




# Liquidated Damages Provisions and Limitations on Liability



Prepared by:  
Francis X. Taney Jr.,  
Taney Legal LLC



**LORMAN**®

Published on [www.lorman.com](http://www.lorman.com) - June 2018

Liquidated Damages Provisions and Limitations on Liability, ©2018 Lorman Education Services. All Rights Reserved.

## INTRODUCING

Lorman's New Approach to Continuing Education

# ALL-ACCESS PASS

The All-Access Pass grants you **UNLIMITED** access to Lorman's ever-growing library of training resources:

- ☑ Unlimited Live Webinars - 120 live webinars added every month
- ☑ Unlimited OnDemand and MP3 Downloads - Over 1,500 courses available
- ☑ Videos - More than 1300 available
- ☑ Slide Decks - More than 2300 available
- ☑ White Papers
- ☑ Reports
- ☑ Articles
- ☑ ... and much more!

Join the thousands of other pass-holders that have already trusted us for their professional development by choosing the All-Access Pass.



**Get Your All-Access Pass Today!**

# SAVE 20%

Learn more: [www.lorman.com/pass/?s=special20](http://www.lorman.com/pass/?s=special20)

Use Discount Code Q7014393 and Priority Code 18536 to receive the 20% AAP discount.

\*Discount cannot be combined with any other discounts.

## **Liquidated Damages Provisions and Limitations on Liability**

*Written by Francis X. Taney Jr.*

The typical “American rule” with respect to damages is that absent a contractual limitation to the contrary, in the event of a contractual breach, the breaching party is liable for all damages that were foreseeable and that proximately flow from the breach. *See Atlas Truck Leasing, Inc. v. First NH Banks, Inc.*, 808 F.2d 902 (1<sup>st</sup> Cir. 1987). In light of this potential exposure, savvy vendors often ask for limitations on liability. Often these provisions will include limitations on consequential and/or punitive damages. Except in very limited circumstances, these provisions are enforceable, especially in the commercial contract context. *See, e.g., High Plains Natural Gas Co. v. Warren Petroleum Co., A Div. Of Gulf Oil Corp.*, 875 F.2d 284 (10<sup>th</sup> Cir. 1989).

The task in addressing requests for limitation of contractual liability is to ensure that you retain appropriate remedies and recourse in the event of a breach. At the minimum, the contract should expressly require the vendor to repair and/or replace any

defective work at the vendor's expense. The customer should also retain the right to remove the vendor and have a replacement vendor complete the work in the event that the vendor cannot repair or replace defective work. The contract should also require the return of any fees charged for work that the vendor is unable to complete satisfactorily.

In instances where the vendor is earning a larger fee, it is more appropriate and more likely that a customer will be to obtain the right to recover some multiple of the vendor's fees in the event that the vendor's mistakes cause consequential damages. In addition, a customer should exclude damages caused by intentional misconduct from the scope of any damages limitation provisions.

In considering requests for damages limitations provisions, it will often be appropriate to consider potential exposure to claims by third parties arising from the vendor's errors or omissions. These claims may come from your customers or clients damaged by the vendor's mistakes, or from unrelated third parties.

The typical contractual tool to address these types of claims is an indemnification provision. In this context, the purpose of an indemnification provision is to require the breaching party to make the non-breaching party whole in the event that the non-

breaching party faces claims from third parties because of the breaching party's errors or omissions. *Red Roof Inns, Inc. v. Scottsdale Ins. Co.*, 419 Fed.Appx. 325 (4<sup>th</sup> Cir. 2011). Common uses of indemnification provisions include protection from third party claims for intellectual property infringement, as well as claims arising from intentional misconduct, or from property damage or bodily injury.

Finally, a customer should keep in mind that in the event that a vendor lacks substantial resources, an indemnification provision may not afford as much practical recourse as would be ideal. For this reason, requiring the vendor to obtain appropriate insurance coverages may serve as an effective backstop in the event all else fails.

In some circumstances, it will be difficult or impossible to calculate the amount of damages that a breach will cause. Liquidated damages provisions are potentially useful in these situations.

Liquidated damages provisions are contract terms setting an artificial measure of damages. To be enforceable, courts typically require that they bear some kind of rational relationship to the size of the likely actual damages, and to not be the product of overreaching by one of the contractual parties. *Space*

*Master Intern., Inc. v. City of Worcester*, 940 F.2d 16 (1<sup>st</sup> Cir. 1991).

By using liquidated damages provisions appropriately, parties can avoid costly and difficult litigation over quantifying damages, and ensure the availability of a meaningful remedy in such situations.

The material appearing in this website is for informational purposes only and is not legal advice. Transmission of this information is not intended to create, and receipt does not constitute, an attorney-client relationship. The information provided herein is intended only as general information which may or may not reflect the most current developments. Although these materials may be prepared by professionals, they should not be used as a substitute for professional services. If legal or other professional advice is required, the services of a professional should be sought.

The opinions or viewpoints expressed herein do not necessarily reflect those of Lorman Education Services. All materials and content were prepared by persons and/or entities other than Lorman Education Services, and said other persons and/or entities are solely responsible for their content.

Any links to other websites are not intended to be referrals or endorsements of these sites. The links provided are maintained by the respective organizations, and they are solely responsible for the content of their own sites.