



1993

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### Recommended Citation

Gregory S. Crespi, *The Adequate Assurances Doctrine after U.C.C. 2-609: A Test of the Efficiency of the Common Law*, 38 Vill. L. Rev. 179 (1993).

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THE ADEQUATE ASSURANCES DOCTRINE AFTER  
U.C.C. § 2-609: A TEST OF THE EFFICIENCY  
OF THE COMMON LAW

GREGORY S. CRESPI\*

I. INTRODUCTION

THERE are a number of scholars who claim that the common law exhibits a tendency towards efficiency, a gradual substitution of more efficient for less efficient rules.<sup>1</sup> Several plausible mechanisms that might singly or in conjunction give rise to such a tendency have been suggested, including judicial preference for efficiency,<sup>2</sup> litigant incentives to challenge inefficient rules,<sup>3</sup> and litigant incentives to exert greater efforts when challenging ineffi-

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1. According to the generally utilized Kaldor-Hicks (wealth maximization) efficiency criterion, a rule of law is efficient if it operates to maximize the aggregate wealth of the affected parties relative to the effects of any other possible rule dealing with the same behavior. RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* § 1.2, at 12-14 (3d ed. 1986). The theory of common-law efficiency is best viewed as a collective product of many scholars developed over the past two decades. The evolution of this hypothesis is well articulated in the following series of articles published in the *Journal of Legal Studies*: Robert Cooter & Lewis Kornhauser, *Can Litigation Improve the Law Without the Help of Judges?*, 9 J. LEGAL STUD. 139 (1980) (mathematics of biological evolution show common law moves toward partial, not maximum, efficiency); John C. Goodman, *An Economic Theory of the Evolution of Common Law*, 7 J. LEGAL STUD. 393 (1978) (common law evolved toward efficiency because litigants with greater incentives have higher probability of winning); William M. Landes & Richard A. Posner, *Adjudication as a Private Good*, 8 J. LEGAL STUD. 235 (1979) (economic considerations appear to influence private adjudication); George L. Priest, *The Common Law Process and the Selection of Efficient Rules*, 6 J. LEGAL STUD. 65 (1977) (efficiency controls common law development); Paul H. Rubin, *Why is the Common Law Efficient?*, 6 J. LEGAL STUD. 51 (1977) (common law efficiency arises from tendency to litigate inefficient rules); R. Peter Terrebonne, *A Strictly Evolutionary Model of Common Law*, 10 J. LEGAL STUD. 397 (1981). For a relatively concise statement and defense of this theory, see Richard A. Posner, *A Reply to Some Recent Criticisms of the Efficiency Theory of the Common Law*, 9 HOFSTRA L. REV. 775 (1981) [hereinafter *A Reply to Some Recent Criticisms*].

2. POSNER, *ECONOMIC ANALYSIS OF LAW*, *supra* note 1, at 491-507.

3. *See, e.g.*, Priest, *supra* note 1, at 67 (inefficient rules increase stakes for litigants); Rubin, *supra* note 1, at 53-60 (party's interest in case outcome and precedent provides incentive to litigate). *But see* Cooter & Kornhauser, *supra* note 1, at 156 (no proof that inefficient laws challenged more often).

cient rules.<sup>4</sup> Other commentators have partially or wholly rejected the claim of common-law efficiency.<sup>5</sup> The evidence so far available is not sufficient to resolve the controversy.<sup>6</sup> This is not surprising, because a judgment as to the efficiency of a legal rule requires knowledge of the wealth and preferences of those persons affected—information that is often difficult or impossible to obtain<sup>7</sup>—and the extent to which a common-law (as opposed to a statutory) doctrine has been adopted across a number of jurisdictions is often a matter of dispute.

This Article examines recent cases that have considered the applicability of a particular common-law doctrine—the right to demand adequate assurances when reasonable doubts have arisen concerning prospective contractual performance—to see what light those opinions might shed upon the common-law efficiency debate. The adequate assurances doctrine was selected for examination because it is universally regarded with favor by commen-

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4. See, e.g., Cooter & Kornhauser, *supra* note 1, at 156 (indicating that greater efforts exerted to contest rather than defend inefficient rules prompts development of efficient rules); Goodman, *supra* note 1, at 393-94 (noting that as rule becomes more efficient, it is less likely to be target of litigation).

5. See, e.g., ROBERT COOTER & THOMAS ULEN, *LAW AND ECONOMICS* 492-99 (1988); Robert C. Ellickson, *A Critique of Economic and Sociological Theories of Social Control*, 16 J. LEGAL STUD. 67, 99 n.114 (1987) (indicating that many recent common-law rulings in United States suggest wealth redistribution); Frank I. Michelman, *A Comment on 'Some Uses and Abuses of Economics in Law'*, 46 U. CHI. L. REV. 307, 308 (1979) (noting that theory of common-law efficiency only describes appearances not actual behavior); Frank I. Michelman, *Norms and Normativity in the Economic Theory of Law*, 62 MINN. L. REV. 1015, 1015 (1978) (stating that empirical research demonstrating common-law efficiency promotes inaccurate assessment of present and future laws); George L. Priest, *Selective Characteristics of Litigation*, 9 J. LEGAL STUD. 399, 399-402 (1980) (arguing that theory of common-law efficiency undermined by failure to address parties' reasons to litigate or settle); Gary T. Schwartz, *Economics, Wealth Distribution, and Justice*, 1979 WIS. L. REV. 799, 799-800 (1979) (opining that economic approach neglects element of justice).

6. Posner, *A Reply to Some Recent Criticisms*, *supra* note 1, at 777 (characterizing available empirical evidence as "at most suggestive, not definitive"); Richard A. Posner, *Some Uses and Abuses of Economics in Law*, 46 U. CHI. L. REV. 281, 284 n.13 (1979) (citing relevant empirical studies); Richard A. Posner, *The Economic Approach to Law*, 53 TEX. L. REV. 757 (1975) (same).

7. The wealth consequences of a rule that are aggregated in making an efficiency determination are conventionally measured on the basis of the willingness to pay evidenced by each of the affected parties. POSNER, *ECONOMIC ANALYSIS OF LAW*, *supra* note 1, § 1.2, at 13-14. A person's willingness to pay to obtain (or to avoid) certain consequences is a function of that person's wealth and structure of preferences. A judgment as to the efficiency of a legal rule, therefore, is always made with regard to a particular set of initial wealth endowments and preference structures characterizing the affected persons. Such information is often difficult or impossible to obtain, and moreover, such information may not be robust with regard to particular changes in those initial wealth endowments or preferences.

tators,<sup>8</sup> is amenable to common-law adoption under any of several convincing rationales<sup>9</sup> and has robust efficiency properties.<sup>10</sup> Article 2 of the Uniform Commercial Code (U.C.C.) incorporates the doctrine,<sup>11</sup> and Article 2 has by all accounts proven to be a great success in the sale-of-goods context.<sup>12</sup> The extent of judicial acceptance of the adequate assurances doctrine in other contexts appears to provide a relatively "clean" measure of the tendency (or lack of such a tendency) of the common-law process to adopt and expand the scope of application of efficient rules.<sup>13</sup> The adequate assurances opinions may also shed light on the relative importance of the different mechanisms by which efficient rules may be promoted in common-law adjudication.

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8. "It seems that it is generally felt that this new approach of demanding assurances has rescued the insecure party from a difficult choice." JOHN D. CALAMARI & JOSEPH M. PERILLO, *CONTRACTS* § 12-2, at 520 (3d ed. 1987); see also E. ALLAN FARNSWORTH, *CONTRACTS* § 8.23, at 672-75 (2d ed. 1990) (explaining party's right to suspend performance until other party performs or offers adequate assurances or, in some instances, security); Thomas M. Campbell, Note, *The Right to Assurance of Performance Under UCC § 2-609 and Restatement (Second) of Contracts § 251: Toward A Uniform Rule of Contract Law*, 50 *FORDHAM L. REV.* 1292, 1293 (1982) (advocating acceptance of right to adequate assurance); Alan G. Dowling, Note, *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, 1386-87 (1975) (describing rights under § 2-609).

9. The adequate assurances doctrine would seem to be a logical corollary of the doctrine of anticipatory repudiation—also a common-law creation—that is necessary to obtain the full effect of that latter doctrine. For a discussion of the relationship between these two doctrines, see *infra* notes 23-25 and accompanying text. The adequate assurances doctrine also appears to be an appropriate means for enabling a promisor to discharge the duty of good faith performance, and for enabling a promisee to effectively mitigate damages upon a promisor's repudiation. Dowling, Note, *supra* note 8, at 1376-80. It can also be justified as a means of having the law more fully reflect and respond to commercial customs and standards. *Id.* at 1380-82.

10. For a discussion of the adequate assurances doctrine's promotion of efficiency, see *infra* text accompanying notes 33-37.

11. U.C.C. § 2-609 (1987). For the text of this section, see *infra* note 28.

12. See, e.g., JAMES J. WHITE & ROBERT S. SUMMERS, *UNIFORM COMMERCIAL CODE* § 6-2, at 233-34 (3d ed. 1988) (indicating that § 2-609 is useful in some situations); Campbell, Note, *supra* note 8, at 1303-04 (finding that adequate assurances doctrine effectively protects contracting parties); Dowling, Note, *supra* note 8, at 1359 (stating that § 2-609 effectively protects nonbreaching party).

13. The degree of acceptance of this doctrine appears to provide a relatively undistorted measure of the significance of economic efficiency in common law evolution because there do not appear to be any significant "legal" difficulties involved in applying the doctrine that judges might wish to weigh against efficiency concerns. The qualification of only relative accuracy as a measure is needed because, as has been convincingly argued by George Priest, the factors that determine which litigated disputes will be settled and which will proceed to trial assure that judges will be presented with an unrepresentative sample of the class of all litigated disputes for resolution. See generally Priest, *supra* note 5.

The results obtained from this examination of a well-regarded and efficient legal doctrine are generally supportive of the common-law efficiency hypothesis. There appears to be some overall movement towards efficiency in the adequate assurances area. This research also suggests, however, that while the common law may tend towards efficiency, it may do so only in a slow and uneven fashion that is shaped more by the interaction of litigation incentives and judicial deference to traditional "legal" bases of authority than by any judicial preference for efficient rules.<sup>14</sup>

Part II of this Article reviews the evolution of the doctrine of anticipatory repudiation that gave rise to the need for an adequate assurances doctrine and briefly discusses the pre-U.C.C. status of the common-law doctrine of adequate assurances. Part III introduces and discusses U.C.C. section 2-609, the major statutory encroachment upon the common law in this area. Part IV discusses the efficiency properties of the adequate assurances doctrine. Part V reviews the post-U.C.C. common-law development, assesses the extent to which the adequate assurances doctrine has been more widely embraced since the adoption of the U.C.C., and examines the reasons behind this movement. Part VI presents the conclusions reached concerning the implications of these findings for the common-law efficiency hypothesis.

## II. ORIGINS OF THE ADEQUATE ASSURANCES DOCTRINE

An anticipatory repudiation occurs when a party to a contract repudiates contractual obligations prior to the time when the party's performance is due. At early common law such a repudiation was not regarded as a breach—instead, the breach only occurred later, when performance did not take place.<sup>15</sup> This view was abandoned in the well-known English case of *Hochster v. De la Tour*.<sup>16</sup> Although the rationale of the *Hochster* opinion directly supports only the limited conclusion that upon a repudiation the promisee should be excused from performance,<sup>17</sup> the additional principle that the promisee also should have an immediate right to sue for damages has taken root in both English and American

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14. For a discussion of this research, see *infra* notes 43-51 and accompanying text.

15. JOHN EDWARD MURRAY, JR., MURRAY ON CONTRACTS § 109, at 609 (3d ed. 1990).

16. 118 Eng. Rep. 922 (Q.B. 1853).

17. Dowling, Note, *supra* note 8, at 1360.

law.<sup>18</sup> The *Hochster* result and its right-to-sue extension was subsequently endorsed by the United States Supreme Court in *Roehm v. Horst*,<sup>19</sup> as well as by the overwhelming majority of state jurisdictions.<sup>20</sup>

The doctrine of anticipatory repudiation places the promisee who has perceived an apparent repudiation in a difficult dilemma. If the promisee regards the apparent repudiation as an anticipatory repudiation, terminates his or her own performance and sues for breach, the promisee is placed in jeopardy of being found to have breached if the court determines that the apparent repudiation was not sufficiently clear and unequivocal to constitute an anticipatory repudiation justifying nonperformance. If, on the other hand, the promisee continues to perform after perceiving an apparent repudiation, and it is subsequently determined that an anticipatory repudiation took place, the promisee may be denied recovery for post-repudiation expenditures because of his or her failure to avoid those expenses as part of a reasonable effort to mitigate damages after the repudiation. Promisors who do not wish to breach but who are unable to perform will often transmit thoroughly ambiguous signals.<sup>21</sup> A promisee placed in this position is in need of some procedure through which the promisee can clarify the situation prior to deciding whether to continue performance. Without such a procedure, the promisee is at risk regardless of the course of action chosen.

The consequences of error are not only adverse to the promisee, but also likely to produce economic waste. If the promisee erroneously concludes that a repudiation has occurred and terminates performance, any subsequent performance by the promisor carried out before the promisor becomes aware of the promisee's actions is likely to be partially or wholly wasted. In that event, instead of the mutual benefits resulting from completed performance on both sides, each party is left to attempt to realize the salvage value of their part performance, often at a net loss. Similarly, if the promisee fails to correctly perceive a repudiation and erroneously continues performance, the post-repudiation expenditures may well have only limited salvage value. The availability of a procedure to clarify the situation prior to the

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18. *Id.*

19. 178 U.S. 1 (1900) (party may regard other party's renunciation as breach of contract).

20. Dowling, Note, *supra* note 8, at 1360.

21. WHITE & SUMMERS, *supra* note 12, § 6-2, at 233.

promisee's performance decision reduces the frequency of errors of either type, and consequently is likely to promote efficient resource allocation and protect the promisee's interests.

The doctrine of adequate assurances allows a promisee to demand adequate assurances of due performance if the promisee has reasonable grounds for insecurity regarding the promisor's willingness or ability to perform. In the absence of receiving such assurances within a reasonable time, the promisee may regard those grounds for insecurity as rising to the level of an anticipatory repudiation.<sup>22</sup> Under this doctrine, a promisee's request for assurances forces the promisor to resolve the uncertainty.

One unfamiliar with the early common law in this area might suspect that because the doctrine of adequate assurances appears to be a logical corollary to the anticipatory repudiation doctrine,<sup>23</sup> it would have been widely adopted by the common law simultaneously with the embracing of this latter doctrine. The adequate assurances doctrine seems to be a useful and uncontroversial means to implement both promisors' duties of good faith and fair dealing and promisees' mitigation of damages responsibilities in a manner consistent with commercial practice.<sup>24</sup> The pre-U.C.C. case law surprisingly reveals, however, that there was no adequate assurances doctrine available at common law.<sup>25</sup>

This absence is difficult to understand. One possible explanation is that the early post-*Hochster* courts that were faced with adequate assurances disputes may have had some residual anxiety about the potential scope and effect of the new anticipatory repudiation doctrine. As a result, these courts may have been unwilling to endorse a corollary doctrine that would further increase a promisor's obligations beyond those originally contracted for, as well as perhaps give rise to a large number of anticipatory repudi-

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22. See, e.g., U.C.C. § 2-609(4) (1978). For the text of this section, see *infra* note 28.

23. See WILLIAM D. HAWKLAND, UNIFORM COMMERCIAL CODE SERIES 2, § 2.609:01, at 102 (1982) ("The adequate-assurance [doctrine] should be viewed as an extension of principles relating to anticipatory repudiation and not as an independent legal concept."); see also Dowling, Note, *supra* note 8, at 1377-78 (stating that "a right to adequate assurance should be recognized as a logical corollary of the rationale underlying the doctrine of anticipatory breach").

24. Dowling, Note, *supra* note 8, at 1376-80.

25. See, e.g., *McCloskey & Co. v. Minweld Steel Co.*, 220 F.2d 101, 104-05 (3d Cir. 1955) (holding that failure to provide assurances does not constitute anticipatory breach); CALAMARI & PERILLO, *supra* note 8, § 12-2, at 518 (indicating absence of common-law procedure to make demand for adequate assurances); Dowling, Note, *supra* note 8, at 1364-65.

ation claims.<sup>26</sup> Such anxiety, if in fact it ever existed, is now no longer present, as evidenced by the fact that the courts have embraced the doctrine of anticipatory repudiation in virtually all contractual contexts.<sup>27</sup>

A second possible explanation for the absence of the doctrine of adequate assurances in the early common law is that pre-U.C.C. courts may have initially been wary of the difficulties involved in ascertaining whether "reasonable grounds for insecurity" existed in fact-specific contexts, and in determining what sorts of promisor actions in advance of the original promised performance were necessary to constitute "adequate assurances." If this latter explanation is accurate, such concerns should have been largely if not wholly dispelled by the favorable judicial experience in applying U.C.C. section 2-609.

### III. U.C.C. § 2-609

The drafters of the U.C.C. codified the adequate assurances doctrine for the sale of goods context in U.C.C. section 2-609.<sup>28</sup> Commentators have universally praised this section's operation.<sup>29</sup> The "reasonable insecurity" and "adequate assurances" determinations, while highly fact-specific, have proven manageable for

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26. See MURRAY, *supra* note 15, § 109, at 609 (discussing concerns with granting relief prior to date of contractual performance).

27. FARNSWORTH, *supra* note 8, § 8.20, at 658-59 (noting that doctrine has "carried the day" and now enjoys widespread acceptance).

28. U.C.C. § 2-609 (1978). The full text of that section is set forth below:  
§ 2-609—Right to Adequate Assurance of Performance

(1) A contract for sale imposes an obligation on each party that the other's expectation of receiving due performance will not be impaired. When reasonable grounds for insecurity arise with respect to the performance of either party the other may in writing demand adequate assurance of due performance and until he receives such assurance may if commercially reasonable suspend any performance for which he has not already received the agreed return.

(2) Between merchants the reasonableness of grounds for insecurity and the adequacy of any assurance offered shall be determined according to commercial standards.

(3) Acceptance of any improper delivery or payment does not prejudice the aggrieved party's right to demand adequate assurance of future performance.

(4) After receipt of a justified demand failure to provide within a reasonable time not exceeding thirty days such assurance of due performance as is adequate under the circumstances of the particular case is a repudiation of the contract.

*Id.* The U.C.C. also includes an extensive and relatively helpful official comment to this section. *Id.* § 2-609 cmt.

29. See, e.g., WHITE & SUMMERS, *supra* note 11, § 6-2, at 237; Campbell, Note, *supra* note 8, at 1303-04; Dowling, Note, *supra* note 8, at 1359, 1364, 1387.

the courts. Commentators have also endorsed the right to demand adequate assurances as conforming to the desires and practices of businesspersons.<sup>30</sup> In addition, the initial fears that parties might resort to repeated, unjustified demands as a means of harassment have proven unfounded.<sup>31</sup> It is impossible to find a writer who has a bad word to say about the application of the adequate assurances doctrine in the U.C.C. Article 2 context, and the general stance taken in the commentary is to call for an extension of the doctrine to a much broader range of contractual settings.<sup>32</sup>

#### IV. EFFICIENCY OF THE ADEQUATE ASSURANCES DOCTRINE

The doctrine of adequate assurances has never been understood as imposing mandatory terms upon the parties.<sup>33</sup> Instead,

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30. Dowling, Note, *supra* note 8, at 1365 (citing DAVID W. CARROLL & FREDERICK W. WHITESIDE, JR., FORMS FOR COMMERCIAL TRANSACTIONS UNDER THE UNIFORM COMMERCIAL CODE ch. 101(36) (1963); STATE OF NEW YORK, REPORT OF THE LAW REVISION COMMISSION, HEARINGS ON THE UNIFORM COMMERCIAL CODE 89 (1954), *reprinted in* 1 STATE OF NEW YORK LAW REVISION COMMISSION REPORT, HEARINGS ON THE UNIFORM COMMERCIAL CODE 153 (William S. Hein & Co. 1980); Richard Cosway, *Sales—A Comparison of the Law in Washington and the Uniform Commercial Code*, 36 WASH. L. REV. 50, 84 (1961)).

31. *Cole v. Melvin*, 441 F. Supp. 193, 203 (D.S.D. 1977) ("Clearly the drafters of the code did not intend that one party to a contract can go about demanding security for the performance of the other whenever he gets nervous about a contract."); FARNSWORTH, *supra* note 8, § 8.23, at 674 (noting that despite small volume of § 2-609 litigation to date, "it seems unlikely that courts will sanction questionable demands for assurances and thereby encourage parties to harass each other").

32. *See, e.g.*, Campbell, Note, *supra* note 8, at 1310 (stating that doctrine of assurances should govern common law of contracts); Dowling, Note, *supra* note 8, at 1359 (asserting that adequate assurances doctrine "would effectively obviate the anomaly present in the traditional doctrine of anticipatory breach if it were applied to *all* contracts rather than just those involving sales of goods").

33. I am unaware of any judge or commentator who has taken the position that the adequate assurances doctrine justifies the imposition of a duty to provide assurances when the parties have previously agreed otherwise. Whether the inclusion of an adequate assurances clause is mandatory regardless of the agreement of the contracting parties is, of course, a different question than whether, if such a clause is included in a contract by agreement or judicial imposition, that clause then *requires* a promisee to demand assurances, if reasonable grounds for insecurity arise, before the promisee can avail himself or herself of the anticipatory repudiation doctrine. Under common law there is no such requirement. *See, e.g.*, *T. Ferguson Constr., Inc. v. Sealaska Corp.*, 820 P.2d 1058, 1061 n.10 (Alaska 1991) (stating that obligee can act without first demanding assurance). Some commentators have argued for such a novel interpretation of the adequate assurances doctrine, at least in the U.C.C. § 2-609 context. *See* 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, 591-92 (1976). There is also some limited support for such an interpretation of § 2-609 to be found in the case law. *See* *Wrightstone, Inc. v. Motter*,

it merely establishes a “default rule” that supplies a contractual term in circumstances in which the parties have failed to agree otherwise. It is widely recognized that a default rule is efficient, as a general matter, if it imposes a term that the parties to a contract would have agreed to had they dealt with the matter in their negotiations.<sup>34</sup> This is so because, with such a default rule to rely upon, the parties can be spared the transaction costs of reaching an agreement on that term. If, however, a default rule imposes a term that differs from that which the parties would have agreed to after negotiation, the parties then face a choice between two more costly alternatives. The parties can either negotiate an express term to avoid the operation of the default rule—at some transaction cost—or they can avoid negotiations and live with the costly consequences of the default rule which, by definition, is not jointly wealth-maximizing because it imposes a different term than that which the parties would have reached after negotiation.

This general principle defining efficient default rules is subject to qualification because it rests upon a simplifying assumption that all contracting “pairs” are identically situated in terms of the default rule they would jointly prefer on a given issue.<sup>35</sup> In practice, different contracting pairs might jointly prefer different default rules, and any particular default rule chosen may impose costs on some pairs who would have preferred a different rule. Such pairs will be forced to either live with or negotiate around what for them is an inefficient result. Therefore, the choice of the globally optimal default rule—the most efficient rule once the consequences for all affected parties are considered—can often

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11 Cumb. L.J. 165, 166-67 (Pa. C. 1961). Nonetheless, most commentators have flatly rejected this interpretation of § 2-609 as unauthorized and unwise. See, e.g., WHITE & SUMMERS, *supra* note 11, § 6-2, at 237 n.23. It would seem reasonable, however, to expect courts to be somewhat less inclined to allow a promisee to avail himself or herself of the anticipatory repudiation doctrine if the promisee has made no effort to resolve any misunderstandings through a demand for assurances. Litigants naturally desire to posture themselves as having been diligent in attempting to resolve conflicts without resort to litigation, and many persons may consequently regard a demand for assurances as a de facto requirement for establishing an anticipatory repudiation defense despite the lack of any formal legal authority to that effect. I am grateful to Roy Ryden Anderson for this insight.

34. See Ian Ayres & Robert Gertner, *Filling Gaps in Incomplete Contracts: An Economic Theory of Default Rules*, 99 YALE L.J. 87, 89-90 & nn.19-21 (1989) (citing academics who argue that default rule should supply terms parties would have reached).

35. Some contracts, of course, may involve more than two parties. The “what the parties would have agreed to” rationale behind optimal default rules, however, easily generalizes to cover rules for multi-party contractual arrangements.

require an empirical assessment of the number of potential contracting pairs who would be disadvantaged by each possible default rule as well as the size of the expected costs of avoidance or of living with the inefficient rule imposed upon each of these contracting pairs.

Fortunately, the adequate assurances doctrine appears to have robust efficiency properties that obviate the need to consider this potential complexity in assessing the doctrine's efficiency. As a theoretical matter, it is difficult to envision why any pair of contracting parties would jointly prefer *ex ante* to *not* have in force a default rule imposing a duty upon both parties to provide adequate assurances upon the arising of reasonable grounds for insecurity as to performance. The potential benefits to both parties of being able to demand such assurances, should the need arise, would appear to outweigh substantially the potential costs of having to provide such assurances should the other party feel insecure as to performance. This proposition is likely to hold true even for those persons who may perceive themselves *ex ante* to be the more likely party to generate grounds for the insecurity. Moreover, the rare instance in which a party would prefer that the contract *not* include an adequate assurances provision would seem to be the exact circumstances under which the other party would have a particularly strong interest that such a provision be included in the agreement, either expressly or through the operation of a default rule. Only in the highly improbable event that *each* party perceived himself *ex ante* to be far more likely than the other to generate grounds for insecurity might the parties be likely to prefer jointly a default rule that did not impose upon either party a duty to provide adequate assurances upon request.

The available empirical evidence concerning contractual behavior in this area lends support to this theoretical conclusion. It has long been customary, at least in the sale of goods context, for sellers to insist upon including a clause in their contracts giving them a right to adequate assurances.<sup>36</sup> The existence of such a

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36. See U.C.C. § 2-609 cmt. 2 (1978) (noting that "principle [of adequate assurances] is reflected in the familiar clauses permitting the seller to curtail deliveries if the buyer's credit becomes impaired"); 5 FREDERICK M. HART & WILLIAM F. WILLIER, FORMS AND PROCEDURES UNDER THE UNIFORM COMMERCIAL CODE ¶ 24.31 (rev. ed. 1992); STATE OF NEW YORK, REPORT OF THE LAW REVISION COMMISSION, HEARINGS ON THE UNIFORM COMMERCIAL CODE 89 (1954), reprinted in 1 STATE OF NEW YORK LAW REVISION COMMISSION REPORT, HEARINGS ON THE UNIFORM COMMERCIAL CODE 153 (William S. Hein & Co. 1980) (indicating that § 2-609 protects parties through ability to demand adequate assurances); Richard Cosway, *Sales—A Comparison of the Law in Washington and the Uniform Commer-*

practice in the sale of goods arena—a classical contractual context that is paradigmatic of many other situations—provides strong prima facie evidence of the efficiency of creating such rights generally by a default rule. One would seem to be on rather safe ground in surmising that the adequate assurances doctrine is likely to provide an efficient default rule in virtually all contractual contexts.

One would think that if ever a doctrine had the favorable characteristics necessary to justify its widespread adoption as a means of promoting economic efficiency, adequate assurances would be that doctrine. Therefore, if it can be shown that over the approximately thirty-year period since the widespread adoption of the U.C.C. the courts have failed to extend significantly the scope of this doctrine beyond the mandated Article 2 context, such a state of affairs would cast doubt upon the proposition that the common law has a long-term tendency towards efficiency.<sup>37</sup> A comprehensive review of the post-U.C.C. case law does, however, reveal a general, though somewhat uneven, trend towards wider acceptance of the adequate assurances doctrine.

#### V. THE POST-U.C.C. EXPERIENCE

As noted above, prior to the adoption of the U.C.C., there was no general doctrine of adequate assurances available at common law.<sup>38</sup> This unavailability was reflected in the *Restatement of Contracts*,<sup>39</sup> which did not include an adequate assurances provision. The *Restatement of Contracts* did include a provision that permitted promisees to change their position in reasonable reliance on the promisor's equivocal manifestations as to willingness or ability to perform.<sup>40</sup> A promisee who so relied, however, bore the risk of that reliance later being determined to be unreasonable,

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*cial Code*, 36 WASH. L. REV. 50, 84 (1961) (noting that § 2-609 reflects "the concepts prevalent among business men"); Robert S. Summers, "Good Faith" in *General Contract Law and the Sales Provisions of the Uniform Commercial Code*, 54 VA. L. REV. 195, 249 (1968) (recognizing that prior to adoption of § 2-609, "lawyers wrote this same right into contracts"); Dowling, Note, *supra* note 8, at 1365 (indicating that § 2-609 "has been praised as conforming to the desires and practices of businessmen").

37. Unless, of course, litigant settlement decisions over that period had served to largely deny courts the opportunity to adopt the adequate assurances doctrine. See Priest, *supra* note 1, at 399-401 (indicating that litigation settlement decisions hamper efforts to study effect of judicial decisions).

38. For a discussion of the lack of an adequate assurances doctrine at common law, see *supra* note 26 and accompanying text.

39. RESTATEMENT OF CONTRACTS § 280 (1932).

40. *Id.*

and the promisee had no means available to force the promisor to first clarify the situation as to his or her intentions or capabilities.

The *Restatement (Second) of Contracts* does include a provision embodying the adequate assurances doctrine.<sup>41</sup> This provision is expressly modeled upon section 2-609 of the U.C.C.<sup>42</sup> This change in *Restatement* doctrine, however, reflects more the difference in jurisprudential attitudes between the two *Restatement* reporters (Williston and Corbin) on this issue than it does any marked expansion of the degree of judicial acceptance of the adequate assurances doctrine outside of the Article 2 context after the general adoption of the U.C.C. and before the publication of the influential later tentative drafts of the *Restatement (Second)*.<sup>43</sup> The *Restatement (Second) of Contracts* was definitely "out in front" of the case law in this area.

Since the widespread adoption of the U.C.C., at least twenty-five cases have been decided in which a promisee has attempted to argue, even though the controversy is outside the scope of

41. RESTATEMENT (SECOND) OF CONTRACTS § 251 (1981). Section 251 reads in full:

§ 251—When a Failure to Give Assurance May be Treated as a Repudiation

(1) Where reasonable grounds arise to believe that the obligor will commit a breach by non-performance that would of itself give the obligee a claim for damages for total breach under § 243, the obligee may demand adequate assurance of due performance and may, if reasonable, suspend any performance for which he has not already received the agreed exchange until he receives such assurance.

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

*Id.*

42. *Id.* § 251 cmt. a.

43. I am aware of only relatively few cases decided after the widespread adoption of the U.C.C. (around 1960) and prior to the 1981 publication of the *Restatement (Second) of Contracts* that consider the applicability of the adequate assurances doctrine, and the results reached in these opinions are evenly divided. Moreover, virtually all of these cases were decided after the promulgation in 1974 of Tentative Draft No. 9 of the *Restatement (Second) of Contracts*, and thus did not provide support for the initial formulation of § 251. See, e.g., *Markowitz & Co. v. Toledo Metro. Hous. Auth.*, 608 F.2d 699, 705 (6th Cir. 1979) (adopting adequate assurances doctrine); *L.E. Spitzer Co. v. Barron*, 581 P.2d 213, 216-17 (Alaska 1978) (same); *Carfield & Sons, Inc. v. Cowling*, 616 P.2d 1008, 1010 (Colo. Ct. App. 1980) (same); *Romig v. deVallance*, 637 P.2d 1147, 1152 (Haw. Ct. App. 1981) (same); *Althoff Indus., Inc. v. Elgin Medical Ctr.*, 420 N.E.2d 800, 804-05 (Ill. App. Ct. 1981) (rejecting adequate assurances doctrine); *Cork Plumbing Co. v. Martin Bloom Assocs., Inc.*, 573 S.W.2d 947, 958 (Mo. Ct. App. 1978) (same); *Schenectady Steel Co. v. Bruno Trimpoli Gen. Constr. Co.*, 350 N.Y.S.2d 920, 922 (N.Y. App. Div.) (same), *aff'd*, 316 N.E.2d 875 (N.Y. 1974); *Mollohan v. Black Rock Contracting, Inc.*, 235 S.E.2d 813, 816 n.1 (W. Va. 1977) (same).

U.C.C. Article 2 and in the absence of a contractual provision authorizing a demand for adequate assurances, that the promisor was subject to a duty to provide adequate assurances upon request after reasonable grounds for insecurity arose.<sup>44</sup> While such a duty has been found to exist under these circumstances by most post-U.C.C. courts that have considered the question,<sup>45</sup> there are a number of other post-U.C.C. cases in which courts have declined to incorporate the adequate assurances doctrine into the common law of their jurisdiction.<sup>46</sup> The proportion of the more recent cases adopting the doctrine is significantly higher, however, than the comparable proportion of earlier post-U.C.C. cases.<sup>47</sup> This trend probably reflects the influence of the endorse-

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44. *Tapat v. Sandwich Islands Constr., Ltd.*, Nos. 90-15193, 90-15239, 1991 U.S. App. LEXIS 21122, at \*2 (9th Cir. Aug. 22, 1991); *Markowitz*, 608 F.2d at 705; *Marvel Entertainment Group, Inc. v. ARP Films, Inc.*, 684 F. Supp. 818, 820-21 (S.D.N.Y. 1988); *United Corp. v. Reed, Wible & Brown, Inc.*, 626 F. Supp. 1255, 1257-58 (D.V.I. 1986); *Jewish Employment & Vocational Serv., Inc. v. Pleasantville Educ. Supply Corp.*, 220 U.S.P.Q. (BNA) 613, 620 & n.3 (E.D. Pa. 1982); *L.E. Spitzer*, 581 P.2d at 216-17; *Carfield*, 616 P.2d at 1010; *Conference Ctr. Ltd. v. TRC*, 455 A.2d 857, 863-64 (Conn. 1983); *Elliot Assocs. v. Bio-Response, Inc.*, C.A. No. 10,624, 1989 WL 72028, at \*1 (Del. Ch. June 21, 1989); *Van Der Noord v. Katz*, 481 So. 2d 1228, 1230 (Fla. Dist. Ct. App. 1985); *Design Eng'g, Constr. Int'l Inc. v. Cessna Fin. Corp.*, 296 S.E.2d 195, 196-97 (Ga. Ct. App. 1982); *Romig*, 637 P.2d at 1152; *Althoff*, 420 N.E.2d at 804; *Drinkwater v. Patten Realty Corp.*, 563 A.2d 772, 776 (Me. 1989); *Cork Plumbing*, 573 S.W.2d at 958; *Julian v. Montana State Univ.*, 747 P.2d 196, 199-200 (Mont. 1987); *Lo Re v. Tel-Air Communications, Inc.*, 490 A.2d 344, 349-50 (N.J. Super. Ct. App. Div. 1985); *Dumesnil, Inc. v. Republic Nat'l Mortgage Co.*, C.A. No. L-83-218, 1983 WL 2337, at \*3 (Ohio Ct. App. Dec. 30, 1983); *Schenectady Steel*, 350 N.Y.S.2d at 922; *Jonnet Dev. Corp. v. Dietrich Indus., Inc.*, 463 A.2d 1026, 1031-32 (Pa. Super. Ct. 1983); *Juarez v. Hamner*, 674 S.W.2d 856, 860-61 (Tex. Ct. App. 1984); *Sears v. Riemersma*, 655 P.2d 1105, 1109 (Utah 1982); *Bitzes v. Sunset Oaks, Inc.*, 649 P.2d 66, 70 (Utah 1982); *Black Rock Contracting*, 235 S.E.2d at 816 n.1.

45. *Markowitz*, 608 F.2d at 705; *Marvel Entertainment*, 684 F. Supp. at 820-21; *Reed, Wible, & Brown*, 626 F. Supp. at 1257-58; *Jewish Employment*, 220 U.S.P.Q. (BNA) at 620 & n.3; *L.E. Spitzer*, 581 P.2d at 216-17; *Carfield*, 616 P.2d at 1010; *TRC*, 455 A.2d at 863-64; *Van Der Noord*, 481 So. 2d at 1230; *Romig*, 637 P.2d at 1152; *Drinkwater*, 563 A.2d at 776; *Julian*, 747 P.2d at 199-200; *Lo Re*, 490 A.2d at 350; *Dumesnil*, C.A. No. L-83-218, 1983 WL 2337, at \*3; *Jonnet Dev. Corp.*, 463 A.2d at 1031-32; *Juarez*, 674 S.W.2d at 860-61; *Sears*, 655 P.2d at 1109; *Bitzes*, 649 P.2d at 70.

46. *Tapat*, No. 90-15193, 1991 U.S. App. LEXIS 21122, at \*2 (9th Cir. Aug. 22, 1991); *Elliot Assocs.*, C.A. No. 10,624, 1989 WL 72028, at \*1; *Design Eng'g*, 296 S.E.2d at 198; *Althoff*, 420 N.E.2d at 804-05; *Cork Plumbing*, 573 S.W.2d at 958; *Schenectady Steel*, 350 N.Y.S.2d at 922; *Black Rock Contracting*, 235 S.E.2d at 816 n.1.

47. I have used the 1981 publication date of the *Restatement (Second) of Contracts* as the earlier/later cutoff date here. This seems to be a useful divide that reflects the apparently greater degree of authority accorded to the adequate assurances doctrine once it had received final *Restatement* endorsement. The choice of 1981 as the cutoff date is somewhat arbitrary; an earlier date could

ment of the adequate assurances doctrine by the influential *Restatement (Second) of Contracts*. The overall impression given by a reading of these cases is one of uneven movement towards broader adoption of the adequate assurances doctrine, particularly after 1981. These findings provide some support for proponents of the common-law efficiency hypothesis, although they also suggest that the movement towards common-law efficiency may at times be quite slow and uneven, and the development may be influenced more by the dynamics of the application of traditional "legal" criteria such as *Restatement* provisions than by judicial concern for efficiency.

The adequate assurances opinions reveal little, if any, overt judicial concern with enhancing economic efficiency.<sup>48</sup> The cases adopting the doctrine rely instead upon more traditional sources of common-law authority, such as statutory analogy,<sup>49</sup> *Restatement* endorsement<sup>50</sup> or cases from other jurisdictions that have in turn rested upon *Restatement* authority.<sup>51</sup> The cases rejecting the adequate assurances doctrine also fail to conduct an analysis that gives weight to efficiency concerns, but instead summarily deny the applicability of the doctrine on the basis of a lack of statutory authority or controlling precedent.<sup>52</sup> These opinions suggest,

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have been used corresponding to, for example, the 1974 publication date of the influential Tentative Draft No. 9 of the *Restatement (Second) of Contracts*, which at § 275 incorporated the language now contained in § 251 of the *Restatement (Second) of Contracts*.

Of the eight pre-1982 cases of which I am aware, only four (50%) adopted the adequate assurances doctrine. Of the 16 cases decided in 1982 or later of which I am aware, however, 14 (82%) adopted the adequate assurances doctrine. For a listing of these cases, see *supra* notes 42-43.

48. None of the adequate assurances cases cited in note 45 above expressly addresses efficiency concerns. The opinion that comes closest to doing so is *Conference Center Ltd. v. TRC*, which in a substantial discussion of the adequate assurances doctrine notes that it is likely to operate "in the interest of both" parties to the contract. *TRC*, 455 A.2d at 864.

49. See, e.g., *Markowitz*, 608 F.2d at 705 (finding that § 2-609 codifies "basic contract law"); *Romig*, 637 P.2d at 1152 (analogizing §§ 2-609 and 2-610 to land transaction).

50. See, e.g., *Marvel Entertainment Group, Inc. v. ARP Films, Inc.*, 684 F. Supp. 818, 820 (S.D.N.Y. 1988) (citing RESTATEMENT (SECOND) OF CONTRACTS §§ 251 & 253); *Drinkwater v. Patten Realty Corp.*, 563 A.2d 772, 776 (Me. 1989) (referring to RESTATEMENT (SECOND) OF CONTRACTS § 251); *Jonnet Dev. Corp. v. Dietrich Indus., Inc.*, 463 A.2d 1026, 1032 (Pa. Super. Ct. 1983) (discussing RESTATEMENT (SECOND) OF CONTRACTS § 251 & cmt. c).

51. See, e.g., *United Corp. v. Reed, Wible & Brown, Inc.*, 626 F. Supp. 1255, 1258 (D.V.I. 1986); *Julian v. Montana State Univ.*, 747 P.2d 196, 200 (Mont. 1987).

52. See, e.g., *Tapat v. Sandwich Islands Constr., Ltd.*, Nos. 90-15193, 90-15239, 1991 U.S. App. LEXIS 21122, at \*2 (9th Cir. Aug. 22, 1991) (noting that "[n]o Hawaiian authority supports application of" § 2-609); *Elliot Assocs. v. Bio-*

therefore, that if the broader adoption of the adequate assurances doctrine has been driven at least in part by its desirable efficiency properties, such adoption likely has been accomplished through the mechanism of litigation shaped by the incentives resulting indirectly from efficiency considerations, and resolved in accordance with traditional "legal" criteria, rather than through the operation of a judicial preference for efficient rules.

## VI. CONCLUSION

The adequate assurances doctrine was traditionally unavailable to litigants at common law. It is, however, an efficient doctrine. Certainly since its incorporation by section 2-609 of the U.C.C. and the courts' subsequent favorable application of that provision, if not before, the adequate assurances doctrine is recognized as having a number of other favorable characteristics that make it amenable to common-law adoption. If the common law in fact has a long-term tendency to favor efficient rules, one would expect to see a clear trend over the past thirty years toward a broader embrace of the adequate assurances doctrine outside of the sale of goods context. A review of the case law confirms this expectation. This trend, however, has been rather slow and somewhat uneven, and it appears to have resulted more from deference to the shift in *Restatement* authority than from any judicial concern with economic efficiency. If in fact this trend has derived from efficiency considerations, the mechanisms through which this trend has taken place have more likely been litigant responses to litigation incentives that favor extensive and intensive challenges to inefficient rules rather than judicial preference for efficient rules.

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Response, Inc., C.A. No. 10,624, 1989 WL 72028, at \*1 (Del. Ch. June 21, 1989) (noticing plaintiffs' failure to cite any New York decisions supporting application of § 2-609 to non-sale-of-goods situation); Design Eng'g, Constr. Int'l Inc. v. Cessna Fin. Corp., 296 S.E.2d 195, 198 (Ga. Ct. App. 1982) (holding that statute does not authorize party not in privity of contract to demand adequate assurances).

