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REPUDIATION OF A CONTRACT UNDER THE UNIFORM COMMERCIAL CODE

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ARTICLE 2 of the Uniform Commercial Code contains about twenty sections dealing with the repudiation of a contract for the sale of goods.¹ These sections will be discussed under the following topic headings:

1. The Nature of a Repudiation
2. Repudiation by Failing To Respond to a Demand for Adequate Assurance of Due Performance
3. The Aggrieved Party May for a Commercially Reasonable Time Await Performance by the Repudiating Party
4. The Aggrieved Party May Resort to Any Remedy for Breach
5. The Aggrieved Party May in Either Case Suspend His Own Performance
6. The Action for Anticipatory Breach
7. The New Measure of Damages for Anticipatory Breach
8. "Cover"
9. "Cancellation"
10. Retraction of the Repudiation
11. Discharge Without Consideration of Any Claim or Right Arising From a Repudiation.

I. THE NATURE OF A REPUDIATION

Under the common law, a repudiation of a contract is a manifestation by a promisor that he wilfully is going to commit a material breach of the contract in the future, or, in other words, that he is

¹ The edition referred to herein is the "1962 Official Text with Comments."

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not going to render substantial performance. This manifestation usually is by spoken or written words, but may be by other conduct.²

Section 2-610 and its comment explain the nature of a repudiation under the Code:

Section 2-610. Anticipatory Repudiation.

When either party repudiates the contract with respect to a performance not yet due the loss of which will substantially impair the value of the contract to the other, the aggrieved party may

- (a) for a commercially reasonable time await performance by the repudiating party; or
- (b) resort to any remedy for breach (Section 2-703 or Section 2-711), even though he has notified the repudiating party that he would await the latter's performance and has urged retraction; and
- (c) in either case suspend his own performance or proceed in accordance with the provisions of this Article on the seller's right to identify goods to the contract notwithstanding breach or to salvage unfinished goods (Section 2-704).

Comment. 1. [A]nticipatory repudiation centers upon an overt communication of intention or an action which renders performance impossible or demonstrates a clear determination not to continue with performance. . . .

2. It is not necessary for repudiation that performance be made literally and utterly impossible. Repudiation can result from action which reasonably indicates a rejection of the continuing obligation. . . .

Two theoretical differences between a repudiation at common law and under the Code are to be seen:

a) Only a promisor can repudiate a contract, and therefore it is impossible for a promisee in a unilateral contract to do so. The Code, however, speaks of a repudiation by "either party," and, in so doing, fails to recognize the possibility of a unilateral contract.³

b) The Code does not use the expressions "substantial performance" or "material breach," but, instead, speaks of a non-performance "which will substantially impair the value of the contract to the other." The difference is discussed in Topic 2 in connection with the phrase "due performance."

² RESTATEMENT, CONTRACTS § 318 (1932); Anderson, *Repudiation of Contract—The Post-Restatement Cases*, 6 DE PAUL L. REV. 1, 3-8 (1956).

³ Anderson, *Contracts Law in the Uniform Commercial Code*, Illinois Continuing Legal Education, Jan. 1963, p. 14-16, 18-21.

2. REPUDIATION BY FAILING TO RESPOND TO A DEMAND FOR
ADEQUATE ASSURANCE OF DUE PERFORMANCE

Section 2-609 creates a new contract enforcement procedure for the situation where one party feels insecure as to the other's performance. The section is involved in the present discussion because it declares that the failure of the suspected party, after a justified demand, to furnish adequate assurance of due performance is a repudiation of the contract.

Section 2-609. Right to Adequate Assurance of Performance.

(1) A contract for sale imposes an obligation on each party that the other's expectation of receiving due performance will not be impaired. When reasonable grounds for insecurity arise with respect to the performance of either party the other may in writing demand adequate assurance of due performance and until he receives such assurance may if commercially reasonable suspend any performance for which he has not already received the agreed return.

(2) Between merchants the reasonableness of grounds for insecurity and the adequacy of any assurance offered shall be determined according to commercial standards.

(3) Acceptance of any improper delivery or payment does not prejudice the aggrieved party's right to demand adequate assurance of future performance.

(4) After receipt of a justified demand failure to provide within a reasonable time not exceeding thirty days such assurance of due performance as is adequate under the circumstances of the particular case is a repudiation of the contract.

[As an aside, it may be noted that the Code's refusal to recognize the existence of the unilateral contract is illustrated by the statement in the first sentence of the section that a contract imposes an obligation "on each party."]

The section places a new enforcement procedure in the hands of a party to a contract for the sale of goods, and uses three new expressions in doing so: "reasonable grounds for insecurity," "due performance," and "adequate assurance of due performance." We have had no experience with such a procedure and we cannot know what interpretations will be attached to the new expressions. The present discussion accordingly will consist mainly of a series of remarks concerning each of the new expressions.

First, "reasonable grounds for insecurity":

a) Subsection (2) states that between merchants, "the reasonableness of grounds for insecurity . . . shall be determined according to commercial standards." The comment adds that commercial rather than legal standards are to be applied, and, to show the difference, gives the following examples of events which might result in "reasonable grounds for insecurity" according to commercial standards: a buyer's failure to make proper payment on separate and legally distinct contracts; and, in the case of a contract for precision parts needed immediately upon delivery, the seller's making of defective deliveries to other buyers with similar needs.

b) "A repudiation is of course sufficient to give reasonable ground for insecurity. . . ." This statement appears in the comment to section 2-611, and is clearly true. It is believed, however, that in the event of a repudiation it seldom will be worth while for the aggrieved party to put the present section into operation by making the written demand for adequate assurance. The repudiator has just indicated in some manner or other that he will not perform, and it may be expected that he will ignore the demand that he do perform. He loses nothing since his failure to comply is merely a second repudiation.

c) The expression "a suspicion of repudiation" describes some of the comment's examples of events which may result in "reasonable grounds for insecurity": "a buyer who requires precision parts which he intends to use immediately upon delivery, may have reasonable grounds for insecurity if he discovers that his seller is making defective deliveries of such parts to other buyers with similar needs,"⁴ and "a report from an apparently trustworthy source that the seller had shipped defective goods or was planning to ship them would normally give the buyer reasonable grounds for insecurity."⁵ These events are circumstantial evidence that the suspected party will not perform the present contract; if they give a true picture of the suspected party's intentions, he may be expected to ignore a demand for adequate assurance of due performance; if they give a false picture, the suspected party may be expected to receive such a demand with bitterness and anger.

d) Insolvency of a credit buyer certainly gives the seller "reasonable grounds for insecurity," although it is not so stated in the Code

⁴ UNIFORM COMMERCIAL CODE § 2-609, comment 3.

⁵ *Ibid.*

or comment. The credit seller, however, seldom will find it worth while to use section 2-609, for the reasons that: first, by hypothesis the buyer almost certainly cannot comply; second, another Code section gives the seller the best remedy of all under the circumstances, which is to withhold further deliveries except for cash;⁶ and, third, the remedies for a repudiation are of little value against an insolvent buyer.

e) Insolvency of a credit seller certainly gives the buyer "reasonable grounds for insecurity," although it is not so stated in the Code or comment. In the usual case, however, payment comes after delivery, and the buyer does not need the privilege to suspend his own performance; the other remedies for a repudiation are of little value against an insolvent seller. In two uncommon situations, however, the section may be of value to a buyer: first, where payment is to precede delivery, and, second, where the buyer owes money to the seller for goods already delivered under the contract. Here the buyer could make his written demand, and the seller's insolvency would almost certainly mean that he could not comply. The seller's failure to comply would constitute a repudiation by him, and the buyer would then have the privilege of deducting his damages from the price still due, under section 2-717.⁷

f) The expression "a suspicion of insolvency" describes some of the comment's examples of events which may result in "reasonable grounds for insecurity": a buyer's falling behind "in 'his account' with the seller, even though the items involved have to do with separate and legally distinct contracts, impairs the seller's expectation of due performance,"⁸ and "the seller is reasonably entitled to feel insecure at a sudden expansion of the buyer's use of a credit term, and should be entitled either to security or to a satisfactory explanation,"⁹ also, when the contract provided for thirty days credit with two per cent discount for payment within ten days, there was "a commercial foundation for suspicion when the practice [of taking the discount] is suddenly stopped."¹⁰ Such events as a buyer's falling behind in his

⁶ UNIFORM COMMERCIAL CODE § 2-702(1).

⁷ UNIFORM COMMERCIAL CODE § 2-717 reads as follows: "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."

⁸ UNIFORM COMMERCIAL CODE § 2-609, comment 3.

⁹ UNIFORM COMMERCIAL CODE § 2-609, comment 4.

¹⁰ *Ibid.*

payments on other contracts with the seller, or suddenly increasing his credit purchases, or ceasing to take a discount for prompt payment, would, of course, raise a question in the seller's mind. Under existing law, the seller probably could do nothing unless he were prepared to allege that the buyer was insolvent, in which case he could refuse to make further deliveries except for cash.¹¹ Section 2-609 is much more favorable to the seller since he need not allege that the buyer is insolvent, but merely that he, the seller, has "reasonable grounds for insecurity," and since he not only may suspend his own performance, but also may acquire the remedies arising from a repudiation. While the section is favorable to a credit seller, it is unfavorable to a credit buyer. The facts mentioned in the comment's examples may indicate that the buyer is under financial pressure without being insolvent, and the receipt of a written demand for adequate assurance of due performance at such a time will certainly increase the pressure and may be enough to cause his collapse.

g) One situation where the section may be expected to be used is when the first party is unscrupulous and makes the demand as a harassing or diversionary tactic. It would seem that the second party must either comply with the demand or run the risk that his failure to do so may be held ultimately to be a repudiation of the contract.

h) An assignment which delegates performance is said to give "reasonable grounds for insecurity," in subsection (5) of section 2-210, entitled, "Delegation of Performance; Assignment of Rights": "(5) The other party may treat any assignment which delegates performance as creating reasonable grounds for insecurity and may without prejudice to his rights against the assignor demand assurances from the assignee (Section 2-609)." By way of illustration, assume a contract for the sale of goods on credit by *S* to *B*:

First, *S* may assign to *X* his right to receive the price and also delegate to *X* his duty to deliver the goods, whereupon, under subsection (5), *B* has "reasonable grounds for insecurity," and may demand assurances from *X*; or

Second, *B* may assign to *Y* his right to receive the goods and also delegate to *Y* his duty to pay the price, whereupon, under subsection (5), *S* has "reasonable grounds for insecurity," and may demand assurances from *Y*.

¹¹ *Leopold v. Rock-Ola Mfg. Corp.*, 109 F.2d 611 (C.A. 5, 1940); RESTATEMENT, CONTRACTS § 287 (1932).

Second, "due performance":

The expression "due performance" is not used elsewhere in the Code, and is not defined or explained anywhere in the Code or comment, but it appears three times in the present section. It is believed that as used in the Code it must be understood to mean one hundred per cent performance, since that is what is "due." No justification is found for believing that "due performance" means anything less than total performance: even though the word "due" also means "appropriate" or "proper" or "suitable," the conclusion is the same, since only total performance is "appropriate" or "proper" or "suitable." Anything less is a breach of contract.

It is believed that "due performance" specifically does not mean "substantial performance." The argument is made elsewhere that the Code excludes the doctrine of substantial performance from the law of contracts for the sale of goods.¹² If other sections have excluded the doctrine of substantial performance from the remainder of the Code, it would be illogical to say that the ambiguous expression "due performance" has incorporated the doctrine into the present section. A summary of the argument that the doctrine of substantial performance has been excluded from the law of contracts for the sale of goods is as follows:

- i) the doctrine is not mentioned anywhere in the Code or comment;
- ii) section 2-601 seems to require exact performance at the stage where the seller is tendering the goods to the buyer:

Section 2-601. Buyer's Rights on Improper Delivery.

Subject to the provisions of this Article on breach in installment contracts (Section 2-612) and unless otherwise agreed under the sections on contractual limitations of remedy (Sections 2-718 and 2-719), if the goods or the tender of delivery *fail in any respect to conform to the contract, the buyer may*

- (a) *reject the whole*; or
- (b) *accept the whole*; or
- (c) *accept any commercial unit or units and reject the rest.* [Emphasis added.];

iii) section 2-703 gives the seller the privilege of "cancellation" in the event of certain named defaults by the buyer. The comment ex-

¹² Anderson, *Contracts Law in the Uniform Commercial Code*, Illinois Continuing Legal Education, April 1963, p. 67-74.

plains that the section is an "index" of all of the seller's remedies "for any breach by the buyer." Nowhere does the section or comment refer to the materiality of the buyer's breach or ask whether his performance was substantial;

iv) section 2-711 gives the buyer the privilege of "cancellation" in the event of certain named defaults by the seller. Nowhere does the section or comment refer to the materiality of the seller's breach or ask whether his performance was substantial;

v) in only three limited situations is the nature or extent of the default expressly required to be taken into account: (a) in deciding whether a buyer may revoke an acceptance of an item of goods,¹³ (b) in deciding whether a repudiation is sufficiently extensive to entitle the aggrieved party to act upon it,¹⁴ and (c) in certain eventualities in the case of a divisible installment contract.¹⁵ In these situations, the test applied by the Code is not the materiality of the breach or whether the performance as a whole is substantial, but whether the default "will substantially impair the value of the contract to the other." The "substantial impairment of the value of the contract" formula considers only the extent of the harm to the aggrieved party, and is different from the doctrine of substantial performance which considers various factors, as is shown by section 275 of the *Restatement of Contracts*:

Section 275. Rules for Determining Materiality of a Failure To Perform.

In determining the materiality of a failure fully to perform a promise the following circumstances are influential:

- (a) The extent to which the injured party will obtain the substantial benefit which he could have reasonably anticipated;
- (b) The extent to which the injured party may be adequately compensated in damages for lack of complete performance;
- (c) The extent to which the party failing to perform has already partly performed or made preparations for performance;
- (d) The greater or less hardship on the party failing to perform in terminating the contract;
- (e) The wilful, negligent or innocent behavior of the party failing to perform;
- (f) The greater or less uncertainty that the party failing to perform will perform the remainder of the contract.

¹³ UNIFORM COMMERCIAL CODE § 2-608.

¹⁴ UNIFORM COMMERCIAL CODE § 2-610.

¹⁵ UNIFORM COMMERCIAL CODE §§ 2-612, 2-616.

Third, "adequate assurance of due performance":

a) Subsection (2) states that "Between merchants . . . the adequacy of any assurance offered shall be determined according to commercial standards."

b) Comment 4 indicates that in some cases "adequate assurance of due performance" would be provided by "a mere promise," while in others it would require "the posting of a guaranty":

(4) What constitutes "adequate" assurance of due performance is subject to the same test of factual conditions. For example, where the buyer can make use of a defective delivery, a mere promise by a seller of good repute that he is giving the matter his attention and that the defect will not be repeated, is normally sufficient. Under the same circumstances, however, a similar statement by a known corner-cutter might well be considered insufficient without the posting of a guaranty or, if so demanded by the buyer, a speedy replacement of the delivery involved. By the same token where a delivery has defects, even though easily curable, which interfere with easy use by the buyer, no verbal assurance can be deemed adequate which is not accompanied by replacement, repair, money-allowance, or other commercially reasonable cure.

c) Another excerpt from comment 4 indicates that adequate assurance may require the giving of "security": "However, the seller is reasonably entitled to feel insecure at a sudden expansion of the buyer's use of a credit term, and should be entitled either to security or to a satisfactory explanation."

d) Comment 4 discusses a 1920 case where the comment says that the buyer gave "adequate" assurance by doing the following: "The buyer sent a good credit report from his banker, expressed willingness to make payments when due on the 30 day terms and insisted on further deliveries under the contract."

e) Subsection (2) of section 2-611, entitled, "Retraction of Anticipatory Repudiation," indicates that a retraction which may be sufficient to nullify a repudiation is not automatically an adequate assurance of due performance: "(2) Retraction may be by any method which clearly indicates to the aggrieved party that the repudiating party intends to perform, but must include any assurance justifiably demanded under the provisions of this Article (Section 2-609)."

f) The comment to the section on retraction indicates that adequate assurance of due performance may be so complex as to require "a reasonable time . . . to be worked out": "However, after a timely

and unambiguous expression of retraction, a reasonable time for the assurance to be worked out should be allowed by the aggrieved party before cancellation."

Summarizing the foregoing remarks on section 2-609, and its new expressions, "reasonable grounds for insecurity," "due performance," and "adequate assurance of due performance":

a) A first party who clearly has "reasonable grounds for insecurity," on account of the other's repudiation or insolvency, seldom will find it worth while to put the section into operation; on the other hand, the section may appear to be useful to a first party who justifiably or unjustifiably is suspicious of the other's intentions or solvency, or who, being unscrupulous, wishes to divert the attention of, or to harass, the other party.

b) "Due performance" is to be taken to mean "one hundred per cent performance," and, specifically, not "substantial performance."

c) "Adequate assurance of due performance," in some cases, may be given by something as simple as "a good credit report" together with an expression of willingness to perform, and, in other cases, may require a "guaranty" or "security," or something so complex that it will need "a reasonable time . . . to be worked out."

3. THE AGGRIEVED PARTY MAY FOR A COMMERCIALLY REASONABLE TIME AWAIT PERFORMANCE BY THE REPUDIATING PARTY

The foregoing title declares the first consequence of a repudiation under section 2-610:

Section 2-610. Anticipatory Repudiation.

When either party repudiates the contract with respect to a performance not yet due the loss of which will substantially impair the value of the contract to the other, the aggrieved party may

- (a) for a commercially reasonable time await performance by the repudiating party; or
- (b) resort to any remedy to breach

These questions arise:

(a) What does the aggrieved party postpone in waiting a commercially reasonable time?

(b) What disadvantage does he suffer if he waits longer than a commercially reasonable time?

In saying that the aggrieved party may await performance for a commercially reasonable time, paragraph (a) implies that he may not wait longer than a commercially reasonable time. The alternative to

waiting is to resort to a remedy under paragraph (b). The answer to the first question then is that the aggrieved party may for a commercially reasonable time postpone his resort to a remedy for breach.

The foregoing conclusion that the aggrieved party may postpone his resort to a remedy for a commercially reasonable time implies that he may not postpone such resort beyond a commercially reasonable time. After a commercially reasonable time he may not resort to a remedy, which means that he has no remedy. The answer to the second question then is that he loses his remedies if he waits longer than a commercially reasonable time in resorting to them.

Under modern American law, a repudiation has various consequences, of which one of the most important is that the aggrieved party may sue the repudiator for breach of contract under the doctrine of anticipatory breach.¹⁶ No limitation corresponding to paragraph (a) exists, but, rather, the aggrieved party may sue immediately or at any time within the period of the statute of limitations, and, if the statute runs on his action for anticipatory breach, he still has an action on the actual breach from the date when performance was due until the statutory period thereafter.¹⁷

English law, however, is to the effect that the aggrieved party has no action for anticipatory breach unless and until he "accepts" the repudiation, apparently by filing suit, and that if he does not "accept" the repudiation, it is nullified.¹⁸ If paragraph (a) were part of an English statute, it might be understood to mean that the aggrieved party is given the privilege of postponing action for anticipatory breach for a commercially reasonable time without suffering the disadvantage of being considered to have "rejected" the repudiation, but if he waits longer than a commercially reasonable time, it will be considered that he did not "accept" the repudiation and accordingly has lost his right of action for anticipatory breach.

Comment 1 contains the only Code explanation of the consequences of waiting longer than a commercially reasonable time:

1. . . . Under the present section . . . the aggrieved party may at any time resort to his remedies for breach, or he may suspend his own performance while he negotiates with, or awaits performance by, the other

¹⁶ Anderson, *Repudiation of Contract—The Post-Restatement Cases*, 6 DE PAUL L. REV. 1, 8 (1956).

¹⁷ *Simpson v. Scott*, 189 Va. 392, 53 S.E.2d 21 (1949); RESTATEMENT, CONTRACTS § 322 (1932); Anderson, *supra* note 16, at 25.

¹⁸ CHESHIRE & FIFOOT, CONTRACT 382-89 (1946); 5 WILLISTON, CONTRACTS §§ 1322-23, 1333-34 (rev. ed. 1936).

party. But if he awaits performance beyond a commercially reasonable time he cannot recover resulting damages which he should have avoided.

The last quoted sentence is unsatisfactory. It seems to say that awaiting performance beyond a commercially reasonable time (or failing to resort to a remedy within a commercially reasonable time) may itself result in damages. The Code contains several remedies for repudiation in addition to the action for anticipatory breach, and it may be that the quoted sentence refers to one or more of them. To the extent, if at all, however, that the sentence refers to an action for anticipatory breach, it is in error, since the date of filing an action for anticipatory breach, within the period of the statute of limitations, has no bearing on the matter of damages.¹⁹

The first sentence quoted above from comment 1 says that the aggrieved party "may at any time resort to his remedies for breach." The third sentence of comment 4 also says that he is free to proceed "at any time":

4. After repudiation, the aggrieved party may immediately resort to any remedy he chooses provided he moves in good faith (see Section 1-203). Inaction and silence by the aggrieved party may leave the matter open but it cannot be regarded as misleading the repudiating party. Therefore the aggrieved party is left free to proceed at any time with his options under this section, unless he has taken some positive action which in good faith requires notification to the other party before the remedy is pursued.

Each of these sentences, in saying that the aggrieved party may resort to his remedies "at any time," conflicts with the apparent meaning of paragraph (a) that he must act within a "commercially reasonable time," and with the explanation in comment 1: "But if he awaits performance beyond a commercially reasonable time he cannot recover resulting damages which he should have avoided."

The solicitude for the repudiator expressed in comments 1 and 4 further hinders the understanding of paragraph (a):

(a) The second sentence of comment 4 says that inaction and silence by the aggrieved party "may leave the matter open but it [*sic*] cannot be regarded as misleading the repudiating party."

(b) The first sentence of comment 4 says that the aggrieved party may immediately resort to any remedy he chooses "provided he moves in good faith (see Section 1-203)."

¹⁹ When interest is allowed as damages for breach of contract, it runs from the date when performance was due, and not from the date of a repudiation or the date of filing suit. RESTATEMENT, CONTRACTS § 337, comment h (1932).

(c) The third sentence of comment 4 says that the aggrieved party is left free to proceed at any time with his options under the section, "unless he has taken some positive action which in good faith requires notification to the other party before the remedy is pursued."

4. THE AGGRIEVED PARTY MAY RESORT TO ANY REMEDY FOR BREACH

The foregoing title declares the second consequence of a repudiation under section 2-610:

Section 2-610. Anticipatory Repudiation.

When either party repudiates the contract . . . the aggrieved party may . . .

- (b) resort to any remedy for breach (Section 2-703 or Section 2-711), even though he has notified the repudiating party that he would await the latter's performance and has urged retraction. . . .

The word "remedy" is defined in section 1-201(34) as follows: " 'Remedy' means any remedial right to which an aggrieved party is entitled with or without resort to a tribunal."

Paragraph (b), by its parenthetical reference to sections 2-703 and 2-711, specifies all of the remedies available to an aggrieved party if the other is guilty of some kind of wrongful conduct, including a repudiation. These two sections are described in their respective comments as "index" sections; section 2-703 is said to gather together "in one convenient place all of the various remedies open to a seller for any breach by the buyer," and section 2-711, together with certain sections not here involved, lists the buyer's remedies. Those remedies for a repudiation which relate mainly to the law of simple contracts are the following:

- a) Recovery of damages by either seller or buyer; this is the action for anticipatory breach and will be discussed in Topic 6.
- b) "Cover" as a remedy of the buyer only; this will be discussed in Topic 8.
- c) "Cancellation" by either seller or buyer; this will be discussed in Topic 9.

The latter part of paragraph (b) conforms to modern American law in saying that the aggrieved party may resort to any remedy for breach, "even though he has notified the repudiating party that he would await the latter's performance and has urged retraction. . . ." ²⁰

²⁰ *Carvage v. Stowell*, 115 Vt. 187, 55 A.2d 188 (1947); RESTATEMENT, CONTRACTS § 320 (1932).

5. THE AGGRIEVED PARTY MAY IN EITHER CASE SUSPEND HIS OWN PERFORMANCE

Paragraph (c) of section 2-610 gives the aggrieved party a supplementary privilege to suspend his own performance while he awaits performance under paragraph (a), or resorts to remedies under paragraph (b):

Section 2-610. Anticipatory Repudiation.

When either party repudiates the contract . . . the aggrieved party may . . .

- (c) in either case suspend his own performance or proceed in accordance with the provisions of this Article on the seller's right to identify goods to the contract notwithstanding breach or to salvage unfinished goods (Section 2-704).

This supplementary privilege exists also under the common law, as a part of the doctrine of the dependency of performances in bilateral contracts, under which the obligation of each party to a bilateral contract is dependent upon his receiving substantial performance. If one party repudiates, thereby manifesting that he will not render substantial performance, the aggrieved party may suspend his own performance, and, if he makes a material change of position, he is discharged.²¹

It should be noted that the privilege to suspend performance cannot exist in the case of a unilateral contract. Assume that *X* says to *Y* in May: "If you will deliver to me your horse Selim in June, I will pay you one hundred dollars on September 1," and assume that *Y* delivers Selim to *X* on June 1, thereby accepting *X*'s offer and forming a unilateral contract; if *X* repudiates in July, it is impossible for *Y* to suspend his own performance since he has no performance to render.²² In stating in substance that either party may suspend his own performance, the Code again fails to recognize the possibility of a unilateral contract.

6. THE ACTION FOR ANTICIPATORY BREACH

The first remedy for a repudiation listed in Topic 4, as provided by section 2-610 (b) and its "index" sections 2-703 and 2-711, is an action for damages for breach of contract by seller or buyer. The

²¹ *Nevins v. Ward*, 320 Mass. 70, 67 N.E.2d 673 (1946); RESTATEMENT, CONTRACTS §§ 280, 398 (1932).

²² 1 WILLISTON, CONTRACTS § 13 (rev. ed. 1936).

language used in the "index" sections is "damages," "damages for non-acceptance," and "damages for non-delivery," but it is understood to mean "damages for breach of contract."

This action for damages for breach of contract, which is based upon a repudiation rather than an actual breach, and which may be brought as soon as a repudiation has occurred, is the action for anticipatory breach. It is a part of the common law throughout the United States, with only Massachusetts clearly opposed.²³ In the single instance where the Code names this action, it is called "an action based on anticipatory repudiation."²⁴

Section 2-610 (b) conforms to the modern American rule in permitting the aggrieved party to sue for anticipatory breach "even though he has notified the repudiating party that he would await the latter's performance and has urged retraction."

Section 2-610 (b) departs from the common law in not restricting the action for anticipatory breach to cases of bilateral contracts executory on both sides: at common law the action does not lie in the case of a unilateral contract or of a bilateral contract fully performed on one side.²⁵

Comment 4 to section 2-610 says that an aggrieved party may immediately resort to any remedy he chooses "provided he moves in good faith (see Section 1-203)." Section 1-203 reads as follows: "Every contract or duty within this Act imposes an obligation of good faith in its performance or enforcement." Comment 4 also says that good faith on the part of the aggrieved party may require notification to the repudiator before a remedy is pursued. If these provisions apply to an action for anticipatory breach, they are new to the law and their purpose is not understood.

7. THE NEW MEASURE OF DAMAGES FOR ANTICIPATORY BREACH

The Code makes a radical departure from existing law in changing the measure of damages in all cases of repudiation by the seller and in some cases of repudiation by the buyer. This change not only affects the amount of the aggrieved party's recovery, but also has the

²³ 5 *id.* at § 1314 (rev. ed. 1936).

²⁴ UNIFORM COMMERCIAL CODE § 2-723.

²⁵ *Mabery v. Western Casualty & Surety Co.*, 173 Kan. 586, 250 P.2d 824 (1952); RESTATEMENT, CONTRACTS § 318 (Supp. 1948).

collateral effect of making "cover" by the buyer a matter of practical necessity if the seller repudiates in a rising market.

Under existing law, the measure of damages for anticipatory breach is the same as in the case of an actual breach, and, in either case, if the contract is for the sale of goods, the basic element²⁶ is the difference between the contract price and market price at the time and place for performance.²⁷ This formula will compensate an aggrieved seller for the fact that on the performance date he has the goods instead of the price to which he was entitled; likewise, it will compensate an aggrieved buyer for the fact that on the performance date he has the purchase money instead of the goods to which he was entitled.

The change made by the Code is to take the market price at the time when the buyer "learned of" the repudiation, instead of at the time for performance, as follows:

a) The new formula is to be used in all cases of repudiation by either seller or buyer if the action comes to trial before the date for performance:

Section 2-723. Proof of Market Price: Time and Place.

(1) If an action based on anticipatory repudiation comes to trial before the time for performance with respect to some or all of the goods, any damages based on market price (Section 2-708 or Section 2-713) shall be determined according to the price of such goods prevailing at the time when the aggrieved party learned of the repudiation.

b) The new formula is to be used in all cases of repudiation by a seller, regardless of when the action comes to trial; the market price date is said to be "the time when the buyer learned of the breach," but "breach" is understood to include repudiation:

Section 2-713. Buyer's Damages for Non-Delivery or Repudiation.

(1) Subject to the provisions of this Article with respect to proof of market price (Section 2-723), the measure of damages for non-delivery or repudiation by the seller is the difference between the market price at the

²⁶ Other elements in the view of the common law are discussed in RESTATEMENT, CONTRACTS §§ 329-41 (1932); other elements in the view of the UNIFORM COMMERCIAL CODE are incidental and consequential damages, covered in sections 2-710 and 2-715.

²⁷ *Reliance Cooperage Corp. v. Treat*, 195 F.2d 977 (C.A. 8, 1952); *Continental Grain Co. v. Simpson Feed Co.*, 102 F.Supp. 354 (E.D. Ark. 1951), *modified* 199 F.2d 284 (C.A. 8, 1952); see *In re Marshall's Garage*, 63 F.2d 759 (C.A. 2, 1933); 5 CORBIN, CONTRACTS § 1053 (1950); RESTATEMENT, CONTRACTS §§ 329, 338 (1932); 5 WILLISTON, CONTRACTS § 1397 (rev. ed. 1936).

time when the buyer learned of the breach and the contract price together with any incidental and consequential damages provided in this Article (Section 2-715), but less expenses saved in consequence of the seller's breach.

c) The formula of the existing law, and not the new formula, is to be used in the case of a repudiation by a buyer, if the action comes to trial (as it usually does), after the date for performance:

Section 2-708. Seller's Damages for Non-Acceptance or Repudiation.

(1) Subject to subsection (2) and to the provisions of this Article with respect to proof of market price (Section 2-723), the measure of damages for non-acceptance or repudiation by the buyer is the difference between the market price at the time and place for tender and the unpaid contract price together with any incidental damages provided in this Article (Section 2-710), but less expenses saved in consequence of the buyer's breach.

The difference in the amount of recovery, depending on whether the seller's action comes to trial before or after the date for performance, comes from the fact that section 2-708 enacts the formula of existing law, but also says that it is subject to section 2-723, under which the new formula is applicable if the action comes to trial before the date for performance.

A change in the market price of the goods after the contract is made is probably the most common cause of a repudiation of a contract for the sale of goods. The effects of the new formula may be illustrated by hypothetical sets of facts, under which, first, a seller repudiates in a rising market, and, second, a buyer repudiates in a falling market.

Assume a contract made in February for the sale by *S* to *B* of 1000 tons of a commodity at \$10 per ton to be delivered in June.

a) Assume that an event occurs on March 1 which makes it likely that the price will rise, and that *S* repudiates on March 2; assume also that the market price remains at \$10 during March, is \$11 in April, \$12 in May, and \$13 during June, and, finally, that *B* sues *S* for damages under the doctrine of anticipatory breach on March 20.

i) Under existing law, *B* will recover \$3000, which is the difference between the market price in June and the contract price.²⁸

ii) Under either section 2-713 or section 2-723 of the Code,

²⁸ These hypothetical facts and the result conform closely to the facts and result in *Reliance Cooperaage Corp. v. Treat*, 195 F.2d 977 (C.A. 8, 1952).

B will recover nothing, since the market price at the time of the repudiation is the same as the contract price.

b) Assume that an event occurs on March 1 which makes it likely that the price will fall, and that *B* repudiates on March 2; assume also that the market price remains at \$10 during March, is \$9 in April, \$8 in May, and \$7 during June, and, finally, that *S* sues *B* for damages under the doctrine of anticipatory breach on March 20.

i) Under existing law, *S* will recover \$3000, which is the difference between the market price in June and the contract price.

ii) Under the Code, *S*'s recovery will depend on when the action comes to trial:

If trial occurs after the performance date, as is probable, section 2-708 applies the rule of the existing law, and *S* will recover \$3000, which is the difference between the market price at the time for "tender" and the contract price.

If trial occurs before the performance date, which will ordinarily happen only in the rather unusual case where the contract has a performance date some years in the future, section 2-723 applies the new formula, and *S* will recover nothing since the market price at the time of the repudiation is the same as the contract price.

An aggrieved seller is subject to the Code's new formula only in the case of a long-term contract where an action for anticipatory breach may come to trial before the performance date, and he can avoid the effect of the new formula even in that situation by delaying suit for anticipatory breach, or by suing only for the actual breach after the performance date has passed. In either such case, section 2-708, and not 2-723, is applicable, and the measure of damages is the difference between the market price at the time for "tender" and the contract price.

An aggrieved buyer, however, cannot avoid the new formula in any case when the seller repudiates: whether he sues for anticipatory breach or only for the actual breach after the performance date has passed and whether trial occurs after the performance date under section 2-713 or before the performance date under section 2-723, his recovery is the same, namely, the difference between the contract price and the market price at the time of the repudiation. The new formula diminishes the value of his action for damages: he recovers the amount that the market price has increased between the date of the

contract and the date of the repudiation, and an alert seller can make that difference small or nothing by repudiating immediately after a price rise appears to be likely. This deterioration to the point of worthlessness in the buyer's action for damages practically compels him to resort to the remedy of "Cover," which is discussed in Topic 8.

8. "COVER"

The previous discussion concluded by pointing out that the Code's new formula for determining the buyer's damages, in the case of a repudiation by the seller in a rising market, practically compels the buyer to resort to the remedy of "cover."

Section 2-711, an "index" section of the remedies of the buyer, says that a buyer may "cover" if the seller repudiates, and section 2-712 explains what "cover" is:

Section 2-711. Buyer's Remedies in General; Buyer's Security Interest in Rejected Goods.

(1) Where the seller fails to make delivery or repudiates or the buyer rightfully rejects or justifiably revokes acceptance then with respect to any goods involved, and with respect to the whole if the breach goes to the whole contract (Section 2-612), the buyer may cancel and whether or not he has done so may in addition to recovering so much of the price as has been paid

(a) "cover" and have damages under the next section as to all the goods affected whether or not they have been identified to the contract; or

(b) recover damages for non-delivery as provided in this Article (Section 2-713).

Section 2-712. "Cover"; Buyer's Procurement of Substitute Goods.

(1) After a breach within the preceding section the buyer may "cover" by making in good faith and without unreasonable delay any reasonable purchase of or contract to purchase goods in substitution for those due from the seller.

(2) The buyer may recover from the seller as damages the difference between the cost of cover and the contract price together with any incidental or consequential damages as hereinafter defined (Section 2-715), but less expenses saved in consequence of the seller's breach.

(3) Failure of the buyer to effect cover within this section does not bar him from any other remedy.

Although section 2-712 says that the buyer may cover after a "breach," the meaning is understood to be that he may cover if the

seller repudiates: a repudiation is one of the facts mentioned in section 2-711 which entitles the buyer to cover.

“Cover” accordingly is a remedy available to a buyer if a seller repudiates, and means that he may buy or contract to buy substitute goods from a different seller, and, having done so, may recover as damages the difference between the contract price and the “cost of cover,” which will be what he pays the second seller. Section 2-715 provides that he also may recover any “incidental” or “consequential” damages sustained:

Section 2-715. Buyer’s Incidental and Consequential Damages.

(1) Incidental damages resulting from the seller’s breach include . . . any commercially reasonable charges, expenses or commissions in connection with effecting cover. . . .

(2) Consequential damages resulting from the seller’s breach include

(a) any loss resulting from general or particular requirements and needs of which the seller at the time of contracting had reason to know and which could not reasonably be prevented by cover or otherwise. . . .

Section 2-712 states that cover is to be made “without unreasonable delay,” but the comment gives a somewhat contradictory explanation:

The requirement that the buyer must cover “without unreasonable delay” is not intended to limit the time necessary for him to look around and decide as to how he may best effect cover. The test here is similar to that generally used in this Article as to reasonable time and seasonable action.

“Cover” is similar to a procedure in existing law known as making a “forward contract” or a “forward-looking contract.” The matter has come up when a buyer of goods has sued a repudiating seller for damages consisting of the difference between the contract price and the market price at the time and place for performance, and when the seller has replied that the buyer could and should have avoided all or part of his damages by making a “forward contract,” at the time of the repudiation, to buy substitute goods from a different seller. American courts have refused to agree with the seller’s contention, however, and have said that the buyer was not required, for the sake and benefit of a repudiating seller, to run the risks involved in making such a forward contract.²⁹ The buyer accordingly has recovered as damages the dif-

²⁹ *Reliance Cooperage Corp. v. Treat*, 195 F.2d 977 (C.A. 8, 1952); *Continental Grain Co. v. Simpson Feed Co.*, 102 F.Supp. 354 (E.D. Ark. 1951), *modified* 199 F.2d

ference between the contract price and the market price at the time and place for performance.

A point to be mentioned in passing, but which is outside the scope of the present discussion, is that the Code provides that the buyer may "cover," not only after a repudiation, but also after an actual breach without repudiation.³⁰

Considerable latitude is given to the buyer when he covers, as is indicated in the comment to section 2-712:

(2) The definition of "cover" under subsection (1) envisages a series of contracts or sales, as well as a single contract or sale; goods not identical with those involved but commercially usable as reasonable substitutes under the circumstances of the particular case; and contracts on credit or delivery terms differing from the contract in breach, but again reasonable under the circumstances. The test of proper cover is whether at the time and place the buyer acted in good faith and in a reasonable manner, and it is immaterial that hindsight may later prove that the method of cover used was not the cheapest or most effective.

Various bits of language in the Code and comment give the impression at first glance that cover is an entirely optional remedy for a repudiation by a seller. The fact, however, is that cover is practically mandatory. If a buyer does not cover when a seller repudiates, these are the consequences:

a) The buyer will be unable to recover damages based on a rise in the market price of the goods occurring between the date of the repudiation and the date for performance, or, in other words, his recovery will be limited to the rise which has occurred between the date of the contract and the date of the repudiation. If the seller is alert and repudiates before much or any of the rise has occurred, the buyer will be able to recover little or nothing, regardless of how much the price rises by the date for performance. This consequence is a result of the Code's new formula, discussed in Topic 7, under which the

284 (C.A. 8, 1952); *Joseph Denunzio Fruit Co. v. Crane*, 79 F.Supp. 117 (D. Cal. 1948). "It is never necessary to expend time or money in an effort to avoid injurious consequences unless the advantage to be derived from such expenditure is almost certain. The plaintiff is not required to run the risk of increasing his loss. For this reason, where the defendant has committed an anticipatory repudiation, it is not necessary for the plaintiff to make a speculative forward contract at the time of the repudiation." 5 CORBIN, CONTRACTS § 1042, at 222 (1950). 5 CORBIN, *op. cit. supra* §§ 1053, 1101; 5 WILLISTON, CONTRACTS § 1397 (rev. ed. 1936).

³⁰ UNIFORM COMMERCIAL CODE § 2-711(1).

measure of damages for a repudiation by a seller is the difference between the contract price and the market price at the time when the buyer learned of the repudiation.

b) The buyer may be unable to recover consequential damages under section 2-712 (2), since they are defined in section 2-715 (2) as including "any loss resulting from general or particular requirements and needs of which the seller at the time of contracting had reason to know and which could not reasonably be prevented by cover or otherwise. . . ."

c) The buyer may be unable to obtain specific performance, as is indicated by the following excerpt from the comment to section 2-712: "Moreover, the operation of the section on specific performance of contracts for 'unique' goods must be considered in this connection for availability of the goods to the particular buyer for his particular needs is the test for that remedy. . . ."

d) The buyer may be deprived of the remedy of replevin under section 2-716 (3): "The buyer has a right of replevin for goods identified to the contract if after reasonable effort he is unable to effect cover for such goods or the circumstances reasonably indicate that such effort will be unavailing. . . ."

The various bits of language in the Code and comment, above referred to, which give the impression at first glance that cover is an entirely optional remedy for a repudiation by a seller, when in fact it is practically mandatory, and which therefore are misleading, are the following:

a) This language from section 2-711 (1): "Where the seller . . . repudiates . . . the buyer . . . may . . . 'cover' . . ."

b) This language from section 2-712 (1): "After a breach [repudiation] within the preceding section the buyer may 'cover' . . ."

c) Subsection (3) of section 2-712: "Failure of the buyer to effect cover within this section does not bar him from any other remedy."

d) Comment 3 to section 2-712:

3. Subsection (3) expresses the policy that cover is not a mandatory remedy for the buyer. The buyer is always free to choose between cover and damages for non-delivery under the next section.

However, this subsection must be read in conjunction with the section which limits the recovery of consequential damages to such as could not have been obviated by cover. Moreover, the operation of the section on specific performance of contracts for "unique" goods must be considered

in this connection for availability of the goods to the particular buyer for his particular needs is the test for that remedy and inability to cover is made an express condition to the right of the buyer to replevy the goods.

The foregoing comment is helpful in warning that failure to cover may cause the buyer to lose the right to consequential damages, specific performance, and replevin, but it is seriously misleading in failing to warn that his action for damages may be worth little or nothing.

e) Comment 5 to section 2-713: "The present section provides a remedy which is completely alternative to cover under the preceding section and applies only when and to the extent that the buyer has not covered."

The Code is inconsistent in causing a seller's repudiation in a rising market to give a buyer a different measure of recovery depending on whether the buyer proceeds by way of an action for damages or by way of cover. If the buyer chooses to sue for damages, he will recover the difference between the contract price and the market price at the time of repudiation. If he chooses to cover, he will recover the difference between the contract price and the cost of cover, and this difference will tend to equal the difference between the contract price and the market price at the time for performance.

The Code's new formula for determining the buyer's damages in case the seller repudiates, that is, the difference between the contract price and the market price at the time of the repudiation, causes an aggrieved buyer's action for damages to be worth little or nothing if a seller repudiates in a rising market, and, correspondingly, encourages a seller to repudiate. If something happens after the contract is made which causes the seller to think that the market price is going to rise between then and the time for performance, he will be induced to repudiate and will hope that the buyer will sue for damages, since this will result in the cheapest outcome for the seller. The seller will be liable only for the amount that the price has risen between the contract and the repudiation.

On the other hand, if the market price rises to the date for performance, the most expensive courses for the seller are:

a) To perform on the due date; this is expensive because the market price of the goods being delivered exceeds the contract price to the extent of the price rise. He can avoid this outcome by not delivering at all.

b) To commit an actual breach on the due date by not delivering;

this is expensive because the buyer can recover as damages the difference between the contract price and "the market price at the time when the buyer learned of the breach," which usually will be on the date for performance. The seller can avoid this outcome by repudiating before the date for performance, whereupon the buyer's damages, under the new formula, become the difference between the contract price and the market price at the time of the repudiation.

c) To be compelled to pay the damages resulting from cover, namely, the difference between the contract price and "the cost of cover"; this will be expensive because this difference will tend to equal the difference between the contract price and the market price at the time for performance. A repudiating seller cannot avoid this outcome if the buyer covers in a proper manner, but even here the seller is given an undeserved advantage by the language of subsection (1): "the buyer may 'cover' by making in good faith and without unreasonable delay any reasonable purchase of or contract to purchase goods in substitution for those due from the seller." This provision seems to place the burden on the aggrieved buyer to show that he acted "in good faith" and "without unreasonable delay" and that his purchase was "reasonable." If the buyer fails to sustain this burden his cover is invalid, and he is left to resort to his action for damages, under which he will recover only the difference between the contract price and the market price at the time of the repudiation.

The deterioration in the value of the buyer's action for damages caused by the Code's new formula, and the resulting practical necessity that he assume the burden of "cover," may cause him to doubt the value of a contract as a protection against a market rise.

9. "CANCELLATION"

The third remedy for a repudiation listed in Topic 4, as provided by section 2-610 (b) and its "index" sections 2-703 and 2-711, is "cancellation" by either seller or buyer. The Code definition of "cancellation" incorporates the word "termination," but "termination" is not a remedy for a repudiation:

Section 2-106. Definitions: "Contract"; "Agreement"; "Contract for Sale"; "Sale"; "Present Sale"; "Conforming" to Contract; "Termination"; "Cancellation."

(3) "Termination" occurs when either party pursuant to a power created by agreement or law puts an end to the contract otherwise than for

its breach. On "termination" all obligations which are still executory on both sides are discharged but any right based on prior breach or performance survives.

(4) "Cancellation" occurs when either party puts an end to the contract for breach by the other and its effect is the same as that of "termination" except that the cancelling party also retains any remedy for breach of the whole contract or any unperformed balance.

Although the definition says that cancellation occurs when either party puts an end to the contract for "breach" by the other, the meaning is understood to be that one party can put an end to the contract if the other repudiates. The reason for this understanding is that each of the "index" sections 2-703 and 2-711 specifies certain acts of wrongful conduct by one party, among which is a repudiation, and each of them then lists various remedies open to the aggrieved party, one of which is to "cancel."

Cancellation is a new remedy for a repudiation, as is seen when it is compared with forms of discharge which may result directly from a repudiation under existing law:

a) A repudiation of a bilateral contract includes a manifestation by the repudiator that he no longer favors the contract and amounts to a proposal by him to rescind it. The aggrieved party need not assent, but he may if he so desires, and, if he does, the result is a rescission by mutual assent, which discharges both parties.³¹ Cancellation differs, since both parties are not discharged, but rather "the cancelling party also retains any remedy for breach of the whole contract or any unperformed balance."

b) A repudiation of a bilateral contract entitles the aggrieved party to make a material change of position, and, if he does so, he alone is discharged, and he retains his remedies for breach of contract against the repudiator.³² It is the material change of position, and not the repudiation, which discharges the aggrieved party, as is seen from the fact that the repudiator can retract his repudiation, and thereby nullify it, until the material change of position, which includes filing suit for anticipatory breach. Cancellation is similar in that only the aggrieved party is discharged, but it differs in not requiring a material change of position. It is assumed that an aggrieved party can effect a cancellation

³¹ *Gibula v. Sause*, 173 Md. 87, 194 Atl. 826 (1937); Anderson, *supra* note 16, at 13.

³² *Nevins v. Ward*, 320 Mass. 70, 67 N.E.2d 673 (1946); RESTATEMENT, CONTRACTS §§ 280, 398 (1932).

by manifesting that he "puts an end to the contract for breach [or repudiation] by the other."

10. RETRACTION OF THE REPUDIATION

Section 2-611. Retraction of Anticipatory Repudiation.

(1) Until the repudiating party's next performance is due he can retract his repudiation unless the aggrieved party has since the repudiation cancelled or materially changed his position or otherwise indicated that he considers the repudiation final.

(2) Retraction may be by any method which clearly indicates to the aggrieved party that the repudiating party intends to perform, but must include any assurance justifiably demanded under the provisions of this Article (Section 2-609).

(3) Retraction reinstates the repudiating party's rights under the contract with due excuse and allowance to the aggrieved party for any delay occasioned by the repudiation.

The first thirteen words of subsection (1) conform to the common law, under which a retraction is the converse of a repudiation, and amounts to a manifestation by the promisor that he will perform his promise when the date for performance arrives.³³

The remainder of subsection (1) differs from the common law in its list of circumstances which bar a retraction. At common law, a repudiation cannot be retracted if the aggrieved party has filed suit for anticipatory breach or if he has materially changed his position,³⁴ but the Code includes two other situations in which a retraction cannot be made: first, if the aggrieved party has "cancelled," and, second, if he has "otherwise indicated that he considers the repudiation final." Subsection (1) does not mention the filing of suit as a bar to retraction, but it is believed that filing suit would be a material change of position, and therefore effective.

The first twenty words of subsection (2) conform to the common law, but the rest of the subsection refers back to section 2-609, which permits a party to "demand adequate assurance of due performance" if he has "reasonable grounds for insecurity." If *X* repudiates, *Y* clearly has "reasonable grounds for insecurity," and may make the demand. The opinion was expressed in the discussion of Topic 2, however, that it seldom will be worth while for *Y* to make the demand, since *X* may

³³ RESTATEMENT, CONTRACTS § 319 (1932).

³⁴ *Ibid.*

be expected to ignore it, in the realization that his failure to furnish the assurance is only a second repudiation.

If the aggrieved party chooses to put section 2-609 into operation by making the written demand for adequate assurance of due performance, then the repudiator cannot retract effectively by the common law method, but, on the contrary, his retraction now "must include any assurance justifiably demanded" under section 2-609. The comment to section 2-611 indirectly yields some information as to what is required by an "adequate assurance of due performance," in that it indicates that a retraction sufficient to nullify a repudiation is not automatically an "adequate assurance," and also that such an "assurance" may be of such a complex nature that it will need "a reasonable time . . . to be worked out":

2. Under subsection (2) an effective retraction must be accompanied by any assurances demanded under the section dealing with right to adequate assurance. A repudiation is of course sufficient to give reasonable ground for insecurity and to warrant a request for assurance as an essential condition of the retraction. However, after a timely and unambiguous expression of retraction, a reasonable time for the assurance to be worked out should be allowed by the aggrieved party before cancellation.

11. DISCHARGE WITHOUT CONSIDERATION OF ANY CLAIM OR RIGHT ARISING FROM A REPUDIATION

Section 1-107. Waiver or Renunciation of Claim or Right After Breach.

Any claim or right arising out of an alleged breach can be discharged in whole or in part without consideration by a written waiver or renunciation signed and delivered by the aggrieved party.

This section creates a new kind of discharge. It resembles a release in that it requires a writing and delivery, but it differs in that it does not require a seal or sufficient consideration.³⁵ Good faith is a requirement, as is shown by the comment to the section: "Its provisions, however, must be read in conjunction with the section imposing an obligation of good faith." The section referred to is 1-203, which reads as follows: "Every contract or duty within this Act imposes an obligation of good faith in its performance or enforcement."

Observing the Code's definitions from section 1-201: "(36) 'Rights' includes remedies" and "(34) 'Remedy' means any remedial right to

³⁵ Clark v. Sperry, 125 W.Va. 718, 25 S.E.2d 870 (1943); RESTATEMENT, CONTRACTS § 402 (1932).

which an aggrieved party is entitled with or without resort to a tribunal," and it being understood that, here as elsewhere in the Code, "breach" includes a repudiation, it appears that any or all of the rights and remedies of the aggrieved party arising from a repudiation can be discharged by the operation of the section. The words "waiver" and "renunciation" are not defined in the Code, and do not have well-defined meanings in the law of contracts.³⁶

Another section of the Code, as explained in its comment, is designed as a safety measure to prevent a writing from operating as a "waiver" or "renunciation" when the writer has a different intention: Section 2-270. Effect of "Cancellation" or "Rescission" on Claims for Antecedent Breach.

Unless the contrary intention clearly appears, expressions of "cancellation" or "rescission" of the contract or the like shall not be construed as a renunciation or discharge of any claim in damages for an antecedent breach.

Comment. This section is designed to safeguard a person holding a right of action from any unintentional loss of rights by the ill-advised use of such terms as "cancellation," "rescission," or the like. Once a party's rights have accrued they are not to be lightly impaired by concessions made in business decency and without intention to forego them. Therefore, unless the cancellation of a contract expressly declares that it is "without reservation of rights," or the like, it cannot be considered to be a renunciation under this section.

It should be noted that section 1-107 is in Article 1 of the Code, entitled "General Provisions," and therefore apparently applies to a claim or right arising under any Article, but section 2-720 is in Article 2 and accordingly applies only to a contract for the sale of goods.

³⁶ Chapter 13 of the Restatement, entitled "Discharge of Contracts," contains Topic 8, entitled "Discharge by Renunciation or by Executed Gift," which contains seven sections dealing with extraordinary and rarely mentioned forms of discharge, all effective without a seal or sufficient consideration. The present section of the Code appears to be intended to have a very broad application, and not to be related to Topic 8 in Chapter 13 of the Restatement except in containing the word "renunciation," and in being effective without a seal or sufficient consideration.