ARTICLE:

VALID LIQUIDATED DAMAGES OR UNENFORCEABLE PENALTIES? A DISCUSSION OF RECENT CALIFORNIA APPELLATE COURT DECISIONS

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Contracting parties build liquidated damages provisions into their agreements in a variety of contexts. These provisions unquestionably can serve useful and legitimate functions including controlling risk exposure and ensuring that the parties will have sufficient incentive to perform. However, California courts have long recognized that a provision for liquidated damages for contractual breach can, under some circumstances, operate as an impermissible contractual forfeiture or penalty. Sections 1670 and 1671 of the 1872 Civil Code originally provided that a liquidated damages provision was enforceable only if determining actual damages was impracticable or extremely difficult.[1] In 1977 these provisions were amended to apply the strict standard set forth in the 1872 Civil Code provisions only to certain contracts (consumer goods and leases of residential real property).[2] For the balance of contracts, the 1977 revision liberalized the rule.[3] The amended section 1671 subd. (b) provides: "[A] provision in a contract liquidating the damages for breach of the contract *is 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."[4]

Under this statutory scheme, and in part due to lack of clear guidance from the California Supreme Court[5] as discussed below in Section A, California appellate courts have repeatedly grappled with the often very fine line between an enforceable liquidated damages provision and an unenforceable penalty provision. This article examines recent developments in California courts regarding the distinction between valid liquidated damages provisions and unenforceable penalties in the contexts of stipulated judgments, commercial leases, and a recent case involving loan agreements. Before addressing these common situations, a discussion of the Supreme Court's decision in *Ridgley v. Topa Thrift & Loan Ass'n,* is necessary to properly set the scene, as the appellate courts in all three situations have cited *Ridgely* in their respective analyses.

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A. *Ridgley v. Topa Thrift & Loan Ass'n*

In *Ridgley v. Topa Thrift 6 Loan Ass'n*[6] ("*Ridgely*"), the California Supreme Court considered whether a late charge in a loan agreement was an unenforceable liquidated damages provision pursuant to section 1671.[7] The loan was for $2.3 million; repayment of the principal was due in two years, and monthly interest payments were due on a set date each month.[8] The loan agreement provided the principal could be repaid early, but if it was repaid early, the borrower would owe a prepayment charge equal to six months of interest, unless all scheduled interest payments were made on time and there were no other defaults.[9] The borrower repaid the principal early, but because one of the monthly interest payments had been late, the bank claimed it was entitled to a prepayment charge of approximately $113,000.[10] The borrower argued the prepayment charge was unenforceable under section 1671 and the Supreme Court agreed, finding the charge substantively constituted liquidated damages for breach of the loan agreement.[11] It also held the charge was invalid because the amount (i.e., six months of interest) was not a reasonable estimate of the damages the bank was likely to suffer due to one late interest payment.[12]

The Supreme Court in *Ridgley* relied heavily upon the analysis of *Garrett v. Coast 6 Southern Fed. Sav. 6 Loan Assn.,*[13] which was decided several years before the 1977 revision to section 1671 and held a late charge in a loan agreement was an unenforceable penalty. The *Ridgely* court described the rule set out in *Garrett* as:

> 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 [citation] and usually becomes effective only in the event of default [citation] upon which a forfeiture is compelled without regard to the damages sustained by the party aggrieved by the breach [citation]. 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. [Citations.]"[14]

In a footnote, the *Ridgely* court stated that: "[n]othing in the 1977 legislation indicates an intent to abrogate *Garrett*'s analysis of unjustified late fees as unenforceable penalties . . . ."[15] The *Ridgely* court's analysis has been criticized by at least one appellate court, which characterized the opinion as failing to properly take into account the California Law Revision Commission's instruc-

tion that"'*[a]ll* circumstances existing at the time of the making of a contract' should be considered when determining whether a liquidated damages provision in a nonconsumer contract is unreasonable."[16] *Ridgely* has been repeatedly cited in the contexts of late charges in loan documents,[17] settlement agree-ments,[18] and in commercial lease agreements.[19] Had the *Ridgely* court taken greater heed of the intent behind the 1977 revisions to sections 1670 and 1671, it is possible the landscape of liquidated damages enforceability in California would be vastly different than it is today. Or perhaps, as suggested by the recent case of *Honchariw v. FJM Private Mortgage Fund, LLC,*[20] discussed below, the *Ridgely* court's comments regarding the 1977 amendments should be limited to only the specific situations that arose in *Garrett*, *Ridgely*, and *Honchariw*.[21] That is, that it is per se unreasonable for the parties to have a one-time late charge for default on a simple installment that is a percentage of the total amount of the debt owed.

B. Settlement Agreements

Commonly, parties will settle litigation by entering into a settlement agreement that includes a stipulated judgment setting out a set sum payable upon failure of a party to perform under the terms of the settlement agreement. California courts have examined these agreements repeatedly and developed some useful guidance for practitioners seeking to draft enforceable provisions. Since the 2014 Second District Court of Appeal's decision in *Jade Fashion & Co., Inc. v. Harkham Industries, Inc.,*[22] courts have generally analyzed liquidated damages provisions as either being closer to the facts of *Jade Fashion* (and therefore enforceable) or closer to the facts of *Greentree Financial Group, Inc. v. Execute Sports, Inc.*[23] ("*Greentree*") (and therefore unenforceable).[24]

In *Greentree*, the parties settled a breach of contract claim for $20,000 via a settlement agreement that included a stipulation for entry of judgment.[25] When the defendant failed to pay, the trial court entered judgment pursuant to the stipulation for entry of judgment for $61,000 that included $45,000 in damages for breach of the underlying contract, $14,000 in prejudgment interest, and $2,000 in attorney's fees and costs.[26] The Fourth District Court of Appeal reversed the judgment, holding that awarding over $40,000 more than the settlement payment "[did] not merely compensate [the plaintiff]—it reward[ed the plaintiff] by penalizing [the defendant]."[27] The *Greentree* court followed the reasoning of *Ridgely* and emphasized that the relevant breach for determining whether the judgment was reasonable was not the breach of the underlying

contract, but rather the breach of the settlement agreement.[28] The court of appeal applied that rule and found that because the parties had not attempted to anticipate actual damages that would flow from breach of the stipulation, the $61,000 judgment was an unenforceable penalty that could not be enforced.[29]

Six years later, the Second District Court of Appeal in *Jade Fashion* affirmed a settlement agreement that provided a $17,500 discount on the amount a defendant owed if the defendant made each of the weekly payments on time.[30] There, the plaintiff was a garment manufacturer that sold a large volume of its products to the defendant, who fell behind in its payment obligations.[31] The defendant did not dispute that it owed $340,000 to the plaintiff, and worked out a payment plan to bring its account current and allow it to receive additional shipments from the plaintiff.[32] The written agreement the parties signed acknowledged the precise amount of the defendant's debt, established a detailed payment schedule, and provided that the defendant could deduct $17,500 from the final payment if the defendant timely made all other payments.[33] Under the agreement, the defendant was not entitled to the discount if even one payment was late.[34] When the plaintiff refused to institute the discount because some of defendant's payments had been late, the defendant argued that the $17,500 represented an unenforceable penalty.[35] The court of appeal disagreed and emphasized two key points that led to its determination that the $17,500 was a valid liquidated damages provision rather than an unenforceable penalty.[36] First, the court noted that the settlement agreement included an acknowledgment of the debt owed by the defendant—i.e., the amount of damages was not in dispute.[37] Second, the $17,500 was not a sum *above* the amount owed, but rather would be taken off of the acknowledged debt if the defendant made timely payments.[38] The court of appeal held that these two points rendered the facts of *Jade Fashion* distinguishable from the facts in *Greentree* and held that the parties' agreement was valid.[39]

A string of four additional published appellate opinions, two in the Second District and two in the Fourth District, followed the *Jade Fashion* decision— each of which invalidated provisions in settlement agreements as unenforceable penalties.[40]

In *Purcell v. Schweitzer,*[41] two settling parties entered into a settlement agreement that involved $38,000 total spread over 24 monthly installments.[42] The settlement agreement further provided that if the defendant defaulted on its payments that the original amount at issue in the lawsuit, $85,000, would im-

mediately become due and payable.[43] The parties included extensive language in the payment provision in an attempt to have the provision viewed as a valid liquidated damages provision including that the $85,000 "is an agreed upon amount of monies actually owed, jointly and severally, by the Defendant [(Schweitzer)] to the Plaintiff [(Purcell)] and is neither a penalty nor is it a forfeiture" and that the $85,000 took into account the "economics associated with proceeding further with this matter" and listed five examples of those "economics."[44] The court of appeal analyzed the provision under the framework of *Greentree* and *Ridgley* by examining whether the relationship between the $85,000 payment and the breach of the settlement agreement—not the breach of the underlying contract—was reasonable.[45] The court of appeal held that it was not, and expressly disapproved of the parties' attempt to avoid the result by including express language that it was not a penalty provision.[46].

In *Vitatech Internat., Inc. v. Sporn,*[47] the Fourth District Court of Appeal analyzed a settlement agreement executed by the parties on the eve of trial.[48] Like the court in *Purcell*, the court of appeal followed the holding of *Greentree* that "any judgment based on the settlement stipulation had to be reasonably related to the anticipated damages caused by breach of the stipulation, not breach of the underlying financial services agreement."[49] The court rejected Vitatech's attempt to distinguish *Greentree* on the basis that in that case the stipulation included language "disclaiming any admission of wrongdoing, fault, [or] liability," noting that while the stipulation here did not include a disclaimer, it also did not include an admission of liability as was included in *Jade Fashion*.[50] The court also rejected Vitatech's attempt to analogize its agreement to that in *Jade Fashion*, holding that "[a]ppellants never acknowledged their liability for the underlying claims or the damages Vitatech alleged in the complaint. Rather, they agreed to settle Vitatech's claims for a lesser amount and Appellants agreed to pay additional damages if they defaulted."[51] The court of appeal held that under the reasoning of *Greentree*, there was no reasonable relationship between the $303,000 judgment and the $75,000 settlement amount set out in the parties' settlement agreement.[52]

In *Red & White Distribution, LLC v. Osteroid Enterprises, LLC,*[53] the Second District Court of Appeal held that a stipulated judgment adding $700,000 in case of failure to pay timely the to $2.1 million settlement amount constituted an unenforceable penalty rather than valid liquidated damages because it bore no relation to reasonably calculable damages for late payment.[54] Like the *Vitatech*

court, the *Red 6 White* court analogized *Greentree* and *Ridgley* and distinguished *Jade Fashion* because the $700,000 was not a discount on a total of $2,800,000 but rather an addition of $700,000 that only applied if and when the defendant breached.[55] The court noted that the parties could have reasonably calculated the range of actual damages the parties could have anticipated from a breach of the agreement to settle the dispute for $2.1 million because such damages are easily determinable such as through prevailing interest rates.[56] The *Red 6 White* court succinctly described the interplay between *Ridgely*, *Greentree*, and *Jade Fashion* as follows:

> *Jade Fashion* is not at all inconsistent with *Ridgley* and *Greentree*, however. In *Jade Fashion*, the court held it is permissible under section 1671 for the parties to agree to a discount for timely payment of an admitted debt . . . Thus, based on *Jade Fashion*, if the parties stipulate that the debt is a certain number, they may agree that it may be discharged for that number minus some amount. They may also agree that in the event the debtor does not timely make the agreed payments, a stipulated judgment may be entered for the full amount.[57]

Finally, in *Graylee v. Castro,*[58] the Fourth District Court of Appeal analyzed a stipulation following the settlement of an unlawful detainer action.[59] There, a landlord brought an unlawful detainer action seeking possession of a residential unit and $27,170 in past-due rent.[60] After settlement including a stipulation for entry of judgment, the landlord filed motion for entry of $28,970 judgment against tenants based on their failure to vacate by a specific time and date specified in the judgment.[61] The superior court entered judgment for the landlord, and the court of appeal reversed, holding that a $28,970 judgment if tenants did not vacate premises by a precise day and time was a form of liquidated damages, and because it bore no reasonable relationship to actual anticipated damages, was an unenforceable penalty.[62] The court of appeal reasoned that this case was more like *Greentree* and *Vitatech* than *Jade Fashion* because (1) the claim was disputed, and (2) the amount of judgment did not withstand scrutiny both because there was no evidence "the parties made any effort to reasonably anticipate the amount of damages that might flow from the tenants' breach of the stipulation," and because there was "no meaningful relationship between the $28,970 judgment and the tenants' failure to move out by 3:00 p.m."[63]

Each of the four cases discussed immediately above demonstrate that California appellate courts were consistently applying the analytical framework to contractual provisions by comparing the value of the money or property forfeited or transferred to the party protected by the condition to the range of

harm or damages anticipated to be caused that party by the failure of the condition. This framework explicitly rejected looking beyond the settlement agreement to the underlying breach that led to the dispute between the parties. This general rule has recently been called into question in the context of settlement agreements as two district courts of appeal—the Second and Fourth—issued published decisions in 2022 rejecting the isolated analysis of the settlement agreement for a more holistic approach examining all surrounding circumstances.[64]

In *Creditors Adjustment Bureau, Inc. v. Imani,*[65] the Second District Court of Appeal held that a stipulation for entry of judgment following a commercial lease dispute allowing debtor to pay $30,000 in 24 consecutive payments of $1,250 but to pay $251,200.13 in the event of default was *not* an unenforceable penalty.[66] The court of appeal drew a comparison between the facts at issue and those in *Jade Fashion*, noting that as in *Jade Fashion*, the $251,200.13 sum was an undisputed debt (past due rent).[67] The *Creditors* court held that it could not "isolate the relevant breach of contract as only the breach of settlement agreement or stipulation for entry of judgment and excluding the underlying contract" because the $251,200.13 damages provision was the actual and conceded amount of damages.[68] *Creditors* is a marked departure from the rigid view expressed in *Greentree* and its progeny that the only relevant inquiry is the relationship between the conditional payment and the damages that flow from the breach of the settlement agreement.[69] However, the court of appeal emphasized that its decision was not inconsistent with *Greentree* and *Vitatech* because the amount at issue was undisputed, stating:

> Nothing in *Greentree* . . . or *Vitatech International*. . . compel a contrary conclusion. Why? Those cases involved disputed claims and here, appellant admitted owing the $251,200.13 as unpaid rent, i.e., damages. Appellant's financial wound was self-inflicted.[70]

Later in 2022, the Fourth District Court of Appeal in *Gormley v. Gonzalez,*[71] ensured that the *Creditors* decision would not be a one-off departure from the strict *Greentree* analysis.[72] In *Gormley*, the parties had entered into a global settlement agreement for multiple medical-malpractice lawsuits that included a provision that if defendants did not timely make the two installment payments totaling $575,000, then liquidated damages would be assessed at the rate of $50,000 per month and $1,644 per day, up to a cap of $1,500,000.[73] Following the defendants' failure to make those payments, the superior court entered judgment against the defendants in an amount that included liquidated dam-

ages, and the defendants appealed, arguing that the settlement agreement included an invalid liquidated damages clause.[74] The Fourth District Court of Appeal expressly rejected the analysis of the courts in *Greentree* and *Vitatech*, noting that those cases relied too heavily on the reasonable relationship between the amount and damages that would flow from the breach of the settlement agreement.[75] Instead, the *Gormley* court cited *Creditors Adjustment* with approval and examined all the surrounding circumstances at the time the settlement was made.[76] In discussing the rule in *Greentree*, the *Gormley* court stated:

> Whether the amount of liquidated damages reflects a reasonable estimate of actual damages is certainly something the court must consider when determining whether the provision is unreasonable, but it is not the only thing. Instead, and as noted above, courts are directed to consider "*All* the circumstances existing at the time of the making of the contract ...,including the relationship that the damages provided in the contract bear to the range of harm that reasonably could be anticipated at the time of the making of the contract. Other relevant considerations in the determination of whether the amount of liquidated damages is so high or so low as to be unreasonable include, but are not limited to, such matters as the relative equality of the bargaining power of the parties, whether the parties were represented by lawyers at the time the contract was made, . . . and whether the liquidated damages provision is included in a form contract."[77]

Creditors Adjustment and *Gormley* represent key decisions expanding the analysis of the reasonableness of liquidated damages provisions in settlement agreements to include more than a simple comparison between the amount of the settlement payment and the amount payable upon failure of a party to perform under the terms of the settlement agreement. Instead, there is now a better chance that provisions in settlement agreements will be analyzed in a more holistic manner that can take into account the underlying case that is being settled. Nevertheless, practitioners would still be wise to structure their settlements as settlements for an acknowledged debt that allows for a discount rather than settlements of a disputed sum that includes an increase upon a party's failure to perform.

The California Supreme Court has now granted review of the Third District Court of Appeal's decision in *JJD-HOV*, and thus will have an opportunity to resolve the difference of approach among these three decisions (*Grand Prospects, Constellation,* and *JJD-HOV*) over the next several months or more. In the mean time, the enforcement of cotenancy provisions in commercial leases at least will remain somewhat uncertain.

C. Commercial Lease Provisions

Appellate courts have come to differing conclusions regarding the applicability of the liquidated damages/unenforceable penalty analysis in the context of commercial leases. Cases in this context illustrate the tension between allowing sophisticated parties to agree to provisions that make sense in specific business contexts whilst preventing parties from creating provisions that operate as unenforceable penalties that run counter to public policy considerations.

In *Grand Prospect Partners, L.P. v. Ross Dress for Less, Inc.,*[78] the Fourth District Court of Appeal analyzed a co-tenancy clause in a retail commercial lease.[79] Co-tenancy provisions allow tenants to reduce their rent or terminate their lease if certain other tenants leave the retail space or the total occupancy of the space falls below a certain level.[80] Typically, the tenant's remedies include some form of rent relief and/or the termination of the lease based on the happening (or lack thereof) of certain conditions.[81] The pertinent provision in *Grand Prospect* provided that Ross had no obligation to open if certain other tenants were also not open, including Mervyn's, who was supposed to open on a parcel not owned by the landlord.[82] If these conditions were not met for a period of 12 months, then Ross could terminate the lease.[83] In addition, during the period that the conditions were not met, Ross had no obligation to pay rent, whether Ross was open and operating or not.[84] The court of appeal engaged in a fact-intensive analysis and while it upheld the termination provision, it also held that the rent abatement remedy was an unenforceable penalty because there was no reasonable relationship between the value of the property forfeited by the landlord (i.e., $39,500 monthly rent) and the anticipated harm to Ross (i.e., $0).[85] The court of appeal noted that this was an extreme provision that involved a very specific factual situation involving a very specific provision that identified events and other tenants by name, and that a more open-ended provision may yield a different result.[86]

In *Constellation-F, LLC v. World Trading 23 Inc.,*[87] the Second District Court of Appeal analyzed a holdover clause in a commercial lease that increased rent by 150 percent.[88] The trial court ruled in favor of the tenant, holding that the provision was a penalty and void under Civ. Code, § 1671.[89] The court of appeal reversed, holding that the provision should be analyzed as a "graduated rental" rather than as a liquidated damages provision under section 1671.[90] Applying the rationale of *Vucinich v. Gordon*[91] that such provisions are enforceable in commercial leases "even if the increased rent is much greater than the base

rent," the court held that the provision was valid.[92] The court then remarked upon a change to 1671 made in 1977 whereby the presumption that a liquidated damages clause in a commercial context is invalid was replaced with a presumption of validity.[93] The court of appeal concluded that the clause was not a penalty that was void under Civ. Code, 1671 because the clause did not mention damages, there was no evidence of oppressive coercion, and even if it constituted liquidated damages, the challenging party had not overcome the presumption of validity.[94]

In *JJD-HOV Elk Grove, LLC v. Jo-Ann Stores, LLC,*[95] the Third District Court of Appeal held that a shopping center lease with a co-tenancy provision that allowed for reduced rent if an anchor tenant left or overall occupancy dropped below an agreed-upon threshold was not a liquidated damages provision, and therefore could not be an unenforceable penalty.[96] Instead, the court treated the operative contract provision as a provision allowing alternative performance.[97] Generally, under such a provision, the party has an option to choose to perform one or more specified acts to satisfy a contractual obligation. Upon holding that

1671 was inapplicable because the provision was not a liquidated damages provision, the court of appeal followed the rule proposed by Jo-Ann Stores that: "the parties' contractual intent when reduced to writing should be controlling and enforced, particularly as applied to the commercial leasing market in arms-length negotiations and transactions."[98] The court emphasized that, as a general rule, "[t]t is not the province of the Court to alter a contract by construction or to make a new contract for the parties."[99] The court explicitly disagreed with the holding of *Grand Prospect*, explaining that the *Grand Prospect* court was mistaken when it found that the co-tenancy provision "was substantially equivalent to a liquidated damages provision" and that its enforceability should be evaluated using section 1671 balancing.[100] The court analogized the provision here to that in *Constellation* in that neither involved a situation where a party breached the agreement.[101] Instead, the court emphasized that a co-tenancy clause such as this, which was negotiated between sophisticated parties in a commercial setting, is typically valid and enforceable when it provides for alternative performance.[102]

The California Supreme Court has now granted review of *JJD-HOV*, and thus will have an opportunity to resolve the difference of approach among these three decisions (*Grand Prospects, Constellation,* and *JJD-HOV*) in the next several months. In the mean time, the enforcement of cotenancy provisions in commercial leases will remain somewhat uncertain.

D. Loan Documents—*Honchariw v. FJM Private Mortgage Fund, LLC*

In *Honchariw v. FJM Private Mortgage Fund, LLC*,[103] the First District Court of Appeal analyzed a provision in a deed of trust that provided for a one-time 10 percent fee of any overdue monthly payment, and a subsequent default interest charge of 9.99 percent per annum assessed against the total amount of unpaid principal balance.[104] In holding that the provision was void under § 1671, the court cited *Ridgely* for the proposition that "a liquidated damages provision is presumed valid if it is in a non-consumer contract but presumed invalid if it is in a consumer contract."[105] As the loan at issue was not for the purchase of property for personal use or as a primary dwelling, the court of appeal analyzed it as a non-consumer contract—and accordingly presumptively valid.[106]

Despite the presumption of validity, however, the *Honchariw* court cited with approval the analysis in *Garrett* and expressly held that despite *Garrett* being decided before the 1977 revision of Section 1671, "*Garrett* remains good law for the proposition that a late fee assessed against the entire unpaid balance of a loan constitutes an unlawful penalty and there is nothing in current section 1671 or the case law following *Garrett* holding otherwise."[107] The court concluded that "based on *Garrett* and its progeny, liquidated damages in the form of a penalty assessed during the lifetime of a partially matured note against the entire outstanding loan amount are unlawful penalties."[108]

Honchariw constitutes a strong re-affirmation of *Garrett* and *Ridgelys'* holdings. It directly rejects the contention that "the Legislature intended to 'legislatively overrule' former section 1671," noting that had it intended to do so, the Legislature "could have provided that liquidated damages provisions in non-consumer contracts are lawful, full stop."[109] Despite the strength in the *Honchariw* court's re-affirmation of *Garrett* and *Ridgely*, however, because each of those decisions involved a one-time late charge that took into account the total debt, practitioners should be cautious extending the *Honchariw* ruling beyond that specific context.

E. Conclusion

While there have been substantial developments in the California appellate case law regarding liquidated damages provisions in certain contexts, true bright-line rules are difficult to come by. In the context of settlement agree-

ments, the narrow reasonableness analysis in which courts have refused to look beyond the terms of the settlement agreement to the underlying claim has been questioned by two appellate courts. In *Creditors Adjustment* and *Gormley* the Second and Fourth District Courts of Appeal instead embraced a more holistic view that looked beyond the settlement agreement to all circumstances surrounding the parties' agreement. Recent decisions in the context of commercial lease agreements have trended away from even examining those provisions as liquidated damages provisions. In *Constellation* the Second District Court of Appeal instead analyzed the holdover rent provision as a "graduated rental" provision and held that under the body of law governing those provisions the provision was enforceable. In *JJD-HOV Elk Grove*, the Second District Court of Appeal analyzed a co-tenancy provision as an alternative performance provision and declined to treat the same as a liquidated damages provision subject to scrutiny under § 1671. The courts in both of these decisions emphasized the importance of allowing sophisticated landlords and tenants the freedom to contract in ways that fit unusual business situations and to not let these parties off the hook when they agree to those terms. Finally, in the context of late payments, the most recent appellate decision, *Honchariw*, re-affirmed the Supreme Court holdings in *Garrett* and *Ridgely*, but the applicability of *Honchariw* holding may be limited to the specific late charge scenario of those three cases.

This article is intended to provide practitioners with a snapshot of this ever-shifting body of law but unless and until the California Supreme Court clarifies the bounds of sections 1670 and 1671 in the non-consumer context, it is likely that the case law in this area will only continue to further splinter. Some additional clarity may come when the Supreme Court completes its review of the *JJD-HOV* decision, which should at least resolve the conflict between that case and *Grand Prospect* in the context of cotenancy clauses.

ENDNOTES:

[1]1872 Civ. Code, §§ 1670 and 1671 read:

1670. Every contract by which the amount of damage to be paid, or other compensation to be made, for a breach of an obligation, is determined in anticipation thereof, is to that extent void, except as expressly provided in the next section. 1671. The parties to a contract may agree therein upon an amount which shall be presumed to be the amount of damage sustained by a breach thereof, when, from the nature of the case, it would be impracticable or extremely difficult to fix the actual damage.

[2]*Civ. Code, § 1671, subds. (c), (d).*

[3]*See Ridgley v. Topa Thrift 6 Loan Ass'n, 17 Cal. 4th 970, 977, 73 Cal. Rptr. 2d 378, 953 P.2d 484 (1998) for discussion.*

[4]*Civ. Code, § 1671, subd. (b), emphasis added.*

[5]*Ridgley v. Topa Thrift 6 Loan Ass'n, 17 Cal. 4th 970, 73 Cal. Rptr. 2d 378, 953 P.2d 484 (1998).*

[6]*Ridgley v. Topa Thrift 6 Loan Ass'n, 17 Cal. 4th 970, 73 Cal. Rptr. 2d 378, 953 P.2d 484 (1998).*

[7]*Ridgley v. Topa Thrift 6 Loan Ass'n, 17 Cal. 4th 970, 73 Cal. Rptr. 2d 378, 953 P.2d 484 (1998).*

[8]*Id. at 974.*

[9]*Ibid.*

[10]*Id. at 979.*

[11]*Id. at 979-981.*

[12]*Id. at 980-981.*

[13]*Garrett v. Coast 6 Southern Fed. Sav. 6 Loan Assn., 9 Cal. 3d 731, 108 Cal. Rptr. 845, 511 P.2d 1197 (1973).*

[14]*Id. at 488 (citing Garrett v. Coast 6 Southern Fed. Sav. 6 Loan Assn., 9 Cal. 3d 731, 108 Cal. Rptr. 845, 511 P.2d 1197 (1973)).*

[15]*Id. at 981, fn. 5.*

[16]*Gormley v. Gonzalez, 84 Cal. App. 5th 72, 88, 300 Cal. Rptr. 3d 156 (3d Dist. 2022) (citing Deering's Ann. Civ. Code (2005 Ed.) foll. § 1671, p. 393, italics added).*

[17]*See e.g. Honchariw v. FJM Private Mortgage Fund, LLC, 83 Cal. App. 5th 893, 299 Cal. Rptr. 3d 819 (1st Dist. 2022).*

[18]*See e.g. Greentree Financial Group, Inc. v. Execute Sports, Inc., 163 Cal. App. 4th 495, 78 Cal. Rptr. 3d 24 (4th Dist. 2008); Jade Fashion 6 Co., Inc. v. Harkham Industries, Inc., 229 Cal. App. 4th 635, 177 Cal. Rptr. 3d 184 (2d Dist. 2014); Purcell v. Schweitzer, 224 Cal. App. 4th 969, 169 Cal. Rptr. 3d 90 (4th Dist. 2014); Vitatech Internat., Inc. v. Sporn, 16 Cal. App. 5th 796, 224 Cal. Rptr. 3d 691 (4th Dist. 2017); Red 6 White Distribution, LLC v. Osteroid Enterprises, LLC, 38 Cal. App. 5th 582, 251 Cal. Rptr. 3d 400 (2d Dist. 2019); Graylee v. Castro, 52 Cal. App. 5th 1107, 265 Cal. Rptr. 3d 885 (4th Dist. 2020); Creditors Adjustment Bureau, Inc. v. Imani, 82 Cal. App. 5th 131, 298 Cal. Rptr. 3d 227 (2d Dist. 2022); Gormley v. Gonzalez, 84 Cal. App. 5th 72, 300 Cal. Rptr. 3d 156 (3d Dist. 2022).*

[19]*See Grand Prospect Partners, L.P. v. Ross Dress for Less, Inc., 232 Cal. App. 4th 1332, 182 Cal. Rptr. 3d 235 (5th Dist. 2015); Constellation-F, LLC v. World Trading 23, Inc., 45 Cal. App. 5th 22, 258 Cal. Rptr. 3d 341 (2d Dist. 2020); JJD-HOV Elk Grove, LLC v. Jo-Ann Stores, LLC, 80 Cal. App. 5th 409, 295 Cal.*

Rptr. 3d 725 (3d Dist. 2022), review granted, see Cal. Rules of Court 8.1105 and 8.1115 (and comment on rule 8.1115(e)(3)), 299 Cal. Rptr. 3d 342, 517 P.3d 1156 (2022).

[20]*Honchariw v. FJM Private Mortgage Fund, LLC*, 83 Cal. App. 5th 893, 299 Cal. Rptr. 3d 819 (1st Dist. 2022).

[21]See e.g. *Honchariw v. FJM Private Mortgage Fund, LLC*, 83 Cal. App. 5th 893, 299 Cal. Rptr. 3d 819 (1st Dist. 2022).

[22]*Jade Fashion 6 Co., Inc. v. Harkham Industries, Inc.*, 229 Cal. App. 4th 635, 177 Cal. Rptr. 3d 184 (2d Dist. 2014)("*Jade Fashion*").

[23]*Greentree Financial Group, Inc. v. Execute Sports, Inc.*, 163 Cal. App. 4th 495, 78 Cal. Rptr. 3d 24 (4th Dist. 2008).

[24]See *Greentree Financial Group, Inc. v. Execute Sports, Inc.*, 163 Cal. App. 4th 495, 78 Cal. Rptr. 3d 24 (4th Dist. 2008), *Jade Fashion 6 Co., Inc. v. Harkham Industries, Inc.*, 229 Cal. App. 4th 635, 177 Cal. Rptr. 3d 184 (2d Dist. 2014).

[25]*Greentree Financial Group, Inc. v. Execute Sports, Inc.*, 163 Cal. App. 4th 495, 498, 78 Cal. Rptr. 3d 24 (4th Dist. 2008).

[26]*Ibid.*

[27]*Id.* at 500.

[28]*Ibid.*

[29]*Id.* at 502.

[30]*Jade Fashion 6 Co., Inc. v. Harkham Industries, Inc.*, 229 Cal. App. 4th 635, 639-640, 177 Cal. Rptr. 3d 184 (2d Dist. 2014).

[31]*Ibid.*

[32]*Ibid.*

[33]*Ibid.*

[34]*Ibid.*

[35]*Jade Fashion 6 Co., Inc. v. Harkham Industries, Inc.*, 229 Cal. App. 4th 635, 645-646, 177 Cal. Rptr. 3d 184 (2d Dist. 2014).

[36]*Id.* at 648-649.

[37]*Ibid.*

[38]*Id.* at 649.

[39]*Id.* at 649-651.

[40]*Purcell v. Schweitzer*, 224 Cal. App. 4th 969, 169 Cal. Rptr. 3d 90 (4th Dist. 2014), *Vitatech Internat., Inc. v. Sporn*, 16 Cal. App. 5th 796, 224 Cal. Rptr. 3d 691 (4th Dist. 2017); *Red 6 White Distribution, LLC v. Osteroid Enterprises, LLC*, 38 Cal. App. 5th 582, 251 Cal. Rptr. 3d 400 (2d Dist. 2019), *Graylee v. Castro*, 52 Cal. App. 5th 1107, 265 Cal. Rptr. 3d 885 (4th Dist. 2020).

[41]*Purcell v. Schweitzer*, 224 Cal. App. 4th 969, 169 Cal. Rptr. 3d 90 (4th Dist. 2014).

[42]*Purcell v. Schweitzer*, 224 Cal. App. 4th 969, 971, 169 Cal. Rptr. 3d 90 (4th Dist. 2014).

[43]*Ibid.*

[44]*Purcell v. Schweitzer*, 224 Cal. App. 4th 969, 972, 169 Cal. Rptr. 3d 90 (4th Dist. 2014).

[45]*Id.* at 974-975.

[46]*Id.* at 976 (citing *Cook v. King Manor and Convalescent Hospital*, 40 Cal. App. 3d 782, 792, 115 Cal. Rptr. 471 (2d Dist. 1974)).

[47]*Vitatech Internat., Inc. v. Sporn*, 16 Cal. App. 5th 796, 801-802, 224 Cal. Rptr. 3d 691 (4th Dist. 2017).

[48]*Vitatech Internat., Inc. v. Sporn*, 16 Cal. App. 5th 796, 801-802, 224 Cal. Rptr. 3d 691 (4th Dist. 2017).

[49]*Id.* at 809 (citing *Greentree Financial Group, Inc. v. Execute Sports, Inc.*, 163 Cal. App. 4th 495, 499-500, 78 Cal. Rptr. 3d 24 (4th Dist. 2008)).

[50]*Id.* at 810-811.

[51]*Id.* at 814.

[52]*Id.* at 814-815.

[53]*Red 6 White Distribution, LLC v. Osteroid Enterprises, LLC*, 38 Cal. App. 5th 582, 251 Cal. Rptr. 3d 400 (2d Dist. 2019).

[54]*Red 6 White Distribution, LLC v. Osteroid Enterprises, LLC*, 38 Cal. App. 5th 582, 590, 251 Cal. Rptr. 3d 400 (2d Dist. 2019).

[55]*Id.* at 589, 590.

[56]*Id.* at 589.

[57]*Ibid* (citations omitted).

[58]*Graylee v. Castro*, 52 Cal. App. 5th 1107, 265 Cal. Rptr. 3d 885 (4th Dist. 2020).

[59]*Graylee v. Castro*, 52 Cal. App. 5th 1107, 265 Cal. Rptr. 3d 885 (4th Dist. 2020).

[60]*Id.* at 887-888.

[61]*Id.* at 889.

[62]*Id.* at 899-890.

[63]*Id.* at 893-894.

[64]*Creditors Adjustment Bureau, Inc. v. Imani*, 82 Cal. App. 5th 131, 298 Cal. Rptr. 3d 227 (2d Dist. 2022); *Gormley v. Gonzalez*, 84 Cal. App. 5th 72, 300 Cal. Rptr. 3d 156 (3d Dist. 2022).

[65]*Creditors Adjustment Bureau, Inc. v. Imani*, 82 Cal. App. 5th 131, 298

Cal. Rptr. 3d 227 (2d Dist. 2022).

[66]*Creditors Adjustment Bureau, Inc. v. Imani*, 82 Cal. App. 5th 131, 136, 298 Cal. Rptr. 3d 227 (2d Dist. 2022).

[67]*Ibid.*

[68]*Id.* at 137.

[69]*Id.* at 136.

[70]*Id.* at 137 (citations omitted).

[71]*Gormley v. Gonzalez*, 84 Cal. App. 5th 72, 300 Cal. Rptr. 3d 156 (3d Dist. 2022).

[72]*Gormley v. Gonzalez*, 84 Cal. App. 5th 72, 300 Cal. Rptr. 3d 156 (3d Dist. 2022).

[73]*Id.* at 76.

[74]*Id.* at 79.

[75]*Id.* at 82-84.

[76]*Id.* at 86-87.

[77]*Id.* at 81 (citing Cal. Law Revision Com. com., Deering's Ann. Civ. Code (2005 Ed.) foll. § 1671, p. 393, italics and bold added; see also *People v. Aguirre*, 64 Cal. App. 5th 652, 661, 279 Cal. Rptr. 3d 126 (3d Dist. 2021) [word "include" is " ' " 'ordinarily a term of enlargement rather than limitation' " ' "]).

[78]*Grand Prospect Partners, L.P. v. Ross Dress for Less, Inc.*, 232 Cal. App. 4th 1332, 182 Cal. Rptr. 3d 235 (5th Dist. 2015).

[79]*Grand Prospect Partners, L.P. v. Ross Dress for Less, Inc.*, 232 Cal. App. 4th 1332, 182 Cal. Rptr. 3d 235 (5th Dist. 2015).

[80]Jenny Dao and Star Lightner, Co-tenancy Provisions in Retail Leases: Liquidated Damages or Alternative Performance? 33 No. 1 Miller & Starr, Real Estate Newsalert (Sep. 2022).

[81]*Ibid.*

[82]*Grand Prospect Partners, L.P. v. Ross Dress for Less, Inc.*, 232 Cal. App. 4th 1332, 1340, 182 Cal. Rptr. 3d 235 (5th Dist. 2015).

[83]*Id.* at 1344.

[84]*Ibid.*

[85]*Id.* at 1362-65.

[86]*Ibid.*

[87]*Constellation-F, LLC v. World Trading 23, Inc.*, 45 Cal. App. 5th 22, 258 Cal. Rptr. 3d 341 (2d Dist. 2020).

[88]*Constellation-F, LLC v. World Trading 23, Inc.*, 45 Cal. App. 5th 22, 2829, 258 Cal. Rptr. 3d 341 (2d Dist. 2020).

[89]*Id.* at 26.

[90]*Id.* at 26-27.

[91]*Vucinich v. Gordon*, 51 Cal. App. 2d 434, 435, 124 P.2d 868 (2d Dist. 1942).

[92]*Id.* at 28-30.

[93]*Id.* at 28.

[94]*Id.* at 28-31.

[95]*JJD-HOV Elk Grove, LLC v. Jo-Ann Stores, LLC*, 80 Cal. App. 5th 409, 295 Cal. Rptr. 3d 725 (3d Dist. 2022), review granted, see Cal. Rules of Court 8.1105 and 8.1115 (and comment on rule 8.1115(e)(3)), 299 Cal. Rptr. 3d 342, 517 P.3d 1156 (2022).

[96]*JJD-HOV Elk Grove, LLC v. Jo-Ann Stores, LLC*, 80 Cal. App. 5th 409, 295 Cal. Rptr. 3d 725 (3d Dist. 2022), review granted, see Cal. Rules of Court 8.1105 and 8.1115 (and comment on rule 8.1115(e)(3)), 299 Cal. Rptr. 3d 342, 517 P.3d 1156 (2022).

[97]*Id.* at 422.

[98]*Id.* at 423.

[99]*Ibid.*

[100]*Id.* at 419-420.

[101]*Id.* at 425.

[102]*Id.* at 426.

[103]*Honchariw v. FJM Private Mortgage Fund, LLC*, 83 Cal. App. 5th 893, 299 Cal. Rptr. 3d 819 (1st Dist. 2022).

[104]*Id.* at 898-899.

[105]*Id.* at 899-900 (citing *Ridgley v. Topa Thrift & Loan Ass'n*, 17 Cal. 4th 970, 73 Cal. Rptr. 2d 378, 953 P.2d 484 (1998)).

[106]*Id.* at 900.

[107]*Id.* at 902.

[108]*Id.* at 905.

[109]*Ibid.*

