concealed carry is allowed, compared to when concealed carry is prohibited.[17] The property owner could have put up signs, but instead allowed concealed carry, meaning that they allowed for this risk to occur. Thus, the choice of not putting up signs should make it more likely that a judge or jury will find that the property owner breached the duty of care owed to the victim.

It bears mention that a handful of states have chosen to head off this problem by passing concealed carry bills with statutory language that may render property owners immune in certain circumstances. Most notably, the state of Wisconsin (which has a similar regime in which private property owners may choose whether to put up signage prohibiting concealed carry) provides that "[a] person that does not prohibit an individual from carrying a concealed weapon on property that the person owns or occupies is immune from any liability arising from its

[16] The plaintiff in such a case could make additional arguments that the building had a further duty to use metal detectors or some other kind of system in order to enforce the prohibition on concealed carry. The Firearm Concealed Carry Act has not been litigated in courts and this is just one of many vagaries raised by the statute, but it seems extremely unlikely that courts would impose, as part of a property owner's duty of care, the responsibility to search entrants.

[17] This point relies on two uncontroversial assumptions; namely, that (1) the number of people carrying handguns and with concealed-carry licenses who will choose what buildings to enter and avoid based on posted signage is not zero and (2) that the risk of an accidental discharge is above zero.

decision."[18] In short, if a property owner does not put up a sign, he or she may be immune from liability. This statute has not been tested in court,[19] but for Illinois property owners, the important fact is that this immunity provision was not borrowed for the Firearm Concealed Carry Act in Illinois; the Illinois statute is instead silent on questions of liability. This silence does not indisputably imply that Illinois lawmakers intended for Illinois property owners to be liable, but it does show that the Illinois legislature could have followed suit and chose not to, thus leaving the door open for such liability. Even if Illinois were to amend the Firearms Concealed Carry Act with such language, we do not yet know how courts would interpret it. This ambiguity would expose property owners who did not put up the signs to significant financial risk.

Proponents of concealed carry have suggested an entirely different scenario as support for allowing concealed carry on private property. In this scenario, a person with a concealed handgun and the intent to harm others enters a building that has posted signage prohibiting concealed carry, and a tragic shooting occurs. Victims may argue that, if the signs had not been put up, the victims could have had a handgun and defended themselves against the gunman. Again, no court in Illinois has considered this question, but it seems unlikely that liability would be found. A question for the court would be whether it was foreseeable and likely that the victims were injured because they could not defend themselves. Some real-life simulations suggest that being armed would not effectively help victims defend themselves in such a situation.[20] A study of the New York Police Department found that even their officers, trained to use handguns several times per year under stress conditions, miss their targets roughly two-thirds

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[18] Wis. Stats. 175.60(21)(b).

[19] The Wisconsin statute, as it exists, is vulnerable to an argument that it refers to "person(s)" who don't prohibit individuals from carrying concealed weapons. "Person" is not defined by the concealed-carry law, but is used throughout in a way that indicates that it refers solely to individuals; for example, other subsections of the law speak of "a person who is a law enforcement officer" and "the unique identifying driver number assigned to a person." Wis. Stats. 175.60(12)(b)(2); Wis. Stats. 175.60(1)(i). Are corporations and limited-liability companies "persons" under the law for the purposes of the concealed-carry statute? No precedent offers an answer in either direction, but property owners should be wary of the possibility that the statute could be construed in a way that does not immunize their companies from liability.

[20] "Gun Owners Participate in Simulation of Paris Massacre." CBS Local Media. January 13, 2015. <http://dfw.cbslocal.com/2015/01/13/gun-owners-participate-in-simulation-of-paris-massacre/> (accessed February 12, 2015); "Carrying a Gun Wouldn't Necessarily Get You Out of a Shooting." ABC News. April 10, 2009. <http://abcnews.go.com/2020/story?id=7298996> (accessed February 23, 2015).

of the time.[21] The Firearm Concealed Carry Act, in contrast to NYPD training, requires "at least 16 hours" of training (with no training under stress conditions[22]) to obtain a license[23] and three more hours of training once every five years in order to renew the license.[24] These simulations and studies indicate that it is not foreseeable and likely that armed individuals could successfully defend themselves in a crisis situation; in fact, attempts by several people with concealed-carry licenses to save the day may create *more* danger.[25] A court could hardly claim that a duty of care was violated because a property owner put up signs to help prevent this additional danger posed by would-be heroes.[26] Also consider that the court may find that the presence of a trespasser on the land (since guns are prohibited) was unforeseeable, and so the property owner breached no duty of care.[27]

To summarize the above, while we don't have the benefit of legal precedent, the best risk management policy for property owners is to prohibit concealed carry on private property by placing signs, as proscribed by the statute. It is of course possible that a judge or jury would find no basis for a breach of a property owner's duty of care, but even reaching that verdict would prove costly for property owners due to legal costs. The property owner who prohibits concealed carry is far more likely to head off the possibility of significant financial liability than is the

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[21] "11 Years of Police Gunfire, in Painstaking Detail." The New York Times. May 8, 2008. <http://www.nytimes.com/2008/05/08/nyregion/08nypd.html> (accessed February 23, 2015).

[22] Instead, the class must cover "firearm safety," "the basic principles of marksmanship," "care, cleaning, loading, and unloading of a concealable firearm," "all applicable State and federal laws relating to the ownership, storage, carry, and transportation of a firearm," and "instruction on the appropriate and lawful interaction with law enforcement while transporting or carrying a concealed weapon." 430 ILCS 66/75(b).

[23] 430 ILCS 66/75(b).

[24] 430 ILCS 66/50.

[25] Consider a 2012 incident in which nine pedestrians were shot by police near the Empire State Building while the police attempted to shoot a suspect armed with a pistol. "Police: All Empire State Shooting Victims Were Wounded by Officers." CNN. August 26, 2012. <http://www.cnn.com/2012/08/25/justice/new-york-empire-state-shooting/> . (accessed February 26, 2015).

[26] A further example suggesting that concealed carry entails more and not less danger can be found in the case of EMC Insurance Companies. In the wake of the tragic Newtown, Connecticut school shooting in December 2012, Kansas passed legislation authorizing schools to allow teachers and staff members with concealed-carry permits to bring handguns into classrooms. EMC made the financial decision to refuse to insure any school allowing concealed carry under the new law. "Kansas Law Aims to Arm Teachers, But Misfires with Insurance Companies." The Washington Post. July 9, 2013. <http://www.washingtonpost.com/blogs/she-the-people/wp/2013/07/09/kansas-law-aims-to-arm-teachers-but-misfires-with-insurance-companies/>. (accessed March 2, 2015).

[27] This is not to say that no one would be able to foresee a person with a gun entering a building in defiance of posted signage. Instead, it is an assertion that since the property owner made a choice not to allow the lawful carrying of guns, the property owner responsibly did his part to mitigate the risk of guns on the property.

property owner who allows concealed carry. The remainder of this memorandum ties up some loose ends and offers cautions to certain property owners.

What about Parking?

Efforts to eradicate concealed carry from property will face one minor obstacle that property owners should be aware of. Under the Firearm Concealed Carry Act, even if a property owner opts to prohibit concealed carry, the following applies:

> [A]ny licensee . . . shall be permitted to carry a concealed firearm on or about his or her person within a vehicle into the parking area and may store a firearm or ammunition concealed in a case within a locked vehicle or locked container out of plain view within the vehicle in the parking area. A licensee may carry a concealed firearm in the immediate area surrounding his or her vehicle within a prohibited parking lot area only for the limited purpose of storing or retrieving a firearm within the vehicle's trunk, provided the licensee ensures the concealed firearm is unloaded prior to exiting the vehicle.[28]

In short, a property owner instituting policies throughout a building should be aware of this carve-out to the law that allows extremely limited concealed carry within a parking area. Since allowing guns in these areas is mandated by law, property owners should face no risk of a court finding a breach of a duty of care, should a tragic incident occur in a parking area.

What about Mixed-Use Buildings?

The law offers little guidance for property owners who own buildings that are partially residential and partially commercial. Imagine the resident who wishes to carry a handgun from his home to a street outside. While one section of the statute speaks on a parallel situation in the

[28] 430 ILCS 66/65(b).

context of public gatherings or special events open to the public,[29] lifting the prohibition for the resident who needs to pass through an otherwise restricted area, the statute is silent on this situation for a private property owner. If restricted from carrying guns throughout their buildings, proponents of concealed carry will argue that they are effectively being prohibited from exercising their Second Amendment rights, as they cannot store the weapon in a case and later arm themselves unless they have a vehicle (per the above section on parking spaces). This creates a direct conflict between the statutory right of gun owners to concealed carry and the statutory right of property owners to exclude concealed carry.

The most prudent practice is for property owners to continue to put up signs, as the risks outlined earlier in this memorandum far outweigh the risk of this particular challenge. Again, while no challenge has yet been brought to courts, a fair argument can be made that the gun owner's complaint is not with the property owner but is instead with the law. The gun owner is free to challenge the law on grounds that it is unconstitutional, and such a lawsuit would not adversely affect the property owner due to litigation costs. An additional solution to head off future disputes may be found through drafting leases and the condominium covenants, conditions, and restrictions in a way that prohibits handguns.[30]

Conclusion

The Firearm Concealed Carry Act offers little guidance for property owners, and many of the questions raised in this memorandum will unfortunately only be resolved through extensive litigation. The statute will doubtlessly be amended by the legislature over the next few years, but in the interim, the optimal way for property owners to avoid being on the losing side of that

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[29] 430 ILCS 66/65(a)(10) prohibits concealed carry on "[a]ny public gathering or special event conducted on property open to the public that requires the issuance of a permit from the unit of local government," but adds "provided this prohibition shall not apply to a licensee who must walk through a public gathering in order to access his or her residence, place of business, or vehicle."

[30] However, this approach may also open the door to litigation. One student law-review article posits that "a patchwork approach will emerge amongst the states" regarding handgun bans by homeowners associations, where some state courts will allow them and others won't, determined solely by judicial discretion. Christopher J. Wahl, *Keeping Heller Out of the Home: Homeowners Associations and the Right to Keep and Bear Arms*, 15 U. Pa. J. Const. L. 1003, 1036 (2014). (available at http://scholarship.law.upenn.edu/jcl/vol15/iss3/7).

litigation and, no matter the outcome, to avoid the significant financial risk imposed by litigation is to put up signs on their properties prohibiting concealed carry. Property owners would be well advised to speak with their insurers and legal counsel regarding best practices going forward.