

ASUC
Renters Legal Assistance
314 Eshleman Hall
510 642-1755
www.ocf.berkeley.edu/~asucrla
asucrla@ocf.berkeley.edu

**THE EVICTION PROCESS
(Unlawful Detainer Lawsuit)**

Overview of the eviction process

If the tenant doesn't voluntarily move out after the landlord has properly given the required notice to the tenant, the landlord can evict the tenant. In order to evict the tenant, the landlord must file an unlawful detainer lawsuit in superior court.

In an eviction lawsuit, the landlord is called the "plaintiff" and the tenant is called the "defendant."

An unlawful detainer lawsuit is a "summary" court procedure. This means that the court action moves forward very quickly, and that the time given the tenant to respond during the lawsuit is very short. For example, in most cases, the tenant has only *five days* to file a written response to the lawsuit after being served with a copy of the landlord's complaint.¹ Normally, a judge will hear and decide the case within 20 days after the tenant files an answer.²

The court-administered eviction process assures the tenant of the right to a court hearing if the tenant believes that the landlord has no right to evict the tenant. The landlord *must* use this court process to evict the tenant; the landlord *cannot* use self-help measures to force the tenant to move. For example, the landlord cannot physically remove or **lock out** the tenant, cut off utilities such as water or electricity, remove outside windows or doors, or seize (take) the tenant's belongings in order to carry out the eviction. The landlord *must use the court procedures*.

If the landlord uses unlawful methods to evict a tenant, the landlord may be subject to liability for the tenant's damages, as well as penalties of up to \$100 per day for the time that the landlord used the unlawful methods.³

In an unlawful detainer lawsuit, the court holds a hearing at which the parties can present their evidence and explain their case. If the court finds that the tenant has a good defense, the court will not evict the tenant. If the court decides in favor of the tenant, the tenant will not have to move, and the landlord may be ordered to pay court costs (for example, the tenant's filing fees). The landlord also may have to pay the tenant's attorney's fees, if the rental agreement contains an attorney's fee clause and if the tenant was represented by an attorney.⁴

If the court decides in favor of the landlord, the court will issue a **writ of possession**. The writ of possession orders the sheriff to remove the tenant from the rental unit, but gives the

tenant five days from the date that the writ is served to leave voluntarily. If the tenant does not leave by the end of the fifth day, the writ of possession authorizes the sheriff to physically remove and lock the tenant out, and seize (take) the tenant's belongings that have been left in the rental unit. *The landlord is not entitled to possession of the rental unit until after the sheriff has removed the tenant.*

The court also may award the landlord any unpaid rent if the eviction is based on the tenant's failure to pay rent. The court also may award the landlord damages, court costs, and attorney's fees (if the rental agreement or lease contains an attorney's fee clause and if the landlord was represented by an attorney). If the court finds that the tenant acted maliciously in not giving up the rental unit, the court also may award the landlord up to \$600 as a penalty.⁵ The judgment against the tenant will be reported on the tenant's [credit report](#) for seven years.⁶

How to respond to an unlawful detainer lawsuit

If you are served with an unlawful detainer complaint, you should get legal advice or assistance *immediately*. Tenant organizations, tenant-landlord programs, housing clinics, legal aid organizations, or private attorneys can provide you with advice, and assistance if you need it.

You usually have only *five days* to respond in writing to the landlord's complaint. You must respond during this time by filing the correct legal document with the Clerk of the court in which the lawsuit was filed. If the fifth day falls on a weekend or holiday, you can file your written response on the following Monday or nonholiday.⁷ Typically, a tenant responds to a landlord's complaint by filing a written "answer." (You can get a copy of a form to use for filing an answer from the Clerk of Court's office.)

You may have a legal defense to the landlord's complaint. If so, you must state the defense in a written answer and file your written answer with the Clerk of Court by the end of the fifth day. Otherwise, you will lose any defenses that you may have. Some typical defenses that a tenant might have are listed here as examples:

- The landlord's three-day notice requested more rent than was actually due.
- The rental unit violated the [implied warranty of habitability](#).
- The landlord filed the eviction action in [retaliation](#) for the tenant exercising a tenant right or because the tenant complained to the building inspector about the condition of the rental unit.

Depending on the facts of your case, there are other legal responses to the landlord's complaint that you might file instead of an answer. For example, if you believe that your landlord did not properly serve the summons and the complaint, you might file a [Motion to Quash Service of Summons](#). If you believe that the complaint has some technical defect or does not properly allege the landlord's right to evict you, you might file a [Demurrer](#). *It is important that you obtain advice from a lawyer before you attempt to use these procedures.*

If you don't file a written response to the landlord's complaint by the end of the fifth day, the court will enter a [default judgment](#) in favor of the landlord. A default judgment allows the

landlord to obtain a [writ of possession](#), and may also award the landlord unpaid rent, damages and court costs.

The Clerk of Court will ask you to pay a filing fee when you file your written response. The filing fee typically is about \$106. However, if you can't afford to pay the filing fee, you can request that the Clerk allow you to file your response without paying the fee (that is, you can request a waiver of the fee). An application form for a fee waiver, called an "[Application for Waiver of Court Fees and Costs](#)," can be obtained from the Clerk of Court.

After you have filed your written answer to the landlord's complaint, the Clerk of Court will mail to both you and the landlord a notice of the time and place of the trial. If you don't appear in court, a default judgment will be entered against you.

Eviction of "unnamed occupants"

Sometimes, people who are not parties to the rental agreement or lease move into the rental unit with the tenant or after the tenant leaves, but before the unlawful detainer lawsuit is filed. When a landlord thinks that these "occupants" might claim a legal right to possess the rental unit, the landlord may seek to include them as defendants in the eviction action, even if the landlord doesn't know who they are. In this case, the landlord will tell the process server to serve the occupants with a [Prejudgment Claim of Right to Possession](#) form at the same time that the eviction summons and complaint are served on the tenants who are named defendants.⁸

Before the court hearing

Before appearing in court, you must carefully prepare your case, just as an attorney would. Among other things, you should:

- Talk with a housing clinic, tenant organization, attorney, or legal aid organization. This will help you understand the legal issues in your case and the evidence that you will need.
- Decide how you will present the facts that support your side of the case -whether by witnesses, letters, other documents, photographs or video, or other evidence.
- Have at least four copies of all documents that you intend to use as evidence - an original for the judge, a copy for the opposing party, a copy for yourself, and copies for your witnesses.
- Ask witnesses to testify at the trial, if they will help your case. You can [subpoena](#) a witness who will not testify voluntarily. A subpoena is an order from the court for a witness to appear. The subpoena must be served on (handed to) the witness, and can be served by anyone but you who is over the age of 18. You can obtain a subpoena from the Clerk of Court. You must pay witness fees at the time the subpoena is served on the witness, if the witness requests them.

The parties to an unlawful detainer lawsuit have the right to a jury trial, and either party can request one. After you have filed your answer to the landlord's complaint, the court will send you a document called a [Memorandum to Set Case for Trial](#) (called an "At-Issue Memorandum" or a "Memo to Set" in some counties).⁹ This document will indicate whether the plaintiff (landlord)

has requested a jury trial. If not, and if you are not represented by a lawyer, tenant advisers usually recommend that you *not* request a jury trial.

There are several good reasons for this recommendation: first, presenting a case to a jury is more complex than presenting a case to a judge, and a nonlawyer representing himself or herself may find it very difficult; second, the party requesting a jury trial will be responsible for depositing the initial cost of jury fees with the court; and third, the losing party will have to pay all of the jury costs.

After the court's decision

If the court decides in favor of the tenant, the tenant will not have to move, and the landlord may be ordered to pay the tenant's court costs (for example, filing fees) and the tenant's attorney's fees. However, the tenant will have to pay any rent that the court orders.

If the landlord wins, the tenant will have to move. In addition, the court may order the tenant to pay the landlord's court costs and attorney's fees, and any proven damages, such as overdue rent or the cost of repairs if the tenant damaged the premises.

It is possible, but rare, for a losing tenant to convince the court to allow the tenant to remain in the rental unit. This is called **relief from forfeiture** of the tenancy. The tenant must convince the court of two things in order to obtain relief from forfeiture: that the eviction would cause the tenant severe hardship, and that the tenant is able to pay all of the rent that is due or that the tenant will fully comply with the lease or rental agreement.¹⁰

A tenant can obtain relief from forfeiture of a lease or a rental agreement, even if the tenancy has terminated (ended), so long as possession of the unit has not been turned over to the landlord. A tenant seeking relief from forfeiture (or the tenant's attorney) must apply for relief *immediately* after the court issues its judgment in the unlawful detainer lawsuit.¹¹

A tenant who loses an unlawful detainer lawsuit may **appeal** the judgment if the tenant believes that the judge mistakenly decided a legal issue in the case. However, the tenant will have to move before the appeal is heard, unless the tenant obtains a stay of enforcement of the judgment or relief from forfeiture (described immediately above). The court will not grant the tenant's request for a stay of enforcement unless the court finds that the tenant or the tenant's family will suffer extreme hardship, and that the landlord will not suffer irreparable harm. If the court grants the request for a stay of enforcement, it will order the tenant to make rent payments to the court in the amount ordered by the court.¹²

A landlord who loses an unlawful detainer lawsuit also may appeal the judgment.

Writ of possession

If a judgment is entered against you and becomes final (for example, if you do not appeal or if you lose on appeal), and you do not move out, the court will issue a **writ of possession** to

the landlord.¹³ The landlord can deliver this legal document to the sheriff, who will then forcibly evict you from the rental unit if you don't leave promptly.

Before evicting you, the sheriff will serve you with a copy of the writ of possession.¹⁴ The writ of possession instructs you that you must move out by the end of the fifth day after the writ is served on you, and that if you do not move out, the sheriff will remove you from the rental unit and place the landlord in possession of it.¹⁵ The cost of serving the writ of possession will be added to the other costs of the suit that the landlord will collect from you.

After you are served with the writ of possession, you have five days to move. If you have not moved by the end of the fifth day, the sheriff will return and physically remove you.¹⁶ If your belongings are still in the rental unit, the sheriff may either remove them or have them stored by the landlord, who can charge you reasonable storage fees. If you do not reclaim these belongings within 18 days, the landlord can mail you a notice to pick them up, and then can either sell them at auction or keep them (if their value is less than \$300).¹⁷ If the sheriff forcibly evicts you, the sheriff's cost will also be added to the judgment, which the landlord can collect from you.

Setting aside a default judgment

If the tenant does not file a written response to the landlord's complaint, the landlord can ask the court to enter a **default judgment** against the tenant. The tenant then will receive a notice of judgment and writ of possession, as described above.

There are many reasons why a tenant might not respond to the landlord's complaint. For example, the tenant may have received the summons and complaint, but was not able to respond because the tenant was ill or incapacitated, or for some other very good reason. It is even possible (but not likely) that the tenant was never served with the landlord's summons and complaint. In situations such as these, where the tenant has a valid reason for not responding to the landlord's complaint, the tenant can ask the court to set aside the default judgment.

Setting aside a default judgment can be a complex legal proceeding. Common reasons for seeking to set aside a default judgment are the tenant's (or the tenant's lawyer's) mistake, inadvertence, surprise, or excusable neglect.¹⁸ A tenant who wants to ask the court to set aside a default judgment must act promptly. The tenant should be able to show the court that he or she has a satisfactory excuse for the default, acted promptly in making the request, and has a good chance to win at trial.¹⁹ A tenant who thinks that grounds exist for setting aside a default judgment should first seek advice and assistance from a lawyer, a legal aid organization, or a tenant organization.

- ¹ Code of Civil Procedure Section 1167.3
- ² Code of Civil Procedure Section 1170.5(a).
- ³ Civil Code Section 789.3.
- ⁴ Civil Code Section 1717; *Trope v. Katz* (1995) 11 Cal.4th 274 [45 Cal.Rptr.2d 241]; see *California Practice Guide, Landlord-Tenant, Paragraphs 9:391.1-9:391.4, 9:391.10 and following* (Rutter Group, 2002).
- ⁵ Code of Civil Procedure Section 1174(b).
- ⁶ Civil Code Sections 1785.13(a)(2),(3).
- ⁷ Code of Civil Procedure Section 1167.
- ⁸ Code of Civil Procedure Section 415.46.
- ⁹ In some counties, the landlord must file the At-Issue Memorandum. *California Practice Guide, Landlord-Tenant, Paragraphs 9:4, 9:11, 9:19-9:20* (Rutter Group, 2001).
- ¹⁰ Code of Civil Procedure Section 1179, as amended, effective January 1, 2003.
- ¹¹ *California Practice Guide, Landlord-Tenant, Paragraph 9:444* (Rutter Group 1999). The tenant's written petition must be served on the landlord at least five days before the date of the hearing on the request for relief. If the tenant does not have an attorney, the tenant may orally apply to the court for relief, if the landlord either is present in court or has been given proper notice. The court also may order relief from forfeiture on its own motion. The court may order relief from forfeiture only on condition that the tenant pay all of the rent due (or fully comply with the lease or rental agreement). (Code of Civil Procedure Section 1179, as amended, effective January 1, 2003.)
- ¹² Code of Civil Procedure Section 1176.
- ¹³ Code of Civil Procedure Section 715.010.
- ¹⁴ Code of Civil Procedure Section 715.020.
- ¹⁵ Code of Civil Procedure Section 715.010(b)(2).
- ¹⁶ Code of Civil Procedure Section 715.020(c).
- ¹⁷ Code of Civil Procedure Sections 715.030, 1174(h); Civil Code Sections 1965, 1988. See the Department of Consumer Affairs' Legal Guides LT-4, "How to Get Back Possessions You Have Left in a Rental Unit," and LT-5, "Options for a Landlord: When a Tenant's Personal Property has Been Left in the Rental Unit." These Legal Guides are available on the Department of Consumer Affairs' Web site, www.dca.ca.gov.
- ¹⁸ Code of Civil Procedure Section 473(b). See *Moskovitz, California Eviction Defense Manual, Section 12.12* (Cal. Cont. Ed. Bar 2003).
- ¹⁹ *Moskovitz, California Eviction Defense Manual, Sections 12.15, 12.16* (Cal. Cont. Ed. Bar 2003).

From:

CALIFORNIA DEPARTMENT OF CONSUMER AFFAIRS

400 R Street
Sacramento, CA 95814
(800) 952-5210
(916) 445-1254
TDD: (916) 322-1700
email: dca@dca.ca.gov
<http://www.dca.ca.gov/>