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The North Carolina Banking Institute Symposium on the Foreclosure Crisis: The Right to Rent, Another Approach to Combat the Foreclosure Crisis

Daniel J. Behrend

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I. INTRODUCTION

> We need to think this through . . . . Why not let a family stay in their own home and maintain it – and provide the bank some revenue – rather than let that home sit empty and become a blight on the neighborhood and possibly a haven for criminals, drugs, and gangs? And if these servicers, some of which have taken billions of dollars in taxpayer bailouts, refuse to meet the foreclosure-reduction standards and goals they have signed up for under the Administration plan, then there need to be some penalties for non-compliance.[1]

Senator Durbin's comments reflect the frustration of many policy makers over the limited progress of government initiatives to stem the foreclosure crisis.[2] In his commentary, Senator Durbin refers to the possibility of allowing homeowners to rent their former home after foreclosure.[3] Such a policy is commonly called

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1. Press Release, Sen. Dick Durbin, Durbin Discusses Next Steps to Address Foreclosure Crisis (Sept. 2, 2009), http://durbin.senate.gov/showRelease.cfm?releaseId=317467.

2. *See* Dean Baker & Andrew Samwick, *Baker and Samwick: Save the Homeowners, Not the Hedge Funds*, PROVIDENCE J., Aug. 31, 2007, http://www.projo.com/opinion/contributors/content/CT_baker31_08-31-07_8G6SA6I.1c1d9dc.html (providing Andrew Samwick's endorsement of adopting a right to rent policy. Samwick served as Chief Economist of the Staff of the President's Council of Economic Advisors under George W. Bush.); *see* Patrick Rucker, *Sen. Schumer: Defaulting Homeowners Could Rent Home*, REUTERS, July 16, 2009, http://www.reuters.com/article/GCA-Housing/idUSTRE56F3JA20090716 (mentioning Sen. Schumer's support for a right to rent policy).

3. *See* Durbin, *supra* note 1.

a "right to rent" plan.[4] Dean Baker, co-director of the Center for Economic Policy Research,[5] first advocated a right to rent plan in 2007 as a means to combat the emerging foreclosure crisis.[6] The idea has garnered renewed interest the past several months and continues to attract a variety of supporters.[7]

Under a right to rent policy, homeowners facing foreclosure remain in their homes as renters for an extended period of time.[8] Baker has refrained from suggesting an exact length to the right to rent or how the duration would be determined, but has given examples ranging from five years[9] to "indefinitely."[10] A right to rent policy permits judges hearing foreclosure proceedings to grant mortgagors facing foreclosure the option to remain in their homes as tenants paying rent at a fair-market rate.[11] While the lender would be able to sell the property after foreclosure, the tenant's rights would not terminate after the sale, and subsequent purchasers would be required to respect the tenant's right to rent for the stipulated duration.[12] Lenders that proceed with foreclosure actions, therefore, run the risk of

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4. DEAN BAKER, THE RIGHT TO RENT PLAN 1 (Center for Economic and Policy Research 2009), http://www.cepr.net/documents/publications/right-to-rent-2009-07.pdf [hereinafter BAKER, PLAN].

5. Center for Economic and Policy Research, About Us, http://www.cepr.net/index.php/about-us/ (last visited Jan. 10, 2010) (describing the Center for Economic and Policy Research's mission "to promote democratic debate on the most important economic and social issues that affect people's lives . . . [by] conduct[ing] both professional research and public education").

6. Dean Baker, Co-Dir., Ctr. for Econ. & Policy Research, The Subprime Borrower Protection Plan (Aug. 20, 2007), http://www.cepr.net/index.php/op-eds-&-columns/op-eds-&-columns/the-subprime-borrower-protection-plan/ [hereinafter Baker, Subprime Protection].

7. *See* Daniel Alpert, *Why Own When You Can Lease?*, N.Y. TIMES, Aug. 1, 2009, at A17, *available at* http://www.nytimes.com/2009/08/01/opinion/01alpert.html?_r=1; Simon Johnson & Alex Stricker, *How to Mop Up Foreclosure Flood*, BLOOMBERG, Nov. 17, 2008, http://www.bloomberg.com/apps/news?pid=20601039&refer=columnist_and&sid=aiKFOhBcR_Z8; Benny L. Kass, *Establishing a Distressed Homeowner's 'Right to Rent'*, WASH. POST, Aug. 1, 2009, http://www.washingtonpost.com/wp-dyn/content/article/2009/07/30/AR2009073004333.html.

8. BAKER, PLAN, *supra* note 4, at 1.

9. *Id.* at 2.

10. Dean Baker, *Subprime Borrowers Deserve an Own to Rent Transition*, ECONOMISTS' VOICE, Feb. 2008, at 2, *available at* http://www.bepress.com/ev/vol5/iss1/art5/ [hereinafter Baker, *Own to Rent*].

11. BAKER, PLAN, *supra* note 4, at 2.

12. *Id.*

acquiring a property with tenants.[13] An outcome where foreclosures resulted in mortgagors becoming renters would make the prospect of foreclosure less appealing to lenders, since a property with tenants is less attractive to potential buyers.[14] A right to rent policy, therefore, would increase incentives for lenders to renegotiate mortgages by imposing additional burdens on lenders who proceed with foreclosures on defaulting homeowners.[15]

Part II of this Note analyzes the right to rent proposal, its benefits and its drawbacks.[16] Part III describes recent efforts by government-sponsored entities to implement right to rent policies.[17] Part IV of this Note compares the Neighborhood Preservation Act with Baker's proposal.[18] Part V concludes that while it would provide additional incentives for lenders to renegotiate mortgages, the right to rent plan's success may be limited due to the same challenges facing existing policies focused on mortgage renegotiation.[19]

II. THE RIGHT TO RENT PLAN

The right to rent plan would allow judges hearing foreclosure actions to permit homeowners to remain in their homes as tenants paying market-rate rent following foreclosure.[20] Dean Baker, an economist and co-director of the Center for Economic and Policy Research, first proposed the right to rent plan in 2007 as a means of combating the emerging foreclosure crisis.[21] Baker suggests that the former homeowner's right to rent the foreclosed home should extend for a "substantial period of

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13. *See id.*

14. Baker, *Own to Rent*, *supra* note 10, at 2–3; Nicholas Weaver, Letter to the Editor, *Baker's 'Own to Rent' Proposal is Economically Inefficient*, ECONOMISTS' VOICE, July 2008, at 1, *available at* http://www.bepress.com/ev/vol5/iss3/art3/.

15. Baker, *Own to Rent*, *supra* note 10, at 2–3.

16. *See infra* Part II, pp. 221-28.

17. *See infra* Part III, pp. 228-33.

18. *See infra* Part IV, pp. 234-35.

19. *See infra* Part V, pp. 235-36.

20. *See* BAKER, PLAN, *supra* note 4, at 1.

21. Baker, Subprime Protection, *supra* note 6.

time."[22] Baker proposed that the right to rent plan should extend at least five years[23] and possibly "as long as [former homeowners] want."[24] Under Baker's proposal, the market-rental rate would be initially established by an "independent appraiser" and adjusted annually based on the Consumer Price Index for rental prices in the home's region.[25] Either party could apply to pay for an additional appraisal in the event that party feels the established market rate is unfair.[26]

A. *The Potential Advantages of the Right to Rent Plan*

Like existing government initiatives, the main goal of the right to rent policy is to keep families in their homes.[27] Unlike current policies, however, the plan does not directly attempt to prevent home foreclosures through renegotiation.[28] Another major difference between the right to rent plan and current government policies is that while families maintain residence in the same home, they transition from homeowners to renters under the plan.[29]

This outcome may seem undesirable based on the societal value placed on homeownership, yet, one justification for the right to rent policy is that it avoids rewarding either lenders or borrowers for making risky choices.[30] The right to rent plan bails out neither the borrower who purchased a home they were unable to afford nor the lender who made risky loans.[31] Following a foreclosure under the right to rent plan, the borrower no longer owns the home, and the lender acquires a tenant-occupied home rather than being able to sell the property free and clear.[32]

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22. BAKER, PLAN, *supra* note 4, at 2.
23. *Id.* at 1.
24. Baker, Subprime Protection, *supra* note 6.
25. BAKER, PLAN, *supra* note 4, at 2.
26. *Id.*
27. *See id.* at 1.
28. *See id.*
29. *See id.*
30. *See id.* at 2.
31. BAKER, PLAN, *supra* note 4, at 2.
32. *Id.*

Arguably, tenant-occupied homes may result in certain advantages to lenders by keeping homes occupied during the housing downturn.[33] For instance, occupied properties may reduce the likelihood of vandalism and neglect that can occur during vacancy.[34] Additionally, a tenant provides lenders rental income that would not be recovered if the home remained vacant and unsold.[35] Renting the property may provide lenders with a desirable alternative to selling the property for a loss in the current housing market, by allowing the tenant to pay rent while the market possibly rebounds.[36] While the right to rent plan potentially represents a mutually beneficial outcome for lenders and borrowers,[37] analysts are concerned that many lenders do not view tenant-occupied homes as advantageous.[38]

An underlying goal of the right to rent plan is to create additional incentives to encourage lenders to renegotiate mortgages facing foreclosure.[39] The prospect of a mortgagor becoming a tenant and the associated costs of the new landlord-tenant relationship makes the process of foreclosure less appealing to creditors.[40] Therefore, by increasing lenders' costs to complete a foreclosure, the right to rent plan incentivizes renegotiating mortgages for lenders.[41]

In order for the right to rent plan to increase incentives to encourage lenders to renegotiate mortgages, the assumption that tenant-occupied homes are less desirable to lenders must hold

33. *See* Barbara Kiviat, *Renting Your House Back: A Solution to Foreclosures?*, TIME, Nov. 12, 2009, http://www.time.com/time/business/article/0,8599,1938255,00.html.

34. *See id.*; S. Adeline McKinney, *The North Carolina Banking Institute Symposium on the Foreclosure Crisis: Municipalities Fight Effects of Foreclosure Blighted Neighborhoods with Neighborhood Stabilization Program Grants and Litigation Against Banks*, 14 NC BANK. INST., 257, 257 (2010).

35. *See* Kiviat, *supra* note 33.

36. *See id.*

37. *See id.*

38. *See, e.g.*, Baker, *Own to Rent*, *supra* note 10, at 2–3 (describing lenders' reluctance to become landlords); Kiviat, *supra* note 33 (quoting JPMorgan Chase spokesman Tom Kelly, "We're in the lending business. We're not equipped to be landlords.").

39. *See* BAKER, PLAN, *supra* note 4, at 1.

40. Baker, *Own to Rent*, *supra* note 10, at 2–3.

41. *See* BAKER, PLAN, *supra* note 4, at 1.

true.[42] Baker and others make this argument and assert that home value is reduced when the home is occupied by tenants during resale.[43] Anecdotally, realtors support this contention.[44] Realtors argue that tenant-occupied homes are often more difficult to sell because the pool of prospective buyers is smaller for tenant-occupied homes compared to properties available for immediate occupancy, the transaction costs for purchasing tenant-occupied homes are higher, and prospective buyers are often hesitant because tenant-occupied homes sell for less than vacant homes.[45] Additionally, lenders may be unprepared to transition to the role of landlord and likely face costs in doing so,[46] such as the cost of hiring a property-management company.[47] By becoming landlords, lenders also face new obligations to repair and maintain homes.[48]

The right to rent plan also hopes to reduce blight in communities facing large numbers of foreclosures.[49] By keeping families in homes, the plan hopes to avoid the problems facing many regions experiencing large numbers of foreclosures and associated home vacancies.[50] Concentrations of foreclosed properties negatively impact nearby home prices and decrease the municipal tax base.[51] The Center for Responsible Lending projects that the foreclosures that occurred in 2009 will negatively affect the value of 69.5 million neighboring homes.[52] An analysis of the

42. *See generally* Baker, *Own to Rent*, *supra* note 10, at 2–3 (describing Baker's belief that most lenders do not wish to acquire tenant-occupied properties, which will make renegotiation more likely).

43. *See, e.g.*, *id.* ("They can sell the property, but the tenant would go with it, which substantially reduces its market value.").

44. *See, e.g.*, Charlotte Laws, *Clueless at City Hall: Foreclosures and Tenants*, AM. CHRON., July 27, 2009, http://www.americanchronicle.com/articles/view/111812 (discussing issues that arise in the resale of tenant-occupied properties).

45. *See id.*

46. Kiviat, *supra* note 33.

47. *Id.* (discussing Fannie Mae's hiring of a property-management company to handle participants in its Deed for Lease Program).

48. *See id.*

49. BAKER, PLAN, *supra* note 4, at 1.

50. *See id.*

51. Benjamin Bernanke, Chairman, Fed. Reserve, Remarks at the Independent Community Bankers of America Annual Convention: Reducing Preventable Mortgage Foreclosures (Mar. 4, 2008), *available at* http://www.federalreserve.gov/newsevents/speech/bernanke20080304a.htm; *see also* S. Adeline McKinney, *supra* note 34, at 257-58, (discussing the impact of foreclosure on municipalities).

52. CTR. FOR RESPONSIBLE LENDING, SOARING SPILLOVER: ACCELERATING

foreclosure process in Chicago found that a foreclosure resulted in "direct municipal costs that in some cases exceed[ed] $30,000 per property."[53]

Finally, advocates of the plan argue that it is cost effective for taxpayers and the government.[54] By using existing judicial processes, the plan can be implemented at little cost.[55] Unlike other interventions, which have required large influxes of money from the government,[56] the right to rent plan is a cost-effective option.[57]

B. *Criticisms of the Right to Rent Plan*

1. Economic Inefficiency

The right to rent plan has been criticized as economically inefficient.[58] The plan arguably places a large burden on lenders with limited relief to borrowers.[59] Lenders may be exposed to thousands of dollars of cost, while former homeowners could find equivalent housing at the market rate while incurring limited additional cost.[60] The costs faced by lenders include hiring property managers to handle their tenant-occupied properties,[61] maintenance costs,[62] and losses in resale value.[63] Borrowers who

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FORECLOSURES COST NEIGHBORS $502 BILLION IN 2009 ALONE 1 (2009), http://www.responsiblelending.org/mortgage-lending/research-analysis/soaring-spill over-3-09.pdf.

53. WILLIAM C. APGAR & MARK DUDA, COLLATERAL DAMAGE: THE MUNICIPAL IMPACT OF TODAY'S MORTGAGE FORECLOSURE BOOM 4 (Homeownership Preservation Foundation 2005), http://www.995hope.org/content/pdf/Apgar_Duda_ Study_Short_Version.pdf.

54. BAKER, PLAN, *supra* note 4, at 1.

55. *Id.* at 2.

56. *See* Renae Merle, *Banks Slow to Modify Mortgages*, WASH. POST, Aug. 5, 2009, http://www.washingtonpost.com/wp-dyn/content/article/2009/08/04/AR200908 0401134.html.

57. BAKER, PLAN, *supra* note 4, at 2.

58. Weaver, *supra* note 14, at 1.

59. *Id.*

60. *Id.* at 1–2.

61. *See* Kiviat, *supra* note 33.

62. *See id.* (discussing the reluctance of lenders to incur liability for maintenance costs).

63. *See, e.g.*, Baker, *Own to Rent*, *supra* note 10, at 2–3 (stating that the presence of tenants negatively impacts resale value).

must vacate the property, on the other hand, face costs from locating a residence to rent and relocation.[64]

2. Logistical Barriers

The plan also ignores some logistical barriers. Baker's proposal does not explicitly recognize some of the transactional costs that lenders may incur as landlords.[65] For example, the plan does not account for property management costs.[66] The right to rent plan also may ignore homeowners' association bylaws, local ordinances, and other regulations that would make the transition to renting the property more burdensome.[67] These criticisms, however, may simply demonstrate the plan's underlying goal of encouraging mortgage renegotiation.[68]

C. *Differences From Existing Federal Programs*

Unlike existing federal programs which attempt to incentivize lender participation, the right to rent plan would enable courts to compel participation.[69] A lender who proceeds with a foreclosure action would be bound to the court's imposition of a right to rent.[70] The right to rent plan would not create a government program for lenders, but rather provides courts with a means of establishing a right to rent to keep former homeowners in their homes as tenants for an extended period of time.[71] Assuming lenders wish to avoid acquisition of tenant-occupied

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64. Weaver, *supra* note 14, at 1–2.

65. *See* Baker, *Own to Rent*, *supra* note 10, at 2–3.

66. *See* Kiviat, *supra* note 33 (discussing Fannie Mae's hiring of a property-management company to manage its tenant-occupied properties under the Deed for Lease Program).

67. *Compare* FANNIE MAE, ANNOUNCEMENT 09-33, AMENDS THESE GUIDES: SERVICING: NEW DEED-FOR-LEASE PROGRAM 2 (2009), https://www.efanniemae.com/sf/guides/ssg/annltrs/pdf/2009/0933.pdf [hereinafter FANNIE MAE, ANNOUNCEMENT 09-33] (excluding properties with zoning or home owner association limitations that would interfere with the Deed for Lease Program) , *with* BAKER, PLAN, *supra* note 4, at 1–2 (placing no explicit limitations on eligible properties on the basis of zoning or home owner association prohibitions).

68. *See* BAKER, PLAN, *supra* note 4, at 1.

69. *See id.* at 2.

70. *See id.*

71. *See id.* at 1–2.

homes, the threat of a court-imposed right to rent may provide homeowners facing foreclosure with increased bargaining power.[72]

The right to rent plan, unlike current government initiatives, also penalizes lenders who fail to renegotiate.[73] The right to rent plan, therefore, rests somewhere between existing government programs that reward voluntary renegotiation[74] and mortgage cramdowns, which result in involuntary renegotiation of mortgage terms.[75] The decision to renegotiate or to foreclose with the possibility of a court-ordered right to rent remains in the sole discretion of the lender.[76] The court-imposed declaration of a right to rent is effectively a penalty to the lender for pursuing foreclosure. This "stick" encourages lenders to renegotiate mortgage terms, complementing the government's "carrots" for voluntary action under existing programs.[77]

The right to rent plan places more power in the courts while decreasing lenders' autonomy.[78] Judges would be provided with an additional option in determining the outcome of any foreclosure hearings lenders pursue.[79] If Baker's assumption that tenant-occupied homes are less attractive to lenders is true to the extent that lenders will renegotiate mortgages to avoid foreclosure under the right to rent plan,[80] then the right to rent plan makes

72. *See* BAKER, PLAN, *supra* note 4, at 1.

73. *See* Baker, *Own to Rent*, *supra* note 10, at 2–3.

74. *See, e.g.*, Michael M. Phillips & Ruth Simon, *Mortgage Bailout to Aid 1 in 9 U.S. Homeowners*, WALL ST. J., Mar. 5, 2009, at A1, *available at* http://online.wsj.com/article/SB123617623602129441.html (describing the incentives created for lenders and mortgage servicers under Making Home Affordable).

75. *See* Adam J. Levitin, *Resolving the Foreclosure Crisis: Modification of Mortgages in Bankruptcy*, 2009 WIS. L. REV. 565, 619 (2009). *See generally* Marjorie B. Maynard, Note, *The North Carolina Banking Institute Symposium on the Foreclosure Crisis: Mortgage Cramdown in Bankruptcy as a Necessary Incentive to Encourage Mortgage Modifications*, 14 N.C. BANKING INST. 275 (2010) (providing additional discussion of proposals to permit home mortgage cramdowns in bankruptcy court).

76. *See* BAKER, PLAN, *supra* note 4, at 1–2.

77. *See* Kathryn E. Johnson & Carolyn E. Waldrep, Note, *The North Carolina Banking Institute Symposium on the Foreclosure Crisis: Overview*, 14 N.C. BANKING INST. 191, 203-13, (2010) (describing incentives provided to lenders and servicers for renegotiating mortgages in default).

78. *Cf.* Levitin, *supra* note 75, at 619 ("Bankruptcy is merely a forced workout, which limits lender control of the negotiation.").

79. *See* BAKER, PLAN, *supra* note 4, at 2.

80. *See id.* at 1.

mortgage renegotiation less voluntary than current policies. While the plan would not force negotiation of the mortgage terms as in a mortgage cramdown,[81] giving judges the option to allow a right to rent would remove some control from lenders.[82]

Baker argues the right to rent plan would also increase mortgagors' bargaining power.[83] If mortgagors demonstrate the ability to pay market rate rent and state they will seek a right to rent ruling in a foreclosure action, they may have increased bargaining power with lenders hoping to avoid becoming the landlord of a foreclosed property.[84] Since a home with tenants is a less attractive option to lenders,[85] lenders may thus be more willing to renegotiate the terms of the mortgage before proceeding with a foreclosure action and be more willing to avail themselves of government incentives to renegotiate.[86]

III. RIGHT TO RENT PROGRAMS IN GOVERNMENT-SPONSORED ENTITIES

A. *Freddie Mac's REO Rental Initiative*

In March 2009, Freddie Mac introduced a program called the REO Rental Initiative.[87] The REO Rental Initiative, like Baker's right to rent plan, allows former homeowners facing foreclosure to transition to tenants.[88] Under the REO Rental Initiative, former homeowners enter a lease agreement to become month-to-month tenants.[89]

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81. *See* Levitin, *supra* note 75, at 619.

82. *Cf. id.* (stating that bankruptcy acts as a "forced workout, which limits lender control of the negotiation").

83. BAKER, PLAN, *supra* note 4, at 1.

84. *See id.*

85. *See* Baker, *Own to Rent*, *supra* note 10, at 2–3.

86. *See* BAKER, PLAN, *supra* note 4, at 1.

87. Press Release, Freddie Mac, Freddie Mac Officially Launches REO Rental Initiative for Tenants, Owner-Occupants After Foreclosure (Mar. 5, 2009), http://www.freddiemac.com/news/archives/servicing/2009/20090305_reo-rental-initiative.html [hereinafter Freddie Mac, Launches REO].

88. *Id.*

89. Freddie Mac, REO Rental Initiative, http://www.freddiemac.com/corporate/buyown/english/avoiding_foreclosure/rental_initiative.html (last visited Jan. 10, 2010).

The REO Rental Initiative has a number of conditions for homeowners' and properties' eligibility.[90] To become tenants under the REO Rental Initiative, homeowners must, (1) "[d]emonstrate the ability to pay the market rent[;]" (2) "[a]llow an inspector to enter and inspect the property[;]" (3) "[s]ign a separate lease agreement[;]" (4) "[s]ign a property condition disclosure at the time of the inspection[;]" and (5) "[a]llow future showings of the property to prospective buyers and real estate agents[.]"[91] Property qualifying for the program must "be in good condition, meet all state laws and local code requirements for rental properties, and be free of all environmental hazards."[92]

The program has at least one limitation that is a disadvantage to homeowners facing foreclosure.[93] Former homeowners who participate in the REO Rental Initiative can only remain in the home on a month-to-month basis,[94] compared to Baker's proposal to allow homeowners to occupy the home as tenants for a term ranging from five years[95] to "indefinitely."[96] This factor alone may diminish the potential benefits for homeowners facing foreclosure. While both plans would provide homeowners facing foreclosure with some security, the REO Rental Initiative would eliminate the shift in incentives under Baker's plan for lenders to renegotiate mortgages rather than proceed with foreclosures.[97] While Freddie Mac has not released specific data on participation rates in the REO Rental Initiative, initial reports support the assumption that the month-to-month lease arrangement has not been particularly attractive to potential

90. *See id.*

91. *Id.*

92. *Id.*

93. *Compare* Freddie Mac, Launches REO, *supra* note 87 (describing the month-to-month tenancy of the program), *with* BAKER, PLAN, *supra* note 4, at 2 ("Gives homeowners facing foreclosure the option of renting their home for a substantial period of time (e.g. 5 to 10 years) at the market rate.").

94. Freddie Mac, Launches REO, *supra* note 87; *see also* Kass, *supra* note 7 ("However, until Freddie determines how long the homeowner can remain in the house, the lease is only month to month. That means that in most cases, when the house is sold, the tenants will be required to vacate -- unless, of course, the buyer is an investor and willing to allow the lease to remain in effect.").

95. BAKER, PLAN, *supra* note 4, at 2.

96. Baker, *Own to Rent*, *supra* note 10, at 2.

97. *See id.* at 2–3 (describing the right to rent's impact of making foreclosure a less attractive option to lenders who wish to avoid becoming landlords).

participants in the program.[98] As one report noted, "most occupants have chosen 'cash for keys' over the relative instability of a month-to-month rental agreement."[99]

The REO Rental Initiative, unlike Baker's proposed right to rent plan, is not intended to combat the foreclosure crisis.[100] The REO Rental Initiative was "not meant to be a structural answer to the deluge of homes moving through foreclosure."[101] Rather, the program simply grants participating former homeowners additional time to relocate while Freddie Mac resells the property.[102] Freddie Mac designed the REO Rental Initiative to benefit itself;[103] and the program's design avoids the disincentives of pursuing a foreclosure created under Baker's plan. Under the REO Rental Initiative, Freddie Mac avoids the potential costs of leaving homes vacant and benefits from rental revenue while the house awaits resale.[104] At the same time, Freddie Mac does not incur a substantial cost that would result under Baker's right to rent plan–acquiring a long-term tenant who would retain the right to rent the property after resale.[105]

Regardless of the REO Rental Initiative's disadvantages relative to Dean Baker's right to rent plan, Freddie Mac's failure to report data regarding the REO Rental Initiative frustrates attempts to evaluate its impact on former homeowners. For example, Freddie Mac has not revealed the number of former homeowners who have used the REO Rental Initiative.[106] The lack of such data also makes it difficult to compare the relative

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98. Harry Terris, *GSEs Find Seized Homes Easier to Empty than Rent*, AM. BANKER, Oct. 14, 2009, *available at* 2009 WLNR 20212557 (discussing the relatively low number of former tenants and borrowers participating in Freddie Mac's program).

99. *Id.* (describing the response to Freddie Mac's REO Rental Initiative).

100. *See id.*

101. *See id.*

102. *See id.*

103. *See id.* ("Rental arrangements may let lenders and investors unload properties 'in a more controlled fashion for a better price,' particularly in neighborhoods that have been hit hard by a glut of homes going on the market, depressing prices, [said Steven Horne, President of Wingspan Portfolio Advisors, LLC].").

104. *See* Kiviat, *supra* note 33.

105. *See* Baker, *Own to Rent*, *supra* note 10, at 2–3.

106. *See* Kiviat, *supra* note 33.

success of the REO Rental Initiative to other programs targeted at assisting homeowners facing foreclosure.

B. *Fannie Mae's Deed for Lease Program*

In November 2009, Fannie Mae announced a version of the right to rent plan called the Deed for Lease Program (D4L).[107] D4L is intended for homeowners facing foreclosure who are unable to obtain mortgage modifications through other programs.[108] As under Baker's proposal, homeowners participating in D4L transition from homeowners to tenants.[109] Under D4L, after the homeowner transfers the property through a deed-in-lieu of foreclosure, the homeowner may remain in the home as a tenant for a term of twelve months.[110]

To qualify for D4L, the property and homeowner must meet a number of requirements.[111] D4L makes the following requirements for properties to be eligible to participate in the program:

> [(1)] There are no zoning or homeowner's association (HOA) rental limitations that would prohibit a D4L. [(2)] Repairs required to make the property habitable are deemed to be in an acceptable amount based on the property value. [(3)] The property is in compliance with local rules and laws or can be brought into compliance within 30 days. [(4)] The property is not within a target area for any corporate, government or community neighborhood stabilization plan which may need the property as part of the plan for purposes other than residential. [(5)] The rental income from the

107. *See* Press Release, Fannie Mae, Fannie Mae Announces Deed for Lease Program (Nov. 5, 2009), http://www.fanniemae.com/newsreleases/2009/4844.jhtml [hereinafter Fannie Mae, D4L].

108. *Id.*

109. *Compare* BAKER, PLAN, *supra* note 4, at 1, *with* FANNIE MAE, ANNOUNCEMENT 09-33, *supra* note 67, at 1 (describing the transition from homeowner to tenant).

110. FANNIE MAE, ANNOUNCEMENT 09-33, *supra* note 67, at 1.

111. *Id.* at 2.

> property is anticipated to cover ongoing maintenance and management costs.[112]

In addition to meeting requirements for the property, participation in D4L requires that occupants meet the following criteria:

> [(1)] The occupant's income is sufficient to cover rental payments of not more than [thirty-one] percent of gross income. If the rental payment is greater than [thirty-one] percent of the occupant's monthly gross income, a lease will not be offered. [(2)] Inspection of the property indicates that the occupants have been keeping the property in good condition. [(3)] The occupant agrees to be responsible for regular maintenance, to keep the property in good condition, and to permit marketing of the property for sale. [(4)] The number of occupants is appropriate for the home and in compliance with local laws and homeowner association rules. [(5)] If pets are present, renter's insurance is obtained if required. [(6)] The occupants signing the lease must agree to a credit review and all occupants over the age of [eighteen] must have an acceptable background check including receiving clearance from the Office of Foreign Assets Control. [(7)] There are no signs or reports of illegal activities conducted at the property. [(8)] The property is to be used as a primary residence.[113]

Like Freddie Mac's REO Rental Initiative, D4L does not offer renters as long of a term of tenancy as Baker's proposed five years[114] to "indefinitely."[115] By offering a twelve-month lease,

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112. *Id.* at 2–3.
113. *Id.* at 3.
114. BAKER, PLAN, *supra* note 4, at 2.
115. Baker, *Own to Rent*, *supra* note 10, at 2.

however, D4L does provide greater security than the REO Rental Initiative's month-to-month lease.[116] Like the REO Rental Initiative, the shorter term of tenancy under D4L relative to the longer term recommended by Baker makes D4L less advantageous to homeowners facing foreclosure than Baker's right to rent plan.[117] Former homeowners who participate in the D4L program agree to a term of twelve months[118] with the potential option to extend to a month-to-month tenancy following the original term.[119] As with the REO Rental Initiative, the shorter term of tenancy may diminish or eliminate the incentives created under Baker's proposal for lenders to renegotiate mortgages rather than proceeding with foreclosures.[120] Fannie Mae markets D4L as an alternative for those unable to secure modification under existing programs[121] and Fannie Mae will likely benefit from tenant occupancy under D4L while the housing market recovers.[122] Therefore, D4L serves as a means for Fannie Mae to benefit from homeowners ineligible for mortgage modification rather than create an incentive to encourage increased mortgage modifications.

IV. THE NEIGHBORHOOD PRESERVATION ACT

Congress is currently considering legislation that would impact the creation of right to rent programs.[123] The

116. *Compare,* FANNIE MAE, ANNOUNCEMENT 09-33, *supra* note 67, at 1 (describing the length of a D4L lease as twelve months), *with* Freddie Mac, Launches REO, *supra* note 87 (describing the program's month-to-month tenancy).

117. *Compare* FANNIE MAE, ANNOUNCEMENT 09-33, *supra* note 67, at 1, *and* Freddie Mac, Launches REO, *supra* note 87, *with* BAKER, PLAN, *supra* note 4, at 1 ("The right to rent for a substantial period of time also would give homeowners much more bargaining power when trying to work out mortgage modifications, resulting in far more homeowners avoiding foreclosure altogether.").

118. FANNIE MAE, ANNOUNCEMENT 09-33, *supra* note 67, at 2.

119. Fannie Mae, D4L, *supra* note 107.

120. *See* BAKER, PLAN, *supra* note 4, at 1 ("The right to rent for a substantial period of time also would give homeowners much more bargaining power when trying to work out mortgage modifications, resulting in far more homeowners avoiding foreclosure altogether.").

121. Fannie Mae, D4L, *supra* note 107.

122. *See* Kiviat, *supra* note 33.

123. *See* Neighborhood Preservation Act, H.R. 2529, 111th Cong. (as referred to S. Comm. on Banking, Hous., and Urban Affairs July 30, 2009).

Neighborhood Preservation Act, introduced by Representative Gary Miller of California passed the House of Representatives and was referred to the Senate Committee on Banking, Housing, and Urban Affairs in July 2009.[124] The Neighborhood Preservation Act authorizes banks to lease foreclosed properties for up to five years.[125] The bill would also allow leases with options to purchase.[126]

The Neighborhood Preservation Act differs from Baker's proposed right to rent plan in a number of ways. First, the bill allows banks to lease the foreclosed property to anyone, not just former homeowners.[127] Second, the bill permits for leases with an option to purchase.[128] Third, the bill sets five years as the maximum length of a lease.[129] Finally, the bill authorizes banks to lease foreclosed properties but does not grant courts hearing foreclosures with the authority to grant homeowners facing foreclosure with a right to rent.[130]

While potentially offering stability to families facing foreclosure, the Neighborhood Preservation Act was primarily intended to help stabilize the housing market.[131] The bill, therefore, would facilitate the development of additional programs by lending institutions to lease foreclosed properties,[132] but would not create a court-imposed right to rent. Like Freddie Mac's REO Rental Initiative and Fannie Mae's D4L, the programs created under the Neighborhood Preservation Act would presumably aim to provide the lenders with the benefits of acquiring tenant-occupied properties, avoiding damage that occurs to vacant properties and collecting rent, while waiting for the housing market to recover.[133] Like the REO Rental Initiative and D4L, the

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124. *Id.*

125. *Id.*

126. *Id.* at § 3(a).

127. *Id.* (providing that banks "may lease to any individual").

128. *Id.*

129. H.R. 2529 § 3(a).

130. *See id.* (permitting depository institutions to rent properties).

131. *See* Press Release, Gary Miller, U.S. Rep. (R-CA), House Unanimously Passes the Neighborhood Preservation Act (July 29, 2009), http://garymiller.house.gov/News/DocumentSingle.aspx?DocumentID=140048.

132. *See id.*

133. *See* Kiviat, *supra* note 33; Miller, *supra* note 131.

programs created by lenders under the Neighborhood Preservation Act presumably would avoid the disincentives created by Baker's right to rent plan for lenders that pursue foreclosures.[134] The legislation, if passed in its current form, therefore, promises less of a means to combat the foreclosure crisis, than an avenue for banks to create programs to address the glut of foreclosed homes on market.[135]

V. CONCLUSION

Dean Baker's right to rent plan would make the foreclosure process more burdensome and less appealing by imposing additional costs and obligations on lenders.[136] The plan creates additional responsibilities and poses new challenges for lenders.[137] Lenders would assume responsibility for overseeing and managing the property.[138] It is also more difficult to sell homes occupied by tenants, which may encourage lenders under a right to rent system to renegotiate mortgages rather than pursue foreclosure.[139]

While focusing on mortgage renegotiation, the right to rent plan and existing government policies ignore other obstacles to mortgage renegotiation and the prevention of foreclosures. Renegotiating mortgage terms fails to address the root causes of mortgagors defaulting on their loans, such as unemployment.[140] Focusing on promoting renegotiation may also ignore other obstacles confronting lenders such as second liens and pooling and

134. *Compare* H.R. 2529 §3 (a) (providing a great deal of discretion to lending institutions to structure the terms and conditions of lease programs), *with* BAKER, PLAN, *supra* note 4, at 2 (empowering the courts to structure the terms and the conditions of the right to rent in a manner that promotes renegotiation over foreclosure).

135. *See* Miller, *supra* note 131.

136. Weaver, *supra* note 14, at 1–2.

137. *Cf.* Kiviat, *supra* note 33 (discussing some of the steps taken by Fannie Mae to implement the D4L program and the reluctance of private lenders to do the same).

138. *Cf. id.* (stating that Fannie Mae hired a property management company to oversee participating D4L properties).

139. *See* Baker, *Own to Rent*, *supra* note 10, at 2–3.

140. *See* Christopher L. Foote et al., *Reducing Foreclosures* 3, 34–35 (Fed. Reserve Bank of Boston, Public Policy Discussion Paper, No. 09-2, 2009), *available at* http://www.bos.frb.org/economic/ppdp/2009/ppdp0902.pdf.

service agreement provisions.[141] Despite interventions to increase the number of mortgage renegotiations, foreclosure may remain a more profitable option to lenders since current incentives fail to overcome the costs of renegotiation.[142]

Therefore, government initiatives and the right to rent plan may ultimately fail to prevent as many foreclosures as policy makers would like. Depending on how greatly it increases incentives to renegotiate, however, the right to rent plan could help increase the number of mortgage modifications. Regardless of the number of mortgage renegotiations the right to rent plan encourages, it may still prove a better policy for keeping families in their homes, even if that is as renters.

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141. *See* Christopher Mayer et al., *A New Proposal for Loan Modifications*, 26 YALE J. ON REG. 417, 419 (2009).

142. *See* Manuel Adelino et al., *Why Don't Lenders Renegotiate More Home Mortgages? Redefaults, Self-Cures, and Securitization* 25–26 (Fed. Reserve Bank of Boston, Public Policy Discussion Paper, No. 09-4, 2009), *available at* www.bos.frb.org /economic/ppdp/2009/ppdp0904.pdf (concluding that renegotiation is a costly option for lenders because of the possible costs incurred from: [1] defaulting mortgagors self-curing during renegotiation; and [2] mortgagors subsequently redefaulting after a successful renegotiation).