



MICHAEL R. DILIBERTO, ESQ.

Drop The Penalty, Keep The Settlement

Many settlement agreements contain a schedule for installment payments, when a party needs time to pay the agreed amount. However, if the agreement contains a penalty for a missed payment, the court could rewrite the deal.

Here is a settlement that was rewritten by the court:*

Plaintiff's complaint asked for \$45,000. The parties agreed to settle for \$20,000, payable in two installments, and agreed that upon default, judgment would be entered for \$61,000.

The defendant failed to make the first installment payment, and judgment was entered for \$61,000 (principal, pre-judgment interest, and attorney's fees).

Reversing on appeal, the judgment was reduced to the original settlement amount of \$20,000. The court noted that damages for the delay in paying money are easily determinable, and the judgment was excessive because it was three times the agreed settlement amount. The court viewed the difference between the \$61,000 judgment and the \$20,000 settlement amount as a \$41,000 late payment penalty, which had no reasonable relationship to any actual damages for delay.

How would the judgment have been enforceable?

By reflecting a reasonable relationship to the range of actual damages the parties could have anticipated from a breach of the settlement agreement, such as interest at prevailing rates, and reasonable costs to pursue the payment.

Avoid a penalty in your settlement, and the settlement you make will be the settlement you keep.

* *Greentree Financial Group, Inc. v. Execute Sports, Inc.* (2008) 163 Cal. App. 4th 495.