

Protecting Tenants at Foreclosure:

Title VII, P.L. 111-22

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Background

- NLIHC estimates that 40% of those losing their homes in foreclosures are renters.
 - *Renters in Foreclosure: Defining the Problem, Identifying Solutions*, January 2009,
<https://www2398.ssldomain.com/nlihc/doc/renters-in-foreclosure.pdf>
- Renters had few, if any, rights and in most states could be summarily evicted
 - *Without Just Cause* (2/09),
http://nlchp.org/content/pubs/Without_Just_Cause1.pdf

Legislative History

- S. 896 passed Senate (5/6/09)
- Public Law 111-22 signed (5/20/09)
- Senator Kerry, Congressional Record
Page: S5110 (5/5/09)

“Under this amendment, tenants in any federally related mortgage loan or any dwelling or residential real property with a lease have a right to remain in the unit until the end of the existing lease. If a new purchaser intends to use the property as a primary residence, then the lease may be terminated, but the tenant has to receive 90 days’ notice to vacate.”

Additional Legislative Information

- Protecting Tenants at Foreclosure:
Statement by Senators Dodd and Kerry
 - S8978 Congressional Record, *August 6, 2009*
 - http://frwebgate.access.gpo.gov/cgi-bin/getpage.cgi?dbname=2009_record&page=S8978&position=all

Protecting Tenants at Foreclosure Act (PTFA)

- Applies to all residential properties which suffer foreclosure
- Protects tenants from summary eviction and protects expectation interests
- Does not affect state or local laws that offer additional protections for tenants
- Expires December 31, 2012

Basic Provisions

- More than 90 days left on lease:
 - Have a right to stay until end of lease
 - Entitled to 90 days' notice before the new owner can file an eviction action in court
 - EXCEPTION: Lease may be terminated on 90 days' notice by a purchaser who will occupy the unit as his or her primary residence
- Less than 90 days left on lease:
 - Entitled to 90 days' notice
 - Includes verbal/oral/month to month leases

PTFA, cont'd

- Effective date varies with type of mortgage and tenancy
 - Applies to a foreclosure on any residential property occurring after May 20, 2009 and
 - on federally related mortgage loans, and on units occupied by 8 participants if notice to vacate issues after May 20, 2009
- Applies to ANY residential property
 - Single-family (1-4 units) – Almost certainly federally related
 - Multifamily (5 or more units) – Not federally related

PTFA, cont'd

- Must be Bona Fide Tenant: does not apply if tenant
 - is the mortgagor or the mortgagor's child, spouse, or parent
 - is paying substantially below FMR without subsidy
 - Lease was not an 'arms-length' transaction

PTFA and Section 8 tenants

- Section 8 housing choice voucher holders have benefit of general protections (section 702) and special protections provided specifically them in section 703
- New owner is subject to the tenant's Section 8 lease
- New owner is subject to the Section 8 Housing Assistance Payment (HAP) contract with the housing authority
- **EXCEPTION:** If the new owner will occupy the unit as a primary residence, he or she can still terminate the tenancy with 90 days' notice

Federally-Related Mortgage Loan

Title 12 United States Code 2602 -- RESPA

(Real Estate Settlement Procedures Act of 1974)

Any loan on 1 - 4 unit residential property made by lender that is

- insured the Federal Government, **or**
- regulated by the Federal Government, **or**
- guaranteed, supplemented or assisted by the Fed. Gov., **or**
- intended to be sold by the originating lender to Ginnie Mae, Fannie Mae or Freddie Mac, or a financial institution from whom it will be purchased by the Freddie Mac, **or**
 - any “creditor”, who makes or invests in res. real estate loans totaling more than \$1,000,000 per year (excepting any agency or instrumentality of any State)

HUD – First Notice

- HUD issued Notice PIH 2009 - 17 providing information on effect of PTFA on HUD programs,
- June 24, 2009 at 74 Fed. Reg. 30106

http://portal.hud.gov/portal/page/portal/HUD/program_offices/administration/hudclips/notices/pih/09pihnotices

HUD – Second Notice

- Notice PIH 2009 - 52 (HA) – Dec. 15, 2009
- Guidance on New Tenant Protections under:

PTFA and ARRA*

http://portal.hud.gov/portal/page/portal/HUD/program_offices/administration/hudclips/notices/pih/09pihnotices

* American Recovery and Reinvestment Act of 2009 (Public Law 111-5, approved February 17, 2009)

Immediately PHAs Must

- **Give Notice of the change in law to:**
 - Current landlords
 - Heads of households receiving voucher assistance
 - HCV applicants who received a voucher
 - Prospective owners
- PHAs may also choose to notify local courts or sheriff's offices

After Learning of Foreclosure PHAs Must

- make efforts to determine the status of foreclosure and ownership of property**
- continue making payments to the original owner until ownership is legally transferred**
- attempt to obtain a written acknowledgement of assignment of the HAP contract from the successor in interest**
- inform tenants that they must continue to pay rent according to the lease**
- inform tenants if the PHA is unable to make HAP contracts to the successor in interest because of rejection by successor in interest, failed HQS inspection, or inability to identify successor in interest and then refer tenant to legal services**

FEDERAL REGULATORS' RESPONSE: OCC

- **Office of Comptroller of the Currency, Aug. 13, 2009 ,
Administrator of National Banks -Guidance, OCC BULLETIN
2009-28**
 - “National banks are advised to adopt policies and procedures to ensure compliance with these new tenant protection provisions. The OCC will evaluate bank compliance in the course of our supervisory process.”
 - <http://www.occ.gov/ftp/bulletin/2009-28.html>
- **Office of Comptroller of the Currency, Jan. 8, 2010 ,
Administrator of National Banks -Guidance, OCC BULLETIN
2010-2**
 - Examiners are to evaluate banks' level of compliance with Protecting Tenants at Foreclosure Act
 - <http://www.occ.gov/ftp/bulletin/2010-2.html>

FEDERAL REGULATORS' RESPONSE: FRB and NCUA,

- **Board of Governors of Federal Reserve System: Division of Consumer & Community Affairs -CA 09– 5, Letter of 7-30-09**
 - Examiners are to evaluate:
 - 1) institution's awareness of the law,
 - 2) its efforts to comply, and
 - 3) its responsiveness to addressing implementation deficiencies
 - <http://www.federalreserve.gov/boarddocs/caletters/2009/0905/caltr0905.htm>

National Credit Union Administration, Aug., 2009, Regulatory Alert - NO: 09-RA-08

- Credit unions should be aware of their responsibilities under the Protecting Tenants at Foreclosure Act of 2009, and implement policies and procedures to ensure compliance with this law.
- www.ncua.gov/resources/RegulatoryAlerts/Files/2009/09-RA-08.docx

FEDERAL REGULATORS' RESPONSE: OTS, and FDIC

- **Office of Thrift Supervision, Department of the Treasury, Sept. 2009, Memorandum for Chief Executive Officers**
 - Institutions under OTS jurisdiction should implement a process to ensure compliance with these requirements.
 - <http://files.ots.treas.gov/25319.pdf>
- **Federal Deposit Insurance Corporation, Sept. 2009, FIL-56-2009, Compliance Officers, Chief Lending Officers, Loan Servicing/Loss Mitigation Department**
 - FDIC examiners will monitor and enforce compliance with the requirements of this law in the same manner as other consumer protection laws and regulations
 - <http://www.fdic.gov/news/news/financial/2009/fil09056.html>

Frequently Asked Questions

- **When can an effective notice to vacate be given?**
 - Must be given by the successor-in-interest
 - Effective notice cannot be given before title passes
 - Notices of the initiation of the foreclosure action are required in some states and desirable in all cases, but they do not serve as a “notice to vacate”
 - When more than 90 days left in the lease term, can be given 90 days before the end of the lease term

Frequently Asked Questions

- **What is the effect of a right of redemption?**
 - Depends upon state law
 - Under many state laws, title does not pass to the successor in interest at the judicial or sheriff's sale until after the period of redemption has expired

Frequently Asked Questions

- **Does the tenant have to pay rent?**
 - Yes. Failure to pay rent may constitute an independent ground for eviction
 - Failure to comply with any clause or provision of the lease may constitute ground for eviction
 - If the successor in interest will not take the payment or cannot be found, tenant should put rent in bank

Frequently Asked Questions

- **What responsibilities does the successor in interest have to maintain the property?**
 - The successor in interest has the responsibilities of the landlord as defined in the lease and applicable law

Frequently Asked Questions

- **Is the application of the law affected by the immigration status of a tenant?**
 - The Act does not condition any of the protections on the immigration status of the tenant

Frequently Asked Questions

- **What form of notice must be used?**
 - Not specified in federal statute
 - Will vary with state and local requirements
- **What is the scope of the preemption of state law?**
 - Does not preempt more protective state and local provisions

Public Law 111-22, Effective Date May 20, 2009

TITLE VII--PROTECTING TENANTS AT FORECLOSURE ACT

SEC. 701. SHORT TITLE.

This title may be cited as the `Protecting Tenants at Foreclosure Act of 2009'.

SEC. 702. EFFECT OF FORECLOSURE ON PREEXISTING TENANCY.

- (a) In General- In the case of any foreclosure on a federally-related mortgage loan or on any dwelling or residential real property after the date of enactment of this title, any immediate successor in interest in such property pursuant to the foreclosure shall assume such interest subject to--
- (1) the provision, by such successor in interest of a notice to vacate to any bona fide tenant at least 90 days before the effective date of such notice; and
 - (2) the rights of any bona fide tenant, as of the date of such notice of foreclosure--
 - (A) under any bona fide lease entered into before the notice of foreclosure to occupy the premises until the end of the remaining term of the lease, except that a successor in interest may terminate a lease effective on the date of sale of the unit to a purchaser who will occupy the unit as a primary residence, subject to the receipt by the tenant of the 90 day notice under paragraph (1); or
 - (B) without a lease or with a lease terminable at will under State law, subject to the receipt by the tenant of the 90 day notice under subsection (1),except that nothing under this section shall affect the requirements for termination of any Federal- or State-subsidized tenancy or of any State or local law that provides longer time periods or other additional protections for tenants.
- (b) Bona Fide Lease or Tenancy- For purposes of this section, a lease or tenancy shall be considered bona fide only if--
- (1) the mortgagor or the child, spouse, or parent of the mortgagor under the contract is not the tenant;
 - (2) the lease or tenancy was the result of an arms-length transaction; and
 - (3) the lease or tenancy requires the receipt of rent that is not substantially less than fair market rent for the property or the unit's rent is reduced or subsidized due to a Federal, State, or local subsidy.
- (c) Definition- For purposes of this section, the term `federally-related mortgage loan' has the same meaning as in section 3 of the Real Estate Settlement Procedures Act of 1974 (12 U.S.C. 2602).

SEC. 703. EFFECT OF FORECLOSURE ON SECTION 8 TENANCIES.

Section 8(o)(7) of the United States Housing Act of 1937 (42 U.S.C. 1437f(o)(7)) is amended--

- (1) by inserting before the semicolon in subparagraph (C) the following: `and in the case of an owner who is an immediate successor in interest pursuant to foreclosure during the term of the lease vacating the property prior to sale shall not constitute other good cause, except that the owner may terminate the tenancy effective on the date of transfer of the unit to the owner if the owner--
 - (i) will occupy the unit as a primary residence; and
 - (ii) has provided the tenant a notice to vacate at least 90 days before the effective date of such notice.'; and
- (2) by inserting at the end of subparagraph (F) the following: `In the case of any foreclosure on any federally-related mortgage loan (as that term is defined in section 3 of the Real Estate Settlement Procedures Act of 1974 (12 U.S.C. 2602)) or on any residential real property in which a recipient of assistance under this subsection resides, the immediate successor in interest in such property pursuant to the foreclosure shall assume such interest subject to the lease between the prior owner and the tenant and to the housing assistance payments contract between the prior owner and the public housing agency for the occupied unit, except that this provision and the provisions related to foreclosure in subparagraph (C) shall not shall not affect any State or local law that provides longer time periods or other additional protections for tenants.'.

SEC. 704. SUNSET.

This title, and any amendments made by this title are repealed, and the requirements under this title shall terminate, on December 31, 2012.

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