Environmental Law

The Tenant Who Leaves Trash Behind

How to handle those cases where landlords are left responsible for a mess

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In these economically difficult times, landlord clients find themselves faced with defaulting tenants.

Sometimes, the tenant defaults not only by failing to pay rent, but by vacating and leaving the leased space in poor condition. Among the not uncommon defaults is a failure of a tenant to dispose of waste. In the residential setting, that is obnoxious. In the commercial or industrial setting, it may be an environmental issue.

How, then, should your landlord client respond when its commercial or industrial tenant leaves hazardous waste or other specially regulated material behind?

Of course, the first option is to contact the departing tenant and to demand that it address the problem.

This might work.

On the other hand, the tenant has just decided to vacate its leasehold and leave the mess. A tenant who does that may also have failed to meet other obligations of its lease, such as paying the rent. Therefore, asking nicely — or, perhaps, not so nicely — has a limited likelihood of success.

Your landlord client may also look to the security deposit, but if that covered the cleanup and any other defaulted obligations, your client probably would not have called you.

So, now your landlord client has a space that has to be cleaned out. The landlord might choose to leave its property in whatever condition it found it and seek to have the tenant return to do the necessary cleanup. On the other hand, if the landlord wants the property to be cleaned more promptly or wants to have control over that work, it will be left chasing recovery of its costs.

In either case, the landlord must decide how, when and in what context to involve

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regulators.

The former tenant, of course, has made the landlord the victim of what probably would constitute a violation of an environmental law. However, the landlord may itself now bear legal responsibility for any violations that exist because the landlord now controls the space and the waste. That would probably be the case — depending on the facts — under the solid waste regulatory programs of the Pennsylvania Solid Waste Management Act and the federal Resource Conservation and Recovery Act, as well as more specialized waste regulatory programs for materials like asbestos or polychlorinated biphenyls. Depending on the facts, it may also be the case under any of the cleanup programs, such as those under the federal Comprehensive Environmental Response, Compensation and Recovery Act ("Superfund") or the Pennsylvania Hazardous Sites Cleanup Act and the Clean Streams Law, if cleanup programs even applied in the circumstances.

Therefore, if your landlord tenant calls the regulators, it runs the risk of inviting enforcement action against itself. It might call the Department of Environmental Protection and DEP might not only issue an order to the former tenant, but also to the landlord.

In some circumstances, a landlord finding materials in a building would have an obligation to report the condition to regulators. The obligations vary by substance and by the condition of the substance.

Different statutes and laws in different states require somewhat different things. In general, however, there may be no obligation to report materials left in a building if those materials are reasonably contained and would not violate any law if the tenant were still present at the site. A dumpster of trash at the loading dock need not be reported, and probably would not violate any law, except that the tenant abandoned it and that abandonment constitutes disposal without a permit. By contrast, a spill of a hazardous substance that will evaporate and vent to the outside air in a reportable quantity has to be reported within a matter of hours. Thus, your landlord client must evaluate its obligation to report the condition it has found very quickly, in the first few hours after it discovers the condition.

Even if the landlord has no obligation to report the condition, it may want to do so in any event.

Ordinarily, one does not call the regulators on oneself. One does not want to tell DEP or EPA about a problem before one has a reasonably good understanding of the scope of the problem and a suggestion on to how to fix it. Otherwise, one cedes the ability to frame the debate over what to do, and that can be costly.

However, in the case we are considering here, countervailing considerations may apply. Your client may want the regulators' help in pursuing the tenant or the individuals associated with the tenant. Even if the regulators turn out to have no interest in pursuing the tenant, or to have no ability to help, the regulators' determination regarding the existence of a violation that has to be remedied may prove useful down the road.

To understand why that follows, return to the question of whether the landlord wants (a) to pursue a cleanup from its tenant or (b) to clean up and to pursue the tenant for the costs.

This tenant has just vacated your client's premises and left them in a mess. Your client is not likely to want that tenant, or anyone associated with that tenant, to take charge of restoring the property. Moreover, that tenant has just walked out on its obligations. It expects to be sued.

Litigation would not result in actual work for months or years. In the meantime, the building is not readily usable. Therefore, your client may want help enforcing against the tenant, and, in any event, your landlord client may well want to manage the cleanup itself. If the landlord cleans up, it must sue its tenant or individuals associated with the tenant for the costs.

The landlord almost certainly has the ability to pursue a claim under its lease; for example, leaving materials in the property may breach a covenant to leave the premises "broom clean." That claim might not reach to the officers of the tenant who directed that the mess be left behind. Thus, if the tenant is judgment-proof (or at least judgment-resistant), the contract claim may be unsatisfactory.

Even if it were satisfactory, the landlord has to prove that the costs it incurred were damages and not an overblown cleanup or an effort to upgrade the space. The regulators help in this regard. If the landlord has received a direction from DEP to take certain actions, it has a much easier time proving later that those actions were, in fact, legally required.

Environmental law practitioners — and many others — are familiar with the Superfund liability scheme. Under that statute, parties responsible for a "release or threatened release of a hazardous substance" may be responsible for "costs of response." While the Supreme Court's 1997 decision in United States v. Bestfoods has limited liability of shareholders and directors under the federal statute, several cases suggest that a corporate officer who personally arranges for disposal of waste would have personal liability. Therefore, one might assume that a similar scheme would exist to impose the costs of cleaning up the inside of a building on persons responsible for the condition.

Unfortunately, the Superfund liability scheme applies in contamination settings, and does not always fit neatly in the case under consideration. Materials in a building may not have been "released" and there may be no threatened release. To be sure, the federal statute defines "release" to include "disposal" and one can make the argument that leaving materials in a building is "disposal."

However, a court may be skeptical that anything that does not leave a building has been "released."

A similar problem exists under the Pennsylvania Hazardous Sites Cleanup Act. Do not discount situations where there is a release or threatened release. Unsecured liquids near floor drains that discharge into an on-site treatment system or storm sewer may constitute a threatened release. However, materials stacked on a loading dock or left in work spaces may not.

Moreover, in order to be recoverable, costs incurred in cleaning up would have to be justified by some analysis of alternatives, often supported by either a brief engineering evaluation and cost analysis or, more properly, by a full remedial investigation and feasibility study. Further, most cleanups under the Superfund program require some opportunity for public involvement in the remedy selection.

Most landlords will not want to take those steps to the same extent as would be

typical at a "Superfund site." In most cases, a landlord will have a litigation position that what it did was adequate; however, defendants may have a reasonable contrary position.

Parallel cost recovery claims do not exist for private persons under the solid waste laws.

One may sue to obtain an injunction to remedy a violation of the federal Resource Conservation and Recovery Act, but RCRA typically provides only detailed rules for situations like the one we are describing if the materials left behind constitute hazardous waste. One may not sue to recover costs. The Pennsylvania Solid Waste Management Act, which provides all sorts of detailed rules governing management of wastes, includes no private right of action at all. The only entity other than the state that may sue for compliance with the state statute is a municipality, which may actually recover its costs for remedying a violation of the solid waste rules.

Trespassing or nuisance claims could provide a source of liability, particularly against individuals at the tenant. However, they suffer from some difficulties.

While there is very little law in Pennsylvania, courts in other jurisdictions have struggled with the notion that trespass requires bringing things onto the land of another. Things left in a leasehold were brought there during the occupancy of the tenant, and merely left. Some courts find that not to be a trespass; others disagree. Similarly, nuisance is a tort among concurrent land uses, and leaving waste in a property may not be a nuisance because the occupations are not concurrent.

One might argue that improperly secured or labeled materials left in a building give rise to a claim of negligence, a failure to exercise due care toward the next occupant because the materials were left unsafely. Governmental enforcement can help with that claim, establishing a standard of care that the tenant failed to meet. Governmental enforcement also, to some extent, helps establish the measure of damages as the cost of doing what is ordered to be done.

With all these difficulties in recovering, governmental enforcement directed at the tenant, its officers, and the landlord can be useful. If the landlord satisfies the government's claim, it may be able to recover on theories like contribution or restitution. Those may be much more satisfactory than any of the others discussed here.

Finally, one should consider insurance. The landlord and the tenant may have policies that will assist with this situation. That is the topic for another column. •

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