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Risky Business

Managers should address potential environmental liabilities through well-thought out lease protections

by Pamela V. Rothenberg

When it comes to environmental liabilities, the Comprehensive Environmental Response, Compensation and Liability Act of 1980 (CERCLA) is alive and well. Under CERCLA, both landlords and tenants are potentially responsible parties (PRPs), as each have "control" over a property. Because PRPs are strictly liable under CERCLA, landlords face considerable potential expense for environmental contamination.

Landlords and managers should undertake comprehensive due diligence with prospective tenants to gain a clear understanding of the potential environmental risks posed by each tenant's activities. In all circumstances, landlords should include in their standard lease forms provisions protecting both the owner and property manager from environmental risks created by tenants. These clauses include traditional devices such as tenant representations, warranties and indemnities regarding hazardous materials, landlord environmental inspection rights and provisions specifically requiring the tenant to perform remedial cleanup of any contamination it causes on the property. Landlords should also consider lease clauses controlling subleasing of the premises and assignment of the lease, prohibiting sublessees or assignees from using the premises for any purpose that might involve hazardous materials.

In addition, the lease should incorporate even more detailed environmental provisions that specifically address any particular risks presented by the tenant's activities, such as:

- Specific tenant disclosures in the form of representations and warranties about all types of chemicals on the property and their exact intended use.

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- Covenants undertaken by the tenant to obtain all required permits for the proposed use of hazardous materials within the premises, copies of which should be provided to the landlord.
- Specific covenants regarding the tenant's use of all hazardous materials, including a requirement, if appropriate, the tenant contract with a licensed environmental handling company to safely remove hazardous materials.
- Provisions allocating to the tenant full responsibility for all costs of remediation as a result of the tenant's activities.
- Requirements that the tenant notify the landlord should a dangerous situation involving hazardous materials occur or if the tenant is contacted by a government agency about environmental matters, so the landlord can participate in remediation.
- Requirements for the tenant to conduct an environmental audit prior to the date the tenant occupies the premises and immediately before the termination of the lease.
- Rights of the landlord to monitor, inspect and test the premises on a routine basis for environmental compliance and to install testing devices.

There are no foolproof lease clauses to fully insulate landlords from CERCLA liabilities affecting their buildings. Under the Act, both landlords and tenants can be held strictly liable for a property's environmental remediation costs regardless of fault. However, many of the risks associated with a tenant's activities can be contractually shifted to the tenant via sound environmental lease provisions. □

Pamela V. Rothenberg (prothenberg@wcsr.com) is a member of the Real Estate Transactions and Real Estate Technology Groups at Womble Carlyle Sandridge & Rice, PLLC.