

Dodd-Frank Wall Street Reform and Consumer Protection Act

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Dodd-Frank Wall Street Reform and Consumer Protection Act Makes Changes to the Federal Protecting Tenants at Foreclosure Act of 2009

On July 21, 2010, the President signed the federal Wall Street Reform and Consumer Protection Act into law. The voluminous law is otherwise known as the “Dodd-Frank” legislation. Dodd-Frank makes certain amendments to the “Protecting Tenants at Foreclosure Act of 2009” (the “Tenants Protection Act”), which affects post-foreclosure eviction procedures. The amendments to the Tenants Protection Act found in Dodd-Frank were effective on July 21, 2010.

The Tenants Protection Act was enacted as part of the “Helping Families Save Their Homes Act of 2009”. It provides protections to bona fide tenants in foreclosed properties where the foreclosed mortgage is a “federally related mortgage loan” (a very broad category of mortgage loans as defined in the federal Real Estate Settlement Procedures Act (“RESPA”)).

Dodd-Frank Extends the Expiration Date

The Tenant Protection Act was originally set to expire or “sunset” on December 31, 2012; Dodd-Frank changes that, and the Tenants Protection Act will now sunset on December 31, 2014.

Are Commercial Loans Covered?

An important question for lenders, mortgage holders and servicers is whether the Tenants Protection Act is limited to residential one- to four-family mortgage loans, or whether commercial loans are covered. The answer is that some commercial loans are covered; where a loan is made to an individual or entity to purchase or improve property which is one- to four-family residential property, the Tenants Protection Act provisions for notice

and eviction must be followed, even if the borrower took the applicable mortgage loan for a commercial purpose. Commercial purpose loans that meet the definition of “federally related mortgage loans” must comply with the Tenants Protection Act.

A “federally related mortgage loan” is any loan (other than a temporary loan such as a construction loan), which is secured by a first or subordinate mortgage on real property that is designed to be a one- to four-family residential property (including condominiums and manufactured homes), and the property has to be located in a U.S. state.

Refinancings and purchase money mortgages are included. The mortgage loan (1) must be made by a lender that is either federally regulated or its deposits are insured by the Federal Government; (2) is insured, guaranteed or supplemented by the Federal Government; (3) is made in conjunction with programs administered by HUD or by another federal agency; (4) is intended to be sold to Fannie Mae, Ginnie Mae or Freddie Mac; (5) is made by a “creditor” as defined by the Consumer Credit Protection Act (15 USC §1602(f)) and that creditor makes or invests in \$1,000,000 worth of residential real estate loans per year; (6) is a reverse mortgage made by one of the aforementioned lenders; (7) is an installment sales contract for residential one- to four-family residential property.

Protecting Tenants at Foreclosure Act of 2009 Before Dodd-Frank Amendments

As a refresher, the Tenants Protection Act requires immediate successors in interest to foreclosed properties, including banks that take title to property after foreclosure, to provide a notice to vacate to any bona fide tenant at least ninety (90) days prior to evicting those tenants as a result of foreclosure. In the event a foreclosure does take place, the Tenants Protection Act requires the successor owner of foreclosed property to honor any existing leases with renters until the end of the lease terms. Protection is not available for the former mortgagor, the mortgagor’s spouse, child or parent. A “*bona fide*” lease is the result of an arm’s-length transaction, and the rent has to be fair market value or government subsidized. The Tenants Protection Act also provides Section 8 tenants in foreclosed properties certain protections.

Dodd-Frank Clarifies When Prior Notice of Foreclosure Occurs

A major change in the Tenants Protection Act brought about by Dodd-Frank concerns the interpretation of the provision that allows bona fide tenants of foreclosed properties to continue to reside at the property for the remaining term of the lease executed with the former owner only if that lease was entered into “as of the date of foreclosure”. Prior to the amendment found in Dodd-Frank, it was unclear when the “date of foreclosure” occurred. If the cut-off period began when foreclosure notices were sent, borrowers and tenants could no longer enter into leases that would have to be honored once the foreclosure notices were mailed and advertised. Thus, under the prior version of the

Tenants Protection Act, a foreclosing owner would take the position that leases entered into AFTER the date the foreclosure notice was mailed were not effective, and the foreclosing owner would not have to honor those leases.

Dodd-Frank changes all that by clarifying the phrase and explaining “For purposes of this section, the date of a notice of foreclosure shall be deemed to be 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.” Unfortunately, ambiguity remains. While Dodd-Frank clarifies that “notice of foreclosure” does not mean any correspondence or advertising undertaken by the mortgagee leading up to the foreclosure sale, it leaves the post-foreclosure timeframe unclear. Put more simply, Dodd-Frank shifts the ambiguity from pre-foreclosure sale to post-foreclosure sale. This is due to the use of the term “complete” in the new definition, i.e., what does “complete title” mean?

Debate is already underway as to whether “complete title to a property is transferred to a successor” occurs at the time of the foreclosure sale or at the time of recording of the foreclosure deed. In Bankruptcy Courts in Massachusetts and Rhode Island, the majority of Bankruptcy Judges who have opined on the issue of when the foreclosure sale is final from a bankruptcy perspective find that the foreclosure is final when the gavel goes down completing the auction, and the purchase and sale agreement is executed by the buyer. On the other hand, there is an argument that the buyer at foreclosure who tenders a deposit and signs the purchase agreement only has equitable title; no legal title passes until the foreclosure deed is tendered to the buyer. Still another interpretation is made by the foreclosing owner who seeks to evict any holdover borrowers or tenants from the property after foreclosure. An eviction action in Massachusetts and Rhode Island cannot be filed until the foreclosure deed has been recorded. Post-foreclosure property owners are going to have to watch out for borrowers and mortgagors whose properties are in the process of foreclosure, as they could enter into lease agreements with tenants AFTER the foreclosure sale date, but before the foreclosure deed goes on record, and the foreclosing owner would be required by law to honor those lease and tenancy agreements.

Another issue Dodd-Frank raises is the impact its amendments will have on pending eviction cases. As statutes are not typically retroactive unless such intention is expressly stated, Dodd-Frank, which is silent on retroactivity, should not impact pending evictions. However, financial institutions should be aware that since each state has its own eviction process (e.g., in Massachusetts, eviction process is known as “a Summary Process action” and includes the sending of a Notice to Quit to a tenant), knowing when such a process has begun will be state specific. Accordingly, a review of the status of each pending eviction should occur.

In sum, post-foreclosure property owners must continue the practice of giving ninety (90)-day pre-eviction notices to bona fide tenants, but the date on which that notice has to

be given will now be later in the process -- on or after the date the foreclosure deed is recorded. Ninety (90)-day notices sent on behalf of the servicer during the foreclosure process will no longer satisfy the Tenants Protection Act. Post-foreclosure property owners should do everything they can to ensure that foreclosure deeds are recorded expeditiously after a foreclosure sale to cut off the rights of mortgagors from entering into new lease agreements with *bona fide* tenants so that the new owner does not have to contend with honoring the terms of those new lease agreements.

Eviction and Tenant Protections in New Massachusetts Chapter 258 of the Acts of 2010

In our August 13, 2010 eblast, we described the new 150-day right to cure requirement for mortgages where the collateral is Massachusetts one- to four-family residential property where the mortgagor resides as his principal residence. In addition to the provisions that affect mortgage foreclosures, the new law, Chapter 258 of the Acts of 2010, "An Act Relative to Mortgage Foreclosures" (the "Act"), signed by Governor Patrick on August 7, 2010, also provides additional protections for tenants living in foreclosed properties, it creates new requirements for lenders offering reverse mortgages, and it creates new mortgage fraud statutes which impose substantial criminal penalties on those who participate in mortgage fraud. Click on the link below for a copy of the Act.

New Chapter 186A "Tenant Protections in Foreclosed Properties"

This section of the article will focus on the eviction and tenant protections found in the Act. We will begin with the eviction provisions which are found in Section 6 of the Act. Section 6 creates a new Chapter 186A of the Massachusetts General Laws entitled "Tenant Protections in Foreclosed Properties". Like the foreclosure provisions of the Act, the eviction provisions were effective upon signature, on August 7, 2010. In general, readers should see that the overall spirit of new Chapter 186A makes it very difficult and almost impossible for foreclosing lenders who buy at foreclosure to follow a schedule where they evict tenants so that the foreclosed property can be vacant for purposes of marketing and selling the property.

Does New Chapter 186A Apply Retroactively to Evictions in Process on August 7, 2010?

Unfortunately, there is no provision in Chapter 186A which addresses whether or not the law is to be applied retroactively to evictions in process as of the effective date of August 7, 2010. The Massachusetts Division of Banks ("DOB") has rejected any retroactivity of the foreclosure provisions of the new law, but the DOB opinion does not address the eviction provisions. The DOB based its decision about the retroactivity of the foreclosure provisions by stating that if the legislature intended to make the law retroactive, it would

have said it was retroactive. Foreclosing lenders could make the same argument. Still another argument against the retroactivity is this: because the right of an owner to evict a tenant for just cause is dependent on the owner having posted a notice within thirty (30) days of the foreclosure sale, if Chapter 186A is applied retroactively, in the case of most pending evictions, the “within thirty (30) days of foreclosure sale” deadline would have already passed making it impossible for a foreclosing owner to exercise its right to conduct an eviction for just cause.

With these arguments in hand, we would not be opposed to proceeding with pending evictions on the theory that the new law applies only to evictions arising out of foreclosures held on or after August 7, 2010, but the decision to go forward would have to be made by the foreclosing lender. Foreclosing lenders should expect consumer advocates, consumer attorneys, and legal aid attorneys, as well as the Housing Courts to take the opposite position that all evictions that were in process as of August 7, 2010, have to be restarted to enable the new owner to post the notices (even though the “posting required within 30 days of the foreclosure” date would have already gone by). Foreclosing lenders should keep in mind that the penalties for an unlawful eviction are substantial – not less than \$5,000 per illegal eviction.

Tenant Protections Provisions Apply to Certain Commercial Mortgages Too

An important distinction is made between the Act’s new foreclosure provisions and the tenant protection provisions with regard to which foreclosed properties the Act covers. While the foreclosure provisions of the Act do not include commercial properties, the eviction and tenant protection provisions DO include foreclosure of commercial purpose loans where the collateral meets the definition of a “Housing accommodation”, no matter how many units are included. A “Housing accommodation” is a building or structure which is real or personal property, used, rented or offered for rent for living or dwelling purposes. A “Tenant” is defined as a person or group of persons who at the time of foreclosure is entitled to occupy a Housing accommodation pursuant to a *bona fide* lease or tenancy or tenancy at will.

More Important Definitions

Other defined terms include “*bona fide* lease or *bona fide* tenancy” whereby a lease or tenancy is not considered “*bona fide*” when the tenant is the mortgagor or the child, spouse or parent of the mortgagor. In other words, the foreclosing owner is not required to provide the tenant protections in new Chapter 186A to the mortgagor and certain listed family members. Additionally, the lease must be the result of an arm's-length transaction.

“Foreclosing owner” is an entity that holds title to a Housing accommodation in its own name, as trustee or beneficiary, where the property has been foreclosed upon, and where

the foreclosing owner held or owned the mortgage which was foreclosed. A “foreclosing owner” may also be the subsidiary, parent, trustee or agent of the entity that held the mortgage, and “foreclosing owner” may include an institutional mortgagee that acquires or holds title to a Housing accommodation within three (3) years of the filing of a foreclosure deed. Last, a property owner is a “foreclosing owner” if it is the Federal National Mortgage Association (“Fannie Mae”) or the Federal Home Loan Mortgage Corporation (“Freddie Mac”). One can see that the Act’s broad definition of “foreclosing owner” goes to great lengths to include all parties and their agents or servicers who are now required to afford certain protections to innocent tenants in foreclosed properties. Merely deeding REO property to another entity (other than a bona fide third-party purchaser) will not eradicate the necessity for the foreclosing owner to provide the required tenant protections.

Minimum \$5,000 Fine for Violating Tenant Protection Law

Mortgage holders and servicers will have to take care to make sure they follow the tenant protections carefully as the Act provides that a foreclosing owner that evicts in violation of new Chapter 186A shall be punished by a fine of “not less than \$5,000”. The district courts, the superior courts and the housing courts of Massachusetts have jurisdiction over actions arising under Chapter 186A and those courts are able to provide injunctive relief to restrain any violation of the new law. Failure to abide by the Act shall be a defense to an eviction action.

Limitations on Evictions

There are two main tenets of new Chapter 186A that are most important to servicers and mortgage holders who buy properties back at their own foreclosure sales -- these are first, that a “foreclosing owner” shall not evict a tenant except for “just cause” or unless a binding purchase and sale agreement has been executed for a *bona fide* third party to purchase the property. The second tenet of new Chapter 186A is the posting and notice requirements. Foreclosing owners and their servicers will see that there are some very detailed posting and notice provisions that must be accomplished to complete a valid and legal eviction.

Posting Requirements

Within thirty (30) days of foreclosure, the foreclosing owner shall post a written notice stating the names, addresses, telephone numbers and telephone contact information of the foreclosing owner, the building manager or property management entity for the foreclosing owner. This posting notice must include a statement of the address to which rent payments or use and occupancy payments are to be sent. The posting notice must be displayed in a prominent location in the building where the rental units are located. It is recommended that foreclosing owners instruct their representatives and/or property

managers to take photographs that will provide evidence of compliance with the posting requirement.

The posting requirement is not accomplished solely by placing the notice in a prominent location. The foreclosing owner is also required to mail a copy of the written notice to each unit, and the foreclosing owner must see that a copy of the notice is “slid under the door of each unit in the building”. While the Act does not require that the copy of the notice be sent by certified U.S mail, foreclosing owners may determine that sending the notice by certified mail is a way to evidence that they did, indeed, mail the required notices. As for the requirement that the notices be “slid under the door . . .”, the Act does not address what happens when foreclosing owners do not have access to common areas to undertake the “sliding” of the notices, or what happens if the door to a rental unit is not such that a notice may be “slid” under the door. Foreclosing owners and their property managers should consider the fact that they are not free to breach the peace of the tenants by using force to enter the foreclosed properties’ common areas or the rental units. They are not free to take actions which may be considered breaking and entering, as nothing in the Act gives foreclosing owners or their agents the ability to do so. Prudent foreclosing owners and their agents should consider knocking on doors at reasonable times to hand-deliver the notices, and they should make detailed notes to keep track of their actions. In some instances, foreclosing owners may have to seek court relief in order to enter the foreclosed properties to accomplish the posting requirements.

What is “Just Cause”

As previously stated, a foreclosing owner can no longer follow a course of action where he seeks to rid the foreclosed property of tenants prior to marketing and selling foreclosed properties. Eviction actions may only be commenced for “just cause” or when a binding purchase and sale agreement has been executed with a *bona fide* third party. Recall that new Chapter 186A does not prohibit or otherwise limit the rights of third-party owners to evict a tenant at the expiration of an existing lease.

Remember that the three-part posting requirement described above must be complied with, and the notice must contain a statement that the tenant has a right to a court hearing prior to eviction. “Just cause” is defined as one (1) of the following items:

1. the tenant has failed to pay the rent that was in effect prior to the foreclosure, or the tenant has failed to pay use and occupancy charges, but ONLY if the foreclosing owner sent the tenant a written notification of the amount of rent or use and occupancy charges the tenant was to pay and to whom it was to be paid;
2. the tenant materially violated an obligation of the lease or the occupancy agreement, other than the requirement that the tenant surrender possession upon property notice. For this instance of “just cause”, the foreclosing owner has to send the tenant written notice of the material violation giving the tenant thirty (30)

- days to cure the violation, and the tenant has to have failed to cure within the thirty (30)-day period;
3. the tenant is committing a nuisance or causing substantial damage or is otherwise substantially interfering with the quiet enjoyment of other occupants in the building;
 4. the tenant is permitting the unit to be used for illegal purposes;
 5. the tenant who had a written *bona fide* lease or other rental agreement which terminated on or after August 10, 2010, has refused to execute an extension agreement or renewal agreement for a further term of like duration. This provision is operative only AFTER the foreclosing owner has made a written request or demand that the tenant execute an extension agreement or renewal agreement for occupancy of the property;
 6. the tenant has refused the foreclosing owner reasonable access to the unit to make necessary repairs or for inspection purposes, as provided for in a rental or occupancy agreement, or as required by U.S. law or Massachusetts state law. In addition, “just cause” exists if the tenant refuses to allow the foreclosing owner access to the property for showing it to a prospective purchaser or mortgagee.

The above six items which define “just cause” result in different posting and notice disclosure requirements. For “just cause” situations listed in paragraphs (1), (2) and (5) above (failed to pay rent or use and occupancy, violated term of lease, and failed to execute extension or renewal of lease), the foreclosing owner cannot commence an eviction until the “posting” notice has been posted and slid under the door for thirty (30) days, and the notice has been delivered. Again, we recommend that our clients mail the required notices by certified U.S. mail so that proof of delivery is available. If sliding the notice under the door is not physically possible (because, for example, there is no space to slide the notice under the door), then you may want to tape an envelope which contains the notice to the door with the name of the occupant (or the word “occupant” on the outside of the envelope). A photograph of the portion of the door that blocks the “sliding” of the notice under the door should be taken, as well as a photograph of the envelope taped to the door.

Note the difference (and more favorable treatment for foreclosing owners) in situations where “just cause” occurs because of one or more of the situations in paragraphs (3), (4) and (6) (nuisance, illegal activity and tenant won’t give access to foreclosing owner). In these situations, an eviction action may be commenced once the posting requirements are completed, including delivery of the notice to the tenants. Unlike “just cause” described in paragraphs (1), (2) and (5) above, only posting and delivery have to be accomplished – there is no need for the foreclosing owner to wait thirty (30) days before commencing eviction.

What is the Proper Amount of Rent or Use and Occupancy Charges?

It should be clear at this point, that a foreclosing owner is now required to undertake a role that he/she previously avoided – that of landlord, even if it is just temporary until a third-party buyer is found for the property. Communication and detailed recordkeeping are going to be very helpful to foreclosing owners in complying with new Chapter 186A. Servicers and property managers should be aware of the elevated importance of gathering information regarding the identities of tenants, what they are paying for rent, if there is a lease, and if yes, can a copy of that lease be obtained? Information about market rents in properties like the foreclosed properties will have to be obtained. Issues are sure to arise regarding what is the correct amount of rent or use and occupancy charges. Section 5 of Chapter 186A provides that in the event a foreclosing owner disagrees with the amount of rent or use and occupancy, the foreclosing owner may bring an action in district court, the superior court or in the housing court seeking the court to set a new, reasonable use and occupancy rate. A “*bona fide*” lease between the former owner of the property and the tenant or proof of rent payments to the former owner shall be presumed reasonable.

Summary of Massachusetts Tenant Protections and New Chapter 186A

It’s clear that the landscape as far as post-foreclosure evictions in Massachusetts has changed dramatically. While there is an issue as to what point in the process the foreclosing owner should begin to comply with the posting requirement, this question results in two (2) different responses. On the one hand, one would argue that the posting requirement can be commenced as soon as the “gavel goes down” on the foreclosure, and the foreclosing owner is the successful bidder. An alternative to that response is that the posting requirement does not commence until the foreclosure deed is recorded (a point in time which is sometimes several months after the foreclosure sale occurred). This is supported by the fact that a summary process eviction action does not commence until the plaintiff has legal title to the deed to the property.

Common sense would seem to dictate that the foreclosing owner should undertake the posting requirements sooner, rather than later. While it favors the foreclosing owner to start getting rents or use and occupancy payments, it also behooves the tenants to have the important contact information about the entity that is responsible for the condition of the building and units, in addition to having clear and concise information about to what entity rental payments should be sent. Therefore, we would recommend that our clients act sooner rather than later in posting.

Remember to follow the posting and noticing requirements very carefully, and communicate the importance of good communication and recordkeeping with your

property managers and other agents that are on the ground working with your foreclosed properties.

[Click here for a copy of Chapter 258 of the Acts of 2010](#)