

# Evictions: Tricky Issues

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## **Improper Notice to Vacate (NTV)**

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### **Possible NTV Issues**

Notice itself is flawed

Delivered incorrectly

Eviction filed too early (did not give tenant the time/days to leave set out in the notice)

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## Landlord Cannot Win Without NTV

- Court may not grant a judgment for possession to the landlord.
- In order to win the case, the landlord has to prove that the notice to vacate was proper at the time it was given.
  - If they fail to prove this, they are not entitled to a judgment in their favor.
  - **This is true even for a default judgment.**

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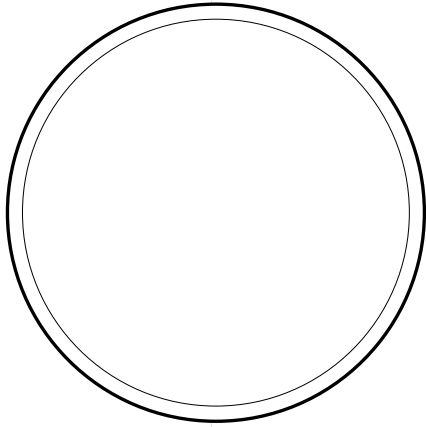
## NTV Proper Delivery

- In general, the notice to vacate must be given **in person** or **by mail** to the premises (the property where the tenant is living). The required time period depends on the situation.

*For more information on the exact requirements for service of notices to vacate (methods and time periods), see:*

- *Ch. 4 of the Evictions Deskbook*
  - <https://www.tjctc.org/tjctc-resources/Deskbooks.html>
- *Notice to Vacate Chart*
  - *on TJCTC's Charts and Checklists page under the "Evictions" tab:*  
<https://www.tjctc.org/tjctc-resources/Charts-and-Checklists.html>

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### Group Discussion #1:

Which of the following should the court do if the Notice to Vacate was not proper?

1. Reject the filing.
2. Dismiss the case.
3. Tell the landlord what they need to do to fix it.
4. After hearing the case at trial, render judgment in favor of the defendant

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### When The Notice To Vacate Is Not Proper

- The court **may not** refuse to accept a filing due to issues related to the notice to vacate.
  - The court also **may not** advise the landlord on the notice to vacate.
  - And the court **may not** dismiss the case before trial due to an improper notice to vacate or a failure to serve the notice properly.
- Once the case gets to trial, if the landlord filed the case too soon, did not give a proper notice to vacate, or did not serve the notice to vacate properly, a judgment should be granted in favor of the defendant.

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## Notice To Vacate Time Must Run Out Before Filing

- Remember that the landlord may not file the eviction suit until the time allowed to the tenant in the notice to vacate has actually run out!
  - For example, the landlord may not hand a three-day notice to vacate to a tenant and file the eviction suit the same day “in case” the tenant fails to leave.
  - The landlord has to wait until the three days is up before they file suit.
- If the landlord “jumps the gun,” they are not entitled to a judgment for possession.

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## Tenant Foreclosure

A tenant is renting a house, and the house gets foreclosed on because the owner did not pay their mortgage?

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## Protecting Tenants At Foreclosure Act

- For example: Suppose Mark owns a house and rents it to Rebecca to live in; he fails to make his mortgage payments; and the bank forecloses on the house and sells it at a foreclosure sale to Thea.
- The Protecting Tenants at Foreclosure Act (PTFA) applies to any residential real property where the tenant is a “bona fide” tenant.
  - “Bona fide” = “arms-length” transaction before title transferred, not child/spouse/parent, fair market rent.

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## Protecting Tenants At Foreclosure Act - Timeframes

In our scenario, Rebecca is a bona fide tenant. So:

- If Rebecca has a lease with a fixed term (and does not breach the lease), she gets to stay in the house through the end of the lease term **unless** Thea is going to use the house as her primary residence.
- If Thea is going to use the house as her primary residence, Rebecca is entitled to a 90-day notice to vacate (as long as Rebecca does not breach the lease).

*For more info on the PTFA, see Ch. 3 of the Evictions Deskbook.*

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## **Owner Foreclosure**

The owner of a house gets foreclosed on because they did not pay their mortgage?

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### **Foreclosure On An Owner – PTFA Does Not Apply**

- Sometimes the owner of a house fails to pay their mortgage and the bank forecloses on the mortgage and sells the house to a new owner at a foreclosure sale.
- When this happens, the Protecting Tenants at Foreclosure Act does not apply because it only protects tenants of the owner, not the owner themselves.

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## Foreclosure On An Owner – Notice To Vacate

- Once the new owner buys the house at the foreclosure sale, the old owner becomes a tenant at sufferance: they previously had a legal right to be there but no longer do.
- This means only a three-day notice to vacate is required.

*See Ch. 3 of the Evictions Deskbook for more info.*

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The Constable Is  
Not Able To Serve  
A Citation By  
Personally  
Delivering It To The  
Tenant Or Leaving  
It With Someone  
Over 16 At The  
Residence?

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## Alternative Service Of The Eviction Citation

- The constable may request alternative service by delivering the citation to the **premises *and also*** sending it **by mail**.
- The request must meet certain requirements and the citation must be delivered and mailed in a specific way.

*For details, see Ch. 4 of the Evictions Deskbook.*

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## Improper Eviction Service

- If the citation was not properly served, you cannot grant a default judgment if the tenant fails to appear.
  - You could postpone the trial to allow for proper service.
- If the tenant does show up, you can go ahead with the trial because once the tenant answers or appears you don't need to worry about how the citation was served.
  - The service rules are there to make sure the tenant knows about the lawsuit.

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**The Tenant  
Appears For Trial  
And You See  
That Service Of  
The Citation  
Was Less Than  
Six Days Ago?**

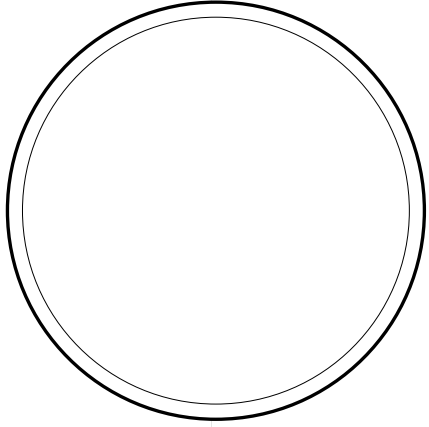
- The tenant has a right to have the citation served at least six days before the trial.
- If you see that this did not happen, you should inform the tenant that they have this right and ask them if they wish to proceed or would like a postponement of the case (a “continuance”).
- If they want a postponement, reset the trial to a date at least six days after they were served with the citation.

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**The Tenant Does  
Not Appear For  
Trial And You  
See That  
Service Of The  
Citation Was  
Less Than Six  
Days Ago?**

- You cannot grant a default judgment in favor of the landlord.
- You should reset the trial date to a day that is at least six days after the citation was served on the tenant and notify the parties of the new trial date.

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## **Group Discussion #2:**

What if eviction citations are frequently not getting served within 6 days of the trial date?  
What could you do?

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### **Servicemembers Civil Relief Act**

The tenant does not show up for trial and the landlord has not filed an affidavit under the Servicemembers Civil Relief Act?

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## Servicemembers Civil Relief Act – Affidavit

- If the tenant does not file an answer/appear at trial, before entering a default judgment, the court must require the landlord to file an affidavit stating:
  - Whether the tenant is in military service & showing necessary supporting facts; or
  - That the plaintiff is unable to determine whether the defendant is in military service.
- Usually, the landlord will attach a printout from a Department of Defense website to show whether the person is in military service.
- If no affidavit is filed, the court **may not** enter a default judgment.

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## Servicemembers Civil Relief Act – Court Action

If an affidavit is filed, there are three possibilities:

- **The tenant is *not* in military service:** the court may enter a default judgment.
- **The court is *unable to determine whether the tenant is in military service:*** the court may require the landlord to post a bond in an amount approved by the court to protect the tenant if it turns out that he is in military service.
- **The defendant *is* in military service:** the court may not enter a judgment until after the court appoints an attorney to represent the defendant. A stay (putting case on hold) for at least 90 days may also be authorized or even required.

*For more info on the SCRA, see Ch. 4 & 7 of the Evictions Deskbook.*

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**Default  
Judgment –  
Petition Silent  
on NTV or  
Reason for  
Eviction**

- The court **may not** grant a default judgment if the petition does not contain a description of when and how the notice to vacate was given and a description of the facts and the grounds for the eviction. Rule 510.3(a).
- Could the court allow the plaintiff to amend the petition to include this information?
- Yes, but the court could require the amended petition to be served on the tenant so that the tenant has notice of the allegations the plaintiff is relying on for the eviction.

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**“And All  
Occupants”**

The landlord files an eviction suit against the tenant “and all occupants”

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## What are Occupants?

- An “occupant” is someone who is living at the residence but who is **not** obligated under a lease with the landlord.
  - For example, a temporary guest of the tenant or the tenant’s minor children.
- Since “occupants” are not on the lease, the landlord may not know who they are, so landlord does not have to name them.
  - He can evict the “occupants” of the tenant along with the tenant.
  - The occupants’ right to be there is based solely on the tenant’s right to be there.

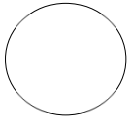
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## Occupants Vs. Tenants

- But what if one of the “occupants” is really a tenant who signed the lease?
  - For example, the wife is a tenant on the lease and the landlord just sues the husband “and all occupants.”
- The landlord cannot evict the wife who is a tenant just by suing her husband and “all occupants.”
  - If the eviction is based on a written residential lease, the plaintiff must list **all tenants obligated under the lease** whom the plaintiff seeks to evict.
  - And a judgment or writ of possession may **not** be issued or executed against a tenant obligated under a lease who is **not** named in the petition & served with a citation.

*Rule 510.3(c).*

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### Group Discussion #3:

John rented a house from Amber for himself and his 10-year-old daughter Thea. A year later, Mark moved in with them and was added to the lease. John has now also subleased the garage apartment to Rebecca. Who is a tenant of Amber and who is an occupant?

Tenant	Occupant

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### Plaintiff Trial Notice

You need to tell the plaintiff what the trial date is?

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## Trial Notice to the Plaintiff

- The Rules do not state how notice of a trial date is to be given to the plaintiff, but some suggestions are:
  - Give the plaintiff a copy of the citation with the trial date;
  - Have the plaintiff contact the court to find out the trial date;
  - Mail, email or fax notice of the trial date to the plaintiff; or
  - Give the plaintiff written notice of a tentative date upon filing the case.
    - Ex: write the court date and time on the receipt.

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### Plaintiff Nonappearance

The plaintiff does not appear for trial?

- If the plaintiff does not appear for trial, the court may:
  - Continue the case to another date; or
  - Dismiss the case for want of prosecution.
    - The court may first give the plaintiff an opportunity to show why the case should not be dismissed.

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**Someone  
Appears At Trial  
For The Plaintiff  
Or The  
Defendant?**

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### **Who May Represent A Party?**

In an eviction case:

- An individual may represent themselves or be represented by an authorized agent (who does not have to be an attorney);
- A corporation or other entity may be represented by an employee, owner, officer or partner of the entity or by a property manager or other authorized agent; and
- Any party may be represented by an attorney.

*Rule 500.4*

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## **Authorized Agents**

- What if someone appears in court and says they are the authorized agent for the landlord or tenant?
- They should either have a written statement from the party authorizing them to appear on their behalf, or the court could take the agent's sworn testimony about if they are authorized prior to proceeding with the case.

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## **Counterclaims**

The tenant files a counterclaim?

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## What are Counterclaims?

- A counterclaim is when a defendant (the party being sued) files their own claim against the plaintiff (the party who filed the suit).
- For example, suppose the tenant claims the landlord came into their apartment when they weren't there and took some jewelry.
- The tenant says they won't pay rent until the landlord returns the jewelry.

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## No Counterclaims in Evictions

- But a tenant may **not** file a counterclaim in an eviction suit!
- The court should dismiss the counterclaim on its own; it does not need to wait for a motion to dismiss from the plaintiff. The eviction case remains in place.
- The tenant could file a separate small claims suit in justice court over the jewelry as long as it is within the jurisdictional limit.

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## I Own the Place!

The tenant claims they have a right to be there because they own the property?

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## Ownership Issues

- A claim for title is when the tenant has a **good faith** claim that they are the owner of the property.
  - For example, if the owner “sold” the property to the tenant and to a new owner and they both have deeds.
- But a tenant just saying they own the property because someone “promised” to give it to them or they have an oral agreement is not enough.
  - An oral agreement to convey real property is not valid.
  - It has to be in writing.

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## No Jurisdiction Over Title to Real Property

- A justice court may not decide a claim for title.
  - It is not within the court's jurisdiction (meaning authority to hear and decide).
  - A justice court only decides the right to possession, not who holds title to the property.

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## Court Options

- If title to the property is at issue, the court has two choices:
  - “**Stay**” or “**abate**” the case while the parties get the title issue resolved in another court.
    - This means the court puts the case on hold and waits until another court decides who owns the property.
  - Dismiss the case “**without prejudice**,” which means the plaintiff would be able to file the suit again after another court decides who owns the property.

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## Contract for Deed

The case involves a property for which the defendant has a contract for deed (also called rent to own, lease purchase, etc.)?

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## What is a Contract For Deed?

- A contract for deed is a **written** contract in which the buyer makes monthly payments toward the purchase of real property. The buyer receives the deed when the purchase price is paid in full and the seller holds legal title until then.
- *For information on special considerations and procedures for cases involving contracts for deed, see Chapter 8 of the Evictions Deskbook.*

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## **What Happens When...?**

The tenant pays the rent after the eviction suit is filed and before trial?

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## **Tenant Pays The Rent After Suit Is Filed**

- If the tenant pays the rent after the suit is filed, it is possible the landlord will move to dismiss or “nonsuit” their case. It is their call.
- If they do not dismiss, the court would still need to decide whether the tenant breached the lease by not paying their rent on time.
- Even if all the rent has now been paid, failure to pay on time or pay late fees could still be a breach and thus entitle the landlord to evict and recover the costs of filing the suit (the filing and service fees).

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## Breach Depends On The Lease

- Whether there is a breach may depend on the language in the lease:
  - For example, does the tenant get so many days to cure a failure to pay the rent on time? If so, there may not be a breach.
  - Is there a late fee and if the tenant failed to pay it does that count as a breach of the lease?

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## Pay or Vacate Notice

- Allowed in TX Property Code as an NTV
- Must service written notice or reminder that rent is due and unpaid **before** giving the Pay or Vacate Notice
- If tenant pays, they cannot evict
  - This is different than normal NTV procedure
- If tenant fails to pay in allotted time, LL can evict

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## Other LL/T Fees

The landlord includes a claim for late fees, utility fees or other damages?

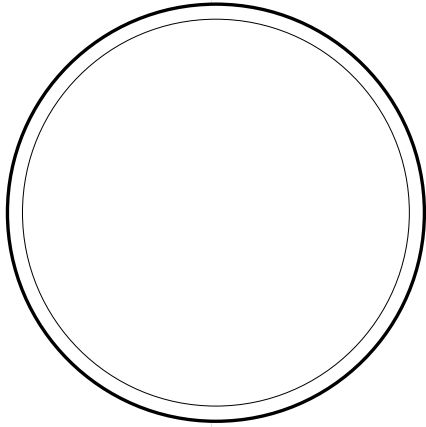


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## Landlord Sues For Late Fees, Utility Fees Or Other Damages

- A landlord may not sue for late fees, utility fees or other damages (for example, damage to the property) in an eviction case.
- They may only sue for possession, back rent, attorney's fees (if applicable), and court costs.

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### **Group Discussion #4:**

So what should the court do if the landlord **does** include something that is not allowed?

And would the landlord have any other remedy for those claims? What should the court say to them?

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### **What Happens When Another Month's Rent Becomes Due?**

- Pay the whole month or prorate?
- This depends on the terms of the lease and when rent is due.
- Most leases provide that the rent is due on the first of the month for the entire month so at that time the rent is due in full for the whole month and that is what the tenant owes.

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## **Duty to Mitigate**

- However, the landlord has a duty to mitigate (meaning to keep his damages as low as possible) and if he can get a new tenant before the end of the month then he should not recover the full month's rent from the tenant as that would be a double recovery.
- For this reason, some judges do prorate the award in an effort to be fair to the tenant.

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## **Bankruptcy**

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## **Bankruptcy: Before Appeal Deadline**

- If the tenant files a bankruptcy petition **before judgment** or after judgment but **before the appeal window closes**:
  - The eviction suit is automatically stayed (put on hold) and no further proceedings may be held until an order from the bankruptcy court lifts the stay or allows the case to proceed.

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## **Bankruptcy: After Appeal Deadline**

- If a tenant files bankruptcy **after the appeal window is closed**, then the case is not stayed, and the landlord is entitled to a writ of possession as in any other case.

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## Bankruptcy Limits

- If a party has filed a bankruptcy case that was dismissed within a year of the new filing, the automatic stay expires after 30 days unless the bankruptcy court extends it.
- If a party has filed two or more bankruptcy cases that have been dismissed within a year of the new filing, there is no automatic stay (though the bankruptcy court can impose one on request if they feel it is warranted).

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You Seem Nice!

What if the landlord or the tenant is not a particularly likeable person?

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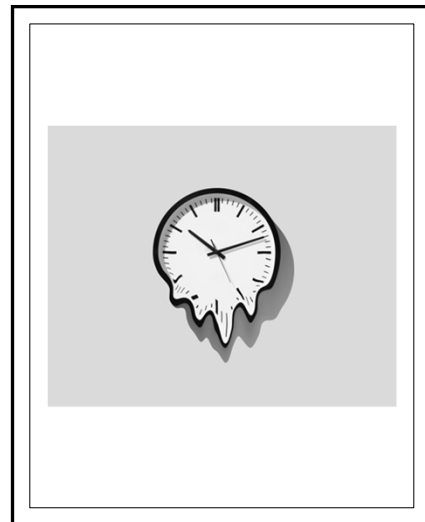
## What May The Court Consider?

- The court needs to look at whether the plaintiff is entitled to possession and not let emotions enter into the court's decision.
- For example, if the tenant claims they don't have to pay the rent because the landlord took their jewelry, even if you are convinced the landlord did take the tenant's jewelry, that does not excuse the tenant's obligation to pay rent.
- Even if the landlord is not a sympathetic person and the tenant is (or vice versa), or an eviction suit is filed during the holidays, the court has to base its decision on whether the landlord has a right on the facts and under the law to recover possession of their real property.

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## Immediate Possession Bond

A bond the landlord files to **possibly** get a writ of possession earlier than the standard timeframe.



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## Immediate Possession Bond Procedure

- If tenant answers or appears—treat case as if it was not filed
- Eviction default with no answer—LL can get possession on or after 7<sup>th</sup> day after notice was served
  - If it was filed with the petition, that means LL can get writ of possession immediately after judgment

*For more details on the requirements and procedures for immediate possession bonds, see Chapter 4 of the Evictions Deskbook and Flowchart.*

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## Tenant Asks For More Time?

- The court may not extend the tenant’s “move out” date.
  - This is between the tenant and the landlord.
- If and when the defendant has to move out depends on whether the defendant perfects an appeal and whether and when the plaintiff requests a writ of possession.
- For this reason, the court should also not include a “move out” date on a judgment.

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## Appeal in Nonpayment Cases

The tenant appeals an eviction suit for nonpayment of rent by filing an appeal bond or a Statement of Inability to Afford Payment of Court Costs?

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## Written Order to Tenant

- If a tenant appeals an eviction suit for nonpayment of rent by filing a Statement of Inability to Afford Payment of Court Costs or by filing an appeal bond, then the court must tell the **tenant in writing**:
  - that they have to pay one month's rent into the justice court registry;
  - how they have to pay it (cash, cashier's check or money order);
  - the date it has to be paid, which must be within 5 days of the date they filed the Statement of Inability or the appeal bond; and
  - that if they fail to pay by the required date, the court may issue a writ of possession without a hearing.

*Rule 510.9(c)(5)(A); Property Code § 24.0053(a-1)*

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## Inability Statement Notice to Other Parties

- If a party files a Statement of Inability to Afford Payment of Court Costs, the court must also send a notice to all the other parties no later than **the next business day** telling them that a Statement was filed.
  - This form is available at [tjctc.org](http://tjctc.org).

*Rule 510.9(d)*

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## If Tenant Fails To Pay Into Registry

- If the tenant was given the notice but fails to pay the rent into the justice court registry by the date given in the notice, the landlord is entitled (upon request and payment of the applicable fee) **to a writ of possession, which the justice court must issue immediately and without a hearing.**

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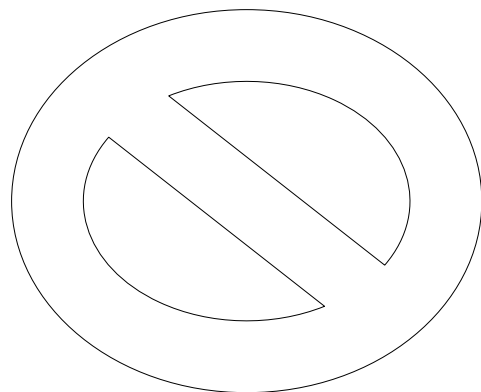
## Appeal Still Proceeds

- The court must issue the writ of possession **even though the tenant has perfected an appeal.**
- So **the appeal is still sent to the county court**, but the landlord is entitled to a writ of possession due to the tenant not paying their rent to the court.
- This means the tenant may still pursue their appeal, but they do not get to remain in the premises while their appeal is pending.

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## Contesting

The losing party appeals, and the winning party files a contest of the appeal bond/Inability Statement?



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## Contest Of Appeal Bond

- In a residential eviction suit for nonpayment of rent, when the losing party appeals by filing an **appeal bond**, the winning party may contest:
  - the amount or form of the appeal bond; or
  - the financial ability of the surety (the person who guarantees the bond) to pay the appeal bond.

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## Contest Of Statement of Inability

- When the losing party appeals by filing a **Statement of Inability to Afford Payment of Court Costs**, the winning party may contest whether the party that filed the Statement is really unable to pay the court costs
  - For example, maybe they can afford an appeal bond.

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## Contest Hearing

- The court must have a hearing and decide whether the appeal bond or Statement of Inability to Afford Payment of Court Costs were properly filed.

*The procedure for these contests is explained in Ch. 4 of the Evictions Deskbook, as well as the Evictions Appeal Flowchart and Evictions Appeal Self-Paced Module.*

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## Mail Maelstrom

The court issues a writ of possession and then receives an appeal in the mail postmarked on the final appeal date?

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## **The Mailbox Rule—General Civil**

- Under the general rules for civil cases, a document that is required to be filed by a certain date is considered to be timely filed if it is put in the U.S. mail on or before that date and received by the court within 10 days of the due date.

*Rule 500.5(b).*

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## **The Mailbox Rule—Eviction Cases**

- But in an eviction case, if a document is filed by mail and not received by the court by the due date, then the court may take any action authorized by the rules, including issuing a writ of possession requiring the tenant to leave the property.

*Rule 510.2.*

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## **Eviction Mail Example**

- For example, if a tenant drops their appeal in the mail on the last day to appeal, and the court receives it within ten days, it is a timely appeal, but if the landlord comes in and asks for a writ of possession before the court receives the appeal, then the court must issue the writ of possession.
- Even though the writ of possession has issued and removed the tenant from the property, the appeal was timely filed, and so it should be sent up to the county court.

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**Thank You!**

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