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Holding the Door Open for Tenants at Foreclosure: Reforming the Protecting Tenants at Foreclosure Act

Nicholas Logothetis

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Part I: Introduction

In 2009, Congress enacted the Protecting Tenants at Foreclosure Act (“PTFA”) as part of its overall response to the Great Recession of 2009.¹ The law was designed to protect tenants living in foreclosed property from sudden evictions stemming from the subprime mortgage crisis.² While the PTFA provides substantial protection to tenants facing foreclosure, the law appears to fall short of its intended purpose in a number of ways. The PTFA and its legislative history are rife with ambiguities and limitations that restrict its ability to effectively protect tenants in the face of foreclosure.³ For instance, in the absence of any constitutional justifications from Congress, many courts have held that the PTFA will only protect tenants in federally related residential foreclosures, rendering the law unconstitutional in cases where a mortgage is governed by state law.⁴ In addition, there is a growing consensus among courts that the PTFA does not create a private right of action for tenants seeking indemnification against successors-in-interest (those who take the property after mortgage default), who fail to comply with the PTFA’s requirements.⁵ Finally, the law is

¹ 65 A.L.R. Fed. 2d 217; Protecting Tenants at Foreclosure Act, Pub. L. No. 111-22, 123 Stat. 1632, 1660-62 (2009) (Note to 12 U.S.C.A. § 5220); Emergency Economic Stabilization Act, 12 U.S.C.A §§ 5201 et seq (2008).

² *Nativi v. Deutsche Bank Nat. Trust Co.*, 09-06096 PVT, 2010 WL 2179885 (N.D. Cal. May 26, 2010).

³ See Peter S. Goodman, *Foreclosures Force Ex-Homeowners to Turn to Shelters*, N.Y. Times, Oct. 19, 2009, at A1, available at http://www.nytimes.com/2009/10/19/business/economy/19foreclosed.html?_r=0.

⁴ See *GMAC Mortg., LLC v. Taylor*, 27 Misc. 3d 550, 899 N.Y.S.2d 802 (Dist. Ct. 2010); *Collado v. Boklari*, 27 Misc. 3d 161, 892 N.Y.S.2d 731 (Dist. Ct. 2009).

⁵ See *Citibank, N.A. v. Corey*, 2012 WL 1552888 (E.D. Cal. 2012); *Deutsche Bank Nat. Trust Co. v. Doe*, 2010 WL 4683923 (D. Conn. 2010); *Patriot Bank v. Monroe*, 2011 WL 5105755 (E.D. Tex. 2011).

scheduled to sunset on December 31, 2014, leaving tenants subject to foreclosures in jeopardy in a time where foreclosure rates vary wildly throughout the country.⁶

In light of the continued increase in foreclosure rates among many states and the limited protection the PTFA affords to those facing foreclosure, this note will argue that the PTFA should be extended indefinitely, and its terms clarified to give greater protection to tenants subject to foreclosure. In particular, the language of the PTFA, which suggests that it will apply to all residential mortgages (regardless of whether the mortgage is federally related), should be found constitutional. Furthermore, the PTFA should be amended to provide greater remedies to tenants and allow a private right of action against successors-in-interest. The PTFA should also place the burden of proof on the successor-in-interest when challenging whether a tenancy falls under the protection of the law. In addition, Congress should look to the provisions of various tenant-protecting state legislation to further amend the PTFA, if it reevaluates the statute before it is scheduled to sunset. Finally, the PTFA should set forth the respective obligations of the landlord and the tenant during the foreclosure proceeding. Although these amendments to the law are ideal, because of the recent sixteen day government shutdown, such a reevaluation of the PTFA may not be realistic (at least for the time being) given the propensity of congress to disagree.⁷

Part II of this Note will explore the recent trends in residential foreclosures and how tenants and other property owners are affected by such foreclosures. It will also analyze the development and the particular terms of the PTFA as well as address some of the enforcement and preemption issues the law faces. Part III of this Note argues in greater detail how the PTFA should be clarified

⁶Protecting Tenants at Foreclosure Act, Pub. L. No. 111-22, 123 Stat. 1632, 1660-62 (2009).

⁷ Jonathan Weisman & Ashley Parker, *Republicans Back Down, Ending Crisis Over Shutdown and Debt Limit*, THE NEW YORK TIMES (Oct. 16, 2013), http://www.nytimes.com/2013/10/17/us/congress-budget-debate.html?_r=0.

and expanded upon by examining the provisions of comparable state laws. Part IV concludes this Note.

Part II: Background and Overview of the PTFA

Congress passed the PTFA to protect tenants living in property subject to foreclosure during the Great Recession.⁸ Nevertheless, Congress neither explained which agency would be responsible for enforcing the PTFA, nor how the law would preempt conflicting state and local legislation.

A. The consequences of sudden foreclosures and the recent trends in the subprime mortgage crisis

While academics seem to regard the recession as officially over, foreclosure rates in 2013 have continued to rise nationwide.⁹ Such increases may be the result of improving prices and demand for real property, which make banks more willing to push homes through the foreclosure process.¹⁰ Previously, between January 2007 and December 2011, more than four million American properties were lost to foreclosure as a result of the subprime mortgage crisis.¹¹ Subsequently, in 2012 alone, approximately 2.3 million foreclosure filings were reported on over 1.8 million properties.¹² In addition, more than half of the country continues to suffer from a steady

⁸ See Protecting Tenants at Foreclosure Act, Pub. L. No. 111-22, 123 Stat. 1632, 1660-62 (2009).

⁹ John S. Tobey, *The Great Recession Is Dead: 10 Steps For Success In 2014*, FORBES MAGAZINE (Dec. 23, 2013, 6:03 PM), <http://www.forbes.com/sites/johntobey/2013/12/23/the-great-recession-is-dead-ten-steps-for-success-in-2014/>; Dan Levy & Heather Perlberg, *Foreclosures Jump as Banks Bet on Rising U.S. Home Prices*, BLOOMBERG PERSONAL FINANCE (Jun. 13, 2013, 2:26 PM), <http://www.bloomberg.com/news/2013-06-13/foreclosures-jump-as-banks-bet-on-rising-u-s-home-prices.html>.

¹⁰ Dan Levy & Heather Perlberg, *Foreclosures Jump as Banks Bet on Rising U.S. Home Prices*, BLOOMBERG PERSONAL FINANCE (Jun. 13, 2013, 2:26 PM), <http://www.bloomberg.com/news/2013-06-13/foreclosures-jump-as-banks-bet-on-rising-u-s-home-prices.html>.

¹¹ Pam Bennett, *The aftermath of the Great Recession: Financially fragile families and how professionals can help*, NORTH CAROLINA STATE UNIVERSITY (May 01, 2012), <http://ncsu.edu/ffci/publications/2012/v17-n1-2012-spring/bennett.php>.

¹² RealtyTrac Staff, *1.8 Million U.S. Properties With Foreclosure Filings in 2012*, REALTYTRAC (Jan. 14, 2013), <http://www.realtytrac.com/content/foreclosure-market-report/2012-year-end-foreclosure-market-report-7547>.

increase in foreclosure activity.¹³ In particular, New Jersey witnessed a 55 percent increase in annual foreclosure rates in 2012, the highest in the country.¹⁴

Steadily increasing foreclosure rates have given rise to frightening consequences for a broad range of people. Increases in foreclosure were at least partially responsible for the rise in family homelessness during the Great Recession of 2009.¹⁵ In addition, some research suggests that foreclosures are especially detrimental to families with children, who are forced to transfer from school to school, which is an experience that often negatively impacts their early stages of development.¹⁶

For tenants who face foreclosure, many are given inadequate notice of their impending foreclosure, which limits their ability to gather the resources to relocate.¹⁷ Unlike the owner of a single-family home, a tenant is unlikely to have sufficient notice of his impending eviction.¹⁸ Tenants are therefore especially vulnerable to abrupt foreclosures and are often unaware of their rights in such proceedings.¹⁹ Tenants and renters represent a significant portion of those in danger of foreclosure.²⁰ According to a 2012 study by the National Low Income Housing Coalition, tenants comprise approximately 40 percent of families affected by foreclosures and rental properties make up an estimated 20 percent of all foreclosures.²¹

¹³ *Id.*

¹⁴ *Id.*

¹⁵ Ralph Da Costa Nunez & Linda Bazerjian, *Foreclosures and Homelessness: Understand the Connection*, INSTITUTE FOR CHILDREN, POVERTY, and HOMELESSNESS (Jan. 2013), http://www.icphusa.org/filelibrary/ICPH_policybrief_ForeclosuresandHomelessness.pdf.

¹⁶ *Id.*

¹⁷ Willard Shepard, *South Florida Renter Caught Up in Foreclosure Action Gets Evicted*, NBCMIAMI.COM, Apr. 6, 2013, <http://www.nbcmiami.com/news/local/South-Florida-Renter-Caught-Up-in-Foreclosure-Action-Gets-Evicted-201790781.html>.

¹⁸ See 65 A.L.R. Fed. 2d 217 (Originally published in 2012).

¹⁹ Creola Johnson, *Renters Evicted en Masse: Collateral Damage Arising from the Subprime Foreclosure Crisis*, 62 Fla. L. Rev. 975, 982 (2010).

²⁰ Shambhavi Manglik, *Renters in Foreclosure: A Fresh Look at an Ongoing Problem*, NATIONAL LOW INCOME HOUSING COALITION (Sep. 2012), http://nlihc.org/sites/default/files/Renters_in_Foreclosure_2012.pdf.

²¹ *Id.*

In one situation, Sebastian Rose, a landscaper in south Florida saw his life “come apart . . . as he and his family were evicted from the place they called home for more than three years.”²² Although Rose was current on his rent, his landlord would not accept any payments because the entire property was going through foreclosure.²³ Rose had nowhere to relocate, no house, and “no time to get a house.”²⁴ Rose scrambled to salvage what he could from his home and even went to court to try and save his family home, but the eviction order was ultimately signed.²⁵ Florida officials noted, “Rose is a prime example of what is happening to homeowners and renters,” and many of them are unaware of the rights and remedies available to them.²⁶ As shown by Rose’s experiences, stronger tenant protective legislation on a federal scale is needed to protect renters from unnecessary hardship and potential homelessness.

B. Historical Background and the Particulars of the PTFA

By October 8, 2008, Congress passed the Emergency Economic Stabilization Act in an effort to protect home values and homeownership (among other things) as well as to promote jobs and economic growth in the midst of the economic crisis.²⁷ As part of that initiative, Congress also passed the PTFA to protect the rights of tenants residing in properties subject to sudden foreclosure.²⁸ Specifically, the PTFA requires any successor-in-interest to a foreclosed property (subject to a federally-related mortgage loan) to provide bona fide tenants with at least a ninety-day notice prior to which they must vacate.²⁹ Despite its apparent restriction to tenancies subject to federally-related mortgage loans, the law goes on to provide that it will also apply to tenants

²² *Id.*

²³ *Id.*

²⁴ *Id.*

²⁵ *Id.*

²⁶ Shambhavi Manglik, *Renters in Foreclosure: A Fresh Look at an Ongoing Problem*, NATIONAL LOW INCOME HOUSING COALITION (Sep. 2012), http://nlihc.org/sites/default/files/Renters_in_Foreclosure_2012.pdf.

²⁷ Emergency Economic Stabilization Act, 12 U.S.C.A §§ 5201 et seq (2008).

²⁸ See Protecting Tenants at Foreclosure Act, Pub. L. No. 111-22, 123 Stat. 1632, 1660-62 (2009).

²⁹ Protecting Tenants at Foreclosure Act, Pub. L. No. 111-22, 123 Stat. 1632, 1660-62 (2009).

residing in “any dwelling or residential real property after the date of [its] enactment.”³⁰ The PTFA’s ninety-day notice requirement also applies to tenancies “without a lease or with a lease terminable at will under state law.”³¹ Furthermore, the PTFA applies to Section 8 tenancies by amending the language of the United States Housing Act of 1937.³²

In addition, the PTFA also requires the immediate successor-in-interest to allow the bona fide tenant to reside on the property until the end of the tenant’s lease, provided that the lease commenced before the notice of foreclosure, unless the successor-in-interest will occupy the property as his primary residence.³³ In the latter instance, a successor-in-interest can terminate the existing lease, but must still provide the tenant with a ninety-day notice to vacate.³⁴ The law also notes that its provisions will “not affect the requirements for termination of any federal or [s]tate-subsidized tenancy or of any [s]tate or local law that provides longer time periods or other additional protections for tenants.”³⁵

The PTFA defines the term “federally-related mortgage loan” as having “the same meaning as in section 3 of the Real Estate Settlement Procedures Act of 1974.”³⁶ Specifically, this is a mortgage secured on residential real property that:

- (1) is made... by any lender the deposits or accounts of which are insured by any agency of the Federal Government...or
- (2) is made...by...any other officer or agency of the Federal Government or under or in connection with a housing or urban development program administered by the Secretary...; or

³⁰ *Id.*

³¹ *Id.*

³² Carsten Grellmann, Why State Courts May Prove Most Effective at Allowing the Protecting Tenants at Foreclosure Act to Protect Tenants, J. Affordable Housing & Community Dev. L., 2012, at 295, 299; 42 U.S.C. § 1437f (2013) (Section 8 of the Housing Act of 1937 authorizes rental assistance payments to private landlords on behalf of low-income households).

³³ *Id.*

³⁴ Elan Stavros Nichols, Unanswered Questions Under the Pfta: Exploring the Extent of Tenant Protections in Foreclosed Properties, J. Affordable Housing & Community Dev. L., Winter 2011, at 153, 155.

³⁵ *Id.*

³⁶ Protecting Tenants at Foreclosure Act, Pub. L. No. 111-22, 123 Stat. 1632, 1660-62 (2009).

(3) is intended to be sold by the originating lender to the Federal National Mortgage Association, the Government National Mortgage Association, the Federal Home Loan Mortgage Corporation, or a financial institution from which it is to be purchased by the Federal Home Loan Mortgage Corporation; or

(4) is made...by any “creditor”... who makes or invests in residential real estate loans aggregating more than \$1,000,000 per year.³⁷

In other words, a federally-related mortgage is one that is either insured by a federal agency or made by a creditor whose real estate loan is significant enough to affect interstate commerce. In the third quarter of 2013, there were 13,182,147 total mortgage holders in the United States, at least 4,986,105 of which were federally related under 12 U.S.C.A. § 2602.³⁸

Additionally, the PTFA provides a specific definition of what constitutes a *bona fide tenant* as one in which:

- (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.³⁹

Stated differently, a *bona fide tenant* is neither the mortgagor nor a member of the mortgagor's immediate family and the tenancy itself must have formed from an arms-length transaction.

³⁷ 12 U.S.C.A. § 2602 (2011).

³⁸ BOARD OF GOVERNORS OF THE FEDERAL RESERVE SYSTEM, MORTGAGE DEBT OUTSTANDING (2013), <http://www.federalreserve.gov/econresdata/releases/mortoutstand/current.htm>

³⁹ Protecting Tenants at Foreclosure Act, Pub. L. No. 111-22, 123 Stat. 1632, 1660-62 (2009).

On July 21, 2010, the language of the PTFA was amended in two important ways.⁴⁰ First, the amendment clarified the phrase “the date of such notice of foreclosure” referred to in regards to the rights of any bona fide tenant as “the date on which complete title to a property is transferred to a successor entity or person as a result of an order of a court or pursuant to provisions in a mortgage, deed of trust, or security deed.”⁴¹ Second, the PTFA was originally scheduled to sunset on December 31, 2012, but the amendment provides that it will continue until at least December 31, 2014.⁴² Although the amendment extended the PTFA and provided some minor clarification, this Note will now demonstrate how such changes did not sufficiently address the law’s major shortcomings such as the apparent lack of administrative enforcement.

C. Current Enforcement Issues of the PTFA

The PTFA gives minimal instruction regarding how it should be enforced.⁴³ As a result, many jurisdictions and federal agencies have been forced to interpret the law with little congressional guidance, furthering the confusion behind this seemingly simple act.⁴⁴ Because Congress did not specify which federal agency would be responsible for enforcing the PTFA, federal agencies which oversee mortgage lenders have, to some extent, expressed their intent to ensure compliance with the act.⁴⁵ Nonetheless, the PTFA has not been effectively enforced by any administrative body, leaving tenants without an effective means of redress in the event that their rights are violated.”⁴⁶

Sandra F. Braunstein, the director of the Division of Community and Consumer Affairs, issued a letter indicating that the PTFA “is self-executing; no federal agency has authority to issue

⁴⁰ Public Law 111-203, § 1484, 124 Stat. 2203 (2010).

⁴¹ *Id.*

⁴² *Id.*

⁴³ Nichols, *supra* note 34 at 300.

⁴⁴ Nichols, *supra* note 34 at 305.

⁴⁵ Nichols, *supra* note 34 at 300.

⁴⁶ *Id.*

regulations implementing the law or to interpret the law.”⁴⁷ However, Braunstein’s letter also suggests that the Federal Reserve Board ought to assure compliance with the PTFA by determining its responsibilities under the law and to assess “compliance management policies and procedures” related to its duties under the PTFA.⁴⁸ Since September 2013, the Federal Reserve Board has not commenced a single enforcement action under the PTFA.⁴⁹

In addition to the Federal Reserve Board, the Office of the Comptroller of the Currency (OCC), an agency charged with regulating national banks, and the Federal Deposit Insurance Corporation (FDIC), which regulates state banks, have both issued letters suggesting their willingness to ensure that banks comply with the PTFA.⁵⁰ In fact, the OCC has drafted a form requiring banks to disclose whether they have complied with the specific procedures of the PTFA when initiating relevant foreclosure proceedings.⁵¹ Conversely, the FDIC has not released its method of ensuring compliance with the PTFA.⁵² Despite the intent of these agencies, neither the OCC nor the FDIC have issued any enforcement efforts with respect to the PTFA as of September 2013.⁵³

⁴⁷ Letter from Sandra F. Braunstein, Dir., Div. of Consumer & Comty. Affairs, to Officers and Managers in Charge, Consumer Affairs Sections, Bd. of Governors of the Fed. Reserve Sys. (July 30, 2009) (on file with author), available at www.federalreserve.gov/boarddocs/caletters/2009/0905/caltr0905.htm.

⁴⁸ *Id.*

⁴⁹ Fed. Reserve Bd., Archive of Enforcement Actions by Year, www.federalreserve.gov/newsevents/press/enforcement/2013enforcement.htm (last visited Sep. 16, 2013).

⁵⁰ See Letter from Ann F. Jaedicke, Deputy Comptroller for Compliance Policy, to Chief Executive Officers of All National Banks, Department and Division Heads, and All Examining Personnel, Office of the Comptroller of the Currency (Jan. 8, 2010) (on file with author), available at www.occ.gov/news-issuances/bulletins/2010/bulletin-2010-2.html; Fed. Deposit Ins. Corp., Financial Institution Letters: Protecting Tenants at Foreclosure Act (Sept. 28, 2009), www.fdic.gov/news/news/financial/2009/fi109056.html.

⁵¹ Office of the Comptroller of the Currency, Protecting Tenants at Foreclosure Act of 2009: Background and Summary 3-4 (Jan. 8, 2010), www.occ.gov/news-issuances/bulletins/2010/bulletin-2010-2a.pdf.

⁵² Grellmann, *supra* note 32 at 304.

⁵³ Office of the Comptroller of the Currency, Archive of Enforcement Actions by Year, <http://apps.occ.gov/EnforcementActions/> (last visited Sep. 17, 2013); Telephone interview with Senior Policy Analyst, Fed. Deposit Ins. Corp. (Sept. 2010).

Lack of enforcement from these agencies is not necessarily the result of negligence or bad faith. The PTFA provides no guidance or compliance requirements other than to provide notice to the tenant.⁵⁴ For example, if a successor-in-interest were to claim the foreclosed property as his primary residence, wherein a tenant may not have the right to remain on the property until his lease expires, the tenant would simply have to rely on the successor's word because the PTFA does not call for any affidavit or proof.⁵⁵ Therefore, while various administrative agencies have expressed their willingness to assure compliance with the PTFA, given the limited detail provided by the PTFA and the lack of any explanatory regulations, such assurances are unlikely to translate into actual enforcement.⁵⁶

D. Preemption issues with the PTFA

The PTFA may encounter some difficulty in the face of conflicting state laws. On the one hand, it has been well-established that the PTFA does not preempt similarly situated state laws which afford tenants greater protection.⁵⁷ The court in *PNC Bank, Nat. Ass'n v. Branch*,⁵⁸ upheld this concept, stressing that the PTFA “specifically allows [for] [s]tate laws that are more favorable to the tenant.” On the other hand, courts have held that the PTFA cannot preempt state laws that provide a basis to evict a tenant.⁵⁹

In *Wells Fargo Bank v. Lapeen*,⁶⁰ the court rejected the argument that the PTFA preempts ejection actions by successors-in-interest attempting to oust tenants by state law. In that case,

⁵⁴ Eloisa Rodriguez-Dod, Stop Shutting the Door on Renters: Protecting Tenants from Foreclosure Evictions, 20 Cornell J.L. & Pub. Pol'y 243, 252 (2010).

⁵⁵ *Id.*

⁵⁶ Grellmann, *supra* note 32 at 300.

⁵⁷ Protecting Tenants at Foreclosure Act, Pub. L. No. 111-22, 123 Stat. 1632, 1661 (2009) (“nothing under this section shall affect the requirements... of any State or local law that provides longer time periods or other additional protections for tenants.”).

⁵⁸ *PNC Bank, Nat. Ass'n v. Branch*, No. CV 11-596-PHX-JAT, 2011 WL 2981806, at *1 (D. Ariz. July 22, 2011).

⁵⁹ Nichols, *supra* note 34 at 154.

⁶⁰ *Wells Fargo Bank v. Lapeen*, No. C 11-01932 LB, 2011 WL 2194117, at *4 (N.D. Cal. June 6, 2011).

the plaintiff, Wells Fargo, acquired title to a property through a foreclosure proceeding against Lapeen, the defendant and former owner of the property.⁶¹ After acquiring title, Wells Fargo served a written notice to vacate on Lapeen containing the applicable portions of the PTFA.⁶² Shortly after Wells Fargo served Lapeen with a notice to vacate, it then filed an unlawful detainer action against Lapeen in California state court (which was later removed to federal court by the defendant).⁶³

The defendant argued that the PTFA creates a “federal ejectment” claim that should preempt a state law if it affords lesser protection to tenants subject to foreclosure than would the PTFA.⁶⁴ In this case, the PTFA provided greater protections to tenants than did the California state law that substituted the PTFA’s ninety-day notice requirement for a sixty-day notice requirement.⁶⁵ By the defendant’s reasoning, it would be impossible to evict a tenant of foreclosed property under California law without complying with the ninety-day notice requirement of the PTFA.⁶⁶ The Court ultimately rejected the defendant’s argument, reasoning that an unlawful detainer action is purely a creature of California state law and that the PTFA, as its language reads, cannot “affect the requirements for termination of any Federal-or State-subsidized tenancy.”⁶⁷

Similarly, in *Wescom Credit Union v. Dudley*,⁶⁸ a tenant facing foreclosure argued that the PTFA converts a state unlawful detainer action into a federal claim because the PTFA imposes restrictions on when a successor-in-interest can evict a tenant. The court maintained that the PTFA cannot preempt a state unlawful detainer action because the “mere presence of a federal issue in a

⁶¹ *Id* at 1.

⁶² *Id.*

⁶³ *Id.*

⁶⁴ *Id* at 2.

⁶⁵ *Wells Fargo Bank*, 2011 WL 2194117, at* 2.

⁶⁶ *Id* at 2.

⁶⁷ *Id* at 2.

⁶⁸ *Wescom Credit Union v. Dudley*, No. CV10–8203 GAF (SSX), 2010 WL 4916578, at *2 (C.D.Cal. Nov.22, 2010).

state cause of action does not automatically confer federal-question jurisdiction.”⁶⁹ The court also held that the PTFA cannot be read to imply a federal cause of action for tenants, but instead creates a federal defense for tenants in state court unlawful detainer actions.⁷⁰

The effect of these cases seems to not only remove the possibility of asserting a private cause of action in federal court for lack of subject-matter jurisdiction, but it also suggests that courts will defer to the provisions of state-laws in foreclosure proceedings, even if such laws provide less protection than the PTFA.⁷¹ Such reasoning reduces the PTFA to a limited federal defense for tenants residing in properties subject to federally-related mortgage foreclosures.⁷²

Part III: Limitations and Potential Solutions for the PTFA

The PTFA may be improved by mirroring similar tenant-protective state laws containing more rigorous notice provisions that allow tenants a private right of action against non-complying successors-in-interest. Furthermore, the PTFA can be constitutionally expanded to protect tenants residing in properties not subject to a federally related mortgage.

A. Courts are reluctant to extend the PTFA to all residential mortgages despite instructions to do so otherwise by the Department of Housing and Urban Development

Courts do not agree on whether the PTFA applies only to federally-related mortgages, or to all residential property mortgages.⁷³ According to the language of the PTFA:

In the case of any foreclosure on a federally-related mortgage loan or on any dwelling or residential real property after the date of enactment of this title, any immediate successor in interest in such property pursuant to the foreclosure shall assume such interest

⁶⁹ *Id* at 2-3 (citing *Merrell Dow Pharm. v. Thompson* 478 U.S. 804, 813 (1986)).

⁷⁰ *Id.*

⁷¹ See *Wells Fargo Bank*, 2011 WL 2194117, at* 1; *Wescom Credit Union v. Dudley*, 2010 WL 4916578, at *2.

⁷² *Id.*

⁷³ See 65 A.L.R. Fed. 2d 217 (Originally published in 2012).

subject to (1) the provision by such successor in interest of a notice to vacate to any bona fide tenant at least 90 days before the effective date of such notice; and (2) the rights of any bona fide tenant, as of the date of such notice of foreclosure.⁷⁴

In *Collado v. Boklari*,⁷⁵ the court held that the language and scope of the PTFA is restricted to protecting tenants of properties subject to a federally related mortgage.⁷⁶ In reaching its decision, the District Court believed that the "or" between "federally-related mortgage loan" and "on any dwelling" was actually a scrivener's error likely inserted into the PTFA because of the haste by which the Emergency Economic Stabilization Act was made.⁷⁷ However, even if the PTFA was enacted as a hasty emergency measure, the PTFA was amended nearly a year after *Collado* was decided where it is likely that such an error would have been corrected.⁷⁸

The *Collado* court also argued that the PTFA cannot not apply to all residential mortgages because Congress does not have the constitutional authority to regulate the private relationship between a landlord and a tenant, "which is the province of state law . . . unless [the mortgage is] linked to United States spending through its federal housing agencies."⁷⁹ The concern raised in *Collado* has been mirrored in other courts, and suggests that if Congress had offered a constitutional justification for the PTFA, courts may be less hesitant to expand the scope of the PTFA to all residential mortgages.⁸⁰

In *Bank of America v. Owens*,⁸¹ the court suggested in dictum that since neither Congress nor any other federal entity has been given the opportunity to defend the PTFA's constitutionality,

⁷⁴ Protecting Tenants at Foreclosure Act, Pub. L. No. 111-22, 123 Stat. 1632, 1660-62 (2009).

⁷⁵ *Collado v. Boklari*, 892 N.Y.S.2d 731, 736 (N.Y. Dist. Ct. 2009).

⁷⁶ *Id.*

⁷⁷ *Id.* at 735-736.

⁷⁸ See Public Law 111-203, § 1484, 124 Stat. 2203 (2010).

⁷⁹ *Id.* at 735.

⁸⁰ *GMAC Mortg., LLC v. Taylor*, 27 N.Y.S.2d 802 (Dist. Ct. 2010).

⁸¹ *Bank of Am. v. Owens*, 903 N.Y.S.2d 667, 669 n.4 (N.Y. City Ct. 2010).

decisions like *Collado* which limit the scope of the PTFA cannot yet be treated negatively.⁸² Therefore, the court in *Owens* was unwilling to reach the conclusion drawn in *Collado*.⁸³ Instead, the court turned to the express instructions given by the United States Department of Housing and Urban Development (HUD) and reasoned that the PTFA should apply to all residential mortgages.⁸⁴ The instructions given by the HUD state that “[t]he responsibility for meeting the [PTFA’s] new tenant protection requirements applies to all successors-in-interest of residential property, regardless of whether a [f]ederally related mortgage is present.”⁸⁵ Despite the HUD’s instructions, tenants subject to foreclosure in non-federally related mortgages still face unsympathetic courts when their rights under the PTFA are violated.⁸⁶

B. Congress has the authority to expand the scope of the PTFA to include non-federally related mortgages

Commentators have argued that the PTFA itself, even when applied exclusively to federally-related mortgages, may be unconstitutional.⁸⁷ Some have speculated that the law infringes upon individual property rights, violates the rights of states, and is an illegitimate exercise of Congress’s Commerce Clause power.⁸⁸ According to the Constitution, Congress has the authority to “regulate Commerce with foreign Nations, and among the several States, and with the Indian tribes.”⁸⁹ Under the Supreme Court’s reasoning in *Gonzales v. Raich*,⁹⁰ Congress has the

⁸² *Id.*

⁸³ *Id.*

⁸⁴ *Id.*

⁸⁵ *Id.* (citing 74 Fed.Reg. 30106–02 (June 24, 2009)).

⁸⁶ See *GMAC Mortgage v. Taylor*, 899 N.Y.S.2d 802, 805 (N.Y. Dist. Ct. 2010) (it is unconstitutional for Congress to regulate landlord-tenant relationships unless the property in question is subject to a federally subsidized expenditure).

⁸⁷ Tony S. Guo, Comment, *Tenants at Foreclosure: Mitigating Harm to Innocent Victims Of The Foreclosure Crisis*, 4 DEPAUL J. FOR SOC. JUST. 215, 229 (2011).

⁸⁸ *Id.*

⁸⁹ U.S. Const. art. I, § 8, cl. 3.

⁹⁰ *Gonzales v. Raich*, 545 U.S. 1, 2 (2005).

power under the Commerce Clause to regulate “purely local activities . . . that have a substantial effect on interstate commerce.”⁹¹ Because today's real estate market “is both national and international in its scope . . . Congress could reasonably conclude that the total impact of such mortgages and their foreclosure[s] substantially affect commerce in more than one state.”⁹² Therefore, because of the involvement of both international banks and foreign financial firms in the mortgage industry, much of the conduct regulated by the PTFA cannot be said to be purely local in nature.⁹³

Even if the PTFA is scrutinized with respect to non-federally related mortgage foreclosures, it can still survive a constitutional challenge.⁹⁴ The Supreme Court has historically upheld a variety of federal legislation regulating intrastate economic activity that substantially affected interstate commerce.⁹⁵ The Supreme Court has held that the regulation of restaurants using primarily local suppliers, intrastate coal mining operations, hotels serving mainly intrastate guests, the cultivation and consumption of homegrown wheat, and intrastate extortionate credit transactions are all constitutional exercises of Congress's Commerce Power.⁹⁶ Given the constitutionality of Congressional regulation over such intrastate economic activity, extending the PTFA to non-federally related mortgages will likely be upheld as a legitimate exercise of Congresses' Commerce Power.⁹⁷ Foreclosures are not only responsible for increases in family homelessness and community blighting, but are also responsible for the nationwide decline in housing prices,

⁹¹ *Id.*

⁹² Symposium, *A Commerce Clause Standard For The New Millennium: “Yes” To Broad Congressional Control Over Commercial Transactions; “No” To Federal Legislation On Social And Cultural Issues*, 55 *ARK. L. REV.* 1213 (2003).

⁹³ Guo, *supra* note 87 at 230.

⁹⁴ *Id.*

⁹⁵ *Id.*

⁹⁶ *Id.* (citing *Katzenbach v. McClung*, 379 U.S. 294 (1964); *Hodel v. Virginia Surface Mining & Reclamation Ass'n, Inc.*, 452 U.S. 264 (1981); *Heart of Atlanta Motel, Inc. v. U. S.*, 379 U.S. 241 (1964); *Wickard v. Filburn*, 317 U.S. 111 (1942); *Perez v. U.S.*, 402 U.S. 146 (1971)).

⁹⁷ *See Id.*

residential investment, and auto sales between 2007 and 2009.⁹⁸ This appears to be the kind of intrastate activity with potentially significant interstate effects that Congress may regulate under the current interpretation of the Commerce Clause. The PTFA could therefore be constitutionally extended to all residential mortgages under the Commerce Clause, regardless of whether a mortgage is federally related.

Congress's ability to enforce the PTFA on all residential mortgages is not limited by the Tenth Amendment, which provides that the "powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."⁹⁹ In *Garcia v. San Antonio Metropolitan Transit Authority*,¹⁰⁰ the Supreme Court held that any federal statutes that are destructive of state sovereignty are unconstitutional exercises of Congress's Commerce Clause power. In addition, the Supreme Court reasoned that the real limit on the federal Commerce Power is through state participation in federal governmental, which itself ensures that federal legislation is not unduly burdensome on state power.¹⁰¹ The PTFA is neither destructive of state sovereignty nor unduly burdensome on state power.¹⁰² The PTFA merely provides tenants with certain rights to ensure they avoid the hardships of sudden foreclosures while limiting the rights of successors-in-interest.¹⁰³

Extending the scope of the PTFA to all residential mortgages also fits well within the limits of Congressional power as set forth by the Supreme Court in *New York v. United States*¹⁰⁴ and

⁹⁸ Atif Mian, Amir Sufi & Francesco Trebbi, *Foreclosures, House Prices, and the Real Economy* 3-4 (Nat'l Bureau of Econ. Research, Working Paper No. 16685, 2011).

⁹⁹ U.S. Const. amend. X.

¹⁰⁰ *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528, 545 (1985).

¹⁰¹ *Id.* at 556.

¹⁰² Guo, *supra* note 87 at 231.

¹⁰³ *Id.*

¹⁰⁴ *See New York v. U.S.*, 505 U.S. 144 (1992) (holding that Congress lacks the power to compel the States to enact some forms of legislation).

Printz v. United States.¹⁰⁵ Because the PTFA neither orders the states to pass any legislation nor compels state officers to enforce its provisions, extending the PTFA to non-federally related state mortgages does not infringe upon the rights of states.¹⁰⁶ The law only compels successors-in-interest to allow bona fide tenants to remain on the premises until their lease ends, or to provide ninety-days notice of their foreclosure.¹⁰⁷ Given the extent to which Congress can enact legislation under its Commerce Power and the fact that the PTFA does not violate state sovereignty, a state's rights constitutional argument against extending the PTFA to non-federally related mortgages will likely fail.

C. The PTFA should allow renters to bring suit against non-complying successors-in-interest or to at least subject them to greater penalties.

The PTFA would also greatly benefit renters by allowing them a private right of action against successors-in-interest or landlords who fail to comply with the act. However, many courts have not looked favorably on providing such a right of action under the PTFA.¹⁰⁸ This may be because the PTFA seems structured as a defensive mechanism, and not a means by which a tenant can bring an action to court.¹⁰⁹

Currently, the only remedy available under the PTFA is a dismissal of a successor-in-interest's eviction action should he fail to comply with the act. In *Pacific Realty Inv. Group, Inc. v. Sprangler*, the District Court for the Northern District of California held that a non-complying

¹⁰⁵ See *Printz v. U.S.*, 521 U.S. 898 (1997) (holding that the federal government may not compel state officers to enact or administer a federal regulatory program.).

¹⁰⁶ See *Guo*, *supra* note 87 at 231.

¹⁰⁷ Protecting Tenants at Foreclosure Act, Pub. L. No. 111-22, 123 Stat. 1632, 1660-62 (2009).

¹⁰⁸ See *e.g.*, *Nativi v. Deutsche Bank Nat. Trust Co.*, No. 09-06096 PVT, 2010 WL 2179885, at *2-5 (N.D.Cal. May 26, 2010) (Because Congress did not express its intent to create a private right of action, none is created under the PTFA); *Deutsche Bank Nat. Trust Co. v. Doe*, 2010 WL 4683923 (D. Conn. 2010) (no private right of action can be inferred from the PTFA).

¹⁰⁹ *Id.*

successor-in-interest would be unable to evict a tenant in a foreclosure proceeding.¹¹⁰ The court reasoned that the PTFA was structured in a way to merely provide a defense to tenants living in foreclosed property from the actions of successors-in-interest, and that the PTFA could provide no other remedies.¹¹¹ In other words, the PTFA can only be invoked once a foreclosure proceeding has been initiated and cannot be used as a basis to sue successors-in-interest.¹¹²

Some state laws take a more aggressive approach to ensure that successors-in-interest comply with tenant-protective legislation. For example, in Oregon, landlords are required to disclose of any potential foreclosure actions to tenants before signing a lease.¹¹³ Failure to do so allows tenants a private right of action to “recover twice the actual damages or twice the monthly rent, whichever is greater, and all prepaid rent.”¹¹⁴ In Minnesota, a landlord must “notify the prospective tenant in writing that the landlord has received . . . notice of a mortgage foreclosure sale” before entering into a lease.¹¹⁵ If a landlord does not comply with these requirements, he is subject to a civil penalty of up to five hundred dollars.¹¹⁶ In New Jersey, the penalties for non-complying successors-in-interest are much more severe. The successor-in-interest must “1) indicat[e] that [he] has lost ownership; 2) identify who the new owner is; and 3) instruct when, where, and to whom the rental payment should be sent.”¹¹⁷ If he fails to do so, pursuant to the New Jersey Foreclosure Fairness Act (NJFAA), the tenant may file a civil action against the successor-in-interest for “either triple damages or \$2,000 per violation, including the recovery of attorney’s

¹¹⁰ *Pacific Realty Inv. Group, Inc. v. Sprangler*, 2011 WL 6020572 (N.D. Cal. 2011)

¹¹¹ *See Id.*

¹¹² *See Id.*

¹¹³ Or. Rev. Stat. § 90.310 (2009).

¹¹⁴ Or. Rev. Stat. § 90.310 (2009).

¹¹⁵ Minn Stat. § 504B.151(a) (2013).

¹¹⁶ Minn Stat. § 504B.151(d) (2013).

¹¹⁷ Johnson, *supra* note 19 at 993 (citing Press Release, New Jersey Department of the Public Advocate, New Laws to Help Tenants in Foreclosed Properties (Feb. 22, 2010) (on file with author).

fees and costs.”¹¹⁸ The NJFAA also holds successors-in-interest responsible for any zoning violations should the property be abandoned.¹¹⁹

As the law stands now, the PTFA does not provide such actions for tenants or such penalties for successors-in-interest in the event the lessor does not comply with the law.¹²⁰ Providing such remedies to innocent tenants would strengthen the PTFA and hold lenders accountable for engaging in bad faith lending and negligent borrowing.¹²¹

D. Courts should place the burden of proof on successors-in-interest when challenging whether a tenancy was bona fide

Tenants facing foreclosure may face additional hurdles because they are often given the burden of proof to establish that their tenancy was “bona fide” within the meaning of the PTFA.¹²² However, according to former Senator John Kerry, the PTFA was not intended to place such burdens on “families in these precarious circumstances.”¹²³ He believed that tenants should not be forced to individually establish their rights under the PTFA.¹²⁴ In addition, in *Bank of America v. Owens*, the court held that tenants do not have to prove their “bona fide” status “before they are entitled to receive ninety days advance notice to vacate from a successor property owner.”¹²⁵ Instead, the successor-in-interest has the burden of proving that a tenancy is not bona fide and therefore not entitled to the notice requirements under the PTFA.¹²⁶ Given the potential for unequal

¹¹⁸ Johnson, *supra* note 19 at 994; See New Jersey Foreclosure Fairness Act, 2009 N.J. Sess. Law Serv. Ch. 296 (West).

¹¹⁹ *Id.*

¹²⁰ See Protecting Tenants at Foreclosure Act, Pub. L. No. 111-22, 123 Stat. 1632, 1660-62 (2009);

¹²¹ See Mark Jickling, *Causes of the Financial Crisis*, CONGRESSIONAL RESEARCH SERVICE (Apr. 09, 2010) <http://www.fas.org/sgp/crs/misc/R40173.pdf>.

¹²² See Federal Nat'l. Mortg. Ass'n v. Hammond, No. CV 11-00867, 2011 WL 2516498, at *2 (C.D. Cal. June 22, 2011) (holding that that the PTFA requires the tenant to raise the successor-in-interest's noncompliance with the law.); See also U.S. Bank Nat. Ass'n v. Hurtado, 899 N.Y.S.2d 806, 808 (Dist. Ct. 2010) (reasoning that the burden of proof is on the tenant to show that he or she is a bona fide tenant under the PTFA.)

¹²³ 155 Cong. Rec. S8978 (daily ed. Aug. 6, 2009) (statement of Sen. John Kerry)

¹²⁴ *Id.*

¹²⁵ *Owens*, 903 N.Y.S.2d at 671.

¹²⁶ *Id.*

bargaining power between an unsophisticated, innocent tenant and a large financial firm acting as trustee for a mortgage holder, the PTFA should place the burden on successors-in-interest when challenging the bona fide nature of the tenancy, or at least place a very light burden on the tenant to prove that the arrangement was bona fide.¹²⁷

E. The PTFA should include specific notice compliance provisions that mirror tenant-protective state laws.

The PTFA may benefit from mirroring similar tenant-protective state laws in areas where the law itself is silent. While not all states provide adequate protection for tenants subject to foreclosures, many states have much more comprehensive systems than the PTFA.¹²⁸ The PTFA itself gives almost no instruction as to how notice must be given to a tenant subject to foreclosure.¹²⁹ By omitting such instruction, a tenant may not be afforded the opportunity to effectively defend his stake in the leasehold.¹³⁰ The law also fails to contain any procedures through which a tenant can seek redress in the event that he fails to receive the notice called for under the PTFA.¹³¹ The PTFA should therefore be amended to include such procedures, and should look to various state laws for guidance.

In general, procedures under state law offer a more comprehensive system of notice and remedies available to tenants.¹³² For instance, in Louisiana, only a sheriff can provide written notice to a tenant after foreclosure proceedings have been initiated.¹³³ Should the sheriff fail to do so, the foreclosure will still be valid, but the successor-in-interest will be unable to remove a tenant

¹²⁷ Guo, *supra* note 87 at 239.

¹²⁸ Grellmann, *supra* note 32 at 255-256.

¹²⁹ *Id* at 253.

¹³⁰ *Id* at n.96.

¹³¹ *Id* at 253.

¹³² See e.g., Alaska Stat. § 34.20.070(c) (2008); 735 Ill. Comp. Stat. Ann. 5 / 15-1506(i)(2) (West 2009); Or. Rev. Stat. § 90.310 (2009).

¹³³ La. Code Civ. Proc. Ann. art. 2293(B)(2) (2013).

by a writ of possession.¹³⁴ In Hawaii, notice of the foreclosure must be published once a week for at least three consecutive weeks in a newspaper of general circulation within the area of the foreclosed property.¹³⁵ In Idaho, sufficient notice requires personal service upon the resident of the property.¹³⁶ Finally, in New Jersey, the notice requirements offer some of the strictest procedures in place to protect the rights of tenants.¹³⁷ New Jersey law prevents successors-in-interest from concealing a tenant's right to remain on the premises by forcing them to provide written notice stating that the tenant can only be evicted through formal court approval.¹³⁸ This process allows the tenant the right to be heard in court because mere notice of foreclosure cannot by itself evict a tenant.¹³⁹ In addition, written notice must also state that "it is unlawful for anyone to try to make the tenant leave by any tactic, including terminating utility services or failing to maintain the lease premises."¹⁴⁰ This provision alludes to the existing notice requirements already in place under the NJFAA that prohibits successors-in-interest from pressuring tenants to vacate their premises.¹⁴¹

Although the PTFA contains no such instructions, it is easy to conclude that the applicable notice requirements under a particular state law would apply.¹⁴² However, state laws vary considerably on what constitutes sufficient notice.¹⁴³ Some states like Georgia do not require that tenants receive any notice of foreclosure, where they would subsequently become tenants at

¹³⁴ *Id.*

¹³⁵ Haw. Rev. Stat. § 667-20 (West 2013).

¹³⁶ Idaho Code Ann. § 45-1506(2) (2012).

¹³⁷ Johnson, *supra* note 19 at 991

¹³⁸ *Id.* at 993 (citing New Jersey Foreclosure Fairness Act, 2009 N.J. Sess. Law Serv. Ch. 296 (West)).

¹³⁹ *Id.*

¹⁴⁰ *Id.*

¹⁴¹ *Id.*

¹⁴² Grellmann, *supra* note 32 at 253.

¹⁴³ *Id.*

sufferance upon completion of the foreclosure process.¹⁴⁴ Because Congress obviously intended tenants to receive adequate notice, the PTFA should instead turn to tenant protective state laws such as those in New Jersey and Louisiana (where notice of foreclosure and renter's rights are all but guaranteed) in specifying its notice requirements.

F. Congress should consider adding other protective provisions to the PTFA in accordance with tenant-protective state laws.

Even with respect to the provisions of the PTFA that are clear (i.e., continuation of a tenant's lease and the ninety-day notice to vacate), the PTFA may still be insufficient to help tenants facing foreclosure.¹⁴⁵ The ninety-day notice requirement may not provide enough time for low-income renters to collect the resources necessary to re-locate to a new tenancy.¹⁴⁶ In response to this concern, the PTFA could benefit from the following progressive solutions in place in a minority of jurisdictions across the country.

First, under Idaho and Montana law, tenants must be provided with a notice least 120 days' notice prior to foreclosure.¹⁴⁷ This solution is more protective than the PTFA and may prove sufficient for some low income renters when gathering the resources necessary to move. However, it is not nearly as progressive as the measures taken in other states.

Under Connecticut law, a landlord may not evict elderly or disable tenants in properties with five or more apartment units without just cause, even in the event of foreclosure.¹⁴⁸ In Massachusetts, any foreclosure action will have no bearing on tenants with leases subsidized by

¹⁴⁴ See e.g., *Id* at 256-258; Ga. Code Ann. § 44-14-162.2 (2009); *Trust Co. Bank v. Atlanta Speedshop Dragway, Inc.*, 432 S.E.2d 608 (Ga. App. 1993).

¹⁴⁵ See Goodman, *supra* note 3.

¹⁴⁶ See *Id.*

¹⁴⁷ See Idaho Code Ann. § 45-1506(2) (2012); Mont. Code Ann. § 71-1-315(1)(a).

¹⁴⁸ Conn. Gen. Stat. § 47a-23c(a)(1) (2012).

the state or the federal government.¹⁴⁹ Congress could easily adopt such procedures into the PTFA, especially in circumstances where the tenancy is subsidized by a federal loan.

Finally, in New Jersey and in the District of Colombia, the two most progressive landlord-tenant districts, any tenancy subject to foreclosure will simply survive the foreclosure.¹⁵⁰ This means that the lease would continue as if no foreclosure had ever taken place, regardless of whether the successor-in-interest will occupy the property as his primary residence (as the PTFA provides).¹⁵¹ In *Chase Manhattan Bank v. Josephson*,¹⁵² the New Jersey Supreme Court also held that regardless of whether a tenancy was established “before or after the execution of the mortgage,” the mortgagee cannot obtain an eviction order without “good cause.”¹⁵³ Under New Jersey law, “good cause” may “include various breaches of tenant responsibilities, such as failure to pay rent and disorderly behavior, as well as grounds based on owner circumstances, such as removal of property from residential use and conversion of the property from the rental market to cooperative or condominium ownership.”¹⁵⁴

Some commentators have offered even more progressive solutions for the PTFA. Creola Johnson, Professor of Law at Ohio State University, argues that tenants should not have to pay rent during the ninety-day notice period because forcing them to do so leaves them unable to gather the resources necessary to secure alternative housing.¹⁵⁵ For a low income, month-to-month tenant, the ninety-day period may be necessary to marshal the funds needed to relocate, rather than contribute to their current tenancy.¹⁵⁶

¹⁴⁹ Mass. Gen. Laws ch. 186, § 13A (2010).

¹⁵⁰ D.C. Code § 42-3505.01 (2012); N.J. Stat. Ann. § 2A:18-61.3.

¹⁵¹ See D.C. Code § 42-3505.01 (2012); N.J. Stat. Ann. § 2A:18-61.3.

¹⁵² *Chase Manhattan Bank v. Josephson*, 135 N.J. 209, 235 (1994).

¹⁵³ *Id.* (citing N.J. Stat. Ann. §2A:18-61.1 (West 2013)).

¹⁵⁴ *Id.* at 219 (citing N.J. Stat. Ann. §2A:18-61.1 (West 2013)).

¹⁵⁵ Johnson, *supra* note 19 at 996.

¹⁵⁶ *Id.*

A more reasonable compromise to this proposal may be to allow successors-in-interest to pay the tenant's relocation expenses while simultaneously shortening the ninety-day notice period.¹⁵⁷ According to Professor Johnson, because the average relocation costs borne by a displaced tenant are about \$2,558, Congress should consider amending the PTFA to allow successors-in-interest the ability to offer a tenant "a minimum of \$2,600 in return for the renter's waiver of the right to remain on the property for the ninety-day period."¹⁵⁸ Should a lender fail to make such an offer, the tenant would be allowed to remain on the property for the full ninety-days rent-free.¹⁵⁹ Similar to the provisions in New Jersey, Professor Johnson believes that successors-in-interest have an obligation to maintain the premises until they are transferred in order to prevent the property from becoming blighted.¹⁶⁰ Professor Johnson's proposal would not only allow the PTFA more flexibility on an individual basis, but it would also enable tenants to obtain the funding needed to relocate within a reasonable, negotiated timeframe.¹⁶¹

It is unlikely that Congress will consider adopting such progressive provisions before the PTFA is scheduled to sunset on December 31, 2014. Nevertheless, by following the examples laid out by the statutes and regulations enacted in New Jersey, the District of Columbia, Connecticut, Massachusetts and some of the revisions proffered by Professor Johnson, the PTFA could be strengthened to help prevent some of the harmful socio-economic consequences tenants face at foreclosure.¹⁶²

Part IV: Conclusion

¹⁵⁷*Id* at 997.

¹⁵⁸ *Id.*

¹⁵⁹ *Id.*

¹⁶⁰ Johnson, *supra* note 19 at 997.

¹⁶¹ *Id.*

¹⁶² *See* Goodman, *supra* note 3.

The PTFA suffers from a lack of administrative enforcement, is often preempted by conflicting state legislation, and gives little instruction as to how notice must be given to tenants.¹⁶³ The PTFA also affords no remedies to tenants whose rights under the law are violated, partly because the plain language of the PTFA does not provide for such remedies and because federal courts have relegated the PTFA to a federal defense.¹⁶⁴ In spite of these drawbacks, national legislation that provides uniform protection to tenants subject to foreclosure is still a pertinent legislative initiative. Foreclosure rates are still increasing in many parts of the country where tenants comprise a sizable portion of such displaced individuals.¹⁶⁵ The PTFA therefore not only remains fundamental today, but it should continue in some form even after the economy and the real estate market have stabilized.

If the PTFA is to continue, it must be amended to provide tenants with greater protections. The PTFA must be given a chance to be justified constitutionally under the Commerce Clause, allowing courts to extend its provisions to all residential mortgages outside of those which are dependent on federal spending. In addition, the PTFA should also provide a wider range of remedies to tenants in the event that a successor-in-interest does not comply with the law. Furthermore, the PTFA must provide procedures for how tenants will be notified under the law, and what rights they may have when those liberties are compromised. Most importantly, the law should consider more liberalized approaches to tenant protection as offered in states like Massachusetts, Connecticut, and even New Jersey. Only with these amendments can the law

¹⁶³ See *Wells Fargo Bank*, 2011 WL 2194117, at * 2; Nichols, *supra* note 34 at 300; Grellmann, *supra* note 32 at 255-256.

¹⁶⁴ See *Id* at * 1; *Wescom Credit Union v. Dudley*, 2010 WL 4916578, at *2.

¹⁶⁵ Bennett, *supra* note 11; RealtyTrac Staff, *1.8 Million U.S. Properties With Foreclosure Filings in 2012*, REALTYTRAC (Jan. 14, 2013), <http://www.realtytrac.com/content/foreclosure-market-report/2012-year-end-foreclosure-market-report-7547>.

effectively achieve its intended purpose by helping tenants overcome the challenges of mortgage foreclosure.