

## Damages under Tenant's Breach of Lease

By Samantha P. McDonald, Esq.

A recent case held that if a tenant breaks a lease before the lease termination date, the landlord cannot seek damages until the lease period ends, because it is impossible to conclusively determine the damages until that point – even if the landlord re-releases the property – because the second tenant could breach too and the first tenant would still be liable for the unpaid rent. *275 Washington Street Corp. v. Hudson River International LLC*, 81 Mass. App. Ct. 418 (2012).

In this case, the parties entered into a twelve-year lease in 2006. The lease contained fairly standard indemnity provisions requiring the tenant to indemnify the landlord from losses arising from the tenant's default during the remainder of the lease term. A year later, the tenant closed up shop but continued to pay rent. The next year, 2008, the tenant stopped paying rent; the landlord took possession of the property and filed a breach of contract case against the tenant. While the case was pending, in 2010, the landlord rented the property to a new tenant at a lower rate.

The court held that the landlord must wait until the damages period provided for under the lease had terminated in 2018 to properly ascertain damages other than rent already due at the time of the tenant's abandonment. Unfortunately, this ruling allows the tenant plenty of time to protect its assets, spend them or even file for bankruptcy before the landlord can bring suit.

Although the Supreme Judicial Court has agreed to review this case and may ultimately decide it differently, for now the way to avoid this predicament is to include a liquidated damages clause in the lease. *275 Washington Street Corp. v. Hudson River International LLC*, 462 Mass. 1101 (2012). Such a clause establishes a set amount of damages in the event of a breach. There are, however, limits applicable to liquidated damages clauses. For example, the amount cannot be so high as to be seen as punitive.

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Call Samantha McDonald, Esq. at 508.459-8026 to help you draft leases with your commercial tenants that include such a liquidated damages clause and can guide you with any other landlord-tenant issues.

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