

The Protecting Tenants at Foreclosure Act: Back to the Future

August 31, 2018 | Christopher J. Capurso and Caleb Rosenberg

Americans love a good revival. Reboots, restorations, and throwbacks are everywhere. Even, it seems, in the halls of Congress. Congress recently enacted the Economic Growth, Regulatory Relief, and Consumer Protection Act (the "Crapo Bill"). Among other things, the Crapo Bill revived the Protecting Tenants at Foreclosure Act of 2009 ("PTFA"), effective June 23, 2018. The PTFA does not authorize an agency to promulgate regulations.

The original PTFA included a sunset provision that terminated its requirements at the end of 2012. Dodd-Frank extended the life of the original PTFA to the end of 2014. Most major secondary market players continued to implement tenant protection policies after the PTFA expired, including Fannie Mae's Tenant-in-Place program.

When It Applies

The PTFA applies to a foreclosure involving any of the following:

- a federally related mortgage, as defined by RESPA, which means a loan (other than temporary financing) made by a federally-related creditor and secured by a one-to four-family residential real property;
- a dwelling; or
- residential real property.

So, the PTFA applies to every foreclosure on property that includes a dwelling occupied by a tenant, whether the loan is consumer or commercial purpose and whether the dwelling is real or personal property. It applies regardless of the number of dwelling units on the property. The law applies to foreclosures on loans secured by one-to four-family dwellings, multi-family properties, and apartment buildings. At least one state court concluded that the original PTFA applied only if the loan was a federally-related mortgage loan under RESPA. According to that court, the Constitution does not allow the federal government to enact laws that interfere with property rights that arise under state foreclosure law unless the loan is a federally-related mortgage loan. *Collado v. Boklari*, 892 N.Y.S.2d 731 (N.Y. Dist. Ct. 2009).

What It Does

The PTFA protects a tenant if state or local law allows the purchaser to terminate the tenant's lease or

tenancy after a foreclosure sale. The purchaser must:

- give any tenant a 90-day notice to vacate before evicting the tenant; and
- honor the terms of a "bona fide" lease or tenancy on the property, unless the purchaser intends to occupy the property as his or her primary residence.

Bona Fide Leases

Under state property law, when a senior creditor's foreclosure sale does not result in a surplus, junior interests are eliminated. As a result, under property law, a foreclosure eliminates a tenant's leasehold interest on a property.

The PTFA protects "bona fide" tenants from having their lease eliminated, unless the purchaser intends to occupy the property as his or her primary residence. A tenant is "bona fide" if:

- the tenant is not the mortgagor or the child, spouse, or parent of the mortgagor;
- the tenant entered into the lease or tenancy in an arms-length transaction before the date complete title to the property is transferred to the buyer; and
- the rent is not substantially less than fair market rent for the property or, if it is, the rent is reduced or subsidized due to a Federal, State, or local subsidy, including but not limited to a Section 8 housing assistance payment contract.

The PTFA does not preempt state or local laws if those laws afford the tenant more stringent or additional protections, and there are 10 states that provide the same or more protections. For example, while the PTFA permits evicting tenants-at-will following 90-days notice, Massachusetts prohibits the eviction of tenants-including tenants-at-will-except for just cause or if there is a binding sale agreement with a bona fide third party.

Why Does It Matter?

If you buy dwellings at foreclosure and the dwellings might be occupied by tenants, you should review your policies to make sure you comply with the PTFA and other tenant protections enacted at the state or local level.

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