

What are Liquidated Damages?

By [Melissa Dewey Brumback](#)

[Adopted from [Construction Law in North Carolina](#) 9/30/2010]



What are Liquidated Damages?

Liquidated Damages are a sum which a party to a contract agrees to pay or a deposit he agrees to forfeit, if he breaks some promise. In the construction realm, liquidated damages (or “LDs”) usually involve money damages for time delays on a construction project. Typically, a contract will state that time is “of the essence” and that for every day past the scheduled completion date (as modified by change orders & directives) a set amount is due from the contractor to the owner.

When can you get liquidated damages? (or, when must you pay liquidated damages?)

Liquidated damages must be specified in the contract up front. They should reflect the reasonable estimate of likely damages that will be incurred if the contractor fails to complete the project timely.

To be enforceable, the amount must have been arrived at by a good-faith effort to estimate in advance the actual damage that would likely ensue from the breach, and they cannot be deemed “penalties.” [Eastern Carolina Internal Medicine, P.A. v. Faidas](#), 149 N.C.App. 940, 564 S.E.2d 53 (2002).

Why?

The purpose of liquidated damages is to reasonably compensate the non-breaching party (typically, the owner for construction delays) which it will likely incur as a result of the breach (e.g., the extended completion date results in lost rent and increase finance charges). Without the liquidated damages provision, the parties would be forced to argue about each alleged cost the owner incurred because of the delay. With liquidated damages, the amount is known ahead of time which should (theoretically) lead to fewer arguments later.

When doesn't the provision work?

Two words—**concurrent delay**. If the owner is delaying the project (through, for example, failure to deliver/install owner-provided equipment), but the contractor is also behind on completion, the two delays may run at the same time—hence “concurrent delay”. In such a situation it becomes difficult if not altogether impossible to separate delays and delay damages. Of course, if the entire delay is owner-related, no liquidated damages can be assessed.

Take-away message

Liquidated damage provisions, if carefully and properly drafted, are enforced in North Carolina. You should know your schedule requirements prior to signing on the dotted line and, if necessary, accelerate your work to complete on time. If you are the owner, however, you also have responsibilities not to interfere with the schedule if you hope to have a chance at recovering liquidated damages from a contractor who delivers a project late.

Questions? Comments? Experience with the joys (and sorrows) of LDs? Drop me a note at [mbrumback at rl-law dot com](mailto:mbrumback@rl-law.com).

Melissa Dewey Brumback is a Raleigh, NC attorney who focuses on construction law. She blogs on construction law at www.constructionlawNC.com. Her twitter handle is @MelissaBrumback.

© Melissa Dewey Brumback 2010. All rights reserved.

Photo "[Water drop bouncing off the water surface](#)" by konradc via Picasa/Creative Commons License.