> beliefs. However, a review of the facts reveals the absence of data to support her beliefs. [The contracting officer] terminated [the contractor] without ever examining a time-schedule or manpower assessment. She terminated [the contractor] without any clear understanding of what needed to be done and how long it would reasonably take. Her decision was based on incomplete information at best and mistaken information at worst. As such, it cannot be sustained. . . .
>
> Finally, contrary to established precedent, [the contracting officer] never examined the impact of her decisions on [the contractor]. She never considered whether [the contractor] would be entitled to more time due to the stop-work orders, or what impact her order had on getting the job completed. She simply assumed that her stop-work orders were reasonable and that [the contractor] was not entitled to anymore time. The court finds that [the contractor] would have been able to substantially complete the contract had [the government] granted [the contractor] the 47 days [the contractor] was entitled to receive. Accordingly, the court finds that [the government] has failed to sustain its burden on its decision to terminate [the contractor] for default based on a failure to make progress.[21]

The court also ruled that the welding standards imposed by the government were more stringent than those actually required by the contract, and the government thus had not proven that the contractor breached the contract welding requirements. With respect to the reprocurement price, the court concluded that the "price was not reasonable" and that the contractor should not be required to reimburse the government.

Based upon its carefully documented findings, the court conluded that the government had wrongfully terminated the contract for default. As a result of the government's wrongful termination, the government (1) was required to pay the contractor $585,000 under the termination for convenience clause for its cost of performance prior to termination, and (2) was denied recovery of the completion contract price of $701,000 paid to the completing contractor. The government's wrongful termination decision thus caused it to pay for the work more than twice the original contract amount of $632,000. Such is the high leverage of a wrongful termination decision.

§ 18:4 Amorphous legal standard of material breach

Although the materiality of breach is the paramount issue in every contract termination dispute, there surprisingly is no adequate common law legal standard by which "material breach"

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[21]CJP Contractors, Inc. v. U.S., 45 Fed. Cl. 343, 378-79 (1999) (citations omitted).

may be judged. Traditional common law[1] backed into the determination of material breach simply by labeling any breach as "material" that was found under fact-specific analysis to go to the "essence of the bargain,"[2] "go to the root of the matter,"[3] or "defeat

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[Section 18:4]

[1]For a straightforward appraisal of the unsuitability of these labels, see Andersen, A New Look at Material Breach In the Law of Contracts, 21 U.C. Davis L. Rev. 1073, 1090 (1988):

> An "essence of the contract" approach to materiality, of course, is even less useful than Professor Williston's resort to fairness as the guiding principle. The "essence" approach acknowledges, at least implicitly, that materiality as conventionally understood is inexorably obscure and can be applied only through a gut-level judgment about how a particular case should be decided. Professor Corbin insisted that material breach should be approached only in this way. Thus, for Corbin, whether a breach is material "is a question of degree; and it must be answered by weighing the consequences in the light of actual custom of men in the performance of contracts similar to the one that is involved in the specific case."
>
> The raw honesty of that perspective on material breach—the admission that attempts to generalize have failed—has a certain appeal. What it cannot do, of course, is provide practical guidance. Perhaps a Professor Corbin or a common-law judge of long tenure has sufficient experience to intuit the essence of materiality without the aid of theory, but the persons who most need to know what a material breach is—those who must decide or advise on a course of action when a commercial transaction goes awry—do not. It is they who must judge whether canceling a contract is justified as a response to a breach, or whether the cancellation will bring down liability on their own heads. To so important a question the law owes a better answer than the incoherence of the Restatement factors, the vagueness of an "essence of the contract" test, or the intuitive, rough justice Professor Corbin would administer. No materiality standard can eliminate all doubt or uncertainty, but the development of a simple, coherent approach to the subject would be an important step forward. (Footnotes omitted.).

See also Certified Power Systems, Inc. v. Dominion Energy Brayton Point, LLC, 2012 WL 384600, *63–65 (Mass. Super. Ct. 2012) (Citing treatise and opining, while finding no material breach of contract, that: "A material breach occurs when there is a breach of an essential and inducing feature of the contract, i.e., an act that goes to the root of the agreement. A breach is material where it is so serious and so intimately connected with the substance of the contract as to justify the other party in refusing to perform further.").

[2]See Siegfried Constr., Inc. v. Gulf Ins. Co., 203 F.3d 822 (4th Cir. 2000) (holding that a subcontractor's "failure to perform was defective, material and 'defeat[ed] an essential purpose of the contract' "). See also Enron Federal Solutions, Inc. v. United States, No. 04-254, February 7, 2008 ("A material breach relates to a matter of vital importance, or goes to the essence of the contract. Materiality depends on the nature and effect of the violation in light of how the particular contract is viewed, bargained for, entered into, and performed by the parties. In determining materiality, courts often look to whether the breached obligation is an important part of the contract.").

See also Milton Regional Sewer Authority v. Travelers Cas. & Sur. Co. of America, 2014 WL 5529169 (M.D. Pa. 2014) (opining that a "material breach" is a "breach of contract going directly to the essence of the contract, which is so exceedingly grave as to irreparably damage the trust between the contracting parties").

the object of the agreement,"[4] thereby resulting in a failure of performance of the agreed exchange.[5] Early 20th century legal analysis focused on whether the breach was of a covenant or condition[6] that went to the "whole consideration of a contract,"[7] and if so, termination for cause was justifiable.[8] Throughout much of the 20th century, judicial practice, for want of clear guidelines, simply addressed the issue of material breach as a fact issue to be decided by court or jury from the admitted evidence.[9] The

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[3]See Franklin Pavkov Const. Co. v. Ultra Roof, Inc., 51 F. Supp. 2d 204, 215, 5 Wage & Hour Cas. 2d (BNA) 846, 139 Lab. Cas. (CCH) ¶ 33939 (N.D. N.Y. 1999) ("For a breach to be considered material, it must go to the root of the agreement between the parties."); RW Power Partners, L.P. v. Virginia Elec. and Power Co., 899 F. Supp. 1490, 1496 (E.D. Va. 1995) ("[A] material breach deprives the party of an expected benefit and goes to the root of the contract"); Harris v. Desisto, 932 S.W.2d 435, 445 (Mo. Ct. App. W.D. 1996) ("[T]his abandonment constituted a breach which went to the 'root' of the agreement sufficient to support rescission"); Silliman Co. v. S. Ippolito & Sons, Inc., 1 Conn. App. 72, 467 A.2d 1249, 1251 (1983) ("rescission is the remedy for an unjustified failure to make progress payments").

[4]See Wells Benz, Inc. v. U.S. for Use of Mercury Elec. Co., 333 F.2d 89 (9th Cir. 1964) ("[A] party may treat his own obligation at an end only if the other's breach is so gross that the very object of the contact is defeated").

See also U.S. ex rel. Thyssenkrupp Safway, Inc. v. Tessa Structures, LLC, 2011 WL 1627311 (E.D. Va. 2011) (defining a material breach as one that was so fundamental as to defeat an essential purpose of the contract, and ruling that no such material breach occurred that would sanction termination of the contract for cause).

[5]See 8 Corbin on Contracts § 32.1 to 32.4.

Another frequently used term is "essential term of the contract." See Mississippi Power Co. v. Water and Power Technologies, Inc., 2006 WL 3457026 (S.D. Miss. 2006) (applying the "essential term of the contract" test to define the materiality of a breach).

[6]See Corbin, Conditions in the Law of Contract, 28 Yale L.J. 739 (1918-1919) (presenting Professor Corbin's seminal discussion on express, implied, and constructive conditions arising out of "some operative fact subsequent to acceptance and prior to discharge.").

[7]See Teeven, A History of Anglo-American Common Law of Contract 223-285 (1990) (discussing shift of the focus of the common law from consideration to reliance); Restatement Second, Contracts § 90.

[8]See Kauffman v. Raeder, 108 F. 171 (C.C.A. 8th Cir. 1901) ("A breach of a covenant which does not go to the whole consideration of a contract but which is subordinate and incidental to its main purpose, does not constitute a breach of the entire contract, or warrant its rescission by the injured party. The latter is still bound to perform his part of the contract, and his only remedy for the breach is compensation for damages."); Wells Benz, Inc. v. U.S. for Use of Mercury Elec. Co., 333 F.2d 89 (9th Cir. 1964).

[9]See Miller v. Mills Const., Inc., 352 F.3d 1166 (8th Cir. 2003), in which the United States Court of Appeals for the Eighth Circuit concluded that a

focus was on the consequences of the breach rather than on its identification. Few contracts aided in such identification because, although "contracting parties can define what will constitute a material breach of their contract,"[10] in the enthusiasm of entering into contracts few parties contemplated breach in sufficient detail to provide clear guidance in all situations.[11]

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contractor had materially breached its subcontract with a steel erection subcontractor by failing to have provided suitable prefabricated steel for erection and thereby making the structure vulnerable to collapse in high winds. Because of problems erecting the steel, the erection subcontractor walked off the site. Although the trial court had failed to make a finding as to either party being in "material breach" of the subcontract, the court resolved the issue on the following fact-specific analysis:

> A material breach of contract allows the aggrieved party to cancel a contract and recover damages for the breach. However, if the breach is not material, the aggrieved party may not cancel a contract but may recover damages for the nonmaterial breach. Under South Dakota law, a material breach is one that "would defeat the object of the contract." Whether a party's conduct amounts to a material breach is a question of fact.
>
> The district court found that [the contractor] breached the contract by failing to provide appropriate materials, but it did not use the term "material" to describe [the contractor's] breach. The object of the contract in this case was the construction of the arena by a specified date. [The contractor's] failure to provide suitable building materials prevented proper construction of the building and made the structure vulnerable to collapse. As the district court noted, the record is replete with evidence of problems with the materials supplied by [the contractor] prior to the collapse. These problems eventually required the [erection subcontractor] to stop working on the building because nothing more could be done until the problems were corrected. The sheer number of problems with the materials led the district court to find that it was impossible for [the erection subcontractor] to perform under the contract. The record also contains evidence that [the erection subcontractor] notified [the contractor and the contractor's steel fabricator] of the problems on several occasions, thereby providing [the contractor] with an opportunity to cure the deficiencies. On these facts, we conclude that a finding of material breach is implicit in the district court's finding that [the contractor] breached the contract by failing to provide appropriate materials.

[10]See McGee Const. Co. v. Neshobe Development, Inc., 156 Vt. 550, 594 A.2d 415, 417 (1991) (opining that "contracting parties can define what will constitute a material breach of their contract"). See also Dalton Properties, Inc. v. Jones, 100 Nev. 422, 683 P.2d 30, 31 (1984) ("the courts have long recognized the validity of contracts that provide either party the option of terminating the contract at will").

[11]See III Farnsworth on Contracts (2d ed. 1998); Calamiri & Perillo, Contracts § 14-5 (3d ed. 1987) ("When parties enter into a contract their minds are usually fixed on performance rather than on breach."). The construction industry's most widely used standard form contracts provide no more than limited guidance. See AIA Document A201-1997, General Conditions of the Contract for Construction, ¶ 14; and EJCDC Document No. 1910-8, Standard General Conditions ¶ 15 (1990), both of which allow the owner to terminate any substantial breach by the contractor, but purport to limit the contractor's right of termination to lengthy stoppage of the work due to four causes: court order, act of government, lack of assurance of owner financial arrangements,

The proper focus of legal analysis is whether the breach materially impairs the nonbreaching party's interest in future contractual performance and mitigation of damages.[12] The latest significant effort to establish a legal framework for analysis of material breach and its justification of termination for cause, namely §§ 241[13] and 242[14] of Restatement Second, Contracts, fails in its es-

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and lack of required design professional certificate of payment or explanation for withholding.

[12]See Andersen, A New Look at Material Breach in the Law of Contracts, 21 U.C. Davis L. Rev. 1073, 1104 (Summer 1988) (arguing that breach should be deemed material only when remedy of termination "would protect the victim's interest in future performance without imposing unnecessary costs on the other side," and that termination and compensatory damages perform distinct functions: "The latter do nothing more than make up for the loss in value to the victim of a breach caused by the missing or imperfect performance of duties that already have come due. By contrast, the [termination] remedy does not address the interest in present performance at all. Rather, it focuses on the performance yet to come.").

[13]See Restatement Second, Contracts § 241, which reads:

> § 241. Circumstances significant in determining whether a failure is material.
>
> In determining whether a failure to render or to offer performance is material, the following circumstances are significant:
>
> (a) The extent to which the injured party be deprived of the benefit which he reasonably expected;
>
> (b) The extent to which the injured party can be adequately compensated for the part of that benefit of which he will be deprived;
>
> (c) The extent to which the party failing to perform or to offer to perform will suffer forfeiture;
>
> (d)The likelihood that the party failing to perform or to offer to perform will cure his failure, taking account of all the circumstances, including any reasonable assurances; and
>
> (e)The extent to which the behavior of the party failing to perform or to offer to perform comports with standards of good faith and fair dealing.

See also Certified Power Systems, Inc. v. Dominion Energy Brayton Point, LLC, 2012 WL 384600, *63–65 (Mass. Super. Ct. 2012) (citing treatise and reciting Restatement, Second Contracts § 241).

[14]See Restatement Second, Contracts § 242, which reads:

> § 242. Circumstances Significant in Determining When Remaining Duties are Discharged
>
> In determining the time after which a party's uncured material failure to render or to offer performance discharges the other party's remaining duties to render performance under the rules stated in §§ 237 and 238, the following circumstances are significant:
>
> (a) those stated in § 241;
>
> (b) the extent to which it reasonably appears to the injured party that delay may prevent or hinder him in making reasonable substitute arrangements;
>
> (c) the extent to which the agreement provides for performance without delay, but a material failure to perform or to offer to perform on a stated day does not of itself discharge the other party's remaining duties unless the circumstances, including the language of the agreement, indicate that performance or an offer to perform by

sential purpose.[15] The balancing approach of § 241 offers little

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that day is important.

[15]More often than not, trial courts merely pay "lip service" to the restatement and then slide the factual issue of "material breach" to the jury with little analysis. See Mustang Pipeline Co., Inc. v. Driver Pipeline Co., Inc., 134 S.W.3d 195, 199, 158 O.G.R. 810 (Tex. 2004) (upholding a jury verdict that a subcontractor had materially breached its contract under the Texas Pattern Jury Charge, "Did [the subcontractor] fail to comply with the contract it had with [the contractor]?). The Supreme Court of Texas, while mentioning §§ 241 and 242 of the Restatement Second, Contracts did not analyze the issue of material breach in the context of the Restatement's five factors. Other courts have simply ignored the Restatement's five factors and relied upon standard jury instructions. See also Ry-Tan Const., Inc. v. Washington Elementary School Dist. No. 6, 208 Ariz. 379, 93 P.3d 1095, 1115-1116, 190 Ed. Law Rep. 564 (Ct. App. Div. 1 2004), opinion vacated on other grounds, 210 Ariz. 419, 111 P.3d 1019, 198 Ed. Law Rep. 327 (2005) (affirming the use of a jury instruction that "material breach occurs when a party fails to do something required by the contract which is so important to the contract that the breach defeats the very purpose of the contract.

One of the best recent decisions applying the Restatement's elements of proof of material breach to a construction case is L.L. Lewis Construction, LLC v. Adrian, 142 S.W.3d 255, 261-263 (Mo. Ct. App. 2004), in which the Missouri Court of Appeals concluded that a contractor had materially breached its building contract and that the owner was justified in refusing to make payment and refusing to allow the contractor to return to the work site. In doing so, the court expressly recognized that "if a breach is not material, the non-breaching party may not cancel the contract, and must pursue other remedies. In deciding whether a material breach had been committed, the court analyzed the dispute in the context of the five factors set forth in § 241 of the Restatement Second, Contracts as follows:

> The first factor, the amount of benefit lost by the [owners], weighs in favor of a finding of material breach. In terms of remodeling their home, the [owners] wanted to create their "dream home," a home that they could live in and be proud of for the rest of their lives. . . . Rather than obtaining their "dream home," however, the [owners] were left with a home that was structurally unsound and significantly damaged by the weight of the addition. . . .
>
> The second factor, the adequacy of compensation, also weighs in favor of a finding of material breach because money damages in this case were inadequate to sufficiently compensate the [owners] for their entire loss. While many of the problems created by [the contractor's] defective performance were cosmetic and, therefore, compensable by monetary damages, the evidence also demonstrated that the deflection in the wood flooring could not be adequately repaired short of tearing the floors out and starting over. . . .
>
> The third factor, the amount of forfeiture by [the contractor], as the breaching party, also weighs in favor of a finding of material breach [because the owners had made progress payments to the contractor].
>
> The fourth factor, the likelihood that the breaching party will cure, also weighs in favor of a finding of material breach. While [the contractor] argues that the [owners] did not allow it an opportunity to cure and refused to allow it to complete the project, the evidence refutes [the contractor's] argument. In particular, [the owners] testified that before [the contractor] completely quit working, they left numerous messages with [the contractor] trying to get [the contractor] to come out and complete parts of the renovation. The results of evidence that [the owners] informed [the contractor] of

practical help.[16] Corbin observes:

> The Restatement (Second) builds on the distinction between material and immaterial breach and adds its weight in favor of keeping the contract in effect through the concept of cure when performance is less than substantial. Even so, it is always a question of fact, a matter of degree, a question that must be determined relatively to all the other complex factors that exist in every instance. The variation in these factors is such that generalization is difficult and the

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numerous problems that [the contractor] failed to rectify.

The final factor, the extent to which [the contractor's] behavior comports with standards of good faith and fair dealing, also weighs in favor of a finding of material breach. In discussing good faith performance, the Restatement defines it has "evasion of the spirit of the bargain, lack of diligence and slacking off, willful rendering of imperfect performance, abuse of a power to specify terms. . . ." The evidence, here, demonstrated that [the contractor] lacked good faith and fair dealing in its contract with [the owners].

See also 1.9 Little York, Ltd. v. Allice Trading Inc., 2012 WL 897776 (Tex. App. Houston 1st Dist. 2012) (applying the circumstances enunciated in Restatement, Second Contracts § 241, and concluding that the owner committed the first material breach which excused the contractor from completing its contract).

[16]The balancing approach of § 241 of Restatement Second, Contracts is difficult for courts to apply, and generally results in conclusory findings of little analytical value. See Restatement Second, Contracts § 241, cmt. c ("Courts frequently use 'material breach' in conclusory fashion without indicating how or why they reached the conclusion.") See also U.S. ex rel. Virginia Beach Mechanical Services, Inc. v. SAMCO Const. Co., 39 F. Supp. 2d 661 (E.D. Va. 1999) (cites §§ 241 and 242, but simply finds that a subcontractor "materially breached" its subcontracts); McClain v. Kimbrough Const. Co., Inc., 806 S.W.2d 194, 199 (Tenn. Ct. App. 1990) ("Applying the [Second] Restatement's standards to this case, we find that the deficiencies in [the subcontractor's] performance were not material and, therefore, that [the contractor] was not entitled to terminate the contract in the manner it did."); U.S. for Use and Benefit of Cortolano & Barone, Inc. v. Morano Const. Corp., 724 F. Supp. 88, 99 (S.D. N.Y. 1989) ("In the absence of a justified termination, [the subcontractor] is entitled to recover for its performance under the subcontract and for any lost profits."); Oak Ridge Const. Co. v. Tolley, 351 Pa. Super. 32, 504 A.2d 1343 (1985) (§ 241 quoted and an effort made to apply it in finding a material breach); R. G. Pope Const. Co., Inc. v. Guard Rail of Roanoke, Inc., 219 Va. 111, 244 S.E.2d 774 (1978) (same).

See also U.S. ex rel. Greenmoor, Inc. v. Travelers Cas. and Sur. Co. of America, 2009 WL 4730233, *49 (W.D. Pa. 2009) (citing treatise and opining that Pennsylvania courts follow Restatement Second, Contracts § 241 in determining the materiality of a breach of contract and noting further that the U.S. Court of Appeals for the Third Circuit provided additional guidance on the restatement factors in Norfolk Southern Ry. Co. v. Basell USA Inc., 512 F.3d 86, 94-96 (3d Cir. 2008), namely, (1) what the nonbreaching party subjectively expected to get out of the contract and whether those expectations were reasonable, (2) whether any resulting forfeiture has been of the breaching party's own making, (3) whether it is likely that the breaching party will perform its contractual duties going forward, not merely whether such a performance is theoretically possible, and (4) the breaching party's motivation, specifically whether the party committed the breach in good faith or in bad faith).

> use of cases as precedents is dangerous. . . .
>
> It is not necessary to go astray into a feckless logomachy. Without knowing how to define a "fact" or a "rule of law," it is possible to work out a practical system of justice by which practical people can live, keeping our stumbling feet in the plowed fields and not blinding our eyes by metaphysical clouds.[17]

This fact-specific focus offers no more objective guidance than Justice Potter Stewart's gut-level test for hardcore pornography: "I know it when I see it."[18]

Although fact-specific judgments have been made for centuries by judges and jurors in adjudicating the propriety of contract termination decisions, the risk is obvious that those termination decisions will be challenged subjectively in " 20/20 hindsight", even though the finders of fact were instructed to view the decision to terminate as of the time and in the factual context in which it was made. The ambiguity inherent in the Restatement Second's balancing approach has not gone unnoticed even by the least sophisticated but most inquiring of legal minds—first year law students. Professor Eric Andersen reports:

> Every year beginning law students embark on a tour of the basic principles of contract law. The journey may be hurried through a single semester or extended across the entire first year, but inevitably the course encounters the topic of material breach. Inquiring minds want to know the difference between a material breach and any other breach of contract.
>
> The instructor has a ready answer: Any breach entitles the victim to a remedy, usually damages. But a material breach has additional consequences. It constitutes the nonoccurrence of a constructive condition of exchange, which gives the victim the power to treat the breach as total. The exercise of that power brings the contract to an end, discharges all executory duties of both parties, and gives the victim a right to damages in lieu of the future performance of the other. Using the terminology of the Uniform Commercial Code, the victim is entitled to "cancel" the contract.
>
> Some students are not satisfied. They understand that they have been given an explanation of the consequences of a material breach, not of its substance. They insist on knowing what makes a material breach or not.
>
> The instructor, beginning to feel uncomfortable, responds that

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[17]See 8 Corbin on Contracts § 36.5 (footnotes omitted).

[18]See Jacobellis v. State of Ohio, 378 U.S. 184, 197, 84 S. Ct. 1676, 12 L. Ed. 2d 793 (1964), concurring opinion of Justice Stewart:

> I shall not today attempt further to define the kinds of material I understand to be embraced within that shorthand description [of hardcore pornography]; and perhaps I could never succeed in intelligibly doing so. But I know it when I see it. . . .

> "[t]here is no simple test to ascertain whether a breach is material." It depends on "whether on the whole it is fairer" to permit the victim to cancel than not to permit cancellation. . . . The students persist: Surely the law can do better than that. Even if no mathematically precise test for materiality exists, there must be a standard, an approach of some kind that governs so important a question.
>
> The instructor is relieved to direct them to the First and Second Restatements of Contracts, in which careful attention is devoted to the meaning of materiality. The Restatements set out a number of 'circumstances' to be considered to determine whether a breach is material. Some students may accept this approach to materiality, especially when assured that scores of courts have dutifully noted or quoted the Restatement factors and have applied them to resolve disputes. Others are more skeptical; to them the relevant Restatement provisions seem enigmatic at best.

The student's journey from law school to the courtroom finds no greater elucidation for assessing the materiality of any breach. Professor Andersen further reports:

> Then the students become lawyers and encounter the material breach case law in practice. Any confidence they may have had that these cases reflect a basic coherence and rationality is likely to be shaken. They soon discover that many courts that purport to follow the Restatements actually ignore them when the time comes to decide the materiality question. Others seem to pick and choose among the stated factors without justifying their choices. Still others do not even attempt to apply the "circumstances" of the Restatements, but follow tests under which materiality is simply a question to be decided on "the inherent justice of the matter."
>
> A close look at the relevant Restatement provisions makes it difficult to blame the courts for falling into confusion or completely bypassing them. The provisions resemble a list of ingredients rather than a recipe; no real guidance is provided on the order or proportion in which to combine the provisions. Indeed, a careful analysis suggests that some of the Restatement factors are substantively irrelevant or misleading as elements of the materiality analysis. In a cynical moment, the lawyer—whether practitioner, jurist, or academic—may wonder whether a paraphrase of Professor Gilmore's quip about the inclusion of Section 90 in the First Restatement might also apply to the materiality factors in the Restatements: An attentive study leads to the despairing conclusion that no one has any idea what the damn thing means.[19]

Notwithstanding the amorphous nature of the legal standard of materiality, some guideposts are evident: (1) an unexcused breach is material only if it reasonably compels a clear inference

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[19]See Andersen, A New Look at Material Breach In The Law of Contracts 21 U.C. Davis L. Rev. 1073, 1074-1076 (1988) (footnotes omitted).

of unwillingness or inability of one party to meet substantially the contractual future performance expectations of the other party, and of the need for the other party to mitigate its damages;[20] (2) a breach cannot be deemed material if the contract has been fully or even substantially performed;[21] and (3) a breach cannot be deemed material if redressable by compensatory damages,[22] and if it raises no justifiable insecurity as to future performance;[23] (4) a breach cannot be deemed material if waived;[24] (5) a breach cannot be deemed material if its remediation would result in economic waste;[25] (6) a breach cannot be deemed material during contract performance until the contractor is given reasonable opportunity to "cure" the breach;[26] and (7) even if found to be material, a breach may be excused for legally recognized reasons,

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[20]See EJCDC Document C-700, Standard General Conditions of the Construction Contract, ¶ 15.02B & D (2002) (requiring the owner to issue the contractor a seven days written notice of its intent to terminate and prohibiting the owner from terminating the contract "if Contractor begins within seven days of receipt of notice of intent to terminate to correct its failure to perform and proceeds diligently to cure such failure within no more than 30 days of receipt of said notice").

[21]See § 18:12. See also Restatement Second, Contracts § 235, cmt. a ("[a] duty is discharged when it is fully performed") and § 237 cmt. d. ("If there has been substantial although not full performance, the building contractor has a claim for the unpaid balance and the owner has a claim only for damages.").

[22]See Restatement Second, Contracts § 236 cmt. a ("Every breach gives rise to a claim for damages and may give rise to other remedies. Even if the injured party sustains no pecuniary loss or is unable to show such loss with sufficient certainty, he has at least a claim for nominal damages"). A breach surely should not be deemed material if the contract expressly provides a remedy and quantum of recovery for a particular type of breach. See Metro Wastewater Reclamation Dist. v. Alfa Laval, Inc., 2008 WL 1924896 (D. Colo. 2008) ("Plaintiff could not terminate the contract [for cause], as the parties clearly intended for the contract to be completed notwithstanding [certain performance failures]" for which liquidated damages were the agreed remedy.).

[23]See Restatement Second, Contract § 251:

> § 251. When a failure to give assurance may be treated as repudiation.
>
> (1) Where reasonable grounds arise to believe that the obligor will commit a breach by non-performance that would of itself give the obligee a claim for damages for total breach under § 243, the obligee may demand adequate assurance of such performance and may, if reasonable, suspend any performance for which he has not already received the needed exchange until he receives such assurance.
>
> (2) The obligee may treat as a repudiation the obligor's failure to provide within a reasonable time such assurance of due performance as is adequate in the circumstances of the particular case.

[24]See §§ 18:17 to 18:20.

[25]See § 18:13.

[26]See § 18:15.

such as impracticability,[27] inducement,[28] fraud, mistake and the like.

It is the prospect of material impact of unexcused breaches upon future contractual performance expectations and upon the need for mitigation that justifies the nonbreaching party in terminating a contract. Termination mitigates the costs and consequences of continuing inadequate performance. An unexcused material breach that justifies termination relates to the nonbreaching party's interest in and justified insecurity about future contract performance. Whether breaches are unexcused and likely to have a material impact upon future performance must be filtered through the prisms of the legal concepts of justifiable repudiation, cure, waiver, substantial performance, economic waste, impracticability, excusable delay, mitigation, and adequacy of compensatory damages.

Justification for termination is viewed on an objective rather than subjective basis. Because a valid termination results in drastic forfeiture of contract rights, basic fairness and good faith dictate that the breaching party be given (1) adequate notice of any curable breaches deemed material enough by the nonbreaching party to warrant termination, and (2) a reasonable opportunity to cure unexcused breaches prior to termination. A justifiable lack of confidence in the adequacy of future performance and in the adequacy of existing protection against the monetary consequences of future inadequate performance, viewed objectively and reasonably, is the appropriate basis upon which a contract should be terminated for material breach. [29]

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[27]See § 18:21.

[28]See § 18:16.

[29]See McDonnell Douglas Corp. v. U.S., 323 F.3d 1006, 1016-1017, 60 Fed. R. Evid. Serv. 1423 (Fed. Cir. 2003), which affirms an objective standard of review of the validity of the termination action premised on failure to make adequate progress, and which requires the contracting officer's determination decision to be based on tangible direct evidence reflecting the impairment of timely completion known at the time of the decision. The court observed:

> A consideration of post-termination facts and events would transform [the] reasonable belief requirement into a demand that the contracting officer have perfect foresight. Limiting the inquiry to the time of the termination action reduces the potential for hindsight bias. Thus, the trial court should focus on the events, actions, and communications leading to the default decision in ascertaining whether the contracting officer had a reasonable believe that there was no reasonable likelihood of timely completion.