

# What next for tenants after a foreclosure?

August 20, 2010

In 2009 President Obama signed into law The Protecting Tenants at Foreclosure Act of 2009. The purpose of this article is to address the application of the Act and identify the people to whom the act applies.

## What does The Protecting Tenants at Foreclosure Act of 2009 do?

The Act is intended to provide some protection to tenants occupying a single family residence lost to a foreclosure due to no fault of their own. The Act essentially says that the buyer of a single family residence of four units or less at a foreclosure sale shall assume the prior owners interest as landlord. Specifically, the Act says that the new owner must: (i) Provide the bona fide tenant at least 90-days notice to vacate; and (ii) allows the bona fide tenant to occupy the property until the end of the remaining lease term.

## Does The Protecting Tenants at Foreclosure Act of 2009 apply to all occupants of property post foreclosure?

No. It does not. The Act only applies to “bona fide” tenants and where the loan that was the subject of the foreclosure was a federally related mortgage loan. Otherwise the Act does not apply. A lease or tenancy is “bona fide” only if the following apply: (i) the borrower, borrower’s child, borrower’s spouse or parent is not the tenant; (ii) the lease or tenancy was the result of an arms-length transaction; and (iii) the rent paid by the tenant 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.

This bona fide lease / tenant requirement is designed to prevent borrowers from construing the law in such a fashion so as to reap the benefits of a law intended to help tenants. Whenever you see tenants that are friends or family members of the borrower then there is likely an issue with the bona fide tenancy. If the lease terms seem too good to be true then there is likely to be an issue with bona fide tenancy. If the notice of default was recorded prior to the lease then there is most definitely an issue with bona fide tenancy (the tenants either knew or should have known about the foreclosure).

In order for the Act to apply the loan that was the subject of the foreclosure must have been a federally related mortgage loan as that term is defined by 12 U.S.C. §2602. The word count for this definition alone exceeds the word limit for this article. Suffice it to say that a federally related mortgage loan is broadly defined but certainly does not apply to all loans. If the loan was originated by a depository based lender or was otherwise a government backed loan then the loan is probably a federally related mortgage. To be sure you should consult an attorney.

As you can see the exceptions to this Act are swallowing the Act. If the tenant was not a bona fide tenant or if the loan that was the subject of the foreclosure was not a federally related mortgage loan then the Act does not apply and the new owner can recover possession of the property through a court proceeding. Be very careful with the representations made to clients having to do with this Act. As you can see, the Act has narrow application. If the tenant entered into the lease prior to the notice of default being recorded, is unrelated to the borrower, is paying market rent and the loan that was the subject of the foreclosure was a federally related mortgage loan then the Act likely applies.