

TITLE VII--PROTECTING TENANTS AT FORECLOSURE ACT

SEC. 701. SHORT TITLE.

This title may be cited as the 'Protecting Tenants at Foreclosure Act of 2009'.

SEC. 702. EFFECT OF FORECLOSURE ON PREEXISTING TENANCY.

(a) In General- In the case of any foreclosure on a federally-related mortgage loan or on any dwelling or residential real property after the date of enactment of this title, any immediate successor in interest in such property pursuant to the foreclosure shall assume such interest subject to--

(1) the provision, by such successor in interest of a notice to vacate to any bona fide tenant at least 90 days before the effective date of such notice; and

(2) the rights of any bona fide tenant, as of the date of such notice of foreclosure--

(A) under any bona fide lease entered into before the notice of foreclosure to occupy the premises until the end of the remaining term of the lease, except that a successor in interest may terminate a lease effective on the date of sale of the unit to a purchaser who will occupy the unit as a primary residence, subject to the receipt by the tenant of the 90 day notice under paragraph (1); or

(B) without a lease or with a lease terminable at will under State law, subject to the receipt by the tenant of the 90 day notice under subsection (1),

except that nothing under this section shall affect the requirements for termination of any Federal- or State-subsidized tenancy or of any State or local law that provides longer time periods or other additional protections for tenants.

(b) Bona Fide Lease or Tenancy- For purposes of this section, 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.

(c) Definition- For purposes of this section, the term 'federally-related mortgage loan' has the same meaning as in section 3 of the Real Estate Settlement Procedures Act of 1974 (12 U.S.C. 2602).

SEC. 703. EFFECT OF FORECLOSURE ON SECTION 8 TENANCIES.

Section 8(o)(7) of the United States Housing Act of 1937 (42 U.S.C. 1437f(o)(7)) is amended--

(1) by inserting before the semicolon in subparagraph (C) the following: 'and in the case of an owner who is an immediate successor in interest pursuant to foreclosure during the term of the lease vacating the property prior to sale shall not constitute other good cause, except that the owner may terminate the tenancy effective on the date of transfer of the unit to the owner if the owner--

'(i) will occupy the unit as a primary residence; and

'(ii) has provided the tenant a notice to vacate at least 90 days before the effective date of such notice.'; and

(2) by inserting at the end of subparagraph (F) the following: 'In the case of any foreclosure on any federally-related mortgage loan (as that term is defined in section 3 of the Real Estate Settlement Procedures Act of 1974 (12 U.S.C. 2602)) or on any residential real property in which a recipient of assistance under this subsection resides, the immediate successor in interest in such property pursuant to the foreclosure shall assume such interest subject to the lease between the prior owner and the tenant and to the housing assistance payments contract between the prior owner and the public housing agency for the occupied unit, except that this provision and the provisions related to foreclosure in subparagraph (C) shall not affect any State or local law that provides longer time periods or other additional protections for tenants.'.

SEC. 704. SUNSET.

This title, and any amendments made by this title are repealed, and the requirements under this title shall terminate, on December 31, 2012.

Public Law 111-22
111th Congress

An Act

May 20, 2009
[S. 896]

To prevent mortgage foreclosures and enhance mortgage credit availability.

*Be it enacted by the Senate and House of Representatives of
the United States of America in Congress assembled,*Helping Families
Save Their
Homes Act of
2009.**DIVISION A—PREVENTING MORTGAGE
FORECLOSURES**12 USC 5201
note.**SECTION 1. SHORT TITLE; TABLE OF CONTENTS.**(a) **SHORT TITLE.**—This division may be cited as the “Helping Families Save Their Homes Act of 2009”.(b) **TABLE OF CONTENTS.**—The table of contents of this division is the following:

Sec. 1. Short title; table of contents.

TITLE I—PREVENTION OF MORTGAGE FORECLOSURES

- Sec. 101. Guaranteed rural housing loans.
- Sec. 102. Modification of housing loans guaranteed by the Department of Veterans Affairs.
- Sec. 103. Additional funding for HUD programs to assist individuals to better withstand the current mortgage crisis.
- Sec. 104. Mortgage modification data collecting and reporting.
- Sec. 105. Neighborhood Stabilization Program Refinements.

TITLE II—FORECLOSURE MITIGATION AND CREDIT AVAILABILITY

- Sec. 201. Servicer safe harbor for mortgage loan modifications.
- Sec. 202. Changes to HOPE for Homeowners Program.
- Sec. 203. Requirements for FHA-approved mortgagees.
- Sec. 204. Enhancement of liquidity and stability of insured depository institutions to ensure availability of credit and reduction of foreclosures.
- Sec. 205. Application of GSE conforming loan limit to mortgages assisted with TARP funds.
- Sec. 206. Mortgages on certain homes on leased land.
- Sec. 207. Sense of Congress regarding mortgage revenue bond purchases.

TITLE III—MORTGAGE FRAUD TASK FORCE

- Sec. 301. Sense of the Congress on establishment of a Nationwide Mortgage Fraud Task Force.

TITLE IV—FORECLOSURE MORATORIUM PROVISIONS

- Sec. 401. Sense of the Congress on foreclosures.
- Sec. 402. Public-Private Investment Program; Additional Appropriations for the Special Inspector General for the Troubled Asset Relief Program.
- Sec. 403. Removal of requirement to liquidate warrants under the TARP.
- Sec. 404. Notification of sale or transfer of mortgage loans.

TITLE V—FARM LOAN RESTRUCTURING

- Sec. 501. Congressional Oversight Panel special report.

TITLE VI—ENHANCED OVERSIGHT OF THE TROUBLED ASSET RELIEF PROGRAM

Sec. 601. Enhanced oversight of the Troubled Asset Relief Program.

TITLE VII—PROTECTING TENANTS AT FORECLOSURE ACT

Sec. 701. Short title.

Sec. 702. Effect of foreclosure on preexisting tenancy.

Sec. 703. Effect of foreclosure on section 8 tenancies.

Sec. 704. Sunset.

TITLE VIII—COMPTROLLER GENERAL ADDITIONAL AUDIT AUTHORITIES

Sec. 801. Comptroller General additional audit authorities.

TITLE I—PREVENTION OF MORTGAGE FORECLOSURES

SEC. 101. GUARANTEED RURAL HOUSING LOANS.

(a) GUARANTEED RURAL HOUSING LOANS.—Section 502(h) of the Housing Act of 1949 (42 U.S.C. 1472(h)) is amended—

(1) by redesignating paragraphs (13) and (14) as paragraphs (16) and (17), respectively; and

(2) by inserting after paragraph (12) the following new paragraphs:

“(13) LOSS MITIGATION.—Upon default or imminent default of any mortgage guaranteed under this subsection, mortgagees shall engage in loss mitigation actions for the purpose of providing an alternative to foreclosure (including actions such as special forbearance, loan modification, pre-foreclosure sale, deed in lieu of foreclosure, as required, support for borrower housing counseling, subordinate lien resolution, and borrower relocation), as provided for by the Secretary.

“(14) PAYMENT OF PARTIAL CLAIMS AND MORTGAGE MODIFICATIONS.—The Secretary may authorize the modification of mortgages, and establish a program for payment of a partial claim to a mortgagee that agrees to apply the claim amount to payment of a mortgage on a 1- to 4-family residence, for mortgages that are in default or face imminent default, as defined by the Secretary. Any payment under such program directed to the mortgagee shall be made at the sole discretion of the Secretary and on terms and conditions acceptable to the Secretary, except that—

“(A) the amount of the partial claim payment shall be in an amount determined by the Secretary, and shall not exceed an amount equivalent to 30 percent of the unpaid principal balance of the mortgage and any costs that are approved by the Secretary;

“(B) the amount of the partial claim payment shall be applied first to any outstanding indebtedness on the mortgage, including any arrearage, but may also include principal reduction;

“(C) the mortgagor shall agree to repay the amount of the partial claim to the Secretary upon terms and conditions acceptable to the Secretary;

“(D) expenses related to a partial claim or modification are not to be charged to the borrower;

“(E) the Secretary may authorize compensation to the mortgagee for lost income on monthly mortgage payments due to interest rate reduction;

shall have access, upon request, to any information, data, schedules, books, accounts, financial records, reports, files, electronic communications, or other papers, things, or property belonging to or in use by the TARP, any entity established by the Secretary under this Act, any entity that is established by a Federal reserve bank and receives funding from the TARP, or any entity (other than a governmental unit) participating in a program established under the authority of this Act, and to the officers, employees, directors, independent public accountants, financial advisors and any and all other agents and representatives thereof, at such time as the Comptroller General may request.

“(ii) VERIFICATION.—The Comptroller General shall be afforded full facilities for verifying transactions with the balances or securities held by, among others, depositories, fiscal agents, and custodians.

“(iii) COPIES.—The Comptroller General may make and retain copies of such books, accounts, and other records as the Comptroller General determines appropriate.

“(D) AGREEMENT BY ENTITIES.—Each contract, term sheet, or other agreement between the Secretary or the TARP (or any TARP vehicle, officer, director, employee, independent public accountant, financial advisor, or other TARP agent or representative) and an entity (other than a governmental unit) participating in a program established under this Act shall provide for access by the Comptroller General in accordance with this section.

“(E) RESTRICTION ON PUBLIC DISCLOSURE.—

“(i) IN GENERAL.—The Comptroller General may not publicly disclose proprietary or trade secret information obtained under this section.

“(ii) EXCEPTION FOR CONGRESSIONAL COMMITTEES.—This subparagraph does not limit disclosures to congressional committees or members thereof having jurisdiction over a private or public entity referred to under subparagraph (C).

“(iii) RULE OF CONSTRUCTION.—Nothing in this section shall be construed to alter or amend the prohibitions against the disclosure of trade secrets or other information prohibited by section 1905 of title 18, United States Code, section 714(c) of title 31, United States Code, or other applicable provisions of law.”.

TITLE VII—PROTECTING TENANTS AT FORECLOSURE ACT

Protecting
Tenants at
Foreclosure Act
of 2009.

12 USC 5201
note.

SEC. 701. SHORT TITLE.

This title may be cited as the “Protecting Tenants at Foreclosure Act of 2009”.

12 USC 5220
note.

SEC. 702. EFFECT OF FORECLOSURE ON PREEXISTING TENANCY.

(a) IN GENERAL.—In the case of any foreclosure on a federally-related mortgage loan or on any dwelling or residential real property

after the date of enactment of this title, any immediate successor in interest in such property pursuant to the foreclosure shall assume such interest subject to—

(1) the provision, by such successor in interest of a notice to vacate to any bona fide tenant at least 90 days before the effective date of such notice; and

Notice.
Deadline.

(2) the rights of any bona fide tenant, as of the date of such notice of foreclosure—

(A) under any bona fide lease entered into before the notice of foreclosure to occupy the premises until the end of the remaining term of the lease, except that a successor in interest may terminate a lease effective on the date of sale of the unit to a purchaser who will occupy the unit as a primary residence, subject to the receipt by the tenant of the 90 day notice under paragraph (1); or

(B) without a lease or with a lease terminable at will under State law, subject to the receipt by the tenant of the 90 day notice under subsection (1),

except that nothing under this section shall affect the requirements for termination of any Federal- or State-subsidized tenancy or of any State or local law that provides longer time periods or other additional protections for tenants.

(b) BONA FIDE LEASE OR TENANCY.—For purposes of this section, 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.

(c) DEFINITION.—For purposes of this section, the term “federally-related mortgage loan” has the same meaning as in section 3 of the Real Estate Settlement Procedures Act of 1974 (12 U.S.C. 2602).

SEC. 703. EFFECT OF FORECLOSURE ON SECTION 8 TENANCIES.

Section 8(o)(7) of the United States Housing Act of 1937 (42 U.S.C. 1437f(o)(7)) is amended—

(1) by inserting before the semicolon in subparagraph (C) the following: “and in the case of an owner who is an immediate successor in interest pursuant to foreclosure during the term of the lease vacating the property prior to sale shall not constitute other good cause, except that the owner may terminate the tenancy effective on the date of transfer of the unit to the owner if the owner—

“(i) will occupy the unit as a primary residence; and

“(ii) has provided the tenant a notice to vacate at least 90 days before the effective date of such notice.”; and

Notice.
Deadline.

(2) by inserting at the end of subparagraph (F) the following: “In the case of any foreclosure on any federally-related mortgage loan (as that term is defined in section 3 of the Real Estate Settlement Procedures Act of 1974 (12 U.S.C. 2602)) or on any residential real property in which a recipient of

assistance under this subsection resides, the immediate successor in interest in such property pursuant to the foreclosure shall assume such interest subject to the lease between the prior owner and the tenant and to the housing assistance payments contract between the prior owner and the public housing agency for the occupied unit, except that this provision and the provisions related to foreclosure in subparagraph (C) shall not affect any State or local law that provides longer time periods or other additional protections for tenants.”.

12 USC 5201
note.
12 USC 5220
note.
42 USC 1437f
and note.

SEC. 704. SUNSET.

This title, and any amendments made by this title are repealed, and the requirements under this title shall terminate, on December 31, 2012.

TITLE VIII—COMPTROLLER GENERAL ADDITIONAL AUDIT AUTHORITIES

SEC. 801. COMPTROLLER GENERAL ADDITIONAL AUDIT AUTHORITIES.

(a) BOARD OF GOVERNORS OF THE FEDERAL RESERVE SYSTEM.—Section 714 of title 31, United States Code, is amended—

(1) in subsection (a), by striking “Federal Reserve Board,” and inserting “Board of Governors of the Federal Reserve System (in this section referred to as the ‘Board’),”; and

(2) in subsection (b)—

(A) in the matter preceding paragraph (1), by striking “Federal Reserve Board,” and inserting “Board”; and

(B) in paragraph (4), by striking “of Governors”.

(b) CONFIDENTIAL INFORMATION.—Section 714(c) of title 31, United States Code, is amended by striking paragraph (3) and inserting the following:

“(3) Except as provided under paragraph (4), an officer or employee of the Government Accountability Office may not disclose to any person outside the Government Accountability Office information obtained in audits or examinations conducted under subsection (e) and maintained as confidential by the Board or the Federal reserve banks.

“(4) This subsection shall not—

“(A) authorize an officer or employee of an agency to withhold information from any committee or subcommittee of jurisdiction of Congress, or any member of such committee or subcommittee; or

“(B) limit any disclosure by the Government Accountability Office to any committee or subcommittee of jurisdiction of Congress, or any member of such committee or subcommittee.”.

(c) ACCESS TO RECORDS.—Section 714(d) of title 31, United States Code, is amended—

(1) in paragraph (1), by inserting “The Comptroller General shall have access to the officers, employees, contractors, and other agents and representatives of an agency and any entity established by an agency at any reasonable time as the Comptroller General may request. The Comptroller General may make and retain copies of such books, accounts, and other records as the Comptroller General determines appropriate.” after the first sentence;



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Unanswered Questions Under the PTFA: Exploring the
Extent of Tenant Protections in Foreclosed Properties

Elan Stavros Nichols

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Unanswered Questions Under the PTFA: Exploring the Extent of Tenant Protections in Foreclosed Properties

Elan Stavros Nichols

I. Introduction

The federal Protecting Tenants at Foreclosure Act of 2009 (PTFA),¹ amended thirteen months later in summer 2010,² is still in its relative infancy. As a result, the PTFA has left many questions of interpretation in

1. Passed by Congress on May 20, 2009, the PTFA is Title VII of the Helping Families Save Their Homes Act of 2009, and is also known as Public Law 111-22, §§ 701-704, 123 Stat. 1632 (2009) [hereinafter, the PTFA]. The text of the PTFA can be found at 12 U.S.C. § 5220. *Zalemba v. HSBC Bank*, No. 10-cv-1646 BEN, 2010 WL 3894577 (S.D. Cal. Oct. 1, 2010) ("As to the statutory structure of Section 702, the Court notes that Section 702 is part of the Emergency Economic Stabilization Act (ESSA) codified in 12 U.S.C. §§ 5201 et seq. Specifically, Section 702 is part of the Troubled Assets Relief Program (TARP) that was enacted as a subchapter of ESSA").

2. The Amendment was passed on July 21, 2010, and can be found at Public Law 111-203, § 1484, 124 Stat. 2203 (2010) (hereinafter, the Amendment). The Amendment has now been incorporated into the text at 12 U.S.C. § 5220.

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states with different mortgage foreclosure processes.³ In particular, the foreclosure by advertisement or power of sale process is unclear when viewed in conjunction with the PTFA.⁴ One particular area of ambiguity with this type of foreclosure process arises in states with a statutory right of redemption following a foreclosure sale, which may extend thirty days to one year or perhaps more.⁵ Understandably, as a somewhat new law, the PTFA does not address certain issues raised by this foreclosure process when state law is not expressly or implicitly preempted.⁶

This article will examine how the PTFA as amended (set out in Part II) applies in states with the foreclosure by advertisement/power of sale process, also called nonjudicial foreclosure as opposed to judicial foreclosure.⁷ This article will use Michigan as an example for this inquiry due to Michigan's provision for a potentially lengthy post-sale redemption period of one year.⁸ In so doing, this article will discuss issues raised by this foreclosure process concerning matters on which the PTFA's terms remain completely silent, including: (1) whether the PTFA applies to property tax foreclosures (Part III.A), and (2) how the payment of rent should be handled during the PTFA notice periods with regard to rented property undergoing foreclosure⁹ (Part III.C).¹⁰

3. See generally Allyson Gold, *Interpreting the Protecting Tenants at Foreclosure Act of 2009*, 19 J. AFFORDABLE HOUSING & CMTY. DEV. L. 205, 207 & n. 24, 218–29 (2010); see also Julia Patterson Forrester, *Still Mortgaging the American Dream: Predatory Lending, Preemption, and Federally Supported Lenders*, 74 U. CIN. L. REV. 1303, 1366–67 (2006) (describing how different each mortgage foreclosure process is from state to state).

4. See PTFA, *supra* note 1, § 702(a)(2)(B): “[N]othing under this section shall affect the requirements . . . of any State or local law that provides longer time periods or other additional protections for tenants.”

5. See generally Gold, *supra* note 3, at 213–14; cf. C. Barrett Pasquini, Note, *The Tax Consequences of the Statutory Right of Redemption in Property Foreclosures*, 48 WM. & MARY L. REV. 1497, 1507 n. 56 (2007) (describing state statutory redemption periods ranging from thirty days to two years for judicial foreclosures).

6. See generally Gold, *supra* note 3, at 209–12, 216.

7. Note that while foreclosure by advertisement is by far the dominant method of foreclosure in Michigan, judicial foreclosure is also permitted. Lorrain S.C. Brown, 10 Things Every Lawyer Should Know About Defending Foreclosure Procedures, at 25-1, CLE presentation at 6th Annual Solo & Small Firm Institute (Detroit Sept. 19, 2009) (copy on file with the author), citing MICH. COMP. LAWS ANN. §§ 600.3101–600.3185. (West 2010). Although “[a]ll jurisdictions authorize judicial foreclosure in some form[,] [t]he primary reason advanced for permitting this non-judicial foreclosure is that it is a cheaper and more efficient remedy.” Barry Hester, *Opportunity Costs: Nonjudicial Foreclosure and the Subprime Mortgage Crisis in Georgia*, 25 GA. ST. U. L. REV. 1205, 1212 (2009) (footnotes omitted). This article will discuss only the foreclosure by advertisement/power of sale process, with the feature of a post-sale statutory redemption right.

8. MICH. COMP. LAWS ANN. § 600.3240 (West 2010).

9. This article will use the general term “foreclosure” largely referring to residential mortgage foreclosures; yet, there is a colorable argument that the PTFA by its express terms applies to non-mortgage foreclosures. See discussion *infra* Part III.A.

10. Gold, *supra* note 3, at 210, 213.

II. Provisions of the PTFA and the Amendment¹¹

In § 702, the PTFA provides in pertinent part as follows.¹² At the outset, the PTFA states that it applies to “any foreclosure on a federally-related mortgage loan,” as later defined in § 702(c),¹³ “or on any dwelling or residential real property after the date of enactment.”¹⁴ Next, the statute sets forth its pivotal provision, i.e., that any “successor in interest” pursuant to the foreclosure takes such interest only after satisfying with a couple of qualifications.¹⁵ First, the successor in interest generally must issue a ninety-day notice to vacate to any “bona fide tenant,” as defined, existing in the property.¹⁶ The statute later specifies that this provision applies to a tenant without a lease or to a tenant at will.¹⁷ The second qualification is quite different: that any bona fide tenant’s ongoing lease, which exists as of the “notice of foreclosure,” must be honored until it expires on its own terms.¹⁸ This is subject to a caveat, however. If successors in interest intend to make the property their primary residence, they can simply issue the ninety-day notice to vacate, cutting off the ongoing lease.¹⁹

Importantly, the July 2010 Amendment clarified that “the date of such notice of foreclosure” referred to in the statute is “the date on which complete title to a property is transferred to a successor entity or person as a

11. This article does not address the PTFA, *supra* note 1, § 703, which relates to so-called Section 8 tenancies. The PTFA provides: “[N]othing under this section shall affect the requirements for termination of any Federal- or State-subsidized tenancy or of any State or local law that provides longer time periods or other additional protections for tenants.” PTFA, *supra* note 1, § 702(a)(2)(B).

12. PTFA, *supra* note 1.

13. “For purposes of this section, the term [‘]federally-related mortgage loan[’] has the same meaning as in section 3 of the Real Estate Settlement Procedures Act of 1974 (12 U.S.C. 2602).” PTFA, *supra* note 1, § 702(c).

14. PTFA, *supra* note 1, § 702(a).

15. *Id.*

16. *Id.* § 702(a)(1)-(2). The PTFA defines the phrase “bona fide lease or tenancy” in § 702(b) as:

. . . For purposes of this section, 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.

Note that the phrase applies to both oral and written leases by its plain language.

17. PTFA, *supra* note 1, § 702(a)(2)(B).

18. *Id.* § 702(a)(2)(A). Again, this provision applies to oral and written leases.

19. *Id.*

result of an order of a court or pursuant to provisions in a mortgage, deed of trust, or security deed."²⁰ In Michigan, that is the date the redemption period expires.²¹ Finally, the Amendment also helpfully extended the effectiveness of the PTFA from 2012 to 2014.²²

To sum up, assuming the foreclosure at issue occurred after Congress enacted the PTFA, the first question is whether there is a bona fide lease or tenancy entered into before the redemption period expired (i.e., the notice of foreclosure). If not, the PTFA does not apply. If so, the second question is whether there is a lease. If there is no lease or merely a lease terminable at will, a ninety-day notice to vacate can be issued when the redemption period expires. If there is an oral or written lease, the third question is whether the successor in interest will use the property as the primary residence. If not, the tenant can finish out the lease. If so, the successor can issue a ninety-day notice to vacate when the redemption period expires.

III. Issues on Which the PTFA Is Silent²³

A. Does the PTFA Apply to Property Tax Foreclosures?

All states levy on real property to collect overdue property taxes, and most of them do it by conducting "a combined sale and foreclosure

20. Amendment, *supra* note 2, §§ (1)(B).

21. See discussion *infra* Part III.B.

22. Amendment, *supra* note 2, §§ (2).

23. One issue that has been gaining more treatment by quite a few lower federal courts over the last two years or so of the PTFA's existence is whether the PTFA creates a private right of action to enforce its protection or redress its violations in federal court. All courts at last count have uniformly answered this question in the negative. See, e.g., *Nativi v. Deutsche Bank Nat'l Trust Co.*, No. 09-06096 PVT, 2010 WL 2179885 (N.D. Cal. May 26, 2010); *Shaikh v. Fannie Mae*, No. 610-CV-1032-ORL-28GJ, 2010 WL 3734851 (M.D. Fla. Aug. 19, 2010), *adopted by* No. 6:10-CV-1032-ORL-18G, 2010 WL 3734849 (M.D. Fla. Sept. 23, 2010). Many of the courts that have spoken on this issue have been California federal district courts, which is understandable given the high rate of foreclosures in that populous and economically challenged state. See *Cohn v. Bank of Am.*, 2011 WL 98840, at *5-6 (E.D. Cal. Jan. 12, 2011). A handful of state courts have also weighed in on the issue of enforcement of the PTFA in state court, whether as a defense to eviction or a separate cause of action. See, e.g., *Bank of Am. v. Owens*, 903 N.Y.S.2d 667 (N.Y. City Ct. 2010) (city court in New York dismissed a tenant eviction action following a foreclosure because the bank did not give an unconditional ninety-day notice to vacate before commencing eviction proceedings). See also, e.g., *Joel v. HSBC Bank USA*, No. 10-13029, 2011 WL 1197528, at *2 (11th Cir. Mar. 31, 2011) (Eleventh Circuit upheld lower court's dismissal of the tenant's complaint that the PTFA was violated; because she was only a tenant-at-will, she received the proper ninety-day notice instead of allowing her lease to go on indefinitely); NATIONAL LAW CENTER ON HOMELESSNESS & POVERTY, *STAYING HOME: THE RIGHTS OF RENTERS LIVING IN FORECLOSED PROPERTIES* 18 (June 2010), available at http://www.nlchp.org/content/pubs/StayingHomeReport_June2010.pdf (last accessed May 3, 2011) [NAT'L CTR. ON HOMELESSNESS & POVERTY RPT.] (describing

process."²⁴ The property tax sale and foreclosure processes in each state generally have a redemption period as well, some long and others short in duration.²⁵ "Michigan provides for a public sale but applies the age old remedy of strict foreclosure. Thus, failure to redeem the property by payment of the taxes due results in a total forfeiture of the property with any surplus going to the governmental creditor."²⁶

By its express terms, the PTFA apparently applies to non-mortgage foreclosures,²⁷ such as residential property tax foreclosures.²⁸ The PTFA itself states that it concerns "any foreclosure on a federally related mortgage loan or on any dwelling or residential real property."²⁹ Indeed, a variety of (perhaps nonbinding) commentators, including nonprofit legal services advocates doing foreclosure defense work³⁰ and a law journal article

a state appellate court case in which an unlawful detainer action against a foreclosed tenant was dismissed for failure to give the proper ninety-day PTFA notice to vacate), citing *RWW Props., LLC v. Stepanoff*, No. N10-0072 (Cal. Super. Ct., Contra Costa Cty., May 25, 2010) (unpublished).

24. James J. Kelly, Jr., *Bringing Clarity to Title Clearing: Tax Foreclosure and Due Process in the Internet Age*, 77 U. CIN. L. REV. 63, 72 & nn. 34-36 (2008) (citing each state's statutory property tax foreclosure process, including some exceptions to the cited proposition). See also Frank S. Alexander, *Tax Liens, Tax Sales, and Due Process*, 75 IND. L.J. 747, 770-74 (2000).

25. Kelly, *supra* note 24, at 72-73; Alexander, *supra* note 24, at 774-75 (describing a one-to-three year property tax foreclosure redemption period in most states).

26. Kelly, *supra* note 24, at 72 n. 37, citing MICH. COMP. LAWS ANN. § 211.60(4) (2008); see also Alexander, *supra* note 24, at 772 n. 137.

27. *Negusie v. Holder*, 129 S. Ct. 1159, 1178 (2009) ("statutory interpretation begins and ends with the plain language of the statute. . . . If the text of a statute governing agency action [d]irectly addresse[s] the precise question at issue[,] then, [t]hat is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress") (citations and quotations omitted).

28. The Michigan County Treasurer's Offices in at least two significant metropolitan counties have indicated that they are aware of the PTFA and are doing their best to comply with it and at least afford some consideration to tenants in tax-foreclosed properties. Addresses by Mich. County Treasurer's Office Reps. at the Michigan Affordable Housing Conference (Apr. 12, 2011) (notes on file with the author); correspondence and interviews with the Ingham County Treasurer's Office (Jan.-Feb. and Apr. 2011) (materials on file with the author). However, speakers at the April conference as well as officials from Ingham County reported that at least one other Michigan county has been observed as not applying the PTFA at all, and that each county has its own procedures for handling tenants during the tax foreclosure process.

29. PTFA, *supra* note 1, § 702(a) (emphasis added).

30. James Schaafsma, *Summary of the Protecting Tenants at Foreclosure Act of 2009*, Oct. 27, 2010 (posted to the Michigan Foreclosure Task Force Listserv, hosted by the Michigan Poverty Law Program's Michigan Foreclosure Prevention Project) (copy on file with the author); interview with James Schaafsma, Michigan Poverty Law

author,³¹ have read the PTFA as relating to literally “any” residential foreclosure. Notably, at least one state court has so held in an unpublished decision, *RWW Properties, LLC v. Stepanoff*.³²

The National Law Center on Homelessness and Poverty’s report, *Staying Home: The Rights of Renters Living in Foreclosed Properties*,³³ briefly describes *RWW Properties*, in which an unlawful detainer action against a tenant in foreclosed property was dismissed for failure to give the proper ninety-day PTFA notice to vacate.³⁴ The report states that the tenant argued in her defense on appeal that although the mortgage on the property was not federally related, “she was entitled to the protections of the PTFA, because that act was by its express language not limited only to federally related mortgages.”³⁵ The report then states that the court “agreed with the tenant that the trial court had erred . . . and directed that the unlawful detainer action be dismissed.”³⁶

Yet, at least one state court (in two different cases) has rejected this broad application of the statute by finding the first instance of “or” in the scope provision of the PTFA, i.e., “or on any dwelling or residential real property,”³⁷ to be a “scrivener’s error.”³⁸ In *United States v. Locke*,³⁹ after losing their claims to an untimely administrative filing under an annual

Program Housing Attorney (Nov. 16, 2010) (notes on file with the author). Schaafsma posits in his summary that the PTFA also applies to land contract foreclosures, but not land contract forfeitures. Schaafsma, *Summary*, *supra*.

31. Gold, *supra* note 3, at 209, 215–16.

32. No. N10-0072 (Cal. Super. Ct., Contra Costa Cty., May 25, 2010) (unpublished). No published citation is available for the state court opinion discussed here, but the source is described further below, *infra* notes 33–36, and in the accompanying text.

33. NAT’L CTR. ON HOMELESSNESS & POVERTY RPT., *supra* note 23.

34. *Id.* The report’s authors state that it did not seem that a written opinion was issued in that case, and this author could not locate one either. *Id.*

35. *Id.*

36. *Id.* Moreover, although expressly choosing not to address the issue, the New York City Court has noted that the U.S. Department of Housing and Urban Development has said in the *Federal Register* that the PTFA’s protections applied to tenants of any foreclosed dwelling, not just foreclosed dwellings with federally related mortgage loans. *Bank of Am. v. Owens*, 903 N.Y.S.2d 667, 669 n.4 (N.Y. City Ct. 2010), quoting Protecting Tenants at Foreclosure: Notice of Responsibilities Placed on Immediate Successors in Interest Pursuant to Foreclosure of Residential Property, 74 Fed. Reg. 30,106-07 (June 24, 2009).

37. PTFA, *supra* note 1, § 702(a) (emphasis added).

38. *GMAC Mortgage v. Taylor*, 899 N.Y.S.2d 802, 805 (N.Y. Dist. Ct. 2010), citing *Collado v. Boklari*, 892 N.Y.S.2d 731 (N.Y. Dist. Ct. 2009). Another federal court has also held that the PTFA does not apply to the renegotiation of a mortgage. *Mangosing v. Wells Fargo Bank*, No. CV-09-0601-PHX-FJM, 2009 WL 1456783 (D. Ariz. May 22, 2009).

39. 105 S. Ct. 1785 (1985).

statutory requirement by one day, plaintiffs brought suit.⁴⁰ The key language in the Federal Land Policy and Management Act stated that mining claimants under the Act had to annually file certain materials "prior to December 31."⁴¹ The claimants filed on December 31 and were told that they were too late and had forfeited their claims.⁴² After some discussion about whether Congress had meant December 31 instead of December 30, the Supreme Court held:

[T]he fact that Congress might have acted with greater clarity or foresight does not give courts a carte blanche to redraft statutes in an effort to achieve that which Congress is perceived to have failed to do. "There is a basic difference between filling a gap left by Congress' silence and rewriting rules that Congress has affirmatively and specifically enacted." *Mobil Oil Corp. v. Higginbotham*, 436 U.S. 618, 625, 98 S. Ct. 2010, 2015, 56 L.Ed.2d 581 (1978). Nor is the Judiciary licensed to attempt to soften the clear import of Congress's chosen words whenever a court believes those words lead to a harsh result. See *Northwest Airlines, Inc. v. Transport Workers*, 451 U.S. 77, 98, 101 S. Ct. 1571, 1584, 67 L.Ed.2d 750 (1981). On the contrary, deference to the supremacy of the Legislature, as well as recognition that Congressmen typically vote on the language of a bill, generally requires us to assume that "the legislative purpose is expressed by the ordinary meaning of the words used." *Richards v. United States*, 369 U.S. 1, 9, 82 S. Ct. 585, 591, 7 L.Ed.2d 492 (1962). . . .⁴³

Justices Stevens and Brennan's dissent in *Locke* terms the statutory language at issue a "scrivener's error."⁴⁴ However, a review of the use of this principle in the Supreme Court's case law over the past twenty years reveals that it has most often been employed by the dissents or secondary concurring opinions.⁴⁵ The true use of the scrivener's error principle seems to be rare in opinions by the majority.⁴⁶

Nonetheless, the position that the PTFA may apply to property tax and other types of residential foreclosures has several sources of support, in

40. *Id.*

41. *Id.* at 1788, 1789.

42. *Id.* at 1790–91.

43. *Id.* at 1793.

44. *Id.* at 1807–08.

45. See, e.g., *Lamie v. U.S. Trustee*, 124 S. Ct. 1023, 1035 (2004) (Stevens, Souter, and Breyer, JJ., concurring); *Holloway v. United States*, 119 S. Ct. 966, 975 n.2 (1999) (Scalia, J., dissenting); *Plaut v. Spendthrift Farm, Inc.*, 115 S. Ct. 1447, 1467 (1995) (Stevens and Ginsburg, JJ., dissenting); *Pittston Coal Group v. Sebben*, 109 S. Ct. 414, 425 (1988) (Rehnquist, C.J., and Stevens, White, and O'Connor, JJ., dissenting).

46. Jonathan R. Siegel, *The Inexorable Radicalization of Textualism*, 158 U. PENN. L. REV. 117, 145–46 n.152, 153 n.193 (2009) (noting that the above-mentioned *Locke* dissent is one of the first places to use the term "scrivener's error" applied to statutory interpretation, and that subsequent cases have used it rarely in the majority to defeat plain language).

addition to various commentators, i.e., the plain language of the statute,⁴⁷ the Executive Branch's interpretation,⁴⁸ and at least one state court opinion.⁴⁹ This is as opposed to only one other state court's view.⁵⁰ Although the legislative history of the PTFA seems to say that it applies only to mortgage foreclosures,⁵¹ the use of legislative history in statutory interpretation falls lower in priority in the analysis than the plain language of the statute.⁵² Indeed, the question may be asked whether either state court decision can be held to be precedential on the issue of interpretation of a federal statute.⁵³ Consequently, at this early stage of interpretation of the PTFA, it appears that we only have unpublished opinions from two state courts holding opposite positions on the issue.⁵⁴ Thus, the PTFA may be applied to residential property tax foreclosures and perhaps other types of non-mortgage foreclosures across the country as well.⁵⁵

B. How Is the PTFA Applied in a Foreclosure by Advertisement State Such as Michigan with a Long Post-Sale Redemption Period?

"Nonjudicial foreclosure [i.e., foreclosure by advertisement/power of sale] is available to mortgagees in roughly sixty percent of the states."⁵⁶ Some examples of jurisdictions other than Michigan that have the process of foreclosure by advertisement or power of sale are Arizona, Georgia, Virginia, and the District of Columbia.⁵⁷ Michigan's redemption period for

47. *Negusie*, 129 S. Ct. at 1178.

48. 74 Fed. Reg., *supra* note 36, at 30,106–07.

49. NAT'L CTR. ON HOMELESSNESS & POVERTY RPT., *supra* note 23, citing RWW Props., LLC v. Stepanoff, No. N10-0072 (Cal. Super. Ct., Contra Costa Cty., May 25, 2010) (unpublished).

50. *Taylor*, 889 N.Y.S.2d at 805.

51. *Id.*; Schaafsma Interview, *supra* note 30. See also *Locke*, 105 S. Ct. at 1793 (noting that in that case there was no legislative history contrary to the Court majority's decision to uphold the plain language).

52. *Negusie*, 129 S. Ct. at 1178; *Locke*, 105 S. Ct. at 1793. But see *Collado*, 892 N.Y.S.2d at 735 ("Precedent exists that requires this Court to ignore the plain meaning of the word 'or', inserted into a hastily enacted amendment, to make it consonant with the function sought to be served . . .").

53. See *United States v. Gilbert Assocs., Inc.*, 73 S. Ct. 701, 703 (1953) (" . . . the meaning of a federal statute is for this Court to decide. ").

54. Compare note 38, *supra*, with note 52, *supra*.

55. See NAT'L CTR. ON HOMELESSNESS & POVERTY RPT., *supra* note 23, at 19 (noting that the two essentially nonprecedential New York opinions holding that the PTFA does not apply to nonmortgage foreclosures are from the same state district court judge, and, as of the report's issuance in June 2010, no New York appellate court had weighed in on the issue), citing *Collado*, 892 N.Y.S.2d at 731; *GMAC Mortgage*, 899 N.Y.S.2d at 802.

56. *Hester*, *supra* note 7, at 1212.

57. *Gold*, *supra* note 3, at 218, 219–20, 227, 228–29. See also ARIZ. REV. STAT. ANN. §§ 12-1282 and 12-1283 (West 2010) (providing for thirty-day and six-month redemption periods only). Generally, Georgia has no statutory right of redemption

mortgage foreclosures by advertisement/post-foreclosure sale⁵⁸ extends one year at its longest—one of the longer time periods for statutory redemption rights.⁵⁹ It can hardly be overstated that in the last few years, the State of Michigan has been hit with multiple economic and housing crises, leading to one of the highest rates of foreclosure in the country.⁶⁰ Compounding the problem have been allegations nationwide of mishandling of foreclosure procedures by lenders, lawyers, and courts alike.⁶¹ Systemic mishandling of foreclosure procedures necessarily impacts tenants in foreclosed properties arguably as much as it affects homeowners.⁶² Because the rate of foreclosures has been so high in Michigan, the need for the PTFA is likewise acute,⁶³ and analysis and tentative use of the PTFA by community service providers have been increasing in earnest.⁶⁴

Part of the confusion with application of the PTFA in a state's unique foreclosure process stems from a confusion in terminology. The terms "foreclose,"

for mortgage foreclosures. Hester, *supra* note 7, at 1212. Further, Hester opines that, with a few exceptions, Georgia's short two-month nonjudicial foreclosure process is typical of the nonjudicial process generally. Hester, *supra* note 7, at 1210.

58. "As the statutory right of redemption is used today, it requires the mortgagor, that is, the original borrower . . . to reimburse the purchaser at [the] foreclosure [sale] the amount paid at auction. This distinguishes the statutory right of redemption from equity of redemption, in which, before [the] foreclosure [notice], the borrower reimburses the lender the total amount still owed on the original mortgage." Pasquini, *supra* note 5, at 1508 (footnotes omitted). Pasquini's article addresses judicial foreclosures only. *Id.* at 1506 n. 48.

59. See generally Gold, *supra* note 3, at 218–30.

60. In August 2006, before the actual height of the simultaneous housing and economic crises, Michigan was already considered one of the ten states with the highest foreclosure rates in the nation. Pasquini, *supra* note 5, at 1510 and n. 69 (noting that from Aug. 2005–Aug. 2006, there had been a 53 percent increase in foreclosures).

61. See generally various authors, *Foreclosures* (special section), N.Y. TIMES, Oct. 21, 2010, available at <http://topics.nytimes.com/top/reference/timestopics/subjects/f/foreclosures/index.html?scp=1-spot&sq=foreclosures&st=cse> (last accessed Apr. 27, 2011). See also Sasha Chavkin, *False Attorney Signatures Cast New Doubts on Foreclosures*, PROPUBLICA BLOG, Dec. 13, 2010, available at <http://www.propublica.org/blog/item/false-attorney-signatures-cast-new-doubts-on-foreclosures> (last accessed Apr. 27, 2011).

62. Although beyond the scope of this article, one method (in addition to the PTFA) that would also alleviate the impact of foreclosure on tenants is to allow them standing to contest the foreclosure itself. Cf. Alexander, *supra* note 24, at 783–84, 786–88 (noting that many states provide that for property tax foreclosures, certain tenants must be given notice of the proceedings).

63. Congress presumably recognized this when it extended the PTFA's expiration date from 2012 to 2014. Amendment, *supra* note 2, § (2).

64. See generally Mich. Foreclosure Task Force Listserv, *supra* note 30, Nov. 30, 2010 (copies of e-mails on file with the author); see also various resources, available at <http://miforeclosure.mplp.org> (last accessed Apr. 27, 2011).

"notice of foreclosure," and "redeem" can have many meanings across many different states' processes.⁶⁵ In this scholar/practitioner's view, it is important to determine exactly what is occurring at that point in the foreclosure process, the status of title to the real property involved, and the next steps in the particular foreclosure process of the jurisdiction at issue.

In a foreclosure by advertisement/power of sale in Michigan, as in other states, the mortgage contract must contain a power of sale clause, allowing the lender to sell the property at issue upon default by the borrower.⁶⁶ A default on the mortgage by the borrower brings the power of sale clause into play.⁶⁷ Following the initial notice of foreclosure, when the lender exercises the power of sale and the advertisement process (publishing and posting) occurs,⁶⁸ whoever purchases the property obtains what is referred to as a sheriff's deed, which contains limited rights.⁶⁹ The lender, as the foreclosing party/mortgagee, may purchase the property⁷⁰ and, in this practitioner's experience, frequently does. This sheriff's deed/title with limited rights transfers immediately.

However, the borrower/mortgagor retains a statutory right of redemption, which restricts the purchaser's rights in the property at issue.⁷¹ Michigan, as an advertisement/power of sale state, is described as a "lien theory jurisdiction."⁷² In Michigan, following the initial foreclosure notice and sale, the mortgagor has the power to pay to reclaim or "redeem" full title to the real property during the redemption period.⁷³ The mortgagor can "pay[] the amount that was bid at the sale plus interest at the same rate as the mortgage, [plus] taxes and insurance."⁷⁴

65. See, e.g., Amendment, *supra* note 2, §§ 1(B) (amending the PTFA to define "notice of foreclosure"); Pasquini, *supra* note 5 (describing two distinct uses of the mortgage law term "redemption").

66. Compare MICH. COMP. LAWS ANN. § 600.3201 (West 2010), cited in Brown, *supra* note 7, at 25-1 (describing Michigan's foreclosure process), with Gold, *supra* note 3, at 218, 219-20, 227 (describing Arizona's, Georgia's, and Virginia's similar commonly used power of sale foreclosure processes).

67. MICH. COMP. LAWS ANN. § 600.3204(1)(b) (West 2010).

68. MICH. COMP. LAWS ANN. § 600.3208 (West 2010).

69. Brown, *supra* note 7, at 25-3, citing MICH. COMP. LAWS ANN. §§ 600.3232, 600.3240 (West 2010).

70. MICH. COMP. LAWS ANN. § 600.3228 (West 2010).

71. Brown, *supra* note 7, at 25-3, citing MICH. COMP. LAWS ANN. §§ 600.3232, 600.3240 (West 2010).

72. Compare Carl W. Herstein, *Real Property*, 45 WAYNE L. REV. 1159, 1191-92 nn.107, 108-09 (1999) (in Michigan, upon obtaining a mortgage, the borrower/mortgagor retains possession and title to property; following default and foreclosure, a borrower/mortgagor retains possession until the redemption period expires), with Gold, *supra* note 3, at 213-14 (describing "intermediate" and "title" theory jurisdictions).

73. MICH. COMP. LAWS ANN. § 600.3240 (West 2010).

74. Brown, *supra* note 7, at 25-3, citing MICH. COMP. LAWS ANN. § 600.3240 (West 2010).

Unfortunately, perhaps, as will be discussed further below, the redemption period for residential properties can be as long as thirty days (in case of abandonment of the real property);⁷⁵ six months (the general period of time for foreclosures in which the remaining debt amounts to greater than two-thirds of the amount of the original loan);⁷⁶ or one year (the general period of time for "other" foreclosures, which are understood to be those in which the remaining debt amounts to less than two-thirds of the amount of the original loan).⁷⁷ The purchaser at the so-called sheriff's sale, who is frequently the lender/mortgagee,⁷⁸ then potentially becomes a "successor in interest" under the PTFA and, thus, subject to its requirements.⁷⁹

The main issue under the original PTFA in states like Michigan with foreclosure by advertisement and potentially long redemption periods remains when the "notice of foreclosure" referred to in the PTFA occurs in the foreclosure process.⁸⁰ The PTFA states in relevant part that leases existing as of the "notice of foreclosure" fall within the PTFA's two main protections of the right to occupancy until the lease ends, and/or the right to ninety days' notice to vacate.⁸¹ Thus, the "notice of foreclosure" referred to in the PTFA determines primary eligibility for its protections and fixes the date that the potential ninety-day notice period begins to run.⁸²

Addressing this question, the text of the Amendment specifically states that the "notice of foreclosure" at issue occurs only after complete title passes to a successor.⁸³ In Michigan, complete title passes to a successor when the redemption period following the foreclosure sale expires, which takes place at the very end of the foreclosure process. Therefore, the required PTFA ninety-day notice to vacate must be given after the redemption period expires, and only then does the ninety-day period begin to run.⁸⁴

75. *Id.*, citing MICH. COMP. LAWS ANN. § 600.3241 (West 2010) (to use this shortened redemption period, the mortgagee must satisfy certain requirements set forth in the statute). See also MICH. COMP. LAWS ANN. § 600.3241a (West 2010).

76. MICH. COMP. LAWS ANN. § 600.3240 (West 2010).

77. Brown, *supra* note 7, at 25-3, citing MICH. COMP. LAWS ANN. § 600.3240 (West 2010). It should be noted that the statutes make reference to redemption periods of other, less commonly occurring lengths of time. See MICH. COMP. LAWS ANN. §§ 600.3240-600.3241a (West 2010).

78. See MICH. COMP. LAWS ANN. § 600.3228 (West 2010).

79. See PTFA, *supra* note 1, § 702(a). See also the NAT'L LAW CTR. ON HOMELESSNESS & POVERTY RPT., *supra* note 23, at 14.

80. See Gold, *supra* note 3, at 213-14, Schaafsma, *Summary*, *supra* note 30.

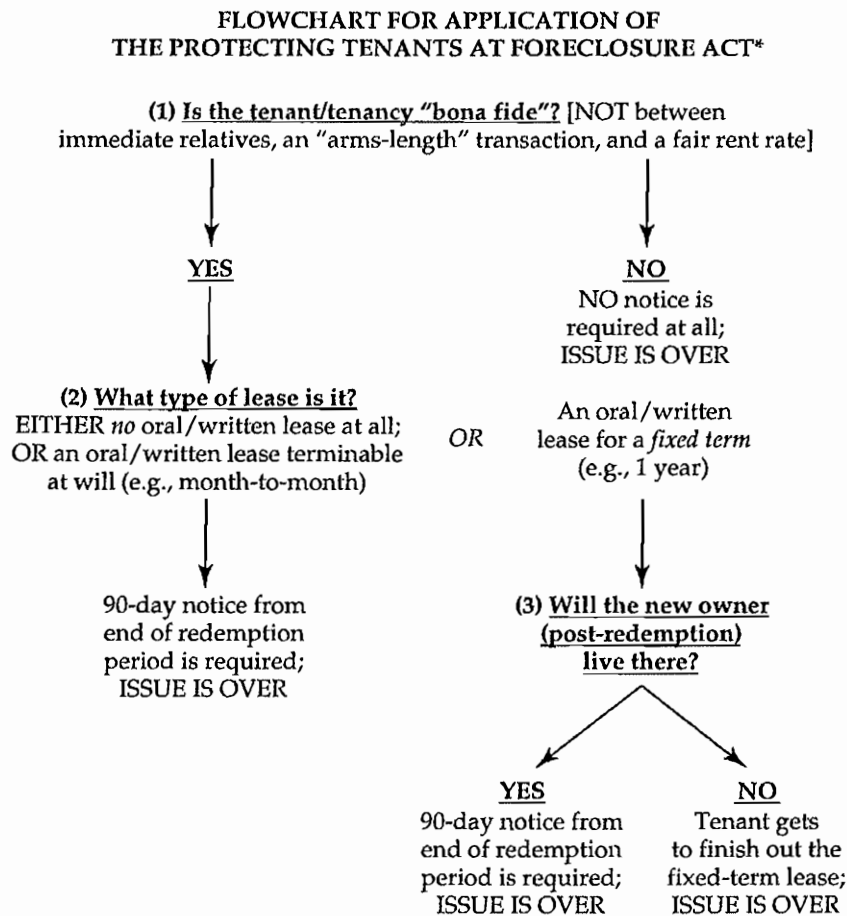
81. PTFA, *supra* note 1, § 702(a).

82. Schaafsma, *Summary*, *supra* note 30.

83. See, e.g., *Southland Home Mortgage, LLC v. Valle*, No. 10-15196-LT7, 2011 WL 722388, at *5 (S.D. Cal. Feb. 16, 2011) (holding that under California foreclosure law, a "notice of default" is not the "notice of foreclosure" referred to in the PTFA).

84. Schaafsma, *Summary*, *supra* note 30 (explaining the Amendment's definition of the phrase the "date of the notice of foreclosure"). See also Schaafsma Interview, *supra* note 30; accord *Protecting Tenants at Foreclosure Act: Guidance on Notification*

The flowchart that follows explains how the PTFA, as amended, interacts with a tenancy in a property that is undergoing foreclosure.



* The flowchart relates to mortgage foreclosures in states in which complete title does not pass to the subsequent owner until the end of the redemption period. The Amendment, *supra* note 2, §§ (1)(B). The flowchart comes into play only with tenancies entered into before complete title passes. The PTFA, *supra* note 1, § 702(a)(2). The author developed the flowchart for use in the Clinic and for her Housing Law Clinic I class, in which she teaches students how to apply the PTFA to advise clients and callers concerning the rights and duties of the statute.

Indeed, as an example of implementation of the “notice of foreclosure” point in time, the Michigan State Court Administrator’s Office revised its Notice to Quit–Termination of Tenancy form (Form D.C. 100c),⁸⁵ which is the standard notice to vacate for various reasons for termination of tenancy, including foreclosure on the mortgagors-owners of the property.⁸⁶ Form D.C. 100c now provides for choices of notice periods of twenty-four hours, seven days, thirty days, any other applicable regular rental period, or ninety days for eviction of tenants pursuant to the PTFA.⁸⁷

C. Is Monthly Rent Still Due and to Whom?

In a foreclosure by advertisement state with a potentially long post-sale redemption period, such as Michigan, the time between the start of the foreclosure process and when the tenant absolutely has to vacate the property or be taken to court can vary widely. The length of the intervening time period depends in pertinent part on the length of the redemption period and whether a written lease exists that extends beyond the time when complete title passes to the successor in interest. Such a lengthy remaining lease period, which may extend one year or perhaps longer,⁸⁸ raises the issue for many tenant advocates whether the tenant should continue to pay rent and to whom.⁸⁹ Because the length of time that tenants are in the property during the foreclosure process can extend seemingly indefinitely, tenants who might be vaguely aware of a pending foreclosure live in a constant state of uncertainty concerning whether they will be summarily evicted, whether the property’s condition will continue to be maintained, and whether they should pay rent to the original owner or some new foreclosing entity or subsequent owner.⁹⁰

Responsibilities Under the Act with Respect to Occupied Conveyance, 75 Fed. Reg. 66,385–86 (Oct. 28, 2010). In fact, the Amendment’s title states that it is a “clarification,” implying that the PTFA always had the meaning that it applied to tenancies created prior to the notice of foreclosure and prior to complete passage of title. See Pub. L. No. 111-203, § 1484, 124 Stat. 2203 (2010) (titled “Sec. 1484. Protecting Tenants at Foreclosure Extension and Clarification”).

85. See Schaafsma, *Summary*, *supra* note 30 (noting the change in the court form).

86. MICH. COMP. LAWS ANN. § 600.5714(1)(f) (West 2010) (allowing summary proceedings to recover possession of premises “[w]hen a person continues in possession of premises sold by virtue of a mortgage or execution, after the time limited by law for redemption of the premises”).

87. Mich. Dist. Ct. Form D.C. 100c, available at <http://courts.michigan.gov/scao/courtforms/landlord-tenantlandcontract/dc100c.pdf> (last accessed Apr. 27, 2011).

88. See Pasquini, *supra* note 5, at 1507 n.56.

89. See E-mail from Michigan State University Housing Law Clinic Director Brian G. Gilmore to the Mich. Foreclosure Task Force Listserv, Nov. 30, 2010, *supra* note 30 (copy on file with the author).

90. See Creola Johnson, *Renters Evicted en Masse: Collateral Damage Arising from the Subprime Foreclosure Crisis*, 62 FLA. L. REV. 975, 977, 990 (2010) (noting the PTFA

In Michigan, as described above, complete title does not pass to (frequently) the lender/mortgagee (a potential successor in interest) until the expiration of the redemption period.⁹¹ Thus, in order to determine *whom* to pay (the original mortgagor/landlord, the mortgagee/bank, or another successor in interest/subsequent purchaser), tenants must determine where their landlord's property is in the foreclosure process. Unfortunately, for a layperson, particularly in cases in which an indigent tenant may be uneducated or unsophisticated in real property matters, determining who holds present record title makes for a daunting task. I have seen tenants in this quandary firsthand at the Housing Law Clinic where I teach and practice. But, determining who holds present record title is an important issue: if the mortgagor/original owner still has the right of redemption, which includes the present right to possession,⁹² the tenant should pay rent to the mortgagor/original owner.⁹³ Yet, if the statutory right of redemption has expired and full title has passed to the mortgagee/successor in interest, the tenant should pay the mortgagee/successor in interest.⁹⁴ Moreover, the tenant and new landlord/successor in interest frequently form a residential lease contract, essentially by performance—the tenant by living in the property and paying rent, and the owner of record by accepting that rent.⁹⁵

Further, strictly speaking from a legal perspective, and to protect themselves from eviction, as long as tenants live in the property during the fore-

leaves open the questions whether rent should be paid and whether the lender has to maintain the condition of the property during the foreclosure process); Gilmore, E-mail, *supra* note 89 (raising the payment of rent concern).

91. Herstein, *supra* note 72. See also *supra* notes 45-51, and accompanying text.

92. Brown, *supra* note 7, at 25-3.

93. See E-mail from Karen M. Tjapkes, Attorney for Legal Aid of Western Michigan, to the Michigan Foreclosure Task Force Listserv, *supra* note 30, Nov. 30, 2010 (copy on file with the author). See *contra* E-mail from Paul Sher, Attorney for Legal Services of South Central Michigan, to the Michigan Foreclosure Task Force Listserv, Nov. 30, 2010 (copy on file with the author) (advising that tenants should escrow their rent rather than pay a foreclosed mortgagor during the redemption period because unless the mortgagor redeems, the mortgagor likely has no intent to maintain the property); E-mail from Ted W. Phillips, Executive Director of the United Community Housing Coalition, to the Michigan Foreclosure Task Force Listserv, *supra* note 30, Nov. 30, 2010 (copy on file with the author) (advising that tenants escrow the last month or two of rent while living in a foreclosed property, to make up for the loss of any security deposit, which would be difficult to recover later).

94. See, e.g., *Patriot Nat'l Bank v. Amadeus*, No. 601931/2009, 2010 WL 4272603, at *4-5 (N.Y. Sup. Ct. 2010).

95. See generally 49 AM. JUR. 2d *Landlord and Tenant* § 118 (2010) (providing in part that "[a] 'tenancy-at-will' is that which a tenant has by an entry made thereon under a demise to hold during the joint wills of the parties," and that a tenancy at will may arise by implication); *Ann Arbor Tenants Union v. Ann Arbor YMCA*, 581 N.W.2d 794, 799-800 (Mich. Ct. App. 1998) (setting forth the basic elements of creation of a tenancy).

closure process, they should attempt to pay rent.⁹⁶ As long as a tenant and property owner have an agreement for the rental of property for pay, a legally enforceable contractual relationship arises.⁹⁷ Not surprisingly, an oral or written lease for a specified term may be enforced for that full term with few exceptions. Even if the lease is a month-to-month lease or other periodic tenancy rent must be paid for the period the tenant resides in the property, until the tenancy terminates upon expiration of the period for which notice to vacate was properly given—whether that notice is given by the successor in interest or the tenant.⁹⁸

IV. Conclusion

A broad federal law like the PTFA cannot help but fail to address each individual state's foreclosure process. As state and federal courts have more opportunities to construe the PTFA, these issues may be increasingly resolved. Additionally, states may fill in the number of gaps left by the PTFA and more specifically apply their own foreclosure and summary proceedings laws through new protective legislation.⁹⁹ The uncertainty and lack of communication and information surrounding the tidal wave of foreclosure of rental properties heightens in residential mortgage foreclosures by advertisement with a potentially lengthy post-sale redemption period. Even after the foreclosure crisis passes and the PTFA sunsets as planned in 2014,¹⁰⁰ or Congress extends it yet again, it would be preferable if legislative bodies enact permanent federal and state law protections to assist tenants in foreclosure.

96. See generally *Ann Arbor Tenants Union*, 581 N.W.2d at 799-800; but see Sher, E-mail, *supra* note 93; Phillips, E-mail, *supra* note 93.

97. 49 AM. JUR. 2d *Landlord and Tenant* § 118 (2010); *Ann Arbor Tenants Union*, 581 N.W.2d at 799-800.

98. At a minimum, in this situation, or if the tenant does not know whom to pay, rent should be escrowed. See Phillips, E-mail, *supra* note 93.

99. See generally Eloisa Rodriguez-Dod, *Stop Shutting the Door on Renters: Protecting Tenants from Foreclosure Evictions*, 20 CORNELL J.L. & PUB. POL'Y 243, 255-65 (2010); see also, e.g., H.B. 4222, 2011 Leg. (Mich. 2011).

100. Amendment, *supra* note 2.