

Assessment of liquidated damages

Number: INFORMAL

Date: September 04, 2001

The Honorable Walter "Skip" Campbell
Senator, District 33
10094 McNab Road
Tamarac, Florida 33321

Dear Senator Campbell:

Pursuant to our recent conversation regarding a letter written by an attorney in this office to the Department of the Lottery, I find it is necessary to state my position on the assessment of liquidated damages against Automated Wagering International (AWI).

The letter contains informal comments written by an attorney in this office and is being circulated as justification for an assessment of liquidated damages by the Department of the Lottery (department) against AWI. The Secretary of the department has represented that this letter is an opinion of the Attorney General's Office. It is not. The letter was prepared in anticipation of possible litigation and was intended only to provide a confidential analysis of the general state of the law concerning liquidated damages. The letter was not intended to support any particular assessment of liquidated damages by the department.

Florida case law recognizes that parties to a contract may stipulate what the consequences of a breach shall be and the stipulation, if reasonable, will control and exclude all other consequences.[1] In determining whether a liquidated damages clause is proper, a court will determine if the damages by their very nature were uncertain at the time of contracting and not excessive or unreasonable.[2]

The contract between the department and AWI contains a liquidated damages provision authorizing the Secretary to assess liquidated damages of up to \$10,000 a day in the case of a "full functionality" delay. In the case of delay in terminal installation, the contract permits the Secretary to assess liquidated damages of up to \$600 per terminal per day. Clearly both AWI and the department, who were represented by counsel, agreed that such damages by their nature were uncertain at the time the contract was entered into and the amounts permitted to be assessed under the contract for liquidated damages constituted a reasonable assessment of those damages. The agreement itself reflects that the liquidated damage assessment represented a good faith effort to quantify "the range of harm that could reasonably be anticipated at the time of the execution of the contract." Both parties agreed that the liquidated damages provision were just and reasonable.[3]

The department has assessed liquidated damages against AWI in the amount of \$4.5 million. I am concerned that the department has not recovered amounts sufficient to cover all possible damages the state may have suffered. For instance, it does not appear that the department assessed for things such as loss of public use and harm to the business relationships between

the department and its retailers and the public.[4] If these matters were considered, I am concerned that they were not given sufficient weight.

As the case law indicates, liquidated damages under a contract are available when actual damages are incapable of being ascertained. While an approximation of actual damages may be attempted in order to ensure that the liquidated damages do not constitute a penalty, that figure constitutes a starting point for the assessment of liquidated damages.

Clearly, there are damages which are incapable of calculation that must be considered and factored into any assessment of liquidated damages. The courts of this state have recognized that monetary loss is not the sole measure of liquidated damages; other factors such as inconvenience or discomfort may be considered in assessing liquidated damages.[5] The department appears to have failed to adequately consider these factors, using the letter from an attorney in this office for the proposition that only actual damages could be assessed. That letter, however, states that an estimation of actual damages serves as a starting point for assessing liquidated damages.[6]

I must, therefore, express my disappointment and concern about the characterization of the letter as an opinion of this office and the use of that letter to justify the amount assessed in liquidated damages against AWI. Based upon my review of the state of the law in Florida, I am of the opinion that where parties, who are represented by counsel, have in good faith entered into an agreement containing a provision for liquidated damages because actual damages are unascertainable, such provision controls unless it can be clearly demonstrated that such assessment is unconscionable or constitutes a penalty.

Sincerely,

Robert A. Butterworth
Attorney General
RAB/tgk

cc: The Honorable Jeb Bush
Governor

Secretary David Griffin
Department of Lottery

[1] See, e.g., *Doc's Junkie Musick, Inc. v. Active Alarms, Inc.*, 545 So. 2d 500 (Fla. 4th DCA 1989); *Hatcher v. Panama City Nursing Center, Inc.*, 461 So. 2d 288 (Fla. 1st DCA 1985).

[2] *Hutchison v. Tompkins*, 259 So. 2d 129 (Fla. 1972); *Hawk's Cay Investors v. Brandy Marine*, 524 So. 2d 681 (Fla. 4th DCA 1988).

[3] See Interim Contract, s. 35A3. And see, RFP # 95/96-001/R-Part II, s. 1.47 A 3.

[4] See, e.g., *Solomon v. Department of State Highways and Transportation*, 325 N.W. 2d 717 (Mich. App. 1984), recognizing that liquidated damages were appropriate for damage to the public which was delayed in its use of the public facility, since such damage did not convert easily into dollars and cents.

[5] See, e.g., *Public Health Trust of Dade County v. Romart Construction, Inc.*, 577 So. 2d 636 (Fla. 3d DCA 1991) (fact that Dade County may have suffered no monetary loss for this 68-day did not, as urged, render this clause unconscionable, because the medical center being constructed was intended as a public facility); *Gables, Gables/Koven, Inc. v. Choate*, 26 FLW D1415 (Fla. 3d DCA 2001).

[6] The letter to Secretary Hart was an attempt by an attorney in this office to provide some guidance in light of the unusual liquidated damages provision in the department's contract. The contract gives the Secretary discretion in assessing liquidated damages (*up to* \$10,000 per day for full system functionality delays and *up to* \$600 per terminal per day for delays in terminal installation). Contracts more commonly provide for liquidated damages in a fixed amount.