

Protecting Tenants at Foreclosure

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Administering agency: PTFA is self-executing; no agency is responsible for administering the act.

Year program started: 2009

Population targeted: renters

As the foreclosure crisis has taken hold, experience and research have revealed that rental properties and renters are at significant risk, with renters comprising 40% of the families affected by foreclosure. These families often have no idea that their landlord has fallen behind on mortgage payments, and have usually continued to pay their rent even as their landlord has failed to pay the mortgage.

Before the enactment of the federal Protecting Tenants at Foreclosure Act (PTFA) in May 2009, in most states it was legal for tenants to be required to move on only a few days' notice. Under the PTFA most tenants now have the right to remain in their home for the remainder of their lease, or at least 90 days.

The PTFA is set to expire at the end of 2014. Representative Keith Ellison (D-MN) and Senator Richard Blumenthal (D-CT) have introduced legislation, H.R. 3543 and S. 1761 respectively, that would remove the 2014 sunset date, making the law permanent. The legislation would also add a private right of action to the law as an enforcement mechanism.

HISTORY AND PURPOSE

In recent years, inappropriate lending, falling home prices, and high unemployment have led to a very high number of foreclosures across the United States. However, the impact of these foreclosures is not limited to homeowners; renters lose their homes every day when the owner of the home they are renting goes into foreclosure. In fact, one in five properties in the foreclosure process is likely to be a rental. Further, research from NLIHC concludes that since these properties often contain more than one unit, and many owner-occupied properties also house renters, roughly 40% of the families facing eviction as a result of the foreclosure crisis are renters. Unlike homeowners, who have some indication that a foreclosure is coming, renters are often caught entirely off-guard.

As might be expected, very low income families and low income and minority communities are bearing the brunt of rental foreclosures. Analysis from NLIHC shows that for four states in New England, the census tracts with the lowest percentage of white individuals and the highest percentage of households that are under the poverty line have the highest foreclosure rates. Multifamily foreclosures, which more often than not impact at least some renters, also occur in these high-poverty, high-minority census tracts.

Prior to May 2009, protections for renters in foreclosed properties varied from state to state, and in most states tenants had few protections. The National Law Center on Homelessness and Poverty (NLCHP) and NLIHC issued a joint report on the foreclosure and eviction laws in each state and the District of Columbia.

Recognizing the hardships experienced by tenants in foreclosed properties, Congress acted in early 2009 to provide a basic set of rights for such tenants. On May 20, 2009, President Obama signed the Protecting Tenants at Foreclosure Act (PTFA; Public Law 111-22, division A, title VII). The PTFA was extended and clarified in the Dodd-Frank Wall Street Reform and Consumer Protection Act (Public Law 111-203, section 1484).

ISSUE SUMMARY

Protecting Tenants at Foreclosure Act. The PTFA requires the immediate successor in interest at foreclosure to provide bona fide tenants with a notice 90 days before requiring them to vacate the property, and allows tenants with leases to occupy the property until the end of the lease term. A bona fide lease or tenancy is one in which: the tenant is not the mortgagor, or the spouse, parent, or child of the mortgagor; the lease

or tenancy is the result of an arm's length transaction; and, the lease or tenancy requires rent that is not substantially lower than fair market rent, or is reduced or subsidized due to a federal, state or local subsidy. If the property is purchased by someone who will occupy the property, then that purchaser can terminate the lease on 90 days' notice, even when the tenant has a lease that extends beyond 90 days after foreclosure.

Tenants with Section 8 housing choice voucher assistance have additional protections, which allow them to retain their Section 8 lease, and require the successor in interest to assume the housing assistance payment contract associated with that lease.

The PTFA applies to all foreclosures on all residential properties; traditional one-unit single family homes are covered, as are multi-unit properties. The law applies in cases of both judicial and non-judicial foreclosures. Tenants with lease rights of any kind, including month-to-month leases or leases terminable at will, are protected as long as the tenancy was in effect as of the date of transfer of title at foreclosure.

The 90-day notice to vacate can only be given by the successor in interest at foreclosure. The successor in interest is whoever acquires title to the property at the end of the foreclosure process. It could be the financial institution that held the mortgage or it could be an individual who purchased the property at foreclosure. Notices of the pending foreclosure, while desirable, do not serve as the 90-day notice required by the PTFA.

The PTFA applies in all states, but does not override more protective state laws. The PTFA specifically provides that it does not affect "any [s]tate or local law that provides longer time periods or other additional protections for tenants." Consequently, state law should be examined whenever there is a tenant in a foreclosed property to maximize the protections available to tenants. State and local law may also help fill some of gaps in the federal law, such as the form (e.g., written or oral) and delivery mechanism for the 90-day notice (e.g., in person, by mail, or by another method).

Other protections. Prior to creation of the PTFA, some financial institutions and Freddie Mac and Fannie Mae independently developed programs to assist renters in foreclosed properties to remain in their homes, and some offered "cash for keys" programs that provide monetary assistance to occupants of foreclosed properties if the occupants agree to leave in a specified period of time, usually 30 days or less. While both the month-to-month lease programs and cash for keys program are options tenants should consider, these options are in addition to, and not a substitute for, the rights provided under the PTFA. Tenants should seek the advice of legal counsel before accepting these options.

The American Recovery and Reinvestment Act of 2009 (ARRA), which predates the PTFA, applied similar renter protections to any foreclosed property purchased with Neighborhood Stabilization Program (NSP) funds. However, in addition to the 90 days' notice requirement and the right to remain in the home for the remaining term of any lease, ARRA further prohibits recipients of NSP funds from discriminating against (i.e., refusing to rent to) holders of Section 8 Housing Choice Voucher assistance.

FORECAST FOR 2014

The PTFA provisions expire at the end of 2014 unless extended. In 2013, Representative Keith Ellison (D-MN) and Senator Richard Blumenthal introduced legislation (H.R. 3543 and S. 1761, respectively) to repeal the sunset date for the PTFA and to add a private right of action for renters whose rights under the PTFA had been violated. The legislation had been introduced by Representative Ellison in the 112th Congress as well, but no action was taken on the measure. It is imperative that Congress act on extending the PTFA as soon as possible, as the law is set to expire at the end of the 113th Congress.

TIPS FOR LOCAL SUCCESS

Implementing PTFA provisions can be challenging. The law was effective upon enactment; however, no

federal agency is charged with interpreting the law or with writing regulations to enforce it. Because the law is self-implementing, individual tenants need to be able to assert their rights. NLIHC, in conjunction with the National Housing Law Project, has developed a toolkit for renters in foreclosed properties. The toolkit contains sample letters, copies of the PTFA, and other materials designed to assist tenants and their advocates in implementing the law and protecting tenants' rights.

Relying on individual tenants to assert their rights is a time-consuming process. A better approach is for the entities and institutions involved in the foreclosure process, such as financial institutions, lawyers, judges, and real estate professionals, to recognize and abide by the law. Advocates at the local level should make area courts and attorneys aware of the law through letters and other contacts.

All federally insured or chartered financial institutions have been informed of the law and instructed to comply with it. If a financial institution does not comply with the law, it is important that advocates identify the foreclosing institution and hold it accountable for the outcome. Federal financial institution regulators have information on their websites that will help identify the relevant regulator for a foreclosing institution and help tenants and advocates lodge a complaint against the institution.

WHAT TO SAY TO LEGISLATORS

Legislators should be educated on the fact that as many as 40% of families faced with foreclosures are renters who are truly blameless in the situation. Federal lawmakers also need information on financial institution compliance or lack thereof with the PTFA. Lawmakers should also be urged to consider changes to bankruptcy laws and other legislation that would encourage lenders to allow former homeowners and renters to stay in their homes.

In addition, because PTFA protections expire at the end of 2014, advocates should ask lawmakers to cosponsor and support the Permanently Protecting Tenants at Foreclosure Act, which would remove the law's sunset date and would add a private right of action for tenants whose rights under the PTFA have been violated. The private right of action is important as it would add an enforcement mechanism to the protections included in the law. It is critical that Congress take action before the end of the 113th Congress.

FOR MORE INFORMATION

- National Low Income Housing Coalition's Foreclosure Policy Issue webpage, <http://nlihc.org/issues/foreclosure>
- NLIHC renter's toolkit, <http://nlihc.org/library/other/foreclosure>
- Renters in Foreclosure: A Fresh Look at an Ongoing Problem, from NLIHC, <http://nlihc.org/library/other/periodic/rif2012>
- Staying Home: The Rights of Renters Living in Foreclosed Properties, from NLCHP, <http://bit.ly/VBrT2u> (PDF).
- "HUD Regulatory Guidance" fact sheet from NLIHC, <http://nlihc.org/issues/foreclosure/ptfa>
- Guidance for FHA, <http://1.usa.gov/VBuQAf> (PDF)

For regulatory agency guidance, see:

- Federal Deposit Insurance Corporation (FDIC), <http://1.usa.gov/VBuXf3>
- Federal Reserve Board of Governors (FRB), <http://1.usa.gov/VBv1LX>
- National Credit Union Administration (NCUA), <http://1.usa.gov/VBvsG5>

For information on the regulatory agency complaint process, see:

- FDIC, <http://1.usa.gov/VBvKwB>
- FRB, www.federalreserveconsumerhelp.gov
- OCC's webpage for filing a complaint, www.helpwithmybank.gov/complaints/index.html
- NCUA, <http://bit.ly/VBvXQg>