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## “Tip of the Month”

### Termination for Material Breach

Business relationships are often formalized by contract. A contract is a legally binding agreement between two or more parties obligating the parties to do or to refrain from doing a particular thing. When a party to a contract fails to perform its obligations under the agreement, the party is said to be in breach of contract. If a contract is breached, can the non-breaching party terminate the contract? It depends.

Not every contractual breach authorizes or entitles the non-breaching party to terminate the contract. A breach can be considered as either “material” or “non-material” depending on the circumstances. Usually, only a “material” breach justifies termination.

So what exactly is a material breach of contract? Courts generally characterize a material breach (also referred to as a “total” breach) as a substantial failure to perform, or a breach so substantial as to defeat the contract’s purpose or object. A material breach goes to the root or essence of the contract; a breach of such significance or materiality as to preclude adequate compensation in money damages. In New Hampshire, the Supreme Court has held that “[o]nly a breach that is sufficiently material and important to justify ending the whole transaction is a total breach that discharges the injured party’s duties.” *Fitz v. Coutinho*, 136 N.H. 721, 725 (1993). Thus, a non-breaching party’s subjective satisfaction, or lack thereof, is legally irrelevant.

Determining whether a breach is material or non-material is a question of fact for the court to decide. While the standard of materiality is necessarily imprecise and flexible, New Hampshire courts generally look to the criteria in Section 241 of the Restatement (Second) of Contracts in determining whether a given breach is sufficiently material and important to justify terminating a contract outright.

Section 241 of the Restatement (Second) of Contracts provides that “[i]n determining whether a failure to render or to offer performance is material, the following circumstances are significant: (a) the extent to which the injured party will be deprived of the benefit which he reasonably expected; (b) the extent to which the injured party can be adequately compensated for the part of that benefit of which he will be deprived; (c) the extent to which the party failing to perform or to offer to perform will suffer forfeiture; (d) the likelihood that the party failing to perform or to offer to perform will cure his failure, taking account of all the circumstances including any reasonable assurances; (e) the extent to which the behavior of the party failing to perform or to offer to perform comports with standards of good faith and fair dealing.”

Terminating a contract for breach can have serious implications. Unfortunately, there is no bright line rule to follow in making this determination. The decision to terminate must be based on a totality of the circumstances.

If you or someone you know needs help in determining whether to terminate a business contract, call the attorneys at Mesmer & Deleault, PLLC today at 668-1971, or contact us by email at mailbox @ biz-patlaw.com.

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