

# LIQUIDATED DAMAGES





# What are Liquidated Damages?

Liquidated Damages | li·qui·da·ted da·ma·ges

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

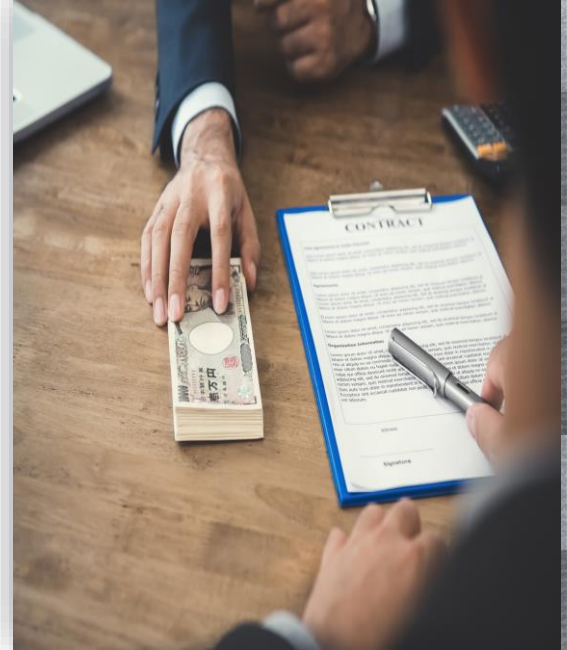
# Actual Damages vs. Liquidated Damages

## 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)

5. **ADDITIONAL TERMS AFFECTING PURCHASE PRICE:** Buyer represents that funds will be good when deposited with Escrow Holder.

**A. DEPOSIT:**

- (1) **INITIAL DEPOSIT:** Buyer shall deliver deposit directly to Escrow Holder. If a method other than wire transfer is specified in **paragraph 3D(1)** and such method is unacceptable to Escrow Holder, then upon notice from Escrow Holder, delivery shall be by wire transfer.
- (2) **INCREASED DEPOSIT:** Increased deposit specified in **paragraph 3D(2)** is to be delivered to Escrow Holder in the same manner as the Initial Deposit. If the Parties agree to liquidated damages in this Agreement, they also agree to incorporate the increased deposit into the liquidated damages amount by signing a new liquidated damages clause (C.A.R. Form DID) at the time the increased deposit is delivered to Escrow Holder.
- (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 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.



## Practice Notes

1. Liquidated damages limited to deposit actually paid. No deposit, no liquidated damages.
2. 3% Cap – 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)

# 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!



# C.A.R. Counter Offer Language

## Paragraph 1A



1. When trying to include liquidated damages back into the contract, have all parties go back and initial in the purchase agreement.
2. 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&As – 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/Liquidated Damages Addendum
  - ◎ BDD- Demand for Deposit for Contingency Cancellation
  - ◎ SDD – Demand for Deposit Buyer Failure to Close