

## Material Breach:

In contract law, a "material" breach of contract is a breach (a failure to perform the contract) that strikes so deeply at the heart of the contract that it renders the agreement "irreparably broken" and defeats the purpose of making the contract in the first place. The breach must go to the very root of the agreement between the parties. If there is a material breach (sometimes referred to as a "total" breach), the other party can simply end the agreement and go to court to try to collect damages caused by the breach.

In deciding whether a breach is material, courts often look to guidance from a legal guide known as the Restatement (Second) of Contracts, as well as to other court decisions that arose from contract disputes. Generally, the factors discussed below are relevant to determining whether a breach of contract was a material breach.

Is The Other Party Deprived of "The Heart" of What It Bargained for?

For example, if the BMW dealer promised you a radio and fancy hubcaps, but the car that was delivered lacked both, that would probably not deprive you of the true purpose of your deal--the car--and would be less likely to be a material breach. You wouldn't be able to end the contract (though you could demand the dealer remedy the situation in some way). On the other hand, if a used-car dealer promised you the actual Ford Mustang driven by Steve McQueen in the movie, "Bullitt", then presented you with a different Mustang, that would be a material breach. In this instance, your bargain wasn't about the make and model of the car; it was about one particular vehicle driven in the movie.

Can the Other Party Be Compensated for The Loss?

Will money solve the problem and, if so, how much? If it's something that can be fixed with reasonable effort or expense, while keeping the contract in effect, it's less likely to be material. Consider the hubcap-free, radio-less BMW, mentioned above. Because the dealer could easily fix the problem by installing the promised features, this probably isn't a material breach of the contract, and you wouldn't be able to cancel the contract.

What Will the Breaching Party Lose (or Forfeit)?

How much has the breaching party already done to fulfill its end of the deal? This factor often hinges on timing: how far along the parties are in carrying out their contractual obligations when the breach of contract occurs. Consider a homeowner who hires a contractor to create a custom kitchen. If the homeowner declares a breach of contract when the kitchen is near completion, the contractor will lose much more in time and money than if the breach of contract was declared before construction began. If most of the contractual obligations have been completed, you will be less likely to be able to say that a breach of contract is material and thus be able to cancel the contract.

What Are the Chances That the Breaching Party Will Fix Things?

The more likely it is that the breaching party can and will fix the problem, the less likely the breach of contract is material. If the other party shows that problems are likely to be solved; for instance, it provides security for its promised payment, or some other reasonable assurance that it will honor the deal, or if the economy or market shifts in favor of performance, then the breach of contract is less likely

to be material. On the other hand, signs of financial weakness or defaults on payments show that the problems are less likely to be corrected (and make it more likely that you could rely on a material breach of contract to cancel the contract).

### Did the Breaching Party Act in Bad Faith?

If the breach of contract was willful or resulted from bad faith or unfair dealing and the case is brought to court, the court is more likely to presume a material breach of contract. For example, one court found that an executive who was insubordinate and refused to follow directions had materially breached his employment agreement. On the other hand, a breach that results from simple carelessness ("negligence") or circumstances beyond the party's control is less likely to be considered a material breach of contract.

### Is the Non-Breaching Party "Ready, Willing, and Able" to Perform?

It's not enough to simply claim that the other party committed a material breach of contract. The non-breaching party must also be "ready, willing, and able" to perform its obligations under the contract, if it hasn't performed them already. In one case, for example, a New York man contracted to buy a vacation house "as is" for \$610,000. When the sellers refused to go through with the deal, the buyer claimed breach of contract and sued. The buyer lost because he could not show he was "ready, willing and able" to perform the contract, because he wanted substantial improvements to the heating and plumbing systems. In other words, he was not willing to take the house "as is."

### What Does the Contract Say?

Some contracts provide guidance as to what constitutes a material breach of contract. Rather than rely on a judge's discretion or interpretation of the law should a dispute arise, the parties can include a clause in the contract stating that a breach of certain provisions of the contract will be considered material breaches. For example, a clause may state that certain activities -- a failure to make payments, a failure to maintain insurance, or a failure to achieve certain sales goals -- will be considered material breaches of the contract. Because delays in performance and payment are not always considered material breaches, some contracts add a statement to the contract that "time is of the essence," which means that these types of delays will be considered material breaches of the contract.