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The Promissory Character of Adequate Assurances of Performance

Michael J. Borden[†]

INTRODUCTION

The central questions of contract law and theory focus on the enforceability of promises.¹ For the contract theorist, the question takes the form, why should the law enforce promises? For the lawyer, the question may often be, which promises will the law enforce? For parties to contracts, the salient question is often, what will happen if I (or my counterpart) fail to honor my promise? Implicit in each of these questions is both an ex ante and an ex post perspective: we care about whether certain utterances will be deemed worthy of the law's attention, but we also care about how the law will respond to a broken promise.

For the theorist, the ex ante and ex post questions are often intertwined, for one cannot satisfactorily articulate a rationale for enforcing promises without taking into account the consequences for the promisee if a promise were broken and the law provided no remedy. Students of contract law learn that the doctrinal bases of contractual obligation (consideration, promissory estoppel, unjust enrichment) correspond with the measures of damages (expectation, reliance, restitution).

It is thus not surprising that so much scholarly attention is devoted to questions of enforceability and damages. Yet there is one doctrine in contract law that lies at the intersection of these two questions that has received very little attention in literature, and no attention whatsoever for its ex

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¹ Melvin Aaron Eisenberg, *The Responsive Model of Contract Law*, 36 STAN. L. REV. 1107, 1112 (1984) ("The first great issue in contract law is what kinds of promises the law should enforce . . .").

ante implications. The subject of this article is the doctrine of adequate assurances of performance. The doctrine is an innovation of twentieth-century contract law and functions as a mechanism to assist in sorting out the consequences of prospective non-performance.

In contract law, a breach cannot occur until the time for performance has passed. But sometimes, it becomes obvious that one party is not going to perform. When that happens, the injured party often would like to pack it in and declare the contract at an end. But doing so poses risks. If the injured party jumps the gun and stops performing prematurely, he risks being deemed to have breached the contract himself. One way that contract law responds to this dilemma is through the doctrine of anticipatory repudiation. Under this doctrine, certain actions may constitute a present breach even before the time for performance has passed. A promisor commits a present breach by anticipatory repudiation when he either unequivocally expresses his intention not to perform his contractual obligations, or intentionally takes some action that renders such performance impossible. Anticipatory repudiation helps disappointed promisees to efficiently organize their affairs and find alternative arrangements, without having to wait until a performance deadline that may be fairly distant.

But anticipatory repudiation can be a trap. An impatient promisee might misconstrue signals from an underperforming promisor as a repudiation when no legally cognizable repudiation has, in fact, occurred.² In such a case, the injured promisor who thought he was entitled to move on from an impaired relationship may find himself liable for breach of contract. A well-counseled promisee who believes that his contractual partner will not perform, but who is not certain that he has received the requisite unequivocal statement of intention not to perform that constitutes an anticipatory repudiation, can pursue another avenue to extricate himself from a troubled contract.

When adopted in 1961, Article 2 of the Uniform Commercial Code introduced to American contract law the doctrine of adequate assurances to address the problem of the

² See *McCloskey & Co. v. Minweld Steel Co.*, 220 F.2d 101 (3d Cir. 1955); *Taylor v. Johnston*, 539 P.2d 425 (Cal. 1975); E. ALLAN FARNSWORTH, *CONTRACTS* § 8.20, at 662-66 (4th ed. 2004).

insecure party.³ A promisee who has “reasonable grounds for insecurity” about the other party’s ability or willingness to perform “may demand in a record adequate assurance of due performance and until the party receives the assurance may if commercially reasonable suspend any performance for which he has not already received the agreed return.”⁴ Often, assurances are utterly straightforward, with the promisor merely affirming his intention to perform his contractual obligations. Sometimes, however, they involve new undertakings, such as a promise to furnish a personal guaranty or other measures to assuage the promisee’s insecurity. If the promisor does not promptly give the required assurances, he is deemed to have repudiated the contract, which means that the insecure party becomes entitled to stop performing. His remaining obligations are discharged and he can get on with his life. The purpose of the doctrine is thus to relieve the insecure party of the risk and uncertainty involved in relying on anticipatory repudiation as an avenue to a finding of breach. In effect, invoking the doctrine shifts the burden to the underperforming promisor to affirm his intention to perform.

What little has been written on the subject of adequate assurances has focused on analyzing its design and effectiveness as a little dance that contracting parties engage in on the road to a finding of breach or repudiation, or its effectiveness in helping the parties avoid such outcomes.⁵ Similarly, the case law generated by the doctrine (some two hundred and fifty cases) has almost entirely centered on the fact-intensive issues of whether a promisee actually had reasonable grounds for insecurity, whether she had properly made her demand for assurances, or whether the assurances demanded were inappropriate.⁶ In contract law casebooks, the doctrine is invariably included in the materials on

³ See Zipporah Batshaw Wiseman, *The Limits of Vision: Karl Llewellyn and the Merchant Rules*, 100 HARV. L. REV. 465 (1987).

⁴ U.C.C. § 2-609(1) (revised 2003).

⁵ See, e.g., Richard Craswell, *Insecurity, Repudiation, and Cure*, 19 J. LEGAL STUD. 339 (1990); Larry T. Garvin, *Adequate Assurance of Performance: Of Risk, Duress, and Cognition*, 69 U. COLO. L. REV. 71 (1998); Robert A. Hillman, *Keeping the Deal Together After Material Breach—Common Law Mitigation Rules, the UCC, and the Restatement (Second) of Contracts*, 47 U. COLO. L. REV. 553 (1976); Keith A. Rowley, *A Brief History of Anticipatory Repudiation in American Contract Law*, 69 U. CIN. L. REV. 565 (2001); Celia R. Taylor, *Self-Help in Contract Law: An Exploration and Proposal*, 33 WAKE FOREST L. REV. 839 (1998); James J. White, *Eight Cases and Section 251*, 67 CORNELL L. REV. 841 (1982).

⁶ See *infra* notes 31-57 and accompanying text.

consequences of non-performance and remedies.⁷ To read all of the available primary and secondary source material on the doctrine, one would think that it relates solely, and not in a terribly important way, to the back-end component of the enforceability question that lies at the heart of contract law.

But contract scholars have entirely missed the fact that the doctrine of adequate assurances implicates that most fundamental question of contract law: which promises are worthy of the law's enforcement apparatus. In this article, I re-characterize the doctrine as one with significant implications for the question of which promises the law should enforce. My aim is to focus readers' attention on the promissory character of adequate assurances. By this I mean that I wish to investigate whether the undertakings contained in some of the more substantial assurances are properly to be considered promises with their own independent validity; that is, contracts. Contracts that can be sued on and give rise to damages apart from those that could be recovered under the parties' original agreement. Contracts that stand alone and endure in force even after the original contract from which they arose has ceased to be in effect; or whether they should be conceived of as modifications of the original contract, or perhaps neither.

Part I provides the reader with an account of the development of the doctrine of adequate assurances from its earliest roots in the doctrine of anticipatory repudiation. Part II explains the workings of the modern doctrine in the context of a recent case. In Part III, I argue that promises made in response to a demand for adequate assurances can be understood as a class of enforceable promises. In Parts IV and V, I attempt to work out the back-end consequences that would result from treating assurances as enforceable promises.⁸

⁷ See, e.g., RANDY E. BARNETT, *CONTRACTS, CASES AND DOCTRINE* 900-05 (4th ed. 2008); CHARLES L. KNAPP, NATHAN M. CRYSTAL & HARRY G. PRINCE, *PROBLEMS IN CONTRACT LAW* 839-40 (6th ed. 2007); ROBERT S. SUMMERS & ROBERT A. HILLMAN, *CONTRACT AND RELATED OBLIGATION* 864-80 (4th ed. 2001).

⁸ This article is conceived as the first of a pair. Its focus is primarily doctrinal (arguing that adequate assurances can be understood as enforceable promises) and practical (considering the consequences of such an understanding). The follow-up article examines the theoretical implications raised by this article.

I. DOCTRINAL BACKGROUND

The roots of the doctrine of adequate assurances lie in the legal and analytical quandary that confronts a party to a contract who awaits performance from an obligor who seems unlikely to perform.⁹ This dilemma arises from the fact that until the time for performance has passed, contract law, as a matter of both logic and doctrine, deems that no breach can occur, for the obligor might still perform his contractual obligations in a timely manner.¹⁰ If I hire a neighborhood teenager to mow my lawn on Saturday, he has until Saturday to perform. If he tells me on Thursday evening that his friend is about to leave for the beach for the weekend and he is thinking about joining him, he has not breached. He can only breach by failing to mow my lawn on Saturday.

So what am I to do? I need my lawn trimmed on Saturday. If I do not arrange for a substitute mower soon, I may be stuck with an ill-kempt lawn for my garden party. Common sense would suggest that as soon as I see my young friend load his beach bag into his friend's car, I should call another enterprising local youth and arrange to have her come and cut the grass. But if I do so, and the original obligor feels the pangs of conscience and returns to honor his contract, I will be obligated to pay both the replacement and the prodigal. If I refuse to perform my part of the original contract, the law will hold me liable for breach of contract. Thus, an obligee who encounters a contracting partner who appears unwilling to perform faces a significant legal risk that impedes his ability to efficiently plan his affairs. This problem is not new, nor is the legal doctrine that purports to address it.

A similar dilemma faced the plaintiff in *Hochster v. De la Tour*,¹¹ the English case that is widely considered to have established the modern law of anticipatory repudiation.¹² In April 1852, Hochster and De la Tour entered into a contract

⁹ Garvin, *supra* note 5, at 71-76.

¹⁰ See generally Alan G. Dowling, *A Right to Adequate Assurance of Performance in All Transactions: U.C.C. § 2-609 Beyond Sales of Goods*, 48 S. CAL. L. REV. 1358, 1358-59 (1975).

¹¹ (1853) 118 Eng. Rep. 922 (Q.B.); 2 El. & Bl. 678.

¹² In his excellent article tracing the origins of the law of anticipatory repudiation, Keith Rowley explains that the common wisdom that treats *Hochster* as the fountainhead of anticipatory repudiation is mistaken. He discusses several cases in America and England that predate *Hochster* in recognizing the right to sue for breach before the time for performance. To trace the earliest roots of anticipatory repudiation, see Rowley, *supra* note 5, at 571-600.

whereby De la Tour would employ Hochster as a courier for three months, beginning on June 1, 1852 at a rate of 10 pounds per month.¹³ On May 11, 1852, De la Tour informed Hochster that he had made other arrangements and would not be honoring the contract.¹⁴ Hochster sued De la Tour on May 22, 1852.¹⁵ He argued that De la Tour's renunciation of his promise constituted a breach of the contract, even though the time for performance had not yet arrived.¹⁶ De la Tour's answer, naturally, was that there could be no breach before the first of June.¹⁷ After the jury found for Hochster, De la Tour moved to arrest the judgment.¹⁸

De la Tour argued that to prevail in his suit, Hochster would have to stand "ready and willing" to perform the entire contract to its conclusion.¹⁹ He insisted that by finding other similar employment, Hochster had forfeited his right to sue on the contract.²⁰ While this argument may sound almost silly to the modern ear, it was fully consonant with the legal environment of the day. Consider Justice Holmes' roughly contemporaneous observation that "the degree of [the promisor's] ability at any moment before he was called on to pay [is] no concern of the [promisee]."²¹

The Lord Chief Justice disagreed with the defendant, and in so doing, he initiated a major change in Anglo-American law:

If the plaintiff has no remedy for breach of the contract unless he treats the contract as in force, and acts upon it down to the 1st June 1852, it follows that, till then, he must enter into no employment which will interfere with his promise "to start with the defendant on such travels on the day and year," and that he must then be properly equipped in all respects as a courier for a three months' tour on the continent of Europe. But it is surely much more rational, and more for the benefit of both parties, that, after renunciation of the agreement by the defendant, the plaintiff should be at liberty to consider himself absolved from any future performance of it, retaining his right to sue for any damage he has suffered from the breach of it. Thus, instead of remaining idle and laying out money in

¹³ *Hochster*, 118 Eng. Rep. at 922.

¹⁴ *See id.* at 924.

¹⁵ *See id.*

¹⁶ *See id.*

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ *Id.* at 926-27.

²¹ *Lowe v. Harwood*, 29 N.E. 538, 539 (Mass. 1885).

preparations which must be useless, he is at liberty to seek service under another employer, which would go in mitigation of the damages to which he would otherwise be entitled for a breach of contract.²²

As for Hochster's right to an immediate remedy, the court noted that

The man who wrongfully renounces a contract into which he has deliberately entered cannot justly complain if he is immediately sued . . . by the man whom he has injured: and it seems reasonable to allow an option to the injured party, either to sue immediately, or to wait till the time when the act was to be done, still holding it as prospectively binding for the exercise of this option, which may be advantageous to the innocent party, and cannot be prejudicial to the wrongdoer.²³

Today's lawyers and law students are well aware of the modern legal response to this problem: anticipatory repudiation. According to the Restatement (Second) of Contracts, "[w]here an obligor repudiates a duty before he has committed a breach by non-performance and before he has received all of the agreed exchange for it, his repudiation alone gives rise to a claim for damages for total breach."²⁴ This terse provision neatly summarizes the current doctrine that aims to resolve my conflict with my derelict neighbor.

But my problem has not completely gone away. For another provision of the Restatement explains what counts as a repudiation.

A repudiation is

- (a) a statement by the obligor to the obligee indicating that the obligor will commit a breach that would of itself give the obligee a claim for damages for total breach under §243 or
- (b) a voluntary affirmative act which renders the obligor unable or apparently unable to perform without such breach.²⁵

The cases applying the doctrine of anticipatory repudiation have consistently held that an obligor must manifest an unambiguous intention "not to perform except on conditions which go beyond the contract" before he will be

²² *Hochster*, 118 Eng. Rep. at 926.

²³ *Id.*

²⁴ RESTATEMENT (SECOND) OF CONTRACTS § 253(1) (1981).

²⁵ *Id.* § 250.

deemed to have repudiated.²⁶ So where does that leave me on Thursday evening? The teenager has only told me that he is thinking about going to the beach. He has not said when he will return. He has not said that he will not perform. Perhaps his words and actions have amounted to a repudiation; perhaps not. Thus the law of repudiation has addressed one problem and introduced another. By inviting the obligee to treat a repudiation as a present breach, the doctrine has replaced a regime that, for all its flaws, at least provided a form of certainty (no breach can occur before the time for performance has passed) with a doctrine that simply shifts the locus of legal risk to the calculation of whether or not the obligor has indeed committed a repudiation. If the obligee is found to have been mistaken about the repudiation, he will likely have committed a breach himself.

So again, where does all this leave me on Thursday evening? According to Karl Llewellyn, it leaves me feeling insecure. Llewellyn recognized that the doctrine of anticipatory repudiation was unsatisfactory in the way we have just described. He was sensitive to the commercial concerns of the promisee who doubts the willingness or ability of the promisor to perform, but who cannot avail himself of the remedy of present breach by anticipatory repudiation, or at least has concerns about his ability to resort to that doctrine.

In 1941, when Llewellyn led the National Conference of Commissioners on Uniform State Laws in its endeavor to craft what became Article 2 of the Uniform Commercial Code, he included in his first draft a provision that proved to be contract law's first recognition of the concept of insecurity.²⁷ This first tentative step was a provision that stated that a buyer on credit warrants to its seller that it "will give the seller no reasonable grounds for insecurity in regard to his continuing ability and willingness to perform."²⁸ Effectively, this iteration of the concept of insecurity would have created an implied term that could be sued upon if breached. But this initial, limited

²⁶ *Id.* § 250 cmt. 3 (citing U.C.C. § 2-610 cmt. 2 (revised 2003)).

²⁷ *See* AN ACT RELATING TO SALES OF PERSONAL PROPERTY AND TO CONTRACTS FOR THE SALE THEREOF, AND TO RIGHTS, OBLIGATIONS, AND REMEDIES ARISING OUT OF SUCH SALES OR CONTRACTS AND IN CONNECTION WITH FINANCING OR OTHER TRANSACTIONS COMMONLY ASSOCIATED THEREWITH, AND TO MAKE UNIFORM THE LAW OF SUCH MATTERS § 16-C (1941), *reprinted in* 1 UNIFORM COMMERCIAL CODE CONFIDENTIAL DRAFTS 3 (Elizabeth Slusser Kelly & Ann Puckett eds., 1995).

²⁸ *Id.* at 73.

provision grew into a much more complete remedy for a party who senses an impending breach.

When Article 2 was finally completed, it included section 2-609, titled “Right to Adequate Assurance of Performance.” Official Comment 1 eloquently states the rationale for and purpose of the doctrine.

The section rests on the recognition of the fact that the essential purpose of a contract between commercial men is actual performance and they do not bargain merely for a promise, or for a promise plus the right to win a lawsuit and that a continuing sense of reliance and security that the promised performance will be forthcoming when due, is an important feature of the bargain. If either the willingness or the ability of a party to perform declines materially between the time of contracting and the time for performance, the other party is threatened with the loss of a substantial part of what he has bargained for. A seller needs protection not merely against having to deliver on credit to a shaky buyer, but also against having to procure and manufacture the goods, perhaps turning down other customers. Once he has been given reason to believe that the buyer’s performance has become uncertain, it is an undue hardship to force him to continue his own performance. Similarly, a buyer who believes that the seller’s deliveries have become uncertain cannot safely wait for the due date of performance when he has been buying to assure himself of materials for his current manufacturing or to replenish his stock of merchandise.²⁹

With this full-throated defense of his innovative scheme to protect the insecure party, Llewellyn presented to the American legal community a tool that has proved useful in managing the risks that often arise when a party appears unlikely to perform. Let us consider the text of the provision.

Subsection one states,

A contract for sale imposes an obligation on each party that the other’s expectation of receiving due performance will not be impaired. If reasonable grounds for insecurity arise with respect to the performance of either party, the other may demand in a record adequate assurance of due performance and until he receives the assurance may if commercially reasonable suspend any performance for which it has not already received the agreed return.³⁰

The provision comprises several legally significant components. First, one must establish reasonable grounds for insecurity.³¹ Second, if such grounds exist, the Code requires

²⁹ U.C.C. § 2-609 cmt. 1 (revised 2003).

³⁰ *Id.* § 2-609(1).

³¹ *Id.*

that a demand for assurances be made in writing.³² Third, the assurances must be adequate.³³ Fourth, the insecure party may suspend his performance for a commercially reasonable time until he receives the assurances.³⁴ Finally, if the recipient of the demand does not provide the assurances within a reasonable time, the insecure party is entitled to treat this intransigence as a repudiation.³⁵

Clearly, each of these elements introduces significant levels of factual and legal uncertainty. What counts as reasonable grounds for insecurity?³⁶ What assurances are adequate?³⁷ How is one to formulate a demand so as to put the promisor on notice of his potential liability under section 2-609?³⁸ What counts as a reasonable time for the promisee to wait to receive assurances?³⁹ The Code's minimally helpful response is to inform us that "the reasonableness of grounds for insecurity and the adequacy of any assurance offered shall be determined according to commercial standards."⁴⁰

The Official Comments attempt to furnish a somewhat more textured method for evaluating some of the factual issues that arise when an insecure party invokes section 2-609. For example, "a report from an apparently trustworthy source that the seller had shipped defective goods or was planning to ship them would normally give the buyer reasonable grounds for

³² *Id.*

³³ *Id.*

³⁴ *Id.*

³⁵ *Id.*

³⁶ See *Smyers v. Quartz Works Corp.*, 880 F. Supp. 1425 (D. Kan. 1995) (failure to respond to attempts to communicate); *Creusot-Loire Int'l, Inc. v. Coppus Eng'g Corp.*, 585 F. Supp. 45 (S.D.N.Y. 1983) (reliable information from others who contract with the promisor that the promisor's goods are defective).

³⁷ See *Smyers*, 880 F. Supp. 1425; *Creusot-Loire*, 585 F. Supp. 45 (demand for letter of credit and extension of warranty upheld as adequate and not excessive).

³⁸ The language of section 2-609 requires that the demand be in writing, though many courts have relaxed this requirement. In fact, the courts have often been extremely flexible about the required form of the demand. See *infra* Part III. Somewhat surprisingly, several courts have found that demand has been made and assurances given where the parties themselves did not realize that they had done so. See *Am. Research Bureau, Inc. v. E-Systems, Inc.*, 663 F.2d 189, 196 n.19 (D.C. Cir. 1980); *AMF, Inc. v. McDonald's Corp.*, 536 F.2d 1167, 1171 (7th Cir. 1976); James J. White, *Eight Cases and Section 251*, 67 CORNELL L. REV. 841, 841-42 (1982) (discussing cases in which assurances were upheld despite the lack of a formal written demand). *But see Cont'l Grain Co. v. McFarland*, 29 U.C.C. Rep. Serv. 512 (4th Cir. 1980) (demand for assurances must be in writing).

³⁹ The courts do not appear eager to either extend the thirty-day limit suggested by the code or require promisors to comply with a demand more promptly than within thirty days. See, e.g., *Smyers*, 880 F. Supp. at 1432-33.

⁴⁰ U.C.C. § 2-609(2) (revised 2003).

insecurity.”⁴¹ This bit of guidance is tepid, but mainly inoffensive. The Comments’ advice for assessing the adequacy of the assurance, however, verges on risible:

Where the buyer can make use of a defective delivery, a mere promise by a seller of good repute that he is giving the matter his attention and that the defect will not be repeated, is normally sufficient. Under the same circumstances, however, a similar statement by a known corner-cutter might well be considered insufficient without the posting of a guaranty or, if so demanded by the buyer, a speedy replacement of the delivery involved.⁴²

The attempt to distinguish between reputable actors and known corner-cutters may perhaps appeal to common sense, and it may comport with Llewellyn’s overall mission of crafting a law that rings true for “commercial men,”⁴³ yet this suggestion could not escape the gentle derision of the drafters of the New York State Law Revision Commission Report on the UCC.⁴⁴ The Report noted that “it is doubtful whether courts would be receptive to an offer of evidence that the opposite party was a ‘known corner-cutter’ in view of the danger that this issue might lead to a major digression, with the dangers of prejudice presented by an exchange of name-calling.”⁴⁵

The picture that emerges from all of this is of a well-conceived doctrine that addresses a significant problem in a logical way, but one that is likely to raise challenging factual issues in litigation, undercutting its effectiveness as a measure to create certainty and predictability in commercial affairs. In fact, a large majority of the reported cases on adequate assurances deal with the issue of whether the promisee in fact had reasonable grounds for insecurity.⁴⁶

⁴¹ *Id.* § 2-609 cmt. 3.

⁴² *Id.* § 2-609 cmt. 4.

⁴³ See Franklin G. Snyder, *Clouds of Mystery: Dispelling the Realist Rhetoric of the Uniform Commercial Code*, 68 OHIO ST. L. REV. 11, 11 (2007).

⁴⁴ STATE OF N.Y. LAW REVISION COMM’N, STUDY OF UNIFORM COMMERCIAL CODE NO. 65, at 538 (1955).

⁴⁵ *Id.*

⁴⁶ *Danzig v. AEC Corp.*, 224 F.3d 1333, 1338 (Fed. Cir. 2000) (promisor missing deadlines created grounds for insecurity); *Pittsburgh-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; subjective fear that obligee will not perform held insufficient); *Nat’l Ropes, Inc. v. Nat’l Diving Serv., Inc.*, 513 F.2d 53, 61 (5th Cir. 1975) (no reasonable grounds for insecurity); *La. Power & Light Co. v. Allegheny Ludlum Indus.*, 517 F. Supp. 1319, 1322-23 (E.D. La. 1981) (reasonable grounds for insecurity where seller suggested a disinclination to perform because of rising costs); *Copylease Corp. of Am. v. Memorex Corp.*, 403 F.

A much smaller group of cases concerns whether the assurances demanded were adequate or excessive,⁴⁷ and several cases address the form of the demand.⁴⁸ Courts may deny relief to insecure promisees who have demanded assurances that exceeded what the court found to be adequate. In *Scott v. Crown*, the parties had entered into several contracts for the purchase and sale of wheat.⁴⁹ In the course of discussions with its banker, Scott learned that Crown “was not the best grain trader” and was advised to look into Crown’s reputation.⁵⁰ An agent from the Department of Agriculture informed Scott that other farmers had complained about Crown’s failure to pay them.⁵¹ Scott acted on this information by demanding assurances from Crown in the form of immediate payment of all amounts due (the contracts called for payment within 30 days of delivery).⁵² The Colorado Court of Appeals ruled that Scott did not, as a matter of law, have the right to suspend its performance after demanding assurances, because he had “demanded performance beyond that required by the contract.”⁵³

Although only one other court has agreed with the *Scott* court in condemning assurances that go beyond the original undertakings of the contract,⁵⁴ the ruling highlights an interesting doctrinal conflict inherent in the process of demanding assurances. However, in their treatise on the Uniform Commercial Code, White and Summers assert that the approach the *Scott* court took is incorrect. As they explain, “[a]ll demands for adequate assurance call for more than was originally promised under the contract, and that is precisely

Supp. 625, 630-31 (S.D.N.Y. 1975) (promisor’s statement that contract was not binding created reasonable grounds for insecurity).

⁴⁷ See *Scott v. Crown*, 765 P.2d 1043, 1046-47 (Colo. App. 1988); *Pittsburgh-Des Moines Steel Co.*, 532 F.2d at 572.

⁴⁸ *Nat’l Ropes*, 513 F.2d at 60-61 n.9; *Auto. Energy Sys., Inc. v. Fibers & Fabrics of Ga., Inc.*, 298 S.E.2d 328, 329-30 (Ga. Ct. App. 1982); *Bodine Sewer v. E. Ill. Precast, Inc.*, 493 N.E.2d 705, 712 (Ill. App. Ct. 1986); *Teeman v. Jurek*, 251 N.W.2d 698, 701 (Minn. 1977). However, in some cases an oral demand for assurances has sufficed. See *Am. Research Bureau, Inc. v. E-Systems, Inc.* 663 F.2d 189, 195-96 (D.C. Cir. 1980); *Diskmakers, Inc. v. DeWitt Equip. Corp.*, 555 F.2d 1177, 1180 (3d Cir. 1977).

⁴⁹ *Scott*, 765 P.2d at 1044-45.

⁵⁰ *Id.* at 1045.

⁵¹ *Id.*

⁵² *Id.*

⁵³ *Id.* at 1046-47.

⁵⁴ *Pittsburgh-Des Moines Steel Co. v. Brookhaven Manor Water Co.*, 532 F.2d 572, 581 (7th Cir. 1976) (demand was excessive because it sought more than what was originally promised under the contract).

what 2-609 authorizes.”⁵⁵ Yet one of the definitions of anticipatory repudiation is a manifestation of unwillingness to continue to perform except upon conditions that go beyond the terms of the contract.⁵⁶ Despite what is probably a doctrinal error on the part of the *Scott* court, if an insecure party demands excessive assurances, he exposes himself to some risk of committing a repudiation.

When one considers that the bulk of adequate assurance cases involve disputes over whether a promisee actually had adequate grounds for insecurity, and that the promisee not infrequently loses the case on this ground,⁵⁷ a somewhat unflattering picture of the doctrine emerges. Recall the original problem of the promisee who foresees a breach by the promisor: before the middle of the 19th Century, he had no recourse but to wait until the time for performance passed. With the advent of anticipatory repudiation, he could treat certain behavior as a breach, but he risked being deemed the breacher if he guessed wrong about the law’s eventual interpretation of the promisor’s actions. Llewellyn’s innovation purported to provide a procedure to benefit the promisee who did not believe that the promisor had actually repudiated, but who nonetheless suffered economically as a result of insecurity.

But if the pre-Article 2 promisee had to cope with risk and insecurity as a result of his imperfect capacity to accurately spot a repudiation, the promisee who relies on section 2-609 must cope with an analogous problem, but at a slightly different moment. He does not lay his wager upon the existence of a repudiation, but rather on the reasonableness of his grounds for insecurity. As one commentator put it in assessing section 2-609’s effectiveness as a legal innovation, “section 2-609 sometimes does little more than extend the minuet between the weaseling party and the contractual counterpart and add a couple of new moves.”⁵⁸

Nevertheless, the doctrine has been viewed as enough of a success that only two decades after the widespread

⁵⁵ JAMES J. WHITE & ROBERT S. SUMMERS, UNIFORM COMMERCIAL CODE § 6-2, at 199 (5th ed. 2000).

⁵⁶ See U.C.C. § 2-610 cmt. 2 (revised 2003); RESTATEMENT (SECOND) OF CONTRACTS § 250 cmt. b (1981).

⁵⁷ See *supra* note 36 and accompanying text.

⁵⁸ WHITE & SUMMERS, *supra* note 55, at 197.

enactment of Article 2 in state legislatures, the American Law Institute included it in the Restatement (Second) of Contracts.⁵⁹

The Restatement's version of the doctrine is nearly identical to section 2-609. One small difference is that the Restatement does not require the demand to be made in writing. Section 2-609, on its face, requires a writing, but many courts have disregarded that requirement.⁶⁰ Another minor difference is that where the Uniform Commercial Code defines both the reasonableness of the grounds for insecurity and the adequacy of the assurances demanded by commercial standards, the Restatement does not.⁶¹

Having established the general legal outline of the doctrine, let us now place the law into a factual context. Sometimes, assurances take a relatively simple form—a mere affirmation of one's duties, a promise to actually perform the obligations undertaken in the contract.⁶² But sometimes, the assurances consist of new undertakings. These can take the form of granting the insecure party the right to inspect the books of the underperforming party in order to confirm ongoing solvency.⁶³ Credit terms could be altered to reduce the amount a buyer may borrow or shorten his time for repayment.⁶⁴ Or, more drastically, the insecure party might demand a personal guaranty from a third party.⁶⁵ But case law also reveals some more interesting assurances. A buyer who is behind in

⁵⁹ RESTATEMENT (SECOND) OF CONTRACTS § 251 (1981).

(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 assurances of due performance and may, if reasonable, suspend any performance for which he has not already received the agreed exchange until he receives such assurance.

(2) The obligee may treat as a repudiation the obligor's failure to provide within a reasonable time such assurance of due performance as is adequate in the circumstances of the particular case.

Id. But this is not to say that the doctrine has escaped serious critique. For an incisive critique, see Garvin, *supra* note 5, at 129-40.

⁶⁰ See *supra* notes 48-55 and accompanying text.

⁶¹ There are a few other differences between the two versions of the doctrine, none of which are significant for our purposes. For an exegesis of the differences, see Taylor, *supra* note 5, at 889-93.

⁶² U.C.C. § 2-609 cmt. 4 (revised 2003); see also, *e.g.*, La. Power & Light Co. v. Allegheny Ludlum Indus., Inc., 517 F. Supp. 1319, 1322-23 (E.D. La. 1981).

⁶³ Int'l Therapeutics, Inc. v. McGraw-Edison Co., 721 F.2d 488, 492 (5th Cir. 1983).

⁶⁴ Hornell Brewing Co. v. Spry, 664 N.Y.S.2d 698, 700-01, 703 (N.Y. Sup. Ct. 1997).

⁶⁵ Creusot-Loire Int'l, Inc. v. Coppus Eng'g Corp., 585 F. Supp. 45, 50 (S.D.N.Y. 1983).

payments might assign his receivables to the seller.⁶⁶ A buyer who is concerned about the quality of the machinery he is purchasing might ask for an extension or enlargement of his warranty.⁶⁷ We could make up some other examples; a seller of special equipment might make alternative arrangements for the procurement of higher quality components where the goods have been defective. But let us take a close look at an actual recent case in which a promisor provides an assurance that involves a new undertaking, and we will find that there may be more to the doctrine than has yet been considered by any court or theorist.

II. THE MODERN DOCTRINE

*Hornell v. Spry*⁶⁸ appears to be a run of the mill adequate assurances case, addressing most of the familiar issues. But a careful reading of the facts reveals an issue that was not litigated, but that directs our attention to the promissory character of adequate assurances. Hornell was a supplier of beverages, including Arizona Iced Tea.⁶⁹ It entered into a contract with Steven Spry whereby Spry was to be an exclusive dealer of Arizona Iced Tea products in Canada.⁷⁰ Perhaps because Spry had a reputation as a successful businessman, Hornell was prepared to ship him a large quantity of product on credit without a written agreement.⁷¹ The relationship quickly ran into significant problems, mostly stemming from the fact that Spry was not paying for the beverages Hornell was shipping.⁷² After a series of attempts to resolve their differences, the parties agreed to a new, more rigorous financing arrangement, whereby Hornell would “provide Spry with a \$300,000 line of credit, so long as payments were made on a net 14 day basis.”⁷³ Spry also entered into an agreement with a factor, whereby Spry would assign his receivables to the factor who would, in turn, pay Hornell

⁶⁶ *Erwin Weller Co. v. Talon, Inc.*, 295 N.W.2d 172 (S.D. 1980); *Hornell*, 664 N.Y.S.2d at 698.

⁶⁷ *Creusot-Loire*, 585 F. Supp. 45.

⁶⁸ *Hornell*, 664 N.Y.S.2d at 698.

⁶⁹ *Id.* at 699.

⁷⁰ *Id.*

⁷¹ *Id.* at 699-700.

⁷² *Id.* at 700.

⁷³ *Id.*

the amounts due on Spry's account.⁷⁴ Hornell resumed shipping iced tea to Spry on these terms, but despite the fact that Spry made his first payment on time, Hornell learned that "Spry's warehouse was empty, that he had no managerial, sales or office staff, that he had no trucks, and that in effect his whole operation was a sham."⁷⁵

As a result of this disturbing news, on May 10, 1994, Hornell wrote a letter to Spry stating,

[B]efore we release any more product, we are asking you to provide us with a letter confirming the existence of your line of credit as well as a personal guarantee that is backed up with a personal financial statement that can be verified. Another option would be for you to provide us with an irrevocable letter of credit in the amount of \$300,000.⁷⁶

Spry did not respond to this letter and, after a few months of negotiations, Hornell sued Spry, seeking a declaratory judgment that Spry had no further rights under the contract.⁷⁷ In ruling for Hornell, the court noted that while both parties maintained that there had been only one demand for adequate assurances (the alteration of credit terms to cap advances at \$300,000 and demand that payment be made in full within fourteen days), in fact Hornell had made two separate demands for adequate assurances.⁷⁸

The court agreed that Spry's initial failure to make timely payments gave Hornell reasonable grounds for insecurity and ruled that Hornell's initiation of tighter credit terms was a reasonable demand for assurances.⁷⁹ These assurances were given and put the relationship on proper legal footing.⁸⁰ But the court explained that when Hornell learned that Spry had been accepting shipments of product without having established any appropriate business operations, Hornell had renewed grounds for insecurity.⁸¹ Thus, the May 10 letter constituted another appropriate demand for adequate assurances.⁸² Spry's failure to respond to this demand

⁷⁴ *Id.* at 700. Neither of these new commitments was made pursuant to a formal written demand for assurances under section 2-609. *Id.* at 700, 702.

⁷⁵ *Id.* at 701.

⁷⁶ *Id.*

⁷⁷ *Id.* at 699, 701.

⁷⁸ *Id.* at 701-03.

⁷⁹ *Id.* at 703.

⁸⁰ *Id.*

⁸¹ *Id.* at 703-04.

⁸² *Id.*

amounted to a “repudiation of the distributorship agreement, which entitled plaintiff to suspend performance and terminate the agreement.”⁸³

Putting aside the question of what Spry wanted with all that iced tea if he wasn’t going to sell it, the case raises a series of issues common to the adequate assurances cases. Did the first attempt to restrain Spry’s actions with the imposition of tighter credit terms amount to a demand for assurances? Were Hornell’s second grounds for insecurity reasonable in view of the fact that Spry had paid his balance in full within fourteen days, in accordance with the initial demand for assurances? Were the assurances demanded in the May 10 letter excessive?

None of these questions caused much difficulty for the *Hornell* court, though it did hint that there was some doubt as to whether Hornell’s second demand was excessive.⁸⁴ Yet there is another question lurking in this case, a question that courts have yet to address. When Hornell initially found that Spry was delinquent in its payments, it demanded that Spry agree to new credit terms in order to assuage its insecurity.⁸⁵ In giving these assurances, Spry made a promise. The question that neither the *Hornell* court, nor any other court, seems to have explicitly confronted is, how long should this new arrangement endure? Is it to last the lifetime of the contract? Should it persist only until Spry establishes a record of timely payment? Or should Spry be required to comply with the promise of the assurances until Hornell has been made whole? The first option suggests that the assurances amount to a modification of the contract. The second, which is probably what the *Hornell* court would have chosen, would more closely tie the assurance to the insecurity—when the promisee is no longer insecure, the assurance is no longer needed.⁸⁶ The last option would indicate that the assurance represents an independent promise in the nature of a separate contract.

Reflecting upon these questions forces one to consider the promissory character of adequate assurances. What are we to make of this promise? Is it a modification of the original

⁸³ *Id.* at 704.

⁸⁴ *Id.* (noting that the question of reasonableness of demands for assurances was “a close one”).

⁸⁵ *Id.* at 700.

⁸⁶ *See infra* note 153 and accompanying text.

contract or could it be viewed as an independent promise?⁸⁷ This article will focus on the latter possibility. When one focuses on the promissory character of the assurance in this manner, one must confront several questions. Is the promise enforceable as a contract?⁸⁸ How long is it to endure?⁸⁹ What are the consequences if it is breached, and can its breach give rise to damages independent of the original contract?⁹⁰ This last question takes on particular importance when one considers the possibility that the original contract might include some limitations on damages, such as a stipulated damages clause, an exclusion of consequential damages, or a clause limiting damages to repair or replacement. The remainder of this article will address these questions.

III. ADEQUATE ASSURANCES OFTEN COMPRISE PROMISES THAT SHOULD BE TREATED AS CONTRACTS

This section will, from a doctrinal perspective, examine whether promises made in response to a demand for adequate assurances meet the basic requirements of a contract. Specifically, this Part will consider contract law's traditional bases of enforcement as well as a relevant ground to deny enforcement—duress.

A. *Enforceable Promises*

A logical place to begin this inquiry is with the definition of a contract. A contract is unhelpfully defined in the Restatement (Second) of Contracts as “a promise or set of promises for the breach of which the law gives a remedy.”⁹¹ Of course, not all promises are enforced as contracts; the simplest way to describe the current state of American contract law is to say that there are two primary categories of promises that courts enforce: those that are given for consideration, and those on which the promisee detrimentally relies.⁹² In this article, I

⁸⁷ Here I wish to clarify my terminology. By using the term “independent promise,” I do not wish to reference the vocabulary of conditions. Rather, I simply mean that the promise of the assurance could form the basis of a separate contract.

⁸⁸ See *infra* Part III.

⁸⁹ See *infra* Part IV.

⁹⁰ See *infra* Part V.

⁹¹ RESTATEMENT (SECOND) OF CONTRACTS § 1 (1981).

⁹² There are, of course, other categories of enforceable promises. For example, promises under seal and promises to modify a contract under section 2-209 of the

will ask whether various types of assurances satisfy one or the other of these two criteria for enforceability, but I will treat an affirmative answer to that question as a necessary—but not a sufficient—condition for treating such an assurance as a contract. Even if an assurance-promise is enforceable because it is given for consideration, or is relied on, it may only be enforceable as a modification of the original contract, not as a separate contract.⁹³

As a preliminary matter, let us first dispose of the weakest form of assurance contemplated by section 2-609: the mere affirmation of one's intention to perform his obligations under the contract.⁹⁴ While this sort of assurance could possibly be construed as a promise, it is not the sort of promise that this article seeks to address.⁹⁵ Instead, as we embark on our inquiry into whether an assurance might involve an enforceable promise, we will focus on more robust, sturdy promises, such as the one to furnish a personal guaranty.

Is such an assurance an enforceable promise? On one level, the question of enforcement can be answered preliminarily in a rather straightforward manner: yes, it's enforceable. Why? By operation of positive law—section 2-609. But this facile answer skirts a fundamental underlying question: what does it mean to enforce a promise? Typically, contract law enforces promises by providing a remedy for their breach, and the remedy is typically money damages meant to put the promisee in the position he would have occupied had the promisor performed.⁹⁶ But in saying that section 2-609 makes the promise enforceable, we are only saying that section 2-609 provides its own regime of enforcement. The promise is, by the terms of the statutory provision, enforced with the remedy of accelerating breach, i.e., the insecure party may treat the principal contract as repudiated. Yet this proposition is, in fact, inaccurate. Section 2-609 is silent on enforcement of the promise, and merely creates a duty to make a certain kind

Uniform Commercial Code. U.C.C. § 2-209 (revised 2003); JOSEPH M. PERILLO & JOHN D. CALAMARI, CALAMARI AND PERILLO ON CONTRACTS 274-78 (5th ed. 2003).

⁹³ I will take up this line of inquiry in the epilogue, *infra*.

⁹⁴ Assurances of this sort are rather common in the case law. *See, e.g.*, *Bausch & Lomb, Inc. v. Bressler*, 977 F.2d 720 (2d Cir. 1992); *Gutor Int'l AG v. Raymond Packer Co.*, 493 F.2d 938 (1st Cir. 1992).

⁹⁵ This is not to say that this sort of assurance is entirely devoid of theoretical significance. Those who would take a strong position on the illegitimacy of assurances would even consider the mere affirmation of intention to perform to be more security than that to which the promisee is entitled. *See Garvin, supra* note 5, at 130-38.

⁹⁶ *See* RESTATEMENT (SECOND) OF CONTRACTS § 344(1) (1981).

of promise and punishes the failure to make that promise, under certain circumstances. Further, it is silent on the question of what happens when a party furnishes assurances but does not live up to them.⁹⁷ Thus my central question: is the promise enforceable in its own right, outside of the context and framework of section 2-609?

The promise might be enforceable for the same kinds of reasons we enforce other promises; namely, it might have been given for consideration, or detrimentally relied upon by the promisee. Let us begin by asking whether there is consideration for the promise. According to Holmes, consideration involves not just a benefit to the promisor and a detriment to the promisee, but also a relationship of “reciprocal conventional inducement.”⁹⁸ The “promise must induce the detriment and the detriment must induce the promise.”⁹⁹ In our example, the buyer promised to furnish a personal guaranty of monies owed. Was that promise bargained for? Did the buyer receive a benefit, or did the seller suffer a detriment? In order to answer these questions, a bit of factual context will be helpful. Imagine the following conversation between a seller and a buyer:

S: Look, I've heard that you have not been paying your other creditors for quite some time. Even though you have finally paid your balance, many of your recent payments have been late. I'm very concerned.

B: I know. Cash has been a little tight, but things have already picked up since the beginning of the new quarter. I'm pretty sure that by the end of the year, I'll be back to paying off my full balance early, as I have done in years past.

S: I don't think that's going to cut it. I've got plenty of other customers I can sell to. I don't want to stop doing business with you, but without a personal guaranty, I've got no other choice.

⁹⁷ One case has hinted at an answer to this question. *See* Am. Research Bureau, Inc. v. E-Systems, Inc., 663 F.2d 189, 196 n.10 (D.C. Cir. 1980). Professor White has pointed out that a careful reading of a footnote in *ARB* reveals the court's belief that “it was the failure to comply with the assurances that gave the right to cancel,” not the failure to give assurances. White, *supra* note 5, at 846. This interpretation of the law stands in contrast with the standard reading of the statute that says that if assurances are given, the insecure party must continue to perform.

⁹⁸ OLIVER WENDELL HOLMES, JR., *THE COMMON LAW* 227-30 (Howe ed., 1963) (1881).

⁹⁹ *Id.*

B: A personal guaranty? Wow, that's a pretty big step. You know, my company has been around for a long time. We're in no real danger of insolvency. Why don't you just give me until the end of the year?

S: I'm sorry, but without a personal guaranty, I'm going to have to stop sending you product.

B: Okay. I'll give you the guaranty.¹⁰⁰

The existence of consideration is invariably a fact-sensitive inquiry. Depending on the factual assumptions we make, it may be somewhat difficult to argue there is consideration for this promise, at least under the bargain theory of consideration. Perhaps the consideration is rooted in the seller's forbearing from suspending his performance. But for that to be a detriment (or a benefit to the buyer), we would have to conclude that the seller had a legal right to do so. Under section 2-609, however, this right does not arise until there has been an actual breach or a breach by anticipatory repudiation (including a repudiation resulting from the promisee's failure to respond to the demand for adequate assurances).¹⁰¹ Thus, while it seems as though there might be a

¹⁰⁰ Some readers might observe that if the seller had the right to stop delivering product, then the buyer must be in breach. This being the case, why doesn't the seller simply sue? If this is not the case, then the seller would be in breach by not delivering. This observation, while logical on its face, is something of a misconception. While it is true that there are many cases in which a promisor's failure to perform will amount to a breach with a clear legal consequence, those are not the kinds of disputes in which adequate assurance doctrine is invoked. As Larry Garvin explains in his excellent article on adequate assurances:

Relational contract is pertinent because the sort of contract under which adequate assurance is invoked almost always is relational. By definition, neither party has performed in full, which removes at a stroke almost all cash sales or ordinary credit sales where the goods are picked up on the spot. Rather, the usual sort of deal in these cases is a construction contract, or a long-term supply agreement, or a contract to manufacture specially-designed goods for some extended period—all potentially relational. In addition, adequate assurance normally comes about in part because the parties failed to define default in detail or otherwise provide expressly for allocating risks of the type that came about. In other words, the contracts are incomplete.

Garvin, *supra* note 5, at 117.

¹⁰¹ U.C.C. § 2-609(4) (revised 2003); *see also* Garvin, *supra* note 5, at 115-20. The facts of *Hornell v. Spry*, 664 N.Y.S. 2d 698 (N.Y. Sup. Ct. 1997), fall neatly into one of Garvin's categories of typical assurances cases. The parties had a long-term supply contract that was never memorialized in a writing and thus devoid of any provisions defining default. What the court characterized as the parties' first round of assurances was their attempt to provide the types of terms that might have governed their agreement in the first instance. If those terms had been agreed upon, Hornell would not have had to resort to a demand for assurances. Rather, it could have sued Spry for breach, assuming his conduct (which was not well explained in the opinion) violated his credit terms.

detriment to the promisee, careful analysis reveals that the insecure party didn't have a right to suspend his performance at the moment the promisee gave the assurance. The time for performance had not yet passed and there had not been an unequivocal repudiation. Until the demand is rejected, or the assurances not given, there is no such right. So it would be circular to conclude that continuing to perform constitutes consideration, for it is only the refusal to give assurances that gives rise to the right to treat the promisor as in breach.¹⁰²

Maybe consideration can be found elsewhere. Consideration doctrine is famously malleable, and courts are usually able to find consideration for a promise whenever they are inclined to do so.¹⁰³ Occasionally, this means reverting to the more easily satisfied test of *Hamer v. Sidway*,¹⁰⁴ which requires only a benefit to the promisor or a detriment to the promisee, but does not require the element of inducement.¹⁰⁵ Moreover, a well-counseled promisee would grant a concession in exchange for the assurance.¹⁰⁶ Perhaps, as with modifications under the common law, a horse, hawk, or robe would suffice.¹⁰⁷ Thus we

¹⁰² Even if this were legal detriment, it would be hard to argue that this detriment induced the promise to provide the guaranty. Rather, one imagines that the buyer gave the guaranty in order to ensure that the seller will continue to deliver product. In this we can begin to see the outlines of a claim of a modification made under duress. We shall pursue this idea shortly.

¹⁰³ See, e.g., *Allegheny Coll. v. Nat'l Chautauqua Cnty. Bank*, 159 N.E. 173 (N.Y. 1927) (finding consideration for a promise to donate to a college in the fact that the college, by accepting the pledge, had made an implied promise to create a named scholarship to memorialize the pledge); *Wood v. Lucy, Lady Duff Gordon*, 118 N.E. 214 (N.Y. 1917) (finding consideration in an implied promise to use best efforts to sell defendant's fashions pursuant to an exclusive distribution agreement); *DeCicco v. Schweizer*, 117 N.E. 807 (N.Y. 1917). In his classic book, *The Death of Contract*, Grant Gilmore pointed out that in *DeCicco*, Chief Judge Cardozo found "consideration for a father's promise to pay his engaged daughter an annuity after marriage in the fact that the engaged couple, instead of breaking off the engagement, had in fact married." GRANT GILMORE, *THE DEATH OF CONTRACT* 69 (Ronald K.L. Collins ed., Ohio State Univ. Press 2d ed. 1974).

¹⁰⁴ 27 N.E. 256 (N.Y. 1891).

¹⁰⁵ Farnsworth asserts that "*Hamer* is still very much alive, along with the notion that either a benefit or a detriment will suffice." FARNSWORTH, *supra* note 2, § 2.4, at 52 n.9; see also *Weiner v. McGraw-Hill, Inc.*, 443 N.E.2d 441, 444 (N.Y. 1982) ("[A]ny basic contemporary definition would include the idea that [consideration] consists of either a benefit to the promisor or a detriment to the promisee . . . [a]s elaborated in *Hamer v. Sidway*, the seminal case on the subject.").

¹⁰⁶ See FARNSWORTH, *supra* note 2, § 4.23, at 295-98.

¹⁰⁷ This is the famous dictum of Lord Coke, explaining what new consideration could be offered to make a modification enforceable in the face of the pre-existing duty rule. To supplement his quaint locution with something more appropriate to a commercial setting, Coke suggested that accepting payment at a different location than originally agreed to would be sufficient consideration to make enforceable a

might say that the consideration is the insecure party's implied promise not to suspend its performance. But can a tacit promise induce a return promise?

In some cases, however, consideration might be easier to find. For example, we might very plausibly assume that in our hypothetical, the contract included a term permitting the seller to cancel if the buyer is late in his payments. With this new fact, we can say with confidence that the seller's willingness to stay in the contract—to waive his right to cancel—would be a bargained-for detriment, and would thus constitute consideration.

Depending on the facts of the particular case, then, there may not be any consideration for the promise of the assurance. But that does not mean that the assurances cannot comprise an enforceable promise; assuming the non-existence of consideration simply moves us along to another branch of our analysis.

Contract law has another significant justification for the enforcement of promises in the absence of consideration: reliance, i.e., the doctrine known as promissory estoppel.¹⁰⁸ Promissory estoppel, though not without its detractors,¹⁰⁹ has been firmly established in American contract law for nearly a century.¹¹⁰ While there is some dispute at the theoretical level over whether promissory estoppel is properly understood as being rooted in promise or in the harm caused by one's utterances, the legal requirements for the invocation of the doctrine are relatively clear. Under section 90 of the Second Restatement, “[a] promise which the promisor should reasonably expect to induce action or forbearance on the part of the promisee or a third person and which does induce such action or forbearance is binding if injustice can be avoided only by enforcement of the promise.”¹¹¹

Promissory estoppel should provide a basis for enforcing assurance-promises in many cases. For our present purposes, let us take the example discussed above of the buyer who promises to furnish a personal guaranty. The seller relies on

modification lowering the price. *Pinnel's Case*, (1602) 77 Eng. Rep. 237 (Q.B.); 5 Co. Rep. 117a, 117b.

¹⁰⁸ See RESTATEMENT (SECOND) OF CONTRACTS § 90 (1981).

¹⁰⁹ See GILMORE, *supra* note 103, at 71.

¹¹⁰ See Benjamin F. Boyer, *Promissory Estoppel: Principle from Precedents: I*, 50 MICH. L. REV. 639, 639-40 (1952) (explaining the development of promissory estoppel).

¹¹¹ RESTATEMENT (SECOND) OF CONTRACTS § 90 (1981).

this promise by continuing to deliver goods on credit, just as the promisor expects. If a court were to find that there is no consideration for this promise (for the sorts of reasons we discussed above), could the seller avoid making good on the guaranty? It seems quite clear that injustice would be the result if the court refused to enforce the promise. The results in cases involving claims of promissory estoppel are invariably fact-sensitive, but this generic example should suffice to establish a basis for recognizing that adequate assurances, in particular cases, can take the form of enforceable promises.

But what if there is neither consideration nor actionable reliance? In such cases, we might argue that the promise is nevertheless enforceable by operation of statutory law—section 2-609. There are other examples in contract law of promises being made enforceable by virtue of a statute even in the absence of consideration.¹¹² For example, under section 2-209 of the Uniform Commercial Code, a promise to modify a contract is enforceable despite the absence of consideration.¹¹³ So maybe there is consideration and maybe there's no consideration, but the promise is enforceable nonetheless.

The presence of consideration, in conclusion, will be a questionable proposition in many cases. There may be good reasons to believe that the promise of the guaranty in our hypothetical was not given for consideration, but, given the right facts, there will be at least a colorable argument to be made to the contrary. If one concludes that there really can be no consideration for such a promise, then one must either conclude that absent detrimental reliance, there is no basis for enforcement or that enforcement is a possibility solely on the basis of the statutory scheme of section 2-609. Alternatively, one might take the position that the determination of whether consideration exists must be taken up on a case-by-case basis, and that in those cases where consideration is found, the promise of the assurance may form the basis of a contract. Given the instability of grounding enforcement on consideration, it seems that the most promising basis for granting legal enforcement to the assurance promise would be that the promisee had relied on it to his detriment. In any event, it is not necessary for our analysis to be able to say

¹¹² A Pennsylvania statute provides that a promise in writing may be enforceable even in the absence of consideration so long as the writing expresses the promisor's intention to be legally bound. 33 PA. STAT. ANN. § 6 (West 2008).

¹¹³ U.C.C. § 2-209(1) (revised 2003).

categorically that all promises made when giving assurances are enforceable as contracts. It is enough to conclude that such treatment is possible, given the right facts. Moreover, the “right facts” exist outside of jerry-rigged hypotheticals; they appear commonly in real cases, like *Hornell*, the Arizona Iced Tea case.

Whether or not a promise can be said to be supported by consideration or enforceable because of reliance, such indicia of enforceability are merely necessary conditions, not sufficient ones. Even a promise that has been detrimentally relied on may not be enforceable if it was not freely given.¹¹⁴ One of the foundational principles in contract law is consent; the law is careful not to impose contractual liability on persons who were in some sense coerced into entering a contract.

B. *Duress and Impaired Volition*

On a conceptual level, a demand for adequate assurances involves duress. An assurance pursuant to section 2-609 is not really a promise freely given. The giver of the assurance does so not of his own volition, but rather because he is being threatened with legal sanction for failing to give it. This is an argument that at least one court has weighed in on. In *Erwin Weller Co. v. Talon Inc.*, a buyer was having difficulty meeting his payment obligations to his seller.¹¹⁵ The parties amended their agreement to provide the buyer “an extended period to make payments due or coming due . . . and granted [the seller] a security interest in the [buyer’s] accounts receivable”¹¹⁶ The buyer argued that the amended agreement “did not constitute a valid contract because [he] signed it under duress.”¹¹⁷ The Supreme Court of North Dakota rejected this argument, stating that the promisee’s demand could not amount to duress because the insecure seller had a statutory right to the assurances.¹¹⁸

So duress is an issue that theoretically could be marshaled as an argument against calling adequate assurances contracts, but doctrinally, it seems dubious. The legal

¹¹⁴ See RESTATEMENT (SECOND) OF CONTRACTS § 175 (1981) (“If a party’s manifestation of assent is induced by an improper threat by the other party that leaves the victim no reasonable alternative, the contract is voidable by the victim.”).

¹¹⁵ 295 N.W.2d 172, 173 (S.D. 1980).

¹¹⁶ *Id.*

¹¹⁷ *Id.* at 174.

¹¹⁸ *Id.*

requirements for duress can be rather formidable¹¹⁹ and don't seem to be present in the kinds of promises we're talking about here. But this is not to say that a promisor could never successfully assert duress as a defense to liability for failing to live up to his assurances. When policing contractual modifications, contract law relaxes the more stringent legal requirements for duress that are imposed when duress is asserted as a defense to formation of an original contract.¹²⁰ David Snyder has argued that in the modification context, courts ought to, and in fact do, consider a lower standard of "coercion."¹²¹

Despite the doctrinal obstacles to characterizing a demand for adequate assurances as duress, Larry Garvin has argued forcefully that section 2-609 does, in fact, endorse duress.¹²² Describing a demand for assurances as "an offer that the promisor can't refuse," Garvin explains:

One party to an agreement is placed in an awkward position; either it consents to an unwanted modification or it is held in breach and forced to pay damages. Though there is a choice here, it is most unpalatable, for the promisor cannot choose simply to go ahead with the contract originally agreed upon. Either way, the promisor will incur new liabilities, whether under the modified contract or under the breached contract. . . . That there is a choice does not eliminate duress; whether the choice was coerced is the real question.¹²³

¹¹⁹ Duress traditionally required proof of physical compulsion or a threat thereof. The law has evolved to allow simply an "improper threat" to serve as the evidentiary basis as it moved away from recognizing only physical duress to economic duress and undue influence. In any event, most courts require some sort of threat. In addition, courts commonly require that the duress "resulted from defendant's wrongful and oppressive conduct and not by plaintiff's necessities." *W. R. Grimshaw Co. v. Nevil C. Withrow Co.*, 248 F.2d 896, 904 (8th Cir. 1957); *see also Selmer Co. v. Blakeslee-Midwest Co.*, 704 F.2d 924, 928 (7th Cir. 1983) (requiring a party claiming duress to show that its financial difficulties had been caused by the other party). So long as a promisee in fact had reasonable grounds for insecurity, it would be difficult to maintain that a demand for adequate assurances pursuant to section 2-609 could amount to wrongful and oppressive conduct.

¹²⁰ Under section 89(a) of the Second Restatement, a modification is enforceable so long as it is "fair and equitable in view of circumstances not anticipated by the parties when the contract was made." Thus attempts to avoid coerced modifications can succeed if they can be shown to be inequitable, irrespective of threats, or whether or not the complaining party's difficulties were caused by the party seeking enforcement. RESTATEMENT (SECOND) OF CONTRACTS § 89(a) (1981).

¹²¹ David V. Snyder, *The Law of Contract and the Concept of Change: Public and Private Attempts to Regulate Modification, Waiver, and Estoppel*, 1999 WIS. L. REV. 607, 684.

¹²² Garvin, *supra* note 5, at 71, 135.

¹²³ *Id.* at 135-36.

While duress may have some potential to limit the ability of an insecure party to extract additional undertakings from his counterpart, curiously, it also has the potential to afflict the insecure party as well. It is possible that the party giving the assurance is not the only one who may be under duress, not the only party with a somewhat impaired volition as relates to this supposed new contract arising out of the assurance. In several cases, courts have found that a demand was made and assurances were given, even though the parties didn't realize that they had done so.¹²⁴ They were engaging in the normal negotiating activity of working out their troubled deal, trying to come to some accommodation. When they could not and eventually ended up in litigation, the court said that their efforts to reach an understanding amounted to assurances demanded and given.¹²⁵ For example, in *AMF, Inc. v. McDonald's Corp.*, AMF had agreed in 1968 to furnish McDonald's with a technologically innovative computerized cash register and twenty-three production models.¹²⁶ Plagued by technical problems, AMF struggled to produce the machines according to schedule.¹²⁷ After several accommodations, McDonald's asked AMF to suspend the production of the twenty-three units.¹²⁸ AMF agreed, but ultimately sued McDonald's for breach.¹²⁹ The court ruled that McDonald's had a right to cancel the contract pursuant to section 2-609.¹³⁰

While this sketch of the facts of *AMF* suggests the normal application of 2-609, there is something rather curious about the court's ruling. McDonald's never made a formal written demand for adequate assurances. Indeed, the reported facts of the case do not suggest that McDonald's even made a formal oral demand. Thus it appears that the court fashioned a 2-609 demand out of the parties' routine attempts to work out their troubled contract.¹³¹

So it is possible not only to be coerced by the insecure party into giving assurances, but also for the insecure party to receive assurances without him knowing it. The cases provide

¹²⁴ *Smyers v. Quartz Works Corp.*, 880 F. Supp. 1425, 1433 (D. Kan. 1995) (demand for payment should be construed as a demand for assurances).

¹²⁵ *Id.*

¹²⁶ 536 F.2d 1167, 1168 (7th Cir. 1976).

¹²⁷ *Id.* at 1169.

¹²⁸ *Id.*

¹²⁹ *Id.*

¹³⁰ *Id.* at 1171.

¹³¹ See *White*, *supra* note 5, at 857-58.

another way that adequate assurances can be less than fully consensual. In these cases, demand for assurances is ruled to be a compulsory prerequisite to canceling the contract.¹³² For example, in *National Farmers Organization v. Bartlett & Co., Grain*, the parties entered into multiple contracts whereby NFO was to deliver specified amounts of grain to Bartlett.¹³³ At some point, Bartlett began withholding payment “as protection against realized or potential loss caused by failure on the Seller’s part to perform all contracts not yet fully performed.”¹³⁴ NFO informed Bartlett on January 26, 1973 that it would not perform the remaining contracts until Bartlett paid a significant portion of the amounts due for grain already delivered.¹³⁵ NFO never delivered any grain under the remaining contracts and Bartlett ultimately withheld some \$18,000.¹³⁶

In its suit to recover the \$18,000, NFO argued that Bartlett’s failure to pay in response to the statement was a repudiation.¹³⁷ The court, however, ruled that NFO’s statement of January 26 was a repudiation.¹³⁸ Although the court could have followed the example of the *AMF* court, finding the January 26 statement to be a demand for adequate assurances it declined to do so, stating, “[p]lainly, the seller could have availed itself of a section 2-609 remedy on January 26. Equally plainly, however, it did not do so.”¹³⁹

In *Harlow & Jones, Inc. v. Advance Steel Co.*, the court took a similar position. Advance was to buy 1000 tons of European steel in three installments from Harlow.¹⁴⁰ After accepting the first two shipments, the buyer expressed concern about the timeliness of the final delivery.¹⁴¹ The contract called for the steel to arrive by “September-October shipment,” though there was evidence of a trade usage indicating that this term contemplated that delivery by November 30 would be

¹³² *But see* GFSI, Inc. v. J-Loong Trading, Ltd., 505 F. Supp. 2d 935, 947 (D. Kan. 2007) (no written demand thus no protection of section 2-609).

¹³³ 560 F.2d 1350, 1352 (8th Cir. 1977).

¹³⁴ *Id.* at 1353.

¹³⁵ *Id.*

¹³⁶ *Id.* at 1354.

¹³⁷ *Id.* at 1356.

¹³⁸ *Id.* at 1358.

¹³⁹ *Id.* at 1355.

¹⁴⁰ 424 F. Supp. 770, 772 (E.D. Mich. 1976).

¹⁴¹ *Id.* at 773.

acceptable.¹⁴² On October 29, Advance sent a letter notifying Harlow of its intention to reject the final shipment because of late delivery.¹⁴³ The steel arrived in mid-November.¹⁴⁴

In ruling that Advance's rejection of the shipment amounted to a repudiation, the court asserted that "[h]ad Advance taken the course prescribed by sec. 2-609, Harlow would have had the opportunity to effect a timely delivery and so cure any delay in shipment. In light of this available remedy, Advance's outright rejection of the contract on October 29 . . . was unjustified."¹⁴⁵

Under cases like *NFO* and *Harlow*, an insecure party appears not to have the option of treating defective performance as a breach or repudiation until he has asked for adequate assurances. Thus we might view the situation as one in which the insecure promisee can be seen as making a coerced demand for assurances and the underperforming promisor making a coerced promise.

But even if one accepts this reading of these cases, it is important not to overstate their significance. For it would be revolutionary indeed to claim that all obligees must pass through section 2-609 (or section 251) on their way to treating an obligor's delinquency as a breach entitling them to suspend performance. This is not the law, for if it were, it would render the doctrine of present breach by anticipatory repudiation meaningless.¹⁴⁶ Rather, the broadly accepted view is the one propounded by the Restatement, that where a promisor has committed a total breach, the promisee is entitled to suspend performance and sue for damages.¹⁴⁷ Nevertheless, in all of this, we can see that there are significant issues of consensuality that might affect our view of the promissory character of adequate assurances. But the doctrines of consent and duress will not serve as a total bar to enforcement.

This Part has shown that there is a substantial doctrinal basis for the claim that a promise made in response to a demand for adequate assurances could be treated in law as an enforceable contract. Although there is some theoretical

¹⁴² *Id.*

¹⁴³ *Id.* at 776.

¹⁴⁴ *Id.*

¹⁴⁵ *Id.* at 778.

¹⁴⁶ *But see* Hillman, *supra* note 5, at 559 (arguing that making recourse to § 2-609 a mandatory predicate to cancelling a contract would best serve the purposes of Article 2).

¹⁴⁷ RESTATEMENT (SECOND) OF CONTRACTS §§ 237, 242 (1981).

basis for questioning the consensual nature of such a promise, no court has taken such a duress argument seriously. In Parts IV and V, we will consider the consequences of treating the assurance-promise as a distinct contract.

IV. CONSEQUENCES OF TREATING ASSURANCES AS ENFORCEABLE PROMISES—DURATION

If we are to treat assurances as a distinct promise comprising an enforceable contract, we must address the ramifications of such a classification. One particularly significant consequence would be the effect on remedies, a topic we explore below in Part V. A related question relates to the duration or life span of the assurance: How long must the promisor continue to perform the undertakings of the assurances? Should the promises contained in the assurances continue to bind the promisor even after the original contract has come to an end, whether it has been breached, cancelled, or otherwise terminated? If the assurance amounts to an enforceable contract, then it stands to reason that the duration of the promisor's obligation to perform should not necessarily be yoked to the duration of the original contract. We might ask whether, in a case like *Hornell*¹⁴⁸ (the Arizona Iced Tea case), a party in Spry's position would have been bound to continue performing in accordance with his assurances for the life of the contract and beyond, had the parties continued in their contractual relationship after agreeing to more restrictive terms. Or would he be entitled to enjoy the parties' original financing arrangement once he had established a track record of responsible behavior, thus putting an end to Hornell's grounds for insecurity?

To begin to answer these vexing questions of duration, let us return to the example of the personal guaranty given in response to a demand for adequate assurances. It is not controversial to say that a guaranty often endures beyond the lifespan of the original contract. Indeed, on some level, the guaranty doesn't really even spring to life until the original contract has come to an end (at least from the unpaid obligee's perspective).¹⁴⁹ To be sure, a guaranty serves an important role

¹⁴⁸ *Hornell v. Spry*, 664 N.Y.S.2d 698 (N.Y. Sup. Ct. 1997).

¹⁴⁹ In the terminology of the Third Restatement of Suretyship and Guaranty, the contract of guaranty involves three parties: a creditor who is owed a duty, termed the obligee; a debtor who owes the duty, the primary obligor; and a guarantor or surety who

from the moment it is given, for it gives the obligee the security to continue performing; indeed this is one of its primary *raison d'être*.¹⁵⁰ But on the other hand, a guaranty is in some sense dormant until the primary obligor defaults on his obligation. It is at that moment that the guaranty fully actualizes. Often, though not in all cases, this moment will roughly coincide with the underlying contract coming to an end, whether through breach, termination or cancellation. Thus, in many instances, a guaranty will outlive the contractual relationship from which it arose. On this basis, we can assert that in some cases, the promise of an assurance can endure beyond the life of the original contract, and be seen as a distinct contract.

But the question of duration is not always so clear. Consider the example of the assignment of receivables. The buyer buys on credit from the seller and is falling behind in his payments. Ultimately, in response to a demand for adequate assurances, the buyer agrees to assign his receivables to the seller. For a while, both parties find this plan agreeable; the seller is getting his money and the buyer is willing to assign the receivables as long as he is getting the goods. Imagine, however, that after some period of time, the buyer realizes that he no longer wants to continue in this arrangement, though he is still in arrears. Under these circumstances, with the seller still insecure about getting paid both for amounts past due and those due on shipments he continues to make, it makes sense to support a rule requiring that the assignment must persist.

But what if the contract terminates while the buyer is still in arrears? This scenario presents us with a different and more interesting question. Assume that the buyer terminates the principal purchase agreement in accordance with the contract's termination provisions, and wants his cash flow back. Does the assignment live on beyond the life span of the contract, or must the seller resort to legal process in order to get paid? The seller would like to continue with the assignment as a sort of self-help remedy, and the buyer wishes he had never made the promise. Does the assignment arrangement continue on for some duration, such as until the contract payments are all made? Or is it a sort of appendage to the principal contract, relying on that contract for its heartbeat

promises to perform, or pay damages on the primary obligor's behalf, the secondary obligor. RESTATEMENT (THIRD) OF SURETYSHIP AND GUARANTY § 1 (1996).

¹⁵⁰ See Avery Wiener Katz, *An Economic Analysis of the Guarantee Contract*, 66. U. CHI. L. REV. 47 (1999).

and blood supply? Is the answer any different if the contract comes to an end because of an unrelated breach, for example, if the buyer fails to place minimum orders. What if the seller breaches?

Although the case law provides precious little guidance in choosing between these two approaches to the duration question, one exception can be found in *Hornell*. Recall that in *Hornell*, Spry, the buyer, agreed to tighter credit terms in response to Hornell's initial demand for adequate assurances.¹⁵¹ These included capping any outstanding credit at \$300,000 and requiring Spry to repay all amounts loaned with fourteen days.¹⁵² Shortly after the parties reached this agreement, Spry arranged to have his balance paid in full, but proceeded immediately to place an order for somewhere between \$390,000 and \$450,000.¹⁵³ Hornell refused to fill this order without further assurances, including a personal guaranty.¹⁵⁴ The court noted that Spry's order not only exceeded the agreed limit, but also "placed Hornell in a position where it would have no opportunity to learn whether Spry would meet the 14-day payment terms, before Spry again became indebted to Hornell for a very large sum of money."¹⁵⁵ The court further stated that the "arrangement, by its terms, clearly contemplated an opportunity for Hornell to test out defendants' ability to make payment with 14-day periods."¹⁵⁶

Although the facts of *Hornell* do not mesh perfectly with those of the hypothetical, the court's comments can be read to suggest a flexible approach to duration aimed at making certain that the assurance lasts as long as needed to assuage the insecurity. They also suggest that the assurance is intended to protect the insecure party against further loss. These dicta from *Hornell* thus shed some light on our question about duration. Yet, to arrive at a more satisfying answer, we must look beyond the case law to the Official Comments to section 2-609, which articulate the purposes of the doctrine.

¹⁵¹ *Hornell*, 664 N.Y.S.2d at 701.

¹⁵² *Id.*

¹⁵³ *Id.*

¹⁵⁴ *Id.*

¹⁵⁵ *Id.* at 703 (emphasis omitted).

¹⁵⁶ *Id.*

A. *The Purposes that Animate the Doctrine of Adequate Assurances*

Further insight into the question of duration may be found in a careful examination of the purposes of adequate assurances, as conceived by Llewellyn and the other drafters of Article 2. Their view, broadly stated, is that assurances are given to ensure that the insecure party might continue performing free from insecurity. Let us once again take a look at the Official Comment to section 2-609, which states:

The section rests on the recognition of the fact that the essential purpose of a contract between commercial men is actual performance and they do not bargain merely for a promise, or for a promise plus the right to win a lawsuit and that *a continuing sense of reliance and security that the promised performance will be forthcoming when due, is an important feature of the bargain.* If either the willingness or the ability of a party to perform declines materially between the time of contracting and the time for performance, *the other party is threatened with the loss of a substantial part of what he has bargained for.* A seller needs protection not merely against having to deliver on credit to a shaky buyer, but also against having to procure and manufacture the goods, perhaps turning down other customers. *Once he has been given reason to believe that the buyer's performance has become uncertain, it is an undue hardship to force him to continue his own performance.* Similarly, *a buyer who believes that the seller's deliveries have become uncertain cannot safely wait for the due date of performance when he has been buying to assure himself of materials for his current manufacturing or to replenish his stock of merchandise.*¹⁵⁷

A close reading of this paragraph reveals several rationales for the doctrine. Taken roughly in the order presented, the first appears to be an affirmation of the expectation interest. In saying that “commercial men . . . do not bargain merely for a promise, or for a promise plus the right to win a lawsuit,”¹⁵⁸ the Comment appears to view a principal purpose of section 2-609 as being to ensure that the promisee receives what he has been promised without resorting to judicial process. The Comment can also be read as expressing a concern for the psychological state of the insecure party. There is disutility in fearing that the promisor will not perform and assurances go some way to assuage that fear. Next, the Comment suggests a desire to minimize the insecure promisee’s potential reliance loss or opportunity cost that may

¹⁵⁷ U.C.C. § 2-609 cmt. 1 (revised 2003) (emphasis added).

¹⁵⁸ *Id.*

result from staying in a contract with a shaky or flaky counterpart. If the promisor is unwilling to give the assurances, the insecure party can cut its loss by refusing to manufacture or deliver goods to the promisor or by arranging to sell them elsewhere.¹⁵⁹ A fourth rationale, expressed in terms of the “undue hardship” to the promisee who must “continue his own performance” when the promisor’s “performance has become uncertain,” can be characterized as a concern for holding the deal together. The implication is that if the assurances are given, the promisee is relieved of an undue hardship and will be more likely to continue in the contractual relationship. While the Official Comment does not explicitly state this as a value, commentators have recognized this purpose of the doctrine¹⁶⁰ and it comports with one of Llewellyn’s overarching purposes in shaping Article 2.¹⁶¹

Other purposes, also not suggested by the text of the Comment, are served by the doctrine. Among these are: fostering communication between the parties,¹⁶² encouraging dispute resolution outside of the courts,¹⁶³ and serving as a self-help enforcement mechanism.¹⁶⁴ I will discuss these purposes in turn, considering whether they offer any support for the view that assurance promises ought to be enforced even after the underlying contract ceases to be in effect.

B. Are the Purposes of the Doctrine Furthered by Enforcing Assurance Promises After the Underlying Contract Has Been Terminated?

If we view adequate assurances as being primarily concerned with holding the deal together, then it hardly makes sense to require the promisor to continue in the assignment of

¹⁵⁹ If the promisor gives the assurances, then either he will make good on the contract (the increased probability of which he has signaled by giving the assurance), or he will breach. If he breaches, then the promisee’s reliance loss in a given case may not have been reduced by the assurances (though he still might have acted to minimize his reliance despite the assurances), but the ex ante reliance loss has decreased as a result of the use of section 2-609.

¹⁶⁰ See Garvin, *supra* note 5, at 124-27; Taylor, *supra* note 5, at 883-85.

¹⁶¹ See Richard A. Danzig, *A Comment on the Jurisprudence of the Uniform Commercial Code*, 27 STAN. L. REV. 621, 621 (1975); Ingrid Michelsen Hillinger, *The Article 2 Merchant Rules: Karl Llewellyn’s Attempt to Achieve The Good, The True, The Beautiful in Commercial Law*, 73 GEO. L.J. 1141, 1149 (1985).

¹⁶² See Taylor, *supra* note 5, at 884.

¹⁶³ *Id.*

¹⁶⁴ *Id.*

his receivables once the contract has been terminated. This much seems self-evident. Similarly, if we are concerned about the psychological dimension of insecurity, nothing on this score is gained if we require assurances to remain in effect after the contract is terminated. These rationales together seem to offer little to the promisee who seeks to use adequate assurances to further his interest in being made whole.

The doctrine of adequate assurances has been applauded for its functions of fostering communication. It may be difficult to see how the communication-inducing function of the doctrine could be used to support extended duration of the assurance promise. But Professor Taylor points out that section 2-609 is useful because it provides a legal reason and framework for a promisee to notify a promisor of valuable information:

Often [the underperforming promisor] may be unaware that the PFB¹⁶⁵ has serious concerns about its performance. By seeking assurances the PFB gives notice of its perception of problems. Upon such notice, the potentially breaching party can take steps to either clarify that the PFB is mistaken or to remedy problems that do exist. Demanding assurance that performance will be forthcoming thus forces both parties to assess the status of the contract and to communicate their understanding to each other. Assurances encourage organic solidarity between parties by ensuring that each remains vested in the contract. Finally, adequate assurances protect the benefit of the bargain by recognizing the importance of the interest in future performance and thereby promote commercial certainty.¹⁶⁶

Taylor's commentary on the communication-fostering aspect of adequate assurances is important to our understanding of the functions and purposes of the doctrine, but despite its elegant support for the doctrine as a whole, it fails to provide any basis for using this aspect to assist in answering our question about duration.

Taylor has also argued that section 2-609 can be effective as an alternative dispute resolution device.¹⁶⁷ If the parties are inclined to cooperate, they can resolve their conflict by using the mechanism of assurances. Successfully avoiding litigation will depend on the promisor both acknowledging his own problematic course of performance and agreeing that the

¹⁶⁵ In Professor Taylor's terminology, a PFB is a "party facing breach"—an insecure party. *See id.* at 859.

¹⁶⁶ *Id.* at 884.

¹⁶⁷ *Id.*

assurances requested are reasonable. Of course these conditions are not always present, as there has been no dearth of reported cases involving disputes over the grounds for insecurity and the adequacy or excessiveness of the assurances demanded.¹⁶⁸ But even where the parties have been able to agree on both the cause of the insecurity and the appropriateness of the demand, there is little reason to believe that the promisor will find anything in section 2-609 to induce him to continue to assign his receivables after the original contract has been terminated, without a mandate from a court. The very absence of judicial precedent on this issue makes it hard to imagine that a promisor would believe that he was under any obligation to do so.

However, it is important at this point to note that we are not here striving for a principle that will make a promisor wish to continue to adhere to his assurances. Rather, we seek a compelling rationale to support a particular legal rule. We do not imagine that our arguments will in fact cause the promisor to continue diverting his cash flows to the insecure party, but aim to construct an obligation to do so. Moreover, the purpose of this entire article is not simply to divine the intention of the drafters of section 2-609, but rather to arrive at appropriate answers to questions which, by hypothesis, the drafters have not considered. The breach of this obligation, which we may very well expect, will cause a legally cognizable harm, the remedy for which will be discussed in the next Part. As we will see, if indeed the law requires the promisor to continue to perform the assurance promise, a very interesting question of damages arises.

In light of this analysis, a rule supporting continued enforcement of the assurance promises beyond the life of the underlying contract can be said to further the purpose of encouraging alternative dispute resolution, if in a somewhat diffuse way, by notifying future promisors of the consequences of failing to fully perform their assurance promises.

To a significant degree, much of the same can be said of the view of adequate assurances as a self-help measure. Professor Taylor has written that “section 2-609 is a powerful statutory incorporation of self-help.”¹⁶⁹ Taylor defines self-help as “private actions taken by those interested in the controversy

¹⁶⁸ See *supra* notes 46-47 and accompanying text.

¹⁶⁹ Taylor, *supra* note 5, at 883.

to prevent or resolve disputes without official assistance of a governmental official or disinterested third party.”¹⁷⁰ Taylor’s definition thus distinguishes self-help from alternative dispute resolution (“ADR”) by excluding from the category of self-help mediation, arbitration, court guided settlement efforts and the like. But there is another important difference in the context of adequate assurances that makes self-help a more central rationale for the doctrine than ADR. ADR is a consensual phenomenon. Recourse to the courts is always an option for parties to a contractual dispute unless they have *mutually* agreed, either at the time of formation or at the time of the dispute, to pursue ADR. By contrast, self-help is more one-sided; it is a mechanism for an aggrieved party to enforce his rights without the assistance of the judiciary. With adequate assurances, the mechanism is provided by statute and, as we have seen, entitles the insecure promisee to extract a promise that will allow him to receive the benefit of his bargain without the cost, trouble, and relational harm that litigation entails. Thus, as a matter of both judicial economy and the convenience of the parties, the self-help function of the doctrine of adequate assurances supports the conclusion that courts ought to rule that the assurance promise is enforceable beyond the life-span of the underlying contract.

We are left, then, with two final candidates to support extended duration: the purpose of making the promisee whole and the purpose of helping the promisee avoid excessive reliance costs. I have saved the best for last. These final two purposes of adequate assurances unambiguously support an expansive view of the duration of the assurance. It bears remembering that section 2-609 is, in fact, a remedial provision. As such, its application ought to be informed by the so-called “spirit of the remedies” provision of section 1-103. This provision states that “[t]he remedies provided by this Act shall be liberally administered to the end that the aggrieved party may be put in as good a position as if the other party had fully performed”¹⁷¹

These two rationales for the doctrine must be seen as carrying greater weight than many of the others that have been discussed. Communication and assuaging psychological insecurity seem flighty and insignificant when measured

¹⁷⁰ *Id.* at 841. I do not adhere strictly to this scheme of classification.

¹⁷¹ U.C.C. § 1-106 (revised 2001).

against the bottom line economic realities of the parties' relationship. Avoiding litigation, while an important function of the doctrine, cannot be seen as more than a secondary function in the context of a legal code that purports to provide rules binding on the courts. Similarly, while self-help may be the primary purpose of some legal provisions, such as those relating to the execution of liens pursuant to a perfected security interest, it cannot be as important as the goal of sorting out economic rights and entitlements in a contractual relationship. The only other rationale of comparable importance is holding the deal together. Taken together, making the insecure party whole and holding the deal together are thus the two most important purposes of the doctrine. But as we have observed, once we have limited our focus to situations in which the underlying contract is no longer in force, the importance of holding the deal together evaporates.

When we talk about making the insecure party whole, we must consider two related concepts. The first is the reduction of costs associated with the insecurity. The Official Comment alludes to these costs, as do many commentators.¹⁷² The second, which is the immediate focus of our attention, is the protection of the expectation or reliance interests implicated by the promise of the assurance. These two amounts are sometimes, but not always, the same. In our present example of the assignment of receivables, they are the same. When the promisee seeks to continue in the assignment arrangement, he seeks not only the satisfaction of the promise of the assurance, but also to receive amounts due under the original contract.¹⁷³ We will see examples in the next Part where the assurance promise creates the possibility that the promisor will become obligated to the promisee for amounts in excess of any due under the original contract.

But if we acknowledge—as we must—that the drafters of section 2-609 were concerned with the promisee's economic loss, and we take full account of the spirit of the remedies section, it is hard to see why the assignment of receivables should not continue until the promisor's obligation is satisfied, irrespective of the termination of the contract. The promisor has promised to commit those cash flows to the repayment of

¹⁷² See Craswell, *supra* note 5, at 410-14; Garvin, *supra* note 5, at 112-16.

¹⁷³ The promisee's reliance costs are equal to the amounts he advanced to the promisor in reliance on his promise to assign receivables. His expectation interest is the same amount: he expects to be paid for his goods under the principal contract.

the obligation, and if we are to take seriously the promissory character of adequate assurances, then until that promise has been fulfilled, it should be enforced.

If it is not to be enforced, the law ought to impose upon the promisor the burden of explaining why. As we have already discussed in Part III, the reason might be a want of consideration. But if the insecure promisee was well-counseled, he may have had the forethought to offer something in exchange for the promise. Alternatively, the promisee may have detrimentally relied on the promise (a wrinkle we will revisit in the next Part). The promisor might argue that his promise was coerced, but absent strong facts suggesting duress, he is not likely to succeed on that issue. Finally, the strongest possibility for categorically denying enforcement of the assurance promise once the original contract has come to an end lies in the possibility of treating the assurance promise as a modification of the original contract, rather than as a separate contract. We shall explore that possibility in the Epilogue.

In sum, there appears to be no reason to categorically deny enforcement of the assurance promise under the circumstances presented by our hypothetical. It is possible that the facts of the particular case will furnish reasons to do so, but at this point, there remains a strong case to be made for embracing the promissory character of adequate assurances and enforcing the assurance promise as a contract in its own right.

To the extent that we view adequate assurances as a doctrine whose primary purpose is to hold the deal together, we would be disinclined to conclude that certain assurance promises should endure in force after termination or breach, for once the promisee's own performance obligations have come to an end, the insecurity, and thus the need for the assurances, vanishes.

Yet, as the language of the Official Comment makes clear, holding the deal together is not the only rationale for the doctrine.¹⁷⁴ It fosters other values, such as promoting communication between parties, encouraging dispute resolution, creating a self-help mechanism, and, above all, minimizing the promisee's economic loss.¹⁷⁵ When we consider these other purposes, particularly ensuring that an injured party is compensated for his loss, it makes less sense to conclude that the assignment should stop once the contract is

¹⁷⁴ U.C.C. § 2-609 cmt. 1 (revised 2003).

¹⁷⁵ *Id.*

terminated. If we treat the new promise as enduring even after the original contract has terminated, then we are embracing a view of adequate assurances as a sort of self-help remedy. The insecure party has been harmed and is empowered by law to extract a promise that will help make him whole. Until he has been made whole, the promise should retain its legal effect.

The question of duration is evidently a complicated one, which the courts have not yet adequately addressed. I hope I have presented a framework for thinking about how to resolve it. Ultimately, it probably ought to be answered with reference to the facts of an individual case, and will depend upon the courts coming to a clearer view of which of the competing rationales for adequate assurances is the most compelling. Whichever view of duration eventually prevails, there remains one final set of issues—indeed the most important set for litigants—to be addressed.

V. CONSEQUENCES FOR DAMAGES

Apart from—and probably more important than—the implications for the duration of the promise, treating an assurance as an independently enforceable contract raises the question of what damages might be available for its breach. Specifically, can the injured party recover the full measure of damages for the breach of the assurance promise even where the original contract provided for some limitation on remedies? Such restrictions can take many forms, including stipulated damages, limitation to repair or replacement of defective parts, and exclusion of consequential damages.

In this part, I would like to explore the proposition that if the assurances comprise an enforceable promise, then the limitations on damages from the original contract should not apply to the new contract. The appeal of this position rests in logic, but there may be doctrinal or theoretical reasons that militate against it. To aid in our discussion of these considerations, consider the following hypothetical conflict that illustrates how the issue might arise.

Suppose we have a buyer and a seller who enter into a contract for the manufacture and sale of a specialized piece of machinery. The buyer has notified the seller about special losses he will suffer if the goods are not delivered in working order by a certain date. Despite the buyer's disclosure that he will lose significant amounts of profitable business with each week the machine is late, the parties' contract limits

consequential damages to one thousand dollars per week for lateness. Alternatively, we might imagine that the damages are simply limited to the cost of repair or replacement. As things turn out, before the time for delivery has arrived, the seller is having trouble getting the machine to work properly and announces that delivery will be delayed. The buyer, feeling insecure, demands assurances from the seller, specifically, retaining a special consultant to redesign the machine and troubleshoot the manufacturing process. The seller promises to do this. It comes to pass that the seller, confident that she will be able to solve the problem herself, and wishing to avoid the added expense of the expert consultant, never actually enlists the help of the expert, and the machine is never properly delivered.

The seller has thus conceivably breached two contracts. Can the buyer sue on that second promise and avoid the limitation of damages that is contained in the principal contract, but not agreed to in the context of the assurances? If the promise of the assurance is treated as a contract, and the buyer suffers damages that are ordinarily recoverable under law, then the buyer ought to recover his full loss. Yet this conclusion may strike some readers as wrong at an intuitive level.

As we consider whether some legal principle informs our uneasiness with this conclusion, we should acknowledge a fundamental factual assumption built into this hypothetical. This story assumes that the parties never bothered to work out the details of their assurances agreement. This is a completely realistic assumption; the cases reveal that parties pay relatively little attention to their assurances. In fact, as we have seen, parties sometimes do not even realize that they have actually demanded and given assurances.¹⁷⁶ Indeed, in his study of a sampling of cases on adequate assurances, Professor James J. White reached this very conclusion, asserting that most cases do not involve a highly conscious or formal process of demanding and giving assurances; rather, they are decided on the basis of a judge's construction of the parties' haphazard, even unintentional, invocation of the doctrine.¹⁷⁷

Thus, another way of looking at this problem of damages is that it is one of incomplete contracts and default

¹⁷⁶ See *supra* notes 121-43 and accompanying text.

¹⁷⁷ See White, *supra* note 5, at 857-59.

rules.¹⁷⁸ In other words, we can say that the problem for our buyer and seller is that, in agreeing to the assurances, they failed to negotiate and memorialize any agreement about the availability of consequential damages or damages otherwise in excess of those recoverable under the original contract.

The theory of default rules proceeds from the recognition that a fully specified contract—one in which the parties contemplate all possible contingencies and negotiate their contract to provide for them—is an impossibility.¹⁷⁹ Parties economize on transaction costs by negotiating only the most important terms, employing boilerplate, and leaving the resulting gaps to be filled by contract law, which supplies the default rules that will govern the situations that the parties themselves have not provided for.¹⁸⁰ Default rules can be broadly classed into two groups: majoritarian defaults and penalty defaults. A majoritarian default is one designed to approximate the rule most parties would have agreed to, had they taken the time to negotiate over the issue.¹⁸¹ Majoritarian defaults thus are intended to be intuitive and unobjectionable, and often involve standards of reasonableness.¹⁸²

Contract theorists have identified a second form of default rule, described as a penalty default. A penalty default, as the name suggests, is designed to penalize one party or another, creating a winner and loser *ex ante*.¹⁸³ This sort of rule may be desirable to the extent that it has its intended effect: forcing parties to reveal information and bargain over the term in question before entering into the contract.¹⁸⁴ This “information-forcing” effect, in turn, can increase the value of the contract to the parties and reduce the likelihood of litigation.¹⁸⁵ Also, since the information the parties have revealed to each other is often memorialized in the contract,

¹⁷⁸ See Barry E. Adler, *The Questionable Assent of Hadley v. Baxendale*, 51 STAN. L. REV. 1547 (1999); Ian Ayres & Robert Gertner, *Strategic Contractual Inefficiency and the Optimal Choice of Legal Rules*, 101 YALE L.J. 729 (1992) [hereinafter Ayres & Gertner, *Contractual Inefficiency*]; Ian Ayres & Robert Gertner, *Filling Gaps in Incomplete Contracts: An Economic Theory of Default Rules*, 99 YALE L.J. 87 (1989) [hereinafter Ayres & Gertner, *Filling Gaps*].

¹⁷⁹ Ayres & Gertner, *Contractual Inefficiency*, *supra* note 178, at 730.

¹⁸⁰ *Id.* at 731.

¹⁸¹ *Id.*

¹⁸² Ayres & Gertner, *Filling Gaps*, *supra* note 178, at 91.

¹⁸³ *Id.* at 95-100.

¹⁸⁴ *Id.* at 97.

¹⁸⁵ Ayres & Gertner, *Contractual Inefficiency*, *supra* note 178, at 735.

the parties are ultimately revealing more information to the courts, which reduces the costs of litigation should any ensue.¹⁸⁶

In the context of this discussion, the question then becomes, what is the best default rule to govern the question of whether the insecure party can recover damages from the breach of the assurance promise in excess of those available under the principal contract? Let us first consider the best majoritarian default. The primary explanation for the incompleteness of contracts is, as mentioned above, economizing on transaction costs. It seems rather obvious to suppose that the damages rule most parties would prefer would be one that carries over the damages rule the parties had agreed to in their principal contract (I will call that the Carryover Rule). Having expended the time and resources to negotiate limitations on damages when forming their contract (recall the hypothetical), the parties would not agree *ex ante* to a rule that nullifies the effect of their earlier effort and requires them to renegotiate the same issue in the stressful context of their deteriorating relationship (which I will call the Independent Damages Rule). I take this line of reasoning to be the basis for any intuitive discomfort we might have with an Independent Damages Rule. The Carryover Rule would also have the advantage of being a rule that most business persons would expect to govern. As they are not excessively focused on obscure questions of law, we might expect them to think, why would the law disregard the agreement we have already reached on the availability of damages?¹⁸⁷

The Independent Damages Rule, on the other hand, would make an appropriate penalty default. Since the underperforming promisor would be liable for greater damages under this rule, she would have an incentive to negotiate with the insecure party over this term at the time she gives the assurances. This is not to say that she would necessarily

¹⁸⁶ Ayres & Gertner, *Filling Gaps*, *supra* note 178, at 97.

¹⁸⁷ Imputing this sort of common-sense reasoning to business persons comports with Llewellyn's view of what a body of commercial law ought to be. *See* Snyder, *supra* note 43, at 22-25. Llewellyn wrote:

The legal profession needs to have the men of commerce think of law and legal work, not as a baffling intricacy of ununderstandable [sic] technicality, but as a helpful device which can be seen, directly, to be helpful though safety requires the use of a lawyer's skills in developing its help. . . . Commercial law requires to be for consumption by commercial men, as well as lawyers.

Memorandum from Karl Llewellyn on The Reasons for a Uniform Commercial Code (c. 1940), in WILLIAM TWINING, KARL LLEWELLYN AND THE REALIST MOVEMENT 524-35 (1973).

convince her counterpart to agree to alter the rule, but it might have the beneficial effect of inducing her to reveal information about the likelihood of her actually performing the new obligation she has undertaken. It would also cause her to compare the cost of non-performance with the cost of performance. This, in turn, could lead either to a more complete negotiation of the assurances, or to a reconfiguration of the original damages arrangement. Information about the likelihood of her compliance with the assurances would also assist the insecure party in determining the extent to which he should continue to rely on the principal contract and her assurances. Perhaps he has the opportunity to seek substitute goods elsewhere, make alternative arrangement with his customers, or hedge in some other manner. Finally, the information-forcing nature of the Independent Damages Rule would create greater certainty and predictability in any future litigation, for the parties would likely have memorialized any understanding they reached during their negotiations, and this documentation would aid a court in determining and enforcing the parties' intentions.

To appreciate another way that the information-forcing character of a penalty default could be useful, consider a variation to our hypothetical. Assume now that in negotiating the original contract, the buyer had not spelled out the likely loss he would realize if the seller were to deliver the machine late and that the only limitation on damages is a repair or replacement clause. Suppose also that the buyer has received substantial orders for goods that will be made with the seller's machine. If the Independent Damages Rule were in place, it would operate to induce the buyer to reveal to the seller the potential loss if she does not deliver the machine promptly. Armed with this information, and the knowledge that she will be liable under the rule of *Hadley v. Baxendale*¹⁸⁸ for lost profits incurred by the buyer, the seller will be able to make a better-informed judgment about how much effort to put into performing. This knowledge might also cause her to reevaluate whether in fact it is efficient for her to give the assurances the buyer requested; perhaps it would be better for her to breach the original contract and either settle with the buyer or leave herself liable only for the damages set out in the original contract.

¹⁸⁸ (1854) 156 Eng. Rep. 145 (Ct. Exch.); 9 Exch. Rep. 341.

The foregoing discussion suggests that while the Carryover Damages Rule may comport with our intuition about what damages ought to be available, it tends to reinforce a problem that seems endemic to the adequate assurances process: the fact that parties appear not to pay sufficient attention to it.

Our discussion of the damages rule has, to this point, proceeded in reference to a hypothetical involving the availability of expectation damages. I consider this to be, in general, the weaker case for invoking the Independent Damages Rule.¹⁸⁹ I will now introduce a hypothetical that presents detrimental reliance as the basis for imposing such a rule. Suppose an individual has hired an architect to design and build an architecturally significant house. The architect is running into a variety of problems, giving the landowner reasonable grounds for insecurity. In response to the buyer's demand, the architect promises to bring in Frank Gehry as a consultant to solve the design problems. The buyer is delighted at having extracted this promise, and perceives that his house will be much more valuable when it becomes known that Frank Gehry was a design consultant for the house. He informs other wealthy architecture enthusiasts about his soon-to-be-built Frank Gehry home. He then enters into a contract to sell the home. As it turns out, the architect completes the house on time and perfectly according to specification. But, as you have probably guessed, he never hired Frank Gehry.

¹⁸⁹ My sense of the comparative weakness of the case of expectation damages is of a piece with Fuller and Perdue's classic evaluation of the relative strength of the moral claims of the expectation, reliance, and restitution interests in contract law. As Fuller and Perdue explain:

[T]he promisee who has actually relied on the promise, even though he may not thereby have enriched the promisor, certainly presents a more pressing case for relief than the promisee who merely demands satisfaction for his disappointment in not getting what was promised him. In passing from compensation for change of position to compensation for loss of expectancy we pass, to use Aristotle's terms again, from the realm of corrective justice to that of distributive justice. The law no longer seeks merely to heal a disturbed status quo, but to bring into being a new situation. It ceases to act defensively or restoratively, and assumes a more active role. With the transition, the justification for legal relief loses its self-evident quality. It is as a matter of fact no easy thing to explain why the normal rule of contract recovery should be that which measures damages by the value of the promised performance.

Lon L. Fuller & William R. Perdue, Jr., *The Reliance Interest in Contract Damages (Pt. I)*, 46 YALE L.J. 52, 55-56 (1936).

This hypothetical presents two important features that challenge our understanding of the promissory character of adequate assurances of performance. First, we have a promisor who has fully performed his contract without any breach whatsoever. Second, the promisee's reliance loss seems to be unrelated to the undertakings of the original contract. I have designed this hypothetical to strain the view of adequate assurances I have endorsed throughout this article. In this scenario, almost all of the values that adequate assurances aims to further are out the window. We are not holding the deal together. The promisee's opportunistic reselling of his Frank Gehry house has nothing to do with either the psychological or economic dimensions of insecurity. In performing the principal contract, the builder has made the promisee whole. Finally, we may have a residual intuitive sense that enforcing this promise simply is not what the doctrine of adequate assurances is all about.

However, at a certain level, none of these considerations is really relevant at all. For what we have is a promise—a promise that was detrimentally relied upon. We enforce promises either because they were given for consideration, or because they were detrimentally relied upon. In fact, as Fuller and Perdue (not to mention Aristotle)¹⁹⁰ have argued, we are more concerned with enforcing promises when the promisor, by making the promise, has caused harm to the promisee. Now certainly, in this case, the promisee might have trouble with some of the doctrinal requirements of promissory estoppel. This might not be a winning case because a court might conclude that nonenforcement would not be unjust; or perhaps that this sort of reliance was not foreseeable by the promisor. But all we would have to do is change a few facts (and not in a terribly unrealistic way) to bring this hypothetical within the ambit of section 90.¹⁹¹ In any event, though the details of this hypothetical may make it an inappropriate case for enforcement, its structure forces us to confront the fact that adequate assurances often involve promises that can be relied upon, and that there is no obvious reason why the harm caused

¹⁹⁰ ARISTOTLE, *THE NICOMACHEAN ETHICS* 109-14 (J. A. Ackrill & J. O. Urmson eds., David Ross trans., Oxford Univ. Press 1998).

¹⁹¹ For example, if the builder simply knew that the landowner was not planning to live in the house, but to sell it for a profit, the chances for success under section 90 would be significantly higher.

by such promises should be treated differently under law than other promises.

In this Part, I have shown that if we take seriously the promissory character of adequate assurances—if we accept that they can be enforceable promises—then we must confront practical considerations of the highest order, namely, the availability of damages for breach of contract. I have shown the practical significance of this issue through the exposition of realistic hypotheticals that demonstrate that real-world litigants would have a serious financial interest in the conflicts I have constructed. Although I do not claim that principles of contract law require the adoption of the Independent Damages Rule, I have provided a factual and theoretical framework for thinking about the question and have given meaningful reasons in support of the rule.

CONCLUSION

The doctrine of adequate assurances of performance has, since its inception, been relegated to the periphery of contract law. By highlighting the promissory character of adequate assurances, I hope to have convinced readers that the doctrine implicates the issues that rest at the very heart of contract theory. I have demonstrated that assurances can take the form of promises that deserve to be treated by the law as enforceable contracts. I have also explored the consequences that would follow from such a treatment, and most importantly, its effect on damages flowing from the breach of the assurance promise.

If one accepts my basic claim about the enforceability of these promises, then the difficult questions of duration and damages addressed in this article ought to provoke more attention from scholars. The next step in resolving these issues involves moving beyond the doctrinal, logical, and functional analyses that were the modalities of this article, and engaging in a more thoroughgoing theoretical analysis focusing on theories of promise and damages.

EPILOGUE

The purpose of this article has been to present an account of assurances that takes their promissory character seriously. A significant implication of such a treatment is that it forces us to consider the impact on damages if the promise of

the assurances is breached. Specifically, if the assurance is treated as a promise giving rise to a contract, then logically, the breach of that promise would give rise to damages independent of those available under the original contract. Similarly, we have seen that treating the assurance promise as a contract would lead us to think that the promise would remain enforceable even after the original contract was no longer in force. We have marshaled a variety of arguments—pro and con—on the questions of duration and damages, but in each case, we were working without the benefit of a clear legal rule that could neatly resolve these issues.

We have, however, hinted at the existence of such a simple means of resolution. Although the courts have not addressed the question, one can easily imagine a court treating the promise of the assurance as a modification of the original contract. Such a maneuver would obviate (or at least greatly simplify) the inquiry into whether the breach of the assurance promise could give rise to damages different from those available for breach of the underlying contract, or how long the assurance promise was to remain in effect. If the courts categorically treated assurances as modifications, then there would be no question of damages under a separate contract and no confusion over duration.

But it is not clear that the courts would disfavor treating the promise of the assurance as a distinct promise, one with its own integrity and one whose breach could give rise to damages that might not be available under the initial contract. This line of inquiry requires consideration of a slightly modified question; namely, which new promises between parties to a contract amount to a modification and which amount to a new contract? Unfortunately, the law of modification does not provide a clear doctrinal framework for answering that question. Moreover, there exists an ample scholarly literature on modification that completely overlooks this question.¹⁹² Yet this omission cannot be ascribed to the notion that the question is too rarefied or esoteric to merit an applicable legal rule.

¹⁹² See, e.g., Robert A. Hillman, *Contract Modification Under the Restatement (Second) of Contracts*, 67 CORNELL L. REV. 680 (1982); Thomas J. Miceli, *Over a Barrel: Contract Modification, Reliance and Bankruptcy*, 22 INT'L. REV. L. & ECON. 41 (2002); John E. Murray, Jr., *The Modification Mysteries: Section 2-209 of the Uniform Commercial Code*, 32 VILL. L. REV. 1 (1987); Irma S. Russell, *Reinventing the Deal: A Sequential Approach to Analyzing Claims for Enforcement of Modified Sales Contracts*, 53 FLA. L. REV. 49 (2001); Snyder, *supra* note 121; Richard E. Speidel, *Contract Formation and Modification Under Revised Article 2*, 35 WM. & MARY L. REV. 1305 (1994).

Indeed, multiple promises are a very common occurrence between contracting parties. Consider the following example.

Buyer and seller have a contract under which buyer agrees to purchase all of its requirements of soda from the seller, with a minimum quantity of one thousand cases of soda per month for a year. Buyer and seller agree that the varieties of soda will be determined at the time of the placement of each purchase order, once a week, at seller's posted wholesale price. In the middle of the contract, seller introduces a new item to its product lineup: iced tea. If the parties agree that buyer will start purchasing iced tea, have they made a new contract or modified their original agreement?

As this hypothetical suggests, there is nothing exceptional about parties to an executory contract making new promises. There are several ways the parties might address these new promises that bear on the question at hand. They might document the new promise with a new form agreement, indicating a subjective intention that the new promise constitutes a new contract. They might explicitly indicate their intention that the new promise acts as a modification of their original agreement. Parties with ongoing relationships also commonly execute master contracts which contemplate new undertakings and provide for easy documentation, such as purchase orders, for any subsequent orders. Alternatively, the parties might not give any thought whatsoever to the classification of the new promise as a modification or separate contract.

The Restatement offers some insight into the question, but it does not necessarily answer our question. A somewhat obscure Comment to section 231 of the Second Restatement provides some doctrinal guidance.

When each party gives more than one promise, or gives some performance in addition to a promise, it may not be clear whether there is a single exchange of promises resulting in a single contract or separate exchanges resulting in separate contracts. If every promise by one party is at least part of the consideration for every promise by the other party, there is a single exchange in which all of the promises on each side are exchanged for all of those on the other side. . . . The form of the agreement is not controlling, and the actual bargain of the parties is not to be determined merely by reference to such criteria as whether separate performances are made the subject of a single promise or of separate promises, whether separate promises are contained in a single writing or in separate writings, or

whether the understanding of the parties is entirely written or oral or is partly written and partly oral.¹⁹³

While, on first reading, this text seems to offer the promise of some guidance for our question, this impression largely dissolves when one grasps the actual purpose of this complex passage. The purpose of this rule is to resolve disputes over whether two contracts, executed essentially simultaneously, but in separate documents, ought to be treated as a single contract or as two contracts. While the factual scenario contemplated by the rule is distinct from the one under consideration in this article, it is conceptually related, and therefore worthy of some further discussion.

Consider the following scenario and commentary: *X* owns a bowling alley and would like to sell it, but wishes to continue working after he sells his business. He agrees to sell the business to *Y* for an amount that reflects the fair value of the business. The two parties execute an agreement of sale at a lawyer's office, and at the same time execute another written agreement under which *X* will work for *Y* as a manager for \$75,000 per year. Three weeks later and before the sale transaction closes, *Y* unjustifiably fires *X*. May *X* refuse to complete the sale of the business to *Y*? As Professor John Murray's treatise explains,

The determination of whether there is one contract or two contracts is highly significant. If there are two contracts, *Y* has breached the employment contract and *X* has breached the sales contract. However, if there is only one contract, *Y* has breached the single contract and *X* has not breached since *X* was excused from any further performance of his duties to complete the transfer of the business upon the breach of duty by *Y*.¹⁹⁴

The test offered by the Restatement requires a court to focus on the intent of the parties, rather than the form of the agreement.¹⁹⁵

So we have here a legal rule that to some degree addresses the question of whether a subsequent promise constitutes a separate contract. But we also must recognize that the rule is meant to apply to separate promises that were made at the time of formation. Still, the consequence of the classification (one contract or two) affects the very question

¹⁹³ RESTATEMENT (SECOND) OF CONTRACTS § 231 cmt. d (1981).

¹⁹⁴ JOHN EDWARD MURRAY, JR., MURRAY ON CONTRACTS § 105, at 659 (4th ed. 2001).

¹⁹⁵ *Id.*

about damages that is fundamental to the problem of assurances we are exploring in this article. Regrettably, by making the parties' intent the key to resolving the question, the Restatement effectively abstains from providing any meaningful guidance that might be of use in distinguishing a modification from a new contract.

Contract law has other minor doctrines that, when viewed at a distance, appear promisingly to address issues analogous to ours. Among these are accord and satisfaction, novation, and the doctrine of substituted contracts. Yet these too prove to be dead ends. In the absence of a clear, comprehensive method of distinguishing between modifications and new contracts, a court interested in classifying assurance promises as modifications would be left to resort either to an intention-of-the-parties analysis, or a functional analysis of the sort we engaged in in Parts IV and V.