

502.05 CONTRACTS – ISSUE OF BREACH BY REPUDIATION.

The (state number) issue reads:

“Did the defendant breach the contract by repudiation?”¹

(You will answer this issue only if you have answered the (state number)² issue “Yes” in favor of the plaintiff.)

On this issue the burden of proof is on the plaintiff. This means that the plaintiff must prove, by the greater weight of the evidence, two things:

First, that before the time arrived for the defendant to perform, the defendant repudiated [his entire obligation³] [a term going to the whole value of what the defendant was to perform] under the contract.⁴ A party to a contract repudiates⁵ his obligation when he expresses, by words or conduct,⁶ a positive, distinct, unequivocal and absolute [refusal] [inability] to perform.

Second, that at the time of the defendant's repudiation, the plaintiff was ready, willing and able to perform his obligations as agreed and would have done so but for the repudiation by the defendant.⁷

NOTE WELL: If the plaintiff has already fully performed his obligations under the contract, modify the instruction to read, “At the time of the defendant’s repudiation, the plaintiff had performed his obligations as agreed.”⁸

But note: In cases of partial performance, “the effect of breach by anticipatory repudiation is to relieve the non-repudiating party from further performance under the contract.”⁹

Finally, as to the (state number) issue on which the plaintiff has the burden of proof, if you find by the greater weight of the evidence that the defendant breached the contract by repudiation, then it would be your duty to answer this issue “Yes” in favor of the plaintiff.

If, on the other hand, you fail to so find, then it would be your duty to answer this issue “No” in favor of the defendant.

¹ Note that a repudiation is not *ipso facto* a breach. The plaintiff must elect to make it a breach. *Profile Invs. No. 25, LLC v. Ammons East Corp.*, 207 N.C. App. 232, 237, 700 S.E.2d 232, 235 (2010) (quoting *Edwards v. Proctor*, 173 N.C. 41, 44, 91 S.E. 584, 585 (1917)). Consequently, “breach by repudiation depends not only upon the statement and actions of the allegedly repudiating party but also upon the response of the non-repudiating party.” *Profile Invs.*, 207 N.C. App. at 237, 700 S.E.2d at 236 (citation omitted).

² See N.C.P.I.-Civil [501.01](#) (Contracts - Issue of Formation); N.C.P.I.–Civil 501.01A (Contracts - Issue of Formation - UCC).

³ An installment contract invokes discrete and separate obligations in an agreement. See N.C. Gen. Stat. § 25-2-612. Nonetheless, the absolute repudiation of all future obligations in an installment contract triggers the statute of limitations upon the non-breaching party’s discovery of future non-performance, rather than when the performance would have become due. *Christenbury Eye Ctr., P.A. v. Medflow, Inc.*, ___ N.C. ___, ___, 802 S.E.2d 888, 893 n. 5 (2017) (citation omitted).

⁴ “For repudiation to result in a breach of contract, ‘the refusal to perform must be of the whole contract or of a covenant going to the whole consideration, and must be distinct, unequivocal, and absolute.’” *Profile Invs.*, 207 N.C. App. at 237, 700 S.E.2d at 236 (quoting *Edwards v. Proctor*, 173 N.C. 41, 44, 91 S.E. 584, 585 (1917)); see also *Tillis v. Calvine Cotton Mills, Inc.*, 251 N.C. 359, 363, 111 S.E.2d 606, 610 (1959); *Pappas v. Crist*, 223 N.C. 265, 268, 25 S.E.2d 850, 852 (1943); *Cook v. Lawson*, 3 N.C. App. 104, 107-08, 164 S.E.2d 29, 32 (1968).

⁵ See *Millis Constr. Co. v. Fairfield Sapphire Valley*, 86 N.C. App. 506, 510, 358 S.E.2d 566, 569 (1987) (“Repudiation is a positive statement by one party to the other party indicating that he will not or cannot substantially perform his contractual duties. When a party repudiates his obligations under the contract before the time for performance under the terms of the contract, the issue of anticipatory breach or breach by anticipatory repudiation arises.”) (citations omitted); *Profile Invs.*, 207 N.C. App. 232, 700 S.E.2d 232 (2010). Sometimes this form of breach is referred to as “anticipatory breach,” see *Millis*, 86 N.C. App. at 510, 358 S.E.2d at 569, or “breach by renunciation,” see *Edwards v. Proctor*, 173 N.C. at 45, 91 S.E. at 585.

⁶ See *Edwards*, 173 N.C. at 46, 91 S.E. at 585; *Gordon v. Howard*, 94 N.C. App. 149, 152, 379 S.E.2d 674, 676 (1989); see also *Phoenix Ltd. P’ship v. Simpson*, 201 N.C. App. 493, 500, 688 S.E.2d 717, 722 (2009) (standing for the proposition that repudiation may be inferred from conduct that naturally leads another person to believe that the repudiating party refuses or is unable to perform on the contract).

⁷ See *Kidd v. Early*, 289 N.C. 343, 364, 222 S.E.2d 392, 407 (1976); see also *Curran v. Barefoot*, 183 N.C. App. 331, 335, 645 S.E.2d 187, 190 (2007) (“Plaintiff’s offer to perform does not have to be shown where defendant refused to honor or repudiates the contract ... As long as plaintiff is able, ready, and willing to perform the conditions of the contract remaining to be performed, he will not be barred from relief.”) (citation omitted).

⁸ *Millis Constr. Co.*, 86 N.C. App at 512, 358 S.E.2d at 570.

9 *Id.* at 511, 358 S.E.2d at 569.

