

# ANTICIPATORY REPUDIATION: A CLEAR BARRIER TO COMMUNICATION

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## I. INTRODUCTION

A subcontractor was involved in a construction project, renovating a series of restrooms for a school district.<sup>1</sup> Things were not exactly going according to plan, and the architect's project manager was unsatisfied with some of the work. The subcontractor was involved in the application of a high performance paint coating, and its speckled color was slightly different from the manufacturer's sample.

The architect's project manager stated in a written evaluation that changes were necessary to correct the problems, but what she did not realize was that the expense involved in the process of preparing the surface and reapplying the coating would be substantial. The particular coating system was only produced in limited production runs, and this only occurred when the individual orders were in sufficient numbers to warrant the production. The subcontractor knew at that time that if he did the requested additional work his business would lose quite a bit of money and that the specific color concern would be unlikely to improve. On the other hand, if he refused to do the work, he would not have fulfilled his responsibilities under the contract.

Burdened with what seemed like a lose-lose situation, the subcontractor went to the general contractor's office and spoke with the project manager about the concerns of the architect's project manager. The subcontractor explained the situation and his difficult position. The subcontractor did not know what to do. He did not want to lose money, and he did not want to cause any problems that might affect his relationship with the general contractor. He had already worked as a subcontractor successfully with that company on several other projects, and their relationship was relatively solid. He told the general contractor about all of his concerns, including the financial aspects, the production issues, and the marginal improvement potential of the additional work.

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1. The events in this example are based on a true account of the author's experience.

However, the conversation took an interesting turn at one point, when the general contractor's project manager paused and plainly asked the subcontractor, "Are you saying you cannot fulfill your end of the contract?" When he asked that question the subcontractor paused as well, because it seemed like the entire tone of the conversation had changed. He answered him, "No, I just wanted a little help."

Following that conversation, a meeting took place on location at the project site, and together the parties worked out their issues. The architect's project manager clarified her concerns that were, in actuality, limited to a few specific areas of the renovation as opposed to the entire coating system as indicated on the previous written notice. The additional work was possible with the remaining product that the subcontractor had on location, and it was limited in scope, so that any additional labor cost was minimized as well.

What the subcontractor did not know at the time is that this was his very first introduction to the concept of anticipatory repudiation. He was not inexperienced with contracts at that time, and he was attempting to work with the other relevant parties in good faith. He had a good relationship with both the architectural firm and the general contractor. He was trying to communicate with all parties in order to work out a solution to a problem. It was his assumption that each party had a specific concern, and each other party was probably not fully aware of the concerns of everyone else.

The consequences for his ignorance regarding anticipatory repudiation could have been extreme. If he had misspoken or made a regrettable statement in the context of a heated discussion, the entire situation could have turned on its head. He could have been punished for what was originally intended to be an open attempt at communication to solve a problem.

Although the above business interaction is not directly covered by Article 2 of the Uniform Commercial Code (U.C.C.), as it is not related to the sale of goods,<sup>2</sup> the account above serves as a good example of the kinds of problems that can arise when dealing with the concept of anticipatory repudiation under the U.C.C. The account above ended with a mutually beneficial conclusion, but that outcome was the product of communication and working together. Without the established relationship and the motivation to communicate and succeed, the events could have easily taken a turn for the worse.<sup>3</sup>

The formulation of anticipatory repudiation under the U.C.C. stands as a disincentive to communication between parties when future performance is called into question. In order to fully understand anticipatory repudiation, this Comment will review the history of anticipatory repudiation, and it will discuss how anticipatory repudiation is set up under the framework of the

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2. U.C.C. § 2-102 (2013).

3. *See id.* § 2-609(4).

U.C.C. This Comment will also discuss how the U.C.C. discourages communications when a party faces difficulty or uncertainty regarding that party's ability to perform, and how a non-repudiating party faces a similar disincentive when the other party repudiates an obligation under an agreement. Finally, this Comment will address why the barrier to communication, caused by anticipatory repudiation, is contrary to optimum business interactions.

## II. BACKGROUND

The history and framework of anticipatory repudiation under the U.C.C. are necessary to understand the importance of the concept in present day contract law. The specific examples of how courts have applied anticipatory repudiation are also instructive as a guideline for the expectations of businesses operating under the U.C.C.

### A. The History of Anticipatory Repudiation

Anticipatory repudiation is the term associated with the occurrence when one party refuses to honor its obligations under a contract prior to the time at which performance is due.<sup>4</sup> It has an extensive history both in the common law, and, as it evolved and reached a point of codification, among the laws of the several states and internationally.<sup>5</sup>

As early as the 1700's, the concept of anticipatory repudiation was found in British courts.<sup>6</sup> By the middle of the 1800's it was found in American courts as well, and American scholars had already given the concept recognition in legal writing.<sup>7</sup> Although early treatment focused more intently on situations in which the breaching party made actions inconsistent with the continued *ability* to perform under a contract, the idea was clearly recognized, nonetheless.<sup>8</sup> By 1916, the doctrine of anticipatory repudiation had even reached the Supreme Court, and the Supreme Court held, in *Central Trust Co. of Illinois v. Chicago Auditorium Ass'n*, that the doctrine of anticipatory repudiation was already well-established.<sup>9</sup>

In 1932, anticipatory repudiation was included in the first *Restatement of Contracts*.<sup>10</sup> It was later included in the U.C.C., and eventually the

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4. *Id.* § 2-610; RESTATEMENT (SECOND) OF CONTRACTS § 250 (1981).

5. CHARLES L. KNAPP, NATHAN M. CRYSTAL & HARRY G. PRINCE, PROBLEMS IN CONTRACT LAW: CASES AND MATERIALS 834 (Vicki Been et al. eds., 7th ed. 2012).

6. Keith A. Rowley, *A Brief History of Anticipatory Repudiation in American Contract Law*, 69 U. CIN. L. REV. 565, 576 (2001).

7. *Id.* at 572.

8. *Id.* at 572 n.35.

9. *Id.* at 572 (citing *Cent. Trust Co. of Ill. v. Chi. Auditorium Ass'n*, 240 U.S. 581, 589 (1916)).

10. *Id.* at 609.

*Restatement (Second) of Contracts* included it as well, along with the changes that arose in the U.C.C.<sup>11</sup> This doctrine even achieved international recognition when it was adopted in 1987 as part of the United Nations Convention on Contracts for the International Sale of Goods.<sup>12</sup>

#### B. The Anticipatory Repudiation Framework Under the Uniform Commercial Code

Article 2 of the U.C.C. provides a non-repudiating party a few options when the other party repudiates an obligation under a contract before the repudiating party's performance is due.<sup>13</sup> Under section 2-610 of the U.C.C., when a party repudiates, the other party can:

- (a) for a commercially reasonable time await performance by the repudiating party; or
- (b) resort to any remedy for breach (section 2-703 or section 2-711), even though he has notified the repudiating party that he would await the latter's performance and has urged retraction; and
- (c) in either case suspend his own performance or proceed in accordance with the provisions of this Article on the seller's right to identify goods to the contract notwithstanding breach or to salvage unfinished goods (section 2-704).<sup>14</sup>

In addition to either waiting for performance or resorting to remedies, a non-repudiating party has another option.<sup>15</sup> Under section 2-609 of the U.C.C., a party has the option of requesting adequate assurances of performance from the other party if there are reasonable grounds to question the other party's future performance.<sup>16</sup> If the other party does not provide adequate assurances within a reasonable time, not exceeding thirty days, then that failure to provide assurance constitutes a breach.<sup>17</sup> The purpose of this section is to maintain the sense of security that should be inherent in any contract, that each party will dutifully perform his obligations when due.<sup>18</sup>

Where section 2-609 speaks to the uncertainty of performance, section 2-610 refers to situations in which an overt communication or action takes place, which reasonably indicates that performance will not occur.<sup>19</sup> Basically, there are three distinct situations that these two sections identify as

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11. *Id.* at 616–25.

12. *Id.* at 629–30 n.368 (becoming effective on January 1, 1988).

13. U.C.C. § 2-610 (2013).

14. *Id.*

15. *See id.* § 2-609.

16. *Id.* § 2-609(1).

17. *Id.* § 2-609(4).

18. *Id.* § 2-609 cmt. 1.

19. *Id.* § 2-610 cmt. 1–2.

possibly constituting a repudiation. The first is when a party makes an overt communication that indicates future non-performance.<sup>20</sup> The second is when a party takes an action which reasonably indicates that future performance will not occur.<sup>21</sup> The final situation is when a party fails to give adequate assurances in a reasonable amount of time after reasonable grounds for questioning future performance manifest, and such a request is made.<sup>22</sup>

Both sections provide an option for the non-repudiating party; the language indicates that the non-repudiating party “may” do the certain specific options provided.<sup>23</sup> Nothing in these sections is mandatory for the non-repudiating party.

It should be noted, however, that section 2-611 does provide the ability to retract a repudiation by the repudiating party.<sup>24</sup> Such a retraction must be made prior to the time when performance is due and before the non-repudiating party has materially changed its position.<sup>25</sup> Such a retraction excuses any consequences of the non-repudiating party’s suspended performance as well.<sup>26</sup>

Additionally, the ability of the repudiating party to retract its repudiation is completely dependent on the actions taken by the non-repudiating party.<sup>27</sup> For example, if the non-repudiating party has canceled the contract or acquired substitute performance elsewhere, then the repudiating party has no right to retract its repudiation, regardless of the relative extent of time between the moment that such retraction is given and the time at which performance is due.<sup>28</sup> In effect, what appears to be an option on the part of the repudiating party is instead subject to the option of the non-repudiating party.<sup>29</sup>

### C. Examples of Repudiation and the Secret Intent to Repudiate

Knowing the framework within which this concept operates is important to perform a proper analysis, but another element that should be examined is when the applicability of anticipatory repudiation has been recognized. The U.C.C. does not specifically define circumstances constituting anticipatory repudiation.<sup>30</sup> Instead, case law provides a guide to

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20. *Id.* § 2-610 cmt. 1.

21. *Id.* § 2-610 cmt. 2.

22. *Id.* § 2-609(1).

23. *Id.* § 2-609(1); *Id.* § 2-610.

24. *Id.* § 2-611.

25. *Id.* § 2-611(1).

26. *Id.* § 2-611(3).

27. *Id.* § 2-611 cmt. 1.

28. *Id.*

29. *Id.*

30. *Nat’l Farmers Org. v. Bartlett & Co., Grain*, 560 F.2d 1350, 1355 (8th Cir. 1977) (applying Missouri law).

instances that qualify as anticipatory repudiation, as well as those instances that do not.<sup>31</sup>

In determining whether the specific actions of a party constitute anticipatory repudiation, a court can follow the U.C.C. framework detailed above,<sup>32</sup> understanding that a “[r]epudiation can take the form of an action that ‘reasonably indicates’ that the party will not perform its contractual obligation.”<sup>33</sup> There are numerous examples of anticipatory repudiation that extend beyond the simple, overt statement of one party, indicating that it will not perform future obligations.

Conditioning one party’s future performance on the addition of obligations to another party also qualifies as anticipatory repudiation.<sup>34</sup> In other words, when a party to an agreement refuses to perform unless a new or modified agreement is formed, the party is stating that it will not perform under the current agreement. Whether a separate agreement manifests in the future is irrelevant. What is important here is how that party is treating the current contract.

It is possible, however, for a party to request modifications to an existing agreement without conditioning that party’s future performance on the manifestation of such modifications.<sup>35</sup> “Neither an attitude that suggests more negotiations are sought nor requests to change the terms of a contract are enough to constitute repudiation.”<sup>36</sup> What this speaks to is the intention of non-performance, and the communication of that intention.<sup>37</sup> A simple request to modify an agreement is a communication of unhappiness, but not of unwillingness.<sup>38</sup>

An example of this type of request, and how it can cause confusion, can be found in *Tenavision, Inc. v. Neuman*.<sup>39</sup> In *Tenavision*, a nursing home interpreted a request for particular forms from a television supplier, the

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31. 4 DAVID FRISCH, LAWRENCE’S ANDERSON ON THE UNIFORM COMMERCIAL CODE § 2-610:11 (3d ed. 2013).

32. See *supra* Part II.B.

33. FRISCH, *supra* note 31, § 2-610:12.

34. See *PAMI-LEMB I, Inc. v. EMB-NHC, L.L.C.*, 857 A.2d. 998, 1014 (Del. Ch. 2004) (where one party’s refusal to perform unless current terms of the partnership contract were changed was a repudiation); see also *Pittsburgh-Des Moines Steel Co. v. Brookhaven Manor Water Co.*, 532 F.2d 572, 583–84 (7th Cir. 1976) (where the seller demanded either a guarantee, financing held in escrow, or an interest in the buyer entity before continued performance).

35. See *In re Bridge Info. Sys., Inc.*, 327 B.R. 382, 387–88 (B.A.P. 8th Cir. 2005) (applying Missouri law) (where a letter of intention to terminate a lease did not constitute anticipatory repudiation because continued performance from both parties prevented damages); see also *K & K Recycling, Inc. v. Alaska Gold Co.*, 80 P.3d 702, 715–16 (Alaska 2003) (where one party requested government approval, work plans, and various other conditions from the other party, a recycling company, but made no indication that it would not perform in the absence of those conditions).

36. *In re Bridge Info. Sys., Inc.*, 327 B.R. at 388 (applying Missouri law).

37. See *id.*

38. See *id.*

39. 379 N.E.2d 1166 (N.Y. 1978).

delivery of which was not in the original agreement, to be an indication of that supplier's anticipatory repudiation of the contract.<sup>40</sup> However, the supplier did not condition any performance on compliance with the request.<sup>41</sup> The nursing home suspended performance after this communication.<sup>42</sup> The court held that, because the supplier's communication did not qualify as a repudiation, the nursing home's suspension of performance was actually a repudiation in itself.<sup>43</sup>

The situation in *Tenavision* sheds light on the fact that a communication, mistaken as an intention of non-performance, can result in an aggrieved party suspending performance and seeking damages. This behavior based on a mistake is, in itself, an anticipatory repudiation of the contract, which means that the party originally fearing non-performance could owe damages to the other party.

Another form of mistake should be noted as well. If a communication of non-performance takes place, and it is based off of a misunderstanding concerning a term in the contract or a mistake, ambiguity, or incompleteness in the contract, that communication does not constitute an anticipatory repudiation.<sup>44</sup> Instead, the parties must cure the defect in the agreement.<sup>45</sup> As long as any renegotiations are done in good faith to cure the problem, the communication should not be construed as repudiation of the contract.<sup>46</sup>

An additional situation that deserves special attention is once again related to whether there exists an intention of non-performance, and whether there is a communication of such an intention. In *Unique Systems, Inc. v. Zotos International, Inc.*, the court held that "[a] secret intention not to perform or a negative attitude does not rise to the level of repudiation."<sup>47</sup> Without a communication or meaningful action relaying the intentions of the repudiating party, there is no anticipatory repudiation.<sup>48</sup> This case is important, because it identifies the necessity of the second fundamental requirement, the communication. Where the focus is usually on the nature of the content in a communication, *Unique Systems* speaks to those situations in which the intent may be clear, but the communication of the intent is not.

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40. *Id.* at 1167.

41. *Id.* at 1168.

42. *Id.* at 1167.

43. *Id.* at 1168.

44. Arthur Rosett, *Partial, Qualified, and Equivocal Repudiation of Contract*, 81 COLUM. L. REV. 93, 108 (1981).

45. *Id.*

46. *Id.*

47. 622 F.2d 373, 377 (8th Cir. 1980) (applying Minnesota law) (citing *Teeman v. Jurek*, 251 N.W.2d 698 (Minn. 1977)).

48. *Id.* at 376-77.

### III. ANALYSIS

Anticipatory repudiation is a helpful tool for a contracting party when that party is facing a clear intention of non-performance from the other party. It helps the non-repudiating party avoid impending damages, and, in doing so, it mitigates future damages that will be caused by an almost certain breach of the contract. Anticipatory repudiation falls short when it stands as a barrier to healthy communication between contracting parties. Healthy communication is important to business relationships, and, by standing as a barrier, anticipatory repudiation causes businesses to make choices according to an artificial prioritization that primarily considers contracts on a transaction-to-transaction basis, while ignoring valuable business relationships.

#### A. One-Sided Protection

If a situation arises that causes insecurity on the part of one party that a repudiation exists or will shortly occur, section 2-609 of the U.C.C. offers the insecure party the option to take action.<sup>49</sup> Once a party makes a clear communication of repudiation or fails to provide requested adequate assurances to the other party of an agreement, anticipatory repudiation under the U.C.C. offers the non-repudiating party the option to take action.<sup>50</sup>

These options are one-sided. The non-repudiating party has the right to invoke protections, while the repudiating party does not.<sup>51</sup> It might seem at first that the repudiating party has full control over whether or not to make a repudiating communication. The repudiating party similarly seems to have full control over whether to provide adequate assurances when requested. When analyzing the framework of the U.C.C., the options available to each party are relatively evident, but in practice the situation is less clear.

When requesting adequate assurances, there is no specific language an insecure party must incorporate into the written request.<sup>52</sup> Additionally, the insecure party may suspend performance, but it does not need to relay any information relating to the suspension to the repudiating party.<sup>53</sup> Additionally, the insecure party's continued performance, by accepting improper deliveries, does not constitute any acceptance of the current state of the contract dealings.<sup>54</sup>

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49. U.C.C. § 2-609(1) (2013).

50. *Id.* § 2-610.

51. *Id.* § 2-609(1).

52. *See id.* § 2-609.

53. *Id.* § 2-609(1).

54. *Id.* § 2-609(3).



These requirements indicate that the party whose future performance is in question may not know of the gravity of the situation. Without a communication of the consequences of a failure to provide adequate assurances, the alleged repudiating party could perceive the request for adequate assurances as a request for the performance of an obligation outside the scope of the original agreement.

Knowing that the request for adequate assurances is originating under section 2-609 of the U.C.C., the party subject to such a request would be on notice of the consequences of a failure to respond or would at least know the basis for the request, and that party could make an informed response. Without such notice, section 2-609 only provides a one-sided protection to the requesting party.

Combining this with the fact that the insecure party can choose to continue receiving improper deliveries and suspend performance secretly until that party receives assurances, the alleged repudiating party has no standard by which to measure the true position of the insecure party.<sup>55</sup> If a party cannot look to the writings and actions of another party to evaluate its position in relation to that party, it cannot form a basis upon which to make any determinations that would affect that relationship.

Knowing that the insecure party views the situation in such a serious light is an important factor in the decision to provide adequate assurances. Knowing that the insecure party has suspended performance until the alleged repudiating party provides assurances is even more relevant in the decision. Without this information and without a requirement to provide it, the alleged repudiating party has no protection while the insecure party does.

When it comes to circumstances where a party has perceived an overt communication of an intention of non-performance or when the alleged repudiating party has failed to provide adequate assurances, a similar situation arises, in which the repudiating party may not be on notice of the non-repudiating party's perception. Although section 2-611 provides a repudiating party the opportunity to retract its repudiation,<sup>56</sup> there is no requirement for the non-repudiating party to notify the repudiating party that it perceives circumstances which constitute a repudiation of obligations under the agreement.<sup>57</sup>

The non-repudiating party has the option to encourage a retraction of the repudiation and assure the repudiating party that it will await performance, but, even in the case that the non-repudiating party provides such encouragement and assurance, it may secretly pursue remedies for a breach.<sup>58</sup> This means a non-repudiating party can calm the concerns of the

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55. *Id.* § 2-609(1); *Id.* § 2-609(3).

56. *Id.* § 2-611.

57. *See id.*

58. *Id.* § 2-610(b).

repudiating party and effectively indicate that the repudiating party has until the time when performance is due to retract its repudiation, while at the same time the non-repudiating party actually reserves the right to seek remedies at any time prior to the time when performance is due.<sup>59</sup>

The U.C.C. protects the non-repudiating party by allowing it to reserve the right to seek remedies. However, it effectively allows the non-repudiating party to preserve its right to seek remedies through a communication that may or may not be provided in actual good faith.<sup>60</sup> A statement indicating that the non-repudiating party will await performance is inherently designed to create an expectation in the repudiating party. However, allowing the non-repudiating party to seek remedies, while providing the repudiating party with an expectation that the non-repudiating party intends to await performance, creates a situation of uncertainty.

Once again, the repudiating party is in a position where it cannot look to the actions or communications of the non-repudiating party in order to establish some level of expectation after the non-repudiating party perceives a repudiation. There is not a notice requirement when the non-repudiating party perceives a repudiation,<sup>61</sup> and the optional notice available under the provisions does not carry an obligation to adhere to whatever statements the non-repudiating party chooses to make.<sup>62</sup> The repudiating party does not have a standard by which to measure its position in relation to the non-repudiating party, and, while the U.C.C. provides protection to the non-repudiating party,<sup>63</sup> it provides none here to the repudiating party<sup>64</sup> and effectively nullifies the ability to retract the repudiation.

Both in the instance of a request for adequate assurances and in the instance of a perceived repudiation prior to the time at which performance is due, the insecure or non-repudiating party receives a one-sided protection, and the repudiating party (or the alleged repudiating party) is effectively without protection.

## B. Disincentive to Communication

Anticipatory repudiation is a disincentive to communication for both parties to an agreement. The party whose performance may be in question could potentially lose benefits under the agreement if the other party interprets a communication as a repudiation, while the insecure or aggrieved

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59. *Id.*

60. Compare U.C.C. § 1-304 (requiring obligations of good faith for the parties to a contract), with *id.* § 2-610(b) (allowing a non-repudiating party to seek remedies despite notifying a repudiating party that remedies would not be sought).

61. See *id.* § 2-610.

62. *Id.*

63. *Id.*

64. See *id.* § 2-609; see also *id.* § 2-610.

party could lose its ability to seek remedies under the U.C.C. if its communication compels the repudiating party to retract its position.

*1. Disincentive for the Repudiating Party to Communicate*

When faced with a situation that would make performance of a future obligation under an agreement difficult, a party to that agreement has a decision to make. That party needs to determine whether to notify the other party of the difficulty or to withhold the information and deal with the difficulties as they arise. In order to make this determination, a review of the party's consequences in either situation is necessary.

The first option to review is that which involves communicating the potential difficulty to the other party. There are positive outcomes that could result from a communication with the other party. First, the other party could receive the information as a beneficial, good-faith demonstration of the party's intention to work with the other party through any difficulties that might arise. Then, the two parties could work together to identify a solution, or, perhaps, the parties could renegotiate an alternative agreement in good faith. This positive result could be expected from situations involving parties with established relationships or those interested in fostering such relationships.

The alternative result could carry negative consequences. If the other party interprets the communication of impending difficulties regarding the future performance of the potentially breaching party as a repudiation of those obligations, then that party can seek remedies under section 2-610 of the U.C.C.<sup>65</sup> As discussed in the previous section, the party communicating the potential difficulties would effectively invest certain rights in the other party while subjecting itself to a state of insecurity. Because of the lack of a notice requirement when a party perceives a repudiation from the other party, a party facing difficulties also takes the chance of giving the wrong impression to the other party, and, if it does so, it may never know of this interpretation until after the other party has sought remedies.

Although a court will subject a communication of repudiation to scrutiny and the non-repudiating party will not always prevail, the severity of the consequences of a misinterpreted communication are quite extreme. While on one hand the result of a communication could be a mutually beneficial interaction, on the other hand the communication might lead to an obligation to compensate the other party for a breach of contract. Thus, communicating the information is a gamble.

When this information is combined with the holding in *Unique Systems, Inc. v. Zotos International, Inc.*, the decision to withhold communications is

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65. *Id.* § 2-610.

more easily determined.<sup>66</sup> As discussed earlier, “[a] secret intention not to perform or a negative attitude does not rise to the level of repudiation.”<sup>67</sup> Additionally, there is no duty to relay information about potential non-performance.<sup>68</sup> The fact that this secret intention of non-performance is protected, while a communication is not protected, clearly indicates that the interests of a party facing performance difficulties are better served if that party chooses to withhold that information from the other party.

At least in terms of provisions contained in the U.C.C., there is no incentive for a repudiating party to communicate the intention to repudiate. There is not even an incentive to communicate a potential difficulty. While there may be an incentive outside of the U.C.C. to communicate such information, inside the U.C.C. there is none.

## 2. *Disincentive for the Non-Repudiating Party to Communicate*

When it comes to the non-repudiating or insecure party, a similar disincentive exists, and an incentive for communicating misleading information manifests as well. While a non-repudiating party does not expose itself to the same vulnerabilities that a repudiating party does when it communicates a state of affairs to the other party, the non-repudiating party can compromise some rights that perceiving a repudiation may have granted.

As described previously, the anticipatory repudiation framework provides a one-sided protection when the other party communicates a repudiation or when there are sufficient conditions to reasonably create insecurity in regard to the future performance of the other party. When an insecurity manifests, the insecure party has a right to request adequate assurances.<sup>69</sup> A failure to respond appropriately, by the party of whom adequate assurances are requested, can result in a repudiation.<sup>70</sup> This repudiation creates a right in the insecure party to seek remedies.<sup>71</sup> The perception of the other party’s intent to repudiate through the communication of such an intent to the non-repudiating party creates the same right as well.<sup>72</sup>

The non-repudiating party’s disincentive to communicate exists in the knowledge that certain communications can destroy the rights created in this framework. There is no notice requirement for the non-repudiating party under the U.C.C.,<sup>73</sup> and, because of this, the non-repudiating party can calculate the timeliness and content of any communications.

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66. See 622 F.2d 373 (8th Cir. 1980).

67. *Id.* at 377 (applying Minnesota law) (citing *Teeman v. Jurek*, 251 N.W.2d 698 (Minn. 1977)).

68. See U.C.C. § 2-610.

69. *Id.* § 2-609(1).

70. *Id.* § 2-609(4).

71. *Id.* § 2-610(b).

72. *Id.*

73. See *id.* § 2-610.

Section 2-611(1) states that a party can retract a repudiation any time before performance is due as long as the non-repudiating party has not canceled the contract or materially changed its position.<sup>74</sup> To effectively take advantage of this provision, a non-repudiating party can calculate any communications of notice that remedies will be sought to take place after the non-repudiating party's position has materially changed. If the non-repudiating party makes a communication prior to this time, and the repudiating party has an opportunity to retract its repudiation, then the non-repudiating party will lose its right to seek remedies.<sup>75</sup>

Similarly, the non-repudiating or insecure party can calculate the content of its communications, if it chooses to communicate, so as to prevent disclosure of its intentions to seek remedies. For example, when an insecure party requests adequate assurances, it can do so in a way that does not disclose any intentions to seek remedies upon a failure by the other party to provide the requested assurances. Doing otherwise could compel the party whose performance is in question to provide false assurances, destroying the rights of the insecure party to seek remedies.

A non-repudiating party can also calculate its communication to include an intention to await performance from the repudiating party until the time at which the performance is due.<sup>76</sup> By doing this, the non-repudiating party can discourage retractions of a repudiation, while maintaining its own rights to seek remedies at any time prior to the time when the other party's performance of its obligations under the agreement is due.<sup>77</sup>

Although these are communications, they are not the healthy communications that could positively affect the relationship between the parties and lead to the mutual benefit originally contemplated in the agreement. This type of calculated communication is fundamentally the same as the absence of meaningful communications between parties. When the communication of strategic or misleading information manifests in a contractual relationship, the results are effectively the same as the destruction of communication channels.

### *3. Suggestions for Overcoming the Disincentive to Communication*

After identifying some of the problems that might negatively influence communication between the parties of a contract, it seems appropriate to review some of the past recommendations for changes to the U.C.C. In 1991, a task force of the A.B.A. Subcommittee on General Provisions, Sales, Bulk Transfers, and Documents of Title, of the Committee on the Uniform

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74. *Id.* § 2-611(1).

75. *Id.* § 2-611(3).

76. *Id.* § 2-610(b).

77. *Id.*

Commercial Code, prepared a study of potential changes to the provisions of article 2, part 6 of the U.C.C.<sup>78</sup> The task force reviewed recommendations prepared by a study committee and provided feedback and potential amendments to the language of the official text.<sup>79</sup>

The study committee identified the importance of the “adequate assurances” provision in section 2-609 and praised the section's facilitation of dispute resolution.<sup>80</sup> The task force, however, recommended the allowance of oral requests (as opposed to only written requests) for adequate assurances and a definition as to what constitutes “adequate assurances.”<sup>81</sup>

In regard to section 2-610, the study committee recommended various minor changes for clarity but specifically encouraged a higher standard when interpreting a communication to constitute a repudiation of future performance.<sup>82</sup> In the implementation of this change, the study committee predicted that the adequate assurances of section 2-609 would be invoked more commonly.<sup>83</sup> The study committee also recommended a clarification as to what actions, if any, the non-repudiating party could take that would be inconsistent with a repudiation.<sup>84</sup> However, the task force failed to respond to these recommendations, and it failed to offer any other recommendations.<sup>85</sup>

The study committee seems to have been on the right track to a certain degree on both provisions, and the failure of the task force to adopt the recommendations is questionable. While the study committee failed to address issues in section 2-609 about adequate assurances, it identified a potential method to encourage the use of the adequate assurances provision found in section 2-609 by increasing the standard necessary for the identification of a repudiation under section 2-610.<sup>86</sup> If the non-repudiating party has a harder time proving that the communication made by the other party was actually a repudiation, then it would need to verify it through the use of the adequate assurances provision of section 2-609.

Where the study committee's determinations fall short is in how it sought to encourage the use of the adequate assurances provision in section 2-609 by making it more appealing. If the use of the adequate assurances provision is in fact a better way to ensure that communications are actually

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78. Task Force of the A.B.A. Subcomm. on Gen. Provisions, Sales, Bulk Transfers, & Documents of Title, Comm. on the U.C.C., *Article 2, Part 6: Breach, Repudiation and Excuse*, 16 DEL. J. CORP. L. 1157, 1157 (1991).

79. *Id.* at 1203 n.1.

80. *Id.* at 1169–70.

81. *Id.* at 1170–71.

82. *Id.* at 1171–72.

83. *Id.* at 1171.

84. *Id.* at 1172.

85. *Id.* at 1173.

86. *Id.* at 1171–72.

intentions of repudiation, then a mandatory request for adequate assurances would sufficiently attain the same goal. It would also accomplish this goal without the uncertainty presently found in section 2-610.<sup>87</sup>

The task force's recommendation for a definition of adequate assurances is helpful as well,<sup>88</sup> but such an amendment should be accompanied by a requirement that specific language is to be included in each request for adequate assurances. This language should include both the consequences for a failure to provide adequate assurances and a specific citation to the applicable provisions of the U.C.C. In this way, the obligations of both parties in regard to necessary and sufficient communications would not be in question.

A summary of these recommendations for change urged by this Comment are as follows: First, when an insecurity or potential communication of repudiation manifests within a contractual agreement, the insecure, non-repudiating party must request adequate assurances. This request for adequate assurances must include a notice of the consequences for failure to reply and a reference to sections 2-609, 2-610, and 2-611 of the U.C.C. Then, the party whose performance is in question must respond within the specific time frame, and that response must include adequate assurances as defined under section 2-609 of the U.C.C.

These changes would remove the disincentive to communicate under the anticipatory repudiation provisions. The repudiating party would not face the uncertainty as it does currently. If a statement is made that the non-repudiating party interprets as constituting a repudiation, then the non-repudiating party could no longer seek remedies without providing notice. The non-repudiating party would first need to request adequate assurances, and in this stage any misinterpretations could be corrected. In this way, the repudiating party would be able to base its actions on defined expectations, and it would not fear adverse actions as the result of a good-faith communication regarding a difficulty in performance.

Similarly, the non-repudiating party would no longer have the ability or incentive to strategically calculate its own communications. Upon the manifestation of any uncertainty, the non-repudiating party's communication would be required, and its content would be predefined. No additional rights would be created for the non-repudiating party until the result of the request for adequate assurances determined such rights.

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87. *Id.* at 1171.

88. *Id.*

### C. The Importance of Communication in Working Relationships

A consequence of the incentive structure found in any statutory framework is the effect that it has on how different entities interact. As identified above, the anticipatory repudiation framework, as it now stands, disincentivizes communication between parties to a contract when a problem arises that could stand in the way of performance. The basic implication of this effect on business relationships is easily perceived, but, over the last few decades, the importance of communication, and its effect on business relationships specifically, has moved to the forefront of contemporary marketing research.<sup>89</sup> The focus on business relationships in marketing has been termed as “relationship marketing.”<sup>90</sup>

The recognition of relationship marketing led to the differentiation of transactional exchange and relational exchange.<sup>91</sup> Where transactional exchange focuses on the short-term exchange, without any notion of commitment beyond the single transaction, relational exchange involves “long-term commitments . . . and the desire for collaboration.”<sup>92</sup> The perceived benefits of relationship marketing “include less need to advertise to attract new customers, higher levels of repeat purchases, and stability of income flow.”<sup>93</sup> The products of these efforts to establish relationships among business partners have been termed as relational assets.<sup>94</sup> As a result, some of the most valuable assets that a company possesses are difficult to quantify, as they include the relationships with customers and suppliers.<sup>95</sup>

In recent years, the concepts of both relational exchange and transactional exchange have been identified as non-exclusive concepts, but the transactional exchange is basically the starting point and the relational exchange is the added value that results when a company tries to appeal to the needs of its relational assets.<sup>96</sup> Simply put, the more a company tries to appeal to the needs of its customers and suppliers in their interactions, the more valuable those interactions become.

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89. See Roger Bennett, *Relationship Formation and Governance in Consumer Markets: Transactional Analysis Versus the Behaviourist Approach*, 12 J. MARKETING MGMT. 417 (1996).

90. *Id.*

91. Aurélie Lefaix-Durand & Robert Kozak, *Integrating Transactional and Relational Exchange into the Study of Exchange Orientation in Customer Relationships*, 25 J. MARKETING MGMT. 1003, 1004 (2009).

92. Jagdish N. Sheth & Reshma H. Shah, *Till Death Do Us Part . . . but Not Always: Six Antecedents to a Customer's Relational Preference in Buyer-Seller Exchanges*, 32 INDUS. MARKETING MGMT. 627, 628 (2003).

93. Bennett, *supra* note 89, at 418.

94. See Robert F. Lusch, James R. Brown & Matthew O'Brien, *Protecting Relational Assets: A Pre and Post Field Study of a Horizontal Business Combination*, 39 J. ACAD. MARKETING SCI. 175 (2011).

95. *Id.* at 191.

96. Lefaix-Durand & Kozak, *supra* note 91, at 1006.



When applying notions of exchange orientation to interactions, it is possible to break down exchanges into several factors that are important to the development of relational assets.<sup>97</sup> These factors are proximity,<sup>98</sup> interdependence,<sup>99</sup> time orientation,<sup>100</sup> commitment,<sup>101</sup> communication,<sup>102</sup> cooperation,<sup>103</sup> trust,<sup>104</sup> regulation,<sup>105</sup> coordination,<sup>106</sup> and structure.<sup>107</sup> The more that one of these factors is focused on by a company, the more that company is oriented toward relational exchanges.<sup>108</sup>

In other words, if a company focuses on the factors that promote the value of its relational assets, it has adopted a strategy of fostering relational assets, and those assets will grow in value. However, when some of the factors are overlooked or inappropriately focused on, the orientation of the company can become misaligned.<sup>109</sup> For example, if a company strives to foster relationships, but it does not take into consideration the concept of trust, it cannot hope to realize the full extent of the fruits of its efforts regarding the other factors. The concept is very similar to the “weakest link”

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97. *Id.*

98. *Id.* at 1007 (defining proximity as applying to the closeness that firms experience both spatially and culturally; the more that a firm caters to a relational asset in terms of proximity, the greater the added value).

99. *Id.* (defining interdependence as emerging between firms as time goes by and repeated exchanges take place; along with repeated exchanges, irreplaceability of a trade partner increases interdependence, and the more interdependence grows between relational assets, the greater the added value).

100. *Id.* (defining time orientation as a determination of how much a company positions itself to establish long-term relationships with its business partners; the more a company focuses on long-term interactions with a relational asset, the greater the added value).

101. *Id.* at 1007–08 (defining commitment as involving notions of putting the customer first and taking short-term losses when the alternative is sacrificing customer satisfaction; the more a company focuses on commitment, the greater the added value).

102. *Id.* at 1008 (defining communication as the sharing of information that is frequent, reliable, relevant, and timely; the more a company focuses on efforts to promote the sharing of information, the greater the added value).

103. *Id.* (defining cooperation as the voluntary undertaking of actions to achieve similar or complimentary goals to those of a trade partner; the more a company focuses on undertaking similar goals to those of a trade partner, the greater the added value).

104. *Id.* (defining trust as the perceived ability to rely on a trade partner; this stems from a number of other factors, including the values of the company, predictability, and competence; the more a company focuses on a reputation that instills trust, the greater the added value in its transactions with those business relationships).

105. *Id.* at 1008–09 (defining regulation as dealing with the attitudes of a company relating to how it encourages actions in those around it; the more coercive the company, the less likely a trade partner is to respond well; the less coercive and more informal, the greater the added value).

106. *Id.* at 1009 (defining coordination as a measure of how integrated trade partners are; if technological integration makes transactional interactions less complicated, then there is a greater value added to transactions with that relational asset).

107. *Id.* at 1009–10 (defining structure as the idea that firms exist and operate within a network of other firms, which are all interconnected; existing within the same strong network as a relational asset improves the value of that relationship).

108. *Id.* at 1006–07.

109. *Id.* at 1017.

analogy. A company's exchange orientation is relationship-oriented only to the extent of its focus on the least prioritized factor.

In regard to the present discussion regarding anticipatory repudiation, there are two specific consequences identified as a result of interactions under the current U.C.C. framework. The first is a disincentive to communicate, while the second is the breach of a contract. A failure to communicate obviously speaks to the communication factor of exchange orientation, while a breach of contract relates to trust and possibly commitment. Additionally, a request for adequate assurances falls under the regulation factor, as the request is a legal compulsory tool, which is designed and utilized to elicit an action on the part of a trade partner.

In the absence of anticipatory repudiation, the worst case scenario regarding relational assets is a degradation of the trust and commitment factors, and a breach of contract is the worst-case scenario as a result of the interaction. When anticipatory repudiation becomes a factor, then there are further concerns. The degradation of the trust and commitment factors remain, but additional factors suffer as well.

If the insecure party requests adequate assurances, it degrades the regulation parameter, as that party is coercing action from the potentially repudiating party through statutorily defined methods. This action may not always harm the relationship, but, in those instances when it is abused or used excessively, it will.

In any situation involving anticipatory repudiation, the communication factor clearly takes punishment from all sides. As outlined above, both parties have a disincentive to openly communicate. Even those communications that do take place are far from the open sharing of reliable information that enhances relationships.

In effect, when anticipatory repudiation under the U.C.C. applies to a specific trade relationship, the orientation of that relationship inherently becomes misaligned. Fruits of efforts to focus on relationship marketing cannot be fully realized due to inherent disincentives.

#### IV. CONCLUSION

Anticipatory repudiation effectively provides one-sided protection to an insecure or non-repudiating party of a contract, while providing little or no protection to a party whose future performance of an obligation under a contract is in question. It disincentivizes communication between trade partners, and it creates an artificial incentive framework in which a party must make decisions. A party facing difficulty in the performance of its obligations can receive no benefit from a communication while anticipatory repudiation remains applicable. Additionally, it can stand as a barrier to

relationship marketing, as its effect on the factors important to relational exchanges devalues relational assets.

Despite a failure by experts in the field to promote any meaningful changes to anticipatory repudiation under the U.C.C., a mandatory request for adequate assurances would help to resolve the problems found in anticipatory repudiation, which is effectively a barrier to communication.