

LIQUIDATED DAMAGES CLAUSES IN COMMERCIAL REAL ESTATE CONTRACTS IN MISSISSIPPI



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Mississippi courts generally have found liquidated damages provisions in contracts for the sale and purchase of commercial real estate to be enforceable. The law in this area, however, is muddled by two factors. First, the courts applying Mississippi law have not distinguished cases involving liquidated damages clauses in contracts for the sale and purchase of commercial real estate from cases involving contracts for sale and purchase of residential properties, lease purchase agreements, leases, construction contracts and even settlement agreements entered into in connection with divorce. Second, a court may determine not to enforce an otherwise valid liquidated damages clause if it would not be equitable to do so, which tends to shift the focus of the time for determining the reasonableness of the liquidated damages clause from the date of the contract to the date of breach.

The Acquisitions Committee of the American College of Real Estate Lawyers is conducting a national survey of state laws pertaining to liquidated damages clauses in commercial real estate transactions. The survey consists of thirteen questions regarding the enforcement of such clauses. This article addresses these questions under Mississippi law.

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

Mississippi courts have not directly addressed whether a seller can choose specific performance

instead of liquidated damages. Based on general contract principles, it is likely that if the contract provided for liquidated damages, and the contract did not provide that liquidated damages were the seller's exclusive remedy, a court applying Mississippi law would find that the seller was entitled to seek specific performance of the contract rather than enforcement of the liquidated damages clause. The closest case to these facts is *Houston v. Willis*, which involved the sale of a residence.² In this case, the contract provided that the seller had the following options if the buyer breached the contract: "(a) accept the earnest money as liquidated damages and this contract shall then be null and void, or (b) enter suit in any court of competent jurisdiction for damages for the said earnest money deposit, or (c) enter suit in any court of competent jurisdiction for specific performance."³ The buyer put up \$20,000 earnest money with the buyer's broker at the time that the contract was executed. In subsequent amendments to the contract, the seller and buyer executed an amendment that "released" the \$20,000 to the seller and reduced the purchase price by \$20,000. The buyer's broker paid the \$20,000 to the seller, and the amount of the earnest money was thereafter referred to as "0." The buyer did not close as provided by the contract, and the seller brought an action seeking specific performance. The buyer argued that the seller was not entitled to specific performance because the seller already had accepted the \$20,000 earnest money as liquidated damages. The Mississippi Court of Appeals⁴ held that since the earnest money already

had been released and paid to the seller pursuant to the amendment, and there was no longer any earnest money, the seller was entitled to specific performance. The implication is that if the \$20,000 was still earnest money, the seller would have had to choose between accepting the earnest money as liquidated damages and specific performance.⁵

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

In Mississippi a seller can choose between pursuing liquidated damages and actual damages as long as the contract gives the seller this option. In *Eastland v. Gregory*, the contract provided that if the buyer failed to perform its obligations under the contract, the seller could keep one-half of the earnest money as liquidated damages,⁶ or the seller could bring an action for damages and give credit for the amount of the earnest money.⁷ When the buyer breached the contract, the seller chose to keep the earnest money and bring an action against the buyer for the amount of its actual damages after crediting the earnest money. At trial, the jury awarded the seller its actual damages and the Mississippi Supreme Court affirmed.

If the contract provides that the earnest money put up by the buyer is the seller's liquidated damages, without expressly providing the seller with the option to seek its actual damages, the seller will not have the option to pursue its actual damages.⁸

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

The seller can pursue both remedies if the contract permits the seller to do this, subject to the limitation that the seller's total damages cannot exceed its actual damages. In the *Eastland v. Gregory* case discussed in Question 2, the contract for the sale and purchase of residential real estate provided that if the buyer failed to perform, the seller was entitled to keep one-half of the earnest money and pursue an action against the buyer for the difference between the earnest money and the seller's actual damages.

The seller elected to keep the earnest money and pursue its actual damages after giving credit for the earnest money. At trial the jury rendered a verdict for the seller, and the Mississippi Supreme Court affirmed in part and reversed and remanded as to a portion of the damages awarded based on evidentiary rulings.⁹ The case does not contain any discussion of the seller's option to retain the earnest money as liquidated damages, so apparently the buyer did not object to the seller pursuing its actual damages rather than keeping the earnest money as liquidated damages.

An interesting situation would exist if the seller kept the earnest money and pursued the actual damages, and the court determined that the seller's actual damages were less than the amount of the earnest money. One alternative is that the seller then could assert the liquidated damages clause and keep the earnest money. Another alternative is that the court could require the seller to reimburse the buyer for the amount by which the earnest money exceeded the seller's actual damages, in the nature of restitution. There are no Mississippi cases that address this issue. Under general remedies law in Mississippi, the seller's remedies are cumulative and not in the alternative, so it is likely that a court applying Mississippi law in this situation would allow the seller to keep the earnest money.

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

The cases in Mississippi that have addressed liquidated damages have not considered when a buyer must decide whether to choose liquidated damages or actual damages. The general statute of limitations that applies to most causes of action is three years,¹⁰ so the seller would have to bring an action before the expiration of three years after the breach.

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

Mississippi does not have a statute addressing liquidated damages in contracts for the sale of real

property. However, the Mississippi Supreme Court has found the liquidated damages provision in Mississippi's version of the Uniform Commercial Code—Section 75-2-718 of the Mississippi Code—to be influential in several cases.¹¹ In a 1980 case, the Mississippi Supreme Court wrote that the legislature had “spoken on the subject of liquidated damages in sales of goods,” quoted Section 75-2-718, and further wrote, “We do not know, nor have we had drawn to our attention, a similar rule as to liquidated damages in land sales contracts, but are influenced by the logic and reason of the law just quoted.”¹² Other cases have relied on Section 75-2-718 in whole or in part in considering the enforceability of liquidated damages clauses.¹³

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

The Mississippi Supreme Court has stated several tests for whether a clause imposes a penalty or is a valid liquidated damages clause. In *Shields v. Early*, one of its first cases addressing liquidated damages, the Mississippi Supreme Court stated:

The fact that the parties to a contract used the words therein “penalty” or “liquidated damages” may prima facie be supposed to mean what they say, yet the expression is not conclusive. The court should ascertain whether the payment stipulated was in truth a penalty or liquidated damages The essence of a penalty is a payment of money stipulated as in terrorem of the party breaching the contract; while the essence of liquidated damages “is a genuine covenanted pre-estimate of damages.” Whether a sum stipulated is a penalty or liquidated damages is a question of construction “to be decided upon the terms and inherent circumstances of each particular contract, judged at of the time of the making of the contract, and not as at the time of the breach.”¹⁴

In another case in 1962, the Mississippi Supreme Court held that the size of the liquidated damages clause will determine whether it is enforceable.

[I]f the sum stipulated is so large as to be out of all proportion to the probable or presumptive loss, and is therefore not a fair measure of the damage actually sustained, it will generally be regarded as a penalty, especially where the actual damage resulting from the breach may be readily ascertained or where the contract discloses no intention to fix the sum as liquidated damages or leaves the intention in this regard in doubt.¹⁵

The Mississippi Supreme Court has further clarified that “[e]quity will enforce a contract for liquidated damages if such liquidated damages can be found to be reasonable and proper in the light of the circumstances surrounding the case.”¹⁶ A court likewise may refuse to enforce an otherwise valid liquidated damages clause on equitable grounds.¹⁷ For example, courts applying Mississippi law have found that it would be inequitable to enforce a liquidated damages clause when the party seeking to assert the clause did not suffer any actual damages.¹⁸

If a court declines to enforce a liquidated damages clause, the party asserting the liquidated damages is entitled to pursue other remedies, such as specific performance and actual damages.¹⁹

7. Who has the burden of proof?

In Mississippi the burden of proof is on the party challenging the liquidated damages clause.²⁰

8. When is “reasonableness” tested?

The black letter law in Mississippi is that the reasonableness of the amount of the liquidated damages clause in a contract to sell and purchase land is to be determined at the time of the making of the contract, not at the time of the breach.²¹ Courts applying Mississippi law have enforced liquidated damages clauses when the seller's actual damages were less than the amount of the liquidated damages, as discussed below.²² But courts have also held that a liquidated damages clause was not enforceable when the party seeking to enforce the liquidated damages provision suffered no actual damages, or when the amount of actual damages was readily ascertainable.²³

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

Liquidated damages in the amount of ten percent of the purchase price or less should be deemed acceptable by a Mississippi court. In a case involving the sale and purchase of commercial real estate, the Mississippi Court of Appeals determined that liquidated damages amounting to 7.6 percent of the purchase price was reasonable.²⁴ The court noted “[t]he liquidated damages were well under ten percent of the purchase price, an amount that has been used in other contracts as a reasonable amount of earnest money.”²⁵ A claim for liquidated damages in excess of 50 percent of the purchase price, however, is likely to be found to be unreasonable. Courts applying Mississippi law have found (1) that liquidated damages in the amount of 50 percent of the purchase price were unreasonable in a contract involving the sale and purchase of residential real estate;²⁶ (2) that the retention by the seller of the buyer’s \$30,000 equity payment in a lease-purchase contract for residential real estate was unreasonable when the seller subsequently sold the property for more than the contract price;²⁷ and (3) that the retention of the buyer’s \$38,595 earnest money in a contract for the sale and purchase of a log-cabin kit was unreasonable when the total purchase price was \$43,656.²⁸ In the cases finding that the amount claimed by the seller was unreasonable, the courts also usually find that allowing the liquidated damages would be inequitable.

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

Courts applying Mississippi law have held that liquidated damages will be allowed when the actual damages are less than the liquidated damages, and even when the seller suffered no actual damages. In *Culbreath Revocable Tr. v. Sanders*,²⁹ a 2007 case involving a contract for sale and purchase of commercial real estate, the sales price was \$850,000. The contract for the sale and purchase of land required the buyer to put up earnest money of \$65,000. The

buyer put up \$30,000 of the earnest money, but then refused to close and demanded return of his earnest money. The contract provided that in the event of a breach of contract by the buyer, the seller could accept the earnest money as liquidated damages. The seller brought an action against the buyer to recover the remaining \$35,000 balance of the earnest money. The buyer argued that the seller should not be entitled to any damages because the seller subsequently had sold the subject property and some additional property for \$1,200,000—\$350,000 more than the contract price.³⁰ The trial court awarded the seller the \$35,000 plus interest and attorneys’ fees. On appeal the Mississippi Supreme Court affirmed, noting that the need for liquidated damages was evident: “The exact damages that could result in the event of a breach would understandably be difficult to determine before hand, and could be substantial.”³¹

In *Hovas Constr., Inc. v. Bd. of Tr. of Western Line Consol. Sch. Dist.*, the Mississippi Court of Appeals held that the calculation of actual damages in a construction contract did not have an impact on liquidated damages, since the damages in that case were not readily ascertainable at the time that the parties entered into the contract.³² In *PYCA Indus., Inc. v. Harrison Cnty. Waste Water Mgmt. Dist.*, the Fifth Circuit, applying Mississippi law in a case involving a liquidated damages clause in a construction contract, reiterated “that the mere fact that the amount of damages ultimately suffered by a party was less than the amount payable under the liquidated-damages clause does not, standing alone, permit courts to recharacterize a liquidated damages provision as a penalty.”³³

On the other hand, some courts have refused to enforce a liquidated damages provision when the party seeking to enforce the liquidated damages provision did not suffer any actual damages. In *Massman Constr. Co. v. Greenville*, a contract for construction of piers for a bridge across the Mississippi River provided that the contractor would pay the city liquidated damages of \$250 for each day that the contractor completed the project late.³⁴ The contractor completed the work late, and the

city withheld the amount of the liquidated damages from payment. The contractor brought an action to recover the withheld payments and asserted that the city wrongfully withheld the liquidated damages because the late completion was due to the city's actions. The district court ruled in favor of the city. On appeal by the contractor, the Fifth Circuit Court of Appeals reversed. The bridge was being built to connect with a road on the Arkansas side of the river. The road was not completed until thirty days after the entire bridge was finished.³⁵ The city, according to the Fifth Circuit, therefore did not suffer any actual loss. Under all of the facts and circumstances of the case, according to the Fifth Circuit, enforcement of the liquidated damages provision "would be inequitable and unreasonable and would amount to the infliction of a penalty rather than the allowance of liquidated damages."

In a 1980 case, *Maxey v. Glindmeyer*,³⁶ the Mississippi Supreme Court held that a liquidated damages clause in a contract for the sale and purchase of residential real estate was not enforceable when the amount of the earnest money deposited and forfeited, \$75,000, was one-half of the purchase price of the property, and the seller's damages should be limited to actual damages.³⁷ In a 2009 case, the Bankruptcy Court for the Southern District of Mississippi found that a liquidated damages clause in a lease of land was not enforceable because the lessor's actual damages were readily ascertainable.³⁸

11. Is mitigation relevant for liquidated damages?

None of the Mississippi cases that have considered liquidated damages has addressed mitigation of damages directly. This suggests that mitigation of damages is not relevant for liquidated damages. If a seller is able to reduce its actual damages by mitigation, should the seller reduce its claim for damages by the amount by which its efforts to mitigate reduced its actual damages?

In *Maxey v. Glindmeyer*, the buyers, the Maxeys, refused to close, and the seller, Glindmeyer, subsequently sold the land to another party for an amount

in excess of the contract price.³⁹ The Maxeys brought an action to recover their earnest money, and Glindmeyer asserted that under the terms of the contract, she was entitled to retain the earnest money as liquidated damages. The Mississippi Supreme Court wrote that it would be inequitable for Glindmeyer to retain the deposit and sell the property for more than the contract price. The court remanded the case for a determination of Glindmeyer's actual damages.⁴⁰

In *Culbreath Revocable Trust*, the buyer, Culbreath, also refused to close.⁴¹ Sanders then sold the property to other parties for an amount in excess of the price in the contract with Culbreath. Sanders brought an action against Culbreath to recover the balance of the earnest money that Culbreath had not paid. The contract provided that Sanders was entitled to accept the earnest money as liquidated damages. The Mississippi Supreme Court held that Sanders was entitled to recover the balance of the earnest money from Culbreath. One distinction between the *Maxey* case and the *Culbreath* case is that the amount of the earnest money in the *Maxey* case was 50 percent of the purchase price, which the court found excessive, while in the *Culbreath* case, the amount of the earnest money was less than 10 percent of the purchase price, which the court found to be reasonable.

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

A "shotgun" liquidated damages clause is one under which a party has a right to liquidated damages for any default by the other party, whether or not the default was material. There are no published cases in which a court applying Mississippi law has addressed this issue. As noted above, courts applying Mississippi law have held in some cases that a liquidated damages clause may not be enforceable if the party seeking to enforce the clause suffered no actual damages. Likewise, courts can decline to enforce liquidated damages clauses on equitable grounds.⁴² Based on these cases, it is likely that a court applying Mississippi law would not enforce a

liquidated damages clause for an immaterial default for which the seller suffered no actual damages.

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

In Mississippi the seller is entitled to recover attorneys' fees in addition to liquidated damages, provided that the contract authorizes the court to award attorneys' fees to the prevailing party. In *Culbreath Revocable Trust*, a contract for the sale and purchase of commercial real estate, the contract contained a general provision that the prevailing party in litigation would be entitled to attorneys' fees.⁴³ The court awarded attorneys' fees to the seller in addition to the award of liquidated damages.

CONCLUSION

The Mississippi Court of Appeals has observed that in a contract for the sale of commercial real estate, "the need for liquidated damages is evident as it would be extremely difficult to estimate possible damages in the event of a breach."⁴⁴ While courts

applying Mississippi law have enforced liquidated damages clauses in cases involving the sale and purchase of commercial real estate and in other cases regardless of the seller's actual damages, courts in other contexts, such as construction contracts and contracts for the sale and purchase of residential properties, have limited the seller to its actual damages based on perceived equitable disparities. The cases holding that the liquidated damages clause was unenforceable when the actual damages were less than the liquidated damages arguably are misapplying the doctrine established in *Shields v. Early* and the other seminal cases in Mississippi that hold that the reasonableness of the liquidated damages clause should be determined at the time of the contract and not at the time of breach. A seller in a contract for the sale and purchase of commercial real estate, with the customary recitations in the liquidated damages clause about the difficulties of ascertaining actual damages and the agreement of both parties that the seller should be entitled to liquidated damages, should feel comfortable that courts applying Mississippi law will enforce the liquidated damages clause. 🍀

Notes

- 1 The opinions expressed in this article are those of the author only and are not necessarily those of Bradley Arant Boult Cummings LLP or any of its attorneys.
- 2 *Houston v. Willis*, 24 So. 3d 412 (Miss. Ct. App. 2009).
- 3 *Id.* at 416.
- 4 The Mississippi Court of Appeals is the intermediate court of appeals in Mississippi. Appeals from trial courts can be assigned either to the Court of Appeals or the Mississippi Supreme Court. A party aggrieved by a decision of the Court of Appeals can appeal to the Mississippi Supreme Court.
- 5 *Houston*, 24 So. 3d at 420.
- 6 The broker, who was holding the earnest money, was entitled to retain the other one-half of the earnest money. This is a common provision in preprinted brokerage contracts for residential sales and purchases in Mississippi.
- 7 *Eastland v. Gregory*, 530 So. 2d 172 (Miss. 1988).
- 8 See *Shields v. Early*, 95 So. 839, 841 (Miss. 1923).
- 9 The court reduced the amount of the actual damages because of deficiencies in the seller's proof.
- 10 Miss. Code Ann. § 15-1-49.
- 11 Miss. Code Ann. § 75-2-718. The current version of Section 75-2-718(1), which is identical to the Section 2-718(1) of the Uniform Commercial Code, provides as follows:
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 nonfeasibility of otherwise obtaining an adequate remedy. A term fixing unreasonably large liquidated damages is void as a penalty.
- 12 *Maxey v. Glindmeyer*, 379 So. 2d 297, 301 (Miss. 1980) (contract for sale and purchase of residential property).
- 13 See *Thomas v. Scarbrough*, 977 So. 2d 393, 398-99 (Miss. Ct. App. 2007) (affirming use of Section 75-2-718 by trial court to hold that liquidated damages clause in residential lease purchase agreement was not enforceable).
- 14 *Shields*, 95 So. at 841 (citations omitted); quoted in *PYCA Indus., Inc. v. Harrison Cnty. Waste Water Mgmt. Dist.*, 177 F. 3d 351, 367 (5th Cir. 1999) (applying Mississippi law); *Hertz Com. Leasing Div. v. Morrison*, 567 So. 2d 832, 836 n. 3 (Miss. 1990).
- 15 *Cont'l Turpentine & Rosin Co. v. Gulf Naval Stores Co.*, 142 So. 2d 200, 209 (Miss. 1962) (agreement not to deal with other companies), quoted in part in *PYCA Indus., Inc.*, 177 F.3d at 367 (5th Cir. 1999).

- 16 Maxey, 379 So. 2d at 301 (contract for sale of residential properties), quoted in *Henderson v. Blount*, 247 So. 3d 328, 332 (Miss. Ct. App. 2018).
- 17 See *R.K. v. J.K.*, 946 So. 2d 764, 773 (Miss. 2007) (property settlement agreement).
- 18 See *Massman Const. Co. v. Greenville*, 147 F.2d 925, 928 (5th Cir. 1945) (discussion of cases holding that liquidated damages are not available when seller suffered no actual loss).
- 19 See *Cont'l Turpentine & Rosin Co.*, 142 So. at 209-210.
- 20 See *Hovas Constr., Inc. v. Bd. of Tr. of Western Line Consol. Sch. Dist.*, 111 So. 3d 663, 669 (Miss. Ct. App. 2012) (Maxwell, J., specially concurring) (construction contract).
- 21 See *PYCA Indus., Inc.*, 177 F.3d at 367-68; *Shields*, 95 So. at 841; *Hovas Constr., Inc.*, 111 So. 3d at 668-69.
- 22 See text accompanying notes 29 to 33.
- 23 See text accompanying notes 34 to 38.
- 24 *Culbreath Revocable Tr. v. Sanders*, 979 So. 2d 704, 712 (Miss. Ct. App. 2007).
- 25 *Id.* at 711.
- 26 Maxey, 379 So. 2d at 297.
- 27 *Thomas v. Scarborough*, 977 So. 2d 393, 399-400 (Miss. Ct. App. 2007).
- 28 *Garziano v. Louisiana Log Home Co.*, 569 Fed. Appx. 292, 293 (5th Cir. 2014) (applying Mississippi law). The \$38,595 was paid by the buyers toward the purchase price. The contract provided that "all monies paid on this contract are earnest monies and that no refund will be made if delivery is refused or if this contract is terminated by the purchaser without the mutual consent of the seller." The court, citing a Mississippi case, wrote that "An earnest money provision is the equivalent of a liquidated damages provision." *Id.* at 301.
- 29 *Culbreath Revocable Tr.*, 979 So. 2d at 709-10.
- 30 The contract was for the sale and purchase of 432 acres of land. After the buyer's default, the seller purchased an additional seven acres adjacent to the 432 acres, constructed an additional road across the property, and sold the entire property off in seven or eight tracts. 979 So. 2d at 710. The court wrote that the subsequent expansion and improvements did not render the liquidated damages clause meaningless because the contract was for a substantial sum, the exact damages would be difficult to determine, and the amount of the liquidated damages was reasonable. *Id.* at 711.
- 31 *Id.* at 712.
- 32 *Hovas Constr., Inc.*, 111 So. 3d at 667-68. This case involved construction of an addition to a school and liquidated damages for failure to complete the construction on time. The court found that it was impossible to ascertain damages for disruption of the school environment.
- 33 *PYCA Indus., Inc.*, 177 F.3d at 367-68. In this case the contractor asserted that the liquidated damages clause for late completion was "clearly excessive and operated as a penalty." The Fifth Circuit affirmed the district court's holding that at the time of the contract, the amount of the damages was not clearly foreseeable, and that the use of the liquidated damages clause was appropriate. *Id.* at 368.
- 34 *Massman Constr. Co. v. Greenville*, 147 F.2d 925 (5th Cir. 1945) (applying Mississippi law).
- 35 The court also wrote that the contractor's delay was in part caused by faulty information regarding the project provided by the city, and that a portion of the project was a grant from the Public Works Administration "for the purpose of assisting in building a bridge and not for the purpose of unjustly enriching the City." *Id.* at 927.
- 36 Maxey, 379 So. 2d at 300-01.
- 37 *Id.* at 301. See also *Thomas v. Scarborough*, 977 So. 2d 393, 399-400 (Miss. Ct. App. 2007) (following Maxey and holding that seller in lease purchase agreement not entitled to retain equity payment and deposit as liquidated damages when seller suffered no actual loss).
- 38 *In re Premier Entertainment Biloxi, LLC*, 413 B.R. 370, 374 (Bankr. S.D. Miss. 2009). The bankruptcy court in the Premier Entertainment case relied on *PYCA Indus., Inc.* for the proposition that liquidated damages are unenforceable "only in limited cases where (1) "the actual damage resulting from the breach may be readily ascertained," or (2) "the contract discloses no intention to fix the sum as liquidated damages or leaves the intention in this regard in doubt." *PYCA Indus., Inc.*, 177 F.3d at 367.
- There, the Fifth Circuit was paraphrasing the Mississippi Supreme Court's test in *Cont'l Turpentine & Rosin Co.*, 142 So. 2d at 209, which is set out in the text accompanying footnote 15. The Fifth Circuit's paraphrase does not include the initial part of the Mississippi Supreme Court's test, which requires that to be unenforceable the amount of liquidated damages must be "so large as to be out of all proportion to the probable or presumptive loss, and is therefore not a fair measure of the damage actually sustained." 142 So. 2d at 209.
- So according to the Mississippi Supreme Court's test in *Cont'l Turpentine*, the court does not reach the question of whether actual damages can be readily ascertained until *after* the court determines that the liquidated damages are "so large as to be out of all proportion to the probable or presumptive loss." Arguably the Fifth Circuit's paraphrase of the Mississippi Supreme Court's test is more narrow than the test as originally stated by the Mississippi Supreme Court.
- 39 Maxey, 379 So. 2d at 301.
- 40 See also *Garziano*, 569 F. Appx. at 293. In this case the buyers of a log-cabin kit paid \$38,595 of the total purchase price of \$46,656, refused to pay the balance, and brought an action against the seller to recover the amount paid. The seller argued that it was entitled to retain the \$38,595 because the contract provided that all amounts paid were considered to be earnest money and liquidated damages. After the buyers had refused to complete the purchase, the seller had sold some of the logs intended for the buyers to another party for \$24,644. The Fifth Circuit found that permitting the seller to keep the logs, or the proceeds from the sale of the logs, and the \$38,595 earnest money would amount to a double recovery by the seller. The earnest money clause therefore was an unenforceable pen-

alty. The court remanded the case for a determination of the seller's actual damages and instructions to refund to the buyers any amount of the earnest money in excess of the seller's actual damages. *Id.* at 302.

41 *Culbreath Revocable Tr.*, 979 So. 2d at 706.

42 See text accompanying notes 16 to 18.

43 *Culbreath Revocable Tr.*, 979 So. 2d at 704 (Miss. 2007).

44 *Id.* at 711.