Tenants at Foreclosure: Mitigating Harm to Innocent Victims of the Foreclosure Crisis

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Introduction

Junk removal services have sprouted up across the country given the robust market for cleaning or “trashing-out” foreclosed properties over the past few years.¹ It is a sad job of rummaging through a family’s belongings. The things left behind paint a faded picture of the resident’s former lives. Turner, who oversees one such service, says he remembers going into one house and seeing the children’s report cards still stuck to the refrigerator: “they evidently had a young female, who I think was in elementary school. It was straight A’s and B’s, and it was still prominently displayed there with a magnet. And you think, ‘Wow, they didn't even have time to grab this,’ or maybe it was just an oversight.”² This is the gloomy landscape of the nation’s housing crisis – waist-high lawns, overfilled gutters, clogged drains, leaking pipes, and lots and lots of junk left behind by families who either didn't have time to pack or just didn't care.

Every 13 seconds in America, there is another foreclosure filing.³ There are more than 6,600 home foreclosures filings a day, with Florida having the nation’s highest rate of homes – 23 percent – either in foreclosure or delinquent on mortgage payments in the second quarter of 2009.⁴ As of the end of December, 2010, the foreclosure crisis has claimed more than five million American homes, about 10% of all homes with a mortgage.⁵ The national discussion on the foreclosure crisis has largely been focused on home owners and financial institutions, but

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⁴ Id.
recent analysis reveals that the crisis is also significantly impacting renters across the country. These renters are innocent victims of the foreclosure crisis, who lose their homes through no fault of their own when their landlord enters foreclosure. According to the National Low Income Housing Coalition (“NLIHC”), an estimated 40 percent of the households that have lost their homes to foreclosures are inhabited by renters.

Until recently, tenants caught up in foreclosure have been summarily evicted with little or no notice, because in foreclosure proceedings, all subordinate leases and interests, including rental agreements, are extinguished when the superior interest holder (mortgagee) takes over. To address this problem, the Protecting Tenants at Foreclosure Act of 2009 (“PTFA”) was signed into law on May 20th, 2009. The new law provides for a 90-day notice requirement, and subjects any immediate successor of a property in foreclosure to existing bona-fide leases. The PTFA marks the first national step in recognizing and alleviating some of the problems associated with tenants at foreclosure. While the Act’s sunset provision has been amended to expire in 2014, it is still deficient in several respects. This comment attempts to outline some of the PTFA’s deficiencies, and recommends further action at the federal, state, as well as local level on behalf of tenants (and banks) at foreclosure.

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9 Id. at 342.
11 PTFA § 702.
Part I of this comment provides a background to the foreclosure crisis. It outlines the historical deregulation of consumer credit markets, and other factors leading up to subprime loans and debt defaults. Part II of this comment discusses the new legislation in more detail. It analyzes what the increased protection means for tenants and banks, who, in most cases, are the immediate successors of a foreclosed property. This section of the comment also touches upon the constitutionality and legislative intent of the Act, as well as procedural concerns in its implementation. Part III of the comment addresses several deficiencies of the PTFA -- namely, the lack of general knowledge regarding the Act, the incapacity for tenants to exercise their rights, and the absence of any real enforcement mechanisms for violations of the law. Part IV looks to various programs throughout the country and suggests that local, state, and federal governments, as well as non-governmental entities, should go further than the PTFA in protecting tenants at foreclosure.

I. The Foreclosure Crisis

The U.S. foreclosure crisis has been called the “worst financial crisis since the Great Depression.” The International Monetary Fund estimated that top U.S. and European banks have lost more than $1 trillion on toxic assets and bad loans from 2007 to 2009. The

13 Jon Hilsenrath, Serena Ng, & Damian Paletta, Worst Crisis Since ’30s, With No End Yet in Sight, WALL ST. J. (Sept. 18, 2008), available at http://online.wsj.com/article/SB122169431617549947.html.
14 The term “toxic asset” describes financial assets whose value has fallen significantly and for which there is no longer a functioning market. “Toxic” has been used to describe the high-risk mortgages for the last two years. The term may have been coined by Angelo R. Mozillo, founder of Countrywide Financial Corporaiton. See Tom Petruno, Mozil knew hazardous waste when he saw it. L.A. TIMES (June 4, 2009), available at http://latimesblogs.latimes.com/money_co/2009/06/the-use-of-toxic-to-describe-high-risk-mortgages-has-been-de- rigueur-for-the-last-two-years-now-it-looks-like-countrywide.html.
foreclosure crisis has been characterized as a two-pronged attack on the U.S. economy. On the one front, the rise in default and foreclosure affects homeowners, neighborhoods, lenders and the real estate industry directly. On the second front, the rise in default and foreclosure has created a domino effect in the financial market, culminating in bank failures and an illiquid credit market. The cause of the economic breakdown is a complex question and experts have disagreed on how much weight to give to various explanations. This comment does not attempt to reconcile such disagreements; it merely attempts to outline some of the more salient factors that led the country to the state it is in today -- namely, the historic trend of an increase in consumer debt, and the increase in availability of cheap credit.

A. Increase in Consumer Debt

In the 1960’s, a consumer could only obtain two types of low interest loans: a long-term, conventional mortgage, or an installment loan issued only after the borrower’s income and assets were assessed in detail to prove creditworthiness. The borrower was required to have a face-to-

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17 Id. at 2.
18 Asset pricing is forward looking, in that buyers and sellers of financial instruments base asset values on the future cash flow expected from assets based on today’s estimates of future risks. Financial firms experienced substantial devaluation in asset prices caused by increasing default rates. Firms failed in large numbers because the loss in value made it difficult for them to meet the financial demands of their creditors. See Id. at 2. Additionally, banks sold mortgages-backed securities to distribute credit risk to investors and to replenish their funds, enabling them to make more loans and distribute more debt. Due to this increased practice of mortgage securitization, the failure of one firm often triggered the failure of another, creating a domino effect that ultimately lead to the collapse of the entire financial market. See generally AMIYATOSH K. PURNA NANDAM, ORIGINATE-TO-DISTRIBUTE MODEL AND THE SUB-PRIME MORTGAGE CRISIS (2010), available at http://www.bus.wisc.edu/finance/workshops/documents/subprime_latestversion.pdf.
face meeting with the lender, and was required to document assets that could be pledged as collateral.\textsuperscript{22} Beginning in the mid-1970’s, the U.S. began to deregulate the consumer credit market in the form of relaxed regulatory controls, resulting in the lifting of interest rate ceilings and the extension of credit to high-risk borrowers.\textsuperscript{23} Recently, up until the foreclosure-induced credit crunch, anyone, and anything,\textsuperscript{24} could reasonably expect to receive a credit card offer.

Compounding the issue of relaxed regulatory controls, the United States and other industrial countries have received large amounts of foreign saving in the past ten to fifteen years.\textsuperscript{25} Much of this foreign saving came from fast-growing emerging markets in rapidly developing Asian nations, where consumption has lagged behind rising incomes, as well as from oil-exporting nations that could not profitably invest all their revenue at home and thus looked abroad for investment opportunities.\textsuperscript{26} Fueled by the flood of credit, U.S. household debt grew at a faster pace than income, and the level of overall household debt became virtually equal to GDP in 2007.\textsuperscript{27} The annual net inflow of foreign saving to the United States grew from 1-1/2% of GNP in 1995 to 6% in 2006,\textsuperscript{28} as the national debt more than doubled.\textsuperscript{29}

\textsuperscript{22} \textit{Id.}
\textsuperscript{23} \textit{Id.} at 398.
\textsuperscript{24} See \textit{Id.} at n. 12 (citing \textit{Credit Cards at 50: The Problems of Ubiquity}, N.Y. TIMES, Mar. 12, 2000, at C11 (noting that former Chair of the U.S. Federal Reserve Alan Greenspan once commented that “[c]hildren, dogs, cats and moose are getting credit cards")).
\textsuperscript{25} \textit{Four Questions, supra} note 20
\textsuperscript{26} \textit{Id.}
\textsuperscript{28} \textit{Id.}
\textsuperscript{29} In January of 1995, outstanding consumer debt was just over $1 trillion. In December of 2006, that number has more than doubled to nearly $2.4 trillion. Total outstanding consumer debt was just over $205 billion in the beginning of 1976. \textit{Consumer Credit Outstanding}, FEDERALRESERVE.GOV, http://federalreserve.gov/releases/g19/hist/cc_hist_sa.txt (last visited Nov. 18, 2009).
Relaxed regulation and the increased inflow of foreign savings vastly increased the availability of consumer credit. The accessibility of technology,\textsuperscript{30} dramatic changes in the U.S. labor market,\textsuperscript{31} and changing social norms\textsuperscript{32} about lending have also contributed to the increase in both supply and demand of credit.\textsuperscript{33} What manifested, however, was only an illusion of wealth. In hindsight, what followed next was hardly surprising, as the foreclosure crisis ultimately resulted from long overdue realizations of an overextended credit market and overinflated home prices.

\textbf{B. Subprime Debt Defaults}

The immediate catalyst of the foreclosure crisis was more apparent. Artificially low interest rates\textsuperscript{34} following the tech bubble burst and 9/11, combined with excess capital, created the perfect environment for irresponsible lending and speculative borrowing.\textsuperscript{35} Pundits have criticized former Federal Chairman Alan Greenspan’s easy-money policies in retrospect, claiming that the low cost of finance had much wider ramifications than the more obvious

\textsuperscript{30} Technology made it both easier to obtain credit and increased the demand of credit. Mortgage and credit card applications are available and can be approved in a matter of seconds on the internet. The explosion of the internet marketplace, e.g. eBay, Amazon.com, and a host of retailers made it more convenient to shop and requires consumers to have a credit card in order to shop online. See Over-Indebtedness, supra note 21, at 405-6.

\textsuperscript{31} Increased risk of temporary unemployment due global outsourcing and corporate restructuring, compounded by inadequate healthcare and sudden medical expenses, can be catastrophic because most Americans have no or very little savings to rely on to pay their expenses. Additionally, income has not kept pace with inflation, and when combined with minimum savings and stagnant wages, U.S. workers find it necessary to rely on consumer debt to get by. See Id. at 406-7.

\textsuperscript{32} America once had a culture of thrift, but economic, cultural, and moral norms changed overtime. Consistent rise in housing prices impressed upon consumers that they could take on more debt, consumers of all income scales expected to own designer goods, and schools and other institutions no longer talk the language of sin and temptation of excess. See David Brooks, The Culture of Debt, N.Y. TIMES (July 22, 2008), available at http://www.nytimes.com/2008/07/22/opinion/22brooks.html.

\textsuperscript{33} See Over-Indebtedness, supra note 21, at 407-9.


problems of inflation. The subprime debt defaults are most commonly attributed to subprime mortgages, or mortgages offered to less credit-worthy borrowers at higher interest rates. This practice of high-risk lending and borrowing increased steadily over the years, from less than 5% of total mortgages in 1994 to 20% in 2006. Cheap money had also created many opportunities for speculators, who drove the already inflated housing market even higher. A record level of approximately 40% of homes purchased in 2005 were not intended as primary residences.

Beginning in early 2007, mortgage lenders began to fail in large numbers. Over 70 mortgage companies went into bankruptcy in the first quarter, including large lenders such as American Century, American Home Mortgage, and First American Mortgage. Many large financial providers exited the subprime business, namely H&R Block, Lehman Brothers and Countrywide. Beginning in the spring of 2007, various hedge funds, due to collateralized debt

37 In the United States, subprime loans are usually classified as those where a borrower has a Fair Isaac and Company (FICO) credit score of below 620. See Governor Edward M. Gramlich, Remarks at the Financial Services Roundtable Annual Housing Policy Meeting (May 21, 2004), available at http://www.federalreserve.gov/Boarddocs/Speeches/2004/20040521/default.htm.
42 12% of home sales in 2005 were vacation-homes, while 28% were for investment purposes. See Amy Hoak, Second-home snapshot, MARKET WATCH (Apr. 30, 2007), http://www.marketwatch.com/story/vacation-home-sales-set-record-in-2006-investment-deals-tumble.
43 Over 70 mortgage companies went into bankruptcy or out of business in the first quarter of 2007, either because they held relatively large asset positions in subprime mortgages and were losing value, or because of the decline in the lending business. See Tatom, supra note 16, at 10.
44 Id.
45 Id.
packages based on subprime loans, began to go out of business.\textsuperscript{46} The half billion dollar losses at UBS’ hedge fund Dillon Read and the $2 billion loss at two Bearn Stearns funds threatened the very existence of large financial institutions.\textsuperscript{47} The domino effect ensued, and the subprime defaults transformed into a full blown financial crisis. By the middle of 2008, the crisis spread to Europe, and central banks around the globe began to cut rates in a coordinated effort to resuscitate the world economy.\textsuperscript{48}

In 1977, U.S. residential (homes and multi-family) mortgage debt totaled just over $741 billion; by 2007, that figure grew to a staggering $11.954 trillion.\textsuperscript{49} The initial problem was confined to subprime mortgages, but increasing defaults from adjustable rate mortgages, compounded by defaults in traditional mortgages due to the severe devaluation of home prices and the securitization of these mortgages, continues to fan the flames. What began as a real-estate bust soon turned into a full blown financial crisis, which spread across entire market sectors, and continues to have devastating effects across the entire U.S. economy as well as global markets. This paper focuses on the effects on tenants, a group of individuals who, until recently, has been overlooked and neglected in the foreclosure crisis.

\section*{II. Tenants at Foreclosure}

Much attention has been given to the victims of the foreclosure crisis, with the most apparent victims being ordinary homeowners who have been signed into a subprime loan, or

\textsuperscript{46} Id.

\textsuperscript{47} Id.


traditional borrowers who can no longer afford their homes due to the economic impact and job loss. Another class of victims has been overlooked until recently: renters. According to the National Low Income Housing Coalition (“NLIHC”), more than 20% of all properties facing foreclosure nationwide are rental units. Because rental properties often house multiple families, the NLIHC calculated that renters make up approximately 40% of the families facing eviction. This percentage may be higher in concentrated urban areas, with very low income families and minority communities bearing the brunt of rental foreclosures.

While fault can certainly be attributed to lenders, borrowers, and policymakers, most renters have had no direct involvement in the financing decisions related to their residences, but are left to deal with the fallout nonetheless. The most immediate problems plaguing tenants at foreclosure include inadequate notice, deplorable conditions of the properties due to the landlord’s failure to maintain, and the inability to find alternative housing.

Tenants in foreclosed properties are often caught unaware of any underlying foreclosure proceedings - often “the first thing they know is there’s some people standing out in the front yard auctioning off the property . . . [a]nd the next day they’ve got a five-day notice to vacate.”

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50 At the end of 2009, one in four U.S. homeowners owe more on their mortgages than the properties are worth. This negative equity lowers homeowners’ mobility because they can’t sell even if they want to move to find a new job. Borrowers who owe more than 120% of their home’s value are also more likely to default. Simon & James R. Hagerty, One in Four Borrowers Is Underwater, WALL ST. J. (Nov. 24, 2009), available at http://online.wsj.com/article/SB125903489722661849.html.
53 Id.
55 See RENTERS IN FORECLOSURE, supra note 52.
Tenants have no legal recourse in the matter because generally their leases are subordinate to the mortgage and will automatically terminate unless the mortgagee opts to preserve it.\textsuperscript{57} Rental properties that enter foreclosure are ill-maintained, with landlords often abandoning properties with unpaid utility bills, and leaving the premises in general disrepair with deplorable conditions.\textsuperscript{58} Furthermore, evicted tenants often lack the necessary financial resources to relocate, with lower income renters often unable to find suitable housing.\textsuperscript{59} To alleviate these problems, the Protecting Tenants at Foreclosure Act of 2009 was enacted in May, 2009.

A. Protecting Tenants at Foreclosure Act of 2009

Effective May 20, 2009, President Obama signed the PTFA, creating significant changes in landlord-tenant law throughout the country. New owners of rental property acquired through foreclosure are now finding themselves in the unfamiliar and often unwelcome role as landlords.

The primary provision of the Act, § 702, is very broad, and applies to all “federally-related mortgage loan[s],” as well as “any dwelling or residential real property.”\textsuperscript{60} Under the PTFA, a landlord-tenant relationship is created by the “subject to” language of the provision, without regard to whether the purchaser is actually aware of the lease or intends to become a landlord.\textsuperscript{61} The purchaser, in effect, assumes the responsibilities of the previous owner, the terms of the lease continue to apply in full, and the statutory obligations imposed by state landlord-

\textsuperscript{57} It is standard practice to include a subordination clause in nearly every lease. See 4 Stuart M. Saft, Real Estate Transactions – Commercial, § 19.2.10 (3d Ed. 2010).
\textsuperscript{60} PTFA § 702.
\textsuperscript{61} Id.
tenant laws will apply with equal force, even if the purchaser is a bank or a real estate investor. The purchaser can prematurely terminate the lease only if the purchaser will occupy the unit as a primary residence, but the purchaser is required to give the tenant 90 days notice before terminating the lease. The minimum 90 days notice also applies to week-to-week or month-to-month leases, even when there is no written lease. Additionally, under § 703, tenants receiving Section 8 housing choice voucher assistance also have the right to remain, and the new owner is required to take over the housing assistance payment contract.

The time of entry requirement of any rental agreements, under § 702(a)(2)(A), has also recently become very lenient. The language of the original statute read that only rental agreements entered into prior to the “notice of foreclosure” would be honored. “Notice of foreclosure,” under the Dodd-Frank Reform Bill, was clarified to be “the date on which complete title to a property is transferred to a successor entity or person as a result of an order of a court or pursuant to provisions in a mortgage, deed of trust, or security deed.” This means that any leases entered into from the time of the lis pendens to the time of the transfer of title may also be valid. One could imagine that these lax requirements will likely be abused, i.e. a

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62 Id.
63 Id.
64 PTFA § 703. Generally, Section 8 tenants have greater protections and have not been impacted as severely as non-Section 8 tenants. This is due to established precedent—holding that heightened Section 8 notice and termination requirements (requiring “good cause” to evict) preempt state common law rules extinguishing tenancies in foreclosures. See, e.g., German v. Federal Home Loan Mortgage Corp., 899 F. Supp. 1155 (S.D.N.Y. 1995). See also California Fed. Sav. & Loan Assn v. Guerra, 479 U.S. 272 (1987).
67 A lis pendens (Latin for “suit pending”) is filed by the mortgagee after the mortgagor has defaulted on his or her mortgage. Lis Pendens, DICTIONARY.LAW.COM, http://dictionary.law.com/Default.aspx?selected=1172 (last visited Jan. 18, 2011).
landlord in foreclosure could rent out the property to a relative for an indeterminable number of years for a dollar.

The PTFA does have a built-in anti-fraud provision, as the Act only applies to “bona fide” leases or tenancies. This requirement has three basic elements: (1) the mortgagor or his child, spouse, or parent cannot be the tenant; (2) the tenancy was the result of arms-length transaction; and (3) the tenancy requires the receipt of rent that is not substantially less than fair market rent. The PTFA provides basic protections to tenants in every state, but shall not affect the requirements of any State or local law that provides for additional protections. The Act is set to sunset on December 31, 2014.

B. Constitutionality of the Act

Commentators have speculated that the PTFA may be attacked under constitutional grounds. The constitutionality of the PTFA indeed raises three particular concerns: 1) whether the Act is a legitimate exercise of congressional power under the Commerce Clause; 2) whether the Act impermissibly impedes upon the rights of the states; and 3) whether the Act violates the property rights of individuals.

1. Congressional Power

The Commerce Clause, enumerated in Article I, Section 8, Clause 3 of the Constitution, provides that Congress shall have the power to “regulate Commerce with foreign Nations, and

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68 PFTA § 702(b).
69 Id.
70 PFTA § 704
among the several States, and with the Indian tribes.” Congressional commerce power extends
to three categories of activities: channels of interstate commerce, instrumentalities of interstate
commerce, and intrastate activities that substantially affect interstate commerce. Because the
regulation of foreclosed rental properties is neither a channel nor an instrumentality of interstate
commerce, the test for determining whether the activity is within Congress’ power to regulate
under the Commerce Clause is whether it “substantially affects” interstate commerce. This test is
“ultimately a judicial rather than a legislative question.” In United States v. Lopez, the Supreme
Court concluded that Congress cannot regulate noneconomic activities based solely on its
aggregate economic impact. The regulation of foreclosed rental properties is economic in
nature, however, and according to Gonzales v. Raich, Congress needs only a “rational basis” for
regulating activities of an economic nature. Under Gonzales, Congress has the power to
regulate “purely local activities” that have a substantial effect on interstate commerce. Due to
the heavy securitization of mortgages by national and international banks and financial firms, the
activity regulated under the PTFA can hardly be argued to be purely local in nature.

Even if applied to purely intrastate lenders, a constitutional challenge would still likely be
invalid. The Supreme Court has upheld a wide variety of congressional Acts regulating intrastate
economic activity where the Court concluded that the activity substantially affected interstate
commerce. A non-exhaustive list of these activities includes the regulation of intrastate coal
mining, intrastate extortionate credit transactions, restaurants utilizing substantial interstate

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72 U.S. CONST. art. I, § 8, cl. 3.
74 Heart of Atlanta Motel, Inc. v. U. S., 379 U.S. 241, 273 (1964)
75 See Lopez, 514 U.S. 536 (1995) (invoking a gun control act, which the court held to be a non-economic activity).
77 Id at 2.
supplies, inns and hotels catering to interstate guests, and production and consumption of homegrown wheat. Under the current line of cases and a rational basis review, the regulation of real property rentals likely meets the requirement of an economic activity that substantially affects interstate commerce, and is therefore a legitimate exercise of congressional power.

2. States’ Rights

The Tenth Amendment of the Constitution provides that the “powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.” It has long been held that the federal government is one of limited, enumerated powers, whereas state powers are numerous and indefinite. In Garcia v. San Antonio Metropolitan Transit Authority, the Supreme Court held that the test for determining state immunity from federal legislation under the Commerce Clause is whether the regulation, as applied to the state activity, is destructive of state sovereignty or violative of any constitutional provision. Here, the PTFA is neither destructive of state sovereignty nor violative of any Constitutional provisions, and a state’s rights constitutional argument will most likely fail. The Court further argued in Garcia that state sovereign interests are better protected by procedural safeguards inherent in the federal system, because states have considerable influence in both houses of Congress and the Executive, and it is not the role of the Court to overstep its bounds in the separation of power. The clear boundaries of federal power are further illustrated in New

83 U.S. CONST. amend. X.
86 Id. at 551-52.
York v. United States⁸⁷ and Printz v. United States.⁸⁸ As applied to the PTFA, nothing in the language of the Act speaks directly to the state, much less orders or compels the states to comply. The Act merely provides rights to tenants and restricts the rights of immediate successors in interest of foreclosed real properties.

3. Property Rights

The Takings Clause under the Fifth Amendment of the Constitution provides that no person shall be deprived of life, liberty, or property, without due process of law, “nor shall private property be taken for public use, without just compensation.”⁸⁹ A mortgage is an interest in or lien on real estate and is thus a right to property, protected by the Fifth Amendment of the Constitution.⁹⁰ Arguably, forcing the immediate successor in interest of a mortgage to be subject to an existing tenancy will fall under a takings analysis. In assessing whether a taking has occurred, the Supreme Court first looks to two narrow categories deemed to be per se takings for Fifth Amendment purposes: 1) permanent physical invasion,⁹¹ and 2) complete deprivation of all economically beneficial uses.⁹² While the PTFA certainly permits a physical occupation of real property, it is temporary in nature and is therefore not a permanent physical invasion for the purposes of a Loretto taking. Additionally, the PTFA does not deprive an owner of all economically beneficial uses under Lucas because the owner is free to personally reside in or to continue to rent out the property subject to an existing lease. Outside these two narrow

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⁸⁹ U.S. CONST. amend. V.
categorical takings, the Court has generally considered the factors set forth in *Penn Central Transp. Co. v. New York City*.\(^93\) Primary among these factors are the “regulation’s economic impact on the claimant, the extent to which it interferes with distinct investment-backed expectations, and the character of the government action.”\(^94\)

In considering the economic impact and the interference with the purchaser’s distinct investment-backed expectations, the Court will consider the property as a whole.\(^95\) For instance, if the plaintiff is a mortgage lender holding onto an inventory of foreclosed properties, the Court will consider the impact to all of the plaintiff’s properties in aggregate.\(^96\) *Pennsylvania Coal Co. v. Mahon*\(^97\) remains the leading case for the proposition that government action “may so frustrate distinct investment-backed expectations as to amount to a ‘taking.’”\(^98\) In *Pennsylvania Coal*, the claimant had sold the surface rights to several properties, while expressly reserving the right to remove the coal underneath.\(^99\) A state statute enacted after the transaction forbade any mining of coal that could cause any house to sink, unless the mining company owned such property and the mining took place more than 150 feet from the property of another.\(^100\) The Court ruled that because the statute made it commercially impracticable to mine the coal, it had nearly the same effect as the complete destruction of the rights that the claimant had reserved from the owners of the surface land.\(^101\) The PTFA, on the other hand, cannot be argued to “so frustrate distinct investment-backed expectations as to amount to a taking.”\(^102\) The immediate successor has the

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\(^94\) *Lingle*, 544 U.S. at 528-29.
\(^96\) Cf. *Id*. at 471-72.
\(^97\) *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393 (1922).
\(^98\) *Penn Central*, 438 U.S. at 127.
\(^99\) *Pennsylvania Coal*, 260 U.S. at 414.
\(^100\) *Id*. at 412-13.
\(^101\) *Id*. at 414-15.
\(^102\) See *Id*.
right to collect rent subject to an existing bona fide written lease or for 90 days, and the immediate successor also keeps ownership of the property after the lease term with no restrictions.

In a similar analysis of economic impact under *Penn Central*, the claimant was prohibited from constructing a 55-story office building above Grand Central Terminal due to a landmark preservation law. The Court did not find that the regulation constituted a taking because the regulation did not interfere with the owners’ present and long-time past use of the property. Unlike *Penn Coal*, where the only use of the underground rights was to mine coal, in *Penn Central*, the terminal could still be used as a terminal even though it could not be converted into an office building, and the owners were still able to make reasonable returns on the terminal as a terminal. The Court further found that because the claimants had not petitioned to build a smaller structure on top of the terminal, there was no way to know if they were denied “any use of any portion” of the airspace above the terminal.

It is difficult to place the PTFA under such a takings analysis, because the economic impact will vary from plaintiff to plaintiff. However, based on case law, the plaintiff will bear the heavy burden to show an economic detriment as well as the absence of any economic alternatives. Such a showing will be exceedingly difficult where the Act is temporary, allows the continuation of leases, and provides an exception for personal occupancy, especially in a slumping housing market where a profitable sale is unlikely.

Lastly, in considering the character of the government action, the Court looks to whether the action amounts to a physical invasion or merely affects property interests through “some

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103 *Penn Central*, 438 U.S. at 104.
104 *Id.* at 121.
105 *See Id.*
public program adjusting the benefits and burdens of economic life to promote the common
good.” 107 Here, the PTFA falls under the latter. Furthermore, the Lingle Court overturned the
“substantially advances” test and held that Takings Clause challenges to regulations had to be
based on the severity of the burden that the regulation imposed upon property rights, 108 not the
effectiveness of the regulation in furthering the governmental interest. 109 Any takings challenge
under current court precedent will likely be an arduous, uphill battle under such a deferential
standard to the legislature.

C. Legislative Intent

In order to assess any success of the PTFA, as well as to facilitate its state and local
implementation, one must first look to the original legislative intent. The PTFA was included
with the Helping Families Save their Homes Act of 2009. 110 The purpose of the PTFA is to
protect tenants, as evidenced by the title of the Act. At a Congressional hearing on August 6,
2009 regarding the implementation of the PTFA, Senator Dodd, along with Senator Kerry,
reasoned that the Act was intended to “assist low and moderate-income families and to help
tenants who need protections from foreclosure or unscrupulous landlords,” who have “for too
long . . . been the innocent victims of the foreclosure crisis.” 111 The senators wanted to ensure
that “families and mortgage holders know their rights and obligations under the law” because of

108 Id.
109 Id. at 548.
110 The Helping Families Save Their Homes Act of 2009 was intended to prevent mortgage foreclosures and to
enhance credit availability. This Act, among other things, expands Chapter 13 bankruptcy by excluding home
mortgage debt from current maximum debt limitations, allows bankruptcy judges to alter mortgage loans owned by
individuals to reduce interest rates or extend the repayment period, and provides a safe harbor from liability for
lenders that enter into modification agreements. See H.R. 1106, 111th Cong. (1st Sess. 2009), available at
http://thomas.loc.gov/cgi-bin/bdquery/z?d111:HR01106:.
the importance of the protections. They asserted that “families in these precarious circumstances should not be forced individually to assert their rights under the law.” Lastly, the PTFA is intended as a statutory floor, and provides “basic protections” for tenants in every State, “unless States have laws or practices that provide greater protections.”

D. Local Implementation and Interpretation

Congress did not establish any procedures under the PTFA, and left such determinations to the individual States. The case study in this comment focuses on Florida, but may be illuminating to all states because Florida has consistently had one of the highest foreclosure rates in the country. Several questions have been brought forth in a Florida Senate Interim report regarding the implementation and interpretation of the legislation:

- Is the landlord required to pursue an eviction action after the 90 days?
- What information should be included in the 90-day notice?
- Is the tenant still required to pay rent and to whom?
- Does the tenant have an obligation to stay?
- Does the property manager have any ongoing obligation to the property?
- What happens with the security deposit?

Some of these questions have been touched upon in meetings with the Senate professional staff and representatives from the real estate industry, the banking industry, the Florida Association of Court Clerks and Comptrollers, the Florida Bar, as well as Florida Legal Services. The actors disagreed on how best to proceed. For instance, representatives from Florida Legal Services

footnotes:
112 Id. (statement of Sen. Chris Dodd).
113 Id. (statement of Sen. John Kerry).
114 Id. (statement of Sen. Chris Dodd).
115 Florida’s foreclosure rate is currently the highest in the country, moving up 14 percent in the 4th quarter of 2010. Florida has the nation’s highest inventory of homes in distress, accounting for nearly 1 out of every 4 foreclosure properties in the entire country. Toluse Olorunnipa, Florida’s foreclosure rate is nation’s highest, MIAMI HERALD (Feb. 17, 2011), available at http://www.miamiherald.com/2011/02/17/2072416/floridas-foreclosure-rate-is.html.
117 Id.
opined that there is still a need for an eviction action subsequent to the 90 days. Others opined that the federal law should act as notice of an eviction at the end of the 90 days, or just one notice regarding the 90 days that includes a termination date should suffice.

In Florida, the Housing and Consumer Umbrella Groups of Florida Legal Services have petitioned the Supreme Court of Florida to enact amendments to the Rules of Civil Procedure in order to conform to the PTFA, in response to Court solicitations of comments from local practitioners. Local legislation continues into the 2011 session to codify the PTFA protections into state legislation. SB 738 creates a framework in Florida’s Landlord Tenant Act to incorporate the federal protections of the PTFA. However, the current proposed Florida bill is nothing but a verbatim copy of the basic protections found in the federal legislation, with no additional requirements or enforcement mechanisms. The additional protections found in the 2010 proposal, SB 606, which added a clause requiring the return of deposit money to the tenant, was struck out.

Despite the PTFA being intended to protect “innocent victims of the foreclosure crisis,” Florida courts have so far refused to review claims of PTFA violations, holding that

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118 Id.
119 Id.
121 See Id.
the PTFA does not create a private right of action for a tenant through § 1983.\textsuperscript{127} Even if a court agreed to review PTFA violations, it may run into several issues. For instance, a literal interpretation of the statute would require notice to be given by the “immediate successor in interest,” and a trustee in foreclosure proceedings may not be authorized to provide the notice. The majority of mortgages are not held by the original lender, and a large percentage of loans have been bundled and sold as securities now owned by trusts.\textsuperscript{128} Florida attorneys have often encountered foreclosures based on assignments created by entities other than the actual note holder, and it was not unusual to find two different plaintiffs filing a foreclosure lawsuit based on the same mortgage.\textsuperscript{129} This creates an issue for banks, as they act as trustees on behalf of the actual holders of the mortgage, as well as issues for the tenant, who may deal with multiple plaintiffs filing eviction notices based on the same mortgage.

Another issue is the burden of proof regarding the “bona fide” status of tenancy. The PTFA is meant to protect tenants at foreclosure, as evidenced by the title of the Act, and as the Senators who put forth the Act pointed out, “families in these precarious circumstances should not be forced individually to assert their rights under the law.”\textsuperscript{130} There is an unequal bargaining at play: the unsophisticated, powerless, innocent tenant versus the large corporate banks, acting as trustees of many unknown mortgage holders.\textsuperscript{131} Under such a reading, courts should place the burden of proof upon the new landlords, or at the very least place a very low burden of proof on

\textsuperscript{127} See, e.g., Sahikh v. Fannie Mae, 2010 WL 3734851 (M. D. Fla. 2010).
\textsuperscript{128} Comments of the Housing Umbrella Group and Consumer Umbrella Group of Florida Legal Services, Inc., supra note 119.
\textsuperscript{129} See Id.
\textsuperscript{131} Public, as well as judicial sentiment has changed due to the housing crisis. About two years ago, judges would dismiss foreclosure cases only if they could find reason to do so. Now, after over two years of the housing crisis, more judges are calling mortgage companies out on paperwork glitches, and in some cases going much further in ruling favorable for homeowners. See Amir Efrati, Foreclosure Challenges Raise Question About Judicial Role, WALL ST. J. (Dec. 24, 2009), available at http://online.wsj.com/article/SB126161279914403525.html.
the tenants in any challenges to whether the tenancy was “bona fide.” Exact measures in local legislative implementations, as well as court interpretations, will surface more in time. However, since the passing of the federal legislation in 2009, Florida’s reaction has been one of minimum compliance, and has not been particularly tenant friendly.

III. The PTFA in Practice

Despite the important victory for struggling tenants nation-wide, many have concluded that the Act is nothing but a toothless wonder. Tenants continue to be evicted from their homes, and the remaining properties sit idly by and decay away as homeless rates increase. A joint study published by the NLIHC and several other organizations reported that approximately 19% of new homelessness was a direct result of foreclosures in 2009. Most tenants do not know about the existence of the PTFA, and banks have continued to send out illegal eviction notices. Other tenants are often pushed into vacating the properties early in return for low cash-for-keys agreements, where banks provide a lump sum if the tenants agree to leave the property immediately and a lower amount if they take a week or two to vacate. As seen, the federal government has no real mechanisms to enforce any of the Act’s provisions. This section of the comment provides a basic overview of what typically happens to tenants after the foreclosure of an occupied property, and pinpoints several particular deficiencies in the Act, as well as some underlying policy concerns.

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134 See Id.

A. An Overview

In the failing real-estate market, where the supply of foreclosed properties far outnumbers the demand, many rental properties are being repossessed and held onto by banks. Banks typically do not wish to become landlords, because they do not want to invest, and because when they do find a buyer, issues of rental rights could impede a sale. The law is still new and many tenants are unaware of their rights, and according to Cathy Vandenberg, managing attorney at Cobb County office of Atlanta Legal Aid, “[b]anks, who aren’t keen on becoming rental landlords, don’t always volunteer the law’s provisions to the tenant.” Unscrupulous real estate agents pressure renters by sending them misleading letters; one such letter sent by a Texas law firm stated, “[t]his letter constitutes formal and final demand that you vacate the premises within three days of the date this letter is delivered” and threatened legal costs if the tenant did not comply.

Even those renters who are aware of the law and are fortunate enough to have representation remain at the mercy of courts and a system ill-equipped to deal with their particular challenges. For instance, a tenant is likely to lose his or her security deposit if the owner goes into foreclosure because lawsuits are costly. Even if a tenant is able to take the landlord to small claims court, in most cases the landlord will have declared bankruptcy, and a

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137 Id.
140 Les Christie, Your landlord got foreclosed. Do you have to go?, CNN MONEY (Feb. 18, 2010), http://money.cnn.com/2010/02/18/real_estate/keep_kicking_out_tenants.
judgment becomes unobtainable. \textsuperscript{141} According to William Deegan, executive director of the American Tenants Association, renters are more likely to need their security deposits when they look for a new place to live, as “[t]enants tend to be poor, young families, the elderly. They fall through the cracks.” \textsuperscript{142} Forced to move on short notice when landlords fail to pay the mortgage, many renters not only lose their security deposits, but also often see their lives turned upside down.

Tiquanda Newton, a tenant under Section 8 in Connecticut, received a notice two days before Christmas of 2009 that she and her two children had a week to move out because of a foreclosure action. \textsuperscript{143} “I felt helpless at that time. I didn’t know what to do,” she said. \textsuperscript{144} The deadline was impossible to meet in the middle of winter in a tight Section 8 subsidized housing market. \textsuperscript{145} Ms. Newton was not informed of her rights under the PTFA, and her Section 8 lease was ignored. \textsuperscript{146} In response to numerous complaints like Ms. Newton’s throughout the state, Connecticut Attorney General Richard Blumenthal issued cease-and-desist letters \textsuperscript{147} to a host of default servicing practitioners ordering them to stop “abrupt and illegal evictions” of tenants residing in foreclosed properties. \textsuperscript{148} According to Blumenthal, real estate agents typically begin

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\textsuperscript{142} Id.
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\textsuperscript{144} Id.
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\textsuperscript{145} Id.
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\textsuperscript{146} Id.
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\textsuperscript{147} In the letters, Blumenthal instructs servicers to “treat all occupants of foreclosed properties as bona fide tenants, unless there is credible evidence to the contrary,” and to “refrain from treating the mere failure to responding to a notice as evidence that the occupant is not a bona fide tenant.” Opponents have argued that any borrower who chooses to hide behind their door would be treated as “bona fide” under federal law. See Joe Weisenthal, \textit{Connecticut’s Richard Blumenthal Has A Truly Bizarre Idea For Protecting Homeowners}, BUSINESS INSIDER (Feb. 23, 2010), www.businessinsider.com/connecticuts-richard-blumenthal-has-a-truly-bizarre-idea-for-protecting-homeowners-2010-2.
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eviction procedures immediately following a foreclosure despite the 90-day notice rule, or pressure the tenants to leave without informing them of their rights.\textsuperscript{149}

Evidently, banks have continued to violate the PTFA provisions by throwing tenants out with inadequate notice or through unlawful tactics. Fannie Mae, the U.S. Government-chartered corporation, has tried to distinguish itself from other financial institutions by offering support for renters.\textsuperscript{150} Tenants Together, a California organization for renter’s rights, tells a different story.\textsuperscript{151} According to Gabe Treves, program director at the organization, "Fannie Mae hires the same realtors as the rest of the banks. These realtors see tenants as a roadblock to their commission, so they bully and mislead them into taking the 'cash-for-keys' offers and signing away their rights to stay in their homes."\textsuperscript{152} Owen Casper, a San Diego-based tenant, received a letter from Fannie Mae informing him of his option to accept a cash-for-keys offer, stay up to an extra 90 days as permitted by the PTFA, or to sign a new month-to-month lease.\textsuperscript{153} Mr. Casper opted to sign a new month-to-month lease, but the real estate agent sent by Fannie Mae told him that the option was not available to tenants with existing monthly agreements, and his sole option was to take the cash and move out.\textsuperscript{154} Tenants Together reports that Mr. Casper’s case is typical of tenants throughout several California counties.\textsuperscript{155}

The bank’s failure to abide by the law is hardly surprising. Many foreclosed properties suffer from deplorable conditions, and while tenants can sue their prior landlords under state

\textsuperscript{149} Id.
\textsuperscript{150} Id. Renters in Fannie Mae-owned properties may be able to stay in their homes. See Buying in a Buyer’s Market, FANNIEMAE.COM, http://www.fanniemae.com/kb/index?page=home&c=homebuyers_supportforrenters (last visited March 3, 2011).
\textsuperscript{151} Gabe Treves, Fannie Mae Violates Its Own Policy By Throwing Tenants Out After Foreclosure, NEWSBLAZE (Feb. 3, 2010), http://newsblaze.com/story/20100203121442zzzz.nb/topstory.html
\textsuperscript{152} Id.
\textsuperscript{153} Id.
\textsuperscript{154} Id.
\textsuperscript{155} Id.
landlord-tenant laws and minimum housing codes, the point is moot since after foreclosure, many landlords are bankrupt and there is no money to collect. Banks, under the PTFA, now step into the shoes of the previous landlord and assume all liabilities under the prior lease agreement, relevant state laws, and local codes or ordinances. This creates an immediate cause of action against the bank, who is not insolvent, and can pay substantial damages. Banks will, of course, follow the path of least resistance. Every tenant they can evict or pay off reduces a great amount of exposure to additional liability. Prior to the PTFA, banks avoided the roles of landlords because they wanted the foreclosed property readily available for sale. Now that the roles are forced upon them, they are trying to buy out of it as cost effectively as possible. However, a bank circumventing the PTFA in this manner is not the only deficiency of the Act.

B. Deficiencies and Policy Concerns

The most apparent deficiency of the PTFA was the Act’s limited time frame, but the PTFA has been amended to sunset on December 31, 2014. Taking in the amount of REO inventory, the number of option adjustable rate mortgage (ARM) resets, spillover costs, and the court backlog in foreclosure cases, the earlier 2012 sunset provision was simply not enough

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156 State to state landlord tenant laws vary, but most states have adopted the Uniform Residential Landlord and Tenant Act of 1972, and general prohibited practices for which damages can be collected include interruption of utilities, and failure to maintain the residences in a habitable manner. See NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS, UNIFORM RESIDENTIAL LANDLORD AND TENANT ACT (1972), available at http://www.law.upenn.edu/bll/archives/ulc/fnact99/1970s/urlta72.htm.

157 See Renters Face Eviction, supra note 135.

158 For instance, in Florida, the landlord may become liable for three times rent or actual and consequential damages, as well as attorney’s fees for violations under Fla. Stat. §83.67, these include failure to: maintain the residence in good repair, make reasonable provisions for extermination of pests, provide locks and cleans, provide for clean and safe common areas, provide garbage pickup, and provide for functional facilities for heat during the winter, running water, and hot water. See Fla Stat. § 83.67 (2009).

159 See Renters Face Eviction, supra note 135.

160 PTFA § 704

161 Option adjustable rate mortgages (ARM), have initial low payments, but once it “resets” at a set future date, monthly payments increase substantially. The ARM has often been compared to a ticking time bomb and has been called one of the “riskiest and most complicated home loan product ever created.” See Nightmare Mortgages, BUSINESS WEEK (Sept. 11, 2006), available at www.businessweek.com/magazine/content/06_37/b4000001.htm.
to accommodate the ongoing crisis. Foreclosure projections have risen dramatically since an early 2006 estimate of 1.1 million subprime foreclosures to a January 2009 estimate of 13 million foreclosures on all types of loans through 2014. The waves of ARM resets predicted to detonate in early 2009 were delayed well into 2010 due to historically low interest rates. ARMs have typically reset after 5 years, at which point monthly bills increase by at least 65 percent. One third of all outstanding loans from 2005-2007 are deeply delinquent. Despite this two year addition to the sunset provision, further extensions may be necessary to mitigate the long term damage to renters across the country.

Another particular instance the PTFA does not address is the limbo period between the time of the foreclosure filing and repossession by the bank, or the immediate successor in interest. During this period, properties are not maintained, utilities are not paid, and a tenant has no legal recourse because the landlord has abandoned the property or is insolvent. This is especially true in judicial foreclosure states, which make up approximately half of the country. What results in Florida is at least 180 days of purgatory for the property and its tenants. This period has become increasingly longer due to the sheer number of foreclosures in the state. In

162 CENTER FOR RESPONSIBLE LENDING, SOARING SPILOVER; ACCELERATING FORECLOSURES TO COST NEIGHBORS $502 BILLION IN 2009 ALONE; 69.5 MILLION HOMES LOSE $7,200 ON AVERAGE 1 (2009), available at http://www.responsiblelending.org/mortgage-lending/research-analysis/soaring-spillover-3-09.pdf.
164 Id.
165 Id.
166 Cf. Mary Jane Smetanka, If no one owns the home, who’s watching the house?, STAR TRIBUNE (Nov. 29, 2009), available at http://www.startribune.com/local/west/77841947.html.
2009, Florida tackled a total of 398,825 foreclosure cases, yet the state had backlogged another 456,000 pending cases. Special courts have been set up, commonly referred to as “rocket dockets,” and the Florida legislature has appropriated $9.6 million in 2010 to hire semi-retired judges and case managers to preside over these fast-track foreclosure hearings. However, recent issues with falsified or incorrect lender documentation, such as “robo signing,” may have slowed down the entire process.

The most important deficiency is that the PTFA lacks any real enforcement mechanisms. Banks, their attorneys and realtors continue to engage in unlawful practices and send illegal notices to evict tenants to limit their liability. Due to the backlog of foreclosures and evictions in the judiciary, practices of summary evictions have become routine and violations of the PTFA almost always slip through the cracks. Furthermore, court access for tenants has generally been extremely circumscribed. Florida Legal Services recently conducted an eviction study in Miami-Dade County. During a sixteen month period in 2008-2009, out of a total of 27,054 residential evictions filed in Miami Dade County, only 6,831 (25%) of tenants filed a response to the initial

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169 Kimberly Miller, Court records show Florida foreclosures increasing; Palm Beach County leveling off, PALM BEACH POST (Feb. 4, 2010, 6:50 PM), http://www.palmbeachpost.com/money/real-estate/court-records-show-florida-foreclosures-increasing-palm-beach-214312.html
170 Annie Butterworth Jones, Court orders managed mediation for foreclosures, FLORIDA BAR NEWS (Jan. 15, 2010), http://www.floridabar.org/divcom/jn/jnnews01.nsf/8c9f13012b96736985256aa900624829/eaeece58a65def76852576a20048fd6b.
171 A “rocket docket” hearing may consist of a teleconference between the judge, lenders, and the borrowers. Lenders do not have to appear in person, and borrowers rarely ever show up to contest the loss of their homes. See David McLaughlin, Why Florida’s Foreclosure Machine is Slowing Down, BUSINESS WEEK (Oct. 18, 2010), available at http://www.businessweek.com/magazine/content/10_43/b4200049069430.htm
172 Id.
173 Robo signing refers to recent revelations that loan servicers were rapidly signing foreclosure documents without even reading them to ensure that the information was accurate. See Tami Luhby, Robo-signing: Just the Start of Bigger Problems, CNNMONEY.COM (Oct. 22, 2010), http://money.cnn.com/2010/10/22/real_estate/foreclosure_paperwork_problems/index.htm.
174 McLaughlin, supra note 170.
175 See supra Part III.A.
176 Brief for the Community Lawyering Clinic, University of Miami Law School as Amici Curiae Supporting Appellant, Kendrick v. Corser, No. 10-488-AP, (11th Cir. 2011) (on file with author)
For the 25% that filed an answer, 30% were immediately dismissed for failure to post rent or file a Motion to Determine Rent, as required by the court. Only 554 (13.6%) of the answers filed were not dismissed before reaching a hearing, and out of these only three resulted in a judgment for the tenant. Even these three judgments included two where the tenant was ultimately evicted. The poorest five of the 80 zip codes accounted for over 15% of all evictions—all of these zip codes are over 90% minority.

In Miami-Dade, the likelihood of a tenant reaching a judge is miniscule, much less being able to raise the PTFA as an affirmative defense to an unlawful eviction. What results, according to Purvi Shah, a Florida Legal Services attorney, is that “the law in general is being deliberately ignored.” The same may ring true across the country. Connecticut Attorney General Blumenthal has issued numerous cease-and-desist letters to a host of default service practitioners, ordering them to stop abrupt and illegal evictions: “[f]ast-track evictions not only harm tenants, but turn vacant properties into eyesores and even crime havens, diminishing values neighborhood wide. We are putting these companies on notice: follow federal law, and treat tenants fairly, or face legal action.” California Attorney General Brown issued similar letters to stop unlawful evictions. It is still unclear, however, what legal actions were taken, and whether anyone has followed through.

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177 Id. at 10-17.
178 Id.
179 Id.
180 Id. at 16.
181 Id. at 11-12.
183 Bay, supra note 147.
Forcefully evicting tenants who pay rent creates even more vacant properties. Empty and poorly maintained homes lead to vandalism, theft, and blighted neighborhoods. The FBI in 2008 had warned of thieves targeting copper in foreclosed homes. A realtor taking a prospective buyer to a vacant home walked into one such situation in Wisconsin, where two people came to the house with a lawnmower under the guise of gardeners, broke into the house and gutted it for its copper piping. Neglect, disrepair and crime naturally diminish value in neighborhoods, making it even more difficult for banks to liquidate their ever increasing foreclosure inventory. Since evicting sound tenants contributes to further abandonment and disrepair, banks, in a way, have been indirectly perpetuating the conditions of the declining housing market.

To elaborate further on the stagnant condition of today’s housing market, it is important to note that foreclosures cause a “spillover” effect by depressing the value of nearby homes. In 2009, almost half of all home sales were either foreclosures or short sales, i.e. properties sold at a substantial discount. This has resulted in lower property values for homeowners and a reduced tax base for communities. Many homeowners today are paying mortgages that cost more than the current market value of their homes, thus resulting in more short sales. The Center for Responsible Lending estimates that, in 2009 alone, foreclosures would cause 69.5 million nearby homes to suffer price declines averaging $7,200 per home, resulting in a $502 billion

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187 See Id.
188 A short sale is an agreement between the mortgagee and mortgagor to sell the property for less than the unpaid mortgage, through this, delinquent homeowners escape a mortgage they cannot afford, and lenders, although taking a loss, avoid the costlier process of completing a foreclosure. See generally Stephanie Armour, Home Sellers Frustrated as Short-sale Deals Collapse, USA TODAY (Aug. 5, 2009), available at http://www.usatoday.com/money/economy/housing/2009-08-04-short-sales-mortgages_N.htm.
189 SOARING SPILLOVER, supra note 161, at 1
190 Id.
total decline in property values. These projections only account for value decline caused by nearby foreclosures, and do not account for the overall slowdown in the housing market or for the general disrepair and increase in crime in particular declining neighborhoods.

Due to the substantial decline in housing prices, banks have been holding onto empty homes and rental properties. According to RealtyTrac, a national online marketer of foreclosed properties, only approximately one-third of foreclosed properties were being listed on the market in 2009. Banks are likely afraid to drive home prices down even further, since the supply of foreclosed properties far outnumber the demand. However, the reality of it all is puzzling; vacant properties sit idly by and decay as homeless rates increase. Neighborhoods fall to shambles and property values continue to deflate, as crime and unemployment rises. Banks, financial institutions, and mortgage holders must learn to take these factors into account and reevaluate their strategies and practices. They must realize that long term sustainability, social stability and the recovery of neighborhoods, and ultimately the housing market, is more important than any immediate short term gains or the limitation on foreseeable liabilities.

IV. Recommendations

The Protecting Tenants at Foreclosure Act of 2009 marks an important, first step in addressing a long overlooked problem; however, it is deficient in several respects. To ensure that tenants at foreclosure are able to remain in their homes, community organizers must educate tenants of their rights, laws must be enacted to ensure that tenants’ utilities are not shut off when

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191 Id.
192 Id.
194 Cf. id. (asserting that excess inventory is one of the biggest problems in housing these days and leads to lower housing prices, which leads to more foreclosures).
their landlords go into foreclosure, and courts should allow tenants to collect statutory damages against real estate professionals that violate the PTFA. Additionally, states should consider enacting programs such as those that have been successful in California and Massachusetts.

A. Community Organizing and Outreach

The most important deficiency of the law is perhaps the lack of knowledge, which renders the federal law ineffective. On a practical level, knowledge of the law is required before tenants can even attempt to assert their rights. Community organizations and tenants’ rights groups have been and should continue to educate renters regarding the law. However, there is no end in sight to home foreclosures over the next few years and it is unclear whether outreach efforts can keep up. According to University of Minnesota Law Professor, Ann Burkhart, who helped write the new foreclosure laws, it is also unclear whether any amount of outreach will force landlords to follow the law. According to Professor Burkhart, there is “an inherent imbalance in power between landlords and tenants that it’s [sic] always been a problem forcing landlords to comply with these kinds of laws . . . [t]he average tenant doesn't know their rights and doesn't have the time or money to pursue a suit. . .”

One outreach group, however, has achieved tremendous success. Project “No One Leaves,” organized by the Harvard Legal Aid Bureau (HLAB), is a student run, door-to-door canvassing project that provides awareness and legal services to tenants and former owners at

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198 Id.
foreclosure. The Project, in 2009 alone, contacted over 1,000 people living in foreclosed properties, and was able to provide limited or full representation in each of those resident’s eventual eviction cases. “No One Leaves” utilizes pro-bono attorneys, volunteers from surrounding universities, community organizers, as well as tenants, to canvass foreclosed neighborhoods, organize pro-se workshops, and provide representation to keep people in their homes. The Project also works with a community bank, Boston Community Capital (BCC), to purchase foreclosed homes, often at below-market cost, and mortgage those homes back to the foreclosing homeowners at the current market rate. Where the Project succeeded most, however, is in its partnership with City Life Vida Urbana, a grassroots organization responsible for building community power, and ultimately effecting legislative change. In August of 2010, Massachusetts passed the “most comprehensive law in the country for protecting people living in foreclosed-on properties.” A similar initiative, a sister project of HLAB’s Project “No One Leaves,” has launched successfully in Miami, organized by students from the University of Miami under the guidance of the Community Justice Project at Florida

201 Id.
205 City Life Vida Urbana is the glue that holds the entire project together. “City Life...is a grassroots community organization in Boston committed to fighting for racial, social, and economic justice . . . by building working class power through direct action, coalition building, education and advocacy.” City Life Vida Urbana -- Mission Statement, http://www.clvu.org (last visited Jan. 20, 2011).
Legal Services. The project has, with the help of student volunteers, reached out to over 1,000 households in the second half of 2010, and has educated tenants at foreclosure through know-your-rights presentations and pro-se workshops. This year, the Miami project plans to expand institutionally, recruit more volunteers, provide more direct services to low-income tenants in danger of being unlawfully evicted, and to help in national movement building. Various outreach initiatives by law school clinics and community organizations have also recently sprouted up in New York, Chicago, Palo Alto, and many other cities across the country.

B. Access to Utilities

The purpose of the PTFA is to keep tenants at foreclosure in their homes, but one glaring oversight is that utilities may become inaccessible during the foreclosure process. Without running water, electricity, or garbage pickup, tenants are unlikely to stay in foreclosed rentals for long, despite having a legal right to do so. In these cases, the landlord will often be insolvent or have gone missing, and claims for constructive eviction will serve no function. In South Florida, most tenant buildings are on a single meter, and the Miami-Dade Water and Sewage Department does not allow tenants to take over the landlord’s delinquent bill. Current proposals are in negotiations with Miami-Dade Water and Sewage, but have been met with much resistance.

209 See Old Routes, PROJECT NO ONE LEAVES MIAMI, http://sites.google.com/site/nooneleavesmiami/canvassing-zones-1/old-routes (last visited Mar. 16, 2011) (indicating the number of households reached out to on each of six separate canvassing outings).
213 See Tariq Osborne, Absentee landlords abandon Opa-locka renters, THE MIAMI TIMES, Aug. 5-11, 2009, at 8A.
In contrast, Minnesota, in May of 2010, signed into law a “Tenant Bill of Rights,” which requires utility companies to provide the following to single-metered residential buildings when landlords fail to pay the bills: (1) adequate notice of termination to tenants in buildings whose landlords failed to pay; and (2) allow tenants to have the service continued or reconnected by paying only current charges for the most recent billing period.\(^{214}\)

**C. Statutory Damages and Loss Mitigation**

Due to the absence of federal enforcement mechanisms, the unwillingness of federal courts to review PTFA violations, and the continued violation of the federal law by real estate practitioners, states should create statutory damages for violations of the law.\(^{215}\) Although states have begun to adopt the federal legislation into state law,\(^{216}\) the legislation offers no immediate relief to current tenants already displaced or in danger of displacement due to the delay in the legislative process, the gap between legislation and administration, and the unclear enforcement mechanisms that may vary from state to state. In states such as Florida, where the proposed state legislation is one of minimal compliance—a virtual copycat of the federal law—violations will undoubtedly continue even after the state enactment. One thing that could help, says Professor Burkhart, is for the language of the law to be strengthened to mandate penalties, such as statutory damages and attorney’s fees, for landlords who break the law.\(^{217}\) In August of 2010, Massachusetts signed legislation giving tenants the right to sue and collect a minimum of $5,000 damages against banks that evict in violation of the law.\(^{218}\)


\(^{215}\) See supra Part II.B.


\(^{217}\) Mador, supra note 196.

Statutory damages will force banks to take their roles of landlords more seriously, and will push them to reevaluate the costs associated with vacant properties. Additionally, states should consider creating incentives for banks that voluntarily choose to lease out their foreclosure inventories, in the form of subsidies or tax benefits. In today’s housing crisis, unlike the 1980’s condo crisis, a speedy resale is not possible due to the sheer amount of foreclosure inventory. Banks, therefore, have a greater incentive to rent out properties and if not to follow the federal law, then at least to mitigate foreclosure losses. Early in 2009, Fannie Mae announced a program where it leased back the home to owners who lost their homes to foreclosure. A Fannie spokesperson said the program was created to “recover losses incurred when Fannie Mae takes over the remaining loan on foreclosed rental properties.” Fannie sometimes has to sell these properties at steep discounts in the current market, and a renter helps Fannie to recoup the difference in the meantime. Fannie’s policy may only be a temporary solution, but it keeps people in housing and mitigates lender losses.

Despite the incentives offered to banks, the trend of banks becoming landlords has been slow to catch on, because banks don’t want to invest, they are worried about a lease potentially impeding a resale, and because they are ill-equipped to handle the requirements of being a landlord. Various programs have, however, sprouted up in the past year to fill this managerial role. FirstService Corporation, for instance, has announced the provision of management services aimed at encouraging renting out bank-owned properties as opposed to leaving them vacant to

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221 Golobay, supra note 12
222 Id.
223 Id.
224 Dobies, supra note 135.
dilapidate and depreciate. Through its subsidiary, TenantAccess, the company seeks to combine “property management and field asset preservation to reach out to servicers and whole loan holders of foreclosed properties and offer to manage a rental or program that would run while the property is being sold.” The company now boasts more than 350 property managers nationwide and has been specifically targeting “instant landlords” under the PTFA.

The National Residential Property Receivership Program similarly “connects lenders, servicers, and investors with independent property managers to handle tenant related issues on foreclosed properties.” Courts have, in some cases, appointed receivers “to handle the property management for a lender who forecloses on a borrower.” The program provides property managers who specialize in tenant housing and lawyers who can work on behalf of the lenders. Mortgage Contracting Services (MCS) has recently launched a 24-hour call center, specializing in emergency response for tenant-occupied properties. MCS provides new bank-lenders with “emergency coverage for tenant-occupied properties [which] enables them to fulfill that role, all without bearing the cost of hiring and training additional vendors.” With codified federal or state penalties for breaches of the law, banks will have to reweigh their opportunity costs and may well take advantage of these new contracting services. However, both states and Congress should watch these contracting services closely to assess whether additional regulation might be required.

225 Golobay, supra note 12. .
226 Id.
229 Id.
230 Id.
231 See Brittany Dunn, Mortgage Contracting Services Launches 24-Hour Call Center, DSNEWS (Feb. 15, 2010), http://www.dsnews.com/articles/mortgage-contracting-services-launches-24-hour-call-center-2010-02-15.
232 Id.
D. Other Recommendations

Several notable programs have been created throughout the country to combat issues of vacant properties that could be adopted by state or local governments. One of these programs is the Residential Abandoned Property Program. The city of Chula Vista, California won a statewide award for its code enforcement program aimed at alleviating issues associated with abandoned homes, such as vandalism, crime, and depreciation. The program was launched over two years ago, and it requires mortgage lenders to maintain vacant foreclosed homes to neighborhood standards, i.e. keeping the lawns green, the fences and doors locked, and repairing broken windows. The program was a preventative measure seeking to avert neighborhoods from becoming blighted due to poor maintenance, and it required lenders to register the home with the city. Nearly 9,000 foreclosures occurred in the past two years, and more than 2,600 properties had been registered with the city, producing more than $183,000 in registration fees. Additionally 2,000 complaints were filed and $1.3 million in fines were issued.

The National Community Stabilization Trust Program is another effort that seeks to link local governments and banks holding foreclosed homes. Under the program, participating banks will allow local officials first priority in viewing and buying properties before placing them on the market. According to the Trust president, “cities should be in the best position to

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234 Id.
235 Id.
236 Id.
237 Id.
238 Id.
240 Id.
control and determine the future of their communities by choosing strategically important houses, purchasing and rehabilitating them.”

Wells Fargo, a voluntary participant of the program, said it was selling foreclosed properties to responsible parties, noting that putting occupants back in abandoned and vacant properties was crucial for the recovery of the housing market.

Similar redevelopment programs by both local nonprofits and state or city governments are currently in execution, utilizing NSP funding. NSP, or Neighborhood Stabilization Programs, were first enacted under the Housing and Economic Recovery Act of 2008 to provide grants to mitigate the negative impact of the nation’s economic decline and housing market collapse. To date, HUD awarded $3.92 billion in NSP1 grants, $1.93 billion in NSP2 grants, and another $1 billion in NSP3 grants. Under NSP1, grantees have 18 months from the date HUD signed their grant agreements to obligate these funds and four years to expend allocations. NSP2 is a 3-year program, where 50% of grant money must be spent in the first

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241 Id.
242 Id.
243 The Neighborhood Stabilization Program was established for the purpose of stabilizing communities that have suffered from foreclosures and abandonment. NSP1 references NSP funds authorized under Division B, Title III of the Housing and Economic Recovery Act (HERA) of 2008, and provides grants to all states and selected local governments on a formula basis. NSP2 references NSP funds authorized under the American Recovery and Reinvestment Act (the Recovery Act) of 2009, and provides grants to states, local governments, nonprofits and a consortium of nonprofit entities on a competitive basis. NSP-TA is a $50 million allocation available for technical assistance providers to NSP grantees. Neighborhood Stabilization Program Grants, HUD.GOV, http://hud.gov/offices/cpd/communitydevelopment/programs/neighborhoodspg (last visited Mar. 3, 2011).
244 Id.
two years and the total must be spent by the end of the third year. Lastly, under NSP3, grantees have two years from the date HUD signed their grant to expend 50% of the funds, and three years to expend the entire amount. Non-profit developers and agencies should take advantage of these funds to rehabilitate and revitalize their local neighborhoods. The Boston Community Bank has been one of the first to take advantage of some of these programs in its Stabilizing Urban Neighborhoods (SUN) initiative.

**Conclusion**

While the PTFA marks an important first step in mitigating the negative impact to tenants affected by the foreclosure crisis, more needs to be done on individual state and local levels. The PTFA alone has been ineffective in practice, primarily due to tenants’ lack of knowledge, the inaccessibility to courts, and the absence of enforcement mechanisms for violations of the law. States such as Massachusetts and Minnesota have created unique protections and given the PTFA effect, while states such as Florida have been one of minimal compliance. The PTFA is by no means a discrete mechanism in solving today’s foreclosure problems, but should be

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250 Program 3, supra note 246.

251 There are a number of grantees that non-profit developers and agencies can seek out. See Neighborhood Stabilization Program Resources Exchange – NSP Grantees, HUDNSPHELP.INFO, http://hudnsphelp.info/index.cfm?do=viewGranteeAreaResults (last visited Mar. 3, 2011).

252 See supra Part IV(A).

253 States are, after all, “laboratories” for policy experiments: “To stay experimentation in things social and economic is a grave responsibility. Denial of the right to experiment may be fraught with serious consequences to the Nation. It is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.” New State Ice Co. v. Liebmann, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting)
considered in conjunction with other legislation,\textsuperscript{254} government programs,\textsuperscript{255} and grassroots initiatives.\textsuperscript{256}

In the center of Brickell, Miami, home to the largest concentration of international banks in the United States,\textsuperscript{257} newly constructed, vacant, high-rise condo buildings shimmer in the skyline.\textsuperscript{258} As the sun rises from the Atlantic, the buildings cast a long, gloomy shadow westward towards I-95. There, under the shade of the interstate highway bridge, the homeless pace up and down near the highway ramps, begging for change.\textsuperscript{259} In other areas of the city, entire homeless camps or shanty towns have come and gone over the past few years.\textsuperscript{260} In 2010, Miami was ranked the leading U.S. city in economic free-fall, with alarming foreclosure rates and a

\textsuperscript{254} See, e.g., H.R. 1728, 111th Cong. (2009). This bill directs HUD to establish grant programs for low and moderate homeowners and tenants to obtain legal assistance associated with foreclosure, prescribes tenant protection measures in case of foreclosures, and authorizes state attorneys general to enforce the tenant protections set forth in the Act. See supra Part IV.B.

\textsuperscript{255} The Federal Housing Administration has a program, called the “occupied conveyance program,” that provides at least 60 days notice before eviction and a right for some homeowners and tenants to remain in a property after it is transferred to FHA. The program permits residents with temporary, permanent, or long-term illness or injury to remain for some period of time after the lender has made a claim and the property is transferred to FHA. See, e.g., 24 C.F.R. §203.674 (1991). See also, Emergency Economic Stabilization Act of 2008, Pub. L. No. 110-343, §§ 101-102, 122 Stat. 3765 (2008)(requiring Treasury Secretary to work with federal entities that hold troubled mortgages to allow tenants to remain for the term of their leases).

\textsuperscript{256} Brickell is the financial district of Miami, often referred to as the “Manhattan of the South,” and houses the largest concentration of international banks in the U.S., mostly along Brickell Avenue. See Brickell – Welcome to Brickell/Financial District, HOMES.POINT2.COM, http://homes.point2.com/Neighborhood/US/Florida/Miami-Dade-County/Miami/Brickell-Real-Estate-Agent.aspx (last visited Apr. 25, 2010).


deepening foreclosure market.\textsuperscript{261} The result, however, is a conundrum, as the increasing masses of the homeless gaze eastward towards a rising skyline of vacant housings.