



## PROPERTY PROTECTION 101:

# A Liability Primer

Protect yourself now or suffer a loss later

*By Bill Tobolsky, Principal of Tobolsky Law*

**I**s your facilities portfolio expanding? Take a minute to catch up on loss reduction and prevention – it could save you untold heartbreak and money.

These tips will help you minimize injury, loss, and financial exposure by optimizing your organizational practices and understanding the legal landscape.

### Be Safe from the Start

You must consider the safety of everyone who will be on site: employees, customers, visitors, delivery people, inspectors, contractors, architects and planners, police and fire personnel, and anyone else who comes to your property, even trespassers.

First, make sure your insurance agent has covered these issues in your commercial general liability (CGL) policy:

- 1) Is there an exclusion for construction on the premises?
- 2) Is there an exclusion for “third party over action” by a contractor’s employee who is injured on the premises and brings a negligence claim against the property owner?
- 3) Is a separate premises pollution policy advisable under the circumstances?

Apply the same scrutiny to tenants and contractors – you may be liable for their negligent acts, so screen them carefully. Leases or contracts must require tenants to supply you with adequate documentation of the safe nature of their activities, due diligence performed in selecting employees, their company’s safety record, monitoring practices on site, and emergency and damage plans.

Most importantly, be sure you are a named insured on their CGL, Builder’s Risk, and other insurance policies, and that you will receive written notice of intention to lapse policies for non-payment or other reasons. Try to

obtain waiver of subrogation clauses as well. Depending on the circumstances, consider requiring a premises pollution policy.

Leases and construction contract documents must contain clauses holding you harmless and indemnifying you for losses caused by the contractor or tenant. Consider requiring bonds or letters of credit to guarantee payment of these obligations if they are not insurable.

### How to Build Your Safety Plan

You need to create a well-organized, practical, usable safety plan for operations, maintenance, and emergencies and appoint a safety officer with real teeth to administer it.

Why do you need a safety plan? Apart from any ethical benefits, the plan saves you money. Possibly big money. And as you know all too well, the law is in love with paper. Files full of it (or gigabytes of it, as the case may be).

And that safety officer? He or she needs sufficient power to shut down a dangerous situation immediately, and management should make it clear that appeals on the safety officer’s decisions are granted rarely, if ever. Everyone must know where they can ask safety-related questions and confidentially report violations with no risk of repercussion.

This plan doesn’t belong in a dusty old file cabinet in the office. It must be practiced daily. It never rains when you bring your umbrella, but it always does when you forget it. Don’t be lulled into complacency.

Whatever the size of your business or property, a safety plan is essential to minimizing the risk of injury and property damage and defending yourself if accidents occur and claims arise against you. Include a requirement to call authorities or medical help as necessary in the event of an incident. Call your CGL carrier as well (and then write them by certified mail).

Provide guidelines for evacuation and other procedures in case of fire, crime, disaster, armed assault, leakage of dangerous or environmentally harmful substances, and other emergencies. Be sure to include an immediate call to your state’s Department of Environmental Protection if there is a spill. Most states impose hefty fines for failure to call promptly.





# BUILDINGS

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## Everyone Plays a Role

Members of your management team must know the emergency plan and their role in it, and so should each employee, contractor, and tenant on the site.

Even customers and visitors must know safe areas, fire evacuation routes, and emergency procedures, so make sure they're posted prominently. Employees, tenants, and contractors must be given the study material they need, and perhaps a course in your company's safety policies.

Remember that you are liable for the errors and omissions of your employees. That's why you're required to investigate and screen them for competence, criminal background, and the like. For example, pre-employment or periodic post-employment drug testing may be appropriate depending on the job or equipment operation requirements, such as those faced by nurses, daycare or eldercare workers, and truck or bus drivers. Highly sensitive positions may call for pre-employment psychological testing as well.

In addition to employees, you are also liable for the foreseeable misconduct of your customers and are held responsible to protect against it with measures such as Code Adam, the missing child alert protocol.

Your property is your turf. Plan to protect it and everybody on it. Plan to prevent or minimize injury and damage with the same zeal with which you implement your business plan. Resist the urge to relax – once the fire starts, it's too late to buy an extinguisher. The jury won't care if your product is the best on the market if your showroom roof caves in from snow and causes injury.

## Safety Requirements for Tenants and Contractors

Provide an appropriate safety plan to contractors and tenants and make sure they educate their employees about it, but resist the urge to directly interfere in their employee supervision or operations lest you find yourself responsible for their negligence.

This plan should also provide comprehensive environmental protocols, including limits on what your tenants may keep on premises and how they store and dispose of dangerous or harmful substances. Provide appropriate procedures for your own staff as well, including:

**Regular inspections:** Inspect on a regular schedule using risk management-trained, non-line employees or



The lines between your duty to invitees, licensees, and other visitors are blurred, but one thing is for sure: slip and fall incidents are never a good sign. Anticipate and prevent accidents like this to avoid a costly, time-consuming lawsuit.

even an outside contractor.

**Warnings:** In writing, immediately warn everyone who is at risk of any dangerous conditions. Use safe areas, fire-resistant corridors, and guarded exit routes.

**Repair:** Repair dangerous conditions as soon as possible. Don't forget to give reasonable notice if possible to all concerned, lest you commit spoliation (intentional destruction or alteration of evidence, such as poor workmanship or product failure).

**Security:** Hire adequate security. The question isn't whether crime or trespass will be attempted, but when.

**Foresight:** Try to imagine what can go wrong, then protect against it. Even if you don't foresee an incident, a jury, equipped with the wisdom of hindsight, will think you should have.

## How to Navigate Today's Legal Landscape

Key changes to the traditional "status equals duty owed" model have blurred the lines between what scope of care you owe to which class of visitor, so it pays to know where you stand regarding people on your property.

Many courts have layered on a policy-driven, fact-specific balancing test on top of the traditional division of visitors into three categories, each of whom is owed a different scope of responsibility from you.

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## KNOW YOUR DUTY TO VISITORS

How far should you go to protect people visiting your property temporarily? Your legal responsibilities vary depending on the nature of the visitor.

Trespasser	Licensee	Invitee	Off-Premises Claimant
<b>What:</b> Someone who enters your land without express permission	<b>What:</b> Someone who enters your land without permission, but whose presence is tolerated	<b>What:</b> Someone who has permission to be on your land	<b>What:</b> Someone who hasn't entered your property, but is affected by the activities conducted on it
<b>Who:</b> A customer who refuses to leave after closing time, anyone who intentionally physically invades your property	<b>Who:</b> Police, firemen, other emergency responders, or frequent trespassers against whom no action is taken	<b>Who:</b> Customers, contractors, service personnel, employees	<b>Who:</b> Neighbors, families of employees
<b>Duty:</b> Not willingly or wantonly inflicting harm, minimal warning of latent dangers	<b>Duty:</b> Avoiding willful/reckless harm, warning of dangerous conditions (especially latent ones)	<b>Duty:</b> Full duty of care	<b>Duty:</b> Varies – some states don't recognize duty to "take-home exposure" claimants

**Trespassers** are on your land without your express or implied permission, from hunters and fishermen who accidentally cross boundaries to children entering an unfenced playground in the center of town. Generally, you only owe trespassers the duty not to willfully or wantonly inflict harm, though some courts add the duty to minimally warn of latent dangers.

However, this category raises questions that can affect what you owe them. Does the absence of "No Trespassing" signs imply an invitation to enter? Must you eject trespassers as soon as you see them to avoid a claim of implied permission, and must you report them to the police? Must you build a higher fence to guard against children who will foreseeably try to trespass to use a private playground or pool?

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—Bill Tobolsky, founder, Tobolsky Law

**Licensees** come onto your land without your permission, but their presence is tolerated. A policeman who visits your vacant, partially constructed storefront late at night after receiving a report of an open basement door is a licensee – you haven't invited him, but you'll suffer his presence. You must avoid willfully or recklessly harming them and warn them of defects or dangerous conditions, such as a latent weakness in the floor that could give way and land the officer in your basement, as in 2011's *Rowe vs. Mazel Thirty, LLC*.

**Invitees** enter your land to pursue commercial or business activity on your invitation. This could include shoppers, employees, or a plumber you hired. You owe them a full duty of care, but the question of what constitutes due care in a given situation usually falls on the jury to decide.

Notwithstanding this seemingly rigid structure, in many cases the distinction between those three statuses is unclear or the result of the traditional test is contradictory to "public policy." When that happens, the court can overrule the status-based structure and require a full duty of care. For example, the policeman is technically a licensee, but the scope of duties you owe to him will blend into a full duty of due care.

### Your Duty to Neighbors, Contractors, and Tenants

Be aware that your responsibility doesn't end at the boundaries of your property. You're responsible for harm inflicted on your neighbors in some situations, such as a broken conduit leaking into your neighbor's pond.

But did you know you could also be responsible for harm done to someone who's never set foot on or near your property? Consider the wife of a man who was exposed to asbestos fibers at work. She developed asbestos-related disease, but her only exposure was through washing his work clothes. The owner of the plant was held to have a duty to the wife to protect her from asbestos even though she never came near his land. In fact, the decision in 2006's *Olivo v. Owens-Illinois, Inc.* deemed the presence of asbestos as a dangerous and defective condition, and it was foreseeable that a worker's wife would suffer disease regardless of whether she ever entered the plant.

As for your responsibility for the negligent acts of your contractors, a building owner is traditionally held responsible for a contractor's negligence only if 1) the work was so inherently dangerous as to constitute a nuisance, 2) the contractor was negligently selected and incompetent, or 3) the owner got too meddlesome and effectively supervised the "manner and means" of the contractor's work.

As with the "status equals duty" principle, however, this clear-cut rule was supplemented by a balancing test as one last hurdle for the owner to surmount in order to be immune from liability. For this final screening, the court must consider the owner's knowledge of the contractor's activity, the foreseeability of the dangerous activity and resulting harm, the owner's opportunity to take corrective action, public policy, and an "abiding sense of fairness."

The scope of liability is expanding, and the predictability of when a duty of care is imposed or liability found is becoming increasingly less predictable as courts apply balancing tests rather than cut and dried common law principles.

For this reason, the need for careful selection of insurance and strict adherence to liability and safety plans is becoming increasingly more vital to prudent risk management. ■

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