

## Where are We Now: The Protecting Tenants at Foreclosure Act

As I noted in a [prior blog post](#), the US Congress restored the federal Protecting Tenants at Foreclosure Act (PTFA) without expiration on June 23, 2018. The PTFA has been in effect, expired, and restored at various points over the past decade. During one period after the PTFA expired, the NC General Assembly passed a law ([S.L. 2015-178](#)) to provide somewhat similar (but not exact, more on that below) protections for tenants of foreclosed property under state law. Most recently, the NC General Assembly took action to repeal that law in light of the permanent restoration of the PTFA. See [S.L. 2019-53](#) and [S.L. 2019-243](#). This blog post tracks where we've been and where the law currently stands related to the PTFA and power of sale foreclosures under G.S. Chapter 45 in NC.

### The Origins of the PTFA

The PTFA was first enacted by Congress in 2009 during the financial crisis. See Public Law 111-22 (May 20, 2009) (codified at [12 U.S.C. sec. 5220 note](#)) [PTFA]. It was intended to provide protection for tenants living in foreclosed properties. In many cases, tenants had little or no notice of the foreclosure and the need to vacate the premises. See [Protecting Tenants at Foreclosure](#), Department of Housing and Urban Development Notice, 74 Fed. Reg. 30106 (June 24, 2009). The purpose of the PTFA is to ensure tenants receive appropriate notice of the foreclosure and are not abruptly displaced. *Id.* The federal PTFA overrides state foreclosure law that held that upon a foreclosure the tenant has no right to continued possession of the premises. North Carolina Clerk of Superior Court Procedures Manual, pg. 130.49 (2012) [CSC Manual]. See *Dixieland Realty Co v. Wysor*, 272 N.C. 172, 175 (1967); *In re Foreclosure of Lien by Ridgeloach Homeowners Ass'n, Inc.*, 182 N.C. App. 464, 469 (2007). See also *Nativi v. Deutsche Bank Nat'l Trust Co.*, 167 Ca. Rptr.3d 173, 192-93 (Cal. Ct. App. 2014); *Curtis v. U.S. Bank Nat Ass'n*, 50 A.3d 558, 564 (Md. 2012).

The protections under Section 702 of the PFTA apply in the case of any foreclosure on a federally-related mortgage loan or on any dwelling or residential real property. PTFA, Sec. 702(a). The protections apply for bona fide tenants. A lease or tenancy is considered bona fide only if

1. The tenant is not the mortgagor, or the child, spouse, or parent of the mortgagor;
2. The lease or tenancy was the product of an arms-length transaction; and
3. The rent required by the lease or tenancy is not substantially less than the fair rental value of the property, or if it is, the rent is reduced by a government subsidy. PTFA, Sec. 702(b).

The protections provided to these tenants under the PTFA include

1. The tenant's right to receive a notice to vacate at least 90 days before the effective date of

- the notice (the “90-day notice”);
2. The tenant’s right to occupy the premises until the end of the lease term, provided the lease is bona fide and was entered into before the notice of the foreclosure, unless the purchaser will occupy the property as a primary residence;
  3. If the purchaser will occupy the property as a primary residence, the tenant’s right to receive the 90-day notice;
  4. In cases without a lease or a lease terminable at will, the tenant’s right to receive the 90-day notice; and
  5. Any other requirements for termination of a Federal or State subsidized tenancy or any State or local law that provides longer time periods or additional protections for tenants.

PTFA, Sec. 702(a). When the PTFA was enacted in 2009, it contained a sunset provision, meaning it automatically expired unless Congress renewed it. It was originally set to expire on December 31, 2012. Congress then extended it to December 31, 2014.

### **The Application of the PTFA in NC From 2009 to December 31, 2014**

When the PTFA was enacted, it added a requirement to the list of things the clerk must consider before issuing an order for possession under N.C.G.S. 45-21.29. This state statute prescribes the process a purchaser of foreclosed property must follow to remove an occupant from the foreclosed property. An application is made by petition to the clerk by the trustee, the lender, or the purchaser of the property or one of their authorized representatives. G.S. 45-21.29(k)(6). If the clerk finds that the petitioner complied with the requirements for issuance of the order, the clerk will enter an order for possession and the sheriff is directed to remove all occupants and their personal property from the premises. G.S. 41-21.29(l).

The guidance set out in the 2012 version of the North Carolina Clerk of Superior Court Procedures Manual addressing the impact of the PTFA on a North Carolina nonjudicial foreclosure stated that the petitioner seeking an order for possession had to show the clerk that the occupant in possession of the foreclosed property was **not a bona fide tenant** in addition to the other requirements listed in G.S. 45-21.29. [North Carolina Clerk of Superior Court Procedures Manual](#), pg. 130.49 (2012). See also [The Protecting Tenants at Foreclosure Act of 2009](#), Dona Lewandowski, UNC School of Government (explaining prior to December 31, 2014 that if the occupant was a bona fide tenant, then the purchaser would have to pursue summary ejectment remedies before the magistrate).

### **NC General Assembly Responds**

When the PTFA expired on December 31, 2014, the NC General Assembly acted to fill in the gap left by the expiration of the PTFA and provide protections for certain tenants of foreclosed property. That state law, S.L. 2015-178, is the discussion of my earlier [blog post](#). It went into effect on October 1, 2015 and created a new G.S. 45-21.33A listing those protections.

From October 1, 2015 until the PTFA was permanently restored on June 23, 2018, before the clerk could issue an order for possession the clerk had to find that the applicant “satisfied” the provisions of G.S. 45-21.33A. G.S. 45-21.29(k)(5a)(2015). For example, if the lease was oral, terminable at will, or the purchaser was going to occupy the premises as a primary residence, then the applicant had to provide

- a 90-day notice to vacate to the tenant “before making an application for possession” before the clerk and
- evidence of the 90-notice to the clerk as part of the application. S. 45-21.33A(d).

One impact of the 2015 state law was to allow a purchaser from a foreclosure to go to the clerk to obtain an order for possession rather than seek summary ejectment to remove the protected tenant from the premises. Orders for possession and summary ejectment are very distinct remedies. An order for possession is typically issued by the clerk without a hearing and without notice of the petition for the order to the tenant or other occupant(s). The tenant generally has no opportunity to raise defenses before the clerk issues the order. This is unlike a summary ejectment proceeding which requires notice to the tenant and opportunity to be heard at a hearing before the magistrate.

### **Congress Permanently Restores the PTFA**

The game of ping-pong continued in 2018 when Congress permanently restored the PTFA, effective June 23, 2018. [Public Law 115-174, title III, sec. 304 \(May 24, 2018\)](#). As a result, both state and federal protections applied to tenants of foreclosed property. State law did not exactly mirror federal law and as a result there was a significant amount of confusion that occurred when one applied both laws to a tenant of foreclosed property.

### **NC General Assembly Responds (Again...and Again)**

The conflict did not last for long because in 2019 a bill was introduced that reflects “the restoration of the federal Protecting Tenants at Foreclosure Act and deletes provisions of State law that were enacted to provide protections when the federal act had sunset.” See [Bill Analysis, House Bill 531: Protect. Tenants at Foreclosure Act Restored, May 31, 2019](#). The bill repealed G.S. 45-21.33A. It also amended G.S. 45-21.29(k)(5a) to delete the reference to G.S. 45-21.33A and revise it to reference the PTFA. The bill was signed by Governor Cooper and went into effect as S.L. 2019-53 on October 1, 2019. The General Assembly then amended G.S. 45-21.29(k) a second time in 2019. Effective November 6, 2019, S.L. 2019-243 repeals G.S. 45-21.29(k)(5a) in its entirety.

### **Just Get to the Point, Meredith: Where are We Now?**

In the words of Cher, we have officially turned back time. The federal and North Carolina statutory law related to protecting tenants at foreclosure is as it existed prior to the passage of North Carolina Session Law 2015-178 (discussed above) and the expiration of the PTFA. The conflict

between state and federal statutes has been eliminated. The protections for tenants in G.S. 45-21.33A added in 2015 to NC law are repealed.

However, Cher was only partially correct. Although we have turned back time on the federal and state statutory framework, the courts have not remained silent on the subject of the PTFA. In 2015 and 2016, two federal court opinions interpreting the PTFA were published by the United States District Court for the Eastern District of North Carolina that inform the analysis of when a clerk may issue an order for possession under G.S. 45-21.29(k): (i) *House v. Fed. Home Loan Mortg. Corp.*, 2015 WL 135979, at \*5 (E.D.N.C. Jan. 9, 2015), *aff'd*, 699 F. App'x 259 (4th Cir. 2017) (House 1), and (ii) *House v. Fed. Home Loan Mortg. Corp.*, 261 F. Supp. 3d 623, 633 (E.D.N.C. 2016), *aff'd*, 699 F. App'x 259 (4th Cir. 2017) (House 2). Both opinions were affirmed by the federal Fourth Circuit Court of Appeals. These opinions establish the term “requisite time period” under the PTFA and are the subject of [my next post](#). In the meantime, for purposes of ensuring compliance with both the PTFA and G.S. 45-21.29(k), keep in mind:

- If there is **a bona fide tenant** under the PTFA occupying the foreclosed property, the clerk may not issue the order for possession under G.S. 45-21.29(k) unless the “requisite time period” under the PTFA has run. During the PTFA’s requisite time period, the purchaser of the foreclosed property must pursue summary ejectment before the magistrate to remove a tenant from the property.
- If there is **not a bona fide tenant** under the PTFA and the other requirements set forth in G.S. 45-21.29 are met, then the clerk may issue the order for possession. CSC Manual, pg. 130.49 (2012). An applicant for the order for possession may show there is not a bona fide tenant, for example, through a sworn statement about the applicant’s knowledge of the person or persons occupying the property submitted with the application.

For those of you in the judicial branch, the NC Administrative Office of the Courts Office of General Counsel published a helpful checklist applicable to orders for possession in power of sale foreclosures that is available on the AOC intranet (JUNO). Hopefully, we have heard the last of the PTFA-related legislation but given this history outlined in this post, you can never be too sure.

*\* This post was updated on August 31, 2020 to include references to the requisite time period under the PTFA and the case decisions in House 1 and House 2.*