# ARTICLE:
# BUILT-IN CONTRACT REMEDIES: AVOIDING THE UNENFORCEABLE PENALTY

*By Giselle Roohparvar**

## UNENFORCEABLE PENALTY DEFINED

Under California law, a provision of a contract found to impose a penalty is unenforceable as a forfeiture and contrary to public policy.[1] The characteristic feature of a penalty is the lack of proportional relation between the forfeiture compelled[2] and the damages or harm that might actually flow from the failure to perform under a contract.[3] Whether a contractual provision is an unenforceable penalty is a question of law subject to judicial determination.[4] When parties are not careful, they risk having a bargained-for condition in their contract struck down as an unenforceable penalty.

The general rule for whether a contractual condition is an unenforceable penalty requires a comparison of (1) the value of the money or property forfeited or transferred to the party protected by the condition to (2) the range of harm or damages anticipated to be caused that party by the failure of the condition.[5] If the forfeiture or transfer bears no reasonable relationship to the range of anticipated harm, the condition will be deemed an unenforceable penalty.[6] The reference to *anticipated* harm or damage means that when determining whether a provision is an unenforceable penalty, courts examine the circumstances that existed at the time of the making of the contract.[7] On the other hand, some contractual terms that appear to penalize a party may be enforceable as valid liquidated damages provisions, or on the basis that the affected party has a choice between alternative performance of the contract, or by early payment at a discount in lieu of a larger payment at a later date. This distinction, between an unenforceable penalty and one of these other methods for building in a valid and enforceable contractual remedy, is the subject of this article.

## I. CASE STUDY—CO-TENANCY CLAUSE.

Co-tenancy requirements are often included in retail leases for the benefit of the tenant.[8] They can be categorized as opening co-tenancy requirements and

*Giselle Roohparvar is a shareholder with the firm of Miller Starr Regalia in its San Francisco office. Her practice includes the representation of sophisticated parties in commercial litigation and landlord-tenant disputes.

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operating co-tenancy requirements.[9] By way of these clauses, a tenant may require that certain other stores in the shopping center be occupied by operating businesses when the subject retail tenancy begins and/or during the tenancy.[10] The purpose of a co-tenancy clause is to ensure the presence of a "critical mass" of key tenants at the shopping center that will generate foot traffic and sales at the tenant's business.[11] If the clause is not satisfied, a lease may provide that the tenant will have a right to free occupancy or reduced rent, or a right to terminate the lease. There is no categorical rule that such methods for enforcing co-tenancy clauses are always unenforceable penalties.[12] Rather, their validity depends on the facts and circumstances of each case.[13]

In *Grand Prospect Partners, L.P. v. Ross Dress for Less, Inc.*, 232 Cal. App. 4th 1332, 182 Cal. Rptr. 3d 235 (5th Dist. 2015), landlord Grand Prospect brought suit against tenant Ross for breach of the parties' retail lease, specifically for Ross' refusal to pay rent and subsequent termination of the lease.[14] The lease included a co-tenancy clause that required, among other things, that upon commencement of Ross's lease, a Mervyn's store would occupy no less than 76,000 square feet of leasable floor area in the shopping center.[15] The clause went on to provide that if Mervyn's was not open for business on the commencement date of Ross' lease, Ross' rent would be abated in its entirety, and if the situation was not cured within 12 months thereafter (meaning that if Mervyn's did not open for business), then Ross had the unfettered option to terminate the lease.[16]

After the Ross lease was executed, but before the Ross store opened, Mervyn's (which owned its building in the shopping center), had filed for bankruptcy and closed its store.[17] Accordingly, Ross advised the landlord that it did not intend to open its store in the shopping center, did not intend to pay rent at any time, and would terminate its lease when the twelve month "cure" period expired.[18] Although the landlord had entered into a lease with another department store (Kohl's) to replace Mervyn's as an anchor tenant at the shopping center, Ross concluded that this did not cure the co-tenancy failure because Kohl's had not leased the required 76,000 square feet and Kohl's was not scheduled to open during Ross's twelve month cure period.[19]

The appellate court found that the rent abatement feature of the co-tenancy provision constituted an unenforceable penalty because the value of the rent abated for the 12-month cure period bore no relationship to the harm that Ross suffered by virtue of Mervyn's absence.[20] Assessing the value of the forfeiture,

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the court found that Grand Prospect had transferred to Ross the right to possession of the retail space, but lost the right to receive monthly rent.[21] It concluded the value of the property rights Grand Prospect relinquished pursuant to the rent abatement provision was approximately $39,500 per month in lost rent.[22] In contrast, Ross did not anticipate any damage, such as lost sales or profits, as a result of Mervyn's failure to operate.[23] In fact, Ross' executives continued to view the shopping center as a desirable location for a Ross store notwithstanding the absence of Mervyn's.[24] The court concluded that because there was no reasonable relationship between the value of the property forfeited by Grand Prospect ($39,500 per month) and the anticipated harm to Ross ($0 per month), the rent abatement aspect of the co-tenancy clause represented a penalty from which the landlord deserved relief.[25]

That being said, the court found that Ross's right to rent abatement was separate from its option to terminate because (1) the right to abatement of rent existed whether or not Ross subsequently exercised its option to terminate the Lease, (2) each right was triggered by different (albeit, partially overlapping) conditions, and (3) each provision resulted in different consequences to the landlord-tenant relationship between Grand Prospect and Ross.[26]

With respect to the termination aspect of the co-tenancy clause, the court found it to be valid and enforceable.[27] The court considered that no forfeiture results from terminating a commercial lease based upon the occurrence of contingencies that (1) are agreed upon by sophisticated parties, and (2) have no relation to any act or default of the parties.[28] Here, Ross' right to terminate the lease was based on conditions that were agreed upon by sophisticated parties. Moreover, the conditions that triggered the right to terminate had no relation to any act or default of the parties because, when the Lease was made, neither Ross nor Grand Prospect could control whether Mervyn's continued to operate a store in the shopping center or whether that space would be occupied by the type of anchor tenant specified in the Lease.[29] Rather, an outside event triggered Ross' termination right.[30] Accordingly, the termination aspect of the co-tenancy clause did not constitute an unenforceable penalty and Ross was justified in relying on it to terminate the lease.[31]

The lesson of *Grand Prospect* is that in order to avoid having a co-tenancy clause be deemed an unenforceable penalty, either the remedy for breach (such as rent abatement) must bear a reasonable relationship to the anticipated harm, or a condition terminating the lease (i.e., a condition subsequent), must be

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agreed upon by sophisticated parties and have no relation to any act or default by the parties. (The condition also must be triggered by an event outside the parties' control, or the lease may be deemed illusory). A tenant cannot seek both to enforce the penalty (entire abatement of rent) while also having the right to continue in occupancy and enjoy the use and benefit of the premises despite the failure of the condition, but a termination clause that ends the landlord-tenant relationship is enforceable by the tenant.

## II. CASE STUDY—LIQUIDATED DAMAGES CLAUSE.

The objective of a liquidated damages clause is to "stipulate [ ] a pre-estimate of damages in order that the [contracting] parties may know with reasonable certainty the extent of liability" in the event of breach.[32] In 1977, the Legislature revised Civil Code section 1671 by deleting the former presumption that a liquidated damages clause in a commercial context is invalid, and replacing it with a presumption of validity.[33] Under current Civil Code section 1671, "a provision in a contract liquidating the damages for the 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."[34]

The Law Revision Commission comment to section 1671 explains that the validity of the liquidated damages provision depends upon its reasonableness at the time the contract was made and not as it appears in retrospect.[35] The amount of damages actually suffered has no bearing on the validity of the liquidated damages provision.[36] The burden of proof on the issue of reasonableness is on the party seeking to invalidate the liquidated damages provision.[37]

The California Supreme Court has held that "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.[38] A liquidated damages clause can be deemed an unenforceable penalty where it bears no reasonable relationship to the range of actual damages that the parties could have anticipated would flow from a breach.[39]

All the circumstances existing at the time of the making of the contract are considered, 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.[40] Other relevant considerations in the determination of whether the amount of liquidated damages is so high or so low as to be unrea-

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sonable 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, the anticipation of the parties that proof of actual damages would be costly or inconvenient, the difficulty of proving causation and foreseeability, and whether the liquidated damages provision is included in a form contract."[41]

In *El Centro Mall, LLC v. Payless ShoeSource, Inc.*, 174 Cal. App. 4th 58, 94 Cal. Rptr. 3d 43 (4th Dist. 2009), the landlord shopping center ("ECM") brought suit against tenant Payless to enforce a liquidated damages provision after Payless closed its store before the end of the lease.[42] Per the terms of the lease, ECM could charge Payless liquidated damages of 10 cents per square foot of leased space for each day Payless did not operate, totaling $98,010 for the period of time left on the lease.[43] Payless refused to pay, alleging the liquidated damages provision in the lease was an unenforceable penalty under Civil Code section 1671.[44] Payless contended that the liquidated damages provision was arbitrarily applied to the tenants at ECM's shopping center and therefore could not be a reasonable estimate of potential damages at the time the lease was signed.[45] In response, ECM asserted that the liquidated damages clause was intended to reimburse ECM for the loss in synergy, goodwill, and patronage that the shopping center and other tenants would lose if Payless ceased operation.[46]

The court held that Payless bore the burden of proving the liquidated damages provision was not intended by the parties to be a reasonable estimate of damages, but was instead a penalty.[47] Payless failed to demonstrate that a charge of 10 cents per square foot did not represent a reasonable estimate of the actual damages a retail center would suffer if a tenant like Payless ceased operations.[48] The court held that the liquidated damages provision (1) was an unenforceable penalty to the extent that it duplicated percentage rental payments that tenant was required to continue paying, but (2) was a reasonable estimate of lost traffic and goodwill in tenant's absence.[49]

Under the analysis of *Payless ShoeSource*, a liquidated damages clause for breach of a lease is presumptively valid and enforceable in the commercial context. The party seeking to challenge it must prove that at the time the contract was entered into, a reasonable endeavor was not made to estimate a fair average compensation for any loss that may be sustained due to breach. By contrast, in the residential context, there is a statutory three percent limit on liquidated damages. Civil Code section 1675(c) states that "[i]f the amount actually paid pursuant to the liquidated damages provision does not exceed 3 percent of the purchase price, the provision is valid to the extent that payment is actually made unless the buyer establishes that the amount is unreasonable as liquidated damages." Unlike the commercial context where the burden is on the party seeking to invalidate the liquidated damages provision to prove unreasonableness, in the residential context, the burden is on the party seeking liquidated damages in excess of three percent of the purchase price to prove reasonableness.[50]

## III. CASE STUDY—DISCOUNT CLAUSE.

In some cases, the terms of a contract may include a "bonus" or "discount" for early performance. The party performing the contract may later argue as a matter of substance over form that the true bargain was based on full performance at the appointed time, and the "discount" or "bonus" is only window dressing designed to capture another basis for upholding the contract, namely, as an alternative method of performance. For example, as discussed below, "prepayment penalties" in loan documents normally are upheld as optional premiums paid for early release of collateral, rather than as a "penalty," and are upheld against challenge on the theory that the borrower always has the option of delaying payment until the debt is due rather than tendering early payment. The case of *Jade Fashion & Co., Inc. v. Harkham Industries, Inc.*, 229 Cal. App. 4th 635, 177 Cal. Rptr. 3d 184 (2d Dist. 2014), addressed the inverse of this approach, specifically whether canceling a discount if payment was late constituted an unenforceable penalty or forfeiture.[51] Under the circumstances of the case, the court determined it did not.

Jade Fashion was in the business of manufacturing and selling garments to other businesses.[52] It entered into a series of purchase order agreements with Harkham under which Harkham purchased certain garments from Jade Fashion at specified quantities and prices.[53] Subsequently, Harkham had cash flow problems and fell behind on its payment obligations, owing Jade Fashion the principal balance of $341,628.77.[54] Jade Fashion initially demanded that Harkham pay off the entire debt, but after further negotiations, agreed to allow Harkham to make fixed weekly payments toward the satisfaction of the debt until the balance due was paid.[55] The parties further agreed that if Harkham made all payments on time, it could take a discount of $17,500 from the total

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amount that was owed.[56] Harkham failed to timely make all of the weekly installment payments.[57]

The court concluded that canceling the discount due to late payments did not constitute an unenforceable penalty or forfeiture.[58] The court explained that by its terms, the agreement did not purport to increase the amount of the original debt owed by Harkham if any future payments were late.[59] The discount was part of the pre-existing debt, which Harkham admitted was due and owing, and which it agreed to repay in accordance with a specified payment schedule.[60] While the court recognized that the public policies embodied in Civil Code section 1671 could not be circumvented merely by labeling a penalty a discount, the plain language of the agreement did not support a finding that Jade Fashion intended to penalize Harkham by agreeing to forbear on collection of a debt that was indisputably due and owing so long as timely payments on the original debt amount were made.[61]

In reaching this conclusion, the court distinguished the agreement from standard settlement agreements, where a defendant who breached the settlement agreement was required to pay a fixed amount of additional damages that was disproportionately higher than the settlement amount.[62] In this case, the agreement between Jade Fashion and Harkham Industries was not an agreement to settle or compromise a disputed claim.[63] Rather, it was an agreement to forbear on the collection of a debt for goods that had been delivered and that was admittedly owed, so long as timely installment payments were made.[64] The court further noted that the express language of the agreement established that the $17,500 discount was not liquidated damages for a breach of contract, nor was it an additional payment over and above any debt that was owed.[65]

In the context of *Jade Fashion*, a contract provision that in case of late payment results in cancellation of a discount given for *timely* payment on debt already due and owing does not constitute an unenforceable penalty. A provision that purports to cancel a discount of a debt not yet due and owing if it is not timely paid may not be enforceable under this analysis.

## IV. CASE STUDY—ALTERNATIVE PERFORMANCE

In certain instances, courts have upheld contractual penalties against unenforceable forfeiture claims based on the doctrine of alternative performance - that where the party has a contractual alternative to incurring the penalty, the provision is not a forfeiture but merely gives the party the option to perform one way or to incur a contractually different cost (not a penalty) by performing (or not) a different way.

In *Meyers v. Home Sav. & Loan Assn.*, 38 Cal. App. 3d 544, 113 Cal. Rptr. 358 (2d Dist. 1974), the court looked at the concept of alternative performance in the context of prepayment penalties. There, class action plaintiffs sought to have the court declare that the prepayment penalties required of persons seeking to pay loans in advance of the normal maturity dates in real estate loan contracts used by defendants were void.[66] The court found that these prepayment penalty clauses did not penalize for the "breach of an obligation," as contemplated by Civil Code section 1670 [liquidated damages].[67] [68] Rather, the clear import of the typical prepayment clause was to give the borrower an option to either pay the note in the manner contemplated by the contract or to prepay the balance due upon condition that a surcharge be added for the privilege of exercising the option.[69] Thus it held that no breach was involved in the prepayment transaction, only the exercise of the option given to the debtor for an alternative method of paying the debt.[70]

In *Lazzareschi Inv. Co. v. San Francisco Fed. Sav. & Loan Assn.*, 22 Cal. App. 3d 303, 99 Cal. Rptr. 417 (1st Dist. 1971), a purchaser of realty brought suit against a savings and loan association to recover the amount of prepayment fee paid in connection with the purchase of realty.[71] Relying on *Freedman v. Rector, Wardens & Vestrymen of St. Mathias Parish*, 37 Cal. 2d 16, 230 P.2d 629, the purchaser argued that damages imposed must bear a reasonable relationship to the injury caused.[72] The court noted that *Freedman* and all cases that have followed it were concerned in some manner with breach of a contract, but in this instance, there had been no breach.[73] Rather, the borrower had the option of making one or more prepayments, and availed himself of the option.[74] The court held that although the word "penalty" was used, in the sense that a charge was made that is equivalent to unearned interest, there was no penalty in the sense of retribution for breach of an agreement, and therefore no unenforceable forfeiture.[75]

In *McGuire v. More-Gas Investments, LLC*, 220 Cal. App. 4th 512, 163 Cal. Rptr. 3d 225 (3d Dist. 2013), lot purchasers brought a breach of contract action against vendor, alleging that vendor had refused to pay money that it had promised to pay in the alternative to performing certain other tasks relating to the properties.[76] Vendor moved for summary judgment on the grounds that plaintiffs could not prove they suffered any actual damages and the damages

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they sought in their complaint were unrecoverable because the provisions providing for payment of those amounts were unenforceable penalty provisions rather than valid liquidated damages clauses.[77] Plaintiffs countered that the payment provisions in question were not unenforceable penalty provisions or even liquidated damages clauses but instead were "bargained-for options for alternative performance."[78] The trial court granted vendor's motion for summary judgment and plaintiffs appealed.[79] The appellate court reversed, noting that a contractual provision that merely provides an option of alternative performance of an obligation does not impose damages and is not subject to statutory limitations on liquidated damages.[80] In determining whether a contractual payment provision is a penalty provision or a provision for alternative performance, the court must view the arrangement from the time of making the contract.[81] The court held there was a genuine issue of material fact because vendor failed to establish that the repurchase premium was necessarily a penalty provision, as opposed to a provision for alternative performance, and therefore the trial court erred in granting summary adjudication.[82]

The doctrine of alternative performance is applicable when the performing party actually has a contractual option, but does not apply to uphold a damages clause or other sanction for a *breach* of the agreement. If the "penalty" is tied to a clear breach, the provision will more likely be analyzed as a penalty and the issue will be whether it is a reasonable method for determining liquidated damages, as discussed above.

## V. CASE STUDY—SETTLEMENT AGREEMENTS

An additional context in which a penalty may be found is that of the settlement agreement. In settlement of a dispute, a creditor and debtor may enter into a settlement agreement that allows the debt to be reduced if paid on a set schedule, with a liquidated damages clause in the event of breach. The analysis of the liquidated damages clause remains whether it bears a "reasonable relationship to actual damages suffered," as the point of the stipulated judgment is not to "reward" but to compensate the creditor in the event of a breach.[83] Thus, a key question becomes which breach the liquidated damages clause seeks to remedy.

In *Sybron Corp. v. Clark Hosp. Supply Corp.*, 76 Cal. App. 3d 896, 143 Cal. Rptr. 306 (2d Dist. 1978), seller sued buyers for payment of $143,977.68 for hospital beds delivered under contract.[84] The parties reached a settlement under which the buyers would pay the seller $72,000 plus interest in 12 monthly installments, but if the buyers defaulted on any payment, a stipulated judgment for $100,000 could be entered in the seller's favor.[85] After paying $42,000, the buyers became delinquent and the seller obtained a stipulated judgment of $100,000.[86] The court held that the stipulated judgment was an unenforceable penalty and forfeiture because it bore "no reasonable relationship to actual damages suffered by [the seller] as the result of delay" and seemed "grossly disproportionate in amount."[87]

As the court explained, a creditor may bargain for a provision whereby if the debtor makes late payments, the creditor may accelerate and collect the entire obligation, plus a reasonable amount to compensate for delay.[88] However, the ultimate obligation imposed on the debtor must not be unreasonable *in proportion* to the original obligation and the seriousness of the default.[89] The court reasoned that enforcement of the default provision "would result in a $28,000 penalty for delay in payment of $30,000, a penalty which bears no rational relationship to the amount of actual damages suffered."[90]

In *Greentree Financial Group, Inc. v. Execute Sports, Inc.*, lender Greentree sued borrower Executive Sports for failure to pay $45,000 due under a financial services contract.[91] The parties entered into a settlement agreement which provided that borrower would pay lender $20,000 in two installments, but if the borrower defaulted on either payment, then lender would be entitled to a judgment for the entire amount sought in its complaint.[92] After borrower defaulted on the first payment, lender obtained a judgment for $61,000, consisting of $45,000 in damages plus interest and attorney fees.[93] The court held that the judgment was an unlawful penalty because it bore "no reasonable relationship to the range of actual damages the parties could have anticipated would flow from a breach of their settlement agreement."[94]

The court noted that the relevant breach to be analyzed "is the breach of the *stipulation,* not the breach of the *underlying contract.*"[95] It then reasoned that the parties "did not attempt to anticipate the damages that might flow from a breach of the stipulation. Rather, they simply selected the amount [the plaintiff] had claimed as damages in the underlying lawsuit, plus prejudgment interest, attorney fees, and costs.' "[96] The court observed that "the judgment would have been enforceable if it had been designed to encourage [the defendant] to make its settlement payments on time, and to compensate [the plaintiff] for its loss of use of the money plus its reasonable costs in pursuing the payment."[97] However,

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"[t]he amount of the judgment, which awarded . . . approximately $40,000 more than the settlement amount, does not merely compensate [the plaintiff]—it rewards [the plaintiff] by penalizing [the defendant]."[98]

Similarly, in *Purcell v. Schweitzer*, 224 Cal. App. 4th 969, 169 Cal. Rptr. 3d 90 (4th Dist. 2014), borrower Schweitzer defaulted on an $85,000 loan given by lender Purcell.[99] After lender sued to recover on the loan, the parties entered into a settlement under which borrower would pay lender $38,000 plus interest in monthly installments, but if any payment was late, the entire original liability of $85,000 would be due.[100] The agreement further provided that the $85,000 was an agreed upon amount of monies actually owed by borrower to lender, was neither a penalty nor forfeiture, and that it took into account the economics associated with proceeding further with the matter.[101] When borrower made one $750 payment six days late, lender immediately sought and obtained a judgment for almost $60,000.[102]

The court held that the judgment was an unenforceable penalty because it "bore no reasonable relationship to the damages that it could be expected that [the lender] would suffer as a result of a breach by [the borrower]."[103] In response to the lender's argument that the parties had agreed the $85,000 amount reflected the economics of proceeding with the lawsuit, the court stated: "That provision in the settlement agreement bore no reasonable relationship to damages [the lender] would be expected to actually suffer as a result of a breach, such as the late payment that occurred in this case. There is nothing in the record to support the fact that obtaining a judgment and instituting postjudgment procedures would cost $85,000. . .. [¶ ] The language in the stipulation seeking to tie the $85,000 to the economics of proceeding further with the matter was an obvious attempt to circumvent the public policy expressed in [Civil Code section 1671]. . . . [T]hat public policy may not be circumvented by words used in a contract."[104]

As with any liquidated damages provision, the remedy for any breach of a settlement agreement must bear a reasonable relationship to the amount of damages that could be anticipated to flow from the breach of the settlement agreement, not the original debt, and the enforceability of the provision is based on the analysis of that agreement, not the underlying dispute.

## VI. CONCLUSION.

To summarize, in order to avoid having a provision in a commercial contract struck down as an unenforceable penalty, the remedy provided in the event of a breach must bear a reasonable relationship to the anticipated damages flowing from the breach of that provision, based on a good faith effort to determine the amount of damages as of the date of contract formation. If the provision does not meet that test, it is not likely to be enforceable unless it is cast as an alternative method of performance, rather than as a remedy for breach. Where a party has the option to perform one way or to incur a contractually different cost (not a penalty) by performing (or not) a different way, the provision is more likely to withstand judicial scrutiny.

**ENDNOTES:**

[1] *Grand Prospect Partners, L.P. v. Ross Dress for Less, Inc.,* 232 Cal. App. 4th 1332, 1338, 182 Cal. Rptr. 3d 235 (5th Dist. 2015); *Purcell v. Schweitzer*, 224 Cal. App. 4th 969, 975, 169 Cal. Rptr. 3d 90 (4th Dist. 2014).

[2] A forfeiture is the involuntary relinquishment of money or property without just compensation as a consequence of a breach or non-performance of some legal obligation.

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

[4] *Grand Prospect Partners, L.P. v. Ross Dress for Less, Inc.*, 232 Cal. App. 4th at 1354-55 (citing *Beasley v. Wells Fargo Bank*, 235 Cal. App. 3d 1383, 1393, 1394, 1 Cal. Rptr. 2d 446 (1st Dist. 1991)).

[5] *Grand Prospect Partners, L.P. v. Ross Dress for Less, Inc.*, 232 Cal. App. 4th at 1358.

[6] *Id*.

[7] *Id*. at 1361.

[8] 1 Retail Leasing, supra, § 7.1, p. 7-2.

[9] *Grand Prospect Partners, L.P. v. Ross Dress for Less, Inc.*, 232 Cal. App. 4th at 1343.

[10] 1 Retail Leasing, supra, § 7.1, p. 7-2.

[11] 1 Retail Leasing, supra, § 7.2, p. 7-2.

[12] *Grand Prospect Partners, L.P. v. Ross Dress for Less, Inc.*, 232 Cal. App. 4th at 1344.

[13] *Id*.

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

[15] *Id*. at 1340.

[16] *Id*. at 1337.

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[17] *Id*. at 1340.

[18] *Id*. at 1340-1341.

[19] *Id*. at 1341.

[20] *Id*. at 1338.

[21] *Id*. at 1361.

[22] *Id*.

[23] *Id*. at 1362.

[24] *Id*. at 1363.

[25] *Id*. at 1365.

[26] *Id*. at 1359.

[27] *Id*. at 1367.

[28] *Id*. at 1367.

[29] *Id*.

[30] *Id*.

[31] *Id*. at 1367.

[32] *El Centro Mall, LLC v. Payless ShoeSource, Inc.*, 174 Cal. App. 4th 58, 63, 94 Cal. Rptr. 3d 43 (4th Dist. 2009) (citing *ABI, Inc. v. City of Los Angeles*, 153 Cal. App. 3d 669, 685, 200 Cal. Rptr. 563 (2d Dist. 1984)).

[33] *Californians for Population Stabilization v. Hewlett-Packard Co.*, 58 Cal. App. 4th 273, 289, 67 Cal. Rptr. 2d 621 (6th Dist. 1997).

[34] Civ. Code, § 1671, subd. (b).

[35] *Id*.

[36] *Id*.

[37] Cal. Law Revision Com. com., 9 West's Ann. Civ. Code (2001 ed.) foll. § 1671, p. 498.

[38] *Ridgley v. Topa Thrift & Loan Assn.*, 17 Cal. 4th at 977.

[39] *Id*; *see Harbor Island Holdings v. Kim*, 107 Cal. App. 4th 790, 132 Cal. Rptr. 2d 406 (4th Dist. 2003) (holding a deferred rent provision constituted an unenforceable penalty where the sum extracted from the obligor substantially exceeded the damages suffered by the obligee).

[40] *Id*.

[41] *Id*.; *see El Centro Mall, LLC v. Payless ShoeSource, Inc.*, 174 Cal. App. 4th at 63.

[42] *El Centro Mall, LLC v. Payless ShoeSource, Inc.*, 174 Cal. App. 4th 58, 94 Cal. Rptr. 3d 43 (4th Dist. 2009).

[43] *Id*. at 60.

[44] *Id*.

[45] *Id.*

[46] *Id.*

[47] *El Centro Mall, LLC*, 174 Cal. App. 4th at 65.

[48] *Id.*

[49] *Id.* at 64-65.

[50] Civ. Code, § 1675, subd. (d) ("If the amount actually paid pursuant to the liquidated damages provision exceeds 3 percent of the purchase price, the provision is invalid unless the party seeking to uphold the provision establishes that the amount actually paid is reasonable as liquidated damages.").

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

[52] *Id.* at 638.

[53] *Id.* at 638-639.

[54] *Id.* at 639.

[55] *Id.*

[56] *Id.*

[57] *Id.* at 640-641.

[58] *Id.* at 648.

[59] *Id.* at 650.

[60] *Id.*

[61] *Id.*

[62] *Id.* at 648.

[63] *Id.*

[64] *Id.*

[65] *Id.* at 649.

[66] *Meyers v. Home Sav. & Loan Assn.*, 38 Cal. App. 3d 544, 545, 113 Cal. Rptr. 358 (2d Dist. 1974).

[67] Civ. Code, § 1670 is now encompassed in Civ. Code, § 1671.

[68] *Meyers v. Home Sav. & Loan Assn.*, 38 Cal. App. 3d at 546.

[69] *Id.* at 546.

[70] *Id.*

[71] *Lazzareschi Inv. Co. v. San Francisco Fed. Sav. & Loan Assn.*, 22 Cal. App. 3d 303, 305. 99 Cal. Rptr. 417 (1st Dist. 1971).

[72] *Id.* at 307.

[73] *Id.*

[74] *Id.*


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[75] *Id.*

[76] *McGuire v. More-Gas Investments, LLC*, 220 Cal. App. 4th 512, 514, 163 Cal. Rptr. 3d 225 (3d Dist. 2013).

[77] *Id.* at 519.

[78] *Id.*

[79] *Id.* at 519-520.

[80] *Id.* at 522.

[81] *Id.* at 527; *see* Civ. Code, § 1671, subd. (b).

[82] *McGuire v.More-Gas Investments, LLC*, 220 Cal. App. 4th at 531-532; *see* Civ. Code, § 1671(b).

[83] *Greentree Financial Group, Inc. v. Execute Sports, Inc.*, 163 Cal. App. 4th 495, 500, 78 Cal. Rptr. 3d 24 (4th Dist. 2008).

[84] *Sybron Corp. v. Clark Hosp. Supply Corp.*, 76 Cal. App. 3d 896, 898, 143 Cal. Rptr. 306 (2d Dist. 1978).

[85] *Id.*

[86] *Id.*

[87] *Id.* at 903.

[88] *Id.*

[89] *Id.*

[90] *Id.*

[91] *Greentree Financial Group. Inc. v. Execute Sports, Inc.*, 163 Cal. App. 4th at 498.

[92] *Id.*

[93] *Id.*

[94] *Id.* at 497.

[95] *Id.* at 499.

[96] *Id.* at 499-500.

[97] *Id.* at 500.

[98] *Id.*

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

[100] *Id.* at 971.

[101] *Id.* at 972.

[102] *Id.* at 973.

[103] *Id.* at 975-976.

[104] *Id.* at 976.