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1Court OKs liquidated damages set at 'minimum' amount of harm
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The predetermined amount of compensation provided by liquidated-damages provisions in breach-of-contract cases "must be for a specific amount for a specific breach; they may not be a penalty to punish nonperformance or as a threat used to secure performance." *Med+Plus Neck & Back Pain Center v. Noffsinger*, 311 Ill.App.3d 853 (2000).

In *Med+Plus*, for example, the 2nd District Appellate Court concluded a liquidated-damages provision was an unenforceable penalty because it decreased over time and had an "inverse relation" to the amount of actual damage caused by a breach. And in *Grossinger Motorcorp v. American National Bank*, 240 Ill. App.3d 737 (1992), the 1st District ruled an "optional liquidated-damages provision" was invalid — because it merely fixed a minimum amount of compensation and left the door open to a claim for actual damages.

The question in a new case was whether a settlement agreement that called for payment of \$100,000 as the "minimum" amount of damages for breach of a confidentiality provision was enforceable.

Distinguishing *Med+Plus* and *Grossinger*, the 1st District decided Theodore Dallas, a former Chicago Teachers Union vice president, was entitled to \$100,000 as liquidated damages because the union and several other defendants reportedly violated the promise of confidentiality they made in Paragraph 2.1 of an agreement that settled the lawsuit Dallas filed after he was ousted as a union official. *Dallas v. Chicago Teachers Union*, No. 1–10–0979 (March 22, 2011).

Here are highlights of Justice Sheldon A. Harris' opinion (with omissions not noted in the text):

In Illinois, a liquidated-damages clause is enforceable as long as 1) the parties intended to agree in advance to the settlement of damages that might arise from a breach, 2) the amount provided as liquidated damages was reasonable at the time of contracting, bearing some relation to the damages which might be sustained, and 3) the actual damages would be uncertain in amount and difficult to prove. *Jameson Realty Group v. Kostner*, 351 Ill.App.3d 416 (2004).

In the case at bar, the first and third elements of the test are not at issue.

With regard to the second element, the defendants argue the liquidated damages provision in Paragraph 2.1 bears no reasonable relationship to the actual damages which the plaintiff might sustain and is, therefore, unenforceable.

In support of this argument, the defendants assert Paragraph 2.1 fails to address the content or veracity of potential statements made concerning the plaintiff. Instead, under this provision, as contemplated by the circuit court's order, any statement about the

plaintiff by the CTU to its membership would trigger the \$100,000 liquidated-damages clause.

The defendants appear to argue that while some statements, such as remarks that are disparaging, might justify an award of \$100,000 in damages, not every statement would. According to the defendants, it is thus possible the actual damages the plaintiff would suffer would not come close to \$100,000. The defendants assert, "This figure has no conceivable relation to actual damages and is unenforceable."

The issue courts look at in this context is not whether the actual damages ultimately caused by the breach are exactly the same as the amount specified in a liquidated-damages provision, but rather whether the liquidated-damages amount is a reasonable forecast of and bears some relation to the loss, as forecast at the time of contracting. *Jameson*, 351 Ill.App.3d at 423 (second element of test is whether "amount of liquidated damages was reasonable at the time of contracting, bearing some relation to the damages which might be sustained").

In the case at bar, the \$100,000 liquidated-damages figure is clearly related to the projected actual loss. As the circuit court below stated in its order:

"The liquidated damages in the amount of 'a minimum of \$100,000' has a direct bearing on any future elected or appointed office plaintiff may pursue with the Chicago Teachers Union.

"His prior salaries from 2004 to 2009 ranged from \$121,383.99 to \$180,886.82. In negotiating the Release and Settlement Agreement plaintiff sought to secure the right to hold an appointed compensated position in the Chicago Teachers Union in the future and he sought to ensure that his reputation in the future would not be compromised by statements that the Chicago Teachers Union and the defendants might make about him."

Notwithstanding the foregoing defendants contend Paragraph 2.1's "failure to account for the content and veracity of the publications is a strong indication that the damages are not reasonable and that the provision is an unenforceable penalty."

The defendants point to *Med+Plus Neck & Back Pain Center v. Noffsinger*, 311 Ill.App.3d 853 (2000). There, the plaintiff employer argued the liquidated-damages provision in its contract with the defendant employee was intended to recoup its costs to train the defendant in the event of a breach. However, the liquidated-damages amount actually decreased the longer the employee stayed with the employer.

The trial court ruled the provision was unenforceable as a penalty. The appellate court affirmed, stating:

"The provision at issue is clearly a penalty and bears no relation to training costs at all. If defendant breached the contract on the very first day, plaintiff's cost to train him would have been almost nothing, yet defendant would be liable to pay plaintiff the full \$50,000 under the liquidated damages provision. If defendant breached the contract on the last day, he would have been fully trained by plaintiff over the course of two years, yet he would be liable to pay plaintiff only \$2,083 (or less) under the liquidated-damages provision.

"Thus, the liquidated-damages provision bears an inverse relation to the costs of training defendant — the more training he receives, the less he must pay under the provision. Accordingly, we find it to be a penalty clause and a mechanism designed to secure defendant's performance of the contract."

In *Med+Plus*, the liquidated-damages clause could only have been a penalty to secure the defendant's performance of the two-year contract and not as the plaintiff argued, a means of recouping training costs. The damages amount was at its peak if the defendant breached on the first day, when very little would have been spent on training; the damages decreased the longer the employee stayed with the employer.

Here, by contrast, the liquidated-damages amount was clearly related to the projected actual loss, as the circuit court indicated.

The defendants advanced a second argument in support of their claim that the \$100,000 damages amount in Paragraph 2.1 is not reasonable and is instead a penalty. The defendants noted that the \$100,000 figure is a minimum rather than a fixed amount and argue that it runs afoul of the rule that liquidated damages must be set at a specific amount for a specific breach.

According to the defendants, the \$100,000 minimum, as opposed to a fixed amount, shows "there was no real attempt to fix damages at a reasonable and realistic sum."

The defendants rely on *Grossinger Motorcorp v. American National Bank & Trust Co.*, 240 Ill. App.3d 737 (1992), where the contract provided that if termination was attributable to the plaintiff "the earnest money shall be forfeited to the [defendant] as liquidated damages, or at defendant's option, [defendant] may exercise any other remedy at law." *Id.* at 740.

In holding this provision unenforceable, *Grossinger* focused on "the optional nature of the liquidated-damages provision which allows defendant to seek actual damages or alternatively to retain the earnest money as liquidated damages."

The court stated: "On its face, the optional nature of the liquidated-damages clause shows that the parties never intended to establish a specific sum to constitute damages in the event of a breach."

In the case at bar, by contrast Paragraph 2.1 contains no such optional clause in the event of a breach. Instead, the parties agreed that a breach results in a minimum of \$100,000 in damages, a specific number that plaintiff sought in this case. The defendants' reliance on *Grossinger* is misplaced.

The defendants also rely on *Catholic Charities v. Thorpe*, 318 Ill.App.3d 304 (2000), and *H & M Driver Leasing v. Champion*, 181 Ill.App.3d 28 (1989), neither of which is apposite to the case at bar.

In *Catholic Charities*, the liquidated-damages clause contained an optional provision which, as in *Grossinger*, allowed the seller to seek actual damages as an alternative to liquidated damages.

In holding the provision unenforceable, the court pointed to the option to seek actual damages, which "reflects that the parties did not have the mutual intention to stipulate to a fixed amount as their liquidated damages." *Catholic Charities*, 318 Ill.App.3d at 313.

Here, as noted, Paragraph 2.1 contains no such optional language.

In *H & M Driver Leasing* the contract provided for a specified amount of liquidated damages plus actual damages. The court reasoned:

"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 can be nothing but security for performance and, therefore, constitutes an unenforceable penalty." *Id.* at 31.

Here, there is nothing in the settlement agreement that would allow the plaintiff to get liquidated damages in addition to actual damages.

We reject the defendants' argument that the liquidated-damages provision in Paragraph 2.1 bears no reasonable relationship to the damages the plaintiff might sustain and is therefore unenforceable. Contrary to the defendants, Paragraph 2.1 meets the second element of the liquidated-damages test.

The amount provided as liquidated damages was reasonable at the time of contracting, bearing some relation to the damages which might be sustained.

The court correctly granted the plaintiff's motion to enforce the agreement.

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