CHAPTER 6

PERFORMANCE AND NONPERFORMANCE

6.1 OVERVIEW

6.101 Importance of Performance Issues. Issues of performance and nonperformance and the rules regarding them are important to the practitioner in several contexts—particularly when a client is considering entering into a contract. To serve the client effectively, the lawyer must understand the terms of the contract, pertinent performance issues, how the law addresses performance-related matters, and how contract language affects performance.

For example, if a client is considering purchasing property for a shopping center, governmental approval for access to the proposed shopping center may be an express or implied condition precedent to the effectiveness of the sales contract for the property and may or may not be waived. Access to the shopping center is central to the economics of the client's proposed purchase, so the existence and effect of conditions precedent are key factors in considering any proposed contract. In this example, the lawyer and the client considering the contract must understand the rules and possible risks concerning potential conditions precedent, as well as other performance matters. More importantly, the parties must clearly address performance-related matters in the contract.

Performance issues may also arise after parties enter into a contract. These issues may require client counseling, communications with the other party to the contract, and negotiations. Once again, knowledge of performance issues is key to the lawyer's role. The client may ask, "Must I perform, or is performance excused?" or "How should I respond to the other party's breach?" The lawyer must be able to answer the client's questions and must know the relative strengths and weaknesses of the parties' positions when advising the client and when dealing with the other party.

Finally, if a dispute arises regarding contract performance and it cannot be resolved by other means, the parties may need to resort to litigation or alternative dispute resolution. Knowledge of performance issues is key to the lawyer's role in assessing the relative merits of the client's case and in best advocating for the client.

6.102 Scope of This Chapter. This chapter addresses matters concerning performance and nonperformance, including conditions; order of performance; prospective nonperformance or anticipatory breach; breaches of contract, the doctrine of substantial performance; permissible responses to a breach; and the excuses for nonperformance offered by the doctrines of impossibility and frustration. The chapter discusses the basic legal rules and how they apply or are likely to apply in Virginia. Where appropriate, this chapter also discusses the potential impact of these basic rules on the practitioner's activities: (i) as a counselor assisting the client in deciding whether to enter into a contract, and then drafting appropriate language; (ii) as a negotiator helping deal with performance issues after the contract is signed; and (iii) as an advocate when performance issues lead to litigation or alternative dispute resolution.

6.2 CONDITIONS

6.201 Overview. Conditions play a key role in contract performance because their occurrence or nonoccurrence can completely excuse performance or cause substantial forfeiture of rights. The law regarding conditions can be esoteric and convoluted. Courts and commentators speak of conditions precedent, conditions subsequent, concurrent conditions, conditions implied in fact, conditions implied in law, and constructive conditions. Determining their existence, type, and effect may be a challenge. For these reasons, the practitioner dealing with contract matters must understand the types of conditions, their effects, and how the practitioner can help the client deal with them.

Classifications of conditions made by commentators and courts follow two approaches. One approach classifies conditions based on the time the conditioning event is to happen in relation to the promisor's duty to perform a promise. Under this classification, conditions are labeled as conditions precedent, conditions concurrent, and conditions subsequent.

The second approach classifies conditions based on the manner in which the condition arises—whether it is imposed by the parties or is created by law.[1] Conditions imposed by the parties are known as either express conditions or conditions implied in fact. Conditions created by law are known

[1] John D. Calamari & Joseph M. Perillo, *The Law of Contracts* § 11.3 (4th ed. 1998) [hereinafter Calamari & Perillo, *Contracts*].

as constructive conditions. This paragraph discusses each of these classifications.

6.202 Conditions Based Upon Time.

A. In General. Courts and commentators have classified conditions based on time into conditions precedent, conditions subsequent, and concurrent conditions.

B. Conditions Precedent.

1. Overview. A condition precedent calls for the performance of some act or the happening of some event after the terms of the contract have been agreed upon but before the contract takes effect.[2] Conditions are distinguishable from promises in that conditions create no rights or duties in and of themselves, but are merely limiting or modifying factors.[3] Conditions precedent appear in contracts in many contexts and are often clearly expressed as conditions. One common example is a provision in the American Institute of Architects (AIA) General Conditions of the Contract for Construction that requires the owner, as a condition precedent to the contractor's performance, to furnish evidence to the contractor that the owner is financially able to meet its obligations under the parties' contract.[4] However, conditions precedent need not always be expressed clearly in writing.

2. Effects of Conditions Precedent. Generally, conditions precedent must be performed; otherwise, performance of the contract will be

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[2] *Smith v. McGregor*, 237 Va. 66, 75, 376 S.E.2d 60, 65 (1989) (citing *Morotock Ins. Co. v. Fostoria Novelty Co.*, 94 Va. 361, 365, 26 S.E. 850, 851 (1897)); 4B Michie's Juris. Va. & W. Va. *Contracts* § 61 [hereinafter Michie's Juris. *Contracts*]; *see Gustafson v. Southland Life Ins. Co.*, 885 F. Supp. 854, 859 (E.D. Va. 1995) (citing *Morotock Ins. Co.*, 94 Va. 361, 26 S.E. 850); *see also de la Rosa Herrera v. Martin*, 49 Va. App. 469, 642 S.E.2d 309 (2007) (finding that a contract did not exist where a foreign agricultural worker satisfied certain but not all conditions precedent necessary to establish a valid employment contract); *Bryant v. McDougal*, 49 Va. App. 78, 636 S.E.2d 897 (2006) (husband's conditional oral affirmation of a settlement agreement created a condition precedent to the existence of a binding agreement); *Chesapeake Square Hotel, LLC v. Logan's Roadhouse, Inc.*, 995 F. Supp. 2d 512, 518 (E.D. Va. 2014) ("When a contract contains a condition precedent, a party "cannot compel specific performance without alleging the achievement of such act or averring a sufficient excuse for its non-performance.").

[3] *In re LCS Homes, Inc.*, 103 B.R. 736, 743 (Bankr. E.D. Va. 1989). Section 224 of the *Restatement (Second) of Contracts* (1981) defines a condition as "an event, not certain to occur, which must occur, unless its non-occurrence is excused, before performance under a contract becomes due."

[4] *See* AIA Document A201-2017, § 2.3. (Information and Services Required of the Owner).

excused. For example, when a contract provides for the performance of conditions precedent before a party is entitled to payment, the conditions must be performed.[5] Conditions precedent are also enforceable against third-party beneficiaries. For example, in *State Farm Fire & Casualty Co. v. Nationwide Mutual Insurance Co.*,[6] the court held that an umbrella insurance contract's requirement that the named insured maintain underlying insurance in the amount listed in the declarations is a condition precedent to the umbrella carrier's performance under the insurance contract, and correspondingly, the insured's right to payment up to the amount of his underlying insurance.[7] Failure to meet a condition precedent or the nonoccurrence of a condition precedent excuses performance.[8]

[5] *Winn v. Aleda Constr. Co.*, 227 Va. 304, 307, 315 S.E.2d 193, 195 (1984) (citing *Wright v. Agelasto*, 104 Va. 159, 161, 51 S.E. 191, 191 (1905)); *see also Hammond v. Pacific Mut. Life Ins. Co.*, 159 F. Supp. 2d 249, 254 (E.D. Va. 2001) ("good health" conditions precedent found in insurance contracts are valid and enforceable under Virginia law); *Bayview Loan Servicing, LLC v. Simmons*, 275 Va. 114, 654 S.E.2d 898 (2008) (holding that preacceleration notice required under the Deed of Trust is a condition precedent to accrual of lender's right of acceleration of indebtedness. The required notice was not given and thus the condition precedent to the defendant's right of acceleration was never met.).

[6] 596 F. Supp. 2d 940 (E.D. Va. 2009).

[7] *Id.* at 947.

[8] *Forrest Creek Assocs., Ltd. v. McLean Sav. & Loan Ass'n*, 831 F.2d 1238, 1241 (4th Cir. 1987) (excusing the defendants from providing funding where the financing contract provided that funding would occur if 200 condominium units were pre-sold and only 100 units were sold); *Newcom Holdings Pty. Ltd. v. Imbros Corp.*, 369 F. Supp. 2d 700, 710 (E.D. Va. 2005) (holding that plaintiff's rights under a deed of rectification never went into effect because a necessary condition precedent did not occur); *Armstrong v. United States*, 7 F. Supp. 2d 758, 768 (W.D. Va. 1998) (citing *Restatement (Second) of Contracts* § 225(1) (1981)); *United States v. Reckmeyer*, 627 F. Supp. 412, 414 (E.D. Va. 1986) (holding that failure to obtain financing for the purchase of cattle prevented title to the cattle from vesting in the defendant); *Blake Constr. Co./Poole & Kent v. Upper Occoquan Sewage Auth.*, 266 Va. 564, 587 S.E.2d 711 (2003) (owner was excused from paying additional compensation under the contract because the contractor failed to provide timely notice of the claim and thus failed to meet express condition precedent); *Apartment Inv. & Mgmt. Co. v. National Loan Investors, L.P.*, 258 Va. 322, 518 S.E.2d 627 (1999) (finding that failure to satisfy condition precedent regarding promissory note's transfer made the note unenforceable by transferee); *accord Restatement (Second) of Contracts*, § 225(2) (1981) (nonoccurrence of condition discharges duty when condition can no longer occur); *see Shepherd v. Colton*, 237 Va. 537, 378 S.E.2d 828 (1989) (excusing seller's performance where evidence demonstrated that the seller was not capable of obtaining county approval, which was a condition precedent to sale of the land); *Smith v. McGregor*, 237 Va. 66, 75, 376 S.E.2d 60, 65 (1989) (finding that where a condition precedent did not occur, neither party defaulted on contract; finding instead that the contract was voidable); *see also Golding v. Floyd*, 261 Va. 190, 539 S.E.2d 735 (2001) (where parties struck language in settlement agreement stating that "the parties agree to execute" a formal agreement and inserted in its place language that the agreement "is subject to execution of" a formal agreement (without including any binding mechanism to reach a formal agreement), the execution of a formal agreement was a condition precedent to the existence of a binding contract); *Bryant v. McDougal*, 49 Va. App. 78, 636 S.E.2d 897 (2006) (same).

3. Exceptions to the General Rule. There are several exceptions to the general rule that failure to meet a condition precedent will excuse performance. If a party waives a condition or if the party relying upon the condition is estopped from relying on the condition, the contract may nevertheless be enforced against that party.[9] For example, if the party charged with satisfying the condition has prevented or hindered its occurrence by failing to pursue that obligation in good faith, the satisfaction of the condition precedent is not required.[10] This situation is also referred to as the "prevention doctrine."[11]

In *Rastek Construction & Development Corp. v. General Land Commercial Real Estate Co., LLC*,[12] the Virginia Supreme Court analyzed the interplay between conditions precedent and the prevention doctrine. In *Rastek*, after a property sale did not close, the broker claimed it was entitled to its commission under the contract based on the prevention doctrine.[13] According to the broker, the seller was unable to bring sufficient funds to closing, and since closing was a condition precedent to payment of the broker's commission, the prevention doctrine applied.[14] The trial court ruled in favor of the broker and awarded the sales commission.

The Virginia Supreme Court, however, disagreed. The Court explained the general rule that "[a] term that makes an event a condition of one party's duty does not *of itself* impose a duty on the other party that the

[9] *Moore Bros. Co. v. Brown & Root, Inc.*, 207 F.3d 717 (4th Cir. 2000) (general contractor's actions misled owners' lenders on project, and hindered the pay-when-paid clause, and therefore waived performance of condition precedent, making contractor liable to subcontractor to pay for additional work performed even though contractor had not yet been paid).

[10] *Lane Constr. Corp. v. Brown & Root, Inc.*, 29 F. Supp. 2d 707, 724-25 (E.D. Va. 1998) (holding that active conduct preventing fulfillment of a condition may excuse or waive performance of the condition precedent), *aff'd in part, rev'd in part sub nom. Moore Bros. Co. v. Brown & Root, Inc.*, 207 F.3d 717 (4th Cir. 2000); *Gulati v. Coyne Int'l Enters. Corp.*, 805 F. Supp. 365, 370 (E.D. Va. 1992) (excusing the defendant from performance where evidence demonstrated that the defendant met its obligation to attempt to satisfy conditions precedent in good faith, even though it was ultimately unsuccessful). *See generally Whitt v. Godwin*, 205 Va. 797, 800, 139 S.E.2d 841, 844 (1965) (noting that in every contract an implied condition exists that one party will not prevent performance by the other party). If both parties are charged with taking action to secure the occurrence of conditions precedent and only one party takes the action, the performance of the party who failed to secure occurrence of the condition will not be excused. *See also Mullen v. Brantley*, 213 Va. 765, 195 S.E.2d 696 (1973).

[11] *See, e.g.*, *Moore Bros. Co.*, 207 F.3d at 724-25.

[12] 294 Va. 416, 806 S.E.2d 740 (2017),

[13] *Id.* at 422.

[14] *Id.* at 422-23.

event occur, and the nonoccurrence of a condition is therefore not of itself a breach of contract by that other party."[15]

In this context, the Court stated the well-recognized principle of contract law referred to as the prevention doctrine: "if one party to a contract hinders, prevents or makes impossible performance by the other party, the latter's failure to perform will be excused."[16] The Court noted the prevention doctrine may be used defensively or offensively.[17]

Regardless of how a party employs the prevention doctrine, Virginia law requires "that the acts or omissions constituting the alleged prevention of the condition 'must be wrongful, and, accordingly, in excess of [the promisor's] legal rights.'"[18] Otherwise, the Court explained, "the mere inability of the promisor to satisfy a condition precedent to his contractual duties would transform the condition into a warranty because it would convert a promisor's innocent inability or legal incapability to satisfy the condition . . . into a breach resulting in absolute liability on the promisor . . . ."[19]

Citing prior precedent, the Court reiterated that the prevention doctrine includes a but-for causation requirement: "'If a promisor prevents or hinders the occurrence of a condition . . . and the *condition would have occurred . . . except for such prevention or hindrance*, the condition is excused, and . . . does not discharge the promisor's duty.'"[20]

In the end, the Court held the facts in *Rastek* did not show a purposeful act or omission that wrongfully prevented the if-and-only-if con-

[15] *Id.* at 426.

[16] *Id.* (quoting 13 Samuel Williston & Richard A. Lord, *A Treatise on the Law of Contracts* § 39:3, at 569 (4th ed. 2013)).

[17] *Id.* at 426-27, S.E.2d. at 746.

[18] *Id.* at 427, S.E.2d at 746 (quoting *Whitt v. Godwin*, 205 Va. at 800-01, 189 S.E.2d at 844 (1965)).

[19] *Id.* ("We thus consider it manifest that this principle has no application when the hindrance is due to some action of the promisor which he was permitted to take under either the express or implied terms of the contract.").

[20] *Id.* at 429-30, S.E.2d at 747 (quoting *Parrish v. Wightman*, 184 Va. 86, 91-93, 34 S.E.2d 229, 232 (1945)).