

I WANT IT ALL AND I WANT IT NOW: THE ENFORCEABILITY OF RENT ACCELERATION CLAUSES



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Most commercial leases provide for a broad range of remedies that the landlord can exercise if the tenant defaults. Sometimes, the lease allows the landlord to accelerate and immediately recover all of the breaching tenant's rent for the balance of the lease term. A tenant who is subject to a rent acceleration clause may question whether it constitutes an unenforceable penalty.

I recently represented a landlord in a case where a tenant challenged the validity of a rent acceleration clause. The Court ultimately decided the clause was enforceable as a matter of law and awarded my client accelerated rent on summary judgment. But each lease is unique. Although the Court correctly upheld the landlord's contractual remedies in that case, it is unclear how the Court would have ruled if it had been presented with different lease language.

Courts analyze acceleration provisions like liquidated damages provisions. See, e.g., *In re Grodnik's, Inc.*, 128 F. Supp. 941, 942-43 (D. Minn. 1955). Under Min-

nesota law, a liquidated damages provision is enforceable if (1) the amount fixed by the contract is a reasonable forecast of just compensation for a breach of the contract, and (2) the harm caused by the breach is impossible or very difficult to accurately estimate. *Gorco Const. Co. v. Stein*, 99 N.W.2d 69, 74 (Minn. 1959).

Minnesota courts have enforced rent acceleration clauses in commercial leases, at least where the tenant's future rent is discounted to present value and the tenant will be credited for rent the landlord receives from a replacement tenant. See *Lariat Companies, Inc. v. Baja Sol Cantina EP, LLC*, 2013 WL 4404589, *4-6 (Minn. Ct. App. Aug. 19, 2013); *1975 Robert Street Partners v. SR Shingle Creek LLLP*, 2008 WL 2020480, *6 (Minn. Ct. App. May 13, 2008). Courts in other states also enforce rent acceleration clauses that reasonably approximate the landlord's actual damages for the tenant's breach. See, e.g., *Aurora Business Park Associates, L.P. v. Michael Albert, Inc.*, 548 N.W.2d 153, 155-58 (Iowa 1996) (collecting cases); Restatement (Second) of Property, Landlord & Tenant, § 12.1, cmt. k and Illustration 12 (1977).

What if the lease does not require the accelerated rent to be discounted to present value? Absent a present value calculation, the accelerated rent may be greater than the landlord's actual damages for the tenant's breach. For example, assume a tenant is required to pay \$100,000 per year in rent until the lease expires ten years from now. If the tenant breaches and the landlord accelerates the tenant's remaining rent without discounting it to present value, the landlord will demand an immediate payment of \$1 million. At first glance, that may seem fair because the tenant otherwise

would have paid \$1 million in rent if it had performed as agreed for the balance of the term. But due to the time value of money, a lump sum of \$1 million today is worth more than a stream of \$1 million payments spread over a ten-year term. By accelerating rent and not discounting it, the landlord ends up in a better position from a revenue standpoint than if the tenant had complied with the lease.

What if the lease allows the landlord to accelerate the tenant's rent, evict the tenant, and keep all of the rent the landlord receives from a new tenant as well? Depending on the circumstances, such a lease could result in a windfall for the landlord – enabling it to generate rental revenue from two separate tenants for the same space.

Commercial landlords (and transactional attorneys who represent them) should be careful not to overreach in drafting rent acceleration clauses. To be safe, they should explicitly state that the accelerated rent will be discounted to present value. They should also avoid any provision that entitles the landlord to retain the proceeds from a replacement tenant in addition to recovering all rent from the breaching tenant. Rent acceleration clauses that go far beyond what is necessary to fairly compensate a landlord could run into enforceability problems, which would defeat the benefits of expressly laying out the landlord's remedies in the first place.

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