

# Kimball, Tirey & St. John LLP

## How Does a Fire Affect a Tenancy?

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**Reviewed December 2008**

Property owners and managers frequently call Kimball, Tirey & St. John for advice regarding their rights and obligations after a rental property fire. Do you know what to do after a fire?

**1. Document and investigate the damage.** Because the landlord, tenant and any insurance carriers' rights and obligations will depend upon the scope of the damage and the cause, investigate and document the damage. Damage should be documented with both photographs and written descriptions. The written description should be objective (i.e. what did you see, hear, smell, or feel), not subjective (what you believe). An objective report example is: "On Sept. 1, at 10:05 a.m. I walked through the unit. The tenant and I were present. The kitchen and living room have a thick layer of soot on the ceilings. There is an odor of smoke throughout the unit. The Tenant told me that he believes the fire started in the kitchen when the oil in a deep fryer he was using caught fire." An investigative report by an expert (a fire department representative or an insurance adjuster) may be particularly helpful, but do your own investigation as well. Investigate potential damage to neighboring units thoroughly as even a minor incident can cause latent problems for a poorly prepared landlord. For example, did the fire in the carpet reach an electrical or ventilation system that is not presently being used? Did the efforts to contain the fire cause water damage in a contiguous unit?

**2. Advise insurance companies.** While some landlords choose not to tender smaller claims to their carrier to avoid premium increases in the future, or because of high deductibles, a landlord should nevertheless consider tendering the claim to his/her insurance carrier promptly. The extent of damage may not always be immediately apparent. If you do not give the insurance carrier an opportunity to survey the damage, you may waive your rights under the policy. Many policies have provisions that relieve an insurance company from liability if the insurance company is not put on notice promptly. If a landlord is named as an additional insured under a renter's policy, a claim should be tendered to that carrier as well.

**3. Determine the landlord's obligations to the tenant and the tenant's obligation to the landlord.** The landlord and tenant's rights and obligations depend on the lease terms, the fire's cause, and the extent of damage. Before providing advice, an attorney may ask you the following questions:

- Is the property residential or commercial?
- What was the cause of the fire? Was the fire caused by the tenant? An electrical system failure? Mixed cause? Undetermined? The fire department's report, if any, may give an opinion on the fire's cause.
- How badly was the property damaged?
- How long are repairs estimated to take?
- What are the lease terms?
  - Is the lease term fixed or a month-to-month?
  - What repair provisions exist in the lease?

- What insurance provisions are contained in the lease, and does the lease contain a subrogation waiver?
- When was rent last paid?

An attorney may also review the lease to determine if it contains any applicable provisions regarding insurance, repair obligations, and rental payments. The lease may specify particular rights and obligations if the property is destroyed. For example, a lease may give either a tenant or a landlord the right to cancel the lease after premises destruction.

In the absence of specific lease provisions, the law provides the following:

**A. Termination of the Lease.** A tenant has the right to occupy the property until the right of occupancy is terminated by law or a governmental entity has ordered that the property be vacated. The lease may be terminated:

- At the end of the agreed term;
- When the landlord and tenant agree to terminate the lease. This agreement may be made by the parties after the fire, or there may be lease provisions that indicate the parties' respective rights and obligations if the property is damaged or destroyed;
- If the leased property was entirely destroyed (Civil Code §1933(4)); or,
- On notice by the tenant, when less than the entire property is destroyed through no fault of the tenant, and the landlord should have known at the beginning of the lease term that the destroyed portion was a material inducement to enter into the lease. Civil Code §1932(2).

It is a question of fact, to be decided by a judge or jury, whether the property has been "entirely destroyed." An uninhabitable property may not be "entirely destroyed." Generally, unless the property has been completely leveled, it has not been "entirely destroyed."

If the tenant who caused the damage refuses to vacate, a landlord may give a notice to quit based upon nuisance or waste. If the tenant refuses to vacate after receiving such notice, a landlord may be required to prosecute an unlawful detainer against the tenant before s/he can regain possession of the property.

**B. Repair Responsibilities.** A residential landlord has the obligation to maintain the rental premises in a habitable condition. Unless a landlord can prove by a "preponderance of the evidence" that the tenant was responsible for the fire, the landlord must make repairs. However, a tenant has the obligation to repair damage to the property caused by his or her own "want of ordinary care."

The tenant has a duty to cooperate with the landlord's repair efforts. Leases usually contain provisions requiring the tenant to permit entry to facilitate repairs. A tenant who refuses to cooperate may be served with a notice of a breach of a lease covenant, terminating the tenancy if not cured.

**C. Rental Payments.** If the property is completely destroyed and the lease is terminated, the obligation to pay future rent due is extinguished. However, rent paid in advance cannot be recovered by the tenant unless the lease provided for a rent apportionment. If tenant damages the property, the tenant has an obligation to pay the full rental amount due under the lease. If the damage is not caused by the tenant, and the tenant remains in possession of the damaged property, the tenant's obligation to pay rent may be reduced or eliminated depending on the scope of damage, unless the landlord pays for the tenant's alternate housing. A tenant with comparable alternate housing must pay rent to the landlord at the lease rate.

**D. Other Payments.** If a fire is caused by a landlord's negligence, the landlord may be liable for the tenant's inconvenience, lost wages, damaged personal property, and lost perishable food. A tenant who causes a fire may be responsible to the landlord for amounts in addition to rental payments. Many landlords now require tenants to maintain renters' insurance and to name the landlord and property manager as an additional insured. Renters' insurance can provide an additional source of recovery for both the landlord and tenant. Before implementing a mandatory renters' insurance program, a landlord should consult with an attorney to be aware of the associated risks and to ensure that the lease contains the necessary language to protect the landlord.

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