Liquidated Damages Clauses in Employment Agreements

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Introduction

If you practice in the field of employment law, you know that employers across a wide range of industries are increasingly resorting to measures designed to protect the company from damages flowing from the departure of employees. Non-compete agreements, which prohibit a departing employee from working for a competitor, are common.[1] So are confidentiality clauses or non-disclosure agreements that require departing employees to return all company proprietary and confidential information and that prohibit them from using such information in future employment.[2] Arbitration agreements, which force almost all employment disputes into private dispute resolution, are also increasingly common and keep many of these issues outside of the public eye and removed from the public discourse.[3]

Employers are also resorting with increased frequency to liquidated damages clauses. These clauses require a departing employee to pay a fixed amount of money to the company, in order to—in theory—compensate the company for the harm caused by the employee's departure. Rather than requiring the company to prove the actual extent of the damage that it has suffered as a result of the employee's departure, liquidated damages clauses set the amount of damages in advance, as a sum certain.

Liquidated damages recently made news, after it was revealed that Sinclair Broadcast Group, the largest broadcasting corporation in the United States, used such clauses to require that employees who

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1. A recent study estimated that about thirty million workers, representing about eighteen percent of the workforce, are covered by non-compete agreements. J.J. Prescott, Norman D. Bishara & Evan Starr, *Understanding Noncompetition Agreements: The 2014 Noncompete Survey Project*, 2016 Mich. St. L. Rev. 369, 461.

2. *See* Orly Lobel, *NDAs Are out of Control. Here's What Needs to Change*, Harv. Bus. Rev. (Jan. 30, 2018), https://hbr.org/2018/01/ndas-are-out-of-control-heres-what-needs-to-change (citing Norman D. Bishara, Kenneth J. Martin & Randall S. Thomas, *An Empirical Analysis of Noncompetition Clauses and Other Restrictive Postemployment Covenants*, 68 Vand. L. Rev. 1 (2015)).

3. Alexander J.S. Colvin, *The Metastisization of Mandatory Arbitration*, 94 Chi.-Kent L. Rev. 1, 9 (2019) (finding that about fifty percent of non-union employers with fifty or more employees have mandatory arbitration).

leave before their contract is up to pay the company over forty percent of their annual salary.[4] Sinclair has found itself the subject of controversial headlines before, including for forcing its anchors and reporters to read an identical script about the dangers of "fake news" that many perceived as "pro-Trump propaganda." Unlike many companies, Sinclair also sought to actually enforce these liquidated damages clauses, bringing suit against two reporters who had left the company for amounts that were significant to the reporters but insignificant to a company of Sinclair's size and dwarfed by the costs of litigating such claims. Sinclair voluntarily dismissed both cases last year.

This article examines the general law applicable to liquidated damages clauses, then applies that law to the clauses in Sinclair's contracts, using the Sinclair clauses as a case study. The article concludes that the courts were likely to find Sinclair's clauses an unenforceable attempt to extract a penalty from departing employees, to punish them for quitting, rather than a permissible liquidated damages clause.

I. What Are Liquidated Damages Clauses?

Liquidated damages are contractual clauses used in a variety of contracts to set a fixed amount of damages to be paid in the event of a breach. In most contract disputes, the amount of damages that flow from a breach is a question for a jury (or, sometimes, a judge) to determine based on the presentation of evidence showing the harm caused by the failure to complete the deal. But liquidated damages remove that analysis from the equation: they fix, in advance, as part of the contract themselves, the amount that will be paid in the event of a breach. They can be used in real estate contracts, to fix the amount of damage to be paid in the event of a breach of a long-term lease, or they can be used in commercial contracts between sophisticated entities to quantify the damages that would flow from the breach of a complex transaction.

It is now increasingly common to see liquidated damages clauses in employment agreements. In this context, liquidated damages clauses are used to fix, in advance, the amount of money that an employee must pay to her employer when she leaves her job. Courts vary in how they have approached such clauses, balancing two competing issues of public policy: the freedom to contract and the freedom to work (including the freedom to leave one's work).

Questions of contract law, the legality of liquidated damages clauses, and the legality of other contractual restrictions on an employee's ability to leave a job (*e.g.*, non-compete clauses) are largely governed by state law and therefore subject to variation from state to state. California law prohibits liquidated damages clauses (as well

4. *See infra* Part II, describing these events.

as non-compete clauses) as unlawful restrictions on trade.[5] In most states, however, the general rule is that liquidated damages clauses are permissible—but penalties are not.

What determines whether a clause is a permissible attempt to contract for liquidated damages or an impermissible attempt to levy a penalty? According to the *Restatement of Contracts*, liquidated damages clauses are permitted "but only at an amount that is reasonable in the light of the anticipated or actual loss caused by the breach and the difficulties of proof of loss. A term fixing unreasonably large liquidated damages is unenforceable on grounds of public policy as a penalty."[6]

Public policy concerns animate this test: on the one hand, a liquidated damages clause that fixes the amount of damages at a sum certain "saves the time of courts, juries, parties and witnesses and reduces the expense of litigation."[7] But public policy does not sanction a clause that seeks to punish a breach of contract (rather than compensate for it) because "[p]unishment of a promisor for having broken his promise has no justification on either economic or other grounds and a term providing such a penalty is unenforceable on grounds of public policy."[8]

In most states, the test for determining whether a clause is a permissible liquidated damages clause or an unenforceable penalty has two parts. First, the court examines whether the amount sought as liquidated damages is reasonable, either because "it approximates the actual loss that has resulted from the particular breach" or because "it approximates the loss anticipated at the time of the making of the contract."[9] Second, the court considers "the difficulty of the proof of loss," that is, whether it is difficult to calculate the sum needed to compensate for the loss resulting from the breach, making a liquidated damages clause necessary.[10]

In New York, for example, "a contractually agreed upon sum for liquidated damages will be sustained where (1) actual damages may be difficult to determine and (2) the sum stipulated is not plainly disproportionate to the possible loss."[11] This test is applied "strictly" by New York courts, and, "where the damages flowing from a breach of a contract are easily ascertainable, or the damages fixed are plainly disproportionate to the contemplated injury, the stipulated sum will be treated as a penalty and disallowed."[12]

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5. *See* Golden v. Cal. Emergency Physicians Med. Grp., 782 F.3d 1083, 1090–91 (9th Cir. 2015) (citing Chamberlain v. Augustine, 156 P. 479, 480 (Cal. 1916)).

6. Restatement (Second) of Contracts § 356 (Am. Law Inst. 1981).

7. *Id.* cmt. a.

8. *Id.*

9. *Id.* cmt. b.

10. *Id.*

11. U.S. Fid. & Guar. Co. v. Braspetro Oil Servs. Co., 369 F.3d 34, 70–71 (2d Cir. 2004) (internal quotation omitted).

12. *Id.* at 71.

These two factors are, paradoxically, in some tension with one another: the first requiring proof that the sum fixed was a reasonable estimate of the loss; the second requiring proof that the amount of the loss is difficult to estimate. Nevertheless, this test is the one generally used by both state and federal courts alike in evaluating liquidated damages clauses.

Before continuing further with this analysis of liquidated damages, it is worth pausing for a moment to examine another paradox inherent in the concept. In a country where the vast majority of employees are "at-will" employees, who can be fired or leave their jobs without any basis, the concept of paying liquidated damages to an employer to leave one's job may seem intuitively wrong to many readers. Indeed, some courts have ruled that liquidated damages clauses are not enforceable in at-will employment relationships, because

> in an at-will employment relationship, either party may terminate the employment relationship at any time for good cause, bad cause, or no cause at all, without liability for future lost wages. The liquidated damages provision, as set forth in [defendant's] at-will employment agreement, violates that principle as a matter of law.[13]

In the Eastern District of New York, for example, a judge certified a class action in 2018 of Filipino nurses whose contracts required them to pay $25,000 to the staffing agency if they left before their contracts expired and who alleged that these liquidated damages clauses were "demonstrative of defendants' practice of using legal action to coerce foreign nurses, including plaintiff, to continue working for defendants."[14] The claims were brought under the Trafficking Victims Protection Act.[15]

Notwithstanding these paradoxes, most courts in most states continue to consider liquidated damages using this two-prong test. In a recent 2014 case, the New York Court of Appeals held that the defendants should have been allowed to present evidence that the amount sought as liquidated damages was disproportionate to the actual loss sustained by the plaintiff.[16] The court explained: "A provision which requires damages 'grossly disproportionate to the amount of actual damages provides for [a] penalty and is unenforceable.'"[17] When the

13. Polimera v. Chemtex Envtl. Lab., Inc., No. 09-10-00361-CV, 2011 WL 2135062, at *5 (Tex. App. May 19, 2011) (citation omitted); *see also* McMillian v. FDIC, 81 F.3d 1041, 1054 (11th Cir. 1996) (explaining that termination of at-will employment "did not, by itself, breach a contract, and thus, the termination logically could not give rise to liquidated damages").

14. Paguirigan v. Prompt Nursing Emp't Agency LLC, No. 17 Civ. 1302, 2018 WL 4347799, at *3 (E.D.N.Y. Sept. 11, 2018).

15. *Id.* at *1 (citing 18 U.S.C. §§ 1589-97 (2012)).

16. 172 Van Duzer Realty Corp. v. Globe Alumni Student Assistance Ass'n, Inc., 25 N.E.3d 952, 957–58 (N.Y. 2014).

17. *Id.* at 957 (alteration in original) (quoting Truck Rent-A-Ctr. v. Puritan Farms 2nd, 361 N.E.2d 1015, 1018 (N.Y. App. 1977)).

amount set "is not proportionate to any loss or gain" that might flow from a breach, but instead "is intended to compel [the defendant's] performance" with the contract, it is an unenforceable penalty.[18]

Similarly, "some courts have explained that a damages provision that awards a specified sum no matter the timing of the breach is likely to be a penalty clause because not all breaches are of the same gravity and thus the fixed damage award is not a reasonable effort to estimate damage."[19] In addition, "liquidated and actual damages are mutually exclusive remedies."[20] That means that the plaintiff suing on breach of contract cannot recover *both* compensation for its actual damages sustained as a result of the breach, and liquidated damages as well.[21] For example, in a recent decision by New York's Fourth Department Appellate Division refused to enforce a liquidated damages clause on this basis. In *Franklin First Financial, Ltd. v. Contour Mortgage Corp.*, the company alleged the departing employee had taken 100,000 files containing the company's confidential information with him when he left; it sought to enforce a liquidated damages clause that required the employee to pay $100 per day that he failed to return the confidential information.[22] The court held the clause was not enforceable because the contract also provided for the company to receive actual damages, "*in addition* to the $100 a day fine" and "[u]nder no circumstances will liquidated damages be allowed where the contractual language and attendant circumstances show that the contract provides for the full recovery of actual damages."[23] This provision was fatal to enforcement of the liquidated damages clause, even though the court also found that the defendant employees failed to demonstrate "either that the damages flowing from the prospective breach were readily ascertainable at the time the parties entered into the Confidentiality Agreement or that the liquidated-damages clause is conspicuously disproportionate to the foreseeable or probable losses."[24]

Consider a recent case out of New Jersey's Appellate Division, applying this analysis. In *Borough of Madison v. Marhefka*, the

18. Leviton Mfg. Co. v. Pass & Seymour, Inc., No. 17 Civ. 46, 2017 WL 3084404, at *6 (E.D.N.Y. July 19, 2017).

19. *Id.* (invalidating liquidated damages clause as a penalty).

20. U.S. Fid. & Guar. Co. v. Braspetro Oil Servs. Co., 369 F.3d 34, 71 (2d Cir. 2004); *see also* Lefemine v. Baron, 573 So. 2d 326, 329–30 (Fla. 1991).

21. *U.S. Fid. & Guar. Co.*, 369 F.3d at 71 (holding liquidated damages sought were not "a reasonable measure of the anticipated harm" and the contract already provided for actual damages sustained as a result of delay); *see also* 555 W. John St., LLC v. Westbury Jeep Chrysler Dodge, Inc., 149 A.D.3d 796, 798 (N.Y. App. 2017) (holding plaintiff could not recover "liquidated damages" where contract provided "a remedy for the whole extent of any injury that would be sustained as a result of a holdover, in addition to the sum of $5,000 per day in liquidated damages").

22. No. 604159-15, 62 Misc. 3d 1220(A), 2019 WL 886000 (Table), *3-4 (N.Y. Sup. Ct. Feb. 19, 2019).

23. *Id.* at *5.

24. *Id.* at *4–5.

Borough of Madison, New Jersey, sued a probationary police officer who had left the Borough's employ during the first year of service (in order to take a job as an officer on a force that was closer to his home), demanding that he pay the Borough $5,000 in liquidated damages for leaving his job before completing five years of service.[25] The New Jersey Appellate Divisions refused to enforce the clause, holding it to be an impermissible penalty. First, the court reasoned that the amount was "not a reasonable forecast of the provable injury resulting from the breach," rejecting the Borough's argument that "an officer's resignation during the first five years deprives the Borough of the experience and knowledge that the resigning officer earned while working for the Borough," because the Borough actually assessed *smaller* fines against more senior officers leaving the force, which "strongly indicated the amounts assessed are penalties for early resignation rather than forecasts of the harm to the Borough."[26] Second, the court found, that "the harm to the Borough was not incapable or very difficult of accurate estimate" because "[t]he Borough contended it paid other officers overtime to cover defendant's duties, but the costs of overtime should not be very difficult to estimate" and "the cost of hiring a new officer does not appear very difficult to estimate."[27] "The Borough made no attempt to show the assessments, which declined from $5000 to $1000 as the officer gains experience, were a forecast of the cost of overtime to cover for him, the cost of a new hire to replace him, or the harm to the security of the Borough."[28] Finally, the court found, assessing $5000 against the police officer was "not reasonable under the totality of the circumstances," because he only made a salary of $41,000 and $5000 was "a significant penalty to him" and therefore "a penalty, which is unenforceable on grounds of public policy."[29] The court emphasized that "this was not a commercial contract, and nothing indicates defendant was a sophisticated party or acting with advice of counsel."[30] Similarly, the court rejected the idea that the police officer employee had voluntarily entered into the contract, finding: "An unreasonable penalty provision is unenforceable even if the parties voluntarily enter into it, or one party relies upon it."[31]

But other courts have enforced liquidated damages clauses. For example, the Indiana Court of Appeals recently upheld the enforcement

25. No. A-5206-15T1, 2018 WL 3059940, at *3-6 (N.J. App. June 21, 2018).

26. *Id.* at *4 (internal quotations omitted) (quoting Wasserman's, Inc. v. Twp. of Middleton, 645 A.2d 100, 106, 107 (N.J. 1994)).

27. *Id.* (internal quotations omitted) (quoting *Wasserman's, Inc.* 645 A.2d at 106–07).

28. *Id.*

29. *Id.* at *5 (internal quotations omitted) (quoting Metlife Cap. Fin. Corp. v. Washington Ave. Assocs. L.P., 732 A.2d 493, 494 (N.J. 1999)).

30. *Id.*

31. *Id.* at *6.

of a liquidated damages clause against engineers who had left their employer to work for a competitor, finding that "liquidated damages in this case serve exactly the purpose for which they were designed" and reasoning that "[t]hese were negotiated agreements" with "clear and explicit terms;" "[t]he relative bargaining power of the parties was reflected in the agreements, in that the agreements had different provisions and different damages calculations depending on the employee's tenure and position"; "[t]he actual damages are difficult to calculate" because it was difficult to value the client contacts of the departing employees and how much business was lost due to their departures and because the company had to "seek and train *multiple* new people" to replace the departing employees.[32] Similarly, in *Mathew v. Slocum-Dickson Medical Group, PLLC*, a lower court in New York upheld a liquidated damages against departing employees who were physicians specializing in cardiology who had left to work for a competitor, finding that the harm of losing physicians to a competitor was difficult to quantify and finding that the liquidated damages of $50,000 or fifty percent of the departing doctor's salary (whichever is greater) was a reasonable measure of the anticipated harm flowing from the breach, including "potential damages caused by the loss of intra-organizational referrals, the loss of good will caused by the departure of critical members of its professional staff, the investment made by defendant in the development of plaintiffs' practices and the cost associated with the recruitment of replacement physicians and the development of those new practices."[33]

II. Sinclair Broadcasting Group's Liquidated Damages Clauses

A. Sinclair Broadcast Group's Liquidated Damages Clauses Revealed in the Wake of the "Fake News" Script Scandal

Sinclair Broadcast Group is the largest broadcaster in the United States; it currently owns or operates 193 television stations and reaches the households of millions of Americans.[34] Sinclair made headlines at the beginning of April 2018 when it became clear that the company had directed all of the anchors at its stations to read the same script warning about the dangers of "fake news."[35] The script quickly drew criticism from Democrats as "pro-Trump propaganda."[36] Sinclair regularly

32. Am. Consulting, Inc. v. Hannum Wagle & Cline Eng'g, Inc., 104 N.E.3d 573, 591–92 (Ind. Ct. App. 2018), *vacated*, 136 N.E.3d 208 (Ind. 2019).

33. 160 A.D.3d 1500, 1502–03 (N.Y. App. 2018).

34. Jacey Fortin & Jonah Engel Bronwich, *Sinclair Made Dozens of Local News Anchors Recite the Same Script,* N.Y. Times (Apr. 2, 2018), https://www.nytimes.com/2018/04/02/business/media/sinclair-news-anchors-script.html [https://perma.cc/VD3Z-2L7S].

35. *Id.*

36. *Id.*

sends such "must-run" segments to its stations, which the stations are required to broadcast, and which "include content like terrorism news updates, commentators speaking in support of President Trump or speeches from company executives."[37] During the 2004 presidential election, Sinclair was in the headlines for another controversial "must-run" when it announced that it would require its television stations to broadcast during prime time a documentary called "Stolen Honor" that was highly critical of then-presidential candidate Senator John Kerry and was denounced by many as political propaganda intended to influence the presidential election, but which Sinclair characterized as "news."[38]

When the controversy surrounding the fake news script broke in April 2018, some Sinclair anchors said they were "forced" to read the script.[39] Many asked why the anchors had gone along with such a "forced" script. Some may have feared being fired if they refused to read the script. Sinclair has a reputation for crushing employee criticism of its programming with a heavy hand; in 2004, for example, Sinclair fired its Washington bureau chief, Jon Lieberman, after he publicly criticized the plans to air "Stolen Honor," calling it "biased political propaganda, with clear intentions to sway the election."[40]

But it turns out that Sinclair also has other tools to dissuade its employees from quitting if they disagree with the company's practices. In the wake of the "fake news" script scandal, additional reporting revealed that Sinclair requires its employees to sign contracts that contain liquidated damages clauses.[41]

B. Sinclair's Liquidated Damages Clause and Other Contractual Provisions

A review of the employment contracts filed by Sinclair in two recent cases seeking to enforce the liquidated damages clauses reveals the following. The contracts contain a liquidated damages clause that requires the departing employee to pay the company "liquidated damages (and not as a penalty) an amount equal to forty percent (40%)

37. *Id.*

38. Jim Rutenberg, *TV Group to Show Anti-Kerry Film on 62 Stations*, N.Y. TIMES (Oct. 11, 2004), https://www.nytimes.com/2004/10/11/politics/campaign/tv-group-to-show-antikerry-film-on-62-stations.html [https://perma.cc/PVV3-7QAK].

39. Fortin & Bronwich, *supra* note 34.

40. Joel Roberts, *Sinclair Amends Kerry Film Plans*, CBS NEWS (Oct. 19, 2004), https://www.cbsnews.com/news/sinclair-amends-kerry-film-plans [https://perma.cc/7Y4U-WJLE].

41. *See* Jordyn Holman, Rebecca Greenfield & Gerry Smith, *Sinclair Employees Say Their Contracts Make It Too Expensive to Quit*, BLOOMBERG (Apr. 3, 2018), https://www.bloomberg.com/news/articles/2018-04-03/sinclair-employees-say-their-contracts-make-it-too-expensive-to-quit [https://perma.cc/7Y4U-WJLE]; *see also* Eriq Gardner, *Can Sinclair Force TV Anchors to Pay up If They Quit?*, HOLLYWOOD REP. (Apr. 3, 2018), https://www.hollywoodreporter.com/thr-esq/sinclair-broadcasting-contracts-make-it-expensive-tv-news-anchors-quit-1099293 [https://perma.cc/PTN7-HHGS].

of Employee's then annual compensation multiplied by a percentage equal to the greater of (a) twenty-five percent (25%), or (b) the percentage of the current contract year remaining after such termination."[42] The clause goes on to provide that if Sinclair does not enforce this liquidated damages clause, it "shall have the right to seek any and all remedies and damages available as a result of Employee's breach of this Agreement."[43]

In addition, the contract also separately provides that an employee who leaves "at any time" before the contract is up, or an employee fired by the company for cause in the first year of her employment, is required to reimburse Sinclair "for the total amount of payments made by [Sinclair] (or the value of any advertising provided by [Sinclair] in trade) for Other Benefits," which are defined as the benefits the employee receives pursuant to the company Employee Handbook (presumably, health insurance, etc.).[44] Sinclair's contract also requires its employees to agree to: (1) non-disclosure;[45] (2) non-compete for six months or one year after leaving the company;[46] (3) one-sided attorneys' fees, to be awarded to Sinclair only in the event it prevails in a dispute with the employee;[47] and (4) mandatory arbitration.[48]

C. Sinclair Seeks to Enforce Its Liquidated Damages Clauses

The public reaction to the reporting on Sinclair's liquidated damages clauses was that the clauses were draconian and unfair.[49] But are they legal?

This is not an abstract legal question. Sinclair sued at least two of its reporters, seeking to enforce the liquidated damages clauses in their contracts. The company sued a West Palm Beach reporter named James Jonathan Beaton, who left Sinclair to start a public relations firm, seeking $5,700 in alleged liquidated damages plus attorneys' fees and costs.[50] Sinclair also filed suit against another West Palm Beach reporter, Lauren Hills, who also left the company to work in public relations; in that case, Sinclair is seeking $17,050 in liquidated damages plus attorneys' fees and costs for what it claims is Ms. Hills' breach of her $46,500/year contract.[51]

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42. Sinclair Employment Agreement § 8.2(c) (on file with author).
43. *Id.*
44. *Id.* § 8.2(b).
45. *Id.* § 7.
46. *Id.* § 11.1.
47. *Id.* § 14.8.
48. *Id.* § 15.
49. *See*, *e.g.*, Gardner, *supra* note 41; Holman, Greenfield & Smith, *supra* note 41.
50. Complaint, Sinclair Commc'ns, LLC d/b/a WPEC NEWS 12 v. James J. Beaton, No. 2017-CC-012511-O (Fla. Cir. Ct. filed Oct. 13, 2017). According to Westlaw's docket entry, the case was closed on August 22, 2018.
51. Complaint, Sinclair Commc'ns, LLC d/b/a WPEC NEWS 12 v. Lauren Hills, No. 50-2017-CA-012261-XXXX-MB (Fla. Cir. Ct. Filed Nov. 8, 2017); *see also* Nicole

These cases are unusual in several respects. Neither Ms. Hills nor Mr. Beaton went to competitor news organizations (both leaving the industry altogether). As Ms. Hills said: "I'd given Sinclair my absolute best and was proud of everything I had done there, but I was just ready to move on. . . . I literally left the industry. It's not like I jumped ship for another TV station."[52] Neither was a well-known or celebrity on-air personality; both were local reporters. As Mr. Beaton said, "Sinclair argues that I caused them irreparable harm by leaving. Believe me, I was a good reporter, but not that good."[53] But, according to some former broadcasters, "the type of contracts that are coming back to haunt Beaton and Hills are ubiquitous in the TV news industry."[54]

Review of the dockets confirms that Sinclair voluntarily dismissed both cases in 2018.[55]

D. Applying the Law to the Facts: Sinclair's Liquidated Damages Clauses Are Likely Unenforceable

The test for liquidated damages is similar in Florida, where Sinclair filed its two suits seeking to enforce its liquidated damages clause, to the general analysis applied in most states, described above. According to the Florida Supreme Court, the test for determining whether a clause is a proper liquidated damages clause or an unenforceable penalty is twofold:

> First, the damages consequent upon a breach must not be readily ascertainable. Second, the sum stipulated to be forfeited must not be so grossly disproportionate to any damages that might reasonably be expected to follow from a breach as to show that the parties could have intended only to induce full performance, rather than to liquidate their damages.[56]

Goodkind, *"I'm Not a Slave to Sinclair Broadcasting": "Trapped" Reporters Sued for Leaving Company Speak out*, NEWSWEEK (Apr. 9, 2018), http://www.newsweek.com/sinclair-fake-news-employee-contracts-877746 [perma.cc/WFW6-6R24]. According to Westlaw's docket entry, the case was voluntarily dismissed on May 2, 2018.

52. Goodkind, *supra* note 51.

53. Jonathan Beaton, *I Quit Working for Sinclair and They Sued Me. Here's Why I'm Fighting Back,* HUFF. POST (Apr. 6, 2018), https://www.huffingtonpost.com/entry/jonathan-beaton-sinclair-suing_us_5ac60f6fe4b09ef3b2441237 [perma.cc/RW4Y-YHRW].

54. Jane Musgrave, *Broadcast Giant, Sinclair, Sues Two Former WPEC-Channel 12 Reporters*, PALM BEACH POST (Apr. 17, 2018), https://www.palmbeachpost.com/news/crime--law/wpec-channel-reporters-among-those-sued-sinclair-media-giant/re20zEErApRFrvERRqOF2J [perma.cc/U5HN-Z7M2].

55. Docket, Sinclair Commc'ns, LLC d/b/a WPEC NEWS 12 v. James J. Beaton, No. 2017-CC-012511-O (Fla. Cir. Ct. Aug. 22, 2018) (on file with author); Docket, Sinclair Commc'ns, LLC d/b/a WPEC NEWS 12 v. Lauren Hills, No. 50-2017-CA-012261-XXXX-MB (Fla. Cir. Ct. May 2, 2018) (on file with author); *see also* Hal Boedeker, *Sinclair Drops Suit Against Orlando Man*, ORLANDO SENTINEL (Aug. 30, 2018), https://www.orlandosentinel.com/entertainment/tv-guy/os-et-sinclair-drops-suit-against-orlando-man-20180830-story.html [perma.cc/M8JU-PASE]; Jane Musgrave, *Sinclair Drops Breach of Contract Lawsuit Against Former WPEC Reporter*, PALM BEACH POST (May 8, 2018), https://www.palmbeachpost.com/news/crime--law/sinclair-drops-breach-contract-lawsuit-against-former-wpec-reporter/FmSORDuDjqbF3HZ1nZeVIK [perma.cc/PP8T-M55D].

56. Lefemine v. Baron, 573 So. 2d 326, 328 (Fla. 1991).

Under these general legal standards that govern liquidated damages clauses, Sinclair's clauses are likely to be held unenforceable penalties, rather than proper liquidated damages clauses.

First, Sinclair's employment contract provides for Sinclair to recover *either* liquidated damages *or* actual damages, because the contract provides that if Sinclair does not enforce this liquidated damages clause, it "shall have the right to seek any and all remedies and damages available as a result of Employee's breach of this Agreement."[57] The contract also provides that Sinclair can recover actual damages in the form of reimbursement for benefits that it paid to the employee.[58]

Exactly this sort of option to seek either liquidated damages or actual damages has been held by the Florida Supreme Court to render the clause unenforceable because "the option granted to [Sinclair] either to choose liquidated damages or to sue for actual damages indicates an intent to penalize the defaulting [employee] and negates the intent to liquidate damages in the event of a breach."[59] Since Sinclair has the ability to recover actual damages, it cannot establish that the damages are difficult to estimate, and therefore it cannot show that a liquidated damages clause is necessary, meaning that its only purpose is to penalize.

Second, the amount set is disproportionately high when compared to the estimated actual damages. If enforced, the clause would allow Sinclair to recover forty percent of the employee's salary multiplied by a percentage equal to the greater of (a) twenty-five percent, or (b) the percentage of the current contract year remaining after such termination.[60] This is an extremely high amount for an employee to pay (e.g., Ms. Hills is reported to have made only $46,000 annually, yet Sinclair is suing her for $17,050). By contrast, the amounts sued for ($5,700 from Mr. Beaton and $17,050 from Ms. Hills) should be insignificant to a company the size of Sinclair (which reportedly earned over $440 million last year) and not even worth the costs of litigating to collect them—except for the fact that Sinclair has also inserted a one-sided attorneys' fees clause into its contracts, entitling only Sinclair but not the employee, to recover its attorneys' fees and costs from the employee if it prevails.[61]

57. Sinclair Employment Agreement, *supra* note 42, § 8.2(c).

58. *Id.* § 8.2(b).

59. *Lefemine*, 573 So. 2d at 329–30. The same is true in New York. *See*, *e.g.*, Agerbrink v. Model Serv. LLC, 196 F. Supp. 3d 412, 418–19 (S.D.N.Y. 2016) ("The general, common-sense rule underlying this determination is that liquidated damages and actual damages are mutually exclusive remedies under New York law. After all, the purpose of a valid liquidated damages provision is to provide a reasonable estimate of the extent of the injury that would be sustained as a result of a breach of the agreement when other measures of damages are unavailable.") (internal quotation and citations omitted).

60. Sinclair Employment Agreement, *supra* note 42, § 8.2(c).

61. *Id.* § 14.8.

It is also highly unlikely that such a high number reflects any correlation to the actual costs incurred by Sinclair (e.g., hiring and training a replacement) as a result of a local reporter such as Ms. Hills or Mr. Beaton leaving their station. Unlike liquidated damages clauses that apply to celebrity figures who may have a value that is difficult to quantify and who may be difficult to replace,[62] Mr. Beaton and Ms. Hills—by their own account—were far from irreplaceable. "Florida courts will not enforce a penalty which is disproportionate to the damages and is agreed upon in order to enforce performance of a contract and held *in terrorem* over the promisor to deter him from breaking his promise."[63]

Further evidence that the clauses are designed to punish rather than compensate may exist in the fact that Sinclair chose to file the cases against Mr. Beaton and Ms. Hills in court—notwithstanding the fact that the contract contains a mutually binding arbitration clause, in which both Sinclair and its employees agreed that "arbitration shall be [the] exclusive means of resolving any dispute or controversy arising out of or relating to this Agreement, Employee's employment with Employer, or termination of Employee's employment."[64] Except in limited non-applicable circumstances, this clause should have required Sinclair to bring its disputes against Ms. Hills and Mr. Beaton in arbitration, not in court. Sinclair's choice to file both cases in court, rather than in the required arbitration forum, suggests it may have had motivations other than compensation.

Third, to the extent the clause is intended to cover actual costs of hiring and training a replacement reporter, those costs seem quantifiable and easy to estimate in advance and provide for in the contract: they are not difficult to ascertain and therefore not properly the subject of a liquidated damages clause in the first place.

Fourth, the amount is set and apparently applies to all breaches, regardless of severity.[65] Mr. Beaton, for example, reportedly quit when he had only a month remaining on his contract,[66] making it very

62. *Contra* Vanderbilt Univ. v. DiNardo, 174 F.3d 751, 755–56 (6th Cir. 1999) (upholding liquidated damages clause in university football coach's contract where the lower court found that "[t]he potential damage to Vanderbilt extends far beyond the cost of merely hiring a new head football coach. . . . It is impossible to estimate how the loss of a head football coach will affect alumni relations, public support, football ticket sales, contributions, etc.").

63. Coleman v. B.R. Chamberlain & Sons, Inc., 766 So. 2d 427, 429–30 (Fla. Ct. App. 2000) (internal quotation and citation omitted) (striking down liquidated damages clause which have resulted in paying plaintiff "more than the amount of its actual damages").

64. Sinclair Employment Agreement, *supra* note 42, § 15.

65. *Contra* Ashcraft & Gerel v. Coady, 244 F.3d 948, 955 (D.C. Cir. 2001) (holding liquidated damages clause enforceable where it applied only to "material breaches" of the contract and was otherwise a reasonable estimate of the loss sustained).

66. Musgrave, *supra* note 55.

unlikely that Sinclair could show it sustained any loss at all as a result of his departure.

Finally, it is irrelevant that Sinclair has used the term "liquidated damages" to label the clause.[67]

Conclusion

Based on all of the preceding, it appears that Sinclair's purported liquidated damages clause would likely not have been enforceable. It is likely that the courts would have held the clause "is not proportionate to any loss or gain" that might flow from a breach, but instead "is intended to compel [the departing reporter's] performance" with the contract.[68]

67. Agerbrink v. Model Serv. LLC, 196 F. Supp. 3d 412, 418–19 ("In this analysis, it is not material what the parties themselves have chosen to call the provision—courts look to substance and not to form to determine whether the provision is a valid liquidated damages clause or an unenforceable penalty.") (internal quotation and citation omitted).

68. Leviton Mfg. Co. v. Pass & Seymour, Inc. No. 17 Civ. 46 (BMC), 2017 WL 3084404, at *6 (E.D.N.Y. July 19, 2017).