

503.94 CONTRACTS - ISSUE OF COMMON LAW REMEDY - VALIDITY OF
LIQUIDATED¹ DAMAGES PROVISION.

The (*state number*) issue reads:

"Did the plaintiff and the defendant enter into a valid agreement stipulating the amount of damages defendant would owe the plaintiff in the event the defendant breached the contract?"

(You will answer this question only if you have answered the (*state number*) issue "Yes" in favor of the plaintiff.)

On this issue the burden of proof is on the plaintiff.² This means the plaintiff must prove, by the greater weight of the evidence, two things:³

First, that the damages which the plaintiff and the defendant might reasonably anticipate from a breach of their (*name contract*) were, at the time they entered into (*name contract*),⁴ difficult to ascertain because of their indefiniteness or uncertainty.

And Second, that the amount of damages stipulated by the plaintiff and the defendant was either a reasonable estimate of the damages which probably would be caused by a breach or is reasonably proportionate to the damages which have actually been caused by the breach.

(In deciding whether the amount of damages stipulated by the parties was a reasonable estimate of the damages which probably would be caused by a breach, you may consider

[the nature of the contract]⁵

[the words used by the parties to express their agreement]⁶

[the intentions of the parties]⁷

[the difficulty of proving the damages which might otherwise result from a breach of the contract]⁸

[the number of ways the contract could be breached and the varying damages that might result from each type of breach]⁹

[the relative bargaining power of the parties]¹⁰

[the relative sophistication of the parties].¹¹)

(The damages stipulation must be a sum certain or a mathematical formula that will result in a sum certain.)¹²

(If the damages anticipated by the parties were reasonably estimated, they are recoverable even though no actual damages are suffered.)¹³)

Finally, as to this (*state number*) issue on which the plaintiff has the burden of proof, if you find by the greater weight of the evidence that the plaintiff and the defendant entered into a valid agreement stipulating the amount of damages the defendant would owe the plaintiff in the event the defendant breached the contract, then it would be your duty to answer this issue "Yes" in favor of the plaintiff.

If, on the other hand, you fail to so find, then it would be your duty to answer this issue "No" in favor of the defendant.

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1. As stated in *Knutton v. Cofield*, 273 N.C. 355, 361, 160 S.E.2d 29, 34 (1968):
"Liquidated damages are a sum which a party to a contract agrees to pay or a deposit which he agrees to forfeit, if he breaks some promise, and which, having been arrived at by a good-faith effort to estimate in advance the actual damage which would probably ensue from the breach, are legally recoverable or retainable . . . if the breach occurs. A penalty is a sum which a party similarly agrees to pay or forfeit . . . but which is fixed, not as a pre-estimate of probable actual damages, but as a punishment, the threat of which is designed to prevent the breach, or as security . . . to insure that the person injured shall collect his actual damages." (quoting *McCormick Damages*, § 146 (1935) (emphasis in original)).

2. Whether a liquidated damages amount is a reasonable estimate of the damages that would likely result from a default is a question of fact. *Green Park Inn, Inc. v. Moore*, 149 N.C. App. 531, 540, 562 S.E.2d 53, 59 (2002). See also *Coastal Leasing Corp. v. T-Bar S Corp.*, 128 N.C. App. 379, 384-85, 496 S.E.2d 795, 799 (1998).

3. *Knutton*, 273 N.C. at 361, 160 S.E.2d at 34-35; *Eastern Carolina Internal Medicine, P.A. v. Faidas*, 149 N.C. App. 940, 945-46, 564 S.E.2d 53, 56, aff'd, 356 N.C. 607, 572 S.E.2d 780 (2002); *Green Park Inn, Inc.*, 149 N.C. App. at 538, 562 S.E.2d at 58; *Ledbetter Bros., Inc. v. North Carolina Department of Transportation*, 68 N.C. App. 97, 105, 314 S.E.2d 761, 767 (1984).

4. The difficulty of estimating damages must be evaluated from the circumstances of the parties at the time of contracting. *Green Park Inn*, 149 N.C. App. at 538, 562 S.E.2d at 58.

5. *Bradshaw v. Millikin*, 173 N.C. 432, 435, 92 S.E. 161, 163 (1917); *Eastern Carolina Internal Medicine, P.A.*, 149 N.C. App. at 947, 564 S.E.2d at 57.

6. The use of such term as "penalty" or "liquidated damages" are not conclusive, however. *Bradshaw*, 173 N.C. at 434-35, 92 S.E. at 163. A recitation that damages will be hard to ascertain does carry some weight. *Ledbetter Bros., Inc.*, 68 N.C. App. at 105, 314 S.E.2d at 767.

7. *Id.*; *Eastern Carolina Internal Medicine, P.A.*, 149 N.C. App. at 947, 564 S.E.2d at 57.

8. *Knutton*, 273 N.C. at 362, 160 S.E.2d at 35; *Bradshaw*, 173 N.C. at 435, 92 S.E. at 163; *Eastern Carolina Internal Medicine, P.A.*, 149 N.C. App. at 947, 564 S.E.2d at 57.

9. *Ledbetter Bros., Inc.*, 68 N.C. App. at 105-06, 314 S.E.2d at 767.

10. *Coastal Leasing Corp.*, 128 N.C. App. at 385, 496 S.E.2d at 799.

11. *Eastern Carolina Internal Medicine, P.A.*, 149 N.C. App. at 947, 564 S.E.2d at 57.

12. *First Value Homes, Inc. v. Morse*, 86 N.C. App. 613, 616-17, 359 S.E.2d 42, 44 (1987).

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13. *Knutton*, 273 N.C. at 362-63, 160 S.E.2d at 35-36.