

NACM Connect Legal Symposium

The Creditor's Guide to Early Termination Fees: 10 Topics in 60 Minutes

Presented By:

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Today's Speakers

- Amy Pona
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- Donald Mausar
 - Shareholder and Commercial Collection Strategist at Weltman, Weinberg & Reis Co., LPA

Today's Agenda:

10 Topics in 60 Minutes

1. What is an Early Termination Fee/Liquidated Damage Clause?
2. Is there a difference between an Early Termination Fee and a Liquidated Damage Clause?
3. When should your contract include an Early Termination Fee/Liquidated Damage Clause?
4. Why should you consider including an Early Termination Fee/Liquidated Damage Clause?
5. Sample Early Termination Fee/Liquidated Damage Clause

Today's Agenda: 10 Topics in 60 Minutes

6. Is an Early Termination Fee/Liquidated Damage Clause legally enforceable?
7. The use of an Early Termination Fee/Liquidated Damage Clause as part of a collection strategy
8. Legal – ease/case law touch points
9. Wrap up thoughts
10. Questions

What Is an Early Termination Fee/Liquidated Damage Clause?

- Written contract term
- Pre-determined amount
- Non-benefiting party pays
- Aggrieved party receives the compensation
- Encourage parties to honor their commitments

Is there a Difference Between an Early Termination Fee and a Liquidated Damage Clause?

- Early Termination Fee = Punitive Damage
 - Breach not required
 - Due upon termination or “early out”
 - A set amount or calculation
 - Serve to encourage consumers to honor their contracts
- Liquidated Damages = Actual Damage
 - Breach is required
 - Best estimate at time of signing the contract
 - Must be fair, reasonable & proportional
 - Recover what has been lost and make the damaged party whole

When to Include a Liquidated Damage Clause

- Most common in commercial contracts
- Industry specific (construction projects, real estate, franchise agreements, merchant/credit processing, government)
- Actual damages are difficult to determine
- Amount reasonably reflects probable loss & is not punitive

When to Include an Early Termination Fee

- Most common in consumer contracts
- Industry specific (cell phone contracts, gym memberships, leases, long term services contracts)
- Incentivize compliance/penalize early exit
- Recoup any offered discounts, promos, equipment install cost, etc.
- Use with “renewal events” or upgrades

When to Use a Liquidated Damage Clause

- Commercial transaction with sophisticated parties
- Timely delivery or performance is important
- Promotes efficiency in damage calculation
- Actual damages cannot be calculated
- Adds predictability for the parties
- Promotes settlement of disputes in event of breach

When to Use an Early Termination Fee

- Early termination would lead to lost revenue or incentives
- Termination clause without cause exists
- Creatively structure the fee
 - Flat rate
 - Prorate
 - Loss of deposit or incentive value

Sample Liquidated Damage Clause

- In the event of delay in completion of the project, the contractor shall pay liquidated damages to owner in the amount of 5% of the total contract price per business day.
- The parties agree that liquidated damages as described in this agreement are a genuine estimate of owner's foreseeable damages and are owner's sole remedy for such delay.
- Delays caused by Force Majeure events or by actions of owner or contractor shall not constitute a delay resulting in the payment of liquidated damages.

Sample Early Termination Fee

If you buy a device under a term contract and cancel service before it ends, we'll charge you an early termination fee (ETF).

Learn more about early termination fees

We charge you an early termination fee (ETF) if you do both of these things:

- Agree to a contract for wireless service, also known as a service commitment, when you activate or upgrade your device.
- Cancel service before completing the term period.

You may see an ETF if you get a discount on a device when you agree to a service commitment. The final ETF amount depends on the type of device you buy. Example: You purchased a tablet with a 2-year term service commitment but canceled service after 15 full months. The ETF would be \$90 – or \$150 minus \$60 (\$4 times 15 months of completed service).

New or AT&T Certified Like-New device	Early termination fee
Smartphone with data service	\$325, minus \$10 for each full month of completed service commitment
Basic phone, tablet, mobile hotspot, AT&T Wireless Internet, or another connected device	\$150, minus \$4 for each full month of completed service commitment

Is my Liquidated Damage Clause Enforceable?

- The main elements that courts look at:
 - Actual damages are difficult to quantify
 - Amount must be liquidated (i.e. agreed upon in advance)
 - The amount must be reasonable
 - Amount must be used as compensation, not as a **penalty**
 - Must be the exclusive remedy for the type of breach specified

Is my Early Termination Fee Clause Enforceable?

- Main considerations
 - Fee is reasonable
 - Contract should distinguish between terminations with or without cause
 - Provide detail on calculation
 - Legal challenge is often for unjust enrichment

The Use of an Early Termination Fee/Liquidated Damage Clause as Part of Collection Strategy

- Is it easy? – No
- Has to be systematic
- Thoughts on drafting
- Rational base
- Business record footing
- Process
- Billing
- Letters
- Calculations – System driven
- Communication
- Enforcement
- Risk – If any
- Expense

Case Law Touch Point

- In almost every jurisdiction you will find court rulings that support recovery in liquidated damage settings if the facts support such a recovery and if it is well drafted and in alignment with the business rationale.
- Factors to consider: The court, the balance, the parties, the breach, the facts.

Wrap Up Thoughts

- Consider the use of an early termination fee or liquidated damage clause to improve your recovery chances and bargaining position.
- Hidden costs of contract breaches add up.
- When you are obligated to fulfill a contract that obligation should run downstream to protect your business position and minimize or eliminate losses and or improve recoveries.



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