

Protecting Tenants at Foreclosure Act (PTFA): Issues and Interpretations



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**Protecting Tenants at Foreclosure Act (PTFA):
Issues and Interpretations**

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Section 1: PFTA Fundamentals

- “Successor In Interest” Requirements

The *Protecting Tenants at Foreclosure Act of 2009* (Pub. L. No. 111-22) (‘PTFA’ or ‘the Act’) was passed on May 20 2009, aimed at protecting tenants of properties subject to foreclosure in the aftermath of the global finance crisis. Some estimates placed the number of renters at 40% of the total number of families that faced eviction due to foreclosure.¹ Eviction without sufficient notice, costs of relocation, disruption to other commitments – these are some of the consequences that renters face in the absence of sufficient protection.

The PTFA had an initial sunset clause that was to take effect from December 31, 2012 but the recent passage of the *Dodd-Frank Wall Street Reform and Consumer Protection Act* (‘DFWSRCPA’) delayed the operation of the sunset clause to December 31, 2014.

The central provisions of the Act allow tenants to remain at the property for up to 90 days after foreclosure or for the remaining period of their lease as long as the successor in interest does not intend on using the property as a primary residency.

The PTFA appears as Title VII, §§ 702-703, of the *To Prevent Mortgage Foreclosures and Enhance Mortgage Credit Availability Act*, Pub. L. No. 111-22, 123 Stat. 1632 (2009):

TITLE VII-PROTECTING TENANTS AT FORECLOSURE ACT

SEC. 701. SHORT TITLE.

This title may be cited as the ‘Protecting Tenants at Foreclosure Act of 2009’.

SEC. 702. EFFECT OF FORECLOSURE ON PREEXISTING TENANCY.

(a) *In General* In 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, any immediate successor in interest in such property pursuant to the foreclosure shall assume such interest subject to—

(1) *the provision, by such successor in interest of a notice to vacate to any bona fide tenant at least 90 days before the effective date of such notice;*

and

(2) *the rights of any bona fide tenant, as of the date of such notice of foreclosure—*

(A) *under any bona fide lease entered into before the notice of foreclosure to occupy the premises until the end of the remaining term of the lease, except that a successor in interest may terminate a lease effective on the date of sale of the unit to a purchaser who will occupy the unit as a primary residence, subject to the receipt by the tenant of the 90 day notice under paragraph (1); or*

(B) *without a lease or with a lease terminable at will under State law, subject to the receipt by the tenant of the 90 day notice under subsection (1),*

¹ National Housing Law Project, ‘The Foreclosure Crisis and Its Impact on Tenants’ (2009) Resource Center, National Housing Law Project, <http://www.nhlp.org/resourcecenter?tid=68>.

except that nothing under this section shall affect the requirements for termination of any Federal or State-subsidized tenancy or of any State or local law that provides longer time periods or other additional protections for tenants.

(b) *Bona Fide Lease or Tenancy*- For purposes of this section, a lease or tenancy shall be considered bona fide only if-

- (1) the mortgagor or the child, spouse, or parent of the mortgagor under the contract is not the tenant;
- (2) the lease or tenancy was the result of an arms-length transaction; and
- (3) the lease or tenancy requires the receipt of rent that is not substantially less than fair market rent for the property or the unit's rent is reduced or

subsidized due to a Federal, State, or local subsidy.

(c) *Definition*- For purposes of this section, the term 'federally-related mortgage loan' has the same meaning as in section 3 of the Real Estate Settlement Procedures Act of 1974 (12 U.S.C. 2602).

SEC. 703. EFFECT OF FORECLOSURE ON SECTION 8 TENANCIES.

Section 8(o)(7) of the United States Housing Act of 1937 (42 U.S.C. 1437f(o)(7)) is amended-

(1) by inserting before the semicolon in subparagraph (C) the following: '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.';

and

(2) by inserting at the end of subparagraph (F) the following: 'In the case of any foreclosure on any federally-related mortgage loan (as that term is defined in section 3 of the Real Estate Settlement Procedures Act of 1974 (12 U.S.C. 2602)) 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.'

SEC. 704. SUNSET.

This title, and any amendments made by this title are repealed, and the requirements under this title shall terminate, on December 31, 2012.

A 'successor in interest' in this context refers to the person or entity who holds the title or interest in the property after another. With respect to the PTF, the successor in interest may be the new mortgagor, the lending institution or bank.

It is interesting to note that there are no federal agencies that have been specifically vested with the power to issue regulations to implement or interpret the law,² although the federal government has

² Board of Governors of the Federal Reserve System, 'To the Officers and Managers in Charge of Consumer Affairs Sections: Subject: Information and Examination Procedures for the Protecting Tenants at Foreclosure Act of 2009' (2009), Board of Governors of the Federal Reserve System, <http://www.federalreserve.gov/boarddocs/caletters/2009/0905/caltr0905.htm>.

promoted compliance and implementation by issuing notices and guidance to institutions and reminded them that non-compliance may lead to enforcement actions and penalties.³

What Type of Properties? Definition of “Federally-Related Mortgage Loans”

“Federally-related mortgage loan” is defined in s 3 of the *Real Estate Settlement Procedures Act of 1974* (12 U.S.C. 2602):

SEC. 3. For purposes of this Act-

(1) the term "federally related mortgage loan" includes any loan (other than temporary financing such as a construction loan) which-

(A) is secured by a first or subordinate lien on residential real property (including individual units of condominiums and cooperatives) designed principally for the occupancy of from one to four families, including any such secured loan, the proceeds of which are used to prepay or pay off an existing loan secured by the same property; and

(B)(i) is 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; or

(ii) is made in whole or in part, or insured, guaranteed, supplemented, or assisted in any way, by the Secretary or any other officer or agency of the Federal Government or under or in connection with a housing or urban development program administered by the Secretary or a housing or related program administered by any other such officer or agency; or

(iii) is intended to be sold by the originating lender to the Federal National Mortgage Association, the Government National Mortgage Association, the Federal Home Loan Mortgage Corporation, or a financial institution from which it is to be purchased by the Federal Home Loan Mortgage Corporation; or

(iv) is made in whole or in part by any "creditor", as defined in section 103(f) of the Consumer Credit Protection Act (15 U.S.C. 1602(f)), who makes or invests in residential real estate loans aggregating more than \$1,000,000 per year, except that for the purpose of this Act, the term "creditor" does not include any agency or instrumentality of any State;

(2) the term "thing of value" includes any payment, advance, funds, loan, service, or other consideration;

(3) the term "settlement services" includes any service provided in connection with a real estate settlement including, but not limited to, the following: title searches, title examinations, the provision of title certificates, title insurance, services rendered by an attorney, the preparation of documents, property surveys, the rendering of credit reports or appraisals, pest and fungus inspections, services rendered by a real estate agent or broker the origination of a federally related mortgage loan (including, but not limited to, the taking of loan applications, loan processing, and the underwriting and funding of loans), and the handling of the processing, and closing or settlement;

(4) the term "title company" means any institution which is qualified to issue title insurance, directly or through its agents, and also refers to any duly authorized agent of a title company;

(5) the term "person" includes individuals, corporations, associations, partnerships, and trusts;

(6) the term "Secretary" means the Secretary of Housing and Urban Development;

(7) the term "affiliated business arrangement" means an arrangement in which (A) a person who is in a position to refer business incident to or a part of a real estate settlement service involving a federally related mortgage loan, or an associate of such person, has either an affiliate relationship with or a direct or beneficial ownership interest of more than 1 percent in a

³ National Law Centre on Homelessness & Poverty, 'Staying Home: The Rights of Renters Living in Foreclosed Properties' (2010), National Law Center on Homelessness & Poverty, Washington D.C., p. 4.

provider of settlement services; and (B) either of such persons directly or indirectly refers such business to that provider or affirmatively influences the selection of that provider; and

(8) the term "associate" means one who has one or more of the following relationships with a person in a position to refer settlement business: (A) a spouse, parent, or child of such person; (B) a corporation or business entity that controls, is controlled by, or is under common control with such person; (C) an employer, officer, director, partner, franchisor, or franchisee of such person; or (D) anyone who has an agreement, arrangement, or understanding, with such person, the purpose or substantial effect of which is to enable the person in a position to refer settlement business to benefit financially from the referrals of such business.

In summary, the scope of "federally-related mortgage loans" includes loans that are:

- secured by residential dwellings, individual units of condominiums, and cooperatives; and
- secured by a first or subordinate lien on residential real property designed for the occupancy of one to four families and the proceeds of which are used to prepay or pay off an existing loan secured by the same property; and
- the loan is made in whole or in part by a lender whose deposits or accounts are insured by an agency of the Federal Government, or is made in whole or in part by any lender who is regulated by any agency of the Federal Government; and
- is made in whole or in part, insured, guaranteed, supplemented, or assisted by the Secretary of HUD or any other officer or agency of the federal government; or which
- is intended to be sold to FNMA, GNMA, the Federal Home Loan Mortgage Corporation (FHLMC) or a financial institution which will be purchased by FHLMC; or which
- is made in whole or in part by a "creditor" as defined in section 103(f) of the *Consumer Credit Protection Act*. 12 USC § 2602(1); 24 CFR § 3500.2.

Loans from a depository based lender or government guaranteed loans will generally come under the scope of the PTFA.

In some jurisdictions, the PTFA's application has been found to not limited to foreclosures on federally-related mortgage loans. The PTF also applies to foreclosures on any dwelling or residential real property on which a non-federally-related mortgage applies. In *RWW Properties v. Stepanoff*, No. N10-0072 (Cal. Super. Ct. App. Div. May 25, 2010), the decision of a California Supreme Court judge who allowed a tenant to be evicted after only 30 days notice after foreclosure on the basis that the PTFA only applied to federally related mortgages was reversed on appeal.

Some ambiguity exists with respect to the types of dwellings across the states. The Californian interpretation was contradicted by the judgement in *Collado v. Boklari*, 892 N.Y.S.2d 731 (N.Y. Dist. Ct. Nov. 9, 2009) (and also in *GMAC Mortgage, LLC v. Taylor*, No. HULT 644-09, 2010 WL 702427 (N.Y. Dist. Ct. Mar. 1, 2010), where the PTFA was found to only apply to HUD, FHA or other federally related properties," and did not cover tenants in non-federally related properties, as the inclusion would render the Act unconstitutional expansion of federal authority.

Though section 702 would read to cover foreclosures on non-federally-related mortgage loans that occurred on or after May 20, 2019, its wording clearly suggests it is to apply to any foreclosures on federally-related mortgage loans that occurred *before or after* the legislation was passed so long as the notice to vacate was served on or after May 20 2009.

Thus, although the case law suggests there is still some uncertainty, the section, by its wording should cover absolutely any kind of residential dwelling, including those subject to foreclosure occupied by

Housing Choice Voucher System or Section 8 tenants, which we will look at in more detail later. Additionally, there is nothing in the Act to suggest that s 702 and the amendments under s 703 operate mutually exclusively.

90 Day Notice to Vacate and Bona Fide Leases

Section 702(a)(1) requires successors in interest, where they require tenants to vacate the property, to provide at least 90 day notice. Successors in interest are also required to observe the terms of any leases entered before the notice of foreclosure, including allowing the tenant to remain for the duration of the lease period (s 702(a)(2)(A)).

The first exception to this rule is where the property has been sold to a purchaser who will use the property as a primary residence (s 702(a)(2)(A)).⁴ In this circumstance, the tenant still must be given at least 90 days notice to vacate.

The second exception to this rule where there is no lease or there is a lease terminable at will under State law (s 702(a)(2)(B)). In this situation, the 90-day notice rule still applies. We will examine the State law exceptions more closely later in this teleconference.

Under s 702(b), a lease or tenancy is considered to be bona fide where the mortgagor, or the child, spouse or parent of the mortgagor under the contract is not the tenant (s 702(b)(1)). The lease or tenancy must also be the result of an arms-length transaction (s 702(b)(2)), or in other words have acted independently, with no relationship to each other, without personal influence, control, pressure or duress from the other party.

In addition to the above two considerations, to qualify as a bona fide lease, the lease must not concern rental rates that are substantially less than fair market rent for the property unless the rent is reduced or subsidised due to a Federal, State or local subsidy. We will look more closely at market rates for rent and subsidies later.

In summary, the 90 day minimum notice requirements contained within s 702 are as follows:

- Successors in interest must avail at least this notice period to tenants in any foreclosed dwellings or residential real property, irrespective of the type of loan or security interest.
- If state or local laws provide more generous period or terms, those and not the federal provisions must be observed.
- Anyone who is a bona fide tenant on the date of the notice of foreclosure must be given the notice whether or not there is a lease or if there is a lease otherwise terminable at will under state law.
- Successors in interest who wish to occupy the property as a primary residence must also give the minimum 90 day notice.

In *Fed. Nat'l Mort. Assoc. v. Dobson*, No. 10-CVG-02140 (Ohio Mun. Ct. Mar. 1, 2010), it was established that an existing tenant is considered to be a bona fide tenant and protected under the PTFA unless there is evidence to prove otherwise. In the case of *Bank of America v. Owens*, 2010 NY Slip Op 20164 (Rochester City Ct. May 5, 2010) it was held that successors in interest seeking to

⁴ U.S. Department of Housing and Urban Development (HUD), 'Notice of Responsibilities Placed on Immediate Successors in Interest Pursuant to Foreclosure of Residential Property,' 74 Federal Register 120 (June 24 2009), pp 30106 - 30107.

avoid the 90-day notice obligation cannot require tenants to prove their status as bona fide tenants within a five days. If the tenant does not prove the evidence, the successor in interest holds the onus of proof that the tenant is not a bona fide tenant.

Note that the PTFA does not create a private right of action for the tenant to sue any successors in interest for damages with respect to a failure to provide sufficient notice under the Act (*Logan v. U.S. Bank National Association*, No. CV 09-08950, 2010 WL 1444878 (C.D. Cal. Apr. 12, 2010); *U.S. Bank Nat'l Ass'n v. Lasoff*, No. CV 10-00235, 2010 WL 669239 (C.D. Cal. Feb. 23, 2010).

- **Interplay with State Laws – Exceptions Where State Laws Trump PFTA**

Under the Supremacy Clause, in the event of any conflict between Federal and state law, federal law is to be observed. However, the PTFA is unambiguous in stating that where State or local laws provide longer time periods or any other additional protections for tenants, it will not work to restrict these longer time period requirements or additional protections (s 702(a)(2)). Thus the PTFA allows State laws to take precedence over its own provisions where they offer more protection but not when they prove to be more onerous for tenants.

The following are some examples of some states and local statutes:⁵

- California - Pre-Foreclosure Sale Notice to Tenants (Cal. Civ. Code §§ 2924.8, 2924b(c)(2)(D)). Trustees are required to post and mail a notice of trustee sale at least 20 days before the foreclosure sale and successor in interests must receive 60 days notice if there is to be eviction after foreclosure, though the PFTA's 90 day requirement will take precedence in these circumstances. This applies only to "loans secured by the residential real property and if the billing address for the mortgage is different than the property address."
- Berkeley, and Beverley Hills CA - Good Cause Eviction Protection (Berkeley Municipal Code § 13.76.130). Berkeley's Rent Ordinance requires just cause or good cause to evict tenants in the city. Foreclosure is generally not good cause to evict. Similar provisions exist for Beverly Hills, East Palo Alto, Glendale, Hayward, Los Angeles, Maywood, Oakland, Richmond, Ridgecrest, San Diego, San Francisco, Santa Monica, West Hollywood, and many of these apply only to rent-controlled properties. Some jurisdictions also have utility-shutoff prohibitions, limitations, or notice requirements.
- Illinois - (Notice requirements (735 Ill. Comp. Stat. § 5/15-1508.5). Lenders or purchasers who take title must make good faith efforts to provide notice by personal service or registered mail to each resident of the property to notify that that ownership is to pass within 21-days of confirmation of sale, and to continue to serve this notice until resident has been notified. The notice must contain additional details in regard to the foreclosure case. Receivers or mortgagees in possession are under the same obligation to serve such a notice.
- Chicago, IL - Foreclosure Notice to Tenants (Chicago Municipal Code § 5-12-095). Chicago requires owners of a property facing foreclosure to notify all tenants in writing. Third party rent-payers who are not tenants must also be notified.
- New York State - Foreclosure Notice to Tenants (N.Y. Real. Prop. Acts. Law § 1303). In New York foreclosing parties must notify tenants of the upcoming foreclosure via registered post. New York has enacted many mirror provisions from the PTFA, giving tenants the right to

⁵ National Housing Law Project, 'Additional State and Local Protections for Tenants in Foreclosure Situations' (2009) Resource Center, National Housing Law Project, <http://nhlp.org/resourcecenter?tid=130>.

remain in their homes after a foreclosure sale for 90 days or for the remainder of their lease (N.Y. Real. Prop. Acts. Law § 1305). The longer of the two timeframes will apply. The New York law offers the same protection to other types of property disposals, such as short sales, deeds in lieu of foreclosure, or properties that are transfer in the period pending foreclosure. Purchasers who wish to reside in the property must give 90 days notice, as under the PTFA. Lenders are under an obligation to maintain the habitability of foreclosed properties after the entry of judgement of foreclosure and sale and before the transfer of title. Unlike the PTFA, the New York statute does not contain a sunset clause.

- In Texas, the rule is 30 days notice for eviction in the event of foreclosure where the tenant is not otherwise in default or in breach of the terms of the lease agreement (*Texas Property Code* § 24.005(b)), and thus 90 day notice period under the PTFA will apply.

Where the lease is terminable at will under State or local law, or no just cause eviction provision can be evoked to the tenant's benefit, the lease may be terminated subject to the 90 day exception. Note that many state and local jurisdictions afford more specific protection to tenants, such as rent control and just cause for eviction in the event of foreclosure. Again, where there is conflict, the less onerous provision applies.

Section 2: Special Nuances for Section 8 Tenants

From s 703, Effect of Foreclosure on Section 8 Tenancies:

...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 he 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.;*

...

In the case of any foreclosure on any federally-related mortgage loan (as that term is defined in section 3 of the Real Estate Settlement Procedures Act of 1974 (12 U.S.C. 2602)) 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.

The above amendments to the *United States Housing Act of 1937* (42 U.S.C. 1437(o)(7) rental voucher assistance provisions extends foreclosure eviction protection to Section 8 tenants.

The statute clearly states that foreclosure in itself is not sufficient to constitute good cause for eviction for Section 8 tenants. The owner, however, may serve an eviction notice with the minimum 90 day notice period if they will occupy the unit as a primary residence. While project-based Section 8 tenants (where Section 8 vouchers are fixed to a particular dwelling and not the tenant) do not come under Section 703, they are still protected by Section 702.

For Section 8 tenants, it does not matter when the foreclosure happened as long as they were tenants on or after the date legislation was passed (May 20 2010).

Where state law provides longer time periods or other protection for tenants, state law will also take precedence over federal law for Section 8 tenants (s 8(o)(7)(2)). The section 703 amendments effective

declare that Section 8 leases are bona fide leases and the new owner must take on the Section 8 lease and the Housing Assistance Contract with the Housing Authority, and cannot evict the tenant unless there is some other just cause. The new owner is thus responsible for repairs and utilities, and anything else the existing lease required of the landlord.

Just cause provisions may be specific to the state or local law. Under s 8(o)(7) of the *United States Housing Act of 1937* (42 U.S.C. 1437(o)(7)), the owner cannot terminate the tenancy except for the following reasons:

- Serious or repeated violation of the terms and conditions of the lease; or
- Violation of applicable Federal, State, or local law; or
- For other good cause

The act also specifies that incidents of threatened or actual domestic violence, stalking or dating violence were not good cause for terminating the tenancy or occupancy rights of the victim of such violence.

Section 3: Interpreting Ambiguities

'Prior to Notice of Foreclosure' and Other Temporal Issues

Foreclosure generally refers to the process by which a mortgagee or lender obtains a court ordered termination of a mortgagor's equitable right of redemption. Section 702 specifically refers to a notice of foreclosure, a term which does not exist in certain state jurisdictions such as California.

On July 21 2010, Congress extended the effective period of the PFTA and clarified the 'Prior to Notice of Foreclosure' issue through the enactment of the *Dodd-Frank Wall Street Reform and Consumer Protection Act* ('DFWSRCPA'). Section 1484 of the DFWSRCPA defines notice of foreclosure to mean:

the date of a notice of foreclosure shall be deemed to be the date on which complete title to a property is transferred to a successor entity or person as a result of an order of a court or pursuant to provisions in a mortgage, deed of trust, or security deed.

Thus the PFTA will apply to lease agreements that were entered into before the date of transfer of *complete title* to the successor in interest. This suggests that the lease or rental agreement must have been signed prior to the date of the Trustee Sale and not the Notice of Default in order for it to be automatically taken on by the successor in interest. In the event where there is no lease or there is a lease terminable at will under State law, the 90-Day notice period will still apply.

In *Burson v Auth Burson v. Auth*, Circuit Court for Baltimore City, Maryland, No. 24-O-09-000201, the PFTA was found to apply to a property that was sold at a foreclosure sale prior to the passage of the PFTA. A Californian case found that the PFTA affords protection to tenants whose leases are entered into after a notice of default has been issued for the property, with the court presuming that the notice of default was not a notice of foreclosure (*JPMorgan Chase Bank, N.A. v. Doe*, Superior Court, San Diego County, No. 00-2009-0000000-CL-UD-CTL).

Redemption Period Issues

The redemption period is the period of time, ranging from three days to 12 months depending on the particular state in which the property is located, during which a former owner can still claim and buy back the foreclosed property. Each state has separate and varying laws defining the period during which all parties – including the purchaser – involved in the foreclosure and subsequent purchase of the property agree that the former owner can still buy back their foreclosed property, though some states do not have provisions for redemption periods at all (such as Nebraska, Hawaii, Idaho, Delaware, Nevada, and Texas) and others require a court determination for redemption to be evoked (Maryland, Connecticut). Some states have redemption periods that run before the auction or sale of the house, while in most states, redemption only comes after the sale or auction. In many states, title will not pass to the success in interest at the sale until the expiry of the period of redemption.

The successor in interest or new owner will not technically have an ownership interest until the end of the redemption period. With respect the operation of the PTFA, because the interest in the property is not transferred until after the redemption period and the purchaser will not have an ownership interest until the redemption period is over, any notice to vacate should be served no early than the last day of the redemption period where the property is not redeemed.

Determining Actual Rent if Lease is Not Available

State laws will recognise the validity of an oral lease for tenancies of less than one year in duration (for example, Idaho). Where no oral or written lease exists, a ‘tenancy at will’ (not a lease) is often deemed to exist. Rent may be determined by looking to past rent receipts or past payments. Bank account statements, receipt slips, and similar evidence can be used to determine actual rent paid. Where there disagreement about the rent and no evidence to support past payments, the market value of rent may be used.

Housing Choice Voucher System tenants or Section 8 tenants pay no more than 30 percent of the family net income, with the Public Housing Agency and the U.S. Department of Housing and Urban Development (HUD) paying the rest of the amount. Net income is calculated by adding up each family member’s gross annual income minus deductions, which includes \$480 per each dependent, child care expenses for children under 13, and disability assistance and medical expenses where eligible.

However, Section 8 tenants pay a maximum of 30 percent of adjusted income for rent only when they reside in dwellings that do not exceed the payment standard – the maximum monthly rent assistance that the HUD will pay to the landlord. The payment standard is usually calculated from the fair market rent which includes utilities and is determined each year by the government (the fair market rental analysis took is located at http://portal.hud.gov/app_nhls/publicWelcome.do?cmd=doFMR).

Families that choose properties above the payment standard set by the HUD will need to cover the difference between the actual rent and the payment standard themselves. If their contribution to rental payments exceeds 40 per cent of adjusted income they will not longer eligible for Section 8 housing.

Determining Market Value of Rent

While there are many formal appraisal methods for the value of property and resulting property taxes for owners, there is not strict or formal way of calculating the market value of rent, particularly as there are many variable that contribute to the desirability of a rental dwelling. A question of fact rather than one of law, the market value of rent can be calculated using publicly available information that give an average rate for similar properties in the area. Websites such as the Department of Housing and Urban Development (HUD) provide information and statistics on fair market rents. The HUD website (located at http://portal.hud.gov/app_nhls/publicWelcome.do?cmd=doFMR) also has a fair market rental analysis tool. Real estate company websites offer rental rates for properties in specific areas, using aggregated data from across the country or zip code and location information to estimate the rent in that area. Private individual assessment companies can provide a formal appraisal in determining the market value of rent.

It is important to note that some properties fall under rent control or rent stabilised provisions. In those cases, tenants and landlords will also need to consider these additional rules.

Security Deposits, Back Rents, and Pre-Payment of Rent

Security deposits are regulated by state laws, which often have limitations on the amount that a landlord can be required of a security deposit and the process by which the deposit is to be returned. For example, in California the security deposit cannot be more than 2 months' rent where the apartment is unfurnished, or 3 months' rent where the apartment is furnished. The security deposit must be fully refunded after 21 days of the tenant moving out and any deductions itemised and justified by writing and receipts for expenses. State laws will vary on the exact requirements and time frames, but most states require return the security deposit within 14 - 30 days.

In the event of foreclosure, given that the PFTA states that any lease entered in before the notice of foreclosure (as defined and clarified by the DFWSRCPA) remains valid and is taken on by the successor in interest, the responsibility for the security deposit is passed on to the successor in interest. For the same reason, back rents must be paid to the successor in interest, who then accounts for any balance with the old owner.

However, there may be some ambiguity between State or local law and the Federal statute in this respect. While the PFTA clearly states that the lease remains valid and is taken on by the successor in interest, some jurisdictions have passed laws that hold the lien holder, usually the mortgagee, responsible for paying the security deposit back to the tenant during the foreclosure process (as applies under current Chicago City Council law).

It is necessary to check with local and state laws to ascertain what is required of all parties with respect to security deposits, back rents, and prepaid rent. Some States, for example, Oregon, allow tenants on properties in foreclosure to apply security deposits or prepaid rent toward monthly rent payments as they are less likely to be able to recover their security deposit or prepaid rent from the former owners. Many states and local city councils have passed laws to provide tenants with more protection.

Where the landlord continues to collect rent after foreclosure without informing the tenant of change of circumstances, the tenant may be able to recover the rent under state or local law provisions, such as lodging a claim through small claims tribunals.

Rent to Own/Purchase Options

This may vary depending on the specifics of the contract, but rent to own purchase options is an agreement whereby the tenant pays a one-off fee to the landlord up front for the right to purchase the property later at an agreed price. In the interim the tenant is still obligated to pay rent, which may or may not be higher than market rates, and a percentage of this rent is often put against the eventual purchase price of the property. Some rent to own contracts may contain a provision which repudiates the tenant's right to buy in the event that they default on lease payments or break lease conditions.

Whether the agreement between the tenant and the owner is one of agreement for sale, or only an agreement that allows an option to purchase, it appears the tenant will still be a bona fide tenant under s 702(b) as they are not technically the mortgagor themselves – the current owner is. There is little case law on this particular issue. Technically, the tenant may still be protected by the PTFA in the event of foreclosure as their status is that of a tenant without any interest in the property, only the option to purchase the property at a later date.

More questions will arise in cases where the rent to own agreement allows for a percentage of the rent to be contributed to the eventual purchase sum. In this case, the tenant will have built some equity in the property. The application of the PTFA will depend in rent to own agreements will probably depend on the actual terms of the rent to own agreement, and what it says about the tenant's ownership status or interest, if any, with respect to the property subject to foreclosure.

Section 4: Compliance – Current Wording on 90-day Notice

The PTFA does not create specific legal requirements as to the wording on the 90-day notice. To prepare a valid 90-day notice to vacate, successors in interest must also look to the local or state laws of the region in which the property is located.

With respect to the PTFA act, successors in interest cannot engage in unfair and misleading trade practices by misleading as to their rights on PTFA a 90-day notice. For example, demanding immediate vacating of the property, or failing to notify tenants of their right to stay for 90 days under the PTFA. To ensure compliance with the PTFA, the notice should be prepared with consideration of state/local law requirements and inform each tenant that they have 90-days notice. It should list the reason that the successor in interest is serving a notice to vacate, whether it is because they intend to make the dwelling their primary residence, or because the tenant is no longer a bona fide tenant because there was no lease, or because the lease is terminable at will under State law.

If the notice is claiming that the tenant is not a bona fide tenant, it should still state that the 90 days notice is available to the tenant. It should also allow the tenant to provide any information that may disapprove the presumption that they are not a bona fide tenant and allow them a reasonable amount of time to do so.⁶ Anecdotal cases have indicated that 90-day notices have been prepared in technical language that proved to be unintelligible, resulting in tenants being unable to understand the points being made out.⁷

⁶ New Haven Legal Assistance Association, 'Violation of the Protecting Tenants at Foreclosure Act: A Report on Noncompliance in Connecticut by Foreclosing Lenders, Real Estate Agents, and Law Firms' (2009), New Haven Legal Assistance Association, New Haven, Connecticut, p. 16.

⁷ Ibid 16 - 17.

There are no specific provisions with respect to cash for keys offers within the PTFA, and unless state or local laws provide the contrary, cash for keys offers are not illegal if they are included on an eviction notice, as long as they do not contradict or mislead the tenant as to their 90-day right or falsely represent that they must accept the cash for keys offer.

In summary, section 90-day notices should be worded with generous consideration of the tenant's rights, state and local laws, and not misrepresent the rights of the tenant

Section 5: Statutory Fraud Considerations

Consumer fraud statutes vary throughout each state. Most are based in part on the federal acts: the *Uniform Deceptive Trade Practices Act*, the *Uniform Consumer Sales Practices Act*, or the *Federal Trade Commission Act*. The Federal Trade Commission regulates interstate trade or commerce, so the provisions under the *Federal Trade Commission Act* (15 U.S.C. §§ 41-58), may be applicable to some interstate cases where successor in interest and tenant cases where misrepresentations have been made.

The federal and state trade practices laws, with variations, forbid the passing off goods, services or property as those of another, false or misleading representations with respect to the goods, services, property or businesses of others, advertising goods, services, property or businesses while not intending to sell them as advertised.⁸

For example, under the *Texas Deceptive Trade Practice – Consumer Protection Act* Tex. Bus. & Com. Code Ann., statutory fraud may be deemed to have occurred when a landlord or some other interested party acts in a way that goes beyond a 'mere breach of contract.'⁹ There needs to be something more in way of a misrepresentation or fraud for the an avenue under the legislation to be availed to the tenant (Riddick, 7 S.W.3d at 670; Quitta, 808 S.W.2d at 644.).

In *West Anderson Plaza v. Feyznia*, 876 S.W.2d 528 (Tex. App.—Austin 1994, no writ), the Austin Court of Appeals discussed the need to view the totality fo the circumstances in a case to decide whether the landlord had violated the DTPA. Six elements to be considered questions were laid out as guidance by the court:

- Whether the representation was clearly factual, clearly interpretive, or some less clear combination of the two;
- Whether the relevant contractual language was ambiguous or unambiguous;
- Whether the parties were in a substantially equal position of knowledge and information;
- Evidence of overreaching or victimizing;
- Evidence of unconscionable conduct;
- Whether there was a confidential or fiduciary relationship between the parties.”

Section 27.01 of the Texas Business and Commerce Code, also known as the Real Estate Fraud Statute prohibits:

(a) *Fraud in a transaction involving real estate or stock in a corporation or joint stock company consists of a*

⁸Brown, Alan S, 'Comparison of Consumer Fraud Statutes Across the 50 States,' (2005) *FDCC Quarterly*, Spring 2005, Tampa, Florida, pp. 1 - 2.

⁹Riddick v. Quail Harbor Condo. Ass'n, Inc., 7 S.W.3d, 663, 670 (Tex. App.—Houston [14th Dist.] 1999, no pet.); *Ashford Development v. USLife Real Estate Services*, 661 S.W.2d. 933, 935 (Tex. 1983). *Dura-Wood Treating Co. v. Century Forest Industries, Inc.*, 675 F.2d 745, 756 (5th Cir. 1982).

1. *false representation of a past or existing material fact, when the false representation is*
 1. *made to a person for the purpose of inducing that person to enter into a contract; and*
 2. *relied on by that person in entering into that contract; or*
2. *false promise to do an act, when the false promise is*
 1. *(A) material;*
 2. *(B) made with the intention of not fulfilling it;*
 3. *(C) made to a person for the purpose of inducing that person to enter into a contract; and*
 4. *(D) relied on by that person in entering into that contract.*

(b) A person who makes a false representation or false promise commits the fraud described in Subsection (a) of this section and is liable to the person defrauded for actual damages.

(c) A person who makes a false representation or false promise with actual awareness of the falsity thereof commits the fraud described in Subsection (a) of this section and is liable to the person defrauded for exemplary damages. Actual awareness may be inferred where objective manifestations indicate that a person acted with actual awareness.

(d) A person who (1) has actual awareness of the falsity of a representation or promise made by another person and (2) fails to disclose the falsity of the representation or promise to the person defrauded, and (3) benefits from the false representation or promise commits the fraud described in Subsection (a) of this section and is liable to the person defrauded for exemplary damages. Actual awareness may be inferred where objective manifestations indicate that a person acted with actual awareness.

(e) Any person who violates the provisions of this section shall be liable to the person defrauded for reasonable and necessary attorney's fees, expert witness fees, costs for copies of depositions, and costs of court.

Taking the above provisions in to account, successors in interest should proceed carefully when communicating with tenants of premises subject to foreclosure about their rights, including the preparation of 90-Day notices to vacate. For example, misrepresenting to a tenant that they have no right to continue with the pre-existing lease in order to induce them to end the lease early, or falsely representing the successor in interest's intention to occupy the dwelling in order to induce the tenant to vacate the property may lead to an action for damages.

Under the Texan statute, as under the federal statute, proof of knowledge or recklessness is not necessary to the recovery of damages,¹⁰ so successors in interest should be informed that while there is no actual action for damages under the PTFA, statutory fraud provisions may allow mislead tenants to take action. Exemplary damages may also be claimed from those who had awareness of the false representation, fails to disclose this to the tenant and benefits from the false representation (s 27.01(d), *Texas Business and Commerce Code*; *Coldwell Banker Whiteside Assocs. v. Ryan Equity Partners*, 181 S.W.3d 879, 888 (Tex.App. - Dallas 2006, no pet.)).

Conclusion

The PTFA protect tenants of dwelling and residential real properties when lessors lose their interest in these properties due to foreclosure. The effect of the PTFA is to override less protective state laws while allowing existing laws to continue providing tenants with stronger protection. It ensures that

¹⁰ *Trinity Indus. v. Ashland, Inc.*, 53 S.W.3d 852, 867 (Tex. App.—Austin, 2001, pet. denied).

bona fide leases are not automatically terminated at foreclosure. The case law suggests that when it comes to the application of the PTFA to non-federally-related mortgages there is still some ambiguity and will depend on state-level court to resolve.

The PTFA is an umbrella provision that enhances the effect of existing state and local laws protecting tenants' interests in the event of a foreclosure. Any advice given with reference to the operation of the PTFA must be well-grounded in the operation of the tenancy, property and notice requirements contained in the law of the state or the locality where the property is located.

Beyond the PTFA, tenants can also look to statutory fraud for relief if successors in interest or any other parties involved make false representations or engage in misleading conduct.

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