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Interpreting the Protecting Tenants at Foreclosure Act of 2009

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Interpreting the Protecting Tenants at Foreclosure Act of 2009

Allyson Gold

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I. Introduction

In the summer of 2007, mortgage foreclosure rates were increasing in nearly all metropolitan areas.¹ By the end of 2008, the foreclosure crisis had spread to suburban areas as well.² Foreclosures in the United States are at an all time high,³ and the number of foreclosed properties will likely increase as the recession's impact continues.⁴

While foreclosure negatively impacts individual owners and surrounding neighbors,⁵ it often also results in the involuntary displacement of tenants.

1. Dan Immergluck, *The Foreclosure Crisis, Foreclosed Properties, and Federal Policy*, 75 J. AM. PLANNING ASS'N 406, 408 (2009).

2. *Id.* at 410.

3. 155 CONG. REC. E1257-04 (daily ed. May 19, 2009) (statement of Rep. Jackson-Lee).

4. There are two predominant methods of foreclosure: judicial foreclosure, in which, upon default on the mortgage by the mortgagor, the mortgagee sues the mortgagor and there is a sale of the property in a court action in equity; and power of sale foreclosure, in which, upon default on the mortgage by the mortgagor, the property is sold at a public sale after the mortgagee satisfies state notice requirements. GRANT S. NELSON ET AL., *REAL ESTATE TRANSFER, FINANCE, AND DEVELOPMENT* 614-15, 641 (8th ed. 2009).

5. Immergluck, *supra* note 1, at 409 ("In addition to causing financial and social hardship to individuals and households, high foreclosure rates can have negative

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The foreclosure crisis impacts a great number of tenants in part because of the "substantial rise in investor-owned borrowing after 2002."⁶ In 2007, over 4,800 foreclosures in Chicago were filed on two-to-six unit buildings, which are typically occupied by tenants.⁷ In comparison, there were approximately 7,300 filings on one-unit properties, which are often owner-occupied.⁸ Moreover, these foreclosures on the two- to six-unit buildings represent many more than just 4,800 households.⁹ In fact, "renters displaced by foreclosures [likely] exceeded owners in 2007 in Chicago."¹⁰ Similarly in New York City, an increase in foreclosure filings in 2008 affecting multi-family dwellings with five or more units impacted 16,000 renter households.¹¹ The numbers increased in the first quarter of 2009, as 4,500 rental households in multi-family dwellings with five or more units were affected by foreclosure filings.¹² While it is difficult to say with certainty how many rental households the foreclosure crisis has affected, estimates indicate "nearly twenty percent of foreclosures involve" one- to four-unit, tenant-occupied properties.¹³

One potential consequence of this tenant displacement is homelessness.¹⁴ Due to "little notice and scant savings," low-income tenants are susceptible to becoming homeless.¹⁵ Displaced tenants are also at risk of homelessness due to the fact that tenants are generally younger and have lower incomes than homeowners.¹⁶ Low-income households, in turn, have

effects on neighborhoods and localities, especially when they are geographically concentrated.") (internal citations omitted).

6. DAN IMMERGLUCK, *FORECLOSED: HIGH-RISK LENDING, DEREGULATION, AND THE UNDERMINING OF AMERICA'S MORTGAGE MARKET* 154 (2009). "Many rental units are owned and operated by individuals with limited resources and so are quite susceptible to foreclosure and the loss of the property." *Id.*

7. *Id.*

8. *Id.*

9. *Id.*

10. *Id.*

11. Vicki Been, Professor of Law and Director of Furman Center for Real Estate and Urban Policy at New York University, *Renters and Foreclosure: Testimony Before the New York City Council Committee on Housing & Buildings* (Apr. 21, 2009) (transcript available at http://furmancenter.org/files/testimonies/Been_Testimony_City_Council_Foreclosure_Hearing_42109.pdf).

12. *Id.*

13. JOINT CTR. FOR HOUS. STUDIES OF HARVARD UNIV., *AMERICA'S RENTAL HOUSING THE KEY TO A BALANCED NATIONAL POLICY* 14 (2008), available at http://www.jchs.harvard.edu/publications/rental/rh08_americas_rental_housing/rh08_americas_rental_housing.pdf.

14. Peter S. Goodman, *Foreclosures Force Ex-Homeowners to Turn to Shelters*, N.Y. TIMES, Oct. 18, 2009, available at <http://www.nytimes.com/2009/10/19/business/economy/19foreclosed.html>.

15. *Id.*

16. NAT'L COAL. FOR THE HOMELESS, ET AL., *FORECLOSURE TO HOMELESSNESS 2009: THE FORGOTTEN VICTIMS OF THE SUBPRIME CRISIS* 8 (2009), available at <http://www.nationalhomeless.org/advocacy/ForeclosuretoHomelessness0609.pdf>.

the greatest housing cost burdens.¹⁷ These cost burdens, coupled with a lack of affordable housing, increase the risk of homelessness for displaced tenants.¹⁸ As stated by the White House Press Secretary, “[o]ne of the often overlooked problems of the foreclosure crisis has been the eviction of renters in good standing, through no fault of their own, from properties in foreclosure.”¹⁹

In response to these “often overlooked problems,” on May 20, 2009, Congress passed the Protecting Tenants at Foreclosure Act of 2009²⁰ (PTFA) as Title VII of the Helping Families Save their Homes Act of 2009.²¹ PTFA requires existing leases to be honored when a property is foreclosed.²² In the event that the tenant does not have a lease or the lease is terminable at will, the tenant is entitled to 90 days’ notice to vacate.²³ This article will examine PTFA and its effect on state law in various jurisdictions. Part II analyzes three aspects of PTFA: (1) what PTFA accomplishes; (2) vagueness within PTFA; and (3) issues that PTFA does not address. The second part of the article will consider how PTFA impacts state law in six jurisdictions: Arizona, Georgia, Illinois, Ohio, Virginia, and Washington, D.C.²⁴

II. Analysis of PTFA

The Protecting Tenants at Foreclosure Act of 2009 has two major parts.²⁵ The first part addresses the effect of foreclosure on preexisting tenancies,²⁶ while the second part addresses the effect of foreclosure on Section 8 tenancies.²⁷ This article will limit its analysis to the first section, examining PTFA and its impact on existing state law regarding tenants’ rights at foreclosure.²⁸ This analysis is broken into three sections. The first section examines the nature of PTFA. The second section analyzes vagueness within PTFA. The final section discusses issues on which PTFA is silent.

17. *Id.*

18. *Id.*

19. Press Release, White House Office of Commc’ns, Pres. Obama Signs the Helping Families Save Their Homes Act and the Fraud Enforcement and Recovery Act, May 20, 2009, 2009 WL 1398465.

20. Protecting Tenants at Foreclosure Act, Pub. L. 111-22, § 701, 123 Stat. 1632 (2009) (hereinafter, PTFA).

21. *Id.* § 1(b).

22. *Id.* § 702.

23. *Id.*

24. These jurisdictions were selected because they represent jurisdictions in which judicial foreclosure is the dominant method of foreclosure as well as those in which power of sale foreclosure is the dominant method of foreclosure.

25. PTFA, *supra* note 20, §§ 702, 703.

26. *Id.* § 702.

27. *Id.* § 703.

28. It should be noted that PTFA is only effective for a limited period of time; all protections under PTFA terminate on December 12, 2012. *Id.* § 704.

A. *The Nature of PTFA and What It Addresses*

PTFA addresses the rights of tenants of a foreclosed property. To do so, PTFA outlines the steps a successor in interest to a foreclosed property must take in order to vacate a preexisting tenant.²⁹ PTFA also addresses properties subject to PTFA and parties that are eligible for PTFA's protection.³⁰

PTFA states that successors in interest to certain foreclosed properties assume interest in such properties subject to the rights of certain tenants.³¹ If the tenant has a lease, the successor in interest assumes his interest in the property "subject to . . . the end of the remaining term of the lease."³² If the successor in interest sells the property to a purchaser who "will occupy the unit as a primary residence," however, he may terminate the lease provided that the tenant receives 90 days' notice.³³ If the tenant does not have a lease or has a lease "terminable at will under state law," the successor in interest assumes his interest subject to the tenant's right to receive a 90-day notice to vacate from the successor in interest.³⁴

PTFA includes an exceptions clause to ensure that tenants receive the greatest protection from foreclosure possible under the law. PTFA states that "nothing under this section shall affect the requirements for termination of any Federal- or State-subsidized tenancy or of any State or local law that provides longer time periods or other additional protections for tenants."³⁵ With this exceptions clause, PTFA only preempts state law regarding the rights of preexisting tenants and successors in interest after foreclosure if state law provides less protection to tenants than PTFA.³⁶ The exceptions clause requires analysis of applicable law within a particular jurisdiction in order to determine the rights of preexisting tenants of foreclosed property.

PTFA provides tenants with more rights than they normally have at foreclosure. Typically, a foreclosure terminates a tenant's ability to occupy a property;³⁷ foreclosure extinguishes the rights of a tenant whose interest in a property is junior to that of the mortgage being foreclosed.³⁸ PTFA changes this standard and establishes a national baseline rule; under PTFA, a tenant's right to occupy a property is not terminated after a fore-

29. *Id.* § 702(a).

30. *Id.* § 702(a)-(b).

31. *Id.* § 702(a).

32. *Id.* § 702(a)(2)(A).

33. *Id.*

34. *Id.* § 702(a)(2)(B).

35. *Id.* § 702(a).

36. See discussion *infra* Part III.

37. NAT'L CONSUMER LAW CTR., FORECLOSURES: DEFENSES, WORKOUTS & MORTGAGE SERVICING § 14.8 (2d ed. 2007).

38. *Id.*

closure. Instead, PTFA requires successors in interest to give preexisting tenants, regardless of whether their interest in the property is junior or senior to the mortgage, at least 90 days to vacate the property.³⁹

Only certain properties fall within PTFA's purview. PTFA applies to the foreclosure of: (1) a federally related mortgage loan, or (2) any dwelling or residential real property.⁴⁰ A federally related mortgage loan "includes any loan (other than temporary financing . . .) [that] is secured by a first or subordinate lien on residential real property . . . designed principally for the occupancy of from one to four families," and is either: (1) "made in whole or in part by a lender insured [by the Federal Government]"; or (2) "made in whole or in part, or insured, guaranteed, or supplemented or assisted in any way by the Secretary or any other officer or agency of the Federal Government or under or in connection with a housing program administered [by the Federal Government]"; or (3) is intended to be sold by the originator to Freddie Mac or Fannie Mae.⁴¹ Because PTFA encompasses the foreclosures of all federally related mortgage loans and all dwellings or residential property, only business properties with mortgage loans not guaranteed by the federal government are excluded from PTFA's protection.

PTFA states that it protects only bona fide tenants and persons with bona fide leases. A lease or tenancy is defined as bona fide if:

- (1) the mortgagor or the child, spouse, or parent of the mortgagor under the contract is not the tenant; (2) the lease or tenancy was the result of an arms-length transaction; and (3) the lease or tenancy requires the receipt of rent that is not substantially less than fair market rent for the property or the unit's rent is reduced or subsidized due to Federal, State, or local subsidy.⁴²

The elements required to establish a bona fide lease or tenancy preclude defaulting mortgagors from obtaining protection under PTFA.⁴³

B. Vagueness Within PTFA

While PTFA gives certain preexisting tenants rights at the foreclosures of certain properties, PTFA contains vagueness that creates problems in its application. PTFA is vague as to the rights and responsibilities of successors in interest after foreclosure. PTFA states that a successor in interest takes the property "subject to . . . the end of the remaining term of the lease,"⁴⁴

39. PTFA, *supra* note 20, § 702(a). A tenant may have longer than 90 days if the tenant has a lease for a term of years and the successor in interest has no interest in using the property as a personal residence. *Id.*

40. *Id.*

41. 12 U.S.C. § 2602(1).

42. PTFA, *supra* note 20, § 702(b).

43. *See id.*

44. *Id.* § 702(a)(2)(A) (emphasis added).

rather than *pursuant to the terms* of the lease. The language is thus unclear as to whether the successor in interest is bound to the covenants that the landlord (the defaulting mortgagor) entered into with the tenant prior to foreclosure.

Narrowly construed, the phrase "subject to the end of the remaining term of the lease" may be interpreted to only bind the successor in interest to one covenant of the lease agreement, its duration. Under this construction, a successor in interest would not be held to any other lease covenants, which may harm tenants; if the other covenants of the lease are not honored, tenants no longer receive the benefit of their original bargain with the landlord.⁴⁵ Conversely, a broad construction of the phrase would bind the successor in interest to all covenants originally entered into by the defaulting mortgagor, with the successor in interest stepping into the shoes of the mortgagor.

The scope of properties that fall under PTFA's protection presents another concern about vagueness in the statutory language. PTFA concerns all "dwellings" and "residential property."⁴⁶ Generally, local ordinances and state regulations define dwellings and residential property. However, if a local ordinance does not specifically state what constitutes a dwelling and residential property, a court may, on a case-by-case basis, determine whether a particular property falls within the definition.⁴⁷ Because the definition of dwelling and residential property may be informed by local ordinances and case-by-case analysis, PTFA's impact may vary depending on the locality. For example, localities differ on their classifications of single-room occupancies, rooming houses, boarding houses, and residential hotels, leading to disparate application of PTFA across jurisdictions.⁴⁸

Further, PTFA's notice requirements are unclear. While PTFA requires the successor in interest to give the preexisting tenant "notice to vacate," this notice is not defined. What qualifies as sufficient notice may thus come from one of three sources: (1) federal common law, (2) state mortgage law, or (3) state landlord and tenant law.

45. Tenants take into account obligations guaranteed by the landlord when they sign a lease and agree to pay a certain amount of rent; this rent reflects the obligations the tenants receive.

46. PTFA, *supra* note 20, § 702(a).

47. *See, e.g., Hill v. Cmty. of Damien of Molokai*, 911 P.2d 861, 867 (N.M. 1996) (To determine whether a group home violated a restrictive covenant against properties that were not single-family residences, the court conducted a factual inquiry. Despite the fact that the occupants received medical treatment in the group home, the court found the group home did constitute a single-family residence because the occupants lived in the home, shared their meals, and received support from each other.).

48. Because localities may have varying definitions of dwellings and residential property, PTFA may even have disparate application within a single state.

The first possibility, federal common law as defined by the federal courts, is unlikely to be the proper source for three reasons. First, PTFA does not evidence any congressional intent to nationalize the definition of "notice to vacate." Second, pursuing a definition set by federal courts could result in clogging the federal court system, which federal judges generally refrain from doing. Third, a federal common law definition may not even exist. The second potential source, state mortgage law, is also unlikely because the type of notice required under such state statutes differs from notice to vacate. Whereas mortgage statutes prescribe notice a foreclosing party must give to the defaulting mortgagor, who may or may not live in the property, notice to vacate from a successor in interest to a preexisting tenant is more analogous to a landlord/tenant relationship. Therefore, the sufficiency of "notice to vacate" under PTFA will likely be determined by examining the third potential source, state landlord/tenant notice requirements. Because sufficiency of notice will likely be determined by looking to landlord/tenant law in each state, the type of notice required to satisfy PTFA will likely vary by jurisdiction.

It is also unclear whether "provision of notice" means the sending of notice or if it also includes the receipt of such notice, which would delay the start of the tenant's 90-day period. State landlord/tenant notice requirements will likely govern whether provision of notice requires receipt of notice by the tenant, and would again vary by jurisdiction.

The third requirement for PTFA's definition of a bona fide lease or tenancy is also vague. The third requirement states that "the lease or tenancy requires the receipt of rent that is not substantially less than the fair market rent for the *property* or the *unit's* rent is reduced or subsidized. . . ."⁴⁹ That this requirement uses both the words "property" and "unit" raises questions as to whether a preexisting tenant has to pay rent that is fair market value for his particular unit or for the building as a whole.⁵⁰ To impose the latter interpretation would contravene the purpose of PTFA, which is to protect tenants, and is therefore highly unlikely. Similarly, the third requirement is vague as to whether the rent must be an amount of money or if the rental payment may be the performance of a service. Whether the performance of a service in exchange for a tenant's ability to occupy a property satisfies PTFA may impact the rights of certain tenants, such as live-in housekeepers or nannies.

49. PTFA, *supra* note 20, § 702(b)(3) (emphasis added).

50. For example, to fall under PTFA's protection, would a tenant in an apartment building need only to demonstrate that he pays fair market value for his individual unit or fair market value for any unit in the entire building? The answer to this question may be significant for successors in interest, who may attempt to evict preexisting tenants in multi-family dwellings by asserting that the usage of both words permits the latter interpretation.

Further, the third requirement for a bona fide lease or tenancy does not stipulate how fair market value should be calculated. It is unclear whether fair market value should be calculated at the time the tenant entered into the lease or tenancy, at the time of foreclosure, when the successor in interest attempts to vacate the tenant, or at some other time. The answer may have a great impact on long-term tenants in rent-controlled apartments.⁵¹ Lastly, the wording of the third requirement is also unclear as to whether individuals who rent portions of properties, such as basements or bedrooms, would fall under PTFA's protection.

C. Issues on Which PTFA is Silent

In addition to raising questions of interpretation, PTFA is silent on several issues that may affect the rights of tenants. PTFA does not address whether a tenant can waive PTFA's protections.⁵² This silence is significant because tenants unaware of their rights may unknowingly waive or sell them to a foreclosing mortgagee or a successor in interest. For example, a foreclosing mortgagee or a successor in interest may offer the tenant money to vacate the property. If the tenant is unaware of his rights, he may accept the money to leave under the false assumption that he could be evicted once the property is foreclosed. If the rights provided by PTFA are determined to not be waivable, a successor in interest will not be able to give a preexisting tenant money in exchange for vacating a property before 90-days or the expiration of the lease period. Other statutory protections, such as anti-deficiency legislation,⁵³ cannot be waived.⁵⁴ Therefore, PTFA may be interpreted to give tenants rights that cannot be waived.

While PTFA's definition of a bona fide lease or tenancy describes elements of the agreement itself, it neglects to set a point in time by which the tenant and the mortgagor must have entered into the agreement.⁵⁵ PTFA does not state whether the agreement must have been entered into before the mortgagor defaulted on the mortgage or if agreements made after default but before foreclosure are eligible for PTFA's protection. Considering Congress's intent to protect tenants from evictions that result from no fault of their own, agreements entered into after default should be protected unless there is bad faith on the part of the tenant. If a tenant has no knowledge

51. Because of rent control or rent stabilization programs, certain tenants may be paying rents substantially below current fair market value.

52. PTFA, *supra* note 20, § 702.

53. Anti-deficiency legislation is legislation that limits the mortgagee's ability to obtain a deficiency judgment. See REAL ESTATE TRANSFER, FINANCE, AND DEVELOPMENT, *supra* note 4, at 731.

54. See *DeBerard Props., Ltd. v. Lim*, 976 P.2d 843 (Cal. 1999) (finding that although the text of California's anti-deficiency statute fails to explicitly prohibit waiver, rights under the statute are not waivable).

55. PTFA, *supra* note 20, § 702.

of default and possible foreclosure, then in keeping with the purpose of PTFA he should receive protection under PTFA. However, if a tenant is aware of the default and the possibility of foreclosure, then his agreement may be outside the scope of PTFA's protection.⁵⁶

PTFA is also silent as to whether a tenant is bound by the terms and conditions of the lease he signed with the mortgagor.⁵⁷ PTFA only states that a successor in interest may not terminate a tenant's right to remain in the property until the tenant's lease expires or 90-days' notice is given.⁵⁸ Narrow interpretation suggests that the tenant need not comport with his lease nor pay rent in order to remain in the property. However, Congress's intent was to protect tenants in good standing from foreclosure. Therefore, protections afforded to tenants by PTFA likely only exist if tenants comply with their leases and continue their rental payments. However, because PTFA is silent on whether a tenant must exercise his statutory protections, the possibility remains that a tenant may be able to terminate his lease before it expires and vacate the property before the end of his statutory possessory period.

PTFA's notice requirements do not specify when a successor in interest may give notice to a tenant.⁵⁹ PTFA does not state whether a successor in interest must wait to send notice until after the foreclosure sale or if a successor in interest may provide notice to a tenant after the mortgagor defaults but before the foreclosure sale occurs.⁶⁰ Thus the interpretation of when notice may be given could depend on the jurisdiction. In title theory jurisdictions, the mortgagor has equitable title in a property and the mortgagee has legal title in the property until the mortgagor makes the final mortgage payment.⁶¹ Upon the final payment, the mortgagor holds both equitable and legal title to the property, and the mortgagee no longer has an interest in the property.⁶² In an intermediate theory jurisdiction, the mortgagor has legal title in the property and the mortgagee has equitable title in the property until the mortgagor finishes payments on the mortgage, at which time the mortgagee has no interest in the property.⁶³ However, under the intermediate theory, once the mortgagor defaults, the mortgagee has legal

56. For example, after a mortgagor defaults on his mortgage, a tenant may insert himself into a building under a multi-year lease in order to give himself the ability to bargain with a successor in interest; the tenant could offer to terminate his lease if the successor in interest pays him a certain amount of money.

57. PTFA, *supra* note 20, § 702.

58. *Id.* § 702(a).

59. *Id.*

60. *Id.*

61. GRANT S. NELSON & DALE A. WHITMAN, REAL ESTATE FINANCE LAW § 4.1 (5th ed. 2007).

62. *See id.*

63. *Id.* § 4.3.

title to the property, subject to the mortgagor's right of equity of redemption; however, the foreclosure sale extinguishes this right.⁶⁴

Because the mortgagee in both title and intermediate theory jurisdictions has a legal interest in the property when the mortgagor defaults, a mortgagee may be deemed a successor in interest after the mortgagor defaults but before the foreclosure sale occurs. If PTFA recognizes legal interest alone as sufficient, then a mortgagee may send notice to the tenant during the time between the mortgagor's default and the foreclosure sale, which would significantly shorten the amount of time that the tenant would be able to occupy the property. However, this understanding of "successor in interest" is unlikely to be recognized by courts interpreting PTFA, because during this time the mortgagor retains an equitable interest in the property.⁶⁵

A mortgagee may also attempt to provide the tenant with notice after the mortgagor defaults but before the property is sold at a foreclosure sale by sending "contingent notice." The notice would be contingent upon the mortgagee being the purchaser at the foreclosure sale; if the mortgagee were the purchaser, his interest in the property, as a successor in interest, would relate back to the date he sent the notice to the tenant and again shorten the tenant's length of notice. While PTFA does not address whether this type of notice is permissible, it would likely be invalid for two reasons. First, as discussed above, the mortgagor still has an equitable interest in the property.⁶⁶ Second, if the mortgagee were able to send contingent notice to tenants, then other third parties would be able to send similar notice. Confusion and uncertainty could be created for the tenant, which would be contrary to the intent of PTFA.

The final issue on which PTFA is silent is the types of legal actions PTFA governs.⁶⁷ PTFA does not state whether it applies only to mortgage foreclosures or if it also applies to deeds in lieu of foreclosure.⁶⁸ Rather than defining the types of instruments that it governs, PTFA states that it applies to "any foreclosure" on certain types of property.⁶⁹ Whether PTFA applies only to properties that are foreclosed, or if it also encompasses properties that are transferred to successors in interest by defaulting mortgagors, impacts the rights of tenants. Under a narrow construction of PTFA, the tenant of a property transferred by a deed in lieu of foreclosure would not gain PTFA's

64. *Id.*

65. *Id.*

66. *Id.*

67. PTFA, *supra* note 20, § 702.

68. A deed in lieu of foreclosure is when a defaulting mortgagor gives the deed to the property to the mortgagee to avoid foreclosure of the property by the mortgagee and to "satisfy the mortgage debt." NELSON & WHITMAN, *supra* note 61, at § 6.18.

69. PTFA, *supra* note 20, § 702(a) (emphasis added).

protection because the transfer does not involve the actual foreclosure of the property.

Congressional intent, however, may compel the inclusion of deeds in lieu of foreclosure. Narrowly stated, Congress' intent was to protect tenants from losing their homes at foreclosure. Broadly stated, Congress' intent was to protect tenants from losing their homes when their landlord lost ownership of the property because of a default. Under the broad construction of this congressional intent, a deed in lieu of foreclosure may be seen as a way in which a mortgagor loses his property. Therefore, to protect tenants whose landlords lose their properties, deeds in lieu of foreclosure should be included in PTFA's protection.

A narrow construction of either PTFA or Congress's intent would result in PTFA's application only to properties that are foreclosed, and not to properties transferred by a deed in lieu of foreclosure. This construction may create undesirable results; mortgagees may be willing to pay mortgagors to transfer the property through a deed in lieu of foreclosure in order to avoid triggering tenant protections under PTFA.⁷⁰

However, potentially undesirable results are likely avoided by the fact that a deed in lieu of foreclosure may be likened to the sale of real estate. In a sale of real estate, the purchaser takes the property subject to any existing interests in the property.⁷¹ A deed in lieu of foreclosure is akin to a sale because the deed is given to "satisfy the mortgage debt."⁷² Thus, a deed in lieu of foreclosure is effectively a sale of the property in exchange for satisfaction of the outstanding balance of the mortgage. Therefore, if a deed in lieu of foreclosure is a sale, then a successor in interest in a property that has a preexisting tenant will take the property subject to the tenant's interest. Thus, even if the transfer of a property by a deed in lieu of foreclosure circumvents tenants' rights under PTFA, the tenant may still remain in the property for the duration of his lease.⁷³

While PTFA creates rights for tenants at foreclosure, the issues on which PTFA is silent and vagueness within PTFA may lead to litigation as tenants invoke these rights. Through litigation, courts will interpret the scope of PTFA. However, courts in different jurisdictions may vary in their inter-

70. This construction would preclude PTFA from applying to Fannie Mae's Deed for Lease program, under which the defaulting mortgagor deeds the subject property to the mortgagee and then leases the property from the mortgagee. Under the Deed for Lease Program, the property is not foreclosed. Press Release, Fannie Mae, Fannie Mae Announces Deed for Lease Program (Nov. 5, 2009), available at <http://www.fanniemae.com/newsreleases/2009/4844.jhtml?p=Media&s=News+Releases&searchid=>.

71. REAL ESTATE TRANSFER, FINANCE, AND DEVELOPMENT, *supra* note 4, at 448-55.

72. NELSON & WHITMAN, *supra* note 61, § 6.18.

73. Nonetheless, PTFA offers greater protection, because it gives tenants without tenancy for a term of years to remain in the property for at least 90 days.

pretation of PTFA's protections, particularly with issues of lease covenants by which preexisting tenants and successors in interest are bound, what type of notice is sufficient under PTFA, and when to calculate fair market value. Without clarification from Congress or the Supreme Court, the impact of PTFA will likely vary as different jurisdictions reach different interpretations.

III. The Impact of PTFA on State Law

The impact of PTFA on state law depends on whether or not it preempts state law in a given jurisdiction. The Supremacy Clause of the Constitution states that the "Constitution, and the Laws of the United States which shall be made in Pursuance thereof . . . shall be the Supreme Law of the Land. . . ." ⁷⁴ Thus, when there is a conflict between federal law and state law, federal law preempts the state law. Federal law preempts state law in two situations. ⁷⁵ The first is when the federal law expressly preempts state law. ⁷⁶ In this situation, the text of the federal law explicitly states that it preempts state law. ⁷⁷ The second situation occurs when federal law implicitly preempts state law. ⁷⁸ The Court recognizes field preemption, where the federal law is so broad that Congress cannot be seen to have left any room for states to further develop law in this area, and conflict preemption, where it is either impossible to comply with both the federal and state laws, or the state law interferes with Congress's intentions in enacting the federal law. ⁷⁹ In any preemption situation, the test for conflict between federal and state law involves an examination of the federal law's "structure or purpose." ⁸⁰

Even when a federal law purports to expressly preempt state law, the scope of the preemption may be unclear; in such situations, a court must look to Congressional intent. ⁸¹ Absent clear congressional intent, courts refuse to find that federal law preempts state law. ⁸² In *Bates v. Dow Agrosciences LLC*, ⁸³ farmers brought a claim against a pesticide manufacturer, alleging that the use of the manufacturer's pesticide damaged the farmers' crops. ⁸⁴ The manufacturer claimed the suit was expressly preempted by a federal law that provided that states "shall not impose or continue in effect any requirements for labeling or packaging in addition or different from

74. U.S. CONST. art. VI.

75. *Gade v. Nat'l Solid Waste Mgmt. Assc.*, 505 U.S. 88, 98 (1992).

76. *Id.*

77. *Id.*

78. *Id.*

79. *Id.*

80. *Id.*

81. *Id.* at 96.

82. *See Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485 (1996).

83. 544 U.S. 431 (2005).

84. *Id.* at 434-35.

those required under this subchapter.”⁸⁵ In holding that the farmers’ claim was not expressly preempted, the Court found that the federal law provided for the preemption only of those state law packaging requirements that are “in addition to or different” from those outlined in the federal law, and did not preempt state laws that are consistent with the federal law.⁸⁶

Similarly, in *Sprietsma v. Mercury Marine*,⁸⁷ the Court analyzed the scope of the express preemption clause in the Federal Boat Safety Act (FBSA).⁸⁸ In looking to the text of FBSA as well as congressional intent surrounding its enactment, the Court determined that minimum boating safety requirements should be seen as the ultimate objective of the legislation and thus states have the ability to enact laws that provide higher safety standards.⁸⁹ *Bates* and *Sprietsma* demonstrate that the scope of express preemption clauses is informed by congressional intent, and that such preemption is narrowly construed so that federal laws function as a floor and not a ceiling; states may enact laws that are broader than the federal law as long as the state law is consistent with the federal law.

Like the federal laws at issue in *Bates* and *Sprietsma*, PTFA preempts state law, stating that “nothing under this section shall affect the requirements for termination . . . of any State or local law that provides longer time periods or other additional protections for tenants.”⁹⁰ Clearly from this text, as well as congressional intent, PTFA aims to give tenants the greatest protection possible, and represents only the minimum amount of protection provided to tenants at foreclosure. Thus, like the interpretation of the statutes in *Bates* and *Sprietsma*, any state or local law that is consistent with the language and intent of PTFA will not be preempted by PTFA.

If state law addressing tenants’ rights at foreclosure affords tenants greater protections than PTFA, PTFA will not preempt state law. The entirety of a state’s laws regarding tenants at foreclosure may provide greater protection to such tenants than PTFA. It is also possible that certain elements of the state’s laws, combined with elements of PTFA, may together provide the greatest protection to tenants at foreclosure. PTFA’s text suggests that either scenario would be consistent with, and therefore permissible under, PTFA.

If, however, state law does not protect a tenant’s interest from being extinguished by foreclosure, then PTFA will preempt state law. To determine if state law offers greater protection to tenants at foreclosure than PTFA, it is necessary to examine the rights of tenants at foreclosure in each state.

85. *Id.* at 435–36.

86. *Id.* at 447.

87. 537 U.S. 51 (2002).

88. *Id.* at 54.

89. *See id.* at 70.

90. PTFA, *supra* note 20, § 702(a).

The analysis of state law begins with examining the state's foreclosure procedure to determine what rights and what role tenants have in the process. When PTFA preempts state law regarding tenants' rights at foreclosure, notice requirements under the state's landlord and tenant law must also be analyzed to determine the type of notice required in order to comply with PTFA.⁹¹ The following analysis examines state law in six jurisdictions, Arizona, Georgia, Illinois, Ohio, Virginia, and Washington, D.C.

A. Arizona

The most common foreclosure procedure in Arizona is power of sale foreclosure on a deed of trust.⁹² A trustee⁹³ may foreclose a deed of trust by power of sale "after a breach or default in performance of the contract or contracts, for which the trust property is conveyed as security, or a breach or default of the trust deed."⁹⁴ However, the power of sale may not be exercised "before the ninety-first day after the date of the recording of the notice of the sale."⁹⁵

When a trustee forecloses pursuant to a deed of trust, the trustee must: record a notice of sale "in the office of the recorder of each county where the trust property is situated"; send by certified or registered mail a copy of the notice to the parties to the deed of trust that includes the recording date; post a copy of the notice on the property to be sold at foreclosure sale at least 20 days before the sale and in a conspicuous location on the property, if this can be achieved without a breach of the peace; post the notice on a superior court building in the jurisdiction in which the property is located; and publish the notice "in a newspaper of general circulation in each county in which the trust property to be sold is situated."⁹⁶ Such publication must occur "at least once a week for four consecutive weeks," with the last day of publication not less than ten days before the date of the foreclosure sale.⁹⁷

In addition to these notice requirements, the foreclosing trustee must also send a copy of the notice of sale to any person who requests a copy and records such request in the county recording office.⁹⁸ Arizona law does

91. When PTFA does not preempt state law, PTFA, and its notice requirements, are not

92. JOHN RAO, TARA TWOMEY & ODETTE WILLIAMSON, FORECLOSURES § 14.8 (2d ed. 2007). See NELSON & WHITMAN, *supra* note 61, at § 1.6 ("In many states the deed of trust represents the most commonly used mortgage instrument.").

93. "Trustee' means an individual, association or corporation qualified . . . or the successor in interest thereto, to whom trust property is conveyed by trust deed." ARIZ. REV. STAT. ANN. § 33-801 (2010).

94. *Id.* § 33-807 (A).

95. *Id.* § 33-807 (D).

96. *Id.* §§ 33-808, 33-809.

97. *Id.* § 33-808 (A) (4).

98. *Id.* § 33-809 (A) (B).

not require that notice of a trustee's sale specify the rights of any parties, including the trustee, the trustor, or any tenants in actual possession of the property.⁹⁹ After proper notice of the sale, the trustee may sell the foreclosed property at a public auction.¹⁰⁰

Under state law, Arizona tenants do not have the right to remain in the property once it has been foreclosed; foreclosure operates to evict tenants from the property.¹⁰¹ Therefore, if the tenant can establish that he has a bona fide lease or tenancy, PTFA will preempt state foreclosure procedure, giving the tenant the ability to remain in possession of the property for the remainder of his lease or for at least 90 days.

To comply with PTFA's notice requirements, a successor in interest will likely be held to notice requirements outlined in Arizona's landlord and tenant law. This law provides, "a person 'notifies' or 'gives' a notice or notification to another by taking steps reasonably calculated to inform the other in ordinary course whether or not the other actually comes to know of it."¹⁰² A tenant receives notice when "it is delivered in hand to the tenant or mailed by registered or certified mail to him at the place held out by him as the place for receipt of the communication or, in the absence of such designation, to his last known place of residence."¹⁰³ If notice is sent by registered or certified mail, however, then "the tenant . . . is deemed to have received such notice on the date the notice is actually received by him or five days after the date the notice is mailed, whichever occurs first."¹⁰⁴

In applying Arizona law, whether a successor in interest complies with the notice requirement under PTFA will depend on whether the 90-day period begins when the landlord gives notice or when the tenant receives notice. If provision of notice under PTFA is interpreted only to require that the successor in interest "give" notice, then under Arizona law, a successor in interest is required only to take reasonably calculated steps to notify a tenant to vacate the property. This interpretation of notice includes actual and constructive notice. If, however, the provision of notice under PTFA is interpreted to include receipt of notice by the tenant, then the tenant must have actual notice to vacate or the successor in interest must send notice by registered or certified mail.

B. Georgia

In Georgia, the most common method of foreclosure is also power of sale.¹⁰⁵ However, a mortgagee may foreclose by power of sale only if the

.99. *Id.* § 33-808 (D).

100. *Id.* § 33-810.

101. *Bennett v. U.S. Land, Title & Legacy Co.*, 141 P. 717, 721 (Ariz. 1914).

102. ARIZ. REV. STAT. ANN. § 33-1313(B).

103. *Id.*

104. *Id.*

105. FORECLOSURES, *supra* note 92, at Appendix C.

mortgage, security deed or lien contract provides for it.¹⁰⁶ In a power of sale proceeding, "all that is required of the foreclosing party is to advertise and sell the property according to the terms of the instrument, and that sale be conducted in good faith."¹⁰⁷ In addition to notice by publication, the foreclosing party must provide "notice of the initiation of proceedings to exercise a power of sale . . . no later than 30 days before the date of the proposed foreclosure"; this notice must be in writing and sent by registered or certified mail to the debtor.¹⁰⁸ Once the foreclosing party complies with notice requirements, it can hold a sale of the foreclosed property to the highest bidder. If the foreclosure sale does not raise enough money to cover the debt secured, then the foreclosing party must obtain judicial confirmation of the sale.¹⁰⁹ Foreclosure results in termination of all junior interests in the property.¹¹⁰

Under current Georgia law, a successor in interest legally may remove a tenant from the property after a foreclosure. A tenant who remains in a property after a foreclosure terminates his interest in the property is a tenant at sufferance, and does not have the legal right to occupy the premises.¹¹¹ Because such a tenant is a tenant at sufferance, the successor in interest need only make a demand for possession in order to remove the tenant from the property.¹¹²

As with Arizona, PTFA also preempts Georgia law. Under Georgia law, preexisting tenants become tenants at sufferance after the property is foreclosed, with no rights or interest in the property. Thus, if a preexisting tenant has a bona fide lease or tenancy, then he will fall under the protection of PTFA and will be able to remain in the property in accordance with the terms of PTFA.

Under Georgia law, a successor in interest may provide a wide variety of notice to a tenant in order to comport with the notice requirements under PTFA, because Georgia law does not require a landlord to provide a particular type of notice to a tenant in order to vacate the tenant from the property.¹¹³ Instead, notice "is sufficient if such notice gets to the

106. See GA. CODE ANN. §§ 44-14-161–44-14-162 (West 2010).

107. *Little v. Fleet Fin.*, 481 S.E.2d 552, 556 (Ga. Ct. App. 1997) (citing *Kennedy v. Gwinnet Commercial Bank*, 270 S.E.2d 867 (Ga. Ct. App. 1980)).

108. GA. CODE ANN. § 44-14-162.2.

109. *Id.* § 44-14-161; see also *Walton Motor Sales, Inc. v. Ross*, 736 F.2d 1449 (11th Cir. 1984) (Under Georgia law, the sole purpose of judicial confirmation of foreclosure sale under a security instrument "is to determine that the sale of real estate was property advertised and conducted and that the land brought its true market value.").

110. *Partin v. S. Discount Co.*, 307 S.E.2d 697 (Ga. Ct. App. 1983).

111. *Id.* at 875–76.

112. *Id.* at 876.

113. *Burns v. Reves*, 457 S.E.2d 178, 181 (Ga. Ct. App. 1995) (citing *Godfrey v. Walker*, 42 Ga. 562 (1871)).

tenant.”¹¹⁴ Such notice need not be in writing.¹¹⁵ Therefore, in applying Georgia notice requirements to PTFA, a successor in interest in Georgia will be in compliance with PTFA so long as notice to vacate gets to the tenant.¹¹⁶

C. Illinois

The Illinois Mortgage Foreclosure Law governs foreclosure procedure in Illinois.¹¹⁷ In Illinois, a mortgagee may terminate a mortgage through a deed in lieu of foreclosure,¹¹⁸ consent foreclosure,¹¹⁹ common law strict foreclosure,¹²⁰ or judicial foreclosure, which is the most common method.¹²¹ Illinois law expressly forbids mortgagees to foreclose by power of sale.¹²²

To initiate a judicial foreclosure procedure, the mortgagee must join the necessary parties to the action.¹²³ Necessary parties include the mortgagor and “other persons (but not guarantors) who owe payment of indebtedness or the performance of other obligations secured by the mortgage and against whom personal liability is asserted.”¹²⁴ Permissible parties may also be joined, and include “[a]ll persons having a possessory interest in the mortgaged real estate.”¹²⁵ After the foreclosure complaint is filed, a trial is held to determine whether the mortgage will be foreclosed.¹²⁶ If the judge

114. *Id.*

115. *Farlow v. Cent. Oil Co.*, 39 S.E.2d 561, 561–62 (Ga. Ct. App. 1946) (holding that notice from the landlord’s attorney to the tenant’s attorney was sufficient under Georgia law, even if it was not in writing).

116. *Burns*, 457 S.E.2d at 181 (whether notice gets to a tenant may be adduced by the facts of the situation).

117. 735 ILL. COMP. STAT. ANN. 5/15-1101–5/15-1107 (West 2010).

118. *Id.* at 5/15-1401 (“Any mortgagee or mortgagee’s nominee may accept a deed from the mortgagor in lieu of foreclosure subject to any other claims or liens affecting the real estate.”).

119. *Id.* at 5/15-1402 (“[T]he court shall enter a judgment satisfying the mortgage indebtedness by vesting absolute title to the mortgaged real estate in the mortgagee free and clear of all claims, liens . . . and interest of the mortgagor, including all rights of reinstatement and redemption, and of all rights of all other persons made parties in the foreclosure whose interests are subordinate to that of the mortgagee.”).

120. *Id.* at 5/15-1403.

121. *Id.* at 5/15-1404 (“Except as provided . . . the interest in the mortgaged real estate of (i) all persons made a party in such a foreclosure and (ii) all nonrecord claimants given notice . . . shall be terminated by the judicial sale of the real estate, pursuant to a judgment of foreclosure.”); see also FORECLOSURES, *supra* note 92, at Appendix C.

122. 735 ILL. COMP. STAT. ANN. 5/15-1405 (“No real estate within this State may be sold by virtue of any power of sale contained in a mortgage or any other agreement.”).

123. *Id.* at 5/15-1501(a).

124. *Id.*

125. *Id.* at 5/15-1501(b)(1).

126. *Id.* at 5/15-1504, 5/15-1506.

enters a judgment of foreclosure, "the real estate which is the subject of the judgment shall be sold at a judicial sale,"¹²⁷ and after the sale, an order to confirm the sale is to be entered.¹²⁸

The entry of a foreclosure judgment can "cut off *only* rights or claims of interest *subsequent* to the interest asserted," but can only bind the junior mortgagee if he is made a party to the proceeding.¹²⁹ However, Illinois law further states:

A lease of all or *any* part of the mortgaged real estate shall not be terminated automatically solely by virtue of the entry into possession by (i) a mortgagee or receiver prior to the entry of an order confirming the sale, (ii) the holder of the certificate of sale, (iii) the holder of the deed issued pursuant to that certificate, or (iv) if no certificate or deed was issued, the purchaser at the sale.¹³⁰

Thus, a foreclosure does not extinguish a leasehold interest in a property.¹³¹

Because a foreclosure sale does not automatically terminate a leasehold in the foreclosed property,¹³² the type of notice that a tenant is entitled to receive from a successor in interest depends on whether the mortgagee makes the tenant a party to the foreclosure.¹³³ If a tenant is not personally served in the foreclosure action, a mortgagee or purchaser may file a supplemental petition¹³⁴ followed by an order of possession, although a tenant may retain possession for the lesser of 120 days or the remainder of his lease, but at least 30 days.¹³⁵

A mortgagee in possession or a purchaser may file a supplemental petition for possession of the property subject to foreclosure "at any time during the pendency of the foreclosure and up to 90 days after the date of the order confirming the sale."¹³⁶ A supplemental petition may only be filed against "a person not personally named as a party to the foreclosure."¹³⁷

127. *Id.* at 5/15-1507.

128. *Id.* at 5/15-1508(f).

129. *Heritage Fed. Credit Union v. Giampa*, 622 N.E.2d 48, 49 (Ill. App. Ct. 1993); *Baldi v. Chicago Title & Trust Co.*, 446 N.E.2d 1205, 1207 (Ill. App. Ct. 1983) ("[A] foreclosure proceeding to which a junior mortgagee is not a party is not binding on him, and he retains his right to redeem in equity.").

130. 735 ILL. REV. CODE ANN. § 5/15-1701(e) (emphasis added).

131. *See id.*

132. *See id.*

133. *See id.* at 5/15-1501 (A tenant is not a necessary party to a foreclosure action).

134. *Id.* at 5/15-1701(h)(1) ("[T]he mortgagee . . . or the purchaser may . . . file a supplemental petition for possession against a person not personally named as a party to the foreclosure.").

135. *Id.* at 5/15-1701(h)(4).

136. *Id.* at 5/15-1701(h)(1).

137. *Id.*

Thus, if the tenant is not personally served with notice of the foreclosure action, then a successor in interest may file a supplemental petition against the tenant. The hearing on the supplemental petition must occur "no less than 21 days from the date of service of the notice."¹³⁸

If the supplemental petition is successful, and the tenant against whom the petition was filed is current in his rent or has made a good faith effort to remain current in his rent, then the order granting possession may not take effect for either "120 days following the notice of the hearing on the supplemental petition" or "through the duration of his or her lease," whichever is shorter, although the tenant must get at least 30 days.¹³⁹ However, the ability of the tenant to remain in the foreclosed property for the 120 days or duration of his mortgage terminates if the tenant fails to continue making rental payments in full or fails to make a good faith effort to do so.¹⁴⁰

A mortgagee in possession or the purchaser at a foreclosure sale may also remove an occupant from the property subject to foreclosure by filing a forcible entry and detainer action against the tenant in possession.¹⁴¹ However, such action is only available if tenant is not a party to the foreclosure¹⁴² and, if a supplemental petition has not been filed, must be 90 days after a notice of intent to file has been properly served on the tenant.¹⁴³ Under a forcible entry and detainer action, the mortgagee or purchaser may not terminate a periodic tenancy, because it expires under its own terms. To terminate a year-to-year tenancy, the mortgagee or purchaser must provide the holdover tenant with written notice 60 days before the end of year.¹⁴⁴ To terminate a week-to-week tenancy, a mortgagee or purchaser must give the holdover tenant "7 days' notice, in writing."¹⁴⁵ For all other cases of tenancy for any term that is less than one year, the mortgagee or purchaser "may terminate the tenancy [of the holdover tenant] by 30 days' notice, in writing."¹⁴⁶ Unlike other tenancies, tenants at will are not entitled to notice.¹⁴⁷

At no point does the Illinois Mortgage Foreclosure Act define what it means to be a tenant or an occupant.¹⁴⁸ Moreover, the section establishing

138. *Id.* at 5/15-1701(h)(2).

139. *Id.* at 5/15-1701(h)(4).

140. *Id.*

141. *Id.*

142. *Id.* at 5/15-1701(h)(1).

143. *Id.*

144. *Id.* at 5/9-205.

145. *Id.* at 5/9-207.

146. *Id.*

147. *Cross v. Campell*, 89 Ill. App. 489, 489 (2nd Dist. 1900) (Under a "tenancy at will . . . [tenants are] not entitled to a notice to quit, a mere demand being all that the law requires under such circumstances.")

148. 735 ILL. REV. CODE ANN. 5/15-1101 *et seq.*

the successors in interest rights to possession uses the words "tenant" and "occupant" in a way that suggests they are interchangeable.¹⁴⁹ Other acts in the Illinois code, in contrast, do define what it means to be a "tenant" for the purpose of each act.¹⁵⁰ Because these other acts define "tenant" in a way specific to each act, those definitions have no bearing on the Illinois Mortgage Foreclosure Act's use of the word tenant. Therefore, it is unclear which persons fall into the category of "tenant" or "occupant," and thus receive protection under Illinois law.

The meaning of "tenant" under Illinois law must be further analyzed to understand the impact of PTFA. The scope of the definition of tenant, as understood by Illinois law, as compared to the definition of bona fide lease or tenancy under PTFA, determines whether PTFA preempts Illinois law. If the Illinois definition is narrower than PTFA's definition, then PTFA will have a great impact in Illinois. Conversely, if the Illinois definition is broader than PTFA's definition, PTFA will have a minimal impact in Illinois.

Illinois law provides greater protection to tenants *without* leases than PTFA does in most situations. If a successor in interest files a supplemental petition, any order to remove a tenant from the foreclosed property may allow the tenant to remain in possession of the property for up to 120 days, which would be greater than the 90 days granted by PTFA. However, in order to be eligible for this protection under Illinois law, a tenant must make a good faith effort to continue to pay his rent, a condition not imposed by PTFA.¹⁵¹ Further, if a successor in interest does not file a supplemental petition, then a tenant may remain in the possession of the property for at least 90 days after the notice of intention to file. For example, if a holdover tenant has a month-to-month tenancy, a successor in interest must notify the tenant of his intent to file a forcible entry and detainer action. After 90 days, the successor in interest may file a forcible entry and detainer action, which for a month-to-month would give a tenant a 30-day notice to vacate, for a total of 120 days.

In only some situations, however, does Illinois law afford greater protection to tenants with bona fide leases or tenancies than does PTFA. If a successor in interest files a supplemental petition, which is only available when the tenant is not a party to the foreclosure, then a tenancy is terminated in 120 days or at the end of the lease, whichever is shorter. Conversely, PTFA states that a tenant may remain in the foreclosed property until his lease

149. See *id.* 5/15-1701.

150. As used in the Rental Property Utility Service Act, "tenant includes occupants of a building or mobile home, whether under a lease or periodic tenancy." ILL. REV. CODE ANN. 735/1.1. See also *id.* at 745/3 (Under the Mobile-Home Landlord and Tenant Rights Act, a "tenant means any person who occupies a mobile home rental unit for dwelling purposes or a lot on which he parks a mobile home for an agreed upon consideration.")).

151. See *infra* n. 57-58 and accompanying text.

expires. Therefore, if tenant has a lease with more than 120 days remaining, then he will receive greater protection under PTFA than under Illinois law.

D. Ohio

In Ohio, the most common method of foreclosure is a judicial proceeding.¹⁵² In order to foreclose a debt secured by a mortgage, the mortgagee must obtain a court order from the county in which the subject property is located.¹⁵³ The mortgagee must then join the necessary parties to the foreclosure proceeding.¹⁵⁴ For matters of jurisdiction, necessary parties include any holder of a right or interest in the subject property that took interest subsequent to the mortgage being foreclosed.¹⁵⁵ Generally, if such a party is not joined to the foreclosure action, the foreclosure does not extinguish that party's right in the property and any subsequent party takes the property subject to that party's surviving right.¹⁵⁶

However, the Ohio Recording Act modifies these general rules.¹⁵⁷ Ohio's Recording Act is a race-notice type of recording statute; it provides that

instruments of writing properly executed for the conveyance of encumbrance of lands, tenements . . . shall be recorded . . . [and u]ntil so recorded or filed for record, they are fraudulent insofar as they relate to a subsequent bona fide purchaser having, at the time of purchase, no knowledge of the existence of that former deed, land contract, or instrument."¹⁵⁸

The recording act modifies the general rules because if a successor in interest in the property is bona fide purchaser for value,¹⁵⁹ then he takes the property free of the unrecorded junior lien.¹⁶⁰

In Ohio, the transfer of property at a judicial foreclosure sale to a successor in interest terminates an existing leasehold estate if the lease is "subsequent and subordinate to the mortgage."¹⁶¹ In *Simplex*, a mortgagee foreclosed on a property that was occupied by a tenant without joining the tenant to the foreclosure action.¹⁶² The court found that, despite the fact the

152. FORECLOSURES, *supra* note 92, at Appendix C.

153. OHIO REV. CODE ANN. § 2323.07 (West 2010).

154. *Hembree v. Mid-America Fed. Sav. & Loan Assc.*, 580 N.E.2d 1103, 1108 (Ohio Ct. App. 1989).

155. *Id.*

156. *Id.*

157. *Id.*; see also OHIO REV. CODE ANN. § 5301.25(A).

158. OHIO REV. CODE ANN. § 5301.25(A).

159. A bona fide purchaser for value is someone who pays value for real estate and lacks notice of prior, unrecorded conveyances. BLACK'S LAW DICTIONARY 1271 (8th ed. 2004).

160. *Hembree*, 580 N.E.2d at 1108.

161. *New York Life Ins. Co. v. Simplex Products Corp.*, 21 N.E.2d 585, 586 (Ohio 1939).

162. *Id.*

tenant was not joined in the action, his interest in the property was terminated by the foreclosure because his lease was executed subsequent to the mortgage.¹⁶³ The court reasoned that the rights of the tenant are directly tied to those of the mortgagor.¹⁶⁴ Therefore, if the mortgagor's interest is extinguished by a foreclosure, then the tenant's interest is necessarily extinguished as well.¹⁶⁵

Based on the *Simplex* holding, the Ohio Court of Appeals in *Hembree* found that a tenant's interest in a property is terminated by foreclosure, even if the tenant is not joined to the foreclosure proceeding.¹⁶⁶ In *Hembree*, a mortgagee pursued a foreclosure action without joining the tenant who was occupying the subject property.¹⁶⁷ The mortgagee then purchased the property at the foreclosure sale.¹⁶⁸ The tenant claimed that because his occupation of the property was "open and notorious," the interest of any party who purchased the property at the foreclosure sale would be subject to the rights of the tenant.¹⁶⁹ The court, however, found that "[r]egardless of the form of notice or the equities, if the underlying right of the tenant is cut off at foreclosure, failure to join is of no consequence."¹⁷⁰ Ohio law thus gives no rights to preexisting tenancies, regardless of whether or not they are joined to the foreclosure action.¹⁷¹ Because of this low standard, PTFA preempts Ohio law. If a preexisting tenant can establish that he is a bona fide tenant under PTFA, he will therefore be able to remain in the foreclosed property after the culmination of the foreclosure action.

A successor in interest also likely need to comply with Ohio notice requirements in order to satisfy PTFA's notice requirements. Ohio law requires that a landlord terminate a tenancy through "notice given" to the tenant.¹⁷² Notice to tenants must be unequivocal, which may be inferred by circumstance.¹⁷³ However, while notice must be unequivocal, no further requirements are provided for notice to be valid.¹⁷⁴ Therefore, whether a successor in interest provides proper notice to a preexisting tenant that comports with PTFA will likely be determined on a case-by-case basis.

163. *Id.*

164. *Id.* at 587.

165. *Id.*

166. *Hembree*, 580 N.E.2d at 1109-10.

167. *Id.* at 1105.

168. *Id.*

169. *Id.* at 1109.

170. *Id.*

171. *Id.*

172. OHIO REV. CODE ANN. § 5321.17.

173. *Reith v. Skruck*, 653 N.E.2d 755, 756 (Ohio Mun. 1995).

174. OHIO REV. CODE ANN. § 5321.17.

E. Virginia

In Virginia, the most common method of foreclosure is by power of sale.¹⁷⁵ If the grantor of a deed of trust defaults in the payment of the debt secured by the deed, then the grantee may exercise foreclosure by power of sale to cure the debt.¹⁷⁶ Before the foreclosure sale may take place, the trustee or the party secured by the deed of trust is required to give written notice of the sale.¹⁷⁷ The written notice of the sale, containing the date, time and place of the sale, must go to: (1) the present owner of the property, (ii) any subordinate lienholder, (iii) any assignee of a note secured by the property, (iv) any condominium unit owners' association that has filed a lien on the property, (v) any property owners' association that has filed a lien on the property, and (vi) any proprietary lessee's association that has filed a lien.¹⁷⁸ This written notice must be delivered by personal delivery or by certified, registered mail to the owner "no less than 14 days prior to such sale."¹⁷⁹ In contrast, the notice given to the remaining parties may be delivered by personal delivery or ordinary mail.¹⁸⁰

In addition to the written notice, the grantee must advertise the foreclosure sale in a "newspaper having a general circulation in the city or county wherein the property to be sold, or any portion thereof, lies."¹⁸¹ The deed of trust itself may specify the number of times the notice must be published.¹⁸² If it does not do so, then the grantee must advertise the foreclosure sale once a week for four successive weeks.¹⁸³

Virginia requires that a landlord provide notice to its tenant(s) in the event of a default on the mortgage, an acceleration of the mortgage, or when the mortgagor receives notice of the foreclosure sale from the mortgagee.¹⁸⁴ However, the requirement does not apply "to any managing agent who does not receive a copy of such written notice from the lender."¹⁸⁵ The

175. FORECLOSURES, *supra* note 92, at Appendix C.

176. VA. CODE ANN. § 55-59(7) (West 2010) ("[T]he trustee shall forthwith declare all the debts and obligations secured by the deed of trust at once due and payable and may take possession of the property and proceed to sell the same at auction . . .").

177. *Id.* § 55-59.1(A).

178. *Id.*

179. *Id.*

180. *Id.*

181. *Id.* § 55-59.2; *see also id.* § 55-59.3 (The advertisement must contain, in addition to anything mandated by the deed of trust, a description of the property, the general location, the time, place and terms of the sale, and the name(s) and contact information of the trustee(s).).

182. *Id.* § 55-59.2(1).

183. *Id.* § 55-59.2(2).

184. *Id.*

185. *Id.*

requirement is also inapplicable when the tenant receives a written copy of the notice of the foreclosure sale.¹⁸⁶ Once a foreclosure occurs, it terminates junior interests in the foreclosed property.¹⁸⁷

While a defaulting landlord must give a tenant notice of his default, this notice does nothing to protect the tenant's possessory interest in the property.¹⁸⁸ Because tenants in Virginia have no rights in a property after it is foreclosed, they are subject to protection under PTFA so long as they can establish that their lease or tenancy is bona fide. PTFA thus preempts Virginia law.

While PTFA preempts Virginia law regarding tenants' rights at foreclosure, Virginia law governs the type of notice that must be given under PTFA by a successor in interest to a preexisting tenant. Under Virginia law, notice "means notice given in writing by either regular mail or hand delivery, with the sender retaining sufficient proof of having given such notice, which may be either a United States postal certificate of mailing or a certificate of service confirming such mailing prepared by the sender."¹⁸⁹ The law further states that "a person shall be deemed to have notice of a fact if he has actual knowledge of it, he has received verbal notice of it, or from all of the facts and circumstances known to him at the time in question, he has reason to know it exists."¹⁹⁰ Finally, "[a] person 'notifies' or 'gives' a notice or notification to another by taking steps reasonably calculated to inform another person whether or not the other person actually comes to know of it."¹⁹¹ When such notice is not in writing, then the party giving the notice bears the "burden of proof to show that the notice was given to the recipient of the notice."¹⁹² Applying this Virginia notice law to PTFA would require successors in interest to either give preexisting tenants notice to vacate in writing, either by hand delivery or by mail, or demonstrate that steps taken were reasonably calculated to give a tenant notice to vacate, which could vary on a case-by-case basis.

F. Washington, D.C.

In Washington, D.C., the most common method of foreclosure is power of sale.¹⁹³ When a mortgagor defaults on a mortgage, a mortgagee may foreclose by power of sale only if there is a power of sale provision contained in

186. *Id.*

187. *Nelson White Constr. Mgmt. Corp v. McConaghy*, 15 B.R. 480, 481 (Bankr. E.D. Va. 1981).

188. *Id.* § 55-225.10.

189. *Id.* § 55-225.8.

190. *Id.*

191. *Id.*

192. *Id.*

193. FORECLOSURES, *supra* note 92, at Appendix C.

the deed of trust, mortgage, or security instrument between the mortgagee and the mortgagor.¹⁹⁴ The foreclosure provisions of the D.C. Code require the mortgagee to notify the mortgagor of the impending foreclosure sale by written notice “by certified mail return receipt requested of said sale to the owner of the real property encumbered by said deed of trust, mortgage, or security instrument at his last known address . . . at least 30 days in advance of the date” of the foreclosure sale.¹⁹⁵ In addition to sending written notice to the mortgagor, the mortgagee must also send a copy of the written notice to the mayor of D.C.; the 30-day period is then measured by the mayor’s date of receipt, as is given in an acknowledgement to the holder.¹⁹⁶ After proper notice, the foreclosed property may be sold at a foreclosure sale.¹⁹⁷ Washington, D.C. foreclosure law does not require the mortgagee to provide notice of the foreclosure sale to other lienholders, whether senior or junior.¹⁹⁸

Washington, D.C. case law specifically addresses the issue of tenants’ rights in the event of a foreclosure sale.¹⁹⁹ In *Valentine*, the mortgagee purchased a four-unit rental building at a foreclosure sale, after the borrower defaulted on his mortgage payments, and subsequently conveyed the building to the Veterans Administration (VA).²⁰⁰ Valentine was a tenant in the building who, after the initial one-year term of her lease expired, had remained in her unit as a tenant-at-will.²⁰¹ After it obtained the property, the VA sent Valentine a 30-day notice to vacate the property.²⁰² Valentine failed to vacate, prompting the VA to file for possession of the property.²⁰³ The D.C. Court of Appeals held that a party who comes into ownership of a property as a result of a mortgage default has the same relationship with the remaining tenants as would any other owner.²⁰⁴ Foreclosure does not extinguish a tenant’s leasehold, even if it is a tenancy-at-will.²⁰⁵ Under Washington, D.C. law, purchasers at foreclosure sales thus obtain property

194. See D.C. CODE § 42-815(b) (2010).

195. *Id.*

196. *Id.*

197. *Id.* § 42-816.

198. *Pappas v. E. Sav. Bank, FSB*, 911 A.2d 1230, 1238-39 (D.C. 2006). The Court found that D.C. Code § 42-815 only requires the mortgagee to send notice to the “owner” of the property, and not to any lienholders. The Court also declined to find that equity principles obligate a mortgagee to send notice of a foreclosure sale to other lienholders.

199. *Adm’r of Veterans Affairs v. Valentine*. 490 A.2d 1165 (D.C. 1985).

200. *Id.* at 1166.

201. *Id.*

202. *Id.*

203. *Id.*

204. *Id.* at 1170.

205. *Id.*

subject to the rights of existing tenants in the property, and may only evict such tenants for specific, enumerated causes.²⁰⁶

As *Valentine* illustrates, a tenant with a lease for a term of years may remain in his unit as a tenant-at-will after the expiration of the stated term of the lease, provided that he continues to pay his rent and does not violate the lease.²⁰⁷ *Valentine* specifically states that a landlord may not evict a tenant unless he has good cause, even after the period of the lease expires. The definition of a legitimate tenancy in Washington, D.C. is clearly much broader than the definition under PTFA and thus provides greater protection to tenants than PTFA.

Because successors in interest of foreclosed property in Washington, D.C. take the property subject to the rights of pre-existing tenants, and because no tenant (not even a tenant-at-will) may be evicted but for a reason listed under the law, tenants in Washington, D.C. enjoy greater protections at foreclosure than PTFA provides. Therefore, PTFA does not preempt Washington, D.C. law.

III. Conclusion

While PTFA requires further clarification, and is silent on certain issues, it does provide rights for tenants at foreclosure where previously none existed. PTFA creates a foundation of rights that may be combined with existing rights under state law in order to maximize the protection for tenants at foreclosure. As evidenced by analysis of state law, however, many states do not provide any protection for tenants in the event of foreclosure of their properties. In these circumstances, PTFA is not just a foundation; it is the only source of rights for tenants at foreclosure. Therefore, PTFA protects many tenants who otherwise would have no recourse during a foreclosure and ultimately helps to solve one of the "often overlooked problems" of the foreclosure crisis.

206. *Id.* at 1167.

207. *Id.*