

# BURR ALERT

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## Don't Get Left in the Dark: Pre-eviction Noticing Requirements Following Sunset on the Protecting Tenants at Foreclosure Act

For the past five years, foreclosing lenders have been bound by a federal law that made it much more difficult to evict non-borrower tenants and occupants of the subject property following a foreclosure sale where the lender took title. The Protecting Tenants at Foreclosure Act (the "Act") attempted to address the plight of tenants caught unaware by landlords with pending foreclosure actions. In so doing, it instituted a national scheme that eschewed all state dispossession laws when it came to non-borrower occupied foreclosure properties, allowing tenants to remain in possession of a property until the later of ninety (90) days or the expiration of their lease term, provided they could show they had a bona fide lease, were paying a fair market rent, and were not related to the former borrower. In short, if a residential tenant could prove he had a real lease, the foreclosing lender was stuck with its terms.

The law, first enacted in 2009 as Title VII of Pub. L. No. 111-22 §701-703, 123 Stat. 1632 (2009) was originally set to expire December 31, 2012. The Act was extended until December 31, 2014, however, by Section 1484(2) of the Dodd-Frank Wall Street Consumer Protection Act of 2010 (Pub. L. No. 111-203). In the 113<sup>th</sup> Congress, Representative Keith Ellison (D-MN) and Senator Richard Blumenthal (D-CT) introduced bills that would remove the 2014 sunset date and make the Act permanent (H.R. 3543 and S. 1761). But neither the House nor Senate acted on the measure, and the Act has now expired by its own terms.

So what happens next? Housing advocacy groups may try to get the Act reinstated in the next Congress, but the outcome of their efforts is uncertain. Congress will likely be unreceptive to arguments on why the Act, initially passed as part of an overall foreclosure mitigation program in the wake of the 2008 financial crisis, is needed in today's rebounding economy. That means that for the moment – and most likely for the future – each state's own dispossession laws will control the noticing process for evicting a non-borrower tenant after foreclosure. It is important, therefore, for foreclosing lenders to formulate an action plan with respect to the residential properties they may take into their REO portfolios.

As a first measure, a foreclosing lender needs to be aware of pre-eviction noticing requirements under applicable state law in the event it is the successful bidder at foreclosure and takes title to the subject property. A general overview of such requirements in the various states in Burr & Forman's footprint is provided below.

### Alabama

Following foreclosure of an occupied residential property, the lender or its counsel must send a letter requesting that the tenant vacate the property within ten (10) days prior to filing an ejectment action. As an added bonus, this 10-day notice also triggers the countdown for a possible waiver of the state's statutory right of redemption. See Ala. Code § 6-5-251(a): "The possession of land must be delivered to the purchaser or purchaser's transferees by the debtor or mortgagor if in their possession or in the

possession of anyone holding under them by privity of title, within 10 days after written demand for possession has been made by, or on behalf of, the purchasers or purchaser's transferees." Failure to vacate within the requisite ten (10) day period results in a waiver of one's statutory right to redemption. Ala. Code 6-5-251(c).

As a practical matter, in Alabama, a purchaser at foreclosure does not take the property subject to a lease, except in very rare circumstances where the lease was signed prior to the mortgage and notice thereof was given to the mortgagee. Thus, the 10-day notice letter is always sent unless the foreclosing party has specific notice of a pre-existing lease agreement on the Property.

If after 10 days the tenant does not vacate the residence, the purchaser may initiate an ejectment action wherein it must be recited that notice of the foreclosure sale (which terminated the lease) was provided to the tenant. Although a court may request that the case be refilled as an eviction, the dispossessory action is technically an ejectment action because there is no privity of contract between the purchaser at foreclosure and the tenant.

## Florida

In Florida, the "notice" to a tenant is provided when the judicial foreclosure complaint (which names all tenants, known or unknown as defendants), is served on him – there is no statute governing the notice requirements as it is really a matter of due process. If, following the foreclosure, a tenant has not vacated, the purchaser may file a motion for possession in the foreclosure action. Generally a hearing will be held, but occasionally a Judge will enter an Order so long as the movant has shown that the tenant was in fact served at the outset of the case with the foreclosure complaint.

The Order will direct the clerk's office to issue a Writ of Possession. Pursuant to Fla. R. Civ. P. 1.580, once the Clerk issues the Writ of Possession, it is delivered to the Sheriff's office. The sheriff then posts the writ of possession on the front door of the residence, providing the tenant with 24 hours to vacate the premises. At that point, the purchaser/owner is free to change the locks and complete the eviction, but as a practical matter, the sheriff will often post the notice on a Friday to allow the tenant or tenants to move out over the weekend.

## Georgia

Upon the completion of a properly conducted non-judicial foreclosure sale in Georgia, the borrower and anyone claiming title or possession by or through the borrower, becomes a "tenant at sufferance" subject to immediate eviction. The only condition precedent to filing a dispossessory action after foreclosure is a demand for possession of the property, which can be made orally or in writing. It is good practice to send a written notice to the tenant asking that he or she comply by a certain date or give up possession. Georgia law does not specify how long the landlord must give the tenant to comply, unless there is a notice period specified in the written lease. Since any lease entered into after the lender's Security Deed is recorded is wiped out with the foreclosure sale, this likely means that a foreclosing lender who takes title to the subject property can demand immediate possession.

## Mississippi

In Mississippi, a foreclosure sale purchaser must file an unlawful entry and detainer action in order to obtain possession of real property after a foreclosure sale. Such action must be brought within one (1)

year of being deprived of possession. Following a foreclosure sale, the purchaser usually makes written demand for possession of the property, although there is no explicit notice provision in the Mississippi Code.

## Tennessee

Following a foreclosure sale, a new owner who wants possession of the property still occupied post-foreclosure must file an unlawful detainer suit in general sessions court, pursuant to Tenn. Code Ann. 29-18-104. At the unlawful detainer hearing, the new owner must show that he is entitled to possession and that the foreclosure was executed, consummated, and recorded. Tenn. Code Ann. 29-18-119. After the 10-day period for the mortgagor to appeal the issuance of the detainer warrant, a writ of possession is filed with the court clerk, who forwards the writ to the sheriff, Tenn. Code Ann. 29-18-125, who will evict the occupants from the foreclosed property. Ten. Code Ann. 29-18-130(a).

In Tennessee, the notice requirements are statutorily determined and depend on whether the new owner has accepted rent from the holdover tenant. If the new owner is the lender who purchased at the foreclosure sale, and the lender/purchaser has accepted rent from the holdover tenant, then formal notice is required. In this situation, a month-to-month tenancy has been created, requiring a full month's notice before beginning eviction proceedings.

## Conclusion

The sunset provision of the Act should leave foreclosing lenders rejoicing rather than in the dark. Without having to comply with the protections previously afforded by the Act, foreclosing lenders should have a much easier time preparing their REO properties for re-sale due to their increased freedom to control the timing of evictions. Whereas before, foreclosing lenders resorted to “cash for keys” to get tenants to vacate the premises before the expiration of their “bona fide” lease, or 90 days (in the instance where they could not produce a written lease), now purchasers can confidently demand possession – or choose to work out a month-to-month tenancy or short-term lease, if so desired. As a last note on the subject, while some states that require a notice to vacate do not specify whether such notice needs to be in writing, it is advisable to do so as a record-keeping measure, and also for use in any ensuing dispossessory action.

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