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One Bite Is Enough

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August 1995
One Bite Is Enough
Roger Bernhardt

In *Donchin v Guerrero* (1995) 34 CA4th 1832, 41 CR2d 192, the Second Appellate District reminds landlords that they had better do something about their tenants' vicious dogs or else they may be liable to outsiders who suffer dog bites (under the principle that owners are liable to outsiders for harm resulting from dangerous conditions on their property).

As a non-dog-owning pedestrian, I am undoubtedly better off because of that decision; it gives me a deeper pocket to reach into if a tenant's dog ever bites me. But as a real property lawyer, I should now advise landlords to modify their leases to prohibit pets.

Landowners, even nonpossessing landlords, are accustomed to being held accountable for injuries occurring on their property because of dangerous conditions. They know, for instance, that they can be held liable to tenants or visitors for such things as broken stairways or defective wiring. But they might also naively assume that their exposure stops at the lot line. In *Donchin*, however, the tenant's dog was four blocks away from the tenant's house when it bit the plaintiff: "[I]f the dog escapes the landlord's property because of defects in that property [*i.e.* a damaged fence], the landlord is liable for the off site injuries." 34 CA4th at 1846.

Given the court's statement, one could advise landlords to keep their fences secure whenever their tenants have dangerous dogs. But that advice does not protect against liability to other tenants or their guests, the dogs may be as adept at finding holes in fences as the landlords are in fixing them, and how would they know whether the dogs are vicious anyway?

A safer approach is to note that *Donchin* faulted the landlord for not terminating the tenant's month-to-month tenancy once he learned of the dog. Terminating a tenancy thus becomes a real property solution to a tort problem.

It is probably safe for a landlord to refuse to rent to tenants with dogs (except for disabled tenants with guide, signal, or service dogs). Moreover, because the dogs may show up after the tenant has already moved in, the lease had also better prohibit them. Because the California Supreme Court has held that pet prohibitions in condominiums are valid and reasonable (*Nahrstedt v Lakeside Village Condominium Ass'n* (1994) 8 CA4th 361, 33 CR2d 63), the same should be true for rental properties. Heartless as it may sound, good legal advice means being antidog.

Donchin said the landlord was liable because he could have notified the tenant: "either ... to get rid of his Rottweilers or vacate the premises in 30 days." 34 CA4th at 1847. Presumably, the notification would have insulated the landlord from liability for the next 30 days. The protection probably would not continue unless the landlord thereafter brought a timely unlawful detainer action.

In the absence of a good cause eviction ordinance, a landlord can terminate a month-to-month tenancy merely by giving notice; grounds are irrelevant. But other kinds of tenancies cannot be so easily terminated. If the tenancy was for a term and the lease was silent on the pet question, a 30-day notice would not work. The landlord cannot order a tenant to stop doing something not

prohibited by the lease, and the landlord cannot unilaterally revise the lease during the term. Without a clause (perhaps also when there is a good cause eviction ordinance in effect), unlawful detainer may fail. Does the fact that the landlord may be liable later if the dog does bite someone mean that she or he can evict the tenant now, *before* the dog has bitten anyone, because it might do so later? Had the lease initially included a prohibition against pets, then possession of a dog would be a breach, and the landlord could send a three-day notice (which should trigger tort immunity). Thus, there had better be a pet prohibition in the lease if the landlord wants to avoid tort liability by successfully evicting the dog owner.

Perhaps humane landlords can write leases that prohibit only vicious dogs. How would they be worded, and how would a personal injury jury look, after the fact, at what our clients could have known and done beforehand to prevent the injuries? There are no safe harbors. *Donchin* limits liability to cases where the landlord actually knew about the dangerous dog, but how long before another court says that an actual knowledge requirement improperly encourages landlords to ignore what is going on in their buildings? Generous tort decisions often generate stingy real estate responses.