

Liquidated Damages as Contract Remedy

Fact Situation #1. John is interested in renting an apartment from Mary, but he wants his wife to take a look at it first. He's worried, though, that someone else will rent the place before he can get back with his wife. John and Mary agree that John will pay Mary \$200 to hold the apartment for him, and not rent it to anyone else, for three days. John does not return with his wife and on the fourth day Mary rents the apartment to someone else. John sues to get his \$200 back. What do you do?

Fact Situation #2. John is interested in renting an apartment from Mary, but he wants his wife to take a look at it first. He's worried, though, that someone else will rent the place before he can get back with his wife. John tells Mary he wants to go ahead with the deal, and promises to return tomorrow with his wife to sign the written lease. Mary agrees to rent the apartment to John, and tells him that she requires a non-refundable \$200 deposit, which will be credited against his first month's rent and if when he returns to sign the lease. John's wife hates the place, and so the deal falls through. John sues to get his \$200 back. How is this different from Fact Situation #1?

Liquidated damages: "a sum which a party to a contract agrees to pay or deposit which he agrees to forfeit if he breaks some promise . . . arrived at by a good-faith effort to estimate in advance the actual damage which would probably ensue from the breach."

Penalty: "a sum which a party similarly agrees to pay or forfeit, . . . but which is fixed, not as a pre-estimate or probable actual damages, but as a punishment, the threat of which is designed to prevent the breach."

McCormick, *Damages* §146 (1935)

A liquidated damages provision is enforceable under North Carolina law when:

1. damages are speculative or difficult to ascertain, and
2. the amount stipulated is a reasonable estimate of probable damages, OR the amount stipulated is reasonably proportionate to the damages actually caused by the breach.

The party challenging the validity of the provision has the burden of demonstrating that it does not satisfy the requirements for enforceability.