DISPROPORTIONATE FORFEITURE: "MAKE A NEW PLAN, STAN . . . JUST GET YOURSELF FREE!"[1]

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ABSTRACT

Express contractual conditions are land mines waiting to wreak havoc when left unsatisfied. Options for relief are limited. A recent example is the court's denial of insurance coverage to Harvard in President and Fellows of Harvard College v. Zurich American Insurance Co.*, a case involving insurance coverage for alleged discriminatory admission procedures. The First Circuit Court of Appeals affirmed the district court's grant of summary judgment to the insurer in the case based on Harvard's failure to satisfy an express contractual condition requiring notification to the insurer within the coverage dates of the policy of claims made against the school. The principle of disproportionate forfeiture provides an often underdeveloped map for freedom from express contractual conditions. Among practitioners and students alike, there is a general familiarity with the doctrine of unconscionability as a potential avenue of relief for a victim of unfairness in contract formation. Many, however, are unfamiliar with the principle of disproportionate forfeiture as an avenue of relief in the event that an express condition, appearing reasonable at contract formation, actually results in an unfair and unreasonable result. In applying the principle, the best view is that cases involving similar issues, such as notification issues, be addressed as a group and that the nonoccurrence of an express condition be excused in the absence of prejudice to the opposing party.*

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1. PAUL SIMON, *50 Ways to Leave Your Lover*, *on* STILL CRAZY AFTER ALL THESE YEARS (Columbia Records 1976).

I. DISPROPORTIONATE FORFEITURE: "MAKE A NEW PLAN, STAN…JUST GET YOURSELF FREE"![2]

The principle of disproportionate forfeiture is a valuable tool to counter the disastrous effects often stemming from a failed express contractual condition. The principle has, however, failed to receive the attention it deserves. Among practitioners and students alike, there is a general familiarity with the doctrine of unconscionability as a potential avenue of relief for a victim of unfairness in

2. SIMON, *supra* note 1.

contract formation.[3] Many, however, are unfamiliar with the principle of disproportionate forfeiture as an avenue of relief in the event that an express condition—appearing reasonable at contract formation—actually results in an unfair and unreasonable result.[4]

The case of *President and Fellows of Harvard College v. Zurich American Insurance Co*.[5] is an example of the consequences of the strict application of a contractual condition agreed upon by the parties.[6] In this case, Harvard sought insurance coverage for claims made against it alleging Harvard engaged in discrimination through its application of race-conscious admission policies benefiting Black and Hispanic applicants and discriminating against Asian American applicants.[7] The insurance contract at issue was a claims-made policy covering claims made within a certain period of time and requiring that, as a condition to coverage, Harvard give notice to Zurich, the insurance company, of any claim within 90 days of the coverage dates of the policy.[8] It was undisputed that Harvard first gave notice to Zurich well past the deadline.[9] Recognizing the notice requirement in a claims-made policy is intended to facilitate rate-setting as well as the insurer's opportunity for investigation, the First Circuit ruled that Harvard's failure to provide timely notice barred recovery under the policy.[10]

3. *See* Audrey G. McFarlane, *The Properties of Instability: Markets, Predation, Racialized Geography, and Property Law*, 2011 WIS. L. REV. 855, 918 ("Unconscionability doctrine is well known for displacing a fundamental assumption of equality in bargaining power between the parties to a contract.").

4. *See* TOM BAKER & KYLE D. LOGUE, INSURANCE LAW AND POLICY 103 (4th ed. 2017) ("Disproportionate forfeiture is a potentially wide-ranging contract doctrine that has received relatively little attention among students and practitioners of insurance law."); Evergreen Square of Cudahy v. Wis. Hous. & Econ. Dev. Auth., 848 F.3d 822, 830 (7th Cir. 2017) (acknowledging the "understatement" of saying that the doctrine of disproportionate forfeiture was not well-developed in the jurisdiction and also that federal common law was unclear on the matter).

5. 77 F.4th 33, 41 (1st Cir. 2023).

6. *See* Nate Raymond, *Harvard Can't Force Insurer to Cover $15 Mln in Race-Case Defense Costs – Judge*, REUTERS: INSURANCE (Nov. 2, 2022, 6:08 PM), https://www.reuters.com/legal/government/harvard-cant-force-insurer-cover-15-mln-race-case-defense-costs-judge-2022-11-02/ [https://perma.cc/6N5A-MJC8].

7. *President & Fellows of Harvard Coll.*, 77 F.4th at 36; *see* Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll., 600 U.S. 181, 187 (2023).

8. *President & Fellows of Harvard Coll.*, 77 F.4th at 36.

9. *Id.* at 36–37.

10. *Id.* at 38.

According to the court, recovery was barred even if Zurich was not prejudiced by the lack of notice or had actual knowledge of the claim.[11]

Application of the doctrine of disproportionate forfeiture would have excused Harvard's lapse in regard to notice.[12] While there are variations between states, in relation to its acceptance and application, Section 229 of the Restatement (Second) of Contracts (Section 229) provides a good starting point for an examination of the doctrine.[13] Section 229 provides as follows: "To the extent that the non-occurrence of a condition would cause disproportionate forfeiture, a court may excuse the non-occurrence of that condition unless its occurrence was a material part of the agreed exchange."[14] This Article will examine the elements needed for a finding of disproportionate forfeiture under Section 229, point out inconsistencies with its application, and provide a framework for future development of the doctrine.[15] Further consideration of the doctrine of disproportionate forfeiture, as a means to avoid the harsh consequences which may result from a failed express contractual condition, is urged.[16]

II. THE TRADITIONAL CONSEQUENCES FLOWING FROM THE FAILURE OF AN EXPRESS CONDITION AS OPPOSED TO A BREACH OF A PROMISE

The court in *Merritt Hill Vineyards Inc. v. Windy Heights Vineyard, Inc.* explained that an express condition agreed upon by the parties involves an event that must occur, unless excused, before performance under a contract becomes due.[17] Situations involving serious consequences flowing from the breach of an express condition, such as Harvard's dispute with its insurer, Zurich, are not uncommon.[18] For example, in *Morse v. Ted Cadillac, Inc.*, the court confronted a situation in which the defendant's obligation to sell an automobile dealership to the plaintiff was expressly conditioned on the issuance of a specific dealer franchise to the plaintiff.[19] When the plaintiff was unable to obtain the requisite franchise and the defendant refused to transfer the dealership, the plaintiff sued for

11. *Id.* at 38–39.

12. *Compare id.*, *with* RESTATEMENT (SECOND) OF CONTS. § 229 (AM. L. INST. 1981).

13. RESTATEMENT (SECOND) OF CONTS. § 229 (AM. L. INST. 1981).

14. *Id.*

15. *See infra* Parts V–IX.

16. *See infra* Parts X–XI.

17. 460 N.E.2d 1077, 1081 (N.Y. 1984) (quoting RESTATEMENT (SECOND) OF CONTS. § 224 (AM. L. INST. 1981)).

18. President & Fellows of Harvard Coll. v. Zurich Am. Ins. Co., 77 F.4th 33, 36–37 (1st Cir. 2023); *see, e.g.*, Morse v. Ted Cadillac, Inc., 537 N.Y.S.2d 239, 240 (App. Div. 1989).

19. 537 N.Y.S.2d at 240.

specific performance asking that the court order the transfer of the dealership.[20] Recognizing, however, that it is a "basic tenet of contract law" that no liability arises when a condition precedent is unfilled, the court found the plaintiff's suit meritless.[21] Similarly, in *Athena 2004, LLC v. LC Rochester, Inc.*, a failed condition precedent prevented the plaintiff from recovering amounts sought for work done on a construction project.[22] According to the court, "[t]he general rule is that 'conditions must be literally met or exactly fulfilled, or no liability can arise on the promise qualified by the condition.'"[23]

The fact that substantial performance will not operate to avoid a forfeiture when an express condition is involved is further illustrated by the court's decision in *Officer v. Chase Insurance Life and Annuity Co.*[24] The plaintiff in the case—the beneficiary of a life insurance policy—sought to avoid a policy provision conditioning recovery on the insured not committing suicide within two years of the effective date of the policy.[25] The insured committed suicide within a few weeks of the two-year mark.[26] The plaintiff's position was that the breach of the insurance contract was immaterial and the doctrine of substantial performance should prevent the insurer from discharging its obligation to pay in view of the fact that the suicide provision was 95 percent performed at the time of the breach.[27] The court, however, refused to entertain an argument involving substantial performance stating that "[i]f a plainly expressed exception, exclusion or limitation in an insurance policy is not contrary to public policy, it is entitled to construction and enforcement *as expressed*."[28]

20. *Id.*

21. *Id.* There is some authority to the effect that a minor failure to completely satisfy an express condition may be excused. *See, e.g.*, Witherell v. Lasky, 145 N.Y.S.2d 624, 627 (App. Div. 1955) ("Substantial performance might make compliance with an express condition unnecessary, but only when the departure from full performance is an inconsiderable trifle having no pecuniary importance.").

22. No. A20-0333, 2021 WL 318045, at *7 (Minn. Ct. App. Feb. 1, 2021) (unpublished nonprecedential opinion).

23. *Id.* at *3 (quoting Capistrant v. Lifetouch Nat'l Sch. Studios, Inc., 916 N.W.2d 23, 27–28 (Minn. 2018)).

24. 541 F.3d 713, 718–19 (7th Cir. 2008).

25. *Id.* at 714.

26. *Id.*

27. *Id.* at 717–18.

28. *Id.* at 717 (quoting Allstate Ins. Co. v. Boles, 481 N.E.2d 1096, 1098 (Ind. 1985)).

The analysis is different when parties to a contract make promises to each other but no express condition is involved.[29] In such a situation, so long as a breaching party has substantially performed on a contract, meaning the party has not committed a material breach, the party is entitled to a contractual recovery.[30] While the nonbreaching party is entitled to proven damages, complete forfeiture on the part of the substantially performing breaching party may not occur.[31] In situations involving a promise, as opposed to an express condition, courts typically describe the contract as involving a constructive condition that a promise by one party be substantially performed before a return performance on the part of the other party is due.[32] The case of *Oppenheimer & Co. v. Oppenheim, Appel, Dixon & Co.* succinctly sets forth this distinction.[33] As explained by the *Oppenheimer* court, express conditions are "agreed to and imposed by the parties themselves."[34] Constructive conditions, however, are "imposed by law to do justice."[35] Absent an exception, such as the doctrine of disproportionate forfeiture, express conditions must be literally performed.[36] On the other hand, substantial compliance is sufficient for constructive conditions which ordinarily arise from contractual promises.[37] In noting the importance of this distinction, the *Oppenheimer* court quoted *Williston on Contracts* as follows:

> Since an express condition . . . depends for its validity on the manifested intention of the parties, it has the same sanctity as the promise itself. Though the court may regret the harshness of such a condition, as it may regret the harshness of a promise, it must, nevertheless, generally enforce the will of the parties unless to do so will violate public policy. Where, however, the law itself has imposed the condition, in absence of or irrespective of the manifested intention of the parties, it can deal with its creation as it pleases,

29. *See* O.W. Grun Roofing & Constr. Co. v. Cope, 529 S.W.2d 258, 261 (Tex. Civ. App. 1975).

30. *Id.*

31. *See* Oppenheimer & Co. v. Oppenheim, Appel, Dixon & Co., 660 N.E.2d 415, 418 (N.Y. 1995) ("[T]he policy favoring freedom of contract requires that, within broad limits, the agreement of the parties should be honored even though forfeiture results." (citing RESTATEMENT (SECOND) OF CONTS. § 227 cmt. b (AM. L. INST. 1981))).

32. 13 RICHARD A. LORD, WILLISTON ON CONTRACTS § 38:13 (4th ed.), Westlaw (database updated May 2023).

33. 660 N.E.2d at 418.

34. *Id.*

35. *Id.* (quoting JOHN D. CALAMARI & JOSEPH M. PERILLO, CONTRACTS § 11-8 (3d ed. 1987)).

36. *Id.*

37. *Id.*

> shaping the boundaries of the constructive condition in such a way as to do justice and avoid hardship.[38]

The Eighth Circuit, in *Robinette v. Commissioner*, further distinguished cases involving express conditions from cases involving constructive conditions implied by the court.[39] As recognized by the *Robinette* court, "[w]here a condition is not a constructive term of the contract, but an express obligation upon which a party's performance depends, performance subject to that condition 'cannot become due unless the condition occurs or non-occurrence is excused.'"[40] Once the existence of an express condition is found, strict enforcement—not substantial performance—is the general standard, and this may have dire consequences for a litigant.[41]

III. TYPES OF EXPRESS CONDITIONS

An express condition often occurs as a condition precedent and is referenced as such. For example, as defined by the Supreme Court of Minnesota in *Capistrant v. Lifetouch National School Studios, Inc.*, "[a] condition precedent is a contract term that 'calls for the performance of some act or the happening of some event after the contract is entered into, and upon the performance or happening of which [the promisor's] obligation is made to depend.'"[42] Failure of such a condition does not necessarily constitute a breach of contract.[43] For example, a condition precedent occurs when a potential home buyer enters into a contract with a seller to purchase a home if a loan can be obtained within 30 days.[44] Only if the potential buyer is able to obtain a loan will the buyer have an obligation to purchase the home.[45] If the buyer attempts in good faith to get a loan but cannot do so within 30 days because, for example, of a bad credit rating, the buyer has no obligation to purchase the home, but also has not committed a breach of contract if they do not follow through with buying the home.[46]

38. *Id.* (quoting 5 WALTER H.E. JAEGER, WILLISTON ON CONTRACTS § 669 (3d ed. 1957)).

39. 439 F.3d 455, 462 (8th Cir. 2006).

40. *Id.* (quoting RESTATEMENT (SECOND) OF CONTS. § 225(1) (AM. L. INST. 1981)).

41. *See* Aniero Concrete Co. v. N.Y.C. Constr. Auth., No. 94 CIV. 9111, 1998 WL 148324, at *5 (S.D.N.Y. Mar. 30, 1998).

42. 916 N.W.2d 23, 27 (Minn. 2018) (quoting Lake Co. v. Molan, 131 N.W.2d 734, 740 (Minn. 1964)) (second alteration in original).

43. *See, e.g.*, Boulevard Builders, Inc. v. Snyder, 108 N.W.2d 914, 914–16 (Wis. 1961).

44. *See id.*

45. *See id.*

46. *See id.* at 916.

While less common, an express condition may also occur in the form of a condition subsequent. As explained by the court in the recent case of *Ainslie v. Fitzgerald*, "[a] condition subsequent . . . discharges a party from a preexisting duty to perform" while, similar to a condition precedent, the occurrence of a condition subsequent may or may not be a breach in and of itself.[47] There is no basis upon which to address whether the occurrence of the condition subsequent involved a material variation.[48] For example, in addressing a condition subsequent which provided that an easement to use a driveway terminated when the property in question ceased to be used for business or professional use, the court in *NPC Offices, LLC v. Kowaleski* stated that there was "no support for the proposition that [the] easement subject to a condition subsequent [could] be terminated only by a material breach," which the court termed an irrelevant issue.[49] Instead, the issue was the occurrence of the condition subsequent agreed upon by the parties.[50] Although finding the doctrine inapplicable to the situation presented, the court further addressed the doctrine of disproportionate forfeiture noting that through its application, under "appropriate circumstances, a contracting party . . . may be entitled to relief from the rigorous enforcement" of an express condition.[51]

There is disagreement as to whether there should be a distinction made between conditions precedent and conditions subsequent. Some courts, such as the court in the 2023 case of *Ainslie*, continue to recognize the distinction between conditions precedent and conditions subsequent.[52] The Restatement (Second) of Contracts does not reference the labels "conditions precedent" or "conditions subsequent" and simply defines a "condition" as "an event, not certain to occur, which must occur, unless its nonoccurrence is excused, before performance under a contract becomes due."[53] Removing the labels was a reasonable step in view of

47. *See* No. 9436-VCZ, 2023 WL 106924, at *10 (Del. Ch. Jan. 4, 2023), *rev'd on other grounds*, 312 A.3d 674 (Del. 2024).

48. *See* NPC Offs., LLC v. Kowaleski, 100 A.3d 42, 48 (Conn. App. Ct. 2014), *rev'd on other grounds*, 131 A.3d 1144 (Conn. 2016).

49. *Id.*

50. *Id.*

51. *Id.* at 49 (quoting Aetna Cas. & Sur. Co. v. Murphy, 538 A.2d 219, 221 (Conn. 1988), *overruled by* Arrowood Indem. Co. v. King, 39 A.3d 712 (Conn. 2012)). The Connecticut Supreme Court's reversal and remand for a new trial in *NPC Offices, LLC v. Kowaleski* was due, in large part, to issues involving whether the contract granting the easement was violated. 131 A.3d at 1153 n.1. The court specifically stated that it did not reach issues involving disproportionate forfeiture. *Id.*

52. 2023 WL 106924, at *10.

53. Park Props. Assocs. v. United States, 82 Fed. Cl. 162, 176 n.9 (2008) (quoting RESTATEMENT (SECOND) OF CONTS. § 224 (AM. L. INST. 1981)).

the difficulty in distinguishing between a condition precedent and a condition subsequent—a task which has been referenced as a "bog of logomachy."[54]

IV. DEFINING AN "EXPRESS CONDITION" AS OPPOSED TO A "PROMISE"

How does one determine if an express condition, or merely a promise, is involved? This is often an area of dispute. While a prudent contract drafter would do well to expressly state as such if the existence of an express condition is intended, words, such as "provided that," "on condition," "when," "so that," "while," "as soon as," and "after," are often used to designate the creation of an express condition.[55] Further, the court in *Suburban Transfer Service, Inc. v. Beech Holdings, Inc.*[56] ruled that a contract referencing repayment of a loan "*provided, however*," that the loan was in the form of a note containing a security agreement "clearly establishe[d] a condition precedent to the creation of a valid loan."[57] According to the court, the words "provided, however" have historically been read as establishing conditional clauses.[58]

Case law is clear, however, that ambiguous language does not favor an express condition.[59] As stated by the court in *Royal Bank of Canada v. Beneficial Finance Leasing Corp.*, "[i]t is a basic principle that a condition precedent will be found only where the contract unambiguously expresses the parties' intent to create such a condition."[60] Because of the general policy opposed to forfeitures, in doubtful and ambiguous situations, words are interpreted as creating a promise and constructive condition—not an express condition.[61] Focusing on the intent of the

54. Hoppe v. Great W. Bus. Servs., LLC, 536 F. Supp. 2d 888, 895 (N.D. Ill. 2008) (quoting NLRB v. Seven-Up Bottling Co., 344 U.S. 344, 348 (1953)).

55. Jones Assocs., Inc. v. Eastside Props. Inc., 704 P.2d 681, 684 (Wash. Ct. App. 1985) (quoting Vogt v. Hovander, 616 P.2d 660, 666 (Wash. Ct. App. 1979)).

56. 716 F.2d 220, 224 (3d Cir. 1983).

57. *Id.*

58. *Id.* at 224–25 (citations omitted).

59. *See* Royal Bank of Can. v. Beneficial Fin. Leasing Corp., No. 87 Civ. 1056, 1992 WL 167339, at *5 (S.D.N.Y June 30, 1992) (citing Manning v. Michaels, 540 N.Y.S.2d 583, 584 (App. Div. 1989)); Int'l Brotherhood of Teamsters v. NASA Servs., Inc., 957 F.3d 1038, 1043, (9th Cir. 2020) ("Conditions precedent must be expressed in plain, clear, and unambiguous language . . . .").

60. *Royal Bank of Can.*, No. 87 Civ. 1056, at *4; *accord* Acme Mkts., Inc. v. Fed. Armored Express, Inc., 648 A.2d 1218, 1221 (Pa. Super. Ct. 1994) (illustrating an act or event will not be construed as a condition unless that "clearly appears" to have been the intent).

61. Howard v. Fed. Crop Ins. Corp., 540 F.2d 695, 697 (4th Cir. 1976); Oppenheimer & Co. v. Oppenheim, Appel, Dixon & Co., 660 N.E.2d 415, 418 (N.Y. 1995); Jones Assocs., Inc. v. Eastside Props. Inc., 704 P.2d 681, 684 (Wash. Ct. App. 1985).

parties in addressing the distinction between a condition and a promise, the court in *Sahadi v. Continental Illinois National Bank & Trust Co.*,[62] stated that a full inquiry must be made into the "intention of the parties and the good sense of the case," with a concern being whether the party protected by the language at issue would be able to achieve its principal goal absent literal performance.[63] Although determining the intent of the parties is the primary goal, courts often go to some length to find a contractual promise, not an express condition.[64] As recognized by *Williston on Contracts*, it is not always easy to distinguish between a condition and a promise.[65] Plus, "the desire of courts to achieve substantial justice in the particular cases before them has sometimes introduced difficulty when, as a matter of language, none existed."[66]

Nevertheless, when it is clear and unmistakable that contracting parties meant to establish an express condition, a court is not free to disregard the intent of the parties.[67] In such a situation, contractual language establishing an express condition, should not be interpreted as language establishing a promise.[68] Recognizing this principle, New York's highest court in *Oppenheimer* found that the parties unambiguously provided for an express condition—as opposed to a promise—through using language such as "if" and "unless and until."[69] Accordingly, the court found no question as to the parties' intent and no role for interpreting the agreement other than as it was written.[70] Significantly, however, the court recognized the role of disproportionate forfeiture as a method by which a court may excuse the nonoccurrence of a condition under appropriate circumstances.[71]

62. 706 F.2d 193, 197 (7th Cir. 1983).

63. *Id.* at 198–99 (citing Foreman State Tr. and Sav. Bank v. Tauber, 180 N.E. 827, 831 (Ill. 1932)) (internal quotation marks omitted); Palmer v. Meriden Britannia Co., 59 N.E. 247, 252 (Ill. 1900).

64. *See Sahadi*, 706 F.2d at 198.

65. *See* LORD, *supra* note 32.

66. *Id.*

67. *See id.*

68. Oppenheimer & Co. v. Oppenheim, Appel, Dixon & Co., 660 N.E.2d 415, 418 (N.Y. 1995) (citing RESTATEMENT (SECOND) OF CONTS. § 229 cmt. a (AM. L. INST. 1981)).

69. *Id.* at 418.

70. *Id.*

71. *Id.* (citing RESTATEMENT (SECOND) OF CONTS. § 229 (AM. L. INST. 1981)). Although the court addressed the doctrine of disproportionate forfeiture, based on the situation presented and the plaintiff's position, the express condition in *Oppenheimer* was not excused on the basis of disproportionate forfeiture. *See id.* at 418–19.

V. THE ELEMENTS OF DISPROPORTIONATE FORFEITURE

The law of disproportionate forfeiture as a means through which a party may be able to obtain relief from the nonoccurrence of an express condition is not clear in all jurisdictions.[72] Recognizing uncertainty in regard to the application of the doctrine, Section 229 provides a launching point for its examination as follows:[73] "To the extent that the non-occurrence of a condition would cause disproportionate forfeiture, a court may excuse the non-occurrence of that condition unless its occurrence was a material part of the agreed exchange."[74] The Supreme Court of Minnesota in *Capistrant*, was of the view that "Section 229 consists of two prongs: (1) whether the occurrence of the condition was a material part of the agreed exchange and (2) a proportionality analysis that balances the risk to be protected with the amount to be forfeited."[75] Application of the second prong depends on whether the first prong is met; if the condition was a material part of the contract at issue, then the condition should be enforced with no need for a further proportionality examination.[76] As discussed below, other courts referencing Section 229 focus on issues of prejudice to the opposing party in addressing materiality and do not perform a specific proportionality analysis.[77] It is apparent

72. *See* LORD, *supra* note 32. While this Article focuses on the application of the disproportionate forfeiture doctrine to express conditions, there is some authority for applying the principle to constructive conditions. For example, the court in *Mount Sinai Hospital v. 1988 Alexander Karten Annuity Trust*, imposed a constructive condition precedent requiring that the landlord provide notice within a certain period regarding a tenant's obligation to pay additional rent. 970 N.Y.S.2d 533, 535 (App. Div. 2013). The court recognized the difference between express conditions and constructive conditions acknowledging that express conditions must generally be literally performed, while constructive conditions, arising from the language of a promise, are subject to a standard of substantial compliance. *Id*. at 539. Although a constructive condition was involved in the case, the court went on to examine the effect of the disproportionate forfeiture doctrine as to the landlord. *Id*. at 541–43; s*ee also In re* Wade, 392 B.R. 302, 307 (Bankr. E.D. Mich. 2008) (analyzing a disproportionate forfeiture argument without requiring the finding of an express condition).

73. *See supra* Part I.

74. RESTATEMENT (SECOND) OF CONTS. § 229 (AM. L. INST. 1981).

75. Capistrant v. Lifetouch Nat'l Sch. Studios, Inc., 916 N.W.2d 23, 29 (Minn. 2018) (citing RESTATEMENT (SECOND) OF CONTS. § 229 cmts. b–c (AM. L. INST. 1981); Varel v. Banc One Cap. Partners, Inc., 55 F.3d 1016, 1018 (5th Cir. 1995)).

76. *Capistrant*, 916 N.W.2d 23, 29 (citing RESTATEMENT (SECOND) OF CONTS. § 229 cmt. c (AM. L. INST. 1981)).

77. *See, e.g.*, Alcazar v. Hayes, 982 S.W.2d 845, 852 (Tenn. 1998); Aetna Cas. & Sur. Co. v. Murphy, 538 A.2d 219, 221 (Conn. 1988), *overruled by* Arrowood Indem. Co v. King, 39 A.3d 712 (Conn. 2012); *see infra* Part IV.A.6.

courts use differing standards in addressing the issue of materiality which presents a problematic issue in determining the reach and applicability of the doctrine.

A. *The Materiality Issue*

1. *Not All Express Conditions Are Material*

The doctrine of disproportionate forfeiture is premised on the concept that not all express conditions are material with nonoccurrence resulting in prejudice.[78] Otherwise, there would be no place for the doctrine. The court in *Capistrant*, referenced above, recognized this fact in its discussion of whether a former employee's delay in returning property owned by the employer excused the employer's duty to pay earned commissions.[79] The *Capistrant* court recognized what it termed the "general rule," that a condition precedent "must be literally met or exactly fulfilled, or no liability can arise on the promise qualified by the condition."[80] Acknowledging the uncertainty surrounding the principle of disproportionate forfeiture and its application, the court noted that issues involving the materiality of an express condition precedent had not been decided in the jurisdiction.[81] Not surprisingly, and apparently capitalizing on that uncertainty, the employer claimed that conditions precedent are always material.[82] Citing Section 229, however, the court disagreed and recognized that, under some situations, the nonoccurrence of a condition may be excused.[83] The court recognized the importance of the materiality prong of Section 229, pointing out that if the occurrence of the condition is indeed a material part of the agreement, then no proportionality analysis is applied.[84] At this point, "forfeiture cannot be prevented."[85] If, however, a condition precedent is not material, review under Section 229 would proceed to a proportionality analysis.[86]

A primary argument in *Capistrant* involved a contractual provision that risk of harm to the employer began "immediately upon an employee's departure" when confidential information is not returned.[87] The employer claimed the immediacy

78. *See Capistrant*, 916 N.W.2d at 28.
79. *Id.* at 24; *see supra* Part IV.
80. *Capistrant*, 916 N.W.2d at 27–28 (quoting LORD, *supra* note 32, § 38.6).
81. *Id.* at 28.
82. *Id.*
83. *Id.* at 29.
84. *Id.*
85. *Id.*
86. *Id.*
87. *Id.*

requirement was material, while the employee claimed his retention of the employer's property for a few months was a minor delay that should be excused as immaterial.[88] Although recognizing that, at times, cases involving conditions precedent may be resolved as a matter of law, the court found unresolved issues under the facts presented and remanded the case for further consideration on the materiality question.[89] At that point, according to the court, should it be determined the immediate return of the property under the contract was not material, the proportionality prong of Section 229 should be addressed.[90]

2. *A Focus on the Core Purpose of the Condition*

In addressing the issue of materiality, some courts focus on the core purpose of the condition at issue in relation to the contract as a whole.[91] For example, the court in the recent case of *Athena 2004, LLC*, stated that a determination of whether a "condition was a material part of [an] agreed exchange focuses on the root or essence of the contract."[92] The lease contract at issue in the case provided that the lessor had to substantially complete work by a certain date; otherwise, the other party had the right to terminate the agreement.[93] The court determined that the provision specifically allowing termination of the lease if the work was not completed by the set deadline indicated the deadline was indeed material.[94] Another factor influencing the court's decision that the materiality standard was met was the fact the parties included a liquidated-damages clause requiring the lessor to pay liquidated damages should the deadline not be met but eliminating any entitlement to liquidated damages if the deadline was met.[95]

88. *Id*.

89. *Id*. at 31.

90. *Id*. The *Capistrant* court also noted that it need not decide whether to adopt Section 229 for all purposes, although recognizing that many other jurisdictions had applied the Section. *Id*. at 28 n.3 (citing Varel v. Banc One Cap. Partners, Inc., 55 F.3d 1016, 1018 (5th Cir. 1995)); *see, e.g*., *In re* Wade, 392 B.R. 302, 307 (Bankr. E.D. Mich. 2008); Prince George's Cnty. v. Local Gov't Ins. Tr., 879 A.2d 81, 96 (Md. 2005); Oppenheimer & Co. v. Oppenheim, Appel, Dixon & Co., 660 N.E.2d 415, 418 (N.Y. 1995); Acme Mkts., Inc. v. Fed. Armored Express, Inc., 648 A.2d 1218, 1221–22 (Pa. Super. Ct. 1994); Kilcullen v. Calbom & Schwab, P.S.C., 312 P.3d 60, 64 (Wash. Ct. App. 2013).

91. *See* Athena 2004, LLC v. LC Rochester, Inc., A20-0333, 2021 WL 318045, at *6 (Minn. Ct. App. Feb. 1, 2021) (nonprecedential opinion).

92. *Id*. (citing BOB Acres, LLC v. Schumacher Farms, LLC, 797 N.W.2d 723, 728 (Minn. Ct. App. 2011)).

93. *Id*.

94. *Id*. (citing *BOB Acres, LLC*, 797 N.W.2d at 728–29).

95. *Id*.

Similarly, in addressing the doctrine of disproportionate forfeiture, the Seventh Circuit in *Evergreen Square of Cudahy v. Wisconsin Housing & Economic Development Authority* focused on whether a challenged condition may be seen as merely a technical term.[96] The contractual condition at issue in the case involved a federal rental assistance program (commonly referred to as "Section 8") which requires property owners to follow instructions and file a request for an annual rent increase before they are allowed to increase rents and receive adjusted subsidies.[97] The owners claimed that the provision should not be enforced because enforcement would result in a disproportionate forfeiture.[98] However, in ruling that the provision was indeed a material one, the court recognized precedent from previous years enforcing the provision.[99] The court further stated that a request for a rent increase "set into motion a time and labor intensive process, and so this was not a mere technical term."[100] On the other hand, finding that an express condition is indeed in the nature of a technicality may justify its disregard. For example, in applying the doctrine of disproportionate forfeiture to excuse the failure of an express condition contained within a loan agreement, the court in *Varel v. Banc One Capital Partners, Inc.* stated the party's default was "at best a technical default" that was "legally excusable."[101]

3. *A Focus on Express Conditions Utilizing Factors Addressing Whether a Breach of a Promise Is Material*

Rather than using a broad focus addressing whether a condition was part of the root or essence of the contract or a technicality, the court in *Miles v. CEC Homes, Inc.* set forth specific criteria deemed appropriate in determining whether the failure of a condition is material under Section 229.[102] The contract at issue in *Miles*, involved construction work and provided that a party desiring to enter into contracts involving supplies, labor, or equipment needs to inform the other party so that the other party has a chance to withhold permission.[103] Although the plaintiff failed to provide advance notification of the cost of the proposed construction work, payment was sought from the defendant for a share of

96. 848 F.3d 822, 830–31 (7th Cir. 2017).

97. *Id.* at 827.

98. *Id.* at 830.

99. *Id.*

100. *Id.* at 831.

101. 55 F.3d 1016, 1018 (5th Cir. 1995).

102. 753 P.2d 1021, 1026 (Wyo. 1988); RESTATEMENT (SECOND) OF CONTS. § 229 (AM. L. INST. 1981).

103. *Miles*, 753 P.2d at 1025.

expenses.[104] In addressing the dispute, the court recognized that a condition precedent must occur before a duty of performance on an opposing party arises.[105] The court further noted that a "single contractual provision may operate as both a condition and a promise."[106] In that type of situation, nonperformance would have a double operation.[107] It would prevent any immediate duty on the part of the opposing party, and it would also constitute a breach entitling the opposing party to damages.[108]

The *Miles* court referenced the doctrine of disproportionate forfeiture, as expressed in Section 229, as an exception to the general rule that "a non-occurrence of [an express] condition precedent excuses a party's duty of performance."[109] In determining whether a condition precedent was a "material part of the agreed exchange" under Section 229,[110] the court cited and quoted Section 241 of the Restatement (Section 241) titled "Circumstances Significant in Determining Whether a Failure Is Material" which states:

> In determining whether a failure to render performance is material, the following circumstances are significant:
>
> (a) the extent to which the injured party will be deprived of the benefit which he reasonably expected;
> (b) the extent to which the injured party can be adequately compensated for the part of that benefit of which he will be deprived;
> (c) the extent to which the party failing to perform or to offer to perform will suffer forfeiture;
> (d) the likelihood that the party failing to perform or to offer to perform will cure his failure, taking account of all the circumstances including any reasonable assurances;
> (e) the extent to which the behavior of the party failing to perform or to offer to perform comports with standards of good faith and fair dealing.[111]

104. *Id.* at 1026.

105. *Id.* at 1025.

106. *Id.*

107. *Id.*

108. *Id.*

109. *Id.* at 1026.

110. *Id.* (emphasis omitted) (quoting RESTATEMENT (SECOND) OF CONTS. § 229 (AM. L. INST. 1981)).

111. RESTATEMENT (SECOND) OF CONTS. § 241 (AM. L. INST. 1981).

Applying the above considerations, the court concluded "that occurrence of the condition [would] be excused."[112] The court's reasoning was based on the fact that, although damages could provide adequate compensation for any failure of notice, no such claim for damages had been made, which indicated the condition did not result in any appreciable loss.[113] Further, no contention was made that the cost of labor or materials was unreasonable.[114] The opposing party simply attempted to rely on the nonoccurrence of the condition.[115] Therefore, the court ruled that liability could not be escaped because of the failure of a nonmaterial condition.[116]

The *Miles* court's reliance on Section 241 is interesting because Section 241 specifically goes to whether an actual breach is material, which is typically an issue when a breach of a promise—not the failure of a condition—is involved.[117] The section does not generally address whether a condition is a material part of an exchange.[118] Section 241 would be relevant, however, in determining whether a material breach of a promise excuses an opposing party's duties.[119]

4. *A Focus on the Role of the Restatement (First) of Contracts and Bad Faith*

The Reporter's Note to Section 229 states the section is based on Section 302 of the Restatement (First) of Contracts (Section 302).[120] The Reporter's Note also cites *Burger King Corp. v. Family Dining, Inc.* for "an excellent discussion" of the principle on which Section 229 is based.[121] *Burger King Corp.* construed Section 302 of the Restatement (First) of Contracts as follows: "A condition may be excused without other reason if its requirement (a) will involve extreme forfeiture or penalty, and (b) its existence or occurrence forms no essential part of the exchange for the promisor's performance."[122] The Reporter's Note for the Restatement (Second) provides no background as to why the wording from the

112. *Miles*, 753 P.2d at 1026.

113. *Id.*

114. *Id.*

115. *See id.* at 1027.

116. *Id.*

117. *See id.* at 1025–26.

118. *See* RESTATEMENT (SECOND) OF CONTS. § 241 (AM. L. INST. 1981).

119. *See id.* § 237.

120. *Id.* § 229 rep.'s note.

121. *Id.* rep.'s note, cmt. *a* (citing Burger King Corp. v. Fam. Dining, Inc., 426 F. Supp. 485 (E.D. Pa. 1977), *aff'd* 566 F.2d 1168 (3d Cir. 1977)).

122. *Burger King Corp.*, 426 F. Supp. at 493 (quoting RESTATEMENT (FIRST) OF CONTS. § 302 (AM. L. INST. 1932)).

Restatement (First) to the Restatement (Second) was changed from "essential" to "material."[123] It would seem that meeting a requirement of "material" is less demanding than meeting an "essential" requirement, but the Restatement is unclear in that respect.[124]

Based on the specific reference to *Burger King Corp.* in the Reporter's Note, which involved a condition subsequent, *Burger King Corp.* is instructive as to situations in which a court, applying Section 229, may find the doctrine of disproportionate forfeiture applicable.[125] The case involved a franchise agreement under which Burger King Corporation (Burger King) agreed that the defending franchisee would have exclusive territory in certain areas, provided it opened a restaurant each year for a period of ten years.[126] The franchisee was behind schedule in getting the restaurants open, and the corporation sought to revoke the franchise agreement.[127] The court recognized that, during the early years of the contract, the head of Burger King was more concerned with general development of the territory as opposed to the franchisee's strict compliance in regard to the number of restaurants opened.[128] Understandably, the court found it suspicious that Burger King's attitude changed when it realized the areas involved could support more than the ten restaurants covered by the original contract with the franchisee.[129] The point being Burger King wanted out of the franchise contract, as well as its provision that the defendants had the exclusive right to open Burger King restaurants in the areas involved, so long as only ten restaurants were opened.[130] While the court did not specifically say its decision hinged on an issue of bad faith, the court was concerned that Burger King failed to act in a reasonable and forthright manner.[131] Burger King's seeming lack of concern with the exact rate of development over a long period of time supported the court's conclusion that the timetable was not an essential part of the parties' contract.[132] Relying on

123. *See* RESTATEMENT (SECOND) OF CONTS. § 229 rep.'s note (AM. L. INST. 1981); RESTATEMENT (FIRST) OF CONTS. § 302 (AM. L. INST. 1932).

124. *See* RESTATEMENT (SECOND) OF CONTS. § 229 rep.'s note (AM. L. INST. 1981); RESTATEMENT (FIRST) OF CONTS. § 302 (AM. L. INST. 1932).

125. *See Burger King Corp.*, 426 F. Supp. at 493–95.

126. *Id.* at 488.

127. *Id.* at 491.

128. *Id.* at 493.

129. *Id.* at 494.

130. *See id.* at 494–95.

131. *See id.* at 493.

132. *Id.* at 493–94. Section 302 of the Restatement (First) of Contracts retains relevance in the analysis of disproportionate forfeiture. For example, although Section 229 is part of the

Section 302, the court refused to terminate the exclusivity agreement, noting that extinguishing the franchisee's right of exclusivity would constitute an "extreme forfeiture."[133] The case supports the position that in determining materiality under Section 229, a court should consider prior history between the parties, as well as indications of bad faith.[134]

5. *A Focus on the Sophistication of a Party*

The sophistication of the parties may also influence a court. For example, after recognizing that the condition at issue was a material part of the contract, the court in *Milford Power Co. v. Alstrom Power, Inc.*, emphasized the sophisticated nature of the parties as follows:

> The parties in this case entered into sophisticated and carefully crafted commercial contracts from positions of relative equality, without the improper influence of fraud or duress. Even if the result of the fair and logical enforcement of those unambiguous agreements seems unduly to burden one of the parties, we decline to embark a voyage into uncharted waters in which untrammeled and unrestrained judicial revisionism would depart significantly from an aspect of contract law upon which contracting parties reasonably can be assumed to have relied for many years.[135]

The court further emphasized the discretion vested in the court, quoting comment b of Section 229, which provides that the rule of disproportionate forfeiture "is, of necessity, a flexible one, and its application is within the sound discretion of the court."[136]

6. *A Focus on Prejudice to the Party Asserting Reliance on the Disproportionate*

Restatement (Second) of Contracts, effective as of 1981, the case of *Varel v. Banc One Capital Partners, Inc.*, relied on both Section 229 of the Restatement (Second) of Contracts (Am. L. Inst. 1981) and Section 302 of the Restatement (First) of Contracts (Am. L. Inst. 1932) in ruling that a condition should be excused based on the doctrine of disproportionate forfeiture. Varel v. Banc One Cap. Partners, Inc., 55 F.3d 1016, 1018 (5th Cir. 1995). Additionally, as discussed in the text above, the Restatement (Second) of Contracts explicitly refers with approval to Section 302 of the Restatement (First) of Contracts. RESTATEMENT (SECOND) OF CONTS. § 229 rep.'s note (AM. L. INST. 1981); RESTATEMENT (FIRST) OF CONTS. § 302 (AM. L. INST. 1932).

133. *Burger King Corp.*, 426 F. Supp. at 495.

134. *See id.* at 494–95.

135. Milford Power Co. v. Alstrom Power, Inc., No. X04CV000121672S, 2001 WL 822488, at *4 (Conn. Super. Ct. 2001) (quoting Tallmadge Bros., Inc. v. Iroquois Gas Transmission Sys., L.P., 746 A.2d 1277, 1292 (Conn. 2000)) (unpublished opinion).

136. *Id.* at *3 (quoting RESTATEMENT (SECOND) OF CONTS. § 229 cmt. b (AM. L. INST. 1981)).

Forfeiture Doctrine

As exemplified by the Supreme Court of Connecticut in *Aetna Casualty and Surety Co. v. Murphy*, other cases focus on prejudice in determining whether an express condition is considered material in relation to a disproportionate forfeiture analysis, without proceeding to a specific proportionality analysis.[137] The court in *Murphy* addressed whether, on the basis that the insurer was not prejudiced, an insured who provided late notice of a claim could recover on a policy of insurance.[138] In *Murphy*, the insured admitted his noncompliance with policy provisions requiring the insured notify the insurer, as soon as practicable, of an occurrence under the policy and immediately forward any demand or suit filed.[139] Existing precedent in the jurisdiction established that, absent waiver, an unexcused and unreasonable delay in notification to an insurer constituted the failure of a condition—entirely discharging an insurer from liability.[140]

The *Murphy* court noted, however, that the long line of cases strictly enforcing such conditions failed to reflect a sufficient analysis of the role that lack of prejudice to the insurer should play.[141] The court recognized that the need to avoid disproportionate forfeitures has tempered the application of the traditional principle of strict compliance.[142] The court traced the history of the more forgiving approach back to the 1921 case of *Jacob & Youngs, Inc. v. Kent*,[143] a case in which Judge Benjamin Cardozo stated, "[t]here will be no assumption of a [contractual] purpose to visit venial faults with oppressive retribution."[144] On the issue of prejudice, the *Murphy* court concluded as follows: "If it can be shown that the insurer suffered no material prejudice from the delay, the nonoccurrence of the condition of timely notice may be excused because it is not, in Restatement terms, 'a material part of the agreed exchange.'"[145] Notably, the court weighed the

137. 538 A.2d 219, 223 (Conn. 1988), *overruled by* Arrowood Indem. Co v. King, 39 A.3d 712 (Conn. 2012). The court in *Arrowood Indemnity Co. v. King* overruled *Murphy* by shifting the burden onto the insurer to show they were prejudiced by the insured's failure to provide timely notice. *King*, 39 A.3d at 725–26.

138. *Murphy*, 538 A.2d at 219.

139. *Id.* at 220.

140. *Id.*

141. *Id.* at 220–21.

142. *Id.* at 221.

143. 129 N.E. 889 (N.Y. 1921).

144. *Murphy*, 538 A.2d at 222 (quoting *Jacobs & Youngs, Inc.*, 129 N.E. at 891) (alterations in original).

145. *Id.* at 223 (quoting RESTATEMENT (SECOND) OF CONTS. § 229 (AM. L. INST. 1981)).

ultimate effect of a contractual provision, as opposed to the intent of the parties, when entering into a contract.[146]

Murphy is not an isolated case in respect to its reasoning.[147] For example, a similar analysis was used by the Tennessee Supreme Court in *Alcazar v. Hayes*.[148] *Alcazar* involved a situation in which an insured party, seeking uninsured motorist benefits, failed to provide notice of an accident within the time limitations required by the contract of insurance at issue.[149] The court pointed out that insurance contracts should be construed in the same manner as other contracts and the jurisdiction "recognize[d] the validity of conditions precedent for insurance coverage."[150] Indeed, the court recognized that, in previous years, the jurisdiction had followed the traditional common law approach that notice was a condition precedent to recovery under a policy of insurance, regardless of whether the insurer was prejudiced.[151] The court discussed public policy concerns and quoted, in full, Section 229.[152] In regard to the materiality issue, the court stated, "the notice requirement is immaterial to the insurance contract in the event that the insurer is not prejudiced."[153]

The focus on harm or prejudice seems contrary to comment c to Section 229 providing as follows:

> *c. Limitation on scope*. The rule of this Section applies only where occurrence of the condition was not a material part of the agreed exchange. . . . It is not enough that the actual non-occurrence happened to involve a departure that was not a material part of the agreed exchange, if the occurrence of the condition was a material part of that exchange.[154]

This comment is contrary to cases which purport to rely on Section 229 but still rests decisions on the lack of prejudice or material harm.[155] Comment c indicates that if the condition was a material part of the initial agreement, then it

146. *Id*.

147. *See id*. at 220–21.

148. 982 S.W.2d 845 (Tenn. 1998).

149. *Id*. at 847.

150. *Id*. at 848 (citing McKimm v. Bell, 790 S.W.2d 526, 528 (Tenn. 1990)).

151. *Id*. at 849 (citation omitted).

152. *Id*. at 853.

153. *Id*.

154. RESTATEMENT (SECOND) OF CONTS. § 229 cmt. c (AM. L. INST. 1981).

155. *See, e.g*., Aetna Cas. & Sur. Co. v. Murphy, 538 A.2d 219, 221–22 (Conn. 1988), *overruled by* Arrowood Indem. Co v. King, 39 A.3d 712 (Conn. 2012); *Alcazar*, 982 S.W.2d at 853.

makes no difference if the breach of the condition involved a departure that was not actually material.[156] So long as the departure was not "trifling," the condition should be given effect with the focus being on the initial agreed upon exchange.[157] Cases such as *Murphy* and *Alcazar*, however, focus on resulting harm, not the importance and significance of a condition in the initial agreement.[158] While it is difficult to reconcile these cases with cases that focus on the importance of a term in the initial agreement, the cases raise an interesting point as to the analysis that should be performed going forward in relation to the doctrine of disproportionate forfeiture.[159]

7. *The Lack of Concrete Guidance*

The cases discussed above illustrate that courts have yet to agree on a settled set of guidelines to be used in determining whether a contractual condition is material.[160] Indeed, due to the myriads of factual situations and controversies that may occur, there may be no set formula that can be applied to definitely determine whether a contractual provision will be deemed material by a court. Accordingly, as discussed further below, the better view is likely to consider the issue of prejudice to the nonbreaching party and, as far as possible, address similar cases as a group, as has been done in the insurance arena.[161]

B. *Determining the Existence of a Forfeiture*

Even when a party establishes to the court's satisfaction that an express condition fails to meet the definition of "material," to proceed under the doctrine of disproportionate forfeiture failure of the condition must have resulted in an actual forfeiture.[162] This principle is illustrated in *Robinette*, in which the court found that the plaintiff, in order to settle a tax debt, entered into a compromise agreement with the IRS containing an express condition precedent.[163] When the agency determined that the plaintiff failed to satisfy conditions of the settlement

156. RESTATEMENT (SECOND) OF CONTS. § 229 cmt. c (AM. L. INST. 1981).

157. *Id*.

158. *See Murphy*, 538 A.2d at 223; *Alcazar*, 982 S.W.2d at 852–53.

159. *See Murphy*, 538 A.2d at 220–23; *Alcazar*, 982 S.W.2d at 853.

160. *See supra* Parts V.A.1–6.

161. *See infra* Part IX.

162. *See, e.g.*, Robinette v. Comm'r, 439 F.3d 455, 463 (8th Cir. 2006); Evergreen Square of Cudahy v. Wis. Hous. & Econ. Dev. Auth., 848 F.3d 822, 831 (7th Cir. 2017); Hoosier Energy Rural Elec. Coop. v. Amoco Tax Leasing IV Corp., 34 F.3d 1310, 1320 (7th Cir. 1994); enXco Dev. Corp. v. N. States Power Co., 758 F.3d 940, 947 (8th Cir. 2014).

163. 439 F.3d at 455, 462.

agreement through the failure to timely file a tax return, his original tax debt was reinstated.[164] The court recognized that even "express conditions may be excused if [the condition is] immaterial to the [contract] and if enforcement of the condition would cause a 'disproportionate forfeiture.'"[165] The plaintiff's problem, however, according to the court, was that his default of the settlement resulting in the reinstatement of his debt did not result in a forfeiture.[166] Instead, it resulted "in nothing more than the reinstatement of a liability that [the plaintiff] admitted he owe[d] with credit for the amounts already paid."[167]

Focusing on a perceived lack of reasonable reliance, the court in *Evergreen Square of Cudahy*, likewise identified the lack of forfeiture as a basis for refusing to apply the doctrine of disproportionate forfeiture.[168] The plaintiff in this case sought relief from a requirement that property owners participating in a federal rental assistance program had to submit an official annual request for adjustment in order to receive a rent increase.[169] The plaintiff claimed that requiring submission of an official request and refusing an automatic increase resulted in the plaintiff losing a significant amount of revenue.[170] Responding to the plaintiff's contention that requiring the submission resulted in a disproportionate forfeiture, the court concentrated on the issue of reasonable reliance.[171] Quoting comment *b* to Section 229, the court stated that "forfeiture" is "used to refer to the denial of compensation that results when the obligee loses his right to the agreed exchange after he has relied substantially, as by preparation or performance on the expectation of that exchange."[172] The court ruled that the party which sought release from the condition involving the rent increase was well aware of the condition at issue, and any reliance on an unsatisfied condition would have been unreasonable.[173] Indeed, the court refused to find any forfeiture at all, let alone a disproportionate one.[174]

Stating that "[i]t is well settled that courts are to enforce, not rewrite, contracts," the court in *Hoosier Energy Rural Electric Cooperative, Inc. v. Amoco*

164. *Id.* at 463.
165. *Id.* (citing RESTATEMENT (SECOND) OF CONTS. § 229 (AM. L. INST. 1981)).
166. *Id.*
167. *Id.* (citing United States v. Lane, 303 F.2d 1, 4 (5th Cir. 1962)).
168. 848 F.3d 822, 831 (7th Cir. 2017).
169. *Id.* at 827. See *supra* Part A.2 for the background of the case.
170. *Id.* at 830.
171. *Id.* at 831.
172. *Id.* (quoting RESTATEMENT (SECOND) OF CONTS. § 229 cmt. b (AM. L. INST. 1981)).
173. *Id.*
174. *Id.*

Tax Leasing IV Corp., further illustrated the deference given to an express condition precedent in the absence of specific action taken by a party establishing reliance.[175] In that case, Hoosier sold electrical generating and transmission property to Amoco Tax and then leased back that property.[176] This was done to enable Amoco Tax's parent company, Amoco Corporation, to claim depreciation deductions on its tax return based on transferred property.[177] When the sale was made, "it was unclear how much depreciation Amoco Corporation would be able to claim" under regulations of the IRS.[178] Because of that uncertainty, the agreement between the parties provided that, if favorable IRS regulations were issued prior to a set date, additional funds would be paid to Hoosier.[179] Favorable regulations were indeed issued by the IRS regarding depreciation, but the regulations were issued a few months after the date set in the contract of sale.[180] At that point, Hoosier sought additional compensation estimated at between $25 million and $28 million.[181] The Seventh Circuit ruled, however, that "payment of additional compensation [was] clearly conditional" as the additional compensation would only be paid "if the IRS published certain regulations prior to" a specific date.[182] Pointing out a "basic tenet of contract law that '[b]efore liability can arise on a promise qualified by conditions expressed or implied in fact, such conditions must be fulfilled,'" the court refused to require Amoco Tax pay additional amounts.[183] As to the doctrine of disproportionate forfeiture, as expressed in Section 229, the court stated that some performance by the party seeking to avoid the forfeiture is required.[184] In support of its conclusion, the court quoted comment *b* to Section 229, which provides that "'forfeiture' is used to refer to the denial of compensation that results when the obligee loses his right to the agreed exchange after he has relied substantially, as by preparation or performance on the

175. Hoosier Energy Rural Elec. Coop. v. Amoco Tax Leasing IV Corp., 34 F.3d 1310, 1321 (7th Cir. 1994) (quoting N. Fork Bank & Tr. Co. v. Romet Corp., 596 N.Y.S.2d 449, 449–50 (App. Div. 1993)).

176. *Id*. at 1313.

177. *Id*.

178. *Id*.

179. *Id*. at 1313–14.

180. *Id*. at 1314.

181. *Id*.

182. *Id*. at 1317 (emphasis omitted).

183. *Id*. (alteration in original) (quoting Morse v. Ted Cadillac, Inc., 537 N.Y.S.2d 239, 240 (App. Div. 1989)).

184. *Id*. at 1320.

expectation of that exchange."[185] Noting that Hoosier did not prepare to perform or actually perform and instead merely waited to see what the IRS would do, the court stated that "even if Section 229 governs our resolution of this case, it would weaken rather than strengthen Hoosier['s] . . . position."[186] The court phrased Hoosier's inability to claim additional compensation as "not a forfeiture but rather . . . 'the loss of an anticipated bargain.'"[187] As stated by the court, "[t]he law permits a man to make a contract which will result in a forfeiture; and when it is clear from the terms of the contract that the parties have so agreed, the forfeiture will be enforced."[188]

Similarly, pointing out that the plaintiff had not parted with anything in addressing the doctrine of disproportionate forfeiture, the Eighth Circuit in *enXco Development Corp. v. Northern States Power Co.*, refused to find a forfeiture.[189] Initially, the parties planned for enXco to obtain requisite permits and perform all engineering and construction needed for a contract entered into by the parties involving a wind-energy project.[190] The contract had a condition precedent obligating enXco to obtain a Certificate of Site Compatibility (Certificate) by a certain date.[191] There were concerns, however, regarding environmental implications of the project, which required a public hearing, ultimately delaying enXco's application for the Certificate.[192] The result of the delays was that enXco did not obtain the Certificate by the requisite date and the defendant, Northern States, terminated the contracts resulting in enXco sustaining several million dollars in losses and enXco filing suit against Northern States for breach of contract.[193] The court refused to allow enXco to use the doctrine of disproportionate forfeiture to avoid the condition pertaining to the date requirement.[194] Assuming, without deciding, that the doctrine could be used as a sword in litigation, the court denied relief to enXco on the principle that "no

185. RESTATEMENT (SECOND) OF CONTS. § 229 cmt. b (AM. L. INST. 1981). The *Hoosier* court noted it is unclear if the state of New York follows Section 229 entirely. *Hoosier*, 34 F.3d at 1320.

186. *Hoosier*, 34 F.3d at 1320.

187. *Id.* (quoting Rawcliffe v. Aguayo, 438 N.Y.S.2d 697, 698 (Sup. Ct. 1981)).

188. *Id.* (alteration in original) (quoting Winston Pers. Agency, Inc. v. Abcon Indus. Inc., 438 N.Y.S.2d 669, 670 (Civ. Ct. 1980)).

189. 758 F.3d 940, 947 (8th Cir. 2014).

190. *Id.* at 942.

191. *Id.*

192. *Id.* at 943.

193. *Id.* at 942–43.

194. *Id.* at 947.

forfeiture occurs where the breaching party maintained ownership of the assets comprising the contract."[195] According to the court, enXco parted with nothing because "[i]t still maintained possession and ownership of the [p]roject assets and real estate" and Northern States did not receive "something for little or nothing."[196]

C. *The Proportionality Analysis*

Assuming that a party succeeds in the argument that an express condition is not a material part of the exchange, and that a forfeiture did indeed occur under Section 229, some courts reference a specific proportionality or weighing analysis balancing the risk protected and the amount forfeited.[197] The Supreme Court of Minnesota in *Capistrant*, specified the necessity of applying two separate prongs in a Section 229 analysis: "(1) whether the occurrence of the condition was a material part of the agreed exchange and (2) a proportionality analysis that balances the risk to be protected with the amount to be forfeited."[198] As discussed above, some courts, however, specifically in the insurance context, focus on the issue of prejudice to an opposing party in connection with a materiality analysis without purporting to do a specific "proportionality" analysis as a final step.[199] The analysis of materiality encompassing a consideration of prejudice in these cases is, however, arguably a form of a proportionality analysis because the focus is on the exposure of harm to one party and the lack of harm to the other.[200]

Suggested steps in conducting a proportionality or weighing analysis under Section 229 was addressed in *Acme Markets, Inc. v. Federal Armored Express, Inc.*[201] as follows:

> In determining whether the forfeiture is "disproportionate," [the] court must weigh the extent of the forfeiture by the obligee against the importance to the obligor of the risk from which he sought to be protected and the degree to which that protection

195. *Id.* (citing Klipsch, Inc. v. WWR Tech., Inc., 127 F.3d 729, 737 (8th Cir. 1997)).

196. *Id.*

197. *See* Capistrant v. Lifetouch Nat'l Sch. Studios, Inc., 916 N.W.2d 23, 31 (Minn. 2018).

198. *Id.* at 29 (citing RESTATEMENT (SECOND) OF CONTS. § 229 cmts. b–c).

199. *See* Alcazar v. Hayes, 982 S.W.2d 845, 853 (Tenn. 1998); Aetna Cas. & Sur. Co. v. Murphy, 538 A.2d 219, 223 (Conn. 1988), *overruled by* Arrowood Indem. Co v. King, 39 A.3d 712 (Conn. 2012); *see also supra* Part V.A.6.

200. *See Alcazar*, 982 S.W.2d at 851–53.

201. 648 A.2d 1218 (Pa. Super. Ct. 1994).

> will be lost if the nonoccurrence of the condition is excused to the extent required to prevent forfeiture.[202]

The court further noted the general principle followed in the jurisdiction: "Pennsylvania law 'abhors forfeitures and penalties and enforces them with the greatest reluctance when a proper case is presented.'"[203]

The District of Columbia case of *Nortel Networks, Inc. v. Gold & Appel Transfer, S.A.*, further illustrates the use of a weighing analysis in determining whether a forfeiture is considered disproportionate.[204] The plaintiff in the case claimed that the defendant failed to abide by letter agreements requiring the defendant to make loans.[205] The defendant, on the other hand, contended they were released from any obligation due to the nonoccurrence of the condition precedent requiring a prior written request of at least 15 days before funds are advanced.[206] The court recognized the importance of a weighing analysis and affirmed the importance of considering the interests of all parties.[207] In performing the weighing analysis, the court found the prior written request provision did not seem to be particularly important in view of the fact the lender received oral notice and had not required written notice for earlier loans.[208] Further, a large loss was at stake for the borrower—$20 million.[209] Accordingly, the court determined that "[w]eighed against the $20 million loss at stake," and considering the intent of the parties, "insisting upon the written request provision would result in a disproportionate forfeiture" to the plaintiff.[210]

VI. CONSIDER THE EXISTENCE OF A TECHNICAL OR TRIFLING DEPARTURE

Even if a court rules, for example, that a contractual condition is material because it goes to the root of the contract itself, there may be room for the principle of disproportionate forfeiture for a mere technical or trifling departure from

202. *Id.* at 1221–22 (quoting RESTATEMENT (SECOND) OF CONTS. § 229 cmt. b (AM. L. INST. 1981)).

203. *Id.* at 1221 (quoting Fogel Refrigerator Co. v. Oteri, 137 A.2d 225, 231 (Pa. 1958)).

204. 298 F. Supp. 2d 81, 86–87 (D.D.C. 2004).

205. *Id.* at 82.

206. *Id.* at 86.

207. *See id.* at 86–87 (quoting RESTATEMENT (SECOND) OF CONTS. § 84 cmt. b (AM. L. INST. 1981)).

208. *Id.* at 87.

209. *Id.*

210. *Id.*

requirements of the condition.[211] Of course, excusing the nonoccurrence of an express condition for some sort of insignificant departure is another way of performing the weighing analysis discussed above, in that a court is determining that a deviation from the express terms of the contract has little effect on the opposing party.[212]

The disregard of trifling departures is illustrated by the recent Third Circuit case of *East Brunswick European Wax Center, LLC v. NLRB*, where the court confronted a situation in which a party failed to comply exactly with a settlement agreement reached with the National Labor Relations Board (NLRB).[213] Quoting comment *a* to Section 229, the court recognized the principle of disproportionate forfeiture stating, "a court may, in appropriate circumstances, excuse the non-occurrence of a condition solely on the basis of the forfeiture that would otherwise result."[214] Further, quoting the *Restatement* comment above, the court recognized that "[a] court may, of course, ignore trifling departures."[215] The primary issue in the case was whether the employer failed to comply with the settlement agreement entered into with the NLRB by emailing certain notices to employees, as opposed to texting the notices as provided for in the settlement agreement.[216] The court determined that occurrence of the condition—providing notice by text—was not a material part of the agreement, and a disproportionate forfeiture would occur if the condition was to be strictly enforced.[217] The court termed the employer's action in emailing employees, as opposed to texting them, a "hyper-technical and relatively insignificant violation" of the agreement.[218]

The court in *Royal Bank of Canada*, further recognized the insignificance and effect of a trifling departure from an express condition.[219] The court acknowledged that "an omission, both trivial and innocent" will, at times, be atoned for by allowing damages, as opposed to the imposition of a forfeiture.[220]

211. *See* E. Brunswick Eur. Wax Ctr., LLC v. NLRB, 23 F.4th 238, 253 (3d Cir. 2022).

212. *See supra* Part V.C.

213. *E. Brunswick Eur. Wax Ctr.*, 23 F.4th at 241.

214. *Id.* at 253 (quoting RESTATEMENT (SECOND) OF CONTS. § 229 cmt. a (AM. L. INST. 1981)).

215. *Id.* (alteration in original) (quoting RESTATEMENT (SECOND) OF CONTS. § 229 cmt. c (AM. L. INST. 1981)).

216. *Id.* at 241.

217. *Id.* at 253.

218. *Id.* at 256.

219. Royal Bank of Can. v. Beneficial Fin. Leasing Corp., No. 87 Civ. 1056, 1992 WL 167339, at *9 (S.D.N.Y. June 30, 1992).

220. *Id.* (quoting Jacob & Youngs, Inc. v. Kent, 129 N.E. 889, 890 (N.Y. 1921)).

Citing the Restatement Section 229, the court stated that "[c]onsistent with the *Restatement*, in New York, the doctrine of substantial performance applies where the 'departure from full performance is an inconsiderable trifle having no pecuniary importance.'"[221] Indeed, comment c to Section 229 states that "[a] court may, of course, ignore trifling departures."[222]

The bar is high, however, for a finding of failure to satisfy an express condition is a trifle of no pecuniary importance, and courts will not lightly apply a standard of substantial compliance.[223] This hurdle was recognized by the court in *Witherell v. Lasky*, a case in which the plaintiff agreed to construct a home for the defendant according to standards required by the Veterans' Administration.[224] A condition precedent for payment to the contractor was certification of evidence of payment of all indebtedness connected with the work of the contractor; however, that condition remained unsatisfied.[225] The court recognized the condition precedent would not be excused, and that "[t]he whole purpose of the instrument would be defeated by relieving the plaintiff of the necessity of performance of the conditions which he has agreed to meet."[226] Regarding the issue of substantial performance, the court stated that "[s]ubstantial performance might make compliance with an express condition unnecessary, but only when the departure from full performance is an inconsiderable trifle having no pecuniary importance."[227] The court ruled the contractor's failure to comply with the condition—requiring evidence of payment from potential lienors—left the court with "no choice" but to rule that the complaint should be dismissed.[228]

Prevailing on an argument that a failure to satisfy an express condition constitutes a technicality or trifle, however, is not unachievable.[229] For example, the Fifth Circuit in *Varel*, overturned the district court's determination that the plaintiff's failure to satisfy a condition precedent precluded recovery.[230] The

221. *Id.* (quoting Kennedy v. Auto. Maint. Inc., 384 N.Y.S.2d 921, 922 (Dist. Ct. 1976)).

222. RESTATEMENT (SECOND) OF CONTS. § 229 cmt. c (AM. L. INST. 1981).

223. *See, e.g.*, Witherell v. Lasky, 145 N.Y.S.2d 624, 625 (App. Div. 1955).

224. *Id.*

225. *Id.* at 625–26.

226. *Id.* at 627.

227. *Id.*

228. *Id.* at 628; *see also* Hoosier Energy Rural Elec. Coop., Inc. v. Amoco Tax Leasing IV Corp., 34 F.3d 1310, 1319 (7th Cir. 1994) (recognizing that, while failure at the trifle level might justify excusing compliance with an express condition, some type of performance is required on the part of the party urging the exception).

229. *See, e.g.*, Varel v. Banc One Cap. Partners, Inc., 55 F.3d 1016, 1021 (5th Cir. 1995).

230. *Id.*

dispute between the parties arose when the defending bank sold securities it held in connection with a loan made to Varel.[231] The sale was allegedly in disregard of a Varel principal shareholder's right of first refusal to purchase the shares at the offered price.[232] Under the agreement at issue, the shareholder was entitled to exercise his right of first refusal only on the condition that the corporation not be in default under the loan agreement.[233] The shareholder did not dispute that a default technically occurred when a subsidiary of the corporation guaranteeing the loan was dissolved without permission.[234] The shareholder argued, however, that nonperformance of the condition of nondefault should be excused.[235] The Fifth Circuit recognized that Texas courts disfavor forfeitures and will excuse nonperformance of a condition precedent if requiring satisfaction of the requirement "(a) will involve extreme forfeiture or penalty, and (b) its existence or occurrence forms no essential part of the exchange for the promisor's performance."[236] The court cited Section 229 to the effect that, "[i]n determining whether [a] forfeiture is 'disproportionate,' a court must weigh the extent of the forfeiture by the obligee against the importance to the obligor of the risk . . . and the degree to which that protection [would] be lost" upon excusal of the condition.[237] The court recognized that "[i]f the default [was] unexcused, the penalty facing [the shareholder was] extreme."[238] On the other hand, with the subsidiary being practically useless as a guarantor, the continued existence of the subsidiary was not an essential part of the performance for which the lenders bargained.[239] Indeed, no attention was paid by the lender to the dissolution of the subsidiary until years later when lawyers were searching for a defense to the lawsuit at issue.[240] The court, therefore, concluded that the dissolution of the subsidiary without written notice to the lenders and without their consent was, "at best a technical default under the loan agreement and was legally excusable."[241]

VII. QUESTIONS OF FACT REQUIRING A TRIAL ON THE MERITS AND THE

231. *Id.* at 1017.
232. *Id.*
233. *Id.*
234. *Id.*
235. *Id.*
236. *Id.* at 1018 (quoting Lesikar Constr. Co. v. Acoustex, Inc., 509 S.W.2d 877, 881 (Tex. Civ. App. 1974)).
237. *Id.* (quoting RESTATEMENT (SECOND) OF CONTS. § 229 cmt. b (AM. L. INST. 1981)).
238. *Id.*
239. *Id.*
240. *Id.*
241. *Id.*

NECESSITY OF EVIDENTIARY SUPPORT

When considering the doctrine of disproportionate forfeiture, issues involving materiality and proportionality may not be clear as a matter of law.[242] For example, in *Pramco III, LLC v. Partners Trust Bank*, the court recognized that the issue of whether a condition precedent was a material part of an exchange may be a question of fact for the fact finder's resolution.[243] In *Cityplace Retail, LLC v. Wells Fargo Bank*, the court declined to issue a summary judgment ruling when a question of fact existed as to whether the doctrine of disproportionate forfeiture applied.[244] Similarly, the court in *Capistrant*, stated that the materiality and proportionality analysis required by Section 229 could not be decided as a matter of law on the record presented, and the court had improperly decided the case on a motion for summary judgment.[245]

In the event of a factual dispute, it is important that a party arguing disproportionate forfeiture under Section 229 present admissible evidence on issues involving materiality, proportionality, and triviality, as opposed to merely arguing the matters.[246] The evidentiary requirement is illustrated by the recent case of *Hampton v. Kohler*.[247] The plaintiff in *Hampton* sued his former employer for allegedly refusing to pay funds which he was rightfully entitled to following the defendant's sale of stock in the company.[248] The agreement the parties entered into provided that the plaintiff was entitled to receive a pro rata portion of proceeds from the sale of stock if he was employed by the successor at the time funds at issue were paid, or if he was not employed by the successor at that time because his employment was terminated without cause.[249] The purpose of the agreement was to ensure that crucial employees stayed on for the duration of the transition period.[250] The plaintiff was not employed by the successor at the time of payment,

242. *See, e.g.*, Pramco III, LLC v. Partners Tr. Bank, 842 N.Y.S.2d 174, 186 (Sup. Ct. 2007); Cityplace Retail, LLC v. Wells Fargo Bank, No. 18-CV-81689, 2019 WL 3716779, at *7 (S.D. Fla. Aug. 7, 2019).

243. *Pramco III*, 842 N.Y.S.2d at 186 (citing Jacob & Youngs v. Kent, 129 N.E. 889 (N.Y. 1921)); *see also* Sahadi v. Cont'l Ill. Nat'l Bank & Tr. Co. of Chi., 706 F.2d 193, 199 (7th Cir. 1983).

244. *Cityplace Retail*, 2019 WL 3716779, at *7.

245. Capistrant v. Lifetouch Nat'l Sch. Studios, Inc., 916 N.W.2d 23, 24 (Minn. 2018).

246. *See, e.g.*, Hampton v. Kohler, 989 F.3d 619, 624–25 (8th Cir. 2021).

247. *Id.* at 625.

248. *Id.* at 620–21.

249. *Id.* at 621–22.

250. *Id.* at 623.

and the court ruled that an amicable separation occurred, not a termination without cause.[251]

The plaintiff in *Hampton* argued that his failure to satisfy the condition precedent to payment (that he either remain employed by the successor or be terminated without cause) should be excused based upon the principle of disproportionate forfeiture.[252] Significantly, on the issue of whether the condition was a material part of the contract between the parties, the defendant supported his motion for summary judgment with evidence that, without a requirement that the plaintiff remain in the successor's employ up to the time funds at issue were paid, he would not have entered into the agreement at issue.[253] While the plaintiff argued to the contrary, no supporting evidence in the form of an affidavit, or otherwise, was submitted.[254] Therefore, the Eighth Circuit affirmed the district court's ruling in favor of the defendant that, as a matter of law, the condition was indeed a material part of the contract.[255] The plaintiff would have had a much better argument that at least a factual issue for trial was presented had he presented evidence, for example in affidavit form, that the provision at issue was not material to the agreed exchange.[256]

The necessity of presenting evidence for the record on issues involving disproportionate forfeiture is further illustrated by the case of *Acme Markets, Inc.*, in which the appellate court stated "that the trial court erroneously believed that its analysis ended upon" finding that a condition precedent was unsatisfied.[257] The parties in the case had entered into a contract for armored car service allowing for reimbursement of losses.[258] The lawsuit ensued after the defendant refused to reimburse the plaintiff for losses incurred after one of its employees was robbed of a bag of cash that had been previously accepted from the plaintiff.[259] The defendant claimed that no recovery was due to the plaintiff because the contract between the parties contained a condition precedent that the defendant's responsibilities would begin when bags of cash were accepted and "receipted for" by the defendant.[260] It

251. *Id.* at 624.
252. *Id.*
253. *Id.* at 625.
254. *Id.*
255. *Id.*
256. *See id.*
257. Acme Mkts., Inc. v. Fed. Armored Express, Inc., 648 A.2d 1218, 1222 (Pa. Super. Ct. 1994).
258. *Id.* at 1219.
259. *Id.*
260. *Id.*

was undisputed that the defendant's employee was in possession of the cash bag, but no receipt was provided.[261]

Acknowledging the receipt requirement constituted a condition precedent, the court turned to Section 229 to determine whether the condition could be excused to avoid unfairness should it be strictly enforced.[262] The court recognized the need for weighing the extent of a forfeiture against the importance of the unfulfilled condition and the extent to which protection would be lost absent its enforcement.[263] The court stated that the receipting requirement "probably was little more than an accounting device designed to track bags" meant to protect the defendant from "theft by its own employees and disputes regarding the number of bags accepted."[264] Those risks were not at issue in the case.[265] The court, however, was concerned about the lack of evidence emphasizing its concern as follows:

> While we believe that the receipt requirement probably was an accounting device which had little impact upon the situation presently at issue, our examination of the certified record reveals that it is devoid of any evidence demonstrating the requirement's actual purpose. Thus, even though we have speculated on the matter, the record is inadequate to determine whether our speculation is accurate. In view of the inadequate record, we may not conduct the critical weighing analysis required by the *Restatement* or determine whether fulfillment of the condition may be excused. Indeed, we note that the trial court erroneously believed that its analysis ended upon concluding that a receipt was required to fulfill the condition precedent. Thus, the court did not consider whether the forfeiture would be disproportionate, decide if the receipt requirement constituted a material part of the exchange, or require the parties to provide an adequate record either for resolving those issues or deciding whether summary judgment in favor of Federal would be appropriate.[266]

The court instructed the trial court on remand to conduct an evidentiary hearing to determine the purpose of the receipt, and whether the condition was a material part of the agreement, as well as to engage in the required weighing analysis.[267] According to the court, any conclusions in regard to the materiality aspect of the condition should involve consideration of the negotiations of the

261. *Id*.

262. *Id*. at 1221.

263. *Id*. at 1221–22 (quoting RESTATEMENT (SECOND) OF CONTS. § 229 cmt. b (AM. L. INST. 1981)).

264. *Id*. at 1222.

265. *Id*.

266. *Id*.

267. *Id*.

parties, all circumstances relevant to the formation of the contract, and the condition involved along with circumstances surrounding the theft.[268]

VIII. THE EFFECT OF SECTION 229 ON OPTION AGREEMENTS

The Restatement Section 229's treatment of option agreements illustrates its focus on the inception of a contract, not prejudice or the lack thereof, resulting from the nonoccurrence of a condition.[269] An illustration presented by the Restatement involves a buyer, A, who makes an option contract with a seller, B, to purchase land so long as the purchase is made no later than June 30, five years later.[270] The buyer does not exercise the option, however, until July 1 of the five year mark.[271] The illustration recognizes that a court may not decide the failure of the date requirement is excused to the extent of one day "because that would give B a more extensive option than that on which the parties agreed."[272] Cases determining the application of the doctrine of disproportionate forfeiture focusing on whether prejudice would result to the obligee would likely rule otherwise, assuming that the obligee could not establish harm to its interests.[273]

While the better argument is that, absent prejudice to the opposing party, the doctrine of disproportionate forfeiture should be applied to excuse the nonoccurrence of an express condition, consistent with the Restatement's view, courts tend to rule otherwise in situations involving option contracts.[274] For example, the court in *Acme Investment, Inc. v. Southwest Tracor, Inc.*, recognized the effect of an option contract in relation to the doctrine of disproportionate forfeiture.[275] The plaintiff in the case had purchased a motel from the defendant but granted the defendant an option to repurchase.[276] In regard to a dispute over the exercise of an option, the court noted that Nebraska applied the law of the Restatement and cited authority for applying Section 229 to the analysis of a condition precedent.[277] Southwest purported to exercise its right to purchase under

268. *Id.*

269. *See* RESTATEMENT (SECOND) OF CONTS. § 229 cmt. a (AM. L. INST. 1981).

270. *Id.* cmt. c.

271. *Id.*

272. *Id.* illus. 5.

273. *See supra* Part V.A.6.

274. *See* Acme Inv., Inc. v. Sw. Tracor, Inc., 911 F. Supp. 1261, 1275 (D. Neb. 1995), *aff'd* 105 F.3d 412 (8th Cir. 1997).

275. *Id.*

276. *Id.* at 1263–64.

277. *Id.* at 1268 (citing Lee Sapp Leasing, Inc. v. Cath. Archbishop of Omaha, 540 N.W.2d 101, 104–05 (Neb. 1995)).

the option, but was unable to show it was "ready, willing and able to close" within the time period required by the contract.[278] Southwest argued that a forfeiture would be imposed if it was not allowed to ultimately prevail on the option.[279] The court, however, rejected that argument stating:

> Despite equity's dislike of forfeitures, requirements governing the time and manner of exercise of a power of acceptance under an option contract are applied strictly. It is reasoned that any relaxation of terms would substantively extend the option contract to subject one party to greater obligations than he bargained for.[280]

Similarly, citing a number of cases, the court in *Casa El Sol-Acapulco, S.A. v. Fontenot*, recognized that the doctrine of disproportionate forfeiture is not ordinarily applicable in situations involving option contracts because "termination of the option does not divest the option holder of [any] rights, [or] assets . . . other than the power to exercise the option."[281] Interestingly, the court noted that in some cases the doctrine may be applied if termination of the option would cause an unconscionable result involving a loss of investments made in reliance upon the option.[282]

The court in *FaceTime Communications, Inc. v. Reuters Ltd.*, similarly recognized that the doctrine of disproportionate forfeiture is rarely applied to option contracts.[283] The plaintiff in that case licensed software products to the defendant for a period of two years.[284] The defendant had an option to pay additional amounts by a certain date in order to obtain a perpetual right to use the software.[285] The defendant, however, was late in tendering those amounts, and the

278. *Id.* at 1272. After the time period allowed by the contract, Southwest alleged that an arrangement had been reached regarding a loan, but the agreement was in favor of a related corporation and, at any rate, was outside the relevant time considerations. *Id.* at 1273.

279. *Id.* at 1274.

280. *Id.* at 1275 (quoting RESTATEMENT (SECOND) OF CONTS. § 25 rep.'s note, cmt. d (AM. L. INST. 1981)).

281. 919 S.W.2d 709, 716 (Tex. App. 1996) (citing B.F. Saul Real Est. Inv. Tr. v. McGovern, 683 S.W.2d 531, 534 (Tex. App. 1984); Guy Dean's Lake Shore Marina, Inc. v. Ramey, 518 N.W.2d 129, 130 (Neb. 1994); TST, Ltd. v. Houston, 353 S.E.2d 26, 27 (Ga. 1987); Cillessen v. Kona Co., 387 P.2d 867, 869 (N.M. 1964); Cnty. of Peoria v. Najman, 523 N.E.2d 375, 377 (Ill. App. Ct. 1988)).

282. *Id.* (citing Jones v. Gibbs, 130 S.W.2d 265, 268–69 (Tex. Comm'n App. 1939); Inn of Hills, Ltd. v. Schulgen & Kaiser, 723 S.W.2d 299, 301 (Tex. App. 1987)).

283. No. 08 Civ. 4730, 2008 WL 2853389, at *6 (S.D.N.Y. July 22, 2008).

284. *Id.* at *1.

285. *Id.* at *2.

plaintiff sought a declaratory judgment that the agreement was at an end.[286] Specifically, the payment was due by January 31 of the stated year, but the defendant did not wire the funds until February 15.[287] Although, noting that the defendant's argument involving disproportionate forfeiture was "interesting," the court granted the plaintiff's motion for summary judgment.[288] The court determined that the applicable jurisdiction, New York, had limited the application of the principle of disproportionate forfeiture in the context of landlord–tenant option contracts.[289] Specifically, the doctrine had been applied to situations in which a tenant installed permanent fixtures with a value that would accrue to the landlord if terms of an option contract were strictly applied.[290] The court further recognized there was no authority for the proposition that the defendant would suffer a forfeiture, as opposed to a loss, in which it could have avoided by diligently protecting its rights.[291] As pointed out by the court, there was no forfeiture to the plaintiff, FaceTime Communications, since it would be left with nothing except what it possessed all along.[292]

IX. A RIGHT TO CONTRACT FOR FORFEITURE?

A significant and interesting issue is whether parties may expressly, or by implication, contract for a forfeiture. The issue was addressed in dicta in *Hoosier*, in which the court found the doctrine of disproportionate forfeiture did not apply because, in the court's opinion, the plaintiff had not suffered a forfeiture.[293] The court went on to state that the law permits a party "to make a contract which will result in a forfeiture; and when it is clear from the terms of the contract that the parties have so agreed, the forfeiture will be enforced."[294] Other courts also recognize the right of a party to enter into a disadvantageous contract.[295] For example, while not specifically addressing the principle of disproportionate forfeiture, the court in *LaFontaine v. Developers & Builders, Inc.*, stated, "[i]f one contracts for a forfeiture . . . the law will scan it closely and will look upon it with

286. *Id.* at *2–3.
287. *Id.* at *2.
288. *Id.* at *6–7.
289. *Id.* at *6.
290. *Id.*
291. *Id.*
292. *Id.*
293. 34 F.3d 1310, 1320 (7th Cir. 1994).
294. *Id.* (citing Winston Pers. Agency, Inc. v. Abcon Indus. Inc., 438 N.Y.S.2d 669, 670 (Civ. Ct. 1980)).
295. *See, e.g.*, LaFontaine v. Devs & Builders, Inc., 156 N.W.2d 651, 659–60 (Iowa 1968).

disfavor, yet as a part of the contract it must be enforced,"[296] and "[w]hile it is true forfeitures are not favored in the law, they are not outlaws."[297]

These cases, however, overlook the underlying purpose of the disproportionate forfeiture doctrine, and its goal of protecting contracting parties from being negatively impacted due, for example, to a failed immaterial condition.[298] Further, generalized and isolated statements made by courts regarding the effect of forfeiture are not persuasive when the statements are made apart from the consideration of materiality and resulting disproportionate forfeiture.[299] For example, the court in *CityPlace Retail* found meritless the plaintiff's proposition that the disproportionate forfeiture doctrine is inapplicable to express forfeiture clauses.[300] In arguing that an express forfeiture clause blocks application of the disproportionate forfeiture doctrine, the plaintiff in the case relied on a statement from *Oppenheimer* that "[if the defendant was] dissatisfied with the consequences of [its] agreement, the time to say so was at the bargaining table."[301] However, as the court in *CityPlace Retail* pointed out, in actuality, *Oppenheimer* affirmed the viability of the disproportionate forfeiture doctrine.[302] The *Oppenheimer* court did not apply the doctrine because of its determination that the plaintiff in the case did not stand to suffer a forfeiture or undue hardship.[303]

The better view is that the doctrine of disproportionate forfeiture should be considered an immutable rule, such as the prohibition on unconscionability in contracts, which cannot be waived by contract.[304] Another example is the general

296. *Id*. (citing Cowan v. Cowan, 75 N.W.2d 920 (Iowa 1956)).

297. *Id*. at 660.

298. *See* RESTATEMENT (SECOND) OF CONTS. § 229 cmt. b (AM. L. INST. 1981).

299. *See, e.g*., CityPlace Retail, LLC v. Wells Fargo Bank, No. 18-CV-81689, 2019 WL 3716779, at *6 (S.D. Fla. Aug. 7, 2019).

300. *Id*.

301. *Id*. (quoting Oppenheimer & Co., Inc. v. Oppenheim, Appel, Dixon, & Co., 660 N.E.2d 415, 421 (N.Y. 1995)) (alteration in original).

302. *Id*. (citing *Oppenheimer*, 660 N.E.2d at 421).

303. *Id*. (citing *Oppenheimer*, 660 N.E.2d at 421).

304. *See* Martha M. Ertman, *Mapping the New Frontiers of Private Ordering: Afterword*, 49 ARIZ. L. REV. 695, 696 n.3 (2007) ("Immutable rules such as the prohibition of unconscionability, . . . are fixed and cannot be waived by contract."). *See generally* Bob Works, *Excusing Nonoccurrence of Insurance Policy Conditions in Order to Avoid Disproportionate Forfeiture: Claims-Made Formats as a Test Case*, 5 CONN. INS. L.J. 505, 588–632 (1999).

principle that one may not release a party from potential tort liability.[305] Particularly when unsophisticated parties are involved, strictly enforcing immaterial conditions to the significant detriment of a party results in a violation of the principles of equity and should not be allowed.[306]

X. THE BEST APPROACH—A FOCUS ON GROUPS AND PREJUDICE

As illustrated by the discussion above, issues involving materiality, proportionality, and the definition of "trivial," are far from clear as applied to the doctrine of disproportionate forfeiture.[307] Illustrating the disarray and confusion, one author noted, "this general meaning of materiality is influenced by the equities inherent in the inquiry, which require balancing the hardship to the party seeking excuse against the loss of protection or increase in risk that will be suffered by the other party as a result of excusing the condition."[308] It is difficult to understand how such a standard would be practically applied. The doctrine of disproportionate forfeiture has further been termed "flexible" to be applied "within the sound discretion of the court."[309] Going case by case and situation by situation makes it impossible to forecast when the doctrine is applicable and which cases satisfy a discretionary standard addressing equities, hardship, and risk. The uncertainty as to application of the doctrine may lead to increased litigation and unfair, inequitable results.

A better practice to focus is on the issue of prejudice and to place cases involving similar situations in groups, whenever possible, with clearer guidance as to when the doctrine will apply. While cases addressing disproportionate forfeiture are not limited to the insurance law context, cases in the insurance arena have led the way in applying the doctrine as a whole to groups of cases involving express conditions precedent pertaining to notice and other requirements contained in insurance policies.[310] For example, *Alcazar* (referenced above), addressed the nonoccurrence of a notice condition in an insurance policy.[311] The court

305. Thomas L. Hudson, *Immutable Contract Rules, the Bargaining Process, and Inalienable Rights: Why Concerns over the Bargaining Process Do Not Justify Substantive Contract Limitations*, 34 ARIZ. L. REV. 337, 339 (1992).

306. *See supra* Part V.A.5.

307. *See supra* Parts V–VIII.

308. Brian A. Blum, *The Protean Concept of Materiality in Contract Law*, 2020 MICH. ST. L. REV. 643, 697–98.

309. Capistrant v. Lifetouch Nat'l Sch. Studios, Inc., 916 N.W.2d 23, 31 (Minn. 2018) (quoting RESTATEMENT (SECOND) OF CONTS. § 229 cmt. b (AM. L. INST. 1981)).

310. *See, e.g.*, Alcazar v. Hayes, 982 S.W.2d 845, 847 (Tenn. 1998).

311. *Id.*; *see supra* Part V.A.6.

acknowledged that for years appropriate notice, as required by policy terms, had been deemed a condition precedent to the insurer's duty to pay, regardless of whether the insurer suffered prejudice based on the lack of required notice.[312] Referencing strict contractual interpretation, and also a concern with public policy, the court stated the following rationale as supporting the jurisdiction's previous enforcement of notice conditions:

> Not only is the insuror entitled to notice in order that it may make prompt investigation and prepare for the defense of the claim, it is entitled to protect its interests in an area susceptible to the presentation of spurious claims. Also, it is in the public interest that litigation be minimized and, to this end, it is essential that the insurance company be in a position to settle claims on a knowledgeable basis.[313]

Nevertheless, the court rejected that view going forward, pointing to the fact the number of jurisdictions following the traditional view had "dwindled dramatically" with the "vast majority" of jurisdictions turning to a focus on whether the insurer was actually prejudiced by an insured's untimely provision of notice.[314] As noted by the court, reasons for the shift included the adhesive nature of insurance contracts, public policy favoring compensating tort victims, and the inequity presented when an insurer receives a windfall based on an insured's failure to satisfy a technicality.[315] Focusing largely on public policy concerns, the *Alcazar* court decided to follow the modern trend.[316]

The *Alcazar* court's reasoning is significant in that it addresses the issue of disproportionate forfeiture and materiality as applied to a group of insurance cases.[317] Further, nonoccurrence of the condition is excused even if an objective view would consider the notice provision material at the time the parties enter into the contract of insurance.[318] No one would deny, for example, that notice is important to an insurer, and requiring prompt notice is likely initially a material part of the contract of insurance. Nevertheless, under the view espoused in *Alcazar*, so long as no prejudice results to the insurer from the nonoccurrence of the condition in the form of late notice, the nonoccurrence is disregarded.[319] This

312. *Alcazar*, 982 S.W.2d at 849 (quoting Hartford Accident & Indem. Co. v. Creasy, 530 S.W.2d 778, 779 (Tenn. 1975)).

313. *Id*. (quoting *Creasy*, 530 S.W.2d at 779).

314. *Id*. at 850 (citations omitted).

315. *Id*.

316. *Id*. at 852–53.

317. *See id*.

318. *Id*. at 853.

319. *See id*.

approach provides a standard measure and provides a measure of certainty to parties regarding the enforcement of conditions precedent.[320]

Similarly, the Colorado Supreme Court in *Clementi v. Nationwide Mutual Fire Insurance Co.*, acknowledged the traditionally applied rule strictly enforcing notice requirements in policies of insurance, regardless of whether the insurer was prejudiced.[321] The court noted the traditional rule supported public policy in that it allowed the insurer to adequately investigate claims and protected insurers from potentially fraudulent claims.[322] Nevertheless, the court joined the trend of viewing cases as a group and requiring prejudice to the insurer before allowing a denial of coverage based on late notice.[323] Notably, under this view, there is no inquiry as to the materiality or importance of the notice provision at the point the contract of insurance is formed.[324]

320. *See, e.g.*, Clementi v. Nationwide Mut. Fire Ins. Co., 16 P.3d 223, 230 (Colo. 2001) (en banc).

321. *Id.* at 226 (citing 8C JOHN A. APPLEMAN & JEAN APPLEMAN, INSURANCE LAW & PRACTICE § 5083.35 at 292 (1981)).

322. *Id.* at 227 (citing Marez v. Dairyland Ins. Co., 638 P.2d 286, 291 (Colo. 1981) (en banc); Certified Indem. Co. v. Thun, 439 P.2d 28, 30 (Colo. 1968); Shelter Mut. Ins. Co. v. Selley, 942 P.2d 1370, 1371 (Colo. App. 1997); APPLEMAN & APPLEMAN, *supra* note 321; Richard L. Suter, *Insurer Prejudice: Analysis of an Expanding Doctrine in Insurance Coverage Law*, 46 ME. L. REV. 221, 223–24 (1994)).

323. *Id.* at 230 (citing *Alcazar*, 982 S.W.2d at 850). While cases such as *Clementi* apply the notice-prejudice rule to groups of cases, it should be noted that jurisdictions are not consistent in the treatment of notice conditions in policies of insurance. This difference in treatment is illustrated by the difference some jurisdictions make between a claims-made policy and an occurrence policy of insurance. A claims-made policy provides coverage only for claims made against an insured within the dates of the policy period. Oregon Schs. Activities Ass'n v. Nat'l Union Fire Ins. Co., 279 Fed. App'x 494, 495 (9th Cir. 2008) (unpublished opinion). With an occurrence policy, coverage is effective so long as the incident for which coverage is sought occurs within the policy period, regardless of when the claim is filed or asserted. Gulf Ins. Co. v. Dolan, Fertig & Curtis, 433 So. 2d 512, 514 (Fla. 1983). An example of inconsistent treatment by jurisdictions is that some treat notice issues in claims-made policies differently from notice issues in occurrence policies and refuse to extend the notice-prejudice rule to claims-made policies. *See Oregon Schs. Activities Ass'n*, 279 Fed. App'x at 485; Schubiner v. New England Ins. Co., 523 N.W.2d 635, 636 (Mich. Ct. App. 1994); DiLuglio v. New England Ins. Co., 959 F.2d 355, 359 (1st Cir. 1992) (applying Rhode Island law). The First Circuit in *President and Fellows of Harvard College v. Zurich American Insurance Co.*, upheld this distinction made between claims-made and occurrence policies. 77 F.4th 33, 37–38 (1st Cir. 2023). The better view is that the rule be applied to both claims-made and occurrence policies. *See id.*

324. *Clementi*, 16 P.3d at 230.

Ferrando v. Auto-Owners Mutual Insurance Co., decided by the Supreme Court of Ohio, illustrates that treating issues as a group, not individually, is not restricted to lack of notice cases.[325] While the insurance coverage case contained a lack of notice defense as one issue, the defending insurer in *Ferrando* also contended it was entitled to deny coverage based on its lack of consent to a settlement agreement entered into by the insured.[326] The court recognized the purpose of a consent-to-settle provision is to protect the insurer's subrogation rights and allow the insurer to seek reimbursement from the tortfeasor.[327] According to the court, in such cases the majority approach is that when an insured fails to give required notice of the settlement of a claim, an inquiry into prejudice is necessary in order to determine whether coverage is forfeited.[328] The court agreed with that approach stating, "[i]t is not logical that the breach of a notice provision should necessitate an inquiry into prejudice while the breach of a consent-to-settle provision should be deemed prejudicial to the insurer in all cases as a matter of law" and that "the same fundamental inquiry should be applied in either case."[329]

The refusal to enforce an express condition absent prejudice to a party due to its nonoccurrence is consistent with accepted contractual principles opposing penalties in situations involving a breach of contract.[330] For example, courts either outright refuse, or limit significantly, a party's entitlement to punitive damages in the event of a contractual breach.[331] The reason for the limitation on punitive damages is accepted economic theory involving what is seen as an "efficient breach."[332] An "efficient breach" occurs when the breach results in a gain to one

325. 781 N.E.2d 927, 937 (Ohio 2002).

326. *Id.* at 930. On the lack of notice issue pertaining to uninsured motorist protection, the court ruled that when an insurer's denial of coverage is based on the failure to meet a notice requirement, the insurer is entitled to refuse coverage only if it is prejudiced by the delay. *Id.* at 945.

327. *Id.* at 937.

328. *Id.*

329. *Id.* at 945.

330. *See* Alberts v. Liberty Life Assurance Co., 65 F. Supp. 3d 790, 795 (N.D. Cal. 2015); Bogle v. Summit Inv. Co., 107 P.3d 520, 530–31 (N.M. Ct. App. 2005).

331. *Alberts*, 65 F. Supp. 3d at 795 (recognizing that punitive damages are unavailable for breach of contract in California); *Bogle*, 107 P.3d at 530 (stating that New Mexico allows a plaintiff to recover punitive damages for breach of contract only if the defendant's conduct is sufficiently "malicious, oppressive, fraudulent, or committed recklessly with a wanton disregard for the plaintiff's rights").

332. *See* E. ALLAN FARNSWORTH, CONTRACTS § 12.3 (4th ed. 2004).

party that is greater than the loss to the other party.[333] Of course, damages are appropriate in that instance, but not a penalty.[334] Similarly, contractual liquidated damage clauses, by which parties agree on the amount of damages to be awarded in the case of a breach, are denied enforcement when "condemned as a penalty."[335]

The U.S. Supreme Court in *UNUM Life Insurance Co. of America v. Ward*, referenced with approval, the application of the disproportionate forfeiture analysis to a group of cases as a whole through the Court's reference to the notice-prejudice rule—requiring prejudice to an insurer before coverage may be denied due to lack of notice.[336] The Court in *UNUM* addressed whether the federal Employee Retirement Income Security Act (ERISA) preempted the California state law notice-prejudice rule.[337] Relying on the ERISA savings clause which states, "any law of any State which regulates insurance," the Court found that the state notice-prejudice rule was not preempted.[338] Interestingly, UNUM raised Section 229 as a defense to coverage, arguing the notice-prejudice rule fit "within its compass."[339] In response to UNUM's position, the Court referenced Section 229's provision that a condition could be excused unless its occurrence was a "material part" of an agreement.[340] Recognizing, however, that the notice-prejudice standard is applied as a general rule, the Court stated that the notice-prejudice rule requires courts "to excuse a failure to provide timely notice whenever the insurer cannot carry the burden of showing actual prejudice, and it allows no argument over the materiality of the time prescription."[341]

The Court's statement, regarding no need for a materiality analysis in regard to the notice-prejudice rule in the insurance context, supports the position that the disproportionate forfeiture analysis may be applied to groups of cases, not

333. *See id*.

334. *See id*.

335. *In re* Skyler Ridge, 80 B.R. 500, 507 (Bankr. C.D. Cal. 1987); *see also* Strouse v. Starbuck, 987 S.W.2d 827, 829 (Mo. Ct. App. 1999) (citing Grand Bissell Towers, Inc. v. Joan Gagnon, Enter., Inc., 657 S.W.2d 378, 379 n.4 (Mo. Ct. App. 1983)) (finding that, absent evidence of damages, a liquidated damages clause is unenforceable as a penalty); Hanover Ins. Co. v. Binnacle Dev., LLC, 493 F. Supp. 3d 585, 590–91 (S.D. Tex. 2020) (recognizing that liquidated damages clauses must be carefully reviewed to ensure they are not unenforceable penalties).

336. 526 U.S. 358, 364 (1999).

337. *Id*. at 358–59.

338. *Id*. at 373 (quoting 29 U.S.C. § 1144(b)(2)(A)).

339. *Id*. at 371 n.4.

340. *Id*.

341. *Id*.

individual situations.[342] A jurisdiction could follow Section 229 through application of the materiality analysis to a group of situations as a whole, not on an individual basis.[343] Disputes between lenders and borrowers and construction disputes, for example, would likely be appropriate for a group type of analysis similar to that performed in the insurance arena. The better approach, however, is to disregard the weight placed on a condition in the initial bargaining process and focus in all cases on the end result—involving whether a party would be prejudiced by the disregard of the nonoccurrence of an express condition. Even if evidence establishes that a condition was considered of great importance at the beginning of a contract, it should not be enforced if, in the end analysis, its nonoccurrence failed to prejudice the opposing party. The issue of timeliness is one example. In negotiating a contract, a party may insist that the other party perform within a certain period of time. If in the end, however, a delay did no harm to the party insisting on the condition, it is not reasonable to strictly apply the condition and impose a forfeiture.

XI. CONCLUSION

A party facing the effects of a failed express condition should consider the doctrine of disproportionate forfeiture as a possible method by which to make a new plan and become free. Although the most prevalent application of the doctrine is in the area of insurance coverage disputes, the doctrine is not limited to this area.[344] In applying the doctrine, one option, as has been followed in large part in the insurance field, is to apply the doctrine to groups of similar cases as a whole.[345] The best option, however, is a focus on prejudice, or the lack thereof.[346] In situations in which the opposing party suffered no prejudice from the nonoccurrence of a condition, there is no sound reason for denying a party the right to receive benefits for which it contracted.[347]

342. *See id*.
343. *See id*.
344. *See supra* Parts V–IX.
345. *See supra* notes 325–35 and accompanying text.
346. *See supra* Part X.
347. *See supra* Part X.