

4.10 BILATERAL CONTRACTS

M. ANTICIPATORY BREACH (Approved 5/98; Revised 7/10)

1. Definite and Clear Repudiation

If the defendant clearly indicates through words or conduct before the time for performance has arrived, that the defendant would not or could not perform the contract, the plaintiff would be entitled to treat that indication as a breach.¹ To qualify as a breach, the defendant's indication of non-performance must have been definite and clear.

A defendant can take back a previously stated or demonstrated unwillingness or inability to perform if the repudiation of the contract is withdrawn before the plaintiff: *[Choose option: (1) substantially changes position; (b) brings an action for damages.]*²

¹ The anticipatory breach must be a “material breach” to discharge the other party. *Ross Systems v. Linden Dari Delite, Inc.*, 35 N.J. 329 341 (1961). Whether seller's refusal to perform a contract for sale of a retail food business constituted an anticipatory breach is a fact question for the jury. *Semel v. Super*, 85 N.J.L. 101 (Sup. Ct. 1913).

² See, *Neptune Research & Development v. Teknics Industry System*, 235 N.J. Super. 522, 534 (App. Div. 1989) and *Miller and Sons Bakery Co. v. Selikowitz*, 8 N.J. Super. 118, 123 (App. Div. 1950).

Note: Where defendant repudiates the contract after plaintiff has performed, plaintiff may be entitled to restitution of what plaintiff gave, as an alternative remedy. *Shea v. Willard*, 857 N.J Super. 446, 451 (App. Div. 1984).

Note: Where the contract involves the sale of goods, the rights of the parties are governed by N.J.S.A. 12A:2-610. As to an anticipatory breach of installment sales contracts, the court said in *Graulich Caterer, Inc. v. Hans Holterbosch*, 101 N.J. Super. 61 (App. Div.

2. Demand for Adequate Assurances³

If you find that (1) the plaintiff had reasonable grounds to support his/her/its belief that the defendant would breach the contract, (2) the plaintiff demanded assurances from defendant that he/she/it would perform in accordance with the contract, and (3) the defendant failed within a reasonable amount of time to provide adequate assurances that he/she/it would perform in accordance with the contract, then plaintiff may treat defendant's failure to provide adequate assurances as a breach of the contract.

1968): “Replacing considerations of anticipatory repudiation and the material injury with the test of substantial impairment, *N.J.S.* 12A:2-612 adopts a more restrictive seller-oriented approach favoring ‘the continuance of the contract in the absence of an overt cancellation.’ *See* Comment to Sec. 12A:2-612, par. 6; also New Jersey Study Comment, par. 2; *Hawkland supra*, 3, c. (3), p. 116. To allow an aggrieved party to cancel an installment contract, *N.J.S.* 12A:2-612(3) requires (1) the breach be of the whole contract which occurs when the nonconformity of ‘one or more installments substantially impairs the value of the whole contract;’ and (2) that seasonable notification of cancellation has been given if the buyer has accepted a nonconforming installment.” (At p. 75).

Note: Under *N.J.S.A.* 12A:2-508, a defective tender of goods subject to the *Sales Act* (*N.J.S.A.* 12A:2-101 *et seq.*) which may have been an anticipatory breach, as in *Parker v. Pettit*, 43 *N.J.L.* 512 (Sup. Ct. 1881), may be “cured” by reasonable notice of intent to render proper performance.

³ The modern view of anticipatory repudiation includes cases in which “reasonable grounds support the obligee’s *belief* that the obligor will breach the contract.” *Spring Creek Holding Company, Inc. v. Shinnihon U.S.A., Ltd.*, 399 *N.J. Super.* 158, 179 (App. Div.), *certif. denied*, 196 *N.J.* 85 (2008); *see also Magnet Res., Inc. v. Summit MRI, Inc.*, 318 *N.J. Super.* 275, 288 (App. Div. 1998). The questions of whether plaintiff’s asserted grounds for demanding assurance are *reasonable*, and whether defendant’s assurance is *adequate*, are questions ordinarily determined by the fact-finder. *Spring Creek, supra*, at 179-84 (discussing certain factors which may be considered by the fact-finder).