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advancing housing justice

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Protecting Tenants at Foreclosure Act of 2009 (PTFA)
Pub. L. No. 111-22, tit. VII, §§ 701-704, 123 Stat. 1632, 1660-62 (enacted May 20, 2009)

General Overview

1. Legislative History – PTFA was incorporated into Helping Families Save Their Homes Act as a floor amendment, so there is no extensive legislative history
    a. S5096-97 (Gillibrand)
    b. S5110 (Kerry)
    c. S5112 (Coburn)
    d. S5115 (Dodd)
    e. S5174-75 (Kerry)
    f. S8978 (Dodd/Kerry)
2. Under PTFA, leases are not automatically extinguished by foreclosure; the successor in interest takes the property subject to the rights of bona fide tenants.
3. PTFA applies to any foreclosure:
    a. On any dwelling or residential property occurring after May 20
    b. On a federally related mortgage loan if eviction notice is issued after May 20
        i. For definition of federally related mortgage loan, see 12 U.S.C. 2602.
    c. PTFA applies only on bona fide leases or tenancies. See (3) below.
4. 90-day notice and right to remain until end of lease
    a. Tenants with fewer than 90 days left on lease or on month-to-month tenancies must receive a 90-day notice before the new owner can commence eviction proceedings
    b. Tenants with more than 90 days remaining on their leases are entitled to stay until end of the lease.
        i. EXCEPTION: lease may be terminated with a 90-day notice if the new owner will move in and occupy the unit as a primary residence.
5. PTFA only applies to bona fide leases or tenancies. PTFA does not apply if:
    a. Tenant is the mortgagor or the mortgagor's child, spouse, or parent; or
    b. Lease was not the result of an arms-length transaction; or
    c. Rent is substantially less than fair market rent, unless the reduction is due to a federal, state, or local subsidy.
6. PTFA applies to any bona fide lease or tenancy created prior to the transfer of title at foreclosure, including those created between default and the transfer of title.
    a. Federal Reserve Letter
        i. PTFA does not cover "tenants who enter in lease agreements after a foreclosure sale"

   - ii. Available at http://www.federalreserve.gov/boarddocs/caletters/2009/0905/caltr0905.htm.
   - b. Dodd/Kerry floor statements. 155 Cong. Rec. S8978 (daily ed. Aug. 6, 2009).
     - i. Tenants "are allowed to remain in place for the remainder of any leases entered into **prior to the transfer of title by foreclosure**."

7. Constitutionality
   - a. Challenged in *Collado v. Boklari*, 2009 NY Slip Op 29447 (Suffolk Dist Ct. Nov. 9, 2009)
   - b. In dicta, the court said that PTFA, as it is applied to foreclosures on loans other than federally related mortgage loans, is outside of Congress's Spending Power.
   - c. Court rewrote PTFA to limit its scope to only "foreclosures on a federally related mortgage loan **on** any dwelling or residential real property."
   - d. Things to keep in mind:
     - i. Discussion about PTFA is only dicta
     - ii. This issue was probably not fully briefed due to the summary nature of the proceeding
     - iii. Court did not analyze PTFA under Commerce Clause
     - iv. Opinion issued by low level trial court
     - v. Most residential foreclosures will still qualify under PTFA as foreclosures on federally related mortgage loans.
8. Sunsets on December 31, 2012
9. Does not preempt state or local laws that that provide longer time periods or other additional protections for tenants.

Section 8 Voucher Holders

10. Voucher holders are covered by § 702.
    - a. Sec. 703 is designed to amend law governing § 8 leases and HAP contracts to accommodate § 702.
11. Additional protections for Section 8 tenants
    - a. New owner takes subject to both the Section 8 lease and the HAP contract
      - i. EXCEPTION: lease may be terminated with a 90-day notice if the new owner will move in and occupy the unit as a primary residence (even during initial lease term?).
    - b. Vacating the property prior to sale does not constitute "other good cause" for terminating Section 8 lease.
12. HUD notice on PHA responsibilities to implement PTFA (HUD PIH Notice 09-52, http://portal.hud.gov/portal/page/portal/HUD/program_offices/administration/hudclips/notices/pih/files/09-52pihn.doc)
    - a. PHAs must notify the change in law to:
      - i. Current landlords
      - ii. Heads of households receiving voucher assistance
      - iii. HCV applicants who received a voucher
      - iv. Prospective owners
    - b. PHA may also choose to notify local courts or sheriff's offices

c. After learning of a foreclosure, PHA must:
    i. Make efforts to determine the status of foreclosure and ownership of property.
    ii. Continue making payments to the original owner until ownership is legally transferred.
    iii. Attempt to obtain a written acknowledgement of assignment of the HAP contract from the successor in interest.
    iv. Inform tenants that they must continue to pay rent according to the lease.
    v. Inform tenants if the PHA is unable to make HAP payments to the successor in interest because of rejection by successor in interest, failed HQS inspection, or inability to identify successor in interest. When PHA is unable to make HAP payments, PHA should also refer tenant to legal services.

13. See also: HUD PIH Notice, 09-17, http://frwebgate5.access.gpo.gov/cgi-bin/PDFgate.cgi?WAISdocID=205973385155+2+2+0&WAISaction=retrieve, Protecting Tenants at Foreclosure: Notice of Responsibilities Placed on Immediate Successors in Interest Pursuant to Foreclosure of Residential Property 74 Fed. Reg. 30106 (June 24, 2009) [Docket Number FR–5335–N–01]

Related Issues

13. Security Deposits
14. Utility Shutoffs
15. Federal examination procedures
    a. OCC (Office of the Comptroller of the Currency)
        i. http://www.occ.treas.gov/ftp/bulletin/2009-28.html
        ii. http://www.occ.gov/ftp/bulletin/2010-2.html
    b. Federal Reserve
        i. http://www.federalreserve.gov/boarddocs/caletters/2009/0905/caltr0905.htm
    c. OTS (Office of Thrift Supervision)
        i. http://files.ots.treas.gov/25319.pdf.
    d. NCUA (National Credit Union Administration)
        i. http://www.ncua.gov/Resources/RegulatoryAlerts/Files/2009/09-RA-08.docx
    e. FDIC (Federal Deposit Insurance Corporation)

State and Local Laws

Post-foreclosure eviction notice requirements and substantive eviction control protections
Note: I have only listed statutes that give tenants protections in addition to those in PTFA.

1. New York (S. 66007 enacted 12/15/09)
    a. Provides similar protections as under PTFA
    b. Right to remain for the greater of 90 days or the remaining term of the lease
    c. Clarifies that the judicial foreclosure process cannot take away the tenant's right to stay until at least 90 days after the foreclosure.
    d. Defines fair market rent

e. No sunset date

2. Illinois
    a. 735 Ill. Comp. Stat. § 5/15-1701 (h)(4)
        i. If tenants are evicted during a judicial foreclosure proceeding, the order of possession must allow tenants to stay for 120 days or until end of lease, whichever is shorter.
        ii. 90-day notice if tenants are evicted outside of the judicial foreclosure process.
        iii. To qualify under the statute, tenants must be current on rent or have made good faith effort to pay rent
    b. Public Act 96-111 (enacted 7/31/09)
        i. Within 21 days of confirmation of sale, the new owner, receiver, or mortgagee in possession after foreclosure must make a good faith effort to identify tenants.
        ii. Within 21 days of confirmation of sale, holder or purchaser must post a written notice on the primary entrance of each dwelling unit informing occupants that the dwelling unit has been foreclosed upon.
        iii. Cannot collect rent if the requirements are not met.
        iv. Tenants may stay in the property a minimum of 30 days after the date the order of possession is entered.
3. Maryland (Md. R. 14-102)
    a. Before purchaser can get an order for possession for a residential property, the purchaser must certify that tenant is not a bona fide tenant under PTFA or that notice has been given to the bona fide tenant and that the tenant has no further right to possession.
4. New Jersey
    a. New Jersey's Anti-Eviction Act (N.J. Rev. Stat. § 2A:18-61.1 *et seq*) prevents evictions due to foreclosure. *Chase Manhattan Bank v. Josephson,* 638 A.2d 1301 (N.J. 1994)
    b. A 4063, P.L. 2009, Chapter 296
        i. When a property is sold at a foreclosure sale, the buyer must make a good faith effort to identify tenants and notify them of their right to remain in their homes and where to pay rent.
        ii. Within 10 business days of obtaining title, the new owner must post a written notice prominently on the door of each unit and send the notice to each tenant by regular and certified mail.
        iii. Required to be in both English and Spanish, the notice must inform the tenant that New Jersey law protects the tenant's right to remain after foreclosure, even if the tenant does not have a written lease.
        iv. In a property with more than 10 residential units, the notice must also be conspicuously displayed in a common area in each building of the property.
        v. A person who violates the statute is liable to the tenant for $2,000 per violation, plus attorney's fees and costs.
5. Massachusetts (Mass. Gen. Laws ch. 186, § 13A)
    a. Foreclosure does not terminate tenancies subsidized under state or federal law.
6. Rent and eviction control jurisdictions

a. California: foreclosure is not good cause to evict from rent control units. *Gross v. Superior Court*, 217 Cal. Rptr. 284 (Cal. Ct. App. 1985).
b. Massachusetts: mortgagee that purchases property at foreclosure must obtain certificate of eviction before it could recover possession. *Boston Rent Equity Board v. Dime Savings Bank of New York*, 611 N.E.2d 245 (Mass. 1993).
c. D.C.: statute restricting landlord's authority to evict protected tenant after foreclosure. *Administrator of Veterans Affairs v. Valentine*, 490 A.2d 1165 (D.C. 1985).
d. New York: purchaser at foreclosure subject to New York City rent and eviction control regulations. *United Institutional Servicing Corp. v. Santiago*, 62 Misc. 2d 935, 310 N.Y.S.2d 733 (1970).

Pre-foreclosure Notice to Tenants

1. California (Cal. Civ. Code § 2924.8)
    a. Requires trustee to post and mail at least 20 days before the foreclosure sale
    b. Notice informs tenants that they must be given 60-day notice after foreclosure, but that other laws may prohibit eviction or give longer notice before eviction
    c. Only applies if the billing address for the mortgage is different from the property address
2. Maine (Me. Rev. Stat. Ann. tit. 14, § 6203-A (enacted 6/15/09)
    a. Mortgagee must provide a copy of the notice of sale to tenant if the mortgagee knows or should know that the property is occupied as a rental unit.
    b. Notice may be served on the tenant by the sheriff or by mail at the tenant's last known address.
3. Maryland (Md. Code. Ann., Real Prop. § 7-105.9)
    a. Mailed notice given at time of filing of foreclosure addressed to "all occupants" at address
    b. Notice informs occupants that property may be sold any time after 45 days from date of notice
4. Minnesota (Minn. Stat. § 580.042)
    a. Foreclosing party must give notice to tenants in properties with one to four family dwelling units.
    b. Notice contains these pieces of information:
        i. Lease is still valid during foreclosure process
        ii. Tenant cannot be asked to move during the six month redemption period following foreclosure sale
        iii. After the redemption period, the new owner must give written notice to evict tenant
        iv. Tenant should contact legal aid, HOME line, or go to Law Help Minnesota web site.
    c. Failure to give notice does not invalidate foreclosure
    d. Violator is liable for $500 to tenant
5. New Jersey (N.J. Ct. R. 4:65-1-4:65-2, as amended by NJ Orders 2009-37)

   a. Requires plaintiff to serve, by personal service or by regular and certified mail, a "Notice to Residential Tenants of Rights During Foreclosure" to all residential tenants in the property being foreclosed.
   b. Notice of sale posted on the premises must also contain the Notice to Tenants described in (a).
   c. Notice informs tenants that foreclosure is not a good ground to remove a bona fide tenant.
6. New York (S. 66007 enacted 12/15/09)
   a. Notice is given at the beginning of foreclosure action
   b. Notice must inform tenants that after foreclosure, they have the right to remain for the greater of 90 days or the remaining term of the lease
7. Nevada (AB 140, Chapter 484 effective 10/1/09)
   a. If property is residential property, must post notice of sale on property
   b. Must also mail notice to tenant or subtenant
8. North Carolina (N.C. Gen. Stat. Ann. § 45-21.17)
   a. For properties with less than 15 rental units, notice of sale must also be mailed to tenants occupying the property. Notice must be given at least 20 days before the sale.
   b. If tenants cannot be identified, letter must be addressed to "occupant."
   c. After receiving notice, tenants may give 10-day notice to terminate the tenancy. N.C. Gen. Stat. Ann. § 42-45.2.
9. Oregon (SB 952 effective 8/23/09)
   a. Notice addressed to occupant or tenant
   b. Notice includes language that federal law may grant additional rights
   c. Notice informs tenants that they may apply security deposit and prepaid rent toward current rent obligations; informs tenants that they must notify landlord in writing if tenant elects to do so
10. Washington (Wash. Rev. Code § 61.24.160, 2009 Wash. Sess. Laws. Ch. 292, effective 7/26/09)
   a. Mail notice addressed to "Resident of property subject to foreclosure sale."
   b. Notice informs tenants that sale will take place ninety days or more after date of notice.
   c. Notice advises tenants that they may want to contact a legal aid office or a housing counseling agency.
11. Wisconsin (Wis. Stat. § 846.35 effective 3/6/09)
   a. Foreclosure plaintiff must provide notice to tenants no later than five days after commencement of foreclosure proceedings.
   b. Notice must also be provided no later than five days after judgment of foreclosure is entered.
   c. Notice can be provided by personal service or certified mail.
   d. A plaintiff who failed to comply is liable to the tenant for $250 in damages for each violation.
12. Chicago (Chicago Municipal Code § 5-12-095)
   a. Within 7 days of being served a foreclosure complaint, landlord must inform all tenants in writing that a foreclosure action has been filed against the landlord.
   b. If the owner fails to comply, the tenant may terminate the rental agreement with a 30-day notice.

13. Minneapolis (Code of Ordinances §244.265)
    a. Notice goes beyond that required in Minnesota statute and makes it punishable as a misdemeanor for failure to comply with the notice requirements.

Disclosure of Foreclosure to Prospective Tenants

1. Minnesota (Minn. Stat. § 504B.151)
    a. Once the landlord's property is in foreclosure, the landlord may not enter into a lease that extends beyond the redemption period.
    b. Landlords must notify prospective tenants that the property is in foreclosure and the date the redemption period ends.
2. Nevada (AB 140, Chapter 484 effective 10/1/09)
    a. Landlord must make written disclosure to prospective tenants that the property is in foreclosure.
    b. Willful violation constitutes a deceptive trade practice under Nevada law.
3. Wisconsin (Wis. Stat. § 704.35 effective 3/6/09)
    a. Landlord must disclose to prospective tenants if a foreclosure action has been commenced on the property.
    b. Any rental agreement entered into during the pendency of the foreclosure action and before the expiration of the redemption period must include a separate written acknowledgement by the tenant that the disclosure was provided.
4. Chicago (Chicago Municipal Code § 5-12-095)
    a. Landlord must disclose in writing to prospective tenants that the landlord is named in a foreclosure complaint.
    b. If the owner fails to comply, the tenant may terminate the rental agreement with a 30-day notice.

Utility Shutoffs

1. California (Cal. Pub. Util. Code §§ 777, 777.1, 10009, 10009.1, 12822, 12822.1, 16481, 16481.1)
    a. Multifamily buildings
        i. 10-day notice of shutoff for individually metered units.
        ii. 15-day notice of shutoff for master metered buildings.
        iii. Tenants have the right to put the utility accounts in their own names without paying for arrearages and then deduct utilities from rent
    b. SB 120 expands existing utility shutoff protections by:
        i. Extending utility shutoff protections to tenants in single-family homes (10 days notice or 7 days if the utility is investor-owned)
        ii. Requiring notices of utility shutoffs to be in writing
        iii. Requiring the shutoff notices to be in Spanish, Chinese, Tagalog, Vietnamese, and Korean in addition to English.

    c. The new SB 120 protections took effect on January 1, 2010, except for tenants in single-family homes served by an investor-owned utility, in which case the new provisions apply on July 1, 2010.
2. City of Oakland (declaration adopted 12/16/2008)
    a. Tenant occupied foreclosed properties where the former owner was responsible for utility payments
        i. Termination of utilities will automatically be deemed a significant threat to health or safety.
        ii. Gives tenants 120 days after the notice of utility shut off to locate their new landlord, assume payment, or make other arrangements.
        iii. Effective until 12/31/2010
3. San Francisco (issued by the City Attorney's office and the Dept of Building Inspection 2/25/09)
    a. No utilities shall be terminated in master-metered multiunit residential buildings, irrespective of foreclosure status.
        i. Does not issue a time frame
        ii. Effective until 12/31/2010
4. Minnesota (Minn. Stat. § 504B.215 enacted 5/15/08)
    a. For master-metered buildings, utility company must post notice before shutting off utilities for nonpayment
    b. Tenants may continue service by paying current charges and not arrearages.
    c. In buildings with fewer than five units, tenants have the right to put the utility accounts in their own names.
5. Minneapolis (Code of Ordinances § 244.590)
    a. The tenants in the building may pay any rents owing to the owner or operator of the building directly to the utility company. The utility company shall make available to any requesting tenant or tenant's representative the utility account of the multiple dwelling or duplex housing which has been posted pursuant to this article. Any such payment shall be considered a reduction of rent owed by the tenant and a reduction of the utility bill owed by the owner or operator of the building.
6. Houston Code of Ordinances §47-47 (2007)
    a. Prior to terminating water service for a commercial customer with tenants, the department shall post notice of termination at a prominent location on the property. After placement of the notice, the department shall allow an additional six calendar days for payment before terminating service. The department shall charge the commercial customer $40.00 for the cost of posting such notice.

Security Deposits

1. Connecticut (Conn. Gen. Stat. § 47a-21)
    a. New owner after foreclosure sale must return security deposit
    b. Landlord is defined in the security deposit statute to explicitly include a person who succeeds to the property interest through foreclosure
2. California (Cal. Civ. Code § 1950.5)

    a. Successor in interest and old landlord are jointly and severally liable for return of the security deposit
    b. Not specifically addressed to properties acquired through foreclosure
3. Oregon (SB 952 effective 8/23/09)
    a. Allows tenants who receive notice of foreclosure to apply security deposits to pay outstanding rent obligations
    b. Must inform landlord in writing that the tenant intends to do so
4. Minnesota (Minn. Stat. § 504B.178)
    a. Allows tenants to apply security deposit toward rent during the redemption period following a foreclosure sale
        i. Withholding all or any portion of rent for the last payment period of the residential rental agreement creates a rebuttable presumption that the tenant withheld the last payment on the grounds that the deposit should serve as payment for the rent.
    b. When the landlord's interest in the property ends (for example, because of death, foreclosure or contract for deed cancellation), the security deposit must be transferred to either the new owner of the tenant. This transfer must be done within 60 days after the current landlord's interest in the property ends or when the new landlord is required to return the security deposit.
5. Wisconsin (Wis. Stat. § 846.35 (2)(a) effective 3/6/09)
    a. The tenant may withhold rent in an amount equal to the security deposit during the last period the tenant actually retains possession of the rental unit, regardless of whether the tenant retains possession after the sale of the property is confirmed.
6. Massachusetts (Gen. Laws ch. 186, § 15B)
    a. Successor in interest and old landlord are both liable for return of the security deposit
    b. Not specifically addressed to properties acquired through foreclosure.
7. Maryland (Md. Code. Ann., Real Prop. § 8-203(d)(3)-(4))
    a. Successor in interest and old landlord are both liable for return of the security deposit
    b. Not specifically addressed to properties acquired through foreclosure.

Cash for Keys

1. Connecticut (Conn. Gen. Stat. § 47a-20f)
    a. Cash for keys offers must be equal to at least the amount of security deposit paid by the tenant.
    b. If there is no evidence of the amount of security deposit paid or no security deposit was paid, offer must at least be equivalent to two months rent or two thousand dollars, whichever is greater.
    c. No mortgagee, lienholder or successor in interest may require a tenant in possession, as a condition of the receipt of such money or other valuable consideration, to waive or forfeit any rights or remedies such tenant may have under law against such mortgagee, lienholder or successor in interest other than the right to bring an action to reclaim the security deposit and interest that would be due such tenant.

Habitability

1. New York
   a. Legislation (S. 66007 enacted 12/15/09)
      i. Mortgagee must maintain property between date of judgment of foreclosure and date of sale
   b. Case law (*DHPD v. Greenpoint*, 169 Misc.2d 61 (New York City Civ. Ct. 1995))
      i. Mortgagee fined for allowing property to fall into state of disrepair after judgment of foreclosure
2. New Jersey
   a. N.J. Stat. § 46:10B-51
      i. For vacant properties, the creditor (bank) is liable for maintaining and abating any nuisances following the filing of the notice of intention to foreclose.
   b. A 4063, P.L. 2009, C 296
      i. Lender is responsible for maintaining a property between the time a foreclosure filing is made and the sale.
3. Maintenance of vacant properties
   a. Many local jurisdictions now require owners of vacant properties to register these properties with the government and maintain vacant properties.
   b. There are now over 300 vacant property registration ordinances across the country.
   c. For a listing of vacant property registration ordinances, see http://www.safeguardproperties.com/content/view/1843/106/

Record Sealing of Post-foreclosure Evictions

1. Illinois (735 Ill. Comp. Stat. § 5/15-1701(h)(5))
   a. Sealing eviction record for occupants who "who would have lawful possession of the premises but for the foreclosure of a mortgage on the property."
2. Minnesota (Minn. Stat. § 484.014)
   a. Mandatory expungement of eviction records if the tenant being evicted after foreclosure did not receive a proper eviction notice

Criminal offenses

1. Colorado (Colo. Rev. Stat. S. 18-5-802)
   a. Expands the definition of *equity skimming* to include the act of continuing to collect rent from a tenant after foreclosure and sale of the property to another person.

Unique approaches

1. Boston
   a. Under this ***REO Tenancy Preservation Pilot*** initiative, the City of Boston, through the Boston Redevelopment Authority (BRA), will purchase foreclosed homes from the

Bank of America with the existing tenants in place. The City will then sell these properties to homebuyers, non-profits, and private developers without displacing the tenants. Eligible buyers could benefit from the City's federal **Neighborhood Stabilization Program** (NSP) funds, which are targeted funds for purchase and rehab of foreclosed homes.

Resources

National Housing Law Project
Attorney/Advocate Resource Center: Foreclosure Crisis and Its Impact on Tenants
http://nhlp.org/resourcecenter?tid=68

National Low Income Housing Coalition
Special Topic: Renters in Foreclosure
http://www.nlihc.org/template/page.cfm?id=159

National Law Center on Homelessness and Poverty
Without Just Cause: A 50-State Review of the (Lack of) Rights of Tenants in Foreclosure
http://www.nlchp.org/content/pubs/Without_Just_Cause1.pdf

National Conference of State Legislatures
Foreclosures 2009 legislation
http://www.ncsl.org/default.aspx?tabid=17229
Foreclosures 2010 legislation
http://www.ncsl.org/default.aspx?tabid=19477

MuniCode
http://municode.com/

This outline was compiled with help from students at UC Hastings Law.