

**NATIONAL LAW CENTER  
ON HOMELESSNESS & POVERTY**

**Staying Home:  
The Rights of Renters Living in Foreclosed Properties**

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

**June 2010**

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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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## EXECUTIVE SUMMARY

The recent economic and foreclosure crises in the United States have resulted in dramatic rates of loss of homeownership. In cities and counties across the country, homelessness and the number of families at risk of homelessness are increasing. The U.S. Conference of Mayors reported that between October 2007 and September 2008, 12 of 25 cities surveyed experienced “an increase in homelessness because of the foreclosure crisis.”<sup>1</sup> In 2008, state and local homeless groups reported a 61 percent rise in homelessness since the foreclosure crisis began.<sup>2</sup>

The foreclosure crisis has not only affected homeowners, but also renters living in foreclosed properties. According to 2009 estimates by the National Low Income Housing Coalition, 40 percent of families facing eviction due to foreclosure are renters, and 7 million households living on very low incomes (31-50 percent of Area Median Income) are at risk of foreclosure.<sup>3</sup> Even renters who are current in their rent payments, and in full compliance with their leases, are frequently forced to vacate their housing when the property is foreclosed upon, often with very little notice. These tenants may also be unable to recover their security deposits from the defaulting landlord. In some cases, tenants are not even aware that foreclosure proceedings had been initiated. These circumstances significantly decrease the likelihood that tenants with lower incomes can find safe, decent, and affordable alternative housing and avoid becoming homeless.

In February 2009, the National Law Center on Homelessness & Poverty (“the Law Center”) and the National Low Income Housing Coalition (NLIHC) issued a report entitled *Without Just Cause: A 50-State Review of the (Lack of) Rights of Tenants in Foreclosure*.<sup>4</sup> The report revealed that most states’ laws provided virtually no protections for tenants in properties that were the subject of foreclosure actions. Indeed, only two – New Jersey and the District of Columbia – provided that tenant leases survived foreclosure. In at least 3 states, eviction proceedings could be initiated after as little as 3 days’ notice to tenants to vacate the property.

In May 2009, in response to advocacy by the Law Center, NLIHC, and others, the federal government enacted the Protecting Tenants at Foreclosure Act of 2009 (the “PTFA” or the

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<sup>1</sup> The United States Conference of Mayors, *Hunger and Homelessness Survey*, Dec. 2008, available at [http://www.usmayors.org/pressreleases/documents/hungerhomelessnessreport\\_121208.pdf](http://www.usmayors.org/pressreleases/documents/hungerhomelessnessreport_121208.pdf).

<sup>2</sup> Ross Colvin, *Family Homelessness Raising in the United States*, Reuters, Nov. 12, 2008, available at <http://www.reuters.com/article/newsOne/idUSTRE4AB18I20081112?pageNumber=2>.

<sup>3</sup> The National Low Income Housing Coalition, *Foreclosure to Homelessness 2009: The Forgotten Victims of the Subprime Crisis*, June 26, 2009, available at <http://www.nationalhomeless.org/advocacy/ForeclosuretoHomelessness0609.pdf>. Research regarding individual states also indicates that a high number of foreclosures involve rental properties. In the state of California, for example, a report released in 2009 by Tenants Together, a California statewide organization for tenant’s rights, estimated that at least one-third of the units in foreclosure in California were rental units and that of the 14 million renters in the state, at least 225,000 lived in properties that went through foreclosure. TENANTS TOGETHER, HIDDEN IMPACT: CALIFORNIA RENTERS IN THE FORECLOSURE CRISIS 6 (2009) available at <http://www.tenants-together.org/downloads/ForeclosureReport.pdf>. A study released by DePaul University revealed that in Chicago’s Cook County “328 multifamily rental buildings were in foreclosure by the second quarter of this year [2009], compared with 185 last year [2008].”<sup>3</sup> Robin Shulman, *Renters Becoming Latest Victims as Foreclosure Crisis Widens*, The Washington Post, Nov. 23, 2009 available at <http://www.washingtonpost.com/wp-dyn/content/article/2009/11/22/AR2009112200927.html>.

<sup>4</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).

“Act”), which provides important federal protections for tenants in foreclosed properties, including the right to receive 90 days’ notice before being required to leave the property and, in many cases, the right to remain for the length of the tenant’s existing lease term.<sup>5</sup> However, the PTFA leaves many issues to be determined by state law, such as what form the notice to the tenant is to take. In addition, the Act does not negate any greater legal protections provided to tenants under state or local law; if state law provides better protections, those protections still apply.

This report summarizes the results of a 50-state survey of state law since enactment of the PTFA. Since the issuance of the *Without Just Cause* report, 30 states plus the District of Columbia have enacted new state laws affecting the rights of tenants in properties subject to foreclosure and/or have proposed new legislation that is pending in the state legislature. At least 16 states have enacted state laws,<sup>6</sup> and as of March 23, 2010, at least 21 states had proposed legislation pending.<sup>7</sup> (The research in this report was generally current as of March 23, 2010, although in some instances developments after that date are noted.)

In addition, the report summarizes and assesses implementation of and compliance with the PTFA to date. It concludes that despite the new law, many tenants across the country are still being ordered to vacate their homes with little notice once the property enters foreclosure. For example, even though she had been paying her rent on time, Beverly, a resident of a rental property in Ohio, came home one weekend to find her apartment had been padlocked, and her belongings removed. She didn’t know the building was in foreclosure, and its new owners had illegally evicted her. Forced to stay with relatives, as even her bed had been taken, Beverly’s rights under the Act were violated.

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

The PTFA provides new federal rights to tenants, including the aforementioned right to receive at least 90 days’ advance notice from the new owner of a property after foreclosure before the tenant(s) can be required to vacate the property. Under the new law, in most circumstances new owners of foreclosed properties, including banks or other lenders, must permit bona fide tenants<sup>8</sup> to remain in their homes for the full length of their lease under the existing lease terms, unless the new owner plans to live in the property as his or her primary residence. The PTFA explicitly extends these protections to tenants who are participants in the Section 8 program and 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.

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<sup>5</sup> Pub. L. No. 111-22, tit. VII, §§ 701-704 (2009).

<sup>6</sup> Arizona, California, Colorado, Illinois, Maine, Maryland, Minnesota, Missouri, Nevada, New Jersey, New York, Oregon, Utah, Virginia, Washington, and Wisconsin.

<sup>7</sup> California, Connecticut, District of Columbia, Florida, Georgia, Hawaii, Indiana, Maryland, Massachusetts, Michigan, Minnesota, Missouri, New York, North Carolina, Ohio, Rhode Island, South Carolina, Tennessee, Vermont, West Virginia, and Wisconsin.

<sup>8</sup> 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.

Unless it is extended, the PTFA will remain in effect only until December 2012.

### **Implementation of the PTFA**

Since the enactment of the Protecting Tenants at Foreclosure Act in May 2009, national and local advocates for tenants, federal agencies and others have worked to spread the word about the law and its new protections.

National advocates, such as the National Law Center on Homelessness & Poverty, the National Housing Law Project and the National Low Income Housing Coalition, have conducted trainings and produced written materials to inform tenants and their advocates about the PTFA. In some states, such as California and Connecticut, housing advocates are working together in statewide coalitions to educate themselves and tenants, and to share advocacy strategies. Advocates in some states, such as Florida, are taking action to educate housing court judges about the PTFA. Legal advocates in some locations, such as in the Boston, Massachusetts area, are joining forces with grassroots advocacy groups to reach tenants in properties slated for foreclosure and inform them of their rights even before the properties change ownership.

Some state government actors are getting involved as well. Several state attorneys general have taken steps to increase public awareness of the rights of tenants in foreclosed properties and, in at least one case, to enforce some of these rights. In February 2010, Connecticut Attorney General Richard Blumenthal, working in conjunction with local legal services attorneys, announced a new initiative to aid tenants in foreclosed properties. Blumenthal emphasized that “law firms, realtors and lenders have moral and legal obligations to provide fair notice and time for tenants to find alternative housing after foreclosures.”<sup>9</sup> The initiative has included sending “cease and desist” letters to more than 30 companies that have violated the PTFA. A number of other state government offices in different states have made efforts to disseminate information about the Protecting Tenants at Foreclosure Act and tenant resources on their website or in press releases, such as the resource toolkit offered by the New Jersey Public Advocate’s office.

Although the PTFA is self-executing and does not impose responsibility for enforcement or guidance on any particular federal agency, the federal government has taken some steps to promote compliance with and implementation of the law. Federal regulatory agencies tasked with overseeing banks, such as the Office of the Comptroller of the Currency (OCC) and the Federal Reserve Board, have issued notices<sup>10</sup> to the institutions they regulate notifying them of their obligations under the PTFA and, in some cases, making clear that they will examine the banks for compliance with the Act. Lack of compliance could result in civil enforcement actions by the agencies, with a possibility of monetary penalties. Some of the regulatory agencies have issued expanded procedures for their examiners to employ when conducting periodic bank examinations that are aimed at assessing whether the banks have sufficient policies, procedures and controls in place to ensure compliance, and that they have actually complied with the PTFA.

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<sup>9</sup> Press Release, Office of Attorney General Richard Blumenthal, February 1, 2010.

<sup>10</sup> See, for example, the July, 2009 letter issued by the Federal Reserve Board at <http://www.federalreserve.gov/boarddocs/caletters/2009/0905/caltr0905.htm> and the August, 2009 bulletin issued by the OCC at <http://www.occ.treas.gov/ftp/bulletin/2009-28.html>.

For example, the OCC created a separate PTFA “Examination Worksheet” for examiners to use when auditing banks and examining their policies that directs examiners to answer targeted questions to assess PTFA compliance, such as whether the banks have issued the required 90 day advance notice to tenants in the case of foreclosures.<sup>11</sup>

In addition, HUD has issued general guidance aimed at ensuring that individuals and entities with whom HUD interacts are aware of the rights and obligations that result from the Act. HUD has also issued guidance to public housing agencies regarding how to implement the PTFA with respect to tenants in the Section 8 program.

### **Continuing Violations of the PTFA**

While awareness of the problems experienced by tenants in foreclosed properties is increasing—as is compliance with the PTFA—as more people become aware of the law’s requirements, much more work remains to be done. Based on reports from the local level across the country, it is clear that violations of tenants’ rights in foreclosed properties continue to occur frequently. Many of these violations involve communication between lenders or their agents and tenants. While violations take many forms, the primary kinds of problems now being reported include:

- Notice to vacate in clear violation of the law. In some cases, lenders or their agents are notifying tenants that they must vacate properties immediately—completely disregarding the tenants’ rights under the PTFA.
- Unclear and/or misleading information. In other cases, lenders or their agents are sending notices that are unclear, written in language difficult for a non-attorney to decipher, or that contain incomplete or misleading information, or both.
- Misleading “cash for keys” offers. Some tenants are offered a “cash for keys” arrangement, in which they are offered a monetary payment in exchange for vacating the property quickly, without ever being told that they have the option to stay if they wish to.
- No communication. In other cases there is no communication at all, and lenders and their agents make no effort to determine whether the property is occupied.
- Failure to contact public housing authority. Lenders are failing, in many cases, to contact the local public housing authority (or other administrator of the local Section 8 program) to obtain information about the obligations they are assuming under the Housing Assistance Payments contract entered into by the previous owner of the property.

The impact of these failures is severe. Some successors in interest—the new owners following foreclosure proceedings—are initiating eviction actions against tenants in violation of the PTFA. Tenants are, in some cases, not receiving the required 90-day advance notice before the new

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<sup>11</sup> Pages 15-16 of the report provides links to regulatory entities’ specific examination procedures or other guidance.

owner initiates evictions proceedings. Sometimes, bona fide tenants are being required to vacate their homes well before the expiration of their lease.

Maintenance of the properties is also a problem, and successors in interest, in many cases, are failing to maintain utilities, perform repairs, or complete other tasks even though the tenant has the right to remain in the property under the current terms of the lease, which requires the owner to do so. Lenders and their agents may fail to inform the tenant(s) whom they should contact in the event maintenance or repairs are needed, and in many cases no one is taking responsibility for performing these functions.

Some tenants and their advocates are turning to litigation to address violations of the PTFA. While published court opinions interpreting or enforcing the PTFA are still sparse at this time, there have been a number of decisions involving the Act. Tenants have had varying degrees of success in asserting rights under the PTFA in litigation against new property owners after foreclosure, and interpretation of the law is still evolving. In one recent case, the Appellate Division of Contra Costa County (CA) Superior Court reversed a trial court decision allowing the eviction of a low-income single mother and her three school-age children from a foreclosed home in which they were living. The court found that the trial court had erred in holding that 30 days' notice was sufficient to initiate eviction proceedings—since under the federal PTFA they are entitled to 90 days' advance notice—and ordered the trial court to dismiss the eviction lawsuit. In one New York state case, though, the court read the language of the PTFA very narrowly to protect only tenants in properties involving “federally related” mortgage loans. In another case, a federal court in California held that the PTFA did not create a private right of action for a tenant to sue a successor in interest for damages for failure to comply with the PTFA's notice requirement.

### **Recent Changes in State Law: Increasing Protections for Tenants in Foreclosure**

A number of state legislatures have recently taken steps to add or improve protections for tenants in foreclosure. *Staying Home* reports the results of a 50-state survey of developments in states' laws regarding the rights of tenants in foreclosure since the *Without Just Cause* report was issued in February 2009. The survey revealed that since February 2009, 30 states plus the District of Columbia have enacted new state laws enhancing the rights of tenants in properties subject to foreclosure and/or have proposed new legislation pending in the state legislature. In the 16 states which have enacted new laws, the laws provide rights and protections for tenants such as:

- The right to receive notice (or receive earlier or clearer notice, or notice on more occasions) of a foreclosure action against the landlord's property;<sup>12</sup>
- The right to receive advance notice of a foreclosure sale of the property, or notice that the property has been foreclosed upon or changed owners;<sup>13</sup>

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<sup>12</sup> See, e.g., Maryland, New York, Utah, Virginia, and Wisconsin.

<sup>13</sup> See, e.g., Colorado, Illinois, Maine, Maryland, Missouri, Nevada, New Jersey, Oregon, Washington, and Wisconsin.

- The right to additional time to vacate the property after foreclosure;<sup>14</sup>
- The right to have the successor in interest to the foreclosed mortgagor maintain the property after and/or during foreclosure;<sup>15</sup>
- The right to deduct or withhold rent under certain circumstances, such as to cover repairs to the property in foreclosure or to compensate for the potential loss of a security deposit.<sup>16</sup>

Further, in at least 21 states, there is proposed legislation pending that would improve protections for tenants in properties subject to foreclosure. For example, proposed legislation in Massachusetts would protect tenants in foreclosed properties from eviction without just cause, such as failure to pay rent or violation of a lease term. In Minnesota, proposed legislation would require persons who take over property as the result of a foreclosure to maintain as rental property any property used as rental property by the landlord, offer renewal leases to tenants of the foreclosed property, and keep affordable rent levels in place.

Although a number of states are making efforts to improve the rights that tenants in properties subject to foreclosure have under state law, in the majority of states, even including the newly enacted provisions, state law does not provide as much protection to tenants as does the federal PTFA. This is especially true of the 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.

## **Recommendations**

The federal bank regulatory entities should increase their monitoring of banks' compliance with the PTFA and take any and all enforcement action within their power against violators. For example, the agencies should more actively seek out information about violations of the PTFA by the banks they regulate, including encouraging members of the public to bring these violations to their attention, taking action on the violations, and publicizing the fact that they are taking action on the complaints (at least in general terms if not by reporting actions taken against individually named banks). Other federal government agencies, such as HUD, Department of the Treasury, the Department of Veterans' Affairs, and the Federal Trade Commission (FTC) should also take action to educate the public about the rights of tenants in foreclosed properties, including doing outreach and setting up systems to receive and respond to complaints of violations. They should also take enforcement action if possible, such as requiring further information and doing ongoing monitoring; warning or fining violators; and engaging in litigation if necessary.

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<sup>14</sup> See, e.g., Illinois, Maine, Maryland, New York, Oregon, and Wisconsin.

<sup>15</sup> See New York.

<sup>16</sup> See, e.g., Maine, Wisconsin.

State legislatures should enact new laws or strengthen existing ones to offer protections for tenants in properties subject to foreclosure – both to provide on a permanent basis those protections offered by the PTFA and to provide additional protections. Such protections could include, for example, requirements that successors in interest explicitly and immediately make clear to tenants that they do not have to leave their housing right after the foreclosure; that they make good faith efforts to identify tenants in the property; that they provide contact information for someone the tenant can contact with concerns or for repairs; and that they take appropriate steps to maintain the properties in good working order. State attorneys general offices should actively monitor violations of the PTFA, including establishing targeted initiatives, designating point people in their offices to oversee the initiatives, and encouraging the public to inform them of violations. These offices should take all enforcement action possible, including cease and desist letters and litigation, if appropriate, against both successors in interest and their agents using state consumer protection laws and any other available tools.

Banks and other successors in interest should honor tenants' rights under the PTFA and state law, and ensure that their agents do the same. Successors in interest should refrain from establishing arrangements wherein the person who first makes contact with tenants in foreclosed properties is someone who has a financial or other interest in having the property vacated for resale. Upon contacting tenants for the first time, successors in interest or their agents should make clear at the beginning of the first interaction—in writing, in person, or otherwise—that the tenant may not have to leave immediately.

Advocates should continue to educate tenants, tenant advocates, and members of the lending and servicing communities about the PTFA and its requirements. They should reach out to tenants as early in the process as possible—ideally before foreclosure proceedings on the tenant's home are initiated—to inform them of their rights. Local advocates should consider forming statewide coalitions to share information and advocacy strategies, and should also educate local judges about the PTFA and rights provided under state law to tenants in properties facing foreclosure.

## INTRODUCTION

The recent economic and foreclosure crises in the United States have resulted in dramatic rates of loss of homeownership. In cities and counties across the country, homelessness and the number of families at risk of homelessness are increasing. The U.S. Conference of Mayors reported that between October 2007 and September 2008, 12 of 25 cities surveyed experienced “an increase in homelessness because of the foreclosure crisis.”<sup>17</sup> In 2008 state and local homeless groups reported a 61 percent rise in homelessness since the foreclosure crisis began.<sup>18</sup>

Homeowners have not been the only group affected by the foreclosure crisis; the crisis has had and continues to have a substantial adverse effect on renters living in properties subject to foreclosure. According to 2009 estimates by the National Low Income Housing Coalition, 40 percent of families facing eviction due to foreclosure are renters, and 7 million households living on very low incomes (31-50 percent of Area Median Income) are at risk of foreclosure.<sup>19</sup> Even renters who are current in their rent payments, and in full compliance with their leases, are frequently forced to vacate their housing when the property is foreclosed upon, often with very little notice. These tenants may also be unable to recover their security deposits from the defaulting landlord. In some cases, tenants are not even aware that foreclosure proceedings had been initiated. These circumstances significantly decrease the likelihood that tenants with lower incomes can find safe, decent, and affordable alternative housing and avoid becoming homeless.

In February 2009, the National Law Center on Homelessness & Poverty (“the Law Center”) and the National Low Income Housing Coalition (NLIHC) issued a report entitled *Without Just Cause: A 50-State Review of the (Lack of) Rights of Tenants in Foreclosure*.<sup>20</sup> The report revealed that most states’ laws provided virtually no protections for tenants in properties that were the subject of foreclosure actions. Indeed, only two – New Jersey and the District of Columbia – provided that tenant leases survived foreclosure. In at least 3 states, eviction proceedings could be initiated after as little as 3 days’ notice to tenants to vacate the property.

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<sup>17</sup> The United States Conference of Mayors, *Hunger and Homelessness Survey*, Dec. 2008, available at [http://www.usmayors.org/pressreleases/documents/hungerhomelessnessreport\\_121208.pdf](http://www.usmayors.org/pressreleases/documents/hungerhomelessnessreport_121208.pdf).

<sup>18</sup> Ross Colvin, *Family Homelessness Rising in the United States*, Reuters, Nov. 12, 2008, available at <http://www.reuters.com/article/newsOne/idUSTRE4AB18I20081112?pageNumber=2>.

<sup>19</sup> The National Low Income Housing Coalition, *Foreclosure to Homelessness 2009: The Forgotten Victims of the Subprime Crisis*, June 26, 2009, available at <http://www.nationalhomeless.org/advocacy/ForeclosuretoHomelessness0609.pdf>. Research regarding individual states also indicates that a high number of foreclosures involve rental properties. In the state of California, for example, a report released in 2009 by Tenants Together, a California statewide organization for tenant’s rights, estimated that at least one-third of the units in foreclosure in California were rental units and that of the 14 million renters in the state, at least 225,000 lived in properties that went through foreclosure. TENANTS TOGETHER, HIDDEN IMPACT: CALIFORNIA RENTERS IN THE FORECLOSURE CRISIS 6 (2009) available at <http://www.tenants-together.org/downloads/ForeclosureReport.pdf>. A study released by DePaul University revealed that in Chicago’s Cook County “328 multifamily rental buildings were in foreclosure by the second quarter of this year [2009], compared with 185 last year [2008].”<sup>19</sup> Robin Shulman, *Renters Becoming Latest Victims as Foreclosure Crisis Widens*, The Washington Post, Nov. 23, 2009 available at <http://www.washingtonpost.com/wp-dyn/content/article/2009/11/22/AR2009112200927.html>.

<sup>20</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).

Since the issuance of the *Without Just Cause* report, in response to advocacy by the Law Center, NLIHC, and others, the federal government has provided a measure of protection for tenants in foreclosed properties through enactment of the Protecting Tenants at Foreclosure Act of 2009 (the “PTFA” or the “Act”), which became effective in May 2009.<sup>21</sup> The new law provides important federal protections for tenants in foreclosed properties, which are explained below.

While the new federal law preempts state law with respect to the rights it explicitly provides, state law remains crucial. The PTFA leaves many issues to be determined by state law. It also specifically provides that the new federal protections do not negate any greater legal protections provided to tenants under state or local law and, unless it is extended, will remain in effect only until December 2012. Since the issuance of the *Without Just Cause* report, at least 16 states have enacted state laws pertaining to the rights of tenants in properties subject to foreclosure and, as of March 23, 2010, at least 21 states had proposed new legislation currently pending.

*Staying Home* describes the provisions of the Protecting Tenants at Foreclosure Act; actions taken by the federal government, state governments, and advocates that relate to implementation of the new law; current implementation problems; and litigation involving the PTFA. The report also reveals the results of a 50-state survey of developments in state laws since the February 2009 release of *Without Just Cause* that impact tenants’ rights in the foreclosure context, including new state laws, proposed state legislation, and the effect of the PTFA on the rights of tenants in each state. Finally, *Staying Home* offers recommendations to improve the situation of renters in foreclosed properties and ensure that their rights are respected.

### **Methodology, Limitations, and Disclaimers**

The drafters of this report made every effort to be complete in their research, which included 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 phone calls with at least one knowledgeable practitioner in the field in each state.<sup>22</sup> Nevertheless, the report may not capture every new development in every state that may be relevant to tenants’ rights in foreclosure.<sup>23</sup> 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 March 23, 2010, although in some instances developments after that date are noted; in a few instances the report includes information about state law that predated the *Without Just Cause* report in order to clarify or correct a statement made in *Without Just Cause*.

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.

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<sup>21</sup> Pub. L. No. 111-22, tit. VII, §§ 701-704 (2009).

<sup>22</sup> Despite the efforts of the drafters to do so, we were unable to speak with knowledgeable practitioners in seven (7) states by the date of issuance of this report.

<sup>23</sup> Although certain municipal laws and ordinances relevant to tenants’ rights in foreclosure that came to the drafters’ attention are discussed in this report, the drafters did not undertake a comprehensive search of municipal law as part of their research.

**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.**

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

The Protecting Tenants at Foreclosure Act, part of the Helping Families Save their Homes Act of 2009, was signed into law by President Obama on May 20, 2009.<sup>24</sup> The law provides important new federal legal protections for tenants whose homes are in properties that are the subject of foreclosure actions.

Under the PTFA, tenants have new legal rights that apply in all cases involving “any foreclosure on a federally related mortgage loan or on any dwelling or residential real property” after May 20, 2009. Under the law:

1. the immediate successor in interest in the foreclosed property (the new owner after the foreclosure takes place) 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;
2. 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;<sup>25</sup>
3. 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.

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.

The law also extends these protections to tenants who are participants in the Section 8 program. New owners of properties in which Section 8 participants reside assume ownership subject to the lease between the prior owner and tenant, and also subject to the Housing Assistance Payments (HAP) contract between the prior owner and public housing agency (or other entity that administers the local Section 8 program).<sup>26</sup> Section 8 participants must also be provided with at

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<sup>24</sup> Pub. L. No. 111-22, tit. VII, §§ 701-704 (2009).

<sup>25</sup> The law includes one exception to this requirement. In cases in which the new owner or person who purchases the unit from the new owner will occupy the unit as a primary residence, the new owner does not have to honor any existing lease for its entire term if that term is longer than 90 days. The tenant, however, must still be provided with at least 90 days’ advance notice after the foreclosure before he or she can be required to vacate the property.

<sup>26</sup> Again, in cases in which the new owner or person who purchases the unit from the new owner will occupy the unit as a primary residence, the new owner is not required to honor the existing lease for its entire term if that term is longer than 90 days. However, the tenant must still be provided with at least 90 days’ advance notice after the foreclosure before he or she can be required to vacate the property.

least 90 days' advance notice after the foreclosure before they can be required to leave their rental housing.

The PTFA explicitly provides that its provisions do not affect the requirements of any state or local law that provide longer time periods or other additional protections for tenants; if state or local law provides better protections, those protections still apply. The PTFA is "self-executing;" it does not assign to any of the federal agencies responsibility for implementation or enforcement, or responsibility for the issuance of regulations or guidance. Unless there is new legislation passed to extend it, the PTFA's protections will remain in effect only until December 31, 2012, pursuant to the Act's "sunset" provision.

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

Since the enactment of the Protecting Tenants at Foreclosure Act in May 2009, national and local advocates for tenants, federal entities, and others have taken steps to spread the word about the federal law and the new protections it provides. Awareness of the problems experienced by tenants in properties being foreclosed upon and the legal rights that exist to protect them is increasing around the country. However, a lot more work remains to be done. There are many reports of tenants vacating their rental housing immediately upon learning that the owner is in default and the property is entering foreclosure. Though it is difficult to obtain definitive information or statistics regarding these tenants, many of these individuals and families likely were unaware that they may have a legal right to remain in their home for at least 90 days, and possibly for longer than that based on their lease. The Law Center receives phone calls from renters asking about their rights to remain in their home—sometimes after they consulted a local attorney who had never heard of the PTFA. Based on information received by the Law Center and other national advocacy groups, there are continuing problems with implementation of the PTFA, and violations abound in many locations across the country.

### **Action by Housing Advocates**

National advocates, such as the Law Center, the National Housing Law Project, and the National Low Income Housing Coalition, have conducted webinars and other trainings and produced written materials to inform tenants and their advocates about the new law. In some states, such as California and Connecticut, housing advocates are working together in statewide coalitions to educate themselves and tenants, and share information to keep abreast of the latest developments in use of the PTFA and state laws to vindicate the rights of tenants in foreclosed properties. In other states, such as Florida, advocates have been jointly working to make sure housing court judges are aware of the PTFA. Legal advocates in some locations, such as the Boston area, have joined forces with grassroots advocacy groups to reach tenants in properties slated for foreclosure and inform them of their rights even before the properties change ownership.

### **State Government Involvement**

Some state government actors are also taking steps to educate the public and bring about compliance with laws protecting tenants in foreclosed properties. Several state attorneys general have taken steps to increase public awareness of the rights of tenants in foreclosed properties and, in at least one case, to enforce some of these rights. In February 2010, Connecticut Attorney General Richard Blumenthal, working in conjunction with local legal services attorneys,<sup>27</sup> announced a new initiative to aid tenants in foreclosed properties. Blumenthal emphasized that “law firms, realtors and lenders have moral and legal obligations to provide fair notice and time for tenants to find alternative housing after foreclosures.”<sup>28</sup> The initiative has included sending “cease and desist” letters to over 30 companies that have violated the PTFA. A

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<sup>27</sup> A coalition of legal services attorneys in Connecticut produced a very useful report about violations of the rights of Connecticut’s tenants in foreclosed properties, which is available at <http://wiki.nlchp.org/display/Manual/Violations+of+The+Protecting+Tenants+at+Foreclosure+Act+%28PTFA%29>.

<sup>28</sup> Press Release, Office of Attorney General Richard Blumenthal, February 1, 2010.

number of other state government offices in different states have made efforts to disseminate information about the Protecting Tenants at Foreclosure Act and tenant resources on their websites or in press releases, such as the resource toolkit offered by the New Jersey Public Advocate's office.

### **Steps Taken by the Federal Government**

As described below, the federal government – through the federal regulatory agencies tasked with overseeing banks and the U.S. Department of Housing and Urban Development – has taken some useful steps to educate landlords and lenders about the rights of tenants in properties subject to foreclosure. The bank regulatory agencies have also taken some steps to monitor banks' compliance with the PTFA.

#### **Federal Regulator Oversight of Financial Institutions' Compliance with the Protecting Tenants at Foreclosure Act**

Banks and other lenders often assume ownership of properties after foreclosure and become “successor[s] in interest” for purposes of the PTFA. Since so many banks are currently taking title through foreclosure to homes on which they hold the mortgages, they comprise a significant share of the entities subject to the PTFA.

For bank lenders that are federally regulated, their compliance with the PTFA can be monitored by the federal banking agencies that supervise them. Banks are regulated by a series of different federal regulatory agencies, each of which has authority over a different set of banks. National banks are regulated by the Office of the Comptroller of the Currency (OCC). Federally chartered thrifts, savings and loans, and savings banks are regulated by the Office of Thrift Supervision (OTS). State-chartered banks that are members of the Federal Reserve System are regulated by the Federal Reserve Board (FRB). State-chartered banks that are not members of the Federal Reserve System are regulated by the Federal Deposit Insurance Corporation (FDIC). Federal credit unions are regulated by the National Credit Union Administration (NCUA). Holding companies of any entity other than those regulated by the OTS are regulated by the FRB; holding companies of any entity regulated by the OTS are also regulated by the OTS. In addition to regulation by the appropriate federal agency, state-chartered institutions are also supervised by regulators in their chartering state. (To find out which entity regulates a specific institution, the FDIC's Institution Directory, <http://www2.fdic.gov/IDASP/>, offers a searchable database.)

The federal banking agencies periodically examine the institutions they supervise for compliance with many different types of laws. These regulators conduct different types of exams of the institutions at different times; compliance with the PTFA would generally be evaluated through a consumer compliance exam or a full scope exam.

Shortly after the passage of the PTFA, the federal banking agencies began to issue guidance to the institutions they regulate reminding them of their obligations under the PTFA. Institutions that violate the PTFA, or any other law, may be subject to civil enforcement actions by the agencies. These actions could potentially include cease-and-desist orders, which require the institution to take some specific action and/or refrain from some specific action, and civil money penalties (fines).

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, and will look for evidence that, where applicable, institutions have actually complied with the PTFA.

- The OCC and FRB have issued specific examination procedures for their examiners to use in evaluating compliance with the PTFA.
  - The OCC's exam procedures are available at <http://www.occ.treas.gov/ftp/bulletin/2010-2a.pdf> (see also <http://www.occ.treas.gov/ftp/bulletin/2010-2.html> for the bulletin announcing the issuance of the procedures).
  - The FRB's procedures are available at <http://www.federalreserve.gov/boarddocs/supmanual/cch/200911/protect.pdf> and [http://www.federalreserve.gov/boarddocs/caletters/2009/0905/09-05\\_attachment.pdf](http://www.federalreserve.gov/boarddocs/caletters/2009/0905/09-05_attachment.pdf) (see also <http://www.federalreserve.gov/boarddocs/CALETTERS/2009/0905/caltr0905.htm> for the letter announcing the issuance of the procedures).
- The OTS, FDIC and NCUA have not publicly issued PTFA-specific exam procedures; however, all three have issued guidance to institutions under their jurisdiction.
  - The OTS' issuance states that OTS-regulated entities "should implement a process to ensure compliance with these requirements" (<http://www.nhlp.org/files/OTS%20Memo.pdf>).
  - The FDIC's issuance states that its 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>).
  - The NCUA has issued a "Regulatory Alert" stating that credit unions are expected to comply with the PTFA (<http://www.ncua.gov/Resources/RegulatoryAlerts/Files/2009/09-RA-08.pdf>).

The federal banking agencies also have consumer assistance divisions that will accept complaints regarding the institutions they supervise, including allegations that an institution has violated the PTFA. However, these consumer offices do not have the 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 or any other law, it may take supervisory action against the institution, but may not inform the consumer of the outcome of such actions unless the outcome directly involves the consumer or the action is a matter of public record.

Contact information for each agency's consumer office is listed below:

OCC: OCC Customer Assistance Group, 1301 McKinney Street, Suite 3450, Houston, TX 77010; (800) 613-6743; [www.occ.treas.gov/customer.htm](http://www.occ.treas.gov/customer.htm) or [www.helpwithmybank.gov](http://www.helpwithmybank.gov); Online Complaints: [http://appsec.helpwithmybank.gov/olcc\\_form/](http://appsec.helpwithmybank.gov/olcc_form/)

- OTS: OTS, 1700 G Street NW, Washington, DC 20552; (800) 842-6929; [www.ots.treas.gov/?p=ConsumerComplaintsInquiries](http://www.ots.treas.gov/?p=ConsumerComplaintsInquiries); [consumer.complaint@ots.treas.gov](mailto:consumer.complaint@ots.treas.gov); Complaint Form: <http://files.ots.treas.gov/upload/files/OTS%20Form%201723.pdf>
- FRB: Federal Reserve Consumer Help, P.O. Box 1200, Minneapolis, MN 55480; (888) 851-1920; [www.federalreserveconsumerhelp.gov/](http://www.federalreserveconsumerhelp.gov/); Online Complaints: [www.federalreserveconsumerhelp.gov/consumercomplaint.cfm](http://www.federalreserveconsumerhelp.gov/consumercomplaint.cfm)
- FDIC: FDIC Consumer Response Center, 2345 Grand Blvd., Suite 100, Kansas City, MO 64108-2638; (877) 275-3342; [www.fdic.gov/consumers/consumer/cc/index.html](http://www.fdic.gov/consumers/consumer/cc/index.html); [consumeralerts@fdic.gov](mailto:consumeralerts@fdic.gov); Online Complaints: [www2.fdic.gov/starsmail/index.asp](http://www2.fdic.gov/starsmail/index.asp)
- NCUA: NCUA Consumer Complaint Office, Alexandria, VA; (800) 755-1030; <http://www.ncua.gov/Resources/ConsumerInformation/Complaints/index.aspx>; [consumerassistance@ncua.gov](mailto:consumerassistance@ncua.gov); Complaint Filing Instructions (No special form required): <http://www.ncua.gov/Resources/ConsumerInformation/Complaints/fcucomplaints.aspx>

### **HUD Guidance**

HUD has provided certain guidance with respect to the Act. In June 2009, HUD outlined in detail the obligations imposed by the PTFA in a notice published in the Federal Register. *See* 74 Fed. Reg. 30,106 (June 24, 2009) (available at <http://edocket.access.gpo.gov/2009/pdf/E9-14909.pdf>). The stated purpose of the notice was to ensure that “individuals or entities that participate in HUD programs or with whom HUD interacts through its programs are aware of the obligations imposed on immediate successors [in] interest in any residential property pursuant to a foreclosure.” *Id.* HUD explicitly made clear in the notice that the obligations imposed by the PTFA are not limited to FHA-insured or HUD-assisted housing, but apply “to all successors in interest of residential property, regardless of whether a Federally related mortgage is present.” *Id.*

On December 15, 2009, HUD issued a further notice providing public housing agencies with guidance on how to implement the PTFA and the tenant protections provisions of the American Recovery and Reinvestment Act (“ARRA”) with respect to Section 8 voucher recipients.<sup>29</sup> *See* HUD Notice PIH 2009 – 52 (HA) (available at <http://www.hud.gov/offices/pih/publications/>

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<sup>29</sup> ARRA, enacted before the PTFA, provides certain protections for Section 8 tenants in properties assisted with funds under the Neighborhood Stabilization Program. *See* HUD Notice PIH 2009 – 52 (HA).

notices/09/pih2009-52.pdf). With respect to the PTFA, the notice explains that, pursuant to the Act, a foreclosure shall not be good cause to terminate a Section 8 voucher recipient tenant's lease, unless the new owner will occupy the unit as a primary residence and the tenant receives 90 days' advance notice to vacate. *Id.* at 1-2. The HUD notice also makes clear that, with respect to Section 8 tenants, the PTFA specifies that the immediate successor in interest pursuant to a foreclosure takes the property subject to the Housing Assistance Payments (HAP) contract between the prior owner and the public housing agency. *Id.* at 2.

The December 2009 notice requires public housing agencies to notify the landlord and tenant that the terms of the HAP contract incorporate the changes in law outlined in the June and December 2009 notices. Public housing agencies are also directed to notify housing choice voucher applicants as well as prospective landlords about the new law. *Id.* at 3-4. The December 2009 notice also instructs public housing agencies regarding what actions to take when they learn that a property is in foreclosure, including making all reasonable efforts to determine the status of the foreclosure and the ownership of the property; continuing to make payments to the original owner until legal transfer of ownership; attempting to obtain from the successor in interest a written acknowledgment of the assignment of the HAP contract; and informing the tenants that they must continue to pay rent in accordance with the lease, or escrow the rent if the new owner is unidentified or unable to accept payment. *Id.* at 4.

According to the December 2009 notice, if a public housing agency is unable to make housing assistance payments to the successor in interest, then the agency should so inform the tenants, and refer them, as needed, to a local legal aid office. *Id.* The agency is also directed to make inquiries to determine whether the units in the foreclosed property receive assistance under the Neighborhood Stabilization Program, in addition to having a tenant who has a housing choice voucher; where that is the case, the agency can use the funds that would have been used to pay rent for other purposes, such as paying utilities or moving expenses. *Id.* at 4-5.

### **Continuing Violations of the Protecting Tenants at Foreclosure Act**

While awareness of the problems experienced by tenants in foreclosed properties is increasing—as is compliance with the PTFA—as more people become aware of the law and its requirements, much more work remains to be done. Based on reports from advocates and tenants across the country, it is clear that violations of the rights of tenants in foreclosed properties continue to occur frequently. Many of these violations involve communication between lenders or their agents and tenants. In some cases, lenders or their agents are notifying tenants that they must vacate properties immediately—completely disregarding the tenants' rights under the PTFA. In other cases, lenders or their agents are sending notices that are unclear, written in language difficult to decipher for a non-attorney, or that contain incomplete or misleading information or both. Sometimes tenants are offered a “cash for keys” arrangement, in which they are offered a monetary payment in exchange for vacating the property quickly, without ever being told that they have the option to stay if they wish. In other cases there is no communication at all, and lenders and their agents make no effort to determine whether the property is occupied by one or more tenants. It also appears that lenders often fail to contact the local public housing authority or other administrator of the local Section 8 program to obtain information about the obligations they are assuming under the Housing Assistance Payments contract entered into by the previous owner of the property.

The impact of these failures is severe. Some successors in interest—the new owners following foreclosure proceedings—are initiating eviction actions against tenants in violation of the PTFA. In many cases tenants are not receiving the required 90 day advance notice before the new owner initiates evictions proceedings. Sometimes, bona fide tenants are not being permitted to remain in the property for the length of their lease as required by the PTFA.

Maintenance of the properties is also a problem in many instances. Once the foreclosure occurs the successor in interest often fails to maintain the utilities, perform repairs, or complete other tasks even though the tenant has the right to remain in the property under the current terms of the lease which require the owner to do so. Lenders and their agents may fail to inform the tenant(s) whom they should contact in the event maintenance or repairs are needed, and in many cases no one is taking responsibility for performing these functions.

### **Litigation Under the Protecting Tenants at Foreclosure Act**

Individuals and their advocates are increasingly turning to courts to enforce the PTFA. Claims based on the PTFA are being raised as a defense in eviction actions, but are also beginning to be used as a basis for affirmative lawsuits against lenders or their agents who appear to be violating the law. To date, there have been only a small number of written, published decisions discussing or interpreting the Protecting Tenants at Foreclosure Act. A few of these decisions, however, bear noting.

The Appellate Division of the Superior Court of California, Contra Costa County, recently reached a decision favorable to tenants in foreclosed properties in *RWW Properties LLC v. Stepanoff*, Superior Court No.N10-0072 (May 25, 2010), although it does not appear that a written opinion was issued. In that case, the tenant in a foreclosed property asserted that the unlawful detainer action filed against her by the new owner of the property was improper because she received neither the 90-day notice to vacate required by the PTFA nor the 60-day notice to vacate provided for by California law. The trial court disagreed, apparently holding that the 30-day notice she received from the new owner was sufficient, and that she was not protected by the PTFA because her mortgage was not federally related and was not entitled to 60 days' notice under state law because she had not lived in her home for more than a year. On appeal, the tenant argued that she was entitled to the protections of the PTFA, because that act was by its express language not limited only to federally related mortgages. She also argued that she was additionally entitled to the 60-day notice provided for under California law, regardless of whether she had lived in her home for more than a year. The appellate court agreed with the tenant that the trial court had erred, reversed the trial court's decision in favor of the new owner, and directed that the unlawful detainer action be dismissed.

In *Logan v. U.S. Bank National Association*, No. CV 09-08950, 2010 WL 1444878 (C.D. Cal. Apr. 12, 2010), the court held that the PTFA did not create a private right of action for a tenant to sue a successor in interest for damages for failure to comply with the Act's notice requirement, and thus the tenant's complaint was dismissed for lack of federal subject matter jurisdiction. Similarly, at least one federal court has rejected the argument in an eviction case that a defense founded upon a failure to comply with the PTFA can support federal jurisdiction. See *U.S. Bank Nat'l Ass'n v. Lasoff*, No. CV 10-00235, 2010 WL 669239 (C.D. Cal. Feb. 23, 2010).

In a recent state court case in California, *JPMorgan Chase Bank, N.A. v. Doe*, Superior Court, San Diego County, No. 00-2009-0000000-CL-UD-CTL, a judge has ruled that the protections of the PTFA are available to a tenant whose lease was entered into after a notice of default had been issued for the property (a notice of default must be provided before a foreclosure action can be filed). Although by its terms the PTFA only protects the leases of those tenants who enter into leases before the “notice of foreclosure,” the court presumably concluded that the notice of default could not function as the notice of foreclosure in the case presented, and thus the PTFA permitted the tenant to occupy the property until the end of the remaining term of the lease. (Note that the drafters of this report have not been able to locate a written decision to review in this matter.)

In *Collado v. Boklari*, 892 N.Y.S.2d 731 (N.Y. Dist. Ct. Nov. 9, 2009), a New York court held that the PTFA only protected tenants in “HUD, FHA or other federally related properties,” and did not cover tenants in non-federally related properties. *Id.* at 734-36. Although recognizing that the text of the Act explicitly states that it applies to foreclosures on federally related mortgage loans “or” on any dwelling or residential property, *Id.* at 734 (quoting the Act), the court concluded that the inclusion of the word “or” would render the Act unconstitutional as an impermissible expansion of federal authority. *Id.* at 735-36. The court thus read the word “or” right out of the Act. *Id.* In another case, the same judge reaffirmed his conclusion that the PTFA only protects tenants in foreclosures of federally related mortgage loans. *See GMAC Mortgage, LLC v. Taylor*, No. HULT 644-09, 2010 WL 702427 (N.Y. Dist. Ct. Mar. 1, 2010). (The court in *Taylor* also concluded that New York’s new Real Property Actions and Proceedings Law § 1305 provides tenants with greater protections than the PTFA, thus the PTFA did not displace the New York law.) These decisions by a lower court, however, are of limited precedential value, and no New York appeals court has yet to take up the issue of the scope of the PTFA.

Another recent New York case, *U.S. Bank Nat’l Ass’n v. Hurtado*, No. SP007095/09, 2010 WL 1444506 (N.Y. Dist. Ct. Apr. 12, 2010), also dealt with interpretation of the PTFA. The court in that case noted that New York has no document entitled a “notice of foreclosure,” the term used in the PTFA, and then construed the notice of pendency (*lis pendens*) used in New York foreclosure procedure to be equivalent to “notice of foreclosure” under the PTFA. *Id.* at \*2. As the notice of pendency was filed before the parties entered into the lease, the court determined that the tenants were not entitled to enforce the lease under the PTFA, which allows tenants to remain for the full lease term only where the lease predated the notice of foreclosure. The court also concluded that the tenants were not “bona fide” tenants under the PTFA, because, instead of paying fair market rent (as required by the PTFA), the lease required the tenants to expend a large sum to repair and renovate the property. *Id.* According to the court, even if it were to determine that the cost of the repairs and renovations was the equivalent of fair market rent, the tenants had defaulted under the lease by failing to complete the repairs and renovations within one year, as required by the lease. *Id.* Accordingly, the tenants’ motion to dismiss the holdover proceeding filed by the foreclosing bank was denied.

In *Deutsche Bank National Trust Co. v. Tulloch*, No. SP 000437/2010, 2010 WL 1796818 (N.Y. Dist. Ct. May 5, 2010), a former Section 8 tenant moved to dismiss the holdover action filed by the new owner of the property after foreclosure. The tenant argued that, under Section 703 of the PTFA, the new owner should have assumed the tenant’s Section 8 tenancy. *Id.* at \*1. The court rejected this argument, concluding that the tenant was not a “bona fide” tenant entitled to the

protections of the PTFA because the tenant did not tender rent payments, as required by the Act. *Id.* at \*2. The court also held that the tenant was not a bona fide tenant “as of the date of [the] notice of foreclosure,” quoting the Act, as the court followed the *Hurtado* decision’s holding that the lis pendens is the “notice of foreclosure” in New York, and such lis pendens had been filed well before the tenant entered into her lease. *Id.*

In *Burson v. Auth*, Circuit Court for Baltimore City, Maryland, No. 24-O-09-000201, decided January 7, 2010 (without a written opinion), the court vacated an order granting possession of a home to a foreclosing bank which had not provided the month-to-month tenant with the 90-day notice to vacate required by the PTFA. The bank argued that it did not need to comply with the PTFA, as the foreclosure sale took place before the effective date of the PTFA. The tenant, however, argued that the bank was required to comply with the PTFA because the bank did not obtain title to the property until ratification of the sale by the bank (a requirement to obtain full title in Maryland), which did not occur until after the effective date of the PTFA. The court adopted the tenant’s interpretation of the PTFA, holding that the bank became a “successor in interest” (required to honor previous leases and provide any tenant a 90-day notice) only upon taking title to the property, which did not occur in this instance until at least 30 days after the foreclosure sale, and after the effective date of the PTFA.

A tenant, represented by an Ohio legal aid organization, has recently filed suit in federal court in Ohio, *Pratt v. GMAC, Inc.*, alleging that the successor in interest after foreclosure failed to comply with the PTFA’s advance notice requirements before demanding that she vacate the property. The tenant also alleges that the successor in interest has failed to maintain the property, as required under Ohio landlord-tenant law. The tenant is asking the court to order GMAC to give her the prescribed amount of time to find a new home and also to maintain the premises during the remainder of her tenancy; she is further asking the court to order GMAC to use a notice to all of its tenants in foreclosed properties that notifies them of their rights under the law. As of June 7, 2010, this case is currently pending.

## RECOMMENDATIONS

### To the Federal Government:

- Federal bank regulatory entities should increase their monitoring of PTFA compliance by banks and their agents, and make clear that the banks are responsible for the actions of their agents. The regulatory entities should also take all authorized enforcement action against banks that are violating individuals' rights under the PTFA either directly or through the actions of their agents. For example, the agencies should more actively seek out information about violations of the PTFA by the banks they regulate, including encouraging members of the public to bring these violations to their attention, taking action on the violations, and publicizing the fact that they are taking action on the complaints (at least in general terms if not by reporting actions taken against individually named banks).
- Other federal government agencies, such as the Federal Trade Commission, HUD, the Department of the Treasury, and the Department of Veterans' Affairs, should become more involved in educating the public about the PTFA, monitoring for compliance, and taking enforcement action as appropriate. They should, at a minimum, conduct outreach and set up systems to receive and respond to complaints of violations. They should also take enforcement action if possible, such as requiring further information and doing ongoing monitoring, warning or fining violators, and engaging in litigation if necessary. For example, the Federal Trade Commission (FTC) should take steps to educate the public and relevant non-bank players—in particular non-bank entities that act either as lenders or lenders' agents—about the PTFA. The FTC should also explore the possibility of taking enforcement action against non-bank lenders or real estate agents, servicing companies and other agents of lenders who are in direct contact with tenants and provide unfair or deceptive information to tenants, for example under its authority to enforce the FTC Act's prohibition against unfair or deceptive practices.

### To State Governments:

- State legislatures should enact new laws, or pass currently pending legislation, that would provide stronger state law protections for tenants in foreclosed properties. These should include not only provisions that mirror the rights in the PTFA and will continue to exist past the PTFA's sunset date but also laws that provide protections beyond those provided by the PTFA.<sup>30</sup> Such protections could include, for example,

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<sup>30</sup> For example, Illinois' new state law sets forth specific procedures successors in interest must follow in dealing with tenants after a foreclosure, including making a good faith effort to identify occupants of a property; sending and posting a notice about the foreclosure; providing the contact information of a designated person whom the tenant may contact about concerns and or repairs; and including specific language making clear that the notice does not require the tenants to vacate the premises. Maryland's new state law conforms state law to the PTFA but without a sunset date and adds other requirements that provide further protection for tenants, such as a requirement that tenants must be notified two times before a foreclosure sale, and must be explicitly alerted of the fact that they may have rights under the law.

requirements that successors in interest explicitly and immediately make clear to tenants that they do not have to leave their housing right after the foreclosure; that they make good faith efforts to identify tenants in the property; that they provide contact information for someone the tenant can contact with concerns or for repairs; and that they take appropriate steps to maintain the properties in good working order.

- State Attorneys General should more actively watch out for violations of the rights of tenants in foreclosure. They should establish targeted initiatives, designate point people in their offices to oversee the initiatives, and encourage members of the public to inform them of violations. These offices should take all enforcement action possible, including issuing cease and desist letters and initiating litigation, if appropriate, against both successors in interest and their agents, using state consumer protection and fraud statutes and any other available tools.

### **To Banks and other Entities or Individuals who Become Successors in Interest of Foreclosed Properties:**

- In addition to ensuring that they themselves are abiding by the provisions of the PTFA and any applicable state laws, banks and other successors in interest should establish procedures, both in the initial contracting stage and subsequently (through ongoing monitoring), to ensure that their agents are aware of and honor the rights of tenants in foreclosed properties.
- Banks and other successors in interest should make clear in their very first contact with tenants or people who may be tenants in properties subject to foreclosure that the tenant will not necessarily be required to vacate the property immediately upon foreclosure and that the tenant may have rights under the PTFA.
- Banks and other successors in interest should refrain from establishing arrangements wherein the person who first makes contact with tenants in foreclosed properties is someone who has a financial or other interest in having the property vacated for resale.<sup>31</sup>

### **Advocates:**

- Advocates should continue to work to educate tenants, other advocates, and members of the lending and servicing community about the PTFA and its requirements.
- Advocates should reach out to tenants to educate them about their rights under the PTFA as early as possible – ideally before foreclosure proceedings are initiated against the property in which they live. Many tenants vacate immediately or very soon after learning of a landlord default, possibly because they assume they no longer have any right to remain on the property. If the tenants had been aware of their rights

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<sup>31</sup> It is our understanding that Fannie Mae is in the process of changing its arrangements so that property management companies rather than brokers will serve as Fannie Mae's agents who make the first and subsequent contacts with tenants in properties that come under Fannie Mae's control as a result of foreclosure.

earlier, they may have chosen to stay and take advantage of the additional time to find safe and decent alternative housing.

- Local advocates should consider forming state coalitions to share information statewide and support each other's advocacy on behalf of tenants.
- Advocates should work to educate housing court judges about the PTFA and its requirements—and applicable state law, including any new protections—in order to increase the likelihood that judges will appropriately apply the law in adjudicating eviction cases and other matters.

## **DEVELOPMENTS IN STATE LAWS 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 states' laws relating to the rights of tenants in foreclosure since the issuance of the *Without Just Cause* report in February 2009. The following section discusses the results of this research. It is useful at the outset, however, to highlight certain trends and themes that have emerged from the 50-state survey on this issue:

*First*, at least 16 states have passed laws that provide enhanced rights for such tenants since February 2009. Among the enhanced rights or protections provided by the new laws are the following:

- The right to receive (or receive enhanced) notice of a foreclosure action against the landlord's property;<sup>32</sup>
- The right to receive advance notice of a foreclosure sale of the property or notice that the property has been foreclosed upon or changed owners;<sup>33</sup>
- The right to additional time to vacate the property after foreclosure;<sup>34</sup>
- The right to have the successor in interest to the foreclosed mortgagor maintain the property after or during foreclosure;<sup>35</sup>
- The right to deduct or withhold rent under certain circumstances, for example to cover repairs to the property in foreclosure or to compensate for the potential loss of a security deposit.<sup>36</sup>

*Second*, there is proposed legislation pending in at least 21 states that would enhance the rights of tenants in foreclosure.<sup>37</sup>

*Third*, even with the added protections, in the overwhelming majority of states, the PTFA is still more protective of tenants' rights in foreclosure than is state law, at least with respect to advance

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<sup>32</sup> See, e.g., Maryland, New York, Utah, Virginia, and Wisconsin.

<sup>33</sup> See, e.g., Colorado, Illinois, Maine, Maryland, Missouri, Nevada, New Jersey, Oregon, Washington, and Wisconsin.

<sup>34</sup> See, e.g., Illinois, Maine, Maryland, New York, Oregon, and Wisconsin.

<sup>35</sup> See, e.g., New York.

<sup>36</sup> See, e.g., Maine, Wisconsin.

<sup>37</sup> See, e.g., California, Connecticut, District of Columbia, Florida, Georgia, Hawaii, Indiana, Maryland, Massachusetts, Michigan, Minnesota, Missouri, New York, North Carolina, Ohio, Rhode Island, South Carolina, Tennessee, Vermont, West Virginia, and Wisconsin.

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 state-by-state results are reported below, including a discussion of new state laws relating to the rights of tenants in foreclosure enacted since February 2009, 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 a knowledgeable practitioner (legal services attorney or housing policy analyst) in the particular state.

## **ALABAMA**

### **New State Laws**

None noted.

### **Proposed Legislation**

None noted.

### **Effect of 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 and the potential for a tenant to remain until the expiration of the lease term even after foreclosure. Under Alabama law, tenants can be required to vacate after a foreclosure sale with substantially less notice than the 90 days provided by the PTFA.

## **ALASKA**

### **New State Laws**

None noted.

### **Proposed Legislation**

None noted.

### **Effect of 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 and the potential for a tenant to remain until the expiration of the lease term even after foreclosure. Under Alaska law, tenants can be required to vacate after a foreclosure sale with substantially less notice than the 90 days provided by the PTFA.

## **ARIZONA**

### **New State Laws**

On May 7, 2010, the Governor signed into law H.B. 2766, 49th Leg. (Ariz. 2010), which adds a section to Arizona's Residential Landlord and Tenant Act. The new 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 multifamily residential rental units consisting of four or more connected units. (*Id.*)

### **Proposed Legislation**

None noted.

### **Effect of 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 and the potential for a tenant to remain until the expiration of the lease term even after foreclosure. Under current Arizona law, tenants may be subject to immediate eviction by the new owner following foreclosure.

## **ARKANSAS**

### **New State Laws**

None noted.

### **Proposed Legislation**

None noted.

### **Effect of the Protecting Tenants at Foreclosure Act**

The PTFA is more protective of tenants' rights in foreclosure than is Arkansas 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 Arkansas law, tenants can be required to vacate after a foreclosure sale with substantially less notice than the 90 days provided by the PTFA. Notably, because of criminal eviction laws in Arkansas, unless their rights are enforced under the PTFA, tenants in Arkansas will typically move soon after they receive eviction notices from their landlords in order to avoid fines and other criminal penalties.

## **CALIFORNIA**

### **New State Laws**

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 provides that 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**

Proposed legislation in California includes a bill that would block public access to tenant eviction records by most members of the public (so that the information would not be used against the tenant—for example, as negative information on a credit report) if a tenant is evicted as a result of foreclosure (unless the landlord prevails in a post-foreclosure eviction action). The bill would also require that an informational “cover sheet” with a notice to renters be included with any eviction notices delivered within one year of a foreclosure sale. The failure to attach this cover sheet would subject the owner to a \$500 fine, in addition to any other fines or penalties provided by law. (S.B. 1149, 2009-2010 Reg. Sess. (Cal. 2010).) This bill is pending further legislative action.

### **Effect of the Protecting Tenants at Foreclosure Act**

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, and as or more protective with respect to advance notice required before a tenant can be forced to vacate the property (California law generally requires 60 days’ notice to vacate for

tenants (or 90 days for Section 8 tenants) after a foreclosure). California law, however, provides certain rights to tenants that go beyond the scope of the PTFA, as described above. 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” to include a situation in which a person knowingly collects rent from a tenant living in a property that has been foreclosed upon, and does not turn that rent over to the true owner of the property. (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 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 (2009).)

### **Proposed Legislation**

None noted.

### **Effect of the Protecting Tenants at Foreclosure Act**

The PTFA is 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 the potential for a tenant to remain until the expiration of the lease term even after foreclosure. Under Colorado law, tenants can be required to vacate after a foreclosure sale with substantially less notice than the 90 days provided by the PTFA (a purchaser under Colorado law is only required to give three days notice before an eviction hearing). The new state law notice provision described above, providing for tenant notice of the proposed foreclosure sale of a property, provides a right not addressed by the PTFA.

## **CONNECTICUT**

### **New State Laws**

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 sections 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 (and is 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.

### **Proposed Legislation**

Connecticut has one bill currently in the General Assembly that is intended to protect tenants in foreclosure. (H.B. 5410, Gen. Assem., Feb. Sess. (Conn. 2010).) In pertinent part, H.B. 5410 would adopt as state law the central tenant rights contained in the federal Protecting Tenants at Foreclosure Act and would clarify the cash for keys law.

First, Section 3 of the bill would codify, as state law, the provisions of federal law by requiring all tenants to receive at least 90 days notice before an eviction action can proceed and by allowing tenants with existing written leases to live out the leases before an eviction can proceed. Second, Section 4 would close a hole in the existing "cash for keys" law. Section 4 would clarify that the move-out incentive must be at least \$2,000.00, regardless of the existence of a security deposit or its amount.

H.B. 5410 is currently pending further legislative action from the General Assembly. H.B. 5410 was referred to Joint Committee on Banks on March 2, 2010, and a public hearing on the bill was held on March 3, 2010.

### **Effect of the Protecting Tenants at Foreclosure Act**

The PTFA is generally more protective of tenants' rights in foreclosure than is currently enacted Connecticut 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. (Note, however, that under Connecticut law, Section 8 leases may survive foreclosure, and a court may order ejectment as part of a foreclosure proceeding only if the tenants are parties to the action.)

## **DELAWARE**

### **New State Laws**

None noted.

### **Proposed Legislation**

None noted.

## **Effect of 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 and the potential for a tenant to remain until the expiration of the lease term even after foreclosure. Under Delaware law, tenants can be required to vacate after a foreclosure sale with substantially less notice than the 90 days provided by the PTFA.

## **DISTRICT OF COLUMBIA**

### **New State Laws**

None noted.

### **Proposed Legislation**

Under D.C. law, foreclosure, unlike many other types of sales or transfers, does not require that notice of the transfer be provided to the tenant. (D.C. Official Code §§ 42-3404.02(d)(1)(C).) Foreclosure is not a permissible basis for eviction. (D.C. Official Code §§ 42-3404.01 – 13.) Nevertheless, tenants have been threatened with eviction due to foreclosure, have received illegal notices to quit, or have even been sued for eviction in the foreclosure context. A proposed bill, B18-0242, 2009 D.C. Council, 18th Period (D.C. 2009), known as the “Tenant Opportunity to Purchase Exemption Clarification Amendment Act of 2009,” would, among other things, require the “transferee” pursuant to foreclosure to provide each occupant of the accommodation and the mayor with a written “Notice of Transfer” within five business days after the date of the transfer and also to provide tenants with a “Notice of Tenants’ Rights During Foreclosure” informing each tenant that foreclosure is not a lawful basis for eviction.

## **Effect of the Protecting Tenants at Foreclosure Act**

Under the PTFA, the immediate successor in interest at foreclosure must: (i) provide tenants with 90-days notice before a tenant can be forced to vacate the property, and (ii) allow tenants with leases to occupy the property until the end of the lease term (with limited exceptions). D.C. law provides, however, that foreclosure is not a valid reason for eviction, *see, e.g., Administrator of Veterans Affairs v. Valentine*, 490 A.2d 1165 (D.C. 1985), and therefore appears to provide as much or more overall protection than federal law.

## **FLORIDA**

### **New State Laws**

None noted.

### **Proposed Legislation**

Numerous bills were introduced during the 2009 legislative session that were intended to protect tenants in foreclosure. All of those bills died in committee. Several bills have been introduced during the 2010 legislative session as well. Although many of those bills have also died in

committee, proposed legislation currently pending includes a bill requiring lenders to notify tenants of potential foreclosure or short-sale actions against the rental property (at the time of taking such action), requiring lenders to provide eligible tenants first right of refusal to purchase property at fair market value, and requiring lenders to use escrow funds for specified purposes. (H.B. 125, 2010 Leg., 112th Reg. Sess. (Fla. 2010) (unfavorable report from committee).)

### **Effect of the Protecting Tenants at Foreclosure Act**

The PTFA is generally 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. Florida law appears to require, however, that a tenant be made a party to foreclosure proceedings, which goes beyond the scope of the PTFA.

### **Notes from the Field**

Effective August 3, 2009, the 15th Judicial Circuit of Palm Beach County issued an administrative order 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. 2009), available at <http://15thcircuit.co.palm-beach.fl.us/web/guest/adminorders/series3>.)

## **GEORGIA**

### **New State Laws**

None noted.

### **Proposed Legislation**

Several bills were introduced during the 2009 legislative session that are intended to protect tenants in foreclosure by requiring advance notice of a pending foreclosure and by helping tenants stay in their homes for longer periods following foreclosure. The proposed legislation includes the following:

- A bill providing that a writ of possession against a tenant of a foreclosed property shall be not be effective until 60 days after the trial of the case and requiring that the tenant tender one month's rent to the court registry within seven days of the trial and a second month's rent within 30 days of the trial. The bill would also require the secured creditor to mail a notice addressed to the "current resident" of the property 30 days before the date of a proposed foreclosure. (S.B. 140, 150th Gen. Assem., 2009-2010 Reg. Sess. (Ga. 2009) (pending further legislative action) (amends Ga. Code Ann. §§ 44-7-55 and 44-14-162.2).)
- A bill requiring the secured creditor to mail a notice to the "current resident" of a property in foreclosure no later than 60 days before the foreclosure or an eviction due

to a foreclosure sale. The bill requires that the notice inform the tenant that he or she could be evicted even if he or she has fully paid rent and complied with her lease. (H.B. 761, 150th Gen. Assem., 2009-2010 Reg. Sess. (Ga. 2009) (pending further legislative action) (amends Ga. Code Ann. § 44-14-162.2).)

- A bill requiring the secured creditor to mail a notice to the “current resident” of a property in foreclosure 30 days before the date of the proposed foreclosure and prohibiting the sheriff from turning out a tenant without proof that the 30 days notice was timely provided to the tenant. (H.B. 761, 150th Gen. Assem., 2009-2010 Reg. Sess. (Ga. 2009) (pending further legislative action) (amends Ga. Code Ann. §§ 44-14-162.2 and 44-7-60).)

### **Effect of 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; where the mortgage predated the lease, the tenants become tenants at sufferance after foreclosure, and can be subject to eviction proceedings at any time.

### **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**

Numerous bills were introduced during the 2009 legislative session that were intended to protect tenants in foreclosure. All of these bills have been carried over to the 2010 regular session. The bills require lenders or landlords to give tenants notice when foreclosure proceedings are initiated, help tenants stay in their homes for longer periods following foreclosure, and require a successor in interest of a foreclosed property to assume the prior lease existing between the foreclosed owner and the current tenant. The proposed legislation includes the following:

- A bill requiring that a successor in interest of a foreclosed property provide 45 days’ notice to the tenant prior to terminating the rental agreement and commencing summary possession proceedings; requiring that a mortgagee or successor in interest notify the tenant 15 days prior to the actual sale of the foreclosed property; and providing that holdover tenants are liable to the successor in interest for the pro-rated

share of rent and other charges authorized under the previous rental agreement for each day the tenant remains in possession of the property. (H.B. 202, 25th Leg., Reg. Sess. (Haw. 2009) (amends Haw. Rev. Stat. §§ 521, 521-71, 667-5).)

- A bill requiring that any person who forecloses on a residential rental property provide the tenant with written notice indicating that foreclosure proceedings have begun and advising the tenant of the implications for the tenant if the property is sold in foreclosure. The bill also requires the successor in interest to provide the tenant with 60 days' written notice to vacate before the tenant can be required to leave the property. (S.B. 784, 25th Leg., Reg. Sess. (Haw. 2009); H.B. 331, 25th Leg., Reg. Sess. (Haw. 2009) (amends Haw. Rev. Stat. §§ 521, 666, and 667-5.5).)
- A bill requiring landlords to give prospective or current tenants prior notice of a foreclosure action and 30 days' notice of the foreclosure sale. The bill also provides that after the foreclosure sale, the tenancy converts to month-to-month and can be terminated with 30 days' notice. (H.B. 443, 25th Leg., Reg. Sess. (Haw. 2009) (amends Haw. Rev. Stat. § 521).)
- A bill requiring mortgagees to give tenants notice of their intent to foreclose and give them 45 days from the date of the notice to vacate the property, and providing that the public sale of the property shall not commence until expiration of the 45 day notice period. (H.B. 522, 25th Leg., Reg. Sess. (Haw. 2009) (amends Haw. Rev. Stat. §§ 667-5, 667-22, 667-25).)
- A bill making a mortgagee in possession or purchaser of a foreclosed residential rental property subject to the rental agreement between the previous landlord and tenant until that agreement expires. (H.B. 525, 25th Leg., Reg. Sess. (Haw. 2009) (amends Haw. Rev. Stat. § 521-45).)
- A bill requiring mortgagors and mortgagees to explore options to avoid foreclosure and requiring 60 days' written notice at the time the property is sold before the tenant can be removed. If enacted, this part of the bill would sunset on December 31, 2012. The bill also requires that after the foreclosure sale, the successor in interest give the tenant the option to keep the rental agreement in full force or vacate the premises in 60 days. The tenant must choose one of the options within seven days. (H.B. 1825, 25th Leg., Reg. Sess. (Haw. 2009) (amends Haw. Rev. Stat. §§ 667, 521-45).)
- A bill requiring the foreclosing lender to give three days' notice to a residential tenant before initiating an action for ejectment or summary possession and requiring a landlord to give notice of a pending foreclosure to a residential tenant three days after the proceeding begins. The bill also provides that a tenant may terminate the tenancy at any time after receiving the three day notice from the landlord. (S.B. 1068, 25th Leg., Reg. Sess. (Haw. 2009) (amends Haw. Rev. Stat. §§ 521, 667-5.5).)
- A bill requiring mortgagors and mortgagees to explore options to avoid foreclosure and requiring the mortgagee to provide notice of the foreclosure to the residential tenants indicating that the new owner of the property may give the tenant a new lease

or a 60-day eviction notice. If enacted, this part of the bill would sunset on December 31, 2012. The bill also requires that a successor in interest to a foreclosed residential property with a month-to-month or less than month-to-month tenancy must provide the tenant with 120 days' notice prior to a summary proceeding for possession. (S.B. 1623, 25th Leg., Reg. Sess. (Haw. 2009) (amends Haw. Rev. Stat. §§ 667, 521-45).)

### **Effect of the Protecting Tenants at Foreclosure Act**

The PTFA is 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 substantially less notice than the 90 days provided by the PTFA (landlords must give month-to-month tenants no less than 45 days' notice of termination).

## **IDAHO**

### **New State Laws**

None noted.

### **Proposed Legislation**

None noted.

### **Effect of 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 appears to provide 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.

### **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, which was signed into law on July 31, 2009 and is effective as of October 29, 2009, provides a number of new protections to tenants in foreclosure. In particular, the Code of Civil Procedure now 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 that the respective notice does not require the occupants to vacate the premises. 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. 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 such 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.”

### **Local Laws**

Chicago Municipal Code § 5-12-095 requires that within seven days of being served a foreclosure complaint, an owner or landlord must inform tenants in writing of the foreclosure action. Owners or landlords must also give written notice to any other third party who has a consistent pattern and practice of paying rent to the owner or landlord on behalf of a tenant. If the owner or landlord fails to comply, the tenant may terminate the rental agreement with a 30-day notice. If a civil proceeding has been commenced and the tenant can demonstrate that the owner or landlord violated this section, the tenant is entitled to recover \$200 in damages.

### **Proposed Legislation**

None noted.

### **Effect of the Protecting Tenants at Foreclosure Act**

Under Illinois law, a tenant may be evicted by the supplemental petition procedure by a receiver or mortgagee in possession prior to the transfer of title, or after title transfers, by the new owner during the 90 days after the confirmation of sale. In either case, the tenant can retain possession of the property for the lesser of 120 days from the date of the *notice* of the supplemental petition or the length of their lease, but in any event, no less than 30 days after the hearing on the supplemental petition. Thus under Illinois law - and absent the PTFA - a tenant could be given a notice period that is shorter than 90 days (but no less than 51 days - 21 day notice of the hearing on the supplemental petition required by statute, plus 30 days after the hearing) where notice of the supplemental petition is provided and the lease has less than 90 days left. 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**

Two bills were introduced during the 2009 legislative session that are intended to give tenants additional rights in foreclosure by requiring that a foreclosing party provide notice of the judgment of foreclosure to tenants, by giving tenants remedies in the event the foreclosing party does not comply with notice requirements, and by giving tenants the option to terminate their leases after a judgment of foreclosure is entered against the landlord. The proposed legislation includes the following:

- A bill requiring the owner of property with four or fewer rental units to notify the tenants within 10 days when a judgment of foreclosure is entered concerning the property and permitting the tenant to terminate the tenancy upon a judgment of foreclosure. This bill also authorizes the tenant to bring a civil action if the owner does not comply with these notice provisions. (H.B. 1081, 116th Gen. Assem., 1st Reg. Sess. (Ind. 2009) (in conference committee) (amends Ind. Code §§ 32-31-3-13 and 32-31-8-1; creates Ind. Code §§ 32-31-8-7 and 32-29-7-3.3).)
- A bill requiring the owner of commercial or residential property containing a rental unit to notify tenants within 10 days when a judgment of foreclosure is entered concerning the property and permitting the tenant to terminate the tenancy upon a judgment of foreclosure. This bill also authorizes the tenant to bring a civil action if the owner does not comply with these notice provisions. (S.B. 225, 116th Gen. Assem., 1st Reg. Sess. (Ind. 2009) (engrossed, pending further legislative action) (amends Ind. Code § 32-31-3-13 and creates Ind. Code §§ 32-29-7-3.5 and 32-31-8-7).)

### **Effect of 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. It appears, however, that in some circumstances a tenant's leasehold interest will not be terminated by foreclosure where that tenant is not made a party to the foreclosure proceeding.

### **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**

Recently enacted legislation that became effective on March 2, 2010 amends the notice provisions of the Iowa landlord-tenant law. These amendments require that a notice to quit (and certain other notices) must be served on the defendant/tenant by one or more of the following methods: (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 such notice by personal service or by sending certified mail, whether or not the tenant signed a receipt for the notice.

### **Proposed Legislation**

None noted.

### **Effect of 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 could be evicted almost immediately (in some cases, within three days) by a new owner after a foreclosure sale. 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.

## **KANSAS**

### **New State Laws**

None noted.

### **Proposed Legislation**

None noted.

### **Effect of 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. Where a tenant is not joined as a party, for both tenancy at will and tenancy year-to-year, Kansas state law usually requires 30 days' written notice prior to the end of the lease term for either party to terminate).

## **KENTUCKY**

### **New State Laws**

None noted.

### **Proposed Legislation**

None noted.

### **Effect of the Protecting Tenants at Foreclosure Act**

The PTFA is more protective of tenants' rights in foreclosure than is Kentucky 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 Kentucky law, notice to tenants is typically sheriff's notice to evict, giving 30 days to vacate the property.

## **LOUISIANA**

### **New State Laws**

None noted.

### **Proposed Legislation**

None noted.

### **Effect of 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, a landlord can commence an eviction proceeding upon five days' notice, substantially less notice than the 90 days provided by the PTFA.

## **MAINE**

### **New State Laws**

A new state law was enacted March 29, 2010 that 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. (Previously, a tenant was allowed to deduct such costs from rent only up to \$500 or half a month's rent.) This law will go 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. Such 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 shall 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 (which procedures 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.

### **Effect of the Protecting Tenants at Foreclosure Act**

Recently enacted Maine law appears to import the PTFA's protections as part of state law. The new state law also provides certain rights that go beyond the scope of the PTFA, as noted above, 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.

## MARYLAND

### **New State Laws**

Effective July 1, 2009, 2009 Maryland Laws Ch. 149 (H.B. 640) authorizes a county or municipal corporation to enact a local law requiring that notice be given to a county or municipal agency or official when either an order to docket or a complaint to foreclose a mortgage or deed of trust is filed on residential property located in the county or municipal corporation. It also requires local lawmakers to enact local laws that require that specified notice must be provided to the county or municipal government or official.

Effective May 19, 2009, 2009 Maryland Laws Ch. 614 (S.B. 842) and 2009 Maryland Laws Ch. 615 (H.B. 776) 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 10-30 days before the foreclosure sale.

Effective June 17, 2009, Md. R. 14-102 provides that, if a foreclosure purchaser is entitled to possession and the person in actual possession refuses to deliver possession, the purchaser may file a motion for judgment awarding possession of the property. If the purchaser does not yet have title to the property, he or she has to give a legal reason for awarding possession. 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 having rights under the federal PTFA or, if the person in possession is such a bona fide tenant, that the notice required under that Act 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.

On May 20, 2010, the Governor signed S.B. 654/H.B. 711 into law. Effective June 1, 2010, the new law conforms state law to the federal Protecting Tenants at Foreclosure Act of 2009, requiring that in most cases tenants with bona fide leases be permitted to remain in their property for the duration of their lease after foreclosure, and that, in any event, tenants be given at least 90 days’ notice before they can be evicted by a successor in interest after a foreclosure sale.<sup>38</sup> Unlike the PTFA, there is no sunset date. 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. The bill also requires that notice be given twice to occupants before the foreclosure sale, alerting them to their rights under the law.

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<sup>38</sup> While the PTFA determines rights as of the date of the “notice of foreclosure,” such that, for example, it protects bona fide leases entered into before the “notice of foreclosure,” the Maryland bill determines rights as of the “transfer of legal title,” such that, for example, it protects bona fide leases entered into before “transfer of legal title.” The bill thus clarifies that 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.

## **Proposed Legislation**

Maryland Senate Bill 640 proposes to alter the content of the pre-foreclosure notices required under state law. (S.B. 640, Gen. Assem., 427th Sess. (Md. 2010).) It would require that the first notice include language advising tenants of their right to stay on the property for 90 days following an eviction notice and of their right to stay until the end of the lease term (if longer than 90 days), and would advise them to speak to an attorney. The second notice must then include the first possible date at which a tenant could be evicted if he or she were to receive proper 90-day notice.

In May 2010, the Maryland court rules committee recommended to the state judiciary that it adopt certain proposed rules that include provision affecting the foreclosure process in Maryland. According to local advocates, with the proposed rule revisions, a foreclosure sale purchaser must first make a “reasonable inquiry” into the occupancy status of the property with an eye towards PTFA rights. To commence a foreclosure eviction with a motion for possession, the purchaser must represent to the court in its motion what steps it has taken in furtherance of its “reasonable inquiry,” that it has complied with the PTFA, and that the occupant no longer has a right to possession. We understand from local advocates that the proposed court rule revisions are expected to be adopted by the state courts.

## **Effect of 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, without the PTFA’s sunset provision, as discussed above.

## **MASSACHUSETTS**

### **New State Laws**

None noted.

### **Proposed Legislation**

Massachusetts has bills currently pending in both chambers of the state legislature that would protect 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. (*See* S.B. 2394, 186th Sess. (Mass. 2010); H.B. 4595, 186th Sess. (Mass. 2010).) Just cause generally would be defined as one or more of the following:

- (1) the tenant has failed to pay the rent or the use and occupancy charges in the amount in effect prior to the foreclosure after being notified in writing of the amount owed and to whom it is to be paid;
- (2) the tenant has violated an obligation or covenant (other than surrendering possession upon proper notice) and has failed to cure within a reasonable time after receiving notice;

- (3) the tenant is committing or permitting to exist a nuisance, is causing substantial damage to the unit, or is interfering with the quiet enjoyment of other occupants;
- (4) the tenant is convicted of a crime an element of which involved using or permitting the unit to be used for any illegal purpose;
- (5) the tenant had a written lease that terminated on or after the effective date of this law and has refused to execute a written extension or renewal after a written request or demand to do so;
- (6) the tenant has refused the foreclosing owner reasonable access to make repairs, to inspect the unit as permitted by agreement or law, or to show the rental unit to a prospective purchaser.

S.B. 2394 (now known as S.B. 2407) was passed by the Senate on April 29, 2010 and has been sent to the House. H.B. 4595 is presently before the House Committee on Ways and Means, having been reported favorably out of the Joint Committee on Housing on April 8, 2010.

Additionally, at least four cities in Massachusetts have passed home-rule petitions seeking to protect tenants in foreclosed buildings from eviction and also impose moratoriums on foreclosures for some homes. Home-rule petitions are subject to approval by the state legislature, known as the General Court. A hearing on at least some of these home-rule petitions was held on March 2, 2010. This legislation is still pending.

Finally, a number of other cities, including Springfield and Chelsea, have adopted resolutions supporting bills that would protect renters from being evicted from foreclosed buildings.

### **Effect of the Protecting Tenants at Foreclosure Act**

The Protecting Tenants at Foreclosure Act generally provides greater protection than Massachusetts law currently provides 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, Massachusetts state law in some cases only requires 30 days notice before termination of tenancy.

## **MICHIGAN**

### **New State Laws**

None noted.

### **Proposed Legislation**

Numerous bills have been proposed in Michigan that are intended to protect tenants in foreclosure, either by helping tenants stay in their homes for a longer period following a foreclosure, or by requiring that notice regarding the foreclosure be provided to the tenant. Other bills would indirectly protect tenants by establishing moratoriums on all foreclosure actions. Such proposed legislation includes:

- 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. (H.B. 4034, 95th Leg., Reg. Sess. (Mich. 2009).)
- A bill providing for a two-year stay on actions to foreclose a mortgage or land contract of residential property in which a judgment of foreclosure has not been entered. (S.B. 29, 95th Leg., Reg. Sess. (Mich. 2009).)
- 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. 4211, 95th Leg., Reg. Sess. (Mich. 2009).)
- A bill providing that plaintiffs commencing an action to foreclose on residential rental property must give notice to tenants by ordinary mail within 15 days of commencing the action. The bill further provides that when a residential rental property is foreclosed upon and the deed vests in the grantee, the grantee named in the deed has the rights and obligations of the mortgagor under any lease on the property. (S.B. 33, 95th Leg., Reg. Sess. (Mich. 2009).)

All of these bills are pending further legislative action.

### **Effect of the Protecting Tenants at Foreclosure Act**

Under current Michigan law, foreclosure does not result in the immediate termination of the tenancy. The lease is valid until the six-month redemption period has ended. 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. 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. The PTFA may provide more protection than state law in that, with limited exceptions, the lease survives foreclosure.

## **MINNESOTA**

### **New State Laws**

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

## **New Local Laws**

Minneapolis Code of Ordinances 244.265 requires landlords with property in Minneapolis to give written notice to tenants within seven days of the landlord's receipt of notice of a mortgage foreclosure sale or contract for deed cancellation. 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).)

## **Proposed Legislation**

Numerous bills have been proposed in Minnesota that are intended to protect tenants in foreclosure, either by helping tenants stay in their homes for a longer period following a foreclosure, or by requiring that notice regarding the foreclosure be provided to the tenant. Such proposed legislation includes:

- A bill providing that when a “holder” takes over a rental property as the result of a foreclosure, a tenant is deemed by operation of law to become the tenant of the holder, and all leases (verbal or written) and all terms and conditions of those agreements shall be transferred to the holder. A “holder” is defined as a contract for deed vendor or the holder of the sheriff's certificate of sale. The bill further provides that a holder shall maintain as rental property property that was used as rental property by the landlord, offer renewal leases to tenants of the foreclosed property, and keep affordable rent levels in place. A holder may not begin an eviction action against a tenant without cause or terminate the tenancy without cause. A holder must offer a fixed-term lease option to a tenant with a periodic lease in place at the time the tenant becomes a tenant of the holder. The provisions would apply to all tenants regardless of when a tenant entered into a rental agreement with the property owner or at what stage the foreclosure process was in when the rental agreement was made.

The bill also imposes a two year stay of foreclosure actions. The court may order that certain conditions relating to the property are met during the stay, including, but not limited to, continued possession of the property, payments by the person in possession, and preservation of the property. (H.B. 626, 2009 Legis., 86th Sess. (Minn. 2009).)

- A bill providing that a tenant of foreclosed property is deemed to become the tenant of the new owner and all lease conditions (verbal or written) shall be transferred to the new owner. The new owner cannot terminate the tenancy without cause, must maintain the rental property maintained by the previous landlord, and must offer renewal leases with fair market rent unless the new owner intends to occupy the property as a primary residence within 60 days of purchase of the property. The new owner must offer a fixed-term lease option to a tenant with a periodic lease in place at the time the tenant becomes a tenant of the new owner. The bill would provide a two-year stay on homestead property mortgage foreclosures when tenants serve the mortgage holder, the applicable court, and the sheriff a notice of right to stay. Holders of a stay must maintain the homestead status of the property, continue to

make monthly payments, and refrain from doing anything that would constitute just cause for dissolution of the stay. Unlike the companion House Bill 2604, Senate Bill 2242 would prohibit evictions without cause and place a moratorium on foreclosures only until June 30, 2012. (S.B. 2242, 2009 Legis., 86th Sess. (Minn. 2009); H.B. 2604, 2009 Legis., 86th Sess. (Minn. 2009).)

- A bill providing for postponement of a foreclosure sale if all or a part of the property to be sold is classified as a homestead and contains one to four dwelling units, for five months if the original redemption period was six months, and for 11 months if the original redemption period was 12 months. (H.B. 2708, 2009 Legis., 86th Sess. (Minn. 2009).)
- A bill providing that holdover tenants in a foreclosed property subject to an eviction action commenced on or before December 31, 2012 have a right to 90 days' notice to vacate, given no sooner than the date of expiration of the time for redemption, where the tenant was a tenant during the redemption period under a lease that began after the mortgage was executed but before the expiration of the redemption period, provided the tenant abides by the lease terms. The bill provides that, for an eviction action commenced on or before December 31, 2012 where the term of a bona fide lease extends more than 90 days beyond the expiration of the redemption period, the tenant must be allowed to 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), provided the tenant abides by the lease terms. However, if the successor in interest or a bona fide purchaser intends to occupy the unit as a primary residence, then 90 days' notice to vacate, effective no sooner than 90 days after the date of expiration of the time for redemption is required, and the tenant does not have the right to stay to the end of the lease. For any eviction action commenced on or before December 31, 2012 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 60 days' notice to vacate, provided the tenant abides by the terms of the lease. For any eviction action commenced on or after January 1, 2013 (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, provided that the successor in interest has provided to the tenant (1) "at least 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, or (2) "at least two months' written notice to vacate no later than the date of the expiration of the time for redemption or termination," provided the notice also states that the tenant will be held harmless for breach of the lease by vacating the premises if the mortgage is redeemed or the contract is reinstated. (H.B. 2668, 2009 Legis., 86th Sess. (Minn. 2010).)

All of these bills are pending further legislative action.

## **Effect of the Protecting Tenants at Foreclosure Act**

Under current Minnesota law, mortgage foreclosure does not result in the immediate termination of a tenancy. In a typical mortgage foreclosure, the tenancy can remain valid until expiration of the redemption period, which is usually six months. Where the tenant held the property under a lease of any duration entered into after the execution date of the mortgage or contract for deed but before the expiration of the redemption or termination period, the new owner, before commencing an eviction action, must give at least two months' written notice to vacate to the tenant (1) no sooner than one month after the redemption or termination period ends, or (2) no later than the end of the redemption or 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. Thus, the PTFA may provide more protection than current state law with respect to the length of time the tenant may remain in the premises, as it requires 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 vacate.

## **MISSISSIPPI**

### **New State Laws**

None noted.

### **Proposed Legislation**

None noted.

## **Effect of 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. Under Mississippi law, tenants can be required to vacate after a foreclosure sale with substantially less notice than the 90 days provided by the PTFA (typically 30 days notice before termination of a lease in the case of month-to-month leases).

## **MISSOURI**

### **New State Laws**

House Bill 836, which was signed by the governor on July 10, 2009, repealed the prior version and enacted a new Missouri Revised Statutes Section 534.030. Section 534.030 now requires that in any case where a foreclosed property is lawfully occupied by a residential tenant who is not in violation of any lease agreement, no action seeking possession may be commenced against the tenant until at least 10 business days after the date of the notice that the foreclosure sale occurred. After a foreclosure sale, 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**

Relevant bills introduced in Missouri include:

- A bill providing that any party attempting to sell a property subject to foreclosure must give tenants at least 60 days' notice before the foreclosure sale. The notice, in a format specified in the bill, must be sent to any tenants living in the property subject to foreclosure. (H.B. 1168, 95th Gen. Assem., Reg. Sess. (Mo. 2009).)
- A bill providing that lenders must give tenants at least 20 days' notice by mail of a foreclosure sale and specifying the language that should be used in the notice. When the lender or trustee does not know the name of the tenant, the lender or trustee may record an affidavit of service as proof they notified the tenant. In cases where a foreclosed property is lawfully occupied by a residential tenant who is not in violation of any lease agreement, no unlawful detainer action may begin against the tenant until 45 days after the date the tenant is given notice that the foreclosure sale occurred. A tenant is not guilty of unlawful detainer unless and until he or she has received written notice that the foreclosure sale occurred and he or she is either in violation of any lease agreement or at least 45 days have passed since the date of the foreclosure sale. (S.B. 469, 95th Gen. Assem., Reg. Sess.(Mo. 2009).)

These bills are pending further legislative action.

### **Effect of the Protecting Tenants at Foreclosure Act**

The PTFA appears to be 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 days' notice to vacate by the new owner after a foreclosure sale, after which the new owner can commence an action for possession.

### **MONTANA**

#### **New State Laws**

None noted.

#### **Proposed Legislation**

None noted.

## **Effect of 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, tenants can be required to vacate after a foreclosure sale with substantially less notice than the 90 days provided by the PTFA. Under Montana law, the purchaser at a trustee's sale is entitled to possession of the property on the 10<sup>th</sup> day following the sale, and any persons remaining in possession after that date are deemed tenants at will. The purchaser may remove a tenant at will by first terminating the rental agreement, then asking the tenant to leave, and finally taking the tenant to court in an eviction proceeding.

## **NEBRASKA**

### **New State Laws**

None noted.

### **Proposed Legislation**

None noted.

## **Effect of the Protecting Tenants at Foreclosure Act**

The PTFA is more protective of tenants' rights in foreclosure than is Nebraska 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 Nebraska law, tenants can be required to vacate after a foreclosure sale with substantially less notice than the 90 days provided by the PTFA. (Under Nebraska state law, a notice to vacate must be given a minimum of three days before an eviction action is commenced, though greater notice may be required in certain circumstances.)

## **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 session 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 session 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.

## **Effect of 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 under current Nevada state law.

## **NEW HAMPSHIRE**

### **New State Laws**

None noted.

### **Proposed Legislation**

None noted.

## **Effect of 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. (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**

None noted.

### **Effect of 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. 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 three or fewer units, however, are not protected by the good cause requirement.) New Jersey state law also requires that tenants be notified of their rights in foreclosure, as discussed above, which goes beyond the scope of the PTFA.

## **NEW MEXICO**

### **New State Laws**

None noted.

### **Proposed Legislation**

None noted.

### **Effect of the Protecting Tenants at Foreclosure Act**

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. Under New Mexico law, tenants can be required to vacate after a foreclosure sale with substantially less notice than the 90 days provided by the PTFA.

## **NEW YORK**

### **New State Laws**

On December 15, 2009, Governor Patterson signed Session Law Ch. 507 (N.Y. 2009), which, among other things, created/amended statutes to provide certain rights to tenants in foreclosure, effective as of January 14, 2010. The new law 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 new 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 use the property as his primary residence). (*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 new 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).)

Per the new law, 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 (effective Apr. 14, 2010).)

### **Proposed Legislation**

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

- A bill mandating the required notice of foreclosure to tenants include a notice of the rights of rent-regulated tenants, informing such tenants that their rights are not affected by foreclosure, and requiring the notice to include the name, address, and telephone number of the foreclosing party. (A.B. 10226, 233d Leg. Sess. (N.Y. 2010).)
- Bills granting that tenants' relocation costs be paid out of foreclosure proceedings. (S.B. 2955, 233rd Leg. Sess. (N.Y. 2010); A.B. 4678, 231st Leg. Sess. (N.Y. 2009).)
- Bills requiring foreclosing parties to provide certain notices to tenants regarding foreclosure proceedings and foreclosure sale, giving such tenants up to 90 days' notice to vacate, and requiring a plaintiff to undertake efforts to identify tenants before they can be named pseudonymously. (S.B. 1363C, 231st Leg. Sess. (N.Y. 2009); A.B. 6297B, 231st Leg. Sess. (N.Y. 2009).)
- Bills sealing eviction records when a leased property was foreclosed upon, and prohibiting disclosure of any such information relating to a tenant. (S.B. 2954, 231st Leg. Sess. (N.Y. 2009); A.B. 4590, 231st Leg. Sess. (N.Y. 2009).)

- A bill requiring a successor in interest after a foreclosure to notify tenants of their right to stay in the property as monthly tenants upon the preexisting terms; the monthly tenancy is to continue for six monthly terms, at the tenant's option. (S.B. 5572, 232nd Leg. Sess. (N.Y. 2009).)
- A bill requiring the service of notice of foreclosure upon all tenants of the building to be foreclosed upon, and requiring a mortgagee, with the mortgagor's assistance, to maintain a current list of tenants. (S.B. 3913, 231st Leg. Sess. (N.Y. 2009).)
- Other bills requiring the service of notice of foreclosure upon all tenants. (S.B. 405, 231st Leg. Sess. (N.Y. 2009); A.B. 2703, 231st Leg. Sess. (N.Y. 2009).)
- Bills providing a one-year moratorium on foreclosures. (S.B. 4109B, 232nd Leg. Sess. (N.Y. 2009); A.B. 8236A, 231st Leg. Sess. (N.Y. 2009).)
- Other bills, introduced before the passage of N.Y. Session Law Ch. 507, that include many of the same tenant protections put into effect by that law. (S.B. 5931B, 232nd Leg. Sess. (N.Y. 2009); A.B. 8917A, 232d Leg. Sess. (N.Y. 2009).)

These bills are pending further legislative action, and some of the bills may have been rendered moot by the passage of N.Y. Session Law Ch. 507. Further, based on discussions with a New York legal aid attorney, it does not appear that any real legislative activity is expected with respect to pending bills relating to tenants' rights in foreclosure.

### **Effect of the Protecting Tenants at Foreclosure Act**

Both the federal PTFA and the new state 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. The New York law, however, provides certain additional protections and some more specific protections for tenants compared to the federal law, as discussed above.

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), discussed in the "Litigation Under the Protecting Tenants at Foreclosure Act" section above (page 20).

### **Notes from the Field**

One New York legal aid attorney noted that the new New York law applies to any disposition of the property after foreclosure is commenced, such that, for example, a successor in interest who takes title as a result of a transfer of the deed in lieu of foreclosure does not escape the requirements of the new state law.

It was also noted that, based on the definition of "tenant" in the new state law, its protections may only apply to tenants who were occupying the property at the time of the notice required by N.Y. Real Prop. Acts § 1303(4), which must be delivered to the tenant within 10 days of the service of the summons and complaint in the foreclosure action; if another tenant moves in after

that time, it would seem that he or she would not be entitled to the protections of the new state law.

## **NORTH CAROLINA**

### **New State Laws**

None noted.

### **Proposed Legislation**

On April 29, 2009, the Senate of North Carolina passed a bill increasing to 60 days the notice period that tenants of foreclosed property must be afforded before the purchaser of the foreclosed property applies for an order for possession. (S.B. 953, 2009-2010 Leg., Gen. Assem. (N.C. 2009).)

### **Effect of 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. Previously, tenants in North Carolina did not generally have specific rights in the context of a foreclosure, other than the right to early termination of leases in buildings of 15 or less rental units upon 10 days' written notice to the landlord and the right to 10 to 30 days' notice for tenants remaining in possession of such property.

## **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.

### **Proposed Legislation**

None noted.

### **Effect of 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. Under North Dakota law, tenants can be required to vacate after a foreclosure sale with substantially less notice than the 90 days provided by the PTFA.

## **OHIO**

### **New State Laws**

None noted.

### **Proposed Legislation**

- On May 6, 2009, a new bill protecting renters in foreclosure (H.B. 9, 128th Gen. Assem. (Ohio 2009)), was passed by the House, and, on May 7, 2009, was introduced in the Senate. If the bill is enacted, it will require the following. A landlord of a residential property that is subject to a foreclosure action must: (1) provide notice within 60 days (the form of notice is prescribed) to existing tenants that the property is undergoing foreclosure, that the tenant will receive written notice of the sale and, if sold, that the tenant's lease will convert to a month-to-month lease; (2) if the foreclosure action is commenced before the rental agreement is entered into, provide the required notice in the rental agreement; (3) provide each tenant with written notice of the date, time and place of the sale at least 21 days before the date of the sale; and (4) within seven days after the foreclosure sale is confirmed, remit to the successor in interest any security deposits paid by the tenant. If the residential property is sold pursuant to a foreclosure action, the rental agreement must convert to a month-to-month rental agreement with the successor in interest to the property becoming the landlord. However, the bill provides that the tenant and successor in interest may mutually agree that the existing rental agreement will remain in effect and be enforceable rather than convert to a month-to-month agreement. The bill also provides for remedies recoverable by the tenant if a landlord or successor in interest fails to provide the required written notice or fails to honor the month-to-month rental agreement. Lastly, the landlord must include a provision in all rental agreements informing the tenant of the landlord's obligations in the event of a foreclosure action.
- On February 10, 2009, another bill protecting renters in foreclosure was introduced in the Senate (S.B. 13, 128th Gen. Assem. (Ohio 2009)). If passed, the bill would require that the Director of Commerce prepare a publication for distribution to owners and tenants of residential rental properties that are subject to foreclosure, listing useful information for owners and tenants, including information to help tenants find assistance if relocation is necessary. The bill states that upon expiration of the federal Protecting Tenants at Foreclosure Act, any rental agreement for a residential rental property subject to foreclosure shall convert to a month-to-month lease, unless the tenant and successor in interest agree to different terms. The bill further requires that a landlord who is the owner of a property that is subject to a foreclosure action shall: (1) provide written notice of the foreclosure action to any tenant within 60 days of receiving notice of the foreclosure; (2) include a notice of the foreclosure in any written rental agreement (or provide written notice at the time of any oral rental agreement) the landlord enters into after receiving notice of the foreclosure action; (3) provide each tenant with written notice of the date, time, and place of the foreclosure sale at least 21 days before the sale; (4) provide notice that the tenant's rental agreement will be subject to the federal Protecting Tenants at Foreclosure Act, unless

that Act has expired, in which case the lease will convert to a month-to-month lease unless the tenant and successor in interest agree to different terms; and (5) within seven days after the foreclosure sale is confirmed, remit to the successor in interest any security deposits paid by the tenant. If the landlord does not file affidavits affirming he or she has provided the required notices, the clerk of the court will send notices to the tenants. The bill also provides that the tenant may recover penalties if a landlord or successor in interest fails to provide the written notice or fails to honor the month-to-month rental agreement.

S.B. 13 would also require that when a foreclosure complaint is filed, the clerk of the court include along with the summons that is served on the owner information regarding the obligations of the owner of the property with respect to any tenants. When answering a complaint, the owner is required to include information about any tenants at the subject property. Within seven days after serving summons on the property owner in the foreclosure action, the clerk of court must send written notice of the foreclosure action to residents of the property.

- Another Senate bill would prohibit requiring a tenant to vacate residential property any earlier than 90 days following the court's confirmation of a foreclosure sale unless the rental agreement expires pursuant to its own terms during those 90 days, in which case the tenant may be required to vacate on the expiration date of the rental agreement (S.B. 46, 128th Gen. Assem. (Ohio 2009)). The bill also provides that nothing in the bill should be construed to reduce the term of any rental agreement. This bill is currently in committee.
- The Ohio House of Representatives also recently passed a bill intended to reduce foreclosures (H.B. 3, 128th Gen. Assem. (Ohio 2009)). The bill was introduced in the Senate on May 21, 2009. Among other things, the bill places a six-month moratorium on mortgage foreclosure proceedings on residential properties occupied by the owner or the owner's tenant (with limited exceptions).

### **Effect of the Protecting Tenants at Foreclosure Act**

The PTFA is more protective of tenants' rights in foreclosure than is Ohio 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 Ohio law, tenants can be required to vacate after a foreclosure sale with substantially less notice than the 90 days provided by the PTFA. (Note that a separate action to evict is required where the tenant is not named as a party in the foreclosure action or served with a copy of the complaint.)

### **OKLAHOMA**

#### **New State Laws**

None noted.

## **Proposed Legislation**

None noted.

## **Effect of 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. However, if a tenant intervenes in a judicial foreclosure proceeding to assert his or her lease rights and is successful, the lease could survive a foreclosure sale rather than be terminated under the execution order. 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**

2009 Oregon Laws Ch. 229 was signed into law by the governor on June 4, 2009 (amending Or. Rev. Stat. § 86.750). The new law 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(4).) 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.

Effective in August 2009, new state laws – 2009 Oregon Laws Chs. 510 and 883, 75th Leg. Assem. (Or. 2009) – amended Oregon law to add certain protections for tenants in foreclosure. Among other things, the new laws provide 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

new 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).)

2010 Oregon Laws Ch. 28, 75th Leg. Assem., 1st Spec. Sess. (Or. 2010), revised the requirements for the notice to tenants in foreclosure mandated by Or. Rev. Stat. § 86.745 to require that more 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 (effective as of June 30, 2010).

### **Proposed Legislation**

None noted.

### **Effect of 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 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. Oregon 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 noted above.

## **PENNSYLVANIA**

### **New State Laws**

None noted.

### **Proposed Legislation**

There are no proposed bills that would enhance tenants' rights specifically in the context of foreclosure. However, two bills have been introduced in the Pennsylvania House that would reduce the timeframe for eviction of tenants generally under current state law. The first bill provides that if judgment is granted for eviction, writ of possession may be issued immediately rather than after five days as previously required (H.B. 322, 193rd Gen. Assem. (Pa. 2009)). In addition, the writ must be served no later than 48 hours after the request was filed by the landlord (however, the writ may still only be executed on the eleventh day following service). The second bill requires the tenant to respond to a landlord complaint not more than seven days from the date of summons (H.B. 1599, 193rd Gen. Assem. (Pa. 2009)). These bills are pending further legislative action.

### **Effect of the Protecting Tenants at Foreclosure Act**

The PTFA is more protective of tenants' rights in foreclosure than is Pennsylvania 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 Pennsylvania law, tenants can be required to vacate after a foreclosure sale with substantially less notice than the 90 days provided by the PTFA. (Pursuant to state law, tenants may receive 10 to 30 days' notice prior to the filing of an eviction action.)

## **RHODE ISLAND**

### **New State Laws**

None noted.

### **New Local Laws**

In August of 2009, the mayor of Providence signed a city ordinance requiring that (1) a successor in interest through foreclosure continue to pay for essential services, (2) tenants be allowed to stay in a foreclosed property for their lease term, (3) banks notify tenants in writing of the new owner's name and address so the tenants know where to pay rent, (4) tenants receive written notice of the property's sale, and (5) tenants receive contact information for Rhode Island Legal Services, as well as other counseling agencies.

### **Proposed Legislation**

Numerous bills have been proposed in Rhode Island that are intended to protect tenants in foreclosure, including:

- A bill providing for a month-to-month periodic tenancy for any bona fide tenants of the foreclosed mortgagor. (H.B. 7192, Gen. Assem., Jan. Sess. (R.I. 2010).)
- A bill that prevents the eviction of residential tenants by a foreclosing mortgagee until the property transfers to another non-financial institution, and requiring that all utilities that are the responsibility of the foreclosed-upon owner be transferred to and be paid by the mortgagee. (H.B. 7045, Gen. Assem., Jan. Sess. (R.I. 2010).)
- A bill that requires a mortgagee to provide notice to bona fide tenants regarding a foreclosure sale at the same time notice is provided to the mortgagor, and further requiring the mortgagee to inform bona fide tenants of the availability of counseling services and provide them with contact information for Rhode Island Legal Services and HUD-approved counseling agencies in Rhode Island. The bills also require that any successor in interest to a foreclosed mortgagor continue to provide essential services such as heat, water, electricity, or gas if the foreclosed mortgagor had provided those services prior to foreclosure. Additionally, the bill requires a successor in interest to a foreclosed mortgagor to give tenants written notice to quit at least 60 days before they can be required to leave the property. (H.B. 7191, Gen. Assem., Jan. Sess. (R.I. 2010).)
- A bill that requires that, before any bona fide tenant legally occupying a foreclosed property can be forced to vacate as a result of a foreclosure: (1) the successor in interest to the foreclosed mortgagor must provide essential services on the same terms as did the foreclosed mortgagor; (2) the successor in interest must provide written

notice to the tenant of the name and address of the successor in interest and/or managing agent; (3) the tenant assumes a month-to-month periodic tenancy, except that where the tenant has a written lease the tenancy shall last for the lease term; (4) the lender/mortgagee must provide written notice to the tenant regarding a foreclosure sale at the same time notice is provided to the mortgagor, and provide the tenant with contact information for Rhode Island Legal Services and HUD-approved counseling agencies in Rhode Island. The bill imposes penalties for failure by any lender/mortgagee to comply with the above requirements. (S.B. 2586, Gen. Assem., Jan. Sess. (R.I. 2010).)

- The Temporary Moratorium on Foreclosures Act provides for a 180-day moratorium on foreclosure sales for certain properties, and provides that no eviction proceedings will be initiated during the moratorium period except if the property is sold to a bona fide purchaser. (S.B. 2321, Gen. Assem., Jan. Sess. (R.I. 2010).)

All of the foregoing bills are pending further legislative action. Pursuant to discussions with a Rhode Island legal aid attorney, however, there is no current activity with respect to pending bills on tenants' rights issues, most likely due to acrimonious debate regarding previous bills on that issue.

### **Effect of the Protecting Tenants at Foreclosure Act**

The PTFA appears to be 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 may be required to vacate after a foreclosure sale with substantially less notice than the 90 days provided by the PTFA.

As noted above, however, certain local laws may provide protections to tenants in foreclosure that go beyond the scope of the PTFA.

### **Notes from the Field**

A Rhode Island legal aid attorney stated that current Rhode Island law is unsettled with respect to the rights of tenants in foreclosure. More specifically, it seems to be an open question as to 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 if such tenants are protected by the residential landlord-tenant act, which would permit tenants to stay for the duration 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 15, 2009, a joint resolution was introduced in the South Carolina House of Representatives that, if passed, would assist all persons affected by foreclosure (whether homeowners or tenants). The resolution provides for a one-year moratorium on residential mortgage foreclosures, except in instances in which the party bringing the foreclosure action states by affidavit that the mortgage lender did not steer the borrower into a subprime mortgage loan. (H.R. 3296, 118th Gen. Assem. (S.C. 2009).)

A second bill introduced in South Carolina to help victims of foreclosure specifically focuses on residential tenants. This bill, introduced February 18, 2009, provides that a pre-existing rental agreement does not terminate automatically in the event of a foreclosure. Instead, the purchaser of the foreclosed property must take that property subject to the rental agreement for the shorter of 12 months, or the end of the rental agreement. (H.B. 3567, 118th Gen. Assem. (S.C. 2009).) These bills are pending further legislative action.

## **Effect of the Protecting Tenants at Foreclosure Act**

The PTFA is more protective of tenants' rights in foreclosure than is South 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 South Carolina law, tenants can be required to vacate after a foreclosure sale with less notice than the 90 days provided by the PTFA. (According to a South Carolina attorney with whom we spoke, eviction procedures are moved quickly through the South Carolina court system.)

## **SOUTH DAKOTA**

### **New State Laws**

None noted.

### **Proposed Legislation**

None noted.

### **Effect of 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. Under state law, an action for forcible entry and detainer requires only three days' notice to a tenant.

## **TENNESSEE**

### **New State Laws**

None noted.

### **Proposed Legislation**

Numerous bills were introduced during the 2009 legislative session that are intended to protect tenants in foreclosure, either by helping tenants stay in their homes for longer periods following foreclosure, by requiring that notice of foreclosure be provided to tenants, and even by requiring lenders to postpone foreclosure proceedings until the expiration of any valid lease on the property. The proposed legislation includes the following:

- A bill requiring 30 days' notice to terminate the tenancy of a residential tenant who occupies a residential property at the time of its foreclosure or other sale. (S.B. 1576, 106th Gen. Assem., Reg. Sess. (Tenn. 2009) (in committee); H.B. 1394, 106th Gen. Assem., Reg. Sess. (Tenn. 2009) (in committee) (amends Tenn. Code Ann. by adding § 66-7-111).)
- A bill providing that, on or after its effective date, any mortgage or deed of trust for which a single family residence is pledged as collateral must include a provision prohibiting the lender from instituting a foreclosure proceeding on the property if it would result in the eviction of a tenant who has a lease and is up-to-date on lease payments. The debtor must also file a copy of the lease in the local register of deeds office, send a copy of the lease to the lender, and attach a copy of the bill to the lease to provide notice to the tenant of his or her rights. If the lender initiates foreclosure, the lender must send notice to the tenant at the time notice by publication is required. If the tenant is current on lease payments, the tenant must direct all remaining payments to the lender until the expiration of the lease, at which time the lender may initiate foreclosure proceedings. For mortgages or deeds of trust entered into prior to the effective date of the bill, lenders are encouraged to delay foreclosure proceedings and follow the procedures in the bill if they have knowledge of a lease on the property. (S.B. 36, 106th Gen. Assem., Reg. Sess. (Tenn. 2009) (in committee); H.B. 369, 106th Gen. Assem., Reg. Sess. (Tenn. 2009) (in committee) (amends Tenn. Code Ann. Title 47, Chapter 50, Part 1, adds Tenn. Code Ann. § 35-5-101(f), and amends § 64-24-101(a)).)
- A bill extending the notice period required for publication of the first advertisement of a foreclosure sale from 20 days to 90 days. It also requires the foreclosing party to include information regarding foreclosure prevention counseling services. (S.B. 1937, 106th Gen. Assem., Reg. Sess. (Tenn. 2009) (in committee); H.B. 1443, 106th Gen. Assem., Reg. Sess. (Tenn. 2009) (in committee) (amends Tenn. Code Ann. § 35-5-101 and adds Tenn. Code Ann. §§ 35-5-117, 35-5-118, and 45-13-130).)

## **Effect of the Protecting Tenants at Foreclosure Act**

The PTFA is more protective of tenants' rights in foreclosure than is Tennessee 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 Tennessee law, tenants can be required to vacate after a foreclosure sale upon 30 days' notice, substantially less notice than the 90 days provided by the PTFA.

## **TEXAS**

### **New State Laws**

None noted.

### **Proposed Legislation**

The Texas Legislature ended its last session on June 1, 2009 and will not reconvene until January 11, 2011. Thus, there is no pending proposed legislation at this time. During the previous session, numerous bills were proposed that were intended to protect tenants in foreclosure. The most prominent was Senate Bill 472 which passed both the House and the Senate and was reported out of the House Conference Committee, but was not sent to the Governor. (S.B. 472, 81st Leg. (Tex. 2009).) Among other things, this legislation would have required lenders to give 60 days notice to tenants to vacate a property after foreclosure (the notice period would revert to 30 days after September 1, 2011); would have required lenders to give adequate notice to tenants within 24 hours of the foreclosure sale; and would have required debtors to give tenants notice of a sale within seven days of receipt of such notice. However, its tenant protections were conditioned upon numerous tenant requirements, such as obtaining insurance. This proposed legislation did not become law before the 81<sup>st</sup> Legislature adjourned.

## **Effect of the Protecting Tenants at Foreclosure Act**

The PTFA is more protective of tenants' rights in foreclosure than current Texas 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. Texas law requires that tenants receive at least 30 days' written notice to vacate after a foreclosure, if the tenant timely pays rent and is not otherwise in default under the lease.

## **UTAH**

### **New State Laws**

Effective May 11, 2010, 2010 Utah Laws Ch. 66 enacts Utah Code Ann. § 78B-6-901.5 to require that if a mortgage was given as security to finance residential rental property, within 20 days after filing an action to foreclose property that includes or constitutes residential rental property, the plaintiff must post a notice on the primary door of each dwelling unit for properties with fewer than nine dwelling units; post a notice in at least three conspicuous places on the property in properties with nine or more dwelling units; and mail a notice to the occupant of each dwelling unit.

The notice must inform the tenant:

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

Failure to provide notice, however, will not invalidate the sale.

The law also amends Utah Code Ann. §57-1-25 regarding notice of trustee's sale to require that, for trust deeds related to residential rental property financing, the trustee must post a notice on the primary door of each dwelling unit for properties with fewer than nine dwelling units; post a notice in at least two conspicuous places on the property in properties with nine or more dwelling units; and mail a notice to the occupant of each dwelling unit. The notice must include the same information as required in the mortgage foreclosure context, detailed above. As in the mortgage foreclosure context, the failure to provide the notice will not invalidate a trustee's sale.

### **Proposed Legislation**

None noted.

### **Effect of the Protecting Tenants at Foreclosure Act**

The PTFA is more protective of tenants' rights in foreclosure than is Utah 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. Utah state law specifies that a tenant must receive between three and 15 days' notice prior to the initiation of an eviction proceeding, and must vacate the premises within three days of the entry of an order of restitution with respect to the property. Utah 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 noted above.

### **Notes from the Field**

Practitioners and tenants should be aware that there have been some cases of landlords offering tenants money (for example, \$2500 in reported incidents) to accept a shorter than the 90 days notice to vacate provided for under the PTFA.

In addition, new owners after a foreclosure, including banks (through their counsel) are still sometimes providing notices to tenants that lay out the shorter timeframes under state law, rather than the 90 days provided to tenants under the PTFA.

Utah Foreclosure Prevention's website provides a helpful factsheet and other self-help resources for renters:

<http://www.utahforeclosureprevention.com/protecting%20tenants%20at%20foreclosure%20act%20fact%20sheet.html>

## **VERMONT**

### **New State Laws**

None noted.

### **Proposed Legislation**

Legislation proposed in Vermont includes H.B. 328, 2009-2010 Legis. Sess. (Vt. 2009), which would amend Vt. Stat. Ann. tit. 12, §§ 4528 & 4532 (2009), to provide that notice of a foreclosure sale must be mailed to any lawfully occupying tenant at least 60 days before the sale. However, failure to comply with this notice requirement will not invalidate the sale.

### **Effect of the Protecting Tenants at Foreclosure Act**

The PTFA is more protective of tenants' rights in foreclosure than is Vermont 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 30 day notice required by Vermont law. The PTFA also provides that, with limited exceptions, a tenant may remain until the expiration of the lease term even after foreclosure, whereas under Vermont state law, foreclosure terminates the tenancy if the plaintiff in the foreclosure action joins the tenant as a party defendant. (Vermont state law, however, requires that a tenant be named as a defendant in the foreclosure action.)

## **VIRGINIA**

### **New State Laws**

House Bill 2080, effective July 1, 2009, amends Virginia Revised Statutes § 55-225.10. Section 55-225.10 requires landlords to give written notice to the tenant of a mortgage default, mortgage acceleration, or foreclosure sale relative to the loan on the dwelling unit within five business days after written notice from the lender is received by the landlord. The requirement however, does not apply: (i) to any managing agent who does not receive a copy of such written notice from the lender; or (ii) if the tenant provides a copy of the written notice from the lender to the landlord or the managing agent.

### **Proposed Legislation**

None noted.

### **Effect of the Protecting Tenants at Foreclosure Act**

The PTFA is more protective of tenants' rights in foreclosure than is Virginia 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. Virginia state law goes beyond the protections granted in the PTFA, however, by requiring a

landlord to give written notice to the tenant of a mortgage default, acceleration or foreclosure sale within five days after the landlord receives written notice from the lender.

## **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.

### **Effect of 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. 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 noted above.

## **WEST VIRGINIA**

### **New State Laws**

None noted.

### **Proposed Legislation**

H.B. 4208, 79th Legis., 2010 Reg. Sess. (W. Va. 2010) would amend the Code of West Virginia to add two new sections:

- Section 37-6-31 requires a landlord to disclose, in a written statement to a prospective tenant to be signed by the tenant before execution of a residential rental agreement,

any outstanding notices of default, any pending foreclosure suits, any pending declaration of forfeiture or suit for specific performance of a contract of sale, or any pending proceeding to foreclose on a tax lien. Any lease that does not include such a signed written statement will be voidable. The section also requires a landlord to notify any tenant in writing of the initiation of any foreclosure action or sale of the residential rental property. Any such notification will not excuse the tenant from paying rent. If a tenant moves as a result of failure to disclose as required by the section, the tenant may recover from the landlord twice the actual damages or twice the monthly rent, whichever is greater, and all prepaid rent, in addition to any other remedy provided by law.

- Section 38-1-16 puts into effect the protections of the Protecting Tenants at Foreclosure Act by providing that a new owner of foreclosed residential property must provide 90 days' notice to vacate to any bona fide tenant; and assumes interest subject to the right of any bona fide tenant under a lease entered into before the notice of foreclosure to occupy the premises until the expiration of the lease unless such new owner will occupy the unit as a primary residence, in which case the tenant must be given 90 days' notice to vacate.

### **Effect of the Protecting Tenants at Foreclosure Act**

The PTFA is more protective of tenants' rights in foreclosure than is currently enacted West Virginia state law with respect to the potential for a tenant to remain until the expiration of the lease term even after foreclosure, and in many cases will also be more protective with respect to the advance notice required before a tenant can be forced to vacate the property. Under West Virginia law, a landlord must provide a tenant with at least three months' notice to vacate prior to the end of any year, and a periodic tenancy for less than a year may be terminated by three months notice or by notice for one full period given before the end of any period (thus, for a month-to-month lease, the tenant would only be entitled to a one month notice given prior to the end of the preceding month).

## **WISCONSIN**

### **New State Laws**

New Wisconsin laws (2009 Acts 2 and 28) have substantially revised tenants' rights in the foreclosure context. The new statutory sections summarized below are effective as of March 6, 2009, unless otherwise noted.

#### (a) Right to Notice and Timeframe:

1. Notice by Landlord: A landlord must notify prospective tenants in writing if a foreclosure action against a residential property has been commenced. If a judgment has been entered, the notice must include the date on which the redemption period ends. Rental agreements entered into after commencement of a foreclosure action that do not contain such notice are voidable by the tenant. (Wis. Stat. Ann. § 704.35.)

2. Notice by Plaintiff: A plaintiff in a foreclosure proceeding must provide tenants in residential properties, through personal service or certified mail, the following:

(a) a notice of filing no later than five days after filing a foreclosure action;

(b) notice of the judgment and notice of the date when the redemption period ends within five days of the grant of judgment of foreclosure; and

(c) notice of the date and time of the confirmation of sale hearing. (Wis. Stat. Ann. § 846.35(1).)

3. If a plaintiff fails to give adequate notice, the tenant is entitled to \$250 and reasonable attorney's fees. (Wis. Stat. Ann. § 846.35(6).)

(b) Termination of Tenancy:

A tenant may retain possession of a rental unit following the confirmation of sale for two months after the end of the month in which the sale of the property is confirmed, while paying rent at the rate paid prior to the confirmation. The tenant may withhold one month's rent in an amount equal to the security deposit for the last period during which the tenant retains possession, but the tenant's right of possession terminates at the end of the month for which the tenant withholds rent. (Wis. Stat. Ann. § 846.35(2).)

(c) Eviction Process and Timeframe:

An eviction after a foreclosure may not be executed prior to the end of the second month beginning after the month in which the sale of the property is confirmed. (Wis. Stat. Ann. § 846.35(3).)

If an eviction action seeks to remove a tenant whose tenancy is terminated as the result of a foreclosure judgment and sale, the complaint must identify the action as an eviction of the tenant due to a foreclosure action. (Wis. Stat. Ann. § 799.41(2) (effective July 1, 2009).)

(d) Tenant Not Named in Complaint:

Effective July 1, 2009, the complaint in a foreclosure action may not name the tenant as a defendant unless the tenant has a lien or ownership interest in the property. (Wis. Stat. Ann. §§ 846.35(5) & 802.03(9).) If a plaintiff fails to comply with this prohibition, the tenant is entitled to \$250 and reasonable attorney's fees. (Wis. Stat. Ann. § 846.35(6).)

### **Proposed Legislation**

One proposed bill would require courts to delay foreclosure actions for 90 days under certain conditions. (A.B. 160, 2009-2010 Leg. (Wis. 2009).) This bill is pending further legislative action.

### **Effect of the Protecting Tenants at Foreclosure Act**

The PTFA is more protective of tenants' rights in foreclosure than is Wisconsin 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. Wisconsin state law, however, provides certain rights to tenants that go beyond the scope of the PTFA, including rights to notice for tenants in foreclosure and the right to withhold certain rent, as noted above.

### **Notes from the Field**

A Wisconsin legal aid attorney noted that many tenants in foreclosure are not aware of their notice rights or their rights to withhold rent equal to their security deposit. The attorney stated that tenant advocates may seek to introduce legislation to require that tenants receive better notice of these rights.

It was also noted that at least one Wisconsin judge believed that the PTFA applied only to tenants receiving Section 8 assistance.

## **WYOMING**

### **New State Laws**

None noted.

### **Proposed Legislation**

None noted.

### **Effect of 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 Wyoming law, 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.