

Housing Law Bulletin

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Cover: Clare Court, a 30-unit community in Baltimore City created by nonprofit Homes for America in the former convent and orphanage of the Franciscan Sisters. All residents receive rent assistance and the average household income in the community is \$11,495. Target populations include persons with disabilities and families adopting multiple siblings.

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Agencies Begin Implementing the Protecting Tenants at Foreclosure Act

This article provides advocates with an update on the guidance and regulations issued by various entities since the passage of the Protecting Tenants at Foreclosure Act (PTFA). The agencies and organizations that have taken steps to implement the PTFA include the U.S. Department of Housing and Urban Development (HUD), the National Association of Realtors, the Federal Reserve, the Office of Comptroller of Currency, the National Credit Union Administration, and the Office of Thrift Supervision.

On May 20, 2009, the PTFA was enacted into law as a part of the Helping Families Save Their Homes Act.¹ Section 702 of the PTFA requires purchasers of foreclosed homes to take the properties subject to existing leases.² The Act also requires a minimum ninety-day notice before commencing an eviction action against a tenant arising solely because of a foreclosure.³ Therefore, if the balance remaining on a lease term is more than ninety days, the successor in interest must give the tenant at least ninety days' notice to vacate prior to the end of the lease term. If the balance remaining on a lease is less than ninety days, the successor in interest must give the tenant at least ninety days' notice to vacate. Section 703 of the PTFA provides additional protections to Section 8 tenants.⁴ No matter what the balance of the lease term, both Section 8 tenants and non-Section 8 tenants can be required to vacate on ninety days' notice if a post-foreclosure owner wishes to occupy the property as his or her primary residence.

HUD Notice

On June 24, HUD published a summary of the PTFA in the Federal Register.⁵ Through this notice, HUD intends to ensure that individuals or entities involved with HUD programs are aware of the PTFA's protections for tenants.⁶

The notice first describes the scope and main provisions of the law. It states that purchasers must preserve the tenancies under any "bona fide" leases as defined in the PTFA.⁷ Advocates should note that the notice states that Section 702 of the PTFA applies only to foreclosures after

¹Helping Families Save Their Homes Act, Pub. L. No. 111-22, §§ 701-04, 132 Stat. 1632, 1660-62 (2009) (§§ 701-04 are referred to as the "Protecting Tenants at Foreclosure Act of 2009" [hereinafter PTFA]).

²PTFA § 702.

³§ 702.

⁴§ 703.

⁵Protecting Tenants at Foreclosure: Notice of Responsibility Placed on Immediate Successors in Interest Pursuant to Foreclosure of Residential Property, 74 Fed. Reg. 30,106 (June 24, 2009).

⁶*Id.*

⁷*Id.* at 30,107.

May 20, 2009.⁸ National Housing Law Project (NHLP) has interpreted the law to cover any “federally related mortgage loan” or loan on a residence occupied by a Section 8 voucher participant even if the foreclosure took place before May 20, 2009⁹ so long as the notice to vacate was not issued before May 20. Advocates should also note that NHLP interprets the date of foreclosure to mean the date after which the successor in interest takes the title that the former mortgagor held, which, depending on state law, may be after all statutory periods of redemptions have expired.¹⁰

The HUD notice also discusses additional protections offered to Section 8 tenants in Section 703 of the PTFA. HUD emphasizes that protections provided under Section 703 to Section 8 tenants are in addition to and “not in lieu of the protections of Section 702.”¹¹ The notice also explains that foreclosure is not “other good cause” to terminate the tenancy unless the purchaser “[w]ill occupy the unit as a primary residence” and has given the tenant a ninety-day notice to terminate the lease.¹²

The instructions that the notice provides to public housing agencies (PHAs) on how to implement the PTFA are also worth noting. The notice instructs PHAs to provide “payments to the new owner for the remaining term of the HAP contract” unless the new owner of the property “will occupy the unit as a primary residence.”¹³ Even in the case where the new owner will be an occupant, “the HAP contract would continue for” the ninety-day notice period.¹⁴ Thus, the new owner takes subject to the lease and must give a ninety-day notice before bringing an eviction action.¹⁵

HUD New England Office Advisory Letter

Shortly before the issuance of HUD’s notice, the New England office of HUD sent a letter regarding the PTFA to all PHA executive directors in the region.¹⁶ In the letter, Donna Ayala, the director of the New England office for

public housing, informs the PHA directors about the passage of the PTFA and its protections for tenants living in homes subject to foreclosure.

The letter specifically addresses the application of the PTFA to Section 8 tenants. First, the letter clarifies that under the PTFA, the “immediate successor in interest” assumes “**both** the existing Section 8 lease and the existing Housing Assistance Payments [HAP] Contract.”¹⁷ Foreclosure, the letter goes on to say, “does not constitute ‘good cause’ for termination of an existing Section 8 lease.”¹⁸ Second, the letter emphasizes that the successor in interest takes subject to both the Section 8 lease and the HAP Contract “even if the foreclosure occurred prior to May 20th.”¹⁹

Ayala also directs PHAs to “identify and work with the successor in interest to ensure that their rights and obligations under the Housing Assistance Payments Contract are understood and complied with by the successor in interest.”

National Association of Realtors Q&A

In June, the National Association of Realtors (NAR) published a “Q&A on Tenant Protections” contained in the PTFA.²⁰ This document addresses questions on the new federal law from the perspective of realtors who manage properties for lenders and servicers that hold foreclosed properties.

The Q&A does not instruct realtors to advise tenants that they have the right to remain under their existing leases. It advises realtors that “we suppose that a tenant could elect not to exercise a right granted to them in the law.”²¹ In addition, the Q&A states that tenants may still be evicted for nonpayment of rent and lease violations.²²

NAR also confirmed in the Q&A that the new owner of a foreclosed property “is the landlord and is entitled to the rights and obligations associated with being the landlord.”²³ This confirmation can be used by advocates to remind lenders and services that they have the duty to maintain the property after foreclosure. The duty of a landlord also extends to the return of security deposits, and the NAR Q&A advises realtors that they should contact the new owner after foreclosure to transfer the security deposit to “the new party.” Advocates can cite this language in asking for the return of a tenant’s security deposit from the realtor in charge of a property owned by a lender.

⁸*Id.* (“Section 702 applies, commencing after May 20, 2009, the date of enactment, to “any foreclosure” on (1) a Federally related mortgage loan, or (2) any dwelling or residential real property.”)

⁹For a more in-depth discussion, see NHLP, *Foreclosure and Section 8 Tenancy: Federal Legislative Developments*, 39 HOUS L. BULL. 193 (2009).

¹⁰Because the mortgagor’s interest in the property had not been extinguished until the expiration of the redemption period, the new owner has not become the “successor in interest” and cannot issue a ninety-day notice until the new owner has actually succeeded to the former mortgagor’s title following the redemption period.

¹¹74 Fed. Reg. at 30,107.

¹²*Id.* This particular language is necessary because Section 703 alters 42 U.S.C. § 1437f(o)(7), which prescribes certain provisions of all voucher leases which must be modified to bring that statute into compliance with Section 702.

¹³*Id.*

¹⁴*Id.*

¹⁵*Id.*

¹⁶Letter from Donna J. Ayala, Director, Office of Public Housing, Boston Hub, U.S. Department of Housing and Urban Development to Executive Directors of Public Housing Agencies in the New England Region (June 15, 2009) (on file with NHLP).

¹⁷*Id.* (emphasis in the original).

¹⁸*Id.*

¹⁹*Id.*

²⁰NARFAQ, *Tenant Protections Provisions Contained in Public Law 111-22*, [http://www.realtor.org/fedistrk.nsf/files/government_affairs_tenant_protect_faqs.pdf/\\$FILE/government_affairs_tenant_protect_faqs.pdf](http://www.realtor.org/fedistrk.nsf/files/government_affairs_tenant_protect_faqs.pdf/$FILE/government_affairs_tenant_protect_faqs.pdf).

²¹*Id.*

²²*Id.*

²³*Id.*

Federal Reserve Letter

On July 30, Sandra Braunstein, the director of the division of consumer and community affairs at the Federal Reserve Board, wrote a letter regarding the PTFA to the officers and managers of the consumer affairs section.²⁴ The letter advises Federal Reserve examiners that under the PTFA, a successor in interest must “allow bona fide tenants with leases to occupy property until the end of the lease term, except the lease can be terminated on ninety days notice if the unit is sold to a purchaser who will occupy the property.”²⁵

The letter also states that “[t]he law does not cover tenants facing eviction in a non-foreclosed property, tenants with a fraudulent lease, tenants who enter in lease agreements after a foreclosure sale, or homeowners in foreclosure.”²⁶ This interpretation is consistent with NHP’s position that the PTFA protects tenants as long as they entered into the lease before the change of title at a foreclosure sale and the expiration of any redemption period.²⁷

The Federal Reserve has regulatory authority over member banks, and the letter instructs examiners conducting consumer compliance examinations “to evaluate an institution’s awareness of the law, its efforts to comply, and its responsiveness to addressing implementation deficiencies.”²⁸

Dodd/Kerry Floor Statements

On August 6, Senators Christopher Dodd and John Kerry spoke on the floor of the Senate to restate the intent behind the PTFA. Senator Dodd said that under the PTFA, “all bona fide tenants who began renting prior to transfer of title by foreclosure of rental property must be given 90 days’ notice before being required to vacate the property.”²⁹ In addition, bona fide tenants “are allowed to remain in place for the remainder of any leases entered into prior to the transfer of title by foreclosure.”³⁰ His statements clarified that the time of “foreclosure” stated in the PTFA refers to the time of “transfer of title by foreclosure” and is consistent with NHP’s interpretation of the law.³¹

Senator Kerry agreed with Senator Dodd that the law was intended “to provide all bona fide tenants, who began renting prior to transfer of title by foreclosure of their rental property, ... at least 90 days’ notice before being required to

vacate the property.”³² Kerry further stated that bona fide tenants “are allowed to remain in place for the remainder of any leases entered into prior to the transfer of title by foreclosure.”³³ Kerry also highlighted the notices issued by the Federal Reserve and HUD and spoke about the importance of foreclosing entities’ compliance with the PTFA.³⁴ Families in foreclosed properties, he said, are in “precarious circumstances” and “should not be forced individually to assert their rights under the law.”³⁵

OCC Bulletin

On August 13, the Office of Comptroller of Currency (OCC), a government entity that oversees national banks, sent out a guidance bulletin on the PTFA to CEOs of national banks. The bulletin notifies banks that under the PTFA, a “bank that takes title to a house after foreclosure” must allow existing tenants to “stay in the residence until the end of their lease” unless the new owners will make the residence their primary residence or where there is no existing lease.³⁶ Even in those situations, the bulletin emphasizes that tenants are still entitled to at least ninety days’ notice before a bank can evict them.³⁷

The OCC advises national banks “to adopt policies and procedures to ensure compliance with these new tenant protection provisions.”³⁸ The OCC also sent the bulletin to its examiners and advised them to evaluate whether banks are complying with the tenant protection provisions of the PTFA.³⁹

National Credit Union Administration Regulatory Alert

In August, the National Credit Union Administration sent a regulatory alert on the PTFA to the board of directors of federally insured credit unions. The letter advises credit unions that when a credit union “takes title after a foreclosure,” it must allow “bona fide tenants with leases to occupy property until the end of the lease term” and give “90 days notice prior to eviction.”⁴⁰ This agrees with NHP’s interpretation that a ninety-day notice can be given only after a foreclosure sale and the expiration of any redemption periods.⁴¹

²⁴Letter from Sandra F. Braustein, Director, Division of Consumer and Community Affairs, Board of Governors of the Federal Reserve System, to the Officers and Managers in Charge of Consumer Affairs Sections (July 30, 2009), <http://www.federalreserve.gov/boarddocs/caletters/2009/0905/caltr0905.htm>.

²⁵*Id.*

²⁶*Id.*

²⁷See Gray, *supra* note 9, at 195-96.

²⁸Letter from Sandra F. Braustein, *supra* note 24.

²⁹155 CONG. REC. S8978 (daily ed. Aug. 6, 2009) (statement of Sen. Dodd).

³⁰*Id.*

³¹See Gray, *supra* note 9.

³²155 CONG. REC. S8978 (daily ed. Aug. 6, 2009) (statement of Sen. Kerry).

³³*Id.*

³⁴*Id.*

³⁵*Id.*

³⁶OCC Bulletin, Helping Families Save Their Homes Act of 2009 – Title VII Tenant Protections, Aug. 13, 2009, <http://www.occ.gov/ftp/bulletin/2009-28.html>.

³⁷*Id.*

³⁸*Id.*

³⁹*Id.*

⁴⁰National Credit Union Administration Regulatory Alert, The Protecting Tenants at Foreclosure Act of 2009, Aug. 2009, <http://www.ncua.gov/Resources/RegulatoryAlerts/Files/2009/09-RA-08.docx>.

⁴¹See Gray, *supra* note 9.

Office of Thrift Supervision Memorandum

On September 2, the Office of Thrift Supervision (OTS) in the Department of the Treasury issued a memorandum on the PTFA to CEOs of institutions under OTS supervision, including federal savings banks and federal savings and loans. The short memorandum advised CEOs that tenants must be given “90 days’ advance notice” before “requiring them to vacate foreclosed property.”⁴² The memorandum also advised member institutions that they should “implement a process to ensure compliance with” requirements of the PTFA. However, the memorandum failed to mention that bona fide tenants have the right to remain until the end of their lease terms.

Conclusion

The PTFA has given many tenants in foreclosed properties the chance to remain in their homes until the end of their leases. As a result, their children can stay in the same school to finish the school year. Tenants with disabilities now have the time they need to locate alternative housing that meets their needs. Even tenants who are not entitled to stay until the end of their leases now have ninety days to look for a new home and make moving plans.

But rapid evictions of tenants in foreclosed properties are still being reported across the country, and tenants are forced to find legal assistance to assert their rights under the PTFA.⁴³ As Senator Kerry said, these tenants should not have to enforce their rights individually when they are faced with losing their homes. Instead, lenders and servicers should make sure that tenants’ rights are protected during and after foreclosure. Federal regulators have started the process of ensuring that their regulated entities are in compliance with the PTFA, but there remains much to be done to educate tenants of their rights and inform property managers of their obligations under the PTFA. For this relatively new law, the implementation process continues. ■

⁴²Office of Thrift Supervision Memorandum, Tenant Protection During Foreclosure, “Helping Families Save Their Homes Act of 2009,” Sept. 2, 2009, <http://files.ots.treas.gov/25319.pdf>.

⁴³See, e.g., Charles Oliver, *Law Helps Protect Renters of Foreclosed Property*, DAILY CITIZEN (Dalton, Ga.) (Aug. 23, 2009) (reporting that a tenant with a thirty-year lease living in a foreclosed home received a notice to vacate that allegedly violated the PTFA).

Earnings and Living Opportunities Act Would Strengthen Section 3*

Section 3¹ was enacted as part of the Housing and Urban Development Act of 1968, which had the overarching purpose of providing “a decent home and a suitable living environment for every American family.”² Section 3 is integral to the fulfillment of this purpose, because it directs training and jobs to public housing residents and other low-income residents living in areas where funds from the Department of Housing and Urban Development (HUD) are expended so as to multiply the benefit of the funds for low- and very low-income individuals. Since its creation, Section 3 has not operated to its greatest potential due to a lack of HUD oversight and the absence of enforceable rules. As a result, a multitude of projects and the expenditure of billions of dollars have failed to generate the quality and quantity of employment opportunities that Congress intended.³

Over the past several years, Representative Nydia Velázquez (D-NY), a senior member of the House Financial Services subcommittee on Housing and Community Opportunity, has demonstrated a continuing interest in strengthening Section 3. Most recently, Representative Velázquez authored the Earnings and Living Opportunities Act (ELOA), which would bolster Section 3 obligations. ELOA was the subject of hearings before the House Subcommittee on Housing and Community Opportunity in New York City on July 20, 2009. ELOA comes at a critical time for the Section 3 program, when HUD is distributing and monitoring the expenditure of roughly \$12 billion in stimulus funds⁴ and \$14 billion in Fiscal Year 2009 appropriations that are subject to the requirements of Section 3.⁵

*The author of this article is Erin Liotta, a J.D. candidate at the University of California, Berkeley, and an intern at the National Housing Law Project.

¹12 U.S.C.A. § 1701u(b) (Westlaw July 13, 2009); see H.R. 2243, 107th Cong., 1st Sess. (2001), H.R. 2298, 108th Cong., 1st Sess. (2003), H.R. 5164, 109th Cong., 2d Sess. (2006), H.R. 3310, 110th Cong., 1st Sess. (2007); see also NHLP, *Proposed Legislation Signals New Hope for HUD’s Section 3 Program*, 36 HOUS. L. BULL. 109 (May 2006).

²Housing and Urban Development Act of 1968, Pub. L. No. 90-448, § 2, 82 Stat. 476 (1968).

³For an illustrative examination of the Section 3 failings of the New York City Housing Authority, the nation’s largest housing program, and corresponding recommendations, see VICTOR BACH & TOM WATERS, COMMUNITY SERVICE SOCIETY, *MAKING THE CONNECTION: ECONOMIC OPPORTUNITY FOR PUBLIC HOUSING RESIDENTS* (2009).

⁴Under the Housing and Economic Recovery Act of 2008, HUD received \$3.9 billion for its Neighborhood Stabilization Program. Under the American Recovery and Reinvestment Act of 2009, HUD received \$7.8 billion in funds subject to Section 3. For more information on Section 3 funds under HERA and ARRA, see NHLP, *New Opportunities for Section 3 Job Creation Under the Recovery Act and the Neighborhood Stabilization Program*, 39 HOUS. L. BULL. 163 (July 2009).

⁵These FY 2009 Appropriations Funds consist of \$4.5 billion for the Public