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# THE DUE PROCESS RIGHTS OF RESIDENTIAL TENANTS IN MORTGAGE FORECLOSURE CASES

Henry Rose\*

## I. INTRODUCTION

In 1987, William Scott signed a lease to rent an apartment from Larry Holder in a building that Holder owned in Chicago, Illinois.<sup>1</sup> Unbeknownst to Scott, Holder had been sued in 1986 by Holder's mortgage lender, Commerce Mortgage Corporation (Commerce), for foreclosure of the mortgage on the building because Holder had not made all of his mortgage payments.<sup>2</sup> Scott and his family took occupancy of the apartment and made all of the rent payments to Holder that were due under the terms of their lease.<sup>3</sup> In the foreclosure case against Holder, Commerce purchased the apartment building at a sheriff's sale in early 1988.<sup>4</sup> Late in 1988, agents of Commerce and employees of the Cook County Sheriff's office came to the apartment building to execute a writ of assistance that had been issued by the court in the foreclosure case authorizing the eviction of the occupants of the building from their living units.<sup>5</sup> Scott had received no notice of the foreclosure action or that he and his family would be evicted from their apartment because of it.<sup>6</sup> Scott informed the agents of Commerce and the Sheriff's employees who had come to his door that he had not received any notice regarding termination of his tenancy.<sup>7</sup> Nevertheless, the Sheriff's employees forcibly evicted

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1. The description of William Scott's tenancy is based on Judge Suzanne Conlon's Memorandum Opinion and Order on defendants' motions to dismiss in *Scott v. O'Grady*, 760 F. Supp. 1288, 1291 (N.D. Ill. 1991), *aff'd* 975 F.2d. 366 (7th Cir. 1992). The author of this article was one of the Scotts' attorneys in this case. The Scotts' principal attorney was Lewis Check.

2. *See Scott*, 760 F. Supp. at 1291.

3. *Id.*

4. *Id.*

5. *Id.*

6. *Id.*

7. *Id.*

the Scotts and removed their belongings from the apartment.<sup>8</sup> Many of the Scotts' belongings were damaged or lost when the Sheriff's employees deposited them outside the building near the street.<sup>9</sup> The Scotts were forced to find temporary housing after they were summarily evicted from their home pursuant to Commerce's foreclosure action against Holder.<sup>10</sup>

After their eviction, the Scotts sued Commerce and the Sheriff contending that their eviction, without notice, violated their due process rights under the Fourteenth Amendment to the U.S. Constitution.<sup>11</sup> The court held that tenants with a valid leasehold interest have a property interest under the Due Process Clause that would have entitled them to notice before an eviction pursuant to a mortgage foreclosure action involving the building in which they reside.<sup>12</sup>

Fast-forward twenty years to 2008 when mortgage foreclosures were mushrooming. Illinois' foreclosure statute was amended in 1993 to provide that tenants living in buildings undergoing foreclosure were entitled to notice and an opportunity to be heard before they could lose possession of their rental units.<sup>13</sup> Despite this statutory protection of their constitutional right to due process, many tenants in Cook County, Illinois, whose buildings were in foreclosure in 2008, continued to face eviction without notice.<sup>14</sup> Tenants facing eviction without notice due to foreclosure occurred so often in Cook County that, in October 2008, Sheriff Thomas Dart declared a moratorium on his staff participating in evictions of tenants in foreclosed buildings<sup>15</sup> until he was provided with documentation that the tenants had received proper notification of their pending evictions.<sup>16</sup>

The problem of tenants being evicted from foreclosed buildings without notice is not limited to Cook County, Illinois. As the number of

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8. *Id.*

9. *Id.* at 1291-92.

10. *See id.*

11. *Id.* at 1292.

12. *See id.* at 1296-97. The court did not decide the issue of whether the Scotts had adequate notice because, on the defendant's motion to dismiss, the court accepted the Scotts' allegation of inadequate notice as true. *Id.* at 1297.

13. *See* 1993 ILL. LAWS 265 (amending 735 ILL. COMP. STAT. ANN. §§ 15/1-501, 1-504, 1-508 (LexisNexis 2011) and adding 735 ILL. COMP. STAT. ANN. § 15/1-701 (LexisNexis 2011)).

14. *See* John Leland, *Sheriff in Chicago Ends Evictions in Foreclosures*, N.Y. TIMES, Oct. 9, 2008, at A14 (according to the Sheriff's Department in 2008 it had conducted 4,800 foreclosures, nearly triple the number they had conducted two years before).

15. *Id.*

16. Mark Konkol, *Evictions to Resume Monday; Dart Satisfied Court Order Protects Renters in Foreclosures*, CHI. SUN TIMES, Oct. 17, 2008, at 17.

residential foreclosures in the United States has skyrocketed since 2006, it is estimated that 40 percent of the people being displaced from their residences in these foreclosures are tenants.<sup>17</sup> Despite the enactment of the federal Protecting Tenants at Foreclosure Act of 2009 (PTFA) that seeks to preserve most residential tenancies in buildings undergoing foreclosure,<sup>18</sup> the problem of the eviction of tenants without notice persists.<sup>19</sup>

The purpose of this article is to explore the due process rights of tenants to receive notice and an opportunity to be heard when foreclosures threaten to terminate their tenancies. PTFA should significantly reduce the incidence of residential tenancies being terminated as a result of foreclosures. However, PTFA offers weak procedural protections if the mortgagee or the successor in interest who acquires ownership pursuant to a foreclosure seeks to terminate the tenancies of residents in the foreclosed building. In those states that require judicial foreclosures, the Due Process Clause of the Fourteenth Amendment should afford tenants notice and an opportunity to be heard before their tenancies are terminated due to foreclosure. In those states that allow non-judicial foreclosures, due process protections are not likely to be available to tenants due to a lack of state action in the foreclosure process. PTFA should be amended to afford all tenants, including those who reside in non-judicial foreclosure states, with notice and an opportunity to be heard before their tenancies are terminated pursuant to a foreclosure.

## II. LEGAL EFFECT OF FORECLOSURE ON RESIDENTIAL TENANCIES

Prior to the enactment of PTFA in 2009, a mortgage foreclosure on a building with a residential tenancy that was created after the mortgage resulted in the termination of the tenancy because a mortgage foreclosure

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17. DANILLO PELLETIERE, NAT'L LOW INCOME HOUSING COALITION: CHALLENGES AND OPPORTUNITIES, RECOGNIZING RENTERS IN THE FORECLOSURE CRISIS 9 (2009), available at <http://www.nlihc.org/doc/NLIHC-Renters-in-Foreclosure-UCLA-5-2009.pdf>. It is estimated that in Chicago in 2009 more renters than property owners were displaced by mortgage foreclosures. MARK SWARTZ & RACHEL BLAKE, LAW'S COMM. FOR BETTER HOUSING, LCBH 2009 REPORT: CHICAGO APARTMENT BUILDING FORECLOSURES: IMPACT ON TENANTS 9 (2010).

18. PUB. L. No. 111-22, § 702, 123 Stat. 1660-61 (codified at 12 U.S.C. § 5220 (Supp. 2011)).

19. See Ken Dixon, *Blumenthal Wants Tenants' Protection in Foreclosures*, CONN. POST, Feb. 2, 2010, available at <http://www.tenants-together.org/article.php?id=1225>; Jon Shirek, *Family Evicted Despite Law Protecting Tenants from Landlord's Foreclosure* (11Alive NBC News television broadcast, Dec. 4, 2010), available at <http://www.11alive.com/news/local/story.aspx?storyid=166521&catid=3>.

terminated any tenancy that was created after the mortgage.<sup>20</sup> Since residential tenancies are typically short-term (i.e., for a term of one year or less) and the notes that mortgages secure are long-term (i.e., involving repayment of debt over as long as thirty years), most residential tenancies are created after the mortgages on the building. If a mortgage predated a tenancy, the tenancy terminated upon foreclosure of the mortgage because it was well-settled that foreclosure of a prior mortgage extinguished a later tenancy.<sup>21</sup> In the unlikely event that a residential tenancy was created before the mortgage, foreclosure of the mortgage did not terminate the tenancy because the property was already burdened by the tenancy at the time of the mortgage, and the mortgagor had no power to grant the property free of the tenancy.<sup>22</sup>

The historical effect of foreclosures on tenancies was dramatically changed by Section 702 of PTFA.<sup>23</sup> Section 702 of PTFA generally provides that for any foreclosure of residential property after the date of PTFA's enactment (May 20, 2009), the successor in interest to the foreclosed property takes the property subject to the remaining term of any bona fide lease entered into before the successor in interest acquired title to the property pursuant to the foreclosure.<sup>24</sup> However, the successor in interest may terminate a tenancy as of the date of sale of the dwelling unit to a purchaser who will occupy it as a principal residence and, if this occurs, the successor in interest must provide the tenant with a notice to vacate at least ninety days before the effective date of the notice.<sup>25</sup>

After enactment of PTFA, most residential tenancies will not be terminated by a foreclosure even if the tenancy was created after the date of the mortgage. This is because under PTFA tenancies survive a foreclosure if they involve a bona fide lease<sup>26</sup> that was created before the successor in interest acquired title in the foreclosure process<sup>27</sup> and the foreclosed

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20. JOSEPH WILLIAM SINGER, *INTRODUCTION TO PROPERTY* 538 (1st ed. 2001).

21. GRANT S. NELSON & DALE A. WHITMAN, *REAL ESTATE FINANCE LAW* 606 (5th ed. 2007).

22. SINGER, *supra* note 20, at 538.

23. PUB. L. NO. 111-22, § 702, 123 Stat. 1660-61 (codified at 12 U.S.C. § 5220).

24. *Id.* § 702(a)(2)(A).

25. *See id.* § 702(a).

26. A lease is bona fide only if:

- (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.

*Id.* § 702(b).

27. *Id.* § 702(a). The date of the notice of foreclosure is the date that complete title to the foreclosed property is transferred to a successor entity or person as a result

property has not been sold to a purchaser who will occupy it as a primary residence.<sup>28</sup> Although PTFA affords residential tenants important new rights when the building is foreclosed, residential tenants continue to be evicted pursuant to foreclosures without notice and without regard to their rights under PTFA.<sup>29</sup>

### III. APPLICATION OF DUE PROCESS TO FORECLOSURES THAT TERMINATE RESIDENTIAL TENANCIES

The Fifth and Fourteenth amendments to the U.S. Constitution both provide that no person shall be deprived of “life, liberty, or property, without due process of law.”<sup>30</sup> Included in the protections guaranteed by these due process clauses are certain procedural rights of persons whose life, liberty, or property is threatened by governmental action, protections such as the right to receive notice of the deprivation and an opportunity to contest the deprivation.<sup>31</sup> In the context of residential tenancies in buildings that are undergoing foreclosure, the key due process issues for tenants are: (1) Does a residential tenancy constitute property within the meaning of the due process clauses?; (2) Is a residential tenancy threatened with termination by a mortgage foreclosure on the building containing the rental unit?; (3) If the foreclosure is sought by a private entity or person, is state action involved?; and (4) Is a residential tenant in a building undergoing foreclosure entitled to notice and an opportunity to be heard to contest a termination of tenancy? Each of these issues will be addressed in the following subparts.

#### A. *Property Under Due Process*

Property protected by the due process clauses includes traditional forms of real property interests.<sup>32</sup> A residential tenancy, by definition, entitles a tenant to possession of some portion of the owner’s real property.<sup>33</sup> The U.S. Supreme Court has addressed the due process rights of residential tenants and has stated that tenants have a “significant interest

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of a court order or pursuant to provisions in a mortgage, deed of trust, or security deed. 12 U.S.C. § 5220 (“History” subsection (c) (Supp. 2011)).

28. *Id.* § 5220 (see “History” subsection (a)(2)(A)).

29. *See supra* note 19 and accompanying text.

30. U.S. CONST. amend. V; U.S. CONST. amend. XIV, § 1.

31. *See Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950).

32. JOHN E. NOWAK & RONALD D. ROTUNDA, *CONSTITUTIONAL LAW* 670 (8th ed. 2010).

33. *See Lindsey v. Normet*, 405 U.S. 56, 72 (1972).

in property: indeed, of the right to continued residence in their homes."<sup>34</sup> Thus, there is no doubt that a residential tenancy is the type of property interest that is protected by the due process clauses.

### *B. Termination of Tenancies by Foreclosure*

After the enactment of PTFA, most residential tenancies will not be terminated by a mortgage foreclosure on a building where the tenants reside. This is true because PTFA generally provides that a successor in interest to a foreclosed building is subject to the rights of a bona fide tenant to occupy the premises for the remaining term of any lease that was entered into before title to the property was transferred to the successor in interest.<sup>35</sup> Nevertheless, a residential tenancy may still be terminated in the foreclosure process under PTFA if: (1) the tenancy is not bona fide and it was created after the mortgage was created;<sup>36</sup> (2) the tenancy is bona fide but it was created after title was transferred to the successor in interest in the foreclosure process;<sup>37</sup> (3) the tenancy is bona fide but the successor in interest terminates the tenancy on the date of sale to a purchaser who will occupy it as a primary residence;<sup>38</sup> or (4) the tenancy is bona fide but the tenant is without a lease or has a lease terminable at will under state law.<sup>39</sup>

PTFA further provides that even if a bona fide tenancy is terminated in the foreclosure process, the successor in interest must provide the tenant with a notice to vacate at least ninety days before its effective date.<sup>40</sup> However, the notice required by PTFA is very different than the notice that due process requires.

PTFA requires a successor in interest to notify a tenant to vacate within ninety days.<sup>41</sup> The notice to vacate simply informs the tenant of a certain date when the occupancy of the rental unit by the tenant ends.<sup>42</sup> A due process notice, on the other hand, informs the person whose property interest is threatened of the pendency of the action and affords the per-

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34. See *Greene v. Lindsey*, 456 U.S. 444, 450–51 (1982.).

35. See PUB. L. NO. 111-22, § 702(a), 123 Stat. 1660–61 (codified at 12 U.S.C. § 5220 historical notes) (Supp. 2011)).

36. See *supra* note 26 for the definition of a bona fide tenancy.

37. See PUB. L. NO. 111-22, § 702(a)(2)(A), 123 Stat. 1660–61 (codified at 12 U.S.C. § 5220 historical notes) (Supp. 2011)).

38. *Id.*

39. *Id.* § 702(a)(2)(B).

40. *Id.* § 702(a).

41. *Id.*

42. See *id.*; *Notice to Vacate Letter*, BUZZLE.COM, <http://www.buzzle.com/articles/notice-to-vacate-letter.html> (last visited Sept. 9, 2011).

son the opportunity to present objections.<sup>43</sup> In the context of a tenant living in a building undergoing foreclosure, due process requires that the tenant be notified of the foreclosure action before they face eviction.<sup>44</sup> Since PTFA only requires a notice to vacate, it neither requires a tenant to be notified of the pending foreclosure nor does it provide the tenant with an opportunity to contest the effect of the foreclosure on the tenancy. Thus, a notice required by due process affords a tenant stronger protection from termination of tenancy pursuant to a foreclosure than does the notice to vacate required under PTFA.

### C. Foreclosures by Private Entities or Persons—State Action

The due process clauses protect a person's life, liberty, or property against the threat of deprivation by governmental action.<sup>45</sup> Whether a governmental action—federal, local, or state—is involved in threatening to deprive a person of life, liberty, or property is described as “state action.”<sup>46</sup>

Many mortgage foreclosures are sought by non-governmental entities or persons, such as private lenders/mortgagees whose right to receive payment on a debt is secured by a mortgage on the real estate owned by the debtor/mortgagor that can be foreclosed if the mortgagor becomes delinquent on the underlying debt. Since many mortgagees are non-governmental entities or private persons, an issue arises as to whether their efforts to foreclose a mortgage constitute state action under due process.

In the United States, there are two common types of mortgage foreclosures: judicial foreclosures pursuant to a state statute and non-judicial foreclosures pursuant to a power-of-sale clause in a mortgage document.<sup>47</sup> Judicial foreclosures account for approximately half of the states' methodology for foreclosure, while non-judicial foreclosure is favored in the remaining states.<sup>48</sup> Judicial foreclosures involve litigation that the mortgagee brings against the mortgagor seeking a judicial declaration of the amount owed on the delinquent debt and a court authorized and supervised public sale of the mortgaged property, usually by a government official, to satisfy the debt.<sup>49</sup> Non-judicial foreclosures involve a public sale of the mortgaged property pursuant to a “power-of-sale clause” in the mortgage document—a clause that allows the mortgagee to foreclose without

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43. See *supra* notes 30–31 and accompanying text.

44. See *supra* note 12 and accompanying text.

45. See ERWIN CHEMERINSKY CONSTITUTIONAL LAW 606 (3d ed. 2006).

46. See NOWAK AND ROTUNDA, *supra* note 32, 595–97.

47. JOHN G. SPRANKLING, UNDERSTANDING PROPERTY LAW 365–67 (2d 2008).

48. *Id.* at 365.

49. See *id.* at 366.

judicial authorization or supervision.<sup>50</sup> In a non-judicial foreclosure, the sale itself may be conducted by the mortgagee or by a designated governmental official.<sup>51</sup>

Whether a mortgage foreclosure involves state action depends upon both the source of the authority to foreclose and the involvement of government officials in the foreclosure process. In *Lugar v. Edmondson Oil Company, Inc.*,<sup>52</sup> the U.S. Supreme Court addressed whether a private creditor who obtains, pursuant to state law, an *ex parte* prejudgment attachment by the county sheriff of an allegedly delinquent debtor's property is engaged in state action under the Fourteenth Amendment.<sup>53</sup> To decide the issue, the Supreme Court adopted a two-part test to determine whether state action exists in a private creditor-debtor context: (1) the alleged due process violation "must be caused by the exercise of some right or privilege created by the State or by a rule of conduct imposed by the state or by a person for whom the State is responsible;"<sup>54</sup> and (2) the person charged with the violation must be a state official, or have "acted together with or . . . obtained significant aid from state officials, or because his conduct is otherwise chargeable to the State."<sup>55</sup> Applying this two-part test to the facts of the case before it, the Court found that the private creditor had engaged in state action because: (1) it had followed an attachment scheme dictated by a state statute,<sup>56</sup> and (2) the debtor's property had been attached by a public official, the county sheriff, based on the *ex parte* application of the creditor.<sup>57</sup>

Based on the characteristics of the typical judicial foreclosure and the state action test announced in *Lugar*, most judicial foreclosures will likely be found to involve state action. Judicial foreclosures are authorized by state foreclosure statutes and involve judicial supervision of the foreclosure process, as well as government officials to conduct public sales of the foreclosed property.<sup>58</sup> These characteristics of judicial foreclosures will generally meet the two-pronged *Lugar* test for state action.<sup>59</sup>

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50. *See id.* at 367.

51. *Id.*

52. 457 U.S. 922 (1982).

53. *Id.* at 924–25.

54. *Id.* at 937.

55. *Id.* at 937.

56. *Id.* at 941.

57. *Id.* at 942.

58. *See* SPRANKLING, *supra* note 47, at 366–67.

59. For example, in *Scott v. O'Grady*, the private mortgagee's filing of a foreclosure suit pursuant to an Illinois statute and the county sheriff's involvement in the eviction of the tenants was found to constitute state action under due process. 760 F. Supp. 1288, 1294–96 (N.D. Ill. 1991).

However, finding state action in non-judicial foreclosures is less likely because the authority for the foreclosures generally arises from a power-of-sale clause in a private mortgage agreement rather than from state law.<sup>60</sup> Also, governmental officials may not be involved in the non-judicial foreclosure process.<sup>61</sup> Finally, the state does not authorize the use of its courts to supervise non-judicial foreclosures.<sup>62</sup> Based on these characteristics, it is unlikely that the *Lugar* test for state action would be met in non-judicial foreclosures.<sup>63</sup> Additionally, the clear trend in cases involving due process challenges to non-judicial foreclosures supports this contention of no state action.<sup>64</sup>

#### *D. Application of Due Process to Tenants in Buildings Undergoing Foreclosure*

A residential tenant has the type of property interest that is protected by the due process clauses of the Fifth and Fourteenth amendments.<sup>65</sup> After enactment of PTFA, most residential tenancies will not be terminated by a foreclosure of the mortgage on the building in which the tenants reside.<sup>66</sup> Notwithstanding the added protections of PTFA, a residential tenancy could still be terminated by a foreclosure in certain circumstances. These circumstances depend on the nature of the tenancy, the timing of various events including the occupancy, and the purchaser's

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60. See SPRANKLING, *supra* note 47, at 367.

61. See NELSON & WHITMAN, *supra*, note 21, at 688.

62. See SPRANKLING, *supra* note 47, at 367. Instead states that allow these type of sales "usually provide statutory safeguards for the mortgagor." *Id.* at 367.

63. See John Pollock, *Going Public: The State-Action Requirement of Due Process in Foreclosure Litigation*, 43 CLEARINGHOUSE REV. 458, 459–60 (Jan.–Feb. 2010).

64. See, e.g., *Pappas v. E. Sav. Bank*, 911 A.2d 1230, 1237 (D.C. 2006) (holding that a non-judicial foreclosure pursuant to a power-of-sale clause is a private debt-collection activity that does not constitute governmental action); *AgriBank FCB v. Cross Timbers Ranch, Inc.*, 919 S.W.2d. 263, 268 (Mo. Ct. App. 1996) (stating that Missouri foreclosures authorized by a power-of-sale clause in the contract "have withstood attacks on the basis of violation of the due process clause of the Fifth Amendment . . . and the Fourteenth Amendment" because "parties have a right to enter into contracts for nonjudicial foreclosures and that the power of sale exercised by a trustee during foreclosure is not principally derived from statute nor otherwise granted by the state"); *Cheff v. Edwards*, 203 Mich. App. 557, 560 (Ct. App. 1994) ("[F]oreclosure by advertisement is not a judicial action and does not involve state action for purposes of the Due Process Clause, but rather is based on contract between the mortgagor and the mortgagee."); see also NELSON & WHITMAN, *supra* note 21, at 682–83 (stating that with respect to power-of-sale foreclosures "[t]he trend of the case law is clearly against finding state action") (citations omitted).

65. See *supra* Part III.A.

66. See *supra* notes 26–28 and accompanying text.

plans for the dwelling unit.<sup>67</sup> Thus, if a mortgagee or a successor in interest seeks to terminate a residential tenancy in a foreclosure, a determination of whether the termination is lawful under PTFA should be made based on the unique factual circumstances of each situation.

A mortgage foreclosure on a building occupied by residential tenants can only implicate the tenants' due process rights if the foreclosure involves state action. State action generally occurs if the authority for the foreclosure is rooted in state law and a government official participates in the mortgage foreclosure process.<sup>68</sup>

Unlike non-judicial foreclosures, state action has been found in due process challenges to judicial foreclosures that terminate residential tenancies.<sup>69</sup> For example, in *Scott v. O'Grady*,<sup>70</sup> a federal district judge found that a judicial foreclosure in Illinois constituted state action under the *Lugar* test because the mortgagee brought a foreclosure action pursuant to a state statute<sup>71</sup> and the mortgagee obtained the assistance of the county sheriff to evict the tenants in the building.<sup>72</sup> *Scott* held that the tenants stated a claim for relief under the Due Process Clause of the Fourteenth Amendment because they had a protected property interest and alleged in their complaint that they were evicted by the sheriff without notice.<sup>73</sup> *Scott* illustrates that, in judicial foreclosure cases, tenants living in buildings that are undergoing foreclosure will generally have due process rights if the foreclosure will terminate their tenancies.

Finding due process violations in non-judicial foreclosures when tenancies are terminated without notice or an opportunity to be heard is much more problematic. It is unlikely that courts will find that non-judicial foreclosures involve state action because the foreclosure is usually authorized by a power-of-sale clause in a private mortgage agreement rather than by state law and may not involve government officials in its

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67. See *supra* notes 36–39 and accompanying text (listing the exceptions to PTFA that terminate a residential tenancy).

68. See *Lugar v. Edmonson Oil Co.*, 457 U.S. 922, 937 (1982).

69. For example, in *Hite v. Field*, one of the earliest case on this issue, a Connecticut trial judge found that month-to-month tenants' due process rights were violated when the only means of notifying them of the foreclosure on the building in which they resided was via a *lis pendens* notice recorded in city land records. 462 A.2d 393, 398 (1982).

70. 760 F. Supp. 1288 (N.D. Ill. 1991).

71. *Id.* at 1294.

72. *Id.* at 1296.

73. *Id.* at 1297. The court did not decide whether notice was adequate, but rather, because the court was deciding whether to dismiss the claim for a failure to state a claim, accepted the Scotts' allegation of inadequate notice as true. *Id.*

execution.<sup>74</sup> An example of a non-judicial foreclosure that was held to not involve state action, for due process purposes, is *Pappas v. Eastern Savings Bank*.<sup>75</sup> The court in *Pappas* rejected a due process challenge to a non-judicial foreclosure because the foreclosure of the mortgage, which was pursuant to a power-of-sale clause, involved only “private debt collection activities” and “did not constitute governmental action.”<sup>76</sup> *Pappas* illustrates that in many non-judicial foreclosure situations tenants living in buildings undergoing foreclosure will generally not be protected by the Due Process Clause of the Fourteenth Amendment because of the absence of state action in the foreclosure process.<sup>77</sup>

#### IV. PROCEDURAL DUE PROCESS RIGHTS CREATED BY STATUTUE

State legislatures can amend state foreclosure laws to provide tenants who live in buildings undergoing foreclosure with notice and an opportunity to be heard in the foreclosure process. For example in Illinois, the state general assembly reacted to the *Scott v. O’Grady* decision by amending the Illinois foreclosure statute to require that tenants living in buildings in foreclosure should receive notice and an opportunity to be heard before their tenancies are terminated.<sup>78</sup> The Illinois foreclosure statute was amended in 1993 to provide that if a tenant was not initially made a party to the foreclosure action, the successor in interest must file and serve a supplemental petition against the tenant after which the tenant would be entitled to a hearing in court to contest the termination of tenancy.<sup>79</sup>

Although PTFA dramatically improves the substantive rights of residential tenants living in buildings undergoing foreclosure and will likely result in significantly fewer tenancies being terminated by foreclosure,<sup>80</sup> the procedural rights it creates are weak. With regard to notice, PTFA creates no rights for tenants to receive notice of the foreclosure process

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74. See *supra* notes 60–64 and accompanying text.

75. 911 A. 2d 1230 (D.C. 2006).

76. *Id.* at 1237.

77. See *supra* note 64.

78. See Illinois Public Act 88-265, effective January 1, 1994; Jan Crawford, *Tenants Won’t Suffer for Sins of Owners*, CHI. TRIB. Jan. 19, 1994, at N1.

79. 1993 ILL. LAWS 265, Sec. 15-501(d), Sec. 15-1701(d)(e)) (amending 735 ILL. COMP. STAT. ANN. § 15/1-501 (LexisNexis 2011) and adding 735 ILL. COMP. STAT. ANN. § 15/1-701 (LexisNexis 2011)).

80. See *supra* Part II.

involving the buildings in which they reside.<sup>81</sup> Further, PTFA is silent about a tenant's right to have an opportunity to be heard to contest a termination of tenancy, which a mortgagee or successor in interest might seek in the foreclosure process.<sup>82</sup> Instead, PTFA only requires notice to inform tenants when they must vacate their rental units.<sup>83</sup>

PTFA should be amended to provide a residential tenant who is living in a building in foreclosure with notice and an opportunity to be heard if a mortgagee or successor in interest seeks to terminate the tenancy. Since PTFA applies to tenancies in all states, including states that allow non-judicial foreclosures, such an amendment to PTFA would ensure that all tenants who face termination of their tenancies due to foreclosures would receive the fundamental protections of notice and an opportunity to be heard.<sup>84</sup> Even though non-judicial foreclosures have generally been found to not involve the state action that triggers due process protections, basic fairness and sound policy demand that all tenants whose tenancies may be terminated in the foreclosure process, including those tenants who reside in states that allow non-judicial foreclosures, should receive notice and an opportunity to contest the termination of their tenancies. Guaranteeing all tenants a statutory right under PTFA to notice and an opportunity to be heard to contest a termination of their tenancies will reduce the number of tenants who are evicted from their

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81. The only notice that PTFA requires to be given to tenants is a notice to vacate. *See* PUB. L. NO. 111-22, § 702(a), 123 Stat. 1660 (codified at 12 U.S.C. § 5220 historical notes) (Supp. 2011)). If a tenant is living in a building that is in foreclosure, PTFA does not require the tenant to be notified of the pending foreclosure. *See id.*

82. If a mortgagee or successor in interest seeks to terminate a tenancy pursuant to a foreclosure, PTFA has no provision for allowing the tenant to contest the termination. *See generally* PUB. L. NO. 111-22, § 702, 123 Stat. 1660-61.

83. *Id.* § 702(a)(1). Section 702 of PTFA does state that a successor in interest must provide a bona fide tenant with notice to vacate at least ninety days before its effective date. *Id.* However, a notice to vacate simply notifies the tenant that they must vacate the rental unit by a certain date. By contrast, due process concerns in the foreclosure context focus on notice of termination of the tenancy and affords the tenant an opportunity to contest the termination. *See supra* note 31 and accompanying text.

84. The Illinois approach of amending its foreclosure statute to require that tenants be notified of their right to appear in court to contest the termination of their tenancies is a sound approach in a state, like Illinois, that requires judicial foreclosures even if a mortgage contains a power-of-sale clause. *See* 735 ILL. COMP. STAT. ANN. § 15/1-405 (LexisNexis 2011). However, even in states that allow non-judicial foreclosures outside of the court system, tenants should also be entitled to notice and an opportunity to be heard to contest the terminations of their tenancies. This result could be accomplished in states that allow non-judicial foreclosures by requiring that tenants living in buildings in foreclosure can only be evicted through the judicial process.

rental units without notice and without any opportunity to challenge the termination of their tenancies.

## V. CONCLUSION

Many residential tenants have been displaced as a result of the recent upsurge in mortgage foreclosures. Some tenants have even been evicted from their homes without notice pursuant to foreclosures. In states that provide for judicial foreclosures, the Due Process Clause of the Fourteenth Amendment should guarantee residential tenants notice and an opportunity to be heard if their tenancies are threatened with termination in the foreclosure process. In non-judicial foreclosures, basic due process protections may not be available to tenants due to a lack of state action in the foreclosure process. However, tenants in all states can be granted the right to notice and an opportunity to be heard by federal statute. The PTFA should be amended to grant these basic procedural rights to all tenants in the United States whose tenancies are threatened to be terminated in the foreclosure process.

