LIQUIDATED DAMAGES IN PURCHASE AND SALE AGREEMENTS: ILLINOIS AND MASSACHUSETTS

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The following two articles are part of a project undertaken by the Acquisitions Committee of the American College of Real Estate Lawyers to analyze on a state-by-state basis the liquidated damage (and alternative) remedies available to sellers for breach of a commercial real estate purchase and sale contract. These articles summarize Illinois law and Massachusetts law as to each of 13 questions posed by the Committee.

ILLINOIS

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In 2018, the Acquisitions Committee of the American College of Real Estate Lawyers (ACREL) undertook a state-by-state analysis of liquidated damage remedies in real estate purchase and sale agreements, prompted by the holding in Ravenstar, LLC v. One Ski Hill Place, LLC, 401 P.3d 552 (Colo. 2017). In Ravenstar, the Colorado Supreme Court upheld a clause, contained in five separate contracts to acquire to-be-built condominium units, providing the seller with an option to choose between liquidated damages and actual damages.

Ravenstar departed from what was considered to be largely settled precedent, i.e., that an option to elect either liquidated or actual damages would invalidate an otherwise valid liquidated damages clause. After all, if a liquidated damages provision represents an effort to pre-agree to a certain recovery

of damages where actual damages are difficult to ascertain, mustn't the right to seek actual damages undermine the foundation upon which the liquidated damages remedy is based?

Stevens A. Carey, the chair of the Acquisitions Committee of ACREL, recently examined that and various other questions in connection with liquidated damages in real estate purchase and sale agreements in "Liquidated Damages in a Real Estate PSA: a Closer Look" – The Practical Real Estate Lawyer, January 2019. Steve's article was motivated by certain questions arising from the holding in Ravenstar but quickly evolved to constitute a welcome and broad overview of how different jurisdictions have considered the liquidated damages remedy. More specifically, Steve's article focused on thirteen distinct questions relating to liquidated damages.

Those same questions are the subject of this article, which attempts to analyze them under Illinois case law. It is hoped that, together with the Carey article, this article will provide practitioners representing parties to Illinois real estate purchase and sale transactions with a more nuanced understanding of the implications of their advice and drafting.

Not surprisingly, the enforceability of liquidated damage provisions has long perplexed Illinois courts. As stated in one of the landmark cases, "[t]here is no fixed rule applicable to all liquidated damage agreements, and each one must be evaluated by its own facts and circumstances." Grossinger Motorcorp, Inc. v. American Natl' Bank and Trust Co., 240 Ill. App. 3d 737 (1992), at 749, citing Likens v. Inland Real Estate Corp. (1989), 183 Ill. App. 3d 461.

In Grossinger, which was cited in Ravenstar disapprovingly, Grossinger (an automobile dealership) entered into an agreement to purchase unimproved real estate from defendant land owners. Purchaser deposited $100,000 as earnest money and the agreement conditioned purchaser's closing obligations upon its obtaining rezoning for its intended operations.

Purchaser agreed to act diligently in pursuing the rezoning. After failing to obtain the necessary rezoning, purchaser delivered notice of termination and sought the return of its earnest money deposit. When seller refused, purchaser filed a complaint for declaratory and injunctive relief, seeking the return of its earnest money and reasonable attorneys' fees, as provided under the agreement.

Seller counter-claimed, alleging that purchaser failed to act diligently. In its prayer for relief, seller asked in the alternative for the earnest money or "other remedies at law," including the difference between the "value" and contract price of the property and all additional expenses which might result from a subsequent sale of the property. Grossinger, at 741-742. Three months later, well before trial, seller amended its prayer for relief, seeking only the earnest money, as liquidated damages, and attorneys' fees. Notably, it is was subsequently learned that seller had resold the property for $1,250,000 more than purchaser had agreed to pay. Id. at 742.

The trial court issued its opinion in seller's favor. The court held that purchaser indeed had breached its obligation to act diligently in seeking the rezoning and awarded the earnest money to seller as liquidated damages. In reaching this result, the court first found that the liquidated damages provision was enforceable, stating that the earnest money amounted to only about two percent of the purchase price and that defendant had incurred substantial carrying costs pending the outcome of the zoning application. Id. at 745. Secondly, the court awarded attorney's fees in an amount of over $49,000 pursuant to a standard prevailing party's clause in the contract.

Purchaser appealed. Seller cross-appealed (on the basis that the amount of attorneys' fees awarded was inadequate).

In issuing its opinion, the Illinois Appellate Court for the First District, Fifth Division disagreed with the lower court's determination that the purchaser had breached the contract, finding that purchaser's failure to present its plan for rezoning was excused by the fact that the contract had previously been properly terminated by purchaser. Further, the court

continued by stating that "[e]ven if we agreed with the trial court's findings that plaintiff was in breach of its agreement, we would reverse [the lower court ruling for seller] on the independent ground that the liquidated damages provision of the contract is unenforceable." Id. at 749. The court cited Section 356(1) of the Restatement (Second) of Contracts:

> Damages for breach by either party may be liquidated in the agreement but only at an amount that is reasonable in the light of the anticipated or actual loss caused by the breach and the difficulties of proof of loss. Id. at 749.

Purchaser argued in its appeal of the trial court's ruling that the optional nature of the liquidated damages provision constituted a penalty. "Plaintiff would contend that by reserving the option to seek compensatory damages, defendant intends for the liquidated damages option to operate only where it exceeds actual damages" Id. at 750. The appellate court agreed, distinguishing the facts in Grossinger from other cases where the other remedies which were reserved to the aggrieved party were not monetary in nature.

Accordingly, since the liquidated damages provision was unenforceable, only actual damages might be collected, and the ultimate sale of the property for $1,250,000 more than the purchaser in Grossinger was to have paid negated that remedy. The court therefore held that purchaser was entitled to the refund of its earnest money deposit since the liquidated damages provision was unenforceable and seller suffered no actual damages. Id. at 752.

Finally, the appellate court held that because the contract provided that the prevailing party was entitled to payment of its legal fees, the trial court erred in its award of legal fees to the seller. "In light of our decision which returns the earnest money to plaintiff, plaintiff cannot be considered the 'unsuccessful party' and defendant can no longer be considered the 'prevailing party' under the contract." Id. at 753. The case was remanded to the trial court for determination of the legal fees, if any, to be awarded to the purchaser.

The following thirteen questions, and the corresponding discussion under Illinois law, track the discussion points in the Carey article:

1. May the seller choose specific performance instead of liquidated damages (so that liquidated damages are not an exclusive remedy)?

Generally speaking, the inclusion of a liquidated damages clause in a purchase and sale agreement does not preclude a party from pursuing specific performance (or other equitable remedies) under Illinois law:

> When there is no misunderstanding or misrepresentation between a purchaser and seller who enter into a contract for the sale of real estate, specific performance is granted as a matter of right and the fact that there is a provision in the contract that provides for liquidated damages in the event of nonperformance does not, in and of itself, prevent the decree of specific performance.

O'Shield v. Lakeside Bank, 335 Ill. App. 3d 834, 841 (2002) (citing Kohrs v. Barth, 212 Ill. App. 3d 468, 471 (1991)); Rootberg v. Richard J. Brown Associates, Inc., 14 Ill. App. 3d 301, 303 (1973) (quoting same); see also Bauer v. Sawyer, 8 Ill. 2d 351, 358 (1956) ("In accordance with our earlier and later decisions and with the weight of authority elsewhere…even if the provision in question is construed as one for liquidated damages, the right to an injunction is not barred"); Carr v. Butterworth, 219 Ill. App. 14, 20 (1920) ("When a contract for sale contains a provision for liquidated damages in case of breach, a court of equity will not for that reason, alone, decline to enforce it in a court of equity"); Koch v. Streuter, 218 Ill. 546, 553 (1905) ("The mere fact that a contract stipulates for the payment of liquidated damages in case of failure to perform does not prevent a court of equity from decreeing specific performance") (citing Lyman v. Gedney, 114 Ill. 388, 398 (1885)).

However, a buyer and seller may agree to preclude specific performance by including in the contract clear language indicating that the liquidated

damages provision is to be the sole remedy in the event of nonperformance. See O'Shield, 335 Ill. App. 3d at 841. See also Lobo IV, LLC v. V Land Chicago Canal, LLC, 2019 IL App (1st) 170955, ¶ 80 ("Parties may contract for an exclusive remedy under the contract, and [o]nce made and agreed upon, this remedy provision is binding on the parties and will be recognized and enforced by our courts.") (citing O'Shield, 335 Ill. App. 3d at 839). "Although there are no set or formulaic words…clear language that would bar specific performance includes phrases that provide for 'something more' than the provision for liquidated damages itself—phrases stating, for example, that the contract will become 'null and void' upon payment of a sum indicated, or that payment is 'in full of all claims of every kind and nature,' or that payment is the 'sole and exclusive remedy' upon a failure to perform." O'Shield, 335 Ill. App. 3d at 841. (citing Davis v. Isenstein, 257 Ill. 260, 263 (1913); McDonagh S.C. v. Moss, 207 Ill. App. 3d 62, 65 (1990); and Coney v. Commercial Nat'l Realty Co., 88 Ill. App. 3d 1026, 1028 (1980)).

Note that specific performance is generally available not only to purchasers, but also to sellers, under Illinois real estate purchase and sale agreements. In Bissett v. Gooch, 87 Ill. App. 3d. 1132 (1980), the appellate court affirmed the trial court's denial of plaintiffs' prayer for specific performance against the defendants. The plaintiffs in this case agreed to purchase a parcel from one of the named defendants, and that named defendant also agreed to construct a single-family residence on the parcel. Id. at 1137. The plaintiffs alleged that the named defendant who agreed to sell the parcel and construct the house engaged in fraud and misrepresentation in the contract and requested specific performance. Id. at 1134. While the court ultimately denied the buyer's request for specific performance, the appellate court asserted the availability of the remedy of specific performance to both buyers and sellers, noting that this remedy is granted only with the court's discretion. See id. at 1139 ("The remedy of specific performance is not a matter of absolute right but is within the discretion of the court. Where a contract for the sale of real estate has been entered into without misrepresentation, unfairness, or superior advantage, specific performance will be granted to either the buyer or the seller.") (internal citations omitted).

2. May the seller choose actual damages instead of liquidated damages (so that liquidated damages are not an exclusive damage remedy)?

Recent cases conclude that inclusion of an optional liquidated damages remedy violates the first prong of the liquidated damages test (see the discussion in Part 6, below) because it indicates that the parties did not intend to stipulate or settle on agreed-upon damages in advance. See Grossinger, supra; Catholic Charities of the Archdiocese of Chi. v. Thorpe, 318 Ill. App. 3d 304, 313 (2000); Kay Gee Amusement Co. v. Cave, 177 Ill. App. 250, 254-5 (1913); Resource. Tech. Corp. v. Congress. Dev. Co., 2003 U.S. Dist. LEXIS 15418 at 14-15; M.L.G. Trust v. Government of the Republic of Indon., 1994 U.S. Dist. LEXIS 14147 at 9. "[I]n essence, such an optional liquidated damages provision fixes a minimum which must be paid from the buyer to the seller, but leaves the door wide open to him to prove actual damage in addition to the so called liquidated damage. This is no settlement at all and it permits the [seller] to have his cake and eat it too." Grossinger, 240 Ill. App. 3d at 751.

Since Grossinger, Illinois appellate courts have generally relied on Grossinger to find that provisions that allow defendants the option to receive liquidated damages or to seek actual damages are unenforceable as a penalty. See, e.g., Karimi v. 401 N. Wabash Venture, LLC, 952 N.E.2d 1278, 1287 (Ill. App. 2011). It should be noted, however, that there have been no Illinois Supreme Court rulings on this matter and some earlier Appellate Court cases have held to the contrary. Gryb v. Benson, 84 Ill. App. 3d 710, 712 (1980) ("The contract in the instant case gave the plaintiffs as sellers an option to retain the earnest money as liquidated damages. But plaintiffs instead chose to sue for their actual damages. This was the prerogative of plaintiffs under the clear language of the contract."); see also Lakshman v. Vecchione, 102 Ill. App. 3d 629, 633-4 (1981), ("It is clear from the terms of paragraph 11 of the contract that it is defendants' option to retain the $3,000 earnest

money deposit or to pursue any other legal or equitable remedy for breach of contract"). In Kohenn v. Plantation Baking Co., 32 Ill. App. 3d 231, 236 (1975), the court did not strike down the optional liquidated damages provision as an unenforceable penalty, but rather, denied seller's counterclaim for actual damages and only allowed the seller to retain the earnest money. The court did not discuss the optional nature of the liquidated damages clause in the contract.

3. If the seller may choose liquidated damages or actual damages, may it have both?

Illinois courts have typically found that if a party is receiving liquidated damages, then it is not entitled to seek additional monetary damages, even where the contract expressly allows for the recovery of damages beyond liquidated damages. See Grossinger; also see Morris v. Flores, 174 Ill. App. 3d 504, 505, 507 (1988) (where the contract stated that the liquidated damages "shall not be the exclusive remedy of seller, and seller shall retain all monies deposited without prejudice to his other remedies," the court allowed the seller to recover only liquidated damages, holding that "the 'other' remedies refers to rights of a kind and character other than money damages" and that "[i]t would be inconsistent to provide in the contract for liquidated damages and also allow a party to pursue other remedies for money damages"); see also H&M Driver Leasing Services, Unlimited, Inc. v. Champion Int'l Corp., 181 Ill. App. 3d 28, 31 (1989) ("Where a contract provides that the breaching party must pay all damages caused by the breach as well as a specified sum in addition thereto, the sum so specified…constitutes an unenforceable penalty"); Curtin v. Ogborn, 75 Ill. App. 3d 549, 555 (1979) ("[I]n the event of a default by the buyer, the earnest money may be retained in full by the seller without reference to the actual damages which may have resulted to the seller from the buyer's default, but [the] seller is not entitled to any additional recovery") (citing Kohenn, 32 Ill. App. 3d at 236). Further, in one of the few cases in which an Illinois court enforced an optional liquidated damages clause, the court expressly held that the seller was not entitled to additional recovery if he exercised the option. See Gryb, 84 Ill. App. 3d at 712.

4. If the seller may choose liquidated damages or actual damages, but not both, when must it decide?

The few courts in Illinois that have enforced optional liquidated damages clauses do not expressly state when a seller must decide between liquidated or actual damages. However, in each case, the seller elected its option before bringing suit (knowing, presumably, that its actual damages would exceed the stated liquidated damages). In Lakshman, the seller chose not to exercise its option of retaining the earnest deposit as liquidated damages (i.e., $3,000). See Lakshman, 102 Ill. App. 3d at 634. There, actual damages would equal the amount of any deficiency between the fair market value of the real estate on the date of the breach and the sales price contracted for by the buyers, including reasonable costs and attorneys' fees. Similarly, in Gryb, sellers chose to bring suit for their actual damages of $3,000, which represented the difference between the contract price and the resale price, rather than retaining their $1,000 earnest money deposit. See Gryb, 84 Ill. App. 3d at 711.

5. Is there an applicable statute addressing liquidated damages clauses?

There is no Illinois statute addressing liquidated damages clauses in contracts for the sale of real property.

6. What is the test for a valid liquidated damages clause?

Illinois courts largely follow the liquidated damages test set forth in Section 356(1) of the Restatement (Second) of Contracts:

> Damages for breach by either party may be liquidated in the agreement but only at an amount that is reasonable in the light of the anticipated or actual loss caused by the breach and the difficulties of proof of loss.

See, e.g., GK Dev., Inc. v. Iowa Malls Fin. Corp., 3 N.E.3d 804, 816 (Ill. App. Ct. 2013); Inland Bank and Trust v. Knight, 399 Ill. App. 3d 378, 383 (2010); Penske Truck Leasing Co., L.P. v. Chemetco, Inc., 311 Ill. App. 3d 447, 454 (2000). Other Illinois courts have articulated this in slightly different terms. For instance, the Grossinger court stated that "[i]n Illinois, courts will generally find a liquidated damages provision to be valid and enforceable in a real estate contract, when: (1) the parties intended to agree in advance to the settlement of damages that might arise from the breach; (2) the amount of liquidated damages was reasonable at the time of contracting, bearing some relation to the damages which might be sustained; and (3) actual damages would be uncertain in amount and difficult to prove." Grossinger, 240 Ill. App. 3d at 749; see also Dallas v. Chi. Teachers Union, 408 Ill. App. 3d 420, 424 (2011); Berggren v. Hill, 401 Ill. App. 3d 475, 480 (2010); Morris v. Flores, 174 Ill. App. 3d 504, 506 (1988); Jameson Realty Group v. Kostner, 351 Ill. App. 3d 416 (2004); Bauer v. Sawyer, 8 Ill. 2d 351, 359 (1956); Gobble v. Linder, 76 Ill. 157, 159 (1875). In determining reasonableness, some Illinois courts have considered whether such predetermined damages would be "oppressive." See Karimi, 952 N.E.2d at 1290 ("The purpose of a liquidated damages provision is to provide parties with a reasonable predetermined damages amount where actual damages may be difficult to ascertain. Courts generally give effect to such provisions if the parties have expressed their agreement in clear and explicit terms and there is no evidence of fraud or unconscionable oppression"); J.B. Lyon & Co. v. Culbertson, Blair & Co., 83 Ill. 33, 43 (1876) (the sum agreed to be paid as liquidated damages must be reasonable and not oppressive"); see also Scofield v. Tompkins, 95 Ill. 190, 194 (1880) ("It would seem incredible to believe that sane parties could have understood and intended to pay as damages $22,770, simply for a failure to pay that sum of money on a specified day…To believe so would be absurd, and it would be highly oppressive to hold").

Note, however, that Illinois courts have held that there are limitations on an overbroad construction of a liquidated damages provision. "[T]he law discourages interpreting a liquidated damages provision broadly and requires that the contract contain clear and explicit language." See Cutilletta v. Griffin, 2012 IL App (1st) 113429-U, ¶ 60 (2012) (unpublished opinion) (citing Newcastle Properties Inc. v. Shalowitz, 221 Ill. App. 3d 716, 727 (1991) (finding that there was an enforceable liquidated damages clause, but only for the amount of the initial earnest money deposit ($1000) due to the contract not clearly and explicitly including the final earnest money agreed to be deposited ($109,000) as liquidated damages).

7. Who has the burden of proof?

Illinois courts impose the burden of proof on the party resisting the enforcement of the liquidated damages provision to show that such provision is a penalty and not enforceable. See Pav-Saver Corp. v. Vasso Corp., 143 Ill. App. 3d 1013, 1019 (1986) ("The burden of proving that a liquidated damages clause is void as a penalty rests with the party resisting its enforcement"). That was also the ruling in an Illinois Supreme Court case. Weiss v. United States Fidelity & Guaranty Co., 300 Ill. 11, 16-17 (1921) ("The burden of proof in such case is on [the person being sued for damages] to show that the contract provided for a penalty and not for liquidated damages, where there is nothing upon the face of the contract that requires the court to make the legal finding that the provision is for a penalty. Such a contract is prima facie evidence that the parties have stipulated and agreed on the actual amount of damages that ought to be recovered for a breach, and in the absence of evidence to the contrary the damages will be held to be liquidated damages").

8. As of when is "reasonableness" tested?

Reasonableness is tested at the time of the making of the contract. See Karimi, at 1288. ("The reasonableness of the amount, though, depends not on the actual damages suffered by the non-breaching party, but on whether the amount reasonably forecasts and bears some relation to the parties' potential loss as determined at the time of contracting"); Christian Mills, Inc. v. Berthold Stern Flour Co., 247 Ill. App. 1 (1927) ("The modern tendency of the courts seems to be to consider reasonableness as the final test, and that as of the time of the making of the

contract, and not as of the time of the breach"). Certain of the courts which assert the three-part test above also provide that reasonableness is to be determined at the time of contracting. See, e.g., Grossinger, 240 Ill. App. 3d at 749.

9. What percentage of the purchase price is likely acceptable as liquidated damages?

Several Illinois courts have considered this question. Generally speaking, there is a willingness to defer to the parties' agreement with respect to the amount of liquidated damages, provided, of course, that the amount is not unreasonably large or a penalty. See Karimi, 952 N.E.2d at 1288, where earnest money of $328,269.60 (or 15 percent of the purchase price) was upheld to be a reasonable sum as liquidated damages. Siegel v. Levy Organization Development Co., 182 Ill. App. 3d 859, 860 (1989) (upholding as reasonable a liquidated damages provision where the $320,000 earnest money deposit represented 20 percent of the $1,600,000 purchase price); Curtin, 75 Ill. App. 3d at 555 (finding that a liquidated damages amount of just below 10 percent of the purchase price was reasonable, where $8,500 in promissory notes were delivered on account of a $87,000 purchase price); Berggren, 401 Ill. App. 3d at 481 ("The amount of five percent of the purchase price [$82,500] was reasonable at the time the parties signed the contract, and the fact that plaintiff subsequently sold the property for a lower price does not change that analysis.").

There is also a recent case where an Illinois court allowed the seller to retain earnest money pursuant to a liquidated damages clause when the earnest money represented approximately 42 percent of the purchase price. See Gardner v. Dolak, 2016 Ill App (3d) 140848-U (2016). Notably, the buyer's claim was found to be barred by laches because she waited six years to inform the seller that she was no longer interested in purchasing the property, when the contract had an approval period of only eighteen months. The court affirmed the trial court's holding that the buyer "forfeited the money under the liquidated damages clause" and found that the buyer's "unreasonable delay coupled with a decrease in property value defeats a claim for reimbursement." Id. at 11. The court allowed the seller to retain $55,000 in liquidated damages for a purchase price of $130,000, but the court did not discuss the reasonableness of such percentage or amount.

There is no reported case in Illinois that has considered whether a lower percentage may be an appropriate liquidated damages ceiling where the absolute dollars of the purchase price involved are more significant, but that is a possibility.

10. Are actual damages relevant for liquidated damages and, in particular, will liquidated damages be allowed when there are no actual damages?

Absent a contract provision to the contrary, Illinois courts have found that actual damages are not required in order to enforce a liquidated damages clause. See Hayden v. Keepper-Nagel, Inc., 62 Ill. App. 3d 828, 830-31 (1978) (finding that the subsequent sale of real property to third parties for the same price as under a contract not consummated by purchasers did not extinguish the sellers' claim for liquidated damages, it held that "the courts will uphold a liquidated damages clause, even absent any proof of actual damages, where the parties have agreed to have the damages provided in the contract ascertained on a particular basis and such provision is reasonable at the time of contracting") (citing Twentieth Century-Fox Film Corp. v. Woods Amusement Corp. 304 F. Supp. 23 (N.D. Ill. 1969)). This principle has been articulated by the Illinois Supreme Court, albeit in a different context, i.e., in a case construing a construction contract. Weiss v. United States Fidelity & Guaranty Co., 300 Ill. 11, 16 (1921) ("Where a contract provides for liquidated damages at so much par day for delay in the performance of a building contract…it is not necessary in an action for breach to allege actual damages from such delay, as plaintiff is entitled to rely on the contract to show that damages at the rate stipulated will result from the breach").

Note, however, that where that intention is set forth in the contract, the party seeking recovery may

have to prove actual damages. See Libby, McNeill & Libby v. Illinois Dist. Tel. Co., 294 Ill. App. 93, 100 (1938) ("If no actual damage was suffered as a result of the breach, there could be no damage subject to liquidation and the amount specified in the contract would have to be held in that event to be a penalty…[b]efore plaintiff is entitled to recover liquidated damages it must show some actual damage as a result of defendant's default"). In this case, the agreement provided that "it is hereby agreed if the District Company fails to perform such service and such failure results in damage to the Subscriber… then in that event the District Company shall pay to the Subscriber a sum equal to…as the fixed, settled, and liquidated damages of the Subscriber for such failure." Id. at 96.

11. Is mitigation relevant for liquidated damages?

There is no obligation to mitigate damages in the context of a liquidated damages provision insofar as requiring the seller to attempt to sell the property. However, Illinois courts have found reasons to disallow liquidated damage remedies where the claimant failed to take certain actions or to amounts that the seller "receive[d]." In Newcastle Properties, Inc., v. Shalowitz, 221 Ill. App. 3d 716, 719 (1991), the court held that the seller had "knowingly and intentionally relinquished its right to collect $109,500 in liquidated damages" because it failed to collect the earnest money by drawing upon a letter of credit before it expired. Id. at 726-27. Although the court found it unnecessary to address the mitigation doctrine, it explained that "if the seller had mitigated its damages by presenting the letter of credit, $109,500 would have been 'theretofore paid'" and thus would have met the required terms of the liquidated damages provision. Id. at 727. Because the earnest money was only "payable" under the letter of credit prior to its expiration (as opposed to "paid"), the purchaser was not liable for the earnest money as liquidated damages. Similarly, a bankruptcy court applying Illinois law considered, in Brown v. Real Estate Res. Mgmt., LLC (In re Polo Builders, Inc.), 388 B.R. 338, 367 (2008), that the plaintiff (a trustee selling a debtor's real property) intentionally did not collect the buyer's earnest money deposit at the time of executing the purchase agreement because the buyer had informed him that it was not in a position to provide the earnest money deposit. At the time of the buyer's breach, the plaintiff had still not "received" the earnest money, and thus the court, applying Newcastle, did not allow the plaintiff to recover it as liquidated damages given the language of the liquidated damages clause.

12. Is a "shotgun" liquidated damages clause enforceable?

Shotgun clauses are generally not enforceable in Illinois. See GK Dev., Inc. v. Iowa Malls Fin. Corp., 3 N.E.3d 804, 822-23 (Ill. App. Ct. 2013) (citing Lake River Corp. v. Carborundum Co., 769 F.2d 1284, 1290 (7th Cir. 1985)). ("When a contract specifies a single sum in damages for any and all breaches even though it is apparent that all are not of the same gravity, the specification is not a reasonable effort to estimate damages; and when in addition the fixed sum greatly exceeds the actual damages likely to be inflicted by a minor breach, its character as a penalty becomes unmistakable.") Also see, Jameson Realty Group v. Kostner, 351 Ill. App. 3d 416, 424 (2004) ("[T]he damages contained in a liquidated damages clause must be for a specific amount for a specific breach"). The Seventh Circuit has also noted that under Illinois law,"[i]f the amount of damages is invariant to the gravity of the breach, the clause is probably not a reasonable attempt to estimate actual damages and thus is likely a penalty." Checkers Eight Ltd. Pshp. v. Hawkins, 241 F.3d 558, 562 (7th Cir. 2001). Nevertheless, if the sum in a shotgun clause is found to be "reasonable in light of any losses that could have been anticipated at the time of the contract," then it may be enforceable. See Siegel (upholding the following clause where the parties believed that the earnest money would be adequate to cover any potential losses under the contract: "If [P]urchaser defaults on any of purchaser's covenants or obligations hereunder, then all sums theretofore paid to seller (including without limitation earnest money and payments for Extras) by purchaser shall be forfeited as liquidated damages and shall be retained by seller"). 182 Ill. App 3d at 862.

13. Does a liquidated damages clause preclude recovery of attorneys' fees by the seller?

In Illinois, an unsuccessful party in a lawsuit is generally not responsible for the prevailing party's attorneys' fees, absent contractual language providing for the award of such fees. See Grossinger, 240 Ill. App 3d at 751. Yet, even where the applicable contract includes express language providing for awarding legal fees, there is a surprising lack of uniformity in the manner in which Illinois courts have addressed this issue in the case of liquidated damages clauses. Some Illinois courts have allowed the recovery of both attorneys' fees and liquidated damages, while other Illinois courts have not. For example, in Penske Truck Leasing Co., L.P. v. Chemetco, Inc., 311 Ill. App. 3d 447, 453 (2000), the court upheld a liquidated damages clause as well as the circuit court's calculation of 15 percent of that amount being added for attorneys' fees. However, in Curtin, 75 Ill. App. 3d at 355, the court reversed an award of $150 in attorneys' fees, holding that the earnest money, which constituted liquidated damages, should have included such fees. It is not clear from the decision whether there was an express provision entitling the prevailing party to collect legal fees. In Grossinger, attorneys' fees in favor of seller were disallowed where the liquidated damages provision was held to be unenforceable, but only because the seller was no longer the "prevailing party" under the contract. Notably, the court remanded the case to the trial court for determination of the amount of attorneys' fees to be awarded to the buyer under the terms of the contract. Id. at 753. In H&M Driver Leasing Services, Unlimited, Inc. v. Champion Int'l Corp., 181 Ill. App. 3d 28 (1989), the circuit court had awarded the plaintiff both liquidated damages and attorneys' fees, but the appellate court reversed on the grounds that the liquidated damages provision was a penalty, and remanded the award of attorneys' fees to be recalculated in accordance with Illinois law. In Lakshman, 102 Ill. App. 3d at 635, where the contract contained an optional liquidated damages clause, but seller opted not to retain the earnest money, the court allowed the seller to collect attorneys' fees.

CONCLUSION

The cases demonstrate that Illinois courts will generally enforce contracts as written and defer to the clearly-stated intention of the parties. If, however, actual damages are expressly made available as a remedy, then there is a strong likelihood that even a well-drafted optional liquidated damages provision will be disallowed.

As an additional irony, where the earnest money has been ordered to be refunded to the purchaser and is no longer available because of the inclusion of a provision entitling a seller to collect actual damages, it is certainly possible to imagine a scenario where the seller is left empty-handed, because the purchaser is an undercapitalized entity. Would a court seek to avoid that result if the underlying facts indicated that was a real possibility? I have found no Illinois case which considers that, but this outcome might serve as a strong argument to resist inclusion of actual damages as an additional remedy.

Indeed, in this author's experience in representing purchasers and sellers in real estate transactions, it is hard to remember more than a small handful of instances of contracts where actual damages were even available as a seller remedy. The notion that liquidated damages are an option or alternative to actual damages is not typically encountered in arm's length commercial real estate contracts; most sophisticated buyers and sellers are content to negotiate an amount of liquidated damages that will fairly compensate the seller if the purchaser is unable, or unwilling, to perform.

Regardless, in negotiating remedial provisions in purchase and sale agreements, knowledge of the law and careful draftsmanship will limit disappointment to clients and embarrassment to (and possible exposure on the part of) their counsel.

MASSACHUSETTS

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This article discusses the enforceability of liquidated damages clauses in purchase and sale agreements governed by Massachusetts law, particularly in the context of commercial real estate transactions. It is part of the ACREL Acquisitions Committee's multi-state review of the 13 questions set forth below.

Under Massachusetts law, there is a presumption of the enforceability of liquidated damages provisions in agreements involving sophisticated commercial enterprises.[1] The burden of establishing that a liquidated damages provision is unenforceable rests with the party challenging enforcement of the provision.[2] A party can meet this burden by showing either: (i) that at the time the contract was executed, the actual damages that would be caused by a breach of the contract were not difficult to ascertain, or (ii) that the sum agreed upon as liquidated damages did not, at the time that the contract was executed, represent a reasonable forecast of damages expected to occur in the event of a breach, and instead, operated as a penalty.[3] To determine whether a liquidated damages provision was reasonable, Massachusetts courts look at the circumstances at the time of contract formation, not the actual damages accruing upon a breach.[4] Thus, Massachusetts courts have rejected the "second look" approach where damages clauses are re-evaluated in light of later circumstances, even in cases in which no actual damages were incurred and the non-breaching party would receive a windfall as the result of enforcement of the liquidated damages provision.[5]

In the context of commercial real estate transactions, Massachusetts courts have held that a five percent liquidated damages clause is reasonable as a matter of law.[6] Other acceptable liquidated damages provisions have ranged from two percent to 20 percent of the total purchase price, depending on the reasonableness of the amount at the time of contract formation and the difficulty of assessing actual damages.[7]

1. Are liquidated damages an exclusive remedy or may the Seller also seek specific performance?

Absent clear evidence of the intention of the parties to the contrary, under Massachusetts law, the mere existence of a liquidated damages provision does not necessarily prevent an action for specific performance. "Liquidated damages clauses do not preclude other remedies available at law or equity under Massachusetts law, absent clear intention of parties to the contrary."[8] It is the parties' intention, as expressed through the terms of the contract that is controlling in determining whether liquidated damages provisions preclude other remedies.[9] For example, courts have held that claims for specific performance and for statutory damages are not precluded on grounds that the liquidated damages clause provides an exclusive remedy unless the liquidated damages provision includes a statement evincing a clear intent to waive all other remedies.[10] "Where the intent of the parties is that the liquidated damages provision is security for the performance of the contract rather than an alternative to performance, specific performance is not barred."[11] Further, under Massachusetts law, specific performance is available as a remedy regardless of whether the party requesting it is the buyer or the seller of real estate.[12] In order for specific performance to be granted, the seller must prove that (a) there is a contract (including its terms), or that a statutory right of first refusal has been properly exercised; (b) the contract was signed by an authorized person in the appropriate capacity; and (c) the contract has been breached by the defendant.[13] Breach can be established by showing (i) the defendant's clear repudiation of the entire contract with the plaintiff ready, willing and able to proceed to a closing, (ii) the plaintiff's tender of performance, or (iii) a demand for performance by the plaintiff with the plaintiff ready, willing, and able to proceed to a closing.[14] Furthermore, "it is axiomatic that one must have behaved equitably in order to obtain equitable remedies,"[15], and therefore inequitable conduct by the plaintiff can preclude a remedy of specific performance, even if the inequitable conduct is insufficient to invalidate the contract.[16] Specific performance might also not be available where it would impose "undue hardship" upon the

defendant, or if there has been a significant delay in commencing an action for specific performance or bringing the action to trial.[17]

2. May the parties create an enforceable option for the Seller to pursue either liquidated damages or actual damages?

The answer to this question is unclear. In a 2013 lease termination case, the Massachusetts Superior Court, recognizing that Massachusetts courts had not spoken definitively on the issue, looked to other jurisdictions and, similar to Florida, Illinois, and New York, held that "the existence of an option to sue for actual damages has the effect of turning a liquidated damages provision into an unenforceable penalty provision."[18] However, in that case, the amount of the liquidated damages at the time the remedy was elected was disproportionate to the actual damages suffered by the non-breaching party.[19] Other Massachusetts courts have held that parties may create an enforceable option to pursue either liquidated damages or actual damages.[20] These courts have expressed that although a contractual option can't be used as a cover for the enforcement of a penalty, if it was intended to give a real option…the contract may be enforced."[21]

3. If the contract creates an option between liquidated damages and actual damages, may the Seller elect both?

The Seller may not elect both remedies unless the contract expressly permits it. When a party elects to retain a deposit as liquidated damages, that party cannot in addition seek actual damages.[22] "The law of contracts is intended to give an injured party the benefit of the bargain, not the benefit of the bargain and a windfall."[23] Courts have held that "liquidated damages and actual damages are, absent express language permitting recovery of both, mutually exclusive remedies, [so] that where an election is permitted, the election of one remedy bars pursuit of the other."[24]

4. If the Seller may decide between liquidated damages and actual damages, but not both, when must it decide?

If the contract allows the Seller to elect liquidated damages or actual damages (but not both), then under Massachusetts law, the Seller would likely have to make that election before or at the time of a default.[25]

5. Does Massachusetts have a statute addressing liquidated damages?

There is no statute specifically addressing liquidated damages in this context.

6. What is the test for a valid liquidated damages clause?

Under Massachusetts law, a clearly written liquidated damages provision will usually be enforced provided that: (i) at the time the contract was signed, the actual damages that would result from a breach were difficult to ascertain, and (ii) the sum agreed upon as liquidated damages represents a reasonable forecast of damages anticipated to result from a breach.[26] Massachusetts courts have recognized that "actual damages in real estate transactions are particularly hard to ascertain at the time a contract is entered into because it is hard to predict when and for what price a property will resell if the deal falls through."[27] Thus, liquidated damages provisions are particularly appropriate in real estate purchase and sale agreements.[28]

7. Who has the burden of proof?

Under Massachusetts law, the burden of proof regarding enforceability of liquidated damages clauses rests on the party seeking to set the liquidated damages provision aside.[29] To be successful, the challenging party must establish that the amount of liquidated damages is unreasonably and grossly disproportionate to the actual damages from a breach or unconscionably excessive.[30] Any reasonable doubt as to whether a provision constitutes a valid liquidated damages clause is to be resolved in favor of the aggrieved party.[31]

8. As of when is reasonableness tested?

Massachusetts courts have adopted the "single look" approach to the enforceability of liquidated damages clauses.[32] In determining whether the sum agreed upon represents a reasonable estimate of the anticipated or actual damages, the court examines only the circumstances at the time of contract formation, regardless of what actual damages may have accrued at the time of the breach.[33] Thus, where liquidated damages clauses are concerned, Massachusetts courts reject the "second look" approach where the clause is re-evaluated in light of later circumstances.[34] Although there is no bright line separating an agreement to pay a reasonable measure of damages from an unenforceable penalty clause, the greater the difficulty either of proving that loss has occurred or of establishing its amount with requisite certainty, the easier it is to show that the amount fixed as liquidated damages is reasonable.[35]

9. What percentage of the purchase price is likely acceptable for liquidated damages?

In terms of a percentage that safely falls within reasonable limits, Massachusetts courts have held that "5 percent of the purchase price in a contract for the purchase and sale of real estate is reasonable as a matter law."[36] While sellers have challenged liquidated damages of a smaller percentage of the purchase price as being too small, those liquidated damages clauses have been enforced.[37] Massachusetts courts have also allowed liquidated damages provisions as high as 20 percent.[38] However, there is a limit, as "a provision setting an unreasonably large liquidated damages amount is unenforceable on public policy grounds as a penalty."[39]

10. Are actual damages relevant for liquidated damages, and in particular, will liquidated damages be allowed when there are no actual damages?

In Massachusetts, liquidated damages are allowed even if there are no actual damages.[40] For purposes of determining whether a liquidated damages provision should be enforced, the "inquiry is limited to the time of contract formation; Massachusetts courts do not take a "second look" at the actual damages after a party breaches."[41] However, this does not make actual damages irrelevant. Actual damages are relevant in so far as they provide a point of comparison in determining whether a liquidated damages clause grossly overestimated or underestimated a party's damages at the time of contract formation.[42]

11. Is mitigation relevant for liquidated damages?

Mitigation is not relevant for liquidated damages.[43] "Massachusetts follows the rule in other jurisdictions holding that, in the case of an enforceable liquidated damages provision, mitigation is irrelevant and should not be considered in assessing damages."[44] When parties agree in advance to an amount they believe represents a reasonable estimate of potential damages, "they exchange the opportunity to determine actual damages after a breach, including possible mitigation, for the peace of mind and certainty of result afforded by a liquidated damages clause."[45]

12. Is a shotgun clause acceptable?

A shotgun clause fixes a single large sum as the liquidated damages for any breach of the contract. Whether this type of provision would be enforceable under Massachusetts law depends upon the circumstances. If, in all of the circumstances in which the shotgun clause were to apply, the amount provided for is reasonable, the shotgun clause may be upheld. Thus, if the shotgun clause reflected the loss anticipated at the time the contract was executed, particularly if it was either difficult to prove that loss occurred or to capture the amount of that loss, the clause will likely be enforced, irrespective of what the actual loss ended up being. [46] In reality, however, it would likely be difficult to have a shotgun clause that provides for a reasonable amount of damages in connection with all potential contract breaches and, as a result, using the shotgun approach to liquidated damages may increase the chances that a Massachusetts court would find the provision to be unenforceable.

13. Do liquidated damages preclude recovery of attorney's fees?

Liquidated damages do not preclude recovery of attorney's fees.[47] Whether attorney's fees are recoverable depends on the terms of the contract.[48] However, the award of attorney's fees in the contract must be reasonable and is a "highly discretionary matter usually left to the judge."[49]

Notes

1 See Guerin v. Stacy, 56 N.E. 892 (Mass. 1900) (stating that "when parties say a sum is payable as liquidated damages, in general, they will be taken to mean what they say and will be held to their word"). See also, Bose Corp. v. Ejaz, 732 F.3d 17, 24–26 (1st Cir. 2013).

2 See Cummings Props., LLC v. Nat'l Comm. Corp., 869 N.E.2d 617, 622 (2007)

3 Id.

4 See Kelly v. Marx, 705 N.E.2d 1114, 1117–1118 (Mass. 1999). See also, NPS, LLC v. Minihane, 886 N.E.2d 670 (Mass. 2008).

5 See Id.; Perroncello v. Donahue, 859 N.E.2d 827, 832 (Mass. 2007); NRT New England, Inc. v. Moncure, 937 N.E.2d 999, 1003 (Mass. 2010).

6 See Kelly, 705 N.E.2d at 1117; NRT New England, 937 N.E.2d at 1003 (stating that a liquidated damages clause in a real estate purchase and sale agreement permitting seller to retain a deposit of 5 percent of the purchase price for buyer's default was reasonable and enforceable as a matter of law).

7 See Kunelius v. Town of Stow, 588 F.3d 1 (1st Cir. 2009). See also, Edlow v. RBW, LLC, 688 F.3d 26 (1st Cir. 2012).

8 See North Am. Consol., Inc. v. Kopka, 644 F.Supp. 191, 193 (D. Mass. 1986); De Blois v. Boylston & Tremont Corp., 183 N.E. 823 (Mass. 1933).

9 See North Am., 644 F.Supp. at 193.

10 Id.

11 See De Blois, 183 N.E. 823; Rigs v. Sokol, 61 N.E.2d 538 (Mass. 1945); Novelty Bias Binding Co. v. Shevrin, 175 N.E.2d 374 (Mass. 1961).

12 See Cavanagh v. Cavanagh, 33 Mass. App. Ct. 240, 244 (1992); Olszewski v. Sardynski, 316 Mass. 715, 717 (Mass. 1944) (finding that ownership of land is a significant burden, and that it would often be inadequate for a seller to receive only the excess of price over value in the event of a breach by the buyer); Michael Pill, 28 Mass. Prac., Real Estate Law § 3:44 (4th ed.).

13 See Pill, supra

14 See id.

15 Galipault v. Wash Rock Investments LLC, 65 Mass. App. Ct. 73, 85 (2005).

16 See Pill, supra

17 See Pill, supra; see e.g., Charles River Park, Inc. v. Boston Redevelopment Authority, 28 Mass. App. Ct. 795 (1990) (denying specific performance in 1985 of an agreement made in 1960).

18 Zuckerman v. Vanu, Inc., 2013 WL 1799859 (Mass. Super. Ct. 2013).

19 Id.

20 See Kulakowski v. Leavitt, 1996 Mass.App.Div. 159 (Mass. Dist. Ct. 1996) (holding that a contract in which the seller had the option of accepting liquidated damages, the difference between the purchase and sale agreement price and fair market value, or the actual out of pocket losses, was valid). See also, Schrenko v. Regnante, 537 N.E.2d 1261 (Mass. App. Ct. 1989) (stating that the contract at issue gave the seller the right to consider the damages unliquidated and to seek additional damages beyond the amount of the forfeited in the deposit) and North Am., 644 F.Supp. at 193 (stating that liquidated damages clauses do not preclude other remedies available at law or equity).

21 See Blay v. Zipcar, 718 F. Supp. 2d 115 (Mass. Dist. Ct., 2010); Avery v. Hughes, 611 F.3d 690 (1st Cir. 2011).

22 See SMS Financial V, LLC v. Conti, 865 N.E.2d 1142 (Mass. App. Ct., 2007) (holding that a liquidated damages provision "calling for a double recovery" is an unenforceable penalty).

23 Perroncello v. Donahue, 859 N.E.2d 827 (Mass. 2007).

24 Avery v. Hughes, 661 F.3d 690 (1st Cir. 2011) (citing Orr v. Goodwin, 953 A.2d 1190, 1196 (2008)).

25 See Zuckerman v. Vanu, Inc., 2013 WL 1799859 (Mass. Super. Ct. 2013) (holding that an option must be exercised at or about the same time the breach occurs, and that where a breach occurs long before a seller decides among contractual remedies, it is unenforceable).

26 Cummings Props., 869 N.E.2d at 622; TAL Financial Corp., 844 N.E.2d 1085.

27 See Kelly, 705 N.E.2d.

28 Id. at 881-82; NRT New England, Inc. v. Moncure, 937 N.E.2d 999, 1003 (Mass. 2010).

29 See Town Planning Eng'g Assocs., Inc. v. Amesbury Specialty Co., 342 N.E.2d 706 (Mass. 1976); Hastings Assocs., Inc. v. Local 369 Bldg. Fund, Inc., 675 N.E.2d 403 (Mass. Ct. App. 1997).

30 See TAL Financial Corp., 844 N.E.2d 1085; Honey Dew Assocs., Inc. v. M & K Food Corp., 241 F.3d 23, 27 (1st Cir. 2001).

31 TAL Financial Corp., 844 N.E.2d 1085.

32 See Kelly, 705 N.E.2d; Clean Harbors, Inc. v. John Hancock Life Ins. Co., 833 N.E.2d 611, 618 (Mass. Ct. App. 2005).

33 Id.

34 Id. See also, Perroncello v. Donahue, 859 N.E.2d 827 (Mass. 2007); NRT New England, Inc. v. Moncure, 937 N.E.2d 999, 1003 (Mass. 2010).

35 See TAL Financial Corp., 844 N.E.2d 1085; A-Z Servicenter, Inc. v. Segall, 138 N.E.2d 266 (Mass. 1956); Perfect Solutions Inc. v. Jereod, Inc., 974 F.Supp. 77, 83 (D. Mass. 1997).

36 Kelly v. Marx, 705 N.E.2d 1114 at 1117 (Mass. 1999); See also, NRT New England, 937 N.E.2d at 1003 (enforcing a liquidated damages clause in agreement for purchase and sale of real estate providing for five percent of purchase price).

37 See Howard, 811 N.E.2d at 1052 (holding that liquidated damages of $1000 was not unreasonably low considering this was to cover damages incurred over 11 day period); See also, Kunelius v. Town of Stow, 588 F.3d 1 (1st Cir. 2009) (upholding a two percent liquidated damages clause since the "vendor failed to produce evidence that the amount was grossly disproportionate to a reasonable estimate of her actual damages at the time of contract formation").

38 See Edlow v. RBW, LLC, 688 F.3d 26 (1st Cir. 2012) (holding that a liquidated damages provision permitting condominium developer to retain 20 percent of purchase price in event of breach by prospective purchaser did not constitute an unenforceable penalty).

39 Colonial at Lynnfield, Inc. v. Sloan, 870 F.2d 761, 764 (1st Cir. 1989).

40 See Perroncello v. Donahue, 859 N.E.2d (stating that even if the seller finds another buyer to purchase the property for a price the same or higher than the original contract price, liquidated damages provision is enforceable). See also, Kelly, 705 N.E.2d at 1117 (enforcing a liquidated damages provision where the seller sold the property at a higher price, and had realized an actual gain as a result of the buyer's breach).

41 Kelly, 705 N.E.2d at 1117.

42 Kunelius, 588 F.3d 1. See also, TAL Financial Corp., 844 N.E.2d 1085 (stating that the disparity between the stipulated sum and actual damages could not be ignored because it was known at the time of the agreement); Kelly, 705 N.E.2d at 1116 (holding that a liquidated damages provision will not be enforced if it provides for an amount "grossly disproportionate to a reasonable damages estimate made at the time of contract formation").

43 See NPS, LLC v. Minihane, 886 N.E.2d 670 (Mass. 2008) (holding that "as a matter of apparent first impression, in the case of an enforceable liquidated damages provision, mitigation of damages is irrelevant").

44 Kelly, 705 N.E.2d

45 Id.

46 See Colonial at Lynnfield, Inc. v. Sloan, 870 F.2d 761, 764 (1st Cir. 1989); A-Z Servicenter, 138 N.E.2d 266 (Mass. 1956); Lynch v. Andrew, 481 N.E.2d 1383, 1386 (Mass. App. Ct. 1985).

47 See Kelley v. Weyerhaeuser, 422 N.E.2d 465, (Mass. App. Ct. 1981) (allowing recovery of attorney's fees in a liquidated damages case under a lease).

48 See TAL Financial Corp., 855 N.E.2d (holding that although attorney's fees can be awarded in conjunction with a liquidated damages provision, they must be reasonable in light of the recovered damages).

49 Id.