

EVICCTIONS BEFORE THE ACT

Prior to PTFA, unless otherwise restricted by local laws, lenders and servicers acquiring properties at foreclosure sales could simply record the deed and then be in a position to evict either the owner or tenant by filing an action for forcible entry and detainer. Depending on the state law, this was typically done by service of a notice to leave the premises, which might require anywhere from three to 60 or more days, followed by the filing of the complaint. Many tenants would learn of the foreclosure only when they were served with this notice. Moreover, it was very common for tenants to pay rent to the borrower/landlord throughout the entire foreclosure proceeding, unaware they were soon to be evicted and unable to recover their security deposits.

In the past, in most instances, lenders and servicers ignored rents and simply focused on gaining possession of the property after foreclosure. As hereinafter discussed, the act will by necessity require reconsideration of how lenders and services will approach tenant-occupied properties both pre- and post-foreclosure.

ENHANCED PRE-FORECLOSURE DUE DILIGENCE AND RISK OF FRAUD

As previously noted, where bona fide tenants occupy the property, unless an exemption applies, under this legislation the foreclosing lender may not evict the tenant until the expiration of the lease or 90 days, whichever is later. No distinction is made in the legislation between oral and written leases. However, it should be noted that under many state laws, a lease for a period in excess of one year must be in writing to be enforceable.

The breadth and vagueness of the legislation unfortunately creates the likely prospect of schemes between unscrupulous lawyers, brokers, and borrowers to create sham leases so that the borrower can either continue to occupy the foreclosed property under the guise that it is occupied by a bona fide tenant or extort a payment out of the foreclosing lender as an inducement to vacate the property.

Based on the new legislation, it would appear that servicers will now have to be far more diligent in determining pre-foreclosure if the property is owner or tenant occupied and, if tenant occupied, whether the purported lease is bona fide and the terms of any leases on

non-owner-occupied properties. At the same time, servicers will need to remain mindful of avoiding claims such as trespass and wrongful interference with the contract between the borrower and tenant pre-foreclosure.

LENDER/SERVICER AS LANDLORD OR MORTGAGEE IN POSSESSION

Most forms of mortgages and deeds of trust include an assignment of rents provision under which the lender and its successors and assigns are granted a security interest in rents that may be exercised upon a loan default. Many lenders and servicers have been reluctant to exercise the assignment of rents out of a variety of potential legal concerns, including becoming what is called a "mortgagee in possession."

As a mortgagee in possession, a lender or servicer in essence may be held to assume responsibility for the habitability of the property and be held liable to the tenant if the property is found not to be habitable or if injury results from an unsafe condition on the property. Based on these concerns, most lenders and servicers have avoided collecting rents during the foreclosure process. However, under the new federal legislation, lenders are now

forced to become landlords of tenant properties and be subject to the duties and responsibilities of a landlord. It is made to complete the foreclosure a 90-day period and, if a longer-term in effect, possibly for the term of the lease.

Lenders and servicers may, at their desire to reconsider the assertion of rents pre-foreclosure since they would otherwise be unavoidable post-foreclosure. In analyzing the issue of whether a lender should exercise the assignment of rents upon foreclosure, it may also be considered allowing the borrower to continue to pay rents acts as an incentive to the lender to engage in stall tactics to delay the foreclosure process so that further rents are collected before property-related expenses go up.

POSSIBLE RESPONSES TO TENANT OCCUPANCY

It is critical for the lender to establish procedures to determine if a property is tenant occupied and, if so, how to proceed as to the collateral. In the event of a tenant-occupied residence, the lender should establish procedures to determine if the property is, in fact, claimed to be occupied and, if so, to determine if the tenants are "bona fide." If it is determined that the occupied property is bona fide, the lender should establish procedures to manage the property and collect rents during the required period, expedite the foreclosure process to a third party who can take title with the tenant in place, or establish systems and procedures to negotiate a termination of possession with the tenant.

While some lenders or servicers simply choose to complete the foreclosure and simply give 90 days on a lease, others take the risks of tenant and third-party conditions on the property. The potential of a longer-term bona fide tenant existing make the adoption of a more assertive approach potentially problematic.

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» SIDEBAR

An Assertive or a Conservative Approach?

SIDEBAR BY // LARRY ROTHENBERG, ESQ.

If an occupant is already known to be a bona fide tenant, or if the occupant produces evidence showing that they are a bona fide tenant, then an eviction without the 90-day notice or prior to the expiration of a bona fide lease will be in violation of the act.

However, if the occupant doesn't respond to the attorney's pre-eviction notice or claims to be a bona fide tenant but fails to deliver the requested evidence, the servicer might decide to take an assertive approach and commence the eviction without delay. Taking this assertive approach will probably result in avoiding a 90-day delay in gaining possession in a significant number of cases. However, this assertive approach comes with risk. If the eviction is commenced without a 90-day notice and the occupant subsequently submits sufficient evidence to show that they are a bona fide tenant, it would be neces-

sary to dismiss the eviction and issue a proper notice prior to commencing a new eviction.

If an eviction is commenced in violation of the act, an aggressive tenant might seek to have sanctions imposed. The act does not expressly prescribe any consequence of an intentional or unintentional violation. Many judges might agree that no sanctions beyond a dismissal of the eviction should be imposed for unintentional violations, but some might be unforgiving. Most chilling is the thought of a tenant coming forward after a lockout is complete and alleging a violation of the act by presenting proof that they were a bona fide tenant.

Therefore, some servicers are proceeding very conservatively by having counsel provide a 90-day notice in all cases, even if the servicer has information that the occupant is probably not a bona fide tenant.