

NEW FEDERAL LAW PROTECTS TENANTS IN FORECLOSED PROPERTIES
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The Protecting Tenants at Foreclosure Act, PL 111-22 became effective May 20, 2009. It applies to foreclosures through December 2012 when the law sunsets.

The days of tenants getting 30 days notice to vacate after a foreclosure sale are gone for awhile. *See* Tex. Prop. Code § 24.005(b). The new federal law enables a bona fide tenant (defined in the Act) who is leasing premises that are foreclosed upon to continue occupancy through the FULL TERM of the lease unless the new owner intends to use the property as his primary residence (in which case the new owner still must give the tenant 90 days notice to vacate). If the lease has expired or is month-to-month, the tenant is still entitled to a 90 day notice to vacate. The tenant still has to abide by the terms of the lease and pay rent, and the new owner (the buyer at the foreclosure sale which is often a lender) has to abide by the lease and other applicable law. Note the Act applies to foreclosures of all residential property not just federally related mortgage loans or single family properties. Tenants of multifamily property, condos, even those renting a mobile home (where it was attached to real estate and sold at a foreclosure sale) are all protected by the Act.

In short ...

Q. Can the new owner of property purchased at a foreclosure sale make a tenant of the property leave right away?

A. No. The new owner must honor the lease agreement (unless the new owner intends to use the property as his primary residence). If the lease agreement is expired or it is a month-to-month tenancy, the new owner still must give the tenant a 90 day notice to vacate.

The Act also applies to Section 8 voucher housing and states that a foreclosure does not constitute “other good cause” for termination of an existing Section 8 lease (except if the new owner intends to occupy the property as his primary residence). The Act states that the new owner assumes both the lease and the housing assistance payments contract. Although more guidance may be coming from HUD, the Act is self-implementing. Per a letter from one HUD Director dated June 15, 2009 (New England PIH Advisory Letter #09 02), the change in the law affects all Section 8 tenants, even those living in units that have been foreclosed upon prior to the effective date of the Act.

It will undoubtedly take time before foreclosure attorneys, lenders, and judges become familiar with this new law so advocates and legal aid offices should be prepared to explain it for some time to come. Tenants also will not be familiar with the law, and if a tenant fails to pay rent to the new owner, then the same termination and eviction laws apply. Tenants may also find themselves being offered cash to leave voluntarily (“cash for keys”), if other methods, deceptive and otherwise, prove ineffective.

Finally, the Act grants tenants a “right” not an obligation to continue the lease. Barring unique facts including different language in the security instrument, Texas foreclosure law generally allows the new purchaser and the tenant to continue the lease by consent –

it does not require either to continue the lease. Before the tenant can be bound to the new owner, the tenant must expressly or impliedly affirm the lease.

Leases receive the same treatment as other encumbrances. Thus, a lease executed before the deed of trust lien is superior to and not extinguished by foreclosure, and the purchaser at the trustee's sale becomes the new landlord. Conversely, leases executed after the recording of the deed of trust may be terminated at the foreclosure sale. However, the purchaser at the sale and the tenant may continue the lease; if the tenant offers and the purchaser accepts rent payments after the foreclosure, they have impliedly done so.

W. Mike Baggett, *Foreclosure Update Including Foreclosing Home Equity Loans*, SBOT 25th Annual Advanced Real Estate Law Course (2003); *see also Peterson v. NCNB Texas Nat'l Bank*, 838 S.W.2d 263, 266 (Tex. App.--Dallas 1992, no pet.).

Thus, tenants who do not wish to continue the lease agreement with the new owner should think twice before continuing to pay rent without seeking the advice of counsel; otherwise, they may be deemed to have continued the lease agreement. The clients we see will have more than likely refused to pay and vacated the premises forcibly or voluntarily which clearly avoids any possible chance of affirmation (and obligation to lease). Then the fight over deposits, damaged carpet and credit reports will go forward as per usual. I look forward to the day when deposits are escrowed rather than spent, interest is paid, and tenants have the right to place something on the landlord's credit report. But until then, this new federal law is quite an improvement given that this last session the Texas Legislature could not even manage to give tenants 60 days notice to vacate after a foreclosure (see e.g., SB 472, 81st Tex. Leg. R.S. which did not get caught up in the voter identification bill slow down). It is nice to know that our bailout money was spent well – on local lender PACs and lobbyists.