

# Commercial Real Estate Monthly

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## LEGAL ISSUES

# Property Managers Face Liability As 'Landlords'

## Indemnity Provisions Needed As Shield From Tenant Lawsuits

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Massachusetts property managers can easily find themselves being treated as landlords when facing tenants' breach of habitability and quiet enjoyment claims, or claims pursued under the state's consumer protection statute.

When this occurs, property managers face potential damages that are generally reserved to property owners – namely, payment of the complain-



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ing tenant's attorneys' fees and double or treble damages.

By planning ahead, however, property managers can contractually protect themselves from incurring responsibility for these potential damages.



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### 'Landlord' Under The Law

The "implied warranty of habitability" and "covenant of quiet enjoyment" generally exist only between a landlord and its residential tenant. While most understand the term "landlord" to mean the actual owner of rental property, Massachusetts law considers a property manager to be a "landlord" with respect to these covenants in certain circumstances.

Specifically, someone who manages and controls premises, collects rent, and makes repairs can be a landlord without actually owning the premises.

Another important factor is when the only contact a tenant has with the leased prem-

ises is with the property manager, a common occurrence for many tenants. Under these circumstances, Massachusetts law permits a jury to find a property manager liable as a "landlord" for breach of habitability and quiet enjoyment claims despite having no ownership interest in the leased premises.

### 'Landlord' Liability

Damages arising from breaches of habitability and quiet enjoyment can be significant. For instance, damages for a breach of the implied warranty of habitability are "measured by 'the difference between the value of the dwelling as warranted ... and the value of the dwelling as it exists in its defective condition.'"

A breach of the covenant of quiet enjoyment is criminally punishable with fines of up to \$300 or imprisonment for up to six months. In addition, under the state's quiet enjoyment statute, violators of the covenant of quiet enjoyment will be held liable "for actual and consequential damages or three month's rent, whichever is greater, and the costs of the action, including a reasonable attorney's fee."

A "willful" or "knowing" violation of the covenant of quiet enjoyment will lead to doubling or trebling of the tenant's actual damages pursuant to the state's consumer protection statute. Under the statute, a property manager can also incur liability by renting an apartment that contains a condition "which may endanger or materially impair the health, safety or well-being of the occupant or is unfit for human habitation," or by failing to fix such a condition once notice is given by the tenant.

### Indemnity Provision

A property manager can take proactive steps when the property management re-

lationship is formed to ensure protection against liability. First and foremost, the property manager should insist that a property management agreement contains an indemnity provision requiring the property owner to defend and indemnify the property manager for any claim related to property management services.

An indemnity provision should *not* contain an exclusionary clause that is triggered by allegations of negligence against the property manager. Such an exclusion within the indemnity provision will almost guarantee a dispute with the property owner over indemnity obligations, as many "landlord/tenant" cases include claims for negligence against the property manager.

A property manager should also insist that insurance-related provisions be contained in the property management agreement, including the following:

First, the agreement should require the property owner to maintain at his expense both multi-peril property insurance and comprehensive general liability insurance for the property.

Second, it should require the property owner to include the property manager as an additional insured on all general liability insurance policies applicable to the property in question.

Third, the agreement should make clear that all indemnity and insurance provisions will survive the expiration or termination of the property management agreement and remain in full force and effect. ■

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