
January 1976

Anticipatory Repudiation under the Uniform Commercial Code: Interpretation Analysis, and Problems

Janice C. Vyn

Recommended Citation

Janice C. Vyn, Comment, *Anticipatory Repudiation under the Uniform Commercial Code: Interpretation Analysis, and Problems*, 30 Sw L.J. 601 (1976)
<https://scholar.smu.edu/smulr/vol30/iss3/5>

This Comment is brought to you for free and open access by the Law Journals at SMU Scholar. It has been accepted for inclusion in SMU Law Review by an authorized administrator of SMU Scholar. For more information, please visit <http://digitalrepository.smu.edu>.

COMMENTS

ANTICIPATORY REPUDIATION UNDER THE UNIFORM COMMERCIAL CODE: INTERPRETATION, ANALYSIS, AND PROBLEMS

by Janice C. Vyn

Article 2 of the Uniform Commercial Code¹ was adopted to provide a coherent and systematic framework for ordering the relationships between buyers and sellers of goods in the market place.² Although the scope and treatment of this area by the Code was mainly an attempt to codify and elucidate the basic contract and property principles governing the law of sales, the Code was innovative in several respects. Nowhere have these changes been more evident than in the area of contractual anticipatory repudiation. Not only did the Code recategorize this long-recognized contract principle, but it also expanded and modified the rights and remedies available to the aggrieved party in such instances.³

The objectives of this Comment are fourfold: first, to examine the sections of the Code dealing with anticipatory repudiation, specifically, sections 2-609 and 2-610; second, to demonstrate how these Code provisions have been interpreted by the courts; third, to compare these sections with pre-Code law in principle and application; and finally, to analyze critically the Code's treatment of this concept and suggest possible areas where the Code's approach could be improved by revision.

I. ANTICIPATORY REPUDIATION: CONCEPT AND THEORY

A general principle of contract law is that any failure to perform an absolute contractual duty constitutes a breach.⁴ Repudiation is a particular type of breach which arises when a promisee manifests his intent to the

1. Unless otherwise noted all references to the Uniform Commercial Code will be to the 1972 Official Text and Comments. The sections of the Code considered in this Article have not been altered in any significant way by the various adopting legislatures unless otherwise indicated. The Uniform Commercial Code 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).

2. Some have suggested that despite this fundamental purpose article 2 is by no means a coherent and systematic treatment of the law of sales. See Peters, *Remedies for Breach of Contracts Relating to the Sale of Goods Under the Uniform Commercial Code: A Roadmap for Article Two*, 73 *YALE L.J.* 199 (1963).

3. It has been suggested that, in actuality, no real changes were made in pre-existing Texas law by the Code's adoption. See Comment, *Anticipatory Breach of Contract: A Comparison of the Texas Law and the Uniform Commercial Code*, 30 *TEXAS L. REV.* 744 (1952). However, such a view fails to take into consideration the total impact of the Code on the doctrine of anticipatory repudiation and the various interpretations of the Code's provisions which could be and have been adopted by the courts.

4. *RESTATEMENT OF CONTRACTS* § 312 (1932).

promisor that he will not perform according to the requirements set forth in the contract. Clearly, a breach exists when this repudiation occurs at the time and place for performance. Problems arise, however, if this repudiation occurs before the performance is due under the contract. Since the absolute duty to perform has not yet arisen according to the contract's terms, in a strict sense no breach has occurred. Frequently, courts and legal scholars have attempted to analyze the legal effect of this type of repudiation, often termed an anticipatory repudiation.⁵ In so doing, they have been confronted with various problems. What constitutes an anticipatory repudiation? What are the rights of the aggrieved party in such an instance? Must he await a performance which will, most probably, not be forthcoming? Must he tender a useless delivery or can he suspend his own contractual duties? Does he have an immediate right to damages and, if so, how are they to be calculated?

A. Common Law Repudiation

Early common law did not recognize a right to sue for an anticipatory repudiation. Due to a mechanistic view of contract relations the courts felt that anticipatory repudiation of a contract was theoretically impossible. To bring an action predicated upon a breach, both an expiration of the time specified for performance in the contract and a failure to perform on that or a subsequent date were necessary.⁶ This rule was relaxed by the English courts in the case of *Hochster v. De la Tour*⁷ which held that an action for breach of contract prior to the performance date was not premature. A breach by virtue of an anticipatory repudiation was subsequently recognized by many courts in the United States.⁸ In *Roehm v. Horst*,⁹ a case brought

5. See generally Ballantine, *Anticipatory Breach and the Enforcement of Contractual Duties*, 22 MICH. L. REV. 329 (1924); Williston, *Repudiation of Contracts*, 14 HARV. L. REV. 317 (1901).

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

7. 118 Eng. Rep. 922 (Q.B. 1853). In April of 1852 the plaintiff and the defendant entered into a contract for employment wherein the plaintiff agreed to work for the defendant for a fixed period of time beginning on June 1, 1852. On May 1, 1852, the defendant informed the plaintiff that he would not perform. The plaintiff brought an action for breach of contract on May 22, 1852, prior to the performance date set in the contract. The defendant contended that no breach had occurred; but, in upholding a jury verdict for the plaintiff, the Court indicated that the action was not premature. Lord Chief Justice Campbell theorized that instead of remaining idle or laying out money for useless preparations, the plaintiff should be entitled to seek employment with another employer so that the damages to which he would otherwise be entitled would be mitigated. *Id.* at 926. Since mitigation of damages was the rationale expressed by Lord Chief Justice Campbell to justify allowing the plaintiff to maintain the suit, the reasoning of the case only leads to the conclusion that the plaintiff, because of the defendant's prospective unwillingness to perform, should be excused from performance without surrendering his right to sue after the breach occurs. The reasoning of the case does not necessarily justify an immediate right to damages prior to a performance date. The acceptance of the anticipatory repudiation doctrine was thus based on a faulty premise. This fact may account for much of the hostility to the doctrine's application. See Terry, Book Review, 34 HARV. L. REV. 891, 894 (1921).

8. See, e.g., *Union Ins. Co. v. Central Trust Co.*, 157 N.Y. 633, 52 N.E. 671 (1899).

9. 178 U.S. 1 (1900). Fourteen years earlier the Court had refused to consider the law on anticipatory repudiation. *Dingley v. Oler*, 117 U.S. 490 (1886).

against an alleged repudiator who had deliberately destroyed the subject matter of the contract prior to the performance date, the United States Supreme Court formally accepted the principle.¹⁰

The doctrine's conceptual difficulties can be overcome by a reaffirmation of one of the primary aims of contract law—the protection of the aggrieved party's reasonable expectation that performance will be forthcoming when due.¹¹ Consequently, courts have willingly implied in every contract a duty not to repudiate.¹² This duty, often articulated in terms of an implied promise, might be breached even though the express promise of performance on the contract date had not been breached. Criticism of the doctrine was mainly directed toward its complicated and speculative damage measure.¹³ The suit for anticipatory repudiation, however, is for the most part brought after the due date for performance so that damages can be determined just as if the contract had been breached when performance was due.¹⁴ The task of measuring damages for breach is actually no more complicated than in several other instances when the law allows recovery for a legally recognized wrong.¹⁵ A loss of expectation of performance is an injury against which the law should offer protection, even though to do so may create problems in the precise and accurate ascertainment of damages.¹⁶

Generally, the difficulties in measuring damages in anticipatory repudiation cases can be resolved by merely awarding the aggrieved party the benefit of his bargain. Notwithstanding the relationship between the trial date and date of contract execution, damages can be measured by the difference between the market price at the time of the repudiation and the contract price together with incidental and consequential damages.¹⁷ The courts, however, have been additionally presented with other problems concerning the definition of an anticipatory repudiation and its application to specific fact situations.

B. *The Requisite Elements*

The courts and commentators have attempted to delineate the requisite elements of an anticipatory repudiation. Corbin suggested that an anticipatory repudiation occurred when a "definite and unequivocal" manifestation of intent not to perform a "substantial" part of the contract was made either

10. Massachusetts at one time was considered in opposition to the remedy provided by this doctrine. *Daniels v. Newton*, 114 Mass. 530, 19 Am. Rep. 384 (1874). Nebraska was also considered as being in opposition. Vold, *Repudiation of Contracts*, 5 NEB. L. BULL. 269 (1927). Due to these states' adoption of § 2-610 of the Code, however, they can no longer be considered as opposing the doctrine. See MASS. GEN. LAWS ANN. ch. 106 (1963); NEB. REV. STAT. §§ 1-101 to 10-104 (1971).

11. Taylor, *The Impact of Article 2 of the U.C.C. on the Doctrine of Anticipatory Repudiation*, 9 B.C. IND. & COM. L. REV. 917, 919 (1968).

12. See *Central Trust Co. v. Chicago Auditorium*, 240 U.S. 581 (1916). See generally 4 A. CORBIN, CONTRACTS § 961 (1951) [hereinafter cited as CORBIN].

13. See, e.g., *Daniels v. Newton*, 114 Mass. 530, 19 Am. Rep. 384 (1874).

14. *Central Trust Co. v. Chicago Auditorium*, 240 U.S. 581 (1916).

15. Taylor, *supra* note 11, at 919. Examples of such instances include the uncertain damages measures applied to an invasion of the right of privacy, an intentional infliction of emotional distress, or a recovery for pain and suffering.

16. *Id.* at 920.

17. See, e.g., *Roehm v. Horst*, 178 U.S. 1, 20-21 (1900); *Allen, Heaton & McDonald v. Castle Farm Amusement Co.*, 151 Ohio St. 522, 86 N.E.2d 782 (1949).

expressly or impliedly prior to the time of performance and was communicated either directly or indirectly to the other contracting party.¹⁸ Some courts relied on this definition,¹⁹ but others stated that only an "absolute repudiation" constituted a breach wherein the repudiator would be liable for damages.²⁰ In all such instances the repudiation had to be voluntary.²¹ Consequently, the intent of the repudiator was the most important consideration.²² This voluntary intent could be shown through words or actions and its determination was a question of fact.²³ What actions or expressions by the repudiator were sufficiently definite, unequivocal, and absolute to demonstrate this intent? Even if the intent seemed clear, when did the repudiation constitute a substantial breach of the contract? Were any contracts excluded from the operation of the doctrine?²⁴ Problems such as these were resolved in divergent ways by individual courts.

The decisions defining the requisite intent were not consistent. Some courts held that a statement of prospective inability to perform was not sufficiently definite to constitute an anticipatory breach,²⁵ while other courts disagreed.²⁶ Even an actual statement of intent not to perform created difficulty for the party seeking remedies. Courts stated that so long as the promisor recognized that the contract was binding, he could deny an obligation of performance as demanded by the other party without his denial

18. CORBIN § 973.

19. See, e.g., *Suburban Improvement Co. v. Scott Lumber Co.*, 67 F.2d 335 (4th Cir. 1933).

20. *Mutual Loan Soc'y v. Stowe*, 15 Ala. App. 293, 73 So. 202 (1916); *Timmerman v. Stanley*, 123 Ga. 850, 51 S.E. 760 (1905); *Parker v. King*, 68 Ga. App. 672, 23 S.E.2d 575 (1942); *Johnson v. Tackitt*, 173 Ky. 406, 191 S.W. 117 (1917). To be absolute, there must be a refusal by one party to perform an executory contract containing mutual obligation. *Parker v. King*, 68 Ga. App. 672, 23 S.E.2d 575, 577 (1942).

21. See, e.g., *Union Ins. Co. v. Central Trust Co.*, 157 N.Y. 633, 52 N.E. 671 (1899).

22. Compare *New York Life Ins. Co. v. Viglas*, 297 U.S. 672, 681 (1936), with *Daniels v. Newton*, 114 Mass. 530, 19 Am. Rep. 384 (1874).

23. See, e.g., *Dudzick v. Degrenia*, 48 R.I. 430, 138 A. 57 (1927).

24. Anticipatory repudiation was clearly a valid cause of action or defense in a suit based on a bilateral contract. A right of action would be extinguished, however, if it appeared that an aggrieved party could not perform his return promise at the time of the breach. See, e.g., *Rubinger v. Rippey*, 201 Misc. 135, 110 N.Y.S.2d 5 (Sup. Ct. 1951). Based on this supposition, some courts held that there could be no cause of action for an anticipatory repudiation in a unilateral contract or a bilateral contract which had become unilateral due to performance by one party since the return party could not remain ready, willing, and able to perform when he had already carried out his contractual duties. See, e.g., *General Am. Tank Car Corp. v. Gorcee*, 296 F. 32 (4th Cir.), cert. denied, 266 U.S. 610 (1924). Corbin disagreed with such decisions. CORBIN § 962. This problem has not been resolved by UNIFORM COMMERCIAL CODE § 2-610 which is not explicitly limited to bilateral contracts. Criticism has been directed toward the Code because of this deficiency. See Williston, *supra* note 5. The *Restatement*, however, specifies that the rule of anticipatory repudiation does not apply to a unilateral contract or an executed bilateral contract. RESTATEMENT OF CONTRACTS § 318 (1932).

25. *McCloskey & Co. v. Minweld Steel Co.*, 220 F.2d 101 (3d Cir. 1955) (statement by subcontractor that he was having difficulty obtaining necessary materials accompanied by a request for assistance); *Salot v. Wershow*, 157 Cal. App. 2d 352, 320 P.2d 926 (1958) (statement of prospective inability to pay the contract price when due and a request for an extension).

26. *De Forest Radio Tel. & Tel. Co. v. Triangle Radio Supply Co.*, 243 N.Y. 283, 153 N.E. 75 (1926) (statement of prospective inability to perform due to an injunction obtained by a third party constituted a breach).

amounting to an anticipatory breach.²⁷ Likewise, a party who demanded performance based on an incorrect interpretation of a contractual provision was not guilty of a repudiation.²⁸ Voluntary acts were held to excuse the aggrieved party from performance.²⁹ But, in certain cases, involuntary acts were found by the courts to be sufficiently definite and unequivocal.³⁰ Because of these conflicting decisions, many parties who had suspended their own performances and instituted suit in reliance on the belief that the particular contract had been repudiated found themselves in a position where they, not the original repudiators, were the parties guilty of the anticipatory breach.

After these questions concerning the actual intent of the repudiator were defined and answered by the courts, still other problems remained to be considered. Clearly, not all anticipatory repudiations amount to a substantial breach of the contract. Thus, the courts had to decide whether the repudiation itself was a total or partial breach. Again, the courts of different jurisdictions reached divergent results.³¹ There was no simple test to ascertain whether a breach was material³² and, if the breach was only partial, the consequences were significantly different. As Corbin suggested, not all anticipatory repudiations would amount to a total breach; to be total the anticipatory repudiation had to be either with respect to the entire performance that was promised or so material as to go to the essence of the contract.³³

In an effort to resolve ambiguities surrounding the doctrine and to reconcile the courts' decisions, the *Restatement of Contracts* specified three actions

27. *New York Life Ins. Co. v. Viglas*, 297 U.S. 672 (1936); *Lumbermens Mut. Cas. Co. v. Klotz*, 251 F.2d 499 (5th Cir. 1958).

28. *Kimel v. Missouri State Life Ins. Co.*, 71 F.2d 921 (10th Cir. 1934); *Milton v. H.C. Stone Lumber Co.*, 36 F.2d 583 (S.D. Ill. 1928), *aff'd*, 36 F.2d 589 (7th Cir. 1929). However, Corbin suggested that even if, by mistake, a party demanded performance when he had no such right under the contract, an anticipatory breach had been committed. CORBIN § 973.

29. *See Roehm v. Horst*, 178 U.S. 1 (1900) (destruction of the subject matter held to be voluntary); *Bowdell v. Parsons*, 103 Eng. Rep. 811 (Q.B. 1808). *See generally* RESTATEMENT OF CONTRACTS § 318(c) (1932).

30. *Central Trust Co. v. Chicago Auditorium*, 240 U.S. 581 (1916) (adjudication of bankruptcy held to be sufficiently voluntary to excuse aggrieved party from performance). Insolvency alone has been held insufficient, even though it makes performance an apparent impossibility and is similar to the bankruptcy situation. *See, e.g., Minneapolis Iron Store Co. v. E.G. Staude Mfg. Co.*, 153 Minn. 107, 189 N.W. 596 (1922); *Phenix Nat'l Bank v. Waterbury*, 197 N.Y. 161, 90 N.E. 435 (1910). Arrest or imprisonment of the promisor, clearly an involuntary act, has been held to support a claim based on the anticipatory repudiation doctrine. *Leopold v. Salkey*, 89 Ill. 412 (1878).

31. A repudiation of a long-term lease, an abandonment of the premises, and a refusal to pay an installment of rent have been held to be sufficiently "total." *Hawkinson v. Johnston*, 122 F.2d 724 (8th Cir.), *cert. denied*, 314 U.S. 694 (1941). But an insurer's letter to the insured, which stated that medical and other proof received by the insurer showed that the insured was not totally disabled, that disability benefits would no longer be paid, and that the insurer was restoring the policy to a premium basis, did not constitute a breach of the entire contract of insurance. *Lauro v. Metropolitan Life Ins. Co.*, 80 F. Supp. 377 (D.N.J. 1948). Where there has been a partial breach coupled with a repudiation, the breach is total. *Gold Mining & Water Co. v. Swinerton*, 23 Cal. 2d 19, 142 P.2d 22 (1943).

32. J. CALAMARI & J. PERILLO, *THE LAW OF CONTRACTS* § 157 (1970).

33. CORBIN § 972. If the breach is only partial, however, Corbin can be interpreted as still allowing a suit for partial breach. *Squillante, Anticipatory Repudiation and Retraction*, 7 VAL. U.L. REV. 373, 380 (1973).

which constituted an anticipatory repudiation: (1) 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; (2) 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; and (3) any voluntary affirmative act which renders substantial performance of his contractual duties impossible or apparently impossible.³⁴

The Uniform Sales Act, which was adopted prior to the *Restatement*, recognized that the aggrieved party had an immediate cause of action due to an anticipatory repudiation.³⁵ Under this statute, however, the repudiating buyer or seller had a valid defense if he could show that the other party had manifested an intention or an inability to perform before the repudiation was made.³⁶ The test for determining whether an anticipatory repudiation had occurred was less rigid than had existed under prior law. But the only remedy provided was a right to rescind the entire contract and demand restitution.³⁷ The aggrieved party was also required to give the repudiating party notice that he was rescinding the contract.³⁸

These attempts at codification of the law of anticipatory repudiation were by no means adequate or complete. Most of the courts attempting to apply the doctrine were still only concerned with one question: whether the acts of the promisor indicated that he could not reasonably be expected to perform. The decisions turned on the peculiarities of the individual fact situations and the ultimate impressions and instincts of the trier of fact. The Code's sections 2-609 and 2-610 were enacted to remedy these problems. This remedy was not merely a codification of the common law, the *Restatement* provisions, and the Uniform Sales Act. Many innovative features were added by the Code's definitional and remedial provisions.

II. ANTICIPATORY REPUDIATION UNDER THE UNIFORM COMMERCIAL CODE

A. Adequate Assurance

Section 2-609³⁹ recognizes the right of an aggrieved party who believes that a repudiation has occurred to demand adequate assurances of performance in writing.⁴⁰ If a seller or buyer has "reasonable" grounds for feeling "insecure," that is, if his "expectation of receiving due performance" is "impaired," he may demand in writing assurances from the alleged repudiator and, at the same time, suspend any performance for which he has

34. RESTATEMENT OF CONTRACTS § 318 (1932). Prospective inability to perform was thus recognized as valid grounds for a suit based on an anticipatory repudiation. See text accompanying notes 25-26 *supra*.

35. UNIFORM SALES ACT § 63(2) (superceded by UNIFORM COMMERCIAL CODE).

36. *Id.*

37. *Id.*

38. *Id.* § 65.

39. UNIFORM COMMERCIAL CODE § 2-609.

40. This was not stated in the Original Draft of May 1949. See UNIFORM COMMERCIAL CODE § 2-609 (1949 version).

not already received the agreed return. A commercial standard rather than a legal standard is applied to determine both the reasonableness of the insecurity and the assurance's adequacy.⁴¹ The grounds for insecurity need not arise from or be directly related to the contract in question.⁴² If the alleged repudiator receives a justified demand he must provide the assurances within thirty days or a repudiation of the contract results.⁴³ Even if a buyer accepts an improper delivery under an installment contract, he still retains his right to demand adequate assurances.⁴⁴

Although the right to demand assurances appears to be a new concept, the basic principles underlying such a right are not without prior foundation in case law.⁴⁵ Section 2-609 merely implements the policy behind recognition of the anticipatory repudiation doctrine that neither party's expectation of receiving the promised return performance should be impaired.⁴⁶ The fact that the parties contract with a view toward performance by one another, not merely for a promise or the right to win a law suit, also is implicit in this section's provisions. Retention of the contract is the goal and premature adjudication is aborted by forestalling, at least temporarily, the immediate right to damages.⁴⁷

The difficulties presented by the inconsistencies and ambiguities in the case law surrounding the doctrine of anticipatory repudiation are also substantially alleviated by the adoption of section 2-609.⁴⁸ A number of questions, however, are not answered by this section. For example, how should "insecurity" be defined? How is the "adequacy" of this assurance to be determined? Can there be an anticipatory repudiation without invoking the written demand for assurance? Even if the adequate assurance is forthcoming, can subsequent actions by the promisor ultimately result in an anticipatory repudiation?

Since the test for determining insecurity depends on commercial standards, the nature of the sales contract in question and the relationship between the contracting parties are of prime importance.⁴⁹ In an effort to clarify the definition of insecurity, the comment to section 2-609 cites the fact situation

41. UNIFORM COMMERCIAL CODE § 2-609(2).

42. *Id.*, Comment 3.

43. The Original Draft specified a 10-day limit. See UNIFORM COMMERCIAL CODE § 2-609(4) (1949 version); compare UNIFORM COMMERCIAL CODE § 2-609 (1962 version).

44. UNIFORM COMMERCIAL CODE § 2-609(3).

45. The comments to this section cite cases in which the right to demand assurances was alluded to although not formally adopted. *Id.*, Comments 3-4.

46. UNIFORM COMMERCIAL CODE § 2-609(1).

47. *Id.*, Comment 1.

48. If there has been no outright, absolute, or unequivocal repudiation by the promisor, the seller or buyer can demand written assurances rather than instituting suit and cancelling the contract based on a repudiation which a court might find has not actually occurred. Thus, when the intent of the repudiating party is unclear or when the materiality of the breach is questionable, an aggrieved party by demanding assurances can discover the nature and extent of the return party's actions without jeopardizing his position in regard to the contract. This provision recognizes that, in certain situations, jurisdictional definitions of the requisite elements constituting an anticipatory repudiation may not be clearly defined. *Id.*

49. *Id.*, Comment 3. By use of the term reasonable, this test also implies a specific application of the Code's merchant good faith provision. *Id.* § 2-103(1)(b).

which occurred in *Corn Products Refining Co. v. Fasola*⁵⁰ as an illustration of reasonable grounds for insecurity, and, therefore, a proper case for an adequate assurance demand. After analyzing the contract involved in that case,⁵¹ the comment states that even false rumors relating to a buyer's financial status are sufficient to entitle a seller to demand adequate assurances.⁵² A suspicion of insolvency will thus support a demand. In his *Notes*⁵³ Karl Llewellyn, the chief reporter of article 2, also made reference to the case of *Lander v. Samuel Heller Leather Co.*⁵⁴ for the purpose of explaining insecurity. According to Llewellyn, after a defective delivery is received by a buyer under an installment contract, he is entitled to demand assurances, but he cannot repudiate the entire contract unless the defective delivery substantially impairs the value of the contract.⁵⁵ Under the Code's formulation an assignment delegating performance is also said to give reasonable grounds for insecurity.⁵⁶

As in the case of insecurity, the adequacy of assurance is to be determined by commercial standards. Adequacy is, therefore, dependent on factual considerations.⁵⁷ Generally, a mere promise to cure a defective installment is sufficient,⁵⁸ but a similar promise from a known "corner-cutter" may not be adequate.⁵⁹ If a defective delivery interferes with the "easy use"⁶⁰ of the buyer, there must not only be verbal assurances but also a replacement.⁶¹ In this regard, the comment to section 2-609 also refers to the *Corn Products* case, where the buyer, upon learning of the seller's hesitations regarding his financial situation, furnished the seller with a good credit report.⁶² This was an adequate assurance for the purposes of the Code.

Although jurisdictions applying the Code's formulation have further clarified these notions, variations in interpretation still exist. In *Gutor Interna-*

50. 94 N.J.L. 181, 109 A. 505 (Ct. Err. & App. 1920).

51. The contract for the sale of oils on 30-days' credit, 2% off for payment within 10 days, provided that credit was to be extended to the buyer only if his financial responsibility was satisfactory to the seller. The buyer had under previous contracts taken advantage of the discount, but in the contract involved in this case he failed to make his customary payment within 10 days. At approximately the same time the seller heard rumors, in fact false, that the buyer's financial position was questionable. 109 A. at 505-06.

52. UNIFORM COMMERCIAL CODE § 2-609, Comment 4. The rumors were sufficient even without the provision in the contract relating to the discount. *Id.*

53. Comment on § 7-10 (S98) at 6, as reproduced in Spies, *Article 2: Breach Repudiation and Excuse*, 30 Mo. L. Rev. 225, 243 (1965).

54. 314 Mass. 592, 50 N.E.2d 962 (1943).

55. The seller and the buyer contracted for the sale of 120,000 pounds of leather to be delivered and paid for in installments. Upon receiving a defective installment, the buyer refused to pay until the seller replaced the goods. The seller declined and the court held that the seller was guilty of an anticipatory repudiation. 50 N.E.2d at 965. According to Llewellyn, the buyer had reasonable grounds to feel insecure and adequately demanded assurances from the seller. Comment on § 7-10 (S98) at 6, as reproduced in Spies, *supra* note 53, at 243.

56. UNIFORM COMMERCIAL CODE § 2-210(5).

57. *Id.* § 2-609, Comment 4.

58. *Id.*

59. *Id.*

60. The term "easy use" is utilized by the comment to show the relationship between the extent of the defect and the buyer's individual needs. *Id.*

61. *Id.*

62. 94 N.J.L. 181, 109 A. 505 (Ct. Err. & App. 1920).

*tional AG v. Raymond Packer Co.*⁶³ a federal court held that insecurity would not be a valid defense to a suit for purchase price when the party claiming the defense has already received the agreed upon performance. In this case an American distributor claimed that subsequent to his receipt of a dictating equipment shipment from a Swiss corporation he discovered that the promise for an exclusive dealership had been breached. Consequently, he claimed that, prior to payment, he had a right to demand adequate assurances. The court clearly rejected this position, stating that section 2-609 did not provide a remedy when the bilateral contract had become unilateral in nature. The buyer had the right to revoke his acceptance or notify the seller of an offset stemming from the distributorship's termination, but section 2-609 "does not terminate liability to pay for goods once in hand; it merely authorizes an insecure party to withhold possibly costly advance performance when the agreed return is in doubt."⁶⁴ Prior to this decision, however, a New York court relying on section 2-609 adopted a contrary position.⁶⁵ A buyer was allowed to withhold payment for an air conditioning unit after the original unit had malfunctioned and the seller had timely replaced it.⁶⁶ The buyer was excused from performance entirely when the seller failed to answer his demand for assurances that the new unit would work during the following summer.⁶⁷

A contract's provisions can in some instances modify the operation and application of section 2-609. Thus, an assignment of performance will not automatically give rise to insecurity when the agreement itself provides adequate security in the event of an assignment.⁶⁸ On the other hand, a contract term which allows a seller to demand the entire payment balance and repossess delivered goods when he feels insecure is ineffective under section 2-609.⁶⁹ There can be adequate security without a resort to the demand for assurance, but there can be no circumvention of the rights afforded by section 2-609.⁷⁰ Contrary to the specifications contained within section 2-609, however, the mere fact that payment under one contract is not

63. 493 F.2d 938 (1st Cir. 1974).

64. *Id.* at 943; *see* note 40 *supra* and accompanying text.

65. *Lockwood-Conditionaire Corp. v. Educational Audio Visual, Inc.*, 3 UCC REP. SERV. 354 (N.Y. Sup. Ct., Westchester Co. 1966).

66. *Id.*

67. *Id.* Reasonable grounds for insecurity have been found when a film renter, contracting for exclusive rights, learns that certain of the films contracted for have been made available for television use. *In re Prods. Unlimited, Inc.*, 3 UCC REP. SERV. 620 (Veteran's Admin. 1966). Generally, the demand itself must not only be in writing but must also be sufficiently specific. A mere request for an acceleration of payments due to a buyer's unstable financial condition is not considered a demand. *National Ropes, Inc. v. National Diving Serv., Inc.*, 513 F.2d 53, 61 (5th Cir. 1975).

68. *Field v. Golden Triangle Broadcasting, Inc.*, 451 Pa. 410, 305 A.2d 689 (1973); *see* note 56 *supra* and accompanying text.

69. *Wrightstone, Inc. v. Motter*, 1 UCC REP. SERV. 170 (Pa. C.P. 1961).

70. *Id.* Under section 9-504, however, a secured party has the right upon default by the debtor to take possession of the collateral and to sell, lease, or otherwise dispose of it, applying the proceeds to the indebtedness. UNIFORM COMMERCIAL CODE § 9-504. *See, e.g., In re Yale Express Sys., Inc.*, 370 F.2d 433 (2d Cir. 1966). However, a stipulation in connection with a secured transaction to the effect that the creditor reserved the right, in the event of a default, to take possession of any and all items involved in the transaction without demand, notice, or court order is void. *Rochester Capital Leasing Corp. v. K. & L. Litho Corp.*, 13 Cal. App. 3d 697, 91 Cal. Rptr. 827 (1970).

made when due does not necessarily justify insecurity as to a payment under another contract when the provisions of the contracts grant the seller excessive and, therefore, invalid powers of cancellation.⁷¹

A major question remaining after the Code's adoption was resolved in *Kunian v. Development Corp. of America*⁷² when the Connecticut Supreme Court recognized the existence of a repudiation after adequate assurances of performance had been given. In this case the buyer assured the insecure seller that his outstanding indebtedness would be paid after the seller's justified demand for assurance. The buyer failed to abide by this promise and the seller was totally excused from performance without a subsequent demand.⁷³

B. Anticipatory Repudiation

According to section 2-610, entitled "Anticipatory Repudiation," when either party repudiates the contract with respect to a performance not yet due, the aggrieved party may wait a "commercially reasonable time" for the repudiating party's performance,⁷⁴ and at the same time resort to the normal remedies for seller's or buyer's breach, in spite of the fact that he may have urged retraction or notified the repudiator that he would await his performance.⁷⁵ In both these instances, the aggrieved party may suspend his own return performance.⁷⁶ Additionally, the repudiation itself must "substantially impair the value of the contract" to the aggrieved party.

Section 2-610, however, does not contain a definition of the term "repudiation." Prior case law is therefore relevant to the meaning of this term. As the comment to section 2-610 indicates, "anticipatory repudiation centers upon an overt communication of intention or an action which renders performance impossible."⁷⁷ The repudiator's performance, however, need not be literally or utterly impossible; it is sufficient if the action indicates a rejection of the continuing obligation.⁷⁸ A demand by one or both parties for more than the contract requires is not in itself a repudiation unless it is coupled with a statement not to perform except on these additional terms.⁷⁹

Clearly, if an assurance is not forthcoming within thirty days under section 2-609, there has been a repudiation under section 2-610. But what other

71. *Northwest Lumber Sales, Inc. v. Continental Forest Prods., Inc.*, 261 Ore. 480, 495 P.2d 744 (1972).

72. 12 UCC REP. SERV. 1125 (Conn. Sup. Ct. 1973).

73. *Id.*

74. This time limitation was added in the 1957 Official Edition. Compare UNIFORM COMMERCIAL CODE § 2-610 (1957 version) with UNIFORM COMMERCIAL CODE § 2-610 (1949 version).

75. This provision was also added in the 1957 Official Edition.

76. UNIFORM COMMERCIAL CODE § 2-610(c).

77. *Id.*, Comment 1.

78. *Id.*, Comment 2.

79. *Id.* Llewellyn's *Notes* cite *Lander v. Samuel Heller Co.*, 314 Mass. 592, 50 N.E.2d 962 (1943), to illustrate this situation. After the buyer in *Lander* discovered the defective delivery, he demanded shipment of the remaining contract order in three days. According to Llewellyn, the buyer's statements are not a repudiation (assuming that the defect did not substantially impair the contract value) unless he refuses to continue with the contract if the deliveries are not forthcoming within that time. Comment on § 7-11 (S99) at 2, as reproduced in Spies, *supra* note 53, at 243.

actions or statements constitute an anticipatory repudiation? The resolution of this question was again left to the courts. The facts and circumstances justifying an anticipatory repudiation have been defined in divergent ways by various courts. This is largely due to the fact that, as in the case of insecurity, the question must be resolved by the trier of fact applying a commercial standard.

Probably the most important case in this area is *Fredonia Broadcasting Corp. v. RCA Corp.*⁸⁰ which was decided by the Fifth Circuit in 1973. RCA contracted to sell broadcasting equipment to the plaintiff. When the broadcasting operation failed, the plaintiff claimed that the business venture was unsuccessful due to RCA's repudiation of the contract: RCA had deliberately shipped the equipment on a delayed, erratic, and incomplete basis; any equipment RCA had delivered was not suitable for the use for which it was sold; and RCA had failed to provide the necessary personnel required by the contract to supervise the installation of the equipment.⁸¹ The jury found a repudiation of the contract. On appeal, RCA claimed that, as a matter of law, the existence of an anticipatory repudiation under the Code could not be determined on the basis of the quality of performance. RCA contended that the test should be "actions which . . . demonstrate a clear determination not to continue with performance."⁸² Rather than formally reject this proposition, the court stated that the jury had sufficient evidence to support a finding that RCA's *conduct* demonstrated a fixed *intention* to renounce.⁸³ At the same time, however, the court found the jury instructions fatally defective since they failed to state that these actions must substantially impair the value of the contract.⁸⁴ The Fifth Circuit spelled out the two-pronged test: the conduct or words must show an intent on the part of the promisor not to continue with the contract obligations, and the acts of repudiation must substantially impair the value of the contract to the return party. This decision also made it apparent that the type of conduct and the materiality of the breach were questions of fact to be decided by the jury. Consequently, the jury could base its conclusion on the quality of performance. According to the Fifth Circuit's holding the question of whether a repudiation has occurred will infrequently be decided, absent an outright repudiation, as a matter of law. As a consequence, when the effect or nature of the repudiator's actions is unclear, there are no definitive guidelines for determining whether an anticipatory repudiation has taken place.⁸⁵

80. 481 F.2d 781 (5th Cir. 1973).

81. *Id.* at 793. This contention was remarkably similar to the repudiation test applied prior to the Code, a test based on the probability that performance will not be forthcoming. See text accompanying notes 18-24 *supra*.

82. 481 F.2d at 793.

83. *Id.*

84. *Id.*

85. Due to this uncertainty a buyer's failure to make payment on delivery as required by an installment contract and a stop-payment on the subsequent check did not constitute an anticipatory repudiation when the seller's action of demanding immediate action appeared to be unreasonable to the jury. *Laredo Hides Co. v. H. & H. Meat Prods. Co.*, 513 S.W.2d 210 (Tex. Civ. App.—Corpus Christi 1974, writ ref'd n.r.e.). A refusal to accept delivery has been found to be an anticipatory repudiation. *Multiplastics, Inc. v. Arch Indus., Inc.*, 14 UCC REP. SERV. 573 (Conn. Sup. Ct. 1974). On

C. Problems

Since a finding of insecurity or anticipatory repudiation is dependent on the facts and circumstances surrounding the transaction, it is quite possible that there could never be an ordered pattern in the decisions. The uncertainties resulting from the recognition of the principle, its definition, and its application were, therefore, not completely alleviated by the Code's attempted clarification. In fact, the intent of the Code formulators was to leave these questions unresolved.⁸⁶ The formulators based their tests on commercial rather than legal standards and left the ultimate determination of what constitutes insecurity or an anticipatory repudiation to the trier of fact.

A long recognized principle of law is that the trier of fact is in the best position to determine the fact issues involved in a case by weighing the evidence which has been presented at trial. Since the trier of fact is present when the evidence is introduced, the credibility of the witnesses can be evaluated and a more appropriate conclusion concerning the actual occurrences and the reasonableness of the actions can be reached. In anticipatory repudiation situations the trier of fact can best determine whether a breach which has substantially impaired the value of the contract has occurred. When this threshold question has been answered, the law can structure the outcome between the parties involved in the litigation. As a consequence, it is to be expected that varying interpretations of superficially similar circumstances will result in such instances.

In any case, the commercial law, as an integral part of our economy, should be applied uniformly in all jurisdictions. There is a definite need for

the other hand, a buyer's refusal to order goods to be manufactured according to the contract is not an anticipatory repudiation when the seller is not ready, willing, and able to perform. *Erb v. Flower*, 248 Cal. 2d 208, 56 Cal. Rptr. 612 (1967). An intervening statute forbidding the transportation of contract goods from Canada into the United States does not justify an American buyer's refusal to accept delivery from his Canadian seller, and, thus, in such an instance the buyer has anticipatorily repudiated the contract. *Swift Canadian Co. v. Banet*, 224 F.2d 36 (3d Cir. 1955). The seller's death, another unforeseen, involuntary occurrence, will excuse the buyer from performance, however, when it appears that the contract goods are nonexistent. *Bonebrake v. Cox*, 499 F.2d 951 (8th Cir. 1974).

A unilateral modification can ripen into an anticipatory repudiation when a buyer changes the specifications in a purchase order, despite the fact that the buyer does not indicate that his performance is contingent on the seller's compliance with these new specifications. *R-Way Furniture Co. v. Power Interiors, Inc.*, 456 S.W.2d 632 (Mo. Civ. App. 1970). This case is not consistent with the Code provisions. See notes 74-79 *supra* and accompanying text. Despite this fact, the court in *R-Way* stated that the jury must decide if an anticipatory repudiation had occurred. 456 S.W.2d at 637. On the other hand, a buyer was found to have repudiated the contract when he stopped payment on a check believing the seller to have altered the terms of the contract by sending a letter of confirmation which failed to include a material provision. *Goldstein v. Stainless Processing Co.*, 465 F.2d 392 (7th Cir. 1972).

A request for an additional sum before the seller would tender performance has been held to be a valid reason for the buyer's cancellation of the contract. *Puget Sound Marina, Inc. v. Jorgenson*, 3 Wash. App. 476, 475 P.2d 919 (1970). A buyer's request for more goods at the original contract price, however, was not a valid reason for the seller's refusal to perform. *Neal-Cooper Grain Co. v. Texas Gulf Sulphur Co.*, 508 F.2d 283 (7th Cir. 1974).

86. The text of the Code does not define the terms "insecurity" or "repudiation." The text merely suggests factors which should be considered in determining the meaning of these provisions. See UNIFORM COMMERCIAL CODE §§ 2-609, 2-610. Compare RESTATEMENT OF CONTRACTS § 318 (1932).

guidelines which take into consideration the practical nature of sales transactions. The uncertainty inherent in the Code's formulation can only lead to a feeling of instability between buyers and sellers in the market place. In one tax case, *Commissioner v. Duberstein*,⁸⁷ Justice Frankfurter in his dissenting opinion criticized the majority's failure to define clearly the type of gift which could be excluded from gross income. The majority had stated that the determination of the donor's intent was a question of fact within the province of the jury. Their ruling could only be overturned if a reasonable man would have reached a different result.⁸⁸ Justice Frankfurter reasoned, however, that such a rule would lead to a lack of needed uniformity in the application of the income tax laws.⁸⁹ As an alternative he suggested that the law prescribe different guidelines based on the status of the parties.⁹⁰ Similar guidelines should be promulgated in the commercial law area. This is not to say, however, that the trier of fact should be completely ousted from his role in anticipatory repudiation cases. As stated previously, there is always a jurisprudential function to be served by this legal institution, and in anticipatory repudiation situations the trier of fact can best determine the nature of the factual situation to which the law is to be applied. Decisions based on rules of law would fail to consider the situation of the parties and the circumstances surrounding the individual contract. Yet, the law on anticipatory repudiation would be better defined and the relationships between buyers and sellers would be more secure if various guidelines for interpreting the Code's provisions were promulgated. There is a clear need for categorization of certain actions as anticipatory repudiation and other actions merely as grounds for insecurity.

The obvious solution to this problem is to require each aggrieved party to demand adequate assurances following any type of inhibiting actions by the promisor. Thus, even when an outright repudiation occurred, the aggrieved party would be required to request a statement, perhaps written, from the repudiator concerning his intent regarding the contract in question. Such a rule would insure stability and security, but would not adequately reflect the relationships between the parties. In some cases an aggrieved party may be able to find a substitute transaction immediately following the repudiation, or he may be able to mitigate damages. In any event, as the wronged party he should not be placed in a position where his options are foreclosed.

87. 363 U.S. 278 (1960).

88. *Id.* at 291.

89. As Justice Frankfurter stated:

Especially do I believe this [that there will be a production of a new volume of exegesis on the new phrases] when fact-finding tribunals are directed by the Court to rely upon their 'experience . . .' in appraising the totality of the facts of each case. Varying conceptions . . . are derived from a variety of experiences or assumptions about the nature of man What the Court now does sets fact-finding bodies to sail on an illimitable ocean of individual beliefs and experiences. This can hardly fail to invite, if indeed not encourage, too individualized diversities in the administration of the income tax law. I am afraid that by these new phrasings the practicalities of tax administration, which should be as uniform as is possible in so vast a country as ours, will be embarrassed.

Id. at 297.

90. *Id.* at 296.

Guidelines could be framed to require a demand for adequate assurances when the repudiating party's actions are anything less than an outright repudiation. But, again, problems exist since many actions might not be considered sufficiently definite to constitute an outright repudiation, and the aggrieved party's financial position could be significantly jeopardized since in the case of anything less than an outright repudiation his ability to mitigate would be limited.

The best solution is to suggest in the comment section certain recurrent fact situations which are reasonable grounds for insecurity and certain recurrent fact situations which allow the aggrieved party to be totally excused from performance. Any unilateral modification of a contract should be reasonable grounds for insecurity so long as the performance is not contingent on the proposed additional terms. Thus, if a buyer merely demands extra goods under the original contract, the seller should be required to demand assurances before he treats the contract as repudiated. Similarly, if the seller varies the specifications of the contract goods or requests an additional sum prior to performance, the comments should provide that the buyer demand adequate assurances. A failure to abide by conditions precedent should be reasonable grounds for insecurity and not an outright repudiation. A mere suspicion of insolvency or insolvency itself, whether affecting the contract in question or a collateral contract, should give rise to the demand requirement.

The occurrence of involuntary intervening forces or unforeseen circumstances should also fall within the provisions contained in section 2-609. On the other hand, an adjudication of bankruptcy, a unilateral modification of a contract which demands performance according to the altered terms, a refusal to accept delivery, a stop payment on the purchase price or the down payment check, a refusal to make payment, or an absolute statement of intent not to perform should all be considered anticipatory repudiations. If such guidelines were incorporated in the Code, the provisions would more adequately meet the needs of the business community.

III. REMEDIES AND DAMAGES

According to section 2-610 the aggrieved buyer or seller can resort to any remedy provided by section 2-703 or section 2-711.⁹¹ A remedy is defined as any remedial right to which an aggrieved party is entitled with or without resort to a tribunal.⁹² Section 2-703 gathers together in one convenient place all of the various remedies open to a seller, whereas section 2-711 enunciates the remedies available to a buyer.

Thus, a buyer can: (1) recover as much of the price as he has paid, or in other words, rescind the contract; (2) recover damages based on the market price differential; (3) "cover" and be awarded the added costs incurred in procuring substitute goods without having to demonstrate market price; (4)

91. UNIFORM COMMERCIAL CODE § 2-610(b).

92. *Id.* § 1-201(34).

in an appropriate case, sue for specific performance;⁹³ and (5) if the seller is insolvent, tender performance and recover the goods.⁹⁴

On the other hand, a seller can: (1) withhold or stop delivery of the goods; (2) "resell" the goods and recover damages measured by the difference between the unpaid contract price and the market price of the goods; or (3) if this amount is insufficient to place the seller in as good a financial position as performance, recover damages measured by his lost profits; or (4) if the goods were incomplete at the time of the buyer's anticipatory repudiation (a) complete the manufacture of the unfinished goods and identify them to the contract; (b) resell the unfinished goods for their salvage value; or (c) identify the unfinished goods to the contract and proceed to recover under another appropriate remedy, such as resale or a suit based on the market price differential. All of these remedies are supplemented by a provision in the Code which allows law and equity to intervene when a remedy is not specifically provided.⁹⁵ Incidental and consequential damages can also be recovered,⁹⁶ but a repudiating party has a limited right of retraction.⁹⁷

A. *The Buyer's Options*

Certainly, the most practiced alternative available to an aggrieved buyer is the right to "cover." Section 2-712 states that a buyer may cover by making in good faith and without reasonable delay any purchase or contract to purchase goods in substitution for those due from the seller.⁹⁸ Recovery is based on the difference between the cost of cover and the contract price together with any incidental and consequential damages minus expenses saved as a result of the seller's breach. The aggrieved buyer can prove his damages easily by resorting to cover; all he has to show is that the cover was effectuated in good faith, without unreasonable delay, and in substitution for the contract goods.⁹⁹ There is no need to prove market price; damages are fixed when the cover option is utilized. There is, however, no mandatory

93. See, e.g., *Field v. Golden Triangle Broadcasting, Inc.*, 451 Pa. 410, 305 A.2d 689 (1973).

94. UNIFORM COMMERCIAL CODE § 2-502.

95. *Id.* § 1-103.

96. *Id.* § 2-715.

97. *Id.* § 2-611. So long as the aggrieved party has not cancelled the contract, materially changed his position, or otherwise indicated that he considers the repudiation final, such a retraction is effective. Cancellation of the contract requires a formal notice to the repudiating party that the nonrepudiating party is treating the contract as having ended. *Id.* § 2-106(4). On the other hand, section 2-611 also recognizes the right to have an informal declaration by allowing the aggrieved party to indicate otherwise to the promisor that he is treating the contract as ended. There are no formal requirements controlling the effectiveness of a retraction. Section 2-611(2) states that "[r]etractation may be by any method which clearly indicates to the aggrieved party that the repudiating party intends to perform, but must include any assurance justifiably demanded under the provisions of this Article (Section 2-609)." The purpose of this section is to promote the continuance of the contract and to give meaning to the recognition of the expectation interest of each party. The right to retract exists, but it is severely limited in order that the aggrieved party will not be burdened by a retraction after he has acted pursuant to the repudiation.

98. *Id.* § 2-712(1).

99. *Id.* § 2-712(2).

requirement that the buyer cover.¹⁰⁰ In fact, the buyer who purchases substitute goods for less than market price can possibly sue for damages rather than basing his recovery on the cover price.¹⁰¹

The buyer's right to damages is spelled out in section 2-713. Damages are computed based upon the difference between the market price at the time when the buyer "learned of" the breach or the repudiation and the contract price together with any consequential and incidental damages resulting from the seller's breach.¹⁰² The market price, generally, is to be determined at the time for tender.¹⁰³

The time question presents several problems for the aggrieved buyer in an anticipatory repudiation situation. Cover is to be effectuated within a reasonable time after the repudiation. Damages are to be measured at the time the buyer "learned of" the repudiation. But, under section 2-610 the buyer has a right to await performance. Thus, can the buyer upon learning of a repudiation wait until performance date before covering? Is a "reasonable time" to be calculated from the moment the buyer "learns of" the repudiation by the seller or from the date that performance is due under the contract? Is the performance date, as a matter of law, a reasonable time? Are damages to be measured based on the market price on any date that the buyer might choose between the actual repudiation and the time for performance? Or do the damages have to be calculated in terms of the market price on the date that performance was due under the contract?

The intent of the Code formulators is not at all clear. One author has suggested that Karl Llewellyn included this "learned of" provision in order to aid an aggrieved party who is informed of a repudiation after performance date, that the provision has no real relation to an anticipatory repudiation case.¹⁰⁴ This time provision, however, was no more than a codification of the New York common law. Two New York cases had held that the time when the buyer knew of the default was determinative. In these cases the buyer was not informed of the repudiation until after performance date.¹⁰⁵ Karl Llewellyn may have been influenced by these decisions and utilized this language in order to provide for this type of situation. If the time of the

100. *Id.* § 2-712(3).

101. See Honnold, 1 N.Y. LAW REVISION COMM'N REP. 569, 570 (1955). Although criticized by some, this option has also been praised because it does not limit the options of the aggrieved party, it is consistent with a number of other Code sections which do not favor the premature election of remedies, it is easy to administer, and it encourages recourse to actual market substitutes by guaranteeing to the injured party that he will have some recourse in the event of an unusually unfavorable substitute contract. Peters, *supra* note 2, at 261. Other problems presented by the cover option, such as the meaning of reasonable commercial purchase and adjusting the difference between cover items and those contracted for, are not within the scope of this Comment.

102. UNIFORM COMMERCIAL CODE § 2-713(1).

103. *Id.* When there is a revocation of acceptance after the goods have arrived, the place for arrival is determinative of the market price. This will probably not affect a suit for anticipatory repudiation, however, except in cases involving installment contracts. Texas states that in either case the place of tender is determinative. TEX. BUS. & COMM. CODE ANN. § 2.713(b) (1968). The parallel provision for the seller's damages directs the use of the "time and place for tender." UNIFORM COMMERCIAL CODE § 2-708(1).

104. See Patterson, 1 N.Y. LAW REVISION COMM'N REP. 697 (1955).

105. See Perkins v. Minford, 235 N.Y. 301, 139 N.E. 276 (1923); Boyd v. L. H. Quinn Co., 18 Misc. 169, 41 N.Y.S. 391 (Sup. Ct. 1896).

breach was anything less than performance date, the performance date would be determinative for purposes of measuring damages.

In this regard the provisions of section 2-723(1) are also important. Under this section if an action for anticipatory repudiation comes to trial before the time for performance, damages for either an aggrieved buyer or seller should be determined according to the price of goods at the time the aggrieved party learned of the repudiation.¹⁰⁶ If the aggrieved buyer's damages for an anticipatory repudiation are always to be determined under section 2-713 according to the time the buyer learned of the repudiation, the pre-performance date trial provision has no meaning as it in fact relates to the aggrieved buyer, even though it expressly states that it applies to the buyer. Consequently, the time for performance should be determinative in such a situation. At the same time, the comment to the Code states that the requirement that the buyer must cover "without reasonable delay" is not intended to limit the time necessary for him to decide how he may best cover.¹⁰⁷ Thus, for all practical purposes the presumption is with the buyer in terms of the time for cover, and, as a result, the right to await performance is not abridged. A similar presumption should exist in the damage measure.

The case of *Oloffson v. Coomer*¹⁰⁸ is significant to a determination of the meaning of the Code sections relating to anticipatory repudiation. In *Oloffson* a farmer repudiated his contract to sell corn to a grain dealer. The buyer argued that the proper measure of damages should be based on the market price at the date set for performance in the contract which was over a year from the date of the repudiation. The trial court agreed, but the Illinois Court of Appeals reversed, stating that although the buyer did indeed have a right to await performance, this time expired on the date of the repudiation. A buyer's right to await performance is conditioned upon his waiting no longer than a commercially reasonable time within the meaning of the good faith provisions of article 2.¹⁰⁹ In this case the date of the repudiation was held to be the only commercially reasonable time.¹¹⁰

In order to solve the problem presented by the incongruities in the Code's provisions, the court in *Oloffson* effectively abolished the buyer's option to await performance. Whether this decision will be followed by other states remains to be seen. An effective argument could easily be made that this holding is not in accord with the Code's formulation: the remedies spelled out in section 2-610 are disjunctive—a buyer has the right to await perform-

106. UNIFORM COMMERCIAL CODE § 2-723(1).

107. *Id.* § 2-712, Comment 2. The reasonableness of cover has not been directly challenged in any anticipatory repudiation case. In *Oloffson v. Coomer*, 11 Ill. App. 3d 918, 296 N.E.2d 871 (1973), the buyer covered almost a year after the repudiation. The cover price was higher than the contract price, but the buyer sued for damages based on the market price differential. *Id.* at 920, 296 N.E.2d at 873. The court, therefore, was not confronted with the issue. However, it is clear that this unreasonably delayed cover (substitute goods were readily available in the market place at the time of repudiation) may have influenced its subsequent decision. See notes 108-10 *infra* and accompanying text.

108. 11 Ill. App. 3d 918, 296 N.E.2d 871 (1973).

109. *Id.* at 921, 296 N.E.2d at 874.

110. *Id.* at 922, 296 N.E.2d at 875.

ance *and* to recover market price. Additionally, the intent of the Code formulators does not seem to coincide with the decision.¹¹¹ Clearly, there has been no conclusive resolution of this problem.¹¹²

B. *The Seller's Options*

The seller's remedies are in many ways analogous to the remedies provided the aggrieved buyer. After repudiation the seller has the option under section 2-706 of reselling the contract goods. This remedy is very similar to the buyer's cover option.¹¹³ The seller can resell goods whenever the buyer has repudiated the contract or has in some other way committed a breach. Section 2-706 sets forth all of the details with regard to this seller's remedy.

The Code states that when there is a proper resale, the seller is entitled to recover the difference between the resale price and the contract price of the goods.¹¹⁴ By this mechanism the seller is encouraged to resell; the only defenses available to a buyer are a lack of good faith and that the acts of the seller were unconscionable. As a result, in the absence of such contentions the seller is entitled to summary judgment on the issue of damages.¹¹⁵ However, there are provisions contained in this section which regulate the method of resale and thus control any possible abuses. For example, the section provides that the resale must be within a commercially reasonable time.¹¹⁶ In anticipatory repudiation cases the right to resell has provided an effective alternative to an aggrieved seller. The commercially reasonable time requirement has not in any way hampered the seller's recovery.¹¹⁷

111. See notes 104-06 *supra* and accompanying text.

112. The Fifth Circuit reached a similar conclusion in *Fredonia Broadcasting Corp. v. RCA Corp.*, 481 F.2d 781 (5th Cir. 1973). The court in *Fredonia* also measured market price differential damages based on the time of the repudiation. *Id.* at 800. This was a trial court decision, however, which was not challenged by the buyer on appeal.

Other problems relating to buyers' remedies in anticipatory repudiation cases have been resolved by the courts, although the decisions may not be followed by other jurisdictions. It has been held that a buyer need not establish market price when he elects to cover; his purchase is presumed proper and the burden of proof is on the seller to show that the cover was not properly attained. *Laredo Hides Co. v. H. & H. Meat Prods. Co.*, 513 S.W.2d 210 (Tex. Civ. App.—Corpus Christi 1974, writ ref'd n.r.e.). An aggrieved buyer can sue for both breach of warranty and a repudiation. Since § 2-610 allows an aggrieved party to treat the contract as continuing in existence by awaiting performance and, at the same time, sue for an anticipatory repudiation, the recovery of damages for an anticipatory repudiation is, therefore, not an exclusive remedy. *Fredonia Broadcasting Corp. v. RCA Corp.*, 481 F.2d 781 (5th Cir. 1973). A buyer who seeks to rescind the contract after the repudiation cannot, however, at a later date recover damages; rescission and damages are inconsistent remedies. *Balon v. Hotel & Restaurant Supplies, Inc.*, 6 Ariz. App. 481, 433 P.2d 661 (1967).

113. The seller's option to resell is stated in more definitive terms than is the buyer's option to cover. Thus, the seller can only recover the contract price when he is unable to resell after a reasonable effort. UNIFORM COMMERCIAL CODE § 2-709(1). To some extent, then, the seller's options are more restricted due to the fact that in most cases an attempt to resell will have to be made. See Peters, *supra* note 2, at 261.

114. UNIFORM COMMERCIAL CODE § 2-706(1).

115. 3A R. DUESENBERG & L. KING, SALES AND BULK TRANSFERS UNDER THE UNIFORM COMMERCIAL CODE § 13.05 (1974).

116. UNIFORM COMMERCIAL CODE § 2-706(1).

117. When a seller resold an airplane, nine months after repudiation, the resale effort was held to be within a commercially reasonable time. *Richards Aircraft Sales, Inc. v. Vaughn*, 203 Kan. 967, 457 P.2d 691 (1969). So long as the seller acts prudently and with reasonable care and judgment the time of resale is to a large extent within

In addition to the right of resale, section 2-708(1) imposes the pre-Code damage measure in cases where the seller decides not to resell. Thus, the seller can recover "the difference between the market price at the time and place for tender and the unpaid contract price."¹¹⁸ In unusual situations, section 2-708(2) supplements this provision by providing that when the measure of damages is inadequate to put the seller in as good a position as he would have been had the contract been performed, the measure of damages is the profit which the seller would have realized from the buyer's full performance.¹¹⁹ Market price is to be determined at the time and place for tender, and if there is no market price, the Code permits the use of market quotations if they are available.¹²⁰ In a case where the suit is brought for an anticipatory repudiation after the time for performance, the market price will be determined according to the time and place provided for performance. But, if the seller's suit comes to trial prior to the performance date with respect to some or all of the goods due under the contract, damages based on market price will be determined according to the price of the goods prevailing at the time the aggrieved party learned of the repudiation.¹²¹

Thus, under the provisions of section 2-708, the seller's damages can vary in terms of the time the case comes to trial. If the case comes to trial prior to performance date, the aggrieved seller may have problems similar to those the aggrieved buyer faces when attempting to determine the time he "learned of" the anticipatory repudiation after he justifiably awaited performance following the repudiation. Of course, the seller's problem will be limited, for the most part, to contracts performable over long periods of time. This may

his discretion. *Id.* at 973, 457 P.2d at 697. Similarly, when a buyer repudiated an order of Christmas trees in September and the seller did not begin his efforts to resell until December, the resale was still within a commercially reasonable time despite the market price decrease in the last few weeks before the holiday. *Whewell v. Dobson*, 227 N.W.2d 115 (Iowa 1975). A buyer who claims that a resale should have occurred at a different time when the market price was higher has little recourse due to both the unqualified "reasonable" standard and the seller's right to await performance under § 2-610. *Aura Orchards v. A. Peltz & Sons*, 27 Agri. Dec. 1546, 6 UCC REP. SERV. 149 (1968). It has also been held that the seller need not give exact notification to the buyer of his intention to resell, due to the fact that the statute does not require that the buyer be notified of the proposed resale; the statute only requires the seller to give the buyer reasonable notification of his intention to resell. *Alco Standard Corp. v. F. & B. Mfg. Co.*, 51 Ill. 2d 186, 281 N.E.2d 652 (1972). *Contra*, *Portal Galleries, Inc. v. Tomar Prods., Inc.*, 60 Misc. 2d 523, 302 N.Y.S.2d 871 (Sup. Ct. 1969).

118. UNIFORM COMMERCIAL CODE § 2-708(1). This remedial provision has rarely been used in anticipatory repudiation situations because of the alternative provisions available and the encouragement to resell. To a large extent the cases involving § 2-708(1) have been limited to goods not completed at the time of repudiation. *See* note 129 *infra* and accompanying text.

119. In many anticipatory repudiation situations sellers have recovered lost profits. *See, e.g.*, *Caribtex Mfg. Corp. v. Barbitex Corp.*, 377 F.2d 795 (3d Cir. 1967) (seller allowed to recover lost profits, including overhead, when buyer repudiated after seller commenced manufacture); *Alter & Sons v. United Eng'rs & Constructors, Inc.*, 366 F. Supp. 959 (S.D. Ill. 1973) (goods specially manufactured by seller for buyer); *Anchorage Centennial Dev. Co. v. Van Wormer & Rodrigues, Inc.*, 443 P.2d 596 (Alas. 1968) (unresellable gold-colored coins for centennial celebration); *Prescon Corp. v. Savoy Constr. Co.*, 259 Md. 52, 267 A.2d 222 (Ct. App. 1970) (repudiation after shop drawings completed).

120. UNIFORM COMMERCIAL CODE § 2-724.

121. *Id.* § 2-723(1).

lead to some interesting trial docketing by attorneys trying to wait until performance date before bringing their case to trial.

Another remedy available to the aggrieved seller is the price remedy contained in section 2-709 which allows the seller, in certain instances, to recover the contract price from the repudiator. If the seller cannot resell for a reasonable price within a reasonable time after the repudiation, he will be entitled to recover the contract price. But, to do so the seller must hold the goods identified to the contract, and if a possible resale appears he may resell and deduct the net proceeds from the contract price.¹²² The seller can sue for the purchase price when the goods have already been accepted (or in the case of an anticipatory repudiation, where the seller tenders performance after the repudiation),¹²³ when the goods have been unjustifiably rejected by the buyer and the seller cannot resell them,¹²⁴ and when the situation involves conforming goods which have been lost or damaged within a commercially reasonable time after the buyer has the risk of loss with regard to them.¹²⁵ This provision has been utilized, to some extent, in anticipatory repudiation cases.¹²⁶

If the seller has not completed manufacture of the goods involved in the contract, he may recover the market price differential based on the possible sale of the goods after completion of manufacturing less costs saved as a consequence of the breach under section 2-708, or he may under section 2-704, in the exercise of "reasonable commercial judgment for the purpose of avoiding loss and of effective realization," complete the manufacture of the goods and identify the goods to the contract. If this alternative is chosen, the aggrieved seller upon the completion of the manufacturing process has the same remedies available to him—namely, resale, market price differential, contract price, and lost profit—as he would have had if the contract had been repudiated after production. This option is limited to some extent by the provision that reasonable commercial judgment must be exercised. The comment to this section points out that this reasonableness is determined

122. *Id.* § 2-709(2).

123. *Id.* § 2-709(1)(a).

124. *Id.* § 2-709(1)(b).

125. *Id.* § 2-709(1)(a). Under *id.* § 2-510(3) the risk of loss is said to rest with the buyer when the buyer anticipatorily repudiates with respect to goods conforming to the contract. In the limited situation where a suit for contract price may not be appropriate and the seller brings an unsuccessful action for the purchase price, he can still recover damages for the breach of contract in the same action.

126. See *Denison Mines, Ltd. v. Michigan Chem. Corp.*, 469 F.2d 1301 (7th Cir. 1972) (seller who chose to keep the contract in effect following the buyer's repudiation was entitled to recover the contract price despite his late delivery in the next shipment under the installment contract); *Multiplastics, Inc. v. Arch Indus., Inc.*, 14 UCC REP. SERV. 573 (Conn. Sup. Ct. 1974) (destruction of the contract goods by fire after the buyer's repudiation, while the goods are still in the physical possession of the seller, allows the seller to recover the contract price despite the fact that the seller awaited performance and urged a retraction); *Midwest Eng'r & Constr. Co. v. Electric Regulator Corp.*, 435 P.2d 89 (Okla. 1967) (testimony to the effect that the articles involved in the contract were made up especially for a buyer's order and were unsuitable for purposes other than filling that order, was sufficient to allow the aggrieved seller to recover the contract price for the articles following the buyer's anticipatory repudiation). A court has held that a seller does not have to make a reasonable effort to resell before he can sue for the purchase price, where the buyer ordered a specific fur jacket with alterations and subsequently refused delivery. *Ludwig, Inc. v. Tobey*, 28 Mass. App. Dec. 6, 5 UCC REP. SERV. 832 (1964).

according to the facts and circumstances at the time the aggrieved seller learns of the repudiation.¹²⁷ It is pointed out that any course of conduct is reasonable unless circumstances make it "clear that such action will result in a material increase in damages."¹²⁸ The burden is thus on the buyer to show that this completion of manufacturing was invalid. The cases dealing with this option have made it evident that a seller who elects to cease manufacturing cannot recover the contract price, but he can recover lost profits less costs saved as a consequence of the repudiation.¹²⁹

C. Problems

There are several problems inherent in the Code's formulation of damages and remedies in situations involving an anticipatory repudiation. The substitute transactions of resale and cover pose no particular problems, but when the market contract differential is utilized in anticipatory repudiation cases, several difficulties are presented. The seller's differential is computed according to the time and place for performance unless the case comes to trial prior to performance date; then the time he "learned of" the repudiation is determinative. The buyer's differential is always calculated according to the time he "learned of" the repudiation. There are three possible interpretations of this buyer provision: (1) "learned of" is definitive and thus the buyer must calculate his damages in terms of the time he was informed of the breach; (2) "learned of" is only meant to apply to situations where a repudiation occurs after performance date and thus it does not apply to an anticipatory repudiation; and (3) as read in conjunction with section 2-610, "learned of" means a reasonable time after the buyer is informed of the breach since he does have the right to await performance.

For the sake of consistency, it could be argued that an aggrieved buyer should have the same rights as the aggrieved seller. Consequently, the time and place for performance should govern in a suit to recover the market price differential. But, by adopting this interpretation, there would be no immediate requirement that the aggrieved party mitigate damages. In fact, the right to await performance can in the unusual case allow an aggrieved buyer or seller either to maximize damages or to speculate in the market at the repudiator's expense. Although this has never actually occurred, the possibility exists. For example, the buyer who contracts for goods at a price of \$1000 to be delivered on December 1, first learns of the repudiation by the seller on September 1. The market price on repudiation date is \$800. If the buyer covers at this time, he will only recover incidental and consequential damages. However, if the market price appears to be rising, he may be

127. UNIFORM COMMERCIAL CODE § 2-704, Comment 2.

128. *Id.*

129. See *Hodes v. Hoffman Int'l Corp.*, 280 F. Supp. 252 (S.D.N.Y. 1968); *Detroit Power Screwdriver Co. v. Ladney*, 26 Mich. App. 478, 8 UCC REP. SERV. 504 (1970); *E-Z Roll Hardware Mfg. Co. v. H. & H. Prods. & Finishing Corp.*, 4 UCC REP. SERV. 1045 (N.Y. Sup. Ct., Nassau Co. 1968); cf. *Meledandi, Inc. v. Kohn*, 7 UCC REP. SERV. 34 (N.Y. Civ. Ct., N.Y. Co. 1969) (holding that the appropriate remedy would be based on the damage measure determined by market price if manufacturing had been completed minus costs saved in consequence of the breach).

able to benefit from doing nothing. Thus, on December 1 the market price is up to \$1200 and the buyer is now able to recover \$200. On the other hand, assuming the same contract, suppose the market price is \$1200 when the seller repudiates and it appears as if the price will soon fall. It would be beneficial to the buyer to cover immediately in order to recover more damages. The situation works essentially the same for the seller in the case of a buyer's repudiation. If a seller contracts to sell goods on December 1 at a cost of \$1000 and the market price is \$1200 at the time of repudiation on September 1 and the price appears to be declining, the seller could possibly decide not to resell the goods. Thus, if the market price is down to \$800 by the time set for performance, he can recover \$200 and retain the goods without taking any affirmative action. Similarly, if the market price is \$800 at the time of repudiation and it appears that the price may rise in the next few months, it could be to his advantage to resell the goods and fix his damage measure. Even in a less complex situation similar results may occur. A buyer upon hearing of a seller's repudiation at a time when market price equals contract price could decide not to act by means of cover if he believes that the market price may rise by the time and place for performance. A seller who is in the same situation with the market falling may decide to suspend his resale efforts until the market price has declined.

Although such problems could occur, it is unlikely that they will occur. Most buyers and sellers are more concerned with maximizing immediate profits than the right to win a potential lawsuit. They would thus prefer to channel their energies into maximizing profits, not damages for breach. These hypotheticals also presuppose that the future price of goods is readily ascertainable. Nevertheless, these examples demonstrate an interpretation which could be given to the Code's provisions. It might be possible for an aggrieved buyer or seller who is willing to take a chance and who is not concerned with maximizing profits to speculate. In theory, then, the right to await performance does not coincide with an appropriate damage measure. A damage measure should reflect the harm suffered; it should never allow an aggrieved party to recover more than he bargained for in the contract.¹³⁰ The Code formulators balanced the equities in favor of the aggrieved party by giving him complete and unlimited options. Any possible usurpation of these options could, to some extent, be contained by the good faith and unconscionable act defenses. There are ways to restructure the Code provisions to reflect more adequately the compensatory function of damages without hindering the rights of the aggrieved party.¹³¹

130. See CORBIN § 990.

131. Damage measures should be integrally related to an incentive to fulfill a promise. Thus, the possibility of allowing an aggrieved party to maximize his damages may be an added incentive to the repudiator not to repudiate. Sanctions, however, should not lead to a waste of resources. Unbargained for and windfall gains are unnecessary; damage recovery alone can adequately fulfill the needed incentive. In the extreme case where an aggrieved party's recovery does not reflect the harm suffered, the additional sanction allowed by the Code is superfluous. See generally R. POSNER, *ECONOMIC ANALYSIS OF LAW* (2d ed. 1973); Barton, *The Economic Basis of Damages for Breach of Contract*, 1 J. LEGAL STUDIES 277 (1972). For a critical analysis of Posner's work and a suggestion for legal implementation of some of the basic principles, see Polinsky,

The best solution would be to require an aggrieved party, whenever possible, to enter into substitute transactions.¹³² Thus, if the goods are readily available or resalable in the market, there is no reason why an aggrieved party should not be required to act within a reasonable time to cover or resell. The only problem would come in terms of the buyer with insufficient cash flow. In actuality, though, he will be left in the same position as when the contract was agreed upon. The comment sections should adequately explain this reasonable time requirement. A reasonable time should depend on both the nature of the goods which are the subject of the contract, and the nature of the contract itself. This would have to be a question of fact, but certain guidelines could be promulgated. Thus, in the case of an outright anticipatory repudiation, the aggrieved party should be required to take affirmative action within a reasonable time after the repudiation is communicated to him. In most short-term contracts the time for performance contained in the contract could be determinative. In long-term contracts the time requirement should more adequately reflect the nature of contract goods and the availability of substitute transactions. In either case, when the goods are frequently bought or sold in the market place the reasonable time would be shorter. Also, if the price of goods is less than contract price at the time of repudiation and the goods are available or in demand, the reasonable time should be measured in light of these factors. Section 2-610 should not give the aggrieved party an unlimited right to await performance. Instead, this right should to some extent be limited by these time requirements. Such a provision requiring substitute transactions would only have an adverse effect in the situation in which the aggrieved party may not want to cover or resell due to his present lack of need for the contract goods or his present inability or unwillingness to sell the goods. There is no reason why these aggrieved parties should be compensated; in reality, they have benefited from the repudiation.

This is not to say, however, that all aggrieved parties would be required to enter into substitute transactions. In some cases, the goods may have been specially manufactured for the buyer or they may be unobtainable in the market place. A full volume seller, for instance, may have resold the contract goods, but this resale may have reduced the total amount of sales possible. In these situations the other damage provisions of the Code would be operative. A buyer who is unable to secure substitute goods may thus sue for the market price differential. The time for performance would be determinative for measurement purposes. A seller who is unable to resell contract goods could recover profit when the goods are not salvageable, and in other cases where the goods are salvageable or recyclable recover the

Economic Analysis as a Potentially Defective Product: A Buyer's Guide to Posner's Economic Analysis of Law, 87 HARV. L. REV. 1655 (1974).

132. Other solutions have been suggested. One author has stated that the aggrieved party should be offered two time periods to invoke the market price differential: the time of the repudiation if notice of acceptance of the repudiation is then communicated to the repudiator and a reasonable time thereafter if no retraction of the repudiation has been received by the aggrieved party. Peters, *supra* note 2, at 267.

market price differential less expenses saved in consequence of the breach. The full volume seller should also be allowed to recover profit.

Such provisions would effectuate the compensatory function of damages. An aggrieved party could wait a reasonable time after the repudiation while attempting to stabilize his position, but could not wait until the time for performance under the contract before channelling his output into other uses or finding some other transactions to fulfill his needs. In the same vein, an aggrieved seller who is informed of an anticipatory repudiation while in the process of manufacturing goods for the buyer at the time of the repudiation should be required to cease manufacture immediately unless he is able to find a substitute contract. The test for cessation of manufacture under the present Code is "reasonable commercial judgment"; the seller is allowed to complete manufacture so long as in his judgment he will be able to resell the goods when they are completed. In some instances such a decision may be economically and commercially reasonable at the time of the repudiation, but not at the time of completion; the demand for such goods may no longer exist or the price of such goods may have declined. There would be a more efficient allocation of market resources if the seller's energies were channelled into the manufacturing of specific contract goods. Likewise, it seems untenable that a seller should be able to tender a useless performance following an anticipatory repudiation. A fully productive economic system requires that goods be utilized and not wasted. This goal is not promoted by this unnecessary rule of law.

IV. CONCLUSION

The recognition of the doctrine of anticipatory repudiation caused several definitional and remedial problems. To a large extent these difficulties were alleviated by the adoption of the Uniform Commercial Code. In an effort to explain better the nature of a repudiation and to allow greater flexibility to the aggrieved party the Code recategorized the principle and provided new remedial options for the aggrieved party. Through these mechanisms the law on anticipatory repudiation was clarified and the positions of buyers and sellers in the market place were made more secure.

However, the Code is not without its own difficulties and, thus, several revisions would enhance the Code's formulation. The difference between insecurity under section 2-609 and an anticipatory repudiation under section 2-610 should be more adequately explained and clarified. Also, the remedial provisions available to the aggrieved party should be revised in order to insure effective utilization of goods and resources while, at the same time, allowing sufficient choices to the aggrieved party. If these changes were incorporated in the Code, the provisions would more adequately reflect the expectations of the business community and would provide a more coherent mechanism for ordering the relationships between buyers and sellers.