Clearinghouse Review

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The wreckage caused by the nation’s foreclosure crisis extends to every corner of our community. Those who rent, just like those who own, have been stripped of their homes. Indeed, an estimated 40 percent of people displaced from their homes due to foreclosure have been renters. At risk of homelessness or struggling with poor living conditions, tenants who try to manage in the confusing wake of foreclosure routinely find that few state or local laws protect them. Consequently renter households have been “kicked out on the street” simply because the landlord failed to pay the mortgage.

In May 2009, in response to the devastating effects on families renting foreclosed properties, Congress passed the Protecting Tenants at Foreclosure Act, part of the Helping Families Save Their Homes Act. This law, which protects housing rights of certain tenants and ensures that they receive adequate notice before being forced to move, was intended to stop the “rampage of sudden evictions of renters” caused by foreclosure and to “help unsuspecting renters from falling victims to foreclosure in which they played absolutely no part.” Here we give an overview of the Protecting Tenants at Foreclosure Act and its enforcement, and we explore in more detail aspects of the law that have caused the greatest stumbling blocks for advocates.
I. Contents

The Protecting Tenants at Foreclosure Act contains two primary provisions: Section 702 provides core protections for all tenants, and Section 703 applies only to tenants who benefit from a voucher under 42 U.S.C. §1437f(o). The Act will sunset in 2014.7

A. Section 702: Protections Applying to All Bona Fide Tenants

Aimed at preventing the rapid displacement of tenants at foreclosure, Section 702 offers covered tenants two general protections: (1) retention of the housing right—including the right to stay through the end of the lease term—to which the tenant was entitled prior to the foreclosure and (2), regardless of the existence of a lease, the right to receive at least ninety days’ notice to vacate before an eviction action is filed.8 These protections preempt any inferior rights otherwise established by state landlord-tenant or real property principles.9

1. Properties Covered by Section 702

Section 702 applies “[i]n the case of any foreclosure on a federally-related [sic] mortgage loan or on any dwelling or residential real property after the date of enactment.”10 Based on the statute’s plain language, then, Section 702 applies to any foreclosure after May 20, 2009 (the date of enactment), on a federally related mortgage loan or on a dwelling or residential real property. As the U.S. Department of Housing and Urban Development (HUD) explains, Section 702 “applies to all successors in interest of residential property, regardless of whether a Federally related mortgage is present” in post—May 20, 2009, foreclosures.11

Be aware, however, that a New York trial court took a different position. In Collado v. Bokari the court found that the Protecting Tenants at Foreclosure Act’s plain language exceeded Congress’ power under Article I, Section 8, of the U.S. Constitution and concluded that “absent a federal subsidy, Congress has no authority to regulate the private relationship of a landlord/tenant which is the province of state law.”12 According to Collado, then, “the statute limits its reach to only those tenancies arising from dwellings or residential real property in which a federally related mortgage was foreclosed.”13

While the Collado analysis would appre-
cially limit the reach of the Act’s protections, it appears to be an anomaly; other New York trial courts have rejected the Collado court’s analysis and continue to construe the Act as written.14

2. Tenants Covered by Section 702

Section 702 protections apply only to tenants with a “bona fide” lease or tenancy—one in which

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 arm’s-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.15

Nonetheless, the Protecting Tenants at Foreclosure Act presumes that a tenancy is bona fide under the Act; the successor in interest has the burden to show otherwise.16

Of these three factors, whether a tenant’s rent is substantially less than fair market rent has been the most contested. In Harper v. JP Morgan Chase Bank National Association a Georgia appellate court upheld a trial court’s determination that the appellant’s rent was substantially less than fair market value.17 The trial court judge relied on expert testimony to find that rent of $1,600 per month was substantially less than the fair market rent of $2,300 per month—even though $1,600 was the amount of the monthly mortgage payment. Likewise in RMS Residential Properties Limited Liability Company v. Naaze the court determined that rent of 42 percent below fair market rent constitutes “substantially less” than fair market under Section 702(b) and therefore the tenant did not benefit from the Protecting Tenants at Foreclosure Act.18 In light of how courts appear to be approaching this issue, advocates should consider engaging an expert regarding fair market rent if a tenant’s “bona fide” status is challenged.

3. Section 702 Protections for Tenants with Leases

Section 702 entitles all bona fide tenants to a ninety-day notice to vacate.19 And Section 702 provides that any immediate successor in interest…pursuant to [a] foreclosure shall assume such interest subject to … the rights of any bona fide tenant … under any bona fide lease entered into before the notice of foreclosure to occupy the premises until the end of the remaining terms of the lease.20

Thus tenants may remain in their homes through the end of their current lease term, with one exception: a lease may be prematurely terminated if a purchaser intends to use the property as the purchaser’s primary residence.21 Even in the case of early termination, however, tenants remain entitled to the ninety-day notice.22


15Protecting Tenants at Foreclosure Act § 702(a)–(b).


19Protecting Tenants at Foreclosure Act § 702(a)(1).

20Id. § 702(a)(2).

21Id. § 702(a)(1).
In addition to allowing tenants to remain in their homes through at least the end of the lease term, Section 702 mandates that all of a tenant’s rights under the tenancy or lease agreement become binding on the successor in interest. Among these rights are the rental amount, the provision of certain utilities, and property maintenance. Accordingly bona fide tenants become the tenants of the successor in interest, who becomes their landlord. Tenants may raise against the successor in interest any affirmative defense to eviction, counterclaim, or affirmative claim, per the lease agreement or local housing laws—a defense which they would have had against the former owner. In this way the Protecting Tenants at Foreclosure Act clearly and directly protects all aspects of tenants’ housing from the jarring, often devastating, effects of a foreclosure.

The term “notice of foreclosure” has been a stumbling block for Protecting Tenants at Foreclosure Act practitioners. Under Section 702 a tenant retains rights under any “bona fide lease entered into before the notice of foreclosure.” Initially this term was undefined, and advocates scrambled to determine its application within the context of their own state-specific foreclosure proceedings. However, the Dodd-Frank Wall Street Reform and Consumer Protection Act clarified “notice of foreclosure” as follows:

For purposes of this section, 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.

Accordingly, even though the term “notice” remains, “notice of foreclosure” has nothing to do with notice; it simply means the complete transfer of title.

In sum, under Section 702 of the Protecting Tenants at Foreclosure Act, tenants who are at foreclosure and enter into lease agreements prior to the (complete) transfer of title resulting from foreclosure maintain all their rights under the lease agreement until the end of that lease term and, as that lease term expires, are entitled to a ninety-day notice to vacate prior to eviction.

4. Section 702 Protections for Tenants with Oral Leases or Leases at Will

Section 702 also protects bona fide tenants who are at foreclosure and do not have a lease agreement or whose lease is terminable at will. As with leased tenancies, these tenants are entitled to a ninety-day notice to vacate prior to eviction. Likewise, a successor in interests takes the foreclosed property subject to “the rights of any bona fide tenant... under State law.” Accordingly tenants without a lease or with a lease terminable at will retain all of the housing rights that state law guaranteed under the prior ownership.
B. Section 703: Protections for Section 8 Voucher Holders

Section 703 confers additional protections on tenants who are at foreclosure and participate in the Section 8 Housing Choice Voucher Program.28 Unlike Section 702, Section 703 is not limited to “bona fide” tenants, so long as the tenant participates in the voucher program. Likewise, a Section 703 tenant need not have entered into a lease prior to a “notice of foreclosure.”29

Under Section 703 an immediate successor in interest after foreclosure (on a federally related mortgage loan or residential real property) takes the property subject to a voucher tenant’s lease and the housing assistance payments contract.30 The immediate successor in interest therefore must honor all of the rights of voucher participant residents in the foreclosed property under the lease and the voucher program itself, and tenants may enforce those rights against the successor in interest.

Similarly an immediate successor in interest may not terminate a voucher participant’s tenancy in order to “vacate[e] the property prior to sale,” and vacating the property does not constitute “other good cause” under the U.S. Housing Act.31 As in Section 702, however, a voucher holder’s tenancy may be terminated early if the owner plans to occupy the unit as his primary residence.32 In such circumstances the voucher holder remains entitled to a ninety-day notice to vacate.33

II. Governmental Enforcement

Passed as a self-executing legislation, the Protecting Tenants at Foreclosure Act required no implementing regulation and imposed no affirmative enforcement obligations on regulatory agencies. Nevertheless, advocates hoped that federal agency enforcement would bring banks and other entities into compliance with the law, thereby obviating tenants’ need to “individually assert their rights under the law.”34 State attorneys general, similarly recognizing the vulnerable positions of tenants in foreclosed properties, have launched independent investigations to ensure that tenants’ rights under the Act are observed after foreclosure.

A. Federal Agency Policies

Although the Protecting Tenants at Foreclosure Act gives federal agencies no express enforcement authority, agencies with oversight powers over the housing and financial industries have issued guidance to regulated entities. How vigorously federal agencies will monitor compliance with the Act, however, has yet to be seen.

1. HUD

In June 2009 HUD became the first agency to issue guidance when it published a summary of the Act in the Federal Register to ensure that individuals and entities involved with HUD programs were aware of how the Act protected tenants.35 The notice reviews the scope and main provisions of the law.

28Protecting Tenants at Foreclosure Act § 703; 42 U.S.C. § 1437f(o)(7) (voucher program). See also Protecting Tenants at Foreclosure: Notice of Responsibility Placed on Immediate Successors in Interest Pursuant to Foreclosure of Residential Property, 74 Fed. Reg. at 30107 (emphasizing that protections of Section 8 tenants under Section 703 are in addition to and “not in lieu of” Section 702 protections of).
29Protecting Tenants at Foreclosure Act § 703.
33id. § 1437f(o)(7)(C)(ii).
The notice also directs public housing agencies on how to implement the Act in the voucher program and instructs agencies to provide "payments to the new owner for the remaining term of the Housing Assistance Payments contract" unless the new owner of the property "will occupy the unit as a primary residence." Even when the new owner will be an occupant, "the [housing assistance payments] contract would continue for" the ninety-day notice period.37

In December 2009 HUD issued a new Public and Indian Housing notice implementing the tenant protection provisions in Section 703 of the Act.38 Like the June notice, this notice informs public housing authorities that purchasers of foreclosed properties with existing housing choice voucher tenants take title subject to both the lease between the owner and the tenant and the housing assistance payments contract between the owner and the public housing authority, and the purchasers may not evict tenants except for good cause.39 HUD emphasizes to the housing authorities that the contract must be interpreted in accordance with the new laws and incorporates by reference the new federal laws and the HUD implementing notices.40 HUD later revised the contract and the tenancy addendum in the Section 8 voucher program to include references to the Act.41

More significant, the notice imposes new implementation responsibilities on public housing authorities and instructs them to be proactive in protecting the rights of voucher holders during foreclosure. For every rental unit that receives voucher assistance, the housing authority must inform all participants—landlords, heads of households that currently receive voucher assistance, voucher applicants who have been issued vouchers and are searching for new homes, and prospective landlords of those trying to use their housing choice vouchers—about the Protecting Tenants at Foreclosure Act’s tenant protection provisions.42 Housing authorities may also notify local courts and sheriffs’ offices about these new tenant protection laws.43

Once a public housing authority learns that a property receiving voucher assistance is in foreclosure, the housing authority must take further steps to ensure that tenants’ Protecting Tenants at Foreclosure Act rights are enforced.44 The housing authority must take the following steps:

- Make reasonable efforts to determine the status and ownership of the property. The notice encourages housing authorities to review legal notices in the local newspaper or on local government websites to monitor whether assisted properties are foreclosed upon.
- Continue to pay the original owner under the existing housing assistance payments contract until ownership is legally transferred.
- Attempt to obtain from the successor in interest a written acknowledgment of the assignment of the contract.45

36Id. at 30107.
37Id.
39Id. at 2.
40Id. at 3.
42Office of Public and Indian Housing, supra note 38, at 2.
43Id. at 4.
44Id.
Inform the tenant to pay rent in accordance with the lease and into escrow if the successor in interest refuses to accept rent. The housing authority must also inform voucher holders that failure to pay rent may constitute an independent ground for eviction. While nonpayment may be an adequate ground for a successor in interest to evict, this language should not be interpreted to allow housing authorities to terminate the voucher holder’s subsidy if the successor in interest refuses to accept rent and when nonpayment is due to no fault of the tenant.47

Inform the family if the housing authority is unable to make housing assistance payments to the successor in interest because the successor in interest refuses to accept payments, the property fails Housing Quality Standards inspections, or the housing authority cannot identify the successor in interest. The housing authority must refer the family to legal services to ensure that the family’s rights are protected.48

2. Federal Reserve

In July 2009 the Federal Reserve informed its examiners about the tenant protections in the Protecting Tenants at Foreclosure Act and asked examiners conducting consumer compliance examinations to evaluate an institution’s awareness of the law, its efforts to comply, and its responsiveness to addressing implementation deficiencies.49

3. Office of the Comptroller of the Currency

In August 2009 the Office of the Comptroller of the Currency, a government entity that oversees national banks, distributed a guidance bulletin on the Protecting Tenants at Foreclosure Act to chief executive officers of national banks. The bulletin notified banks that under the Act a “bank that takes title to a house after foreclosure” must allow present tenants to “stay in the residence until the end of their lease” unless the new owner will make the residence her primary residence or where there is no lease.50 Even then, the bulletin emphasized, tenants are entitled to ninety days’ notice before a bank may evict them.51 The Office of the Comptroller of the Currency advised national banks “to adopt policies and procedures to ensure compliance with these new tenant protection provisions” and asked Comptroller of the Currency examiners to evaluate banks for compliance with the Protecting Tenants at Foreclosure Act.52 Under examination procedures attached to a later-issued bulletin, examiners must grade banks on three criteria: whether the bank has (1) given tenants at least ninety days’ notice to vacate; (2) honored tenants’ right to remain in the premises until the end of existing leases; and (3) honored both the lease and the housing assistance payments contract when a Section 8 voucher tenant resides in the property.53

46“Escrow” has different meanings in different jurisdictions; advocates should work with their local voucher-processing entities to reach an understanding of how this would work in their area.

47While the Office of Public and Indian Housing notice does not address the question, advocates should be aware that tenants may also be evicted for material lease violations.

48Office of Public and Indian Housing, supra note 38, at 4.

49Letter from Sandra F. Braunstein, Director, Division of Consumer and Community Affairs, Board of Governors of the Federal Reserve System, to the Officers and Managers in Charge of Consumer Affairs Sections (July 30, 2009), http://bit.ly/aC3sMh.


51Id.

52Id.

4. National Credit Union Administration

In August 2009 the National Credit Union Administration sent Protecting Tenants at Foreclosure Act guidance to federally insured credit unions. The letter advised that when a credit union “takes title after a foreclosure,” it must allow “bona fide tenants with leases to occupy property until the end of the lease term” and give “90 days’ notice prior to eviction.”

5. Office of Thrift Supervision

In September 2009 the U.S. Department of the Treasury’s Office of Thrift Supervision issued a memorandum on the Protecting Tenants at Foreclosure Act to chief executive officers of institutions, including federal savings banks and federal savings and loans, under the office’s supervision. The short memorandum advised that tenants must be given “90 days’ advance notice” before “requiring them to vacate foreclosed property.” The memorandum also asked member institutions to “implement a process to ensure compliance with” the Act. The Office of Thrift Supervision, however, failed to mention that bona fide tenants have the right to remain until the end of the lease term.

6. Federal Deposit Insurance Corporation

In September 2009 the Federal Deposit Insurance Corporation wrote to its supervised institutions to inform them about the Protecting Tenants at Foreclosure Act. The letter explained that under the Act “[a]ll tenants must receive a 90-day notice before being evicted as the result of a foreclosure” and the law requires that “existing leases for renters are honored to the end of the term of their lease.” The letter also informed recipients that “FDIC examiners will monitor and enforce compliance with the requirements of this law in the same manner as other consumer protection laws and regulations.”

B. State Attorney General Enforcement Actions

In response to reports of widespread noncompliance with the Protecting Tenants at Foreclosure Act, attorneys general from Connecticut and California have taken enforcement actions. In February 2010 Connecticut Attorney General Richard Blumenthal announced an initiative to assist tenants in foreclosed properties. Working in coordination with Connecticut legal aid attorneys, Blumenthal sent cease-and-desist letters warning law firms, real estate companies, banks, and loan servicers to stop evictions that violate the Act. The Connecticut attorney general’s office has continued to collaborate with legal aid advocates in the state to police violations of the Act and corresponding state laws that protect tenants after foreclosure.

In June 2010, after more than twenty public interest organizations urged him to follow Connecticut’s lead, California Attorney General Edmund G. Brown Jr. launched an investigation into illegal evictions of tenants after foreclosure. Brown sent letters to “banks, loan servicers, private investors, and law firms demanding information about whether they [were] complying with federal, state, and local laws regarding foreclosed

56Ibid.
59New Haven Legal Assistance Association, Greater Hartford Legal Aid, Legal Assistance Resource Center of Connecticut, Connecticut Legal Services, and Statewide Legal Services participated in these efforts.
properties and their treatment of tenants. The investigation is pending.

Advocates should consider engaging their attorney general or other state or local leaders when specific entities routinely violate the Act in order to pressure these entities into compliance before residents find themselves in eviction proceedings.

III. In Practice

Despite somewhat lackluster government enforcement, the Protecting Tenants at Foreclosure Act has given advocates concrete tools to use in protecting tenants whose housing is at risk due to foreclosure.

A. As an Eviction Defense

The Protecting Tenants at Foreclosure Act is often used as a defense to postforeclosure eviction actions. For example, when faced with an eviction filed fewer than ninety days from the date of the notice to vacate, a bona fide tenant can plead the Act as a defense to defeat the premature eviction. For bona fide tenants with long-term leases, the Act is a defense to any eviction actions filed before the lease has expired.

When defending postforeclosure evictions, advocates should always examine the eviction notice for defects. Apart from the ninety-day notice requirement, the Protecting Tenants at Foreclosure Act is silent on the form or content of an eviction notice. As a result, questions such as what language an eviction notice must contain or how a notice must be served remain governed by state law.

California advocates, among others, have been successful in challenging vague or ambiguous eviction notices after foreclosure. For example, many postforeclosure notices in California give occupants as many as five different timelines for when they must vacate before an eviction action is filed—from three days for a former owner to ninety days for a bona fide tenant—all in one notice. These notices put the burden on the tenant to decipher which time frame applies—a tall order for many low-income tenants. When challenged, however, courts have found these notices to be fatally ambiguous. Because many other states require eviction notices to be clear and unequivocal, similar challenges are likely to succeed elsewhere.

The Protecting Tenants at Foreclosure Act’s “notice to vacate” requirement may create a disparity between federal and state law and provide yet another potential eviction defense. The Act requires a ninety-day “notice to vacate” before a tenant may be evicted; by contrast, landlord-tenant laws in many states require a “notice to quit” or “notice to terminate.” Seizing on this distinction, Connecticut advocates successfully argued that tenants must be served with two consecutive notices, a notice to vacate under the Act and a notice to quit under state law, before a postforeclosure eviction may be filed.

A notice is defective if served prematurely. Under the Act, only an immediate successor in interest may serve the eviction notice. In most states, title to a foreclosed property is transferred at the foreclosure sale or at a sale confirmation hearing. In other states, especially those with a redemption period after foreclosure, a bank or a postforeclosure owner may not become an immediate successor in interest until sometime after a foreclosure sale. Thus advocates should challenge eviction notices issued by a successor before transfer of title is complete on the basis that the successor had no standing to issue such notice.


B. Affirmative Litigation

The Protecting Tenants at Foreclosure Act was enacted to prevent abrupt evictions after foreclosure, but tenants in foreclosed properties continue to find themselves locked out of their homes.64 Advocates have contemplated affirmative litigation—such as moving to enjoin a lender from issuing inadequate notices aimed at intimidating tenants into vacating in fewer than ninety days—to enforce the Act before tenants are at risk of losing their housing. However, the Act confers no express private right of action to sue; to date no court has allowed a tenant to enforce the Act directly under an implied theory of a private right of action.65

Rather than pursue a difficult analysis of a private right of action, other practitioners have focused on using consumer protection laws, such as state unfair and deceptive acts and practices statutes, as a means to enforce the Protecting Tenants at Foreclosure Act outside eviction court.66 Advocates facing wide-scale violation of the Act might want to take a closer look at existing state and local laws and determine whether they might be helpful in framing a case premised under the Act. In any event, because the Act makes postforeclosure owners landlords, state landlord-tenant remedies, such as remedies related to illegal lockouts or breach of the warranty of habitability, remain available against postforeclosure owners.

Tenants, who were largely ignored as victims of the foreclosure crisis before the Protecting Tenants at Foreclosure Act, may now rely on federal law, in addition to any state or local protections, to avoid rapid displacement when their homes change hands due to foreclosure. How these federal protections will work, however, varies among states, which may have vastly different foreclosure (judicial versus nonjudicial) and eviction procedures. Incumbent on advocates is to use the basic tools that the Act provides in conjunction with preexisting state and local procedures and tenant protection laws in order to ensure that tenants at foreclosure no longer fall through the cracks.

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64See, e.g., Nativi v. Deutsche Bank National Trust Company, No. 09-06096, 2010 WL 2179885, at *1 (N.D. Cal. May 26, 2010) (describing tenants who were locked out of their homes without eviction or court order).


66E.g., California’s Unfair Competition Law, CAL. BUS. & PROF. CODE §§ 17200–17210 (2010), gives consumers a remedy even if an underlying statute contains no private right of action (see Stop Youth Addiction Incorporated v. Lucky Stores Incorporated, 71 Cal. Rptr. 2d 731, 735–40 (Cal. 1998)).
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