

**NATIONAL LAW CENTER  
ON HOMELESSNESS & POVERTY**

**Eviction (Without) Notice:  
Renters and the Foreclosure Crisis**

**A Report by the  
National Law Center on Homelessness & Poverty**

**December 2012**

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## **ABOUT THE NATIONAL LAW CENTER ON HOMELESSNESS & POVERTY**

The National Law Center on Homelessness & Poverty is committed to solutions that address the causes of homelessness, not just the symptoms, and works to place and address homelessness in the larger context of poverty.

To this end, we employ three main strategies: impact litigation, policy advocacy, and public education. We are a persistent voice on behalf of homeless Americans, speaking effectively to federal, state, and local policy makers. We also produce investigative reports and provide legal and policy support to local organizations.

You are invited to join the network of attorneys, advocates, students, activists, and committed individuals who support the Law Center. Our network provides a forum for individuals, non-profits, and corporations to participate and learn more about using the law to advocate for solutions to homelessness. For more information about our organization and access to publications such as this report, please visit our website at [www.nlchp.org](http://www.nlchp.org).

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**The Law Center is solely responsible for the views expressed in this report.**

## EXECUTIVE SUMMARY

This report focuses on a critically important, but often overlooked, aspect of the foreclosure crisis: its impact on tenants. A 2009 federal law, the Protecting Tenants at Foreclosure Act (“PTFA”), created important new rights for tenants living in foreclosed properties. Many tenants and their advocates are unaware of these rights, however, and banks and their agents are often in violation of the law. This report reviews the impact of foreclosure on tenants, summarizes the provisions of the new law, describes ongoing violations of the PTFA, and provides a review of changes in state law since the PTFA’s enactment. The first section of the report summarizes the results of a national survey conducted by the Law Center of 227 advocates and 156 tenants in foreclosed properties to determine the extent of PTFA noncompliance. The Law Center will continue to collect this information as part of its growing national violations database. The second section of this report describes the actions, or lack thereof, taken by the 50 states and the District of Columbia to protect tenants in foreclosed properties at the state level.

### **The Financial and Foreclosure Crises: Homelessness is Growing and Tenants are at Risk**

The United States is in the grips of a protracted foreclosure crisis that is the worst financial disaster since the Great Depression. The collapse of the housing market lies at the core of the recession, contributing to a shrinking economy, a rising unemployment rate, and a devastating loss of wealth for many families. It has also led to dramatically increased rates of homelessness. Research indicates that approximately 19% of new homelessness in 2009 was a result of the foreclosure crisis.<sup>1</sup> More recent data from 2011 shows that family homelessness has increased by an average of 16 percent in major U.S. cities since the crisis began.<sup>2</sup>

By the end of 2010, over five million homes, which represent 10% of all homes with a mortgage, had been lost to foreclosure.<sup>3</sup> It is estimated that an additional eight to ten million mortgages will enter foreclosure before the crisis ends, speculated to be another five years away.<sup>4</sup> The historic \$25 billion dollar national mortgage settlement of 2012 between 49 state attorneys general, the federal government, and the nation’s five largest loan servicers (Bank of America, Ally/GMAC, Citi, WellsFargo, and JPMorgan Chase Bank) will provide some limited relief to homeowners in the coming years.<sup>5</sup> It also mandates that each servicer develop written policies and procedures to ensure that laws protecting renters in foreclosed properties are followed, and appoints a monitor to track compliance with the settlement terms.<sup>6</sup> These positive efforts, however, will not be sufficient to fully address the prolonged financial disaster.

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<sup>1</sup> National Coalition for the Homeless et al., *Foreclosure to Homelessness 2009: The Forgotten Victims of the Subprime Crisis*, (2009), available at <http://www.nationalhomeless.org/advocacy/ForeclosuretoHomelessness0609.pdf>

<sup>2</sup> The United States Conference of Mayors, *Hunger and Homelessness Survey: A Status Report on Hunger and Homelessness in America’s Cities – A 29 City Survey* (December 2011), available at <http://usmayors.org/pressreleases/uploads/2011-hhreport>.

<sup>3</sup> Tony Guo, *Tenants at Foreclosure: Mitigating Harm to Innocent Victims of the Foreclosure Crisis*, DePaul J. For Soc. Just (June 2011) available at [http://works.bepress.com/cgi/viewcontent.cgi?article=1002&context=tony\\_guo](http://works.bepress.com/cgi/viewcontent.cgi?article=1002&context=tony_guo)

<sup>4</sup> Amherst Securities Group LP, *Testimony of Laurie S. Goodman Before Subcomm. on Housing, Transportation and Community Development, S. Comm. on Banking, Housing & Urban Affairs* (Sept. 20, 2011) available at

[http://banking.senate.gov/public/index.cfm?FuseAction=Files.View&FileStore\\_id=dc3d9918-5aca-47b2-9ce4-b9daaef67957](http://banking.senate.gov/public/index.cfm?FuseAction=Files.View&FileStore_id=dc3d9918-5aca-47b2-9ce4-b9daaef67957)

<sup>5</sup> Copies of all five Consent Judgments, obligating Bank of America, Ally/GMAC, Citi, Wells Fargo, and JPMorgan Chase can be found at <http://www.nationalmortgagesettlement.com>

<sup>6</sup> Id.

While significant attention has been paid to the losses suffered by homeowners, the impact of foreclosure on renters has been largely ignored. Research shows, however, that rental properties constitute an estimated 20% of all foreclosures.<sup>7</sup> Approximately 40% of families facing eviction due to foreclosure are renters.<sup>8</sup> And, the raw numbers of renters affected by foreclosure has tripled in the past three years.<sup>9</sup>

These figures translate into millions of people who are at risk of homelessness once their rental property is foreclosed upon, many of them children.<sup>10</sup> Recent research on the impact of the foreclosure crisis on children revealed that approximately three million children, or 37% of all children affected by foreclosure, live in rental housing.<sup>11</sup> The percentage is even greater in some localities. In southern New England, for example, 45% of foreclosed units containing children are rentals.<sup>12</sup>

The problem may only continue to worsen as renters represent a rising segment of the U.S. population. Since 2000, the total number of renters in America increased by 5.1 million people.<sup>13</sup> And, in 2010, renters made up the majority of households in several of our nation's most populous cities.<sup>14</sup>

Prior to 2009, the legal rights of renters living in foreclosed properties were governed solely by state and local laws. Under the laws of many states, even today, the lease agreement between a tenant and a defaulting landlord does not survive foreclosure and tenants who have done everything right, paid their rent on time, and complied with all of the terms of their leases can still be legally evicted with little notice. In Arizona, for example, new owners are entitled to immediate possession of foreclosed homes.

The tragedy of this situation is made worse by the injustice of it. Renters are innocent bystanders caught in the crossfire of the foreclosure crisis, becoming vulnerable to homelessness through no fault of their own.

### **The Protecting Tenants at Foreclosure Act of 2009 (PTFA)**

The Protecting Tenants at Foreclosure Act of 2009 ("PTFA") was enacted in response to the growing impact of the foreclosure crisis on tenants and the lack of protections available to them at the state and local levels. The PTFA provides that a successor in interest, often a financial institution such as a bank, assumes title to a foreclosed property subject to the interests of any

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<sup>7</sup> National Low Income Housing Coalition, *Renters In Foreclosure: A Fresh Look at an Ongoing Problem* (September 2012), available at [http://nlihc.org/sites/default/files/Renters\\_in\\_Foreclosure\\_2012.pdf](http://nlihc.org/sites/default/files/Renters_in_Foreclosure_2012.pdf)

<sup>8</sup> *Id.* at 1.

<sup>9</sup> *Id.* at 3.

<sup>10</sup> Isaacs, J., Brookings Institution and First Focus, *The Ongoing Impact of Foreclosures on Children* (April 2012) available at [http://www.firstfocus.net/sites/default/files/Foreclosures%202012\\_0.pdf](http://www.firstfocus.net/sites/default/files/Foreclosures%202012_0.pdf)

<sup>11</sup> *Id.* at 9.

<sup>12</sup> *Id.* at 9.

<sup>13</sup> The Joint Center for Housing Studies of Harvard University, *The State of the Nation's Housing 2012* (2012), available at <http://www.jchs.harvard.edu/sites/jchs.harvard.edu/files/son2012.pdf>

<sup>14</sup> Sixty-nine percent of households in New York City, 61.8 percent in Los Angeles, 55.1 percent in Chicago, and 54.6 percent in Houston rented their homes in 2010. U.S. Census Bureau, *Housing Characteristics 2010* (October 2011), available at <http://www.census.gov/prod/cen2010/briefs/c2010br-07.pdf>



bona fide tenants residing there. The fundamental purpose of the federal law is to protect renters living in foreclosed properties from abrupt evictions and to give them adequate time to find alternative housing.<sup>15</sup> To achieve this aim, the PTFA provides bona fide tenants with the right to remain in their homes for the duration of their lease agreement or, if a tenant has a short term lease or no lease, for a minimum of 90 days with notice.<sup>16</sup>

The PTFA explicitly extends these protections to tenants who are participants in the Section 8 program. In addition to the lease, the PTFA requires that the new owner assume the housing assistance payments contract between the prior owner and the public housing authority or other local administrator of the Section 8 program.<sup>17</sup>

The PTFA is an important step toward complying with the International Covenant on Economic, Social and Cultural Rights (“ICESCR”) to which the United States is a signatory. Article 11(1) of the ICESCR states that all parties to the Covenant recognize that housing is a human right and that they will take appropriate steps to ensure the realization of that right.<sup>18</sup> The Committee on Economic, Social, and Cultural Rights’ General Comment 4 to Article 11 of the ICESCR lists seven aspects of the human right to housing, including security of tenure.<sup>19</sup> Security of tenure guarantees legal protection against forced eviction and other threats to housing security, which is the primary aim of the PTFA.<sup>20</sup>

### **Key Finding: Violations of the PTFA Continue**

For over a year, the Law Center has collected information on violations of the PTFA and other problems suffered by tenants in the foreclosure crisis. Using an online survey tool, tenants in foreclosed properties and tenants’ rights advocates were asked a series of questions related to PTFA non-compliance in areas ranging from notices to vacate to unlawful evictions.<sup>21</sup>

Two surveys were employed to accumulate the PTFA violations data: one was designed for tenants residing in foreclosed properties and the other was designed for tenants’ rights advocates. Each survey was tailored to its intended audience and captured data on topics ranging from notices to vacate to methods of eviction. The Law Center received a combined total of 383 responses, representing 156 tenants and 227 advocates across the country. These responses are reflective of even greater numbers of people, however, as tenant respondents often represented

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<sup>15</sup> Statement of Senator Dodd, 155 Cong. Rec. S8978 (daily ed. Aug. 6, 2009) available at <http://www.gpo.gov/fdsys/pkg/CREC-2009-08-06/pdf/CREC-2009-08-06-pt1-PgS8978-2.pdf>

<sup>16</sup> Pub. L. No. 111-22, tit. VII, §§ 701-704 (2009).

<sup>17</sup> Id.

<sup>18</sup> International Covenant on Economic, Social and Cultural Rights, opened for signature Dec. 16, 1966, Art. 11(1), 993 U.N.T.S. 3, 5 (entered into force Jan. 3, 1976)

<sup>19</sup> General Comment 4, The right to adequate housing (Sixth session, 1991), U.N. Doc. E/1992/23, annex III at 114 (1991), reprinted in Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, U.N. Doc. HRI/GEN/1/Rev.6 (2003).

<sup>20</sup> General Comment 4, The right to adequate housing (Sixth session, 1991), U.N. Doc. E/1992/23, annex III at 114 (1991), reprinted in Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, U.N. Doc. HRI/GEN/1/Rev.6 at 18 (2003).

<sup>21</sup> Both surveys are available on our website. Tenants in foreclosed properties may fill out the survey at <http://nlchp.org/PTFARenters.cfm>. Tenant advocates may fill out the survey at <http://nlchp.org/PTFAAdvocates.cfm>.

larger households and advocate respondents described the collective experience of their numerous clients.

Since the enactment of the PTFA, national and local tenants' advocates, federal agencies, and others have worked to inform the public about the law and its protections. The survey results reveal, however, that too many tenants are still unaware that they are protected by federal law when their homes are foreclosed upon. In addition, there are attorneys, real estate agents, housing court judges, and new owners of foreclosed properties who either remain ignorant of their obligations under the law or who willfully violate them.

### **Common Violations of the PTFA**

Reports from tenants and advocates to our nationwide survey reveal that violations of the PTFA are widespread across the country. Many of these violations involve problems with communication between new owners, their agents, and tenants. However, violations take a variety of forms and affect tenants in myriad ways.

Common violations of the PTFA reported by advocate survey respondents include:

- Lack of communication from the new owner (85.9%);
- Illegal, misleading, or inaccurate written notices (68.1%);
- Harassment from real estate agents, law firms, or bank representatives (61.1%);
- Failure to maintain the property (64.3%).

Common violations of the PTFA reported by tenant survey respondents include:

- New owners' bad faith assertions that respondents' tenancies are not bona fide;
- Failure of new owners to determine the occupancy status of residents in foreclosed properties;
- Failure of new owners to provide information on where to pay rent and/or to request property maintenance.

An utter lack of communication between the new owner and the tenant is the most commonly reported problem. These communication struggles are largely the fault of landlords whose identities and whereabouts may be unknown to tenants as a result of the foreclosure. No communication means no information, leaving tenants to make critical housing decisions in the dark.

The substance of communication that is had can also be the subject of reported violations. A notice that provides inaccurate or confusing information, for example, fails to apprise tenants of their rights and may cause them to hurriedly vacate their homes before they have had adequate time to find alternative stable housing. Tenants who decide to stay in their homes and explore their legal options may be forced to defend their rights in court. But, even when the PTFA may be raised as a defense to an eviction action, to do so successfully may require the assistance of legal representation which can be prohibitively expensive or otherwise impossible to obtain.

False, misleading, or harassing contact from new owners or their agents, such as real estate agents or attorneys, are also common problems. Tenants who are told at their doorsteps that their lease agreements are no longer valid and that they must vacate the property immediately, or, alternatively, sign new leases at increased rental amounts, may rely on that information to their detriment. These tenants may vacate their homes before they can find suitable replacement housing or they may enter into lease agreements they can't afford to avoid immediate homelessness.

Poor maintenance of foreclosed properties is another prevalent and severe problem. Housing that is undergoing the foreclosure process may be neglected or wholly abandoned by the defaulting owner who will cease making any necessary repairs to the property or fail to pay for necessary utility services such as water, sewer, and electricity. Following a foreclosure, the successor in interest – often a large financial institution lacking any designated individual or department responsible for maintaining the foreclosed property – will similarly fail to provide needed upkeep and utility services. The result is that growing numbers of tenants reside in substandard housing that is unfit for human life. A tenant living in such a property may face the unfair choice of remaining in there or becoming homeless.

A tenant whose rights have been violated under the PTFA has little recourse against the law's violator. Discerning where to report a violation is confusing, as there is no federal agency responsible for monitoring and enforcing compliance with the law. Seeking damages in a court of law is even more difficult, as there is no express private right of action currently included within the language of the PTFA. The lack of a clear enforcement mechanism means that violators often act with impunity, harming innocent renters.

### **Engaging the Government and Private Businesses to Further Compliance Goals**

While enforcement of the PTFA can be challenging, advocates have employed multiple strategies at the federal and state levels to further the goal of compliance. In addition, advocates have initiated collaboration with federal agencies, financial institutions, and their agents to promote greater awareness of the requirements of the PTFA and also to create PTFA compliant materials for renters, such as form notices to vacate.

### **Protections for Tenants in Foreclosure at the State Level**

A number of state legislatures have taken steps to add or improve protections for tenants in foreclosure. *Eviction (Without) Notice* reports the results of a 50-state survey of developments in states' laws regarding the rights of tenants in foreclosure since the passage of the PTFA. The survey revealed that, although 23 states have enacted new state laws enhancing the rights of tenants residing in foreclosed properties, the majority of states have failed to provide any needed protections.

### **Positive Changes in State Law Since the Enactment of the PTFA**

Some examples of new state law protections for tenants in foreclosed properties include:

- The right to receive notice of a foreclosure action against the landlord (16 states);

- The right of prospective tenants to receive notice that the rental home is in foreclosure (6 states);
- Some manner of “just cause” requirement for eviction of tenants in foreclosed properties (5 states);
- Measures providing for security deposit or prepaid rent compensation (3 states);
- Measures aimed at preventing the termination of utility services in foreclosed rental properties (3 states);
- Record sealing for tenants who were evicted due to foreclosure (2 states);
- Adoption of substantially similar protections set forth by the PTFA (7 states).

A growing number of states have enacted laws providing protections to renters not contemplated by the PTFA, such as the right of tenants to receive notice of impending foreclosure actions, completed foreclosure sales, or utility service arrearages. These additional notice requirements assist tenants in maintaining their housing stability by providing them with additional time to plan and save.

In addition, at least seven states have enacted protections substantially the same as those afforded under the PTFA. The state of Connecticut provides an excellent example and serves as a model for other states. Since the adoption of Public Law 11-201, the protections offered by Connecticut are essentially the same as those contained in the PTFA, except that Connecticut’s protections extend beyond the current PTFA sunset date to December 31, 2017. With respect to advance notice required before a tenant can be forced to vacate the property, both Connecticut and the PTFA require 90 days’ notice and also provide that, with limited exceptions, a tenant may remain until the expiration of the lease term even after foreclosure.

### **The PTFA Remains More Protective Than the Laws in the Majority of States**

Although a number of states are making efforts to improve the rights of tenants living in foreclosed properties, state law remains less protective than the federal PTFA in the vast majority of states. The areas where this is most pronounced is in survival of a lease beyond a foreclosure and the amount of advance notice that a tenant must receive before they can be forced to vacate a foreclosed property.

The PTFA remains, therefore, the surest and best protection for tenants in foreclosed properties across the country. Extending its protections beyond the current sunset date of 2014 is critical to the housing stability of millions of Americans, and also an important step toward protecting security of tenure as required by the human right to housing.

### **Recommendations to the Federal Government**

- **Congress should pass legislation to make the PTFA permanent federal law.** The PTFA is currently set to expire on December 31, 2014, however, the foreclosure crisis will continue well beyond that date, threatening the housing stability of millions of American renters. Legislation introduced by Representative Keith Ellison (D-MN) , H.R. 3619, would make the PTFA permanent and add a private right of action. Senator Richard Blumenthal (D-CT) will introduce similar legislation on December 17, 2012.

Both bills will have to be reintroduced in the next Congressional session, however, if they do not become law this year.

- **Congress should amend the PTFA to include an express private right of action.** This amendment would allow tenants whose rights have been violated under the PTFA to seek relief in court. A private right of action would also serve as a powerful deterrent to potential violators of the federal law.
- **Congress should vest clear authority and responsibility in one federal agency to regulate and enforce compliance with the PTFA.** To make a single federal agency, such as the Consumer Federal Protection Bureau (“CFPB”), responsible for guidance and enforcement of the PTFA would reduce governmental inefficiency while simultaneously increasing the likelihood of compliance with the law.
- **Federal bank regulatory entities should increase their monitoring of PTFA compliance by banks and their agents.** Special attention should be paid to the actions of agents, such as real estate professionals and law firms, who often have the most interaction with tenants. It should be made clear that banks will be held responsible for their agents’ violations of the law. The regulatory entities should also take all authorized enforcement action against banks that are violating renters’ rights under the PTFA.

#### **Recommendations to State Governments**

- **State legislatures should enact increased protections for renters living in foreclosed properties.** At a minimum, these protections should mirror those of the PTFA ensuring that the majority of leases survive foreclosure and providing at least 90 days advance notice to tenants. State legislatures should go beyond these safeguards, however, and pass legislation that address areas not governed by the PTFA, such as advance notification of impending foreclosures and mandated notice setting forth the full array of options upon foreclosure.

#### **Recommendations Financial Institutions, Other Successors in Interest, and the Monitor**

- **Banks and other successors in interest should ensure that they are complying with the requirements of the PTFA.** Banks should make certain that the notices they provide to tenants are unambiguous and clearly lay out the rights and options of tenants. Banks should also establish procedures for training hired real estate agents, attorneys, and other agents on the requirements of the PTFA and actively monitor agents’ interactions with tenants to ensure compliance with the law. Banks should additionally designate specific departments or individual employees who can address their tenants’ concerns, such as those regarding property maintenance and the return of security deposits, and also to receive and investigate PTFA related complaints.
- **The five largest mortgage servicers in the nation, Bank of America, Ally/GMAC, Citi, Wells Fargo, and JPMorgan Chase, should comply with the terms of the national mortgage settlement.** The historic settlement requires these five banks to

develop and implement written policies and procedures to ensure compliance with renters' rights, including those established under the PTFA. These requirements should be embraced and serve as a model for banks not bound by the agreement.

- **The Monitor of the national mortgage settlement should ensure that the banks governed by the consent judgments comply with their obligations to renters in foreclosed properties.** The findings of compliance, or non-compliance, with the PTFA should be specifically reported to the Monitoring Committee.

## METHODOLOGY, LIMITATIONS, AND DISCLAIMERS

For over a year, the Law Center has collected information on violations of the PTFA and other problems suffered by tenants in the foreclosure crisis. Using an online survey tool, tenants in foreclosed properties and tenants' rights advocates were asked a series of questions related to PTFA non-compliance in areas ranging from notices to vacate to unlawful evictions.<sup>22</sup>

Two surveys were employed to accumulate the PTFA violations data: one was designed for tenants residing in foreclosed properties and the other was designed for tenants' rights advocates. Each survey was tailored to its intended audience and captured data on topics ranging from notices to vacate to methods of eviction. The Law Center received a combined total of 383 responses, representing 156 tenants and 227 advocates across the country. These responses are reflective of even greater numbers of people, however, as tenant respondents often represented larger households and advocate respondents described the collective experience of their numerous clients.

The multiple-choice tenant survey asked for information about household composition, the kind of lease the tenant has or had, how the tenant first learned that their home had been foreclosed upon, the kind of notice the tenant received, and the effect of the foreclosure on their housing at the time of survey completion. Tenants were also able to provide additional information not specifically asked in the survey.

The multiple-choice advocate survey asked for information on how often the advocate works with tenants in foreclosed properties, the types of problems experienced by those tenants, and provided a place for advocates to describe in greater detail the issues commonly faced in their advocacy.

State law information contained in the report was obtained by searching Westlaw statutory, legislative, case law, and news databases, in some cases supplemented with Google news and other web searches. Researchers also sought to confirm the research results through telephone calls with at least one knowledgeable practitioner in the field in each state. Nevertheless, the report may not capture every new development in every state that may be relevant to tenants' rights in foreclosure. States' laws with respect to tenants' rights in foreclosure are, of course, subject to change. The research in this report was generally current as of December 12, 2012.

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<sup>22</sup> Both surveys are available on our website. Tenants in foreclosed properties may fill out the survey at <http://nlchp.org/PTFARenters.cfm>. Tenant advocates may fill out the survey at <http://nlchp.org/PTFAAdvocates.cfm>.

We encourage anyone using this report to consult with a local attorney for a more detailed analysis of a particular state's laws on this topic and/or their application to any particular set of facts.

**The information in this report is not offered as legal advice, and should not be used as a substitute for seeking professional legal advice. The use of any information contained in this report does not create an attorney-client relationship.**

## SECTION ONE

### INTRODUCTION

For more than half of a decade, America has been in the grips of an unprecedented housing crisis. A tsunami of foreclosures has washed over the nation, resulting in a dramatic loss of housing stability and transforming neighborhoods into combinations of vacant blocks, dilapidated housing, and investor-owned communities.

Millions of home owners have already lost their piece of the American dream to foreclosure, and millions more are expected to lose their properties in the years to come.<sup>23</sup> The staggering level of foreclosures, combined with prolonged unemployment, has led to increased homelessness.<sup>24</sup>

The impact of the foreclosure crisis has been most pronounced in communities of color.<sup>25</sup> All communities, however, have suffered. Even those home owners who remain current on their mortgage loans have found that declining home prices and vacant neighboring properties have significantly depressed the value of their investment and changed the faces of their once thriving neighborhoods.

Much attention has been paid in recent years to the plight of single family home owners. Home mortgage borrowers have been a favorite subject in the national discourse and both lawmakers and the courts have made the reduction of home ownership loss a priority. Home owners will also receive some limited relief as a result of the historic \$25 billion dollar settlement announced in February of 2012 between 49 state attorneys general, the federal government, and the nation's five largest loan servicers.<sup>26</sup> Renters living in foreclosed properties, however, have been largely ignored.

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<sup>23</sup> By fall of 2011, nearly four million homes were either in foreclosure or had mortgages that were in serious default. Experts predict that an additional eight to ten million mortgages are likely to default and enter foreclosure before the crisis ends. National Consumer Law Center, *Rebuilding America: How States Can Save Millions of Homes Through Foreclosure Mediation* (February 2012), available at [http://www.nclc.org/images/pdf/foreclosure\\_mortgage/mediation/report-foreclosure-mediation.pdf](http://www.nclc.org/images/pdf/foreclosure_mortgage/mediation/report-foreclosure-mediation.pdf)

<sup>24</sup> National Coalition for the Homeless et al., *Foreclosure to Homelessness 2009: The Forgotten Victims of the Subprime Crisis*, (2009), available at <http://www.nationalhomeless.org/advocacy/ForeclosuretoHomelessness0609.pdf>

<sup>25</sup> The housing crisis has widened the wealth gap, with the median wealth of white households now 20 times that of African-American households and 18 times that of Hispanic households. Additionally, African-Americans and Latinos are twice as likely as white homeowners to lose their homes to foreclosure. National Consumer Law Center, *Why Responsible Lending is a Fair Housing Issue* (February 2012), available at [http://www.nclc.org/images/pdf/credit\\_discrimination/fair-housing-brief.pdf](http://www.nclc.org/images/pdf/credit_discrimination/fair-housing-brief.pdf)

<sup>26</sup> Copies of all five Consent Judgments, obligating Bank of America, Ally/GMAC, Citi, Wells Fargo, and JPMorgan Chase can be found at <http://www.nationalmortgagesettlement.com>

There is a lack of national data on the total number of renters affected by foreclosures, however, available research indicates that rental properties constitute an estimated 20% of all foreclosures.<sup>27</sup> A report released in September of 2012 by the National Low Income Housing Coalition (“NLIHC”) showed that the number of families facing eviction due to foreclosure has consistently remained at 40% in the past three years, and that the real numbers of families affected has tripled.<sup>28</sup>

These figures translate into millions of people who are at risk of homelessness once their rental property is foreclosed upon, many of them children.<sup>29</sup> First Focus and the Brookings Institution published the first quantitative analysis of the number of children who have lost their homes, or who are at serious risk of losing their homes, due to foreclosure. They estimate that approximately three million children, or 37% of all children affected by foreclosure, live in rental housing.<sup>30</sup> In some localities, the percentage is even greater. In southern New England, for example, 45% of foreclosed units containing children are rental units.<sup>31</sup>

The housing instability that results from foreclosure on a rental property can be devastating. Moving is expensive, sometimes prohibitively so for tenants with little savings, large families, or low incomes. Beyond the monetary costs of relocation, tenants forced into an abrupt move may have to disrupt their employment, schooling, health care and systems of social support – sometimes with only a few days’ notice. Very low-income people who are fortunate enough to receive federal housing subsidies face the additional risk of losing their Section 8 vouchers or other rental assistance when faced with an unexpected housing disruption.

A displaced renter and her family may fall victim to homelessness. School districts and state departments of education identified foreclosure as the third most common reason given for the increase in homeless children in 2010.<sup>32</sup>

If a renter is forced to vacate before she can find a place to store belongings, then that person may also lose all of her possessions. These harms are compounded by the loss of security deposits and any pre-paid rents that often disappear along with defaulting landlords. These losses are particularly devastating in an increasingly unaffordable housing market.<sup>33</sup>

In the 2000’s, low-income renters earning \$15,000 a year or less grew by over 2 million people, accounting for a full quarter of overall household growth.<sup>34</sup> This rise in renters was accompanied

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<sup>27</sup> National Low Income Housing Coalition, *Renters In Foreclosure: A Fresh Look at an Ongoing Problem* (September 2012), available at [http://nlihc.org/sites/default/files/Renters\\_in\\_Foreclosure\\_2012.pdf](http://nlihc.org/sites/default/files/Renters_in_Foreclosure_2012.pdf)

<sup>28</sup> Id. at 3.

<sup>29</sup> Isaacs, J., Brookings Institution and First Focus, *The Ongoing Impact of Foreclosures on Children* (April 2012) available at [http://www.firstfocus.net/sites/default/files/Foreclosures%202012\\_0.pdf](http://www.firstfocus.net/sites/default/files/Foreclosures%202012_0.pdf)

<sup>30</sup> Id. At 9.

<sup>31</sup> Id. at 9.

<sup>32</sup> Isaacs, J., Brookings Institution and First Focus, *The Ongoing Impact of Foreclosures on Children* (April 2012) available at [http://www.firstfocus.net/sites/default/files/Foreclosures%202012\\_0.pdf](http://www.firstfocus.net/sites/default/files/Foreclosures%202012_0.pdf)

<sup>33</sup> Between 2007 and 2010, over 20 million US households paid more than half of their incomes toward housing – with renters accounting for most of the increase. In 38 of the 64 markets tracked by MPF Research, rents on multi-family properties outpaced inflation. The Joint Center for Housing Studies of Harvard University, *The State of the Nation’s Housing 2012* (2012), available at <http://www.jchs.harvard.edu/sites/jchs.harvard.edu/files/son2012.pdf>

<sup>34</sup> Id. at 25.



by a decline of 470,000 rental housing units that were affordable as well as habitable.<sup>35</sup> The Joint Center for Housing Studies of Harvard University reported that, “[i]n 2001, 8.1 million low-income renters competed for 5.7 million affordable units, leaving a gap of 2.4 million units. By 2010, the shortfall had more than doubled to 5.1 million units.”<sup>36</sup> Research from NLIHC puts the deficit of affordable and available units even higher at 6.8 million.<sup>37</sup> This disparity is likely to grow in coming years given the increasingly crowded rental market.

While no community has escaped the negative effects of the foreclosure crisis, racial and ethnic minority groups have arguably been the greatest casualties. The decline in housing values and the loss of homes has resulted in a dramatic loss of wealth among American families, with minority communities experiencing the largest relative losses. The median wealth of white households is now twenty times that of African American households, increasing from twelve times higher in 1984.<sup>38</sup> The wealth gap similarly widened between white and Hispanic households. In 1984, the median wealth of white households was eight times higher than that of Hispanic households.<sup>39</sup> Today, it is eighteen times higher.<sup>40</sup>

Minorities are also disproportionately represented in the rental market, accounting for 46 percent of renters in 2011.<sup>41</sup>

### **THE PROTECTING TENANTS AT FORECLOSURE ACT**

In 2009, the National Law Center on Homelessness & Poverty and the National Low Income Housing Coalition issued a report entitled *Without Just Cause: A 50 State Review of the (Lack of) Rights of Tenants in Foreclosure* detailing the shocking lack of protections afforded to renters in foreclosed properties.<sup>42</sup> The report revealed that responsible renters who had always paid their rent on time, abided by their lease terms, and perhaps had no clue that their homes were in jeopardy could be forced into the street upon very short notice under the controlling laws of the states.

Recognizing the urgent problem facing the nation’s renters, Congress responded to the findings of the report and the advocacy of The Law Center and NLIHC by passing the Protecting Tenants at Foreclosure Act.<sup>43</sup> The PTFA, part of the Helping Families Save their Homes Act of 2009, was signed into law by President Obama on May 20, 2009.

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<sup>35</sup> Id. at 25.

<sup>36</sup> Id. at 25.

<sup>37</sup> National Low Income Housing Coalition, *Renters In Foreclosure: A Fresh Look at an Ongoing Problem* (September 2012), available at [http://nlihc.org/sites/default/files/Renters\\_in\\_Foreclosure\\_2012.pdf](http://nlihc.org/sites/default/files/Renters_in_Foreclosure_2012.pdf)

<sup>38</sup> National Consumer Law Center, *Why Responsible Lending is a Fair Housing Issue* (February 2012), available at [http://www.nclc.org/images/pdf/credit\\_discrimination/fair-housing-brief.pdf](http://www.nclc.org/images/pdf/credit_discrimination/fair-housing-brief.pdf)

<sup>39</sup> Id. at 3.

<sup>40</sup> Id. at 3.

<sup>41</sup> Minority groups contributed heavily to the rise of renter households between 2004 and 2011. Blacks accounted for 24% of the growth, Hispanics contributed 17%, and Asians and other groups contributed 18%. The Joint Center for Housing Studies of Harvard University, *The State of the Nation’s Housing 2012* (2012), available at <http://www.jchs.harvard.edu/sites/jchs.harvard.edu/files/son2012.pdf>

<sup>42</sup> The *Without Just Cause* report is available at: [http://www.nlchp.org/content/pubs/Without\\_Just\\_Cause1.pdf](http://www.nlchp.org/content/pubs/Without_Just_Cause1.pdf).

<sup>43</sup> Pub. L. No. 111-22, tit. VII, §§ 701-704 (2009).

The fundamental purpose of the PTFA is to protect renters in foreclosed properties from abrupt evictions and to give them adequate time to find alternative housing. In passing the PTFA, Senator Christopher Dodd, one of the law's drafters, stated, "[F]or too long, tenants have been the innocent victims of the foreclosure crisis. Countless tenants across the country have been forced to leave their homes simply because their landlords were unable to pay their mortgages."<sup>44</sup>

The PTFA is an important step toward complying with the International Covenant on Economic, Social and Cultural Rights ("ICESCR") to which the United States is a signatory. Article 11(1) of the ICESCR states that all parties to the Covenant recognize that housing is a human right and that they will take appropriate steps to ensure the realization of that right.<sup>45</sup> The Committee on Economic, Social, and Cultural Rights' General Comment 4 to Article 11 of the ICESCR lists seven aspects of the human right to housing, including security of tenure.<sup>46</sup> Security of tenure guarantees legal protection against forced eviction and other threats to housing security, which is the primary aim of the PTFA.<sup>47</sup>

The protections of the PTFA apply to bona fide tenancies involving "any foreclosure on a federally related mortgage loan or on any dwelling or residential real property" after May 20, 2009.

A lease or tenancy is considered to be "bona fide" as long as:

- 1) the tenant is not the mortgagor or the child, spouse or parent of the mortgagor;
- 2) the lease or tenancy is the result of an arms-length transaction; and
- 3) the lease or tenancy requires receipt of rent that is not substantially less than the fair market rent for the property.

Under the PTFA, the immediate successor in interest, meaning the new owner of the property following a foreclosure, whether an individual, a bank, or other entity, takes title to a property subject to the rights of any bona fide tenant. Specifically, the law provides that:

- the immediate successor in interest in the foreclosed property cannot require a bona fide tenant to leave the rental property before 90 days from the date on which the new owner provides the tenant with a notice to vacate the premises;
- the new owner must allow any bona fide tenant who entered into a lease prior to the notice of foreclosure to remain in the property for the term of his/her lease;
- the new owner must honor the rights of any bona fide tenant living in the property without a lease or with a lease terminable at will under state law.

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<sup>44</sup> Statement of Senator Dodd, 155 Cong. Rec. S8978 (daily ed. Aug. 6, 2009) available at <http://www.gpo.gov/fdsys/pkg/CREC-2009-08-06/pdf/CREC-2009-08-06-pt1-PgS8978-2.pdf>

<sup>45</sup> International Covenant on Economic, Social and Cultural Rights, opened for signature Dec. 16, 1966, Art. 11(1), 993 U.N.T.S. 3, 5 (entered into force Jan. 3, 1976)

<sup>46</sup> General Comment 4, The right to adequate housing (Sixth session, 1991), U.N. Doc. E/1992/23, annex III at 114 (1991), reprinted in *Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies*, U.N. Doc. HRI/GEN/1/Rev.6 (2003).

<sup>47</sup> General Comment 4, The right to adequate housing (Sixth session, 1991), U.N. Doc. E/1992/23, annex III at 114 (1991), reprinted in *Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies*, U.N. Doc. HRI/GEN/1/Rev.6 at 18 (2003).

In other words, pursuant to the PTFA, a tenant is entitled to receive a written notice giving them at least 90 days from the effective date of the notice to vacate the property.<sup>48</sup> Bona fide tenants with existing leases must be permitted to remain in their home for the full duration of their lease agreements under the existing lease terms. We believe, and a number of courts have agreed, that the language of the PTFA also requires successors in interest to assume the duties of the defaulting landlords, such as the duty to maintain the property in habitable condition.

The PTFA explicitly extends protections to tenants who are participants in the Section 8 program.<sup>49</sup> New owners of properties housing Section 8 tenants assume ownership subject to both the existing lease agreement as well as the Housing Assistance Payments (“HAP”) contract between the former owner and the public housing agency (or other entity that administers the local Section 8 program.)<sup>50</sup> The law further provides that a new owner may not evict Section 8 tenants except upon good cause.<sup>51</sup> As with renters who do not receive housing assistance, Section 8 participants are entitled to 90 days’ advance notice before they can be required to vacate their homes.

The sole exception to the protections offered to bona fide tenants under the PTFA is when the immediate successor in interest intends to use the property as his or her own primary residence. Even in that instance, however, a 90 day notice to vacate is required.

Congress clarified the PTFA in the Dodd-Frank Wall Street Reform and Consumer Protection Act, signed into law on July 21, 2010.<sup>52</sup> Section 1484 of the Act makes clear that “notice of foreclosure”, which is the point at which the protections of the PTFA are triggered, means, “the date on which complete title to a property is transferred to a successor entity or person as a result of an order of a court or pursuant to provisions in a mortgage, deed of trust, or security deed.”<sup>53</sup> This language serves to protect any bona fide tenant who enters into a rental agreement prior to the transfer of complete title to a new owner.

The PTFA preempts state law except to the extent that a state has provided greater protections of renters in foreclosed properties. Therefore, the PTFA serves as the floor of renter protections across the country. States may, and should, go above the PTFA’s minimum protections to provide greater renter safeguards. This is particularly important given the PTFA’s current sunset date of December 31, 2014. If the federal law is not extended, or made permanent as advocated in this report, state and local protections will be the only shield available to renters caught in the continuing web of the foreclosure crisis.

The PTFA is silent on several important issues affecting tenants in foreclosed properties, leaving many issues to be determined by state law or to be determined by the courts. For example, the

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<sup>48</sup> Bank of N.Y. Mellon v. De Meo, 254 P.3d 1138 (Ariz. App. 2011)

<sup>49</sup> Pub. L. No. 111-22, Section 703

<sup>50</sup> Id.

<sup>51</sup> Id.

<sup>52</sup> Pub. L. 111-203, Section 1484

<sup>53</sup> Id.

PTFA does not include an express private right of action, leaving ambiguous whether a tenant may sue following a violation of his or her rights under the federal law.

## **FEDERAL REGULATORY AGENCIES AND THE PTFA**

The PTFA is self-executing and no single federal agency is responsible for its implementation or enforcement. Although bank lenders and other financial institutions are federally regulated, their oversight is conducted by a series of different agencies, each with its own jurisdiction. National banks and federally chartered thrifts, savings and loans, and saving banks are regulated by the Office of the Comptroller of the Currency (OCC). State-chartered banks that are members of the Federal Reserve System are regulated by the Federal Reserve Board (FRB), while state-chartered banks that are not members of the Federal Reserve System are regulated by the Federal Deposit Insurance Corporation (FDIC).<sup>54</sup> In addition to regulation by the appropriate federal agency, state-chartered institutions are also supervised by regulators in their chartering state.

Federal banking agencies are responsible for periodically examining the institutions they supervise for compliance with multiple laws, including the PTFA. The method of examination is either a consumer compliance exam or a full scope exam which may be conducted at various times of the year.

At the time of the PTFA's enactment, the bank regulatory agencies issued guidance letters, examination procedures and general information regarding the law. Only a few federal regulatory bodies have issued updates since the enactment of the PTFA, however, and fewer still have taken steps to integrate the law into their compliance manuals and regulatory materials.

To evaluate institutions' compliance with the PTFA, the agencies can assess whether the institutions have sufficient policies, procedures and controls in place to ensure compliance with the law. The agencies can also look for evidence that, where applicable, institutions have actually complied with the PTFA.

Federal banking agencies also have consumer assistance divisions that will accept complaints regarding the institutions they supervise. However, these consumer officers do not have legal authority to adjudicate legal allegations or make findings of fact. Instead, they act as informal mediators between consumers and institutions, attempting to bring about mutually agreeable resolutions of disputes.

If an agency has reason to believe an institution has violated the PTFA, it may take supervisory action against the institution. It may not, however, inform the consumer of the outcome of such actions unless the outcome directly involves the consumer or unless the action is a matter of public record. Institutions that violate the PTFA may be subject to civil enforcement actions by the regulatory agencies, including cease-and-desist orders, or they may be fined.

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<sup>54</sup> To find out which entity regulates a specific institution, the FDIC's Institution Directory, <http://www2.fdic.gov/IDASP/>, offers a searchable database.

## **The Office of the Comptroller Currency (“OCC”)**

On January 9, 2010, the OCC issued a bulletin setting forth new procedures for its examiners to use in measuring bank compliance with PTFA. Examiners must grade banks on whether they have provided tenants with 90 day notices, whether they have honored tenants’ bona fide lease agreements, and whether they have complied with the requirements protecting Section 8 program participants.

The OCC issued an updated and revised worksheet used to audit, evaluate bank policies and expand procedures and training in 2011.<sup>55</sup> It also issued a notice of revised examination procedures.<sup>56</sup>

Additionally, the OCC issued “Guidance on Potential Issues with Foreclosed Residential Properties” on December 14, 2011. That guidance discusses the PTFA’s provisions and asserts that the bank is responsible for reading the lease in order to determine whether the property can be shown to future purchasers. The guidance further states that banks are responsible for returning tenants’ security deposits. Finally, it is noted that states may enact additional requirements that are not preempted by the federal law.<sup>57</sup>

The OCC has merged with the Office of Thrift Supervision (OTS) since the PTFA’s enactment but the merger has not affected the agencies role in PTFA enforcement.

## **The Federal Reserve Board (“FRB”)**

The Federal Reserve Board issued its initial documents in 2009 following the passage of the PTFA.<sup>58</sup> On April 5, 2012, an updated document issued entitled “Policy Statement on Rental of Residential or Other Real Estate Owned Properties.”<sup>59</sup> The FRB’s policy statement directly references the PTFA and advises that banking institutions must comply with its requirements. Banks are also counseled to provide necessary oversight in the case of third part property management.

## **The Federal Deposit Insurance Corporation (“FDIC”)**

The FDIC has not issued any new guidance or documents since 2009.<sup>60</sup>

## **The National Credit Union Association (“NCUA”)**

The NCUA has not issued any new guidance or documents since 2009.<sup>61</sup>

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<sup>55</sup> Available at <http://www.occ.gov/publications/publications-by-type/comptrollers-handbook/ptfa.pdf>

<sup>56</sup> Available at <http://www.occ.gov/news-issuances/bulletins/2011/bulletin-2011-15.html>

**ARTICLE I.** <sup>57</sup> Available at <http://www.occ.gov/news-issuances/bulletins/2011/bulletin-2011-49.html>

<sup>58</sup> Available at <http://www.federalreserve.gov/boarddocs/caletters/2009/0905/caltr0905.htm> & [http://www.federalreserve.gov/boarddocs/caletters/2009/0905/09-05\\_attachment.pdf](http://www.federalreserve.gov/boarddocs/caletters/2009/0905/09-05_attachment.pdf)

<sup>59</sup> Available at <http://www.federalreserve.gov/newsevents/press/bcreg/bcreg20120405a1.pdf>

<sup>60</sup> Available at <http://www.fdic.gov/news/news/financial/2009/fil09056.html>

<sup>61</sup> Available at <http://www.ncua.gov/Legal/Documents/Regulatory%20Alerts/RA2009-08.pdf>

## **The Department of Housing and Urban Development (“HUD”)**

HUD does not regulate financial institutions, however, as the federal agency responsible for the Section 8 voucher program and the Federal Housing Administration (“FHA”), its actions regarding the PTFA merit discussion. HUD first issued a notice regarding the PTFA in June of 2009, entitled, “Notice of Responsibilities Placed on Immediate Successors in Interest Pursuant to Foreclosure of Residential Property”, to alert those associated with HUD programs to the obligations on new owners of foreclosed homes.<sup>62</sup>

HUD issued an additional notice implementing Section 703 of the PTFA, the section of the law which sets forth tenants’ protections relevant to Section 8 voucher holders, on December 15, 2009.<sup>63</sup> The notice advises Public Housing Authorities (“PHA”s) that a new owner of a foreclosed property housing Section 8 tenants takes title subject to the lease agreement as well as the HAP contract. The notice also advises PHAs that these tenants cannot be evicted except upon good cause.

The HUD notice places responsibility on PHAs to implement the protections set forth under the PTFA and to be proactive in that effort during the foreclosure process.<sup>64</sup> Once a PHA learns that a property is in foreclosure, the PHA must take affirmative steps to ensure that the rights guaranteed under the law are enforced. Reasonable efforts must be made to determine who owns the property, and PHAs are obligated to continue paying the original owner under the existing HAP contract until ownership is legally transferred. The PHA must also attempt to obtain a written acknowledgment of HAP assignment from the property’s new owner.

Additional HUD guidance was issued regarding the application of the PTFA to FHA occupied conveyances. The FHA, a part of HUD, provides mortgage insurance on single family and multifamily homes, protecting lenders against losses if homeowners default on their loans. In most circumstances, the FHA requires that insured properties be vacant at the time they are conveyed to FHA following foreclosure. In guidance issued originally on October 2010, and then updated in March of 2012, HUD clarified that mortgagees must comply with the PTFA.<sup>65</sup> An “Extension of Notice” was also issued by HUD on December 16, 2011, extending their original notice until December 31, 2014, when the PTFA is currently set to expire.<sup>66</sup>

### **VIOLATIONS OF THE PTFA: SURVEY RESULTS**

Although the PTFA has been in place for over three years, reports from advocates and tenants across the country make clear that violations remain widespread nationwide. The Law Center has been monitoring violations of the PTFA, most notably through an online survey of legal advocates and tenants in foreclosed properties across the nation.<sup>67</sup>

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<sup>62</sup> Available at <http://www.gpo.gov/fdsys/pkg/FR-2009-06-24/pdf/E9-14909.pdf>

<sup>63</sup> HUD Notice PIH 2009 - 52 (HA)

<sup>64</sup> Id.

<sup>65</sup> The notice is available at: [http://www.ofr.gov/OFRUpload/OFRData/2012-06297\\_PI.pdf](http://www.ofr.gov/OFRUpload/OFRData/2012-06297_PI.pdf)

<sup>66</sup> Notice PIH-68 (HA)

<sup>67</sup> NLCHP collected survey responses from 227 tenants’ advocates and 156 tenants in foreclosed properties.

The nature of specific violations vary, however, there are common problems pervasive in every corner of the country. Primary among them is a lack of communication between new owners of foreclosed properties, their agents, and their tenants, with 79.5% of advocate respondents citing this as a common problem. Other reported violations by tenant advocates include illegal, misleading, or inaccurate written notices (68.1%), harassment from the agents of new owners (61.1%), and the new owner's failure to maintain the rental property (64.3%).

The following section discusses in detail these and other commonly cited violations of the PTFA as reported by tenants and tenant advocates in our nationwide survey.

## **PROBLEMS WITH COMMUNICATION**

The majority of reported violations stem from a lack of constructive communication between new owners, their agents, and tenants living in foreclosed homes. No communication means no information, leaving tenants to make critical housing decisions in the dark.

Communication struggles are largely the fault of landlords whose identities and whereabouts may be unknown to tenants as a result of the foreclosure. Tenants wishing to contact their new landlords may find it difficult to determine, as an initial matter, who owns the rental property. Some of this is a function of how mortgages were generated and sold during the housing boom. Many mortgages were bundled with other loans and sold as securities now held by trusts. Even when a renter determines that their home is owned by a financial institution, it is challenging to find a person or department who will respond to communication about landlord and tenant issues, such as maintenance and utility service. The problem is exacerbated when the financial institution is headquartered outside of the state where the property resides.

### **No Communication from the New Landlord**

Communication based violations take many forms, but one of the biggest problems identified in reports by national advocates is an utter lack of communication from the new owner. Indeed, 79.5% of advocate respondents cited lack of communication from the new landlord as a primary concern.

The reason for the concern is multi-faceted. Tenants are often unaware that their former landlords have defaulted on their mortgages and lost the rental properties in foreclosure. The first time tenants are made aware of a change in ownership may be when tenants receive their notice to vacate, a document advising tenant that they must move from their apartments by a stated date or face legal action. Even worse, some tenants remain unaware that their housing stability is jeopardized until they are served with legal papers naming them as defendants in eviction proceedings.

This lack of knowledge precludes tenants from making advanced plans to save money and find new housing. The resultant housing instability may also threaten their employment, schooling, medical care, family life, or other systems of social support. It further limits tenants' ability to save for moving expenses, such as rental application fees or a security deposit.

Even when tenants become aware that their homes have been foreclosed upon, they may remain ignorant of the identity of their new landlords. This lack of knowledge has multiple negative implications for tenants. For example, renters who do not know their landlord's identity will also not know where to send their rental payments. This can create a catch-22 situation for tenants who may fail to pay timely rent, through no fault of their own, and then be served with an eviction based on their non-payment. Some case law holds that the 90 day notice provisions of the PTFA are applicable to bona fide tenants in cases of non-payment of rent, however, there is no legal consensus on this issue.<sup>68</sup>

Tenants who do not know their new landlords' identities also will not know whom to contact with property maintenance concerns and requests for needed repairs. Tenants who experience serious maintenance problems such as leaking roofs, malfunctioning plumbing, or insect infestation have nowhere to turn, ultimately resulting in unlivable conditions. This problem is further complicated when unknown and uncommunicative new landlords are responsible for the provision of necessary utilities, such as water or electricity, and the tenant has no recourse when there is a disruption in services.

### **Failure to Determine Occupancy Status**

A variation of the problem surrounding lack of communication occurs when the new landlord or their agent(s) fail to exercise due diligence in determining whether or not a property is occupied and the status of any occupant. Tenant advocates report that, in some cases, a new owner or their agent will simply fail to make any effort to determine whether a foreclosed home has people living within it. This presents an obvious problem for tenants whose homes are directly affected by any disposition of the foreclosed property.

Failure to ascertain the status of the occupant (e.g. former owner or bona fide tenant) is highly problematic as well. Different legal protections apply to occupants of foreclosed properties depending on their status, making an accurate determination of this information critical. For example, a defaulting mortgage borrower who lost their home in a foreclosure action may be legally evicted pursuant to time periods set forth under applicable state law, whereas a bona fide tenant is permitted to stay for a minimum of 90 days with notice under the PTFA.

This problem is not cured simply by providing a tenant with a notice to vacate which contains all potentially relevant time periods. Such a notice may be so ambiguous and confusing to the tenant that it is insufficient to sustain an eviction action as a matter of law.<sup>69</sup> Furthermore, the notice may be improperly used as a vehicle for filing an eviction action against a bona fide tenant in less time than is permitted under the PTFA. For example, a new landlord may provide a notice

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<sup>68</sup> In *Fed. Nat'l Mortg. Ass'n v. Vidal*, No. 11H8SP004364, 2012 WL 597929 (Mass. Hous. Ct. Feb. 17, 2012), the court held that a tenant is entitled to a 90 day notice to vacate even when the eviction is based on non-payment of rent. Also, in *PNMAC Mortg. v. Stanko*, No. 11U04495, 2012 WL 845508 (Cal. Super. Ct. Mar. 7, 2012), the court stated that "[t]he language of the PTFA is unequivocal in this regard; no matter what rights or 'interest' the foreclosing party assumes (including the right to evict for non-payment of rent), it cannot evict without providing the minimum 90 day notice to bona fide tenants. [That period] is inviolable no matter what theory of eviction a foreclosing party has available to it."

<sup>69</sup> See *Alta Cmty. Invs. III v. Ottoboni*, No. 1370195 (Cal. Super. Ct. July 29, 2010)(In a tentative ruling, the court dismissed an eviction based on an equivocal and ambiguous 3/30/60/90 day notice.) See also *E. Trade Bank v. Salter*, No. 1372298 (Cal. Super. Ct. Jan. 20, 2011)(In a tentative ruling, the court dismissed an eviction based on a 3/60/90 day notice that was found to be equivocal.)



setting forth time periods relevant to both defaulting former owners and to bona fide tenants, then file an eviction action once the shorter of the periods has elapsed. This puts a tenant in the position of having to raise their bona fide status, along with any other PTFA related arguments, in court - often without the assistance of counsel.

### **Lack of Communication and Section 8**

Participants in the Section 8 program experience unique problems when their new landlords do not communicate with them. New owners who fail to make contact with their tenants may also fail to make contact with the administrators of their tenants' Section 8 program. Additionally, new owners may fail to obtain information about their obligations under existing Housing Assistance Payment contracts entered into by the previous owners of the properties. This lack of communication puts tenants in a precarious position, leading to confusion, delayed or ceased rental payments, or perhaps tenants' termination from the Section 8 program.

### **PROBLEMS WITH NOTICE**

Under the PTFA, bona fide tenants may remain in their homes through the end of their lease agreements or for a period of at least 90 days, whichever is longer. In either case, tenants must be given clear and unambiguous information about their right to occupy the property with a notice that is delivered no less than 90 days prior to the effective date of the notice, meaning the date upon which a tenant can be legally required to vacate the property.<sup>70</sup>

The notice requirements of the PTFA are critically important to housing stability for tenants residing in foreclosed properties. The notice to vacate is often the first time a tenant becomes aware that their home has been foreclosed upon. In our national survey of tenants in foreclosed properties, nearly 50% of responders described a written notice as the first information they were given regarding the foreclosure on their rental home. Less than 7% of those received notice from someone familiar to the renter - namely, the defaulting landlord. While the PTFA does not govern the actions of defaulting landlords, the failure of former owners to apprise their tenants of the foreclosure status of their homes contributes heavily to problems suffered by tenants down the line.

Although the notice requirements of the PTFA lie at the heart of its intended purpose, the failure to follow the PTFA's notice provisions is one of the most cited violations of the law. Illegal, misleading, and inaccurate notices were cited by 68.1% of surveyed advocates as a major problem affecting tenants in foreclosed properties.

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<sup>70</sup> In *Bank of N.Y. Mellon v. De Meo*, 254 P.3d 1138 (Ariz. App. 2011), the court addressed the issue of whether a successor in interest could provide a notice to a bona fide tenant of less than 90 days, but proceed with an eviction action more than 90 days after the tenant was served with "some notice" to vacate. The court explained that, by the express terms of the PTFA, a successor in interest must provide a bona fide tenant with a notice setting forth a period of at least 90 days before the notice's effective date. Specifically, the court found that Section 702(a) of the PTFA, "requires that the effective date provided in the notice to vacate be not less than 90 days after service of the notice upon the tenant." Such a notice is a prerequisite to a legal eviction action against a bona fide tenant.

## **Inaccurate Notices**

The PTFA provides that bona fide tenants may remain in their homes through the remainder of their lease or, if there is a short-term lease or no lease agreement at all, for at least 90 days with notice. Many notices do not set forth these mandated timeframes, however, and instead will cite lesser periods applicable under preempted state law. Even worse, some notices may advise that a tenant must vacate immediately, with no basis in any law. Tenants who are unaware of the PTFA, or who do not have a clear understanding of its protections, may rely to their detriment on that notice and vacate the property before they can obtain new, stable, and safe housing.

## **Improperly Delivered Notices**

The method of notice delivery can also be problematic. This is particularly true in multi-family rental units where a notice to vacate may simply be posted in a common area, advising that all inhabitants must move from the property by a stated date. If the notice is not prominently posted or is lost, taken by a single tenant, or otherwise overlooked, renters will remain unaware that anything is wrong until they are served with an eviction complaint.

## **Ambiguous, Equivocal, and Confusing Notices**

Sometimes notices will contain information that is technically correct, but still violate the PTFA because the information is couched in language so confusing or misleading that a tenant is baffled as to his or her options. Notices written in complicated, “legalese”, rather than in plain language, is a common example of this problem. Tenants who are not legal experts may be unable to properly decipher the notice and form the wrong conclusions about their right to remain in the property.

Also prevalent are notices which set forth multiple time periods to vacate the property, of which one or more may be applicable to the tenant. One example of this type of notice is commonly referred to as a 3/30/60/90 day notice. These notices are seemingly intended to address various forms of occupancy which are each entitled to different notice periods. Some courts have held, however, that these notices are equivocal, ambiguous, and insufficient to sustain an eviction action.<sup>71</sup>

## **Threatening Notices**

Some notices to vacate are more than inaccurate, confusing, or misleading; they are threatening. Advocate survey respondents across the nation report that some tenants receive notices indicating that they must vacate the premises in less time than is mandated under the PTFA, and that if they fail to do so, they will be considered trespassers and subject to criminal liability. A tenant who receives this type of threatening notice may flee her home without establishing a safe

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<sup>71</sup> See *Alta Cmty. Invs. III v. Ottoboni*, No. 1370195 (Cal. Super. Ct. July 29, 2010)(In a tentative ruling, the court dismissed an eviction based on an equivocal and ambiguous 3/30/60/90 day notice.) See also *E. Trade Bank v. Salter*, No. 1372298 (Cal. Super. Ct. Jan. 20, 2011)(In a tentative ruling, the court dismissed an eviction based on a 3/60/90 day notice that was found to be equivocal.)

and stable alternative for fear of suffering an arrest and being treated like a criminal simply for living in her foreclosed home.

### **Notices Improperly Requiring Tenant Action**

After a foreclosure, it is important for the new owner to determine the occupancy status of those living in the property. Is the occupant a defaulting former owner? Or is the occupant a bona fide tenant entitled to the protections of the PTFA? To determine this information, new owners may provide notices to occupants requesting for them to complete some action, such as to provide copies of their lease agreements.

While such requests for information are reasonable and can help facilitate the enforcement of the PTFA, notices that require the tenant to prove their bona fide status through the provision of requested information may run afoul of the law. For example, a notice to vacate may advise an occupying tenant that, unless she provides proof of rental payments within five days of receiving the notice, it will be assumed that she is not a bona fide tenant. Indeed, some of these notices require such proof before they will recognize any form of tenancy. Some courts have held that this form of notice is considered unlawful as it improperly shifts the burden to the tenant to establish their bona fide status.<sup>72</sup>

### **PROBLEMS WITH REAL ESTATE AGENTS, LAW FIRMS, AND OTHER BANK REPRESENTATIVES**

Financial institutions that have acquired rental property through foreclosure will hire real estate agents, law firms, or other agents to perform various duties related to property management and disposition. These third-party agents of successors in interest are bound by the requirements of the PTFA along with the financial institutions they serve. Advocate survey respondents across the country, however, report that these agents are some of the worst violators of the PTFA. 61.1% of advocate respondents reported harassment from real estate agents, law firms, or bank representatives as a common problem experienced by tenants in foreclosed properties.

### **Misleading and Inaccurate Information**

Frequently, agents of successors in interest, such as real estate agents or attorneys, have the first and largest amount of ongoing communication with renters. Indeed, communication from these agents may be the primary information that tenants are given to determine their options and make important decisions about their housing.

When these agents are not aware of the requirements of the PTFA, or when they chose to blatantly disregard them, inaccurate information is provided to tenants. For example, surveyed advocates report that these agents may advise bona fide tenants that the foreclosure terminated

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<sup>72</sup> *Bank of Am. N.A. v. Owens*, 903 N.Y.S.2d 667 (City Ct. 2010)(Petitioner's requirement that bona fide tenants fill out and submit questionnaires as a prerequisite to the tenants' receipt of 90 days' advance notice to vacate a foreclosed rental property imposes an obligation on bona fide tenants that is neither required nor authorized by the PTFA. See also *Fed. Nat'l Mortgage Assoc. v. Dobson*, No. 10-CVG-02140 (Ohio Mun. Ct. Mar. 1, 2010).

their rental rights, requiring them to immediately vacate the property. Alternatively, agents may advise bona fide tenants that they must vacate the property under time periods set forth in their state's law, which is almost always substantially less than the 90 days provided under the PTFA.

### **Harassing and Threatening Conduct**

Tenants and advocates alike have described deliberately aggressive and abusive behavior by real estate agents and attorneys as pervasive across the country. Indeed, 61.1% of advocate survey respondents described harassment by real estate agents, law firms, and other bank representatives as a common problem experienced by renters in foreclosed properties.

Reports of harassing and threatening conduct are common when agents are anxious to have tenants quickly vacate the property. Tenants will field numerous phone calls, emails, or other contact from impatient agents advising that they must vacate their homes at once or face legal consequences, such as eviction or arrest.

Harassing conduct is also reported when the agent wishes to keep the property occupied, but under new lease terms. Tenants are misadvised that their interest in the property has been terminated with the foreclosure and that they have no right to remain in the home. They are then presented with the option to sign a new lease agreement, often with less favorable terms and more expensive rent, or move from the home. Tenants who wish to take time to research and consider their options face aggressive pressure to make a quick decision. Consequently, many tenants are frightened into vacating homes where they have the right to remain or into accepting a deal they cannot afford.

### **Cash for Keys Agreements**

A Cash for Keys agreement is one where a tenant is offered a monetary payment in exchange for leaving a property, often on an expedited basis. The amount of the payment will typically decrease over time, thus incentivizing a tenant to vacate as quickly as possible.

Cash for Keys agreements are not inherently problematic. In fact, such deals may be some tenants' best option for maintaining stable housing. A problem arises, however, when a Cash for Keys agreement is presented as the tenant's only option beyond eviction. Often, bona fide tenants are never advised that they have the right to remain in their homes for the duration of their leases or up to 90 days with notice as alternatives to accepting a Cash for Keys agreement.

When the tenant is provided misleading information about their options while simultaneously being induced with cash to vacate quickly, the tenant may form the belief that they have no option but to take the cash and run or risk being evicted with nothing. This problem is made worse when, as often occurs, the agent facilitating the deal threatens or harasses the tenant into accepting the agreement as soon as possible. Tenants under pressure will accept the deal and be unable to maintain housing.

## **PROBLEMS WITH PROPERTY MAINTENANCE AND HABITABILITY**

Many renters in foreclosed properties have found themselves living in increasingly dilapidated homes with no one to turn to for needed repairs.<sup>73</sup> The impact can be severe, causing a property to fall into such extreme disrepair that it is no longer fit for human life. 64.3% of advocate survey respondents cited a failure to maintain the rental property as a common problem experienced by tenants in the foreclosure crisis.

There are numerous ways in which a lack of upkeep can degrade the quality of a property such that it becomes uninhabitable. Leaks in the roof, for example, can cause water damage or allow dangerous mold to grow. A lack of maintenance can further lead to insect and rodent infestation, plumbing problems, or failing electrical systems. Low-income tenants who do not have the financial resources to remedy these problems at their own expense must frequently choose between living in these conditions or moving out and becoming homeless.<sup>74</sup>

### **Defaulting Landlords Worsen the Problem**

The foreclosure crisis has left a significant number of homes, and sometimes entire blocks, neglected and in poor condition. For many of these properties, the disrepair began with the defaulting landlord who, in anticipation of losing the property, ceased to provide regular maintenance or pay for needed utility services.

The length of the foreclosure process, particularly in states that adopt a judicial foreclosure approach, exacerbates the problem. During the pendency of a prolonged foreclosure action, a limbo period where no entity takes responsibility for the rental property may be created. “During this period, properties are not maintained, utilities are not paid, and a tenant has no legal recourse because the landlord has abandoned the property or is insolvent.”<sup>75</sup> This limbo period may last for years, leaving rental homes in very poor condition by the time new owners assume title to the foreclosed properties.

Utility services pose another problem. Landlords who have relinquished their responsibility to maintain rental properties also will fail to pay for master-metered utility services. The result is that large balances are incurred on utilities and, eventually, necessary services such as water and electricity, are shut off. Tenants with sufficient financial resources will be stuck paying one or more bills that were never their responsibility. Those without enough money to satisfy the balances will instead be forced to suffer the loss of needed utility services, or try to find another place to live.

Although new owners cannot be faulted for the inaction of their defaulting predecessors, they are still responsible for providing safe and habitable housing to bona fide tenants. Obligations under the PTFA are not contingent on the condition of the property at the time ownership changes

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<sup>73</sup> Hasty, Steve. *Protecting Tenants at Foreclosure by Funding Needed Repairs*, 20 J.L. & Pol’y 581 (2012).

<sup>74</sup> Hearne, Jeffrey & Shah, Purvi. *Renters: The Forgotten Victim’s of Florida’s Foreclosure Crisis* available at <http://www.flhousing.org/wp-content/uploads/2012/05/Renters-Forgotten-Victims-Foreclosure-Crisis.pdf>

<sup>75</sup> Guo, Tony. *Tenants at Foreclosure: Mitigating Harm to Innocent Victims of the Foreclosure Crisis* (June 2011) available at [http://works.bepress.com/cgi/viewcontent.cgi?article=1002&context=tony\\_guo](http://works.bepress.com/cgi/viewcontent.cgi?article=1002&context=tony_guo)

hands.

### **Financial Institutions Do Not Make Good Landlords**

Banks or other financial institutions are often the new owners of foreclosed rental homes, and this contributes to problems with property maintenance. Although successors in interest assume the responsibilities of the prior landlord under the PTFA, financial institutions are ill equipped to serve as residential landlords. These entities often do not have clearly designated departments or employees who are responsible for the collection of maintenance requests or for managing timely responses to them. A tenant with a maintenance issue may find that it is difficult, or even impossible, to report problems with the property. This is especially challenging for tenants living in properties owned by financial institutions based outside of their home states.

### **Properties in Disrepair Burden Local Governments**

Local governments have made efforts to address the maintenance problems related to foreclosed properties by issuing citations and fines against neglectful landlords. In Florida, at least 10 cities have issued over 10,000 code violations against banks in the past few years.<sup>76</sup> Although the citations result in fines to banks, or even liens on the properties, the banks will often ignore these sanctions and continue to neglect the properties. This creates a financial burden for local governments which are forced to pay private contractors for any upkeep of the property.<sup>77</sup> Cities seeking to enforce the liens, for example, encounter the same problem plaguing renters – they are unable to locate a contact person at the bank who is responsible for property maintenance.<sup>78</sup>

### **Minority Groups Are Disproportionately Harmed**

Minority groups are disproportionately likely to live in unsafe, unserved, and dilapidated housing.<sup>79</sup> The National Fair Housing Alliance (“NFHA”) examined over 1,000 properties in nine U.S. cities and discovered that bank investment related to maintaining bank owned, or REO properties, was significantly greater in white neighborhoods. In minority dominated neighborhoods, such properties were a whopping 42 percent more likely to receive poor maintenance or none at all.<sup>80</sup>

## **PROBLEMS NOT SPECIFICALLY ADDRESSED BY THE PTFA**

While the PTFA is a vitally important law protecting tenants in the foreclosure crisis, it does not address many issues. The following section provides a brief discussion of some additional problems that are commonly experienced by renters struggling in foreclosed properties.

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<sup>76</sup> Reid, Tim. *U.S. Cities Struggle With Blighted Bank- Owned Homes*, Reuters, (June 8, 2012) available at <http://www.reuters.com/article/2012/06/08/us-usa-housing-blight-idUSBRE85707320120608>

<sup>77</sup> Id.

<sup>78</sup> Id.

<sup>79</sup> National Fair Housing Alliance, *The Banks Are Back – Our Neighborhoods Are Not: Discrimination in the Maintenance and Marketing of REO Properties* (April 2012) available at [http://www.nationalfairhousing.org/Portals/33/the\\_banks\\_are\\_back\\_web.pdf](http://www.nationalfairhousing.org/Portals/33/the_banks_are_back_web.pdf)

<sup>80</sup> Id. at 2.

## **The Defaulting Landlord**

The relationship between a tenant and a defaulting landlord is not addressed by the PTFA, however, it is worth examining here. Defaulting landlords, in anticipation of losing their investment properties in foreclosure, may abandon their responsibilities to their tenants. As discussed above, this may result in severely neglected and dilapidated rental homes or terminated utility services. This will also create a situation where renters are denied access to vital information and communication about their housing.

A lack of communication with the former landlord was the number one issue cited by national tenants' advocates in our survey, with a whopping 85.9% of advocate respondents describing it as a problem affecting their clients.

A defaulting landlord is in the best position to advise his or her tenants about the foreclosure status of their home, such as whether a foreclosure has been initiated and the timing of any associated court hearings or property sales. Too often, however, defaulting landlords choose to keep their tenants in the dark about these matters - depriving them of critical additional time to prepare for the costs of a housing transition and leaving them feeling blindsided when they finally learn of the impending loss of their home.

In addition to a lack of communication, some defaulting landlords will deliberately provide false information to current or prospective tenants for financial gain. A defaulting landlord may, for example, use deception to lure a tenant into paying advanced rents and a security deposit on a property that the landlord knows will be imminently lost to foreclosure. Similarly, a former landlord may abuse their tenants' good faith and continue to collect rent even after they have lost legal title to the property. This type of theft not only unjustly enriches the former landlord, it also leaves a tenant vulnerable to eviction for non-payment when the new owner, to whom rental payments are rightfully owed, attempts to collect their unpaid balances.

## **Missing Security Deposits**

When tenants move into a rental property, they are typically required to pay a refundable security deposit to cover any potential damage to the property beyond normal wear and tear. The amount of the security deposit varies, however, it is not uncommon for the amount to be substantial – perhaps even as high as an entire month's rental payment. The loss of a security deposit can be devastating to low-income renters who may have invested their scant savings in that payment. Since access to that money can make the difference between obtaining a new home or not, the return of security deposits to which tenants are entitled is of critical importance.

Unfortunately, it is common for security deposits to disappear along with defaulting landlords. Even when former landlords can be located, they may be insolvent, leaving tenants with no option but to accept significant financial losses. 63.8% of advocate respondents cited missing security deposits as a problem commonly experienced by renters in foreclosed properties. Although, the PTFA is silent on the issue of security deposits, a fair reading of the law indicates that the return of a security deposit is the responsibility of the successor in interest who, by the

express language of the law, assumes their interest in the property subject to the rights of any bona fide tenant

### **Lack of Legal Representation**

Legal representation in a civil matter is a luxury that many renters cannot afford. While numerous organizations provide free legal services to qualifying low-income renters, those resources are tremendously overburdened and much of the need created by the volume of foreclosed rental properties is unmet. Many renters are unable to secure the legal services they need to defend their rights in a foreclosure action – leaving them vulnerable to the loss of their homes and with nowhere to go. According to the National Legal Aid and Defender Association, “[l]egal needs studies consistently show that 70-90% of the legal needs of the poor go unaddressed...[and unrepresented] litigants often fare poorly in the courts.”<sup>81</sup>

### **The Effect of an Eviction**

An eviction action on one’s record, even when unjustly filed, can preclude a renter from obtaining future housing. This puts tenants wishing to exercise their rights under the PTFA between a rock and a hard place. Given the lack of an express private right of action, tenants are often forced to assert their federal rights as a defense to an eviction complaint. Even when the tenant wins in court, they may find that their future housing opportunities are limited. A prospective landlord may pass on the rental application of a good renter simply because there is an eviction filing in their rental history. Removing an eviction filing from a renters’ record may be an option for some, but is not available in every jurisdiction.

## **REPORTING VIOLATIONS OF THE PTFA**

Both tenants and their advocates reported confusion over where to report violations of the PTFA. Although there is no one entity that assumes authority for enforcing the PTFA, the federal regulatory agencies discussed above, the Monitor’s Office established by the National Mortgage Settlement, and the office of the Attorney General in each state are available options.

### **Federal Regulatory Agencies**

As discussed above, various federal agencies have jurisdiction over the actions of the banks they regulate. Consumers can file complaints regarding non-compliance of the PTFA through the Consumer Affairs department of the federal agency that supervises and examines the financial institution causing the grievance. The complaint system is meant to serve as a mediation tool between the bank and the consumer.

If the bank is unable to resolve the issue, a complaint can be filed with the appropriate regulatory banking agency. To determine which agency regulates a particular institution, the consumer can visit <http://www.ffiec.gov/consumercenter/default.aspx> and enter the name of the bank. The

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<sup>81</sup> Engler, Russell, *Connecting Self-Representation to Civil Gideon: What Existing Data Reveal About When Counsel is Most Needed*, available at <http://www.nlada.org/DMS/Documents/1309724204.67/Engler%20article%20Fordham%202010.pdf>



correct agency to contact should appear. All of the agencies have an online complaint filing system that details what to include in the complaint and how to submit it.

### **National Mortgage Settlement**

The historic national mortgage settlement also presents a method for PTFA violations reporting. Indeed, such reporting is encouraged during the period of three years that the settlement is in effect.

Announced in February of this year, the national mortgage settlement requires compliance with renters' rights pursuant to the express language of the consent judgments binding the nation's five largest mortgage servicers, Bank of America, Wells Fargo, Ally/GMAC, Citi, and JPMorgan Chase. Pursuant to the settlement, each servicer must develop and implement written policies and procedures to ensure compliance with local, state, and federal renters' protections, including the PTFA.<sup>82</sup>

Bank compliance with the terms of the settlement is overseen by the Office of the Monitor, headed by the former banking commissioner in North Carolina, Joseph A. Smith. The Monitor will periodically report whether banks are complying with the agreement to a Monitoring Committee, and may also recommend additional measures to ensure compliance, if necessary. The Office of the Monitor has established a website for use by tenants and advocates to report violations of settlement, including the mandates regarding tenants in foreclosed properties. The website available at <https://www.mortgageoversight.com> includes a checklist of potential problems, including one entitled, "Tenants Rights Issues."

### **COLLABORATIVE EFFORTS TO IMPROVE PTFA COMPLIANCE**

Tenants' advocates have worked in collaboration with federal agencies, real estate professionals, banks, and other financial institutions to inform those entities' understanding of the PTFA and to help bring their actions into compliance with the law.

### **National Association of Realtors**

The Law Center has engaged in collaborative efforts with the National Association of Realtors in an effort to educate real estate professionals about the PTFA and to bring their actions into compliance with the law.

Real estate agents are often the first points of contact for tenants living in foreclosed properties, and it is not uncommon for their communication to be the only information that a renter is given about their housing options. Renters, who may be learning for the first time that their home has changed hands and that they might be required to move earlier than they'd planned, will rely upon that information when making their housing decisions. Consequently, the information that a real estate agent provides to a renter is of the utmost importance – it must be accurate, clear, and given in good faith.

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<sup>82</sup> National Mortgage Settlement Servicing Standards VIII.B.2.

Reports from renters and advocates alike revealed that real estate agents frequently contribute to violations of the PTFA by providing inaccurate information to tenants about their rights to remain in the property or engaging in harassing conduct designed to get tenants to move or sign new leases. In response to these reports, The Law Center reached out to the National Association of Realtors (“NAR”), a membership organization containing approximately half of all real estate professionals working in the country today, to suggest methods of collaboration that would educate real estate agents of their obligations under federal law. NAR, recognizing the benefit that such collaboration would provide to its members, responded with enthusiasm.

The collaborative efforts with the National Association of Realtors includes the creation of an issue brief explaining what the PTFA is and how it relates to real estate agents. This document, in addition to being made available on NAR’s website, has been disseminated to hundreds of its various committee members, professional leaders in their respective communities, at NAR’s mid-annual conference. The Law Center also partnered with NAR to create a Frequently Asked Questions document, also online, which contains common questions that a real estate professional may have about foreclosed rental properties and the rights of renters living within them.<sup>83</sup>

NAR should be commended for making its communication outlets to members readily available to The Law Center. The efforts of NAR and The Law Center to educate real estate professionals about the PTFA will enhance compliance with the law to the benefit of countless renters. This effort serves as an important model that should be duplicated across the country and across relevant industries.

### **Banks and Other Financial Institutions**

Financial institutions, such as banks, can be the worst violators of the PTFA, But, they are also critically important to the implementation of the PTFA. The Law Center has reached out to Bank of America to engage in collaborative efforts to educate bank employees about the PTFA and their obligation under the law. To date, the Law Center has achieved moderate success in those efforts.

For example, Bank of America has provided copies of its notices to vacate to the Law Center for review and suggested edits. Bank of America has also assembled a team of its employees to hold conference calls about PTFA compliance and have invited The Law Center and others to advise them when PTFA violations become apparent. Considerably more must be done before the collaborative efforts are helpful to tenants in foreclosed properties owned by the bank. Bank of America should be credited, however, for engaging in conversations with the Law Center to increase its voluntary compliance with the PTFA.

### **Department of Housing and Urban Development (“HUD”)**

The Law Center, The National Low Income Housing Coalition (“NLIHC”), and the National Housing Law Project (“NHLP”) have worked with HUD to help revise FHA’s notice regarding occupied conveyances. More recently, the Law Center met with top HUD officials and policy

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<sup>83</sup> The FAQs are available on NAR’s website at [www.realtor.org](http://www.realtor.org).

advisors to discuss expanded collaborative work, including the training of HUD approved housing counselors to serve as a source of information for tenants in foreclosed properties in strategic parts of the country. These efforts have the potential to make a large impact because, as the federal agency responsible for federal housing programs, HUD is well-positioned to reach millions of people. We encourage HUD to continue its work with the Law Center and to expand its outreach activity surrounding the PTFA. HUD should, for example, ensure that updated information about tenants' rights under the federal law is available on HUD's website. Beyond this, however, HUD should engage in expansive outreach designed to educate all renters participating in HUD's various housing programs along with the public at large.

### **Fannie Mae and Freddie Mac**

In the wake of the foreclosure crisis, the Federal National Mortgage Association ("Fannie Mae") and the Federal Home Loan Mortgage Corporation ("Freddie Mac") suffered billions of dollars in losses and were placed in conservatorships overseen by the Federal Housing Finance Agency ("FHFA"). FHFA is tasked with conserving and protecting the assets of Fannie Mae and Freddie Mac while also regulating their activities to ensure sound operation of both enterprises.

The Law Center's initial attempts to help Fannie Mae enter into voluntary compliance with the notice requirements of the PTFA achieved moderate success, resulting in the inclusion of PTFA information in the "Know Your Options" notice that is sent to renters in Fannie Mae properties. Similar efforts with Freddie Mac have been stalled for several months due to a prolonged internal review process cited by Freddie Mac in approving suggested PTFA language in their notice to tenants.

In July of 2012, the Law Center, the NLIHC, and the NHLP met with FHFA General Counsel, Alfred M. Pollard, and other agency employees to discuss FHFA's role in furthering PTFA compliance by both Fannie Mae and Freddie Mac. That meeting has proved fruitful, ultimately resulting in the addition of PTFA information on Fannie Mae's "Know Your Options" website.<sup>84</sup>

### **DEVELOPMENTS IN STATE LAW**

Since the enactment of the PTFA, 23 states and the District of Columbia have enacted laws protecting tenants in foreclosed properties, including laws that go beyond the protections of the PTFA. This is a positive trend as the PTFA preempts state laws except to the extent that they are more protective of renters in foreclosed properties, demonstrating that the PTFA is intended to serve as the minimum level of protection. States can, and should, enact additional and more comprehensive safeguards for tenants who will continue to suffer in the foreclosure crisis for years to come.

The following section provides some examples of positive trends in state laws that have been passed since the enactment of the PTFA. This information is not intended to be, and is not, a comprehensive listing of all new laws protecting tenants in foreclosed properties.

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<sup>84</sup> [www.knowyouroptions.com](http://www.knowyouroptions.com)

## **Protections Similar to the PTFA**

Connecticut, California, Maryland, Minnesota, Oregon, and New York have adopted all, or substantially all, of the protections included in the PTFA, such as the requirement that tenants be provided with 90 days advanced notice before a new landlord may commence with an eviction.<sup>85</sup>

## **Notice of Foreclosure Proceedings**

The PTFA requires advance notice before tenants can be legally removed from their homes, however, it does not impose any duty to inform the tenant of an impending foreclosure action or home sale. As discussed above, advance notice allows tenants the time they need to make plans, save money, pack their belongings, and make any other arrangements necessary to maintain their housing stability. Some states have added to this critical planning and preparation time by imposing obligations on defaulting landlords or mortgage trustees to inform tenants well before the property changes hands.

Some states require that a tenant be notified of a pending foreclosure action recorded against the defaulting landlord. In Alaska, for example, the trustee must send by certified mail a copy of the notice of default to any person occupying the property within ten days of its recording.<sup>86</sup> Colorado is similar, requiring notice within twenty days. Vermont goes even further, requiring that tenants be joined in any judicial foreclosure action, requiring notice of any court hearings or action to be served upon the tenants.

## **Notice of Foreclosure Sale**

Some states require tenants to be notified when a foreclosure sale is imminent. In Maine, a copy of the notice of sale must be provided to a tenant if the mortgagee knows, or reasonably should know, that the property is rented. Montana also requires notice of sale, obligating personal service of the notice at least thirty days before the sale date.

Arizona has adopted another variation of the notice requirement, obligating landlords to notify prospective tenants if a rental property of less than four units is being foreclosed upon. Tenants whose rights have been violated under the law may seek both injunctive relief and damages. Nevada similarly requires notice of foreclosure proceedings to prospective tenants, and a willful violation of the law constitutes a deceptive trade practice under state law.

## **Habitability & Utility Shutoff Protections**

The PTFA provides that a successor in interest assumes title to the foreclosed property subject to the interests of any bona fide tenant, thus creating an obligation on the new landlord to comply with all habitability and utility requirements set forth under applicable law and/or the lease agreement. Some states have taken the additional step of passing legislation specific to the

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<sup>85</sup> See Section Two of the report for a state-by-state review of laws pertaining to tenants in foreclosed properties, including Connecticut, California, Maryland, Minnesota, Oregon, and New York.

<sup>86</sup> Alaska Stat. Section 34.20.070 effective September 19, 2012.

maintenance of foreclosed residential properties, providing an additional layer of protections for tenants.

In New Jersey, for example, a lender may not attempt to force a tenant out of her home by failing to maintain the property during the pendency of a foreclosure proceeding. New York also imposes a statutory duty on lenders to maintain foreclosed properties after the entry of a judgment of foreclosure until the property is sold.

### **Just Cause Requirements**

“Just cause”, also known as “good cause”, laws serve to restrict the grounds upon which a landlord may legally seek an eviction of protected tenants. Some states, including Massachusetts, New Hampshire, and New Jersey, have adopted laws which exclude foreclosure on the property from the definition of “just cause”, requiring other grounds, such as non-payment of rent, to be present before an owner may seek an eviction.<sup>87</sup>

### **Sealing Records of Post-Foreclosure Evictions**

A tenant who has been evicted from a foreclosed rental home is often blameless for the loss of their housing. Often, tenants who had a right to remain in the rental housing have been unjustly evicted from foreclosed properties in violation of the PTFA. These tenants may have no recourse in the courts and, indeed, may continue to suffer the consequences of the eviction when they seek other housing in the rental market. As discussed above, an eviction on one’s credit history is an obstacle to obtaining a new apartment.

Recognizing this problem, and its inherent unfairness, some states have enacted laws allowing record sealing of post-foreclosure evictions. In Illinois, tenants who would otherwise legally reside in the property but for the foreclosure may have their eviction records sealed.

## **RECOMMENDATIONS**

### **Recommendations to the Federal Government**

- **The PTFA should be made permanent.** The PTFA is currently set to expire on December 31, 2014. If the federal law is no longer in effect, tenants in foreclosed properties will have only state and local laws available to protect them. Given that state and local laws are, in general, considerably less protective than the PTFA, it is imperative that the PTFA be made permanent federal law. Legislation introduced by Representative Keith Ellison (D-MN) , H.R. 3619, would make the PTFA permanent and add a private right of action. Senator Richard Blumenthal (D-CT) will introduce similar legislation on December 17, 2012. Both bills will have to be reintroduced in the next Congressional session, however, if they do not become law this year.
- **The PTFA should be amended to include an express private right of action.** A private right of action would allow tenants to seek damages in court for violations of their

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<sup>87</sup> See Section Two of the report for a more detailed review of “just cause” or “good cause” laws, including those of Massachusetts, New Hampshire, and New Jersey.

rights under the law. A private right of action would also serve as a powerful deterrent to potential violators of the federal law.

- **Congress should vest clear authority and responsibility in one federal agency to regulate and enforce compliance with the PTFA.** To make a single federal agency, such as the Consumer Federal Protection Bureau (“CFPB”), responsible for guidance and enforcement of the PTFA would reduce governmental inefficiency while simultaneously increasing the likelihood of compliance with the law.
- **Federal bank regulatory entities should increase their monitoring of PTFA compliance by banks and their agents.** Special attention should be paid to the actions of agents, such as real estate professionals and law firms, who often have the most interaction with tenants. It should be made clear that banks will be held responsible for their agents’ violations of the law. The regulatory entities should also take all authorized enforcement action against banks that are violating renters’ rights under the PTFA. These entities should actively seek out information about violations of the PTFA by the banks that they regulate and encourage tenants to bring violations to their attention. Additionally, regulatory entities should take all available actions against PTFA violations and publicize that they are doing so to further deter non-compliance by banks and their agents.

#### **Recommendations to State Governments**

- **State legislatures should enact increased protections for renters living in foreclosed properties.** At a minimum, these protections should mirror those of the PTFA, ensuring that the majority of leases survive a foreclosure action and providing at least 90 days’ notice to renters with short-term or no lease agreements. State legislatures should go beyond these safeguards, however, and pass legislation that address areas not covered by the PTFA. These areas include, but are not limited to, notice to renters of an impending foreclosure, notice to tenants of their rights and options at the time of a foreclosure, provisions for addressing habitability concerns, return of pre-paid rents and security deposits, and “just cause” eviction actions.

#### **Recommendations to Financial Institutions and other Successors in Interest**

- **Banks and other successors in interest should ensure that they are complying with the requirements of the PTFA.** Banks should make certain that the notices they provide to tenants are unambiguous and clearly lay out the rights and options of tenants. Banks should also establish procedures for training hired real estate agents, attorneys, and other agents on the requirements of the PTFA and actively monitor agents’ interactions with tenants to ensure compliance with the law. Banks should additionally designate specific departments or individual employees who can address their tenants’ concerns, such as those regarding property maintenance and the return of security deposits, and also to receive and investigate PTFA related complaints.
- **The five largest mortgage servicers in the nation, Bank of America, Ally/GMAC, Citi, Wells Fargo, and JPMorgan Chase, should comply with the terms of the**

**national mortgage settlement.** The historic settlement requires these five banks to develop and implement written policies and procedures to ensure compliance with renters' rights, including those established under the PTFA. These requirements should be embraced and serve as a model for banks not bound by the agreement.

#### **Recommendations to the Monitor of the National Mortgage Settlement**

- **The Monitor of the national mortgage settlement should ensure that the banks governed by the consent judgments comply with their obligations to renters in foreclosed properties.** The findings of compliance, or non-compliance, with the PTFA should be specifically reported to the Monitoring Committee.

## **SECTION TWO: 50-State Survey of State Laws**

### **DEVELOPMENTS IN STATE LAW REGARDING THE RIGHTS OF TENANTS IN FORECLOSURE**

For this report we surveyed the laws of all 50 states and the District of Columbia regarding developments in state laws relating to the rights of tenants in foreclosure since the enactment of the PTFA. The following section discusses the results of this research.

No fewer than twenty-three states have passed state laws regarding rights of tenants in foreclosure since the enactment of the PTFA. Although the PTFA, which went into effect in May 2009, is generally more protective of tenants' rights in foreclosure than most states' laws, some of the new state laws provide tenants with additional protections not contemplated by the PTFA. Among such additional protections are:

- The right to receive notice of a foreclosure action against the landlord (16 states);
- The right of prospective tenants to receive notice that the rental home is in foreclosure (6 states);
- Some manner of "just cause" requirement for eviction of tenants in foreclosed properties (5 states);
- Measures providing for security deposit or prepaid rent compensation (3 states);
- Measures aimed at preventing the termination of utility services in foreclosed rental properties (3 states);
- Record sealing for tenants who were evicted due to foreclosure (2 states);
- Adoption of substantially similar protections set forth by the PTFA (7 states).

Florida is also noteworthy in that several judicial circuit courts have entered administrative orders requiring parties seeking a writ of possession to certify that they have complied with, or that the issuance of the writ of the possession would not violate, the PTFA.<sup>88</sup> However, there have been anecdotal reports of landlords failing to provide proper notice and banks attempting to illegally evict tenants sooner than permitted by the PTFA.

The state-by-state results are reported below, including a discussion of new state laws relating to the rights of tenants in foreclosure, if any; proposed legislation on that topic, if any; a discussion of the effect of the PTFA on the rights of tenants in properties subject to foreclosure in each state; and, in certain instances, noteworthy comments from knowledgeable practitioners (legal services attorneys or housing policy analysts) in the particular state.

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<sup>88</sup> Such a "writ of possession" would be an order from the court directing the tenant to vacate the property and granting the party seeking the writ the right to possession of the property.



## **ALABAMA**

### **New State Laws**

None noted.

### **Proposed Legislation**

None noted.

### **Comparison with the Protecting Tenants at Foreclosure Act**

The PTFA is more protective of tenants' rights in foreclosure than is Alabama state law with respect to advance notice required before a tenant can be forced to vacate a property. The PTFA requires 90 days' advance notice while Alabama law provides, at most, 10 days' notice prior to permitting eviction proceedings. (Ala. Code § 6-5-251 (2009); *see* Ala. Code § 35-9A-461 (2009) (implying that no notice is required)). If the court rules for the landlord, the court can issue a writ of restitution after seven days (Ala. Code § 35-9A-461 (2009)). In addition, the eviction action may be appealed by the tenant within 7 days, but the appeal will only stay the writ of possession if the tenant continues to pay rent. (Ala. Code § 35-9A-461 (2009)).

In addition, the PTFA also provides that, with limited exceptions, a tenant may remain until the expiration of the lease term after foreclosure, whereas under Alabama law tenancy does not survive foreclosure (*First Nat'l Bank v. Welch*, 132 So. 44 (Ala., 1930)).

## **ALASKA**

### **New State Laws**

None noted.

### **Proposed Legislation**

None noted.

### **Comparison with the Protecting Tenants at Foreclosure Act**

The PTFA is more protective of tenants' rights in foreclosure than is Alaska state law with respect to advance notice required before a tenant can be forced to vacate the property. The PTFA requires 90 days' advance notice while Alaska state law requires the tenant be served a copy of the notice of default within 10 days of recording the default. Alaska also requires a valid notice to quit but does not specify a required timeline and allows an action for possession to be brought immediately upon the tenant holding over possession, potentially allowing an action directly after the foreclosure sale. (Alaska Stat. §§ 34.20.090(b), 09.45.060 – 09.45.160, 09.45.630).

The PTFA also provides that, with limited exceptions, a tenant may remain until the expiration of the lease term after foreclosure, whereas under Alaska state law, the owner following a sale in

foreclosure has right to possession (Alaska Stat. § 34.20.090(b); *Winn v. Mannhalter*, 708 P.2d 444 (Alaska 1985)).

## **ARIZONA**

### **New State Laws**

On May 7, 2010, the Governor signed into law H.B. 2766, 49th Leg. (Ariz. 2010), which added a section to Arizona's Residential Landlord and Tenant Act. The law requires that, where a rental agreement is entered into after the initiation of a foreclosure action, the owner of the property shall include written notice of potential foreclosure with the rental agreement. (Ariz. Stat. Ann. § 33-1331.) The required notice shall state that the property is undergoing foreclosure, and provide (1) contact information for the court where the foreclosure is pending or a trustee, attorney, or other responsible party; and (2) information regarding the time and place set for auction of the property. (*Id.*). The new law also provides for damages for failure to provide the required notice, and permits the tenant to recover his or her security deposit. The law, however, does not apply to multi-family residential rental units consisting of four or more connected units. (*Id.*).

### **Proposed Legislation**

None noted.

### **Comparison with the Protecting Tenants at Foreclosure Act**

The PTFA is more protective of tenants' rights in foreclosure than is Arizona state law with respect to advance notice required before a tenant can be forced to vacate the property. The PTFA requires 90 days' advance notice while Arizona law provides that a sale in foreclosure provides the new owner with right to immediate possession and the new owner can obtain an action for forcible detainer following notice. (Ariz. Rev. Stat. § 12-1173.01).

The PTFA also provides that, with limited exceptions, a tenant may remain until the expiration of the lease term after foreclosure, whereas under Arizona law, the owner following a sale in foreclosure has the right to immediate possession. Note, however, that under Ariz. Rev. Stat. § 12-1173.01(B), an action for forcible detainer will not affect the rights of persons in possession under a lease or other possessory right which is superior to the interest sold, forfeited or executed upon (e.g. if the tenant's lease chronologically preceded the mortgage).

## **ARKANSAS**

### **New State Laws**

None noted.

### **Proposed Legislation**

None noted.

## **Comparison with the Protecting Tenants at Foreclosure Act**

The PTFA is more protective of tenants' rights in foreclosure than is Arkansas state law with respect to the potential for a tenant to remain after the foreclosure as well as with respect to advance notice required before a tenant can be forced to vacate the property. The PTFA requires 90 days' advance notice and provides that, with limited exceptions, a tenant may remain until the expiration of the lease term after foreclosure, while under Arkansas law, a valid statutory foreclosure allows the purchaser immediate possession. (Ark. Code Ann. §§ 18-50-101 *et seq.*; *see also Foster v. Enarc Lumber Mfg. Co.*, 233 Ark. 811, 813 (Ark. 1961); *Norton v. J.T. Fargason Co.*, 166 Ark. 455 (Ark. 1924); Ark. Code. Ann. §§ 18-60-301 *et seq.*; *c.f.* Ark. Code. Ann. §§ 18-17-701 *et seq.*, 18-17-901 *et seq.*).

## **CALIFORNIA**

### **New State Laws**

Signed into law on September 25, 2012 and effective on January 1, 2013 (notice provisions become effective March 1, 2013 or 60 days following posting of a dated notice incorporating the amendments on the Department of Consumer Affairs Internet Web site, whichever date is later), A.B. 2610 incorporates substantially the same protections as the PTFA into state law. A.B. 2610 amends Cal. Civ. Proc. Code § 1161b to require 90 day notice periods to any month-to-month or periodic tenancy. For any fixed term residential lease, the lease survives foreclosure unless the purchasers will occupy the premises as a primary residence, the lessee is the mortgagor or related to the mortgagor, the lease was not the result of an arms' length transaction, or the rent is substantially below market rate (unless subsidized). A.B. 2610 goes beyond PTFA as it requires the Department of Consumer Affairs to make translations of the notice available in five specified languages and extends the operation of the provisions establishing a crime, thus imposes a state-mandated local program. These protections will sunset on December 31, 2019.

Also signed into law on September 25, 2012 and effective on January 1, 2013, S.B. 1191 adds Cal. Civ. Code § 2924.85, which requires landlords who have received a notice of default to disclose this in writing to any prospective tenant prior to signing a lease with them. The law also specifies the content of the notice and requires it be in several languages. The law sunsets on January 1, 2018.

On September 31, 2010, the Governor signed S.B. 1149 into law. This law prohibits public access to tenant eviction records by most members of the public if a tenant is evicted as a result of foreclosure unless the landlord prevails in a post-foreclosure eviction action within 60 days. In addition, an informational "cover sheet" specifying tenants' rights generally must be provided to renters with any eviction notices delivered within one year of a foreclosure sale. (S.B. 1149, 2010 Leg., Reg. Sess. (Cal. 2010) (enacted).) The sunset for these "cover sheet" requirements was subsequently extended to December 31, 2019 in S.B. 825, which was signed into law on August 28, 2012.

Effective January 1, 2010, the California Public Utilities Code was amended to provide that public utilities (i.e., those utility companies that provide electricity, water, heat and/or gas) must give notice in writing to tenants in single-family homes that their landlord is in arrears with

payments prior to extinguishing those services to the tenants, in situations in which landlords are paying utilities on behalf of tenants. Notices must be provided in numerous languages. The law further provides that tenants who make a payment or payments to a public utility when their landlord has failed to do so may deduct these payments from their rent. Previously, this law applied only to tenants in multi-family dwellings. (H.R. 120, 2009-2010 Reg. Sess. (Cal. 2009), to be codified as Cal. Pub. Util. Code § 777.1 (2010).)

### **New Local Laws**

On February 25, 2009, the Department of Building Inspection for the City of San Francisco signed a declaration to protect residents of master-metered multiunit residential buildings in the event of foreclosure. The declaration provided that until December 31, 2010, utilities to these tenants may not be turned off, regardless of whether their landlord has paid the utility bills.

On March 16, 2010, the Board of Supervisors of the City of San Francisco enacted an ordinance extending “just cause” protections to tenants in properties not otherwise subject to eviction protections when those properties are foreclosed upon (San Francisco Admin. Code §§ 37.2, 37.9D (2010)).

Approximately 16 cities in California have passed or introduced laws preventing banks from evicting tenants living in foreclosed properties without “just cause,” such as where the tenant fails to pay rent or the owner wishes to move in to the property.

### **Proposed Legislation**

None pending.

### **Comparison with the Protecting Tenants at Foreclosure Act**

As of January 1, 2013, the protections offered by the PTFA will be incorporated into California law, though the existing legal protections for tenants under California law are greater than those under PTFA and will extend past the PTFA’s sunset date to December 31, 2019. Until January 1, 2013, the PTFA is more protective of tenants’ rights in foreclosure than is California state law with respect to the potential for a tenant to remain until the expiration of the lease term even after foreclosure. It is also more protective with respect to advance notice required before a tenant can be forced to vacate the property as California law generally requires 60 days’ notice to vacate for tenants (or 90 days for Section 8 tenants) after a foreclosure (Cal. Civ. Proc. Code § 1161b). California law, however, does provide certain rights to tenants that go beyond the scope of the PTFA, as described above. Also, mortgagees are required to mail a copy of the notice of default to the tenant within 30 days of recording it (Cal. Civ. Code. § 2924b). Further, certain local ordinances requiring “just cause” for eviction of tenants after foreclosure add a layer of protection not contemplated by the PTFA.

## **COLORADO**

### **New State Laws**

Effective August 5, 2009, the Colorado Criminal Code was amended to expand the definition of “equity skimming” (a class 5 felony) to include a situation in which a person knowingly collects rent on behalf of someone other than the owner (Colo. Rev. Stat. Ann. § 18-5-802 (2009)).

On April 22, 2009, a bill was signed into law requiring that tenants of residential properties to be foreclosed upon must be included in the mailing list (*see* Colo. Rev. Stat. Ann. § 38-38-100.3) given by the foreclosing entity to the county trustee, which is then used to provide notice to the tenants no more than 20 days after the publication of the notice of sale of the property (Colo. Rev. Stat. Ann. §§ 38-38-101, 103 (2009)).

### **Proposed Legislation**

None noted.

### **Comparison with the Protecting Tenants at Foreclosure Act**

The PTFA is generally more protective of tenants’ rights in foreclosure than is Colorado state law with respect to advance notice required before a tenant can be forced to vacate the property and with respect to the potential for a tenant to remain until the expiration of their lease. Under Colorado law, if the mortgage was recorded before the lease was signed and no junior lien holders have redeemed, the lease can be terminated by the purchaser in the foreclosure sale (though as noted above, tenants must be given notice after the publication of the notice of sale of the property). (Colo. Rev. Stat. § 38-38-501 et seq.).

## **CONNECTICUT**

### **New State Laws**

Public Law No. 11-201, effective on July 13, 2011, added Conn. Gen. Stat. § 49-31p, which adopted the protections of the PTFA for state law, including the 90 day notice period and the ability for, with limited exceptions, a tenant to remain until the expiration of the lease term after foreclosure. The law also extends these protections past the PTFA’s current sunset, to December 31, 2017.

Conn. Gen. Stat. § 47a-20e, effective November 25, 2008, stays any ejectment or prohibits any summary process against a bona fide tenant involving a foreclosed property until 60 days after the date title vests in the successor in interest or after a rental agreement expires, whichever occurs first. The 60-day stay applies only if the rental agreement was entered into more than 60 days before commencement of the foreclosure action. If the rental agreement was entered into less than 60 days before the commencement of the foreclosure action, ejectment or summary process may commence 30 days after the date that absolute title vests in the successor in interest. Any action to dispossess the tenant may be based on any ground provided by §§ 47a-23 or 47a-31 of the summary process law. However, an action to dispossess the tenant may not be based on the

ground that the tenant no longer has the right or privilege to occupy the premises as a result of such judgment of foreclosure.

Connecticut's "cash for keys" law (Conn. Gen. Stat. § 47a-20f), also effective November 25, 2008, allows the successor in interest to offer financial incentives to tenants who move out quickly. Section 47a-20f permits the offer of money or other valuable consideration as incentive to vacate, as long as the offer is at least equal in amount or value to the security deposit and interest due under the relevant laws (in addition to the return of the security deposit) or at least two months' rent or \$2,000.00, whichever is greater, if no evidence of a security deposit exists or no security deposit was paid. This section was then amended in 2010 by Public Law 10-181, require the offer be the greater of the following, regardless of evidence of a security deposit: (1) the security deposit and interest that would be due such tenant under the relevant laws plus any such security deposit and interest; (2) two months' rent, or (3) two thousand dollars.

### **Proposed Legislation**

None noted.

### **Comparison with the Protecting Tenants at Foreclosure Act**

Until 2011, the PTFA was generally more protective of tenants' rights in foreclosure than current Connecticut state law. Since the adoption of Public Law 11-201, however, the protections offered by Connecticut are essentially the same as those contained in the PTFA, except that Connecticut's protections extend to December 31, 2017. With respect to advance notice required before a tenant can be forced to vacate the property, both Connecticut and the PTFA require 90 days' notice and also provide that, with limited exceptions, a tenant may remain until the expiration of the lease term even after foreclosure. Under both the PFTA and Connecticut state law, Section 8 leases may survive foreclosure. (*See also Bristol Savings Bank v. Savinelli*, CV-95-0377478-S, 1996 Conn. Super Lexis 742 (Conn. Super. Ct. Mar. 21, 1996); *Webster Bank v. Occhipinti*, No. CV-970059147S, 1998 WL 846105 (Conn. Sup. Ct. Nov. 20, 1998)).

Connecticut state law does provide the following additional protections not afforded by the PFTA: a court may order ejectment as part of a foreclosure proceeding in Connecticut only if the tenants are parties to the action; and if the foreclosed property consists of at least five apartment units, a tenant cannot be forced to move at all if the tenant (or a member of the household) is at least 62 years old or is physically disabled. (Conn. Gen. Stat. Ann. §§ 47a-23c. 49-22 (West 2012); *Tappin v. Homecomings Financial Network, Inc.*, 265 Conn. 741 (Conn. 2003)).

## **DELAWARE**

### **New State Laws**

None noted.

### **Proposed Legislation**

None noted.

## **Comparison with the Protecting Tenants at Foreclosure Act**

The PTFA is more protective of tenants' rights in foreclosure than is Delaware state law with respect to advance notice required before a tenant can be forced to vacate the property, as the PTFA requires 90 days' notice compared to the 5 day notice required under Delaware law, which states that a tenant who holds over for more than 5 days after a property has been duly sold in a foreclosure and the title perfected may be removed by an action for summary possession (25 Del. C. § 5702). Delaware law also requires that tenants receive notice of the commencement of foreclosure proceedings, and allows tenants to be made a party to mortgage foreclosure actions. (Del. Code Ann. tit. 10, § 5061 (West 2012)). Procedurally, in the event of a judicial foreclosure sale, the foreclosing party can receive a writ of possession awarded against any person still in possession of the property, such as a tenant. (10 Del. C. § 5011). The PFTA provides that, with limited exceptions, a tenant may remain until the expiration of the lease term even after foreclosure, whereas under Delaware state law, tenants can be required to vacate after a foreclosure. (Del. Code Ann. tit, 25, § 5106 (West 2012)).

## **DISTRICT OF COLUMBIA**

### **New State Laws**

None noted.

### **Proposed Legislation**

None noted.

## **Comparison with the Protecting Tenants at Foreclosure Act**

D.C. law is more protective of tenants' rights in foreclosure than the PTFA in that foreclosure is not a valid reason for eviction even if the lease has expired. (*See, e.g., Adm'r of Veterans Affairs v. Valentine*, 490 A.2d 1165 (D.C. 1985)). If a tenant continues to pay rent – regardless of whether the lease has expired -- that tenant cannot be evicted except if: (1) the tenant violates the lease or a court determines the tenant has committed an illegal act within the rental unit; (2) the owner wishes to use the property for personal use and occupancy as a dwelling or to sell the property to someone for their personal use and occupancy; (3) the owner wishes to make substantial renovations that cannot safely be made while the dwelling is occupied or to substantially rehabilitate the property in either case the tenant has the right to rent following completion of renovations or rehabilitations; (4) the property is to be replaced with new (non-rental) construction or demolished; or (5) the housing provider is going to discontinue the housing use of (and not rehabilitate or renovate) the property for at least a year. Notice to vacate under the foregoing circumstances ranges from 30 to 180 days. (D.C. Code § 42-3505.01 (2001)).

### **Notes from the Field**

One practitioner noted that in 2010, the D.C. Court of Appeals decided *Banks v. Eastern Savings Bank*, 8 A.3d 1239 (D.C. 2010), which holds that a foreclosure extinguishes all prior leases as a matter of D.C. law. Although a tenant in D.C. still becomes a tenant of the post-foreclosure

owner by operation of law and has the right to remain, the specific terms that govern the tenancy are unclear, and *Banks* leaves many unanswered questions for future litigation (or legislation).

## **FLORIDA**

### **New State Laws**

None noted.

### **Proposed Legislation**

Numerous bills were introduced during the 2010, 2011, and 2012 legislative sessions that were intended to protect tenants in foreclosure. All of those bills died.

Further, in 2010 the Florida Legislature authorized and designated funds for the purpose of processing a backlog of residential mortgage foreclosure cases. In 2011 the Florida legislature did not renew the designated funding. Various courts across Florida are struggling with foreclosure proceedings, and are issuing new Foreclosure Procedures. Additionally several judicial districts are initiating administrative orders, as indicated below.

### **Comparison with the Protecting Tenants at Foreclosure Act**

The PTFA is more protective of tenants' rights in foreclosure than is Florida state law with respect to advance notice required before a tenant can be forced to vacate the property and the potential for a tenant to remain until the expiration of the lease term even after foreclosure. With the exception of certain judicial circuits listed below which apply the PTFA within their circuit, Florida statutes does not provide a specific right to notice. Florida law does state, however, that a tenant's lease is not terminated by foreclosure if a tenant is not a party to foreclosure proceedings, unless that tenant has actual notice of the proceedings and fails to disclose its interest in the property, which goes beyond the scope of the PTFA. (*See Dundee Naval Stores Co. v. McDowell*, 61 So. 108 (Fla. 1913); *Riley v. Grossest*, 556 So. 2d 473, 476 (Fla. Dist. Ct. App. 1990). *See also* Fla. Stat. § 695.01(1) (2008) (unrecorded leases for a term longer than one year will not be good in law or equity against subsequent purchasers)). However, a local practitioner noted that including "John Doe, tenant" will be often sufficient to satisfy the requirement.

### **Notes from the Field**

Several judicial circuits in Florida, including the 5th, 6th, 7th, 10th, 11th, 13th, and 15th, have entered administrative orders requiring parties seeking a writ of possession to certify that they have complied with, or that the issuance of the writ would not violate, the PTFA. The specific requirements of each judicial circuit are as follows:<sup>89</sup>

- **5th Judicial Circuit:** Providing that any motion for a writ of possession must include a certification that no tenants are in possession of the property or, if there are, that such tenants have been provided with notice as required by the PTFA and that the motion does

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<sup>89</sup> This list of judicial circuit administrative orders is not exhaustive



not seek an order that violates any tenant's right to continued occupancy under the PTFA. (*Protecting Tenants at Foreclosure Act of 2009*, Administrative Order No. A-2009-22 (Fla. Cir. Ct. Sept. 2, 2009), available at <http://www.circuit5.org/>).

- **6th Judicial Circuit:** Providing that any motion for a writ of possession must contain a certification from the attorney stating whether tenants are in possession of the property. If tenants are in possession, the attorney must certify that he or she has given the tenants notice as required by the PTFA, and the tenants must receive notice of the hearing on the writ. (*Mortgage Foreclosure Proceedings*, Administrative Order No. 2010-025 PA/PI-CIR (Fla. Cir. Ct. May 21, 2010), available at <http://www.jud6.org/LegalCommunity/LegalPractice/AOSAndRules/aos/aos2012/2012-002.htm>).
- **7th Judicial Circuit:** Providing that any motion for a writ of possession must include a certification that no tenants are in possession of the property or, if there are, that such tenants have been provided with notice as required by the PTFA and that the motion does not seek an order that violates any tenant's right to continued occupancy under the PTFA. (*Writs of Possession in Residential Mortgage Foreclosure Cases*, Administrative Order CV-2010-016-SC (Fla. Cir. Ct. Mar. 26, 2010), available at <http://www.circuit7.org/Administrative%20Orders/civil/CV-2010-016-SC.html>).
- **10th Judicial Circuit:** Providing that, prior to the Clerk issuing a writ of possession, the immediate successor-in-interest must certify to the court that there are no bona fide tenants in possession of the property or that any such tenants have been provided with the notice required by the PTFA. (*Standard Procedures and Language in Foreclosure Proceedings; Electronic Foreclosure Sales in Lieu of On-Site Auctions; Writs of Possession*, Administrative Order No. 3-15.13 (Fla. Cir. Ct. Aug. 3, 2011), available at <http://www.jud10.org/AdministrativeOrders/index3civil.htm>).
- **11th Judicial Circuit:** Providing that the issuance of writs of possession is subject to the PTFA. (*Amending Administrative Order and Final Judgment of Foreclosure Form*, Administrative Order No. 09-09-A1 (Fla. Cir. Ct. Nov. 2009), available at <http://www.jud11.flcourts.org/adminorders.aspx?pid=303>).
- **13th Judicial Circuit:** Providing that a plaintiff seeking an order directing the clerk to issue a writ of possession must file a verified motion swearing that the residence is either unoccupied, occupied by the debtor, or occupied by a bona fide tenant who has been notified pursuant to the requirements of the PTFA and that the motion does not seek an order that violates the tenant's right to occupancy under the PTFA. (*Foreclosure Procedures*, Administrative Order S-2011-029 (Fla. Cir. Ct. June 28, 2011), available at <http://www.fljud13.org/Portals/0/AO/DOCS/S-2011-029.pdf>).
- **15th Judicial Circuit:** Providing that any motion for a writ of possession must contain a certification from the attorney stating whether tenants are in possession of the property. If tenants are in possession, the attorney must certify that he or she has given the tenants notice as required by the PTFA. (*In re Protecting Tenants at Foreclosure Act of 2009*, Administrative Order 3.307-7/09 (Fla. Cir. Ct. July 27, 2009), available at

[http://15thcircuit.co.palm-beach.fl.us:8080/c/document\\_library/get\\_file?uuid=dfd59815-28f1-453c-8f52-feab20818298&groupId=10136](http://15thcircuit.co.palm-beach.fl.us:8080/c/document_library/get_file?uuid=dfd59815-28f1-453c-8f52-feab20818298&groupId=10136).

## **GEORGIA**

### **New State Laws**

None noted.

### **Proposed Legislation**

Several bills were introduced during the 2009-2010 legislative session that were intended to protect tenants in foreclosure. All of these bills died.

One bill intended to protect tenants in foreclosure has been introduced during the 2011-2012 legislative session.

- A bill providing that where a landlord is holding a security deposit for a tenant in a foreclosed property, the foreclosing party must return any security deposit owed the tenant at the time the tenancy is terminated; the foreclosing party must provide a notice to vacate at least 90 days prior to the effective date of such notice; a tenant may elect to remain in the premises until the end of the remaining term of the lease, unless the successor in interest sells the property to a purchaser who will occupy the unit as a primary residence, in which case 90 days' notice is required; a foreclosing party may not wrongfully induce a tenant to vacate property being foreclosed upon, including by mischaracterizing the rights of the tenant, implying that the tenant is obligated to accept an offer, or by discontinuing electricity, heat, or other utilities or by failing to maintain the premises in a habitable condition; any violation of the notice provisions or the wrongful inducement provisions in this law will subject the person, entity, or agent to liability in the amount of \$3,000.00 per violation, plus reasonable attorney's fees, litigation costs, and actual damages. (H.B. 445, 151st Gen. Assemb., Reg. Sess. (Ga. 2011) (pending further legislative action) (adding Ga. Code Ann. § 44-7-38 and amending Ga. Code Ann. §§ 44-7-55 and 44-14-162)).

### **Comparison with the Protecting Tenants at Foreclosure Act**

The PTFA is generally more protective of tenants' rights in foreclosure than is Georgia state law with respect to advance notice required before a tenant can be forced to vacate the property and the potential for a tenant to remain until the expiration of the lease term even after foreclosure. Under Georgia law, where a lease was entered into before the mortgage was acquired, the tenants become tenants at will after foreclosure, entitled to 60 days' notice before termination of the lease. If the mortgage predated the lease, the tenants become tenants at sufferance after foreclosure, and can be subject to eviction proceedings at any time. (*Trust Co. Bank v. Atlanta Speedshop*, 432 S.E. 2d 608 (Ga. App. Ct. 1993); Ga. Code Ann. § 44-7-7 (2010)).

### **Notes from the Field**

In Fulton County, all contested proceedings, including evictions, are sent to mandatory

mediation. At mediation, tenants' PTFA rights can provide them leverage in negotiations with the new owner subsequent to the foreclosure sale.

## **HAWAII**

### **New State Laws**

None noted.

### **Proposed Legislation**

None noted.

### **Comparison with the Protecting Tenants at Foreclosure Act**

The PTFA is generally more protective of tenants' rights in foreclosure than is currently enacted Hawaii state law with respect to advance notice required before a tenant can be forced to vacate the property and the potential for a tenant to remain until the expiration of the lease term even after foreclosure. Under Hawaii law, tenants can be required to vacate after a foreclosure sale with as little as 10 days' notice for tenants with shorter than month-to-month tenancies and 45 days' notice for month-to-month tenants, substantially less notice than the 90 days provided by the PTFA. If, however, the new owner seeks to convert the property to condominiums, Hawaii requires 120 days' notice, in which case Hawaii law would be more protective than the PTFA. (Haw. Rev. Code § 521-71 (2011)).

## **IDAHO**

### **New State Laws**

None noted.

### **Proposed Legislation**

None noted.

### **Comparison with the Protecting Tenants at Foreclosure Act**

The PTFA is more protective of tenants' rights in foreclosure than is Idaho state law with respect to advance notice required before a tenant can be forced to vacate the property and the potential for a tenant to remain until the expiration of the lease term even after foreclosure. After foreclosure, Idaho law provides that the new owner is entitled to possession on the tenth day following the sale, and a tenant remaining on the property may be subject to expedited eviction proceedings (occurring 5 to 12 days after the tenant receives notice of the eviction proceedings). (See Idaho Code Ann. §§ 45-1506(11), 6-310 to -311A (2011)).

### **Notes from the Field**

An effective strategy for leveraging tenants' PTFA rights has been to seek mediation after an ejectment action is filed post-foreclosure, which courts generally grant, and which provides

tenants the opportunity to use their PTFA rights to negotiate cash-for-keys or other similar arrangements.

## **ILLINOIS**

### **New State Laws**

Public Act 96-111, signed into law on July 31, 2009, provides new protections to tenants in foreclosure. In particular, the Code of Civil Procedure requires that within 21 days of confirmation of sale, the purchaser of a foreclosed property: (1) make a good faith effort to identify occupants of the mortgaged property; (2) deliver notice to all known occupants that the dwelling unit has been foreclosed upon, by leaving such notice with a suitable person, or sending such notice to the occupant by first class mail; and (3) post a written notice on the primary entrance of each dwelling unit subject to foreclosure, informing the occupants that the dwelling unit has been foreclosed upon. Both notices must provide the name, address and telephone number of an individual or entity whom the tenants may contact with concerns about the mortgaged real estate or to request repairs to the property, and include specific language stating, "This is NOT a notice to vacate the premises" and that the tenant may want to contact legal air or housing agency to determine rights. If the name and address of an occupant is ascertained more than 21 days after the confirmation of sale, then the notice must be provided within seven days of learning the occupant's identity. If the notice is not given to an occupant, no rent may be collected and the lease may not be terminated for non-payment of rent until notice is served. Provided the occupant does not owe rent, in an eviction proceeding under foreclosure law, occupants in foreclosed properties are given the shorter of 120 days from the service of notice of the eviction proceeding or the length of their lease to move but a minimum of 30 days after the eviction order. The Act also permits rent increases under certain prescribed circumstances. Public Act 96-111 also changes the term "tenant" to "occupant." Similar eviction procedures are created for mortgagors and receivers of property.

710 Ill. Comp. Stat. 1.2, effective August 26, 2011, amends the Security Deposit Return Act and provides that the purchaser of a foreclosed property under Article 15 of the Code of Civil Procedure is liable for the security deposit that the lessee paid to the lessor. The new lessor must post a notice on the property indicating it has the security deposit and accrued interest.

Public Act 96-1131, effective on July 20, 2010, added § 9-121 to the Code of Civil Procedure. The law allows the court to seal a forcible entry and detainer action if the court finds that: (1) the plaintiff's action was sufficiently without a basis in fact or law, which may include a lack of jurisdiction; (2) that placing the court file under seal is clearly in the interests of justice; and (3) that those interests are not outweighed by the public's interest in knowing the record. The law further requires the court to seal the record in certain circumstances.

### **Proposed Legislation**

Illinois has several bills under consideration in the legislature regarding rights of tenants who occupy a foreclosed property:

- House Bill 3062, introduced on February 23, 2011, amends the Landlord and Tenant Act

and provides that a landlord shall make a good faith effort in writing to timely disclose to all tenants following, or in anticipation of, a significant change concerning the leased property is the subject of a foreclosure action, the control of the property has changed or will change; and that the tenant may terminate, without penalty, the lease upon 90 days' written notice. The amendment also provides that a landlord shall make a good faith effort to disclose in a timely manner to each prospective tenant who is considering leasing premises that the property (1) is the subject of a foreclosure action; (2) is for sale or has been sold; or (3) will be under different management. (H.B. 3062, 97th Gen. Assemb., Reg. Sess. (Ill. 2011)).

- House Bill 6113, approved by the House on March 26, 2010, would create the Foreclosed Home Receiver License Act and would license receivers of a home foreclosed on by a bank mortgagee. Upon possession of a foreclosed home, licensed receivers would be required to preserve all personal property of the mortgagor or former occupant, with certain exceptions, for at least 30 days, unless the mortgagor or occupant releases his or her claim to the property in writing before then. The receiver must post a public notice containing certain specified information related to how the personal property may be reclaimed. Additionally, it delegates to the Department of Financial and Professional Regulation administration of the Act, and it sets forth powers and duties of the Department, licensure requirements, grounds for discipline, civil and criminal penalties for violation of the Act, and administrative procedure. A similar bill, S.B. 3811, was also introduced in the Senate. (H.B. 6113, 96th Gen. Assemb., Reg. Sess. (Ill. 2010)).
- House Bill 5852, introduced on February 10, 2010, would govern the conditions under which a mortgagor may remain in possession pre-judgment, through judgment until 30 days after sale confirmation and thereafter. It would also prohibit a mortgagee, assignee of a mortgagee, mortgagee-in-possession, receiver or holder of a certificate of sale or deed, or purchaser who fails to file a supplemental petition under provisions of the Illinois Mortgage Foreclosure Law concerning possession during the pendency of a mortgage foreclosure, from filing a forcible entry and detainer action against an occupant of the mortgaged real estate, until 90 days after a notice of intent to file such action has been properly served upon the occupant. Tenants current on their lease are permitted to stay until the end of the lease or 120 days, whichever is shorter. (H.B. 5852, 96th Gen. Assemb., Reg. Sess. (Ill. 2010)). A similar bill, S.B. 3562, was also introduced in the Senate. (H.B. 6113, 96th Gen. Assemb., Reg. Sess. (Ill. 2010)).
- Senate Bill 3962, introduced Nov. 4, 2010, would place a moratorium on all pending residential real estate foreclosures, subject to a review by the state Attorney General (AG) regarding the lenders' practices. It would also create an office to monitor foreclosures in the AG's office.

### **Comparison with the Protecting Tenants at Foreclosure Act**

The PTFA is generally more protective of tenants' rights in foreclosure than is Illinois state law with respect to advance notice required before a tenant can be forced to vacate the property and the potential for a tenant to remain until the expiration of the lease term even after foreclosure. Under Illinois law, during the foreclosure proceedings or for 90 days after the confirmation of

sale, the mortgagee-in-possession, receiver, or new owner may file a supplemental petition for possession with the court. The tenant gets 21 days' notice before the hearing on the supplemental petition (this may happen before the confirmation of sale, though, so does not necessarily extend the time the tenant can continue to occupy the premises). Any order of possession resulting from the hearing must allow the occupant to remain for the shorter of (but in no event less than 30 days): (1) 120 days from the date of the *notice* of the supplemental petition, or (2) the length of their lease. (735 Ill. Comp. Stat. 5/15-1701). In the event that no supplemental petition is filed, no action for detainer can be brought against the occupant without at least 90 days' notice of the intention to file such an action. Thus, because the clock starts upon notice of the petition, not its outcome, under Illinois law -- and absent the PTFA -- a tenant could be given a notice period that is shorter than 90 days where notice of the supplemental petition is provided and the lease has less than 90 days left. (*Id.*). As a result, advocates in Illinois are taking the position that the PTFA preempts the supplemental petition procedure entirely prior to the transfer of title and, after the transfer, that the PTFA preempts state law to the extent that the PTFA provides longer timelines.

## **INDIANA**

### **New State Laws**

None noted.

### **Proposed Legislation**

None noted.

### **Comparison with the Protecting Tenants at Foreclosure Act**

The PTFA is generally more protective of tenants' rights in foreclosure than is Indiana state law with respect to advance notice required before a tenant can be forced to vacate the property and the potential for a tenant to remain until the expiration of the lease term even after foreclosure. Indiana does provide, however, that a tenant's leasehold interest, at least in the commercial context, will not be terminated by foreclosure where that tenant is not made a party to the foreclosure proceeding. (*Myers v. Leedy*, 915 N.E.2d 133, 137 (Ind. 2009) (lessee worked farmland claimed in breach of contract dispute; no notice of action given); see *Como, Inc. v. Carson Square, Inc.*, 648 N.E.2d 1247 (Ind. Ct. App. 1995), *aff'd* by an equally divided court 689 N.E.2d 725 (Ind. 1997) (lessee made substantial improvements to commercial property; no notice given)). Indiana courts have declined to rule on tenants' protections if they are joined as parties of the foreclosure proceedings, but have noted that in that situation the tenant would receive the PTFA's protections. (*Myers v. Leedy*, 915 N.E.2d 133, 139 (Ind. 2009)).

### **Notes from the Field**

In *Myers v. Leedy*, 915 N.E.2d 133 (Ind. 2009), the Supreme Court of Indiana held that "a tenant's leasehold interest in property survives a forfeiture or foreclosure action to which the tenant was not made a party where the vendor/mortgagee knew or upon reasonable diligence should have known that a tenant was in possession of the property." 915 N.E.2d at 137. The

court further held that “the leasehold interest of a tenant in possession of property is not extinguished upon constructive notice of pending litigation involving the subject property.” *Id.* at 138-39 (noting that constructive notice was affected by the filing of a lis pendens notice in the property record). Finally, the court acknowledged that its decision does not address the rights of a tenant in possession of property who has been joined as a party in a foreclosure action, but noted in that situation that the tenant would receive the protections provided by the PTFA.

## **IOWA**

### **New State Laws**

Legislation effective March 2, 2010 requires that a notice to quit (and certain other notices) must be served on the defendant/tenant by: (a) delivery evidenced by an acknowledgment of delivery that is signed and dated by a resident of the premises; (b) personal service pursuant to Iowa law; or (c) posting on the primary entrance door of the premises *and* mailing by both regular mail and certified mail to defendant/tenant (a posted notice must be posted within the applicable time period for serving notice and must include the date the notice was posted). (Iowa Code §§ 562A.29A, 648.3 (2010)). The old law allowed notice by personal service or by sending certified mail, whether or not the tenant signed a receipt for the notice.

### **Proposed Legislation**

None noted.

### **Comparison with the Protecting Tenants at Foreclosure Act**

The PTFA is generally more protective of tenants’ rights in foreclosure than is Iowa state law with respect to advance notice required before a tenant can be forced to vacate the property and the potential for a tenant to remain until the expiration of the lease term even after foreclosure. For example, under Iowa law, tenants can be evicted almost immediately (in some cases, after three days) by a new owner after a foreclosure sale (Iowa Code Ann. §§ 648.1(4), 648.3). Iowa law, however, arguably requires that a tenant be made a party to a foreclosure proceeding in order for the foreclosure to terminate his or her rights under the lease (Iowa Code Ann. §§ 646.2, 654.2D). Section 652.2D(4)(b) gives a borrower 30 days to cure default after which creditor may enforce its interest. Also, Iowa Code Ann. § 648.15 provides that 30 days peaceable possession by the occupant, with knowledge of the plaintiff, after the cause of action accrues, acts to bar to a forcible entry and detainer action but a creditor can proceed in an action for possession. Interrupting peaceable possession requires more than serving a notice to quit. (*Thomas v. Brodsack*, 215 N.W.2d 503 (Iowa, 1974); *Roshek Realty Co. v. Roshek Brothers Co.*, 249 Iowa 349 (Iowa, 1957); *Heiple et al. v. Reinhart*, 100 Iowa 525 (Iowa, 1897)).

## **KANSAS**

### **New State Laws**

None noted.

## **Proposed Legislation**

None noted.

## **Comparison with the Protecting Tenants at Foreclosure Act**

The PTFA is generally more protective of tenants' rights in foreclosure than is Kansas state law with respect to advance notice required before a tenant can be forced to vacate the property and the potential for a tenant to remain until the expiration of the lease term even after foreclosure. However, in Kansas, foreclosure is only effective against a tenant if the tenant is joined as a party to the foreclosure proceeding; otherwise, the tenant's leasehold interest continues unaffected by the foreclosure (*Citizens Bank & Trust v. Brothers Construction & Manufacturing, Inc.*, 18 Kan. App. 2d 704, 859 P.2d 394 (Kan. Ct. App. 1993), citing *Wheat v. Brown*, 3 Kan. App. 431, 43 Pac. 807 (1896)). Where a tenant is not joined as a party, both for tenancies of three month periods or less and for year-to-year tenancies (Kansas law is unclear about tenancies of between three months and one year), Kansas state law usually requires 30 days' written notice prior to the end of the lease term for either party to terminate (Kan. Stat. Ann. §§ 58-2504, 58-2505).

## **KENTUCKY**

### **New State Laws**

None noted.

### **Proposed Legislation**

None noted.

### **Comparison with the Protecting Tenants at Foreclosure Act**

There is no explicit state protection for tenants residing in a foreclosed property in Kentucky. As a result, the PTFA appears to be more protective of tenants' rights in foreclosure than Kentucky state law because the PTFA requires advance notice a tenant can be forced to vacate the property and because the PTFA generally allows a tenant to remain after foreclosure until the expiration of the lease term even after foreclosure. (*See* Ky. Rev. Stat. Ann. § 383.195; Ky. Rev. Stat. Ann. § 383.660).

## **LOUISIANA**

### **New State Laws**

None noted.

### **Proposed Legislation**

None noted.



## **Comparison with the Protecting Tenants at Foreclosure Act**

The PTFA is generally more protective of tenants' rights in foreclosure than is Louisiana state law with respect to advance notice required before a tenant can be forced to vacate the property and the potential for a tenant to remain until the expiration of the lease term even after foreclosure. Under Louisiana law, notice of foreclosure can follow one of two paths. First, if the sheriff serves written notice upon the tenant of the seized property (La. Code Civ. Proc. Ann. art. 2293), and the tenant does not vacate the premises on demand, the purchaser may have the court issue a writ of possession directing the sheriff to give the purchaser physical possession of the property (LSA-R.S. 13-4346), by use of force if necessary (La. Code Civ. Proc. Ann. art. 2501 & 325). Second, if the sheriff does not seize the property, the lessor (or his agent) may provide the tenant with written notice to vacate, which will allow the tenant to vacate the premises at least 5 days after the date of such notice (La. Code Civ. Proc. Ann. art. 4701). If the lease has a definite term, the notice to vacate may not be given more than 30 days before the expiration of the term. Nonpayment of rent will terminate a lease, though it is not clear whether an owner can use the five-day notice where a lease has a "definite term." (*Id.*).

## **MAINE**

### **New State Laws**

Public Law Chapter 566 LD 1790 was signed March 29, 2010 and incorporates the PTFA, providing that a bona fide tenancy may be terminated only according to the provisions of the PTFA, and also allows a tenant to deduct from rent the full cost associated with making necessary repairs to property in foreclosure if the landlord fails to maintain the property, except that the reasonable costs of compliance must not exceed two months' full rent. These rights exist while the foreclosure proceeding is pending or in which a foreclosure judgment has been entered. (Previously, a tenant was allowed to deduct such costs from rent only up to \$500 or half a month's rent.). This law went into effect in July 2010 (90 days from the date of the legislative session's adjournment, which was April 12, 2010). (Me. Rev. Stat. Ann. tit. 14, §§ 6001, sub-§1-A; 6026, sub-§10 (2010)).

A mortgagee foreclosing on a property by power of sale, which is allowed in certain cases where the mortgage is for a business or agricultural purpose, must provide notice to a residential tenant of that property if the mortgagee knows or should know by exercise of due diligence that the property is occupied as a rental unit. Notice must be given 21 days before exercise of the power of sale. Upon request from a mortgagee, the mortgagor or its representative in interest must provide the name, address and other contact information for any residential tenant. Notice to a residential tenant may be served on the tenant by sheriff or sent by first-class mail and registered mail to the tenant's last known address. The statute provides an optional model notice form. (Me. Rev. Stat. Ann. tit. 14, § 6203-A (effective June 15, 2009, with certain revisions effective February 24, 2010)).

In judicial foreclosure proceedings, after final judgment has been entered in favor of the mortgagee, the mortgagee must provide a copy of the foreclosure judgment to any residential tenant of the premises. Upon request from a mortgagee, the mortgagor shall provide the name, address and other contact information for any tenant. A tenant who receives written notice under

this section is not required to file any responsive pleadings and is entitled to receive written notice of all subsequent proceedings including all matters through and including sale of the property. The mortgagee must provide written notice to the tenant if the mortgagee knows or should know by exercise of due diligence that the property is occupied as a residential rental unit. The mortgagee must make two good-faith efforts to provide written notice to the tenant in person; if such efforts are unsuccessful, notice may be provided to a tenant by first-class mail and registered mail at the tenant's last known address. After providing the required notice, and upon expiration of Maine's 90-day redemption period, the mortgagee may institute an action for forcible entry and detainer (the procedures for which are described in § 6001). (Me. Rev. Stat. Ann. tit. 14, § 6322-A (effective June 15, 2009, with certain revisions effective February 24, 2010).)

### **Proposed Legislation**

None noted.

### **Comparison with the Protecting Tenants at Foreclosure Act**

Maine law imports the PTFA's protections as part of state law (Me. Rev. Stat. tit. 14, § 6001(1-A)). State law also provides certain rights that go beyond the scope of the PTFA, such as the right to deduct from rent the full cost of repairs to property in foreclosure where the landlord does not maintain the property (Me. Rev. Stat. tit. 14, § 6026, sub-§10).

## **MARYLAND**

### **New State Laws**

2009 Maryland Laws Ch. 614 (S.B. 842) and Ch. 615 (H.B. 776), which became effective May 19, 2009 require that a 45-day pre-foreclosure notice addressed to "all occupants" be sent to the address of the residential property at the time of filing an action to foreclose a mortgage or deed of trust on residential property. In addition, a notice of foreclosure sale addressed to "all occupants" must be sent to the address of the residential property not earlier than 30 days or later than 10 days before the foreclosure sale.

2009 Maryland Laws Ch. 149 (H.B. 640), which became effective July 1, 2009, gives county or municipal corporations the right to enact a local law requiring that notice be given to a county or municipal agency or official when an order to docket or a complaint to foreclose a mortgage or deed of trust is filed. Maryland law already required that after commencement of foreclosure but before sale of the property the seller had to give notice 15 days prior to sale to the county or municipal corporation, so Ch. 149 authorizes the county or municipal corporation to enact a local law that provides for an additional, earlier notice. If such a local law is enacted, the required notice must be within 5 days after filing an order to docket or a complaint and must include certain specific details.

2010 Maryland Laws Ch. 587 (S.B. 654) and Ch. 588 (H.B. 711), which became effective June 1, 2010, conform state law to the PTFA by providing that in most cases tenants with bona fide leases be permitted to remain in the property for the duration of their lease after foreclosure. The new law also provided that tenants be given at least 90 days' notice before they can be evicted

after a foreclosure sale.<sup>90</sup> Unlike the PTFA, which currently has a sunset date of 2014, there is no sunset date in the Maryland law. In addition, the bill provides that the 90-day notice to vacate has to be sent by first class and certified mail, has to state the legal basis for terminating the tenancy, and has to identify the date of the notice and the effective date of the termination of the tenancy.

Effective July 1, 2010, Md. R. 14-102 provides that, if a foreclosure purchaser is entitled to possession and the tenant refuses to move out, the purchaser may file a motion for judgment awarding possession of the property. The motion shall include averments, made to the best of the purchaser's knowledge, information, and belief, establishing either that the person in possession is not a "bona fide" tenant or that the notice required under the PTFA has been given and that the tenant has no further right to possession. If a notice pursuant to the PTFA is required, the purchaser shall state the date the notice was given and attach a copy of the notice as an exhibit to the motion.

2011 Maryland Laws Ch. 245 (S.B. 516) and Ch. 246 (H.B. 842) into law, which became effective July 1, 2011, prohibit a foreclosure sale purchaser from collecting rent payments from a bona fide tenant unless the purchaser: (1) conducts a specified reasonable inquiry concerning the occupancy of the residential property, including whether the tenant is "bona fide;" and (2) serves on each bona fide tenant a specified notice concerning rent payments.

### **Proposed Legislation**

Maryland introduced one bill in 2011, but it has since died.

### **Comparison with the Protecting Tenants at Foreclosure Act**

Maryland state law provides for protections for tenants in foreclosures that are largely in line with, and in some respects go beyond, the PTFA. Moreover, Maryland state law does not have the PTFA's 2014 sunset provision. Md. Code Ann., Real Prop. § 7-105.

## **MASSACHUSETTS**

### **New State Laws**

S.B. 2407, passed in 2010, added ch. 186A to the General Laws, "Tenant Protections in Foreclosed Properties." The law protects tenants in foreclosed properties from eviction without just cause, except if there is a binding purchase and sale contract for a bona fide third party to purchase the housing accommodation from a foreclosing owner. (Mass. Gen. Laws Ann. ch. 186A, § 2 (West 2012).)

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<sup>90</sup> While the PTFA determines rights as of the date of the "notice of foreclosure," such that bona fide leases entered into before the "notice of foreclosure" are protected, the Maryland bill determines rights as of the "transfer of legal title" such that bona fide leases entered into before "transfer of legal title" are protected. In other words in Maryland, all bona fide tenants who are in the property as of the date of the transfer of legal title are entitled to the notice period. (*See Curtis v. U.S. Bank Nat. Ass'n*, 2012 WL 3553316 (Md. August 20, 2012)).

## **Proposed Legislation**

None noted.

## **Comparison with the Protecting Tenants at Foreclosure Act**

The PTFA and Massachusetts law are each more protective of tenants' rights in foreclosure than the other, depending on the circumstances. With regard to the potential for a tenant to remain until the expiration of the lease term even after foreclosure, Massachusetts law prohibits eviction without just cause, even if the new owner wishes to use the property as a primary residence; until there is a binding purchase and sale agreement for a bona fide third party to purchase the property, a foreclosing owner cannot evict a tenant except for just cause. (Ch.186A, §2). (The PTFA allows eviction in the case of a new owner wishing to use the property as his primary residence.). However, under Massachusetts law, leases for an unexpired term for years or for a definite term will automatically be converted to tenancies at will upon foreclosure (except leases subsidized under state or federal laws, which are not affected by foreclosure). The new owner can then remove a tenant by terminating this tenancy with just 30 days' written notice. (Ch. 186 § 13). In comparison, the PTFA requires 90 days' notice and also provides that, with limited exceptions, a tenant may remain until the expiration of the lease term even after foreclosure. (Mass. Gen. Laws Ann. ch. 186, §§ 12-13A (West 2012); Mass. Gen. Laws Ann. ch. 186A, § 2 (West 2012)).

## **MICHIGAN**

### **New State Laws**

None noted.

### **Proposed Legislation**

Numerous bills in 2011 were introduced to protect tenants in foreclosure, either by requiring that notice regarding the foreclosure be provided to the tenant or indirectly by establishing moratoriums on all foreclosure actions.

- A bill providing for a one-year stay on actions to foreclose a mortgage or land contract for the sale of residential property in which a judgment of foreclosure has not been entered. The period for redemption in the case of sale would also be extended. (H.B. 4405, 96th Leg., Reg. Sess. (Mich. 2011)).
- A bill amending the Truth in Renting Act, Mich. Comp. Laws §§ 554.631 to 554.641, to require a rental agreement to contain a provision that a landlord must notify a tenant of any foreclosure actions being taken against the property within 30 days after the period of redemption has begun and again at least 30 days before conclusion of redemption. A landlord who leases property to a tenant during the redemption period would be required to give written notice to the tenant before entering into the lease agreement, stating that the property has been foreclosed on and identifying the number of days remaining in the redemption period. A landlord in violation of this section would be liable to the tenant for damages and for a civil infraction and fine up to \$500. (H.B. 4222, 96th Leg., Reg.

Sess. (Mich. 2011)).

### **Comparison with the Protecting Tenants at Foreclosure Act**

Under Michigan law, a foreclosure sale does not result in the immediate termination of the tenancy. The lease remains valid until the redemption period has ended, typically after six months. (Mich. Comp. Laws. Ann. §§ 600.3240, 600.3140 (West 2012).) Although not completely settled, it has been argued that holdover tenants, once the redemption period has ended, have the right to a 30-day eviction notice before eviction proceedings can begin. A writ of restitution can issue 10 days after entry of judgment for possession. Ch. 600.5744(4). Assuming the 90-day notice afforded by the PTFA would commence once the six-month redemption period under Michigan law ends (and the landlord ceases to own the property), the PTFA would give Michigan tenants an additional 60 days' notice beyond the state law's 30-day (or one rental period) notice requirement. The PTFA may also provide more protection than state law in that, with limited 554.134 exceptions, the lease survives foreclosure. (Mich. Comp. Laws. Ann. §§ 554.134, 600.5714, 600.5716, 600.5741, 600.5744 (West 2012).)

### **MINNESOTA**

#### **New State Laws**

2009 Minn. Laws Ch. 130, effective August 1, 2009, amended, Chapter 580 of the Minnesota Statutes (Mortgages; Foreclosure by Advertisement), including Minn. Stat. § 580.07. It requires the occupant of a property subject to foreclosure be notified of the postponement of a foreclosure sale and the rescheduled date of the sale.

2010 Minn. Laws Ch. 315, effective August 1, 2010, amended Section 504B of the Minnesota Statutes (Eviction Actions; Grounds; Retaliation Defense; Combined Allegations). Some effective dates were extended in amendments adopted in 2012. (2011 Minn. Laws Ch. 132). The amended Minn. Stat. § 504B.285 provided that holdover tenants in a foreclosed residential property subject to an eviction action commenced on or before December 31, 2014 have a right to 90 days' notice to vacate which starts only after expiration of the time for redemption. The tenant must be a tenant during the redemption period under a lease that began after the mortgage was executed but *before* the expiration of the redemption period and have abided by the lease terms. For evictions commenced on or before December 31, 2014 where a bona fide lease extends more than 90 days beyond the expiration of the redemption period, a tenant in good standing may occupy the property for the duration of the lease and be provided at least 90 days' notice to vacate (effective no sooner than the date the lease expires). However, there is an exception to this broad tenant right: if the successor in interest or a bona fide purchaser intends to occupy the unit as a primary residence, the tenant has only 90 days to vacate, once notice has been provided, which can be given 90 days after the date of expiration of the time for redemption.

For an eviction action commenced on or before December 31, 2014 where the person holding over is a tenant in a foreclosed property *subject to a contract for deed*, and the person was the tenant during the time for termination of the contract to convey the property under a lease that began after the contract for deed was executed but prior to the expiration of the time for

termination, the tenant is entitled to two months' notice to vacate, provided the tenant abides by the terms of the lease. Such notice shall be given no sooner than one month after the expiration of the time for termination. Alternatively, a tenant can break the lease and vacate without liability, even if the contract is reinstated. Minn. Stats. § 504B.285(1)(b).

For evictions commenced on or after January 1, 2015 (for both mortgage foreclosures and foreclosures of property subject to a contract for deed), the person entitled to the property may recover possession from a holdover tenant who was a tenant under a lease during the redemption or termination period, the rules follow procedures similar to tenants in a property subject to a contract for deed. Eviction can occur so long as the tenant receives two months' written notice to vacate no sooner than one month after the expiration of the time for redemption or termination so long as the tenant abides by all the terms of the lease. Alternatively the tenant can break the lease without liability even if the mortgage is redeemed or the contract is reinstated. Minn. Stats. § 504B.285(1)(b); S.B. 1272, 87th Leg., Reg. Sess. (Minn. 2011); H.B. 1515, 87th Legis., Reg. Sess. (Minn. 2011).

2010 Minn. Laws 237, effective May 15, 2010, amended, Section 580 of the Minnesota Statutes 2009 Supplement. The amended Minn. Stat. Supp. § 580.07 grants a mortgagor postponement of a foreclosure sale for five months if the original redemption period was six months, and for 11 months if the original redemption period was 12 months if the property to be sold is classified as a homestead and contains one to four dwelling units,

### **Local Laws**

Minneapolis Code of Ordinances 244.265 requires Minneapolis tenants to receive written notice within seven days of the landlord's receipt of notice of a mortgage foreclosure sale or contract for deed cancellation. A landlord with knowledge of a foreclosure sale must notify a prospective tenant of that fact, including the date on which the mortgagor's redemption period ends. Notice must be given by personal service with affidavit of service by a third party, or by certified mail, return receipt requested. Violations of the ordinance are punishable as a misdemeanor. (Minneapolis Code of Ordinances § 244.265 (2009).)

### **Comparison with the Protecting Tenants at Foreclosure Act**

Under Minnesota law, mortgage foreclosure does not immediately terminate a tenancy. In a typical mortgage foreclosure, the tenant can remain until expiration of the redemption period, which is usually six months. (Minn. Stat. §§ 580.023, 582.032, 582.32 (2012)). Where an eviction action commenced on or before December 31, 2014, Minnesota provides the same protections as the PFTA, requiring successors in interest to honor the full term of a bona fide tenant's lease (unless a new owner plans to occupy the property as a primary residence), and requires 90 days' notice to tenant to vacate and provides for it to be effective 90 days after the date of the expiration of the time for redemption. On or after January 1, 2015, where a tenant's lease (of any duration) was entered into after the execution date of the mortgage or contract for deed but before the expiration of the redemption or termination period, before commencing an eviction action the new owner must give at least two months' written notice to vacate to the tenant (1) no sooner than one month after the termination period ends, or (2) no later than the end of the termination period, if the notice states that the tenant will not be held liable for breach by

leaving the premises if the mortgage is redeemed or the contract reinstated. Despite these complicated provisions, the protections to tenants will continue to be comparable to those under the PTFA. (Minn. Stat. § 504B.285 (2012)).

Prior to the actual foreclosure, also, Minnesota law requires the foreclosing party give tenants notice of the foreclosure action, and landlords who have received a notice of default to disclose the notice in writing to any prospective tenant prior to signing a lease with them. (Minn. Stat. §§ 580.042, 504B.151 (2012)).

## **MISSISSIPPI**

### **New State Laws**

None noted.

### **Proposed Legislation**

None noted.

### **Comparison with the Protecting Tenants at Foreclosure Act**

The PTFA is more protective of tenants' rights in foreclosure than is Mississippi state law with respect to advance notice required before a tenant can be forced to vacate the property and the potential for a tenant to remain until the expiration of the lease term even after foreclosure. , Mississippi law does not address the rights of tenants in foreclosure, and as such, tenants can be required to vacate by the new owner after a foreclosure sale with little or no notice, as compared to the 90 days' notice provided for by the PTFA. (Miss. Code Ann. § 89-8-17). Mississippi does provide for 30 days' notice to correct when terminating a tenancy for material noncompliance with the lease. This period is unlikely to apply, however, because there is no noncompliance in the foreclosure context, and no rationale for a 30 day remedial window. However, a tenant could refuse to pay and thereby conceivably trigger the 30-day window (Miss. Code Ann. § 89-8-13). Additionally, the PTFA provides that, with limited exceptions, a tenant may remain until the expiration of the lease term even after foreclosure. (Miss. Code Ann. §§ 89-8-1–69 (West 2011)).

## **MISSOURI**

### **New State Laws**

House Bill 836, effective July 10, 2009, enacted a Missouri Revised Statutes Section 534.030. Section 534.030 requires that where a foreclosed property is lawfully occupied by a tenant in good standing, eviction cannot begin until 10 business days after notice that the foreclosure sale occurred. The new owner of the property must provide the tenant with written notice of the foreclosure sale, that he or she is the new owner, and (if the new owner seeks possession) that the tenant has 10 business days from the notice to vacate the property.

The notice must be sent by mail and must be posted on the door of the premises where the tenant resides.

## **Proposed Legislation**

S.B. 554 (, 96th Gen. Assem., 2d Reg. Sess. (Mo. 2012).)) would give a tenant 90 business days rather than 10 business days after notice of the foreclosure sale to vacate the premises under § 534.030.

## **Comparison with the Protecting Tenants at Foreclosure Act**

The PTFA is more protective of tenants' rights in foreclosure than is Missouri state law with respect to advance notice required before a tenant can be forced to vacate the property and the potential for a tenant to remain until the expiration of the lease term even after foreclosure. Under Missouri law, tenants can be given as little as 10 business days' notice to vacate by the new owner after notice of a foreclosure sale, after which the new owner can commence an action for possession. In comparison, the PTFA requires 90 days' notice and also provides that, with limited exceptions, a tenant may remain until the expiration of the lease term even after foreclosure. (Mo. Ann. Stat. § 534.030 (West 2012).

## **MONTANA**

### **New State Laws**

None noted.

### **Proposed Legislation**

None noted.

### **Comparison with the Protecting Tenants at Foreclosure Act**

The PTFA is more protective of tenants' rights in foreclosure than is Montana state law with respect to advance notice required before a tenant can be forced to vacate the property and the potential for a tenant to remain until the expiration of the lease term even after foreclosure. Under Montana law, the purchaser at a trustee's sale is entitled to possession of the property 10 days following the sale, and any tenants remaining in possession after that date are deemed tenants at will. The purchaser may remove a tenant at will by giving written notice informing the tenant to remove from the premises within a period to be specified in the notice (but which may not be less than 1 month). In comparison, the PTFA requires 90 days' notice and also provides that, with limited exceptions, a tenant may remain until the expiration of the lease term even after foreclosure. (Mont. Code Ann. § 70-24-429 (2012); Mont. Code Ann. § 70-24-441 (2012); Mont. Code Ann. § 71-1-319 (2012)).

## **NEBRASKA**

### **New State Laws**

None Noted.



## **Proposed Legislation**

None noted.

## **Comparison with the Protecting Tenants at Foreclosure Act**

The PTFA is more protective of tenants' rights in foreclosure than is Nebraska state law with respect to the potential for a tenant to remain until the expiration of the lease term even after foreclosure. Under Nebraska case law, it appears that foreclosure immediately terminates the lease as a lessee of real estate cannot acquire any greater interest in a property than that held by the landlord (*see Schrunk v. Andres*, 221 Minn. 465, 22 N.W.2d 548 (1946). *But see Kleven v. Brunner*, 429 N.W.2d 384, 386 (1988) (giving conflicting statements as to whether a lease survives foreclosure)

In addition, tenants can be required to vacate after a foreclosure sale under Nebraska law with substantially less notice than the 90 days provided by the PTFA. Under Nebraska law, after a foreclosure, the new owner may proceed against the tenant either as a trespasser or a tenant. *Schrunk v. Andres*, 221 Minn. 465, 22 N.W.2d 548 (1946). If proceeding as a trespasser, the tenant must give a notice to leave the premises at least 3 days before the commencement of the action. Once commenced, the trial on an action for possession must occur between 10 and 14 days after the issuance of the summons. If the court rules against the tenant, the court may issue a writ of restitution directing the sheriff to deliver possession within at most 10 days. (Neb. Rev. Stat. §§ 25-21,219 *et seq.*).

If proceeding as a tenant, the procedure is substantially the same, though, no notice to leave is required and, if the court rules against the tenant, an appeal will stay the writ of restitution, provided the tenant posts a sufficient bond (Neb. Rev. Stat. §§ 76-1441 – 1447).

## **NEVADA**

### **New State Laws**

Effective October 1, 2009, 2009 Nev. Stat. 484 provides that notice of sale must be posted on the property and mailed to tenants/subtenants within three business days after a public notice of sale is given pursuant to Nev. Rev. Stat. § 21.130 (2009). Moreover, the law provides that the new owner cannot evict tenants before a specified notice period expires (the lease will still be in effect during the notice period). For periodic tenants with a period less than one month, the notice period is the number of days in the period; and for other periodic tenants the notice period is 60 days. Finally, the law requires the landlord to inform a prospective tenant in writing if the property to be leased is the subject of foreclosure proceedings.

## **Proposed Legislation**

None noted.

## **Comparison with the Protecting Tenants at Foreclosure Act**

The PTFA is more protective of tenants' rights in foreclosure than is Nevada state law with

respect to advance notice required before a tenant can be forced to vacate the property and the potential for a tenant to remain until the expiration of the lease term even after foreclosure. The PTFA requires 90-days' notice prior to requiring a tenant to vacate the property, which is longer than the 60-day period provided for tenancies periodic tenancies of one month or more under current Nevada state law (Nev. Rev. Stat. § 40.255(2)). For all periodic tenancies with a period of less than one month, the notice requirement is simply the number of days in the period. (Nev. Rev. Stat. § 40.255(2)). Nev. Rev. Stat. § 21.130(3) requires that tenants be given notice of their rights in foreclosure, which goes beyond the scope of the PTFA.

## **NEW HAMPSHIRE**

### **New State Laws**

None noted.

### **Proposed Legislation**

None noted.

### **Comparison with the Protecting Tenants at Foreclosure Act**

The PTFA is more protective of tenants' rights in foreclosure than is New Hampshire state law with respect to advance notice required before a tenant can be forced to vacate the property and the potential for a tenant to remain until the expiration of the lease term even after foreclosure. Under New Hampshire law, tenants can be required to vacate after a foreclosure sale with substantially less notice than the 90 days provided by the PTFA. N.H. Rev. Stat. Ann. § 540:3 provides that 30 days' notice is sufficient in all cases. (Although certain articles have stated that New Hampshire is considered to be a "just cause" eviction state where foreclosure would not necessarily provide grounds for eviction, we have been told by local advocates that in practice tenancies can be terminated as a result of a foreclosure.)

## **NEW JERSEY**

### **New State Laws**

Effective February 16, 2010, N.J. Stat. Ann. § 2A:50-70 (2009) provides that the new owner of foreclosed residential property must give written notice to tenants about the change of ownership and the tenants' right to remain in the property no later than 10 business days after the transfer of title. (Under pre-existing New Jersey law, foreclosure is not a valid basis for eviction.) The statute also requires the new owner to give the same notice to tenants again when they communicate with the tenants, verbally or in writing, to induce them to vacate.

Effective February 16, 2010, N.J. Stat. Ann. § 2A:50-71 (2009) provides that the new owner of foreclosed residential property (or his agents) cannot induce tenants of the property to vacate except with a bona fide monetary offer. The tenants shall have five business days to decide whether to accept or reject the offer. The statute specifically prohibits the new owner from misrepresenting the tenants' rights, taking harassing action such as cutting off utilities, or unlawfully increasing the rent.

Effective November 17, 2009, the New Jersey Supreme Court amended the state court rules to require that, before entry of judgment in a foreclosure matter, the plaintiff must serve on all tenants a notice of tenants' rights during foreclosure, and also that a notice of sale posted on the property must be accompanied by the notice of tenants' rights during foreclosure. The form of the notice is specified in Appendix XII-K to the court rules; the notice must inform tenants of their right to stay in the property.

### **Proposed Legislation**

- A bill mandating that an individual who takes title to a property through foreclosure must permit any tenant to remain in the property for 90 days prior to filing a complaint for eviction, provided that the tenant continues to pay all rent due pursuant to the lease with the prior owner during this 90-day period. Current law allows for the removal of a tenant if the owner of the property seeks to personally occupy the residence or seeks to convert the residence to a nonresidential use. (A.B. 1124, 214th Leg., Reg. Sess. (N.J. 2011).)
- A bill requiring an individual or entity that takes possession of a residential property through foreclosure to provide any tenant in the property with relocation assistance equal to six months of rental payments if the tenant is being removed as the result of an illegal occupancy. This bill would impose on a new owner the same obligation to the tenant as would be imposed on the original landlord if the tenant were forced to leave the property as the result of an illegal tenancy. (S.B. 665, 215th Leg., Reg. Sess. (N.J. 2012).)

### **Comparison with the Protecting Tenants at Foreclosure Act**

New Jersey generally permits evictions of tenants only for good cause, and foreclosure does not qualify as good cause (N.J. Stat. Ann. § 2A:18-61.3(b); *Chase Manhattan Bank v. Josephson*, 638 A.2d 1301, 1314 (N.J. 1994)). Therefore, New Jersey state law typically provides the equivalent or more protection than the PTFA with respect to the rights of tenants to remain in their property following foreclosure. (Residential tenants in owner-occupied homes with not more than 2 rental units, however, are not protected by the good cause requirement. N.J. Stat. Ann. § 2A:18-61.1). N.J. Stat. Ann. § 2A:50-70 requires that tenants be notified of their rights in foreclosure, which goes beyond the scope of the PTFA.

## **NEW MEXICO**

### **New State Laws**

None noted.

### **Proposed Legislation**

None noted.

### **Comparison with the Protecting Tenants at Foreclosure Act**

New Mexico state law appears not to offer any specific protections for tenants in foreclosure. The PTFA is more protective of tenants' rights in foreclosure than is New Mexico state law with respect to advance notice required before a tenant can be forced to vacate the property and the

potential for a tenant to remain until the expiration of the lease term even after foreclosure. New Mexico state law does not specifically address tenants' rights in foreclosure but generally provides that landlords must give written notice of material noncompliance with lease within 30 days of breach and then must provide a seven day cure period for tenant to correct the noncompliance. In the case of nonpayment of rent, a tenant has three days after the landlord gives notice of nonpayment before the tenant can be evicted. (N.M. Stat. 47-8-33). How these notice periods would translate to a foreclosure context is unclear from the statute. However, under Uniform Owner-Resident Relations Act, a court may apply equitable principles to prevent eviction of a qualified indigent tenant of public housing even if the tenant has been adjudged liable for back rent. (N.M. Stat. 47-8-33; *City of Albuquerque v. Brooks*, 114 N.M. 572, 844 P.2d 822 (N.M., 1992)).

## **NEW YORK**

### **New State Laws**

N.Y. Real Prop. Acts § 1303 requires that the foreclosing party in a foreclosure action provide certain notice to any tenant of a dwelling unit, in addition to the mortgagor. (N.Y. Real Prop. Acts § 1303(1)(b)). The notice must be delivered to the tenant within 10 days of service of the summons and complaint, and must be in bold and on different colored paper than the summons and complaint. The text of the required notice is specified in the statute; among other things, it must inform the tenant that he or she may be able to remain in possession until the end of the lease term or, if there is no lease, until 90 days after the new titleholder provides a notice to vacate. The notice also states that tenants in rent-controlled or subsidized housing may have other rights. (*Id.* § 1303(4) & (5)).

The law allows bona fide tenants in foreclosure to occupy the property for the greater of 90 days from the date the successor in interest mails a required notice or until the end of the lease term (provided that the successor in interest does not intend to occupy a single unit of the dwelling as his primary residence, in which case tenant occupation of the property will be limited to 90 days unless the property is covered by a state or federal statutory scheme or system). (*Id.* § 1305(2)). During this period, the tenancy shall continue on the same terms and conditions as existed before the foreclosure sale. (*Id.*) The successor in interest is required to provide written notice to all tenants informing them of their rights to remain in the property as stated above, and providing them with the name and address of the new owner. (*Id.* § 1305(3)).

The law also notes that the new protections are in addition to any rights possessed by (1) a tenant who is not made a party to a foreclosure action, (2) a tenant in subsidized housing, or (3) a tenant in a rent-controlled/stabilized unit. (*Id.* § 1305(5)).

Under N.Y. Real Prop. Acts § 1303, a plaintiff in a foreclosure action who obtains a judgment of foreclosure and sale relating to property that is abandoned by the mortgagor but occupied by a tenant is required to maintain the property until ownership has been transferred through the closing of title in foreclosure or other disposition and the deed recorded. (*Id.* § 1307).

On August 13, 2010, the Governor signed A.B. 10226/S.B. 7139 into law. This new law amends the provisions requiring notice of foreclosure to tenants. The law extends the notice requirement to all rent-stabilized and rent-controlled tenants. The notice must include the name, address and

telephone number of the foreclosing party. The law makes clear that the rights of rent-controlled and rent-stabilized tenants are not affected when their building enters foreclosure.

### **Proposed Legislation**

There have been many bills introduced in the New York legislature pertaining to tenants' rights in foreclosure, including:

- A bill providing a one-year moratorium on foreclosures. (A.B. 1597, 234th Leg., Reg. Sess. (N.Y. 2011))
- A bill mandating notice to tenants before any mortgagee can accelerate the maturity of a mortgage obligation, commence legal action including mortgage foreclosure or take possession of any security for such mortgage obligation. The notice is required to provide information about the availability of foreclosure prevention assistance from the state to prevent foreclosure. (A.B. 3538, 234th Leg., Reg. Sess. (N.Y. 2011).)
- A bill granting relocation costs to tenants required to vacate a foreclosed property prior to the termination of his or her lease. These costs are generated from the proceeds of the foreclosure sale and may not exceed \$1,500 per lessee. (S.B. 3589, 234th Leg. Sess. (N.Y. 2011); A.B. 3661, 234th Leg., Reg. Sess. (N.Y. 2011).)
- Bills sealing eviction records when a leased property was foreclosed upon and prohibiting disclosure of any such information relating to a tenant. (S.B. 3588, 234th Leg. Sess. (N.Y. 2011); A.B. 3996, 234th Leg., Reg. Sess. (N.Y. 2011).)
- A bill expanding the definition of "tenant" for purposes of notice of foreclosure to any person who appears as a lessee on a lease or who is a party to an oral or implied rental agreement with the mortgagor. (S.B. 1520, 234th Leg., Reg. Sess. (N.Y. 2011).)
- A bill providing special protections to tenants of properties that have been foreclosed. (S.B. 6297, 233d Leg. Sess. (N.Y. 2010); A.B. 1363, 233d Leg., Reg. Sess. (N.Y. 2010).)
- A bill requiring the prevailing party in a foreclosure action to maintain the property in a safe and habitable condition and allowing municipalities to enforce this section. (S.B. 1182, 233d Leg. Sess. (N.Y. 2010); A.B. 5358, 233d Leg., Reg. Sess. (N.Y. 2010).)

### **Comparison with the Protecting Tenants at Foreclosure Act**

Both the federal PTFA and New York law require a 90-day notice to vacate for tenants, and in certain cases permit tenants to remain in the foreclosed property for the greater of 90 days after notice to vacate following foreclosure or the end of the lease term. (N.Y. Real Prop. Acts § 1305(2)). New York law, however, provides certain additional protections for tenants compared to the federal law. For example, New York law requires the foreclosing mortgagee to maintain the property after the judgment of foreclosure but prior to sale.

Note that one court in New York has held that the PTFA only protects tenants in HUD, FHA or other federally-related properties, and does not cover tenants in non-federally related properties. *See Collado v. Boklari*, 892 N.Y.S.2d 731 (N.Y. Dist. Ct. Nov. 9, 2009).

## **Notes from the Field**

One New York public interest attorney noted that, while the 2009 revisions to N.Y. Real Prop. Acts Article 13 have had some favorable effect, there have been new challenges with respect to the maintenance of foreclosed rental properties. Steven J. Baum, PC, the largest foreclosure law firm in New York, closed its doors in 2011. Since that time, it has been difficult for municipal housing code offices to find a responsive entity to deal with. Further, there have been reports that banks are purposefully delaying seeking foreclosure judgments on rental properties, thus avoiding the maintenance obligation.

## **NORTH CAROLINA**

### **New State Law**

None noted.

### **Proposed Legislation**

None noted.

### **Comparison with the Protecting Tenants at Foreclosure Act**

The PTFA is more protective of tenants' rights in foreclosure than is North Carolina state law with respect to advance notice required before a tenant can be forced to vacate the property and the potential for a tenant to remain until the expiration of the lease term even after foreclosure. Under North Carolina law, tenants did not generally have specific rights in the context of a foreclosure with two exceptions. First, upon receiving notice of foreclosure, tenants residing in buildings of 15 or fewer rental units have the right to terminate their leases early upon 10 days' written notice to the landlord. (N.C. Gen. Stat. §§ 42-45.2, 45-21.16A). Second, with respect to notice to the tenants, tenants residing in buildings of 15 or fewer units must receive 10 days' written notice and tenants residing in buildings with more than 15 units must receive 30 days' notice. (N.C. Gen. Stat. § 45-21.29(k)(5)).

## **NORTH DAKOTA**

### **New State Laws**

Effective August 1, 2009, N.D. Cent. Code § 33-06-01 (regarding evictions) was repealed and recodified under N.D. Cent. Code § 47-32-01, but there was no change to the substantive content of the law regarding eviction or tenant rights.

### **Proposed Legislation**

None noted.

## **Comparison with the Protecting Tenants at Foreclosure Act**

The PTFA is more protective of tenants' rights in foreclosure than is North Dakota state law with respect to advance notice required before a tenant can be forced to vacate the property and the potential for a tenant to remain until the expiration of the lease term even after foreclosure. North Dakota state law appears not to offer any specific protections for tenants in foreclosure. N.D. Cent. Code § 47-32-02 requires only 3 days' notice before eviction proceedings begin.

## **OHIO**

### **New State Laws**

None noted.

### **Proposed Legislation**

The Ohio legislature recently introduced a bill pertaining to tenants' rights in foreclosure.

Under House Bill 181, residential rental agreements would need to include a provision detailing the landlord's notice obligations in the event of foreclosure. The proposed law also provides that, upon the confirmation of a foreclosure sale, the successor in interest to the property shall be the landlord under the rental agreement. On the date that the foreclosure sale is confirmed, the tenant's current agreement is converted into a month-to-month rental agreement. A tenant may recover the greater of actual damages or one month's rent if a landlord or successor in interest fails to (1) honor the rental agreement or (2) does not provide the notice required by law. (H.B. 181, 129th Gen. Assemb., Reg. Sess. (Ohio 2011).)

## **Comparison with the Protecting Tenants at Foreclosure Act**

The PTFA is more protective of tenants' rights in foreclosure than is Ohio state law with because the PTFA requires advance notice required before a tenant can be forced to vacate the property and because the PTFA generally allows a tenant to remain even after foreclosure until the expiration of the lease term. Though Ohio has no laws specifically addressing the rights of tenants in the case of a landlord's foreclosure, tenants can be required to vacate within 3 days after a foreclosure sale, if one of several things has already occurred, including the lease term has expired, the tenant has failed to pay rent or the proper notice of termination of the lease (7 days for week-to-week leases and 30 days for month-to-month leases) has occurred. This contrasts with the 90 days provided by the PTFA. (Ohio Rev. Code Ann. § 1923.02, 1923.04, 5321.17).

### **Notes from the Field**

According to one public interest attorney, court enforcement of the PTFA in Ohio remains uneven. This is particularly true where the tenant is not aware of his or her rights, and therefore does not raise a PTFA defense. One attorney from an Ohio legal services organization noted that this often occurs; and, as a result, tenants frequently abandon rental property under the mistaken assumption that the foreclosure will ultimately force them from their home. These foreclosure-related vacancies have had a devastating impact on low-income, inner-city neighborhoods in

Ohio with high concentrations of racial and ethnic minorities. *See generally The Cost of Vacant and Abandoned Properties to Eight Ohio Cities*, COMTY. RESEARCH PARTNERS/REBUILD OHIO, [http://communityresearchpartners.org/uploads/publications/FullReport\\_Nonembargoed.pdf](http://communityresearchpartners.org/uploads/publications/FullReport_Nonembargoed.pdf) (last visited Apr. 5, 2012).

At least one court – the Cleveland Municipal Court Housing Division – does, however, enforce *sua sponte* the PTFA rights of tenants

## **OKLAHOMA**

### **New State Laws**

None noted.

### **Proposed Legislation**

One bill introduced in the Oklahoma legislature pertains to tenants' rights in foreclosure:

- House Bill 1689 outlines procedures where the property subject to foreclosure proceedings has been vacated or abandoned. The proposed law would permit the mortgagee to take possession of the property in certain circumstances and exempt it from liability for the dispossession of the mortgagor or tenant. A tenant would have the right to object during litigation determining whether to allow the mortgagee to occupy the property. (H.B. 1689, 53d Leg., 1st Reg. Sess. (Okla. 2011).

### **Comparison with the Protecting Tenants at Foreclosure Act**

The PTFA is generally more protective of tenants' rights in foreclosure than is Oklahoma state law with respect to advance notice required before a tenant can be forced to vacate the property and the potential for a tenant to remain until the expiration of the lease term even after foreclosure. In the standard landlord/tenant context, Oklahoma law requires 7 (if tenancy is less than month to month) or 30 days' (in case of month-to-month tenancy) notice before a landlord may terminate the tenancy, depending on the length of the term (41 Okl. St. Ann. § 111). The lease could survive a foreclosure sale rather than be terminated under the execution order if the tenant intervenes in the judicial foreclosure proceeding to assert his or her lease rights and is successful (12 Okl. St. Ann. § 765). In this case, the tenant would be able to occupy the premises through the term of the lease, as similarly provided for under the PTFA. However, based on discussions with an Oklahoma legal aid attorney, most tenants do not have the knowledge or wherewithal to utilize the intervention procedure.

## **OREGON**

### **New State Laws**

Legislation modified Oregon statutes dealing with foreclosures and tenants' rights in 2009, 2010 and 2011. Many of these laws will sunset on January 1, 2015.



Or. Rev. Stat. § 86.750 now requires the trustee, on or before the date the trustee conducts the foreclosure sale, to record an affidavit indicating that he or she mailed the required notice to the grantor. Or. Rev. Stat § 86.750 also requires that a notice of foreclosure sale be served upon the occupant of the property at least 120 days before the trustee conducts the sale.

Or. Rev. Stat. § 86.755 provides that, when the property in a trustee's sale is a dwelling unit that a person holds under a tenancy created voluntarily by the grantor, the purchaser may obtain possession through the relevant judicial procedure if, after the sale, the purchaser terminates the tenancy in a written notice to the tenant. At least 60 days' notice must be provided for a fixed term tenancy, and at least 30 days' notice must be provided for a month-to-month or week-to-week tenancy or for a fixed term tenancy in cases where the purchaser intends to occupy the property as a primary residence. In any case, the tenant is only entitled to notice if the tenant gives the trustee of the property written evidence of his or her rental agreement at least 30 days before the date first set for the sale. The new law also provides time restrictions on initiating the possession procedure. (Or. Rev. Stat. § 86.755). It also provides for notice of sale requirements targeted at tenants. The notice of sale to tenants must include contact information for the Oregon State Bar as well as an organization or person who provides free legal services. (The form for the notice of sale is specified in the statute.) In addition, the notice must inform tenants' of their rights to stay in the unit following foreclosure for either 30 or 60 days after a notice to vacate, as well as the fact that federal law may provide for a longer notice period. (Or. Rev. Stat. § 86.745). The required notice is also to state that a tenant whose unit is in foreclosure may apply his or her security deposit or prepaid rent to the tenant's obligation to the landlord under the rental agreement, if the tenant so notifies the landlord in advance. The law states, however, that the purchaser at a trustee's sale is not to be considered a landlord (required to maintain the property) unless the purchaser accepts rent from the tenant, enters into a new rental agreement with the tenant, or fails to terminate the tenancy within 30 days after the date of the sale. (Or. Rev. Stat. § 86.755(7)).

Or. Rev. Stat. § 86.745 was amended in 2010 to require that additional information be provided to the tenant, including a notification about the specific protections of both the federal Protecting Tenants at Foreclosure Act and state law.

On August 8, 2011, the Governor signed S.B. 519 into law. This new law provides that the holder of an affordable housing covenant may purchase foreclosed property at a trustee's sale for the lesser of the total sum of obligations secured by the trust deed or mortgage of the property or the highest bid received for the property. (S.B. 519, 76th Leg., Reg. Sess. (Or. 2011) (enacted)).

Senate Bill 491, adopted June 23, 2011, modifies the requirements for notice of foreclosure and termination of tenancy for residential dwellings in advance of sale. The notice must include: (a) scheduled date of foreclosure; (b) rights of protection against eviction; (c) tenancy between time of notice and foreclosure sale; and (d) tenancy after foreclosure. The law also requires notice to be provided to tenants *after* foreclosure, including (a) a statement that the dwelling has been sold at foreclosure; (b) the date of foreclosure, the name and contact information of the purchaser; (c) information about the rights of tenants; and (d) contact information for the Oregon Bar and a person or organization that provides legal help to individuals at no charge to the individual. Finally, the law provides for the purchaser to take possession of a unit occupied by a tenant under certain circumstances: (1) upon the expiration of a fixed term tenancy, under certain

circumstances; or (2) at least 90 days after service of a written termination of notice if the tenancy is (a) a fixed term tenancy and the purchaser intends to occupy the unit as his or her primary residence or (b) a month-to-month or week-to-week tenancy. (S.B. 491, 76th Leg., Reg. Sess. (Or. 2011) (enacted)).

Senate Bill 293 was signed into law on May 16, 2011. This new law modifies the provisions regulating the negotiation of rental agreements and disclosure of rent and fees. Specifically, the law authorizes tenants to use security deposits or prepaid rent to make rental payments when the tenant receives notice of foreclosure of property that is the subject of the tenant's rental agreement. (S.B. 293, 76th Leg., Reg. Sess. (Or. 2011) (enacted)).\

### **Proposed Legislation**

None noted.

### **Comparison with the Protecting Tenants at Foreclosure Act**

The PTFA is more protective of tenants' rights in foreclosure than is Oregon state law with respect to advance notice for certain tenants. As under the PTFA, Oregon law mandates 90 days' notice before a tenant under a fixed term or month-to-month lease can be forced to vacate the property. However, unlike the PTFA, the state law may not protect individuals without a lease or with a lease that is terminable at will. However, individuals with a fixed lease term appear to be protected. (S.B. 293, 76th Leg., Reg. Sess. (Or. 2011) (enacted).) Courts will apply equitable principles in eviction cases. Oregon law does provide certain rights to tenants that go beyond the scope of the PTFA, including notice of sale requirements and required notices about the tenants' rights in foreclosure. (O.R.S. § 86.755).

## **PENNSYLVANIA**

### **New State Laws**

None noted.

### **Proposed Legislation**

In 2011, a bill intended to protect tenants in foreclosure was introduced. The bill would require a landlord to immediately notify all tenants in writing if a judgment of foreclosure or judgment pursuant to a tax sale is entered against the landlord. The bill also states that the property cannot be sold less than 90 days after notice to the tenants. (H.B. 1846, 195th Gen. Assem. (Pa. 2011).)

### **Comparison with the Protecting Tenants at Foreclosure Act**

The PTFA is more protective of tenants' rights in foreclosure than Pennsylvania state law because the PTFA requires advance notice before a tenant can be forced to vacate the property and because the PTFA generally allows a tenant to remain even after foreclosure until the expiration of the lease term. Though Pennsylvania has no laws specifically addressing the rights of tenants in the case of a landlord's foreclosure, where the lease term has expired or the tenant has breached the conditions of the lease, a tenant can be required to vacate with 15 days' notice

for a lease of one year or less, or 30 days' notice for leases longer than one year. (68 Pa. Stat. Ann. §250.501 (West 2012).) This contrasts with the 90 days' notice provided by the PTFA.

## **RHODE ISLAND**

### **New State Laws**

None noted.

### **Proposed Legislation**

Numerous bills have been proposed to protect tenants in foreclosure.

H.R. 7136 would allow eviction of tenants in foreclosed properties only for "just cause." Just cause includes, among other things: failure to pay rent; material violations of express or legal obligations or failure to cure the violation within 30 days; committing a nuisance in the unit; using the unit for any illegal purpose; for a tenant with an expired lease, failure to execute a written extension or renewal; refusing the foreclosing owner reasonable access to the unit; an owner's decision to board up the property after substantial housing violations. (H.B. 7136, Gen. Assem., Jan Sess. (R.I. 2012).)

A bill identical to H.B. 7136 was introduced into the Rhode Island State Senate. (S.B. 2212, Gen. Assem., Jan. Sess. (R.I. 2012).)

H.R. 5252 would allow a new owner to evict tenants after 60 days advance notice. It would also require a mortgagee to notify tenants of the date, time, and place of a foreclosure sale along with contact information for Rhode Island Legal Services and HUD approved counseling agencies in Rhode Island. Any successor in interest to a foreclosed mortgagor would be required to provide essential services such as heat, running water, hot water, electric or gas if the foreclosed mortgagor had provided said services prior to foreclosure. (H.B. 5252, Gen. Assem., Jan. Sess. (R.I. 2011).)

H.B. 6016, introduced in 2011, is similar to 2012's H.R. 7136, above, to require evictions based on "just cause" (H.B. 6016, Gen. Assem., Jan. Sess. (R.I. 2011).)

S.B. 344 would require a mortgagee to continue to provide essential services if the foreclosed mortgagor had provided said services prior to foreclosure. It also requires notice be provided to each tenant of the sale of the property and of Rhode Island legal services and HUD approved counseling services. Notice is a prerequisite to an action for possession of the premises. A bona fide tenant in a foreclosed property assumes a month to month periodic tenancy where the tenant has not otherwise entered into a written rental agreement with a homeowner or landlord with respect to the dwelling unit of mortgaged residential premises; in the latter case tenancy is assumed for the duration of the written agreement. (S.B. 344, Gen. Assem., Jan. Sess. (R.I. 2011).)

All of the foregoing bills are pending further legislative action.

## **Comparison with the Protecting Tenants at Foreclosure Act**

The PTFA is more protective of tenants' rights in foreclosure than is Rhode Island state law with respect to advance notice required before a tenant can be forced to vacate the property and the potential for a tenant to remain until the expiration of the lease term even after foreclosure. Under Rhode Island law, tenants generally have 20 days in which to answer a complaint for eviction for reasons other than nonpayment of rent. Failure to answer means the tenant has defaulted and the eviction process can commence. The PTFA also provides that, with limited exceptions, a tenant may remain until the expiration of the lease term even after foreclosure. (R.I. Gen. Laws § 34-18-38 (2012).)

However, the City of Providence ordinances may protect tenants in foreclosure beyond the scope of the PTFA. If a tenant entered into an oral or written rental agreement 30 days or more prior to the foreclosure, then the foreclosing mortgagee must maintain essential services, provide notice of the upcoming sale, information on where they can obtain legal and other counseling services, notice of the completed sale and information as to new owners and to whom rental payments should be made. Additionally, a bona fide tenant then assumes a month-to-month tenancy unless the tenant enters into a written rental agreement with the mortgagor. Provision of notices of the upcoming sale and the subsequent sale is a prerequisite to an action for possession of the premises against a tenant. (Providence, R.I., Code of Providence Ordinances, ch 13, art. X, §§ 13-218 to -220 (2009).)

### **Notes from the Field**

A Rhode Island legal aid attorney stated that Rhode Island law is unsettled with respect to the rights of tenants in foreclosure, specifically whether tenants after foreclosure become tenants at sufferance, entitled only to notice to vacate as specified by the bank (which reportedly could be as little as one day); or whether tenants are protected by the residential landlord-tenant act, which would permit them to stay until the end of their lease, or, if no lease, then for 30 days, before being required to vacate.

The attorney also noted a drop in foreclosure-related evictions after the enactment of the PTFA.

## **SOUTH CAROLINA**

### **New State Laws**

None noted.

### **Proposed Legislation**

On January 11, 2011, a bill pertaining to tenants in foreclosure was re-introduced to the South Carolina General Assembly; it provided that a preexisting rental agreement would not terminate upon the subsequent foreclosure of the landlord's mortgage. Instead, the purchaser of the foreclosed property would take that property subject to the rental agreement for the shorter of 12 months, or the end of the rental agreement. (H.B. 3231, 119th Gen. Assem. (S.C. 2011)). A previous version of this bill was introduced in 2009. (H.B. 3567, 118th Gen. Assem. (S.C. 2009).)

## **Comparison with the Protecting Tenants at Foreclosure Act**

The PTFA is more protective of tenants' rights in foreclosure than South Carolina state law because the PTFA requires advance notice before a tenant can be forced to vacate the property and because the PTFA generally allows a tenant to remain even after foreclosure until the expiration of the lease term. Currently, South Carolina law does not specifically address the rights of tenants in foreclosure. As such, tenants whose lease has expired, who fail to pay rent or who violate the terms of the lease can be required to vacate by the new owner after a foreclosure sale. Once the new owner provides notice of intended eviction, a tenant generally has ten days in which to respond. If a writ of ejectment is issued, the occupants will be required to vacate the property within 24 hours. (SC. Code Ann. § 27-37-10 (West 2011)). This contrasts with the 90 days' notice provided for by the PTFA.

### **Notes from the Field**

According to a South Carolina attorney, eviction procedures generally move quickly through the South Carolina court system.

## **SOUTH DAKOTA**

### **New State Laws**

None noted.

### **Proposed Legislation**

None noted.

## **Comparison with the Protecting Tenants at Foreclosure Act**

The PTFA is more protective of tenants' rights in foreclosure than is South Dakota state law with respect to advance notice required before a tenant can be forced to vacate the property and the potential for a tenant to remain until the expiration of the lease term even after foreclosure. Unlike the PTFA, South Dakota law does not explicitly provide a tenant the right to remain in the property until the expiration of the lease after foreclosure. Further, under South Dakota law, tenants can be required to vacate with substantially less notice than the 90 days provided by the PTFA. An action of forcible entry and detainer can be maintained upon three days' notice under certain circumstances, including against a party who remains in possession of mortgaged property after it is sold and the redemption period has expired (S.D. Codified Law §§ 21-16-1, 2 (2011)).

## **TENNESSEE**

### **New State Laws**

None noted.

## **Proposed Legislation**

None noted.

## **Comparison with the Protecting Tenants at Foreclosure Act**

The PTFA is more protective of tenants' rights in foreclosure than Tennessee state law with because the PTFA requires advance notice before a tenant can be forced to vacate the property and because the PTFA generally allows a tenant to remain even after foreclosure until the expiration of the lease term. Though Tennessee has no laws specifically addressing the rights of tenants in the case of a landlord's foreclosure, its general laws on termination of tenancies provide 30 days' notice for termination of a month-to-month tenancy and 10 days' notice for a week-to-week tenancy. State law also allows termination (after an opportunity to cure) based on non-payment of rent or other breach of lease provisions within 14 or 30 days depending on whether the basis for termination has previously occurred. (Tenn. Code §§ 66-28-505, 66-28-512). This contrasts with the 90 days' notice provided by the PTFA.

## **TEXAS**

### **New State Laws**

None noted.

## **Proposed Legislation**

On February 9, 2011, a bill was introduced in Texas that would change the current law protecting tenants in foreclosure by giving residential tenants (who timely pay rent) at least 90 days' written notice to vacate if a purchaser chooses not to continue the lease. (HB 1218, 82nd Leg. (Tex. 2011).) The current law provides for 30 days' written notice. (Tex. Prop. Code Ann. § 24.005 (Vernon 2012)).

## **Comparison with the Protecting Tenants at Foreclosure Act**

The PTFA is more protective of tenants' rights in foreclosure than current Texas law because the PTFA requires advance notice before a tenant can be forced to vacate the property and because the PTFA generally allows a tenant to remain even after foreclosure until the expiration of the lease term. Texas law requires that if the foreclosed lien is superior to the tenant's lease, a tenant who timely pays rent and is not otherwise in default under the lease must receive at least 30 days' written notice to vacate after a foreclosure. The rights of a tenant whose lease is superior to the foreclosed lien are unclear. (Tex. Prop. Code Ann. §§ 24.001-24.002, 24.005 (Vernon 2012)). In comparison, the PTFA requires 90 days' notice.

## **UTAH**

### **New State Laws**

On March 22, 2010, Utah passed a new law, 2010 Utah Laws Ch. 66 (H.B. 243) protecting tenants residing in properties potentially going through foreclosure. The new law created a new

portion of the Utah Code and amended two other portions of the Code. 2010 Utah Laws Ch. 66 became effective May 11, 2010. All of the provisions of 2010 Utah Laws Ch. 66 are currently set to sunset on December 31, 2014. (Utah Code Ann. §§ 63I-1-257, 63I-1-278)).

2010 Utah Laws Ch. 66 newly created Utah Code Ann. § 78B-6-901.5 -- § 78B-6-901.5 requires that within 20 days after filing an action to foreclose “residential rental property,” the plaintiff must (a) post a notice either on the primary door of each dwelling unit for properties with fewer than nine dwelling units or in at least three conspicuous places on the property for properties with nine or more dwelling units; and (b) mail a notice to the occupant of each dwelling unit.

The posted and mailed notice must inform the tenant:

- That under federal law the tenant may continue to occupy the unit after foreclosure for the duration of the lease or until 90 days after the sale of the property at auction after service of notice to vacate, whichever is later;
- That the tenant may be required to present the new owner with a copy of the lease agreement to prove the right to remain; and
- That the tenant must continue to pay rent.

According to the new section, failure to provide notice or a defect in the notice is not a defense to a foreclosure action and does not invalidate the sale.

2010 Utah Laws Ch. 66 also amended Utah Code Ann. §57-1-25 to ensure that tenants in residential rental properties that are going to be sold at auction because of defaulted trust deeds receive notice of their rights. As such, the revised statute provides that the trustee must (a) post a notice on the primary door of each dwelling unit for properties with fewer than nine dwelling units or in at least two conspicuous places on the property for properties with nine or more dwelling units; (b) and mail a notice to the occupant of each dwelling unit. The notice must include the same information required in the mortgage foreclosure context, detailed above.

Additionally, 2010 Utah Laws Ch. 66 amended Utah Code Ann. § 78B-6-802 (2010). Under this amendment, tenants who are considered “bona fide” tenants under Section 702 of the PTFA are not considered to be guilty of unlawful detainer when they continue to reside at a property foreclosure sale.

### **Proposed Legislation**

None noted.

### **Comparison with the Protecting Tenants at Foreclosure Act**

Utah has not adopted its own laws concerning tenants’ rights in foreclosure; as a result, the PTFA is more protective than Utah state law because the PTFA requires advance notice before a tenant can be forced to vacate the property and because the PTFA generally allows a tenant to remain even after foreclosure until the expiration of the lease term. That said, Utah has adopted notice provisions that go beyond the scope of the PTFA by requiring plaintiffs and trustees to notify tenants of their rights under the PTFA. (Utah Code Ann. §57-1-25, 78B-6-901.5 (2010)).

Moreover, Utah state law makes clear that tenants who are considered “bona fide” tenants are not guilty of unlawful detainer when they remain in the rented property after a foreclosure sale. (Utah Code. Ann. 78B-6-802 (2010)).

### **Notes from the Field**

Utah Foreclosure Prevention’s website provides a helpful factsheet and other self-help resources for renters: <http://utahforeclosureprevention.com/pdf/PTFA%20English.pdf>

## **VERMONT**

### **New State Laws**

House Bill 403, which created Sections 4931-38, 4941, 45-46, 49-54, 61-69 of Title 12 of the Vermont Statutes, was signed into law on May 5, 2012 H.B. 403, 2011 Gen. Assemb., Reg. Sess. (Vt. 2011). The bill generally updated and consolidated Vermont’s statutory provisions regarding foreclosure of mortgages. As under pre-existing law a tenant must be joined as a defendant in a foreclosure action and be provided 60 days’ notice of a foreclosure sale. (12 V.S.A. §§ 4932, 4965). One change is the new provisions is that a tenant must be provided notice to vacate the property the longer of 30 days prior to the date the new owner shall take possession or such other time as is required by federal law. (12 V.S.A. § 4946).

### **Proposed Legislation**

None noted.

### **Comparison with the Protecting Tenants at Foreclosure Act**

The PTFA is overall more protective of tenants’ rights in foreclosure than Vermont state law because the PTFA provides that, with limited exception, a tenant may remain until the expiration of the lease term even after foreclosure whereas, under Vermont state law foreclosure terminates the tenancy. That said, Vermont law is as protective of tenants’ rights in foreclosure as the PTFA with respect to advance notice required before a tenant can be forced to vacate the property because Vermont law provides the same notice requirement as federal law (as long as the federal notice requirement is longer than 30 days). (12 V.S.A. § 4946).

## **VIRGINIA**

### **New State Laws**

In July 1, 2009, House Bill 2080 was signed into law. Among other things, H.B. 2080 created Virginia Revised Statutes § 55-225.10, which required landlords to give written notice to the tenant of a mortgage default, mortgage acceleration, or foreclosure sale within five business days of the landlord receiving written notice from the lender. (H.B. 2080, 2009 Gen. Assem., Reg. Sess. (Va. 2009) (enacted)).

2011 Senate Bill 1220, which became effective March 25, 2011, added additional language to Section 55-225.10 (S.B. 1220, 2011 Gen. Assem., Reg. Sess. (Va. 2011) (enacted)); and 2012



House Bill 1110, which became effective April 18, 2012, provided the current language of Section 55-225.10, (H.B. 1110, 2012 Gen. Assem., Reg. Sess. (Va. 2012) (enacted)).

Section 55-225.10 still has the same notice requirement that it had when it was first passed except that the notice must now be provided to current and prospective tenants. Section 55-225.10 now also gives a tenant the right to terminate the lease if a landlord fails to provide the required notice. It also provides that if a tenant is residing in the dwelling unit on the date of foreclosure the tenant may remain in the dwelling unit as a tenant “only pursuant” to the PTFA. (Va. Code Ann. § 55-225.10 (West 2012)).

### **Proposed Legislation**

None noted.

### **Comparison with the Protecting Tenants at Foreclosure Act**

Virginia law explicitly permits tenants the right to remain in foreclosed dwelling units “only pursuant” to the PTFA. Thus, the PTFA is more protective than Virginia state law in that when the PTFA sunsets, Virginia law will not provide tenants the right to remain in foreclosed dwelling units. Virginia state law goes beyond the protections granted in the PTFA in that it requires a landlord to give written notice to the tenant of a mortgage default, mortgage acceleration or foreclosure sale within five days after the landlord receives written notice from the lender. (Va. Code Ann. § 55-225.10 (West 2012)).

## **WASHINGTON**

### **New State Laws**

S.B. 5810, 60th Legis., 2009 Reg. Sess. (Wash. 2009) amends Wash. Rev. Code Ann. §§ 61.24.040 and 61.24.060 (2010) to provide that a trustee must give tenants at least 90 days’ written notice of a foreclosure sale of the property and that a new owner after a foreclosure sale must enter into a new rental agreement with the tenant or provide the tenant with 60 days’ or more written notice to vacate the property.

Wash. Rev. Code Ann. § 61.24.143 (2010) requires that an additional pre-foreclosure notice be mailed to the resident of property subject to foreclosure sale. The additional notice must contain the following text: “The foreclosure process has begun on this property, which may affect your right to continue to live in this property. Ninety days or more after the date of this notice, this property may be sold at foreclosure. If you are renting this property, the new property owner may either give you a new rental agreement or provide you with a sixty-day notice to vacate the property. You may wish to contact a lawyer or your local legal aid or housing counseling agency to discuss any rights that you may have.”

### **Proposed Legislation**

None noted.

## **Comparison with the Protecting Tenants at Foreclosure Act**

The PTFA is more protective of tenants' rights in foreclosure than is Washington state law with respect to advance notice required before a tenant can be forced to vacate the property (90 days under the PTFA versus 60 days under state law) and the potential for a tenant to remain until the expiration of the lease term even after foreclosure (under Washington state law the lease may be terminated after foreclosure) (Wash. Rev. Code Ann. §§ 61.24.040 and 61.24.060 (2010)).

Washington state law, however, provides certain rights to tenants that go beyond the scope of the PTFA, including notice of sale requirements and required notices about the tenants' rights in foreclosure, as set forth above (Wash. Rev. Code Ann. §§ 61.24.040, 61.24.060 and § 61.24.143 (2010)).

## **Notes from the Field**

One attorney from an eviction defense clinic in Washington State noted that his organization is regularly able to use both the state and federal laws to protect tenants in foreclosed properties. He noted that some tenants may be unaware of their rights, particularly if they do not read the required notices closely. However, those tenants who do seek assistance are able to exercise their rights under the law.

A representative from another Washington legal service organization noted that enforcement of the state and federal laws has been difficult even when tenants are aware of their rights. There have been anecdotal reports of landlords failing to provide proper notice and banks attempting to illegally evict tenants sooner than permitted by the PTFA. In Washington, once a tenant is named in an eviction notice, this information becomes a part of the public record. This negatively impacts tenants' ability to secure rental housing in the future.

## **WEST VIRGINIA**

### **New State Laws**

H.B. 3177, 81st Leg., Reg. Sess. (W. Va. 2012) (enacted) amends the Code of West Virginia, effective January 2013, to add a new section: Section 38-1-16 provides that a tenant occupying property sold by a trustee pursuant to a deed of trust under an unexpired written lease that is not of record or was placed of record after the deed of trust was placed of record, must be given 90 days' written notice of termination or notice not less than 30 days prior to the expiration of the lease, whichever is shorter. A month-to-month or other tenancy may be terminated upon 30 days' written notice. This law does not differentiate or reference sales pursuant to foreclosures.

### **Proposed Legislation**

None noted.

## **Comparison with the Protecting Tenants at Foreclosure Act**

The PTFA is more protective of tenants' rights in foreclosure than West Virginia state law with respect to a tenant's ability to remain until the expiration of the lease term even after foreclosure

because West Virginia law does not provide for a tenant's right to remain in a foreclosed property for the remainder of the lease term. Under current (pre-January 2013) West Virginia law, a landlord may terminate a year-to-year lease agreement by providing at least three months' notice prior to the end of any year, and a landlord may terminate a shorter periodic tenancy in the same way or by providing notice for one full period before the end of any period. (W. Va. Code Ann. § 37-6-5 (West 2012)). In other words, a month-to-month tenant would be entitled to one month notice given prior to the end of the preceding month. As of January 2013, a tenant occupying property sold pursuant to a deed of trust will be entitled to slightly different notice requirements, which are set forth above in the description of Section 38-1-16. (H.B. 3177, 81st Leg., Reg. Sess. (W. Va. 2012)).

## **WISCONSIN**

### **New State Laws**

Effective July 1, 2011, the Wisconsin Legislature repealed the tenant notification provisions of the state foreclosure statutes (Wis. Stat. Ann. § 846.35 (*repealed by 2011 Wis. Act. 32*)). With the repeal of these provisions, banks and other lenders no longer have to provide notice under Wisconsin state law to tenants when commencing or completing foreclosure actions.

### **Proposed Legislation**

None noted.

### **Comparison with the Protecting Tenants at Foreclosure Act**

The PTFA is more protective of tenants' rights in foreclosure than Wisconsin state law because the PTFA requires advance notice before a tenant can be forced to vacate the property and because the PTFA generally allows a tenant to remain even after foreclosure until the expiration of the lease term. Under Wisconsin law, the foreclosure sale immediately terminates the lease, provided the lien attached before the lease. Wis. Stat. Ann. § . The new purchaser shall be entitled to possession upon production of a deed of the premises sold (issued by the sheriff upon the sale of the premises). The court may also issue a writ of assistance to deliver possession, if necessary. Wis. Stat. Ann. § 846.17.

## **WYOMING**

### **New State Laws**

None noted.

### **Proposed Legislation**

None noted.

### **Comparison with the Protecting Tenants at Foreclosure Act**

The PTFA appears to be more protective of tenants' rights in foreclosure than is Wyoming state law with respect to advance notice required before a tenant can be forced to vacate the property and the potential for a tenant to remain until the expiration of the lease term even after foreclosure. Under Wyo. Stat. Ann. § 1-21-1003, landlords need only provide tenants with three days' notice before commencing an eviction proceeding, whereas the PTFA entitles a tenant to 90 days' notice to vacate, at a minimum, after foreclosure. However, Wyo. Stat. Ann. § 34-4-104(a) requires that tenants be served with notice of the foreclosure sale at least 25 days' before the date of the foreclosure sale.