

COMMERCIAL REAL ESTATE INSIGHT & NEWS

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Liquidated Damages Clause in Commercial Lease Unenforceable

BY PAUL C. BAUER • DECEMBER 6, 2022

In its December 5, 2022 slip opinion for *Cummings Properties, LLC v. Darryl C. Hines*, No. 21-P-1153, the Massachusetts Appeals Court held that a provision of a commercial lease that accelerated all remaining rent as liquidated damages after tenant default bore "no reasonable relationship to expected damages and is thus unenforceable as a penalty."

In reaching its decision, the Appeals Court distinguished the Supreme Judicial Court's holding in *Cummings Properties, LLC v. National Communications Corp.*, 449 Mass. 490, 494 (2007). Although the facts were similar, the Appeals Court found that the SJC's 2007 decision "did not address in that case whether a rent acceleration clause is a penalty if it allows the landlord to collect both the full amount of rent owed under the lease and rent from a new tenant."

The Appeals Court decision is consistent with principles of equity, and the majority of commercial lease forms in use today eschew rent acceleration clauses in favor of provisions that provide for liquidated damages based on the differential between total lease rent reserved over the term over fair market rent for such term. Nonetheless, the Appeals Court's reasoning is a thin reed on which to rely. At the same time, it may be brilliant reasoning as it de facto creates an election of remedies obligation on the landlord. Providing that a landlord must provide a tenant with a right of occupancy if it pays the liquidated damages puts the landlord in the position of having to make the decision either to pursue the accelerated rent *or* to attempt to relet the property.

Given the thin distinction between *Hines* and *National Communications,* this case appears to be an offer to the Supreme Judicial Court to revisit its earlier decision in *National Communications* in light of equity and decisions in other jurisdictions. While we must await the Supreme Judicial Court's opinion on the matter (assuming *Hines* is appealed), in most instances, landlords can avoid this uncertainty by drafting comprehensive, equitable liquidation damages clauses that are structured to make the landlord whole after a tenant default without constituting a penalty. These have previously been supported by the courts and indeed are positively referenced in *Hines*.

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