

The Ohio State University

From the Selected Works of Creola Johnson

February 26, 2010

Renters Evicted En Masse: Collateral Damage Arising From the Subprime Foreclosure Crisis

Creola Johnson



Available at: https://works.bepress.com/creola_johnson/2/

**RENTERS EVICTED EN MASSE: COLLATERAL DAMAGE
ARISING FROM THE SUBPRIME FORECLOSURE CRISIS
CREOLA JOHNSON***

I. INTRODUCTION

Across the country, innocent renters are becoming victims of their landlords' inability to avoid foreclosure on their rental properties. Many are not receiving the legal rights that they are entitled to under federal and state law.¹ For example, Marjorie Benedum and her husband Mel Harris came home from church in December of 2009 to find a sheriff's notice on their door warning them to move out in 10 days or be evicted from their Baltimore home.² The notice came as a shock to Benedum and Harris as they had never failed to pay their rent on time.³ They learned their impending eviction was a result of the foreclosure on the property against their landlord.⁴ What the couple did not know when they found the notice of eviction is that they were entitled to stay in the property for 90 days under a new federal law.⁵ Luckily, this family learned their rights from a local attorney and did not have to immediately vacate their home, but not every family is so fortunate.⁶

* Creola Johnson (johnson.1904@osu.edu), Professor of Law, The Ohio State University, Michael E. Moritz College of Law. Thanks to Britney Cochran and David Dirr for their research assistance.

¹ See, e.g., Gabe Treves, *Fannie Mae Violates its Own Policy By Throwing Tenants Out After Foreclosure*, NEWS BLAZE, Feb. 3, 2010, available at <http://newsblaze.com/story/20100203121442zzzz.nb/topstory.html> (discussing the growing number of complaints from California renters against Fannie Mae because it is relying on real estate agents to handle its foreclosed properties even though these agents are violating federal law and Fannie Mae's own policies that are supposed to protect innocent tenants from eviction).

² Jamie Hopkins, *More Maryland Renters Caught Amid Foreclosure Lenders and Agents are Seeking Rapid Evictions Despite New State and Federal Laws Passed to Protect Tenants*, BALTIMORE SUN, Dec. 30, 2009 at 1A.

³ *Id.*

⁴ *Id.*

⁵ *Id.*

⁶ *Id.*

Lenders, as mortgagees, are foreclosing on homes as more and more borrowers find themselves unable to pay their mortgages.⁷ Lenders have been relying on the assumption that taking the homes via foreclosure is the best course of action since they can be resold to cover the outstanding mortgage indebtedness.⁸ Relying on such assumption has proven to be wrong in too many instances because it ignores current market conditions, results in innocent people being evicted from affordable housing, and results in residential properties remaining vacant and becoming public nuisances.⁹

Many of the borrowers facing foreclosure are non-occupant owners. No doubt, some tried to be prudent investors who saw owning real estate as a long-term investment. Others were speculators or flippers—people who obtained adjustable rate loans to purchase homes for the sole purpose of reselling the homes at a profit within a year or two of purchase.¹⁰ However, when the housing bubble burst and economic conditions took a turn for the worst, many borrowers-landlords became trapped with mortgage payments they could not afford and residential properties they could not sell.

⁷ See, e.g., Press Release, *Attorney General Warns Law Firms, Banks and Real Estate Companies To Stop Illegal Evictions*, Connecticut Attorney General's Office, Feb. 1, 2010 [hereafter *Attorney General Warns Law Firms, Banks and Real Estate Companies*]

⁸ See *Neighborhoods: The Blameless Victims of Subprime Mortgage Crisis: Hearings Before the Subcomm. on Domestic Policy of the H. Comm. on Oversight and Government Reform*, 110th Cong., 96-115 (statement of Doug Leeper, Code Enforcement Manager, City of Chula Vista, Calif., stating lenders did not prepare for fallout from issuing too many risky loans and stating that they believed they could simply sell the house after the borrower's default).

⁹ See *Attorney General Warns Law Firms, Banks and Real Estate Companies*, *supra* note 7 (quoting Richard Blumenthal, Conn. A.G., as saying “[m]indless and needless automatic evictions benefit no one - - devastating tenants, the neighborhood and the new property owner,” and “not only harm tenants, but turn vacant properties into eyesores and even crime havens, [thereby] diminishing values neighborhood wide”).

¹⁰ See Ada Focer, *Flip... Flip... Flip... Flop: Mortgage Fraud and Property “Flipping” Skew Low-Income Housing Markets*, SHELTERFORCE, Sept. 2000, at 10, 10, available at <http://www.nhi.org/online/issues/113/focer.html> (“Land or property flipping (as distinct from loan flipping which is repeated refinancing by predatory lenders) happens when property is purchased and quickly resold for a large profit, after little or no meaningful rehabilitation.”).

The innocent victims of these landlord-borrowers are consumers like the couple in Baltimore who simply had the misfortune of renting a house or apartment from a landlord-borrower unable to pay the mortgage. Despite having never defaulted on their rental payments to the landlord-borrower and enactment of a new federal law giving tenants 90 days to vacate foreclosed properties, renters are being ordered to vacate in as little as three days or else face eviction.¹¹ Some tenants are not even aware of the landlord's trouble until the sheriff arrives to evict them or until their utilities are turned off due to the landlord's failure to pay the utility bills.¹² Scrambling to quickly come up with sufficient cash for moving expenses and a security deposit to get another place to rent, some tenants then find themselves on the brink of homelessness.¹³

Because of a policy of automatically evicting tenants upon foreclosure, some lenders along with their lawyers and property managers, have been accused of violating federal and state laws by lying to tenants¹⁴ or harassing and intimidating them to get them to vacate the foreclosed properties.¹⁵ Such harassment and intimidation from lenders and their agents include threatening tenants with eviction lawsuits if they do not comply with the lenders' demands, threatening to

¹¹ See, e.g., Peralte C. Paul, *Renters Aided If Landlord Defaults*, ATLANTA J. - CONST., Nov. 9, 2009, at A1 (stating that many lawyers are ignorant about the new law and banks are hesitant to volunteer information about the new law to tenants).

¹² See *Assembly Approves Assemblyman Torrico's Protections for Renters in Foreclosed Properties*, U.S. STATE NEWS, May 29, 2008, available at 2008 WLNR 10237454.

¹³ See, e.g., National Coalition for the Homeless, et al., *Foreclosure to Homelessness 2009: the Forgotten Victims of the Subprime Crisis*, available at <http://www.nationalhomeless.org/advocacy/ForeclosuretoHomelessness0609.pdf> (reporting results of a survey of 178 organizations with direct knowledge about local homeless matters, 159 responded that some of their clients had become homeless as a result of foreclosure and that tenants were more heavily impacted than owner-occupants of foreclosed properties).

¹⁴ See, e.g., Judy Peet, *Foreclosure-based Evictions Leave Many Renters Homeless*, NEW JERSEY REAL-TIME NEWS, Jan. 17, 2010 (stating that the biggest violators in rural and suburban areas are real estate agents and that "lenders, lawyers and management companies are misinforming tenants in the cities").

¹⁵ See, e.g., *Attorney General Warns Law Firms, Banks and Real Estate Companies*, supra note 7 (reporting that Richard Blumenthal, Conn. A.G., issued cease and desist orders to "at least 15 bank and mortgage servicers, nine law firms and six real estate companies" telling them must comply with renter foreclosure protection laws or face enforcement proceedings).

damage the tenants' credit by reporting them to the credit reporting agencies, shutting off the tenants' water or electricity, and filing eviction lawsuits citing to non-existent or incorrect legal authority to create an aura of legitimacy for their eviction demands.¹⁶

Even if a lender's eviction of an innocent tenant is arguably grounded in the law, a blanket policy of evicting tenants is irrational given the current market realities. While America's housing market is showing some signs of improvement due to an \$8,000 tax credit for first-time home buyers,¹⁷ foreclosures are expected to continue to rise while home prices are predicted to remain stagnant or stabilize.¹⁸ Because lenders have tightened their lending standards, a growing number of potential borrowers do not qualify for mortgage loans.¹⁹ With real estate prices still well below desirable levels, a lender following a rational foreclosure policy would refrain from evicting tenants who are not in default under their leases and who are capable of maintaining the foreclosed properties until the housing market turns around and the properties can be sold at a profit.²⁰

¹⁶ See, e.g., Complaint, State of Cal. vs. Jarvis, et al., No. RG08 380738, at 2-3 (Cal. Super. Ct. Apr. 8, 2008); AG Orders Servicers and Attorneys to Stop Evictions, Feb. 3, 2010, www.dsnews.com (reporting that one non-profit legal aid organization discovered that a real estate agent told an innocent renter four or five statements that "were blatantly false, in an attempt to persuade the tenant to leave").

¹⁷ See Javier C. Hernandez, *New-Home Sales Rise, But Factory Orders Slip*, N.Y. TIMES, Nov. 26, 2009, at B3 (reporting the rise in home sales but noting other indicators of the continuing recession).

¹⁸ See *id.* (stating that "median prices, which have been relatively stable, fell slightly from a year earlier, to \$212,200, raising the possibility of a second collapse of the housing market"); Luke Mullins, *Home Prices Stabilize Further, But More Drops May Be in Store*, U.S. NEWS & WORLD REP., Jan. 26, 2010, (Pg. Unavail. Online), available at 2010 WLNR 1735274; Renae Merle *Housing Recovery Could Take a Decade, Economists Warn*, Wash. Post (Bus. Sec.), Jan. 26, 2010, (Pg. Unavail. Online) (stating "[h]ome prices have fallen 30 percent since reaching their peak in 2006, and many economists think they will take another tumble this year as more foreclosures pile on the market").

¹⁹ See Bob Tedeschi, *Lending Standards Tightened*, N.Y. TIMES, Jan. 27, 2010, at RE7.

²⁰ *Homeowners Are Not the Only Victims of the Mortgage Foreclosure Crisis; Tenants in Foreclosed Rental Properties Are Being Displaced Nationwide*. Testimony of Judith Liben, Housing Attorney at the Massachusetts Law Reform Institute Before The House of Representatives Committee on Financial Services 4 (Sept. 20, 2007), available at http://www.house.gov/apps/list/hearing/financialsvcs_dem/testimony_-_liben_1.pdf [hereinafter *Testimony of Judith Liben*] ("The banks rarely consider that in many cases it would be more prudent and

Part I of this Article describes the consequences of thousands of tenants of being evicted from residential properties obtained by lenders in foreclosure proceedings against the owners-landlords. The tenants suffer consequences such as losing their security deposits, struggling to find alternative housing, experiencing disruptions in family life, and even becoming homeless. In addition to individualized consequences, societal consequences include the costs imposed upon communities to provide social services to the evicted tenants and their families, and the burden on cities in dealing with homes left vacant due to the lenders' inability to sell them and failure to properly maintain them. Moreover, foreclosure-based evictions of innocent renters is proving to be a burden on the law enforcement officials tasked with enforcing lenders' debts by evicting innocent tenants.²¹

Part II of this Article analyzes the effectiveness of a new federal law, Protecting Tenants at Foreclosure Act ("PTFA"),²² as well as various state laws designed to afford protection to tenants who are not in default under their leases. The PTFA only gives a bona fide tenant who has a lease term greater than 90 days the right to stay for the remainder of the term and all other bona fide tenants the right to stay 90 days after notice is given.²³ Part II shows that because the PTFA failed to specify what the notice must contain and failed to prohibit common practices that lead to unlawful evictions, it falls short of striking a proper balance between protecting innocent tenants and granting the lenders commercial leeway in foreclosure proceedings. Not only does

more profitable to keep the buildings occupied with rent-paying tenants while they search for a new owner."").

²¹ See *infra* notes 55-57 and accompanying text (discussing one sheriff's temporary refusal to evict renters due to foreclosures against the landlord).

²² The PTFA is Title VII of the Helping Families Save Their Homes Act of 2009, Pub. L. No. 111-22, 123 Stat. 1632 (2009) (to be codified in scattered titles and sections of U.S.C.).

²³ See *id.*

the new federal law not go far enough to protect tenants, most tenants are not aware of the limited rights afforded to them under the PTFA.

To minimize the impact of the current foreclosure crisis on innocent tenants, Part III proposes amendments to the PTFA that include requiring the lender to maintain the property until the 90-day period has expired and follow procedures designed to provide easily-understood notice to the tenant about their rights and options long before a foreclosure sale is complete. Tenants should receive notices containing clear instructions about how to pay the rent. These requirements are needed to prevent lenders from intimidating tenants into vacating the foreclosed property immediately and from falsely claiming non-payment of rent as grounds for eviction.²⁴ Part III further proposes ways in which national, state and local officials can inform tenants of their rights under the existing law. All stakeholders—lenders, tenants, neighbors, cities, and taxpayers—benefit from a policy of allowing responsible tenants to remain in rental property until the end of their lease term. This not only allows lenders to receive a steady stream of rental revenue but allows the tenant to maintain affordable housing and prevents foreclosed properties from becoming vacant public nuisances.

I. RENTERS ARE HIT HARD BY FORECLOSURE CRISIS

Many tenants are being affected by the foreclosure crisis. While no one has an exact figure, studies estimate that up to 50 percent of all foreclosures involve residential properties that are not occupied by the owners. Because tenants are not usually named or joined as defendants

²⁴ See, e.g., Donna Rolando, *Knowing Rights Helped Ridgefield Park Tenant Keep Her Home*, NORTH JERSEY, February 7, 2010, available at http://www.northjersey.com/realestate/news_residential/83744067_Knowing_rights_helped_tenant_keep_her_home.html (stating that new owners of foreclosed properties sometimes deliberately hide from tenants information about where to pay rent because they know tenants must maintain rental payments to avoid eviction).

in foreclosure proceedings,²⁵ researchers are unable to accurately estimate the number of renters affected by the foreclosure crisis. A study by Harvard University's Joint Center for Housing Studies found that nearly 20 percent of foreclosures involve small investor-owned residential rental properties.²⁶

Higher estimates about affected tenants exist in certain parts of the country.²⁷ For example, a real estate agent who specializes in selling foreclosed properties estimates that 50 to 60 percent of the homes he has listed for sale in California were occupied by renters, many of whom first learned of their predicament when the agent told them they had to move.²⁸ Policy Matters Ohio, a nonprofit organization that researches economic issues impacting Ohioans, recently released a study finding that 3,918 foreclosures in the year 2007 were on rental properties in Cuyahoga County (the seat of Cleveland) and that this figure reflected a 29 percent

²⁵ See David Rothstein, *Collateral Damage: Renters in the Foreclosure Crisis*, POLICY MATTERS OHIO, June 2008, at 9, available at http://www.policymattersohio.org/pdf/CollateralDamage2008_0619.pdf (last visited July 8, 2008); *Without Just Cause, A 50-State Review of the (Lack of) Rights of Tenants in Foreclosure*, National Law Center on Homelessness & Poverty and the National Low Income Housing Coalition, February 25, 2009, at 7, available at http://www.nlchp.org/content/pubs/Without_Just_Cause1.pdf (last visited Feb. 17, 2010) (stating that only 12 states "explicitly require that tenants be named as parties to foreclosure proceedings in order for foreclosure to automatically terminate tenancies or otherwise provide the new owner with immediate possessory rights in the property").

²⁶ See *America's Rental Housing: The Key to a Balanced National Policy*, Joint Center for Housing Studies, Harvard University 1-2 (2008) (examining rental housing affordability issues in the context of the foreclosure crisis and stating that "[t]he plentiful supply of mortgage capital ... fed a substantial rise in high-risk lending to absentee owners of one- to four-unit rental properties").

²⁷ See, e.g., *Hidden Impact: California Renters in the Foreclosure Crisis*, TENANTS TOGETHER, Mar. 2009, at 6, available at <http://www.tenantstogether.org/downloads/ForeclosureReport.pdf> (finding that its analysis of data from a foreclosure firm about foreclosures in California "revealed that approximately one third of the residential units in foreclosure in 2008 were rentals" and estimating that at least 225,000 renters were impacted by these foreclosures); Ellen Yan, *Renters At Risk In Mortgage Crisis*, NEWSDAY, Mar. 4, 2009, at A34 (stating that one real estate firm, which represents banks in getting foreclosed properties ready for sale in Suffolk, New York, encounters tenants in at least 30 percent of the foreclosures).

²⁸ See Leslie Berkman, *Foreclosures Leave Tenants Out in Cold, Too*, PRESS-ENTERPRISE (Riverside Cal.), June 22, 2008, available at 2008 WLNR 11877063.

increase over the previous year.²⁹ The study also found that the foreclosure filing rate for rental properties grew at a rate higher than filings for owner-occupied properties.³⁰ Moreover, rental foreclosure filings represented nearly 30 percent of all residential property foreclosure filings in 2007.³¹

Research shows that many tenants do not understand their rights upon being ordered to vacate.³² For example, a 2006 survey of Illinois renters found that 37% of them did not understand their rights as tenants and 64% of them stated that their quality of life as renters would greatly improve if they knew their rights and responsibilities.³³ Therefore, one can understand why tenants who, fearful of eviction proceedings, would quickly vacate their premises after receiving notice of a foreclosure.³⁴ Sometimes judges do not understand eviction laws and issue eviction orders depriving innocent tenants of their statutory time period within which to vacate the premises.³⁵

Besides judges exacerbating the foreclosure problem for renters, lenders are accused of capitalizing on the ignorance and fears of tenants by intimidating them into vacating the foreclosed properties.³⁶ For example, in Oakland, California, the conduct of lenders and their

²⁹ See Rothstein, *supra* note 25, at 3-4 (reporting that two-thirds of the foreclosure filings were in Cleveland, where more than half of the city's households are renters).

³⁰ The likely explanation for this is that a small-investor landlord that is experiencing a financial crunch is likely to let the rental property go into foreclosure before letting his or her owner-occupied property go into foreclosure.

³¹ *Id.*

³² See, e.g., C.W. Nevius, *Renters' Eviction Notices Are Often Illegal in S.F.*, S.F. CHRON., Dec. 18, 2008, at B1.

³³ See Douglas Schenkelberg, Tammie Grossman, and Katherine Walz, *Insecure in Your Own Home: What it Means to Rent in Illinois*, (January 2006) <http://www.nlihc.org/doc/repository/IL-Insecure.pdf> (last visited Oct. 30, 2008) (discussing findings of the Illinois Renters Survey, which had the objective of understanding the experiences of tenants in Illinois and makes recommendations regarding how best to improve the quality of life for them).

³⁴ See, e.g., Nevius, *supra* note 32, at B1.

³⁵ *Id.*

³⁶ See, e.g., Mary Ann Wilbourn, *Renters also fall victim to wave of foreclosures*, PRESS ATLANTIC CITY, June 1, 2008, at D1, available at, 2008 WLNR 10430558 (President of the Orange County Association of

agents against renters has been outrageous. In fact, the city attorney sued one real estate firm that acted as property manager for several banks and boasted about having a track record of “generating results” for banks by “significantly reducing their carrying costs from time of acquisition to time of disposition.”³⁷ The city attorney accused the firm of violating Oakland’s “just cause” ordinance in numerous ways including: intimidating tenants into taking paltry “cash for keys” offers to vacate; turning off tenants’ heat and electricity; refusing to return tenants’ phone calls in reply to notices to vacate; refusing requests for information about the foreclosure or the identity of the new property owner; failing to provide a just cause for eviction such as proof of nonpayment of rent; and failing to advise tenants of their right to seek advice from Oakland’s rent board.³⁸ The firm settled after being sued.

A. Renters and Their Families Pay Huge Financial and Social Costs

When lenders and their agents engage in tactics to force tenants out, it cost tenants a lot to immediately vacate their current housing and find other suitable housing. The overwhelming majority of renters are not refunded their security deposits or the remainder of the current month’s rent previously paid to the landlord.³⁹ Without such a refund, tenants must quickly find cash or credit to pay for moving expenses to relocate to a new place and to pay for utility deposits to secure utility services at the new place. Not only does the tenant need money for these expenditures but will need enough money to pay a new security deposit, along with the

Realtors states that out-of-state lenders are the biggest intimidators of tenants in foreclosure and that they do not know about California’s 30-day notice requirement to evict a tenant); John M. Glionna, *Renters Fight to Stay in Foreclosed Buildings*, L.A. TIMES, March 12, 2008, at C1 (“Area activists agree ... low-income renters who have the right to remain in their homes are increasingly being harassed in foreclosure proceedings by lenders eager to be rid of them.”).

³⁷ See Christopher Heredia, *City Sues Landlord Alleging Illegal Evictions From Foreclosed Homes*, S.F. CHRON., April 10, 2008, at B2.

³⁸ *Id.*; Complaint, *City of Oakland vs. Jarvis, et. al*, No. RG08-380738 (Superior Ct., Alameda County Apr. 8, 2008). The firm settled after being sued.

³⁹ See Rothstein, *supra* note 25, at 10 (reporting that “80 percent of renters lose their entire security deposit and roughly 15 percent receive some of their deposit and rent back”).

first and, sometimes, last month's rent.⁴⁰ However, due to the current contraction of consumer credit, tenants may find reasonably-priced credit unattainable and may resort to usurious payday loans in order to obtain cash to cover all of the relocation costs.⁴¹ There are numerous news stories of innocent tenants unable to afford relocation expenses, especially given that security deposits can be as high as \$1,500.⁴² An Ohio study estimates that the average costs to a tenant displaced by foreclosure to be \$2,558.⁴³ Tenants who live in cities, like San Francisco, with high-cost rental properties for moderate-to-low income earners, can expect to pay more to find alternative housing after eviction.⁴⁴

In addition to suffering economic costs directly related to the loss of the rental property,⁴⁵ tenants suffer in other ways. The abruptness of the displacement presents transportation challenges to renters having to find alternative housing if they are reliant on public transportation or are struggling to afford gas prices in order to get to work. Renters may also experience difficulties obtaining affordable childcare for infants and toddlers. Abrupt displacement by

⁴⁰ See Schenkelberg, *supra* note 33, at 8 (stating that roughly 25% of renters had been asked by a landlord "to pay a security deposit equal to at least twice their monthly rent"). The required security deposit varies based on where the rental unit is located and the size and type of the unit.

⁴¹ See generally, Creola Johnson, *Dear President Obama: You Protected The Troops; Now Fulfill Your Promise To Protect All Americans From Payday Loans*, __ Ohio State L.J. __ (discussing how payday loans, which are marketed as a short-term solution for a financial emergency, often ensnare consumers in a cycle of an indebtedness that has a likelihood of sending a consumer into bankruptcy court for relief) (publication pending).

⁴² See, e.g., Tim Logan, *Renters Often Become the Forgotten Victims*, ST. LOUIS POST-DISPATCH, June 20, 2008, at B1 (A single mother with four children attempted to find a alternative rental housing after losing her place to foreclosure and she expressed her frustration that at every place she visited, the prospective landlord wanted either \$1,000 or \$1,500 for a security deposit).

⁴³ See Rothstein, *supra* note 25, at 3-4 (reporting that two-thirds of the foreclosure filings were in Cleveland, where more than half of the city's households are renters, and estimated that based on the number of rental units, "it is possible that renter families experienced \$10 million in losses because of foreclosure filings").

⁴⁴ Research shows that rental properties in several US cities are severely unaffordable for low-to-moderate income tenants See, e.g., Barbara Whitaker, *Few Options for Displaced Tenants*, N.Y. TIMES, February 6, 2005.

⁴⁵ Tenants who attempt to fight eviction will also have to incur legal fees if they do not qualify for legal aid.

foreclosure also presents challenges to a tenant's family in the form of uprooting children from school and transferring them to other schools. Children who switch schools frequently tend to experience behavioral problems and poor performance. One study found that "[s]tudents with two or more school changes in the previous year are *half* as likely to be proficient in reading as their stable peers."⁴⁶ Officials in Flint Michigan have been so troubled by foreclosures and the dislocation of renters and their children that the officials have implemented a program that pays a monthly rental subsidy of \$100 to qualifying parents to help them stay in the same school district.⁴⁷

B. Displacement of Renters by Foreclosure Imposes Costs on Communities

Besides renters and their families, the community and municipality in which the renter family is located are also impacted by the foreclosure crisis. Taxpayers bear the burden when public agencies provide social services to evicted tenants and their families as well as direct financial benefits like the rent subsidy mentioned above.⁴⁸ Churches and other nonprofit organizations also help tenants by offering services and financial help, including paying security deposits to help tenants secure alternative housing.⁴⁹ The eviction of innocent tenants by foreclosing lenders has caused one county sheriff to (1) hire a social worker to help evicted tenants find alternative housing, (2) assign an attorney to investigate potential instances of mortgage fraud, and (3) expand the sheriff's financial crimes unit to include investigations into

⁴⁶ Rumberger, Russell, *The Causes and Consequences of Student Mobility*, JOURNAL OF NEGRO EDUCATION. Vol. 72, No. 1, pp. 6-21, (2003).

⁴⁷ See Erik Eckholm, *To Avoid Student Turnover, Parents Get Help With the Rent*, N.Y. TIMES, June 24, 2008, A15 (stating that "the recent rash of foreclosures on landlords is adding to the problem, forcing renters from their homes" and reporting that Michigan's Department of Human Services pays the subsidy directly to the landlords of the tenants).

⁴⁸ *Id.*

⁴⁹ See, e.g., Stephanie Armour, *Renters Can't Escape Housing Crisis[:] Rents Rise as Foreclosures Send Owners Packing*, USA TODAY, Apr. 22, 2008, at B1 (reporting that a tenant family displaced by foreclosure lost their \$5,000 and would have been homeless had the church not lent them the money for a new security deposit).

claims of mortgage fraud to protect innocent tenants.⁵⁰ Consequently, aid to innocent renters evicted by lenders unduly strains public and private resources.

Rather than relying on governmental agencies and charitable organizations, some tenants displaced by foreclosure resort to living with friends and families, thus coining the new term “doubling up.”⁵¹ This could lead to overcrowding and safety hazards.⁵² Displaced renters who are not fortunate enough to have such a support system become a greater burden to the community by resorting to homeless shelters or subsidized transitional housing.⁵³

The eviction also negatively impacts the law enforcement community to the extent they are involved in evictions. Sheriff Thomas Dart suspended foreclosure evictions in Cook County, Illinois (which includes Chicago) because he believed that lenders were leaving it up to the sheriff’s deputies to determine who lived in foreclosed properties and that innocent tenants were being forced out by lenders.⁵⁴ During a CNN interview he stated: “These mortgage companies ... don’t care who’s in the building. They simply want their money and don’t care who gets hurt along the way. On top of it all, they want taxpayers to fund their investigative work for them.

⁵⁰ Thomas J. Dart, *Safeguards Added to Eviction Process*, Cook County Sheriff’s Office; http://www.cookcountysheriff.org/press_page/press_evictionSafeguards_10_16_08.html (last accessed 10/31/08)

⁵¹ See Rothstein, *supra* note 25, at 10, n. 25 (stating that while little data is available about families in this living condition “[d]oubling up is becoming an increasingly popular route for families facing foreclosure, eviction, or homelessness”).

⁵² *The Impact of the Foreclosure Crisis on Public and Affordable Housing in the Twin Cities: Hearing Before the House Financial Services Committee, Subcommittee on Housing and Community Opportunity*, 111th Cong. (2010), at 2-3 (statement of Michael Dahl, Public Policy Director with HOME Line), available at http://financialservices.house.gov/hearings_all.shtml (last visited Feb. 17, 2010) [hereinafter *Impact of the Foreclosure Crisis on Public and Affordable Housing*] (stating that “‘doubling up’” may be an important short-term transitional fix to avoid homelessness, but poses serious concerns about overcrowding if these households are unable to find affordable rental housing down the road”).

⁵³ See, e.g., *id.* (stating that three families out of 50 interviewed temporarily stayed at a shelter).

⁵⁴ Cook County Sheriff Tom Dart brought the issue of the impact of foreclosure-based evictions to light when he announce that the sheriff’s department was “just not going to evict innocent tenants” any longer. M.J. Stehpey, *The Sheriff Who Wouldn’t Evict*, TIME MAGAZINE, October 13, 2008, available at <http://www.time.com/time/nation/article/0,8599,1849454,00.html> (last accessed November 11, 2008).

We're not going to do their jobs for them anymore. We're just not going to evict innocent tenants. It stops today.”⁵⁵

Many lenders, as a result of their irresponsible lending to risky landlords,⁵⁶ have made law enforcement unwilling participants in what is essentially debt collection work, not crime prevention or detection. Law enforcement units, whose resources are already strained, are being made to enforce lenders' loans by throwing dutifully-paying renters out on the street with very little notice and no resources with which to find alternative living arrangements. Moreover, foreclosures have a disproportionate impact on minority communities. As a result, by the lenders' putting law enforcement personnel in a position of perceived unfair action against renters, law enforcement will be impeded in their effectiveness and reputation in actual crime prevention and criminal investigative work in minority communities who tend to be more distrustful of law enforcement than predominately white communities.⁵⁷

When lenders follow a blanket policy of evicting tenants, they not only unfairly burden renter families and the communities that help them, but lenders further inflict harm because these evictions substantially increase the number of abandoned and blighted properties. The dramatic increase in foreclosures and subsequent eviction of tenants and homeowners has led to a dramatic rise in vacant blighted properties.⁵⁸ Because the supply of residential housing

⁵⁵ *Illinois Sheriff Scolds Banks for Evictions of “Innocent” Renters*, Oct. 9, 2008, <http://www.cnn.com/2008/US/10/08/chicago.evictions/index.html> (last visited Feb. 23, 2010) (reporting foreclosures have more than tripled from 1999 to October 2008).

⁵⁶ See 155 CONG. REC. S5060 (daily ed. May 4, 2009) (statement by Sen. Schumer) (describing various substandard practices use by lenders to underwrite for mortgages on multifamily rental properties and stating that “this kind of basic underwriting malpractice has left tens of thousands of families in New York State and other States vulnerable”).

⁵⁷ The author observed that news coverage about Sheriff Dart showed minority residents upset by the eviction of innocent renters.

⁵⁸ See Creola Johnson, *Fight Blight: Cities Sue Lenders to Hold Them Responsible for the Rise in Foreclosures and Abandoned Properties*, 2008 UTAH L. REV. 1169, 1198-1227 (2008) (hereinafter Johnson, *Fight Blight*) (discussing how lenders' foreclosure practices has cause a spike in abandoned blighted properties).

substantially exceeds the demand for them, many vacant residential properties have become eyesores as they deteriorate due to neglect and become a target of criminals, such as thieves stripping the homes of copper and other valuable materials.⁵⁹

This increase in vacant blighted houses decreases the values of neighboring properties and, in turn, lowers the tax revenues cities can collect.⁶⁰ For instance, a study conducted using the City of Philadelphia's housing market found that homes within 150 feet of an abandoned property "experienced a net decrease in sales price of \$7,627."⁶¹ Three counties in Michigan have a projected combined \$34 million decrease in tax revenue for the year 2009 as a result of the foreclosure crisis.⁶² Declining property tax revenues for cities has a domino effect, including less revenue for cities to provide social services such as police and fire protection.⁶³

Moreover, these abandoned and blighted properties often become public nuisances and can endanger the surrounding communities. Long-term vacancies in neighborhoods lead to a higher prevalence of arson, drug-dealing, prostitution, gang activity, and murder.⁶⁴ Abandoned properties often become dangerous fire hazards, dumping grounds for toxic materials, and breeding grounds for vermin and insects.⁶⁵ Dealing with all of these conditions has caused cities to tap into already severely limited budgets to provide services to secure the vacant properties.⁶⁶

⁵⁹ *Id.* at 1181-90 (explaining how foreclosures lead to vacant properties and how such vacancies result in increased criminal activities).

⁶⁰ *Id.* at 1190.

⁶¹ Ann B. Shlay and Gordon Whitman, *Research for Democracy: Linking Community Organizing and Research to Leverage Blight Policy*, University of Toledo COMM-ORG working paper, available at <http://comm-org.wisc.edu/papers2004/shlay/shlay.htm> (last accessed 10/27/08).

⁶² See Steve Neavling, *\$34 million in lost property taxes forces cuts in county services: Foreclosures drain cash from counties*, Det. Free Press, Oct. 16, 2008.

⁶³ See, Alan Mallach, *Abandoned Property: Effective Strategies to Reclaim Community Assets*, FANNIE MAE FOUNDATION (2004), at 5, http://www.fanniemae.foundation.org/programs/hff/pdf/HFF_v6i2/pdf.

⁶⁴ *Id.* at 6.

⁶⁵ *Id.*

⁶⁶ *Id.*

These are services that should be the responsibility of lenders holding the mortgages on the vacant properties.

Because many lenders have abdicated their responsibilities, cities are engaged in protracted and expensive litigation to hold lenders responsible for damages for abating the nuisance at thousands of blighted foreclosed properties and expenses incurred to providing services at the properties.⁶⁷ Some cities file against lenders individual nuisance abatement and receivership/foreclosure actions, but they are often unsuccessful because, as a result of securitization of residential mortgages, cities do not know which entity actually holds the mortgages on the blighted properties.⁶⁸ Additionally, because such civil proceedings often prove ineffective, some cities, such as Buffalo and Cleveland, have resorted to criminal proceedings to force them to repair or demolish abandoned properties.⁶⁹

Along with individual civil or criminal proceedings that seek to hold one lender responsible for a single residential property, cities like Baltimore, Buffalo and Cleveland, are also using very costly mass litigation to sue large financial institutions to hold them responsible for thousands of foreclosed and vacant properties.⁷⁰ Baltimore's lawsuit was the first one against a large mortgage lender, Wells Fargo, and accuses it of predatory lending practices, in violation of the Fair Housing Act, and claims that these practices led to large-scale foreclosures that were primarily in the city's predominately African-American communities.⁷¹ Buffalo, which estimates it has 10,000 vacant buildings, sued 36 lenders for violations of nuisance and property maintenance codes to recover the cost of maintaining or demolishing numerous abandoned

⁶⁷ See *Fight Blight*, *supra* note 58, at 1195-99.

⁶⁸ *Id.*

⁶⁹ *Id.* at 1220-25.

⁷⁰ *Id.*

⁷¹ *Id.* at 123031.

homes.⁷² Cleveland's lawsuit against 21 financial institutions claims that their funding of subprime loans to mortgage lenders (like Wells Fargo) created a public nuisance as a result of the thousands of foreclosures against residential properties in Cuyahoga County.⁷³ At this time, all of these cases are pending but if any city is successful, other cities are sure to follow suit.⁷⁴ Whether cities use civil or criminal proceedings in response to the increase in vacant blighted properties, they have to incur considerable additional cost for a foreclosure crisis that lenders are partially responsible for creating.

Apart from the far-reaching financial burden and negative impact on communities through blighted and vacant properties, the displacement of renters through foreclosures also exacerbates the affordable housing crisis.⁷⁵ Displacement forces renters to compete for a decreasing stock of affordable rental properties with both the consumers who historically rent and borrowers who are losing their principal residences to foreclosure.⁷⁶ This increased demand for rental property coupled with the constrained supply, driven by a stagnant new building construction, creates a shortage in affording rental property which is likely to lead to rising prices that the displaced renters cannot afford.

⁷² *Id.* at 1195-204.

⁷³ *Id.* at 1205-21.

⁷⁴ Cities can consider suing other bad actors. For example, Minneapolis and three of its neighborhood associations filed suit against a real estate company, TJ Waconia, along with its principals and related companies, and won their first legal battle when a judge appointed a legal custodian to manage and sell 141 blighted properties.

⁷⁵ *See, e.g., Impact of the Foreclosure Crisis on Public and Affordable Housing, supra* note 52 (stating that Minnesota is "struggling with limited resources - like so many other states - to provide affordable housing opportunities for tens of thousands of homeowners displaced by the ongoing foreclosure crisis, and the nationwide economic recession").

⁷⁶ *See, e.g., id.* (stating that when HOME Line received on 47 calls from across Minnesota from tenants living in a property faced with a foreclosure. If we do nothing except address the foreclosure crisis this year, additional fundamental problems with the housing market will remain. Minnesota is "struggling with limited resources - like so many other states - to provide affordable housing opportunities for tens of thousands of homeowners displaced by the ongoing foreclosure crisis, and the nationwide economic recession").

The subprime foreclosure crisis has truly become an example of capitalism at its worst. Prior to the housing bust, federal banking regulators had a hands-off approach to the oversight of the residential mortgage industry and that led to lenders relaxing traditional underwriting standards and issuing to borrowers subprime loans on terms with high likelihood of default. As a result, lenders, having privatized their profits, are now externalizing the inevitable costs of their irresponsible lending on to everyone, including innocent renters. The following section analyzes whether a recent federal law will afford innocent renters sufficient protection from foreclosure-based evictions.

II. LEGISLATIVE MEASURES TO PROTECT INNOCENT TENANTS AFFECTED BY FORECLOSURES

Generally, a purchaser at a foreclosure sale that is held in accordance with state law is entitled to possession.⁷⁷ Most of the time, the lender-mortgagee, as the foreclosing creditor, is the only bidder at a foreclosure sale and, therefore, becomes the “purchaser.”⁷⁸ Prior to Congress’s enactment of the Protecting Tenants at Foreclosure Act (“PTFA”), the mortgagee’s ability to use a foreclosure judgment or sale to evict the tenant depended on whether, under state law, the lease predated the mortgage or the tenant was joined as a defendant in the foreclosure proceedings.⁷⁹

⁷⁷ See ROBERT S. SCHOSHINSKI, *AMERICAN LAW OF LANDLORD AND TENANT* § 10:5 (1980); Milton R. Friedman and Patrick A. Randolph, Jr., *FRIEDMAN ON LEASES* § 29:3.3 (5th ed. 2004)

⁷⁸ See BAXTER DUNAWAY, 2 *L. DISTRESSED REAL EST.* § 16:39 (2008) (“In the majority of foreclosure sales, the lender will be the only bidder. It is necessary for the lender to bid in order to protect its own interest as well as that of the borrower.... [C]ourts will closely scrutinize the sale, particularly where the borrower is subject to a deficiency judgment after the sale.”); Janet Flaccus, *Pre Petition and Post Petition Mortgage Foreclosures and Tax Sales and the Faulty Reasoning of the Supreme Court*, 51 *Ark. L. Rev.* 25, 49 (1998) (reporting that “[t]hird parties purchased at the foreclosure sale in twenty-three percent of the cases”); Anthony J. Handzlik, *Mortgage Foreclosure as Fraudulent Conveyance: Is Judicial Foreclosure an Answer to the Durrett Problem?*, 1984 *Wis. L. Rev.* 195, 211-12 (stating “[u]sually the mortgagee is the only bidder and, in about ninety-nine percent of public foreclosure sales, it is the purchaser”).

⁷⁹ See SCHOSHINSKI, *supra* note 77, at § 10:5 (“It is well settled that a leasehold interest antedating a mortgage ... on the lessor’s estate is unaffected by foreclosure”); MILTON R. FRIEDMAN AND PATRICK A. RANDOLPH, JR., *FRIEDMAN ON LEASES* § 8:1.2 (5th ed. 2004).

A. Protecting Tenants at foreclosure Act of 2009

In 2009, Congress passed the PTFA, which gives a tenant limited protection regardless of whether the lease predates the foreclosure or the tenant is joined in the foreclosure action.⁸⁰ It applies to all residential properties in foreclosure.⁸¹ If the tenant has less than 90 days left on the lease, the tenant is entitled to 90 days notice before the new owner can evict the tenant.⁸² If the tenant's lease has more than 90 days left on it, the tenant has the right to remain in the foreclosed property until the end of the lease.⁸³ However, if the new owner is going to use the unit as a primary residence, the new owner may evict the tenant after 90-days notice even if the remaining lease term exceeds 90 days.⁸⁴ To take advantage of the 90-day period, the tenancy must be a "bona fide," meaning that the tenancy is the result of an arms-length transaction, the rent is not substantially below market value, and the tenant is not the mortgagor, the mortgagor's child, spouse or parent.⁸⁵

The PTFA is very short, less than two pages long, and only gives a bona fide tenant a limited right to stay, thereby creating more questions than answers.⁸⁶ Perhaps, a longer, more comprehensive statute would have led to a raucous fight over whether such legislation was necessary and, therefore, a political compromise led to passage of the PTFA even though it left many unanswered but very important questions.⁸⁷ It is silent about (1) the contents of the notice

⁸⁰ See Pub. L. No. 111-22, §§ 701-704, 123 Stat. 1632 (2009). The PTFA is actually Title VII of the Helping Families Save Their Homes Act of 2009.

⁸¹ *Id.* at § 702(a).

⁸² *Id.*

⁸³ *Id.* at § 702(a)(2) (stating that the tenant has only 90 days if the new owner is plans to occupy the foreclosed property as a residential home).

⁸⁴ *Id.*

⁸⁵ *Id.* Paying below market value does not apply to tenants whose housing is subsidized via a Section 8 voucher. *Id.*

⁸⁶ See *supra* notes 77-82 and accompanying text.

⁸⁷ See *infra* note 122 and accompanying text (stating that only one republican in the US Senate voted for the PTFA, and it passed by a vote of 57 to 39).

that is to be given to the tenant, (2) the obligations of the tenant to pay rent during dependency of the foreclosure case and after the foreclosure sale, (3) the obligations of the lender to maintain the property until the tenant vacates, (4) the practices of the lenders that employed to force out the tenant, or (5) the penalties the lender is subject to for violating the law.⁸⁸

In states lacking strong protections for innocent renters, the PTFA will largely be ineffective because it fails to address the fact that unlawful foreclosure-based evictions take place primarily due to tenants not knowing their rights and lenders exploiting that ignorance.⁸⁹ The next section of this Article considers New Jersey law as instructive of what kind of protections are necessary to inform tenants of their rights to ensure they can act on them and, thereby, avoid becoming a victim of an unlawful eviction. Later, in Part 4, this Article proposes amendments to the PTFA to limit the ability of lenders and their agents to force tenants out either through deception or intimidation.

B. New Jersey Law Affords Renters Strong Protections Worth Considering

The PTFA does not preempt state or local laws that give additional protections.⁹⁰ Consequently, tenants in a minority of jurisdictions—cities such as Oakland, San Francisco, and Seattle, and states such as New Jersey and New York—are given various rights in the event of the lender’s foreclosure against the landlord.⁹¹ These laws afford the consumer more protections than the PTFA.⁹²

⁸⁸ See Pub. L. No. 111-22, §§ 701-704, 123 Stat. 1632 (2009).

⁸⁹ See Ken Dixon, *Blumenthal Wants Tenants’ Protection in Foreclosures*, CONN. POST (Bridgeport), Feb. 2, 2010, (stating that according to legal aid attorneys, “illegal evictions have been occurring regularly since last spring, when a federal law took effect protecting renters from new owners” in foreclosure-based evictions).

⁹⁰ *Id.*; *infra* notes 77-85 and accompanying text (discussing the PTFA).

⁹¹ See, e.g., Just Cause for Eviction Ordinance, Oakland, Cal., O.M.C. § 8.22.3 (2002); Arizona Mobile Home Parks Residential Landlord and Tenant Act, ARIZ. REV. STAT. § 33-1476 (LexisNexis 1975); Arizona Recreational Vehicle Long-Term Rental Space Act, ARIZ. REV. STAT. § 33-2143 (LexisNexis 2000); Connecticut Mobile Manufactured Homes, CONN. GEN. STAT. § 21-80 (1974); District of

In comparison to the other states, New Jersey, a state reputed to have the strongest protections for tenants,⁹³ stands out as a model for assessing what amendments to the PTFA can be amended to afford all Americans additional protections. In New Jersey, a tenant cannot be evicted without good cause under the state’s Anti-Eviction Act, and it specifies only 18 good-cause eviction grounds.⁹⁴ In a 1994 case involving a lawsuit where the mortgage predated the lease, Chase Manhattan Bank argued that it was not a landlord covered by the Anti-Eviction Act and, therefore, could evict the tenant after its foreclosure proceeding was complete.⁹⁵ The Supreme Court of New Jersey held in *Chase Manhattan Bank v. Josephson* that regardless of whether a tenant’s lease predates or antedates the creation of the mortgage, the lender-mortgagee cannot obtain an eviction order without good cause.⁹⁶ The court found plain the language of the 1986 amendment to the Act which made it applicable to “the owner’s or landlord’s *successor* in ownership” and, therefore, held that the Act encompassed both foreclosing mortgagees and purchasers at foreclosure sales.⁹⁷

Columbia Rental Housing Evictions, D.C. CODE § 42- 3505.01 (2001); Florida Mobile Home Park Lot Tenancies, FLA. STAT. ANN. § 723.061 (West 1984); Massachusetts Local Control of Rents and Evictions, MASS. GEN. LAWS ANN. ch. 40 § 1-9 (West 1970); New Hampshire Termination of Tenancy, N.H. REV. STAT. ANN. § 540:2 (1985); New Jersey Removal of Residential Tenants, N.J. STAT. ANN. § 2A:18-61.1 (West 2000); New York Rent Control Act, N.Y. UNCONSOL. LAW § 26-408 (McKinney 1985). *See also* Florence Wagman Roisman, *The Right to Remain: Common Law Protections for Security of Tenure: An Essay in Honor of John Otis Calmore*, 86 N.C. L. REV. 817 (2008).

⁹² For instance, the Rental Housing Act of 1985 for the District of Columbia sets forth only ten grounds for “good cause” eviction, but foreclosure is not listed as one of them and only three are related to tenant conduct: nonpayment of rent, breach of the lease, or commission of a crime. *See* D.C. CODE § 42-3505.01 (2001).

⁹³ Wagman, *supra* note 91, at 830.

⁹⁴ *See* N.J. Stat. Ann. § 2A:18-61.1 (West 2000) (providing that “no lessee or tenant . . . may be removed by the Superior Court from any house, building, mobile home or land in a mobile home park or tenement leased for residential purposes . . . except upon establishment of one of [eighteen] grounds as good cause”); LEGAL SERVICES OF NEW JERSEY, TENANT’S RIGHTS IN NEW JERSEY 56 (2009).

⁹⁵ *See* *Chase Manhattan Bank v. Josephson*, 135 N.J. 209, 638 A.2d 1301 (1994).

⁹⁶ *Id.* at 1301.

⁹⁷ *Id.* at 1309 (emphasis added).

The court recognized the act’s overarching purpose of protecting innocent tenants from eviction and the “critical shortage of rental housing space in New Jersey.”⁹⁸ The act’s application to mortgagees and purchasers would, therefore, “protect those tenants from having to confront the devastating effects of eviction not through any fault of their own but merely because they had rented property from landlords that were either unwilling or unable to meet their mortgage obligations.”⁹⁹ Because foreclosure is not mentioned in the Act, the New Jersey Supreme Court held that the foreclosure does not constitute good cause to evict the tenants.¹⁰⁰ If the mortgage predates the lease, however, the foreclosing mortgagee or foreclosure sale purchaser has the right to (1) negotiate a new lease with the tenant, (2) increase the rent to a reasonable rate, (3) offer a renewal lease having no unreasonable changes in substance and terms of the original lease, and (4) pursue eviction for any statutory just cause, such as non-payment of rent.¹⁰¹ As result of New Jersey’s Anti-Eviction Act and case law interpreting, tenants in New Jersey have “a perpetual tenancy, virtually a life interest, in favor of a tenant of residential premises covered by the Act,” as long as there are no statutory grounds for eviction.¹⁰²

Despite strong protections provided by statute and case law, the New Jersey legislature passed in 2009 the New Jersey Foreclosure Fairness Act (“NJFAA”) to extend to tenants

⁹⁸ *Id.*

⁹⁹ *Id.* at 1310.

¹⁰⁰ *Id.*

¹⁰¹ *See id.* at 1310-1311; N.J. STAT. ANN. § 2A:18-61.3b; N.J. STAT. ANN § 2A:18-61.1f; N.J. STAT. ANN § 2A:18-61.1i. If the tenant defaults after the lender takes over the property, eviction is an order. *See, e.g., DeMarco v. City of Philadelphia*, 90 Pa. Commw. 224, 494 A.2d 875 (1985) (Where the court had granted writ of possession to landlord for the tenant’s to pay rent, the tenant had no right to possession of premises and was a trespasser; thus, original owner of property, who reacquired property from landlord by deed in lieu of foreclosure when landlord could not make mortgage payments, did not commit an unfair housing practice in attempting to evict tenant).

¹⁰² *See Ctr. Ave. Realty v. Smith* 264 N.J.Super. at 349-50 (App. Div. 1993).

additional rights.¹⁰³ Tenants' rights advocacy groups and the New Jersey's Department of the Public Advocate supported passage of this law because of an increasing number of complaints about lenders misinforming innocent tenants about their rights and intimidating them into vacating foreclosed properties.¹⁰⁴

Because tenants were unaware of their rights and lenders took advantage of this lack of knowledge, the NJFAA mandates that tenants be provided with written notice about their rights to arm them with "the information necessary to fight improper evictions."¹⁰⁵ The NJFAA requires a purchaser of foreclosed residential properties to provide to tenants written notice in English and Spanish within 10 days after the purchaser takes ownership.¹⁰⁶ If the residential facility has 10 or fewer units with tenants, the new owner must provide the written notice to each tenant.¹⁰⁷ If the facility has more than 10 units, the new owner must post the notice in common areas.¹⁰⁸

The statute mandates the precise words the notice must contain and it includes, among other things, a statement (1) indicating that the landlord has lost ownership, (2) identifying who the new owner is, and (3) instructing when, where and to whom the rental payment should be sent.¹⁰⁹ These provisions are necessary because some lenders were hiding this information in order to be able to claim the tenant's non-payment of rent as a basis for eviction.¹¹⁰ To keep lenders from deceiving tenants about their right to stay, the notice must state that that an eviction

¹⁰³ See New Jersey Foreclosure Fairness Act, 2009 N.J. Sess. Law Serv. Ch. 296 (West). This act amends the Mortgage Stabilization and Relief Act, N.J. STAT. ANN §§ 55:14K-82 to 55:14K-93. (West Supp. 2009).

¹⁰⁴ See *New Laws to Help Tenants in Foreclosed Properties*, N.J. DEPT. OF THE PUBLIC ADVOCATE, Feb. 22, 2010, at 1.

¹⁰⁵ *Id.*

¹⁰⁶ See New Jersey Foreclosure Fairness Act, 2009 N.J. Sess. Law Serv. Ch. 296 (West).

¹⁰⁷ *Id.*

¹⁰⁸ *Id.*

¹⁰⁹ *Id.*

¹¹⁰ See, e.g., Rolando, *supra* note 24.

can only occur through a court process where the tenant has a right to be heard, that a tenant can be evicted only for good cause, and that a foreclosure alone cannot constitute grounds for eviction.¹¹¹ The notice must state it is unlawful for anyone to try to make the tenant to leave by any tactic, including terminating utility services or failing to maintain the lease premises.¹¹² The notice informs tenants that violators of the NJFAA are subject to criminal and civil penalties.¹¹³

The last sentence of the required written notice tells the tenant to contact a lawyer if someone is pressuring the tenant to leave.¹¹⁴ This requirement hints at practices now prohibited under the NJFAA that lenders use to pressure a tenant into leaving.¹¹⁵ From the time of the foreclosure filing until one year after transfer of the foreclosed property occurs, neither the foreclosing creditor nor its agent can put any pressure on the tenant to leave.¹¹⁶ This prohibition is meant to be broad enough to cover the lender as well as an array of co-conspirators (i.e., lawyers, realtors, and property managers) acting on behalf of the lender.¹¹⁷ Prohibited pressure tactics include misrepresenting the tenant's rights, shutting off utility services, failing to maintain the property in a habitable condition, raising the rent in violation of rent control statutes and ordinances, and implying that a tenant must accept a lender's monetary offer to vacate.¹¹⁸

The prohibition on using an offer to vacate to pressure a tenant into leaving is relevant because many lenders use cash for keys programs to get tenants to move out even before the

¹¹¹ *Id.* (stating "EXAMPLES OF "GOOD CAUSE" ARE FAILURE TO PAY RENT, WILLFULLY DAMAGING THE PREMISES, OR PERSONAL OCCUPANCY BY THE NEW OWNER OF THE HOUSE OR APARTMENT THAT YOU NOW LIVE IN") (emphasis in original).

¹¹² *Id.*

¹¹³ *Id.*

¹¹⁴ *See* New Jersey Foreclosure Fairness Act, 2009 N.J. Sess. Law Serv. Ch. 296 (West).

¹¹⁵ *Id.*

¹¹⁶ *Id.*

¹¹⁷ *Id.*

¹¹⁸ *Id.*

foreclosure proceeding is complete.¹¹⁹ The NJFAA prohibits anyone from communicating with a tenant to induce the tenant to vacate the property except if the communication is a “bona fide monetary offer” made accordance with the act.¹²⁰ The bona fide offer has to be in writing and must include the written notice discussed above.¹²¹ All of these requirements are necessary to keep a lender or its agent from tricking a tenant into believing they must accept the offer.

In addition to the notice required if the lender makes monetary offer to vacate, the New Jersey Supreme Court recently issued an order that requires a written notice to be sent to the tenant during the pendency of a foreclosure proceeding.¹²² The owner’s failure to provide this notice means the foreclosure cannot be completed.¹²³ This order is designed to prevent lenders from deceiving a tenant into believing that the foreclosure filing against the landlord automatically terminates the tenant’s right to stay.¹²⁴

If foreclosing parties or their agents fail to provide the required notices or use illegal means to pressure tenants to leave, the NJFAA allows tenants to sue the violators for either triple damages or \$2,000 per violation of the law and for recovery of attorney’s fees and costs.¹²⁵ The new law also gives municipalities the power to hold foreclosing lenders responsible for code violations if the property is abandoned.¹²⁶

¹¹⁹ See, e.g., *Public Advocate: Tenants Continue to be Pressured to Leave Homes Because of Foreclosures*, US FED. NEWS, Oct. 25, 2009 (Pg. Unavail. Online), available at 2009 WLNR 21156324.

¹²⁰ See New Jersey Foreclosure Fairness Act, 2009 N.J. Sess. Law Serv. Ch. 296 (West).

¹²¹ *Id.*

¹²² New Jersey Supreme Court Order (Nov. 17, 2009) (amending Rule 4:64-1 and 4:65-2), available at <http://www.judiciary.state.nj.us/notices/2009/n091123d.pdf>. The notice must be in bold and in a font size of 14-point or larger and must be entitled “IMPORTANT NOTICE ABOUT TENANTS’ RIGHTS.” *Id.*

¹²³ See *New Laws to Help Tenants in Foreclosed Properties*, *supra* note 98, at 1. Pursuant to the order, the sheriff must also post the notice on the property. *Id.*

¹²⁴ See *New Laws to Help Tenants in Foreclosed Properties*, *supra* note 98, at 1.

¹²⁵ See New Jersey Foreclosure Fairness Act, 2009 N.J. Sess. Law Serv. Ch. 296 (West).

¹²⁶ *Id.*

The foregoing analysis of New Jersey law forces lenders and their agents to give tenants standardized form written notices at least two points in time to make clear to tenants who continue to pay rent that they have (1) the right to stay in the foreclosed property, (2) the right to have continued utility and maintenance services, and (3) the right to be free from pressure leave. The conduct prohibited under the NJFAA is the kind of conduct perpetrated by lenders that usually leads to improper evictions. Because engaging in the prohibited conduct or failing to give the required notices subjects the lender and its agents to civil and criminal penalties, lenders in New Jersey now know it could cost them too much to risk following improper tactics to try to force tenants to leaving.

C. Federal Statute Needs to Do More to Protect Tenants from Lenders' Deceptions

Unlike NJ Foreclosure Fairness Act, the Federal Protecting Tenants at Foreclosure Act (“PTFA”) is too deficient to be effective in affording tenants protection from foreclosure-based evictions. Although the PTFA requires the lender to give at least 90 days notice,¹²⁷ it does not specify when it should be given and what the contents of the required notice should be. Long before a foreclosure proceeding is initiated, the landlord-mortgagor has defaulted. As a result, the lender-mortgagee has the ability to serve notice on the tenant residing in the property at the same time a foreclosure complaint is filed against the landlord-mortgagor. However, many renters have no idea that the landlord is facing foreclosure until a sheriff’s deputy appears at the renter’s doorstep *after* the foreclosure sale has been completed and serves on the renter a notice to vacate the premises within so many days. Because a foreclosure proceeding can take several months to complete, tenants should be given notice of the foreclosure filing against the landlord simultaneously with the filing of the foreclosure lawsuit or shortly thereafter so tenants can start weighing their options. The tenant should also receive a notice when the foreclosure sale is

¹²⁷ See Pub. L. No. 111-22, §§ 701-704, 123 Stat. 1632 (2009).

complete since this usually the event triggering how much time the tenant can remain in the property.

In addition to making clear when the required notices should be given, the PTFA should require process servers be used to serve the required notice.¹²⁸ Use of law enforcement personnel would be unwise because it pits them against innocent renters and, therefore, is likely to harm law enforcement efforts to build strong community relations and cause the renters undue stress.¹²⁹ If service cannot be effectuated through a process server, then the lender should be required to mail the notice to the tenant and post it the tenant's door.

The PTFA should be amended to make clear what the required notices should contain. These notices should be very similar to the notices required under New Jersey law. To be like New Jersey law, the PTFA should be amended to require lenders to use a standardized notice form that provides instructions that make clear the tenant's rental payment obligations during the pendency of the foreclosure case and after the foreclosure sale. The form should also notify the tenant that the lender and its agents cannot make the tenant waived any of his or her rights and are prohibited from engaging in tactics designed to deceive the tenant into leaving voluntarily or force the tenant out of the rental property. The standardized notice form should inform tenants that they have the right to: (1) stay for 90 days after the required notice has been received,¹³⁰ (2) live free of any of pressure or harassment from the lender or its agents to leave early, and (3) receive the same utility and maintenance services required of the previous landlord.

¹²⁸ If the lender is foreclosing on a home with less than three units, the lender should be required to use a process server to serve on an adult tenant occupying the property the notice after the foreclosure complaint is filed against the landlord and after foreclosure sale. This should be required within 10 days after notice of default has been served on the landlord in a non-judicial foreclosure jurisdiction or of the filing of the foreclosure complaint in a judicial foreclosure jurisdiction.

¹²⁹ See *supra* notes 55-57 and accompanying text (discussing Sheriff Dart's refusal to evict innocent tenants affected by the foreclosure crisis).

¹³⁰ If the tenant has more 90 days left on the lease term, the standardized notice form would inform the tenant of the right to stay for the remainder of the lease term.

One could argue that the tenant should have to pay the utilities.¹³¹ Allowing tenants to make utility payments directly to the utility company permits the lender to avoid taking on this traditional landlord obligation. However, requiring lenders to provide the same services that were provided by the landlord¹³² is a better measure because it protects innocent tenants from being out of pocket for expenses caused by the landlord's failure to honor its contractual obligations.

In addition to obligating the landlord to pay the utilities previously paid by the landlord, the PTFA should free tenants from their obligation to pay rent during the 90-day period. The current obligation to pay rent is highly detrimental to tenants who have 90 days to vacate because it leaves them so little time to save enough money to secure alternative housing. The tenant's obligation to pay rent should continue only if the tenant's term under the lease is greater than 90 days. Lenders will no doubt balk at the idea of having to pay utilities and allow the tenant to stay in the premises rent-free for the 90-day period.

One compromise could be to allow the lender to shorten the 90-day period if it pays the tenant reasonable relocation expenses. Because one study found that the average costs for a tenant displaced by foreclosure to be \$2,558, the PTFA should be amended to permit lenders to give a renter at least \$2,600 in order to cut off a tenant's right to remain in the property for the 90-day period.¹³³ Some banks already recognize the benefit in paying the tenant cash for keys and allowing the tenant to remain rent-free in exchange for the tenant's agreement to a move-out

¹³¹ Minnesota has a bill that would permit tenants to pay utilities if the landlord fails to do so. H.F. 3348, 85th Gen. Assem, Reg. Sess. (Minn. 2008).

¹³² Rhode Island's bill would require the lender to provide the same services that were provided by the landlord. H.B. 7892, 2008 Leg., Jan. Sess. (R.I. 2008)

¹³³ See *supra* notes 43-45.

date.¹³⁴ Under a recently-passed statute in Connecticut, a lender's cash-for-keys offer has to pay the tenant double the amount of the rent or \$2,000, whichever is greater.¹³⁵ The recommended standardized notice under the PTFA should also inform tenants that they have the right to try to negotiate for an amount higher than \$2,600 if such compensation is necessary to secure affordable safe housing. While some renters may be sophisticated enough to negotiate,¹³⁶ others may not know it is possible and should be encouraged to negotiate for a better deal. Once the tenant has received the required fee to vacate, the tenant should have at least 15 more days to vacate the premises. The goal of this proposed amendment would be to enable the tenant to have sufficient money and reasonable time to find suitable rental housing. If the lender fails to make an offer to pay the required fee to vacate within 15 days of the foreclosure sale, the tenant should have the full 90 days before being obligated to vacate the premises or pay rent.

Finally, the PTFA should be amended to remove a sunset provision set at December 31, 2012. This is the most unfortunate provision of the Act. Current statistics only point to a worsening foreclosure crisis; consequently, there is no reason to believe the negative impact of foreclosures on renters will disappear by 2012. In Ohio, one of the states worst hit by foreclosures, the number of foreclosures increased more than 3 percent in 2009.¹³⁷ This topped

¹³⁴ See Yan, *supra* note 27, at A34 (stating that a real estate firm that represents banks in getting foreclosed properties ready for sale in Suffolk, New York, offers "cash for keys" agreements that pay tenants from \$500 to \$1,500 and allow them to stay rent-free in exchange for a move-out date).

¹³⁵ See CONN. GEN. STAT. ANN. § 47a-20f (West 2009) (requiring that "if there is no evidence of the amount or value of the security deposit paid by the tenant or no security deposit was paid by the tenant, [the offer to vacate early] be in the amount of two months' rent or two thousand dollars, whichever is greater").

¹³⁶ See, e.g., Mary Shanklin, *Renters Becoming Victims to Home Foreclosures*, Pitt. Post-Gazette, June 7, 2009, at H11 (reporting that after the bank offered one renter \$1,500 to leave, the renter persuaded the bank to pay him \$3,400 based on the fact that he and his spouse had painted the rental home and invested in other ways in the home).

¹³⁷ Kevin Kemper, *Foreclosures Continue to Climb in '09 to Close Out a Forgettable Decade*, BUSINESS FIRST, Jan. 22, 2009.

off a steady increase in foreclosures every year since 2000.¹³⁸ Michael Dahl, Public Policy Director for HOME Line, an organization that provides free legal and educational services to tenants in Minnesota, testified that his agency received 18 calls in 2000 from Minnesotan tenants asking about foreclosures compared to 1,265 calls in 2009.¹³⁹ Given this steady yet staggering increase in tenants facing foreclosures in the first decade of this century, it is unfathomable to think that the number of foreclosures in America will be anything near the pre-crises level by 2012.¹⁴⁰ Thus, ending the protections of the PTFA in 2012 will endanger many innocent tenants and possibly further prolong the housing crisis. Only one republican senator voted for the PTFA, and this vote occurred when the democrats controlled the US Senate.¹⁴¹ If foreclosures continue to be a problem in 2012 as predicted, attempts by democrats to extend the expiration date of the PTFA may not be possible now that democrats lack a filibuster-proof majority.¹⁴²

In summary, the PTFA should be amended to remove the sunset provision and to add provisions that make it a comprehensive foreclosure protection statute that, among other things, informs tenants of their rights and prohibits lenders from engaging improper eviction tactics.

D. The Recommended Protections Place a Constitutionally Permissible Burden On the Mortgagee's Contract and Property Rights

¹³⁸ *Id.*

¹³⁹ See *Impact of the Foreclosure Crisis on Public and Affordable Housing*, *supra* note 52.

¹⁴⁰ See *id.* (describing the various factors existing before and after the current foreclosure crisis that make exacerbate the affordable rental housing problem and arguing that the PTFA should be permanently extended).

¹⁴¹ U.S. Senate Roll Call Votes, May 6, 2009 (reporting roll vote indicating that Olympia Snowe (R-Maine) was the only republican who voted for S. Amdt. 1036, which became the PTFA). Research did not reveal on any congressional comments revealing why all but one republican decided to vote against the PTFA.

¹⁴² See Susan Page, *WHAT NOW for the Democrats? GOP Win in Mass. Jolts Obama Plans*, USA TODAY, January 21, 2010, at A1 (suggesting that the election of republican Senator Scott Brown's election ends the senate's filibuster-proof majority and, therefore, will frustrate the efforts of President Obama to get his agenda enacted into law).

Lenders may argue that the PTFA and the other protections recommended above impermissibly burden the lenders' freedom-of-contract and property rights. Courts, however, have held that it is constitutionally permissible to burden a lender's contract and property rights. For example, the New Jersey Supreme Court upheld in *Chase Manhattan Bank v. Josephson* that a good-cause eviction statute was constitutional under New Jersey law to prevent a mortgagee-bank from evicting a tenant after completion of the foreclosure process.¹⁴³ The New Jersey statute placed broad restrictions on property owners and landlords by shielding tenants from arbitrary and capricious eviction and limiting the reasons for which a tenant can be evicted to a number of statutorily specified "good cause" grounds. The New Jersey statute went so far as to prevent evictions at the end of a tenant's lease term if a good cause cannot be established. The court ruled that "[r]estrictions on the use of property, if in furtherance of a valid governmental purpose, serve the public interest and are considered a proper exercise of the police power even though they may result in some economic disadvantage."¹⁴⁴ The court concluded that a statute can constitutionally be enforced when the public interest served "clearly outweighs the impairment" caused by its enforcement.¹⁴⁵

Like the New Jersey Supreme Court, a New York court found anti-eviction statutes to be a "reasonable regulatory burden serving the justified public purposes of providing adequate housing and avoidance of dislocation of tenants" and held that compelled tenancy does not amount to a physical taking.¹⁴⁶ In *Dawson*, rent control laws restricted owners from evicting tenants under a claim of necessity for their own personal use and occupancy because tenants had

¹⁴³ *Chase Manhattan Bank v. Josephson*, 135 N.J. 209, 211 (1994).

¹⁴⁴ *Id.* at 233.

¹⁴⁵ *Id.*

¹⁴⁶ *Dawson v. Higgins*, 588 N.Y.S.2d 93, 97 (Sup 1992), judgment aff'd 610 N.Y.S.2d 200 (1st Dept. 1994).

occupied the units for more than 20 years.¹⁴⁷ The court held that the law was not an unconstitutional physical taking of private property under the Fifth Amendment.¹⁴⁸

The Protecting Tenants at Foreclosure Act and proposed amendments to it are not like the statutes upheld in *Josephson* and *Dawson*, as none of the author's proposals allow the tenant to keep the leased premises long-term or indefinitely. Evidence exists that the burden on innocent renters are enormous in comparison to the burden on lenders,¹⁴⁹ especially given the fact irresponsible lending was a major contributor to the current foreclosure crisis. Therefore, proposed amendments to the Protecting Tenants at Foreclosure Act are modest and should not be considered an unconstitutional taking.

CONCLUSION

America is experiencing its worst foreclosure crisis in history, and tenants are the silent victims of this crisis. The timely rental payments and responsible tenant behavior of people like Marjorie Benedum and her husband Mel Harris¹⁵⁰ are being rewarded with a sudden undeserved eviction and the task of finding quickly comparable housing. Because the current legal framework does not put lenders on the hook for the risky loans they gave to property buyers looking to get rich quick during the housing boom, lenders continue to burden individuals, communities and society at large with the consequences of their risky lending practices. Eviction of an innocent tenant inflicts harm to the following: (1) the tenant's purse, (2) the tenant's family (children uprooted from schools, etc.), (3) the limited resources of the community

¹⁴⁷ 588 N.Y.S.2d at 97-98.

¹⁴⁸ *Id.* at 99.

¹⁴⁹ The National Preservation Working Group (PWG) and National Low-Income Housing Coalition (NLIHC) recently sent a proposal to the majority and minority leaders of the United States House of Representatives and United States Senate urging that the anticipated economic stimulus package include \$8 million in funding for the rehabilitation of affordable rental housing to serve low-income families. The proposal letter was prepared and endorsed by the National Preservation Working Group and sent to Speaker Pelosi, Majority Leader Reid, Republican Leader Boehner, and Minority Leader McConnell.

¹⁵⁰ See *supra* notes 2-6 and accompanying text.

in which the tenant resides, (4) the law enforcement officers tasked with enforcing lender's bad loans by evicting tenants, and (5) the nearby residents and cities in which the vacant properties are located.

While the Protecting Tenants at Foreclosure Act is a good start—giving bona fide tenants 90-days to remain in foreclosed properties, more protections are needed for tenants. The proposed amendments to the Act do not extend the time the tenant should be allowed to stay or give the tenant a perpetual tenancy like New Jersey law does. Instead the proposed amendments, if adopted, would give tenants standardized notice forms that inform them of their rights in such manner that tenants will be empowered to fight improper eviction actions by lenders. Lenders will be out of pocket additional costs if they compensate tenants to vacate the premises early. The lenders must maintain the vacant properties to prevent them from becoming public nuisances and burdens on local municipalities.

The huge individual and societal costs now occurring far outweigh any potential burden to the lender under the proposed amendments. In the end, a win-win situation is created because the tenant benefits from maintaining affordable housing for a period of time, and the lender benefits from a responsible tenant who remains in the property.