

One Minute Memo™



Massachusetts SJC Expands Enforceability of Liquidated Damages Clauses

The Supreme Judicial Court has ruled that a rent acceleration clause in a commercial lease may be enforced with regard to certain material breaches, despite the possibility that the liquidated damages clause might be an unenforceable penalty with regard to other, minor breaches. Since the SJC's 1942 decision in *Commissioner of Ins. v. Massachusetts Acc. Co.*, such liquidated damages clauses were categorically barred when they could be applied to both trivial as well as material breaches. The Court has long held that a liquidated damages clause will be enforced where potential damages were difficult to determine at the time the agreement was made, and the clause was a reasonable forecast of damages expected to occur in the event of a breach; otherwise it is an unenforceable penalty.

Recently, in *Cummings Properties, LLC v. National Communications Corporation*, the SJC allowed enforcement of a liquidated damages clause that would have been barred under *Commissioner of Ins.* In *Cummings*, the lease contained a liquidated damages clause with rent acceleration which would apply to the lessee's default in the payment of the rent or any other sum specified in the lease. When the lessee stopped paying rent, the lessor terminated the lease and sued for, *inter alia*, the accelerated rent payment of over \$500,000. The District Court found for the lessor, but the Appellate Division,

following *Commissioner of Ins.*, vacated the award of damages, concluding that the acceleration of rent provision was an unenforceable penalty because it would apply to both breaches of major importance and ones of minor financial importance.

In reversing the Appellate Division and modifying its holding in *Commissioner of Ins.*, the SJC recognized the "near unanimous trend toward upholding liquidated damages clauses in agreements between sophisticated parties." The court also relied on the lease's severability clause when reaching its conclusion that, where the liquidated damages provision applies to breaches of multiple covenants, "it may be presumed that the parties intended the provision to apply only to those material breaches for which it may properly be enforced." Because the court concerned itself only with the default in the payment of rent, it did not decide whether the parties' agreement in the lease that other types of defaults were "significant" meant that the rent acceleration clause would be enforceable for the breach of any or all of them.

If you have any questions about this ruling, please contact the Seyfarth Shaw attorney with whom you work or any of the real estate attorneys on our website, www.seyfarth.com.

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