FILLS FOR SPILLS

HCD Acquires Jurisdiction to Require Removal of Sewage Overflow

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SB 589 Provides HCD with the same jurisdiction as a local enforcement agency to require removal (not just treatment) of sewage spills. Naturally, a depression caused by removal of ground contamination may need to be filled or re-graded to avoid accumulation of ground water. Let's summarily review this law's causes, requirements, why you should never be cited and lurking liabilities for managerial indifference.

What's the problem? Perhaps no lawsuit is tougher to defend than a sewage claim. Indeed, the issue has spilled into the courts. It is not rocket science to predict verdicts. In one case, residents spewed evidence of repeated odors, leaks, clogs, broken pipes and saturated leach fields, buttressed with photo and video evidence. Unlike the prior owner's practice, evidence revealed that little regular maintenance was performed, though high and frequent costs for emergency repairs were incurred. Owner also claimed the issue was age of the system, not a failure to maintain. But owner's excuses did not "cap" the liability. The court held that the owner "willfully" failed to maintain. Of the video evidence, the appellate court commented: "If a picture is worth a thousand words, a moving picture is worth a million. We have examined the photographs and viewed the videotapes. . . malfunctioning septic lines with urine and feces flowing therefrom is so gross that we can almost smell what the residents had to endure."

Underlying the new law is the plain fact that management should efficaciously remedy sewage issues as soon as possible so that residents are not impacted and there is no need for inspection and citation.

SB 589 amends the Health and Safety Code to clarify that HCD has the authority to require sewer repairs and sewage spill clean-up relating to sewer systems and permanent buildings in mobilehome parks and special occupancy parks. The law includes "sewage," specifically, among the materials that are prohibited from being deposited on the ground in a mobilehome park. The area covered includes permanent buildings' fixtures and a park's sewage system, in addition to fixtures of mobilehomes and recreational vehicles. The law allows HCD to order the removal or sanitation or both of the sewage, wastewater, or material that has been spilled. HCD may order the removal or sanitation to be consistent with the requirements of, and subject to approval by, the local environmental health agency.

This bill therefore, essentially, clarifies that HCD is vested with the same powers extant in local inspection authority. But it should serve as a reminder of the importance of sewer maintenance. Remember that HCD is empowered to prohibit waste from plumbing fixtures in homes in the park from being deposited on the ground. HCD adopted regulations contained in Title 25 of the Code of Regulations to enforce these provisions. Local agencies have the option of assuming code enforcement. Reported nuisances must be abated within five days (or a longer time if allowed). Current law also prohibits any waste water or material from any plumbing fixture in a mobilehome or recreational vehicle from being deposited on the ground. Note that there is a bifurcation of liability established at the sewer connection point: owners have duties on the park side of the connection; and, residents have duties for mobilehome fixtures on the mobilehome side. Sometimes,

difficulties in evaluating the source of a clog suggest action first, and determining responsibility later, as I explain below.

The new law conforms HCD powers to the powers of local code enforcement. This need for clarification flows from the Senate Select Committee on Mobilehomes' reports of complaints of sewage back-ups caused by sewage lines or septic tanks. Reportedly, cleanup usually involves HCD requiring that management spread disinfectant for treatment, but with larger or undiluted spills, mere cleanup is insufficient. The committee felt that HCD did not have authority to require owners to remove contaminated soil when a major spill occurs. The bill intends to provide the same level of cleanup authority for park residents and people living elsewhere, and, to ensure that spills from a park's sewage system or buildings are subject to HCD regulation.

The deeper implications. It is important to take care of spills promptly when discovered. Let me put this in context. Ideally, how impossibly prompt a response would your defense lawyer desire? Simple: before the spill can be videotaped. In other words, immediately; as soon as reported to the management if not discovered sooner.

Should manager's be looking for leaks, spills? Of course. Manager's should be regularly, proactively walking the park. Some say twice daily.

Recurrent problems? Certainly, owners attend to spills and leaks. Recurrent attention required in certain areas may suggest more than just maintenance, but need for more invasive and permanent remediation. Treating recurrent problems promptly may not be enough, as the case above tells us.

Whose duty? What if a spill occurs and the source of stoppage cannot be determined? A dispute over responsibility while sewage lays deposited on the ground will not lull code enforcement's actions. Ultimately, the duty of code enforcement lies with the park operator. If a spill is a resident's responsibility, the resident is cited, and most likely, the park operator receives a copy of the citation. If the resident does not treat the spill, eventually, the park operator must. The remedy, dependent on the facts of each case, may include termination of tenancy for a code violation (Civil Code section 798.56(a)), violation of a rule and regulation, commission of a substantial annoyance or an injunction for a rule violation. Which remedy applies requires advice of experienced counsel. If management waits to sort out responsibility and lets the spill fester, other residents may be affected and claim that management is not properly enforcing the rules and regulations, and allowing the harboring of a nuisance.

The decision to take the initiative and clean up a spill, the cause of which is then not determined or clear, should be made with circumspection and consideration of all the risks and benefits. My thinking? Let's say you are sitting in a trial court, as a party to a lawsuit: first, imagine a citation for sewage spill projected onto a large screen in front of a jury. Now, in contrast, imagine the projection of an invoice for cleaning a spill, later determined to be a resident's responsibility. If a cleanup was a resident responsibility, the management has apt time and ability to seek reimbursement: this remedy may be far superior to defending the claim the management failed in its duty to the resident and others affected by a spill, even if not caused by management.

I am a big fan of preventive thinking: maximizing revenue, avoiding needless risk, making well-considered cost-benefit decisions in management. Plainly, squelching avoidable litigation is

wise. Ask any lawyer who owns a park. Management decision-making concerning sewage spills is not a question of balancing "aggressive management" or "expense control," against being too "risk adverse." It is much simpler, and, it is not merely the correct "legal answer."

Basically, the proposition to consider is this. Can your "bottom line" benefit more from: (1) the cost of remediation, reinforcing resident perceptions of professional management and good will, justifying fair rent adjustments among other things, or (2) the expense and uncertainty of legal liability, potential penalties for willful code violations or punitive damages (which are not insured and not tax deductible), insurance coverage disputes, loss of good will, stress on your employees, your lost time and sleep and non-productive damage-control efforts?

I also suggest that you investigate permanent cures, rather than periodic cleanups. Isolate and permanently stop tree roots where feasible, rather than periodically clean out. This may entail removal of trees as authorized by the Mobilehome Residency Law guided by counsel's advice. If there is a possible tenant-caused problem, consider making the repair, then once resident-causation is determined, consider charging the resident, making a claim against the homeowner's policy, seeking legal relief. Many rental agreements wisely and always mutually call for arbitration or other alternate dispute resolution to quickly and cheaply deal with such issues.

Me?
I conclude that a repair invoice makes a much better court exhibit than a code citation. Don't you?