## LANDLORD AND TENANT

### LANDLORD MUST USE REASONABLE EFFORTS TO MITIGATE DAMAGES AFTER TENANT'S BREACH

Hoppenstein Properties, Inc v. Schober, 329 S.W.3d 846 (Tex. App.—Fort Worth 2010).

**FACTS:** Bill Schober ("Tenant") leased commercial premises from Hoppenstein Properties, Inc. ("Landlord") for a period of six years, and spent $40,000 to make the premises business ready. Tenant's business suffered after moving into the leased premises and almost a year after signing the lease Tenant vacated the premises. After Tenant's breach of the lease and after spending over $50,000 to renovate the space, Landlord leased part of the space to a new tenant, a hookah bar needing a smaller space than Schober's antique furniture business. Landlord subsequently sued Tenant for damages for prematurely vacating the premises.

Tenant's default of the lease was not contested, but Tenant argued that Landlord had failed to mitigate its damages because there was another business owner in the same center that was interested in taking over his space as-was. After a trial, a jury awarded Landlord $5,500 in damages, an amount short of the requested $107,584.54. Landlord appealed and argued that the jury's evidence to support its finding that Landlord wholly failed to mitigate its damages caused by Tenant's breach of the lease was insufficient.

**HOLDING:** Reversed and Remanded.

**REASONING:** A landlord has a duty to make reasonable efforts to mitigate damages when the tenant breaches the lease and abandons the property. *Austin Hill Country Realty, Inc. v. Palisades Plaza, Inc.,* 948 S.W.2d 293, 299 (Tex. 1997). However, a landlord is not required to simply fill the premises with any willing tenant; the replacement tenant must be suitable under the circumstances. A tenant's assertion that a landlord failed to mitigate damages is an affirmative defense. Thus, the tenant properly bears the burden of proof to demonstrate that the landlord has failed to mitigate damages and the amount by which the landlord could have reduced its damages.

In its analysis, the court looked to the jury's award of $5,550 for the past due rent that had accrued before Tenant vacated the premises and determined the amount awarded did not include any amounts of rental, late fees, or cost of improvements to the premises for any time after Tenant vacated the premises (all authorized by the lease agreement in the event of a tenant default). In light of that, the court held that although Tenant brought forward evidence showing that Landlord was not interested in mitigating damages because of his refusal to lease to another tenant in its shopping center, Tenant failed to prove that Landlord could have immediately rented Tenant's premises and failed to prove that Landlord was not entitled to any post-abandonment damages whatsoever.

## ARBITRATION

### ARBITRATION AGREEMENT MAY BAN CLASS ACTION

AT&T Mobility LLC. v. Vincent Concepcion , ___ U.S. ___ (2011).

As this issue was going to press, the United States Supreme Court held by a vote of 5-4 that arbitration agreements may ban the use of class action. The case involved an arbitration agreement entered into by Vincent and Liza Concepcion as part of the sale and servicing of cellular telephones with AT&T Mobility LLC (AT&T). The contract provided for arbitration of all disputes between the parties but required that claims be brought in the parties' "individual capacity, and not as a plaintiff or class member in any purported class or representative proceeding."

The Ninth Circuit found the provision unconscionable under California law as announced in *Discover Bank v. Superior Court,* 36 Cal. 4th 148, 30 Cal. Rptr. 3d 76, 113 P. 3d 1100 (2005). It also held that the "*Discover Bank* rule" was not preempted by the FAA because that rule was simply "a refinement of the unconscionability analysis applicable to contracts generally in California." In response to AT&T's argument that the Concepcions' interpretation of California law discriminated against arbitration, the Ninth Circuit rejected the contention that "class proceedings will reduce the efficiency and expeditiousness of arbitration" and noted that "*Discover Bank* placed arbitration agreements with class action waivers on the exact same footing as contracts that bar class action litigation outside the context of arbitration." The Supreme Court reversed, holding that "because it 'stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress,' *Hines v. Davidowitz, 312 U.S. 52, 67, 61 S. Ct. 399, 85 L. Ed. 581 (1941)*, California's *Discover Bank* rule is preempted by the FAA.

The Court noted that although §2 of the Federal Arbitration Act preserves generally applicable contract defenses, nothing in it suggests an intent to preserve state-law rules that stand as an obstacle to the accomplishment of the FAA's objectives. "As we have said, a federal statute's saving clause 'cannot in reason be construed as [allowing] a common law right, the continued existence of which would be absolutely inconsistent with the provisions of the act. In other words, the act cannot be held to destroy itself.'" The Court found that California's *Discover Bank* rule interferes with arbitration. Although the rule does not *require* classwide arbitration, it allows any party to a consumer contract to demand it *ex post.* The Court also noted that "the rule is limited to adhesion contracts, but the times in which consumer contracts were anything other

**The rule is limited to adhesion contracts, but the times in which consumer contracts were anything other than adhesive are long past.**