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TENANTS' RIGHTS IN FORECLOSURE ACTIONS

Issue Description

Proliferation of mortgage foreclosures is daily news in the United States, capturing the attention of individuals, industry, and government alike. The issue is often discussed in terms of the problems facing lending institutions and borrowers or homeowners. Also caught up in the mortgage foreclosure situation, however, are tenants, who may find that the property they are renting is the subject of a foreclosure action or that they are asked to vacate a property after it is sold under a foreclosure judgment. Tenants may become aware of the foreclosure action but not understand their rights. The purpose of this interim report is to research problems tenants face when dealing with foreclosure actions, to review how other states are handling landlord-tenant issues in the foreclosure context, and to identify legislative policy options. The report will also assess the recently enacted federal law that affects tenants' rights in foreclosure actions and identify any policy gaps that could be filled through state legislation.

Background

What is Foreclosure?

A foreclosure action is initiated when a borrower fails to make payments on his or her mortgage. Most mortgage lenders wait until the borrower has missed four payments before filing the complaint with the court. This practice is governed by what is known as a "deemer clause" in most mortgage contracts.¹ Currently under the law, a mortgage company must serve a complaint, a notice of *lis pendens*,² and a summons on the borrower in order to initiate foreclosure proceedings.

The complaint generally alleges that the plaintiff, as the holder of the note and mortgage, seeks to foreclose the mortgage held on a particular piece of real property. The action is filed in the county where the real property is located.³ The complaint must be served on all parties to the action.⁴

The Legislature created an optional "speedy" foreclosure procedure for residential foreclosures in 1993, codified at s. 702.10, F.S.⁵ This section provides a fast-track foreclosure process through an order to show cause, whereby a lender can obtain an *in rem* judgment.⁶ Upon filing a foreclosure complaint, the mortgagee can request an order to show cause for the entry of a final judgment. The judge must then read the complaint and verify that it states a cause of action.⁷ If the complaint is verified, the judge will issue an order to the defendant to show cause why a final judgment should not be entered.⁸ If a defendant waives the right to be heard, the judge shall promptly enter a

¹ Conversation with a representative from the Florida Bankers Association, August 19, 2009.

² The definition of "lis pendens," as appropriate for this report, is "[a] notice, recorded in the chain of title to real property, required or permitted in some jurisdictions to warn all persons that certain property is the subject matter of litigation, and that any interests acquired during the pendency of the suit are subject to its outcome." BLACK'S LAW DICTIONARY (8th ed. 2004). Essentially, "[t]he purpose of a notice of lis pendens is to alert creditors, prospective purchasers and others to the fact that the title to a particular piece of real property is involved in litigation." 35 FLA. JUR. 2D *Lis Pendens* s. 3 (2009).

³ Section 47.011, F.S.

⁴ *Dundee Naval Stores Co. v. McDowell*, 61 So. 108 (Fla. 1913).

⁵ Facsimile from U.S. Bankruptcy Judge Catherine Peek McEwen to the Senate Committee on Judiciary, March 12, 2007 (on file with the Senate Committee on Judiciary).

⁶ A "judgment in rem" is "[a] judgment that determines the status or condition of property and that operates directly on the property itself." BLACK'S LAW DICTIONARY (7th ed. 1999).

⁷ Section 702.10(1), F.S.

⁸ *Id.*

final judgment of foreclosure.⁹ Upon the court's entry of a final judgment, the procedures set out in s. 45.031, F.S., for a judicial sale should be followed.

Mortgage Foreclosure Crisis

The foreclosure crisis began in 2007 and shows no signs of slowing. RealtyTrac reported in September 2009 that there were more than 358,000 foreclosure filings recorded in the month of August 2009. This figure is an 18-percent increase from the amount of filings at the same time a year ago. Nevada, Florida, California, Arizona, Michigan, Idaho, Utah, Colorado, Georgia, and Illinois are the top 10 states for foreclosure filings.¹⁰

According to reports, the crisis was a result of lenders doing a high volume of subprime lending. Subprime loans are loans with adjustable rates (also known as ARMs) that allow borrowers to have extremely low monthly payments for perhaps the first two to four years. After the two to four years, however, the rate can jump to much higher rates, which can result in the borrower's payment sometimes being more than 100 percent higher than the original rate, making it financially impossible to pay. These loans created a housing boom that allowed for many buyers with poor credit to purchase homes with little or no down payment. In early 2007, a rash of overextended borrowers began to default on these mortgages.¹¹

In the meantime, these loans had been repackaged and sold by banks and financial institutions and then assembled into pools by a governmental, a quasi-governmental, or a private entity. This activity is known as the securitization process, whereby entities issue "securities that represent claims on the principal and interest payments made by borrowers on the loans in the pool."¹² Once these loans were sold by the original lender, it made it difficult for borrowers to know who actually owned the mortgage, which in turn made it extremely difficult for borrowers to seek loan modifications.¹³

Statistics compiled by the Office of the State Courts Administrator show that foreclosure filings in Florida have grown at an exponential rate over the last three years. The office reports 238,080 filings from January through September 10, 2009 (excluding Dixie County). This number is more than triple the amount of filings reported for the entire year in 2006.¹⁴

Task Force on Residential Mortgage Foreclosure Cases

This tremendous increase in mortgage foreclosure filings caused and continues to cause a strain on the courts. A Task Force on Residential Mortgage Foreclosure Cases was formed in March 2009 to recommend to the Supreme Court "policies, procedures, strategies, and methods for easing the backlog of pending residential mortgage foreclosure cases while protecting the rights of parties."¹⁵ The Florida Supreme Court charged the task force with including in its recommendations to the Court alternative dispute resolution strategies, case management techniques, and approaches to providing pro bono or low-cost legal assistance to homeowners. The Court also directed the task force to examine existing court rules and propose any changes to the rules that would "facilitate early, equitable resolution of residential mortgage foreclosure cases."¹⁶ Although the focus of the task force was

⁹ Section 702.10(1)(d), F.S.

¹⁰ Adrian Sainz, *National Foreclosure Filings Dip from July to August*, Baltimore Sun, September 10, 2009, <http://www.baltimoresun.com/business/real-estate/bal-foreclosure0910,0,3141478.story>.

¹¹ Brian Grow, Keith Epstein, and Robert Berner, *How Banks Are Worsening the Foreclosure Crisis*, Business Week, February 12, 2009, http://www.businessweek.com/print/magazine/content/09_08/b4120034085635.htm.

¹² U.S. Securities and Exchange Commission, *Mortgage-Backed Securities*, <http://www.sec.gov/answers/mortgagesecurities.htm>.

¹³ Conversation with a representative from Jacksonville Area Legal Aid, July 24, 2009. See also FLORIDA SUPREME COURT TASK FORCE ON RESIDENTIAL MORTGAGE FORECLOSURE CASES, FINAL REPORT AND RECOMMENDATIONS, August 17, 2009, 19.

¹⁴ Summary Reporting System (SRS), *Real Property/Mortgage Foreclosure Filings by County and Month*, provided by the Office of the State Courts Administrator (on file with the Senate Committee on Judiciary).

¹⁵ FLORIDA SUPREME COURT TASK FORCE ON RESIDENTIAL MORTGAGE FORECLOSURE CASES, INTERIM REPORT, May 8, 2009, 3.

¹⁶ *Id.*

not on tenant issues directly, tenants may be affected by the recommendations of the task force to the extent the recommendations affect the resolution of foreclosure actions.

The recommendations were released on August 17, 2009. Noting the limited resources available, the task force recommended a uniform, statewide managed mediation program that is implemented through a model administrative order issued by the chief judge of each circuit. It will require that every foreclosure case that involves residential homestead property be referred to mediation unless the plaintiff and borrower agree otherwise or unless a pre-suit mediation was conducted. Some of the features of the administrative order include referral of the borrower to foreclosure counseling prior to mediation, early exchange of borrower and lender information, and the ability of the plaintiff's representative to appear by telephone and borrowers will not be charged a fee.

The task force also recommended processing the foreclosure cases by three distinct categories:

(1) homestead properties that are referred to mediation and are likely to resolve through the managed mediation program; (2) vacant and abandoned properties that can move through the courts quickly through expedited foreclosure processes; and (3) other foreclosure cases, which may include tenant-occupied or non-borrower-occupied properties, in which the borrower has been unable to communicate with the plaintiff to resolve the case, and which may be referred to the managed mediation program at equal cost to both parties.¹⁷

The task force also recommended changes to the Rules of Civil Procedure along with the forms to use with the rules for those cases that will not be resolved through the mediation program.

Renters' Rights in Foreclosure

When a property subject to foreclosure is being rented, service of the proceedings is often made on a "Jane or John Doe" at the address of the property in addition to the borrower. Once the foreclosure lawsuit is filed, a tenant's rights are limited. If the property is sold at auction, a writ of possession is entered, which requires the tenant to vacate the premises.¹⁸ A tenant's options before a writ of possession is entered can include moving out before an eviction or delaying the foreclosure process by filing a motion to delay the auction.

Foreclosure actions often leave tenants with questions about what to do next. In some cases, the tenant may not have received a notice of the foreclosure. Some questions tenants might ask include:

- If I am the tenant, why am I being served?
- As a tenant, am I supposed to respond to the notice?
- How long can I stay?
- Will I get my security deposit back?
- What if the landlord states that he or she plans to stop the foreclosure?
- Can I continue to rent from the new landlord?

During the 2009 Regular Session, Senate Bill 1646 addressed tenants' rights in foreclosure actions. The bill reflected input from Florida Legal Services, the Florida Bankers Association, the Real Property, Probate, and Trust Law Section of The Florida Bar, and several other interested parties. The bill addressed notice to tenants during the judicial sales procedure, return of deposit monies, and landlord disclosure to prospective tenants when there is a pending foreclosure action. Although the bill died in committee, the issues related to tenants' rights in foreclosure actions continue.

Seven other House and Senate bills were introduced during the 2009 Regular Session which addressed issues related to tenants' rights. The issues included requiring a landlord to notify a tenant whether the property is in foreclosure or in short sale status, a damages-and-civil-penalty provision when landlords fail to comply with

¹⁷ FLORIDA SUPREME COURT TASK FORCE ON RESIDENTIAL MORTGAGE FORECLOSURE CASES, FINAL REPORT AND RECOMMENDATIONS, August 17, 2009, 8.

¹⁸ Fla. R. Civ. P. 1.580.

notice requirements to tenants, and protection of a tenant's credit rating when a tenant is evicted due to a foreclosure proceeding.

Findings and/or Conclusions

Effects on Tenants in Foreclosure

Quantifying the precise effect of foreclosures on tenants is difficult. Research for this report has not identified statistics that establish definitively how many of the more than 238,000 foreclosure filings in Florida involve properties occupied by tenants. One newspaper reported that, nationally, an estimated 40 percent of families facing eviction are renting a property that is in foreclosure, according to the National Low Income Housing Coalition.¹⁹ Understanding how tenants are affected by foreclosures is also complicated by the fact that renters in this state occupy different categories of rental units – from large multi-unit apartment complexes, to smaller buildings with only a few units, to individual houses or townhouses that are rented by the owner. The experiences of tenants and the problems they may encounter in the foreclosure process can vary significantly based on factors such as whether the property is managed by an experienced property manager, the actions of landlords in receiving and applying rent payments and holding security deposits, the amount of time that passes between the entry of a judgment and the foreclosure sale, and the intentions of the purchaser of the property at the foreclosure sale. Thus, it is not possible to identify a definitive set of conditions facing all tenants in this state; however, interviews with tenant advocates, landlords and realtors, and representatives of the financial industry, as well as other research for this report, provide anecdotal information on conditions facing some tenants who find the property they are renting involved in foreclosure.

Notice of Foreclosure Action

It is usually in the best interests of the party seeking foreclosure to serve the tenants. Service on the tenants preserves the right to a writ of possession following the sale of the property. If the tenant is not served with notice, he or she can retain possession of the property by filing an affidavit with the sheriff stating that he or she is entitled to possession of the property and why.²⁰ In situations in which a tenant rents a property subsequent to the filing of a foreclosure, he or she may never know that foreclosure proceedings have commenced. However, even when a tenant does receive notice, he or she may not understand what to do with the notice. The first time the tenant may become aware that something is going on with the property is when a notice of eviction is served.²¹

Payment of Rent and Status of Security Deposits

Depending upon the circumstances, the tenant may continue to send rent to the landlord, who may or may not be applying it to the mortgage. The tenant can be easily confused by what the status of the lease is and stop paying rent altogether or continue to pay rent and end up also losing the security deposit.²² Tenants whose landlords abscond with the security deposit can seek a remedy by filing a petition in small claims court. The success of the claim will depend on whether the landlord can be located and if the landlord has the funds to pay.

Delays between Foreclosure Judgment and Sale

Some tenant advocates report that the period between the foreclosure judgment and the actual sale of the property can result in the property falling in to disrepair because the “owner” may be out of the picture and the judgment plaintiff does not have legal responsibility. In the 11th Judicial Circuit, Miami-Dade County reported an average of 4,664 foreclosures filed monthly in 2008. Despite the voluntary moratorium on foreclosures at the beginning of 2009, there was an increase in foreclosure filings to 6,308 per month on average in the first three months of

¹⁹ Shannon Behnken, *Renters Losing Homes as Landlords Fall into Foreclosure*, Tampa Tribune, July 24, 2009, <http://www2.tbo.com/content/2009/jul/24/renters-losing-homes-landlords-fall-foreclosure/>.

²⁰ Fla. R. Civ. P. 1.580.

²¹ Anthony Clark, *Foreclosures Can Be Nightmare for Renters*, Gainesville Sun, July 1, 2009, <http://www.gainesville.com/article/20090701/ARTICLES/907011002?Title=Foreclos>.

²² John McCarthy, *Law Promises Help for Renters Caught in Foreclosure Mess*, FloridaToday.com, September 21, 2009, <http://www.floridatoday.com/apps/pbcs.dll/article?AID=/20090921/NEWS01/909210308>.

2009.²³ The average caseload is now between 4,500 and 5,000 cases per judge.²⁴ With this type of caseload, there are delays that occur due to the limited capacity to handle the number of sales on any given day. Additionally, the Florida Supreme Court Task Force on Residential Mortgage Foreclosure Cases reports that:

The current form foreclosure judgment permits the plaintiff to cancel the sale unilaterally simply by not showing up, because it includes the language that the sale will not be held unless the plaintiff's representative is present. As a result, a vast number of properties are in a state of limbo between final judgment and sale. For the sale to be reset, a judge must sign another order. Reviewing the motions to reset sale, an explanation of the cancellation is seldom given. Even if the cancellation is due to workout efforts with the borrower, there is no report of the status of the efforts. As a result, there is enormous waste of sale capacity and duplication of efforts in terms of resetting those sales being unnecessarily consumed in these cases.²⁵

Some tenant advocates point to receiverships as a possible option to ensure that property is maintained between the time of the foreclosure judgment and the sale. The role of a receiver is to control and manage property involved in litigation.²⁶ A precedent for use of receiverships is currently found in the foreclosure context involving condominiums. The receivership is seen as a way to help the condominium association collect rents and maintenance fees from either the landlord or the tenant. For example, in one South Florida condominium complex, a receiver was appointed after a foreclosure to collect maintenance fees.²⁷

Another option to deal with disrepair for a tenant is to withhold the rent as provided under s. 83.56(1), F.S. If a landlord fails to maintain the premises, the tenant has the option to withhold the rent. The tenant must notify the landlord in writing at least seven days prior to the rent being due.

Vacating the Property upon Sale

Prior to passage of recent federal legislation (discussed later in this report), in Florida a foreclosure sale acted as a termination of the lease.²⁸ As a result, after the sale, if the purchaser could get a writ of possession, the tenant could be asked to leave immediately. For tenants who moved in after the foreclosure process, notice to vacate after foreclosure may be the first time they learned about the property being in foreclosure. As noted later in this report, this aspect of the foreclosure process for tenants has been dramatically affected by the passage of federal legislation.

Other States' Efforts 2007-2009

In 2009, the National Conference of State Legislatures reported that 44 bills were introduced in 15 states that addressed tenants' rights in foreclosure. Only three of those bills became law. Colorado enacted a law that expands the definition of the criminal offense of equity skimming to include the act of continuing to collect rent from a tenant after foreclosure and sale of the property to another person.²⁹ Maryland enacted a law requiring a notice addressed to "all occupants" be sent to the address of the residential property at the time of filing an action to foreclose a mortgage or deed of trust on residential property.³⁰ Washington enacted a law that gives tenants 60 days' written notice before the tenant can be removed from the property after a foreclosure sale.³¹

²³ On December 1, 2008, Governor Crist announced a voluntary agreement with Florida banks to place a moratorium on foreclosure filings for 45 days. Jennifer Liberto, *Crist Says Banks Agree to Delay Foreclosures*, St. Petersburg Times, December 2, 2008, <http://tampabay.com/news/politics/state/article922561.ece>.

²⁴ TASK FORCE ON RESIDENTIAL MORTGAGE FORECLOSURE CASES, *supra* note 15, at 2-3.

²⁵ TASK FORCE ON RESIDENTIAL MORTGAGE FORECLOSURE CASES, *supra* note 17, at 26-27.

²⁶ Fla. R. Civ. P. 1.620, Author's Comment – 1967.

²⁷ Monica Hatcher, *Condo Converter Ordered to Turn Over 15 Units to Association*, The Miami Herald, September 8, 2009, <http://www.miamiherald.com/business/story/1223912.html>.

²⁸ *Dundee Naval Stores Co. v. McDowell*, 61 So. 108, 117 (Fla. 1913).

²⁹ COLO. REV. STAT. s. 18-5-802 (2009).

³⁰ MD. CODE, REAL PROPERTY s. 7-105.9(b)(1) (2009).

³¹ WASH. REV. CODE s. 61.24.170(1) (2009).

The issue of tenants' rights was also addressed in 2008, with two states, Illinois and California, enacting laws allowing the tenants to reside in the residence subsequent to the foreclosure and another, Minnesota, providing notice to prospective tenants that the landlord is in foreclosure. Illinois' law provides that in the situation where the tenant makes a good-faith effort to keep current in the rent, an order of possession must allow the tenant to retain possession under the lease. It also provides that no mortgagee-in-possession, receiver, holder of a deed or certificate of sale, or purchaser shall file a forcible entry and detainer action against a tenant until 90 days after a notice of the intent to file the action.³² Until January 1, 2013, the California law gives a tenant or subtenant 60 days to remove themselves from the property once the property is sold at foreclosure.³³

Minnesota revised its existing statutory requirements for a landlord whose property is in foreclosure to add a requirement to give notice to prospective tenants. "[T]he landlord must notify the prospective tenant in writing that the landlord has received notice of a contract for deed cancellation or notice of a mortgage foreclosure sale as appropriate, and the date on which the contract cancellation period or the mortgagor's redemption period ends."³⁴

In 2007, North Carolina enacted a law that requires that a notice of sale in foreclosure proceedings be sent to certain tenants residing in the property to be sold, allows those tenants after receiving the notice to terminate the rental agreement upon 10 days' written notice to the landlord, and requires that those tenants be given 30 days' notice of an application for an order for possession.³⁵

General Trends in Proposed Legislation

There were some general trends in the legislation proposed throughout the states regarding notice to the tenants of the foreclosure actions and extending the time a tenant may reside in the foreclosed property. Some states are exploring advance notice requirements (e.g., Hawaii H.B. 443 (2009)), while others are more heavily weighted toward ensuring the tenant may remain in the home after the foreclosure sale. (e.g., Mass. S.B. 1609 (2009)). The states vary on what is an appropriate time for the tenant to remain in the foreclosed home. The longest stands at 120 days, while the shortest is 10 days.

In 2009, Indiana House Bill 1081 proposed giving the tenant an additional avenue of relief in the courts if the landlord did not give proper notice regarding a foreclosure. It authorizes a tenant to bring a civil action if the owner does not comply with the notice provisions, and provides that a tenant who terminates a rental agreement early in compliance with the statute does not forfeit the damage deposit.

Also in 2009, California lawmakers proposed legislation that would prevent property owners who acquire rental properties through foreclosures from taking action to terminate any tenancy within one year of acquiring ownership. Additionally it gave the tenants legal recourse if the new owner does terminate tenancy. The proposed bill provided that a landlord who violates this provision would be liable to the tenant in a civil action for actual damages and a fine not to exceed \$100 for each day the landlord remains in violation of this provision, but not less than \$250 for each separate cause of action.³⁶

Federal Law

On May 20, 2009, the Helping Families Save Their Homes Act of 2009, P.L. 111-22, became law. Part of the law includes the Protecting Tenants at Foreclosure Act, which gives certain protections to tenants during foreclosure. This legislation has significantly affected the policy landscape being explored by state legislatures with respect to giving tenants notice before they are forced to vacate the property after the sale in foreclosure.

The law requires that the successor in interest of the foreclosed property (usually the purchaser) give tenants a notice to vacate the residence at least 90 days before the purchaser intends to occupy the residence. In situations where there is a lease and the purchaser does not intend to occupy the residence, the tenant may continue to stay

³² 735 ILL. COMP. STAT. 5/15-1701 (2009).

³³ CAL. CIV. PROC. CODE s. 1161b (2009).

³⁴ MINN. STAT. 504B.151 (2009).

³⁵ N.C. GEN. STAT. s. 42-45.2 (2009).

³⁶ California A.B. 603 (2009).

in the residence until the end of the lease. For those tenants without a lease, the purchaser at the time of foreclosure must still provide to the tenants a 90-day notice to vacate the residence.

The law requires that notice be given to bona fide tenants, which means that the tenant cannot be the mortgagor, or the child, spouse, or parent of the mortgagor; that the lease was the result of an arm's-length transaction; and that the rent is not substantially less than the fair market rent for the property unless it is reduced by a federal, state, or local subsidy. The law specifically states that it does not affect any state or local law that provides longer time periods or other additional protections for tenants. The provisions of the act will expire on December 31, 2012.

No federal regulations will be issued regarding the implementation or the interpretation of the legislation.³⁷ However, there are still questions that have arisen:

- Is the landlord required to pursue an eviction action after the 90 days?
- What information should be included in the 90-day notice?
- Is the tenant still required to pay rent and to whom?
- Does the tenant have an obligation to stay?
- Does the property manager have any ongoing obligation to the property?
- What happens with the security deposit?

Some of these questions were addressed in a meeting with Senate professional staff and representatives of the Florida Association of Court Clerks and Comptrollers, the Florida Association of Realtors, the banking industry, the Florida Apartment Association, the Real Property, Probate, and Trust Law (RPPTL) Section of The Florida Bar, and Florida Legal Services, Inc., on September 18, 2009. Representatives of Florida Legal Services, Inc., opined that there is still a need for an eviction action subsequent to the 90 days. Some disagreed, stating that the federal law should act as notice of an eviction at the end of the 90 days, while others stated that one notice regarding the 90 days that includes a termination date should suffice.

The 15th Judicial Circuit of Palm Beach County has already issued an administrative order providing that any motions for writs of possession must contain a certification from the attorney regarding whether or not tenants are in possession of the property. In the case where tenants are in possession, the attorney must certify that he or she has given the tenants notice as required under the federal law.

There was also debate among meeting participants regarding the need to amend the definition of landlord in ch. 83, F.S. The definition of "landlord" in s. 83.43(3), F.S., is "the owner or lessor of a dwelling unit." Florida Legal Services argued that this definition should be amended to include "purchaser in foreclosure" so that it is clear to the tenant to whom they had an obligation to pay rent and it is clear that the purchaser has the obligations of a landlord. Representatives of the RPPTL section of the Bar, however, argued that this change was unnecessary because the person who is issued title in the foreclosure action is the owner and therefore is already included within this definition.

Options and/or Recommendations

Although not a participant in the mortgage agreement between a lender and a property owner, a tenant can be affected significantly by a residential foreclosure. Research for this report has identified policy options available to a state legislature that wishes to address tenants' rights in the foreclosure process.

Right to Remain in Property after Foreclosure/Compatibility with Federal Law

- Arguably, the federal Protecting Tenants at Foreclosure Act has addressed a principal concern among tenant advocates, namely ensuring that tenants have notice before being forced to leave a property after it

³⁷ Board of Governors of the Federal Reserve System, Letter to the Officers and Managers in Charge of Consumer Affairs Sections, *Information and Examination Procedures for the "Protecting Tenants at Foreclosure Act of 2009,"* July 30, 2009, <http://www.federalreserve.gov/boarddocs/caletters/2009/0905/caltr0905.htm>.

is sold at foreclosure. This law, for example, addresses and obviates a component of legislation debated in the Florida Senate in 2009 which required notice before possession. The federal legislation expires on December 31, 2012. In deference to the federal legislation, the Florida Legislature could hold off taking action with respect tenants and foreclosure and wait and see whether Congress reenacts or otherwise extends the policy.

- The Legislature could incorporate the federal policy into its own state law by creating a comparable and consistent requirement in state law to provide 90 days' notice. This change would ensure (assuming no subsequent action by a future Legislature) that the policy would remain in place after the expiration of the federal law. In doing so, the Legislature would need to ensure that any law enacted is consistent with and maintains at least the minimum protections of the federal law, as states are authorized to provide greater protections but preempted from imposing lower protections. In this way, for example, the Legislature could prescribe the form of notice.
- In addition to codifying the basic federal notice policy into state law, the Legislature could incorporate the federal policy into related aspects of landlord-tenant law. For example:
 - Specify that the purchaser in foreclosure is within the statutory definition of a landlord.
 - Codify a substantive right for a tenant to challenge a writ of possession on the grounds of failure to comply with federal law.
 - Codify a right in an eviction action for a hearing on compliance with the 90-day notice requirement.

Notice Prior to Execution of Lease

Last year, the Senate proposed legislation included a provision requiring a landlord to notify a prospective tenant – before he or she executes a lease – that the property is subject to a filed foreclosure action. Arguably, because under the federal law the lease survives the sale and the tenant must be given 90 days' notice before a purchaser who intends to occupy the property can force the tenant to vacate, the importance of warning a tenant before signing a lease is less necessary. However, if the Legislature wants to ensure that a person has the option of deciding whether he or she wants to deal with the uncertainty of whether he or she will be able to remain in the property long-term, it could pursue this requirement. A risk, however, is that providing this notice may dissuade some prospective tenants from signing a lease, potentially exacerbating the financial problems facing the landlord.