

## **THE LEGISLATURE SHOULD RESTORE TWO-MONTH-NOTICE PROTECTION TO COMMERCIAL TENANTS IN FORECLOSURE**

### The Current State of the Law

Suppose you are a Minnesota tenant and sign a long lease. Unbeknownst to you, your new landlord isn't the actual owner of the building. Instead, he is buying it on a contract for deed.<sup>1</sup> He gets behind on his payments and the owner<sup>2</sup> gives him 60-day notice to catch up or lose the building.<sup>3</sup> He doesn't catch up and he loses the building.<sup>4</sup> What happens to your lease?

In the old days, under common law, your lease would have been cancelled and you would have been subject to immediate eviction as soon as the owner took back/possessed the building.<sup>5</sup> However, under Minn. Stat. § 504B.285, subd. 1b you get a bit of protection. Essentially this provision requires the owner to give you two-months notice to terminate the lease.<sup>6</sup>

This two-month-notice rule is the same for commercial and residential tenants.

Suppose instead you are a Minnesota tenant and sign a long lease. Unbeknownst to you, your new landlord has a mortgage.<sup>7</sup> He gets behind on his payments and the lender<sup>8</sup> gives him 6 months notice to catch up or lose the building.<sup>9</sup> He doesn't catch up and he loses the building via foreclosure.<sup>10</sup> What happens to your lease?

Unlike in the contract-for-deed example, it depends crucially on whether you are a commercial tenant or a residential tenant.

If you are a commercial tenant – be it a huge one like a Sears department store or a tiny one like a hole-in-the-wall taco stand – your lease is cancelled and you are subject to immediate eviction as soon as the lender takes back the building. The old common law rule applies and you have no statute to protect you.

On the other hand, if you are a residential tenant – whether the lease is for a 20-room mansion in Wayzata or a tiny SRO apartment or something in between – your lease is protected completely from the foreclosure with a pair of exceptions. If the buyer at the foreclosure sale or a subsequent buyer wants to live in the building (plans to be an owner occupant), she can give you a 90-day termination notice. Also, if the lease is not a bona fide lease -- basically it is a sweetheart deal meant to rip off the lender -- then the buyer can give you a 90-day termination notice. If your lease has less than 90 days to go (including month-to-month leases) you still get 90-day protection. These rights are set out in Minn. Stat. § 504B.285, subd. 1a.

In summary, all tenants – big or small, residential or commercial – get two-month protection if their landlord loses the building by cancellation of a contract for deed. However, in a foreclosure, almost all residential tenants' leases are fully protected but commercial tenants – both big and small – lose their leases without notice the day the lender takes back the building.

## How We Got Here by Mistake

How did this happen? Why don't commercial tenants at least get two-months protection when a mortgage is foreclosed but do get two-month protection when a contract for deed is cancelled?

The answer is in the history of amendments to Minn. Stat. § 504B.285. These amendments had the untended consequence of eliminating foreclosure protection for commercial tenants.

Here in seven steps is the history in question.

Step 1: Until 1984, all tenants were subject to the common-law rule that upon cancellation or foreclosure, their leases ended when possession went back to the owner or lender. In 1984 a new law gave all tenants some protection; the lender or owner had to give the tenant at least a one-month notice to terminate the lease after foreclosure or cancellation of a contract for deed.<sup>11</sup> Over time, the details of how and when that notice could be given changed slightly<sup>12</sup> and the notice period was extended to two months.<sup>13</sup>

Step 2: Enter the U.S. Congress. In 2009, responding to the foreclosure crisis, Congress passed and the president signed the Protecting Tenants at Foreclosure Act ("PTFA"). With some minor differences, the PTFA gave all U.S. residential tenants the protections now found in Minn. Stat. § 504B.285, subd. 1a.<sup>14</sup> The 2009 PTFA had a sunset date of 12/31/2012.

Step 3: In 2010, a set of new statutes nicknamed the Tenant Bill of Rights were enacted as 2010 Minn. Laws ch. 315. Because the PTFA superseded any weaker state protections, primarily for simplification's sake, as part of the Tenant Bill of Rights the legislature deleted the existing foreclosure protection in section 504B.285 and replaced it with language that mirrored the PTFA.<sup>15</sup> The existing contract for deed protection was left in place. To mirror the PTFA these changes were sunset 2/31/2012 and the old protections were set to be back in place ("sunrise") on 1/1/2013.<sup>16</sup>

There was a quirk in this new law. Unlike the federal PTFA, the new Minnesota law's foreclosure protection applied to both commercial and residential tenants.

Step 4: Apparently someone noticed this quirk. In 2011, the Minnesota law was changed by adding the word "residential" to Minn. Stat. § 504B.285, subd. 1a.<sup>17</sup>

**As a result, the statute now provided no protection at all to commercial tenants at least through the sunset date of 12/31/2012.** I can only guess that commercial-tenant lobbyists were asleep at the wheel.

Step 5: In 2010, Congress changed the sunset date for the PTFA to 12/31/2014.<sup>18</sup> In response, the 2012 Minnesota legislature changed the sunset date in Minn. Stat. §504B.285 to the same 12/31/2014.<sup>19</sup>

Step 6: The federal PTFA did sunset. Anticipating this possibility, in 2013 residential tenant advocates convinced the Minnesota legislature to remove the sunset date in Minn. Stat. § 504B.285 and make its residential foreclosure protection permanent.<sup>20</sup>

**As a result, the elimination of foreclosure protection for commercial tenants became permanent.**

Step 7: Finally, in 2018, as part of a compromise budget bill, the PTFA was reenacted, this time with no sunset date.<sup>21</sup> Thus, at least so long as Congress leaves the PTFA alone, the Minnesota residential foreclosure protections in Minn. Stat. § 504B.285 are largely duplicative of federal law (although the Minnesota law includes a couple of minor extra protections).

**However, commercial tenants are still out of luck.**

#### The Legislature Should Fix the Problem

Therefore, as a matter of simple fairness and to fix this unintended consequence, the legislature should (re)enact a (new) provision into Minn. Stat. § 504B.285 to restore the two-month-notice protection to commercial tenants in foreclosed properties.<sup>22</sup>

#### Notes

1. In legalese, he “possesses the building as a vendee on a contract for deed”. Throughout this post, I’ve tried to put most the legalese and legal citations in endnotes..
2. In legalese, “the vendor on the contract for deed”.
3. See Minn. Stat. § 559.21, subd. 2a.. Minnesota statutes and (session) laws are available on the Revisor’s excellent website, <https://www.revisor.mn.gov/> . Federal Public Laws enacted since 1974 are available at <https://www.congress.gov/public-laws/>
4. In legalese, the owner/vendor now “possesses” the building.
5. At common law, after the redemption or cancellation period the lender simply took over, the lease was cancelled, and the tenant became a tenant at sufferance (almost like a trespasser).The one (rarely occurring) exception to this common-law rule is that if the lease was signed before the mortgage or contract for deed and the lender knew of the lease, then the lease is not cancelled. *Schrunk v. Andres*, 221 Minn. 465,470, 22 N.W.2d 548,551 (1946) (available at

<https://www.casemine.com/judgement/us/5914a1ceadd7b0493468ea04> )

6. The subdivision actually allows the owner to give the two months notice during the cancellation period (the 2 months the original landlord/vendee has to try to catch up on his payments) but the associated requirements make it difficult to do this and it is quite unusual for this to be done. Almost always, the vendor waits until after cancellation occurs to give a two-month termination notice.

7. In legalese, he is the “mortgagor”. He got a loan from a bank or other lender and signed a mortgage just like many homeowners have mortgages on their homes.

8. In legalese, “the mortgagee”.

9. Minn. Stat. §§ 580.23 and 581.10.

10. In legalese, the lender now “possesses” the building.

11. 1984 Minn. Laws ch. 567, s. 5, amending Minn. Stat. § 504B.285 (then codified at Minn. Stat. § 566.03).

12. 1992 Minn. Laws ch. 376, art. 1, s. 10

13. 2008 Minn. Laws ch. 177, s. 2-3, This law also abrogated *Broszko v. Principal Mutual Life Ins. Co.*, 533 N.W.2d 656 (Minn. Ct. App. 1995) which had construed Minn. Stat. § 566.03 (the prior codification of Minn. Stat. § 504B.285) oddly and thereby eliminated some of the intended protection in the statute. The next year a drafting error in the 2008 law was fixed. See 2009 Minn. Laws ch. 130, s. 1

14. P.L. 111-22, Title VII

15. See 2010 Minn. Laws ch. 315, s. 10-12.

16. See 2010 Minn. Laws ch. 315, s. 13.

17. 2011 Minn. Laws ch. 58.

18. P.L. 111-202, sec. 1484.

19. 2012 Minn. Laws ch. 132.

20. 2013 Minn. Laws.ch. 100, s. 2-3.

21. P.L. 115-174, sec. 304.

22. For example, the following subdivision could be added to Minn. Stat. §504B.285:

**Subd. 1d. Grounds when the person holding over is a tenant in a foreclosed non-residential property.**

The person entitled to the premises may recover possession by eviction when any person holds over non-residential real property on foreclosure of a mortgage and expiration of the time for redemption, provided that if the person holding the real property after the expiration of the time for redemption was a tenant during the redemption period under a lease of any duration and the lease began after the date the mortgage was executed but prior to the expiration of the time for redemption, and the person has received:

- (1) at least two months' written notice to vacate no sooner than one month after the expiration of the time for redemption, provided that the tenant pays the rent and abides by all terms of the lease; or
- (2) at least two months' written notice to vacate no later than the date of the expiration of the time for redemption, which notice shall also state that the sender will hold the tenant harmless for breaching the lease by vacating the premises if the contract is reinstated.