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UNFAIR FORECLOSURE PROCESS: PROTECTING THE TENANTS THAT PAY YOUR MORTGAGE

Dania L. Sancho¹

I. INTRODUCTION

The foreclosure crisis has struck the nation in an unprecedented way.² The damage is so grave that at no other time in history since the Great Depression have so many Americans lost their homes, with millions more currently in jeopardy of foreclosure.³ Rental homes take the backlash caused by foreclosures a step further, affecting thousands of tenants across the nation.⁴ These tenants are blindsided by the current foreclosure procedure, and, through no fault of their own, are often left homeless when their landlords lose the property after defaulting on their mortgages.⁵

That is exactly what happened to Andrea Utley, who was suddenly forced to leave her house when she received a notice of foreclosure requiring her to vacate the house by the end of the month.⁶ As if life as a

1. Juris Doctor Candidate 2017, St. Thomas University School of Law, *St. Thomas Law Review*, Articles Editor; Bachelor of Science in Paralegal Studies, Nova Southeastern University, 2013. I want to thank Professor John Makdisi for inspiring me to write this comment and reinforcing my interest in property. I also want to thank my Executive Notes and Comments Editor, Monica Twombly, and my Comments Editor, Lizbell Lucero, for their suggestions and assistance in every step of this writing process. A special thanks goes to my parents and my better half for their patience, understanding, and unconditional support during the process of writing this comment and through my law school career. Additionally, I would like to thank a very good friend, Caludia Capdesuner, for her support during this process.

2. See Dianne Feinstein, *Mortgage Fraud and America's Foreclosure Crisis*, DIANNE FEINSTEIN, http://www.feinstein.senate.gov/public/index.cfm?a=Files.Serve&File_id=3b152e79-bc45-48e3-8692-ad9c80c21ca8&SK=0C8380A3AC716A7F84E1D44142357089 (last visited Jan. 30, 2016).

3. See Pam Bennett, *The aftermath of the Great Recession: Financially fragile families and how professionals can help*, N.C. STATE U., <http://ncsu.edu/ffci/publications/2012/v17-n1-2012-spring/bennett.php> (last visited Jan. 25, 2016) (describing the crisis as the worst of the thirteen recessions since the Great Depression). It has been named as the "Great Recession," as it has presented major difficulties to families across the nation. *Id.* The National Bureau of Economic Research 2010 reported the recession officially ended in June 2009; however, the effects on families still linger and many are wondering if it really ended. *Id.*

4. See Bruce Kennedy, *As Foreclosures Keep Coming, Renters Are Threatened Once Again*, TENANTS TOGETHER (Oct. 28, 2010), <http://tenantstogether.org/article.php?id=1685> (reporting renters being blindsided by foreclosure notices).

5. *Id.*

6. See Sanjay Bhatt, *New laws help tenants evicted due to foreclosure*, THE SEATTLE

single mother with two daughters is not hard enough, unexpectedly, she received notice that she had to vacate her home in thirty days.⁷ When Utley first moved in, she said, “[f]inally for the first time in their lives they have their own bedrooms.”⁸ Although this scenario illustrates only one family’s struggles, Utley’s story demonstrates hardships faced by many tenants affected by foreclosure.⁹ One of the most difficult challenges faced by these victims is the length of time necessary to find a home and ultimately relocate; this can take significantly longer than a few weeks.¹⁰

This comment addresses the problem tenants face when their rights are violated.¹¹ Part II explains the different types of foreclosure actions, including judicial foreclosure in Part II(A), and non-judicial foreclosure in Part II(B), while Part II(C) describes the twenty-first century crisis in the United States.¹² Part III of this comment explains the Protecting Tenants at Foreclosure Act of 2009, an act created by Congress in 2009 to help the affected tenants during the crisis.¹³ Further, Part IV explains the different types of ownership and property rights.¹⁴ Part V contrasts the Protecting Tenants at Foreclosure Act of 2009 and current law.¹⁵ Part VI provides a viable solution to the problem tenants face while their rental property is undergoing foreclosure by providing relief to those tenants left out in the cold. The solution section recommends that the Florida Legislature revise

TIMES (updated July 7, 2009, 12:38 PM), <http://www.seattletimes.com/seattle-news/new-laws-help-tenants-evicted-due-to-foreclosure/>. Andrea Utley is a thirty-seven-year-old single mother of two girls, Isabella, nine (9), and Alivia, seven (7). *Id.* This was a tough year for Utley, who had recently divorced and moved from Montana to Seattle with her daughters. *Id.* A few days before Christmas, Utley came home to find a notice from the bank; her landlord had defaulted on their mortgage weeks before Utley signed her lease. *Id.* Ultimately, Utley had to send her daughters back to Montana to live with her parents while she looked for a new home. *Id.*

7. *See id.*

8. *See Bhatt, supra* note 6 (referring to her daughters).

9. *See Phillip Lovell & Julia Isaacs, New Report Reveals 2 Million Children Will Be Directly Impacted By the Foreclosure Crisis*, FIRST FOCUS (Apr. 30, 2008), <http://firstfocus.org/news/press-release/new-report-reveals-2-million-children-will-directly-impacted-foreclosure-crisis/> (estimating two million children will be impacted by foreclosure action). “[T]he first comprehensive analysis of how the crisis will impact kids . . . explains that this number will rise even higher when accounting for other populations, such as children being evicted from rental units that are going into default . . .” *Id.*

10. *See Bhatt, supra* note 6. “Finding a new rental is especially hard for tenants who are poor and receive vouchers for housing through the federal Section 8 program because of the tight supply of this type of housing.” *Id.*

11. *See* discussion *supra* Part I.

12. *See* discussion *infra* Part II.

13. *See* discussion *infra* Part III.

14. *See* discussion *infra* Part IV.

15. *See* discussion *infra* Part V.

its current foreclosure law to require banks to ascertain all interested parties to the property, including tenants, and disclose if the property is tenant occupied at the time of the foreclosure sale.¹⁶ The proposed law will also require that tenants' leases survive foreclosure actions as originally provided by the Protecting Tenants at Foreclosure Act of 2009.¹⁷

II. BACKGROUND

A. THE PROCESS OF JUDICIAL FORECLOSURE

The foreclosure¹⁸ procedure commences after a homeowner evades mortgage payments and the bank "files a public default notice, called a notice of default or *lis pendens*."¹⁹ In Florida, during a judicial procedure,

16. See discussion *infra* Part VI.

17. *Id.*

18. *Foreclosure*, BLACK'S LAW DICTIONARY (10th ed. 2014) (defining foreclosure as "[a] legal proceeding to terminate a mortgagor's interest in property, instituted by the lender (the mortgagee) either to gain title or to force a sale in order to satisfy the unpaid debt secured by the property"); *Foreclosure Terms and Definitions*, REALTYTRAC, <https://support.realtytrac.com/hc/en-us/articles/200612960-Foreclosure-Terms-and-Definitions> (last visited Jan. 30, 2016) ("A legal action that terminates all ownership rights in a home when the home[owner] fails to make the mortgage payments or is otherwise in default under the terms of the mortgage.").

19. *Dundee Naval Stores Co. v. McDowell*, 61 So. 108, 112 (Fla. 1913); 35 FLA. JUR. 2d *Lis Pendens* § 2 (2009); Helen Mason, *No One Saw It Coming—Again Systemic Risk and State Foreclosure Proceedings: Why a National Uniform Foreclosure Law Is Necessary*, 67 U. MIAMI L. REV. 41, 51 (2012) (stating the first step in the judicial foreclosure process is the filing of the foreclosure complaint and *lis pendens*); REALTYTRAC, *supra* note 18; Daniel T. Pascale, Esq., *The Use of a Lis Pendens to Collect a Debt in Florida*, FLORIDA REAL ESTATE LAWYERS BLOG, (Aug. 1, 2013), <http://www.floridarealestatelawyersblog.com/2013/08/01/creditors-and-lis-pendens/>; *Are you at risk of foreclosure and losing your home?*, U.S. DEP'T OF HOUS. & URBAN DEV., http://portal.hud.gov/hudportal/HUD?src=/topics/avoiding_foreclosure/fctimeline (last visited Jan. 30, 2016) [hereinafter HUD]; *Default*, BLACK'S LAW DICTIONARY (10th ed. 2014) (defining default as "[t]he omission or failure to perform a legal or contractual duty; esp., the failure to pay a debt when due"); *Lis Pendens*, BLACK'S LAW DICTIONARY (10th ed. 2014) (defining *lis pendens* as "[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"). The foreclosure complaint must be served to all parties in the action. *Dundee*, 61 So. at 112. However, only tenants for years are considered parties of the foreclosure action. *Id.*

A [homeowner's] failure to pay the full amount of the payment due on the date [specified] or a borrower's breach of any agreement set forth in the security agreement shall constitute a default. If payment is not received or the breach cured within [thirty] days of the default, a creditor may send a Notice of Default.

Mason, *supra*, at 88. Notice of Default is "[t]he initial document . . . filed by a trustee that starts the foreclosure process, usually after the occurrence of a default under the deed of trust, or mortgage" REALTYTRAC, *supra* note 18. "A *lis pendens* is usually filed by the lender to

it is the bank's obligation to prove that the homeowner has defaulted on his or her payments.²⁰ The first step the bank takes to resolve a default with a homeowner is to send a demand letter,²¹ which is followed by court action if the demand letter is not successful.²² If the homeowner is unable to cure the default, the lender's attorney files a *lis pendens* with the court.²³ In order for a bank to acquire court approval to foreclose a property, the bank must deliver proof that the account is in default, which is the sole purpose of the legal proceeding.²⁴ A foreclosure proceeding ends in one of the

start the foreclosure process under judicial foreclosure," and is used in judicial foreclosure, while a notice of default begins the foreclosure process under non-judicial foreclosure. *Id.* (defining *lis pendens* as "a notice that a lawsuit is pending, the outcome of which affects title"). The *lis pendens* gives notice to the public that a pending action has been filed against the homeowner, and also puts added pressure on homeowners to pay off their debt. Pascale, *supra*. A *lis pendens* may also be filed to notify any other lien holders. 35 FLA. JUR. 2d *Lis Pendens* § 2 ("[T]he purpose of a notice of *lis pendens* is to alert creditors, prospective purchasers and others to the fact that the title to a particular piece of real property is involved in litigation."). See Pascale, *supra* (explaining the use of *lis pendens* is to provide the public, which includes other lien holders, with notice by making it publicly available). The notice of default provides instructions to homeowners on the amount they are required to pay, and how much time they have to issue payment. HUD, *supra*. If the homeowner pays according to these instructions, the foreclosure process is over. *Id.*

20. See *Foreclosure Process*, U.S. DEP'T OF HOUS. & URBAN DEV., http://portal.hud.gov/hudportal/HUD?src=/topics/avoiding_foreclosure/foreclosureprocess (last visited Jan. 30, 2016) [hereinafter *Foreclosure Process HUD*] (adding that bank's wait three to six months before taking any action against the homeowner, thereby proving in court that the homeowner has been in default for several months). Property owners who are late in their mortgage payments will receive a notice of default from their lender. *Id.* (explaining that when a homeowner is in default, the bank will send a letter demanding payment). The notice of default is usually sent when the homeowner is three to six months late on his or her mortgage payments. *Id.* The notice of default provides instructions to the homeowner on the amount they are required to pay and how much time they have to pay. *Id.* (explaining the importance of constant communication from the homeowner to the bank regarding the homeowner's financial hardships). If the homeowner pays according to these instructions, the foreclosure process is terminated. *Id.* (stating that the homeowner has thirty days to respond with payment to avoid foreclosure).

21. *Demand Letter*, BLACK'S LAW DICTIONARY (10th ed. 2014) ("A letter by which one party explains its legal position in a dispute and requests that the recipient take some action (such as paying money owed), or else risk being sued."); *Stages of Foreclosure*, HOLD ON TO YOUR HOME, <http://holdontoyourhome.org/stages-of-foreclosure/> (last visited Jan. 30, 2016). Essentially, the bank accelerates the mortgage and everything is due, hence foreclosure. HOLD ON TO YOUR HOME, *supra*. Prior to foreclosure, the owner gets a letter to "cure" the default by paying any past due amount and make the account current before initiating foreclosure. *Id.*

22. *The Foreclosure Process: Understanding How Foreclosures Work*, BIGGERPOCKETS, <http://www.biggerpockets.com/rei/foreclosure-process/> (last visited Jan. 30, 2016) (stating that if the default is not corrected, a foreclosure sale begins).

23. *The Timeline for Foreclosure in Florida*, GRAHAM LEGAL (Jan. 2014), <http://grahamlegalpa.com/the-timeline-for-foreclosure-in-florida/>; see *Foreclosure Process HUD*, *supra* note 20 (explaining that lenders file foreclosure actions with the court).

24. GRAHAM LEGAL, *supra* note 23; see *Mortgage Vs. Deed of Trust*, PRIVATE MONEY

following four ways:

(1) the [homeowner] reinstates the loan by paying off the default amount during a grace period determined by [Florida statute;] (2) the [homeowner] sells the property to a third party during the pre-foreclosure period; (3) a third party buys the property at a public auction at the end of the pre-foreclosure period; or (4) the [bank] takes ownership of the property, usually with the intent to re-sell it on the open market.²⁵

The current foreclosure timeline in Florida for judicial foreclosures is approximately 180 days.²⁶

B. THE PROCESS OF NON-JUDICIAL FORECLOSURE

“Non-judicial foreclosures²⁷ occur when a deed of trust²⁸ containing a sale clause is involved, which provides a mechanism to sell the property

LENDING GUIDE, <http://www.privatemoneylendingguide.com/borrowers/articles/mortgage-vs-deed-of-trust> (last updated June 2015) (explaining that promissory notes alone are not secured and in order to secure such notes lenders use the mortgage as a security document by recording it in the public records). “[The foreclosure] process requires the lender to file a lawsuit in order to receive a judgment.” PRIVATE MONEY LENDING GUIDE, *supra*.

25. FLA. STAT. § 702.07 (2015); FLA. STAT. § 702.036(1)(a)(4) (2015); Mason, *supra* note 19, at 89; see *Real Estate Owned*, BLACK’S LAW DICTIONARY (10th ed. 2014) (defining real estate owned as “[p]roperty acquired by a lender, [usually] through foreclosure, in satisfaction of a debt”); *What is Foreclosure?*, PLANATEK FINANCIAL, <http://planatek.net/what-is-foreclosure/> (last visited Jan. 30, 2016). “The sale allows the [homeowner] to pay off the loan and avoid having a foreclosure on his or her credit history.” *Id.* The property can only be sold to a third party who is not affiliated with the foreclosing bank or the foreclosed homeowner. FLA. STAT. § 702.036(1)(a)(4). If the homeowner reinstates the loan by paying off the default amount, the court has the “power, and authority to rescind, vacate, and set aside a decree of foreclosure at any time before the sale of foreclosure.” FLA. STAT. § 702.07. “This grace period is also known as pre-foreclosure.” PLANATEK FINANCIAL, *supra*. During the pre-foreclosure period, the bank, as the first lien holder, has rights to the property, and

[the bank can take] ownership of the property, either through an agreement with the [homeowner] during pre-foreclosure, via a short sale, foreclosure or by buying back the property at the public auction. Properties repossessed by the lender are also known as bank-owned or REO properties (Real Estate Owned by the lender).

Id.

26. *Florida Foreclosure Law Summary*, FORECLOSURE LAW, http://www.foreclosurelaw.org/Florida_Foreclosure_Law.htm (last visited Jan. 30, 2016).

27. *Nonjudicial Foreclosure*, BLACK’S LAW DICTIONARY (10th ed. 2014) (defining nonjudicial foreclosure as “[a] foreclosure method that does not require court involvement”).

28. *Deed of Trust*, BLACK’S LAW DICTIONARY (10th ed. 2014) (defining deed of trust as “[a] deed conveying title to real property to a trustee as security until the grantor repays a loan . . . [t]his type of deed resembles a mortgage”); Stephen Elias, *Will Your Foreclosure Take Place In or Out of Court?*, NOLO, <http://www.nolo.com/legal-encyclopedia/free-books/foreclosure-book/chapter2-3.html> (last visited Jan. 30, 2016). “The deed of trust authorizes the entity named as trustee in the deed of trust to foreclose on the property if you ever defaulted.” Elias, *supra*.

upon default.²⁹ This clause permits the trustee³⁰ to begin a foreclosure sale without meeting the extensive requirements of a judicial foreclosure.³¹ “The trustee is typically required to issue a notice of default and notify the [homeowner] accordingly about the default status.”³² If the homeowner fails to respond, the trustee then initiates the steps necessary to begin the foreclosure process.³³

C. THE FINANCIAL CRISIS OF THE TWENTY-FIRST CENTURY

The foreclosure crisis began in the early twenty-first century as a growth in subprime³⁴ mortgages in a wide variety of weak housing markets, and was initially hindered by fast rising home values.³⁵ Yet, by the second

29. Elias, *supra* note 28.

30. *Trustee*, BLACK’S LAW DICTIONARY (10th ed. 2014) (defining trustee as “one who, having legal title to property, holds it in trust for the benefit of another and owes a fiduciary duty to that beneficiary.”). A trustee’s duties generally requires him or her to “convert to cash all debts and securities that are not qualified legal investments, to reinvest the cash in proper securities, to protect and preserve the trust property, and to ensure that it is employed solely for the beneficiary, in accordance with the directions contained in the trust instrument.” *Id.*

31. *Power-of-Sale Clause*, BLACK’S LAW DICTIONARY (10th ed. 2014) (defining power-of-sale clause as “[a] provision in a mortgage or deed of trust permitting the mortgagee or trustee to sell the property without court authority if the payments are not made.”).

32. See Elias, *supra* note 28 (discussing the procedure taken in a non-judicial foreclosure).

33. *Id.*; see Frank S. Alexander et al., *Legislative Responses to the Foreclosure Crisis in Nonjudicial Foreclosure States*, 31 REV. BANKING & FIN. L. 341 (2011–2012) (explaining how the crisis in foreclosure began between the years of 2004 and 2005). The timeline in a non-judicial foreclosure is much shorter, approximately taking from thirty to ninety days. Elias, *supra* note 28.

34. *Subprime*, BLACK’S LAW DICTIONARY (10th ed. 2014) (defining subprime as “[i]nvolving an amount of money that a borrower may not be able to pay back, [usually] at a high rate of interest.”); *Subprime Loan*, INVESTOPEDIA, <http://www.investopedia.com/terms/s/subprimeloan.asp> (last visited Jan. 30, 2016); *What is Subprime Loan?*, THE LAW DICTIONARY, <http://thelawdictionary.org/subprime-loan/> (last visited Jan. 30, 2016). A subprime loan is usually a mortgage or home equity loan, made to one whose financial condition and creditworthiness are poor, creating a high risk of default. THE LAW DICTIONARY, *supra*. A subprime loan usually has an adjustable interest rate that starts low in order to assist a person with weak financial ability qualify, then increases during the life of the loan. INVESTOPEDIA, *supra*.

35. See Blair Hickman, *10 Questions – And Answers – To Help You Understand the Foreclosure Crisis*, PROPUBLICA, (Apr. 18, 2012, 3:18 PM), <http://www.propublica.org/getinvolved/item/10-questions-and-answers-to-help-you-understand-the-foreclosure-crisis> (discussing the cause of the financial crisis in two ways: (1) the result of subprime lending when the homeowners could not afford the loans they were taking on the property; and (2) the economic downturn as unemployment rate spiked); Soo Youn, *Market’s New Face: Home Prices Flatten*, WASH. POST, (Dec. 14, 2006), <http://www.washingtonpost.com/wp-dyn/content/article/2006/12/13/AR2006121300524.html> (showing a significant decrease in the price of the housing market). Given the decrease in the

half of 2006, some areas experienced a decrease in real estate prices, while foreclosures in other areas began to increase at dramatic rates.³⁶ This was especially true in metropolitan areas, which had previously experienced rapid price inflation fueled by subprime mortgages³⁷ and exotic home loans.³⁸ The decrease in real estate prices left homeowners unable to afford their mortgage and restrained from selling their homes.³⁹ In the same year, Florida, Arizona, Nevada, and California had the highest foreclosure rates in the nation.⁴⁰ In 2009, the number of prime loan foreclosures began to dominate subprime foreclosures, while the national unemployment rate continued to climb.⁴¹ As a result, foreclosures spread both geographically and demographically.⁴² In the same year, the United States reported that a foreclosure took place every thirteen seconds.⁴³ For example, during the

market, most homeowners could not sell their homes and had lost their equity in their homes. *Id.*

36. *Subprime mortgage crisis*, U. OF N.C. 1, <http://www.stat.unc.edu/faculty/cji/fys/2012/Subprime%20mortgage%20crisis.pdf>.

37. *Subprime Loan*, BLACK'S LAW DICTIONARY (10th ed. 2014) (defining subprime loan as “[a] loan, [especially] a mortgage or home-equity loan, made to one whose financial condition and creditworthiness are poor, creating a high risk of default.”); Shauna Carther, *What is a subprime mortgage?*, INVESTOPEdia, www.investopedia.com/ask/answers/07/subprime-mortgage.asp (last visited Jan. 30, 2016) (defining subprime mortgage as a type of loan given to individuals with poor credit scores who would not be able to qualify for conventional mortgages).

38. See Committee on Judiciary, *Tenants' Rights in Foreclosure Actions*, THE FLORIDA SENATE 1, 2 (2009), http://archive.flsenate.gov/data/Publications/2010/Senate/reports/interim_reports/pdf/2010-124ju.pdf (stating that homeowners interest rates can increase more than 100% than the original rate); see also *Exotic Mortgage Loans Are Making a Comeback: Should We Be Worried?*, THE MOTLEY FOOL, <http://www.fool.com/investing/general/2015/07/04/exotic-mortgage-loans-are-making-a-comeback-should.aspx> (last visited Jan. 30, 2016) (explaining the types of exotic mortgage loans that contributed to the financial crisis); Juliet Lapidus, *What's So Exotic About an "Exotic Loan"?*, SLATE (July 8, 2008, 5:36 PM), http://www.slate.com/articles/news_and_politics/explainer/2008/07/whats_so_exotic_about_an_exotic_loan.html (describing exotic home loan as easy to keep up at the beginning but it carries significant risks for borrowers down the road by doubling or even tripling the mortgage payments at the end of the loan); Kenneth R. Harney, *Home Prices Flatten Out, But There's a Bright Side*, WASH. POST, (Mar. 9, 2002), <http://www.washingtonpost.com/archive/realestate/2002/03/09/home-prices-flatten-out-but-theres-a-bright-side/8d34ea97-13d9-452f-ab48-678355b1a09a/>; Youn, *supra* note 35.

39. Hickman, *supra* note 35.

40. Diana Olick, *It's Prime Time in Foreclosures*, CNBC, (May 28, 2009, 1:08 PM), <http://www.cnbc.com/id/30984467>; Shayna M. Olesiuk & Kathy R. Kalsner, *The 2009 Economic Landscape*, FDIC, http://www.fdic.gov/bank/analytical/quarterly/2009_vol3_1/AnatomyPerfectHousing.html (last visited Jan. 30, 2016).

41. Olick, *supra* note 40.

42. *Id.*

43. *The Foreclosure Learning Curve*, 95 A.B.A. J. 66 (2009) (discussing the ninety-minute mid-year meeting of the American Bar Association held in February 2009, in particular,

American Bar Association's ninety-minute mid-year meeting alone, more than 400 foreclosures were initiated in the United States.⁴⁴ Florida has been the most delinquent state in the nation with approximately one-in-four home loans either past due or in foreclosure.⁴⁵

This foreclosure crisis has primarily affected delinquent homeowners.⁴⁶ However, the tenants renting these properties from delinquent homeowners have also been affected.⁴⁷ As a result of the increase in foreclosures, tenants are affected almost as often as homeowners.⁴⁸ The media focused on the homeowners and banks during the foreclosure crisis; yet, the tenants renting these properties are the "hidden victims."⁴⁹ It is estimated that about forty percent of these tenants and their families are faced with evictions due to nationwide foreclosures.⁵⁰ These families are left with dramatic consequences as a result of the current foreclosure process, including, "[early] lease termination; eviction without proper notice or a reason other than the unit has been foreclosed upon; the

mentioning the economy as a key cause of the housing foreclosure crisis).

44. *Id.*

45. See Olesiuk & Kalsner, *supra* note 40 (explaining the imbalances in the housing market with a noticeable increase in second mortgage originations in Florida); see also Olick, *supra* note 40 (stating that in 2009, the bulk of the trouble was centered in Florida, along with California, Nevada, and Arizona).

46. See Denise Finney, *Mortgage Fraud: Understanding and Avoiding It*, INVESTOPEDIA, <http://www.investopedia.com/articles/mortgages-real-estate/10/how-mortgage-fraud-affects-markets.asp> (last visited Jan. 30, 2016) (examining complex ethical and criminal issues surrounding mortgage fraud).

47. Jorge Newbery, *U.S. Foreclosure Rise*, HUFFINGTON POST, (Apr. 23, 2015, 5:19 PM), http://www.huffingtonpost.com/jorge-newbery/us-foreclosures-rise_b_7116916.html?utm_hp_ref=foreclosure-crisis; Jeffrey Hearne and Purvi Shah, *Renters: The Forgotten Victims of Florida's Foreclosure Crisis*, THE FLORIDA HOUS. COAL. 14, <http://www.flhousing.org/wp-content/uploads/2012/05/Renters-Forgotten-Victims-Foreclosure-Crisis.pdf>.

48. Hearne & Shah, *supra* note 47.

49. *Id.*; Kate Berry, *Tough Choices for Servicers After Tenant Foreclosure Law Expires*, NAT'L MORTGAGE NEWS, (Feb. 5, 2015), <http://www.nationalmortgagenews.com/news/servicing/tough-choices-for-servicers-after-tenant-foreclosure-law-expires-1044042-1.html>. "[S]cores of low-income renters are losing their homes through no fault of their own." Hearne & Shah, *supra* note 47. "[T]enants are truly the innocent victims of foreclosure because they didn't fall behind on the mortgage, and are current on their rent and could be evicted through no fault of their own" Berry, *supra*.

50. Berry, *supra* note 49; see Bhatt, *supra* note 6 (estimating that forty percent of foreclosed homes were occupied by tenants); see also Hearne & Shah, *supra* note 47 (stating that renters make up forty percent of the families facing eviction due to foreclosure); *The Foreclosure Crisis and Its Impact on Tenants*, NAT'L HOUS. LAW PROJECT, <http://www.nhlp.org/foreclosureandtenants/> (last visited Jan. 30, 2016). "Roughly 30% to 40% of properties in foreclosure have tenants or renters, said Linda Couch, a senior vice president for policy and research at the National Low Income Housing Coalition." Berry, *supra* note 49.

loss of the tenant's security deposit . . . and utility service shutoffs without notice."⁵¹

III. PROTECTING TENANTS AT FORECLOSURE ACT OF 2009

Tenant evictions escalated due to the inefficiency of the current foreclosure process, and as a result, unanticipated eviction notices surprised tenants.⁵² Tenants were unaware that the homes they were living in had been repossessed from their landlords, and they unsuspectingly continued to pay rent on a monthly basis.⁵³ In an attempt to address this issue, Congress responded with the Protecting Tenants at Foreclosure Act of 2009 ("PTFA"), which intended to stabilize neighborhoods and minimize the impact of foreclosures throughout the communities.⁵⁴ The PTFA was enacted on May 20, 2009, and immediately offered significant protection to tenants of foreclosed properties.⁵⁵ The PTFA provided bona fide tenants⁵⁶ a right to receive notice prior to being evicted from a foreclosed property.⁵⁷ It required the successor-in-interest that acquired a rental property through foreclosure to honor the lease of any bona fide tenant living in the property,

51. Berry, *supra* note 49; NAT'L HOUS. LAW PROJECT, *supra* note 50. Tenants also face the costs associated with relocation, finding a new place to live, and filing an eviction complaint, which may affect their credit or ability to subsequently lease another property, and disruption of education, employment, and social support networks. *Id.* "[W]hen a property became real estate-owned following a foreclosure, the tenant lost his deposit and no longer had the right to occupy the home unless the new owner offered him a new lease. Mortgage servicers typically do not want to be landlords, so most tenants were required to move." Berry, *supra* note 49.

52. See *It is clear that the foreclosure crisis affects more than homeowners*, NAT'L LOW INCOME HOUS. COAL., <http://nlihc.org/issues/foreclosure/ptfa> (last visited Jan. 21, 2016).

53. See *id.*

54. *Id.*; Hearne & Shah, *supra* note 47.

55. Protecting Tenants at Foreclosure Act, Pub. L. No. 111-22, §§ 701-4, 123 Stat. 1632 (2009); *Renters in Foreclosure Toolkit*, NAT'L LOW INCOME HOUS. COAL., <http://nlihc.org/issues/foreclosure/ptfa> (last visited Jan. 31, 2016) [hereinafter NAT'L LOW INCOME HOUS. COAL.]. The PTFA protected any valid rental arrangement created before title to the property was transferred as a result of foreclosure. NAT'L LOW INCOME HOUS. COAL., *supra*.

56. Committee on Judiciary, *supra* note 38 ("[T]he tenant cannot be the mortgagor, or the child, spouse, or parent of the mortgagor; that the lease was the result of an arm's-length transaction; and that the rent is not substantially less than the fair market rent for the property unless it is reduced by a federal, state, or local subsidy."); see also Samanta Parks, *Tenants Suffer When Landlords are Foreclosed*, FORECLOSURE DATA ONLINE, http://www.landlord.com/tenants_suffer_when_landlord_forecloses.htm (last visited Jan. 21, 2016) (explaining that tenants rarely get notice of the foreclosure until they are informed they have to vacate the property because landlords are not legally obligated to inform their tenants about the foreclosure).

57. Protecting Tenants at Foreclosure Act, Pub. L. No. 111-22, §§ 701-04, 123 Stat. 1632 (2009).

or to provide a bona fide tenant with a ninety day notice to vacate.⁵⁸ According to the PTFA, any bona fide tenant who had a valid written lease had the option to continue occupying the property for the remainder of the lease term, unless the new owner of the property intended to occupy the property as a primary residence.⁵⁹ The PTFA also applied to any Section 8 tenancy.⁶⁰ Originally, the PTFA was set to expire on December 31, 2012.⁶¹ However, the Dodd-Frank Wall Street Reform and Consumer Protection Act⁶² extended the PTFA expiration date to December 31, 2014.⁶³

As of December 2015, Florida ranks third in the nation in foreclosure

58. *Id.*; NAT'L LOW INCOME HOUS. COAL., *supra* note 55. "The ninety-day period begins to run when the [successor-in-interest] that acquired the title to the property after the foreclosure provides the notice to the tenant." NAT'L LOW INCOME HOUS. COAL., *supra* note 55.

59. Protecting Tenants at Foreclosure Act, Pub. L. No. 111-22, §§ 701-04, 123 Stat. 1632 (2009). The PTFA explains that any bona fide lease executed before a notice of foreclosure is filed provides the tenant with the option to occupy the property until the end of the lease term, unless the successor-in-interest will occupy the property as a primary residence. *Id.* The tenant's bona fide status is obtained only if:

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

Id.

60. *See id.* (stating the protections provided to tenants also included those tenants with Section 8 benefits); *see also* NAT'L HOUS. LAW PROJECT, *supra* note 50 (explaining that the act also provides additional protections for Section 8 tenants); *What is Section 8?*, GOSECTION8, <http://www.gosection8.com/what-is-section8.aspx> (last visited Jan. 21, 2016) [hereinafter GOSECTION8] (explaining that the Housing Choice Vouchers Program is a federal program to provide housing for Americans living in poverty). Section 8 of the Housing Choice Vouchers Program "offers affordable housing choices for very low-income households by allowing families to select from privately owned residences that are made available for rent by their owner." GOSECTION8, *supra*.

61. Protecting Tenants at Foreclosure Act, Pub. L. No. 111-22, §§ 701-04, 123 Stat. 1632 (2009).

62. *See* Mark Koba, *Dodd-Frank Act: CNBC Explains*, CNBC (May 11, 2012, 4:01 PM), <http://www.cnbc.com/id/47075854> (explaining the act was made with the intention of preventing another collapse of major financial institutions); *Wall Street Reform: The Dodd-Frank Act*, WHITE HOUSE, <https://www.whitehouse.gov/economy/middle-class/dodd-frank-wall-street-reform> (last visited Jan. 21, 2016). The Dodd-Frank Act included protection for consumers with rules to help borrowers from abusive lending and mortgage practices by banks. Koba, *supra*. President Obama signed this law with the purpose of building a safer, more stable financial system. WHITE HOUSE, *supra*.

63. *See* Dodd-Frank Wall St. Reform & Consumer Prot. Act, Pub. L. No. 111-203, § 1011, 124 Stat. 1376, 1964 (2010); *Protecting Tenants at Foreclosure Act of 2009*, COMPTROLLER OF THE CURRENCY ADM'R OF NAT'L BANKS, <http://www.occ.gov/publications/publications-by-type/comptrollers-handbook/ptfa.pdf> (last visited Jan. 21, 2016).

rates.⁶⁴ In December 2015, there were 916,449 properties in the United States, in some stage of the foreclosure process.⁶⁵ In 2015, the Miami-Dade County Clerk of Courts reported 4,172 foreclosure complaints filed between January and July.⁶⁶ The number of complaints filed during that seven-month period, although less than the previous year, remains high and is affecting a large number of tenants.⁶⁷ Therefore, since the PTFA has already expired, tenants in Florida are now back to the same terms that applied prior to the PTFA, which requires that tenants only receive a thirty day notice to vacate their homes.⁶⁸

During the foreclosure process, tenants are typically unaware that the property they are renting is in foreclosure.⁶⁹ Tenants often have no idea that their landlords have fallen behind on their mortgage payments, and usually continue to pay their rent while their landlords fail to pay their mortgages.⁷⁰ Therefore, tenants are oblivious to the foreclosure proceedings until after the property has been sold.⁷¹ Thirty days is not

64. *U.S. Real Estate Trends & Market Info*, REALTYTRAC (Dec. 2015), <http://www.realtytrac.com/statsandtrends/foreclosuretrends>. The top five states are Nevada, Maryland, New Jersey, Florida, and Delaware. *Id.*

65. David Dayen, *You Thought the Mortgage Crisis Was Over? It's About to Flare Up Again*, NEW REPUBLIC (Aug. 24, 2014), <http://www.newrepublic.com/article/119187/mortgage-foreclosures-2015-why-crisis-will-flare-again>; *U.S. Real Estate Statistics & Foreclosure Trends Summary*, REALTYTRAC, (Dec. 2015), <http://www.realtytrac.com/statsandtrends>. These statistics clearly present a problem showing “[t]he foreclosure crisis was never solved; it was deferred.” Dayen, *supra*. With the expiration of the government’s temporary relief programs, relief measures and legacy issues from the crisis will begin to increase in 2015, causing more foreclosures even eight years after the crisis. *Id.*

66. *Foreclosure Filing Statistics*, MIAMI-DADE CLERK OF COURTS, http://www.miami-dadeclerk.com/property_mortgage_foreclosures.asp (last visited Jan. 21, 2016).

67. *See id.*

68. FLA. STAT. § 83.561 (2015).

69. *Protecting Tenants at Foreclosure Act*, NAT’L LOW INCOME HOUS. COAL., (June 12, 2015), http://nlihc.org/sites/default/files/FactSheet_PTFA_2015.pdf; *New Fla. law protects tenants after a foreclosure*, WEICHERT, REALTORS, (June 3, 2015), <http://www.weicherthallmark.com/fla-law-protects-tenants-foreclosure/>. The law in Florida requires the successor-in-interest (not the homeowner) to provide the tenant with notice of the foreclosure. *Id.* However, the successor-in-interest takes ownership of the property after the foreclosure sale has already taken place. *Id.* Therefore, the law fails to provide adequate notice during the foreclosure process. *Id.*

70. Tim Jones, *Former landlord collected rent while house was in foreclosure*, DAILY REPUBLIC (May 25, 2013), <http://www.dailyrepublic.com/news/business-local/former-landlord-collected-rent-while-house-was-in-foreclosure/>.

71. *See generally* Willard Shepard, *South Florida Renter Caught Up in Foreclosure Action Gets Evicted*, NBC SOUTH FLA., <http://www.nbcmiami.com/news/local/South-Florida-Renter-Caught-Up-in-Foreclosure-Action-Gets-Evicted-201790781.html> (last visited Nov. 14, 2015) (reporting that tenants are caught by surprise when they get a notice informing them that they are being evicted).

sufficient time to find a new home and make arrangements to move, especially if it is the first time the tenant is informed of the foreclosure.⁷²

Additionally, neither the PTFA nor Florida statutory law resolves the problems faced by tenants during foreclosure.⁷³ In addition to the lack of notice to tenants, landlords often abandon the property and their obligations, causing deterioration of the property.⁷⁴ Unfortunately, some landlords manipulate their tenants during the pendency of the foreclosure action.⁷⁵ Landlords enter into leases with, and take security deposits from tenants after a foreclosure action has already begun.⁷⁶ In other cases, landlords take advantage of tenants' lack of knowledge and continue to act as if they still own and control the property, even after foreclosure has been finalized.⁷⁷ For example, according to CNN, a landlord advised his tenants that his debt problem had been settled and that they should continue paying him rent, when, in fact, the property had already been foreclosed.⁷⁸ Tenants are innocent bystanders in this foreclosure crisis.⁷⁹ They are the ultimate victims and are often blindsided when their landlord defaults on their mortgage.⁸⁰

72. See NAT'L HOUS. LAW PROJECT, *supra* note 50 (“[T]he date on which complete title to a property is transferred to a successor [in-interest] . . . as a result of an order of a court . . .”); see also Shepard, *supra* note 71 (“I don’t know what I’m going to do at this time. I have nowhere to relocate. I have no house. No time to get a house . . .”).

73. FLA. STAT. § 83.561 (2015); Hearne & Shah, *supra* note 47, at 15.

74. Hearne & Shah, *supra* note 47, at 15 (“Some landlords abandon their properties . . . others simply stop paying bills such as master-metered utilities causing those utilities to be shut off and leaving tenants without water or electricity.”).

75. See Les Christie, *Tenants victimized by foreclosures*, CNNMONEY, (Dec. 15, 2008, 3:38 PM), http://money.cnn.com/2008/12/08/real_estate/tenant_foreclosure_victims/ (discussing landlords lying to tenants regarding the status of their loan). Several cases were reported where homeowners were lying to tenants regarding the status of the property, even signing leases after the property had been transferred. *Id.* Unbeknownst to them, a couple with four children signed and notarized a new lease after the foreclosure on the house had been finalized. *Id.*

76. See Jones, *supra* note 70.

77. See Christie, *supra* note 75.

78. See *id.* In a similar case, the landlord entered into a new lease with tenants even after the property had been foreclosed. *Id.*

79. See generally Stephanie Armour, *Hitting Home: New faces join ranks of the homeless*, USA TODAY, (June 26, 2008, 9:10 AM), http://usatoday30.usatoday.com/money/economy/housing/2008-06-25-homeless-families-foreclosure_N.htm (reporting how people go from having a home to being homeless in a matter of days).

80. See Christie, *supra* note 75 (discussing how foreclosures can be a tragedy for tenants).

IV. OWNERSHIP INTEREST IN PROPERTY

A. HOMEOWNERS' OWNERSHIP INTEREST

Fee simple ownership⁸¹ is the most familiar form of ownership to buyers of residential real estate.⁸² A fee simple buyer is given legal title and possession of the property in perpetuity, or until they sell, lease, or mortgage it.⁸³ The fee simple owner has the right to possession, use, and disposal of the land as he or she wishes.⁸⁴ The fee simple owner can give away a part of the estate, or the estate in its entirety.⁸⁵

B. LENDERS' OWNERSHIP INTEREST

A mortgage occurs when a homeowner, who normally holds a fee simple interest in the property, pledges his or her interest rights to the property as collateral for a loan.⁸⁶ Execution of the mortgage does not convey title to the lender that is defeasible on payment of the secured debt, but rather confers on the bank a lien on the property that secures the debt.⁸⁷ Therefore, a mortgage is an encumbrance⁸⁸ on the right to the property.⁸⁹ A

81. *Fee Simple Interest*, BLACK'S LAW DICTIONARY (10th ed. 2014) ("An interest in land that, being the broadest property interest allowed by law, endures until the current holder dies without heirs."); Diane Tuman, *Fee Simple vs Leasehold Ownership*, ZILLOW, (last edited Oct. 12, 2012), <http://www.zillow.com/wikipages/Fee-Simple-vs-Leasehold-Ownership/>. "Fee simple is sometimes called fee simple absolute because it is the most complete form of ownership." Tuman, *supra*.

82. See Tuman, *supra* note 81 (explaining the difference between leasehold and fee simple interests).

83. See *id.* ("A fee simple buyer is given title (ownership) of the property, which includes the land and any improvements to the land in perpetuity.").

84. *Id.*

85. John Makdisi, Professor of Law, St. Thomas University, Lecture at St. Thomas University School of Law, Property II Class (Spring 2015). The homeowner can give away the present possessory interest in the property, while retaining the estate. *Id.*

86. See *Understanding Fee Simple Ownership*, FINANCIALWEB, <http://www.finweb.com/real-estate/understanding-fee-simple-ownership.html#axzz3nihs0ZjZ> (last visited Nov. 14, 2014) (explaining that homeowners have the ability to use the property they own in fee simple as collateral).

87. *Sears, Roebuck & Co. v. Camp*, 124 N.J. Eq. 403, 408 (E. & A. 1938).

88. *Encumbrance*, BLACK'S LAW DICTIONARY (10th ed. 2014); JESSE DUKEMINIER, JAMES KRIER, GREGORY ALEXANDER, MICHAEL SCHILL & LIOR STRAHILEVITZ, *PROPERTY* (8th ed. Wolters Kluwer 2014); REALTYTRAC, *supra* note 18. This is shown when the homeowner has a mortgage on the property, yet transfers the possessory interest to a tenant when the property is leased. DUKEMINIER ET AL., *supra*. The tenant gains a possessory interest in the property, and the mortgage remains attached to the property. *Id.* A mortgage is considered a lien on the property, and it is the right of the lender to take title to the property if the homeowner does not

promissory note⁹⁰ on the loan is generally secured by a recorded mortgage on such real property.⁹¹ As with other types of loans, mortgages have an interest rate and are scheduled to amortize⁹² over a set period of time, typically thirty years.⁹³ Upon default, the bank only has a possessory interest, and ownership of the premises remains subject to the homeowner's equity of redemption.⁹⁴ In order to terminate the homeowner's equity of redemption, the bank must bring an action to foreclose the mortgage, obtain a writ of execution for sale of the mortgaged property, and sell the property at a foreclosure sale.⁹⁵ The foreclosing bank obtains an ownership interest in the property only when the bank purchases the property at the foreclosure sale.⁹⁶

C. TENANTS' OWNERSHIP INTEREST

Tenants who enter into a lease with a homeowner receive a leasehold

make the payments due on the mortgage. REALTYTRAC, *supra* note 18. Black's Law Dictionary defines the word "encumbrance" as follows:

A claim or liability that is attached to property that may lessen its [the property] value, such as a lien or mortgage; any property right that is not an ownership interest . . . [a]n encumbrance cannot defeat the transfer of possession, but it remains after the property or right [possessory right] is transferred.

BLACK'S LAW DICTIONARY, *supra*.

89. See William C. Spaulding, *Real Estate Encumbrances: Deed Restrictions, Liens, Easements, and Encroachments*, THISMATTER, <http://thismatter.com/money/real-estate/encumbrances.htm> (last visited Nov. 14, 2015) (explaining that a lien holder has a right to the property when the mortgage is not paid, while the easement is a right given by the homeowner to someone else to use their property for a particular purpose). An easement is similar to a mortgage in that both hold an interest in the property that is owned by a homeowner. *Id.*

90. *Promissory Note*, BLACK'S LAW DICTIONARY (10th ed. 2014) ("An unconditional written promise, signed by the [homeowner], to pay absolutely and in any event a certain sum of money either to, or to the order of, the [lender] or a designated person [by the lender].").

91. PRIVATE MONEY LENDING GUIDE, *supra* note 24 (explaining that promissory notes alone are unsecured, and lenders must use mortgages as security documents by recording them in the public records in order to secure such notes).

92. *Amortize*, BLACK'S LAW DICTIONARY (10th ed. 2014) (defining amortize as "arrang[ing] to extinguish (a debt) by gradual increments.").

93. *Five Steps to Homeownership*, MORTGAGE BANKERS ASS'N, https://www.mba.org/Documents/Consumertools/MBA_Consumer_Tools-1Homeownership.pdf (last visited Nov. 14, 2015) (describing different types of home loans, and stating that thirty year fixed loans remain the most common).

94. See *Dorman v. Fisher*, 31 N.J. 13, 14 (N.J. 1959) (stating that a mortgagee is entitled to possession without first barring a mortgagor's equity of redemption).

95. See *Carteret Sav. & Loan Ass'n v. Davis*, 105 N.J. 344, 347–48, (N.J. 1987) (explaining the right of redemption period).

96. See *Guttenberg Sav. & Loan Ass'n. v. Rivera*, 85 N.J. 617, 630 (N.J. 1981) (explaining how a mortgagee obtains an ownership interest in property).

estate.⁹⁷ A leasehold interest is created when a homeowner with a fee simple estate enters into a lease agreement or contract with a person, who then becomes the tenant, to transfer the possessory interest in a property for a specified period of time.⁹⁸ Lease agreements contain covenants, including the covenant of quiet enjoyment.⁹⁹ As a result of this covenant, when a successor-in-interest evicts a tenant prior to the expiration of the tenant's lease, it is considered a breach of the covenant of quiet enjoyment.¹⁰⁰

Notice of the foreclosure proceeding occurs when a tenant is named in a foreclosure action as a defendant or party in interest, and is served with a copy of the complaint.¹⁰¹ Some states require joinder of tenants, while other states only require joinder of tenants in certain circumstances.¹⁰²

97. Brad Dashoff and John Antonacci, *Understanding Real Property Interests and Deeds*, AMERICAN BAR ASS'N, http://www.americanbar.org/newsletter/publications/law_trends_news_practice_area_e_newsletter_home/2011_summer/real_property_interests_deeds.html (last visited Nov. 14, 2014); *Leasehold Estate*, BLACK'S LAW DICTIONARY (10th ed. 2014) ("A tenant's possessory estate in land or premises, the four types being the tenancy for years, the periodic tenancy, the tenancy at will, and the tenancy at sufferance.").

98. Tuman, *supra* note 81. A tenant pays a compensation to the homeowner for the rights of use and enjoyment of the land during the term of the lease. *Id.* "The buyer of leasehold [(a tenant)] real estate does not own the land; they have a right to use the land for the [leased term]." *Id.*

99. *Brown v. Lober*, 389 N.E. 2d 1188, 1191 (Sup. Ct. 1979); *Covenant of Quiet Enjoyment*, BLACK'S LAW DICTIONARY (10th ed. 2014) ("The possession of land with the assurance that the possession will not be disturbed by a superior title."); see *Quiet Enjoyment*, WEST'S ENCYCLOPEDIA OF AMERICAN LAW, <http://www.encyclopedia.com/doc/1G2-3437703628.html> (last visited Nov. 14, 2015) (explaining the covenant of quiet enjoyment in real property). A covenant of quiet enjoyment is breached when tenants get (1) evicted, or (2) a claim or payment of paramount title is made. *Brown*, 389 N.E. 2d at 1191.

100. *Nativi v. Deutsche Bank Nat'l Tr. Co.*, 167 Cal. Rptr. 3d 173, 201 (Cal. Ct. App. 6th 2014); *Curtis v. United States Bank N.A.*, 427 Md. 526, A.3d 558 (2012) (holding trustee had no immediate right of possession after foreclosure). In this case, after a non-judicial foreclosure sale, tenants sued the landlord's immediate successor in interest for breach of the covenant of quiet enjoyment. *Nativi*, 167 Cal. Rptr. at 173 (explaining that under the PTFA, a subordinate bona fide lease survives foreclosure for the remainder of the term, consequently, a bona fide tenant and the successor-in-interest under the lease have a landlord-tenant relationship). The successor-in-interest takes subject to a bona fide lease by operation of PTFA, which implies a contractual covenant of quiet enjoyment, and the successor-in-interest cannot breach that covenant. *Nativi*, 167 Cal. Rptr. at 198–99.

101. See *Dundee Naval Stores Co. v. McDowell*, 61 So. 108, 112 (Fla. 1913) (finding a tenant cannot be deprived of his or her rights without being given an opportunity to be heard by being made a party to the foreclosure proceedings).

102. ME. REV. STAT. ANN. tit. 14, § 6321 (2009) (requiring that a tenant be named in a foreclosure proceeding if the tenant's lease is properly recorded); VT. STAT. ANN. tit. 12, § 4523(c)(1) (2009) ("The plaintiff shall join as a party defendant any person occupying the mortgaged property pursuant to a residential rental agreement . . ."); Rex Edward Russo, *Is a 2*

However, failure to join a tenant as a party-defendant generally results in the tenant retaining the right to possession of the property after the foreclosure ends.¹⁰³

V. THEN AND NOW

In 2014, the PTFA expired.¹⁰⁴ After the expiration, a handful of states voluntarily offered the same protections as the expired law. Seventeen other states, however, had no specific tenant protections, and did not allow servicers to evict immediately following a foreclosure sale; the rest of the states defaulted to statutory law.¹⁰⁵ Although the subprime mortgage crisis occurred almost a decade ago, the lingering effects remain.¹⁰⁶ Tenants are left with uncertainty as a result of conflicting laws.¹⁰⁷ With the expiration of the PTFA, tenants renting homes subject to foreclosure actions continue to be at risk of eviction without notice at the conclusion of foreclosure proceedings.¹⁰⁸ Florida continues as one of the most economically distressed states; the properties in foreclosure more than quintupled between 2006 and 2008.¹⁰⁹ Consequently, Florida should consider revising its foreclosure procedures instead of obtaining federal assistance.¹¹⁰

year residential lease agreement (not notarized) legal in Florida?, AVVO (Nov. 9, 2013), <http://www.avvo.com/legal-answers/is-a-2-year-residential-lease-agreement—not-nota-1485297.html> (stating that most landlords do not want their leases recorded, and “many lease agreements specifically prohibit recording”). In Florida, lease agreements are not usually recorded and are not public record. *See generally* Russo, *supra*.

103. *Dundee*, 61 So. at 113.

104. *See* discussion *supra* Part III (explaining the PTFA and its expiration).

105. Berry, *supra* note 49.

106. *Id.* As of December 2015, “820,000 properties [were] stuck somewhere in the foreclosure process . . . [and] had not yet been liquidated through a foreclosure auction or by a bank taking legal title to the property . . .” *Id.*

107. *Id.* “There is confusion because some state laws provide tenants with the notice of the foreclosure itself, while other [states] require a notice period after a foreclosure . . .” *Id.*

108. *See* discussion *supra* Parts II and III (examining the problem faced by tenants in foreclosed property).

109. Iris J. Lav, Jason Levitis, and Liz McNichol, *Economic Data Can Be Used to Target State’s Fiscal Relief Effectively*, CENTER ON BUDGET AND POLICY PRIORITIES, <http://cbpp.org/files/3-3-08sfp.pdf> (revised July 9, 2008). This estimate is based on three states: Arizona, Florida, and California. *Id.*

110. *See* Kevin F. Jursinski, *The Mortgage Foreclosure Crisis in Florida: A 21st Century Solution*, 84 THE FLA. B. J. 91 (2010), <https://www.floridabar.org/divcom/jn/jnjournal01.nsf/Author/7980149C94FEDD7E852577300062C1D2> (explaining the different federal, state, and local programs, which are currently in place to address foreclosure crisis, are either outdated or not effective as expected).

VI. SOLUTION

There is an ongoing problem between property ownership, tenant rights, and foreclosure actions.¹¹¹ While the PTFA alleviated tenant evictions to some degree, it failed to take into account that the estate and interest in a property are two separate and distinct ownership rights.¹¹² A new law should be proposed in Florida that will take this distinction into account, and consider the New Jersey Just Cause law and the PTFA as guidelines to the new proposed legislation.¹¹³ The new proposed law would provide that a successor-in-interest who takes title to a tenant occupied residential property following a foreclosure sale takes title to the property, subject to the rights of the tenant.¹¹⁴ The proposed law would include the same restrictions on buyers who purchase a foreclosed property as the restrictions currently in place for conventional sales.¹¹⁵ The buyer who

111. See discussion *supra* Parts III, IV, and V.

112. See discussion *supra* Part III; JOHN MAKDISI & DANIEL B. BOGART, *ESTATES IN LAND AND FUTURE INTEREST*, (Vicki Been et al. eds., 6th ed. 2014) (explaining the different types of estates and interests in property).

113. FLA. CONST. art. III § 6 (2012); FLA. CONST. art. III § 8(a) (2012); see N.J. STAT. ANN. tit. 2A, § 18-61.2b (2013) (stating the statute protected tenants from eviction by foreclosing mortgagees irrespective of whether their tenancy was established before or after the execution of the mortgage); *How an Idea Becomes a Law*, THE FLORIDA SENATE, <http://www.flsenate.gov/About/HowAnIdeaBecomesALaw> (last visited Nov. 14, 2015). The process of passing a bill in Florida is as follows:

Every bill passed by the legislature shall be presented to the governor for approval and shall become a law if the governor approves and signs it, or fails to veto it within seven consecutive days after presentation. If during that period or on the seventh day the legislature adjourns sine die or takes a recess of more than thirty days, the governor shall have fifteen consecutive days from the date of presentation to act on the bill. In all cases except general appropriation bills, the veto shall extend to the entire bill. The governor may veto any specific appropriation in a general appropriation bill, but may not veto any qualification or restriction without also vetoing the appropriation to which it relates.

FLA. CONST. art. III § 8(a). "Either house may originate any type of legislation; however the processes differ slightly between houses." THE FLORIDA SENATE, *supra*. The Florida Senate explains the process of creating a law as follows:

A legislator sponsors a bill, which is referred to one or more committees related to the bill's subject. The committee studies the bill and decides if it should be amended, passed, or failed. If passed, the bill moves to other committees of reference or to the full house. The full house then votes on the bill. If it passes in one house, it is sent to the other house for review. A bill goes through the same process in the second house as it did in the first. A bill can go back and forth between houses until a consensus is reached.

Id.

114. See discussion *supra* Part IV(C).

115. See Kevin Perk, *Buying Investment Properties with Existing Tenants*, BIGGER POCKETS (June 3, 2013), <https://www.biggerpockets.com/renewblog/2013/06/03/existing-tenants/> (explaining that change in ownership does not void leases on the property). A buyer who purchases the property with a tenant cannot modify the lease without the tenant's consent. *Id.*

purchases a foreclosed property with a tenant living in the property must honor the terms of the lease. Therefore, the property changes ownership, but the lease survives the transfer and continues in place with the new owner as landlord.¹¹⁶

When purchasing a foreclosed property, the purchaser buys the property “as is” with no warranties.¹¹⁷ Most buyers understand there are a variety of risks associated with buying a foreclosed property.¹¹⁸ “This means there [is] no warranty protection and[,] more importantly, there is no stipulation on disclosures of the property.”¹¹⁹ If the property has outstanding liens, it is up to the buyer to inspect the property and find out whether the property is suitable, otherwise, they purchase subject to any liens.¹²⁰ This should also be the case when the buyer purchases a foreclosure property that is tenant occupied; the buyer should inspect the

Which “means [a buyer] cannot kick [a tenant] out six months into a year lease.” *Id.* The buyer must honor the lease until the expiration of the lease term. *Id.*

116. *Id.*

117. See *Sale as is*, BLACK’S LAW DICTIONARY (10th ed. 2014) (defining “sale as is” as “[a] sale in which the buyer accepts the property in its existing condition unless the seller has misrepresented its quality.”); *As is*, BUSINESS DICTIONARY, <http://www.businessdictionary.com/definition/as-is.html> (last visited Nov. 14, 2015) (explaining the term “as is” is used in sale contracts to inform buyers there is no expressed or implied warranty); *Buying a Home As-Is - Buying a Foreclosure or Bank Owned Property*, CREDIT INFOCENTER, <http://www.creditinfocenter.com/real-estate/buying-home-as-is.shtml> (last updated June 1, 2015); Tara-Nicholle Nelson, *4 Tricks and Traps Foreclosure Buyers Need to Know*, SOTAHOE, <http://www.southlaketahoerealestategroup.com/buyers/4-tricks-and-traps-foreclosure-buyers-need-to-know/#sthash.wmlafgZW.dpuf> (last visited Nov. 14, 2015). “The seller is providing notification upfront [to the purchaser] that they will make no repairs to the property as a condition of sale.” CREDIT INFOCENTER, *supra*. “Generally, bank-owned homes are sold on a very strict ‘as-is, where-is’ basis, which just means that a buyer should expect to take possession of it, if [the buyer ultimately buys it], in exactly the position and location it is, no matter how defective.” Nelson, *supra*.

118. See Tony Guerra, *If You Buy a Foreclosure House With a Lien, Can the Bank Come After You?*, SFGATE, <http://homeguides.sfgate.com/buy-foreclosure-house-lien-can-bank-come-after-you-48881.html> (last visited Nov. 14, 2015); *The Smart Way to Buy Foreclosures*, HOME FINDER, <http://www.homefinder.com/research/how-to-buy-a-foreclosure-34id#top> (last visited Nov. 14, 2015). “Foreclosed homes sometimes come with material repair and maintenance conditions that can be costly to address.” Guerra, *supra*. Many buyers who buy foreclosed properties are real estate investors who flip homes, they are usually very aware that the purchase comes with inherent risk that the property may be damaged or in need of significant changes to make the home habitable or compliant with zoning requirements. HOME FINDER, *supra* (explaining that since foreclosure sales are usually cash only, it mostly limits bidders to investors).

119. See Nelson, *supra* note 117 (explaining that many states exempt banks from making substantive disclosures about the condition of the property).

120. See Guerra, *supra* note 118 (discussing various creditor liens that survived foreclosure).

property prior to purchasing it, or is otherwise be subject to the tenancy.¹²¹

Whether it is a title defect or a condition of the property, full disclosure of defects is a requirement of conventional sales.¹²² The seller can be held liable to the buyer if the seller fails to disclose defects prior to, or at the time of closing, and a defect arises at a later time.¹²³ However, when dealing with a foreclosure sale, one phrase must always come to mind, “*caveat emptor*.”¹²⁴ When a buyer purchases a home in foreclosure, they have no recourse against the seller if there are any kinds of defects with the home, including title defects, that are known or should have been known at the time of closing.¹²⁵

Additionally, when buyers purchase homes in foreclosure, they cannot always be certain of its condition.¹²⁶ “Foreclosure properties often attract multiple offers, with professional investors stepping in and bidding up the prices of many below market foreclosure listings.”¹²⁷ Deals that initially look promising end up selling at significantly higher prices.¹²⁸ As such, because there are no warranties when purchasing a foreclosed home,

121. See Janet Portman, *Buying a Foreclosed Home as a Rental Property*, NOLO, <http://www.nolo.com/legal-encyclopedia/buying-foreclosed-home-rental-property-29711.html> (last visited Nov. 14, 2015) (explaining that after the PTFA, all leases survived foreclosure, except those buyers who purchased as primary residence). The PTFA required buyers, who purchased a property that had a tenant with a written lease to honor the lease until its expiration. *Id.*

122. *The Benefits of Buying a New Home vs. a Foreclosure*, NEW HOMES, http://www.newhomesmag.com/news/buying_new_vs_foreclosure.php (last visited Feb. 1, 2016) (discussing the difference between disclosures in foreclosure and conventional sales).

123. *Id.*; see Ilona Bray, *Home Defects: Sue the Seller?*, NOLO, <http://www.nolo.com/legal-encyclopedia/bought-home-with-defects-whos-30058.html> (last visited Nov. 14, 2015) (discussing sellers duty to disclose and determining liability for the appropriate party).

124. See *Caveat Emptor*, BLACK’S LAW DICTIONARY (10th ed. 2014) (defining caveat emptor as “[a] doctrine holding that a purchaser buys at his or her own risk”); see also NEW HOMES, *supra* note 122 (explaining that problems arise when the property has multiple lien holders, and seller did not make the necessary agreements to create a smooth sales process). Caveat Emptor is Latin for “let the buyer beware.” *Caveat Emptor*, BLACK’S LAW DICTIONARY, *supra*.

125. See DUKEMINIER ET AL., *supra* note 88, at 582–92 (discussing title defects).

126. See NEW HOMES, *supra* note 122 (stating the foreclosure process is not simple and may involve numerous complications); *The Benefits of Building a New Home vs. Fixing up a Bank Owned Home*, HIBBARD CONSTRUCTION (May 17, 2012, 9:58 AM), <http://www.hibbardconstruction.com/blog/2012/5/17/the-benefits-of-building-a-new-home-vs-fixing-up-a-bank-owne.html> (“Buyers are forced to come out of pocket to bring the home up to an acceptable standard of living.”). HIBBARD CONSTRUCTION, *supra*.

127. HIBBARD CONSTRUCTION, *supra* note 126.

128. *Id.*; see NEW HOMES, *supra* note 122 (“[Foreclosure homes] might be in bad shape because the homeowner did not maintain the property, the home was poorly constructed, or the home has been vacant for a long time.”).

buyers must be prepared to take the property in whatever condition they find it in, which includes assuming current tenants.¹²⁹

Usually, prior to submitting an offer on the property, the buyer schedules an appointment to see the property.¹³⁰ Once there, if the buyer notices any defects, it is up to the buyer to decide whether he or she will make an offer, and ultimately purchase the property, subject to the defect.¹³¹ Clearly, when a buyer goes to inspect the property and notices that it is tenant occupied, the buyer must do his or her due diligence to find out the terms of the tenancy.¹³²

If the buyer does not comply with the due diligence, then the purchase of the property should be subject to the tenancy, just as it would be subject to any other latent defect in the property.¹³³ When buying a foreclosure property, the buyer sale may occur at an auction.¹³⁴ Although a list of foreclosure property is advertised prior to the auction, there are buyers who may not see the listing until the day of the auction, and may not get the time to inspect the property in person.¹³⁵ Therefore, the proposed law will require banks to disclose that the property is tenant occupied in the description of the auction sale.¹³⁶ This condition will require the bank to establish if there is a tenant on the property during the foreclosure proceeding.¹³⁷

Prior to an action that will affect an interest in property, a state must provide notice to apprise interested parties of the pendency of the action, and afford them an opportunity to present their objections.¹³⁸ When the

129. HIBBARD CONSTRUCTION, *supra* note 126.

130. *See Due Diligence When Buying Real Estate*, ENTREPRENEURIAL INSIGHTS, (Sept. 20, 2014), <http://www.entrepreneurial-insights.com/due-diligence-when-buying-real-estate/> (explaining the due diligence period, and that it is done prior to signing a contract); *see also* HOME FINDER, *supra* note 118 (explaining the non-standard process, and the pre-closing checklist).

131. *See* DUKEMINIER ET AL., *supra* note 88, at 582–92.

132. *Sale of a house*, TENANCY SERVICES, <https://tenancy.govt.nz/ending-a-tenancy/change-of-landlord-or-tenant/sale-of-a-house/> (last visited Nov. 14, 2015).

133. *Id.* (“When a rented property is sold, the tenancy continues and the new owner becomes the new landlord.”).

134. HOME FINDER, *supra* note 118 (explaining the process of purchasing a home at auction).

135. *Id.*

136. *See supra* Part V (discussing the uncertainty tenants face with conflicting laws and the need for a better approach).

137. *See* Amy Loftsgordon, *Deceptive Foreclosure Practices: When Banks Treat Occupied Homes as Vacant*, NOLO, <http://www.nolo.com/legal-encyclopedia/deceptive-foreclosure-practices-when-banks-treat-occupied-homes-vacant.html> (describing the process the bank takes by hiring a field service company to inspect the property and determine its occupancy status).

138. *See The Foreclosure Process*, OLYMPIA TITLE,

lender files for foreclosure, the homeowner is served with a complaint.¹³⁹ This provides the homeowner with notice of the litigation, and the homeowner can prepare for what lies ahead.¹⁴⁰ In order to comply with Florida law, parties having an interest in the properties that are subject to foreclosure must be provided with such notice.¹⁴¹ This notice is given to the homeowner; however, the tenant is frequently not served with the complaint.¹⁴² Since banks ascertain interested parties from a title report, tenants are usually omitted in the complaint because their leases are not recorded, which thus results in their absence from title searches of the property.¹⁴³ In order to resolve this problem, banks should be required to determine if there is a tenant with an interest in the property by any other means necessary.¹⁴⁴

<http://www.olympiatile.org/pdf/state%20of%20florida%20foreclosure%20process.pdf> (explaining that banks obtain a title report for foreclosure to ascertain interested parties to be named in the complaint).

139. See Amy Loftsgordon, *How To Respond To a Foreclosure Summons*, ALL LAW, <http://www.alllaw.com/articles/nolo/foreclosure/respond-summons.html> (explaining the complaint, notice of *lis pendens*, and summons in a foreclosure action).

140. *Id.* (explaining that a complaint and summons informs the borrower that an answer must be filed if the lawsuit will be contested).

141. *Id.*; *Foreclosure by Judicial Sale*, FIND LAW, <http://realestate.findlaw.com/foreclosure/foreclosure-by-judicial-sale.html> (last visited Jan. 30, 2016). Parties having an interest in the property include: owner of the property, mortgagor, junior lien holders, parties who are in possession of the property (such as residential tenants), parties holding easement or servitude rights (such as home associations), parties with non-possessory interests in the property, persons claiming an interest in the property under a statutory lien or encumbrance created subsequent to the recording or filing of the mortgage being foreclosed. See FIND LAW, *supra*; Loftsgordon, *supra* note 139.

142. Anthony Clark, *Foreclosures Can Be Nightmare for Renters*, THE GAINESVILLE SUN, (July 1, 2009), <http://www.gainesville.com/article/20090701/ARTICLES/907011002?Title=Foreclos> (describing how the Clerk of Court's Office in Alachua County decided to stop issuing summonses to tenants). Steve Lehr (a process server who served tenants with summonses) explains his concern after the court stopped issuing summonses to tenants, adding, "many renters won't find out about the foreclosures until they are evicted by new owners with little time to find new housing." *Id.*

143. See OLYMPIA TITLE, *supra* note 138 (explaining how the bank determines who to name in the complaint based on a title search of the public records); Mark Morfopoulos, *The Art Of Reviewing A Leasehold Title Insurance Commitment*, MEISLIK & MEISLIK, (Jan. 17, 2010), http://www.meislik.com/articles/art_reviewing_leasehold_title_commitment/. Leases are not usually recorded in public records, and, therefore, tenants with an interest in the property would not be shown when a title search is performed. Morfopoulos, *supra*.

144. See Loftsgordon, *supra* note 137 (explaining that banks hire field service companies to perform services on behalf of the bank). Field service companies provide physical inspection and property preservation. *Id.*

VII. CONCLUSION

Due to the foreclosure crisis affecting Florida, the current foreclosure procedures and the prior legal framework have become outdated or expired, which calls for an alternative solution.¹⁴⁵ This comment validates the existing problem in the foreclosure process, which is the deprivation of tenant rights.¹⁴⁶ By creating a rule that balances the interests of lenders, homeowners, and tenants, a “foreclosure law will ensure fairness and return certainty to the foreclosure process, which, in turn, will bring vitality to the United States housing market and propel economic recovery.”¹⁴⁷

145. *See supra* Part III (discussing the expired Federal law passed by Congress to aid tenants).

146. *See supra* Parts II and III.

147. Mason, *supra* note 19, at 93.