

Tenants and Foreclosure in California

The Crucial Questions

Why are the powers that be so concerned about people who can't pay their mortgages? When tenants can't pay rent, politicians don't rattle on about the need for relief.

It's not the foreclosure problem that the President and Congress are worried about. When the fear was that people who couldn't pay their mortgages would be evicted, the powers that be didn't pay much attention. Neither Republicans nor Democrats have ever been much concerned about that. The problem is that the mortgages that couldn't be paid had been sold to investors all over the world and the investors are in danger of losing lots and lots of money. These folks are the banks, investment houses and very rich folk that politicians respond to.

Further the problem is spreading. It's not just low-income buyers, but speculators buying rental property, and middle income people taking out mortgages that allowed them to choose their payments, coupled with collapsing prices in many areas, that has led to this crisis. As prices decline, even people who can afford to pay their mortgages decide that it's not worth it.

Many people may just walk away from their houses. And landlords really have an incentive, as it doesn't threaten their homes, just yours.

The broader economic problem is that the credit system has become the substitute for decent wages for two-thirds of the population, as the powers that be sought to end stagflation increase corporate profits by crashing worker pay. Having spent 30 years on this program, we're now back to the same place.

I pay my rent. Why isn't my landlord using the money to pay the mortgage?

There's nothing in the law that requires that your landlord use your rent money to pay the mortgage. Landlord groups have been very successful in tying rent payments to the cost of maintaining rental units, but there's no necessary connection. A landlord can use the money to pay the mortgage, buy a Hummer, send his kids to college or go on a really expensive vacation. Your obligation to pay rent has nothing to do with his obligation to pay the mortgage. It's not fair but, as you'll discover, the real estate interests buy lots of access and don't have to be fair.

How does foreclosure work in California?

Most foreclosures in California are non-judicial for a variety of reasons I won't get into here. That means that the lender doesn't have to go to court to foreclose

when the borrower doesn't pay. After your landlord has missed two or three payments, the lender files a "Notice of Default" with the County Recorder. If your landlord doesn't either pay the arrears or negotiate a deal with the lender, the lender can foreclose relatively quickly and try to sell the building at a courthouse auction. A "Notice of Trustee Sale" should be posted at the property which, for many tenants, is the first notice that there is a problem. Most buildings don't sell at auction and the lender ends up taking the building back. The lender then enters the default with the County Recorder, and takes possession of the building. This process can take from four months to a year, depending on how quickly your landlord's lender moves.

Because foreclosure rules and process vary from state to state, if you live in another state, you should find a local tenants' organization or a lawyer specializing in landlord-tenant law to give you information about foreclosure in your state.

My landlord's lender has filed a notice of default. Can I move?

If you have a month-to-month rental agreement, you can move at any time. Just send your landlord a letter stating that you'll be moving in 30 days. If you have a lease, you'll have to negotiate with your landlord to leave early, and there's not much you can do if he won't let you out of the lease. The fact that he's in default doesn't cancel the lease. Only the foreclosure sale does that. And your landlord may well want to continue collecting rent from you until the foreclosure.

What happens after the lender or new owner takes possession of my home?

Under state law, California tenants have no rights. State law allows the new owner (if someone buys the building) or the lender to evict almost all tenants by serving them with a 30-days' notice to vacate the property. Lenders generally don't want to become landlords and will usually force any tenants to vacate the building promptly. It's possible that, as the foreclosure crisis deepens, lenders may want tenants to stay, if only to protect the building from squatters, vandals and the deterioration that comes with long-term vacancy. At this point, though, it's likely that the lender will serve you with a 30-days' notice to vacate your home.

If your building is sold to a new owner, it depends on whether the landlord has purchased the building as an investment or intends to live there. A new landlord may not evict you if it's an investment property.

I've lived in my home for more than a year. Doesn't the lender have to give me 60-days' notice under state law?

No, the lender need only give you 30-days' notice.

I have a year's lease. Can the lender evict me if it hasn't expired?

In most cases, yes. The lease is voided by the foreclosure, and the lender need only give you a 30-days' notice.

But in a very small number of cases, a lender may be forced to allow a tenant to stay until the expiration of the lease. If, and only if, you signed your lease before the landlord took out the mortgage on which she or he defaulted, the lender must allow you to stay for the entire lease period. Because foreclosure in California takes so long, even if your lease was signed before your landlord took out the mortgage, it's unlikely that you'll have more than a couple of months left on the lease, and it may not be worth the trouble to enforce your rights here. But if you do decide to try to stay through the end of your lease, you should contact a lawyer specializing in tenants' rights immediately. Don't expect to just tell the lender that you're "first in time, first in right" without having legal muscle to back you up.

[The "first in time, first in right" issue may be more trouble than it's worth. You may have to have recorded the lease prior to the time the landlord took out the loan. In most cases that wouldn't be worth the trouble.]

I have a lease under Section 8. What do I do?

Section 8 tenants usually cannot be evicted as a result of foreclosure. If the lender tries to get you to move anyway, get in touch with your local legal aid office immediately. Many lenders don't know that they can't evict Section 8 tenants and you'll need to have a lawyer send a stern letter explaining your rights.

What is "cash for keys"?

Some lenders will offer you money if you'll move within a couple of weeks and leave the building unharmed. Lenders started out offering \$500, but tenants quickly figured out that they needed the time more than such a small sum. If you're packed and ready to go, there's no reason not to take the \$500, but if you haven't found a new home, you probably need the time more than the money. And if you do want "cash for keys," you might want to think about how much it will cost you for rent and deposit, moving expenses, and the general hassle of it all in deciding what a fair payment would be.

It is essential that you get any "cash for keys" agreement with the lender **IN WRITING**. There is now anecdotal evidence that lenders have been agreeing to these payments and then reneging on them. Sleazy, of course, but unless you have a written agreement, you may never see any money. Be sure that any agreement is signed by an authorized bank officer.

What if I can't move in 30 days?

It's possible that you can negotiate with the lender for more time, particularly if you only need a week or two. A local lender is more likely to be amenable to an extension than a European bank. (European bankers love the American landlord-tenant system. They can do things here that they would never get away with in European countries, and they tend to do them. My reading indicates that Deutsche Bank has been particularly nasty.) European banks treat American tenants the way US corporations treat agricultural workers in Central America.

If you can't negotiate with the lender, you must move by the time the 30 days is up. If you don't move, the landlord can file an unlawful detainer and ask the court to evict you. Most tenants don't know this, as they aren't often faced with eviction, but the right of private reporting agencies has eviscerated the rights of California tenants to defend themselves in court. Court documents are a matter of public record, and that enables various landlord reporting services to compile information on tenants who have had unlawful detainer actions filed against them in court. These services don't care whether the tenant won or lost the case, since most landlords don't want a tenant who has defended her rights against a landlord. The eviction reporting services look at filings; they don't care how the case was resolved. You must move before an unlawful detainer is filed. Period.

My landlord has suffered foreclosure and I'm going to move. How do I get my security deposit back from my landlord?

You don't. The person or company that owns your building must return your security deposit to you. The law is quite clear on this point. On sale of the building, whether an ordinary sale or a foreclosure sale, your security deposit must either be transferred to the new owner or returned to you. And it's the responsibility of the new owner to collect the security deposit from your former landlord. If the lender didn't get the security deposit you paid, it's not your problem. The lender still has to return it to you. If it's not returned to you within three weeks after you move, you can sue the lender in Small Claims Court, just as you would any landlord, to recover the money.

I live in San Francisco. We have "just cause" eviction. Can the lender evict me?

Many tenants in California live in communities with rent control and/or "just cause" eviction. Unlike tenants in most of California, who can be evicted "for any reason or no reason at all," tenants who live in communities with "just cause" eviction protections cannot be evicted except for specified good reasons. Tenants can be evicted if they don't pay the rent, trash the place, engage in illegal activities, or disturb the neighbors. Tenants can also be evicted so that the owner can live in the unit, if the landlord is taking the unit off the rental market

(pursuant to the Ellis Act), and for a very few other just causes. Foreclosure is not a cause for eviction in California communities with "just cause."

It's interesting that foreclosure is a "just cause" for eviction in many East Coast cities. But one of the first modern "just cause" eviction laws in California was written as part of San Francisco's Proposition U in 1978. Chester Hartman, one of the drafters of Proposition U, suggested that there was no reason to include foreclosure as a cause for eviction. Later drafters of other laws followed suit, and no "just cause" eviction law in California allows foreclosure as a reason for eviction.

Beware, however, of a lender who tries to get around the "just cause" provisions of your local ordinance by telling you that you can stay without paying rent. The lender then waits for a few months and then sends a 3-days' notice to pay rent or quit. If you plan to stay in your home, be sure that you keep the rent money available, so that you can pay the rent if the lender tries to pull this scam on you. Then send copies of all of the documents showing the lender's bad behavior to the City Attorney in your community, as the City Attorney may wish to take action if she or he detects a pattern of misbehavior.

So how do I know if I'm covered under "just cause" eviction protections?

Ah, this question is a set up, as it allows me to explain some of the complexities of these laws. The following communities have both rent control and "just cause" eviction: San Francisco, Oakland, Berkeley, Los Angeles, Santa Monica and West Hollywood. San Jose, Palm Springs, Hayward and Beverly Hills have rent control, but no eviction protections. San Diego, however, has "just cause" eviction, but no rent control. A few other communities have mediation programs or very limited rent control. Those won't help you in this situation, and your "protection" is limited to that provided by state law.

But it gets even more complicated. Some "just cause" laws provide protection to tenants who aren't covered by the rent control provisions of the local ordinances. Yes, it is confusing, but that's because the real estate interests sought (and received, of course) help from the State Legislature in limiting tenants' rights after communities with tenant majorities forced the passage of rent control and "just cause" eviction ordinances. This legislation, known as the Costa-Hawkins Rental Housing Act or, simply, Costa-Hawkins, imposed severe limits on local laws, exempting all single-family houses and many condominiums from rent control, and requiring that all local laws allow for vacancy decontrol. However, it did not prohibit local ordinances from protecting tenants in these units from unjust eviction, so the "just cause" eviction protections may apply even if your unit isn't covered by rent control. So, am I covered?

No, I am not going to try to explain the intricacies of all the laws here. The best way to find out if you're covered by the "just cause" provisions of your local law is

to call the Rent Control or Stabilization Board in your community, a local tenants' organization, or a lawyer specializing in tenants' rights. You'll get better information more quickly by consulting those who answer these questions all the time. And I don't think I need to tell you that you should not depend on the lender for accurate information. Lenders often don't know the local laws, or hope that tenants don't, and try to evict after foreclosure whether or not they have the right to do so. (In Oakland, for instance, the City Attorney has been forced to take action against lenders who try to evict tenants in violation of that city's ordinance.)

I want to talk to a lawyer. How do I go about finding one?

Here's where I get to explain that landlord-tenant law is a specialized area of legal practice, and that going to see your cousin's friend who specializes in divorce and family law is not a good idea. Tenants' organizations often have lists of lawyers who specialize in tenants' rights issues. Some tenants' lawyers advertise in the phone book. You're more likely to find a lawyer in communities with strong tenants' movements than in the Valley or communities without many tenants. You might try contacting a sympathetic local official (someone who doesn't spit when talking about the tenants in the neighborhood) or a city information line. Sometimes a Bar Association referral panel will be able to refer you to a good tenant lawyer.

It's unfortunate though that the areas with the largest number of foreclosures have very limited assistance for tenants. Foreclosures occur far more frequently in lower-income communities, and those communities are less likely to be protected by local rent control and "just cause" eviction laws. Local officials are often closely tied to the real estate interests, and are not disposed to support legislation that would be opposed by those interests unless there are sufficient middle income tenants to require passage of these laws.