

What Is Acceptable 'Wear And Tear' In A Commercial Lease?

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Terminating a commercial lease? You're likely to encounter the question of whether the surrendered premises are in the condition required pursuant to the lease terms. Commercial leases often require the rental premises to be surrendered in the same condition as when originally leased, normal wear and tear excepted. Unfortunately "normal wear and tear" is one of the most commonly used and least understood phrases in a standard commercial lease.

The definition of "normal wear and tear" varies from state to state, and as most cases are fact specific the courts can provide only general guidance. "Normal wear and tear" generally means "a gradual deterioration in condition resulting from appropriate use over time, assuming routine maintenance was performed." Based on this definition, here are six actions a contracting party can take to ensure that lease termination does not result in lease litigation:

1. Document the Condition of the Premises at the Beginning of the Lease

Proving either — as landlord — that your damages exceed normal deterioration or — as tenant — that you have complied with your maintenance obligations will likely require evidence of the original condition of the premises. Prior to taking possession, document the condition of the premises — all of the premises, including equipment and fixtures. Documentation can take various forms such as photographs, videos or even a written description, but, if the intent is to rely on that documentation as subsequent evidence, make sure that you can demonstrate the authenticity, accuracy and date of your documentation.

2. Review the Lease Terms Carefully for Representations Concerning the Then Current Condition of the Premises

Most leases contain pages of boilerplate or standard language relating to the parties' obligations and the condition of the premises. One of the most common sentences is, "Tenant's taking possession of the premises shall be conclusive evidence of receipt thereof in good order and repair." In a case decided in Indiana in February 2016, the court stated that that boilerplate statement of condition could be sufficient evidence for the court to conclude that the premises were in good condition at lease commencement, despite the fact that the plaintiff was unable to provide any evidence in support.[1] As



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a result, a tenant who accepts a lease containing a description of the premises may very well be stuck with that description as the starting point for any discussion of “ordinary wear and tear.” Conversely, that can be an attractive consideration for a landlord. Under any circumstance, the parties need to review any description of the condition of the premises and make sure that description accurately reflects the actual condition of the premises before executing a lease.

3. Retain Copies of all Maintenance Records

In some states “normal wear and tear” assumes that the tenant is responsible for performing all necessary, routine maintenance as it becomes due. If a tenant fails to retain maintenance records and cannot demonstrate that routine maintenance was performed as needed, it will be that much harder for the tenant to demonstrate that any deterioration is within the bounds of ordinary wear and tear. Conversely, a lack of maintenance records makes it that much easier for a landlord to successfully argue that the wear and tear is not ordinary and, therefore, any repair costs remain the tenant’s obligation.

4. Identify Which Party is Responsible for Specific Repairs

Simply stating that the premises must be returned to preleasing condition ordinary wear and tear excepted is not sufficient to identify the maintenance and repair obligations of the parties. For example, if a tenant is not liable for ordinary wear and tear, does it still have to paint the premises at the termination of the lease? What if the lease term was one year versus 20 years? Does that impact the obligations of the parties in regard to cosmetic issues? Which of the parties is responsible for structural repairs and what is included in the term structural repairs? What if the tenant causes a structural injury? Is the landlord still responsible for making that repair? The more you clarify the respective obligations of the parties and your understanding of what is included in “normal wear and tear,” the less likely you are to end up in litigation.

5. Don’t Forget the Impact of Actual Use

The contracting parties must take into consideration the actual use for which the premises are rented. The landlord who rents the premises to a tenant for the purpose of running a conference center is going to have significantly different expectations than the landlord who rents a building as a warehouse for the storage of heavy machinery, and the phrase “ordinary wear and tear” takes on a completely different meaning. Tailoring lease language to fit a particular use is imperative when the use is likely to come with its own set of expectations and demands.

6. Can Ordinary Wear and Tear Mean that it was Completely “Used Up”?

For some courts the length of the lease can be a significant factor in determining liability for deterioration.[2] The longer a lease term, the more likely it is that ordinary wear and tear can arguably equal “all used up” or “reached the end of its useful life.” In those instances, should the tenant be required to replace a “used up” fixture or structural component? A common example is the roof. A tenant who remains in commercial premises for a period in excess of 20 years can anticipate that the building will need a new roof at the end of the tenancy. Is the tenant who performed all routine maintenance during the tenancy liable for the replacement of the roof after the 20 year term or did the roof simply suffer from “a gradual deterioration in condition resulting from appropriate use over time?” Issues of this nature that are especially prevalent in long term commercial leases make it even more important to carefully identify the parties’ respective obligations for the maintenance and repair of the premises.

Reviewing and understanding provisions and representations concerning the condition of premises, taking steps to document the condition of the premises in a lease and defining the parties' respective responsibilities in this area are important factors in avoiding litigation. An ounce of proactive attention to these issues can save pounds of costs and inconvenience at lease termination.

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[1] Anthony Wayne Corp. v. Elco Fastening, Systems, LLC, 2016 WL 687887 (N.D. Ind. 2016); cf. Bobeck Real Estate Company, Inc. v. Frontier North, Inc., 120 F.Supp.3d 845 (N.D. Ind. 2015)(absent proof of condition of premises at lease commencement, the tenant could not be liable for failing to return the premises to as good a condition as at lease commencement.)

[2] See, Statler Arms Inc. v. Apcoa Inc., 700 N.E.2d 415 (Ohio Ct. Com. Pl. 1997)(courts may make a distinction in the obligations of landlord and tenant in a commercial versus residential lease and in a long term versus short term lease.)

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