

RESOLUTION 9-04-02

DIGEST

Landlord/Tenant: Prohibition of Indemnity Clauses in Commercial Leases

Adds section 1953.1 to the Civil Code to prohibit clauses in a commercial lease making the tenant liable for negligence of the landlord.

RESOLUTIONS COMMITTEE RECOMMENDATION

APPROVE IN PRINCIPLE

Reasons:

This resolution adds section 1953.1 to the Civil Code to prohibit clauses in a commercial lease making the tenant liable for negligence of the landlord. This resolution should be approved in principle because a landlord should not be able to force a prospective tenant to accept an indemnity clause as a condition of the tenancy.

Tenants are typically in a far inferior position when negotiating a lease of commercial space. As a result, landlords generally refuse to negotiate the terms of standard form leases. Tenants are forced to accept indemnity provisions in favor of the landlord. There is a basic unfairness of one party in a superior position forcing a party in an inferior position to accept the burden of the superior party's negligence. When the inferior party objects, the superior says: "rent elsewhere." Also, an unsophisticated or unrepresented tenant may not understand the significance of the indemnity until it is too late. This resolution helps to level the landlord-tenant negotiating field by preventing the landlord from taking advantage of the tenant's weakness or lack of sophistication on this issue.

TEXT OF RESOLUTION

RESOLVED that the Conference of Delegates recommends that legislation be sponsored to add section 1953.1 to the Civil Code to read as follows:

- 1 §1953.1
- 2 No real property lease for commercial premises covered by this Title shall contain a
- 3 provision under which any tenant is responsible for or indemnifies the landlord for the ordinary
- 4 or gross negligence of a landlord or any employee, agent, subcontractor of any landlord.

(Proposed new language underlined; language to be deleted stricken.)

PROPONENT: San Diego County Bar Association

STATEMENT OF REASONS:

Existing Law: It is common in commercial leases for the landlord to require the tenant to indemnify the landlord for injuries to the tenant or any business invitee of the tenant caused by the ordinary or gross negligence of the landlord or an employee, agent or subcontractor of the landlord.

The Problem: The existing law means that a security guard employed by the landlord could run over a business invitee of the tenant and the tenant would be required to indemnify the landlord for any injuries. While it may be argued that this is merely a shifting of the insurance burden, damage awards exceeding policy limits are not uncommon. The exclusion of ordinary negligence in the lease is a trap for the unwary tenant or the tenant's attorney. These provisions are not, as a practical matter, negotiable, especially with shopping center landlords. Commercial landlords should not be able to evade that responsibility by contract under antiquated doctrines such as caveat emptor that have little to do with today's reality.

This Resolution: This resolution would insure that those responsible for a condition or situation giving rise to tort damages are actually held liable.

IMPACT STATEMENT

This proposed resolution does not affect any other law, statute or rule.

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