

developing this legislation. Other important collaborators include law enforcement, district attorney's associations, civil rights organizations, and fair housing groups. As with any type of legislation, policymakers will want proof that there is a need for these protections, so it is critical to gather client stories and, if possible, data on evictions and denials of housing resulting from domestic violence. It is also necessary to educate policymakers regarding the link between domestic violence and homelessness and to explain that a safe and stable home is crucial to ending the cycle of violence.<sup>30</sup> Agencies that cannot participate in legislative advocacy due to Legal Services Corporations restrictions can still play a valuable role by reviewing proposed legislation to ensure that it is consistent with existing landlord-tenant and family law statutes and by providing anecdotal information. Finally, the experiences of advocates in the growing number of states that have these protections can be invaluable in drafting language, developing strategy, creating outreach materials, and responding to opposition arguments. ■

## Congress Considers Protection for Tenants Victimized by Foreclosures

In a 2007 letter to Barney Frank, Chairman of the House of Representatives' Committee on Financial Services, Federal Reserve Chairman Ben Bernanke responded to Mr. Frank's inquiries regarding the impact of foreclosures on tenants by stating that: "[these] interactions are governed by state laws, and are not an area in which the Federal Reserve has regulatory authority".<sup>1</sup> Mr. Bernanke then "encourage[d] the Congress . . . to give this problem appropriate consideration and explore whether legislative or regulatory changes are called for to better protect responsible consumers."<sup>2</sup>

Congress is now considering just such changes. Identical federal bills, titled the "Protecting Tenants at Foreclosure Act of 2008," were introduced in the United States House on May 5, 2008 and in the Senate on May 19, 2008.<sup>3</sup>

These bills are intended to mitigate the disruptive impacts of foreclosure-induced evictions on families that, in most cases, did nothing to precipitate the mortgage default. Testimony at a July 23, 2008, briefing on Capitol Hill<sup>4</sup> laid out the dramatic and tragic impact of foreclosure on families who often learn their fate when the sheriff or an agent of a foreclosure sale purchaser appears at their door demanding immediate possession. Hinting at the sheer numbers of families involved, a recent survey by the National Low Income Housing Coalition (NLIHC) found that, in 2007, 25% of foreclosed single family homes in California were renter occupied, 35% of the nearly 14,000 foreclosure filings in Chicago involved two- to six-unit buildings, and that 60% of the 15,000 filings in New York City were on multi-unit buildings.<sup>5</sup> A related survey disclosed that only eight states provide over thirty days notice to tenants and require the new owner to use a judicial eviction process.<sup>6</sup> Eight

<sup>1</sup>Letter from Ben Bernanke to Rep. Barney Frank (Oct. 25, 2007), at 1.

<sup>2</sup>*Id.* at 2.

<sup>3</sup>Protecting Tenants at Foreclosure Act of 2008, H.R. 5963, 110<sup>th</sup> Cong. (2008) and S. 3034, 110<sup>th</sup> Cong. (2008) (hereinafter "the Bills"), respectively sponsored by Reps. Ellison of Minnesota, McCarthy of New York and Capuano of Massachusetts (referred to the House Committee on Financial Services) and by Senators Kerry and Kennedy of Massachusetts (referred to the Committee on Banking, Housing and Urban Affairs).

<sup>4</sup>Organized by the National Low Income Housing Coalition, with participation by SERVE, Inc. (Securing Emergency Resources through Volunteer Efforts), United Way, National Alliance to End Homelessness, the United Conference of Catholic Bishops and the National Housing Law Project, the briefing was attended by approximately eighty Congressional staff, and representatives of media and interested organizations.

<sup>5</sup>NLIHC, *Foreclosure's Invisible Victims: Recent Research on the Foreclosure-Crisis* (July 23, 2008).

<sup>6</sup>NLIHC, *Foreclosure and Eviction Practices by State* (Draft July 25, 2008).

<sup>30</sup>The National Housing Law Project has developed sample advocacy letters, fact sheets, and testimony in support of housing protections for domestic violence survivors. To obtain these documents, or for any other information about housing protections for domestic violence victims, contact NHLP Equal Justice Works Fellow Meliah Schultzman at mschultzman@nhlp.org.

more states require that tenancies survive foreclosure unless the tenant<sup>7</sup> is named in the foreclosure filing.<sup>8</sup> Over two-thirds of states, therefore, provide neither of these protections to tenants who were otherwise in good standing upon the foreclosure sale.

### Preexisting Tenancies

The bills would provide that "bona fide" tenants under "bona fide" leases<sup>9</sup> receive at least ninety days notice to vacate in the event of foreclosure on their residence, with tenants under leases longer than ninety days entitled to occupy the premises through the remaining term of the lease.<sup>10</sup> The sole exception would be that, even if an existing lease extends beyond ninety days, a successor may terminate the lease "on the date of sale of the unit to a purchaser who will occupy the premises as a primary residence," with ninety days' notice to vacate.<sup>11</sup>

### Section 8 Tenancies

As a subclass of all tenants, Section 8 Housing Choice Voucher program participants receive additional protections. The foreclosure purchaser would not be able to assert "vacating the property prior to sale [as] other good cause" for terminating the lease during the initial term of the lease.<sup>12</sup> In subsequent lease terms, vacating prior to sale would constitute "good cause" only "if the property is unmarketable while occupied, or if such owner will occupy the unit as a primary residence."<sup>13</sup>

The bills further provide that the foreclosure purchaser of a unit occupied by a voucher participant would take title subject both to the Housing Assistance Payments (HAP) contract with the local housing agency and to the lease with the tenant.

### Implementation

The bills provide that the preexisting tenant protections govern "any foreclosure on any dwelling or residential real property after the date of enactment of this Act." Although the bills do not define "foreclosure," it presumably means the trustee's sale or court judgment terminating the mortgagor's rights.<sup>14</sup>

<sup>7</sup>*Id.* (sometimes named as "J. Doe").

<sup>8</sup>*Id.*

<sup>9</sup>A "bona fide" tenant and a "bona fide" lease exist if: "(1) the mortgagor under the contract is not the tenant; (2) the lease or tenancy was the result of an arms-length transaction; or (3) the lease or tenancy requires the receipt of rent that is not substantially less than fair market rent for the property." The Bills at Section 2(b).

<sup>10</sup>The Bills at Section 2(a)(2)(A) and (B).

<sup>11</sup>*Id.* Section 2(a)(2)(A).

<sup>12</sup>*Id.* Section 3.

<sup>13</sup>*Id.*

<sup>14</sup>Section 2(a) applies the bills to the immediate successor in interest "pursuant to the foreclosure."

The voucher participant protections would be implemented by adding language to Section 8 (o)(7) of the United States Housing Act of 1937,<sup>15</sup> which governs the content and operation of the HAP and the lease. Therefore, it is unclear whether these protections would take effect only upon inclusion of the newly mandated provisions in a new HAP contract, a renewal contract, or a lease renewal.

### Scope

It is important to note that both the preexisting tenancies and the Section 8 tenancies provisions reach only to the "immediate successor in interest" at the foreclosure sale.<sup>16</sup> Subsequent purchasers would take possession free of the bills' constraints, so their effect on straw subsequent successors would likely become the subject of litigation under federal law and state legal and equitable title principles.

The preexisting tenancy sections of the bills specify that longer time periods or additional tenant protections found in federal or state subsidized housing requirements, or in state or local law, would remain unaffected.<sup>17</sup> The Section 8 tenancies section, requiring the survival of the HAP and lease, provides that longer time periods or additional tenant protections found in state or local law would also be unaffected.<sup>18</sup>

### Prospects for These Bills

Because cash flow is critical to the operation and therefore the marketability of multi-unit rental property, there is little incentive for sellers or purchasers of such properties to want the units empty at sale, unless the plan is for major renovation. In contrast, many foreclosing lenders continue to insist that single-family homes be vacant, although this may change as the number of foreclosures continues to rise and significant numbers of vacant homes, both by their very existence and because they attract vandals, pull down the value of both the empty houses and those in the surrounding neighborhood. How the various interests will position themselves if these bills reach the floor of Congress has yet to be seen, but these bills represent an important attempt to protect responsible consumers. ■

<sup>15</sup>42 U.S.C. § 1437f(o)(7) (2007).

<sup>16</sup>The Bills at Section 2.(a) and Section 3-(1) and (2).

<sup>17</sup>The Bills at Section 2(a)(2).

<sup>18</sup>*Id.* Section 3 (2).