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Not Pictured: Minnesota's Disfavor Toward Forfeitures—Capistrant v. Lifetouch Nat'l Sch. Studios, Inc., 916 N.W.2D 23 (Minn. 2018).

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NOT PICTURED: MINNESOTA'S DISFAVOR TOWARD FORFEITURES—CAPISTRANT V. LIFETOUCH NAT'L SCH. STUDIOS, INC., 916 N.W.2D 23 (MINN. 2018).

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I. INTRODUCTION

In *Capistrant v. Lifetouch National School Studios, Inc.*,[1] the Minnesota Supreme Court adopted section 229 of the Restatement (Second) of Contracts ("Restatement Section 229") to resolve an employment contract conflict that was contrary to Minnesota's reluctance to enforce forfeitures.[2] In its niche opinion, the majority credits Minnesota's disfavor of forfeitures but refuses to resolve the contractual dispute as a matter of law.[3] While the *Capistrant* matter remains unresolved on remand, the court's decision to integrate Restatement Section 229 creates a precedentially consistent avenue for employees to recover relief from former corporate employers.

This Paper begins by detailing Minnesota's historical interpretation of contracts, conditions precedent, and aversion to forfeitures—all of which paved the way for implementing Restatement Section 229.[4] The facts and procedural posture of *Capistrant* follow.[5] The analysis argues that the Minnesota Supreme Court could have affirmed the appellate court's decision in favor of Capistrant, viewed in combination with the facts on the record and Minnesota's precedential reluctance toward forfeitures.[6] Nevertheless, the analysis proffers that the adopted Restatement creates an avenue for corporate employees to recover appropriate remedies in future forfeiture actions.[7] Thus, this Paper concedes that the Minnesota Supreme Court ultimately ruled correctly in *Capistrant*, despite the lack of a sound resolution at law because Capistrant, and those similarly situated, will recover under the newly implemented standard.[8]

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[1] 916 N.W.2d 23 (Minn. 2018).
[2] *Id.* at 28, 31.
[3] *Id.* at 24.
[4] *See infra* Part II.
[5] *See infra* Part III.
[6] *See infra* Part IV.
[7] *See infra* Part IV.
[8] *See infra* Part V.

II. HISTORY

A. Contracts Generally Defined

A contract is generally defined as "a promise or set of promises for the breach of which the law gives a remedy or the performance of which the law recognizes as a duty."[9] While contracts are comprised of promises, promises are legally enforceable only if there is a legal duty to perform.[10] Consequently, a contract—a legally enforceable promise—is formed when "two or more parties exchange bargained-for promises, manifest mutual assent to the exchange, and support their promises with consideration."[11]

In turn, a party prevails in a breach of contract action upon proving three elements: "(1) formation of a contract; (2) performance by plaintiff of any *conditions precedent* to his right to demand performance by the defendant; and (3) breach of the contract by defendant."[12] Notably, some Minnesota federal courts include damages as an element of a breach of contract claim,[13] such that "[a] successful breach-of-contract claim under Minnesota law [requires]: '(1) formation of a contract; (2) performance by plaintiff of any conditions precedent; (3) a material breach of the contract by defendant; and (4) damages.'"[14]

B. Conditions Precedent

The second element in a breach of contract action—a plaintiff's failure to fulfill conditions precedent—is at issue in *Capistrant*.[15] Per the

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[9] Baehr v. Penn-O-Tex Oil Corp., 258 Minn. 533, 537, 104 N.W.2d 661, 664 (1960) (summarizing RESTATEMENT (FIRST) OF CONTRACTS § 1 (AM. L. INST. 1932)).

[10] *See* RESTATEMENT (SECOND) OF CONTRACTS § 2 (AM. L. INST. 1981).

[11] Med. Staff of Avera Marshall Reg'l Med. Ctr. v. Avera Marshall, 857 N.W.2d 695, 701 (Minn. 2014) (citing RESTATEMENT (SECOND) OF CONTRACTS § 17 (AM. L. INST. 1981)); *see* Thomas B. Olson & Assoc., P.A. v. Leffert, Jay & Polglaze, P.A., 756 N.W.2d 907, 918 (Minn. Ct. App. 2008) ("The formation of a contract requires communication of a specific and definite offer, acceptance, and consideration.") (quoting Com. Assocs., v. Work Connection, Inc., 712 N.W.2d 772, 782 (Minn. Ct. App. 2006) (citing Pine River State Bank v. Mettille, 333 N.W.2d 622, 626-27 (Minn. 1983)).

[12] Park Nicollet Clinic v. Hamann, 808 N.W.2d 828, 833 (Minn. 2011) (emphasis added) (citing Briggs Transp. Co. v. Ranzenberger, 299 Minn. 127, 129, 217 N.W.2d 198, 200 (1974)) ("These elements of the cause of action are the fundamental propositions which plaintiff must prove in order to establish a right of recovery.").

[13] *See, e.g.*, Hot Stuff Foods, LLC v. Dornbach, 726 F. Supp. 2d 1038, 1042 (D. Minn. 2010) (citing MSK EyEs Ltd. v. Wells Fargo Bank, N.A., 546 F.3d 533, 540 (8th Cir. 2008)).

[14] Gen. Mills Operations, LLC v. Five Star Custom Foods, Ltd., 703 F.3d 1104, 1107 (8th Cir. 2013) (quoting Parkhill v. Minn. Mut. Life Ins. Co., 174 F. Supp. 2d 951, 961 (D. Minn. 2000), *aff'd*, 286 F.3d 1051 (8th Cir. 2002)).

[15] Capistrant v. Lifetouch Nat'l Sch. Studios, Inc., 916 N.W.2d 23, 24 (Minn. 2018); *see Park Nicollet Clinic*, 808 N.W.2d at 833.

Restatement, "[a] condition is an event, not certain to occur, which must occur, unless its non-occurrence is excused, before performance under a contract becomes due."[16] At common law, conditions are related to either: (1) "the existence of a contract" or (2) "the duty of immediate performance under [the contract]."[17] These common-law conditions are known respectively as "conditions precedent to the *formation* of [a] contract" or "conditions precedent to *performance* under an existing contract."[18] The former involves issues related to the offer and acceptance, precluding any determinative contract formation.[19] The latter recognizes a binding contract but excuses a party's duty to perform until the contracting party adheres to the condition precedent.[20] Thus, failure to perform constitutes a breach if the contracting party fulfilled the requisite condition precedent in anticipation of performance.[21]

Common law indicates most conditions are conditions precedent to performance under an existing contract,[22] which Minnesota case law similarly reflects. For instance, conditions precedent are historically attributed to insurance policies.[23] Within this context, a condition precedent is an event that needs to occur—some act that the insured needs to do after the parties agree on contractual terms—before the insurance contract becomes binding.[24] Thus, if the condition precedent is not met (e.g., notifying an insurance company about damages in the requisite amount of time) and the insurer does not waive the non-occurrence, the insured's policy rights do not vest.[25]

In 1986, Minnesota adopted this concept when Justice Marshall coined Minnesota's operative definition of condition precedent:

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[16] RESTATEMENT (SECOND) OF CONTRACTS § 224 (AM. L. INST. 1981).
[17] 13 WILLISTON ON CONTRACTS § 38:4 (4th ed. Nov. 2020).
[18] 20 BRENT A. OLSON, MINNESOTA PRACTICE SERIES: MINNESOTA BUSINESS LAW DESKBOOK, FORMATION AND OPERATION OF BUSINESSES § 7:110(b) (Nov. 2019) (emphasis added).
[19] *See id.* (referencing M. K. Metals, Inc. v. Container Recovery Corp., 645 F.2d 583, 587–89 (8th Cir. 1981)).
[20] *See* City of Haverhill v. George Brox, Inc., 716 N.E.2d 138, 141 (Mass. App. Ct. 1999); *see also* CORBIN ON CONTRACTS § 628 (1960 & Supp. 1999); 5 WILLISTON ON CONTRACTS § 666A (3d ed. 1961); RESTATEMENT (SECOND) OF CONTRACTS § 224 (AM. L. INST. 1981).
[21] *See* 13 WILLISTON ON CONTRACTS, *supra* note 17.
[22] *Id.*
[23] *See* 14 WILLISTON ON CONTRACTS § 41:2 (4th ed. 2020) (noting the commonality of conditions precedent and subsequent being associated with insurance policies); *see also, e.g.*, Price v. Phoenix Mut. Life Ins. Co., 17 Minn. 497, 504, 1871 WL 3288, at *6 (July 1871) (holding that a warranty within a life insurance policy is a condition precedent that must be strictly complied with), *overruled in part by* Chambers v. Nw. Mut. Life Ins. Co., 64 Minn. 495, 498, 67 N.W. 367, 368 (1896) (holding that insurers have the burden to allege, plead, and prove all warranties relevant to a case to avoid the insurance policy vesting).
[24] *Chambers*, 64 Minn. at 497, 67 N.W. at 368.
[25] *Id.*

> A condition precedent, as known in the law, is one which is to be performed before the agreement of the parties becomes operative. A condition precedent calls for the performance of some act or the happening of some event after the contract is entered into, and upon the performance or happening of which its obligation is made to depend.[26]

Thereafter, the Minnesota Supreme Court and Court of Appeals proceeded to define and uphold conditions precedent, most notably in tax,[27] insurance,[28] and commercial law matters.[29]

C. Disproportionate Forfeiture

If a condition precedent is not satisfied, a forfeiture may result if it is reasonable.[30] A forfeiture is the denial of compensation—specifically, a promisee's lost right to the agreed exchange—after the promisee relied substantially on that exchange.[31]

In 1962, the Minnesota Supreme Court held that forfeitures are not favored in law or equity.[32] Thus, Minnesota courts simultaneously decided that construction against forfeitures must be adopted when reasonably possible.[33] Meaning, unless the parties intended or the contract stated otherwise, a contract must be construed to avoid forfeiture.[34]

The Minnesota Supreme Court gradually developed stricter guidelines prohibiting disproportionate forfeitures, particularly when obligors who drafted the agreements were the ones seeking forfeitures.[35] Nevertheless, when a condition precedent constitutes an accident or mistake, equity relieves the individual when the delay is slight, the loss is

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[26] *Id.*

[27] *See, e.g.*, Crossroads Church v. Cnty. of Dakota, 800 N.W.2d 608, 617 (Minn. 2011) (construing a statutory deadline as a condition precedent in a property tax matter because the notice was material to permit re-zoning).

[28] *See, e.g.*, Nat'l City Bank v. St. Paul Fire & Marine Ins. Co., 447 N.W.2d 171, 178 (Minn. 1989) (enforcing a banker's blanket bond as a condition precedent in an insurance matter because it was a material contract term).

[29] *See, e.g.*, Minnwest Bank Cent. v. Flagship Props. LLC, 689 N.W.2d 295, 300 (Minn. Ct. App. 2004) (excusing the lender from performance because the borrower failed to obtain a Small Business Administration loan, which was a condition precedent to the long-term financing agreement).

[30] *Crossroads Church*, 800 N.W.2d at 616 (explaining that several oral contract conditions precedent were not met, which were material to the contract, making forfeiture reasonable under the circumstances).

[31] RESTATEMENT (SECOND) OF CONTRACTS § 229 cmt. b (AM. L. INST. 1981).

[32] Naftalin v. John Wood Co., 263 Minn. 135, 147, 116 N.W.2d 91, 100 (1962).

[33] *Id.* (noting the applicable rule set forth under 17 C.J.S. Contracts § 320).

[34] *Id.*

[35] Turner v. Alpha Phi Sorority House, 276 N.W.2d 63, 66 (Minn. 1979).

small, and not granting relief results in an unconscionable hardship.[36] Similarly, courts do not enforce forfeiture when the contract adequately protects the obligor by other means.[37] To further protect the obligee, the party wishing to enforce forfeiture "carries a heavy burden of establishing his right thereto by clear and unmistakable proof."[38] While no formal rule was adopted until the *Capistrant* decision, Minnesota's general aversion to forfeitures remains consistent.[39]

D. The Bennett Test

The *Capistrant* decision involved both contract law and employment law,[40] warranting an overview of Minnesota's enforcement and drafting considerations for restrictive covenants, primarily post-employment covenants not to compete.[41] *Bennett v. Storz Broadcasting Co.* is Minnesota's landmark case for determining the validity of noncompete clauses within employment contracts.[42]

William Bennett, a former and mediocre night-time radio personality, signed an employment contract containing an eighteen-month noncompete provision that prohibited him from obtaining related employment within a thirty-five-mile radius of Storz Broadcasting Company.[43] Ultimately, the court held that this noncompete clause was unreasonable.[44] The court ruled as such because the provision was broader than necessary to protect the former employer's legitimate interests,[45] and

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[36] Trollen v. City of Wabasha, 287 N.W.2d 645, 648 (Minn. 1979) (excusing the non-occurrence of a condition precedent in a real estate matter because of its unconscionable result on the tenant).

[37] *See, e.g.*, Hideaway, Inc. v. Gambit Inv. Inc., 386 N.W.2d 822, 824 (Minn. Ct. App. 1986) (acknowledging that Respondent was adequately protected by receiving $500 when Appellant breached).

[38] United Carbon Co. v. Monroe, 92 F. Supp. 460, 465 (W.D. La. 1950), *aff'd*, 196 F.2d 455 (5th Cir. 1952) (crafting the standard of proof for forfeiture actions: clear and unmistakable proof).

[39] *See* Capistrant v. Lifetouch Nat'l Sch. Studios, Inc., 916 N.W.2d 23, 28 (Minn. 2018).

[40] *Id.* As will be noted in Part IV.B, *Capistrant* involves an "immediate" return-of-property clause intermixed with an employment noncompete clauses—both of which forfeit Capistrant's retirement benefits. *See id.* at 30–31.

[41] *See* Ryan E. Mick & JoLynn Markison, *Non-Compete Laws: Minnesota*, PRAC. L. STATE Q&A (May 15, 2020).

[42] Bennett v. Storz Broadcasting Co., 270 Minn. 525, 134 N.W.2d 892 (1965).

[43] *Id.* at 894.

[44] *Id.* at 899–900.

[45] *Id.* at 898 ("One is privileged purposely to cause another not to perform a contract . . . with a third person by in good faith asserting or threatening to protect properly a legally protected interest of his own which he believes may otherwise be impaired or destroyed by the performance of the contract . . . .") (quoting RESTATEMENT (FIRST) OF TORTS § 773 (AM. L. INST. 1939) to define an employer's legitimate interest at stake in an employment contract)).

because the plaintiff would be forced to accept a substantial salary decrease or move to another community to find work that did not violate the noncompete agreement.[46]

Consequently, the Minnesota Supreme Court adopted the *Bennett* test to resolve similar noncompete disputes.[47]

> The test applied is whether or not the restraint is necessary for the protection of the business or good will of the employer, and if so, whether the stipulation has imposed upon the employee any greater restraint than is reasonably necessary to protect the employer's business, regard being had to the nature and character of the employment, the time for which the restriction is imposed, and the territorial extent of the locality to which the prohibition extends.[48]

In other words, the *Bennett* test enforces a noncompete agreement when "the restraint is necessary for the protection of the business or good will of the employer" *and* the agreement does not impose "greater restraint [on the employee] than is reasonably necessary to protect the employer's business."[49] This test also considers: (a) the nature and character of the employment; (b) the duration of the noncompete; and (c) the geographical scope of the noncompete.[50] Ultimately, if the employer's interests predominate over the employee's interests, the noncompete agreement is valid and enforceable.[51]

While cases such as *Pathfinder Communications Corp. v. Macy*[52] and *Walker Employment Services, Inc. v. Pankhurst*[53] distinguished

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[46] *Id.* at 898. The Court held that the effect of the noncompete clause created a restraint on trade, because it limited Bennett's right to work and earn a living. *Id.* Because this employment contract placed a restraint on trade, it was "[c]autiously considered, carefully scrutinized, looked upon with disfavor, strictly interpreted and [not] reluctantly upheld" (citing and adopting the rule established in Arthur Murray Dance Studios of Cleveland v. Witter, 105 N.E.2d 685, 693 (Ohio 1952)).

[47] *See generally* Davies & Davies Agency, Inc. v. Davies, 298 N.W.2d 127, 131 (Minn. 1980); Alside, Inc. v. Larson, 300 Minn. 285, 294, 220 N.W.2d 274, 280 (1974).

[48] *Bennett*, 270 Minn. 525 at 534, 134 N.W.2d at 899.

[49] *See* Mick & Markison, *supra* note 41, at 2–3 (summarizing *Bennett*, 134 N.W.2d at 899).

[50] *See id.*

[51] *See id.*

[52] 795 N.E.2d 1103 (Ind. Ct. App. 2003). Macy mistakenly relied on *Bennett* because the matter at bar was not factually similar to *Bennett*. *Id.* at 1112 n.5. In *Bennett*, the radio-host was mediocre at best, while Macy was utilizing Pathfinder resources to increase Macy's name recognition and marketability, creating a legitimate protectable interest. *Id.*

[53] 300 Minn. 264, 219 N.W.2d 437 (1974). This case distinguishes *Bennett* in the following ways: (1) Pankhurst had access to his employer's clients and his employer's secrets; (2) the restrictive covenant was not unduly restrictive, because it only applied for one year following employment and to Hennepin County; (3) there was no unreasonable restraint regarding time or area; and (4) Parkhurst was not forced out or demoted to an inferior position. *Id.* at 441–42.

Bennett, the *Bennett* test remained relatively consistent, even in recent years.[54] That said, *Wells Fargo Insurance Services USA v. King* recently expanded its application.[55] Wells Fargo Insurance sued King for breaching a noncompete clause after Wells Fargo Insurance merged with King's prior employer.[56] A Minnesota District Court applied the *Bennett* test and determined the employer's subjective intent to enforce a restrictive covenant may affect a court's willingness to enforce it.[57] However, the court did not interpret *Bennett* to mean that under Minnesota law, the enforceability of a noncompete clause turns on the employer's subjective motivation.[58]

The *Bennett* test's most recent application is outlined in *Lapidus v. Lurie LLP*.[59] Lapidus was an administrative partner at Lurie, responsible for managing Lurie's business and affairs, supporting Lurie's partners, and administering Lurie's relationships with its legal counsel, banks, health insurance carriers, and professional liability insurance carriers.[60] However, upon retiring, Lapidus began providing services to a competing business, violating the noncompete clause in his Lurie employment contract.[61]

The Minnesota Court of Appeals determined that Lapidus's former employment, combined with his tenure as a partner, demonstrated his direct access and knowledge to the confidential information that Lurie had a legitimate business interest in protecting.[62] Thus, the three noncompete provisions served Lurie's legitimate interest in protecting its confidential information, satisfying the first prong of the *Bennett* test.[63]

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[54] *See, e.g.*, Medtronic, Inc. v. Advanced Bionics Corp., 630 N.W.2d 438, 456 (Minn. Ct. App. 2001) (extending *Bennett*). The Minnesota Court of Appeals determined that "restrictive covenants are enforced to the extent reasonably necessary to protect legitimate business interests. Legitimate interests that may be protected include the company's good will, trade secrets, and confidential information." *Id.* (citations omitted).

[55] No. 15-CV-4378, 2016 WL 6892108, at *1 (D. Minn. July 29, 2016).

[56] *Id.* at *5.

[57] *Id.* at *7.

[58] *Id.*

[59] No. A17-1656, 2018 WL 3014698 (Minn. Ct. App. June 18, 2018).

[60] *Id.* at *6.

[61] *Id.* at *3. Lapidus violated three provisions under the noncompete clause. *Id.* First, 17.1(a) prohibited Lapidus from rendering any services to clients who were served during the partnership two years immediately prior to withdrawal or retirement. *Id.* at *1. Next, 17.1(b) prohibited Lapidus from providing services within fifty miles of the office. *Id.* at *2. Finally, 17.3(e) forfeited any post-retirement payments if Lapidus provided services to former clients within ten years following withdrawal or retirement. *Id.* at *2.

[62] *Id.* at *7.

[63] *See id.* at *6 ("The protection of confidential information is a legitimate business interest where the former employee had access to or knowledge of 'information not readily ascertainable by . . . competitors' and intended to be kept 'in house.'") (quoting and applying the rule set forth in Roth v. Gamble-Skogmo, Inc., 532 F. Supp. 1029, 1030 (D. Minn. 1982)).

Next, the appellate court affirmed the noncompete provisions, as both were reasonable in scope and duration because each provision protected Lurie's confidential information and good will.[64] First, the two-year temporal restriction was justified because Lapidus had "conducted business in the same area for many years," building a sizable clientele.[65] In relation, "'[s]olicitation by mere reputation and past business practices is more than sufficient'" to uphold a time restriction.[66] Second, the fifty-mile geographic noncompete provision was properly limited in scope and duration to protect Lurie's legitimate business interests because it paralleled similar provisions in supporting cases.[67] Thus, the appellate court utilized the *Bennett* test to uphold the noncompete clause in Lapidus's contract.[68]

Minnesota courts undertake the same *Bennett* test principles when the violation of noncompete clauses forfeits employee benefits. *Harris v. Bolin* exemplified this; a former employee sued his former employer to recover profit sharing plan funds he forfeited because he violated the noncompete clause in his employment contract.[69] After interpreting the vague forfeiture clause,[70] the court held that "the forfeiture clause of the profit sharing plan and trust agreement constitute[ed] an unlawful restraint of trade because it [was] not limited as to time, harm to the employer, or geographical area."[71]

Coincidentally, *Lapidus v. Lurie* used this same analysis to establish whether Lapidus forfeited his retirement benefits by violating noncompete provision 17.3(e).[72] However, unlike the plaintiff in *Harris*, Lapidus did not derive his post-retirement payments from a profit-sharing plan.[73] Instead, the payments were intended to provide consideration for Lapidus's continued promise not to compete.[74] Moreover, the employment contract did not

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[64] *Id.* at *8. A two-year noncompete clause is reasonable in the court's eyes per prior precedent. *Id.* Furthermore, an agreement not to render competitive services for the ten years upon which $11 million in post-retirement funds would be distributed constitutes a fair exchange for continued loyalty. *Id.*

[65] *Id.* at *6.

[66] *Id.* (quoting Haynes v. Monson, 301 Minn. 327, 330, 224 N.W.2d 482, 484 (1974)).

[67] *Id.* at *7. The court affirmed the fifty-mile geographic barrier because Minnesota enforced a five-year noncompete clause over six states in a factually similar matter. *See Roth*, 532 F. Supp. at 1031–32.

[68] *See Lapidus*, 2018 WL 3014698, at *2, *9.

[69] 310 Minn. 391, 393, 247 N.W.2d 600, 601 (1976).

[70] "[I]f an employee leaves the Company to enter into a competing business, the Trustee, in his discretion, may declare all or any part of the employer's contribution to an employee's account forfeited." *Id.* at 601–02 (internal quotes omitted).

[71] *Id.* at 603.

[72] *See Lapidus*, 2018 WL 3014698, at *8.

[73] *Id.*

[74] *Id.*

provide Lurie with adequate protection without the forfeiture clause.[75] Lastly, Lapidus did not suffer a "great injustice" because he continued to profit at his former employer's expense.[76]

Apart from noncompete clauses, Minnesota recognizes other agreements used to protect confidential information and trade secrets.[77] While not expressly recognized, Minnesota courts are likely to uphold non-disclosure and non-solicitation covenants if they are supported by adequate consideration.[78] While the analysis regarding these covenants may resemble the *Bennett* test, Minnesota courts may be less strict when deciding whether to uphold these alternative agreements because they are traditionally less restrictive on trade.[79] That said, Minnesota has generally taken a strict stance on the inevitable disclosure doctrine pertaining to these covenants and noncompete clauses.[80] For example, suppose an employer fails to demonstrate that breaching the noncompete contract would result in irreparable harm to the employer; in that case, the inevitable disclosure doctrine cannot satisfy the burden of proof necessary to issue an injunction against the former employee.[81]

E. Section 229 of the Restatement (Second) of Contracts

"Restatements of the law are considered persuasive authority only and are not binding unless specifically adopted in Minnesota by statute or case law."[82] Restatement Section 229, while not adopted in Minnesota prior to the *Capistrant* decision, runs parallel with Minnesota's historical reluctance toward forfeitures.[83] It reads: "[t]o the extent that the non-occurrence of a condition would cause disproportionate forfeiture, a court may excuse the non-occurrence of that condition unless its occurrence was a material part of the agreed exchange."[84] Meaning, a court may excuse the

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[75] *Id.* Lurie contracted a liquidated-damages provision that protected Lurie's lost revenue resulting from former partner competition. *Id.* However, the forfeiture provisions were crafted to shield Lurie's post-retirement payment program as a whole, because these payments were unfunded and a major part of the company's current cash flow. *Id.*

[76] *Id.* at *9.

[77] *See* Mick & Markison, *supra* note 41, at 13.

[78] *Id.* at 16.

[79] *Id.*

[80] *Id.* at 17.

[81] *See* St. Jude Med., Inc. v. Carter, 913 N.W.2d 678, 685 (Minn. 2018) (citing Menter Co. v. Brock, 147 Minn. 407, 410, 180 N.W. 553, 554–55 (1920) (inferring irreparable harm when: (1) customer good will is at stake; (2) an employee takes and intends to benefit from business secrets; or (3) the risk of disclosing business secrets could cause irreparable damage)).

[82] Williamson v. Guentzel, 584 N.W.2d 20, 24 (Minn. Ct. App. 1998).

[83] Capistrant v. Lifetouch Nat'l Sch. Studios, Inc., 916 N.W.2d 23, 28 (Minn. 2018).

[84] RESTATEMENT (SECOND) OF CONTRACTS § 229 (AM. L. INST. 1981). A forfeiture "refer[s] to the denial of compensation that results when the obligee loses his right to the agreed

non-occurrence of a condition during the period where it should have occurred if the occurrence is *immaterial* to the contract.[85] Thereafter, the court weighs the extent of the forfeiture against the potential risk and the protection lost if the non-occurrence of the condition is excused.[86]

In *enXco Development Corp. v. Northern States Power Co*, the court implemented Restatement Section 229.[87] The case concerned two contracts that functioned together to accomplish a wind-energy-generation project known as the Merricourt Project ("Project").[88] The first contract, the Developed Wind Project Purchase and Sale Agreement ("PSA"), required enXco to obtain the requisite permits to develop the Project site.[89] These permits included the Certificate of Site Compatibility ("CSC"), which was needed before the parties could begin the Project.[90] Regardless, all permits needed to be satisfied prior to the "Long-Stop Date."[91] In return, Northern States Power Company ("NSP") would purchase the Project's real estate and assets for $15 million.[92] This contract also had an express termination clause, permitting either party to terminate upon written notice if the conditions precedent were not fulfilled before construction began.[93] The second contract—the Engineering, Procurement, and Construction Agreement ("EPCA")—required NSP to pay enXco over $350 million in exchange for constructing and finalizing the Project.[94] The purpose of these two contracts was to ensure that neither party had an obligation to proceed with the EPCA until enXco met the PSA obligations.[95]

Once enXco executed the PSA, enXco had approximately twenty-nine months to obtain the CSC, but two years expired before enXco submitted the CSC application.[96] "Thus, enXco had less than six months to obtain the CSC by the Long-Stop Date," which it ultimately failed to complete.[97] However, enXco purchased turbines in preparation for the

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exchange after he has relied substantially, as by preparation or performance on the expectation of that exchange." *Id.* at cmt. b.

[85] *See id.* at cmt. c.

[86] *Id.* at cmt. b.

[87] 758 F.3d 940, 947 (8th Cir. 2014) (applying Minnesota law).

[88] *Id.* at 941–42.

[89] *Id.* at 942.

[90] *Id.*

[91] *Id.* "Long-Stop Date" was March 31, 2011. *Id.* This date served as a milestone to assess whether the Project could be built in time. *Id.*

[92] *Id.*

[93] *Id.*

[94] *Id.*

[95] *Id.*

[96] *Id.* at 942–43.

[97] *Id.* at 943. This permit process requires a statutorily mandated public hearing, and, in this case, that process was initially supposed to take two to four months. *Id.* However, due to a

Project, totaling roughly $216 million.[98] Thus, enXco sued NSP for declaratory relief and damages for breach of contract.[99] enXco argued that disproportionate forfeiture should apply to prevent strict enforcement of the condition precedent; however, the district court granted summary judgment in NSP's favor and enXco appealed.[100]

On appeal, the Eighth Circuit assumed that Minnesota would apply the doctrine of disproportionate forfeiture under Restatement Section 229, but it also considered that forfeitures may be appropriate when "consonant with notions of fairness and justice under the law."[101] Based on this dual standard, the court excused enXco's forfeiture for two reasons. First, enXco "maintained possession and ownership of the Project assets and real estate," intending to profit from the turbines in other projects, while NSP did not assume the same.[102] Second, both enXco and NSP are sophisticated corporate parties who were both represented by counsel during contract negotiations.[103] As such, the circuit court left both parties to their bargain, refusing to apply the doctrine of disproportionate forfeiture.[104]

This case narrows the application of Restatement Section 229. Now, forfeitures do not result when: (1) the breaching party maintains ownership of the assets comprising the contract;[105] or (2) sophisticated parties are represented by counsel during contract negotiations.[106] Overall, Minnesota's precedential disfavor toward forfeiture is encompassed within the Restatement and narrowed in relevant part to corporate entities via the *enXco* decision—both of which should have been reflected in *Capistrant v. Lifetouch National School Studios, Inc.*[107]

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snowstorm, the hearing was delayed, and the CSC permit was not granted until June 8, 2011. *Id.*

[98] *Id.* Notably, enXco redeployed these turbines for use in a different project in Texas. *Id.*

[99] *Id.* at 944.

[100] *Id.* enXco also argued under the doctrine of temporary impracticability but that doctrine is not relevant to this Paper. *Id.*

[101] *Id.* at 947 (quoting Klipsch, Inc. v. WWR Tech., Inc., 127 F.3d 729, 737 (8th Cir. 1997)) (internal quotations omitted).

[102] *Id.* (comparing to Hideaway, Inc. v. Gambit Inv. Inc, 386 N.W.2d 822, 824 (Minn. Ct. App. 1986) (noting that the doctrine applied when the non-breaching party retained "a business worth $13,000 after only paying $500")).

[103] *Id.*

[104] *Id.*

[105] *Id.* (referencing *Klipsch, Inc.*, 127 F.3d at 737).

[106] *Id.* ("These sophisticated parties, presumably with the assistance of experienced and able counsel, exercised their liberty of contract and now are accountable for the product of their negotiations.") (quoting Metro. Sports Facilities Comm'n v. Gen. Mills, Inc., 470 N.W.2d 118, 125 (Minn. 1991)).

[107] 916 N.W.2d 23 (Minn. 2018); *see infra* Section IV.C.

III. THE *CAPISTRANT* DECISION

A. The Lifetouch Contract

On June 30, 1986, John J. Capistrant ("Capistrant") entered into a Territory Manager Employment Agreement ("Agreement") with his former employer, Lifetouch National School Studios, Inc. ("Lifetouch").[108] Section III Exhibit B of the Territory Agreement was titled "Residual Commission and Payments for Restriction Against Competition."[109] It stated that Lifetouch would pay Capistrant residual commission equaling thirty percent of Net Sales Receipts in the Territory during the last Fiscal Year in six equal annual installments, starting one year after the Territory Agreement terminated.[110]

In consideration for residual commission payments, Capistrant signed the provisions in Section III Paragraph 11: "Restriction Against Competition."[111] Under this Paragraph, Capistrant acknowledged that disclosing any of Lifetouch's confidential or proprietary information, trade secrets, or other affiliated information would cause insurmountable harm to Lifetouch.[112] Thus, the Agreement restricted Capistrant from competing with Lifetouch during the contract term and for twenty-four months after the contract term concluded.[113] Two unnumbered paragraphs at the end of Paragraph 11 state the following, creating a basis for the forfeiture of Capistrant's Residual Commission:

> In the event that Territory Manager shall violate any of the provisions of this section, then Lifetouch shall have the right to seek injunctive relief and any other remedy allowed to it in law or equity or by this Agreement.
>
> At the end of the Term, Territory Manager shall immediately deliver to Lifetouch all of Lifetouch's property . . . .[114]

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[108] Capistrant v. Lifetouch Nat'l Sch. Studios, Inc., No. 27-CV-14-17918, 2016 WL 3197527, at *1 (Dist. Ct. Minn. May 12, 2016), *rev'd*, 899 N.W.2d 844 (Minn. Ct. App. 2017), *rev'd*, 916 N.W.2d 23 (Minn. 2018).
[109] *Id.* at *3.
[110] *Id.*
[111] *Id.* at *1–2.
[112] *Id.* at *2.
[113] *Id.* (summarizing the following prohibitions: (A) disclosing trade secrets; (B) soliciting or dealing with any school involved with Lifetouch; and (C) soliciting any present or future Lifetouch employees).
[114] *Id.*

B. Facts & Procedural Posture

On September 29, 2014, Capistrant filed a declaratory judgment action to determine the proper calculation of residual commission due upon his retirement because the plain language of the contract supported that it was worth approximately $2.6 million.[115] Three months after Capistrant's retirement, Capistrant informed his attorney that he forwarded emails containing Lifetouch's records to his personal email and accumulated eight boxes of Lifetouch's records in his attic over thirty years.[116] Capistrant's attorney promptly informed Lifetouch's counsel about this discovery, and Capistrant distributed the email and documents to Lifetouch upon its request.[117] Consequently, Lifetouch moved for summary judgment, asserting that Capistrant's failure to satisfy the immediate return-of-property clause acted as the non-occurrence of a condition precedent, excusing Lifetouch's obligation to pay Capistrant his residual commission.[118]

The district court granted Lifetouch's motion for summary judgment.[119] The Minnesota Court of Appeals reversed and remanded, holding that the return-of-property clause read as a whole "function[s] as a noncompete agreement with a forfeiture clause."[120] Thus, to avoid disproportionate forfeiture, the court applied Restatement Section 229 to excuse the non-occurrence of the condition.[121] The court held, as a matter of law, that the forfeiture was disproportionate because: (1) the immediate return of property was immaterial to the contract; (2) Lifetouch's ability to forfeit was not clear and convincing; (3) the delay in returning property caused Lifetouch no harm; and (4) the contract adequately protected Lifetouch with other provisions.[122]

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[115] *See* Complaint at 1, Capistrant v. Lifetouch Nat'l Sch. Studios., Inc., No. 27-CV-14-17918, 2014 WL 12784904 (Dist. Ct. Minn. Oct. 23, 2014) (filing declaratory judgment action); Capistrant v. Lifetouch Nat'l Sch. Studios., Inc., No. 27-CV-14-17918, 2016 WL 3197527, at *7 n.5 (Dist. Ct. Minn. May 12, 2016) (noting plain language issue); Capistrant v. Lifetouch Nat'l Sch. Studios, Inc., 899 N.W.2d 844, 852, 859 (Minn. Ct. App. 2017), *rev'd*, 916 N.W.2d 23, 26 (Minn. 2018) (acknowledging contract's worth).

[116] *Capistrant*, 899 N.W.2d at 850.

[117] *Id.*

[118] *Id.* at 850–51.

[119] *Capistrant*, 2016 WL 3197527, at *5. The court also held no reasonable jury could classify Capistrant's three-month delay in returning Lifetouch's property as immediate. *Id.* at *6. Additionally, while forfeitures are not favored in Minnesota, the court held that equity could not save Capistrant from his contractual obligations. *Id.* at *7. Finally, Capistrant's motion for summary judgment on alternative unjust enrichment grounds was granted because an express contract was found. *Id.* at *8.

[120] *Capistrant*, 899 N.W.2d at 854.

[121] *Id.* at 855.

[122] *Id.* at 857. The appellate court also held the district court erred "by not considering whether the forfeiture clause was a part of an overbroad restrictive covenant to not compete." *Id.* at 857–58; *see* Harris v. Bolin, 310 Minn. 391, 395, 247 N.W.2d 600, 603 (1976). The

C. The Minnesota Supreme Court's Decision

Lifetouch appealed the appellate court's decision, and the Minnesota Supreme Court affirmed in part, reversed in part, and remanded on the following grounds.[123] First, the court noted that Lifetouch's immediate return-of-property clause was a condition precedent to Lifetouch's duty to pay Capistrant his residual commission.[124] Thus, the court reversed the appellate court's finding that the return-of-property clause was immaterial as a matter of law because, in general, conditions precedent are always material.[125]

Still, Lifetouch's return-of-property clause was distinguishable from previous cases in which the court applied this general rule because: (1) the contract condition did not become operative until Capistrant's employment terminated twenty-eight years following its commencement, and (2) failure to comply with the clause would result in a $2.6 million forfeiture.[126] Given the unprecedented employment clause and forfeiture at hand, the court affirmed the appellate court's decision to adopt Restatement Section 229.[127] This meant the court's decision hinged on whether the immediate return-of-property clause was "material" as defined under Restatement Section 229 before it could find a basis to reject the disproportionate forfeiture.[128]

The court identified multiple conflicting inferences that could impact the determination of whether the return-of-property clause was material in relation to Capistrant's right to residual commissions.[129] Noting that the materiality of the clause would determine if Capistrant would receive millions of dollars or walk away from thirty years of employment with no retirement funds, the court remanded back to the district court for factual findings on materiality.[130] Thus, if the district court determines on

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court compared the forfeiture of a profit sharing plan and trust agreement because it was "not limited as to time, harm to the employer, or geographical area . . . . [And because it was] broader than necessary to protect the legitimate interests of the employer." *But see* Capistrant v. Lifetouch Nat'l Sch. Studios, Inc., 916 N.W.2d 23, 30 n.5 (Minn. 2018) (explaining that the Agreement did not restrict Capistrant's ability to work elsewhere or for a competitor, thereby not satisfying the overbroad principle as established in *Harris*).

[123] *Capistrant*, 916 N.W.2d at 23.

[124] *Id.* at 27.

[125] *Id.* at 28–29.

[126] *Id.* at 26–30 (referencing how the condition precedent here *does not* allow resolution of the materiality question as a matter of law, because the provision imposed an unprecedented noncompete obligation that continued after Capistrant's employment ended).

[127] *Id.* at 28.

[128] *Id.* at 29.

[129] *Id.* at 30–31.

[130] *Id.* at 31.

remand that the contract term is immaterial, it will also likely find the forfeiture disproportionate, affording Capistrant an appropriate remedy.[131]

IV. ANALYSIS

A. Minnesota's precedential reluctance toward forfeitures should have afforded Capistrant an appropriate remedy irrespective of section 229 of the Restatement (Second) of Contracts.

The Minnesota Supreme Court failed to uphold its own precedent when remanding the appellate court's decision in the *Capistrant* matter. As demonstrated by decades of case law, the Minnesota Supreme Court looks upon forfeitures of all kinds with disfavor,[132] indicating that forfeitures are contrary to law and equity.[133] As such, equity relieves an obligee when there has been "excusable and inconsequential tardiness," particularly when forfeiture would cause the obligee significant hardship and eradicate their long-term success.[134] Thus, in allowing forfeiture of Capistrant's retirement funds, *Capistrant* is contrary to Minnesota's standard even though it involved a first impression noncompete employment contract.[135]

The Minnesota Court of Appeals provided a precedentially consistent analysis when finding for Capistrant, and the Minnesota Supreme Court should have affirmed summary judgment, irrespective of Restatement Section 229. The rule is as follows: if a contract forfeits employee benefits by means disproportionate to the company's harm, the forfeiture cannot be upheld.[136] A forfeiture is disproportionate under Minnesota case law if: (1) there is excusable delay fulfilling the condition precedent because the delay does not cause the obligor harm; (2) other provisions in the noncompete agreement adequately protect the obligor; (3) the contract's language does

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[131] *See id.*

[132] *See, e.g.*, Harris v. Bolin, 310 Minn. 391, 247 N.W.2d 600, 602 (1976); Hideaway, Inc. v. Gambit Investments, Inc. 386 N.W.2d 822, 824 (Minn. Ct. App. 1986) (citing Warren v. Driscoll, 186 Minn. 1, 5, 242 N.W. 346, 347 (1932)).

[133] Naftalin v. John Wood Co., 263 Minn. 135, 147, 116 N.W.2d 91, 100 (1962).

[134] Trollen v. City of Wabasha, 287 N.W.2d 645, 647–48 (Minn. 1979) (referencing F. B. Fountain Co. v. Stein, 97 Conn. 619, 624, 118 A. 47, 49 (1922)).

[135] *Capistrant*, 916 N.W.2d at 30 (deciding that the return-of-property clause imposed continuous obligations on Capistrant post-employment, preventing the appellate court from resolving the materiality question as a matter of law) (distinguishing Crossroads Church v. Cnty. of Dakota, 800 N.W.2d 608, 615 (Minn. 2011). *But see, e.g.*, Bellboy Seafood Corp. v. Nathanson 410 N.W.2d 349, 350 (Minn. Ct. App. 1987). Defendant Nathanson breached his noncompete agreement, causing his former employer's business to lose between twenty-five percent to thirty-three percent of its business in four weeks. *Id.* at 351. However, the appellate court found for Defendant as the liquidated damages provision amounted to a forfeiture of earned income and was unenforceable. *Id.* at 352.

[136] *See* Capistrant v. Lifetouch Nat'l School Studios, Inc., 899 N.W.2d 844, 848 (Minn. Ct. App. 2017).

not provide clear and unmistakable proof of the obligor's intent to forfeit; or (4) an unfulfilled condition precedent is immaterial to the contract.[137]

1. Excusable Delay & Harm to Obligor

The Minnesota Supreme court strikes down forfeitures when the failure to timely fulfill a condition precedent would significantly disadvantage the obligee but not cause substantial harm to the obligor.[138] In the *Capistrant* matter, the post-employment restrictive covenants in the noncompete clause protected Lifetouch from harm as follows:

> 11. **Restrictions Against Competition**. Territory Manager agrees that during the Term and for twenty-four (24) months following the end of the Term, Territory Manager shall not:
>
> A. Disclose any trade secrets and confidential information of Lifetouch, including Lifetouch's school and customer lists and merchandising techniques, to any person, firm, corporation, association or other entity for any reason or purpose whatsoever.
>
> B. Directly or indirectly, either as an individual for Territory Manager's own account, or on behalf of another person or persons, corporation, partnership or other entity, solicit or deal with any school included in Lifetouch's Business whom Territory Manager solicited or serviced while in the employ of Lifetouch or whom Territory Manager knew to be a customer of Lifetouch or any of Lifetouch's affiliates.
>
> C. Directly or indirectly, either as an individual for Territory Manager's own account, or on behalf of another person or persons, corporation, partnership or other entity, solicit any present or future employee of Lifetouch

[137] *See id.* at 857.

[138] *See Trollen*, 287 N.W.2d at 648 ("[I]n cases of mere neglect in fulfilling a condition precedent . . . which do not fall within accident or mistake, equity will relieve when the delay has been slight, the loss to the lessor small, and when not to grant relief would result in such hardship . . . as to make it unconscionable to enforce literally the condition precedent . . . .").

> for the purpose of hiring or attempting to hire such employee.[139]

Notably, Capistrant's three-month delay in returning Lifetouch's paper records and forwarding Lifetouch emails to a private email address did not result in the harm that Lifetouch contractually protected itself against.[140] Capistrant did not disclose trade secrets, compete with Lifetouch, or solicit any present or future Lifetouch employees.[141] Instead, the box of records accumulated throughout Capistrant's career collected dust in his attic, and the emails he forwarded for safekeeping remained undistributed and later deleted.[142] The record also lacked evidence that Capistrant intended to disseminate Lifetouch's confidential business records.[143] At most, Lifetouch's only damages were from hiring an expert to track Capistrant's email correspondence.[144] Even so, in Capistrant's effort to recover his retirement benefits, the employment contract provided a means for Lifetouch to rescind thirty years of funds Capistrant relied on.[145] These facts indicate a disproportionate forfeiture under Minnesota case law because the three-month delay in returning the property at issue did not cause the harm that Lifetouch contractually protected itself against.[146] In turn, the court should have affirmed the appellate court's decision.

2. Adequate Protection

The Minnesota Supreme Court also denies issuing forfeitures when a contract protects the obligor by means other than by forfeiture.[147] Here, Lifetouch was adequately protected by other provisions in the noncompete agreement,[148] so a forfeiture should not have been issued because contracts are construed to avoid forfeiture unless the parties explicitly intended

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[139] Capistrant v. Lifetouch Nat'l School Studios, Inc., No. 27-CV-14-17918, 2016 WL 3197527, at *2 (Dist. Ct. Minn. May 12, 2016).

[140] *See* Brief & Addendum of Appellant John J. Capistrant at 19–20, Capistrant v. Lifetouch Nat'l Sch. Studios, Inc., 899 N.W.2d 844 (Minn. Ct. App. 2017) (No. A16-1829), 2017 WL 2131976, at *19–20 [hereinafter Brief & Addendum of Appellant Capistrant].

[141] *See id.* at *31.

[142] *See id.* at *19–20.

[143] *See id.* at *20.

[144] *See id.* (noting that forensic services costed Lifetouch $23,441.61—an unnecessary expense, considering the lack of evidence against Capistrant).

[145] *See id.* at *55.

[146] *See* Trollen v. City of Wabasha, 287 N.W.2d 645, 648 (Minn. 1979).

[147] *See* Hideaway, Inc. v. Gambit Investments, Inc., 386 N.W.2d 822, 824 (Minn. Ct. App. 1986) (citing Myhre v. Severson, 211 Minn. 189, 191, 300 N.W. 605, 606 (1941)); *see also* Naftalin v. John Wood Co., 263 Minn. 135, 147–48, 116 N.W.2d 91, 100 (1962).

[148] *See* Capistrant v. Lifetouch Nat'l Sch. Studios, Inc., 899 N.W.2d 844, 856 (Minn. Ct. App. 2017).

otherwise.[149] Despite the district court's determination, the contract explicitly intended to forfeit Capistrant's funds. The remedial verbiage noted in two unnumbered paragraphs at the end of Paragraph 11 did not solidify Lifetouch's ability to forfeit Capistrant's Residual Commission:

> In the event that Territory Manager shall violate any of the provisions of *this section*, then Lifetouch shall have the right to seek *injunctive relief and any other remedy allowed to it* in law or equity or by this agreement.
>
> At the end of the Term, Territory Manager shall immediately deliver to Lifetouch all of Lifetouch's property . . . in Territory Manager's possession or control and belonging to Lifetouch.[150]

As demonstrated, injunctive relief (or other remedies sought) protected Lifetouch if Capistrant violated any of "the provisions of this section."[151] As assessed, Capistrant did not violate any of the terms warranting injunctive or other relief.[152] Relying on *Hideaway*,[153] the appellate court accurately determined the contract protected Lifetouch because violating provisions A, B, or C triggered injunctive relief, forfeiture of Capistrant's Residual Commission, and/or any other remedy allowed to Lifetouch.[154] Thus, the Minnesota Supreme Court should have affirmed the appellate court's decision because the employment contract sufficiently protected Lifetouch without the forfeiture clause, and Minnesota's precedent averts forfeiture actions when other provisions protect an obligor.[155]

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[149] *Id.* at 854 (citing *Naftalin*, 263 Minn. at 147–48, 116 N.W.2d at 100); *see Hideaway*, 386 N.W.2d at 824.

[150] Capistrant v. Lifetouch Nat'l Sch. Studios, Inc., No. 27-CV-14-17918, 2016 WL 3197527, at *2 (Dist. Ct. Minn. May 12, 2016) (emphasis added).

[151] *Id.* Based on the format of the Agreement, "this section" refers to disclosing trade secrets, soliciting or dealing with any schools involved with Lifetouch, and soliciting any present or future Lifetouch employees. *See Trollen*, 287 N.W.2d at 648 ("[I]n cases of mere neglect in fulfilling a condition precedent . . . which do not fall within accident or mistake, equity will relieve when the delay has been slight, the loss to the lessor small, and when not to grant relief would result in such hardship . . . as to make it unconscionable to enforce literally the condition precedent . . . .").

[152] *See supra* Section IV.A.1.

[153] 386 N.W.2d at 824. This case involves a property buyer who retained a $13,000 business despite only paying the seller $500 after the seller trespassed on the property. *Id.* at 824–25. The Court reversed this determination because the contract's language was void of any language warranting this transfer upon the seller's trespass. *Id.* Likewise, this was considered unjust because a disproportionate forfeiture would have resulted for the seller while the buyer was adequately protected by other means. *Id.* at 825.

[154] *Capistrant*, 899 N.W.2d at 857.

[155] *See Trollen*, 287 N.W.2d at 648 ("[I]n cases of mere neglect in fulfilling a condition precedent . . . which do not fall within accident or mistake, equity will relieve when the delay

3. Clear & Unmistakable Proof of Intent to Forfeit

Additionally, the Minnesota Supreme Court interprets contracts without regard to forfeiture provisions because Minnesota does not favor them; however, the court will consider them if the parties explicitly intend to provide for a forfeiture.[156] Here, Lifetouch's intent is outlined in Section III: Residual Commission and Payments for Restriction Against Competition.[157] It follows Paragraph 11. Discerning in pertinent part, it reads:

> If Territory Manager has duly performed all of Territory Manager's obligations under the Agreement and under any prior Territory Manager Employment Agreement between the parties for a period of at least 6 Fiscal Years prior to the end of the Term, following the end of the Term, Lifetouch shall pay to Territory Manager a Residual Commission equal to 30% of Net Sales Receipts in the Territory during the last Fiscal Year before the end of the Term . . . Territory Manager's Residual Commission shall be paid in 6 equal annual installments, commencing one year from the date of termination of the Agreement . . . .
>
> In consideration for payments of Residual Commission to Territory Manager, Territory Manager agrees that the provisions of Paragraph 11 of the Agreement shall be extended and shall apply during the period Territory Manager is entitled to receive Residual Commission payments. If at any time Territory Manager breaches the provisions of Paragraph 11 of the Agreement, in addition to Lifetouch's other remedies, Lifetouch shall be entitled to terminate Lifetouch's obligation to make any payment of Residual Commission that have not yet been paid by

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has been slight, the loss to the lessor small, and when not to grant relief would result in such hardship . . . as to make it unconscionable to enforce literally the condition precedent . . . ."); *see also Hideaway*, 386 N.W.2d at 824.

[156] *Compare Naftalin v. John Wood Co., 263 Minn. 135, 147–48,* 116 N.W.2d 91, 100 (1962) ("Whenever reasonably possible, a construction against a forfeiture will be adopted. To this end, a contract will be construed not to provide for a forfeiture *unless there is a clear expression or manifestation of the intent of the parties in this respect*; and, where the contract does so provide, the provision will be strictly construed.") (emphasis added), *and id.* at 148 ("One claiming forfeiture carries a heavy burden of establishing his right thereto by clear and unmistakable proof."), *with* Harris v. Bolin, 310 Minn. 391, 393, 247 N.W.2d 600, 602 (1976) ("[F]orfeitures under covenants against competition are not favored and those claiming them must show that the equities are on their side.").

[157] *See supra* Part III.

> giving Territory Manager written notice of such termination.[158]

The district court utilized Section III and the second unnumbered section in Paragraph 11 as a basis to forfeit Capistrant's retirement funds, arguing that Lifetouch clearly intended this forfeiture and Capistrant accepted it as evinced by his signature.[159] As such, because Capistrant signed the employment agreement and sought his retirement funds, he "should have been aware of the provisions of the agreement at issue."[160] Most notably, the district court states that "[e]quity cannot rescue Plaintiff from his contractual obligations."[161]

The appellate court rightfully rejected this argument based on Lifetouch's inability to provide "clear and unmistakable proof" of Lifetouch's intent to forfeit.[162] As noted in Section III, the contract required Capistrant to perform all obligations under the Agreement for six years before the end of the contract;[163] Paragraph 11 enumerated those obligations.[164] However, the immediate return-of-property clause noted within the noncompete provisions is listed after the forfeiture clause, which is roped into the period when Capistrant was entitled to receive his Residual Commission.[165] Meanwhile, the language in Section III requires Capistrant to perform his obligations for six years prior to the end of his employment, during which he would be receiving his retirement funds.[166] Thus, the appellate court associates the ongoing obligations listed in clauses A through C under Paragraph 11 with the forfeiture clause in Section III.[167] The appellate court concluded Capistrant could not comply with a return-of-property clause for the prior six years or for the six years when he was

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[158] Capistrant v. Lifetouch Nat'l Sch. Studios, Inc., No. 27-CV-14-17918, 2016 WL 3197527, at *3 (Dist. Ct. Minn. May 12, 2016).

[159] *See id.*

[160] *Id.* at *7.

[161] *Compare id.*, *with id.* at n.5 ("Plaintiff argues that there is no evidence that he used, or intended to use, Defendant's property for personal gain. Accordingly, the argument goes, there is no harm to Defendant. Although the Court is not unmindful of the drastic consequences of what may be oversight rather than villainy, Plaintiff's equitable argument fails in the face of the specific contract language.").

[162] Capistrant v. Lifetouch Nat'l Sch. Studios, Inc., 899 N.W.2d 844, 854 (Minn. Ct. App. 2017) (referencing the standard of proof under *Naftalin v. John Wood Co., 263 Minn. 135, 147–48,* 116 N.W.2d 91, 100 (1962)).

[163] *See Capistrant*, 2016 WL 3197527, at *3.

[164] *See* Trollen v. City of Wabasha, 287 N.W.2d 645, 648 (Minn. 1979). (A) disclosing trade secrets; (B) soliciting schools contracted with Lifetouch; or (C) soliciting Lifetouch employees. *Id.*

[165] *Compare id., and Capistrant*, 899 N.W.2d at 856, *with Capistrant*, 2016 WL 3197527, at *3.

[166] *See Capistrant*, 2016 WL 3197527, at *3.

[167] *Capistrant*, 899 N.W.2d at 855.

expected to receive his residual commission because returning property is a one-time-event.[168] Meaning, Lifetouch failed to present clear and unmistakable proof that it intended to forfeit Capistrant's retirement funds via the court's own reasonable interpretation. Thus, based on Minnesota precedent,[169] the Minnesota Supreme Court should have affirmed this determination as a matter of law.

4. Immateriality of Condition Precedent

Finally, the Minnesota Supreme Court may overrule forfeitures in circumstances whereby the violation of an express condition does not constitute a material breach.[170] Here, the forfeiture clause in Section III allowed Lifetouch to terminate its obligation to pay Capistrant's retirement funds if Capistrant "breach[ed]" Paragraph 11.[171] Applying *BOB Acres*, the appellate court determined that "[t]he use of the word 'breach' does not evince an intent of the parties to form a strict forfeiture clause, because even when express conditions of a contract are violated, the breach is not necessarily material."[172] Instead, a material breach must occur before non-performance is waived.[173]

Under this strict contractual interpretation, a material *breach* is necessary to violate Paragraph 11, not a failure to fulfill the return-of-property clause condition precedent.[174] Lifetouch did not offer any evidence or persuasive argument[175] to support the conclusion that the immediate return of Lifetouch's property was material, especially because Capistrant would not receive his first Residual Commission payment until one year after his retirement.[176] Moreover, the district court made no finding that

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[168] *Id.*

[169] *See* Chambers v. Nw. Mut. Life Ins. Co., 64 Minn. 495, 498, 67 N.W. 367, 368 (1896).

[170] *See* BOB Acres, LLC v. Schumacher Farms, LLC, 797 N.W.2d 723, 728–29 (Minn. Ct. App. 2011) (referencing Boatwright Constr., Inc. v. Kemrich Knolls, 306 Minn. 519, 520–21, 238 N.W.2d 606, 607 (1976)).

[171] *Capistrant*, 899 N.W.2d at 855.

[172] *Id.*

[173] *See id.* (citing Heyn v. Braun, 239 Minn. 496, 501, 59 N.W.2d 326, 330 (1953).

[174] Capistrant v. Lifetouch Nat'l Sch. Studios, Inc., 916 N.W.2d 23, 31 (Minn. 2018).

[175] Lifetouch cites *St. Louis Produce Market v. Hughes*, 735 F.3d 829 (8th Cir. 2013) in its argument at the district court level. Capistrant v. Lifetouch Nat'l Sch. Studios, Inc., No. 27-CV-14-17918, 2016 WL 3197527, at *6 (Dist. Ct. Minn. May 12, 2016). While *Hughes* also involves a condition precedent that arose at the end of the parties' employment relationship, *Hughes* applies Missouri law and does not address the key issue at hand. *See Capistrant*, 916 N.W.2d at 30. As noted by the Minnesota Supreme Court in reference to its *Capistrant* opinion, "the case is not helpful here" because the return-of-property clause was a "one-time event" that Lifetouch relied on to forfeit Capistrant's entire residual commission that would have been paid following Capistrant's employment. *Id.* However, the return-of-property clause in *Hughes* was closely tied to the company's performance. *Id.*

[176] *See* Brief & Addendum of Appellant Capistrant, *supra* note 140, at *31–32.

"time was of the essence"[177] or material to the agreed-upon exchange.[178] The court only found that the immediate return-of-property clause was a condition precedent.[179] Therefore, the unfulfilled condition precedent was immaterial to the contract,[180] and the forfeiture should not have been issued per Minnesota case law.[181]

In summary, a forfeiture is disproportionate under Minnesota case law if: (1) there is excusable delay fulfilling the condition precedent because the delay does not cause the obligor harm; (2) the other provisions in the noncompete agreement adequately protected the obligor; (3) the contract's language does not provide clear and unmistakable proof of the obligor's intent to forfeit; or (4) an unfulfilled condition precedent is immaterial to the contract.[182] Thus, consistent with Minnesota's aversion to forfeitures, Capistrant's Residual Commission should not have been subject to forfeiture. Instead, the Minnesota Supreme Court should have utilized the facts on the record in combination with the appellate court's analysis to affirm in Capistrant's favor.

B. Alternatively, enforcing the drafting considerations for restrictive covenants not to compete under the Bennett test could have secured Capistrant his retirement funds.

The Minnesota Court of Appeals considered whether Capistrant could recover if the forfeiture clause within the employment contract functioned as a restrictive covenant not to compete in violation of the *Bennett* test.[183] Applying *Harris* by example, the appellate court reasoned that the noncompete agreement was unenforceable because the forfeiture clause allowed complete forfeiture on the basis of "de minimis harm to Lifetouch" even though Lifetouch was "adequately protected under other provisions in the contract."[184] The Minnesota Supreme Court rejected this

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[177] *See* Beeler v. Katz Enterprises (Minnesota), Inc., No. C9-00-1684, 2001 WL 410342, at *2 (Minn. Ct. App. Apr. 24, 2001) (informing that a breach can be established if time is a material element of the contract).

[178] *Capistrant*, 2016 WL 3197527, at *2.

[179] *Id.* at *7.

[180] Capistrant v. Lifetouch Nat'l Sch. Studios, Inc., 899 N.W.2d 844, 856–57 (Minn. Ct. App. 2017). When addressing this materiality analysis and relevant case law, the appellate court applies Restatement Section 229, noting that its application, while not adopted by the Minnesota Supreme Court, was used in an Eighth Circuit opinion and is persuasive here. Id. at n.5.

[181] *See* BOB Acres, LLC v. Schumacher Farms, LLC, 797 N.W.2d 723, 728–29 (Minn. Ct. App. 2011) (referencing Boatwright Constr., Inc. v. Kemrich Knolls, 306 Minn. 519, 520–21, 238 N.W.2d 606, 607 (1976)).

[182] *See Capistrant*, 899 N.W.2d at 857.

[183] *See id.* at 858–59.

[184] *Id.*

determination and distinguished *Harris* from *Capistrant*.[185] The court held that, while Capistrant was prohibited from soliciting Lifetouch's customers or employees during the six years he would be receiving his Residual Commission, Capistrant's Agreement was limited in duration and did not restrict his ability to work elsewhere or for a competitor.[186] Thus, based on *Harris*, the court did not consider the Agreement overbroad.[187] However, both courts failed to appropriately apply the *Bennett* test because they solely considered *Harris*, thereby construing the *Bennett* test as a five-part conjunctive rule as opposed to a two-part conjunctive rule with three considerations.

> The test applied is whether or not the restraint is necessary for the protection of the business or good will of the employer, and if so, whether the stipulation has imposed upon the employee any greater restraint than is reasonably necessary to protect the employer's business, *regard being had to* the nature and character of the employment, the time for which the restriction is imposed, and the territorial extent of the locality to which the prohibition extends.[188]

As noted above, a noncompete agreement, pursuant to the *Bennett* test, is enforced only when the restraint is necessary to protect the employer's business or good will, *and* the agreement does not impose a greater restraint than reasonably necessary on the employee to protect the employer's business.[189] The second half of the rule is not contingent on the remaining factors but merely looks to those factors in considering (a) the nature and character of the employment; (b) the duration of the noncompete; and (c) the geographical scope of the noncompete.[190] Considering the facts in the light most favorable to Capistrant, the noncompete provision imposed greater restraint on Capistrant than reasonably necessary to protect Lifetouch's business interests.[191] Likewise, Minnesota courts also consider the subjective motivation of an employer when weighing the relevant *Bennett* factors, which also weigh in Capistrant's favor.[192]

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[185] Capistrant v. Lifetouch Nat'l Sch. Studios, Inc., 916 N.W.2d 23, 31 n.5 (Minn. 2018).
[186] *Id.*
[187] *Id.*
[188] Bennett v. Storz Broad. Co., 270 Minn. 525, 534, 134 N.W.2d 892, 899 (1965) (emphasis added).
[189] Mick & Markison, *supra* note 41, at 2–3.
[190] *Id.* (summarizing the remainder of the *Bennett* test).
[191] *See id.*; *see also* Capistrant v. Lifetouch Nat'l Sch. Studios, Inc., 899 N.W.2d 844, 858–59 (Minn. Ct. App. 2017).
[192] *See, e.g.*, Wells Fargo Ins. Servs. USA, Inc. v. Kyle King & Sherman Ins. Agency, Inc., No. 15-CV-4378, 2016 WL 6892108, at *1 (D. Minn. July 29, 2016); *see also infra* Section IV.B.3.

1. Protection of the Business or Good Will of the Employer

Lifetouch satisfies the first part of the *Bennett* test. As an extension of the first element, courts enforce restrictive covenants to the extent necessary to protect "legitimate business interests."[193] Legitimate business interests include a company's good will, trade secrets, and confidential information.[194] As stated in Lifetouch's noncompete provision in Paragraph 11 subsection A, Capistrant was prohibited from disseminating Lifetouch's trade secrets and confidential information.[195] This would also include the immediate return-of-property clause noted in the second unnumbered section in Paragraph 11 because it relates to subsection A. Likewise, it is undisputed that the information Capistrant retained would be valuable to Lifetouch's competitors and cause significant harm if disclosed.[196] Assuming that subparts B and C fall under this same reasoning, the court should have considered the first element met and continued to the second part of the *Bennett* test.

2. No Greater Restraint than Reasonably Necessary

Lifetouch does not satisfy the *Bennett* test's second element because it restrained Capistrant more than reasonably necessary. Furthermore, each court failed to consider how the noncompete provision, as a whole, restrained trade more than reasonably necessary. Like *Bennett*, Lifetouch crafted a noncompete clause that limited Capistrant's right to work and earn a living,[197] given the nature and character of employment, duration of the noncompete, and the noncompete's geographic scope.

a. Nature & Character of Employment

The Minnesota Supreme Court held that former employees forfeit their benefits when they directly compete with their former employers.[198] Capistrant's nature and character of employment are distinguished from Minnesota precedent. Capistrant is a Territory Manager, meaning he is both a photographer and sales representative for specified territories, and privy

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[193] Medtronic, Inc. v. Advanced Bionics Corp., 630 N.W.2d 438, 456 (Minn. Ct. App. 2001) (citing Webb Publ'g Co. v. Fosshage, 426 N.W.2d 445, 450 (Minn. Ct. App. 1988)).
[194] *Id.* (citing Roth v. Gamble-Skogmo, Inc., 532 F. Supp. 1029, 1031 (D. Minn. 1982)).
[195] Capistrant v. Lifetouch Nat'l Sch. Studios, Inc., No. 27-CV-14-17918, 2016 WL 3197527, at *2 (Dist. Ct. Minn. May 12, 2016).
[196] *See* Respondent's Brief at 30, Capistrant v. Lifetouch Nat'l Sch. Studios, Inc., 899 N.W.2d 844 (Minn. Ct. App. 2017) (No. A16-1829), 2017 WL 2131975, at *30.
[197] *See* Bennett v. Storz Broad. Co., 270 Minn. 525, 533, 134 N.W.2d 892, 898 (1965).
[198] *See, e.g.*, Walker Emp. Servs., Inc. v. Pankhurst, 300 Minn. 264, 219 N.W.2d 437 (Minn. 1974); Lapidus v. Lurie LLP, A17-1656, 2018 WL 3014698 (Minn. Ct. App. June 18, 2018).

to confidential information.[199] Further, Capistrant's employment ended because he retired, not because he chose to work for a competing business.[200] Also, in consideration of Capistrant's agreement not to compete with Lifetouch, Lifetouch agreed to compensate Capistrant $2.6 million in six annual installments.[201] As such, Capistrant was expected not to use the confidential information he was privy to or else forfeit these funds. Capistrant never disclosed Lifetouch's confidential information.[202] There is also no evidence Capistrant retained a subsequent job, let alone a job for a competing company.[203] Thus, these payments should have vested to afford Capistrant the ability to earn a living through his retired life without needing to seek other employment.

b. Duration of the Non-Compete

Minnesota courts consider the duration of noncompetes within this analysis and come to various determinations based on the amount of funds at stake.[204] In comparison, had the *Capistrant* Agreement required *only* six-year compliance not to compete in return for $2.6 million, it would have satisfied the duration consideration. However, this court has never opined on a noncompete clause contingent on years of prior and post compliance that terminates upon a one-time event: the "immediate" return of company property. While each court agreed that immediacy is unambiguous,[205] the court of appeals ruled immediacy was immaterial while the supreme court viewed materiality itself as susceptible to conflicting inferences.[206] Thus, there is no consensus regarding immediacy as it pertains to the duration of the noncompete. As demonstrated by this lack of case law and conflicting inferences, the duration of the noncompete is too broad to be upheld.

c. Geographical Scope

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[199] *Capistrant*, 2016 WL 3197527, at *1.
[200] *See id.* at *1, *4.
[201] *See id.* at *3.
[202] *See* Capistrant v. Lifetouch Nat'l Sch. Studios, 899 N.W.2d 844, 850, 859 (Minn. Ct. App. 2017).
[203] *See id.*
[204] *See, e.g.*, Roth v. Gamble-Skogmo, Inc., 532 F. Supp. 1029, 1032 (D. Minn. 1982); Lapidus v. Lurie LLP, No. A17-1656, 2018 WL 3014698, at *9 (Minn. Ct. App. June 18, 2018).
[205] Compare Capistrant v. Lifetouch Nat'l Sch. Studios, Inc., 916 N.W.2d 23, 31 n.2 (Minn. 2018) (agreeing with the court of appeals that a three-month delay cannot constitute as an immediate return of property), with Capistrant, 899 N.W.2d at 851 ("'Immediately' is an unambiguous term.").
[206] *Capistrant*, 916 N.W.2d at 30–31.

Historically, Minnesota courts uphold noncompetes when the geographical scope is limited to a reasonable mile radius unless such restriction requires the former employee to accept a substantial salary decrease or move to another community to find work.[207] While no geographical scope is explicitly stated in the *Capistrant* Agreement, it implies a broad and encompassing restriction. As noted in Paragraph 11 subsection B, Capistrant is prohibited from directly or indirectly "soliciting" or "dealing with" any school associated with Lifetouch or any of its customers or affiliates.[208]

Lifetouch has been the professional photography company of choice for schools and families for over eighty years.[209] While Lifetouch's headquarters are in Eden Prairie, Minnesota, "the enterprise is organized around four primary business lines operating . . . across North America."[210] It is also an affiliate of Shutterfly, Inc.—a leading online photo retailer and manufacturer of high-quality personalized products, providing its services in North America, Canada, and internationally.[211] Due to Lifetouch's expansive reach through its own means and through Shutterfly's affiliation, Capistrant is virtually prevented from exercising his expertise anywhere.

Furthermore, based on Capistrant's education and experience, he would likely need to accept a substantial salary decrease or move to another community to find work, contrary to the *Bennett* standard.[212] For instance, in 1980, Capistrant graduated from St. Thomas University with a marketing degree.[213] Upon graduation, he immediately went to work for Lifetouch as a photographer and sales representative in California, spending his entire working career (nearly 30 years) at the company.[214] He first assumed the San

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[207] *Compare, e.g.*, Bennett v. Storz Broad. Co., 270 Minn. 525, 536, 134 N.W.2d 892, 900 (1965) (finding the noncompete unreasonable because prohibiting the former employee from accepting any related employment within a thirty-five-mile radius would result in needing to accept a substantial salary decrease or move to another community to find work), *with* Walker Emp. Servs., Inc. v. Pankhurst, 300 Minn. 264, 272–73, 219 N.W.2d 437, 441–42 (1974) (limiting noncompetition to Hennepin County was enforceable), *and Lapidus*, 2018 WL 3014698, at *7 (holding that fifty miles is a reasonable geographical limitation to not compete).

[208] Capistrant v. Lifetouch Nat'l Sch. Studios, Inc., No. 27-CV-14-17918, 2016 WL 3197527, at *2 (Dist. Ct. Minn. May 12, 2016).

[209] *Who we are*, LIFETOUCH (2018), https://lifetouch.com/professional-photography-company/ [https://perma.cc/MMP5-NGEH].

[210] *Id.*

[211] *See id.*; *see also Shutterfly Inc. Closes Transformational Acquisition of Lifetouch*, SHUTTERFLY INC.: PRESS RELEASES (Apr. 2, 2018), https://www.shutterflyinc.com/shutterfly-inc-closes-transformational-acquisition-of-lifetouch/ [https://perma.cc/KF3W-ST5C] (acquiring Lifetouch in January 2018).

[212] *See Bennett*, 134 N.W.2d at 899.

[213] *See* Brief & Addendum of Appellant Capistrant, *supra* note 140, at *3.

[214] *Id.* at *3–4.

Francisco Bay Territory ("SF Territory") and many others throughout his employment.[215] Notably, Capistrant transformed the SF Territory into one of the top performing territories in the entire nation. He won "Territory of the Year" awards on several occasions, including in 2001 when he "was the highest-ranked territory manager company-wide, and one of only two territory managers who delivered more than 15% growth and market share in his territory."[216] Under Paragraph 11 subsection B, Capistrant cannot exercise this level of expertise where he resides.[217] Meaning, Capistrant would likely need to move residences or assume a substantial salary decrease to work in a field he is not familiar with due to Lifetouch's noncompete clause. Thus, this noncompete clause is geographically broad and must be struck down under the *Bennett* test.

3. Employer's Subjective Motivations

Moreover, when applying the *Bennett* test, Minnesota does not enforce noncompete clauses on the subjective motivation of the employer.[218] Based on *Capistrant's* procedural posture, Lifetouch attempted to construe its immediate return-of-property clause as a final effort to rescind Capistrant's retirement funds, thereby accomplishing its subjective motivation to forfeit because of Capistrant's conduct while employed. For instance, Capistrant initially filed a declaratory judgment action against Lifetouch to collect his contractually promised Residual Commission.[219] Lifetouch's Answer and Counter Claim generally denied Capistrant's allegations and countered that any territories assigned to Capistrant via Lifetouch's efforts were not subject to Residual Commission and that Capistrant communicated with prohibited parties when employed.[220] However, during the discovery process, Lifetouch amended its Counter

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[215] *Id.* at *4 (SF Territory); *id.* at *9 (remaining territories: CB Territory, KP Territory, Jake Barker's Portrait World, W.C. Thompson, and Arabesque).

[216] *Id.* at *4.

[217] Capistrant v. Lifetouch Nat'l Sch. Studios, Inc., No. 27-CV-14-17918, 2016 WL 3197527, at *2 (Dist. Ct. Minn. May 12, 2016).

[218] *See, e.g.*, Wells Fargo Ins. Servs. USA, Inc. v. Kyle King & Sherman Ins. Agency, Inc., No. 15-CV-4378, 2016 WL 6892108, at *1 (D. Minn. July 29, 2016).

[219] Complaint at 1, Capistrant v. Lifetouch Nat'l Sch. Studios, Inc., No. 27-CV-14-17918, 2016 WL 3197527 (Dist. Ct. Minn. May 12, 2016) (27-CV-14-17918), 2014 WL 12784904, at *1. Per the Territory Manager Agreement, Section III: "Lifetouch shall pay to Territory Manager a Residual Commission equal to 30% of the Net Sales Receipts in the Territory during *the last fiscal year* before the end of the term . . . ." *Id.* at ¶ 9 (emphasis added). However, Lifetouch agreed to pay Capistrant commission including territories that were assigned to Capistrant at the *start* of his employment. *Id.* at ¶ 13 (emphasis in the original).

[220] Defendant's Answer & Amended Counterclaim, Capistrant v. Lifetouch Nat'l Sch. Studios, Inc., No. 27-CV-14-17918, 2016 WL 3197527 (Dist. Ct. Minn. May 12, 2016) (No. 27-CV-14-17918), 2015 WL 13670157.

Claim and moved to forfeit Capistrant's entire Residual Commission upon Capistrant's failure to return Lifetouch's property immediately.[221] This indicates Lifetouch's subjective motivations, which the court should have considered further when weighing appropriate restraints.

In summary, had the court enforced the *Bennett* test's drafting considerations for restrictive covenants not to compete, Capistrant could have secured his retirement funds. While this analysis concedes that Lifetouch's general restraint on disclosing confidential information is necessary, the Agreement imposes greater restraints than reasonably necessary as detailed under the relevant considerations. First, the nature and scope of Capistrant's employment agreement, while not overtly broad, was unnecessary because Capistrant (1) did not compete or intend to compete with Lifetouch, and (2) Capistrant was retiring, not terminating his employment with the intention to work for another employer. Second, the duration of the noncompete was inherently broad because it was contingent on an immediate return-of property clause subject to conflicting inferences, meaning that a set timeframe could not be established. Thirdly, the geographical scope of the noncompete was overly broad because Capistrant would likely need to move residences or assume a substantial salary decrease in a field he is not as familiar with per Paragraph 11 subsection B. Finally, when considering the procedural posture of the *Capistrant* matter, there appears to be subjective motivation on Lifetouch's part to forfeit Capistrant's retirement funds. As such, the Minnesota Supreme Court could have utilized the *Bennett* test to secure Capistrant's Residual Commission, irrespective of the Restatement.

C. Section 229 of the Restatement (Second) of Contracts creates an avenue for corporate employees to retain post-employment benefits in future forfeiture actions.

As demonstrated, the *Capistrant* matter could have been resolved irrespective of Restatement Section 229.[222] However, the district court abandoned Minnesota's precedential reluctance toward forfeitures.[223] Likewise, the Minnesota Supreme Court reversed the appellate court's holding, finding that the Restatement could not excuse Capistrant's failure

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[221] *See id.* at ¶ 58, ¶ 62.

[222] *See supra* Sections IV.A–B.

[223] *See* Brief & Addendum of Appellant Capistrant, *supra* note 140, at *37–38 (referencing secondary case law that the district court utilized in place of Minnesota case law); *see also, e.g.*, St. Louis Produce Mkt. v. Hughes, 735 F.3d 829 (8th Cir. 2013) (applying Missouri law); AIG Centennial Ins. Co. v. Fraley-Landers, 450 F.3d 761 (8th Cir. 2006) (arguing for compliance with Arkansas law).

to comply with the condition precedent as a matter of law.[224] Thus, to appease both precedent and procedural validity, the Minnesota Supreme Court adopted Restatement Section 229 to prevent disproportionate forfeitures here and in future actions.[225]

The court applied the Restatement to the *Capistrant* matter as follows: "[I]f the occurrence of the condition is a material part of the agreement, then the proportionately analysis is not applied, and the forfeiture cannot be prevented. But if the condition is not material, then the court is to engage in the proportionality analysis."[226] Thus, the primary issue on appeal is the materiality of the immediate return-of-property clause because the proportionality analysis is already in Capistrant's favor.[227]

Moreover, by adopting the Restatement, *enXco Development Corp. v. Northern States Power Co.* becomes especially persuasive.[228] This case narrows Restatement Section 229 by assessing circumstances whereby the non-occurrence of a condition precedent may result in forfeiture. As such, forfeitures may be contingent on: (1) whether the breaching party

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[224] *Compare* Crossroads Church v. Cnty. of Dakota, 800 N.W.2d 608, 615 (Minn. 2011) (affirming summary judgment because the condition precedent—meeting the statutory deadline—was unfulfilled when the contract ended), *with* Capistrant v. Lifetouch Nat'l Sch. Studios, Inc., 916 N.W.2d 23, 30–31 (Minn. 2018) (reversing summary judgment because the condition precedent imposed ongoing obligations even after the contract ended).

[225] *See Capistrant*, 916 N.W.2d at 29. "If the district court determines that the immediate return of property under the contract was not material, the district court then must turn to the proportionality prong of section 229 to determine if the fioriture was disproportionate." *Id.* However, note that the Supreme Court is only applying this standard to employment contracts resulting in disproportionate forfeiture, not for all purposes. *Id.* at 28 n.3.

[226] *See id.* at 29 (summarizing RESTATEMENT (SECOND) OF CONTRACTS § 229 cmts. a–c (AM. L. INST. 1981)); Varel v. Banc One Capital Partners, Inc., 55 F.3d 1016, 1018 (5th Cir. 1995) ("[D]iscussing how courts applying the Restatement must examine 'whether performing the condition precedent was the object of the contract or merely incidental to it' and then weigh whether the penalty is extreme when 'measured against the purpose' of the condition."); *see also* Brent A. Olson, MINNESOTA PRACTICE SERIES: BUSINESS LAW DESKBOOK, FORMATION AND OPERATIONS OF BUSINESS § 7:110 (Nov. 2020 ed.) (citing the adopted Restatement in Minnesota).

[227] *See Capistrant*, 916 N.W.2d at 31 (reversing the proportionality prong of the appellate court's decision because the court remanded the materiality issue and "the proportionality prong is reached only after there is a conclusion on the materiality prong."). *But see* Capistrant v. Lifetouch Nat'l Sch. Studios, Inc., 899 N.W.2d 844, 856 (Minn. Ct. App. 2017) (reaching the proportionality prong because Capistrant is forfeiting $2.6 million in Residual Commission when Lifetouch is protected under Paragraph 11, Clause A, with or without the immediate return-of-property clause). *See also supra* Section IV.A.4 (analyzing the immateriality of the condition precedent).

[228] enXco Dev. Corp. v. Northern States Power Co., 785 F.3d 940, 946 (8th Cir. 2014) ("Assuming, without deciding, that Minnesota courts would apply the doctrine of disproportionate forfeiture to the non-occurrence of conditions precedent . . . ."); *Capistrant*, 889 N.W.2d at 860 n.5 (discussing the persuasive nature of the *enXco* decision).

maintains ownership of the assets comprising the contract;[229] or (2) whether sophisticated parties are represented by counsel during contract negotiations.[230]

Here, Capistrant failed to fulfill the condition precedent: the immediate return-of-property clause.[231] Nevertheless, "[a] court need not excuse entirely the non-occurrence of the condition, but may merely excuse its non-occurrence *during the period of time in which it would otherwise have to occur* . . . if it concludes that *the time of its occurrence is not a material part of the agreed exchang*e."[232] Illustrating this comment, Capistrant lacked the intent to disseminate the property at issue by immediately returning it upon Lifetouch's request.[233] Thus, "immediacy" was not material to the Agreement, so Capistrant did not *maintain* that property under the first *enXco* standard.[234] Instead, Lifetouch retained all the Residual Commission Capistrant would have assumed.[235] Conceding that Capistrant's duties and Residual Commission are material to the Agreement,[236] Lifetouch *maintained ownership of all assets comprising the contract* by forfeiting Capistrant's Residual Commission.[237] Next, Lifetouch is a sophisticated entity whose corporate counsel drafted the Agreement.[238] Meanwhile, Capistrant did not have representation in 1986 when he signed the Agreement, so forfeiture must be excused under the second *enXco* standard.[239]

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[229] *enXco Dev. Corp.*, 785 F.3d at 947 (emphasizing Klipsch, Inc. v. WWR Tech., Inc., 127 F.3d 729, 738 (8th Cir. 1997)).

[230] *Id.* (referencing Metro. Sports Facilities Comm'n v. Gen. Mills, Inc., 470 N.W.2d 118, 125 (Minn. 1991)).

[231] *Capistrant*, 916 N.W.2d at 26.

[232] RESTATEMENT (SECOND) OF CONTRACTS § 229 cmt. c. (AM. L. INST. 1981) (emphasis added).

[233] Once Lifetouch learned Capistrant still had company documents, Lifetouch requested their return and Capistrant returned everything requested, sincerely believing he did so. *See* Brief & Addendum of Appellant Capistrant, *supra* note 140, at *17. Thereafter, Lifetouch acquired no evidence that Capistrant shared these documents with third parties or competitors. *Id.* at *20.

[234] *See enXco Dev. Corp.*, 785 F.3d at 947.

[235] Capistrant v. Lifetouch Nat'l Sch. Studios, Inc., No. 27-CV-14-17918, 2016 WL 3197527, at *8 (Dist. Ct. Minn. May 12, 2016) (emphasis added) (entitling Lifetouch to terminate its obligation to make *any* payment of Residual Commission).

[236] *See* Respondent's Brief, *supra* note 196, at *5 ("To reward Capistrant for helping to grow Lifetouch's business and to ensure that he helped transition that business when he left, Lifetouch also agreed to pay Capistrant a smaller amount of money in the form of a 'Residual Commission.'").

[237] *See* Defendant's Answer and Amended Counterclaim, *supra* note 220.

[238] *See* Brief & Addendum of Appellant Capistrant, *supra* note 140, at *4 ("The 1986 Agreement was drafted by Lifetouch.").

[239] *See* Defendant's Answer and Amended Counterclaim, *supra* note 220.

Capistrant must succeed under the doctrine of disproportionate forfeiture per the *enXco* standard, constructively adopted via Restatement Section 229. In the same token, *Capistrant* affirms *enXco* by protecting an employee's ability to maintain commissions from corporate entities absent: (1) a material breach that the contract is crafted to protect the employer against; or (2) when independent counsel executes initial agreements on behalf of each party.[240] Overall, both create an avenue for employees to recover in future forfeiture actions against their corporate employers. Thus, this analysis must concede that the Minnesota Supreme Court reached an appropriate resolution in the *Capistrant* matter because Capistrant and those similarly situated are more likely to recover under this implemented standard.

V. CONCLUSION

Capistrant presented the court with an employment contract issue of first impression: whether it should enforce an immediate return-of-property clause functioning as a forfeiture clause in a noncompete agreement.[241] The court determined it must adopt Restatement Section 229 to afford employees an adequate remedy when the non-occurrence of an immaterial condition precedent noted within an employment contract would result in a disproportionate forfeiture.[242] In sum, the court could have affirmed the appellate court's holding in favor of Capistrant, given Minnesota's reluctance to forfeitures, irrespective of Restatement Section 229. However, adopting this Restatement creates an avenue for employees to retain an appropriate remedy in future forfeiture actions against their former corporate employers. Thus, the Minnesota Supreme Court's ruling is beneficial to Capistrant and the working community at large, despite there not being a sound resolution at bar.

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[240] *Compare* enXco Dev. Corp. v. Northern States Power Co., 785 F.3d 940, 947 (8th Cir. 2014), *and* Klipsch, Inc. v. WWR Tech., Inc., 127 F.3d 729, 737 (8th Cir. 1997), *and* Metro. Sports Facilities Comm'n v. Gen. Mills, Inc., 470 N.W.2d 118, 125 (Minn. 1991), *with* RESTATEMENT (SECOND) OF CONTRACTS § 229 cmt. c (AM. L. INST. 1981).

[241] Capistrant v. Lifetouch Nat'l Sch. Studios, Inc., 916 N.W.2d 23, 27 (Minn. 2018).

[242] *Id.* at 31.

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