

Legal Byte – May 29, 2009

By Deanne M. Rymarowicz, Esq.
GLVAR Legal Counsel

REO Agents and Investor Buyers Take Note! New Federal Law Gives Tenants an Extra 90 Days

Earlier this month Congress passed (and the president has already signed into law) a remarkable bill known as the "Helping Families Save Their Homes Act of 2009." The bill was styled by lawmakers as "an Act to prevent mortgage foreclosures and enhance mortgage credit availability."

The bill received some media attention, mostly for giving a safe harbor to loan servicers who use loan modifications and other loss mitigation tools to help homeowners avoid foreclosure.

One aspect, though, has largely escaped notice, and it has a far-reaching impact on state law and owners' rights. That aspect is protection for tenants living in a home foreclosed upon by the lender. A bona fide tenant, whether subject to a lease or not, must receive *at the very least* 90 days' notice before vacating the property.

Yes, you read that correctly: a new owner – whether an investor, a buyer who intends to be an owner-occupant, or the bank – who purchases a foreclosed home now takes the home subject to the tenants' possessory rights and must provide a tenant with 90 days notice before requiring the tenant to leave.

The new notice provisions apply to "any foreclosure on a federally-related mortgage or on any dwelling or residential real property." In other words, pretty much every home foreclosed on after May 20, 2009 (the effective date of the new law).

To be eligible for the 90-day notice, the tenant must be "bona fide." According to the new law, a lease or tenancy shall be considered "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."

Some tenants may live out the remainder of the lease term if the lease was entered into before the date of the notice of foreclosure. (Because the new owner is required to honor the lease, it appears that the new owner would likewise be entitled to rental payments.) However, if the tenant has such a lease but the new owner intends to occupy the home as a "primary residence" then the owner has the right to terminate the lease as of the sale date, but the tenant still gets 90 days' notice. If the lease is terminable at will, or the tenant has no lease, the new owner may terminate the tenancy but still has to provide the 90 days' notice.

For purchasers at the trustee's sale, the questions become more significant: how to determine if the property is occupied by a tenant or the mortgage holder; what is the status of the lease; what kind of financing and insurance are available if the new owner intends to occupy the home, but legally cannot do so for 90 days?

REO listing agents who are assigned tenant-occupied homes by an asset manager must exercise caution to avoid practicing property management if they do not possess a property management permit. All listing agents should inquire how their clients intend to address the requirements of the new law.

A copy of the new law is available [here](#). This federal mandate expires on December 31, 2012.

The ramifications to this bill are extensive and completely overwrite the provisions of NRS 118A and NRS 40. Simply put, Nevada's "three-day notice" for bona fide tenants living in a foreclosed home no longer applies. More notice, and a greater awareness of federal mandates, is required.

*This article is of a general nature and is not intended to address any specific legal or ethical situation. Suggestions for revisions to GLVAR forms may be sent to the Forms Committee at forms@glvar.org. Legal questions should be directed to NVAR's Legal Answerline at **1-800-748-6999**.*
