Dissecting Contract Breach Terminology, Warranties, and Remedies: Part One

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Editor's note: This is part one in a series of articles. Part two will be published in the next issue of The Construction Lawyer.

Introduction

Construction contracts have long posed a unique problem in overall contract jurisprudence.[1] While this observation is undoubtedly accurate, it comes without an explanation as to what the problem is or why it has arisen. This article will not only attempt to articulate an answer to both issues, but also to recommend a solution. To start with, it is not just due to the fact that, unlike a majority of other judicially reviewed transactions, construction, by its nature, is process-oriented. Nor is it primarily due to the interdependent nature of construction contract performances, where a party may simply be precluded from performing without prefatory performance by the other, such as by providing information essential to the latter's performance. Rather, construction contracts should be viewed as a prism for correcting the skewed vision of contractual breach as a binary choice due to less than accurately descriptive terminology. Nearly all judicial pronouncements on the subject of contractual breach are, as will be shown, inappropriately narrow in focus, leading to oversimplification and misleading conclusions. A more critical and holistic approach is necessary to provide a sound jurisprudential basis for decision-making.

The heart of the problem is the concept of "material" breach, which has been shoehorned into the construction law field.[2] Court decisions and articles dealing with construction-related contracts are replete with inconsistent treatment of basic contract terminology when applied to potential damage and termination claims in situations that simply do not fit an either/or approach—namely, it either is, or is not, material. The same can be said for claims of breach of contract in the field of information technology migration contracts, which have a similar process-oriented focus with essential interdependencies among the involved parties. The absence of published analysis regarding the nature of differences between various types of breach and their impact on the scope of available claims seems overdue.[3]

The very concept of "breach" has at times been applied to excuse a nonbreaching party's future performance on a blanket basis without describing the significance of the breach.[4] While the need to draw clear-cut lines between categories of contractual breach may seem unnecessary, it actually is essential. The void has persisted in no small part because of the siloed treatment of construction contract jurisprudence from relatively simple performance and sale transactions, which themselves do not easily fit into the unique nature of construction and other process-oriented contracts requiring interdependent performances.

Possible inconsistencies and difficulties can also be seen when considering the application of claim limitation periods. If the law regarding contractual breach had not been developed in a virtual vacuum, with apparent disregard of the complexities of process-focused agreements, there likely would not be the glaring inconsistency in approach that has ultimately developed.

The Material-Immaterial Breach Deficiencies

The "First to Breach" Rule

The existing nomenclature evidenced in most judicial decisions, and employed by many commentators, focuses on whether a breach provides the nonbreaching party an option to (1) pursue a damage remedy and/or (2) declare the contract terminated, thereby releasing it from all further obligations.[5] The predominant term used to describe this type of qualifying breach is a "material" one.[6] Another characterization is that the breach goes to the essence of the contract.[7] While both are vague, some guidance is offered via the Restatements in terms of general criteria for establishing a breach sufficient to justify the nonbreaching party's future nonperformance as follows:

(a) the extent to which the injured party will be deprived of the benefit to which he reasonably expected;

(b) the extent to which the injured party can be adequately compensated for the part of that benefit to 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 offer to perform will cure his failure, taking account of the circumstances including reasonable assurances;

(e) the extent to which the behavior of the party failing to perform or offer to perform comports with standards of good faith and fair dealing . . . and in addition . . .

- the extent to which it reasonably appears to the injured party that delay may prevent or hinder him in making reasonable substitute arrangements;
- the extent to which the agreement provides for performance without delay [such that] . . . performance or an offer to perform by that day is important.[8]

Unfortunately, these likewise suffer from ambiguity in the repeated use of "the extent to which" qualifier and without any suggestion as to how many of the criteria need to be met. Rarely have judicial decisions actually employed these criteria, and instead opting for the shorthand term "material."

All too often, courts have overgeneralized common law principles—not the least of which is when a nonbreaching party is held to have an option to terminate its future performance obligations by properly employing the first to breach rule.[9]

The lack of precision in such a concept should be obvious when it comes to how vested obligations[10] must be treated. For example, if a contractor has properly completed a portion of its scope of work prior to being terminated for anticipatory breach of a "time of the essence" requirement,[11] its right to payment for that properly completed work, and the owner's corresponding payment obligation, become fully vested. This becomes even more obvious when applied to a situation where a contractor completes a project one day after the expiration of a "time of the essence" deadline. It is generally recognized that a failure to substantially complete within a contractually specified "time of the essence" deadline amounts to a substantial breach of contract entitling an owner to terminate.[12] Without recognition of such a vesting limitation on the scope of future performance relief upon exercise of a termination option, an owner could escape responsibility for making final payment altogether, regardless of the extent of actual damage incurred due to the one-day delay in completion. Otherwise, there would be a clear repudiation of the basic principle that "the law abhors a forfeiture."[13]

Thus, a terminating owner should always be obligated to credit the contractor with vested amounts for work performed when seeking compensation for monetary damages resulting from what the courts characterize as a contractor's material breach. Even if a contractor purposefully dragged its feet, resulting in an inability to meet the "time of the essence" due date and thereby triggering an anticipatory breach, if a contractor is not entitled to credit and payment for its properly completed work, there would also be a violation of the party's right to an efficient breach of its contract.[14] In other words, an accurate statement of the first to breach termination option must include a limitation to only excuse future obligations that had not become fully vested as of the termination exercise date.

Material Breach Conceptual Deficiencies

Most often, the term "material breach" is bandied about without any recognition that "material" is literally defined as "having real importance or great consequences."[15] This definition assumes that "importance" and "consequences" are essentially interchangeable, although the adjectives "real" and "great" are not. Leaving definitional vagueness behind, the only other conceivable type of breach would have to be one that is not material: one that is "immaterial" or "nonmaterial." As a leading treatise on contract law recognizes, there is "some confusion" in the use of the term "material."[16] Actually, there is more than just some confusion, especially when used in contract provisions.[17]

However, before exploring the implications of these latter categories of breach, several questions arise regarding the proposition that a material breach justifies termination or rescission by the nonbreaching party.[18] For one, how would one define a breach which is not immaterial (i.e., a "material" breach) but is insufficient to justify contract termination? By definition, such a breach could not exist; yet, it obviously must and does. Similarly, the only way to classify a breach that is sufficient to justify an award of damages, but not justify termination, would be to label it as immaterial.[19] And if such a breach is categorized as immaterial, where does the line get drawn between an immaterial breach justifying an award of damages and one that does not? The answer to this last question may lay in application of the economic waste[20] and diminished value[21] doctrines.

At least one commentator has maybe unwittingly characterized the appropriate standard to be whether performance deficiencies are "sufficiently material to warrant termination."[22] This commentary clearly suggests that there can be material breaches that are not sufficient to justify termination, thereby creating at least a dual set of definitions for what material really means for purposes of available remedies. Unfortunately, such a characterization posits the concept that materiality is a sliding scale from insufficient to sufficient without providing any substantive guideposts to help determine which is which. It would also leave unresolved the question of what then would constitute an immaterial breach. So far, no classification system has been found to be judicially recognized or advanced in the academic sphere to address these glaring doctrinal issues.

The subject gets even a bit more complicated when the contract concept of substantial completion is considered. Generally, if a contract is substantially performed,[23] the breaching party is entitled to its contract price less any costs to cure deficiencies.[24] In addition to the construction field, this rule applies equally to sales transactions,[25] despite the particular provisions of the

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Uniform Commercial Code (UCC) regarding rejection, acceptance, and revocation of acceptance.[26] The nonbreaching party in a UCC transaction is not entitled to declare the contract terminated, excusing further nonperformance on its part. With a sale transaction, if goods are not delivered as promised, there is obviously a breach of the essential purpose of the transaction, so as to satisfy the first to breach rule justifying nonpayment by the buyer. Construction contracts, unfortunately, do not lend themselves to such a simplistic approach. Yet, courts have largely failed to recognize the essential differences and need to avoid simply grafting breach terminology from the former to the latter.

Frequently, courts employ an essential purpose test as the key for determining whether a material breach has occurred.[27] However, this glosses over a critical question when applied to contractual performance involving multiple performance elements. In one instance, a court simply stated: "[a] material breach of one aspect of a contract generally constitutes a material breach of the whole contract."[28] No effort was made to define the "aspect" in terms of its significance to the essence or essential purpose of the overall transaction. Loose language and unsophisticated analysis such as this does little to advance an understanding of the complexities of contractual breach and can certainly mislead the less-than-critical practitioner.

Should the essential purpose be determined on the basis of the character of any one of the elements deemed critical to the essence of the transaction, then the character of the obligation would arguably determine the character of the breach.[29] Utilizing the concept of materiality, any breach of a material obligation would result in a material breach. Therefore, there could be no such thing as an immaterial breach of a material obligation. However, this cannot hold true without substantial manipulation.

For example, an immaterial breach of an essential obligation can occur after substantial performance[30] has been achieved by a failure to fully perform that obligation. In short, the character of the obligation would not necessarily determine the character of the breach. One way around this would be to treat the essential performance obligation as essential only up to the point of substantial performance of the obligation. Another approach would be for an essential obligation to be comprised of a composite of immaterial obligations, which, taken in their entirety, have to be substantially performed, leaving any remaining immaterial obligations unperformed. Unfortunately, such an approach would require a recharacterization of virtually all essential obligations as nothing more than intertwined immaterial obligations requiring a complicated analysis as to how many threads of these immaterial obligations must be performed to constitute substantial performance of the overall essential obligation. It appears that use of the term "material" to characterize the nature of an obligation and consequently the nature of the breach creates more questions than it answers. As before, there is no room for a breach that entitles the nonbreaching party to recover damages without having a termination option.

Similarly, reconstructing an essential obligation into a composite of immaterial component parts would necessitate consideration of whether overall substantial completion of the essential obligation needs to be determined on the basis of substantial or full completion of each of the components or of just enough of the components to give rise to substantial completion of the composite obligation. Such a theoretical construct would seem to be nothing more than assessing the number of "angels-dancing-on-the-head-of-a-pin," unless one is bent on developing a rebuttal to the premise that an essential obligation is subject to a material or immaterial breach such that the nature of the obligation does not determine the classification of the breach. This approach, however, does not seem feasible from a practical point of view.

Take, for example, a contract containing a "time of the essence" provision calling for delivery of a piece of mechanical equipment with mounting brackets.[31] As noted previously, the law generally recognizes that failure to satisfy a "time of the essence" provision will amount to a material breach of the contract.[32] Assume the equipment comes on time but without one of the mounting brackets, which will be delayed one day and, without which, the machine is unusable. It is inconceivable that the buyer could justifiably terminate the contract at the end of the day the equipment is delivered. Obviously, mounting brackets are essential for use of the equipment, but the breach of one day would not give rise to a frustration of the essential purpose of the transaction: namely, delivery of the equipment *with* the mounting bracket within the time of the essence period. In short, the law needs to recognize an immaterial breach of a material obligation as not triggering the first to breach rule when performance has been substantially completed, even though not fully satisfying a "time of the essence" due date.

A Substantial Performance Solution—Maybe

Another issue arises as to whether the breach of a combination of individually nonessential obligations can give rise to a frustration of the transaction's overall purpose such that the nature of the individual obligations will not determine the nature of the breach. Presumably, the

answer is "yes" because when taken in aggregate, the obligations can represent an essential purpose even though other nonmaterial obligations covered by the contract are properly performed. The concept of substantial performance might save the day. If the aggregation of nonmaterial obligations that are breached preclude achievement of "substantial performance" of the contract, then the first to breach rule should be triggered with contractual theories in place and consistent.

One might ask, if the concept of "substantial performance" is really the key to determining whether the first to breach rule may be triggered, then why not use the term "substantial breach" to determine whether "substantial performance" has been achieved? Doing so would avoid the dilemma presented when the character of the obligation (material or not) would determine the character of the breach. Instead, the type of remedy would define the character of the breach. It would allow for a technical or otherwise insignificant breach of an essential obligation such as delivery of the machine with all mounting brackets under the prior example. Once an essential obligation (i.e., one going to the essence of the contract) has been substantially performed, any subsequent failure to fully perform that obligation would be nonsubstantial and subject to only a remedy of damages.

One of the clearest examples of the problem created by characterizing a breach as "material" is in the case of payment defaults.[33] If a party has partially performed and thereby become entitled to an installment payment under the contract, it is difficult to determine if the default is "material" for purposes of termination rights. Often, such materiality will depend upon whether the nonpayment jeopardizes the other party's ability to continue performance.[34] It has been said that the requirement for progress payments "must be deemed so material that a substantial failure to pay would justify the contractor declining to proceed,"[35] implying that materiality is a spectrum beyond immaterial. Regardless, it is hard to understand how a payment default of lesser significance could ever be considered "immaterial," much less in the mind of a juror. While the following construct may resolve some of this obvious disconnect, it will not totally eliminate the problem created by an initial "material breach" starting point for structuring the range of breach terminology.

Unlike criteria for determining materiality of a breach with a nonmonetary performance obligation where substantial completion is determined in the case of a product or structure suitable for the purchaser's use and benefit despite various deficiencies, the concept of substantial performance or completion does not fit the area of monetary performance obligations. Assume an owner has made installment payments equal to 75 percent of the total project price, providing some profit to the builder, without 85 percent of project completion—far short of substantial completion. It is obvious that the same criteria used to determine the materiality of breach of nonmonetary obligations cannot be used for purely monetary failures. Certainly, the shortfall in payment should not be considered "immaterial" and unimportant even though that is the result when basing breach terminology on the idea that "material" provides both baseline (i.e., right to monetary damages) and topline (i.e., termination option) remedies.

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Partial-Total Breach Conceptual Deficiencies

Several courts, in an apparent recognition of the problems created by the use of "material" breach terminology, have adopted a similar, yet essentially equivalent, approach. These decisions employ a more apt designation of "total" breach, which justifies termination, and a "partial" breach, which does not.[36] The total breach allows for recovery of damages or exercise of the first to breach rule, allowing exercise of the termination option. A partial breach, on the other hand, only allows for recovery of damages. Yet, such a two-breach classification system still leaves a gaping hole: What about a minor, albeit technical, breach that does not justify a damage remedy? A possible workaround will be explored, although it is not believed to be adequate for a number of reasons, to be explained.

To begin with, labeling a breach "total" can be misleading in that it suggests no part of the promised performance has been rendered. This can be particularly troubling when there are multiple performances, all critical to accomplishing the essential purpose of the transaction. If all but one essential obligation is substantially completed and another is not, it may be difficult to judge whether there is a total breach of the transaction. Asking a jury to engage in such a nuanced assessment seems unnecessary and overly difficult simply because of the characterization employed. Similarly, labeling a breach "partial" can likewise be misleading in various circumstances. Where one essential performance obligation among several is the sole occasion for a finding of breach, it would be logical to conclude that there was only a partial breach should the majority of the key obligations be fully or substantially performed even though the essence of the transaction has been unfulfilled. Again, the terminology employed by the courts and commentators may be readily comprehensible to the experienced contract practitioner but, in all likelihood, to few others.

A Hybrid Total, Partial, and Material Breach Approach

There is also a hybrid approach that attempts to use

the concept of materiality as a threshold for determining whether a breach is total or partial. As one court observed:

> Some courts appear to confuse the distinction between total and partial breaches with the distinction between material and immaterial breaches. In contrast to total and partial breaches, "[t]he distinction between material and immaterial breaches is a distinction based upon the severity of the breach." The severity of the breach determines whether the non-breaching party may seek remedies for a total breach or remedies for a partial breach. When one party to a contract materially breaches the contract, the other party is—if it so chooses—discharged and freed of any obligation to perform and may at that point sue for damages. Of course, a non-breaching party may nevertheless treat a material breach as either a partial breach or a total breach. In other words, if a breach of contract is material, the injured party has the right either to cease performance and sue for total breach, or to continue performance and sue for partial breach. Conversely, when a breach is immaterial, the non-breaching party is not excused from future performance and may sue only for the damages caused by the breach. Thus, the primary distinction between a material breach and an immaterial breach is that only a material breach excuses the non-breaching party from future performance.[37]

This approach seems to conclude that an immaterial breach will constitute a partial breach triggering a right to exercise the corresponding remedies, such as recovery of monetary damages. At the same time, it asserts that a partial breach can be a material breach accompanied by an implicit waiver of the right to terminate the contract without further performance obligations by the nonbreaching party. Ascribing nontermination remedies to the definition of partial breach in this manner—by suggesting a material breach can be treated as total or partial (i.e., immaterial)—tends to blur the material-immaterial distinction even though the approach might seem coherent. In other words, by definition, a "material" breach cannot be a material breach entitling termination while also constituting an immaterial breach that does not. Linking the remedies available for a given breach to the definition of a partial breach is at the heart of this inconsistency in terminology. In short, the court is defining the breach by the remedy rather than vice versa. It would be much easier to simply ascribe a range of remedies to total (i.e., material) breach that overlaps with those available for a partial (i.e., immaterial) breach instead of suggesting a material breach may be treated as an immaterial one.

In this total-partial breach construct, "immaterial" and "partial" breaches would be assigned to situations where there has been substantial performance of a contract. One, therefore, might be left with the conclusion that a "partial" breach is equivalent to an "immaterial" breach because, in both, the nonbreaching party presumably has a claim for damages resulting from the partial or immaterial breach. However, this is misleading on its face. Immaterial, by its very name, constitutes a characterization of something that is unimportant [38] and accordingly not accurately descriptive. It seems illogical that a nonbreaching party could recover damages for either breach of the unimportant obligation or an unimportant breach of an important obligation. Surely, damages should only be recoverable for an obligation having some importance, assuming the words are to have any real meaning as descriptive adjectives. Finally, it is inconceivable that a mere technical breach of an unimportant obligation should ever give rise to a justiciable claim.

Contract breach and damage concepts can work with a total-partial breach classification. In other words, a total breach would trigger both damage and termination option remedies, whereas partial breach would only give rise to a damage remedy absent economic waste, although that relief may be limited to diminished value. Neither of the latter concepts should apply to the total breach termination option, although equally applicable to the damage component. [39] In short, the economic waste and diminished value principles should be equally applicable to both total and partial breach relief. [40]

When applied to partial breach situations, economic waste and diminished value limitations on recoverable damages can afford what one might call a "no-harm, no-fault" breach. In short, if there is a partial breach where the cost to cure amounts to economic waste, damages would only be available to the extent of diminished value, if any. [41] Should an owner be unable to prove a measurable amount of diminished value, the breach would result in a no-net-damage recovery. As an example, if a stud wall is constructed 16¼" on center, instead of 16," absent a measurable structural shortcoming, the owner would have no recoverable damages. While these limitations on damage recoveries do allow for recognition of a merely technical partial breach without triggering liability, it seems to be a rather roundabout process to salvage contract breach from unnecessary gyrations to arrive at what most people would simply consider an immaterial breach—one of no legal consequence. The breach classification system employed in the construction law field, on the other hand, provides a simple, straightforward nomenclature avoiding this maneuvering and should be advanced to areas outside construction in order to achieve jurisprudential consistency. We will cover that in Part Two of this article in the next issue of *The Construction Lawyer*.

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Endnotes

1. See, e.g., Pavel Enter., Inc. v. A.S. Johnson Co., Inc., 674 A.2d 521, 525 (Md. 1995) ("[T]he relationships involved in construction contracts have long posed a unique problem in the law of contracts. . . ."); Rights and Liabilities of General Contractors, Consl. Fl-Cle § 5.1 (2022) (["T]he principles and concepts that govern contracts in general apply with equal force to construction contracts. . . . However, the construction contract has certain attributes that set it apart . . . [and] it presents some unique problems. . . .").

2. The use of "material" to characterize the extent of a party's breach so as to justify either termination or recission in the construction context is prolific. *E.g.*, L & A Contracting Co. v. S. Concrete Servs., Inc., 17 F.3d 106, 110 (5th Cir. 1994) ("[T] o constitute a legal default, there must be (1) a material breach or a series of material breaches (2) of such magnitude that the obligee is justified in terminating the contract."). In the government-contracting context, the Court of Federal Claims famously discusses the common law foundations of the "material breach" rule in *Enron Federal Solutions, Inc. v. United States.* 80 Fed. Cl. 382, 396–98 (2008) (describing a common law material breach as one that "relates to a matter of vital importance, or [one] that goes to the essence of the contract); *see also* Thomas v. Dep't Hous. & Urb. Dev., 124 F.3d 1439, 1442 (Fed. Cir. 1997).

3. Consideration of the various types of breach as applied to (i) the concept of anticipatory repudiation (as distinguished from anticipatory breach) and (ii) UCC sale transactions are beyond the scope of this article.

4. As an example, the Texas Court of Civil Appeals in *Board of Regents of University of Texas v. S & G Construction Co.*, asserted an inaccurate generalization when construing whether S&G's continuation of work after the Board of Regents breached its contract constituted a waiver of its right to cease performance: "[I]t is a fundamental proposition of contract law that when one party breaches its contract, the other party is put to an election of continuing or ceasing performance. . . ." 529 S.W.2d 90 (Tex. 1975). In *Board of Regents*, frustratingly, no effort was made to distinguish a minor or insignificant breach from one that goes to the heart of the overall contractual arrangement. This lack of nuance disserves the spectrum of breaches that arise on construction projects.

5. Randy Kinder Excavating, Inc. v. J.A. Manning Constr. Co., Inc., 899 F.3d 511, 516–17, n.3 (8th Cir. 2018) ("[A] dditionally, even where it is timely asserted, the first-to-breach rule simply allows the non-breaching party to discontinue performance and seek damages."); Hamilton Specialty Ins. Co. v. Transition Inv., LLC, 818 F. App'x 429, 436 (6th Cir. 2020) (discussing Michigan's first-to-breach rule in the insurance context).

6. For example, the concept of "materiality" has been employed to determine if a failure to make progress payments by an owner justifies a contractor's refusal to proceed with the work. Macri v. United States for Use of John H. Maxwell & Co., 353 F.2d 804, 810 (9th Cir. 1965) ("[I]t is well settled that an owner's failure to make progress payments on a building contract may constitute a material breach. . . ."); *c.f.* Justin Sweet & Marc Schneier, Legal Aspects of Architecture, Engineering and the Construction Process § 33.04(A) (7th ed. 2004) ("[I]f the contract does not expressly create a power to terminate, termination is allowed in the event of a material breach."). The Restatement (Second) of Contracts § 241 also provides a five-prong test for determining whether a breach is material. Restatement (Second) of Contracts § 241 (1981).

7. Brown v. Grimes, 192 Cal. App. 4th 265, 281 (2011) (holding the performance obligation at issue did not "go to the essence of the contract").

8. Restatement (Second) of Contracts §§ 241–242 (1981). The Restatement's guidance for construing materiality was recently applied by the Eighth Circuit. *Randy Kinder Excavating Inc.*, 899 F.3d at 517–18.

9. The first to breach rule, normally asserted as a defense to another contracting party's claim, "provides that a party to a contract cannot claim its benefits if he or she is the first to violate it." Clean Uniform Co. St. Louis v. Magic Touch Cleaning, Inc. Eyeglasses, 300 S.W.3d 602 (2009) (citing R.J.S. Sec., Inc. v. Command Sec. Servs., 101 S.W.3d 1, 18 (Mo. App. 2003)); Forms Mfg. Inc. v. Edwards, 705 S.W.2d 67, 69 (Mo. App. 1985). However, that breach must be "material." Guidry v. Charter Commc'ns, Inc., 269 S.W.3d 520 (2008); *see also* Bank of Am., N.A. v. Narula, 261 P.3d 898 (Kan. 2011); Mustang Pipeline Co., Inc. v. Driver Pipeline Co., Inc., 134 S.W.3d 195 (Tex. 2004) ("[W]e hold that as a matter of law Driver committed a material breach. Mustang was thereafter discharged from its duties under the contract."); Dye v. Diamante, 510 S.W.3d 759, 767 (Ark. 2017) ("A 'material breach' is a failure to perform an essential term or condition that substantially defeats the purpose of the contract for the other party. A material breach excuses the performance of the other party.").

10. Rawlings v. Rawlings, 766 A.2d 98, 110 (Md. 2001) ("A most natural definition of the term 'vested' is 'accrued' or, as dictionaries put it, 'completed and consummated.' But in that sense, any claim or interest which has come into being and been perfected as a 'right' would have to be said to be vested."). Another definition notes that a vested right is an immediate right of present enjoyment or a present fixed right of future enjoyment. Langston v. Riffe, 359 Md. 396, 419–20 (2000) (quoting 2 Norman J. Singer, Statutes and statutory construction §§ 41.05, 41.06 (7th ed. 2009) at 369–70) [hereinafter Singer]); *c.f.* Lands' End Inc. v. City to Dodgeville, 881 N.W.2d 702, 716 (Wis. 2016) ("[D]efining a 'vested right' is somewhat difficult, and some definitions are opaque, circular, and conclusory. One such definition of a vested right is that a vested right is a presently legally enforceable right, not dependent on uncertain future events. Statutes and Statutory Construction(also known as *Sutherland Statutory Construction*), for example, describes several definitions of 'vested right,' including 'an immediate right of present enjoyment or a present fixed right of future enjoyment.'"); *c.f.* Singer, *supra*, § 41:6 at 456 (footnote omitted).

11. While there are differing approaches to whether an express contractual provision is required to render a "time of the essence" enforceable, it is established that the failure of a contractor to complete its scope of work under an enforceable "time of the essence" contract regime justifies termination by the owner. *See*, *e.g.*, Madden Phillips Constr., Inc. v. GGAT Dev. Corp., 315 S.W.3d 800, 819 (Tenn. Ct. App. 2009); *In re* Constr.

Contractors of Ocala, Inc., 196 B.R. 188, 193 (M.D. Fla. 1996) (upholding termination of a subcontractor for failure to complete its scope of work within the time for completion under a "time of the essence" regime); Call v. Alcan Pac. Co., 251 Cal. App. 2d 442, 448 (1967) ("[A]n owner has a common law right to cancel a building contract if the contractor, without fault of the owner, fails to comply with a 'time of the essence' clause."). It is similarly recognized that a liquidated damage clause in conjunction with a "time of the essence" provision, which fixes an owner's damages to the number of days past the required date for completion, are valid and enforceable. J.E. Hathaway & Co. v. United States, 249 U.S. 460, 464 (1919). The remedy of termination and release from further nonvested obligations under the contract for anticipatory breach will only be available if the obligation being breached is an essential component of the essence of the contract. Metric Sys. Corp. v. McDonnell Douglas Corp., 850 F. Supp. 1568 (N.D. Fla. 1994) (upholding contractor's termination of its subcontractor for anticipatory repudiation of its subcontract on the basis of the subcontractor's failure to continue work pending resolution of disputes); Appeal of Crown Welding, Inc., 89-1 BCA P 21332, ASBCA No. 36107, WL 123533 (1988) (upholding government's termination of a contractor for default as contractor, on a fixed-price contract, refused to continue work pending resolution of additional work items); *c.f. In re* Wansdown Prop. Corp. N.V., 620 B.R. 487 (S.D.N.Y. 2020) (holding anticipatory breach of a land sale closing date justified termination and release of future obligations as the closing date was subject to a material "time of the essence" provision).

12. *See*, *e.g.*, *Madden Phillips Constr., Inc.*, 315 S.W.3d at 819; *In re Constr. Contractors of Ocala, Inc.*, 196 B.R. at 193; *Call*, 251 Cal. App. 2d at 448 ("[A]n owner has a common law right to cancel a building contract if the contractor, without fault of the owner, fails to comply with a 'time of the essence' clause.")

13. The maxim "the law abhors a forefeiture" finds its home in the basis of equity and has been relied on unanimously in varying contractual contexts. *E.g.*, UNUM Life Ins. Co. of Am. v. Ward, 526 U.S. 358, 371 (1999) (upholding California's notice-prejudice rule in the insurance context); Smith v Steckman Ridge, LP, 590 F. App'x 189, 198 (3d Cir. 2014) (holding forfeiture of a lease agreement would be inequitable under Pennsylvania law); *see also* Piedmont Ctr. 15, LLC v. Aquent, Inc., 286 Ga. App. 673, 677–78 (Ct. App. 2007) ("[B]y failing to comply with [the notice provisions] Piedmont Center improperly imposed a forfeiture of the cancellation option").

14. *See* Patton v. Mid-Continent Sys., Inc., 841 F.2d 742, 751 (7th Cir. 1988) ("[E]ven if the breach is deliberate, it is not necessarily blameworthy. The promisor may simply have discovered that his performance is worth more to someone else. If so, efficiency is promoted by allowing him to break his promise, provided he makes good the promisee's actual losses. If he is forced to pay more than that, an efficient breach may be deterred, and the law doesn't want to bring about such a result.").

15 .*Material*, Merriam Webster (2021).

16. 10 Arthur L. Corbin et al., Corbin on Contracts § 53.4.

17. The construction industry routinely uses the word "material" in reference to warranties. ConsensusDOCS § 3.8.1 provides the contractor warrants "all materials and equipment will be … free from defective workmanship and materials … and the Work will be free from material defects not intrinsic in the design or materials required by the contract." Certainly, a single item of work with a material defect so as to be subject to the warranty is not intended to be of such a nature as to give rise to a breach entitling the owner to a termination option.

18. Van Bibber Homes Sales v. Marlow, 778 N.E.2d 852, 858 (Ind. 2002) (quoting Barrington Mgmt. Co. v. Paul E. Draper Fam. Ltd. P'ship, 695 N.E.2d 135, 141 (Ind. Ct. App. 1998)) ("Rescission of a contract is not automatically available," but "if a breach of the contract is a material one which goes to the heart of the contract, rescission may be the proper remedy.").

19. In circumstances where a breaching party substantially completes its contract, but leaves unfulfilled obligations, the nonbreaching party could exercise its offset rights to accomplish the substantive equivalent of a termination should the unpaid contract balance cover the costs to complete those obligations. Amoco Prod. Co. v. Fry, 118 F.3d 812, 817 (D.C. Cir. 1997) ("[L]ike private creditors, the federal government has long possessed the right of offset at common law"); *see also* United States v. Munsey Trust Co., 332 U.S. 234, 239 (1947).

20. Generally, economic waste occurs when the reasonable cost of completing performance or of remedying the defects is not clearly disproportionate to the probable loss in value to him or endangering other parts of the structure. Restatement (Second) of Contracts § 348(2)(b) (1979).

21. A determination of the recoverable damages requires a comparison of the cost of completion or correction and the difference in market value. *See id.* §§ 347, 348. The lesser of the two establishes the recoverable damages. *Id.* The party asserting what is in effect a diminution in value defense has the burden of proof as to the amount by which the condition diminishes the value in comparison to the cost of repair asserted by the claimant. *Id.* § 346(1); *see also* Stangl v. Todd, 554 P.2d 1316, 1320 (Utah 1976) ("[T]he contract breaker should pay the cost of construction and completion in accordance with his contract, unless he proves, affirmatively and convincingly, such construction and completion would involve an unreasonable economic waste."). Exceptions to the diminished value rule include, among others, when repairs are necessary to abate a hazardous condition. *See* School Dist. v. Kunz, 249 Wis. 272, 24 N.W.2d 598 (1946).

22. See Construction Law, Second Edition, ch. 16 at 506 (Allen I. Overcash et al. eds., 2019) (citing Bruner & O'Connor on Construction Law § 18:39 (West 2002)) (reformatted with citations omitted).

23. "Substantial performance," for all practical purposes, is synonymous with "substantial completion," especially in a construction context. Substantial performance occurs when, "although the conditions of the contract have been deviated from in trifling particulars not materially detracting from the benefit the other party would derive from a literal performance, [the defendant] has received substantially the benefit he expected, and is, therefore, bound to pay." Newcomb v.

Schaeffler, 279 P.2d 409, 412 (Colo. 1955); Western Distrib. Co. v. Diodosio, 841 P.2d 1053, 1058 (Colo. 1992); J.M. Beeson Co. v Sartori, 553 So. 2d 180, 182 (Fla. Dist. Ct. App. 1989) ("[S]ubstantial completion and substantial performance are virtually identical for our purposes."). A party has substantially performed when the only variance from the strict and literal performance consists of technical or unimportant omissions or defects. Reliance Ins. Co. v. Utah Dep't of Transp., 858 P.2d 1363, 1370 (Utah 1993) (abrogated on other grounds by Com. Real Estate Inv., L.C. v. Comcast of Utah II, Inc., 285 P.3d 1193, 1203 (Utah 2012); *c.f.* All Seasons Constr., Inc. v. Mansfield Hous. Auth., 920 So. 2d 413, 416 (La. 2006) (stating that substantial completion was "referred to also as substantial performance" and "can result even though deficiencies exist").

24. United States for Use & Benefit of Aucoin Elec. Supply Co. v. Safeco Ins. Co. of Am., 555 F.2d 535 (5th Cir. 1977) ("[I] f a contract has been fully or substantially completed, recovery may be had only for the contract price" unless complete performance is prevented by the other party's breach, in which event the nonbreaching party "may elect either to recover his damages under the contract or treat the contract as rescinded and recover the reasonable value of his work in quantum meruit" just as "if the contract has been only partially completed [in which event] recovery may be had either on the contract or for the value of the services rendered.").

25 For an example of this in a sales transaction, see *F. C. Mach. Tool & Design, Inc. v. Custom Design Techs., Inc.*, where the court stated: "The long and uniformly settled rule as to contracts requires only a substantial performance in order to recover upon such contract. Merely nominal, trifling, or technical departures are not sufficient to breach the contract." 2001 WL 1673702 (C.A. Ohio 2001) (citing Ohio Farmers' Ins. Co. v. Cochran, 135 N.E. 537 (Ohio 1922)).

26. U.C.C. §§ 2-602, 2-606, 2-608 (Am. L. Inst. & Unif. L. Comm'n 1977).

27. Bruner & O'Connor on Construction Law, *supra* note 22, § 18:4. A material breach is one that is substantial enough that it "reasonably compels a clear inference of unwillingness or inability of one party to meet substantially the contractual future performance expectations of the other party. . . ."

28. Brown v. Grimes, 192 Cal. App. 4th 265, 278 (2011) (citing 23 Richard A. Lord, Williston on Contracts § 63:3 at 440 (4th ed. 2000)) (fns. omitted).

29. Brown, 192 Cal. App. 4th at 281 (finding the performance obligation at issue did not "go to the essence of the contract").

30. "Substantial performance" and "substantial completion" are recognized to be interchangeable. J.M. Beeson Co. v. Sartori, 553 So. 2d 180, 182 (Dist. Ct. App. Fla., 4th Dist. 1989) (citing Ramada Dev. Co. v. Rauch, 644 F.2d 1097 (5th Cir. 1981)).

31. Despite being a UCC-governed transaction, this is used for illustrative purposes.

32. See, *e.g.*, Madden Phillips Constr., Inc. v. GGAT Dev. Corp., 315 S.W.3d 800, 819 (Tenn. Ct. App. 2009); *In re* Constr. Contractors of Ocala, Inc., 196 B.R. 188, 193 (M.D. Fla. 1996) (upholding termination of a subcontractor for failure to complete its scope of work within the time for completion under a "time of the essence" regime); Call v. Alcan Pac. Co., 251 Cal. App. 2d 442, 448 (1967) ("[A]n owner has a common law right to cancel a building contract if the contractor, without fault of the owner, fails to comply with a 'time of the essence' clause.").

33. The adequacy of a payment default to justify rescission is beyond the scope of this article.

34. United States for Use & Benefit of Aucoin Elec. Supply Co. v. Safeco Ins. Co. of Am., 555 F.2d 535, 541 (5th Cir. 1977) ("[E]ven when payment is not made when due, it is not sufficient reason to stop work unless it really suspends work."). The reasonableness of abandonment of one's work for nonpayment will depend upon the amount withheld, its duration, and factual circumstances. *See* Stewart v. C. & C. Excavating & Constr. Co., 877 F.2d 711, 713 (8th Cir. 1989); Havens v. Safeway Stores, 678 P.2d 625, 625 (Kan. 1984); *c.f.* Macri v. United States for Use of John H. Maxwell & Co., 353 F.2d 804, 808 (9th Cir. 1965).

35. *See* Guerini Stone Co. v. P.J. Carlin Constr. Co., 248 U.S. 334 (1919).

36. *E.g.*, Gramm v. Ins. Unlimited, 378 P.2d 662, 664 (Mont. 1963) ("The non-payment of an installment of money will always create a right of action for that money, but it will not always be a total breach."). Corbin observes, "[T]he terms 'total breach' and 'partial breach' can render useful service, even though actual usage is not altogether consistent, if it is recognized that such a variation exists and that they do not in themselves determine the result that a court should reach." 10 Corbin on Contracts, *supra* note 16, § 53.4.

37. Myriad Dev., Inc. v. Alltech, Inc., 817 F. Supp. 2d 946, 963 (W.D. Tex. 2011) (citations omitted); *c.f.* 10 Corbin on Contracts, *supra* note 16, § 53.4, n.1 ("[M]aterial and immaterial breaches are distinguished by the severity of the breach.").

38. *Immaterial*, Merriam-Webster (2021).

39. Numerous Florida and Missouri decisions have applied economic waste in the context of total breach of a construction project. Rector v. Larson's Marine, Inc., 479 So. 2d 783, 783 (Fla. Dist. Ct. App. 1985) ("[N]either of those alternatives would be allowed, however, if it were to involve unreasonable economic waste."); Fox Creek Constr., Inc. v. Opie's Landscaping, LLC, 587 S.W.3d 746, 750–51 (Mo. Ct. App. 1999); *c.f.* Grossman Holdings Ltd. v. Hourihan, 414 So. 2d 1037, 1037 (Fla. 1982) (stating measure of damages in a total breach scheme is the difference between the value of completion and the value of work performed).

40. In *Stege v. Hoffman*, 822 S.W.2d 517, 520–22 (Mo. Ct. App. 1992), the Missouri appellate court used economic waste in its analysis of damages for partial completion.

41. Ross Dress For Less, Inc. v. Makarios-Oregon, LLC, 512 F. Supp. 3d 1138, 1155 (Ore. 2021) (holding diminution in value is the proper measure of damages when the cost of repair is disproportionate to the diminution in value so as to constitute economic waste). In *Ross*, the court noted, in tracing the history of the economic waste concept: "The origin of the economic waste doctrine is generally considered to be Justice Cardozo's opinion for the New York Court of Appeals in *Jacob & Youngs v. Kent*, although the term 'economic waste' does not appear anywhere in that decision." *Ross*, 512 F. Supp. 3d at 1155.