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Liquidated Damages v. Actual Damages – Which Is the Better Choice?

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Liquidated damages provisions are common to all types of agreements, from leases to construction contracts. While liquidated damages provisions may appear "boilerplate" and full of legalese, they profoundly impact how much a party may collect in the event of breach.

Liquidated damages is an agreed-upon dollar amount that a non-breaching party is entitled to collect in the event of breach of contract. The Massachusetts Appellate Court has opined that when, at the time of contracting, the amount of actual damages is difficult to ascertain and the parties agree on an amount that is a "reasonable forecast" of damages resulting from breach, a liquidated damages clause generally will be upheld. *Mittas Early Learning, LLC v. MDC Properties – Westford Rd, LLC*, 104 Mass.App.Ct. 615, 619 (2024) citing *George v. Nat'l Water Main Cleaning Co.*, 477 Mass. 371, 375 (2017). Practically, a valid liquidated damages provision forecloses the right to seek actual damages.

If a party agrees to liquidated damages and later wants to contest the provision and seek actual damages, that party has to demonstrate as a matter of law that the liquidated damages provision is unenforceable. *Id*. citing *NPS* at 419. That is no easy feat, particularly if the parties to the subject contract are so-called sophisticated businesspeople.

Liquidated damages provisions represent a tradeoff between the peace of mind that comes with knowing precisely what a non-breaching party is entitled to collect in the event of breach and the non-breaching party's right to prove and collect actual damages. *Id*. citing *NPS, LLC v. Minihane*, 451 Mass. 417, 423 (2008). Determining whether to agree to a liquidated damages provision involves risk assessment and financial analysis. The only right decision is the one that best suits the parties.

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