

ARTICLE

STOP SHUTTING THE DOOR ON RENTERS: PROTECTING TENANTS FROM FORECLOSURE EVICTIONS

*Eloisa Rodriguez-Dod**

This Article discusses existing and proposed federal and state laws affecting tenants' rights in foreclosure. As "Foreclosure" signs rapidly join "For Sale" signs across the country, the national foreclosure crisis has not only displaced homeowners, but a plethora of renters as well. The approach taken by states concerning tenants affected by foreclosure varies greatly. Furthermore, a recently enacted federal law, created specifically to help tenants in foreclosure, does not relieve the uncertainty surrounding this issue. In addition to being the first to critique the new federal law, this Article offers recommendations for legislation that may better protect tenants from foreclosure-related evictions.

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INTRODUCTION

"Foreclosure" signs are rapidly joining "For Sale" signs across the country. In March 2009, it was reported that "a foreclosure takes place every 13 seconds in the U.S."¹ Leading the nation in per household foreclosures, the state hit hardest by this epidemic was Nevada followed by California, Arizona, and Florida.² Although the foreclosure rates in Ne-

* Eloisa C. Rodriguez-Dod, Professor of Law, Nova Southeastern University Shepard Broad Law Center, Fort Lauderdale, Florida. I am grateful to Carolina Lombardi, Esq., and my sister, Carmen Ferreira, Esq., for their thoughtful and helpful comments, and to Aylia Licor and Venessa Valdes for their superb research assistance.

¹ James Podgers, *The Foreclosure Learning Curve*, 95 A.B.A. J. 66, 66 (2009).

² Dan Levy, *U.S. Foreclosure Filings Jump 23% to Record in Third Quarter*, BLOOMBERG (Oct. 15, 2009, 12:00 AM), http://www.bloomberg.com/apps/news?pid=newsarchive&sid=aFofq9_za8Is. During the third quarter of 2009, "one in every 23 households" in Nevada were foreclosed, the highest rate in the nation. *Id.* California and Arizona tied at "one in

vada and California had seemed to be dropping in early 2009,³ this was not the case.⁴ Foreclosures in Nevada rose ten percent from the second to third quarter of 2009.⁵ California led the nation with the highest number of filings—250,054—during the third quarter of 2009,⁶ and Florida has had the distinction of being “the most delinquent state in the nation,” with approximately “one in four . . . home loans . . . past due or in foreclosure.”⁷ Foreclosures in Florida increased 75% from 2008 to 2009.⁸ In Miami-Dade County, Florida alone, as many as 25,618 foreclosure complaints were filed between January and April 2009;⁹ the number of complaints filed during that four-month period reflects an approximate 58% increase over the same period in 2008, and amounts to 45% of the total foreclosure suits filed in that county in all of 2008.¹⁰ Overall, approximately one out of every 374 homes throughout the nation was foreclosed or repossessed in April 2009.¹¹ The nation braced for “[t]he second tsunami of foreclosures” to hit by the end of 2009.¹²

every 53 households.” *Id.* Florida followed closely behind with foreclosures of one in every fifty-six households. *Id.* Since early 2009, Nevada, California, and Florida have consistently experienced the highest foreclosure rates. See Monica Hatcher, *S. Florida Foreclosures Soar*, MIAMI HERALD, May 14, 2009, at 1C. One report noted that Florida led the nation in foreclosures during the second quarter of 2009, with 17% of mortgages “somewhere in the foreclosure process.” Daniel Chang, *Florida’s Courts, Homeowners and Lenders Are Struggling to Deal with the State’s 17 Percent Foreclosure Rate*, MIAMI HERALD, Oct. 19, 2009, at 16G.

³ Hatcher, *supra* note 2.

⁴ See Levy, *supra* note 2.

⁵ *Id.*

⁶ *Id.*

⁷ Cammy Clark, *It’s Getting Worse*, MIAMI HERALD, Oct. 18, 2009, at 1A.

⁸ Hatcher, *supra* note 2.

⁹ *Foreclosure Filing Statistics*, MIAMI-DADE COUNTY – CLERK OF COURTS, http://www.miami-dadeclerk.com/property_mortgage_foreclosures.asp (last visited Oct. 24, 2010). These figures are truly striking when compared to previous years’ filings: 56,656 in 2008; 26,391 in 2007; and 9,814 in 2006. *Id.*

¹⁰ *Id.*

¹¹ Hatcher, *supra* note 2. Although some of the figures in this Article may include commercial properties which have been foreclosed or repossessed, the focus of this Article is on foreclosure of residential properties. Likewise, this Article will not particularly focus on tenants living in federal and state subsidized housing that is subsequently foreclosed, although federal or state laws may provide other statutory provisions for these circumstances. See, e.g., *infra* note 66.

¹² Clark, *supra* note 7, at 1A (quoting John Tur, real estate investment instructor). Residential foreclosure rates were expected to continue to rise through 2010. Levy, *supra* note 2. In October 2009, the Miami-Dade County, Florida Clerk of the Court projected an additional 75,000 foreclosure filings in that county before the end of the year. Chang, *supra* note 2, at 18G. Residential foreclosure rates also were expected to continue to rise through 2010. Levy, *supra* note 2. Yet, although foreclosures filed on a little over 1.65 million properties by mid-year 2010 represented an eight percent increase over the same period in 2009, there was a five percent decrease from the previous six months. RealtyTrac Staff, *1.65 Million Properties Receive Foreclosure Filings in First Half of 2010*, REALTYTRAC, <http://www.realtytrac.com/content/foreclosure-market-report/165-million-properties-receive-foreclosure-filings-in-first-half-of-2010-5877> (last visited Dec. 22, 2010). The third quarter of 2010 experienced approximately a four percent increase in foreclosures from the previous quarter. RealtyTrac Staff,

Although a little over 1.65 million properties had foreclosure filed on them by mid-year 2010—an eight percent increase over the same period in 2009—there was a five percent decrease from the previous six months.¹³

Homeowners are not the only persons affected by this crisis. Rental units have accounted for more than 20% of the properties being foreclosed.¹⁴ Reportedly, approximately 40% of families being evicted¹⁵—about 70,000 renters¹⁶—have been displaced because their landlords' properties were foreclosed. It is estimated that in the northeastern United States up to 50% of foreclosures involve renters.¹⁷ And in the Chicago area, foreclosure-related tenant evictions tripled from 2007 to 2008.¹⁸

Anecdotes abound about foreclosures and consequent evictions of renters. Tenants dutifully paying their monthly rent have found themselves forced out of their rental homes because landlords defaulted on their mortgages.¹⁹ Many have been low-income tenants who receive little notice before being uprooted and have little savings to afford a move to new housing.²⁰

Foreclosure Activity Increases 4 Percent in Third Quarter, REALTYTRAC, <http://www.realtytrac.com/content/press-releases/q3-2010-and-september-2010-foreclosure-reports-6108> (last visited Dec. 22, 2010). The small increase in numbers may be misleading regarding a new wave of foreclosures as many lenders, including some of the largest, placed a temporary moratorium on foreclosures late in 2010 while they reviewed allegations of faulty paperwork. *Id.*; see also Gretchen Morgenson, *Flawed Paperwork Aggravates a Fore closure Crisis*, N.Y. TIMES, Oct. 3, 2010, available at <http://www.nytimes.com/2010/10/04/business/04mortgage.html?ref=foreclosures> (describing irregularities in foreclosure documentation leading to a call for a halt to foreclosures). Foreclosure statistics for the fourth quarter of 2010 were not available at the time this Article went to print.

¹³ Realty Trac Staff, *1.65 Million Properties Receive Foreclosure Filings in First Half of 2010*, REALTYTRAC, <http://www.realtytrac.com/content/foreclosure-market-report/165-million-properties-receive-foreclosure-filings-in-first-half-of-2010-5877> (last visited Dec. 20, 2010).

¹⁴ DANILO PELLETIERE, NAT'L LOW INCOME HOUS. COALITION, *RENTERS IN FORECLOSURE: DEFINING THE PROBLEM, IDENTIFYING SOLUTIONS* 6 (2009), available at <http://www.nlihc.org/doc/renters-in-foreclosure.pdf>.

¹⁵ *Id.* at 7.

¹⁶ Charles Duhigg, *Fannie Mae Lets Renters Stay Despite Foreclosures*, N.Y. TIMES, Dec. 15, 2008, at B1, available at http://www.nytimes.com/2008/12/15/business/15evict.html?_r=2&scp=2&sq=70,000%20renters&st=cse.

¹⁷ Bridget Huber, *Even Renters Who Are Paid up Are Getting Kicked out*, CHRISTIAN SCI. MONITOR, Mar. 24, 2009, <http://features.csmonitor.com/economyrebuild/2009/03/24/even-renters-who-are-paid-up-are-getting-kicked-out/>.

¹⁸ Les Christie, *Tenants Victimized by Foreclosures*, CNNMONEY.COM (Dec. 15, 2008, 3:38 PM), http://money.cnn.com/2008/12/08/real_estate/tenant_foreclosure_victims/index.htm.

¹⁹ See Duhigg, *supra* note 16; Huber, *supra* note 17.

²⁰ Peter S. Goodman, *Foreclosures Force Ex-Homeowners to Turn to Shelters*, N.Y. TIMES, Oct. 19, 2009, at A1, available at http://www.nytimes.com/2009/10/19/business/economy/19foreclosed.html?_r=1&scp=1&sq=goodman%20foreclosure&st=cse.

Unfortunately, some landlords have been exploiting renters even while facing their own legal dilemma. For example, landlords have entered into leases with, and taken substantial security deposits from, unsuspecting tenants after a foreclosure action has been filed against the rental property.²¹ In other, more egregious cases, landlords take advantage of tenants' ignorance and continue to act as if they were still in control of the property despite the completion of the foreclosure. In one case, a landlord advised his tenants that his debt problem had been settled and that they should continue paying him rent—in fact, the landlord no longer owned the property due to foreclosure.²² In another case, the landlord entered into a new lease with tenants even after foreclosure of the rental property had become final.²³ Renters “really are innocent bystanders” in this foreclosure crisis.²⁴ They are “the ultimate victims,”²⁵ often being “blindsided when their landlord defaults on the mortgage.”²⁶

Until recently, most tenants had little or no recourse when lenders foreclosed on landlords' properties. However, given the spate of foreclosures and the resulting increase in homelessness,²⁷ legislators, policymakers, courts, advocacy groups, and law enforcement personnel have taken heed of the situation and have begun to develop a systematic means of ensuring rights for tenants who are “caught in the housing crisis crossfire.”²⁸ The first Part of this Article analyzes existing and proposed laws and policies affecting tenants' rights related to foreclosures. Part II of the Article provides recommendations for additional legislation that may better prepare tenants for, and protect them from, unexpected fore-

²¹ Telephone Interview with Carolina A. Lombardi, Senior Attorney, Legal Services of Greater Miami, Inc. (Mar. 2, 2009).

²² Christie, *supra* note 18.

²³ *Id.*

²⁴ Steve Brandt & Warren Wolfe, *Oct. 29: Wave of Foreclosures Hits Renters*, STAR TRIB. (Minneapolis-St. Paul), Oct. 29, 2007, http://www.startribune.com/business/11245186.html?elr=KArksDyycyUtyycyUiD3aPc:_Yyc:aUU (last updated Nov. 5, 2007) (quoting Julianne Ortman, finance director for the Hennepin County Sheriff's Office).

²⁵ Christie, *supra* note 18 (quoting John Taylor, president of the National Community Reinvestment Coalition).

²⁶ *Id.*

²⁷ See Stephanie Armour, *New Faces Join Ranks of Nation's Homeless*, USA TODAY, June 26, 2008, at 1B, available at http://www.usatoday.com/money/economy/housing/2008-06-25-homeless-families-foreclosure_N.htm; Benjamin J. Burton, Op-Ed., *Help the Forgotten Victims of the Housing Crisis*, MIAMI HERALD, Nov. 3, 2008, at 27A.

²⁸ Christie, *supra* note 18; see, e.g., NAT'L LAW CTR. ON HOMELESSNESS & POVERTY & NAT'L LOW INCOME HOUS. COAL., WITHOUT JUST CAUSE: A 50-STATE REVIEW OF THE (LACK OF) RIGHTS OF TENANTS IN FORECLOSURE 8, 10–11 (2009), available at http://www.nlchp.org/content/pubs/Without_Just_Cause2.pdf [hereinafter WITHOUT JUST CAUSE]; see also Vicki Been & Allegra Glashauser, *Tenants: Innocent Victims of the Nation's Foreclosure Crisis*, 2 ALB. GOV'T L. REV. 1, 19–28 (2009) (discussing newly proposed policies and legislation to protect tenants); Burton, *supra* note 27, at 27A (advocating for tenant protection at the state and federal level).

closure-related evictions. The final Part provides the Article's conclusion.

I. STATE OF THE UNION

Across the United States, tenants are being evicted from their homes soon after foreclosure of their landlords' properties. Existing legislation and policy did little or nothing to help renters avoid eviction.²⁹ New Jersey, however, has been a leader in providing protection for tenants—at least under certain circumstances.³⁰ A New Jersey law, originally enacted in 1974³¹ and commonly referred to as the New Jersey Anti-Eviction Act,³² provides that tenants may be removed from the premises only for statutorily specified “good cause” reasons.³³ Interestingly, in 1993, at a time when foreclosures rates were also high,³⁴ the Anti-Eviction Act was criticized for its failure to expressly preclude foreclosing mortgagees from evicting tenants unless the mortgagee had a statutory good cause basis.³⁵ Several years earlier, the New Jersey Legislature had amended the Anti-Eviction Act, extending its application beyond the landlord to the “owner’s or landlord’s successor in ownership or possession.”³⁶ Notwithstanding the amendment, in 1993 the Appellate Division of the New Jersey Superior Court held that foreclosing mortgagees were not restricted from evicting tenants because it found “no clear manifestation

²⁹ See generally WITHOUT JUST CAUSE, *supra* note 28 (outlining tenant foreclosure problems state-by-state).

³⁰ See Lynn Arditi, *Lawmakers Scramble to File Foreclosure Protection Bills*, PROVIDENCE J., Feb. 13, 2009, at A7, available at http://www.projo.com/news/content/FORECLOSURE_BILLS_02-13-09_HID9PPO_v159.3e467e4.html.

³¹ Anti-Eviction Act, ch. 49, § 2, 1974 N.J. Laws 119, 120–22.

³² See, e.g., James E. Tonrey, Jr., *Protecting Tenants from Foreclosing Mortgagees: New Jersey's Anti-Eviction Act in the Post-Guttenberg Era*, 23 SETON HALL L. REV. 1006, 1007 n.6 (1993).

³³ N.J. STAT. ANN. § 2A:18-61.1 (West 2009).

³⁴ See Tonrey, *supra* note 32, at 1006–07 nn.1–2 & 5.

³⁵ *Id.* at 1065. Twelve years earlier, the New Jersey Supreme Court had reviewed whether the Anti-Eviction Act, in its original version, applied to foreclosing mortgagees. See *Guttenberg Sav. & Loan Ass'n v. Rivera*, 428 A.2d 1289 (N.J. 1981). In that case, a foreclosing mortgagee had sought possession of the foreclosed property. *Id.* at 1291. Tenants of the property moved to dismiss the mortgagee's complaint for possession on the grounds that the mortgagee had no basis for removal of the tenants under the Anti-Eviction Act. *Id.* The subject tenancies had been created after execution and recordation of the mortgage and, thus, were subordinate to the mortgage. See *id.* at 1291–92. In finding that “the [New Jersey] Legislature did not intend that the Act affect a mortgagee's right,” *id.* at 1298, the court held that the Act did not apply to “a mortgagee holding a lien prior to the leasehold of a tenant in possession.” *Id.* at 1292 (limiting its holding and not addressing situations where tenants had prior leasehold).

³⁶ 1993 N.J. Sess. Law Serv. Ch. 342 (codified as amended at N.J. STAT. ANN. § 2A:18-61.3b (West 2009)).

that the Legislature” intended to place restrictions on mortgagees.³⁷ But the case was promptly appealed.³⁸ On appeal, the New Jersey Supreme Court reversed the appellate court’s decision, finding that the plain language of the amended statute did include foreclosing mortgagees and was “consistent with *the Act’s overall purpose of protecting blameless tenants from eviction.*”³⁹

In the wake of the recent foreclosure crisis, many jurisdictions have advanced new legislation and policy. Some of the legislation is similar to the New Jersey law, and other legislation gives additional rights to tenants who may face eviction due to their landlords’ foreclosure.

A. Federal Policies and Legislation

In late 2008, the Federal National Mortgage Association (Fannie Mae)⁴⁰ recognized the impact caused by the rising number of foreclosures and announced that it would suspend foreclosures of, and evictions from, single-family occupied properties from November 26, 2008, to January 9, 2009.⁴¹ The purpose behind the suspension was “to allow affected borrowers facing foreclosure to retain their homes while Fannie Mae works with mortgage servicers to implement the streamlined modification program [SMP] scheduled to launch December 15.”⁴² The news

³⁷ Chase Manhattan Bank v. Josephson, 619 A.2d 241, 247 (N.J. Super. Ct. App. Div. 1993). The court reviewed legislative history and statutory language in reaching its decision. *Id.* at 245–48.

³⁸ Chase Manhattan Bank v. Josephson, 638 A.2d 1301 (N.J. 1994).

³⁹ *Id.* at 1309 (citing N.J. STAT. ANN. § 2A:18-61.3b) (emphasis added).

⁴⁰ The Federal National Mortgage Association (Fannie Mae) is a “government-sponsored private corporation” established pursuant to 12 U.S.C. § 1717 and operating in the secondary mortgage market. *About Fannie Mae*, FANNIE MAE, <http://www.fanniemae.com/aboutfm/charter.jhtml;jsessionid=TH3XOVOLUKRNRJ2FQSHSFGI?p=About+Fannie+Mae> (last visited Oct. 24, 2010). Fannie Mae “accounts for more than 40 percent of the \$12 trillion in U.S. residential mortgage debt.” Jody Shenn, *Fannie Mae to Loosen Rules for Home-Loan Refinancing (Update 2)*, BLOOMBERG (Feb. 5, 2009, 12:07 AM), <http://www.bloomberg.com/apps/news?sid=aTu9HA5cZgQ4&pid=20601087>. For further information regarding Fannie Mae’s organization and operation, see generally *About Fannie Mae*, *supra*.

⁴¹ News Release, Fannie Mae, Fannie Mae to Suspend Foreclosures Until January 2009 While Streamlined Modification Program is Implemented (Nov. 20, 2008), <http://www.fanniemae.com/newsreleases/2008/4531.jhtml> [hereinafter Fannie Mae to Suspend Foreclosures].

⁴² *Id.* The streamlined modification program (SMP) was a foreclosure prevention effort that applied to loans scheduled for foreclosure between November 26, 2008, and January 9, 2009, and owned by Fannie Mae, Freddie Mac, or another government-sponsored enterprise. *Id.* The SMP mandated a temporary suspension of foreclosure sales to allow loan servicers and foreclosure attorneys to modify borrowers’ loan terms to manageable monthly figures. *Id.* Loan terms subject to modification included interest rates, amortization period, and deferral of principal payments. *Id.* To qualify for the modification program, the borrower-owner had to have missed at least three payments, occupied the property as his or her primary residence, and not filed for bankruptcy. *Id.* Even if a borrower’s previous efforts at loan modification proved fruitless, the program offered a “second look” to review the decision and assure all options have been considered. *Id.* The SMP was then replaced by the Home Affordable Modification

release issued by Fannie Mae made no mention of tenants, although a suspension of foreclosures effectively aided tenants as well.⁴³ Thereafter, Fannie Mae successively announced further extensions of the foreclosure and eviction suspensions until January 31, 2009,⁴⁴ and again until February 28, 2009.⁴⁵ In the meantime, it had begun working on a new policy that would permit tenants in Fannie Mae-owned foreclosed properties to remain on the premises or to vacate the property with financial assistance.⁴⁶ The National Real Estate Owned (REO) Rental Policy took effect on January 13, 2009.⁴⁷ Under the policy, tenants of Fannie Mae-owned single-family foreclosed properties who wish to continue

Program (HAMP). See Announcement 09-05 R, Michael A. Quinn, Senior Vice President, Single-Family Risk Officer, Fannie Mae, Reissuance of the Introduction of the Home Affordable Modification Program, HomeSaver Forbearance™, and New Workout Hierarchy, April 21, 2009 (reposted May 15, 2009), <https://www.efanniemae.com/sf/guides/ssg/annltrs/pdf/2009/0905.pdf>. HAMP is part of President Obama's Homeowner Affordability and Stability Plan. *Id.* It is a national modification program designed to help homeowners in default (including foreclosure and bankruptcy) or in imminent risk of default. *Id.* HAMP is aimed at modifying homeowners' loan to 31% of their monthly income. *Id.* The property must be a one- to four-unit property occupied by the owner and the mortgage loan in question must be a first lien mortgage loan acquired before January 1, 2009. *Id.* The property owner's "monthly mortgage payment ratio" must be higher than 31%. *Id.* The property owner must sign a financial affidavit detailing his or her financial hardship and include income documentation not older than ninety days. *Id.* Servicers with loans owned or guaranteed by Fannie Mae must take part in the program with regards to those loans. *Id.* Servicers with other types of mortgage loans may also participate in the program by entering into a servicer participation agreement. *Id.* HAMP expired on December 31, 2009. *Id.* Fannie Mae also offered another loan modification program, the HomeSaver Forbearance, for property owners who did not qualify for the HAMP. *Id.*

⁴³ Fannie Mae to Suspend Foreclosures, *supra* note 41.

⁴⁴ News Release, Fannie Mae, Fannie Mae Extends Foreclosure Sale and Eviction Suspension (Jan. 8, 2009), <http://www.fanniemae.com/newsreleases/2009/4575.jhtml?p=Media&s=News+Releases>. Fannie Mae extended the suspensions to enable it to continue working on the implementation of the SMP and its new National Real Estate Owned (REO) Rental Policy. *Id.*

⁴⁵ News Release, Fannie Mae, Fannie Mae Extends Eviction Suspension Another Month (Jan. 30, 2009), <http://www.fanniemae.com/newsreleases/2009/4595.jhtml?p=Media&s=News+Releases>.

⁴⁶ See News Release, Fannie Mae, Statement by Brian Faith, Managing Director: Communications on National Tenant Policy (Dec. 15, 2008), <http://www.fanniemae.com/newsreleases/2008/4556.jhtml?p=Media&s=News+Releases>. Apparently, Fannie Mae's tenant-eviction suspension policy "was inspired by the case of Evelyn Colon, a [single] mother of three" who was being evicted post-foreclosure even though she made timely rental payments and had a valid lease. Kenneth R. Gosselin, *Renter Wins Fannie Mae Fight*, HARTFORD COURANT, Dec. 16, 2008, at A1; Leticia Carvalho, *Tenant Protection Urged for Renters in Foreclosure Properties*, REALESTATEPROARTICLES.COM, Dec. 20, 2008, <http://www.realestateproarticles.com/Art/3230/265/Tenant-Protection-Urged-for-Renters-in-Foreclosure-Properties.html>. After some intervention by U.S. Senator Christopher Dodd and the Greater Hartford Legal Aid on her behalf and others similarly situated, Fannie Mae announced the change in its eviction policy. Gosselin, *supra*, at A14; Carvalho, *supra*.

⁴⁷ News Release, Fannie Mae, Fannie Mae Announces National REO Rental Policy (Jan. 13, 2009), <http://www.fanniemae.com/newsreleases/2009/4581.jhtml?p=Media&s=News+Release> [hereinafter National REO Rental Policy].

living in the home would be required to sign a new month-to-month lease with Fannie Mae.⁴⁸ The lease terms would provide for market rate rents⁴⁹ and no security deposit.⁵⁰ Alternatively, tenants who vacated the property were offered a “cash for keys” incentive—financial assistance for the move to another home.⁵¹ Fannie Mae intended the policy to “mitigate the disruption of personal lives that foreclosures can cause, and help bring a measure of stability to communities impacted by high foreclosure rates.”⁵² Fannie Mae’s rental policy remains in place notwithstanding federal legislation enacted thereafter.⁵³

The Federal Home Loan Mortgage Corporation (Freddie Mac)⁵⁴ instituted similar policies. It had joined Fannie Mae and the Federal Housing Finance Agency in creating and implementing the SMP.⁵⁵ Freddie Mac had also suspended foreclosures and evictions through April 1, 2009.⁵⁶ Meanwhile, on March 5, 2009, it announced the start of its own

⁴⁸ *Id.*

⁴⁹ *Id.* Fannie Mae has stated it “will work to reach an equitable resolution” in those instances where markets rates are higher than a tenant’s prior rental payment. *Id.*

⁵⁰ *Id.* The tenant must be occupying the premises “at the time Fannie Mae acquires the property.” *Id.* In addition, for a tenant to be eligible to remain on the premises, the property must be in compliance with state and local laws regarding rentals. *Id.* Fannie Mae will not conduct a check of tenants’ credit or payment histories. News Release, Fannie Mae, Fannie Mae’s National REO Rental Policy FAQs, http://www.fanniemae.com/newsreleases/2009/faq/FAQ_national_REO_rental_policy_010709.pdf [hereinafter Rental Policy FAQs]. It will place the property for sale during the tenant’s month-to-month occupancy; any new purchaser will take the property subject to the existing lease. *Id.*

⁵¹ National REO Rental Policy, *supra* note 47; *see* Rental Policy FAQs, *supra* note 50.

⁵² National REO Rental Policy, *supra* note 47 (quoting Michael Williams, chief operating officer of Fannie Mae).

⁵³ The program is now known as the REO Tenant-in-Place Rental Policy. The program no longer offers a “cash for keys” incentive for tenants who vacate the rental property; rather, tenants who sign a twelve-month lease with Fannie Mae are eligible for relocation assistance, equal to one month’s rent, at the end of the lease term. *REO Tenant-in-Place Rental Policy FAQs*, FANNIE MAE, http://www.fanniemae.com/homebuyers/pdf/rental_faqs.pdf (last visited Nov. 22, 2010).

⁵⁴ Congress created this United States government-sponsored enterprise as a shareholder-owned company. *Frequently Asked Questions About Freddie Mac*, FREDDIE MAC, http://www.freddiemac.com/corporate/company_profile/faqs/ (last visited Nov. 9, 2010). The purpose of Freddie Mac, a U. S. government-sponsored enterprise, is to promote home ownership and to stabilize residential mortgage markets in the nation. *Id.* Freddie Mac accomplishes this goal by purchasing home loans from banks and mortgage companies on the secondary market and reselling them to investors after repackaging the loans as mortgage-backed securities and guaranteeing them. *Id.* Currently, out of the 5.3 million loans in default in the nation, Freddie Mac owns nine percent. *Id.*

⁵⁵ News Release, Freddie Mac, Freddie Mac Suspends All Foreclosure Sales of Occupied Homes from Day Before Thanksgiving until January 9, 2009 (Nov. 20, 2008), http://www.freddiemac.com/news/archives/servicing/2008/20081120_foreclosure-suspend.html [hereinafter Freddie Mac Suspends All Foreclosures].

⁵⁶ News Release, Freddie Mac, Freddie Mac Officially Launches REO Rental Initiative for Tenants, Owner-occupants After Foreclosure: Freddie Mac Continues Suspension of Evictions Through April 1, 2009 (Mar. 5, 2009), http://www.freddiemac.com/news/archives/servicing/2009/20090305_reo-rental-initiative.html [hereinafter Freddie Mac Officially Launches

REO Rental Initiative.⁵⁷ Although Freddie Mac's program mirrored the Fannie Mae National REO Rental Policy in many respects, it also provided for additional benefits.⁵⁸ For example, Freddie Mac's program applies not only to tenants but also to owners of foreclosed properties.⁵⁹ Also, rental payments under the REO Rental Initiative are the lesser of market rates or the amount a tenant was paying before foreclosure.⁶⁰ The stated purpose of Freddie Mac's program is "[f]irst and foremost, . . . to help cushion the impact of foreclosure on families who own or rent homes with Freddie Mac-owned mortgages."⁶¹

More recently, on May 20, 2009, President Barack Obama signed into law the Protecting Tenants at Foreclosure Act of 2009.⁶² This new federal law provides for a ninety-day notice to bona fide tenants⁶³ prior to eviction from a foreclosed property.⁶⁴ Additionally, bona fide tenants, other than those "without a lease or with a lease terminable at will under

REO Rental Initiative]. Freddie Mac initially suspended foreclosures and evictions through January 9, 2009. Freddie Mac Suspends All Foreclosures, *supra* note 55. Later, Freddie Mac announced additional extensions of the suspension policy. News Release, Freddie Mac, Freddie Mac Extends Suspension of Single Family Foreclosure Sales, Evictions until January 31, 2009 (Jan. 8, 2009), http://www.freddie.mac.com/news/archives/servicing/2009/20090108_suspension-extension.html (extended until January 31, 2009); News Release, Freddie Mac, Freddie Mac Extends Eviction Suspension until March, Launches Rental Option for Foreclosed Borrowers, Tenants (Jan. 30, 2009), http://www.freddie.mac.com/news/archives/servicing/2009/20090130_reo-rental.html [hereinafter Freddie Mac Extends Eviction Suspension] (extended until February 28, 2009); News Release, Freddie Mac, Freddie Mac Extends Moratorium on Foreclosure Sales (Feb. 13, 2009), http://www.freddie.mac.com/news/archives/servicing/2009/20090213_suspension-march.html (extended moratorium on foreclosure sales until March 6, 2009).

⁵⁷ Freddie Mac Officially Launches REO Rental Initiative, *supra* note 56.

⁵⁸ See *REO Rental Initiative*, FREDDIE MAC, http://www.freddie.mac.com/corporate/buyown/english/avoiding_foreclosure/rental_initiative.html (last visited Oct. 24, 2010).

⁵⁹ Freddie Mac Officially Launches REO Rental Initiative, *supra* note 56.

⁶⁰ Freddie Mac Extends Eviction Suspension, *supra* note 56.

⁶¹ *Id.* (quoting David M. Moffett, Chief Executive Officer, Freddie Mac). CEO Moffett also noted that "keeping foreclosed properties occupied and in better repair will support local property values and promote a faster recovery in the housing market." *Id.*

⁶² Protecting Tenants at Foreclosure Act of 2009, Pub. L. No. 111-22, §§ 701-704, 123 Stat. 1632, 1661 (2009) [hereinafter Protecting Tenants at Foreclosure Act]. The law took immediate effect and applies "[i]n the case of any foreclosure on a federally-related mortgage loan or on any dwelling or residential real property after the date of enactment." *Id.* § 702(a).

⁶³ The statute reads:

[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.

Id. § 702(b).

⁶⁴ *Id.* § 702(a)(1).

State law,”⁶⁵ may continue to live on the property for the remainder of the lease term unless a new owner of the property will occupy it as a primary residence.⁶⁶ The Protecting Tenants at Foreclosure Act of 2009 does not preempt longer notice requirements or other tenant protections under any federal or state law.⁶⁷ Thus, it serves to give some greater protections to tenants where there may have been little or none at all.⁶⁸

But the Act is not without its flaws. Although the Federal Deposit Insurance Corporation will be ensuring compliance with the Act,⁶⁹ the law does not provide compliance requirements other than providing notice to tenants. For example, the Act does not require any affidavit or other proof that a new purchaser of the foreclosed property intends to occupy the property as a primary residence. Seemingly, a tenant would simply have to rely on the new purchaser’s word.⁷⁰ Therefore, unscrupulous buyers may assert that they will be using the foreclosed premises as their primary residence when in fact that is not the case. Under these circumstances, ignorant and misled tenants would not have a valid basis on which to assert their right to remain on the property for the full term of the lease.⁷¹ Moreover, tenants may not be aware of their rights under the law as there is no requirement that they receive any information regarding the Protecting Tenants at Foreclosure Act of 2009 during the foreclosure process or in the notice to vacate.⁷²

Conversely, a new purchaser may truthfully state that she will be using the property as her primary residence. Nonetheless, that purchaser might not intend to do so until a time beyond expiration of a tenant’s existing lease. The Act does not provide a bona fide tenant any recourse for this situation and, thus, any such purchaser may require a tenant to vacate the property upon ninety-day notice notwithstanding the fact that the purchaser will not take immediate occupancy.⁷³

⁶⁵ *Id.* § 702(a)(2)(B).

⁶⁶ *Id.* § 702(a)(2)(A). Termination of the lease under these circumstances is also subject to the ninety-day notice requirement. *Id.* The Protecting Tenants at Foreclosure Act includes a similar provision for Section 8 tenancies. *Id.* § 703.

⁶⁷ *Id.* § 702(a).

⁶⁸ See WITHOUT JUST CAUSE, *supra* note 28, at 10.

⁶⁹ *Protecting Tenants at Foreclosure Act, FDIC Fin. Inst. Letter, FIL-56-2009*, FDIC (Sept. 28, 2009), available at <http://www.fdic.gov/news/news/financial/2009/fil09056.pdf> (“FDIC examiners will monitor and enforce compliance with the requirements of this law in the same manner as other consumer protection laws and regulations.”).

⁷⁰ See Protecting Tenants at Foreclosure Act, Pub. L. No. 111-22, §§ 701–704 (2009).

⁷¹ See *supra* notes 65–66 and accompanying text.

⁷² See §§ 701–04; see also Daniel Shoer Roth, *Renters Bullied by Owners Facing Foreclosure*, MIAMI HERALD, Apr. 13, 2010, at 2B (explaining that “most of the tenants . . . are unaware of these new laws” which are “being deliberately ignored” when evicting tenants post-foreclosure).

⁷³ Of course, one must recognize that a new purchaser may wish to repair or renovate a home before taking occupancy and would necessarily require that the tenant vacate the premises before beginning the work.

Additionally, the Act is silent as to the manner in which notice must be given to tenants. Arguably, state law regarding notice would apply. However, state laws differ in the manner of providing notice, e.g., whether personal service is necessary, posting is sufficient, or formal service is required.⁷⁴ Furthermore, the Act does not contain a procedure that provides a tenant with due process if a tenant claims not to have received a notice to vacate. Unfortunately, no penalties are in place for noncompliance with the notice requirements; thus, some successors in interest could potentially deceive tenants without fear of recourse.

On the other hand, the Act does not exclude month-to-month tenants or tenants at will from the ninety-day notice requirement. Consequently, these tenants often receive greater benefits under the law than they would have under the terms of their leaseholds.⁷⁵ Likewise, the Act does not exclude tenants who may be in default or who later default under the terms of their lease. Although this Article has discussed the ramifications of landlords' actions, i.e., defaulting under a loan, on tenants, tenants should not now be able to turn around and take advantage of a property's successor in interest. The Act, however, does not require tenants who remain on the property during the ninety-day period to necessarily fulfill obligations that may be incorporated in their leases, such as maintenance of the property.⁷⁶ Consequently, the Act has, in effect, given inequitable rights to some tenants.

Lastly, despite its lofty goal of saving tenants in foreclosed properties from immediate displacement, the Act fails to recognize that time is not the only issue confronting these tenants. Ninety days (or even longer) may not be sufficient time for tenants to come up with the financial resources required to effectuate a move into comparable housing.⁷⁷ Landlords generally require that a tenant pay a security deposit and may require both first and last months' rent at the outset of a lease.⁷⁸ The same issue that has caused owners to default on their mortgage loans—

⁷⁴ See discussion *infra* Part I.B.

⁷⁵ See Samanta Parks, *Tenants Suffer When Landlords Are Foreclosed*, FORECLOSUREDATAONLINE, Oct. 31, 2007, <http://www.foreclosuredataonline.com/blog/foreclosed/tenants-suffer-when-landlords-are-foreclosed/> [hereinafter *Tenants Suffer*].

⁷⁶ See §§ 701–04.

⁷⁷ See Goodman, *supra* note 20 and accompanying text.

⁷⁸ See, e.g., OFFICE OF POLICY DEV. & RESEARCH, U.S. DEP'T OF HOUS. & URBAN DEV., STRATEGIES FOR PREVENTING HOMELESSNESS 4 (2005), http://www.huduser.org/Publications/pdf/Strategies_for_preventing_Homelessness.pdf.

unemployment⁷⁹—has also caused problems for tenants.⁸⁰ Without financial assistance, the law may simply be giving tenants more time in their current premises with nowhere to go when they are eventually evicted.

The Act is set to expire on December 31, 2012.⁸¹ However, with the expected rise in foreclosures,⁸² and with the current backlog in some courts,⁸³ foreclosures which used to take a few months may now take up to a year to conclude.⁸⁴ With the amount of time foreclosures take and with no immediate end to the crisis in sight, the Protecting Tenants at Foreclosure Act of 2009 should not terminate until a comprehensive federal and state-wide plan is in place⁸⁵ that will apply even when the economy and real estate market stabilize.⁸⁶

⁷⁹ Alan Zibel, *Foreclosures Rise 5 Percent from Summer to Fall*, HUFFINGTON POST, Oct. 15, 2009, http://www.huffingtonpost.com/2009/10/15/foreclosures-rise-5-percent_n_321831.html (“Unemployment is the main reason homeowners are falling into trouble.”). One government source noted that “[s]ince the start of the recession in December 2007, the number of unemployed persons has increased by 7.6 million to 15.1 million, and [as of September 2009] the unemployment rate has doubled to 9.8 percent.” TED: THE EDITOR’S DESK, BUREAU OF LABOR STATISTICS, U.S. DEP’T OF LABOR, UNEMPLOYMENT IN SEPTEMBER 2009, Oct. 6, 2009, http://www.bls.gov/opub/ted/2009/ted_20091006.htm. Among other reasons that homeowners are defaulting is the drop in home values; for example, in South Florida, some homeowners are simply walking away and allowing lenders to foreclose on properties where the equity has fallen below the balance due on the loan. Monica Hatcher, *Homeowners Walking Away from Underwater Mortgages*, PALM BEACH POST, Oct. 25, 2009, <http://www.palmbeachpost.com/business/content/state/epaper/2009/10/25/1025default.html>. According to Monica Hatcher, “As property values have plummeted by an average of 50%, such strategic defaults now make up a sizable chunk of South Florida’s foreclosures. In the fourth quarter of [2008], they accounted for an estimated 28% of all defaults in Miami-Dade and Broward counties” *Id.*

⁸⁰ The unemployment rate among renters in 2008 was 7.1% as compared to a 3.3% unemployment rate among homeowners. DAVID P. BERNSTEIN, *THE IMPACT OF HOME OWNERSHIP ON MOBILITY AND LABOR MARKET OUTCOMES: EVIDENCE FROM THE CURRENT POPULATION SURVEY (2005 TO 2008)* 6 (2009), <http://ssrn.com/abstract=1414461> (follow “One-Click Download” hyperlink). For comparisons of unemployment rates among homeowners and renters between 1996 and 2004, see DAVID P. BERNSTEIN, *PRELIMINARY RESULTS: THE IMPACT OF LOW-EQUITY HOUSING SITUATIONS ON LONG TERM UNEMPLOYMENT (2009)*, http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1366344 (follow “One-Click Download” hyperlink).

⁸¹ Protecting Tenants at Foreclosure Act § 704.

⁸² See Chang, *supra* note 2; Clark, *supra* note 7; Levy, *supra* note 2; *supra* text accompanying note 12.

⁸³ See Chang, *supra* note 2.

⁸⁴ *Id.* (“Foreclosures that once took three to five months to complete in [Florida’s] Miami-Dade and Broward counties now take nine months to one year to move from initial filing to final judgment and auction.”).

⁸⁵ See *infra* Part II.

⁸⁶ Obviously, a lender’s right to foreclose will continue to exist and tenants will continue to be affected by foreclosures even after the economy recovers. These protective laws should not serve only as a bandage to be removed once the current scars heal.

B. State Policies and Legislation

There is no unified approach to the way states handle a tenancy in a foreclosure.⁸⁷ Most states follow a long-standing principle that a foreclosure will make an existing lease obsolete.⁸⁸ However, every state has different laws regarding tenants' rights during foreclosures. Some states offer minimal rights while others combine a host of requirements to establish at least adequate protection.⁸⁹

A requirement found among all states' laws is that tenants receive some notice prior to eviction, but the states differ as to what type of notice and when notice must be given. Notice to the tenant includes notice of the landlord/borrower's loan default,⁹⁰ notice of the foreclosure

⁸⁷ See WITHOUT JUST CAUSE, *supra* note 28, at 6.

⁸⁸ See *id.* at 8. A foreclosure can directly or indirectly terminate a lease or modify the lease. *Id.* For example, in Alaska, a purchaser at a foreclosure sale is entitled to possession of the premises after the foreclosure. ALASKA STAT. § 34.20.090(b) (2009). Currently, in Rhode Island, a foreclosure does not terminate a tenancy, but modifies it to a tenancy at sufferance; the new landlord can then choose to keep or terminate the lease. See *Noorigian v. Greenfield*, 156 A. 515 (R.I. 1931). Legislation recently introduced in Rhode Island would convert a tenancy in a foreclosed property into a month-to-month tenancy for bona fide tenants, as that term is defined in the proposed bill. H.B. 5741, 2009 Gen. Assem., Jan. Sess. (R.I. 2009), available at <http://www.rilin.state.ri.us/BillText09/HouseText09/H5741.pdf>. However, New Jersey and the District of Columbia do not conform to this principle, as a lease remains unaffected and cannot be terminated because of foreclosure; a lease can only be terminated upon just cause, e.g., nonpayment of rent or destruction of premises by tenant. D.C. CODE § 42-3505.01 (2009); N.J. STAT. ANN. § 2A:18-61.3 (West 2009).

⁸⁹ For example, in Georgia, tenants receive no notice of a foreclosure sale and become tenants at sufferance once a foreclosure is completed. See GA. CODE ANN. § 44-14-162.2 (2009); *Trust Co. Bank v. Atlanta Speedshop Dragway, Inc.*, 432 S.E.2d 608 (Ga. App. 1993). In contrast, in Illinois, a lease is terminated by foreclosure if the foreclosure judgment so provides, assuming the tenant was either named as a party in the foreclosure proceeding or given notice as a "nonrecord claimant." See 735 ILL. COMP. STAT. ANN. 5 / 15-1506(i)(2) (West 2009). In contrast, Vermont requires joinder of a tenant in a foreclosure proceeding; in addition, a landlord who receives a foreclosure complaint must provide each tenant who enters into a rental agreement notice of the pending foreclosure and the tenant may be required to vacate the premises upon 30 days' notice. VT. STAT. ANN. tit. 12, § 4523(c) (2009). In Louisiana, written notice must be served by the sheriff to a tenant after seizure of the premises. LA. CODE CIV. PROC. ANN. art. 2293(B)(2) (2008). If the sheriff fails to serve notice on the tenants, the foreclosure sale will still be valid. *Id.* However, the subsequent purchaser of the property will be unable to use a writ of possession to remove the tenant from the property incident to the foreclosure proceeding and instead will have to file an eviction action. *Id.*; LA. REV. STAT. ANN. § 13:4346 (2008).

⁹⁰ Alaska requires that the trustee of a deed of trust serve a copy of a notice of default on "any . . . person in possession of or occupying the property" within ten days after the notice has been recorded. ALASKA STAT. § 34.20.070(c) (2008). In Oregon, a landlord must disclose any notice of default (or foreclosure proceedings) to a tenant before signing a lease. OR. REV. STAT. § 90.310 (2009). If a landlord fails to disclose this information, and a tenant is forced to vacate because of foreclosure, "the tenant may recover twice the actual damages or twice the monthly rent, whichever is greater, and all prepaid rent." *Id.* This law only applies to a "dwelling unit in premises containing no more than four dwelling units." *Id.* In contrast, Nevada does not require notice of default unless a tenant records a request for any notice of default by the owner or a notice of sale of the property; such notice must be sent by mail

proceeding,⁹¹ notice of sale,⁹² notice to vacate,⁹³ and notice of eviction.⁹⁴ The more forms of notice a tenant receives, especially if notice is sent at varied intervals in the foreclosure proceeding, the more the tenant is protected.⁹⁵

Notice offers a tenant protection in terms of the amount of time the tenant will have to seek a new home,⁹⁶ but state law governs the manner and time frame in which notice must be provided.⁹⁷ Therefore, even if a

within ten days after the notice has been recorded and mailed to the owner. NEV. REV. STAT. § 107.090 (2008) (amended in 2009 on unrelated matter).

⁹¹ Notice of the foreclosure proceeding occurs when a tenant is named in a foreclosure proceeding as a defendant or a party of interest, pursuant to state law, and served with a copy of the complaint. Some states require joinder of tenants. *See, e.g., Dundee Naval Stores Co. v. McDowell*, 61 So. 108, 113 (Fla. 1913) (“[T]he leaseholder cannot be deprived of his rights without being given an opportunity to be heard by being made a party to the foreclosure proceedings . . .”). But other states only require joinder of tenants in certain circumstances. *See, e.g., ME. REV. STAT. ANN. tit. 14, § 6321* (2009) (requiring that a tenant be named in a foreclosure proceeding if the tenant’s lease is properly recorded); VT. STAT. ANN. tit. 12, § 4523(c)(1) (“The plaintiff shall join as a party defendant any person occupying the mortgaged property pursuant to a residential rental agreement . . .”). However, failure to join a tenant as a party-defendant generally results in the tenant retaining right to possession of the property. *See, e.g., Dundee Naval Stores Co.*, 61 So. at 113.

⁹² All states provide some notice of sale of the foreclosed property, each differing in how close to the date of sale the notice is sent. *E.g., HAW. REV. STAT. § 667-5(a)(1), (b)(2)* (2009); IDAHO CODE ANN. § 45-1506(2) (2009); MONT. CODE ANN. § 71-1-315(1)(a), (b) (2007); S.C. CODE ANN. § 15-39-660 (2008); VT. STAT. ANN. tit. 12, § 4532(e); W. VA. CODE § 38-1-4 (2009).

⁹³ A notice to vacate is usually given before an eviction process is needed or as part of a foreclosure proceeding to eject a tenant. *See, e.g., CAL. CIV. PROC. CODE § 1161b(a)* (West 2008) (requiring sixty-day notice to vacate to “tenant . . . in possession of a rental housing unit at the time the property is sold in foreclosure”); CONN. GEN. STAT. § 47a-23(a) (2009) (landlord must give tenant a notice to quit possession or occupancy of premises subject to the listed permissible reasons, at least three days before the date on the notice); TEX. PROP. CODE ANN. § 24.005(b) (West 2009) (requiring thirty-day notice to vacate after foreclosure if “the tenant timely pays rent and is not otherwise in default . . . after foreclosure”).

⁹⁴ Examples of notices of eviction can be found in each individual state’s landlord and tenant laws. For example, in Florida, once a landlord has completed the eviction process in court, a tenant has twenty-four hours to vacate after a sheriff has posted a notice of eviction on the property door. FLA. STAT. § 83.62(1) (2009).

⁹⁵ Notice throughout the foreclosure process is imperative because a landlord may establish a tenancy without the tenant’s knowledge of a pending foreclosure proceeding, which could result in a challenge to the tenant’s right to possession.

⁹⁶ In addition, notice of foreclosure proceedings may provide a tenant with the opportunity to defend leasehold rights in foreclosure if, for example, the lender’s interest is subordinate to the tenant’s. *See Trust Co. Bank v. Atlanta Speedshop Dragway, Inc.*, 432 S.E.2d 608 (Ga. Ct. App. 1993) (holding that if the lease was created before a security deed, a lessee may retain her leasehold interest when the property is foreclosed and sold to a subsequent purchaser); *P.J.’s Army Surplus & Co. v. G.D. & G.*, 93-609 (La. App. 5 Cir. 3/16/94), 635 So. 2d 1217 (holding that a lease recorded before a mortgage survives a foreclosure).

⁹⁷ *See IDAHO CODE ANN. § 45-1506(2)* (2009) (notice of sale to be mailed at least 120 days before sale date); MONT. CODE ANN. § 71-1-315(1)(b) (notice of sale to be posted at least twenty days before sale date). The Montana Code also provides for notice of sale to be mailed to the owner, and any person with a recorded interest, at least 120 days before the sale. MONT. CODE ANN. § 71-1-315(1)(a).

state mandates more than one notice, that protection will be inadequate if the notice provides a tenant with only minimal time to act. More troubling is the fact that, in some states, tenants may receive notice only by chance—i.e., there is no specific requirement to give a tenant notice.⁹⁸ For example, tenants may receive constructive rather than actual notice before eviction, if at all, where the state foreclosure proceedings require that notice of sale be posted at the local courthouse or published in a local newspaper.⁹⁹

At least twenty-five states require that notice be given to tenants of a mortgage loan default by the landlord/borrower or of the foreclosure proceeding.¹⁰⁰ This gives existing tenants an early warning of what lies ahead. Some states require that the defaulting landlord/owner of the

⁹⁸ See TEX. PROP. CODE ANN. § 24.005(b) (“Before a foreclosure sale, a foreclosing lienholder *may* give written notice to a tenant stating that a foreclosure notice has been given to the landlord or owner of the property and specifying the date of the foreclosure.” (emphasis added)). Texas has a bill pending which would give tenants who have continued to pay rent and have not defaulted in any other way a ninety-day notice to vacate if the purchaser chooses to end the lease at foreclosure. H.B. 3551, 81st Leg., Reg. Sess. (Tex. 2009), *available at* <http://www.legis.state.tx.us/tlodocs/81R/billtext/pdf/HB03551E.pdf>. Delaware considers tenants to have constructive notice of a foreclosure upon the filing of a *lis pendens*. See DEL. CODE ANN. tit. 25, § 1603(b) (2009).

⁹⁹ See, e.g., S.C. CODE ANN. § 15-39-660 (2008) (requiring a notice of sale to be posted at the courthouse and in a local newspaper); W. VA. CODE §§ 38-1-4, 59-3-2 (2009) (requiring a notice of foreclosure sale to be posted in newspapers or, if there are no local newspapers, in a courthouse). Although most states couple the aforementioned requirements with other requirements that would increase the likelihood of a tenant receiving notice, such as posting the notice on the property door, see, for example, HAW. REV. STAT. §§ 667-5(a)(1), (b)(2) (2009), these forms of delivery of notice are still indirect. A more direct method of delivery would be to serve notice on the tenant. Hawaii introduced a bill on January 26, 2009 that would amend this statute and require a lender, through its attorney, to give tenants direct notice of foreclosure and forty-five days to vacate the premises. H.B. 522, 25th Leg., Reg. Sess. (Haw. 2009), *available at* http://www.capitol.hawaii.gov/session2009/Bills/HB522_.HTM. Idaho’s foreclosure laws require personal service on the occupant of the property:

At least three (3) good faith attempts shall be made on different days over a period of not less than seven (7) days each of which attempts must be made at least thirty (30) days prior to the day of the sale to serve a copy of the notice of sale upon an adult occupant of the real property in the manner in which a summons is served. At the time of each such attempt, a copy of the notice of sale shall be posted in a conspicuous place on the real property unless the copy of the notice of sale previously posted remains conspicuously posted.

IDAHO CODE ANN. § 45-1506(5).

¹⁰⁰ WITHOUT JUST CAUSE, *supra* note 28, at 7.

property give notice to the tenant.¹⁰¹ Other states, such as Delaware, require that the lender give notice.¹⁰²

Yet other states delay notice to tenants until a time prior to sale of the foreclosed property.¹⁰³ For an occupant of a property facing foreclo-

¹⁰¹ See VT. STAT. ANN. tit. 12, § 4523(c)(3) (2009). In Vermont, even though “the owner of the mortgaged property shall notify each tenant who enters into a residential rental agreement[] that the premises are the subject of a pending foreclosure action,” there is no penalty for the landlord’s failure to provide such notice. *Id.* In Ohio, where tenants do not have a right to receive notice of foreclosure (unless they are named as a party in the proceeding) or sale, OHIO REV. CODE ANN. §§ 2329.01–.61 (West 2009), a bill approved by the House on May 06, 2009, and awaiting Senate approval would require a landlord to give notice of a foreclosure to a tenant, which includes information about a potential sale of the property and modification of the lease:

(B)(1) Any landlord of a residential property that has been notified by a court that the property is the subject of a foreclosure action shall provide each tenant at that property with written notice of the foreclosure action. The notice shall include a statement in substantially the following form and printed in fourteen-point, times new roman font:

“This property is undergoing foreclosure. For more information on this action, you should contact the (your county) Clerk of Courts for the Court of Common Pleas, (address), at (phone number).

A sale at auction may or may not occur as a result of this foreclosure. Currently, [the sale of this property has been set for (time, date, and place)] or [no date for sale of this property has been established]. You will receive written notice of the sale at least twenty-one days before it takes place.

If there is a sale of this property at auction, your current rental agreement will convert to a month-to-month rental agreement upon the sale of the property.

Note: With a month-to-month rental agreement, either the tenant or the landlord may terminate the agreement by providing written notice of termination to the other at least thirty days prior to a date on which the rent payment normally is due. The rental agreement then terminates on that date.”

(2) If the rental agreement is entered into before the foreclosure action is initiated, the landlord shall provide the written notice of the foreclosure action within sixty days after having been notified by the court that the foreclosure action has been filed. If the rental agreement is entered into after the foreclosure action is initiated, the landlord shall include the written notice of the foreclosure action in the rental agreement.

(C) Any landlord of a residential property that is the subject of a foreclosure action shall provide each tenant at that property with written notice of the date, time, and place of the sale of the foreclosed property at least twenty-one days before the date of the sale at auction.

H.B. 9, 128th Gen. Assem., Reg Sess. (Ohio 2009), available at http://www.legislature.state.oh.us/BillText128/128_HB_9_PH_Y.pdf.

¹⁰² DEL. CT. C.P.R. 4(f)(4) (“Not later than ten (10) days following the filing of an action begun by scire facias (foreclosure), the plaintiff . . . shall send by certified mail . . . to tenants holding or possessing a leasehold estate for years or at will in such real estate, a notice consisting of a copy of the complaint and a written Notice to Lien Holders and Tenants of Filing of Action” (parenthetical added)); see also 735 ILL. COMP. STAT. ANN. 5 / 15-1502(c)(2) (West 2008) (requiring that if a tenant is not named in the foreclosure, a lender must send notice of foreclosure to the tenant at least thirty days prior to foreclosure judgment if the lender wants to terminate the tenant’s interest).

¹⁰³ *E.g.*, IDAHO CODE ANN. § 45-1506 (requiring a notice of sale be sent to the last known address of the tenant if the tenant is on the record or the person administering the sale knows

sure, some states provide for service on the occupant a specified number of days before the sale;¹⁰⁴ this appears to give a tenant a better opportunity to learn about a foreclosure proceeding if previously unknown to the tenant. Generally though, a notice of sale will consist of the aforementioned newspaper or courthouse posting.¹⁰⁵ However, this notice of sale is usually a required part of the foreclosure proceedings and thus directed to the public at large or to the property owner, not the tenant.¹⁰⁶ Thus, direct notice of sale to a tenant is not necessarily a requirement of a state's landlord and tenant laws. Nonetheless, states that mandate these forms of notice do give tenants a better opportunity to find out about a foreclosure by also requiring a notice of sale to be posted in a conspicuous place on the property.¹⁰⁷

Of course, whether a notice of sale provides sufficient protection depends on how much time the notice of sale provides between the date of notice and the actual sale date; this is the amount of time that a tenant would have to seek a new residence if the notice of sale were the first notice given.¹⁰⁸ Some states require that notice of sale be delivered twenty days before sale of the property,¹⁰⁹ while Idaho requires a notice of sale to be delivered at least 120 days before the sale takes place.¹¹⁰

A few states do not require prior notice to tenants.¹¹¹ Tenants in North Dakota and Kentucky, for example, only receive a notice to vacate, followed by an eviction proceeding, if necessary.¹¹² This process provides only a minimal amount of time for a tenant to find a new residence.

or should have known about the tenant and requiring at least three good faith attempts be made to serve the occupant of the property at least thirty days before the sale).

¹⁰⁴ See *id.*

¹⁰⁵ See *supra* note 99 and accompanying text.

¹⁰⁶ See, e.g., ALA. CODE § 35-10-13 (2009) (notice of sale to be published in county newspaper); KAN. STAT. ANN. § 60-2410 (2009) (officer needs to give public notice of the time and place of sale); MISS. CODE ANN. § 89-1-55 (West 2009) (notice of sale advertised in newspaper and posted on courthouse door disclosing the name of the mortgagor); MO. ANN. STAT. § 443.320 (West 2009) (notice of sale as newspaper advertisement).

¹⁰⁷ See, e.g., HAW. REV. STAT. § 667-5 (2009); W. VA. CODE §§ 38-1-4, 59-3-2 (2009).

¹⁰⁸ No matter how far in advance a tenant receives a notice of sale, if a landlord signs a new lease with a different tenant after notice had been given to a previous tenant, the new tenant will be oblivious to the foreclosure unless another notice of sale is given closer to the date of the sale.

¹⁰⁹ E.g., MONT. CODE ANN. § 71-1-315(1)(b) (2007).

¹¹⁰ IDAHO CODE ANN. § 45-1506 (2009).

¹¹¹ N.D. CENT. CODE § 32-19-40 (2009) ("persons holding unrecorded conveyances need not be made parties"); see also N.D. CENT. CODE §§ 28-23-04, 32-19-18, 35-22-01. In Massachusetts, a tenant is entitled to notice of a foreclosure within thirty days *after* a mortgagee conveys title or takes possession of the property. MASS. GEN. LAWS ANN. ch. 244, § 15A (West 2009). In Nevada, a tenant receives notice of default or sale only if the tenant records a request for such notice with the clerk. NEV. REV. STAT. ANN. § 107.090 (West 2008) (amended in 2009 regarding an unrelated matter).

¹¹² KY. REV. STAT. ANN. §§ 383.195 (West 2010); N.D. CENT. CODE § 47-16-15 (2009).

Several states, such as Florida, require that a tenant be joined in a foreclosure proceeding to terminate a tenancy.¹¹³ If a tenant is not joined, the tenancy will continue.¹¹⁴ The new owner must commence a separate eviction action to obtain possession of the property.¹¹⁵ If the tenant is joined, the tenancy is simply severed and the sheriff, usually after a short notice of eviction, can have the tenant removed.¹¹⁶ In this situation, the tenant would actually have to vacate the property faster than if the tenant was not named in the foreclosure proceeding¹¹⁷ because eviction usually takes longer than having the sheriff remove a tenant once a foreclosure is complete.

¹¹³ See, e.g., *Dundee Naval Stores Co. v. McDowell*, 61 So. 108, 112 (Fla. 1913) (“The rights of persons who have an interest in the subject-matter of the litigation, whether legal or equitable, cannot be adjudicated or affected by a decree rendered in a suit to which they were not made parties.”).

¹¹⁴ See, e.g., *id.*; *Citizens Bank & Trust v. Bros. Constr. & Mfg., Inc.*, 859 P.2d 394, 396 (Kan. Ct. App. 1993) (“[A] mortgage foreclosure action will only terminate a lessee’s interest in the real estate if the lessee is made a party to the action.”); *Gibbs v. Kinsey*, 566 N.Y.S.2d 117, 117 (N.Y. App. Div. 1991) (“Due process requires that one be given notice and an opportunity to be heard before one’s interest in property may be adversely affected by judicial process.”).

¹¹⁵ See, e.g., CONN. GEN. STAT. § 47a-42 (2009) (suggesting that when a tenant is not named in the foreclosure proceeding, a new owner can still terminate the lease by commencing a separate eviction action to remove the tenant). In Delaware, if “[t]he tenant holds over for more than 5 days after the property has been duly sold upon the foreclosure of a mortgage and the title has been duly perfected,” the landlord can bring an eviction through summary proceeding. DEL. CODE ANN. tit. 25, § 5702(6) (2009).

¹¹⁶ See, e.g., CONN. GEN. STAT. § 49-22 (2009) (permitting a tenant named in a foreclosure proceeding to be ejected from the premises as part of the proceeding without requiring a separate eviction action). *But see id.* § 47a-20e (effective November 25, 2008) (stating that if there is a written lease, a tenant cannot be ejected or an eviction proceeding cannot commence against the tenant until either the end of the tenant’s lease or sixty days after the new owner acquires title, whichever is longer, regardless of whether the tenant is named in a foreclosure proceeding). If there is no written lease, the tenant can be ejected, or an eviction proceeding can begin, thirty days after the new owner acquires title. *Id.* Furthermore, the new law makes it clear that an eviction action can still be commenced against a tenant for any other reason listed in Connecticut law besides foreclosure. *Id.* Note that if House Bill 9 is enacted in Ohio, a tenancy will become a month-to-month tenancy; a tenant can still be evicted if the new landlord decides not to renew the lease in any given month. See H.B. 9, 128th Gen. Assem., Reg. Sess. (Ohio 2009), available at http://www.legislature.state.oh.us/BillText128/128_HB_9_PH_Y.pdf.

¹¹⁷ See, e.g., N.Y. REAL PROP. ACTS. LAW §§ 221, 713 (McKinney 2008). In New York, when a tenant is named in a foreclosure proceeding, the tenant should vacate by the date of the foreclosure sale if the same is included in the judgment. *Id.* § 221. If the tenant is not named in a foreclosure proceeding, the new owner must file an eviction action or summary proceeding *after* the foreclosure proceeding is complete, thereby adding the eviction timeframe to the already lengthy foreclosure process. *Id.* §§ 711, 713, 731; see *Green Point Sav. Bank v. Defour*, 618 N.Y.S.2d 169 (N.Y. Sup. Ct. 1994). Thus, a tenant named as a party in a foreclosure proceeding would get notice of the foreclosure more quickly than a tenant who was not included and the former would have to vacate the premises faster than if the tenant had not received notice.

In a few states, if the tenant is not joined, the tenancy is modified and becomes a tenancy at will or tenancy at sufferance;¹¹⁸ this usually gives the tenant approximately thirty days to find a new residence if the landlord asks the tenant to vacate the premises.¹¹⁹ In Georgia, the tenant becomes a tenant at sufferance, which offers the weakest form of protection.¹²⁰

In addition to the aforementioned notices, states have created, or are creating other ways to provide tenants with more protection during foreclosure. In Connecticut, landlords cannot evict tenants who are elderly or disabled and live in buildings with five or more units without just cause, regardless of foreclosure.¹²¹ In Massachusetts, foreclosure will not affect the leases of tenants whose rent payments are subsidized by the federal or state government; also, as of November 2007, a foreclosure converts a tenancy for a definite period to a tenancy at will.¹²²

Some states do not categorize a tenancy as created pre- or post-foreclosure;¹²³ thus an owner may create a lease with an unsuspecting

¹¹⁸ See, e.g., MASS. GEN. LAWS ch. 186, § 13A (2009); OR. REV. STAT. ANN. § 86.755(5)(a) (West 2009); *Trust Co. Bank v. Atlanta Speedshop Dragway, Inc.*, 432 S.E.2d 608 (Ga. Ct. App. 1993); *Barron v. Fed. Home Loan Mortg. Corp.*, No. 07-CV-11580, 2008 WL 275675, at *1 (E.D. Mich. Jan. 31, 2008); *Noorigian v. Greenfield*, 156 A. 515 (R.I. 1931).

¹¹⁹ See, e.g., GA. CODE ANN. §§ 44-7-7, 44-7-50 (West 2009) (permitting “the owner . . . [to] demand the possession of the property so rented, leased, held, or occupied” in a tenancy at will or tenancy by sufferance and requiring that a tenant at will receive sixty days’ notice to vacate); MASS. GEN. LAWS ch. 186, § 13 (2009) (requiring that a tenant at will receive notice before eviction proceedings are commenced, either thirty days or “equal to the interval between the days on which the rent reserved is payable . . . whichever is longer”); MICH. COMP. LAWS ANN. § 554.134 (West 2009) (requiring that a tenant at will or tenant by sufferance receive thirty days’ notice to vacate); OR. REV. STAT. ANN. § 86.755(5)(b) (requiring that a tenant at sufferance receive thirty days’ notice to vacate before eviction proceedings are commenced); R.I. GEN. LAWS § 34-18.1-2 (2009) (requiring that a tenant at will or by sufferance in “commercial leasing and other estates” vacate upon the date specified in a written request).

¹²⁰ *Trust Co. Bank*, 432 S.E.2d at 608. Georgia’s Senate Bill 140, introduced February of 2009, would allow a Georgia tenant with a valid lease to remain in the foreclosed property up to sixty days after the sale date, as long as the tenant continues to pay rent. S.B. 140, 2009 Gen. Assem., Reg. Sess. (Ga. 2009), available at http://www.legis.ga.gov/legis/2009_10/pdf/sb140.pdf.

¹²¹ CONN. GEN. STAT. § 47a-23c(a)(1) (2009).

¹²² MASS. GEN. LAWS ch. 186, § 13A.

¹²³ In contrast, for example, Iowa and Minnesota distinguish between leases that are entered into before a foreclosure proceeding has commenced and leases that are entered into after a foreclosure proceeding has commenced. IOWA CODE ANN. § 617.11 (West 2009) (“When so indexed said action shall be considered pending so as to charge all third persons with notice of its pendency, and while pending no interest can be acquired by third persons in the subject matter thereof as against the plaintiff’s rights.”); MINN. STAT. ANN. § 504B.151 (West 2009) (limiting lease terms for a lease entered into after a foreclosure complaint is filed and requiring the landlord to notify the potential tenant of the foreclosure); *Wagner v. Wagner*, 90 N.W.2d 758, 764 (Iowa 1958) (Lis pendens “gave notice to [the tenant] of the action pending and of the issues therein; he cannot complain . . . that his lessor had no right to lease to him, in derogation of the rights of the other owners and of a possible purchaser at partition sale”).

tenant after the owner knows foreclosure proceedings have commenced. Kansas does differentiate between leases that were created before or after a foreclosure, although it does not offer the post-foreclosure tenant any protection.¹²⁴ This if a tenant leases a property after the mortgagee commences a foreclosure action, the tenant is charged with notice; the tenant has no property rights against the mortgagee and becomes a tenant at will after the mortgage is foreclosed.¹²⁵ On the other hand, Kansas treats pre-foreclosure tenants more favorably: if an existing tenant is not named in the foreclosure proceeding and the mortgagee should have known of the tenant's existence, the new owner takes the property subject to the lease.¹²⁶ Minnesota specifically addresses the issue of a tenancy commencing after a foreclosure action has been filed, and gives the landlord the responsibility of notifying the new tenant:

Once a landlord has received notice of a . . . mortgage foreclosure sale under chapter 580 or 582, or summons and complaint under chapter 581, the landlord may only enter into (i) a periodic residential lease agreement with a term of not more than two months or the time remaining in the contract cancellation period or the mortgagor's redemption period, whichever is less or (ii) a fixed term residential tenancy not extending beyond the cancellation period . . .¹²⁷

Furthermore, the Minnesota statute states: "Before entering into a lease . . . the landlord must notify the prospective tenant in writing that the landlord has received . . . notice of a mortgage foreclosure sale . . ." ¹²⁸ Similarly, Ohio included a section in its proposed legislation that would differentiate between the time and manner of service of notice of foreclosure proceedings on tenants whose leases commence before and after a foreclosure proceeding has begun.¹²⁹ However, under either procedure for service of notice, the lease converts to a month-to-month tenancy unless the new landlord and tenant agree otherwise.¹³⁰

¹²⁴ WITHOUT JUST CAUSE, *supra* note 28, at 49.

¹²⁵ *Id.* Vermont has similar legislation, which charges a tenant who signs a lease after a foreclosure has commenced with constructive notice of the foreclosure based on the lis pendens filed with the court in connection with the foreclosure action. See VT. STAT. ANN. tit. 12, § 4523(b) (2009).

¹²⁶ Citizens Bank & Trust v. Bros. Constr. & Mfg., Inc., 859 P.2d 394 (Kan. Ct. App. 1993); see also *supra* notes 113–14 and accompanying text.

¹²⁷ MINN. STAT. § 504B.151(a) (2009) (amended May 20, 2009, this section applies to leases entered into on or after August 1, 2009).

¹²⁸ *Id.* § 504B.151(b).

¹²⁹ H.B. 9, 128th Gen. Assem., Reg Sess. (Ohio 2009), available at http://www.legislature.state.oh.us/BillText128/128_HB_9_PH_Y.pdf.

¹³⁰ *Id.*

Interestingly, the two states that do not require notice to a tenant still offer the most protection.¹³¹ In New Jersey and the District of Columbia, a tenancy survives a foreclosure, and a foreclosure is not a valid reason for eviction.¹³² The lease would continue as if no foreclosure had ever taken place; there is simply a new landlord involved.¹³³ These two jurisdictions give superior protection to tenants, even more so than the Protecting Tenants at Foreclosure Act, which only allows the lease to continue if the new owner will not use the property as his or her primary residence.¹³⁴

The Protecting Tenants at Foreclosure Act, which allows a lease to survive foreclosure (with some exceptions), has upset the long-standing principle among states that foreclosure will almost always make an existing lease obsolete.¹³⁵ Even before the Act became law, states began introducing and enacting legislation that would offer tenants more protection.¹³⁶ Current or pending legislation ranges from requiring longer

¹³¹ D.C. CODE § 42-3505.01 (2009); N.J. STAT. ANN. § 2A:18-61.3 (West 2009).

¹³² D.C. CODE § 42-3505.01; N.J. STAT. ANN. § 2A:18-61.3.

¹³³ D.C. CODE § 42-3505.01; N.J. STAT. ANN. § 2A:18-61.3.

¹³⁴ See *supra* note 66 and accompanying text.

¹³⁵ See *supra* notes 63–66 and accompanying text.

¹³⁶ See, e.g., Assem. B. 140, 75th Leg., Reg. Sess., 2009 NEV. STAT. 2780, available at http://www.leg.state.nv.us/75th2009/Bills/AB/AB140_EN.pdf (requiring a landlord to notify a potential tenant if the property is subject to foreclosure; requiring notice to a tenant that property is subject to notice of sale; allowing a tenant to remain on a foreclosed property for up to sixty days after the foreclosure sale; requiring the tenant to pay rent to the new landlord; and allowing a new landlord to negotiate a new lease with the occupying tenant); S.B. 40, 2009 Gen. Assem., Jan. Sess. (R.I. 2009), available at <http://www.rilin.state.ri.us/BillText09/SenateText09/S0040A.pdf> (passed by Senate on June 25, 2009) (requiring a lender to notify the tenants of a foreclosure sale and to provide contact information for housing assistance and legal services; also requiring a sixty-day notice to quit for tenants); S.B. 842, 426th Gen. Assem., Reg. Sess. (Md. 2009), available at <http://mlis.state.md.us/2009rs/bills/sb/sb0842e.pdf> (enacted May 19, 2009) (requiring “all occupants” of foreclosure property to receive notice of foreclosure and notice of sale); H.B. 4211, 95th Leg., Reg. Sess. (Mich. 2009), available at <http://www.legislature.mi.gov/documents/2009-2010/billengrossed/House/html/2009-HEBH-4211.htm> (passed by House on March 17, 2009) (requiring the landlord to notify the tenant of foreclosure after commencement and before conclusion of redemption period; requiring a tenant to continue paying rent to then landlord during foreclosure; requiring a landlord to notify in writing any potential tenants of pending foreclosure; and allowing imposition of penalties on a landlord who does not comply); S.B. 469, 95th Gen. Assem., 1st Reg. Sess. (Mo. 2009), available at <http://www.senate.mo.gov/09info/pdf-bill/intro/SB469.pdf> (last action taken on this bill was on February 26, 2009) (requiring 20 days’ notice of foreclosure sale to tenants; requiring notice to tenants that foreclosure sale occurred; and mandating that evictions proceedings not occur until 45 days after notice to tenants that foreclosure sale has occurred); Assem. B. 140, 75th Leg., Reg. Sess., 2009 NEV. STAT. 2780, available at http://www.leg.state.nv.us/75th2009/Bills/AB/AB140_EN.pdf (requiring a landlord to notify a potential tenant if the property is subject to foreclosure; requiring notice to a tenant that property is subject to notice of sale; allowing a tenant to remain on a foreclosed property for up to 60 days after the foreclosure sale; requiring the tenant to pay rent to the new landlord; and allowing a new landlord to negotiate a new lease with the occupying tenant); S.B. 953, 2009 Gen. Assem., 2009 Sess. (N.C. 2009), available at <http://www.ncleg.net/Sessions/2009/Bills/Senate/PDF/S953v3.pdf> (passed by the Senate on April 29, 2009) (allowing a tenant receiving

notice periods before sale or eviction, to allowing a tenant to terminate a lease without penalty, to requiring just cause to evict tenants at foreclosure.¹³⁷ The Protecting Tenants at Foreclosure Act has also provided protection to tenants in states that offer minimal or no protection.¹³⁸ For example, Georgia did not offer tenants at foreclosure any rights, but as a result of the federal Act, tenants in Georgia now benefit from certain protections.¹³⁹ The Act, however, does not preempt state law that offers

Section 8 assistance to remain in the foreclosed property until the expiration of the lease); S.B. 40, 2009 Gen. Assem., Jan. Sess. (R.I. 2009), available at <http://www.rilin.state.ri.us/BillText09/SenateText09/S0040A.pdf> (passed by Senate on June 25, 2009) (requiring a lender to notify the tenants of a foreclosure sale and to provide contact information for housing assistance and legal services; also requiring a 60-day notice to quit for tenants).

¹³⁷ See S.B. 13, 128th Gen. Assem., Reg. Sess. (Ohio 2009), available at http://www.legislature.state.oh.us/BillText128/128_SB_13_RS_Y.pdf (most recent legislative action taken on June 25, 2009) (allowing a tenant to terminate a rental agreement without penalty upon notice of a foreclosure; requiring a landlord to put a tenant on notice of foreclosed property and sale date; requiring the clerk of the relevant court to put a tenant on notice when foreclosure action is filed; allowing a lease to continue after a foreclosure; and allowing civil remedies against a landlord who violates the new law); S.B. 952, 75th Leg. Assem., 2009 Reg. Sess. (Or. 2009), available at <http://www.leg.state.or.us/09reg/measpdf/sb0900.dir/sb0952.en.pdf> (enacted June 24, 2009) (creating a requirement that tenants receive notice of sale and, after the sale, a notice to vacate of either 30 or 60 days, depending on the terms of the tenancy; mentioning that federal law possibly offers more protection and should be taken into account by the tenant); H.B. 5933, 2009 Gen. Assem., Jan. Sess. (R.I. 2009), available at <http://www.rilin.state.ri.us/BillText09/HouseText09/H5933.pdf> (bill introduced February 26, 2009) (stating that after a foreclosure sale, a tenant can be only be evicted for good cause, such as non-payment of rent). Florida had three bills die in committee on May 2, 2009, all of which contained protection for tenants in the form of requiring notice of foreclosure. H.B. 1093, 2009 Leg., Reg. Sess. (Fla. 2009), available at <http://www.flsenate.gov/data/session/2009/House/bills/billtext/pdf/h109300.pdf>; H.B. 875, 2009 Leg., Reg. Sess. (Fla. 2009), available at <http://www.flsenate.gov/data/session/2009/House/bills/billtext/pdf/h087501c1.pdf>; S.B. 454, 2009 Leg., Reg. Sess. (Fla. 2009), available at <http://www.flsenate.gov/data/session/2009/Senate/bills/billtext/pdf/s0454.pdf>. One bill contained a provision that would have allowed a tenant to terminate a rental agreement upon notice of foreclosure. See H.B. 1093, 2009 Leg., Reg. Sess. (Fla. 2009), available at <http://www.flsenate.gov/data/session/2009/House/bills/billtext/pdf/h109300.pdf>.

¹³⁸ See Protecting Tenants at Foreclosure Act, *supra* note 62, § 701.

¹³⁹ *Id.*; WITHOUT JUST CAUSE, *supra* note 28, at 35. In Georgia, state law does not require notice to a tenant of a foreclosure sale; constructive notice of the sale through newspaper postings is all that is received, if anything at all. See GA. CODE ANN. § 44-14-162.2 (West 2009) (stating that “debtor” is entitled to direct notice of sale and that notice of sale must be published); see also *Breizman v. Heritage Bank*, 348 S.E.2d 713 (Ga. App. 1986) (stating that Georgia statute dictates that “only [the mortgagee] was entitled to receive any notice of the initiation of foreclosure proceedings other than by advertisement,” although decided in context of a guarantor rather than a tenant). Also, Georgia offers a non-judicial foreclosure process, giving tenants less time and opportunity to discover the pending foreclosure. GA. CODE ANN. § 44-14-49 (West 2009) (mentioning the availability of judicial foreclosure as well as other methods to foreclose as listed in the chapter); § 44-14-161 (mentioning foreclosure without legal process). Furthermore, assuming there is no appeal, eviction proceedings are completed very quickly, anywhere from eight days if a tenant does not answer an eviction complaint to approximately fifteen days if the court holds a hearing to determine possession without delay. See §§ 44-7-50 to -56. Tenants become tenants at sufferance after a foreclosure sale, at the

a tenant better protection.¹⁴⁰ Thus, some headway has been made in protecting tenants through both federal and state laws.

II. RECOMMENDATIONS

As discussed above, a myriad of policies and legislation has been proposed or enacted to protect residential tenants when lenders are foreclosing on a landlord's property. Some are more effective than others in accomplishing the goal of reducing a disruption in the tenants' living conditions, making the transition into new housing smoother, and lessening costs associated with such a move. But even those that seem to provide greater rights and protections suffer from inherent problems.¹⁴¹ Policymakers should consider creating and adopting a fully comprehensive plan that integrates many, if not all, of the following rights and obligations, some of which are already in effect in certain jurisdictions.

Before entering into a lease, landlords often conduct consumer credit checks on a potential tenant¹⁴² to verify that the tenant has the financial wherewithal to meet monthly rental obligations. Tenants should have the same opportunity to conduct a credit check on a potential landlord to ensure that a landlord is meeting his own financial obligations and, thus, will not likely face foreclosure in the future. Consumer credit checks, however, generally require the consent of the person whose credit is being investigated¹⁴³ and payment for the credit check itself.¹⁴⁴ Thus, a landlord may refuse to give consent or a tenant may not wish to spend additional funds when income is scarce. Nevertheless, because of the impact of tenancy foreclosures on renters and the community at large, states should create a clearinghouse if only for the purpose of permitting a credit check of landlords, either at no cost or a reduced fee, prior to a tenant signing a lease. In this manner, tenants would presumably contract with a more credit-worthy landlord without the risk of facing a potential and unexpected foreclosure during the term of the lease.

Similarly, a landlord could be required, upon demand by a prospective tenant, to provide an estoppel letter issued by his mortgage lender.

mercy of the new owner's decision to keep or terminate the lease. *Trust Co. Bank v. Atlanta Speedshop Dragway, Inc.*, 432 S.E.2d 608 (Ga. Ct. App. 1993).

¹⁴⁰ Protecting Tenants at Foreclosure Act § 702.

¹⁴¹ See, e.g., *supra* text accompanying notes 69–86.

¹⁴² See, e.g., Eloisa C. Rodriguez-Dod & Olympia Duhart, *Evaluating Katrina: A Snapshot of Renters' Rights Following Disasters*, 31 NOVA L. REV. 467, 480 n.100 (2007).

¹⁴³ *Id.*

¹⁴⁴ Many online companies offer tenant credit checks at varying prices. See, e.g., E-RENTER.COM, <http://www.e-renter.com/> (last visited Oct. 24, 2010); C.I.T.I CREDIT BUREAU, <http://www.citicredit.net/> (last visited Oct. 24, 2010); YOUCHECKCREDIT.COM, <http://www.youcheckcredit.com/> (last visited Oct. 24, 2010).

The estoppel letter would reflect the outstanding balance of the landlord's mortgage loan and whether the payments on the loan were current. A tenant would then have the ability to make an informed decision regarding a landlord's potential default and foreclosure status before entering into a lease or taking possession of the leased premises.

Before the foreclosure crisis began, most renters were not aware of the effect of foreclosure on their tenancies.¹⁴⁵ Tenants did not understand that, and in most instances, they would lose their right to continue to reside in the rental property. A simple clause in a lease could easily correct this problem. Landlords should be required to include in any lease a notice regarding the potential effect on a tenant, under state law, if the rental property is foreclosed upon. Additionally, the clause should include a notice regarding a tenant's rights, if any, upon foreclosure; this clause may either fully state such rights or advise a tenant that certain rights exist under state law. Some states already require landlords to disclose to tenants certain statutory rights. For example, in Florida, a landlord who rents more than five dwelling units must furnish to tenants a copy of the statutory provision regarding a landlord's duty when imposing a claim on a security deposit and a tenant's right to object to the claim.¹⁴⁶ Similarly, a potential foreclosure disclosure clause could be included in leases; however, unlike in Florida, this clause would have to be included in all residential leases, rather than limiting its application to those landlords who rent more than a certain number of units. Including such a notice in a lease would be neither burdensome nor costly for a landlord.

Leases should also be required to include a provision whereby a landlord is in default once a lender provides the landlord with a notice of foreclosure of the property for failure to make mortgage or other payments.¹⁴⁷ Generally, a tenant who lives on property in foreclosure proceedings would be in breach of a lease if the tenant vacates the property before expiration of the lease term for no reason other than the pending foreclosure. Therefore, a tenant is forced to remain on the property until the earlier of expiration of the lease term or conclusion of the foreclosure process, followed by possible eviction. Of course, a tenant can always

¹⁴⁵ WITHOUT JUST CAUSE, *supra* note 28, at 6.

¹⁴⁶ FLA. STAT. § 83.49(2)(c) (2009).

¹⁴⁷ For example, a landlord's failure to pay taxes, homeowner or condominium association fees, and contractors may also lead to liens and eventual foreclosure of the rental property. In reality, a tenant would be better served by earlier notices of any late payments by the landlord which could eventually lead to foreclosure. However, this suggestion is not realistic in that it does not take into account all circumstances which may lead to a notice of late payment. For example, a landlord's mortgage payment may actually have been lost in the mail. Allowing a tenant to declare a default upon receipt of a notice of a landlord's late payment, without the ability of the landlord to correct the default, may unduly hurt a landlord. Thus, the better alternative is to provide a notice of foreclosure to the tenant.

attempt to negotiate early termination of a lease with a landlord. However, a landlord may refuse to do so and likely will refuse given the landlord's own financial situation. A default provision would give a tenant the option of remaining on the leased premises until conclusion of the foreclosure or moving into another residence without being forced out. To be fully effective, any such statute must include language requiring both the landlord and the creditor to furnish a copy of any notice of foreclosure to the person in possession of the property, i.e., the tenant.¹⁴⁸ Thus, a tenant should be permitted to record a lease in the public records.¹⁴⁹ Recordation would put a foreclosing lender on notice regarding a tenant in possession. As lenders generally conduct a title search report to ensure it includes all required parties on the foreclosure complaint, recordation would presumably safeguard a tenant's right to receive notice of foreclosure.

As discussed above, tenants endure many financial obstacles when forced to move as a result of a foreclosure. A displaced renter must pay moving costs, potentially first and last months' rent in a new home, and a new security deposit. In addition, a tenant may possibly lose the security deposit that the tenant initially paid in order to rent the now-foreclosed property if the landlord absconds with the money.¹⁵⁰

There are several alternatives that may relieve the tenants of these unexpected financial burdens. One possibility is to require a landlord to post a bond equal to any last month's rent and security deposit paid by a tenant to a landlord when first entering into a lease. The landlord's bond, likewise, would need to be posted at the beginning of the lease term. A tenant would be able to make a claim against the bond for those sums should the tenant be forced to leave the premises before the expiration of the lease, or for the amount of the security deposit if the landlord does not have a rightful claim against and fails to return the deposit. Unfortunately, landlords would likely factor the cost of the bond into the rental payments and, thus, rental charges would increase.

A system whereby tenants could purchase a type of "rental foreclosure insurance" is another possible solution. This insurance policy would ostensibly cover a tenant's foreclosure related costs. However,

¹⁴⁸ *But see supra* notes 101–02 and accompanying text.

¹⁴⁹ According to Grant S. Nelson and Dale A. Whitman, "In most jurisdictions . . . leases that do not exceed some stated term—typically one, two, or three years—are not within the scope of the recording acts." Grant S. Nelson & Dale A. Whitman, *Reforming Foreclosure: The Uniform Nonjudicial Foreclosure Act*, 53 DUKE L.J. 1399, 1478 (2004). In addition, landlords generally do not allow for recordation of leases to avoid any potential cloud on title.

¹⁵⁰ *See Tenants Suffer*, *supra* note 75.

the cost of any such insurance could potentially be as much as, or more than, the costs related to a tenant's forced move.¹⁵¹

Another option, which goes hand in hand with the suggested default provision, is to allow tenants to sue the landlord for reasonably foreseeable damages such as moving costs and return of the security deposit. However, filing a civil lawsuit would require a tenant to expend additional monies for costs and attorneys' fees, and time.¹⁵² Needless to say, even if a tenant were to prevail in any such action, the likelihood of recovery would be slim. However, state legislators may consider enacting a statutory provision which would include a foreclosed tenant as a kind of junior lienholder in the foreclosure proceeding, to be reimbursed for reasonably foreseeable damages from surplus funds, if any. The tenant would be paid after secured lienholders who have a valid claim against any such surplus funds received payment but before distribution of the surplus to the foreclosed landlord.

Another, and possibly more feasible, alternative is to allow a tenant to deposit rents in a court registry or other escrow account if a mortgagee has provided the tenant with notice of a pending foreclosure of the leased property. Once foreclosure is finalized, the sums held in escrow would be released first to the tenant for payment of the reasonably foreseeable damages and then any remainder to the landlord.

In addition to receiving notice of a pending foreclosure, mortgagees should also provide notice to tenants before the issuance of the final order of foreclosure by the court. In this manner, tenants who may face eviction will be better prepared for their eventual move.

However, notwithstanding the foregoing, states should follow the lead taken by New Jersey and the District of Columbia and permit tenancies to survive foreclosures.¹⁵³ The new owner of the property, whether the lender or a third party, would take the foreclosed property subject to the existing lease. Thus, rather than forcing innocent tenants from their homes, the tenants could remain on the property until expiration of the lease term. This would create a positive effect on the economy as it

¹⁵¹ For example, lenders often require homeowners to purchase private mortgage insurance (PMI) when the loan-to-value ratio is high. Samanta Parks, *Will Mortgage Insurance Prevent Foreclosure?*, FORECLOSUREDATAONLINE, Dec. 17, 2007, <http://www.foreclosuredataonline.com/blog/mortgage-foreclosure/will-mortgage-insurance-prevent-foreclosure/>. However, PMI "is not inexpensive." *Id.* "The average cost of this type of insurance is around one half to one percent of [the] loan balance." *Id.*

¹⁵² Although a lease may contain a provision wherein a prevailing party in a lawsuit may recover attorney's fees, most attorneys would likely not be willing to represent a tenant on a contingency basis. A tenant may resort to a local legal services program which may provide representation at no cost. In addition, an indigent tenant may have costs waived by the court. However, tenants in such circumstances need immediate access to monies and cannot afford to wait the time it takes for a civil lawsuit to conclude.

¹⁵³ See *supra* notes 131–33 and accompanying text.

allows for stability in the form of continued ingestion of money in the market (rent payments) and reduction of homelessness. This would also be the fairest result for innocent tenants who have faithfully paid their rents to foreclosed landlords.

Lastly, states should consider giving tenants a right of redemption. A tenant would thus be afforded the opportunity to cure a landlord's indebtedness and take title to the property. Some states statutes already give tenants a right to cure the debt.¹⁵⁴ Although most tenants would likely not have the financial means to redeem the property, this would be another possible avenue for a tenant to pursue.

CONCLUSION

The foreclosure crisis and its effect on tenants does not just impact the local community, but has also had a national impact. A comprehensive plan would aid a large sector of the U.S. population—renters who have been unduly affected by foreclosures over which they had no control. It is the government's duty to afford protection to these people. These recommendations are a feasible means to keep the door open for renters.

¹⁵⁴ See, e.g., COLO. REV. STAT. § 38-38-104 (2010); FLA. STAT. § 45.0315 (2009).

