

# Correction to *California Tenants' Rights* edition 18 Chapter 14—pages 231-236

## Your Rights if Your Landlord Suffers Foreclosure

This section deals with the rights of a tenant whose landlord has suffered a foreclosure, and the property in which you live is now owned by a bank, other lender, or other person or entity that has purchased the property at the foreclosure sale. The information in this section does *not* apply to owner-occupants who have suffered foreclosure. It applies only to *tenants* of landlords whose properties were foreclosed by their mortgage lender.

### The Effect of Foreclosure

When an owner defaults on a mortgage, the mortgage holder, usually a bank, arranges for the property to be sold at a foreclosure sale. At such sales, that mortgage holder usually winds up owning the property, though sometimes a third party investor outbids the mortgage holder and winds up with the property. Before May 20, 2009, most renters lost their leases upon foreclosure. The rule was that if the mortgage was recorded with the county Recorder's Office before the lease was signed, a foreclosure wiped out the lease. Leases signed before the mortgage was recorded survived (and continue to survive) the foreclosure.

Because most leases last no longer than a year, it was all too common for the mortgage to predate the lease and destroy it upon foreclosure. After foreclosure, the new owner could terminate the tenancy on 60 days' written notice, and the tenant would have to leave unless the new owner accepted rent so as to create at least an implied month-to-month tenancy—which itself could later be terminated by 30-day or 60-day notice.

These harsh consequences for leases signed after the mortgage was recorded changed dramatically in 2009 (leases signed before the mortgage was recorded continued to enjoy their survival). Effective May 20, 2009, and lasting until December 31, 2014, the federal "Protecting Tenants at Foreclosure Act of 2009" provides that when loan is foreclosed upon, and *when the bank buys at the sale and takes over as owner*, post-mortgage leases now survive a foreclosure—meaning the tenant can stay at least until the end of the lease. Month-to-month tenants are entitled to 90 days' notice before having to move out. This notice period is even longer than the normal 30-day or 60-day notice required to terminate a month-to-month tenancy.

So much for the rules when the bank takes over as owner. If the property is bought at the foreclosure sale by a purchaser who intends to live on the property, that individual may terminate a lease with 90 days' notice (again, remember that leases signed pre-mortgage remain in effect, regardless of the intentions of the new owner). But there are some important qualifications for tenants who want to take advantage of this new right to 90 days' notice. They must be "bona fide" tenants, which means:

- the tenant isn't the spouse, child, or parent of the owner,
- the leasing transaction was conducted in an "arms' length," and
- the rent isn't "substantially below" fair market value.

This ability of a new owner to oust a tenant on 90 days' notice applies *only* where the individual wanting to live in the property is the purchaser *at the foreclosure sale*, not where the bank becomes the

owner and then later sells to an individual. In that case, the buyer must honor the lease because the bank was required to do so, and he or she bought the property subject to that lease.

The new law also means that a new owner, whether a bank or an individual who bought as an investor, can insist the tenant comply with the lease or rental agreement the tenant entered into with the old owner. This means that on the first rent due date after the property changes hands, you must pay the same rent to the new owner. If you don't pay, the new owner can give you a 3-day notice to pay rent or quit if necessary.

If you receive notice that the property in which you live has been foreclosed (that is, a "trustee's sale" has been held), you should stop paying rent to the now-former owner and pay it to the new owner. If you don't know who that is, set aside your rent payment each month (to be extra careful, set up an escrow account and deposit it there), so that you can pay it to the new owner once you find out who that is. If you receive a 3-day notice to pay rent or quit from the new owner, you might want to confirm with your county's Recorder's Office—usually located at the county seat—that the person or entity giving you the notice is truly the new owner.

In sum, for post-mortgage leases, when the new owner is the bank (or another federally-insured lending institution) that foreclosed on the property, that bank becomes your landlord and must honor your lease. In the case of a month-to-month tenancy, it must give 90 days' notice of termination of tenancy. These protections apply to Section 8 tenants, too. Individual buyers who intend to live on the property can terminate your lease with 90 days' notice.

Tenants who live in cities with "just cause" eviction protection are also protected from terminations at the hands of an acquiring bank or new owner. These tenants can rely on their city's ordinance's list of allowable reasons for termination. Because a change of ownership, without more, does not justify a termination under

the cities' lists of allowable reasons to evict, the fact that the change occurred through foreclosure will not justify a termination. However, a new owner who wants to do an "owner move-in" eviction may do so, as long as the owner complies with the ordinance's procedures.

### Cash for Keys

To encourage tenants to leave quickly and save on the court costs associated with an eviction, banks offer tenants a cash payout in exchange for their rapid departure. Thinking that they have little choice, many tenants—even protected Section 8 and rent-control tenants—take the deal. To make matters worse, real estate agents who claim to be working for the banks try to pressure tenants to leave, implying such tenants have no rights. Do not be intimidated by real estate agents or banks or their attorneys. Know your rights and stand your ground, unless, of course, a financial offer to move quickly seems like a good deal. Keep in mind that it will cost the bank one to two thousand dollars to evict you and that the process, if you contest the case, could take well over a month.



### RESOURCE

Check out the "Action Guide for California Tenants in Foreclosure Situations" from Tenants Together, a state-wide nonprofit group that defends and advances tenants' interests. Go to [www.tenants-together.org](http://www.tenants-together.org) and choose their Tenant Foreclosure Resource Center.

## Responding to Termination Notices: Month-to-Month Tenants

Month-to-month tenants have always known that their tenancies could be terminated upon 30 or 60 days' notice, depending on the longevity of their tenancy. The 2009 federal legislation changed the rules a bit, depending on whether the tenant is "bona fide" or not (see the explanation just above):

- **Bona fide tenants.** You are entitled to 90 days' notice, no matter who purchases the property upon foreclosure.
- **Non-bona fide tenants.** You are entitled to 60 days' notice, unless you are living with someone who was a party to the mortgage that was foreclosed upon, in which case, you're entitled to only 30 days' notice.

## Responding to Termination Notices: Tenants With Leases

If the property you rent changes ownership due to a foreclosure, you may receive any one of several different kinds of termination notices (you may even receive two at once). Whether the notice is legally valid, and your proper response to the notice, will depend on a number of factors. You'll need to know, first, whether the mortgage was signed before the lease, or after. You'll also need to determine whether you meet the qualifications for a "bona fide" tenant. Consult the flow chart below. After following it out to the description that fits you, go to the numbered paragraph that describes your rights and gives you advice on how to proceed.

① Your rights: Because your lease was signed before the date the mortgage was recorded, it's preserved. (You'll probably need to take a trip to the county Recorder's Office to confirm when the deed of trust was recorded.)

Your response: Inform the new owner that your lease predates the mortgage. Present a copy of your written lease. If you are nonetheless named in an eviction lawsuit, you should defend on this basis. In Item 4.k of the Answer, type "Plaintiff is not entitled to possession of the subject property, as defendant's lease was signed on , 20 , prior to the recording of the deed of trust foreclosed upon, by which plaintiff became owner. Therefore, plaintiff became owner subject to defendant's leasehold."

② Your rights: As a bona fide tenant, you are entitled to the benefit of the new federal legislation, which requires the bank to honor your lease.

Your response: If you receive any termination notice, inform the bank or their attorney, preferably in writing, that you are a "bona fide tenant." Show them a copy of your written lease, or summarize the terms of any verbal agreement. You should also pay the bank the rent that you paid to the former owner.

If you are nonetheless named in an eviction lawsuit, then, in Item 4k of the Answer, type "Plaintiff is not entitled to possession of the subject property, as Defendant is a bona fide tenant, protected by the 'Protecting Tenants at Foreclosure Act of 2009.' Thus, Plaintiff must (choose one) honor Defendant's lease OR (if the tenancy is month-to-month) give 90 days' notice."

### Why a 3-Day and a 90-Day Notice?

Some banks send tenants both a 3-day and a 90-day notice, particularly in the case of single-family properties. Here's why: When owners *who also live on the property* default, they can properly be told to move with a 3-day notice. Many banks don't know, however, whether the residents are tenants or former owners. To cover each possibility, they send two notices, or even a single, combined 3-day/90-day notice. But you're a tenant, not an owner, so the 3-day notice is inappropriate. See the text below for advice on how to respond to a 3-day notice.

③ Your rights: Because you are not a bona fide tenant, you don't enjoy the benefit of the new federal law. Your lease was wiped out at foreclosure because it was signed after the mortgage was recorded. You are, however, entitled to 60 days' notice under state law, not 30 days and certainly not 3 days.

Your response: Contact the bank and explain that under state law, C.C.P. § 1161b(a), you are entitled to 60 days. If the bank doesn't correct its notice (or send you a new one), and serves you with an eviction Complaint, Item 4k of

your Answer should read, “Defendants, as lawful tenants in possession of the subject property when foreclosure took place, were entitled to 60 days’ notice of termination, per C.C.P. § 1161b (a), and such notice was not given. Therefore, defendants’ tenancy was not lawfully terminated.”

④ Your rights: Because you are not a bona fide tenant, you don’t enjoy the benefit of the new federal law. Your lease was wiped out at foreclosure because it was signed after the mortgage was recorded. You are, however, entitled to 60 days’ notice under state law, unless you live with someone who was an original signer of the mortgage that was foreclosed upon.

Your response: If you got a 60 day notice, you have 60 days to move. If you’ve mistakenly been given a 90 day notice, you have 90 days. If you got a 90-day notice plus a 3-day notice, contact the bank and explain that you are not the former owner, but a tenant, and that the 3-day period does not apply to you (see “Why a 3-Day and a 90-Day Notice?” above). If you don’t do that and the new owner files an eviction lawsuit without naming you as a defendant, you will have to act quickly by filing a Claim of Right to Possession once the Sheriff arrives with a 5-day notice to move, directed to the former owner. (See “The Complaint and Summons,” above).

If you are named as a defendant in an eviction lawsuit, you should defend on this basis: In Item 4k of the Answer, type “Plaintiff is not entitled to possession of the subject property, because Plaintiff has not given Defendant the required 60 days’ notice to vacate, per CCP § 1161b.”

⑤ Your rights: As a bona fide tenant, you are entitled to 90 days’ notice when an individual who intends to occupy buys at the foreclosure sale.

Your response: Contact the individual or their attorney and explain that 3, 30, or even 60 days is not sufficient, in light of the new federal law. If they won’t budge and serve you with eviction papers, you can defend against it by raising your right to 90 days’ notice in your court-filed Answer. See “Filling out the form Answer,” below.

If you are named as a defendant in an eviction lawsuit, you should defend on this basis: In Item 4k of the Answer, type “Plaintiff is not entitled to possession of the subject property, because Plaintiff has not given Defendant the required 90 days’ notice to vacate, per the “Protecting Tenants at Foreclosure Act of 2009.”

⑥ Your rights: As a bona fide tenant, you are entitled to 90 days’ notice when an individual who intends to occupy buys at the foreclosure sale.

Your response: You have 90 days to move. If you are served with a 3-day notice as well, contact the owner and explain that you are a tenant, not an owner, which means that the 3-day period does not apply to you. If you don’t do that and the new owner files an eviction lawsuit without naming you as a defendant, you will have to act quickly by filing a Claim of Right to Possession (see “The Complaint and Summons,” above).

⑦ Your rights: Because you’re not a bona fide tenant, you don’t enjoy the benefit of the new federal law—your lease was wiped out upon foreclosure. However, you are entitled to 60 days’ notice (not 30 and not 3) under state law.

Your response: If the new owner brings an unlawful detainer action, you should defend on that basis, and your first step would be to fill out Item 4.k in the Answer as follows: “Plaintiff has not properly terminated defendants’ tenancy with the 60-day notice required by C.C.P. § 1161b, having used a \_\_\_\_-day notice instead.”

⑧ Your rights: Because you are not a bona fide tenant, you don’t enjoy the benefit of the new federal law. Your lease was wiped out at foreclosure because it was signed after the mortgage was recorded. You are, however, entitled to 60 days’ notice under state law. Your response: If you received a 60- or 90-day notice, you have that amount of time in which to move. If you also received a 3-day notice, contact the individual owner and explain that you are not the former owner, but a tenant, and that the 3-day period does not apply to you.

### Termination Notices Post-Foreclosure (Tenants With Leases)

