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The Right to Assurance of Performance Under § UCC 2-609 and Restatement (Second) of Contracts § 251: Toward a Uniform Rule of Contract Law

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THE RIGHT TO ASSURANCE OF PERFORMANCE UNDER UCC § 2-609 AND RESTATEMENT (SECOND) OF CONTRACTS § 251: TOWARD A UNIFORM RULE OF CONTRACT LAW

INTRODUCTION

The idea that a contract involving mutual covenants contains an implied promise that neither party will repudiate its duties has been accepted in Anglo-American law since its announcement as the doctrine of breach by anticipatory repudiation in *Hochster v. De la Tour*[1] over one hundred years ago. Ideally, the doctrine permits a contracting party who determines that the bargained for performance is not going to be forthcoming to rescind the contract and arrange substitute performance.[2] The notion underlying the doctrine is that a contracting party bargains for performance, not merely for a promise and the right to win a lawsuit if the promise is breached.[3]

Breach by anticipatory repudiation occurs when a party, by words or conduct, manifests his intention not to perform a substantial part of the bargain when the time for performance arrives.[4] Thus, a contract may be repudiated by a positive statement of inability or unwillingness to perform, or by any affirmative act by which a party renders performance of his duties impossible.[5]

When the manifestations of prospective inability are equivocal, indefinite or uncertain, but sufficient to cause the promisee to fear a repudiation, the common law provides the promisee no clear guidance as to how to proceed. Section 251 of the Second Restatement of Contracts,[6] which is modeled after section 2-609 of the Uniform Com-

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1. 118 Eng. Rep. 922 (1853). "[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 any thing to the prejudice of the other inconsistent with that relation." *Id.* at 926; *accord* Roehm v. Horst, 178 U.S. 1, 16 (1900); Dingley v. Oler, 117 U.S. 490, 502-03 (1886); Johnstone v. Milling, 16 Q.B.D. 460, 467 (1886).

2. *See, e.g.*, Nevins v. Ward, 320 Mass. 70, 73-74, 67 N.E.2d 673, 675 (1946); Hochster v. De la Tour, 118 Eng. Rep. 922, 926-27 (1853).

3. U.C.C. § 2-609 official comment 1 (1977); Restatement (Second) of Contracts § 251 comment a (1979).

4. Restatement (Second) of Contracts § 250 (1979); *e.g.*, City of Fairfax v. Washington Met. Area Transit Auth., 582 F.2d 1321, 1325-26 (4th Cir. 1978), *cert. denied*, 440 U.S. 914 (1979); McCloskey & Co. v. Minweld Steel Co., 220 F.2d 101, 104 (3d Cir. 1955); Farwell Constr. Co. v. Ticktin, 59 Ill. App. 3d 954, 961-62, 376 N.E.2d 621, 627 (1978); McClelland v. New Amsterdam Cas. Co., 322 Pa. 429, 433, 185 A. 198, 200 (1936); *see* U.C.C. § 2-610 official comment 1 (1977).

5. Restatement (Second) of Contracts § 250 comment a (1979); Restatement of Contracts § 380 (1932); *see* Roehm v. Horst, 178 U.S. 1, 9, 20 (1900); Union Ins. Co. v. Continental Trust Co., 157 N.Y. 633, 643, 52 N.E. 671, 674 (1899).

6. Restatement (Second) of Contracts § 251 (1979). The tentative draft of the Second Restatement placed the right to assurance at § 275. Restatement (Second) of

mercial Code (UCC),[7] is designed to deal with this problem.[8] Both of these sections create a new form of repudiation: failure to provide adequate assurance of performance within a reasonable time after receiving a demand therefor from a justifiably insecure party.[9]

This Note urges acceptance of the right to assurance into the common law of contracts. It examines some of the questions surrounding the Second Restatement formulation of this right, and analyzes its theoretical underpinnings in light of experience under the corresponding UCC rule. It recommends a formulation of the assurance device that will promote the certainty of outcome and uniformity of decision which are essential to contract law.

I. Problems with the Anticipatory Breach Doctrine

A. *The Early Doctrine*

Early in the history of anticipatory repudiation, the courts developed a strict interpretation of the doctrine, under which repudiation is found only if its manifestation is "definite" and "unequivocal," and the covenant breached is "substantial" or "material."[10] Unfortu-

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Contracts § 275 (Tent. Draft No. 9, 1974). The section was renumbered as § 251 in the final published version. The final tentative draft was approved and the Second Restatement of Contracts formally promulgated by the American Law Institute on May 17, 1979. 1979 A.L.I. Proc. 420-21 (1980). The final published version of the Second Restatement of Contracts was published in three volumes in November, 1981. Unless otherwise indicated, all future references will be to the sections of the Second Restatement of Contracts as they are numbered in the final published version.

7. Restatement (Second) of Contracts § 251 reporter's note (1979); *see* U.C.C. § 2-609 (1977); Restatement (Second) of Contracts § 251 comment a (1979).

8. *See* 1973 A.L.I. Proc. 232 (1974).

9. J. Calamari & J. Perillo, The Law of Contracts § 12-7 & n.40 (2d ed. 1977) (discussing § 2-609 of the UCC, and § 275 of the tentative draft of the Second Restatement which was subsequently promulgated as § 251).

10. *See, e.g.*, Dingley v. Oler, 117 U.S. 490, 501-02 (1886) (refusal of the promisor to honor the contract, except at the higher current market price, held not sufficiently definite); City of Fairfax v. Washington Met. Area Transit Auth., 582 F.2d 1321, 1328-29 (4th Cir. 1978) (exclusion of party to 1970 contract from 1977 contract involving the same parties and subject matter, and replacing the 1970 agreement, held not sufficient alone to support claim of anticipatory breach), *cert. denied*, 440 U.S. 914 (1979); Wonalancet Co. v. Banfield, 116 Conn. 582, 586, 165 A. 785, 789 (1933) (statement by a party that he was going out of business and promisee would have to take his chances that there would be enough money to pay the debt owing on the contract held insufficient to prove anticipatory breach); Slaughter v. Barnett, 114 Fla. 352, 364-67, 154 So. 134, 138-40 (1934) (clear statement by seller that he does not intend to perform on the due date held not sufficient to support anticipatory breach action); Farwell Constr. Co. v. Ticktin, 59 Ill. App. 3d 954, 961-63, 376 N.E.2d 621, 627-28 (1978) (refusal to perform based on erroneous interpretation of the contract does not amount to anticipatory breach); Johnstone v. Milling, 16 Q.B.D. 460, 468 (1886) (statement by landlord that he cannot afford to honor a covenant to rebuild within four years not sufficiently definite).

nately, a body of inconsistent precedent has developed as courts have applied their own ideas of "definiteness" and "substantiality."[11] Consequently, insecure promisees cannot determine with certainty whether a court will consider the conduct of a promisor to be an anticipatory repudiation.[12]

There are several courses of action open to such a promisee. He may: (1) rescind the contract and sue for restitution; (2) ignore the repudiation and continue preparation for performance in the hope that the promisor will perform, risking reduced recovery because of the avoidable consequences rule, which requires a plaintiff to minimize his damages; or (3) suspend performance and immediately sue for breach.[13]

Because the burden of proving breach is always placed on the insecure party,[14] he acts at his peril. If he protects himself by refusing to perform, he runs the risk of being adjudged to have committed a material breach should a court determine that the promisor did not repudiate.[15] If he fails to act, he risks being denied full damages by operation of the avoidable consequences rule.[16]

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11. Taylor, *The Impact of Article 2 of the U.C.C. on the Doctrine of Anticipatory Repudiation*, 9 B.C. Indus. & Com. L. Rev. 917, 920-22 (1968); *see* Wardrop, *Prospective Inability in the Law of Contracts*, 20 Minn. L. Rev. 380, 392-93 (1935); Comment, *Anticipatory Repudiation Under the Uniform Commercial Code: Interpretation, Analysis, and Problems*, 30 Sw. L.J. 601, 603-06 (1976). *Compare* Salot v. Wershow, 157 Cal. App. 2d 352, 357-58, 320 P.2d 926, 930 (1958) (statement of inability to pay the contract price when due not sufficiently definite), *and* Mollohan v. Black Rock Contracting, Inc., 235 S.E.2d 813, 815-16 (W. Va. 1977) (statements by the plaintiff that he could not perform because he lacked the proper equipment not sufficiently definite), *with* Nevins v. Ward, 320 Mass. 70, 73-74, 67 N.E.2d 673, 675 (1946) (statement that advance payment would be needed before the contract could be completed held sufficiently definite).

12. Wardrop, *supra* note 11, at 392-93, 399 & n.90; *see* Restatement (Second) of Contracts § 250 comment d (1979); Note, *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 *passim* (1975) [hereinafter cited as *A Right to Adequate Assurance*].

13. 4 A. Corbin, Corbin on Contracts §§ 975-983 (1951); 11 S. Williston, A Treatise on the Law of Contracts §§ 1301, 1314, 1337 (3d ed. 1968); Note, *Constructive Conditions in Contracts*, 42 Colum. L. Rev. 903, 924 (1942); *see* S.J. Groves & Sons Co. v. Warner Co., 576 F.2d 524, 529 (3d Cir. 1978).

14. *A Right to Adequate Assurance*, *supra* note 12, at 1358-59; *see* Restatement (Second) of Contracts § 250 comment d (1979).

15. Rosett, *Partial, Qualified, and Equivocal Repudiation of Contract*, 81 Colum. L. Rev. 93, 94 (1981) [hereinafter cited as Rosett I]; *see* Vold, *Repudiation of Contracts*, 5 Neb. L. Rev. 269, 319-22 (1927); Wallach, *Anticipatory Repudiation and the UCC*, 13 U.C.C. L.J. 48, 50 (1980); *see, e.g.*, Ringel & Meyer, Inc. v. Falstaff Brewing Corp., 511 F.2d 659, 659-60 (5th Cir. 1975); Salot v. Wershow, 157 Cal. App. 2d 352, 357-58, 320 P.2d 926, 930-31 (1958).

16. Rosett I, *supra* note 15, at 94; Vold, *supra* note 15, at 319-22; *see* Roehm v. Horst, 178 U.S. 1, 20-21 (1900); S.J. Groves & Sons Co. v. Warner Co., 576 F.2d 524, 528 & n.5 (1978). *See generally* 5 A. Corbin, *supra* note 13, § 1039; 11 S. Williston, *supra* note 13, §§ 1353-54.

B. *The Restatement of Contracts Solution*

Section 280 of the original Restatement of Contracts[17] was designed to resolve the insecure promisee's dilemma. It permits promisees to change position in reasonable reliance on the other party's equivocal manifestations as to willingness or ability to perform.[18] The rule is based on the sound proposition that an obligee should not be required to bear a risk of failure of consideration created by the words or actions of the obligor.[19] When the manifestations are equivocal, however, the insecure party will not easily prove reasonable reliance;[20] he is always subject to second guessing by the fact finder. If the rule is interpreted in a manner lenient to the insecure party, the potential injustice is merely shifted to the promisor. Although the equivocal signals may be explainable, the promisor, given no opportunity to account for his conduct or assure the insecure party, can be robbed of his legitimate contract rights by a simple, unilateral change of position by the insecure party.[21]

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17. Restatement of Contracts § 280 (1932).

18. *Id.* Section 280 of the Restatement provides: "(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 conditional 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 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." *Id.*; *see id.* § 280 comment b; *id.* § 318 comment d; *id.* § 323 comment b.

19. *Id.* § 280 comment a. Comment a states: "A promisor may justly be required to take large risks as to the possibility of getting what he bargained for in return for his own performance, where this risk is due to circumstances over which the other party has no control . . . but where the risk is due to a statement by the other promisor that he will not perform his duty, or even to a statement by him of a doubt whether he will perform it, the risk of failure of consideration is wrongfully imposed and . . . discharges the other party." *Id.*

20. Truly equivocal actions will logically yield a fifty-percent chance that a fact finder will decide for the other party. *See* 6 A. Corbin, *supra* note 13, § 1260; *id.* § 1259 (Supp. 1980).

21. Change of position operates to prevent a retraction of repudiation, Restatement of Contracts § 318 comment d (1932), prevents a supposed repudiator from putting an insecure party in breach by tender of conforming performance on the date due, *id.* § 323 comment b; *see* First Nat'l Bank v. Indian Indus., 600 F.2d 702, 709 (8th Cir. 1979), and operates as an excuse of condition. Restatement of Contracts § 280 comment b (1932); *see* First Nat'l Bank v. Indian Indus., 600 F.2d 702, 709 (8th Cir. 1979); Diskmakers, Inc. v. De Witt Equip. Corp., 555 F.2d 1177, 1180 (3d Cir. 1977). The right of an insecure promisee to unilaterally terminate the contract is one of the injustices the drafters of the Second Restatement aim to abruptly end. The reporter's note to § 251 makes it clear that the section is intended to stand in place of, not in addition to, the right to create an estoppel by changing position under Restatement of Contracts § 280. Restatement (Second) of Contracts § 251 reporter's note (1979).

Thus, rather than increasing certainty, section 280 merely alters the insecure party's dilemma.[22] If the promisee acts to protect himself, he is likely to have to litigate the issue of reasonable reliance on the manifestations of the promisor.[23] If he fails to act, he may improperly increase his damages.[24] This uncertainty of outcome promotes increased litigation and a corresponding increase in transaction costs.[25]

C. *The UCC Solution*

The approach of the UCC to the problems of the common-law rule is to permit an insecure party to demand adequate assurance of performance when the manifestations of a promisor cause reasonable insecurity.[26] The promisee may treat failure to provide such assurance as a repudiation.[27]

The right to assurance rule of section 2-609 was an innovation in contract law,[28] based more on policy than on precedent.[29] There was no such right at common law.[30] The right does, however, share a common practical justification with the *Hochster v. De la Tour*[31] decision that first introduced the anticipatory breach doctrine.[32] A perceptive expression of these concerns on which modern contract law focuses is found in *Hawkinson v. Johnston:*[33]

> [When there is a dispute] it is far better . . . for the individuals and for society, that the rights and obligations between them should be promptly and definitely settled . . . . The commercial world has long since learned the desirability of fixing its liabilities and losses as quickly as possible, and the law similarly needs to remind itself that, to be useful, it too must seek to be practical.[34]

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22. *See* Rosett, *Contract Performance: Promises, Conditions and the Obligation to Communicate*, 22 U.C.L.A. L. Rev. 1083, 1093 (1975) [hereinafter cited as Rosett II]; *supra* notes 12-16 and accompanying text.

23. *See* Ranger Constr. Co. v. Dixie Floor Co., 433 F. Supp. 442, 446 (D.S.C. 1977); Idaho Falls Bonded Produce & Supply Co. v. United States, 107 F. Supp. 952, 955 (Ct. Cl. 1952); Restatement of Contracts § 280 comment a (1932); *id.* § 323(2).

24. *See* Roehm v. Horst, 178 U.S. 1, 20-21 (1900); S.J. Groves & Sons Co. v. Warner Co., 576 F.2d 524, 528 & n.5 (1978); *supra* note 16 and accompanying text.

25. *See* R. Posner, Economic Analysis of the Law § 21.4 (2d ed. 1975).

26. *See* U.C.C. § 2-609 & official comment 1 (1977).

27. *Id.* § 2-609(4) & official comment 2.

28. 1973 A.L.I. Proc. 232 (1974); Anderson, *Repudiation of a Contract Under the Uniform Commercial Code*, 14 De Paul L. Rev. 1, 3 (1964).

29. *See* 1973 A.L.I. Proc. 232 (1974).

30. Wallach, *supra* note 15, at 55; *see* 2 R. Anderson, Anderson on the Uniform Commercial Code § 2-609: 3 (2d ed. 1970); Anderson, *supra* note 28, at 3.

31. 118 Eng. Rep. 922 (1853).

32. Jackson, *"Anticipatory Repudiation" and the Temporal Element of Contract Law: An Economic Inquiry into Contract Damages in Case of Prospective Nonperformance*, 31 Stan. L. Rev. 69 (1978); Wallach, *supra* note 15, at 48-49; *see supra* notes 1-3 and accompanying text.

33. 122 F.2d 724 (8th Cir.), *cert. denied*, 314 U.S. 694 (1941).

34. *Id.* at 729-30.

Commentators, concentrating on the economic effects of contract law and the essentially economic justification for its existence, extend the reasoning of *Hawkinson v. Johnston* and *Hochster v. De la Tour.* They contend that the legal rules governing contract formation and disputes should promote certainty among contracting parties and encourage speedy and efficient fixing of liabilities and losses without direct judicial intervention[35]—though the threat of sure if not swift judicial enforcement of the bargain must always be present.[36] These policies have been effectively implemented through the Uniform Commercial Code, which is designed to "simplify, clarify and modernize the law governing commercial transactions."[37]

D. *The Second Restatement Solution*

Although Article 2 of the UCC applies specifically to transactions in goods,[38] it has been applied by analogy to a variety of contracts.[39] Applicability of the Article by analogy is usually determined by whether the contract is sufficiently like a transaction in goods.[40] Most courts, however, have applied section 2-609 only to cases involving contracts strictly or primarily for the sale of goods.[41] These courts do not extend the rationale of the section to those cases most appropriate for its application—cases involving the combined sale of goods and services.[42] This focus on the subject matter of the transaction empha-

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35. Rosett I, *supra* note 15, at 103; Rosett II, *supra* note 22, at 1085-87. *See generally* R. Posner, *supra* note 25, § 21.4, at 434 (discussing costs of bringing a legal dispute to trial).

36. *See* R. Posner, *supra* note 25, § 4.1; T. Hobbes, Leviathan ch. 14, at 108 (Collier ed. 1977).

37. U.C.C. § 1-102(2)(a) (1977).

38. *Id.* § 2-102. " 'Goods' means all things (including specially manufactured goods) which are movable at the time of identification to the contract . . . ." *Id.* § 2-105(1).

39. *See, e.g.*, Kroeze v. Chloride Group Ltd., 572 F.2d 1099, 1105 (5th Cir. 1978) (purchase of securities); Land v. Roper Corp., 531 F.2d 445, 448 (10th Cir. 1976) (sale of stock); Meehan v. New England School of Law, 522 F. Supp. 484, 494 (D. Mass. 1981) (employment contract); Romig v. deVallance, 637 P.2d 1147, 1152 (Hawaii Ct. App. 1981) (sale of interest in real property).

40. *See* 1 R. Anderson, *supra* note 30, § 2-102:4 (2d ed. 1970 & Supp. 1981); Murray, *Under the Spreading Analogy of Article 2 of the Uniform Commercial Code*, 39 Fordham L. Rev. 447, 464-72 (1971).

41. *E.g.*, Ranger Constr. Co. v. Dixie Floor Co., 433 F. Supp. 442, 444-45 (D.S.C. 1977) (§ 2-609 applied only if transaction is a sale of goods within Article 2 of the UCC); Althoff Indus. v. Elgin Medical Center, Inc., 95 Ill. App. 3d 517, 522-23, 420 N.E.2d 800, 804-05 (1981) (same); Cork Plumbing Co. v. Martin Bloom Assocs., Inc., 573 S.W.2d 947, 958 (Mo. Ct. App. 1978) (same); Schenectady Steel Co. v. Bruno Trimpoli Gen. Constr. Co., 43 A.D.2d 234, 236, 350 N.Y.S.2d 920, 922-23 (same), *aff'd*, 34 N.Y.2d 939, 316 N.E.2d 875, 359 N.Y.S.2d 560 (1974); Field v. Golden Triangle Broadcasting, Inc., 451 Pa. 410, 422-24, 305 A.2d 689, 695-96 (1973) (same), *cert. denied*, 414 U.S. 1158 (1974).

42. *See, e.g.*, Bonebrake v. Cox, 499 F.2d 951 (8th Cir. 1974); Lincoln Pulp & Paper Co. v. Dravo Corp., 436 F. Supp. 262 (D. Me. 1977); Ranger Constr. Co. v.

sizes form over substance. Rather than focusing on whether the contract is analogous to a sale of goods, the analysis should determine whether the contract problem sought to be resolved is analogous to the problem resolved by the Article 2 assurances rule. Thus the rule, designed to solve the problems of equivocal anticipatory repudiation in sales contracts, should be applied by analogy to the problems of equivocal anticipatory repudiation in all contracts.

The American Law Institute, recognizing that the problem of party insecurity in contract law is substantially identical to the problem resolved by section 2-609,[43] has rejected the original Restatement of Contracts solution[44] as inferior in practice to the demand for assurance device of the UCC,[45] and has replaced section 280 with Second

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Dixie Floor Co., 433 F. Supp. 442 (D.S.C. 1977); Executive Centers of Am., Inc. v. Bannon, 62 Ill. App. 3d 738, 379 N.E.2d 364 (1978); Care Display, Inc. v. Didde-Glaser, Inc., 225 Kan. 232, 589 P.2d 599 (1979); Schenectady Steel Co. v. Bruno Trimpoli Gen. Constr. Co., 43 A.D.2d 234, 350 N.Y.S.2d 920, *aff'd*, 34 N.Y.2d 939, 316 N.E.2d 875, 359 N.Y.S.2d 560 (1974); Air Heaters, Inc. v. Johnson Elec., Inc., 258 N.W.2d 649 (N.D. 1977); Van Sistine v. Tollard, 95 Wis. 2d 678, 291 N.W.2d 636 (1980). *But see* Romig v. deVallance, 637 P.2d 1147, 1152 (Hawaii Ct. App. 1981) (applying § 2-609 by analogy to sale of interest in real property). At least four different tests are currently utilized by courts in analyzing mixed contracts: (1) the "predominant factor test," which focuses on whether the contract is predominantly for a sale of goods, *see, e.g.*, Bonebrake v. Cox, 499 F.2d 951, 960 (8th Cir. 1974); Ranger Constr. Co. v. Dixie Floor Co., 433 F. Supp. 442, 444-45 (D.S.C. 1977); (2) the "contract terminology test," which focuses on the language of the contract, *see, e.g.*, Entron, Inc. v. General Cablevision, 435 F.2d 995, 1000 (5th Cir. 1970); Nitrin, Inc. v. Bethlehem Steel Corp., 35 Ill. App. 3d 577, 594-95, 342 N.E.2d 65, 78-79 (1976); (3) the "movability test," which focuses on the definition of "goods" in U.C.C. § 2-105(1) (1977), *see, e.g.*, Cacace v. Morcaldi, 435 A.2d 1035, 1038 (Conn. Super. Ct. 1981); Robertson Cos. v. Kenner, 32 U.C.C. Rep. Serv. (Callaghan) 387 (N.D. Oct. 23, 1981); and (4) the "divisibility of contract test," in which the court divides the contract into its goods and services parts and applies the UCC to the goods portion. *See, e.g.*, Insurance Co. of N. Am. v. Radiant Elec. Co., 55 Mich. App. 410, 222 N.W.2d 323 (1974); Field v. Golden Triangle Broadcasting, Inc., 451 Pa. 410, 422, 305 A.2d 689, 696 (1973), *cert. denied*, 414 U.S. 1158 (1978). *See generally* Marshall, *The Applicability of the Uniform Commercial Code to Construction Contracts*, 28 Emory L.J. 335, 350-74 (1979) (discussion of the various tests). The goods-services analysis applied in these cases is designed to ensure that the UCC is applied only to those contracts that are "transactions in goods" within the meaning of § 2-102, U.C.C. § 2-102 (1977); sharp distinction is drawn between those cases to which the UCC rules apply and those to which they do not. Once it is determined that a transaction is not in goods, the UCC rules are ignored. In this way, the UCC is prevented from influencing the common law.

43. 1973 A.L.I. Proc. 232 (1974); *see supra* pt. I(B).

44. 1973 A.L.I. Proc. 232 (1974).

45. U.C.C. § 2-609 (1977). Section 2-609 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

Restatement section 251.[46] Modeled after section 2-609,[47] section 251 similarly provides insecure parties a right to adequate assurance of performance,[48] though the formulation of the rule does differ in some respects from that of section 2-609.[49]

II. Application of the Assurance Device

Many problems of insecurity and uncertainty that are not satisfactorily resolved by the traditional doctrine of anticipatory repudiation can be efficiently resolved by utilization of the assurance device.[50]

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and the adequacy of any assurance offered shall be determined according to commercial standards. (3) Acceptance of any improper delivery or payment does not prejudice the aggrieved party's right to demand adequate assurance of future performance. (4) After receipt of a justified demand failure to provide within a reasonable time not exceeding thirty days such assurance of due performance as is adequate under the circumstances of the particular case is a repudiation of the contract." *Id.*

46. Restatement (Second) of Contracts § 251 (1979). Section 251 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, 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." *Id.*

47. *Id.* § 251 reporter's note; *see id.* § 251 comment a.

48. *Id.* § 251(1). Section 251 has not been widely followed since its introduction in 1974. *See id.* § 251 (app. 1982). Research has revealed only three cases applying the assurance device and citing § 251, or its predecessor § 275, as authority. David Nassif Assocs. v. United States, 644 F.2d 4, 12 (Ct. Cl. 1981) (per curiam); L.E. Spitzer Co. v. Barron, 581 P.2d 213, 216-17 (Alaska 1978); Carfield & Sons v. Cowling, 616 P.2d 1008, 1010 (Colo. App. 1980); *see infra* notes 90-92 and accompanying text. One circuit court has characterized the right to assurance as "basic contract law . . . codified in the Uniform Commercial Code § 2-609." Markowitz & Co. v. Toledo Met. Hous. Auth., 608 F.2d 699, 705 (6th Cir. 1979). In one Hawaii intermediate appellate decision, the court utilized the device in a real property sale, citing UCC § 2-609 by analogy. Romig v. deVallance, 637 P.2d 1147, 1152-53 (Hawaii Ct. App. 1981). At least one jurisdiction has expressly declined to accept the Second Restatement rule into the common law of contracts. Mollohan v. Black Rock Contracting, Inc., 235 S.E.2d 813, 816 n.1 (W. Va. 1977). The court in *Mollohan* did say, however, that failure to provide assurance after a demand can be presented to the jury as evidence of unequivocal and positive repudiation. *Id.* This use of the assurance device eviscerates it. Failure to provide assurance to a justifiably insecure promisee must be treated as sufficient proof of a repudiation to eliminate the present anomalies and concomitant uncertainty that are associated with the doctrine of breach by anticipatory repudiation. Treating such a failure merely as evidence of a repudiation adds to the list of elements that the insecure party may prove but does not decrease the risks involved in treating ambiguous conduct as a repudiation.

49. 1973 A.L.I. Proc. 232 (1974); *see infra* pt. III.

50. *See, e.g.*, Markowitz & Co. v. Toledo Met. Hous. Auth., 608 F.2d 699, 705 (6th Cir. 1979); Ranger Constr. Co. v. Dixie Floor Co., 433 F. Supp. 442, 446 (D.S.C. 1977); David Nassif Assocs. v. United States, 644 F.2d 4, 12 (Ct. Cl. 1981) (per curiam); L.E. Spitzer Co. v. Barron, 581 P.2d 213, 216 (Alaska 1978); Carfield

When parties have more than one contract with each other, for example, a breach of one contract may be grounds for insecurity as to the others.[51] It is a generally accepted rule of contract law, however, that breach of another and separate contract cannot be pled as a defense to a breach of contract action.[52] Nevertheless, it would be clearly unjust to expect a party in such a position to await actual breach under each successive contract. The assurance device would allow the promisee to determine with reasonable certainty the prospects for performance of the other contracts. Failure to provide such assurance would be an anticipatory breach of the contracts yet to be performed, allowing the insecure party to suspend his performance, make alternative arrangements for performance and avoid the necessity of expensive judicial proceedings. Repudiation of the future contracts could be litigated in one proceeding, and because the failure to provide assurance makes the repudiation unequivocal, the claim could be disposed of by motion for summary judgment.[53]

When a party disputes the nature of his obligations under a contract, or questions the enforceability or validity of a contract term without absolutely refusing to perform,[54] the other party is caught in the classic anticipatory repudiation dilemma.[55] Using the assurance device, a promisee can be reasonably assured of performance, or can

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& Sons v. Cowling, 616 P.2d 1008, 1010 (Colo. App. 1980); Romig v. deVallance, 637 P.2d 1147, 1149 (Hawaii Ct. App. 1981).

51. Ranger Constr. Co. v. Dixie Floor Co., 433 F. Supp. 442, 443 (D.S.C. 1977). In *Ranger*, the defendant had two contracts with plaintiff to supply and install floors in buildings: the first contract to be performed in 1974 in North Carolina, the second to be performed in 1975 in South Carolina. *Id.* When the plaintiff failed to make payment under the North Carolina contract forcing defendant to sue, defendant deemed himself insecure with regard to the South Carolina contract, doubting plaintiff's ability or willingness to pay. *Id.* In accordance with prudent business practice, defendant demanded adequate assurance of plaintiff's intention to perform. Failing to receive the required assurance, defendant refused to perform and plaintiff sued for breach. *Id.*

52. Hal Roach Studios v. Film Classics, 156 F.2d 596, 599 (2d Cir. 1946); Ranger Constr. Co. v. Dixie Floor Co., 433 F. Supp. 442, 445-46 (D.S.C. 1977); Rock v. Gaede, 111 Kan. 214, 216, 207 P. 323, 324 (1922); Hanson & Parker v. Wittenberg, 205 Mass. 319, 326-27, 91 N.E. 383, 384 (1910); Levi v. L.A. Thompson Scenic Ry. Co., 128 Misc. 465, 466, 218 N.Y.S. 666, 666-67 (1926).

53. *See, e.g.*, Louisiana Power & Light Co. v. Allegheny Ludlum Indus., Inc., 517 F. Supp. 1319, 1322-23 (E.D. La. 1981); Uarco, Inc. v. Zig-Zag Fanfolding Corp., No. 80 C 5263 (N.D. Ill. June 22, 1981) (available on LEXIS, Genfed library, Dist file); Romig v. deVallance, 637 P.2d 1147, 1152 (Hawaii Ct. App. 1981).

54. *See* Copylease Corp. of Am. v. Memorex Corp., 403 F. Supp. 625, 631 (S.D.N.Y. 1975); L.E. Spitzer Co. v. Barron, 581 P.2d 213, 217(Alaska 1978). In *L.E. Spitzer Co. v. Barron*, a dispute arose between the parties to a joint venture agreement when the written contract provided by defendant failed to accurately reflect the oral agreement under which work on defendant's construction project had already begun. Plaintiff's demand for assurance that defendant would honor the oral contract was met by a refusal. *Id.* at 217.

55. *See supra* notes 12-16 and accompanying text.

prove repudiation merely by showing reasonable grounds for insecurity, a demand for assurance and a failure to receive assurance. Once these elements are proved, it follows inevitably that there has been a repudiation by the promisor.[56]

Injustices inherent in traditional installment land sales contracts[57] can be eliminated by use of the assurance device.[58] In an installment land sale contract, the vendor retains title to the property until payment of the final installment.[59] Because the covenants of the vendor and vendee are independent, the vendee must continue to make installment payments, even if there is a possibility that the vendor will be unable to produce marketable title.[60] Thus, if a vendor fails to provide the bargained-for title insurance within a reasonable time, the vendee may not suspend payment, nor sue for rescission, even after repeated demands for performance.[61] In such a case the vendee has no means of ensuring that he will receive that for which he bargained.[62] The assurance device would permit the vendee either to receive adequate assurance of performance, or to suspend his own performance without the risks of default.[63]

A related problem in non-installment sales is faced by a vendee who discovers, while the contract is executory, that there are defects in

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56. *See* Comment, *A Suggested Revision of the Contract Doctrine of Anticipatory Repudiation*, 64 Yale L.J. 85, 101 & n.90 (1954) [hereinafter cited as *Suggested Revision*].

57. *See* Ellis v. Butterfield, 98 Idaho 644, 651, 570 P.2d 1334, 1341-42 (1977) (Bistline, J., dissenting); Comment, *Forfeiture: The Anomaly of the Land Sale Contract*, 41 Alb. L. Rev. 71, 72-73 (1977) [hereinafter cited as *Forfeiture*].

58. *See* Romig v. deVallance, 637 P.2d 1147, 1152 (Hawaii Ct. App. 1981); Ellis v. Butterfield, 98 Idaho 644, 651-52, 570 P.2d 1334, 1341-42 (1977) (Bistline, J., dissenting).

59. Ellis v. Butterfield, 98 Idaho 644, 651, 570 P.2d 1334, 1341 (1977) (Bistline, J., dissenting); M. Madison & J. Dwyer, The Law of Real Estate Financing ¶ 8.03 (1981); *Forfeiture, supra* note 57, at 73-74.

60. Ellis v. Butterfield, 98 Idaho 644, 651, 570 P.2d 1334, 1341 (1977) (Bistline, J., dissenting); M. Madison & J. Dwyer, *supra* note 59, ¶ 8.03. Should a vendee default with respect to payment, the vendor may bring an action in ejectment and retain as liquidated damages any payments made. *Id.*; *Forfeiture, supra* note 57, at 79-91.

61. *See* Blinzler v. Andrews, 94 Idaho 215, 218-19, 485 P.2d 957, 960-61 (1971); *Forfeiture, supra* note 57, at 100 & n.223.

62. *See, e.g.*, Ellis v. Butterfield, 98 Idaho 644, 651, 510 P.2d 1334, 1341 (1977) (Bistline, J., dissenting); Blinzler v. Andrews, 94 Idaho 215, 219-20, 485 P.2d 957, 962-64 (1971) (Shepard, J., dissenting).

63. *See* Romig v. deVallance, 637 P.2d 1147, 1152 (Hawaii Ct. App. 1981). The Uniform Land Transactions Act (ULTA) includes a right to receive adequate assurance section that is almost identical to § 2-609 of the UCC. U.L.T.A. § 2-403, 13 U.L.A. 621 (1977). The ULTA has not been adopted by any jurisdiction. U.L.A. Directory of Acts 9-73 (1982). *Romig v. deVallance* is the only case applying § 2-609 by analogy to the sale of an interest in real property. 637 P.2d at 1152. *But cf.* Markowitz & Co. v. Toledo Met. Hous. Auth., 608 F.2d 699, 705 (6th Cir. 1979) (finding the right to assurance to be a general proposition of contract of law).

vendor's title to the property.[64] Under the traditional rule, if the vendor can clear the defects within a reasonable time, the vendee must tender the purchase price and demand clear title.[65] The vendor is then entitled to a reasonable time after the contract closing date to cure any defects in title and tender a valid deed.[66] If the vendee fails or refuses to tender the purchase price until the vendor cures the defects, he will be held to have repudiated the contract.[67]

Insecure vendees are thus expected to continue preparation for performance without being sure of receiving the agreed return.[68] Moreover, financing for such transactions, which must usually be arranged in advance of the contract closing date,[69] may not be available without a certificate of unencumbered title from a title guaranty company.[70] A vendee may therefore be unable to tender the purchase price on the closing date.[71] The assurance device would allow a

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64. *See, e.g.*, Cohen v. Kranz, 12 N.Y.2d 242, 244, 189 N.E.2d 473, 474, 238 N.Y.S.2d 928, 930 (1963); Bord v. Brindisi, 49 A.D.2d 695, 695-96, 370 N.Y.S.2d 766, 767-68 (1975); Grady v. Balmain, 28 A.D.2d 702, 702, 280 N.Y.S.2d 956, 957 (1967).

65. *E.g.*, O'hara Group Denver, Ltd. v. Marcor Hous. Sys., 595 P.2d 679, 684 (Colo. 1979) (en banc); Cohen v. Kranz, 12 N.Y.2d 242, 246, 189 N.E.2d 473, 475, 238 N.Y.S.2d 928, 932 (1963); *see* Ace Realty, Inc. v. Looney, 531 P.2d 1377, 1380 (Okla. 1974).

66. O'hara Group Denver, Ltd. v. Marcor Hous. Sys., 595 P.2d 679, 684 (Colo. 1979) (en banc); Cohen v. Kranz, 12 N.Y.2d 242, 246, 189 N.E.2d 473, 475, 238 N.Y.S.2d 928, 932 (1963); Ballen v. Potter, 251 N.Y. 224, 229, 167 N.E. 424, 425 (1929); Ace Realty, Inc. v. Looney, 531 P.2d 1377, 1380 (Okla. 1974).

67. Cohen v. Kranz, 12 N.Y.2d 242, 247, 189 N.E.2d 473, 476, 238 N.Y.S.2d 928, 932 (1963); Ballen v. Potter, 251 N.Y. 224, 229, 167 N.E. 424, 425 (1929); Ace Realty, Inc. v. Looney, 531 P.2d 1377, 1380 (Okla. 1974). *See* O'hara Group Denver, Ltd. v. Marcor Hous. Sys., 595 P.2d 679, 684 (Colo. 1979) (en banc). This situation was anticipated by the Reporter for the Second Restatement of Contracts as one in which the vendee should have a right to demand assurance. Restatement (Second) of Contracts § 251 comment b, illustration 5 (1979); *accord* U.L.T.A. § 2-403(c) & comment 5, 13 U.L.A. 622 (1977).

68. *See, e.g.*, Cohen v. Kranz, 12 N.Y.2d 242, 246, 189 N.E.2d 473, 475, 238 N.Y.S.2d 928, 932 (1963); Bord v. Brindisi, 49 A.D.2d 695, 695-96, 370 N.Y.S.2d 766, 766 (1975).

69. *See* F. Galaty, W. Allaway & R. Kyle, Modern Real Estate Practice § 23, at 359 (9th ed. 1982).

70. *See* M. Madison & J. Dwyer, *supra* note 59, ¶ 3.04[15].

71. Of course, any vendee hindered or prevented from performing through the fault of the vendor will have a defense to any action by the vendor for damages or specific performance and will have a right to sue the vendor for breach. 4 A. Corbin, *supra* note 13, § 947. However, it must be remembered that parties bargain for performance, not for a promise and the right to a law suit if it is not fulfilled. U.C.C. § 2-609 comment 1 (1977); Restatement (Second) of Contracts § 251 comment a (1979). Utilization of the assurance device before the closing of the transaction would indicate to the vendor the need for due performance and shift the risk of noncompliance to him.

vendee to receive assurance of performance,[72] or enable him to sue for breach without the necessity of arranging expensive financing or risking loss of any deposit paid on account. These problem cases, typical of the anticipatory repudiation doctrine, demonstrate how the right to assurance allows an insecure party to "force a crystallization of the situation so that he can determine his own future course of conduct."[73] In contrast to traditional common-law rules, the assurance device reduces uncertainty of outcome in litigation[74] and thereby promotes settlement.[75]

III. Interpretation of the Device

To derive maximum benefit from the assurance device, the rule available for contracts in general should be substantially identical to the one developed for sale of goods. If a largely identical formulation is used, courts and parties can freely draw on the valuable, though limited, fund of decisional precedent[76] behind section 2-609 as an aid to interpretation and application of the device. This practice will build a unified body of precedent in which there is no unnecessary distinction made between contracts for sale of goods and those that are not.[77] The assurance device is designed to, and does, solve a

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72. In this case it appears that the only adequate assurance that the vendee will receive clear title on the closing date would be a certificate of clear title from a title guaranty company. Thus, to provide adequate assurance, the vendor would probably have to clear the defects in title.

73. Wallach, *supra* note 15, at 55.

74. *See* State of N.Y. Law Revision Comm'n, Act, Recommendation and Studies Relating to the Uniform Commercial Code, Legislative Doc. No. 65B, at 162 (1954), *reprinted in* 1 State of N.Y. Law Revision Comm'n Report, Hearings on the Uniform Commercial Code 47, 98 (1954) [hereinafter cited as 1954 Report]; *Suggested Revision, supra* note 56, at 101.

75. *See* R. Posner, *supra* note 25, § 21.4; Rosett I, *supra* note 15, at 103. The assurance device may also promote settlement by promoting communication between parties. *See* Holt v. Seversky Electronatom Corp., 452 F.2d 31, 36 (2d Cir. 1971).

76. *See, e.g.*, National Ropes, Inc. v. National Diving Serv., Inc., 513 F.2d 53, 60-61 (5th Cir. 1975) (what constitutes demand for assurance); Copylease Corp. of Am. v. Memorex Corp., 403 F. Supp. 625, 631 (S.D.N.Y. 1975) (adequacy of assurance); Erwin Weller Co. v. Talon Inc., 295 N.W.2d 172, 174 (S.D. 1980) (reasonable grounds for insecurity); Tennell v. Esteve Cotton Co., 546 S.W.2d 346, 354 n.4 (Tex. Civ. App. 1977) (same).

77. Such distinctions are often made on apparently arbitrary grounds; similar contracts may by one court be designated a sale of goods and by another sale of services. *Compare* Ranger Constr. Co. v. Dixie Floor Co., 433 F. Supp. 442, 444-45 (D.S.C. 1977) (sale and installation of floors in apartment building held not sale of goods), *and* Cork Plumbing Co. v. Martin Bloom Assocs., Inc., 573 S.W.2d 947, 958 (Mo. App. 1978) (sale and installation of plumbing fixtures in apartment building held not sale of goods), *with* Cleveland Lumber Co. v. Proctor & Schwartz, Inc., 397 F. Supp. 1088, 1092 (N.D. Ga. 1975) (sale and installation of woodburning kiln held sale of goods), *and* Meyers v. Henderson Constr. Co., 147 N.J. Super. 77, 82-83, 370 A.2d 547, 550 (1977) (sale and installation of warehouse overhead doors held sale of

problem common to all contracts and should apply to all contracts without regard to subject matter.[78]

The evident superiority of the UCC assurance device stems from the efficiency with which it protects the expectation interest of contracting parties. This results from several aspects of its language and operation, each of which invite analysis and comparison to the corresponding clauses proposed for the common law in the Second Restatement formulation.

A. *Grounds for Insecurity*

The UCC is applied to any "insecurity . . . with respect to . . . performance,"[79] whether or not it is by nonperformance, or would give rise to a claim for damages for total breach.[80]

In contrast, the language in section 251 of the Second Restatement limits the basis of reasonable grounds for insecurity to prospective breaches by nonperformance that would give rise to a claim for damages for total breach.[81] The potential grounds for insecurity are much broader than this.[82] If courts adopt such limited grounds for

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goods), *and* Ellis Mfg. Co. v. Brant, 480 S.W.2d 301, 303 (Tex. Civ. App. 1972) (sale and installation of kitchen fixtures in apartment building treated as sale of goods without discussing the goods-services distinction). Rather than apply the UCC rules by analogy to contracts that are not sale of goods, some courts either go to great lengths to characterize the contract as a sale of goods or apply the UCC rules without discussion of the matter at all. *See, e.g.*, Pittsburgh-Des Moines Steel Co. v. Brookhaven Manor Water Co., 532 F.2d 572, 580 (7th Cir. 1977) (sale of a million gallon water tank held sale of "movable" goods); Omaha Pollution Control Corp. v. Carver-Greenfield Corp., 413 F. Supp. 1069, 1085-86 (D. Neb. 1976) (design, construction, sale and operation of pollution control facilities covered by the UCC by analogy); County Asphalt, Inc. v. Lewis Welding & Eng'g Corp., 323 F. Supp. 1300, 1301-02 (S.D.N.Y. 1970) (UCC applied to construction and sale of two asphalt plants), *aff'd*, 444 F.2d 372 (2d Cir.), *cert. denied*, 404 U.S. 939 (1971); Robertson Cos. v. Kenner, 32 U.C.C. Rep. Serv. (Callaghan) 387, 391-92 (N.D. Oct. 23, 1981) (sale of galvanized steel warehouse treated as sale of goods).

78. *See* Markowitz & Co. v. Toledo Met. Hous. Auth., 608 F.2d 699, 705 (6th Cir. 1979); Romig v. deVallance, 637 P.2d 1147, 1152 (Hawaii Ct. App. 1981); *supra* notes 39-43 and accompanying text.

79. U.C.C. § 2-609(1) (1977).

80. *See id.* § 2-609 official comment 3 (suggesting that minor breaches such as defective or delayed delivery can operate as sufficient insecurity with respect to performance); Harlow & Jones, Inc. v. Advance Steel Co., 424 F. Supp. 770, 776 (E.D. Mich. 1976) (late delivery when time is not of the essence).

81. Restatement (Second) of Contracts § 251(1) (1979); Rosett I, *supra* note 15, at 105. *But see* Restatement (Second) of Contracts § 251 comment c (1979). Actual minor breaches can be reasonable grounds to suspect more serious breaches in the future, and an obligee can base a demand for assurance on such minor breaches whether or not he brings suit for damages. *Id.; see* Carfield & Sons v. Cowling, 616 P.2d 1008, 1009-10 (Colo. App. 1980) (involving minor breach and applying tentative draft of § 251).

82. Rosett II, *supra* note 22, at 1087 n.5.

seeking assurance, insecure parties will be faced with the pre-UCC dilemma;[83] they must accurately predict whether the court will find the anticipated breach sufficiently "material" or "substantial" to warrant the demand for assurance. The focus should be on whether, in any given case, the party is reasonable[84] in his belief that he will not receive all that he bargained for under the contract. Broadening grounds for insecurity would promote the primary benefit to be gained from use of the assurance device—the reduction of uncertainty.[85]

B. *Time Certain to Respond*

A further source of certainty in the UCC provision is the inclusion of a specific time within which assurances must be given.[86] The thirty-day limit of section 2-609 is a maximum which may be varied by agreement.[87] The drafters of the UCC considered it necessary to "free the question of reasonable time from uncertainty in later litigation" by including a specific time limit.[88] In this respect, nonsales

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83. J. White & R. Summers, Uniform Commercial Code § 6-2, at 211 (2d ed. 1980); *see supra* notes 12-16 and accompanying text.

84. Reasonableness is a concept that varies from case to case. With respect to claims of insecurity under § 2-609 of the UCC, courts have generally adopted an objective standard of reasonableness. *E.g.*, Diskmakers, Inc. v. DeWitt Equip. Corp., 555 F.2d 1177, 1179 (3d Cir. 1977) (criteria for insecurity are to be judged by commercial standards); Pittsburgh-Des Moines Steel Co. v. Brookhaven Manor Water Co., 532 F.2d 572, 581-82 (7th Cir. 1976) (reasonable grounds for insecurity must be determined on objective factual basis; subjective insecurity is not sufficient); Turntables, Inc. v. Gestetner, 52 A.D.2d 776, 777, 382 N.Y.S.2d 798, 799 (1976) (court noted a number of objective commercial criteria underlying insecurity of defendant as justifying demand for assurance under § 2-609). Incorporation of a practical business standard also provides a measure of flexibility responsive to short-term changes in the economic environment that can cause insecurity. In Harris v. Hine, 232 Ga. 183, 205 S.E.2d 847 (1974), for instance, the promisee claimed an increase in the market price as a reasonable ground for insecurity due to the unusual situation that caused the price of cotton to more than double in six months. *Id.* at 184, 205 S.E.2d at 847-48. Thus, the buyer was able to ascertain long before actual default by nonperformance that the seller intended to default and was able to take legal action to ensure his supply of the raw material. *Cf.* Louisiana Power & Light Co. v. Allegheny Ludlum Indus., 517 F. Supp. 1319, 1322 (E.D. La. 1981) (request for additional compensation held to be reasonable ground for insecurity).

85. *See* State of N.Y. Law Revision Comm'n, *supra* note 74, at 162, *reprinted in* 1954 Report, *supra* note 74, at 98; *Suggested Revision*, *supra* note 56, at 101.

86. U.C.C. § 2-609(4) (1977). It is not clear, however, whether the drafters intended that the 30-day limit could be extended as well as shortened by agreement. Although the text states that a reasonable time may not exceed 30 days, *id.*, the comments seem to authorize any commercially reasonable limitation. *Id.* § 2-609 official comment 6.

87. *Id.* § 1-102(3); 2 R. Anderson, *supra* note 30, § 2-609:3.

88. U.C.C. § 2-609 official comment 5 (1977). The first proposed final draft of the Uniform Revised Sales Act contained a ten-day limit for the provision of assurance. Uniform Revised Sales Act § 99(4) (Proposed Final Draft No. 1, 1944) (current version at U.C.C. § 2-609(4) (1977)).

contracts are no different from sales contracts.[89] The framers of the Second Restatement rule, however, rejected a time certain as too rigid for a common-law rule.[90]

To promote certainty and uniformity, a presumption should be created that the thirty-day limit of the UCC represents a reasonable time within which assurance must be given, absent agreement or circumstances requiring a different time for response. Of course, careful contract drafters will include specific time limits in any right to assurance clause.

C. *Adequacy of Assurance*

A principal source of uncertainty in both section 251 and section 2-609 is the notion of "adequate assurance."[91] Although the cases decided under section 2-609 are few,[92] they are sufficient to provide a basis for interpretation of this ill-defined concept. The drafters of both the UCC and Second Restatement rules apparently intended that commercial or business standards should apply. The UCC comments require an objective factual basis for adequacy—or inadequacy—of assurance just as for determination of reasonable grounds for insecurity.[93] Although neither section attempts to define adequacy, it is clear that the duty of good faith and fair dealing is as applicable to the assurance as to the demand.[94]

Adequacy of assurance can range from a mere promise to perform to the posting of a guaranty bond.[95] If there are broad bases for

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89. *Cf.* U.L.T.A. § 2-403 comment 3, 13 U.L.A. 621 (1977) (time limit provides certainty in real estate transactions). Because the concepts of "insecurity" and "assurance" are indefinite, and "reasonableness" can vary from contract to contract, commentators suggest that the parties include clauses defining all three concepts and limiting the time for acting. U.C.C. § 2-609 official comment 6 (1977); 2 R. Anderson, *supra* note 30, § 2-609:3.

90. 1974 A.L.I. Proc. 349 (1975); Farnsworth, *Ingredients in the Redaction of the* Restatement (Second) of Contracts, 81 Colum. L. Rev. 1, 11 & n.70 (1981); *see* 1973 A.L.I. Proc. 232 (1974).

91. U.C.C. § 2-609 (1977); Restatement (Second) of Contracts § 251 comment a (1979); *see* Hillman, *Keeping the Deal Together After Material Breach—Common Law Mitigation Rules, the UCC, and the Restatement (Second) of Contracts*, 47 U. Colo. L. Rev. 553, 592 (1976).

92. 1973 A.L.I. Proc. 232 (1974); *see* 2 R. Anderson, *supra* note 30, § 2-609:3-9 (2d ed. 1970 & Supp. 1979).

93. U.C.C. § 2-609 official comment 4 (1977).

94. *Id.* § 2-609 official comment 3; Restatement (Second) of Contracts § 251 comment d (1979); *see* U.C.C. § 1-203 (1977); Restatement (Second) of Contracts § 205 (1979).

95. *See* U.C.C. § 2-609 official comment 4 (1977); Restatement (Second) of Contracts § 251 comment e (1979); 2 R. Anderson, *supra* note 30, § 2-609:8; *see, e.g.*, S.J. Groves & Sons Co. v. Warner Co., 576 F.2d 524, 529 (3d Cir. 1978) (promise to perform inadequate because of erratic behavior of promisor); Louisiana Power & Light Co. v. Allegheny Ludlum Indus., Inc., 517 F. Supp. 1319, 1323 (E.D. La. 1981) (belated and qualified offer of performance is not adequate assurance); Uarco,

insecurity, there must be a flexible interpretation of adequacy of assurance. A reasonable but tenuous basis for insecurity such as rumor of insolvency[96] should not require the strongest of assurances. Insecure parties should not be allowed to rewrite the contract to allow them to get more through the assurance than was bargained for under the contract.[97]

D. *Form of the Demand for Assurance*

Some recent decisions under the UCC rule have recognized that the policy of the section is better served by permitting oral demands for assurance in some situations,[98] despite the section 2-609 requirement of a written demand.[99] Section 251 has adopted the better rule reflected in these decisions: Although the comments to section 251 indicate that a written demand is preferable, the section requires only a demand that is reasonable under the circumstances.[100]

Questions may still remain as to what actions other than a straightforward written or oral demand will constitute a demand for assurance sufficient to satisfy the rule. A mere demand for monies due and owing, even though in writing, has been held insufficient to constitute a demand for assurances under section 2-609.[101] Similarly, a request for advance payment of part of the contract price to enable the seller to perform has been found insufficient because such a request did not require any act assuring performance.[102] On the other hand, an oral demand for payment overdue combined with a threat to cancel future, unrelated contracts has been held to be sufficient demand for adequate assurance of due performance of the future, unrelated contracts.[103]

Inc., v. Zig-Zag Fanfolding Corp., No. 80 C 5263 (E.D. Ill. June 22, 1981) (available on LEXIS, Genfed library, Dist file) (adequate assurance requires a clear indication of intent to perform).

96. *See* U.C.C. § 2-609 official comment 4 (1977); *cf.* Erwin Weller Co. v. Talon Inc., 295 N.W.2d 172, 174 (S.D. 1980) (growing amount of credit extended to defendant constitutes reasonable grounds for insecurity).

97. Pittsburgh-Des Moines Steel Co. v. Brookhaven Manor Water Co., 532 F.2d 572, 582 (7th Cir. 1976); *see* U.C.C. § 2-609 official comment 6 (1977).

98. *See* AMF, Inc. v. McDonald's Corp., 536 F.2d 1167, 1170-71 (7th Cir. 1976); Kunian v. Development Corp. of Am., 165 Conn. 300, 312, 334 A.2d 427, 433 (1973).

99. U.C.C. § 2-609(1) (1977); *see* Teeman v. Jurek, 312 Minn. 292, 297-98, 251 N.W.2d 698, 701 (1977).

100. Restatement (Second) of Contracts § 251(2) & comment d (1979).

101. National Ropes, Inc. v. National Diving Serv., Inc., 513 F.2d 53, 61 (5th Cir. 1975).

102. Nasco, Inc. v. Dahltron Corp., 74 Ill. App. 3d 302, 309, 392 N.E.2d 1110, 1116 (1979).

103. Toppert v. Bunge Corp., 60 Ill. App. 3d 607, 611-12, 377 N.E.2d 324, 328-29 (1978).

In *United States v. Humboldt Fir, Inc.*,[104] a federal contract law case applying section 2-609 by analogy, notice that strict compliance with the contract would be required was construed as a demand obligating the promisor to provide adequate assurance.[105] At no time, however, did the promisee make any formal demand for assurance.[106] The case illustrates a practice followed by a number of courts[107] that could lead to unjust applications of the right to assurance device. These courts view a demand for strict compliance as somehow equivalent to a demand for assurance.[108] In such a case, the promisor may not have sufficient notice that the failure to respond with adequate assurance will place him in breach. Courts should require that an actual demand for assurance be made rather than decide after the fact that equivocal actions constitute such a demand. One of the advantages of the assurance device is that it promotes communication between the parties.[109] Consequently, the device should be applied only when the promisor is given to clearly understand that a demand for assurance has been made, and therefore has reasonable notice and opportunity to respond.[110]

E. *Modification of the Rule by Agreement*

Under both the UCC and the Second Restatement rules, the implied right to assurance "may be modified by agreement of the par-

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104. 426 F. Supp. 292 (N.D. Cal. 1977), *aff'd*, 625 F.2d 330 (9th Cir. 1980).

105. *Id.* at 298.

106. *See id.*

107. *See, e.g.*, David Nassif Assocs. v. United States, 644 F.2d 4, 12 (Ct. Cl. 1981) (per curiam); Toppert v. Bunge Corp., 60 Ill. App. 3d 607, 611-12, 377 N.E.2d 324, 328 (1978); Schenectady Steel Co. v. Bruno Trimpoli Gen. Constr. Co., 43 A.D.2d 234, 236, 350 N.Y.S.2d 920, 922, *aff'd*, 34 N.Y.2d 939, 316 N.E.2d 875, 359 N.Y.S.2d 560 (1974).

108. *See, e.g.*, United States v. Humboldt Fir, Inc., 426 F. Supp. 292, 298 (N.D. Cal. 1977), *aff'd*, 625 F.2d 330 (9th Cir. 1980); David Nassif Assocs. v. United States, 644 F.2d 4, 12 (Ct. Cl. 1981) (per curiam). No clear demand for assurance as required by the various formulations of the demand for assurance rule was made in either *Humboldt Fir*, *see* 426 F. Supp. at 298, or *Nassif*. *See* 644 F.2d at 12. Until there has been a demand for assurance, there can be no suspension of performance under § 2-609(1), Tennell v. Esteve Cotton Co., 546 S.W.2d 346, 354 n.4 (Tex. Civ. App. 1976), or under § 251. *See* Restatement (Second) of Contracts § 251(1)-(2) (1979).

109. Rosett I, *supra* note 15, at 103; *see* Holt v. Seversky Electronatom Corp., 452 F.2d 31, 36 (2d Cir. 1971).

110. *See* AMF, Inc. v. McDonald's Corp., 536 F.2d 1167, 1170-71 (7th Cir. 1976). The *AMF* court held that lack of a written demand was excusable if the seller had a "clear understanding that [buyer] had suspended performance until it should receive adequate assurance of due performance." *Id.* at 1171; *see* ARB, Inc. v. E-Systems, Inc., 663 F.2d 189, 196 n.10 (D.C. Cir. 1980).

ties."[111] Unlike the UCC provision, however, section 251 offers no express limitation on the extent of modification.

Any clause seeking to give the protected party overbroad powers to cancel or adjust the contract, or setting up arbitrary standards for action by the protected party, should be ineffective.[112] The parties should not be allowed to frustrate the policy underlying the right to assurance rule by modifying the right out of existence.[113] Neither should the rights granted be expanded to such an extent that the protected party is given the right to cancel or alter the contract upon any arbitrary claim of insecurity.[114] It must be made certain that the right to assurance will not be a device giving protected parties authority, in the name of "insecurity," to rewrite the contract to receive more than was originally bargained for.[115]

F. *Retraction of Repudiation and the Right to Assurance*

Section 256 of the Second Restatement[116] also bears on the operation of section 251. Under section 256, a repudiation can be nullified by a timely retraction or by an end to the events or circumstances which had caused the insecurity or repudiation.[117]

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111. Restatement (Second) of Contracts § 251 comment a (1979); *accord* U.C.C. § 1-102(3) (1977); *id.* § 2-609 official comment 6.

112. *See* Pittsburgh-Des Moines Steel Co. v. Brookhaven Manor Water Co., 532 F.2d 572, 582 (7th Cir. 1976); Northwest Lumber Sales v. Continental Forest Prods., 495 P.2d 744, 749 (Ore. 1972); Wrightstone, Inc. v. Motter, 1 U.C.C. Rep. Serv. (Callaghan) 170, 172 (Pa. Ct. C.P. 1961); U.C.C. § 2-609 official comment 6 (1977).

113. Any security clause setting up arbitrary standards for action or otherwise frustrating the policy of the rule is likely to run afoul of the good faith obligation of the UCC, U.C.C. § 1-203 (1977), or the Second Restatement. Restatement (Second) of Contracts § 205 (1979). The obligations imposed by § 2-609 and § 251 are implied in every contract. Any security clause found to abrogate that obligation should thus be unenforceable, and the implied obligation should be utilized in its place.

114. Pittsburgh-Des Moines Steel Co. v. Brookhaven Manor Water Co., 532 F.2d 572, 581 (7th Cir. 1976); Wrightstone, Inc. v. Motter, 1 U.C.C. Rep. Serv. (Callaghan) 170, 171 (Pa. Ct. C.P. 1961); U.C.C. § 2-609 official comment 6 (1977).

115. *See* Pittsburgh-Des Moines Steel Co. v. Brookhaven Manor Water Co., 532 F.2d 572, 582 (7th Cir. 1976); U.C.C. § 2-609 official comment 6 (1977).

116. Restatement (Second) of Contracts § 256 (1979).

117. *Id.* Section 256 provides: "(1) The effect of a statement as constituting a repudiation under § 250 or the basis for a repudiation under § 251 is nullified by a retraction of the statement if notification of the retraction comes to the attention of the injured party before he materially changes his position in reliance on the repudiation or indicates to the other party that he considers the repudiation to be final. (2) The effect of events other than a statement as constituting a repudiation under § 250 or the basis for a repudiation under § 251 is nullified if, to the knowledge of the injured party, those events have ceased to exist before he materially changes his position in reliance on the repudiation or indicates to the other party that he considers the repudiation to be final." *Id.*

Section 2-611(2) of the UCC provides the better rule that a repudiator may retract a repudiation but must give adequate assurance of performance upon demand.[118] This is the logical rule because a repudiation is sufficient cause for insecurity and warrants a demand that assurance be provided.[119] The right to continuing security that performance will be forthcoming when due[120] requires that the insecure party be permitted to demand adequate assurance of performance as a condition precedent to an effective retraction of repudiation.

CONCLUSION

Contracting parties bargain for performance, not merely for promises. When faced with prospective failure of consideration, parties to sales and nonsales contracts share a common problem of insecurity with respect to performance and require similar relief. The assurance device dispels such insecurity and should be accepted into the common law of contracts in a form virtually identical to that contained in the UCC. A uniform right to assurance rule will avoid arbitrary distinctions between contracts that are for sale of goods and those that are not, and will promote judicial efficiency and uniformity of decision in contract law.

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118. U.C.C. § 2-609(2) (1977). The Reporter's note to § 256 says the section accords with § 2-611, which also allows retraction of repudiation in certain circumstances. Restatement (Second) of Contracts § 256 reporter's note (1979); *see* U.C.C. § 2-611 (1977). The latter section includes a clause to the effect that any retraction "must include any assurance justifiably demanded under the provisions of this Article." *Id.* § 2-611(2). The comments to this section make it clear that failure to provide assurances demanded under the assurance section will render the retraction ineffective. *Id.* § 2-611 official comment 2.

119. U.C.C. § 2-611 official comment 2 (1977).

120. *Id.* § 2-609 official comment 1; Restatement (Second) of Contracts § 251 comment a (1979); *see* Hochster v. De la Tour, 118 Eng. Rep. 922, 926 (1853).