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Contract Law

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I. DEBTOR'S CONTRACTUAL WAIVER OF APPRAISAL RIGHTS HELD INVALID

In *SCN Mortgage Corp. v. White*[1] the South Carolina Supreme Court affirmed the court of appeals' holding that a contractual waiver of appraisal rights is invalid as contrary to public policy.[2] This holding overrules the court's decision in *Tri-South Mortgage Investors v. Fountain*.[3]

SCN Mortgage Corp. v. White consolidated appeals from ten foreclosure actions. The plaintiff sought foreclosure of the ten mortgages and the right to deficiency judgments if sale of the properties did not satisfy the debts. Each of the ten mortgages contained a waiver of the statutory right to an appraisal.[4] The provision stated: "[T]he mortgagor waives the benefit of any appraisement laws for the State of South Carolina."[5] The defendant debtors asserted that this waiver was invalid as a violation of public policy. The trial judge held the waiver of appraisal rights effective. Citing *Anderson Bros. Bank v. Adams*,[6] the South Carolina Court of Appeals reversed the lower court's decision.[7] The South Carolina Supreme Court affirmed the court of appeals.[8]

The South Carolina Supreme Court began its opinion with a recitation of the statutory right to appraisal.[9] A defendant in a real estate foreclosure proceeding in which a personal judgment is sought may apply for an order of appraisal of the property within thirty days after the sale of the mortgaged property.[10] Following the appraisal, the deficiency judgment is reduced to reflect the appraised amount.[11]

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1. ___ S.C. ___, 440 S.E.2d 868 (1994).

2. *See* SCN Mortgage Corp. v. White, 309 S.C. 146, 420 S.E.2d 514 (Ct. App. 1992), *aff'd*, ___ S.C. ___, 440 S.E.2d 868 (1994).

3. 266 S.C. 141, 221 S.E.2d 861 (1976), *overruled by* SCN Mortgage Corp. v. White, ___ S.C. ___, 440 S.E.2d 868 (1994).

4. *SCN Mortgage Corp.*, 309 S.C. at 147-48, 420 S.E.2d at 514-15.

5. *Id.* at 148, 420 S.E.2d at 515.

6. 305 S.C. 25, 406 S.E.2d 173 (1991).

7. *SCN Mortgage Corp.*, 309 S.C. at 148, 420 S.E.2d at 515.

8. *SCN Mortgage Corp.*, ___ S.C. ___, 440 S.E.2d 868.

9. *Id.* at ___, 440 S.E.2d at 869.

10. S.C. CODE ANN. § 29-3-680 (Law. Co-op. 1991).

11. S.C. CODE ANN. § 29-3-740 (Law. Co-op. 1991). The court's decision in Tri-South Mortgage Investors v. Fountain, 266 S.C. 141, 221 S.E.2d 861 (1976), offers a clear characterization of the statutes: "They provide a method by which a mortgagor can have the real estate involved in a foreclosure appraised at the fair value, which appraisal figure shall be then used as the basis for computing the deficiency judgment rather than the highest price bid at a judicial sale." *Tri-South*, 266 S.C. at 147, 221 S.E.2d at 864.

The supreme court noted the court of appeals' reliance on *Anderson Bros. Bank v. Adams* in its acceptance of the argument that a waiver of statutory appraisal rights is a violation of public policy.[12] Acknowledging that "necessity often drives debtors to make ruinous concessions" when they are attempting to secure a loan, the *Anderson Bros.* court held that a debtor's contractual waiver of appraisal rights is invalid as to a *guarantor*.[13] That is, a guarantor is not bound by the debtor's waiver of the right to appraisal.

The South Carolina Supreme Court extended the *Anderson Bros.* holding to protect *debtors* from their own waiver.[14] Mentioning the *Anderson Bros.* court's reliance on case law from other jurisdictions that recognize that the waiver of a debtor's statutory rights is against public policy, the supreme court pronounced its intention to "join those jurisdictions that give effect to a debtor's statutory rights."[15] Adopting the language of the *Anderson Bros.* court, the supreme court concluded that the application of the appraisal statute should protect the debtor by preventing a waiver in advance.[16] The court held the contractual waiver of appraisal rights invalid as a violation of public policy.[17]

Neither the opinion of the court of appeals nor that of the supreme court expressly discuss the rationale for extending the holding of *Anderson Bros.* The court of appeals' opinion explicitly recognized that the *Anderson Bros.* ruling was confined to guarantors.[18] Nevertheless, the court of appeals thought "the logic of the rule set forth in *Anderson Brothers Bank* applies even more forcefully to the notemakers who became debtors upon signing the notes."[19] While the supreme court mentioned the possible limitation on the application of *Anderson Bros.*, it did not discuss any basis, beyond its invocation of public policy, for extending the invalidity of contractual waivers of appraisement as to guarantors to include the debtors themselves.

The lack of an explicit justification for the extension of *Anderson Bros.* to include notemaker debtors is significant. Although the *Anderson Bros.* opinion includes far-reaching dicta and citations from other jurisdictions espousing public policy rationale, the actual holding is narrow: "We hold that boilerplate language, inserted by Bank, at the end of a mortgage *signed only by Debtors, is not binding upon Guarantors.*"[20] This statement implies that

12. *SCN Mortgage Corp.*, ___ S.C. at ___, 440 S.E.2d at 869.

13. *Anderson Bros.*, 305 S.C. at 28, 406 S.E.2d at 175 (quoting Salter v. Ulrich, 138 P.2d 7, 9 (Cal. 1943)).

14. *SCN Mortgage Corp.*, ___ S.C. at ___, 440 S.E.2d at 869.

15. *Id.* at ___, 440 S.E.2d at 869.

16. *Id.* at ___, 440 S.E.2d at 869.

17. *Id.* at ___, 440 S.E.2d at 869.

18. *SCN Mortgage Corp.*, 309 S.C. at 148, 420 S.E.2d at 515.

19. *Id.*

20. *Anderson Bros.*, 305 S.C. at 28, 406 S.E.2d at 175 (emphasis added).

the guarantor's failure to sign the agreement is a determinative issue.[21] The *Anderson Bros.* holding can thus be adequately explained by the principle that a third party cannot be bound by a contract it did not sign.[22] The court also emphasized that the waiver language was boilerplate and printed in small type at the end of the mortgage.[23] This may further limit application of the case to instances where the waiver is inconspicuous and not a negotiated term in the contract. Furthermore, the *Anderson Bros.* court only briefly mentioned the public policy considerations underlying the application of the appraisal statute despite an alleged waiver.[24] The decision does not appear to rest on public policy grounds.

The South Carolina Supreme Court's decision in *SCN Mortgage Corp. v. White* overrules *Tri-South Mortgage Investors v. Fountain*[25] "to the extent it is inconsistent" with the opinion.[26] The court in *Tri-South* held a contractual waiver of the South Carolina statutory appraisal rights valid despite the argument that these rights could not be waived because they concerned public policy.[27] The *Tri-South* court based its decision on a distinction between individual and public interests.[28] The court explained that statutory rights usually may be waived by agreement unless a question of public policy is involved.[29] However, an agreement is not contrary to public policy simply because it waives a statutory right.[30] "'Whether the effect of any specific statute can be avoided by agreement depends upon whether the statute is one enacted for the protection of the public generally or whether it is designed solely for the protection of the rights of individuals, in which case it may be waived.'"[31] The *Tri-South* court concluded that because the South Carolina appraisal statute protects only a small sector of the public, individuals against whom a deficiency judgment is sought in a foreclosure action, the statute may

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21. *See id.*

22. *Cf.* North Charleston Joint Venture v. Kitchen of Island Fudge Shoppe, Inc., 307 S.C. 533, 416 S.E.2d 637 (1992) (holding that a guarantor is not bound by a clause waiving the right to a trial by jury in a lease that did not name guarantor and to which guarantor was not a party).

23. *Anderson Bros.*, 305 S.C. at 28, 406 S.E.2d at 175.

24. *See id.*

25. 266 S.C. 141, 221 S.E.2d 861 (1976).

26. *SCN Mortgage Corp.*, ___ S.C. at ___, 440 S.E.2d at 869.

27. *Tri-South Mortgage Investors*, 266 S.C. at 147, 221 S.E.2d at 864. The South Carolina code sections cited by the court in this opinion are the predecessors to § 29-3-680 and § 29-3-740 cited in *SCN Mortgage Corp.*, ___ S.C. at ___, 440 S.E.2d at 869.

28. *Tri-South Mortgage Investors*, 266 S.C. at 147, 221 S.E.2d at 864.

29. *Id.* (citing 17 AM. JUR. 2D *Contracts* § 173 (1964)); *see* 17A AM. JUR. 2D *Contracts* § 256 (1944) (stating that "[r]ights conferred as a matter of public policy cannot be waived").

30. *Tri-South Mortgage Investors*, 266 S.C. at 147, 221 S.E.2d at 864 (citing 17 AM. JUR. 2D *Contracts* § 173 (1964)).

31. *Id.* at 147-48, 221 S.E.2d at 864 (quoting 17 AM. JUR. 2D *Contracts* § 173, at 531 (1964)).

therefore be waived.[32] The court further reasoned that if the statute truly protected a public policy interest, it would not stipulate that statutory protection is sacrificed in the absence of a timely petition.[33]

The requirement for a timely petition, cited in *Tri-South* as evidence of private interest protection, is more appropriately explained as a legislative desire to appraise property as near in time to the actual sale as possible. A timely petition ensures that the appraisal amount is accurate and reflects the fair value of the property at the time of sale. Furthermore, the *Tri-South* court's conclusion that because only judgment debtors are protected the statute must involve only a private interest, is illogical. The *Tri-South* reasoning leads to the result that a statute protecting only those who fall within the realm of the statute, as all statutes do, can never reach the level of protecting a public interest. Therefore, despite the supreme court's failure to clearly distinguish its decision in *SCN Mortgage Corp. v. White* from *Tri-South*, the *Tri-South* decision appears to rest on dubious grounds.

The supreme court's decision in *SCN Mortgage Corp. v. White* does not go so far as to make a distinction between statutes enacted to protect the public good or those designed to protect private interests. The public policy argument advanced by the court consists of a general reference to the *Anderson Brothers* dicta[34] and a citation to *Dennis v. Moses*.[35] Although the court failed to articulate its rationale for holding that the appraisal statute protects a public interest, a public policy justification does exist. In *Salter v. Ulrich*,[36] cited in the *Anderson Brothers* opinion,[37] the court declared unenforceable and void "'any agreement exacted from a borrower as a condition to the making or renewing of any loan secured by a deed of trust, mortgage or other lien . . . whereby the borrower agrees to waive any [statutory] rights."[38] The court recognized that unfortunate circumstances often force debtors to make "ruinous concessions" when in need of a loan and implied that statutes should be enforced to protect the public in such instances.[39]

The Supreme Court of Washington also followed this public policy rationale in *Dennis v. Moses*,[40] holding that the advance contractual waiver

32. *Id.* at 148, 221 S.E.2d at 864.

33. *Id.; see* S.C. CODE ANN. § 29-3-680 (Law. Co-op. 1991) (stipulating that an application for an order of appraisal must be made within thirty days of the sale of the mortgaged property).

34. *SCN Mortgage Corp.*, ___ S.C. at ___, 440 S.E.2d at 868.

35. 52 P. 333 (Wash. 1898).

36. 138 P.2d 7 (Cal. 1943).

37. *Anderson Bros.*, 305 S.C. at 28, 406 S.E.2d at 175.

38. Salter v. Ulrich, 138 P.2d 7, 9 (Cal. 1943). The *Salter* court quoted this language from the California Code of Civil Procedure. Even though the statute was enacted after the foreclosure in question, the court followed its mandate.

39. *Id.*

40. 52 P. 333 (Wash. 1898).

of statutory rights to appraisal following a foreclosure sale is void as against public policy.[41] The *Dennis* court stated: "[A]n act limiting the rights of a citizen to contract with reference to his property must tend to promote the public good in some way or it is an unwarranted interference therewith."[42] The court found the promotion of the public good in the spirit of the appraisal act, which tended "to prevent the sacrifice of property."[43]

South Carolina's appraisal act appears to possess a similar spirit. The appraisal statute was enacted by the South Carolina Legislature during the economic depression in the early 1930s.[44] The public policy underlying the statute is revealed in the annual message of the Governor to the General Assembly in 1933, the year the statute was enacted.[45] Under the topic heading "Early Steps to Relieve Mortgagors," the Governor suggested that "any measure designed to benefit mortgagors and unfortunate debtors should be presented early in the session that it may serve its intended purpose."[46] This purpose, as the heading preceding the statement indicates, was relief. The appraisal statute appears to protect the public from compromising its right to receive fair value for property in the event of a foreclosure and deficiency judgment as a condition to obtain a mortgage. The public policy underlying the statute is the protection of "unfortunate debtors"[47] who may make "ruinous concessions"[48] as a prerequisite to obtaining loans.

The South Carolina Supreme Court's decision in *SCN Mortgage Corp. v. White* may be viewed as infringing on a party's right to contract. The decision abrogates a party's right to waive the statutory appraisal provision in advance, even if the waiver is a negotiated term in the contract.[49] Holding a contract provision void conflicts with established contract law. A court cannot rewrite a contract for parties when the plain language of the contract is capable of construction.[50] A court cannot relieve a party from the effect of unambiguous contract terms despite the failure of the contracting party to protect its own interests.[51] As stated in *King v. Oxford*,[52] South Carolina courts "do not sit

41. *Id.*
42. *Id.* at 340.
43. *Id.* at 336.
44. *Tri-South Mortgage Investors*, 266 S.C. at 147, 221 S.E.2d at 864.
45. I.C. Blackwood, Message of Governor to the General Assembly (Jan. 10, 1933), *in* REPORTS OF STATE OFFICERS, BOARDS, AND COMMITTEES TO THE GENERAL ASSEMBLY OF THE STATE OF SOUTH CAROLINA 14 (1933).
46. *Id.*
47. *Id.*
48. Salter v. Ulrich, 138 P.2d 7, 9 (Cal. 1943).
49. *SCN Mortgage Corp.*, ___ S.C. at ___, 440 S.E.2d at 869.
50. Conner v. Alvarez, 285 S.C. 97, 102, 328 S.E.2d 334, 336 (1985).
51. Gilstrap v. Culpepper, 283 S.C. 83, 86, 320 S.E.2d 445, 447 (1984).
52. 282 S.C. 307, 318 S.E.2d 125 (Ct. App. 1984).

for the purpose of relieving parties who refuse to exercise reasonable diligence or discretion to protect their own interests."[53] However, the South Carolina Supreme Court's decision in *SCN Mortgage Corp. v. White* implies that the public policy of protecting unfortunate debtors from ruinous concessions trumps the normal rules of contract interpretation.

Susan E. Drake

II. FAILURE TO ACT BY DATE SPECIFIED IN A REAL ESTATE SALES CONTRACT MAY NOT CONSTITUTE A MATERIAL BREACH

In *Ackerman v. McMillan*[1] the South Carolina Court of Appeals held that a purchaser's failure to apply for financing within the time specified in a contract of sale was not a material breach and thus did not warrant repudiation of the contract by the sellers.[2] The court held that a party to a contract may repudiate the contract only when a breach by the other party is "so fundamental and substantial as to defeat the purpose of the contract."[3] If the breach is "not so material as to defeat the purpose of the contract, the nonbreaching party is compensated by damages."[4]

On December 4, 1989, Ackerman and the McMillans entered into a written contract for the sale of the McMillans' home. The contract provided, first, that the purchaser would apply for financing within ten days of the execution of the contract. Second, the contract provided that the seller would have the right to continue to offer the property for sale and, upon receiving another offer, the purchaser would have forty-eight hours after notification of the new offer to provide the seller "'reasonable evidence that any financing required under [the] agreement will be granted.'"[5]

On February 5, 1990, the McMillans removed their home from the market.[6] Ackerman was informed of this decision on February 27, 1990. On March 11, 1990, Ackerman, for the first time, applied for financing and

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53. *Id.* at 312, 318 S.E.2d at 128 (citing Mobley v. Quattlebaum, 101 S.C. 221, 85 S.E. 585 (1915)).

1. ___ S.C. ___, 442 S.E.2d 618 (Ct. App. 1994).

2. *Id.* at ___, 442 S.E.2d at 619-20.

3. *Id.* at ___, 442 S.E.2d at 620 (citing Gibbs v. G.K.H., Inc., ___ S.C. ___, 427 S.E.2d 701 (Ct. App. 1993)).

4. *See id.* at ___, 442 S.E.2d at 620 (citing Childress v. C.W. Myers Trading Post, Inc., 100 S.E.2d 391 (N.C. 1957)).

5. *Id.* at ___, 442 S.E.2d at 619. The contract also provided that it was contingent upon the purchaser completing the sale and closing of her home. *Id.* at ___, 442 S.E.2d at 619. That provision was not at issue in the case.

6. The McMillans decided they no longer needed to move to Florence. *Ackerman*, ___ S.C. at ___ n.1, 442 S.E.2d at 619 n.1.

informed the McMillans that she intended to close the sale of the house by April 15, 1990, the closing date specified in the contract. Ackerman received the money to close the sale from her father,[7] but the closing never took place. Consequently, Ackerman sued the McMillans for damages. A special referee found that Ackerman could not recover damages because she had breached the contract by failing to apply for financing within ten days and because she failed to remove the contingency within forty-eight hours of learning that the McMillans had decided to take the house off of the market.[8]

Ackerman turns upon the court of appeals' interpretation of the provision requiring Ackerman to apply for financing within ten days of the execution of the contract.[9] The court agreed with the special referee's determination that Ackerman's failure to comply with the provision constituted a breach of the contract, but added that her breach did not constitute a material breach justifying the McMillans' repudiation. Because Ackerman had obtained the funds necessary to close the sale before the specified closing date, "the purpose of the contract was not defeated."[10] The McMillans, thus, had no right to repudiate the contract; they could only seek damages for Ackerman's failure to comply with the financing provision within the ten day allotted time period.[11]

Implicit in the court's holding is the determination that the time restriction in the contract did not amount to a "time of the essence" clause. Although South Carolina law regarding this topic is minimal, an analysis of existing South Carolina case law, as well as that of other jurisdictions, indicates that the decision in *Ackerman* is not inconsistent with the widely held theory that

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7. Ackerman applied at another institution and was approved for a $100,000 loan contingent upon the bank's receiving an acceptable appraisal of the house. Because the appraiser was denied access to the house, Ackerman approached her father for the money. *Id.* at ___ nn.2-3, 442 S.E.2d at 619 nn.2-3.

8. *Id.* at ___, 442 S.E.2d at 619.

9. The court of appeals determined that the special referee erred in treating the McMillans' decision to stay as an offer to themselves which triggered the 48 hour contingency provision. A general rule of contract law provides that the parties must have a mutual obligation to complete the contract. 17 C.J.S. *Contracts* § 100(1) (1963). The court decided that the McMillans' offer to themselves was invalid because "[a] contract by one with himself is void." *Ackerman*, ___ S.C. at ___, 442 S.E.2d at 620 (citing Moore v. Bennettsville Warehouse Co., 136 S.C. 312, 134 S.E. 395 (1925)). Such contracts lack mutuality of obligation. *Id.* at ___, 442 S.E.2d at 620 (citing Alala v. Peachtree Plantations, Inc., 292 S.C. 160, 355 S.E.2d 286 (Ct. App. 1987)); *see also* Humble Oil & Ref. Co. v. DeLoache, 297 F. Supp. 647, 658 (D.S.C. 1969) ("In the law of contracts, mutuality, both in definition and in application, is largely synonymous with consideration." (citations omitted)). Consequently, the court of appeals held that Ackerman had no duty under the contract to remove the 48 hour contingency, and reversed the special referee's finding to the contrary.

10. *Ackerman*, ___ S.C. at ___, 442 S.E.2d at 620.

11. *Id.* at ___, 442 S.E.2d at 620.

time is of the essence in real estate law when expressly provided for in the sales contract.

A general rule of real estate law states that "time will not be regarded as of the essence of the contract merely because a definite time for performance is stated therein, without any further provision as to the effect of nonperformance at the time stated."[12] In order for time to be treated as of the essence in a contract for the sale of realty, "it should clearly appear therefrom that such was the intention of the parties; as, for example, by a provision that the agreement shall be void unless the act named be completed by a certain day, or by other equivalent expression."[13] Although the contract in *Ackerman* did state that the contract would be terminated if the buyer failed to provide evidence of financing approval within forty-eight hours of a second offer, no similar provision applied to the ten-day limit for application for financing.[14]

Often, contract disputes regarding failure to comply with express "time of the essence" clauses involve a failure to close the sale of the real estate[15] or the failure to make a necessary payment by the dates specified in the contract.[16] However, none of the cases surveyed in this area have dealt with an application for financing provision like that at issue in *Ackerman*. Also, taking into account that "time of the essence" clauses have become boilerplate and are often inserted without consideration of the importance of time in the transaction,[17] a conclusion that time would be of the essence to all terms of the contract is questionable.

Had the court of appeals determined that time was of the essence as to the financing application provision, the court's holding might still be justified. Even if an express provision makes time of the essence applicable to terms of a contract, the stipulated time limit may be extended either by agreement or waiver of both parties.[18] Thus, even though a sales contract may contain an

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12. 91 C.J.S. *Vendor & Purchaser* § 104, at 1000 (1955); *see also* Scheer v. Doss, 83 S.E.2d 612, 614 (Ga. 1954) ("'Merely prescribing a day at or before which the act must be done, does not render the time essential with respect to such act.'" (quoting Ellis v. Bryant, 48 S.E. 352, 353 (Ga. 1904))).

13. Mangum v. Jones, 54 S.E.2d 603, 607 (Ga. 1949) (citations omitted); *see also* Bishop v. Tolbert, 249 S.C. 289, 153 S.E.2d 912, 918 (1967) (stating that generally time is not of the essence of a contract unless made so expressly or by implication from the surrounding circumstances).

14. *See Ackerman*, ___ S.C. at ___, 442 S.E.2d at 619.

15. *See, e.g.*, Miceli v. Dierberg, 773 S.W.2d 154 (Mo. Ct. App. 1989); Realco Equities, Inc. v. John Hancock Mut. Life Ins. Co., 540 A.2d 1220 (N.H. 1988); Zahl v. Greenfield, 556 N.Y.S.2d 393 (App. Div. 1990).

16. *See, e.g.*, First Nat'l Bank v. Glens Falls Ins. Co., 27 F.2d 64 (4th Cir. 1928); Goff v. Graham, 306 N.E.2d 758 (Ind. Ct. App. 1974).

17. 2 ARTHUR R. GAUDIO, THE AMERICAN LAW OF REAL PROPERTY § 20.04 (1994).

18. Smith v. Hues, 540 S.W.2d 485, 488 (Tex. Civ. App. 1976); *see also* Hart v. Lyons, 436 N.E.2d 723, 726 (Ill. App. Ct. 1982) (recognizing that parties can agree to extend the closing

express "time of the essence" clause, the general consensus among courts faced with interpreting these provisions is that the guarantee is not absolute, but rather depends upon the intention of the parties and the circumstances surrounding the making of the contract.[19] Similarly, section 2-302(c) of the Uniform Land Transactions Act states that "[t]he phrase 'time is of the essence' or other similar general language does not of itself provide explicitly that failure to perform at the time specified discharges the duties of the other party."[20] By failing to insist that Ackerman comply with the financing application provision, the McMillan's effectively extended the ten-day limit by waiver. Thus, it seems likely that the outcome of *Ackerman* would have been the same even if the contract had included a "time is of the essence" provision.

Ackerman provides little guidance in determining when a breach of a contract provision is a material breach. The court merely stated that a material breach is one that is so substantial and fundamental as to defeat the purpose of the contract.[21] South Carolina courts have not put forth a concrete test for determining when a breach will be deemed material, thereby justifying repudiation. However, the supreme court has adopted the standards set forth in section 241 of the Restatement (Second) of Contracts for determining whether a failure to render or to offer performance is material.[22] Under section 241, significant circumstances to be taken into account by a court should include:

(a) the extent to which the injured party will be deprived of the benefit which he reasonably expected;
(b) the extent to which the injured party will be adequately compensated for the part of that benefit which he will be deprived;
(c) the extent to which the party failing to perform or to offer to perform will suffer forfeiture;

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date).

19. *See, e.g.*, Ravitch v. Stollman Poultry Farms, Inc., 328 A.2d 711, 716-17 (Conn. 1973); Anest v. Bailey, 556 N.E.2d 280, 283 (Ill. App. Ct. 1990).

20. U.L.T.A. § 2-302 (1975). This section of the Act requires that the contract must clearly state what will happen if the parties do not perform by the date specified; the section also has a peripheral effect of limiting the boilerplate language of the clauses. *See* GAUDIO, *supra* note 17, § 2.04, at 20-48.

21. *Ackerman*, ___ S.C. at ___, 442 S.E.2d at 620 (citing Gibbs v. G.K.H., Inc., ___ S.C. ___, 427 S.E.2d 701 (Ct. App. 1993) and Childress v. C.W. Myers Trading Post, Inc., 100 S.E.2d 391 (N.C. 1957)).

22. Kiriakides v. United Artists Communications, ___ S.C. ___, ___, 440 S.E.2d 364, 366 (1994) (utilizing RESTATEMENT (SECOND) OF CONTRACTS § 241 (1981) to determine whether a breach of a commercial lease is trivial or immaterial).

(d) the likelihood that the party failing to perform or to offer to perform will cure his failure, taking account of all the circumstances including any reasonable assurances;
(e) the extent to which the behavior of the party failing to perform or to offer to perform comports with standards of good faith and fair dealing.[23]

Other jurisdictions have applied these factors to find that a material breach exists where a purchaser failed to insure properties as required by the sales contract and to pay the second and third installments due under the contract[24] and where a contract provided that the purchaser could not make substantial improvements or alterations without written consent from the vendors, and purchasers' assignees demolished a building on the property without consent.[25] These factors have also been used to determine that a material breach does not exist where purchasers left a check for earnest money payable to vendors at the designated bank instead of depositing cash with the bank as required by the contract.[26]

Relying on the basic standard of materiality, the *Ackerman* court did not apply the Restatement factors to the financing application provision. Ackerman failed to comply with the ten day financing contingency, but her failure to apply for financing within ten days of the execution of the contract did not defeat its purpose. She was ready and willing to close the sale by the April 15, 1990 deadline agreed upon by the parties. The McMillans' repudiation of the contract did, however, defeat the purpose of the contract, and the court thus concluded that their repudiation constituted a material breach.

M. Jean Lee

23. RESTATEMENT (SECOND) OF CONTRACTS § 241 (1981).
24. *E.g.*, Goff v. Graham, 306 N.E.2d 758 (Ind. Ct. App. 1974).
25. *E.g.*, Barber v. Freeman, 742 P.2d 711 (Or. Ct. App. 1987).
26. *E.g.*, Cowman v. Allen Monuments, Inc., 500 S.W.2d 223 (Tex. Civ. App. 1973).