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ANTICIPATORY BREACH AND THE UNILATERAL CONTRACT: A DECADE OF THE STATUS QUO?

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I. INTRODUCTION

The law on anticipatory breach has been called "difficult"[1] for students and referred to as "pure joy to teachers intent upon persecuting their students."[2] With such characterizations, these writers could not resist the temptation to inspect decisions of the last decade to discover if additional nuances in the law of anticipatory breach have been revealed.[3]

Such is the objective of this paper. It is an inquiry into case decisions of the past decade to determine whether what might be called an "exception to the exception" to the rule governing anticipatory breach has gained further support.[4]

II. BACKGROUND: ANTICIPATORY BREACH IN GENERAL

The origin of the doctrine of anticipatory breach dates back to the

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1. Dawson, *Metaphors and Anticipatory Breach of Contract*, 40 CAMBRIDGE L.J. 83 (1981).

2. J. WHITE & R. SUMMERS, HANDBOOK OF THE LAW UNDER THE UNIFORM COMMERCIAL CODE § 6-2, at 207 (2d ed. 1980).

3. For other commentary on anticipatory breach and unilateral contracts, see Jackson, *"Anticipatory Repudiation" and the Temporal Element of Contract Law: An Economic Inquiry into Contract Damages in Cases of Prospective Nonperformance*, 31 STAN. L. REV. 69 (1978); Note, *Contracts: Anticipatory Breach, Long Island R.R. v. Northville Industries Corp.*, 44 BROOKLYN L. REV. 661 (1978) [hereinafter cited as Note, *Contracts: Anticipatory Breach*]; Note, *The Doctrine of Anticipatory Breach Revisited—Does Unnecessary Confusion Still Exist?*, 38 LA. L. REV. 177 (1977); Comment, *Anticipatory Repudiation Under the Uniform Commercial Code: Interpretation, Analysis, and Problems*, 30 SW. L.J. 601 (1976); Comment, *Anticipatory Breach—A Comparative Analysis*, 50 TUL. L. REV. 927 (1976).

4. As will be discussed in this article, the general or majority rule governing anticipatory breach is that a contract may be considered to have been breached where an obligor repudiates a duty *before* he has committed a breach by nonperformance. *See infra* note 13 and accompanying text. The exception to the majority rule applies to contracts which are unilateral at their inception, or have become unilateral through complete performance by the other party. Thus, the doctrine of anticipatory breach does not apply to unilateral contracts. *See infra* note 15 and accompanying text. The "exception to the exception," or minority rule, in essence applies the general rule to unilateral contracts as well. *See infra* note 94 and accompanying text.

English case of *Hochster v. De La Tour*.[5] In April, 1852, the plaintiff and defendant made an agreement that the plaintiff would begin work for the defendant in June, 1852.[6] In May, 1852, the defendant changed his mind and informed the plaintiff his services would not be needed.[7] The plaintiff then brought an action for breach of contract. The defendant claimed the suit was initiated prematurely because the time for his performance under the contract had not yet occurred.[8]

The court found the plaintiff's action was not premature. It reasoned that it would be irrational to require the plaintiff to remain ready to perform his obligations once the defendant explicitly declared he would not perform on the contract.[9] The court noted:

> [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 damage he has suffered from the breach of it.[10]

Not everyone agrees, however, that the court's decision was "much more rational."[11] Nonetheless, the doctrine of anticipatory breach is generally followed by courts in England and the United States.[12]

The rule and its exception can be found in one sentence of the Restatement of Contracts: "Where an obligor repudiates a duty before he has committed a breach by non-performance and before he has received all the agreed for exchange for it, his repudiation alone gives rise to a claim for damages for total breach."[13]

Where there has been an anticipatory breach of contract by one of

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5. 118 Eng. Rep. 922 (Q.B. 1853).
6. *Id.* at 923.
7. *Id.*
8. *Id.*
9. *Id.* at 926.
10. *Id.*
11. *See, e.g.*, 4 A. CORBIN, CONTRACTS §§ 959-61 (1951) [hereinafter cited as 4 A. CORBIN]; Terry, Book Review, 34 HARV. L. REV. 891 (1921). Terry compliments Professor Williston's critique of anticipatory breach by stating:

> Perhaps the most valuable and distinctive characteristic among the many valuable features of this book, namely the fearlessness with which the author stamps in no uncertain terms and with clearness of logic and irrefutable argument those vicious errors which have crept in, in one way or another, but which should be extirpated for the everlasting good of the science [of law], can be illustrated in no better way than by his attack upon the false doctrine of "anticipatory breach." That doctrine, as the author well demonstrates, is not and never has been defensible.

Id. at 894.

12. *See* 4 A. CORBIN, *supra* note 11, § 959; RESTATEMENT (SECOND) OF CONTRACTS § 227(1) (1981); 11 S. WILLISTON, A TREATISE ON THE LAW OF CONTRACTS § 1312 (3d ed. 1968) [hereinafter cited as 11 S. WILLISTON].

13. RESTATEMENT (SECOND) OF CONTRACTS § 253(1), comments c, d (1981).

the parties, the other party may treat the entire contract as broken and may immediately sue for damages.[14] However, under the exception to the rule, the doctrine of anticipatory breach does not apply to contracts which are unilateral at their inception or have become so by complete performance by the other party.[15]

The operation of these principles may be illustrated by the following:

> Example 1. Seller and Buyer contract for the sale and purchase of wheat at a future date. Before the date of performance for either party one notifies the other that he will not perform. If the other elects, he may treat this as an anticipatory breach of contract.[16]

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14. Application of the doctrine of anticipatory breach raises other issues which are beyond the scope of this article. One such issue is the right of the injured party to choose between initiating suit at the time of the anticipatory breach or waiting until the time for performance under the contract has passed before initiating suit. The case law of the last decade seems to recognize this choice of remedies. *See* Jackson v. American Can Co., 485 F. Supp. 370 (W.D. Mich. 1980) (innocent party has option to sue immediately for breach of contract or wait until time of the performance); CCE Fed. Credit Union v. Chesser, 150 Ga. App. 328, 258 S.E.2d 2 (1979) (innocent party had the election to await time for performance and thereafter bring suit); Szabo Assocs., Inc. v. Peachtree-Piedmont Assocs., 141 Ga. App. 654, 234 S.E.2d 119 (1977) (innocent party may accept anticipatory breach and sue at once for damages or may treat the contract as remaining in force); Builder's Concrete Co. v. Fred Faubel & Sons, Inc., 58 Ill. App. 3d 100, 373 N.E.2d 863 (1978) (innocent party may elect to treat the repudiation as a breach and sue immediately or may await the time for the promisor's performance and then bring suit); Washington Homes, Inc. v. Interstate Land Dev. Co., 281 Md. 712, 382 A.2d 555 (1978) (repudiation of contract by one party gives other party choice of remedies); Space Center, Inc. v. 451 Corp., 298 N.W.2d 443 (Minn. 1980) (injured party can elect to sue immediately or can wait for time when performance is due); Wren Reese, Inc. v. Great Lakes Structural Concrete Prods., Inc., 50 Ohio App. 2d 168, 362 N.E.2d 269 (1975) (repudiation prior to performance gives the innocent party the option to sue immediately or wait for time for performance to arrive). *See* Taylor v. Johnston, 15 Cal. 3d 130, 539 P.2d 425, 123 Cal. Rptr. 641 (1975) (injured party can treat repudiation as anticipatory breach and immediately sue or wait until time for performance arrives); Lufkin Nursing Home, Inc. v. Colonial Inv. Corp., 491 S.W.2d 459 (Tex. Civ. App. 1973) (other party may consider repudiation as breach and sue or wait for time for performance). *But see*, Fowler v. A & A Co., 262 A.2d 344 (D.C. 1970) (on total repudiation of contract party no longer has election of continuing contract but must enforce his rights through available legal remedies).

However, it must be remembered that the nonbreaching party cannot elect to wait until the time for performance has passed to sue if this will increase his damages. Most authorities agree that the duty to mitigate damages overrides the concept of election. *See* J. CALAMARI AND J. PERILLO, THE LAW OF CONTRACTS § 12-10 (2d ed. 1977); 4 A. CORBIN, *supra* note 11, § 983; 11 S. WILLISTON, *supra* note 12, §§ 1301-03.

15. *See supra* note 13 and accompanying text. For additional case support not discussed in this article, see Jackson v. American Can Co., 485 F. Supp. 370 (W.D. Mich. 1980); Kammert Bros. Enter., Inc. v. Tanque Verde Plaza Co., 4 Ariz. App. 349, 420 P.2d 592 (1966); Garage and Serv. Station Employees Union v. Pacific Mut. Life Ins. Co., 2 Cal. App. 3d 706, 82 Cal. Rptr. 821 (1969); Garrett v. American Family Mut. Ins. Co., 520 S.W.2d 102 (Mo. Ct. App. 1974).

16. See *supra* note 14 for a discussion of the right of the nonbreaching party to elect to treat the repudiation as an anticipatory breach. Two issues related to the election question are whether the nonbreaching party has to "accept" the anticipatory breach and what actions constitute an election to treat the repudiation as a breach. *See, e.g.*, Builder's Concrete Co. v. Fred Faubel & Sons, Inc., 58 Ill. App. 3d 100, 373 N.E.2d 863 (1978) (promisee may evince his

> Example 2. Seller delivers wheat to the Buyer under a contract which calls for payment at a definite future date. Before the date of payment the Buyer notifies the Seller that he will not pay the debt when due. This is a contract which is unilateral in nature or has become so by performance and no action for anticipatory breach will lie under the exception.

Eminent legal scholars such as Williston and Corbin have expressed views on this doctrine and its exception.[17] Their respective opinions continue to be cited by courts, even in recent decisions.[18] Williston delineates the law on this subject in clear language:

> The general rule is certainly no unilateral promise for an agreed exchange to pay money at a future day can be enforced until that day arrives. For the same reason, when a bilateral contract has become a unilateral obligation by full performance on one side, anticipatory repudiation of that obligation does not permit immediate filing of an action.[19]

A number of reasons have been offered in support of the doctrine of anticipatory breach. For example, the United States Supreme Court has stated the parties to a contract have a right to the maintenance of the contractual relationship up to the time for performance, as well as to a performance of the contract when due.[20] Or, consistent with the doctrine of mitigation of damages, a court may rule the nonbreaching party is required to lessen the damage resulting from a "premature" breach.[21] Another reason supporting the doctrine seems to be that,

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election to treat an anticipatory repudiation by the promisor as a breach by either promptly filing suit or by detrimentally changing his position in reliance on the repudiation); Andrew Dev. Corp. v. West Esplanade Corp., 347 So. 2d 210 (La. 1977) (definitive refusal to perform obviates the necessity of a formal putting in default as a prerequisite to recovery); Stefanowicz Corp. v. Harris, 36 Md. App. 136, 373 A.2d 54 (Ct. Spec. App. 1977) (even under rule requiring injured party's acceptance of anticipatory repudiation, it is apparently not necessary to bring home to the repudiating party the election of the injured party); Space Center, Inc. v. 451 Corp., 298 N.W.2d 443 (Minn. 1980) (initiating a lawsuit constitutes an election to sue immediately on an anticipatory breach rather than waiting for time for performance). *See also* William B. Tanner Co. v. WIOO, Inc., 528 F.2d 262 (3d Cir. 1975) (acceptance is no longer required under Pennsylvania law to give rise to anticipatory breach of contract); Pacific Coast Eng'g Co. v. Merritt-Chapman & Scott Corp., 411 F.2d 889 (9th Cir. 1969) (for repudiation to result in anticipatory breach of contract, it must be treated and acted upon as such by the party to which it was made); Fox v. Dehn, 42 Cal. App. 3d 165, 116 Cal. Rptr. 786 (1974) (an election was made when claim in probate was filed for breach of contract); Sawyer Farmers Coop. Ass'n v. Linke, 231 N.W.2d 791 (N.D. 1975) (an anticipatory repudiation of contract need not be accepted by the aggrieved party in order to constitute a breach of such contract). *See also* 4 A. CORBIN, *supra* note 11, § 981; 11 S. WILLISTON, *supra* note 12, §§ 1320, 1321.

17. *See infra* notes 19 & 25 and accompanying text.

18. *See, e.g., infra* notes 74 & 102 and accompanying text.

19. 11 S. WILLISTON, *supra* note 12, § 1326 at 146.

20. *See* Central Trust Co. v. Chicago Auditorium Ass'n, 240 U.S. 581 (1916).

21. *See, e.g.*, Oloffson v. Coomer, 11 Ill. App. 3d 918, 296 N.E.2d 871 (1973) (nonbreaching party obligated at time of anticipatory breach to cover corn purchase in face of rapidly rising prices). *See also supra* note 14.

without such a rule, the nonbreaching party must continue to be ready to perform his own promise.[22] This last rationale provides primary support for the applicability of the doctrine of anticipatory breach to executory contracts only. Corbin acknowledges that the exception, expressed by Williston and the Restatement, is adhered to by most courts, yet questions its rationality.[23] As shall be discussed, courts that are tempted to stray from applying the exception often indicate a fair appreciation of Corbin's judgment that the doctrine of anticipatory breach should apply to all contracts.[24] Corbin has stated:

> Such statements are based upon the erroneous idea that the reason for holding an anticipatory repudiation to be a breach of contract is that otherwise the injured party must himself continue to be ready to perform on his own part . . . . The reasons upon which it can actually be sustained are equally applicable to unilateral contracts. The harm caused to the plaintiff is equally great in either case; and it seems strange to deny to a plaintiff a remedy of this kind merely on the ground that he has already fully performed as his contract has required.[25]

In order to position recent cases within the scope of the majority rule or the minority rule,[26] the rest of this article will discuss recent decisions which appear to apply the majority rule, including courts which dealt with statutes of limitations; identify jurisdictions following the minority rule; and conclude with a note on an apparently new member of the minority view.

III. The Majority Rule and the Unilateral Contract

As Corbin has noted, "[o]ne of the most common kinds of unilateral contracts consists of promises to pay a sum of money in return for a consideration already fully executed."[27] As previously noted, the majority rule states the doctrine of anticipatory breach is not applicable to unilateral contracts.[28] As will be discussed in a later portion of this article, a review of case decisions of the last decade often reveals an unenthusiastic support for the majority rule.[29] Nevertheless, this lack of enthusiasm has not significantly eroded judicial support for the rule.

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22. 4 A. Corbin, *supra* note 11, § 962 at 864-65.
23. *Id.*
24. *See infra* note 102 and accompanying text.
25. 4 A. Corbin, *supra* note 11, § 962 at 864-65.
26. *See supra* note 4.
27. 4 A. Corbin, *supra* note 11, § 963 at 865. Corbin gives the following examples of such contracts: "promissory notes for money lent; bills of exchange and letters of credit already paid for in advance; insurance policies payable at a future day, the insured having paid the premium in advance." *Id.* at 865-66.
28. *See supra* notes 13, 15 & 19 and accompanying text.
29. *See infra* note 64 and accompanying text.

For example, two recent New York cases evidenced no reticence in applying the majority rule to such unilateral contracts.

In *Wallace Clark & Co. v. Acheson Industries, Inc.*,[30] a licensor of patents counterclaimed in a suit filed by its licensee. The licensor demanded the overdue royalties, as well as future royalties under the license agreement. In its decision, the district court unhesitantly applied the majority rule and denied the licensor's plea for its future royalties.[31] The issue of anticipatory breach was dealt with in a footnote, listing the considerable authority for denial of the plea to allow an action for anticipatory repudiation.[32] The court did, however, administer some comforting advice by predicting the licensee would make the payments in the future.[33]

In *Franklin Society Federal Savings & Loan Association v. Far-Pap Corp.*,[34] the court also unhesitantly applied the majority rule in denying a claim for anticipatory breach. The dispute involved the actions of a corporate mortgagor and its mortgagee, and a significant lack of communication. The mortgagor was late on its monthly payments, making its December payment in January. This late payment was accepted by the mortgagee. However, an agent for the mortgagee, unaware that the late payment had been sent and received, wrote a letter to the mortgagor. The letter notified the mortgagor that there was a default in the December payment and that the mortgagee had made an election to declare the entire mortgage accelerated. Further, the mortgagor was warned that no further payments on the mortgage would be accepted. The January payment was not paid and the mortgagee then filed its foreclosure action.[35]

One of the mortgagor's defenses was that it was not in default because its December payment had been received and accepted by the mortgagee in January. The court agreed and found there was no de-

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30. 422 F. Supp. 20 (S.D.N.Y. 1976).

31. *Id.* at 23.

32. *Id.* at 23 n.6. The court noted that:

> Wallace Clark's acts reflecting resistance to payment of its future obligations may be analogized to an anticipatory breach of a promise to make installment payments of money on future dates. When one party to the contract has fully performed, as has Acheson by granting the patent license, the anticipatory breach by the other party of such an obligation will not justify acceleration of future payments.

Id.

33. Now that the plaintiff's second attempt to have the patent declared invalid has failed and it is obligated to make the payments under the licensing agreement, there is no reason to assume that it will not meet its obligations. In such circumstances, there is no basis for acceleration of the future payments.

Id. at 23.

34. 57 A.D.2d 607, 393 N.Y.S.2d 782 (1977).

35. *Id.*, 393 N.Y.S.2d at 783.

fault as to the December payment in January.[36] Further, the court agreed that the mortgagee's letter announcing a default and acceleration was invalid as to the December payment.[37]

The mortgagor also claimed that the part of the January letter announcing the mortgagee would accept no further installment payments was a complete repudiation of the contract and a clear anticipatory breach. The court did not offer to dispute this, but dismissed the contention with the application of the general rule. The court stated the mortgagor's argument "lacks merit inasmuch as the doctrine of anticipatory breach is not applied with regard to contracts for the payment of money in fixed monthly installments."[38] The court found the failure to pay the January payment was properly treated as a default, allowing acceleration and a foreclosure action. It ruled the filing of the action was notice of its election to accelerate and the foreclosure action was allowed to proceed.[39]

Some skepticism over the courts' preference for the majority rule is justified, however, when the reader studies the analytical techniques used in some court opinions and the results achieved therein. It seems as if the court will often go to some extent to bring the facts of a case *within* the doctrine of anticipatory breach to prevent harm to an injured plaintiff. For example, the majority rule can still be "honored" by showing it is applicable to a case because a careful reexamination of the factual situation discloses that the contract is conditional on some performance by the plaintiff.[40] Accordingly, a critical reader of *Long Island Railroad v. Northville Industries Corp.*[41] might say the court exercised meticulous attention to the facts in finding that a unilateral contract did not exist after all.[42]

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36. *Id.*

37. *Id.*

38. *Id.*

39. *Id.* See *supra* note 16 for a discussion of what actions constitute an election to treat a repudiation as a breach.

40. It is well established that the fact that a contract is entirely unilateral at the time of repudiation by the defendant is not in itself sufficient to deprive the injured party of an immediate right of action; this is true, even though the contract is a unilateral contract for the mere payment of money installments in the future. The contract, even though unilateral, may be conditional upon some performance to be rendered by the plaintiff. If it is thus conditional, the cases hold that the plaintiff can maintain an action at once for the anticipatory repudiation, without performing the condition. It has been so held, even where the condition to be performed by the plaintiff is not any part of the agreed exchange for the performance promised by the defendant.

4 A. CORBIN, *supra* note 11, § 967 at 876.

41. 41 N.Y.2d 455, 362 N.E.2d 558, 393 N.Y.S.2d 925 (1977).

42. There are, of course, other interpretations of the opinion. One commentator concluded that the court "announced a seemingly new, more liberal application of the doctrine of anticipatory breach in New York." Note, *Contracts, Anticipatory Breach, supra* note 3, at 661. Neverthe-

In this case, the railroad sued to collect future payments from a fuel company under the terms of a license agreement granted by the railroad to the company. The fuel company had the right to build and maintain a pipeline on railroad property.[43] The twenty-year license agreement contained a clause allowing renegotiation of the rates to be charged after ten years, but required that a minimum fixed amount would be charged for the full twenty years.[44] The fuel company allegedly breached the agreement after three years and the railroad sought, among other damages, the minimum payments for the full, but unexpired, twenty-year term.[45] As its defense the fuel company argued there can be no anticipatory breach of a contract which has become unilateral. The fuel company contended that the railroad, being in a passive role, had fully performed under the contract, in a manner similar to that of a landlord under a lease.[46]

With this potential barrier to recovery by the railroad, the court carefully examined the license agreement, listing the duties of the party which had already performed. It appeared at first that the railroad had only to sit back and collect the license payments. However, on closer scrutiny, the court determined the railroad, rather than having a passive role, was obligated to future performance under certain conditions.[47] What if the railroad had to abandon the property which provided a site for the fuel company's pipeline? Couldn't the railroad be in breach? This by itself "manifests dependency of performances and thus the need to apply the doctrine of anticipatory breach."[48] The court's characterization made the agreement a license embodying mutual and interdependent obligations. Therefore, the court noted "it is not necessary to enlarge the doctrine . . . or to consider generally whether the doctrine of anticipatory breach should be applicable to unilateral contracts. The doctrine is flexible enough to permit its application to the railroad's claim in this case."[49]

Similar to the *Long Island Railroad* court's scrutiny of the partic-

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less, the court did remind the reader that the focus must be on "whether the railroad has any obligation from which it needs to be relieved." 41 N.Y.2d at 467, 362 N.E.2d at 565, 393 N.Y.S.2d at 933.

43. 41 N.Y.2d at 457, 362 N.E.2d at 559, 393 N.Y.S.2d at 926.

44. *Id.* at 458, 362 N.E.2d at 560, 393 N.Y.S.2d at 927.

45. *Id.* at 459, 362 N.E.2d at 561, 393 N.Y.S.2d at 928.

46. *Id.* at 465, 362 N.E.2d at 564, 393 N.Y.S.2d at 932. "In some jurisdictions, the repudiation of his lease by a tenant and refusal to pay further rent is held not to be a breach by anticipation, with respect to rent that is not yet due at the time of repudiation." 4 A. CORBIN, *supra* note 11, § 986 at 954.

47. 41 N.Y.2d at 467, 362 N.E.2d at 565, 393 N.Y.S.2d at 933.

48. *Id.* at 467, 362 N.E.2d at 566, 393 N.Y.S.2d at 933.

49. *Id.* at 468, 362 N.E.2d at 566, 393 N.Y.S.2d at 933 (citations omitted).

ular facts of a case, the Supreme Court of Minnesota could also be viewed as analyzing facts in such a way as to dispense with the necessity of ruling on the question of unilateral contracts. The case was *Sheet Metal Workers Local No. 76 v. Hufnagle*,[50] and it involved a promissory note which was unpaid. The maker had signed the note and given certain securities as collateral. The collateral agreement was unclear as to liability upon the forced disposal of the securities. The note was unpaid and the securities sold. A balance remained unpaid but the maker alleged, that under the terms of the agreement, he was not liable for the outstanding balance. The holder sued for the outstanding balance including the installments not yet due.[51]

In its decision, the court did not apply the majority rule regarding anticipatory breach and unilateral contracts. Instead, the court carefully reviewed the evidence of the alleged breach. Using the trial testimony of the parties, the court ruled that as a matter of law the maker's acknowledgment that he intended to make payments but was "unable to make [them] when [he] was supposed to" was not evidence of a clear breach of contract.[52] In effect the court chose to apply neither the majority nor minority rule, leaving the parties with the following somewhat tentative statement:

> It may be that the exclusion of installment payment obligations from the anticipatory breach doctrine should be reconsidered . . . . Since defendant has never unequivocally repudiated the note or indicated he does not feel bound by it, we need not address the question of whether an exclusion to the anticipatory breach doctrine for installment payment contracts remains appropriate.[53]

Of course no court can be criticized when it applies the rule that the intention of the party not to perform must be clear. A mere negative attitude unaccompanied by supporting conduct does not qualify as an anticipatory repudiation.[54] Where there is evidence suggesting actions

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50. 295 N.W.2d 259 (Minn. 1980).

51. The facts of the case are more fully set forth at 295 N.W.2d at 260-61.

52. *Id.* at 263. The court seemed to overlook the fact that, prior to trial, the maker had not made the required payments. Indeed, the maker wrote a letter to the creditor which stated:

> I am sorry to advise you that as of this time I am unable to do anything with regard to my obligations to your organization and have no idea when in the future I will be able to take care of this matter.
>
> I think it would be appropriate if you took the relief provided in our contract.

Id. at 261. See *infra* note 54 regarding the requirements to evidence a renunciation of contract.

53. 295 N.W.2d at 263.

54. The overwhelming rule from case law of the last decade requires that an effective repudiation must be "a positive statement or action by [a party] indicating distinctly and unequivocally that he either will not or cannot substantially perform any of his contractual obligations." Lovric v. Dunatov, 18 Wash. App. 274, ____, 567 P.2d 678, 682 (1977). *See* Covington Bros. v. Valley Plastering, Inc., 93 Nev. 355, 566 P.2d 814 (1977) (a repudiation must be clear, positive

or intent other than a final and complete repudiation, the doctrine does not apply.[55]

In *Apostolou v. Mutual of Omaha Insurance Co.*,[56] the court applied a similar technique of factual scrutiny to summarily deny a disabled person's plea for future disability insurance benefits. When his disability benefits were terminated, the insured brought suit alleging that the failure to make the payments was an anticipatory breach of the insurance contract. The court stated, that even assuming an action for anticipatory breach of an accident and health insurance policy could be maintained in New York, there must, of course, be a complete repudiation.[57] This, the court could not find. It noted the behavior of the insurance company did not demonstrate a complete repudiation because the insurer continued to accept the insured's payment of the premium under the policy.[58]

Thus, courts using various analytical techniques can apply the majority rule narrowly, or sidestep its application to obtain a particular result. However, some courts express substantive doubts about the application of the majority rule. The decision in *Diamond v. University of Southern California*[59] supports this observation. In *Diamond,* the plaintiff, on behalf of himself and other season ticket holders, filed a class action suit for anticipatory breach of contract. Each buyer of "economy" season tickets had been promised an option to purchase a Rose Bowl ticket if the football team was selected to play at the Rose Bowl.[60] The team was selected, but the University notified the "econ-

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and unequivocal); Tenavision, Inc. v. Neuman, 45 N.Y.2d 145, 379 N.E.2d 1166, 408 N.Y.S.2d 36 (1978) (repudiation requires an overt communication of intention not to perform); Shafer v. A.I.T.S., Inc., 285 Pa. Super. 490, 428 A.2d 152 (1981) (renunciation must be absolute and unequivocal). *See also* City of Fairfax v. Washington Metropolitan Area Transit Auth., 582 F.2d 1321 (4th Cir. 1978) (repudiation must be unconditional and total, but need not be express or dependent on spoken words alone; it may rest on defendant's conduct evidencing a clear intention to refuse performance in the future); McAlpine v. AAMCO Automatic Transmissions, Inc., 461 F. Supp. 1232 (E.D. Mich. 1978) (conduct must manifest an absolute and unequivocal refusal to perform to constitute repudiation); Order of AHEPA v. Travel Consultants, Inc., 367 A.2d 119 (D.C. App. 1976) (repudiating party must have communicated, by words or conduct, unequivocally and positively its intention not to perform).

55. Carson v. Brown Motel Invs., 87 Cal. App. 3d 422, 151 Cal. Rptr. 385 (1978) (a letter interpreting one's legal rights is not an absolute and unequivocal refusal to perform). *But see* Hampton v. District Council 37 Health & Sec. Plan, 97 Misc. 2d 324, 411 N.Y.S.2d 124 (Civ. Ct. 1978) (anticipatory breach occurs when a party maintains an untenable construction of a contract on a matter of essential substance).

56. 72 A.D.2d 781, 421 N.Y.S.2d 600 (1979).

57. *Id.* at 781, 421 N.Y.S.2d at 601.

58. *Id.* For a more thorough discussion of anticipatory breach of unilateral insurance contracts, see 4 A. CORBIN, *supra* note 11, §§ 968, 969; 11 S. WILLISTON, *supra* note 12, §§ 1328, 1329.

59. 11 Cal. App. 3d 49, 89 Cal. Rptr. 302 (1970).

60. *Id.* at 51, 89 Cal. Rptr. at 303.

omy" season ticket holders that because of reasons beyond its control, it could not honor the agreement.[61] Four days later a class action was filed on behalf of about six hundred persons.

Less than two weeks after the filing of the class action and still two weeks before the Rose Bowl game, sufficient tickets became available, making the ticket issue moot.[62] The University subsequently filed a motion for summary judgment, which the trial court granted.[63] The appeal was filed, however, to vindicate the plaintiffs' rights to attorney fees. More importantly, at least for purposes of this review, the appeal offered the court an opportunity to comment on the doctrine of anticipatory breach. The court stated:

> Granting, at least for the sake of argument, that the filing of an action is a sufficient change in position to destroy the power to retract an anticipatory repudiation of a contract, plaintiff forgets that, logically or not, it is the general rule, recognized in this state, that the doctrine of breach by anticipatory repudiation does not apply to contracts which are unilateral in their inception or have become so by complete performance by one party.[64]

That the words "logically or not" betrayed the court's questioning mind on this doctrine was confirmed in its conclusion. The court noted that it has "taken the easy way out and decided to affirm on the basis of a simple principle of contract law."[65] It then looked to the future, stating:

> The day may come when that principle, which already is not universally admired . . . will be successfully questioned in another class action, similar in structure, but which presents major considerations of public policy which outweigh the social utility of a technical exception to the doctrine of anticipatory breach. When that day comes, the court concerned with the case can easily confine this decision to its own peculiar facts by noting that easy cases make bad law.[66]

IV. ANTICIPATORY BREACH AND THE STATUTE OF LIMITATIONS

An additional factor for consideration when applying the doctrine of anticipatory breach is when the statute of limitations period begins. As noted earlier, when the doctrine does apply, there must be an unequivocal repudiation by the breaching party.[67] Given a repudiation, the

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61. *Id.*
62. *Id.* at 52, 89 Cal. Rptr. at 304.
63. *Id.* at 51-52, 89 Cal. Rptr. at 304.
64. *Id.* at 53, 89 Cal. Rptr. at 305.
65. *Id.* at 55, 89 Cal. Rptr. at 306.
66. *Id.* at 55-56, 89 Cal. Rptr. at 306 (footnote omitted).
67. *See supra* note 54.

injured party generally can elect to bring suit immediately or wait until the time for performance under the contract.[68] The question arises, then, whether the statute of limitations period begins to run at the time of the repudiation or at the time of performance under the contract. Usually, the statute begins to run when the cause of action accrues, which in turn depends upon whether the injured party elects to treat the repudiation as a breach.[69]

Within the scope of this article, it is perhaps somewhat ironic that the application of the majority rule respecting unilateral contracts may benefit a party who could otherwise be barred from bringing suit by the statute of limitations. Judges who are reluctant to deny litigants access to court because of the operation of the statute of limitations might accommodate this philosophy by applying the majority rule.[70]

The cases which follow certainly would fit within that explanation. Two of the cases involved the claims of beneficiaries of earned pension plans, and the third case involved the claim of an insurance agent against his insurance company. The application of the general rule in all three cases allowed them to sue without being barred by the statute of limitations.

Even then, the opinions do not necessarily indicate strong support for the majority rule. For example, in *Sethre v. Washington Education Association*[71] a group of private educators sued for a determination of their rights under a pension plan. The private educators derived their pension rights from the terms of the state program. In effect, what was to be received by state employees would also be received by the private educators.[72] Several educators terminated their employment before the normal time for retirement. At the time of their termination the benefits to be paid in the future, at normal retirement age, were based on a

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68. *See supra* note 14.

69. *See* 4 A. CORBIN, *supra* note 11, § 989 at 967. *See also,* Napa Ass'n of Pub. Employees Local 614 v. County of Napa, 98 Cal. App. 3d 263, 159 Cal. Rptr. 522 (1979) (the other party may elect not to regard the anticipatory breach as a final breach, and if it does not so elect the statute of limitations does not begin to run until the time for performance is due); Oeth v. Mason, 247 Cal. App. 2d 805, 56 Cal. Rptr. 69 (1967) (if promisee does not elect to regard the anticipatory repudiation as a final breach he may wait until the time for performance is due before regarding the contract as broken and before the statute of limitations starts to run); Dunn v. Reliance Life & Accident Ins. Co. of America, 405 S.W.2d 389 (Tex. Civ. App. 1966) (statute of limitations did not begin to run at time of repudiation).

70. Longevity of a cause of action is aptly illustrated by the facts in M.S. Felman Co. v. WJOL, Inc., 104 Ill. App. 2d 66, 243 N.E.2d 33 (1968). A radio station's 1932 promise to provide certain free advertising so long as WJOL operates a radio station was not breached by anticipation 32 years later in 1964 by its refusal to carry the advertising. The 10-year statute of limitations did not begin to run until 1964.

71. 22 Wash. App. 666, 591 P.2d 838 (1979).

72. *Id.* at 668, 591 P.2d at 840.

1% formula. Later, the state raised the benefits to a 2% formula. The private educators who had taken early retirement contended the new rate would apply to them when they reached normal retirement age. The private retirement association, however, notified these educators that they would not be beneficiaries of the new rate. Their benefits would remain calculated on the 1% formula.[73] The law suit was instituted to establish that the 2% formula should be used instead.

The private retirement association defended this action on the ground that the statute of limitations barred the claim. It argued that a breach, if any, occurred when the association notified the private educators that their benefits would not be based on the 2% formula. The private educators countered with the argument that a breach could only occur if the pension based on the 2% formula was not paid at the time of their normal retirement age.

Citing Williston, the Washington Court of Appeals agreed with the private educators, stating:

> The doctrine of anticipatory breach of contract does not apply because Sethre and the others, by working for the Association over a period of years, had fulfilled all of their obligations under the pension agreements. An anticipatory breach cannot occur where one party has performed all of his duties under the contract.[74]

As in a number of other cases, the court could not resist adding the thought that this may not have been an anticipatory breach in any event.[75]

Jackson v. American Can Co.,[76] closely parallels the critical facts of *Sethre*. *Jackson* involved a research scientist who elected to take early retirement at age fifty-five, but deferred retirement payments until he became sixty-five. The company pension plan fixed a penalty if a retiree should seek and accept employment during those intervening years with a competing company. The scientist did just that, joining a company in competition with his old employer. The former employer learned of this new employment and notified Jackson that his pension, according to the contract formula, would be reduced by approximately 33% when payments became due. Jackson asked the company to reconsider its decision but the company refused to change its mind. When retirement benefits became due the payments were accordingly re-

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73. *Id.* at 669, 591 P.2d at 841.

74. *Id.* at 672, 591 P.2d at 843.

75. The court noted that "until the applications of Sethre and the others were actually denied, the Association could, at any time, reverse its stated position and award pensions based on the 2 percent formula." *Id.*

76. 485 F. Supp. 370 (S.D. Mich. 1980).

duced. Two years after the company began paying the reduced benefits Jackson brought suit.[77] The former employer filed a motion for summary judgment on the ground that the statute of limitations had expired on Jackson's claim. If the company's earlier ruling and announcement was a breach of contract, the limitations period had indeed expired.[78] The court, however, denied the employer's motion for summary judgment. It ruled that when the contract is unilateral, or when one party has already completed performance and only money remains to be paid at some future time, no cause of action will arise until the date of performance.[79] Thus, the statute of limitations period did not begin to run until the time for performance under the contract.

A matter of forty days and the statute of limitations was at issue in the decision of *Garrett v. American Family Mutual Insurance Co.*[80] The court was asked to determine whether a termination notice, which was to take effect forty days thereafter, was a breach activating the statute of limitations. An insurance company had orally agreed to grant an insurance agent ownership of his "expirations and renewals" at the termination of their agency agreement.[81] On December 21, 1954, the agent received notice of the cancellation of his agency by the company. The cancellation was effective February 1, 1955, forty days later. The announcement stated that the agent would not be allowed to keep his expirations and renewals contrary to the terms of the oral agreement.[82] The insurance agent brought an action on January 30, 1958, alleging a breach of the oral agency agreement. The trial court awarded the agent damages for the future losses due to these converted "expirations."[83]

On appeal the insurance company pursued its contention that the breach of contract, if any, occurred on December 21, 1954, when it was breached by anticipation. If the communication of the announcement was a breach, the suit had been filed forty days too late to meet the three year statute of limitations. The Missouri Court of Appeals disagreed with this interpretation by the insurance company. It held that

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77. *Id.* at 372-73.

78. *Id.* at 373.

79. *Id.* at 375. It is interesting to note that if the *Jackson* court had creatively analyzed the facts of this case, it could have concluded that the contract was contingent upon Jackson not working for a competing company; hence, the contract would not have been completely unilateral. Under that analysis, Jackson's claim could have been barred by the statute of limitations.

For observations on court practices of factual scrutiny, see *supra* text accompanying notes 39-42.

80. 520 S.W.2d 102 (Mo. Ct. App. 1975).

81. *Id.* at 108.

82. *Id.* at 109.

83. *Id.* at 110.

the original bilateral agency contract had become unilateral through performance by the agent.[84] Missouri, ruled the court, restricts the doctrine of anticipatory breach of contract to contracts which embody mutual and interdependent conditions and obligations. The doctrine, therefore, has no application where the complaining party has fully performed.[85]

V. ANTICIPATORY BREACH: THE MINORITY RULE

The minority rule, which might be inartfully called an "exception to the exception" to the majority rule, was established in Texas.[86] Texas courts permit an action for anticipatory breach despite the fact that the nonbreaching party has fully performed his duties under the contract. It is interesting, but not altogether surprising, to note how the rule arose. *Pollack v. Pollack*[87] is cited as the origin of the Texas rule.[88] In *Pollack*, one Charles made an absolute conveyance to Henry upon the latter's promise to pay Charles $5,000 per year for life. If Charles was to die before Henry the contract would be fully executed. However, should Henry predecease Charles, Henry was obligated to bequeath to Charles property to the value of $100,000.[89] The contract contained a provision which contemplated the future agreement of Charles and the devisees of Henry as to the particular property necessary to satisfy the $100,000 obligation. Further, if no agreement was then reached, as much of the property would be sold as necessary to pay Charles $100,000.[90]

The anticipatory breach occurred when Henry refused to make the required monthly payments. Charles sued, alleging breach of contract. Henry contended that the doctrine of anticipatory breach applies only to contracts which are in their executory stage. Considerable authority was offered supporting this application.[91] However, the Texas Commissioners reexamined the facts and determined that the contract was not

84. *Id.* at 122.

85. *Id.*

86. Pollack v. Pollack, 46 S.W.2d 292 (Tex. Civ. App. 1932).

87. *Id.*

88. *See* American Casualty & Life Ins. Co. v. Hastings, 300 S.W.2d 754, 757 (Tex. Civ. App. 1957); Comment, 31 MICH. L. REV. 526, 530 (1932).

89. 46 S.W.2d at 292.

90. *Id.*

91. *See, e.g.*, Moore v. Security Trust & Life Ins. Co., 168 F. 496 (8th Cir. 1909); Washington County v. Williams, 111 F. 801 (8th Cir. 1901); Manufacturer's Furniture Co. v. Cantrell, 172 Ark. 642, 290 S.W. 353 (1927); Clarey v. Security Portland Cement Co., 99 Cal. App. 783, 279 P. 483 (1929); Fidelity & Deposit Co. v. Brown, 230 Ky. 534, 20 S.W.2d 284 (1929); Leon v. Barnsdall Zinc Co., 309 Mo. 276, 274 S.W. 699 (1925); New York Life Ins. Co. v. English, 96 Tex. 268, 72 S.W. 58 (1903); 11 S. WILLISTON, *supra* note 12, § 1320.

completely executed on the part of Charles.[92] They suggested that Charles still had a possible future duty to negotiate with the heirs of Henry over the selection of the property to be sold to provide the $100,000. This, reasoned the Commissioners, was an agreement containing an "implied obligation on the part of Charles to make a real or bona fide effort to agree. . . ."[93] They concluded that future performance by both parties was still possible. The Commissioners then added the following:

> However, even should we treat the contract as fully performed by Charles, and yet to be performed on the part of Henry only, we are of the opinion that the rule of anticipatory breach should still be applied, because every reason that can be given for applying the rule to the one instance applies with equal force to the other. The doctrine which excepts contracts fully performed by one side from the general rule is purely arbitrary, and without foundation in any logical reason.[94]

Any doubt as to whether this reasoning placed Texas as the first state to refuse to apply the general rule of anticipatory breach was soon dispelled in 1937 by the decision of *Universal Life & Accident Insurance Co. v. Sanders*.[95] In that case, a beneficiary to an insurance contract sued for the value of all future installments to mature during her life expectancy because of the insurance company's failure to pay the presently due installments.

The insurance company apparently accepted that *Pollack* reflected Texas law, but the company contended the rule should not be applicable to health and accident policies. The company's argument did not impress the Commissioners.[96] They adhered to the earlier language of *Pollack*, reminding the insurance company that:

> The [*Pollack*] opinion reflects that the court took notice of contrary holdings in other jurisdictions. In fact, it was stated in that opinion that the great weight of authority, both in America and in England, is to the effect that the doctrine of anticipatory breach applies only to contracts still to be performed, in whole or in part, by both sides, but this court rejected the reasons supporting that conclusion as being unsound. We

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92. See *supra* text accompanying notes 39-42 for observations on court practices of factual scrutiny.

93. 46 S.W.2d at 293.

94. *Id.*

95. 102 S.W.2d 405 (Tex. Civ. App. 1937).

96. The insurance company distinguished *Pollack* on the grounds that the instant case involved a money contract. It was also contended that the contract in *Pollack* was bilateral and executory, while the insurance contract was unilateral. The company also argued that the beneficiary did not allege the company had absolutely repudiated its obligation. *Id.* at 407. For a discussion of the doctrine of anticipatory breach with regard to insurance contracts and money contracts see 4 A. CORBIN, *supra* note 11, §§ 963-69; 11 S. WILLISTON, *supra* note 12, §§ 1328-30.

must therefore regard it as being settled in this jurisdiction that the distinctions relied upon by defendant are not recognized.[97]

Since this decision, Texas has faithfully followed the rule first announced in *Pollack*. Accordingly, Texas decisions in the 1970's applied the minority rule in a variety of factual settings.[98] One such decision was *Pitts v. Wetzel*,[99] which dealt with a promise having an unusual maturity date. In *Pitts*, a man had promised to repay a woman certain sums when he was "financially able." In a suit for repayment there was no proof that he was presently "financially able." The woman creditor countered with evidence that the debtor had told her he never intended to pay the debt. This, it was offered, was a clear repudiation of the obligation to pay at any time. Citing *Pollack*, the court ruled that the debtor's unequivocal repudiation of his obligation to repay his creditor permits the creditor to file an action to recover payment immediately.[100]

Texas, however, does not stand alone as the sole jurisdiction supporting the minority rule regarding anticipatory breach and unilateral contracts. The Supreme Court of New Hampshire in *Hoyt v. Horst*,[101] has joined Texas in applying the minority rule. In *Hoyt*, a dancing school manager promised repayment of a loan of $13,000 by paying 5% of the monthly gross of the dancing studio until the loan was fully satisfied. This promise to pay in installments contained no acceleration clause. The manager made some payments, then defaulted and later denied all liability. In a suit for the principal balance, the court allowed an action for anticipatory breach and stated:

> The practical justice of allowing this procedure under the facts of the present case is plain. We recognize that there is authority for the proposition that where a contract is executed except for the payment of money in installments no relief for anticipatory breach will be granted until the time for payment arrives. However, we agree with Professor

97. 102 S.W.2d at 407.

98. *See, e.g.*, Sheshunoff & Co. v. Scholl, 564 S.W.2d 697 (Tex. 1978) (employment contract); Republic Bankers Life Ins. Co. v. Jaeger, 551 S.W.2d 30 (Tex. 1976) (disability insurance benefit); Chavez v. Chavez, 577 S.W.2d 306 (Tex. Civ. App. 1979) (property settlement dispute); American Founders Life Ins. Co. v. Wehling, 561 S.W.2d 911 (Tex. Civ. App. 1978) (insurance agency contract); Dunham & Ross Co. v. Stevens, 538 S.W.2d 212 (Tex. Civ. App. 1976) (real estate contract).

99. 498 S.W.2d 27 (Tex. Civ. App. 1973). *Pitts* was only the first of at least five other Texas decisions during the 1970's that applied the minority rule. *See supra* note 98. Two recent Texas decisions have been reported which exhibit a broadening applicability of the minority rule in Texas. *See* Group Life & Health Ins. Co. v. Turner, 620 S.W.2d 670 (Tex. Civ. App. 1981) (disability insurance benefits); Hardin Assocs. v. Brummett, 613 S.W.2d 4 (Tex. Civ. App. 1981) (employment contract).

100. 498 S.W.2d at 28.

101. 105 N.H. 380, 201 A.2d 118 (1964).

> Corbin that Courts should be able to deal with such a situation as here exists so as to avoid endless delays and multiplicity of suits.[102]

The New Hampshire Supreme Court in *Hoyt* recognized there was authority contrary to its position but believed that such authority does "not meet the practical realities of such cases as this one, as well as the view which we have hereby adopted."[103]

Corbin has reflected that while certain Texas decisions stand for the proposition there is no distinction between executory and executed consideration, "no such decision has been found where the debt was evidenced by a formal bond, a promissory note, a bill of exchange, or other formal commercial paper."[104] That observation remained true even in Texas where none of the seven recently reported decisions[105] dealt with a formal evidence of debt.

However, such a case may now be *Poinciana Hotel, Inc. v. Kasden,*[106] decided by the Florida District Court of Appeals in 1979. The obligations under scrutiny were promissory notes secured by mortgages, the payment of which was held to be in default despite the fact that the final maturity date had not arrived. Admittedly, the promise to pay was breached by anticipation by a matter of hours. Nevertheless, the Florida court found a premature breach.[107]

The facts concerned a complex real estate transaction but the issue was simple enough. In substance, a third purchase money mortgage was executed by the buyers of a hotel, the obligation and mortgage requiring the senior mortgages be kept current by the mortgagor. Installment payments on the senior mortgages were due on February 1, 1976, with a ten-day grace period. On February 11, 1976, the third mortgagee, claiming there was a default on the senior mortgages due February 1, 1976, filed a mortgage foreclosure action. Actually, the senior mortgages would not be in default until midnight of February 11, 1976. Nevertheless, the trial court entertained the mortgage foreclosure action and ultimately decreed foreclosure.[108] The trial court addressed the question of anticipatory breach and dealt with it head on. In its final decree of foreclosure the court found the mortgagor had made it clear that it was not going to pay these installments, that it was contemplating bankruptcy, and that the wife of the principal officer of the corporate mortgagor had taken the money and gone to

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102. *Id.* at 389, 201 A.2d at 124 (citations omitted).
103. *Id.*
104. 4 A. CORBIN, *supra* note 11, § 963 at 867-68 (footnote omitted).
105. *See supra* notes 98 & 99.
106. 370 So. 2d 399 (Fla. Dist. Ct. App. 1979).
107. *Id.* at 401.
108. *Id.* at 400.

South America.[109] The trial court held this to be an anticipatory breach and then applied the law:

> Whereas, generally, the Doctrine of Anticipatory Breach does not apply, under the circumstances of this particular case, . . . the Doctrine of Anticipatory Breach should apply because it fulfills the basic purposes of the Doctrine as set forth and explained by Professor Corbin in his Treatise on Contracts, Second Edition. . . .[110]

On appeal, the court was divided. The majority, however, approved the trial court's finding of the facts and application of the law.[111] The court felt this was an appropriate case for Corbin's view, adding:

> Notwithstanding the fact that the application of the doctrine when there is a unilateral contract does constitute a rare exception to the general rule, the mortgagor's repudiation of his part of the mortgage contracts prior to the time fixed for his performance entitled the mortgagees herein to protect their interests.[112]

The dissenting judge pointed out that the mortgagor was not in violation of the express terms of the mortgage and strongly disapproved of the "rare" circumstances rationale of the majority. He found their conclusions were reached "only by creating an exception to the general, in fact well-nigh universal, rule that there may be no such 'anticipatory breach' of a strictly unilateral obligation. . . ."[113]

VI. CONCLUSION

It is apparent that the majority rule governing the doctrine of anticipatory breach has not undergone drastic changes since it was announced in *Hochster*.[114] Decisions of the last decade clearly support the view that, generally, there can be no anticipatory breach of a unilateral contract or of a contract where one party has fully performed its duties. Courts adhere to this rule whether it is "logical or not."[115] Texas, however, continues to vigorously apply the doctrine of anticipatory breach

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109. *Id.* at 401.

110. *Id.*

111. In a special concurring opinion Judge Barkdull profiled a compelling scenario regarding the risk facing the creditor (3rd mortgagee). This included not only the risk of the bankruptcy of the debtor but the acceleration of the senior mortgagee which included the prospect of the third mortgagee being required to immediately "pay approximately $400,000 in order to protect their security interest." *Id.* at 403.

112. *Id.* at 401 (footnote omitted).

113. *Id.* at 402 (Schwartz, J., dissenting) (citations omitted).

114. *See supra* note 5 and accompanying text.

115. *See supra* note 64 and accompanying text.

to unilateral contracts.[116] New Hampshire also applies the doctrine.[117] And now, Florida appears to be a new voice in support of the minority view.[118]

The writers, however, can hardly dismiss the lingering feeling that while the majority rule is still applied, it is not popular. Apologists for the minority rule can offer a moderately strong case for the observation that the majority rule is unhesitantly applied when the result which follows is consistent with the equity of the case. Certainly the cases dealing with statutes of limitation support such an observation.[119] Further, courts appear to express underlying sympathy for the minority rule, even when applying the majority rule.[120]

It seems odd that a judicially created rule,[121] which receives a significant amount of criticism by the courts, continues to exist.

116. *See supra* note 98 and accompanying text.

117. *See supra* note 101 and accompanying text.

118. *See supra* note 106 and accompanying text.

119. *See supra* notes 67-85 and accompanying text.

120. *See, e.g., supra* notes 64-66 and accompanying text.

121. It is interesting to note that many legal scholars attribute the creation of the doctrine of anticipatory breach to the mistaken oral argument propounded by the defense counsel in *Hochster. See, e.g.*, J. CALAMARI & J. PERILLO, THE LAW OF CONTRACTS § 12-2 at 457 (2d ed. 1977); 4 A. CORBIN, *supra* note 11, § 960.