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This practice note addresses the concepts of anticipatory repudiation and the right to demand adequate assurance of future performance with respect to an agreement for the sale of goods under the Uniform Commercial Code (UCC). The note also discusses, among other things, requirements for repudiation, how a party should proceed in making and responding to a demand for adequate assurance, and available remedies under the UCC.

The UCC emphasizes that actual performance of a sales agreement is an essential part of parties' bargain, and that a continuing sense of reliance and security on timely performance of the promised obligations by the other party is a critical part of that bargain. For example, sellers require protection against delivering goods to financially insecure buyers on credit, and may forego other sales opportunities in order to procure and/or manufacture goods for a buyer. Buyers also need to be safeguarded when they believe a seller's ability to deliver goods has become uncertain, as timely performance may be critical to their own manufacturing needs or necessary to replenish their stock or meet obligations to their customers. The UCC recognizes that it would be an undue hardship to force a party to continue to perform its obligations under the agreement when it has reasonable grounds to believe that the other party will not or cannot perform, and therefore provides such an aggrieved party with certain rights that may allow it to suspend its own performance of the agreement, demand adequate assurance of future performance from the other party, and/or treat the contract as terminated if the reasonable basis for its insecurity is not adequately revolved within a reasonable time.

As the UCC imposes critical rights and obligations regarding anticipatory repudiation and adequate assurance on parties to a sales agreement, if you represent buyers and sellers of goods, it is essential to understand these provisions in order to properly represent and protect your clients that are involved in sales transactions. As sales agreements can be cancelled in the event of an anticipatory repudiation or failure to timely provide adequate assurance, thereby subjecting the repudiating party to damages, it is crucial that such rights are properly exercised and that clients understand the rights and remedies afforded by the UCC.

For further guidance and materials pertaining to the sale of goods, see [Contracts for Goods or Services](#) and [Supply of Goods Resource Kit](#).

Anticipatory Repudiation

Anticipatory repudiation, sometimes referred to as anticipatory breach, occurs when one party to an agreement makes a statement, engages in some action, or experiences an event that indicates to the other party that it will not fulfill its contractual obligations or that it will not be able to perform within the time required under the agreement. The focus is on some overt communication of a party's intention not to perform or an action that renders performance impossible or reflects a clear determination that a party will not continue the performance of the agreement.

When anticipatory repudiation occurs, the other party has the right to demand adequate assurance of performance, rather than simply wait to see what happens and whether the other party eventually performs the agreement.

Requirements for Anticipatory Repudiation

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Anticipatory repudiation requires a party to an agreement to have engaged in some conduct, whether through its communications or action, that substantially impairs the value of the contract to the other party. Such communication or action must demonstrate either that (1) it will not perform as required pursuant to the terms of the agreement, or (2) its performance is not reasonably possible under the circumstances. The repudiation must also substantially impair the value of the contract to the aggrieved party.

Note that the subject performance that is being repudiated need not be rendered impossible. Rather, it is sufficient that a reasonable person would determine that the repudiating party will not or cannot fulfill its obligations. A mere claim by the performing party that it is facing certain challenges, displeased with the terms of the arrangement, or otherwise unsure of its ability to fulfill its obligations when due, however, is not sufficient to constitute an anticipatory repudiation. However, repudiation will automatically result when a party fails to provide timely adequate assurance of future performance after a justifiable request has been made.

Examples of Anticipatory Repudiation

Anticipatory repudiation of a sales agreement can occur in a variety of ways. Examples of anticipatory repudiation include the following:

- An unequivocal statement by a buyer that it will not pay for ordered goods
- A statement made by a seller that it will no longer be producing the goods that the buyer ordered
- A seller's closing of its only production facility (i.e., where the goods that have been ordered by the buyer are only made)
- Credible information regarding a buyer's deteriorating financial condition or material, adverse change in credit rating, but only if it is reasonable to conclude that the buyer's timely performance would be in jeopardy
- An inappropriate demand for adequate assurance (discussed in detailed later in this practice note)

Statements indicating a party's need for more time in contracts where time is not of the essence, or requests for contract modification are not, however, examples of anticipatory repudiation.

Available Remedies for Repudiation

In transactions where a repudiation has taken place with regard to performance that is not yet required, the loss from which repudiation will substantially impair the value of the agreement to the other party, the aggrieved party may (1) await performance by the repudiating party for a commercially reasonable time, or (2) avail itself of any of the remedies for breach of contract offered (as further discussed in the [Damages for Breach of Contract](#) section below), even if the aggrieved party has already notified the repudiating party that it would await performance and has urged retraction of the repudiation. In either scenario, the aggrieved party is also entitled to suspend its own performance for which it has not already received the bargained-for return, but only if such suspension is commercially reasonable under the circumstances. [UCC § 2-610](#).

An aggrieved party, however, cannot wait indefinitely for the other party to perform and allow its damages to accumulate. If a party waits beyond a commercially reasonable period of time to take action when confronted with repudiation, it will be precluded from recovering those damages that could have been avoided had it taken action sooner. You should therefore monitor a client's response to any repudiation and ensure that the client does not refrain from taking permitted action to its detriment. Moreover, clients should be cautioned not to engage in any conduct, inaction or silence (on the part of the aggrieved party) that may be misleading to the repudiating party. Additionally, while the aggrieved party is free to proceed with its available remedies at any time, there may be instances where it has taken some affirmative action that will require it in good faith to notify the other party before it will be pursuing a remedy.

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An aggrieved party may not rely on [UCC § 2-610](#) remedies, however, if it is also in breach of the applicable agreement. Accordingly, if you represent an aggrieved party that believes a repudiation has occurred, verify that the client is not itself in breach of the sales agreement before it exercises any of the UCC remedies.

You should also note that notwithstanding the rights afforded by the UCC, the aggrieved party will still have an implied duty to mitigate its damages resulting from the repudiation. However, some courts have held that parties can contractually agree to waive or limit a party's obligation to mitigate damages in the event of a breach. As such waiver or limitation may result in increased damages that could otherwise have been avoided or reduced through reasonable mitigation efforts, you should confer with the client and determine if such a waiver would be beneficial in light of the transactions contemplated by the subject agreement. If a mitigation waiver is desired by the client, ascertain whether and under what circumstances a waiver would be enforced under the law that will govern the relevant sales agreement. For additional guidance on mitigation issues, see [Mitigation of Damages in Sale of Goods Contracts](#).

Substantial Impairment

As previously noted, an aggrieved party may only rely on the remedies provided under [UCC § 2-610](#) if the other party's repudiation would substantially impair the value of the contract. Substantial impairment can be something that materially affects, among other things:

- The timing of delivery
- The quantity of the goods
- The quality of the goods
- The assortment of the goods

Substantial impairment is a qualitative threshold that will be determined on a case-by-case basis. The UCC notes that the most useful test of substantial value is whether the aggrieved party will sustain a material inconvenience or injustice if it is required to wait and receive tender of the subject goods minus the part or aspect of the agreement that is being repudiated. Courts have compared substantial impairment to the concept of material breach under traditional contract law.

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The UCC recognizes that an agreement for the sale of goods imposes an obligation on each party to fulfill its contractual duties so that the other party will receive the performance as required under the contract. In instances where either party maintains reasonable grounds for insecurity with respect to the other party's performance, the insecure party may demand, in writing, adequate assurance of due performance. If commercially reasonable under the circumstances, the requesting party may also suspend its own performance under the sales agreement for which it has not already received the agreed upon return until such time that it receives the requested assurance(s).

If the recipient of a justified demand for adequate assurance does not provide assurance of its performance within a reasonable time (which amount of time will be based upon the prevailing circumstances but cannot exceed 30 days), there will be a repudiation of the sales contract. [UCC § 2-609](#). However, the aggrieved party should still take action after repudiation, such as providing notice of termination of the agreement, as the repudiating party may still have the ability to retract its repudiation (as discussed in the [Retracting an Anticipatory Repudiation](#) section below). For a form notice that a repudiation is being deemed by the aggrieved party as final, see [Anticipatory Repudiation Final Notice \(Buyer\)](#).

With respect to sales transaction between merchants, the reasonableness of the grounds for insecurity, as well as the adequacy of any assurance that may be offered, will be determined based on commercial standards. A "merchant" is defined by the UCC as any person who deals in goods of the kind or otherwise by its occupation holds itself out as having knowledge or skill peculiar to the goods involved in the transaction, or to whom such

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knowledge or skill may be attributed as a result of the merchant's employment of an agent or broker who holds itself out as having such knowledge or skill. See [UCC §§ 2-609\(2\); 2-104](#).

Thus, the UCC allows the aggrieved party an opportunity to be proactive and take measures to address its concerns that the other party will not perform the sales agreement, rather than wait to see what transpires. If reasonable grounds exist, an aggrieved party may (1) demand adequate assurance of future performance, (2) suspend its own performance under the agreement until such time that it receives the requested assurance, and (3) treat the agreement as breached and repudiated if adequate assurance is not timely provided. You should also note that even in cases where a buyer accepts improper delivery or a seller makes improper payment, such action will not impair the client's right to demand adequate assurance of future performance under the agreement. [UCC § 2-609\(3\)](#).

Under the UCC, a demand for adequate assurance must be made in writing. [UCC § 2-609](#). The writing requirement is liberally construed by courts, and as such if the requesting party can show that the other party had a clear understanding that performance would be suspended until adequate assurance was received, the written requirement would usually be satisfied. See *AMF v. McDonald's Corp.*, [536 F.2d 1167 \(7th Cir. 1976\)](#). Similarly, if the pattern of interaction between merchants demonstrates both parties' clear understanding that performance would be suspended until adequate assurance was received, the written requirement would be satisfied. See [ARB, Inc. v. E-Systems, Inc.](#), [663 F.2d 189 \(D.C. Cir. 1980\)](#). Nevertheless, as there is no benefit in assuming any unnecessary risk, best practices would dictate requesting assurance in writing in all instances.

It should also be noted that the *Restatement (Second) of Contracts § 251* replicates the UCC, and is also based on the principle that parties are entitled to a continuing sense of security with respect to the other party's future performance. While the Second Restatement is not statutory law, courts often adopt its principles with respect to agreements that are not governed by the UCC. In contrast to the UCC, the Restatement also allows for an oral demand for assurance in exigent circumstances. Additionally, many states have expanded the right to demand reasonable assurance regarding performance of non-UCC contracts.

For certain transactions, the parties may want to negotiate and incorporate terms addressing adequate assurances into their sales agreement. For example, in transactions where the seller will be extending significant credit to a buyer, or where the buyer will be relying upon timely and proper shipments of the goods, the parties can specifically address what actions will provide reasonable grounds for the provision of adequate assurance(s), as well as what those assurances will be. However, the UCC warns against the inclusion of terms that provide the aggrieved party with wide powers to cancel or modify the agreement in the event it becomes insecure, as such terms will be construed in light of the good faith requirement inherent in the agreement and, for merchants, the observance of reasonable commercial standards. Thus, while such agreed-upon terms may provide a limited expansion of the protections afforded by the UCC, as well as serve to fix a reasonable time in which assurance must be given and/or define what will constitute an adequate assurance, the use of draconian terms and arbitrary standards will generally not be enforceable.

The Demand Letter Seeking Adequate Assurance

A written demand for adequate assurance typically takes the form of a letter. The letter should explicitly state that a demand for adequate assurance is being made. Simply inquiring about or commenting on the status of the other party's performance is not sufficient. Rather, the letter should also include a sufficiently detailed description of the aggrieved party's cause for concern, as well as a demand for specific and reasonable assurances given the circumstances.

Counsel, however, must ensure that the client's demand for adequate assurance is reasonable. An excessive demand for adequate assurance can, under certain circumstances, be considered itself a repudiation of the sales agreement by the requesting party, so care must be taken to properly tailor the request. A demand for assurances that goes beyond what the subject contract requires is not itself a repudiation and will not alone nullify a clear expression that such party intends to honor its future performance obligations. However, when such a demand is coupled with language that can be reasonably construed to mean that the requesting party does not intend to

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perform its contractual obligations except if the other party satisfies conditions that extend beyond the terms of the agreement, such a demand will be deemed a repudiation.

Accordingly, the demand letter is not an opportunity to rewrite the parties' contract. Generally speaking, the letter should not make demands or requests for adequate assurance that seek additional terms that were not part of the parties' agreement and were never negotiated or agreed upon at the time of contracting, such as deposit obligations or earlier payment deadlines. Examples of reasonable demands may, however, include a request that a buyer issue a letter of credit in response to a seller's reasonable concern about the buyer's financial situation, or a request that a seller arrange for an alternate supplier in response to a buyer's concern that the current supplier is folding its business.

You should therefore make sure that a client requesting adequate assurance does not make demands beyond what it reasonably needs as an assurance. Instead, requests should be sufficient to adequately address and satisfy the requesting party's insecurity respecting the other party's contract performance. An overly burdensome demand may be deemed harassing and considered to be made in bad faith. If a client makes requests for assurances that go beyond the terms of parties' agreement, you should ensure that the language used will not be interpreted to mean that your client does not intend to perform unless such extra-contractual conditions are met.

Additionally, the demand letter should set forth the date by which the requested assurances are required. The UCC provides that the receiving party has a reasonable time not to exceed 30 days to respond to a demand for adequate assurance. [UCC § 2-609](#). Whether a time for taking an action required by the UCC is reasonable will, in turn, depends on the nature, purpose, and circumstances of the action. [UCC § 1-205](#). If the aggrieved party needs assurances sooner than the specified 30 days, this should be included in the demand letter. If the receiving party fails to provide the requisite assurance within the allowable time period, it has effectively repudiated the contract in question.

For form demand letters seeking adequate assurance, see [Letter from Buyer Demanding Adequate Assurances from Seller](#) and [Letter from Seller Demanding Adequate Assurances from Buyer](#).

Reasonable Grounds for Insecurity

It is imperative that an aggrieved party have reasonable grounds for insecurity prior to sending a demand letter seeking adequate assurance. For example, insecurity cannot be based on factors known at the time the parties entered into the agreement, as the parties will be deemed to have assumed such known risks. It can, however, be based on suspected events that end up not transpiring, as long as reliance thereon was reasonable at the time. There must, however, be an objective factual basis for a party's insecurity, rather than a purely subjective fear that the other party will not perform.

The consequences from a party improperly demanding assurance without a reasonable basis for its insecurity can be dire. If an aggrieved party errs in making this determination, makes a demand for assurance, and suspends its performance, the aggrieved party may ultimately be determined to be the party in breach of the agreement. You must therefore make certain that the client has a reasonable basis for its insecurity before it sends a demand for adequate assurance and stops performing its obligations under the sales agreement. Moreover, an aggrieved party should not automatically assume repudiation has occurred unless the other party provides a clear anticipatory repudiation (such as in a clear writing). For example, in instances where a party is attempting to renegotiate parts of the applicable agreement, but does not state a clear and unequivocal repudiation, such action will not provide a sufficient basis for the other party to terminate the agreement or stop its performance on the grounds of anticipatory repudiation. See [Briarwood Farms, Inc. v. Toll Bros., Inc., 2011 U.S. App. LEXIS 25595](#).

Responding to a Demand Letter

Responses to demand letters must also be made in writing, subject to the same exceptions as set forth above (see The Demand Letter Seeking Adequate Assurance under [Demand for Adequate Assurance of Future Performance](#)). Failure to respond on a timely basis is tantamount to a repudiation. If the recipient believes that the sender's basis

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for insecurity is erroneous, it should address any inaccuracies or misplaced concerns in its response, and provide supporting documentation, if any, that supports its position.

When responding to a reasonable demand, however, the assurances provided should be adequate in all respects. For example, if a seller is concerned that a buyer will not fulfill its payment obligations, a buyer's advance payment of all, or a significant portion of, the outstanding balance would, most certainly, be adequate assurance. Some examples of inadequate assurance include a buyer providing a seller with a statement that it intends to pay the agreed upon amount, or a seller providing a buyer with an excuse for a potentially late delivery instead of providing a specific solution to the problem pursuant to the buyer's request.

For form response letters, see [Letter from Buyer Responding to Seller's Demand for Adequate Assurance](#); and [Letter from Seller Responding to Buyer's Demand for Adequate Assurance](#).

Retracting an Anticipatory Repudiation

A repudiating party may retract its repudiation prior to the time that such party's next obligation is due under the sales agreement unless the aggrieved party has either (1) communicated to the repudiating party that it is treating the agreement as cancelled or the repudiation as final; or (2) materially changed its position in reasonable reliance on the repudiation. An example of materially changing one's position is where a buyer, treating a seller's anticipatory repudiation as final, places an order for the same goods with another seller. A retraction will reinstate the rights and obligations of both parties under the contract, with allowances being made to the non-repudiating party to the extent that it has incurred damages. [UCC § 2-611](#).

Retraction may be made by any method that clearly indicates to the aggrieved party the repudiating party's intention to perform the agreement. However, the retraction must include any assurance reasonably demanded by the other party pursuant to [UCC § 2-609](#). While the UCC permits an oral retraction by the repudiating party, best practices would include providing the applicable retraction in writing, which will provide demonstrable evidence that the aggrieved party was notified that a retraction has occurred. However, if the non-repudiating party provided the repudiator with an opportunity to retract a repudiation within a specified time period, the repudiation will automatically become final and binding upon the expiration of such time period, even if the non-repudiating party did not detrimentally rely upon the repudiation.

In light of the fact that under the UCC the ability to retract a repudiation will largely be dependent upon the response and conduct of the aggrieved party, a party that is contemplating repudiation must proceed with caution before taking such action. If the aggrieved party, in response to repudiation, either cancels the agreement or materially changes its position, the ability to retract the repudiation will no longer exist.

Damages for Breach of Contract

Repudiation of a sales agreement will likely entitle the aggrieved party to recover damages as a result of the repudiating party's breach. A seller's remedies in the event of a buyer's breach are set forth in [UCC § 2-611\(2\)](#). The UCC permits the aggrieved seller to:

- Withhold or stop delivery of any untendered portion of a purchase
- Resell the goods and recover damages pursuant to [UCC § 2-706](#)
- Recover damages for non-acceptance of the goods pursuant to [UCC § 2-708](#)
- recover the purchase price of the goods pursuant to [UCC § 2-709](#)—or—
- Cancel the contract

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[UCC § 2-711](#) sets forth a buyer's remedies in the event of a seller's breach. The UCC permits the buyer to cancel the agreement, recover whatever amount was theretofore paid for the goods, and:

- Cover by acquiring substitute goods under [UCC § 2-712](#) and seek damages
- Recover damages for non-delivery pursuant to [UCC § 2-713](#) (subject to a potential duty to mitigate damages)
- Recover the goods under [UCC § 2-502](#) if and as identified in the applicable contract –or–
- Obtain specific performance or replevy the goods pursuant to [UCC § 2-716](#)

For further discussion and guidance on buyers and sellers remedies under the UCC, see [UCC Remedies for Buyer and Seller and Third-Party Rights](#) and [UCC Damages and Remedies](#).

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- [Contract Terms and the UCC](#)
- [Commercial Dispute Avoidance and Management](#)
- [Excuses for Nonperformance: Conditions Following Contract Formation](#)
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- [UCC Damages and Remedies](#)

Annotated Forms

- [Letter from Buyer Demanding Adequate Assurances from Seller](#)
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- [Letter from Seller Demanding Adequate Assurances from Buyer](#)
- [Letter from Seller Responding to Buyer's Demand for Adequate Assurance](#)
- [Anticipatory Repudiation Final Notice \(Buyer\)](#)
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