

FAQ for Tenants & Their Attorneys

1. How much notice must California tenants receive if evicted because of foreclosure?

Answer: Usually 90 days.

CCP 1161b(a) provides that “a tenant or subtenant in possession” of a foreclosed property must be given a 90-day notice before eviction. This means that the new owner cannot file an unlawful detainer until after the 90-day period has expired. There is no bona fide test under state law, as there is with the federal Protecting Tenants at Foreclosure Act. Even if the tenant is renting from a close family member or paying very low rent, she is still entitled to a 90-day notice under CCP 1161b(a). It does not matter if the property changed hands multiple times after the foreclosure and the party seeking to evict the tenant is not the “immediate successor in interest.” The only exception to the 90-day requirement under CCP 1161b is for tenants who are living in the home with the former homeowner—*i.e.* renting a room (see question 2).

Most tenants with fixed-term leases, entered into before title was transferred to the new owner by the foreclosure sale, are entitled to remain in their homes until the end of their lease, even if it extends beyond 90 days. However, if the post-foreclosure

owner wishes to occupy the property as their primary residence, they need only give the tenants a 90-day notice. To qualify for protection under CCP 1161b, fixed-term leases must meet the requirements of a three-prong test which essentially determines whether a tenancy is the result of a normal business transaction, as opposed to a sweetheart deal between friends or relatives. Although the test is nearly identical to the “bona fide” test in the federal Protecting Tenants at Foreclosure Act, state law does not use the term “bona fide.” CCP 1161b(b) specifically provides that fixed-term leases will not be honored if:

1. The lessee is the mortgagor or the child, spouse, or parent of the mortgagor;
2. The lease was not the result of an arms' length transaction;
3. The lease requires the receipt of rent that is substantially less than fair market rent for the property, except when rent is reduced or subsidized due to a federal, state, or local subsidy or law.

If a new owner brings an unlawful detainer action against an existing tenant with a fixed-term lease, the new owner bears the burden of proving the lease does *not* meet the above standards. CCP 1161b(c).

In “just cause” jurisdictions, tenants have a complete defense to any eviction action based on foreclosure. Just cause ordinances restrict evictions to those based on an enumerated list of “just” reasons for eviction, such as nuisance and nonpayment of rent. Foreclosure is not a just cause for eviction in these jurisdictions and a tenant may not be evicted simply because her landlord lost the property to foreclosure.

State and federal law may mandate different notice periods for post-foreclosure tenants. Advocates should apply the most tenant-favorable law. California law and the PTFA both specify that the most protective law for tenants applies in any given situation; there is no preemption. Pub. L. No. 111-22, tit. VII, §702(a)(2)(B), 123 Stat. 1632, 1660-62 (2009), as amended by Pub. L. No. 111-203, tit. XIV, §1484 (2010); CCP §1161b(e).

2. How much notice must tenants living with the former homeowner receive?

Answer: 90 or 30 days, depending on whether the tenancy is “bona fide” under federal law.

California’s unlawful detainer statute generally requires that tenants in foreclosed properties receive a 90-day notice before eviction. CCP 1161b. Only tenants who reside in the home with the former homeowner are not entitled to this 90-day notice. CCP 1161b(d). Although they are not protected by 1161b, these tenants may still qualify for a 90-day notice under the federal Protecting Tenant at Foreclosure Act. (“PTFA”), Pub. L. No. 111-22, tit. VII, §702, 123 Stat. 1632, 1660-62 (2009), as amended by Pub. L. No. 111-203, tit. XIV, §1484 (2010). The PTFA provides that post-foreclosure owners take title “subject to” the rights of any “bona fide” tenant and requires that such tenants receive a 90-day notice to quit, or be allowed to remain through the end of their fixed-term lease. *Id.* If the tenant living with the former homeowner qualifies as “bona fide,” advocates should argue that these

tenants are entitled to a 90-day notice under the PTFA. The PTFA defines a “bona fide” tenancy as one in which:

- (1) the mortgagor or the child, spouse, or parent of the mortgagor under the contract is not the tenant;
 - (2) the lease or tenancy was the result of an arm’s length transaction;
- and
- (3) the lease or tenancy requires the receipt of rent that is not substantially less than fair market rent.

Id. § 702(b). If the tenant is not “bona fide,” they are only entitled to a 30-day notice before eviction. CCP 1161a(c). Specifically, “tenants and subtenants” are entitled to notice “at least as long as the term of the hiring itself but not exceeding 30 days.” CCP 1161a. Since most tenancies are month to month, most tenants would be entitled to one month, or a 30-day, notice. If you are representing a tenant living with the former homeowner, please contact the HBOR Collaborative for further information and assistance.

3. How much notice must an adult child renting from a former-homeowner parent receive?

Answer: It depends on whether the parent also lives in the home.

California law requires that nearly all tenants receive a 90-day notice before eviction, regardless of any relationship between the tenant and former owner. CCP 1161b(a). The only exception is for tenants who have been living with the defaulting

property owner. CCP 1161b(d). A child renting from her parent would therefore qualify for a 90-day notice under state law if the parent does not live with the child. If the parent *is* living in the home with the tenant-child, the child may only be entitled to a 30-day notice before eviction, pursuant to CCP 1161a(c) (see question 2). The child in that case does not qualify for any protection under the federal Protecting Tenants at Foreclosure Act because their tenancy is not “bona fide.” The PTFA defines a “bona fide” tenancy as one in which “the mortgagor or the child, spouse, or parent of the mortgagor under the contract is not the tenant” (see question 2).

4. How much notice is required to evict a tenant after a short sale?

Answer: Either 30 or 60 days.

In a short sale, the proceeds from the foreclosure sale do not cover the amount the homeowner owes on the loan, but the bank agrees to release its lien if the homeowner finds a buyer. Regular eviction rules apply in short sales because short sales are not foreclosures. Therefore, a 60-day notice is required for tenants who have lived at the premises for longer than 12 months, and only a 30-day notice is required for tenants who have lived in the home for less than 12 months. CC 1946.1. Tenants with fixed-term leases may remain until the end of the lease term.

5. Does a private investor who buys residential property at a foreclosure sale have to satisfy HBOR and PTFA requirements before evicting tenants?

Answer: Yes.

A private investor that purchases a foreclosed property must follow California law and the federal Protecting Tenants at Foreclosure Act (PTFA) before evicting any tenants from the property. California's CCP 1161b and the PTFA both apply to post-foreclosure owners regardless of whether they are banks, individuals, private investors, or other entities.

Further, California law is not limited to "immediate successors in interest" after a foreclosure. While the PTFA applies to any owner who acquired the foreclosed property at the trustee's sale, CCP 1161b applies to *any* post-foreclosure owner seeking to evict a tenant who was in possession of the home when the foreclosure occurred. Even if the property was sold again to a third owner after the trustee's sale, *that* owner must comply with CCP 1161b. For example, if Wells Fargo acquires the home at the trustee sale and then sells the home to a private investor, that investor must comply with CCP 1161b before evicting existing tenants, even though that investor did not acquire the home directly through foreclosure.

The type of purchaser only matters if the purchaser is a natural person who seeks to use the property as his or her primary residence. In this case, under both federal and state law, tenants need only receive a 90-day notice to quit - even if they have a fixed term lease extending beyond 90 days.

6. How do unnamed tenants join an unlawful detainer case to prevent eviction?

Answer: File a Prejudgment or Post-Judgment Claim of Right to Possession form, depending on whether judgment has been entered.

Banks routinely serve unlawful detainers naming only the former homeowner as defendant, leaving tenants to find out about the eviction when the sheriff arrives to lock them out. Under the previous law, when a bank alleged that it had served a prejudgment claim of right to possession form on all occupants, it triggered a 10-day deadline for any unnamed tenants to join the UD by filing a prejudgment form. CCP 415.46 eliminated this 10-day deadline for tenants and subtenants in foreclosed properties. They may now file the prejudgment form at any time before judgment has been entered and join in the UD to defend their rights in court.

If judgment has already been entered, a tenant may still join the case by filing a post-judgment claim form with the sheriff. As long as the tenant makes her claim before she is locked out, she can join the case. If the tenant makes a post-judgment claim, she should complete three copies of the form: 1) an original signed by the sheriff to file with the court; 2) a copy signed by the sheriff and file-stamped by the court clerk for the tenant's records; and 3) another copy for the sheriff. Within two days after the sheriff signs the claim form, the tenant must file it with the court. This requires a filing fee or fee waiver. CCP 1174.3. If the tenant makes a prejudgment claim she will automatically be joined in the case provided her fee waiver is granted or filing fee paid. CCP 1174.25. If the tenant makes her claim

post-judgment, the court will hold a hearing to determine whether she may enter the case. CCP 1174.3. The court must make a determination based on the evidence presented at the hearing and will deny the claim if it determines that the claimant is an invitee, licensee, guest, or trespasser. *Id.* Tenants should bring evidence of their lease or rental agreement and proof of rent payments.

Advocates should note that the existing prejudgment and post-judgment claim forms have *not* been amended to conform with the new law. Provide a copy of the new statutory language to educate any clerk, sheriff, or judge not aware of these new tenant protections. Please contact the HBOR Collaborative for assistance if you have any questions about pre or post-judgment claims or if a tenant you are representing is denied his or her claim.

7. Does a tenant have to post rent to obtain a hearing after filing a Claim of Right to Possession?

Answer: No.

Often, tenants in foreclosed homes first learn that an unlawful detainer judgment has been entered when the sheriff arrives at the door with a writ. If a tenant seeks to join a UD case after judgment has been entered, the tenant must use a Claim of Right to Possession form. The tenant must submit this form to the sheriff for his or her signature. Within two days, the tenant must file the signed form with the court. CCP 1174.3. At this time, the tenant *may* deliver a deposit of 15 days' rent to the court, but rent is not required. *Id.* If the tenant posts rent, the hearing will be set

for between 5 and 15 days after the date the claim was submitted. *Id.* If the tenant does not post rent, the hearing will be set for 5 days after the date the claim was submitted. *Id.* It appears, however, that courts are scheduling hearings for 5 days after the claim was submitted regardless of a rent posting. Advocates should advise tenants filing a claim *not* to post rent because the tenant risks losing some or all of their deposit and there appears to be no advantage in posting rent.

If the tenant does post rent with the court and the court determines that the tenant's Claim of Right to Possession is valid, the court will return the deposit and order that the Unlawful Detainer Summons and Complaint be amended to include the tenant. CCP 1174.3. If the court determines that the tenant's Claim of Right to Possession is invalid or the tenant fails to appear at the hearing, the court will return any deposit paid by the tenant, less any prorated amount for each day that enforcement of the judgment was delayed by the tenant's claim. *Id.* The prorated amount will be paid to the landlord and the court will order the sheriff to enforce the original writ of possession, as amended to include the tenant, and remove the tenant from the property within five days. *Id.*

8. If a tenant is trying to recover her security deposit, should she demand it from her original landlord or the new owner?

Answer: Both.

The new owner must return the tenant's deposit if the prior owner did not return it pre-foreclosure. CC 1950.5(j). The prior owner and new owner are jointly and severally liable for any amount of the deposit that was not legally withheld. *Id.*

9. Do tenants need to pay rent during the 90-day notice period?

Answer: Yes.

Under both the federal Protecting Tenants at Foreclosure Act and CCP 1161b, the new post-foreclosure owner takes over the original rental agreement. CCP 1161b requires new owners to take on the "rights and obligations" of the lease, which include the right to collect rent. The PTFA does not spell things out as clearly, but specifies that immediate successors in interest take title "subject to" the rights of any bona fide tenant under a bona fide lease. Either way, the obligation to pay rent continues.

New owners also owe duties to tenants. In addition to maintaining the property and providing security and any services required under the rental agreement (such as paying for utilities), new owners are required to provide tenants with a detailed notice informing tenants of the new ownership and explaining where to pay rent. CC 1962. The Homeowner Bill of Rights added a new provision to CC 1962,

prohibiting new owners from *evicting* tenants for nonpayment of any rent that accrued before this notice was given. However, the tenant still owes this rent to the new owner, who could sue the tenant for the back rent in civil court. Tenants should be advised to put aside rent after a foreclosure to prepare for this situation.

10. Do tenants without written leases get any post-foreclosure protections?

Answer: Yes, most are entitled to a 90-day notice regardless of whether there is a written lease.

Neither federal nor state law requires that a tenant have a written lease to be entitled to extended notice before eviction. CCP 1161b simply says that “tenants and subtenants” are entitled to a 90-day notice before eviction. As long as the tenant is paying rent for their housing, they must receive at least a 90-day notice before eviction. They do not need a written rental agreement.

11. What should I do if I lose a UD hearing or trial, the law was on my side, and there was no court reporter?

Answer: Appeal or do a writ.

There is no court reporter in most unlawful detainer courtrooms, but tenants still have the right to file a writ to challenge an adverse ruling or file an appeal to challenge a judgment or final order. Please contact the HBOR Collaborative if you receive an unfavorable ruling which is contrary to law.

Email us at: MHoward@wclp.org or Leah@tenantstogether.org