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HUD, States Take Additional Steps to Protect Tenants in Foreclosed Properties*

An article in the October issue of the *Bulletin* described how agencies have begun to implement the Protecting Tenants at Foreclosure Act (PTFA),¹ the new federal law giving tenants at least 90 days to move after foreclosure.² Since then, the Department of Housing and Urban Development (HUD) has issued a new Notice instructing public housing agencies (PHAs) on how to implement the PTFA. Additionally, the Office of the Comptroller of the Currency (OCC) issued a bulletin outlining new procedures for its examiners to use in grading banks on PTFA compliance. Further, a number of states, including New York and Illinois, have enacted laws to give additional protections to tenants and promulgated court rules to ensure compliance with the PTFA in their judicial foreclosure procedures. This article will describe these developments affecting the rights of tenants in foreclosure.

HUD Notice PIH 2009-52

On December 15, 2009, HUD issued a Notice³ implementing the tenant protection provisions in the Neighborhood Stabilization Program (NSP) of the American Recovery and Reinvestment Act⁴ and Section 703 of the PTFA.⁵ Like a previous Notice issued in June,⁶ the new Notice informs PHAs that purchasers of foreclosed properties with existing Section 8 tenants take title subject to both the lease between the owner and the tenant and the Housing Assistance Payments (HAP) contract between the owner and the PHA. Further, these purchasers cannot evict tenants except for good cause.⁷ The Notice emphasizes that the HAP contract must be interpreted in accordance with the new laws and that the contract incorporates by reference the new federal laws and the HUD implementing notices.⁸

HUD states in the Notice that it will revise the Section 8 lease addendum and HAP contract to reflect the change

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¹Protecting Tenants at Foreclosure Act, Pub. L. No. 111-22, tit. VII, §§ 701-704, 123 Stat. 1632, 1660-62 (2009).

²NHLP, *Agencies Begin Implementing the Protecting Tenants at Foreclosure Act*, 39 Hous. L. BULL. 249, 249-252 (Oct. 2009).

³Protecting Tenants at Foreclosure Act – Guidance on New Tenant Protections, PIH 2009-52 (Dec. 15, 2009).

⁴Pub. L. No. 111-5, tit. XII, 123 Stat. 115, 218-219 (2009).

⁵Pub. L. No. 111-22, tit. VII, §§ 701-704, 123 Stat. 1632, 1662. (2009).

⁶Protecting 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).

⁷PIH 2009-52, at 2.

⁸*Id.* at 3.

in law.⁹ Once these forms are issued, PHAs must use them for new lease-ups, but they are not required to revise existing contracts that already have been executed.¹⁰

More significantly, PIH 2009-52 imposes new responsibilities on PHAs to implement the tenant protection provisions in the PTFA and NSP. PIH 2009-52 instructs PHAs to be proactive to protect the rights of voucher holders during foreclosure. For every rental unit that receives voucher assistance, PHAs must give information about the tenant protection provisions of the PTFA and NSP to all participants.¹¹ Participants include: (1) existing landlords; (2) heads of households that currently receive voucher assistance; (3) voucher applicants who have been issued vouchers and are searching for new homes; and (4) prospective voucher landlords.¹² The HUD Notice encourages PHAs to use sample notices prepared by the National Low Income Housing Coalition (NLIHC) and the National Housing Law Project (NHLPL).¹³ PHAs may also notify local courts and sheriff's offices about these new tenant protection laws.¹⁴

The Notice requires that once a PHA learns that a property receiving voucher assistance is in foreclosure, it must take further steps to ensure that tenants' rights under the PTFA are enforced. These steps include:

- Making all reasonable efforts to determine the status and ownership of the property. The Notice encourages PHAs to review legal notices in newspapers or local government websites to monitor whether assisted properties are foreclosed upon.
- Continuing to pay the original owner under the existing HAP contract until ownership is legally transferred.
- Attempting to obtain from the successor in interest a written acknowledgment of assignment of the HAP contract.¹⁵
- Informing the tenant to pay rent in accordance with the lease and to pay rent into escrow if the successor in interest refuses to accept rent.¹⁶ The PHA must also inform voucher holders that failure to pay rent may

constitute an independent ground for eviction. While nonpayment of rent may be an adequate ground for a successor in interest to evict, this language should not be interpreted to allow PHAs to terminate the voucher holder's subsidy in a situation where the successor in interest refuses to take the voucher holder's rent and the nonpayment of rent is not the tenant's fault.¹⁷

- Informing the family if the PHA is unable to make HAP payments to the successor in interest because the successor in interest refuses to accept payments, the property fails Housing Quality Standards inspections or the PHA cannot identify the successor in interest. The PHA must also give the family a referral to legal services to ensure that the family's rights are protected.¹⁸

The Notice also requires PHAs to determine whether a voucher-assisted unit will receive or has received NSP funds.¹⁹ For these units, PHAs are authorized to use funds to pay for utilities that are the landlord's obligation and moving costs, including new security deposits.²⁰ PHAs should also determine whether tenants in foreclosed properties may be entitled to relocation assistance under the Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970.²¹

Finally the Notice reminds PHAs that the PTFA does not preempt any state or local law that provides additional protections for tenants.²²

OCC Instructs Examiners to Grade Banks on PTFA Compliance

On January 9, 2010, OCC issued a bulletin outlining new procedures for its examiners to use in evaluating banks on compliance with the PTFA.²³ This bulletin follows a bulletin issued last year advising national banks to adopt policies and procedures to ensure compliance with the PTFA.²⁴ The new bulletin sets out guidelines for OCC examiners to follow in grading banks on their performance.²⁵ Under the examination procedures attached to the new bulletin, examiners must grade banks on whether the bank has (1) provided a tenant with at least a 90-day notice to vacate; (2) assumed residential property subject to the tenant's right to remain in the premises until the

⁹*Id.*

¹⁰*Id.*

¹¹*Id.*

¹²*Id.*

¹³*Id.* The notices are posted on NLIHC's website at <http://www.nlihc.org/template/page.cfm?id=227> and on NHLPL's website at <http://nhlp.org/node/763>. See also Letter from Boston Housing Authority to Tenants in Foreclosure, <http://www.povertylaw.org/poverty-law-library/research-guides/foreclosure-webinar/bha-letter.pdf>.

¹⁴PIH 2009-52, at 4.

¹⁵See, e.g., Boston Housing Authority, Assignment of Housing Assistance Payment Contract upon Foreclosure of Property, <http://www.povertylaw.org/poverty-law-library/research-guides/foreclosure-webinar/HAP-assignment.pdf>.

¹⁶"Escrow" means different things in different jurisdictions, and advocates should work with their local voucher processing entities to reach an understanding of how this would work in their jurisdiction.

¹⁷While not discussed in the HUD Notice, advocates should be aware that tenants may also be evicted for material lease violations.

¹⁸PIH 2009-52, at 4.

¹⁹*Id.* See Pub. L. No. 111-5, tit. XII, 123 Stat. 115, 218-219 (2009).

²⁰PIH 2009-52, at 5.

²¹*Id.*

²²*Id.*

²³OCC Bulletin 2010-2, Protecting Tenants at Foreclosure Act of 2009, Jan. 8, 2010, <http://www.occ.gov/ftp/bulletin/2010-2.html>.

²⁴OCC Bulletin 2009-28, Helping Families Save Their Homes Act of 2009—Title VII Tenant Protections, Aug. 13, 2009, <http://www.occ.gov/ftp/bulletin/2009-28.html>.

²⁵*Id.*

end of an existing lease; and (3) assumed residential properties occupied by Section 8 tenants subject to both the lease and the HAP contract.²⁶

New York Enacts Foreclosure Law

On December 15, 2009, New York Governor David Paterson signed into law S66007, a comprehensive foreclosure bill.²⁷ Like the PTFA, S66007 gives tenants the right to remain in their homes after a foreclosure sale for 90 days or the remainder of their lease, whichever is longer.²⁸ Also similar to the PTFA, S66007 allows a purchaser who intends to reside in the property as his or her primary residence to evict the tenant with a 90-day notice, even if the tenant has more than 90 days remaining on the lease.²⁹

S66007 also grants tenants new protections in addition to those in the PTFA. Specifically, S66007 covers tenants in properties that were disposed through other means, such as a short sale or deed in lieu of foreclosure, if the property is transferred during the pendency of a foreclosure proceeding.³⁰

The law also ensures that tenants receive notice that the building is being foreclosed on at the beginning of the foreclosure process. Under the new law, the foreclosing party must notify tenants of the impending foreclosure through a notice delivered by both certified and first-class mail.³¹ If the tenants cannot be identified, the foreclosing party must send the notice via first-class mail addressed to the "occupant."³² This notice must inform tenants that they may not be evicted until at least 90 days after they are served by the successor in interest to the property with an eviction notice.³³ For tenants with longer fixed lease terms, the notice must tell them that they may stay until the end of the lease term.³⁴ Unless the foreclosing party states compliance with the notice requirement in the complaint, the party will not be able to commence a foreclosure proceeding on the property.³⁵ Receiving notice at the very beginning of the foreclosure process enables tenants to plan ahead, lessening the potential disruption that a foreclosure on the home may cause.

S66007 also addresses the problem of foreclosed buildings falling into disrepair when the prior owner fails to maintain the building during the pendency of the foreclosure proceedings. To address this habitability issue,

the law imposes a statutory duty on lenders to maintain foreclosed properties during the time period between the entry of judgment of foreclosure and sale and the transfer of title at a foreclosure sale.³⁶ Finally, unlike the PTFA, which expires at the end of 2012,³⁷ S66007 does not contain a sunset provision.

A recent state court decision gives the new law added meaning. In *Collado v. Boklari*, a New York trial court, in dicta, applied the statutory canon of constitutional avoidance and limited the scope of the PTFA to foreclosures on federally related mortgage loans, despite the PTFA's clear language to the contrary.³⁸ While there are reasons to question the court's reasoning,³⁹ S66007 adds the PTFA's tenant protections to state law and alleviates concerns that tenants could be denied the PTFA's protections if other courts follow *Collado's* reasoning.

New Protections for Illinois Tenants in Foreclosed Homes

On July 31, 2009, Illinois Governor Pat Quinn signed into law HB 3863, amending the Illinois Mortgage Foreclosure Law to provide additional protections for tenants living in properties facing foreclosure.⁴⁰ The central provisions of HB 3863 regard notice. Prior to the new amendments, Illinois tenants were not entitled to notice when ownership of the property in which they live changed as a result of foreclosure. Consequently, Illinois tenants affected by foreclosure faced only confusion, unaware of information that would help them navigate safely through the process.

Under HB 3863, a lender or purchaser who, as a result of the foreclosure, takes title at the confirmation of sale must, within 21 days, make a good faith effort to identify everyone who lives at the acquired property.⁴¹ During that same 21-day period, the lender or purchaser must also provide written notice by personal service or first-class mail to each known resident of the property informing him or her that control of the property has changed.⁴² The notice must include: (1) the name and case number of the foreclosure case, and the court where the foreclosure case was pending; (2) the name, address, and telephone number of an individual or entity whom residents may contact with concerns about the property or to request repairs; and (3) the following language, or language that is substantially similar: "This is NOT a notice to vacate the premises. You

²⁶OCC Bulletin 2010-2, *supra* note 23.

²⁷2009 N.Y. Laws 507, 2009 N.Y. Consol. Laws Adv. Legis. Serv. 507 (Lexis Nexis).

²⁸2009 N.Y. Consol. Laws Adv. Legis. Serv. 507, at *4. The law also clarifies that New York's judicial foreclosure process cannot take away the tenant's right to stay in his or her home until at least 90 days after title is transferred through foreclosure.

²⁹*Id.*

³⁰*Id.*

³¹*Id.* at *1.

³²*Id.*

³³*Id.*

³⁴*Id.*

³⁵*Id.*

³⁶*Id.* at *6.

³⁷Pub. L. No. 111-22, tit. VII, § 704, 123 Stat. 1632, 1662.

³⁸2009 NY Slip Op. 29447, at *6 (Suffolk Dist. Ct. Nov. 9, 2009).

³⁹For example, the court only looked at the Spending Clause of the U.S. Constitution and failed to analyze the PTFA's constitutionality under the Commerce Clause. *Id.* at *3-4.

⁴⁰2009 Ill. Laws 111, available at <http://www.ilga.gov/legislation/publicacts/fulltext.asp?name=096-0111&GA=96&SessionId=76&DocTypeId=HB&DocNum=3863&GAID=10>. Illinois is a primarily judicial foreclosure state.

⁴¹735 ILL. COMP. STAT. § 5/15-1508.5(a)(1) (2009).

⁴²§ 5/15-1508.5(a)(2).

may wish to contact a lawyer or your local legal aid or housing counseling agency to discuss any rights that you may have.”⁴³

The lender or purchaser is under a continuing duty to serve this written notice on any tenant that it learns is occupying the property, even if the tenant is discovered after the initial 21-day period.⁴⁴ A truncated version of this notice must also be posted at the premises.⁴⁵

If a receiver (or mortgagee in possession) is appointed to operate and manage the subject property while the foreclosure case is pending, the receiver also has the duty to identify residents and serve them with a similar notice.⁴⁶ In sum, under HB 3863, whenever control of the property changes during or as the result of a foreclosure, tenants must be notified and given contact and foreclosure case information.

Finally, HB 3863 provides some additional protections for tenants throughout the foreclosure process. A receiver appointed by the court may not raise the rent of a month-to-month tenant without leave of court.⁴⁷ Further, a receiver or mortgagee in possession must accept rental payments from tenants and HAP payments on behalf of voucher holders or other third-party rental assistance payments during the foreclosure case.⁴⁸ Finally, tenants who are evicted by petition as a part of the foreclosure case must be given at least 30 days to move after the hearing on that petition.⁴⁹

Maryland and Florida Courts Amend Rules in Response to the PTFA

While the New York and Illinois legislatures enacted new protections for tenants in foreclosure, the judicial branches in Maryland and Florida have taken the lead in protecting tenants. In Maryland and Florida, foreclosures are primarily conducted through a judicial process. Both states have amended their court rules to ensure that successors in interest have complied with the PTFA before they are awarded possession of residential property.

Maryland amended its court rules to require compliance with the PTFA before a purchaser at a foreclosure sale can take possession of a residential property.⁵⁰ If a tenant resided in the foreclosed property, the purchaser must give proof that a proper eviction notice has been given and that the tenant has no further right to possession before a court can entertain a motion to grant a judgment of possession.⁵¹

⁴³§ 5/15-1508.5(a)(2).

⁴⁴§ 5/15-1508.5(c).

⁴⁵§ 5/15-1508.5(e).

⁴⁶§ 5/15-1704(f).

⁴⁷§ 5/15-1704(g).

⁴⁸§ 5/15-1704(c)(2.5).

⁴⁹HB 3863 passed out of both houses prior to the PTFA's effective date. Until the PTFA expires, much of Illinois' supplemental petition procedure is likely preempted. See 735 ILL. COMP. STAT. § 5/15-1701(h).

⁵⁰Md. R. 14-102 (2009).

⁵¹*Id.*

Advocates in Florida were successful in getting local courts to ensure that successors in interest comply with the PTFA. The Eleventh Judicial Circuit, a court that covers Miami-Dade County, issued an administrative order to prohibit judges from granting possession after a foreclosure sale of a residential property unless the purchaser has proved compliance with the PTFA after the court conducts a hearing.⁵² In addition, the order makes clear that writs of possession must make reference to the PTFA.⁵³

Conclusion

As the foreclosure crisis deepens, federal regulators and states have begun to realize the impact on tenants and the need to minimize unnecessary displacement. Consequently, they have moved to implement stronger protections for tenants through various mechanisms. HUD and OCC have used their administrative powers to seek greater compliance with the PTFA. Maryland and Florida courts have more vigorously enforced PTFA provisions. New York and Illinois have gone even further in enacting state laws that expand upon the PTFA's protections. These developments are encouraging for housing advocates, as they indicate that tenants' concerns are being addressed. As the 2010 legislative sessions open across the country, advocates hope to continue building on these achievements to mitigate the burdens of foreclosure on tenants. ■

⁵²The Eleventh Judicial Circuit, Miami-Dade County, Florida, Administrative Order No. 09-09 A1.

⁵³*Id.*