

[6] [7] [8] ¶¶ 28 We next turn to the question of whether the stipulated damages clause is a valid and enforceable provision for liquidated damages. “[A] trial court's decision concerning the validity or invalidity of a clause involves factual and legal determinations, and they will be reviewed as such.” *Koenings v. Joseph Schlitz Brewing Co.*, 126 Wis.2d 349, 358, 377 N.W.2d 593 (1985) (citing *188 *Wassenaar v. Panos*, 111 Wis.2d 518, 525, 331 N.W.2d 357 (1983)). “The overall single test of validity is whether the clause is reasonable under the totality of circumstances.” *Wassenaar*, 111 Wis.2d at 526, 331 N.W.2d 357 (citations omitted); *see also Westhaven Assocs., Ltd. v. C.C. of Madison, Inc.*, 2002 WI App 230, ¶¶ 17, 257 Wis.2d 789, 652 N.W.2d 819. To determine reasonableness, we consider: (1) whether the parties intended to provide for damages or for a penalty; (2) whether the injury caused by the breach would be difficult or incapable of accurate estimation at the time of entering into the contract; and (3) whether the stipulated damages are a reasonable forecast of the harm caused by the breach. *Wassenaar*, 111 Wis.2d at 529-30, 331 N.W.2d 357. “Essentially, we must look at both the ‘harm anticipated at the time of contract formation and the actual harm at the time of breach.’” *Kernz v. J.L. French Corp.*, 2003 WI App 140, ¶¶ 30, 266 Wis.2d 124, 667 N.W.2d 751 (quoting *Wassenaar*, 111 Wis.2d at 532, 331 N.W.2d 357). “The factors are not meant to be mechanically applied, and courts may give some factors greater weight than others.” *Id.* (quoting *Westhaven*, 257 Wis.2d 789, ¶¶ 17, 652 N.W.2d 819); *see also Koenings*, 126 Wis.2d at 361-62, 377 N.W.2d 593

Rainbow Country Rentals and Retail, Inc. v. Ameritech Publishing, Inc. 286 Wis.2d 170, 187-188, 706 N.W.2d 95, 103 (Wis.,2005)

As the above discussion demonstrates, the various factors and approaches to determine reasonableness are not separate tests, each of which must be satisfied for a stipulated damages clause to stand. Reasonableness of the stipulated damages clause cannot be determined by a mechanical application of the three factors cited above. 3 Hawkland, *Uniform Commercial Code Series*, sec. 2-718:01, p. 426 (1982). Courts may give different interpretations to or importance to the various factors in particular cases. Sweet, *Liquidated Damages in California*, 60 Calif.L.Rev. 84, 131-36 (1972); Clarkson, Miller, and Muris, *Liquidated Damages v. Penalties: Sense or Nonsense?*, 1978 Wis.L.Rev. 351, 378-83.

Wassenaar v. Panos 111 Wis.2d 518, 533, 331 N.W.2d 357, 364 (Wis.,1983)

Excellent case which examines the issues in great depth