

Liquidated Damages

Legal Tools March 2023

What are Liquidated Damages?

A contractually agreed upon amount the buyer will owe the seller in the event the buyer breaches the contract

Actual Damages vs. Liquidated Damages

Actual Damages

The actual loss suffered by the non-breaching party (often specific amounts from receipts and invoices)

Liquidated Damages

A contractually agreed upon estimate of actual damages



Liquidated Damages Rules

1. Must be a reasonable estimation at the time of contract
2. Liquidated damages are the amount actually paid
3. Residential 1-4 where buyer intends to occupy, 3% or less is presumed valid
4. Provision must be separately signed/initialed
5. Provision must be 10-point bold type (or in red, 8-point bold type)
6. When multiple payments:
 - A. Total must satisfy #1, #2 and #3
 - B. Each payment must satisfy #4 and #5

RPA-CA:, Paragraph 5A(3)

(3) RETENTION OF DEPOSIT: Paragraph 29, if initialed by all Parties or otherwise incorporated into this Agreement, specifies a remedy for Buyer's default. Buyer and Seller are advised to consult with a qualified California real estate attorney: (i) Before adding any other clause specifying a remedy (such as release or forfeiture of deposit or making a deposit non-refundable) for failure of Buyer to complete the purchase. Any such clause shall be deemed invalid unless the clause independently satisfies the statutory liquidated damages requirements set forth in the Civil Code; and (ii) Regarding possible liability and remedies if Buyer fails to deliver the deposit.

RPA-CA:, Paragraph 29

29. **LIQUIDATED DAMAGES** (By initialing in the space below, you are agreeing to Liquidated Damages):

If Buyer fails to complete this purchase because of Buyer's default, Seller shall retain, as liquidated damages, the deposit actually paid. If the Property is a dwelling with no more than four units, one of which Buyer intends to occupy, then the amount retained shall be no more than 3% of the purchase price. Any excess shall be returned to Buyer. Release of funds will require mutual, Signed release instructions from both Buyer and Seller, judicial decision or arbitration award. AT THE TIME OF ANY INCREASED DEPOSIT BUYER AND SELLER SHALL SIGN A SEPARATE LIQUIDATED DAMAGES PROVISION INCORPORATING THE INCREASED DEPOSIT AS LIQUIDATED DAMAGES (C.A.R. FORM DID).

Buyer's Initials _____ / _____

Seller's Initials _____ / _____

Practice Notes

1. Liquidated damages limited to deposit actually paid. So what happens if no deposit is made? See next slide.
2. 3% Cap for Residential 1-4 unit properties where buyer intends to occupy – If deposit is 3% or less, Seller gets deposit actually paid. If deposit is over 3%, Seller gets 3% and must return overage (unless Seller can prove validity of excess)

What if the deposit is not made?


(3) **RETENTION OF DEPOSIT:** Paragraph 29, if initialed by all Parties or otherwise incorporated into this Agreement, specifies a remedy for Buyer's default. **Buyer and Seller are advised to consult with a qualified California real estate attorney:** (i) Before adding any other clause specifying a remedy (such as release or forfeiture of deposit or making a deposit non-refundable) for failure of Buyer to complete the purchase. Any such clause shall be deemed invalid unless the clause independently satisfies the statutory liquidated damages requirements set forth in the Civil Code; and (ii) **Regarding possible liability and remedies if Buyer fails to deliver the deposit.**

Why contact an attorney?

- Possibly, the liquidated damage clause does not apply, and the general rule of damages applies instead.
- Possibly, the amount paid, nothing, is the allowable damages pursuant to the liquidated damages clause - Is this interpretation really fair?

C.A.R. Form DID

- Used when Buyer increases deposit
- Includes optional liquidated damages clause
- Without this form, increased deposits are not subject to the liquidated damages provision!



**DELIVERY OF INCREASED DEPOSIT
AND LIQUIDATED DAMAGES ADDENDUM**
(To be used at time increased deposit is paid, not with offer or counter offer)
(C.A.R. Form DID, 12/21)

The following terms and conditions are hereby incorporated into the Purchase Agreement, OR Other _____
("Agreement"), dated _____
on property known as _____ ("Property"),
between _____ ("Buyer")
and _____
("Seller"). Buyer and Seller are referred to as the "Parties."

1. By depositing on _____ (date) the sum of _____ Dollars (\$ _____) by
 cash cashier's check personal check wired funds or _____,
payable to _____, Buyer hereby increases the total deposit to
_____ Dollars (\$ _____).

2. IF BUYER AND SELLER HAVE AGREED TO LIQUIDATED DAMAGES IN THE AGREEMENT, THE FOLLOWING
LIQUIDATED DAMAGES PROVISION IS (IS NOT) HEREBY INCORPORATED IN AND MADE A PART OF THIS
ADDENDUM.

If Buyer fails to complete this purchase because of Buyer's default, Seller shall retain, as liquidated damages,
the deposit actually paid. If the Property is a dwelling with no more than four units, one of which Buyer
intends to occupy, then the amount retained shall be no more than 3% of the purchase price. Any excess shall
be returned to Buyer. Release of funds will require mutual, Signed release instructions from both Buyer and
Seller, judicial decision or arbitration award.

The undersigned have read and acknowledge receipt of a copy of this Increased Deposit/Liquidated Damages
Addendum.


SELLER _____ Date _____
SELLER _____ Date _____
BUYER _____ Date _____
BUYER _____ Date _____

Buyer has given the additional deposit to Broker who acknowledges receipt of the additional deposit.

Real Estate Broker _____
By _____ Date _____

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DELIVERY OF INCREASED DEPOSIT AND LIQUIDATED DAMAGES ADDENDUM (DID PAGE 1 OF 1)

C.A.R. Counteroffer Language Paragraph 1A



- When trying to include liquidated damages back into the contract, have all parties go back and initial in the purchase agreement.
- Seller should return the purchase agreement with the counter offer so Buyer knows if it's being initialed. Seller should check the box accepting the purchase agreement subject to attached counter offer.

Disputes

What if the Seller/Buyer won't release the deposit?

Buyers – C.A.R. Sample Letter BDD in zipForm®, Demand for Deposit for Contingency Cancellation

Sellers – C.A.R. Sample Letter SDD in zipForm®, Demand for Deposit Buyer Failure to Close



Practice Notes

1. Sample letters BDD and SDD demand release of the deposit, provide a deadline, and explain that a \$1,000 penalty may be awarded in addition to the deposit.
2. Both letters meet the small claims court requirement that a demand be made for the amount in dispute before filling a complaint.



ADDITIONAL RESOURCES

- **Quick Guide** – [Liquidated Damages](#)
- **Legal Q&A** – [Liquidated Damages and Deposit Disputes](#)
- **C.A.R. Forms and Sample Letters**
 - RPA-CA – California Residential Purchase Agreement and Joint Escrow Instructions
 - DID – Delivery of Increased Deposit and Liquidated Damages Addendum
 - BDD- Demand for Deposit for Contingency Cancellation
 - SDD – Demand for Deposit Buyer Failure to Close