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EFFECTIVE RISK MANAGEMENT

William H. Locke, Jr.

Author Contact Information:
Bill Locke
Graves Dougherty Hearon & Moody PC
Austin, Texas

blocke@gdhm.com
512-480-5736

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CHAPTER 1: RISK MANAGEMENT

I. INTRODUCTION TO RISK MANAGEMENT

A. Risk of Property Loss and Injuries

1. Premises

A person injured on another's property has two potential causes of action against the owner of the property: a premises liability claim for an unreasonably dangerous condition on the premises, or a negligence claim for negligent activity on the premises. When the alleged injury is the result of a negligent activity, the injured party must have been injured by, or as a contemporaneous result of, the activity itself, not by a condition the activity created. The negligent activity theory of liability is only applicable where the evidence shows that the injuries were directly related to the activity itself. If the injury was created by a condition created by an activity rather than the activity itself, the plaintiff claiming negligent activity is limited to a premises liability theory of recovery. See 59 TEX. JUR. 3d Premises Liability § 7 *Negligent activity and premises defect bases for premises liability – Negligent activity claim*.

2. Leased Premises

The following list illustrates some of the many property loss and injury risk allocation questions to be addressed in leases:

- Upon casualty loss, what happens to the lease, does it terminate or does it continue?
- If due to a casualty loss the premises become untenantable, what happens to the rent?
- Who is responsible for the restoration of the premises?
- Is the premises located in special hazard areas, such as flood zones, hurricane or earthquake areas?
- Are there tenant improvements and betterments to the premises?
- Does the tenant's operations at the premises result in invitees coming to the premises or the use of contractors, business autos, or high pressured boilers at the premises?
- Are there special environmental hazards or other extraordinary risks associated with tenant's use of the premises?
- Who is responsible for injuries occurring on the premises?
- Is the protecting party financially capable of funding the loss or injury without insurance?
- If rent and income by the parties is interrupted due to the occurrence of the peril, will the financial stability of either or both of the lease parties be materially adversely affected?
- Is insurance available to fund protection against these risks at a commercially affordable rate? What minimum coverage limits are reasonable? What deductibles are acceptable? What coverage exclusions and limitations are acceptable?

3. Construction Premises

In the typical construction job, an owner hires a general contractor, who hires an independent contractor (*i.e.*, a subcontractor), who employs an employee. Unfortunately accidents happen in the course of construction that result in workplace injuries or even fatalities.

B. Contractual Risk Allocation

Risk allocation provisions are contained in all contracts. They are used in an attempt to assure the intended economic objectives of the "deal." The success of an entity's approach to contractual risk transfer can be considered successful if it meets the following criteria:

- Risks retained are appropriate and affordable.
- Risk as an element of the overall transaction and negotiation is incorporated at the onset.

- Indemnity, insurance, and other pertinent conditions are not so onerous that contact negotiations drag on unnecessarily delaying the transaction or necessitating the use of second-rate service providers to accomplish the contract's purpose.

- Contractual conditions allocating risk are not so onerous that a court disallows their operation at a future point in time.

- Insurance requirements are clear, using recognized terms that can be interpreted both at the time the contract is negotiated and in possible future disputes.

- Insurance and other support for the indemnity is in place when a loss occurs.

- A thorough insurance monitoring process keeps the transferee in compliance with the insurance requirements.

- The performance of the contract is monitored and regularly evaluated.

C. Absence of Contractual Risk Allocation – the Common Law and Statutory Allocation Schemes

The common law allocates risks in the absence of contractual risk allocation.

1. Activities and Locations

a. Premises

(1) Premises Liability

In *Occidental Chem. Corp. v. Jenkins*, 478 S.W.3d 649, 644 (Tex. 2016) the Texas Supreme Court reviews the relationship between premises liability and general tort liability, stating

> Depending on the circumstances, a person injured on another's property may have either a negligence claim or a premises liability claim against the owner….When the injury is the result of a contemporaneous, negligent activity on the property, ordinary negligence principles apply. *Id.* When the injury is the result of the property's condition rather than an activity, premises-liability principles apply. *Id.* Although premises liability is itself of negligence law, it is a "special form" with different elements that define a property owner or occupant's duty with respect to those that who enter the property. *Id.*

A premises liability claim encompasses a nonfeasance theory of negligence based on the failure of the owner or occupier or controller to take reasonable measures to make the premises reasonably safe. [1] The elements of a premises liability claims are the following:

- The cause of the injury is a condition of the property.

- The condition existed prior to the accident.

- The condition posed a general, unreasonable danger to all working on the premises, rather than a specific danger to a person performing a particular activity. [2]

(2) Care, Custody or Control

The Texas Supreme Court in *Wilson v. Tex. Parks & Wildlife Dep't*, 8 S.W.3d 634, 635 (Tex. 1999 per curiam) observed

> As a rule, to prevail on a premises liability claim, a plaintiff must prove that the defendant possessed – that is, owned, occupied, or controlled - the premises where injury occurred.

Of these circumstances, **control** of the premises is the key element for premises liability. [3] "Possession," "Ownership" or "occupancy"[4] of property though needs to also involve an element of control except in circumstances of strict liability.

(3) Leases

An owner that leases a premises generally owes not duty to tenants or their invitees for unreasonably dangerous conditions on leases premises. Generally under a lease, the lessor transfers possession and control of the leased premises to the lessee. [5] See further discussion below as to Leases and Leased Premises.

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Answer Bar: The Ins and Outs of Commercial Real Estate Loans and Title Insurance

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