



## **WHITE PAPER: TENANTS' RIGHTS IN FORECLOSURE ACTIONS**

### **I. SUMMARY**

The precarious position of tenants in properties being foreclosed became front-page news with the bust of the housing market, the subsequent high volume foreclosures, and the immediate eviction of many tenants at the conclusion of the foreclosure action. The problem was nationwide, leading Congress to pass the Protecting Tenants at Foreclosure Act (PTFA).<sup>1</sup> The PTFA overlaid any state law protections for tenants, providing bona fide tenants with time after the foreclosure before having to leave the foreclosed rental property. These protections, however, expired on December 31, 2014. The attached legislation would provide tenants in Florida with similar protections provided by the PTFA.

### **II. BACKGROUND**

Since the passage of PTFA the foreclosure process in Florida has changed. However, what happens to a tenant in a property being foreclosed remains the same under Florida law: if a "Jane or John Doe" service is made to the foreclosed property being rented, a writ of possession issues after the property is sold at auction, requiring the tenant to vacate the property. In many cases, the tenant may not have

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<sup>1</sup> Public Law 111-22, (May 20, 2009), as extended and clarified by the Dodd -Frank Wall Street Reform and Consumer Protection Act, Public Law 111-203 (July 21, 2010)

received actual notice of the foreclosure action for a number of reasons, including the property being rented to the tenant after the foreclosure has begun and after any “Jane or John Doe” service. Often the first time the tenant learns about the foreclosure is when the writ of possession is executed.

Prior to passage of the PTFA, constituent complaints in Florida led to eight House and Senate bills being filed during the 2009 Regular Session in an effort to protect the innocent tenant.<sup>2</sup> In 2010, a bill protecting tenants in the foreclosure process passed in the Florida Senate; however, protection was then being provided by the PTFA.<sup>3</sup>

With the expiration of the PTFA, tenants renting homes that fall into foreclosure are now back to the same position that led to the influx of legislation in 2009 – tenants are at risk of eviction without notice at the conclusion of a foreclosure.<sup>4</sup>

Data on the number of PTFA cases in the state is difficult to find. Legal services advocates have probably seen the largest volume of cases; however, generally, their case coding does not necessarily indicate a PTFA case. Here is available data:

Community Legal Services of Mid-Florida since 5/09	630 cases
Jacksonville Area Legal Aid and Three Rivers Legal Services since 5/09	340 cases
Legal Services of Greater Miami	

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<sup>2</sup> *Tenants’ Rights in Foreclosure Actions*, Interim Report 2010-124, October 2009, Committee on Judiciary, The Florida Senate, [http://archive.flsenate.gov/data/Publications/2010/Senate/reports/interim\\_reports/pdf/2010-124ju.pdf](http://archive.flsenate.gov/data/Publications/2010/Senate/reports/interim_reports/pdf/2010-124ju.pdf)

<sup>3</sup> SB 606, Relating to Termination of a Rental Agreement

<sup>4</sup> If the certificate of title issued prior to December 31, 2014, the tenant is entitled to the protections of the PTFA.

Hotline calls since 1/13  
Legal Aid of Orange County since 1/14

113 cases  
91 cases

Most of these cases represent “advice only” or “brief service” since the PTFA enabled legal services advocates to advise clients of their rights so they might represent themselves. Legal services offices continue to see tenants caught in the foreclosure web.

### **III. CHANGES PROPOSED TO FLORIDA LAW**

The changes proposed for Florida’s Residential Landlord Tenant Act would track the PTFA language, since we now have over five years of successful implementation of that law in Florida.

A new section within Part II, Chapter 83, would be created. It would provide that upon issuance of the certificate of title after the foreclosure sale, if there is a tenant, the purchaser takes title as the landlord, subject to the rights created by this new section.<sup>5</sup>

A tenant, to qualify for the protections, must not be the mortgagor foreclosed or the child, parent, or spouse of the mortgagor unless it is a multiunit property. The rental agreement must be the result of an arms-length transaction. The tenant also must be paying fair market rent, unless the rental is subsidized under a federal state or local subsidy.<sup>6</sup>

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<sup>5</sup> The tenant, of course, remains subject to all laws that apply to residential tenants; failure to pay rent or other material violations of any rental agreement or Florida Residential Landlord Tenant Act subjects the tenant to an action for eviction.

<sup>6</sup> See Protecting Tenants at Foreclosure Act of 2009, Comptroller’s Handbook, Comptroller of the Currency, Administrator of National Banks, <http://www.occ.gov/publications/publications-by-type/comptrollers-handbook/ptfa.pdf>

The qualifying tenant is entitled to a minimum of 90 days written notice of termination. If there is a written rental agreement entered into before the certificate of title issues, the tenant may remain until the end of the rental agreement, or at least the 90 day notice termination period, whichever is longer.

If there is a written rental agreement, but the purchaser sells the home to a purchaser who will occupy the home as a primary residence, this new purchaser may terminate the rental agreement by delivering a 90-day notice of termination.

The 90-day notice of termination must substantially comply with a statutorily provided notice and is to be delivered in the same manner as other notices under Part II, Chapter 83.

The new law should take effect upon becoming law.

#### **IV. CONCLUSION**

Protecting tenants during the foreclosure process should be a priority for all stakeholders, particularly where there is little if any adverse impact to others.

Florida's history with the application of the federal Protecting Tenants In Foreclosure Act has shown us that tenants can be provided notice after a foreclosure sale and adequate time to vacate without harming the other parties to the foreclosure action.