



# Rainey • Kizer • Reviere & Bell plc

ATTORNEYS AT LAW

105 South Highland Avenue  
Post Office Box 1147  
Jackson, Tennessee 38302-1147  
731.423.2414  
Fax: 731.426.8111

January 30, 2014

## COMMERCIAL TRANSACTION NEWSLETTER

### **BE CAUTIOUS WITH USE OF LIQUIDATED DAMAGES**

In many contracts, the parties do not want the time and expense of litigating the element of damages for nonperformance by one party or the other. The case of Bachour vs. Mason illustrates an example of where the Court did not enforce a liquidated damages provision in a contract. In the Bachour case, Bachour entered into a contract to buy two lots from Mason and contracted for Mason to have a road built. The contract provided that the final \$75,000.00 of the purchase price to Mason would be held until the road was completed. The contract further provided that in the event the road was not completed in six and one-half months, Mason would “forfeit” any remaining balance of the \$75,000.00 final payment. The streets were not completed by the deadline date.

Bachour (the Buyer) filed a Complaint For Declaratory Judgment that the road was not completed timely and that Mason (the Seller) forfeited the remaining \$75,000.00 final payment. The Trial Court ruled that the Buyer was not entitled to \$75,000.00 because it was a forfeiture. The Buyer appealed.

The Court of Appeals discussed the aspect of liquidated damages. The Court wrote that liquidated damage provisions in contracts are subject to close scrutiny because of the Tennessee public policy against forfeitures. In order for a liquidated damage clause to be enforceable, there must be a reasonable relationship between the stipulated amount and the amount of damages that might reasonably be expected in the event of a breach. When the amount of a liquidated damage provision in a contract is deemed not to bear a reasonable relationship to the amount of damages likely to result from a breach of the contract, then the clause is deemed to be an unenforceable penalty.

In the Bachour case, the Court pointed out the testimony of the parties was that there was no evidence as to what would be the probable damages, and that the Buyer testified that he did not attempt to justify the \$75,000.00 figure in terms of the magnitude of his possible losses. The Buyer simply stated he wished he had asked for more, even though it was clear he had not suffered any actual damages. Correspondingly, the Court dismissed the Buyer’s complaint and allowed the Seller to collect the \$75,000.00 additional money for the sale of the lots.

**OUR RECOMMENDATION:** Frequently, parties will put in a dollar amount in a contract for liquidated damages without making an analysis of whether that dollar amount bears a reasonable relationship to what might be actual damages. Such an analysis must be made, or the result could be that the liquidated damage amount is considered a penalty and therefore not enforceable, as against public policy.

### **RAINEY, KIZER, REVIERE & BELL, P.L.C.**

William C. Bell, Jr., Attorney at Law  
[bell@raineykizer.com](mailto:bell@raineykizer.com)

Angela C. Youngberg, Attorney at Law  
[ayoungberg@raineykizer.com](mailto:ayoungberg@raineykizer.com)