



GUTTER BALLS AND APPLE SAUCE

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It's all about relationships. After husbands and wives, and parents and teenagers, the landlord-tenant relationship is perhaps the most prone to misunderstanding and conflict. The Arkansas Court of Appeals recently dealt with a dispute between Tenant, which assumed an existing lease for a bowling alley facility owned by Landlord.

Essence means essence...

The lease called for monthly rent to be paid on the first of each month and percentage rent to be paid annually, plus Tenant was to pay the ad valorem taxes. The lease also contained a fifteen-day notice provision before a default would be declared, with forfeiture if a default did occur. And it recited the mantra "*Time is of the essence.*"

Landlord and Tenant scuffled over these requirements, even to the point of Landlord suing for back percentage rent and complaining of Tenant "riding" the notice provision. The lawsuit was settled on condition that Tenant accept amendments to the lease shortening the

notice period to five days and including a version of what is sometimes referred to as a "one bite at the apple" clause---specifically, the Tenant was entitled to the notice and grace period once every six months. Otherwise, default could be declared without notice.

Just the fax, ma'am...

Sure enough, Tenant apparently failed to pay the ad valorem taxes and Landlord gave it five days notice, by fax, and reminded Tenant of the one-bite rule. Less than a month later, Tenant apparently tried to deliver the rent by courier , but the courier fell sick and was three days late with her delivery, which nothing prevented Tenant from dealing with. When she arrived, Landlord refused to accept the rent and faxed notice of default and demanded that the Tenant get out or face an unlawful detainer action.

That meant Tenant would owe triple the rent for any days it was found to have held the premises after the lease was terminated. The trial court held that Tenant basically admitted the default (despite having an excuse) and that the termination had occurred justifiably. It therefore imposed the triple rent. *Ouch!*

No spare there...

Whether or not you or I would have made the same decisions as either Tenant or Landlord in this instance, as in bowling, the rules of the game are clear. One-bite rules are enforceable, both in leases and mortgage loans. They are in fact useful negotiating tools, to tighten an otherwise broad notice provision, so that both sides get some of what they want. Further, with leases and with notices, if rent or a note payment is due over a weekend, pay early.

Finally, the term "time is of the essence" is frequently ignored by tenants and other contracting parties. It means every deadline or due date in a lease or other contract will be *strictly enforced, no excuses* ---in his instance, Tenant could not *knowingly* slide past a deadline,

even with a note from Mom. (This is different, by the way, from an unexpected intervening problem not easily correctable, such as an earthquake.) The risk of betting on an excuse being accepted is both loss of the lease **and** treble damages. Toe the line.

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