

**IN THE SUPREME COURT OF FLORIDA**

IN RE: AMENDMENTS TO FLORIDA  
RULES OF CIVIL PROCEDURE – FORM  
1.996 (FINAL JUDGMENT OF FORECLOSURE)

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CASE NO: SC09-1579

**COMMENTS OF THE HOUSING UMBRELLA GROUP OF FLORIDA  
LEGAL SERVICES, INC.**

The Housing Umbrella Group of Florida Legal Services, Inc. (hereafter Housing Umbrella Group), pursuant to the notice issued by this Court on February 16, 2010, file these comments on the proposed Amendments to the *Florida Rule of Civil Procedure – Form 1.996 (Final Judgment of Foreclosure)*. We request the Court to change paragraph 6 of the judgment so that it complies with the federal Protecting Tenants at Foreclosure Act.

**Introduction and Background**

The Housing Umbrella Group is a statewide association of approximately 175 legal services and legal aid attorneys and law professors from 18 independent legal services/legal aid providers and three law schools in Florida. Founded in the 1980s, Housing Umbrella Group attorneys provide civil legal services to the indigent throughout the State of Florida. The Housing Umbrella Group is particularly concerned with protecting the rights of low-income tenants who are living in foreclosed properties and how the proposed Final Judgment of Foreclosure will impact these tenants.

*Imagine this scenario:* You come home after a long day at work to find a notice posted on your front door with the words, “Writ of Possession” highlighted in bold print. The notice says you must move out within 24 hours or the sheriff can come and forcibly remove you. It is after 5:00 PM when you see the notice, so you cannot reach anyone to ask for help – not an attorney, not the bank named as the Plaintiff, not the courthouse. You have paid your rent on time every month, and you have a valid lease that has not expired. Having moved in three months ago, you had no idea that your landlord was in foreclosure, and you never received any court documents until now. Where will you and your kids go? How can you possibly get out in 24 hours? Where will you get the money to suddenly move?

The above scenario is not at all far-fetched. Each week, it is occurring throughout the state of Florida to innocent tenants living in properties that have been foreclosed. This problem potentially affects many of the estimated 4.5 million residential renters in Florida. A recent study by the National Low Income Housing Coalition found that more than 20% of the properties facing foreclosure nationwide are rentals and since many of the rentals are multiple units it is estimated that renters make up 40% of those losing their residence upon foreclosure.<sup>1</sup>

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<sup>1</sup> National Low Income Housing Coalition, *Renters in Foreclosure: Defining the Problem, Identifying Solutions*, January 2009, <https://www2398.sslldomain.com/nlihc/doc/renters-in-foreclosure.pdf>.; see also, “White Paper: Tenants in Foreclosed Properties,” by Florida Legal Services, Inc. (Feb. 2010).

Congress attempted to address this national problem by passing the federal Protecting Tenants at Foreclosure Act (“PTFA”), Pub. L. No. 111-22, §§ 701-704 (effective date May 20, 2009). A copy of PTFA is attached as Exhibit A. PTFA applies to all foreclosures on residential property. It requires that a new owner acquiring property through the foreclosure sale honor existing leases. For tenants without an existing lease, the new owner can only terminate the tenancy after serving a 90 day notice on the tenant. If the residence is sold to subsequent purchasers that want to occupy the unit as a primary residence, then the new owners do not have to honor the full term of an existing lease, but in those cases, the new owner must provide the tenant with at least 90 days written notice terminating the tenancy. PTFA only protects bona-fide leases or tenancies. Under PTFA, a bona fide tenant: (1) cannot be the mortgagor or the child, spouse, or parent of the mortgagor; (2) must have entered into the tenancy through an arms-length transaction; and (3) must pay a rent that is not substantially less than the fair market rent (unless subsidized by a governmental agency). PTFA is effective until December 31, 2012; a bill has been introduced in Congress to make these protections permanent.<sup>2</sup>

The Supreme Court’s proposed Final Judgment of Foreclosure does not take into account the PTFA and the proposed language directly conflicts with the

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<sup>2</sup> H.R. 4766, Permanently Protecting Tenants at Foreclosure Act of 2010.

requirements of PTFA. This Court must modify the final judgment to reconcile it with PTFA so that all parties, including plaintiffs, tenants, third-party purchasers, attorneys, and judges, comply with PTFA's requirements.

### **Examples of Tenants Impacted By Foreclosures**

From our experience, many judges across the state are, unfortunately, unfamiliar with PTFA and its requirements. Below, we have provided examples of how courts are regularly disregarding the federal law, how it impacts those tenants, and the steps a tenant must take when the PTFA is disregarded:

**Example #1** -- Jared and his wife rented a single family home pursuant to an oral agreement. Their home property was sold at a foreclosure sale on November 25, 2009. A Certificate of Title was issued by the Clerk of Court on December 8, 2009, a Writ of Possession issued on January 17, 2010, and on January 18, 2010, Jared was served with a 24-hour Writ of Possession. Unfortunately, Jared did not have legal counsel. As a result of receiving the Writ of Possession, Jared moved out of his home within the 24-hour period, causing Jared and his wife extreme stress and financial hardship. Jared was never provided with the 90 day notice required by the Protecting Tenants at Foreclosure Act, nor did the court ensure that the new owner had complied with PTFA.

**Example #2** -- Carlos, his wife, and two children reside in a single family home in pursuant to a one year written lease which expires on October 31, 2010.

Unbeknownst to Carlos, a foreclosure had been filed against his landlord 7 months before Carlos started to rent the property. Carlos never received any court pleadings regarding the foreclosure action until he received a 24-hour Writ of Possession. The new owner did not comply with PTFA and the court did nothing to ensure compliance with PTFA.

Fortunately, Carlos obtained legal counsel and his attorney filed a Motion To Set Aside Writ of Possession. After the attorney obtained an emergency hearing, the judge issued an order staying enforcement of the writ and then scheduled an evidentiary hearing. At the evidentiary hearing the judge concluded that Carlos' legal rights under PTFA had been violated. As a result, the court vacated the Writ and restored Carlos' tenancy. Only with the help of an attorney could Carlos and his family remain in their home and enforce their rights under PTFA.

**Example #3** -- Annette R. and her husband rent a single family home under a written lease which terminates on June 30, 2010. Annette filed an answer to the foreclosure complaint which specifically notified the Plaintiff and the court that she was a tenant in the property and she had a lease which expired in June 2010. The property was sold at a foreclosure sale and the plaintiff purchased the property at the foreclosure sale. The plaintiff filed a Motion For Order Directing Clerk to

Issue Writ of Possession, which was granted ex parte, and a few days later, Annette was served with a 24-hour Writ of Possession.

Annette retained an attorney who filed an Emergency Motion To Set Aside and Vacate Writ of Possession. The attorney scheduled an emergency court hearing and the trial Judge vacated the Writ of Possession because Annette's tenancy rights under the Protecting Tenants at Foreclosure Act had been violated.

Unfortunately, these cases are not isolated and are typical stories that we hear every day. Courts, plaintiffs, attorneys, and third-party purchasers regularly disregard PTFA. As our examples demonstrate, tenants frequently need legal counsel in order to enforce their rights under this federal law. That is why it is extremely important that the final judgment of foreclosure approved by the Florida Supreme Court clearly mandate compliance with PTFA.

### **Problems with the Proposed Final Judgment**

Paragraph 6 of the proposed final judgment of foreclosure fails to address the rights of tenants created by PTFA. As background, Paragraph 6 was suggested by the Florida Bar's Real Property Probate and Trust Law (RPPTL) Section, as evidenced by Fast-Track Report in Response to Legislative Changes filed on August 28, 2009 by the Civil Procedure Rules Committee and the Florida Bar. The suggested changes to Paragraph 6 appear to have been drafted by the RPPTL Section prior to the May 20, 2009 enactment of PTFA, since the changes were

approved by the Civil Procedure Rules Committee in June 2009, and, therefore, were certainly promulgated by the RPPTL section months before the Committee approval date. This accounts for the failure of the language to address the PTFA.

The RPPTL Section suggests the following language for Paragraph 6:

On filing the certificate of ~~title sale~~, defendant(s) and all persons claiming under or against defendant(s) since the filing of the notice of lis pendens shall be foreclosed of all estate or claim in the property ~~and the purchaser at the sale~~, except as to claims or rights under chapter 718 or chapter 720, Florida Statutes, if any. Upon the filing of the certificate of title, the person named on the certificate of title shall be let into possession of the property. If any defendant remains in possession of the property, the clerk shall without further order of the court issue forthwith a writ of possession upon request of the person named on the certificate of title.

The RPPTL Section suggested the changes in the first sentence to address cases where there “may be multiple defendants and to adapt to the requirements of the Florida Statutes Section 45.0315 (right of redemption), Chapter 718 (the Condominium Act), and Chapter 720 (the homeowners’ associations act).” Fast-Track Report in Response to Legislative Changes, page 3. The Housing Umbrella Group does not contest these changes.

It is the remainder of the changes to paragraph 6 that concern the Housing Umbrella Group. The RPPTL Section gives no explanation for the change in the second sentence of paragraph 6. The Report states the last sentence was added by the RPPTL Section “to allow the purchaser to obtain a Writ of Possession from the Clerk without having to schedule another hearing to deal with a defendant (i.e., a

party to the litigation) who refuses to vacate the property after the certificate of title is issued.” Page 3 and 4. As written, the proposed final judgment forecloses the tenant’s right to possession of the property once the certificate of sale is filed. This directly conflicts with PTFA. Under PTFA, all bona fide residential tenancies survive the foreclosure sale and issuance of a certificate of sale, just like a tenancy would continue if the landlord sold the property at a traditional real estate closing. PTFA entitles the tenant to occupy the premises until the expiration of his or her lease agreement. If there is no current lease, the new owner must provide the tenant with at least 90 days written notice before terminating the tenancy. Because of this protection under PTFA, the proposed final judgment of foreclosure cannot automatically foreclose the rights of tenants. The final judgment of foreclosure must be amended to include an exception for bona fide residential tenants under PTFA.

Because of the PTFA exception to the traditional termination of inferior lien rights in foreclosure, the trial court is required to hold an evidentiary hearing to determine whether the purchaser at the foreclosure sale is entitled to obtain a writ of possession against the individual occupying the foreclosed property. Under the proposed final judgment, “the clerk shall without further order of the court issue forthwith a writ of possession upon request of the person named on the certificate of title.” This proposed language would **improperly** entitle the purchaser at the



foreclosure sale to obtain a writ of possession against a tenant even though the tenant is entitled to remain in the property until the end of the lease term or until the new owner provides at least 90 days written notice terminating the tenancy.

A writ of possession cannot issue automatically in a foreclosure action without potentially violating PTFA. Clearly, the trial court may issue a writ of possession against the mortgagor or a non-bona fide tenant, but the only way for the trial court to properly make this determination is by conducting an evidentiary hearing for which the tenant is properly notified. At the hearing, the trial court can determine, based upon the evidence presented, whether the property is occupied by a bona fide tenant under PTFA. If a bona-fide tenant resides in the property, the tenancy has survived the foreclosure and a writ of possession cannot be issued.

### **Administrative Orders Addressing PTFA**

Several judicial circuits in Florida have issued administrative orders in an attempt to comply with PTFA. However, these orders have different requirements and they do not necessarily ensure compliance with PTFA. The Seventh Judicial Circuit (A.O. CV-2010-016-SC) and the Fifteenth Judicial Circuit (A.O. 3.307-7/09) have administrative orders which require a motion for writ of possession to include an attorney certification that there are no tenants in possession of the property and that the writ of possession would not violate the tenant's right to continued occupancy under PTFA. It is unclear how an attorney could sign this

certification without visiting the property and having personal knowledge about who is residing in the property. Additionally, there is no requirement for the court to hold a hearing. This means a tenant disputing the allegations in the motion would be served with the writ of possession and face the difficult challenge of obtaining an emergency hearing and a stay before the sheriff returns to evict the tenant.

The Eleventh Judicial Circuit's administrative order (A.O. 09-09 A1) requires that the foreclosure court conduct a hearing and only issue a writ of possession which is in compliance with PTFA. While this administrative order lacks specific details to ensure compliance with PTFA, commendably, it requires a hearing, where the tenant can appear, **before** a writ of possession is issued. Because of these differing requirements, enforcement of a tenant's right to continued occupancy under PTFA presently depends upon the requirements of the judicial circuit where the tenant lives.

### **Proposed Language**

In order to ensure that tenants uniformly obtain the protections of PTFA and to address the concerns listed above, the Housing Umbrella Group proposes the following language for paragraph 6 of the final judgment of foreclosure:

On filing the certificate of ~~title~~ sale, defendant(s) and all persons claiming under or against defendant(s) since the filing of the notice of lis pendens shall be foreclosed of all estate or claim in the property ~~and the purchaser at the sale~~, except as to claims or rights under chapter 718 or chapter 720,

Florida Statutes, or under the Protecting Tenants at Foreclosure Act of 2009, Pub. L. No. 111-22, §§ 701-704. The person named on the certificate of title may move the court to issue a writ of possession. The clerk shall not automatically issue a writ of possession, and may issue a writ of possession only when so ordered by the court after a hearing on the motion. The person named on the certificate of title shall provide notice of the hearing by mail to any tenants who have made an appearance in the action or who are known to occupy the property, or, if there are no known tenants, the person named on the certificate of title shall mail notice of the hearing to the property, addressed to “occupant(s)”, and also post such notice in a conspicuous place for each dwelling unit. After the hearing, the court may order the clerk to issue a writ of possession if the court finds that the property is unoccupied or that the property is occupied by the mortgagor(s) or other person(s) without a bona fide tenancy, but the court shall not order the issuance of a writ of possession if it finds that the property is occupied by any person with a bona fide tenancy, as defined in the Protecting Tenants at Foreclosure Act of 2009.

The final judgment must specify these requirements in order to uniformly uphold across Florida a tenant’s federally protected rights in foreclosures. If the language is not included in the final judgment, courts will authorize the issuance of writs of possession without holding hearings to first determine who is occupying the property, and tenants will improperly receive writs of possession. To enforce their rights under PTFA and stop the writ, the tenant will be required to file an emergency motion and schedule a hearing before the sheriff returns to evict them within the 24-hour notice period provided by the writ of possession. Most residential tenants will be representing themselves since they cannot afford an attorney, may not qualify for the services of legal aid, and/or simply may not have time to retain legal representation before the 24-hour writ expires. Because it is a

difficult process to stop a writ of possession, most tenants will simply move out of the property for fear of the unknown and the purpose of the PTFA will be defeated.

Although PTFA requires an additional hearing before a writ of possession is issued, this should not overly burden the court system. Currently, in most foreclosures, the plaintiff is taking title at the foreclosure sale. By now, foreclosing plaintiffs and their attorneys should be well aware of the rights afforded to tenants by PTFA. They should be taking reasonable steps to determine whether the properties are occupied by tenants protected by PTFA. Ordinary prudence should prompt non-institutional purchasers to take the same steps. If purchasers perform their due diligence and find that there is a bona fide tenant in the property, then they should not be seeking a writ of possession and those cases should not require a hearing.

It is also important that PTFA language be included in the final judgment so that tenants are notified of their right to continued occupancy and their right to a hearing. Many tenants receive a copy of the foreclosure judgment when it is mailed to the property address. Without a PTFA reference in the final foreclosure judgment, the tenant may mistakenly believe that he must move out immediately after the foreclosure sale. Our proposed language would place the tenant on notice that PTFA allows the tenant to remain in the property and that the trial court will conduct a hearing regarding possession of the property.

Adoption of our proposed language will guarantee that Florida courts uniformly comply with PTFA and provide tenants with the rights and protections afforded them by this federal law.

### **Conclusion**

Tenants are the innocent victims of the foreclosure crisis and the Protecting Tenants at Foreclosure Act provides additional important protections to these tenants. The proposed final judgment ignores this federal law. This Court must amend the form final judgment of foreclosure to comply with the tenant protections created by PTFA. By making these changes, the Court will give effect to the PTFA and provide protection for those whom Congress clearly intended to protect.

Jeffrey Hearne  
Fla. Bar No. 512060  
Co-Chair, Housing Umbrella Group  
Of Florida Legal Services, Inc.  
Legal Services of Greater Miami, Inc.  
3000 Biscayne Blvd, Ste 500  
Miami, FL 33137-4129  
(305) 438-2403

Jeffrey G. Haynie  
Fla. Bar No. 843741  
Jacksonville Area Legal Aid, Inc.  
126 W. Adams Street  
Jacksonville, FL 32202  
(904) 356-8371

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Alice M. Vickers  
Fla. Bar No. 0402631  
Florida Legal Services, Inc.  
2425 Torreya Drive  
Tallahassee, FL  
(850) 385-7900

Michael L. Resnick  
Fla. Bar No. 844659  
Legal Aid Society of the Orange  
County Bar Association  
100 E. Robinson Street  
Orlando, FL 32801  
(407) 841-8310

Michelle Ku  
Fla. Bar No. 103608  
Student Legal Services,  
University of Central Florida  
P.O. Box 163650  
Orlando, FL 32816-3650  
(407) 823-2538

Purvi Shah  
Fla. Bar No. 508489  
Florida Legal Services, Inc.  
3000 Biscayne Blvd. #102  
Miami, FL 33137  
(305) 573-0092

Christina McLamore, Esq.  
Fla. Bar No. 36244  
Community Legal Services of Mid-Florida, Inc.  
128-A Orange Avenue, Suite 100  
Daytona Beach, FL 32114-4310  
(386) 255-6573

### **CERTIFICATE OF SERVICE**

I certify that a copy of the Comments of the Housing Umbrella Group of Florida Legal Services, Inc. have been sent by U.S. Mail to Mark A. Romance, 201 S. Biscayne Blvd, Suite 1000, Miami, FL 33131-4327 this 12th day of April, 2010.

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Alice M. Vickers

### **CERTIFICATE OF COMPLIANCE**

I certify that these comments were prepared in accordance with the font requirements of Fla. R. App. P. 9,210(a)(2).

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Alice M. Vickers