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Recent Mass. Supreme Judicial Court decision serves as reminder to commercial landlords

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In a recently-issued opinion (*275 Washington Street Corp. v. Hudson River International, LLC, et al.*), the Mass. Supreme Judicial Court (the Court) once again put commercial landlords on notice regarding the importance of having a sufficiently explicit liquidated damages clause in the remedies provisions of commercial leases in Mass. The Court's opinion described the pertinent lease provisions as follows: "Under paragraph 21(h) of the lease, if the tenant defaulted, the landlord had the right to reenter and take possession of the premises, and declare the term of the lease ended, 'without prejudice to any remedies which might be otherwise used for arrears of rent or other default.' Paragraph 21(h) also included an indemnification clause, which provided that 'Tenant shall indemnify Landlord against all loss of rent and other payments which Landlord may incur by reason of such termination during the remainder of the term.' The lease did not grant the landlord a liquidated damages remedy or any other remedy apart from indemnification for the loss of post-termination rent, but included a cumulative remedies clause..."

The landlord sued to recover its damages resulting from the original tenant's breach of the lease. After some disagreement among the lower courts as to whether the landlord was entitled to collect post-termination damages pursuant to the indemnification provision alone, the case wound up before the Court. In rejecting the trial court's reasoning in awarding landlord post-termination damages, the Court once again stated the "bright line" rule in Mass. for awarding post-termination damages, namely, that such recovery only arises when a landlord has explicitly reserved its right to liquidated damages in the lease. Even then, a liquidated damages clause should be drafted with caution and specificity to ensure that the landlord is permitted to recover liquidated damages at the time the lease is terminated.

The Court's holding was twofold: (i) a landlord cannot recover for post-termination damages under an indemnification clause in a lease until the end of the period specified in the lease (when the amount of damages the defaulting tenant is on the hook for can be ascertained with a greater degree of certainty), unless the indemnification clause specifically provides that damages may be recovered earlier (i.e., through rent acceleration); and (ii) a landlord has no common-law remedy for damages following the termination of a lease where no provision in the lease otherwise provides such a remedy. In arriving at its holding the Court reaffirmed the foundation for awarding post-termination damages to commercial landlords in Mass.; reiterating that indemnification clauses - no matter how broadly drafted - do not automatically entitle landlords to post-termination damages. Leasing practitioners in Mass. are likely quite familiar with the required language for liquidated damages clauses, which has emerged from previous judicial opinions issued by Mass. courts considering this issue. The language can essentially be broken down into three components: (i) that actual damages would be difficult - if not impossible - to calculate; (ii) as a result of this difficulty,

landlord and tenant agree that "X" is a reasonable estimate of the actual damages that landlord would incur as a result of tenant's breach; and (iii) that the payment of the foregoing estimate of actual damages is not a penalty, but rather liquidated damages payable by tenant under the lease. The permissible amount of "X" will generally depend on how well the liquidated damages and other pertinent lease provisions are drafted, but Mass. courts have upheld liquidated damages provisions allowing for full rent acceleration (though generally less the proceeds from reletting the premises by virtue of landlord's duty to mitigate damages). Commercial landlords in Mass. would do well to take a second look at the standard leases they use to ensure compliance with the Court's holding in this case.

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