# Understanding 'material breach'

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**What does "material breach" mean? I'd like to give the layperson a working knowledge of this legal concept within the context of a soft economy.**

## Whether a breach is "material" is for a judge or jury to decide.

***Hypothetical:*** Assume you're the landlord of a retail development that contains common areas, the maintenance costs of which are spread proportionately among your tenants. Your oldest lease contains language that "tenant shall reimburse landlord for its proportionate share of the common area maintenance expenses by April 1 of each year." The last page of this lease contains a provision, which says that "time is of the essence with regard to the terms and provisions contained herein."

Currently, you're eight years into the initial 10-year lease term and, up until this recent credit crunch, tenant has made all lease-related payments on time. However, on this particular April 1, you didn't receive reimbursement.

On April 9, you receive a letter (and a phone call) from your tenant to the effect that their cash flow is tight, but they promise to pay in three weeks. You explain that if you don't get reimbursement in three weeks, you'll have to terminate the lease. Your tenant repeats the promise and follows up with a letter to that effect, which you receive two days later.

On April 27 (still within the three-week period), you send a letter to tenant that you are canceling the lease and entering into a new one with a new tenant. Why? Payment is almost a month overdue and, for whatever reason, you don't believe tenant will pay.

***Question:*** Can you declare tenant to be in material breach of the lease, terminate the lease and enter into a new lease?

***Discussion:*** Maybe. The law on material breach (in a non-goods contract) sets forth that if a party fails to perform a promise which amounts to both a material and total breach (i.e. no cure by the breaching party is forthcoming within a reasonable period of time), then the aggrieved party may — among other alternatives — cancel the contract, enter into another contract and sue the breaching party for certain damages.

Whether a breach is "material" is ultimately for a judge or jury to decide. However, let's just assume that the breach by tenant is not material. Thus, the landlord cannot terminate the lease and enter into a new lease. What about our fact pattern would support such a finding, and what could we learn from it?

First, although the lease mandates payment by April 1, there's no lease language that makes the tenant's breach a "material breach" under the lease. Without it, the landlord will be unsuccessful in claiming that tenant's failure to pay by April 1 justified landlord's termination of the lease. Accordingly, when drafting, you should include language that "tenant's failure to tender reimbursements by April 1 shall constitute a material breach of the agreement." With that language, it will be easier for the court to find the tenant in material breach.

Second, although the phrase "time is of the essence with regard to the terms and provisions contained herein" appears in the lease, some courts have held that the use of a singular, detached "stock phrase" doesn't, by itself, make tenant's breach tantamount to material breach. Rather, if the parties intended for time to be "of the essence" with regard to tenant's April 1 obligation, then this language could have (and should have) been inserted directly into the operative provision of the lease.

Third, whether or not tenant's failure to pay by April 1 constituted a "material breach" of the lease, the landlord still jumped the gun in attempting to terminate the lease. Why? A tenant with a good payment history wasn't given a chance to pay within the agreed-upon time period.

Accordingly, there wasn't a "total" breach by tenant which justified landlord's attempt to terminate. This doesn't mean the landlord couldn't claim a partial breach and sue for damages arising from tenant's failure to make payment by April 1. However, it does mean the landlord wasn't justified in attempting to wholly terminate the lease and enter into a new one.

At the end of the day, if the landlord had waited the three weeks before writing the letter to the tenant, the court would be more likely to hold that tenant's cure of the breach wasn't forthcoming. This, in turn, would increase the odds that tenant would be found to have been in material breach. BIZ

**Editor's note:** *The legal concept of material breach is complicated, and the analysis and application of it to any set of facts should only be attempted by qualified legal counsel.*