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Cover: Developed by nonprofit Citizens Housing Corp. and located in San Francisco, Mosaica consists of 151 units of mixed-use, affordable rental and ownership housing, including 93 units of low-income housing for families and 24 units for low-income seniors.

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Foreclosure and Section 8 Tenancy: Federal Legislative Developments*

The Protecting Tenants at Foreclosure Act (PTFA), part of the Helping Families Save Their Homes Act signed into law on May 20, 2009, is a much-needed expansion of the law governing the relationship between existing tenants and new owners of foreclosed rental properties.¹ In its simplest terms, the PTFA protects tenants by requiring that a successor in interest of a foreclosed-upon property abide by the terms and conditions of the existing lease and that all bona fide tenants receive a ninety-day notice to vacate.² This is the first time in more than sixty years that federal law has required notices for evictions from private rental units or required that a new owner take subject to existing leases.³ This article responds to claims limiting the impact of the statute, with special attention to the PTFA's effects on Section 8 tenants. It provides an interpretation of the law that gives Section 8 tenants the maximum protection, in accordance with Congressional intent, by extending as long as possible the time to find replacement housing or negotiate continued occupancy beyond any ninety-day notice period.

Five major questions may arise from the interpretation of the PTFA and its effect on Section 8 tenancies:

- To which tenants do the statute's protections apply?
- Who may initiate eviction proceedings?
- When may a notice to vacate be served?
- Does the PTFA apply to properties foreclosed upon prior to the statute's date of enactment? and
- To what terms and conditions is the new owner subject?

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¹Helping Families Save Their Homes Act, Pub. L. No. 111-22, §§ 701-04, 132 Stat. 1632, 1660-62 (2009) (§§ 701-704 are referred to as "the Protecting Tenants from Foreclosure Act" [hereinafter PTFA]).

²*Id.*; The White House Office of the Press Secretary, Reforms for American Homeowners and Consumers: President Obama Signs the Helping Families Save Their Homes Act and the Fraud Enforcement and Recovery Act, May 20, 2009, available at http://www.whitehouse.gov/the_press_office/Reforms-for-American-Homeowners-and-Consumers-President-Obama-Signs-the-Helping-Families-Save-their-Homes-Act-and-the-Fraud-Enforcement-and-Recovery-Act/.

³See the provisions of the O.P.A. Rent Regulation for Housing (8 Fed. Reg. 7322-02 (June 2, 1943)) issued pursuant to the Emergency Price Control Act of 1942 as discussed in *Wrenn v. Sutton*, 65 Cal. App. 2d Supp. 823 (1944) and *Lester v. Isaac*, 63 Cal. App. 2d Supp. 851 (1944), which require a notice in compliance with the federal regulations to terminate a tenancy.

Answers to each question are available from the context of the PTFA and the statute's legislative history. These answers should serve as helpful tools for advocates using these new federal safeguards.⁴

To Which Tenants Do the Statute's Protections Apply?

The first question to ask regarding statutory interpretation of the PTFA is to whom does it apply? The operative sections of the PTFA are Section 702, Effect of Foreclosure on Preexisting Tenancy, and Section 703, Effect of Foreclosure on Section 8 Tenancies.⁵ The title and the text of Section 703 state that it only applies to Section 8 tenants. Section 8 tenants are also covered by Section 702, as evidenced by the text of the statute and the legislative history of the PTFA. That Section 702 encompasses all tenants is evidenced by the phrases "any dwelling or residential real property" in 702(a), "any bona fide tenant" in 702(a)(1) and 702(a)(2), and "any bona fide lease" in 702(a)(2)(A) (emphases added). Thus, as long as the tenant and lease are bona fide, Section 702 protects all residential tenants, including Section 8 tenants.

The legislative history of the PTFA reinforces the conclusion that Section 702 encompasses Section 8 tenants. The language of the PTFA is derived in large part from the American Recovery and Reinvestment Act (ARRA), which was enacted in February 2009.⁶ The ARRA provisions relating to tenancy were intended to protect tenants from foreclosure in the limited circumstance of new owners acquiring foreclosed properties through the use of Neighborhood Stabilization Program funds made available under ARRA or under the Housing and Economic Recovery Act of 2008.⁷ In ARRA, the ninety-day notice provision applied to bona fide tenancies and leases. To be bona fide, "the lease or tenancy requires the receipt of rent that is not substantially less than fair market rent for the property."⁸ It could be argued that this clause left open the possibility that Section 8 tenants would not be considered bona fide tenants, and thus not be entitled to ninety days' notice because the amount that Section 8

tenants pay on their own is far below market value.⁹ The first House version of the PTFA from March 2, 2009, contained this same language, as did prior Senate versions, including the one from May 5, 2009.¹⁰ On May 19, the day before the enactment of the PTFA, the Senate bill was sent to the House and passed with several amendments, one being the addition of the clause "or the unit's rent is reduced or subsidized due to a Federal, State, or local subsidy."¹¹ This amendment demonstrates Congress' intent to ensure that Section 8 tenants receive the same protection from foreclosure as all other tenants, and therefore Section 703 is a supplement to, and not a replacement for, Section 702.

Section 8 tenants are also covered by Section 702, as evidenced by the text of the statute and the legislative history of the PTFA.

The statute protects bona fide tenants. A bona fide lease or tenancy is defined as one in which the tenant is not the child, spouse or parent of the mortgagor, the lease or tenancy was the result of an arm's length transaction, and the rent is not substantially less than the fair market, except for units whose rent is reduced by a federal, state or local subsidy.¹² Some have argued that the definition of bona fide tenant or lease is further restricted to one entered into before the notice of foreclosure. Those raising this argument seek to exclude from the protections of the PTFA all tenants whose possession was the result of an arm's length transaction but had the misfortune of entering into a lease after a notice of default was filed or the foreclosure had otherwise begun. This interpretation of

⁹Whether the definition of "rent" is the tenant's rent or the HAP payments, or both, has been litigated in the context of a landlord's waiver of tenant breach by nonpayment of rent. See *Royal American Management, Inc. v. Godfrey*, 14 Fla. Supp. 2d 56 (1985) (Clearinghouse No. 44,416) (holding that acceptance of HUD rent subsidies constitutes acceptance of rent and a waiver of tenant's breach due to nonpayment); *Greenwich Gardens Assocs. V. Pitt*, 126 Misc. 2d 947 (N.Y. Dist. Ct. 1984); *Central Brooklyn Urban Dev. Corp. v. Copeland*, 471 N.Y.S. 2d 989 (N.Y.C. Civ. Ct. 1984); *Walton v. Holmes*, No. 86-1170-CC (Duval Cnty., Fla., Ct. July 1, 1986). Some courts have held that the definition of rent only includes the tenant's portion, which would make "rent" for Section 8 tenants well below market value. See e.g., *East Lake Management and Dev. Corp. v. Irvin*, 195 Ill. App. 3d 196 (1990) (holding that acceptance of HAP payments even after filing eviction suit does not waive termination of lease). The added provision in the PTFA renders irrelevant the definition of rent, at least in terms of whether or not a tenant or lease is bona fide.

¹⁰H.R. 1247, 111th Cong. (2009); S. 896, 111th Cong. (as passed by Senate, May 6, 2009).

¹¹S. 896, 111th Cong. (engrossed amendment as agreed to by House, May 19, 2009); PTFA § 702(b)(3).

¹²PTFA § 702(b).

⁴Protecting Tenants at Foreclosure: Notice of Responsibilities Placed on Immediate Successors in Interest Pursuant to Foreclosure of Residential Property, 74 Fed. Reg. 30,106 (June 24, 2009). HUD recently issued a notice in the Federal Register providing guidance for the implementation of the PTFA. The notice restates the statute in more accessible language and describes the major changes in the law but does little to address some of the PTFA's interpretive difficulties. The notice is consistent with the positions taken in this article.

⁵PTFA §§ 702-03.

⁶American Recovery and Reinvestment Act, Pub. L. No. 111-5, § 1201-04, 123 Stat. 115, 214-26 (2009) [hereinafter ARRA].

⁷*Id.* at 218-219 (Under the heading "Community Planning and Development: Community Development Fund").

⁸*Id.* at 219.

the statute is contrary to the purpose of the PTFA, which seeks to protect a broad range of tenants by encompassing all differing state law foreclosure procedures and to provide the broadest protection to those tenants by not usurping more favorable state laws. The operative language of the statute imposes obligations on successors in interest—those whose interest arise post foreclosure. There is no operative language regarding the rights of tenants or obligations of successors in interest pre-foreclosure. Thus, there is no evidence of legislative intent to carve out a group of tenants who are not protected by the statute.¹³

The application of the PTFA to project-based Section 8 tenants raises additional issues. Although Section 703 nominally applies to “Section 8 tenancies,” project-based Section 8 tenants are not covered by Section 703,¹⁴ which applies only to Section 8 vouchers.¹⁵ While project-based Section 8 tenants are not protected by Section 703, they receive the safeguards enjoyed by all other tenants under Section 702. Sections 702 and 703 both require owners of foreclosed properties to take title subject to preexisting leases between tenants and the entity being foreclosed upon.¹⁶ Although, unlike Section 703, Section 702 does not expressly require new owners to take subject to both the lease and the Housing Assistance Payment (HAP) contract, the project-based Section 8 lease¹⁷ is terminable only for specified good cause or when the HAP contract is terminated.¹⁸ Thus, project-based Section 8 tenants may actually enjoy long-term tenancy protection under Section 702, so long as the HAP contract is not legally terminated.

Project-based HAP contracts are terminable only under their terms. Most project-based HAP contracts generally contain a provision that the HAP contract stays in effect and that payments will be made in the event of

a foreclosure, even a foreclosure by HUD.¹⁹ Owners generally have no right to terminate a project-based HAP contract. For its part, HUD’s ability to terminate project-based HAP contracts is limited by the Schumer Amendment, which substantially restricts HUD’s ability to cancel contracts when foreclosing on properties with a formerly HUD-insured mortgage.²⁰ HUD’s authority to terminate contracts when foreclosing on non-HUD-insured properties, or outside of a foreclosure proceeding, is less clear, although certainly the specific terms of the actual HAP contract provide the analytical starting point. It would be ironic for HUD to seek a less-regulated position than PHAs, which are not free to terminate voucher HAP contracts under Section 703. Such behavior could be challenged as an abuse of discretion under the Administrative Procedure Act.²¹

Who May Initiate Eviction Proceedings?

The PTFA by its terms is applicable to successors in interest of a foreclosed property, and not the owner being foreclosed upon. The PTFA states in the first section that, “any immediate successor in interest in such property pursuant to the foreclosure shall assume such interest subject to...the provision, by such successor in interest of a notice to vacate...”²² The application of the PTFA solely to successors in interest is significant in that it helps to identify the point at which tenants may receive notice to vacate. Where exactly this notice falls along the foreclosure timeline is discussed below.

When May Notice to Vacate Be Served?

The ninety-day notice to vacate may be served “at least 90 days before the effective date of such notice.”²³ The new owner’s interest is subject to “the rights of any bona fide tenant [with or without a lease], as of the date of such notice of foreclosure.”²⁴ The most reasonable interpretation of the phrase “such notice of foreclosure”

¹³It could be further argued that such an interpretation of the statute would serve to nullify the element of the definition of a bona fide tenant that the transaction be at arm’s length. Tenants that would be excluded from protection of the PTFA, including those who entered into contracts in good faith and without knowledge of the foreclosure or with knowledge but assurances that renting the unit would prevent such foreclosure.

¹⁴For the purposes of this analysis, project-based Section 8 refers only to the programs administered by HUD’s Office of Multifamily Housing, which account for the vast majority of all project-based tenancies. Other project-based Section 8 programs administered by the Office of Public and Indian Housing and PHAs, such as moderate rehabilitation and project-based vouchers, have different form leases and contracts requiring separate analysis.

¹⁵Section 703 amends Section 8(o) of the United States Housing Act of 1937, 42 U.S.C. § 1437f(o), which is the section governing the voucher program.

¹⁶PTFA §§ 702(a), 703, amending Section 8(o)(7)(F) of the Act.

¹⁷HUD Form 90105-A, Model Lease for Subsidized Programs (Dec. 2007).

¹⁸*Id.*, ¶¶ 23 and 30.

¹⁹Most initial project-based HAP contracts are based on an older HUD form and contain the same provision stating that the contract survives foreclosure. *See, e.g.*, HUD Form 52522-D, Part II of the Housing Assistance Payment Contract, 2.20(e)(2) (May 1995); HUD Form 52625-B, Part II of the Housing Assistance Payment Contract, 2.13(d) (Nov. 1975). Most of these initial project-based HAP contracts have expired and the projects are now governed by renewal contracts. Although the basic renewal contract renews all terms of the initial contract unless explicitly modified, there is no such explicit revision of the foreclosure provision. HUD Office of Multifamily Housing, Section 8 Renewal Policy: Guidance for the Renewal of Project-Based Section 8 Contracts, Attachment 11 (Nov. 5, 2007).

²⁰Pub. L. No. 111-8, div. I, Title II, § 218, ___ Stat. ___ (March 10, 2009) (“Schumer Amendment” requiring HUD to maintain project-based assistance at foreclosure or disposition sale, absent specified exceptions, FY 09).

²¹5 U.S.C.A. § 706(2) (July 17, 2009).

²²PTFA §§ 702(a), 702(a)(1).

²³*Id.*

²⁴PTFA §§ 702(a)(2), 702(a)(2)(A).

is that it is a notice that the foreclosure has in fact taken place—in other words, that the transaction is completed.²⁵ Because the purpose of the statute is to protect tenants and impose obligations on a successor in interest, a new owner (successor in interest) cannot issue a ninety-day notice to vacate until he or she has taken ownership of the rental property through the foreclosure sale of the property and the property rights of the owner prior to foreclosure are extinguished.²⁶ Any other interpretation would render the statute internally inconsistent and violate the common practice and logic that only the owner of a property or its agent may seek to evict. If the owner who is being foreclosed upon still has an interest in the property and the foreclosure is not complete, there is no successor in interest. Moreover, the foreclosing entity, which may become the successor in interest, cannot interfere with the owner's interest pre foreclosure.²⁷ Thus, any definition of "notice of foreclosure" that would make it applicable to a point on the foreclosure timeline prior to the transfer of ownership would be inappropriate and inconsistent with the purposes of the statute.

An additional consideration in calculating the point at which a successor in interest may give a tenant a ninety-day notice is the "right of redemption" period following a foreclosure sale. Redemption is available prior to a foreclosure sale, and in many states, "statutory redemption" exists whereby a party being foreclosed upon can reclaim the property after the foreclosure sale.²⁸ Redemption statutes differ markedly from jurisdiction to jurisdiction, with the period ranging anywhere from six months to two years.²⁹ Some allow for a redemption period in both judicial and power of sale foreclosures, while some provide for it in only one type of foreclosure.³⁰ In a number of states, the party being foreclosed upon has the right to retain possession of the property during the period of

²⁵The specifics of the foreclosure proceeding will necessarily differ based on the jurisdiction. Depending on whether the jurisdiction allows judicial or non-judicial foreclosure, or whether the state operates under a title theory or a deed theory of mortgages, can possibly alter the analysis. No matter the peculiarities of a particular jurisdiction, it is essential to emphasize that the party being foreclosed upon must lose *all* interest in the property and that the eviction proceedings should be delayed as long as possible in order to effectuate the purpose of the PTFA, which is to protect tenants.

²⁶See 1 Grant S. Nelson & Dale A. Whitman, *Real Estate Finance Law* §§ 7.1-7.32 (5th ed. 2007) for an excellent discussion of the general principles of foreclosure and an exposition on variations among jurisdictions.

²⁷This is an important distinction because it takes into consideration the differences in the nature of mortgages depending on whether the jurisdiction relies on a title theory or lien theory. In some title theory states, it might be possible for the foreclosing entity to take possession of the property prior to the finalization of the foreclosure. By placing the emphasis on "successor in interest," tenants are protected from lenders even in title theory states. Also, it is important to note that successor in interest refers to the interest in the property and not the interest in the mortgage.

²⁸1 Nelson & Whitman, *Real Estate Finance Law*, § 8.4.

²⁹*Id.*

³⁰*Id.*

redemption; in others, there is no such right.³¹ It is also the case that in some instances of judicial foreclosure, the purchase is not entirely complete until the court confirms the sale agreement.³² Although confirmation of sale will be granted in most instances, it can provide even more time before the successor in interest may serve a ninety-day notice.³³ Therefore, in some jurisdictions, the right to redemption period can significantly delay a foreclosing entity's ability to begin the eviction process because the party being foreclosed upon still has an interest in the property, especially in states where the party being foreclosed upon retains the right to possession.

In some jurisdictions, the right to redemption period can significantly delay a foreclosing entity's ability to begin the eviction process because the party being foreclosed upon still has an interest in the property.

Further, the completion of the foreclosure process through the termination of the previous owner's interests is not sufficient to begin the ninety-day notice period. The new owner must take affirmative action to begin this ninety-day period by serving the tenant with a "notice to vacate." The ninety-day notice cannot automatically begin at the time of sale, even in the situation where the property will become the primary residence of the new owner, because the PTFA states that "a successor in interest may terminate a lease effective on the date of sale."³⁴ This permissive language, along with the general procedural protections against eviction, proves the requirement that a successor in interest must take action to notify the tenant and thus commence the ninety-day period.³⁵

Because the foreclosure process occurs in a number of phases and differs from state to state, others may try to argue that the phrase "notice of foreclosure" is ambiguous and could refer to various points along the foreclosure timeline such as notice of default, filing of a foreclosure in court, judicial determination of foreclosure, notice of a foreclosure sale, etc. However, the reasoning above shows that this phrase can only refer to the time at which the successor in interest, which may be the foreclosing entity, has full rights to the property and the owner prior to foreclosure has relinquished any and all property interests.

³¹*Id.*

³²*Id.* at § 7.17.

³³*Id.*

³⁴PTFA § 702(a)(2)(A) (emphasis added).

³⁵The nature of the eviction action and its procedures will depend on the jurisdiction, and again, it is essential to pursue the latest date possible for the beginning of the ninety-day period to effectuate the purposes of the statute.

Does the PTFA Apply to Properties Foreclosed upon Before the Statute's Date of Enactment?

Related to when a ninety-day notice may be sent to a tenant is the application of the PTFA to properties at different stages in the foreclosure process as of May 20, 2009. It is clear that the PTFA will apply to all tenants where the entire foreclosure proceedings occur after the date of the PTFA's enactment, May 20, 2009, until the sunset clause date of December 31, 2012.³⁶ However, where some step in the foreclosure process occurred before May 20, 2009, the applicability of the PTFA requires closer analysis.

Based on the analysis above and an understanding of the effective date of the "notice of foreclosure" as the time of completion of the sale and termination of all property rights of those being foreclosed upon, the statutory protections for tenants apply to all foreclosures pending as of May 20, 2009. Even if there were a notice of default, filing of foreclosure in court, advertising sale, or anything short of a transfer of ownership and a termination of the rights of the previous owner prior to this date, the successor in interest is bound by the restrictions of the PTFA.

Some may argue that tenants are not entitled to the protection of the PTFA in properties where the sale and transfer of ownership occurred before May 20, 2009.³⁷ However, the PTFA states, "[i]n the case of any foreclosure on a federally-related mortgage loan or on any dwelling or residential real property after the date of enactment of this title..."³⁸ As will be explained, the most reasonable argument is that "after the date of enactment" is only applicable to the second category, "any dwelling or residential real property," and that the protections of the statute were intended to apply to all federally-related mortgage loans, regardless of whether the foreclosure occurred before or after May 20.

The doctrine of last antecedent is a general principle of statutory interpretation, which states that a qualifying word or phrase applies only to the immediately preceding antecedent.³⁹ According to Sutherland, "the last antecedent is the last word, phrase, or clause that can be made an antecedent without impairing the meaning of the sentence. Thus a proviso usually is construed to apply to the

provision or clause immediately preceding it."⁴⁰ Here the proviso regarding the date of application of the PTFA should apply to the last antecedent, which in this case is "any dwelling or residential real property." Further, "[e]vidence that a qualifying phrase is supposed to apply to all antecedents instead of only to the immediately preceding one may be found in the fact that it is separated from the antecedents by a comma."⁴¹ In Section 702(a) there is no comma separating the qualifying phrase, "after the date of enactment of this title," from either antecedent.

In addition to the doctrine of last antecedent, the rule of construction that requires that every word and phrase in a statute have meaning indicates that the PTFA is intended to apply to all federally related mortgage loans, regardless of the date of foreclosure. "It is an elementary rule of construction that effect must be given, if possible, to every word, clause and sentence of a statute. A statute should be construed so that effect is given to all its provisions, so that no part will be inoperative or superfluous, void or insignificant[.]"⁴² Because most federally related mortgage loans are on a "dwelling or residential real property," if the qualifying clause "after the date of enactment of this title" were to apply to both antecedents, the phrase "dwelling or residential real property" would be superfluous and insignificant.

This interpretation of the effective date of the tenant protections is important because the definition of a federally related mortgage loan, taken from Section 3 of the Real Estate Settlement Procedures Act, is expansive and affords many tenants with the safeguards of the PTFA, regardless of the date of foreclosure.⁴³ The definition includes any loans directly from government agencies as well as those "made in whole or in part by any lender the deposits or accounts of which are insured by any agency of the Federal Government, or is made in whole or in part by any lender which is regulated by any agency of the Federal Government..."⁴⁴ Most mortgage loans would be included in this definition because a high percentage of lenders utilize the FDIC or are regulated by the government, and this broad protection is consistent with the purposes of the PTFA.⁴⁵

³⁶PTFA § 702(a), 704.

³⁷Arguments against this could be made for the retroactive application of the statute or for the proposition that the PTFA is merely a clarification of existing law, and thus would not have retroactive effects, only retrospective application. Success on the basis of these statutory constructions is unlikely given the fact that legislative intent is a requisite element for any retrospective/retroactive argument and there is nothing in the record that would indicate such intent. For the landmark case on the statutory retroactivity, see *Landgraf v. USI Film Products*, 511 U.S. 244 (1994). For an exposition of a "clarification" of the law versus a "change" in the law, see *Piamba Cortes v. American Airlines, Inc.*, 177 F.3d 1272 (11th Cir. 1999).

³⁸PTFA § 702(a) (emphasis added).

³⁹2A Norman J. Singer & J. D. Shambie Singer, *Sutherland Statutory Construction* § 47:33 (7th ed. 2001).

⁴⁰*Id.* (internal quotations omitted).

⁴¹*Id.*

⁴²*Id.* § 46:6 (internal quotations omitted).

⁴³Real Estate Settlement Procedures Act, 12 U.S.C.A. § 2602 (2009).

⁴⁴12 U.S.C. § 2602(1)(B)(i).

⁴⁵HUD's New England Regional Office has unequivocally confirmed this position in stating, "These changes are effective for all Section 8 tenants, even those living in units that have already been foreclosed." Protecting Section 8 Tenants at Foreclosure, New England PIH Advisory Letter 09-02, (June 15, 2009).

To What Terms and Conditions Is the New Owner Subject?

A final question relates to the various obligations a successor in interest may have to the terms and conditions of a tenant's occupancy. The operation of the PTFA could differ depending on the length of term of the Section 8 lease.

Section 703 states that the successor in interest is subject to the lease between the Section 8 tenant and the landlord, as well as the HAP contract between the landlord and the PHA.⁴⁶ The new owner is required to allow the tenant to finish the lease term and obliged to follow the HAP terms, including the good cause requirement. The language in Section 703 states that where there is a foreclosure "during the term of the lease, vacating the property prior to sale shall not constitute other good cause," subject to the provision that a new owner can terminate the lease with a ninety-day notice if the unit will be the new owner's primary residence.⁴⁷

Another important aspect of the PTFA is that its protections apply to all Section 8 leases. Before the PTFA was sent to the House on May 19, 2009, all prior versions of the bill stated that actions related to foreclosure would not constitute good cause "during the term of the initial lease."⁴⁸ Under the Section 8 Tenancy Addendum, the elimination of the word "initial" excludes the possibility of using foreclosure as "a business or economic reason for termination of the tenancy" in the case of tenants with extended or subsequent leases.⁴⁹ In accordance with the required Section 8 lease addendum, foreclosure should not be good cause under an initial lease term, because "other good cause for termination of tenancy must be something the family did or failed to do."⁵⁰ For subsequent lease terms, the good cause requirement for termination of a Section 8 lease is expanded to include business reasons, "such as sale of the property, renovation of the unit, the owner's desire to rent the unit for higher rent."⁵¹ The PTFA excludes the possibility that foreclosure constitutes good cause during the term of any Section 8 lease.⁵² This conclusion is supported by the fact that this language mirrors the ARRA language, except that ARRA states that it is good cause if property is "unmarketable while occupied." The failure to repeat this language in the PTFA strengthens the position that foreclosure may not be used to support a claim that there is good cause to evict.⁵³ The

elimination of the "unmarketable while occupied" provision and the deletion of the word "initial" both indicate Congress' intent that foreclosure should not constitute a legitimate "business or economic" reason for termination of any Section 8 tenancy.

The terms of Section 703 of the PTFA provide stability for Section 8 tenants by allowing them to maintain their tenancy under the terms of the lease despite foreclosure, with the exception of a successor in interest who intends to become a resident. Section 8 tenants have the security that they will not be evicted without good cause,⁵⁴ that their lease remains effective, and that the successor in interest is their bona fide landlord, responsible for each and every duty a landlord owes a tenant, either by law or by contract.

Additional Tenant Protections

In addition to the PTFA, some tenants have additional protections. Both Sections 702 and 703 contain the provision that the PTFA "shall not affect any State or local law that provides longer time periods or other additional protections for tenants."⁵⁵ State and local regulations, especially in rent control and eviction control jurisdictions, should be examined to determine the relative levels of protection in comparison with the PTFA. The source of the funds used to acquire foreclosed properties may provide another avenue for tenant protection. Though not as expansive, similar protections are available under ARRA and HERA, both enacted before the PTFA, for a property acquired with funds made available through the Neighborhood Stabilization Program.⁵⁶ In addition, under EESA, federally controlled or owned lenders were required to maintain the tenancies of those current on their rent and to protect federal, state and local rental subsidies.⁵⁷ Some federally controlled lenders, like Fannie Mae, developed policies to protect tenants in response to litigation.⁵⁸ Additionally, specific lenders not controlled by the federal government may have enacted tenant protection policies, as

⁵⁴Project-based Section 8 tenants cannot be evicted except for good cause. For voucher tenants the statute provides for good cause only during the term of the lease and the term shall be for not less than one year, unless the PHA determines that a shorter term will improve housing opportunities for the tenant or is the local market practice. 42 U.S.C.A. § 1437f(0)(7). Despite the legislation, it may be that the tenant's lease requires termination for cause at the end of the term or of a month-to-month tenancy. Advocates should review the lease to determine whether there must be good cause to terminate a month-to-month voucher tenant. See *Wasatch Property Management v. Degrate*, 126 Cal. Rptr.2d 923, 928 (2002) (According to the California rules of Court, this case may not be cited; nevertheless the reasoning of the case can be used in other cases).

⁵⁵PTFA §§ 702(a)(2)(B)(1), 703(2).

⁵⁶ARRA 123 Stat. at 218-19.

⁵⁷Emergency Economic Stabilization Act, 12 U.S.C.A. § 5219b (2009).

⁵⁸Answer at 14-20, *Fed. Nat'l Mortgage Ass'n v. Barnes*, No. 095478 (New Haven Super. Ct. filed December 4, 2008).

⁴⁶PTFA § 703(2).

⁴⁷PTFA § 703(1).

⁴⁸H.R. 1247, 111th Cong. (2009); S. 896, 111th Cong. (as passed by Senate, May 6, 2009).

⁴⁹HUD Form 52641-A, 8(d)(3)(c), (Jan. 2007).

⁵⁰HUD Form 52641-A, 8(d)(1).

⁵¹HUD Form 52641-A, 8(d)(3)(c).

⁵²PTFA § 703(1).

⁵³ARRA 123 Stat. at 219.

did Freddie Mac and Fannie Mae.⁵⁹ Although not likely to be as protective as the PTFA, it is worthwhile to investigate a lender's policy to determine if additional protections are available to tenants of properties foreclosed upon both before and after May 20.

Conclusion

The public policy underlying the PTFA is consistent with extending protections to the maximum number of tenants in units subject to foreclosures. According to the bill's sponsor, the statute was designed to protect "low- to moderate-income folks in America who do not get protections otherwise from being just booted out on the street, which is literally what has happened in the absence of this protection."⁶⁰ When accompanied by the purposes of Section 8 housing in general, this testimony illuminates the principle that the statute should be interpreted most favorably to tenants affected by the foreclosure crisis.

To summarize, the PTFA was intended to provide expansive and beneficial safeguards for all tenants in danger of losing their housing through the exclusive fault of the property's owner. In brief:

- Both Section 702 and Section 703 of the PTFA apply to Section 8 tenants.
- The operative language of the PTFA imposes obligations on successors in interest.
- A successor in interest can only give ninety-day notice at the completion of the foreclosure sale and termination of all property rights of the party being foreclosed upon.
- The PTFA applies to all federally related mortgages, regardless of whether the transaction was completed before May 20, 2009.
- A successor in interest becomes a landlord and is subject to all terms and conditions of any lease or Section 8 HAP contract related to the tenancy prior to foreclosure. ■

⁵⁹Kelly Evans, Fannie Mae to End Tenant Evictions in Foreclosures, *The Wall Street Journal*, December 15, 2008, available at <http://online.wsj.com/article/SB122929716434005201.html> (containing correspondence between legal services advocates and Fannie Mae confirming the policy); see Fannie Mae's National REO Rental Policy FAQs available at http://www.fanniemae.com/newsreleases/2009/faq/FAQ_national_REO; Freddie Mac Extends Eviction Suspension Until March, Launches Rental Option for Foreclosed Borrowers, Tenants, News Release (Jan. 30, 2009).

⁶⁰155 Cong. Rec. S5174 (daily ed. May 6, 2009) (statement of Sen. Kerry).

Quiet Title Claim Denied Following Attempted Prepayment of RHS 515 Loan*

The United States Court of Appeals for the Ninth Circuit has affirmed a federal district court decision restricting an owner of a Rural Housing Service (RHS) project from prepaying its loan through a quiet title action. In *Schroeder v. United States*,¹ the court held that the Emergency Low Income Housing Preservation Act of 1987 (ELIHPA)² applied to the Section 515 loan at issue, and limited the borrower's ability to prepay the loan.³ Further, the court held that the district court's refusal to quiet title on an equitable basis was appropriate, as it prevented the borrower from avoiding the prepayment restrictions.⁴

Background

Congress enacted ELIHPA in 1987 in an effort to preserve affordable rural housing, as borrowers were prepaying their RHS loans.⁵ ELIHPA allows prepayments for RHS loans only if borrowers comply with several requirements intended to preserve low-income housing.⁶ In 2002, the Supreme Court held that ELIHPA "repudiated" existing loan contracts and, as a result, affected property owners could claim damages against the government.⁷ However, the Court did not hold that owners or the government could disregard the statute. Borrowers seeking to prepay RHS loans must still follow ELIHPA's procedures but may seek damages.⁸ In *Schroeder*, the owner attempted to circumvent this process by bringing an action to quiet title in Oregon state court.

Alberta Schroeder owns a six-unit RHS Section 515 project in Heppner, Oregon. She purchased the property in 1984, three years before Congress enacted ELIHPA, from a company that constructed the property in 1975 using a forty-year loan from RHS (then the FmHA).⁹

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¹ ___ F.3d ___, 2009 WL 1740751 (9th Cir. 2009).

²42 U.S.C.A. § 1472(c) (Westlaw July 15, 2009).

³*Id.* at *5.

⁴*Id.* at *6.

⁵*Id.* at *1.

⁶Under ELIHPA, an owner seeking to prepay must give notice of his or her intent. The government must then make an offer providing incentive to remain in the program. If the owner still seeks to prepay after the incentive offer, he or she must offer to sell the property to a qualified nonprofit purchaser or public agency if the prepayment will have an adverse impact on minority housing opportunities. If the property is not sold within 180 days, then the owner may prepay the loan. *See* 42 U.S.C. § 1472 (c).

⁷*Franconia Assocs. v. United States*, 536 U.S. 129, 143 (2002).

⁸*Schroeder*, 2009 WL 1740751, at *2.

⁹*Id.*