THE PROTEAN CONCEPT OF MATERIALITY IN CONTRACT LAW

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INTRODUCTION

Materiality is a pervasive concept in contract law, and it plays a central role in many contract doctrines. The question of whether a term or matter is material is a crucial factor in the determination of rights, obligations, or remedies in many contract disputes.[1] Courts and commentators agree on the broad, nonspecific meaning of materiality in contract law: A term or matter is material if it is fundamentally important to the contract and goes to its very basis. The word "essential" is often used synonymously with "material" to denote such crucial importance.[2] However, this general definition is just a starting point in the determination of materiality—it is not refined or specific enough to provide anything more than a rough impression and offers no guidance into the complex set of considerations that often go into the decision on whether or not a term or matter is material. Materiality cannot be adequately defined in the abstract because the inquiry into materiality is heavily reliant on the facts of each case and the interpretation of the contract in its context. This context includes not only the factual circumstances that are commonly taken into account in interpreting meaning but extends to the goal and purpose of the materiality inquiry in the specific contract dispute. Materiality analysis plays different roles under the myriad doctrines that call for an assessment of it. For example, the determination of materiality in

1. The phrase "term or matter" recognizes that although materiality usually relates to the importance of a term of the contract, there are situations in which it applies to the severity of the impact of an event or circumstance on the contract. The most obvious example is an event after contract formation that is claimed to render a party's performance impracticable or to frustrate the purpose of the contract. *See infra* Part V.

2. *E.g.*, RESTATEMENT (SECOND) OF CONTS. § 33 cmt. a (AM. L. INST. 1981) (using the word "essential"). This Article discusses the use of the word "essential" in Sections III.A and III.C on offer and acceptance and indefiniteness, and it is commonly used in relation to the statute of frauds (discussed in Section III.D). While there may be a subtle difference in the meaning of "essential" and "material," they are not functionally distinguishable and should be treated as synonymous. In relation to this usage in connection with the statute of frauds, see *infra* note 122.

relation to a claim of breach of contract has a different purpose than it has in resolving the question of, say, whether a contract was formed at all, or whether it can be avoided on grounds of misrepresentation or mistake.

In some cases, the materiality of a term or matter is or seems to be obvious. For example, in a contract of sale, the price to be paid for the property is surely fundamentally important, so that the parties' lack of agreement on the price inevitably leads to the conclusion that they did not form a contract. Similarly, the buyer's complete failure to pay the price is unquestionably a material breach of the contract. In other cases, materiality is not readily apparent. For example, it is not self-evident that an arbitration clause or a provision fixing the time for performance is material. In these less obvious cases, the determination of materiality involves a complex evaluation of the contract in context. Some court opinions articulate the nature and scope of this evaluation, but others are less forthcoming and more conclusory.

This Article examines materiality in several contract doctrines for the purpose of identifying the role that the materiality analysis plays in each of them. Part I surveys the somewhat elusive question of whether materiality should be decided as a question of fact or law.[3] Part II shows the importance of materiality analysis in breach and repudiation;[4] Part III discusses materiality in relation to contract formation, including offer and acceptance, indefiniteness, and the statute of frauds;[5] Part IV examines the role that materiality plays in misrepresentation and mistake;[6] Part V discusses the requirement of materiality in impracticability and frustration of purpose;[7] Part VI shows the effect of materiality on the excuse of a condition;[8] and Part VII discusses materiality in relation to the discharge of a surety.[9] This Article describes the role that a determination of materiality plays in each of these areas, identifies the factors and considerations that are taken into account in that determination, and articulates the particular meaning of materiality engendered by the doctrinal context of the inquiry.

The Article concludes that this examination of the role of materiality analysis across the gamut of contract law shows that

3. *See infra* Part I.
4. *See infra* Part II.
5. *See infra* Part III.
6. *See infra* Part IV.
7. *See infra* Part V.
8. *See infra* Part VI.
9. *See infra* Part VII.

although the general meaning of materiality—fundamentally important and essential—is consistently understood throughout contract law, this meaning does not fully encompass the scope of the materiality analysis.[10] The determination of materiality is influenced by the specific purpose of and equities inherent in the materiality inquiry under each of the doctrines in which it is an element. It is a protean concept, malleable and adaptable in light of the policies, goals, and equities (considerations of fairness) pertinent to the particular inquiry.

I. MATERIALITY AS A LEGAL OR FACTUAL QUESTION

The question of whether materiality is a legal or factual issue is important at both the trial and appellate level. At trial, if it is a question of law, the judge decides it, but if it is a question of fact, it must be allocated to the factfinder—commonly the jury, unless the case is being tried without one. In addition, treating a matter as a legal question may avoid trial altogether by allowing for the case to be disposed of at the pretrial stage by a motion for dismissal or summary judgment,[11] or at the end of the trial by a directed verdict.[12] On appeal, if materiality is factual, the factfinder's conclusion on materiality must be accepted by the appellate court unless clearly erroneous, but if it is a legal question, the appellate court is not bound by the determination at trial and may review the decision de novo.[13]

Materiality is a matter of contract interpretation, subject to the general principles applicable to the interpretation and construction of a contract.[14] In dealing with general principles of contract interpretation, § 212(2) of Restatement (Second) of Contracts states that interpretation is a question of law unless the determination of

10. *See infra* CONCLUSION.

11. Summary judgment is appropriate where it is apparent from the pleadings and other documentation filed with them that there is no genuine dispute as to any material fact. *See* Fed. R. Civ. P. 56(a) ("The court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law."); Fed. Ins. Co. v. Turner Constr. Co., 779 F. Supp. 2d 345, 352–53 (S.D.N.Y. 2011) ("A genuine dispute exists for summary judgment purposes where the evidence is such that a reasonable jury could decide in the non-movant's favor.").

12. *See* Gibson v. City of Cranston, 37 F.3d 731, 736 (1st Cir. 1994) (explaining that where materiality is a question of law, it is appropriate for a court to give a directed verdict on the issue of materiality).

13. *See* EventMonitor, Inc. v. Leness, 44 N.E.3d 848, 854 (Mass. 2016).

14. *See* Gilbert v. Dep't of Just., 334 F.3d 1065, 1071–72 (Fed. Cir. 2003).

meaning requires evaluation of the credibility of extrinsic evidence or choosing among reasonable inferences from that evidence.[15] This follows the general principle that the interpretation of a written document is a legal question unless there is credible extrinsic evidence of meaning, raising a genuine dispute of fact that cannot be resolved without a factual determination.[16] The need for a factual or credibility determination is not always obvious, so courts have some leeway in reaching the conclusion that interpretation is properly disposed of as a legal question.[17] This decision may be influenced by considerations of efficient trial management or judicial control.[18]

Courts generally apply the principles articulated in Restatement (Second) of Contracts § 212(2) in deciding the question of materiality. They recognize that materiality should be treated as a factual question to the extent that there are factual circumstances relevant to the determination, and there is a need to resolve a factual dispute or to evaluate the credibility of evidence.[19] Under this approach, materiality

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15. *See* RESTATEMENT (SECOND) OF CONTS. § 212(2) (AM. L. INST. 1981). Extrinsic evidence goes beyond the language of the document itself and relates to those factual circumstances under which the contract was made, such as what was said in negotiations, trade usage, and the parties' course of dealing or performance. *See Extrinsic Evidence*, BLACK'S LAW DICTIONARY (11th ed. 2019).

16. *See* RESTATEMENT (SECOND) OF CONTS. § 212(2) cmt. d (AM. L. INST. 1981) (noting the longstanding judicial tradition of treating interpretation of language as a legal question, both at trial and on appeal, unless there is a genuine factual dispute over meaning to be resolved by evaluating relevant extrinsic evidence).

17. *See* STEVEN J. BURTON, ELEMENTS OF CONTRACT INTERPRETATION 153 (2009).

18. *See id.* at 152 (observing that the uneven approach to allocating decision-making on ambiguity in a contract probably stems from a tension between respect for the jury and doubts about its ability to resolve complex interpretational questions); William C. Whitford, *The Role of the Jury (and the Fact/Law Distinction) in the Interpretation of Written Contracts*, 2001 WIS. L. REV. 931, 931–32 (2001) (arguing that fear of the jury has helped shape the law of contract interpretation, thereby confusing and distorting it).

19. *See In re* Exide Techs., 607 F.3d 957, 963 (3d Cir. 2010) (explaining that materiality is a factual question, to be decided as a matter of law only when the inferences are certain); APS Cap. Corp. v. Mesa Air Grp., Inc., 580 F.3d 265, 271–72 (5th Cir. 2009) (stating that while the ultimate question of indefiniteness—whether an agreement contains all essential terms to qualify as an enforceable contract—is a legal question, the examination of context to determine intent is a factual question); *Gilbert*, 334 F.3d at 1072 (explaining that what a party did or did not do is a factual question, but where facts are undisputed, the determination of whether there has been material noncompliance with the contract is reduced to a question of law); Gordon v. Matthew Bender & Co., 186 F.3d 183, 185 (2d Cir. 1999) (holding that in determining materiality, it is for the jury to resolve conflicting testimony, and it is not the court's function to weigh the credibility of witnesses); Arrow Master, Inc. v. Unique Forming,

should be handled as a legal question only to the extent that a legal determination follows fact-finding, or when the facts are settled and undisputed, or there is no factual evidence available, so that materiality must be decided simply as a matter of interpreting contractual language.[20] Even where there is a factual dispute relating to materiality, a court may decide the issue as a question of law if it determines that the answer is so patent and obvious that there is only one reasonable conclusion it can reach on the disputed facts.[21] Courts

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Ltd., 12 F.3d 709, 715 (7th Cir. 1993) (holding that materiality is a complicated fact question, involving inquiry into whether the breach defeated the bargained for objectives of the contract); Malik Corp. v. Tenacity Grp., LLC, 961 A.2d 1057, 1061 (D.C. 2008) (holding that materiality of a breach is a factual question); *EventMonitor, Inc.*, 44 N.E.3d, at 853 (holding that materiality is ordinarily a factual question, but is a legal question if evidence on the point is "undisputed or sufficiently lopsided"); DC Farms, LLC v. Conagra Foods Lamb Weston, Inc., 317 P.3d 543, 550 (Wash. Ct. App. 2014) (holding that materiality of a breach is a factual question dependent on the circumstances of the case).

20. *See* Rocheux Int'l of N.J., Inc. v. U.S. Merchs. Fin. Grp., 741 F. Supp. 2d 651, 681 (D.N.J. 2010) (concluding that a material alteration issue is a question of fact and law). In some cases, both factual and legal determinations are required, leading some courts to describe materiality as a "mixed question of fact and law." *See, e.g.*, *Gilbert*, 334 F.3d at 1071–72; *see also* Southern v. Goetting, 353 S.W.3d 295, 300 (Tex. Ct. App. 2011) (holding that in the absence of factual evidence, the determination of whether all essential terms have been agreed to is a question of law); Knowles v. Wright, 288 S.W.3d 136, 142-43 (Tex. Ct. App. 2009) (holding that in the absence of evidence explaining what was meant by a vague term, indefiniteness is decided as a question of law); Hollywood Fantasy Corp. v. Gabor, 151 F.3d 203, 207 (5th Cir. 1998) (stating that the review of written negotiations to decide if an offer is accepted is primarily a question of law).

21. *See* Gibson v. City of Cranston, 37 F.3d 731, 735–36 (1st Cir. 1994) (quoting Dunne Leases Cars & Trucks, Inc. v. Kenworth Truck Co., 466 A.2d 1153, 1160 (R.I. 1983)) (explaining that "materiality 'is essentially a factual question'" to be resolved by considering all pertinent evidence, but if the question "admits of only one reasonable answer," it is appropriately handled as a matter of law); *see also In re* Universal Mktg, Inc., 541 B.R. 259, 285 (Bankr. E.D. Pa. 2015) (explaining that although the determination of materiality is a question of fact, it is appropriately treated as a legal issue, even if materiality is disputed, if there is only one reasonable conclusion on the matter); Sw. Bell Yellow Pages, Inc. v. Robbins, 865 S.W.2d 361, 366 (Mo. Ct. App. 1993) (stating that substantial performance is generally a factual question, but it is a matter of law if reasonable minds cannot differ on the immateriality of the defect in performance); Siouxland Ethanol, LLC v. Sebade Bros., 859 N.W.2d 586, 592 (Neb. 2015) (holding that materiality is commonly a fact question, but a breach is material as a matter of law if there is only one reasonable conclusion to the disputed factual question). A similar approach is found in the area of tort in relation to fraud. *See* RESTATEMENT (SECOND) OF TORTS § 538, cmt. e (AM. L. INST. 1977). The Restatement (Second) of Torts says that materiality is a matter for the "jury subject to the control of the court," but that "[t]he court may withdraw the

also commonly treat materiality as a legal question where the contract itself declares a particular matter to be material.[22] However, matters are not that tidy. Some opinions treat the determination of materiality in a conclusory way, offering no support for the pronouncement that materiality must be decided as a matter of law, but relying only on judicial precedent or other legal authority.[23]

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case from the jury if the fact misrepresented is so obviously unimportant that the jury could not reasonably find that" it would have influenced a reasonable person. *Id.*

22. *See EventMonitor, Inc.*, 44 N.E.3d at 853–54 (finding that the trial court's decision about the materiality of a breach is supported); Dunkin' Donuts of Am., Inc. v. Middletown Donut Corp., 495 A.2d 66, 74 (N.J. 1985) (noting that although equity will seek to avoid a forfeiture, it will respect a contract term that specifies that a stated breach will be material). For cases deferring to a contract term stating that a particular breach will be material, see *infra* note 38.

23. *See* Leica Geosystems, Inc. v. L.W.S. Leasing, Inc., 872 F. Supp. 2d 1191, 1200–01 (D. Colo. 2012) (making the conclusory statement, based on legal precedent, that a warranty disclaimer and a liability limitation are material); Simon v. Simon, 625 N.E.2d 564, 567 (Mass. App. Ct. 1994) (noting that the question of whether a writing satisfies the statute of frauds is a legal issue, but assuming from this that it is also the judge's function to decide if a term omitted from the writing is material); Hugo Boss Fashions, Inc. v. Sam's Eur. Tailoring, Inc., 293 A.D.2d 296, 297 (N.Y. App. Div. 2002) (reciting that materiality is a factual question but then making the unsupported conclusory determination that a forum selection clause is material); Lively v. IJAM, Inc., 114 P.3d 487, 493 (Okla. Civ. App. 2005) (making the conclusory statement, based on prior decisions of other courts, that a forum selection clause is a material alteration). UCC §2-207 provides a good example of a conclusory approach to materiality. *See infra* Section III.B. Official Comment 4 offers examples of terms that should normally be treated as material, and Official Comment 5 lists some terms that would not likely be material. *See* U.C.C. § 2-207, cmts. 4–5 (AM. L. INST. & UNIF. L. COMM'N 1977). The Comments provide no explanation of how the drafters reached the conclusion about materiality, creating some confusion as to whether the listed terms should always be treated as *per se* material or immaterial, irrespective of context. Some cases seem to adopt a *per se* approach to materiality under UCC §2-207. *See, e.g.*, *Leica Geosystems, Inc.*, 872 F. Supp. 2d at 1200 (stating that a warranty disclaimer is material because it is included as an example of a material term in Colorado's version of Official Comment 4 to UCC §2-207); ISRA Vision AG v. Burton Indus., Inc., 654 F. Supp. 2d 638, 648–49 (E.D. Mich. 2009) (a non-assignment clause is material as a matter of law). There seems to be particular confusion over arbitration and forum selection clauses. Commentators have observed that some courts have held such clauses to be material as a matter of law, while other courts have held that the materiality of such clauses is a factual issue. *See* Corneill A. Stephens, *Escape from the Battle of the Forms: Keep It Simple, Stupid*, 11 LEWIS & CLARK L. REV. 233, 246–47 (2007); Timothy Davis, *U.C.C. Section 2-207: When Does an Additional Term Materially Alter a Contract*, 65 CATH. U.L. REV. 489, 510 (2016). For examples of such conflicting cases, see Bayway Ref. Co. v. Oxygenated Mktg. & Trading A.G., 215 F.3d 219, 224 (2d Cir. 2000) (holding that an arbitration clause is material as a matter of law); Dumont Tel. Co. v. Power & Tel. Supply Co., 962 F. Supp. 2d 1064, 1080 (N.D. Iowa 2013) (holding that an arbitration provision

II. MATERIALITY IN RELATION TO BREACH OF CONTRACT

This Part deals with several issues pertaining to materiality in the context of breach of contract. Section II.A describes the fundamental distinction between material and immaterial breach; Section II.B discusses the basis for determining if a breach is material; Section II.C shows how material breach analysis applies to anticipatory repudiation; and Section II.D examines the application of the concept of material breach in classifying contracts as executory in bankruptcy cases.

A. The Fundamental Distinction Between Material and Immaterial Breach of Contract

Any shortfall from a promised performance is a breach of contract.[24] However, some breaches are minor, while others are so serious and fundamental that they qualify as material. Unless the breaching party takes action to cure the breach in time, the material breach becomes total.[25] Where a party commits an immaterial breach of the contract but has otherwise adequately performed its contractual obligations, it is said to have substantially performed the contract.[26] Therefore, substantial performance, by definition, constitutes an immaterial breach.[27]

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should not be treated as *per se* material because materiality is a factual question to be resolved on the circumstances of each case).

24. *See* Balfour Beatty Rail, Inc. v. Kansas City S. Ry. Co., 173 F. Supp. 3d 363, 394–95 (N.D. Tex. 2016); Neonatal Prod. Grp., Inc. v. Shields, 312 F. Supp. 3d 1010, 1024 (D. Kan. 2018).

25. Under some circumstances a party who has committed a material breach of contract can eliminate or lessen the seriousness of the breach by curing it—rectifying the defect in performance. *See* RESTATEMENT (SECOND) OF CONTS. § 241(d) (AM. L. INST. 1981). A breach that is capable of being cured is described as a partial breach. *See id.* An incurable material breach or a curable material breach that is not cured is described as a total breach and gives rise to the remedies for material breach. *See id.* § 236(2). This Article does not address the issue of cure, so references to material breach assume the absence of cure, making the breach material and total. *See id.* § 236(1).

26. *See* United States v. Castaneda, 162 F.3d 832, 838 (5th Cir. 1998).

27. Gilbert v. Dep't of Just., 334 F.3d 1065, 1074 (finding that although a party breached a settlement agreement, the breach was not material because the party substantially complied with the agreement); Int'l Food Concepts, Inc. v. E. U.S. Agric. & Food Exp. Council Corp., No. 99-55333, 2000 WL 1659332, at *3 (9th Cir. Nov. 3, 2000) (stating that a party has substantially performed if the breach does not go to the essence of the contract); *Castaneda*, 162 F.3d at 837–38 (finding that the defendant's breach of a plea agreement did not deprive the government of the benefit

The materiality of a breach is crucial to rights and remedies of both the breaching and the nonbreaching party. A party who commits an immaterial breach is entitled to the contract price of the performance it has rendered, offset against any damages suffered by the nonbreaching party.[28] However, a party whose breach is material forfeits the right to any claim under the contract and is confined to a claim for unjust enrichment to the extent that the performance rendered has conferred an actual economic benefit on the victim of the breach.[29]

Regarding the nonbreaching party, an immaterial breach confines it to a claim for damages, commonly calculated as the cost of rectifying the deficient performance.[30] That is, where a breach is

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of its bargain, so the defendant had substantially performed and the government was not justified in revoking the plea agreement); *Neonatal Prod. Grp., Inc.*, 312 F. Supp. 3d at 1025 ("[S]ubstantial performance is the antithesis of material breach."); *Balfour Beatty Rail, Inc.*, 173 F. Supp. 3d at 396 ("[I]f a party has committed a material breach, . . . its performance cannot be substantial."); *Siouxland Ethanol, LLC*, 859 N.W.2d at 592; Hadden v. Consol. Edison Co. of N.Y., Inc., 312 N.E.2d 445, 449 (N.Y. 1974) (stating that substantial performance is determined by examining the degree of nonperformance, the purpose of the contract, and the extent to which the aggrieved party has already received the substantial benefit of the bargain); Cont'l Dredging, Inc. v. De-Kaizered, Inc., 120 S.W.3d 380, 394 (Tex. Ct. App. 2003) (holding that a party has substantially performed, and hence has not committed a material breach, if the defects in performance are not a pervasive and substantial deviation, so that the contract's essential objective can be accomplished by remedying them); JOHN EDWARD MURRAY, JR., MURRAY ON CONTRACTS 672 (5th ed. 2011) ("[A] finding of substantial performance is necessarily a finding that the breach is immaterial.").

28. *See* RAJ Partners, Ltd. v. Darco Constr. Corp., 217 S.W.3d 638, 643 (Tex. App. 2006).

29. *See Balfour Beatty Rail, Inc.*, 173 F. Supp. 3d at 396 (holding that a party who has breached materially may not sue on the contract for the performance rendered, but if the party has substantially performed, it may sue on the contract to recover for its performance); Strategic Res. Grp., Inc. v. Knight-Ridder, Inc., 870 So. 2d 846, 848 (Fla. Dist. Ct. App. 2003) (holding that substantial performance is so closely equivalent to what was bargained for that it would be unreasonable to deny the breaching party the full contract price, offset by whatever damages the nonbreaching party has suffered); *RAJ Partners, Ltd.*, 217 S.W.3d at 644 (holding that a party who has performed substantially may claim the contract price, offset by the cost of remedying the defects in performance); Horton v. Horton, 487 S.E.2d 200, 203 (Va. 1997) (holding that a party who has committed a material breach is not entitled to enforce the contract).

30. *See Balfour Beatty Rail, Inc.*, 173 F. Supp. 3d at 397 (holding that where there has been substantial performance, the nonbreaching party can recover the cost of completing the job or remedying the defects); *RAJ Partners, Ltd.*, 217 S.W.3d at 644–45 (stating that damages due to the victim of an immaterial breach are typically the cost of remedying the defects in performance); RESTATEMENT (SECOND) OF CONTS. § 236 (AM. L. INST. 1981) (explaining that damages for material and total breach are

immaterial, the nonbreaching party is confined to claiming damages to rectify the breach, but is not entitled to terminate the contract.[31] It is obliged to continue its own performance and to receive the breaching party's performance.[32] However, a material breach permits the nonbreaching party, not only to claim full expectation damages but also to withhold its own performance and to terminate the contract.[33] This termination right is explained by the doctrine of conditions and is based on the theory that the rendition of the breaching party's performance is a promissory condition of the nonbreaching party's duty to render its own performance.[34] Therefore, the breaching party's

based on all of the injured party's remaining rights of performance, but damages for minor breach are confined to compensating the injured party for only its remaining rights of performance).

31. *See* Miller v. Mills Constr., Inc., 352 F.3d 1166, 1172 (8th Cir. 2003).

32. *See id.* at 1171–72 (stating that a material breach entitles the aggrieved party to cancel the contract and claim damages, but a immaterial breach confines the party to claim damages for the immaterial breach); *Gilbert*, 334 F.3d at 1065 (holding that an employer could not terminate an employment contract and discharge an employee for a immaterial breach of the contract); Sw. Bell Yellow Pages, Inc., v. Robbins, 865 S.W.2d 361, 366 (Mo. Ct. App. 1993) (holding that if the breaching party substantially performed, the victim is confined to a claim for damages to allow for the defect in performance); *RAJ Partners, Ltd.*, 217 S.W.3d at 643 (holding that where there has been substantial performance, the nonbreaching party cannot use the breaching party's failure to complete performance as a basis for withholding its own performance); MURRAY, *supra* note 27, at 661–62.

33. *See* Arrow Master, Inc. v. Unique Forming Ltd., 12 F.3d 709, 714 (7th Cir. 1993) (holding that only a material breach justifies nonperformance by the other party); Eksouzian v. Albanese, No. CV 13-00728-PSG-MAN, 2015 WL 4720478, at *9 (C.D. Cal. 2015) (stating that material breach allows for rescission of the contract); Henderson v. Wells Fargo Bank, N.A., 974 F. Supp. 2d 993, 1005 (N.D. Tex. 2013) (holding that a material breach discharges the other party's performance obligations); *See* Siouxland Ethanol, LLC v. Sebade Bros., 859 N.W.2d 586, 592 (Neb. 2015); DC Farms, LLC v. Conagra Foods Lamb Weston, 317 P.3d 543, 550 (Wash. Ct. App. 2014) (explaining that by confining rescission to a material breach, substantial performance doctrine protects a party from the loss of rights under the contract).

34. A condition is an uncertain event that must or must not occur to make contractual performance due. *See* Capistrant v. Lifetouch Nat'l Sch. Studios, Inc., 916 N.W.2d 23, 27 (Minn. 2018); RESTATEMENT (SECOND) OF CONTS. § 224 cmt. b (AM. L. INST. 1981). A promissory condition could be express, implied in fact, or construed. *See id.* § 226 cmt. a (explaining that an event may be made a condition either if the parties expressly agree to it, or agreement can be inferred as a matter of interpretation from extrinsic evidence or may be construed as reasonable by the court). Note that not all conditions in a contract are promissory. *See* Liberty Mut. Ins. Co. v. Sumo-Nan, LLC, No. 14-00520, 2015 WL 6755212, at *16 (D. Haw. Nov. 4, 2015). Some conditions, typically those based on an event outside of the parties' control for which neither party takes responsibility, are non-promissory. *See id.* If a non-promissory condition is unfulfilled, the duty contingent on it does not arise, but, because neither party has promised that the condition will occur, its nonfulfillment is not a breach of

material breach of the promised performance is also the nonfulfillment of the promissory condition on which the nonbreaching party's performance duty is contingent.[35]

B. The Determination of Whether a Breach is Material

In some cases, the contract itself may settle the question of whether a breach is material by providing that the breach of the obligation in issue will be material. The stipulation of material breach may be made by direct language in the contract, denominating a particular breach as material,[36] or it may be made more subtly by expressly stating that the performance of one party is conditioned on the performance of the other.[37] Courts commonly give effect to the

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contract. *See id.* (stating that failure of a condition excuses the performance dependent on it but does not give rise to a breach of contract absent a promise that it would occur); RESTATEMENT (SECOND) OF CONTS. § 225(3) (AM. L. INST. 1981) (explaining that the nonoccurrence of a condition is not a breach by a party unless that party has promised that the condition will occur).

35. *See* RESTATEMENT (SECOND) OF CONTS. § 237 (AM. L. INST. 1981) (stating that it is a condition of each party's performance duties that there is no uncured material failure by the other party to render a performance due at an earlier time); MURRAY, *supra* note 27, at 663–64 (observing that § 237 treats a material breach as the nonoccurrence of a constructive condition that suspends or terminates the breach victim's performance obligations, which are contingent on the fulfillment of that constructive condition); Eric G. Anderson, *A New Look at Material Breach in the Law of Contracts*, 21 U.C. DAVIS L. REV. 1073, 1077–80 (1988) (explaining that damages alone are an insufficient remedy for material breach, so that the performance of the breaching party is treated as a condition of the nonbreaching party's performance duty, and failure of the condition entitles the nonbreaching party to cancel the contract). The general rule requiring material breach as a precondition to termination of the contract does not apply to the buyer in a sale of goods, in which the perfect tender rule of UCC § 2-601 gives the buyer the right to reject the goods and terminate the contract if the goods or tender fail to conform to the contract in any respect. *See* U.C.C. § 2-601 (AM. L. INST. & UNIF. L. COMM'N 1977).

36. *See, e.g.*, State v. Int'l Bus. Machs. Corp., 51 N.E.3d 150, 153 (Ind. 2016); Ellis v. Candia Trailers & Snow Equip., Inc., 58 A.3d 1164, 1172 (N.H. 2012).

37. The distinction between express and construed conditions is subtle and often difficult to draw. The Restatement acknowledges this by describing the distinction as "somewhat arbitrary." RESTATEMENT (SECOND) OF CONTS. § 226 cmt. c (AM. L. INST. 1981). Nevertheless, the distinction is important to materiality analysis. If the contract expressly makes the performance of one of the parties a condition of the other's performance, the court will give effect to this by requiring exact fulfillment of the condition and will not recognize substantial compliance with the condition (that is, substantial performance) as sufficient. *See* St. Louis Produce Mkt. v. Hughes, 735 F.3d 829, 832 (8th Cir. 2013). Therefore, nonfulfillment of the condition, even in a minor respect, is treated as a material breach. *See id.* (stating that an explicit condition precedent must be exactly and literally fulfilled for the duty dependent on it to arise);

parties' intent to treat the breach as material.[38] In the absence of contract language to this effect, the materiality of a breach is decided objectively, by weighing the consequences of the breach in light of the language of the contract, interpreted within the overall context,

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Davis Specialty Contracting, Inc. v. Turner Constr. Co., No. 13-cv-10352, 2016 WL 675909, at *5–6 (E.D. Mich. Feb. 8, 2016) (explaining that substantial performance does not satisfy an express condition, which must be exactly or literally fulfilled for liability to arise on the promise qualified by the condition); Oppenheimer & Co. v. Oppenheim, Appel, Dixon, & Co., 660 N.E.2d 415, 421 (N.Y. 1995) (requiring exact compliance with a condition relating to written landlord consent by a specified date); RESTATEMENT (SECOND) OF CONTS. § 226 cmt. c (AM. L. INST. 1981) (stating that where parties have clearly designated a performance as a condition, the court will ordinarily feel constrained to apply that term strictly). There is some authority that the rule of strict construction should be applied to implied-in-fact conditions as well. *See* Evergreen Square of Cudahy v. Wis. Hous. & Econ. Dev. Auth., No. 13–CV–743–JPS, 2016 WL 53871, at *9 (E.D. Wis. Jan 4, 2016) (holding that express and implied-in-fact conditions must both be exactly fulfilled for liability to arise on the promise qualified by the condition). However, the rule of strict compliance does not apply if the promissory condition is construed. *See* RESTATEMENT (SECOND) OF CONTS. § 226 cmt. c (AM. L. INST. 1981) (explaining that since the court has created the condition through the process of construction, it has the discretion to find that substantial compliance with the condition is sufficient and that the shortfall from exact compliance is not material). In a narrow range of cases, the equitable doctrine of unfair forfeiture may ameliorate the requirement of strict compliance with an express condition where the condition is not material and the court determines that applying it rigidly would have an unduly harsh impact on the breaching party. *See infra* Section VI.A.

38. *See* Gen. DataComm Indus., Inc. v. Arcara (*In re* Gen, DataComm Indus., Inc.), 407 F.3d 616, 624 (3d Cir. 2005), *cert. denied*, 126 S. Ct. 735 (2005) (holding that the court will respect a clear term in the contract that declares a particular breach to be material); Gilbert v. Dep't of Just., 334 F.3d 1065, 1072–73 (Fed. Cir. 2003) (examining the language of the parties' agreement to determine if it designates which breaches would be material); *Int'l Bus. Machs. Corp.*, 51 N.E.3d at 158–59 (stating that the breach was material because it was so denominated in the contract); EventMonitor, Inc. v. Leness, 44 N.E.3d 848, 850 (Mass. 2016) (stating that the employment contract defined material breach by specifying which employee breaches would permit the employer to terminate for cause); *Ellis*, 58 A.3d at 1172 (holding that the breach of a noncompetition provision is material because the contract so stipulated); Dunkin Donuts of Am., Inc. v. Middletown Donut Corp., 495 A.2d 66, 75 (N.J. 1985) (upholding a contract term designating a breach as material, even though it created a forfeiture). Note, however, that a court may not strictly enforce a "time of the essence" provision in a contract but may just treat it as one of the factors to be taken into account in deciding if a delay is material. *See* Gresser v. Hotzler, 604 N.W.2d 379, 384 (Minn. Ct. App. 2000) (explaining that a time of the essence clause is not dispositive but reinforces the interpretation that a delay in performance is material); RESTATEMENT (SECOND) OF CONTS. § 242(c) cmt. d (AM. L. INST. 1981) (explaining that the court must evaluate a "time of the essence" provision under the totality of the circumstances to determine if the delay is in fact a significant breach).

including the circumstances of the breach.[39] For this reason, it is impossible to define material breach in precise and exact terms.

It can be difficult to predict how a court may decide a dispute over the materiality of a breach. This uncertainty could create a hazard for the victim of the breach, who may not be sure, until the matter is ultimately resolved by litigation, whether it was justified in treating the breach as material and terminating the contract on that ground.[40] Recognizing that materiality is a flexible concept, not amenable to precise definition, Restatement (Second) of Contracts § 241 does not attempt a definitive definition of material breach. Instead the section lists five circumstances that it describes as "significant" in determining if a failure of performance is material.[41] These five circumstances are (1) the extent to which the injured party will be deprived of its reasonably expected benefit; (2) the extent to which damages would adequately compensate the victim; (3) the extent to which the breaching party will suffer forfeiture; (4) the likelihood of cure; and (5) the extent to which the conduct of the breaching party conforms to standards of good faith and fair dealing.[42]

Only the first circumstance—the extent to which the injured party will be deprived of its reasonably expected bargain—speaks

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39. *See* Gibson v. City of Cranston, 37 F.3d 731, 736–37 (1st Cir. 1994); First Annapolis Bancorp, Inc. v. United States, 75 Fed. Cl. 586, 589 (2007); Siouxland Ethanol, LLC v. Sebade Bros., 859 N.W.2d 586, 592 (Neb. 2015); Phipps v. Skyview Farms, Inc., 610 N.W.2d 723, 730–31 (Neb. 2000).

40. *See* MURRAY, *supra* note 27, § 108(D), at 669–70 (stating that if the judgment of the innocent party in treating the breach as material turns out to have been wrong in hindsight, that party will no longer be innocent, but will itself have materially breached the contract). The problem of unpredictability is highlighted in some cases. *Compare* Jenkins v. Eckerd Corp., 913 So. 2d 43, 54 (Fla. Dist. Ct. App. 2005), *with id.* at 59 (Ervin, J., dissenting) (highlighting the disagreement between the majority and dissent on whether the breach was material).

41. RESTATEMENT (SECOND) OF CONTS. § 241 (AM. L. INST. 1981) (stating that the "standard of materiality . . . is necessarily imprecise and flexible" and it describes this list as "circumstances, not rules").

42. *Id.* § 241(a)–(d) & cmts. d, e. Section 241(e) and Comment f substitutes the standard of good faith and fair dealing for the standard of willfulness, which was used in the Restatement of the Law of Contracts § 275. *See id.* § 241 cmt. f. Comment f to § 241 concedes that the good faith and fair dealing of the breaching party does not affect the severity of the breach, but it nevertheless identifies this factor as a relevant circumstance in deciding whether the injured party should be granted the remedy for material breach. *See id.*; *see also* Shay v. Gallagher, No. CV 93-0302341, 1995 WL 31026, at *5 (Conn. Super. Ct. Jan. 18, 1995) (stating that the conclusion that the defendant's breach was or was not willful or in violation of standards of good faith and fair dealing is not dispositive of materiality but must be weighed with all the other factors).

directly to the importance of the breach.[43] Courts have used equivalent formulations to articulate this central meaning of material breach, variously describing a material breach as one that relates to a matter of vital importance; or goes to the root or essence of the parties' agreement; or undermines or destroys its fundamental or central purpose; or breaches a performance that was a *sine qua non* of the contract, which would not have been made without it; or breaches fundamental obligations under the contract; or involves an essential or inducing feature of the contract.[44]

The second circumstance listed in § 241—the extent to which damages would adequately compensate the victim—is described in Comment c to § 241 as a corollary of the first factor.[45] The comment emphasizes situations in which damages are inadequate because they are difficult to prove.[46] Comment b to § 241 cautions that the extent of the victim's loss is relevant to but not determinative of the question of whether the injured party will be deprived of the reasonably expected benefit of the bargain.[47] The extent of economic harm resulting from the breach is clearly an important consideration in deciding materiality—the actual or potential financial harm resulting from the breach could be a strong indicator of materiality. However, proof of significant damages or a showing that damages would be difficult to prove is not an indispensable element of materiality where it otherwise appears that the breach went to the core of the parties' agreement.[48]

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43. *See* RESTATEMENT (SECOND) OF CONTS. § 241(a) (AM. L. INST. 1981). Comment b to § 241 rather understates the central role of this consideration by describing it merely as an "important circumstance" in determining whether the breach is material. *See id.* cmt. b.

44. *See* Gilbert v. Dept. of Just., 334 F.3d 1065, 1071 (Fed. Cir. 2003); Eksouzian v. Albanese, No. CV 13-00728–PSG–MAN, 2015 WL 4720478, at *8–9 (C.D. Cal. Aug. 7, 2015); DC Farms, LLC v. Conagra Foods Lamb Weston, Inc., 317 P.3d 543, 550 (Wash. Ct. App. 2014); Manpower, Inc. v. Mason, 405 F. Supp. 2d 959, 969 (E.D. Wis. 2005); Gibson v. City of Cranston, 37 F.3d 731, 737 (1st Cir. 1994); SMR Techs., Inc. v. Aircraft Parts Int'l Combs, Inc., 141 F. Supp. 2d 923, 932–33 (W.D. Tenn. 2001); Arrow Master, Inc. v. Unique Forming, Ltd., 12 F.3d 709, 714 (7th Cir. 1993); City of Meridian v. Petra Inc. 299 P.3d 232, 250 (Idaho 2013); *see also* Siouxland Ethanol, LLC v. Sebade Bros., LLC, 859 N.W.2d 586, 592 (Neb. 2015); EventMonitor, Inc. v. Leness, 44 N.E.3d 848, 853 (Mass. 2016).

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

46. *See id.* § 241 cmt. c (explaining the difficulty in proving loss with sufficient certainty affects adequacy of compensation).

47. *See id.* §241(c)–(e).

48. *See* Ellis v. Candia Trailers & Snow Equip., Inc., 58 A.3d 1164, 1172 (N.H. 2012); *see also* Horton v. Horton, 487 S.E.2d 200, 204 (Va. 1997).

The other three circumstances identified in § 241 are not directly related to the significance of the breach.[49] The possibility of cure, listed in § 241(d), is not really apposite to the question of materiality, but speaks more to the totality of the breach.[50] A material breach is not total unless it is incurable or uncured—and if it is effectively cured, it ceases to be a material breach, even if it would have been a material breach if left uncured.[51] The other two circumstances—forfeiture and failure of good faith and fair dealing—do not address the question of whether the breach goes to the heart of the bargain. Rather, they identify two specific ancillary considerations of fairness that a court may take into account in evaluating the appropriateness of the remedy for total material breach. Their purpose is to temper materiality analysis by examining not only the significance of the breach, but also the overall fairness of going beyond an award of damages to compensate for the shortfall in performance, and granting the more draconian remedy of contract termination.[52] The specific considerations of forfeiture and good faith do not form the basis of the materiality determination in most cases, in which the importance of the breach to the basis of the bargain is the crucial criterion.[53]

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49. *See* RESTATEMENT (SECOND) OF CONTS. § 241(c)–(e) (AM. L. INST. 1981).

50. *See id.* § 241(d) cmt. e (stating that the likelihood of cure gives the breach victim some security that performance will be rendered and argues against treating the failure of performance as a material breach).

51. See *supra* note 25 and accompanying text for information on the relationship of cure to material breach.

52. Section 241 is based substantially on RESTATEMENT OF THE LAW OF CONTS. § 275 (AM. L. INST. 1981), which was heavily influenced by the view of its reporter, Professor Williston. Comment a to RESTATEMENT OF THE LAW OF CONTRACTS § 275 indicates that the purpose of including factors unrelated to the seriousness of the breach was to take into account the inherent justice of allowing the injured party to terminate the contract. *See* Anderson, *supra* note 35, at 1083–84, 1091 (criticizing the § 241 factors as inconsistent or generally inapplicable, and arguing that they do not contribute much to a workable materiality standard).

53. Courts sometimes cite all the § 241 factors but focus only on the central question of whether the breach is serious enough to qualify as material. *See, e.g.*, *In re* Exide Techs., 607 F.3d 957, 963 (3d Cir. 2010) (acknowledging that willfulness of the breach may be relevant but holding that the crucial factors to be considered in determining material breach are the ratio of performance rendered to that unperformed, the quantitative character of the default, the degree to which the contract's purpose has been frustrated, and the extent to which the aggrieved party has received the substantial benefit of the promised performance); *see also* Gibson v. City of Cranston, 37 F.3d 731, 736–37 (1st Cir. 1994) (citing but not applying the § 241 factors); United States v. Castaneda, 162 F.3d 832, 838 n.29 (5th Cir. 1998) (citing the factors of likely cure and the breaching party's good faith, but focusing on whether the breach deprived the victim of the benefit of its bargain); Henderson v. Wells Fargo Bank, N.A., 974 F. Supp. 2d 993, 1005–06 (N.D. Tex. 2013) (citing § 241 but

However, courts commonly acknowledge the relevance of considerations of fairness in deciding if a breach is material.[54] These considerations are informed by the crucial role of materiality doctrine in breach situations, which is to determine the extent to which the breach is so fundamental that it actually deprives the nonbreaching party of the benefit of its bargain, justifying its termination of the contract and claim for full expectation damages.[55] A key question on this inquiry is whether the victim's right to terminate the contract and claim full expectation losses is necessary to protect its interest in future performance.[56]

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disregarding all the factors except for the importance of the breach); Hadden v. Consol. Edison of N.Y., Inc., 312 N.E.2d 445, 449 (N.Y. 1974) (recognizing willfulness of the breach as a factor in deciding materiality, but focusing on the extent of nonperformance and the degree to which the breach frustrated the purpose of the contract); Cont'l Dredging, Inc. v. De-Kaizered, Inc., 120 S.W.3d 380, 395 (Tex. App. 2003) (citing the § 241 factors, but focusing on the importance of the breach, in which the ratio between what was promised and what was left unperformed will often be decisive); Anderson, *supra* note 35, at 1089–91 (arguing that some courts cite § 241, but ignore it in the analysis of materiality or fail to apply it meaningfully).

54. Courts sometimes express this as the "inherent justice" of the matter. *See, e.g.*, Arrow Master, Inc. v. Unique Forming, Ltd., 12 F.3d 709, 714 (7th Cir. 1993); *see also* Hickox v. Bell, 552 N.E.2d 1133, 1144 (Ill. App. Ct. 1990).

55. *See* Miller v. Mills Constr., Inc., 352 F.3d 1166, 1172 (8th Cir. 2003) (stating that a material breach defeats the very object of the contract, making the other's performance impossible and excusing it); Siouxland Ethanol, LLC v. Sebade Bros., 859 N.W.2d 586, 592 (Neb. 2015) (finding a material breach is a failure to do something so fundamental as to defeat the essential purpose of the contract, making continued performance virtually pointless and excusing it); *Hickox*, 552 N.E.2d at 1144 (noting a material breach goes to the essential purpose of the contract and defeats it); RESTATEMENT (SECOND) OF CONTS. § 236 (AM. L. INST. 1981) (stating a claim for damages for total material breach is based on the injured party's remaining rights of performance); *Id.* § 237 (stating that it is a condition of the injured party's remaining performance duties that the other party has not committed an uncured material breach).

56. *See* Gilbert v. Dep't of Just., 334 F.3d 1065, 1075 (Fed. Cir. 2003) (holding that an employee's breach of a "last chance" probationary agreement was not material because the employee essentially completed a counseling and rehabilitation program, the purpose of which was to treat his alcoholism); *see also Miller*, 352 F.3d at 1172 (holding that the prime contractor's failure to supply appropriate materials to the subcontractor prevented the subcontractor from performing its work and defeated the essential purpose of the contract); *Castaneda*, 162 F.3d at 837–39 (asserting that in order to revoke a plea agreement on grounds of the defendant's breach, the government must prove that the breach was material in that it deprived the government of the benefit of its bargain); Vereen v. Hargrove, 96 S.W.3d 762, 765–66 (Ark. Ct. App. 2003) (holding that a late payment of rent was not material because it was of little consequence); *Hickox*, 552 N.E.2d at 1144 (stating that a breach is not material if the general purpose of the contract could still be accomplished); Weisman v. N.J. Dep't of Hum. Servs., 982 F. Supp. 2d 386, 391

C. Materiality in Relation to Repudiation

The emphasis on protecting the nonbreaching party's interest in future performance is most starkly implicated where one of the parties (the obligor) repudiates the contract in advance of the due time for its performance. A repudiation is the obligor's expression of intent, either by clear, unequivocal statement or by voluntary affirmative conduct, to commit a breach of the contract when its performance becomes due.[57] Like a breach, a repudiation may be material—an expression of intent not to perform the contract at all or not to perform a core obligation under the contract; or it may be immaterial—an expression of intent not to perform a minor or ancillary commitment under the contract. The materiality of the repudiation is central to obligee's right to act on the repudiation. To constitute an actionable repudiation, giving the obligee the right to terminate the contract immediately and claim damages for total breach, the obligor's statement or conduct must renounce a material obligation under the contract.[58] Repudiation is, in effect, an anticipatory breach of contract, so the basic meaning of materiality in this context—a serious breach that defeats the essential purpose of the contract—is the same as it is for breach. The

(D.N.J. 2013) (asserting that to determine the materiality of a breach, the court should evaluate the quantitative ratio that the breach bears to the contract as a whole and the degree of probability that it will be repeated); EventMonitor, Inc. v. Leness, 44 N.E.3d 848, 854–55 (Mass. 2016) (holding that an employee's copying of the employer's proprietary data was not a material breach because the employee neither used nor disclosed the information, and therefore did not undermine the essential purpose of the contract—the protection of the employer's confidential information); *Siouxland*, 859 N.W.2d at 592–93 (holding that the buyer's significant and repeated failure to order minimum quantities of the product specified in the contract was serious enough to defeat the essential purpose of the contract and made the other party's performance virtually pointless); Anderson, *supra* note 35, at 1092–93, 1106–07 (arguing that the most useful approach to deciding materiality is to focus on protecting the victim's interest in future performance, determined objectively without imposing unnecessary costs on the breaching party).

57. RESTATEMENT (SECOND) OF CONTS. § 250 (AM. L. INST. 1981).

58. *See id.* at cmt. d ("[F]or a statement or an act to be a repudiation, the threatened breach must be of sufficient gravity that, if the breach actually occurred, it would of itself give the obligee a claim for damages for total breach . . . ."); *see also* E. ALLAN FARNSWORTH, CONTRACTS § 8.20, at 581, 583 (4th ed. 2004) (stating that the repudiation of material obligations is treated as the nonoccurrence of a condition to the obligee's performance); *Id.* § 8.21, at 586–87 (stating that the repudiation must be serious enough that the obligee could treat it as a total breach if it occurred at the time of performance); U.C.C. § 2-610 (AM. L. INST. & UNIF. L. COMM'N 2017) (using materiality, meaning substantial impairment of the value of the contract, as a basis for terminating the contract on grounds of repudiation).

crucial question to be answered is whether the obligor's words or actions may reasonably be interpreted to be such a clear and serious disavowal of its fundamental obligations that it is appropriate to allow the obligee the right to terminate the contract immediately, in advance of the due date of the performance.

In contrast to a repudiation, which is, by definition, a deliberate and voluntary anticipatory rejection of contract, a breach at the time of performance may or may not be deliberate and intentional. Therefore, the equitable considerations that may be relevant to the determination of materiality in breach situations, such as good faith and unfair forfeiture, are inapposite in relation to the purposeful act of repudiation.[59] Instead, courts tend to focus more sharply on meaning and deliberateness of the apparent manifestation of intent not to perform and its impact on the obligee's prospects of receiving the fundamental benefit of the bargained performance.[60]

D. The Issue of Material Breach in Relation to the Assumption of an Executory Contract in Bankruptcy

As part of the bankruptcy policy of enabling the financial rehabilitation of a debtor, § 365 of the Bankruptcy Code permits the trustee of the bankruptcy estate, with court approval, to assume or reject an executory contract entered into by the debtor prior to the bankruptcy.[61] The goal of § 365 is to enable the estate to obtain the benefit of the debtor's advantageous contracts while rejecting the debtor's disadvantageous or undesirable contracts.[62] However, the

59. *See* FARNSWORTH, *supra* note 58, §8.21, at 587–88 (stating that a party's incorrect but good faith belief that it has the right to alter or refuse performance does not excuse a repudiation); RESTATEMENT (SECOND) OF CONTS. §§ 241(d), 256 (AM. L. INST. 1981) (identifying the concept of cure as a consideration in determining the materiality of a breach, which does have an analogue in the principle that a party may retract a repudiation at any time before it is acted upon or accepted by the other party).

60. *See* Legacy Acad., Inc. v. Doles-Smith Enters., 812 S.E.2d 72, 77 (Ga. Ct. App. 2018) (stating that the repudiation must apply to the entire contract and must be an unqualified refusal to fulfill any future obligations under the contract); Princes Point LLC v. Muss Dev. LLC, 87 N.E.3d 121, 124 (N.Y. 2017) (stating that the expression of intent not to perform must be voluntary, positive, and unequivocal to entitle the obligee to an immediate claim for damages for total breach).

61. *See* 11 U.S.C. § 365 (2020) ("[T]he trustee, subject to the court's approval, may assume or reject any executory contract or unexpired lease of the debtor.").

62. *See In re* Exide Techs., 607 F.3d 957, 962 (3d Cir. 2010) (stating that the estate's ability to assume or reject the debtor's executory contracts is based on the bankruptcy policy of debtor rehabilitation).

estate only has the right to decide whether to assume or reject the debtor's unperformed contract if the contract qualifies as executory as defined in bankruptcy law.[63] The standard for determining material breach under contract law is directly relevant to the question of whether the contract qualifies as executory under bankruptcy law.

If the trustee assumes the contract, the estate is substituted for the debtor as a party to the contract and it takes over the debtor's obligations and acquires its rights under the contract, but if the trustee rejects the contract, 11 U.S.C. § 101(10)(B) treats the other party as creditor with a breach of contract claim against the estate.[64] The trustee is motivated to assume the contract if the estate would gain an advantage from it by increasing the funds available for the payment of creditors or advancing the debtor's economic recovery, but would reject the contract if it is burdensome or otherwise not in the estate's interests to continue it. The Bankruptcy Code does not define "executory contract," but the standard meaning adopted by most courts is that a contract qualifies as executory if, at the time that the bankruptcy petition is filed, the obligations of both parties are so far unperformed that the failure of either party to perform would constitute a material breach, excusing the performance of the other.[65]

The question of whether there are unperformed material obligations on both sides is determined under general principles of contract law.[66] Therefore, the contract law concept of materiality could play a significant role in the estate's fortunes. Although the basic meaning of materiality in this context follows contract law, the aim of the inquiry is different. It is not concerned with the breach victim's remedy, but with the needs and interests of the estate, balanced against the fairness of assumption or rejection on the non-debtor party.[67]

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63. *See id.*

64. *See* 11 U.S.C. § 101(10)(B) (2020).

65. *See In re Exide Techs.*, 607 F.3d at 962; *see also* Olah v. Baird (*In re* Baird), 567 F.3d 1207, 1211 (10th Cir. 2009); Gen. Datacomm Indus., Inc. v. Arcara, 407 F.3d 616, 623 (3d Cir. 2005); Lifemark Hosps., Inc. v. Liljeberg Enters., 304 F.3d 410, 436 (5th Cir. 2002).

66. *See In re Exide Techs*., 607 F.3d at 962–63 (finding that the contract was not executory because the non-debtor party had substantially performed under contract law's test of materiality); *Gen. Datacomm Indus., Inc.*, 407 F.3d at 623–24 (holding the contract was executory because the contract itself designated as a material breach the failure to render the very performance that was outstanding at the time of bankruptcy).

67. *See* Agarwal v. Pomona Valley Med. Grp., 476 F.3d 665, 670–71, 674 (9th Cir. 2007) (reviewing the trustee's decision to reject an executory contract, the court evaluates not only the benefit to the estate but also the reasonableness and fairness to the other contracting party).

III. MATERIALITY IN RELATION TO CONTRACT FORMATION

As Part II explains, when materiality is assessed in breach situations, the purpose of the inquiry is to determine whether the breach is serious enough to entitle the nonbreaching party to terminate the contract and claim full expectation relief.[68] Where materiality is in issue in relation to contract formation, the inquiry has a different goal—to decide if the parties formed an enforceable contract, or if a contract was formed, to decide what terms became part of the contract.[69] In formation issues, the court's goal is to try to give effect to the manifested intent of the parties by upholding and enforcing a contract that was apparently intended but not binding the parties to a contract that was not. As with breach, materiality is judged primarily on the importance of the term to the basis of the bargain, but the concern about giving effect to the parties' intent impacts the analysis.

A. Materiality in Relation to Offer and Acceptance

At common law, and under Uniform Commercial Code (UCC) Article 2, a manifestation of intent to enter a contract does not qualify as an offer unless its terms, interpreted in context with reference to any pertinent extrinsic evidence, are reasonably certain.[70] To qualify as reasonably certain, at common law, all material terms must be included in the proposal to enter the contract, and the proposal as a whole must provide a basis for determining a breach and an appropriate remedy.[71] Therefore, at common law, the importance of an unclear or omitted term in the proposal to enter the contract is crucial

68. *See supra* Section II.A.

69. *See* United Pub. Workers Local 646 v. Dawson Int'l, Inc., 149 P.3d 495, 509 (Haw. 2006) (stating that it is an elementary rule of contract law that the parties must manifest agreement on all essential elements to create a binding contract).

70. *See generally* U.C.C. §§ 2-201 to 2-725 (AM. L. INST. & UNIF. L. COMM'N 2017) (governing contracts for a sale of goods and having no provisions that specifically deal with offers); *see also* § 1-103(b) (making common law principles applicable unless displaced by UCC provisions); RESTATEMENT (SECOND) OF CONTS. § 33 (AM. L. INST. 1981).

71. *See* RESTATEMENT (SECOND) OF CONTS. § 33 cmt. a (stating that uncertainty as to "incidental or collateral matters" is not likely to be fatal to the existence of a contract, but uncertainty as to an "essential" term precludes contract formation). The comment uses the word "essential" rather than "material," but these words are functionally synonymous. *See supra* note 2.

to the determination of whether the proposal is certain enough to qualify as an offer.[72]

The issue of materiality may also arise with regard to the question of whether or not the offeree's response to the offer qualifies as an acceptance. The standard rule of common law, commonly called the mirror image rule, is that unless a difference between the terms of the offer and acceptance can be reconciled by interpreting them as consistent, any deviation from the offer in the response disqualifies it as an acceptance.[73] As a result, such a response is likely treated as a rejection or a counteroffer.[74] If it is a counteroffer, a contract will only be formed if the offeror accepts the counteroffer, either expressly or by performing after receiving it.[75]

The rule requiring exact correspondence between the offer and acceptance is endorsed by Restatement (Second) of Contracts and is generally applied by courts.[76] However, some courts have loosened the rigor of the rule by holding that an offeree's response to an offer is not disqualified as an acceptance merely because it contains terms that vary from the offer in immaterial respects.[77] Different terms in an

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72. *Compare* U.C.C. § 2-204(3) (AM. L. INST. & UNIF. L. COMM'N 2011), *with* RESTATEMENT (SECOND) OF CONTS. § 33 cmt. a (AM. L. INST. 1981) (specifying more clearly that uncertainty as to an essential term is fatal to contract formation). UCC § 2-204(3) merely expresses the general policy that the court should uphold a contract if the parties intended to make it and there is a reasonable basis for giving an appropriate remedy. Neither UCC § 2-204(3) itself, nor its Official Comment indicate that the inclusion of all essential terms is crucial.

73. *See* MURRAY, *supra* note 27, §49(A), at 167 (explaining that under the mirror image rule, the acceptance must exactly match the offer).

74. *See id.* (explaining that under the mirror image rule, a purported acceptance that seeks to vary the terms of the offer in any way cannot be an acceptance but is actually a counteroffer).

75. *See* Paul Gottlieb & Co. v. Alps S. Corp., 985 So. 2d 1, 6 (Fla. Dist. Ct. App. 2007); *see also* Polytop Corp. v. Chipsco, Inc., 826 A.2d 945, 947, 949 (R.I. 2003).

76. *See* RESTATEMENT (SECOND) OF CONTS. §§ 58, 59 (AM. L. INST. 1981); JOSEPH M. PERILLO, CALAMARI AND PERILLO ON CONTRACTS 85 (6th ed. 2009) (stating that courts have enforced the mirror image rule rigorously); *see also* MURRAY, *supra* note 27, § 49(A), at 167.

77. *See* Hollywood Fantasy Corp. v. Gabor, 151 F.3d 203, 208 (5th Cir. 1998) (acknowledging the materiality exception to the mirror image rule); *see also* Raydon Expl., Inc. v. Ladd, 902 F.2d 1496, 1500 (10th Cir. 1990) (noting that immaterial variances between offer and acceptance are to be disregarded); Hoyt R. Matise Co. v. Zurn, 754 F.2d 560, 566 (5th Cir. 1985) (holding that to fail as an acceptance, the offeree's response must differ in a material respect from the offer); Sung v. Hamilton, 676 F. Supp. 2d 990, 999–1000 (D. Haw. 2009) (reciting the traditional mirror image rule, but then qualifying it by stating that there must be agreement on all essential or material elements); Gresser v. Hotzler, 604 N.W.2d 379,

offeree's response to the offer qualify as material if the change alters the legal meaning and effect of the proposed contract by substantially altering the performance obligations of the parties.[78] The inquiry into materiality therefore focuses on the impact of the variation on the fundamental rights of the parties.[79] If the variation is severe enough to effect the core basis of the bargain offered by the offeror, the parties did not actually make a contract.[80] Yet if the variation does not significantly change the offered bargain, rigid application of the mirror image rule would be unduly technical and contrary to the true intent of the parties.[81] In a sale of goods, UCC § 2-207 eliminates the problem of the mirror image rule by abolishing it and specifically recognizing that a response to an offer can be an acceptance, even if it contains terms that are additional to or different from the offer.[82] Therefore, provided that the response to an offer is a definite and timely expression of acceptance and is not stated to be conditional on the offeror's assent to additional or different terms, it constitutes an acceptance.[83] However, the response to the offer may fail to qualify as a definite expression of acceptance if there is a significant divergence between the offer and the response, particularly with regard to

383–84 (Minn. Ct. App. 2000) (adopting case law holding that the mirror image should be relaxed, so that only a response that differs materially from the offer should prevent contract formation); PERILLO, *supra* note 76, at 85.

78. *See Gresser*, 604 N.W.2d at 384 (holding that although there is meager authority on what constitutes a material term, the focus should be on whether the new term in the acceptance substantially alters the parties' performance obligations as set out in the offer); *see also Hollywood Fantasy Corp.*, 151 F.3d at 208–09 (stating that material departures from the offer in an acceptance generally involve significant increases in a party's financial obligations or exposure, or in a party's contractual duties, so that changes in ancillary matters that did not increase the offeror's performance costs were not material); *Raydon Expl., Inc.*, 902 F.2d at 1500 (explaining that terms in an acceptance relating to collateral or unimportant matters are immaterial variances).

79. *See Hollywood Fantasy Corp.*,151 F.3d at 210.

80. *See id.* (explaining how the rule requiring the acceptance to accord with the offer protects the offeror's control of the essential terms of the contract but should not be applied to defeat contract formation where it is clear that the offer has in fact been accepted).

81. *See id.*

82. *See* FARNSWORTH, *supra* note 58, § 3.21, at 161–62; *see also* Davis, *supra* note 23, at 495–96; Stephens, *supra* note 23, at 240 (stating that a principal purpose of UCC § 2-207 was to remedy the injustice caused by the common law mirror image rule).

83. *See* U.C.C. § 2-207(1) (AM. L. INST. & UNIF. L. COMM'N 2011).

transaction-specific terms that are not boilerplate.[84] The effect of this rule is to distinguish two degrees of materiality under UCC § 2-207. Some differences between the offer and response may be so profoundly material as to prevent contract formation altogether. Others may not defeat contract formation but may be excluded from the contract under UCC § 2-207(2).

B. Materiality in Relation to the Treatment of Additional or Different Terms in an Acceptance: UCC § 2-207(2)

UCC § 2-207(1) is designed to deal with situations in which a buyer and seller exchange documents,[85] typically standard forms, for the purpose of forming a contract for the sale of goods, but the purported acceptance contains terms that are additional to or different from those offered.[86] As noted in Section III.A, if these terms significantly change the basis of the bargain proposed by the offeror,

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84. *See* ConocoPhillips Alaska, Inc. v. Williams Alaska Petroleum, Inc., 322 P.3d 114, 129–30 (Alaska 2014) (observing that it is not clear from the UCC or case law how much a purported acceptance may differ from an offer and still qualify as a definite acceptance under UCC § 2-207, but concluding, rather cryptically, that the response to the offer will not qualify as an acceptance if it differs "*significantly* (not just materially) from the offer on a *sufficiently important* term"); *see also* FARNSWORTH, *supra* note 58, § 3.21, at 165 (stating that under UCC § 2-207(1), a reply from an offeree that varies terms that are usually subject to bargaining is likely not an expression of acceptance); MURRAY, *supra* note 27, § 50, at 169–70 (stating that it is absurd to suggest that an acceptance that changes the fundamental bargain offered could qualify as a definite expression of acceptance under UCC § 2-207(1)).

85. As used here, a "document" could be either tangible or electronic.

86. *See* U.C.C. § 2-207(1) (AM. L. INST. & UNIF. L. COMM'N 2011). In addition to dealing with the acceptance of an offer, UCC § 2-207(1) deals with additional terms in a post-formation "written confirmation." If the document is sent to confirm a contract that the parties have already entered informally or orally, the document does not implicate the question of whether a contract has been formed, so the sole question is whether a term in the confirmation became part of the contract. *See id.* cmt. 1. For purposes of this Article, it does not matter whether the document is an acceptance or confirmation because these situations raise the same question of whether a term in the document constitutes a material alteration of either an offer or a previously formed oral or informal agreement. No distinction between these situations is apparent in the case law with regard to the issue of material alteration. For examples of cases applying materiality analysis to the confirmation of a previous oral or informal agreement, see generally Bayway Refin. Co. v. Oxygenated Mktg. & Trading A.G., 215 F.3d 219 (2d Cir. 2000); Dumont Tel. Co. v. Power Tel. Supply Co., 962 F. Supp. 2d 1064 (N.D. Iowa 2013); Leica Geosystems, Inc. v. L.W.S. Leasing, Inc., 872 F. Supp. 2d 1191 (D. Colo. 2012); Jada Toys, Inc. v. Chic. Imp., Inc., No. 07 C 699, 2009 WL 3055370 (N.D. Ill. Sept. 18, 2009). For the sake of simplicity, this discussion deals only with new terms in an acceptance.

the response may not qualify as acceptance at all.[87] However, UCC § 2-207 recognizes that in some circumstances, particularly where variations between the offer and response are contained in standard boilerplate, a contract was formed despite the fact that the acceptance contains terms that are different from or additional to those contained in the offer.[88]

In essence, if it is determined under UCC § 2-207(1) that the response to an offer with new terms is an acceptance, UCC § 2-207(2) treats those new terms as proposals for addition to the contract.[89] If the parties are not both merchants as defined in UCC § 2-104(1), the proposals do not become part of the contract unless deliberately accepted by the recipient.[90] However, if both parties are merchants, UCC § 2-207(2) states that the terms become part of the contract unless one of three conditions are satisfied: the offer expressly limits acceptance to its terms, the offeror makes a timely objection to the new terms, or the new terms materially alter the offer.[91] The only condition relevant to this discussion is that the new terms do not become part of the contract if they materially alter it.[92] The party

87. *See supra* note 84.

88. *See* U.C.C. §2-207(1) (AM. L. INST. & UNIF. L. COMM'N 2011) ("A definite . . . expression of acceptance . . . operates as an acceptance even though it states terms additional to or different from those offered . . . .").

89. UCC § 2-207(1) refers to additional or different terms—that is, terms that add to or contradict the offer—while subsection (2) mentions only additional terms, leaving unclear if different terms are covered by subsection (2). *See* U.C.C. § 2-207(1), (2) (AM. L. INST. & UNIF. L. COMM'N 2011). This has led to interpretational questions about the distinction between additional and different terms, and whether subsection (2) should be applied to a term that is classified as different, rather than additional. *See* MURRAY, *supra* note 27, § 51(F), at 185–86. These interpretational puzzles need not be discussed here because they are not relevant to the narrow issue of the meaning of materiality in UCC § 2-207(2). Therefore, this discussion refers generically to both different and additional terms as "new terms."

90. UCC § 2-104(1) recognizes two categories of merchant. *See* U.C.C. § 2-104(1) (AM. L. INST. & UNIF. L. COMM'N 2011). Merchants include not only those who deal in goods of the kind involved in the transaction but also those who, personally or through an agent, hold themselves out by occupation as having knowledge or skill relating to the goods or practices involved in the transaction. *See id.*; Kloceck v. Gateway, Inc., 104 F. Supp. 2d 1332, 1341 (D. Kan. 2000) (holding that where a buyer is not a merchant, a new term in the seller's written confirmation is merely a proposal for addition to the contract, which must be accepted by the buyer).

91. *See* U.C.C. § 2-207(2) (AM. L. INST. & UNIF. L. COMM'N 2011) ("Between merchants such [additional] terms become part of the contract unless: (a) the offer expressly limits acceptance to the terms of the offer; (b) they materially alter it; or (c) notification of objection to them has already been given or is given within a reasonable time after notice of them is received.").

92. *See id.* § 2-207(2)(b).

seeking to exclude the term has the burden of proving that it is material.[93]

The Official Comments to UCC § 2-207 present guidelines for determining if an alteration is material, but they are quite obscure.[94] Comment 3 vaguely hints that materiality depends on whether the term is important enough to change the bargain in a significant respect.[95] However, Comment 4 embellishes the standard meaning of materiality by requiring that the alteration must "result in surprise or hardship if incorporated without express awareness by the other party."[96] This standard is confusing. By using the disjunctive "or," Comment 4 suggests that materiality could result from either surprise or hardship—it is not necessary to show both. However, Comment 5 makes no reference to hardship and refers only to provisions that "involve no element of unreasonable surprise."[97] It is not clear why the test morphed from surprise or hardship to unreasonable surprise, and the Comments offer no explanation of what would constitute unreasonable surprise, or why hardship was eliminated as a factor in Comment 5.[98] The Comments further obfuscate the test for materiality by including selective examples, in Comment 4, of specific terms that would normally be material alterations and, in Comment 5, of specific terms that would normally not be.[99] The Comments do not explain why

93. *See* Bayway Refin. Co. v. Oxygenated Mktg. & Trading A.G., 215 F.3d 219, 223 (2d Cir. 2000) (holding that UCC § 2-207 creates an assumption that the addition becomes part of the contract, so the party alleging that it is not part of the contract has the burden of proof); *see also* Paul Gottlieb & Co. v. Alps S. Corp., 985 So. 2d 1, 6 (Fla. Dist. Ct. App. 2007) (explaining that the party seeking to exclude the term must prove that it is material).

94. *See* Prod. Components, Inc. v. Regency Door & Hardware, Inc., 568 F. Supp. 651, 653 (S.D. Ind. 1983) (noting that the surprise and hardship standard is "conspicuously vague"); *see also* Davis, *supra* note 23, at 505 (observing that the inconsistency between the comments and the lack of definition of surprise and hardship have confused the relationship between hardship, surprise, and material alteration).

95. U.C.C. § 2-207(2) cmt. 3 (AM. L. INST. & UNIF. L. COMM'N 2011) (stating that absent express agreement by the recipient, the term will not be included if it materially alters the bargain, but that the term will be incorporated into the contract if it "would not so change the bargain").

96. *Id.* cmt. 4.

97. *Id.* cmt. 5.

98. *See* Stephens, *supra* note 23, at 247–48 (noting that the Official Comments to UCC §2-207 offer no explanation of the change in standard in Comments 4 and 5).

99. For example, one of the examples of material alteration offered by Comment 4 is a clause that requires "a guaranty of 90% or 100% deliveries in a case such as a contract by cannery, where the usage of the trade allows greater quantity

those terms were selected, and the use of specific examples seems to suggest that for some terms, materiality can be determined as a matter of law without applying the test of materiality proposed by the Comments. This has led to inconsistent decisions on whether some terms can be treated as material *per se*, without an examination of the significance of the term in the context of the actual transaction.[100]

Despite their confusing characteristics, the Comments do indicate that the baseline test for materiality in UCC § 2-207(2) is the importance of the term to the central purpose of the bargain.[101] The hardship standard may or may not be a pertinent inquiry. Some courts and commentators do consider the hardship standard while others have concluded that hardship is not a relevant factor and should be disregarded.[102] Courts that apply it require that the term must go

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leeways." U.C.C. § 2-207 cmt. 4 (AM. L. INST. & UNIF. L. COMM'N 2011). One of the examples of an immaterial alteration in Comment 5 is "a clause setting forth and perhaps enlarging slightly upon the seller's exemption due to supervening clauses beyond his control . . . ." *Id.* cmt. 5.

100. With regard to arbitration clauses, see *Bayway Refin. Co.*, 215 F.3d at 224 (explaining that an arbitration clause is material as a matter of law). *Contra* Dobson Bros. Constr. Co. v. Arr-Maz Prods., L.P., No. 4:12-CV-3118, 2013 WL 12141246, at *8 (D. Neb. May 7, 2013) (rejecting case law that an arbitration clause is *per se* a material alteration because the facts showed that in this case the form containing the clause had been used in a course of dealing); Dumont Tel. Co. v. Power Tel. Supply Co., 962 F. Supp. 2d 1064, 1080 (N.D. Iowa 2013) (explaining that an arbitration provision should not be treated as *per se* material because materiality is a factual question to be resolved on the circumstances of each case). With regard to other provisions, see Leica Geosystems, Inc. v. L.W.S. Leasing, Inc., 872 F. Supp. 2d 1191, 1200 (D. Colo. 2012) (holding that a warranty disclaimer is material because it is included as an example of a material term in Official Comment 4 to UCC §2-207); ISRA Vision A.G. v. Burton Indus., 654 F. Supp. 2d 638, 648–49 (E.D. Mich. 2009) (holding that a non-assignment clause is material as a matter of law).

101. *See Leica Geosystems, Inc.*, 872 F. Supp. 2d at 1201 (holding a choice of law provision not to be a material alteration because the law of the selected state was largely the same as that of the state that would otherwise have governed the matter); *see also Prod. Components, Inc.*, 568 F. Supp. at 654 (holding a forum selection clause to be material because the party waives many normal procedural and substantive rights); Borden Chem., Inc. v. Jahn Foundry Corp., 834 N.E.2d 1227, 1231–32 (holding that an indemnity clause and disclaimer of warranties in an acceptance was a material alteration because it departed significantly from the offer by shifting legal liability).

102. For examples of cases that do not consider the hardship standard, see Union Carbide Corp. v. Oscar Mayer Foods Corp., 947 F.2d 1333, 1336 (7th Cir. 1991) (reasoning that the test of surprise and hardship is misleading because hardship is a consequence, not a criterion); see also Paul Gottlieb & Co. v. Alps S. Corp., 985 So. 2d 1, 8 (Fla. Dist. Ct. App. 2007); Stephens, *supra* note 23 at 247–48 (criticizing the inexplicable change in the standard in Official Comments 4 and 5). For cases applying the hardship standard, see *infra* note 103. *See* Rocheux International of N.J.,

beyond being merely disadvantageous to the offeror or contrary to its interests, but must impose substantial economic hardship on the offeror.[103] This requirement of substantial hardship shows that the hardship inquiry is essentially an application of the standard that the term must go to the basis of the parties bargain because an unimportant alteration of the terms of the offer would not likely meet the test of substantial hardship.

It is harder to fit the surprise standard into the basic test of materiality because the focus of surprise is not so much on the importance of the term, but on whether it might reasonably be expected, given the context and nature of the transaction.[104] Surprise has both an objective and a subjective element, so a party cannot claim to have been surprised by a term that it expected or reasonably should have expected.[105] It could be argued that surprise is a kind of proxy for the importance of the alteration because the offeror should be aware of the probability that the acceptance would include a term that is commonly used in transactions of that kind so that the offeror's failure to exclude it by proper objection is evidence that it must not have been

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Inc. v. U.S. Merch. Fin. Grp., Inc., 741 F. Supp. 2d 651, 681 (D.N.J. 2010) (noting that a number of courts have concluded that hardship is not an independent ground for finding material alteration but consider it nevertheless).

103. *See Dumont Tel. Co.*, 962 F. Supp. 2d at 1080 (explaining that the mere fact that an arbitration clause waives the right to litigate in court is not enough to constitute hardship—its material effect must be determined on the circumstances of the case); *see also Leica Geosystems, Inc.*, 872 F. Supp. 2d at 1201 (holding that extreme economic hardship must be shown); *ISRA Vision A.G.*, 654 F. Supp. 2d at 649 (stating that hardship focuses on whether the provision would cause substantial economic hardship); Davis, *supra* note 23, at 504–05 (noting that courts have generally required substantial economic hardship).

104. *See ISRA Vision A.G.*, 654 F. Supp. 2d at 648 (noting that the entire context of the transaction, including course of dealing, trade usage, and conspicuousness of the term, must be evaluated to decide surprise).

105. *See Bayway Refin. Co.*, 215 F.3d at 225 (explaining that to establish surprise the party must show both that it did not actually know of the term—a subjective element, and that it was justified in not knowing of it—an objective element); *see also Jada Toys, Inc.*, No. 07 C 699, 2009 WL 3055370, at *8 (stating that interest and attorney's fees provisions were not unreasonably surprising, and therefore not a material alteration because the parties had engaged in hundreds of transactions using the form with those provisions); *Dumont Tel. Co.*, 962 F. Supp. 2d at 1079 (holding that extensive course of dealing, involving hundreds of invoices containing the same arbitration clause, precluded the recipient from claiming surprise, merely because it never read the terms on the invoices); Davis, *supra* note 23, at 503 (explaining that in determining surprise, courts take into account both the subjective element of the actual knowledge of the party and the objective element of what the party should have known).

an important component of the transaction.[106] However, this is not an entirely convincing argument, given the assumption behind UCC § 2-207 that parties are not expected to read the boilerplate in each other's forms.[107] An alternative explanation is that the surprise element has nothing to do with the importance of the term at all but is a fairness standard pertinent to the nature of the materiality inquiry in this context. UCC § 2-207(2) only comes into operation after a contract has been found under UCC § 2-207(1) and focuses on the question of when, in the absence of actual agreement to a term, a merchant–offeror should be held to a term added to the transaction by the merchant–offeree, often in preprinted boilerplate.[108] Fairness requires that the offeror should not be held to an unexpected and significant alteration of which it was actually unaware, but should be held to an unimportant alteration that it could have excluded by a provision in the offer limiting acceptance to its terms or by subsequent objection.

C. Materiality in Relation to Indefiniteness

Like the question of whether a contract was formed by offer and acceptance, the inquiry into indefiniteness focuses on whether the parties manifested assent to the contract.[109] It is therefore similarly concerned with drawing the line between not imposing a contract on parties who did not actually form a contract and not invalidating a contract that the parties actually made.[110]

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106. *See* U.C.C. §2-207(2) (AM. L. INST. & UNIF. L. COMM'N 2011) (empowering the offeror to exclude new terms in the acceptance either by limiting acceptance to the terms of the offer or by objecting to the new term); *Union Carbide Corp.*, 947 F.2d at 1336 (stating that a term that is expectable is not surprising, and hence not material); *see also Paul Gottlieb & Co.*, 985 So. 2d at 8 (holding that a change is surprising if it cannot be presumed that a reasonable merchant would have consented to it); *Rocheux Int'l of N.J., Inc.*, 741 F. Supp. 2d at 684.

107. *See* Stephens, *supra* note 23, at 246 (observing that under the "surprise or hardship" criterion, virtually all new terms in an acceptance could qualify as material alterations because they are assumed to be unread and are likely detrimental).

108. *See* MURRAY, *supra* note 27, §51(C), at 178 (explaining that UCC §2-207(2) only comes into effect to determine the fate of additional or different terms in the response to the offer if the response qualifies as an acceptance under UCC §2-207(1)).

109. *See* Gardens at Glenlakes Prop. Owners Ass'n, Inc. v. Baldwin Cnty. Sewer Serv., LLC, 225 So. 3d 47, 54 (Ala. 2016) (holding that to be enforceable as a contract, all material terms of the parties' agreement must be sufficiently definite).

110. *See id.* (stating that courts do not favor the destruction of contracts on grounds of indefiniteness but should not make a contract for the parties where there is no basis for reasonably determining the parties' intentions); *see also* Calhoun Cnty. v. Blue Cross Blue Shield of Mich., 824 N.W.2d 202, 210 (Mich. Ct. App. 2012)

Parties may have entered into an understanding that has the appearance of a contract. However, the understanding may be insufficient to qualify as a contract because it omits or fails to adequately express one or more terms. An inadequate expression of contractual intent could result from oversight, unclear drafting, or the parties' deliberate deferral of agreement on some aspect of the arrangement. The basic rule is that a manifestation of intent to enter an agreement, interpreted in context, cannot be a contract unless its terms are reasonably certain.[111] This requirement means that the terms of the contract must at least sufficiently indicate that the parties intended to enter into the contract and must provide a basis for an appropriate remedy for breach.[112] The question of whether the

(explaining that judicial avoidance on grounds of indefiniteness is disfavored, so a court will seek to enforce the agreement if the terms of the contract can be determined with reasonable certainty).

111. *See* APS Cap. Corp. v. Mesa Air Grp., Inc., 580 F.3d 265, 271–72 (5th Cir. 2009) (holding that to determine the material terms of a contract for purposes of deciding that the contract is sufficiently definite to enforce, the entire context of the contract must be examined, including the nature of the contract, the parties' relationship, and their course of dealings). Contextual evidence, such as usage, course of dealing, or discussions during negotiations may resolve the indefiniteness and show that the parties did in fact reach agreement on the uncertain or omitted term. For example, it may be apparent that the parties intended the term to be based on a reasonableness standard, with reference to industry practice. *See* Rule v. Brine, 85 F.3d 1002, 1010–13 (2d Cir. 1996) (holding that an agreement to pay a fair or reasonable royalty did not make the contract too indefinite because it indicated that the parties intended the royalty to be set by industry standards); *see also Gardens at Glenlakes Prop. Owners Ass'n*, 225 So. 3d at 54–55 (holding that a term relating to the rate to be charged for services did not fail for indefiniteness where it could be inferred that the parties intended a market standard to apply); *Calhoun Cnty.*, 824 N.W.2d at 210–12 (stating that failure to state the specific amount of a fee did not render the contract too indefinite because the amount was reasonably ascertainable by objective formula). Even in the absence of contextual evidence, the omission or uncertainty can be cured by a gap filler—a default term supplied by law—if it is apparent that the parties reasonably expected the gap filler to apply. *See* MURRAY, *supra* note 27, §39(B)(2), at 96–97; PERILLO, *supra* note 76, §2.9, at 46–47. In some cases, the parties' conduct subsequent to execution of the contract may overcome the indefiniteness by clarifying their intent. *See* RESTATEMENT (SECOND) OF CONTS. § 34(2) (AM. L. INST. 1981).

112. *See* Ind. Gas Co. v. Ind. Fin. Auth., 977 N.E.2d 981, 997–98 (Ind. App. 2012) (stating that a court cannot make a contract for the parties but will enforce a contract that is definite enough in its material terms to enable the court to ascertain the parties intent); *see also* Spears v. Ky. Ins. Agency, Inc., No. 2011-CA-000481-MR, 2012 WL 4839015, at *3 (Ky. Ct. App. 2012) (holding that the terms of the contract must be complete and definite enough to enable the court to determine damages in the event of breach); Southern v. Goetting, 353 S.W.3d 295, 300 (Tex. App. 2011) (holding that the court will not make a contract for the parties where they

omission or uncertainty relates to a material aspect of the agreement is crucial to deciding if the agreement is sufficiently certain to qualify as a valid contract. Indefiniteness relating to an immaterial incidental or collateral term should not preclude contract formation.[113] But no valid and enforceable contract is created if the indefiniteness relates to a material aspect of the transaction.[114]

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have deferred agreement on essential terms); *Knowles*, 288 S.W.3d at 143–44 (holding the court will not enforce an agreement as a contract unless the parties have actually agreed to it); RESTATEMENT (SECOND) OF CONTS. § 33 (AM. L. INST. 1981).

113. *See* Tractebel Energy Mktg., Inc. v. AEP Power Mktg., 487 F.3d 89, 96 (2d Cir. 2007) (holding that a valid contract was created because the terms left for future negotiation were immaterial); *see also* Echols v. Pelullo, 377 F.3d 272, 275 (3rd Cir. 2004) (stating that a court will enforce a contract with an indefinite provision that is not essential or material); Shann v. Dunk, 84 F.3d 73, 78–79 (2d Cir. 1996) (holding that an agreement is unenforceable if it omits essential terms, but the evidence showed that the uncertain terms in issue were not regarded by the parties as going to the heart of the transaction); Surface Materials Sales v. Surface Prot. Indus., 368 F. Supp. 2d 836, 839 (N.D. Ohio 2005) (holding that a termination fee was not central to the contract, so the parties' failure to agree on it does not preclude contract formation, and the court will fix a reasonable fee); FARNSWORTH, *supra* note 58, §3.29, at 212 (explaining that if parties fail to agree, a court may be more willing to supply a term if it regards the term as relatively unimportant); MURRAY, *supra* note 27, § 39, at 95 (discussing how courts have little difficulty in enforcing a contract where all material terms are agreed upon, and only insignificant matters are left for future determination); PERILLO, *supra* note 76, § 2.9, at 44.

114. *See* Ass'n Benefit Servs., Inc. v. Caremark RX, Inc., 493 F.3d 841, 850 (7th Cir. 2007) (finding that no contract was formed because the essential performance obligations were too unspecific); *See Tractebel Energy Mktg., Inc.*, 487 F.3d at 95 (holding that for a contract to be created, the manifestations of assent must be definite enough to assure the court that the parties are truly in agreement on all material terms); *Echols*, 377 F.3d at 275 ("[A] court will not enforce a contract that is indefinite in any of its material and essential provisions."); *see also Rule*, 85 F.3d at 1010 (holding that there is no contract if the parties leave agreement on a material term to future negotiation); Ford Motor Co. v. Kahne, 379 F. Supp. 2d 857, 869 (E.D. Mich. 2005) (stating that no contract is formed if the parties leave essential terms for future agreement); *Surface Materials Sales*, 368 F. Supp. 2d at 839 (holding that if an essential term of the contract is left for future agreement, there is no contract unless and until the parties reach agreement on that term); Lawrence v. Jones, 864 P.2d 194, 197 (Idaho Ct. App. 1993) (finding that uncertainty as to an essential term of a contract prevents contract creation); Acad. Chi. Publishers v. Cheever, 578 N.E.2d 981, 984 (Ill. 1991) (holding that an agreement to publish a collection of short stories was invalid because it omitted essential terms, including the number of stories, the party who would select them, the delivery date of the manuscript, and publication details); *Spears*, No. 2011-CA-000481-MR, 2012 WL 4839015, at *3 (finding that to be enforceable and valid, a contract must specify all material and essential terms); Joseph Martin, Jr., Delicatessen, Inc. v. Schumacher, 417 N.E.2d 541, 543 (N.Y. 1981) (stating that definiteness as to a material matter—the rent payable in the renewal period of a lease—is essential to contract formation); RESTATEMENT (SECOND) OF

The basic meaning of materiality in this context is that the missing or uncertain term is essential and goes to a party's core performance duties under the contract.[115] This concept ties in with the accepted general meaning of materiality. However, materiality is transaction-based, as it is in other contexts, and the determination of materiality is influenced by the underlying purpose of the inquiry. This purpose is to decide if the parties did actually make a contract on terms sufficient to permit enforcement and the grant of a remedy.[116] If it can be accomplished in the absence of agreement on a particular term, that term may not be material in this context, even though it may be so considered in another.[117] This shift in focus is subtle, and its consequences may not always be easy to predict.[118]

CONTS. § 33 cmt. a (AM. L. INST. 1981) (stating that the indefiniteness must relate to an essential term); MURRAY, *supra* note 27, § 39(B)(1)–(2), at 95–96 (explaining that where the parties failed to express a material term of the contract and it cannot be supplied by usage or other contextual evidence, courts hold that the agreement is unenforceable); PERILLO, *supra* note 76, § 2.9, at 43 (stating that an agreement is fatally indefinite and void if it is not reasonably certain as to its material terms).

115. *See Ass'n Benefit Servs., Inc.*, 493 F.3d at 851 (holding that an essential obligation is an important component of the parties' basic exchange of performances); *Tractebel Energy Mktg., Inc.*, 487 F.3d at 96 (finding that details relating to procedural matters did not go to the core of the contract); *Ford Motor Co.*, 379 F. Supp. 2d at 871 (finding that the evidence established that the parties understood the unresolved terms to be important aspects of the contract that went to the very basis of the performance); *Lawrence*, 864 P.2d at 197 (holding that if contemplated, a provision securing the debt in a land sale contract is essential to the transaction because it is indispensably necessary and important in the highest degree); *Knowles*, 288 S.W.3d at 143–44 (consulting services to be performed by one of the parties went to the core of that party's obligations, so failure to specify them with certainty was a material omission, rendering the agreement too indefinite for enforcement).

116. *See* RESTATEMENT (SECOND) OF CONTS. § 33(2) (AM. L. INST. 1981) (stating that an agreement is sufficiently certain to form a contract if it terms provide a basis for determining a breach and giving an appropriate remedy).

117. *See Ind. Gas Co.*, 977 N.E.2d at 997–98 (holding that a subordination agreement, which the parties' had not yet negotiated, was an important term of the contract, but was not material for purposes of finding a valid and definite contract because it was clear that the parties intended a contract and there was a basis for granting an appropriate remedy).

118. This unpredictability is demonstrated in cases in which judges on the same appellate panel reach different conclusions on the materiality of an indefinite term. *See, e.g.*, *Echols*, 377 F.3d at 281 (illustrating an instance where the majority and dissent disagreed on whether the omission of the price term rendered the agreement too indefinite to enforce); *See Spears*, No. 2011-CA-000481-MR, 2012 WL 4839015, at *5 (showing a situation whereby the majority and dissent disagreed on whether the parties' deferral of agreement on a noncompete clause, exit agreement, and arbitration provision resulted in fatal indefiniteness).

D. Materiality in Relation to the Statute of Frauds

Compliance with the statute of frauds can be classified as a formation issue because it goes to the question of whether an enforceable contract was formed out of an alleged agreement.[119] If a contract is subject to the statute of frauds, it must be evidenced by a written memorandum.[120] The memorandum must be sufficient to show the existence of a contract, signed by the party to be charged or its agent, and reasonably identifying the subject matter of the contract.[121] To qualify as a sufficient memorandum in transactions other than a sale of goods, the writing must include all the material terms of the contract.[122] If a term is material, its complete omission from the

119. *See* RESTATEMENT (SECOND) OF CONTS. §110 cmt. d (AM. L. INST. 1981) (stating that an agreement subject to the statute of frauds is unenforceable as a contract unless the requirements of the statute are satisfied).

120. Chapter 5 of the Restatement (Second) of Contracts covers what may be described as the "traditional" statute of frauds, closely modelled on an English statute of 1677, and enacted in very similar language in every state. *See* RESTATEMENT (SECOND) OF CONTS. ch. V (AM. L. INST. 1981). The traditional statute covers a small group of specific types of contracts. *See id.* § 110. The most common of these contracts are ones for the sale of an interest in land and contracts that cannot be performed within a year of execution. *See id.* In addition, a third traditional category, contracts for the sale of goods for a price of $500 or more, is covered by the UCC. *See* U.C.C. § 2-201 (AM. L. INST. & UNIF. L. COMM'N 1977). State legislatures have enacted statutes requiring a writing or record for various other transactions, in addition to the traditional categories. In contemporary law, "writing" includes not only a tangible written document but also a retrievable electronic or other record. *See* Electronic Signatures in Global and National Commerce Act, 15 U.S.C. § 7001(a) (2006) (specifying that an electronic record satisfies the requirement of writing wherever a writing is required to validate or record a contract); *see also* UNIF. ELEC. TRANSACTIONS ACT § 7 (AM. L. INST. 1999). Therefore, references to a writing or memorandum in this Article include retrievable intangible records.

121. *See* RESTATEMENT (SECOND) OF CONTS. § 131(a)–(b), cmts. d–f. State statutes are notably uniform in setting out these requirements. *See* ARIZ. REV. STAT. ANN. § 44-101 (1989); CAL. CIV. CODE § 1624 (Deering 1990); FLA. STAT. § 725.01 (1995); 740 ILL. COMP. STAT. 80/1 (1874); MASS. GEN. LAWS ch. 259, § 1 (1902); MO. REV. STAT. § 432.010 (1939); N.C. GEN. STAT. §§ 22-1 to -2 (1826); OHIO REV. CODE ANN. § 1335.05 (LexisNexis 1976); OR. REV. STAT. § 41.580 (2003); 9 R.I. GEN. LAWS §9-1-4 (2007); TEX. BUS. & COM. CODE § 26.01 (2005); VA. CODE ANN. § 11-2 (1990); WASH. REV. CODE § 19.36.010 (2011); WIS. STAT. § 241.02 (2015).

122. The rule that all material terms must be included in the memorandum does not apply to sales of goods because UCC § 2-201 deliberately softens the rigor of the statute of frauds by treating a memorandum as sufficient even if it omits or incorrectly states a material term. *See* U.C.C. § 2-201 (AM. L. INST. & UNIF. L. COMM'N 1977). Official Comment 1 to that section makes it clear that the writing need not state all the material terms of the contract. *See id.* cmt. 1; *see also* RESTATEMENT (SECOND) OF CONTS. § 131 cmt. g (AM. L. INST. 1981) (acknowledging that UCC § 2-

memorandum is a violation of the statute of frauds, rendering the alleged contract unenforceable.[123] The party seeking enforcement is not permitted to offer extrinsic evidence to prove the term.[124] However, if the term is in the memorandum in an incomplete or unclear form, courts do allow extrinsic evidence to be admitted to clarify or augment the term.[125]

The question of whether a writing satisfies the statute of frauds is essentially legal, but the determination of materiality is not

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201(1) does not require all essential terms to be included in the writing). UCC § 2-201(1) contains a narrow exception to its more lenient approach in that it does require the writing to include the quantity of goods sold and precludes enforcement of the contract beyond any quantity stated in the writing. *See* U.C.C. § 2-201(1) (AM. L. INST. & UNIF. L. COMM'N 1977); *see also* Olympia Express, Inc. v. Linee Aeree Italiane, 509 F.3d 347, 352 (7th Cir. 2007); W. Chance No. 2, Inc. v. KFC Corp., 957 F.2d 1538, 1542 (9th Cir. 1992); House of Prayer v. Evangelical Ass'n for India, 7 Cal. Rptr. 3d 24, 27–28 (Cal. Ct. App. 2003); Sterling v. Taylor, 152 P.3d 420, 425 (Cal. 2007); De Vaux v. Westwood Baptist Church, 953 So. 2d 677, 682 (Fla. Dist. Ct. App. 2007); Simon v. Simon, 625 N.E.2d 564, 568 (Mass. App. Ct. 1994); Shellabarger v. Shellabarger, 317 S.W.3d 77, 82 (Mo. Ct. App. 2010); Caito v. Juarez, 795 A.2d 533, 536 (R.I. 2002); Moudy v. Manning, 82 S.W.3d 726, 728 (Tex. Ct. App. 2002); C. Porter Vaughan, Inc. v. DiLorenzo, 689 S.E.2d 656, 660 (Va. 2010); RESTATEMENT (SECOND) OF CONTS. § 131(c) (AM. L. INST. 1981) (stating that the memorandum must state "with reasonable certainty the essential terms of the unperformed promises in the contract").

123. *See* RESTATEMENT (SECOND) OF CONTS. § 131 (AM. L. INST. 1981) (using the word "essential" instead of "material"). There is no indication that the words have a different meaning, so "essential" should be treated as a synonym for "material." These words are used interchangeably in some opinions. *See, e.g.*, *House of Prayer*, 7 Cal. Rptr. 3d at 27; *Simon*, 625 N.E.2d at 568; *Moudy*, 82 S.W.3d at 728; Cohen v. McCutchin, 565 S.W.2d 230, 232 (Tex. 1978).

124. *See Olympia Express, Inc.*, 509 F.3d at 352 (holding that if a memorandum completely omits an essential term, it cannot be supplied by parol evidence because to allow that would defeat the purpose of the statute of frauds); *W. Chance No. 2, Inc.*, 957 F.2d at 1542 (finding that if an essential term is absent from the memorandum, it cannot be supplied by parol evidence); *Cohen*, 565 S.W.2d at 232 (stating that the terms of the contract must be ascertainable from the memorandum without resorting to extrinsic evidence to supply it); *Moudy*, 82 S.W.3d at 728 (finding that the writing must be complete in itself in every material respect so that it can be understood without resorting to parol evidence).

125. *See Sterling*, 152 P.3d at 427–28 (holding that parol testimony is admissible to clarify essential terms that are unclear, as long as they are in the writing); *Shellabarger*, 317 S.W.3d at 82 (finding that the date of performance of a land sale contract is not an essential term and can be established by extrinsic evidence); Wolfe v. Villines, 610 S.E.2d 754, 757 (N.C. Ct. App. 2005) (stating that a land sale contract violates the statute of frauds if it leaves the identity of the land in a state of absolute uncertainty and refers to nothing extrinsic that could identify the land).

necessarily also a legal question.[126] The decision on whether an omission from the writing is material involves the usual process of interpretation of the agreement in context, which requires fact finding unless there are no factual issues to be resolved, or materiality is obvious enough to admit of no reasonable opposite conclusion.[127] Although courts do sometimes make unexplained conclusory pronouncements that a term absent from the writing is or is not material, the basis of these decisions usually seems to be that the term in question is patently and unquestionably material.[128]

The basic general meaning of materiality, that the omitted term is fundamental to the agreement, applies in cases involving the statute

126. Some court opinions create confusion by appearing to conflate the legal and factual questions. *See, e.g.*, *Simon*, 625 N.E.2d at 567–68 (stating that the determination of whether a memorandum satisfies the statute of frauds is a question of law, and then apparently also deciding the materiality of a term omitted from the writing as a question of law); *Moudy*, 82 S.W.3d at 728–29 (stating that the determination of whether a memorandum satisfies the statute of frauds is a question of law, so it is also the court's function to decide if a term omitted from the writing is material).

127. *See House of Prayer*, 7 Cal. Rptr. 3d at 27 (explaining that what is essential depends on the circumstances of the agreement in context, including the subsequent conduct of the parties and the remedy sought); *De Vaux*, 953 So. 2d at 682 (finding there is no definitive list of essential terms, which vary widely based on the circumstances of each transaction); Opdyke Inv. Co. v. Norris Grain Co., 320 N.W.2d 836, 841–42 (Mich. 1982) (holding that the sufficiency of the memorandum in attaining the purpose of the statute depends on the context of the case); *See* RESTATEMENT (SECOND) OF CONTS. § 131 cmt. g (AM. L. INST. 1981) (stating that the determination of whether a term is essential depends on the agreement in context, including the parties' subsequent conduct, the nature of actual dispute, and the remedy sought).

128. *See Olympia Express, Inc.*, 509 F.3d at 352 (holding, without explanation, that the price and quantity of the airline tickets purchased in a contract for the sale of the tickets are "of course" essential); *De Vaux*, 953 So. 2d at 682 (acknowledging the relevance of context, but reaching the conclusion, without reference to the context or explanation, that financing terms are essential in the sale of real property); *Simon*, 625 N.E.2d at 567–68 (concluding without explanation that the duration of a lease is an essential term); *Shellabarger*, 317 S.W.3d at 82 (asserting without explanation that the essential elements of a contract for the sale of land are the parties, subject matter, and price, but that the date of performance is not an essential term); Caito v. Juarez, 795 A.2d 533, 536 (R.I. 2002) (concluding, without explanation, that payment terms are essential in a contract for the sale of real estate); *Moudy*, 82 S.W.3d at 728 (stating without explanation that the description of the property sold is an essential element of a contract for the sale of land); C. Porter Vaughan, Inc. v. DiLorenzo, 689 S.E.2d 656, 660 (Va. 2010) (asserting without explanation that the essential terms of a real estate brokerage contract are identification of the property, the approximate purchase price, and the terms of the sale).

of frauds.[129] However, the purpose of the inquiry influences the ultimate conclusion on materiality. As the very title of the statute of frauds suggests, its principal purpose of requiring a sufficient memorial of the agreement is to prevent a fraudulent claim that the parties entered into a contract.[130] Its requirement of a signed record containing the essential terms of the contract is aimed at preventing such fraud and the prospect of perjury by confining enforcement to contracts that can be established and verified by documentary evidence.[131] The role of the written memorandum is largely evidentiary, and it should be treated as sufficient if it performs that function by providing probative evidence that the contract was in fact made.[132]

Although the statute of frauds is aimed at preventing the fraudulent assertion of an alleged contract, courts recognize that a strict, doctrinaire application of the statute could allow the party denying the contract to use the statute dishonestly to escape an oral or inadequately recorded contract that was actually made.[133] This concern

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129. *See Sterling*, 152 P.3d at 425; *Shellabarger*, 317 S.W.3d at 82 (distinguishing the essential elements of a contract—the substance of the agreement—from details and particulars).

130. *See Sterling*, 152 P.3d at 425 ("The contents of the writing must be such as to make successful fraud unlikely.").

131. *See* Elderberry of Weber City, LLC v. Living Ctrs. Se., Inc., 971 F. Supp. 2d 575, 588 (W.D. Va. 2013) (holding that the purpose of the statute of frauds is to provide reliable evidence of the existence and terms of the contract and to reduce the likelihood that a contract can be fraudulently claimed); Church Yard Commons Ltd. P'ship v. Podmajersky, Inc., 76 N.E.3d 96, 102–03 (Ill. App. Ct. 2017) (finding that the statute of frauds is an evidentiary safeguard to shield defendants and courts from the problems of proof of relating to an oral contract); *C. Porter Vaughan, Inc.*, 689 S.E.2d at 660 (explaining that the statute of frauds is procedural or remedial in nature and is concerned with the enforceability, not the validity of the agreement); *See* RESTATEMENT (SECOND) OF CONTS. § 131 cmt. c (stating that the statute's primary purpose is to require reliable evidence of the existence and terms of the contract, so as to prevent the enforcement of a fraudulently claimed contract that was never made).

132. *See Sterling*, 152 P.3d at 422 (finding that the memorandum serves only an evidentiary function under the statute of frauds); *see also Opdyke Inv. Co.*, 320 N.W.2d at 841 (stating all that is required to satisfy the purpose of the statute is that the memorandum has some probative value in establishing the existence of the contract).

133. *See* Int'l Casings Grp., Inc. v. Premium Standard Farms, Inc., 358 F. Supp. 2d 863, 873–74 (W.D. Mo. 2005) (holding that the statute's purpose is to prevent fraud, not to perpetrate it by allowing a party to escape responsibility for its promises); Cooke v. Goethals, No. 39410-3-II, 2010 WL 3639912, at *3 (Wash. Ct. App. Sept. 21, 2010) (explaining that the statute is meant to prevent fraud, so courts will not apply it to protect a fraud); Wolfe v. Villines, 610 S.E.2d 754, 758 (N.C. Ct.

calls for a more flexible approach to deciding whether a memorandum satisfies the statute of frauds. Unlike UCC §2-201, which expressly does not require the memorandum to contain all material terms, the common law is generally held to include that requirement.[134] However, unless there is no plausible argument that the term is immaterial, the determination of materiality should focus on the narrow purpose of the inquiry for purposes of the statute.[135] Unlike the role that materiality plays in other contexts, for example, such as to determine whether the parties reached agreement at all,[136] or whether a contract was fundamentally breached,[137] the goal here is merely to decide if the incomplete writing is sufficient to support the allegation that the parties did in fact form a contract.[138] That is, the point of the inquiry into materiality in this context is to decide if the term is so fundamental to the bargain that its omission from the writing precludes the writing from fulfilling the evidentiary function of supporting the probability of a genuine contract.[139]

IV. MATERIALITY IN RELATION TO MANIFESTATIONS OF ASSENT INDUCED BY MISREPRESENTATION OR MISTAKE

Under the objective test of contracts, a party is bound by its manifestation of assent, irrespective of its subjective intentions or any misconceptions that may have induced that manifestation.[140] However, the doctrines of misrepresentation and mistake ameliorate this rule by affording relief to a party whose apparent assent to the contract was induced by a factual misconception resulting from a misrepresentation

App. 2005) (stating that "the purpose of the statute of frauds is to guard against fraudulent claims," not to allow the defendant to evade a contractual obligation).

134. *See* RESTATEMENT (SECOND) OF CONTS. § 131 cmt. b (AM. L. INST. 1981); *see also supra* notes 122, 123.

135. *See* RESTATEMENT (SECOND) OF CONTS. § 131 cmt. c (AM. L. INST. 1981) (noting that the statute's primary purpose is evidentiary, and its goal is to require reliable evidence of the existence and terms of the contract, so as to prevent the fraudulent or perjured assertion of a contract that was never made.)

136. *See supra* Sections III.A & C.

137. *See supra* Section II.B.

138. *See Elderberry of Weber City, LLC*, 971 F. Supp. 2d at 588; *Church Yard Commons Ltd. P'ship*, 76 N.E.3d at 102–03; *C. Porter Vaughan, Inc.*, 689 S.E.2d at 660.

139. *See Int'l Casings Grp., Inc.*, 358 F. Supp. 2d at 873–74.

140. *See* Morales v. Sun Constructors, Inc., 541 F.3d 218, 221 (3d Cir. 2008) (holding that contractual assent is not determined by the parties' subjective intent but by their outward manifestations of intent); RESTATEMENT (SECOND) OF CONTS. §17 cmt. c (AM. L. INST. 1981) (stating that agreement is determined by manifested intent).

of the other party or an excusable mistake.[141] As the following discussion shows, the doctrines of misrepresentation and mistake are based on different circumstances and have different requirements, but they share the common element that the misconception underlying the manifestation of assent must have related to a material aspect of the transaction.

A. Materiality in Relation to Fraudulent and Nonfraudulent Misrepresentation

A misrepresentation is a false assertion of fact made by one of the parties and justifiably relied on by the other who is thereby induced to enter the contract.[142] The usual remedy for misrepresentation is rescission of the contract—the party who was induced to enter a contract by the misrepresentation may avoid the contract and claim restitution.[143] Alternatively, the induced party may elect to keep the contract in force and claim damages to compensate for the loss resulting from the misrepresentation.[144] A misrepresentation may be either fraudulent or nonfraudulent.[145] A misrepresentation is fraudulent if the party making it knows that it is false and intends it to induce the other party's assent.[146] Knowledge of the falsity of the misrepresentation and intention to mislead the defrauded party form

141. *See* RESTATEMENT (SECOND) OF CONTS. §164 (AM. L. INST 1981) (explaining that a contract is voidable by a party whose manifestation of assent was induced by justifiable reliance on a misrepresentation); *id.* ch. 6 (stating that contract law supports finality of transactions, but the law departs from this policy by giving relief where a party's manifestation of assent is induced by mistake).

142. *See* RESTATEMENT (SECOND) OF CONTS. § 159 cmts. c–d (AM. L. INST. 1981) (stating that a misrepresentation is an assertion not in accord with an objectively ascertainable thing, event, or situation that actually exists outside of the contract, and could include an opinion, prediction, or expression of intent that is founded on a factual basis); *id*. cmt. a (explaining that an assertion may be inferred from conduct, including concealment or nondisclosure); *see also* RESTATEMENT (SECOND) OF TORTS § 538 cmt. b (AM. L. INST. 1974) (stating that expressions of opinion, intention, and law could qualify as representations of fact if fact-based).

143. *See* RESTATEMENT (SECOND) OF CONTS. § 164 (AM. L. INST. 1981).

144. *See* PERILLO, *supra* note 76, § 9.23, at 309.

145. *See* RESTATEMENT (SECOND) OF CONTS. § 159 cmt. a (AM. L. INST. 1981).

146. *See* InterCall, Inc. v. Egenera, Inc., 824 N.W.2d 12, 23, 26 (Neb. 2012) (finding that a reckless statement is fraudulent, even though the maker did not actually know that it was untrue); RESTATEMENT (SECOND) OF CONTS. § 162 (AM. L. INST. 1981) (stating that knowledge of falsity includes not only knowledge or belief that the assertion is not in accord with the facts but also a lack of confidence in its truth, or knowledge that there is no basis for the assertion); RESTATEMENT (THIRD) OF TORTS: LIAB. FOR ECON. HARM § 10 (AM. L. INST. 2020).

the basis of *scienter*—the guilty mental state that makes the misrepresentation fraudulent.[147] If *scienter* is not present or cannot be established, the misrepresentation is not fraudulent.[148] As such, the party seeking avoidance must base its claim on nonfraudulent misrepresentation.[149] A nonfraudulent misrepresentation may result from negligence.[150] However, even in the absence of negligence, an innocent misrepresentation may be actionable if it is material.[151]

The role of the misrepresentation in inducing the contract is crucial: The misrepresentation must actually have induced consent. It need not have been the sole or even the dominant inducement, provided that it was a substantial factor in persuading the victim to enter the contract.[152] Although actual reliance is required, it is not

147. *See* RESTATEMENT (THIRD) OF TORTS: LIAB. FOR ECON. HARM § 10 cmt. a (AM. L. INST. 2020) (stating that *scienter* is measured subjectively—the defendant must have had a culpable state of mind and must have been guilty of consciously and deliberately misrepresenting the truth).

148. *See id.* (explaining that a party who makes a false statement carelessly, but in good faith, may be liable for negligent misrepresentation but has not committed fraud).

149. *See id.*

150. To claim relief for a negligent representation, the party seeking relief must establish a duty of care and breach of that duty. *See* Roers v. Countrywide Home Loans, Inc., 728 F.3d 832, 837–38 (8th Cir. 2013). In a contract case, a duty of care usually arises as a matter of course from the contract. *See id.* If there is no contractual relationship, the plaintiff's cause of action for negligent misrepresentation is based in tort law, which requires proof that the parties had some other kind of relationship that created a duty of care. *See* RESTATEMENT (SECOND) OF TORTS § 552 (AM. L. INST. 1977) (stating that liability for purely economic harm resulting from negligent misrepresentation must be based on some form of privity that justifies reliance on the misrepresentation); DAN B. DOBBS ET AL., HORNBOOK ON TORTS 1123, 1124 (2d ed. 2016) (explaining that a negligent misrepresentation inducing a contract is a matter of contract law, and, in the absence of a contract, liability for a negligent misrepresentation causing only economic loss is recognized only in limited circumstances under tort law).

151. *See* Pauma Band of Luiseno Mission Indians v. California, 813 F.3d 1155, 1164 (9th Cir. 2015) (explaining that an innocent misrepresentation is actionable if it is material); Worley v. City of Jonesboro, 385 S.W.3d 908, 915–16 (Ark. Ct. App. 2011)(finding that an innocent misrepresentation is "constructive fraud" because of its tendency to deceive, even though it resulted from a mistake by the party making the misrepresentation, without knowledge of falsity, intent to deceive, or moral guilt). Innocent misrepresentation is usually actionable only where the representation is a warranty. Alternatively, an innocent misrepresentation could be grounds for avoidance under mistake doctrine if both parties were innocently unaware that the representation was false. DOBBS ET AL., *supra* note 148, at 1127–28.

152. *See* Sundberg v. TTR Realty, LLC, 109 A.3d 1123, 1131 (D.C. 2015) (holding that assent must have been induced by actual reliance at the time of contracting); *InterCall, Inc.*, 824 N.W.2d at 20 (explaining that as a question of fact,

enough. In addition, that reliance must have been justified.[153] The test for justification is based on all the circumstances of the case and is a blend of subjective and objective considerations.[154]

The materiality of the misrepresentation is unquestionably a vital issue in both fraudulent and nonfraudulent misrepresentations, and an evaluation of the materiality of the misrepresentation is inescapably inherent in the determination of justifiable inducement. While it is conceivable that a person may be subjectively induced to enter into a contract by an objectively immaterial misrepresentation, this scenario is seldom likely to happen.[155] However, the role of materiality in

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the misrepresentation must have contributed substantially to the victim's willingness to enter the contract); *see also* RESTATEMENT (SECOND) OF CONTS. § 167 cmt. a (AM. L. INST. 1981) (stating that reliance on the misrepresentation need not be the sole or even the predominant factor in inducing the party to enter the contract—it is enough that it substantially contributed to that decision); RESTATEMENT (THIRD) OF TORTS: LIAB. FOR ECON. HARM § 11 cmt. a (AM. L. INST. 2020) (stating that reliance is a form of factual but-for causation, which need not have been the sole cause of the victim's decision to enter the contract, as long as the victim's actual reliance on it was a crucial factual cause of the victim's manifestation of assent).

153. *See* Adam v. Stonebridge Life Ins. Co., 612 F.3d 967, 972 (8th Cir. 2010) (listing justifiable reliance as an element of fraud); Hodge v. Craig, 382 S.W.3d 325, 343 (Tenn. 2012) (stating that to obtain relief for fraud the plaintiff must not have known that the representation was false and must have been justified in relying on it).

154. *See Adam*, 612 F.3d at 973 (holding that the recipient of a fraudulent misrepresentation is justified in relying on the truth of a straightforward assertion, even if it could have discovered the untruth by investigation, provided that the falsity is not obvious); Lewis v. Bank of America N.A., 343 F.3d 540, 546 (5th Cir. 2003) (asserting that justifiable reliance does not require the plaintiff's reasonableness, but he cannot blindly rely on a misrepresentation where its falsity was patent); Banque Franco-Hellenique de Commerce Int'l et Maritime, S.A. v. Christophides, 106 F.3d 22, 26 (2d Cir. 1997) (finding that the party claiming fraud must be objectively warranted in relying on the misrepresentation and must subjectively believe the misrepresentation to be true); Daly v. Kochanowicz, 884 N.Y.S.2d 144, 152–53 (N.Y. App. Div. 2009) (holding that the plaintiff must show actual and justifiable reliance, and failed to do so because she had been alerted to the untruth of the misrepresentation); RESTATEMENT (THIRD) OF TORTS: LIAB. FOR ECON. HARM §11 cmt. d (AM. L. INST. 2020) (stating that reasonable reliance is measured against community standards of behavior, but justifiable reliance is more personalized and takes into account the plaintiff's capabilities, knowledge, and sophistication); DOBBS ET AL., *supra* note 148, at 1130 (stating that bare reliance is not enough—it must also be justified).

155. *See* T. Brown Constructors, Inc. v. Pena, 132 F.3d 724, 729 (Fed. Cir. 1997) (linking the materiality of a misrepresentation to the plaintiff's reasonable reliance on it); Shawmut-Canton LLC v. Great Spring Waters of Am., Inc., 816 N.E.2d 545, 549–50 (Mass. App. Ct. 2004) (finding that materiality is often joined with inducement, so that a misrepresentation qualifies as material if it is shown that the misrepresentation was one of the principal grounds for inducing the contract); Miller v. Celebration Mining Co., 29 P.3d 1231, 1235–36 (Utah 2001) (holding that

fraudulent misrepresentation is obfuscated by Restatement (Second) of Contracts § 164, which requires proof of materiality only for nonfraudulent misrepresentations, and omits it as a requirement for fraud.[156] The Restatement (Second) of Contract's requirement of materiality only for nonfraudulent misrepresentations, and not for fraud, dates back to the time of the original Restatement of Contracts.[157] The requirement is based on the principle that a strictly objective standard of materiality should not apply to the victim of a deliberately dishonest misrepresentation, who merely needs to show, subjectively, that its assent to the contract was based on justifiable reliance on the misrepresentation.[158] The problem with § 164 is that it

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where a misrepresentation is material, reliance is presumed to be justified); RESTATEMENT (SECOND) OF CONTS. § 167 cmt. b (AM. L. INST. 1981) (stating that the materiality of the misrepresentation is a significant factor in determining whether the misrepresentation was an inducing cause, and it is assumed that the recipient attached importance to a material misrepresentation but not an immaterial one); DOBBS ET AL., *supra* note 148, at 1118 n.45 ("[J]ustifiable reliance may be regarded as encompassing materiality."); Stephanie R. Hoffer, *Misrepresentation: The Restatement's Second Mistake*, 2014 U. ILL. L. REV. 115, 122, 130 (stating that a misrepresentation must be material in most or perhaps all cases because the misrepresentation must actually induce assent); Emily Sherwin, *Nonmaterial Misrepresentation: Damages, Rescission, and the Possibility of Efficient Fraud*, 36 LOY. L.A. L. REV. 1017, 1020–21 (2003) (explaining that materiality is just a subcategory of justifiable reliance).

156. *See* RESTATEMENT (SECOND) OF CONTS. § 164 (AM. L. INST. 1981) (stating that a contract is voidable by a party whose manifestation of assent was induced by justified reliance on either a fraudulent or material misrepresentation). The word "material," used in this sense, refers to nonfraudulent misrepresentations made without *scienter*. *See id.* Comment c to § 162 reinforces this by stating that materiality is not required for fraud but is required for a nonfraudulent misrepresentation. *See id.* § 162 cmt. c. RESTATEMENT (THIRD) OF RESTITUTION & UNJUST ENRICHMENT § 13 (AM. L. INST. 2011) follows the approach of the Restatement (Second) of Contracts by distinguishing fraudulent and material misrepresentations. Comment b to § 13 states that it is deliberately drafted to be consistent with the rules of contract law for determining when rescission is available for misrepresentation. *See id.* § 13 cmt. b. However, tort law does require materiality as an element of fraud. *See* RESTATEMENT (SECOND) OF TORTS § 538 (AM. L. INST. 1977); RESTATEMENT (THIRD) OF TORTS: LIAB. FOR ECON. HARM § 9 (AM. L. INST. 2020). RESTATEMENT (SECOND) OF TORTS § 538 cmt. c (AM. LAW INST. 1977) specifically recognizes that its approach in requiring materiality for fraud is different from the Restatement (Second) of Contracts.

157. RESTATEMENT (FIRST) OF CONTS. § 538 (1932).

158. In its purest form, the objective standard of materiality in relation to misrepresentation is whether a reasonable person would have regarded the fact misrepresented to be important in determining the course of action. *See* RESTATEMENT (SECOND) OF CONTS. § 162(2) (AM. L. INST. 1981); RESTATEMENT (SECOND) OF TORTS § 538 cmt. e (AM. L. INST. 1977). Sherwin, *supra* note 153, at 1019 explains that § 164 reflects the view of Professor Williston, the reporter for the original Restatement of the Law of Contracts, that a party who commits deliberate and successful fraud should

is misleading. First, in most cases, a party is not likely to be induced subjectively to enter into a contract on the basis of a misrepresentation that is objectively immaterial—most contracting parties are just not that idiosyncratic, so the distinction is seldom meaningful.[159] Second, the objective test of materiality is really a blend of objective and subjective considerations, articulated in the widely accepted standard that a misrepresentation is material either if it would be likely to induce a reasonable person to manifest assent, or if the maker knows or should know that the recipient would likely give it weight and be induced to enter the contract, whether reasonably or not.[160]

No distinction between fraudulent and nonfraudulent misrepresentations is apparent in court opinions, which commonly treat materiality as a requirement of all forms of misrepresentation.[161] Courts frequently employ the usual basic meaning of materiality—the

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not be able to escape liability on the ground that the fraud was not material. *See* MURRAY, *supra* note 27, § 96(B), at 525–26 (asserting that an "unwise or foolish person" should be able to avoid the contract for fraud, even if the misrepresentation would not have induced a reasonable person to assent); PERILLO, *supra* note 76, § 9.14, at 293–94.

159. *See* MURRAY, *supra* note 27, § 96(B), at 526 (noting the dearth of case law involving fraudulent immaterial assertions).

160. *See* RESTATEMENT (SECOND) OF CONTS. § 162 cmt. c (AM. L. INST. 1981); RESTATEMENT (THIRD) OF TORTS: LIAB. FOR ECON. HARM § 9 cmt. d (AM. L. INST. 2020); RESTATEMENT (SECOND) OF TORTS § 538(2) cmts. d, f (AM. L. INST. 1977). Comment d to § 538 notes that materiality is not confined to a misrepresentation that affects the pecuniary advantages of the transaction, but it also applies to sentimental considerations that would be regarded as important by a reasonable person. *See* RESTATEMENT (SECOND) OF TORTS § 538(2) cmt. d (AM. L. INST. 1977). Comment f to § 538 mirrors RESTATEMENT (SECOND) OF CONTS. § 162 cmt. c (AM. L. INST. 1981), making reference to the particular interests to the defrauded party. Even though a reasonable person would not consider the misrepresentation important and would not be induced by it, the representation must be treated as material if the maker knows that the recipient would be likely to consider it important. *See* RESTATEMENT (SECOND) OF TORTS § 538 cmt. f (AM. L. INST. 1977). A party "who preys upon another's known idiosyncrasies cannot complain if the contract is held voidable when he succeeds in what he is endeavoring to accomplish." *See* RESTATEMENT (SECOND) OF CONTS. § 162 cmt. c (AM. L. INST. 1981); *see also* Goldman v. Town of Plainfield, 762 A.2d 854, 856 (Vt. 2000) (a misrepresentation is material, either if a reasonable person would attach importance to it, or if the party making the misrepresentation knows or has reason to know that the other party is likely to do so).

161. *See* Universal Health Servs., Inc. v. United States, 136 S. Ct. 1989, 2003 (2016) (holding that materiality in contract and tort law are substantially similar); R & R Capital, LLC v. Merritt, 632 F. Supp. 2d 462, 479 (E.D. Pa. 2009) (evaluating a fraudulent misrepresentation); Hoffer, *supra* note 153, at 131 (noting that a few courts follow the Restatement approach that materiality is not necessary to find fraud, but they seem to be in the minority).

misrepresentation must relate to an essential and important matter that goes to the basis of the bargain.[162] However, this basic meaning of materiality in the context of misrepresentation is shaded by the distinct and specific purpose of the inquiry into the role that the misrepresentation played in inducing assent—whether the factual basis of the bargain was so seriously misrepresented by one party to the other that it defeated the assent of the recipient of the false information.[163]

B. Materiality in Relation to Mistake

Mistake doctrine derives from equity and is intended to provide relief to a party whose assent to a contract was based on a fundamental factual mistake.[164] The remedy most commonly available to the adversely affected party is avoidance of the contract.[165] The doctrine

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162. *See* Olmsted v. Saint Paul Pub. Sch., 830 F.3d 824, 829 (8th Cir. 2016) (holding that a misrepresentation is material if it would be likely to induce a person to manifest assent); *R & R Capital*, 632 F. Supp. 2d at 479–80 (finding that the sellers' claim that a lame horse was the best available was material because knowledge of that fact would likely have induced a reasonable person not to buy the horse); *In re* Universal Mktg., Inc., 541 B.R. 259, 286 (Bankr. E.D. Pa. 2015) (holding that the debtor's misrepresentations in financial disclosures were material because they substantially contributed to a bank's extension of credit to the debtor); Sundberg v. TTR Realty, LLC, 109 A.3d 1123, 1131 (D.C. 2015) (finding that a misrepresentation is material if it would either be likely to induce a reasonable person to manifest assent, or the maker knows that it would be likely to induce this recipient to do so); Jordan v. Knafel, 880 N.E.2d 1061, 1069–71 (Ill. App. Ct. 2007) (finding that a settlement agreement was avoidable by the plaintiff because the defendant's fraudulent misrepresentation that the plaintiff was the father of her child was a substantial factor in inducing the plaintiff to enter into the agreement); Att'y Grievance Comm'n v. Narasimhan, 92 A.3d 512, 528–29 (Md. 2014) (holding that a lawyer's misrepresentation of legal experience was material because a reasonable person would have regarded experience as important to a decision to retain the lawyer); Miller v. Celebration Mining Co., 29 P.3d 1231, 1235 (Utah 2001) (finding that the misrepresentation of the identity of a party is material because identity is inextricably linked to capacity to perform).

163. *See* Scotts Co. v. Liberty Mut. Ins. Co., 606 F. Supp. 2d 722, 741 (S.D. Ohio 2009) (holding that a misrepresentation is material if a contract would not have been formed without it); Colaizzi v. Beck, 895 A.2d 36, 39–40 (Pa. Super. Ct. 2006) (finding that a misrepresentation is material if the transaction would not have been consummated had the misrepresentation not been made).

164. *See* RESTATEMENT (SECOND) OF CONTS. ch. 6 (AM. L. INST. 1981); Frona M. Powell, *Mistake of Fact in the Sale of Real Property*, 40 DRAKE L. REV. 91, 92–93 (1991) (stating that the equitable nature of mistake doctrine gives courts great flexibility in deciding when relief is appropriate).

165. *See* De Monet v. PERA, 877 S.W.2d 352, 358 (Tex. App. 1994) (holding that mistake entitles a party to rescission of the contract and restitution).

distinguishes a mistake shared by both parties—categorized as a mutual mistake—from a mistake attributable only to the party seeking avoidance—–categorized as a unilateral mistake.[166] The distinction between these categories is not always obvious, but it need not be addressed here because the issue of the materiality of the mistake is the same for both categories of mistake. To avoid a contract for mistake, the adversely impacted party must establish that the mistake was made with regard to a fact existing at the time of contracting; the factual error must have been a basic assumption on which the contract was made; it must have a material effect on the agreed exchange of performances; and the party claiming avoidance must not have borne the risk of the mistake.[167]

The materiality of the mistake is reflected in the two separate but interconnected requirements that the mistake must have related to a basic assumption on which the contract was made, and it must have a material effect on the exchange of performances. The test of basic assumption goes to the motivation in entering into the contract—the mistake is so fundamental to the factual assumptions underlying the contract that it would not have been entered into had the true facts been known.[168] The test of materiality focuses on the impact of the mistake on the exchange—the extent to which it substantially deprived the adversely affected party of the reasonably expected bargain.[169]

166. *See* RESTATEMENT (SECOND) OF CONTS. § 152 (AM. L. INST. 1981) (setting out the elements of mutual mistake); *id.* § 153 (setting out the elements of unilateral mistake). In essence, a mistake is usually classified as unilateral where it forms the basis of the decision of only one of the parties and does not affect the decision of the other. *See id.* That is, it relates only to the basic assumption of one of the parties. *See id.* A common example is a seller's or contractor's error in calculating price. *See id.* The customer is interested only in what the price is and has no information on, or participation in, that calculation. *See, e.g.*, Bert Allen Toyota, Inc. v. Grasz, 909 So. 2d 763, 769–70 (Miss. Ct. App. 2005) (holding that the buyer of a pickup truck was concerned only with the ultimate price asked by the seller, not with the means of its calculation, so the seller's computational error was a unilateral mistake).

167. *See* RESTATEMENT (SECOND) OF CONTS. § 151 cmts. a–b, §§ 152(1), 153–54 (AM. L. INST. 1981).

168. *See* Roers v. Countrywide Home Loans, Inc., 728 F.3d 832, 836 (8th Cir. 2013) (stating that the buyers of land would not have entered into the contract but for the erroneous basic assumption that the land could be subdivided); Hillside Assocs. of Hollis, Inc. v. Me. Bonding & Cas. Co., 605 A.2d 1026, 1030 (N.H. 1992) (explaining that the mistake must go to the very basis of the alleged contract).

169. *See Roers*, 728 F.3d at 836 (stating that for a mistake to be material, it must go to the very nature of the exchange); Shawmut-Canton LLC v. Great Spring Waters of Am., Inc., 816 N.E.2d 545, 551 (Mass. App. Ct. 2004) (holding that relief

These two elements flow into each other because an error that belies a basic assumption underlying the contract is likely, in most cases, to result in a material effect on the exchange of performances. Therefore, although the elements are theoretically distinct and each must be established, they are difficult to separate in practice and readily coalesce into a single inquiry.[170] The focus of that inquiry is to decide when a mistake is fundamental enough to justify relief.[171] In this respect, the twin requirements of basic assumption and material effect mirror the relationship in material breach analysis between the basis of the bargain and the economic impact of the breach.[172] As is true with regard to material breach, the question of whether the error is sufficiently fundamental to merit relief for mistake is dependent on the facts and the balance of the equities of each case, making it hard to predict how a case may be decided.[173]

The close relationship between basic assumption and material effect is apparent in the similar standards for deciding if these requirements are met.[174] A basic assumption—which need not be articulated expressly, and can be inferred from the nature and circumstances of the transaction[175]—goes to the essence of the contract, so that the mistaken party would not have entered the

for mistake is only appropriate where the mistake has such a material effect on the agreed exchange so as to upset the very basis for the contract).

170. *See* Koam Produce, Inc. v. DiMare Homestead, Inc., 329 F.3d 123, 127 (2d Cir. 2003) (conflating basic assumption and materiality); RESTATEMENT (SECOND) OF CONTS. § 152 cmt. c (AM. L. INST. 1981) (stating that a party cannot avoid a contract merely by showing a mistake as to a basic assumption on which the contract was made but must also show that the mistake had a material effect on the agreed exchange of performances); MURRAY, *supra* note 27, § 92(D)(2), at 494 (stating that the party must show not only that it would not have entered the contract but for the erroneous basic assumption, but also that it materially affected the agreed exchange); Hoffer, *supra* note 153, at 121 (explaining that judicial determinations of basic assumption have bled into the court's analysis of the separate requirement of material effect).

171. *See* Hoeffer, *supra* note 153, at 119.

172. *See supra* text accompanying notes 45–48.

173. *See* Hoffer, *supra* note 153, at 119 (discussing the difficulty in determining whether a mistake is fundamental enough to justify avoidance); Powell, *supra* note 162, at 92–93, 97 (conveying that in mistake doctrine, materiality cannot be defined beyond broad generalizations because equitable considerations make that determination very dependent on the particular facts of each case).

174. *See* Hillside Assocs. of Hollis, Inc. v. Me. Bonding & Cas. Co., 605 A.2d 1026, 1030 (N.H. 1992) (discussing assumptions in contract formation).

175. *See id.* (concluding that the assumption need not be stated—the more basic the assumption, the less likely it will be articulated); Hoffer, *supra* note 153, at 121 (determining what basic assumption underlay the contract is fact dependent and not easily predictable).

contract had it known the true facts.[176] This test for basic assumption bears a striking resemblance to the test for materiality that courts articulate for misrepresentation.[177] A mistake has a material effect on the agreed exchange if it upsets the very basis of the contract.[178]

The allocation of risk to the mistaken party is crucial in mistake cases and precludes relief even if the mistake relates to a basic assumption under which the contract was entered and it has a material effect on the exchange.[179] The party seeking avoidance of the contract is denied relief for mistake if the contract expressly or impliedly allocates the risk of the error to that party;[180] or if the party's mistake

176. *See Hillside Assocs. of Hollis, Inc.*, 605 A.2d at 1030; Knudsen v. Jensen, 521 N.W.2d. 415, 418 (S.D. 1994); MURRAY, *supra* note 27, §92(D)(1), at 493; Hoffer, *supra* note 153, at 120. RESTATEMENT (SECOND) OF CONTS. §152 cmt. b (AM. L. INST. 1981) does not offer specific guidance on the test for basic assumption in mistake cases but just notes that the test is the same as it is for impracticability and frustration of purpose, dealt with in § 261 and § 265, and in UCC § 2-615. This test is covered in *infra* Part V.

177. *See supra* text accompanying note 161.

178. *See* Roers v. Countrywide Home Loans, Inc., 728 F.3d 832, 836 (8th Cir. 2013) (stating that a mistake as to the extent of land purchased is material because it goes to the very nature of the transaction); Koam Produce, Inc. v. DiMare Homestead, Inc., 329 F.3d 123, 127 (2d Cir. 2003) (holding a seller's price reduction for produce, based on a false quality determination by corrupt USDA inspectors, constituted a material mistake); Shawmut-Canton LLC v. Great Spring Waters of Am., Inc., 816 N.E.2d 545, 551 (Mass. App. Ct. 2004) (finding a mistake as to zoning laws may have been an inducement to entering a commercial lease, but it did not upset the very basis of the contract and was not grounds for avoidance because the tenant could still use the property for its intended purpose); De Monet v. PERA, 877 S.W.2d 352, 357–58 (Tex. App. 1994) (concluding that a material mistake goes to the essential substance of the contract, rather than merely to a collateral matter and is determined in the entire context of the transaction); RESTATEMENT (SECOND) OF CONTS. §152 cmt. a (AM. L. INST. 1981) (discussing that relief for mistake is appropriate only where the mistake so materially affects the agreed exchange of performances as to upset the very basis of the contract).

179. *See* RESTATEMENT (SECOND) OF CONTS. §152 cmt. e (AM. L. INST. 1981) (articulating the significance of risk allocation in mistake cases); *id.* §154 cmt. a (stating that the mistaken party's assumption of risk precludes relief, even though the mistake upsets basic assumptions and significantly affects the exchange).

180. *See generally* SCI Minn. Funeral Servs., Inc. v. Washburn-McReavy Funeral Corp., 795 N.W.2d 855 (Minn. 2011) (discussing that the terms of the contract indicated that the risk of error was allocated to the party seeking relief for mistake); Cherry v. McCall, 138 S.W.3d 35, 39–40 (Tex. App. 2004) (stating that a contractual provision that the buyer bought the property "in its current condition" and "as is" allocated to the buyer the risk of mistake as to the state of the property); RESTATEMENT (SECOND) OF CONTS. §154(a) cmt. b (AM. L. INST. 1981) (explaining that a party may agree by words or actions to perform in spite of a mistake that would otherwise justify avoidance).

was caused by conscious failure to ascertain facts;[181] or, in the absence of these circumstances, if the court finds that it is reasonable to allocate the risk of the mistake to that party.[182] Therefore, although risk allocation is a distinct element, separate from basic assumption and materiality, there is a relationship between risk assumption and materiality: The mistaken party's assumption of the risk of the mistake, either in the contract or because of conscious ignorance, could give rise to the inference that the party did not regard that fact as material and should not be allowed to claim an unfair imbalance in the agreed exchange.[183]

The dispute in a mistake case is over the viability of the contract—the party claiming mistake seeks release from the contract while the other party wishes it to remain in effect.[184] Materiality analysis is at the center of this dispute, which must balance the

181. *See Koam Produce, Inc.*, 329 F.3d at 127–28 (finding that the mistaken party should not be allocated the risk of a mistake where it had no awareness of or access to facts that would have alerted it to the mistake); Estate of Nelson v. Rice, 12 P.3d 238, 242 (Ariz. Ct. App. 2000) (holding that the estate bore the risk of mistakenly selling valuable paintings for a fraction of their worth because it failed to appraise the paintings and was therefore consciously ignorant); Bert Allen Toyota, Inc. v. Grasz, 909 So. 2d 763, 763 (Miss. Ct. App. 2005) (concluding that the seller bore the risk of an obvious error in computing the price of a pickup truck because it totally failed to exercise reasonable care in making the computation); RESTATEMENT (SECOND) OF CONTS. §154(b) cmt. c (AM. L. INST. 1981) (stating that "[e]ven though the mistaken party did not agree to bear the risk," it assumes the risk of the mistake if it was consciously ignorant—it was aware of its lack of knowledge but failed to make an effort to correct that ignorance.); Hoffer, *supra* note 153, at 123 (pointing out that there is a parallel between conscious ignorance in mistake doctrine and unjustifiable reliance in misrepresentation, in that both these barriers to relief are based on an evaluation of whether the claimant should have been more diligent in protecting its own interests—a mistaken party has some leeway in responsibility for an error, so that mere negligence, short of conscious ignorance should not bar relief); *see also* Donovan v. RRL Corp., 27 P.3d 702, 717–18 (Cal. 2001) (stating that negligence does not bar relief for mistake unless it is extreme); *Knudsen*, 521 N.W. 2d. at 419–20 (discussing that a mistaken party's negligent mistake does not preclude relief unless the party's error resulted from a failure to act in good faith and in accordance with standards of fair dealing); RESTATEMENT (SECOND) OF CONTS. §157 (AM. L. INST. 1981) (stating that the mistaken party's fault in failing to discover facts should not bar relief unless the fault amounts to bad faith or a breach of the standards of fair dealing).

182. *See* RESTATEMENT (SECOND) OF CONTS. §154(c) cmt. d (AM. L. INST. 1981).

183. *See* S. Nat'l Bank of Hous. v. Crateo, Inc., 458 F.2d 688, 692–93 (5th Cir. 1972) (stating that facts are material if the parties consider them to be, so that a fact must be taken to be immaterial if a party is consciously ignorant of it resulting from failure to ascertain it).

184. *See generally id.*

hardship of enforcement to the party claiming mistake against the other party's loss of bargain.[185] This consideration impacts the determination of materiality and requires a balancing of the equities that goes beyond the bare focus on the objective importance of the mistake.[186] Avoidance is most appropriate where the mistake has so unbalanced the exchange that it would be unfair to hold the mistaken party to the contract and would create a windfall for the other party.[187]

V. MATERIALITY IN RELATION TO EXCUSE OF PERFORMANCE ON GROUNDS OF IMPRACTICABILITY AND FRUSTRATION OF PURPOSE

All contracts contemplate future performance and are based on suppositions about the future. In most cases, a party is bound by its contractual promises even if post-formation circumstances turn out to be different than assumed, making the contract less desirable for that party.[188] However, where a post-formation change in circumstances—a supervening event—so profoundly undermines a basic assumption underlying the contract, the doctrines of impracticability and

185. *See id.*

186. *See* Knudsen v. Jensen, 521 N.W.2d. 415, 420 (S.D. 1994) (reasoning that, in disposing of a mistake case between two innocent parties, the court must use its equitable discretion to decide what is fair and just under the circumstances). Where the mistake is unilateral, RESTATEMENT (SECOND) OF CONTS. §153 (AM. L. INST. 1981) expresses this equitable principle by identifying as a consideration that enforcement of the contract would be unconscionable. *Donovan*, 27 P.3d at 716–17, 716 n.6 (applying the unconscionability doctrine in granting relief for unilateral mistake).

187. *See* RESTATEMENT (SECOND) OF CONTS. §152 cmt. c (AM. L. INST. 1981) (stating that the party seeking avoidance must show that the "imbalance in the agreed exchange [resulting from the mistake] is so severe that he can not fairly be required to carry it out"); Roers v. Countrywide Home Loans, Inc., 728 F.3d 832, 836–37 (8th Cir. 2013) (reasoning that the fact that the exchange is more advantageous to the other party is a consideration but not a requirement for relief); *Donovan*, 27 P.3d at 717 (showing that a significant mistake in the advertised price of a vehicle would have a severe impact on the seller and would be a windfall for the buyer); Hillside Assocs. of Hollis, Inc. v. Me. Bonding & Cas. Co., 605 A.2d 1026, 1030–31 (N.H. 1992) (stating that the imbalance in the exchange is an important consideration); FARNSWORTH, *supra* note 58, §9.3, at 606–07 (observing that although courts recognize that hardship to the party seeking avoidance is enough, relief is more likely to be granted if the mistake makes the exchange more advantageous to the other party); MURRAY, *supra* note 27, §92(D)(2), at 494 (stating that a court is more likely to give relief if the mistake would result in the unjust enrichment of the non-mistaken party).

188. *See* RESTATEMENT (SECOND) OF CONTS. ch. 11, intro. note (AM. L. INST. 1981) (stating that under the maxim, "*pacta sunt servanda*," a contract must be kept even if a change of circumstances makes the contract more burdensome or less desirable than expected).

frustration of purpose may be available to excuse the performance of the negatively affected party.[189] The standard formulation of these doctrines, as set out in Restatement (Second) of Contracts and UCC Article 2 articulates identical requirements for impracticability and frustration of purpose: The performance of a party is made impracticable or the purpose of the contract is frustrated by an event occurring after contract formation; the non-occurrence of that event was a basic assumption of the contract; the party seeking relief was not at fault in causing the event; and the risk of the event occurring was not assumed, expressly or impliedly, by that party.[190] This formulation does not state in so many words that the supervening event must have a material effect on the contract, but as the following discussion explains, it is a crucial requirement, inherent in the very nature of the doctrines.

Unlike the mistake doctrine, which is concerned with defective assent based on an error of fact existing at the time of contract formation, the doctrines of impracticability and frustration of purpose focus on the impact of post-formation events on the contract.[191] They are therefore not aimed at avoidance of the contract, but at excusing a promised performance, thereby exonerating the excused party from

189. *See* Specialty Tires of Am., Inc. v. CIT Grp./Equip. Fin., Inc., 82 F. Supp. 2d 434, 437–38 (W.D. Pa. 2000) (stating that, in the overwhelming majority of circumstances, contracts are to be performed but, in limited circumstances, unexpected and radically changed conditions may excuse performance); RESTATEMENT (SECOND) OF CONTS. ch. 11, intro. note (AM. L. INST. 1981) (explaining that justice may require relief if an extraordinary circumstance makes performance so vitally different from what was expected, so as to alter the essential nature of that performance).

190. The requirements for impracticability are set out in functionally equivalent language in RESTATEMENT (SECOND) OF CONTS. §261 (AM. L. INST 1981) and U.C.C. §2-615 (AM. L. INST. & UNIF. L. COMM'N 1977), and the requirements for frustration of purpose are set out in RESTATEMENT (SECOND) OF CONTS. §265. *See* Waddy v. Riggleman, 606 S.E.2d 222, 229 n.9, 229–30, 235 (W.Va. 2004) (recognizing these elements as widely applied in contemporary cases). UCC §2-615 confines the excuse of impracticability to sellers, *id*. at 235, and has no equivalent provision for buyers. UCC Article 2 does not have a provision dealing with frustration of purpose.

191. The temporal dividing line between a mistake at the time of contracting and a post-formation event making the contract impracticable or frustrating its purpose is widely recognized but not watertight. RESTATEMENT (SECOND) OF CONTS. §266 cmt. a (AM. L. INST. 1981) (recognizing a form of "existing impracticability" where a party has no reason to know of a fact, the nonexistence of which is a basic assumption of the contract, but conceding that it is difficult to distinguish this form of impracticability from mistake).

liability for breach of contract.[192] Depending on the nature of the event and its impact, the performance may be entirely excused, or a performance falling short of what was originally promised may be found not to be a breach of contract.[193] If the performance of the party seeking relief is fully excused, the other party's obligations under the contract also fall away, or if the excuse is partial, they are appropriately adjusted to the extent that it loses the benefit of its bargain.[194]

The doctrines of impracticability and frustration of purpose are so closely related that they are almost indistinguishable, and in many cases, the same facts could support the application of either doctrine.[195] Impracticability fits better where the change in circumstances makes the performance impossible to carry out, or it impedes it significantly and unreasonably, or it increases the risk, burden, or expense of

192. *See* Cent. Kan. Credit Union v. Mut. Guar. Corp., 102 F.3d 1097, 1103 (10th Cir. 1996) (showing that impracticability excuses a party's unfulfilled future obligation to perform); Gander Mountain Co. v. Islip U-Slip LLC, 923 F. Supp. 2d 351, 359 (N.D.N.Y. 2013) (explaining that frustration of purpose discharges the party's contractual duty).

193. *See* enXco Dev. Corp. v. N. States Power Co., 758 F.3d 940, 945 (8th Cir. 2014) (stating that temporary impracticability may justify a delay in performance); Hoosier Energy Rural Elec. Coop., Inc. v. John Hancock Life Ins. Co., 588 F. Supp. 2d 919, 931 (S.D. Ind. 2008) (reasoning that impracticability can be partial or temporary); *Specialty Tires of Am., Inc.*, 82 F. Supp. 2d at 442 (explaining that temporary impracticability only excuses performance for as long as the impracticability lasts); RESTATEMENT (SECOND) OF CONTS. § 269 (AM. L. INST. 1981) (stating that temporary impracticability or frustration may excuse performance temporarily); *id.* § 270 (stating that impracticability or frustration may excuse only part of a performance); U.C.C. §2-615 (AM. L. INST. & UNIF. L. COMM'N 1977) (explaining that impracticability may merely delay performance or permit partial performance, rather than excusing it entirely).

194. *See* FARNSWORTH, *supra* note 58, § 9.9, at 642–46 (explaining that a party's material failure to perform because of impracticability permits the other party to withhold performance and terminates the contract, but does not permit damages for breach, while partial excuse allows for apportionment of the other party's performance).

195. The doctrine of frustration of purpose was formulated in the case of Krell v. Henry, 2 K.B. 740 (1903), as an expansion of the doctrine of impossibility, which was much narrower than the contemporary doctrine of impracticability. The development of the broader impracticability doctrine probably renders frustration of purpose redundant. Nevertheless, it still features regularly in court opinions. *See generally* Nicholas R. Weiskop, *Frustration of Contractual Purpose – Doctrine or Myth?*, 70 ST. JOHN'S L. REV. 239 (1996) (explaining the difference between impracticability and frustration of purpose and questioning whether frustration of purpose truly is a distinct doctrine). Some courts have also blurred the distinction. *See, e.g.*, Phillips v. McNease, 467 S.W.3d 688, 695 (Tex. App. 2015) (equating frustration of purpose and impracticability).

rendering it.[196] Frustration of purpose is more appropriate where the change in circumstances has not precluded performance or made it unreasonably onerous, but defeats the fundamental, mutually recognized purpose of the contract.[197] Apart from this distinction, impracticability and frustration have identical elements—a post-formation event, the nonoccurrence of which was a basic assumption of the contract, and an absence of fault and risk assumption by the party seeking relief.[198]

This formulation does not expressly state that the occurrence of the event must have a material effect on the exchange.[199] However, for the following reasons, it is clear that the materiality of the occurrence is implicit in the requirements that the nonoccurrence of the event was a basic assumption on which the contract was made, and that the happening of the event made the party's performance impracticable or frustrated the contract's purpose. First, the nonoccurrence of the event only qualifies as a basic assumption of the contract if the assumption that the event would not occur goes to the essence and fundamental

196. *See* U.C.C. § 2-615 cmt. 4 (AM. L. INST. & UNIF. L. COMM'N 1977) (distinguishing situations of severe difficulty from mere market changes); *see also* RESTATEMENT (SECOND) OF CONTS. § 261 cmt. d (AM. L. INST. 1981) (explaining that impracticability must be based on abnormal, extreme, and unreasonable difficulty, expense, injury, or loss). Both Official Comment 4 to UCC § 2-615 and Comment d to RESTATEMENT (SECOND) OF CONTS. § 261 (AM. L. INST. 1981) provide examples, such as severe shortage of raw materials or supplies as a result of war, embargo, local crop failure, or failure of major sources of supply.

197. *See* Brenner v. Little Red Sch. House, Ltd., 274 S.E.2d 206, 209 (N.C. 1981) (agreeing with 17 AM. JUR. 2D *Contracts* § 401 (1964) that frustration, rather than impracticability, is the proper doctrine where a fortuitous event supervenes to totally destroy the expected value of performance); JB Pool Mgmt., LLC v. Four Seasons at Smithville Homeowner's Ass'n, Inc., 67 A.3d 702, 709 (N.J. Super. Ct. App. Div. 2013) (explaining the distinction between impracticability and frustration of purpose); RESTATEMENT (SECOND) OF CONTS. § 265 cmt. a (AM. L. INST. 1981) (explaining that frustration is distinct from impracticability because there is no impediment to either party's performance).

198. *See* JB Pool Mgmt., 67 A.3d at 709 (citing to RESTATEMENT (SECOND) OF CONTS. § 265 cmt. a (AM. L. INST. 1981) and explaining the identical elements between impracticability and frustration of purpose).

199. However, the requirement of materiality is mentioned elsewhere in the Restatement's chapter on impracticability and frustration. *See* RESTATEMENT (SECOND) OF CONTS. § 269 (AM. L. INST. 1981) (stating that temporary impracticability or frustration of purpose suspends, "but does not discharge" performance unless performance after the suspension has become "materially more burdensome"); *see also id.* § 271 (stating that the nonfulfillment of a condition may be excused on grounds of impracticability "if the occurrence of the condition is not a material part of the agreed exchange and forfeiture would otherwise result").

basis of the contract.[200] Second, only a material change in circumstances would satisfy the requirement that the event rendered performance impracticable because an immaterial change in circumstances would not be sufficient to create the extreme difficulty, burden, or loss needed to qualify the performance as impracticable.[201] Similarly, for an event to frustrate the purpose of the contract, it must be material enough to severely frustrate the principal and fundamental purpose of the contract, rendering the transaction senseless.[202]

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200. *See* Waddy v. Rigleman, 606 S.E.2d 222, 236–37 (W. Va. 2004) (holding that a contractual provision declaring time of performance to be of the essence is strong evidence that timely performance was a material term of the contract). The test is equivalent to the test of basic assumption in relation to mistake. In addressing the meaning of "basic assumption" in mistake doctrine, RESTATEMENT (SECOND) OF CONTS. § 152 cmt. b (AM. L. INST. 1981) cross references §§ 261, 265 on frustration of purpose, as well as UCC § 2-615(a) on impracticability, and states that the term is used in relation to mistake in the same sense that it is used in impracticability and frustration of purpose.

201. *See* RESTATEMENT (SECOND) OF CONTS. § 261 cmt. d (AM. L. INST. 1981) (defining impracticability as "extreme and unreasonable difficulty, expense, injury or loss"). Comment d then expands on this definition by referring to events that cause a "marked increase in cost or prevents performance altogether," or would risk injury to person or property "that is disproportionate to the ends to be attained by performance." *Id.* It contrasts these serious consequences with "[a] mere change in the degree of difficulty or expense" that does not amount to impracticability. *Id*. Comment d indicates that § 261 uses the concept of impracticability in the same sense as UCC § 2-615, but Comment d is more expansive in its explanation than the Official Comments to UCC § 2–615. *See id.*; *also* U.C.C. § 2-615 cmt. 4 (AM. L. INST. & UNIF. L. COMM'N 1977) (contrasting a marked increase in cost or a complete inability to get supplies, which may constitute impracticability, from a change in cost or market conditions that should not). Case law likewise emphasizes the materiality requirement inherent in impracticability. *See* All Points Capital Corp. v. Boyd Bros., No. 5:11-cv-116, 2011 WL 2790170, at *1–2 (N.D. Fla. July 15, 2011) (finding that there must be a "direct connection" between the events and the resulting difficulties in rendering performance, and the excuse of impracticability is not available where changes in general market conditions have made performance "more difficult and less profitable"); Ashraf v. Swire Pac. Holdings, Inc., 752 F. Supp. 2d 1266, 1270 (S.D. Fla. 2009) (stating that changing market conditions are not enough to constitute impracticability); Prusky v. Reliastar Life Ins. Co., 474 F. Supp. 2d 695, 700 (E.D. Pa. 2007) (stating that impracticability is more than futility and a party cannot excuse performance merely because it believes it to be futile—the party must show "extreme difficulty or expense, or the threat that performance would result in injury"); *Waddy*, 606 S.E.2d at 231–32 (quoting RESTATEMENT (SECOND) OF CONTS. § 261 cmt. d (AM. L. INST. 1981)) (explaining that a party must make "reasonable efforts to" overcome obstacles to performance and cannot claim impracticability merely because performance has become more difficult).

202. *See* Gander Mountain Co. v. Islip U-Slip LLC, 923 F. Supp. 2d 351, 359 (N.D.N.Y. 2013) (quoting U.S. v. Gen. Douglas MacArthur Senior Vill., 508 F.2d 377, 381 (2d Cir. 1974)) (stating that the frustration must be substantial— "a 'virtually

As with mistake, even if materiality can be established, relief may be refused on the basis of the separate, and often determinative requirement that the party seeking relief must not have borne the risk of the event.[203] For purposes of impracticability and frustration, risk allocation is determined either by contract provisions that expressly or impliedly allocate that risk to one of the parties, or in the absence of such a provision, in a manner reasonable under all the circumstances.[204] One of the most important circumstances taken into account in allocating the risk of an occurrence in the absence of a contractual assumption of risk is the foreseeability of the event.[205] To qualify as foreseeable for this purpose, it is not enough that the event was merely conceivable as a possibility; it must have been a possible and probable contingency that the parties would reasonably have taken into account in entering the contract.[206] A party should not be given relief for impracticability or frustration if that party anticipated or should have reasonably anticipated and taken into account the possible change in circumstances.[207] As in mistake, risk allocation, while not

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cataclysmic, wholly unforeseeable event'" must have "rendere[d] the contract valueless" to the party seeking relief); Linder v. Meadow Gold Dairies, Inc., 515 F. Supp. 2d 1154, 1162 (D. Haw. 2007) (reasoning that the duty to comply with environmental laws added expense to the operation of a dairy farm, but was not so severe as to substantially frustrate the contract's purpose, and was fairly within the risks assumed in the contract by the dairy farm); RESTATEMENT (SECOND) OF CONTS., § 265 cmt. a (AM. L. INST. 1981) (explaining that the purpose frustrated must be the "principle purpose" of the contract, and "so completely the basis of the contract that, as both parties understand, without it the transaction would make little sense").

203. *See* Conneaut Lake Park, Inc. v. Park Restoration, LLC (*In re* Conneaut Lake Park, Inc.), 564 B.R. 495, 508 (Bankr. W.D. Pa. R. 2017) (finding that the destruction of premises did not give rise to a claim of impracticability where the contract allocated that risk to the party seeking relief).

204. *See* U.C.C. § 2-615 cmt. 8 (AM. L. INST. & UNIF. L. COMM'N 1977); RESTATEMENT (SECOND) OF CONTS. § 261 cmt. c (AM L. INST. 1981).

205. *See* Specialty Tires of America, Inc. 82 F. Supp. 2d at 438–39 (stating that foreseeability is an important but not dispositive factor in risk allocation); *Waddy*, 606 S.E.2d at 232–33 (noting that foreseeability is a significant but not conclusive factor in deciding if the nonoccurrence of the event was a basic assumption of the contract).

206. *See* Hoosier Energy Rural Elec. Coop., Inc. v. John Hancock Life Ins. Co., 588 F. Supp. 2d 919, 932 (S.D. Ind. 2008) (noting that even if an event is conceivable, it does not qualify as foreseeable if it is improbable); *see also Specialty Tires of Am., Inc.*, 82 F. Supp. 2d at 438–40 (expounding that even if the possibility of a variety of potential calamities can be foreseen, they may not be likely enough to be worth bargaining over).

207. *See* Cent. Kan. Credit Union v. Mut. Guar. Corp., 102 F.3d 1097, 1103 (10th Cir. 1996) (holding that performance should not be excused for impracticability if it should have been foreseen and provided against in the contract); *see also Gander*

directly related to materiality, does have an impact on its determination: The absence of a term in the contract protecting a party against a foreseeable and likely contingency adds force to the argument that the occurrence of the contingency should not be treated as material enough to justify relieving the party of its promised performance.[208]

Materiality analysis therefore permeates the requirements for relief on grounds of impracticability and frustration of purpose. Although the basic meaning of materiality in this context accords with its overall general meaning—the supervening event must profoundly affect the fundamental basis of the contract—the role that it plays here must be taken into account in deciding whether the impact of the event justifies allowing one of the parties to escape liability for nonperformance, thereby depriving the other of the benefit of its bargain.[209] Therefore, the impact of the occurrence cannot be determined merely on the basis of its objectively important effect on the contract, but must be evaluated in light of all the equities of the case, balancing the hardship of compelling the performance by the party seeking excuse against the other party's reliance interest in the contract.[210]

VI. MATERIALITY IN RELATION TO EXCUSE OF A CONDITION

The usual consequence of nonfulfillment of a condition is that the duty of performance contingent on the condition does not come

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Mountain Co., 923 F. Supp. 2d at 360 (exploring the question of whether the party seeking to avoid liability could have anticipated and guarded against the event through contractual safeguards); *Hoosier Energy*, 588 F. Supp. 2d at 931 (explaining that impracticability requires unexpected radically changed circumstances); Brenner v. Little Red Sch. House, Ltd., 274 S.E.2d 206, 210 (N.C. 1981) (holding that a father could not claim frustration of purpose to excuse his obligation to pay a full year's tuition to a private school because he should reasonably have foreseen that his ex-wife might withdraw the child from the school).

208. *See* Prusky v. Reliastar Life Ins. Co., 474 F. Supp. 2d 695, 702 (E.D. Pa. 2007) (reasoning that if a contingency was foreseen its nonoccurrence should not be treated as a basic assumption of the contract).

209. *See* RESTATEMENT (SECOND) OF CONTS. ch. 11, intro. note (AM. L. INST. 1981) (illustrating that where an extraordinary change in circumstances alters the essential nature of the performance, the court must determine whether justice requires a departure from the general rule that the obligor bears the risk that the contract has become more burdensome or less desirable than expected).

210. *See Specialty Tires of Am., Inc.*, 82 F. Supp. 2d at 441 (conducting a balancing of the harm to the parties in determining impracticability).

into effect.[211] However, there are doctrines under which an express condition, which would otherwise be strictly enforced, may be excused, so it is removed and the duty contingent on the condition becomes absolute and unconditional.[212] This Section covers two bases for excusing a condition, provided that it is not material. The first is disproportionate forfeiture, discussed in Section VI.A, and the second is waiver, discussed in Section VI.B.

A. Excuse of an Immaterial Condition on Grounds of Disproportionate Forfeiture

The equities influencing the determination of materiality are clearly apparent in the doctrine permitting excuse of an express condition on grounds of disproportionate forfeiture.[213] Disproportionate forfeiture is a flexible concept, in essence involving a loss of rights beyond the mere forfeiture of the rights under the contract, that results in extreme and unfair hardship on the party seeking excuse.[214] The reason for nonfulfillment of the condition could be the inadvertence of the party who was obliged to perform it or circumstances beyond that party's control.[215]

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211. *See* RESTATEMENT (SECOND) OF CONTS. § 224 (AM. L. INST. 1981) ("A condition is an event, not certain to occur, which must occur, unless its nonoccurrence is excused, before performance under a contract becomes due.").

212. *See id.* § 226 cmt. c (explaining that courts typically feel compelled to strictly enforce express conditions). *Supra* note 34 distinguishes promissory and non-promissory conditions. The grounds of excuse discussed in this part are applicable to both promissory and non-promissory conditions, provided that the condition in question is not a material part of the exchange.

213. *See* RESTATEMENT (SECOND) OF CONTS. § 229 cmt. a (AM. L. INST. 1981) (expounding that the doctrine of disproportionate forfeiture is primarily applicable to express conditions because if the condition is not express, the court may be able to avoid forfeiture simply by declining to construe a condition).

214. *See* Conley v. Guerrero, 127 A.3d 705, 709 (N.J. Super. Ct. App. Div. 2015) (finding that "[d]isproportionality is a flexible concept," within the court's discretion); *see also* United Props., Ltd. v. Walgreen Props., Inc., 82 P.3d 535, 538 (N.M. Ct. App. 2003) (stating that disproportionate forfeiture involves such hardship to the party seeking relief as to make literal enforcement of the condition unconscionable); *see also* RESTATEMENT (SECOND) OF CONTS. § 229 cmt. b (AM. L. INST. 1981) (explaining that disproportionate forfeiture is necessarily a flexible inquiry).

215. *See* RESTATEMENT (SECOND) OF CONTS. § 229 (AM. L. INST. 1981) (setting out the general principle that the court has the discretion to excuse an immaterial condition to avoid disproportionate forfeiture). Section 271 extends this principle to situations in which the condition has become impracticable to perform as a result of a change of circumstances beyond the control of the party seeking excuse.

Although courts are reluctant to refuse enforcement of a contract as written, a court may exercise its equitable discretion to intervene if disproportionate forfeiture will result from a trivial or technical nonfulfillment of a condition—that is, enforcing the condition will cause disproportionate harm to the party seeking excuse, and the condition is not so important that its excuse will cause substantial prejudice to the other party.[216] For this reason, the doctrine of disproportionate forfeiture is confined to immaterial conditions, and is not a ground for excusing a material condition, even if its enforcement would cause significant loss to the party seeking to excuse the condition.[217]

The general meaning of materiality, for purposes of deciding to excuse a condition on the basis of disproportionate forfeiture, conforms to its meaning elsewhere—whether the condition relates to the object of the contract or is merely incidental to it.[218] However, this

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See id. § 271. Illustration 2 to § 271 gives the example of an insured who cannot satisfy a condition of timely notice of claim because of a disabling injury. *See id.* It is not necessary to distinguish these situations here because both are based on disproportionate forfeiture as the result of nonfulfillment of an immaterial condition.

216. *See* United States v. Doe, 741 F.3d 359, 364 (2d Cir. 2013) (reasoning that although an express condition must usually be exactly performed, the court has the discretion to excuse such exact compliance if the condition is not a material part of the exchange); *see also* Varel v. Banc One Cap. Partners, Inc., 55 F.3d 1016, 1018 (5th Cir. 1995) (holding that performance of a condition will be excused if it will involve extreme forfeiture, and its occurrence is not an essential part of the exchange). *But see In re* C.A.F. Bindery, Inc., 199 B.R. 828, 834–35 (Bankr. S.D.N.Y. R. 1996) (finding that the court will intervene where minor noncompliance with the condition causes substantial forfeiture because equity abhors forfeiture); *cf.* Capistrant v. Lifetouch Nat'l Sch. Studios, Inc., 916 N.W.2d 23, 28 (Minn. 2018) (examining that the court disfavors forfeiture and will avoid it where reasonable if strict enforcement of the condition would cause disproportionate forfeiture). Not all courts are willing to exercise this equitable discretion to forgive noncompliance with an express condition. *See, e.g.*, Woodland Inv. Member, LLC v. Soldier Creek, LLC, No. 11-3013-JTM, 2012 WL 1893512, at *15–16 (D. Kan. May 23, 2012) (acknowledging that although equity abhors forfeitures, it is not appropriate to apply disproportionate forfeiture doctrine where a party has bound itself to perform certain conditions or lose its rights); *see also United Props., Ltd.*, 82 P.3d at 541–42 (stating that security of transactions requires exact compliance with an express condition, so the doctrine of disproportionate forfeiture should not be used to grant relief to party who failed to comply precisely with the condition).

217. *See Doe*, 741 F.3d at 364; *see also In re* Wade, 392 B.R. 302, 307 (E.D. Mich. 2008).

218. *Compare Doe*, 741 F.3d at 364 (finding that a condition is material and cannot be excused if it goes to the heart of the contract and excuse would diminish the rights protected by the condition), *and* Edelman Arts, Inc. v. Art Intern. (UK) Ltd., 841 F. Supp. 2d 810, 828 (S.D.N.Y. 2012) (reasoning that a condition is material, and

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.[219]

B. Excuse of an Immaterial Condition on Grounds of Waiver

In the context of conditions, a waiver is a party's voluntary relinquishment, expressly or by conduct, of a condition included in the contract for its benefit.[220] Where one of the parties to a contract (the promisor) refuses to perform on the grounds that a condition of its performance has not been fulfilled, the other (the promisee) may allege that the condition has fallen away because the promisor waived it. A successful claim of waiver therefore prevents the promisor from

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not a mere technicality or unimportant, if the party asserting it would not have entered the contract without it), *with In re C.A.F. Bindery, Inc*., 199 B.R. at 834–35 (distinguishing a material term from one that is merely trivial or technical), *Capistrant*, 916 N.W.2d at 29, *and* RESTATEMENT (SECOND) OF CONTS. § 229 cmt. c (AM. L. INST. 1981) (adopting the same standard of materiality as applies to waiver—that the condition is not just procedural or technical but has a significant effect on value bargained for or the burden of risk assumed by the other party).

219. *See Varel*, 55 F.3d at 1018 (determining whether forfeiture is disproportionate, the court must weigh the extent of forfeiture that will be suffered by the party seeking excuse against the degree to which excuse of the condition would reduce the protection and increase the risk of the party protected by the condition); *see also Conley*, 127 A.3d at 709 (noting the court will weigh the extent of the forfeiture against the degree to which the other party's protection will be lost if the condition is excused); *Capistrant*, 916 N.W.2d at 29 (stating that disproportionate forfeiture occurs where the penalty is extreme in relation to the purpose of the condition, so that strict enforcement would impose injustice on the party who would suffer forfeiture and is not necessary for the adequate protection of the rights of the party seeking enforcement of the condition); RESTATEMENT (SECOND) OF CONTS. § 229 cmt. b (AM. L. INST. 1981) (explaining that disproportionate forfeiture must be determined by weighing the extent of the forfeiture against the extent to which excusing the condition will prejudice the other party).

220. *See* FARNSWORTH, *supra* note 58, §8.5, at 523–24. The waiver of a condition is distinguishable from the readily confusable excuse of a condition by estoppel. *See id.* The party in whose favor the condition has been included in the contract may be estopped from asserting the condition if it indicates by words or conduct that it will perform even if the condition is not satisfied, it knows or has reason to know that the other party is likely to rely on that statement or conduct, and the other party does in fact rely on it. *See id.* The essence of estoppel is justifiable reliance on words or conduct, which does not have to be shown for waiver. *See id.* However, as explained below, waiver applies only to immaterial conditions, but estoppel is not so restricted. In some cases, the facts may support estoppel as an alternative to waiver. *See id.*

insisting on strict compliance with a condition after having indicated to the promisee, by express words or conduct, that it would not require strict compliance.[221] However, waiver doctrine is applicable only where the condition is not a material part of the exchange under the contract because waiver is the unilateral abandonment of the condition, without consideration from the other party.[222] To protect the rights of the promisor, its relinquishment of a material condition is not effective unless accomplished in a mutually agreed modification of the contract, under which the promisor receives new consideration from the promisee in exchange for removing it.[223] Therefore, the question of whether a waived condition is material is crucial to decide on the validity of a waiver without consideration.

The general meaning of materiality in relation to the waiver of a condition conforms to its use in other contexts: A condition is material if it is part of the core basis of the bargain.[224] However, the purpose of the inquiry into materiality in this context again requires a different focus on the equities relevant to the matter. Waiver is confined to immaterial conditions because the requirement that the abandonment of a material right must be supported by consideration ensures that a party is not held to have unwittingly and gratuitously abandoned an important right under the contract.[225] Therefore, where there is some

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221. *See* Regents of the Univ. of Cal. V. Principal Fin. Grp., 412 F. Supp. 2d 1037, 1042 (N.D. Cal. 2006) (explaining that a waiver may be made by conduct); Mercedes-Benz Credit Corp. v. Morgan, 850 S.W.2d 297, 298 (Ark. 1993) (holding that by accepting late payments on a secured car loan on several occasions, the creditor had waived the condition that the debtor's continued possession of the car was contingent on prompt installment payments); Guest House Int'l, LLC v. Shoney's N. Am. Corp., 330 S.W.3d 166, 201 (Tenn. Ct. App. 2010).

222. *See Regents of the Univ. of Cal.*, 412 F. Supp. 2d at 1042 (finding that the waiver of a material condition is not binding absent additional consideration); RESTATEMENT (SECOND) OF CONTS. § 84(1)(a) (AM. L. INST. 1981); FARNSWORTH, *supra* note 58, § 8.5, at 524, 527.

223. *See* RESTATEMENT (SECOND) OF CONTS. § 84 cmt. d (AM. L. INST. 1981) (noting that consideration is not required for the waiver of an immaterial condition because the change in the duty of the party whose performance was subject to the condition has not been significantly changed); FARNSWORTH, *supra* note 58, §8.5, at 527 (explaining that waiver is confined to relatively minor conditions to prevent erosion of the rule of strict compliance with an express condition).

224. *See* RESTATEMENT (SECOND) OF CONTS. § 84 cmts. c–d (AM. L. INST. 1981) (explaining that a condition is a material part of the exchange if it significantly affects the promisor's value or burden of risk, but is not material if it is just procedural, technical, or comparatively minor); *Guest House Int'l, LLC*, 330 S.W.3d at 201–03 (distinguishing a material right from a procedural, technical, or minor condition).

225. *See* Cole Taylor Bank v. Truck Ins. Exch., 51 F.3d 736, 739 (7th Cir. 1995) (holding that the abandonment of a material condition requires consideration

question about the importance of the term, a court is more likely to uphold a waiver if the promisor's refusal to perform is based on a technicality used as a pretext for nonperformance, but is less likely to validate a waiver if the condition is arguably a significant element of the contract.[226]

VII. MATERIALITY IN RELATION TO THE DISCHARGE OF A SURETY RESULTING FROM AN ALTERATION OF THE PRINCIPAL OBLIGATION

A suretyship (or guarantee) is an agreement between the surety and a creditor (obligee) under which the surety undertakes to pay a debt owed to the obligee by another (the obligor or principal) in the event of the obligor's default.[227] The suretyship is a distinct contract between the surety and obligee, which creates a secondary liability and is collateral to the principal obligation, to which the surety is not a party.[228] Without the surety's consent, the obligor and obligee may not change the terms of the debt secured by the suretyship, thereby materially increasing the obligation undertaken by the surety to pay or perform in the event of the obligor's default.[229] The test for material

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because it is not likely that a party would give up an important right for nothing, and the other party's self-serving claim of gratuitous waiver is implausible).

226. *See* RESTATEMENT (SECOND) OF CONTS. § 84 cmts. c–d (AM. L. INST. 1981) (explaining that a waiver is not binding if it affects the value received or the burden or risk assumed by the waiving party, but the waiver of a procedural, technical, or minor condition does not impose any significant burden on the waiving party and is therefore valid without consideration).

227. While there may be subtle differences between a suretyship and guarantee, the distinction is blurred, and these labels are commonly used interchangeably. RESTATEMENT (THIRD) OF SURETYSHIP & GUAR. § 1 (AM. L. INST. 2006) uses the general term "secondary obligor" to encompass both. For purposes of this discussion, there is no difference in legal effect between a suretyship and a guarantee, and both are referred to as suretyships.

228. *See* CRM Collateral II, Inc. v. Tri-County Metro. Transp. Dist., 715 F. Supp. 2d 1143, 1153 (D. Or. 2010); Midland Steel Warehouse Corp. v. Godinger Silver Art, Ltd., 714 N.Y.S.2d 466, 468 (App. Div. 2000); RESTATEMENT (THIRD) OF SURETYSHIP & GUAR. § 1.

229. *See* Fed. Ins. Co. v. Turner Const. Co., 779 F. Supp. 2d 345, 354 (S.D.N.Y. 2011) (explaining that suretyship is subject to the general principle of contract law that the obligations of a party cannot be expanded without that party's consent); U.S. Fidelity & Guar. Co. v. Braspetro Oil Servs. Co., 369 F.3d 34, 61 (2d Cir. 2004) (noting that in the absence of the surety's consent, it can escape the suretyship if the underlying obligation is changed in a way that materially prejudices the surety); Finagin v. Ark. Dev. Fin. Auth., 139 S.W.3d 797, 804 (Ark. 2003) (reasoning that a material alteration in the principal obligation, without the surety's consent, discharges the surety); *Midland Steel Warehouse Corp.*, 714 N.Y.S.2d at 468

alteration of the surety's obligation follows the basic standard meaning of materiality—a change that affects the core basis of the surety's commitment, expressed in this context as a change in the obligor's underlying obligation that significantly increases the surety's risk or is substantially prejudicial to the surety.[230] The rule that a material alteration of the underlying obligation releases the surety reflects the purpose of the materiality determination in relation to suretyship, which is aimed at the protection of the surety by relieving it of its commitment only where that commitment has been significantly altered without its consent.[231]

CONCLUSION

The materiality of a term or matter is sometimes so self-evident that the conclusion relating to materiality is easy to reach. However, in many cases, the matter is not so obvious and requires careful interpretation of the contract in context. In these cases, materiality is necessarily a fluid concept, based on an evaluation of the contract language interpreted under all the circumstances of the case, which includes not only the overall context in which the contract was formed

(stating that because the surety's obligation is distinct, the parties to the underlying contract cannot adversely alter its obligation to a material extent without its consent).

230. *See Fed. Ins. Co.*, 779 F. Supp. 2d at 354, 356 (discharging the surety where the obligor and obligee amended the underlying contract in a manner that greatly increased the likelihood of the obligor's default); *Finagin*, 139 S.W.3d at 803 (holding that an alteration is material if it requires the surety to do significantly more than originally undertaken); SuperValu, Inc. v. KR Douglasville, LLC, 613 S.E.2d 154, 156–57 (Ga. Ct. App. 2005) (changing the terms of the underlying obligation was material because it greatly increased the surety's risk); Salomon Smith Barney, Inc. v. Ins. Co. of State of Pa., 738 N.Y.S.2d 41, 42 (N.Y.A.D. 2002) (substituting an auditor was not a material alteration because it did not alter the amount or scope of the surety's obligation); First Enter. Bank v. Be-Graphic, Inc., 149 P.3d 1064, 1069 (Okla. Civ. App. 2006) (extending payment and changing the amount of the loan were a material alteration of the surety's obligation); *CRM Collateral II, Inc.*, 715 F. Supp. 2d at 1153 ("A modification materially increases a guarantor's risk when a careful and prudent person undertaking the risk would have regarded the modification as substantially increasing the chances of loss."); RESTATEMENT (THIRD) OF SURETYSHIP & GUAR. § 41 cmt. a (AM. L. INST. 2006) (explaining that the surety is discharged from any unperformed duties if the modification of the underlying contract makes it more difficult or expensive to perform, thereby imposing a fundamentally increased risks, or making it more likely that the surety will be required to perform).

231. *See Midland Steel Warehouse Corp.*, 714 N.Y.S.2d at 468 (stating that under general contract rules, a party's obligation may not be altered without its consent, and if the parties to the underlying contract alter it materially without the surety's consent, the surety is released from its obligations).

and performed, but also the reason for and goal of the inquiry into materiality.

In each of the doctrines discussed in this Article, the determination of materiality is a crucial component of the resolution of the dispute: Where a contract has been breached, the severity of the breach determines the rights and remedies of both parties, and the inquiry into materiality is aimed at deciding whether the breaching party has forfeited its contractual rights. In a dispute about formation issues, the materiality of omitted, unclear, or conflicting terms underpins the decision on whether a contract was formed at all, or if it was formed, what terms became part of it. The purpose of evaluating the materiality of a misrepresentation or mistake is to decide whether it is serious enough to vitiate the assent of one of the parties, dashing the contractual expectations of the other. The decision on whether to excuse a party from performance on grounds of impracticability or frustration of purpose depends on the extent to which a post-formation event has undermined the fundamental basis of the contract—again, excusing the nonperformance of one of the parties at the expense of the other. The materiality of a condition is a key consideration in the decision on whether to excuse it, thereby weakening the rights of the party who was protected by the condition. The materiality of a change in the underlying obligation determines whether or not the alteration should discharge the surety, removing the protection anticipated by the obligee.

In all of these cases, the decision on materiality is decided, not in the abstract, but in light of the goal of the inquiry and its consequences for the parties in the specific transaction in issue. Courts do not always expressly and clearly articulate this relationship between the generic standard for deciding materiality—the importance of the term or matter—and the more specific considerations engendered by the context of the inquiry. However, this relationship is apparent from the fact that courts decide materiality within the confines of and with reference to the particular doctrine applicable to the dispute. Therefore, despite its uniform generic meaning, materiality is not a homogeneous concept, but a protean one that takes on particular shades of meaning under different doctrines of contract law.