

Will Fannie Mae's Lead in REO Rental Policy Set the Standard for the Private Market?

If the term "blameless victims" applies to any class affected by the mortgage meltdown, it must surely apply to tenants of properties which succumb to foreclosure. A recent report by the National Low Income Housing Coalition found that more than 20% of the properties facing foreclosure nationwide are rentals.¹ The report further found that because rental properties often are home to multiple families, renters make up roughly 40% of the families facing eviction.² In urban areas, mainly because of the high concentrations of large apartment buildings, the percentage may be as high as 56%.³ This article reviews one Congressional attempt to prevent tenant displacement in foreclosed properties, advocates' attempts to enforce this statutory provision, and the response of Fannie Mae and Freddie Mac for their substantial REO portfolios.⁴

Congressional Action

On July 30, 2008, Congress attempted to address mortgage-based financial insecurity through the Housing and Economic Recovery Act of 2008 (HERA). HERA established the Federal Housing Finance Agency (FHFA) as an independent agency of the federal government and subjected Fannie Mae, Freddie Mac, the Federal Home Loan Banks and the Office of Finance to "supervision and regulation" of the FHFA.⁵ On September 7, 2008, the FHFA placed Fannie Mae and Freddie Mac into conservatorship.⁶

¹DANILO PELLETIERE, PH.D., NLIHC, *RENTERS IN FORECLOSURE: DEFINING THE PROBLEM, IDENTIFYING SOLUTIONS, EXECUTIVE SUMMARY* (2008), at <https://www.2398.sslldomain.com/nlihc/doc/renters-in-foreclosure.pdf>. Fannie Mae is the common name for the Federal National Mortgage Association. Freddie Mac stands for the Federal Home Loan Mortgage Corporation.

²*Id.*

³*Id.* at 7.

⁴Press Release, Fannie Mae, Fannie Mae Announces National REO Rental Policy (Jan. 13, 2009), available by title and date at <http://www.fanniemae.com/index.jhtml>; Press Release, Freddie Mac, Freddie Mac Suspends All Foreclosure Sales of Occupied Homes from Day Before Thanksgiving Until January 9, 2009 (Nov. 20, 2008), http://www.freddie.com/news/news_archive.htm. Beyond the scope of this article are the tenant protections enacted in the American Recovery and Reinvestment Act of 2009 (Pub. L. No. 111-5, tit. XIII (Feb. 17, 2009) (AARA of 2009) for tenants in foreclosed properties acquired after the date of enactment (Feb. 17, 2009) with any amounts made available either under Title XIII, Community Development Fund of ARRA of 2009 or under the Neighborhood Stabilization Program (Pub. L. No. 110-289, Subdivision B., tit. III, § 2301 et seq. (July 30, 2008)).

⁵Pub. L. 110-289, tit. I, § 1101, 122 Stat. 2661 (July 30, 2008).

⁶Federal Housing Finance Agency, Statement of FHFA Director James B. Lockhart (Sept. 7, 2008), <http://www.fhfa.gov/webfiles/23/FHFAStatement9708final.pdf>.

On October 3, 2008, Congress passed and the President signed a massive spending package known as the Emergency Economic Stabilization Act of 2008 (EESA).⁷ Title I, Section 109 of this act,⁸ the Troubled Asset Relief Program (TARP), provides that the Secretary of the Treasury "shall coordinate with the [Federal Deposit Insurance] Corporation, the [Federal Reserve] Board,⁹ the Federal Housing Finance Agency (FHFA), the Secretary of Housing and Urban Development, and other Federal Government entities that hold troubled assets" to take certain actions to facilitate loan modification and restructuring and "where permissible, to permit bona fide tenants who are current on their rent to remain in their homes under the terms of the lease."¹⁰

Consequently, on October 3, 2008, FHFA, in coordination with the Treasury and other holders of troubled assets, became statutorily bound, where permissible, to require these federal or federally controlled entities to protect the occupancy rights of bona fide tenants.

Defense of Tenants by Greater Hartford Legal Aid and New Haven Legal Assistance

On September 9, 2008, a tenant in Hartford, Connecticut, current in her rent, received notice to vacate a recently foreclosed property by September 15, 2008. Fannie Mae followed this notice with an eviction action in state court. On October 21, 2008, Greater Hartford Legal Aid (GHLA) contested this eviction.¹¹ GHLA filed a Motion to Dismiss or in the Alternative Motion for Stay of Proceedings, citing their client's bona fide tenant status, the FHFA conservatorship of Fannie Mae, a statement by FHFA Director, James B. Lockhart, III, acknowledging the mandate of the conservatorship to protect renters,¹² and the EESA requirement that the Secretary of Treasury work with FHFA to permit tenants to remain post-foreclosure. GHLS asserted that Fannie Mae's failure to act consistently with such obligations deprived the court of subject matter jurisdiction.

Meanwhile, New Haven Legal Assistance (NHLA) built on the GHLA work by drafting answers to eviction cases asserting EESA, due process and public policy defenses.¹³ On December 8, 2008, NHLA wrote a letter to the Interim General Counsel for Fannie Mae (copying

⁷Pub. L. No. 110-343, 122 Stat. 3765, Emergency Economic Stabilization Act of 2008, (Oct. 3, 2008) [hereinafter EESA].

⁸Tit. I, § 109, 122 Stat. 3774.

⁹With the exception of "mortgages and securities held, owned, or controlled in connection with open market operations under section 14 of the Federal Reserve Act (12 U.S.C. 353), or as collateral for an advance or discount that is not in default." Tit. I, § 110(a) (1) (C), 122 Stat. 3775.

¹⁰Tit. I, § 109, 122 Stat. 3775 (emphasis added).

¹¹Fed. Nat'l Mortgage Ass'n v. Doe, Superior Court/Housing Session, J.D. of Hartford (Oct. 21, 2008). Attorneys for Doe are Stephanie A. D'Ambrose and David A. Pels.

¹²Federal Housing Finance Agency Statement, *supra* note 6.

¹³Housing Justice Network listserve email (Dec. 10, 2008).

FHFA Director Lockhart, Senator Dodd,¹⁴ and Congressman Frank¹⁵) asserting the illegality of the ongoing evictions of tenants living in properties foreclosed upon by Fannie Mae, requesting their immediate suspension and raising the specter of legal action.¹⁶

Fannie Mae's Response

In early December, Director Lockhart called the GHLA attorneys and negotiations followed. On December 15, 2008, Fannie Mae announced a suspension through January 9, 2009, of all tenant evictions from and foreclosure sales of its one- to four-unit properties.¹⁷ On January 8, 2009, Fannie Mae extended the suspension of foreclosure sales and evictions through January 31, 2009, in part to "provide additional time for the company to operationalize its new National REO Rental Policy, [to] allow renters in company-owned foreclosed properties to stay in their homes."¹⁸ On January 13, 2009, Fannie Mae issued notice of its National Real Estate Owned (REO) Rental Policy, subtitled "Renters in Fannie Mae-Owned Foreclosed Properties Eligible to Stay in Their Homes."¹⁹ The announcement stated:

The new policy applies to renters occupying foreclosed properties at the time Fannie Mae acquires the property. Renters occupying any type of single-family property will be eligible including residents of two- to four-unit properties, condos, co-ops, single-family detached homes and manufactured housing. Eligible renters will be offered a new month-to-month lease with Fannie Mae or financial assistance for their transition to new housing should they choose to vacate the property. The properties must meet state laws and local code requirements for a rental property.

While the company markets the properties for sale, Fannie Mae will manage the properties through a real estate broker or a property management company. The company will not require security deposits to be posted in connection with this program.

Renters in the foreclosed properties will be asked to pay market rate rent under the new leases. Rates may be determined by reviewing local comparable rents, conducting a neighborhood survey, or through other relevant indicators. Rates will also be subject to any legal rent control restrictions. The company will review each instance where the market rate may require a tenant to pay additional rent and will work to reach an equitable resolution.

On behalf of the company, property managers are contacting renters in Fannie Mae-owned foreclosed properties to notify them of their options.²⁰

Freddie Mac

On November 20, 2008, Freddie Mac announced its own moratorium on foreclosures and evictions involving occupied single-family and two- to four-unit properties effective from November 26, 2008, through January 9, 2009.²¹ On January 8, 2009, this moratorium was extended through January 31, 2009,²² and on January 30 it was extended again through February 28.²³

While Freddie, like Fannie, will offer month-to-month leases, the programs differ in that Freddie proposes rents at the lesser of market or what the tenant was formerly paying, requires occupants to demonstrate the ability to pay the rent (a subject not addressed in Fannie Mae's public announcements), provides that buildings not meeting local code requirements are eligible if they can be brought into compliance for an affordable amount, and does not directly address treatment of tenants receiving rent subsidy via housing choice vouchers.

Issues for Advocates

The announcements of the Fannie Mae and Freddie Mac rental policies were welcomed by tenant advocates as an important step towards protecting bona fide tenants from eviction. However, a number of issues remain to be resolved. For example, while EESA provides that tenants should, where permissible, be permitted to "remain in their homes under the terms of the lease," both Fannie Mae and Freddie Mac are offering tenants new month-to-month leases. Presumably, many affected tenants have leases with unexpired terms significantly longer than one

¹⁴Democrat, Chairman of the Senate Banking, Housing & Urban Affairs Committee.

¹⁵Democrat, Chair of the House Financial Services Committee.

¹⁶Signed by the litigation team of Amy Marks, Amy Eppler-Epstein, Shelley White and Francis Deneen.

¹⁷Fannie Mae, Statement by Brian Faith, Managing Director Communications on National Tenant Policy, News Release (Dec. 15, 2008). Fannie Mae had quietly circulated a draft lease for comment, at <http://www.fanniemae.com/media/statements/index.jhtml?p=Media&s=Statements>.

¹⁸Fannie Mae, Fannie Mae Extends Foreclosure Sale and Eviction (Jan. 8, 2009), available by title and date at <http://www.fanniemae.com/index.jhtml>.

¹⁹Fannie Mae, Fannie Mae Announces National REO Rental Policy (Jan. 13, 2009), available by title and date at <http://www.fanniemae.com/index.jhtml>.

²⁰*Id.*

²¹Press release, Freddie Mac, *supra* note 4.

²²Press Release, Freddie Mac, Freddie Mac Extends Suspension of Single Family Foreclosure Sales, Evictions until January 31, 2009 (Jan. 8, 2009), http://www.freddiemac.com/news/news_archive.htm.

²³Press release, Freddie Mac, Freddie Mac Extends Eviction Suspension until March, Launches Rental Option for Foreclosed Borrowers, Tenants (Jan. 30, 2009), http://www.freddiemac.com/news/archives/serVICING/2009/20090130_reo-rental.html.

month. It is also not clear whether any terms of current leases more protective of the tenant will be incorporated into the new lease.

EESA also requires that tenant occupancy plans "shall include protecting Federal, State, and local rental subsidies and protections."²⁴ While Fannie Mae has acknowledged being bound by rent control legislation in setting rents, it has not affirmed being bound by other state and local rental protections. With respect to honoring Housing Choice Vouchers, Fannie has agreed to do so, but has not explained how it will deal with a lease between the participant/tenant and the former landlord or with a Housing Assistance Payment contract between that landlord and the Section 8 administering agency (usually a public housing agency) if those agreements extend beyond one month or have other provisions not favored by Fannie Mae. Freddie Mac's announcement does not address the voucher issue.

On several issues, Freddie Mac's announced policies appear to be more favorable to tenants. Rents will be set at the lesser of market rent or what the tenant had been paying, whereas Fannie Mae will seek market rent, subject to an as-yet unspecified review if the tenant is currently paying below market. Freddie Mac will consider properties not up to code eligible if they can be brought into compliance, whereas Fannie Mae requires participating properties to be code compliant.

Current Status

Fannie Mae and Freddie Mac have, for the time being, suspended evictions as well as foreclosure sales on one- to four-unit buildings. During this moratorium Fannie and Freddie plan to manage the properties through real estate brokers or management companies.

Both Fannie Mae and Freddie Mac continue to design and develop programs which will allow many bona fide tenants to stay in their homes post foreclosure. Both have sought new allies, asking for advice and counsel from the advocate community. Both announced, on February 13, 2009, that they were extending the suspension of evictions through March 6, 2009.²⁵

As of the fourth week in February, Fannie Mae had not withdrawn its eviction action against the tenant represented by GHLA, nor offered a new lease to the tenant. Neither Fannie nor Freddie had announced formal rules for the announced programs.

Conclusion

As Fannie and Freddie follow through on their commitments, the scale of their holdings, the number of potentially affected tenants and their potential success in stabilizing their troubled portfolios could influence others in the market to adopt similar programs to protect tenant occupancy and reduce abandonment, deterioration and vandalism.

Meanwhile, GHLA and NHLA continue to vigorously represent their clients and to make their pleadings and experience available to the tenant advocacy community, and tenant advocates should remain vigilant to ensure that the promise of these programs is fulfilled in a manner that ensures tenants' rights to remain in their homes.

For updates on tenant protection programs, visit the news and media sections of the Fannie Mae²⁶ and Freddie Mac²⁷ websites. ■

²⁴Pub. L. No. 110-343, tit. I, § 109(b), 122 Stat. 3775 (Oct. 30, 2008).

²⁵Press release Fannie Mae, Fannie Mae Suspends Foreclosure Sales Pending Administration Announcement (Feb. 13, 2009), <http://www.fanniemae.com/newsreleases/2009/4613.jhtml?p=Media&s=News+Releases>; Freddie Mac, Freddie Mac Extends Moratorium on Foreclosure Sales (Feb. 13, 2009), http://www.freddiemac.com/news/archives/sericing/2009/20090213_suspension-march.html.

²⁶See <http://www.fanniemae.com/index.jhtml>.

²⁷See <http://www.freddiemac.com/>.