Commercial Leasing Law IN Brief ™

Landlord Exposure for Tenant Conduct

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Any landlord will occasionally wonder whether it can be legally responsible for a tenant's conduct or conditions on the leased premises. As with most legal questions, the answer is that it depends. From nuisance conditions that impede the ability of others to enjoy life or property, to dangerous conditions that injure a tenant's visitor, much hinges on: (1) what the landlord knows, and (2) when they knew it. This article discusses two recent Indiana Court of Appeals decisions that offer guidance on the subject.

Conditions with Adverse Impact Away From the Leased Premises – Nuisance

You may already be familiar with the nuisance concept, but a brief overview will aid this discussion. Indiana Code § 32-30-6-6 defines nuisance as "whatever is: (1) injurious to health; (2) indecent; (3) offensive to the senses; or (4) an obstruction to the free use of property; so as to essentially interfere with the comfortable enjoyment of life or property." Classic examples include environmental contamination, industrial or agricultural applications that create offensive odors, or morally offensive business enterprises. The lay of the land must be considered in evaluating a nuisance claim. For example, one probably has a nuisance claim if a residential neighbor builds a backyard chicken coup, but one who builds a rural residence near a properly zoned hog farm almost certainly does not.

Landlords are generally not liable for a tenant's nuisance, except in the event that the landlord: (1) leases property to the tenant for the purpose of opening a business that is a nuisance by its character, or (2) knows of and can stop the tenant's nuisance, but does not.

In *Neal v. Cure*, 2010 Ind. App. LEXIS 2218, the tenant's dry cleaning business caused environmental contamination on the neighboring plaintiffs' property, and those plaintiffs filed a nuisance lawsuit against the landlord. No one argued that a dry cleaner, by its character, is a nuisance, so the question before the court was whether the landlord knew of the environmental contamination and chose not to stop it. The court reviewed the evidence, and concluded that the landlord did not actually know of the contamination. Given that, the plaintiffs argued that the landlord was still liable for nuisance because it should have known of the contamination [i.e., (1) the landlord saw barrels of the contaminant on the leased premises, but never inquired as to the contents; (2) the landlord considered the tenant a "sloppy housekeeper;" and (3) a report relating to a 1991 spill showed a release of the same contaminant].

The court ruled against the plaintiffs, stating that Indiana law required actual knowledge by the landlord, and not just reason to know. In doing so, it made particular note of the fact that the landlord knew of the 1991 spill, but not the resulting report (which showed

earlier contamination). Apparently, the tenant did not make the report available to the landlord and also told the landlord that the spill "didn't amount to anything."

The *Neal* case demonstrates that plaintiffs will face a fairly high threshold with respect to establishing the landlord's knowledge of an alleged nuisance. Still, there is a fine line between lack of actual knowledge and willful ignorance. In this case, for example, the outcome may conceivably have been different had the landlord possessed the 1991 spill report and simply chosen not to read it. Even in light of *Neal*, Indiana landlords should be aware of their tenants' activities and consciously consider whether any nuisance is occurring. And given *Neal*, if it is concluded that a nuisance is occurring, the situation should be addressed with the tenant. Commercial leases often contain nuisance clauses that should inform the landlord of its options. If landlords have questions about whether a given activity constitutes a nuisance, a real estate attorney should be consulted.

Landlords must also exercise caution at lease inception, because mistake is no defense for landlords that have allegedly leased space for a nuisance purpose. In other words, courts and landlords might disagree about the character of the tenant's business. And if the landlord subjectively, but mistakenly, concluded that the prospective tenant's business would not constitute a nuisance, the landlord can later be found responsible for the nuisance. Again, the lay of the land is important as an identical activity may or may not be considered a nuisance in a given location. Adult book stores, for example, are not legal nuisances *per se*, but would almost certainly be declared as such if opened in a residential neighborhood or next-door to a school or church. Zoning considerations are particularly important in this regard, and a real estate attorney should be consulted if the landlord has any doubts.

Dangerous On-Site Conditions – Premises Liability

Although not a groundbreaking decision, *Morehead v. Deitrich*, 932 N.E.2d 1272 (Ind. Ct. App. 2010) nicely summarizes the Indiana law applicable to whether a landlord may be responsible for dangers on a leased premises after the tenant takes possession. In *Morehead*, a mail carrier sued the landlord after having been attacked by the tenant's pit bull. The facts suggested that the landlord knew the dog was vicious, and the mail carrier argued that the landlord was responsible for the attack because he should not have permitted the dog on the premises. The court disagreed, finding that the landlord was not in "control" of the premises and that the dog was the tenant's responsibility.

Landlords should be cautioned, however, that surrendering possession to the tenant does NOT automatically absolve the landlord from any potential premises liability. The two key considerations include whether the landlord: (1) has retained control over the premises; and (2) actually knows of the dangerous condition. But some courts have held that actual physical possession of the property, at the precise time of the incident, is not always determinative. A landlord might be deemed in "control" of the premises, even after the tenant takes possession, if the landlord was in the best position to prevent the harm that occurred.

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The *Deitrich* court cited an exception to the "general and elementary rule" that landlords do not "control" leased premises for purposes of a liability analysis. The exception applies where the landowner knows: (1) that a dangerous condition exists on the property; (2) that the property will be used or visited by the public; and (3) that the public would be exposed to the dangerous condition. *Deitrich*, 932 N.E2d at 1278 *citing Walker v. Ellis*, 129 N.E.2d 65 (Ind. Ct. App. 1955). One can construct various hypothetical scenarios in which a landlord might be responsible for a danger that is not rectified or made known to the tenant when possession is transferred. Latent hazards are of particular concern, and landlords should be aware that, although actual knowledge is the barometer, courts do not look kindly in this context on a willful failure to discover dangers that the landlord, in an exercise of reasonable care, should have discovered.

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