AN EMPIRICAL STUDY OF THE ENFORCEMENT OF LIQUIDATED DAMAGES CLAUSES IN CALIFORNIA AND NEW YORK

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INTRODUCTION

A liquidated damages provision is a contract clause that predetermines the measure of damages in case a party breaches an agreement. Liquidated damages clauses are among the most commonly used contract clauses and are standard practice in most commercial agreements.[1] Parties typically include such clauses in their contracts in an attempt to minimize anticipated litigation time and cost and to avoid the unpredictability of courts' damages calculations. The renegotiation leverage gained from a liquidated damages clause provides incentive for a party to bargain for the inclusion of such a clause, especially if the party considers itself likely to be the nonbreaching party in any potential dispute. However, in reality, the security parties get from including a liquidated damages clause in their agreement is far from absolute. While certain types of liquidated damages clauses are more likely to be enforced than others, these clauses cannot confidently be relied on by practitioners. Despite a common perception to the contrary, this Note will show that such unreliability exists across jurisdictions.

American courts distinguish between valid liquidated damages clauses and penalty clauses. Simply put, a valid liquidated damages clause compensates the nonbreaching party in the case of breach, while a penalty clause, as its name suggests, penalizes the breaching party and by its coercive nature serves to induce performance.[2] The distinction between these two clauses, which is often difficult to make, is an important one: while liquidated damages clauses are enforceable, penalty clauses are unenforceable as being against public policy.[3] Whether courts should continue to follow this distinction has been the subject of extensive scholarly debate. Rather than adding another voice to the clamor, this Note will take the current distinction between liquidated damages and penalty clauses as

1. Tara Naughter, *6 Key Clauses Found in Commercial Contracts*, CONT. WORKS (Nov. 16, 2017), https://www.contractworks.com/blog/6-key-clauses-found-in-commercial-contracts [https://perma.cc/Q7GF-S3ZQ].

2. 24 SAMUEL WILLISTON & RICHARD A. LORD, WILLISTON ON CONTRACTS § 65:3 (4th ed. 1990).

3. *Id.* § 65:1.

given.

Instead, this Note will examine and compare how courts in New York, the most important American contract law jurisdiction,[4] and in California, the state with the largest economy,[5] have applied the distinction in recent years. This Note will discuss trends in enforcement and reasoning gleaned from the detailed study of over fifty of the latest court decisions on the enforceability of liquidated damages clauses in each California and New York. In doing so, this Note will test the validity of two hypotheses. The first hypothesis is that courts across jurisdictions are more likely to enforce liquidated damages clauses if the parties to the agreement are sophisticated. The second hypothesis is that New York courts are more likely than California courts to enforce liquidated damages clauses, and that this difference is most pronounced in consumer contracts.

Part I of this Note will provide an overview of the policy debate regarding whether the law should distinguish between liquidated damages clauses and penalty clauses and thus refuse to enforce penalty clauses. This Part will explain the most important arguments both in favor of and against enforcing penalty clauses and point out an argument regarding the theoretical foundation of liquidated damages.

Part II of this Note will describe the current state of the law of liquidated damages, articulating both the formal doctrine and how recent cases have interpreted it. This Part will outline the research methodology used for this project, give an account of first California and then New York law, before making a preliminary comparison of the approaches taken in the two jurisdictions.

Part III of this Note will discuss current trends in the enforcement of liquidated damages clauses in both California and New York, addressing characteristics of common transaction and clause types.

Part IV of this Note will analyze the importance of parties' sophistication and the negotiation process to courts' decisions on the enforceability of liquidated damages clauses.

This Note will make two significant contributions to the legal scholarship in this area. First, by describing the findings of an extensive empirical case survey, this Note will provide practitioners with an on-the-ground view of how courts actually treat liquidated damages clauses. This

4. Geoffrey P. Miller, *Bargaining on the Red-Eye: New Light on Contract Theory* 4 (NYU Ctr. for Law & Econ., Working Paper No. 08-21, 2008), https://ssrn.com/abstract=1129805 [https://perma.cc/6Q95-RVQV].

5. BUREAU OF ECON. ANALYSIS, GROSS DOMESTIC PRODUCT BY STATE, 3RD QUARTER 2020 (2020), https://www.bea.gov/sites/default/files/2020-12/qgdpstate1220_0.pdf.

will give attorneys and their clients a better understanding of whether to include liquidated damages clauses in their agreements, how to phrase them, and, when considering breaching an agreement, whether a clause is likely to be enforced.

Second, this Note will ultimately draw several significant conclusions from this empirical analysis. The first being that there is no significant difference between California and New York courts' treatment of liquidated damages clauses. Courts in both jurisdictions are more likely to enforce liquidated damages clauses in agreements between sophisticated parties. Further, there is no significant difference between how California and New York courts enforce liquidated damages clauses, both generally and against consumers and unsophisticated parties. This Note argues that this is due, at least in part, to the importance of sophistication and negotiation in courts' determination of the enforceability of liquidated damages clauses. The absence of a significant difference between California and New York courts' enforcement of liquidated damages clauses calls into question the widely held belief that New York courts take a formalist approach to contract law and that this makes New York an appealing jurisdiction for parties to business contracts. While New York law is the law of choice for parties to commercial contracts and generally preferred over California law,[6] where liquidated damages clauses are concerned, parties choosing New York law likely do not receive the benefits they expect from their choice of law.

I. THE POLICY DEBATE SURROUNDING PENALTY CLAUSES

The debate about whether and how courts should enforce liquidated damages clauses is centered around the core of American contract law: freedom of contract. As a general matter, parties to a contract are free to contract for whatever they desire. However, the freedom to contract is not absolute. Parties' freedom is constrained by general principles of equity. Thus, the general rule is that parties may contract for whatever they desire, so long as it does not violate public policy.[7] But what exactly are the constraints required by public policy?

Aside from prohibiting enforcement of contracts involving illegal activity, the main constraint on the freedom of contract by public policy has been the accepted principle that contract law does not award punitive damages.[8] Thus, courts have long distinguished between liquidated damages

6. Miller, *supra* note 4, at 4–5 (stating that in a sample of contracts containing forum selection clauses, almost half of the contracts selected New York courts, whereas only a few chose California courts to resolve their dispute).

7. RESTATEMENT (SECOND) OF CONTRACTS § 356 (AM. LAW INST. 1981).

8. *Id.* § 355.

clauses and penalty clauses, the latter of which have been deemed unenforceable due to their punitive nature. There is no question that liquidated damages clauses that are not punitive should be enforced. The bulk of the policy debate surrounding liquidated damages focuses on two main questions: first, how liquidated damages clauses should be distinguished from penalty clauses; and second, whether or not penalty clauses should be enforced. Arguments regarding both issues are generally rooted in concerns for either fairness or economic efficiency. Somewhat surprisingly, a majority of scholars who have weighed in on the debate have argued that penalty clauses should be enforced, which goes against the currently prevailing doctrine.[9]

A. Arguments Against Enforcing Penalty Clauses

An argument frequently made against enforcing penalty clauses is that penalty clauses discourage efficient breaches. Judge Posner explained this with the following example:

> Suppose a breach would cost the promisee $12,000 in actual damages but would yield the promisor $20,000 in additional profits. Then there would be a net social gain from breach. After being fully compensated for his loss the promisee would be no worse off than if the contract had been performed, while the promisor would be better off by $8,000. But now suppose the contract contains a penalty clause under which the promisor if he breaks his promise must pay the promisee $25,000. The promisor will be discouraged from breaking the contract, since $25,000, the penalty, is greater than $20,000, the profits of the breach; and a transaction that would have increased value will be forgone.[10]

Another argument against enforcing penalty clauses made by Clarkson, Miller, and Muris is that penalty clauses incentivize parties to attempt to induce a breach by the other party.[11] They reason that because the non-performing party would be better off if the performing party breached than if it performed, the non-performing party will be tempted to make it difficult for the performing party to live up to the contract.[12] This in turn would lead to both parties spending more resources: the non-performing party to interfere with performance of its counterpart, and the performing party both

9. Michael Pressman, *The Two-Contract Approach to Liquidated Damages: A New Framework for Exploring the Penalty Clause Debate*, 7 VA. L. & BUS. REV. 651, 660 (2013).

10. Lake River Corp. v. Carborundum Co., 769 F.2d 1284, 1289 (7th Cir. 1985).

11. Pressman, *supra* note 9, at 660–61 ("[P]enalty clauses often—but not always—give rise to situations where there may be an incentive to and prospect of inducing breach." (citing Kenneth W. Clarkson, Roger Leroy Miller & Timothy J. Muris, *Liquidated Damages v. Penalties: Sense or Nonsense?*, 1978 WIS. L. REV. 351, 356)).

12. *Id.* at 661.

to overcome the resistance and to monitor and detect interference.[13] This results in an inefficient transaction.

A further argument is advanced by Paul Rubin.[14] He distinguishes between expectedly self-enforcing and non-self-enforcing contracts.[15] Expectedly self-enforcing contracts are those that remain in force only while both parties to the contract wish to maintain their agreement and both parties may terminate the agreement at any time.[16] Absent an unforeseen change in circumstances, there is no need for external enforcement.[17] According to Rubin, contracts containing valid liquidated damages clauses fall into this category. Non-self-enforcing contracts, on the other hand, are agreements that parties enter into expecting that a third party will settle the agreement, even absent unforeseen changes in circumstances.[18] Rubin reasons that contracts containing penalty clauses fall into this category. Building on the argument by Clarkson, Miller, and Muris, Rubin reasons that even when both parties fulfill their promises under the contract, one party will always have an incentive to claim that the other side breached.[19] Thus, it is the non-self-enforcing nature of contracts containing penalty clauses that suggests that these contracts result in more litigation than contracts without penalty clauses that are self-enforcing.[20] Accordingly, Ruben maintains that penalty clauses impose a social cost in the form of the added burden on the judicial system.[21]

While most arguments focus on incentives to the contracting parties, one argument against enforcing penalty clauses looks at the effect that penalty clauses have on parties other than those involved directly in the contract and on the broader economy. The argument focuses on the effect penalty clauses have on third parties that have entered agreements with a party forced to pay such a penalty in an unrelated contract dispute. Requiring a breaching party to pay a penalty, which is by definition in excess of actual damages, leaves the breaching party with less money to pay its debts to other creditors. This increases the risk of default on debts to other creditors. This in turn increases the breaching party's risk of bankruptcy. Because most contract breaches and bankruptcies occur during economic downturns and

13. *Id.*
14. Paul H. Rubin, *Unenforceable Contracts: Penalty Clauses and Specific Performance*, 10 J. LEGAL STUD. 237, 238 (1981).
15. *Id.*
16. *Id.*
17. *Id.* at 239.
18. *Id.* at 240.
19. *Id.* at 243–44.
20. *Id.*
21. *Id.* at 244.

penalty clauses increase both the risk of default on agreements other than the one already breached, and the risk of bankruptcy, penalty clauses may amplify downturns in the business cycle.[22]

B. Arguments in Favor of Enforcing Penalty Clauses

A straight-forward argument why penalty clauses should be enforced rests simply on the assertion that freedom of contract should not be limited, and courts should not interfere with agreements that parties freely entered. This argument is made by Richard Epstein, who would take the calculation of damages completely out of the hands of courts and instead make all damages "set by agreement and not by any abstract principles of justice, however pleasing and symmetrical they might appear to judges."[23]

Another reason why many scholars argue that penalty clauses should be enforced is that, as Judge Posner put it in *Lake River Corp. v. Carborundum Co.*, penalty clauses are an "earnest of performance."[24] This means simply that having a penalty in place that a party knows it will have to pay in case it breaches lends credibility to the promises made. Under this reasoning, the more punitive the clause, the more credible a party's promise of performance becomes. Drawing on basic economic theory, it is safe to assume that, keeping all else constant, reducing the transaction cost of entering agreements will lead to more agreements being made and thus increase overall economic efficiency. Because uncertainty about the other party's future performance is a transaction cost, penalty clauses reduce the transaction cost of uncertainty by lending credibility to promises, which will lead to some agreements being made that otherwise would not be made. Posner further elaborated that, assuming parties are competent in negotiating contracts, parties will not include a penalty clause unless they have determined that the benefits of including the clause outweigh the costs thereof.[25]

Further, some scholars have argued that penalty clauses should be enforced because they function as options to walk away from a contract, and the amount of liquidated damages specified is the price of exercising that option. These scholars argue that because the parties know better than courts what they want from the transaction, it is efficient to allow the parties to contract freely for such termination options.[26]

22. Lake River Corp. v. Carborundum Co., 769 F.2d 1284, 1289 (7th Cir. 1985).

23. Richard A. Epstein, *Beyond Foreseeability: Consequential Damages in the Law of Contract*, 18 J. LEGAL STUD. 105, 108 (1989).

24. *Lake River*, 769 F.2d at 1289.

25. *Id.*

26. Robert E. Scott & George G. Triantis, *Embedded Options and the Case Against Compensation*

Another argument in favor of enforcing penalty clauses is that not enforcing them incentivizes inefficient breaches. For instance, Goetz and Scott argue that because expectation damages tend to undercompensate nonbreaching parties due to difficulties of proving the nonbreaching party's idiosyncratic valuation of the transaction, breaching parties do not internalize the full costs of their breach.[27] To ensure that they will be adequately compensated, contracting parties thus often acquire insurance from third parties. However, because the vendor is the lowest-cost insurer, acquiring outside insurance is a less efficient alternative that is only necessary due to the nonenforcement of penalty clauses.[28]

Thus, generally, arguments similar to those that justify the enforcement of nonpunitive liquidated damages clauses apply also to penalty clauses: they promote certainty and efficiency, and thus tend to decrease litigation costs. Requiring courts to examine liquidated damages clauses to determine their enforceability negates these benefits the parties sought to receive from including a liquidated damages clause.[29] Lastly, the prohibition of penalty clauses may well be a superfluous means of protecting parties from contractual unfairness because the doctrines of unconscionability, fraud, and duress already serve this purpose.[30]

C. A DIFFERENT PERSPECTIVE ON THE POLICY DEBATE

More recently, Michael Pressman has argued that while debating the enforceability of penalty clauses, the academic literature has overlooked the "unsteady theoretical foundations" on which liquidated damages stand and has thus taken for granted that liquidated damages clauses—those that do not qualify as penalty clauses—should be enforced.[31] Independent of potential theoretical shortcomings, it is still generally accepted that liquidated damages clauses that are not penalties are enforceable. Thus, and as this Note seeks to be a practical guide on current trends in enforcement of liquidated damages clauses, exploring the theoretical underpinnings of liquidated damages goes beyond the scope of this Note.

in Contract Law, 104 COLUM. L. REV. 1428, 1429 (2004).

27. Charles J. Goetz & Robert E. Scott, *Liquidated Damages, Penalties and the Just Compensation Principle: Some Notes on an Enforcement Model and a Theory of Efficient Breach*, 77 COLUM. L. REV. 554, 557 (1977).

28. *Id.* at 582–83.

29. Pressman, *supra* note 9, at 662.

30. Goetz & Scott, *supra* note 27, at 594.

31. Pressman, *supra* note 9, at 652–53.

II. MODERN LAW OF LIQUIDATED DAMAGES

Liquidated damages clauses have been part of Anglo-American law since the early development of the legal system itself.[32] Courts of equity first developed a rule against enforcing penalty clauses, and courts of law then adopted this rule to prevent over-reaching and to protect parties from unconscionable contract terms.[33]

A. RESEARCH METHODOLOGY

To assess the enforcement of liquidated damages clauses by courts in recent years, I used the LexisNexis database to identify and survey cases in which a party contested a liquidated damages clause. I looked at the most recent decisions of federal and California and New York state courts applying California and New York law respectively.[34] Because the volume of relevant cases in New York is significantly higher than in California, in order to get roughly equal sample sizes for both jurisdictions, I studied California cases decided between May 2008 and August 2019 and New York cases decided between February 2013 and September 2019. I have not studied in detail potential impacts this difference in time frames may have on the samples of cases, but a brief analysis does not suggest the presence of any significant effects.[35] In total, I analyzed fifty-eight California cases, one of which involved two contested liquidated damages clause, for a total of fifty-nine clauses, and fifty-three New York cases, many of which involved multiple contested liquidated damages clauses, for a total of sixty-six clauses.[36] Appendix Tables 1 and 2 provide complete lists of all California

32. 11 JOSEPH M. PERILLO, CORBIN ON CONTRACTS § 58.1 (2005).

33. *Id.*

34. I excluded cases in which courts applied federal law or the law of states other than California and New York. Before I decided to limit my study to state law, I read several cases evaluating liquidated damages clauses under the Fair Labor Standards Act and the Employment Retirement Income Security Act of 1974. Courts in these cases enforced every single liquidated damages clause.

35. To briefly assess any potential significance of the difference in time frames, I compared California cases from 2008 to 2012, the years in which I only looked at California cases, to California cases from 2013 to 2019, the years in which I studied cases from both jurisdictions. I compared both the average number of cases filed per year and the percentage of liquidated damages clauses that were not enforced. From 2008 to 2012, four cases were filed in the average year and 35% of liquidated damages clauses were held unenforceable. From 2013 to 2019, roughly 5.6 cases were filed per year and 44% of liquidated damages clauses were held unenforceable. The slight differences between the time periods do not suggest any statistical significance of the time period. One interesting consideration is the possible effect of the 2007–2008 financial crisis on the amount of cases filed and courts' treatment of liquidated damages clauses. In the wake of the crisis, one would expect to see an increased number of cases filed. However, California statistics do not support this expectation. The impact of the crisis on the financial market was likely felt more strongly in New York than California. But because this study did not examine New York cases in the immediate wake of the crisis, any possible impact does not affect the data used in this study.

36. I included only cases in which the court ruled on the enforceability of a liquidated damages clause. I excluded, for example, cases in which courts merely held that a clause survives a motion for

and New York cases respectively, the type of agreement, type of clause, and whether the clause was enforced.

B. CALIFORNIA LAW

California has long regulated the treatment of liquidated damages and penalty clauses by statute. Under sections 1670 and 1671 of the Civil Code of the State of California enacted in 1872, California law considered any contract clause determining damages in anticipation of breach presumptively void, unless determining actual damages was impracticable or extremely difficult.[37] However, in 1977, the California legislature adopted a recommendation of the California Law Revision Commission and repealed section 1670 and amended section 1671. Section 1671 now distinguishes contracts involving consumer goods and services and leases of residential property, which fall under section 1671(d), from any other types of contracts, which fall under section 1671(b).[38] In contracts for consumer goods and services and residential leases, the test has not changed and liquidated damages clauses are still presumptively void and are only enforced if determining actual damages is "impracticable or extremely difficult."[39] For all other contracts, the rule has been relaxed and liquidated damages clauses are now presumptively valid, "unless the party seeking to invalidate the provision establishes that the provision was unreasonable under the circumstances existing at the time the contract was made."[40]

Based on the statutory framework, the case law has developed two distinct tests, one under section 1671(b) and the other under section 1671(d). Both approaches are alike in that they look to the substance of a clause rather than its appearance; and thus, neither approach attaches any weight to whether the clause is labeled in the contract as a liquidated damages clause,

summary judgment or in which parties on appeal were precluded from raising the issue of enforceability. Further, I read every case that resulted from my search in which the court decided on the enforceability of a liquidated damages clause in the years that I studied. While I believe that my search was over- rather than under-inclusive, I cannot conclusively rule out the possibility that one or more cases with the relevant criteria escaped my search, and therefore were not included in this analysis. For reference, the search phrase I used on LexisNexis is: opinion((liquidat! /s damag! /p enforc! or unenforc! or valid! or uph*ld!) or (terminat! /s fee /p enforc! or unenforc! or valid! or uph*ld!)) and core-terms((liquidat! /s damag! /p enforc! or unenforc! or valid! or uph*ld!) or (terminat! /s fee /p enforc! or unenforc! or valid! or uph*ld!)) or headnotes((liquidat! /s damag! /p enforc! or unenforc! or valid! or uph*ld!) or (terminat! /s fee /p enforc! or unenforc! or valid! or uph*ld!)) or overview((liquidat! /s damag! /p enforc! or unenforc! or valid! or uph*ld!) or (terminat! /s fee /p enforc! or unenforc! or valid! or uph*ld!)). I then narrowed my search to California or New York respectively and included related federal material.

37. 13 CAL. LAW REVISION COMM'N, CALIFORNIA LAW REVISION COMMISSION ANNUAL REPORT 1601, 1739 n.2 (1976).

38. CAL. CIV. CODE § 1671 (West 2019).

39. *Id.* § 1671(d).

40. *Id.* § 1671(b).

a penalty, or something else entirely.[41]

The California Supreme Court in *Ridgley v. Topa Thrift & Loan Ass'n*, articulated the current standard under section 1671(b) as follows:

> A liquidated damages clause will generally be considered unreasonable, and hence unenforceable under section 1671(b), if it bears no reasonable relationship to the range of actual damages that the parties could have anticipated would flow from a breach. The amount set as liquidated damages "must represent the result of a reasonable endeavor by the parties to estimate a fair average compensation for any loss that may be sustained." In the absence of such relationship, a contractual clause purporting to predetermine damages "must be construed as a penalty." "A penalty provision operates to compel performance of an act and usually becomes effective only in the event of default upon which a forfeiture is compelled without regard to the damages sustained by the party aggrieved by the breach. The characteristic feature of a penalty is its lack of proportional relation to the damages which may actually flow from failure to perform under a contract."[42]

This language has led a majority of courts analyzing liquidated damages clauses under section 1671(b) in the last decade to conduct a single-prong test, focusing on the reasonableness of the relationship of the liquidated damages to the anticipated damages. Only a few courts addressed the "reasonable endeavor" prong, and one court explicitly acknowledged that it is unclear whether the reasonable endeavor test is still relevant outside the consumer context.[43] The courts that did address the reasonable endeavor test have uniformly held that it does *not* require that the parties engaged in actual negotiations.[44] However, courts have expressed different views on what the test *does* require. Some have held that the test focuses solely on the substantive reasonableness of the liquidated damages in relation to the anticipated damages.[45] Under this approach, the reasonable endeavor test would be nothing more than a rephrasing of the reasonable relationship test. Other courts, however, have found the reasonable endeavor test to require

41. *See, e.g.*, Weber, Lipshie & Co. v. Christian, 60 Cal. Rptr. 2d 677, 682 (Ct. App. 1997). *But see* Nissanoff v. Balikian, No. D051866, 2009 Cal. App. Unpub. LEXIS 425, at *13 (Jan. 20, 2009) (unpublished) (supporting its holding that a liquidated damages clause was a penalty by stating that the contract referred to the clause as a "penalty"). While no California court in the cases studied relied significantly on the labeling of a clause in a contract, many courts referred to the language of the contract if the language supported the decision the court reached on other grounds. This suggests that the labeling has some, if only minimal, importance.

42. Ridgley v. Topa Thrift & Loan Ass'n, 953 P.2d 484, 487 (Cal. 1998) (quoting Garrett v. Coast & S. Fed. Sav. & Loan Ass'n, 511 P.2d 1197, 1202 (Cal. 1973)) (citations omitted).

43. Curren v. Escamilla (*In re* Vec Farms, LLC), 395 B.R. 674, 691 (Bankr. N.D. Cal. 2008).

44. *See, e.g.*, *id.*

45. *See, e.g.*, E. W. Bank v. Altadena Lincoln Crossing, LLC, 598 B.R. 633, 642 (C.D. Cal. 2019).

the parties to have intended and attempted to estimate the damages that would constitute fair compensation.[46]

A significant minority of California courts cited to the California Law Revision Commission's 1976 Annual Report as persuasive authority for the intent of the legislature in amending section 1671.[47] The report states that under section 1671(b), factors that courts should take into account in determining the reasonability of liquidated damages "include, but are not limited to, such matters as the relative equality of the bargaining power of the parties."[48]

In consumer contracts under section 1671(d), the same standard as under sections 1670 and 1671 before they were amended in 1977 continues to apply. A commonly cited case, *Utility Consumers' Action Network, Inc. v. AT&T Broadband of Southern California, Inc.*, states that the case law has developed a two-part test.[49] The first prong follows the language of section 1671(d), requiring that fixing the amount of actual damages was impracticable or extremely difficult.[50] The second prong is judge-made and requires that the amount of liquidated damages represents "a reasonable endeavor by the parties to estimate fair compensation for the loss sustained."[51] The reasonable endeavor prong itself has two prongs, the first examining the intent of the parties, and the second evaluating how well the liquidated damages clause estimates actual damages.[52] Courts applying the reasonable endeavor test have held that while it does not require the parties to have negotiated the liquidated damages clause, it does require that the party seeking to enforce the liquidated damages clause engaged in "some form of analysis" of the damages it was likely to sustain in case of a breach.[53]

As applied in recent cases, the additional requirement under section 1671(d) that actual damages be impracticable or extremely difficult to fix carries little weight in courts' analyses. The only instance in which this requirement would determine the validity of a liquidated damages clause

46. *See, e.g.*, Jiu Zhou Grp. (HK) Holding Ltd. v. M. Bros., No. B269861, 2017 Cal. App. Unpub. LEXIS 4528, at *34 (June 30, 2017).

47. *See infra* Appendix Table 1.

48. CAL. LAW REVISION COMM'N , *supra* note 37, at 1751.

49. Util. Consumers' Action Network, Inc. v. AT&T Broadband of S. Cal., Inc., 37 Cal. Rptr. 3d 827, 831 (Ct. App. 2006).

50. *Id.* at 832.

51. *Id.* (quoting Rice v. Schmid, 115 P.2d 498, 500 (Cal. 1941)).

52. *See id.*

53. Cellphone Termination Fee Cases, 122 Cal. Rptr. 3d. 726, 747 (Ct. App. 2011) (quoting Hitz v. First Interstate Bank, 44 Cal. Rptr. 2d 890, 901 (Ct. App. 1995)); *see also* Del Monte Props. & Invs., Inc. v. Dolan, 236 Cal. Rptr. 3d. 923, 926 (App. Dep't Super. Ct. 2018) ("Respondent did not articulate specific facts showing why the circumstances of this case justify liquidated damages to compensate losses caused by late payment.").

would be if damages were ascertainable and the liquidated damages clause was a reasonable estimate of actual damages. However, such liquidated damages clauses are rarely challenged. In the cases included in this study, no court struck down a liquidated damages clause because it met the reasonable endeavor prong, but damages were not exceedingly difficult to ascertain.[54]

The most important difference between the approaches under section 1671(b) and 1671(d) is the presumption of validity or invalidity and thus who carries the burden of proof. In five of the California cases studied, all analyzed under section 1671(b), neither party was able to show that the liquidated damages were either reasonable or unreasonable.[55] Because the burden under section 1671(b) is on the party contesting the liquidated damages clause, the clauses in these cases were enforced.[56]

C. NEW YORK LAW

Unlike the California legislature, the New York legislature has not enacted a statute that addresses liquidated damages. Instead, the enforcement of liquidated damages clauses in New York is governed exclusively by common law.[57] In *Truck Rent-A-Center, Inc. v. Puritan Farms 2nd, Inc.*, the Court of Appeals of New York stated the law of liquidated damages as follows:

> A contractual provision fixing damages in the event of breach will be sustained if the amount liquidated bears a reasonable proportion to the probable loss and the amount of actual loss is incapable or difficult of precise estimation. . . . If, however, the amount fixed is plainly or grossly disproportionate to the probable loss, the provision calls for a penalty and will not be enforced. . . . In interpreting a provision fixing damages, it is not material whether the parties themselves have chosen to call the provision one for "liquidated damages," as in this case, or have styled it as a penalty. . . . Such an approach would put too much faith in form and too little in substance. Similarly, the agreement should be interpreted as of the date of its making and not as of the date of its breach.[58]

54. *See infra* Appendix Table 1.

55. *See* TI Beverage Grp. Ltd. v. S.C. Cramele Recas SA, No. 06-07793, 2015 U.S. Dist. LEXIS 180251 (C.D. Cal. Jan. 7, 2015); City of Oakland v. Pittman, No. A136606, 2013 Cal. App. Unpub. LEXIS 9290 (Dec. 23, 2013); El Centro Mall, LLC v. Payless ShoeSource, Inc., 174 Cal. App. 4th 58 (2009); Roodenburg v. Pavestone Co., 171 Cal. App. 4th 185 (2009); Kaufman v. Diskeeper Corp., No. B247315, 2014 Cal. App. Unpub. LEXIS 2961 (Apr. 28, 2014).

56. *See, e.g.*, Royalty All., Inc. v. Tarsadia Hotels, Nos. D062537 & D063402, 2014 Cal. App. Unpub. LEXIS 3806, at *51–52 (May 29, 2014) (unpublished).

57. *See infra* Appendix Table 2.

58. Truck Rent-A-Ctr., Inc. v. Puritan Farms 2nd, Inc., 361 N.E.2d 1015, 1018–19 (N.Y. 1977) (citations omitted).

Additionally, liquidated damages clauses are generally presumed valid and the burden is on the party contesting their enforcement.[59] The New York Court of Appeals has also "cautioned generally against interfering with parties' agreements."[60]

New York law, like California law, states that courts should evaluate liquidated damages clauses based on their substance rather than their form. Just like California courts, New York courts generally abide by this part of the doctrine with only a few exceptions.[61]

Despite it not being expressly articulated as part of the test for enforceability of liquidated damages clauses, New York courts frequently look at the sophistication of the parties and procedural aspects of the transaction, such as negotiation, relative bargaining power, and whether the parties were represented by counsel.[62] Many courts stated that contracts resulting from arms-length negotiations by sophisticated parties are entitled to judicial deference.[63]

D. COMPARISON OF CALIFORNIA AND NEW YORK LAW

As stated above, both California and New York courts do not attach significant meaning to the labeling of a liquidated damages clause in a contract. This extends to the inclusion of phrases stating, for instance, that the liquidated damages were reasonably calculated. While a court may point to such a clause to support a decision that the clause is valid, the presence of such a clause carried no significant weight in a court's analysis in any of the cases studied, and courts frequently found unenforceable penalties despite the presence of a statement by the parties that the liquidated damages were reasonably calculated.[64]

Comparing the two jurisdictions, California is often said to be a particularly consumer-friendly jurisdiction, whereas New York has a reputation of favoring freedom of contract. Both of these preconceptions seem to be met when looking at the doctrine laid out in each jurisdiction.

59. *See, e.g.*, JMD Holding Corp. v. Cong. Fin. Corp., 828 N.E.2d 604, 609 (N.Y. 2005).

60. *Id.*

61. *See, e.g.*, Trilegiant Corp. v. Sitel Corp., No. 09 Civ. 6492, 2013 U.S. Dist. LEXIS 72828, at *25 (S.D.N.Y. May 20, 2013) (relying expressly on the use of the word "fine" in striking down a liquidated damages clause as an unenforceable penalty).

62. *See, e.g.*, JMW 75 LLC v. Debs, 73 N.Y.S.3d 724, 725–26 (App. Term 2018).

63. *See, e.g.*, RES Exhibit Servs., LLC v. Genesis Vision, Inc., 64 N.Y.S.3d 786, 792 (App. Div. 2017).

64. *See, e.g.*, Del Monte Props. & Invs., Inc. v. Dolan, 236 Cal. Rptr. 3d. 923, 925–26 (App. Dep't Super. Ct. 2018) (finding an unenforceable penalty even though the contract stated that the parties "agree that these charges represent a fair and reasonable estimate of the costs" the non-breaching party was likely to incur from breach).

California, unlike New York, expressly created a separate test under which liquidated damages clauses in consumer contracts are presumptively void.[65] New York courts, on the other hand, have expressly stated their reluctance to interfere with parties' agreements,[66] and no such language can be found in any of the California opinions studied. Thus, one would expect that California courts generally find a higher percentage of challenged liquidated damages clauses to be unenforceable penalties than do New York courts. Further, one would expect this difference between California and New York courts to be most evident in cases involving consumer contracts.

Surprisingly, recent cases do not confirm these expectations. Comparing the percentage of clauses each jurisdiction's courts invalidated as unenforceable penalties shows that California courts refused to enforce 25 out of 59 or 42% of challenged clauses,[67] whereas New York courts determined that 42 out of 66, or 64% of challenged clauses were unenforceable penalties. Similarly, when looking only at consumer contracts, the statistics also do not support the conclusion that California law is more consumer-friendly than New York law. California courts held that 4 out of 7, or 57%, of challenged liquidated damages clauses were unenforceable penalties, while New York courts invalidated all three challenged clauses in consumer contracts as unenforceable penalties.[68]

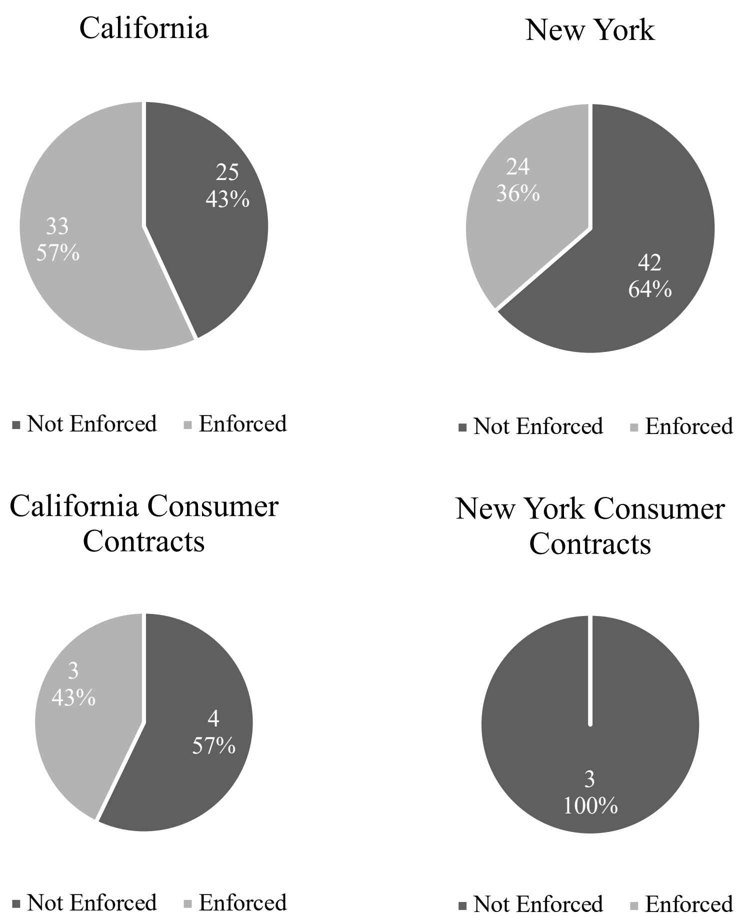
65. *See supra* text accompanying notes 38–39.

66. *See supra* text accompanying note 60.

67. One of the twenty-five unenforceable clauses was not called a penalty by the court. *See* Concept Chaser Co. v. Pentel of Am., Ltd., Nos. B241929 & B243330, 2014 Cal. App. Unpub. LEXIS 3786, at *39–40 (May 27, 2014) (unpublished) (holding that no mutual assent existed with regard to a damages provision that proscribed "a minimum of $10,000" per breach and thus failed to provide a clear amount or formula that allowed the parties to calculate damages with reasonable certainty).

68. The low number of consumer-contract cases litigated in both jurisdictions makes these observations less meaningful. Why so few liquidated damages clauses in consumer contracts are litigated would be an interesting issue for further research.

FIGURE 1. Liquidated Damages in California and New York Generally and in Consumer Contracts



However, these findings, by themselves, do not necessarily discredit the expectation that New York courts are less inclined than California courts to find a liquidated damages clause to be an unenforceable penalty, both generally or in consumer contracts. Because the above percentages were calculated without controlling for factors affecting courts' analyses, they leave open the possibility that New York courts were simply faced with objectively more punitive clauses than California courts and that this difference in the sample of cases is the reason for the unexpected overall results.

In the following Sections, this Note will more closely analyze the case law while controlling for factors such as the type of transaction, the type of liquidated damages clause, and the identity of the parties to the contract.

The findings of this Note will suggest that partly despite and partly because they engage in differing analyses, there is no statistically significant difference in the results reached by California and New York courts regarding the enforceability of liquidated damages clauses.

III. CURRENT TRENDS IN ENFORCEMENT

As a preliminary matter, a broad statistical comparison of California and New York courts in their enforcement of liquidated damages clauses is made difficult by the different kinds of agreements that are litigated in the two states. I have read the cases from three different perspectives in order to gain as many insights as possible. I categorized them according to the (1) transaction type, (2) the nature and effect of the liquidated damages clause, and (3) the identity of the parties to the agreement. While the cases involved many of the same transaction types, California and New York courts see these transaction types in very different proportions. Further, each transaction type has common ways in which liquidated damages clauses are treated, thus skewing the overall percentage of enforced clauses. The case law reveals the greatest consistencies in enforcement of liquidated damages clauses both within each state and when comparing New York to California when categorized based on the nature and effect of the liquidated damages clauses themselves. However, many of the inconsistencies that remain when evaluating the cases based on the type of liquidated damages clause involved can be explained by the identities of the parties to the agreement. Therefore, I will discuss the most commonly litigated transaction types in California and New York, and what features define cases of these types. I will also address the most common types of liquidated damages clauses and how courts treat them across different transaction types. Where appropriate, I will discuss typical transactions and clauses with analyses of the significance of the identity of the parties.

A. Settlement Agreements

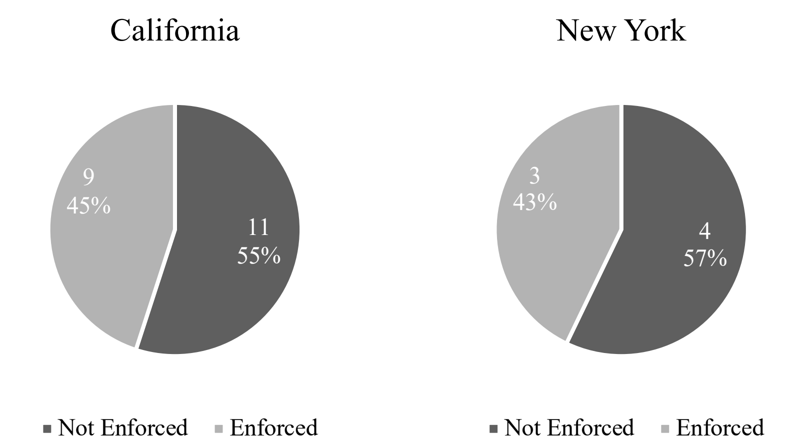
The most commonly litigated transactions in California in the last twelve years in which parties contested the enforceability of liquidated damages provisions were settlement agreements.[69] Roughly one-third of all clauses studied in California cases came from settlement agreements.[70] In

69. *See infra* Appendix Table 1.
70. *See id.*

New York, however, only about one-tenth of the studied clauses came from settlement agreements.[71] Thus, this Section will analyze mainly California cases and point out differences and similarities to New York cases where appropriate.

Because roughly half of the contested liquidated damages clauses in settlement agreements were enforced in California and New York,[72] no meaningful prediction about the enforceability of a liquidated damages clause can be made based on the fact that it was from a settlement agreement.

FIGURE 2. Liquidated Damages in California and New York in Settlement Agreements



It is clearly established in both California and New York law that when determining the reasonableness of the relation of liquidated damages to anticipated actual damages, the actual damages that matter are those anticipated from a breach of the settlement agreement, not the damages sought in the suit underlying the settlement agreement.[73] Thus, clauses awarding the damages sought in the lawsuit underlying a settlement agreement are not only the most commonly contested liquidated damages clauses in settlement agreements in California, but are also the clauses most

71. *See infra* Appendix Table 2.

72. In California, 11 out of 20 clauses were held to be penalties, and in New York, 3 out of 6 clauses were unenforceable penalties.

73. *See, e.g.*, Trs. of Columbia Univ. v. D'Agostino Supermarkets, No. 655914/2016, 2018 NYLJ LEXIS 536, at *9–10 (Sup. Ct. Feb. 27, 2018); Greentree Fin. Grp., Inc. v. Execute Sports, Inc., 78 Cal. Rptr. 3d 24, 27–28 (Ct. App. 2008).

consistently held to be unenforceable penalties.[74] These clauses are typically designed in one of two ways. Some liquidated damages clauses expressly state that in the event of default, a stipulated judgment may be entered against the defaulting party over an amount equal or close to the full amount sought in the underlying suit.[75] Other agreements purport to settle for an amount equal or close to the damages sought in the underlying complaint, but state that the settlement amount will be discounted to a considerably smaller amount if the breaching party makes all payments on time.[76] Because these two clauses are different only in form rather than substance, and yield essentially the same result, both are struck down by most courts.[77] Thus, phrasing a settlement agreement as containing a discount rather than a liquidated damages clause will not sway a court to enforce the damages award unless the court finds that it truly operates more like a discount than a penalty.

However, several California courts have enforced damages awards in agreements that the courts deemed to contain true discount provisions.[78] Courts finding a clause to be a discount rather than a damages provision have held that California Civil Code section 1671 does not apply to discounts, and that there is thus no requirement that the damages to be paid be reasonably related to anticipated actual damages.[79] However, because courts will only find clauses to be true discounts if they find the damages amount prior to the

74. 7 out of 10 liquidated damages clauses awarding damages in excess of the true settlement amount were declared unenforceable penalties by California courts. In New York, only one such clause was contested within the time period studied. Following the rule that courts look only at the settlement agreement rather than any underlying suit or transaction, *Trustees of Columbia University*, struck down such a liquidated damages clause as an unenforceable penalty. *See Trs. of Columbia Univ.*, 2018 NYLJ LEXIS 536, at *9.

75. *See, e.g.*, Purcell v. Schweitzer, 169 Cal. Rptr. 3d 90, 95 (Ct. App. 2014).

76. *See, e.g.*, Murphy v. Combat Sports Acad., LLC, No. A153937, 2019 Cal. App. Unpub. LEXIS 3585, at *12–13 (May 24, 2019) (unpublished) (holding that a settlement amount of $150,000 discounted to $32,000 functioned as an unenforceable penalty because the parties were truly willing to settle for $32,800).

77. *But see* Baf v. Omid, No. B204935, 2008 Cal. App. Unpub. LEXIS 9504, at *11 (Nov. 24, 2008) (unpublished) (enforcing a stipulated judgment over $60,000 for default on a settlement payment of $53,000 because the stipulated judgment was "still *less* than . . . [the at least $76,000] owed under the complaint"); Curren v. Escamilla (*In re* Vec Farms, LLC), 395 B.R. 674, 691 (Bankr. N.D. Cal. 2008) (enforcing a stipulated judgment over $1.1 million for default on a settlement payment of $750,000, because the breaching party had accepted that it may have to pay $1.1 million in return for the non-breaching party giving up the "chance to recover a potential $5 million" at trial). It seems that California courts are willing to enforce stipulated judgments in excess of the settlement amount as long as they are closer to the settlement amount than the amount sought in the complaint. By how much such stipulated judgments may exceed the settlement amount must be determined by the reasonable-relation test on a case-by-case basis.

78. *See, e.g.*, Jade Fashion & Co., Inc. v. Harkham Indus., Inc., 177 Cal. Rptr. 3d 184, 198 (Ct. App. 2014).

79. *See, e.g.*, Legado Cos. v. Jones, No. B264248, 2016 Cal. App. Unpub. LEXIS 5374, at *16–17 (July 21, 2016) (unpublished).

discount to be reasonable in light of actual anticipated damages, the lifting of this requirement likely does not have much meaning. Because courts, to differentiate between true discounts and hidden penalties, need to engage in the difficult and necessarily imprecise act of attempting to determine the amount parties were truly willing to settle for, it is often difficult to reconcile decisions finding true discounts with others finding hidden penalties.[80]

One instance in which a California court departed from the trend of not enforcing stipulated judgments that exceed the amount settled for can be explained by looking at the identity of the parties to the agreement. In *Florez v. Yim*, the California Court of Appeals enforced a liquidated damages clause that provided for the entering of a stipulated judgment of $300,000, even though the parties had settled for $175,000.[81] The court pointed out that the plaintiffs, "two unsophisticated workers" had been exploited by their employer when they were required for years to work fifteen and nine hours per day respectively for seven days a week at wages of under four dollars per hour.[82] Against this factual backdrop, the court emphasized that the employer was at least as sophisticated as the workers and that the employer did not meet the burden of proving that the liquidated damages were unreasonable.[83]

Other types of liquidated damages clauses that were contested in settlement agreements in California and New York fall into many different categories and are more appropriately discussed below according to the type of clause rather than the transaction type.

Lastly, courts, according to equitable principles under the law of remedies, may exercise their discretion in monitoring settlement agreements to ensure that such agreements are not exceedingly one-sided. However, in the cases studied, only two California courts and one New York court referred to equitable powers.[84] Further, all three cases referred to this power

80. *Compare* Murphy v. Combat Sports Acad., LLC, No. A153937, 2019 Cal. App. Unpub. LEXIS 3585, at *12–13 (May 24, 2019) (unpublished) (holding that a settlement of a suit seeking roughly $158,000 for $150,000 discounted to $32,000 functioned as an unenforceable penalty because the parties were truly willing to settle for $32,000), *with* Mitsuwa Corp. v. Wehba, Nos. B284741 & B286994, 2019 Cal. App. Unpub. LEXIS 5211, at *6–7 (Aug. 6, 2019) (unpublished) (holding that a settlement amount of $15 million, which equaled the amount sought in the underlying suit, discounted to $10.5 million was enforceable as a true discount).

81. Florez v. Yim, No. B255766, 2015 Cal. App. Unpub. LEXIS 2316, at *1–2 (Apr. 2, 2015) (unpublished).

82. *Id.* at *2, *9.

83. *See id.* at *9–10.

84. Curren v. Escamilla (*In re* Vec Farms, LLC), 395 B.R. 674, 685 (Bankr. N.D. Cal. 2008); Dye v. Sachs (*In re* Flashcom, Inc.), No. CC-13-1311, 2014 Bankr. LEXIS 4215, at *34 (B.A.P. 9th Cir. Oct. 1, 2014); TD Capital Grp. LLC v. First Union Baptist Church of the Bronx (*In re* First Union Baptist Church of the Bronx), No. 17-cv-7184 & 17-cv-7199, 2018 U.S. Dist. LEXIS 20669, at *13 (S.D.N.Y. Feb. 7, 2018).

only within the context of bankruptcy proceedings, and only one court used its equitable power to modify the terms of the settlement agreement.[85] Thus, it appears from the cases studied that courts' equitable powers are not significant outside the realm of bankruptcy proceedings.

B. LOAN CONTRACTS

In New York, most liquidated damages clauses that were litigated came from loan contracts.[86] In California, on the other hand, only 3 out of 58 contested clauses came from loan contracts.[87] Further, while 20 out of the 28 challenged clauses in New York were held to be unenforceable penalties, all three clauses contested in front of California courts were enforced.[88] Looking only at these statistics, one might draw the inference that in loan agreements, New York courts are more likely than California courts to strike down liquidated damages clauses as penalties. However, a closer look refutes this assessment. During the time studied, 12 out of the 14 New York cases that included challenges to liquidated damages clauses in loan agreements arose from loan contracts that were so similar that they can be considered mere variations of the same agreement. In fact, given the number of repeat players in these cases, it seems highly likely that many of the contested agreements were drafted by the same law firms and lawyers. To illustrate the deal that frequented the New York federal district courts in recent years, an in-depth case study of a representative case, *LG Capital Funding, LLC v. 5BARz International*, follows.[89]

LG Capital Funding, LLC ("LG") is a New York investment management company.[90] 5BARz International, Inc. ("BARZ") is a publicly traded wireless technology company that designs and patents cellular network infrastructure devices.[91] Since its inception in 2008, BARZ has funded its business through private placements and debt and has raised over $23 million.[92] LG regularly invests in companies in need of short-term capital.[93] In June 2015, BARZ issued a one year, $52,500 convertible

85. *Dye*, 2014 Bankr. LEXIS 4215, at *34.

86. In New York, 28 out of 66, 42% of contested liquidated damages clauses came from loan contracts. *See infra* Appendix Table 1.

87. *See infra* Appendix Table 1.

88. *Id.*; *see infra* Appendix Table 2.

89. LG Capital Funding, LLC v. 5barz Int'l, Inc., 307 F. Supp. 3d 84 (E.D.N.Y. 2018).

90. *LG Capital Funding LLC*, BLOOMBERG, https://www.bloomberg.com/profile/company/1011199D:US [https://perma.cc/F88J-KB2E].

91. 5BARz International, Inc. Going Concern Analysis at 3, *LG Capital Funding*, 307 F. Supp. 3d (No. 16-CV-2752).

92. *Id.*

93. Because LG was involved in at least eight other similar disputes with other companies, LG seems to be an experienced lender of short-term capital. *See infra* Appendix Table 2 (listing all cases LG

redeemable note ("the note") with an 8% annual interest rate.[94] Under the note, LG was entitled to convert "all or any" of the outstanding principal amount into shares of BARZ's common stock.[95] The price at which the outstanding principal was to be converted into shares was to be 60% of the lowest publicly reported trading price of the stock in the fifteen trading days prior to the day on which the notice of conversion was received.[96]

According to Joseph Lerman, a member of LG, the conversion feature was crucial in inducing LG to enter into the note.[97] LG regarded an investment in BARZ as coming with a "significant risk due to [BARZ's] unstable financial condition, specifically, its high net loss and limited revenue, as well as [BARZ's] own substantial doubts about the ability of BARZ to continue as a going concern without further investment."[98] The conversion feature of the note was designed to compensate LG for this risk by allowing it to obtain BARZ's stock at a discount to the market price and to then resell it on the open market, thus earning a high rate of return.[99] Reselling the shares to third parties would also protect LG from being forced to rely on BARZ having adequate funds to pay off the note.[100] To ensure the availability of shares, the note required BARZ to issue "irrevocable transfer agent instructions" for transfers under the note, and that BARZ reserve at all times at least four times the amount of shares required to satisfy a full conversion of the note.[101]

Because both parties to the agreement were familiar with the process of lending and borrowing money using instruments such as the note in question, it appears that entering into the note was a fairly standard proceeding for both sides. Nothing in the extensive record before the court indicates that the parties seriously negotiated any terms of the note. In fact, the only reference to the parties' negotiations is a statement by Mark Geoghegan, BARZ's director of finance, saying that "[a]lthough we discussed specific terms with LG, we did not discuss LG's motivation other than to obtain [a] favorable

was involved in).

94. Declaration of Mark Geoghegan para. 6, *LG Capital Funding*, 307 F. Supp. 3d (No. 16-CV-2752).

95. 5BARZ International, Inc. 8% Convertible Redeemable Note Due June 16, 2016 para. 4(a), *LG Capital Funding*, 307 F. Supp. 3d (No. 16-CV-275).

96. *Id.*

97. Declaration of Joseph Lerman in Support of LG Capital Funding, LLC's Motion for Preliminary Injunction para. 14, *LG Capital Funding*, 307 F. Supp. 3d (No. 16-CV-2752).

98. *Id.*

99. *Id.*

100. *Id.*

101. 5BARZ International, Inc. 8% Convertible Redeemable Note Due June 16, *supra* note 95, at para. 12.

rate of return within the limits of New York law."[102]

The note listed fourteen subsections describing various events that constituted a default by BARZ.[103] Among them were a failure by BARZ to deliver common stock within three business days upon receipt of a notice of conversion, a failure to replenish the share reserve within three business days of the request of LG, and a failure by BARZ to remain current with its filings with the Securities and Exchange Commission ("SEC").[104]

The note further provided that should BARZ fail to cure any of the listed events of default within five days, the entire note would become immediately due and payable.[105] Upon default, the note's principal was to increase by 10% and interest was to begin to accrue at 24% per year or, "if such rate is usurious or not permitted by current law, then at the highest rate of interest permitted by law."[106] In case BARZ defaulted by failing to deliver shares, the note set out that "the penalty shall be $250 per day the shares are not issued beginning on the 4th day after the conversion notice was delivered to [BARZ]. This penalty shall increase to $500 per day beginning on the 10th day."[107] Additionally, the note contained a "Make-Whole" provision that prescribed that if BARZ failed to deliver shares within three days of receipt of a notice of conversion, it would have to make LG whole as provided by the following formula:

Failure to Deliver Loss = (High trade price at any time on or after the day of exercise) x (Number of conversion shares)[108]

On March 15, 2016, LG submitted a notice to BARZ's transfer agent and BARZ's CEO, requesting to convert $7,945.48 into 174,242 shares BARZ common stock.[109] The same day, BARZ's transfer agent told LG that it did not yet have the records to transfer any shares.[110] On April 27, 2016, an agent of LG reached out to BARZ's transfer agent for a status update but was told that the transfer agent did not have a share reserve for BARZ.[111] The LG agent contacted BARZ's CEO the same day, and, after receiving no

102. Supplemental Declaration of Mark Geoghegan in Further Opposition to Plaintiff's Motion for Summary Judgement para. 6, *LG Capital Funding*, 307 F. Supp. 3d (No. 16-CV-2752).
103. 5BARZ International, Inc. 8% Convertible Redeemable Note Due June 16, 2016, *supra* note 95, at para. 8(a)–(n).
104. *Id.* at para. 8(k)–(m).
105. *Id.* at para. 8.
106. *Id.*
107. *Id.*
108. *Id.*
109. Notice of Conversion, *LG Capital Funding*, 307 F. Supp. 3d (No. 16-CV-2752).
110. Document 47-6, *LG Capital Funding*, 307 F. Supp. 3d (No. 16-CV-2752).
111. Document 2-9, *LG Capital Funding*, 307 F. Supp. 3d (No. 16-CV-2752).

response, contacted BARZ's director of finance on May 2, 2016.[112] On May 3, 2016, LG cancelled its first notice of conversion,[113] and instead submitted a new notice of conversion, this time requesting to convert the entire note balance plus interest into BARZ shares.[114] When BARZ continued to fail to respond and its transfer agent again told LG that it had no share reserve in place, LG on May 17, 2016 sent a letter to BARZ invoking the note's "Make-Whole" clause.[115] The letter demanded payment of liquidated damages of $168,258.42 calculated pursuant to the formula for the loss from a failure to deliver shares.[116] When BARZ was again unresponsive, LG brought suit on May 31, 2016.[117]

Among other things less relevant for the purposes of this discussion, LG demanded liquidated damages and offered two alternative damages calculations. The first calculation requested liquidated damages of $256,318.91,[118] the sum of $179,500, arising from fixed daily payments of $250 and later $500, plus $76,818.91, arising from default interest and a 10% increase in principal for failure to pay the note at maturity.[119] The second calculation asked for $203,949.60 based on the note's make-whole clause.[120] The court analyzed the requested damages divided into three types: default interest rate and principal increase resulting in $76,818.91, fixed daily payments amounting to $179,500, and make-whole damages of $203,949.60.

The court stated that liquidated damages are enforceable under New York law where "(1) actual damages are difficult to determine and (2) the amount of damages awarded pursuant to the clause is not clearly disproportionate to the potential loss."[121]

First, the court held that LG, by converting all principal and interest due into an entitlement to shares, gave up any claim to unpaid principal and interest.[122] Thus, rather than expressly addressing whether the 24% default interest rate and the 10% principal increase are enforceable, the court found that they do not apply.[123]

112. *Id.*
113. Document 47-7, *LG Capital Funding*, 307 F. Supp. 3d (No. 16-CV-2752).
114. Notice of Conversion, *supra* note 109.
115. Document 47-10, *LG Capital Funding*, 307 F. Supp. 3d (No. 16-CV-2752).
116. *Id.*
117. Verified Complaint at 12–13, *LG Capital Funding*, 307 F. Supp. 3d (No. 16-CV-2752)
118. The opinion erroneously stated $256,328.91 as the sum of $179,500 and $76,818.91. I am using the correct damages amount, which is $256,318.91.
119. *LG Capital Funding*, 307 F. Supp. 3d at 101.
120. *Id.*
121. *Id.* (citations omitted).
122. *Id.* at 101–02.
123. In all cases arising out of this type of loan agreement, courts did one of two things. If the lender had attempted to convert the entire balance of the loan, courts, as in this case, held that the default interest

Second, the court held that the daily payments of $250 and $500 that added up to $179,500 were based on an unenforceable penalty clause.[124] First, the court pointed out that the note itself called the damages a "penalty," but then added that the words used in the note were not material.[125] Because the demanded damages were "wildly disproportionate to actual losses," the court looked to whether LG had offered any explanation as to their reasonability.[126] However, in none of its motions or declaration did LG ever do more than simply request the liquidated damages while failing to address their reasonability.[127] Further, the court held that the daily payments were unenforceable on the additional grounds that "actual damages are a function of conversion price, the market price for defendant's shares at the time of defendant's breach when it failed to deliver the shares, and the number of shares converted, all of which can easily be determined."[128]

Third, the court similarly struck down the make-whole clause both because damages were easily calculable and because the clause spelled out a disproportionate damages calculation. Because the provision determined damages by multiplying the number of conversion shares by the high market price on *any* day on or after the day the conversion was exercised, the court concluded that it was "designed to provide [LG] with a guaranteed higher cash payout than a true make-whole measure."[129]

Ultimately, the court awarded LG damages of $110,472.70, representing the number of shares LG sought to convert multiplied by the market value of BARZ's stock on the date of BARZ's breach.[130] Despite it being clearly larger than the amount of principal and interest due at the time of breach, this damages amount, in the court's view, represented fair compensation for LG because it took into account the conversion feature LG had bargained for.[131]

This case generally illustrates why parties include liquidated damages

rate and the principal increase provisions did not apply because the lender had given up its entitlement to the loan balance. If, on the other hand, the lender had only attempted to convert part of the loan amount, courts held that the principal increase was an unenforceable penalty, but that the default interest rate was enforceable.

124. *LG Capital Funding*, 307 F. Supp. 3d at 102.

125. *Id.*

126. *Id.*

127. *See, e.g.*, Declaration of Joseph Lerman in Support of Motion for Summary Judgement of LG Capital Funding, LLC para. 31, 36, *LG Capital Funding*, 307 F. Supp. 3d (No. 16-CV-2752).

128. *LG Capital Funding*, 307 F. Supp. 3d at 102.

129. *Id.* at 103.

130. Memorandum & Order at 11–12, *LG Capital Funding*, 307 F. Supp. 3d (No. 16-CV-2752). The court determined the date of breach to be May 9, 2016, the fourth business day after LG delivered the second notice of conversion.

131. *Id.* at 18–19.

clauses in their agreements, shows that even sophisticated parties sometimes agree on clearly punitive damages clauses, and provides an example of the toll on both parties and the judicial system when liquidated damages clauses are litigated. More specifically, this case demonstrates aspects common to the loan agreements containing liquidated damages clauses that have been litigated in New York in recent years. Viewing the agreement from the lender's perspective, it is clear why LG wanted security on the damages it would receive in case of breach and why LG wanted the liquidated damages clauses providing this security to also incentivize BARZ to perform. Investing in BARZ undoubtedly came with a substantial risk. BARZ's Form 10-K, filed with the SEC, admits that at the end of 2014 there was a "substantial doubt that the Company would be able to continue as a going concern."[132] Additionally, the course of the litigation itself is proof of BARZ's illiquidity and unreliability, as shown by the fact that two different attorneys requested to withdraw from their representation of BARZ because it failed to pay its legal fees.[133] On the other hand, the borrower, BARZ, described LG as a "predatory lender" providing " 'death spiral' financing to distressed companies with ruinous hidden costs and charges."[134] This contention finds some support in the fact that similar liquidated damages clauses were struck down in eight other cases litigated by LG during the time surveyed.[135] BARZ further claimed that LG refused to meaningfully engage in settlement negotiations in order to allow time to pass and liquidated damages to accrue, hoping for a windfall.[136] However, given that BARZ is a sophisticated entity that has entered into many loan agreements, the question remains whether a court should be sympathetic to its portrayal as an unknowing victim of LG's alleged scheme.

C. FIXED DAILY PAYMENTS

The most frequently litigated type of liquidated damages clause during the time studied consists of clauses demanding fixed daily payments.[137] Clauses requiring the breaching party to make daily payments of a fixed sum

132. Form 10-K at 20, *LG Capital Funding*, 307 F. Supp. 3d (No. 16-CV-2752). The form further provides that "[i]n the event that the Company cannot raise further debt or equity capital, or achieve profitable operations, the Company may have to liquidate their business interests and investors may lose their investment." *Id.*

133. Letter Motion to be Relieved as Counsel, *LG Capital Funding*, 307 F. Supp. 3d (No. 16-CV-2752); Sworn Declaration of Sheryl Mintz Goski, *LG Capital Funding*, 307 F. Supp. 3d (No. 16-CV-2752).

134. Declaration of Mark Geoghegan, supra note 94, at para. 7.

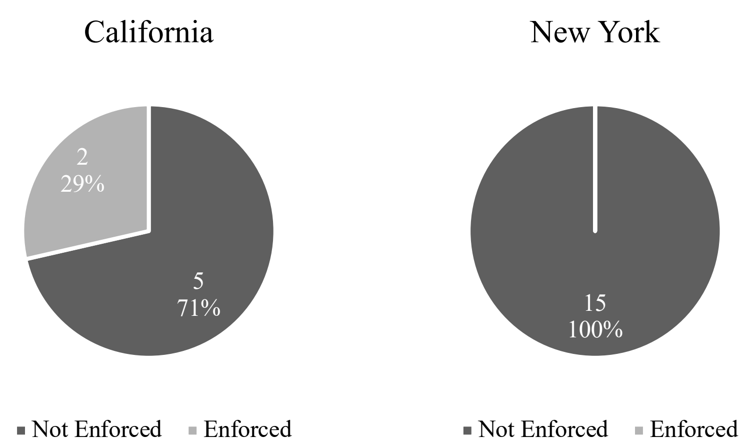
135. *See infra* Appendix Table 2 (listing all cases LG was involved in).

136. Supplemental Declaration of Mark Geoghegan in Further Opposition to Plaintiff's Motion for Summary Judgement, *supra* note 102, at para. 15.

137. In New York, clauses demanding fixed daily payments were especially common because they appeared in 11 out of the 12 almost identical loan contracts illustrated in the above case study.

were consistently struck down by both California and New York courts. New York courts held all fifteen such clauses they faced to be unenforceable penalties, while California courts enforced fixed daily payments in only 2 out of 7 cases.

FIGURE 3. Holdover Clauses as Liquidated Damages in California and New York



The reasoning for striking down these clauses was simple and uniform across cases, independent of the transaction type the clause originated in or the jurisdiction the case arose in.[138] Because daily payments facially appear to be punitive rather than compensatory, courts typically regarded the presence of such a clause alone as meeting the burden of the party contesting the liquidated damages.[139] While both New York and California courts in most cases simply stated that the daily payments bore no reasonable relation to the non-breaching party's actual damages, some California courts went on to explain that indefinite payments or payments that applied equally to various types of breaches of different magnitudes could not be reasonable

138. Clauses calling for fixed daily payments came from many types of agreements: loan contracts, non-disclosure agreements, leases, purchase agreements, a settlement agreement, and a services contract.

139. *See, e.g.*, LG Capital Funding, LLC v. FLASR, Inc., 422 F. Supp. 3d 611, 617 (E.D.N.Y. 2018). In all cases arising out of the type of loan agreement discussed in the case study above, it was apparent that the amounts of the fixed daily payments were arbitrarily chosen and intended to compel performance rather than to compensate, as shown by the fact that none of the parties seeking to enforce these liquidated damages was able to explain why the payment amounts selected were $250 and $500, or why that amount changed on the tenth day after breach.

estimates of actual damages.[140]

The only two cases in which liquidated damages clauses demanding fixed daily payments were enforced arose from two likely identical or at least very similar purchase agreements by the same retailer with two different wholesalers. In both cases, the retailer bought goods from a wholesaler, but the wholesaler failed to deliver the goods on time. The liquidated damages clause in each contract demanded daily payments of the greater of two percent of the purchase price or $2,000. Because the retailer was able to show that it suffered discounts from customers of one to two percent of the purchase price per day the goods were late, both courts enforced the liquidated damages clause.[141]

D. INCREASE OF PRINCIPAL AMOUNT

Other liquidated damages clauses that exhibit common characteristics and are treated similarly by courts in both California and New York are clauses that call for an increase in the principal amount to be paid by the breaching party. In both jurisdictions, such clauses were almost always struck down as unenforceable penalties. New York courts struck down 2 out of 3 clauses, while California courts refused to enforce both contested clauses they faced.[142]

In examining why courts frequently struck down liquidated damages clauses demanding an increase of the principal amount, no common reasoning is discernible except that courts typically concluded that the increase in the principal amount was not reasonably related to the damages anticipated by the parties. This leaves the following question unanswered: What is it about this type of liquidated damages clause that makes it less likely to be enforced? In addition, there does not seem to be a plausible way of functionally distinguishing an increase in the principal from a fixed payment in case of breach. Clauses that I refer to as calling for a fixed payment in case of breach are those that predetermine a certain amount that the breaching party must pay to the non-breaching party in case of a

140. *See, e.g.*, Dollar Tree Stores Inc. v. Toyama Partners LLC, 875 F. Supp. 2d 1058, 1073 (N.D. Cal. 2012).

141. *See* Second Generation v. Cong Ty Tnhh Anh Chau Co., No. B289774, 2019 Cal. App. Unpub. LEXIS 5284, at *28–29 (Aug. 9, 2019) (unpublished); Second Generation v. Kody Branch of Cal., No. BC609405, 2017 Cal. Super. LEXIS 8520, at *8–9 (Oct. 19, 2017).

142. Despite the small sample size for these clauses, the trend is significant. The only time a court upheld a liquidated damages clause calling for a principal increase, the court expressly based its decision on the fact that the parties were sophisticated businessmen who had negotiated at arms-length and were represented by counsel. That the extensive bargaining process entitled the parties' agreement to deference was further supported by the fact that guarantors had, through an additional agreement, guaranteed to pay any payments contractually required of the breaching party. Shelter Island Opportunity Fund, LLC v. Chow, No. 653118/11, 2013 N.Y. Misc. LEXIS 5118, at *9–10 (Sup. Ct. Oct. 22, 2013).

breach.[143] Under both types of clauses, the breaching party must pay an additional predetermined sum. The only difference between the two appears to be in their form rather than their substance. But, as explained above, both California and New York doctrines dictate that the form of a clause should not be given meaning over its substance, and courts during the period studied consistently adhered to this principle. However, California and New York courts enforced liquidated damages clauses that called for a fixed payment in case of breach in six of thirteen cases, whereas they only enforced 1 out of 5 clauses calling for an increase in the principal amount. From this difference in enforcement, despite the lack of substantive differences, I conclude that liquidated damages do not tend to be unreasonable because they call for an increase in the principal amount, but rather that unreasonable amounts of liquidated damages tend to be phrased as an increase in the principal amount.[144]

E. DEFAULT INTEREST RATES

The greatest uniformity in enforcement of a certain type of liquidated damages clause was present among default interest rate clauses. During the time studied, California and New York courts enforced every clause that called for a default interest rate.[145]

It appears that courts are generally more deferential in enforcing default interest rates than they are in enforcing most other types of liquidated damages clauses.[146] This trend becomes clear when examining the reasonableness analysis conducted by two California courts.[147] In both cases,

143. *See, e.g.*, Jiu Zhou Grp. (HK) Holding Ltd. v. M. Bros., No. B269861 & B272470, 2017 Cal. App. Unpub. LEXIS 4528, at *34 (June 30, 2017) (unpublished) (enforcing a liquidated damages clause calling for a fixed payment of one million dollars in case of breach).

144. Despite the phrasing of a clause not carrying meaningful weight in an analysis of its enforceability, the simple fact that parties phrased a liquidated damages clause as an increase in principal is an indicator that the true purpose of the clause was mainly to compel performance rather than to compensate. While substantively insignificant, increasing one large payment to a larger sum appears more punitive than charging a small payment for a breach, even though the two alternative forms of payment result in overall identical sums of money. This perception may be related to and derived from the so-called denomination effect. This cognitive bias describes a general tendency that people are less likely to spend money in a large denomination than they are to spend the same amount in multiple smaller denominations. John Manning, *Cognitive Bias Series: 6. The Denomination Effect*, INT'L BANKER (June 24, 2016), https://internationalbanker.com/brokerage/cognitive-bias-series-6-denomination-effect [https://perma.cc/R6PS-28A9].

145. California courts enforced three, and New York enforced six default interest clauses.

146. The only other liquidated damages clauses that received similar deference from courts in both California and New York were holdover clauses calling for a multiple of regular rent.

147. The third California case, *Fannie Mae v. Marchesiello*, No. A146624, 2017 Cal. App. Unpub. LEXIS 3473, at *12–13 (May 19, 2017) (unpublished), focused entirely on the parties' sophistication, the bargaining process, and the fact that the party contesting the default interest rate had not presented any evidence to show a that the rate was unreasonable.

the court held that an unreasonably high amount of liquidated damages compared to the contract amount was not enough to find the liquidated damages clause unenforceable because the large amount was due more to the time over which the interest had accrued than to the rate at which it had accrued.[148] This is very different from the approach that California and New York courts typically take when faced with liquidated damages clauses that call, for example, for fixed daily payments. In those cases, courts frequently point to the overall amount of accrued damages to establish the unreasonableness of the daily payments.[149]

Thus, courts in both jurisdictions seem inclined to uphold default interest rates as long as they do not violate state usury laws. Further, even if a default interest rate exceeded the rate permitted by usury laws, courts in California and New York enforced these rates if an exception to the usury laws applied. In *Roodenburg v. Pavestone Co.*,[150] a California appellate court enforced an 18% interest rate because it found that the contract was not subject to state usury laws because it did not involve a loan or forbearance, as required by the California Constitution.[151] Similarly, several New York courts enforced 24% interest rates, clearly in excess of the New York civil usury limit of 16%, because the parties facing the interest rate were corporations and as such barred under N.Y. GEN. OBLIG. § 5-521(1) (McKinney 2020) from relying on civil usury as a defense.[152]

Lastly, in the 2019 case *East West Bank v. Altadena Lincoln Crossing, LLC*, the Central District Court of California followed California Supreme Court precedent in holding that "a prospective increase in interest rate of a fully matured loan upon default is not subject to § 1671(b) analysis" and thus enforceable.[153] This means that if a liquidated damages clause calling for a default interest rate applies to a breach for failure to pay a loan's balance at maturity, California courts will treat it as offering an alternative means of performance rather than as functioning as a penalty. The significance of the doctrine of alternative means of performance is discussed below.

148. Roodenburg v. Pavestone Co., 89 Cal. Rptr. 3d 558, 565–66 (Ct. App. 2009); E. W. Bank v. Altadena Lincoln Crossing, LLC, 598 B.R. 633, 643–44 (C.D. Cal. 2019).

149. *See, e.g.*, LG Capital Funding, LLC v. Sanomedics Int'l Holdings, Inc., No. 508410, 2015 N.Y. Misc. LEXIS 4294, at *37–38 (Sup. Ct. Nov. 23, 2015).

150. *Roodenburg*, 89 Cal. Rptr. 3d at 565–66.

151. CAL. CONST. art. XV, § 1.

152. *E.g.*, LG Capital Funding, LLC v. 5BARZ Int'l, 307 F. Supp. 3d 84, 98 (E.D.N.Y. 2018).

153. *E. W. Bank*, 598 B.R. at 639.

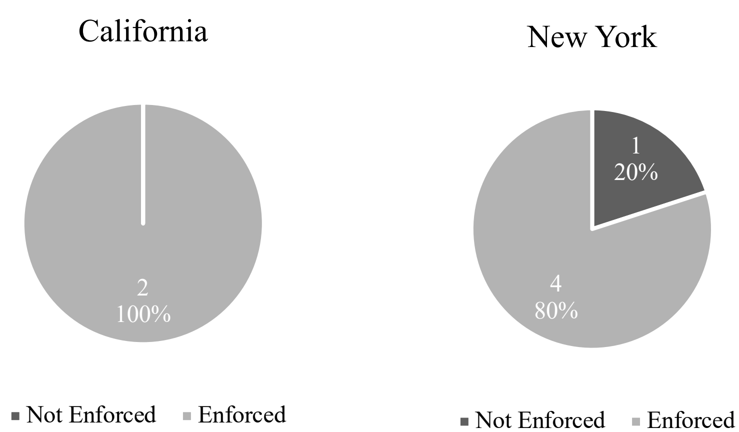
F. Leases

The lease agreements studied in California and New York fall into two categories: commercial leases and residential leases. The liquidated damages provisions in these agreements fixed damages for two situations: defaults on rent payments and holdovers. A holdover occurs when a tenant remains in possession of the premises after the term of the lease has expired.[154]

1. Commercial Leases

The majority of liquidated damages clauses contested in commercial leases during the time periods studied in California and New York respectively were holdover clauses.[155] In California and in New York, courts in recent cases have been very deferential to parties' agreements that fix damages in case of a holdover.[156]

FIGURE 4. Holdover Clauses as Liquidated Damages in California and New York



154. *Holdover Tenant*, INVESTOPEDIA, https://www.investopedia.com/terms/h/holdover-tenant.asp [https://perma.cc/p5cd-Q36E].

155. In New York, 5 out of 8 contested clauses in commercial leases addressed holdovers. In California, both contested clauses in commercial leases addressed holdovers.

156. New York courts enforced 4 out of 5 clauses fixing holdover damages, and California courts enforced both challenged holdover-damage clauses. The only case that struck down a holdover clause did so because the liquidated damages clause awarded the non-breaching party both actual and liquidated damages. *555 W. John St., LLC v. Westbury Jeep Chrysler Dodge, Inc.*, 49 N.Y.S.3d 903, 905 (App. Div. 2017). It is clearly established under both California and New York law that liquidated and actual damages are mutually exclusive.

Courts have consistently upheld clauses that fix monthly holdover rent equal to roughly twice the amount agreed on under the lease,[157] with one court even upholding a triple-rent provision.[158] Most courts simply stated that the party contesting the holdover clause failed to meet its burden of proving that the predetermined damages were not reasonably related to actual anticipated damages. Additionally, some courts mentioned that increased transaction costs and intangible damages such as goodwill are difficult to measure.[159] Instead of engaging in analyses of the reasonability of the relationship of holdover rent to actual anticipated damages, many New York cases conclusively cited to a list of prior cases that have upheld similar holdover rent provisions.[160] However, the possible reasoning underlying this perplexing judicial deference to holdover clauses is aptly explained by the Los Angeles Division of the United States Bankruptcy Court for the Central District of California. In *In re Art & Architecture Books of the 21st Century*, the court reasoned that in the case of a holdover, a clause fixing damages does not penalize a tenant for a breach committed in the past, but for ongoing possession of the property.[161] The significant difference between the two is that the tenant in case of a holdover may decide at any point to vacate the premises and thus avoid further payments.[162]

While this reasoning appears sound in cases in which a tenant remains in possession of the premises for an extended period of time, it breaks down in cases in which tenants, possibly inadvertently, vacate the premises shortly after the termination date of the lease. In such cases, it seems difficult to meaningfully distinguish between holdover clauses and penalty clauses that call for increased fixed payments that are triggered by delays in the performance of contractual obligations.

Liquidated damages clauses in commercial lease agreements that do not address holdovers but fix damages in case of a default on rent fall into different categories and are more appropriately discussed in other sections according to the type of clause rather than transaction type.

157. *See, e.g.*, Carlyle, LLC v. Quik Park Beekman II, LLC, 74 N.Y.S.3d 434, 437 (App. Term 2018).

158. *See* Ninety-Five Madison Co. v. Karlitz & Co., No. 653113, 2014 N.Y. Misc. LEXIS 896, at *39 (Sup. Ct. Feb. 27, 2014).

159. *See, e.g.*, Wells Fargo Bank Nw., N.A. v. Ryan Int'l Airlines, Inc., No. CV 09-03489, 2011 U.S. Dist. LEXIS 164696, at *13–14 (C.D. Cal. Apr. 27, 2011); Kingman v. ZMoore Ltd., No. 652564, 2018 N.Y. Misc. LEXIS 3590, at *14–15 (Sup. Ct. Aug. 16, 2018).

160. *See, e.g.*, Getty Props. Corp. v. Getty Petroleum Mktg. Inc., No. 651762, 2015 N.Y. Misc. LEXIS 4885, at *7–8 (Sup. Ct. May 14, 2015).

161. *In re* Art & Architecture Books of the 21st Century, 522 B.R. 249, 264 (Bankr. C.D. Cal. 2014).

162. *Id.* (holding that a clause fixing holdover rent of 150% of the regular rent was not an unenforceable penalty).

2. Residential Leases

As stated above, when the liquidated damages clause at issue is contained in a residential lease, California law places the burden not on the party contesting enforceability, but on the party seeking the liquidated damages award. New York law, on the other hand, continues to place the burden on the party challenging the liquidated damages clause. This difference in which party bears the burden is noticeable when comparing California courts' analysis of clauses in residential leases with that of California courts' analysis of clauses in nonconsumer contracts and with the New York court's analysis of a liquidated damages clause in a residential lease, during the time period studied. California courts emphasized that the burden in residential lease agreements is on the party seeking liquidated damages and struck down liquidated damages clauses without finding that they were *not* the result of a reasonable endeavor to estimate actual damages, but simply because the party seeking liquidated damages was unable to prove that they *were* the result of such a reasonable endeavor.[163] In the California and New York cases studied, all liquidated damages clauses in residential leases were struck down as unenforceable penalties.[164]

However, the extent to which the different approaches under California and New York law actually lead to different outcomes in factually similar cases does not become clear from the cases studied. Only one liquidated damages clause in a residential lease was contested in front of a New York court during the time studied. In *Biggio v. Puche*, a New York supreme court formally adhered to New York doctrine and placed the burden on the party contesting the liquidated damages clause.[165] However, the court struck the clause down as an unenforceable penalty solely based on the amount of damages demanded, without referring to any argument made by the party contesting liquidated damages. Thus, it appears that the court in *Biggio* placed a less onerous burden on the party contesting liquidated damages in a residential lease than other New York courts did in commercial leases or other business agreements. In effect, the *Biggio* court's approach was similar to that of California courts in residential lease cases. However, for two

163. *See, e.g.*, Del Monte Props. & Invs., Inc. v. Dolan, 236 Cal. Rptr. 3d 923, 926–27 (App. Dep't Super. Ct. 2018); *Phelps v. Misthos*, No. A129963, 2012 Cal. App. Unpub. LEXIS 8718, at *30–31 (Nov. 29, 2012) (unpublished), which otherwise conducted a similar analysis to *Del Monte*, did not conduct a true reasonable endeavor test, but rather consolidated the two prongs of the test into a single inquiry into the reasonableness of the relation of liquidated damages to actual anticipated damages.

164. California courts struck down all three liquidated damages clauses in residential leases, and the only liquidated damages clause contested in a residential lease in New York was also held unenforceable.

165. Biggio v. Puche, No. 113912/09, 2013 N.Y. Misc. LEXIS 3639, at *15–17 (Sup. Ct. Aug. 13, 2013).

reasons, this case study does not provide sufficient evidence to explore whether these observations have broader significance. First, *Biggio* is the only New York residential lease case studied, so it remains unclear whether *Biggio* is an outlier or an indicator of a trend. Second, the clause contested in *Biggio* appeared facially more punitive than the clauses contested in New York commercial lease cases.[166] Accordingly, the possibility remains that it was not the type of agreement, but rather the type of clause that led the *Biggio* court to impose a lesser burden on the contesting party. More research on New York courts' treatment of liquidated damages clauses in residential leases is necessary to investigate the relevance of the observations made in *Biggio*.

G. LIQUIDATED DAMAGES AS ALTERNATIVE MEANS OF PERFORMANCE

Under certain circumstances, California courts faced with clauses that fix payments have not analyzed these clauses as liquidated damages clauses. Under California law, "[a] contractual provision that merely provides an option of alternative performance of an obligation does not impose damages and is not subject to section 1671 limitations."[167] In the cases studied, the doctrine of alternative performance was predominantly applied by courts in the context of early termination fees,[168] where the general rule is that "[w]here a contract for a specified period of time permits a party to terminate the agreement before its expiration in exchange for a lump-sum monetary payment, the payment is considered merely an alternative to performance, and not a penalty."[169] Generally, to present a valid alternative to performance, a clause must meet two requirements. First, the clause must not only come into effect upon a breach of the agreement.[170] Second, the options presented by a clause must give a party a "realistic and rational choice."[171] A choice can only be realistic and rational if the terms of the option are themselves reasonable. Thus, to determine whether a party had a realistic and rational choice, courts essentially analyze whether the payment fixed by the contract clause was, at the time of contract formation, a reasonable price of

166. *Compare id.* at *16–17 (striking down liquidated damages in the form of a $150 daily fee that had amounted to $62,700 for delays in paying rent of only $3,600), *with* VBGO Penn Plaza, LLC v. Salon Media Grp., Inc., No. 654955, 2019 N.Y. Misc. LEXIS 841, at *3–4 (Sup. Ct. Mar. 1, 2019) (enforcing liquidated damages of the original rent amount to be paid in installments as though no breach had occurred).

167. Cellphone Termination Fee Cases, 122 Cal. Rptr. 3d 726, 752 (Ct. App. 2011).

168. I refer to the "doctrine" of alternative performance, even though I will argue that its limited effects make it undeserving of such a noteworthy title.

169. Morris v. Redwood Empire Bancorp, 27 Cal. Rptr. 3d 797, 803 (Ct. App. 2005).

170. *See, e.g.*, Stadium Promenade, LLC v. Shake It Up, LLC, No. G049753, 2015 Cal. App. Unpub. LEXIS 1556, at *17–18 (Mar. 2, 2015) (unpublished).

171. Blank v. Borden, 524 P.2d 127, 131 (Cal. 1974).

nonperformance.[172] If a court finds that the payment determined by the clause at issue fails this reasonableness analysis, the court will strike it down as an unenforceable penalty.[173]

New York courts do not formally distinguish clauses that provide for alternative means of performance from those that provide for liquidated damages. However, because a reasonableness analysis is built into California's analysis for alternative means of performance, California and New York law are substantively similar and this formal difference does not lead to any real difference in case outcomes.

IV. THE (UN)IMPORTANCE OF SOPHISTICATION AND NEGOTIATION

As described in Sections II.B and II.C, both California and New York courts sometimes consider parties' sophistication and the procedural aspects of a transaction, such as relative bargaining power and whether the parties were represented by counsel in the negotiation process. In several cases, courts appeared to engage in an analysis very akin to that under the procedural prong of the doctrine of unconscionability.[174] Overall, a somewhat higher percentage of New York courts relied on sophistication and negotiation than did California courts.[175]

Further, under the split approach, California courts differentiate between consumer contracts under section 1671(d) and nonconsumer contracts under section 1671(b). California courts formally only look at sophistication and negotiation in nonconsumer contracts under section 1671(b). In contrast, New York courts do not formally distinguish between consumer and nonconsumer contracts and may formally consider sophistication and negotiation in all types of contracts. This formal difference in approach does not have a divergent impact on California and

172. *See, e.g.*, Hutchison v. AT&T Internet Servs., No. CV07-3674, 2009 U.S. Dist. LEXIS 53937, at *12–15 (C.D. Cal. May 5, 2009).

173. *See, e.g.*, Med. Sales & Consulting Grp. v. Plus Orthopedics USA, Inc., No. 08CV1595, 2011 U.S. Dist. LEXIS 123497, at *23–24, 26 (S.D. Cal. Oct. 25, 2011) (holding that a clause conditionally granting a salesman 150% of his previous year's sales was not an alternative means of performance but an unenforceable penalty because the payment bore "no reasonable relationship to the damages" and its only purpose was to compel performance).

174. *E.g.*, Westco Petroleum Distribs. v. Huntington Beach Indus., No. B264846 & B269393, 2017 Cal. App. Unpub. LEXIS 5492, at *19–20 (Aug. 10, 2017) (unpublished).

175. In California, 6 out of 58 decisions expressly relied on sophistication and negotiation, one additional decision cited them as relevant factors but did not rely on them, and two more cases merely cited to the Law Revision Commission's Report that lists sophistication and negotiation as relevant factors. In New York, decisions in 11 out of 53 cases relied on sophistication and negotiation, and two additional cases examined them as relevant factors but decided that other considerations outweighed them.

New York decisions, but in fact leads to a convergence between them. The protection consumers get from the shifted burden of proof and presumed invalidity of liquidated damages clauses in California consumer contracts is mirrored by New York courts' reliance on sophistication and negotiation. The purpose of New York courts' consideration of sophistication and negotiation is clearly to give deference to agreements freely entered into and resulted from arms-length negotiations. However, the unavoidable flip side of this is that New York courts were more suspicious of liquidated damages clauses that originate from agreements that result from negotiations between parties of unequal bargaining power, in which at least one party was unsophisticated. This may explain why the cases studied suggest that California courts are not more protective of consumers than New York courts. In fact, New York courts struck down all three liquidated damages clauses challenged in consumer contracts, while California courts held that four out of seven liquidated damages clauses were in fact unenforceable penalties.[176]

To further examine whether there is a significant difference between California and New York courts' treatment of contracts involving at least one unsophisticated party, I categorized the cases according to party identity, and distinguished between businesses and individuals. The value of this distinction rests on the assumption that individuals tend to be less sophisticated than businesses.[177]

In both California and New York, the majority of liquidated damages clauses were challenged in contracts between businesses.[178] In California, courts found 13 out of 38, or 34% of the clauses that were to be enforced

176. *See supra* Figure 1. The small number of cases challenging liquidated damages clauses in consumer contracts in both California and New York makes any conclusion drawn from the sample less meaningful. Thus, even though one might be tempted to conclude from the data that New York courts are more consumer-protective than California courts, the more reasonably valid conclusion is that there is no significant difference in the level of consumer protection concerning liquidated damages under California and New York law. It may be worth conducting further research to examine if there is a meaningful difference between California and New York in the number of cases brought by consumers challenging liquidated damages. Further, one might investigate whether the percentage of liquidated damages clauses challenged by consumers compared to those challenged by businesses is, in reality, greater than it appears from the cases studied for this Note. A possible explanation for the low percentage of challenges in consumer contracts may be that this Note only considered cases that went to trial. It may well be that consumer cases were more likely than nonconsumer cases to settle before trial.

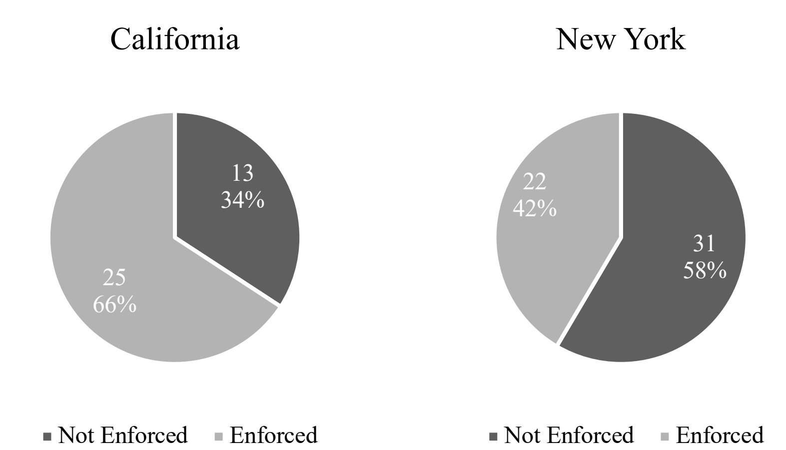
177. This assumption ignores the fact that individuals may of course be highly sophisticated, while businesses, especially smaller ones, may be relatively unsophisticated. However, the individual versus business distinction seemed to be the best proxy available to study a potential trend in enforcement for sophisticated versus unsophisticated parties. In an attempt to control for some weaknesses in this distinction, I counted individuals acting as trustees towards the business-category, as their position as trustee makes it likely that they are relatively sophisticated.

178. In California, 33 out of 59 clauses were disputed between businesses, and in New York, 51 out of 66 clauses were disputed between businesses.

against businesses to be unenforceable penalties.[179] However, in cases in which a liquidated damages clause was to be enforced against an individual, courts refused to enforce 11 out of 21 clauses, or 52%.[180] This indicates a tendency for California courts to be more willing to enforce liquidated damages clauses against sophisticated parties.

In New York, courts found unenforceable penalties in 31 out of 53, or 58% of the clauses that were to be enforced against businesses.[181] On the other hand, New York courts refused to enforce 10 out of 13, or 77% of liquidated damages clauses against individuals. This suggests that New York courts, like California courts, are less likely to enforce liquidated damages clauses against individuals than they are to enforce them against businesses. This trend seems at least as strong in New York as it does in California.

Figure 5. Liquidated Damages to be Enforced Against Businesses in California and New York

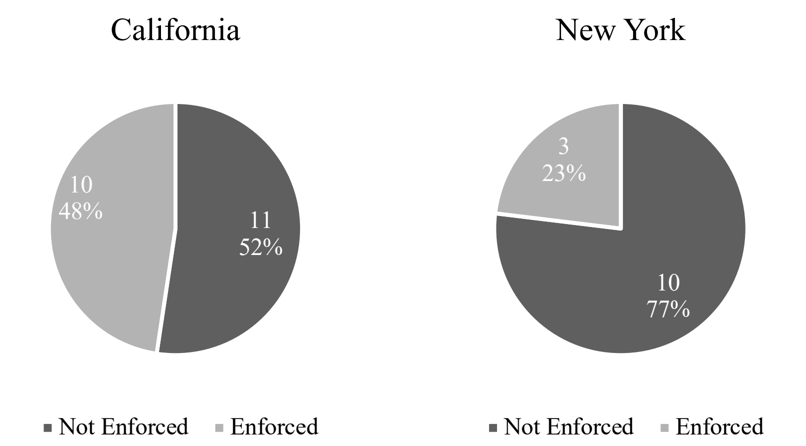


179. This statistic includes cases in which both parties were businesses and the few cases in which individuals sought to enforce liquidated damages clauses against businesses. The breakdown between the two categories is as follows: Business v. Business: 11 out of 33 (33%) penalty; Individual v. Business: 2 out of 5 (40%) penalty. One case striking down a clause in a contract between two businesses did not refer to it as a penalty, but refused to enforce it for lack of mutual assent and vagueness. Concept Chaser Co. v. Pentel of Am., Ltd., Nos. B241929 & B243330, 2014 Cal. App. Unpub. LEXIS 3786, at *39–40 (May 27, 2014) (unpublished).

180. This statistic includes liquidated damages clauses to be enforced against individuals in contracts with businesses or other individuals. The breakdown between the two categories is as follows: Business v. Individual: 6 out of 14 (43%) penalty; Individual v. Individual: 5 out of 7 (71%) penalty.

181. This statistic can be broken down as follows: Business v. Business: 31 out of 51 (61%) penalty; Individual v. Business: 0 out of 2 (0%) penalty.

Figure 6. Liquidated Damages to be Enforced Against Individuals in California and New York



These findings further support the conclusion that California courts are not more likely than New York courts to strike down liquidated damages clauses, in general and against unsophisticated parties. Further, these findings support the argument that courts' consideration of the parties' sophistication as well as the amount and manner of negotiation leads to similar practical outcomes in the decisions by California and New York courts.

CONCLUSION

This Note has tested two hypotheses regarding the enforcement of liquidated damages clauses in California and New York. Only one of these hypotheses finds support in recent case law. Both California and New York courts are more likely to enforce liquidated damages clauses against sophisticated parties than against unsophisticated parties. However, the hypothesis that California courts are more inclined than New York courts to find penalties, and that California courts are particularly protective of consumers and unsophisticated parties has not been confirmed by the cases, neither when looking at the entire sample of cases, nor when investigating narrower categories of common transactions or clauses. Even though the respective doctrines under California and New York law seem to suggest California courts would be more consumer protective, the effects of California's consumer-friendly statutory provision are overshadowed by the tendency of both California and New York courts to consistently enforce or strike down certain types of liquidated damages clauses and to consider the importance of sophistication and negotiation in determining whether to enforce certain clauses.

The safest way for parties to ensure that the liquidated damages clauses in their agreements will be enforced is to analyze how best to estimate actual damages and to negotiate the details of clauses with the other party. However, in reality, deals happen quickly, and parties do not negotiate every clause of a contract, and instead often opt to simply adapt preexisting contracts to present needs. Thus, parties wishing to maximize the likelihood that the liquidated damages clause included in their standard agreement will be enforced should keep the trends indicated in this paper in mind. Some general guidelines include: (1) in a settlement agreement, do not derive liquidated damages from the amount sought in the suit underlying the settlement; (2) only phrase liquidated damages as daily payments if the nonbreaching party can prove daily losses; (3) phrase liquidated damages in the form of interest rates if possible; and (4) courts are lenient in enforcing holdover clauses in leases, even if they call for multiples of the regular monthly rent.

Lastly, practitioners and parties should note that California courts are not as consumer-friendly and New York courts are not as formalistic as their reputation may suggest. California and New York courts are generally similarly likely to enforce liquidated damages clauses, no matter the type of clause, agreement, or identity of the parties.

APPENDIX

APPENDIX TABLE 1. California Cases

Case	*Transaction Type*[182]	*Parties*[183]	*LQD Clause*	*Held*
Second Generation v. Cong Ty Tnhh Anh Chau Co., 2019 Cal. App. Unpub. LEXIS 5284 (2019).	Purchase K	B v. B	Fixed Daily Payments	Enforceable
Red &White Distribution, LLC v. Osteroid Enterprises, LLC, 38 Cal. App. 5th 582 (2019).	Settlement Agreement	B v. B	Stipulated Judgment > Amount Owed	Penalty
Mitsuwa Corp. v. Wehba, 2019 Cal. App. Unpub. LEXIS 5211 (2019).	Settlement Agreement	B v. I	Discount To Amount < Amount Owed	Enforceable
Murphy v. Combat Sports Academy, LLC, 2019 Cal. App. Unpub. LEXIS 3585 (2019).	Settlement Agreement	I v. B	Stipulated Judgment > Amount Owed	Penalty
East West Bank v. Altadena Lincoln Crossing, LLC, 598 B.R. 633 (C.D. Cal. 2019).	Loan Default	B v. B	Default Interest Rate	Enforceable
Sutra Beauty, Inc. v. Duran, 2019 U.S. Dist. LEXIS 25306 (C.D. Cal. 2019).	License K	B v. I	Fixed Payment	Penalty
Saeid Mohebbi v. Mahnaz Khazen, 2019 U.S. Dist.	Settlement Agreement	I v. B	Principal Increase	Penalty

182. To facilitate the analysis, some agreements that did not fall into one of the common transaction types, but for purposes of this Note functioned akin to transactions of a common category, were included in such common categories with which they shared relevant features.

183. B = Business; I = Individual. Any form of entity or organization was included in the B category.

LEXIS 4226 (N.D. Cal. 2019).				
BASF Corp. v. Waterpaper, Inc., 2018 U.S. Dist. LEXIS 189129 (C.D. Cal. 2018).	Purchase K	B v. B	Repayment > What Party Put in	Penalty
Del Monte Properties & Investments, Inc. v. Dolan, 236 Cal. Rptr. 3d 923 (Ct. App. 2018).	Residential Lease	B v. I	Fixed Payment Per Breach	Penalty
Lefty, LLC v. Macchiarini, 2018 Cal. App. Unpub. LEXIS 3053 (2018).	Purchase Agreement	I v. B	Voidable Note	Enforceable
Ticketmaster LLC v. Prestige Entertainment Inc., 306 F. Supp. 3d 1164 (C.D. Cal. 2018).	Breach of Terms of Use	B v. B	Fixed Payment Per Breach	Enforceable
Arciniega v. Clark (*In re* Arciniega), 2017 Bankr. LEXIS 4215 (B.A.P. 9th Cir. 2017).	Settlement Agreement	I v. I	Fixed Daily Payments	Penalty
Second Generation v. Kody Branch of California, 2017 Cal. Super. LEXIS 8520 (2017).	Purchase K	B v. B	Fixed Daily Payments	Enforceable
Vitatech International, Inc. v. Sporn, 224 Cal. Rptr. 691 (Ct. App. 2017).	Settlement Agreement	B v. B	Stipulated Judgment > Amount Owed	Penalty
Westco Petroleum Distributors v. Huntington Beach Industries, 2017 Cal. App. Unpub. LEXIS 5492 (2017).	Licensing Agreement	B v. I	Unspecified LQDs	Penalty

Jiu Zhou Group (HK) Holding Ltd. v. M. Bros., Inc., 2017 Cal. App. Unpub. LEXIS 4528 (2017).	License K	B v. B	Fixed Payment	Enforceable
Fannie Mae v. Marchesiello, 2017 Cal. App. Unpub. LEXIS 3473 (2017).	Loan Default	B v. I	Default Interest Rate	Enforceable
Marinakis v. Dias, 2016 Cal. App. Unpub. LEXIS 7445 (2016).	Settlement Agreement	I v. I	Principal Increase	Penalty
Legado Cos. v. Jones, 2016 Cal. App. Unpub. LEXIS 5374 (2016).	Settlement Agreement	B v. I	Discount To Amount < Amount Owed	Enforceable
Fong v. Washington Hospital Healthcare System, 2016 Cal. Super. LEXIS 1443 (2016).	Service K	B v. B	Amount Earned Plus Additional Percentage	Enforceable
911 Restoration Franchise, Inc. v. Blakeney, 2015 U.S. Dist. LEXIS 186525 (C.D. Cal. 2015).	License K	B v. I	Fixed Payment	Penalty
Hollywood Investment Properties LP v. Ibrahim, 2015 Cal. Super. LEXIS 20027 (2015).	Residential Lease	B v. I	Fixed Daily Payments	Penalty
Florez v. Yim, 2015 Cal. App. Unpub. LEXIS 2316 (2015).	Settlement K	I v. B	Stipulated Judgment > Amount Owed	Enforceable
Stadium Promenade, LLC v. Shake It Up, LLC, 2015 Cal. App.	Settlement Agreement	B v. B	Stipulated Judgment > Amount Owed	Penalty

Unpub. LEXIS 1556 (2015).				
Mahlum v. Adobe Systems, 2015 U.S. Dist. LEXIS 2085 (N.D. Cal. 2015).	Yearly Subscription; Early Termination Fee	B v. I	Full K Amount if Cancel After Cancellation Deadline	Enforceable
TI Beverage Group Ltd. v. S.C. Cramele Recas SA, 2015 U.S. Dist. LEXIS 180251 (C.D. Cal. 2015).	Settlement Agreement	B v. B	Fixed Payment Per Breach	Enforceable
In re Art & Architecture Books of the 21st Century, 522 B.R. 249 (Bankr. C.D. Cal. 2014).	Commercial Lease; Holdover	B v. B	1.5 Times Rent	Enforceable
Dye v. Sachs (*In re* Flashcom, Inc.), 2014 Bankr. LEXIS 4215 (B.A.P. 9th Cir. 2014).	Settlement Agreement	B v. B	Stipulated Judgment > Amount Owed	Penalty
Jade Fashion & Co., Inc. v. Harkham Industries, Inc., 177 Cal. Rptr. 3d 184 (Ct. App. 2014).	Settlement Agreement	B v. B	Discount To Amount < Amount Owed	Enforceable
Royalty Alliance, Inc. v. Tarsadia Hotels, 2014 Cal. App. Unpub. LEXIS 3806 (2014).	Purchase K	B v. B	Keep Deposit	Enforceable
Concept Chaser Co. v. Pentel of America, Ltd., 2014 Cal. App. Unpub. LEXIS 3786 (2014).	IP Agreement	B v. B	Fixed Payment Per Breach	Unenforceable (But Not Called Penalty)
Environmental Capital Group v. PCG Clean Energy & Technology	Service K; Early Termination Fee	B v. B	Fixed Payment	Enforceable

Fund, 2014 Cal. Super. LEXIS 8780 (2014).				
Kaufman v. Diskeeper Corp., 2014 Cal. App. Unpub. LEXIS 2961 (2014).	Non-Disclosure K	I v. B	Fixed Payment Per Breach	Enforceable
Hunt v. Stalians, 2014 Cal. App. Unpub. LEXIS 1874 (2014).	Purchase Agreement W/ Installment Payments	I v. I	Fixed Payment if Early Payoff	Enforceable
Purcell v. Schweitzer, 169 Cal. Rptr. 3d 90 (Ct. App. 2014).	Settlement Agreement	I v. I	Stipulated Judgment > Amount Owed	Penalty
Press Rentals, Inc. v. Genesis Fluid Solutions, Ltd., 2014 U.S. Dist. LEXIS 564 (N.D. Cal. 2014).	Settlement Agreement	B v. B	Attorney's Fees of Underlying Suit	Penalty
			Accelerated Payment	Enforceable
City of Oakland v. Pittman, 2013 Cal. App. Unpub. LEXIS 9290 (2013).	Settlement Agreement	B v. I	Fixed Payment Per Breach	Enforceable
Nylim Real Estate Mezzanine Fund II, L.P. v. Lembi, 2013 Cal. App. Unpub. LEXIS 5087 (2013).	Loan K; Guarantee Clause	B v. B	Full K Amount	Enforceable
Phelps v. Misthos, 2012 Cal. App. Unpub. LEXIS 8718 (2012).	Residential Lease	I v. I	Fixed Daily Payments	Penalty

Dollar Tree Stores Inc. v. Toyama Partners LLC, 875 F. Supp. 2d 1058 (N.D. Cal. 2012).	Services Under Commercial Lease	B v. B	Fixed Daily Payments	Penalty
Medical Sales & Consulting Group v. Plus Orthopedics USA, Inc., 2011 U.S. Dist. LEXIS 123497 (S.D. Cal. 2011).	Service K	B v. B	Fixed Payment	Penalty
Wells Fargo Bank Northwest, N.A. v. Ryan International Airlines, Inc., 2011 U.S. Dist. LEXIS 164696 (C.D. Cal. 2011).	Commercial Lease of a Good; Holdover	B v. B	Double Rent	Enforceable
Cellphone Termination Fee Cases, 122 Cal. Rptr. 726 (Ct. App. 2011).	Yearly Subscription; Early Termination Fee	B v. I	Fixed Fee Independent of Time of Cancellation	Penalty
Edwards v. Symbolic International, Inc., 414 Fed. App’x. 930 (9th Cir. 2011).	Purchase K	B v. B	Keep Deposit	Enforceable
Williams v. Oberon Media, Inc., 2010 U.S. Dist. LEXIS 47201 (C.D. Cal. 2010).	Yearly Subscription; Early Termination Fee	I v. B	Minimum Fee; But Paid-For Services Provided	Enforceable
Universal City Studios International B.V. v. Universal Studios International B.V., 2009 U.S. Dist. LEXIS 134865 (C.D. Cal. 2009).	License K	B v. B	Full K Amount Remaining	Enforceable
Beck Properties v. Hameed, 2009 Cal. App. Unpub. LEXIS 9794 (2009).	Non-Compete K	I v. I	Fixed Payment	Enforceable

Craigslist, Inc. v. Realworks Group LLC, 2009 U.S. Dist. LEXIS 132432 (N.D. Cal. 2009).	Breach of Terms of Use	B v. B	Fixed Payment Per Breach	Enforceable
Danial v. Truxtun, 2009 Cal. App. Unpub. LEXIS 5772 (2009).	Employment K	I v. B	Full K Amount Remaining	Enforceable
Hutchison v. AT&T Internet Services, 2009 U.S. Dist. LEXIS 53937 (C.D. Cal. 2009).	Yearly subscription; Early termination Fee	I v. B	Fixed Fee Independent of Time of Cancellation	Enforceable
El Centro Mall, LLC v. Payless ShoeSource, Inc., 94 Cal. Rptr. 3d 43 (Ct. App. 2009).	Services under Commercial Lease	B v. B	Fixed Payment Per Breach	Enforceable
Roodenburg v. Pavestone Co., L.P., 89 Cal. Rptr. 3d 558 (Ct. App. 2009).	Purchase Agreement	B v. B	Default Interest Rate	Enforceable
Nissanoff v. Balikian, 2009 Cal. App. Unpub. LEXIS 425 (2009).	Non-Disclosure Agreement	I v. I	Fixed Payment Plus Fixed Daily Payments if Late	Penalty
IDT Netherlands BV v. West Coast Distribution Inc., 2008 U.S. Dist. LEXIS 105921 (C.D. Cal. 2008).	Purchase K	B v. B	Minimum Amount of K Price	Enforceable
In re Rn Cal Iversa Ente Pri E Co., 2008 Cal. App. Unpub. LEXIS 9508 (2008).	Purchase K	B v. B	Keep Deposit Plus Any Future Deposits	Penalty
Baf v. Omid, 2008 Cal. App. Unpub. LEXIS 9504 (2008).	Settlement Agreement	B v. B	Stipulated Judgment > Amount Owed	Enforceable

Curren v. Escamilla (*In re* Vec Farms, LLC), 395 B.R. 674 (Bankr. N.D. Cal. 2008).	Settlement K	B v. B	Stipulated Judgment > Amount Owed	Enforceable
Greentree Financial Group, Inc. v. Execute Sports, Inc., 78 Cal. Rptr. 3d 24 (Ct. App. 2008).	Settlement K	B v. B	Stipulated Judgment > Amount Owed	Penalty

APPENDIX TABLE 2. New York Cases

Case	*Transaction Type*[184]	*Parties*[185]	*LQD Clause*	*Held*
Paguirigan v. Prompt Nursing Employment Agency LLC, 2019 U.S. Dist. LEXIS 165587 (E.D.N.Y. 2019).	Employment K; Early Termination	B v. I	Fixed Payment Depending on Time of Breach	Penalty
Global Brand Holdings, LLC v. Accessories Direct International USA, Inc., 2019 U.S. Dist. LEXIS 128965 (S.D.N.Y. 2019).	License Agreement	B v. B	Full K Amount Remaining	Enforceable
Morgan v. Ernst, 2019 N.Y. Misc. LEXIS 1808 (App. Term 2019).	Yearly Subscription; Early Termination	I v. I	Full K Amount Remaining Plus Lost Profits	Penalty
In re 1141 Realty Owner LLC, 598 B.R. 534 (Bankr. S.D.N.Y. 2019).	Loan K	B v. B	Full Loan Balance Plus Interest	Enforceable
VBGO Penn Plaza, LLC v. Salon Media Group, Inc., 2019 N.Y. Misc. LEXIS 841 (Sup. Ct. 2019).	Commercial Lease; Default	B v. B	Rent Due in Regular Installments	Enforceable
LG Capital Funding, LLC v. FLASR, Inc., 422 F. Supp. 3d 611 (E.D.N.Y. 2018).	Loan K	B v. B	Fixed Daily Payments	Penalty
Perseus Telecorn, Ltd. v. Indy Research Labs, LLC, 2018 N.Y. Misc. LEXIS 5753 (Sup. Ct. 2018).	Yearly Subscription; Early Termination	B v. B	Full K Amount Remaining	Penalty
Adar Bays, LLC v. GeneSYS ID, Inc., 341 F. Supp. 3d 339 (S.D.N.Y. 2018).	Loan K	B v. B	Fixed Daily Payments	Penalty

184. To facilitate the analysis, some agreements that did not fall into one of the common transaction types, but for purposes of this Note functioned akin to transactions of a common category, were included in such common categories with which they shared relevant features.

185. B = Business; I = Individual. Any form of entity or organization was included in the B category.

Kingman v. ZMoore Ltd., 2018 N.Y. Misc. LEXIS 3590 (Sup. Ct. 2018).	Commercial Lease; Holdover	I v. B	Double Rent	Enforceable
Adar Bays, LLC v. 5Barz International, Inc., 2018 U.S. Dist. LEXIS 139843 (S.D.N.Y. 2018).	Loan K	B v. B	Fixed Daily Payments	Penalty
			Principal Increase	Penalty
			Conversion at Highest Trade Price	Penalty
			Default Interest Rate	Enforceable
LG Capital Funding, LLC v. Accelera Innovations, LLC, 2018 U.S. Dist. LEXIS 137490 (E.D.N.Y. 2018).	Loan K	B v. B	Fixed Daily Payments	Penalty
			Highest Trade Price	Penalty
			Default Interest Rate	Enforceable
LG Capital Funding, LLC v. M Line Holdings, Inc., 422 F. Supp. 3d 739 (E.D.N.Y. 2017).	Loan K	B v. B	Fixed Daily Payments	Penalty
			Default Interest Rate	Enforceable

Leeber Realty LLC v. Trustco Bank, 316 F. Supp. 3d 594 (S.D.N.Y. 2018).	Commercial Lease Default	B v. B	Full K Amount Remaining	Enforceable
Mathew v. Slocum-Dickson Medical Group, PLLC, 75 N.Y.S.3d 738 (App. Div. 2018).	Non-compete K	I v. B	Greater of Fixed Payment and Fixed Percentage	Enforceable
LG Capital Funding, LLC v. 5barz International, Inc., 307 F. Supp. 3d 84 (E.D.N.Y. 2018).	Loan K	B v. B	Fixed Daily Payments	Penalty
			Highest Trade Price	Penalty
JMW 75 LLC v. Debs, 73 N.Y.S.3d 724 (App. Term 2018).	Settlement Agreement	I v. B	Undefined	Enforceable
Carlyle, LLC v. Quik Park Beekman II, LLC, 74 N.Y.S.3d 434 (App. Term 2018).	Commercial Lease Holdover	B v. B	Double Rent Plus 25%	Enforceable
LG Capital Funding, LLC v. Eventure Interactive, Inc., 2018 U.S. Dist. LEXIS 37637 (E.D.N.Y. 2018).	Loan K	B v. B	Fixed Daily Payments	Penalty
			Highest Trade Price	Penalty
			Default Interest Rate	Enforceable
Trustees of Columbia University in N.Y.C. v. D'Agostino Supermarkets, 2018 NYLJ LEXIS 536 (Sup. Ct. 2018).	Settlement Agreement	B v. B	Stipulated Judgment > Amount Owed	Penalty

LG Capital Funding, LLC v. CardioGenics Holdings, Inc., 2018 U.S. Dist. LEXIS 28001 (E.D.N.Y. 2018).	Loan K	B v. B	Fixed Daily Payments	Penalty
			Highest Trade Price	Penalty
RES Exhibit Services, LLC v. Genesis Vision, Inc., 63 N.Y.S.3d 280 (App. Div. 2017).	Service K	B v. B	Undefined	Enforceable
LG Capital Funding, LLC v. Coroware, Inc., 2017 U.S. Dist. LEXIS 146190 (E.D.N.Y. 2017).	Loan K	B v. B	Fixed Daily Payments	Penalty
			Default Interest Rate	Enforceable
TD Capital Group LLC v. First Union Baptist Church of the Bronx (*In re* First Union Baptist Church of the Bronx), 2018 U.S. Dist. LEXIS 20669 (S.D.N.Y. 2018).	Settlement K	B v. B	Deed on Property	Enforceable
LG Capital Funding, LLC v. On4 Communications, Inc., 2017 U.S. Dist. LEXIS 117201 (E.D.N.Y. 2017).	Loan K	B v. B	Highest Trade Price	Penalty
Leviton Manufacturing Co. v. Pass & Seymour, Inc., 2017 U.S. Dist. LEXIS 112390 (E.D.N.Y. 2017).	Settlement K	B v. B	Double Payments Independent of Type of Breach	Penalty
Colacino v. Colacino, 60 N.Y.S.3d 181 (App. Div. 2017).	Settlement K	I v. I	Formula to Estimate Damages	Enforceable
Prospect Funding Holdings, LLC v. Heady, 2017 N.Y. Misc. LEXIS 2305 (Sup. Ct. 2017).	Purchase K	B v. I	Treat as Principal Increase	Penalty
555 W. John St., LLC v. Westbury Jeep Chrysler Dodge, Inc., 49 N.Y.S.3d 903 (App. Div. 2017).	Commercial Lease; Holdover	B v. B	Fixed Daily Payments	Penalty

Union Capital LLC v. Vape Holdings Inc., 2017 U.S. Dist. LEXIS 60445 (S.D.N.Y. 2017).	Loan K	B v. B	Fixed Daily Payments	Penalty
			Conversion at Highest Trade Price	Penalty
Markham Gardens, L.P. v. 511 9th, LLC, 40 N.Y.S.3d 179 (App. Div. 2016).	Purchase K	B v. B	Full K Amount Remaining but Still Get Part of Goods	Enforceable
Agerbrink v. Model Service LLC, 196 F. Supp. 3d 412 (S.D.N.Y. 2016).	License Agreement	B v. I	Keep Deposit or Get Actual Damages	Penalty
Auto-Chlor of NYC v. Mount Fishtail, Inc., 2016 N.Y. Misc. LEXIS 2567 (App. Term 2016).	Yearly Subscription; Early Termination	B v. B	Full K Amount Remaining Plus Attorneys' Fees	Penalty
Fitzpatrick v. Fitzpatrick, 33 N.Y.S.3d 338 (App. Div. 2016).	Settlement Agreement	I v. I	Increase in Regular Fixed Payments	Penalty
Sisters of the Holy Child Jesus at Old Westbury v. Corwin, 29 N.Y.S.3d 736 (App. Term 2016).	Yearly Subscription; Early Termination	B v. I	Full K Amount Remaining if Withdraw After Deadline	Enforceable
Sol Group Marketing Co. v. American President Lines, Ltd., 2016 U.S. Dist. LEXIS 5445 (S.D.N.Y. 2016).	Purchase K	B v. B	Fixed Payment Per Breach Where LQDs Too Low	Enforceable
LG Capital Funding, LLC v. Sanomedics International Holdings, Inc., 2015 N.Y. Misc. LEXIS 4294 (Sup. Ct. 2015).	Loan K	B v. B	Fixed Daily Payments	Penalty

Days Inns Worldwide, Inc. v. Hospitality Corp., 2015 U.S. Dist. LEXIS 122207 (S.D.N.Y. 2015).	License K	B v. B	Greater of Two Formulas but Capped at Max	Enforceable
Getty Properties Corp. v. Getty Petroleum Marketing Inc., 2015 N.Y. Misc. LEXIS 4885 (Sup. Ct. 2015).	Commercial Lease; Holdover	B v. B	Double Rent	Enforceable
HLT Existing Franchise Holding LLC v. Worcester Hospitality Group, LLC, 609 Fed. App'x 669 (2d Cir. 2015).	License K	B v. B	Full K Amount Remaining	Enforceable
326 E. 85 Realty LLC v. Hairy Monk Corp., 7 N.Y.S.3d 245 (Civ. Ct. 2014).	Settlement K	B v. B	Fixed Daily Payments	Penalty
GTD Services, Inc. v. Lewis, 2014 N.Y. Misc. LEXIS 4073 (Dist. Ct. 2014).	Yearly Subscription; Early Termination	B v. I	Fixed Payment	Penalty
720 Lex Acquisition LLC v. Guess? Retail, Inc., 2014 U.S. Dist. LEXIS 117518 (S.D.N.Y. 2014).	Commercial Lease Default	B v. B	Choice Between Two Formulas	Enforceable
Microban Products Co. v. API Industries, Inc., 2014 U.S. Dist. LEXIS 63883 (S.D.N.Y. 2014).	Purchase K	B v. B	Min. Amount of K Price	Enforceable
Ninety-Five Madison Co., L.P. v. Karlitz & Co., Inc., 2014 N.Y. Misc. LEXIS 896 (Sup. Ct. 2014).	Commercial Lease; Holdover	B v. B	Triple Rent	Enforceable
Northern Shipping Funds I, L.L.C. v. Icon Capital Corp., 998 F. Supp. 2d 301 (S.D.N.Y. 2014).	Loan K	B v. B	Fixed Payment	Penalty

Tullett Prebon Financial Services v. BGC Financial, L.P., 975 N.Y.S.2d 18 (App. Div. 2013).	Non-Disclosure K	B v. B	Fixed Daily Payments	Penalty
Del Nero v. Colvin, 975 N.Y.S.2d 825 (App. Div. 2013).	Non-Compete K	I v. I	Cancellation of Full K Amount	Penalty
Shelter Island Opportunity Fund, LLC v. Chow, 2013 N.Y. Misc. LEXIS 5118 (Sup. Ct. 2013).	Loan K	B v. B	Principal Increase	Enforceable
			Default Interest Rate	Enforceable
Biggio v. Puche, 2013 N.Y. Misc. LEXIS 3639 (Sup. Ct. 2013).	Residential Lease Default	I v. I	Fixed Daily Payments	Penalty
Photography by Brett Mathews, Inc. v. Solomon, 975 N.Y.S.2d 832 (App. Term 2013).	Service K	B v. I	Full K Price if Cancel After Deadline	Penalty
Trilegiant Corp. v. Sitel Corp., 2013 U.S. Dist. LEXIS 72828 (S.D.N.Y. 2013).	Service K	B v. B	Fixed Payment Per Breach	Penalty
Arthur Cab Leasing Corp. v. Loup Hacking Corp., 972 N.Y.S.2d 142 (Sup. Ct. 2013).	License K; Early Termination Fee	B v. B	Fixed Payment Depending on Time of Breach	Enforceable
Ford v. Cardiovascular Specialists, P.C., 959 N.Y.S.2d 352 (App. Div. 2013).	Non-Compete K	B v. I	Fixed Payment	Penalty