

The Protecting Tenants at Foreclosure Act: *Keeping Tenants in the Loop and in Their Homes*

By Clanitra L. Stewart

Introduction

Imagine that you have just received a phone call from a frantic tenant who has discovered that the home she has been renting from her landlord for years is being foreclosed on. Although the tenant has a written lease with her landlord, she was not notified about the foreclosure until late in the process. Now that the tenant knows the foreclosure is happening, she wants to know about her legal rights in the matter. Will she have to move? Does the law protect her tenancy at all? If you received a call like this, would you know how to advise this client?

In the past, residential tenants in South Carolina properties that were foreclosed on were left with little, if any, notice of the foreclosure action and even less time to find a new place to live. Moreover, those tenants had little recourse to enforce their existing leases. In some cases, the foreclosing entities were not even aware that a tenancy existed for the property that predated the foreclosure action. Fortunately, recent changes to federal law have

placed the tenant in a more equitable position in such situations.

On May 20, 2009, President Barack Obama signed into law the “Protecting Tenants at Foreclosure Act” (PTFA). The PTFA is Title VII of the much broader “Helping Families Save Their Homes Act of 2009.” The Helping Families Save Their Homes Act was designed to help stabilize the housing crisis and to provide protections for homeowners and renters at risk of losing their homes or apartments. To accomplish its purpose, Congress placed within the PTFA’s four sections strong protections for tenants with existing residential leases for certain types of property that were foreclosed upon after May 20, 2009. These protections allow certain tenancies predating the enactment of the law to survive foreclosure actions for at least 90 days, or in some cases, the remainder of the lease term, whichever is longer. The provisions of the PTFA apply only to *residential* leases. The PTFA does not change *any* laws related to commercial leases. Protecting Tenants at Foreclosure

Act, Pub. L. No. 111-22, §§ 701–704, 123 Stat. 1660 (2009).

Section 701 of the PTFA provides the title of the Act. Section 702 describes the effects of a foreclosure action on a preexisting tenancy. Section 703 describes the effects of a foreclosure action on existing tenancies for Section 8 housing. Finally, Section 704 provides the date that the provisions of the Act will terminate: December 31, 2012. *Id.* Although sparse in language, the PTFA provides clear requirements for “successors in interest pursuant to the foreclosure” of residential properties occupied by tenants. Generally, these successors in interest are individuals, banks or other entities that have purchased the foreclosed properties. Although not explicitly stated in the PTFA, implied in the term “successor in interest” is the fact the legal title has transferred to the successor pursuant to the foreclosure. Accordingly, even if a foreclosure case on a residential property with a tenant living on it is filed prior to May 20, 2009, the provisions of the



PROTECTING TENANTS

FORECLOSURE ACTION

PTFA could still affect the foreclosure if legal title did not pass to a new owner until after that date.

Section 702: Foreclosure actions and preexisting tenancies

Section 702 of the PTFA states that for foreclosures on residential properties that occur after May 20, 2009, any immediate successor in interest to that residential property pursuant to the foreclosure takes the foreclosed residential property subject to certain rights of "bona fide tenants" with "bona fide leases" that were in existence at the time of the foreclosure. § 702, 123 Stat. at 1660-61. Section 702(b) provides that a tenant or a lease is "bona fide" when: 1) the tenant is not the mortgagor or a child, spouse or parent of the mortgagor; 2) the tenancy is the result of an arms-length transaction; and 3) the tenant has been paying rent that is not substantially less than the fair market rent for the property (unless that residential unit is subsidized through a federal, state or local subsidy). § 702(b), 123 Stat. at 1661.

The primary right of a bona fide tenant with a bona fide preexisting lease is that, in most cases, the successor in interest *must* allow the tenant to finish out the entirety of the remainder of the lease term. § 702(a), 123 Stat. at 1660-61. The only exception to this provision is that the successor in interest *may* terminate the tenant's lease if the successor in interest will occupy that foreclosed property as a *primary* residence. *Id.* However, even under this unlikely exception, the successor in interest, who has effectively become the tenant's new landlord, must give the tenant 90 days' advance notice to vacate. *Id.* There is no express provision in the PTFA that requires the successor in interest to renew the tenant's lease once the remainder of the lease term or the 90-day time period has ended. Another important right of the tenant under Section 702(b) is that in circumstances where the remainder of the tenant's existing lease term is less than 90 days, the successor in interest must still provide the tenant with a minimum of 90 days

advanced notice to vacate. § 702(b), 123 Stat. at 1661. Therefore, even if a tenant is on a month-to-month or week-to-week lease, or if the tenant's lease is terminable at will, the tenant still has to receive 90 days notice to vacate. Were these precautions not put in place, many tenants would find themselves without adequate time to find other housing if they were not notified by their previous landlords that a foreclosure action on the leased property was pending.

It is important to note that because Section 702 contains *broad* descriptions of the types of property covered by the Act, it is unlikely that a successor in interest would be purchasing a type of residential property not covered by the PTFA. Section 702(a) makes it clear that these provisions apply to foreclosures that occur on "federally-related mortgage loans" and on all dwellings or residential real property foreclosed upon after May 20, 2009. § 702(a), 123 Stat. at 1660-61. Per the provisions of the PTFA, the phrase "federally-related mortgage

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loan” as used in the Act carries the same definition as under Section 3 of the “Real Estate Settlement Procedures Act of 1974” (RESPA). § 702(c), 123 Stat. at 1661. Based on this broad definition, such loans would include a first lien or a subsequent lien on a one-unit-to-four-unit property meeting one of the five specific requirements under RESPA that include the majority of federal or non-federal commercial lenders. 12 U.S.C. § 2602(1) (2009). However, because Section 702(a) specifically includes language making the section applicable to “any dwelling or residential property,” virtually all types of residential property could fall subject to the PTFA. § 702(a), 123 Stat. at 1660–61.

Section 703: Additional protections for Section 8 Voucher tenants

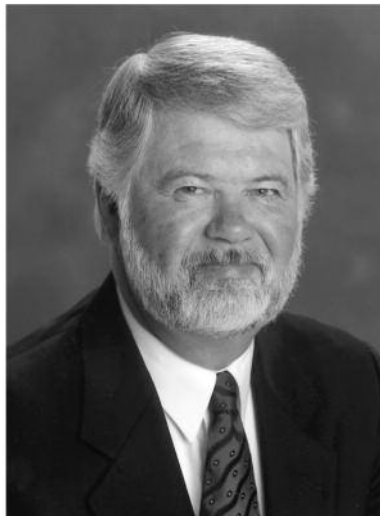
In drafting the PTFA, Congress saw fit to provide additional protections for certain tenants who receive low-income housing assistance under the United States Housing Act of 1937, as amended. § 703, 123 Stat. at 1661–62. This means that in addition to the tenant protections listed in Section 702, successors in interest who obtain residential properties that are subsidized through the Section 8 Voucher program (also called the “Section 8 Housing Choice Voucher Program”) have additional obligations they will need to meet to comply with the PTFA. *Id.*

The U.S. Department of Housing and Urban Development (HUD) administers the Section 8 Housing Choice Voucher Program (HCVP) on a federal level. 24 C.F.R. § 982.3 (2010). HUD provides this federal funding for the HCVP to certain public housing authorities (PHAs) that administer the HCVP at a local level. Through the HCVP, HUD provides eligible low-income tenants with safe, affordable housing by allowing them to choose their own rental units so long as those units meet certain housing quality standards and the rent on the units is reasonable for the financial subsidy HUD will provide. 24 C.F.R. § 982.1 (2010).

Before a PHA will provide a HCVP subsidy for a tenant to live in the rental unit, the owner of that unit must enter into a Housing Assistance Payment (HAP) contract with the PHA. 24 C.F.R. § 982.451 (2010). This HAP contract is a separate agreement from the HCVP rental lease that the tenant and the owner of the rental unit enter into, but it reflects similar requirements about tenant rights and landlord obligations. The owner of the rental unit and a representative from the PHA sign the HAP contract, which contains very detailed information about the rules that the owner must follow to continue to receive the subsidy. *Id.* Some of these rules address specific limitations on the reasons for which an owner can terminate the HCVP lease of an HCVP tenant. These reasons can include serious and repeated lease violations; violations of state, federal and local law; and in some cases, “other good cause.” 42 U.S.C. § 1437f (2008).

As under Section 702, Section 703 requires that a successor in interest pursuant to foreclosure

must allow the HCVP tenant to keep the unit for the remainder of the lease term or for at least 90 days, whichever is longer. However, Section 703 of the PTFA also amends the language of 42 U.S.C. § 1437f(o)(7) to provide greater protections to tenants living in HCVP rental properties when those properties were foreclosed on after May 20, 2009. § 703, 123 Stat. at 1661–62. First, under Section 703(1), the successor in interest, as the new landlord, may not claim that vacating the property prior to the sale is “other good cause” to terminate the HCVP tenant’s lease. *Id.* Secondly, under Section 703(2), the successor in interest takes ownership of the property subject to the terms of *both* the HCVP lease between the HCVP tenant and the previous owner *and* the terms of the HAP contract that was in place between the previous owner and the PHA. *Id.* This means that the successor in interest, by virtue of taking over the foreclosed property, is not only bound to abide by South Carolina law regarding landlord obligations, but also the



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more rigorous federal obligations of a landlord under the HCVP program through the HAP contract and the HCVP lease. *Id.*

With the amendments required under Section 703, the language of 42 U.S.C. § 1437f(o)(7)(C) will now read that each HAP contract entered into by a PHA and the owner of the rental unit:

[S]hall provide that during the term of the lease, the owner shall not terminate the tenancy except for serious or repeated violation of the terms and conditions of the lease, for violation of applicable Federal, State, or local law, or for other good cause and that an incident or incidents of actual or threatened domestic violence, dating violence, or stalking shall not be construed as a serious or repeated violation of the lease by the victim or threatened victim of that violence and shall not be good cause for terminating the tenancy or occupancy rights of the victim of such violence;

and in the case of an owner who is an immediate successor in interest pursuant to foreclosure during the term of the lease vacating the property prior to sale shall not constitute other good cause, except that the owner may terminate the tenancy effective on the date of transfer of the unit to the owner if the owner (i) will occupy the unit as a primary residence; and (ii) has provided the tenant a notice to vacate at least 90 days before the effective date of such notice.

§ 703, 123 Stat. at 1661–62 (emphasis added). Meanwhile, the amendments to 42 U.S.C. § 1437f(o)(7)(F) will now read that the HAP contract:

[M]ay include any addenda required by the Secretary to set forth the provisions of this subsection. **In the case of any foreclosure on any federally-related mortgage loan**

[as that defined by the Real Estate Settlement Procedures Act § 3, 12 U.S.C. 2602 (1974)] or on any residential real property in which a recipient of assistance under this subsection resides, the immediate successor in interest in such property pursuant to the foreclosure shall assume such interest subject to the lease between the prior owner and the tenant and to the housing assistance payments contract between the prior owner and the public housing agency for the occupied unit, except that this provision and the provisions related to foreclosure in subparagraph (C) shall not affect any State or local law that provides longer time periods or other additional protections for tenants.

Id. (emphasis added).

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Section 704: The sunset clause

While opinions may vary as to whether the provisions of the PTFA go too far or do not go far enough, the reality is that the provisions of the PTFA are only temporary. Under Section 704 of the PTFA, the law and the amendments made pursuant to this law will terminate on December 31, 2012. § 704, 123 Stat. at 1662. However, it is possible that Congress will choose to extend some or all of the provisions of the PTFA prior to the sunset date. It is also possible that similar provisions could be incorporated into the South Carolina Code to extend these protections for South Carolina tenants in foreclosed properties.

Putting it all together: Some final questions

Because the federal law affects foreclosures and landlord-tenant relationships, there are clearly implications for South Carolina attorneys practicing in areas of the law affected by these changes. These implications leave many questions as to how to proceed under the PTFA. A few of those questions are as follows:

- Does the PTFA require an additional layer of analysis for South Carolina attorneys representing successors in interest to rental property pursuant to a foreclosure or South Carolina attorneys representing landlords, tenants or public housing authorities?

Due to Congress' desire not to inhibit states and localities that already provide greater protections to tenants in foreclosed properties than provided for in the PTFA, Sections 702 and 703 both explicitly state that state or local laws that provide "longer time periods or additional protections for tenants" would trump the provisions of the PTFA. §§ 702-703, 123 Stat. at 1661-62. However, under existing South Carolina law, tenants living in foreclosed units have no greater protections or longer time periods upon which to rely. Accordingly, South Carolina attorneys, landlords and property managers, public housing authorities, banks and other com-

mercial lenders, and other persons or entities that deal with foreclosed properties in which tenants may be living at the time will need to work harder to ensure compliance with the provisions of the PTFA, as well as other applicable provisions of federal laws (e.g., other provisions governing HCVP housing).

- Are successors in interest pursuant to foreclosure allowed to evict a tenant in an existing lease for *independent* grounds other than the fact that the property has been foreclosed on?

Yes. There is nothing in the provisions of the PTFA that prevents a tenant living in a property that was foreclosed on after May 20, 2009, from being evicted because of that tenant's failure to comply with the *existing* lease provisions. For example, if a tenant fails to pay rent on time, the successor in interest as the new landlord can follow South Carolina's procedure for the eviction of that tenant. See S.C. Code Ann. §§ 27-40-710 & 27-37-10 *et. seq.* Additionally, if a tenant breaches a term of the *existing* lease or of the South Carolina Residential Landlord-Tenant Act, an eviction action could also be filed on those grounds. See S.C. Code Ann. § 27-40-510 *et. seq.* & 27-37-10 *et. seq.* However, it is important to recognize that the successor in interest as the new landlord also has the responsibility to comply with South Carolina law regarding a landlord's obligations. This includes providing certain notices to the tenant as to where to pay rent and to direct concerns and complaints as well as complying with other landlord obligations. S.C. Code Ann. §§ 27-40-410 *et seq.*

For successors in interest obtaining foreclosed properties for which a rental subsidy is received (particularly those covered under Section 703 of the PTFA), the successors in interest must be sure to comply with all applicable federal statutes and regulations, in addition to South Carolina's eviction procedure. In fact, HUD's Office of Public and Indian Housing has issued two specific notices that addressed the addi-

tional requirements of PHAs and successors in interest to properties covered by HCVP leases and HAP contracts. See *Protecting 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); *Protecting Tenants at Foreclosure Act: Guidance on New Tenant Protections*, HUD Notice PIH 2009-52 (December 15, 2009).

- Will HUD be issuing new regulations for successors in interest and PHAs obligated under Section 703 of the PTFA?

Possibly. However, all of the provisions of the PTFA are self-implementing and were effective as of May 20, 2009. HUD has issued two notices providing some guidance regarding the obligations of successors in interest and PHAs under the PTFA. *Id.*

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