

Tenants in Foreclosure: New Federal Protections

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Legislative History

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Legislative History

Background and Context

- As foreclosures increased renters affected
- Field reports including reports from legal services
- Field hearing in Minnesota (8/9/07)
- Judith Liben, Mass. Law Reform Institute, testimony before House Financial Services Committee (9/20/07)
- NLIHC research (5/08)
- *Without Just Cause* (2/09)

Legislative History

Congressional Response

110th Congress

- H.R. 3915 (11/07) (Passed House)
 - Basic protections; 90 day notice right ,with to remain for lease, but no longer than 6 months
 - Prospective only, applicable to “mortgages” made after date of enactment
- H.R. 5963 (5/5/08) and S. 3034 (5/19/08) (Introduced)
 - Basic protections, including section 8 protections
 - Applicable to all foreclosures after date of enactment
- Emergency Economic Stabilization Act of 2008 (10/3/08) (P.L. 110-343) (TARP)
 - Treasury Secretary required to coordinate with holders of troubled assets to permit bona fide tenants who are current on their rent to remain in their homes

Legislative History

Congressional Response

111th Congress

- H.R. 384, TARP II (1/21/09) (Passed House)
 - Similar to H.R.3915
- ARRA/NSP (2/17/09) (P.L. 111-6)
 - Basic protections, including expanded section 8 protections
 - Applicable only to properties purchased with NSP (both I and II) funds
- H.R. 1247 (3/2/09) (Introduced)
 - Basic provisions with expanded section 8 provisions
- H.R. 1728 Anti-Predatory Lending Bill (5/7/09) (Passed House)
 - Included H.R. 1247, with additional improvements,
 - Webcast of markup instructive
http://www.house.gov/apps/list/speech/financialsvcs_dem/markup042309.shtml
 - Passed House, some floor discussion about tenant protection provisions

Legislative History

S. 896, P.L. 111-22

- S. 896 passed Senate (5/6/09)
 - Tenant protections added by amendment number, S. Amdt. 1036, offered by Senator Kerry (S.Amdt. 1024 also filed by Senator Kerry was never offered)
 - Some floor discussion on amendment
 - Strong vote, 57-39, for amendment
- House amended S. 896
 - Clarified bona fide lease including adding language to ensure that subsidized rents included in definition
 - Eliminated distinction between initial term and later terms in section 8
- Public Law signed (5/20/09)

Legislative History

S. 896, P.L. 111-22

Senator Senator Gillibrand, *Congressional Record*,
S5096-5097

“This amendment would allow any tenants in a foreclosed building the right to live out their lease, providing them with the same protections any other renter would have. For a family without a lease, the amendment would guarantee a minimum of 90 days' notice so that renters have the time and the resources to find a new home. “

Legislative History

S. 896, P.L. 111-22

Senator Kerry, Congressional Record Page: S5110

“Under this amendment, tenants in any federally related mortgage loan or any dwelling or residential real property with a lease have a right to remain in the unit until the end of the existing lease. If a new purchaser intends to use the property as a primary residence, then the lease may be terminated, but the tenant has to receive 90 days' notice to vacate.”

“The provisions of this amendment would sunset. I wish to make that clear. This sunset is based on the notion that this is to deal with the current crisis, and it would sunset on December 31, 2012. Furthermore, it states specifically that none of the provisions here would affect any State and local law that provides a longer time period or other additional protections to renters. So there is nothing here that reduces the protection renters get.”

Legislative History

S. 896, P.L. 111-22

Senator Coburn, Congressional Record Page:
S5112

“That is a State issue. State laws apply, and we are going to pull that in and make it a Federal issue. Anybody who has any connection with Federal insurance, FHA, anything else, we are now going to start writing the laws on contract law in my State, in his State, and every other State. That is exactly how we got into the trouble we are in today.”

Legislative History

S. 896, P.L. 111-22

Senator Dodd, Congressional Record Page: S5115

“What Senator *Kerry* is saying here, at least for tenants who are in good standing on their properties, they should not be affected because the property ended up in foreclosure through whatever rationale that may have happened to the landlord. It seems to me, putting people out on the street is not what we ought to be doing at a time such as this. Whatever your views are about whether these programs are working as effectively as they should, I think all of us agree the innocent who are being confronted with these decisions should not be left in a more precarious position than they are already in, and that is exactly what would happen in the absence of the Kerry amendment, the Kerry-Gillibrand-Reid amendment. “

Legislative History

S. 896, P.L. 111-22

Consideration of SA 1036 and Record Vote, Congressional Record Page:
S5174-5175

Senator Kerry: “What we want to do is provide them with a provision where they will have 90 days--if the people who foreclosed are going to use that residence as a primary residence. If the residence is going to continue to be a multiple-party residence where they have a number of people renting and they will continue to use it as such, we want to leave those leases in effect until the end of the lease. We are protecting legitimate, low- to moderate-income folks in America who do not get protections otherwise from being just booted out on the street, which is literally what has happened in the absence of this protection.”

Senator Shelby: “I believe this is not a good proposal. This changes the law, as we understand it. It has been working a long time. It will cause all kinds of problems. Once a property is foreclosed, what do you do with it next? It delays it.”

State Law & the Protecting Tenants at Foreclosure Act

Catherine Bendor

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Foreclosure Procedures

- Vary greatly from state to state
- Judicial vs. Non Judicial Foreclosures
 - Judicial – usually involves initiation of formal legal case
 - Non-Judicial – lender can institute foreclosure without judicial intervention following default (generally available when mortgages contain “power of sale” clause)
 - 36 states permit both judicial and non-judicial foreclosures
 - In most states permitting both types, non-judicial process more common
 - 14 states and DC permit foreclosure only through judicial process
- Public Sale/Auction vs. “Strict Foreclosure”

Does The Tenancy/ Lease Survive Foreclosure?

State Law:

- In majority of states, renter's rights under lease automatically terminated following foreclosure (though circumstances that allow tenancy to be terminated vary by state)
- (DC and NJ are exception – tenancy survives foreclosure - foreclosure not automatic basis for eviction)

Protecting Tenants At Foreclosure Act:

- Tenancy/Lease survive foreclosure (except when new owner will use property as primary residence)

Must Tenants Receive Notice of Foreclosure and/or Notice to Vacate Foreclosed Property?

State Law:

- 17 states require that tenants in properties subject to foreclosure be provided with notice of proceeding or default by owner
- 12 states require that tenant be named as parties to foreclosure proceedings in order for foreclosure to automatically terminate tenancy or provide new owner with immediate possessory rights
- Notice to vacate once foreclosure goes into effect - usually substantially less than 90 days advance notice required

Protecting Tenants At Foreclosure Act:

- Successor in interest must provide at least **90 days' notice** to vacate to any bona fide tenant

Protecting Tenants at Foreclosure Act does not negate more favorable state protections

702 (a) "..... except that nothing under this section shall affect the requirements ... of any State or local law that provides longer time periods or other additional protections for tenants."

Preemption: Does the new statute preempt existing state law?

- Begin with analysis of Congressional intent – express or inferred from statute’s structure and purpose
 - Even if Congressional intent unclear, state law may be preempted when state law:
 - conflicts with federal law and compliance with both laws a “physical impossibility”
 - “stands as an obstacle to the accomplishment and execution” of Congress’ objectives
- Barnett Bank of Marion County, N.A. v. Nelson*,
517 U.S. 25, 31 (1996)
- Federal law can prevail over conflicting state law even if law relates to an area traditionally covered under state law

Frequently Asked Questions

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- What properties are covered by the statute?
 - Any dwelling or any residential property
 - Single family (1-4 units) and multifamily (5 or more units)
 - Federally-related is not a limitation

Frequently Asked Questions

- When does the law apply?
 - Effective on enactment: 5/20/09
 - Applies to foreclosures that occur after enactment
 - Pending foreclosures are covered; test is whether title has passed: Is there a successor in interest with full title?

Frequently Asked Questions

- When can an effective notice to vacate be given?
 - Must be given by the successor in interest; so effective notice cannot be given before there is a successor in interest, i.e. any point before title passes
 - Notices of the initiation of the foreclosure action are required in some states and desirable in all cases, but they do not serve as a “notice to vacate”
 - When there is a lease, can be given 90 days before the end of the lease term

Frequently Asked Questions

- Does the tenant have to pay rent?
 - Yes, if the successor in interest will not take the payment or cannot be found, rent should be escrowed
 - Failure to pay rent may constitute an independent ground for eviction

Frequently Asked Questions

- What responsibilities does the successor in interest have to maintain the property?
 - The successor in interest has the responsibilities of the landlord as defined in the lease or applicable law

Frequently Asked Questions

- Will HUD be issuing any guidance on the section 8 provisions?
 - The provisions are self-implementing and effective immediately; HUD does not have to issue regulations to implement the provisions
 - HUD is reviewing the Act and will be providing information for section 8 administrators soon

Frequently Asked Questions

- Is the application of the law affected by the immigration status of a tenant?
 - The Act itself does not condition any of the protections on the immigration status of the tenant

Frequently Asked Questions

- What form of notice must be used?
 - Not specified in federal statute
 - Will vary with state and local requirements

Frequently Asked Questions

- What is the scope of the preemption of state law?
 - Does not preempt more protective state and local provisions
 - Does not preempt evictions based on other causes, such as failure to pay rent