

THE RIGHT TO DEMAND ADEQUATE ASSURANCE OF DUE PERFORMANCE: UNIFORM COMMERCIAL CODE SECTION 2-609 AND RESTATEMENT (SECOND) OF CONTRACTS SECTION 251

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I. INTRODUCTION

A recurring problem in contractual relationships arises when a promisor's statement or conduct suggests to the promisee that the promisor will be unable or unwilling to render some future performance. Because the traditional doctrine of breach by anticipatory repudiation did not provide sufficient protection to an insecure promisee in such circumstances, the drafters of the Uniform Commercial Code (UCC) created a new remedy for an insecure promisee in section 2-609, which provides:

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

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

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

(4) After receipt of a justified demand failure to provide within a reasonable time not exceeding thirty days such assurance of due performance as is adequate under the circumstances of the particular case is a repudiation of the contract.¹

Subsequently, the drafters of the *Restatement (Second) of Contracts* parroted this innovation in section 251, which provides:

(1) Where reasonable grounds arise to believe that the obligor will commit a breach by non-performance that would of itself give the obligee a claim for damages for total breach under § 243, the obligee may demand adequate assurance of due performance and may, if reasonable,

1. U.C.C. § 2-609 (1972). All references to the Uniform Commercial Code are to the 1972 Official Text, unless otherwise noted.

suspend any performance for which he has not already received the agreed exchange until he receives such assurance.

(2) The obligee may treat as a repudiation the obligor's failure to provide within a reasonable time such assurance of due performance as is adequate in the circumstances of the particular case.²

This article will examine the common law principles and prior statutory provisions which created the problem which led the drafters of the UCC and the *Restatement (Second)* to include these provisions. The article will then discuss how these provisions have been interpreted by the courts to determine whether they have been sufficient to solve the problems facing an insecure promisee.

II. COMMON LAW BACKGROUND

A. *The Doctrine of Anticipatory Repudiation*

Prior to the landmark decision in *Hochster v. De La Tour*,³ the English common law was not clear about what rights a promisee had when the promisor, by words or conduct, indicated his clear inability or unwillingness to render a promised performance. A number of cases had held that where the promisor had taken action clearly inconsistent with his promised performance, the promisee had an immediate right to sue for breach, even though the time for the promisor's performance had not yet arrived. For example, in *Short v. Stone*⁴ a man promised to marry a woman, but before the scheduled date for the marriage, he married another. The court held that the prospective bride had an immediate right to sue the duplicitous groom for breach of the contract of marriage. Subsequently, in *Ford v. Tiley*⁵ the owner of real property agreed to lease it to a tenant for a period of years. The owner then leased the property to another for the same term. The court held that the tenant could sue the owner immediately, even though the date for the owner's performance had not yet arrived.⁶

The principal authority to the contrary was *Phillpotts v. Evans*.⁷ That case involved a contract for the purchase of wheat, which the buyer repudiated prior to the date of delivery. The seller sued for breach and sought damages based on the difference between the contract price and the market price on the date delivery was due. The buyer responded that the seller's damages should be measured by the market price on the date the seller

2. RESTATEMENT (SECOND) OF CONTRACTS § 251 (1979).

3. *Hochster v. De La Tour*, 2 El. & Bl. 678, 118 Eng. Rep. 922 (Q.B. 1853).

4. *Short v. Stone*, 8 Q.B. 358, 115 Eng. Rep. 911 (1846).

5. *Ford v. Tiley*, 6 B. & C. 325, 108 Eng. Rep. 472 (K.B. 1827).

6. *Id.* at 326, 108 Eng. Rep. at 473. A similar result obtained in cases involving a contract to sell specific goods and a sale of those goods to another purchaser prior to the date of the seller's promised performance. *Bowdell v. Parsons*, 10 East. 359, 103 Eng. Rep. 811 (1808).

7. *Phillpotts v. Evans*, 5 M. & W. 475, 151 Eng. Rep. 200 (Ex. 1839).

learned of the buyer's unequivocal refusal to perform. The Court of Exchequer affirmed the lower court's ruling that the market price should be measured as of the date when delivery was due. Rather than focusing narrowly on this remedial question, however, Baron Parke tied the question of the proper date for measuring damages to the question of the date when the seller could have brought suit for the buyer's breach. Baron Parke treated the buyer's unequivocal statement that he would not accept the wheat as "a mere nullity"⁸ which, although it might have given the seller the right to rescind, did not constitute an actionable breach. The essence of Baron Parke's opinion was that when a buyer repudiated, the seller was faced with a real dilemma: either ignore the repudiation and continue to hold himself ready to perform or rescind the contract and forego any right of action for damages for breach.

Some fifteen years after the decision in *Phillpotts v. Evans*, this dilemma was resolved by the now classic decision in *Hochster v. De La Tour*.⁹ There, the plaintiff had agreed to serve as a courier for the defendant on the defendant's three-month tour of Europe which was to commence on June 1, 1852. The defendant wrote to the plaintiff saying that the defendant had changed his mind and refused the plaintiff's services. The plaintiff sued the defendant on May 22, 1852, just a few days prior to the date on which performance was to begin. The defendant appealed from an adverse judgment and argued that the plaintiff had no right to sue for breach of contract prior to the date when the defendant's performance was due.

Lord Campbell rejected the defendant's claim and also rejected Baron Parke's dictum in *Phillpotts v. Evans* that a promisee has no right of action after the promisor's repudiation prior to the time the promisor's performance is due. Lord Campbell justified the decision principally on practical considerations—when a promisor has clearly communicated to the promisee his inability or unwillingness to perform, the promisee should not be required to go to the trouble and expense of holding himself ready to perform his part of the bargain as a predicate to his right to sue for breach of contract. Instead, Lord Campbell said the aggrieved promisee should have the option of seeking substitute arrangements immediately or of awaiting the repudiator's performance and, in both cases, preserving his right to sue for breach of contract.

In addition to this eminently practical justification, Lord Campbell recognized that a contractual relationship creates expectations of due performance which are entitled to protection. In oft-quoted language, he said:

[W]here there is a contract to do an act on a future day, there is a relation constituted between the parties in the meantime by the contract, and that they impliedly promise that in the meantime neither will do

8. *Id.* at 477, 151 Eng. Rep. at 202.

9. *Hochster v. De La Tour*, 2 El. & Bl. 678, 118 Eng. Rep. 922 (Q.B. 1853).

anything to the prejudice of the other inconsistent with that relation.¹⁰

The decision in *Hochster* soon gained widespread acceptance in the United States.¹¹ This doctrine, which came to be known as "breach by anticipatory repudiation," offered some consolation to a promisee faced with a promisor's clear expression of unwillingness or inability to perform. The utility of this doctrine, however, was severely limited in American courts by what could charitably be described as a hypertechnical view of what words or conduct were sufficiently clear and definite to constitute a repudiation.

An extreme example of this attitude is the United States Supreme Court's decision in *Dingley v. Oler*.¹² In that case the plaintiffs had delivered a large quantity of ice to the defendants at a time when the market price of ice was about fifty cents per ton, with the understanding that the defendants would deliver a like quantity of ice to the plaintiffs during the following season. When the following season arrived, the market price of ice had climbed to five dollars per ton and the plaintiffs demanded delivery. The defendants responded: "We must, therefore, decline to ship the ice for you this season, and claim, as our right, to pay you for the ice, in cash, at the price you offered it to other parties here [fifty cents per ton], or give you ice when the market reaches that point."¹³ The plaintiffs subsequently made another demand for immediate delivery and the defendants responded:

Now you ask us at a time when we are pressed by our sales and by short supply threatening us and others, to deliver to you the equivalent in tons of the ice taken from you under the circumstances stated. This does not seem to us to be fair . . . We cannot, therefore, comply with your request to deliver to you the ice claimed, and respectfully submit that you ought not to ask this of us in view of the fact stated herein and in [our earlier letter].¹⁴

The plaintiffs sued for breach of contract prior to the expiration of the season for shipping ice. The plaintiffs prevailed at trial, but the Supreme Court reversed. The Court held that the defendants' first letter was not intended "as a final and absolute declaration that the contract must be regarded as altogether off,"¹⁵ because it left open the possibility of a timely shipment of ice if the market price fell to the level of the previous season. The Court further characterized the defendants' second letter as merely refusing to ship the ice immediately, but not as foreclosing any possibility of a timely shipment. Justice Matthews explained:

10. *Id.* at 689, 118 Eng. Rep. at 926.

11. *E.g.*, *Roehm v. Horst*, 178 U.S. 1 (1900); *Fox v. Kitton*, 19 Ill. 519 (1858); *Crabtree v. Messersmith*, 19 Iowa 179 (1865); *Dugan v. Anderson*, 36 Md. 567 (1872); *Burtis v. Thompson*, 42 N.Y. 246 (1870).

12. *Dingley v. Oler*, 117 U.S. 490 (1886).

13. *Id.* at 501.

14. *Id.* at 502.

15. *Id.* at 501-02.

[Defendants' second letter], we think, is very far from being a positive, unconditional, and unequivocal declaration of fixed purpose not to perform the contract in any event or at any time. In view of the consequences sought to be deduced and claimed as a matter of law to follow, the defendants have a right to claim that their expressions, sought to be converted into a renunciation of the contract, shall not be enlarged by construction beyond their strict meaning.¹⁶

This restrictive approach to what constitutes a repudiation was followed in a number of state court decisions,¹⁷ and substantially limited an insecure promisee's ability to use the doctrine of anticipatory repudiation. Absent a "positive, unconditional, and unequivocal declaration," an insecure promisee was put in a dilemma. If he chose to treat the promisor's equivocal statement as a repudiation and cancel the contract, he ran the risk that a factfinder might later determine that the promisor's statement was not a repudiation and that the insecure promisee's cancellation was the first material breach.¹⁸ On the other hand, if the insecure promisee continued to perform or prepared to perform after learning of the promisor's equivocal statement, he ran the risk that a factfinder might later determine that the promisor's statement was a repudiation and that the insecure promisee's continued performance following the repudiation impermissibly increased his damages.¹⁹ This dilemma was also present where, although a promisor did not communicate to the promisee that he would not perform, the promisee acquired reliable information that the promisor would be unable to perform. For example, the traditional view was that a promisor's insolvency was not a repudiation,²⁰ nor was the appointment of a receiver for the promisor or his property.²¹

B. Private Responses to the Problem of Equivocal Statements

Faced with this dilemma, parties who had sufficient clout often included "insecurity clauses" in their contracts. In *James B. Berry's Sons Co. v. Monark Gasoline & Oil Co.*,²² the seller of gasoline included the following

16. *Id.* at 502.

17. See *Oliver v. Loydon*, 163 Cal. 124, 124 P. 731 (1912); *Wells v. Hartford Manilla Co.*, 76 Conn. 27, 55 A. 599 (1903); *Listman Mill Co. v. Dufresne*, 111 Me. 104, 88 A. 354 (1913); *National Contracting Co. v. Hudson River Water Power Co.*, 110 A.D. 133, 97 N.Y.S. 92 (1905); *Hardeman-King Lumber Co. v. Hampton Bros.*, 104 Tex. 585, 142 S.W. 867 (1912); *Vittum v. Estey*, 67 Vt. 158, 31 A. 144 (1894).

18. See, e.g., *Wonalancet Co. v. Banfield*, 116 Conn. 582, 165 A. 784 (1933).

19. See, e.g., *Rockingham County v. Luten Bridge Co.*, 35 F.2d 301 (4th Cir. 1929) (applying N.C. law); *Clark v. Marsiglia*, 1 Denio 317, 43 Am. Dec. 670 (1845). See generally 2 S. WILLISTON, *SALES* 1458 & n.93 (2d ed. 1924).

20. See, e.g., *Phenix Nat'l Bank v. Waterbury*, 197 N.Y. 161, 90 N.E. 435 (1910).

21. See, e.g., *Minneapolis Iron Store Co. v. E.G. Staude Mfg. Co.*, 153 Minn. 107, 189 N.W. 596 (1922); *Barthen v. Lodi Corps.*, 94 N.J. Eq. 177, 119 A. 189 (1922).

22. *James B. Berry's Sons Co. v. Monark Gasoline & Oil Co.*, 32 F.2d 74 (8th Cir. 1929).

insecurity clause in the contract for sale:

In the event that payment for goods shipped is not promptly made in accordance with the terms of this sale; or in the event that the credit or the financial responsibility of the purchaser becomes impaired or unsatisfactory to the seller, the seller reserves the right to demand cash or satisfactory security before making shipments. Upon the failure of the buyer to provide cash or satisfactory security to fully satisfy the seller's demands, the seller reserves the right to discontinue making shipments and to cancel the sale, or any part of the sale, thereby terminating all obligation on the part of the seller for delivery of the goods sold.²³

In *Berry's Sons* the court upheld the seller's cancellation of the contract when the buyer told the seller it would not be able to pay for further shipments of gasoline, the seller received other information that buyer's financial condition was impaired, and the buyer refused the seller's demand to pay cash. The court rejected the buyer's contention that the insecurity clause rendered the contract invalid due to lack of mutuality of obligation, noting that such clauses are enforceable because the seller's right to cancel was not wholly within the seller's discretion, but was conditioned on the seller's actual and reasonable uncertainty²⁴ and on the buyer's refusal to post satisfactory security or to pay cash.²⁵

The court in *Berry's Sons* went on to say that, even if the contract had not contained the insecurity clause, the seller would still have had the right to demand payment in cash or adequate security.²⁶ However, that statement was supported only by citation to authority which related to a seller's right to insist on payment in cash when he discovers that his buyer is insolvent, which was not, apparently, the case in *Berry's Sons*.²⁷ No other reported case of the pre-UCC era recognized an insecure promisee's right to withhold performance upon the discovery of reasonable grounds for insecurity, absent a contractual provision to that effect.

The use of these insecurity clauses gave some relief to an insecure promisee, but this purely private protective device suffered from some obvious flaws. First, only a party with sufficient bargaining power could succeed in inserting such a clause in a contract. Second, these clauses typically oper-

23. *Id.* at 75.

24. *Id.* at 76.

25. *Id.*

26. *Id.*

27. *Id.* (citing *H. Muehlstein & Co. v. Hickman*, 26 F.2d 40 (8th Cir. 1928)). The buyer's insolvency triggered the seller's right of stoppage *in transitu* and was also one basis of the unpaid seller's lien on goods in his possession. The lien of an unpaid seller was codified in § 54 of the Uniform Sales Act, discussed *infra* at text accompanying notes 28-29. The Uniform Sales Act provision was, in turn, patterned after the ancient common law notion of the unpaid vendor's lien. See, e.g., C. TIEDEMAN, A TREATISE ON THE LAW OF SALES OF PERSONAL PROPERTY, INCLUDING THE LAW OF CHATTEL MORTGAGES, ch. X (1891); W. STORY, A TREATISE ON THE LAW OF SALES OF PERSONAL PROPERTY, ch. IX (2d ed. 1853).

ated in favor of only one of the parties to the contract, usually the seller.

C. *The Uniform Sales Act*

The Uniform Sales Act, approved by the National Conference of Commissioners on Uniform State Laws in 1906, and ultimately enacted in thirty-six states, made no substantial new attempt to protect the insecure promisee. Instead, the Sales Act merely codified certain common law rights of an unpaid seller. Section 54 of the Sales Act recognized the unpaid seller's right to a lien on goods in his possession which allowed the seller to retain possession of them until the buyer tendered the purchase price in cases where: (1) the goods had been sold without any stipulation as to credit; (2) the goods had been sold on credit, but the term of credit had expired; or (3) the buyer became insolvent.²⁸ In addition, the Sales Act recognized the seller's right to stop goods in transit when the buyer became insolvent.²⁹

These codifications of pre-existing common law remedies offered some protection to the seller, but did nothing to alleviate the problems a seller faced when he received information about a detrimental change in the buyer's financial condition or when a non-insolvent buyer had negotiated a credit sale with the seller.

The only provision of the Sales Act which gave any protection to an insecure buyer was section 63(2), which generally gave the seller the right to sue for the contract price, but which also provided: "[It] shall be a defense to such an action that the seller at any time before judgment in such action has manifested an inability to perform the contract or the sale on his part or an intention not to perform it."³⁰ No reported case invoked this provision in favor of an insecure buyer. Furthermore, it was unclear whether this provision went beyond giving the buyer a defense against a claim for nonpayment in cases where the seller had repudiated.

D. *The Restatement of Contracts*

The drafters of the *Restatement of Contracts* attempted to deal with the problem of the insecure promisee in section 280, which was captioned "Manifestation by One Party of Inability to Perform or of Intention Not to Perform." Section 280 provided:

- (1) Where there are promises for an agreed exchange, if one promisor manifests to the other that he cannot or will not substantially perform his promise, or that, though able to do so, he doubts whether he will substantially perform it, and the statement is not conditioned on the existence of facts that would justify a failure to perform, and there are no such facts, the other party is justified in changing his position, and if he

28. UNIFORM SALES ACT § 54(1)(a)-(c) (1906).

29. *Id.* at § 57.

30. *Id.* at § 63(2).

makes a material change of position he is discharged from the duty of performing his promise.

(2) The party making a statement within the rule stated in Subsection (1) has power to nullify the effect of the statement by a retraction, as long as the other party has not materially changed his position.³¹

This section allowed the insecure promisee to protect himself from a claim of breach where his failure to perform was justifiably induced by the promisor's statements. In addition, under section 306 of the *Restatement*, if the promisor ultimately failed to perform, the promisee was excused from tendering his own performance as a condition to bringing suit.³²

These provisions were not sufficient to solve the problem of the insecure promisee. First, the promisee was given this protection only when the promisor made a statement indicating his inability or unwillingness to perform. Thus, the promisee was not protected in a situation where he received reliable information from a third party indicating that the promisor would be unable or unwilling to perform. Second, the promisee was protected only after he had made a "material change of position." It was unclear whether merely suspending performance would constitute such a "material" change of position. Third, many of the courts invoking these provisions did so only in cases where the promisor had actually committed a present material breach or where the promisor had repudiated.³³ Fourth, and perhaps most important, these provisions did not establish a procedure whereby the insecure promisee could suspend performance while communicating with the equivocating promisor in an attempt to establish facts, clarify positions, and explore alternatives to keep the contract alive.

31. RESTATEMENT OF CONTRACTS § 280 (1932).

32. *Id.* at § 306. This section provided:

Where failure of a party to a contract to perform a condition or a promise is induced by a manifestation to him by the other party that he cannot or will not substantially perform his own promise or that he doubts whether though able he will do so, the duty of such other party becomes independent of performance of the condition or promise. He has power to nullify his manifestation of unwillingness or inability by retracting it, so long as the former party, in reliance thereon, has not changed his position.

Id.

33. *Havanich v. Safeco Ins. Co.*, 557 F.2d 948, 951 (2d Cir. 1977); *Southern Materials Co. v. Bryan Rock & Sand Co.*, 308 F.2d 414, 418 (4th Cir. 1962); *Marcinak v. West Indies Inv. Co.*, 299 F.2d 821, 823 (3d Cir. 1962); *Rabouin v. NLRB*, 195 F.2d 906, 913 (2d Cir. 1952) (Hand, J., dissenting); *Freedman v. Rector, Wardens & Vestrymen*, 37 Cal. 2d 16, 19, 230 P.2d 629, 631 (1951); *C.W. Blomquist & Co. v. Capital Area Realty Inv. Corp.*, 270 Md. 486, 495-96, 311 A.2d 787, 792 (1973); *Ross Sys. v. Linden Dari-Delite, Inc.*, 62 N.J. Super. 439, —, 163 A.2d 184, 190 (1960), *aff'd in part and rev'd in part on other grounds*, 35 N.J. 329, 173 A.2d 258 (1961); *Conti v. United States*, 158 F.2d 581, 583 (1st Cir. 1946); . *But see J.K. Welding Co. v. W.J. Halloran Steel Erection Co.*, 178 F. Supp. 584, 590 (D.R.I. 1959); *Nevins v. Ward*, 320 Mass. 70, 73, 67 N.E.2d 673, 675 (1946).

III. DRAFTING HISTORY OF SECTION 2-609

Article 2 of the U.C.C. was the product of a process of legal evolution involving an attempt to revise the Sales Act or substantially to supplant it with a federal sales act. Consequently, it is not surprising that the principles now embodied in section 2-609 were also the product of a process of evolution. That section evolved from a specific solution to a specific problem under the Sales Act into a generally-applicable remedy for insecure promisees.

The problem which first led to the mechanism of a demand for assurance arose in installment sales contracts. Under section 45 of the Sales Act, if the seller made a defective delivery or if the buyer refused to accept or pay for a conforming installment,

it depends in each case on the terms of the contract and the circumstances of the case, whether the breach of contract is so material as to justify the injured party in refusing to proceed further and suing for damages for breach of the entire contract; or whether the breach is severable, giving rise to a claim for compensation but not a right to treat the whole contract as broken.³⁴

Under this section the aggrieved party was faced with a dilemma common to all insecure promisees. The promisee was forced to guess whether a subsequent factfinder would determine that the defaulting promisor's breach was or was not "material." If the promisee's guess was wrong and he chose to terminate the contract, his termination would be wrongful and constitute the first material breach. Recognizing this dilemma, the drafters of the revised Sales Act in 1940 included section 57, which provided:

Section 57. DELIVERY IN INSTALLMENTS—

(1) Unless otherwise agreed, the buyer of goods is not bound to accept delivery thereof by installments.

(2) (a) In a contract to sell made by a merchant, where the goods are to be delivered in separate installments, or payment of part or all of the price falls due before delivery, or before delivery of a later installment, material default in the conditions of either any delivery or any payment justifies the opposing party in refusing to proceed, nor does acceptance of the defective delivery or payment impair such justification.

(b) If the aggrieved party duly dispatches notification of such refusal to proceed, and the defaulting party fails to provide prompt assurance against future material default which is mercantilely adequate to satisfy a reasonable person in the circumstances, the aggrieved party may cancel the contract as to the future and have his remedy for breach of the entire contract.

(c) The burden is on the defaulting party to show that any default is not so material as to impair a reasonable merchant's confidence in later

34. UNIFORM SALES ACT § 45(2) (1906).

adequate performance, and to show the mercantile adequacy of any assurance offered.

(d) Where the default is in a payment or the defect in delivery results in damages capable of immediate liquidation without dispute (as in the case of deficiency in quantity) the aggrieved party may require settlement as part of the assurance to be offered.³⁵

The drafters explained the reasons for including this provision as follows:

COMMENT ON SECTION 57, SALES ACT, SECTION 45 AS MODIFIED.

The redraft of the second subsection might seem in one sense frankly new law. In another sense it is very familiar law. It corresponds to clauses which over the last forty years have become so prevalent and which are felt as so important by the mercantile community that their absence from a contract-form is occasion for surprise.

The policy involved is, however, ancient in Sales law. The seller who has been unpaid for one delivery has for a hundred and fifteen years (since *Bloxam v. Sanders* 4 B. & C. 941—K.B. 1825) had his lien on the undelivered portions to secure any payment of price due on the delivered portions of the goods. The right of withholding delivery was extended by the Sales Act of 1906 expressly to the case of goods as yet unappropriated under a contract (the original Section 53(2), section 88 of this Draft), so that in an installment contract any buyer who defaulted in payment has been flatly subject, even without an express clause, to having further deliveries held up. Indeed under the definition of "insolvent," the buyer need not actually default. The difficulty has been, first, that history has limited this result to default in regard to *payment*, whereas other defaults are left unsettled in result. And second, the difficulty has been that history has operated only in favor of the seller, whereas a buyer who has been disappointed in deliveries on which he must reckon and which he must be prepared to handle is equally interested in security of performance. The last difficulty is that a privilege of holding up a delivery is not a privilege of cancellation and of treating the whole contract as broken. Such privilege the "unpaid seller" in due course acquires under the original Act, by express provisions. Not so, the buyer. The redraft thus first of all provides balance in remedy as between the parties. Secondly, it carries the available remedy to completion. Third, it adopts the base-line of the old Act in regard to seller's protection: to-wit, that *default* calls for *security*, that it is the job of a contract-breaker to satisfy the contract-keeper that it is safe to proceed and rely. Fourth, it suggests a wherewithal to ease the dispute and reestablish the working relation. "Mercantile adequacy of assurance" may seem to a lawyer at first sight a strange and unworkable standard of fact. Against this is to

35. Draft for a "Uniform Sales Act, 1940." Appended to and Part of Report on the Uniform Sales Act to National Conference of Commissioners on Uniform State Laws, Philadelphia, 1940, at 53, reprinted in 1 E. KELLY, *UNIFORM COMMERCIAL CODE DRAFTS* 220 (1984) [hereinafter KELLY].

be set first the fact that such standards in the case of clauses on revocation and reestablishment of credit work in practice moderately well, and have worked in court in litigation on such clauses. Secondly, the old Section provides a standard even more elusive in regard to whether anticipatory breach occurs: "whether the breach is severable." But the old Section calls that standard into play at a point where it *engenders* mercantile dispute, the general rights of the parties remaining unclear, so that there is no solid basis for negotiation. The present Section fixes a solid basis of respective rights, prevents acceptance from prejudicing the acceptor's position, and drives toward a mercantilely feasible solution.³⁶

Many of the themes underlying section 2-609 were present in section 57. First is the desire to provide an equivalent remedy to both buyers and sellers when they are faced with facts making future performance by the other party uncertain. Second is the emphasis on a promisee's need for security when the promisor's future performance is uncertain. Third, and most important, is the desire to establish a mechanism to keep the deal together by encouraging the parties to communicate, discover the true state of affairs and, if necessary, make proposals for alteration or accommodation, and to be able to do this before either party is forced to elect to treat the other's actions as a ground for cancellation. Fourth, section 57 emphasized the need to judge the parties' conduct in light of commercial realities, not according to technical or abstract formulations of contract doctrine.

In 1941 the drafters submitted to the Conference of Commissioners on Uniform State Laws a second draft of the revised Uniform Sales Act. This second draft contained section 45, which provided:

Section 45. *Delivery in Installments.*

(1) Between merchants, if the goods are to be delivered in separate installments, or if payment of part or all of the price falls due before delivery, or before delivery of a later installment, then a material default in regard to either any delivery or any payment justifies the opposing party in refusing to proceed. Acceptance of the defective delivery or payment does not impair such justification.

(2) If the aggrieved party duly dispatches notification of such refusal to proceed, and the defaulting party fails to provide such prompt assurance against future material default as has mercantile adequacy in the circumstances, then the aggrieved party may cancel the contract as to the future and have his remedy for breach of the entire contract.

(3) The burden is on the defaulting party to show that any default is not so material as to impair a reasonable merchant's confidence in later adequate performance, and to show the mercantile adequacy of any assurance offered.

(4) Where the default is in a payment, or the defect in delivery results in damages capable of immediate liquidation without dispute (as in the case of deficiency in quantity), the aggrieved party may require set-

36. *Id.* at 53-54; 1 KELLY, *supra* note 35, at 220-21.

tlement as part of the assurance to be offered.

(5) The policy of this section, as of this Act, is

(a) to recognize that the obligation under a mercantile contract extends not only to performance when due, but also to keeping the obligee's expectation of such performance from being undermined by the obligor, and

(b) to provide informal machinery for adjustment, where the obligee's expectation is so undermined.³⁷

Significantly, the drafters concluded that the protection provided to insecure promisees by section 45 with regard to installment sales contracts should be afforded in other sales situations as well. Thus, a seller on credit was protected by section 16-C, which provided:

Section 16-C. *Implied Warranties by the Buyer.* Between merchants—

(1) A buyer by buying or contracting to buy goods on credit warrants that he is and will remain solvent, and also agrees that if he gives the seller reasonable grounds for insecurity in regard to his continuing ability and willingness to perform, the seller may proceed in like manner as in case of material default in a payment, under section 45.

(2) A buyer by taking delivery of goods on credit represents that at the time of taking delivery he is solvent.

(a) If bankruptcy, receivership, or general assignment occurs within ten days after the taking of delivery, this raises a presumption that the buyer's procurement of delivery was in breach of this representation.

(b) If it does not, the presumption is to the contrary.³⁸

In addition, the drafters afforded the remedy provided by section 45 to sellers extending credit and to prepaying buyers in section 42, which provided:

Section 42. *Delivery and Payment are Concurrent Conditions; Sufficiency.*

(1) Delivery of the goods and payment of the price are the subject-matter of concurrent conditions; that is to say, the seller must be ready and willing to give possession of the goods to the buyer in exchange for the price and the buyer must be ready and willing to pay the price in exchange for possession of the goods.

(2) Neglect or refusal of one party to receive delivery or payment does not impair the sufficiency in law of such readiness and willingness of the other party.

(3) Readiness and willingness are, in the event of breach by the other party, sufficiently evidenced by any means which by mercantile usage are adequate.

(4) Where by the contract delivery is to precede payment or payment is to precede delivery, the performance which first comes due may be withheld, if the other party has manifested a probable inability to perform on

37. Report and Second Draft, The Revised Uniform Sales Act 190-91 (1941), reprinted in 1 KELLY, *supra* note 35, at 470-71.

38. *Id.* at 127-28, 1 KELLY, *supra* note 35, at 407-08.

his part, or an intention not to perform. Further procedure and remedy may be had as in the case of default in an installment contract under Section 45.

(5) The principle which underlies and is to guide the application of the further particular rules on delivery is that where the circumstances of the contract and of its performance permit complete delivery and complete actual receipt to be accomplished as a single and simple transaction, that transaction is crucial for many aspects of the contract; but that insofar as the circumstances of the contract require completion of delivery and receipt to occur in a series of actions at different times or places, the time or place for payment, or for inspection before payment, or for turning over control by transfer of documents, or for completing an adequate opportunity to receive, or the like, is to be adjusted as the circumstances require.³⁹

Although these sections dealt with insecurity in a series of specific problem areas, the comments to these sections clearly indicated that the drafters perceived these sections as examples of broader principles which were significant in developing a uniform statute on sales of goods:

Especially between merchants, safety in negotiation, reduction of the stake in dispute, and adjustment procedures, are provided, together with procedures for clarifying doubtful questions, in time to move without gambling on the uncertain outcome of a future lawsuit.⁴⁰

Integration and simplification of underlying theory has been sought, Contract theory being predominant. The hazard of breach at the last minute has been cut as low as possible. The contract is recognized as involving an obligation not to disrupt expectation of performance.⁴¹

This recognition of a need for a broad principle of insecurity materialized in the 1944 Proposed Final Draft No. 1 of the Uniform Revised Sales Act. Section 99 of that draft provided:

Insecurity, Installments and Repudiation

Section 99. Right to Adequate Assurance of Performance.

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

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

(3) Acceptance of any improper delivery or payment does not

39. *Id.* at 182-83, 1 KELLY, *supra* note 35, at 462-63.

40. *Id.* at 21, 1 KELLY, *supra* note 35, at 301 (citing § 45).

41. *Id.* (citing §§ 45, 42 & 16-C).

prejudice the aggrieved party's right to demand adequate assurance as to the future.

(4) After receipt of a justified demand failure to provide within a reasonable time not exceeding ten days such assurance as is adequate under the circumstances of the particular case is a repudiation of the contract.⁴²

Section 99 is virtually identical to current section 2-609, with only two substantive differences: first, subsection (1) of section 2-609 now requires that the demand for assurance be "in writing"; and second, subsection (4) of section 2-609 now extends the period for furnishing assurances to "a reasonable time not exceeding thirty days." These changes were made in the 1950 Proposed Draft with Comments.⁴³ The text of section 2-609 has not been changed since the 1950 Proposed Draft.

IV. SECTION 2-609 IN THE COURTS

A. *Reasonable Grounds for Insecurity*

The most frequently litigated issue under section 2-609 involves determining when a promisee has reasonable grounds for insecurity about the promisor's performance. This section will examine some general principles relating to the reasonableness of a promisee's insecurity and then review some recurring fact situations where the question has arisen.

Whether a promisee has reasonable grounds for insecurity is a question of fact.⁴⁴ Section 2-609 provides that, between merchants, the reasonableness of a party's insecurity is to be determined by commercial standards.⁴⁵ Although this is seemingly a purely objective standard, it contains a subjective element insofar as the general duty of good faith⁴⁶ is also applicable to a promisee claiming to be insecure.⁴⁷ Thus, if a promisee has special knowledge of the promisor's ability to perform, he should not be entitled to demand assurance even though an average promisee without such special knowledge might have reasonable grounds for insecurity.⁴⁸ For example, a

42. Uniform Revised Sales Act (Sales Chapter of Proposed Commercial Code) Proposed Final Draft No. 1 at 52 (1944), reprinted in 2 KELLY, *supra* note 35, at 64.

43. Uniform Commercial Code Proposed Draft with Comments at 210-11 (1950), reprinted in 10 KELLY, *supra* note 35, at 244-45.

44. AMF, Inc. v. McDonald's Corp., 536 F.2d 1167, 1170 (7th Cir. 1976) (applying Ill. law); Universal Builders Corp. v. United Methodist Convalescent Homes, 7 Conn. App. 318, 323, 508 A.2d 819, 822 (1986); SPS Indus., Inc. v. Atlantic Steel Co., 186 Ga. App. 94, —, 366 S.E.2d 410, 413 (1988).

45. U.C.C. § 2-609(2); Universal Resources Corp. v. Panhandle E. Pipe Line Co., 813 F.2d 77, 79 (5th Cir. 1987) (applying Tex. law); Erwin Weller Co. v. Talon, Inc., 295 N.W.2d 172, 174 (S.D. 1980).

46. U.C.C. § 1-203 provides: "Every contract or duty within this Act imposes an obligation of good faith in its performance or enforcement." See also U.C.C. § 2-106.

47. U.C.C. § 2-609 comment 3.

48. Comment, *The Uniform Commercial Code Section 2-609: A Return to Certainty*, 14

sharp decline in a buyer's financial condition should not give a seller a right to demand assurance if the seller knows from prior dealings or otherwise that such a decline is normal due to the seasonal nature of the buyer's business.

Section 2-609 does not expressly state what standards should be utilized in determining the reasonableness of the insecurity of a promisee who is not a merchant. No reported decision has raised the issue. However, given the limitation of the use of commercial standards to contracts between merchants, it is logical to apply a "reasonable consumer" standard to a situation where a consumer is insecure about the promisor's performance.

The facts which give rise to the claim of insecurity must be facts which came to the attention of the insecure promisee after the contract was concluded.⁴⁹ This requirement is necessary to prevent a promisee from asserting insecurity and a right to assurance under section 2-609 as a disguised way of renegotiating a contract based on facts which he knew at the time of contracting and the risk of which he must be deemed to have accepted by entering into the contract. For example, in *Field v. Golden Triangle Broadcasting, Inc.*,⁵⁰ the contract for sale expressly allowed the buyer to assign his rights to a corporation to be formed by the buyer. After the contract was concluded, the buyer made such an assignment and the seller subsequently demanded assurance from the buyer, including additional security for the purchase price. When the buyer refused to provide this assurance, the seller cancelled the contract and the buyer sued for breach of contract. In affirming a judgment for the buyer, the court said that, because the seller agreed to the assignment at the time the contract was made, there was no event subsequent to the contract which would give the seller a right to demand assurance. The seller's cancellation was, therefore, a repudiation.⁵¹

An issue which has not yet been resolved by the courts is whether a promisee may base his insecurity on information which he should have been aware of at the time the contract was made, but which did not actually come to his attention until later. This issue was suggested, but not decided, in *Universal Resources Corp. v. Panhandle Eastern Pipe Line Co.*⁵² This case involved a fifteen-year "take or pay" gas purchase agreement under which the buyer was obligated to purchase a specific amount of gas (the "Contract Quantity") each year. If the buyer failed to purchase the Contract Quantity

J. MARSHALL L. REV. 113, 124-25 n.77 (1980).

49. *Universal Resources Corp. v. Panhandle E. Pipe Line Co.*, 813 F.2d 77, 79 (5th Cir. 1987) (applying Tex. law); *Pittsburgh-Des Moines Steel Co. v. Brookhaven Manor Water Co.*, 532 F.2d 572, 581 (7th Cir. 1976); *Nasco, Inc. v. Dahltron Corp.*, 74 Ill. App. 3d 302, 309, 392 N.E.2d 1110, 1116 (1979); *Field v. Golden Triangle Broadcasting, Inc.*, 451 Pa. 410, 423, 305 A.2d 689, 696 (1973).

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

51. *Id.* at 423-24, 305 A.2d at 696-97.

52. *Universal Resources Corp. v. Panhandle E. Pipe Line Co.*, 813 F.2d 77 (5th Cir. 1987) (applying Tex. law).

in any year, it was obligated to pay the difference between the purchase price of the Contract Quantity and the purchase price of the quantity actually purchased. The buyer, in the succeeding five years, had the option of taking gas previously paid for but not taken ("makeup gas") if its requirements exceeded the Contract Quantity in those later years.⁵³

After two years of performance under the contract, the buyer conducted a geological study of the reservoirs in the fields from which the gas was to be produced and also did a study of its projected future requirements of gas. The buyer concluded, based on these studies, that the fields contained insufficient gas for its future needs and demanded assurance from the seller that sufficient makeup gas would be provided or that deficiency payments would be refunded. The seller refused to provide this assurance and the buyer then withheld deficiency payments.

The district court rendered judgment for the seller and the United States Court of Appeals for the Fifth Circuit affirmed, holding that the buyer did not have reasonable grounds for insecurity. The court noted that there was "no event occurring *after* the execution of the Agreement which could give rise to a reasonable insecurity."⁵⁴ The court stated that there had been no change in the reservoir's capacity and no change in the seller's ability to perform. The only "event" occurring after the contract was the buyer's geological study and an experienced buyer should be deemed to have known the risk that it would be unable to recoup deficiency payments by taking makeup gas.⁵⁵

The court's conclusion is probably correct, but its reasoning is suspect. The focus on whether an *event* may give rise to reasonable grounds for insecurity should not be limited to events which occur after the contract was concluded; rather, the focus should be on whether the insecure promisee *knew* of the event at the time the contract was concluded.⁵⁶ For example, a buyer who learns after the contract has been concluded that the seller has previously delivered nonconforming goods to other buyers has reasonable grounds for insecurity even though the *event* giving rise to that insecurity—i.e., the delivery of nonconforming goods—occurred before the contract was concluded.⁵⁷

53. *Id.* at 78.

54. *Id.* at 79 (citing *Pittsburgh-Des Moines Steel Co. v. Brookhaven Manor Water Co.*, 532 F.2d 572 (7th Cir. 1976)) (emphasis in original).

55. *Id.* at 79 (citing *Lone Star Gas Co. v. McCarthy*, 605 S.W.2d 653, 656 (Tex. Civ. App. 1980)). Additionally, the court noted that the buyer's alleged insecurity arose from purely subjective evaluations and that the buyer's predictions of its future needs for gas were based on unsupported assumptions which were inconsistent with the buyer's needs during the first two years of the contract term. *Id.* at 79.

56. *Cf. Field v. Golden Triangle Broadcasting, Inc.*, 451 Pa. 410, 424, 305 A.2d 689, 696 (1973).

57. *Creusot-Loire Int'l, Inc. v. Coppus Eng'g Corp.*, 585 F. Supp. 45, 49-50 (S.D.N.Y. 1983) (the seller had delivered nonconforming similar products to other buyers; the buyer

The issue in *Universal Resources*—whether an insecure promisee can assert insecurity based on facts which he should have known at the time the contract was made—can best be resolved by analogy to the law of mistake under the *Restatement (Second) of Contracts*. Section 154(b) of the *Restatement (Second)* provides in relevant part: "A party bears the risk of mistake when . . . he is aware, at the time the contract is made, that he has only limited knowledge with respect to the facts to which the mistake relates but treats his limited knowledge as sufficient . . ."⁵⁸ The buyer in *Universal Resources* knew, at the time it entered into the contract, that it had limited knowledge of the gas reserves in the reservoir, but treated this knowledge as sufficient. Thus, it should be deemed to have assumed the risk that the field would be insufficient to provide its requirements in the future.

If this analogy is carried forward, then the insecure promisee's ignorance of pre-existing facts should preclude finding reasonable grounds for insecurity based on those facts only where the promisee knew its information with respect to those facts was incomplete, yet chose to enter into the contract with conscious uncertainty as to those facts. This resolution of the issue recognizes that promisees must often enter into contracts with limited knowledge of facts, and would penalize only those promisees who have notice of a potential problem but who fail to avail themselves of an opportunity to investigate.

Consistent with the requirement that a party's insecurity be "reasonable," a number of courts have required the insecure promisee to demonstrate an objective factual basis for insecurity, rather than a purely subjective fear that the other party will not perform.⁵⁹ For example, in *Cole v. Melvin*⁶⁰ one farmer had sold cattle to another pursuant to an agreement which allowed the original seller to repurchase those cattle which became pregnant during a specified period of time. The original buyer/reseller claimed that he became uncertain whether the original seller/repurchaser would perform his promise to repurchase. The court rejected this claim, noting that the only objectively determinable fact to which the original buyer could point as a basis for insecurity was the original seller's retention of certain recordation papers on the cattle and that this retention was more consistent with a desire to repurchase the cattle.⁶¹ The court stated: "Clearly, the drafters of the Code did not intend that one party to a con-

learned of nonconformities after the contract was concluded; *held*, the buyer had reasonable grounds for insecurity).

58. RESTATEMENT (SECOND) OF CONTRACTS § 154(b) (1979).

59. *Universal Resources Corp. v. Panhandle E. Pipe Line Co.*, 813 F.2d 77, 79 (5th Cir. 1977) (applying Tex. law); *Pittsburgh-Des Moines Steel Co. v. Brookhaven Manor Water Co.*, 532 F.2d 572, 581 (7th Cir. 1976) (applying Ill. law); *Cole v. Melvin*, 441 F. Supp. 193, 203 (D.S.D. 1977); *SPS Indus., Inc. v. Atlantic Steel Co.*, 186 Ga. App. 94, —, 366 S.E.2d 410, 413 (1988).

60. *Cole v. Melvin*, 441 F. Supp. 193 (D.S.D. 1977).

61. *Id.* at 203.

tract can go about demanding security for performance of the other whenever he gets nervous about a contract. Some reason for the demand for assurance must precede the demand."⁶²

Another factor relevant in determining the reasonableness of a promisee's insecurity is the reliability of the source of the information which gives rise to the insecurity. In *Clem Perrin Marine Towing, Inc. v. Panama Canal Co.*,⁶³ the lessee of a tugboat had an option to purchase the tugboat at the end of the lease term. As the time for the exercise of the purchase option approached, the lessee was informed that the lessor had added a third ship mortgage on the tugboat and was not making payments on the first ship mortgage on the tugboat. This information came from a broker who had played a major role in putting together the original lease arrangement. The court noted that the broker's information seemed reliable and was enough to give the lessee reasonable grounds for insecurity.⁶⁴

The other side of the coin is illustrated by *Cherwell-Ralli, Inc. v. Rytman Grain Co.*⁶⁵ In that case the buyer and seller had entered into an installment contract for the sale of goods. The buyer soon fell into arrears in payment and the seller brought this to the buyer's attention, but continued to make deliveries. The buyer became concerned that the seller would cease deliveries because the market price had risen. The buyer then sent the seller a check for the past-due payments. Before the check cleared, a truck driver (who was not an employee of the seller) told the buyer that this "would be his last load."⁶⁶ The buyer then stopped payment on the check and made a demand for assurance on the seller. The court, in affirming a judgment for the seller, noted that the information from the truck driver was "facially unreliable"⁶⁷ and that the buyer had not shown any other factual basis for its insecurity.

This aspect of the opinion in *Cherwell-Ralli* is somewhat troublesome. The truck driver's statement could be subject to at least three interpretations: (1) another driver would make future deliveries; (2) another trucking company would make future deliveries; or (3) the seller would make no future deliveries. Although the truck driver probably would only have direct knowledge of the first two of these alternatives, both of which are consistent with the seller's continuing to perform his contract obligations, the statement is nevertheless consistent with the third alternative and should be sufficient to cause reasonable alarm on the buyer's part, at least entitling it to inquire about the seller's plans for future deliveries.

So long as the information which forms the basis for the promisee's in-

62. *Id.*

63. *Clem Perrin Marine Towing, Inc. v. Panama Canal Co.*, 730 F.2d 186 (5th Cir. 1984).

64. *Id.* at 191.

65. *Cherwell-Ralli, Inc. v. Rytman Grain Co.*, 180 Conn. 714, 433 A.2d 984 (1980).

66. *Id.* at 716, 433 A.2d at 986.

67. *Id.* at 720, 433 A.2d at 987.

security comes from a reliable source, the information may constitute reasonable grounds for insecurity even if the information is, in fact, false.⁶⁸ This conclusion is necessary because the promisee is frequently in no position to evaluate the truthfulness of information he receives about the promisor. If the information is really false, the promisor may demonstrate that and thereby provide adequate assurance to the promisee.

It has frequently been stated that a ground for insecurity need not arise from, or be directly related to, the contract under which a promisee seeks adequate assurances.⁶⁹ In substance, this statement means that defaults under other contracts of a similar nature may give a promisee reason to believe that a similar default may occur under the contract in issue.⁷⁰ However, this statement does not mean that a promisee can demand assurance before performing under a contract even if his insecurity does not relate to performance by the promisor under the contract in issue. The facts giving rise to insecurity, even though they may arise from failure to perform other contracts, must indicate to the promisee some prospective inability or unwillingness on the part of the promisor to perform under the contract in issue.

As a final general proposition, it must be remembered that a demand for assurance is not a remedy for breach.⁷¹ Instead, it is a mechanism which allows an insecure promisee to put the promisor to a choice—either provide adequate assurance of due performance or be deemed to have repudiated the contract. Thus, if the promisee has already committed a present material breach, the promisee clearly has no right to demand assurance that the promisor will perform.⁷² Similarly, if the promisor has already committed a present material breach, a subsequent demand for assurances by the promisee should have no effect.⁷³

The latter principle, however, should not necessarily apply when the promisor may have repudiated the contract prior to the date his performance was due. To be sure, if the promisor is found to have repudiated a contract, any subsequent demand for assurances by the promisor should be ignored. However, where the insecure promisee makes a demand for assurance after the promisor's repudiation, a court should treat the demand as valid for several reasons. First, the UCC provision and comments on retraction of repudiation make it clear that one proper response to a repudiation

68. U.C.C. § 2-609 comment 3.

69. *Id.*; *Clem Perrin Marine Towing, Inc. v. Panama Canal Co.*, 730 F.2d 186, 189 (5th Cir. 1984); *Toppert v. Bunge Corp.*, 60 Ill. App. 3d 607, 611, 377 N.E.2d 324, 328 (1978).

70. U.C.C. § 2-609 comment 2.

71. *Sumner v. Fel-Air, Inc.*, 680 P.2d 1109, 1116 (Alaska 1984); *Mayflower Farms v. Tech-Mark, Inc.*, 64 Or. App. 121, 127, 666 P.2d 1384, 1388 (1983).

72. *United States v. Great Plains Gasification Assocs.*, 819 F.2d 831, 835 (8th Cir. 1987) (applying Ill. law); *Mayflower Farms v. Tech-Mark, Inc.*, 64 Or. App. 121, 126, 666 P.2d 1384, 1388 (1983).

73. *Sumner v. Fel-Air, Inc.*, 680 P.2d 1109, 1116 (Alaska 1984).

is a demand for assurance under section 2-609.⁷⁴ Second, to refuse to give effect to a demand for assurance made after the promisor's repudiation would resurrect the common law dilemma in which an insecure promisee must guess whether an equivocal expression of inability or unwillingness to perform amounts to a repudiation. Third, such a demand by the promisee is perfectly consistent with one of the options the UCC affords the promisee after learning of the promisor's repudiation—i.e., to await performance by the repudiating party for a commercially reasonable time.⁷⁵

At first glance it might seem that no problems would arise in this situation. If the promisor has repudiated, it should make no difference whether the repudiation was by words or conduct before a demand for assurance is made or by the promisor's failure to provide assurance following the promisee's demand. The time of repudiation could be important, however, in three situations.

First, if the repudiating promisor does provide timely adequate assurance of due performance, the promisee should not be allowed to cancel the contract based on the promisor's earlier repudiation.⁷⁶

Second, where a seller repudiates, the date the buyer learned of the repudiation may be relevant to determining the buyer's damages. Section 2-713(1) provides that a buyer's damages may be calculated based on the difference between "the market price when the buyer learned of the breach" and the contract price.⁷⁷ There is a substantial split of authority as to the proper interpretation of the phrase "when the buyer learned of the breach" in the context of a seller's repudiation. Courts have reached three conclusions about the proper interpretation of this phrase: (1) the date the buyer learned of the seller's repudiation;⁷⁸ (2) a commercially reasonable time after

74. U.C.C. § 2-611(2) provides: "Retraction [of a repudiation] 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)." Furthermore, a comment to § 2-611 provides:

A repudiation is of course sufficient to give reasonable ground for insecurity and to warrant a request for assurance as an essential condition of the retraction. However, after a timely and unambiguous expression of retraction, a reasonable time for this assurance to be worked out should be allowed by the aggrieved party before cancellation.

U.C.C. § 2-611 comment 2. See also *Hudson Feather & Down Prods., Inc. v. Laneer Clothing Corp.*, 128 A.D.2d 874, 875, 513 N.Y.S.2d 173, 174 (1987).

75. U.C.C. § 2-610(a).

76. This result could probably be reached without invoking § 2-609 by treating the promisor's providing assurance as an effective retraction of the repudiation under § 2-611. The demand for assurance would probably mean that the promisee had not manifested his intention to treat the repudiation as final. U.C.C. § 2-611(1).

77. U.C.C. § 2-713(1).

78. See, e.g., *Neal-Cooper Grain Co. v. Texas Gulf Sulphur Co.*, 508 F.2d 283 (7th Cir. 1974) (applying Ill. law); *Fredonia Broadcasting Corp. v. RCA Corp.*, 481 F.2d 781 (5th Cir. 1973) (applying Tex. law); *Bliss Produce Co. v. A.E. Albert & Sons, Inc.*, 35 Agric. Dec. 742 (1976); *Oloffson v. Coomer*, 11 Ill. App. 3d 918, 296 N.E.2d 871 (1973); *Burgess v. Curly Olney's*,

the buyer learned of the repudiation;⁷⁹ and (3) at least where the buyer has shown an inability to cover, the time for the seller's performance.⁸⁰

In jurisdictions which adhere to the first two views, the date of repudiation will be at least the starting point for determining the market price component of the buyer's damages. In these jurisdictions a court should conclude that the date of repudiation was the end of a reasonable time, not exceeding thirty days, after the buyer's demand for assurance, even if the court also concludes that some earlier statement or conduct of the seller was sufficient to constitute a repudiation. Any other conclusion would be inconsistent with the purpose of section 2-609 to make it clear to an insecure promisee (here, the buyer) when the promisor can safely be treated as having repudiated the contract.

Third, the time when a repudiation is deemed to have occurred may be important if an aggrieved buyer seeks to measure his damages by the "cover" method—*i.e.*, by the difference between the contract price and the cost of procuring substitute goods.⁸¹ One of the requirements for a qualifying "cover" purchase is that it be effected "without unreasonable delay."⁸² Although section 2-712 does not expressly say so, the time for determining the delay begins at the date of the breach.⁸³ Thus, if a buyer demands assurance of due performance from the seller after the seller has repudiated, the time for beginning to measure the buyer's delay in covering should be the end of a reasonable time, not exceeding thirty days, after the buyer's demand for assurance, rather than the earlier date when the seller may otherwise be deemed to have repudiated. Again, this conclusion is compelled by the purpose of section 2-609 to give the aggrieved promisee a clear indication of when he may safely treat the promisor as having repudiated.

These general principles are somewhat helpful in determining when a promisee has reasonable grounds for insecurity, but more specific guidance may be discovered by examining the reported decisions involving section 2-609 for recurring factual patterns where courts have found the presence or absence of reasonable grounds for insecurity. The discussion will begin with cases involving an insecure seller and conclude with cases involving an insecure buyer.

1. *Insecure Seller*

Because a buyer's general obligation under the Code is to accept and

Inc., 198 Neb. 153, 251 N.W.2d 888 (1977).

79. See, *e.g.*, *First Nat'l Bank v. Jefferson Mortgage Co.*, 576 F.2d 479 (3d Cir. 1978) (applying N.J. law).

80. See *Cargill, Inc. v. Stafford*, 553 F.2d 1222 (10th Cir. 1977) (applying Colo. law).

81. U.C.C. § 2-712.

82. U.C.C. § 2-712(1).

83. *Transammonia Export Co. v. Conserv, Inc.*, 554 F.2d 719, 724 (5th Cir. 1977) (applying Fla. law).

pay for the goods according to the contract,⁸⁴ it should not be surprising that a seller is most often insecure when he has reason to believe that the buyer may be unable or unwilling to pay for the goods. Similarly, because delivery and payment are, unless otherwise agreed, constructive conditions,⁸⁵ sellers may normally protect themselves from the prospect of non-payment by withholding delivery pending tender of the purchase price. Therefore, most situations where sellers will invoke section 2-609 involve credit sales, installment contracts, or a series of contracts between the buyer and the seller.⁸⁶

The clearest situation in which a seller has reasonable grounds for insecurity occurs when the buyer has fallen behind in payments for goods already delivered by the seller under the contract at issue. In this situation courts have unanimously held that the seller has reasonable grounds for insecurity and is entitled to suspend further deliveries until adequate assurance is provided.⁸⁷

Similarly, where the buyer refuses to pay for conforming goods delivered and accepted, the seller has reasonable grounds for insecurity and is justified in suspending deliveries under separate contracts with the buyer.⁸⁸ However, if a buyer has justifiably withheld payments under separate contracts due to the seller's breach of those contracts, the seller does not have reasonable grounds for insecurity, at least so long as the buyer has manifested unquestioned willingness and ability to pay for future conforming deliveries.⁸⁹

Although actual non-payment gives a seller reasonable grounds for insecurity, a seller's fear that a buyer may not pay for goods to be delivered in the future raises a much closer question. In *Pittsburgh-Des Moines Steel Co. v. Brookhaven Manor Water Co.*,⁹⁰ the seller agreed to construct a large water tank for the buyer with the payment of the entire contract price due within thirty days after the tank was tested and accepted. The seller was mistakenly informed that the buyer had obtained a loan to finance the

84. U.C.C. § 2-301.

85. U.C.C. § 2-307.

86. Even if a contract for sale requires payment at the time of delivery, a seller who is also to manufacture the goods may want assurance of due performance prior to incurring the costs of manufacture. Cf. *Smith-Scharff Paper Co. v. P.N. Hirsch & Co. Stores, Inc.*, 754 S.W.2d 928 (Mo. App. 1988) (seller who stock piled inventory of items specially manufactured for buyer entitled to demand assurance upon learning buyer planned to go out of business).

87. See, e.g., *Turntables, Inc. v. Gestetner*, 52 A.D.2d 776, 382 N.Y.S.2d 798 (1976); *Kunian v. Development Corp. of Am.*, 165 Conn. 300, 334 A.2d 427 (1973); *International Therapeutics, Inc. v. McGraw-Edison Co.*, 721 F.2d 488 (5th Cir. 1983) (applying Tex. law).

88. *National Farmers Org. v. Bartlett & Co., Grain*, 560 F.2d 1350, 1355 (8th Cir. 1977) (applying Mo. law).

89. *National Farmers Org. v. Coast Trading Co.*, 488 F. Supp. 944, 951 (D. Or. 1977), aff'd by order, 639 F.2d 789 (9th Cir. 1981).

90. *Pittsburgh-Des Moines Steel Co. v. Brookhaven Manor Water Co.*, 532 F.2d 572 (7th Cir. 1976).

purchase price and the seller then requested evidence that the entire purchase price was being held in escrow and was committed to the purchase of the tank. The seller subsequently learned that the buyer had not obtained the loan. The seller then asked for a personal guarantee by the buyer's president and reiterated its demand that an escrow arrangement be made by any potential lender to the buyer. The buyer refused to comply and neither party performed further. The seller sued the buyer for damages and the lower court gave judgment for the buyer. The seller appealed and contended that it had reasonable grounds for insecurity based on the buyer's failure to obtain the loan and that the buyer's failure to provide the escrow arrangement and guarantee amounted to a repudiation.

The appellate court affirmed the judgment for the buyer. The majority opinion concluded that the seller did not have reasonable grounds for insecurity merely because the buyer had not obtained the loan. The majority noted that the purchase price was not due for several months and said: "[r]easonable businessmen prefer in the absence of some compulsive reason not to commence paying interest on borrowed money until the time for the use of that money is at hand."⁹¹ In a concurring opinion Judge Cummings noted that at the time the contract was signed the parties believed that the buyer would obtain a loan to finance the purchase price and when the loan failed to materialize, a prudent businessman in the seller's position would have reasonable grounds for insecurity;⁹² however, Judge Cummings found that the assurances demanded by the seller were unreasonable.⁹³

On the whole, Judge Cummings had the better of this argument. Where the parties contemplate a particular lender as the source of financing the purchase price and that lender fails to make the loan, the seller might rightfully demand assurance that another comparable lender be found before proceeding. However, even though a seller in such a situation would have reasonable grounds for insecurity, it should be entitled to no more than a commitment to lend from a reputable lender, not an immediate loan with the proceeds held in escrow for months pending delivery and acceptance of the goods.⁹⁴

There is some question whether a buyer's sudden use of credit available under the contract for sale gives the seller reasonable grounds for insecurity. Comment 5 to section 2-609 indicates that, if a buyer who has routinely taken advantage of a cash discount suddenly ceases this practice and utilizes a credit facility extended by the seller, this is enough to give the seller reasonable grounds for insecurity.⁹⁵ It would be a mistake to read too much

91. *Id.* at 581.

92. *Id.* at 583 (Cummings, J., concurring).

93. *Id.* at 583-84 (Cummings, J., concurring).

94. The effect of a demand for excessive assurance is discussed in section IV E, *infra*.

95. U.C.C. § 2-609 comment 5 (citing *Corn Prods. Ref. Co. v. Fasola*, 74 N.J.L. 181, 109 A. 505 (1920)).

into this comment. A close reading of comment 5 discloses that the statement about sudden utilization of a credit facility was made in the context of a seller who had also heard reliable rumors about the buyer's financial difficulties.

Similarly, in *Erwin Weller Co. v. Talon, Inc.*,⁹⁶ the buyer's sudden expansion of credit purchases was held to give the seller reasonable grounds for insecurity, but only in the context of an adverse credit report on the buyer and repeated failures by the buyer to respond to seller's telephone calls inquiring about the large number of credit purchases.⁹⁷ In those circumstances the buyer's utilization of the credit arrangement may have ominous overtones justifying a demand for assurance. However, absent such adverse information, a buyer who has successfully bargained for an extension of credit from the seller should be free to utilize that credit without fear that the seller may subsequently make a demand for assurance to insist on cash payments. As one commentator has succinctly stated: "A party is not reasonably threatened by the occurrence of the very risks that he has assumed under the contract."⁹⁸

2. Insecure Buyer

Although a seller's insecurity almost always stems from evidence that a buyer will be unable or unwilling to pay for the goods, a buyer's insecurity may arise from more varied events: (1) the seller may not deliver the goods at all; (2) the seller may not deliver the goods on time; or (3) the seller may not deliver conforming goods. The reported cases have dealt only with the first and third of these problems.

A recurring situation arises where the buyer learns that the seller's source of supply may not produce the required goods. In *In re Coast Trading Co.*,⁹⁹ the buyer of grain had reason to believe that the seller's principal supplier might not provide the grain needed and demanded assurance from the seller that the supplier would ship the grain. The court held that the buyer did not have reasonable grounds for insecurity because the contract did not specify that the grain was to be provided by any particular supplier and because the seller did business with several other suppliers.¹⁰⁰

Likewise, in *Universal Resources Corp. v. Panhandle Eastern Pipe Line Co.*,¹⁰¹ a buyer of natural gas tested the field from which the gas was to

96. *Erwin Weller Co. v. Talon, Inc.*, 295 N.W.2d 172 (S.D. 1980).

97. *Id.* at 174. The opinion does not specifically say that the seller received adverse information in the credit report. However, because the seller made further inquiries of the buyer after receipt of the credit report, that would be the most reasonable inference.

98. 1 R. ALDERMAN, A TRANSACTIONAL GUIDE TO THE UNIFORM COMMERCIAL CODE 299 (2d ed. 1983).

99. *In re Coast Trading Co.*, 26 B.R. 737 (Bankr. D. Or. 1982).

100. *Id.* at 740.

101. *Universal Resources Corp. v. Panhandle E. Pipe Line Co.*, 813 F.2d 77 (5th Cir.

be supplied and concluded that it was inadequate to meet the buyer's projected demand over the term of the contract. The buyer made a demand for assurance which the seller refused. Judgment in favor of the seller was affirmed and the court held that the buyer did not have reasonable grounds for insecurity. The court noted that there had been no change in the seller's condition after the contract was concluded,¹⁰² that the seller had always tendered the gas required by the contract,¹⁰³ and that the buyer's insecurity was based on unsupported assumptions about the future market for natural gas, including a substantial increase in demand, while in fact the buyer had failed to take the required quantity of gas in the first two years of the contract term.¹⁰⁴

A different conclusion was reached in *Consolidated Edison Co. v. Charles F. Guyon, Inc.*,¹⁰⁵ where the seller informed the buyer that the seller was closing its plant due to a labor dispute. The buyer's demand for assurance was met with the seller's suggestion that the buyer could obtain the goods from another supplier at the same price and that the buyer should look solely to such other supplier for any defects in the goods. The court held these "assurances" inadequate.¹⁰⁶

From these cases one could conclude that where no particular source of goods is contemplated, information suggesting that one source may be unavailable is not sufficient to constitute reasonable grounds for insecurity. However, where both the buyer and the seller contemplate that the goods are to come from a specific source, if the buyer has reliable information that the source will be unavailable or inadequate, the buyer has reasonable grounds for insecurity unless the buyer somehow assumed the risk of this unavailability or inadequacy at the time the contract was formed.

A similar situation arises in cases involving the sale of goods which are subject to a security interest held by a third party. In that situation one court has held that where identified goods are subject to a contract for sale, the seller's failure to pay a debt to a third party which is secured by those goods gives the buyer reasonable grounds for insecurity.¹⁰⁷

The other situation involving a buyer's insecurity arising in the reported cases—the seller's delivery of nonconforming goods—has routinely led to a finding that the buyer has reasonable grounds for insecurity. These

1987) (applying Tex. law).

102. *Id.* at 79.

103. *Id.*

104. *Id.* at 79.

105. *Consolidated Edison Co. v. Charles F. Guyon, Inc.*, 98 A.D.2d 483, 471 N.Y.S.2d 269 (1984).

106. *Id.* at 485, 471 N.Y.S.2d at 270. The court did not expressly hold that the buyer had reasonable grounds for insecurity, but that conclusion must be assumed in light of the court's inquiry into the adequacy of the seller's assurance.

107. *See Clem Perrin Marine Towing, Inc. v. Panama Canal Co.*, 730 F.2d 186 (5th Cir. 1984).

situations have arisen where the seller has delivered nonconforming goods in prior installments,¹⁰⁸ where the seller has delivered nonconforming similar goods under prior contracts with the buyer,¹⁰⁹ and where the seller has delivered nonconforming similar goods to other buyers.¹¹⁰

Finally, where a seller expresses doubt about the legal validity of a contract for sale, the buyer has reasonable grounds for insecurity.¹¹¹

B. The Meaning of "Due Performance"

There has been some debate in academic circles over the appropriate meaning of the term adequate "assurance of due performance" in section 2-609. One commentator suggests that the term "due performance" means one-hundred-percent performance,¹¹² while another says it means performance (even if defective in some respect) which would not substantially impair the value of the contract to the party making the demand.¹¹³

Those who believe that the term "due performance" means "total performance" or "one-hundred-percent performance" emphasize the obvious idea that the term refers expressly to that performance which is "due" under the contract—i.e., the promised performance. The promised performance is, of course, full performance.¹¹⁴ Furthermore, comment 1 to section 2-609 speaks of the *promised* performance as the most important element of the bargain struck between the parties.¹¹⁵ Finally, the language "substantially impairing the value of the contract," which is present in several other Code sections,¹¹⁶ is conspicuously absent from section 2-609.

Those who assert that "due performance" should be equated with the "substantial impairment" standard argue that this standard strikes an appropriate balance between the danger the promisee faces when it appears that the promisor will breach and the danger that an unscrupulous promisee

108. See *T & S Brass & Bronze Works, Inc. v. Pic-Air, Inc.*, 790 F.2d 1098 (4th Cir.1986) (applying S.C. law).

109. See *AMF, Inc. v. McDonald's Corp.*, 536 F.2d 1167 (7th Cir. 1976) (applying Ill. law).

110. See *Creusot-Loire Int'l, Inc. v. Coppus Eng'g Corp.*, 585 F. Supp. 45 (S.D.N.Y. 1983).

111. See, e.g., *Copylease Corp. v. Memorex Corp.*, 403 F. Supp. 625 (S.D.N.Y. 1975) (applying Cal. law); *Sumner v. Fel-Air, Inc.*, 680 P.2d 1109 (Alaska 1984). Of course, if the buyer expresses doubt about the legal validity of the contract for sale, the seller also has reasonable grounds for insecurity.

112. *Anderson, Repudiation of a Contract Under the Uniform Commercial Code*, 14 *De Paul L. Rev.* 1, 7-8 (1964).

113. Comment, *The Uniform Commercial Code Section 2-609: A Return to Certainty*, 14 *J. MARSHALL L. REV.* 113, 122-23 (1980) [HEREINAFTER COMMENT, A RETURN TO CERTAINTY]; COMMENT, SECTION 2-609: RIGHT TO ADEQUATE ASSURANCE OF PERFORMANCE, 7 *NAT. RESOURCES J.* 397, 400-02 (1967).

114. Comment, *A Return to Certainty*, *supra* note 113, at 123 n.67.

115. U.C.C. § 2-609 comment 1.

116. U.C.C. § 2-608 (revocation of acceptance); U.C.C. § 2-610 (anticipatory repudiation); U.C.C. § 2-612 (installment contracts); U.C.C. § 2-616 (right to cancel or modify after performance is rendered impracticable).

will seize on a trivial defect in the promisor's performance and make an unfounded demand for assurance of total performance.¹¹⁷ Further, it is argued that the "total performance" view would allow a promisee to escape the "substantial impairment" standard governing repudiations in section 2-610 by making a demand for assurance of complete performance and treating a failure to provide such assurance as a repudiation.¹¹⁸

The "total performance" view has the better of this argument for several reasons. First, it more closely corresponds to the language of section 2-609. Second, a person utilizing a demand for assurance as a subterfuge will probably not be acting honestly and in accordance with reasonable standards of fair dealing in the trade, thus making the demand illegitimate due to a lack of good faith.¹¹⁹ Third, the argument that the "total performance" view would allow a promisee to evade the "substantial impairment" standard of section 2-610 ignores the fact that the remedy under section 2-609 is merely suspending performance pending receipt of adequate assurance, whereas section 2-610 gives the aggrieved party the right immediately to resort to any remedy for breach, including cancellation.¹²⁰ Hence, because the promisor has a commercially reasonable time not exceeding thirty days to provide assurance and thus keep the contract alive, there is little danger that the insecure promisee will be able to utilize a demand for assurance as a basis for cancelling a contract due to a picayune prospective failure to perform. Finally, placing on the insecure promisee the burden of proving that the prospective non-performance would substantially impair the value of the contract would add another item of proof to the insecure promisee's case, similar to the common law requirement that the promisor's statement be sufficiently definite, certain, and unequivocal as to constitute a repudiation.¹²¹ This is contrary to section 2-609's purpose of affording a speedy and sure method of determining whether the promisor can safely be treated as having repudiated the contract.

C. *Procedural Requirements of the Demand for Assurance*

Assuming that a promisee has reasonable grounds for insecurity, he must demand assurance of due performance from the promisor. The following subsection discusses the form and content of the demand.

1. *The Requirement of a Written Demand*

On its face, section 2-609(1) seems to require that the insecure promisee make a demand for assurance in writing. Indeed, a number of courts have

117. Comment, *A Return to Certainty*, *supra* note 113, at 123.

118. *Id.* at 123 & n.68.

119. See *supra*, text accompanying notes 46-47.

120. U.C.C. § 2-610(b). Cf. U.C.C. §§ 2-703(f), 2-711(1).

121. See *supra*, text accompanying notes 11-21.

found a failure to put the demand in writing fatal to a promisee seeking to invoke section 2-609.¹²² Three courts, however, have not required a written demand for assurance.¹²³ The leading case taking this position is *AMF, Inc. v. McDonald's Corp.*¹²⁴ In that case the seller had agreed to sell to the buyer a number of computerized cash registers. When a prototype performed unsatisfactorily and the buyer obtained information that the seller would be unable to meet the scheduled delivery dates for the remaining machines, the buyer and seller held a meeting at which it was agreed that further production would be held up pending agreement on a set of performance and reliability standards. No such agreement was ever reached and the seller ultimately sued the buyer for breach of contract. The buyer defended by alleging that it properly cancelled the contract after the seller failed to provide adequate assurance. The seller responded that the buyer's demand for assurance was inadequate because the buyer had not made a written demand.

The court upheld the buyer's exercise of its section 2-609 remedy even though it had made no written demand for assurance. The court, relying on its prior rejection of "a formalistic approach" to section 2-609¹²⁵ and the mandate that the Code be "liberally construed,"¹²⁶ held no written demand was required because the seller's own testimony and memoranda showed its clear understanding that the buyer had suspended performance pending receipt of adequate assurance.¹²⁷

It has been suggested that *AMF* and the other cases recognizing the validity of an oral demand for assurance stand for the proposition that the writing requirement in section 2-609 may be disregarded.¹²⁸ A close reading of these cases, however, suggests that such a conclusion is too broad. These cases indicate that the parties challenging the adequacy of the demand did not allege that no demand had been made; instead, they merely alleged the

122. *National Farmers Org. v. Bartlett & Co. Grain*, 560 F.2d 1350, 1355 n.9 (8th Cir. 1977) (applying Mo. law); *National Ropes, Inc. v. National Diving Serv., Inc.*, 513 F.2d 53, 61 (5th Cir. 1975) (applying Fla. law); *Quaker Alloy Casting Co. v. Gulfco Indus., Inc.*, 686 F. Supp. 1319, 1350 (N.D. Ill. 1988); *Automated Energy Sys. Inc. v. Fibers & Fabrics, Inc.*, 164 Ga. App. 772, 774, 298 S.E.2d 328, 330 (1982); *Bodine Sewer, Inc. v. Eastern Ill. Precast, Inc.*, 143 Ill. App. 3d 920, 930, 493 N.E.2d 705, 712 (1986).

123. *ARB (American Research Bureau), Inc. v. E-Systems, Inc.*, 663 F.2d 189, 196 (D.C. Cir. 1980) (applying Md. law); *AMF, Inc. v. McDonald's Corp.*, 536 F.2d 1167, 1170-71 & n.9 (7th Cir. 1976) (applying Ill. law); *Kunian v. Development Corp. of Am.*, 165 Conn. 300, 312, 334 A.2d 427, 433 (1973).

124. *AMF, Inc. v. McDonald's Corp.*, 536 F.2d 1167 (7th Cir. 1976).

125. *Pittsburgh-Des Moines Steel Co. v. Brookhaven Manor Water Co.*, 532 F.2d 572, 581 (7th Cir. 1976).

126. U.C.C. § 1-102(1).

127. *AMF, Inc. v. McDonald's Corp.*, 536 F.2d at 1171.

128. See, e.g., Comment, *The Right to Assurance of Performance Under UCC § 2-609 and Restatement (Second) of Contracts § 251: Toward a Uniform Rule of Contract Law*, 50 *FORDHAM L. REV.* 1292, 1307 (1982).

absence of a written demand.¹²⁹ In cases where the party on whom the demand is made admits the existence of the demand, it makes little sense to hold the demand defective because it was not made in writing.

Although the drafting history of section 2-609 does not indicate why the writing requirement was added,¹³⁰ one could reasonably assume that it was inserted as an evidentiary safeguard against false allegations of oral demands for assurance. If that assumption is correct, then it would make section 2-609's writing requirement somewhat analogous to the writing requirement in Article 2's statute of frauds provision, section 2-201. Section 2-201 normally requires a writing indicating that a contract for sale has been made between the parties, which must be signed by the party against whom enforcement is sought and which must specify quantity.¹³¹ However, section 2-201 provides four statutory exceptions to the writing requirement: (1) a written confirmation between merchants;¹³² (2) specially-manufactured goods;¹³³ (3) admission in court by the party against whom enforcement is sought;¹³⁴ and (4) a contract where payment has been made and accepted or where goods have been delivered and accepted.¹³⁵ Each of these exceptions to the writing requirement of section 2-201 is premised on facts which provide reliable evidence (other than a writing) that a contract for sale has been made.¹³⁶

Similar results should obtain under section 2-609 if other reliable evidence exists that the insecure promisee made a demand for assurance. Thus, if the promisor admits the demand in court,¹³⁷ if the promisor's writings indicate its understanding that a demand was made,¹³⁸ or if the promisor

129. *ARB (American Research Bureau), Inc. v. E-Systems, Inc.*, 663 F.2d 189, 196 n.10 (D.C. Cir. 1980) (applying Md. law) (facts demonstrated "both parties' clear understanding that suspension of buyer's performance was the alternative to satisfactory performance by seller"); *AMF, Inc. v. McDonald's Corp.*, 536 F.2d 1167, 1171 (7th Cir. 1976) (applying Ill. law) (evidence of seller's "clear understanding that [buyer] had suspended performance until it should receive adequate assurance of due performance from [seller]"); *Kunian v. Development Corp. of Am.*, 165 Conn. 300, 312, 334 A.2d 427, 433 (1973) ("It is undisputed [that] the plaintiff demanded adequate assurance that the defendant would pay its outstanding indebtedness before the plaintiff would continue making deliveries.").

130. The 1950 Proposed Final Draft (Text Edition) was the first draft of § 2-609 to include the term "in writing." Neither that draft nor the 1950 Proposed Final Draft (Text and Comments Edition) explained the reasoning behind adding the requirement that the demand for assurance be in writing.

131. U.C.C. § 2-201(1) and comment 1.

132. U.C.C. § 2-201(2).

133. U.C.C. § 2-201(3)(a).

134. U.C.C. § 2-201(3)(b).

135. U.C.C. § 2-201(3)(c).

136. J. WHITE & R. SUMMERS, *HANDBOOK OF THE LAW UNDER THE UNIFORM COMMERCIAL CODE* 65 (2d ed. 1980).

137. *Cf.* U.C.C. § 2-201(3)(b).

138. *Cf.* U.C.C. § 2-201(2).

actually provides assurance of due performance,¹³⁹ then the insecure promisee's demand should be treated as effective even though it was not made in writing.

Although treating the writing requirement under section 2-609 the same as the writing requirement under section 2-201 may make sense as a policy matter, it must nevertheless be recognized that section 2-609 does not expressly authorize any exceptions to its writing requirement. Accordingly, courts might justifiably be reluctant to extend section 2-201's exceptions to a demand for assurance under section 2-609.

Similar results could be achieved by utilizing the doctrines of waiver or estoppel under section 1-103.¹⁴⁰ For example, once an insecure promisee makes an oral demand for assurance and the promisor fails timely to object to the oral nature of the demand, the promisor should be deemed to have waived the requirement that the demand be in writing. If the insecure promisee either cancels the contract after the promisor's failure to provide assurance or continues his performance after receipt of assurance, the promisee should be deemed to have materially changed his position in reliance on the procedural validity of the demand and the promisor should not thereafter be entitled to retract the waiver by asserting that the oral demand is invalid. Alternatively, the promisor's failure timely to object to the oral demand should be deemed a representation that the promisor considers the demand to be procedurally proper and if the promisee relies on that implicit representation by either cancelling the contract if no assurance is provided or continuing his performance after receipt of assurance, the promisor should be estopped from later challenging the demand due to the lack of a writing.

It could be argued that recognizing the validity of oral demands for assurance will open up the possibility that a promisee may fraudulently assert the existence of an oral demand. Of course, if a promisee truly has a fraudulent intent, he may forge a written demand for assurance and swear on a stack of Bibles that the demand was sent to the promisor. A problem which is more likely to arise is that an equivocal oral statement actually made in negotiations will, with the passage of time and the benefit of attorney-aided hindsight, be transformed into a demand for assurance. That problem is

139. Cf. U.C.C. § 2-201(3)(c). Of course, the issue would only arise in this situation if the insecure promisee claims the assurance provided is not "adequate." This issue is addressed in section IV E, *infra*.

140. U.C.C. § 1-103 provides in relevant part: "Unless displaced by the particular provisions of this Act, the principles of law and equity, including . . . estoppel . . . or other validating or invalidating cause shall supplement its provisions." Although waiver is not listed among the principles of law and equity under § 1-103, courts universally assume that waiver is included in these supplementary principles. See, e.g., *United States v. Greenwich Mill & Elev. Co.*, 291 F. Supp. 609 (N.D. Ohio 1968); *Clovis Nat'l Bank v. Thomas*, 77 N.M. 554, 425 P.2d 726 (1967); *Christensen v. Equity Coop. Livestock Sales Ass'n*, 134 Wis. 2d 300, 396 N.W.2d 762 (Wis. Ct. App. 1986).

better addressed by focusing less on the requirement of a writing and more on the fact that any statement made by the promisee to the promisor must actually convey to the promisor a demand for assurance, which is the next topic to be addressed.

2. *Necessity of a Demand for Assurance*

In order to invoke the protection of section 2-609, the insecure promisee must "demand adequate assurance of due performance." Not every statement made to the promisor by an insecure promisee relating to the contract in question, even if made in writing, constitutes a demand for assurance. It is clear, for example, that merely requesting a meeting with the promisor is not a demand for assurance.¹⁴¹ Likewise, a mere request for information about the performance of a contract is not a demand for assurance.¹⁴²

Four decisions have attempted to determine what sorts of statements constitute demands for assurance, and the results in all four cases are highly questionable. Two cases have strongly implied that a credit seller's request for prepayment of part of the purchase price is not a sufficient demand for assurance.¹⁴³ In both those cases, however, the courts had held that the allegedly insecure promisee did not have reasonable grounds for insecurity.¹⁴⁴ Had there been reasonable grounds for insecurity, it seems clear that a demand for progress payments by an insecure seller should be construed as a demand for assurance, like a request for the posting of a bond or a guarantee.¹⁴⁵

Two other cases have dealt with the question of what sorts of communications may constitute demands for assurance. In *National Farmers Organization v. Bartlett & Co., Grain*,¹⁴⁶ the buyer and seller had entered into several separate contracts for the sale of grain. When the seller was late in delivering grain under some of the contracts, the buyer withheld part of the payments due under contracts where the seller had timely delivered, which it was not entitled to do under section 2-717.¹⁴⁷ The seller then notified the

141. *Penberthy Electromelt Int'l, Inc. v. United States Gypsum Co.*, 38 Wash. App. 514, 518, 686 P.2d 1138, 1141 (1984). See also *Scott v. Crown*, 765 P.2d 1043, 1046-1047 (Colo. App. 1988) (statement that seller wanted to "settle" some questions with buyer not a sufficient demand for assurance).

142. *SPS Indus., Inc. v. Atlantic Steel Co.*, 186 Ga. App. 94, —, 366 S.E.2d 410, 414 (1988).

143. *National Ropes, Inc. v. National Diving Serv., Inc.*, 513 F.2d 53, 61 (5th Cir. 1975) (applying Fla. law); *Nasco, Inc. v. Dahltron Corp.*, 74 Ill. App. 3d 302, 309, 392 N.E.2d 1110, 1116 (1979).

144. *National Ropes, Inc. v. National Diving Serv., Inc.*, 513 F.2d at 61; *Nasco, Inc. v. Dahltron Corp.*, 74 Ill. App. 3d at 309, 392 N.E.2d at 1116.

145. U.C.C. § 2-609 comment 4.

146. *National Farmers Org. v. Bartlett & Co., Grain*, 560 F.2d 1350 (8th Cir. 1977).

147. *Id.*; § 2-717 allows a buyer to set off its damages by withholding payment only where the withholding is under the same contract which has been breached by the seller.

buyer that no further shipments would be made until the buyer paid the amounts it had withheld under the earlier contracts. When the buyer failed to make these payments, the seller cancelled. The court held the seller's demand improper (and its cancellation a repudiation) because the demand was not in writing and because the demand did not seek assurance of performance of the executory contracts but instead sought actual part performance on the contracts where payment was past due.¹⁴⁸

The court's conclusion that the seller's demand for payment was not a demand for assurance is incorrect. When a buyer falls behind in paying its debts to the seller, the seller has reasonable grounds for insecurity as to whether the buyer will make future payments when due.¹⁴⁹ Because that failure to pay is the source of the seller's insecurity, the seller should be entitled to demand, at a minimum, that the buyer rectify the problem which gave rise to the insecurity by making the past due payments.

Another aspect of the problem is illustrated by *Scullin Steel Co. v. Paccar, Inc.*¹⁵⁰ In that case the buyer agreed to buy a fixed number of railroad "car sets" over a period of five years. Approximately two years into the agreement, the railroad car industry collapsed and the buyer notified the seller that it would not purchase any more goods under the contract. The seller then notified the buyer that it considered the buyer to be in breach and offered to settle the dispute for a cash payment, but the buyer refused. The court held that the seller's offer to settle was a demand for assurance and the buyer's failure to agree constituted a repudiation.¹⁵¹

This result is clearly incorrect. The requirement of assurance of "due performance" must be read as referring to assurance that the contractually-required performance will be forthcoming. The seller's notice to the buyer in *Scullin* was not a demand for assurance that the buyer would duly perform its remaining contractual obligations; it was an offer to settle the dispute by allowing the buyer to make a cash payment *in lieu of* future performance under the contract. Section 2-609 was designed to create a method by which a contract can continue in force if the promisor supplies adequate assurance of due performance or, alternatively, to give the insecure promisee a clear indication that he can safely treat the promisor as having repudiated. It was not designed to allow the promisee to force a compromise of an existing dispute on the breaching promisor.

Although these cases do not create any generally-applicable standard by which a demand for assurance may be identified, such a standard is not difficult to formulate. At a minimum, an effective demand for assurance must indicate that the promisee is insecure about the promisor's future performance and that the promisee requires some showing that the promisor

148. *National Farmers Org. v. Bartlett & Co., Grain*, 560 F.2d at 1355 & n.9.

149. U.C.C. § 2-609 comment 3; see *supra*, text accompanying notes 87-89.

150. *Scullin Steel Co. v. Paccar, Inc.*, 708 S.W.2d 756 (Mo. Ct. App. 1986).

151. *Id.* at 761.

will perform.¹⁵²

3. *Effect of Failure to Demand Assurance*

Although there have been suggestions to the contrary,¹⁵³ resorting to section 2-609 is optional¹⁵⁴ and a failure to demand assurance does not prohibit an insecure promisee from exercising his full array of remedies for breach.¹⁵⁵ The only "sanction" for failing to demand assurance is that the insecure promisee is put back in the pre-UCC dilemma which requires him to guess whether the promisor's equivocal words or actions constitute a repudiation¹⁵⁶ and whether the promisor's present breach is substantial enough to justify treating it as a total breach and cancelling the contract.¹⁵⁷

4. *Need to Notify Promisor of Election to Treat Failure to Provide Assurance as a Repudiation*

If an insecure promisee makes a demand for assurance and if the promisor fails to provide such adequate assurance within a reasonable time not exceeding thirty days after receipt of the demand, such failure is a repudiation. Section 2-609 does not expressly require that the insecure promisee notify the promisor of his election to treat the failure to provide assurance as a repudiation and cancel the contract. Indeed, one court has held that an insecure promisee has no obligation to give the promisor notice of cancellation.¹⁵⁸

As a practical matter, however, the insecure promisee would be foolish

152. A form of a demand for assurance appears in Comment, *A Return to Certainty*, *supra* note 113, at 132 n.115 (1980). As one noted authority has pointed out, however, in practice the demand is frequently very informal. White, *Eight Cases and Section 251*, 67 CORNELL L. REV. 841, 843-44, 859-60 (1982) [hereinafter White].

153. Hillman, *Keeping the Deal Together After Material Breach—Common Law Mitigation Rules, the U.C.C., and the Restatement (Second) of Contracts*, 47 U. COLO. L. REV. 553, 589-93 (1976).

154. The insecure party "may in writing demand adequate assurance of due performance" U.C.C. § 2-609(1) (emphasis added).

155. *Indussa Corp. v. Reliable Stainless Steel Supply Co.*, 369 F. Supp. 976, 978-79 n.6 (E.D. Pa. 1974) (applying N.Y. law) (the seller was not required to demand assurance prior to exercising its right to stop delivery upon discovery of the buyer's insolvency under U.C.C. § 2-702).

156. See, e.g., *Ross Cattle Co. v. Lewis*, 415 So. 2d 1029 (Miss. 1982).

157. See, e.g., *Harlow & Jones, Inc. v. Advance Steel Co.*, 424 F. Supp. 770 (E.D. Mich. 1976) (under a C.I.F. contract, the seller's failure to make a reasonable contract for shipment did not result in "material delay or loss" under § 2-504 and thus the buyer wrongfully rejected shipment).

158. *International Therapeutics, Inc. v. McGraw-Edison Co.*, 721 F.2d 488, 492 (5th Cir. 1983). Accord, *Farmers Union Grain Terminal Ass'n v. Hermanson*, 549 F.2d 1177, 1183 & n.4 (8th Cir. 1977) (applying N.D. law); *Louis Sherry Ice Cream Co. v. Harlem River Consumers' Coop., Inc.*, 18 U.C.C. 97, 102 (N.Y. Civ. Ct. 1975); *Mott Equity Elev. v. Svihovec*, 236 N.W.2d 900, 909 (N.D. 1975).

not to give the promisor notice that the promisee is treating the failure to provide assurance as a repudiation and cancelling the contract. This is because the promisor, like any repudiating party, has the power to retract his repudiation "unless the aggrieved party has since the repudiation cancelled or materially changed his position or otherwise indicated that he considers the repudiation final."¹⁵⁹ Because of the evidentiary difficulty of establishing a cancellation without some outward manifestation of an intent to cancel (such as giving notice)¹⁶⁰ and because of the difficulty of proving a material change in position, the insecure promisee should always notify the promisor of his election to treat the repudiation as final and cancel the contract.

D. *Right to Suspend Performance Pending Receipt of Assurance*

A right to demand assurance would be of little value unless the insecure promisee could protect himself by suspending his own performance pending receipt of adequate assurance. Section 2-609(1) allows the insecure promisee to suspend his performance pending receipt of assurance, but only if such suspension is "commercially reasonable."¹⁶¹ This limitation on the ability to suspend performance has not been raised in any reported decision and courts have simply assumed that suspending performance is commercially reasonable so long as the insecure promisee has reasonable grounds for insecurity.

The only reported decision dealing with the ability to suspend performance involved the limitation that an insecure promisee is only allowed to suspend "any performance for which he has not already received the agreed return."¹⁶² In *Gutor International AG v. Raymond Packer Co.*,¹⁶³ the buyer had received five hundred conforming machines pursuant to a contract with the seller. The buyer alleged that it had reasonable grounds to believe that the seller would breach a distributorship agreement favorable to the buyer and refused to pay for the machines. The court rejected the buyer's claim, noting that the buyer could not withhold payment for conforming goods already delivered because it had received the agreed return for its

159. U.C.C. § 2-611(1).

160. *SPS Indus., Inc. v. Atlantic Steel Co.*, 186 Ga. App. 94, 366 S.E.2d 410 (1988). In addition, if the promisee is the buyer and his cancellation is treated as a rejection of the goods, he must give timely notice in order for the rejection to be effective. U.C.C. § 2-602(1). Finally, if the insecure promisee exercises a remedy in addition to cancellation, notice of the decision to elect such remedy may be required. *See, Indussa Corp. v. Reliable Stainless Steel Supply Co.*, 369 F. Supp. 976 (E.D. Pa. 1974) (notice required of seller exercising right of stoppage in transit; applying N.Y. law); *Anheuser v. Oswald Refractories Co.*, 541 S.W.2d 706 (Mo. Ct. App. 1976) (seller's resale under U.C.C. § 2-706 requires notice to buyer).

161. U.C.C. § 2-609(1).

162. *Id.*

163. *Gutor Int'l AG v. Raymond Packer Co.*, 493 F.2d 938 (1st Cir. 1974) (applying Mass. law).

performance.¹⁶⁴

E. "Adequacy" of Assurance

An insecure promisee may only demand "adequate" assurance of due performance and the promisor can avoid repudiation only by providing "adequate" assurance. The question of what assurance is adequate, like the question whether the insecure promisee has reasonable grounds for insecurity, is to be judged by commercial standards if both parties to the contract are merchants.¹⁶⁵ The comments to section 2-609 make it clear that the adequacy of assurance is not to be judged by the sort of "satisfaction" clauses prevalent in personal services contracts.¹⁶⁶ Consistent with the UCC's rejection of a purely subjective approach, the only case on point held that a promisor may furnish "adequate" assurance, and thus avoid being deemed to have repudiated the contract, even if the assurance furnished is different from the assurance demanded.¹⁶⁷

There has been some debate about whether an insecure promisee can demand assurance in the nature of promises of additional performances not required by the terms of the underlying contract. Much of this debate stems from misconstruction of some unfortunately broad language of the United States Court of Appeals for the Seventh Circuit in *Pittsburgh-Des Moines Steel Co. v. Brookhaven Manor Water Co.*¹⁶⁸ In that case the buyer and the seller had agreed to a contract for the construction and sale of a large water tank. Originally, the seller had proposed a series of progress payments as construction proceeded, but the buyer objected and the contract provided for full payment within thirty days after the tank was accepted. When the seller thereafter learned that the buyer had not secured a loan which may have been contemplated as the source of the purchase price, the seller demanded evidence that the entire purchase price would be held in escrow and a personal guarantee of payment of the price by the buyer's president. When the buyer refused, the seller sued for breach of contract. The majority opinion held that the seller had no reasonable grounds for insecurity and that, in any event, the assurances demanded by the seller were excessive. In discussing the latter holding, the majority said:

Section 2-609 is a protective device when reasonable grounds for insecurity arise; it is not a pen for rewriting a contract in the absence of those reasonable grounds having arisen, particularly when the proposed

164. *Id.* at 943.

165. U.C.C. § 2-609(2); *American Bronze Corp. v. Streamway Prods.*, 8 Ohio App. 3d at 231, 456 N.E.2d at 1303.

166. U.C.C. § 2-609 comment 4.

167. *American Bronze Corp. v. Streamway Prods.*, 8 Ohio App. 3d 223, 231, 456 N.E.2d 1295, 1303 (1982).

168. *Pittsburgh-Des Moines Steel Co. v. Brookhaven Manor Water Co.*, 532 F.2d 572 (7th Cir. 1976).

rewriting involves the very factors which had been waived by the one now attempting to wield the pen.¹⁶⁹

This language could be viewed as indicating that an insecure promisee cannot demand assurance in the nature of additional performances not required by the underlying contract. That interpretation is inconsistent with comment 4 to section 2-609 which clearly contemplates a guarantee of performance by a third party as one form of assurance which may properly be demanded. Furthermore, the above-quoted italicized language clearly limits the scope of the court's comment to a situation where there are no reasonable grounds for insecurity and the allegedly insecure promisee attempts to use section 2-609 as a tool to extort a favorable contract modification. Thus, courts should not foreclose an insecure promisee from demanding assurance of due performance in the nature of a performance not required by the terms of the underlying contract—i.e., a contract modification—in cases where the promisee is actually insecure.

As the comments to section 2-609 make clear, whether additional performance may properly be demanded as an assurance may well depend on whether the other party has a good or poor reputation in the industry.¹⁷⁰

Like the question whether a party has reasonable grounds for insecurity, the question of what assurance is adequate is closely geared to the facts of the particular dispute. Unlike the question whether a party has reasonable grounds for insecurity, however, very few reported cases have dealt with the question of what assurance is "adequate." Those few cases will be analyzed in two groups: (1) the insecure buyer demands assurance; and (2) the insecure seller demands assurance.

1. *Insecure Buyer*

A buyer may be insecure about a seller's prospective non-performance for any number of reasons.¹⁷¹ Accordingly, the types of assurance which may be deemed adequate will vary with the basis for the buyer's insecurity.

In *Copylease Corp. v. Memorex Corp.*,¹⁷² the buyer had entered into an agreement to buy copying products from the seller. Subsequently, the seller's representatives strongly indicated that they believed the contract to be unenforceable due to vagueness and possible antitrust problems. After several unsuccessful efforts to compromise the disputes and amend the agreement, the seller wrote to the buyer enclosing a revised version of the agreement and stating that if the revised version was not assented to by the buyer, the seller would terminate the prior agreement. The buyer responded

169. *Id.* at 582 (emphasis added).

170. U.C.C. § 2-609 comment 4.

171. *See supra*, text accompanying notes 98-99.

172. *Copylease Corp. v. Memorex Corp.*, 403 F. Supp. 625 (S.D.N.Y. 1975) (applying Cal. law).

by saying it would continue to purchase goods from the seller only if the seller agreed in writing to honor the terms of the prior agreement. The seller refused to do so.

The court held that the buyer's demand for assurance was proper and that the seller repudiated when it failed to provide such assurance.¹⁷³ Implicit in the court's holding is the assumption that the assurance demanded—written acknowledgment of the validity of the contract—would have been adequate if provided. Thus, where the basis for the promisee's insecurity is the promisor's unwillingness to perform based on doubts as to the validity of the agreement, the promisor's acknowledgment of the agreement's validity would be adequate assurance.

In *Universal Builders Corp. v. United Methodist Convalescent Homes*,¹⁷⁴ the seller agreed to supply roof trusses to the buyer for use in the construction of several buildings. The seller's second shipment was only one-half of the trusses the buyer had ordered and the buyer made several unsuccessful telephone calls seeking delivery of additional trusses. The buyer then wrote to the seller and demanded delivery of two hundred trusses within a week and threatened to cancel if the trusses did not arrive. The seller failed to deliver and the buyer purchased trusses elsewhere and sued to recover the excess cost of these substitute trusses. The court concluded that the buyer's letter was a demand for assurance and the seller's failure to furnish the trusses was a repudiation.¹⁷⁵ The court emphasized that the seller was an expert in the construction industry and should have known that its failure to deliver trusses ordered by the buyer would substantially delay the buyer's construction.¹⁷⁶ Thus, when an installment seller fails to deliver an adequate quantity of goods in one installment, a demand for an additional quantity of goods in a subsequent installment is a demand for adequate assurance.

*Creusot-Loire International, Inc. v. Coppus Engineering Corp.*¹⁷⁷ suggests the sort of assurance which will be deemed adequate when a seller delivers nonconforming goods to other buyers. In that case the buyer agreed to buy five "fan mix burners" for installation in its Yugoslavian ammonia plant. Subsequently, the buyer learned that the seller had delivered defective burners to similar ammonia plants in Syria and Sri Lanka. The buyer then demanded proof that the five burners would satisfy the contract specifications. The seller responded by suggesting modification of the contract specifications, but failed to disclose that similar modifications had failed to cure similar problems at the Sri Lanka plant. When no agreement about

173. *Id.* at 631.

174. *Universal Builders Corp. v. United Methodist Convalescent Homes*, 7 Conn. App. 318, 508 A.2d 819 (1986).

175. *Id.* at 323, 508 A.2d at 822.

176. *Id.*

177. *Creusot-Loire Int'l, Inc. v. Coppus Eng'g Corp.*, 585 F. Supp. 45 (S.D.N.Y. 1983).

amending the specifications was forthcoming, the buyer demanded cancellation and a refund, but the seller refused. When the buyer learned of the additional troubles at the Sri Lanka plant, the buyer demanded that the seller extend the contractual warranty period and furnish a letter of credit in the amount of the purchase price. The seller refused both of these demands.

In an action for breach of contract brought by the buyer, the court held the buyer's demand for the warranty extension and letter of credit to be justifiable and the seller's failure to furnish these assurances to be a repudiation.¹⁷⁸ The court said these assurances were reasonable because issuing a letter of credit is a common business practice in international transactions and because the seller had stalled for several months in responding to the buyer's demand for technical assurances and had displayed a lack of candor in failing to reveal the problems at the Sri Lanka plant.¹⁷⁹

This opinion is instructive on at least three issues involving what assurance may be deemed adequate. First, it shows that the promisor's lack of candor and "stalling" may be relevant to determining the adequacy of assurances. Second, it shows that demands for assurance which prove unsuccessful may justify an insecure promisee in subsequently demanding more substantial assurances. Third, it clearly indicates that an insecure promisee may demand assurance in the nature of contract modifications—the letter of credit and extended warranty—in some circumstances.

Finally, in *Consolidated Edison Co. v. Charles F. Guyon, Inc.*,¹⁸⁰ the seller told the buyer that it was being forced to close its plant due to a labor dispute and offered to terminate the contract without liability. The buyer then demanded that the seller confirm that the order would be filled. The seller responded that the buyer could get the same goods from another source at the same price and that the seller would place the order with that other source, but only if the buyer agreed to look solely to the other source with respect to any liability resulting from defects in the products. The buyer refused and sued for breach. In upholding a summary judgment for the buyer on the issue of the seller's liability, the court said that the seller's attempt to disclaim any liability kept its response from being adequate assurance.¹⁸¹ Thus, any attempt to provide assurance in the nature of an alternative source of goods cannot be adequate if coupled with an attempt to relieve the seller of liability for non-performance.

178. *Id.* at 50.

179. *Id.*

180. *Consolidated Edison Co. v. Charles F. Guyon, Inc.*, 98 A.D. 2d 483, 471 N.Y.S.2d 269 (1984).

181. *Id.* at 485, 471 N.Y.S.2d at 270.

2. *Insecure Seller*

Because a buyer's principal obligation is to pay the purchase price as required by the contract, most insecure sellers will demand evidence that the buyer will be able and willing to pay. However, the form of assurance demanded by the insecure seller or tendered by the buyer may take many forms. Surprisingly, however, the only form of assurance of payment which has been the subject of litigation is payment of the purchase price into escrow.

A demand for an escrowed payment of the purchase price was held improper in *Pittsburgh-Des Moines Steel Co. v. Brookhaven Manor Water Co.*,¹⁸² but this holding was in the context of a negotiated credit sale and in a case where the seller failed to establish reasonable grounds for insecurity in the first place. A similar demand was held proper in *Kunian v. Development Corp.*,¹⁸³ where a buyer fell behind in making installment payments. The seller initially demanded payment of the arrearage and the buyer promised, but failed, to pay. The seller then demanded that the buyer make payments¹⁸⁴ into an escrow account, a demand which the buyer refused. The seller then cancelled and sued for breach. The court held that the seller's demand was proper and the buyer's failure to provide such assurance a repudiation. Finally, in *Fast v. Southern Offshore Yachts*,¹⁸⁵ a buyer responded to the seller's demand for assurance by offering to tender the remaining installment of the purchase price into an escrow account and the court held this to be an adequate assurance of the buyer's performance.

There is a common thread running through these cases. If a credit sale has been negotiated and the buyer has not fallen behind in any payments, a demand for escrowed future payments is probably excessive. If, however, the buyer has fallen behind in installment payments, a seller may properly demand payment into escrow as a condition to future deliveries. Finally, a buyer who tenders payment into an escrow account will certainly be deemed to have provided adequate assurance to the seller.

3. *Standards for Evaluating What Assurance Is Adequate*

Because the determination of the adequacy of assurance is so closely tied to the facts of a specific case, courts have found it unnecessary to establish general rules defining what categories of assurances may be deemed adequate. It is clear, however, that the determination whether assurance is adequate must begin by identifying the basis of the promisee's insecurity.

182. *Pittsburgh-Des Moines Steel Co. v. Brookhaven Manor Water Co.*, 532 F.2d 572 (7th Cir. 1976).

183. *Kunian v. Development Corp. of Am.*, 165 Conn. 300, 334 A.2d 427 (1973).

184. Although the opinion is not entirely clear, it appears that the proposed escrow arrangement included payments for future deliveries.

185. *Fast v. Southern Offshore Yachts*, 587 F. Supp. 1354 (D. Conn. 1984).

Hence, one can identify two distinct bases for insecurity and the types of assurances which should be adequate for each basis for insecurity.

First, if a promisee's insecurity is based on apparently reliable information from a third party, the promisor could furnish adequate assurance of due performance merely by proving that information to be false. If, however, the promisor is unable to prove the information to be false, then the insecure promisee should be entitled to demand assurance in the nature of promises of additional performance not called for in the underlying contract. Second, if a promisee's insecurity is based on the promisor's failure to render a prior performance (either to the promisee or to some similarly-situated third party), only a prompt promise to cure or actual cure should be deemed adequate assurance. If the underlying contract calls for performance in installments, the insecure promisee should also be entitled to demand assurance in the nature of promises of additional performance not called for in the underlying contract.

4. *The Effect of Demanding Unreasonable Assurance*

An issue which has not received the attention it deserves is the effect of a truly insecure promisee's demand for assurance of due performance where the assurance demanded is deemed excessive or unreasonable. The question in such cases is whether a demand for such assurance should be treated as invalidating the demand or should be treated as a valid demand but requiring the promisor only to provide assurance which is not excessive or unreasonable.

Although no court has explicitly explored this question, at least one opinion has suggested that a demand for excessive assurance is an invalid demand for all purposes. In *Pittsburgh-Des Moines Steel Co. v. Brookhaven Manor Water Co.*,¹⁸⁶ the seller agreed to construct a large water tank for the buyer, with the buyer to pay the entire contract price within thirty days after the acceptance. The seller then learned that the buyer had failed to get a loan which both parties may have contemplated as the source of the purchase price. The seller demanded evidence that the purchase price was being held in escrow and a personal guarantee of payment by the buyer's president. The buyer refused and the seller terminated its performance and sued for breach.

The appellate court affirmed a judgment for the buyer. The majority opinion concluded that the seller did not have reasonable grounds for insecurity.¹⁸⁷ In a concurring opinion Judge Cummings concluded that the seller did have reasonable grounds for insecurity, but that the demand for the escrow and personal guarantee was excessive and thus the buyer did not have

186. *Pittsburgh-Des Moines Steel Co. v. Brookhaven Manor Water Co.*, 532 F.2d 572 (7th Cir. 1976).

187. *Id.* at 581.

to provide any assurance.¹⁸⁸ Judge Cummings' opinion clearly suggests that an insecure promisee who demands assurance which is excessive or unreasonable forfeits the right to receive any assurance at all. Comments in at least one other opinion support this view.¹⁸⁹

Assuming that the promisee is truly insecure, courts should not treat a demand for excessive assurances as a nullity. To do so would discourage promisees from demanding specific types of assurance and encourage promisees to make vague demands for "adequate" assurance. This is less likely to lead to meaningful negotiations concerning assurance and is thus inconsistent with section 2-609's purpose to encourage parties to communicate about possibilities to keep the contract in force.

In addition, the promisor is sufficiently protected against sanctions for failing to provide excessive assurance by the other limitations on the promisee's ability to demand assurance. Where excessive assurance is demanded as a subterfuge to allow the promisee to escape an unfavorable contract, a court is likely to conclude that the demand is in bad faith¹⁹⁰ or that the promisee had no reasonable grounds for insecurity in the first place.¹⁹¹

A sensible solution to the problem would be to require the promisor to object to the assurance demanded within the commercially reasonable time he has to respond under section 2-609 or be deemed to have waived any claim based on the alleged excessive nature of the assurance. This would encourage the parties to discuss alternative forms of assurance, protect the insecure promisee by allowing him to suspend performance pending the promisor's response, discourage the promisor from "sandbagging" by refusing to respond to a good faith demand, and also discourage post-cancellation nitpicking about other forms of assurance which might have been deemed adequate. Finally, because the promisee's insecurity will often be caused by information about the promisor's future intentions, the promisor is often in the best position to suggest alternative forms of assurance. Courts should require the promisor to do so in a timely fashion or be precluded from later asserting that the assurances demanded were excessive.

F. *Modification of Section 2-609 Rights by Agreement*

Like most other provisions of the UCC, the parties' rights and obligations under section 2-609 may be varied by agreement, within certain limitations.¹⁹² Comment 6 to section 2-609 notes that any clause purporting to

188. *Id.* at 583-84 (Cummings, J., concurring).

189. *United States v. Great Plains Gasification Assocs.*, 819 F.2d 831, 834 (8th Cir. 1987) (applying Mo. law).

190. *Id.* at 834 n.5.

191. *Pittsburgh-Des Moines Steel Co. v. Brookhaven Manor Water Co.*, 532 F.2d at 581.

192. U.C.C. § 1-102(3) provides:

The effect of provisions of this Act may be varied by agreement, except as otherwise provided in this Act and except that the obligations of good faith, diligence,

give one party wide powers to cancel or readjust a contract must be read in light of the non-disclaimable obligation of good faith which, in the case of a merchant, includes the observance of reasonable standards of fair dealing in the trade.¹⁹³ Hence, absent an attempt to use a demand for assurance as a disguised right to terminate, the parties have very wide latitude to modify section 2-609 rights by agreement.

Given this latitude, it is somewhat strange that very few cases have dealt with the right to modify section 2-609 rights by agreement. The principal issue which has arisen in these cases is whether a promisee may cancel the contract based on its insecurity without giving notice of insecurity to the promisor. The two courts which have considered this issue have held that notice is required.

In *Wrightstone, Inc. v. Motter*¹⁹⁴ the seller sold goods to the buyer with the understanding that the purchase price was to be paid within twenty-four months. The contract allowed the seller to accelerate the debt and repossess the goods without notice if the buyer defaulted in payment or if the seller deemed itself insecure. At a time when the buyer was not in default, the seller repossessed and sold the goods and obtained a confessed judgment for the deficiency. The buyer successfully moved to reopen the judgment. The court found that the seller should have demanded assurance of performance from the buyer and its failure to do so could provide a defense to the buyer.¹⁹⁵ Although the court did not discuss the point, its opinion clearly intimated that section 2-609 rights cannot be modified to allow an insecure promisee to cancel the contract without giving the promisor notice and a reasonable opportunity to provide adequate assurance.

Similarly, in *Northwest Lumber Sales, Inc. v. Continental Forest Products, Inc.*,¹⁹⁶ the seller refused to deliver a quantity of studs after the buyer had refused to pay for a previous delivery of pine. The contracts had incorporated by reference a trade association's standard terms and conditions of sale, one of which gave the seller the right to cancel if the buyer failed to meet financial obligations to the seller unless the buyer furnished a satisfactory guarantee of payment. The court found this provision to be an attempt to modify section 2-609 by agreement,¹⁹⁷ and construed the provision to require the seller to notify the buyer prior to the seller's exercise of its right to

reasonableness and care prescribed by this Act may not be disclaimed by agreement but the parties may by agreement determine the standards by which the performance of such obligations is to be measured if such standards are not manifestly unreasonable.

193. U.C.C. § 2-609 comment 6; see U.C.C. §§ 1-203, 2-103(1)(b).

194. *Wrightstone, Inc. v. Motter*, 1 U.C.C. Rep. Serv. (Callaghan) 171 (Pa. C.P. 1961).

195. *Id.* at 172.

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

197. *Id.* at 492, 495 P.2d at 749.

cancel.¹⁹⁸

Both of these decisions are clearly correct, insofar as they treat the clauses in question as contractual attempts to modify section 2-609 rights. A principal purpose of section 2-609 is to encourage communication between the parties and facilitate the completion of the bargain if at all possible. It would frustrate this purpose to allow the insecure promisee to cancel without offering the promisor a reasonable opportunity to provide assurance of performance and thus keep the contract alive. Furthermore, because the insecure promisee has the power to suspend his own performance pending receipt of adequate assurances, the insecure promisee can hardly claim any prejudice from a requirement that he give the promisor notice and a reasonable time to provide assurance before treating the promisor's failure as a repudiation and cancelling the contract.

G. *Section 2-609 Beyond Sales of Goods: Application by Analogy*

Despite persuasive arguments urging that section 2-609 be applied by analogy,¹⁹⁹ courts have generally refused to apply section 2-609 principles to contracts not involving sales of goods. One field which ought to lend itself nicely to the ameliorative effect of section 2-609 is construction contracts. The performance of a construction contract is fraught with potential repudiatory situations due to uncertain and changing delivery schedules, unanticipated difficulties, changing plans and specifications, weather, labor problems, and potential supply shortages. Nonetheless, all three courts which have considered the question have held, with no meaningful discussion, that a construction contract is not a contract for the sale of goods under Article 2 of the UCC²⁰⁰ and accordingly, section 2-609 is inapplicable.

Only two reported cases have applied section 2-609 by analogy to non-goods transactions. One is *UMIC Government Securities, Inc. v. Pioneer Mortgage Co.*,²⁰¹ a case involving the sale of some mortgage-backed government securities governed by article 8. The fact that this court was willing to apply section 2-609 by analogy to investment securities is likely the result of comment 1 to section 2-105, which expressly invites courts to apply article 2 rules by analogy to cases involving investment securities under article 8.²⁰²

198. *Id.* at 493, 495 P.2d at 749.

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

200. *Althoff Indus., Inc. v. Elgin Medical Center, Inc.*, 95 Ill. App. 3d 517, 522-23, 420 N.E.2d 800, 804-05 (1981); *Cork Plumbing Co. v. Martin Bloom Assocs., Inc.*, 573 S.W.2d 947, 958 (Mo. Ct. App. 1978); *Schenectady Steel Co. v. Bruno Trimpoli Gen. Const. Co.*, 43 A.D. 234, 236-37, 350 N.Y.S.2d 920, 922, *aff'd*, 34 N.Y.2d 939, 359 N.Y.S.2d 560, 316 N.E.2d 875 (1974).

201. *UMIC Gov't Sec., Inc. v. Pioneer Mortgage Co.*, 707 F.2d 251 (6th Cir. 1983).

202. U.C.C. § 2-105 comment 1 provides in relevant part:

"Investment securities" are expressly excluded from the coverage of this Article.

It is not intended by this exclusion, however, to prevent the application of a particu-

The second case which applies section 2-609 by analogy is *Conference Center Limited v. TRC—The Research Corp.*,²⁰³ which involved a dispute under a commercial real estate lease. In that case the lessee had abandoned the leased premises after receiving notice that the lessor's mortgagee was instituting foreclosure proceedings. The lessor sued the lessee for damages and the lessee asserted that the mortgagee's initiation of foreclosure proceedings constituted a constructive eviction justifying its abandonment of the premises. The lessor responded that the mortgagee had assured the lessee that its occupancy could continue. The trial court granted the lessee's motion for summary judgment. The Supreme Court of Connecticut reversed, holding that there were genuine issues of material fact relating, *inter alia*, to whether the lessee had made any demands for assurance of due performance of the lease and whether the lessee had received any commercially adequate assurance.²⁰⁴ Justifying application of section 2-609's principles to construction contracts, the court said: "Recourse to the commercial doctrine of insecurity is equally appropriate for the resolution of disputes concerning constructive eviction, for such disputes frequently require inferences to be drawn about future conduct and future expectations for beneficial enjoyment of the leasehold premises."²⁰⁵ This case presents a thoughtful approach to the question of applying section 2-609 by analogy and stands in sharp contrast to other cases which simply conclude that if article 2 is not applicable to a transaction, an insecure promisee has no right to demand adequate assurance from the promisor.

V. DRAFTING HISTORY OF THE RESTATEMENT (SECOND) OF CONTRACTS SECTION 251

The precursor of the present section 251 of the *Restatement (Second) of Contracts* first appeared in Tentative Draft No. 8, numbered as section 275, and provided:

When reasonable grounds for insecurity arise with respect to an obligor's future performance as a result of

(a) his manifestation by words or other conduct that he doubts that he will be willing to perform, or

(b) his apparent inability to perform without a breach by non-performance that would of itself give the obligee a claim for damages for total breach under § 268, his failure upon a reasonable demand by the obligee to give within a reasonable time such assurances of due perform-

lar section of this Article by analogy to securities . . . when the reason of that section makes such application sensible and the situation involved is not covered by the Article of this Act dealing specifically with such securities (Article 8).

203. *Conference Center Ltd. v. TRC—The Research Corp.*, 189 Conn. 212, 455 A.2d 857 (1983).

204. *Id.* at 226-27, 455 A.2d at 864.

205. *Id.*

ance as it is reasonable to require is a repudiation.²⁰⁶

This section was clearly patterned after section 2-609 of the Code.²⁰⁷ It was designed to replace prior sections 280, 283, and 323,²⁰⁸ but it rejected the notion embodied in those prior sections that if an obligor manifests doubt of his performance or inability to perform, then the obligee can "by mere change of position, deprive the obligor of his rights under the contract and subject him to a claim for its breach even if that obligor is prepared, in fact, to perform."²⁰⁹ In the next Tentative Draft, section 275 was rewritten as follows:

(1) Where reasonable grounds arise to believe that the obligor will commit a breach by non-performance that would of itself give the obligee a claim for damages for total breach under § 268, the obligee may demand adequate assurance of due performance and may, if reasonable, suspend any performance for which he has not already received the agreed exchange until he receives such assurance.

(2) The obligee may treat the obligor's failure to provide within a reasonable time such assurance of due performance as is adequate in the circumstances of the particular case as a repudiation.²¹⁰

With two minor changes,²¹¹ this draft is identical with the final version of this section, now numbered as section 251.

VI. A COMPARISON OF SECTION 2-609 AND SECTION 251

Although the final version of section 251 is closely patterned after subsections (1) and (4) of section 2-609, there are some differences which could lead to different outcomes depending on which section applies. As Professor White has pointed out in an excellent article, there are three differences between the two sections.²¹²

First, section 251 does not require that a demand for assurance be made in writing, whereas section 2-609 requires a written demand.²¹³ The issue whether a written demand should always be required under section 2-609 has been discussed earlier.²¹⁴

Second, although both sections allow a promisor receiving a demand for

206. RESTATEMENT (SECOND) OF CONTRACTS § 275 (Tent. Draft No. 8, 1973).

207. *Id.* reporter's note.

208. *Id.*

209. *Id.* (citations omitted).

210. RESTATEMENT (SECOND) OF CONTRACTS § 275 (Tent. Draft No. 9, 1974).

211. In subsection (1), the cross-reference to § 268 was changed to § 243. In subsection (2), the phrase "as a repudiation" was moved from the end of the sentence to follow the introductory phrase "The obligee may treat"

212. White, *supra* note 152, at 841-42 n.4.

213. As noted earlier, some courts have upheld as effective an oral demand for assurances under § 2-609. See *supra* note 123 and accompanying text.

214. See *supra* text accompanying notes 128-140.

assurance a "reasonable time" in which to provide adequate assurance, section 2-609 imposes a time limit of thirty days, whereas section 251 does not. As Professor White has correctly pointed out, in the normal case where the promisee merely seeks the promisor's promise to perform and some evidence of his ability to perform, a reasonable time would probably never exceed thirty days and thus the difference is unlikely to be important.²¹⁵ Even though it is unlikely to be significant, this difference may be justified when one considers that an insecure seller of goods usually needs assurance that the buyer will pay and that the insecure buyer usually needs assurance that the seller will timely deliver conforming goods. Regardless of whether the insecure promisee merely seeks a promise of performance or some other form of assurance, it seems highly unlikely that the assurance could not be provided within thirty days. In cases not involving contracts for sale of goods, however, it may be more time-consuming to provide adequate assurance. In a construction contract, for example, a labor dispute may require settlement by arbitration, or a supply shortage may require extended searches for alternative sources of supply. Similarly, in a long-term contract for the sale of land, a problem with a title defect or adverse third-party claim may be resolved only by a quiet title suit or other judicial proceeding. Supplying adequate assurance of performance in these circumstances may take considerably longer than thirty days, and section 251 recognizes that possibility by declining to place a limit on the "reasonable time" the promisor has to furnish adequate assurance.

Third, the sections differ in the conditions required before an insecure promisee may make a demand for adequate assurance. Section 2-609 provides that he must have "reasonable grounds for insecurity . . . with respect to the performance" of the promisor. Section 251 provides that he must have reasonable grounds "to believe that the obligor will commit a breach by non-performance that would of itself give the obligee a claim for damages for total breach under § 243" Again, Professor White has suggested that in practice this distinction is likely to be of little importance considering that section 251 does not require the insecure promisee to show a present material breach.²¹⁶ The insecure promisee must only demonstrate that the grounds for insecurity give the promisee a basis for believing that a material breach will occur.²¹⁷

VII. SECTION 251 IN THE COURTS

Unlike section 2-609 of the UCC, very few reported cases have involved the application of section 251 of the *Restatement (Second)*. Almost all of the reported cases have concluded that the right to demand adequate assur-

215. White, *supra* note 152, at 842 n.4.

216. *Id.*

217. *Id.*

ance ought to be part of general contract law. Only one court has flatly refused to adopt section 251 as a rule of decision. In *Mollohan v. Black Rock Contracting, Inc.*,²¹⁸ the plaintiff agreed to unload and store some rock for the defendant. The defendant alleged that the plaintiff subsequently said that he (the plaintiff) had insufficient equipment to do the job, a statement the plaintiff denied making. The defendant then hired another to do the job and the plaintiff sued for breach. The Supreme Court of West Virginia upheld a judgment for the plaintiff and rejected the defendant's claim that the plaintiff's statement provided reasonable grounds for insecurity and that a failure to provide adequate assurance allowed him to cancel. The court said:

We are not prepared to adopt [the right of an insecure promisee to demand adequate assurance of due performance] in our general contract law except to the extent that a demand for assurances and failure to give them may be evidence of repudiation to present to a jury with other evidence to prove absolute, unequivocal and positive repudiation and anticipatory breach.²¹⁹

The court's refusal to adopt section 251 is puzzling because the facts do not indicate that the defendant ever made any demand for assurance. Other than *Mollohan*, however, the principle that an insecure party has a right to demand adequate assurance of due performance has been adopted in cases involving a joint venture agreement,²²⁰ a construction contract,²²¹ leases,²²² real estate sales contracts,²²³ a contract for the sale of a radio station,²²⁴ and a sale and leaseback of construction equipment.²²⁵ None of these cases have involved any particularly interesting or unusual application of section 251 which might have led to a different result if section 2-609 of the UCC had been applied. Several of the cases have involved the question whether a promisee has reasonable grounds for insecurity. Cases have found reasonable grounds for insecurity where the promisor denies the binding nature of an oral joint-venture agreement,²²⁶ where the promisor disputes a contractor's estimate of the cost of certain improvements the cost of which is to be

218. *Mollohan v. Black Rock Contracting, Inc.*, 160 W. Va. 446, 235 S.E.2d 813 (1977).

219. *Id.* at —, 235 S.E.2d at 816 n.1 (emphasis in original).

220. *L.E. Spitzer Co. v. Barron*, 581 P.2d 213, 217 (Alaska 1978).

221. *Carfield & Sons, Inc. v. Cowling*, 616 P.2d 1008, 1010 (Colo. Ct. App. 1980).

222. *Conference Center Ltd. v. TRC—The Research Corp.*, 189 Conn. 212, 225-26, 455 A.2d 857, 863-64 (1983); *Jonnett Dev. Corp. v. Dietrich Indus., Inc.*, 316 Pa. Super. 533, —, 463 A.2d 1026, 1032 (1983) (presumption, in dicta, that the right exists).

223. *Juarez v. Hamner*, 674 S.W.2d 856, 861 (Tex. Ct. App. 1984) (dicta); *Bitzes v. Sunset Oaks, Inc.*, 649 P.2d 66, 70 (Utah 1982) (option contract); *Sears v. Riemersma*, 655 P.2d 1105, 1109 (Utah 1982).

224. *Lo Re v. Tel-Air Communications, Inc.*, 200 N.J. Super. 59, 71-72, 490 A.2d 344, 350-51 (App. Div. 1985).

225. *United Corp. v. Reed, Wible & Brown, Inc.*, 626 F. Supp. 1255, 1258 (D.V.I. 1986).

226. *L.E. Spitzer Co. v. Barron*, 581 P.2d 213, 217 (Alaska 1978).

shared by the promisor and the contractor,²²⁷ where an optionor offers to terminate an option agreement and alleges that the agreement is invalid because of impossibility,²²⁸ where a prior mortgagee of leased premises institutes foreclosure proceedings,²²⁹ and where the buyer of real estate discovers his seller is the owner of only a limited interest therein and that the property is subject to multiple, previously-undisclosed encumbrances.²³⁰

VIII. CONCLUSION

The drafters of section 2-609 wanted to provide a method to reduce the stakes in dispute, to clarify doubts by providing a safe harbor for reasonable conduct, and to recognize that parties to a contract should not disrupt each other's reasonable expectations of performance.²³¹ By and large, section 2-609 and its offspring, section 251 of the *Restatement (Second)*, have performed these tasks well. By providing a mechanism whereby the insecure promisee may put the equivocating promisor to the test of either furnishing assurance or repudiating the contract, it removes the burden of uncertainty faced by such a promisee at common law. The reported cases, of course, involve situations where the promisor and promisee were unable to come to terms on the propriety of the assurance demanded or tendered. Although there is always room to dispute particular results in light of the broad standards of "reasonable grounds for insecurity" and "adequate assurance," most decisions have, quite justifiably, resolved uncertainties in favor of the truly insecure promisee. At the same time, the judiciary has denied relief to promisees who made unjustified or bad faith demands. As judicially applied, the assurance device has served an important function.

One is struck, however, by the possibility that the real benefit of the assurance device is not reflected in the reported cases. This writer suspects that demanding assurance is frequently the first step to an eventual agreement between the promisee and promisor to work out difficulties of performance. If that is the case, then the assurance device is one of the most innovative and commercially sensible developments in contract law in this century.

227. *Sears v. Riemersma*, 655 P.2d 1105, 1109 (Utah 1982).

228. *Bitzes v. Sunset Oaks, Inc.*, 649 P.2d 66, 70 (Utah 1982).

229. *Conference Center Ltd. v. TRC—The Research Corp.*, 189 Conn. 212, 226-27, 455 A.2d 857, 864 (1983).

230. *Juarez v. Hamner*, 674 S.W.2d 856, 861 (Tex. Ct. App. 1984).

231. See *supra* text accompanying notes 38-39.

