

The 4 Most Dangerous Trends Facing Landlords™©2007 (Part 1) by Richard Ivar Rydstrom, Esq.

The four greatest dangers facing landlords today are: (1) the ever present threat of liability exposure to lawsuits of endless types, (2) the ever growing new I.R.S. laws, regulations, tax traps and trends, (3) the risks that landlords deny or do not understand (4) and the opportunity that landlords deny or do not understand.

#1 - Lawsuits, Lawsuits, Lawsuits

A landlord (real estate rental owners) are vulnerable to countless types of lawsuits and liability exposure from actions for discrimination, harassment, mold, lead based paint, asbestos, fire, employment, retaliatory eviction, breach of contract, third party liability suits (re contractors, subcontractors, guests), personal injury and property damage, partners, investors, contractors, handymen, wrongful hiring/firing, among others. Lawsuits are moving into the multi-million dollar range. Insurance may not be sufficient. Apartment builder owners were even sued by a "class" (*group of tenants*) in Los Angeles for toxic injuries as a result of negligence, breach of the implied warranty of habitability, public nuisance, negligent and intentional misrepresentation, and unfair business practices. (*Sharon R. Wheeler, et al v Avalonbay Communities, et al. No BC 237274, LASC*). Look for lawsuits to *supersize* in the future.

Failure of the 'Putting Your Head in the Sand - Defense'!

Landlords may be *liable* for dangerous conditions on their property, such as asbestos or lead paint based (injuries), even if they do *not have knowledge* of the hazard! The law presumes knowledge to the landlord, and the law presumes the hazard is present!

Law Presumes 'Knowledge of Law': "Just as a motorist is presumed to know the laws regulating motor vehicles, the court reasoned, so a landlord is presumed to know the requirements of the local housing code pertaining to the habitability of leased premises. Landlords need not inspect the premises before leasing, the court said, but because of the implied representation of habitability that accompanies the making of the lease, they fail to do so at their peril." (*Benik v Hatcher 750 A2d 10 (Md Ct App. 2000)*).

Law Presumes 'Hazards Present': After a triggering event such as a fire, discovery of asbestos, mold, lead based paint dust, or a contractor's violation of a work procedure, the law presumes the presence of the hazardous material. (Cal/OSHA Title 8, California Code of Regulations Section 1532 et seq., etc.) The law requires you hire a DHS licensed Project Designer and Industrial Hygienist. The units must be tested, then professional cleaned, then tested again.

Common Risks in Hiring a Contractor!

The simple act of hiring a contractor to repair your building should cause you great concern. Why? Because agency law generally holds the *principal liable* for third parties and its employees' wrongful conduct. (ie: 2nd *Restatement of Agency 213Ca, CC 2330-2339, Ca LC 2750.5*). The hirer of an independent contractor who fails to take peculiar

risk precautions may be liable for all persons injured. (2nd Restatement of Torts 413, 416, 427-427a (1965)). An owner, general or prime contractor is presumed liable for the acts of a licensed contractor that it hired. (ie: *Ca LC 2705.5, Sabella v Wisler (1963) 59 C2d 21*). More and more, the law has refined itself to hold responsible the owner or trades that have control, knowledge or supervision over the construction process. What if the painter causes hazardous material to go into the units and contaminate them? Who is liable for the costs to put the tenants in hotels for weeks or months during the testing, remediation and final testing process it completed? Who pays you for your lost rent? Who is liable for the tenant lawsuits for property or injury? Can you protect yourself? Yes you can, with contracts and proper entity protection devices.

Lawsuits and Case Liability Examples!

Mold! \$14,000,000!

- A **\$14,000,000** verdict was upheld in the appellate court against the *construction manager* for mold growth due to dampness and excessive humidity in the county courthouse (from faulty HVAC and mechanical systems, leaking windows, curtain walls EFIS and other defects from wet and damp building materials which fed the growth of mold, mildew and other organisms). The water damaged building becomes the covered property damage for coverage under the CGL insurance claim. (*Centrex-Rooney Construction Co., Inc v Martin County, Florida 706 S2d 20 (Fla App 1998)*).
- A building **owner** was held **vicariously liable** with a demo-sub under the "particular risk doctrine" who failed to turn off the electric, causing death to the electric-sub worker. The jury awarded **\$2,884,557**. (*Thompson et al v Estate of Ken Davis, et al 10-20-00. Santa Ana Ca No 801067. Appeal pending*).
- An **apartment builder owner** (husband and wife) went **bankrupt** to allegedly avoid execution of a judgment for sexual battery. A new **fraudulent conveyance** of **\$5,000,000** of real property (to wife) action was then sought against defendants (landlord-owners). *Bradford v James Quan (3-27-00) Pomona No NEC 059723 (Actions v. insurance co., Appeal Aff.)*.
- **Owner** of apartment building failed to clean and repair loose tiles caused by a leak and accumulation in the kitchen from the above unit which landlord was aware. Plaintiff's wheelchair caught the edge of a loose tile causing him to fall off the chair causing soft tissue injuries. Binding arbitration awarded **\$893,550** on a \$1,000,000 policy. (*Cordier v AP Reyes, San Jose No DC 207196, Nov. 29, 99*).
- The apartment **management company** and the **employer-roofer** were held jointly and severally liable for **\$3,279,000** to a roofer-employee who slipped and burned himself with hot tar. Since, it was held, that the roofer did not have valid workers compensation insurance (Labor Code 3715 et seq) and a valid contractor's license (Ca Labor Code 2750.5) both were liable at law, precluding plaintiff from contributory negligence (Labor Code 3708).

- The building **owner** and the **general contractor** were liable for **\$10.3 million** when a cable snapped and the elevator fell 180 feet causing personal injuries (NY Lab Law 5240, 5241 due to their subcontractors failure to provide plaintiff with proper protection for worked performed). (*Alvarez v Morse Diesel Intel NY NY Sup Ct No 116146/99, May 16, 2001*).

Asbestos! \$15,000,000!

- An operating engineer at an office building for 21 years was diagnosed with mesothelioma from exposure to asbestos fire proofing material sprayed inside. Plaintiff and his wife sued the **building owner** and other operating engineers. They settled for **\$5 million**. (*Hoskins v Business Mens Assurance Co of Am., Mo Jackson Cty Cir Ct No 00-CV-206172, Feb 23, 2001*). Plaintiff also sued the manufacturer and won **\$10,000,000**. (*Hoskins v Federal Mogul Corp 20 PLLR 135 (Aug. 2001)*).
- Water leakage and mold caused personal property and structural damage to a family living in a New York apartment. Plaintiffs are seeking **\$180,000,000** against **owner** Glenwood Management Corp, operated by East 77th Realty LLC. (Dean HM Chenensky, et al v Glenwood Management Corp, et al., No 120461/00 NY Sup NY Co).
- Employees of a newspaper seeks **\$10,000,000** from the **owner (landlord)** of their building for injuries from exposure to toxic mold. (J.J. Acquisition Corp. v Pacific Gulf Properties __). Homeowners sued **developers and contractors** for construction defects from the growth of toxic mold. (Spectrum Community Association v Bristol house Partnership, June 2000 __).
- 125 lawsuits is seeking **\$8 Billion** in New York against **apartment owners** for personal injury damages incurred by exposure to fungi and mold contamination. (*Samaris S. Davis., et al v Henry Phipps Plaza South, et al No 116331/98, N. Y. Sup. N.Y. Co., May 1999*). The judge denied the class action certification on August 8, 2001 on liability issues only. A separate wrongful death(s) action is pending.

Defective Galvanized Plumbing!

- It cost some 40 **builders, developers, owners** and pipe **manufacturers** **\$41,000,000** for leaking rusty or corroded clogged galvanized Korean pipes (plumbing) in an approved class action settlement in Los Angeles County Superior Court. Over 3552 single family home and 1124 condos in 15 new-home communities in Santa Clarita Valley build from 1986-1994. (*Newhall Land & Farming Co., American Beauty Homes, Dale Poe Dev., Presley Homes, Pacific Bay, Paragon Homes, Monteverde Devl., Dong Du Steel Ltd., Et al. LASC*)
- **Warning! Gas Stoves, Ranges Or Furniture!** Gas stoves and ranges have caused serious injury to tenants and children when the unit tips over causing **crush or burn injuries**. **Landlords and installers** of gas stoves/ranges will not be excused for *failure to inspect* and retrofit (properly *secure and bracket*) stoves and ranges. Although manufacturers and sellers have escaped strict liability since tort reform, all proper defendants may be liable for negligence. *Rest. (3rd) of Torts: Product Liability; Tipping Stoves: A Risk You Need To Know About, CPM Aspects, Mar/Apr 1994 at 12 (Copies at Institute of Real Estate Management 430 N Michigan Ave Chicago IL 60611; Consumer Product Safety Common Product Profile for Ranges, Ovens And Stoves (10/76).*

- Landlords! **Punitive damages** can be awarded even with no compensatory or nominal damages in race **discrimination** cases, under the Fair Housing Act of 1968, 42 USC 3601 et seq., and the Civil Rights Act of 1966, 42 USC 1981, 1982. Owner (landlords) lied to prospective tenants about the availability of apartment, while waiting for the "right tenant". (*Alexander v Riga* 208 F3d 419 (3d Cir 2000)). Punitive damages are not dischargeable in bankruptcy court!

Lead Paint!

- Insurer **denied coverage** on **lead based paint** injuries causing brain damage to 3 children tenants. The insurer said it was liable only for years in which elevated lead levels were detected in the children (not before). The court found liability as the injury is not commensurate with external manifestation. Some bodily injuries occur before manifestation of symptoms. **Warning!** However, language could be placed in policies to limit the occurrence-based policy during policy period, here "year by year policy", which is like a "claims made" limitation). (*Campell v Metro Prop & Cas Ins Co* __FSUpp2d__, No 09-CIV. 5328 NRB, 2000 WL 297174 (SDNY Mar 21, 2000)).

#2 - I.R.S. Traps & Trends™ - Update

New laws and rules are made everyday by case law, the United States Congress, State legislatures, and the SEC, Treasury or IRS. Sometimes it's more about nothing, but sometimes it's something about something. There is a serious trend afoot that should concern every taxpayer, especially landlords. Laws get dangerous when "factual presumptions" are imputed against the taxpayer or landlord. These legal fictions are placed in the law to make it easier to find liability. These 'facts' will make it more difficult to avoid knowledge or responsibility. Recent U.S. Congressional hearings in late 2006 and most recently in February 2007 have set a trend in tax and asset protection law that you should know about. Notably, the hearings were termed: "**Tax Haven Abuses, The Enablers, The Tools and Secrecy Hearing; and the most recent bill termed: "Stop Tax Haven Abuse Act"**". In a nutshell, the Federal and State governments are looking to raise money. The Feds are looking to close the tax-gap and the deficit – in part to pay for the Iraq war and other pending needs (Social Security, Medicare, etc.)

The "Stop Tax Haven Abuse Act"!

On February 17, 2007 a bi-partisan bill called the "**Stop Tax Haven Abuse Act**" was introduced by Senator Carl Levin (D-Mich.), Senator Norm Coleman (R-Minn.) and Senator Barack Obama (D-Ill.) to stop offshore tax haven abuse and domestic and related offshore tax shelter abuses. This law would the IRS to prove its case with automatic evidentiary factual presumptions against violators in favor of the IRS or SEC. It renders restricts the use of attorney legal opinions to shield the taxpayer from devastating penalties, and to prove the taxpayer's 'reasonable cause to claim the tax benefit'. Briefly stated, use of offshore trusts, offshore credit cards, or other offshore devices as well as domestic trusts or potentially tax abusive schemes will be subject to major restriction, penalty, high scrutiny or audit. The new law would target offshore transactions or entities of every kind. But it would also make some important changes to tax shelters or tax avoidance schemes, domestic trusts, tax planning, and potentially asset protection structures. (*Continued next month*).

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