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ATLANTA BUILDING NEWS

GAHBA PARTNERS WITH BOYS & GIRLS CLUB TO HIGHLIGHT CAREERS IN CONSTRUCTION

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THE AFFORDABLE HOUSING CREDIT IMPROVEMENT ACT AND HOW IT WILL IMPACT HOMEBUILDING

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Greater Atlanta Home Builders Association

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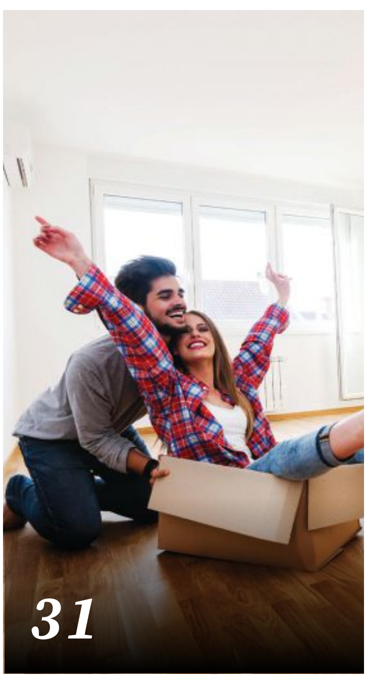

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LIQUIDATED DAMAGES PROVISIONS

When a party breaches a contract, the non-breaching party generally can recover the actual damages resulting from that breach. However, proving the amount of those damages in court or in arbitration can be time-consuming, expensive, challenging and sometimes legally impossible.

To avoid having to prove actual damages, contracting parties often agree in their contracts that a specific amount of damages can be recovered in the event of future breaches of the contract. These provisions are generally known as "liquidated damages" provisions.

Common examples of liquidated damages provisions are those allowing a seller to retain earnest money or a construction deposit where a buyer fails to close, and those allowing a party to recover damages for delay in a specified amount per day for the failure of the other party to close on time.

In Georgia, not all liquidated damages provisions are enforceable. To be enforceable, the provision must meet all of the following requirements. First, the liquidated damages provision must be binding for both parties. It is unenforceable if the non-breaching party has either an option to recover actual damage instead of liquidated damages or the right to recover both. However, a liquidated damages provision will not be invalidated by limiting it to certain breaches or by including an option to seek specific performance instead of the liquidated damages.

Second, at the time of contracting, the actual damages covered by a liquidated damages provision must be difficult or impossible for the parties to accurately estimate. Just because complex calculations may be required, does not mean that damages will be deemed difficult to estimate.

Third, the parties must not intend the money stipulated in a liquidated damages provision to be a penalty. The goal of an enforceable liquidated damages provision is to compensate for loss resulting from a breach, while the goal of a penalty is to deter a party from breaching or to punish a party for doing so. If the specified amount of damages plainly exceeds the likely amount of actual damages, a court or arbitrator may conclude that it is an unenforceable penalty. Normally, the party's intent is determined from the wording of the liquidated damages provision, but labels alone are not decisive. A clause can provide for "liquidated damages" without that term being used, and the use of that term will not save an otherwise unenforceable penalty. Significantly close calls will be deemed penalties. Always avoid using the term "penalty" in a liquidated damages provision, and always use the term "liquidated damages."

Fourth, the stipulated amount of damages must be a reasonable estimate, at the time of contracting, of the actual damages likely to result from the covered breaches. If that amount is chosen randomly or for another reason, the provision will be unenforceable. It may also be unenforceable when the same stipulated amount applies to multiple breaches that are likely to result in significantly different amounts of actual damages.

However, never fear, if a court or arbitrator finds that a liquidated damages provision is unenforceable, that does not mean that the non-breaching party is without a damages remedy. It just means that party must seek and prove the amount of actual damages.