Calif. Ruling Shows Limits Of Exculpatory Lease Clauses

By Fawaz Bham and Javier De Luna
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In the realm of commercial leasing, the fine print of contracts can often hold significant consequences for both landlords and tenants.

One area of contention arises with exculpatory clauses, which are normally used to absolve landlords from responsibility for injuries or damages suffered by tenants or third parties, even if those harms result from the landlord's negligence or failure to maintain the premises adequately.

However, the efficacy of exculpatory clauses becomes blurred when confronted with hazards such as asbestos, a notorious carcinogen found in many older commercial buildings.

Unlike routine maintenance issues, asbestos presents a latent danger that may not manifest for years or even decades after exposure. In such cases, the enforceability of exculpatory clauses may not hold up under legal scrutiny.

Courts in California often recognize a landlord's statutory duty to disclose known hazards, including asbestos, to tenants.[1] This duty arises from principles of fairness and public policy, which prioritize the health and safety of occupants. Landlords cannot simply rely on exculpatory clauses to absolve themselves of liability when it comes to known dangers like asbestos.

Moreover, the statutory duty to disclose extends beyond merely acknowledging the presence of asbestos.

In cases where there is a potential for employees or contractors to encounter asbestos on the property, landlords are also required to post a warning sign according to specific guidelines.[2] This sign serves to notify employees, contractors and other service providers about the presence of asbestos on the premises, allowing them to take appropriate measures to mitigate risks effectively.

Failure to fulfill these obligations can result in severe consequences for landlords. Courts may deem exculpatory clauses unenforceable if landlords knowingly conceal or fail to investigate asbestos exposure risks.

In a decision by the California Court of Appeal released in January, Epochal Enterprises Inc. v. LF Encinitas Properties LLC, the limitations of exculpatory clauses in safeguarding landlords from liability were underscored.

The involved exculpatory clauses included an indemnification clause, which shielded the landlord from personal injury or property damage liability except in cases of gross negligence or intentional misconduct

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by the landlord, and a limitation of liability clause in which the tenant waived all claims for consequential damages or loss of business or profits.
In Epochal, the defendant landlord failed to disclose to the tenant that the leased premises contained asbestos even though the landlord knew of the presence of these materials before signing the lease.

The defendant attempted to avoid liability by first exercising the indemnification clause. However, the court held that the clause did not bar the plaintiff's damages since the defendant's failure to disclose supported a finding that the defendant acted with gross negligence, thereby negating the indemnification clause's intended protections.

Regarding the limitation of liability clause, the court held that it did not shield the defendant from liability. While parties to a commercial lease may agree to limit liability for breaches of covenants in the lease, limitations on breaches for tort liability will be subject to the public policy expressed in California Civil Code Section 1688.[3]

This section provides that contracts which have as an object, to "exempt anyone from responsibility for his [or her] own fraud, or willful injury to the person or property of another, or violation of law, whether willful or negligence, are against the policy of the law."[4]

This section is commonly used to invalidate contractual provisions that attempt to exempt liability for "future intentional wrongs and gross negligence and prohibits provisions exempting ordinary negligence when the public interest is involved or a statute expressly forbids it."[5]

In this case, the landlord violated at least two statutes requiring asbestos disclosure.

The first is the Carpenter-Presley-Tanner Hazardous Substance Account Act, which states that "any owner of nonresidential real property who knows or has reasonable cause to believe that a release of hazardous substance has come to be located on or beneath that real property" must, before leasing the property, give the lessee written notice of the condition.[6]

There is also the Asbestos Notification Law, which requires the owners of buildings constructed prior to 1979 to post a written warning whenever construction, maintenance or remodeling is to be conducted in an area of the premises where there is the potential for employees to encounter asbestos or asbestos-containing materials.[7]

It is worth noting that an "owner" includes any lessee of a building or part of a building.[8] Thus, lessees might also have an obligation to disclose such information to contractors or employees. This ruling emphasized the importance of transparency and due diligence in commercial lease agreements, particularly concerning hazards like asbestos exposure.

Moreover, beyond the statutes cited in the case, the Occupational Safety and Health Administration may also require building owners, including lessees, who are going to conduct repair or construction work to know and notify potential parties of the existence of asbestos-containing material or material that presumably contains asbestos.[9]

In recent years, the legal landscape surrounding asbestos exposure in commercial leases has evolved, with courts increasingly recognizing the limitations of exculpatory clauses in safeguarding landlords from

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liability. This trend underscores the importance of thorough due diligence and transparent communication between landlords and tenants in commercial lease agreements.

While Epochal may be disappointing for commercial landlords, as it weakens one of their strongest tools commonly used to defend their position, it still provides both landlords and tenants with a learning opportunity.

Landlords must recognize their duty to prioritize tenants' safety and take proactive steps to address potential hazards, including asbestos, within their properties. This can take many forms, such as:

- Ensuring full disclosure of all known hazards;
- Conducting rigorous due diligence to identify any potential hazards, including hiring qualified professionals to assess the property;
- Tailoring exculpatory clauses with clear language to target specific circumstances, implementing what was learned from Epochal;
- Implementing proactive maintenance and an inspection schedule to identify and address potential hazards;
- Educating tenants about safety measures and protocols to prevent accidents;
- Obtaining appropriate insurance; and
- Maintaining detailed records of all communications, inspections and maintenance activities related to the property.

Following these steps can lower the risk of accidents and put landlords in a stronger position if one does occur.

For tenants, understanding the limitations of exculpatory clauses and advocating for robust disclosure and mitigation measures regarding asbestos exposure is crucial. Tenants can take similar steps to improve their position when leasing commercial property, including:

- Conducting thorough due diligence;
- Scrutinizing the lease agreement carefully, paying particular attention to any exculpatory clauses or provisions related to landlord liability;
- Requesting full disclosure of all known hazards before signing the lease and insisting on written documentation; and
- Keeping detailed records of all communications with the landlord.

In conclusion, while exculpatory clauses serve as common fixtures in commercial leases, their effectiveness in absolving landlords of liability for hazards like asbestos exposure is not absolute.

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Landlords must carefully navigate a complex legal environment that prioritizes transparency, thoroughness and safeguarding the rights and safety of tenants.

As demonstrated by the situation on Epochal, failing to disclose hazards can prove more costly than disclosing them upfront.

Notes

1. Epochal Enterprises, Inc. v. LF Encinitas Properties, LLC , 2024 WL 278179 (Cal. Ct. App. Jan. 12, 2024), as modified on denial of reh'g (Jan. 31, 2024).

2. Epochal Enterprises, Inc., 2024 WL 278179 at *584.

3. Epochal Enterprises, Inc., 2024 WL 278179 at *586.

4. Cal. Civ. Code § 1668 (West).

5. Epochal Enterprises, Inc., 2024 WL 278179 at *586.

6. Cal. Health & Safety Code § 78700 (West).

7. Cal. Health & Safety Code § 25915 (West).

8. Epochal Enterprises, Inc., 2024 WL 278179 at *587.

9. 29 C.F.R. § 1926.1101.

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