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EIGHT CASES AND SECTION 251

James J. White†

“[A] continuing sense of reliance and security that the promised performance will be forthcoming . . . is an important feature of the bargain”—so states Comment 1 to section 2-609 of the Uniform Commercial Code. At common law, one party to a contract might suffer considerable and justifiable anxiety about the other party’s willingness or ability to perform and yet have no legal basis for cancelling the contract or for procuring additional assurances from the other party. Section 251 of the Restatement (Second) of Contracts¹ is designed to provide a remedy for one party’s reasonable fears that the other party to a contract will not perform. In certain circumstances the section allows one party to demand assurances of performance from the other and if the other fails to provide adequate assurances, to treat that failure as a repudiation of the contract.²

Section 251 of the Restatement (Second) of Contracts is a direct descendant of section 2-609 of the Uniform Commercial Code. Drafters of the *Restatement Second* acknowledge that relationship,³ and a comparison of the two provisions reveals only minor technical differences.⁴ On

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¹ § 251. When a Failure to Give Assurance May Be Treated as a Repudiation

(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.

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

² See *id.* §§ 250-57, Introductory Note.

³ *Id.* § 251, Reporter’s Note.

⁴ There are three technical differences between § 2-609 and § 251. Each could produce different outcomes under the two sections, but it is unclear that any will do so. First, § 2-609 requires that the request for adequate assurances be made in writing, while § 251 imposes no such requirement. Surely there will be an occasional case in which the court will find an effective oral demand, yet in interpreting § 2-609, will reject the demand as not in writing. Even under the UCC, however, two courts have accepted oral demands for assurances, at least in circumstances where there was other evidence that substantiated one party’s assertion that a demand had been made. See *ARB (American Research Bureau), Inc. v. E-Systems, Inc.*, 663 F.2d 189, 196 n.10 (D.C. Cir. 1980); *AMF, Inc. v. McDonald’s Corp.*, 536 F.2d 1167, 1171 (7th Cir. 1976).

The second change offers another equally small chance for differences between § 2-609

their faces these provisions seem to offer a formal procedure to be invoked by a demand for assurances, possibly invoked by a lawyer. Each also gives the demanding party the right to suspend performance while awaiting assurances and, absent appropriate assurances, to treat the contract as repudiated. So construed, the provisions are an uncomplicated device for one party's lawyer to use against another whose willingness or capacity to perform has become uncertain. To test the hypothesis that section 2-609 and section 251 are rather narrow procedures which must be invoked formally, I will consider eight cases decided under section 2-609 of the UCC.⁵ Because the sections are nearly

and § 251. Under both, the party receiving the request for adequate assurances has a "reasonable time" in which to respond. Section 2-609(4), however, limits the reasonable time to a period "not exceeding thirty days." In a rare case, a period longer than 30 days may be regarded as reasonable, but that seems to be an unusual situation. If the classic assurance situation involves one party looking for nothing more than the other party's promise that he intends to go ahead with the contract and that he is capable of doing so, it is difficult to conceive of any situation in which more than 30 days would be needed. If, on the other hand, the assurance takes the form of a guarantee of some other performance by a third party, it is possible that more than 30 days could be allowed.

The final technical difference lies in the articulation of the conditions required before a party may demand assurances. Under § 2-609 he must have "reasonable grounds for insecurity . . . with respect to the performance" of the other party. Under § 251 he needs reasonable grounds "to believe that the obligor will commit a breach by non-performance that would of itself give the obligee a claim for damages for total breach under § 243" It is conceivable, therefore, that one party could have reasonable grounds for insecurity simply because the other party had threatened a breach that would not constitute a material breach, and thus would have grounds under § 2-609 but not under § 251.

To understand § 251 a party must also consider the rather loose-jointed definition of materiality that appears in § 241, and then read it together with § 237 and § 243. In theory, he determines whether the failure is material by reading § 241. He then finds in § 237 that the obligation to perform is conditioned on the absence of uncured material failures, presumably as defined in § 241. Then he concludes under § 243 that he has an action for total breach if the act was material under § 241 so as to fill the condition under § 237. That in turn leads back to § 251 to demonstrate that he has a right to demand adequate assurance.

On paper all of that is much more complicated than § 2-609. In practice one suspects that the two sections will operate in very much the same way. Section 251 instructs the court to determine not whether there has been material breach, but only whether the grounds under consideration give one basis for believing that a material breach will occur. For example, a buyer's economic difficulties which suggest that he will be unable to pay the agreed price will invariably give rise to reasonable grounds for insecurity and will no less indicate the prospect of material breach. Likewise, information suggesting that the seller would be unwilling to perform the contract because, for example, the market price has changed drastically will no less constitute a material breach than it will represent grounds for insecurity. In short, one suspects that the reasonable grounds for insecurity test under § 2-609 will work out to be the same as material breach under § 251, § 243, and § 241.

⁵ For additional cases involving the use of § 2-609, see, *e.g.*, *Continental Grain Co. v. McFarland*, 29 U.C.C. Rep. Serv. 512 (4th Cir. 1980) (demand for assurances must be in writing); *Pittsburg-Des Moines Steel Co. v. Brookhaven Manor Water Co.*, 532 F.2d 572, 581 (7th Cir. 1976) (reasonable grounds for insecurity must be based on events occurring after contract negotiations and must be more than a subjective fear that obligee will not perform); *National Ropes, Inc. v. National Diving Serv., Inc.*, 513 F.2d 53, 61 (5th Cir. 1975) (no reasonable grounds for insecurity; request for accelerated payment not a § 2-609 demand); *Gutor Int'l Ag v. Raymond Packer Co.*, 493 F.2d 938, 943 (1st Cir. 1974) (§ 2-609 does not enable

identical, there is no reason to believe that the outcome of those cases would have been different had they been governed by section 251 rather than by the UCC.

Carefully read, the cases refute the hypothesis. First, they suggest that section 251 is not principally a lawyer's weapon, but that of a judge. Indeed, it may be wrong to think of the section as proposing a

purchaser to withhold payment for accepted goods while awaiting seller's assurances that franchise will not be cancelled); *Lubrication & Maintenance, Inc. v. Union Resources Co.*, 522 F. Supp. 1078, 1081-82 (S.D.N.Y. 1981) (dispute over interpretation of escalation clause and fears over buyer's financial stability entitled seller to demand § 2-609 assurances; buyer's failure to provide assurances is a repudiation); *Louisiana Power & Light Co. v. Allegheny Ludlum Indus.*, 517 F. Supp. 1319, 1322-23 (E.D. La. 1981) (purchaser entitled to demand assurances after seller suggests it may not perform due to rising costs; seller's failure to provide assurances constituted a repudiation); *National Farmers Org. v. Coast Trading Co.*, 488 F. Supp. 944 (D. Ore. 1977), (seller without reasonable grounds for insecurity cannot demand § 2-609 assurances and cannot cancel contract on buyer's failure to provide assurances; seller in breach); *Cole v. Melvin*, 441 F. Supp. 193, 203 (D.S.D. 1977) (grounds for insecurity to be determined according to commercially reasonable standards; here, no grounds for insecurity and thus failure to give assurances not an anticipatory repudiation); *United States v. Humboldt Fir, Inc.*, 426 F. Supp. 292, 298 (N.D. Cal. 1977) (seller's notice that strict performance would be required interpreted as § 2-609 demand; buyer's failure to respond within 30 days is a repudiation), *aff'd*, 625 F.2d 330 (9th Cir. 1980); *Copylease Corp. of Am. v. Memorex Corp.*, 403 F. Supp. 625, 630-31 (S.D.N.Y. 1975) (defendant's statement that contract was not binding was not sufficiently unequivocal to be an anticipatory repudiation; however, statement provided plaintiff with reasonable grounds for insecurity, enabling it to make § 2-609 demand; defendant's failure to give assurances put it in breach); *Kunian v. Development Corp. of America*, 165 Conn. 300, 312-33, 334 A.2d 427, 433 (1973) (defendant-buyer gave assurances that arrearages would be paid; when payment not made, plaintiff demanded guarantee; defendant's failure to provide guarantee within a reasonable time excused plaintiff from further performance); *Harris v. Hine*, 232 Ga. 183, 205 S.E.2d 847 (1974) (market conditions and information that defendant-seller had contracted to sell his cotton crop to others justified buyer's § 2-609 demand; defendant's reply was a written repudiation of contract with plaintiff); *Financial Bldg. Consultants, Inc. v. St. Charles Mfg. Co.*, 145 Ga. App. 768, 771, 244 S.E.2d 877, 879 (1978) (seller entitled to demand § 2-609 assurances when buyer had refused shipment on four of five contracts and was in arrears in payment for fifth); *Nasco, Inc. v. Dahltron Corp.*, 74 Ill. App. 3d 302, 309, 392 N.E.2d 1110, 1116 (1979) (plaintiff had no grounds for insecurity; therefore trial court incorrectly interpreted plaintiff's letter to defendant as a demand for assurances); *Toppert v. Bunge Corp.*, 60 Ill. App. 3d 607, 611-12, 377 N.E.2d 324, 328 (1978) (defendant's failure to pay for delivered goods on separate contract gave plaintiff reasonable grounds for insecurity; plaintiff's demand for payment interpreted as § 2-609 demand; defendant's failure to provide assurances entitled plaintiff to refuse further delivery); *Turntables, Inc. v. Gestetner*, 52 A.D.2d 776, 777, 382 N.Y.S.2d 798, 799 (1976) (buyer in arrears who misrepresented business circumstances gave seller reasonable grounds for insecurity; seller entitled to stop deliveries when buyer failed to give assurances); *Lockwood-Conditionaire Corp. v. Educational Audio-Visual, Inc.*, 3 U.C.C. Rep. Serv. 354 (N.Y. Sup. Ct. 1966) (seller given until summer to provide assurances that air conditioning unit functions effectively); *Northwest Lumber Sales, Inc. v. Continental Forest Prods.*, 261 Or. 480, 489-90, 495 P.2d 744, 749 (1972) (contract incorporating trade-association rule by reference makes § 2-609 demand mandatory before seller can cancel contract); *Tennell v. Esteve Cotton Co.*, 546 S.W.2d 346, 354 n.4 (Tex. Civ. App. 1976) (buyer's assignment of contract without notice to seller not a repudiation; seller could have used § 2-609); *Ellis Mfg. Co. v. Brant*, 480 S.W.2d 301, 303-04 (Tex. Civ. App. 1972) (no reasonable grounds for insecurity and no right to use § 2-609 demand when contract conditions for payment have not yet been met).

new procedure and creating a legal right; rather, it may be correct to view section 251 as giving powerful and new legal meaning to old acts. The cases reveal section 251's value as a tool for judicial modification of the law in the best common-law tradition. In a moment of extravagance, one might read my eight cases to say that section 251 will substantially reshape the landscape of repudiation and material breach. It is conceivable that section 251 will change the ancient rule that a verbal repudiation must be unequivocal and that the section will abolish the need for messy speculation about which breaches are material. Think ahead to the twenty-first century when we are all dead and the *Restatement Third* appears. It is possible that the cases under section 251 will have so modified the law that sections 241 and 250 will merge and read:

One has committed a material breach or repudiation when his acts or other circumstances make it appear likely that he is either incapable of performing or unwilling to do so.

I

THE CASES

Because the courts' use of section 2-609 differs according to the kind of case presented, I have divided my eight cases into three groups: (1) those in which one party appears incapable of performing; (2) those in which the breaching party appears capable of performing but is unwilling to do so; and (3) those in which there appears to be a good-faith dispute and in which neither party is incapable or unwilling. Conceding that these divisions are arbitrary and that in the darkness of the forest one may not be able to tell one species from another, I think it is still useful to make the division. My subsidiary hypothesis is that factors not logically related to section 2-609 have shaped the court's use of section 2-609. Put another way, the courts have used section 2-609 as a tool for achieving results determined *a priori* to be just, rather than as a tool for defining a just outcome.

A. *One Party Apparently Incapable*

One of the troublesome situations to which section 251 should minister arises when one party gives progressive signs that he will be incapable of performing. Often these signs are accompanied by earnest assurances of the party's willingness and capability. Here one might expect the other party to invoke section 251 and thus to bring matters to a head. Three recent UCC cases—*AMF, Inc. v. McDonald's Corp.*,⁶ *Erwin Weller Co. v. Talon, Inc.*,⁷ and *ARB (American Research Bureau), Inc. v. E-*

⁶ 536 F.2d 1167 (7th Cir. 1976).

⁷ 295 N.W.2d 172 (S.D. 1980).

*Systems, Inc.*⁸—illustrate the courts' use of section 2-609 in such cases. In *AMF* and *ARB*, solvent and well-intentioned sellers were simply incapable of producing the product for which they contracted. In *Weller*, the buyer had financial difficulties.

In *AMF*, the seller agreed to produce a prototype computerized cash register and twenty-three production models. The cash registers would have been used in various McDonald's fast-food restaurants to enable counter personnel to work faster, to provide daily reports for accounting and bookkeeping, and to add, compute, and receive cash. McDonald's installed the initial machine in its busiest restaurant, located in Elk Grove, Illinois. Reading between the lines, one surmises that the Elk Grove emporium was McDonald's crown jewel, the Maxim's of the fast food industry. The contract provided that AMF would have the first unit available in February of 1969 and would install the remaining units before July 1, 1969.

Ultimately, performance of this obligation was postponed six months and then suspended. Meanwhile, at Elk Grove the prototype was not performing well. There were frequent service calls by AMF and others; it had numerous breakdowns and other difficulties. In April of 1969, one year after it was installed, McDonald's removed the prototype. A month earlier, the parties had met to negotiate performance and reliability standards that would have specified "the number of failures permitted at various degrees of seriousness, total permitted downtime, maximum service hours and cost."⁹ Pending agreement on those terms, McDonald's asked that the production of the twenty-three units be suspended, and AMF agreed to the suspension. The parties met again in May and July of 1969, but they never agreed upon performance and reliability standards.

In April 1972, AMF sued for breach of contract to purchase the twenty-three production models. In July of the same year, McDonald's sued to recover \$20,000 paid for the prototype and for losses due to its failure to perform satisfactorily. The court denied both claims, concluding that McDonald's had a right to cancel the contract because of the application of section 2-609. In particular, the court determined that McDonald's had reasonable grounds for insecurity because of the continuing unsatisfactory performance of the Elk Grove machine, the postponement of delivery dates, and the lack of progress at the AMF manufacturing plant where the machines were to be produced.

The court concluded that McDonald's complied with section 2-609 although there was never any written demand for assurance. It excused the statutory requirement for a writing because of specific recognition in

⁸ 663 F.2d 189 (D.C. Cir. 1980).

⁹ 536 F.2d at 1169.

two AMF memoranda that McDonald's had suspended performance until it received assurance. The court concluded that when AMF did not furnish adequate assurance in the meeting of May 1969, it had repudiated the contract.

Superficially, the AMF case is a conventional application of section 2-609: demand for assurance, lack of assurance, and repudiation. On reflection, however, it is not quite as conventional as it might seem. First, the court brushed aside section 2-609's explicit requirement that the demand be written. Second, nothing in the opinion indicates that there was even a formal oral demand.¹⁰ In effect, the court applied section 2-609 to one party's routine negotiating behavior and gave it significant legal consequence—namely, repudiation by the other.

Compare *AMF* with *ARB, Inc. v. E-Systems*¹¹ and *Weller Co. v. Talon, Inc.*¹² *ARB* was a competitor of A. C. Neilson of the "Neilson ratings." E-Systems had agreed to manufacture a device that would be attached to television sets in consumers' homes to convey information to ARB about the viewing habits of the household that owned the television set. The parties had signed a fifty-three page contract that specified various items to be delivered at certain times. Initial testing showed that the items delivered late in 1973 did not work properly. During the first half of 1974, E-Systems delivered additional models; these too proved "largely unsuccessful."¹³ E-Systems did not deny the lack of success; rather, it attributed the difficulties to features of the monitoring system for which it was not responsible. In the summer of 1974, ARB stopped making payments, and E-Systems argued that cessation of payments constituted a breach of contract.

The master, the state trial court, and the court of appeals concluded that E-Systems had breached its warranties and violated the contract. The court of appeals concluded that ARB's request for better performance when the pre-production models proved "inadequate" was a demand under section 2-609 and that it was entitled to cease paying once it became apparent that E-Systems's assurances (that models offered in 1974 would be conforming) were not accurate. In a footnote, the court concluded that

[t]here is no need to pinpoint the particular writing in which the demand for assurances under § 2-609 was made, where, as here, the pattern of interaction—demand for assurances, assurances given,

¹⁰ Apparently something occurred at a March 1969 meeting between McDonald's and AMF personnel that occasioned two AMF memoranda acknowledging McDonald's suspension of performance pending assurances. Yet all that the opinion tells us about the content of the meeting is that AMF and McDonald's agreed to formulate performance and reliability standards and to hold up production pending mutual agreement on these standards. *Id.*

¹¹ 663 F.2d 189 (D.C. Cir. 1980).

¹² 295 N.W.2d 172 (S.D. 1980).

¹³ 663 F.2d at 191.

performance still non-conforming—demonstrates both parties' clear understanding that suspension of buyer's performance was the alternative to satisfactory performance by seller.¹⁴

As in *AMF v. McDonald's*, the seller could not produce a conforming product. Note how differently, however, the court in *ARB* used section 2-609. This is not like the *AMF* scenario of demand and no assurance; it is a case of assurances given and given repeatedly. As the quoted footnote indicates, it was the failure to comply with the assurances that gave the right to cancel. As in *AMF*, the court found no need for formality in the demand. It is unclear whether the demand was in writing or was oral, but the court stated that it was not necessary even to identify the particular communication constituting the demand for assurances.

*Erwin Weller Co. v. Talon, Inc.*¹⁵ involved a buyer who was apparently unable to perform because of financial difficulties. Weller agreed to manufacture ice scrapers and snow brushes for Talon and to ship the products directly to Talon's customers. The customers were to pay Talon within sixty days of the shipment, and Talon was to pay Weller thirty days after it had received payment from its own customers. After Weller had shipped goods calling for payment of \$47,000, it began to have some concern about Talon's financial health. It made inquiries about Talon's credit standing with a national credit reporting agency and made a series of phone calls to Talon's president. When these calls were never returned, Weller "demanded assurances of performance by Talon."¹⁶ When no assurances were delivered, Weller suspended shipment to Talon's customers for ten days. Apparently in response to that suspension, Talon agreed to amend the agreement and to give Weller a security interest in its accounts receivable. There was a period of performance under the amended agreement, but ultimately Weller stopped performance at a time when Talon owed \$74,094.51.

Weller sued to recover that amount, and Talon counterclaimed on the ground that Weller had interfered with its business by improperly making contact with its customers. Moreover, Talon argued that the amended agreement was invalid because it had been forced to sign "under duress."¹⁷ A jury decided against Weller on its basic claim for \$74,000 and against Talon on its counterclaim. The Supreme Court of South Dakota reversed the jury verdict and ruled that the court should have entered a directed verdict for Weller on its \$74,000 claim. The court's use of section 2-609 is informative:

¹⁴ *Id.* at 196 n.10.

¹⁵ 295 N.W.2d 172 (S.D. 1980).

¹⁶ *Id.* at 173. The opinion does not indicate whether Weller's demand was written or oral nor the exact date on which it was made. Nor is it possible to tell from the opinion whether the court has simply omitted the details or whether it is interpreting routine negotiating behavior as meeting the requirements of § 2-609.

¹⁷ *Id.* at 174.

The growing amount of credit extended to Talon by Weller under the parties' January 1977 agreement and the failure of Talon's president to respond to Weller's attempts to discuss the matter with him gave Weller reasonable grounds for insecurity with respect to future performance by Talon. . . . We conclude that Weller's exercise of its statutory rights belies Talon's claims of duress.¹⁸

Weller is like *AMF* and *ARB* in the sense that the court failed to point to any specific communication or statement as a formal invocation of section 2-609. The court apparently relied on the failure to perform after the assurances were demanded and given to find that Talon had breached the contract. In that sense *Weller* is similar to *ARB*. The court did not, however, specifically articulate that use of section 2-609; it used the section as a response to Talon's argument about duress. At common law, Talon's argument might have been that the modified agreement was invalid for lack of consideration. Here, the court used section 2-609 to respond to that argument.

B. *Obligor Unwilling to Perform*

A second case clearly envisioned by the drafters of section 2-609 and section 251 is one in which the obligor is capable of performing but unwilling to do so.¹⁹ Here one envisions a seller who is dragging his feet because he now realizes that he can get a higher price elsewhere for his goods or services, or a buyer who perceives that he can purchase for a lower price. Except perhaps to a heartless economist, the obligor's claims here are less appealing than those in the preceding situations. By hypothesis this obligor has the capacity to perform, but sheer love of money motivates him to avoid his contract.

One might consider this the most frequent scenario for the use of sections 2-609 and 251; the obligee sees the market changing radically, receives some signals from the obligor that he will not perform, and thus asks for assurances. Strangely, I have found only two decisions that follow this scenario.²⁰ Several cases in which the obligor proves to be un-

¹⁸ *Id.*

¹⁹ RESTATEMENT (SECOND) OF CONTRACTS § 251, Comment c (1979); UNIFORM COMMERCIAL CODE § 2-609, Official Comment 1.

²⁰ Among the eight cases discussed here, *Cherwell-Ralli, Inc. v. Rytman Grain Co.*, 180 Conn. 714, 433 A.2d 984 (1980), comes closest to the envisioned scenario. However, the court there found that the buyer did not have reasonable grounds for insecurity, a precondition to a § 2-609 demand for assurances. The court's conclusion appears justified because the buyer's insecurity was based on its own delay in paying for delivered goods and on the unverified remarks of a truck driver, as well as on changing market conditions that made its contract price well below market level.

There are, however, other cases in which § 2-609 serves its anticipated function as an aid to a party in good faith. *See, e.g., Louisiana Power & Light Co. v. Allegheny Ludlum Indus.*, 517 F. Supp. 1319 (E.D. La. 1981) (contract for condenser tubing for use in 3 LP & L nuclear plants; due to rising costs, Allegheny requests additional compensation; when LP & L refuses Allegheny writes suggesting it may not perform, LP & L's agent sends § 2-609 letter; Alle-

willing fall into two other categories. First are those in which neither party invokes section 2-609, but in which the court draws important inferences from one party's failure to use the section. Second are cases in which the one seeking to escape the contract asserts section 2-609 in an ingenious way to facilitate his own escape.

No party is obliged to invoke section 2-609, but an obligor's failure to use the section may allow the court to infer that the obligor's equivocal acts constitute repudiation. In *Harlow & Jones, Inc. v. Advance Steel Co.*,²¹ the court drew just such an inference. In *Harlow & Jones*, the seller, a middleman who had arranged the shipment, sued the buyer to recover damages for breach of an agreement to purchase 1,000 tons of European steel. The buyer argued that the shipment was late, that the tender was nonconforming, and therefore that its refusal to accept the late steel was excused. Rejecting that argument, the court allowed the seller to recover \$108,561.62.

The buyer in *Harlow & Jones* had accepted the first two shipments, but refused to accept the final shipment that was shipped in mid-November and arrived in Detroit on November 27, 1974. It based its rejection on late delivery. The seller argued that the delivery was not late because the contract term, "September-October shipment," contemplated a delivery as late as November 30. Although the goods were not shipped until November, they arrived before the November 30th date and, the seller argued, the contract was not breached.

The court found that the buyer's statement in an October 29 letter that it intended to reject the third shipment because of "late delivery" constituted a repudiation of the contract. Despite the court's statement that there was "no real reason to doubt [the buyer's] good faith in concluding by October 29, 1974, that the steel in question would not . . . be delivered until December . . .,"²² one suspects that the court did doubt the buyer's good faith. In any event, the court made clever use of section 2-609 in reaching its conclusion: "Had [defendant] taken the course described by Sec. 2-609, [seller] would have had the opportunity to effect a timely delivery and so cure any delay in shipment. In light of this available remedy, [buyer's] outright rejection of the contract on October 29 . . . was unjustified."²³

Section 2-609 appears to have had the same impact in *National Farmers Organization v. Bartlett & Co., Grain*.²⁴ In that case, Bartlett had

gheny's failure to reply justifies LP & L's conclusion that Allegheny has repudiated the contract); *Harris v. Hine*, 232 Ga. 183, 205 S.E.2d 847 (1974) (contract for sale of cotton; after contract is signed, shortage develops and cotton prices double; plaintiff-buyer sends § 2-609 letter, defendant-seller replies with written repudiation).

²¹ 424 F. Supp. 770 (E.D. Mich. 1976).

²² *Id.* at 777.

²³ *Id.* at 778.

²⁴ 560 F.2d 1350 (8th Cir. 1977).

entered into forty-five contracts for the purchase of grain from NFO. The parties fully performed thirty-one of these contracts; the dispute involved the remaining fourteen. The fourteen contracts had been formed between August and December of 1972; with one exception, the contracts called for delivery in December 1972 or in 1973. From the time of the first contract (August 5, 1972) to that of the last (December 4, 1972), the price per bushel irregularly but persistently increased from \$1.80 to \$2.34. Beginning in December 1972, and continuing throughout January 1973, the buyer was "retaining some of the purchase price of grain actually delivered as protection against realized or potential loss caused by failure on the [seller's] part to perform all contracts not yet fully performed."²⁵ On several occasions, the seller made oral demands for payment for the grain already delivered and on January 26, 1973, the seller notified the buyer that it was not going to deliver any grain on the remaining fourteen contracts until the buyer paid a substantial amount of the money due on deliveries already made. Seller never delivered any grain under the remaining fourteen contracts, and on January 30 the buyer sent the seller a telegram stating that it was "bringing all outstanding contracts . . . to current market price."²⁶ At that point the buyer sent the seller the amount due on the performed contracts, less the difference between the market and contract price on the contracts not yet performed.

The seller sued for the \$18,000 that the buyer had set off on the unperformed contracts. Buyer argued that seller's January 26 statement was a repudiation; the court agreed. As in *Harlow & Jones*,²⁷ the court pointed out that the seller had failed to use section 2-609: "Plainly, the seller could have availed itself of a section 2-609 remedy on January 26. Equally plainly, however, it did not do so."²⁸

Doubtless the changing market conditions in these cases gave the court ample extrinsic evidence of the steel purchasers' and the grain sellers' interests in getting out of their contracts;²⁹ yet in both, the statements fell well short of unjustified, unequivocal refusals to perform. In

²⁵ *Id.* at 1353.

²⁶ *Id.*

²⁷ 424 F. Supp. 770 (E.D. Mich. 1976).

²⁸ 560 F.2d at 1355.

²⁹ In *National Farmers Org. v. Bartlett and Co., Grain*, evidence of a rising grain market appears in the 30% increase in contract prices from August to December 1972 and by more than a \$45,000 difference between market and contract price. *Id.* at 1354.

In *Harlow & Jones, Inc. v. Advance Steel Co.*, the court briefly alluded to the volatile steel market in the summer of 1974. 424 F. Supp. 770, 773 (E.D. Mich. 1976). Price controls on steel were lifted at the end of April 1974. By mid-year, prices for domestic cold-rolled steel had risen 30% over December 1973 levels. 142 STANDARD & POOR'S INDUSTRY SURVEYS, STEEL-COAL CURRENT ANALYSIS S36 (July 25, 1974). European and Japanese steel prices compared favorably with domestic prices and imports rose sharply. *Id.* During the third and fourth quarters of 1974, however, demand fell and domestic prices leveled off. 143 STANDARD & POOR'S INDUSTRY SURVEYS, STEEL-COAL CURRENT ANALYSIS S36 (Mar. 13, 1975). This

labeling these statements as repudiations, are the courts proposing a new definition of repudiation? If one asserts an arguably justifiable right to cancel a contract in a situation in which a willing obligor would seek assurances, is the assertion of the right to cancel *ipso facto* a repudiation? So it seems.

Saint Peter does not stand at the gate to turn aside the sinners from section 2-609 or section 251. Thus the way lies open also for weasels and welschers to employ these provisions. For example, one party might seize upon a defect in his obligor's performance, insist upon assurances that he knows will not be forthcoming, and assert that he is free to cancel the contract. It is also possible for one who receives a demand for assurances to manipulate the sections. For example, such a person might offer a promise of continued performance or a guarantee by a third party in circumstances in which he knows that such promise or guarantee might appear to be, but in fact is not, a reasonable assurance. Like any useful tool, the demand for assurances can be put to inappropriate uses.

In *Teeman v. Jurek*,³⁰ for example, one party apparently made such an attempt to manipulate section 2-609. Teeman had contracts to sell 48,000 bushels of corn to Jurek in three installments. Jurek was a middleman who intended to resell the corn to GTA, a grain terminal in Superior, Wisconsin. After delivery of one installment, Teeman contracted to sell soybeans to Jurek, and when a dispute arose over the performance of the corn contract, Jurek withheld \$8,544.20 on the soybean contract. Apparently, trade practice allowed reduction of prices if corn was damaged, there was foreign material in the corn, or the corn weighed less than fifty-four pounds per bushel. In the first delivery there were modest reductions in the price because of claimed weight shortage and because of grading reductions. The grading deduction involved \$135-\$140 and the weight shortage involved \$75-\$80 on a shipment priced in excess of \$13,000.³¹ When Teeman complained, Jurek's buyer gave up the weight reductions but insisted on maintaining the grading reductions. Apparently because of the weight dispute some of the weights were cross-checked at scales of third parties.

In August Teeman commenced withholding delivery of corn, and in September he wrote a letter to Jurek's buyer, GTA, with a copy to Jurek, which read as follows:

In my previous letter to you on August 8th, I stated that I would not deliver any more corn to Superior and take the losses I have taken on every load that had a check weight on it. This still stands with me, if there is not going to be any other adjustments than what has been

might explain why a purchaser eager to contract for imported cold-rolled steel in July 1974 would reconsider his options in October.

³⁰ 312 Minn. 292, 251 N.W.2d 698 (1977).

³¹ *Id.* at 294, 251 N.W.2d at 699.

made, there is not going to be any more corn. In fact the 18,000 bu. is now gone and there is also another contract for 20,000 bu. for February 1974 delivery that will not be delivered either under the conditions I have experienced with delivery of corn to Superior up to this time.³²

Shortly after he sent the letter, Teeman sold his corn to another buyer. On the 18,000 bu. delivery, Jurek had to pay his buyer 71 cents per bushel, the difference between the market price of \$2.20 at the end of August 1973 and the contract price of \$1.49 per bushel. On the 20,000 bu. of corn to be delivered in February 1974, he was able to settle for a difference of 20 cents per bushel. One can assume that Teeman enjoyed a substantial profit over his contract price by selling on the open market in the fall of 1973.

At trial Teeman argued that he had a right to demand assurances under section 2-609, that he had done so and that he was free to cancel the contract for failure to receive them. The court dealt with that contention as follows:

To be sure, he complained about short weight and grading discounts, but whatever the merit of those complaints the evidence more than sufficiently shows that he received adequate assurance that his complaints would be remedied. He was promised reimbursement for the grading discounts and was given the option of directing future deliveries at another elevator. Moreover, nothing can be found in the transcript of evidence to indicate that Teeman ever in writing demanded adequate assurance of due performance from Jurek.³³

The court easily could have interpreted Teeman's September 14, 1973, letter as a written demand for assurances from Jurek. Or, like the *AMF* court it could have found an adequate demand in his repeated oral requests. The court refused to do either. One senses a skepticism of the sincerity of Teeman's grading and weight complaints in the court's opinion. Sellers in rapidly rising markets who carp about small matters deserve such skepticism. Nonetheless, the case demonstrates an unsuccessful use of section 2-609 by one who wishes to escape a contract for ulterior reasons. If the facts are as one suspects, the Minnesota court was correct in rejecting the application of the section in *Teeman*. Future courts will have to be vigilant to protect against such inappropriate uses of sections 2-609 and 251.³⁴

³² *Id.* at 295, 251 N.W.2d at 700.

³³ *Id.* at 297, 251 N.W.2d at 701.

³⁴ Of course, there is an important premise behind this entire argument that should be articulated: a party should not be excused from a contract because of the combination of a demand for assurances and insubstantial defaults when his true motivation for avoidance of the contract lies elsewhere. Here, we surmise that Teeman wanted out of the contract, not because of the grading or weighing dispute, but because he knew he could sell his corn for 50% more on the open market. Some might argue that the court has no business analyzing

C. *Good-Faith Disputes*

In the first two subsets, I have hypothesized either that the one party was incapable of performing the contract or that he was unwilling to perform. This subset comprises cases in which each party is proceeding in good faith and each is capable of performing his part of the contract. A dispute arises, nonetheless, because of a good-faith disagreement about the quality of the obligor's performance or about the meaning of the contract. At the outset I confess the artificiality of my subdivisions. Invariably the lawyer who represents the party who is incapable or unwilling will paint his client as a willing, capable, but aggrieved party.

Where there is a good-faith dispute between the parties and there are plausible arguments on both sides of the dispute, neither or both of the parties will have reasonable grounds for insecurity. In such cases, sections 2-609 and 251 do little to advance one's analysis about which party should be held in default.

Although one cannot be certain, it appears that *Diskmakers, Inc. v. DeWitt Equipment Corp.*³⁵ is a case involving a good-faith dispute on both sides. Early in 1974 there was a general shortage of polyvinyl chloride, the plastic used to manufacture phonograph records. In February 1974 Diskmakers, a phonographic record manufacturer, agreed to purchase two million pounds of PVC from a group of brokers. The plastic was offered in the form of "regrind material," a granular substance made from record-making scraps. Such material may be reused, but it must be free from contamination. Only after Diskmakers signed the contract did it learn that the seller was DeWitt Equipment Corp. In his initial

the motivation of the party who seeks to use § 2-609, but should look only at the objective behavior of that party to determine whether there is default or material breach.

Although I have found no cases in which the parties have done the kind of clever manipulation of the section that seems possible, perhaps a word on that is in order. Assume in *Erwin Weller Co. v. Talon, Inc.*, 295 N.W.2d 172 (S.D. 1980), *see* notes 15-18 and accompanying text *supra*, where the seller feared that his buyer was having financial difficulty, that seller had written a letter asking for adequate assurance of performance and stating that he was uncertain about the buyer's financial situation. If that letter were brought to the buyer's lawyer, how could he respond? Is a letter that simply states that "we hereby assure you that we will perform the contract and have adequate resources to do so" an adequate assurance? It might be, at least if the buyer had had no prior cash flow problems. *See* U.C.C. § 2-609, Comment 4. Note, however, that if the seller now concludes that the buyer is insolvent and cannot perform, and elects his option to cancel the contract, he is worse off than if he had not asked for assurances. He is like the child who has asked and is denied permission to go to the candy store but then decides to go. His punishment will be more severe than it would have been had he gone without asking permission. To avoid manipulation of the response to a § 2-609 demand, therefore, the seller's lawyer must be careful to specify the kind of reasonable assurances that he will accept. He needs to tread the narrow line in such cases between asking for unreasonable assurances of the kind that need not be responded to at all, and asking for too general a response of the kind that will get no more than a promise that fulfills § 2-609 but leaves his reasonable expectations unfulfilled.

³⁵ 555 F.2d 1177 (3d Cir. 1977).

conversation with Diskmakers, the president of DeWitt expressed some doubt as to whether his material would satisfy the contract specifications. After a number of telephone conversations, DeWitt agreed to make inquiries of his supplier, who was also a broker, to determine whether or not the material would suit Diskmakers' needs.

Diskmakers subsequently assigned the contract to another record-maker³⁶ and determined to provide a revocable letter of credit with terms that promised payment to DeWitt only if the product had been available for inspection and testing in New Jersey. The assignee defaulted on payment and the assignee failed to accept delivery four days after receipt of notice. The original contract provided merely for "a letter of credit." Upon receipt of the revocable and highly conditional letter, DeWitt declared that Diskmakers had breached the contract and demanded payment of liquidated damages.

At trial DeWitt received a summary judgment on the ground that Diskmakers had breached the contract by offering a qualified and revocable letter of credit when the term "letter of credit" would have called for an irrevocable letter under section 2-325(3). Diskmakers argued that its conversations with DeWitt led it to doubt that DeWitt could provide appropriate material. It argued that this doubt created a right to suspend performance under section 2-609. If it was entitled to suspend all performance, *a fortiori* it was entitled to offer more limited performance than the contract called for, namely a revocable instead of an irrevocable letter of credit. The Third Circuit reversed the lower court decision for DeWitt and remanded for further consideration at the district court level.

Except for the light that it might throw upon the use of section 2-609 in such a circumstance, the *Diskmakers* case is quite unremarkable. If we assume that each party was sparring with the other in a wary but good-faith effort to get what it wanted out of the contract, we see that section 2-609 does little to resolve matters. If a party has reasonable grounds for insecurity, he may suspend his performance. If he does not have such grounds, his suspension will likely constitute an anticipatory repudiation. Presumably if each party is at all times willing and able to perform the contract, then there are no reasonable grounds for insecurity. Here Diskmakers seemed legitimately concerned about DeWitt's willingness to perform, given that it offered a revocable and not an irrevocable letter of credit. How does section 2-609 help? Conceivably each party could have asked for assurances from the other, each could have granted assurances, yet neither's position would have changed. The same is true where the parties have a legitimate disagreement about the meaning of the specifications or other terms in the contract. If each has

³⁶ A footnote indicates that the contract was eventually reassigned to Diskmakers but does not indicate when the reassignment occurred. *Id.* at 1178 n.1.

a plausible and good-faith interpretation that favors his position, how does section 2-609 help to resolve that dispute? The section's impotence in good-faith disputes is nicely illustrated by *Cherwell-Ralli, Inc. v. Rytman Grain Co.*³⁷ There a buyer of grain, Rytman, had become concerned that the seller, Cherwell-Ralli, might not complete performance because the market price of the grain had risen significantly above the contract price. In a telephone conversation, Cherwell-Ralli's president assured Rytman's president that deliveries would continue if Rytman would pay for the goods already delivered. Thereupon, Rytman sent Cherwell-Ralli a check for \$9,824.60 to cover shipments already made. Several days later, Rytman stopped payment when he was told by a truck driver not employed by Cherwell-Ralli that the shipment would be his last load. The trial court, affirmed by the Connecticut Supreme Court, concluded that Rytman, not Cherwell-Ralli, breached the contract. It found that Rytman had no reasonable grounds for insecurity and that Rytman had breached the contract by stopping payment and refusing to pay for goods already delivered.

If, as it seems, Rytman truly believed that Cherwell-Ralli was not going to perform, yet Cherwell-Ralli was willing to perform but had an understandable wish to be paid, we have a classic case of capable parties involved in a good-faith dispute. Section 2-609 does nothing to eliminate Rytman's honest but misplaced anxiety. Having demanded assurances and stopped payment, he is left in exactly the same position as if he had merely stopped payment.

This is a body of repudiation cases with tangles that sections 2-609 and 251 will not unsnarl. In these cases the courts will continue to search unassisted to determine whether a given act was a repudiation. Each party will have to bear continued uncertainty about whether the other party's act is sufficiently egregious to allow him to suspend performance. With these cases we are back in the nineteenth-century common law of contract.

II

ANALYSIS AND CONCLUSION

To summarize the learning of these eight cases and to analyze their meaning for section 251 of the *Restatement Second*, let us start with the most obvious and uncontroversial proposition. All who have given at least momentary consideration to the cases and the language of section 2-609 and section 251 will agree that those sections cannot eliminate the uncertainty over which party breached the contract when there is a good-faith dispute. Both *Diskmakers* and *Cherwell-Ralli* illustrate the problems. In the former case each party had reason to doubt the other's

³⁷ 180 Conn. 714, 433 A.2d 984 (1980).

willingness or ability. When each took progressively stronger action to bring the dispute to an end, he did so at his peril and in continuing uncertainty about whether the other party had in fact repudiated the contract or committed a material breach. In *Cherwell-Ralli* the buyer demanded assurances and suspended his performance because of market conditions and information received from a third party. The court found no ground for insecurity. If there is no ground for insecurity, failure to respond to a demand does not constitute a repudiation and the person requesting the assurance is left where he began. The point here is a minor one: those who look for a device universally suited to assign responsibility for aborting a contract will not find one in section 251. Section 251 will not resolve some of the most hotly disputed and intensely litigated cases—namely, those in which each party believes in good faith that the other has repudiated or otherwise breached the contract.

A second finding, and one quite surprising at least to me, is that section 251 does not seem to operate principally as a lawyer's weapon formally invoked in the face of a well-defined dispute. In the abstract I contemplated section 2-609 operating much like section 2-702. Section 2-702 is the provision that allows a seller to recover goods in certain circumstances when he sold them on credit to an insolvent buyer. In most cases it requires a formal demand for their return within ten days of their delivery. In that situation one sees seller delivering to a buyer, finding himself unable to collect, and going to his lawyer. His lawyer in turn makes a formal demand for the return of the goods under section 2-702 as a prelude to a lawsuit.³⁸

I envisioned exactly that form of behavior under section 2-609—namely an aggrieved party going to his lawyer, who suggests that they write a section 2-609 letter to smoke out the true intention and capacity of the other party. There must be many cases in which the aggrieved goes to its attorney and the attorney directs the writing of a section 2-609 letter. It is striking, however, that those do not seem to be the prom-

³⁸ The formality of a § 2-702 demand is well illustrated in *Ranchers & Farmers Livestock Auction Co. of Clovis, N.M. v. First State Bank of Tulia, Tex.*, 531 S.W.2d 167 (Tex. Civ. App. 1975). When the buyer's check for a cattle purchase was dishonored for insufficient funds, the seller sought reclamation under § 2-702(2) by sending an "instrument" bearing the title: "DEMAND OF SELLER FOR GOODS RECEIVED BY BUYER ON CREDIT WHILE INSOLVENT ON NOVEMBER 21, 1973." *Id.* at 168.

A number of § 2-702(2) reclamation demands occur in circumstances that would almost certainly lead to litigation. Typically, these cases involve priority disputes among a reclaiming seller, a bankruptcy trustee, and a secured creditor. *See, e.g., In re Daylin, Inc.*, 596 F.2d 853 (9th Cir. 1979) (§ 2-702(2) demand sent one day after buyer files bankruptcy petition; reclaiming seller entitled to return of goods); *In re Daley, Inc.*, 17 U.C.C. Rep. Serv. 433 (D. Mass. 1975) (§ 2-207(2) demand on March 28, bankruptcy petition on March 31; bank's security interest takes priority over seller's right to reclaim); *In re Federal's Inc.*, 402 F. Supp. 1357 (E.D. Mich. 1975), *rev'd*, 553 F.2d 509 (6th Cir. 1977) (Chapter XI petition on Aug. 16, § 2-702(2) demand on Aug. 18; reclaiming seller takes priority over bankruptcy receiver).

inent cases; certainly they are not prominent in the appellate courts' use of section 2-609. Because the courts do not address the question directly, one cannot always be sure about the form of the demand, but it is clear that no formal demand was made in most of the eight cases. There is no evidence in the opinions that a lawyer was involved in presenting a formal demand in even one of the eight cases. Thus, what one first perceives as a new right to be invoked by a formal procedure has proved instead to be a new legal remedy attached to an old form of behavior.

Consider the form of invocation of section 2-609 in the eight cases. In *Cherwell-Ralli*, the buyer sent a section 2-609 letter; however, it was of no avail because the court found no reasonable grounds for insecurity.³⁹ In *Weller*, the court stated with apparent certainty that the seller had "demanded assurances" but provided no information about the precise timing of this demand or its form, written or oral.⁴⁰ The Third Circuit in *Diskmakers* entertained the argument that specified conditions in a revocable letter of credit could be interpreted as a written section 2-609 demand;⁴¹ the matter was left for the district court to resolve on remand. In *ARB*, the court could not even point to a specific communication that constituted the demand for assurances. Rather, it pointed to an amorphous group of communications and responses. Most of these apparently passed between the technical representatives of the buyer and the seller, made without specific reference to section 2-609 and without thought of application of that doctrine. In *AMF*, the court did not demand a writing, and it seems clear that there too the demands constituted the kind of requests that are routinely made in negotiation and concern a product that is not working properly. Again there is no indication that there was any reference in the demand to either party's legal rights, much less to section 2-609. The very point in *Harlow & Jones, Inc. v. Advance Steel Co.* and *National Farmers Organization v. Bartlett & Co., Grain* is that there were no demands. In *Teeman*, the court refused to find Teeman's letter to be a demand.

It is quite clear, therefore, that the important and principal use of section 251 will not be in cases in which a lawyer writing in a formal style on behalf of his client invokes that section. Rather, it will appear in the legal effect given to an oral or written statement of a layman—an engineer, developer, architect, contractor, or other party—who has never heard of, much less thought about, section 251. Or it will come in the legal effect given to the absence of a demand.

That leads to my third point, one that portends an influential and

³⁹ 180 Conn. at 719-20, 433 A.2d at 987.

⁴⁰ 295 N.W.2d at 173 (S.D. 1980).

⁴¹ "[I]t is arguable that the condition set out in the revocable letter of credit, i.e., the opportunity to inspect the goods before delivery satisfied the requirement of a written demand for reassurance." 555 F.2d at 1180.

wide-ranging effect for section 251: the judicial use of section 2-609 in the eight cases. In the best common-law tradition, the judges have adapted section 2-609 to a variety of situations that may never have been envisioned by the drafters of the UCC. It is ironic that Llewellyn, who so disdained "covert tools," has given us a covert tool of great subtlety, breadth, and power.

On the one hand, section 2-609 is a device whereby a court can change what would otherwise be an immaterial breach into a material breach. Judge Tamm seems to have done that in *ARB*. He pointed out that ARB demanded and received assurances, and concluded that E-Systems breached the contract in such a way as to give ARB the right to cancel because it had failed to live up to those assurances. In a sense it is not a section 2-609 case at all. Section 2-609 is used only to magnify the importance of E-System's failure to perform. It seems a plausible and sensible extrapolation from section 2-609, but not necessarily one that the drafters had in mind. Judge Tamm's analysis short-circuits the agonizing found in many common-law cases in which a court attempts to determine whether a breach in one installment so affects the expectations or behavior for other installments as to constitute a material breach.⁴² How much easier it would be to find simply that there has been a demand for assurances under section 251, and that the assurances were given but then breached.

In *Weller* one sees an altogether different use of section 2-609. There the parties had renegotiated their agreement and ultimately the buyer, Talon, argued that the agreement was invalid because of duress. The court concluded that section 2-609 would have given the seller the right to renegotiate the contract and therefore mitigated any claim of duress. In effect, section 2-609 is filling in for consideration or perhaps explaining why there was no consideration.

⁴² *Plotnick v. Pennsylvania Smelting & Ref. Co.*, 194 F.2d 859 (3d Cir. 1952), is an excellent example of judicial reasoning on the question of the materiality of a breach as to one installment. The case was decided under § 45 of the Uniform Sales Act, which made the materiality of a buyer's failure to pay for one or more installments dependent upon contract terms and the circumstances of each case. In *Plotnick*, the court concluded that a seller of battery lead was not justified in rescinding its contract with a buyer who withheld payment because of the seller's delay in delivery. Section 2-612 of the Uniform Commercial Code is based on § 45 of the Uniform Sales Act. Therefore it is not surprising that courts have continued to wrestle with the materiality of breach issue in decisions under § 2-612(3). *See, e.g.*, *S.J. Groves & Sons Co. v. Warner Co.*, 576 F.2d 524 (3d Cir. 1978) (substantial impairment when seller failed to deliver conforming installments of ready-mix concrete for bridge construction project); *Holiday Mfg. Co. v. B.A.F.S. Sys., Inc.*, 380 F. Supp. 1096 (D. Neb. 1974) (buyer's failure to protest substantial delay in correcting defects on three prior occasions and buyer's placement of additional purchase orders after finding significant defects on five occasions indicate that there was no substantial impairment of contract justifying the buyer's cancellation); *Gulf Chem. & Metallurgical Corp. v. Sylvan Chem. Corp.*, 122 N.J. Super. 499, 300 A.2d 878 (1973) (seller failed to prove that buyer's failure to pay for first installment substantially impaired value of contract as a whole; buyer allowed to recover on counterclaim for seller's breach in refusing to deliver remaining two installments).

In both *ARB* and *AMF*, the court dug into the negotiation, communication, and correspondence to find a demand that suits section 2-609. In *Teeman*, however, the Minnesota Supreme Court was unwilling to find a demand for assurance on the basis of a much more concrete and direct statement. A comparison of the three cases illustrates the extensive discretion that the section provides the courts. If, as in *ARB* and *AMF*, the courts conclude that the aggrieved party had a right to cancel the contract because the other party was unwilling or incapable, section 251 offers a direct route to that conclusion. If, as in *Teeman*, the court concludes that the one asserting the use of section 2-609 or section 251 is in fact the weasel, it can simply conclude that the statement was not sufficiently explicit to constitute a demand under section 251 or that assurances were adequate. Surely this is "covert" behavior of the highest order. In each of the three cases one suspects that the courts have made *a priori* judgments about motivation and culpability. They are adopting or rejecting section 2-609 to validate their conclusion about responsibility for aborting the contract.

Finally, consider the judicial use of section 2-609 in cases such as *Harlow* and *NFO*. In those cases the courts upgraded into a repudiation what would otherwise have been a justified suspension of performance or an equivocal statement. They did so, not because the other party demanded assurances under section 2-609, but because the party ultimately found to be in breach *failed* to use that section. Although neither court stated that the section must be used, each court drew an important inference from its lack of use. Where one, who for other reasons appears to be unwilling to perform his contract, seizes upon insufficiencies in the performance of the other party without asking for assurances, the courts seem to say that they will regard those complaints as repudiations. In effect, the courts are making sections 2-609 and 251 mandatory in those cases.

At a minimum, the cases show that section 251 will be a useful, discrete, and subtle judicial tool. Even this small sample shows that it is covert in the sense that it can be made to do work for which the court is unwilling to articulate the true reason; it offers enormous judicial discretion in its application. It may give legal consequences to acts taken in the course of negotiation by parties who never considered those consequences. It is not the outcome of the cases that is surprising; when one finds that assurances were demanded and not given he expects the court to conclude that there is repudiation. When, as in *ARB*, the assurances are given and breached, it seems plausible to conclude that there is a material breach just as there would have been had the assurances never been given. The revolutionary aspect of the cases lies in the courts' willingness to apply the section 2-609 rubric to negotiating behavior during routine contract administration and without reference to the code sec-

tion. One may assume that such behavior goes on in virtually every contract dispute. If each such dispute presents the opportunity for the application of section 2-609 or section 251, then the court always retains the power to use those sections to allocate liability for aborting the contract. To the extent that the sections are routinely used to allocate liability to one who would not be responsible under our traditional notions of material breach or anticipatory repudiation, we have significantly changed the law of contracts. We have softened the requirements for repudiation and material breach, not just in a limited class of "2-609 or 251 cases," but in all kinds of contract disputes where the parties have never heard of, much less invoked, section 251 or section 2-609.

My eight cases tell me that one who acts in bad faith, appears incapable of performing, or breaches his contract in even a limited way commits a repudiation or a material breach by much more equivocal and less egregious behavior than the black letter would lead one to believe. If the courts continue down this path, it is possible that Restatement Third will read:

One has committed a material breach or a repudiation when his acts or other circumstances make it appear likely that he is either incapable of performing or unwilling to do so.