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Ask the Lawyer: Recourse to Anticipated Breach of Contract

Question:

A supplier with whom my company deals has been giving us the runaround for weeks. He's having trouble delivering goods, and if I don't get them soon then my business will be in big trouble. Do I have to wait for him to breach our contract or can I take legal action now?

Answer:

Knowing that a supplier will not fulfill its obligations under a contract can be like watching a train wreck in slow motion. The law protects businesses from expected future breaches of contract, also referred to as "anticipatory breaches." However, the mere expectation of a breach does not automatically mean you have a legal right to damages. Further, the anticipated non-performance must adversely affect the whole contract.

Under Section 2-609 of New York's Uniform Commercial Code (UCC), when a buyer has "reasonable grounds for insecurity" as to the performance of the seller, the buyer can demand the seller provide assurance that he or she will fulfill his or her part of the deal. If the seller improperly delivers a good or service, the "insecure" party can still demand future assurances of due performance.

If a party does not provide such assurance within up to 30 days after it is demanded — or if such party states that it will not meet its future obligations — then the non-breaching party may have grounds to pursue damages for this anticipatory breach of contract. In cases of delivery failures or repudiations that undermine the whole contract, the buyer may purchase or contract for substitute goods, which are referred to as "cover." The buyer can seek damages from the seller equal to the difference between the cost of the cover and the contract price. Further, the buyer can seek other damages stemming from the repudiation or non-delivery.

The doctrine of anticipatory breach of contract is often evoked when real estate deals sour, but it does come up in business-to-business transactions. A November 2011 ruling in the case of Joseph P. Carrara & Sons Inc. versus A.R. Mack Construction Co. Inc. highlights the importance an "unqualified and clear refusal to perform with respect to the entire contract" is to anticipatory breach of contract claims. This case involved a subcontractor that was contracted to supply a contractor with concrete for a project in Ticonderoga.

Due to inclement weather, the supplier informed the contractor that it would not be able to deliver the concrete in accordance with the contract. The supplier proposed an alternative delivery schedule contingent upon weather conditions. The supplier informed the contractor that it would cease all operations in New York for the winter if the contractor did not respond to the notice within a certain time. The contractor did not respond to this notice and hired another concrete supplier. The original supplier subsequently filed a breach of contract

lawsuit.

The New York State Supreme Court, Appellate Division, Third Judicial Department, affirmed a lower court’s ruling dismissing the supplier’s complaint because the sub-contractor had made it clear it would not fulfill its part of the purchase agreement. The appellate court said a refusal in the form of an "unequivocal statement of intent to perform upon the satisfaction of extracontractural conditions," such as the sub-contractor’s threat to cease operations unless the contractor accept its terms, could support an anticipatory breach claim. Further, the court was not convinced that the contractor’s hiring of an alternative concrete supplier resulted in a material breach.

Anyone concerned that a party will not perform its responsibilities under a contract should immediately contact a contract litigation attorney. Delays in getting a lawyer involved as soon as the threat of a breach emerges could be costly.

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. The information in this column is not intended as legal advice.