

Gavel to Gavel: Anticipating breach of contract

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During our state's current economic downturn, it is even more important than usual that businesses across all industries use foresight to avoid contractual breaches by their dealers, customers and partners.

Consider the following: After a missed deadline, a merchant emails her customer asking if she can expect payment before expiration of a 15-day grace period. The customer informs the merchant he is suffering from cash flow problems, and first has to make rent and pay other past-due invoices. The merchant demands assurance that payment will be made within 15 days, but the customer ignores that request. Under the terms of their agreement, the customer is not in default until expiration of the

grace period.

In circumstances such as these, what can a business owner do to avoid uncertainty about payment, or worse, delaying the inevitable? A good option for many business owners is evaluating whether they have a claim for anticipatory repudiation.

Anticipatory repudiation of a contract is permitted when one party has not yet breached a contract, but unconditionally rejects its responsibility to perform in the future. The other party may then treat the contract as breached and immediately pursue a legal remedy. Rejection of a future performance obligation does not have to be verbal. If it is clear through a party's actions or conduct that he will not fulfill a future promise, a repudiation claim may still be asserted.

A business owner has other options in addition to immediately filing a lawsuit. She may await performance for a commercially reasonable time. Or, if the contract requires future performance of the business owner, her performance may be suspended until the breach is cured.

Of course, it is not always easy to predict when someone plans to breach a contract in the future. Because of the inherently short time period during which repudiation claims may be asserted, it is important to maintain good business records and document all communications in writing. Not only will good business practices minimize costs when it becomes necessary to speak with an attorney, their time can be more efficiently spent determining whether you have a claim that can be filed on short notice.

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