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THE UNIFORM COMMERCIAL CODE SECTION 2-609: A RETURN TO CERTAINTY

INTRODUCTION

The most important function of the law of contracts is to protect each party's expectation "interest" in the contract.¹ Each promisee ought to be able to rely upon a promisor's promise that he will fulfill his obligation under the contract so that the promisee will realize the benefits he expects to obtain from it. A failure by the promisor to fulfill this obligation is considered a breach of contract, and is normally grounds for the promisee to invoke his right to seek a remedy which will place him in as good a position as if the promisor had fully performed. In spite of the desires of the parties to a contract there exist a number of ways in which an agreement may break down. One of the most common breaches of contract is anticipatory repudiation.²

The Dilemma

An anticipatory repudiation by a party to a contract is a repudiation of his contractual duty before the time fixed in the contract for his performance has arrived. At early common law, the British courts held that it was impossible for a party to breach his contract prior to the time when his performance was due, for it was only at the time of performance that the promisor in fact, as well as in law, failed to perform as he had agreed.³ This mechanistic approach was cast aside in *Hochster v. De La Tour*,⁴ which held that an action for breach of contract prior to the performance date is not premature.⁵ The principle enun-

1. 4 CORBIN, CONTRACTS § 959 (1951).

2. The doctrine of anticipatory repudiation has a two-fold purpose; first, to avoid any further damage to the promisee which might flow from his being required to continue his own performance after repudiation, second, to allow him to recover immediately any damages for past expenditures related to the contract. *E.g.*, *Hochster v. De la Tour*, 118 Eng. Rep. 922 (Q.B. 1853).

3. *See, e.g.*, *Phillpots v. Evans*, 151 Eng. Rep. 200 (Ex. 1839) (Baron Parke's opinion).

4. 118 Eng. Rep. 922 (Q.B. 1853).

5. *Id.* at 926. Lord Cambell stated:

[I]t is surely much more rational, and more for the benefit of both parties, that, after the renunciation of the agreement by the defendant, the plaintiff should be at liberty to consider himself absolved from any future performance of it, retaining his right to sue for any damages he has

ated in *Hochster* was endorsed by the United States Supreme Court in *Roehm v. Horst*,⁶ which involved an action for breach brought against an alleged repudiator who had intentionally destroyed the subject matter of the contract prior to the date set for performance. The doctrine of anticipatory repudiation since *Roehm* has been acknowledged in an overwhelming majority of the states and appears to have been rejected only in Massachusetts.⁷

The modern doctrine of anticipatory repudiation focuses upon two distinct types of conduct engaged in by a prospective repudiator.⁸ First, a repudiation may arise when the promisor, without justification, makes a statement that he cannot or will not perform.⁹ In order for such a statement to constitute a repudiation, the promisor's language must be sufficiently distinct, unequivocal, and absolute to be reasonably interpreted to mean that he cannot or will not perform.¹⁰ Second, one may repudiate by voluntarily putting it out of his power to perform as agreed

suffered from the breach of it. Thus, instead of remaining idle and laying out money in preparation which must be useless, he is at liberty to seek service under another employer, which would go in mitigation of the damages which he would otherwise be entitled to for a breach of the contract.

6. 178 U.S. 1 (1900).

7. See *Porter v. American Legion of Honor*, 183 Mass. 326, 67 N.E. 238 (1903); *Daniels v. Newton*, 114 Mass. 530 (1874). It is doubtful, however, whether these cases would be followed today.

8. The RESTATEMENT OF CONTRACTS § 318 (1932) originally enunciated three types of conduct and read as follows:

Except in the cases of a contract originally unilateral and not conditional on some future performance by the promisee, and of a contract originally bilateral that has become unilateral and similarly unconditional by full performance by one party, any of the following acts, done without justification by a promisor in a contract before he [has breached by failure to render performance or by hindering performance by the other party] constitutes an anticipatory repudiation which is a total breach of contract:

(a) a positive statement to the promisee or other person having a right under the contract, indicating that the promisor will not or cannot substantially perform his contractual duties;

(b) transferring or contracting to transfer to a third person an interest in specific land, goods, or in any other thing essential for the substantial performance of his contractual duties;

(c) any voluntary affirmative act which renders substantial performance of his contractual duties impossible, or apparently impossible.

9. *E.g.*, *Oloffson v. Coomer*, 12 U.C.C. Rep. Serv. 1082 (Ill. App. 1973) (where seller told buyer, at a time when the price for future delivery was rising, that he was not planting corn because the season had been too wet and that plaintiff should arrange to obtain corn elsewhere).

10. Statements made in the following cases were held not to be distinct, unequivocal, and absolute. *McCloskey & Co. v. Minwild Steel Co.*, 220 F.2d 101 (3d Cir. 1955) (statements by a subcontractor that he was having difficulty obtaining necessary materials accompanied by a request for assist-

upon.¹¹ Such actions must be both voluntary and affirmative, and must make it actually or apparently impossible for the promisor to perform.¹²

The Uniform Commercial Code,¹³ in section 2-610,¹⁴ has carried forward the basic pattern of the common law. Under section 2-610, the repudiation need not be of the whole contract, but only of such portion that the loss to the aggrieved party will substantially impair the value of the contract to him. The Code prescribes three measures to deal with such repudiations. The aggrieved party may, for a commercially reasonable time, await performance by the repudiating party.¹⁵ He may also resort to any remedy provided by the Code for breach, even though he has notified the other party that he would await his performance and has urged retraction.¹⁶ And in either case, he may suspend his own performance.¹⁷

ance); *Salot v. Wershow*, 157 Cal. App. 352, 320 P.2d 926 (1958) (statement of inability to pay the contract price when due and a request for an extension).

11. *Rhoem v. Horst*, 178 U.S. 1 (1900). See note 6 and accompanying text *supra*.

12. RESTATEMENT (SECOND) OF CONTRACTS § 274 (Tent. Draft No. 9, 1974) includes these requirements in its text. The provision reads as follows:

A repudiation is

- (a) a statement by the obligor to the obligee that the obligor will not perform without a breach, or
- (b) a voluntary affirmative act which renders him unable or apparently unable to perform without a breach that would of itself give the obligee a claim for damages for total breach under § 268.

13. Unless otherwise noted, all reference to the Uniform Commercial Code [hereinafter cited as U.C.C.] will be to the 1972 Official Text and Comments. The U.C.C. has been adopted by forty-nine states, the District of Columbia, and the Virgin Islands. Only Louisiana remains without the Code. R. NORDSTROM, HANDBOOK OF THE LAW OF SALES § 2 (1970).

14. U.C.C. § 2-610 reads as follows:

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).

15. U.C.C. § 2-610(a).

16. U.C.C. § 2-610(b). A repudiation may be retracted unless the aggrieved party has since the repudiation cancelled, materially changed his position, or otherwise indicates that he considers the repudiation final. U.C.C. § 2-611(1).

17. U.C.C. § 2-610(c). Under this section the aggrieved party may also proceed to identify goods to the contract or salvage unfinished goods.

Although invoking the doctrine of anticipatory repudiation appears relatively uncomplicated, its application involves the evaluation of an unlimited variety of human responses made in an equal number of contractual settings,¹⁸ thus confronting the party it is intended to protect with difficult legal and practical problems.¹⁹ Doubtful and indefinite statements that performance may or may not take place, for example, will not be held to create an immediate right of action.²⁰ Moreover, a mere request for a change in the terms of a contract or even a request for cancellation are not enough in themselves to constitute a repudiation. The promisee's *practical dilemma* is this: when the effect or nature of the prospective repudiator's actions are unclear, there are no definite guidelines for determining whether an anticipatory repudiation has taken place.²¹ The promisee's *legal dilemma* depends on which of the two possible responses he makes to the promisor's actions. First, he may postpone taking any action until the date set for actual performance under the contract arrives, and then sue for breach if such performance is not forthcoming.²² Second, he may characterize the promisor's

18. E. KIONKA, UNIFORM COMMERCIAL CODE—A REMEDY FOR PROSPECTIVE INABILITY TO PERFORM, IN THE UNIFORM COMMERCIAL CODE COORDINATOR 441 (1962).

19. Comment, *A Right to Adequate Assurance of Performance in All Transactions: U.C.C. § 2-609 Beyond Sales of Goods*, 48 S. CAL. L. REV. 1358 (1975) [hereinafter cited as *Beyond Sales of Goods*].

20. *Dingley v. Oler*, 117 U.S. 490 (1886). In *Dingley*, the seller refused to deliver ice according to the terms of the contract because of an increase in the market price of ice. The Supreme Court declined to find a repudiation and explained that:

[a]lthough . . . they decline to ship the ice that season, it is accompanied with the expression of alternative intention, and that is, to ship it, as must be understood, during that season, if and when the market price should reach the point which, in their opinion, the plaintiffs ought to be willing to accept as its fair price between them This, we think, is very far from being a positive, unconditional, and unequivocal declaration of fixed purpose not to perform the contract in any event or at any time. In view of the consequences sought to be deduced and claimed as a matter of law to follow, the defendants have a right to claim that their expressions, sought to be converted into a renunciation of the contract, shall not be enlarged by construction beyond their strict meaning.

Id. at 501-02.

21. Comment, *Anticipatory Repudiation Under The Uniform Commercial Code: Interpretation, Analysis and Problems*, 30 Sw. L.J. 601, 611 (1976).

22. *E.g.*, *Oloffson v. Coomer*, 12 U.C.C. Rep. Serv. 1082, 1086-88 (Ill. App. 1973). In *Oloffson*, the seller unequivocally repudiated a contract for the sale of corn. The court held that under certain circumstances the aggrieved party may await the performance of a repudiating party with respect to performance not yet due. The seller's awaiting performance, however, is conditioned upon his; (1) waiting no longer than a commercially reasonable time, and (2) dealing with the seller in good faith. *See also Frost v. Knight*, L.R. 7 Ex. 111 (1872), where it was said that:

the promisee, if he pleases, may treat the notice of intention (of the

actions as being a clear and unequivocal rejection of the continuing obligation and bring suit before the time fixed in the contract for performance.²³

By selecting the first response the promisee runs the risk that a court will deem his inaction a failure to minimize avoidable damages.²⁴ Such a determination may cost the promisee his right to consequential damages.²⁵ On the other hand, by selecting the second response, the promisee may find himself a defendant in a suit for anticipatory repudiation brought by the promisor.²⁶

The resolution of this dilemma depends upon the answer to a single inquiry: at what point does the right to suspend performance and bring an action for breach become fixed? With the answer to this inquiry comes the certainty and stability that guide commercial men in ordering their affairs.

The Code's Solution

Section 2-609 of the Uniform Commercial Code recognizes the promisee's dilemma and proposes a solution.²⁷ It provides a

promisor) as inoperative, and await the time when the contract is to be executed, and then hold the other party responsible for all the consequences of non-performance; but in that case he keeps the contract alive for the benefit of the other party as well as his own; he remains subject to all his own obligations and liabilities under it, and enables the other party not only to complete the contract, if so advised, notwithstanding his previous repudiation of it, but also to take advantage of any supervening circumstances which would justify him in declining to complete it.

23. *E.g.*, *Bliss Produce Co. v. A.E. Albert & Sons, Inc.*, 20 U.C.C. Rep. Serv. 917 (App. Div. N.Y. 1976). Here, the notification by a dealer of potatoes that he would be unable to ship as required due to adverse weather conditions was sufficiently unequivocal to constitute an anticipatory repudiation. The court stated that the date of notification was the earliest that the buyer would have cause to take action. A clear exposition of the doctrine by Mr. Justice Cardozo can be found in *New York Life Ins. Co. v. Viglas*, 291 U.S. 672 (1935).

24. This characterization is the application of the doctrine of mitigation of damages with respect to repudiation in advance of the date set for performance. A majority of courts have held that the mitigation principle is applicable in such cases, and that the innocent promisee cannot recover damages that could have been avoided subsequent to the repudiation. *See Rockingham County v. Luter Bridge Co.*, 35 F.2d 301 (4th Cir. 1929) (contract to have bridge built repudiated before completion of work).

25. Moreover, under § 2-610, if one awaits performance beyond a commercially reasonable time, he may lose his right to resell or cover since both remedies must be effected within a commercially reasonable time. U.C.C. §§ 2-706, 2-712.

26. Suspension of performance without reasonable grounds for insecurity or a distinct and unequivocal repudiation may lead to an anticipatory repudiation on the part of the party suspending performance.

27. Professor Llewellyn has said:

If there is one thing that makes trouble in . . . contracts of any kind for

means whereby a party may demand adequate assurances of future performance when his sense of security that performance will be forthcoming when due is impaired. Initially, the aggrieved party is permitted to suspend his own performance and any preparations therefore, with excuse for any resulting delay.²⁸ Second, the aggrieved party is given the right to require adequate assurance that the other party's performance will be duly forthcoming.²⁹ Finally, the aggrieved party may treat the contract as breached by anticipatory repudiation if the assurances are not forthcoming or are not adequate.³⁰

The enactment of section 2-609 substantially broadened pre-existing protections against impending breach. Though no general rule dealing with this problem is to be found in the Uniform Sales Act,³¹ that Act did provide protections in some specialized and limited situations.³² Thus, where the price became due before delivery and the seller brought suit to recover it, the buyer could successfully defend himself if before judgment the seller "had manifested an inability to perform the contract . . . or an intention not to perform it."³³

Augmenting these limited provisions was section 73 of the Uniform Sales Act, which incorporated "the rules of law and equity,"³⁴ and the Restatement of Contracts. Under the Restate-

future delivery, it is in situations where you are beginning to wonder whether he (the other party to the contract) is going to perform and you have not yet got up to the place . . . where you can say either he is insolvent or he had repudiated . . . Section 2-609 gives you the withdrawal [*sic*] for finding out where you are within a reasonable time. This is certainty. This is the kind of certainty that eliminates litigation.

REPORT OF THE NEW YORK LAW REVISION COMMISSION, HEARING ON ARTICLE 2 OF THE UNIFORM COMMERCIAL CODE 162 (1954).

28. U.C.C. § 2-609, Comment 2. "Suspend Performance" under § 2-609 means to hold up performance pending the outcome of the demand, and also includes suspending any preparatory action.

29. *Id.* This principle reflects the familiar practice of inserting clauses into the contract which permit the seller to curtail deliveries if the buyer's credit becomes impaired. When held within the limits of reasonableness and good faith, this principle actually expresses no more than the fair business meaning of any commercial contract.

30. *Id.* The comment states that this is the principle underlying anticipatory repudiation, whether by way of defective part performance or by repudiation.

31. See 1A UNIFORM LAWS ANNOTATED §§ 53-55, 63(2) (1950).

32. NEW YORK LAW REVISION COMMISSION, HEARING ON ARTICLE 2 OF THE UNIFORM COMMERCIAL CODE 202 (1954) [hereinafter cited as N.Y.L.R.C.].

33. UNIFORM SALES ACT § 63(2). This section was of slight impact because of the rarity of transactions which called for payment before delivery. See also UNIFORM SALES ACT §§ 54(c), 45(2).

34. UNIFORM SALES ACT § 73. *Cf.* U.C.C. § 1-103 where it is provided that: Unless displaced by the particular provisions of this Act, the principles of law and equity, including the law merchant and the law relative to capacity to contract, principal and agent, estoppel, fraud, misrepresen-

ment of Contracts, the "apparent inability without justification to perform a condition or promise for an agreed exchange" empowered the other party to change his position and to refuse a proper but subsequent tender of performance.³⁵ Such a broadly stated rule, however, had little authority in the cases.³⁶

The lawyer's response to this pre-Code dilemma gave rise to the commercial practice of inserting "insecurity clauses" in a contract.³⁷ Such clauses typically give one party to the contract the right to cancel or suspend performance in the event the other party's financial responsibility became impaired or unsatisfactory. Cancellation or suspension under an insecurity clause must be grounded in actual dissatisfaction, based upon reasons neither arbitrary nor capricious.³⁸

Notwithstanding these limited protections, section 2-609 was formulated as a single theory of general application to all sales agreements looking to future performance. It was intended to, and does, conform to the desires and commercial practices of modern-day businessmen.³⁹ Section 2-609 provides:

(1) A contract for sale⁴⁰ 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 re-

tation, duress, coercion, mistake, bankruptcy, or other validating or invalidating cause shall supplement its provisions.

35. RESTATEMENT OF CONTRACTS § 323 (1932). Cf. RESTATEMENT (SECOND) OF CONTRACTS § 275 (Tent. Draft No. 9, 1974). See note 12 *supra*.

36. See also RESTATEMENT OF CONTRACTS §§ 280-84, 318(b), (c) (1932).

37. A typical insecurity clause reads as follows:

In the event that payment for goods shipped is not promptly made in accordance with the terms of this sale; or in the event that the credit or the financial responsibility of the purchaser becomes impaired or unsatisfactory to the seller, the seller reserves the right to demand cash or satisfactory security before making shipments. Upon the failure of the buyer to provide cash or satisfactory security to fully satisfy the seller's demands, the seller reserves the right to discontinue making shipments and to cancel the sale, or any part of the sale, thereby terminating all obligation on the part of the seller for delivery of the goods, or any part of the goods sold.

James B. Berry's Sons Co. v. Monark Gasoline & Oil Co., 32 F.2d 74, 75 (1929).

38. *Id.* at 76. The court in *Berry's Sons* held that if the clause had not been inserted into the contract, the court would have implied such a term into the contract. "[S]uch implied term . . . is more than a shield—it is a sword—and the seller can refuse to deliver except for cash, and sue the buyer for damages for refusal to accept deliveries and pay cash." No case since *Berry's Sons* has held that such an implied term exists if the parties have not expressly included such a provision in their contract.

39. U.C.C. § 2-609, Comment 2 reveals that its provisions have been adopted to meet the needs of commercial men in such situations.

40. This term, under § 2-106, includes contracts for the present sale of goods as well as contracts to sell goods at a future time.

spect to the performance of either party the other may in writing⁴¹ 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 merchants⁴² 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 time⁴³ 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.⁴⁴

This section reflects the policy of attempting to encourage the parties to meet and communicate in an effort to clarify or modify troubled contracts.⁴⁵ A party confronted with an equivocal repudiation can discover the nature and extent of the prospective repudiator's actions without jeopardizing his interest in the contract, while the prospective repudiator can attempt to fuse expectations with changed circumstances.⁴⁶ Retention of the contract is the goal, and "the hardening of attitudes that invariably follows the commencement of litigation" is postponed.⁴⁷

Section 2-609 is drafted in a very broad and general manner. A proper use of the section calls for a firm understanding of its innovative terms.⁴⁸ The purpose of this comment is twofold: (1) to analyze the meaning of section 2-609, and the cases interpreting it, and (2) to suggest a possible future role for section 2-609 in light of modern business practices.

41. The requirement of a written demand was not expressly stated in the Code's 1949 version.

42. One may become a merchant in three ways: by dealing, by representing oneself as one who has knowledge, and by being the principal of one who represents himself as having such knowledge. U.C.C. § 2-104.

43. What is reasonable depends upon the nature, purpose, and circumstances of such action. Such time, however, cannot in any circumstance exceed thirty days. U.C.C. § 1-204.

44. The N.Y.L.R.C., *supra* note 32, in its supplementary report on the Code did not recommend any changes in § 2-609.

45. U.C.C. § 2-609, Comment 1.

46. *Cole v. Melvin*, 22 U.C.C. Rep. Serv. 1154 (D.S.D. 1977) (defendant's failure to answer plaintiff's letters demanding adequate assurance of a contract to buy and sell cattle did not constitute an anticipatory repudiation where there was no evidence of any objective facts upon which the plaintiff could base his insecurity).

47. *Holt v. Seversky Electronatom Corp.*, 9 U.C.C. Rep. Serv. 1223, 1226 (2d Cir. 1971).

48. N.Y.L.R.C., *supra* note 32, at 203. Terms used nowhere else in the Code include "due performance," "adequate assurance," and "insecurity."

OPERATION AND IMPLEMENTATION

Obligation

Section 2-609(1) imposes an obligation on each party to a contract not to impair the other's expectation of receiving due performance. This obligation is implemented by a power to "demand adequate assurances of due performance."⁴⁹ Where one party senses an unwillingness or inability of the other to perform as expected, the risk of failure of consideration is unjustifiably imposed upon him. Since he can no more be expected to perform when counter-performance is doubtful or uncertain than when he actually has not received performance, his right to demand assurances takes effect.⁵⁰

This right to be free from worry during the interval up to performance may not, however, be all encompassing. Though the language of section 2-609 is sweeping, it apparently was not designed to apply either to unilateral contracts or to bilateral contracts that have become unilateral through completed performance by the promisee.⁵¹ One justification for excluding such contracts from the scope of section 2-609 is suggested by the section's dominant provision: that the promisee can "suspend any performance" for which "he has not already received the agreed return."⁵² Clearly, if one has the power to suspend his performance, it must be a performance which is yet to be rendered. In the same light, if one has already received his agreed-upon return, he may not resort to the power.⁵³ A second

49. *Id.* at 201.

50. *E.g.*, *Diskmakers, Inc. v. DeWitt Equip. Corp.*, 21 U.C.C. Rep. Serv. 1016 (3d Cir. 1977) (buyer, after declarations by seller, supplied revocable letter of credit instead of irrevocable letter of credit as required under § 2-325(3) was legally entitled to withhold the irrevocable letter if seller's declarations were found to be unequivocal under § 2-610).

51. A bilateral contract is one in which two rights and two duties exist. In such a contract, each party has a right against the other and each has a duty of performance toward the other. A unilateral contract is one in which the promisor manifests an intention that he wants an act or performance in exchange for his promise. *Brackenbury v. Hodgkin*, 116 Me. 399, 401, 102 A. 106, 107 (1917).

52. U.C.C. § 2-609(1).

53. *Gutor Int'l AG v. Raymond Packer Co.*, 14 U.C.C. Rep. Serv. 567 (1st Cir. 1974) (insecurity was held not to be a valid defense to a suit for the purchase price when the party claiming the defense had already received the agreed upon return). *But see* *Lockwood-Conditionaire Corp. v. Educational Audio Visual, Inc.*, 3 U.C.C. Rep. Serv. 354 (N.Y. Sup. Ct. 1966) (in an action to replevy air conditioning equipment for failure to make complete payment, the defendant was held to be justified in his demand for assurances since the equipment had not functioned properly during the few days it was tested); N.Y.L.R.C., *supra* note 32, at 204 (§ 2-609 also deals with the problem where the aggrieved party has fully performed and counterperformance by the prospective repudiator seems to be impaired).

justification for excluding such contracts is that sub-section (1) of 2-609 imposes an obligation of "each party" to a contract. In the case of a unilateral contract, there is only one promisor; the legal result is that he is the only party who is under an enforceable legal obligation. Since this sub-section makes the power of suspension contingent upon each party's owing an obligation to the other, it must envision a bilateral contract.⁵⁴ The final justification is that if the promisee has completed his performance, he is incapable of minimizing his "postrepudiation damages and thus, he will not be prejudiced by having to wait out the promisor's time for performance before suing."⁵⁵ This final justification is speculative at best and has been criticized as ignoring commercial realities.⁵⁶

Provided that the contract falls within the reach of section 2-609, sub-section (1) focuses upon the extent of the security afforded the contracting parties. "Each party," is entitled to receive "due performance."⁵⁷ The term due performance, found nowhere else in the Code, can be defined in one of two ways; first, it can mean "perfect tender,"⁵⁸ or second, it can mean something less than substantial impairment.⁵⁹ Both interpretations have support,⁶⁰ though the latter appears more compatible with section 2-610.⁶¹

"Substantial impairment of the value of the contract" is the Code's manner of testing a party's justification for suspension

54. The argument can be made that the obligation referred to in § 2-609(1) is only an obligation *not* to impair expectations and that expectations can and most often do arise in unilateral contracts.

55. *Beyond Sales of Goods*, *supra* note 19, at 1362.

56. *Id.* at 1362 n. 23. The author vigorously opposes this limitation and argues that its proponents ignore the commercial reality that the promisee may be injured in his affairs generally if not directly.

57. U.C.C. § 2-609(1).

58. U.C.C. § 2-601, the "perfect tender" rule, reads as follows:

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.

59. The substantial impairment test is used in several sections of the Code including §§ 2-608, 2-610, and 2-612. Substantial impairment is measured by the material inconvenience or injustice that will result if the aggrieved party is forced to wait and receive an ultimate tender, minus the part or aspect repudiated. U.C.C. § 2-610, Comment 3.

60. *Contra*, Anderson, *Repudiation of a Contract Under the Uniform Commercial Code*, 14 DEPAUL L. REV. 1, 7-8 (1964) (author contends that due performance means 100% performance).

61. *See* note 10 *supra*.

when it appears that he will not receive the performance for which he has bargained. This standard is applied where there has been a claimed anticipatory repudiation,⁶² when a non-conforming installment impairs the value of future installments,⁶³ and when a buyer is notified of a material delay caused by the occurrence of a contingency, the non-occurrence of which was a basic assumption on which the contract was made.⁶⁴ It would appear that this test should also be used as a working definition of "due performance" as that expression is used in section 2-609. Under such a use of the test, the promisee would have the right to demand adequate assurances and suspend performance only where the ultimate tender, if received, would result in material inconvenience or injustice to the promisee.⁶⁵ This view is justified because it strikes an agreeable balance between sharply conflicting interests under the rule—namely, the danger one party faces when it appears that the other will breach, versus the danger that an unscrupulous party who wishes to escape his contractual obligations will make unfounded demands claiming that his expectations have been impaired.⁶⁶ In addition, if due performance were interpreted as total performance,⁶⁷ the aggrieved party in a repudiation situation could evade the requirements of section 2-610 by ignoring that section and proceeding under section 2-609. He would thereby gain a remedy that section 2-610 never intended him to have: the right to suspend performance when the repudiation does not substantially impair the value of the contract.⁶⁸

62. *Id.*

63. Under U.C.C. § 2-612(2), a buyer may reject any non-conforming installment if the non-conformity substantially impairs the value of *that* installment. Under subsection (3), when a non-conformity with respect to one or more installments substantially impairs the value of the whole contract there is a breach of the whole.

64. U.C.C. § 2-616(1). Under this section if a buyer receives a justified notice of delay under § 2-615, he may, in writing, terminate or modify the contract where the prospective deficiency substantially impairs the value of the whole contract.

65. *Fredonia Broadcasting Corp. v. RCA Corp.*, 481 F.2d 781 (5th Cir. 1973) (reversed because the jury did not receive instructions which included the substantial impairment language of § 2-610).

66. N.Y.L.R.C., *supra* note 32 (comments by Professor Honnold).

67. The "perfect tender" rule has some support in § 2-609, Comment 1, where it is recognized that the *promised performance* is the most important element of the bargain struck between the parties. What is *promised* is full performance. In addition, if substantial impairment were the correct standard, why wasn't it drafted into the language of the statute?

68. A promisee desiring to avoid an unpleasant contract may assert that his expectation of perfect performance is impaired in a manner slightly greater than the common law *de minimus* rule would except and thereby escape the rigors of the greater § 2-610 standards. See Comment, *Commercial Law—Uniform Commercial Code—Section 2-609: Right to Adequate Assurance of Performance*, 7 NAT. RESOURCES J. 397 (1962).

Reasonable Grounds for Insecurity

Whether a party in a particular case has reasonable grounds for insecurity is a question of fact.⁶⁹ A court, when considering whether the demanding party properly deems himself insecure, can be expected to look to the circumstances that existed at the time the insecurity arose.⁷⁰ The section further provides that, as between merchants, the reasonableness of the insecurity "shall be determined by commercial standards."⁷¹ This reference to commercial standards, however, carries no connotation that the requirement of good faith is not equally applicable.⁷²

The standard by which insecurity is measured appears to be a mixture of objective facts,⁷³ which can be legally equated with reasonable grounds for insecurity, and subjective concerns. This mixture flows from *Pittsburg-Des Moines Steel Co. v. Brookhaven Manor Water Co.*⁷⁴ In that case, the parties agreed that full payment for a water tank, to be built by Pittsburg-Des Moines, would be due and payable within thirty days after the tank had been tested and accepted by Brookhaven. The construction of the water tank was scheduled to begin in April of 1969. Prior to this time, however, Brookhaven's negotiation for a loan, the proceeds of which were to pay for the tank, had deteriorated, and Pittsburg-Des Moines demanded assurances. The court held that Pittsburg-Des Moines's subjective questioning in itself was not enough to demonstrate reasonable grounds for insecurity. A more objective factual basis than what was shown was necessary.⁷⁵ It follows from the Brookhaven decision that both objective and subjective grounds for insecurity are indispensable. Thus, where a demand is prompted by purely subjective concerns not rooted in any objective facts, there is no basis for determining the reasonableness of the demand.⁷⁶ Likewise, where a demand is prompted by objective facts devoid of any subjective concerns on the part of the demanding party, a lack of good faith is evident.⁷⁷

69. *AMF, Inc. v. McDonald's Corp.*, 19 U.C.C. Rep. Serv. 801, 806 (7th Cir. 1976) (after defendant had entered into a contract to purchase a number of computerized cash registers, circumstances arose which gave defendant reasonable grounds for insecurity as to plaintiff's ability to perform).

70. 2 ANDERSON, UNIFORM COMMERCIAL CODE § 2-609: 6 (2d ed. 1971).

71. U.C.C. § 2-609(2), Comment 3 provides that "reasonable" grounds are defined by commercial standards rather than legal standards.

72. U.C.C. § 1-203 reads as follows: "Every contract or duty within this Act imposes an obligation of good faith in its performance or enforcement."

73. The source of the facts which leads the aggrieved party to conclude that the other party will not perform is not vital, so long as these facts justify a reasonable belief that the contract in question will be breached.

74. 18 U.C.C. Rep. Serv. 931 (7th Cir. 1976).

75. *Id.* at 941.

76. *Cole v. Melvin*, 22 U.C.C. Rep. Serv. 1154 (D.S.D. 1977). See note 46 *supra*.

Although the Code fails to define the term "insecurity," it does suggest factors to consider when determining its meaning. Among these factors are the nature of the sales contract;⁷⁸ the repetition, by the prospective repudiator, of the conduct which caused the insecurity;⁷⁹ any insecurity existing in the performance of other contracts legally unrelated to the contract in question;⁸⁰ the expanding use of the credit term by the prospective repudiator;⁸¹ and the reputation and rumors as to the stability and conduct of the party upon whom demand is made.⁸² By further generalization these factors and others may be broken down into two broad categories. An aggrieved party's insecurity may arise from either a perceived unwillingness or a perceived inability of the other party to perform.⁸³

77. Where a party is not subjectively concerned about performance, as in the case where he has special knowledge as to the ability of the other to perform, a subsequent demand based on objective factors alone lacks good faith and may amount to a repudiation of the contract.

78. U.C.C. § 2-609, Comment 3. If, for example, the contract provides that time is not of the essence, a claim that one is insecure because of a late payment or delivery is invalid.

79. *Kunian v. Development Corp. of America*, 12 U.C.C. Rep. Serv. 1125 (Conn. 1973); U.C.C. § 2-609, Comment 5. Both *Kunian* and Comment 5 view repeated delinquencies as cumulative.

80. *National Farmers Org. v. Bartlett & Co., Grain*, 22 U.C.C. Rep. Serv. 658 (8th Cir. 1977) (breach of one contract did not justify the aggrieved party in refusing to perform another separate and distinct contract); *Topert v. Bunge Corp.*, 24 U.C.C. Rep. Serv. 618 (Ill. App. 1978) (plaintiff justified in refusing to perform remaining contracts with defendant where the defendant imposed conditions beyond the scope of present and past due contracts); *Northwest Lumber Sales, Inc. v. Continental Forest Products, Inc.*, 10 U.C.C. Rep. Serv. 1035 (Ore. 1972) (seller not justified in refusing to deliver a carload of studs ordered under another contract at a time when buyer had wrongfully refused to pay for a carload of pine already delivered); *see also* U.C.C. § 2-609, Comment 3.

81. *Corn Products Ref. Co. v. Fasola*, 94 N.J.L. 184; 109 A. 505 (1920) (buyer's failure to take advantage of customarily used credit term and an extension of its credit line are reasonable grounds for seller in invoking insecurity clause); U.C.C. § 2-609, Comment 4.

82. *Pittsburgh-Des Moines Steel Co. v. Brookhaven Manor Water Co.*, 18 U.C.C. Rep. Serv. 931 (7th Cir. 1976) (rumors to the effect that buyer could not negotiate a loan); *Turntables, Inc. v. Gestetner*, 19 U.C.C. Rep. Serv. 131 (N.Y. Sup. Ct. 1976) (rumors that other sellers have been stuck with unpaid bills of the buyer); U.C.C. § 2-609, Comment 4; *see generally* 2 ANDERSON, UNIFORM COMMERCIAL CODE § 2-609:6 (2d ed. 1971).

83. A promisee's insecurity need only be perceived and not real. In *Harlow & Jones, Inc. v. Advance Steel Co.*, 21 U.C.C. Rep. Serv. 410 (E.D. Mich. 1976), the parties entered into a contract calling for delivery in October and November. On the last day of October, the buyer cancelled because of "late delivery assuming, incorrectly, that since shipment was not likely until well into November, and considering the usual 30 day transit time, would mean delivery sometime in December." The court stated that even if the buyer believed in good faith that the steel would not be delivered within the contract period, cancellation was not the appropriate remedy; the buyer

Where a party indicates an unwillingness to perform, two principles are undermined: that the parties to a contract look to actual performance, and that a continuing sense of reliance and security that the promised performance will be forthcoming when due is an important feature of the bargain. *Toppert v. Bunge Corp.*⁸⁴ is a logical starting point in examining this type of insecurity. In *Toppert*, the seller had completed delivery on two of several contracts he had entered into with the buyer. The buyer withheld payment in order to bring pressure on the seller's brother and father to sign and perform certain other unrelated contracts with the buyer. The seller was held to have reasonable grounds to be insecure and to be justified in having suspended performance on the future contracts.

A contrary result was reached in *Northwest Lumber Sales, Inc. v. Continental Forest Products, Inc.*⁸⁵ despite a similar fact pattern and the near-compelling logic of *Toppert*.⁸⁶ In *Northwest Lumber*, the court held that the mere fact that payment under one contract is not made when due is not necessarily a reasonable ground for insecurity as to payment under another contract. The court concluded that in the present case there was no question of the "buyer's financial ability to pay its bills. . . ."⁸⁷ The *Northwest Lumber* court's reasoning suggests that financial ability to pay debts controls the determination of the reasonableness of the grounds for insecurity. Such a suggestion was clearly rejected in *Toppert*, where there were no doubts about the buyer's ability to pay its bills. This apparent conflict was resolved in *Ellis Manufacturing Co. v. Brant*.⁸⁸ *Ellis* holds that, as a matter of law, failure to receive payment when due is not in itself an absolute ground for insecurity. "Something more" is necessary, and it must be found under the circumstances of each and every case.⁸⁹

should have demanded assurances under § 2-609, *id.* at 421. In *Turntables, Inc. v. Gestetner*, 19 U.C.C. Rep. Serv. 131 (N.Y. Sup. Ct. 1976), the seller was justified in suspending performance even though his suspicion that plaintiff was insolvent may have been inaccurate.

84. 24 U.C.C. Rep. Serv. 618 (Ill. App. 1978).

85. 10 U.C.C. Rep. Serv. 1035 (Ore. 1972).

86. In this case, Northwest Lumber entered into a contract with Continental for the sale of a carload of plywood in December of 1968. Continental sold the carload of plywood to a customer but the order was never shipped from Northwest Lumber to Continental's customer. Continental was forced to acquire a substitute car of plywood from another source at a substantially increased price. Thereafter, a dispute arose over Northwest Lumber's liability for failing to deliver the plywood and Continental declined to pay for a car of pinewood previously bought from Northwest Lumber. Northwest's response to Continental's actions was to postpone delivery on a third contract which the parties had entered into, claiming insecurity.

87. *Id.* at 1040.

88. 10 U.C.C. Rep. Serv. 1416 (Tex. 1972).

Ellis, however, falls short of its goal of defining insecurity by failing to delineate the factors which are to be considered in searching for that "something more." It appears that commercial practice yields the two guiding considerations in such cases. First, the buyer's failure to make payment when due may make it financially impossible or unreasonably burdensome for the seller to supply future installments as promised. Second, a buyer's failure to make payment for one installment or on one contract may create such reasonable apprehension in the seller's mind concerning future payment that he should not be required to take the risk involved in continuing deliveries.⁹⁰ If either of such consequences are demonstrable, the seller has reasonable grounds to be insecure and may demand assurances.

In *Toppert* and *Northwest Lumber* there was no evidence that delay in payment made it difficult for either buyer to make future deliveries. To the contrary, both admitted that they could have delivered had they chosen to do so. The sellers' insecurity, if any, must therefore have been based on reasonable apprehension, engendered by the buyer's behavior, as to the future of the contract. In *Toppert* the buyer's failure to pay was designed to bring pressure on the seller's father and brother and constituted a "lack of good faith on the buyer's part and imposed conditions beyond the scope of the contract."⁹¹ On the other hand, in *Northwest Lumber*, the seller knew the buyer was withholding payment solely to cover possible losses on the replaced plywood order, and there was no apparent reason why the buyer would have been unwilling to guarantee payment on future orders.⁹² Thus, under the circumstances, only *Toppert* was justified in suspending performance on the future contracts.

A second type of unwillingness is apparent in the situation where insecurity is based upon an equivocal remark by the

89. In *Ellis*, a supplier contended that his failure to deliver materials was justified because it had reasonable grounds for insecurity because the buyer failed to pay for the last lot delivered. Under the contract, however, payment was not due until the materials were installed in certain apartments. Since only a small portion of the materials delivered had been installed, it was not established as a matter of law that the seller had reasonable grounds for insecurity. Furthermore, the seller's refusal to deliver the last lot was not because of insecurity, but rather in keeping with the seller's usual practice of attempting to collect all monies due before his last shipment.

90. This analysis is derived from *Plotnick v. Pennsylvania Smelting & Ref. Co.*, 194 F.2d 859 (3d Cir. 1952), where it was held unreasonable for a seller of battery lead to withhold delivery of installments covered under the contract where the buyer failed to pay for a carload already delivered. The analysis can be utilized in the case of both buyers and sellers.

91. *Toppert v. Bunge Corp.*, 24 U.C.C. Rep. Serv. 618, 623 (Ill. App. 1973).

92. *Northwest Lumber Sales, Inc. v. Continental Products, Inc.*, 10 U.C.C. Rep. Serv. 1035, 1040 (Ore. 1972).

promisor. Here, a case-by-case approach is employed to measure the reasonableness of one's insecurity in the following manner: First, would a repudiation result if the basis for the remark in fact existed? If so, the promisee has grounds to be insecure. Second, did the remarks come from a reliable source? If they did, the promisee's grounds are reasonable. *Copylease Corp. of America v. Memorex Corp.*⁹³ presents a textbook example of such a situation. Memorex, attempting to squeeze Copylease out of a favorable contract, called a meeting between the parties. At one point during a heated exchange Memorex's attorney stated that an "unworkable business agreement" existed which did not represent "any mutually acceptable basis for doing business." He added that in his opinion there was a "substantial question" concerning the validity of the contract.⁹⁴ The clear import of the remarks was that the contract was not a binding commitment, thus satisfying the first element of the above analysis. The reliable source requirement was clearly also satisfied, for the statements were made directly to Copylease by Memorex's lawyer and general manager. Copylease, therefore, had reasonable grounds for insecurity and could have chosen to submit a written demand for assurances.⁹⁵

The second of the two broad categories which represent the aggrieved party's position are the situations in which insecurity arises from the perceived inability of the other party to perform. Courts faced with this type of uncertainty place emphasis on the relative strengths of the objective facts which are claimed to demonstrate an apparent inability.⁹⁶ Powerful objective grounds for insecurity, for example, were presented in *Turntables, Inc. v. Gestetner*.⁹⁷ Here, the buyer never paid for goods already delivered. Its "Fifth Avenue showroom" turned out to

93. 18 U.C.C. Rep. Serv. 317 (S.D.N.Y. 1975) (Parties entered into a contract whereby plaintiff agreed to remarket three of defendant's products for an initial 12 month term, defined to commence on the date of first shipment of a private label toner. A meeting was scheduled to resolve contract differences and at this meeting the statements constituting the plaintiff's insecurity were made).

94. *Id.* at 322. Along with these statements, Memorex's general manager said, "the business has evolved to such a point that . . . I don't want to continue business under the . . . present relationship."

95. In *Markowitz & Co. v. Toledo Met. Hous. Auth.*, 608 F.2d 699 (6th Cir. 1979) (statements made by defendant's chairman of the board to the effect that the Authority was unaware of any contract entered into between the parties and that the Authority had no intention of honoring its commitments, satisfied the requirements of § 2-609, and the builder was justified in making a demand for assurances).

96. *E.g.*, *AMF, Inc. v. McDonald's Corp.*, 19 U.C.C. Rep. Serv. 801 (7th Cir. 1976) (nonfunctional prototype).

97. 19 U.C.C. Rep. Serv. 131 (N.Y. Sup. Ct. 1976).

be a telephone answering service; its Island Park factory turned out to be someone else's premises, to which the buyer did not have access, and in which he leased no space and had no employees, machinery or equipment therein; and another supplier told the seller that it had been stuck with an unpaid bill of the buyer's. The seller's suspicions concerning the buyer's ability and solvency were clearly based on strong objective criteria, and he was entitled to the benefit of section 2-609 even though his suspicions might have been inaccurate.⁹⁸

Supplementing the two general categories of insecurity are two instances of conduct which need not meet the above requirements. The first is statutory insecurity under section 2-210(5).⁹⁹ Under this section, an assignment delegating performance gives grounds for insecurity as a matter of law even though the demanding party's chances of receiving due performance are not materially impaired.¹⁰⁰ A second instance of conduct under this heading emphasizes the degree of care which must be exercised when proceeding under section 2-609. If a demand for assurances is unwarranted, a suspension of performance is, of course, grounds for insecurity of the party upon whom the demand is made.¹⁰¹ It may also constitute an anticipatory repudiation by the demanding party, for in the absence of a right to demand assurance he has no right to suspend performance.¹⁰²

98. *Id.* In addition to the objective fact-subjective concern criterion, some courts require something more to trigger the applicability of § 2-609. These courts require that insecurity must be based upon a change in the circumstances which existed at the time of the making of the contract. Underlying this requirement is the premise that if an unfavorable risk in dealing with another party exists at the time the contract is entered into, good business judgment may dictate that assurances be secured before contracting rather than afterwards. *Pittsburgh-Des Moines Steel Co. v. Brookhaven Manor Water Co.*, 18 U.C.C. Rep. Serv. 931, 941 (7th Cir. 1976); *accord*, *Field v. Golden Triangle Broadcasting, Inc.*, 451 Pa. 410, 414, 305 A.2d 689, 697 (1973). In the same light it should be noted that a contract's terms can sometimes negate the existence of any basis for insecurity. For example, where a letter agreement specifically provided the extent of security which an assignee corporation was to provide, "the seller cannot later contend that he was entitled to further security beyond what he originally agreed to." *Id.* at 424, 305 A.2d at 696.

99. U.C.C. § 2-210(5) provides: "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)."

100. *Tennell v. Esteve Cotton Co.*, 21 U.C.C. Rep. Serv. 978 (Tex. 1976) (the fact that buyer assigned his rights under a contract for the sale of cotton did not constitute a repudiation of the contract for which the seller could suspend performance where no demand for assurances was made).

101. *Pittsburgh-Des Moines Steel Co. v. Brookhaven Manor Water Co.*, 18 U.C.C. Rep. Serv. 931, 940-42 (7th Cir. 1976) (suspension was unjustified since there was no demonstration that reasonable grounds for insecurity had arisen, and an anticipatory repudiation resulted).

102. *Id.*

Demand

When it appears that the applicability of section 2-609 has been triggered by the impairment of a party's expectation of due performance, the right to demand assurances ensues. The demand must be supported by the events preceding it¹⁰³ and the privilege to make such a demand is preserved as long as the insecurity persists.¹⁰⁴ It has been held that, generally, a demand should be sufficiently specific in order to maximize the effectiveness of the section.¹⁰⁵ A specific demand insures commencement of the thirty-day period in which the prospective repudiator must respond, and also increases the likelihood that the demanding party will receive the form of assurance that will obviate his uncertainty.¹⁰⁶ But the Code fails to state the degree of specificity required when making a demand, or even that some specificity *is* required. Jurisdictions applying the Code's formulation have further obscured the notion.¹⁰⁷

Inherent in the concept of specificity is the notion that section 2-609 must be implemented volitionally. *National Farmers*

103. *Cole v. Melvin*, 22 U.C.C. Rep. Serv. 1154 (D.S.D. 1977) (demand made before any objective grounds for insecurity does not invoke § 2-609).

104. *E.g.*, *Copylease Corp. of America v. Memorex Corp.*, 18 U.C.C. Rep. Serv. 317, 324-25 (S.D.N.Y. 1975). A demand need not be made as soon as insecurity arises and one party may urge counterperformance or retraction. A demand, however, can only be made while a sense of insecurity exists.

105. *National Ropes, Inc. v. National Diving Serv., Inc.*, 16 U.C.C. Rep. Serv. 1376 (5th Cir. 1975).

106. A demand stating only that a party is insecure will start the thirty-day period in which assurances must be provided. The promisor has the discretion, however, of whether his assurance will consist of a promise to perform or whether it will consist of the posting of a bond. This holds true even in the commercial setting.

107. In *National Ropes, Inc. v. National Diving Serv., Inc.*, 16 U.C.C. Rep. Serv. 1376, 1384 (5th Cir. 1975), the court required a specific demand and held that a request for accelerated payments from a prospective repudiator, due to his unstable financial condition, was not considered to be in the nature of a demand.

The demand requirement was satisfied in *Cole v. Melvin*, 22 U.C.C. Rep. Serv. 1154 (D.S.D. 1977), where it read as follows:

If you are not satisfied with this and have any attention [*sic*] of backing out on our contract, then please forward the recordation papers to me so I can sell these heifers up here. If you still want the heifers then I will gladly keep them for you, they are on a self-feeder of rolled oats and are doing well except for the couple of young RWF heifers that haven't come in heat yet.

Please let me know what your plans are as soon as possible.

Id. at 1162.

A demand was also deemed to have been made in *United States v. Humboldt Fir, Inc.*, 21 U.C.C. Rep. Serv. 736 (N.D. Cal. 1977), where a waiver of an executory portion of a contract was retracted by a notice that strict performance would be required. The court decided that the strict performance notice was the equivalent of a demand for assurances.

Organization v. Bartlett and Co., Grain,¹⁰⁸ clearly requires that a party must actively pursue a remedy under section 2-609 in order to enjoy its benefits.¹⁰⁹ This requirement flows from the nature of the consequences imposed upon the prospective repudiator.¹¹⁰ A search of the cases, however, shows that this requirement is often disregarded. An illustration is found in *United States v. Humbolt Fir, Inc.*,¹¹¹ where, pursuant to sections 2-208¹¹² and 2-209,¹¹³ the seller waived the time for performance stipulated in a contract for the sale of timber. The seller subsequently retracted the waiver and notified the buyer that strict performance would be required. The court held that the notification of retraction served as a demand for assurances and that the buyer's inaction constituted a repudiation of the contract.¹¹⁴ Such determinations place both buyer and seller in ambiguous positions. The seller, by failing to make a specific and intentional demand, is left unsure of whether the thirty-day period has commenced, and is at the mercy of the buyer as to the

108. 22 U.C.C. Rep. Serv. 658 (8th Cir. 1977) (seller's notification to buyer that seller would not deliver in future until buyer paid substantial sums due amounted to an anticipatory repudiation where such a requirement went beyond the terms of the contract, time was not of the essence, and there was no impairment of the buyer's ability to pay).

109. *Id.* at 664 n.9.

110. An anticipatory repudiation would result, for example, if assurances were not supplied within thirty days.

111. 21 U.C.C. Rep. Serv. 736 (N.D. Cal. 1977).

112. U.C.C. § 2-208 provides the following:

(1) Where the contract for sale involves repeated occasions for performance by either party with knowledge of the nature of the performance and opportunity for objection to it by the other, any course of performance accepted or acquiesced in without objection shall be relevant to determine the meaning of the agreement.

(2) The express terms of the agreement and any such course of performance, as well as any course of dealing and usage of trade, shall be construed whenever reasonable as consistent with each other; but when such construction is unreasonable, express terms shall control course of performance and of course of performance shall control both course of dealing and usage of trade (Section 1-205).

(3) Subject to the provisions of the next section on modification and waiver, such course of performance shall be relevant to show a waiver or modification of any term inconsistent with such course of performance.

113. The relevant portion of § 2-209 provides:

(4) Although an attempt at modification or rescission does not satisfy the requirements of subsection (2) or (3) it can operate as a waiver.

(5) A party who has made a waiver affecting an executory portion of the contract may retract the waiver by reasonable notification received by the other party that strict performance will be required of any term waived, unless the retraction would be unjust in view of a material change of position in reliance on the waiver.

114. *United States v. Humboldt Fir, Inc.*, 21 U.C.C. Rep. Serv. 736, 743 (N.D. Cal. 1977).

form of the assurance he may receive.¹¹⁵ The buyer, unaware of the existence of a demand, may not supply assurances even though willing and able to do so, the result being an uncalled-for repudiation.¹¹⁶

The demand must be not only specific and intentional but also reasonable. Section 2-609 does not give the alarmed party a right to redraft the contract. Whether the individual invoking the section is merely requesting an assurance that performance will be forthcoming or is attempting to use it to imply a term into the contract is a mixed question of law and fact, depending for its answer in part upon the court's interpretation of the obligations imposed upon the parties. A court will scrutinize a proposed rewriting particularly closely when it involves the very factors conceded at that negotiation stage by the party now attempting to wield the pen.¹¹⁷

Assuming the demand for assurances is based upon appropriate grounds, the Code prevents abuse of the right to demand by imposing upon it two limitations. The first is a limitation placed on the scope of what can be demanded. Between merchants, the nature of the demand is limited by commercial standards, and the circumstances are determinative. For instance, in *AMF, Inc. v. McDonald's Corp.*,¹¹⁸ the buyer was held

115. A demand should read as follows:

Dear Sir: We feel that our expectation of receiving due performance under our sales contract with you, dated November 25, 1963, is impaired because (here state grounds). We consider these facts to constitute a reasonable ground for insecurity under section 2-609 of the Uniform Commercial Code and under paragraph nine of our agreement. As a result, we demand that you give us adequate assurance of due performance. We would consider the following an adequate assurance: (here state what is considered an adequate assurance). Unless you comply with this demand for adequate assurances of due performance by March 7, 1964, we will treat this contract as repudiated by you. Sincerely yours, (signature)

W. HAWKLAND, A TRANSACTIONAL GUIDE TO THE U.C.C. 950 (1964).

116. It must be remembered that the policy behind § 2-609 is the resolution of conflict before litigation. See notes 27-30 and accompanying text *supra*.

117. *Pittsburgh-Des Moines Steel Co. v. Brookhaven Manor Water Co.*, 18 U.C.C. Rep. Serv. 931, 942 (7th Cir. 1976). In the negotiation stages, Pittsburgh-Des Moines and Brookhaven changed the terms of the original agreement where 60% of the contract price was due upon receipt of material by Pittsburgh-Des Moines, 30% upon completion, and 10% after testing. The terms were modified to provide that 100% of the contract price was due and payable 30 days after testing. Pittsburgh-Des Moines' request for escrow financing in effect implied that the original terms were reinstated.

Logically, a party is not reasonably threatened by the very risks he has assumed under the contract. Only unassumed risks, therefore, furnish reasonable grounds for insecurity. W. HAWKLAND, A TRANSACTIONAL GUIDE TO THE U.C.C. 196 (1964).

118. 19 U.C.C. Rep. Serv. 801 (7th Cir. 1976). Both parties are clearly

to have been justified in seeking assurances regarding performance and reliability standards on future orders after the delivery of a defective prototype.¹¹⁹ Other demands held to be reasonable in the mercantile practice include requiring the procurement of a film owner's certificate stating that ordered films had not been shown on television;¹²⁰ requiring an opportunity to inspect before delivery;¹²¹ and requiring a buyer to deposit sufficient cash in escrow to pay for delivered materials.¹²²

The second limitation preventing abuse of the right is the prohibition on repeated demands. Generally, if the promisee were to make several demands of the same promisor within a short period of time when a single demand would be sufficient, the promisee would be violating the doctrine and fair dealing of good faith.¹²³ This is because after the initial demand, the prospective repudiator has a reasonable time in which to supply the assurances requested. A second demand, therefore, may amount to a bad faith interference with performance.

Nonetheless, repeated demands have been held to be permissible. In a Connecticut case, for example, a supplier and a contractor entered into a contract for the sale of plumbing and heating materials under which deliveries were to be made when ordered and payments were to be made on the 25th of each month. The contractor failed to make several payments and the supplier suspended performance and awaited assurances. Thereafter, the contractor sent the buyer \$5,000, promised to pay the outstanding indebtedness, and promised to pay for any subsequent orders. Deliveries were then resumed, but the contractor failed to live up to his promises. The supplier again

merchants and are therefore bound by commercial standards. U.C.C. § 2-104.

119. In addition to a defective prototype, AMF never repaired the prototype, nor replaced it. Similarly, it was unable to satisfy McDonald's that the 23 machines on order would work. The tendered performance standards were unacceptable for allowing too much down time and AMF's personnel were too inexperienced to produce a proper machine. *AMF, Inc. v. McDonald's Corp.*, 19 U.C.C. Rep. Serv. 801 (7th Cir. 1976).

120. *Appeal of Productions Unlimited, Inc.*, 3 U.C.C. Rep. Serv. 620 (Vet. Adm. 1966) (demand pursuant to rental service contract for films that the films be free of television use, was justified where it was discovered that offered films were available for free television use).

121. *Diskmakers, Inc. v. DeWitt Equip. Corp.*, 21 U.C.C. Rep. Serv. 1016 (3d Cir. 1977) (buyer, who was entitled to adequate assurances, was justified in sending revocable letter of credit instead of an irrevocable letter of credit, as required by contract; such revocable letter was deemed the equivalent of a demand to inspect before delivery).

122. *Kunian v. Development Corp. of America*, 12 U.C.C. Rep. Serv. 1125, 1133 (Conn. 1973) (buyer's repeated failure to abide by its promises justified seller in conditioning future deliveries only if an escrow deposit was made).

123. See generally *Beyond Sales of Goods*, *supra* note 19, at 1381 n.94.

demanded assurances, but specified it would deliver the balance of the materials only if an escrow deposit was made. The Supreme Court of Connecticut held that a second demand was justified as being commercially reasonable.¹²⁴

Furthermore, it is plain that repeated demands are necessary where the parties have several legally distinct contracts between them. The problem that arises in such a setting is exemplified in *National Farmers Organization v. Bartlett and Co., Grain*.¹²⁵ In that case, the parties entered into numerous contracts, scheduling several for future performance. The buyer had fallen behind in his account on a single contract that had presently become due, and the seller suspended performance on all the outstanding contracts. In holding that the seller's actions were unjustified, the court stated that the seller's demand "*did not seek assurance of performance on the future contracts;*" it sought only assurance as to the part of the performance that was past due under the present contract.¹²⁶ The seller, therefore, anticipatively repudiated its future contracts with the buyer when it suspended performance before making a demand. The importance of *National Farmers* is its cautionary rule that when insecurity under one contract leads to a demand for assurances, and such a demand is not directed towards a separate and legally distinct contract, the demand will be presumed to relate only to the contract past due.

Before examining the question of what constitutes an adequate assurance, it is imperative to consider the form of the demand. Section 2-609 explicitly states that a demand for assurances must be in writing.¹²⁷ The courts have not compelled a strict adherence to this essential element and have justified such an attitude as a renunciation of the "formalistic approach."¹²⁸ The attitude does seem to affirm certain underlying policies and purposes of the Code, such as liberal construc-

124. *Kunian v. Development Corp. of America*, 12 U.C.C. Rep. Serv. 1125 (Conn. 1973).

125. 22 U.C.C. Rep. Serv. 658 (N.C. 1977).

126. *Id.* at 664 n.9 (emphasis added).

127. Cases supporting the requirement of a writing are: *National Farmers Org. v. Bartlett & Co., Grain*, 22 U.C.C. Rep. Serv. 658, 664 (N.C. 1977); *Teeman v. Jurek*, 21 U.C.C. Rep. Serv. 506, 510 (Minn. 1977); *Copylease Corp. of America v. Memorex Corp.*, 18 U.C.C. Rep. Serv. 317, 325 (S.D.N.Y. 1975).

128. *AMF, Inc. v. McDonald's Corp.*, 19 U.C.C. Rep. Serv. 801, 806 (7th Cir. 1976) (defendant's failure to make a written demand for adequate assurances by plaintiff of due performance was excusable because the evidence showed plaintiff's clear understanding at the time of a meeting between the parties that defendant had suspended performance until it should receive such assurance); *accord*, *Kunian v. Development Corp. of America*, 12 U.C.C. Rep. Serv. 1125 (Conn. 1973).

tion and commercial reasonableness.¹²⁹ What the courts *have* required, however, is that under the circumstances, the equivalent of a written demand be conveyed to the prospective repudiator.¹³⁰ What constitutes "the equivalent to a written demand" is speculative at best, but a face-to-face conversation appears to be enough.¹³¹

Adequate Assurances

Although section 2-609 prescribes no specific standard as to the form or nature of an assurance, the phrase "adequate assurance" is perhaps the best defined of this section's novel terms.¹³² Whether the reply to a demand is adequate to assure the demanding party of due performance is to be determined in light of all the circumstances and in harmony with the requirement of good faith.¹³³ Between merchants, the adequacy of the offered assurance incorporates commercial standards in addition to good faith.¹³⁴ But it is not subjective good faith that is the criterion.¹³⁵ Instead, the comments apparently compel recognition of a reasonable merchant standard. Accordingly, an adequate assurance is one that is sufficient to instill in a reasonable merchant a sense of reliance that the promised performance will be forthcoming when due.¹³⁶ Such a determination must be made on an ad hoc basis, except insofar as particular commercial standards may become accepted as a matter of law, and the adequacy of the assurance might depend upon the character and reputation of the prospective repudiator.¹³⁷ Thus, a satis-

129. U.C.C. §§ 1-102(1), (2). Among the underlying purposes of the Code are, the simplification and modernization of commercial transactions, the continued expansion of commercial practices, and to make the law of commercial transactions uniform. The Code is to be applied liberally to promote such purposes.

130. *Kunian v. Development Corp. of America*, 12 U.C.C. Rep. Serv. 1125, 1133 (Conn. 1973) (meeting between parties).

131. *E.g.*, *Toppert v. Bunge Corp.*, 24 U.C.C. Rep. Serv. 618 (Ill. App. 1978) (meeting between parties).

132. *See* U.C.C. § 2-609, Comment 4 and examples therein.

133. 2 ANDERSON, UNIFORM COMMERCIAL CODE § 2-609:6 (2d ed. 1971).

134. *See* merchant requirements under § 2-104 at note 42, *supra*. The relationship between the parties, any prior dealings that they have had, the reputation of the party whose performance has been called into question, the nature of the grounds for insecurity, and the time within which the assurance must be furnished are all relevant factors. The standards a merchant is held to under Article 2 is honesty in fact and the observance of reasonable commercial standards of fair dealing in the trade. U.C.C. § 2-103(1)(b).

135. U.C.C. § 2-609, Comment 4. The Code rejects the purely personal "good faith" test established by *Corn Products Refining Case*, 109 A. 505 (N.J. 1920); *see also* note 133 *supra*.

136. W. HAWKLAND, SALES AND BULK SALES (3d ed. 1976).

137. U.C.C. § 2-609, Comment 4.

factory assurance may range from 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 to the requirement of a pledge of a security by a known corner cutter.

The flexible range of assurances is explored in *Kunian v. Development Corp. of America*.¹³⁸ In *Kunian*, the buyer's outstanding debt escalated to \$38,000, in violation of the express terms of the contract. The seller demanded assurances and received \$5,000 and the buyer's promise to pay the outstanding indebtedness if deliveries continued. Under the circumstances, and in accordance with commercial standards, these assurances were deemed to obviate the seller's uncertainty. Thereafter, the buyer failed to live up to his promises, and the seller demanded a deposit in escrow sufficient to pay for delivered materials. Obviously, no lesser assurance would be satisfying under the circumstances. The buyer's repeated failure to fulfill his promises were viewed as cumulative, thus enabling the seller to avoid further loss by demanding the deposit.¹³⁹

In *Kunian*, the buyer's inability to make the deposit in escrow leads to the question of whether it is permissible for one to vary from the assurance requested. It is manifest from the wording of the comments that the promisor is free to provide assurances different from those demanded, so long as the assurances, measured by objective standards, dispel the promisee's insecurity.¹⁴⁰ Whether it is advisable to vary from the assurances requested depends upon the nature of the demand. If the demand is clearly immoderate relative to the grounds for insecurity, the risk is slight that a court will later deem the variance unreasonable, for a promisor will never legally be required to give more than the assurances necessary to remove the promisee's grounds for insecurity.¹⁴¹

138. 12 U.C.C. Rep. Serv. 1125 (Conn. 1973).

139. U.C.C. § 2-609, Comment 4 provides that "repeated delinquencies must be viewed as cumulative." Other examples of assurances given in commercial settings are found in several cases. In *Teeman v. Jurek*, 21 U.C.C. Rep. Serv. 506 (Minn. 1977), a seller of corn was held not to be entitled to withhold deliveries under § 2-609 where it appeared that he had received assurances that his complaints about short weight and grading discounts were remedied and he was given the option of directing future deliveries to an elevator of his choice.

In *AMF, Inc. v. McDonald's Corp.*, 19 U.C.C. Rep. Serv. 801 (7th Cir. 1976), a manufacturer of computerized cash registers was held to have repudiated his contract under § 2-609(4) where performance standards tendered to McDonald's were unacceptable because they permitted excessive down time, never repaired the delivered prototype, and was unable to satisfy McDonald's that the 23 units on order would work.

140. U.C.C. § 2-609, Comment 4.

141. *E.g.*, *National Farmers Org. v. Bartlett & Co., Grain*, 22 U.C.C. Rep. Serv. 658 (8th Cir. 1977) (communication that amounted to a statement of

Problems associated with variance arise only in situations where the assurances demanded are sufficiently specific.¹⁴² If a demand is specific and in accordance with common sense and reasonable business practice, it should be met with the precise assurance requested. Thus, when a request is made to a delinquent supplier that it provide production and delivery schedules, a response that it will proceed "with all deliberate speed" is clearly inadequate.¹⁴³ Where, however, the demand is general, the burden of deciding upon the nature of an adequate assurance is shifted to the promisor. The assurances supplied in a general demand situation need be only as definite as required to dispel the promisee's insecurity.¹⁴⁴ Thus, a seller of corn was held not to be entitled to withhold delivery under section 2-609 where it appeared he had received adequate assurance that his complaints about short weight and grading discounts would be remedied by allowing him to direct future deliveries to an elevator of his own choice.¹⁴⁵

The breach that results from the failure to provide proper assurances within a reasonable time not exceeding thirty days is that of anticipatory repudiation. What constitutes a reasonable time depends upon the circumstances of each particular case;¹⁴⁶ what is actually reasonable may be less than the full thirty-day period.¹⁴⁷ A repudiation may be retracted unless the aggrieved party has acted upon the breach in some manner.¹⁴⁸ To be effective, however, a retraction must be accompanied by any assurance demanded under section 2-609.¹⁴⁹

intention not to perform except on conditions which went beyond the terms of the contract constituted an anticipatory repudiation).

142. See notes 68-70 and accompanying text *supra*.

143. *Schenectady Steel Co. v. Bruno Trimpoli General Constr. Co.*, 43 A.D. 234, 350 N.Y.S.2d 920 (1974) (Article 2's underlying rationale was applied even though the contract did not fall within the scope of Article 2. Here the appellant's failure to give assurances, after all the previous delays, that it would proceed "with all possible speed" as opposed to the requested definite schedule justified respondent's termination of the contract).

144. U.C.C. § 2-609, Comment 4.

145. *Teeman v. Jurek*, 21 U.C.C. Rep. Serv. 506 (Minn. 1977). In addition to giving the buyer his choice of elevators, seller agreed to cancel the grading deductions although it did not revise its evaluation of the delivered corn.

146. U.C.C. § 2-609, Comment 5.

147. ILL. ANN. STAT. ch. 26, § 2-609, Comment 5 (Smith-Hurd).

148. U.C.C. § 2-611. The aggrieved party forecloses the possibility of retraction by either cancelling, materially changing his position, or otherwise indicating that he considers the repudiation final.

149. U.C.C. § 2-609, Comment 2 provides: "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."

Finally, the parties may, in some instances, insert clauses in their contracts which modify the application of section 2-609. Such provisions must be read against the fact that the requirement of good faith is not subject to modification by agreement.¹⁵⁰ Thus, these clauses may enlarge the protection given by the section to some extent,¹⁵¹ but any clause seeking to set up arbitrary standards will be held ineffective. Thus, an assignment of performance will not automatically give rise to insecurity when the contract itself provides for adequate security in the event of an assignment.¹⁵² On the other hand, a term in an installment contract giving the seller, if he deems himself insecure, the option to declare the entire balance immediately due and payable or to repossess the goods without notice is ineffective under section 2-609.¹⁵³

Scope

Article 2 of the Code is confined to transactions involving goods.¹⁵⁴ Since nothing in the text or comments of section 2-609

150. U.C.C. § 2-609, Comment 6 provides:

Clauses seeking to give the protected party exceedingly wide powers to cancel or readjust the contract when ground for insecurity arises must be read against the fact that good faith is a part of the obligation of the contract and not subject to modification by agreement and includes, in the case of a merchant, the reasonable observance of commercial standards of fair dealing in the trade.

151. Such clauses can enlarge protections by fixing the time within which a request for assurance must be given, or to define the scope of an adequate assurance in any reasonable commercial fashion. If however, a clause sets up an arbitrary standard it will be held to be ineffective. *See*, Northwest Lumber Sales, Inc. v. Continental Forest Products, Inc., 10 U.C.C. Rep. Serv. 1035 (Ore. 1972) (provision in contract giving unusually broad powers to cancel the contract to the seller was of doubtful validity under § 2-609 if construed to give seller the power to cancel without prior notice and opportunity to the buyer to respond); *accord*, Wrihstone, Inc. v. Motter, 1 U.C.C. Rep. Serv. 170 (Pa. C.C.P. 1961) (provision giving seller, if he deems himself insecure, the right to declare balance immediately due and payable and to repossess without notice was unreasonable).

152. *Field v. Golden Triangle Broadcasting, Inc.*, 451 Pa. 410, 305 A.2d 689 (1973). By agreement of the parties, it was clear that Field was going to assign his rights to a corporation to be formed. The agreement also provided for the security which the assignee corporation was to provide. Clearly where adequate assurances of performance are present in the contract, and there has been no change in the circumstances, one may not invoke the protections of § 2-609 to demand additional security. *See* notes 62-63 and accompanying text *supra*.

153. *See* note 149 *supra*.

154. U.C.C. § 2-102 provides:

Unless the context otherwise requires, this Article applies to transactions in goods; it does not apply to any transaction which although in the form of an unconditional contract to sell or present sale is intended to operate only as a security transaction nor does this Article impair or repeal any statute regulating sales to consumers, farmers, or other specified classes of buyers.

U.C.C. § 2-105 provides in part:

overrides this limitation, this provision appears to be of limited applicability. Indeed, several cases construing the section have reaffirmed its inapplicability as to contracts involving transactions other than those involving goods.¹⁵⁵ Notwithstanding the article 2 limitation, section 2-609 has been extended to rental service contracts by allowing a lessee the right to demand owner's certificates from a lessor who was supplying nonconforming films.¹⁵⁶ Similar rights were held to be available to a building contractor under a construction contract when the promisor, a city housing authority, threatened repudiation of its written agreements.¹⁵⁷ Finally, the section has been deemed applicable to mixed transactions by justifying a general contractor's demand for assurances after a subcontractor failed to install cabinet and kitchen fixtures as agreed.¹⁵⁸

Although section 2-609 is not likely to be fully accepted in other branches of the law of contracts in the near future,¹⁵⁹ the general right to demand assurances is gaining partial recognition. Such recognition is desirable for several reasons: the remedy is central to a resolution of the dual nature of the promisee's dilemma;¹⁶⁰ it is not inherently limited to transactions involving the sale of goods;¹⁶¹ and the right is commercially desirable.¹⁶²

(1) "Goods" means all things (including specially manufactured goods) which are movable at the time of identification to the contract for sale other than the money in which the price is to be paid, investment securities . . . and things in action. "Goods" also includes the unborn young of animals and growing crops and other identified things attached to realty as described in the section on goods to be severed from realty.

155. *Cf.* *Field v. Golden Triangle Broadcasting, Inc.*, 451 Pa. 410, 305 A.2d 689 (1973) (sale of a going concern); *Ranger Constr. Co. v. Dixie Floor Co.*, 433 F. Supp. 442 (D.S.C. 1977) (mixed transaction).

156. *Appeal of Productions Unlimited, Inc.*, 3 U.C.C. Rep. Serv. 620 (Vet. Adm. 1966).

157. *Markowitz v. Toledo Met. Hous. Auth.*, 19 U.C.C. Rep. Serv. 131 (N.Y. Sup. Ct. 1976).

158. *Ellis Mfg. Co. v. Brant*, 10 U.C.C. Rep. Serv. 1416 (Tex. Civ. App. 1972). In determining whether a mixed contract for goods and services should be covered as a sale of goods the applicable test

for inclusion or exclusion is not whether they are mixed, but, granting that they are mixed, whether their predominant factor, their thrust, their purpose, reasonably stated, is the rendition of service, with goods incidentally involved (e.g., contract with artist for painting) or is a transaction of sale, with labor incidentally involved (e.g., installation of a water heater in a bathroom).

Ranger Constr. Co. v. Dixie Floor Co., 433 F. Supp. 442, 444 (D.S.C. 1977).

159. *See* note 153 and accompanying text *supra*.

160. *See* notes 18-26 and accompanying text *supra*.

161. U.C.C. § 2-609, Comment 2.

162. *Beyond Sales of Goods*, *supra* note 19, at 1380.

CONCLUSION

To a great extent, section 2-609 has alleviated the definitional and remedial problems created by the recognition of the doctrine of anticipatory repudiation. The section was created to provide the aggrieved party with a means to discover the nature and extent of questionable conduct on the part of a prospective repudiator, and to provide remedial options. These options clarify the law concerning pre-performance insecurity, and make the positions of buyers and sellers in the marketplace more secure.

The formulation of the section, however, has created several unique problems. The concepts of "insecurity" and "assurance" are indefinite and need to be clarified. The section should stress that, whenever practical, the parties should include in their contracts specific criteria or standards by which to define such terms as the parties wish them to be defined. Guidelines for such modification by agreement should be spelled out in the comments, and should be binding upon the parties unless they are unreasonable. These changes need to be incorporated into section 2-609 in order to provide the certainty that is necessary in agreements looking to future performance.

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