Mind Your Business

Tia's Tips for Better Rental Management
By Tia Politi, ROA President

When Disaster Strikes: Navigating the tricky realms of Accidents, Acts of God and Acts of Tenants

Many things can happen to make a rental property partially or fully uninhabitable, either short- or long-term, and landlord-tenant law doesn't provide much specific guidance for landlords on how to manage truly disastrous problems. Depending on the severity of the damage, the landlord may need to initiate a claim on their rental property policy, require the tenants to do the same, or even initiate a claim under a tenant's renter's insurance policy, if they have one and refuse to initiate a claim themselves for damage they caused. Factors that can play into that decision include the amount of each party's insurance deductibles compared to the extent of the damage, the cooperation or lack thereof of the tenant's household, the anticipated timeliness of repairs, and the ability to assess fault for the damage. The nature of the problem and its severity, along with attribution of fault, will help determine the landlord's responsibilities.

If the condition was caused by the deliberate or negligent actions of the tenant or a guest, there are different liability concerns than if the damage was caused by the negligence of the landlord, a failure of one or more components of the unit, an accident not the tenant's fault, or an Act of God.

Statutes require a landlord to maintain the premises in a habitable condition, but when that duty becomes impossible, the landlord may still have some duty to act. As the provider of shelter in a business relationship, it is the landlord's duty to ensure that the tenants have secure shelter either in the property or elsewhere, even if that means paying for a hotel room for a couple of nights while the details get sorted out. With residents whose insurance covers substitute housing and replacement of personal property, the landlord's obligations will be easier to manage. If tenants are displaced by a disaster, and have no renter's insurance, the Red Cross will usually step in to help those who lack available resources to help themselves, but for a very short time.

If the fault is that of a random third party, say a drunk driver crashes into the rental unit, rendering the property unsecure and partially uninhabitable, both parties can make claims on their insurance policies to cover their areas of responsibility and the insurance companies can subrogate against the responsible third party. Landlords should still act immediately to secure the property and ensure the tenant's safety.

If the fault is an Act of God, do what is reasonable and act in good faith. During the ice storm of 2016, many residents were without water and power for almost a week. Trees and limbs fell onto houses, causing substantial damage for many. In cases like this, landlords were not willfully withholding essential services and may not have been able to safely get to the property to secure it, remove hazards and repair the property. For months afterward, tree service operators were behind on storm clean-up, and contractors were behind on repairs. It seems reasonable to think that if tenants cannot be held liable for ~~an~~ Acts of God, neither can landlords, as long as they are making every reasonable effort to comply with their responsibilities.

If the fault is that of the tenant or a tenant's guest and the tenant has renter's insurance, the policy will cover the costs of substitute housing and replacement of personal property, as well as providing up to $100,000 in liability coverage to repair the damage to the property. If the level of damage exceeds this limit, then the landlord's policy should kick in and their insurance company can subrogate to the tenant on the landlord's behalf. In cases where tenants or their guests cause the damage, landlords have far less responsibility, and ORS 90.360 specifically exempts damage awards to tenants when, "The tenant knew or reasonably should have known of the condition and failed to give actual notice to the landlord in a reasonable time prior to the occurrence of the personal injury, damage to personal property, diminution in rental value or other tenant loss resulting from the noncompliance; or…The condition was caused after the tenancy began by the deliberate or negligent act or omission of the of someone other than the landlord or a person acting on behalf of the landlord…The tenant may not terminate or recover damages under this section for a condition caused by the deliberate or negligent act or omission of the tenant or other person on the premises with the tenant's permission or consent."

What if the damage was not accidental or careless, but caused by the tenant with malicious intent? Does this rise to the level of allowing the landlord to reasonably issue a 24-Hour Notice to Vacate for Harm or Substantial Damage? For purposeful actions like arson, intentional flooding or extreme vandalism, it's possible that a landlord could terminate a tenancy this quickly. The standard of proof for an act that is **outrageous in the extreme** is very high, but if it is appropriate, landlords may need to consider this option, and evict if the notice expires and the tenants don't move out.

If the fault is caused by the landlord's neglect or failure to act, then they bear at least some liability for damages incurred by the tenant (a good reason to always have a personal liability umbrella). An example of that might be mold from a condition they knew or should have known about that they didn't address, a faulty repair that fails, or a condition that the tenant warned about that they didn't address. It's always a good idea to look at the rental unit with a critical eye toward prevention of liability claims. (Re-read my article, ***Risk Management for Risky Times*** on the ROA website for a rundown of landlord liability concerns.)

Substitute Housing

When substitute housing is required to be provided by the landlord, it should be, "…of a quality that is similar to or less than the quality of the dwelling unit with regard to basic elements including cooking and refrigeration services, and, if warranted, upon consideration of factors such as location in the same area as the dwelling unit, the availability of substitute housing in the area and the expense relative to the range of choices for substitute housing in the area." 90.365(1) (c)

If the rental unit is very basic and older, then the tenant can't get reimbursed (at least not fully) for staying at the Hilton. They can stay at the Hilton, but their comp would be Motel 6 (no offense to Motel 6), so the landlord would be responsible for the Motel 6 daily rate, not the Hilton daily rate, as compensation to the tenant. There's a lot of range in price and quality between those two options, so be reasonable and fair, and take into consideration the needs of the household, and the length of the displacement.

For example, I had a tenant report a large crack in her living room ceiling that suddenly appeared along with a dramatic drop in a large portion of sheetrock. It was pretty serious, so we arranged substitute housing for her while the problem was addressed. She needed lodging that would accommodate her two dogs and wanted a kitchenette to do her own cooking, so we found her a weekly rate hotel that had an efficiency kitchen and would accept her dogs. Even though the rental was very basic, the owner had to pony up for a more expensive housing situation to accommodate her two dogs and her reasonable request for a kitchen. Since the extent of the repair was going to be quite lengthy, the owner agreed to release her without the required 30-day notice, and she chose to find another rental.

That was in a very different housing market; rentals were much easier to come by than they are today. Currently, landlords may find that residents are not unwilling, but unable to find another property. If she had been unwilling or unable to find another suitable property, we would have needed to protect her personal property during the remediation, and provide substitute housing for the necessary length of time. In the instance above, the daily cost of the substitute housing would have been much more than the daily cost of rent, which would likely have been covered by insurance, but In this case, the landlord made the choice to absorb the costs instead of file an insurance claim. We were fortunate to have a cooperative resident who figured things out and moved quickly. We refunded her rent and security deposit from the date of displacement, paid for the substitute housing, and once she removed her property, fixed up the house and re-rented it.

Another time, I had a tenant who dragged his feet after a substantial roof leak rendered his one-bedroom apartment uninhabitable. The tenant was displaced and I worked with him to get a hotel room for what I thought would be a few nights, but he refused to move back in because he said he didn't trust the owner's repair. Since the owner was willing to release him, I found a comparable unit we had in another building and offered that to him, but he balked at that option too. Turns out he had been thinking of moving anyway, and the timing had been nearly perfect, but not quite. We refunded his rent from the date of displacement as well as his security deposit and I negotiated a total of about eight days in the motel. He wanted more, but because his old unit was ready, I had a comparable unit available, and he chose neither I felt like I was on pretty firm ground.

How long must a landlord provide substitute housing? I guess that depends partly on how long the tenants will be displaced. If the loss is total, then the tenants have a duty to work towards finding another home. If the tenancy will continue after repairs, and the landlord provides substitute housing then the tenants should continue to pay rent during that time. If the tenant's renter's insurance covers that, then the landlord may need to refund the days of rent during which the tenants are displaced, and seek compensation for their loss from their insurance company.

Diminution in Value

How does a landlord calculate diminution in value for a partial loss? The formula is estimating the price a comparable rental property would command on the open market, minus the unusable portions of the property. I once had a tenant who was renting a three-bedroom, two-bath home and a sudden roof leak rendered one bathroom and one bedroom uninhabitable. The tenant chose to stay through the restoration, paying rent as usual until the work was complete. I then calculated the difference in monthly rent between his unit and the rent for a comparable two-bedroom, one-bath unit, multiplying

by the number of days of loss. With the tenant's agreement, he received a credit for that amount. Some tenants may not want to agree to paying in full and waiting for a credit, and I can see the reasoning there as well. Some may think they are entitled to some cash for their pain and suffering, and if the fault is that of the landlord, that may be reasonable. Negotiation is a subtle art, and without much clarity landlords are on their own negotiating with tenants for what is reasonable that they can agree on. With hostile, combative or mentally ill residents this can be a challenge.

Regaining possession from unwilling residents

Even when the dwelling is a total loss and 100 percent their fault, some tenants don't want to leave. Either denial kicks in or they don't have any resources, or maybe not even the capacity to make drastic decisions and carry them out. We are blessed to live in a community where there are abundant social services that may be able to assist. In addition to the Red Cross, landlords may seek help from Senior & Disabled Services, the Department of Human Services, Catholic Community Services, ShelterCare, or St. Vincent de Paul. Tenants can also call 211 to received information about social services available in their area. But in some cases, it may require service of notice to terminate the tenancy.

If the tenants are month-to-month and in place for less than one year, landlords may still issue a 30-day notice of termination without cause (No-cause tenancy termination timeframes may be different in different jurisdictions or in subsidized housing.), but if the tenants have been in place for more than one year, or are in a fixed-term lease, the problem can be much more complicated. With the complexities of SB 608 changing the way tenancies can be terminated, and the very high penalties for landlord error, it may be prudent to consult with an attorney prior to initiating any kind of termination notice; however, nothing in the law prohibits both parties from agreeing to a mutual termination of the tenancy. You would still be well-advised to seek legal counsel to ensure that any agreement you make is solid.

A property management friend had tenants who caused a house fire resulting in a total loss of the home, but they didn't have renter's insurance, so after a couple of days in a motel paid for by the Red Cross, they came back and started camping in the backyard. The restoration company refused to work on the house with them living in the yard and continuing to access portions of the ruined residence. We started brainstorming ideas and finally hit upon asking the city of Cottage Grove for their help, and because the tenants were camping illegally, they assisted in removing them from the property. City and county codes can be helpful in tenant removal, especially when the property suffers such extreme damage that it is red-tagged by government officials. It is also an exception under the tenant defense of retaliation when issuing a no-cause notice of termination.

Insurance considerations

Insurance policies can be very different, so be aware of what is covered and what isn't. What the property policy doesn't cover, may be covered by a personal liability umbrella. Sometimes the cost of the deductible and the increase in premium from making a claim can be comparable, or higher, than just absorbing all of the costs of repair and substitute housing, making it the better choice. Certain kinds of damage to a unit may not be covered at all, such as mold damage or damage caused by the manufacturing of drugs, such as distillation of marijuana oils. Even without knowledge of the tenant's activities, insurance agents say some policies won't cover damage in these instances, so landlords should review their coverage and inspect their properties regularly.

Who's responsible for the other party's insurance deductible? I have no idea, but it seems reasonable to think that if one party is clearly at fault then they should compensate the other for that expense, but if it's a third-party accident or Act of God, then each absorbs their own deductible. What if the other party's insurance rates go up due to the claim? Another thorny question. I suppose if the insurance company made it clear that a rate increase was directly tied to the incident, and fault has clearly been attributed to their reckless indifference, carelessness or neglect, then it seems reasonable to think that could be calculated and passed on as well.

Even when tenants are liable for damage, it can be best to leave the problem to the insurance company's discretion. I once had some college students renting a large house who went home for the holidays, leaving behind frozen water pipes due to a failure to follow our winterization instructions. They made the interesting decision to leave the spigot on in the kitchen sink in case things thawed out. And thaw out they did! Once the water started flowing into their sink (piled high with food scraps and dirty dishes) it hit the food- and ice-clogged drain and for four days, the kitchen water ran and ran, running into the basement, flooding the main floor and eventually pouring out the side door where the gardener noticed. I received a panicked call asking if he should go in and turn off the water. He had found the tenants' hidden key under a rock, so I instructed him to go in and do that. (Remember, when you perform an emergency entry such as this, you must send a written notification to the tenant within 24 hours of entry. The notice shall include the date and time of entry, the reason for entry and the names of the persons who entered.)

When the tenants returned, they wanted to try to continue living there, but the contractors working on the house said it wasn't safe and they refused to continue the work until they were gone. There was a standoff for a few days while some of the tenants balked, but they eventually retrieved the property they could and found temporary lodging. The landlord's policy covered the loss of rent during the restoration. The question was, will this tenancy continue? Since it took much longer to restore than anyone thought, they never did move back in and found permanent housing elsewhere at their own expense, but we did not release them from lease until much later by agreement of the parties. The landlord's insurance company tried to subrogate against the tenants' parents, but eventually dropped the case when the parents hired an attorney and threatened litigation. Even though they could presumably have been held responsible for the flood, it wasn't worth a costly fight.

Fortunately, disasters are rare, and being prepared with adequate insurance and some idea of the responsibilities will help. But if the tenant is uncooperative, or the landlord does their best and gets sued anyway, best to be prepared. Everyone wishes for the path to be straight and the solutions clear, but in situations like this it is rarely the case. There are times when landlords need competent legal advice, especially because a judge may be the final arbiter of whether they acted reasonably and in good faith.

This column offers general suggestions only and is no substitute for professional legal counsel. Please consult an attorney for advice related to your specific situation.