
RENTERS: THE INNOCENT VICTIMS OF THE FORECLOSURE MORTGAGE CRISIS

I. INTRODUCTION

Imagine for a moment that after years of paying your monthly rent, you receive a knock at your door one day with a notice stating that you must vacate the premises within a few days. Finding another place for you and your family to live within weeks or even days, especially if you did not financially expect such a sudden eviction, is truly a burden. This was the predicament in which “A.S.” found herself in August 2007.¹ She signed a three-year lease on a three bedroom condominium in April 2006.² She recalls specifically informing the owner that she wanted a three-year lease because she had “no intention of moving before that time” as her resources would not allow her.³ After being personally assured by the landlord that the arrangement was beneficial for not only A.S. but the landlord as well, she took possession of the premises and faithfully paid her monthly rent.⁴ She was surprised in August 2007, when she was informed by a real estate broker standing at the door that the property was in foreclosure.⁵ He informed her that she could either wait out the foreclosure sale and be evicted by the new purchaser (the bank in her situation), or she could take “cash for keys” and voluntarily move out within fifteen days.⁶ She was also kindly informed that an eviction would remain on her rental record.⁷ Fearing any type of negative mark on her pristine credit report and rental record, she immediately opted to take \$1500 in exchange for her keys rather than be surprised in the future.⁸ “The foreclosure was an unexpected financial burden that I, as a renter, never expected to encounter.”⁹ A.S.’s

1. Interview with A.S., anonymous renter, in L.A., Cal. (Jan. 3, 2009).

2. *Id.*

3. *Id.*

4. *Id.*

5. *Id.*

6. *Id.*

7. Interview with A.S., *supra* note 1.

8. *Id.*

9. *Id.*

situation is not unique, as “[t]he number of foreclosure rental victims is soaring.”¹⁰ As the ongoing foreclosure crisis in the United States threatens to further weaken the economic future of the nation, many renters find themselves in A.S.’s predicament.¹¹

While most homeowners know of their pending foreclosure status, responsible renters throughout the nation are being blindsided when their landlord defaults on the mortgage. Depending on which state and county the property is located, laws governing the eviction process after a foreclosure sale vary drastically. A California renter may receive two months after a foreclosure sale to vacate the premises, whereas a renter in a neighboring state may have only days.¹² Regardless of the different laws governing states and counties, what remains consistent is the growing rate of foreclosures across the nation. By the end of October 2008, foreclosures of multi-unit homes soared 150% from the previous year.¹³ This figure does not even include tenants renting single-family homes or condominiums.¹⁴ In Cuyahoga County, Cleveland, Ohio, renter occupied foreclosure filings, alone, increased twenty-nine percent between 2006 and 2007.¹⁵ The foreclosure problem facing renters across the nation is growing at such an alarming rate that legal-aid groups have threatened to sue Fannie Mae over recent evictions.¹⁶ As of recently, Fannie Mae established a new National Real Estate Owned Rental Policy which allows qualified renters in foreclosed properties owned by Fannie Mae to remain in their homes.¹⁷ Michael Williams, the Chief Operating Officer of Fannie Mae, notes the policy is aimed to “mitigate the disruption of personal lives that foreclosure can cause, and help bring a measure of stability to communities impacted

10. Les Christie, *Tenants Victimized by Foreclosures*, CNNMONEY.COM, Dec. 15, 2008, http://money.cnn.com/2008/12/08/real_estate/tenant_foreclosure_victims.

11. See *Using FHA for Housing Stabilization and Homeownership Retention, Part II: Hearing Before the H. Comm. on Financial Servs.*, 110th Cong. 7 (2008) [hereinafter *FHA, Part II*] (statement of Martin O’Malley, Governor, Maryland).

12. Christie, *supra* note 10; see *FHA, Part II, supra* note 11, at 29 (statement of Sheila Crowley, President, National Low Income Housing Coalition) (noting two families in Alaska became homeless after losing the homes they had rented due to foreclosure with just seven days notice).

13. Christie, *supra* note 10.

14. *Id.*

15. Kelly Evans, *Fannie Mae to End Tenant Evictions in Foreclosures*, WALL ST. J., Dec. 15, 2008, at A5.

16. *Id.*

17. Press Release, Fannie Mae, Fannie Mae Announces National REO Rental Policy (Jan. 13, 2009), <http://www.fanniemae.com/newsreleases/2009/4581.jhtml;jsessionid=GXLWZ04SOHAM5J2FECHSFGA?p=Media&s=News+Releases>.

by high foreclosure rates.”¹⁸ Renters eligible for the program are offered a month-to-month lease or given financial assistance to help them change residences if they chose to vacate.¹⁹ Although this is a landmark decision by Fannie Mae, it impacts only those properties owned by Fannie Mae.²⁰ This policy alone is not enough to tackle the growing problem of foreclosures which not only impacts homeowners, but has drizzled down to renters and communities.

Because the social and economic effect of eviction is felt regionally, eviction laws have historically been a regional cause rather than a national one.²¹ But, with the foreclosure crisis threatening the national economy,²² eviction laws can no longer be left in the hands of individual banks or local governments to control. This Comment will propose the enactment of uniform legislation by states to govern the rights of tenants who are affected by foreclosure throughout the country. This Comment will also recommend specific provisions to be included in the uniform legislation. Part II will discuss the foreclosure crisis and its growth in recent years. It will also describe the impact of foreclosures on the rental market, specifically focusing on the degree of impact on various types of renters and rental properties. Part III will explain the legal foreclosure process as it applies to renters. It will focus on recent laws and ordinances enacted to tackle the foreclosure crisis by individual states. Part IV will propose the enactment of uniform legislation by individual states affected by foreclosure. It will recommend imposing stricter notice requirements, uniform time limits, and the expunging of eviction records among other changes. Finally, Part V will conclude by highlighting the benefits of stabilizing the rental market as produced by state enactment of uniform legislation.

II. BACKGROUND

The current mortgage foreclosure crisis is historically the most severe case yet.²³ Foreclosure is a legal process through which the lender (mortgagee) “terminate[s] a mortgagor’s interest in real property” in order to “gain title or to force a sale in order to satisfy the unpaid debt secured by

18. *Id.*

19. *Id.*

20. *Id.*

21. Evans, *supra* note 15, at A5.

22. See *FHA, Part II, supra* note 11, at 7.

23. *Id.*

the property.”²⁴ As illustrated in the introduction, the mortgage foreclosure crisis in the United States extends beyond the parameters of homeownership. It has not only affected the principal parties, such as homeowners and lenders, but also has had a serious impact on the entire community. Communities in which foreclosed properties are located are “trying to prevent the repossession of homes on one hand and manage the resulting vacant properties, increases in crime, homelessness, and other problems that stem from family financial crisis.”²⁵ Included in this category of “other problems” are the unspoken issues faced by renters of foreclosed properties that have fallen victim to the recent wave of foreclosures.²⁶ As of August 2008, the Mortgage Banker Association estimated that nationally, one out of seven mortgages was in default.²⁷ In Nevada alone, the default rates for non-owner occupied housing reached thirty-two percent by August 2008.²⁸ Further aggravating the problem of foreclosures is the declining job market. About 533,000 jobs were lost in November 2008 alone.²⁹ This brings the 2008 total job loss to a devastating figure of 1.9 million.³⁰ Jay Brinkmann, Chief Economist for the Mortgage Banker Association, recently described the impact of the declining employment market on the foreclosure crisis: “Absent a recession, the 2009 numbers would likely have fallen by several hundred thousand, but the effects of job losses and general economic deterioration make the 2009 outlook worse, particularly if mortgage problems become more widespread.”³¹

A. Foreclosure Crisis on a National and State Level

The current mortgage foreclosure problem nationally can truly be described as a “crisis” with no end in sight. RealtyTrac, a foreclosure listing firm, estimates more than 2.3 million Americans faced foreclosure

24. BLACK’S LAW DICTIONARY 1164 (9th ed. 2009).

25. Julie A. Tappendorf & Brien J. Sheahan, *Dealing with Distressed Properties: Local Government Strategies to Mitigate the Impact of Foreclosures on Communities*, SP011 A.L.I.-A.B.A. CONTINUING LEGAL EDUC. 1301, 1303 (2008).

26. *See id.*

27. *Id.*

28. *Id.*

29. David Goldman, *Lost: 1.9 Million Jobs*, CNNMONEY.COM, Dec. 5, 2008, http://money.cnn.com/2008/12/05/news/economy/jobs_november/index.htm?postversion=2008120514.

30. *Id.*

31. Tami Luhby, *Foreclosures Soar 76% to Record 1.35 Million*, CNNMONEY.COM, Dec. 5, 2008, http://money.cnn.com/2008/12/05/news/economy/mortgage_delinquencies/index.htm?postversion=2008120515.

proceedings in 2008.³² According to the U.S. Foreclosure Market Report released by RealtyTrac in January 2009, an alarming total of 3,157,806 foreclosure filings were reported in 2008 on 2,330,483 properties.³³ Foreclosure filings include, but are not limited to, default notices, auction sale notices, and bank repossessions.³⁴ This figure shows an increase of eighty-one percent from 2007 and a shocking “225 percent increase in total properties from 2006.”³⁵ These figures translate into one in every fifty-four properties (1.84%) receiving at least one type of foreclosure filing during the year.³⁶ This figure has increased 0.81% since 2007.³⁷ According to the U.S. Foreclosure Market Report, California, Florida, and Arizona have posted the highest foreclosure filings for 2008.³⁸ The trend of mounting foreclosure filings continued to rise from 2007 for these states. For example, California reported the highest figure of any state in the third quarter of 2007, an estimated 148,000 foreclosure filings.³⁹ With the second highest foreclosure rate in the country at the time, one in every eighty-eight households had some type of foreclosure filing.⁴⁰ According to RealtyTrac, “523,624 California properties received a foreclosure filing in 2008” showing an increase of “nearly 110 percent from 2007 and nearly 498 percent from 2006.”⁴¹ As a result of the mortgage foreclosure crisis, in January 2008, California was estimated to face a \$14.5 billion budget shortfall and billions more lost in economic growth.⁴² Between the third quarter and fourth quarter of 2008, foreclosure activities nationwide *decreased* only four percent.⁴³ This was largely a result of state legislation.⁴⁴ With this minimal decrease of only four percent within one

32. Press Release, RealtyTrac, Foreclosure Activity Increases 81 Percent in 2008 According to RealtyTrac U.S. Foreclosure Market Report (Jan. 15, 2009), http://media.modbee.com/smedia/2009/01/15/14/2008_Foreclosure_Market_Report_from_RealtyTrac.source.prod_affiliate.11.pdf.

33. *Id.*

34. *Id.*

35. *Id.*

36. *Id.*

37. *Id.*

38. Press Release, RealtyTrac, *supra* note 32.

39. STAFF OF U.S. SEN. BARBARA BOXER, THE FORECLOSURE CRISIS AND CALIFORNIA 2 (2008), <http://boxer.senate.gov/features/mortgage/Senator%20Boxer%27s%20Foreclosure%20Crisis%20Report.pdf>.

40. *Id.*

41. Press Release, RealtyTrac, *supra* note 32.

42. CAL. BUDGET PROJECT, GOVERNOR RELEASES PROPOSED 2008-09 BUDGET 1 (2008), http://www.cbp.org/pdfs/2008/080116_govbudget.pdf.

43. Press Release, RealtyTrac, *supra* note 32.

44. *Id.*

quarter came a seventeen percent increase in December filings from November (forty-one percent increase since 2007).⁴⁵ Although state legislation,⁴⁶ moratoria enacted by Freddie Mac and Fannie Mae,⁴⁷ and programs and policies implemented by major lenders were aimed at delaying the foreclosure activities⁴⁸ in the fourth quarter, the numbers surprisingly still soared through the roof between November and December.

B. Impact on Communities

Individual state legislation, moratoria enacted by Freddie Mac and Fannie Mae, and programs and policies implemented by major lenders to date have not been successful in significantly alleviating the foreclosure crisis.⁴⁹ This is precisely where the problem lies. While organizations, banks, and legislature attempt to “fix” the foreclosure crisis by facing it head-on to address problems faced by homeowners and lenders, they fail to address the underlying troubles faced by renters. The plight of the renter has become a silent problem. While news articles and the government constantly address the troubles faced by “distressed homeowners,” they fail to address the bigger problem emerging beyond the horizon. “Renters who have the misfortune of having landlords who lose their property to foreclosure are the completely blameless victims.”⁵⁰

Renters become victims when communities are impacted by the crisis. The consequences of the foreclosure crisis on the community are reversing

45. *Id.*

46. JEFF CRUMP, FORECLOSURE CRISIS RESPONSE: FORECLOSURE DATA GROUP FINAL REPORT 3 (2008), available at <http://www.house.leg.state.mn.us/dfl/pdf/DataGroupFinalReport.pdf> (stating that Minnesota enacted in 2007 what was considered to be the strongest anti-predatory lending law); see Press Release, RealtyTrac, *supra* note 32.

California law (SB1137), which required lenders to provide written notice of their intent to initiate foreclosure proceedings 30 days prior to issuing a notice of default (NOD), resulted in a reduction of NODs from 44,278 in August to 21,665 in September. Notice of Default filings then surged by 122 percent, to over 42,000, in December.

Id.

47. Press Release, Fannie Mae, Fannie Mae to Suspend Foreclosures Until January 2009 While Streamline Modification Program is Implemented (Nov. 20, 2008), <http://www.fanniemae.com/newsreleases/2008/4531.jhtml?p=Media&s=News+Releases> (stating that Fannie Mae suspended foreclosure sales on occupied single-family properties as well as the completion of evictions scheduled to occur between November 26, 2008 and January 1, 2009).

48. *See id.*

49. *See supra* Part III.A.

50. *FHA, Part II, supra* note 11, at 29 (statement of Sheila Crowley, President, National Low Income Housing Coalition).

years of community development efforts.⁵¹ In 2007, according to a National League of Cities survey, nearly sixty-two percent of cities reported an increase in the number of foreclosures.⁵² When asked to list the three conditions that have most severely impacted their local communities, forty-two percent of cities listed the increase in foreclosure rates.⁵³ With this increase, thirty-three percent of cities also reported an increase in abandonment and vacant properties.⁵⁴ Not only does vacancy translate into property maintenance issues,⁵⁵ but it also promotes vagrancy and criminal activity such as vandalism, theft, and fraud.⁵⁶ As the *Washington Post* reports, “Scams of various stripes are thriving in the foreclosure mess and flourishing at the margins of landlord tenant laws.”⁵⁷ Homes left vacant by owners in foreclosure or banks in possession become targets for fraud. For example, in July 2008, Richard Hiner was arrested in Fairfax County, Virginia for breaking into empty bank owned homes, changing the locks, and listing them on Craigslist.org—a website featuring free online advertisement—as rentals.⁵⁸ According to police, he accepted payment on nine properties including one property which he rented to two families simultaneously.⁵⁹

Not all foreclosure scams are so unique and daring. Usually, most involve a dishonest landlord who collects rent from the tenant yet fails to pay the mortgage, or a landlord who no longer has legal title to the property yet continues to collect rent until the bank initiates the eviction process.⁶⁰ For example, Silvana Cuello, an immigrant and mother of three, was asked to pay her October rent even though the owner lost title to the house in September.⁶¹ Largely uneducated about the eviction and foreclosure process, tenants are being taken advantage of and falling victim to a national crisis which they did not help create.⁶² As a result of the increase

51. *Id.*; Nat'l League of Cities, Housing Finance and Foreclosures Insta-Poll Fact Sheet (Questions), <http://www.nlc.org/ASSETS/A279AFD7D50F4F9182A02E35B129F17D/Insta-Poll%20Fact%20Sheet.pdf> (last visited Oct. 9, 2009).

52. *See* Nat'l League of Cities, *supra* note 51.

53. *Id.*

54. *Id.*

55. *See* Tappendorf & Sheahan, *supra* note 25, at 1303.

56. *See id.*

57. Nick Miroff, *Foreclosure Epidemic Infecting Rental Market*, WASH. POST, Dec. 9, 2008, at A1.

58. *Id.*

59. *Id.*

60. *Id.*

61. *Id.*

62. *See id.*

in foreclosures, over half of the cities polled found a growing need for social services such as counseling and food banks.⁶³

Further exacerbated by the increasing foreclosures is the “loss of home equity among the surviving homeowners.”⁶⁴ “[P]eople down the block and people across the street suffer as well with deterioration both in the quality of life and the value of that property”⁶⁵ Not only are homeowners across the street from foreclosed properties suffering, but “extremely-low-income renters now face increased competition for an adequate supply of affordable housing from slightly higher-income households who have been foreclosed upon.”⁶⁶ The foreclosure crisis has thus far affected almost every member of a community, starting with the owners and lenders, and ending with renters, who are the most heavily impacted.

C. *Impact on Rental Market*

In a report prepared by Senator Barbara Boxer, participants of roundtable discussions held during January 2008 in Riverside, California, noted the following:

The number of tenants in investor-owned properties affected by the crisis is also on the rise. Many renters are unaware that the homes they are living in or moving into are already in foreclosure, and that the owner may be collecting rent but not paying the loan. This problem has been seen even among Section 8 properties, where tenants who already are facing economic hardships and instability are being kicked out of their rental homes.⁶⁷

These innocent victims have been silently battling the mortgage foreclosure crisis along side homeowners with no help from the media or the government. Renters in owner-occupied—but more often investor-owned properties—are being evicted as a result of the foreclosure crisis.⁶⁸ According to the testimony of Judith Liben before the House of

63. Tappendorf & Sheahan, *supra* note 25, at 1303.

64. CRUMP, *supra* note 46, at 5.

65. *FHA, Part II*, *supra* note 11, at 2 (statement of Barney Frank, Chairman, H. Comm. on Financial Servs.).

66. *Id.* at 4.

67. STAFF OF U.S. SEN. BARBARA BOXER, *supra* note 39, at 2. Riverside County was one of the counties hit hardest by the foreclosure crisis in California. *Id.* at 1.

68. *Legislative and Regulatory Options for Minimizing and Mitigating Mortgage Foreclosures: Hearing Before the H. Comm. on Financial Servs.*, 110th Cong. 141 (2007) [hereinafter *Legislative and Regulatory Options*] (testimony of Judith Liben, Housing Attorney, Massachusetts Law Reform Institute), available at http://financialservices.house.gov/hearing110/testimony_-_liben_1.pdf.

Representatives Committee on Financial Services, foreclosed rental properties are “typically smaller buildings, condominiums, and single-family rented homes.”⁶⁹ The problem faced by renters is not limited to low income neighborhoods, but rather spreads through cities and suburbs affected by both the low-income as well as the more upscale neighborhoods.⁷⁰ “[T]enants who did nothing wrong except to rent from a defaulting owner are suffering harsh collateral damage from the mortgage fallout,” describes Liben.⁷¹

1. Impact of Foreclosures on the Rental Market

Upon foreclosure sale, the new owner is usually the bank.⁷² Although third-parties are sometimes the new owners at foreclosure sales, more often than not, the bank repossesses the property and takes title at the foreclosure sale.⁷³ Upon taking title, and depending on the state, the bank evicts the tenants in order to market the property for sale.⁷⁴ Frequently, in order to speed up the process of removing tenants, agents for the banks will offer the tenants “cash for keys.”⁷⁵ As illustrated in A.S.’s case,⁷⁶ the bank may, for example, make the following offer to the tenant: “If you leave in five days, we’ll give you \$500. Otherwise, we’ll evict quickly and you’ll get nothing.”⁷⁷ Not familiar with foreclosure process and eviction laws, tenants take these offers, assuming the court will evict them anyway.⁷⁸ Housing and Urban Development consumer credit counseling agencies have described, for example, the situation in Northern California:

The tenants’ complaints include the foreclosing bank failing to provide utilities as required under state law and high-pressure tactics and outright threats by the foreclosing lender or its agent trying to force the tenant out of the property on an accelerated timeline.

Many of these tenants are renting single-family homes in middle-class neighborhoods that were owned as investment properties by individuals.⁷⁹

69. *Id.*

70. *Id.*

71. *Id.*

72. *See id.*

73. *See id.*

74. *Legislative and Regulatory Options, supra* note 68, at 141, 143.

75. *Id.* at 144.

76. *See supra* Part I.

77. *Legislative and Regulatory Options, supra* note 68, at 144.

78. *Id.*

79. *Id.* at 142.

Even in states that have enacted prohibitory laws against post-foreclosure evictions, renters are still facing problems.⁸⁰ Many times, banks ignore local, state, and even federal law in the case of Section 8 leases,⁸¹ and threaten to evict tenants.⁸² For example, in the District of Columbia, although foreclosing banks are legally prohibited from evicting a tenant without good cause, according to a local housing lawyer:

Banks typically send 30-day notices to vacate immediately upon foreclosing, despite the tenants' absolute right to stay and rent after the foreclosure. . . . When tenants do show up in court to fight the eviction, the banks dismiss their cases—but then begin pressuring tenants into “cash for keys” deals that barely offer enough for security deposit on a new place.⁸³

Often, the bank refuses to maintain the property, “leaving devastated families and scarred neighborhoods.”⁸⁴ Tenants may even learn of the foreclosure when their utilities, such as water and heat, are suddenly shut off. This was the case of Thelma Hill in St. Paul, Minnesota, a mother of five children living in a duplex.⁸⁵ Although Thelma was up-to-date on her rent, she received a water shut-off notice, without warning.⁸⁶ Without running water, she was unable to keep her family in the duplex.⁸⁷ As a result of this burdensome surprise, she was forced to move to a homeless shelter.⁸⁸ Thelma's situation clearly illustrates the problem of lenders refusing to be landlords.⁸⁹

2. Percentage of Non-Owner Occupied Properties

In 2006, thirty-two percent of residential properties in the nation were tenant occupied.⁹⁰ In Minneapolis, Minnesota, for example, fifty-six

80. *Id.* at 144.

81. See 42 U.S.C. § 1437f(b)(1) (2006) (authorizing the Secretary of Housing and Urban Development “to enter into annual contributions contracts with public housing agencies pursuant to which such agencies may enter into contracts to make assistance payments to owners of existing dwelling units in accordance with this section” for the purpose of aiding low-income families in obtaining a decent place to live and of promoting economically mixed housing).

82. *Legislative and Regulatory Options*, *supra* note 68, at 144.

83. *Id.*

84. *Id.* at 141.

85. Jessica Mador, *Renters Put Out By Foreclosures*, MINN. PUBLIC RADIO NEWSQ, May 11, 2007, <http://minnesota.publicradio.org/display/web/2007/03/22/foreclosures/>.

86. *Id.*

87. *Id.*

88. *Id.*

89. See *Legislative and Regulatory Options*, *supra* note 68, at 145.

90. *Id.* at 147.

percent of foreclosures in 2006 involved rental properties.⁹¹ The ratio of tenant to owner-occupied foreclosure properties was even greater in cities.⁹² For example, in St. Paul, Minnesota, the percentage of renter occupied foreclosure properties is even greater.⁹³ In Los Angeles, California, sixty percent of residential properties in 2006 were tenant occupied⁹⁴ and at the risk of their landlords foreclosing. In the third quarter of 2008, according to the United States Census Bureau, twenty-seven percent of all housing units nationwide were renter occupied.⁹⁵ Of the total recorded for third quarter of 2008, fourteen percent nationwide were vacant properties.⁹⁶ Thus, this twenty-seven percent of the U.S. housing population was at dire risk of being threatened by foreclosure.

Further, foreclosure of multi-unit properties increased from 8955 in 2007 to 22,386 units by the end of October 2008.⁹⁷ These numbers reflect a 150% increase.⁹⁸ These figures do not include the countless number of foreclosures on single-family properties across the nation.⁹⁹ On April 9, 2008, the House Committee on Financial Services noted that of the 108 million occupied housing units across the United States, nearly 33 million were renter occupied, leaving 75 million owner-occupied housing units.¹⁰⁰ Nearly 83 million housing units had mortgages.¹⁰¹ Hence, about seventy-six percent of the occupied units across the country face risk of foreclosure.¹⁰² These 33 million renter-occupied housing units were potentially at risk of facing problems resulting from foreclosure.

91. *Id.* at 146.

92. *See id.* at 147.

93. *Id.* at 146.

94. *Id.* at 147.

95. ROBERT R. CALLIS & LINDA B. CAVANAUGH, U.S. DEP'T OF COMMERCE, CENSUS BUREAU REPORTS ON RESIDENTIAL VACANCIES AND HOMEOWNERSHIP 3 (2008), <http://www.census.gov/hhes/www/housing/hvs/qtr308/files/q308press.pdf>; *see also* U.S. DEP'T OF HOUS. AND URBAN DEV., U.S. HOUSING MARKET CONDITIONS 22 (2008), http://www.huduser.org/periodicals/ushmc/fall08/USHMC_Q308.pdf (“The number of all occupied units was up from the second quarter of 2008 by a statistically insignificant 0.5 percent and increased a statistically insignificant 1.3 percent from the third quarter of 2007.”).

96. CALLIS & CAVANAUGH, *supra* note 95, at 3.

97. Christie, *supra* note 10.

98. *Id.*

99. *See id.*

100. *Using FHA for Housing Stabilization and Homeownership Retention, Part I: Hearing Before the H. Comm. on Financial Servs.*, 110th Cong. 31 (2008) [hereinafter *FHA, Part I*] (statement of Jeb Hensarling, Member, H. Comm. on Financial Servs.).

101. *See id.*

102. *See id.*

3. Impact on Renters

Included in the millions of renter-occupied housing are various types of units: multi-unit buildings, single family buildings, and Section 8 units. Concerns that tenants face from the foreclosure crisis differ depending on the type of housing unit they rent and the city in which the property is located.¹⁰³ The type of dwelling occupied by tenants is an important factor to consider when evaluating the tenant's legal rights.¹⁰⁴ For multi-unit property renters, the problems faced are uncompassionate. As illustrated above with the case of Thelma Hill, the most serious problem facing multi-unit property renters is the lack of basic utilities. When the landlord is anticipating foreclosure, oftentimes he or she will collect rent payments but neglect to pay the mortgage and utility bills.¹⁰⁵ Tenants may even learn of the foreclosure when their utilities, such as water and heat, are suddenly shut off.¹⁰⁶ Frequently, lenders that come into possession of the foreclosed property refuse to act as a "landlord" and *manage* the property, "leaving devastated families and scarred neighborhoods."¹⁰⁷ Tenants in these situations either voluntarily vacate the property or even worse, live with the absence of necessities such as heat, air conditioning, and running water.¹⁰⁸ Families who voluntarily vacate as a result of lack of basic utilities commonly find themselves in homeless shelters, as illustrated by the case of Thelma Hill.¹⁰⁹ Because landlords are not required to inform their tenants that they are behind in their mortgage payments,¹¹⁰ in many cases the foreclosure comes as a surprise, leaving tenants facing financial hardship. When lenders allow tenants to remain in foreclosed buildings, lenders may demand the tenant pay as much as five months of advance rent.¹¹¹ Most often, however, banks use the threat of eviction as leverage in this negotiation process.¹¹²

Many of these problems are also faced by renters in single-family units. Like multi-unit renters, single-unit renters usually lose advance rent

103. *See Legislative and Regulatory Options*, *supra* note 68, at 143.

104. *Id.*

105. *See Mador*, *supra* note 85.

106. *See id.*

107. *Id.* at 141.

108. Ginger Gillenwater, *Some Cities Blocking Landlords from Evicting Due to Defaulting Mortgage Payments*, LAWYERSANDSETTLEMENTS.COM, Feb. 15, 2008, <http://www.lawyersandsettlements.com/articles/01983/housing-eviction.html>.

109. Mador, *supra* note 85 (stating that Thelma Hill voluntarily moved her family to a homeless shelter after her landlord went into foreclosure and the property's utilities were shut off).

110. *See Gillenwater*, *supra* note 108.

111. *Id.*

112. *See id.*

payments and security deposits following a foreclosure sale,¹¹³ which can have a devastating financial impact on low-income families. Tenants in the District of Columbia and states such as Minnesota are more protected than their counterparts in other states. In the District of Columbia, for example, legislation allows a tenant's lease to overrule the foreclosure, so the tenant has a legal right to fight the eviction.¹¹⁴ As noted above, however, some lenders, refusing to follow state and local laws, send eviction notices upon foreclosure anyway. In Minnesota, a tenant is allowed to remain in a rental property for six months following a foreclosure.¹¹⁵ But, even in states with stricter pro-tenant laws, lenders who are unable to evict tenants often simply increase the monthly rent to such a degree that tenants voluntarily leave.¹¹⁶ Because some cities do not prohibit the raising of rents, lenders have found this to be an alternate form of legal eviction.¹¹⁷ Hence, the tenant's rights are further complicated depending on whether the housing unit is located in a city or municipality with local rent control laws in place or not. Tenants in rent control protected properties in Los Angeles may legally be entitled to additional days to relocate due to the fact that they can only be evicted for the thirteen enumerated statutory reasons,¹¹⁸ whereas tenants in local suburbs outside Los Angeles with no rent control laws may have less time since they are protected only by the notice requirements for the type of tenancy which they hold.¹¹⁹ Depending on the city, country, and state in which a tenant resides, laws vary drastically.

Tenants renting single-family unit properties face the same problems as those renting multi-unit properties, with a few added headaches. While most multi-unit properties are "income producing" properties, giving the lender notice of the tenant's existence, single-family residences may be classified as "owner occupied" by the lender, who may not become aware of a tenant's existence if the owner decides to rent out the property. This poses a problem when the property is foreclosed because lenders are unaware of the tenants' existence and therefore do not provide timely notice of foreclosure.

Renters bound by federal Section 8 leases are also victims in this foreclosure crisis. Although Section 8 leases cannot be terminated by

113. *Id.*

114. *Id.*

115. *Id.*

116. Gillenwater, *supra* note 108.

117. *Id.*

118. *See infra* Part III.D.

119. *See infra* Part III.B.

foreclosure sale, banks often times try to evict these tenants.¹²⁰ Regardless of the type of properties rented or income level of renters, all renters across the nation face the same foreclosure related problems.¹²¹ This trickle-down effect of the foreclosure crisis has had such a profound impact on communities that the Sheriff of Cook County, Illinois, for example, refused to carry out any evictions connected with foreclosure sales because tenants were being surprised by eviction without proper notice.¹²²

4. Impact on Lenders

Although renters are victims in this foreclosure mortgage crisis, lenders have also taken a hard hit with the growing number of foreclosures in the past years. Lenders will often bear a direct loss if a loan goes into foreclosure because lenders retain the credit risk.¹²³ Once the lender or servicer has taken title to the property through a foreclosure sale or auction, they prepare to market the property.¹²⁴ Because state laws differ on the foreclosure process, the costs associated with a foreclosure for lenders vary by state.¹²⁵ Some states require a judicial foreclosure, which is lengthy as well as costly.¹²⁶ The average time it takes between the first missed payment and the foreclosure sale, nationally, is roughly one year.¹²⁷ Added to this year of waiting for the lender, is the additional time needed post repossession of the property to clear title if needed, arrange, and sell.¹²⁸

The preparation and resale of the property can account for over forty percent of the foreclosure related losses for lenders.¹²⁹ Often lenders must restore the property to marketable condition prior to listing it for sale.¹³⁰ These restoration costs include, but are not limited to, painting, plumbing

120. *Legislative and Regulatory Options*, *supra* note 68, at 141 n.2.

121. *See id.* at 141.

122. Azam Ahmed & Ofelia Casillas, *Sheriff: I Will Stop Enforcing Evictions; Legal, Real Estate Experts Wonder How Dart's Promise Will Play Out*, CHI. TRIB., Oct. 9, 2008, at 1.

123. MORTGAGE BANKERS ASS'N, LENDER'S COST OF FORECLOSURE 2 (2008), <http://www.nga.org/Files/pdf/0805FORECLOSUREMORTGAGE.PDF>.

124. *Id.* at 5.

125. *Id.* at 3.

126. *Id.*

127. *See* Amy Crews Cutts & William A. Merrill, *Interventions in Mortgage Default: Policies and Practices to Prevent Home Loss and Lower Costs* 30, tbl.6 (Freddie Mac, Working Paper No. 08-01, 2008), *available at* http://www.freddiemac.com/news/pdf/interventions_in_mortgage_default.pdf.

128. MORTGAGE BANKERS ASS'N, *supra* note 123, at 3.

129. *Id.* at 5.

130. *Id.*

repairs, replacing appliances and carpeting, and repairing water damage.¹³¹ These costs are necessary for marketing because distressed properties are often allowed to deteriorate.¹³² Further added to the costs are the commissions of real estate agents hired to sell the repossessed property.¹³³ The final blow to lenders is losses on the unpaid principal balance at the time the property is sold.¹³⁴ Approximately twenty percent of the total costs of foreclosure are allocated to the payoff of the unpaid principal.¹³⁵ “According [to] the Joint Economic Committee of Congress, the average foreclosure costs roughly \$77,935”¹³⁶

The staggering costs of foreclosures on lenders may be one of the reasons lenders opt to evict tenants rather than allow them to remain in the foreclosed properties. Foreclosing banks claim they need to evict tenants because it is easier to restore, if necessary, and sell a building or home when it is vacant.¹³⁷ With the overwhelming and growing number of foreclosure properties in the United States, banks should shed this business model,¹³⁸ especially since lenders have a large number of vacant properties they cannot sell.¹³⁹ With the growing cost, it is more financially feasible for lenders to allow renters to remain in the foreclosed properties until resale.¹⁴⁰ Not only will this give renters more time to relocate, but it will bring in income for the lenders. “[I]t would be more prudent and more profitable to keep the buildings occupied with rent-paying tenants while they search for a new owner.”¹⁴¹ Further, by allowing tenants in good standing to remain in the dwellings, not only will the properties be more marketable but they will also not cause a nuisance to the neighborhood with their vacant status.¹⁴²

131. *Id.*

132. *Id.*

133. *Id.*

134. MORTGAGE BANKERS ASS’N, *supra* note 123, at 6.

135. CUTTS & MERRILL, *supra* note 127, at 33.

136. Glenn Setzer, *Foreclosure Cost Lenders, Homeowners, the Community, and You Big Bucks*, MORTGAGE NEWS DAILY, June 2, 2008, http://www.mortgagenewsdaily.com/622008_Foreclosure_Costs.asp.

137. *See Legislative and Regulatory Options*, *supra* note 68, at 143.

138. *Id.* at 145.

139. *Id.*

140. *Id.* at 143.

141. *Id.*

142. *Id.* at 145.

III. CURRENT LEGAL SYSTEM

The rights of tenants across the country vary depending on a number of factors including, but not limited to, the type of property, leasehold, rules of priority, and state and local ordinances. Landlord-tenant laws vary within cities, counties, and states. Because of the lack of uniform legislation across states, problems faced by renters of foreclosed properties are exacerbated by their lack of knowledge concerning their rights.

A. Factor 1: Type of Property

The type of property rented impacts the tenant's legal rights.¹⁴³ Problems faced by renters of multi-unit, single-family, and Section 8 housing for example, vary slightly.¹⁴⁴ These problems and their impact on renters in the foreclosure crisis were discussed in Part II.

B. Factor 2: Type of Leasehold

According to Black's Law Dictionary, a "leasehold" is a "tenant's possessory estate in land or premises, the four types being [i] the tenancy for years, [ii] the periodic tenancy, [iii] the tenancy at will, and [iv] the tenancy at sufferance."¹⁴⁵ Termination of these four common law tenancies varies, hence impacting the rights of tenants. "Tenancy for a term" is for a fixed period of time and expires at the end of the fixed period without either party giving notice.¹⁴⁶ A "tenancy at sufferance" is created when a tenant who was rightfully in possession wrongfully remains in possession after termination of the tenancy, and obtains the title "holdover tenant."¹⁴⁷ The tenancy lasts only until the landlord evicts the tenant. A "periodic tenancy" is for a period of some fixed duration that continues for succeeding periods until either the landlord or tenant gives notice of termination.¹⁴⁸ The notice must be equal to the period, except in a year to year tenancy in which at least six months notice is required.¹⁴⁹ A "tenancy at will" has no stated

143. See *Legislative and Regulatory Options*, *supra* note 68, at 144.

144. *Id.*

145. BLACK'S LAW DICTIONARY 973 (9th ed. 2009).

146. *Id.* at 1604.

147. *Id.*

148. RESTATEMENT (SECOND) OF PROP. § 1.5 (1977).

149. *Id.* § 1.5 cmt. f.

duration but rather endures as long as both tenant and landlord desire.¹⁵⁰ The tenancy can be terminated at will at any time but some states have statutes requiring the landlord to give some notice, for example, thirty days.¹⁵¹ Thus, depending on the tenant's legal title, the rights of the tenant will vary at the time of foreclosure sale. It should be added as a second factor affecting the tenant's rights along with the type of property rented.

C. Factor 3: Rules of Priority

The third factor to consider in evaluating each individual tenant's rights is the rules of priority. With a tenancy for years, if the fixed period is in excess of one year, it is subject to the Statute of Frauds¹⁵² and thus must be in writing.¹⁵³ Further, depending on the controlling local law in a particular state, a lease for a term in excess of one year may be a recordable instrument.¹⁵⁴ If the law requires recordation, a failure to do so will affect the validity of the lease.¹⁵⁵ According to Black's Law Dictionary, recordation is "[t]he act or process of recording an instrument, such as a deed or mortgage, in a public registry," which "generally perfects a person's interest in the property against later purchasers (including later mortgagees)."¹⁵⁶ In California, a lease with a term of one year is subject to recordation laws¹⁵⁷ similar to the lender's recordation of the deed of trust or mortgage. A lien of a deed of trust or mortgage recorded before the lease has priority over the leasehold estate as well as priority over the rights of the tenant under the lease.¹⁵⁸ What does this all mean? Not surprisingly, this means when the deed of trust has priority over the lease, the estate of the foreclosure sale purchaser has priority over the lease as well.¹⁵⁹ To illustrate, assume Landlord's lien on Blackacre was recorded with a deed of trust on January 1, 2006, and Tenant's lease agreement on Blackacre was recorded on March 1, 2006. Lender's deed of trust recorded three months earlier, takes priority over the lease agreement. Therefore, if Landlord

150. *Id.* § 1.6.

151. *See id.*

152. RESTATEMENT (SECOND) OF CONTRACTS § 130 (1981).

153. 1 HARRY D. MILLER ET AL., MILLER & STARR CALIFORNIA REAL ESTATE § 1:65 (3d ed. 2003); *see* RESTATEMENT (SECOND) OF PROP. § 2.5.

154. *See* RESTATEMENT (SECOND) OF PROP. § 2.2 & cmt. a.

155. *See id.*

156. BLACK'S LAW DICTIONARY 1388 (9th ed. 2009).

157. 5 MILLER ET AL., *supra* note 153, § 11:101.

158. *Id.*

159. *Id.*

defaults on the lien, and Lender sells the property at a foreclosure sale to Purchaser, Purchaser's estate takes priority over the leasehold estate and thus the lease is extinguished. The foreclosure sale¹⁶⁰ terminates all subsequent possessory interests (i.e., the lease) in the property. Therefore, under a senior lien (i.e., lender's deed of trust recorded on January 1, 2006), a foreclosure sale terminates Tenant's junior lease.¹⁶¹ The lease would not be enforceable against the foreclosure sale purchaser.¹⁶² In the illustration, Tenant would be a holdover tenant (tenancy at sufferance) or even a trespasser if he were to remain in possession of the property after the foreclosure sale.¹⁶³ If the lessee has actual or constructive notice of the mortgage, the mortgagee is not bound by the subsequent lease.¹⁶⁴ Because there is no privity of contract or estate, neither the purchaser nor the tenant can enforce the terms of the lease.¹⁶⁵ Tenants across the country are finding themselves in this predicament. Without rights to enforce their lease agreements against purchasers of foreclosure properties, tenants are falling victim to a crisis they did not help create.¹⁶⁶ Foreclosure sale purchasers may dispossess the tenants in possession of the property by an action in ejectment or unlawful detainer.¹⁶⁷ The opposite legal position benefits the

160. CAL. CIV. PROC. CODE § 725a (West Supp. 2009) ("The beneficiary or trustee named in deed of trust or mortgagee named in mortgage . . . shall have the right to bring suit to foreclose the same in the manner and subject to the provisions, rights and remedies relating to the foreclosure of a mortgage upon such property.").

161. See *Gerhard v. Stephens*, 442 P.2d 692, 709 (Cal. 1968) (noting that the holder of the fee title receives the "totality of the *possessory and corporeal* rights of ownership in real property"); *Principal Mut. Life Ins. Co. v. Vars, Pave, McCord & Freedman*, 77 Cal. Rptr. 2d 479, 484 (Ct. App. 1998).

162. *Principal Mut. Life Ins. Co.*, 77 Cal. Rptr. 2d at 484.

163. See *McDermott v. Burke*, 16 Cal. 580, 589 (1860) ("The relation between the [foreclosure sale] purchaser and tenant is that of owner and trespasser, until some agreement, express or implied, is made between them with reference to the occupation."); *Dover Mobile Estates v. Fiber Form Prods., Inc.*, 270 Cal. Rptr. 183, 186 (Ct. App. 1990).

164. 42 JAUQUALIN FRIEND PETERSON ET AL., CALIFORNIA JURISPRUDENCE 3D: LANDLORD AND TENANT § 354 (West 2008); see also BLACK'S LAW DICTIONARY 1164 (9th ed. 2009) (defining "actual notice" as "[n]otice given directly to, or received personally by, a party" and defining "constructive notice" as "[n]otice arising by presumption of law from the existence of facts and circumstances that a party had a duty to take notice of, such as registered deed or a pending lawsuit").

165. *McDermott*, 16 Cal. at 589 (stating that purchaser was entitled to possession because "[t]here is no privity of contract or of estate between the purchaser upon the decree of sale and the tenant"); see *Dugand v. Magnus*, 290 P. 309, 310 (Cal. Dist. Ct. App. 1930).

166. See Miroff, *supra* note 57, at A4.

167. 5 MILLER ET AL., *supra* note 153, § 11:101 n.22 ("The right to recover possession is an integral part of the policy behind the laws of priority."); see CAL. CIV. PROC. CODE § 1161a (West 2007); *Evans v. Superior Court*, 136 Cal. Rptr. 596, 600 (Ct. App. 1977) ("The policy behind [CAL. CIV. PROC. CODE § 1161a] is clear . . . [it] provide[s] a summary method of ouster where an occupant holds over possession after sale of the property.").

tenant, so when a lease is executed and recorded prior to the recordation of a deed of trust, title from a foreclosure sale is subject to this senior lease¹⁶⁸ and therefore the lease is enforceable as against the purchaser. But, note that a lien of a deed of trust has priority over *unknown* and *unrecorded* leases, unless the lien holder had implied notice of the lease.¹⁶⁹

Even in situations where a tenant's lease has priority over the lender's deed of trusts, tenants still face problems if their lease contract alters the priorities of their interests to avoid the general rule. Often, tenants have agreed in their lease contract to an "'automatic subordination' that the lease will be subordinate to all existing and future liens."¹⁷⁰

D. Factor 4: State Laws and Local Ordinances

The fourth factor to consider is specific state, country, and local laws and ordinances. Tenants' rights after a foreclosure sale of a residential property vary drastically depending on the location of the distressed unit. With each state, county, and city, different types of tenants encounter different rental laws and ordinances. For one, federally subsidized tenancies, such as Section 8 tenancies, survive foreclosure.¹⁷¹ Although Section 8 tenants are protected by federal statute, banks often ignore laws and evict tenants.¹⁷² Federal laws are not the only regulatory schemes ignored by lenders. Local and state laws are also being ignored¹⁷³ although these local rent regulatory schemes, like rent stabilization and rent control ordinances, were enacted to prevent the termination of a tenancy upon foreclosure sale.¹⁷⁴ For example, in Los Angeles, California, the Rent Stabilization Ordinance, which became effective May 1, 1979, protects tenants from eviction by providing thirteen legal reasons for eviction.¹⁷⁵ "The sale or foreclosure of a residential rental property is not one of the . . . legal reasons for eviction under the [ordinance]."¹⁷⁶ Purchasers at a foreclosure sale become a "landlord," and are subject to the ordinance.¹⁷⁷ This ordinance applies to rental buildings in the City of Los Angeles with two or more dwelling units and a Certificate of Occupancy issued on or before October 1, 1978.¹⁷⁸ Multi-family apartments, duplexes, town homes, and condominiums are just some types of units included in the ordinance, which regulates rent increases and limits evictions.¹⁷⁹ Although this

168. 5 MILLER, *supra* note 153, § 11:101.

169. *Id.*

170. *Id.*; *see also* Principal Mut. Life Ins. Co. v. Vars, Pave, McCord & Freedman, 77 Cal. Rptr. 2d 479, 484 (Ct. App. 1998); Dover Mobile Estates v. Fiber Form Prods., Inc., 270 Cal. Rptr. 183, 185-86 (Ct. App. 1990).

ordinance protects tenants from being evicted as a result of foreclosure in Los Angeles, it limits protection to only tenants renting dwelling units constructed prior to 1978. This leaves renters of buildings constructed after 1978 and renters of single-family dwellings with no protection.

As of December 17, 2008, the Los Angeles City Council enacted the Foreclosure Eviction Ordinance, which prohibits banks or purchasers of property foreclosed on or after December 17, 2008, from evicting a tenant merely because of a foreclosure sale.¹⁸⁰ This ordinance was enacted specifically to protect tenants in single-family or new multi-family properties with a post October 1, 1978 Certificate of Occupancy.¹⁸¹ This “net” was enacted to catch all tenants excluded from the original Rent Stabilization Ordinance, in light of the recent foreclosures. Because rent control prohibits an eviction of a tenant on foreclosed property, it is being used successfully to defend unlawful detainer actions.¹⁸² Further, California Governor Arnold Schwarzenegger signed into law Senate Bill 1137, which adds and repeals section 1161b of the Code of Civil Procedure.¹⁸³ This new foreclosure law prevents tenants from being evicted as a result of foreclosure sale.¹⁸⁴ Section 1161b, added to the Code of Civil Procedure, requires sixty days written notice to quit to be given to tenants in possession of rental property after a foreclosure sale, before the tenant can be evicted from the property.¹⁸⁵ This legislation temporarily protects tenants until

171. Raun J. Rasmussen, *Tenants' Rights During and After Foreclosure*, in *HANDLING YOUR FIRST FORECLOSURE* 85, 89 (Robert A. Wolf ed., 1999).

172. *Legislative and Regulatory Options*, *supra* note 68, at 144 (“Even where post-foreclosure evictions are prohibited by state, local, or, in the case of Section 8 leases, federal law, housing advocates report that the banks often ignore the law and threaten tenants with eviction.”).

173. *Id.*

174. *See* Rasmussen, *supra* note 117, at 89.

175. L.A., CAL., MUNICIPAL CODE ch. 15, art. 1, § 151.09 (2009).

176. RENT STABILIZATION DIV., L.A. HOUSING DEP'T, FORECLOSURE EVICTION MORATORIUM, *available at* <http://lahd.lacity.org/lahdinternet/Portals/0/Rent/54BULL%20FORECLOSURE%20EVICTION%20MORATORIUM%20Bulletin2.pdf>.

177. *Id.*

178. *Id.*

179. *Id.*

180. *Id.*

181. *Id.*

182. 4 BAXTER DUNAWAY, *LAW OF DISTRESSED REAL ESTATE* §48:95 (2008).

183. S. 1137, 2008 Leg., 2007-2008 Sess. (Cal. 2008), *available at* http://www.leginfo.ca.gov/pub/07-08/bill/sen/sb_1101-1150/sb_1137_bill_20080708_chaptered.pdf.

184. *Id.*

185. *See* CAL. CIV. PROC. CODE § 1161b(a) (West Supp. 2009).

January 1, 2013.¹⁸⁶ Prior to this legislation, California tenants had only thirty days notice after a foreclosure sale.¹⁸⁷

In California, foreclosures are administered out of court through a “nonjudicial foreclosure (trustee’s) sale,”¹⁸⁸ which conveys absolute title to the purchaser. Therefore, all subordinate encumbrances, including a tenant’s recorded lease, are extinguished.¹⁸⁹ To illustrate all of California’s laws and local ordinances combined, consider the following illustrations.

In Illustration 1, assume Landlord and Tenant have entered into a periodic tenancy for months (monthly rental agreement). If the property, built in 1960 and located in a city with no rent stabilization or rent control ordinance,¹⁹⁰ is sold at a foreclosure sale, Purchaser¹⁹¹ must give sixty days notice to vacate to the Tenant prior to filing for eviction. If the same property were located in Los Angeles, Purchaser would not be allowed to evict the tenant unless one of the thirteen eviction reasons enumerated in the Rent Stabilization Ordinance was present.

In Illustration 2, assume Landlord and Tenant have entered into a tenancy for years (i.e., a one-year lease agreement) which was recorded *after* the deed of trust on the property. If the property, located in a city with no rent stabilization or rent control ordinance, is sold at a foreclosure sale, because the deed of trust has priority, the lease would be extinguished upon foreclosure sale, conveying absolute title to Purchaser. Purchaser would have to give Tenant, a holdover tenant with no right to possession, sixty days notice to vacate.

In Illustration 3, assume the lease agreement was entered into and recorded *prior* to the recordation of the deed of trust on the property, and contains no subordination clause. In this scenario, regardless of whether the property is located in a rent control or stabilization city or not, Tenant’s lease would survive the foreclosure sale. Purchaser is bound by the lease agreement because he was imparted actual notice.

186. S. 1137.

187. California Foreclosure Law for Tenants, <http://www.californiahousingforecast.com/commentary/2008/11/1/california-foreclosure-law-for-tenants.html> (Oct. 31, 2008, 17:07) (stating that prior to this law, a tenant was given thirty days notice; now a tenant gets sixty days notice if his lease is extinguished or he is a month-to-month tenant).

188. CAL. CIV. PROC. CODE § 2924.

189. 5 MILLER ET AL., *supra* note 153, § 11:95.

190. For example, the City of Glendale has no rent control. City of Glendale, Cal., City Attorney, Frequently Asked Questions, <http://www.ci.glendale.ca.us/city-attorney/faq.asp#12> (last visited Oct. 9, 2009).

191. Often times, the purchaser at a foreclosure sale are the lenders. *Legislative and Regulatory Options*, *supra* note 68, at 141.

In Illustration 3, assume Landlord and Tenant have entered into a tenancy for years (i.e., a one-year lease agreement), which was recorded *after* the deed of trust on the property. The property is located in Los Angeles which has the Rent Stabilization Ordinance and Foreclosure Eviction Ordinance. Upon foreclosure sale, the lease agreement is extinguished. Tenant becomes a holdover tenant yet cannot be evicted unless one of the thirteen eviction reasons is present.

There are states with more protective tenants' rights controls when it comes to foreclosure sales. In the District of Columbia, for example, tenants cannot be evicted based on a foreclosure sale.¹⁹² The Rental Housing Act of 1985 allows ten legal ways to evict tenants.¹⁹³ As long as the tenant continues to pay rent, he or she cannot be evicted from a rental unit, except as provided in the D.C. Code.¹⁹⁴ Foreclosure is not listed among the ten legal exceptions to eviction.¹⁹⁵ Thus, the purchaser at a foreclosure sale becomes the new landlord. The Rental Housing Act was enacted to stabilize the rental housing market "by protecting renters from arbitrary eviction."¹⁹⁶ Therefore, not only are tenants' rights impacted by the type of leasehold estate they enter into and the type of unit they rent, but local ordinances and state laws also play a large factor in determining their fate upon foreclosure sale.

IV. ENACTMENT OF UNIFORM LEGISLATION BY INDIVIDUAL STATES

Few states give renters much protection during a foreclosure sale. According to attorney Don Lampe, who has testified before Congress on mortgage issues, state and local laws "generally don't require that servicers inform tenants that there's a foreclosure action on their home."¹⁹⁷ Little has been done recently to tackle this growing problem. The enactment of the \$700 billion Emergency Economic Stabilization Act, which requires all federal entities "where permissible, to permit bona fide tenants who are current on their rent to remain in their homes under the terms of the lease,"

192. D.C. CODE § 42-3505.01 (Supp. 2009); see Press Release, Office of the Tenant Advocate, DC Law Protects Tenants During Foreclosures (Aug. 28, 2008), <http://newsroom.dc.gov/show.aspx/agency/ota/section/2/release/14721>.

193. Press Release, Office of the Tenant Advocate, *supra* note 192.

194. D.C. CODE § 42-3505.01(a).

195. *See id.*

196. Kelley Ann Baione, *The District of Columbia Rental Housing Act: Eviction Protection for the Tenants of Defaulting Mortgagor Under Administrator of Veterans Affairs v. Valentine*, 35 CATH. U. L. REV. 1133, 1152 (1986).

197. Christie, *supra* note 10.

is an example of such legislation.¹⁹⁸ Further exacerbating the problems faced by tenants are the differences in legislation between one city or county and another.¹⁹⁹ By applying uniform laws throughout the state, tenants' rights associations will more easily inform all tenants within the state of their rights upon a foreclosure sale. States across the nation should implement uniform foreclosure protection legislation with tenants in mind. The legislation should tackle several key problems faced by tenants. Because the current foreclosure mortgage crisis is a recent problem in light of the economic downturn, such legislation should mirror Depression-era legislation. This type of uniform legislation is *necessary* to keep communities afloat during this devastating economic recession. By standardizing foreclosure eviction laws in each state, not only will laws be consistent throughout the country, but educating tenants will be easier as well. The following are sections necessary for the successful implementation of this type of tenants' rights legislation.

A. Notice Requirement

One of the major problems faced by tenants is that purchasers from a foreclosure sale give them little time to relocate.²⁰⁰ Tenants are caught off-guard when they receive eviction notices, or even a Notice to Vacate from the purchaser. As mentioned in Part II, tenants are now facing competition in the rental market from distressed homeowners who also seek rental units due to foreclosure. More time to locate affordable housing is necessary to ensure tenants are able to find affordable housing.²⁰¹ A duty of care should be imposed on the landlord to give the tenant a Notice of Default if the landlord should default on his or her mortgage for more than forty-five days. Lien holders with actual or constructive notice of the tenancy should be required by statute to also give notice to the tenant of the landlord's default forty-five days after the first missed mortgage payment. With these requirements in place, the tenant will be placed on notice that a possible foreclosure may result in the future. Notice of sale or auction should be posted on the property according to state laws on three separate

198. Emergency Economic Stabilization Act of 2008, H.R. 1424, 110th Cong. 26 (2008), available at <http://financialservices.house.gov/press110/essabill.pdf>.

199. See RealtyTrac, *Foreclosure Laws and Procedures by State*, <http://www.realtytrac.com/foreclosure-laws/foreclosure-laws-comparison.asp> (last visited Oct. 5, 2009). Notices of sale in California, for example, are published twenty-one days prior to a nonjudicial foreclosure sale, whereas in Minnesota notices are published only seven days prior to a foreclosure sale. See *id.*

200. See *Legislative and Regulatory Options*, *supra* note 68, at 142.

201. *Id.*

occasions to ensure that the tenant has the opportunity to see them. Notice of the foreclosure sale should be posted on the property, at most, twenty-four hours following sale.

B. Six-Month Prohibition Against Eviction

Following a foreclosure sale, tenants in good standing should be allowed to remain in the properties.²⁰² The legislation should include a prohibition against eviction of tenants by a purchaser following a foreclosure sale, if the eviction is solely because of the foreclosure, for a minimum of six months. The District of Columbia's Rental Housing Act can be used as a model.²⁰³ This prohibition should be limited, however, to the purchaser at a foreclosure sale. Subsequent purchasers of the property from the purchaser at foreclosure sale shall not be bound by this eviction limitation. Upon this second sale, the second purchaser shall follow state and local laws regarding eviction. This is to ensure investors will continue to purchase foreclosure properties, stimulating the housing market. Six months after the foreclosure sale, the renter shall become a holdover tenant. The six-month landlord-tenant relationship between the purchaser at foreclosure sale and the tenant shall be extinguished. Landlords must give sixty days notice to vacate if desired. Tenant has the option to vacate the premises following the foreclosure sale at any time. If the landlord requests the tenant to vacate following the six months due to foreclosure, the landlord must give a rental assistance voucher per adult legally residing in the property. The dollar amount per voucher can be determined by individual states depending on their cost of living, wages, etc.

C. Expunging of Eviction Record

This legislation should include a section which addresses the recent wave of foreclosure victims that have already suffered. Those tenants legally evicted as a result of a foreclosure sale must live with an eviction on their rental record.²⁰⁴ This makes it extremely difficult to find rental housing in the future. Therefore, tenants with evictions on their rental records as a result of foreclosure sale occurring on or after January 1, 2006

202. See Christie, *supra* note 10.

203. D.C. CODE § 42-3505.01 (Supp. 2009).

204. See *Legislative and Regulatory Options*, *supra* note 68, at 144.

2009]

RENTERS: THE INNOCENT VICTIMS

363

shall be given the opportunity to apply for expunging of the eviction from their rental records by the court.

D. Utilities and General Maintenance: The Obligation of the Purchaser at a Foreclosure Sale

Upon default by the landlord, the lien holder shall be required to ensure proper maintenance of the distressed property. The lien holder shall be required to maintain utilities necessary to the health and safety of the tenant by paying all delinquencies owed to the utility companies. The purchaser of the distressed property at a foreclosure sale shall be required by this law to maintain the property according to local standards. The purchaser shall also be required to maintain utilities necessary to the health and safety of the tenant.

E. Federal Funding to Communities

States need further assistance in order to address the impact of the foreclosure crisis on their communities. This legislation should include a section which allocates federal funding to the state to be used on any program related to fighting the impact of foreclosures on the community. This can include Legal Assistance Programs to educate renters on their rights and funding to local municipalities to ensure aggressive enforcement of local standards.²⁰⁵ Individual states may determine appropriate use of these funds.

F. Imposition of Heavy Fines

Further, the imposition of heavy fines on violators of this proposed legislation and all local and state laws affecting the distressed properties is necessary. Lenders and landlords shall be fined if they violate any of the provisions of this legislation. If the fine is not paid with the time allocated by individual states, it must be filed as a lien against the distressed property with priority over all other recorded encumbrances.

205. See STAFF OF U.S. SEN. BARBARA BOXER, *supra* note 39, at 2.

V. CONCLUSION

By enacting uniform legislation, states will not only be maintaining consistent laws throughout counties and cities, but will also be addressing the problems tenants face in the housing market as a result of the foreclosure crisis. As described above, the foreclosure crisis is not only a problem faced by homeowners and lenders across the nation, but has come to affect renters, resulting in harsh impacts on local neighborhoods and communities.

*Arminé Bazikyan**

* Juris Doctor Candidate 2010, Southwestern Law School; Bachelor of Arts, History, 2006, University of California, Los Angeles. I would like to express my gratitude to Professors Susan J. Martin and Sung Hui Kim for their guidance and the staff and editors of the *Southwestern Law Review* for their valuable advice.