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"Something Wicked This Way Comes": Revising Rhode Island Law to Require Notice to Tenants in Foreclosure

I. INTRODUCTION

Maria Simmons and her husband Kenneth fell prey to a landlord in East Providence who let them move into one of his rental homes in a middle-class neighborhood.[1] "When I get back," Maria recalled him saying, "we'll write out some kind of lease." Only a month later, a neighbor approached her and told her about a foreclosure notice she spotted in the newspaper.[2] The landlord, Charles Oertel, bought the property in September 2004 for $233,000, his tenth rental property secured with "risky subprime loans" with partner William Prunty.[3] Oertel had a "30-year mortgage that carried an initial interest rate of 6.53 percent, which was scheduled to adjust two years later to a maximum of 9.53 percent.[4] Thereafter the rate would adjust every six months to a maximum of 12.53 percent."[5] All of Oertel's other properties had been foreclosed on by the time Mrs. Simmons' home was advertised for foreclosure, due in part to the rapidly increasing mortgage payments required for the properties and the inability of rental income to keep up.[6] As Oertel put it, "You start robbing Peter to pay Paul."[7] The Simmons's were lucky enough to find stable, suitable replacement housing upon their eviction,[8] but

1. Lynn Arditi, *Foreclosure Fallout*, PROVIDENCE J. BULL. (R.I.), Jan. 6, 2008, at D1, *available at* 2008 WLNR 416231 [hereinafter *Fallout*].
2. *Id.* The bank sent the notice of foreclosure to the landlord the day after the Simmons's moved in.
3. *Id.*
4. *Id.*
5. *Id.*
6. *Id.*
7. *Id.*
8. *Id.*

there is nothing preventing what had happened to them with Oertel from happening again with another landlord.

What happens to the tenants in foreclosed homes? They, like the borrower, must vacate the property when the bank reclaims its possessory interest and subsequently sells the property to fulfill the outstanding debt. The tenant, however, is typically the last to know that a default has occurred and that a foreclosure sale is imminent. "[T]hey are caught unaware: 'The first thing they know is there's some people standing out in the front yard auctioning off the property [. . .] And the next day they've got a five-day notice to vacate.'"[9] Tenants are not entitled to any notice of foreclosure in Rhode Island, though they can be sure to receive notice of eviction from the bank, requiring that they vacate within a "reasonable" amount of time.[10] Although notices of foreclosure are printed in the Providence Journal as required by law,[11] with the increased volume of foreclosure advertisements and the expectation of personal notice from a landlord, most tenants do not expect to see a notice, nor are they looking. Note that Rhode Island landlord-tenant law does not apply in foreclosure situations.[12]

This phenomenon has the potential to affect all tenants, whether under a lease or not and whether up to date on rent or not. Renters cannot be assured that their monthly payments are going toward the property's mortgage or included utilities, nor can they be assured that the unit they are renting is not already in foreclosure proceedings. Seventy-nine year old Providence renter Irene Foss found herself in this situation last year.[13] She was a tenant in good standing, renting part of a triple-decker that housed six other adults and seven children.[14] The home's water had been shut off, prompting an inquiry into the property owner's water and mortgage delinquency.[15] Realizing that the property

9. Lynn Arditi, *Collateral Damage: Foreclosure crisis forces many renters from homes*, PROVIDENCE J. BULL. (R.I.), Nov. 25, 2007, at D1, *available at* 2007 WLNR 23443290 (quoting Robert M. Sabel, Rhode Island Legal Services' litigation director) [hereinafter *Collateral Damage*].

10. *Collateral Damage*, *supra* note 9.

11. *See* R.I. GEN. LAWS § 34-27-4(a) (1956).

12. *Collateral Damage*, *supra* note 9.

13. *Id.*

14. *Id.*

15. *Id.* Mrs. Foss and her neighbors had to pay to have the water turned

would be going up for foreclosure auction after a neighbor had fortuitously spotted a foreclosure notice in the paper, Irene hoped that the new owner might want to keep the current tenants.[16] At the unsuccessful bank auction, Mrs. Foss approached the auctioneer and mentioned that the landlord had showed one of the vacant apartments to a prospective tenant just a week earlier, at which time the auctioneer advised her not to make anymore rental payments.[17] Not all tenants are as lucky as Mrs. Foss. Most do not get any advice about continuing rental payments, nor do most get a heads up that they might be signing a lease for a unit that is already in default, like Maria Simmons.

A. "Something wicked this way comes"[18]

How can these harmful effects be prevented? Several problems converge to create the mess, but by teasing out the specific effects of foreclosure on tenants, one solution is perfectly clear. If only tenants had some way of knowing that they are in for tough times, that they are going to be put out, that they should start looking now for new housing and that they should stop paying rent on their doomed apartment. Landlords have made it apparent that they are not to be relied upon to provide this warning to their tenants: recall that Mrs. Foss's landlord and Charles Oertel knew that they were in foreclosure, but failed to notify the people to whom it would matter most, their tenants. The only other party with the information and the means to warn the tenants is the bank. Lenders can be counted on to notify borrowing landlords, their customers, that they are in default and that foreclosure proceedings will be commenced soon. Why shouldn't they also be expected to notify the home's occupants of the foreclosure as well? It is cheap, it is easy, and it is in their

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back on, resulting in a payment in addition to their monthly rent payments. In Mrs. Foss's situation, as in many others', the landlord was responsible for paying water and sewer bills, not the tenants. When the landlord takes rent, but fails to pay the mortgage and/or promised utilities, the tenants end up paying out the nose. *Id.*

16. *Id.*

17. *Id.* Note that so long as the borrower is still the record titleholder, he is still the landlord and is entitled to rent. If the tenant stops paying rent, but the foreclosure isn't consummated, the landlord may seek to recover the unpaid rent from the tenant. *See* R.I. GEN. LAWS § 34-18-56(c) (1956).

18. William Shakespeare, MacBeth act 4, sc. 1.

best interests to do so.

Keeping these problems in mind, this note investigates and ultimately proposes a notice requirement that would ensure that mortgagees inform tenants in residential foreclosure situations of the foreclosure sale. Part Two explores the factors that have combined to create the foreclosure crisis that Rhode Island is currently facing. Part Three examines the law of mortgage foreclosure, with a brief common law overview followed by an explanation of the mortgage foreclosure laws of Rhode Island. Part Four probes the ways in which the Rhode Island courts could read the proposed notice requirement into existing Rhode Island law, looking specifically to jurisprudence in New Hampshire and constitutional notice principles. Part Five studies the option of creating the notice requirement via legislative change, mirroring the laws of Minnesota that are currently being copied nationwide. Finally, the note concludes by exploring the likelihood of change and predicting the outcome of each proposed avenue to change.

II. STATEMENT OF THE PROBLEM

A. The Rhode Island Foreclosure Crisis

In Rhode Island, July of 2008 saw the number of legally noticed foreclosures reach a "two-year high" of 422.[19] Of the 372 foreclosure notices posted in Rhode Island in August 2008, fifty-seven percent, or 211, were located in Providence, with fifty-two of the August Providence foreclosures effected on multifamily dwellings.[20] The state's mortgage delinquency rate for the second quarter of 2008, at 6.37%, is higher than the national delinquency rate of 6.22%.[21] Subprime adjustable rate mortgage (ARM) loans accounted for 24.54% of second quarter foreclosures in Rhode Island.[22] When coupled with the prediction that hundreds of thousands of option ARM loans will adjust beginning in April 2009, this spells continued disaster, despite the potential decrease

19. *See* RHODE ISLAND HOUSING, STATEWIDE FORECLOSURE TRACKING: SEPTEMBER 2008 1 (2008), http://www.rhodeislandhousing.org/filelibrary/Sept08%20Foreclosure.pdf [hereinafter *Tracking*].

20. *Id.*

21. *Id.* at 2.

22. *Id.*

in subprime mortgage defaults.[23]

Compounding the apparent foreclosure problem in Rhode Island, specifically when looking at multifamily properties in Providence, is the sky-high state unemployment rate of 9.4%,[24] beating the national average of 7.2%.[25] The forecast is gloomy, with the highest unemployment rate in the nation combined with almost 110 metropolitan multifamily foreclosures in the month of August alone. Where is the state's housing problem headed, and when will it end?

While the answers to these questions may not be clear as of yet, one thing is clear: how the state's situation got to where it is. The state's situation mirrors that which is found around the nation. Tight lending practices slacked off with the falling interest rates following the terrorist attacks of September 11th, lowered in an effort to boost the economy.[26] A wide availability of credit, often at rates below the prime interest rate, lured first-time homebuyers, minorities, the elderly, and investors into snapping up properties quickly and with little initial overhead.[27] This in turn led to a housing boom that peaked in 2004.[28] In 2004, Providence home sales increased 20.43% from the previous year, crushing the state sales increase of only 8.63%.[29] More homes were purchased in Providence that year than anywhere else in the state, setting the city up for a real estate bust it may not have seen coming. Now, many people owe more on their mortgages

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23. Prashant Gopal, *The Next Real Estate Crisis*, BUS. WK., June 5, 2008, *available at* http://www.businessweek.com/print/lifestyle/content/jun2008/bw2008065_526168.htm.

24. December 2008 jobless figure. *See* U.S. BUREAU OF LAB. STAT., ECONOMIC NEWS RELEASE: REGIONAL AND STATE EMPLOYMENT AND UNEMPLOYMENT SUMMARY, November 21, 2008, *available at* http://www.bls.gov/news.release/laus.nr0.htm.

25. December 2008 figure. *See id.*

26. Peggy J. Crawford & Terry Young, *Will the Subprime Meltdown Burst the Housing Bubble?*, 10 GRAZIADIO BUSINESS REPORT, PEPP. U., no. 3, 2007, at 1, *available at* http://gbr.pepperdine.edu/073/housing.html.

27. For a general overview of predatory lending practices, *see generally* Kurt Eggert, *Held Up in Due Course: Predatory Lending, Securitization, and the Holder in Due Course Doctrine*, 35 CREIGHTON L. REV. 503 (2001-2002).

28. Kevin Shalvey, Multi-family homes in city hit hard by foreclosure, Special Section: 2008 City of Providence, PROVIDENCE BUS. NEWS, July 21, 2008, available at http://www.pbn.com/detail/33868.html.

29. *Id.*

than their house is worth[30] and can no longer make their adjusted payments, which has led to the current foreclosure crisis.

B. Focus on Multifamily Property Foreclosure

Multifamily homes are hit especially hard. Often owned by the investors, absentee landlords, minorities, and first-time homebuyers[31] who signed on for doomed mortgages,[32] multifamily homes are more likely to be subject to subprime or ARM loans, which in turn are more likely to lead to higher foreclosure rates. This simple link hints at a correlation between high foreclosure rates for subprime and subprime ARMs and high foreclosure rates for urban multifamily units.[33]

The most distinguishing feature of multifamily properties in the foreclosure context is the increased likelihood [or certainty] that someone other than the owner/borrower occupies one or more of the units. Unfortunately, when a foreclosure is completed on these properties, is it not just the borrower who is ousted: everyone residing therein is ousted, including tenants. This skews the common foreclosure calculus by making one property's foreclosure affect three or four families, rather than only one family per property. The effects on the state, its cities, and their neighborhoods are monumental and oftentimes undervalued.

"Foreclosures have a way of rotting neighborhoods like cavities, from the inside out."[34] Foreclosures leaving renters homeless or holding over in their wakes have several consequences outside the scope of the property and renters themselves. "Foreclosures cause intense damage to

30. *Id.*

31. *See* Jorge O. Elorza, *Landlords, Rent Control and Healthy Gentrification: A Policy Proposal to Deconcentrate the Poor in Urban America*, 17 CORNELL J.L. & PUB. POL'Y 1, 21 (Fall 2007).

32. Eggert, *supra* note 27, at 517.

33. RI second quarter foreclosure figures show that subprime ARMs accounted for 24.54% of foreclosures, while non-ARM subprime loans accounted for 15.44% of foreclosures. Of the 357 foreclosure notices issued in the state of Rhode Island in August, about 109, just under 30 percent of the total, were issued to multifamily homes in Providence. *Tracking*, *supra* note 19, at 2.

34. *See* Lynn Arditi, *A Street Struggles in Providence; Borrowing troubles*, PROVIDENCE J. BULL. (R.I.), Oct. 5, 2008, at A, *available at* 2008 WLNR 18951337 [hereinafter *Struggles*].

borrowers/homeowners completely distinct from the financial effect of losing a house," [35] and this effect likely extends to the tenant in foreclosure. Most notably, "loss of foreclosure is not limited to that suffered by the borrowers themselves, but also spreads out in a rippling fashion, affecting the entire community." [36] Case in point: Bellevue Avenue in Providence's West End.[37] It depicts what is becoming a common scene in Providence and across the country: "[o]nce abandoned, these homes have been taken over by gangs and drug people, and they become breeding places for crime." [38]

Tenants who are evicted with little notice, especially in foreclosure situations, are in danger of falling prey to scheming landlords like Mrs. Foss's, or to less-than-honest landlords like Charles Oertel. They lose work and money while searching for new housing, and may accrue debt in the form of attorney's fees, unpaid utility bills that they may or may not have been responsible for in the first place, and wasted rent or "'use and occupancy' fees"[39] from holding over prior to an eviction.

This tends to perpetuate a cycle of poverty that gets concentrated in one place.[40] Demographic, social, economic, and political factors combine to isolate collections of like people in one neighborhood or location, cutting them off from employment, social, economic, and health opportunities available to other classes or demographics.[41] Two sets of circumstances are likely to exist, each posing a different outcome for the neighborhood's level of concentrated poverty. First, if a middle-income tenant is forced out of a unit due to foreclosure, he is likely to have the means to move to a better neighborhood, and he will bring with him the benefits of mixed-income neighborhoods.[42] Second, if a lower income, demographically homogeneous tenant is ousted by a foreclosure, he is likely to stay in the neighborhood, close to public

35. Eggert, *supra* note 27, at 581.
36. *Id.* at 582.
37. *Struggles*, *supra* note 34.
38. Eggert, *supra* note 27, at 582 (quoting Richard M. Daley, mayor of Chicago, *as reported* by James T. Berger, Subprime Lending Produces Dangerous Side-Effects, CHI. SUN-TIMES, June 9, 2000).
39. *Fallout*, *supra* note 1.
40. Elorza, *supra* note 31, at 5-6.
41. *Id.* at 6.
42. *Id.* at 12-16.

transport, ethnic groups, and failing schools.[43]

III. FORECLOSURE LAW

A. Generally

Common Law Foreclosure Principles

In order to explore a policy change in the field of mortgage foreclosure notices, it is imperative to have a loose understanding of how the foreclosure process works. By examining the general common law principles of mortgage foreclosures, the Rhode Island laws and processes will become clearer. Every state has different statutorily enumerated procedures for mortgage foreclosures, but there are several common strands regardless of state statute.

1. Right of Redemption

Every mortgage involves an equitable right of redemption for the borrower, and many of the United States jurisdictions recognize a statutory right of redemption in mortgages.[44] A right of redemption is a right held by the mortgagor to own the property outright, provided certain conditions of the mortgage are met.[45] When referring to mortgage foreclosure, it is technically this right of redemption that is being foreclosed upon, not the mortgage agreement itself.[46] The foreclosure action serves to sever the right of redemption, as described below.

The right of redemption exists in two forms, one equitable and the other statutory. The equitable right of redemption exists in almost every mortgage agreement, provided that no other arrangement has been made between borrower and lender on this point.[47] Once a foreclosure is enacted on these mortgages, the equitable right of redemption is extinguished, as the borrower has

43. *Id.* at 6.

44. Caryl A. Yzenbaard, *Payment or Non-Payment and Foreclosure*, RESIDENTIAL REAL ESTATE TRANSACTIONS DATABASE, Sept. 2005, at §4:37, *available at* RRET § 4:37.

45. Debra Pogrund Stark, *Foreclosing on the American Dream: An Evaluation of State and Federal Foreclosure Laws*, 51 OKLA. L. REV. 229, 231 (1998).

46. *Id.*

47. *See* Yzenbaard, *supra* note 44, at n.65.

failed to fulfill the conditions of the mortgage.[48] Statutory rights of redemption provide a certain period of time, typically running from the start of the foreclosure process, in which the borrower may pay the outstanding loan plus costs and redeem title to the property.[49] Once the statutorily prescribed period ends, there is no further chance for the borrower to redeem.[50]

Two Means of Foreclosing the Right of Redemption

1. Power of Sale, or Non-Judicial Foreclosures

State by state, foreclosures are typically carried out by one of two common means, each bearing distinct policy motivations. The non-judicial or "power of sale" foreclosure allows the mortgagee to foreclose the mortgagor's equitable right to redeem the mortgaged property without legal action.[51] States that practice this method of foreclosure have specific statutes outlining the procedures for selling the property. Commonly, the statutes require notice of default to the mortgagor.[52] If the defect is not cured, this first notice will be followed by a notice of sale that is both sent to the mortgagor and advertised in the newspaper for a specified amount of time.[53] Unless the mortgagor redeems the loan, the sale or auction will proceed as per statute.[54] Following the sale, the title rests in the buyer, and those remaining in the property may be evicted per state statute.[55]

Non-judicial or power of sale foreclosures are typically practiced in states that follow the title theory of mortgages.[56] The title theory proposes that the mortgagee is conveyed the title to the property when the mortgage agreement is made.[57] Title is

48. *See* Stark, *supra* note 45.
49. *See* Yzenbaard, *supra* note 44, at n.69.
50. *See id.*
51. Stark, *supra* note 45, at 231.
52. Hon. William Houston Brown, *Enforcement of the Mortgage: Default, Receivership, and Foreclosure—Foreclosure—Power-of-sale foreclosure*, THE LAW OF DEBTORS AND CREDITORS DATABASE, Nov. 2008, at § 8:17, *available at* DEBTCREDIT § 8:17.
53. *Id.*
54. *See* Stark, *supra* note 45, at 232.
55. Brown, *supra* note 52.
56. RESTATEMENT (THIRD) OF PROP.: MORTGAGES § 4.1 cmt. a (1) (1997).
57. *Id.*

subject to defeasance upon complete payment by the mortgagor.[58] The historical development of the title theory is important to understanding its practical effect today.

The title theory was first conceived in England, at the time when livery of seisen was a requirement for a conveyance of property.[59] At that time, the lender would occupy the property until the borrower paid off the entire loan, at which point the livery of seisen, as illustrated by the physical gift of the property, would take place to complete the conveyance.[60] Possession by the mortgagee was the norm until the middle of the seventeenth century, when the equitable right of redemption was recognized, allowing the borrower to possess the property for the duration of the mortgage unless and until an uncured default occurred.[61]

When it became normal for the mortgagor to be the owner in possession, the mortgagee ended up holding a mere security interest in the property.[62] So, when a mortgagor failed to perform the conditions of the mortgage agreement, the mortgagee could exercise his right to repossess and foreclose the right of redemption either judicially or by self-help entry onto the property.[63] The newly formed American colonial states adopted this evolved theory, except that there was usually an express agreement that the mortgagor would maintain possession, and the mortgagee would hold a security interest only.[64]

The practical effect of the title theory, as explained by its historical development, is that the "security interest only" theory is fairly widespread in its adoption, with some statutory variations state by state.[65] The mortgagee's right to redeem upon default is still recognized in the form of possession immediately upon an uncured default.[66] Therefore, in most title states, foreclosure of the right of redemption is achieved through a non-judicial foreclosure sale.[67] This allows the mortgagee to exercise its very

58. *Id.*
59. *Id.*
60. *Id.*
61. *Id.*
62. *Id.*
63. *Id.*
64. *Id.*
65. *Id.*
66. *Id.*
67. *Id.*

limited right to possession incident to title, and they tend to favor this means of foreclosure.[68]

2. Judicial Foreclosure

A judicial foreclosure involves a court action brought by the mortgagee.[69] By this court action, the mortgagee seeks to foreclose the mortgagor's equitable right to redeem the mortgaged property.[70] Mortgagors tend to favor this means of foreclosure because it gives them more notice, time, and possibility to argue for themselves.[71]

Judicial foreclosure proceedings tend to be most common in lien theory states because of the nature of exercising possessory interests in lien states.[72] The lien theory basically holds that the mortgagee holds a "lien" in the form of a security interest in the property for the amount due from the mortgagor.[73] Legal and equitable title remain in the mortgagor.[74] This theory was adopted by statute as a change to the initially popular title theory.[75] The lien theory has the practical effect of requiring an action for foreclosure, because unlike the title theory and power of sale, the mortgagee does not have a possessory interest in the property; a court action must be the device that cuts off the mortgagor's right to possess.[76]

Common Notice Requirements

The universal form of notice required in mortgage foreclosures dictates that the lender inform the borrower that he is in default, and that the debt is accelerated.[77] From that point on, states vary on what is required. It is common for the bank to have to notify the borrower either of the foreclosure sale's details or the action pending against it in court to judicially foreclose the equitable

68. *See* Stark, *supra* note 45, at 232.
69. *See id.* at 231.
70. *See id.*
71. *See id.* at 232.
72. RESTATEMENT (THIRD) OF PROP.: MORTGAGES § 4.1 cmt. a (2) (1997).
73. *Id.*
74. *Id.*
75. *Id.* A third, very uncommon intermediate theory of mortgage title exists. *Id.* at cmt. a (3).
76. *See* Stark, *supra* note 45, at 231.
77. *See id.* at 232.

right of redemption.[78] For non-judicial sales, the lender is commonly required to publish notice of the sale for a certain period of time preceding the sale, either in a circulating newspaper or in a public posting place.[79] Other than this mortgagee-mortgagor notice requirement at the end of the mortgage relationship, there is little else that states can agree upon when it comes to how and to whom notice is provided.

B. Rhode Island

Title Theory and the Power of Sale in Rhode Island

Rhode Island retains the title theory.[80] This preference is reflected in the state's statutory scheme, which envisions the property owner granting the lender "fee simple of the mortgaged premises."[81] Thus, foreclosure is achieved by a non-judicial power of sale.[82]

Once the mortgagee determines that the loan is in default, it may accelerate the debt, notify the mortgagor of the default, and unless the default is cured, it may have an attorney begin the foreclosure process.[83] At this point, the mortgagee takes title to the property because the default has gone uncured.[84] The mortgagee is now the title-holding owner of the property, and the borrower becomes a tenant by sufferance or a tenant at will.[85]

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78. *See id.*

79. Brown, *supra* note 52.

80. *See* Houle v. Guilbeault, 40 A.2d 438, 483 (R.I. 1944); Simmons v. Brown, 7 RI 427, 428 (R.I. 1863). *But see* 140 Reservoir Ave. Ass'n v. Sepe Inv., LLC, 941 A.2d 805, 811 (R.I. 2007) (stating that "title theory is a fiction designed to aid in decision making; it is not an absolute per se rule of law.").

81. *See* R.I. GEN. LAWS § 34-11-20 (1956). This presumption takes effect when the words "with mortgage covenants" are used in real estate conveyances.

82. *See* R.I. GEN. LAWS § 34-11-22 (1956). Note, too, the several other options existing for the foreclosure to take place: via judicial action, per R.I. GEN. LAWS § 34-27-1 (1956); action for ejectment per R.I. GEN. LAWS §34-20-4 (1956); or by peaceable and open entry in the presence of two witnesses per R.I. GEN. LAWS § 34-23-3 (1956). *See also* John P. Kromer et. al., *Rhode Island Mortgage Lending: Foreclosure*, RESIDENTIAL MORTGAGE LENDING: STATE MANUAL NORTH EASTERN DATABASE, August 2008, at § 2:19, *available at* RML-SRNE RI § 2:19.

83. Kromer, *supra* note 82.

84. § 34-11-20.

85. *See* Noorigan v. Greenfield, 156 A. 515, 516 (R.I. 1931).

The first step in the power of sale requires that the bank notify the mortgagor of the power of sale proceedings. The mortgagor must be:

> mailed written notice of the time and place of sale by certified mail return receipt requested at the address of the real estate and, if different, at the mortgagor's address listed with the tax assessor's office of the city or town where the real estate is located or any other address mortgagor designates by written notice to mortgagee at his, her, or its last known address, at least twenty (20) days for mortgagors other than individual consumer mortgagors, and at least thirty (30) days for individual consumer mortgagors, days prior to the first publication, including the day of mailing in the computation.[86]

Once this mailed notice has been made, the published notice required by the first subsection of the statute will be valid.[87] Published notice must be made once a week for the three weeks preceding the sale, with the first publication made no fewer than twenty-one days before the sale itself.[88] The notice may include the address of the property, plus either a metes and bounds description of the property, the tax assessor's plat information, or a citation of the book and page on which the mortgage is recorded.[89]

Eviction and Execution

The foreclosure and assumption of title in the mortgagee extinguishes the mortgagor's equitable right to redeem the mortgage.[90] The mortgagee may seek to evict those remaining in the home, including the former owner and his tenants, notifying

86. R.I. GEN. LAWS § 34-27-4(b) (1956).
87. R.I. GEN. LAWS § 34-27-4(a).
88. *Id.*
89. R.I. GEN. LAWS § 34-27-5 (1956).
90. "Any person entitled in equity to redeem any mortgaged property, whether real or personal, may prefer a complaint to redeem the property, which complaint may be heard, tried and determined according to the usages in chancery and the principles of equity." R.I. GEN. LAWS § 34-26-1 (1956). If the foreclosure was exacted by a judicial action or by peaceable and open entry, a three-year statutory period exists during which the mortgagor may redeem the mortgage. R.I. GEN. LAWS § 34-23-3.

them that their "tenancy" in his home is over and setting a date by which they must be out.[91] Next, the mortgagee

> may commence an eviction action, which may be filed no earlier than the first day following the expiration or termination of the tenancy. The action shall be commenced by filing a "Complaint for Eviction for Reason Other Than for Nonpayment of Rent," which shall be filed in the appropriate court according to the form provided in § 34-18-56(e).[92]

The required summons must follow the format proscribed at R.I. Gen. Laws §34-18-56(h), and it must give the occupants twenty days from the date of service to file a responsive pleading, and it must stipulate that if none is filed, the occupants will have defaulted in the proceeding.[93] The occupants are given five days to appeal.[94]

If the occupants do not appeal and the judgment is not satisfied, the eviction will be executed by a constable[95] on the sixth day after the entry of default judgment.[96] The constable serves the occupant with an eviction notice, and if this is ignored, the owner can order a moving company to possess the occupant's belongings and lock the occupant out of the property, all at the occupant's expense.[97]

Absence of Landlord-Tenant Relationship

Generally, when someone purchases an occupied rental property in a normal owner-to-buyer sale, the purchaser may choose whether or not to honor the existing leases, creating a relationship between the new owner and the former lessees.[98]

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91. *See* R.I. GEN. LAWS § 34-18-38 (1956), which governs evictions for unlawful holdovers following the expiration of the term. Mortgagees, and alternatively, the high bidder at the foreclosure sale, tend to want to evict the occupants to make sales and occupancy easier.

92. *See* R.I. GEN. LAWS § 34-18-38(a).

93. *See* R.I. GEN. LAWS § 34-18-38(b).

94. *See* R.I. GEN. LAWS § 34-18-48 (1956).

95. *Id. See also* Lynn Arditi, *Eviction*, PROVIDENCE J. BULL. (R.I.), June 15th, 2008, at A, *available at* 2008 WLNR 11423879 (Detailing the duties and struggles of a state eviction constable).

96. § 34-18-48.

97. *Id.*

98. Baxter Dunaway, *Rights to Possession, Receivers, and Rents After*

When there is a mortgage foreclosure involved, the circumstances change. The landlord-tenant relationship ceases to exist between the titleholder and the existing tenants when the superior interest holder (the mortgagee) takes over and extinguishes subordinate leases and interests, which include rental agreements.[99] Thus, landlord-tenant law does not traditionally apply in foreclosure situations, and because the minor interests are extinguished, there is no legal relationship between the bank and the borrower's tenants.[100] It is this landlord-tenant relationship and its attendant statutes that typically govern the termination and eviction procedures for residential units.[101]

Rhode Island laws only refer once to the specific tenancy situation of banks and former mortgagors and their tenants post-foreclosure.[102] Recall that borrowers become tenants at will or tenants by sufferance post-foreclosure, with the mortgagee as the title holding "landlord."[103] This specific tenancy relationship is referred to only in the Commercial Landlord-Tenant statute, at R.I. General Laws § 34-18.1-2, which reads:

> Tenants of lands or tenements at will or by sufferance covered by this chapter shall quit upon notice in writing from the landlord at the day named therein.[104]

While this section of the law applies expressly to the exclusion of residential properties,[105] it is the only statute that refers

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Default, Interim Protection for Lenders: In General, LAW OF DISTRESSED REAL ESTATE DATABASE, Sept. 2008, at § 11:27, *available at* LAWDRE § 11:27 [hereinafter § 11:27].

99. *Id.*

100. Aside from creating problems when it comes to honoring and terminating leases, the lack of a traditional landlord-tenant relationship also presents problems when it comes to enforcing warranties of habitability or minimum occupancy standards, especially when it comes to the provision of essential utilities normally provided by the landlord. For a general discussion of this problem, see Lynn Arditi, *Foreclosures Leave Some Tenants High and Dry*, PROVIDENCE J. BULL. (R.I.), June 19, 2008, *available at* 2008 WLNR 11674890 [hereinafter *High and Dry*].

101. *See generally* R.I. GEN. LAWS § 34-18 (1956) (Residential Landlord and Tenant Act).

102. *Collateral Damage*, *supra* note 9 (citing R.I. GEN. LAWS § 34-18.1 (1956)).

103. *See* Noorigan v. Greenfield, 156 A. 515, 516 (R.I. 1931).

104. R.I. GEN. LAWS § 34-18.1-2.

105. R.I. GEN. LAWS § 34-18.1-1.

specifically to the tenancy at will or tenancy by sufferance post-foreclosure.

Case law has overlooked this caveat and implied that only this notice is required to remove the holdovers prior to any eviction action, even those taking place on residential properties. An 1890 case notes that, under a statute of almost identical wording, notice is required to the holdovers from the new owner of the residential property so that the entire eviction procedure might be avoided if the tenants move out first.[106] Cases on the notice statute have held that reasonable notice is required, and anything from twenty-one days to three days has been held as acceptable notice.[107] These notices to quit must indicate that they are being sent from the new "landlord," which is the mortgagee in these circumstances.[108]

It is safe to assume that because this statutory notice requirement is the only reference to tenants by sufferance or at will, it is the only notice required of mortgagees before evicting the borrower.[109] The courts have endorsed this view in their decisions as noted. So, the notice required to initiate an eviction proceeding in the case of mortgage foreclosures must merely be "reasonable," and this can be as short as three days.[110] This notice, though, is solely required to the borrower as the holdover tenant.[111] There is no mention of the pre-existing leaseholders. Thus, the question arises whether the mortgagee, as the new titleholder, is required to give the pre-existing lessees any notice. By operation of law, they have no legal relationship,[112] and thus no notice is required between the two.

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106. *See* Johnson v. Donaldson, 20 A. 242, 243 (R.I. 1890).

107. *See* Greene v. Walsh, 112 A. 801, 803 (R.I. 1921) (holding that notice must be reasonable, and that twenty-one days was enough time); *but see* Payton v. Shelburne, 2 A. 300, 301 (R.I. 1885) (holding that three days was acceptable notice while rebutting the notion that notice must be reasonable, as the statute specifies a day on which to move, interrupting the "reasonableness" inference). The *Payton* holding that three days is sufficient notice under the statute has not been expressly overruled. 2 A. at 301.

108. *See Noorigan* 156 A. at 516; *see also* Leite v. Croviero, 89 A. 20, 20 (R.I. 1913) (same).

109. *Collateral Damage*, supra note 9 (citing R.I. GEN. LAWS § 34-18.1).

110. *Id.*

111. *Id.*

112. *High and Dry*, *supra* note 100; *see also* § 11:27 ("[S]uch leases would be extinguished upon foreclosure [...] automatically.").

C. Summary

To summarize, Rhode Island law follows the title theory of mortgages, with the mortgagee taking title to the property upon an uncured default.[113] The foreclosure itself is exacted by a non-judicial foreclosure sale.[114] The mortgagors remaining in the home after the mortgagee takes title become the bank's tenants by sufferance or at will, and are therefore due reasonable notice to quit before the bank may begin an eviction proceeding;[115] this notice may be of as few as three days.[116] However, this is all the law currently requires: there is no legal relationship between the mortgagee as titleholder and the mortgagor's existing tenants,[117] and therefore no duty to notify the existing tenants of the foreclosure itself, the sale, or even of the eviction. This is the place in the law where problems arise for tenants.

The following sections examine potential ways to remedy this flaw. To prevent the drastic effects on tenants in foreclosure, mortgagees should be required to notify tenants in foreclosed homes of the foreclosure sale. However, it is unlikely that the mortgagees themselves will undertake this policy without some nudging from the law. Therefore, two avenues to change exist. First, the courts might interpret the law in a way that recognizes the tenant's right to notice. Secondly, the legislature could endeavor to write the notice requirement into the existing law. By examining these two options, it becomes clear that the policy can change, and that the problem facing tenants in foreclosure is an unnecessary burden.

IV. AVENUES TO CHANGE: JUDICIAL INTERPRETATION

There are two main ways in which the Rhode Island courts could interpret a notice requirement for the tenants in foreclosure from existing statutes and legal principles. The first would mirror

113. *See* R.I. GEN. LAWS § 34-11-20.

114. R.I. GEN. LAWS § 34-11-22 (1956).

115. R.I. GEN. LAWS § 34-18.1-2 (requiring tenants to vacate *upon notice*) (emphasis added); Noorigan v. Greenfield, 156 A. 515, 516 (R.I. 1931) (holding that notice from recent foreclosure buyer demanding tenant vacate was insufficient because it was delivered by foreclosure buyer without indication that he was in fact the landlord with the right to evict tenant).

116. Payton v. Shelburne, 2 A. 300, 301 (R.I. 1885).

117. *High and Dry*, *supra* note 100.

a theory adopted in New Hampshire, which considers tenants to be owners of property, entitling them to notice of foreclosure from the mortgagee.[118] The second possible judicial interpretation involves Constitutional principles of notice.[119] Both judicial interpretations offer valuable insight into notice requirements, and they both highlight areas that the Rhode Island courts would need to address in order to read a notice requirement into law.

A. New Hampshire's "Owner in Interest" Approach

New Hampshire law allows for a non-judicial sale, with notice publication requirements similar to Rhode Island's.[120] Additionally, notice to the mortgagor must be mailed by registered or certified mail at least twenty-five days before the foreclosure sale.[121] As it currently reads, the law defines mortgagor as including:

> the mortgagor and any grantee, assignee, devisee or heir of the mortgagor holding a recorded interest in the mortgaged premises subordinate to the lien of the mortgage, provided that such interest is recorded, at least 30 days before the date of the sale, in the registry of deeds for the county in which the mortgaged premises are situated.[122]

So, mailed notice is required not exclusively to the mortgagor himself; there are others who may be entitled to notice of the foreclosure.[123]

1. *Snyder v. New Hampshire Savings Bank*: Lessee as Owner

In 1991, the New Hampshire Supreme Court explored the "others" due notice under the statute, which then defined "mortgagor" as including "the mortgagor or the then record owner of the premises."[124] The differences in the current and then-current statutes prove to be relatively insignificant in light of how

118. *See* Snyder v. N.H. Sav. Bank, 592 A.2d 506, 508-9 (N.H. 1991).
119. *See* U.S. CONST. amend. V; U.S CONST. amend XIV.
120. N.H. REV. STAT. ANN. § 479:25 (2008).
121. *Id.*
122. *Id.*
123. *Id.*
124. *See Snyder*, 592 A.2d at 507.

the Court interpreted the language.[125] As such, its decision has not been overruled since.[126]

Plaintiff, Bio-Energy Corporation, rented a building owned by Hoague-Sprague Corporation, which was the subject of four mortgages, held by the New Hampshire Savings Bank (defendant), the United States Small Business Administration, Gordon M. Snyder (also a plaintiff), and Walter E. Heller and Company of New England, Inc.[127] Hoague-Sprague defaulted on the mortgage held by defendant New Hampshire Savings Bank, so a foreclosure sale was held per New Hampshire RSA 479:25.[128] Papertech was the highest bidder and became the titleholder of the property.[129] Plaintiff Bio-Energy continued to occupy the premises following the sale.[130] Papertech served Bio-Energy with a notice to vacate, which prompted Bio-Energy to intervene in the action already commenced by plaintiff Snyder.[131]

Snyder had already commenced an action in equity to set aside the foreclosure for lack of notice, arguing that he was entitled notice under the statute as a lienholder, pointing to New Hampshire RSA 479:25 for support.[132] Bio-Energy sought to intervene in Snyder's action, arguing that as the lessee, it too was a lienholder and that failure to provide it notice invalidated the foreclosure sale.[133] The trial court denied the motion to intervene, holding that Bio-Energy was neither a lienholder nor an owner for the purposes of the relevant statute.[134] Bio-Energy appealed this decision, arguing that as a lessee, it qualifies either as a lienholder or an owner.[135] In the alternative, Bio-Energy argued that if the statute did not entitle it to notice, it was violative of the due process clause of the United States Constitution.[136] The defendants disagreed, arguing that the statute could not be read

125. *Id.* at 508.
126. *Id.* at 506.
127. *Id.* at 506-7.
128. *Id.* at 507.
129. *Id.*
130. Bio-Energy continued to occupy the property through the appeal. *Id.*
131. *Id.*
132. *Id.*
133. *Id.*
134. *Id.* at 506.
135. *Id.* at 507.
136. *Id.*

to require notice to the tenants and that this proper reading did not implicate the due process clause.[137]

The New Hampshire Supreme Court approached the question of whether Bio-Energy could intervene, noting that it could if it was considered an owner in the statute's eyes.[138] The statute's language was ambiguous, so the Court looked to the legislative history "for interpretive guidance."[139] Entitling the "then record owner of the premises" to notice was not determinative, as the Court's interpretation, following the Restatement (First) of Property, of the term "owner" encompassed people with "one or more interests."[140] The statute's use of the word "owner" did not address the fact that several concurrent interests could exist at the same time for a given piece of property.[141] Thus, the Court concluded, by indicating that "owners" are entitled to notice, the New Hampshire legislature must have intended to include all those with valid property interests, including lessees.[142]

Because Hoague-Sprague granted Bio-Energy a leasehold interest, which is a valid conveyance, Bio-Energy qualified as a grantee of the mortgagor. Being a grantee qualifies Bio-Energy as an owner under the Restatement view.[143] Therefore, Bio-Energy, as the holder of a valid leasehold interest in the property, was considered an "owner" under the statute, and therefore entitled notice of foreclosure under the statute.[144]

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137. *Id.*

138. The Court did not dispute that lessees have property interests. *Id.*

139. *Id.* at 508.

140. *Id.* The Court cites RESTATEMENT (FIRST) OF PROPERTY § 10, at 25 (1936), wherein "owner" means a person with one or more interests.

141. *Id.*

142. *Id.* at 508-09. The court explored the fact that the legislature had written "then record owner of the premises" into the law in 1979, replacing a fuzzier statute that entitled "a grantee of the mortgagor" and the holders of "other encumbrances." The current language actually mirrors that which was replaced in 1979, as it entitles grantees of the mortgagor to notice. The Court addressed the fact that deleting the grantee language did not result in any significant change in the class of people entitled notice, as grantees and owners were concurrent classes, and therefore redundant. *Id.* at 508.

143. The current language of the statute encompasses grantees of mortgagors, therefore the holding is still applicable despite the legislature's change. § 479:25.

144. *Snyder*, 592 A.2d at 509 ("As a long-term owner of a leasehold [...] Bio-Energy easily falls within this class of parties.").

2. Persuasive Value of *Snyder*

In holding that lessees are grantees of mortgagors, and therefore qualify as "owners" for the purposes of the foreclosure notice statute, the New Hampshire Supreme Court illustrated a means to entitle tenants to notice without an express legislative enumeration or change.[145] The New Hampshire statute allowed the interpretation partially due to its inclusive wording, and partially because of the Court's receptiveness to the Restatement's view of "owner."[146] Can Rhode Island courts adopt this same logic when interpreting its own foreclosure notice statutes?

The obvious starting point in assessing the viability of this avenue is the statutory language itself. The initial notice of foreclosure required of the mortgagee specifically refers only to the mortgagor, and no other parties.[147] "Mortgagor" is not specifically defined in Title 34, the relevant title of the General Laws. The courts have, in the past, turned to Black's Law Dictionary to look up ambiguous or undefined terms in question, seeking the plainest and most commonly accepted meaning of the term.[148] Therefore, the courts would find that Black's defines "mortgagor" as "[o]ne who mortgages property; the mortgage-debtor, or borrower."[149] This is a very narrow definition for the purposes of the *Snyder* analysis, leaving practically no room to interpret the tenant as part of this class.

Furthermore, the courts have already implied that in holdover situations, there is no legal relationship between the mortgagee and the mortgagor's tenants.[150] Thus, under § 34-18.1-2, the reasonable notice required from the mortgagee to the holdover tenants "at will or by sufferance" is only directed at the mortgagor once again,[151] with no practical means to interpret the tenants into the equation.

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145. *Id.*

146. RESTATEMENT (FIRST) OF PROPERTY § 10 (1936).

147. *See* R.I. GEN. LAWS § 34-27-4(b) (1956) ("Provided, however, that no notice shall be valid or effective unless the mortgagor has been mailed written notice [...]").

148. *See* Nat'l Refrig., Inc. et al. v. The Travelers Indem. Co. of Am., 947 A.2d 906, 910 (R.I. 2008) (turning to Black's Law Dictionary to define an ambiguous contract term).

149. BLACK'S LAW DICTIONARY 1030 (7th ed. 1999).

150. *High and Dry*, *supra* note 100.

151. R.I. GEN. LAWS § 34-18.1-2.

The only definition relevant to the *Snyder* analysis lies within the statutory scheme at § 34-18-11, enumerating definitions for the Residential Landlord Tenant Act.[152] There, the term "owner" is defined as any person(s) who:

> (i) Has legal title or tax title (pursuant to §§ 44-9-40 – 44-9-46, inclusive, of the general laws) to any dwelling, dwelling unit or structure with or without accompanying actual possession thereof; or
>
> (ii) Has charge, care, or control of any dwelling, dwelling unit or structure as owner or agent of the owner, or an executor, administrator, trustee, or guardian of the estate of the owner. Any person representing the actual owner in this way shall be bound to comply with the provisions of this chapter and of rules and regulations adopted pursuant thereto to the same extent as if he or she were the owner.[153]

The key to the Legislature's inflexibility lies in the first part of the definition, which requires legal or tax title to be owner.[154] To a lesser degree, the second part also illustrates this inflexibility, as it is unlikely that the mortgagee's lessee will be considered to be the mortgagee's agent.[155]

Based on the statutory language alone, it is unlikely that the courts will interpret the tenant to be a member of the narrowly tailored classes entitled to notice. Absent a spark of judicial inspiration to disregard the statutes themselves, tenants are not statutorily entitled to notice, nor can they be reasonably read into the law as it currently stands.

B. Constitutional Inspiration: Fundamental Fairness?

The United States Supreme Court has addressed the issue of notice requirements pertaining to tax sales and mortgage foreclosures, which should provide the Rhode Island courts with some guidance. It is worth noting that these cases only really

152. Again, note that the Residential Landlord Tenant Act does not technically apply to the situation at hand, but that it is just the closest thing within the statutory framework. *High and Dry*, *supra* note 100.

153. R.I. GEN. LAWS § 34-18-11 (10).

154. *Id.*

155. *See* 2A C.J.S. *Agency* § 20 (2008).

serve an advisory function and do not bind Rhode Island.[156]

1. Due Process Clause

The highest court's decisions have all been based on the United States Constitution, as interpreted in the previous decision of *Mullane v. Central Hanover Bank & Trust Co.*[157] In that decision, the Court noted that prior to an action which will affect an interest in life, liberty, or property protected by the Due Process Clause of the Fourteenth Amendment, a State must provide "notice reasonably calculated, under all circumstances, to appraise interested parties of the pendency of the action and afford them an opportunity to present their objections."[158] This rule applied, the Court held that published notice of a trust settlement action was insufficient to apprise all the beneficiaries of the pending action, especially since their names and contact information were readily ascertainable.[159]

Almost thirty-five years later, the Court revisited the issue in *Mennonite Board of Missions v. Adams*,[160] attempting to answer the question "whether notice by publication and posting provides a mortgagee of real property with adequate notice of a proceeding to sell the mortgaged property for nonpayment of taxes."[161] The state actor in question there was the City of Elkhart, Indiana, responsible for providing notice in accord with *Mullane* prior to the tax sale.[162] In holding that the notice was insufficient, the Court noted that there were other inexpensive and efficient

156. *See infra* at p. 26-28.
157. 339 U.S. 306 (1950).
158. *Id.* at 314.
159. *Id.* at 315, 318.
160. 462 U.S. 791 (1983). For an outstanding analysis of *Mennonite's* impact and effect, *see* Michael H. Rubin & Keith E. Carter, *Notice of Seizure in Mortgage Foreclosures and Tax Sale Proceedings: The Ramifications of Mennonite*, 48 LA. L. REV. 535 (1988) (specifically analyzing the impact of the ruling in Louisiana, generally discussing the national implications).
161. *Id.* at 792. Mennonite was the mortgagee, while Adams was the property owner following the tax sale in question, seeking to quiet title to his newly acquired property.
162. *Id.* at 793-94. Elkhart posted and published notice as required by both *Mullane* and their own ordinance, and it sent notice to the mortgagor via certified mail, but it did not provide any notice to Mennonite, despite the fact that Mennonite's mortgage on the property was, at its inception, recorded by the City. *Id.* at 792, 794.

mechanisms of notice that could have informed the listed mortgagee of the tax sale.[163]

2. Applicability of *Mennonite* and *Mullane* to Non-State Actors?

These constitutional principles apply only to state actors.[164] In Rhode Island foreclosure sales, however, no state actor is involved: the mortgagee gives the notice on its own accord, per statutory requirements.[165] Despite this seemingly private action, state laws are used to secure the sale, raising the question of whether or not this is enough state action or involvement to trigger the protections of the Due Process Clause of the United States Constitution.[166] The Supreme Court has addressed this situation as well, holding that it does not.[167]

Mennonite relied heavily on *Mullane*, especially in the explanation of the fairness involved in providing adequate notice to those with any property interests.[168] The *Mennonite* decision carefully quoted the *Mullane* decision's reasoning behind its holding that published notice was inferior to personal or mailed notice:

> Chance alone brings to the attention of even a local resident an advertisement in small type inserted in the back pages of a newspaper, and if he makes his home outside the area of the newspaper's normal circulation the odds that the information will never reach him are large indeed. The chance of actual notice is further reduced when, as here the notice required does not even name those whose attention it is supposed to attract, and does not inform acquaintances who might call it to

163. *Id.* at 799-800. "Notice by mail or other means as certain to ensure actual notice is a minimum constitutional precondition to a proceeding which will adversely affect the liberty or property interests of *any* party, whether unlettered or well versed in commercial practice, if its name and address are reasonably ascertainable." (emphasis in original).

164. U.S. CONST., *supra* note 119.

165. *See* R.I. GEN. LAWS § 34-11-20.

166. U.S. CONST., *supra* note 119.

167. Tulsa Prof'l Collection Servs. v. Pope, 485 U.S. 478, 485-86 (1988) (holding that private reliance on state sanctions or procedures, without significant and overt assistance of state officials, does not rise to the level of state involvement needed to qualify the action as a state action).

168. *Mennonite*, 462 U.S. at 795-96.

> attention. In weighing its sufficiency on the basis of equivalence with actual notice we are unable to regard this as more than a feint.[169]

This is true regardless of who is posting the notice, whether a state actor or not. For persons with property interests, whose names and addresses are reasonably ascertainable, published notice is practically inadequate for the above-enumerated reasons.

The Court's analysis is instructive on the issue of fundamental fairness to tenants in the case of a foreclosure sale, which "may result in the complete nullification of the [tenant's] interest, since the purchaser acquires title free of all liens and other encumbrances at the conclusion of the redemption period."[170] There is no reason why a court could not find this analysis helpful or persuasive, especially in light of *Mennonite's* emphasis on inexpensive means of notice to these easily ascertainable interest holders.[171] So, while the private mortgagee is in no way constitutionally compelled to provide notice beyond what is currently required, there is significant rationale for following the minimum constitutional notice guidelines anyway.

C. Summary: Judicial Interpretation

If tenants are to be entitled notice from a foreclosing mortgagee, they should not count on the courts of Rhode Island to read this notice into existing law. The current statutory scheme is very narrowly tailored, entitling a slim class of people to notice of foreclosure.[172] Tenants are not members of this class as it currently stands. While federal constitutional principles are instructive and tend to favor tenants with property interests, there is no binding effect of the Due Process Clause's notice requirements on private mortgage lenders utilizing state laws to achieve foreclosure sales.[173] If tenants seek notice entitlement, they should rely on a more proactive approach.

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169. *Id.*
170. *Id.* at 798.
171. *Id.* at 799.
172. *See* R.I. GEN. LAWS §§ 34-27-4(b); 34-18.1-2; 34-18-11.
173. Tulsa Prof'l Collection Servs. v. Pope, 485 U.S. 478, 485 (1988) (holding that private use of state-sanctioned procedures does not constitute state action and thus does not implicate the Due Process clause of the Fourteenth Amendment).

V. AVENUES TO CHANGE: LEGISLATIVE AMENDMENT

The interests of tenants who risk foreclosure are not entirely unrepresented in the Rhode Island General Assembly. In fact, several delegates and interest groups have and continue to attempt legislative change that would protect the tenants' rights in case of foreclosure.[174] Most recently, twin bills were introduced in the House and Senate that would require written notice of the foreclosure and pending sale from the mortgagee to the mortgagor's tenants, to be delivered at the same time that the mortgagor is informed of the foreclosure and pending sale.[175] However, the policy proposal has been "held for further study,"[176] which "generally means it's [sic] dead."[177] While the crisis continues to grow and evolve, it is possible that the bills may be submitted afresh at the start of the new legislative session.[178] It may be helpful for legislators, interest groups, and others to look at a statute that has been successful, learning from its evolution in order to strengthen or shape a similar statute in Rhode Island.

A. Minnesota's Foreclosure Notice Requirements

1. Historical Evolution of Tenant Notice Requirement

Notice of foreclosure to occupants appeared in the Minnesota Session Laws as early as 1867 as a required means to supplement notice published outside of the county in which the property was located.[179] By 1878, the Legislature had added to the minimum publication requirement:

> In all cases, a copy of such notice shall be served in a like manner as summons in civil actions in the District Court,

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174. *High and Dry*, *supra* note 100.

175. H. 7892, 2008 H.R., Jan. Sess. (R.I. 2008); S. 2110, 2008 S., Jan. Sess. (R.I. 2008).

176. *See* H.R. 2008-LC02194, Jan. Sess. (R.I. 2008).

177. E-mail from Robert M. Sabel, Director of Litigation, Rhode Island Legal Services, Inc. (Nov. 3, 2008, 14:43 EST) [hereinafter Sabel, *E-mail*] (on file with author).

178. *Id.*

179. 1867 MINN. LAWS, ch. 74 § 5 p. 120, *available at* https://webrh12.revisor.leg.state.mn.us. Note that this personally served notice was only required under the listed conditions; if the notice was published in the same county as the property, no personal service on the occupants was necessary.

> at least four (4) weeks before the time of sale, on the person in possession of the mortgaged premises, if the same are actually occupied.[180]

This 1878 language remains virtually unchanged today.[181]

2. Current Minnesota Notice Requirements

Prior to mortgage foreclosure, the lender must send the mortgagor a notice containing foreclosure prevention counseling information.[182] This notice informs the borrower of his danger of foreclosure, and advises him as to steps he can take to prevent a sale from being consummated.[183] This section was added in the 2008 session.[184]

In mortgage foreclosures achieved by sale in Minnesota, the mortgagee must give six weeks published notice, and must make personal service[185] on the "person in possession of the mortgaged premises" with the notice of foreclosure sale at least four weeks prior to the sale.[186] Failure to provide this notice will invalidate a foreclosure sale.[187]

The personally served notice of foreclosure on the occupants must coincide with the service of a "foreclosure advice notice" to the owner, explaining his options and rights in foreclosure.[188] Absent an action to invalidate the sale within one year after the sale, failure to provide the "foreclosure advice notice" to the owner

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180. 1878 MINN. LAWS, ch. 53 § 5 p. 107, *available at* https://webrh12.revisor.leg.state.mn.us.

181. MINN. STAT. § 580.03 (2008).

182. MINN. STAT. § 580.021 (2008).

183. *Id.*

184. *See* 2008 MINN. SESS. LAW SERV. Ch. 341 (West) [hereinafter MINN. LEGIS.] (adds § 580.021, with the new form at § 580.022).

185. "[S]hall be served in a like manner as a summons in a civil action in the district court." *See* § 580.03.

186. *Id.*

187. *See* Ledgerwood v. Hanford, 214 N.W. 925, 926 (1927); *see also* Casey v. McIntyre, 48 N.W. 402, 403 (1891).

188. "This section applies to foreclosure of mortgages under this chapter on property consisting of one to four family dwelling units, one of which the owner occupies as the owner's principal place of residency on the date of service of the notice of sale on the owner." *See* MINN. STAT. § 580.041 (2008). Note that the section provides the exact format and wording to be used, ensuring uniformity and lack of confusion. *See* MINN. LEGIS., *supra* note 184, for the most recent revisions.

will not invalidate the sale on its own.[189] The Minnesota Legislature has amended this section to add § 580.032, which requires that a similar notice be served on the tenants in foreclosure.[190]

The third and final current notice requirement in Minnesota law involves the owner in foreclosure and prospective tenants. Once a property owner has received notice of foreclosure, he must take care to limit the terms of any incoming leases on the doomed property, and he must notify the incoming tenant, in writing, of the date on which the foreclosure sale is to take place and the date on which the owner's redemption period ends.[191]

3. Copycat Laws

Minnesota's longstanding statutory notice requirements have made a bold impression on political units as small as cities and as large as the federal government. On the local level, cities, including Baltimore, have taken Minnesota's requirements into account when drafting their own laws.[192] There, the purchaser in foreclosure is now bound by a statutory requirement to

> (1) notify any occupant of the property of the date on which the writ of possession is first scheduled to be executed by the Sherriff; or (2) if the Sherriff has agreed to provide notices of this sort, arrange for the sheriff to notify the occupant of the date on which the writ of possession is first scheduled to be executed.[193]

The notice shall be both mailed by certified and first class mail with a certificate of mailing within fourteen (14) days of the first scheduled date, and posted on the premises at least seven (7) days before the sale.[194] This is analogous to notice required for

189. *Id.*
190. MINN. LEGIS., *supra* note 184.
191. MINN. STAT. § 504B.151 (2008). This section also provides for circumstances under which the tenant may stay longer with the mortgagee or new holder's permission. This creates a relationship between the mortgagor's tenants and the mortgagee/purchaser, allowing the new holder to step into the landlord's shoes.
192. BALTIMORE, MD. CITY CODE, Art. 13, § 8B-2 (2008).
193. *Id.*
194. *Id.*

eviction,[195] which is common to most states with such a procedure, but it is special in that it requires not only an on-site posting of notice, but also mailed notice to "any occupant of the property."[196] Providing notice that is specifically calculated to inform the occupants (as opposed to the owner or borrower alone) is close to the personal service requirements contained in Minnesota law,[197] yet they are likely less expensive to implement and therefore closer to what most cities and states would adopt for themselves.

May of 2008 saw the introduction of a bill in each of the United States Houses of Congress, entitled "Protecting Tenants at Foreclosure Act of 2008."[198] Representative Keith Ellison of the 5th District of Minnesota introduced the House version first, on May 5th.[199] The bill aims to "protect the interests of bona fide tenants in the case of any foreclosure on any dwelling or residential real property," much like the Minnesota statute.[200] Specifically, the bill would require that, in any foreclosure of a residential property, the immediate successor in interest assumes said interest subject to:

> (1) the provision, by such successor in interest of a notice to vacate to any bona fide tenant at least 90 days before the effective date of such notice; and (2) the rights of any bona fide tenant, as of the date of such notice of foreclosure[201]

pursuant to either the tenant's preexisting lease (which the successor in interest may terminate with notice), a lease terminable at will under State law, or without a lease.[202] These requirements do not affect "the requirements for termination of any Federal- or State- subsidized tenants or of any State or local

195. *See* R.I. GEN. LAWS § 34-18-38 (1956).
196. BALTIMORE, MD. CITY CODE, Art. 13, § 8B-2(a)(1) (2008).
197. MINN. STAT. § 580.03.
198. *See* Protecting Tenants at Foreclosure Act of 2008, H.R. 5963, 110th Cong. (2008); *see also* S. 3034, 110th Cong. (2008).
199. *See* H.R. 5963.
200. *Id.* "Bona fide" leases or tenancies are such if the "mortgagor under the contract is not the tenant; [...] the lease or tenancy was the result of an arms-length transaction; or [...] the lease or tenancy requires the receipt of rent that is not substantially less than fair market rent for the property."
201. *Id.*
202. *Id.* at § 2(a).

law that provides longer time periods or additional protections for tenants."[203] The bill provides special requirements for Section 8 Tenancies, offering amendments to the United States Housing Act of 1937.[204] Since its introduction in May, the House version of the bill has been referred to the House Committee on Financial Services.[205]

B. Minnesota's Value to Rhode Island Lawmakers

As mentioned earlier, Rhode Island has attempted to pass a law similar to that in Minnesota, but the Rhode Island version is not likely to be revived until the next session of the General Assembly.[206] However, what was introduced is very similar to § 580.03 of the Minnesota Statute, requiring that the mortgagee provide written notice to the bona fide tenant(s), explaining the default, the date of sale, and the options available to them for counseling services.[207] This proposal, unlike the Minnesota law, would not invalidate the sale, but it would prevent the successor in interest from initiating an action for possession of the occupied unit(s).[208] Additionally, in order for the successor in interest to the mortgagor to recover possession of the bona fide tenant's occupied unit, he would have to serve a notice to quit at least sixty (60) days before the named date to quit.[209]

1. Understanding the Arguments

In order to evaluate what went wrong with the proposal, it

203. *Id.* at § 2(a)(2)(B).

204. *Id.* at § 3.

205. *Id.; see* 110 Bill Tracking H.R. 5963 (Lexisnexis). The Senate version of the bill, introduced in mid-May, has also been read and referred to the Committee on Banking, Housing, and Urban Affairs. *See* 110 Bill Tracking S 3034 (Lexisnexis).

206. Sabel, *E-mail*, *supra* note 177.

207. H. 7892, 2008 H.R., Jan. Sess. (R.I. 2008); S. 2110, 2008 S., Jan. Sess. (R.I. 2008). The Rhode Island measure attempts to address another pressing issue facing tenants in foreclosure by requiring that the successor in interest continue to provide the essential utility services that the mortgagor provided until the tenants quit.

208. H. 7892, 2008 H.R., Jan. Sess. (R.I. 2008); S. 2110, 2008 S., Jan. Sess. (R.I. 2008).

209. This is a large departure from the eviction or commercial landlord-tenant time period, which hover around twenty or thirty days. *See supra* notes 90, 92, 96, 109-115 and accompanying text.

may be helpful to simplify the positions of the two most obvious players in the debate: banks versus tenants' rights groups. The Rhode Island Bankers Association (RIBA or "the Association"), through their attorney, filed a letter of opposition with the Rhode Island Senate President, Joseph Montalbano.[210] In its letter, the Association details several reasons why it opposes the bill, including its belief that Rhode Island would be the only state with "restrictions on the foreclosure process such as would result if the legislation passed."[211] Additionally, the Association objects to the requirement of ascertaining the names of tenants, citing the lack of a landlord tenant relationship between the bank and the mortgagor's tenants, and the difficulty that arises when attempting to get the tenants' names.[212] The letter speculates as to the repercussions for the secondary mortgage market,[213] as well as the potential for the "statute to chill the ability to sell the property at the foreclosure sale. Few buyers would be willing to purchase the property with tenants in place an additional sixty days of occupancy and requirement to providing utilities."[214]

The tenants' rights groups were led by Rhode Island Legal Services (RILS), who commented on the RIBA letter.[215] This letter addresses two fundamental problems with the RIBA letter. First, the RIBA letter commented on an old version of the Senate

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210. The letter cited that RIBA's "opposition coincides with the position of the Rhode Island Mortgage Bankers as well as the Credit Union League." *See* Letter from William A. Farrell, Counselor at Law, Brown Rudnick LLP, to John Flynn, Office of Senate President Joseph A. Montalbano (June 10, 2008) [hereinafter *RIBA Letter*] (on file with author).

211. *Id.*

212. *Id.*

213. *Id.* For a discussion rejecting the idea of a moratorium on foreclosures to protect tenants, see comments made by Bill Farrell, a lobbyist for the Rhode Island Mortgage Bankers Association, to the Providence Journal. *See* Lynn Arditi, *Tenants, Advocates Rally to Stop Foreclosures in Rhode Island*, PROVIDENCE J. BULL. (R.I.), Jan. 15, 2009, at A, *available at* 2009 WLNR 806991.

214. *RIBA Letter, supra* note 210. *See also* Tenant Protection Bill: Proposed Sub A (on file with author) which cites that the Rhode Island Mortgage Bankers Association had proposed an alternative 30-day period within which to quit.

215. Letter from Robert M. Sabel, Director of Litigation, Rhode Island Legal Services, to Colleen Hastings and Theresa Paiva Weed, Office of the Senate Majority Leader (June 13, 2008) [hereinafter *RILS Letter*] (on file with author).

bill,[216] which had been outmoded at that point by "Proposed Sub A," removing requirements for foreclosure counseling services and a longer pre-foreclosure notification period for the tenants.[217] Second, the RILS letter points out that no landlord tenant relationship would arise if the bill was passed, quelling the fears of banks, which understandably do not want to become landlords.[218] The bill seeks to amend the mortgage foreclosure chapter of the property title of Rhode Island law, and not the Residential Landlord and Tenant Act, for the very reason of avoiding the creation of a landlord tenant relationship between banks and tenants.[219]

A core objection to RIBA's position on the potential "chilling effect" was contained in the RILS letter:

> All it really means is the foreclosing bank may get a little less at a foreclosure sale. Of course, the real problem for the banks is the vast number of foreclosures coupled (oversupply) with tightening credit thereby restricting the number of eligible buyers. [RIBA's] objection also elevates the foreclosing banks [sic] slight economic hit over the dispossession of innocent tenants. As we have read, these foreclosing banks are far from innocent and their reckless lending practices and mortgage products are the root cause of the mortgage crisis.[220]

The letter goes on to address the "legal responsibility and [. . .] simple decency" that obligate the mortgagees to provide essential services to tenants preparing to quit.[221]

Overall, it is not surprising who came out where on which issues. Banks do not want to support legislation that makes them unwilling landlords. They also do not want to increase their costs to foreclose, especially when the market is failing to being with. Tenant advocacy groups want to mitigate the inevitable damage suffered by innocent tenants in foreclosure. It is understandable that more time for the tenant is more desirable. Is there a point

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216. *Id.*
217. *Id.*
218. *Id.*
219. *Id.*
220. *Id.*
221. *Id.*

at which the two sides can compromise and the goals of each can be substantially met? The answer lies in the Minnesota and Baltimore statutes, as well as the federal proposals.

2. Compromise: The Ideal Tenant Foreclosure Notice Requirement

The compromised tenant foreclosure notice requirement bill can ideally serve the best interests of both banks and tenants. The proposal should seek to give tenants as much advanced notice as possible to prevent holdover tenancy and foul play by landlords in foreclosure, all achieved in a reasonably easy and inexpensive manner that can preserve and protect the banks investment, namely the property itself. What the compromise should avoid, though, is any sort of moratorium on foreclosures or breaks in the process, beyond what is determined by the legislature to be in the interests of justice and entirely necessary.

A careful examination of the previously introduced bill, the other statutes in effect elsewhere, and current proposals should illustrate the direction that Rhode Island policy makers can and should take to achieve these goals. With five special characteristics, the ideal compromise should quell both sides and achieve the goals.

First, the bill should seek to amend the Mortgage Foreclosure chapter of the Property title of Rhode Island Law. This was done previously,[222] and it serves two functions. It prevents the implication of a landlord tenant relationship between the bank and the mortgagor's tenant(s),[223] which is desirable for several reasons. The location of the amendment also reinforces the fact that this is a problem unique to foreclosure situations, and by locating it in the mortgage section rather than the Residential Landlord and Tenant Act, the waters may remain relatively unmuddied.

Second, the bill should require that notice of the foreclosure and pending sale be mailed (certified, return receipt requested) to the occupants of the property at the same time that the notice required to the mortgagor is sent.[224] By requiring the occupants

222. *See id.*
223. *See id.*
224. *See* R.I. GEN. LAWS § 34-27-4(b) (1956), which requires 30 day notice

to be mailed notice, banks cannot complain of difficulty of ascertaining names, nor can they complain of the prohibitive cost of personal service.[225] It is notice that is reasonably calculated to reach those who need it. Failure to provide this notice at all should not invalidate the sale, but it should provide the tenants with a defense to an overdue move out. If those who need it do not accept delivery of the certified letter, thus preventing the return receipt, it may be fair to deem any resultant defenses waived.

Third, Rhode Island policymakers should expand upon Baltimore's posting policy[226] and require that the lender post large notices of foreclosure with the date of the sale on the main ingress and egress points of the home seven days prior to the sale. Certain requirements for multifamily homes would need to be worked out to insure that the notices are posted in places where every tenant will see them. This will act as a second line of defense for tenants, as it is notice that, if posted in an unambiguous and prominent manner, is sure to inform the tenant that the home will be sold in seven days. This method has been used for other important notices in the state[227] and it is less expensive[228] than personal service.

Fourth, the bill should contain a provision mirroring that of Minnesota's Statute § 504B.151, placing a "restriction on residential lease terms for buildings in financial distress" and requiring "notice of pending foreclosure" to prospective tenants.[229] This puts a legal duty on landlords who are aware of their foreclosure situation to inform incoming tenants of the ramifications of renting a unit that is in foreclosure. Requiring landlords to take responsibility for their actions and to provide

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for individual consumer mortgagors and 20 day mailed notice to non-individual consumer mortgagors.

225. *See RIBA Letter*, *supra* note 210.

226. BALTIMORE, MD. CITY CODE, Art. 13, § 8B-2 (2008).

227. Posting has become an oft utilized means of notice on both the state and local levels. *See, e.g.*, R.I. GEN. LAWS § 23-27.3-123.1.1 (1956) (requiring the posting of a stop-work notice on job sites); *see also, e.g.*, NARRAGANSETT, R.I. CODE OF ORDINANCES, Ch. 46, art. II, § 46-32 (2008) (requiring the posting of public nuisance violation notices for extended periods of time).

228. *See* C. Jordan Myers, *Learning to Live with Jones v. Flowers: A "New Wrinkle" for an Old Standard*, 57 EMORY L. J. 463, 482-83 (2008) (discussing the cost differences between mailed, personal, and posted notice).

229. MINN. STAT. § 504B.151 (2008).

minimal disclosure takes some of the onus off of the banks and places it where it needs to be. Additionally, this portion of the bill leaves the problem of illegal holdovers to the eviction process,[230] which banks might see as the lesser of two evils if forced to choose between eviction and a statutorily-required holdover period as was previously proposed.

Finally, any essential utility provision rider should be limited to a week or ten days, if included at all. While this is a major stumbling block facing tenants in foreclosure and an issue that must be addressed with legislation, it should not necessarily be a rider to a notice bill. Banks do not want to be, nor should they be, landlords,[231] and while Rhode Island Legal Services is correct in saying that provision of essential utilities for holdover tenants is in the bank's best interest,[232] banks do not see it that way and are likely to oppose any bill that contains such a rider.[233] Therefore, any utility provision proposal should be introduced as its own bill or taken up with the Public Utilities Commission.[234] This major point of contention should not bog down the passage of a tenant notice bill.

C. Summary: Legislative Change

The best avenue to change for tenants in foreclosure is the legislative arena. Crafting a bill that would be supported by both banks and tenant advocacy groups will not be easy, nor is the proposal contained herein purportedly the most thorough or realistic: it is ideal. Several factors may come to bear on any policy proposal, including any political shifts following the November election, economic bailout packages,[235] or the changing of the credit market. Regardless of these changes and factors, something must be done, and the legislative arena seems to be the most viable means of achieving change.

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230. *See* R.I. GEN. LAWS § 34-18-38 (1956).
231. *RIBA Letter*, *supra* note 210.
232. *RILS Letter*, *supra* note 215.
233. *RIBA Letter*, *supra* note 210.
234. *See generally* R.I. GEN. LAWS § 39-1 (1956) (enumerating the scope of powers and rights held by the Public Utilities Commission).
235. H.R. 1424, 110th Cong. (2008) (enacted).

VI. CONCLUSION

If blameless tenants like Maria Simmons and Irene Foss want to avoid being kicked out of their homes when their homes are sold out from under their defaulting landlords, they have two options. They can try their luck in the courthouse, or they can contact their legislators and advocates and propose change. The courthouse will be a difficult place to air their grievances, because the law is currently ignorant of their situations. It is the State House, the representative branch of Rhode Island's government, which holds the promise for these tenants, and those who will find themselves on the street in the future. The law can no longer ignore the tenants in foreclosure.

Careful wording and legislative intent can produce an atmosphere that equally values tenants and banks. Any bill should require that lenders notify the mortgagor's tenants of foreclosure and the pending sale. This seeks to prevent the problem of holdover tenants from coming to fruition where at all possible, which is when most problems occur. The banks would have a relatively low burden for provision of notice, as they already publish and mail notice to the mortgagor.

As discussed above, the policy that this paper advocates is an ideal compromise between banks and tenants, and it is not necessarily only appropriate for Rhode Island's situation. While its actual reception in the General Assembly or the public cannot be gauged, it is clear that it is needed. Minnesota is far ahead of the nation when it comes to tenants' rights in foreclosure, but it is not likely to remain alone for long. Cities, states, and even the federal government are examining the need for change in this region of the law—why shouldn't Rhode Island be at the fore of the movement?

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