

INSIDE THE LAW

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IMMIGRATION FOR SAME-SEX COUPLES POST DOMA

By Kirk A. Carter, Esquire

(508) 532-3514 | kcarter@fletchertilton.com



On June 26th the Supreme Court found the Defense of Marriage Act (DOMA) to be unconstitutional, striking down the law that prevented same-sex marriages, validly entered into in states recognizing such marriages, from being recognized by the federal government for benefits purposes.

There are more than 1,000 federal benefits extended to heterosexual married couples that were previously denied to gay married couples. Among such benefits was the recognition of same-sex marriages for immigration purposes. Post DOMA, gay foreign nationals can more easily bring their same-sex spouses to the US while traveling for business, education, or pleasure, while gay US citizens legally married to or intending to marry a foreign national of the same sex can sponsor their spouse or fiancé for a visa to live with them permanently here in the United States.

Today same-sex marriage is recognized in 15 countries worldwide. Massachusetts was the first state to recognize same-sex marriage in 2004. Since then 12 other states and the District of Columbia have recognized same-sex marriage. Several states recognize civil unions, and many states expressly prohibit same-sex marriage. For many years gay US citizens in bi-national relationships have been denied the ability to sponsor their partners, despite their being in long-standing committed relationships. Many same-sex partners of US citizens have been deported from the United States, leading many US citizens to leave and live abroad in order to be with their loved ones. For 17 years DOMA expressly prohibited the federal government from recognizing such relationships, even if legally recognized in various states such as Massachusetts.

With the death of DOMA, gay American citizens can now sponsor their lawfully married spouses for permanent residence. If they are not yet married and their loved ones reside abroad, they can sponsor them for a fiancé visa to travel to the US for the purpose of getting married, provided they can demonstrate that they will be married in a state that recognizes same-sex marriage. United States Citizenship and Immigration Services (USCIS) has issued guidance that indicates they will look to the law of the jurisdiction where the marriage was celebrated to determine whether the marriage is valid. Thus, marriages entered

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into in one of the 14 other countries that recognize same-sex marriage can also support a petition for immigration benefits. Like all marriage-based petitions, couples seeking immigration benefits based on marriage face a high level of scrutiny, particularly as it relates to the bona fides of their relationship. This scrutiny will likely be higher for same-sex couples in states where gay marriage is not recognized or by examiners who don't personally agree with the Supreme Court's decision.

The death of DOMA also makes it easier for foreign nationals in same-sex marriages to travel to the US for business, pleasure, work, or education. While opposite-sex spouses and their children have long been able to accompany their foreign national spouses to the US in a dependent visa category that allowed them to remain in the US for the same period as their spouse, gay couples have historically been denied this right. More recently same-sex partners have been allowed to accompany their spouses to the US, not under a dependent visa of the same duration, but instead on a visitor's visa limited to six months at a time. This required the "visiting" spouses to renew their "visitors" visa every six months even though their spouses may have been working on a three- or five-year visa. With DOMA out of the way, USCIS can now issue dependent visas in the same visa category and for the same duration as the primary visa holder to any legally married same-sex spouse.

The Obama administration has been quick to respond to the Supreme Court's decision, and both the Department of Homeland Security (DHS) and the Department of State (DOS) have issued preliminary guidance. USCIS has actually begun approving same-sex petitions filed prior to the Supreme Court's decision and is accepting new cases. While many issues remain unanswered, and further guidance from both DHS and DOS is anticipated, it is clear that bi-national same-sex couples, post DOMA, have opportunities that didn't previously exist, making this the opportune time to speak with an immigration attorney familiar with such issues. **FT**

RECENT RULING UNDERSCORES THE IMPORTANCE OF DAMAGES PROVISIONS IN A COMMERCIAL LEASE

By Donna Toman Salvidio

(508) 459-8072 | dsalvidio@fletcherilton.com



A recent ruling by the Massachusetts Supreme Judicial Court (SJC) highlights the importance of negotiating appropriate damages provisions in commercial leases. Landlords should ensure that their leases contain a comprehensive liquidated damages provision allowing them to accelerate rent for the balance of the lease term in the event of a tenant default.

Without one, the landlord must wait until the end of the lease term, possibly decades, to ascertain its actual damages.

In *275 Washington Street Corp. v. Hudson River International, LLC*, 465 Mass. 16 (2013), the SJC ruled that a commercial landlord whose tenant broke a 12-year lease after only two (2) years could not seek damages until the 12-year lease term was up, even though the landlord quickly found a replacement tenant.

The lease contained an indemnification clause holding the tenant responsible for any losses as a result of the tenant's breach but did not include a liquidated damages provision or any other remedy aside from indemnification. A liquidated damages clause would have allowed the landlord to accelerate the balance of the unpaid rent owed by the tenant through the end of the term.

After the tenant's default only two years into the 12-year lease, the landlord re-entered the property and took possession of the commercial space. Shortly thereafter, the landlord filed a breach-of-contract suit against the tenant, seeking unpaid rent for the balance of the lease term and other damages. While the landlord's breach-of-contract suit against the former tenant was pending, the landlord entered into a 10-year lease with a new tenant for the same space. The new lease went beyond the original 12-year term but was for a reduced monthly rent.

The landlord argued that because the new tenant's lease extended past the former tenant's lease term, damages could be easily ascertained using the difference in rent that would have been collected from the original tenant and what would now be collected from the new tenant during that period. The SJC disagreed, however, citing future uncertainties such as possible destruction of the premises by fire,

The SJC ruled that the landlord must wait until the original 12-year term had expired to ascertain the full scope of its actual damages.



a default by the new tenant or a sale of the premises that could affect the actual amount of the loss sustained by the landlord. Consequently, the SJC ruled that the landlord must wait until the original 12-year term had expired to ascertain the full scope of its actual damages. Of course by that time, the chances of the landlord recovering anything from a defunct business would be highly unlikely.

The *275 Washington Street Corp.* decision highlights the importance of incorporating a clear provision into leases that explicitly sets forth a landlord's remedies in the event of a default. If the landlord's commercial lease had contained a liquidated damages provision providing for the landlord's ability to accelerate rent through the balance of the lease term in the event of the tenant's default, the landlord would have been able to secure damages through the end of the lease term by filing suit immediately. Commercial landlords should insist upon a damages acceleration clause to prevent a fate similar to the one that befell the landlord in the *275 Washington Street Corp.* case. Conversely, tenants will want to dilute such a clause to the extent possible.

In its decision, the SJC notably commented that “[a] landlord left without an adequate remedy following breach of the lease by a tenant has only itself to blame for entering into a lease that fails to provide such a remedy. We shall not disrupt the settled expectations of leasing parties in order to protect a landlord from the consequences of failing to insist on an adequate remedy in the negotiation of a commercial lease.”

The *275 Washington Street Corp.* decision underscores the importance of negotiating a rent acceleration and/or liquidated damages provision in any commercial lease, and it serves as a reminder that Massachusetts courts will not go out of their way to protect landlords who fail to protect themselves by negotiating an appropriate commercial lease. The attorneys at Fletcher Tilton PC endeavor to stay on top of developments that impact commercial lease drafting and lease negotiations, and the attorneys possess the experience to ensure that landlords and tenants alike are expertly represented in their leasing transactions. **FT**

FIRM NEWS

Sumner B. "Tony" Tilton Receives Honorary Degree



Congratulations to Tony Tilton for being awarded an honorary Doctor of Laws degree from Clark University during their Commencement on May 19, 2013.

Tony is a life member of the Clark University Board of Trustees. He has been a powerful force for Clark University for many years and has helped guide Clark's relationship

with the City of Worcester, now a national model of how a university and municipality can work together for mutual benefit. Tilton Hall is named in recognition of his generous support of Clark.

Mary & Warner Fletcher Being Honored at This Year's Harvey Ball

(As seen on *Telegram.com*, June 4, 2013)



The Worcester Historical Museum has announced that Mary and Warner Fletcher will be recipients of the 2013 Harvey Ball Smile Award.

The museum presents the award annually to a person, organization or group whose commitments have made a difference in the city of Worcester. This year's ball will

celebrate the Fletchers' dedication to the community.

William Wallace, museum executive director, said, "Mary and Warner Fletcher continue a long tradition of great Worcester couples who have been dedicated to the betterment of Worcester. They join a long list of those whose endeavors have generated a longstanding and positive impact on the community. Mary and Warner define philanthropy, which makes them the ideal recipients of the Harvey Ball Smile Award."



Attorney Kirk A. Carter recognized in Metrowest 495 Biz as Top Ten to Watch

Congratulations to attorney Kirk Carter who

appeared in April's issue of *Metrowest 495 Biz* as one of the "Top Ten to Watch." To read the entire article online, go to our website, www.fletchertilton.com, and go to the "Firm News" tab at the top of the page.



We are proud to offer our congratulations to attorney Samantha P. McDonald whose writings were recently published in *Crocker's Notes on Common Forms* (10th ed., MCLE 2013), edited by Sydney F. Smithers, IV. To read more, visit our website at www.fletchertilton.com and find her biography under the "Professionals" tab.

Fletcher Tilton Welcomes Attorney Lawrence A. Brodeur to Our Team



Lawrence A. Brodeur is Of Counsel to the firm. His practice includes the areas of commercial real estate, land use and zoning, financing, residential real estate and municipal law. Attorney Brodeur spent ten years in the public sector prior to beginning his practice of law. He held municipal management positions in Millbury, Shrewsbury and Auburn.

Attorney Brodeur has served as permitting counsel for two regional mall projects; for regional grocery store projects; for two national home improvement store retail projects; for two national grocery/home goods big box retailers and for multi-screen movie theatre projects for a national movie theatre chain.

Fletcher Tilton^{PC}
Attorneys at law

The Guaranty Building
370 Main Street, 12th Floor
Worcester, MA 01608-1779

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