WAIVER — THE HOLDER OF AN INSTALLMENT NOTE WHO HAS ACCEPTED LATE PAYMENTS AS A PREVIOUS COURSE OF DEALING WAIVES THE RIGHT TO INVOKE AN ACCELERATION CLAUSE UNLESS FIRST NOTIFYING THE OBLIGOR THAT FUTURE LATE PAYMENTS WILL NOT BE ACCEPTED. *Dunn v. General Equities of Iowa* (Iowa 1982).

W. A. and Lola Dunn were payees on separate notes executed by General Equities of Iowa, Inc.[1] The identical notes were executed on March 31, 1974.[2] The notes were payable in annual installments over a period of ten years[3] with installments due on or before March 31 of each year.[4] The notes contained acceleration clauses invocable upon default "at the option of the holder."[5] General Equities defaulted on the 1979 payments.[6] The Dunns returned the defendant's untimely payment and demanded payment of the entire balance, with interest, as provided for in the acceleration clause.[7] Upon the refusal of General Equities to pay the entire balance, the Dunns brought suit.[8]

The district court ruled for the defendant, holding that the "plaintiffs had waived their right to invoke the acceleration clause."[9] The Iowa Supreme Court *held*, affirmed.[10] The holder of an installment note who has accepted late payments as a previous course of dealing waives the right to invoke an acceleration clause unless first notifying the obligor that future late payments will not be accepted. *Dunn v. General Equities of Iowa*, 319 N.W.2d 515 (Iowa 1982).

Iowa courts have long defined "waiver" as "the voluntary and intentional relinquishment of a known right."[11] The term "waiver" has myriad

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1. Dunn v. General Equities of Iowa, 319 N.W.2d 515, 515 (Iowa 1982).
2. *Id.*
3. *Id.*
4. *Id.* Each note provided for payments of $121,170 at seven percent per annum. *Id.* Delinquent installments drew an interest rate of nine percent. *Id.*
5. *Id.* The acceleration clause read: "Upon default in payment of any interest, or any installment of principal, the whole amount then unpaid shall become due and payable forthwith, at the option of the holder without notice." *Id.*
6. *Id.* The parties stipulated that "the 1979 payments were not made until April 10, 1979," ten days late. *Id.*
7. *Id.* at 515-16.
8. *Id.* at 516.
9. *Id.*
10. *Id.* at 517.
11. Iowa Grain v. Farmers Grain & Feed Co., Inc., 293 N.W.2d 22, 25 (Iowa 1980) (failure to find waiver of right to have a commodity futures trading account liquidated); FDIC v. Farrar, 231 N.W.2d 602, 605 (Iowa 1975) (holding non waiver of right of redemption); Kaltoft v. Nielsen, 252 Iowa 249, 257, 106 N.W.2d 597, 602 (1960) (waiver of contractual clause requiring building to be completed by contract date).

uses. Contract rights,[12] personal privileges,[13] defenses in a civil action,[14] constitutional rights,[15] and statutory rights or benefits are all susceptible to waiver.[16]

The *Dunn* decision dealt with waiver in a contract context.[17] It is axiomatic that contract rights can be waived. As used in the *Dunn* opinion, waiver is predicated upon a choice or election of the waiving party not to assert a known right.[18]

Waiver and estoppel are akin[19] and the terms are often used loosely and interchangeably by the courts.[20] It is a mistake to assume that waiver and estoppel are in any way interchangeable.[21] There is very little elemental overlap of the two doctrines.[22]

The essential elements of estoppel are: "a false representation or concealment of material facts;"[23] "lack of knowledge of the true facts on the part of the actor;"[24] "intention that [the false representation or conceal-

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12. *See, e.g.*, Dunn v. General Equities, 319 N.W.2d at 516.

13. *See* 3 F. WHARTON, WHARTON'S CRIMINAL EVIDENCE § 566 (13th ed. 1972).

14. In civil actions, many rights are subject to waiver. *See* Beeck v. Kapalis, 302 N.W.2d 90, 93-94 (Iowa 1981) (objection that action is barred by statute of limitation). *See also In re* Estate of Dull, 303 N.W.2d 402, 404 (Iowa 1981) (personal jurisdiction); Hengel v. Hyatt, 312 Minn. 317, ___, 252 N.W.2d 105, 106 (1977) (defects in service of process).

15. *See* Eliason v. Wiborn, 281 U.S. 457, 459-60 (1930) (waiver of right to object to constitutionality of state statute allegedly working unconstitutional deprivation of property without due process). *See also*, Pierce v. Somerset R. Co., 171 U.S. 641, 649-50 (1898) (waiver of right to question constitutionality of state statute).

16. *See* Halsrud v. Brodale, 247 Iowa 273, 281, 72 N.W.2d 94, 99 (1955) (contractual waiver of statutory right to water drainage).

17. Dunn v. General Equities, 319 N.W.2d at 516.

18. *Id.*

19. Euclid Ave. State Bank v. Nesbit, 200 Iowa 159, 204 N.W. 253, *reh'g denied*, 201 Iowa 506, 207 N.W. 761 (1926).

20. *Id. See* Perkins v. City Nat'l. Bank of Clinton, 253 Iowa 922, 935-36, 114 N.W.2d 45, 53 (1910). When the elements of these two equitable doctrines are compared, it is easy to see that any interchangeable use would clearly be inappropriate. *See id.* at 935-36, 114 N.W.2d at 52-53.

21. *See infra* text accompanying notes 23-31.

22. Pond v. Anderson, 241 Iowa 1038, 44 N.W.2d 372 (1950). The court stated that "[w]hile 'waiver' and 'estoppel' are closely akin, they are not the same. Waiver does not necessarily imply that the other party has been misled to his prejudice while estoppel involves this element." *Id.* at 1043, 44 N.W.2d at 375.

23. *See* Moser v. Thorp Sales Corp., 312 N.W.2d 881, 892 (Iowa 1981). *See also*, Johnson v. Johnson, 301 N.W.2d 750, 754 (Iowa 1981). In *Johnson*, the plaintiff brought partition action against her former husband and third-party contract purchasers of real estate formerly held in joint tenancy by her and her husband. *Id.* at 751-52. The court held plaintiff was estopped. *Id.* at 754. The court noted that Mrs. Johnson had concealed her interest in the subject property at the time the contract of sale was entered into. *Id.* The court held that by refusing to help in making the house and utility payments, Mrs. Johnson wanted her representations to be acted upon. *Id.*

24. Johnson v. Johnson, 301 N.W.2d 750, 754 (Iowa 1981).

ment] be acted upon;"[25] and "reliance thereon by a party to whom [the representation is] made, to his prejudice and injury."[26] Waiver, as developed in Iowa case law, has three essential elements:[27] the existence of a waivable right or condition;[28] knowledge on the part of the party allegedly waiving;[29] and an intention to relinquish such right.[30]

The element of reliance, essential to estoppel, is not required for a waiver to exist.[31] It is apparent that in most situations, as in the *Dunn* case, a party has relied upon a belief when the other party will not require strict performance of the condition allegedly waived.[32] Although it is impossible to say whether General Equities would have made timely payment if the Dunns had not manifested an intention to waive strict enforcement, this probably affected the court's decision.[33]

The *Dunn* court applied the elements of waiver to a contract situation.[34] By holding that the right to invoke an acceleration clause may be waived by accepting late payments, the court followed a well-defined trend.[35]

For a waiver to occur, there must be knowledge of the right allegedly waived on the part of the party against whom the waiver is asserted.[36] This knowledge of the material facts and rights can be actual or constructive.[37]

A party may be deemed to have constructive notice by cashing checks remitted for payment that are dated after the due date.[38] In *Dunn*, the plaintiffs, on three separate occasions, cashed checks dated after the day

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25. *Id.*

26. *Id.*

27. Millsap v. Cedar Rapids Civil Serv. Comm'n., 249 N.W.2d 679, 683 (Iowa 1977).

28. *Id.* Perkins v. City Nat'l. Bank, 253 Iowa 922, 935, 114 N.W.2d 45, 52-53 (1962).

29. Grandon v. Ellingston, 259 Iowa 514, 521, 144 N.W.2d 898, 903 (1966). The court in *Grandon* looked to the acts of the party and their results to determine if knowledge and intent were present. *Id.* at 521-22, 144 N.W.2d at 903.

30. *See* Bankers Trust v. Economy Coal Co., 224 Iowa 36, 43, 276 N.W. 16, 20 (1937). Intent will be determined by examining all of the facts and circumstances. *Id.*

31. *See* 3A A. Corbin, Corbin on Contracts § 752, at 481-82 (1960).

32. *See* Williamson v. Wanless, 545 P.2d 1145 (Utah 1976). In *Williamson*, the defendants had been delinquent in making payments on an installment note, presumably because late payments had been previously accepted despite acceleration provision in the installment contract. *Id.* at 1146-47.

33. This was one of the factors of the decision in *Williamson v. Wanless*. *Id.* at 1147-48.

34. Dunn v. General Equities of Iowa, 319 N.W.2d at 516.

35. *See infra* text accompanying note 56.

36. *See* O'Connor v. Knights & Ladies of Security, 178 Iowa 383, 405-07, 158 N.W. 761, 768-69 (1916). In *O'Connor*, the court determined that the defendant insurance company had waived its right to declare a contract forfeiture. 178 Iowa at 385-94, 158 N.W. at 762-65. The court looked to dated receipts given by the company to the plaintiff to determine there had been a knowing waiver. *Id.*

37. *See generally*, McGowan v. Pasol, 605 S.W.2d 728 (Tex. Civ. App. 1980).

38. *Id.*

upon which payment came due.[39] Whether the party actually knows he is accepting late payments is immaterial; what matters is that the checks were accepted some time after the due date.[40]

For a waiver to occur, there must also be an intent on the part of the waiving party.[41] Intent is determined, as in virtually all areas of the law, by the objective manifestations of the waiving party.[42] The intent to waive is determined by the effect the outward manifestations have on the party asserting the waiver.[43]

In *Dunn*, the court accepted General Equities' contention that by accepting late payments, the Dunns evidenced an intent to be less than stringent in requiring timely payment.[44] The intent of the Dunns was manifested by the fact that General Equities remitted late payment, allegedly on the belief it would be accepted.[45]

The *Dunn* court held that the represented intent could be fulfilled by the manifestations evidenced by a previous "course of dealing" between the parties.[46] In analyzing the prior transactions between General Equities and the Dunns, the court utilized the Uniform Commercial Code (UCC) definition of "course of dealing."[47] As defined in the UCC, a "course of dealing" means "a sequence of previous conduct between the parties to a particular transaction which is fairly to be regarded as establishing a common basis of understanding for interpreting their expressions and other conduct".[48]

By applying this definition, the court made no radical change in Iowa law, and in fact only substituted a modern definition for one that Iowa courts had long held.[49] The *Dunn* opinion pointed out that a prior course of

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39. Dunn v. General Equities of Iowa, 319 N.W.2d at 517.

40. *See generally* McGowan v. Pasol, 605 S.W.2d at 732 (concerning waiver of acceleration clause).

41. *Id.*

42. Trotter v. Grand Lodge of Iowa, 132 Iowa 513, 528-29, 109 N.W. 1099, 1104 (1906).

43. *See id.* In *Trotter*, the court held that an insurance company, by commonly accepting late premium payments, waived its right to call a forfeiture for an untimely payment. *Id.* The court stated:

> If then, such company . . . adopts a method of business by which premiums or assessments are habitually collected and received for a period of several days after they become delinquent according to the strict letter of the contract, and no forfeiture or suspension is declared thereon . . . and by this course of business members reason fairly to conclude that the insurer does not insist upon literal compliance with the terms of the contract in this respect; then it will not be heard to deny the good standing of a member who has depended upon the custom observed by the agent, and has paid or offered to pay his assessments in accordance therewith.

Id. at 519-20, 109 N.W.2d at 1101.

44. Dunn v. General Equities of Iowa, 319 N.W.2d at 517.

45. *Id.*

46. *Id.*

47. *Id.* at 516-17.

48. IOWA CODE § 554.1205(a) (1981).

49. Iowa courts have previously held that the way to prove waiver of a contract provision

dealing as defined in the UCC has been utilized in other context.[50] In the insurance arena, for example, the Iowa Supreme Court has stated that where the acts and conduct of the insurer caused an insured to believe it would not insist upon the strict enforcement of the time for premium payment, the insurer cannot declare a forfeiture when the insured acts on a belief induced by the previous course of dealing.[51]

The *Dunn* court held that the right to invoke an acceleration option was waived by a prior course of dealing of accepting late payments.[52] The court explained that the stated rule had previously been applied by Iowa courts in the context of real estate contract forfeitures.[53] Looking to this line of cases as persuasive precedent, the court continued that "because the rule is applicable to contract rights generally, the forfeiture context is not of controlling significance."[54]

In addition to cases of real estate forfeiture, which the Iowa Supreme Court found highly analogous to the situation in *Dunn*, there are several other lines of decisions that are similar to the problem in *Dunn*.[55] There is an analogous body of case law holding that acceptance of a late payment of interest on a note will waive the creditor's right to accelerate the entire debt.[56] A large number of jurisdictions have so held.[57] In *Farmers' and Merchants' Bank v. Daiker*,[58] the Iowa Supreme Court held that the plain-

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is to show a "general course of dealing between the parties." Livingston v. Stevens, 122 Iowa 62, 69, 94 N.W. 925, 927 (1903).

50. 319 N.W.2d at 516 (citing Citizens Savings Bank v. Sac City State Bank, 315 N.W.2d 20, 26 (Iowa 1982)). *See also* Hedrick Savings Bank v. Myers, 229 N.W.2d 252 (Iowa 1975). The *Hedrick* court found that the bank had given the defendant authority to sell livestock held as security for a loan. *Id.* at 255. The court held that the bank could not object to the sales where previous sales had been made with the bank's knowledge and the proceeds applied to the outstanding loan. *Id.*

51. *See* Bricker v. Great Western Accident Ass'n., 161 Iowa 61, 140 N.W. 851 (1913). In *Bricker*, where the insurer had often accepted late premium payments, the court stated that,

> Where the acts and conduct of the insurer have been such as to indicate a purpose and intent not to insist upon a strict performance of the terms of the certificate touching the times of payments of installments . . . it has been held that the association is estopped to claim that which by its conduct it manifestly denied.

Id. at 64-65, 140 N.W. at 853.

52. Dunn v. General Equities of Iowa, 319 N.W.2d at 517.

53. *Id.* (citing Westercamp v. Smith, 239 Iowa 705, 717, 31 N.W.2d 347, 353 (1948)).

54. *Id.*

55. *See infra* text accompanying notes 56-69.

56. *See* Farmers & Merchants Bank v. Daiker, 153 Iowa 484, 487, 133 N.W. 705, 705-06 (1911).

57. Jurisdictions holding that the acceptance of past due payments will cause a waiver of the creditor's right to accelerate the due date include: Bisno v. Sax, 175 Cal. App. 2d 714, 346 P.2d 814 (1959); Colorado Kenworth Corp. v. Whitworth, 144 Colo. 541, 357 P.2d 629 (1960); Gus' Bath v. Lightbown, 101 Fla. 1205, 133 S. 85, *reh'g granted* 135 S. 300 (1931); Andregg v. Sparrow, 152 Kan. 744, 107 P.2d 739 (1940); Theatre Equip. Acceptance Corp. v. Betman, 259 Mich. 245, 242 N.W. 903 (1932).

58. 153 Iowa 484, 133 N.W. 705 (1911).

tiff bank had waived its option to cause the note to become due by accepting an untimely payment of interest.[59] The court stated that, "if, knowing that defendant paid [the interest installment], understanding that it was being received in satisfaction of the past-due interest, [plaintiff] will be held to have waived the default, and cannot thereafter make it a ground for declaring the whole debt due."[60]

In the foreclosure context, the courts have held that acceptance of late payment will cause waiver of an acceleration clause until notice and subsequent default.[61] In *Westercamp v. Smith*,[62] the Iowa Supreme Court ruled that where there had been a history of accepting untimely payments on a contract to purchase real estate, the seller would be found to have waived his right to foreclose upon further receipt of tardy payments.[63] The rule is well stated in the Oregon decision of *Stinemeyer v. Wesco Farms, Inc.*:[64] "A creditor who has, by his past actions, led his debtor to believe that the terms of their agreement requiring prompt payment will not be strictly enforced must, before taking advantage of an acceleration option, give the debtor a reasonable opportunity to make up his delinquent payments."[65]

In Illinois, this rationale has recently been applied to hold that in the context of an equipment lease, the lessor's acceptance of late rent payments caused a waiver of an objection to tardy payments.[66] In *Builders' Concrete Co. of Morton v. Fred Faubel and Sons, Inc.*,[67] the court held, *inter alia*, that by accepting late rent payments, the lessor waived its right to charge a breach of the lease-contract.[68] This was so held despite the fact that the lease agreement contained a clause making timeliness of payment especially important.[69]

Thus, the Iowa Supreme Court in *Dunn* correctly stated the rule of law in applying the equitable doctrine of waiver by a prior course of dealing.[70]

The court held there was sufficient evidence to support the trial court's finding of a waiver.[71] The plaintiff had accepted the first installment, though it was only a day late.[72] The second payment was paid in two equal install-

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59. *Id.* at 487, 133 N.W. at 705-06.
60. *Id.* at 487, 133 N.W. at 706.
61. *See* Westercamp v. Smith, 239 Iowa 705, 717, 31 N.W.2d 347, 353 (1948).
62. 239 Iowa 705, 31 N.W.2d 347 (1948).
63. *Id.* at 717, 31 N.W.2d at 353.
64. 260 Or. 109, 487 P.2d 65 (1971).
65. *Id.* at ___, 487 P.2d at 67.
66. *See* Builder's Concrete Co. v. Fred Faubel & Sons, 58 Ill. App. 3d 100, ___, 373 N.E.2d 863, 867 (1978).
67. 58 Ill. App. 3d 100, 373 N.E.2d 863 (1978).
68. *Id.* at ___, 373 N.E.2d at 867.
69. *Id.*
70. Dunn v. General Equities of Iowa, 319 N.W.2d at 516.
71. *Id.*
72. *Id.*

ments on the 13th of April and the 16th of June.[73] The 1978 payments were on time, and the 1979 payments, ten days late, were returned with a demand for the entire amount due and owing.[74] Because the case was tried to the court, the trial court's findings of fact needed to be supported only by substantial evidence.[75] The Supreme Court, without discussion, held that the record of payments lent substantial support to the findings of the trial court.[76] The notes in question, however, did not have clauses dictating that acceptance of a late payment would not operate as a waiver of the right to demand subsequent payments be made on a timely basis.[77] While this was not mentioned in the *Dunn* opinion, presence of such a clause would surely cause a different result.

In *North Side Bank v. La Melle,*[78] the plaintiff bank brought a foreclosure action against the defendant mortgagors.[79] The *per curiam* decision finding a waiver stated that the plaintiff had a "long history of accepting late monthly installments on the mortgage."[80] Taken at face, this would clearly lend support to the *Dunn* holding that a prior course of dealing is concededly established by a "long history" of accepting late payments.[81]

In *Ashback v. Wenzel,*[82] the seller of corporate stock brought an action for breach of contract against the buyer.[83] The plaintiff had sold stock to the defendant corporation in consideration for the execution and delivery of three promissory notes of varied denominations.[84] The Colorado Supreme Court held, *inter alia,* that the seller had waived his right to invoke the acceleration clause due to his habitual acceptance of late payments on the notes.[85] The facts of *Ashback* show that it is a clear case of "prior course of dealing" that would support a claim of waiver.[86] The plaintiff had accepted late monthly payments without protest for a period of 31 months.[87] Thus, this decision also exemplifies a situation in which it would clearly be inequi-

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73. *Id.*

74. *Id.*

75. *Id.* at 517.

76. *Id.*

77. Appendix to Appellant's Brief at ___, Exhibit 46, Dunn v. General Equities of Iowa, 319 N.W.2d 515 (Iowa 1982).

78. 380 So. 2d 1322 (Fla. Dist. Ct. App. 1980).

79. *Id.*

80. *Id.*

81. *Id.*

82. 141 Colo. 35, 346 P.2d 295 (1959).

83. *Id.* at ___, 346 P.2d at 295.

84. *Id.* The notes were for $20,000, $17,455.59 and $5,915.21 and were secured by a mortgage on corporate property. *Id.* at ___, 346 P.2d at 295-96.

85. *Id.* at ___, 346 P.2d at 297.

86. *See infra* text accompanying note 87.

87. The record showed that payments were even accepted after suit was brought. *Id.* at ___, 346 P.2d at 297.

table not to hold that there had been a waiver.[88]

A decision from the Texas Court of Civil Appeals also provides an example of a situation in which a waiver could easily be found.[89] In *McGowan v. Pasol*, the plaintiffs sought to accelerate the maturity of an installment note secured by a mortgage on an apartment building in Brownsville, Texas.[90] The note was payable in monthly installments commencing March 1, 1977, and of the installments which became due from that date until March 1, 1979, eighteen were paid late and all were accepted by the payee.[91] The court held that there was a waiver of the right to accelerate the maturity where prior notice had not been given.[92] In *McGowan*, it is clear that the facts gave rise to a justifiable belief by the obligor-defendants that the option to accelerate would not be exercised for mere lateness of payments.[93]

A Utah decision, *Williamson v. Wanless*,[94] provides guidelines that can aid a court in determining whether acceptance of late payments constitutes a clearly established prior course of dealing that would justify finding a waiver.[95] In *Williamson*, plaintiffs brought suit to enforce an acceleration clause and demanded the balance of a note executed in part payment for farm property.[96] The Utah Supreme Court reversed the trial court's opinion and held that the payee of the note had waived the right to invoke the acceleration clause until notice to the defendant that there would be strict enforcement of the time of payment provision.[97] It appeared that the plaintiffs had accepted late payments on fifteen of twenty-five occasions.[98]

In *Stinemeyer v. Wesco Farms, Inc.*,[99] the Oregon Supreme Court held that an assignee of a land sale contract waived contract provisions calling for timely payments by accepting late interest payments.[100] In *Stinemeyer*, six of eight monthly payments due were accepted as much as two months late.[101]

It appears that there is no magical number of acceptances of late payments that will constitute a "prior course of dealing."[102] The emphasis has

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88. *See* Ashback v. Wenzel, 141 Colo. 35, 346 P.2d 295 (1959).
89. *See* McGowan v. Pasol, 605 S.W.2d 728 (Tex. Civ. App. 1980).
90. *Id.* at 730.
91. *Id.*
92. *Id.*
93. *Id.*
94. 545 P.2d 1145 (Utah 1976).
95. *Id.*
96. *Id.*
97. *Id.*
98. *Id.*
99. 260 Or. 109, 487 P.2d 65 (1971).
100. *Id.* at ___, 487 P.2d at 67.
101. *Id.*
102. In *Williamson v. Wanless*, fifteen out of twenty-five payments were late. 545 P.2d at 1146. In *McGowan*, eighteen late payments were accepted. 605 S.W.2d at 730. In *Ashback*, late monthly payments were accepted over a thirty-one month period. 141 Colo. at ___, 346 P.2d at

been on whether the actions of the party allegedly making the waiver were such that they would create a reasonable belief in the payor that strict adherence to contract terms would not be required.[103] If the conduct of the payee is such that the payor could act in reasonable reliance on it, a finding of waiver would be justified.[104]

The *Dunn* decision takes a liberal view of what constitutes a "course of dealing" amounting to waiver.[105] With only three late payments, the court found substantial evidence of a course of dealing.[106] While based on sound principles, the *Dunn* decision appears to expand the amount of action necessary to create a waiver by a previous course of dealing.[107]

The *Dunn* decision may have created some confusion as to how much leeway a holder would have when dealing with a financially strapped obligor. In some cases, the question of whether the acceptance by the holder of a timely but smaller installment would also act as a waiver of the right to invoke the acceleration clause may also arise. Previous Iowa cases in the contract context appear to state that the acceptance of a partial, yet timely, payment would not lead to a waiver of the right to invoke the acceleration clause.[108] The Iowa Supreme Court has held that acceptance of a partial payment will not cause waiver.[109] This is a sound holding when considered in the light of the essential elements of waiver and the principle upon which it is based.[110]

The purpose of the waiver doctrine is to preclude a party from "cracking down" after letting the other develop a belief that the terms of the contract would not be strictly enforced.[111] The party asserting that a waiver had occurred could argue that, by accepting the partial payments, the other party indicated a flexible position with regard to enforcing the contract terms.[112] But the better rule would hold that by accepting partial payments, the holder would manifest an intent to waive only his rights to insist upon a full payment and not his right to insist upon a timely payment.[113]

While the *Dunn* opinion adeptly states the rule of law, its succinct factual summary leaves the practitioner with few pragmatic guidelines. The

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297. In *LaMelle*, there was a "long history of accepting late monthly installments on the mortgage." 380 So. 2d at 1323.

103. *See supra* text accompanying note 94.

104. 141 Colo. at ___, 346 P.2d at 297.

105. Dunn v. General Equities of Iowa, 319 N.W.2d at 516.

106. *Id.*

107. *Id.*

108. *See* Collins v. Nagel, 200 Iowa 562, 565-66, 203 N.W. 702, 704 (1925).

109. *Id. But see Smalley v. Renken*, where the court held that the right to accelerate upon the mortgage was waived because the late payment was partial in that it contained no interest upon the interest. 85 Iowa 612, 615, 52 N.W. 507, 508 (1892).

110. *See supra* text accompanying notes 27-35.

111. *See* Williamson v. Wanless, 545 P.2d at 1147.

112. Collins v. Nagel, 200 Iowa at 567, 203 N.W. at 705.

113. *See id.*

Dunn opinion states that a prior course of dealing amounting to waiver can be eradicated if "the holder has notified the obligor that future late payments will not be accepted."[114] Yet the opinion does not elaborate on what type of notice would suffice to contradict an established pattern of dealings.[115] Nevertheless, the court flatly states that there is a recognized right to withdraw a waiver of time for performance by giving "reasonable notice" of such withdrawal.[116] "Reasonable notice" is a somewhat imprecise term and just what would be reasonable notice of a future intent to strictly adhere to time for performance is not totally clear.

In *Williamson v. Wanless*,[117] the trial court held that the obligors received sufficient notice of plaintiff's future intent to enforce the time for payment.[118] The Utah Supreme Court overruled the trial court decision, one reason being that the defendants did not receive adequate notice.[119] The court was of the belief that the letter from the plaintiff's attorney to defendants was simply a "friendly and gentle admonition" when it should have been a "demand or ultimatum".[120] A reading of the letter makes it apparent that the Utah Supreme Court decision is not beyond criticism.[121] The letter reminded the defendants they were in arrears, indicated that contractual remedies would be followed up if payments were not timely, and requested that future payments be made on time.[122]

It appears that the Utah decision is especially severe. Although *Dunn* gives no clear indication, it seems to suggest that any notice would be sufficient provided it had the effect of conveying an intent to strictly adhere to contract provisions.[123] The UCC, found to be relevant to the *Dunn* situation by the court, provides a definition of "notice" that appears to suffice for the

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114. Dunn v. General Equities of Iowa, 319 N.W.2d at 317.

115. *See supra* text accompanying notes 66-70.

116. Dunn v. General Equities of Iowa, 319 N.W.2d at 517 (citing Bettis v. Bettis, 228 N.W.2d 193, 195 (Iowa 1975)).

117. 545 P.2d 1145 (Utah 1976).

118. *Id.*

119. *Id.* at 1148.

120. *Id.*

121. *Id.* at 1149.

122. The letter stated:

Dear Folks:

I have just had a phone call from the Williamsons, and they are quite concerned over the fact that you have been somewhat late, sometimes as high as three months, in making your payments.

This inconveniences the Williamsons to no end and, as you know, *they have certain remedies* under their contract, such as declaring the full amount due and payable, which, *if they are aggravated*, they will pursue. In a spirit of harmony, it *would be nice* if the payments could be made on time so there would not be any further friction arise.

With kind regards, we are, [etc.]

Id. at 1147. (emphasis in original).

123. *See* Bettis v. Bettis, 228 N.W.2d 193, 195 (Iowa 1975).

purposes of *Dunn*.[124] Section 554.1201(26) explains that, "A person *'notifies'* or *'gives'* a notice or notification to another by taking such steps as may reasonably be required to inform the other in the ordinary course whether or not such other actually comes to know of it."[125] Thus, it seems that most authorities would hold that adequate notice is any that gives the other a reasonable opportunity to perform the conditions previously waived.[126]

The court in *Dunn* has joined a majority of jurisdictions in applying the doctrine of waiver to an acceleration clause situation. While it appears that this is the better rule, perhaps future decisions will clarify just what factual scenario would give rise to a claim of waiver.

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124. Iowa Code § 554.1201(26) (1981).
125. *Id.* (emphasis in statute).
126. Bettis v. Bettis, 228 N.W.2d at 195.