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# Wyler Summit Partnership v. Turner Broadcasting System, Inc. and the Cotractual Waiver Doctrine: Transforming the Shield into a Sword

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# NOTES & COMMENTS

## ***WYLER SUMMIT PARTNERSHIP V. TURNER BROADCASTING SYSTEM, INC. AND THE CONTRACTUAL WAIVER DOCTRINE: TRANSFORMING THE SHIELD INTO A SWORD?\****

### I. INTRODUCTION

A well-established rule under California contract law is that a party to a contract may waive a provision that was inserted in the agreement solely for the benefit of that party.<sup>1</sup> The waiver doctrine is generally employed where the non-waiving party has failed to comply with a minor contract term, or where a condition precedent to the waiving party's performance has not occurred.<sup>2</sup> By waiving the term or condition, the party is able to continue its performance under the contract and maintain the right to the non-waiving party's performance.<sup>3</sup> This use of the waiver doctrine is referred to as "defensive"<sup>4</sup> because it does not impose new legal duties on the non-waiving party.<sup>5</sup> Instead, defensive waiver, a long recognized doctrine in contract law,<sup>6</sup> is used as a shield: it enables the parties to avoid the termination of the contract that might otherwise occur due either to a party's non-compliance or the non-occurrence of a term.<sup>7</sup>

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\* Credit for inspiring the topic of this Note belongs to Mitchel Karp's article entitled *Offensive Use of the Contractual Waiver Doctrine: Does Wyler Summit v. Turner Threaten the Stability of Entertainment Agreements?*, ENT. & SPORTS LAW., Summer 1998, at 11. Mr. Karp is an attorney with Pierce, Gorman in Beverly Hills.

1. See *Sabo v. Fasano*, 201 Cal. Rptr. 270, 271 (Ct. App. 1984) (citing *Doryon v. Salant*, 142 Cal. Rptr. 378 (Ct. App. 1977)).

2. See 1 B.E. WITKIN, SUMMARY OF CALIFORNIA LAW, CONTRACTS § 768 (9th ed. 1987) (providing common examples of waiver such as a landlord's waiver of the rent payment due date provision by acceptance of rent).

3. See Mitchel Karp, *Offensive Use of the Contractual Waiver Doctrine: Does Wyler Summit v. Turner Threaten the Stability of Entertainment Agreements?*, ENT. & SPORTS LAW., Summer 1998, at 11, 11.

4. See, e.g., *id.*

5. See *id.*; see also *Groves v. Prickett*, 420 F.2d 1119, 1125 (9th Cir. 1970).

6. See generally JOHN D. CALAMARI & JOSEPH M. PERILLO, THE LAW OF CONTRACTS §§ 11-29 to 11-32 (3d ed. 1987) (discussing the application of the defensive waiver doctrine in case law).

7. See *Rennie & Laughlin, Inc. v. Chrysler Corp.*, 242 F.2d 208, 210 (9th Cir. 1957).

This Note discusses how the Court of Appeals for the Ninth Circuit in *Wyer Summit Partnership v. Turner Broadcasting System, Inc.*<sup>8</sup> effectively approved the *offensive* use of the contractual waiver doctrine—a use which had never before been allowed under California law.

In *Wyer Summit*, the heirs of William Wyler (“Wyer”), director of the famous film *Ben Hur*,<sup>9</sup> sought to waive the installment payment provision in Wyler’s contract with Turner Broadcasting System (“Turner”), the original movie studio’s successor in interest.<sup>10</sup> Wyler’s heirs (“Wyer Summit”) argued that they had the right to waive the annual payment cap on Wyler’s percentage compensation that had been specified in the installment payment provision of the contract, and that therefore Turner had a duty to remit the unpaid portion that had accrued under the cap.<sup>11</sup> However, the factual context of *Wyer Summit* is fundamentally distinct in several ways from situations in which contractual waiver is normally employed.<sup>12</sup> The most significant distinction is that Wyer Summit used waiver in an offensive manner,<sup>13</sup> as opposed to the defensive use previously allowed under California case law.<sup>14</sup> The Ninth Circuit, however, ignored this critical difference, remanded the case and thus allowed the heirs to proceed on their breach of contract claim arising from Turner’s failure to remit all compensation owed under the allegedly waived payment provision.<sup>15</sup>

This Note analyzes the *Wyer Summit* opinion in order to determine whether the Ninth Circuit correctly applied California’s contractual waiver doctrine. Part II discusses California contract law and the rules California courts have established regarding contractual waiver. Part III examines the decisions of the district court and the Ninth Circuit Court of Appeals in *Wyer Summit*, and argues that the Ninth Circuit majority opinion is inconsistent with both California case law and long-standing principles relating to the use of the contractual waiver doctrine. This part also discusses the *Wyer Summit* dissenting opinion, and concludes that the dissent analyzed the contractual waiver doctrine in a manner consistent with precedent and general contract principles. In addition, Part III

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8. 135 F.3d 658 (9th Cir. 1998).

9. *BEN HUR* (MGM-Loew’s, Inc. 1959).

10. See *Wyer Summit Partnership v. Turner Broad. Sys., Inc.*, 135 F.3d 658, 659–60 (9th Cir. 1998).

11. See *id.*

12. See *infra* Part II.B.

13. See Karp, *supra* note 3, at 12.

14. See, e.g., *Rennie & Laughlin*, 242 F.2d at 210 (holding that waiver can only be employed for defensive purposes).

15. See *Wyer Summit*, 135 F.3d at 664.

examines the potentially negative ramifications of the *Wylter Summit* decision for entertainment lawyers. Finally, Part IV suggests that the *Wylter Summit* precedent could have a detrimental effect on the ability of entertainment attorneys to draft reliable agreements on behalf of their clients.

## II. CALIFORNIA CONTRACT LAW

To understand the ramifications of the *Wylter Summit* decision, it is necessary to first examine California statutory and common law relating to contract interpretation and the contractual waiver doctrine.

### A. Contract Interpretation Rules

California statutes and the cases interpreting those statutes direct courts to adhere to an objective view of contract interpretation.<sup>16</sup> For instance, the California Civil Code provides that where the language of a contract is clear, that language must govern the contract's interpretation.<sup>17</sup> Similarly, the Code mandates that where written contracts are concerned, the intention of the parties should be ascertained from the writing alone, if practicable.<sup>18</sup> In other words, courts presume a contract reflects the intent of the parties, and prefer to enforce the plain meaning of the contractual terms where possible.<sup>19</sup>

Further, where attached documents accompany a complaint, the court's analysis need not be limited to the allegations contained in the complaint.<sup>20</sup> In fact, California cases have held that a court may look beyond the complaint and consider attached documents even on a motion to dismiss,<sup>21</sup> despite the general rule that the court must accept the non-

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16. See WITKIN, *supra* note 2, § 684, at 617 (stating that the modern approach toward contract interpretation is to determine the parties' intent under an objective standard).

17. See CAL. CIV. CODE § 1638 (West 1985); see also *General Star Indem. Co. v. Schools Excess Liab. Fund*, 888 F. Supp. 1022, 1025 (N.D. Cal. 1995) (citing CAL. CIV. CODE § 1638 for the proposition that "[t]he written language of the contract governs if it is clear and explicit"); *Shaw v. Regents of the Univ. of Cal.*, 67 Cal. Rptr. 2d 850, 855 (Ct. App. 1997) (holding that "[w]here contract language is clear and explicit and does not lead to absurd results, we ascertain intent from the written terms and go no further" (citing *Ticor Title Ins. Co. v. Employers Ins.*, 48 Cal. Rptr. 2d 368, 373 (Ct. App. 1995))).

18. See CAL. CIV. CODE § 1639.

19. See *id.* §§ 1638–1639.

20. See *Roth v. Garcia Marquez*, 942 F.2d 617, 625 n.1 (9th Cir. 1991); *Durning v. First Boston Corp.*, 815 F.2d 1265, 1267 (9th Cir. 1987). Attached documents can include contracts. See, e.g., *Roth*, 942 F.2d at 625.

21. See *Roth*, 942 F.2d at 625; *Durning*, 815 F.2d at 1267.

movant's allegations as true.<sup>22</sup> It is well settled that if an attached document refutes any allegations of a complaint, the court is not required to accept those allegations as true.<sup>23</sup>

Thus, even at the pre-trial motion level, a court deciding a contract dispute should base its analysis primarily on the contract itself.<sup>24</sup> Where a contract is attached to a complaint as an exhibit, and the language of the contract differs from allegations in the complaint, the contract's language takes precedence over the complaint.<sup>25</sup>

### B. *The Contractual Waiver Doctrine*

Contractual waiver has been defined as "an intentional abandonment or relinquishment of a known right or advantage which, but for such waiver, the party would have enjoyed."<sup>26</sup> Contractual waiver often occurs when one party waives a minor term or condition with which the other party is unable, or fails, to comply.<sup>27</sup> As a result of the waiver, the contract remains in force and the waiving party is able to receive the benefit of the other party's performance.<sup>28</sup>

The primary limit applied to the waiver doctrine is that the provision waived must have been placed in the contract solely for the waiving party's benefit.<sup>29</sup> Thus, if a provision benefits both parties, it cannot be waived by only one party.<sup>30</sup>

Common examples of waiver include: waiver of a "time is of the essence" provision by acceptance of late payments in an installment contract for the sale of land or goods;<sup>31</sup> a landlord's waiver of a rent payment due date by the acceptance of late rent;<sup>32</sup> and an employer's waiver of twenty years' service requirement as the basis for an employee's

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22. See *Durning*, 815 F.2d at 1267.

23. See *Roth*, 942 F.2d at 625; *Wilson v. United Airlines*, No. C 98-2460 MMC, 1998 WL 754602, at \*1 (N.D. Cal. Oct. 23, 1998) (noting that the court may disregard factual allegations if they are contradicted by the facts established in documents attached as exhibits to the complaint).

24. See generally CAL. CIV. CODE § 1638; *Roth*, 942 F.2d at 625.

25. See *supra* notes 17-24 and accompanying text.

26. 5 SAMUEL WILLISTON & WALTER H.E. JAEGER, A TREATISE ON THE LAW OF CONTRACTS § 678 (3d ed. 1961) (quoting *Carfi v. De Martino*, 46 N.Y.S.2d 134, 136 (Sup. Ct. 1944)).

27. See WITKIN, *supra* note 2, § 768, at 694-95 (listing common examples of waiver).

28. See *Karp*, *supra* note 3, at 11.

29. See *Sabo v. Fasano*, 201 Cal. Rptr. 270, 271 (Ct. App. 1984).

30. See CALAMARI & PERILLO, *supra* note 6, § 11-31, at 494.

31. See WITKIN, *supra* note 2, § 768, at 694-95.

32. See *id.*

pension.<sup>33</sup> As these examples demonstrate, the waiver doctrine generally takes the form of one party's waiver of a condition precedent<sup>34</sup> to its performance where enforcement of that condition would have an unjust or unwanted impact on one or both parties. The undesirable impact normally takes the form of termination or forfeiture of the contract.<sup>35</sup>

The fundamental philosophy underlying the contractual waiver doctrine is that courts favor the enforcement of contracts.<sup>36</sup> Thus, in order to preserve the execution of contracts, courts allow a party to waive the right to terminate due to the breach or non-occurrence of an immaterial provision that inures solely to that party's benefit.<sup>37</sup>

The rules that California courts have applied to the waiver doctrine and the doctrine's fundamental characteristics fall into the following four general categories.

### 1. Provision Waived Must Be Immaterial and Technical

A rule that has been consistently applied to waiver cases is that a party may only waive a provision inserted for its sole benefit if that provision is immaterial and technical.<sup>38</sup> Examples of provisions deemed

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33. *See id.* Waiver can be an express statement or can be implied from conduct. *See id.* § 767, at 694.

34. A condition is "a fact, the happening or nonhappening of which creates (condition precedent) or extinguishes (condition subsequent) a duty on the part of the promisor." WITKIN, *supra* note 2, § 721, at 653 (emphasis omitted). A "condition precedent" is a condition that is to be performed before some act dependent on it is performed. CAL. CIV. CODE § 1436 (West 1982).

35. *See Karp, supra* note 3, at 11. The case of *Sabo v. Fasano*, 201 Cal. Rptr. 270 (Ct. App. 1984), involved the use of waiver to avoid an unwanted result. In *Sabo*, a real estate purchase offer provided that the offer would be deemed revoked if not accepted within five days of its execution. *See id.* at 271. The sellers accepted the offer on the sixth day, but the purchaser did not object to the late acceptance and instead initiated the escrow process. *See id.* When the sellers asserted that they had no obligation to sell because the offer lapsed before they accepted, the buyer sued for specific performance. *See id.* at 270–71. The court held that by not objecting to the late acceptance, the buyer waived the acceptance deadline requirement, which had been inserted in the contract for his benefit alone. *See id.* at 271, 274. Thus, the buyer avoided the unwanted result of being denied the purchase by waiving a provision that had been inserted to benefit him alone. *See generally id.* at 270. Another use of waiver to avoid an unwanted result arises in the landlord-tenant context where a residential lease provision requires payment on a certain day. If strictly complied with, such a provision would force the landlord to void the lease upon receipt of a payment just one day late. By waiving the right to receive the payment on time, the landlord avoids the undesirable result of having to find a new tenant, and the tenant avoids eviction.

36. *See Reeder v. Longo*, 182 Cal. Rptr. 287, 290 (Ct. App. 1982).

37. *See infra* Part II.B.2.

38. *See* JOHN EDWARD MURRAY, JR., CASES AND MATERIALS ON CONTRACTS 819 (1969).

immaterial and technical include: payment due dates;<sup>39</sup> a real estate purchase acceptance deadline;<sup>40</sup> a seller's right to payment before delivery of goods;<sup>41</sup> and conditions relating to the delivery deadline and location in a sales contract.<sup>42</sup>

The *Restatement (Second) of Contracts*<sup>43</sup> has been cited as supporting the view that only an immaterial part of a contract may be waived.<sup>44</sup> The *Restatement* provides that a subsequent promise to perform a conditional duty is binding in spite of the non-occurrence of the condition unless the occurrence of the condition was a material part of the agreed exchange.<sup>45</sup> Stated differently, a promise to disregard the non-occurrence of the condition (to waive the condition) is not binding if that promise materially affects the value received in the exchange.<sup>46</sup>

Consistent with this immateriality rule and the corresponding *Restatement* view, California courts have upheld waiver in cases involving relatively minor, technical provisions of the contracts at issue.<sup>47</sup> For example, in *Knarston v. Manhattan Life Insurance Co.*,<sup>48</sup> the court held that an insurance company impliedly waived its contractually reserved right to void a policy by allowing the insured to make a late payment.<sup>49</sup> Because the payment due date was a minor and technical provision, and because it benefited only the insurance company by ensuring that it would receive payments at regular intervals, the court's enforcement of the contract was consistent with the immateriality and sole benefit rules.<sup>50</sup> Similarly, in *Sabo v. Fasano*,<sup>51</sup> the court held that a buyer of real estate could waive a contract provision requiring the sellers to accept the buyer's offer within a

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39. See *Knarston v. Manhattan Life Ins. Co.*, 73 P. 740, 743 (Cal. 1903) (upholding waiver of an insurance payment due date).

40. See *Sabo*, 201 Cal. Rptr. 270; see also *supra* note 35.

41. See WITKIN, *supra* note 2, § 767, at 694.

42. See *id.*

43. RESTATEMENT (SECOND) OF CONTRACTS (1979).

44. See generally *Wylar Summit Partnership v. Turner Broad. Sys., Inc.*, 135 F.3d 658, 665–66 (9th Cir. 1998) (Tashima, J., dissenting); MURRAY, *supra* note 38, at 819. Although the *Restatement* is not a binding authority, many courts cite its provisions related to waiver in deciding contract disputes. See, e.g., *Castle Homes & Dev., Inc. v. City of Brier*, 882 P.2d 1172, 1180 n.15 (Wash. Ct. App. 1994); *Seattle-First Nat'l Bank v. Westwood Lumber*, 829 P.2d 1152, 1160 (Wash. Ct. App. 1992).

45. RESTATEMENT, *supra* note 43, § 84(1)–(1)(a).

46. See *id.* § 84 cmt. c.

47. See *infra* notes 48–53.

48. 73 P. 740 (Cal. 1903).

49. See *Knarston*, 73 P. 740 at 743.

50. See generally *id.*; see also *supra* notes 29, 38–46 and accompanying text.

51. 201 Cal. Rptr. 270 (Ct. App. 1984).

certain time period.<sup>52</sup> As with the due date in *Knarston*, the court deemed the acceptance deadline provision in *Sabo* a minor part of the agreement that solely benefited the waiving party.<sup>53</sup>

California courts have generally treated payment due date and deadline provisions as immaterial and minor contractual terms that can be waived by one party if inserted solely for that party's benefit.<sup>54</sup> Courts permit waiver in these situations because they are hesitant to invalidate contracts simply because a minor provision of the agreement proved undesirable or was not carried out.<sup>55</sup>

## 2. Waiving Party's Right to Terminate or to Refuse to Perform

In addition to the immateriality requirement, contract cases utilizing the waiver doctrine have shared another common characteristic. In each of these cases, the waiving party had the right to terminate the contract or to refuse to perform its duty based on the non-waiving party's breach of the waived provision, or on the non-occurrence of a condition.<sup>56</sup> For instance, in *Knarston*, the insurance company had the right to cancel the insured's policy based on the insured's late payment.<sup>57</sup> Similarly, in *Sabo*, the real estate buyer could have terminated the contract because the sellers accepted his offer after the deadline specified.<sup>58</sup>

Additionally, in *Wesley N. Taylor Co. v. Russell*,<sup>59</sup> a contract for the sale of real property allowed the purchaser to void the agreement if he was unable to obtain a loan on certain terms.<sup>60</sup> The court held that the purchaser waived the conditional provision even though he could have terminated the contract for having failed to secure the loan terms specified in the agreement.<sup>61</sup> The court noted that a provision making the contract contingent upon securing a loan benefits only the purchaser because it

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52. See *Sabo v. Fasno*, 201 Cal. Rptr. 270 (Ct. App. 1984).

53. See generally *Sabo*, 201 Cal. Rptr. 270.

54. See *Knarston*, 73 P. at 743; *Sabo*, 201 Cal. Rptr. at 271.

55. See *Reeder v. Longo*, 182 Cal. Rptr. 287, 290 (Ct. App. 1982) (noting that "[t]he law . . . favors the enforcement of contracts").

56. See, e.g., *Knarston*, 73 P. 740; *Sabo*, 201 Cal. Rptr. 270; *Mortgage Fin. Corp. v. Howard*, 26 Cal. Rptr. 917 (Ct. App. 1962) (holding that the plaintiff waived right to consider the defendant in default by accepting delinquent installment payment).

57. See generally *Knarston*, 73 P. 740; see also text accompanying notes 48–50.

58. See *Sabo*, 201 Cal. Rptr. 270; see also text accompanying notes 51–53.

59. 15 Cal. Rptr. 357 (Ct. App. 1961).

60. See *id.* at 358–59.

61. See *id.* at 365.



enables him or her to terminate the contract without being liable for breach.<sup>62</sup>

Courts' approval of waiver in these cases reflects the common theme underlying the waiver doctrine. Because courts favor the enforcement of contracts,<sup>63</sup> they prefer the waiver of a minor provision to the termination of the contract.<sup>64</sup>

### 3. Waiver of Certain Types of Provisions Requires Consideration

In several cases governed by California law, the Ninth Circuit has held that where substantial rights are involved, consideration is required for a waiver to be valid.<sup>65</sup> Although the court has never clearly defined what constitutes a substantial right, other sources provide a general understanding of the term's meaning. For example, in his treatise on California law, Witkin equates a substantial right to materiality.<sup>66</sup> He states:

There can be no waiver of "a material part of the agreed exchange"; i.e., the party entitled to performance cannot by a mere declaration or other acts, unsupported by consideration, give up the entire benefit of the contract. Thus, a buyer may . . . not [waive] the right to receive the goods; and a seller . . . cannot by a mere waiver give up his right to receive the price.<sup>67</sup>

Further, *American Jurisprudence Second*<sup>68</sup> cites the Ninth Circuit case *United States v. Chichester*,<sup>69</sup> and notes that "there may be a valid waiver of *formal*, as distinguished from *substantial*, rights without a consideration . . ."<sup>70</sup> Although this does not explain what a substantial right is, it does indicate what it is not. *Chichester* makes clear that a formal provision—one that other authorities describe as an immaterial and technical provision<sup>71</sup>—does not involve a substantial right.<sup>72</sup>

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62. *See id.*

63. *See Reeder v. Longo*, 182 Cal. Rptr. 287, 290 (Ct. App. 1982).

64. *See supra* notes 56–62 and accompanying text.

65. *See, e.g., Rennie & Laughlin, Inc. v. Chrysler Corp.*, 242 F.2d 208, 211 (9th Cir. 1957) (holding that "[w]here substantive rights are involved . . . waiver must be supported by either an agreed consideration or by acts amounting to an estoppel"); *Pacific States Corp. v. Hall*, 166 F.2d 668 (9th Cir. 1948).

66. WITKIN, *supra* note 2, § 767, at 694.

67. *Id.*

68. 28 AM. JUR. 2D *Estoppel and Waiver* (1997).

69. 312 F.2d 275 (9th Cir. 1963).

70. 28 AM. JUR. 2D, *supra* note 68, § 159 (emphasis added).

71. *See, e.g., MURRAY, supra* note 38, at 819 (stating that cases where waiver without consideration has been allowed usually involve conditions that are immaterial and technical).

In addition, the fact that California courts have only allowed waiver without consideration where the waived provisions are immaterial and technical<sup>73</sup> indicates that provisions involving substantial rights are material terms of a contract. This is corroborated by *Witkin and American Jurisprudence Second*.<sup>74</sup> Further, other jurisdictions have described a substantial right as one relating to a substantial part of the contract.<sup>75</sup>

The two leading Ninth Circuit cases that deal with the issue of substantial rights are *Pacific States Corp. v. Hall*<sup>76</sup> and *Rennie & Laughlin, Inc. v. Chrysler Corp.*<sup>77</sup> In *Pacific States*, a debtor alleged that a creditor company had waived its right to receive interest by failing to reflect the interest owed on several documents sent to the debtor.<sup>78</sup> The Ninth Circuit held that the creditor's right to receive interest on a \$45,000 loan was a substantial right.<sup>79</sup> Therefore, because the debtor gave no consideration for the alleged waiver of the substantial right, the court held that the waiver was invalid.<sup>80</sup>

The *Pacific States* court did not elaborate on why the receipt of interest constitutes a substantial right.<sup>81</sup> However, its decision is consistent with Witkin's statement that California law does not allow a party to waive the entire benefit of the contract.<sup>82</sup> The fundamental benefit a creditor receives for granting a loan is the receipt of interest. No credible argument can be made that a provision specifying the percentage of interest to be assessed against a debtor is an immaterial term, or that it is not related to a substantial part of the contract. Thus, the Ninth Circuit's holding in *Pacific States* is in accord with its own precedent on waiver, with Witkin's treatise on California contract law and with the definition of substantial right adhered to by other jurisdictions.

Similarly, in *Rennie & Laughlin*,<sup>83</sup> the court rejected the waiver of a substantial right due to lack of consideration.<sup>84</sup> In that case, the contract between a franchised automobile dealer and a car manufacturer provided

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72. See generally 28 AM. JUR. 2D, *supra* note 68, § 159.

73. See *supra* Part II.B.1.

74. See WITKIN, *supra* note 2, § 767, at 694; 28 AM. JUR. 2D, *supra* note 68, § 159.

75. See 17A AM. JUR. 2D *Contracts* § 657 (1991).

76. 166 F.2d 668 (9th Cir. 1948).

77. 242 F.2d 208 (9th Cir. 1957).

78. *Pacific States Corp. v. Hall*, 166 F.2d 668, 671 (9th Cir. 1948).

79. See *id.* at 669, 671-72.

80. See *id.* at 671.

81. See generally *Pacific States*, 166 F.2d 668.

82. See WITKIN, *supra* note 2, § 767, at 694.

83. 242 F.2d 208 (9th Cir. 1957).

84. See *Rennie*, 242 F.2d at 211.

that the dealer had to obtain the written consent of the manufacturer prior to assigning the franchise agreement.<sup>85</sup> After the manufacturer refused to approve the sale of the franchise to purchasers that the manufacturer brought in, the dealer sued for breach of contract.<sup>86</sup> The dealer claimed the manufacturer waived its right to require written consent when the manufacturer introduced the purchasers.<sup>87</sup> The Ninth Circuit held the dealer could not base his action on waiver because, while substantive rights<sup>88</sup> were involved, there had been no consideration offered.<sup>89</sup>

As in *Pacific States*, the *Rennie & Laughlin* court failed to explain why it felt substantive rights were at issue in the case.<sup>90</sup> However, an automobile manufacturer has a significant interest in approving potential dealers of its products. Thus, a provision requiring prior approval can hardly be equated to an immaterial provision such as a payment due date.<sup>91</sup>

In sum, California courts allow waiver of immaterial or technical provisions without consideration.<sup>92</sup> On the other hand, where a party wishes to waive a material provision, or a provision relating to a substantial part of the contract, California courts require consideration to validate a waiver.<sup>93</sup>

#### 4. California's Prohibition of Offensive Waiver

California courts have uniformly upheld the use of waiver if its use complies with the rules regarding immateriality, the right to terminate and consideration.<sup>94</sup> This valid use of waiver is referred to as "defensive" because it protects the waiving party from an unwanted result, such as termination of the contract, due to the other party's non-performance.<sup>95</sup> Defensive waiver does not result in the imposition of legal duties on the non-waiving party that were not a part of the original contract.<sup>96</sup>

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85. *See id.* at 209.

86. *See id.* at 209-10.

87. *See id.* at 210.

88. In the contractual waiver context, the Ninth Circuit seems to use "substantial" and "substantive" interchangeably. *See, e.g., Rennie & Laughlin*, 242 F.2d 208 (using term "substantive"); *Pacific States*, 166 F.2d 668 (using term "substantial").

89. *Rennie & Laughlin*, 242 F.2d at 211.

90. *See id.*

91. Compare *Rennie & Laughlin*, 242 F.2d at 211, with *Knarston v. Manhattan Life Ins. Co.*, 73 P. 740, 743 (Cal. 1903) (upholding waiver of an insurance payment due date).

92. *See supra* Part II.B.1.

93. *See supra* notes 65-66, 76-89 and accompanying text.

94. *See supra* Parts II.B.1-3.

95. *See supra* Part II.B.2.

96. *See, e.g., Rennie & Laughlin*, 242 F.2d at 210.

An example of the use of defensive waiver is where a landlord waives his right to terminate a lease by accepting rent after the date required under the contract. This waiver neither harms the tenant nor imposes on him or her any additional duties under the lease. Thus, enforcement of the waiver preserves the lease agreement, allows the landlord to avoid an unwanted termination of the lease and does not penalize the tenant in the process. This use of waiver allows for a fair and desirable result for all parties to the contract despite the breach of an immaterial condition.

While California federal and state courts have approved the defensive use of waiver, they have consistently prohibited the offensive use of the waiver doctrine.<sup>97</sup> Unlike a defensive waiver, an offensive use of waiver adds a duty to the obligations of the non-waiving party that was not originally a part of the contract.<sup>98</sup> In *Rennie & Laughlin*, the Ninth Circuit unequivocally stated the rule against offensive waiver: “[I]t is settled that waiver can be employed only for defensive purposes. It can preclude the assertion of legal rights but it cannot be used to impose legal duties. The shield cannot serve as a sword.”<sup>99</sup>

In *Groves v. Prickett*,<sup>100</sup> the Ninth Circuit refused to allow the offensive use of waiver.<sup>101</sup> The court rejected a corporation’s argument that a purchaser of its stock had waived unsatisfied conditions in the escrow agreement that solely benefited the purchaser, and that the purchaser was thus obligated to pay the balance of \$45,000.<sup>102</sup> Citing *Rennie & Laughlin*, the court held the corporation could not impose on the purchaser the duty to pay despite the non-occurrence of the conditions precedent by claiming that the purchaser had waived the provisions.<sup>103</sup> Because there was no evidence that the purchaser had waived the provisions, crediting the corporation’s argument would have resulted in imposing a duty on the purchaser that was not in the original agreement: the duty to pay despite the fact that the required conditions under the original contract had not occurred.<sup>104</sup> Thus, the court refused to permit the corporation’s attempt to employ offensive waiver.<sup>105</sup>

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97. See *Groves v. Prickett*, 420 F.2d 1119, 1125 (9th Cir. 1970); *Rennie & Laughlin*, 242 F.2d at 210.

98. See *Groves*, 420 F.2d at 1125; Karp, *supra* note 3, at 13.

99. *Rennie & Laughlin*, 242 F.2d at 210 (footnote omitted).

100. 420 F.2d 1119 (9th Cir. 1970).

101. See *id.*

102. See *id.* at 1121–23, 1125.

103. See *id.* at 1125.

104. See *id.* at 1125–26.

105. See *id.*

By contrast, in *Reeder v. Longo*,<sup>106</sup> the court upheld a waiver, but emphasized that the use employed by the plaintiff was defensive rather than offensive.<sup>107</sup> In *Reeder*, a buyer brought suit for specific performance of a real estate agreement, and claimed he had expressly waived a subordination provision inserted solely for his benefit.<sup>108</sup> Because the provision was invalid, it would have rendered the contract void had the buyer not waived it.<sup>109</sup> Unlike the corporation's attempted use of waiver in *Groves v. Prickett*,<sup>110</sup> the buyer's waiver in *Reeder* was defensive.<sup>111</sup> Waiver of the provision did not impose new duties on the seller; it simply resulted in saving the contract from invalidation.<sup>112</sup> In allowing the waiver, the court noted that the provision's removal would not prejudice the seller.<sup>113</sup> The court's reasoning implies that if the waiver had been used offensively to impose a new duty on the seller, the court would not have enforced it.<sup>114</sup>

It is well-settled that it is not within a court's purview to rewrite contracts.<sup>115</sup> Because offensive waiver has the effect of imposing a new duty on the non-waiving party, its use essentially enables one party to rewrite a contract.<sup>116</sup> A court's approval of the offensive use of waiver is therefore tantamount to participating in the unilateral rewriting of a contract. Case law provides limited guidance as to the reasons courts have prohibited offensive waiver. It seems likely, however, that offensive waiver's fundamental similarity to the unilateral rewriting of a contract underlies its prohibition.

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106. 182 Cal Rptr. 287 (Ct. App. 1982).

107. *See id.* at 290.

108. *See id.*

109. *See id.* at 289.

110. 420 F.2d 1119, 1125-26 (9th Cir. 1970); *see also supra* notes 101-06 and accompanying text.

111. *Reeder*, 182 Cal. Rptr. at 290.

112. *See id.*

113. *See id.*

114. *See id.*

115. *See Imperial Fire Ins. Co. v. Coos County*, 151 U.S. 452, 462 (1894) (holding that "[t]he courts may not make a contract for the parties. Their function and duty consist simply in enforcing and carrying out the one actually made."); *American Pipe & Steel Corp. v. Firestone Tire & Rubber Co.*, 186 F. Supp. 904, 908 (S.D. Cal. 1960) (stating that "[i]n interpreting a contract, a court should not rewrite the contract between the parties"); *In re Mission Ins. Co.*, 48 Cal. Rptr. 2d 209, 215 (Ct. App. 1995) (stating that "[w]hen the language of a contract is plain and unambiguous it is not within the province of a court to rewrite or alter by construction what has been agreed upon") (citing *Crow v. P.E.G. Constr. Co.*, 319 P.2d 47 (Cal. Ct. App. 1957)).

116. *See Karp, supra* note 3, at 13.

III. *WYLER SUMMIT PARTNERSHIP V. TURNER BROADCASTING SYSTEM, INC.*A. *Background*

In 1958, William Wyler and MGM-Loew's ("MGM") executed a written contract calling for Wyler to direct the motion picture *Ben Hur*.<sup>117</sup> In consideration for Wyler's services, MGM was to pay him \$350,000 plus three percent of any gross receipts the film earned in excess of \$20 million.<sup>118</sup> The contract specified that MGM would pay Wyler's percentage compensation in "annual installments not to exceed the sum of \$50,000 in any one year."<sup>119</sup> As of January 31, 1995, *Ben Hur* had grossed over \$131 million.<sup>120</sup> However, due to the yearly cap on Wyler's percentage compensation, Turner owed more than \$1.5 million in deferred compensation to Wyler's heirs.<sup>121</sup>

In 1995, Wyler Summit, a partnership formed by the director's heirs, notified MGM's successor in interest, Turner Broadcasting System, Inc. ("Turner"), that it desired to waive the installment payment provision of the *Ben Hur* contract, and requested that Turner remit the unpaid portion of the percentage compensation owed to Wyler Summit.<sup>122</sup> When Turner refused, Wyler Summit filed suit in the Northern District of California, claiming breach of contract, unjust enrichment, breach of fiduciary duty and breach of the implied duty of good faith and fair dealing.<sup>123</sup> The heirs sought a reformation of the contract to eliminate the installment payment provision and remission of the percentage compensation owed.<sup>124</sup>

Wyler Summit alleged that the installment payment provision had been inserted into the contract solely for Wyler's benefit. The heirs contended the purpose of the cap was to allow Wyler to avoid the heavy income taxes he would have otherwise owed if he had been paid the total

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117. *Wyler Summit Partnership v. Turner Broad. Sys., Inc.*, 135 F.3d 658, 659 (9th Cir. 1998).

118. *See id.*

119. *Id.* at 659.

120. *See id.* at 660 n.2. The film earned more Academy Awards than any other previously released film, including: Best Picture (Sam Zimbalist, producer); Best Actor (Charlton Heston); Best Supporting Actor (Hugh Griffith); and Best Director (Wyler). *Id.* (citing *Academy Awards for 1959* (visited Sept. 6, 1997) <[http://us.imdb.com/Oscars/oscars\\_1959.html](http://us.imdb.com/Oscars/oscars_1959.html)>).

121. *See id.* Wyler died in 1981, and his heirs subsequently became his successors in interest to the *Ben Hur* contract. *Id.* at 660 n.3.

122. *See id.* at 660.

123. *See Wyler Summit*, 135 F.3d at 660.

124. *See id.* The heirs also demanded a book accounting and declaratory relief to determine the parties' rights and obligations under the contract. *See id.*

percentage compensation each year.<sup>125</sup> Wyler Summit further contended that because the provision had been inserted solely for Wyler's benefit, it could be waived at his request,<sup>126</sup> and that the parties had never intended for the provision to result in depriving Wyler or his heirs of the full compensation owed.<sup>127</sup> Finally, Wyler Summit argued that by refusing to remit the unpaid compensation amount, Turner was receiving an unintended windfall at Wyler Summit's expense by continuing to earn significant interest on the balance owed.<sup>128</sup>

In response to the Wyler Summit suit, Turner filed a motion to dismiss, asserting that Wyler Summit had failed to state a claim upon which relief could be granted.<sup>129</sup> In support of its motion, Turner argued that the language of the contract clearly called for it to pay a maximum of \$50,000 per year, and that the compensation owed to Wyler Summit would ultimately be paid in the aggregate as a result of those years where the percentage amount owed was less than \$50,000.<sup>130</sup> Turner conceded that the company would continue to "earn and retain interest income"<sup>131</sup> on the unpaid compensation until the full amount was paid, but contended that this reflected the intent of Wyler and MGM in drafting the contract.<sup>132</sup>

### B. District Court Decision

The District Court granted Turner's motion and dismissed all of Wyler Summit's claims.<sup>133</sup> The court held that Wyler Summit could not waive the contract's installment provision because the contract did not contain a clause authorizing such a waiver, nor did the contract indicate that the percentage compensation cap was included *solely* for Wyler's benefit.<sup>134</sup> The court concluded that the installment payment provision also benefited Turner by allowing it to defer paying the total compensation

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125. *See id.* Under the 1954 Internal Revenue Code, the marginal tax rate for taxable income over \$100,000 was 89 percent; for taxable income over \$150,000, the rate was 90 percent; and for taxable income over \$200,000, the rate increased to 91 percent. *See id.* at 660 n.5.

126. *See id.* at 660.

127. *Id.*

128. *See id.* at 661.

129. *See Wyler Summit*, 135 F.3d at 661.

130. *See id.* at 661. In other words, should three percent of the film's gross receipts for one year amount to less than \$50,000, Turner would remit the full \$50,000 and apply the surplus to the amount owed.

131. *Id.*

132. *See id.*

133. *See id.*

134. *See id.* at 662.

owed, and thus receiving and retaining interest on the unremitted portion.<sup>135</sup> Wyler Summit appealed to the Ninth Circuit Court of Appeals.<sup>136</sup>

### C. Ninth Circuit Majority Decision

The Court of Appeals for the Ninth Circuit began its opinion by noting that it affirmed the district court's dismissal with the exception of the breach of contract claim.<sup>137</sup> As to that claim, the Ninth Circuit found that the lower court had committed two reversible errors.<sup>138</sup> First, the court held that the district court was mistaken in interpreting the Ninth Circuit's decision in *Eichman v. Fotomat Corp.*<sup>139</sup> to mean that under California law, waiver can be employed only if it is authorized by some other provision of the contract.<sup>140</sup>

Second, the Ninth Circuit found that the district court erred by resolving what the majority deemed to be a factual issue—whether the installment payment provision was inserted solely for Wyler's benefit—and thus violated the standards applicable to deciding a motion to dismiss under Federal Rule of Civil Procedure 12(b)(6).<sup>141</sup> The majority stated that in deciding 12(b)(6) motions, a court may not resolve factual issues such as whether the payment provision was actually put in the contract to benefit only Wyler.<sup>142</sup> Thus, the majority held that the lower court should have accepted Wyler Summit's well-pleaded allegations as true and construed them in a light most favorable to Wyler Summit, instead of making a factual determination as to the intent of the parties with regard to the payment provision.<sup>143</sup>

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135. See *Wyler Summit*, 135 F.3d at 662.

136. See *id.* at 659.

137. See *id.* at 661.

138. See *id.* at 663.

139. 880 F.2d 149 (9th Cir. 1989).

140. See *Wyler Summit*, 135 F.3d at 662.

141. See *id.* at 663. Rule 12(b)(6) allows a party to make a motion to dismiss for failure to state a claim as a separate motion instead of as part of a responsive pleading. See FED. R. CIV. P. 12(b)(6).

142. See *Wyler Summit*, 135 F.3d at 663 (quoting *Crescenta Valley Moose Lodge No. 808 v. Bunt*, 87 Cal. Rptr. 428, 431 (Ct. App. 1970) (stating that “[w]hether a condition is solely for the benefit of [a particular contracting party] is for the trial court to determine as a fact from all the evidence”). However, the *Wyler Summit* court also noted that in *WYDA Associates v. Merner*, 50 Cal. Rptr. 2d 323, 330 (Ct. App. 1996), a California appellate court held that the benefit issue was a matter of law, not fact. See *Wyler Summit*, 135 F.3d at 663 n.10. The dissent found this the better rule. See *infra* Part II.E.

143. See *Wyler Summit*, 135 F.3d at 664.



The majority held that the district court was required to accept Wyler Summit's allegation that the installment payment provision was included in the contract solely for Wyler's benefit.<sup>144</sup> The court then noted that "it is a well-established principle of California law that 'a contracting party may waive conditions placed in a contract solely for the party's benefit.'"<sup>145</sup> Because the majority felt Wyler Summit had made a sufficient allegation of waiver, it held that the complaint stated a cause of action for breach of contract based on Turner's alleged failure to perform (failure to remit the full compensation owed) in accordance with Wyler Summit's claim that it had waived the payment provision.<sup>146</sup> Therefore, the Ninth Circuit reversed the lower court's decision on the breach of contract claim and remanded for trial on the factual issue of whether the installment payment provision was inserted in the contract solely for Wyler's benefit.<sup>147</sup>

#### *D. Inconsistencies Between the Majority Decision and California Law*

In allowing Wyler Summit to proceed on its breach of contract claim, the Ninth Circuit ignored both California statutes and common law.<sup>148</sup> The Ninth Circuit had previously held that on a 12(b)(6) motion, a court may consider exhibits to a complaint, such as a contract, in addition to the allegations stated in the complaint.<sup>149</sup> Also, California Civil Code Section 1639 provides that the intent of parties should be determined from the contract itself, if possible.<sup>150</sup> Thus, the *Wyler Summit* majority should not have merely accepted Wyler Summit's allegation of waiver on its face.<sup>151</sup> Instead, to determine whether the installment payment provision was inserted solely for Wyler's benefit, the court should have looked to the *Ben Hur* contract.<sup>152</sup> In holding that the district court erred by looking beyond the complaint instead of accepting Wyler Summit's allegation as true, the

144. *See id.* at 664.

145. *Id.* at 662 (quoting *Sabo v. Fasano*, 201 Cal. Rptr. 270, 271 (Ct. App. 1984)).

146. *See id.* at 664.

147. *See id.*

148. *See infra* Part II.E.

149. *See, e.g.,* *Roth v. Garcia Marquez*, 942 F.2d 617, 625 n.1 (9th Cir. 1991) (stating that if an alleged contract attached to a complaint contradicts allegations of a complaint, "the court need not accept the allegations as being true" (citing *Ott v. Home Savings & Loan Ass'n*, 265 F.2d 643, 646 n.1 (9th Cir. 1958))); *Durning v. First Boston Corp.*, 815 F.2d 1265, 1267 (9th Cir. 1987) (stating that a court may consider documents attached to a complaint, such as a contract, in addition to the allegations of the complaint itself); *see also supra* Part II.A.

150. *See* CAL. CIV. CODE § 1639 (West 1985); *see also supra* Part II.A.

151. *See, e.g.,* CAL. CIV. CODE § 1639; *see also supra* Part II.A.

152. *See Wyler Summit*, 135 F.3d at 663-64; CAL. CIV. CODE § 1639; *see also supra* Part II.A.

Ninth Circuit majority contradicted California statutory and common law, and the court's own case law.<sup>153</sup>

Additionally, the Ninth Circuit failed to recognize that the situation in *Wylar Summit* is distinguishable from those cases where California courts have approved the use of waiver.<sup>154</sup> First, the court did not apply the commonly stated rule that only waivers of immaterial and technical provisions are valid in the absence of consideration.<sup>155</sup> As discussed above, the Ninth Circuit has previously held that where a contractual provision involves a substantial right, any attempt to waive it must be supported by consideration.<sup>156</sup> The court has never precisely defined "substantial right" in the waiver context, nor has it confronted the specific issue of whether an *installment* payment provision involves substantial rights.<sup>157</sup> However, other sources of law indicate that a substantial right correlates to a material term of a contract, or to a term related to a substantial part of the contract.<sup>158</sup>

The Ninth Circuit's decision in *United States v. Chichester*<sup>159</sup> is instructive in determining what constitutes a substantial right. In *Chichester*, the court held that the Government had not waived its right to terminate a contract with a bomb manufacturer that continuously failed to

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153. See *supra* notes 149–150 and accompanying text; *Wilson v. United Airlines*, No. C 98-2460, 1998 WL 754602, at \*1 (N.D. Cal. Oct. 23, 1998) (holding that in deciding a motion to dismiss, the court should accept all material allegations in the complaint as true and construe them in the light most favorable to the nonmovant unless exhibits attached to the complaint contradict the allegations made therein); see also *supra* Part II.A.

154. See *supra* Parts II.B.1–II.B.4.

155. See CALAMARI & PERILLO, *supra* note 6, § 11-31, at 493; see *supra* Parts II.B.1, II.B.3.

156. See, e.g., *Rennie & Laughlin, Inc. v. Chrysler Corp.*, 242 F.2d 208, 211 (9th Cir. 1957) ("where substantive rights are involved it is said frequently that waiver must be supported by either an agreed consideration or by acts amounting to an estoppel"); see also *supra* Part II.B.3. Waiver of a provision involving a substantial right equates to a modification of the contract. See CALAMARI & PERILLO, *supra* note 6, § 11-31, at 494. Thus, because modification of a contract requires consideration, the rule that waiver of a substantial right also requires consideration is consistent with fundamental contract principles. See *id.*; *Rennie & Laughlin*, 242 F.2d at 211.

157. Other authorities do state that a payment provision is a material contract term, however. See, e.g., *Pacific States Corp. v. Hall*, 166 F.2d 668, 671 (9th Cir. 1948) (stating that an interest percentage provision involved substantial rights); CALAMARI & PERILLO, *supra* note 6, § 11-31, at 493. To illustrate the point that a payment provision is a material contract term, Calamari & Perillo give the following example:

[I]f A agreed to paint B's house and B promised to pay \$1,000 and immediately after the promise was made B promised to pay \$1,000 even if A did not perform, the waiver would not be effective because there is an attempt to waive a material part of the agreed exchange.

CALAMARI & PERILLO, *supra* note 6, § 11-31, at 493.

158. See *supra* Part II.B.3.

159. 312 F.2d 275 (9th Cir. 1963).

deliver the number of bombs per month specified in the contract.<sup>160</sup> Reiterating its holding from *Pacific States Corp. v. Hall*,<sup>161</sup> the Ninth Circuit stated that “where substantial rights are involved, a waiver must be supported by consideration to be valid.”<sup>162</sup> The court then found that the amount at issue, \$437,059, constituted a substantial right.<sup>163</sup>

The holdings of *Pacific States* and *Chichester*, as well as the statements of other legal authorities regarding the substantial right concept,<sup>164</sup> indicate that an installment payment provision is a material term of a contract and thus implicates substantial rights, especially where a significant amount of money is involved.<sup>165</sup> In *Wyler Summit*, the amount claimed to be due was over \$1.5 million.<sup>166</sup> Given the Ninth Circuit’s holding in *Chichester* that a potential claim of \$437,059 constituted a substantial right, Wyler Summit’s claim for over one million dollars should also be regarded as a substantial right.

The Ninth Circuit’s failure to analyze Wyler Summit’s claim under *Pacific States Corp.* and *Chichester* is a significant oversight. Had the court adhered to its own precedent, it could have found that Wyler Summit’s allegation of waiver was not sufficient because it desired to waive a provision involving a substantial right and a significant amount of money without offering any consideration in exchange.<sup>167</sup> The majority should have affirmed the district court’s dismissal of Wyler Summit’s waiver claim for this reason alone.

160. See *United States v. Chichester*, 312 F.2d 275, 278, 283 (9th Cir. 1963).

161. 166 F.2d 668, 671 (9th Cir. 1948); see also *supra* Part II.B.3.

162. *Chichester*, 312 F.2d at 282 (quoting *Pacific States*, 166 F.2d at 671).

163. See *id.*

164. See *supra* Part II.B.3.

165. See *Chichester*, 312 F.2d at 282; *Pacific States*, 166 F.2d at 671 (holding that an interest percentage provision involved substantial rights).

166. 135 F.3d at 660.

167. See *id.*; see also MURRAY, *supra* note 38, at 819. Murray supports the view that consideration is required for waiver of conditions that are not merely immaterial and technical. See *id.* He criticizes *Bowman v. Surety Fund Life Ins. Co.*, 182 N.W. 991 (Minn. 1921), as a case that violates this rule. See *id.* In *Bowman*, an insurer was held to have waived its right not to pay despite the fact that the decedent had breached the policy condition against entering into military service, and that there was no consideration given for the supposed waiver. See *id.* Murray notes:

It was held that an indication of an intention to pay, made with knowledge of the fact that the insured had been killed in action, made the company liable in spite of the breach of condition, although there was neither consideration nor the elements of a promissory estoppel. *The new promise involved such a radical change in the extent of the obligation originally assumed by the insurer that it may be doubted whether there was any justification in holding it to be binding in the absence of the elements requisite to the creation of liability in the first instance.*

*Id.* (emphasis added).

By ignoring its own precedent and allowing Wyler Summit to pursue its claim, the Ninth Circuit sanctioned Wyler Summit's attempt to modify a central term of the contract without Turner's agreement. Approving such a modification essentially permits Wyler Summit to unilaterally rewrite the contract, which has long been prohibited under contract law.<sup>168</sup>

Wyler Summit's desired application of the waiver doctrine differs from the typical application of waiver in two additional ways. First, waivable provisions are usually conditions *precedent* to the waiving party's performance.<sup>169</sup> Under the California Civil Code, a condition precedent is defined as a condition that is to be performed before some act dependent on it is performed.<sup>170</sup> Applying this definition to the Wyler Summit installment payment provision, it appears that the provision does not qualify as a condition precedent to Wyler Summit's performance. The intent of the original Wyler-MGM contract was that Wyler would perform by directing the movie *before* any percentage compensation payments from movie proceeds were due under the installment provision.<sup>171</sup> Thus, because Wyler's performance was due before MGM/Turner was obligated to pay him, his performance was a condition precedent to any installment payments being made. Therefore, waiver of the payment provision in *Wyler Summit* is inconsistent with the traditional waiver scenario.<sup>172</sup>

Second, in typical waiver cases, waiver of a contract provision constitutes an intentional abandonment of the right to terminate the contract, or to refuse to perform based on the other party's breach or on the non-occurrence of a conditional provision.<sup>173</sup> The party abandons the right to terminate or to refuse to perform in order to continue receiving the benefits of the contract.<sup>174</sup> By contrast, in *Wyler Summit*, the plaintiff did not allege any breach, nor was there evidence offered to show that Turner had breached any provision of the original contract.<sup>175</sup> Therefore, Wyler Summit's attempted waiver did not constitute an abandonment of a right to

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168. See, e.g., *American Pipe & Steel Corp. v. Firestone Tire & Rubber Co.*, 186 F. Supp. 904, 908 (S.D. Cal. 1960), *aff'd*, 292 F.2d 640 (9th Cir. 1961); see also *supra* Part II.B.4.

169. See Karp, *supra* note 3, at 11. Witkin defines condition as "a fact, the happening or non-happening of which creates (condition precedent) or extinguishes (condition subsequent) a duty on the part of the promisor." WITKIN, *supra* note 2, § 721, at 653.

170. CAL. CIV. CODE § 1436 (West 1982).

171. See *Wyler Summit*, 135 F.3d at 659; see *supra* Part III.A.

172. See Karp, *supra* note 3, at 11.

173. See *Sabo v. Fasano*, 201 Cal. Rptr. 270, 271 (Ct. App. 1984); see also *supra* Part II.B.2.

174. See *WILLISTON & JAEGER*, *supra* note 26, § 678, at 239; Karp, *supra* note 3, at 11; see also *supra* Part II.B.2.

175. See *Wyler Summit*, 135 F.3d at 667 (Tashima, J., dissenting).

terminate. The absence of any breach by Turner part represents another distinction between *Wylar Summit*'s attempted waiver and those cases where waiver has normally been upheld.

Finally, the most significant problem with the *Wylar Summit* decision is that by allowing *Wylar Summit* to proceed in its suit, the Ninth Circuit seems to condone the offensive use of waiver and its concomitant imposition of additional duties on the non-waiving party.<sup>176</sup> Should *Wylar Summit* succeed on remand, the waiver of the payment provision will create an additional duty for Turner that was not identified in the contract: the duty to remit in one payment the total accrued compensation owed to the heirs.<sup>177</sup> As the *Wylar Summit* dissent observed, "the only effect of waiving the installment payment provision is to add to the performance obligations of Turner, the non-waiving party, to pay more, earlier, than was originally required under the contract."<sup>178</sup>

Although California state and federal courts had not allowed offensive waiver in any case prior to *Wylar Summit*,<sup>179</sup> the Ninth Circuit majority in *Wylar Summit* failed to address the well-settled distinction between offensive and defensive waiver.<sup>180</sup> In effect, the court held that the same rules apply to both.<sup>181</sup> In doing so, and in reversing the dismissal of *Wylar Summit*'s breach of contract claim, the court implicitly permitted the offensive use of waiver. Allowing one party to impose a duty on another party that was not within the original contract is tantamount to rewriting the contract—something that courts have consistently been hesitant to do.<sup>182</sup>

*Wylar Summit*'s unprecedented holding provides a legal foundation for a party seeking to unilaterally modify terms of a contract.<sup>183</sup> Relying on *Wylar Summit*, a party who has become unhappy with a contract term may now survive a motion to dismiss by simply alleging that it has the right to waive and technically rewrite that term because it was included in the contract for that party's sole benefit.<sup>184</sup> The fact that waiver of such a provision would clearly impose a new duty on the other party is irrelevant under *Wylar Summit*.

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176. See *Rennie & Laughlin, Inc. v. Chrysler Corp.*, 242 F.2d 208, 210 (9th Cir. 1957) (holding that offensive waiver is not valid).

177. See *Wylar Summit*, 135 F.3d at 661–62.

178. *Id.* at 666 (Tashima, J., dissenting).

179. See *supra* Part II.B.4.

180. See *Wylar Summit*, 135 F.3d at 659–64.

181. See Karp, *supra* note 3, at 12.

182. See *supra* Part II.B.4.

183. See *infra* Part III.F.

184. See Karp, *supra* note 3, at 12.

Given the importance of contract stability in the entertainment industry,<sup>185</sup> the *Wylar Summit* precedent may have serious negative repercussions in the field. Thus, if *Wylar Summit* has the effect of allowing certain parties to unilaterally modify contracts and impose new contractual duties on the non-waiving party, the case could present significant problems for entertainment attorneys.<sup>186</sup>

### E. The Ninth Circuit Dissent

In contrast to the Ninth Circuit majority, the dissent called for the application of the traditional rules regarding contractual waiver that are firmly grounded in California contract principles and in the court's prior decisions.<sup>187</sup>

The dissent argued that the district court did not commit either of the reversible errors found by the majority.<sup>188</sup> First, the dissent stated that the interpretation of a contract is a matter of law, not a question of fact.<sup>189</sup> As such, the dissent felt the district court's consideration of the contract language in addition to the complaint did not violate the rule against deciding factual issues on a 12(b)(6) motion to dismiss.<sup>190</sup>

The dissent conformed to Ninth Circuit precedent<sup>191</sup> in stating that *Wylar Summit*'s "allegation [that the payment provision was inserted solely for its benefit] is not entitled to be accepted as true because . . . it is contradicted by a plain reading of the contract."<sup>192</sup> The dissent found no indication in the *Wylar-MGM* contract that the installment payment provision was intended solely to benefit *Wylar*.<sup>193</sup> Therefore, the dissent

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185. See generally *id.* at 13.

186. See *infra* Part III.F.

187. See *Wylar Summit*, 135 F.3d at 664–67 (Tashima, J., dissenting); see *supra* Part II.B.

188. See *Wylar Summit*, 135 F.3d at 664 (Tashima, J., dissenting).

189. See *id.* at 664–65 (citing *HS Servs., Inc. v. Nationwide Mut. Ins. Co.*, 109 F.3d 642, 644 (9th Cir. 1997) (holding that the interpretation of an insurance contract was a question of law to be reviewed *de novo*)).

190. *Id.* at 664–65.

191. See, e.g., *Roth v. Garcia Marquez*, 942 F.2d 617, 625 n.1 (9th Cir. 1991) (stating that if a contract attached to a complaint contradicts allegations of a complaint, the court need not accept those allegations as true); *Durning v. First Boston Corp.*, 815 F.2d 1265, 1267 (9th Cir. 1987) (holding that on a 12(b)(6) motion to dismiss, the court is not limited to considering the allegations in a complaint, but can also consider documents that are part of the complaint).

192. *Wylar Summit*, 135 F.3d at 665 (Tashima, J., dissenting).

193. The dissent addressed the compelling point that if, as *Wylar Summit* contends, *Wylar* insisted the installment payment provision be inserted in order to avoid heavy income taxes, then he "surely had no subjective intent that the provision could be waived by him. Otherwise, he would have run afoul of the constructive receipt of income doctrine, making all of his percentage compensation immediately taxable to him upon its receipt by MGM." *Wylar Summit*, 135 F.3d at

believed contract interpretation rules and precedent compelled the majority to let the contract guide its analysis, instead of deciding based on the allegations of Wyler Summit's complaint.<sup>194</sup> According to the dissent, the only sensible interpretation of the contract was that the payment provision was intended to benefit both parties: forbearing payment of the total amount owed to Wyler benefited MGM, and saving on taxes benefited Wyler.<sup>195</sup>

The dissent's assertion that the majority should have relied on the Wyler-MGM contract to decide Turner's motion to dismiss is supported by both Ninth Circuit precedent<sup>196</sup> and California state case law. The dissent cited<sup>197</sup> *WYDA Associates v. Merner*,<sup>198</sup> where the court held the contract should direct a court's decision on a motion for summary judgment of a contract dispute.<sup>199</sup> The court based this holding on California Civil Code section 1639, which states that where possible, the intention of the parties to a written contract should be ascertained from the contract alone.<sup>200</sup> The *Wyler Summit* dissent noted that although a conflict exists in California case law as to how a contract should be construed on a Rule (12)(b)(6) motion, the rule stated in *WYDA Associates* is the better one.<sup>201</sup>

The majority, on the other hand, relied on two older state appellate cases that held the issue of whether a condition was placed in a contract for

665 n.2. (Tashima, J., dissenting). For support, the judge cited 2 MERTENS LAW OF FEDERAL INCOME TAXATION § 10.01 (1998), which provides:

The doctrine of constructive receipt requires that a taxpayer be treated as having received an amount when it is credited to his account, set apart for him, or otherwise made available so that he may draw upon it at any time, or so that he could have drawn upon it during the taxable year if notice of an intention to withdraw had been given.

*Id.* That section specifically notes that "the doctrine of constructive receipt is sometimes applied to deferred compensation arrangements." *Id.* Whether Wyler's deferred percentage compensation falls under this doctrine is beyond the scope of this Note. However, if the court had examined this issue and found that the doctrine did apply, the court would likely have been compelled to interpret the provision as not having been inserted solely for Wyler's benefit, and thus not waivable, so as not to render the contract violative of income tax laws. See CAL. CIV. CODE § 1643 (West 1985) (providing that "[a] contract must receive such an interpretation as will make it lawful . . ."); 2 MERTENS LAW OF FEDERAL INCOME TAXATION § 10.01 (1998); see also *City of San Diego v. Rider*, 55 Cal. Rptr. 2d 422, 433 (Ct. App. 1996) (stating that "[u]nder basic rules of statutory and contract construction, provisions subject to both lawful and unlawful interpretations are to be interpreted in a manner which makes them lawful").

194. See *Wyler Summit*, 135 F.3d at 665 (Tashima, J., dissenting).

195. See *id.*

196. See *Roth*, 942 F.2d at 625 n.1.

197. See *Wyler Summit*, 135 F.3d at 665 n.1 (Tashima, J., dissenting).

198. 50 Cal. Rptr. 2d 323 (Ct. App. 1996).

199. See *WYDA Assocs. v. Memer*, 50 Cal. Rptr. 323, 326–27 (Ct. App. 1996).

200. See *id.* at 327 (quoting CAL. CIV. CODE § 1639 (West 1985)).

201. See *Wyler Summit*, 135 F.3d at 665 n.1 (Tashima, J., dissenting).

the benefit of one party was a factual determination.<sup>202</sup> A court may not decide any factual issues on a 12(b)(6) motion.<sup>203</sup> Therefore, in the majority's view, the district court erred in making any determination as to which party the payment provision was intended to benefit.<sup>204</sup>

However, the court's ruling ignored two of its own recent cases.<sup>205</sup> These cases held that on a 12(b)(6) motion, a court must include attachments to the complaint in its analysis and thus must review terms contained in an attached contract.<sup>206</sup> The court is not obligated to accept the complaint allegations as true where they are contradicted by an exhibit to the complaint.<sup>207</sup> Thus, the dissent's argument that the district court was correct in basing its dismissal of Wyler Summit's claim on the contract language is well-founded.<sup>208</sup>

In its discussion of the waiver doctrine, the dissent noted that the majority's reliance on the waiver cases, beginning with *Knarston v. Manhattan Life Insurance Co.*,<sup>209</sup> was misplaced because each of those cases involved waiver of a minor or procedural condition.<sup>210</sup> The dissent was correct in noting that, unlike the installment payment provision in the *Ben Hur* contract, none of the waivable provisions were fundamental terms of the contracts at issue.<sup>211</sup> In fact, the majority conceded that most of the waiver cases it cited concerned minor or procedural conditions precedent to performance, but the court remained silent on the issue of whether the payment provision in *Wyler Summit* fit into that category.<sup>212</sup> In contrast, the dissent correctly recognized that the provision at issue in *Wyler Summit* was fundamentally different from the type normally held waivable.<sup>213</sup>

202. See *id.* at 663 (citing *Crescenta Valley Moose Lodge No. 808 v. Bunt*, 87 Cal. Rptr. 428, 431 (Ct. App. 1970)); *Wesley N. Taylor Co. v. Russell*, 15 Cal. Rptr. 357, 365 (Dist. Ct. App. 1961).

203. *Wyler Summit*, 135 F.3d at 663.

204. See *id.*

205. See *Roth*, 942 F.2d at 625 n.1; *Durning*, 815 F.2d at 1266–67.

206. See *Roth*, 942 F.2d at 625 n.1; *Durning*, 815 F.2d at 1266–67.

207. See *Durning*, 815 F.2d at 1266.

208. See *Wyler Summit*, 135 F.3d at 665 (Tashima, J., dissenting).

209. 73 P. 740 (Cal. 1903).

210. *Wyler Summit*, 135 F.3d at 665 (Tashima J., dissenting); see also discussion of *Knarston supra* notes 48–50 and accompanying text.

211. See *Wyler Summit*, 135 F.3d at 666 (Tashima, J., dissenting); see also *supra* Part II.B.1.

212. *Wyler Summit*, 135 F.3d at 662. The court simply stated that it nevertheless did not see why application of waiver should not be allowed in *Wyler Summit*. See *id.*

213. See *id.* at 665 (Tashima, J., dissenting). The majority also unwittingly weakened its own argument by mentioning the black letter rule that a waivable provision is normally one that is precedent to the waiving party's performance. See *id.* at 662. As discussed in Part III.D, the installment payment provision in the Wyler-MGM contract was not a condition precedent to Wyler's duties. See *id.* at 659–60.



In addition, the dissent analogized the Wyler-MGM contract to contracts in other waiver cases and argued that the majority ignored *Restatement (Second) of Contracts* section 84(1).<sup>214</sup> The dissent interpreted that section as prohibiting waiver from materially altering the parties' agreed upon exchange.<sup>215</sup> According to the dissent, such a change may be accomplished only through modification of the contract by mutual consent or estoppel.<sup>216</sup> The dissent felt the installment provision was a fundamental term of the *Ben Hur* contract, and waiver of the provision would materially alter the exchange between the parties.<sup>217</sup> As such, the provision should not be subject to "unilateral waiver" by Wyler Summit.<sup>218</sup> Furthermore, in the dissent's view, Wyler Summit's use of waiver violated the *Restatement* rule that a promise to disregard the non-occurrence of the condition is not binding if it materially affects the value received by the promisor.<sup>219</sup> In support of this contention, the dissent cited several California cases in which courts held that a party cannot waive a critical provision of a contract.<sup>220</sup> The dissent's reasoning is analogous to arguments employed by the Ninth Circuit in cases holding that provisions involving substantial rights may not be waived without consideration.<sup>221</sup>

The dissent observed that the effect of waiving the installment provision was to add to the performance obligation of Turner, the non-waiving party, and accurately characterized this use of waiver as offensive.<sup>222</sup> The dissent pointed out that the court had expressly prohibited this use of waiver in cases such as *Groves v. Prickett*<sup>223</sup> and *Rennie & Laughlin, Inc. v. Chrysler Corp.*<sup>224</sup>

The dissent also noted that waiver is justified when it "spares one of the parties (usually the non-waiving party) the loss that would occur if the

214. *See id.* at 665–66 (Tashima, J., dissenting) (citing RESTATEMENT (SECOND) OF CONTRACTS § 84(1) & cmts. c–d (1979)).

215. *See id.*

216. *See id.* at 666.

217. *See id.*

218. *See Wyler Summit*, 135 F.3d at 666 (describing unilateral waiver as waiver desired by only one party).

219. *See id.*; *see also* RESTATEMENT (SECOND) OF CONTRACTS § 84, cmt. c (1979).

220. *See Wyler Summit*, 135 F.3d at 666 (Tashima, J., dissenting) (citing *Intel Corp. v. Hartford Accident Indem. Co.*, 952 F.2d 1551 (9th Cir. 1991), *Conner v. Union Auto Ins. Co.*, 9 P.2d 863 (Cal. Dist. Ct. App. 1932)).

221. *See United States v. Chichester*, 312 F.2d 275, 282 (9th Cir. 1963); *Pacific States Corp. v. Hall*, 166 F.2d 668, 671 (9th Cir. 1948); *see also supra* Part II.B.3.

222. *Wyler Summit*, 135 F.3d at 667 (Tashima, J., dissenting).

223. 420 F.2d 1119, 1125 (9th Cir. 1970).

224. 242 F.2d 208, 210 (9th Cir. 1957); *see Wyler Summit*, 135 F.3d at 666 (Tashima, J., dissenting); *see also supra* Part II.B.4.

waiving party's performance were excused by failure of the condition."<sup>225</sup> However, as the dissent recognized, this justification is inapposite to *Wylar Summit* because Wylar fully performed his duties under the contract over forty years prior to the suit's inception.<sup>226</sup> Accordingly, there was no performance for the waiving party to preserve.<sup>227</sup>

Finally, the dissent could find no case to support the majority's holding that a non-waiving party's continued performance pursuant to the allegedly waived provision constituted a breach of contract.<sup>228</sup> The dissent concluded by noting:

The majority's new formula for waiver will no doubt have a corrosive effect on the stability of contractual relations, particularly long-term agreements. Its overly-expansive reading of *Knarston* removes all limits on the kinds of provision [sic] that can be waived by parties eager to engage in a line-item redrafting of their agreements.<sup>229</sup>

#### F. Possible Consequences of the Wylar Summit Decision

The *Wylar Summit* decision may pose significant hazards for entertainment attorneys in drafting contracts for their clients. The majority's holding could open the door to instability in contract law because it potentially allows the use of waiver as a tool to unilaterally modify a contract and impose additional duties on the non-waiving party.<sup>230</sup> Under the *Wylar Summit* precedent, material provisions in entertainment agreements that were previously unassailable without a mutual agreement to modify may now be subject to deletion through one party's waiver.<sup>231</sup>

For example, recording contracts commonly contain a provision stating that artists must deliver each album required under the contract within a certain period of time.<sup>232</sup> Suppose an artist who is unhappy with his or her record company records all the albums required under the contract within a short span of time, and subsequently claims he or she has

225. *Wylar Summit*, 135 F.3d at 666 (Tashima, J., dissenting).

226. *Id.* at 659–60; *see also supra* Part III.A.

227. *Wylar Summit*, 135 F.3d at 666 (Tashima, J., dissenting).

228. *See id.* at 667.

229. *Id.*

230. *See generally* Karp, *supra* note 3, at 12.

231. *See generally id.*, *supra* note 3, at 12–13; *Wylar Summit*, 135 F.3d at 667 (Tashima, J., dissenting).

232. *See* DONALD S. PASSMAN, ALL YOU NEED TO KNOW ABOUT THE MUSIC BUSINESS 120–22 (1997). The time period normally spans between six and eighteen months. *See id.* at 122.

fully performed under the contract and is thus free to sign with another record company.<sup>233</sup> If the company with which the artist was originally signed protests, the artist could rely on *Wylers Summit* and argue that because the provision inured solely to the artist's benefit, he or she had the right to waive it.

However, such a timing provision actually benefits *both* the record company and the artist. At a minimum, it helps to ensure that the artist will remain under exclusive commitment to the company while it strives to promote and sell the artist's recordings. If the situation in this hypothetical were to occur, the company could be burdened with a surplus of unmarketable albums<sup>234</sup> and unrecoverable royalties and costs,<sup>235</sup> while the new album that the artist recorded for his or her new record company reaches the top of the record charts.

In this hypothetical, waiver of the timing provision would result in imposing burdens on the company that were not part of the contract—such as being forced to market the artist's albums without the artist's participation. Under the waiver rules established prior to *Wylers Summit*, this result alone would likely have led a court to prohibit any attempt by the artist to waive the timing provision.<sup>236</sup> However, under *Wylers Summit*, as long as the artist alleged that the provision was inserted in the contract solely for his or her benefit, he or she would at least survive a motion to dismiss or a motion for summary judgment in a resulting suit. The *Wylers Summit* decision renders the artist's offensive use of waiver and the issue of whether the provision was actually intended to benefit both parties irrelevant—at least at the pre-trial motion stage.

*Wylers Summit* could also have a detrimental impact on the motion picture business. Suppose two lead actors in a film nearing the end of production decided after seeing the rough cut of the movie that they did not want their names associated with the film.<sup>237</sup> The actors could use the *Wylers Summit* decision to justify waiving their respective rights to receive credit.<sup>238</sup> The use of the actors' names in marketing the movie benefits the studio as well as the actors because advertising the stars of the film helps to

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233. See *id.* at 122 (recounting that musical artist Frank Zappa arrived at his record company one day with four albums, "said he was delivering all the remaining product required under his deal, and thus was free to sign elsewhere"); see also Karp, *supra* note 3, at 13.

234. See PASSMAN, *supra* note 232, at 122 (stating that record companies have an interest in avoiding the artist delivering more than one album at a time because the company "can't reasonably market more than one album at a time").

235. See generally *id.*

236. See *supra* Part II.B.4.

237. See generally Karp, *supra* note 3, at 13.

238. See *id.*

draw large audiences and increase the studio's box office receipts. Nevertheless, the Ninth Circuit's ruling in *Wylar Summit* potentially allows actors to escape this type of credit provision through offensive waiver.

Of course, whether *Wylar Summit* "will . . . have [such] a corrosive effect on the stability of contractual relations"<sup>239</sup> will depend on how lower courts interpret and apply the *Wylar Summit* holding. If the lower courts read *Wylar Summit* narrowly, such that only a very specific set of facts will be held to support the allegation that a contract term was inserted to benefit only the waiving party, then *Wylar Summit* may have little impact on contract stability.<sup>240</sup> Conversely, if the courts loosely interpret the benefit issue, then "no doubt, aggressive practitioners will use contractual waiver as an offensive sword to cut, splice, and dice agreements for clients looking for a better deal than they bargained for,"<sup>241</sup> or use it to get out of a deal with which their clients are dissatisfied.

However, even if lower courts do interpret the benefit issue narrowly, the *Wylar Summit* decision may nonetheless have damaging effects on contractual relations. Prior to *Wylar Summit*, an attempt to employ offensive waiver would likely have been disposed of in the pre-trial stage. *Wylar Summit* may now permit a party to survive at least a motion to dismiss. Thus, even if the decision does not ultimately result in offensive waiver claims succeeding at trial, it could impose significant legal costs on parties opposing an invalid waiver claim.

In summary, the fact that the *Wylar Summit* decision makes any of the above scenarios legally possible should rightfully give pause to entertainment lawyers who endeavor to create binding agreements upon which their clients can rely and to protect their clients from costly legal battles over their contractual rights.

#### IV. CONCLUSION

The Ninth Circuit's decision in *Wylar Summit Partnership v. Turner Broadcasting System, Inc.* not only contradicts settled rules of general contract interpretation, but also proves to be inconsistent with California law regarding the use of contractual waiver. With its unprecedented grant of broad latitude to a party wanting to unilaterally rewrite a fundamental provision of a contract, the decision may have "opened a Pandora's box of challenges to longstanding contractual arrangements."<sup>242</sup>

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239. *Wylar Summit*, 135 F.3d at 667 (Tashima, J., dissenting).

240. See Karp, *supra* note 3, at 13.

241. *Id.*

242. *Id.* at 12.

Entertainment attorneys in California should be aware of the *Wylar Summit* decision until it is clear how persuasive the Ninth Circuit's reasoning will ultimately be to lower courts. Until that time, an overly cautious approach to drafting contracts is advisable. Attorneys can attempt to circumvent the possibility that a party to a contract will try to use the waiver doctrine offensively by inserting a "no waiver" clause.<sup>243</sup> Such a clause might state: "The parties acknowledge and agree that each and every term and condition set forth herein has been inserted into the agreement for the mutual benefit of the parties."<sup>244</sup> This type of language may preclude a party from successfully invoking *Wylar Summit* to unilaterally and offensively waive a contract provision, and thus help to preserve the original intent of *all* parties and to protect the stability of the contract.

*Shannon C. Hensley*\*\*

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243. *See id.* at 13.

244. *Id.*

\*\* This Note is dedicated to my mother, Carol Hensley, for her unfaltering support of all my endeavors; to my friends for their saintly patience with me through the creation of this Note and through law school generally; and to KNW, for, and in spite of, everything. In addition, I am forever grateful to Francesca Brotman-Orner (de facto co-author) and her staffwriter quad; Ivy Choderker; and the rest of the *Loyola of Los Angeles Entertainment Law Review* staff for their invaluable work in shaping this Note. My thanks also to Professor Victor Gold for his assistance and advice. Finally, I credit my grandmother, Clare Looney, for bestowing upon me a passion for reading and learning that continues to motivate and inspire me.