

CASEBRIEFS

The Understanding Video Lecture Series™

Anticipatory Repudiation

What is it?

- If a party makes it clear, even before his performance is due, that he cannot or will not perform, he is said to have anticipatorily repudiated the contract.
- Most states (not MA) allow the victim of an anticipatory repudiation to sue before the time for performance has come.

What is repudiation?

- When a party CLEARLY indicates that he cannot or will not perform, sometimes in the form of a statement.
- Vague doubts are not enough. Neither is a grudging willingness to perform.

Hypo: Anticipatory Repudiation

Singer contracts with Opera to sing a performance on 4/1 for \$5K.

On 2/1, Singer writes to Opera, “My career has taken off, and my going rate is now \$10K. It seems unfair that I should have to sing for \$5K.”

Opera writes back, “Your engagement is canceled – we don’t want you singing if you feel aggrieved.”

Which party, if either, is in breach?

Answer: Anticipatory Repudiation

- Opera. A party may commit breach before the time for performance by anticipatorily repudiating.
 - But anticipatory repudiation requires an unequivocal statement in inability or unwillingness to perform.
 - Singer's "it seems unfair" falls short of that.
 - Opera's recourse was to ask for assurances of performance, not cancel immediately.

Hypo: Anticipatory Repudiation

As with prior hypo, Singer contract to sing for Opera on 4/1.

On 3/1, Singer writes, “The money you’re paying isn’t enough, so I’m cancelling my 4/1 appearance.”

On 3/10, just as Opera is about to hire a replacement, Singer faxes, “I’ve reconsidered, and I’ll sing after all.”

Opera hires replacement singer and refuses to let Singer perform.

Which party, if either, is in breach?

Answer: Anticipatory Repudiation

- Opera. An anticipatory repudiation (like any repudiation) may be retracted:
 - until the other party either sues, changes position in reliance, or states she regards repudiation as final.
- Since Opera hadn't yet done any of these things when it got the retraction,
 - the retraction was effective, as if the repudiation had never occurred.

One more

On February 8, Representative sent Customer the following written offer: “Will sell Unique Anti-aging Serum. Terms: \$1000 total price must be tendered February 15 and Serum will be delivered March 1. Notify immediately if terms are acceptable. S/Representative.” This letter was received by Customer on February 9. The next day, Customer telephoned Representative and accepted the offer.

On February 14, Customer forwarded a certified check in the amount of \$1000 that was received and deposited by Representative on February 15. On February 22, Representative sent the Following wire to Customer: “Be advised the deal’s off. I shall be returning your check forthwith.” When Customer received this communication the Following day, she immediately telephoned Representative and told her: “I want that Unique Serum. I will institute legal action if necessary to enforce our agreement.”

Has there been anticipatory repudiation?

No

- While the seller IS unequivocally stating that the deal is off, one party has performed (Sent payment) so there is no anticipatory repudiation

