



Suspend performance or terminate a contract for material breach under US law

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During the performance of a contract, a party may find itself in the unhappy position of discovering that its contracting party has failed to perform its contractual obligation. For example, a buyer of goods discovers that the goods are defective. Or a supplier is not paid in a timely manner by its customer.

One possible response to the breach by the other party may be for the aggrieved party to suspend its own performance, or more dramatically, terminate the contract. Although this response is legitimate in some situations, an aggrieved party needs to be cautious about suspending its performance or terminating the contract in an unlawful manner, and becoming the aggressor, rather than the victim.

This article provides guidance under US law on when a party is entitled to suspend performance or terminate a contract for material breach by the other party.

I. Right to suspend performance for material breach

a) General rule

A party is entitled to suspend its performance in case of a material breach by the other party. This right of suspension is premised on the concept that one party's performance is a "constructive condition" of the other party's performance.²

There is a wonderful ease about suspension of performance, which makes it an attractive option for a party facing non-performance by its counterparty. Suspension is easy, quick and cheap. It does not require a lawsuit to be filed, or any kind of third-party decision or approval to be obtained. For this very reason, suspension is considered a "self-help" remedy.

Furthermore, suspension can be an effective tool for persuading the other party to rectify its behaviour. What is being suspended, be it a payment or a delivery, will be supplied to the other party only if and when the other party corrects its behaviour.

Like other self-help remedies, suspension promotes the private settlement of disputes, lessening the burden on courts and reducing the costs of settlement.

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² Farnsworth on Contracts, §8.19a (3rd ed. 2004) ("The rationale for giving an aggrieved party the rights to suspend its own performance and to demand assurance of the other party's performance is that the aggrieved party's duties are constructively conditional on the other party's doing what it is to do in the order determined by the contract.").



The ease and private nature of suspension carry, however, the potential for abuse, which is why courts have built safeguards to prevent the suspension right from being abused. As suspension depends only on the aggrieved party's own assessment of the circumstances surrounding the breach, there is no possibility for an independent third party (like a judge) to review the matter, at least prior to the suspension.

The safeguards built by courts are based on the concept of "material breach": a party is entitled to suspend performance only when the other party has committed a "material breach" of its obligations.³ In the absence of a "material breach" by the other party, a party would by suspension violate its obligations.⁴

The concept of "material breach" represents a balance struck by courts, in answering the question:

"Will it be more conformable to justice in the particular case to free the injured party, or, on the other hand, to require her to perform her promise, in both cases giving her a right of action if the failure to perform was wrongful?"⁵

As stated in this question, the right of action for a wrongful failure to perform (i.e. seeking damages or other relief) is a separate issue from the right to suspend performance. In other words, even if a breach is not material, the injured party may still be able to bring an action for damages or other relief, although the injured party would remain bound to perform its obligations.

The concept of "substantial performance" is closely related to the concept of "material breach". Substantial performance is performance without material breach.⁶

b) Material breach

³ Farnsworth on Contracts, §8.15; Michigan Habilitation & Learning Center, Inc. v. Community Living Services, Inc., No. 338026 (Michigan Court of Appeals, July 24, 2018) ("Under long-standing Michigan law the party who commits the first substantial breach of a contract cannot maintain an action against the other contracting party for failure to perform. ... Slight deviations in the performance of a contractual promise will not always negate the other party's reciprocal duty to perform, ... but when the noncomplying performance amounts to a substantial or material breach of the contract, the breaching party is precluded from maintaining a claim for breach of contract based on the nonbreaching party's subsequent failure to perform."); Forbes v. Prime General Contractors, Inc., Case No. 2D17-353 (Florida Court of Appeal, Sept. 7, 2018) (party may suspend performance in case of material breach by other party). Cases cited in this article are available on the open legal database www.justia.com.

⁴ Walker & Co. v. Harrison, 347 Mich. 630, 81 N.W.2d 352 (1957) (neon sign installer's failure to clean sign as requested by customer was immaterial breach, not justifying customer's refusal to pay; as a result, customer's refusal to pay constituted material breach); Aljawad v. Majeed, No. 13-4763 (US Court of Appeals for the 3rd Circuit, June 10, 2015) (non precedential) (supply of 1,248 motion sensors out of agreed 1,263 constituted substantial performance of settlement agreement, and 15-sensor shortfall was not material breach, so recipient of sensors was not excused from obligation to pay for 1,248 sensors supplied).

⁵ Restatement (First) of Contracts § 275, cmt. a.

⁶ First Sec. Bank v. Murphy, 964 P.2d 654 (Idaho 1998) ("breach of contract is not material if substantial performance has been rendered").



A key question thus becomes, when is a breach “material”?

A breach is material when it goes to the “essence” or “heart” of the contract.⁷

Factors considered in determining whether a breach is material include:

1. The extent to which the injured party will be deprived of the benefit it reasonably expected⁸;
2. the extent to which the injured party can be adequately compensated for the benefit of which he will be deprived;
3. the extent to which the party failing to perform will suffer forfeiture;
4. the likelihood that the party failing to perform will cure his failure, taking account of all the circumstances including any reasonable assurances; and
5. the extent to which the behavior of the party failing to perform comports with standards of good faith and fair dealing.⁹

It is irrelevant whether the injury suffered by the other party was foreseeable to the breaching party as a consequence of the breach.

The time for determining materiality is the time of the breach and not the time that the contract was made.

The first factor – extent of deprivation of benefit reasonably expected – is the most important one, and often decisive in determining whether the breach is material. This first factor in turn may depend on the second factor, whether the injury can be adequately compensated by damages. An injury that can be adequately compensated by damages can lead to the conclusion that suspension is not justified as a means of protecting a reasonably expected benefit.

As an alternative formulation of the first factor, courts sometimes look at whether the breach was so central as to defeat an “essential” or “primary” purpose of the contract.

In *State of Indiana v. IBM Corp.*, No. 49A02-1211-PL-875 (Court of Appeals of Indiana, Feb. 13, 2014), the Indiana court of appeals criticized the lower court’s use of a balancing test comparing the benefits

⁷ *Allen Engineering Contractor v. United States*, No. 2014-5094 (US Court of Appeals for the Federal Circuit, May 7, 2015) (“A breach is material when it relates to a matter of vital importance, or goes to the essence of the contract.”); *State of Indiana v. IBM Corp.*, No. 49A02-1211-PL-875 (Court of Appeals of Indiana, Feb. 13, 2014).

⁸ *Michigan Habilitation & Learning Center, Inc. v. Community Living Services, Inc.*, No. 338026 (Michigan Court of Appeals, July 24, 2018) (“To determine the significance of the initial breach, the court should consider whether the nonbreaching party obtained the benefit it reasonably expected to receive.”).

⁹ Restatement (Second) of Contracts §241; *Randy Kinder Excavating, Inc. v. JA Manning Construction Co., Inc.*, No. 17-2886 (US Court of Appeals for the 8th Circuit, Aug. 7, 2018) (Missouri law); *Aljawad v. Majeed*, No. 13-4763 (US Court of Appeals for the 3rd Circuit, June 10, 2015) (non precedential) (Pennsylvania law); *State of Alaska v. Alaskan Crude Corp.*, Nos. S-16308/16417 (Alaska Supreme Court, Aug. 31, 2018); *State of Indiana v. IBM Corp.*, No. 49A02-1211-PL-875 (Court of Appeals of Indiana, Feb. 13, 2014).



received by the State from the contract, to the benefits of which the State had been deprived as a result of IBM's breach. The State of Indiana had entered into a contract with IBM to modernize and improve the State's welfare system.

As the Indiana court of appeals wrote:

"Although ... IBM met some objectives and provided some important benefits, the question [in a material breach analysis] is whether IBM's failures went to the essence of the contract—to provide and expand access to services for welfare recipients in a timely, reliable, and efficient manner within federal guidelines, to discourage fraud, and to increase work-participation rates."

As for the third factor – forfeiture – it considers the potential impact on the breaching party from a suspension or termination of the contract. It is not the nature or gravity of the breach which is being considered here. Rather, it is a potential "forfeiture" or loss suffered by the breaching party as a result of suspension or termination, which is being considered. Where, for example, goods are specifically made for a particular buyer, a seller would be forced to forfeit the goods if the contract were cancelled because the seller would be unable to resell those goods to another buyer.¹⁰

Another extreme example of forfeiture would be a security services contract, where a facility owner who delays in payment could suffer great forfeiture or loss if the security services provider suddenly stopped protecting the facility.

c) Notice and timing of suspension and other considerations

Although notice of suspension may not be strictly required¹¹, good practice would be for the suspending party to give notice of suspension to the other party. This notice would serve to alert the other party of the suspension, and provide for the possibility of communication between the parties on the situation having led to the suspension, as an attempt to resolve the issue.

As to the timing of suspension, a party wishing to suspend its performance should do so promptly upon learning of the other party's material breach. A party who continues to enjoy the benefits of the contract and fails to suspend its performance promptly, waives the right to suspend.¹²

When a party decides to suspend performance, it must be careful to stop its continued enjoyment of any benefits provided by the other party. It is not possible for a party on the one hand, to suspend its

¹⁰ Cf. Restatement (Second) of Contracts § 241, comment d.

¹¹ Howard S. Lease Constr. Co. v. Holly, 725 P.2d 712 (Alaska 1986) (notice was not required prior to withholding a portion of the progress payment).

¹² Randy Kinder Excavating, Inc. v. JA Manning Construction Co., Inc., No. 17-2886 (US Court of Appeals for the 8th Circuit, Aug. 7, 2018) (under Missouri law, party waives ability to object to breach by continuing to accept benefits of contract); Maverick Benefit Advisors, LLC v. Bostrom, S-16-0030 (Wyoming Supreme Court, Oct. 6, 2016) (purchasers of company who continued operating the business long after they had knowledge of the seller's alleged misrepresentations, waived the first-to-breach affirmative defense). The first-to-breach affirmative defense is available to a party who suspended performance in reaction to an earlier material breach by the other party.



performance (and later terminate the contract if the material breach by the other party is not cured), while enjoying the benefits received.

For example, the customer suspending payment due to a supplier's deficient performance, cannot at the same time continue enjoying use of any deliverables not paid for.

If continued enjoyment of benefits received is important, then the party should instead claim damages, rather than suspend performance.

d) Examples of material breach

Courts generally hold that a customer's failure to make a single progress payment is a material breach and justifies a builder in suspending performance. The breach deprives the builder of the benefit expected from such payment – relief from having to finance the work in some other fashion. It may put the builder under great financial strain.

Other examples of material breach are:

- a party unilaterally terminating a contract without justification¹³
- failure by residential and medical services providers for disabled adults to comply with background checks and training requirements for staff¹⁴: in this case, the party acquiring the services was a non-profit organization, which because of the lack of credentials of the service providers' staff, would not be entitled to reimbursement of the service fees by a county government agency under Medicaid guidelines. This particular context made the lack of staff credentials an especially serious breach, justifying non-payment of the fees.
- Government contractor furnished false payment and performance bonds to the Navy, and thus failed to maintain such bonds, as required by federal law, in connection with construction contracts with the Navy¹⁵
- Delay of at least 4 years by the government in approving oil companies' plan of exploration, which was contractually required to be done within 30 days, in addition to significant new approval procedures imposed by the government as a result of new legislation¹⁶

¹³ State of Alaska v. Alaskan Crude Corp., Nos. S-16308/16417 (Alaska Supreme Court, Aug. 31, 2018) (lessor materially breached oil and gas lease by unilaterally terminating the lease, where lessee met the contractually-defined conditions for extension of the lease).

¹⁴ Michigan Habilitation & Learning Center, Inc. v. Community Living Services, Inc., No. 338026 (Michigan Court of Appeals, July 24, 2018) (noting that "The contracts include multiple sections requiring that the staff providing the services meet specific and enumerated requirements. ... Moreover, the deposition testimony taken also makes clear that who performed the services was essential to the contract.").

¹⁵ Allen Engineering Contractor v. United States, No. 2014-5094 (US Court of Appeals for the Federal Circuit, May 7, 2015).

¹⁶ Mobil Oil v. United States, 530 U.S. 604, 621 (2000).



e) Sale of goods

In a sale of goods, special rules apply in some situations, as exceptions to the general rules of the common law discussed above.

The Uniform Commercial Code (UCC), which governs sales of goods, gives a buyer the right, on notifying the seller, to deduct damages for partial breach from the balance due on the price.¹⁷

Furthermore, the “perfect tender rule” of UCC 2-601, applicable in one-shot contracts, requires the seller to conform perfectly to its obligation, for the buyer may reject if the goods fail “in any respect” to conform to the contract.¹⁸ Thus, here the seller must do much more than just “substantial performance”, and the buyer can reject the goods and withhold payment for “any” breach, not just a material breach.

This seemingly draconian approach, however, is heavily qualified.¹⁹ The perfect tender rule applies only to one-shot contracts, not to instalment contracts. An “instalment contract” is one which requires or authorizes the delivery of goods in separate lots to be separately accepted, even though the contract contains a clause “each delivery is a separate contract” or its equivalent.²⁰ Instalment contracts are governed by UCC 2-612 which permits rejection only if the non-conformity substantially impairs the value of that instalment, and cannot be cured. So here, in instalment contracts we find again the standard of “substantial impairment” which calls to mind the common law rule of substantial performance.

Nor does the perfect tender rule apply to late deliveries under a shipment contract, which are governed by UCC 2-504, which provides that late delivery is grounds for rejection only if “material delay or loss ensues”.

Yet another qualification of the perfect tender rule is the UCC’s general invitations to use trade usage, course of dealing, and course of performance in the interpretation of contracts. Trade usage allowing for certain minor defects would therefore influence interpretation of the seller’s obligation.

Furthermore, the perfect tender rule does not entitle a buyer to act in bad faith in rejecting. A buyer’s bad faith may be invoked under UCC 1-304, to bar rejections. For example, a buyer acts in bad faith if it rejects goods in a falling market (i.e. when the market value of the goods is falling) because of insubstantial nonconformity, and despite an offer of a monetary allowance by the seller.²¹

¹⁷ UCC 2-717 states: “The buyer on notifying the seller of his intention to do so may deduct all or any part of the damages resulting from any breach of the contract from any part of the price still due under the same contract.”

¹⁸ White and Summers, Uniform Commercial Code, Hornbook series (6th ed. 2010), §9.3.

¹⁹ Corbin on Contracts Desk Edition §68.02.

²⁰ UCC 2-612(1).

²¹ T.W. Oil, Inc. v. Consolidated Edison Co., 57 N.Y.2d 574 (1982).



These numerous limitations and courts' application of the perfect tender rule lead to the conclusion that, in practice there is little difference between perfect tender and the common law rule of substantial performance.²² Perfect tender is not so perfect after all.

Another special rule in a sale of goods relates to a buyer's failure to pay an instalment giving the seller reasonable grounds for insecurity with respect to the buyer's performance. In such situation, the seller can demand adequate assurance of performance and "may if commercially reasonable suspend any performance" for which the seller "has not already received the agreed return."²³

f) Contractual clause

Another exception to the rule on suspension for material breach is if the contract provides for any different rules, which would prevail over the default general principle.

For example, a contract could provide for a right to suspend in a defined situation, such as a right to suspend payment in case the services delivered do not meet a certain requirement. This clause would entitle the customer to suspend payment if the services do not meet the defined requirement, without the need to inquire whether such breach is material.

II. Right to terminate contract for total breach

a) Total breach

As termination is a more dramatic step than suspension, it is only logical that the conditions for when a party is entitled to terminate (or in the Uniform Commercial Code's terminology, "cancel"²⁴) a contract are more stringent than for when he may simply suspend performance.

Although as discussed above a material breach allows the aggrieved party to suspend performance, only a "total breach" allows the party to terminate the contract, which discharges its duty.²⁵

A total breach occurs when the material breach cannot be cured, or nonperformance is accompanied by repudiation or there is a substantial impairment of the value of the contract at the time of the breach.²⁶ Courts are often willing to allow the breaching party some period of time to cure its breach.

²² White and Summers UCC §9.3

²³ UCC 2-609(1)

²⁴ Cancellation "occurs when either party puts an end to the contract for breach by the other". UCC 2-106(4).

²⁵ Corbin on Contracts Desk Edition §68.02

²⁶ Mobil Oil v. United States, 530 U.S. 604, 608 (2000) ("total breach" is a breach that "so substantially impairs the value of the contract to the injured party at the time of the breach that it is just in the circumstances to allow him to recover damages based on all his remaining rights to performance."); Corbin on Contracts Desk Edition §68.02.



A “total” breach is one that is sufficiently material and important to justify the aggrieved party to declare the contract is at an end. By contrast, a “partial” breach²⁷ provides the aggrieved party with a right to sue for provable damages, but it is not sufficiently material or important to end the contract.

b) Cure

Whether the breaching party can cure its breach, is a critical inquiry. Not only is it a consideration in determining whether a breach is material (as discussed above), entitling the other party to suspend performance, but it is also an important inquiry in determining whether a breach is total, entitling the other party to terminate the contract.

A key part of the cure inquiry is the amount of time elapsed following the breach. The longer this amount of time is, the greater the likelihood the breach is not curable or will not be cured. For example, after some period of time, the builder that has suspended its performance in response to the customer’s failure to make a progress payment can treat the breach as total if the customer has not cured by making payment.

By contrast, termination of a contract shortly after the breach runs the risk of being premature and unjustified.²⁸

Whether a material breach has remained uncured for long enough to justify termination is a question of fact, much like the question whether the breach is material in the first place. Similar circumstances are relevant: deprivation of expected benefit; adequate compensation for loss; risk of forfeiture; likelihood of cure.²⁹

The risk of forfeiture factor leads to the examination of the situation of the *breaching* party, and the potential loss that would result to that party from termination. This loss comes from the actions undertaken by the breaching party in reliance on the contract, and the inability to recoup benefits from those actions if the contract is terminated. For example, a builder undertakes costly preparations for a construction project, and will suffer forfeiture if the project is terminated by a customer.

Courts generally tolerate more delay in curing by the breaching party when the breach comes after that party has relied on the contract by performance or otherwise, than when the breach occurs early on before reliance.

An example of a high risk of forfeiture is a supplier of specially manufactured goods which has incurred manufacturing costs, and will be unable to resell the goods to another buyer in case of termination.

²⁷ Another term for partial breach is “incidental” breach. R.C. Hobbs Enters. v. J.G.L. Distrib., 104 P.3d 503 (Mont. 2004) (“‘incidental’ breaches ... only entitle the non-breaching party to sue for damages”).

²⁸ Turner Concrete Steel Co. v. Chester Constr. & Contracting Co., 114 A. 780, 782 (Pa. 1921) (abandonment of a large contract within a few hours of large payment default was not justified).

²⁹ Restatement (Second) of Contracts §242.



Likelihood of cure is another factor in determining how long the injured party must wait before terminating. If the breaching party indicates that it will not perform or cure, such a repudiation would justify termination.

Courts also base their determination of the required length of time on the nature of the contract. As a general rule, courts often conclude that “time is of the essence” in sales of goods, though even under such a contract the injured party may not be allowed to terminate immediately on breach without giving the breaching party a chance for cure.

Courts have not generally allowed immediate termination of other types of contracts, absent a showing of contrary intent.

No cure period is allowed in case of “some types of dishonest conduct [which] are so egregious and of such a nature that the aggrieved party may terminate the contract immediately even where a cure provision is specifically provided in the contract.”³⁰

c) Cure under the UCC

Although the concept of cure was known before the Uniform Commercial Code, the UCC must be credited with giving a seller of goods a clear right to cure and with popularizing the word “cure”.³¹ The UCC provisions on cure apply only to contracts for the sale of goods, but they may be applied by analogy to other contracts.

The UCC allows cure in two situations. First, cure is allowed when the “time for performance has not yet expired”.³² The seller then has the right, on notifying the buyer, to make a conforming delivery within that time.

Second, even where the time for performance has expired, a seller may cure, on notifying the buyer, if the seller performed in good faith and if cure is appropriate and timely under the circumstances.³³

d) Contractual clauses

The parties may agree to terms regulating their rights and obligations relating to termination for breach.

A common example is a clause providing for the right to terminate a contract in the event of a material breach not cured within a specified period of time. The benefit from such a clause is that the cure

³⁰ LJI Transp. v. Pilot Air Freight, 905 A.2d 991, 992 (Pa. Super. 2006) (franchisee of freight forwarding company routed shipments through other freight forwarders, including its own affiliated company).

³¹ Farnsworth on Contracts §8.17.

³² UCC 2-508(1).

³³ UCC 2-508(2).



period is agreed, so that the parties no longer face the uncertainty under default rules about what is a “reasonable” cure period.

If the clause goes on to define specific examples of material breach, an additional element of uncertainty is removed.

Any such agreed terms would apply and prevail over any contrary default rules.

The stock phrase “time is of the essence” can be included in the contract. Just specifying a date for performance is not enough to make time of the essence.³⁴ The fact that time is of the essence will lead to delays being characterized as material breaches, and a termination right arising, if not immediately upon day 1 of the delay, at least a very short period thereafter in the absence of expeditious cure.

In software licenses, parties sometimes negotiate a clause entitling the licensor to immediately terminate the license in the event of a breach by the licensee of the license or confidentiality terms. Thus, such a contractual term dispenses with the requirement for the licensor to show a “total breach”, such as a material breach not cured.

Contractual terms may also restrict the licensor’s termination rights. In one case, a court interpreted an “irrevocable” license as depriving the licensor of the right to terminate the license for licensee’s material breach.³⁵

e) Waiver

A party can by its statements or conduct waive its right of suspension or termination. For example, a customer who promises to pay a builder despite material defects, could be considered to have waived its right to suspend payment or terminate the contract for these defects.

The concept of waiver underlies the rule that, if a buyer of goods accepts them, knowing that they have defects justifying rejection, the buyer must pay the price.³⁶

Another example of waiver is a party that grants an extension of time to the other party.³⁷

Waivers can also occur by a party’s silence and inaction in the face of the other party’s breach. A party is not excused from performing its remaining duties if it continues the agreement with knowledge of the breach by the other party.³⁸

³⁴ ADC Orange v. Coyote Acres, 857 N.E.2d 513 (N.Y. 2006) (a fixed date in a real estate sales contract “alone does not make time of the essence”; payment two weeks late not a material breach); 1800 Smith Street Assocs. v. Gencarelli, 888 A.2d 46 (R.I. 2005) (“explicit time limits standing alone and without more do not indicate that the time fixed for performance [is] intended by the parties to be a material or an essential part of their agreement”).

³⁵ Timeline, Inc. v. Proclarity Corp., 2007 U.S. Dist. LEXIS 38669 (W.D. Wash. May 29, 2007).

³⁶ UCC 2-709(1)(a).

³⁷ CBS v. Merrick, 716 F.2d 1292 (9th Cir. 1983) (deadline was waived where producer orally agreed to waive it and later ignored, and other party relied).

³⁸ Edwards v. Allied Home Mtg. Capital Corp., 962 So.2d 194 (Ala. 2007); Restatement Second §246.



Simply urging performance from the breaching party does not amount to a waiver of the urging party's rights, however.³⁹ Rather, a waiver is present only where the injured party accepts significant performance by the breaching party after the breach.⁴⁰

The effect of the waiver is to deprive the waiving party of the right to later suspend its performance or terminate the contract. A later attempt to suspend or terminate would not be permitted, and would constitute a breach. However, the waiving party may still claim damages for partial breach, although in some circumstances the party may be deprived of claiming damages as well.

An anti-waiver clause may prove an effective way to counter inadvertent acceptance of the other party's performance.⁴¹ However, an anti-waiver clause can only provide limited protection as the parties' conduct may vitiate the effect of such clause.⁴²

f) Damages and restitution

A party terminating a contract for total breach is entitled to recover damages caused by the breach.

The measure of damages which can be recovered is, the amount that would put the terminating party in the position it was in immediately prior to contracting. This includes restitution of any contractual payments made.⁴³

The measure of damages is different, if the injured party elects to affirm rather than terminate the contract. In such case, the damages that can be recovered are those that would put the injured party in the position it would have been in, had the contract been performed.⁴⁴

III. Conclusion and practical tips

Although the rules on material breach have been largely unified among the states through widespread adoption of the Restatement Second's framework, the question what amounts to a material breach is

³⁹ Mobil Oil v. United States, 530 U.S. 604, 622 (2000) (oil companies did not waive right to restitution of their initial payment for oil exploration leases, by urging performance from the government).

⁴⁰ Mobil Oil v. United States, 530 U.S. 604, 622 (2000).

⁴¹ Long Island Sav. Bank v. United States, 503 F.3d 1234 (Fed. Cir. 2007) (anti-waiver clause was conclusive in refuting claim of waiver); *Ex parte* Keelboat Concepts, 938 So.2d 922 (Ala. 2005) (anti-waiver clause meant that promisee's "failure to strictly enforce terms of the franchise agreement ... could not amount to a waiver of the requirement that notice of the election to renew be timely given").

⁴² Pollard v. Southdale Gardens, 698 N.W.2d 449 (Minn. App. 2005) ("Because a nonwaiver clause may be modified by subsequent conduct, the mere presence of a nonwaiver clause does not automatically bar a waiver claim.").

⁴³ Mobil Oil v. United States, 530 U.S. 604, 614 (2000) (contracting party is entitled to restitution if the other party "substantially" breached a contract or communicated its intent to do so); *Forbes v. Prime General Contractors, Inc.*, Case No. 2D17-353 (Florida Court of Appeal, Sept. 7, 2018) (home owners who terminated home renovation contract for builder's material breach, were entitled to recover damages to restore owners to position they were in immediately prior to entering contract, including payments made to builder).

⁴⁴ *Forbes v. Prime General Contractors, Inc.*, Case No. 2D17-353 (Florida Court of Appeal, Sept. 7, 2018)



fact-based and difficult to predict. A party contemplating suspending its performance or terminating a contract because of what it views a material breach by the other party, must be very careful, lest by suspending and terminating improperly it commits a material breach.

Based on the case law, here are a few practical recommendations:

1. Give the breaching party a reasonable time to cure the breach, prior to terminating a contract: if the contract defines a cure period, make sure to allow the breaching party that cure period.
2. Include examples of material breach in the contract: you should make sure to include examples of material breach in the contract, at least for those breaches that you want to be considered material. This contractual clause will provide predictability and minimize the risks that come from taking actions (such as suspension or termination) based on a unilateral view that a material breach has been committed.

The stock phrase “time is of the essence” can be included in the contract. An even better approach is to provide for the right of suspension or termination in specific circumstances.⁴⁵

Another effective approach is to set a “condition” for a party’s performance on the other party’s performance by a specified time.

3. Extreme caution should be exercised during renegotiation of a contract: a party wishing to renegotiate should be careful not to unilaterally impose new terms, which can be a material breach. Renegotiation should not include threats to end the contract unless new (unilaterally imposed) terms are accepted by the other party.

For example, a customer who requests a price reduction, should not make a threat to end the contract or breach its obligations (such as a purchase commitment) unless the supplier accepts the price reduction.

4. In the face of contractual performance issues, beware of waivers of the right to suspend performance or terminate a contract. If a party wishes to retain the right to suspend or terminate for the other party’s breach, prompt action is necessary, as a delay in exercising rights could be characterised as a waiver of these rights.

To avoid waivers, an injured party must act promptly, by notifying the other party of the breach, suspending performance, ceasing its continued enjoyment of benefits from the contract (such as use of the goods received) and after a reasonable cure period, terminating the contract.

⁴⁵ *Barker v. Johnson*, 591 P.2d 886 (Wyo. 1979) (provision that vendor could terminate land-sale contract if purchaser did not cure default 15 days after notice was “unequivocal”).



Even if a party is willing to waive its suspension or termination right, the party needs to consider whether it wishes to retain the possibility later to claim damages for the breach. If so, a “reservation of rights” statement should be included in any communication, to avoid any risk the waiver could be found to deprive a claim of damages as well.

Anti-waiver clauses can be effective in preventing inadvertent waivers. However, if the clause is reciprocal, both parties would potentially benefit from it. Consider a clause addressing a specific type of waiver to be avoided, which could be more effective than a general clause, and preserve the possibility of waivers in situations not covered by the clause.

Sample general anti-waiver clause: “The failure of any party to insist upon strict performance of any of the terms of the agreement shall not be considered to be a waiver of such terms.”

5. Time of performance: because the right of suspension is based on the concept of constructive conditions of exchange, it is important to define the time of performance and the order in which the parties’ performances should occur.