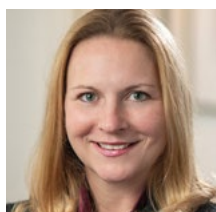


LIQUIDATED DAMAGES IN WEST VIRGINIA PURCHASE AND SALE AGREEMENTS



BRIAN P. JETT is a Member in the Business Law practice group of Jackson Kelly PLLC as well as the Real Estate, Energy, and Cannabis industry groups, specializing in real estate transactions, zoning and subdivision, renewable energy, natural resource development, and medical cannabis issues. Brian's practice focuses on assisting clients in all phases of wind and solar project development, drafting and reviewing title insurance commitments, coordinating and conducting real estate closings, and preparing complex coal, oil, and gas title opinions for Colorado, Ohio, Pennsylvania, and West Virginia. He also provides counsel to clients on medical cannabis issues in West Virginia under the West Virginia Medical Cannabis Act. Brian assists clients in obtaining subdivision approvals, advising on state and local zoning laws, as well as conducting legal research and analyzing coal, oil, and gas title issues, specifically tax sale irregularities, royalty versus oil and gas in place reservations, invalid and/or incorrect assessments and adverse claims on title, and acreage discrepancies. Prior to attending law school, Brian served as a title abstractor for a West Virginia-based company where he researched surface and mineral title ownership, completed title files for lease takeoffs and prepared reports for clients and attorneys regarding oil and gas ownership. He also served as a petroleum landman for a land company where he negotiated and reviewed oil and gas leases. He was named a West Virginia Super Lawyers® Rising Star for Real Estate Law (2022) and is a member of Delta Mu Delta Honor Society.



MICHELLE ELMORE WOOTON is a Member in the Banking, Renewable Energy, Oil and Gas, and Coal industry groups of Jackson Kelly PLLC, focusing primarily on wind and solar development, real estate development, and commercial leasing. Michelle's practice focuses on both commercial real estate development and mineral development. She has significant experience in mineral law and has represented clients in connection with multiple transactions. She handles all aspects of mineral development in all energy realms, with an emphasis on solar and wind renewable energy. Her mineral development practice includes assisting renewable energy developers and financial lenders with title work, financing, curative actions, leases, zoning, and transactional agreements. Michelle practices in negotiated acquisitions, development, and financing for commercial projects. She also has significant experience in the convenience store and gas station law arena.

Michelle is a leader within the firm, serving as the co-leader of the firm's internal land and natural resource development practice group. She was selected by her peers for inclusion in The Best Lawyers in America® for Oil and Gas Law (2018-2023). She is a Fellow with the American College of Real Estate Lawyers, member of Order of the Coif (2004), and was executive student works editor of the West Virginia Law Review.

This article examines 13 questions on liquidated damage remedies in real estate purchase contracts under the laws of West Virginia in accordance with an ongoing American College of Real Estate Lawyers (ACREL) project by the Acquisitions Committee.

1. May the Seller choose specific performance instead of liquidated damages (so that liquidated damages are not an exclusive remedy)?

Specific performance has been an available remedy for a breach of obligations under a real estate contract for the entire jurisprudence of West Virginia.¹ A

seller is able to file a suit for specific performance.² The remedy is available in certain circumstances so long as the real estate contract does not mandate otherwise.³ The presence of a liquidated damages clause does not preclude an action for specific performance.⁴ A contract can set forth any combination of damages and the parties shall be permitted to set forth multiple damage claims for a breach of such contract.⁵ Specific performance is not a matter of right and is examined on a case-by-case basis. It is granted at the discretion of the court after examining all facts and circumstances related to the purchase of real property.⁶

West Virginia jurisprudence generally considers specific performance to be an extraordinary remedy, especially where the underlying contract does not specifically mandate specific performance.⁷ However, because of the unique nature of real property, specific performance is routinely awarded for purchase contracts in West Virginia.⁸

Specific performance requires that the party seeking such remedy be without fault as related to the contract or transaction. In an action for specific performance, there cannot be actual fraud or mistake by the non-breaching party asserting the action for specific performance.⁹ Additionally, the requirement of specific performance cannot cause hardship or oppression.¹⁰ Courts require that the party seeking specific performance of a contract not be in breach of that contract for any reason.¹¹ Misrepresentation can be a defense to a suit for specific performance.¹²

2. May the Seller choose actual damages instead of liquidated damages (so that liquidated damages are not an exclusive damage remedy)?

If the terms of the purchase agreement clearly and unambiguously address a seller's rights to liquidated damages, then the express terms of purchase agreement will likely determine the seller's right to choose between the two, provided the liquidated damages provision is valid.¹³ Thus, while no jurisdictional case law is directly on-point, a West Virginia court would probably—though not certainly—conclude that an unambiguous contractual provision which allows a seller to choose between liquidated damages and actual damages is enforceable.

There is no jurisdictional authority that directly addresses the question of whether a seller may elect to pursue actual damages, rather than liquidated damages, if the parties' written contract *only* provides for liquidated damages. That said, West Virginia's courts are generally reluctant to "add" terms to written agreements.¹⁴ Thus, if a purchase and sale agreement is silent as to whether a seller may choose between actual and liquidated damages, a West Virginia court would probably conclude that the seller only has the right to pursue liquidated damages.

Notably, however, if a buyer's breach amounts to an outright repudiation of its obligations to a seller, and the seller's actual damages far exceed its agreed-upon liquidated damages, the seller might successfully argue that it is entitled to actual damages. The District Court for the Southern District of West Virginia briefly considered this issue in *Continental Realty Corp. v. Andrew J. Crevolin Co.*¹⁵ While *Continental* did not involve a real estate purchase agreement, the court's analysis and conclusions are instructive. Here, a hotel owner/operator (Continental) entered into a written agreement with a general contractor (Oakridge), pursuant to which Oakridge agreed to construct a Holiday Inn in downtown Huntington, West Virginia. The contract between Continental and Oakridge called for liquidated damages in the sum of \$1,333.33 per day of delay in Oakridge's completion of the project. Oakridge, however, did not merely delay its performance, but "simply abandoned the project in a manner which was not only violative of their contractual obligations, but in a manner so as to leave the project in such a condition as to be subject to serious water damage."¹⁶ Thus, the Court concluded:

in cases of abandonment as here, and as distinguished from mere delay in completion, the better and more equitable rule is that abandonment is a breach, voiding the liquidated damage clause. This is especially so where the abandonment results in actual damages far in excess of the liquidated amount called for under the contract. To do otherwise would be to award the wrongdoer. The liquidated damage clause was contemplated by the parties to cover normal delays. When Oakridge abandoned the project as it did, it repudiated the contract and actual damages may be recovered.¹⁷

Ultimately, in any jurisdictional scenario, the terms of the purchase and sale agreement between the seller and buyer will weigh heavily on the seller's right to elect between liquidated and actual damages. The parties to a purchase and sale agreement should therefore make every effort to ensure that the terms of the agreement clearly, precisely, and comprehensively address the parties' respective

rights regarding the applicability of liquidated and actual damages, as well as the seller's right to choose between the two.

3. If the Seller may choose liquidated damages or actual damages, may it have both?

No, West Virginia cases do not contemplate awarding both actual and liquidated damages. If there is an enforceable liquidated damages clause, a party is entitled to recover liquidated damages only. West Virginia courts abide by the theory that the contracting parties' intent should be given effect if they choose to contract around the default rules.¹⁸ However, in the event that a contractual liquidated damages clause is held to be an unenforceable penalty, the remedy for breach will revert to the default remedy at law, actual damages.

In lieu of actual damages, parties to a contract for the sale of real estate may establish liquidated damages in the event of breach.

Parties may properly contract for liquidated damages (1) where such damages are uncertain and not readily capable of ascertainment in amount by any known or safe rule, whether such uncertainty lies in the nature of the subject, or in the particular circumstances of the case; or (2) where from the nature of the case and tenor of the agreement, it is apparent that the damages have already been the subject of actual fair estimate and adjustment between the parties.¹⁹

This provides certainty between the contracting parties. However, as noted, a party may be forced to settle for its actual damages. It has long been the law in West Virginia that if liquidated damages are disproportionately high in relation to actual damages, the contractual liquidated damages clause will be invalidated as an unenforceable penalty.²⁰ In such instances, the remedy is actual damages only.

Finally, it should be noted that a seller's claim for liquidated damages does not necessarily preclude the seller from seeking damages based on injuries that are not covered by the liquidated damages clause. It is, in fact, well established in West Virginia

that "[a] provision for liquidated damages will not prevent recovery for actual damages for events which are not covered by the liquidated damages clause, unless the contract expressly provides that damages other than those enumerated shall not be recovered."²¹

4. If the Seller may choose liquidated damages or actual damages, but not both, when must it decide?

If a contract calls for liquidated damages, and those damages are reasonable and not considered a penalty, then the parties decide at the execution of the contract that liquidated damages will be the damages awarded under a contract.²² However, if the liquidated damages clause does not cover events and/or damages from a breach, then actual damages can also be sought at the date of the breach absent a provision in the purchase agreement stating that liquidated damages are the only damages to be awarded.²³

5. Is there an applicable statute addressing liquidated damages clauses?

No, West Virginia does not have a liquidated damages statute related to the purchase and sale of real estate. However, West Virginia does have a statute addressing liquidated damages which applies to the purchase and sale of goods. West Virginia Code section 46-2-178 (Liquidation or Limitation of Damages; Deposits) states the following:

(1) Damages for breach by either party may be liquidated in the agreement but only at an amount which is reasonable in the light of the anticipated or actual harm caused by the breach, the difficulties of proof of loss, and the inconvenience or nonfeasibility of otherwise obtaining an adequate remedy. A term fixing unreasonably large liquidated damages is void as a penalty.

(2) Where the seller justifiably withholds delivery of goods because of the buyer's breach, the buyer is entitled to restitution of any amount by which the sum of his payments exceeds

(a) the amount to which the seller is entitled by virtue of terms liquidating the seller's damages in accordance with subsection (1), or

(b) in the absence of such terms, twenty percent of the value of the total performance for which the buyer is obligated under the contract or \$500, whichever is smaller.

(3) The buyer's right to restitution under subsection (2) is subject to offset to the extent that the seller establishes

(a) a right to recover damages under the provisions of this article other than subsection (1), and

(b) the amount or value of any benefits received by the buyer directly or indirectly by reason of the contract.

(4) Where a seller has received payment in goods their reasonable value or the proceeds of their resale shall be treated as payments for the purposes of subsection (2); but if the seller has notice of the buyer's breach before reselling goods received in part performance, his resale is subject to the conditions laid down in this article on resale by an aggrieved seller (section 2-706).²⁴

6. What is the test for valid liquidated damages clause?

West Virginia has not had the occasion to discuss the validity of liquidated damages in the context of real estate purchase agreements. West Virginia has upheld liquidated damages when set forth in an installment land sale agreement, which could be viewed as a type of real estate purchase agreement.²⁵

Further, the Supreme Court of Appeals of West Virginia has set forth the "black-letter rule on liquidated damages provisions" that would be equally applicable to real estate purchase agreements.²⁶

Parties in West Virginia can contract for liquidated damages in two situations. First, parties can contractually agree to liquidated damages "where such damages are uncertain and not readily capable of ascertainment in amount by any known or safe rule,

whether such uncertainty lies in the nature of the subject, or in the particular circumstances of the case."²⁷ Second, where the "'tenor of the agreement' establish[es] that the parties calculated the liquidated damages 'through actual fair estimate and adjustment.'"²⁸ These two situations need not be connected and can stand independently.

However, "when the amount is grossly disproportionate to the actual damages such a clause in a contract is a penalty clause rather than a liquidated damages provision."²⁹ And such a "penalty clause will not be enforced unless justice clearly demands it."³⁰ In making this determination, one "must look retrospectively to determine whether a disputed liquidated damages clause would impose a penalty if enforced."³¹ Therefore, a liquidated damages clause might be reasonable and enforceable when examining facts associated with the particular instance, but penal and unenforceable in reality.³²

Accordingly, in West Virginia, a liquidated damages clause in a real estate agreement is likely valid when damages would be uncertain or hard to calculate and/or when the parties have taken reasonable efforts to ensure the liquidated damages is a fair estimate of the true damages, and not a penalty.

7. Who has the burden of proof?

As a general rule, the burden is on the breaching party to prove that a liquidated-damages clause is unenforceable.³³ Unfortunately, the Supreme Court of Appeals of West Virginia has not addressed this issue in the context of real estate purchase and sale agreements. Other cases relating to the purchase and sale of property, however, support the conclusion that the party seeking to avoid the liquidated damages provision bears the burden of proof.³⁴

8. As of when is "reasonableness" tested?

West Virginia courts consider reasonableness of a liquidated damages sum as part of the analysis of whether the sum is properly considered an enforceable liquidated damages amount or an unenforceable penalty.³⁵

While the Supreme Court of Appeals of West Virginia has not specifically defined the analysis as a two-part test, the court looks both at reasonableness of the sum at the time of contracting as well as in comparison to the actually-incurred damages arising from the breach.³⁶

9. What percentage of the purchase price is likely acceptable as liquidated damages?

A West Virginia court has enforced liquidated damages clauses where the liquidated damages were approximately 15 percent of the purchase price. In *Stonebraker v. Zinn*, where there was default on an installment contract, the seller retained a \$1,500 down payment and all monthly payments made up to the point of breach.³⁷ That court concluded that the \$189.09 monthly payments paid by the purchaser were reasonable considering the fair rental value of the home.³⁸ In all, the seller retained \$3,850 for a home valued at \$25,000, which the court found not to be an excessive retention.³⁹

The court also noted that, in West Virginia, in conducting this reasonableness analysis, a court should consider expenses and opportunity costs incurred by the seller. Specifically, they should consider “not only the loss of fair rental value to the vendor, but also costs involved in the sale of the property, depreciation, attorney fees and other directly related expenses arising by virtue of the purchaser’s abandonment of the property.”⁴⁰

10. Are actual damages relevant for liquidated damages and, in particular, will liquidated damages be allowed when there are no actual damages?

West Virginia courts have not considered this question in connection with a real estate transaction. However, the question has arisen in the construction context. For example, in *Charleston Lumber Co. v. Friedman*, the court heard a case involving liquidated damages arising out of a contract for construction of a building.⁴¹ There, a contractor was to pay \$10 per day if the building was not completed within the agreed-upon time frame. The court found

that in cases where “a contract fixes liquidated damages, no proof further of damage is required. Proof of actual damage is not necessary.”⁴² Thus, the contractor was forced to pay liquidated damages, even though there was no proof of actual damages caused by the delay.⁴³ However, because West Virginia jurisprudence requires liquidated damages to be examined to ensure that such damages are not penal in nature, actual damages may still be relevant.

11. Is mitigation relevant for liquidated damages?

In West Virginia, courts have recognized that one generally has a duty to mitigate damages: “As a general rule a person whose property is endangered or injured must use reasonable care to mitigate the damages; but such person is only required to protect himself from the injurious consequence of the wrongful act by the exercise of ordinary effort and care and moderate expense.”⁴⁴


12. Is a “shotgun” liquidated damages clause enforceable?

A “shotgun” liquidated damages clause is one under which a party has a right to liquidated damages for any default by the other party, whether or not the default was material. The enforceability of a “shotgun” liquidated damages clause would be determined on a case-by-case analysis. Although parties are free to execute contracts on their own terms, liquidated damages clauses which are grossly disproportionate to actual damages incurred will likely be unenforceable.

13. Does a liquidated damages clause preclude recovery of attorneys’ fees by the Seller?

Though this question has not arisen in the context of a real estate transaction, it has been considered in a case involving a leasehold interest. In *Vance v. Smallridge*, a liquidated damages clause specified the amount for late rent payments.⁴⁵ The contract also stated that attorney’s fees were recoverable in the event of breach.⁴⁶ The Supreme Court of Appeals of West Virginia affirmed the lower court’s ruling that the provision for attorney’s fees was valid as it was

an “arms-length transaction” between two experienced parties.⁴⁷ Thus, courts will enforce provisions for attorney’s fees provisions even where there is a liquidated damages clause.

Moreover, as has already been noted above, courts will consider attorneys’ fees in determining whether the quantity of liquidated damages amounts to an unenforceable penalty.⁴⁸ 

Notes

- 1 Campbell v. Fetterman’s Heirs, 20 W. Va. 398 (1882).
- 2 Summers v. Hively, 88 S.E. 608 (W. Va. 1916).
- 3 Rollyson v. Born, 85 W. Va. 15 (1919).
- 4 Hutchinson v. Gilles, No. 18-0644, 2020 WL 528321 (W. Va. 2020).
- 5 Peerless Carbon Black Co. v. Gillespie, 105 S.E. 517 (W. Va. 1920).
- 6 Gray v. Marion, 76 S.E.2d 585 (W. Va. 1953); Lowther Oil Co. v. Miller-Sibley Oil Co., 44 S.E. 433 (W. Va. 1903).
- 7 Gray, 76 S.E.2d at 585 (noting that “[t]he remedy of specific performance of a contract is not a matter of right in either party, but rests in the sound discretion of the court, to be determined from all the facts and circumstances of the case.”).
- 8 Allegheny Country Farms, Inc. v. Huffman, 787 S.E.2d 626 (W. Va. 2016).
- 9 Brand v. Lowther, 285 S.E.2d 474 (W. Va. 1981).
- 10 Id. at 479.
- 11 Searfoss v. Bowen, 126 S.E. 574, 575 (W. Va. 1925).
- 12 Manning v. Bleifus, 272 S.E.2d 821, 824 (W. Va. 1980)(requiring, however, that fraud, mistake, or misrepresentation be specially pled as a defense).
- 13 See, e.g., Orteza v. Monongalia Cnty. Gen. Hosp., 318 S.E.2d 40, 43 (W. Va. 1984) (quoting Syl. Pt. 2, Bethlehem Mines Corp. v. Haden, 172 S.E.2d 126, 126 (W. Va. 1969)) (“Where the terms of a contract are clear and unambiguous, they must be applied and not construed.”). For a discussion of the enforceability and legality of liquidated damages provisions in West Virginia, see Question No. 6, below.
- 14 See, e.g., Syl. Pt. 3, Cotiga Dev. Co. v. United Fuel Gas Co., 128 S.E.2d 626, 628 (W. Va. 1962) (“It is not the right or province of a court to alter, pervert or destroy the clear meaning and intent of the parties as expressed in unambiguous language in their written contract or to make a new or different contract for them.”).
- 15 380 F.Supp. 246, 257 (S.D.W.Va. 1974).
- 16 Id. at 249.
- 17 Id. at 257.
- 18 Syl. Pt. 3, Cotiga Dev. Co. v. United Fuel Gas Co., 128 S.E.2d 626, 633 (W. Va. 1962).
- 19 Stonebraker v. Zinn, 286 S.E.2d 911, 912 (W. Va. 1982).
- 20 Beury v. Fay, 80 S.E. 777, 779 (W. Va. 1914), Syl. Pt. 4, Huntington Eye Assocs., Inc. v. LoCascio, 553 S.E.2d 773, 782 (W. Va. 2001).
- 21 VanKirk v. Green Const. Co., 466 S.E.2d 782, 787 (W. Va. 1995); see also Wolf Creek Contracting Co., LLC v. Nicholas Cnty. Solid Waste Auth., No. 2:19-CV-00672, 2020 WL 5604051, at *6 (S.D.W. Va. Sept. 18, 2020).
- 22 Beaury, 80 S.E. at 779 (W. Va. 1914).
- 23 VanKirk, 466 S.E.2d at 787 (W. V. 1995).
- 24 W. Va. Code § 46-2-178 (2022).
- 25 Stonebreaker, 286 S.E.2d at 912.
- 26 Huntington Eye Associates, Inc. v. LoCascio, 553 S.E.2d 773, 782 (W. Va. 2001).
- 27 Id.
- 28 Gateway Towne Ctr., LLC v. First United Bank & Tr., No. 1:09CV127, 2011 WL 3877010, at *6 (N.D.W. Va. Sept. 2, 2011).
- 29 W. Virginia Pub. Emps. Ins. Bd. v. Blue Cross Hosp. Serv. Inc., 328 S.E.2d 356, 359 (W. Va. 1985).
- 30 Id.
- 31 Gateway Towne Ctr., No. 1:09CV127, 2011 WL 3877010, at *7.
- 32 Id.
- 33 25A C.J.S. Damages § 317.
- 34 Cf. Crowley v. Vaughan, 106 S.E. 539 (W. Va. 1921) (party asserting that offer was withdrawn prior to acceptance bears the burden of proof); Ward v. Moore, 60 W. Va. 615, 55 S.E. 743 (1906) (purchaser seeking abatement of purchase money because of deficiency in quantity of land bears the burden of proving deficiency).
- 35 Stonebraker, 286 S.E.2d at 913 (W. Va. 1982) (“If the provision is considered a penalty, courts generally find the clause void and limit recovery to actual damages.”).
- 36 See Wheeling Clinic v. Van Pelt, 453 S.E.2d 603, 609 (W. Va. 1994) (“in determining whether a clause in a contract stating a sum to be paid in the event of a breach of the contract is liquidated damages or a penalty, the important question is ... the reasonableness in fact of the agreed sum when the contract was made.”); see also Stonebraker, 286 S.E.2d at 912 (“A clause for damages in a contract is a penalty rather than a liquidated damage provision when the amount is grossly disproportional in comparison to the damages actually incurred.”).
- 37 286 S.E.2d at 915.
- 38 Id.
- 39 Id.
- 40 Id. at 914.
- 41 61 S.E. 815, 820 (W. Va. 1908).
- 42 Id.
- 43 Id.

44 Chesser by Hadley v. Hathaway, 439 S.E.2d 459, 465 (W. Va. 1993).

45 No. 11-0689, 2012 WL 3055439, at 2 (W. Va. June 22, 2012).

46 Id. at 1.

47 Id.

48 See Stonebraker, 286 S.E.2d at 914.