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Workshop 23

Defaults and Remedies: Deep Dive into Default and Remedies in Purchase Agreements

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1. Introduction

This paper uses a modified 13 question framework utilized by the American College of Real Estate Lawyers ("ACREL") to analyze and compare the treatment of liquidated damages in the representative jurisdictions of Pennsylvania, Oklahoma, Tennessee, and California. Each question is preceded by a summary of the nuances between these four jurisdictions in their respective treatment of liquidated damages provisions. After the Colorado Supreme Court held in 2017 that a seller could choose either liquidated *or* actual damages, the ACREL sought to better understand the treatment of optional liquidated damages for purchase and sale agreements ("PSAs") in the United States. *Ravenstar, LLC v. One Ski Hill Place, LLC*, 401 P.3d 552 (Colo. 2017). The ACREL Acquisitions Committee formed 13 questions to analyze liquidated damages across several jurisdictions. This paper builds on the ACREL analysis and provides a comparative look at liquidated damages in certain jurisdictions that represent general rules applicable in various states.

2. 13 Question Framework

The following 13 questions will be analyzed, answered, and compared for the jurisdictions of Oklahoma, Pennsylvania, Tennessee, and California. These jurisdictions represent a variety of differing rules across the United Stated that are applicable to each of the questions presented.

A. Is there an applicable statute addressing liquidated damages clauses?
B. May the non-breaching party choose specific performance instead of liquidated damages (so that liquidated damages are not an exclusive remedy)?
C. May the non-breaching party choose actual damages instead of liquidated damages (so that liquidated damages are not an exclusive *damage* remedy)?
D. If the non-breaching party may choose liquidated damages or actual damages, may it have both?
E. If the non-breaching party may choose liquidated damages or actual damages, but not both, when must it decide?
F. What is the test for a valid liquidated damages clause?
G. Who has the burden of proof?
H. As of when is "reasonableness" tested?
I. What percentage of the purchase price is likely acceptable as liquidated damages?

J. Are actual damages relevant for liquidated damages and, in particular, will liquidated damages be allowed when there are no actual damages?
K. Is mitigation relevant for liquidated damages?
L. Is a “Shotgun” liquidated damages clause enforceable?
M. Does a liquidated damages clause preclude recovery of attorneys’ fees by the non-breaching party?

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

In the United States, some jurisdictions, like Oklahoma and California, have enacted liquidated damages statutes that deal specifically with real estate transactions: In Oklahoma, the statute relates to all real estate transactions, whereas in California there is both a generally applicable statute with respect all transactions and a specific statute related only to residential transactions. Other states, like Pennsylvania and Tennessee, have adopted the Uniform Commercial Code (which does not generally apply to PSAs), but have not yet adopted liquidated damages statutes that deal specifically with real estate transactions, although the UCC related statute in Pennsylvania has been held to provide guidance in the context of real estate PSAs.

1) Oklahoma Rule – Directly Applicable Statute

The Oklahoma rule for liquidated damages in the context of PSAs is based on presumptive validity if the amount is less than five percent (5%) of the purchase price, and liquidated damages in excess of the five percent (5%) threshold require evidence supporting the claimed amount. Title 15, Section 215(B) of the Oklahoma Statutes deals directly with real estate contracts and provides as follows:

> “A provision in a real estate sales contract, providing for the payment of an amount which shall be presumed to be the amount of damages sustained by a breach of such contract, shall be held valid and not a penalty, when such amount does not exceed five percent (5%) of the purchase price. In the event such amount exceeds five percent (5%) of the purchase price, such provision shall be held invalid and a penalty unless the party seeking to uphold the provision establishes that such amount is reasonable. If such provision is valid under this subsection, the limitations of Section 28 of Title 23 of the Oklahoma Statutes do not apply.” 15 O.S. §215.

Following the adoption of the ordinance in 1985, a 1991 case verified that this section was to be “given effect in real estate contract actions” and that certain other precedential sections of the Oklahoma Statutes did not apply. *1414 Partnership v. Taveau*, 815 P.2d 1228, 1230 (Okla. Civ. App. 1991). In particular, *1414 Partnership* overturned the rule in *Reid v. Auxier*, 690 P.2d 1057, 1061 (Okla. Civ. App. 1984) in which the court upheld the general rule in Oklahoma that liquidated damage provisions were unenforceable. The court in *1414 Partnership* analyzed the new statute and held that, “*Reid* is thereby no longer controlling with respect to application of the above new Subsection B statute as a measure of damages in a real estate contract.” *1414 Partnership v. Taveau*, 815 P.2d at 1230.

2) Pennsylvania Rule – UCC Liquidated Damages Statute Provides Guidance for PSAs

Pennsylvania has a liquidated damages statute, though it has not typically been held to apply to real estate PSAs. Section 2718 of Title 13 of the Pennsylvania Consolidated Statutes deals with liquidated damages. This statute falls under Title 13, which is the commercial code section for the Pennsylvania Statutes and likely would not apply to real estate PSAs. However, this statute does not have exclusionary language and was referenced in a recent real estate case, so the statute at the very least provides guidance on how to craft a valid liquidated damage clause under Pennsylvanian law in PSAs. *Zemenco, Inc. v. Developers Diversified Realty Corp.*, No: 05-48962005, U.S. Dist. LEXIS 23011 (W.D. Pa. Oct. 24, 2006) (holding that the plaintiff seller could not win a breach of contract suit for actual damages when the contract contained a valid liquidated damages provision). The statute provides as follows:

> “(a) Liquidated damages in agreement—damages for breach by either party may be liquidated in the agreement but only at an amount which is reasonable in the light of the anticipated or actual harm caused by the breach, the difficulties of proof of loss, and the inconvenience or non-feasibility of otherwise obtaining an adequate remedy. A term fixing unreasonably large liquidated damages is void as a penalty.” 13 Pa.C.S. § 2718.

The Pennsylvania rule differs from Oklahoma rule in that there is no directly applicable statute in Pennsylvania, and there is no bright-line threshold for determining the validity of liquidated damage clauses in Pennsylvania.

3) Tennessee Rule – No Directly Applicable Statute

Section 47-2-718 does apply for liquidated damages in Tennessee, but likely does not apply to real estate transactions as this section is to be treated under Tennessee's adoption of the Uniform Commercial Code. Tenn. Code Ann. § 47-2-718. This section does not have exclusionary language regarding transfers of real property, but it may not apply as it falls under the Uniform Commercial Code and it is not cited in real estate PSA cases in Tennessee.

4) California – Directly Applicable Statute

Section 1675 in Title 4.5 of the California Civil Code deals with liquidated damages in the purchase and sale of residential property. This section only applies to sales of residential units that meet certain criteria. The general liquidated damages provision can be found in Section 1671, which provides as follows:

> "(b) Except as provided in subdivision (c), a provision in a contract liquidating the damages for the breach of the contract is valid unless the party seeking to invalidate the provision establishes that the provision was unreasonable under the circumstances existing at the time the contract was made." Cal. Civ. Code §1671.
>
> Section 1675 provides:
>
> "(b) A provision in a contract to purchase and sell residential property that provides that all or any part of a payment made by the buyer shall constitute liquidated damages to the seller upon the buyer's failure to complete the purchase of the property is valid to the extent that payment in the form of cash or check, including a postdated check, is actually made if the provision satisfies the requirements of Sections 1677 and 1678 and either subdivision (c) or (d) of this section." Cal. Civ. Code §1675.

B. May the non-breaching party choose specific performance instead of liquidated damages (so that liquidated damages are not an exclusive remedy)?

Specific performance is available in all four representative jurisdictions, and the non-breaching party may choose specific performance instead of liquidated damages if the contract allows it. *Dillon v. Ringleman*, 155 P. 563, 565 (Okla. 1916), *Dillard v. Ceaser*, 243 P.2d 356 (Okla. 1952), Roth v. Hartl, 75 A.2d 583 (Pa. 1950), *Mott v. Graves*, Np. 02A01-9410-CH-00244, 1995 Tenn. App. LEXIS 817 (Tenn. App. Dec. 20, 1995), *Real Estate Analytics, LLC v. Vallas*, 160 Cal. App. 4th 463 (Cal. Ct. App. 2008). In all four states, inclusion of a liquidated damages clause does not preclude specific performance necessarily, as long as the liquidated damages clause is not an exclusive remedy. If parties want to ensure liquidated damages are exclusive, they must outline it as so in the contract.

1) Oklahoma – Specific Performance Likely Available

Specific performance is likely available to a party, even if there is a liquidated damages provision in the contract. In *Oltman Homes v. Mirkes*, 190 P.3d 1182, 1186-1187 (Okla. Civ. App. 2008), the Oklahoma Court of Civil Appeals held that, a seller could either retain the earnest money as liquidated damages *or* forgo the liquidated damages to seek any other legal or equitable remedy. This allowed the seller to seek specific performance, and likely sets the precedent for allowance of seeking specific performance as an alternative to liquidated damages. If the parties include a liquidated damages clause as the exclusive remedy, however, it is unlikely the courts will allow specific performance. *See JPMorgan Chase Bank, N.A. v. Specialty Restaurants, Inc.*, 243 P.3d 8, 13 (Okla. 2010), *Siloam Springs Hotel, LLC v. Century Surety Company*, 392 P.3d 262, 268 (Okla. 2017). Oklahoma courts, like other courts, are not inclined to rewrite contracts and generally aim to uphold the bargain of the parties.

2) Pennsylvania -- Specific Performance Likely Available

Pennsylvania law does not clarify whether liquidated damages must be exclusive, but the parties may specify that liquidated damages are an exclusive remedy. *Bettinger v. Carl Berke Ass'n, Inc.*, 314 A.2d 296, 298-99 (Pa. 1974). Further, the inclusion of a liquidated damages clause does not necessarily preclude the right of the non-breaching party to pursue specific performance if the contract allows for it. *York Group, Inc. v. Yorktowne Caskets, Inc.,* 924 A.2d 1234, 1239 (Pa. Super. Ct. 2007) ("the liquidated damages clause does not preclude the right of York to pursue specific performance of the Agreement as an additional remedy").

3) Tennessee -- Specific Performance Expressly Available

The existence of a liquidated damages provision does "not preclude the complainant from seeking a specific performance." *Leeper v. Morelock*, 76 S.W.2d 335, 337 (Tenn. 1934). Courts do not want to allow breaching parties to simply pay a fee in order to avoid specific performance. *Leeper v. Morelock*, 76 S.W.2d 335, 337 (Tenn. 1934) (citing *Kettering v. Eastlack,* 107 N.W. 177, 178 (Iowa 1906)). In *Kettering*, the court found that, "[w]here it is apparent that the intention was that the obligor convey, and the provision for damages or penalty is simply a means of securing conveyance, the obligor cannot relieve himself from the duty to convey, which equity will enforce, by tendering payment of the penalty or damages." *Kettering*, 107 N.W. at 178. In this case, however, the contract did not state that liquidated damages were the exclusive remedy, which may have turned the case if it were included. Tennessee courts look to the intent of the parties in making the determination if a non-breaching party can pursue other remedies.

4) California -- Specific Performance Expressly Available

When a PSA for real estate in California provides for liquidated damages for the buyer's breach but does not specify that liquidated damages are the seller's exclusive remedy, California law is clear that a seller may choose specific performance instead of liquidated damages. As stated in Witkin's Summary of California Law:

> "[A] liquidated damage provision does not deprive the seller of his or her election to seek specific performance rather than damages" 1 WITKIN, SUMMARY OF CALIFORNIA LAW 11th Contracts § 549 (2018).

California also has adopted two statutes that clarify that contracts may be specifically enforced even if the damages are liquidated and that the liquidated damages statutes do not affect a party's rights to specific performance. Cal. Civ. Code §3389, Cal. Civ. Code §1680.

C. May the non-breaching party choose actual damages instead of liquidated damages (so that liquidated damages are not an exclusive damages remedy)?

In some states, parties may structure their contract so that liquidated damages are not the exclusive remedy, and it is possible that a non-breaching party could structure a contract to allow seeking of liquidated damages *or* other types of damages. In other states, parties who include a valid liquidated damages clause are barred from seeking actual damages. Though some states like Oklahoma are unclear on this question, it is critical to assess how the specific jurisdiction treats valid liquidated damages clauses to ensure each party has a clear expectation of possible outcomes.

1) Oklahoma – Split: Actual Damages Available v. Actual Damages Unavailable

There is a split of authority in Oklahoma on whether actual damages are available when the contract contains a valid liquidated damage clause. In *1414 Partnership v. Taveau*, 815 P.2d 1228, 1230 (Okla. Civ. App. 1991), the Oklahoma Court of Civil Appeals (Division No. 3) held that a valid and enforceable liquidated damages provision makes the statutory provisions related to actual damages inapplicable. This is contrasted with *Oltman Homes*, in which the court held that a seller could seek damages where the PSA specified that the seller had the mutually exclusive alternative remedies of liquidated damages or foregoing the liquidated damages and seeking any other legal or equitable remedy. *Oltman Homes*, 190 P.3d at 1186-87.

2) Pennsylvania – Valid Liquidated Damages Clause = No Actual Damages

A party that retains legally enforceable liquidated damages will be barred from seeking actual damages. *Blue Mountain Mushroom Co., Inc. v. Monterey*, 246 F.Supp.2d 394, 400 (E.D. Pa. 2002). If the contract includes liquidated damages as an exclusive remedy, the non-breaching party may not elect to pursue actual damages. *Carlos R. Leffler, Inc. v. Hutter*, 696 A.2d 157, 162 (Pa. Super. Ct. 1997) ("Parties who agree to include a liquidated damages clause in their contract, and do so properly, cannot later claim entitlement to actual damages; rather, in keeping with the law of contracts, the parties must be bound by their bargain").

3) Tennessee – Potential to Pursue Liquidated or Actual Damages

A carefully crafted PSA likely allows a party to pursue other types of damages in lieu of liquidated damages even when the PSA contains a valid liquidated damage clause. In *G.H. Swope Bldg. Corp. v. Horton*, 338 S.W.2d 566, 567 (Tenn. 1960), a contract clause stated, "[T]he owner may at his option, (1) retain the sum of money deposited which I agree shall constitute liquidated damages for my failure or refusal to abide by the terms of the offer, or (2) proceed to enforce his legal rights, if any." Clearly then, the owner may choose liquidated damages in

the form of the deposit or return the deposit and seek other remedies *Id*. at 568. Parties may wish to structure their contracts to outline such a possibility.

Based on Loveday v. Barnes, No. 03A01-9201-CV-0030, 1992 Tenn. App. LEXIS 539, at *11-12 (Tenn. Ct. App. June 19, 1992), it appears possible to recover both liquidated damages and actual damages: in Loveday, the PSA included the right that the earnest money deposit may be forfeited as liquidated damages. The court interpreted this language to mean that the seller could recover actual damages in addition to liquidated damages.

4) California – Potential to Pursue Liquidated or Actual Damages

Though the liquidated damages statutes in California provide a test for valid provisions, they do not address whether a party could choose between liquidated and actual damages if the contract does not specify exclusivity. The current statute (applicable to residential transactions) only requires that the damages provision be reasonable under the circumstances at the time the contract was made and does not specify that the parties show it is difficult to assess potential actual damages. CAL. CIV. CODE §1671. It is possible, then, that a party could choose between actual or liquidated damages if the contract so provides.

D. If the non-breaching party may choose liquidated damages or actual damages, may it have both?

One of the main tenants of liquidated damages is that such damages stipulate a more certain outcome in the event of breach, because actual damages in real estate transactions may be hard to prove. However, liquidated damages clauses may be ruled unenforceable if they amount to a penalty, depending on the context and contract. In each of these jurisdictions, it is not likely a non-breaching party will be entitled to liquidated *and* actual damages. Cases and statutes seem fairly clear that allowance of recovery of both may be more likely to amount to a penalty, so a non-breaching party will not be able to recover both.

1) Oklahoma – Either Liquidated Damages or Actual Damages – Not Both

Even with the split of authority with respect to whether a seller may choose actual damages instead of liquidated damages, Oklahoma case law is consistent in that a seller may not choose both liquidated damages and actual damages. Under *the 1414 Partnership* rule, actual damages are not available at all if there is a liquidated damages provision in the agreement. Under *Oltman Homes*, though actual damages is a permissible remedy, notwithstanding the inclusion of a liquidated damages provision, actual damages is only available as a mutually exclusive remedy such that the seller must forego liquidated damages before the seller can seek actual damages. Therefore, regardless of whether *Oltman Homes* and *1414 Partnership* are contradictory in both respects, both cases stand for the proposition that a seller is not entitled to both actual and liquidated damages.

2) Pennsylvania – Possible for to Recoup Both Actual and Liquidated Damages

Pennsylvania courts seem fairly clear that a non-defaulting party is not entitled to both actual damages and liquidated damages. However, this may not be a hard-and-fast rule depending on the court, the amount of actual and liquidated damages (ensuring it is not a penalty), the intent of the parties (if they both agree to these clear terms), and the wording of the contract (outlining how and why remedies are applied). Potentially, recovery of both types of damages is a penalty itself. "Since liquidated damages are a substitute for actual damages, permitting the recovery of both liquidated and actual damages for the same loss could be nothing but a penalty*." Fallabel v. Brophy-Wolter.*, 6 Pa. D. & C. 5th 129 (Pa. D. & C. 2008).

Further, "where the breach of agreement admits of compensation, the recovery may be limited to the loss actually sustained, notwithstanding a stipulation for a penalty. This rule is founded upon the principle that one party should not be allowed to profit by the default of the other, and that compensation and not forfeiture is the equitable rule." *Hanrahan v. Audubon Builders, Inc.*, 614 A.2d 748, 750 (Pa. Super. Ct. 1992). In this case however, the liquidated damages clause was unenforceable as a penalty. It might be possible, then, to structure an enforceable liquidated damages clause that could be added to recovery of actual damages.

3) Tennessee – Possible (but not likely) to Recoup Both Actual and Liquidated Damages

It is not likely that the non-breaching party is entitled to both liquidated and actual damages. The specific language of the contract will be critical. The specific language proscribes any other construction, and the complainant is "entitled to but one of the two alternatives." *G.H. Swope Bldg. Corp.*, 338 S.W.2d at 568. Tennessee courts look to *Thompson v. Exchange Building Company*, 8 S.W.2d 489 (Tenn. 1928) for precedent in which the court held that a default "merely gives the seller the choice of enforcing his full rights against the purchaser, or claiming the amount stipulated as liquidated damages," and the complainant's election to retain the deposit as liquidated damages "conclusively estopped [the complainant] from resorting to any other remedy." *Thompson*, 8 S.W.2d at 492.

4) California -- Either Liquidated Damages or Actual Damages – Not Both

It is likely that a party cannot recover both types of damages, as recovery of actual damages in addition to liquidated damages would nullify the goal of liquidated damages in streamlining dispute resolution and possibly be unenforceable as a penalty. It is not certain whether liquidated damages provisions are exclusive remedies covered under the California Commercial Code. Cal. Com. Code §2719. It is possible that liquidated damages could be optional, giving the parties rights to other remedies, but it is also possible that a court could invalidate a liquidated damages clause that gives the non-breaching party the right to elect other remedies. For example, a California court held that a liquidated damages clause does not prevent a party from suing for specific performance. *See Allen v. Smith*, 94 Cal. App. 4th 1270, 1278 (Cal. Ct. App. 2002). Parties should, if it is their intent, state that the liquidated damages are the exclusive remedy by using words such as "only," "shall," or "must," rather than "may." *Nelson v. Spence*, 182 Cal. App. 2d 493, 497-98 (Cal. Ct. App. 1960).

E. If the non-breaching party may choose liquidated damages or actual damages, but not both, when must it decide?

In some states, this is a critical question to assess before the contract is signed. In these four representative jurisdictions, the rules for when one must elect liquidated damages vary from being unknown, having no specified deadline, making an election before retention of the deposit, or looking to the language of the contract.

1) Oklahoma – No Known Rule

It is unclear when a party must decide between liquidated and actual damages. In *Oltman Homes*, the court held the seller may, "upon breach of the contract," elect liquidated damages by "retaining the earnest money," or the seller could forego liquidated damages and seek actual damages. *Oltman Homes*, 190 P.3d at 1187.

2) Pennsylvania –No Deadline

The parties must decide when they write the contract whether to include a clause for liquidated damages. Generally, when a buyer repudiates a PSA that includes a liquidated damages provision, the seller is entitled to the sum as liquidated damages. *Tudesco v. Wilson*, 60 A.2d 388 (Pa. Super. Ct. 1948). Under *Leffler*, there is no deadline by which a party must elect actual or liquidated damages because inclusion of a liquidated damages provision precludes the seller from seeking actual damages.

3) Tennessee – Before Retention of Deposit

The non-breaching party must decide which remedy it seeks to pursue before it actually retains the deposit as liquidated damages. If a party retains the deposit as liquidated damages it is "conclusively estopped from resorting to any other remedy." *G.H. Swope Bldg. Corp.*, 338 S.W.2d at 568.

4) California – Contract Language Controls

It is unclear when the party must choose, though the language of the contract may be indicative. In *Royer*, the plaintiff had the right to retain the down payment as a setoff against actual damages, and that retention of the down payment was consistent with the choice of either remedy. *Royer v. Carter* 37 Cal. 2d 544, 547 (Ca. 1951).

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

Some states included automatic safe harbor in their statutes, while others utilize a combination of the Uniform Commercial Code and common law. For the states with safe harbors, however, parties may still elect liquidated damages higher than the safe harbor, but the provision will likely be tested for reasonableness according to the jurisdiction's standards. In states without real estate liquidated damages statutes, a reasonableness test will likely be used to assess any liquidated damages provision in the real estate context.

1) Oklahoma – Safe Harbor: Presumptive Threshold Established by Statute

A liquidated damages clause is valid if it does not exceed 5% of the purchase price. 15 Okla. Stat. § 215(B). If the amount exceeds 5%, the provision will be held invalid unless the party seeking to uphold the provision establishes that the amount is reasonable. The reasonableness test includes (1) whether the damages are difficult or impossible to estimate accurately, (2) the parties' intent to provide for damages rather than a penalty, and (3) that the sum stipulated must be a reasonable pre-breach estimate of the probable loss*. Sun Ridge Investors, Ltd. V. Parker*, 956 P.2d 876 (Ok. 1998).

2) Pennsylvania -- Reasonableness Test with No Presumptive Threshold (Guidance from UCC)

Pennsylvania has merged the Uniform Commercial Code and common law in regards to liquidated damages. In Pennsylvania, liquidated damages must bear a reasonable relation to anticipated or actual damages

and are generally enforceable when they represent a good faith estimate of probable damages in the event of breach. *Pantuso Motors, Inc. v. Corestates Bank, N.A.*, 798 A.2d 1277, 1282 (Pa. 2002).

Pennsylvania courts are likely to enforce a liquidated damages clause if (1) the amount of damages reasonably forecasts just compensation for the anticipated breach, and (2) the harm caused by the breach is impossible or very difficult to accurately estimate when the parties sign the agreement. Pa. C.S.A. §2718(a), *Holt's Cigar Co. v. 222 Liberty Associates*, 591 A.2d 743, 747-48 (Pa. Super. Ct. 1991). Using project-based, objective criteria is helpful. *D.A. Nolt, Inc. v. Philadelphia Mun. Auth.*, 463 F. Supp. 3d 539, 544 (E.D. Pa. 2020)

The parties should attempt to base the liquidated damages on objective criteria. *See Geisinger Clinic v. Di Cuccio*, 606 A.2d 509, 517-18 (Pa. Super. Ct. 1992). The courts would like to see an "indication in the record" that the figures were possible accurate estimates of actual damages. *D.A. Nolt, Inc.*, 463 F. Supp. 3d at 544.

3) Tennessee – Reasonableness Test

In order for a liquidated damages provision to be valid, (1) the parties must intend that it is liquidated damages and not a penalty; (2) it must be a reasonable estimate of potential damages at the time of contract formation; and (3) actual damages must be indeterminable or difficult to measure. *Guiliano v. Cleo, Inc.*, 995 S.W.2d 88, 100-101 (Tenn. 1999). *Vanderbilt Univ. v. DiNardo* potentially added a fourth element; that liquidated damages cannot be grossly disproportionate to the actual damages. *Vanderbilt Univ. v. DiNardo*, 174 F.3d 751, 755 (6th Cir. 1999).

4) California – Reasonableness Test

Generally, the liquidated damages clause will be held valid "unless the party seeking to invalidate the provision establishes that the provision was unreasonable under the circumstances existing at the time the contract was made." Cal. Civ. Code §1671 (b). California also outlined requirements for execution and print size of liquidated damages provisions in Section 1677. Cal. Civ. Code §1677. It is possible that these additional Section 1677 requirements are either to help the parties appreciate the consequences of a liquidated damages provision or to protect the buyer. ANN. REP., 13 CAL. L. REVISION COMM'N 1601, 1758–1759 (1976), *See Guthman v. Moss*, 150 Cal. App. 3d 501, 501 (1984).

The California Law Revision Commission outlined several factors in determining reasonableness, including (1) whether a damages provision has a reasonable relation to the range of harm that reasonably could be anticipated at the time of contract execution, (2) the relative bargaining power, (3) whether the parties were represented by lawyers at the time of contract execution, (4) the anticipation of the parties that proof of actual damages would be costly or inconvenient, (5) the difficulty of proving causation and foreseeability, and (6) whether the liquidated damages provision is included in a form contract. ANN. REP., 13 CAL. L. REVISION COMM'N 1601, 1758–1759 (1976).

For transactions that fall under §1675 (residential property sales that contain no more than four residential units and that the buyer intends to occupy), a provision that does not exceed 3% of the purchase price will be deemed valid unless the buyer establishes that the amount is unreasonable as liquidated damages. Cal. Civ. Code §1675. Reasonableness here is tested by assessing (1) the circumstances existing at the time the contract was made and (2) the price and other terms and circumstances of any subsequent sale or contract to sell and purchase the same property if the sale or contract is made within six months of the buyer's default. §1675(e).

G. Who has the burden of proof?

For states like Pennsylvania and Tennessee, the case law is not clear on who holds the burden when liquidated damages are claimed; however, it appears that the general rule in those jurisdictions is that the burden arguably rests on the party seeking enforcement. In states like Oklahoma, the burden shifts depending on whether the statutory threshold for liquated damages is exceeded. In states like California, the burden is on the party seeking to invalidate the provision (assuming the provision meets all statutory requirements).

1) Oklahoma – Below 5% = Burden on Party Opposing/Above 5% = Burden on Party Seeking to Uphold

If the liquidated damages amount does not exceed 5% of the purchase price, it is assumed valid by the statute. 15 Okla. Stat. § 215(B). accordingly, the burden would be on the party seeking to invalidate or oppose the provision to prove that the clause should not be enforceable. On the other hand, a liquidated damages provision of greater than 5% is presumed invalid unless the party seeking to uphold it proves reasonableness, which means the party seeking up uphold the provision has the burden of proof. *Id.*

2) Pennsylvania – Unclear/Burden on Party Seeking Enforcement

It is not clear which party has the burden of proving the enforceability of a liquidated damages clause. Generally, in a contract action, the burden of proof is on the party alleging breach or default. *East Texas Motor Freight v. Lloyd,* 484 A.2d 797 (Pa. Super. Ct. 1984).

In Pennsylvania, clauses that set for liquidated damages that are reasonable and fair attempts to compensate for anticipated loss are valid. *Caldbro v. Dep't of Aging*, 689 A.2d 347, 351 (Pa. Commw. Ct. 1997). Each party must take responsibility as a drafter to make sure the liquidated damages are a reasonable estimate, and it would be wise to support the clause with some sort of drafting "indication in the record" that shows the clause is a reasonable pre-breach estimate. *Hanrahan,* 614 A.2d at 751-52.

3) Tennessee – Unclear/Burden on Party Seeking Enforcement

It is not clear who has the burden of proof in Tennessee. On the one hand, if the court is unsure whether a provision is a penalty or valid liquidated damages, it must be construed as the former. *Beasley v. Horrell*, 864 S.W.2d 45, 48 (Tenn. Ct. App. 1993), overruled on other grounds by *Guiliano v. Cleo, Inc*. (citing *Testerman v. Home Beneficial Life Ins. Co.*, 524 S.W.2d 664, 668 (Tenn. Ct. App. 1974)). Also, in *Eatherly Construction Company v. HTI Memorial Hospital*, No. M2003-02313-COA-R3-CV, 2005 WL 2217078 (Tenn. Ct. App. Sept. 12, 2005), without citing *Beasley*, the Court of Appeals ruled that the party seeking to enforce a liquidated damages clause had the burden to establish that the liquidated sum was a reasonable estimate of potential damages. Kenneth (Pete) Ezell Jr. et al. *Tennessee Law on Liquidated Damages in Real Estate Purchase and Sale Agreements,* ACREL News & Notes (Sep. 2019) https://acrel.site-ym.com/resource/resmgr/news_and_notes/2019-09_ezell_-_liquidated_d.pdf

However, in *Unifirst,* the Tennessee Court of Appeals held (without citing *Beasly*) that the party seeking to avoid the clause bore the burden of proof. *Unifirst Corp. v. Lane*, No. M2000-00357-COA-R3-CV, 2001 WL 8791, at *4 (Tenn. Ct. App. 2001) (citing *Farmers Export Co. v. M/V Georgis Prois*, 799 F.2d 159 (5th Cir. 1986)).

4) California – Burden on Party Seeking to Invalidate

As per Section 1671, the party seeking to invalidate the liquidated damages provision has the burden of proof. Cal. Civ. Code §1671.

H. As of when is reasonableness tested?

Each of the jurisdictions tests reasonableness at the time of contract execution. Whether statutorily prescribed or found in common law, courts look to see if the parties made a reasonable estimate of possible damages at the time they make the contract. However, the courts may still examine actual damages to determine if the liquidated damages estimate was reasonable, so it is critical to consider jurisdictional case law precedent if a party does breach.

1) Oklahoma – No Test If Presumed Valid

If the purchase price does not exceed 5%, the provision is statutorily deemed valid, and no reasonableness test is required. However, if a party seeks to enforce liquidated damages in excess of 5% of the purchase price, then a reasonableness test would be applicable and the court would look to reasonableness at the time the contract was executed. *See*, *Sun Ridge Investors, Ltd. v. Parker*, which involved a liquidated damages provision in a lease, the Oklahoma Supreme Court held that "the sum stipulated must be a reasonable pre-breach estimate of the probable loss." *Sun Ridge Investors, Ltd. v. Parker*, 956 P.2d 876, 878 (Okla. 1998). Based on *Sun Ridge Investors*, it is likely that such a clause would be tested for reasonability at the time of contract execution.

2) Pennsylvania – At Time of Contract Formation

Evidence of the difficulty of estimating damages and the reasonableness of the damages forecast is tested at the time the contract was executed. *A.G. Cullen Construction, Inc. v. State System of Higher Education*, 898 A.2d 1145, 1162 (Pa. Commw. Ct. 2006), *See also See Geisinger Clinic v. Di Cuccio*, 606 A.2d 509, 517-18 (Pa. Super. Ct. 1992). Reasonableness is tested at the time the parties enter the contract to determine whether the sum is a reasonable approximation of the expected loss rather than an unlawful penalty. The courts, however, may consider the actual amount of damages relative to the stipulated sum to determine the enforceability of a liquidated damages clause. *Holt's Cigar Co.*, 591 A.2d at 747-48.

3) Tennessee – At the Time of Contract Formation

The reasonableness of a liquidated damages provision is tested at the time of contract formation. *Guiliano*, 995 S.W.2d at 100. In real estate PSAs, actual damages are often difficult to predict, which gives more weight to the prospective nature of liquidated damages. Overall, courts should not require the non-breaching party to prove

actual damages if the original intent of the parties was to stipulate damages in the form of a liquidated damages provision. *Guiliano*, 995 S.W.2d at 100.

4) California – At the Time of Contract Formation

Section 1671 of the California Civil Code states that the test of reasonableness is determined by "the circumstances existing at the time the contract was made." Cal. Civ. Code §1671. The Commission's Report stated that "Reasonableness should be judged in light of the circumstance's confronting the parties at the time of the making of the contract." ANN. REP., 13 CAL. L. REVISION COMM'N 1601, 1742 (1976).

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

States differ on what percentage of the purchase price is likely acceptable. Some states include safe harbors in their statutes, like Oklahoma and California. In California, the rule differs depending on whether there is a residential or commercial PSA at issue. Other states, like Pennsylvania and Tennessee, use case law as precedent. All of the states, however, if the liquidated damages clause exceeds any statutory harbors, test the clause for reasonableness based on the contract and the context at the time of contract execution. Each state uses slightly different factors in evaluating reasonableness, so it is possible that a wide range of percentages could be acceptable depending on the specific PSA.

1) Oklahoma – Safe Harbor 5%

If the liquidated damages amount does not exceed 5% of the purchase price, it is deemed a valid liquidated damages provision. 15 Okla. Stat. § 215(B). If the damages amount is greater than five percent, the reasonableness test includes determining whether the damages are difficult or impossible to estimate accurately, the parties' intent to provide for damages rather than a penalty, and that the sum stipulated must be a reasonable pre-breach estimate of the probable loss. *Sun Ridge Investors, Ltd. V. Parker*, 956 P.2d 876 (Ok. 1998).

2) Pennsylvania – No Bright Line Rule: Generally 9% -11% (But Could be More)

Overall Pennsylvania courts tend to find 9-11% liquidated damages reasonable. However, a higher percentage may be appropriate if there are no extra factors that might force specific performance (rather than payment of the liquidated damages). The Superior Court of Pennsylvania upheld a liquidated damages provision that was 10% of the $16,000 purchase price, as it bore a reasonable relation to the purchase price and was not a penalty. *Kraft v. Michael*, 70 A.2d 424, 427 (Pa. Super. Ct. 1950). The courts examined (1) the language of the contract, (2) the intention of the parties as gathered from all its provisions, (3) the subject of the contract and its surroundings, (4) the ease or difficulty of measuring the breach in damages, (5) the sum stipulated, and (6) what the result should be considering good conscience and equity. *Id.* At 425-426. In one case, 11.1% was considered reasonable because of an elevated sales price ($2.25M) and a loss of $400,000 on the subsequent sale of the property*. Palmieri v. Partridge*, 853 A.2d 1076, 1081 (Pa. Super. Ct. 2004).

A liquidated damage that amounted to 15% was found unenforceable as it would likely compel specific performance. *Ellis v. Roberts*, 98 Pa. Super. 49 (Pa. Super. Ct. 1930). Though this case says that 15% of the total purchase price could be viewed as a penalty, it ought to be noted that the seller's financial condition almost necessarily required specific performance, because seller may not have had the ability to pay the liquidated damage. *Id.* at 59. The plaintiff in that case was limited to recovery of "just compensation for the breach of the contract." Although this case exists, it does not preclude liquidated damages of greater than 15%. *Id.*

3) Tennessee – No Bright Line Rule

There is no bright line rule in Tennessee regarding the acceptable percentage for liquidated damages. The "reasonableness of a provision for liquidated damages is to be determined prospectively, i.e. at the time the parties contracted, and not retrospectively by [the court]." *Kendrick v. Alexander*, 844 S.W.2d 187, 191 (Tenn. Ct. App. 1992). The *Kendrick* court held that 12% liquidated damages relative to the total purchase price was reasonable under the terms of the contact. *Id.*

Conversely, in *Harmon v. Eggers*, 699 S.W.2d 159, 164 (Tenn. Ct. App. 1985), *overruled on other grounds by Guiliano v. Cleo, Inc.*, the court determined that 50% of the total purchase price as liquidated damages was equivalent to a forfeiture/penalty and, therefore, violated public policy.

4) California - Residential Rule: Not to Exceed the Deposit / Commercial Rule: No Safe Harbor

If a contract is for purchase and sale of residential property that the buyer intends to occupy, liquidated damages may not exceed the amount buyer paid as a deposit. *Allen v. Smith*, 94 Cal. App. 4th 1270, 1278 (Cal. Ct. App. 2002). Further, a liquidated damages provision is presumed valid if the deposit does not exceed 3% of the purchase price, unless buyer establishes the amount is unreasonable. If the deposit exceeds 3%, the party seeking

to uphold the provision must establish its reasonableness. Cal. Civ. Code §1675. For commercial real estate contracts, there is no safe harbor or cap for liquidated damages.

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

Each of the jurisdictions considers whether the liquidated damages provisions were reasonable predictions of possible future damages. Though the extent of actual damages may be irrelevant, and the provision will be found enforceable if the estimate was reasonable at the time of contract execution, parties should clearly structure their liquidated damages clauses to show that reasonableness. Though not required by all four jurisdictions, strategies for structuring may (1) explicitly outline the difficulty of estimating damages and that the damages arising from a breach are difficult or impossible to estimate at the time of signing, (2) state that the damages are a reasonable estimate of potential future damages, (3) state that liquidated damages are compensatory and not a penalty, (4) use objective metrics and industry-specific criteria for estimating future damages, and, if possible, (5) outline a specific amount of damages or a specific formula for calculating and estimating damages.

1) Oklahoma – No Actual Damages Necessary

In Oklahoma, liquidated damages are allowed even if there are no actual damages: As discussed above, Oklahoma has a statute that directly controls liquidated damages. In *Oltman Homes*, the court held that liquidated damages measured by Title 15, Section 215(B) of the Oklahoma Statutes are not limited by other stator provisions governing actual damages.

2) Pennsylvania – No Actual Damages Necessary

Pennsylvania courts might allow recovery of liquidated damages when there are no actual damages shown, though a court may examine actual damages in order to determine if the liquidated damages clause was reasonable. One Pennsylvania court, after noting that "the Board finds the apparent absence of actual damages to be very indicative that the liquidated damages clause is penal in nature," held that there is no requirement that actual damages be shown in order to recover liquidated damages. *Commonwealth, DOT v. Interstate Contractors Supply Co*, 568 A.2d 294 (Pa. Commw. Ct. 1990), *see also Sutter Corp. v. Tri Boro Mun. Auth.*, 487 A.2d 933, 936 (Pa. Super. Ct. 1985). Though actual damages may not be necessary to show, the reasonableness test in Pennsylvania requires that the liquidated damages be a reasonable forecast of expected damages, so it is critical that parties remember to structure clauses with that in mind. *D.A. Nolt, Inc. v. The Philadelphia Mun. Auth.*, No. 18-4997 2020 BL 199761 (E.D. Pa. May 28, 2020).

3) Tennessee – No Actual Damages Necessary

Tennessee courts will most likely not allow recovery of liquidated damages even where there are no actual damages, as long as it was not known at the time of contract formation that there would be no actual damages. This assumes all of the elements of reasonableness are met. The *Guiliano* court held, "The extent of actual damages has no bearing on the appellant's recovery of liquidated damages." *Guiliano* 995 S.W.2d at 101.

4) California – Actual Damages May be Necessary

Liquidated damages must be a reasonable estimate of damages at the time the contract was made, so actual damages should not be relevant for the validity of liquidated damages. Cal. Civ. Code §1671. However, one case found that a provision for a "non-refundable" deposit was found to be an unlawful penalty where the sellers suffered no actual damages. *Kuish v. Smith*, 181 Cal. App. 4th 1419, 1422 (Cal. Ct. App. 2010). The court did note that the contract did not contain a liquidated damages provision, as was expressly stipulated by the parties (because the inability to receive a refund of the deposit was not contingent upon a breach), so it is possible that the outcome would have been different had the parties structured this as a liquidated damages provision. *Id.* at 1429.

K. Is mitigation relevant for liquidated damages?

In these four jurisdictions, it is likely that mitigation is not relevant for liquidated damages in each of the states. These four states do not rely heavily on actual damages in determining the validity of a liquidated damages clause, and therefore mitigation of actual damages is most likely irrelevant for assessing the validity of liquidated damages. However, parties may consider before contract execution what mitigation steps could be taken in the event of breach. As some states like Pennsylvania may consider actual damages in assessing reasonableness of liquidated damages, they may also assess the parties' consideration of mitigation.

1) Oklahoma – Likely Irrelevant

Oklahoma courts have not opined on whether the mitigation of damages is relevant in connection with a liquidated damages provision. However, given that actual damages are not relevant in determining whether a liquidated damages provision is enforceable, it is likely that mitigation of actual damages is also irrelevant.

2) Pennsylvania – Likely Irrelevant

It is not likely that mitigation is relevant for liquidated damages in Pennsylvania. In 2012, where a plaintiff sought contractual interest, the Pennsylvania Supreme Court cited an Ohio case that held, "where a liquidated damages clause is deemed valid, non-breaching party does not have a duty to mitigate damages following a breach." *TruServ Corp v. Morgan's Tool & Supply Co.*, 39 A.3d 253, 262 (Pa. 2012) (citing *Lake Ridge Academy v. Carney,* 613 N.E.2d 183 (Ohio 1993)).

Though there is little case law on the relevance mitigation in this context, a few principles are worth noting. A party who suffers a loss typically has a duty to make reasonable efforts to mitigate his losses. *Delliponti v. DeAngelis*, 681 A.2d 1261, 1265 (Pa. 1996). When speaking on this principle, the Pennsylvania Supreme court recently said that "to hold otherwise would in many instances penalize the breaching party beyond the assessment of actual damages while rewarding the injured party for his failure to act." *Bafile v. Borough of Munch,* 588 A.2d 462 (Pa. 1991). However, for a liquidated damages clause to be valid, it needs to not be a penalty and reasonable in light of difficulty of assessing potential actual future damages and other criteria mentioned above. If the clause is found valid, it then likely will not be considered a penalty, even if the non-breaching party fails to mitigate the damages. Since actual damages need not be shown to recover liquidated damages, it is unlikely that the non-breaching party needs to mitigate any actual damages in order to recover liquidated damages. *Sutter Corp. v. Tri Boro Mun. Auth*., 487 A.2d 933, 936 (Pa. Super. Ct. 1985). Finally, the injured party is not obligated to mitigate damages when both it and the liable party have an equal opportunity to reduce damages. *Somerset Community Hosp. v. Allan B. Mitchell & Assocs.,* 685 A.2d 141 (Pa. Super. Ct. 1996).

3) Tennessee – Irrelevant

Mitigation is not relevant for liquidated damages because mitigation would offset actual damages, and actual damages are irrelevant. *See Guiliano v. Cleo, Inc.*, 995 S.W.2d 88, (Tenn. 1999) (an employer argued that the higher salary eliminated the possibility of actual damages: The court disagreed, holding that the employee's lack of actual damages had "no bearing on the appellant's recovery of liquidated damages." *Id.* at 101. Though not in the real estate PSA setting, this case is instructive for how Tennessee courts may assess liquidated damages in real estate PSAs.

4) California – Irrelevant

Like Tennessee, mitigation is not necessary or relevant for liquidated damages because mitigation would offset actual damages, which are irrelevant for assessing the enforceability of liquidated damages. As reasonableness is assessed at the time of contract formation, the parties may consider what mitigation may be reasonable at the time of contract formation.

L. Is a "shotgun liquidated damages clause enforceable?

"Shotgun" liquidated damages clauses allow for complete recovery of the liquidated damages irrespective of the materiality of the breach. Shotgun liquidated damages clauses are generally not enforceable in any of these states, as they would amount to a penalty. Parties may wish to separate liquidated damages for distinct breaches, and can do so in their contracts. That way, courts can analyze liquidated damages for reasonableness based on different breaches, and the parties may have greater control over the outcome of liquidated damages.

1) Oklahoma – May be Enforceable (subject to Safe Harbor)

In Oklahoma, it is likely a shotgun liquidated damages clause will be assessed on its reasonability, and will not necessarily be invalid purely by its existence. As the Oklahoma statutes provide a safe harbor, a shotgun clause that falls under the 5% threshold may be enforceable.

In an antiquated case, the Oklahoma Supreme Court held that, "[w]here a contract provides for a number of distinct things to be done by one of the parties, and further provides a sum certain to be taken as liquidated damages, if there is only a partial breach, the sum agreed upon as liquidated damages must be held a penalty, and the plaintiff can only recover his actual damages." *Graves v. Fitzpatrick*, 260 P. 10, 11 (Okla. 1927). Section 215(B) may overrule the *Graves* case if the liquidated damages amount does not exceed 5% of the purchase price. 15 O.S. §215. If the liquidated damages provision calls for damages of greater than 5% of the purchase price, the *Graves* ruling may still hold.

One case of note is *American Multi-Cinema, Inc. v. Southroads*, 119 F.Supp.2d 1190, 1207 (D. Kan. 2000), in which the United States District Court of Kansas (applying Oklahoma law) rejected the "antiquated" holdings of the past, citing a trend toward acceptance of liquidated damages provisions. This Kansas court outlined a possible solution to assess liquidated damages as they apply covenant-by-covenant and that a "provision that is unenforceable as to one covenant would nonetheless be enforceable as to another covenant so long as that covenant is a reasonable forecast in the light of the breach that actually occurred." *Id.* at 1207.

2) Pennsylvania – Likely Unenforceable

It is unlikely a shotgun liquidated damages clause is enforceable in Pennsylvania. When different breaches may result in widely disparate actual damages, the sum stipulated as liquidated damages is not a reasonable forecast of the expected loss and hence a penalty, unless this sum also varies depending on the nature of the breach. *Offtek, Inc. v. Stephen Nikles & Copiers*, No. 2003-C-3001, 2006 Pa. D. & C. Dec. LEXIS 699 (Pa. D. &. C. Mar. 23, 2006). "A sum fixed as security for the performance of a contract containing a number of stipulations of widely different importance, breaches of some of which are capable of accurate valuation, for any of which the stipulated sum is an excessive compensation, is a penalty." *Geisinger Clinic v. Di Cuccio*, 606 A.2d 509, 517-18 (Pa. Super. Ct. 1992).

3) Tennessee – Likely Unenforceable

A shotgun liquidated damages clause is likely unenforceable in Tennessee. In *City of Nashville v. Nashville Traction Co*, 142 Tenn. 475 (1920), the Tennessee Supreme Court refused to enforce payment of a performance bond. The court stated:

> "The courts almost uniformly hold where a contract contains a number of stipulations of varying degrees of importance and a single sum is made payable for any breach, applicable alike to important and unimportant covenants, it will be treated as a penalty rather than liquidated damages, no matter what name is given it by the parties. Cases to this effect are too numerous to be cited. They will be found collected in 17 C. J. p. 953; 8 R. C. L. p. 571; note, Ann. Cas. 1912C, 1024; note, L. R. A. 1915E, 373; note, 108 Am. St. Rep. 56; Sutherland on Damages, § 294; Pomeroy, Eq. Juris. § 441." *Id.* at 480-81.

4) California – Likely Unenforceable

It is unlikely that California would uphold a shotgun liquidated damages clause because of California's reasonableness test. A damage that "bears no reasonable relationship to the range of actual damages that the parties could have anticipated would flow from a breach" will likely be considered unreasonable and thus unenforceable. *Ridgley v. Topa Thrift & Loan Assn.*, 953 P.2d 484, 488 (Ca. 1998). A shotgun liquidated damages clause that attempts to force the breaching party to pay the entire sum of liquidated damages for any type of breach will likely be found a penalty. Parties should structure their agreements to assess certain types of liquidated damages for certain types of breach if they wish to separate the possible outcomes. *Wyndham Vacation Resorts v. Timeshare Relief,* No.: CV 18-09306-CJC(AFMx), 2019 U.S. Dist. LEXIS 231704 (C.D. Cal. 2019).

M. Does a liquidated damages clause preclude recovery of attorneys' fees by the non-breaching party?

It is likely that attorneys' fees are recoverable in all jurisdictions even if there is a valid liquidated damages provision. It is prudent for parties to stipulate this in their PSAs and to make sure attorneys' fees are reasonable, and, in some cases, explicitly outline attorneys' fees.

1) Oklahoma – Unknown Rule, But likely Allowed

Oklahoma courts have not opined on whether attorneys' fees are recoverable notwithstanding the existence of a liquidated damages provision in the agreement. However, in *Oltman Homes*, the court implied that, notwithstanding the fact that the parties had an enforceable liquidated damages provision, attorneys' fees would have been awarded if the parties had included an express provision in the agreement providing for the award of attorneys' fees, noting that "Seller may be allowed a counsel fee only if…the contract in suit provides for recovery of attorneys' fee". *Oltman Homes*, 190 P.3d at 1191-92. This outcome is consistent with other Oklahoma Supreme Court rulings that employ the "American rule" with respect to attorneys' fees, i.e. attorneys' fees are awarded in Oklahoma only if authorized by agreement of the parties, by statute, or where the fee is an item of damage caused by the wrong itself, rather than an item of expense incurred in attempting to secure redress for the wrong. *Eagle Bluff, L.L.C. v. Taylor*, 237 P.3d 173, 179 (Okla. 2010).

2) Pennsylvania – Attorneys' Fees Allowed

Recovery of liquidated damages does not preclude recovery of attorneys' fees, *Citicorp Mortgage v. Morrisville Hampton Village Realty Ltd. Partnership*, 662 A.2d 1120 (Pa. Super. Ct. 1995). The court will still test the reasonableness of the legal fee determined by the circumstances of the particular case. *Federal Land Bank of Baltimore v. Fetner*, 410 A.2d 344 (Pa. Super. Ct. 1979).

3) Tennessee – Unknown Rule

There is no relevant case law in Tennessee on this issue, but it is likely that Tennessee courts could award attorneys' fees in addition to liquidated damages, in their discretion, provided that the PSA contained an attorneys' fee provision. Any fees awarded would have to be deemed reasonable, and Tennessee applies a multi-factor test based on the Rule 1.5 of the Rules of Professional Conduct. *Mize v. Consulo*, No. M2011-00455-COA-R3CV, 2011 WL 6152980, at *7 (Tenn. Ct. App. Dec. 8, 2011).

4) California – Attorneys' Fees Allowed

A liquidated damages clause does not preclude recovery of attorneys' fees. *Zlotoff v. Tucker* 154 Cal. App. 3d 988, 995 (Cal. Ct. App. 1984).