

# TENANTS: INNOCENT VICTIMS OF THE NATION’S FORECLOSURE CRISIS

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## INTRODUCTION

Renters are innocent victims of the foreclosure crisis, losing their homes through no fault of their own when their landlord goes into foreclosure. Until lately, the national discussion on the foreclosure crisis largely focused on owner-occupied homes, but recent analysis reveals that the crisis is significantly impacting renters across the country.<sup>1</sup> New York University's Furman Center for Real Estate and Urban Policy found that in New York City, well over half of all foreclosure filings in 2007 were on two to four family or multi-family buildings, and a growing body of data and anecdotal evidence indicates that the problem is not isolated to New York City; heart wrenching stories of renters losing their homes have appeared in newspapers nationwide.<sup>2</sup>

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<sup>1</sup> David Handelman, *Low-Income Renters Feel Foreclosure Burn*, MEDILL REP. WASH., July 3, 2008 (explaining how experts think the plight of the foreclosure crisis on renters has been underreported); Cody Calamaio, *Foreclosure Crisis Hurting Renters, Too*, TUCSON CITIZEN, July 2, 2008 (according to the local Community Development and Neighborhood Conservation Department, rental foreclosures are a "big problem" that is only recently receiving attention); Danilo Pelletiere & Keith Wardrip, *Renters and the Housing Credit Crisis*, 17 POVERTY & RACE 4, 1 (July/Aug. 2008) ("As the implosion of credit and housing markets progressed, gaining national attention, the impact on renters and rental housing went largely unrecognized by policymakers and the media."). Even in the recently passed Emergency Economic Stabilization Act (EESA), renters affected by foreclosure received only passing notice. The subsection entitled "Tenant Protections" provides only that any loan modifications that affect rental properties should not affect existing subsidies and protections, and that those modifications "take into account the need for operating funds to maintain decent and safe conditions at the property." 12 U.S.C. § 5220(b)(3)(B) (2008) (emphasis added). However, recent news indicates that the plight of renters is finally moving into the national spotlight. In December 2008, Fannie Mae announced that it would sign new leases with renters living in foreclosed properties owned by the company. News Release, Fannie Mae, Statement by Brian Faith, Managing Director Communications on National Tenant Policy (Dec. 15, 2008), available at <http://www.fanniemae.com/newsreleases/2008/4556.jhtml?p=Media&s=News+Release>. See also Charles Duhigg, *Fannie Mae Lets Renters Stay Despite Foreclosures*, N.Y. Times, Dec. 14, 2008, at B1 (describing the plan as the "first nationwide effort to provide widespread relief to renters").

<sup>2</sup> Press Release, Furman Center for Real Estate and Urban Policy, New Analysis of NYC Foreclosure Data Reveals 15,000 Renter Households Living in Buildings that Entered Foreclosure in 2007 (Apr. 14, 2008) [hereinafter Furman]. More recent data, from the first half of 2008, reveals that the percentage of foreclosure filings on 2-4 and multi-family buildings has remained constant. The phrase "multi-family buildings" refers to buildings with five or more units. See, e.g., *Legislative and Regulatory Options for Minimizing and Mitigating Mortgage Foreclosures: Hearing Before the H. Comm. on Financial Services*, 110th Cong. 35 (2007) (testimony statement of Judith Liben, Housing

These renters often are completely unaware that their landlords are in default until utilities are shut off or an eviction notice appears on their door. Frequently, they lose not just their homes, but also their security deposits.<sup>3</sup> Finding a new rental on short notice is often difficult, especially for low-income tenants who face increasing competition for fewer affordable apartments on the market.<sup>4</sup> In the majority of states, purchasers at foreclosure sales are entirely within their rights to evict all existing tenants, but even when renters have the right to stay in their homes after foreclosure—when the tenant holds a Section 8 voucher, for example—they are frequently intimidated or improperly lured out of their homes with offers of “cash for keys.”<sup>5</sup> In addition,

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Attorney, Massachusetts Law Reform Institute) [hereinafter *Hearing*]; Jondi Gumz, *Renters Caught in Foreclosure Mess*, SANTA CRUZ SENTINEL, Sept. 9, 2008; Dina ElBoghady, *Foreclosure Crisis Catching Renters Off Guard*, WASH. POST, Aug. 8, 2008, at A01 (including a story of one renter who was forced out of two different homes because of foreclosure).

<sup>3</sup> See, e.g., Jeff Knebel, *Foreclosure Crisis is Affecting Renters, Too*, MOUNT SHASTA AREA NEWSPAPERS (Cal.), Sept. 3, 2008 (reporting on newlywed renters returning from their honeymoon only to find an eviction notice); Brett Wilkison, *Renters Rocked by Foreclosure Evictions*, VISALIA TIMES-DELTA (Cal.), Aug. 29, 2008 (telling of the “cruel surprise” facing renters, the “unseen victims” of the foreclosure crisis); Jeff Pope, *Impending Foreclosures Leave Renters in Limbo*, LAS VEGAS SUN, Aug. 28, 2008 (reporting on renters who were “stunned when a ‘for sale’ sign appeared one day in the front yard of the house they were renting” and left wondering if an eviction notice would end up on their door); Wendell Hutson, *Apartment Renters Caught in Foreclosure Net*, CHI. DEFENDER, Aug. 13, 2008 (“She knew something was wrong when, in January, her rent payment was returned by the post office.”); Keith Benman, *Renters Swept Up in Foreclosure Storm*, THE TIMES (Ind.), July 13, 2008. For articles about utility shut-offs, see April Dembosky, *Foreclosures Mean Crises for H.I.V. Positive Renters*, N.Y. TIMES, Aug. 26, 2008, at B6 (reporting on a landlord shutting off utility service while the tenant was still in possession of the property and before foreclosure proceedings were complete); James Temple, *Foreclosure’s Hidden Victims*, S.F. CHRON., Aug. 15, 2008, at A1 (“Renters are being told to leave, are living in the dark or are receiving little response to their complaints as their homes fall into disrepair.”).

<sup>4</sup> The foreclosure crisis generally has made finding rental properties more difficult, because of an increased number of former homeowners searching for rentals after foreclosure. See, e.g., Nick Rahaim, *Foreclosure Crisis Forces Rental Crisis*, CALIFORNIAN.COM, Sept. 13, 2008; Christiana Schmitz, *Rental Runaround: Renters Evicted Because of Foreclosure Have Trouble Finding New Housing*, CHI. REP., July 1, 2008 (explaining how evicted renters, especially if they are poor, are having difficulty finding new housing); Pelletiere & Wardrip, *supra* note 1, at 6 (“It seems likely that in all but the slackest rental markets, increased demand will be met with declining supply in the short run.”).

<sup>5</sup> See, e.g., Mike Dello Stritto, *‘Cash for Keys’ Becoming More Common*, CBS13 (Cal.), Feb. 11, 2008, <http://cbs13.com/local/cash.for.keys.2.651785.html> (last visited Nov. 10, 2008); Benman, *supra* note 3; Andres Araiza, *Renters Facing Eviction*, ABC30 (Cal.), Aug. 25, 2008, <http://abclocal.go.com/kfsn/story?section=news/local&id=6350628> (highlighting a story in which a renter

rental fraud has developed where landlords who know foreclosure is imminent, or non-owners posing as landlords, collect renters' money, then disappear.<sup>6</sup> The actual owners can then evict the fraud victims.

A handful of states already protect tenants from foreclosure-related evictions by requiring a "just cause" for eviction, such as non-payment of rent. Around the country, local governments are debating stronger tenant protection laws to deal with the growing rental foreclosure crisis.<sup>7</sup> These proposals include increased notice requirements, financial aid for moving expenses, and prohibitions against utility shut-offs.<sup>8</sup>

This article aims to help inform the debate over these proposals. The first section reveals the scope of the crisis by describing what the available data tells us about the impact of foreclosures on renters and rental housing. The second section presents an overview of the rights tenants have when their landlord is foreclosed. It uses New York as an example, but highlights laws in other states that offer stronger tenant protection. The third section analyzes the debates taking place in state and local governments across the country, and reaches beyond the plight of the individual tenants to discuss the impact landlord foreclosure may have on the availability and quality of rental housing.

#### I. RENTERS IMPACTED BY FORECLOSURE: THE EXTENT OF THE PROBLEM

The displacement of renters due to foreclosure is not limited to a few heartrending tales scattered around the country. On the contrary, data demonstrates that the problem is widespread. In New York City, NYU's Furman Center for Real Estate and Urban Policy found that nearly 60% of the 15,000 notices of foreclosure

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was offered \$1,400 to vacate in two weeks or go through "the regular eviction process"); Debt Advocacy Center, Cash For Keys, <http://www.foreclosurefish.com/cashforkeys.htm> (last visited Oct. 27, 2008) (providing a basic definition of "cash for keys").

<sup>6</sup> For more information see *infra* Part I.

<sup>7</sup> See, e.g., H.R. 4735, 110th Cong. § 2 (2007); California Political Desk, *Assembly Approves Torrico's Protections for Renters in Foreclosed Properties*, CAL. CHRON., May 30, 2008; Adrian Sainz, *Renters in Foreclosed Homes Get Help*, ASSOCIATED PRESS, Oct. 17, 2008.

<sup>8</sup> See, e.g., Sainz, *supra* note 7 (discussing proposed legislation in various states); Evicting Tenants When Landlords Foreclose!, <http://orangecountyrealestatevoice.com/?s=evicting+tenants> (Aug. 20, 2008, 12:24 EST) (discussing the problem of utility shut offs).

filed in 2007 were on two to four family or multi-family buildings.<sup>9</sup> Using a conservative estimate (assuming that an owner lives in one of the units in all two to four family buildings), the Center estimated that 15,000 renter households, or about 38,000 New Yorkers, were impacted by foreclosure.<sup>10</sup>

Studies across the nation are uncovering similar trends. The Joint Center for Housing Studies of Harvard University found that in 2007, 20% of all foreclosure filings across the country were in non-owner occupied properties.<sup>11</sup> The National Low Income Housing Coalition estimates that one third of all properties facing foreclosure across New England are in multi-unit buildings, and 45% of homes at the end of the foreclosure process in four New England states are rentals.<sup>12</sup> In Chicago, the Woodstock Institute found that 35% of foreclosure filings were on two to six unit buildings, and other researchers are finding similar results in counties in Michigan, Minnesota, and North Carolina.<sup>13</sup>

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<sup>9</sup> Furman, *supra* note 2.

<sup>10</sup> *Id.* Brooklyn accounted for the largest share of these foreclosures, with 7,200 renter households entering foreclosure (or 56% of all Brooklyn foreclosure filings). *Id.* However, the impact was seen across all five boroughs. Queens and the Bronx had 3,723 renter households (or 37%), and 2,483 rental households (or 59%) entering foreclosure respectively, while Staten Island had 488 rental households (or 27%) entering foreclosure. *Id.* Although Manhattan had a lower number of total properties entering foreclosure, a staggering 83% of all those properties that did enter foreclosure were rental properties. Manhattan had 1,333 total households facing foreclosure, of which 1,111 were renter households. *Id.*

<sup>11</sup> JOINT CTR. FOR HOUS. STUDIES OF HARVARD UNIV., AMERICA'S RENTAL HOUSING: THE KEY TO A BALANCED NATIONAL POLICY 14 (2008).

<sup>12</sup> KEITH E. WARDRIP & DANILO PELLETTIERE, NAT'L LOW INCOME HOUS. COAL., PROPERTIES, UNITS, AND TENURE IN THE FORECLOSURE CRISIS: AN INITIAL ANALYSIS OF PROPERTIES AT THE END OF THE FORECLOSURE PROCESS IN NEW ENGLAND 4, 5 (2008) (analyzing the foreclosure records of Connecticut, Massachusetts, New Hampshire, and Rhode Island); Danilo Pelletiere, Research Dir. & Keith Wardrip, Research Analyst, Nat'l Low Income Hous. Coal., Out of Reach 2008: Rental Housing and the Current Crisis (July 24, 2008) [hereinafter NLIHC].

<sup>13</sup> GEOFF SMITH, WOODSTOCK INST., FORECLOSURE CRISIS IMPACTS CHICAGO'S RENTAL HOUSING MARKET 2 (2008) (noting that in 2007, 35% of 13,872 foreclosure filings in Chicago were on 2-6 unit buildings). *See, e.g.*, CHRISTOPHER L. FOOTE ET AL., FED. RESERVE BANK OF BOSTON, SUBPRIME FACTS: WHAT (WE THINK) WE KNOW ABOUT THE SUBPRIME CRISIS AND WHAT WE DON'T 5 (2008) (finding that in Massachusetts, multi-family dwellings account for only 10% of residential property but almost 30% of foreclosures); John Fraser, 2008 Foreclosures by Property Type for Lowell and Lawrence, MERRIMACK VALLEY HOUS. REP. (UMASS Lowell/Middlesex North Registry of Deeds), July 2008, at 2 (finding that for two Massachusetts counties, multi-family properties make up a disproportionate number of foreclosures); NLIHC, *supra* note 12 ("25% of foreclosure filings in Kalamazoo, MI, were renter occupied", 60% of filings affected renters in Minneapolis, and 29% affected renters in Mecklenburg

The scale of the foreclosure crisis is likely even greater for renters than these numbers indicate because of the emergence of new types of rental fraud.<sup>14</sup> One type of fraud involves owners in default on their mortgage payments who know that their properties will soon enter foreclosure. The owners lease the properties out to unsuspecting renters, collect security deposits and rent, and disappear when the foreclosure process formally begins.<sup>15</sup> Another fraud scheme involves individuals posing as landlords, and renting properties (often left vacant due to foreclosure) that they do not own.<sup>16</sup> In this scam, the purported landlord collects security deposits and the first month's rent from tenants, even though the purported landlords have no legal possession of the property.<sup>17</sup> When the real owner of the property (the mortgage holder or person who purchased the property at the foreclosure auction or from the bank's inventory) discovers the fraud, the tenants are evicted.<sup>18</sup>

Tenants in rental housing that is foreclosed upon face the costs and disruption of having to find a new apartment and move, often with little notice, and are unlikely to be able to recover their security deposits. Even tenants who are legally protected from foreclosure-related eviction are at risk of losing their homes.

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County, N.C.). This data is supported by reports of an increased need for the services of community housing organizations. NLIHC, *supra* note 12 (listing different community housing organizations that have an increased volume of clients requesting foreclosure-related eviction help).

<sup>14</sup> *E.g.*, *How to Protect Yourself from Rental Fraud*, N.Y. DAILY NEWS, Aug. 27, 2008 (explaining that rental fraud "is intimately related to the ongoing mortgage meltdown," and although statistics are not yet available, the "sheer volume of the anecdotes is alarming").

<sup>15</sup> *See, e.g.*, Kelly Bennett, *Renters Caught When Banks Foreclose on Landlords*, VOICE OF SAN DIEGO, Aug. 5, 2008, available at <http://www.voiceofsandiego.org/articles/2008/08/05/news/02renter080508.txt> (describing a situation where a renter was the victim when the landlord purchased a home with stolen identity); Hillary Copsey & Nadia Vanderhoof, *Foreclosures Have Mortgage Fraud on the Rise in St. Lucie*, VERO BEACH PRESS J., Apr. 27, 2008, at A1 (reporting on a victim of renter fraud, and quoting local officials on a recent spike in rental fraud cases).

<sup>16</sup> John Benedict, *Foreclosure Scams—Renters Beware*, E REALESTATEEXEC, Apr. 2008, [http://erealestateexec.com/legal\\_notes/foreclosure\\_scams.php](http://erealestateexec.com/legal_notes/foreclosure_scams.php).

<sup>17</sup> *See, e.g.*, REAL ESTATE FRAUD UNIT, L.A. COUNTY SHERIFF'S DEP'T, VICTIM'S GUIDE TO REAL ESTATE FRAUD [hereinafter VICTIM'S GUIDE]; Brent Whiting, *Fraud Aimed at Renters, Police Warn*, ARIZ. REPUBLIC (Phoenix), Aug. 7, 2008, Valley & State, at 1; Press Release, S.C. Dep't of Consumer Affairs, Residential Rental Scam: Combining Fraud with Risk of Identity Theft (Aug. 6, 2008) (issuing a warning following reports of rental fraud in neighboring states).

<sup>18</sup> *See* VICTIM'S GUIDE, *supra* note 17 ("When the fraud is discovered the tenant is evicted, losing his security and rental deposits."); Benedict, *supra* note 16.

Many tenants are unaware of their rights, so incentives such as “cash for keys” are attractive. “Cash for keys” is industry parlance for the practice some lenders who have acquired the property through foreclosure (or people who have purchased the property at a foreclosure auction or at another point in the foreclosure process) have of offering tenants money to vacate the home and drop any claims to possession.<sup>19</sup> Generally, the new owner tells the tenant that if the tenant does not take advantage of the offer quickly (often within a week), they will still be evicted, but without any compensation.<sup>20</sup> New owners have significant success in removing even tenants protected by federal or state laws.<sup>21</sup>

## II. TENANTS’ RIGHTS

The data in Part I highlights the serious impact the foreclosure crisis is having on tenants; this part discusses tenants’ rights throughout the foreclosure process.

Foreclosure laws do not generally mention renters.<sup>22</sup> It is unsurprising, therefore, that tenants’ rights in the foreclosure process usually are limited. Foreclosure laws vary state by state, but the effect of foreclosure on tenants is not significantly impacted by the state’s theory of mortgages or the specifics of the state’s foreclosure procedures. Therefore, rather than do an exhaustive fifty state survey, this section first will describe tenants’ rights generally, using New York State law as an example, then will highlight a few states that have stronger tenant protections.

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<sup>19</sup> Benman, *supra* note 3.

<sup>20</sup> Carolyn Said, *Foreclosure’s Hidden Victims—The Tenants*, S. F. CHRON., Feb. 7, 2008, at A1 (quoting the director of the Neighborhood Law Corporation, Alex Nguyen, as saying that lenders offer tenants cash to vacate the property in ten days, and if the tenants do not accept the offer, they are evicted).

<sup>21</sup> *Hearing*, *supra* note 2, at 148 (suggesting lenders who evict tenants illegally be penalized); Temple, *supra* note 3 (“[N]ot all renters are aware of the rules, and not all of the entities that take control of properties try to learn them.”); Jay Fitzgerald, *Foreclosures Hit Tenants; Activists: New Owners Trample on Renters’ Rights*, BOSTON HERALD, Oct. 29, 2007, at 28 (“many section 8 tenants panic, and don’t fight eviction notices”); Carol Yur, *Foreclosure Crisis Hits Many Local Residents*, DAILY CALIFORNIAN, Oct. 23, 2008 (discussing effectiveness of intimidation tactics).

<sup>22</sup> *E.g.*, N.Y. REAL PROP. ACTS. LAW § 1303 (McKinney Supp. 2008) (containing no reference to renters and only requiring that the “foreclosing party” provide the mortgagor with notice of foreclosure).

*A. Tenants' Rights in Foreclosure: An Overview*

To understand tenants' rights when their landlord's property is foreclosed upon, it is not necessary to have a detailed understanding of mortgage law, but a basic overview is helpful. In New York, as well as the majority of states, the mortgage creates a lien on the property that provides security for the debt.<sup>23</sup> The borrower (the "mortgagor") grants a mortgage to the lender (the "mortgagee"), which gives the lender the right to force a sale of the property if the debt is not repaid.<sup>24</sup> If the borrower defaults on the debt by failing to make scheduled mortgage payments, the lender may not take the property immediately.<sup>25</sup> The lender must bring a foreclosure action, which is a legal proceeding to terminate the borrower's right to the property.<sup>26</sup>

There are two main types of foreclosure: judicial foreclosure and non-judicial foreclosure.<sup>27</sup> Judicial foreclosure in New York first requires the lender to serve the owner with notice that the lender has begun a legal action to force a sale of the property. The lender must file a notice of pendency (generally known as a *lis pendens*) with the county clerk, which provides constructive

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<sup>23</sup> Ann M. Burkhardt, *Freeing Mortgages of Merger*, 40 VAND. L. REV. 283, 322 (1987) [hereinafter *Freeing Mortgages*]. A "lien" is "a legal right or interest that a creditor has in another's property . . ." BLACK'S LAW DICTIONARY 941 (8th ed. 2004). New York follows the lien theory of mortgages, but a minority of states follow the title theory. *Freeing Mortgages, supra*, at 322. Under the title theory, the "mortgage is a vested fee simple interest subject to complete defeasance by the payment of the mortgage debt." *Garrison v. Garrison*, 460 A.2d 945, 947 (Conn. 1983). This means that the mortgagee (the lender) has title to the property and the mortgagor (the borrower) only has a right of possession until the debt is paid. Ann M. Burkhardt, *Lenders and Land*, 64 MO. L. REV. 249, 267 (1999) [hereinafter *Lenders*] (providing an overview of the differences in foreclosure processes in title and lien theory states). The difference between title theory and lien theory states affects the mechanics of the foreclosure process and how renters' leases are terminated, but does not affect whether or not the tenant has the right to remain on the property. *Id.* at 269. Even in title theory states, the mortgagee still has a redemption period, which is determined by state law. *Id.* at 268. A few states lie somewhere in between the title and lien theories. *Id.*

<sup>24</sup> N.Y. REAL PROP. ACTS. LAW § 254 (McKinney 2006).

<sup>25</sup> *See generally* §§ 1301-1391, 1401-1461 (McKinney 1979 & Supp. 2008) (describing the process which must occur in order to foreclose on a mortgage) (§§ 1401-1461 to be repealed by L. 1998, c. 231 § 2, effective July 1, 2009).

<sup>26</sup> *See* §§ 1351-52, 1411 (explaining the effect of each of the foreclosure proceedings). New York only allows non-judicial foreclosure if permitted under the terms of the lease, for buildings with six or more units, and the mortgagee does not plan to terminate tenants' leases.

<sup>27</sup> Grant S. Nelson & Dale A. Whitman, *Reforming Foreclosure: The Uniform Nonjudicial Foreclosure Act*, 53 DUKE L.J. 1399, 1403 (2004).

notice to the general public of the suit.<sup>28</sup> Next, there is a judicial hearing to obtain a “judgment of sale,” which, if the foreclosing lender prevails, directs the county sheriff, or other designated individual, to sell the property.<sup>29</sup>

Non-judicial foreclosure is generally faster than judicial foreclosure, but, in New York, is permitted only in limited circumstances for residential buildings.<sup>30</sup> For non-judicial foreclosure, the lender must publish a notice of sale in a local newspaper and serve a copy on the mortgagor, describing the property, mortgage, sum due, and time and place of the sale.<sup>31</sup> The sale is then conducted at a public auction.<sup>32</sup>

Under either judicial or non-judicial foreclosure, proceeds from the sale are applied to repayment of the debt secured by the foreclosed mortgage (after payment of any outstanding superior liens, such as property taxes), with any surplus paid to the homeowner.<sup>33</sup> The foreclosing lender will acquire the property if there are no bids in excess of the amount set by the lender.<sup>34</sup> Both types of foreclosures provide an opportunity for a defaulting mortgagor to pay off the remainder of the debt before the sale and maintain ownership of the property, which is called the “right of redemption.”<sup>35</sup> If borrowers do not exercise their right of redemption, all their rights to the property are extinguished by the foreclosure sale.<sup>36</sup> When the defaulting mortgagor is a

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<sup>28</sup> N.Y. REAL PROP. ACTS. LAW §§ 1303, 1331. *Lis pendens* is “a notice, recorded in the chain of title to real property, required or permitted in some jurisdictions to warn all persons that certain property is the subject matter of litigation, and that any interests acquired during the pendency of the suit are subject to its outcome.” BLACK’S LAW DICTIONARY 950 (8th ed. 2004).

<sup>29</sup> N.Y. REAL PROP. ACTS. LAW § 1351 (McKinney 1979 & Supp. 2008).

<sup>30</sup> *See* § 1401 (to be repealed by L. 1998, c. 231, § 2, effective July 1, 2009). *See generally* FORECLOSURE LAW & RELATED REMEDIES: A STATE-BY-STATE DIGEST 408 (Sindey A. Keyles ed., 1995) (providing information on each state’s judicial and non-judicial foreclosure laws).

<sup>31</sup> N.Y. REAL PROP. ACTS. LAW §§ 1404-05.

<sup>32</sup> § 1408.

<sup>33</sup> § 1409.

<sup>34</sup> Generally the lender will only acquire the property if there are no bids in excess of the amount of the outstanding debt. Real estate acquired by the foreclosing lenders is generally referred to as “real estate owned” or “REO” property.

<sup>35</sup> N.Y. REAL PROP. ACTS. LAW § 1341 (McKinney 1979). Until purchase, the lender only has a possessory interest in the property that is subject to the borrower’s equitable or statutory right of redemption. In New York, that statutory right of redemption allows the borrower to redeem the property after a judgment of sale, but before the sale is completed. *See, e.g.*, *Chase Manhattan Bank v. Josephson*, 638 A.2d 1301, 1305 (N.J. 1994).

<sup>36</sup> N.Y. REAL PROP. ACTS. LAW § 1352.

landlord, and that landlord fails to exercise the right of redemption and loses the property, tenants are at risk of having their leases terminated.<sup>37</sup> Once leases are terminated, the purchaser has the option to evict the tenants.<sup>38</sup>

Although the time required to complete foreclosure varies by state, judicial foreclosure generally entails a longer process.<sup>39</sup> While non-judicial foreclosure ranges from three to eight months, judicial foreclosure generally takes over a year (for example, New York City judicial foreclosure typically lasts eighteen months).<sup>40</sup>

Tenants' statutory rights in this process can be viewed at three points: (i) as of the signing of the lease (because the timing of the lease determines its priority compared to the mortgage), (ii) during the foreclosure process (when tenants have the right to be joined in a judicial foreclosure proceeding), and (iii) between the beginning of foreclosure and the time the tenant moves out (when tenants may have rights regarding notice of the foreclosure or before eviction).

### 1. Priority

The order of priority between the lease and the mortgage determines whether or not the lease may be terminated by a foreclosure proceeding (absent any of the other factors described in this section).<sup>41</sup> Generally, the priority of property interests is determined by the common-law rule of "first in time, first in right."<sup>42</sup> This means that creditors who have a lien on a property

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<sup>37</sup> See 74 N.Y. Jur.2d *Landlord and Tenant* § 236-37 (1999) (explaining that even though foreclosure terminates the lease, the tenant may have a claim for breach of the covenant for quiet enjoyment).

<sup>38</sup> See 74 N.Y. Jur.2d *Landlord and Tenant* § 307 (1999); see also *Knickerbocker Oil Corp. v. Richfield Oil Corp.*, 254 N.Y.S. 506, 511 (2d Dep't 1931).

<sup>39</sup> See 74 N.Y. Jur.2d *Landlord and Tenant* § 307 (1999).

<sup>40</sup> See generally Jenny Schuetz et al., *Neighboring Effects of Concentrated Mortgage Foreclosures*, 17 J. Hous. Econ. (forthcoming 2008) (manuscript at 7, on file with Furman Ctr. for Real Estate and Urban Policy) (discussing the effect of foreclosure laws on the length of the process); Nat'l Low Income Hous. Coal., *Foreclosure and Eviction Practices by State*, July, 25, 2008, <http://www.nlihc.org/doc/State-Foreclosure-Chart.pdf> (listing the time frames of foreclosures by state, with the shortest non-judicial foreclosures taking as little as eighty-five days, and lengthier judicial foreclosures taking up to 355 days).

<sup>41</sup> See *infra* pp. 14-17 (discussing states with statutory protection that override priority of liens rules).

<sup>42</sup> *E.g.*, *United States v. City of New Britain*, 347 U.S. 81, 85 (1954) ("The principle is believed to be universal, that a prior lien gives a prior claim, which is entitled to prior satisfaction . . ."); *United States v. McDermott*, 507 U.S. 447, 449 (1993) ("Absent provision to the contrary, priority for purposes of federal law

that was chronologically first have priority over any subsequent liens on the property. Because mortgages and leases are, in this sense, both liens on property, leases signed prior to execution of the mortgage have priority over the mortgage, and remain in force after foreclosure.<sup>43</sup> But this situation would likely occur only if the landlord refinanced the property after leases were already in force.<sup>44</sup> In this situation, the purchaser at the foreclosure sale becomes the new landlord and the tenancies continue. However, much more commonly, the “first in time, first in right” rule results in lease termination. Except in the aforementioned case of refinancing, property owners generally execute mortgages concurrently with purchase, well before rental leases are signed. Because leases made subsequent to the mortgage are subordinate to that mortgage, when the mortgagee commences a foreclosure proceeding, the mortgage lien takes priority over the lease lien. These leases are then terminated by foreclosure, and the purchaser at the foreclosure sale may evict the tenants.<sup>45</sup>

There are a couple of exceptions from the general rule that subordinate leases are terminated by foreclosure. The first exception is for federally subsidized Section 8 housing and, in New York City and some localities of California, for residents of rent stabilized and rent controlled apartments.<sup>46</sup> Leases under

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is governed by the common-law principle that ‘the first in time is the first in right.’”); *MetLife Ins. Co. v. U.S.*, 194 N.Y.S.2d 168, 172 (1st Dep’t 1959). However, states may statutorily alter the “first in time, first in right rule.” *See, e.g., State of Wash. v. Hi-Lo Foods, Inc.*, 383 P.2d 910, 913 (Wash. 1963) (referring to “the state’s undoubted power to fix priority in liens . . .”); *McMillen Feed Mills, Inc. v. Mayer*, 220 S.E.2d 221, 221 (S.C. 1975) (interpreting a state statute changing lien priority).

<sup>43</sup> *See, e.g., Gorin v. Stroum*, 192 N.E. 90, 92 (Mass. 1934) (“[T]he rights of a tenant in possession of real estate, under a lease given prior to the execution of a mortgage of the same premises, are not extinguished by a foreclosure of the mortgage, and that the purchaser at a foreclosure sale . . . becomes the landlord of the lessee.”); *United Gen. Ins. Agency v. Am. Nat’l Ins. Co.*, 740 S.W.2d 885, 886 (Tex. Ct. App. 1987).

<sup>44</sup> *Gorin*, 192 N.E. at 92.

<sup>45</sup> In New York, the purchaser may do so by bringing an eviction proceeding and showing the deed or a copy of the deed acquired at the foreclosure sale. N.Y. REAL PROP. ACTS. LAW § 713 (McKinney 1979). The purchaser of the property, of course, has the option not to evict the tenants and instead create new tenant agreements. *See* Morton P. Fisher, Jr. & Richard H. Goldman, *The Ritual Dance Between Lessee and Lender- Subordination, Nondisturbance and Attornment*, 30 REAL PROP. PROB. & TR. J. 355, 369-70 (1995).

<sup>46</sup> N.Y. COMP. CODES R. & REGS. tit. 9, § 2504.1 (West 1974); N.Y. COMP. CODES R. & REGS. tit. 9, § 2524.1 (West 1987); Aleksandra Todorova, *Renters Face Eviction as Lenders Foreclose on Properties*, SMART MONEY, Nov. 27, 2007.

Section 8 may only be terminated “for serious or repeated violation of terms or conditions of the lease or for other good cause,” and rent paying tenants in rent regulated apartments cannot be evicted except for statutorily defined reasons that do not include foreclosure.<sup>47</sup> The second exception is leases that include a Subordination, Non-Disturbance and Attornment Agreement (“SNDA”) provision.<sup>48</sup> These provisions accomplish three things: first the lease is contractually subordinated to the mortgage even if it is chronologically superior; second, in the event of foreclosure, the lender agrees not to disturb the renter’s tenancy, which generally requires the lender to continue with all the responsibilities of the lease including repairs and utilities; and third, after foreclosure, the tenant agrees to recognize the lender as a landlord.<sup>49</sup> Therefore, these clauses protect tenants from foreclosure-related eviction.<sup>50</sup>

## 2. Joinder

Although lease priority determines whether a purchaser may evict tenants, the purchaser must prove ownership of the

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<sup>47</sup> 42 U.S.C.S. § 1437(d)(1)(5) (LexisNexis 2006); N.Y. COMP. CODES R. & REGS. tit. 9, § 2524.1(a) (West 1987) (“As long as the tenant continues to pay the rent to which the owner is entitled, no tenant shall be denied a renewal lease or be removed from any housing accommodation by action to evict . . . except on one or more of the grounds specified in this Code.”); BERKELEY, CAL., ORDINANCE FOR RENT STABILIZATION AND EVICTION FOR GOOD CAUSE, § 13.76.130 (1980); L.A., CAL., RENT STABILIZATION ORDINANCE § 151.09 (1979). *See generally* Esme Caramello, Clinical Instructor, Harvard Law School, Preserving Section 8 Tenancies After Foreclosure, Presentation before Shriver Center National Center on Poverty Law (Oct. 2, 2008) (outlining the legal issues Section 8 tenants may face after foreclosure); *see also* Drury v. Sidney Davis, Inc., 116 N.Y.S.2d 118, 119 (Sup. Ct. 1952) (“The judgment of foreclosure does not strip the tenant of the shielding protection given him by the restraints against eviction contained in the emergency rent laws.”); L.A. HOUS. DEP’T., FORECLOSURES IN RENT-STABILIZED PROPERTIES (2008).

<sup>48</sup> The protection provided by SNDAs is probably not significant for residential tenants, as the provisions are more common in commercial leases. For a discussion of such agreements see, Fisher & Goldman, *supra* note 45. *See also* Dover Mobile Estates v. Fiber Form Prods., 270 Cal. Rptr. 183, 185 (Ct. App. 1990) (“A lease may also be deemed subordinate by virtue of a subordination agreement.”); David P. Kassoy, *The Tension Between Lenders and Credit Tenants Over SNDAs*, 23 L.A. LAW. 16, 16 (2001) (defining and explaining the purpose of SNDAs); Michael H. Rubin & S. Jess Sperry, *Lease Financing in Louisiana*, 59 LA. L. REV. 845, 867, 869 (1999).

<sup>49</sup> Kassoy, *supra* note 48, at 16.

<sup>50</sup> *Cf.* Jeremy B. Fox, *Foreclosure Protection not Always the Deal it Seems*, WASH. BUS. J., Apr. 12, 2002 (cautioning lease signers from hastily entering into SNDA agreements to avoid eviction in foreclosure because of other unintended consequences of the agreements such as requiring consent for subleasing).

property and bring an eviction action against the tenants before an eviction will be legally enforced.<sup>51</sup> In New York, tenants have a right to be joined as parties to judicial foreclosure proceedings.<sup>52</sup> After a foreclosure sale, the new owner may not evict the tenant unless the tenant was joined as a party to the foreclosure proceeding because it would violate due process to enforce a judgment against someone who was not a party.<sup>53</sup> However, the new owner is not barred from bringing another action against the tenant to complete eviction.<sup>54</sup> In New York, this second action forces tenants to either exercise their right of redemption (an opportunity to pay off the debt and gain ownership of the property), or be precluded from claiming “any title or interest in the subject property,” including a possessory interest.<sup>55</sup> Therefore, except in the unusual case where the tenant is able to redeem the property, failure to be joined to the foreclosure proceeding does not prevent the purchaser from eventually evicting the tenant.<sup>56</sup>

The foreclosing party’s failure to join the tenants in the foreclosure action can offer some relief for tenants, however.

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<sup>51</sup> *E.g.*, N.Y. REAL PROP. ACTS. LAW § 713(5) (McKinney 1979 & Supp. 2008).

<sup>52</sup> § 1311(1).

<sup>53</sup> *E.g.*, County Fed. Sav. & Loan Ass’n. v. First Penn. Realty Corp., 23 N.Y.2d 680, 682 (1968); *Gibbs v. Kinsey*, 566 N.Y.S.2d 117, 117 (4th Dep’t 1991) (“Due process requires that one be given notice and an opportunity to be heard before one’s interest in property may be adversely affected by judicial process.”); *Nationwide Assocs. v. Brunne*, 629 N.Y.S.2d 769, 769 (2d Dep’t 1995); *Green Point Sav. Bank v. Defour*, 618 N.Y.S.2d 169, 171 (Sup. Ct. 1994) (holding that a tenant who is not a party to the foreclosure action is not bound by the judgment and cannot be evicted pursuant to it; “[t]he interest of an occupant of the mortgaged premises who is not served remains unaffected by foreclosure.”); *SI Bank & Trust v. Sheriff of the City of N.Y.*, 751 N.Y.S.2d 794, 794 (2d. Dep’t 2002); *Marine Midland Bank v. Freedom Rd. Realty Assocs.*, 611 N.Y.S.2d 34, 35 (2d Dep’t 1994) (“The absence of a necessary party in a mortgage foreclosure action simply leaves that party’s rights unaffected by the judgment of foreclosure and sale.”); *Polish Nat’l Alliance of Brooklyn v. While Eagle Hall Co.*, 470 N.Y.S.2d 642, 646 (2d Dep’t 1983) (explaining that “RPAPL 1311 codifies the equitable principle that persons holding title to the premises or acquiring any right to or lien on the property subsequent to the mortgage should be made defendants in the foreclosure action.”).

<sup>54</sup> In New York, the buyer would bring a “judgment foreclosing right of redemption” or an “action to determine claims where foreclosure of mortgage was void or voidable.” §§ 1352, 1503.

<sup>55</sup> *E.g.*, 6820 Ridge Realty v. Goldman, 701 N.Y.S.2d 69, 75 (2d Dep’t 1999) (finding that failure to exercise right to redeem extinguishes all interests including possessory interests).

<sup>56</sup> Even these limited procedural safeguards do not apply to month-to-month tenants. *Oligbo v. Louis (In re Oligbo)*, 328 B.R. 619, 638 (Bankr. E.D.N.Y. 2005).

First, the delay caused by the second proceeding provides tenants with time to prepare to move. Second, it gives tenants an opportunity to be heard in court and to contest the purchaser's title to the property. In the current crisis, mortgages have been sold so frequently that it is sometimes difficult for purchasers to prove ownership. Courts have traditionally been lax about this proof, but two federal district court judges in Ohio recently dismissed thirty-seven foreclosure cases because the lenders did not have proper documentation of ownership.<sup>57</sup> Third, some purchasers of foreclosed properties may never bring a claim to terminate a tenant's lease. If the tenant continues to pay rent after the foreclosure proceeding, and the purchaser does not bring an eviction proceeding against the tenant, a new tenancy or an attornment (a tenant agreement to be bound to a new landlord) may be created.<sup>58</sup> In New York, attornment occurs if the tenant pays rent to the purchaser and the purchaser accepts it; both parties are then bound by the terms of the original lease.<sup>59</sup> Therefore, tenants should always continue to pay rent after a foreclosure sale if they wish to remain on the property.<sup>60</sup>

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<sup>57</sup> *In re* Foreclosure Actions, Nos. 1:07cv1007 et al., 2007 WL 4034554, at \*1 (N.D. Ohio Nov. 14, 2007) (“[A]n affidavit alone, in which the affiant simply attests that the plaintiff is the owner and holder of the note and mortgage, is insufficient to comply with Section 1.2.5’s ‘documentation’ requirement.”); *In re* Foreclosure Cases, Nos. 1:07CV2282 et al., 2007 WL 3232430, at \*3 n.3 (N.D. Ohio Oct. 31, 2007) (explaining that the courts “must act as gatekeepers” in ensuring that plaintiffs have standing); *Hooksett v. Boynton*, No. 2007-675, 2008 WL 3893223, at \*2-3 (N.H. Aug. 20, 2008) (finding insufficient proof that plaintiff was owner of property). Judge Boyko wrote a colorful opinion denying standing to the plaintiffs because they did not meet documentary requirements: “The Court will illustrate in simple terms its decision: ‘Fluidity of the market’-‘X’ dollars, ‘contractual arrangements between institutions and counsel’-‘X’ dollars, ‘purchasing mortgages in bulk and securitizing’- ‘X’ dollars, ‘rush to file, slow to record after judgment’-‘X’ dollars, ‘the jurisdictional integrity of the United States District Court’-‘Priceless.’” *In re Foreclosure Cases*, 2007 WL 3232430, at \*3 n.3.

<sup>58</sup> Fisher & Goldman, *supra* note 45, at 369.

<sup>59</sup> See 9 WARREN’S WEED NEW YORK REAL PROPERTY, § 96.210 EFFECTING ATTORNMENT TO PURCHASER (Lorraine Power Tharp et al. eds., 5th ed. 2004) (2007); N.Y. REAL PROP. LAW § 224 (McKinney 2006); *Kelley v. Osborn*, 157 N.Y.S. 1100, 1101 (1st Dep’t 1916).

<sup>60</sup> *E.g.*, MassLegalHelp.org, Landlord-Tenant Relationship After Foreclosure, <http://masslegalhelp.org/housing/landlord-tenant-relationship-after-foreclosure> (last visited Oct. 21, 2008) (informing tenants to send a letter to the purchaser inquiring to whom to send rent, and to put the rent money in a separate account if they cannot determine the new landlord).

### 3. Notice

Finally, for tenants whose leases are terminated by foreclosure proceedings, it is important whether or not notice of foreclosure is required, and how much time the notice of eviction gives the tenant to vacate. “Notice of foreclosure” refers to the official notice served by the lender on the borrower (and in some cases on the tenants) that foreclosure proceedings have begun. “Notice of eviction” refers to the length of time statutorily required between the termination of a tenant’s lease and the day when the tenant must relinquish possession of the property. Notice at either stage provides tenants some opportunity to assess their rights and prepare for the costs and disruption of moving. Most states (in both judicial and non-judicial foreclosure proceedings) do not require notice of foreclosure for tenants.<sup>61</sup> A lender filing for judicial foreclosure in New York, for example, is not currently required to serve notice of foreclosure on tenants (although a pending bill would change that).<sup>62</sup> Generally in non-judicial foreclosure proceedings publication of the foreclosure sale in local newspapers is required, but notice specifically targeted at tenants is not.<sup>63</sup>

In those states that do not require notice of foreclosure for tenants, frequently tenants are unaware that their landlords have entered the foreclosure process, and do not realize they are at risk of being evicted from their homes until a notice to vacate the property appears on their door. New owners, especially banks, generally act very quickly once they acquire property to terminate tenants’ leases, and in most states, once the lease is terminated, the formal eviction process moves rapidly.<sup>64</sup> A tenant could be given as little as three days’ notice to vacate the property before a judicial eviction action is commenced.<sup>65</sup> Based on reports

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<sup>61</sup> For a discussion of states that currently require notice of foreclosure filing be provided to tenants see *infra* pp. 14-17.

<sup>62</sup> Assemb. B. 06984, 2007-2008 Leg. Reg. Sess. (N.Y. 2007) (pending bill currently “held for consideration in judiciary,” explaining the current state of New York law as “[i]f the residing person at the foreclosed property is a tenant . . . he or she will not receive a notice,” and proposing to change it so that tenants are served with notice of foreclosure at the same time as the landlord is served with such notice).

<sup>63</sup> *E.g.*, N.Y. REAL PROP. ACTS. LAW § 1402 (McKinney 1979 & Supp. 2008) (repealed by L.1998, c. 231, § 2, effective July 1, 2009).

<sup>64</sup> *Hearing, supra* note 2, at 141 (“[I]f the foreclosing bank takes title, it evicts the renter households very quickly—usually with only three to thirty days’ notice.”).

<sup>65</sup> A notice to vacate gives the tenant some amount of time to leave the

of housing counselors, the National Low Income Housing Coalition estimates that half of the renters evicted due to landlord foreclosures have less than thirty days to leave the property.<sup>66</sup>

*B. Tenants' Rights: States with Stronger Protections*

Several states protect tenants from the consequences of foreclosure by superseding the general mortgage and foreclosure rules with statutes requiring landlords to have a "just cause" before evicting tenants, or by modifying foreclosure rules to require more lengthy notice periods for tenants who might be evicted.<sup>67</sup>

First, "just cause" or "good cause" provisions provide renters with protections similar to those of Section 8 and rent regulation statutes.<sup>68</sup> Although these "just cause" laws were not enacted in reaction to the current foreclosure crisis, they are nonetheless effective protections for tenants in the event of foreclosure. Washington, D.C., New Jersey, and New Hampshire all have just cause provisions similar to each other and to rent regulation statutes.<sup>69</sup> Generally, a just cause provision means that landlords are unable to evict renters except in statutorily defined circumstances (such as nonpayment of rent). Because foreclosure

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property before a formal judicial process is begun. OHIO REV. CODE ANN. § 1923.04 (LexisNexis 2004 & Supp. 2008) (requiring notice be provided to tenants that they have three days to vacate the property before an eviction action is commenced); NEV. REV. STAT. ANN. § 40.255 (LexisNexis 2006) (requiring only three days' notice to quit before eviction commenced). Failing to vacate before the formal eviction process begins provides tenants with more time to prepare to move, but an eviction record can make it difficult to find new rental housing.

<sup>66</sup> Keith Wardrip, Research Analyst, Nat'l Low Income Hous. Coal., *Foreclosure's Invisible Victims: Recent Research on the Foreclosure Crisis 8* (July 23, 2008) (reporting that "86% of housing counselors report that renters typically have less than 2 months to vacate a foreclosed property; [and] 51% report less than 1 month").

<sup>67</sup> See, e.g., D.C. CODE ANN. § 42-3505.01 (LexisNexis 2006); N.J. STAT. ANN. § 2A:18-61.1 (West 2000 & Supp. 2008); N.H. REV. STAT. ANN. § 540:2 (2007).

<sup>68</sup> See, e.g., D.C. CODE ANN. § 42-3505.01.

<sup>69</sup> § 42-3505.01 ("Except as provided in this section, no tenant shall be evicted from a rental unit . . . so long as the tenant continues to pay the rent . . ."); N.J. STAT. ANN. § 2A:18-61.1 (West 2000 & Supp. 2008); N.H. REV. STAT. ANN. § 540:2 (2007). The New Hampshire law is more restrictive than the others because it does not apply to "single-family houses acquired . . . through foreclosure" or "rental units in an owner-occupied building [with] 4 dwelling units or fewer." § 540:1-a(I)(b), (d). In addition, some cities have "just cause" protections. *E.g.*, SEATTLE, WASH., MUNICIPAL CODE § 22.206.160(C) (2008); CHI., ILL., MUNICIPAL CODE § 5-12-130 (2008).

is not listed as a cause to evict tenants, it is not a valid reason for eviction.

Arguably, eviction after a foreclosure would not trigger the protections of the D.C. and New Jersey statutes.<sup>70</sup> As discussed in Part I, when a lease is junior to the mortgage, purchasers at foreclosure sales are not required to continue tenancies and may evict any tenants.<sup>71</sup> Therefore, purchasers are not necessarily included in the statutory prohibition against “landlords” evicting tenants without just cause, because the right to evict tenants from foreclosure arises before purchasers have taken on any landlord duties. The courts have found, however, that these just cause provisions do apply in foreclosure.<sup>72</sup> For example, the New Jersey just cause statute covers purchasers by forbidding evictions against any person who “*was* a tenant of a landlord” so that “the owner’s or landlord’s successor in ownership or possession” can gain possession.<sup>73</sup> The New Jersey Supreme Court interpreted this language to cover all foreclosure sale purchasers.<sup>74</sup> The D.C. court also disposed of the problem through statutory interpretation.<sup>75</sup> Therefore, in jurisdictions with “just cause” rules, tenancies are not terminated by foreclosure even when the lease is junior to the mortgage.

Second, some states have strengthened notice requirements specifically to provide relief for renters in the current foreclosure

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<sup>70</sup> *Guttenberg Sav. & Loan Ass’n v. Rivera*, 428 A.2d 1289, 1298 (N.J. 1981) (holding that the New Jersey Anti-Eviction Act did not apply to tenants evicted due to foreclosure), *overruled by Chase Manhattan Bank v. Josephson*, 638 A. 2d 1301, 1314 (N.J. 1994). The New Hampshire statute avoids this problem because it covers all “lessors” or “owners” of property. N.H. REV. STAT. ANN. § 540:2.

<sup>71</sup> *See supra* note 43 and accompanying text.

<sup>72</sup> *See, e.g., Adm’r of Veterans Affairs v. Valentine*, 490 A.2d 1165, 1170 (D.C. 1985) (holding that the just cause provision applies to properties after foreclosure, therefore, foreclosure is not an appropriate reason to evict tenants), *aff’d*, *Merriweather v. D.C. Bldg. Corp.*, 494 A.2d 1276, 1276 (D.C. 1985) (“In this appeal the court is asked to decide whether a tenant holding over after foreclosure is entitled to the eviction protections of the Rental Housing Act . . . . We hold on the authority of [*Valentine*] that the eviction protections survived foreclosure.”).

<sup>73</sup> N.J. STAT. ANN. § 2A:18-61.3b (West 2000) (emphasis added).

<sup>74</sup> *Chase Manhattan Bank*, 638 A.2d at 1314 (holding that the anti-eviction act “protects tenants from eviction by foreclosing mortgagees irrespective of whether their tenancy was established before or after the execution of the mortgage”).

<sup>75</sup> The D.C. court skirts the “landlord” problem by stating that “landlord,” “tenant,” and “rental unit” in the just cause statute should not be interpreted technically, but by ordinary usage, so all people “who *have been renting* apartments and who continue to pay the rent” are protected. *Valentine*, 490 A.2d at 1169-70.

crisis. There are two opportunities to provide tenants with time to prepare for a move. First, when the lender initiates foreclosure proceedings, some states require the lender to serve tenants a notice of foreclosure.<sup>76</sup> For example, California requires that a sign be posted on the rental property when foreclosure is commenced.<sup>77</sup> Second, after the lender completes foreclosure and terminates tenants' leases, some states have lengthened the time required before eviction is authorized. For example, Illinois recently increased its post-foreclosure eviction notice requirement to 120 days or the duration of the tenant's lease; whichever is shorter.<sup>78</sup> Tenants, accordingly, have up to 120 days from the date the purchaser terminates their lease before eviction.<sup>79</sup> This will not provide protection for tenants on month-to-month leases, however, because the duration of their leases, thirty days, is shorter than the new 120 days notice period.<sup>80</sup> In addition to notice of foreclosure, California also requires a sixty days' eviction notice before tenants must relinquish possession.<sup>81</sup> These

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<sup>76</sup> See, e.g., D.C. CODE ANN. § 42-3505.01 (LexisNexis 2006); MINN. STAT. ANN. § 580.03 (West 2000 & Supp. 2007) ("Six weeks' published notice shall be given . . . and at least four weeks before the appointed time of sale a copy of such notice shall be served . . . upon the person in possession of the mortgaged premises . . .").

<sup>77</sup> The required sign must say: "Foreclosure process has begun on this property, which may affect your right to continue to live in this property. Twenty days or more after the date of this notice, this property may be sold at foreclosure." CAL. CIV. CODE § 2924.8 (a) (West 2008). Minnesota also requires that tenants receive notice of foreclosure. MINN. STAT. ANN. § 580.03 ("[N]otice shall be given that such mortgage will be foreclosed by sale . . . and at least four weeks before the appointed time of sale a copy of such notice shall be served . . . upon the person in possession of the mortgaged premises . . .").

<sup>78</sup> 735 ILL. COMP. STAT. ANN. 5/15-1701 (h)(4) (West Supp. 2008) ("In a case of foreclosure where the tenant is current on his or her rent, any order of possession must allow the tenant to retain possession of the property covered in his or her rental agreement (i) for 120 days following the notice of the hearing on the supplemental petition that has been properly served upon the tenant, or (ii) through the duration of his or her lease, whichever is shorter. This item (4) shall only apply if the tenant continues to pay his or her rent in full during the 120-day period.").

<sup>79</sup> See 5/15-1701 (h)(4).

<sup>80</sup> Many month to month tenants are low-income. See Mary Ann Glendon, *The Transformation of American Landlord-Tenant Law*, 23 B.C. L. REV. 503, 508, 540 (1982); see also Maria Lerman Hutkin, *Using Bankruptcy to Pay the Rent Via the Automatic Stay*, 63 S. CAL. L. REV. 181, 205 (1989); Michael H. Schill, *Distressed Public Housing: Where Do We Go From Here?*, 60 U. CHI. L. REV. 497, 516 n.115 (1993); Kathryn B. Richards, Note, *The Illinois Condominium Property Act: An Analysis of Legislative Efforts to Improve Tenants' Rights in the Condominium Conversion Process*, 57 DEPAUL L. REV. 829, 847 (2008).

<sup>81</sup> CAL. CIV. CODE § 2924.8 (a). The rest of the notice sign in California must

increased notice requirements mitigate the effect foreclosures have on tenants by providing them with time to determine their rights in their current home or find a new home.

Although currently most of the nation's tenants are not protected from the consequences of foreclosure, that is changing. The next part of this article will discuss protections that have been proposed across the country.

### III. MITIGATING FORECLOSURE'S IMPACT ON TENANTS: ANALYSIS OF LOCAL PROPOSALS

Many state and local governments are debating proposals to shelter renters from the worst consequences of the foreclosure crisis. The next subsection assesses those proposals. But the fact that such proposals are seen as necessary raises questions about why tenants are being forced out of foreclosed properties, rather than being allowed to stay. Subsection B addresses that question.

#### *A. Proposals to Increase the Protections Available to Tenants Whose Landlords are Foreclosed*

Some proposals seek to mitigate the impacts of the crisis with increased funding for outreach, and pro bono services to better inform tenants of the rights they already have, advise them about what they can do to protect themselves if their property enters foreclosure, and warn them against fraud by landlords or people posing as landlords.<sup>82</sup> Others aim to enact laws that provide

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contain the following language: "If you are renting this property, the new property owner may either give you a new lease or rental agreement or provide you with a 60-day eviction notice. However, other laws may prohibit an eviction in this circumstance or provide you with a longer notice before eviction. You may wish to contact a lawyer . . ." § 2924.8 (a). Massachusetts, Minnesota, and Montana also have relatively strong notice laws. Massachusetts requires thirty days from the notice of lease termination before eviction. MASS. GEN. LAWS ANN. ch. 186, § 13 (West Supp. 2008). The Minnesota government modified their tenant protections in August 2008 to require two month's notice of eviction be given no sooner than one month after the tenants' lease is terminated. MINN. STAT. § 504B.285 (West 2002) (amended 2008). In Montana, ten days after a foreclosure sale, the tenants become tenants at will and may be evicted with thirty days notice. MONT. CODE ANN. §§ 71-1-319, 70-24-441 (2007).

<sup>82</sup> For example, "Borrower Outreach Days" are now held in Ohio and Chicago. Press Release, Ohio Treasurer of State, Borrower Outreach Day Returns to Youngstown on August 12 (Aug. 4, 2008); Press Release, Chicago Mayor's Office, Borrower Outreach Days Help Hundreds of Chicagoans (Jan. 30, 2008). As a practical matter, even once protections are in place, a lack of information about

tenants more time to prepare for eviction by requiring notice to the tenant that the foreclosure process has started.<sup>83</sup> Still others involve plans to mitigate post-foreclosure impacts on tenants that range from including emergency rental and moving assistance for tenants suddenly forced out of their homes to expunging foreclosure evictions from tenants' rental records.<sup>84</sup>

States also are debating how best to prevent utility shut-offs and maintenance decline during foreclosure proceedings.<sup>85</sup> Landlords in default often stop making utility payments, leaving renters without electricity, water or sewer service before the

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the complex foreclosure process can make new rights harder to enforce. For example, tenants report experiencing difficulty identifying their new landlord, which can cause them to fall behind on rent, providing the new landlord with a just cause for eviction. Proposals to improve communication include sending tenants in foreclosed homes information on the foreclosure in multiple languages. See Temple, *supra* note 3 (explaining that San Francisco plans to send multi-lingual notices to tenants about foreclosure).

<sup>83</sup> See, e.g., Assem. B. 06984, *supra* note 62 (pending legislation in New York that would require that all tenants receive a copy of the notice of foreclosure served upon the property owner); see also Brian Albrecht, *Renters to Get Early Warning; Often Aren't Aware of Foreclosures*, THE PLAIN DEALER (Cleveland), July 26, 2008, at B1 (discussing new early notification program effort to give tenants six months to prepare to move); *Lawmakers Plan Housing Law Changes*, ASSOCIATED PRESS – ALERT (Cal.), Aug. 5, 2008 (discussing a new proposal requiring landlords to inform potential tenants if the rental property has a notice of default against it). In November of 2007, the U.S. House of Representatives passed a bill that included a requirement that tenants receive notice of foreclosure; however, the Senate has not yet voted on the bill. H.R. 3915, 110th Cong. (as passed by House, Nov. 15, 2007).

<sup>84</sup> See Allan Appel, *Housing Authority Tackles Prison Re-Entry, Foreclosure Crisis*, NEW HAVEN INDEP., Aug. 14, 2008, available at [http://www.newhavenindependent.org/archives/2008/08/housing\\_authori\\_3.php](http://www.newhavenindependent.org/archives/2008/08/housing_authori_3.php); Fran Spielman, *Daley Seeks to Aid Tenants Hurt When Landlords in Foreclosure; Aid Program Can Pay 3 Months' Rent*, CHI. SUN-TIMES, Aug. 15, 2008, at 13 (reporting on a City Hall plan to increase emergency assistance by providing moving expenses and up to three months of rent for those eligible); 37 U.S.C.A. § 406 (West Supp. 2008) (regarding assistance to members of the military transferring stations); Karen Jowers, *New Law Helps Renters Forced Out by Foreclosure*, ARMY TIMES, Aug. 18, 2008, at 29 (reporting on federal government offering moving help to members of the military who are evicted because of landlord foreclosure). Eviction records can make finding a new rental property difficult. In August, Minnesota passed a law expunging an eviction from rental records if the tenants either didn't receive notice of the foreclosure or left the property before the end of the redemption period. Minn. Stat. Ann. § 484.014 (2008). See generally *House Passes HOPE VI Extension with Replacement Housing Changes*, 36 Hous. & Dev. Rep.: Current Dev. 39 (2008) (discussing amendments to the Hope VI public housing revitalization program that would protect elderly and disabled tenants from eviction based on the drug-related and criminal activity of household members or guests).

<sup>85</sup> See *infra* notes 87-90 and accompanying text.

foreclosure is complete.<sup>86</sup> Massachusetts already requires utility companies to notify tenants before shutting off utilities provided by the landlord.<sup>87</sup> But because utility companies often lack information on which properties are not owner-occupied, shut downs still occur.<sup>88</sup> Legislation pending in Rhode Island would require all foreclosure sale purchasers of properties with existing tenants to continue providing “essential services,” including heat and water utility services.<sup>89</sup> California debated requiring utility companies to notify tenants if their landlords were behind in payment, but Governor Schwarzenegger recently vetoed the legislation.<sup>90</sup> That bill also would have addressed another harsh consequence of foreclosure for tenants: loss of the security deposit. Although the original landlords are required to return security deposits, tenants are often unaware of this right or are unable to locate their landlord, and have trouble recovering deposits after foreclosure.<sup>91</sup> The California bill would have

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<sup>86</sup> Lynn Ardit, *Foreclosures Leave Some Tenants High and Dry*, PROVIDENCE J., June 19, 2008, at 1 (reporting on the increasing number of tenants facing water or sewer shut offs because of foreclosure); John Glionna, *Renters Fight to Stay in Foreclosed Buildings*, L.A. TIMES, Mar. 12, 2008, at B1 (reporting utility shut-off to push renters out of the building after their landlord left town); Clive McFarlane, *Duct Tape is No Remedy For Sewer Leak*, WORCESTER TELEGRAM & GAZETTE (Mass.), Sept. 26, 2008 (reporting on residents dealing with raw sewage, rats, roaches and maggots since the landlord abandoned the property while foreclosure proceedings are not yet finalized).

<sup>87</sup> MASS. ANN. LAWS ch. 164, § 124 (LexisNexis 2002).

<sup>88</sup> See § 124(D); see also MASS. ANN. LAWS ch. 165, § 11(E) (LexisNexis 1974).

<sup>89</sup> H. 7892, Gen. Assem., Jan. Sess. (R.I. 2008).

Where any dwelling unit of a foreclosed mortgage estate is occupied by a bona fide tenant of the foreclosed mortgagor, and where the foreclosed mortgagor had provided essential services including, without limitation, heat, running water, hot water, electric, or gas to such tenant, any successor in interest to the foreclosed mortgagor shall continue to provide the same essential services under the same terms and conditions to the tenant.

*Id.*

<sup>90</sup> Assemb. B. 2586, 2008 Leg. Reg. Sess. (Cal. 2008) (redefining “landlord” to include anyone who acquires property through a foreclosure proceeding; existing law already requires landlords to provide utility service and return of security deposits). See also California Political Desk, *Governor Vetoes Two Consumer-Oriented Foreclosure Bills*, CAL. CHRON., Sept. 25, 2008 (explaining how the proposed bill would aid tenants in getting their safety deposit back); Marc Lifsher, *Gov. Vetoes Bill Loan Oversight Bill*, L.A. TIMES, Sept. 26, 2008, at 3 (Governor Schwarzenegger indicated that he would sign bills “increas[ing] accountability in the real estate market” instead of the bill introduced by Assemblyman Ted Lieu that cracked down on mortgage company advantage-taking).

<sup>91</sup> *E.g.*, TEX. PROP. CODE ANN. § 92.103 (Vernon 1984) (stipulating the landlord obligation to refund security deposit); MASS. GEN. LAWS ANN. ch. 186, § 15B(e) (West 1969) (“A security deposit shall continue to be the property of the

protected tenants from loss of security deposits by making new owners jointly and severally liable for the repayment.<sup>92</sup> Finally, of course, existing “just cause” laws provide a model for states seeking to prevent eviction. A pending bill in Massachusetts, for example, would prohibit foreclosure as a cause for eviction, stating that “just cause” must be present in order to evict.<sup>93</sup>

New tenant protections may bring unintended consequences. It is important, therefore, that this debate look beyond the individual tenants, and also consider how tenant protection laws might impact the availability and quality of rental housing more broadly. Municipalities considering whether to enact increased tenant protections should evaluate potential long-term consequences and be careful to avoid unintended negative impacts. The debated tenant protection proposals are clearly tenant-friendly, and they likely would provide some relief for individuals facing eviction after their landlord is foreclosed. There is also a possibility, however, that these proposals could negatively affect renters more broadly by driving up the cost of borrowing (and, as a result, driving up the rent), or by making renting more difficult. For example, if “just cause” eviction is required and foreclosure sale purchasers are responsible for continuing all prior lease agreements, buying a property at foreclosure could become (or be perceived as) more costly.<sup>94</sup>

Frequently, buyers at foreclosure sales are the lenders themselves who are generally banks that lack the desire or expertise to serve as landlords. If foreclosure becomes more costly for the lending banks, those banks may be less likely to lend money to potential landlords, which would drive up the cost of borrowing, and consequently, increase the rent the landlord charges. Alternatively, the lenders could begin to prohibit the borrower from renting. Increased borrowing costs or anti-renting provisions could lead to a reduction in available rental housing. This would be especially problematic for low-income tenants in

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tenant . . . and shall not be subject to the claims of any creditor . . . including a foreclosing mortgagee.”)

<sup>92</sup> Assemb. B. 2586, 2008 Leg. Reg. Sess. (Cal. 2008) (As passed by the California Legislature, Section 3, Subsection 1, of the enactment suggests that Section 1950.5 of the Civil Code will enforce liability on the new landowner who doesn’t return a security deposit in bad faith).

<sup>93</sup> H.R. 4734, 185th Gen. Crt., Reg. Sess. (Mass. 2008). *See also* MASS. ALLIANCE AGAINST PREDATORY LENDING, AN ACT REQUIRING JUST CAUSE FOR EVICTION IN FORECLOSED PROPERTIES, FACT SHEET (2008).

<sup>94</sup> *See infra* pp. 22-25 (discussing the economic consequences of evicting tenants).

need of affordable housing.

New protections also could increase non-financing costs for landlords, which could similarly reduce the stock of affordable rental housing. If states adopt new eviction protections analogous to current “just cause” provisions (requiring “just cause” for any eviction, as opposed to adopting laws that only prohibit eviction due to foreclosure), it will become trickier for current landlords to evict tenants for a variety of reasons unrelated to foreclosure. Landlords may then be less inclined to rent, or require greater background checks, security deposits or qualifying incomes. This would likely disproportionately affect potential tenants who are low income, have bad credit, or any other characteristics the landlord considered risky. If eviction is more difficult or costly, landlords may fear renting to tenants they perceive as risky, which will reduce the options of renters searching for affordable housing.<sup>95</sup>

Although these concerns are strongest for proposals that adopt “just cause” eviction statutes, they also are present for proposals increasing or requiring notice. Notice requirements provide tenants with greater opportunity to object throughout the foreclosure process, which could slow down foreclosure and thereby increase costs for foreclosing mortgagees. Landlords currently are able to convince tenants (even those who are protected by anti-eviction laws) to vacate through “cash for keys” or intimidation schemes. Notice to these tenants would allow them to become informed about their rights and to resist a landlord’s pressure to vacate. Also, notice would allow them to insist that landlords go through the formal eviction processes, which would give the tenants an opportunity to raise defenses

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<sup>95</sup> The debate over whether or not increased regulation of the landlord-tenant relationship will ultimately help tenants and improve affordable housing or hurt tenants in the long run and decrease the available stock of affordable housing is not new. See, e.g., Edward H. Rabin, *The Revolution in Residential Landlord-Tenant Law: Causes and Consequences*, 69 CORNELL L. REV. 517, 520 (1984) (arguing that regulations such as rent control have a detrimental impact on tenants); Duncan Kennedy, *The Effect of the Warranty of Habitability on Low Income Housing: “Milking” and Class Violence*, 15 FL. ST. U. L. REV. 485, 485 (1987) (arguing against the “mainstream” view that the enforcement of the warrant of habitability will hurt tenants); Charles J. Meyers, *The Covenant of Habitability and the American Law Institute*, 27 STAN. L. REV. 879, 903 (1975) (arguing warrant of habitability will likely harm tenants); Robin Powers Kinning, *Selective Housing Code Enforcement and Low-Income Housing Policy: Minneapolis Case Study*, 21 FORDHAM URB. L.J. 159, 159-61 (1993) (providing a helpful overview of the academic literature on the economics of housing regulations).

and cause delays. Increased time and cost of foreclosure could drive up the costs of borrowing, again reducing the supply, and raising the price, of affordable rentals. While these effects are uncertain, it is important for lawmakers to consider long term results so they don't negatively affect the same population they are aiming to protect.<sup>96</sup>

### *B. Why Do Purchasers Evict Tenants?*

The reason that renters are so affected by the foreclosure crisis is that owners who acquire single family and multi-unit properties through foreclosure are choosing to exercise their option to evict the tenants in the building. Encouraging new owners to allow tenants to remain in their homes could avoid the potential unintended consequences associated with increased tenant protections discussed above, and ultimately be more effective in mitigating the effect of the foreclosure crisis on tenants than simply prolonging evictions.

Purchasers who evict tenants must think their properties are generally more profitable vacant than with tenants, but it is important to ask whether or not this is accurate, and if it is not, why these purchasers do not allow the tenants to remain. It may not make economic sense in many current markets for foreclosure buyers to evict all current tenants. Traditionally, new owners evicted tenants because they believed they could increase profits through renting to higher paying tenants, or improving the property and either selling the property or renting it at a higher rent to new tenants.<sup>97</sup> However, in the current climate, where vacancy rates are already soaring in markets hit hard by foreclosures, this logic is no longer justified. A growing consensus

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<sup>96</sup> A study of rental housing in areas that have adopted "just cause" tenant protections would be useful in evaluating these concerns. See *Adm'r of Veteran Affairs v. Valentine*, 490 A.2d 1165, 1172 (D.C. 1985) (Terry, Assoc. J., dissenting) (arguing that the courts' decision to prevent eviction after foreclosure could result in "a drying up of available mortgage funds for the purchase of rental properties in the District."); *Guttenberg Savs. & Loan*, 428 A.2d 1289, 1297 (N.J. 1981), *superseded by statute*, N.J. STAT. ANN. § 2A:18-61.1 (West 2000), *as recognized in Chase Manhattan Bank v. Josephson*, 638 A.2d 1301 (N.J. 1994) (presenting arguments from amicus that the Anti-Eviction Act will "accelerate the decrease in the supply of mortgage funds").

<sup>97</sup> See, e.g., *Chase Manhattan Bank*, 638 A.2d 1301, at 1304 (where a new owner wanted to evict tenants because they were paying below market value rents); Temple, *supra* note 3 ("Lenders who take back properties or investors who pick up foreclosed homes generally prefer the buildings empty, because that makes them easier to sell.").

is emerging among policymakers that banks (or other foreclosure sales purchasers) should not evict current tenants.<sup>98</sup> Rather than resulting in increased profits, evicting tenants leads to vacant properties. Vacant properties often become run-down, and are at risk for vandalism, neglect, and illegal occupancy, which can cause the value of the property to decline, and put downward pressure on property values of the surrounding community.<sup>99</sup> If purchasers instead allowed rent-paying tenants to remain, they would not only avoid the decrease in value associated with vacancy, but would also be provided with a steady stream of income from the tenants. In theory, renters would benefit by remaining in their homes, the community would benefit by decreasing the number of vacant properties, and the purchasers themselves would benefit by collecting rents and maintaining the value of their property. Yet, despite this, the purchasers continue with eviction.<sup>100</sup>

Perhaps purchasers continue to evict tenants because the

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<sup>98</sup> *Hearing, supra* note 2, at 150.

Banks should understand that it is bad business practice to routinely evict tenants post-foreclosure if the lender wants to preserve value in the property. While it may take some work to be a property manager, the value of the foreclosed property is enhanced if it remains occupied while a new owner is found. This makes good business sense; vacant properties are vandalized more, thus making them less attractive to new buyers. And collecting rents from tenants should help offset other costs of foreclosure.

*Id.* See also Alex Ulam, *For Banks, Foreclosed Homes Pile Up*, N.Y. REAL ESTATE NEWS, June 2, 2008 (reporting banks having difficulty selling foreclosed properties and, as such, should modify the mortgage instead of foreclosing). The EESA also supports the view that it is best if renters remain in their properties, directing the Secretary to “where permissible” allow “bona fide tenants who are current on their rent to remain in their homes under the terms of the lease.” 12 U.S.C. § 5219 (b) (2008). See *Analysis of the TARP: Challenges and Opportunities for Your Business*, CLIENT ADVISORY (Katten, Muchin, Rosenman, LLP), Oct. 13, 2008, at 5 (explaining that because the EESA encourages allowing tenants to remain in their homes post foreclosure that there may be opportunities for investors with experience in managing rental properties to take over management of foreclosed rental properties); Kenneth R. Gosselin, *Hartford Tenant Fights to Stay in Home After Foreclosure*, HARTFORD COURANT, Nov. 11, 2008 (reporting on “what attorneys’ believe” is the first legal challenge to enforce EESA provision 5219 (b)).

<sup>99</sup> See, e.g., W. Dennis Keating, *Preserving Properties on the Edge: Rapid Recycling of Distressed and Abandoned Properties*, JOINT CTR. FOR HOUS. STUDIES HARV. UNIV., March 2007; Vikas Bajaj, *Foreclosure’s Residue*, N.Y. TIMES, May 27, 2008, at C1 (discussing the problem of vacant properties).

<sup>100</sup> *But see* Dominic Holden, *Home Free: Foreclosure Crisis Benefits at Least One Group: Renters*, THE STRANGER (Seattle, W.A.), Sept. 30, 2008, (“For banks, allowing tenants to remain in those houses - even tenants who don’t pay rent - may make sense” to prevent the decrease in value from vacancy).

purchasers in the current foreclosure crisis have a different business model than traditional foreclosure purchasers. The business model of the investors who are buying foreclosure properties and evicting the tenants is not clear, but some opponents of the model fear that some investors seek to illegally subdivide the properties.<sup>101</sup> Illegal subdivision, or illegal occupancy, refers to using a building in a way that is prohibited by building code requirements.<sup>102</sup> Examples of illegal subdivision include dividing a property into more units than allowed under the code (e.g., converting a single family home into a multi-family home) or allowing occupancy in a portion of the house where it is illegal (e.g., converting an attic into a dwelling unit without a certificate of occupancy or following code rules).<sup>103</sup> Concern over illegal subdivisions is mounting around the country, in particular at the local level. In Arizona, for example, the legislature recently passed a bill increasing penalties to deal with the growing number of illegal subdivisions, and counties in New Jersey and New York are considering ways to crack down on illegal subdivisions.<sup>104</sup> Illegal subdivision not only results in overcrowding and dangerous conditions on the property itself, but also overloads services from the increased population in the illegal occupancy, and thereby affects neighbors as well. Building and subdivision laws ensure that buildings are safe and that

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<sup>101</sup> Cf. Sean Holstege, *Desperate Owners Duped by Easy Rent*, ARIZ. REPUBLIC, Aug. 31, 2008 (similarly, owners on the brink of foreclosure with vacant rental properties do not screen potential tenants closely and find their properties being used as drophouses).

<sup>102</sup> BLACK'S LAW DICTIONARY 1465 (8th ed. 2004).

<sup>103</sup> It is difficult to track how many units are illegally subdivided because both tenants and landlords fear fines or eviction, but a recent analysis by Pratt Center for Community Development found that in New York City at least 114,000 apartments are "underground" housing. The center explains that it is difficult to count the number of illegally subdivided units, but 114,000 apartments appeared in the 2000 census that were unaccounted for by building reports. ROBERT NEUWIRTH, PRATT CTR. FOR CMTY. DEV. AND CHHAYA CMTY. DEV. CORP., *NEW YORK'S HOUSING UNDERGROUND: A REFUGE AND RESOURCE 1* (2008).

<sup>104</sup> The bill permits civil penalties against people who illegally subdivide land, and requires the Real Estate Department to notify the public of illegal subdivisions. ARIZ. REV. STAT. ANN. § 32-2183.03 (West 2008). See also Denisa Superville, *Borough to Target Housing Violations: May Hire Part Time Enforcement Official*, HERALD NEWS (N.J.), May 12, 2007, at A09 (reporting on debates concerning increasing illegal subdivisions); *Online Tool Will Help Park Enforce Land-Use Policies*, TIMES UNION (Albany), Jan. 23, 2008, at A3 (new enforcement initiative against illegal subdivisions); Seung Min Kim, *Franklin Township Looks to Toughen Penalties for Illegal Housing*, STAR-LEDGER (Newark, N.J.), Mar. 28, 2008, at 21 (public hearing to consider a "crack down" on illegal subdivisions).

services are adequate for the community; illegal subdivision can have a wide-reaching effect not only on the subdivided property, but on the surrounding community.

Purchasers at foreclosure sales may believe that they can illegally subdivide the foreclosed home, rent it to a greater number of individuals than permitted under building codes, make a fast profit, and abandon it either before violations are discovered or when wear and tear on the building has made it essentially worthless. Residents risk eviction because of code violations, and post-eviction, the property would likely remain empty while the illegality is corrected. Through vacancy and a decrease in the quality of housing stock, illegal subdividing could have long term consequences on the housing market.

Alternatively, the purchasers of foreclosed homes who evict the existing tenants may hope to flip the property quickly. If they misjudge the market, however, the house could remain empty for long periods, with all the attendant problems of vacancy.

#### CONCLUSION

Good tenants are innocent victims of the nation's foreclosure crisis. They do not have mortgages, they pay their rent on time, and think they have no reason to fear foreclosure. Then an eviction notice or "for sale" sign appears on their property and the foreclosure crisis ensnares them. In a handful of states, and in rent-regulated or Section 8 housing, "just cause" protects tenants from eviction. But in the vast majority of situations, tenants have no defense if their property is sold at a foreclosure sale and the new owner brings an eviction proceeding against them. These tenants must find new homes in an often increasingly competitive rental market, while their old homes often stay vacant, contributing to neighborhood decline.

As the significant impact the foreclosure crisis is having on tenants becomes clearer, state and local governments are debating how to mitigate the burden on renters. Proposals range from new "just cause" laws and prohibitions against utility shut-offs to notice requirements and moving assistance. The effect these new laws will have on the availability and quality of rental housing in the future is uncertain, as are the motivations of purchasers to continue evictions. Legislators should be mindful of the uncertainties, and consider the economic effects of proposed tenant protections on lenders and landlords in the public debate. In the end, it may be most effective for legislators to shift their

focus towards working with lenders, banks, or other new owners to create incentives not to evict current tenants.