

## **How to Protect Yourself Against Premises Liability Claims Arising Out of the Negligence of Your Lessee**

For those of you who own retail outlets and lease them to dealers, you do not need to worry about being sued over an injury to one of the lessee's customers, right? Not so fast! With today's litigious society, a customer injured at a retail outlet is likely to sue everyone searching for the deepest pockets, and that includes you. However, taking appropriate steps before entering into a lease can reduce, if not eliminate, your potential legal exposure arising out of the lessee's negligence.

Consider this example. You lease a retail outlet to a dealer under the terms of a written lease. The lease requires the lessee to maintain the conditions of the premises, but you agree to maintain the structural integrity of the building, including the roof. Shortly after the lessee opens for business one morning, he sees a puddle of water on the floor. Rather than cleaning it up or putting up a "caution wet floor" sign, he decides to heat up a sausage biscuit for breakfast. Just then he hears a scream and turns around to find an elderly woman laying on the floor right next to the puddle. It had rained the night before, and apparently the roof had leaked causing the puddle to form. Despite the lessee failing to clean up the puddle or to take adequate precautions to protect his customers, guess who is going to find herself or himself right in the middle of a lawsuit—YOU!

Under Florida law, you do not have liability for injuries at a leased premises merely because you own the premises. However, whether you have legal exposure is largely going to depend on the language in your lease and supply agreement. Specifically, under the terms of the lease (or through your actions), have you retained substantial control of the premises, a portion of the premises, or the lessee's business operation; or have you retained a right of possession of any portion of the premises?

There is no hard and fast rule governing what constitutes "substantial control." However, certain actions would most definitely be considered "substantial control." These actions include making employment decisions for the lessee, setting the retail pricing for the motor fuel at the premises, funding the lessee's operations, or sharing the profits with the lessee. Conversely, you do have the ability to impose certain requirements without such requirements being deemed "substantial control." Hours of operation, maintenance responsibilities, customer service standards, regulatory law and rule compliance, and uniforms with your brand supplier's logo are all examples of such requirements. The Florida Supreme Court has said that these are normal requirements in the modern world of franchisor/franchisee relationships.

So where does this leave you under the above example? Because you had "substantial control" over the maintenance of the roof, you are going to be sitting next to the lessee in the courtroom trying to prove that the elderly woman should have been more careful. Further, the lessee (the same guy that left the puddle sitting there) will have his

finger pointed directly at you trying to prove that the accident never would have happened had you properly maintained the roof.

Fortunately, you have the ability to avoid liability for injuries suffered by customers of the lessee by doing the following:

- ALWAYS have a written lease.
- Include language in your written leases that the lessee is responsible to perform all maintenance and repairs at the premises (both inside and outside the building).
- Include language in your written leases specifically stating that the lessee is an independent contractor and is not your agent, and that you have no control over the day-to-day operations of the business.
- Include an indemnity provision in your written leases requiring the lessee to indemnify you from any claims brought by a third party relating to the lessee's operation of his business.
- Require the lessee to carry sufficient general liability insurance that names you as an additional insured, and require the lessee to give you proof that such insurance is in effect.

In today's litigation driven society, it is important to limit your legal exposure where you can. By taking the actions described above, you can effectively minimize your exposure based on the negligence of the lessee. Don't get caught sleeping at the wheel. Take the time to review your leases to make sure you have not unnecessarily created risk for yourself.

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